"...Three Generations of Imbeciles Are Enough..."

STATE EUGENIC STERILIZATION LAWS IN AMERICAN THOUGHT AND PRACTICE

by

JULIUS PAUL, Ph.D.

Walter Reed Army Institute of Research

Washington, D.C.

1965

ADD TO MANUSCRIPT

(p. 213) 1951), and pp. 198-206 of his book, Sex Versus Civilization (Los Angeles: The Noontide Press, 1967).

(p. 702) and E. James Lieberman, "Preventive Psychiatry and Family Planning," 26 J. of Marriage and the Family 471 (1964) at 475.

(p. 213, fn. 159); Contrast with Prof. Pendell's latest article, "A Eugenic Marriage Law," The American Mercury (summer, 1967) at 39-41.

[illegible] (A- [illegible]) Griswold v. Conn. (1965)

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(The opinions and assertions in this manuscript are those of the author only and are not to be construed as carrying the endorsement of the Department of the Army)

.....FOR Brian, Allegra, Sara, Aaron, Derrick, and Laura

WHOSE PATIENCE WAS NEARLY INFINITE.....

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sterilization; The American Eugenics Society for loaning certain items; the National Catholic Welfare Conference for giving me several pamphlets that were long out-of-print and hard to find; and the Municipal Reference Library of the City of Chicago for the gift of several of the major works of Harry H. Laughlin.

Books by Mark Haller and Arthur E. Fink and a thesis and article by Waltern Berns were extremely useful in stimulating many of the ideas expressed in this work, and numerous smaller writings in the law and medical journals served to fill in many gaps in the story. Officials in all of the states covered by this study were extremely helpful in supplying the data that was used in these sections, and the author wishes to single out the states of California, Connecticut, Delaware, Idaho, Iowa, Indiana, Kansas, Minnesota, North Carolina, Pennsylvania, Oregon, Utah, Virginia, and Wisconsin for exceptional perserverance in this regard. A special debt is owed to the states of Connecticut, Iowa, Indiana, Minnesota, Wisconsin and Virginia for allowing the author to personally visit their capitals and interview public officials responsible for the enforcement of their sterilization laws. Data for the state of Michigan was greatly enhanced by the permission granted by Judge Wallace Waalkes of the Probate Court of Kent County (Grand Rapids) to search the sterilization records of that county over a period of several decades. Judge Holland M. Gary of the Muskingum County Probate Court (Zanesville, Ohio) did the same for sterilization cases in his court and provided a substantial part of the Ohio story. To both of these judges, the author expresses his special gratitude as well as to Dr. Bernard L. Diamond of San Francisco for permission to use portions

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Julius Paul,

Washington, D.C.,

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INTRODUCTION

"...I am, indeed, not sure that in the progressive future, it will not be deemed a measure of sound policy and of commendable statesmanship to stamp out insanity, by castrating all the insane men and spaying all the insane women...." DR. WILLIAM GOODELL (1882)[1]

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"Castrate the criminal, cut off both ears close to his head and turn him loose to go where he will...." DR. JESSE EWELL (1907)[2]

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"Society must look upon germ-plasm as belonging to society and not merely to the individual who carries it." COMMITTEE TO STUDY AND REPORT ON THE BEST PRACTICAL MEANS OF CUTTING OFF THE DEFECTIVE GERM-PLASM OF THE AMERICAN POPULATION (1914)[3]

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"...Three generations of imbeciles are enough." UNITED STATES SUPREME COURT JUSTICE OLIVER WENDELL HOLMES, JR. (1927)[4]

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"...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...." JUSTICE WILLIAM O. DOUGLAS (1942)[5]

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1 "Clinical Notes on the Extirpation of the Ovaries for Insanity," 38 Amer. J. Insanity 294 (1882) at 295. Dr. Goodell was a pioneering gynecologist. American,

2 "A Plea for Castration to Prevent Criminal Assault," 11 Va. Med. Semi-Monthly 463 (Jan. 11, 1907) at 464.

3 Report of the Eugenics Section of the American Breeders' Association, in Harry H. Laughlin, Scope of the Committee's Work, Eugenics Record Office Bull. No. 10A (Cold Spring Harbor, 1914) at 16.

4 Buck v. Bell, 274 U.S. 200 (1927) at 207.

5 Skinner v. Oklahoma, 316 U.S. 535 (1942) at 541.

INTRODUCTION

Perhaps the previous quotations may appear startling to the untutored eye, but when placed within the context of American intellectual, social, political and legal history, they have a meaning that can throw needed light on the nature of freedom in a democratic society and more particularly, the relation of scientific knowledge to public policy.

The subject of eugenic sterilization in American history came to the attention of this writer quite by accident. As a young undergraduate in liberal arts, the first reading of the United States Supreme Court's decision in Buck v. Bell seemed idiosyncratic at best, but not too shocking. And perhaps it was more a "tribute" to the literary style of Mr. Justice Holmes than anything else. In any event, the subject did not entrance me and was quickly forgotten, that is until a reading of the Court's 1942 decision in Skinner v. Oklahoma made it appear that neither Holmes nor the 1927 Court were necessarily infallible or even prophetic. The intervening fifteen years of world history, much of it stemming out of the policies of Nazi philosophy and action, had made their mark on the minds of men, and Buck v. Bell could never be the same again. Or so it seemed to the unsophisticated graduate student.

But was this really the case? What impact on American sterilization

practices did the Buck and Skinner cases really have? Did the Nazi eugenics policies really destroy the eugenics movement in America? And in the years since 1927, modern human genetics had not stood still. New discoveries about the secrets of human heredity, especially in the area of mental retardation, made Buck v. Bell look even more remote and anachronistic and the question still loomed large: what happens to an area of scientific or quasi-scientific knowledge once it gets into the law and the validity of that knowledge grows more dubious by the year?

The desire to pursue these and other questions involving freedom and the democratic state became more insistent when one of the author's graduate professors, Harry V. Jaffa, raised some moral questions regarding the validity of Buck v. Bell.[1] As a student of public law, one problem seemed to me to be more persistent than others: If a law is based on knowledge that is either shaky at the start or in time is proved scientifically invalid, how can procedural due process answer the question of whether the state can legislate in certain areas? If human genetics at the time of Buck v. Bell was greatly divided over the validity of eugenic sterilization laws, how could the Supreme Court avoid the substantive question of the constitutionality of laws based on dubious scientific hypotheses? Could the "umbrella" of a 1927 decision, which even at that time was regarded as grossly deficient as a definitive statement of human genetics and public policy, be expanded another 40 years? How did the 27 states with sterilization laws

still on the books regard Buck v. Bell, or Skinner v. Oklahoma?

Another consideration that helped promote this study was the lack of any systematic, definitive treatment of sterilization in America beyond two pioneer studies in the 1930s, J. H. Landman's Human Sterilization: The History of the Sexual Sterilization Movement (1932) and the famous report of the committee of the American Neurological Association for the investigation of eugenical sterilization, published under the title of Eugenical Sterilization: A Reorientation of the Problem in 1936.[2] Most of the more recent literature was fragmentary and was limited to particular states and their sterilization history and experience.

In the last decade, however, a renewed interest in sterilization laws appeared in the professional literature. The first sign was publication in 1956 of Epilepsy and the Law by Roscoe L. Barrow and Howard D. Fabing,[3] a study that perceptively analyzed the laws dealing with epileptics, including those that included them in their sterilization statutes. The authors called for a wholesale remodelling of current epilepsy laws in the light of recent medical knowledge and practice in the treatment of "one of man's age-old, stigmatized diseases. This is a blueprint for social action which will permit us to atone for more than 2000 years of error in the management of the epileptic patient."[4]

Following the reappraisal of epilepsy and the law, two notable

events occurred that stimulated this writer's interest in a systematic analysis of sterilization trends throughout the nation. The first was an article prepared by the Legal and Socio-Economic Division of the American Medical Association entitled "A Reappraisal of Eugenic Sterilization Laws" which appeared in 1960 and which was followed by the 1961 report of the American Bar Foundation on the rights of the mentally ill entitled The Mentally Disabled and the Law, with a chapter on eugenic sterilization.[5]

All three of these assessments of eugenic sterilization laws raised doubts about their scientific and legal validity and all called for intensive research into the present workings of these laws. Zenoff concluded her AMA reappraisal:

> Since sterilization is a drastic remedy and generally a permanent infringement of bodily integrity, those affected by laws authorizing it are entitled to every reasonable precaution. Thus far they have not been adequately protected. The sterilization of persons (a) without legal authorization, (b) before the constitutionality of the law is tested, (c) under unconstitutional laws, and (d) with lack of representation by counsel are all clear illustrations of this disregard of rights. The fact that scientific opinion differs as to the value of sterilization certainly indicates that the merits of this type of legislation should be re-evaluated. 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. A study of sterilization statistics indicates that its use is steadily decreasing. However, it is not known whether this stems from doubts concerning the constitutionality of the laws, public reaction, or a change in medical opinion.[6]

In like manner, Birnbaum called for an intensive study of present sterilizations laws and their administration to ascertain the cause of the decline in operations in public mental hospitals, "even though the applicable statutes and case law have not changed." He continued:

> ....Is this change due to a lack of belief in the hereditary etiology of mental disorders; due to a change in administrative philosophy; due to improved facilities in mental hospitals; due to a belief that the indications for eugenic surgical sterilization were being abused; due to an increased use of eugenic institutional sterilization; due to an increasing belief that these patients should be discharged without either eugenic surgical or institutional sterilization; due to a feeling that with increased and improved public welfare programs, the

> economic problems for those affected have been alleviated; due, as has been alleged in the case of Kansas, to the fear of a lawsuit for money damages after the procedure has been performed, even if it is believed that the lawsuit cannot be successfully prosecuted; or due to any other reasons? I believe that the information obtained from this contemplated study of the contrasting procedures of several states might lead to a more rational and more just administration of "legislation which involves one of the basic civil rights of man."[7]

Much of the legal periodical literature that followed the Supreme Court's 1942 Skinner decision raised questions about the validity of the Buck decision in the light of the later interpretations of sterilization law. In unanimously invalidating Oklahoma's habitual criminal sterilization statute on equal protection grounds, the Court in the words of Mr. Justice Douglas departed from the Holmes opinion of 1927 in spirit and style of writing:

> ....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 races

> or types which are inimical to the dominant group to wither and disappear. There is no 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....[8]

Although the 1935 Oklahoma sterilization law dealt only with habitual criminals, whom the law designated as hereditary criminals on the basis of the particular crime or crimes committed, two concurring justices raised vital questions that touched on the Buck decision of 1927. Chief Justice Stone raised the question of the scientific proof of hereditary defect when he said:

> Moreover, if we must presume that the legislature knows --- what science has been unable to ascertain --- that the criminal tendencies of any class of habitual offenders are transmissible regardless of the varying mental characteristics of its individuals, I should suppose that we must likewise presume that the legislature, in its wisdom, knows that the criminal tendencies of some classes of offenders are more likely to be transmitted than those of others. And so I think the real question we have to consider is not one of equal protection, but whether the wholesale condemnation of a class to such an invasion of personal liberty, without opportunity to any

> individual to show that his is not the type of case which would justify resort to it, satisfies the demands of due process.[9]

Justice Jackson went even further than Stone, when, after paying only modest lip-service to the Buck precedent, he said:

> 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 crime. But this Act falls down before reaching this problem, which I mention only to avoid the implication that such a question may not exist because not discussed. On it I would also reserve judgment.[10]

The kind of research endeavor called for by Zenoff and Birnbaum was not undertaken by this writer. For one thing, getting into actual sterilization hearings is a practical impossiblity (although some states might permit it under certain conditions), and not every state is even willing under the law to allow public scrutiny of its sterilization records (North Carolina, for example). Almost all of the present 27 states with sterilization laws were willing to correspond with me and many were willing to allow visits for more systematic examination of their sterilization programs. In Michigan, where sterilization is

handled through the Probate Courts of the various counties, co-operation varied from county to county, depending on the attitude of the judges. Visits to the states of Virginia, Indiana, Wisconsin, Minnesota, Connecticut and Iowa gave the author a much clearer picture of the administration of sterilization in those states. In a modest way, some of the information called for by Zenoff and Birnbaum will be found in subsequent chapters, but there is still much to be learned about state sterilization in the United States. Often, the sterilization situation (as for example, in Connecticut and Kansas) can change radically and almost spontaneously, depending on a single case, or a single administrator, or a combination of forces coming to fruition at a particular point in history. Policy changes are sometimes a subtle result of many intervening variables, including changes in the state of scientific knowledge or attitudes toward procedural fairness, as for example, the question of what constitutes "consent" to a sterilization operation.[11]

In digging into the sterilization past in America, evidence of operations performed before laws were passed (as in Kansas and Indiana) or where no law was ever enacted (as in Pennsylvania, Massachusetts, Ohio, Colorado, Maryland, and Illinois) or where subsequent sterilization laws were later invalidated by the courts, all help to accentuate Zenoff's concern with the legal fairness of such legislation.[12] After over half-a-century of sterilization experience in America, four states with compulsory state sterilization laws (Alabama, Washington, Delaware, and Wisconsin) still do not include the right to a judicial review

by an ordinary court of a sterilization order. And the leading sterilization state in the nation, California, with nearly a third of all reported cumulative sterilizations, did not provide such an appeal right until an amendment to its law in 1951. Up to that time, nearly 20,000 sterilizations were performed in California, and if the other 6 states still without the right to appeal in 1965 were included, the total is over 26,000 operations. This would mean that nearly half of all of the reported operations under compulsory sterilization laws denied these persons the basic right to test the validity of the sterilization order on any grounds, be they procedural or substantive. Thus, what the Supreme Court in 1942 called "one of the basic civil rights of man" was given less respect than most of our rudimentary aspects of criminal trials.[13]

Haller, in his history of American eugenics, after noting the use of so-called eugenic sterilization laws for social (or "life adjustment") purposes, concludes:

> Indeed, it is doubtful if present knowledge provides justification, on eugenic grounds, for a state policy of sterilization. The indignity and (in the case of women) danger of the operation can hardly justify the negligible and largely unknown eugenic results. Whether sterilization can, on occasion, be justified on social grounds is another question. Certainly, in

states where sterilization is used, a number of superintendents and social workers have praised the results. Yet, without safeguards, a policy of sterilization is fraught with danger to the rights of the individual --- danger that persons will be pressured into an operation against their wills or that, in the southern states, it will be employed primarily against members of the Negro race.[14]

METHODOLOGY

Any problem (e.g., eugenic sterilization) that cuts across intellectual and social history, the law, medicine, and morals is not conducive to easy analysis. The methodology used in this study was a combination of American social and intellectual history (particularly for the early period), close analysis of various state sterilization laws and judicial decisions (state or federal), and correspondence and selective interviews with state officials clothed with administrative responsibility for enforcing sterilization laws in their respective states. In essence, no particular methodology was followed. Essentially, the best way of describing the research procedure would be to state several questions that underpin the study and its purpose:

1. How did sterilization get into our state laws? What ideas and political pressures militated in the direction of eugenics, especially at the end of the 19th and beginning of the 20th century?
2. What changes occurred in sterilization laws and their enforcement?
3. What impact did new scientific data have on their enforcement or lack of enforcement? Court decisions? Internal or external pressures?
4. What is the status of the civil rights of those affected by these laws? How is "consent" obtained and what meaning can consent

procedures have when mentally ill or mentally retarded persons are involved?

5. When is the state of scientific knowledge "ripe" for public policy? Is there some criterion for determining the credibility of scientific or even quasi-scientific data before it is incorporated in statute? How can new scientific data be related to laws that include old and even outmoded scientific concepts, or unscientific concepts?

6. What lessons does American sterilization experience provide for the administrative process, the relation of science to government, the balance of freedom and authority in a democratic society, and finally, the relation between fundamental individual rights (due process, equal protection, bodily integrity) and changing social needs (the quality and quantity of population; health and disease; eugenics and euthenics; changing notions of the welfare state).[15]

This is primarily a study of American state sterilization experience, not a comparative study of sterilization in other countries. Where critical judgments are made, they are based on American standards of due process, or fair procedure, and the rights of the citizen and are not compared to the most unique eugenics experiment in modern history, namely that of Nazi Germany. The reasons may not appear obvious to every reader, but it is the opinion of this writer that eugenics in American thought and practice can best be understood by

excluding Nazi history, especially since the eugenics movement in England and America predated Germany's by nearly 30 years, insofar as public policies are concerned. And since America was the pioneer in modern eugenics legislation, including eugenic sterilization laws, it behooves us to learn from our own experience.

In the next chapter, an attempt is made to chronologically trace the eugenics movement in America to its present juncture and to give something of the essentially historical flavor of a movement that is as fascinating as any in our history. This will be followed by the "heart" of the study, which is a state-by-state analysis of present state sterilization policies. The final portions of this study will deal with voluntary sterilization, the return of punitive sterilization proposals and related questions that grow out of a study of this kind. It should perhaps be said at the outset that because the subject of sterilization is within the ambit of the states, it will be far from consistent or even rational when comparisons among the various states are made. Hence, to talk of "American" sterilization experience is in many respects a misnomer, because each state has its own unique history where sterilization is concerned. Trying to discern a "trend" among the states, or recent "national" developments in this regard is really an attempt to find an "overview" for nearly 60 years of sterilization history in our state laws, and nearly a century of Social Darwinian and Mendelian variants of eugenics propaganda and ideology. If this diversity is at times confusing and even amorphous, this is as it should

be. If the author's value judgments (morals to be exact) intrude on the analysis before the final concluding chapter is reached, this is not due to a lack of modesty or even humility, but because the nature of this data is such that any researcher would have grave difficulty (whether he comes from law, medicine, genetics, theology, or philosophy) in keeping an objective face indefinitely. But for the most part, an effort will be made to describe and trace the major ingredients of our eugenic sterilization history in some kind of logical framework.

This study began as a study in individual civil rights, but in its gestation process it went beyond the purely legal questions that were initially explored to a final and perhaps more complex and philosphical question: how does modern science (in this case genetics, medicine, surgery, psychiatry, etc.) affect the role of government and the rights of its citizenry? How does scientific knowledge become translated into public policies with, at times, far-reaching effects, often not predictable, on fundamental and sacred human rights? In an age where all kinds of scientific knowledge on numerous fronts is advancing with unprecedented speed, how can our traditional concepts of law, politics, administration, and morals keep pace with the ever-increasing demands of our scientific and technological universe? Are there any adequate guidelines for even attempting to answer such questions?

Sterilization, be it eugenic or not, is not the whole story of modern science and public policy. We need only look around to see all

kinds of other problems -- atomic energy and its control and use; fluoridation of water; smoke abatement; smoking and cancer; artificial human insemination; testing of drugs for human consumption; the use of artificial human organs; and many others -- that demand the deepest kind of reflection on the problems presented above. Whatever can be learned from the history of eugenics thought in American history will have only limited application to these other problems, but perhaps the process by which science, law, and politics interact can be seen more fully and more sensibly. If our sensitivities and sensibilities are in some measure improved, and our view of the mid-twentieth century American Zeitgeist viewed in something of an historical perspective, perhaps we can face the future with a renewed hope that three generations of imbeciles are not enough and that Justice Holmes' oft-quoted aphorism is neither a monument to the wit nor the wisdom of a great jurist or a great judicial institution, but is rather another sad example of human ignorance and superstition.

In this case the bitch-goddess Science was a facade, and the warning is all too obvious: the Supreme Court is the wrong place and perhaps the least qualified to act the Solomonic arbiter of what is or is not scientifically valid -- and modern science, whatever the subject-matter, should be made aware of the pitfalls of allowing basic scientific questions to be answered by an appeal to great constitutional principles of American law. Perhaps the fault does not lie in the

Court, but rather in the premature, and as the next chapters may indicate -- often ill-advised and regrettable translation of scientific or quasi-scientific knowledge into social doctrine and political reform. Perhaps this statement of geneticist J. B. S. Haldane best summarizes this point:

> ...We know very little about human heredity as yet, though nowhere are rasher statements made about it than in America; and many of the deeds done there in the name of eugenics are about as much justified by science as were the proceedings of the Inquisition by the gospels...[16]

INTRODUCTION -- FOOTNOTES

1 Professor Jaffa suggested the reading of an M.A. thesis by Walter Berns, Buck v. Bell: The Sterilization Decision and Its Effects on Public Policy (Unpublished Master's thesis, University of Chicago Library, 1951), which proved invaluable at the start and helped to stimulate my desire for a more systematic examination of sterilization in America. Bern's article, "Buck v. Bell: Due Process of Law?" 6 Western Pol. Q. 762 (1953) also proved stimulating and thought-provoking and raised the leading question of the relation between procedural due process and substantive rights. (at 774-75). It was several years later before Professor Jaffa's casual comments and suggestions materialized into a research project with support from the American Philosophical Society. But the author is cognizant of the fact that he is indebted to one of the really fine minds in political philosophy in America today, a mind that ranges over subjects as diverse as Hamlet, medieval Thomism, Lincoln, and states' rights.

2 J. H. Landman, Human Sterilization; The History of the Sexual Sterilization Movement (N.Y.: Macmillan, 1932); The Committee of the American Neurological Association For the Investigation of Eugenical Sterilization, Eugenical Sterilization; A Reorientation of the Problem (N.Y. Macmillan, 1936). The 1935 ANA report is sometimes called the

report of the Myerson Committee after Dr. Abraham Myerson, who headed a five man committee that also included Drs. James B. Ayer, Tracy J. Putnam, Clyde E. Keeler, and Leo Alexander.

3 Dean Barrow is Dean of the University of Cincinnati College of Law and Dr. Fabing is Past President of the American Academy of Neurology. The book was sub-titled "A Proposal for Legal Reform in the Light of Medical Progress" (N.Y.: Hoeber-Harper, 1956)

4 At 109, Wisconsin (1955), North Dakota (1961) and Michigan (1962) deleted epileptics from their sterilization statues. Other sterilizing states have stopped including epileptics unless they can be shown to be mentally ill or mentally retarded as defined by the law. Also, see the well-reasoned discussion of marriage and eugenics by Hans Strauss in chap. 54, "Epileptic Disorders," in Silvano Arieti (ed.), American Handbook of Psychiatry (N.Y.: Basic Books, 1959), vol. II at 1137-38.

5 "Reappraisal of Eugenic Sterilization Laws" (in Medicine and the Law), 173 J.A.M.A. 1245-50 (July 16, 1960), reprinted under the same title by Elyce Zenoff in 10 Clev.-Mar. L. Rev. 149 (1961). The ABF report was edited by Frank T. Lindman and Donald M. McIntyre and was published by the Univ. of Chicago Press. Chapter six, at pp. 183-97 was devoted to eugenic sterilization. Both of these reappraisals were

the work of Elyce Zenoff Ferster. They were followed by another perceptive analysis by Morton Birnbaum, a lawyer and physician, entitled "Eugenic Sterilization," 175 J.A.M.A. 951-958 (March 18, 1961). For a more recent stinging attack on state sterilization laws as they relate to epileptics, see Samuel Livingston, "Restrictive Measures Relative to Epilepsy; Comments on the Medical Aspects," 10 Archives Environmental Health 508 (1965), especially his discussion of the Iowa law at 512. Also, see Regina Bligh, "Sterilization and Mental Retardation," 51 A.B.A.J. 1059 (1965) and comments in 52 id. 114, 116 (1966).

6 Id. at 1249. Mrs. Ferster went even further in her chapter on sterilization in the American Bar Foundation study, where she wrote in the final section on conclusions and recommendations: "1. A re-evaluation of the basis for statutes providing for the compulsory sterilization of the mentally disabled is recommended. Since current scientific opinion challenges the eugenic value of sterilization, legislatures of states having compulsory sterilization statutes should review thoroughly the scientific basis for such laws. In order that these legislatures may reappraise adequately the wisdom of authorizing compulsory sterilization of the mentally disabled, the social, moral and practical implications of these laws should be considered in connection with the study." The second conclusion read: "2. Statutes authorizing compulsory sterilization of the mentally disabled should afford every reasonable procedural protection

to the individual concerned." The third and final conclusion and recommendation went far beyond the need for intensive research and reappraisal of the laws: "3. Since available materials do not disclose the amount and type of evidence required to justify compulsory sterilization of mentally disabled persons, observation of actual proceedings to authorize sterilization is necessary before any conclusion can be made as to the sufficiency of the proof in such proceedings. Without the benefit of observing the procedures and techniques employed at sterilization hearings, it is impossible to ascertain or evaluate what the deciding agencies take into account at the hearings. A review of the statutes and allied material does not reveal the criteria used by these agencies in determining the need for sterilization. Before any report can be made as to whether decisions made at sterilization hearings are arrived at judiciously, a number of questions must be answered, including: What is the degree of reliance placed upon the testimony of medical experts, such as the superintendent of the hospital initiating the petition? To what extent is the case history of the patient reviewed? To what degree is independent inquiry made into new theories and scientific opinion which may be contrary to the testimony of the medical expert?" The Mentally Disabled and the Law, at 190-91.

7 Birnbaum, supra note 5, at 958. When Dr. Birnbaum uses the term

"eugenic institutional sterilization," he means the compulsory segregation of persons in public mental institutions for the avowed purpose of preventing procreation, presumably for eugenic reasons. The patient, usually a female, is neither surgically sterilized nor discharged from the institution.

8 Skinner v. Oklahoma, 316 U.S. 535 (1941) at 541.

9 Ibid., p. 544. Scientific proof of hereditary transmission thus comes close to the heart of the problem of procedural due process.

10 Ibid., pp. 546-47. This strikes at the heart of substantive due process. The statements of Justices Douglas, Stone, and Jackson prompted James B. O'Hara and T. Howland Sanks in an article "Eugenic Sterilization," 45 Geo. L. J. 20 (1956) to comment thus: "...Although the Supreme Court has not in any way reversed itself on the issue of substantive due process of law involved in eugenic sterilization, some statements made in the opinion of the Court and in the concurring opinions in the Skinner case indicate that the legal philosophy behind the Buck case was not as acceptable to the Justices in 1942 as it was in 1927. Legal thinking, in general, has tended to depart from the spirit, if not the letter, of the law established by Mr. Justice Holmes in the Buck case. Whether this departure has been sufficient, in kind or degree, to bring about an eventual repudiation of the

principles underlying compulsory sterilization is, at this time, impossible to determine. However, in light of the changed judicial philosophy implicit in the Skinner decision, and further, considering the gradually decreasing number of reported sterilizations each year, it is believed that the compulsory sterilization movement in America will continue to decline." (at pp. 40-41). This article was one of the better legal analyses of the long judicial history, state and federal, of sterilization laws in the United States. Their prophecy of the continued decline of compulsory sterilization was correct for the past decade of American sterilization history. Two extremely useful sources of discussion of the Buck and Skinner cases are found in the Berns thesis, supra note 1, at pp. 15-46 and 124-28 and in Alan S. Engel, Eugenic Sterilization: A Study in the Relationship Between Law and Social Control (Unpublished Doctoral Dissertation in Political Science, Northwestern University, 1960) at pp. 54-61 and 61-74. Also, see Arthur S. Miller, "Fluoridation vs. The Constitution," 48 Sat. Rev. 49 (April 3, 1965) at 51 for his discussion of the Buck and Skinner cases

11 A very good recent example of how difficult it is for a researcher to crack the professional and administrative facade is seen in the article on "German Measles and Pregnancy" in 58 Life 24 (June 4, 1965). In an editor's note at page 3, managing editor George P. Hunt tells of the brushoff of Life reporter Bob Liang by obstetricians and hospitals in the Los Angeles area, and only after getting the help of

the head of the California Obstetricians Society was Liang invited to a hospital. Even then, he and Life photographer Co Rentmeester found their difficulties in getting hospital permission slips, which were necessary in doing the story. Abortion, like sterilization, is not a story that many hospital administrators want to make public.

12 It is difficult to obtain accurate figures in some cases, but here are the best available figures: operations before legislation: Kansas had at least 58 castrations done by Dr. F. Hoyt Pilcher at the Institution for Feeble-Minded Children at Winfield; Indiana (here the figures vary as to Sharp's vasectomies at the Indiana Reformatory at Jeffersonville, but Sharp's own figure of 176 is probably the most authentic); States without laws: Pennsylvania had at least 270 operations at the Training School for the Feeble-Minded at Elwyn; Massachusetts: 26 castrations at Monson State Hospital for Epileptics by Dr. Everett Flood and 1 vasectomy at the Boston State Hospital; Ohio (at least 3 recent salpingectomy operations in the 1960s by order of the Probate Court in Zanesville; one each in Colorado, Illinois, and Maryland; states where the laws were declared unconstitutional by the state courts: Alabama, 224 (advisory opinion of state Supreme Court); Michigan, 1; New York, 42; Oregon, 127; Washington, 685; Indiana, 120; North Carolina, 49. Also included should be those operations performed in states with laws but where

these operations were not covered by the existing statutes: California (San Quentin Prison, 628 "voluntary" vasectomies on inmates; over 50 "voluntary" castrations in the Superior Courts for Los Angeles County and 70 in San Diego County and one recent "voluntary" vasectomy in the Pasadena Municipal Court). The total for all of the above operations would be 2,534 operations.

13 This is all the more shocking in the light of the fact that the Supreme Court's decision in Buck v. Bell in 1927 was for the extreme eugenicists the vindication of a model sterilization bill which included notice, hearing, right to counsel, and the right to appeal. Happily, all of the states that enacted sterilization laws for the first time after 1927 included most of these rights in their laws. Of the erstwhile 6 state laws without the right to appeal, two (Alabama and Kansas) went before their respective state supreme courts. The Kansas law withstood judicial scrutiny in 1928, but the Alabama law has been inactive since 1935 due to an adverse advisory opinion by their Supreme Court. Kansas eventually repealed its law in 1965, and Connecticut shifted from a compulsory to a voluntary law in 1965. Thus, both states are included in the figure of 26,000 operations.

14 Mark Haller, Eugenics: Hereditarian Attitudes in American Thought (1963) at 141. Haller's comment about the danger of sterilization in the case of the female is indeed interesting in the light of a comment by J.B.S. Haldane in his 1938 book, Heredity and Politics: "...It is

inevitable that if large numbers of women are sterilized, a certain proportion, I do not know how large --- probably less than 1 per cent --- will die as a result of the operation. Now it is a fundamental principle of English law that a person's life must not be endangered except in order to save him from some greater danger. *** I am not at all convinced that this principle of the sanctity of human life may not be of somewhat more importance for the State in the long run than a reduction in the number of defectives of certain kinds..." (at 87) On Haller's final comment on the potential use of sterilization against Negroes, the evidence is discussed in part in the later survey of present state practices, but it is difficult indeed to get positive proof that this is the case. See, however, Joseph L. Morrison, "Illegitimacy, Sterilization, and Racism - A North Carolina Case History," 39 Social Service Rev. 1 (1965); Charles Windle, "Factors in the Passage of Sterilization Legislation; The Case of Virginia," 29 Public Opinion Quar. 306 (1965); the SNCC (Student Nonviolent Coordinating Committee) pamphlet, Genocide in Mississippi (Atlanta, 1964); and the discussion of punitive sterilization proposals in Mississippi in chapter III, infra.

15 Engel, in his very provocative dissertation, supra note 10, raised two cardinal questions with regard to American sterilization experience: (1) which set of values control the decision-makers;

and (2) on what empirical propositions will their actions be predicated? His work was an attempt at the utilization of a more "vigorous empirical approach," as he calls it, to the analysis of law. He concluded that if good case experiences are pooled together, perhaps "...the process of constructing the long-sought ideal of a law-and-social control theory may be well within reach." (at 171) This writer applauds his aims and his efforts in this direction, but disclaims any attempt of this kind in this book. Nevertheless, there are lessons in the American sterilization experience that could help to mold the kind of theory that Engel describes, and when the more propitious occasion arises, this writer would like to share in an effort of this kind.

16 "Biology Moulding the Future," 73 The Forum 331 (1925) at 334-35.

CHAPTER ONE

EUGENICS IN AMERICAN THOUGHT AND PRACTICE:

THE INTELLECTUAL HISTORY OF EUGENIC STERILIZATION

EUGENICS IN AMERICAN THOUGHT AND PRACTICE: THE INTELLECTUAL HISTORY OF EUGENIC STERILIZATION

In order to understand the place of eugenic sterilization laws in American history in the 20th century, it is necessary to view the political and legal history of the sterilization movement in its intellectual setting. Several earlier studies[1] have eloquently and systematically traced the place of social Darwinian thought, together with subsequent biological and hereditarian attitudes in American intellectual and social history.

The application of Darwinian principles of natural selection to social affairs at the last quarter of the nineteenth century was perhaps the great stimulus for the popularly accepted notions of what constituted human heredity. But social Darwinism by itself was not sufficient, especially since the last decades of the century produced a number of social protest movements that placed their faith in the malleability of man and society and the desire to reshape the environment through political and other schemes of change. It was during this period when Darwinism was being transformed into a public fad that Darwin's cousin, Francis Galton, first began his studies of genius and national inheritance and laid the foundations for modern eugenics by coining the term "eugenics" from the Greek word meaning "well born" in 1883. Eugenics was to be the study of how man

through social agencies of control could maximize (positive eugenics) all the good inborn qualities and minimize or decrease the bad (negative eugenics) qualities of future generations. But social Darwinism and Galton's early writings, or even Richard Dugdale's famous study of The Jukes in 1877 were not sufficient to make eugenics, in the words of Hofstadter, a movement that "has proved to be the most enduring aspect of social Darwinism."[2] Even before Galton officially launched the eugenics movement in England in 1904, American professional literature, much of it medical, was flooded with the theories of the criminal anthropologists, especially the movement for the castration of criminals. Criminal behavior was felt to be hereditary in many quarters and castration was believed by many to be the best and most effective means to cut off the sexual passions of the criminal, especially those that committed sexual crimes, and for the general criminal population, to prevent the transmission of "criminal" tendencies. Masturbation was thought to be the fountainhead of many defects in human behavior, and interestingly enough, most of the so-called eugenic sterilizations performed before laws were passed in Indiana and other states after 1907 (Sharp's vasectomies from 1899-1907 in Indiana, Pilcher's castrations in the 1890s in Kansas, Flood in Massachusetts, and Kerlin and Barr in Pennsylvania beginning in the 1880s) were actually called "therapeutic" and not eugenic and were believed to have "curative" effects on the chronic masturbator).

The belief in the magical qualities of surgery for the treatment of habitual criminality was heightened with the discovery in the 1890s in America of a much simpler male operation, vasectomy, by Sharp in Indiana. It was not only less painful, safer, and easier to perform, but it did not have the ugly taste of "cruel and unusual" punishment that castration still had in the public mind.[3]

Oliver Wendell Holmes, Sr., writing in the Atlantic in 1875 on the subject of "Crime and Automatism" could remark that "in most cases crime can be shown to run in the blood."[4] Castration (asexualization as it was often called in this period) was also believed to be a cure for insanity, but among psychiatrists this "curative" did not become popular as a means of actually curing the illness, but was suggested as a means for preventing the further propagation of similar offspring by the insane. At a time when a large proportion of the insane were regarded as incurable, another important event took place: the beginning of systematic (at times crude) statistical studies of institutional populations (prisons, hospitals, mental institutions). Coupled with the earlier study of The Jukes (in which Dugdale gave far more credence to environmental factors than the eugenicists credited him with), insanity and feeble-mindedness was thought, as the senior Holmes thought, to "run in families." Thus, the last 20 years of the 20th century in America were years when hereditarian attitudes had moved from the realm of ideas into the area of organizations fighting (or attempting to ameliorate) such diverse evils

as crime, insanity, intemperance, and a multitude of other personality or "character" defects that were believed to "run in the blood."

At the turn of the 20th century, two important events occurred in the realm of modern science that had inestimable impact on the course of genetics and in turn eugenics in American thought and action. Galton's writings had importance in America even before 1904 and his successor Karl Pearson had extended human genetics to include moral and intellectual traits as well as the physical. These two events both made their impact on the future of American eugenics. The first, which took place in the 1880's and 1890's was the battle in the field of biology between the neo-Darwinians who rejected the notion that acquired characteristics were inherited and the neo-Lamarckians, who defended it. While this seemed like an intra-family squabble over the nature of germ-plasm theory and its effects, it was to have a crucial role in the nature-nurture controversy for years to come. August Weismann's attack on acquired characteristics, if accepted in same way that social Darwinian notions were found agreeable to the study of social phenomenon, would deal a death blow to American social reform. While this storm was raging in biology, the discoveries of Gregor Mendel were rediscovered about 1900. At a time when the biological approach to social theory was dying out, Weismann's germ-plasm theory and Mendel's laws of heredity were to be grasped and applied anew to feeble-mindedness, criminality, and almost every

conceivable "defective" trait that man has ever had. Feeble-mindedness, in particular, was to become the source of enormous attention in the press and professional literature, and the Great Danger to America, the myth that America would be swamped with the "unfit," was now really a movement that swept the country in the period of 1900-1915.

Allied with this was the growth of intelligence testing, especially the Binet-Simon test which was adopted at the Vineland Training School in New Jersey by Dr. Henry H. Goddard in 1908. Goddard's book, Feeblemindedness, Its Causes and Consequences, which appeared in 1914, helped to launch the notion that feeble-mindedness was a recessive trait. Armed with statistics based on pedigree studies and intelligence tests, now refined by Terman at Stanford and called the Stanford-Binet test, the eugenicists had the aura of science to prove their case. It was no wonder that men like Goddard could argue persuasively that social reform was largely futile.

> ...The eugenists and the psychological testers seemed to confirm each others' findings and the conclusions therefrom. The early psychological testers had proved to their own satisfaction that most criminals were feeble-minded; their supplementary studies, such as that of the Kallikaks, showed that feeble-mindedness and, by implication, criminality were inherited. The eugenists with their investigations into "degenerate" families were equally convinced that criminal character was passed on through the germ plasm....[5]

Physical, mental, moral, and every other conceivable trait of man was to be regarded by the extreme hereditarians as transmissible, and the rash of genealogical studies beginning with the Kallikaks in 1911, the Nam and Hill Folk in 1912, the Pineys in 1913, and the new Jukes study by A. H. Estabrook in 1915 made it all the more apparent to them that the proof was easy to find and substantiate. This is why Goddard could say, after his Kallikak study, that feeble-mindedness is "largely responsible" for paupers as well as criminals, prostitutes, and drunkards[6] and why Charles B. Davenport in his Trait Book which his field workers used in tracing family lines could argue that any trait of man could be traced directly to one gene, including such obviously "genetic" traits as "inadventuresomeness," "unconversationableness," "matter-of-factness," and "reading habits." It was this kind of exaggerated and distorted use of the Mendelian unit-particle theory that caused even Karl Pearson to attack Davenport's work, but the flood of literature of this kind continued unabated.

Thus, college-trained white, middle and upper class physicians, psychiatrists, scientists, social workers, and correctional and prison personnel were able to explain -- if explanation was needed -- why the insane were largely incurable, the feeble-minded largely untrainable, the criminals mainly recidivist, the alcoholic continually returning to the bottle, and the indigent and pauper "preferred" a life of indolence and want: all of them suffered from a biological flaw that

explained their unfitness, and gave Davenport the basis for saying in 1912 to the National Conference of Charities and Correction (now called the National Conference of Social Welfare) that social reform was futile. "The only way to secure innate capacity is by breeding it." If, as Pearson thought, heredity accounts for nine-tenths of man's capacity, it also accounted for most, if not all of his unfitness. The extremes to which statistical and pedigree analysis went was shown in the intelligence testing during the draft of World War I. Studies showed that if these criteria were accepted as fact, over half of the American people were feeble-minded!

The rapid urbanization at the end of the nineteenth and beginning of the twentieth century, the large influx of immigrants into America at the time, who were often housed in our great city clums or ghettos, also militated in the direction of eugenic "solutions": "fitness" was nearly always associated with the upper (white, native American) classes and "unfitness" with the lower (poor, Negro, immigrant) classes and it is no accident that many in the extreme wing of American eugenics were linked directly with the "race betterment" and immigration restrictionist organizations in the nation.

Eugenics in America was given the credence of scientific truth and the respectability of a legitimate movement partly because it had many of the nations's leading scientific figures in its vanguard. It was not, as might appear in historical hindsight, a movement led by crackpots or illiterate nativist Americans. On the contrary, its

Who's Who may prove startling to some readers: Charles B. Davenport, perhaps its most important protagonist was a biologist, previously of Harvard and Chicago; David Starr Jordan was a biologist and chancellor of Stanford University; Alexander Graham Bell, who studied the genetics of deafness was a prized follower; Luther Burbank; psychiatrists Adolf Meyer and Stewart Paton; physician Lewellyn Barker of Johns Hopkins; Vernon Kellogg and F. A. Woods, biologists from Stanford and M.I.T.; geneticist William E. Castle of Harvard; psychologists William McDougall and Robert Yerkes of Harvard; Henry F. Osborn, the famous paleontologist of the American Museum of Natural History; Conklin, the Princeton biologist; Thorndike, Columbia's famous psychologist who did much to carry the idea of inherited mental capacity into the academic world; Huntington, Yale's famous geographer; Hooton, Harvard's anthropologist; Pearl in statistics and biometry at Johns Hopkins, sociologists E. A. Ross (Wisconsin), Madison Grant, Charles R. Henderson, and Lothrop Stoddard; J. M. Cattell, psychology, Pennsylvania; Roswell Johnson, geologist; and Irving Fisher, economics, Yale. Osborn, Grant, Stoddard, Conklin, Huntington, Thorndike, Woods, Hooton, Pearl and John C. Merriam were all members of the Galton Society of New York, which Davenport founded.

Another important national link in the story was the organization in 1913 of the Eugenics Research Association, which conducted annual conferences at Cold Spring Harbor (Long Island) and provided the chief source of

stimulation for the study of human genetics in America at that time. Davenport was its first president and he was followed by a number of distinguished figures including Cattell, Meyer, Henry E. Crampton, a zoologist, Grant, Paton, Fisher, Barker, and Woods.

It is no wonder that eugenics caught on so quickly in America after the turn of the century. Armed with Weismann and Mendel, the Stanford-Binet intelligence test, numerous family pedigree studies, institutional statistics, and two surgical procedures that could sterilize without castrating (vasectomy for the male and salpingectomy for the female) -- and the myth that America would be flooded with the "cacogenic" or socially inadequate -- the eugenics movement in America began interestingly enough in an animal breeding organization, the American Breeders' Association, formed in 1903. In 1906, this group set up a number of committees on specific breeding problems including a Committee on Eugenics, which was clothed with the responsibility "to investigate and report on heredity in the human race" and emphasizing their debt to Galton, "to emphasize the value of superior blood and the menace to society of inferior blood."

The Research Committee of the Eugenics Section adopted a resolution in May, 1911 appointing a "committee to study and report on the best practical means of cutting off the defective germ-plasm in the American population." An expert advisory committee of distinguished

scientists in many fields was later added and included among others L. F. Barker in medicine; W. B. Cannon in physiology; Alexis Carrel in surgery; Herbert J. Webber in biology; Raymond Pearl in thremmatology; Alexander F. Chamberlain in anthropology; Stewart Paton in psychiatry; H. H. Goddard in psychology; Franklin H. Giddings in sociology; and Irving Fisher in public affairs. The rather expansive nature of the committee's work was seen in its stated purpose: "To investigate all phases of the problem of cutting off the supply of defectives, and to publish from time to time data which will aid the student of social affairs in weighing any particular phase of the problem that may present itself."[8]

The eugenics section became vital enough for the organization to change its name to the American Genetic Association in 1913. Earlier, in 1910, with the financial assistance of Mrs. E. H. Harriman, Davenport, who was secretary of the Committee on Eugenics of the American Breeders' Association, set up the Eugenics Record Office in Cold Spring Harbor, Long Island. As director of the Station for Experimental Evolution of the Carnegie Institution of Washington, which was also located at Cold Spring Harbor, Davenport was able to develop his dedication to eugenics into a national center for eugenics education, research, and propaganda.[9] In 1918, again with Mrs. Harriman's generosity, the Eugenics Record Office and the Station were combined

into a single Department of Genetics under the direction of Davenport. Thus, one of America's great foundations was to be the support for an enterprise that went far beyond scientific research. As for Galton, eugenics was for Davenport the equivalent of a religious mission. It had many of the qualities of most fads and was conducive to extremism of many kinds.

One of the great eugenics propagandists of the period was the Chautauqua circuit speaker, Albert E. Wiggam, whose book, The New Decalogue of Science appeared in 1922 and who declared:

> The first commandment of science to statesmanship is the duty of eugenics. *****.....eugenics is a method ordained of God and seated in natural law for securing better parents for our children, in order that they may be born more richly endowed, mentally, morally and physically for the human struggle....[10]

Following the setting up of the Eugenics Record Office in 1910, eugenics societies were organized in St. Louis, Chicago, Madison, San Francisco, and in Minnesota and Utah, in addition to the Galton Society of New York. The Race Betterment Foundation was organized in Battle Creek, Michigan and held conferences in 1913, 1914 and 1928. American eugenicists were instrumental in the setting of international congresses on eugenics. The first International Congress on Eugenics was held in London in 1912, the second and third in New York in 1921 and

1932. Out of the second congress came the eventual organization of the present day American Eugenics Society.

Notwithstanding the scientific resources and personalities that infused the eugenics movement in America, its failure was all too obvious a part of the personalities of those most intimately connected with the movement.

> Davenport, then, was a pioneer in the study of human genetics, and he had the facilities and support to create a world center for painstaking and important investigations in the heredity of man. That he did not do so was a tragedy resulting largely from his own scientific methods and temperament. ***** All in all, Davenport's place in the eugenics movement is difficult to assess, for he was a strange mixture of scientist and advertiser. As an organizer, he led the movement. He it was who founded the Eugenics Record Office, encouraged others to unravel the threads of human heredity, and spurred the formation of societies and committees to spread the eugenics creed. As a scientist, however, his influence was less happy, for the eventual repudiation of his research by other scientists often brought repudiation of the movement of which it was a part. In addition, his extreme hereditarian bias led

> him to draw into leadership men who shared his biases but often lacked his scientific interest. Thus he contributed not only to the rapid spread of interest in eugenics but also to a type of eugenics that was often extreme in its emphasis upon race and heredity. Perhaps it was inevitable that the eugenics movement was largely the creation of true believers -- men convinced that only in eugenics lay the road to human progress.[11]

The American eugenics movement concentrated for the most part on negative eugenics proposals: segregation of the insane and feeble-minded; sterilization of these and other so-called "defectives"; marriage restriction laws; birth control (especially of the poor, the immigrant, and the "unfit"); immigration restriction laws; and eugenics education and counselling (which could be regarded as positive as well as negative, depending on which "class" of people were being counselled). The Committee on Eugenics set up by the American Breeders' Association in 1906 was the first to officially call for massive programs of segregation, sterilization, and eugenics education. The Committee to Study and Report on the Best Practical Means for Cutting Off the Defective Germ-Plasm in the American Population in its report of 1914 made it clear that "...society must look upon germ-plasm as belonging to society and not solely to the individual who carries it..."[12]

The extreme to which eugenics could go were amply illustrated in

the 1914 report. An estimated 10% of the American people was regarded as socially inadequate and a combined program of segregation, sterilization, and education would purge the nation of its undesirable germ-plasm within two generations. Laughlin added a model sterilization law, which was compulsory, and included the feeble-minded, the insane (including the psychopathic), the "criminalistic" (including the delinquent and wayward), the epileptic, the inebriate (including the drug-habitués), the diseased (including the tubercular, the syphilitic, the leprous, others with chronic infections and largely segregable diseases), the blind (including those with seriously impaired vision), the deaf (including those with seriously impaired hearing), the deformed (including the crippled), and dependent (including orphans, ne'er-do-wells, the homeless, tramps and paupers) -- whether inside or outside institutions. In less than a decade, a movement which in its earlier 19th century phases had included only the habitual criminal had now expanded outward to numerous groups that needed "cutting off" if America was going to avoid the menace of the alleged fecundity of the unfit.[13]

But men like Davenport and Laughlin, among the true believers of the American eugenics movement, do not entirely account for its amazing vitality in the period from 1900-1915. Part of the answer can be found in what on first blush might be the strange marriage between eugenics and Progressivism in Wisconsin. A penetrating

historical analysis of this phenomenon by Rudolph J. Vecoli produced the following comments:

> From the history of the eugenics movement in Wisconsin it is evident that sterilization was a Progressive measure. It was taken up and agitated by reform groups and organizations; it was advocated by Progressive leaders and publications; and it was enacted by a Progressive legislature and administration. Yet the question remains: Why were the Progressives so receptive to eugenic ideas? Although the eugenic assumption of the primacy of heredity in determining the quality of human beings ran counter to the Progressive thesis that improved social conditions produced better persons, the "nature-nurture" conundrum did not appear to trouble the average Progressive. Eclectic and pragmatic, he could combine eugenic and environmental reforms without fretting over logical inconsistency....[14]

But what did eugenics have that appealed to Progressivism? The answer was many things, including the following:

> As an intellectual creed, eugenics appealed to the progressive-minded as modern and challenging. It was endowed with the glamour which Darwin had lent to the science of biology. Galton and his followers couched their arguments in the terminology of evolution, and

> in their numerous studies of family histories the principle of hereditary transmission of social virtues and vices did indeed appear to be an incontestably established biological fact. Eugenics further suited the contemporary temper, with its naturalistic image of man as animal inextricably involved in the cosmic drama of evolution, yet able, by taking thought, to control the direction of his own development. The Progressive reformer with his faith in "Science" as the means to his humanitarian ends found the eugenic teachings convincing and congenial, particularly since he was preoccupied with the purpose of preventing social problems. Eugenics promised to dam the flow of crime, poverty, and vice at its headwaters....[15]

But how could the Progressives, who were regarded as humane and compassionate, accept the hard-hearted determinism of eugenics? Even this difficulty was not insuperable, according to Vecoli:

> Yet this eugenic reasoning led the Progressives to espouse policies which normally would have been considered brutal and inhuman. Life imprisonment, denial of the rights of marriage and mating, surgical interference with the reproductive organs -- all were accepted as legitimate ways of dealing with the feeble-minded,

> the epileptic, the insane, the minor delinquent as well as the hardened criminal. The acceptance of these harsh measures reflected something of the deep anxiety aroused by the fear of racial degeneracy. It also expressed the tough-mindedness of the Progressives who believed that to bring about the good society one must follow the dictates of science, not of the heart. Time and again, the advocates of sterilization warned that "maudlin sentiment" must not be allowed to obstruct the application of eugenic principles.[16]

But perhaps the most crucial ingredient that brought the two movements together was the emphasis on a collectivist view of the power and purpose of the State:

> Eugenics was also in agreement with the Progressive outlook in its collectivist emphasis. Eugenist and Progressive agreed that laissez faire would result in disaster and that the interests of the individual must be subordinate to the welfare of society. Both were willing to restrict personal liberty in behalf of the corporate good, and both turned to the State as the instrument of reform. The eugenic proposal that the most intimate of human relationships be subjected to public regulation went far beyond the Progressive's

> demands for anti-trust and labor legislation. Yet the reformer's assumption that individualism must be curbed in industry and politics facilitated his acceptance of the same principle in the sphere of human breeding.[17]

Yet no less significant than the collectivist bias and perhaps an important element in its reinforcement were the economic and particularly the class differences that were involved:

> Eugenics further appealed to the middle and upper-class Progressives because it offered a reform program which sanctioned rather than condemned the existing social order. ***** The emergence of a complex urban industrial society greatly increased the number of the socially inadequate, while a heightened social conscience made the public more aware of their unfortunate brethren. ***** The eugenic remedies, promising to eradicate social evils while at the same time reducing the tax burden, must have been particularly attractive to reform-minded but property-owning citizens. *** It was these qualities of eugenics, then, which serve to explain the readiness with which it was embraced by Wisconsin Progressives: the congruity between the eugenic doctrines and certain aspects of the Progressive mentality; and the suitability of eugenics in a reform

> movement basically middle class in leadership and outlook.[18]

Haller has noted the preponderance of "experts" in the ranks of the eugenics movement and their impact on its direction and influence in the early years:

> Eugenics, in fact, remained a movement of the experts; therein lay its importance and strength. Its origin in the nineteenth century stemmed from the growing ranks of those concerned with care and treatment of the poor, delinquent, mentally ill, and feeble-minded. As a part of a world movement in the twentieth century, eugenics gained influential support and leadership from biologists, psychologists, criminologists, sociologists, physicians, social workers, liberal clergymen, and many others who prided themselves upon keeping abreast of the latest developments in the study of man and the solution of social problems. These were, of course, the same sort of people involved in the progressive reforms in the early part of the century. In understanding the development of American social thought, it is important to realize that many who taught in the nation's universities or worked directly with the dependent and delinquent were convinced eugenists and that hereditarian

> attitudes exerted a pervasive influence upon the educated mind in the Progressive Era.[19]

Like the progressives and other reformers of the day, eugenicists carried their ideas into the public arena and concentrated their attention on American state legislatures in the hope of incorporating eugenical ideas in public policies.

> Through the appeal for legislation, the American public doubtless received its major education in the eugenics creed. In carrying its program to the public, eugenics took its place among a multitude of reform projects competing for attention in the Progressive Era and its proponents followed much the same methods as the other groups that battled to aid the unfortunate and alleviate social ills. Despite appeals to voters, however, the legislative victories of eugenics arose more from expert testimony before legislative committees than from public demands. Support came chiefly from state boards of charity, institutional superintendents, professors, and others whose readings and interests kept them abreast of the latest findings in psychiatry, criminology, and the study of the feeble-minded. Eugenics remained primarily a movement of specialists rather than a popular crusade.[20]

Perhaps it should be made clear that not all of those who joined the eugenics bandwagon were scientists. Like most movements that spread rapidly, it too had its crackports, but even the suggestions of the most serious students of eugenics such as Davenport were not found acceptable to serious scientific students of genetics who found the application of the unit-particle theory of Mendel, the easy application of Mendelian ratios of inheritance to pedigree studies, the exaggerated claims of the Stanford-Binet testers, and the alleged (later to be shown patently false) claims that the "unfit" were more fertile, especially the feeble-minded --- far more propaganda and religious fiat than fact. Always, in the midst of the eugenic discussion was the cry for more research, for facts and not generalizations. The extremism of a Davenport drew criticism from many quarters. The simplistic argument of Davenport is illustrated in this quotation from a book published in 1912 on Heredity and Genetics:

> These studies of inheritance of mental defect inevitably raise the question of how to eliminate the mentally defective. This is a matter of great importance because, on the one hand, it is now coming to be recognized that mental defect is at the bottom of most of our social problems. Extreme alcoholism is usually a consequence of a mental make-up in which self-control of the appetite for liquor is lacking. Pauperism is a consequence of

> mental defects that make the pauper incapable of holding his own in the world's competition. Sex immorality in either sex is commonly due to a certain inability to appreciate consequences, to visualize the inevitableness of cause and effect, combined sometimes with a sex-hyperaesthesia and lack of self-control. Criminality in its worst forms is similarly due to a lack of appreciation of or receptivity to moral ideas.[21]

That Davenport and the more extremist hereditarians failed to see the value of environmental factors, particularly where they might "predispose" a person to certain defects that appeared genetic, is shown in an earlier statement, where Davenport speaks of the Jukes family history and of the "method of inheritance for laziness":

> ...It will be observed that we have not here to do merely with a high percentage of pauperism in the offspring of two lazy people, but with 100 per cent, or complete, pauperism. The children cannot rise in any particular quality above the potentiality of their more advanced parent. Training the feeble-minded will develop the characteristics that are present, but will create no new ones. No amount of training will develop that of which there is no germ; you may water the ground and till it and the sun may shine on it, but where there is

no seed there will be no harvest.[22]

The Journal of Criminal Law and Criminology, the organ of the American Institute of Criminal Law and Criminology, was particularly concerned with the arguments for and against sterilization of criminals, beginning with a vigorous protest against sterilization laws in 1913.[23] In the reports of Committee H of the Institute, and although the pro-eugenics membership seemed to carry the day in the first report in 1914, their second report in 1916 continued to cry for more research and added a fourth point to their suggestions:

> (4) That no further laws should be passed authorizing the sterilization of criminals as a eugenic or therapeutic measure until there is a greater unanimity of opinion that criminality is heritable and that sterilization has definite therapeutic values that cannot be produced otherwise.[24]

By the time of the Committee's fourth report in 1917, Dr. William A. White was chairman and he would write:

> ...The complexities of the problem are very great; they involve matters touching questions of heredity, questions of surgery, of law, or morals, religion and sociology, about which divers views are held, not only by people in general, but by the members of the committee in particular, and as in the past it has been found

> impossible to unite upon any common ground that was sufficiently definite to be of value...[25]

In the public mind, eugenics and sexual sterilization were regarded as synonomous, and among the proposals for negative eugenics in the law, sterilization legislation is the most prominent.

STERILIZATION IN POLITICS AND LAW

Even before the eugenics movement was in full swing, especially in the period up to 1915, sterilization bills began to appear. The first, in 1897 in Michigan, failed to pass. This was an asexualization bill aimed at criminals and defectives, and was in reality, really aimed at stopping masturbation in state institutions. With the advent of Sharp's operations in Indiana, more and more interest was evident in the use of vasectomies and Pennsylvania in 1905 was the first to pass a eugenic sterilization law. But Governor Pennypacker vetoed the law, saying:

> ...What is the nature of the operation is not described but it is such an operation as they shall decide to be "safest and most effective." 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...[26]

With Michigan[27] and Pennsylvania unable to bring a law to complete fruition, the precedent was left to Sharp and his cohorts in Indiana, who successfully placed the first eugenic sterilization law on the books in 1907. Typical of the early laws, Indiana's statute was compulsory and covered confirmed criminals, idiots, imbeciles, and rapists. Within a decade, by the time America entered World War I in 1917, the list had grown to 16 states (Connecticut, California, and Washington in 1909; Iowa and New Jersey in 1911; Nevada and New York in 1912; Kansas, Michigan, North Dakota, and Wisconsin in 1913; Nebraska in 1915; and Oregon, New Hampshire, and South Dakota in 1917).

Northwithstanding the surge of legislation and successful political maneuvering[28] of the early eugenics pressure groups, the early laws ran into many difficulties, both internal and external. In some cases, medical superintendents were reluctant to apply the laws, either because they feared their unconstitutionality or they doubted their efficacy on either therapeutic or eugenic grounds. From the time of Indiana's law in 1907 to 1921, there were only 3233 reported official sterilizations, and 80% of these were in California alone. Litigation was perhaps the key external factor, accounting for invalidation in 7 out of 8 cases to reach the state or federal courts up to 1925. Laws fell in New Jersey (1913), Iowa (1914), Nevada, New York, and Michigan (1918), and Oregon and Indiana (1921). Only one law, and that was a punitive sterilization law in Washington, withstood a court test.[29] The failure

of these laws to measure up to constitutional standards of due process and equal protection of the laws was just another evidence of the crude and ill-considered haste in which many were drafted and passed.[30]

With sterilization crawling along at a snail's pace and with the adverse publicity of these cases, eugenics suffered only a temporary setback. Ironically, arguments against sterilization laws took on the aura of "patriotic" support of basic American traditions of constitutional fairness. Following the New Jersey case, this note appeared in a law journal:

> ...Free Americans would not allow their homes invaded to have their daughters undergo salpingectomy, and if they would not, why should law extend one hand in charity to a poor man's daughter while the other holds for her a surgeon's knife? We do not owe to posterity this sort of discrimination, and, were we to practice it, further defectives rather would be increased than diminished.[31]

And W. A. Shumaker in an 1918 article wrote:

> ...It does not speak well for the vigilance with which the rights of the unfortunate are protected. A five dollar tax of doubtful validity would be more strenuously contested in the courts. There is a vigorous humanitarian opposition in this country to allowing dogs and rabbits

> to be made the victims of medical experimentation. Is it more tolerable that human beings should be mutilated in pursuit of a theory which has failed to convince the competent investigators of the Institute of Criminology of its merits?[32]

Ideally, the eugenicists sought an "ideal" court-proof law that would escape the class legislation argument(through extramural application) and provide all of the necessary procedural safeguards. A law that would be legally "airtight" and acceptable to the general public,courts,and administrators alike would enable the institutional superintendents to enforce the laws with greater regularity.[33]

The fact that some of the superintendents were loathe to enforce these laws is not shocking when one looks at the categories that most of the early laws included. By the time of Landman's book in 1932, there were 34 distinct classes of persons covered by the various enactments up to that time. The most common, as would be expected, were (in the terms used in the laws) feeble-mindedness, idiocy, imbecility, insanity, and epilepsy. But these so-called mental defects were not the only ones considered hereditary and they were often linked in the same compulsory sterilization law with such categories as habitual or confirmed criminals, sexual perverts, moral degenerates, syphilitics, drunkards, drug addicts, prostitutes, rapists, and various combinations of the above.[34]

Despite the incredible coverage of these early laws (and many of these categories are still present in current sterilization laws), the great bulk of operations were performed on the mentally ill and retarded. Out of all of the operations reported up to this time, less than 3,000 out of nearly 65,000 were on "others" (including the epileptic). Laughlin's "model" statute was partially followed in the text of these laws, but not in fact, for if the various categories (34 or more) had been zealously sterilized as the laws provided, the figure of 65,000 would be much larger indeed.[35]

But alas, the courts, which seemed to be the downfall of eugenic sterilization in America, came to the rescue just at the time when it appeared in the words of Havelock Ellis that most of the laws "were a dead letter" and would "...really seem to have themselves a sterilizing effect on a most useful eugenic operation."[36] The year 1925 turned the tide in a direction that took nearly a generation of domestic and world history to reverse when the highest courts in Michigan and Virginia upheld the constitutionality of their eugenic sterilization statutes.[37] But this was not sufficient reason for rejoicing because two state supreme courts could not determine the outcome in future litigation and the experience before 1921 was ample proof that the courts could be troublesome. There must be a final vindication for sterilization law in America in the only court that could give it: the U. S. Supreme Court.

Twenty years after the first sterilization law passed in Indiana in 1907, this "vindication" came in Buck v. Bell, 274 U.S. 200 (1927) and Mr. Justice Holmes' opinion and sterilization in American history would forever be linked to his famous statement: "...The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes.... Three generations of imbeciles are enough." Up to this time, less than 9,000 operations had been performed in the 20 years of sterilization in America under the laws of the 25 states that had passed laws up to 1927. Judge Harry Olson could write that "...This twenty year period has been a remarkably short time in which to develop the legalized use of this agency for race betterment..." and Harry H. Laughlin went even further in saying:

> The decision of the Supreme Court of the United States... marked the termination of the basic experimental period in American eugenical sterilization laws. This decision, which was handed down by Mr. Justice Holmes, upheld the Virginia statute in every essential feature. It is now known definitely that any State can, if it desires to do so, and it has not specifically forbidden itself by its own state constitution, enact an eugenical sterilization statute which will be held constitutional by both the State and Federal courts. This decision means also that in the future eugenical sterilization

> will be looked upon by the American people as a reasonable and conservative matter; it is no longer a wild or radical proposition. Eugenical sterilization, properly safeguarded, is a logical exercise of the police power inherent in each of the forty-eight states of the Union. In their courageous and successful experimental statutes the several states have recognized the element of biological inheritance in the endowment of children who constitute the successive generations of American citizens, and they have forbidden reproduction by those of its citizens who are most severely handicapped -- physically, mentally or emotionally -- by inadequate inheritance.[38]

Buck v. Bell not only gave the eugenicists the legal vindication they had sought for so long,[39] but scientific respectability as well, and all of this is an 8-1 decision of the Court which had no cited authorities, no footnotes, no mention of previous state or federal sterilization cases[40] and all in five frothy paragraphs of barely over three pages. It is no wonder that Lauglin could speak in glowing terms of how the "American people have followed the scientific method as faithfully and as accurately as an engineer may be said to be scientific in perfecting a machine to do a particular work" and what is more,

> ...after twenty years of such work the first experimental

> period is ended by the development of a scientifically produced statute which any one of the several states can, if it desires, enact with the assurance of being on sound ground legally, biologically and practically. Thus law and eugenics have participated in this particular outcome -- and to this extent, at least, both law and eugenics may be said to be modern sciences. They have taken a definite problem; have set up reasonable experiments and by learning from successive evidence they have perfected an instrument which works as designed.[41]

And with the Supreme Court as an ally, perhaps even Democracy could be "saved" before the country went down the cacogenic road to self-destruction. Writing in the same year that the Buck decision was rendered, Edward M. East wrote:

> Thus our whole governmental system is out of harmony with genetic common sense. Would it not be better to revise it, to revise it radically in a direction 180 degrees removed from that which our radicals advise? Is there any reason whatever to suppose that the country would not be better off if suffrage depended upon an educational qualification at least as high as that which our best high schools demand in their entrance examinations....[42]

THE AFTERMATH OF BUCK V. BELL

"...Three generations of imbeciles are enough" lit a fuse in those states that were reluctant to enact or use sterilization laws. In the decade after the 1927 decision, 28 statutes were enacted, including sterilization laws in 7 states and Puerto Rico for the first time,[43] most of which were pattered after the Virginia law that had met the test. North Carolina, which had not used its 1919 law, revived itself in new anactments of 1929 and 1933. Other lukewarm states followed suit. Furthermore, in 10 cases that came before the courts, only 4 statutes were invalidated, a complete reversal from the days of 1907-25, when only one law was able to escape judicial repudiation. The number of new states adding to the earlier number of sterilizing states and the revision of earlier laws is not the true index of the impact of Buck v. Bell. Whereas there were only 8,515 reported operations from 1907 until the end of 1927 according to Gosney and Popenoe,[44] the Human Betterment Foundation reported a total of 27,869 at the end of 1937, a decade later.[45] This meant that the cumulative figure had tripled in the decade after the Buck decision, and what is equally or even more important is that California, which had completely dominated American sterilization with 62% of all operations as late as 1930, dropped to around 43% of all sterilizations by 1938 and continued to decline in its proportion of the national total until today it has

less than a third of all operations performed since 1907. Although there were scientific and legal (in addition to religious opposition in some quarters) doubts of the validity of eugenic sterilization, and the presence of critical official reports in England and America condemning the use of compulsory eugenic sterilization, the floodgates had been opened and the depression years of the 1930s saw the highest incidence of state operations in our history when nearly 25,000 persons underwent these operations (which represents roughly 37½ percent of all the reported sterilizations under state laws in America from 1907-65). Dormant as well as new laws were being enforced with a vigor hitherto not seen in American sterilization history.

While the figures for state eugenic sterilizations climbed steadily in the 1930s (especially in states such as North Carolina, Kansas, Michigan, Virginia, Minnesota, and Oregon), the literature of the period following the 1927 decision in Buck v. Bell showed little letup in the harshness of attack on American sterilization laws. The English, who had given the intellectual thrust to the American eugenics movement, never enacted eugenic sterilization legislation and their leading eugenicists were almost always in favor of voluntary laws, if any.[46] The fear of compulsory governmental action based on tentative scientific knowledge at best prompted Bertrand Russell to write:

> ...They are, that is to say, some thirty years behind the best knowledge of the time. This illustrates the

> fact that in all such matters it is very dangerous to legislate until science has arrived at stable conclusions which have remained unchallenged for several decades at least, since, otherwise, false ideas become embodied in statutes, and therefore endeared to magistrates, with the result that the practical application of better ideas is greatly retarded. ***** I do not say that the law ought not, at some future time, to be extended more widely -- I say only that our scientific knowledge at present is not adequate for this purpose, and that it is very dangerous for a community to allow its moral reprobations to masquerade in the guise of science, as has undoubtedly happened in various American states.[47]

At the 53rd annual meeting of the American Association for the Study of the Feeble-Minded in 1929, Dr. E. A. Doll, well-known for his studies at the Vineland Training School in New Jersey, expertly summed up many of the objections to eugenic sterilization:

> There is ordinarily but little value in the eugenic sterilization of the low-grade feeble-minded who rarely mate and who seldom present sexual problems. There is theoretically no value in sterilizing the non-hereditary types. There are numerous technical difficulties in establishing the hereditary nature of feeble-mindedness

> where both parents are not themselves feeble-minded. There are objections to sterilizing borderline cases which may represent frank problems of diagnosis.[48]

And in the following year, Dr. Lewis J. Doshay made a slashing attack on the claims of the hereditarians regarding the alleged inheritance of mental diseases.[49]

The writing of Dr. Ronald A. Fisher was often quoted by the anti-eugenicists to show that the bulk of mental retardation was carried by the so-called "normal" carriers, and not by the retarded themselves, and that therefore the statistical assertions of the extreme hereditarians were greatly exaggerated and far from being scientifically valid. But Fisher was often quoted erroneously by writers on both sides.[50]

As early as 1926, one of England's leading authorities on the nature of mental deficiency, Dr. Alfred F. Tredgold, had warned against the extravagant statements made by some eugenicists regarding the transmissibility of mental defect and the efficacy of sterilization and his conclusions were similar to those made in a study in 1926 by the Mental Deficiency Committee of the Surrey (England) County Council:

> ...It would appear that if every defective now existing were to be sterilized, the result a generation hence, would be insignificant.[51]

The Report of the Mental Deficiency Committee appointed by the

Boards of Control and Education (known as the Wood Committee), issued in 1929, also viewed the efficacy of sterilization with much the same doubts and was not convinced that California experience (which up to that time characterized sterilization in America) was conclusive.[52]

The year 1930 saw the appearance of two statements on sterilization by widely divergent sources, Pope Pius XI and the White House Conference on Child Health and Protection. The Pope, in his famous encyclical Casti Connubii (On Christian Marriage) dated December 31, 1930 took strong issue with eugenics, and especially surgical sterilization, when compelled by public authorities:

> ...For there are some who, oversolicitous for the cause of eugenics, not only give salutary counsel for more certainly procuring the strength and health of the future child -- which, indeed, is not contrary to right reason --- but put eugenics before aims of a higher order... Public magistrates have no direct power over the bodies of their subjects; therefore, where no crime has taken place and there is no cause present for grave punishment, they can never directly harm, or tamper with the integrity of the body, either for the reasons of eugenics or for any other reason...[53]

It should be noted that the Pope could accept the utility of genetic counselling, but surgical interference (unless sterilization was an indirect effect of a licit direct effect, e.g., ridding the body

of a diseased organ) whether voluntary or compulsory was quite another matter. In the same year, 1930, the National Catholic Welfare Conference issued four instructive pamphlets in a series on Problems of Mental Deficiency.[54]

In a subsequent pamphlet entitled Human Sterilization, published by the same organization in 1936, Msgr. John A. Ryan had this to say about the Supreme Court's decision in Buck v. Bell in 1927:

> Some Catholics assume that the Constitution protects all natural rights against encroachment by Congress or by the States. This is a complete misconception. ***** In general, Catholics are too prone to trust to the Supreme Court for protection of their rights and interests instead of actively defending these in legislative bodies before the obnoxious proposals have been enacted into laws. If the decision in the Virginia sterilization case has the effect of dissipating this excessive trust in the Court and arousing Catholics to the necessity of actively opposing such dangerous measures as sterilization before they have taken shape in statutes, it will prove to that extent a blessing.[55]

The extent to which the vigilance of Catholic groups was responsible for the defeat of sterilization legislation in the 1930s is not known, but the historical fact that New Jersey and New York did not enact new

legislation after their state courts invalidated existing sterilization laws in 1913 and 1918 and the fact that the states of Illinois, Maryland, Massachusetts, Missouri, Ohio and Pennsylvania never successfully put sterilization laws on their books might be credited in part to Catholic opposition. Msgr. Ryan thought it was unfortunate that Justice Butler (who was a Catholic) did not publish the grounds for his dissent, and even questioned the Justice on why he gave a silent dissent.[56] The strength of Msgr. Ryan's position was best illustrated in this pointed admonition:

> In view of the foregoing facts, particularly the Papal condemnation, it is clear that no Catholic is morally justified in promoting either the enactment or the execution of sterilization laws. This applies to private citizens as well as to public officials and public employees, but especially to legislators, physicians and surgeons.[57]

It is perhaps unfair to "blame" Justice Butler for not being explicit, but a dissenting justice can keep his reasons to himself and it is only because of the aftermath of Buck v. Bell that his failure seems to loom large. Had he supplied that side of the case that was missing from the beginning, or at least made reference to the arguments against eugenic sterilization laws (whether based on legal, religious or broadly moral grounds), the Court in the 1942 Skinner case might have

been more venturesome. But Supreme Court justices carry heavy burdens as it is, and this writer is inclined to feel the responsibility for the shoddiness of the Buck decision rests on many persons outside of the Supreme Court.[58]

Prior to the papal encyclical of Pius XI condemning state sterilization, Catholic opinion was not entirely opposed to the use of state eugenic sterilization in selected cases. The arguments over the moral justification of the state's use of this power was argued by theologians from Europe and America in the pages of the Ecclesiastical Review in 1910-15, but the work of a German, Rev. Joseph Mayer, was perhaps the most stimulating and provocative single discussion by a Catholic of the subject of sterilization of the mentally diseased in Catholic literature prior to the 1930 encyclical.[59] While Fathers Mayer, Bruehl, and even Msgr. Ryan before the encyclical of 1930, could accept the use of compulsory state sterilization of criminals and other anti-social "defectives" as a measure of communal necessity and hence a moral end, there were still some necessary reservations. Popenoe, in reviewing Mayer's book, wrote for example:

> ...Dr. Mayer feels that in current practice the sterilization that is being done does not meet the necessary requirements because it has not been satisfactorily shown that the well-being of any state is yet menaced by the propagation of its psychopaths, the inheritance of

> mental diseases is still obscure, the possibilities of segregation have not been tested sufficiently, and the present technique of sterilization is not perfect and in some cases (X-rays) may even do more harm than good...[60]

Although Pope Pius XI's encyclical of 1930 marked a critical turning point in the Catholic Church's official attitude toward sterilization, the strength of this pronouncement did not visibly slow down the pace of state sterilization, which reached its highest peak in the 1930s and early 1940s. Yet, some writers feel that Catholic opposition kept some states from moving into the sterilization camp.[61]

The White House Conference in its section on the handicapped child (specifically, problems of mental deficiency) approved of <u>selective sterilization</u> in these words:

> In those cases where segregation and contraception for the whole reproductive period would work grave injustice, and where at the same time persistent use of contraceptive methods is not likely or is undesirable, sterilization is apparently the best means of preventing reproduction by the mentally deficient, particularly the feeble-minded. ***** There are at present no legal, surgical or humanitarian obstacles to the extensive practice of selective sterilization of the adult feeble-minded; these facts should be impressed upon the

> consciousness of every responsible citizen. *** When adequately safeguarded, little individual or social danger at[illegible]s sterilization, however, and for the prevention of some of the individually and socially injurious effects of low-grade mentality, selective sterilization may be regarded as a highly desirable although perhaps not indispensable adjunct to any program of prevention.[62]

Noticeably absent was any mention of the problem of compulsory sterilization although mention was made of "adverse opinion in some quarters" which probably meant church groups such as the Catholic Church and others who opposed compulsory sterilization on religious, legal or humanitarian grounds.[63] But the Report did mention "properly drafted laws permitting sterilization are constitutional..." which meant that laws patterned after that of Virginia would be legal, but there was no attempt to analyze the history of states then using laws that were far below the standards of the Virginia law.

In another report made by a committee created during the administration of President Herbert Hoover, the Report of the President's Research Committee on Social Trends, this statement appeared:

> ...In the present state of knowledge there is bound to be violent disagreement as to those who are biologically "undesirable"; hence, progress in their elimination will

hereditary abnormalities do not propagate at a rate that is sufficient to keep up their number."[67] And Lionel S. Penrose, who was later to become Galton Professor of Eugenics at the University of London in 1945, in a comment on American eugenic sterilization laws wrote that ---

> ...The legislation can in no case be said to have advanced much beyond the experimental stage, and the examples of the workings of such Acts in some instances have not been very encouraging from the eugenic point of view...[68]

Neither the Supreme Court of the United States nor a White House Conference slowed down the flow of discussion in both England and America.[69] But the most significant discussions of human sterilization, and undoubtedly the most systematic since the earlier writings of Laughlin (which were unfortunately always partisan), were found in the book, Human Sterilization, by J. H. Landman (1932) and the famous reports of the Departmental Committee on Sterilisation of 1934 (the English Brock Report) and the 1935 report on eugenical sterilization by the committee of The American Neurological Association (the Myerson Committee Report).

Landman traced the history of eugenic sterilization in America and diligently attempted to steer clear of the ideological pitfalls of so much of the earlier literature on the subject. "This book is not designed as propaganda either for or against the program of human

sterilization," he wrote; and he added:

> ...It purports to be a scholarly and scientific treatment of the available data on the subject. The conclusions are not final but suggestive. What the question of cacogenicity, which is the crux of the entire problem of human sterilization, requires is more science than propaganda, and more research than speculation.[70]

The legal vindication of sterilization in Buck v. Bell did not blind him to the realities of what the laws actually contained. Landman found a confusion in the laws between "inheritance" or "heredity" and congenital acquisition of what were loosely called by some eugenicists to be the "cacogenic" or "dysgenic" qualities, and he condemned the zealous and uncritical acceptance by the extreme eugenicists of the Davenport kind of Mendelian unit character thesis. Laughlin's model eugenical sterilization law was a prime example of this unquestioned acceptance.

> A mere perusal of the list of the socially undesirable classes subject to human sterilization in the several states is sufficient to convince one of the misinformation concerning the mental disorders of mankind that our legislators entertain. Well meaning as they may be, they have allowed themselves to fall a prey to the propaganda of the over zealous doctrinaire eugenicists

> of our country who regard the sterilization of all our socially inadequate people one of the panaceas of our social ills. **** It might be well said that as to the profound questions as to the etiology, diagnosis, prognosis and therapeutics of the various mental disorders, our legislators manifest colossal ignorance.[71]

The most obvious example of what Landman called "the glaring discrepancy between science and fact" was the preponderance of sterilizations on the insane, despite the fact that most eugenicists regarded feeble-mindedness as more likely to be hereditary than insanity. Other claims, such as the "therapeutic" benefits to the person, were questioned and a careful critique of the main arguments of eugenics was presented. Although Landman was appalled by what he regarded as the frequency of social inadequacy in the population, he could nevertheless write:

> These serious criticisms of the present state of eugenics show its great need for more science and less speculation. Any new program for social therapy must be held in abeyance until such time when an adequate scientific basis for it is established. Human sterilization, as a social program, requires more scientific evidence. In the meantime, if human sterilization must be employed, it should be employed cautiously.[72]

The Brock Committee Report of 1934 rejected the use of compulsory

sterilization and noted that even in states with compulsory sterilization laws, consent was often obtained.

> ...Experience indicates that compulsory measures cannot be enforced, or that they become comparatively ineffective, without the support of public opinion. If public opinion is favourable compulsion is unnecessary; if public opion is indifferent compulsion tends to convert indifference into hostility. As one witness puts it, "compulsion defeats itself."[73]

While noting that the problem of mental defect was a serious one in England, the Committee was not convinced of the alleged fecundity of defectives. "The supposed abnormal fertility of defectives is, in our view, largely mythical and results from the accident that from time to time distressing exceptions to the general rule find their way into the Courts and are noticed in the Press."[74]. Although voluntary sterilization was accepted under prescribed conditions and with governmental controls, psychiatric aspects of the operation were also carefully considered in this statement:

> We accept the view, therefore, that the psychological advantages of voluntary sterilisation to patients suffering from mental illness would outweigh any injurious results. But since in some mental states a sterilising operation may be contra-indicated, we consider

> that, in the case of persons suffering from any form of mental disorder, sterilisation should not be allowed without a recommendation from a competent psychiatrist, who should be required to examine the patient and to certify that, in his opinion, no injurious results would be likely to follow.[75]

Despite the advocacy of voluntary operations in certain cases, Parliament has not enacted any sterilization law in England. American experience was convincing neither to the Brock Committee nor to Parliament.

It was equally unconvincing to the only scientific organization to make a systematic study of state eugenic sterilization in America, the American Neurological Association, which issued the report of its committee for the investigation of eugenical sterilization at its annual meeting in 1935 and published it in 1936.. The ANA recommendations were hard-hitting and pointed and consisted of the following:

> (1) Our knowledge of human genetics has not the precision nor amplitude which would warrant the sterilization of people <u>who themselves are normal</u> in order to prevent the appearance, in their descendants, of manic-depressive psychosis, dementia praecox, feeblemindedness, epilepsy, criminal conduct or any of the conditions which we have had under consideration....

> (2) Particularly do we wish to emphasize that there is at present no sound scientific basis for sterilization on account of immorality or character defect....
>
> (3) 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 when the germ-plasm 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. Neurology and psychiatry still have as their duty the laborious task of discovering pathology, pathogenesis and therapeutics even for those conditions in which heredity undoubtedly plays a role....[76]

All of the prevalent myths about the degree of feeble-mindedness were explored.

> ...there is nothing to indicate that mental disease and mental defect are increasing, and from this standpoint there is no evidence of a biological deterioration of the race. What is certain is that hospital population is

> increasing. *** The alarmist attitude is not justified except from the standpoint of the expense of taking care of the mentally sick. To offset this, it is probable that adequate care in the form of adequate institutions acts to remove from the general population the mentally sick and defective and to prevent them from propagating; in other words, that good hospitals and a good hospital system are eugenic measures rather than the reverse.[77]

On the alleged fecundity of the feeble-minded, the Report said this:

> ...Even in the case of those who marry, it will be seen that the birth rate is low and the reputedly high fecundity of the mentally defective groups is a myth and based on the assumption that those who are low in the cultural scale are also mentally and biologically defective.[78]

With regard to legislation, the Report stated that "Any law concerning sterilization in the United States under the present state of knowledge should be voluntary and regulatory rather than compulsory." Most of the compulsory laws, the Report added, were either unused or were being enforced on the basis of the custom of obtaining consent of the patient. All laws, they recommended, should cover those at large and in private institutions as well as those in state institutions

(extramural as well as intramural coverage), in order to avoid "group or class discrimination." The administration of the sterilization laws should be in the hands of one or several boards consisting of experts in the problems involved. "This arrangement would promote elasticity in the application of the law, and permit the utilization of future advances in knowledge."[79]

As in the case of the Brock Report in England, the ANA report called for extensive further research:

> ...It is obvious to us that investigation of the problem of inheritance, especially of the psychiatric conditions, has been haphazard and often inexact. This is no criticism of the able men who have devotedly studied these most difficult problems and it well may be that no complete scientific approach is possible in the present state of knowledge or rather of our ignorance, but it is time that a prolonged research be undertaken in which psychiatrists, statisticians, and geneticists will collaborate.[80]

The Report condemned the exaggerated use in the past of the "history method" (the pedigree studies). "...Any experienced neurologist or psychiatrist knows how deplorably inadequate such a technique is, how replete with errors of ommission and commission...."

With psychiatrists, psychologists, geneticists, and

> statisticians working together in a planned way, aided by the appropriate number of social workers and clerical assistants, the various problems relating to inheritance of neurological and psychiatric diseases might be clarified and the resultant knowledge become the basis of more appropriate action than is possible at the present time. *** Furthermore, it is to be emphasized that no great or radical change in the complexion of society can be expected from any such sterilization program as we recommend, nor from any justifiable legislation. We do not believe that society needs to hurry into a program based on fear and propaganda. Although the problem of mental disease and defectiveness is enormous, there exists no new social or biological emergency.[81]

The report of the American Neurological Association was the most forceful ever presented, but it was not the last comment on the matter. The American Medical Association's Committee to Study Contraceptive Practices and Related Problems reported the following in 1937:

> Our present knowledge regarding human heredity is so limited that there appears to be very little scientific basis to justify limitation of conception for eugenic reasons....There is conflicting evidence regarding the

transmissability of epilepsy and mental disorders.[82]

The Brock and Myerson reports came at the moment when Hitler's eugenics program was already underway in Nazi Germany with the passage in 1933 and enforcement beginning in 1934 of the Law for the Prevention of Defective Progeny. Many American eugenicists welcomed the law, and the pages of the Eugenical News are sufficient proof of their enthusiasm. But historical hindsight can play tricks and it would be unfair to compare what we now know of Nazi history with what was known at that time. The Report of the American Neurological Association could barely scan the first year of the law's use, but they made an assessment:

> ...It is fair to state that it is not a product of the Hitler regime, in that its main tenets were proposed and considered several years before the Nazi regime took possession of Germany. *** It will be seen that this law is very precise and, as appears later, conforms closely with the present knowledge of medical eugenics. The law is hedged around with safeguards and official intervention. Provisions are made for trial, appeal, and execution of the law with characteristic German thoroughness. There are Hereditary Health Courts and Hereditary Supreme Courts. There are officials who are set aside to interpret and enforce the law, in a much more deliberate and complete fashion than is the case

> in the United States or elsewhere....[83]

In England, political philosopher Ernest Barker devoted a portion of his The Citizen's Choice to eugenic legislation:

> ...I am not arguing that the State may not rightly pass eugenic legislation, and even go to the length of providing for compulsory sterilization. I am only arguing that, before it does so, it must get down to the moral foundations of politics. The State cannot enforce a rule of artificial selection because the scientist has discovered a principle of natural selection. It can only enforce a rule which confers rights and imposes duties on human beings when it is sure that some moral claims and some answering moral responsibility is so strong, and so much deserving of support, that it may safely be made a matter of legal right and duty.[84]

Geneticist J. B. S. Haldane, who was Professor of Genetics from 1933-37 and of Biometry from 1937-57 at the University of London, wrote one of the most outspoken criticisms ever made by leading geneticists in Britain and America in his book Heredity and Politics, which appeared in 1938. Concentrating on the American experience, rather than the Nazi, because, in his words, "I wished to persuade British readers that such abuses may occur under a legal system based on English law,

and carried out under the criticism of a press somewhat freer than our own...." Haldane said:

> I do not believe that our present knowledge of human heredity justifies much of the legislation which is supposed to be based on it. **** ...a premature application of our rather scanty knowledge will yield little result, and will merely serve to discredit the branch of science in which I am working.[85]

American sterilization experience was based on laws that were not justified by the then present state of human heredity. "I personally regard compulsory sterilization as a piece of crude Americanism like the compulsory prohibition of alcoholic beverages"[86] said Haldane, and although a confirmed Marxist he answered the economic argument for compulsory sterilization in this fashion:

> ....But it is at least arguable that the proposal to turn out a number of mental defectives into the bitter economic struggle of modern life, provided only that they cannot reproduce, is a step morally backwards, and an abandonment of one of the forms of behavior which distinguish man from most other animals.[87]

Even before the end of World War II and the systematic reports on Nazi sterilization, euthanasia, and extermination programs, the Eugenics News had shifted ground. Frederick Osborn, who scorned the

racism of Grant, Stoddard and others in the American eugenics movement, wrote an editorial on the "American Concept of Eugenics," in which he said:

> ...We are all environmentalists, and we are all hereditarians, too, especially when we can see our way to eugenic measures which will not conflict with, but rather supplement, other social ideals.[88]

At the Seventh International Congress of Geneticists, held in 1939 in Edinburgh, Scotland, a document entitled "The Geneticists' Manifesto" was originally signed by Crew, Haldane, Harland, Hogben, Huxley, Muller, and Needham and by others later. This "Manifesto" laid great emphasis on environmental conditions of life and stressed voluntary means of improving population:

> A fourth prerequisite for effective genetic improvement is the legalization, the universal dissemination, and the further development through scientific investigation, of ever more efficacious means of birth control, both negative and positive, that can be put into effect at all stages of the reproductive process -- as by voluntary temporary or permanent sterilization, contraception, abortion (as a third line of defense), control of fertility and of the sexual cycle, artificial insemination, etc....[89]

The decade of the 1930s, which began with the acceptance of selective sterilization by the White House Conference on Child Health and Protection, and which saw the most widespread and at times reckless use of state sterilization, ended with a marked change in the direction and spirit of American eugenics. The widespread condemnation of extreme hereditarian views here and in England, the disenchantment with the eugenics program of Nazi Germany, and the dying off of the more avid of the extreme eugenicists in America, all helped to give a new and perhaps different emphasis to "...three generations of imbeciles are enough." State sterilization was far from ended, but the country and the Supreme Court were ready for the case of Skinner v. Oklahoma in 1942.

FROM SKINNER TO THE MID-1960s

Although the 1942 Skinner decision did not overturn Buck v. Bell, it did raise some serious questions about the relation of genetics and law. Thomas Reed Powell in an article dealing with the case found the decision instructive:

> Turning now to the condemnation visited on the other statute in Skinner v. Oklahoma the main concern should be that of the psychologist or the psychiatrist rather than any expert in black letter law. The interesting thing about the decision is that seven members of the

> Court refrained from passing any judgment on the underlying issue of permanent significance...[90]

Professor Powell was somewhat charitable with the Court in this case when he said:

> So much for what Justices of the United States Supreme Court have said and done. The recital does not throw much light on what they or their successors would do with milder eugenic meansures, except to make clear that they would be zealous in insisting upon strong scientific support for the necessity and the efficacy of prophylactic prescriptions and upon adequate procedural safeguards in picking the persons subjected to them. ***** If all this seems sadly vague and amorphous to those who extract certainties out of test tubes, it can only be answered that of such is the kingdom of jurisprudence. Even in the kingdom of the healing art one does not always find complete concord and certainty...[91]

Another view was expressed by Professor Harry Kalven, Jr. who found that the constitutional history of American sterilization "does not end with the bons mots of Mr. Justice Holmes in Buck v. Bell." Although the Skinner case was decided on narrow grounds, he noted that "...a distaste for the law, a recognition of scientific perplexities,

and a concern for the civil liberties aspect permeate the majority opinion and the concurring opinions of Chief Justice Stone and Justice Jackson...." But Kalven would hazard a guess about the future constitutionality of the more general eugenic sterilization laws:

> Technically, the Skinner decision is narrow. It goes only to certain features of the Oklahoma statute. It deliberately avoids passing on the status of criminal sterilizations generally and it acknowledges Buck v. Bell. But I would conclude that the constitutionality of all criminal statutes is in grave doubt today and would hazard the further guess that the sterilization of many insane is equally insecure. The legal career of sterilization is thus a useful example, first, of the law too quickly adopting a popularized scientific premise without exposing it to adequate scrutiny, and second, of the law's consequent difficulty in keeping abreast of the revisions of scientific hypotheses. "Three generations of imbeciles" may no longer be the prediction and even where it is, it may no longer be enough. Buck v. Bell may in the end survive as a monument only to the wit but not the wisdom of Mr. Justice Holmes.[92]

Perhaps the most thorough-going analyses of eugenic sterilization came just after the Skinner case in the form of two articles by Abraham

Myerson, a psychiatrist who had headed the committee of the American Neurological Association that reported on sterilization in 1935, and Walter Wheeler Cook, a professor of law at Northwestern.

Myerson's article was a continuation of many of his earlier thoughts on sterilization laws and especially the views of the extreme hereditarians.

> ...It is highly significant that the diseases which are best known are non-hereditary in their genesis and that the diseases which are fundamentally unknown as to pathology and physiological mechanism are ascribed to heredity.... * * * * * * * * * *
>
> ...Without in the least denying the important role of heredity, it can only be stated that low cultural level, especially occurring in sequestered groups, has been called feeblemindedness on very scanty and insufficient evidence -- evidence which any court of law would throw out as the worst kind of hearsay and which science should not even consider.[93]

Myerson condemned the strict hereditarians and their neglect of environment:

> ...To separate environment from heredity is a useful dichotomy, but one which becomes pernicious when it becomes viewed as an absolute fact rather than as an

> abstraction of the human mind. *** The arrogant and the proud tend to be hereditarians and to neglect the environment entirely. *** Furthermore, those who have been impressed by the hopelessness of much of the therapeutics of psychiatry, who have been appalled by the rising cost of caring for the mentally sick, the epileptic, the feebleminded and the criminals have sought the impatient reform and have advocated sterilization more from despair than from real understanding.[94]

What was needed most of all was not propaganda nor the hasty reformist zeal of the earlier extreme hereditarians, but knowledge, which could only come from long, diligent, and systematic research in human heredity.

> The most important conclusion is that neither the psychiatrist nor the eugenist can afford to be dogmatic in his opinion. What is needed most of all is an o[illegible] research, preferably by some great governmental agency, and the ideal agency would be the United States Public Health Service....[95]

Eugenics and euthenics are not at opposite poles, but actually complement each other, and Myerson called for this recognition:

> ...The program of euthenics, may, therefore, be considered a part of eugenic betterment; and legislation which

> provides the best of food and housing, sunshine, reasonable hours of employment and adequate compensation, social insurance of necessary kinds, as well as good medical care, although it may be defined as euthenic, is also eugenics of a positive type. It is time medical biology and law made some kind of formal alliance with a division of labor and a unified purpose for the social good....[96]

He also called for a balance between the requisites of science and those of law. "Science," said Myerson, "must gather the material and present the facts." And law has "the job of putting the indicated program of social reformation into activity...." But Myerson had his caveats for the Law:

> ...Having assured itself that the propositions evolved by science are solidly established and accepted, to it belongs the task of manipulating the unwielding and prejudiced society into line. Whatever laws it passes must be capable of being enforced, for however good scientific theory and postulates may be, there are social principles of conduct, taboos, unreasonable attitudes and non-rational traditions which must be taken into account. Other rights of the individual must not be violated even though to do so seems to be a short cut to reform....[97]

Psychiatrist Myerson sounds like a good American Legal Realist with a debt to Roscoe Pound when he concludes on this note:

> ...Law, especially in a democracy, must possess the guilelessness of the dove and wisdom of the serpent in framing suitable legislation and workable technics for their operation in the particular society within whose framework the reformation is to be wrought.[98]

If a psychiatrist could advise the Law, the legal publicist could perhaps look outside the Law for the answer to the question of the desirability of adopting compulsory eugenic sterilization statutes. This would require a good deal of searching in the literature of genetics, eugenics, and the general literature on human sterilization, and not the history of due process of law or equal protection of the laws in American constitutional history. For this job, one of America's ablest legal realists undertook what was probably the most energetic attempt to apply what Holmes called "cynical acid" to the claims of the eugenicists. Skinner v. Oklahoma was for Walter Wheeler Cook the catalyst for an article on "Eugenics or Euthenics" that was quite unprecedented in the myriad literature of American law journals.

Cook read amidst the writings of Jennings, Hogben, Davenport, Goddard, Haldane, S. J. Holmes, Myerson, Pearl, Conklin, Tredgold and others; he examined the discussions of Mendel's unit-particle theory and its repudiation, the theories of feeble-mindedness, the pedigree

studies, 'I.Q.' and environment, measurement of intelligence, and insanity, epilepsy, and "criminality" as inheritable. And he came to most of the conclusions of the report of the American Neurological Association of 1935, although he did not cite the report in his article, particularly in his repudiation of the notions of the extreme hereditarians:

> ...The notions of the eugenists that 'poorer' human stock, by which they usually mean those who are economically and socially the under-privileged, is reproducing itself more rapidly than the 'more intelligent' classes, i.e., those of higher economic and cultural status, and so that the genetic constitution of the population is being debased, seems to have little if any foundation in modern biological science, even though there are scientists in that general field who still assert the contrary. Granting that genetic constitution does play a significant part in the determination of all 'mental' as well as physical characteristics, we still have the fact that modern biology has shown the error of assuming that therefore environment is unimportant and can not substantially alter what the individual becomes...[99]

Professor Cook concluded that both environment and heredity were important forces, and that -

> ...those who wish to organize or endow institutions for human betterment will do well to turn their attention to the promotion of further fundamental research into the problems of human heredity, with reference not only to the effect of genetic factors upon 'mental' as well as physical characteristics but also to the effect of environment upon the manifestation of those factors. Emphasis should be placed upon the discovery of ways and means of so altering the environment that we can make the most of the genetic constitution with which nature has endowed us. Persons interested in human betterment should also interest themselves in helping to improve the political, social, and economic organizations of our life, so that the results of such research may be put in/to practical operation. In short; if we accept the findings of modern biology, our greatest hope for human betterment lies not in 'eugenics,' but in 'euthenics': the development and application of the science having to do with the betterment of living conditions to secure more efficient human beings.[100]

Throughout his article, Professor Cook acted the role of the layman examining the literature of modern biology on human heredity. Interestingly enough, he barely alluded to the constitutional questions,

since the primary purpose of his analysis was to ascertain "so far as a non-expert in the field can do so, what the present status of the science of human heredity is." On this, he did an admirable job, and the conclusion seems all too obvious by its absence that many of the state sterilization laws needed overhaul in terms of the current facts of modern biological knowledge, and that the Buck and Skinner decisions could both stand further scrutiny.

In 1945, the Illinois Legislative Council, pursuant to a legislative proposal, conducted a study of current American sterilization laws and the literature on the subject. Their study, which cited Landman, the ANA report, the Brock Committee Report, and Cook's article among others, came to the following conclusions:

> Although a large number of states have on their statute books sterilization laws, it is still an open question as to their desirability and effectiveness. It would seem reasonable that if only inmates of state institutions are to be sterilized it should be done previous to their being discharged from the institution. It would also be reasonable to conclude that if such sterilization is desirable for the betterment of society it would be even more desirable to sterilize those defectives who are not inmates of an institution. If sterilization is desirable from a social point of view, then all carriers

> should be sterilized since they procreate the majority of the defectives. This seems impossible because science has no way of detecting such carriers. Except in a few rare types of defects science is not ready to say definitely what part heredity plays in procreating defectives. *** It would seem that at the present stage of understanding of the laws of heredity the wiser course for society to follow is to institutionalize their defectives rather than to embark on any comprehensive scheme of sterilization as a social policy.[101]

Even as the repudiation of much of the earlier extreme hereditarian propaganda continued apace, the residue of the past continued to appear, as for example, in a book at the end of World War II that recommended that the negotiators at the peace table recommend broad sterilization programs (both compulsory and voluntary) for <u>all</u> nations.

> The peace negotiators may be in a position to insist that the conquered countries pass such laws, and that the laws be administered under Allied supervision for a given period as prerequisite to autonomy.[102]

Dr. Clarence J. Gamble, long active in the Human Betterment movement, in assessing the state of sterilization laws in 1945 wrote:

> An important bar to a more extensive use of this form

> of prophylaxis is the public's lack of understanding of the differences between castration and sterilization.[103]

Albert Deutsch in his book, The Mentally Ill in America, devoted portions of a chapter on changing concepts of mental defects to a discussion of eugenic segregation and sterilization.

> ...At first, as we have noted, the ideal underlying institutional custody of the feebleminded was to protect the inmates from the dangers of society. The turn of the century witnessed a complete revolution in the custodial ideal; the main object now was to protect society from the menace of mental defectives. *** While the growth of the custodial ideal was in large part due to the general feeling of pessimism regarding the possibility of training feebleminded persons to satisfactory adjustment in the community, it gradually became more and more identified with the idea of eugenic segregation....[104]

On the state laws of eugenic sterilization, Deutsch concluded:

> Today, in view of our scant scientific data on the laws of human heredity in regard to defective stock, and the socially dangerous uses that can be made of too little knowledge, it is well to hold ambitious schemes such as eugenic sterilization in abeyance until a more opportune

> time. For the present, many scientists feel, the most effective means of coping with the problem of eliminating mental defect is to concentrate upon the environment....[105]

In an examination of the arguments of the eugenicists and the environmentalists, the Iowa Law Review in a survey of human sterilization in 1950 found that future court tests might be in the offing:

> ...While moral arguments have undoubtedly greatly influenced the courts when called upon to examine the constitutionality of sterilization measures, the arguments in the opinions have consistently either stated or assumed that the subnormal trait under consideration was inheritable. Such statement or assumption has been based on the "proved" transmissibility of the defectiveness from the parent. However, the increasing strength of the theories of the environmentalists and the indications of the falsity of the eugenics doctrine as applied in this area, foretell another judicial struggle over the constitutionality of compulsory human sterilization. This conflict may come in a re-examination of present statutes, which are based on heredity, or it may come if and when some state legislature enacts similar provisions with environmental influence as the justification. The substantive due process clause of the

> Fourteenth Amendment to the Federal Constitution will be the main weapon of those who would defeat either type of statute. It is probable that present-day eugenics laws could not withstand such a attack in light of recent trends in scientific findings and beliefs. Whether a similar environmental statute would withstand such an attack is a matter of conjecture. This is certain, however: the advocates of compulsory human sterilization aren't "out of the woods" yet.[106]

Guttmacher and Weihofen in their book, Psychiatry and the Law, noted that many of the states (such as Iowa) with purportedly eugenic laws, were actually sterilizing on an environmental or social basis, but they also noted the possibility of constitutional difficulties:

> A hereditary-environmental basis for sterilization may be stronger factually, and therefore constitutionally, than the older overemphasis on inheritability alone. Surely such a principle would be difficult to administer justly and wisely, but when the time comes that nations do not feel the necessity of stimulating the production of children because of their fears of manpower shortages in case of war, it is more likely to become a part of eugenic planning. To guard against the possibility of being judicially stricken down on due-process grounds,

> a carefully drawn statute ought either to be restricted to a fairly narrow classification which would include only those conditions for which there is fairly good evidence of inheritability (e.g. amaurotic family idiocy), or if more loosely drawn, ought to allow the person a hearing on whether his condition in fact was of an inheritable type.[107]

A classic example of the ignorance of what constitutes due process of law in action was found in a statement in the Human Betterment Association of America's Summary of United States Sterilization Laws, which was prepared by their legal department and issued in May, 1952:

> When laws are enacted which curtail the rights of citizens in such an important area of their lives as that of procreation, one would expect to find their validity strongly contested. Since 1907, the year of enactment of the first state law, only twenth-three cases have been reported in state and federal reporters, involving inmates of state institutions. This speaks well not only of the care and forethought state legislators have given to the consideration of the provisions of the laws but also of the care exercised in their application by administrators. In the same period of time, 53,558 sterilization operations have been performed under the laws.[108]

The number of state and federal cases might be an index to the quality and degree of procedural fairness, but when one looks at the people who were involved in these cases, it is no wonder that the figure is so low. On the other hand, the fact that laws in eleven states (Alabama, Indiana, Iowa, Michigan, New Jersey, New York, Nevada, North Carolina, Oklahoma, Oregon and Washington) were found wanting by either state or federal courts does not speak well of the "care and forethought" of state legislators, nor the solicitude of the state administrators. Mrs. Ruth Proskauer Smith, then executive director of HBA, in an article in the New York Times of October 7, 1962, was quoted as saying: "...that some people had apparently overlooked the fact that the program was voluntary. She noted that the Human Betterment Association had opposed any kind of compulsory sterilization since its founding in 1943." The 1952 statement came at a time when HBA was fully committed to a voluntary sterilization program and couldn't have cared less about the "rights" of the institutionally sterilized. The fact of the matter is that no group in the country really concerned itself with the rights of these people and since HBA had moved away completely from a concern with state laws of either a compulsory or voluntary kind, its concern with the law was primarily in terms of the organization's program, not the rights of the institutionalized mentally ill and retarded.

The 1952 HBA statement noted that the "majority of such laws now

in effect" contain essential features of due process of law, but it failed to mention that of the 27 compulsory sterilization laws then on the books (including Alabama and Washington, and excluding the voluntary laws in Minnesota and Vermont), several failed to include the following procedural conditions: 3 states (Alabama, Connecticut, Washington) did not provide for notice to patient, next-of-kim, or guardian; 9 states (Alabama, California unless an objection was filed within 30 days, Connecticut, Delaware, Maine, Oregon, South Dakota (no hearing provided for the mentally ill), Washington, and Wisconsin) did not provide for a hearing before the board deciding on sterilization; 9 states (Alabama, California, Connecticut, Delaware, Georgia, Montana, New Hampshire, Washington, and Wisconsin) did not provide for the right to counsel, and of the 18 states that did provide for the right to counsel in a hearing, only 5 (Idaho, Maine, Michigan, North Dakota, and Oregon) actually provided for the appointment of counsel where the patient did not have one and all of these states except for Maine also provided for payment of such appointed counsel; and 6 states (Alabama, Connecticut, Delaware, Kansas, Washington, and Wisconsin) had no provision for the right of judicial appeal. These were the technicalities of the state sterilization laws and tell only part of the story that the Human Betterment Association could ignore with impunity. And, in addition to the above deficiencies, 9 states (Delaware, Iowa, Nebraska, North Carolina, North Dakota, Oregon, South Dakota, Washington and

Wisconsin) failed to designate the specific sterilization operations called for in the law.

To fully illustrate the procedural rectitude of the Human Betterment Association, one need only look at the cumulative figures for operations for those states at the end of 1951 that lacked one or more of the requirements of fundamental due process of law, not including the specification of the particular operation. The total for the 13 states that came within this category came to 31,004 out of a grand total at that time (1952) of 53,558 operations performed from 1907-52. This meant that nearly 60% of all operations performed up to the time of the HBA statement had been performed under state laws that were procedurally deficient.[109]

If those states failing to specify a particular sterilization operation had been included in these calculations, then Iowa (1,347), Nebraska (742), North Carolina (2,937) and North Dakota (872) would have been added to the total of operations performed under procedurally deficient laws, bringing the total to 36,902 operations, or just over 69% of the cumulative total up to 1952.

RECENT DISCUSSIONS OF EUGENICS IN GENERAL AND STERILIZATION IN PARTICULAR (1951-65)

The last 15 years has seen a rash of scientific and textbook

materials on human heredity, particularly the breakthroughs in our knowledge of hereditary defects due to chemical and metabolic disturbances, and nearly all of this material has condemned the use of premature knowledge in legislation, especially that of compulsory sterilization. Dr. Tage Kemp, a Danish geneticist, writing in his book Genetics and Disease, had this to say about American sterilization laws:

> ...On the whole we may probably say that the sterilization laws and their application in the U.S.A. have not yet been finally established. They have not always rested sufficiently on a medico-genetic basis, nor have they always been based unconditionally on the principle of voluntariness.[110]

The famed biologist, Sir Julian Huxley, views the value of eugenics as a long-term effort at applying the knowledge of genetics, but not without "somewhat radical changes in customs and laws and outlook..." And he cautions against some of the political sins of the past when he says:

> ...Eugenics for general improvement does not mean trusting the State or any other authority with some arbitrary power for deciding what are good and what are bad hereditary qualities...[111]

Sir Julian agrees with Professor Hermann J. Muller that society is threatened with genetic deterioration because of our "load of mutations," but

negative eugenics --

> can only be successful if family planning and eugenic aims are incorporated into medicine in general and into public health and other social services in particular. Its implementation in practice will depend on the use of methods of contraception or sterilization, combined where possible with A.I.D. (artificial insemination by donor) or other methods of vicarious parenthood. In any case, negative eugenics is of minor evolutionary importance and the need for it will gradually be superseded by efficient measures of positive eugenics. In cases of specific genetic defect, voluntary sterilization is probably the best answer....[112]

Huxley, in harmony with many of the geneticists of the 1930s who criticized the extravagant arguments of the extreme hereditarians, says that "....As in all other fields, we need to combine environmental and genetic measures, and if possible render them mutually reinforcing." And he adds:

> Positive eugenics has a far larger scope and importance than negative. It is not concerned merely to prevent genetic deterioration, but aims to raise human capacity and performance to a new level.[113]

All of these things must be done with a conscious concern for the

rights and the feelings of those concerned and never by the imposition of these choices by an authoritarian agency.

> ...The way is open for the most significant step in the progress of mankind -- the deliberate improvement of the species by scientific and democratic methods. ***** If, as I firmly believe, man's role is to do the best he can to manage the evolutionary process on this planet and to guide its future course in a desirable direction, fuller realization of genetic possibilities becomes a major motivation for man's efforts, and eugenics is revealed as one of the basic human sciences.[114]

Neel and Schull in their 1954 book, Human Heredity, devoted a portion of a chapter on the applications of genetic knowledge to a discussion of eugenics. They opened on a sober note of historical perspective:

> The eugenics movement has had a lurid and disquieting history. In Nazi Germany the positive aspect was perverted to the doctrine of a race of supermen whose illustrious racial heritage conferred special rights, while the negative aspects were interpreted as permitting the wholesale extermination of elements whom the supermen adjudged undesirable. During the same period there was in the United States a great deal of loose thinking, based

> primarily upon failure to develop a critical attitude twoard both the nature-nurture problem and the precise mathematical consequence of either positive or negative selection. These developments combined to bring discredit upon the entire eugenics movement, an opprobrium from which a sounder eugenics movement is only now emerging. It is imperative that in this renewal of interest the lessons of the past be not forgotten. Every sincere believer in the development of eugenics would do well to refer from time to time to such biased presentations of the problem as Grant's Passing of the Great Race, as a reminder of the extremes to which so-called "eugenicists" of other days have gone and the pitfalls to be avoided.[115]

The authors are not content to leave the questions of history to casual observation, for the history of eugenics in America in its earlier phase has lessons for the present:

> The protagonists of eugenics can at this point accuse the authors of setting up a straw man, and with some justification. Nevertheless, there is an important point at issue here. Time and again man, in consequence of an insufficient understanding of the factors involved, has contrived to upset nature's balance. Where this

> results in the introduction of a new insect pest or the extinction of a once numerous animal, such as the passenger pigeon, the results, although serious economically, can be compensated for. But where the organism involved is man himself, it behooves us to proceed with great caution.[116]

Unlike the authors of the 1952 statement of the HBA, these authors show a pronounced concern for the rights of the persons involved, especially where so-called "consent" to the operation is involved:

> Although there appears to be, the, ample legal precedent for compulsory sterilization, as well as adequate safeguards of the rights of the individual, in most of the states sterilization is on a "voluntary" basis, i.e., an institutionalized individual or his guardian applies for sterilization. Since, however, the act of sterilization often carries with it the possibility of release from the institution, one may question to what extent a type of persuasion is employed.[117]

Even in the case of so-called private voluntary sterilization situations, the question of true volition is raised:

> From the standpoint of reproduction, it is difficult to see any essential moral difference between voluntary sexual sterilization and the rigid practice of birth

> control. There seems to be no reason to accept one but not the other. Accordingly, we would feel that there are no contraindications to the voluntary sterilization of certain classes of people, as much on sociological as on eugenic grounds, where the individuals concerned are aware of the consequences of their decisions. It is a moot point whether those whom society adjudges insane or mentally deficient (and who numerically constitute one of the largest problems) are in a position to make responsible decisions, including those concerning reproduction. Any sterilization program which encompasses such persons will have difficulty avoiding a large element of "persuasion," if not compulsion.[118]

For the present, the authors are unwilling to place present genetic knowledge in the hands of government:

> The present authors cannot help feeling that before man attempts to grasp the reins of his genetic destiny, he should have a far more comprehensive knowledge of human inheritance than is now at his disposal. Few would doubt the wisdom of curbing the reproduction of the mentally unbalanced. But the principle involved, once unleashed, has ramifications which touch upon the lives of all of us. ***** Eugenic procedures based

> upon our present limited knowledge cannot help being discriminatory, in the sense that they single out the obviously handicapped, while failing to touch those no less handicapped but in less apparent ways.[119]

Neel, in concluding an essay on the applications of genetics to human problems, said:

> Each year both the possibilities and the complexities of eugenics become more apparent. Our knowledge of the forces that have shaped man cannot be described as anything but fragmentary. Our concepts of human mutation rates are based on the partial study of the behavior of a few dozen genes, which may or may not be representative. Our ignorance of the kinds of selective factors which have been important in the past and are important today is profound. From the long-range point of view, there is nothing more important than the preservation, and perhaps the improvement, of those genetic attributes that have carried man to his favored position. And nothing I can think of could do the unfolding study of human heredity, with all its broad implications, more harm than premature attempts to apply that knowledge in any dogmatic fashion to as complex an issue as man has ever tackled.[120]

The appearance of Rev. Joseph Fletcher's Morals and Medicine in 1954 was an earth-shaker for the public as well as those interested in problems of forensic medicine. One chapter was devoted to sterilization and was largely a critique of Catholic objections to the use of either voluntary or compulsory sterilizations. The author found no sound ethical objections to either voluntary or state-ordered sterilizations:

> It is impossible to see how the principle of social justice -- at least on any very profound view of it -- can be satisfied if the community may not defend itself, and is forced to permit the continued procreation of feeble-minded or hereditarily diseased children. Sterilization in such cases is not solely a matter of commutative justice (or personal control), but also of distributive justice (or state control). If it is argued that the segregation of such creatures is an alternative to sterilization, then our reproach will be that something more than personal values are being protected by that argument. ***** The argument that all people, regardless of their stature as persons or their capacity to become persons, have a natural-law right to their procreative faculties and that we may not rightfully take them away, is just as fully circumvented by segregation as by sterilization. In the natural

> order it is an observable rule that what does not function dies, and the parallel principle in ethics is that rights which are denied their exercise are dead, although not necessarily invalidated. There is no difference between compulsory sterilization and compulsory segregation. The latter quite effectively takes away sexual freedom and destroys procreation....[121]

Fletcher's concern is not with due process of law, but with the quality of life and of society that is involved: "...At bottom, the right of society to be clean and safe, and the right of every child to be sound of mind and body, are the things at stake in the argument for compulsory sterilization...."[122]

Fletcher's exciting excursion into morals and medicine was followed by two equally challenging attempts at analyzing the same kinds of questions, including both voluntary and compulsory sterilization in books by two English scholars, Glanville Williams and Norman St. John-Stevas,[123] who were divided in their support of the Fletcher position. After surveying the earlier literature, including the ANA and Brock reports and the work of Landman, St. John-Stevas wrote:

> ...As has been seen, medical knowledge is so fragmentary in this sphere, and the dispute over the nature of the hereditary processes so fundamental, that scientific knowledge cannot be said to have reached the degree

> of certainty requisite to justify a policy of compulsory sterilization. It is even doubtful whether the vast majority of the sterilization statutes satisfy the requirements of substantial due process, which requires their provisions to bear a reasonable relationship to existing medical knowledge of heredity. It may of course be argued that the statutes are justified on environmental rather than hereditary grounds, for if they do not eradicate hereditary defect, they do prevent children being brought up in unsuitable homes and by inadequate parents. Construed as they are written, most of the statutes could not be upheld on this ground, and even in those that lay down "social" reasons for sterilization, the avoidance of environmental hardship would probably not be considered a sufficient justification for such a drastic step as sterilization.[124]

Like Williams, an American author of a text on social legislation, Helen I. Clarke, found little to fear in American sterilization practice:

> ...Conservative laws probably will remain on the statute books and perhaps continue to be passed, but they will remain ineffectual unless an informed public opinion demands their competent execution. To date the small

> number of operations performed under the laws indicates halfhearted support of sterilization programs. It seems obvious to this writer that sterilization should be available not only to those who transmit familial defects but to those who cannot decently maintain themselves and their issue. Since the laws of inheritance are uncertain, mandatory sterilization at present should be required only of persons with clear-cut inheritance histories. However, statutes should include provisions for the voluntary sterilization of persons with certain designated disabilities who live outside institutions. Finally, surgeons should not have to fear civil or criminal prosecution because an individual with legitimate reason requests and obtains a private operation. "Legitimate" should include eugenic, social, and therapeutic reasons.[125]

Clarke is optimistic about the possibility of fair administration of well-written laws on the subject of sterilization:

> Advocates of sterilization programs favour carefully drawn statutes to include the requirements that adequate procedural and administrative facilities be furnished. If these limiting statutory specifications are carried out, there is little reason to fear that the individual will be deprived of his legitimate freedom, that race

> "purging" will occur, or that euthanasia will be the inevitable next step....[126]

Masland, Sarason, and Gladwin in their study of mental subnormality warned against the use of sterilization at the present stage of scientific knowledge of human heredity:

> ...The fact that a disease is hereditary does not indicate that there is no form of therapy conceivable or that sterilization or other eugenic practices are the only hopes for modification of the problem. The modification of the stressful features of our environment, in the broadest sense of the word, may be an entirely proper and effective means of dealing with many genetic diseases....[127]

The holder of the Galton Professorship of Eugenics at London University, Dr. Lionel S. Penrose, in his Outline of Human Genetics appraised the value of negative eugenics:

> ...A not uncommon view is that it should be possible, by sterilization or other such methods, to prevent the transmission of unfavourable genes and thus reduce the incidence of hereditary defects in the population. Emphasis on this aspect of eugenics is now much less popular than formerly for a variety of reasons, quite apart from the dangers of misapplication of schemes

> from political motives. For example, it is now widely realized that the eugenic effects of any superficial sterilization scheme must be rather slight as compared with the effort required to enforce it. Recessive abnormalities are only very rarely propagated by affected parents; they appear among the children of normal carriers. Little effect can be produced by preventing affected homozygotes from breeding, since they very rarely breed anyway and, when they do, their children are quite likely to be normal. Attacking the disease by sterilizing all heterozygotes is theoretically possible but terribly wasteful. Indeed if, as is generally believed, every person is heterozygous for one or more recessive defect, the project is absurd. The more practical remedy, advocating that carriers of the same defect should be discouraged from mating with one another, would efficiently diminish occurrence of abnormal homozygotes and would be eugenically acceptable.[128]

Anthropologist Ashley Montagu in a discussion of scientific knowledge and political policy wrote:

> Scientists with political axes to grind -- some of them of the highest scientific distinction -- have been

> responsible for some most unfortunate social changes. Such scientists are likely to be anxious to introduce "reforms" in society wherever they can. As a consequence of their activities our unfortunate immigration laws were first put in the form they have had ever since, except that they have gone from bad to worse, since politicians uneducated in the facts of heredity began to modify them. Many of the sterilization laws enacted by many States of the Union were also largely the work of politically minded scientists and pseudo-scientists...[129]

Professor Montagu places his faith in the value of genetic counselling and education, not compulsory state laws:

> A society does not properly acquit itself of its responsibilities to its citizens by either choosing to ignore the existence of defectives and placing the entire burden of their care upon the parents, or else by approaching the problem with the crude and ineffectual scalpel of sterilization. Our society should make much more varied and substantial assistance available than it does at present to the family with one or more defective children. And to forestall the advent of undesired defective children, genetic counseling should be available premaritally, and is the most significant

> clarification that ought to be interestedly sought by the young couple contemplating marriage. The best time and place to prepare individuals in such knowledge-seeking attitudes is in the schools, for an elementary knowledge of the facts of genetics, of human heredity, should become part of the intellectual equipment of every ordinarily educated citizen.[130]

Davies, in his book, The Mentally Retarded in Society, concluded a discussion of sterilization in America in this way:

> To the author, who has endeavored to weigh available evidence and opinion on all sides of the question, sterilization fails to recommend itself, in the present state of our knowledge, as a measure of social control to be generally applied to the subnormal. From the point of view of succeeding generations, it appears doubtful that sterilization would reduce the number of mental defectives sufficiently to be of any general social significance, or to have any appreciable effect on public expenditures. From the point of view of the present generation, sterilization can in no sense be a substitute for constructive training and community programs reenforced by research and treatment.[131]

Fuller and Thompson in their text on Behavior Genetics speak of

the value of eugenics in this way:

> ...the eugenics movement has been considered as a proposal to substitute directed for natural selection in human populations. As applied to deleterious characters inherited in simple Mendelian patterns, it is reasonable that man should use his scientific knowledge to prevent the conception of children likely to be severe social burdens. Beyond this, our knowledge of human genetics is insufficient to base further recommendation, particularly since we do not know the nature of the future society to which our descendants must be adapted.[132]

Dartmouth College's convocation in September, 1960 on the Great Issues of Conscience in Modern Medicine provided a lively forum for the discussion of the role of eugenics among other things. Dr. Rene J. Dubos, speaking on hereditary defects, said:

> ...As all of us know, there are now many techniques available for postponing death in every age group and for almost any type of disease. For example, we can save the lives of children suffering from almost any type of congenital or hereditary defects, and there is no question, of course, that to save such a life is a humane act and source of professional gratification, but it is a sorry fact that in many cases saving the

> life of an individual suffering from hereditary defects has long-range consequences, which will then magnify medical problems for the following generations.[133]

Novelist Aldous Huxley also addressed himself to eugenics:

> Whether, as Prof. Muller suggests, we can as a matter of practical policy impose or get people to accept a system of eugenics seems doubtful. I think the best we can hope for at present is possibly to encourage certain forms of negative fear of eugenics -- that is to say, of discouraging people with obvious genetic defects from reproducing their kind; and for the rest it seems to me we have to find out what are the best environmental conditions for eliciting the enormous potentialities of human beings....[134]

Sir Charles Snow took a position similar to Huxley's:

> I would like to say a rather similar word about eugenics. I think it is not for us in our generation to try and tell future men everthing they should be like. I don't think we're omniscient. I think we've got to show a proper humility. They may choose to be very different from what we would like them to be. And, therefore, I find myself very strongly on Mr. Huxley's side. I think we've got to make the environment tolerable. "Leave

> if you like" is a strnage legacy to our descendants. Dr. Muller's great pool of sperm -- that seems to be one of the really original bequests one generation might ever leave to another. But leave it there for them to make the choice. They are going to live in a very different world....[135]

For geneticist Hermann J. Muller, the sperm bank idea is but one of several possible avenues in which society could be awakened to what he calls the "genetic predicament" and its solutions:

> Important new techniques are likely to break through into general use by way of many different channels, in consequence of the diverse benefits they offer. Breaking through in various ways, of which that just sketched is only one example, the new techniques of reproduction must eventually come to afford the necessary balance to our present genetic predicament. Reversing the present downward genetic trend, they offer the hope of not merely compensating for ailments and weaknesses, but of allowing a resumption, under conscious guidance this time, of our progression toward an even higher estate. Thus we should be able to give free rein to our advancing medicine, while at the same time actively helping future generations. And we should thereby have

> advanced from barbarism to civilized practices in that major field of human life that has till now remained in its essentials the most untouched by culture, the field of reproduction.[136]

The age-old problem of genetics and eugenics when applied to social and political policies is the ethical question of who decides what is genetically desirable for society, and on what basis? There are still significant differences within the biological fraternity over such questions. T. Dobzhansky, for example, in a discussion of the ideas of Muller and Crow, said:

> However, usefulness and harmfulness are not the intrinsic properties of a variant gene; genes are useful, neutral, or harmful only in a certain environment; and the relevant environments are of two kinds: the external or secular, and the internal or genetic environment. What is good in the Artic is not necessarily good on the equator; what was good in man in the ice age is not necessarily good now; what is good in a democracy is not necessarily good under a dictatorship. This is really so elementary for a geneticist that it would seem a waste of time to talk about it, if it were not for the fact that it is so often forgotten in discussions of human evolution, even by some geneticists.[137]

In another paper, Dobzhansky discussed the relation of heredity to environment:

> ...It would greatly simplify matters if we could classify traits and determine which are hereditary and which environmental. This is impossible, because without exception all traits are hereditary and all are environmental.... ***** I do not mean to say that the distinction between hereditary and environmental diseases or between hereditary and environmental behavior traits is meaningless but, to be meaningful, the problem must be stated correctly. What we must ask is: What part of the observed variance in a given characteristic is due to the variety of genotypes existing in the individuals under study and what part to the variety of environments to which these individuals are exposed?...[138]

Dobzhansky disposed of the unit-particle theory, so popular in early extreme hereditarian literature, in this fashion:

> ...A part of the difficulty comes from the misuse of the concept of "trait." A trait is an abstraction; the organism has no traits, it is our language that makes it necessary for us to describe living things in terms of "traits." The trouble begins when traits cease to be devices for description and analysis and become

> independently existing entities. This is what happened in the early years of genetics. Each gene was supposed to determine a single "unit-character" or trait of the organism.... ***** The concept of unit-character is abandoned in modern genetics. There is no one-to-one correspondence between traits and genes. Many, and probably, all traits are determined by many genes; and many, probably all, genes determine many traits. A trait is an aspect of the total development pattern of the organism. It does not exist apart from this total development pattern.[139]

Geneticists, both at home and at international meetings, have shown a high degree of humility and self-evaluation in interpreting their findings for possible public use. Dr. Franz J. Kallmann, in his optimistic speech, "The Goals and Perspectives in Human Genetics," at the opening session of the Second International Conference of Human Genetics at Rome in 1961 said:

> All human health and behavioural potentials, in line with genetic theory, rest upon the cytochemical properties of well-organized gene units in the nucleus of cells, which are endowed with the ability to store a vast amount of hereditary information, and, therefore, are essentially inseparable from man's evolutional advance,

> from his adaptive strength, and from his hope for continuous posterity and well-being. Hence, we are really responsible for a general realization of the fact that mankind as a whole must learn how to survive safely, before we can benefit from the multitude of important contributions that human genetics would be able to make to our scientific schemes and therapeutic programs. In fact, no other discipline is in a more privileged position to provide the tools for a better understanding not only among workers in the human sciences but among all the peoples of the world.[140]

But not all scientists who are aware of the enormous importance of human genetics for man's physical as well as social future are quite as optimistic. Rene Dubos, for example, says:

> ...it must not be taken for granted that the power of science is limitless. After all, it is only during the past few decades that medical treatment has permitted the victims of genetic disabilities to survive and to reproduce on such a large scale. Should the trend continue, it is far from certain that therapy can keep pace with the problems that will have to be met to avoid biological extinction. Indeed, I would be surprised if the medical geneticist of the future did not rate the sociological

> aspects of his science as more important than its contributions to biochemistry.[141]

In a "Statement of the Eugenic Position" issued in 1961, a special committee of the board of directors of the American Eugenics Society said:

> The function of the American Eugenics Society is to contribute to the advancement and dissemination of knowledge about human genetics particularly in relation to similar scientific knowledge from the social and biological sciences, including knowledge of the social and psychological factors which determine size of family among different kinds of couples. The Society's function is therefore to a great extent interdisciplinary.[142]

The constant urge for more and more knowledge and more certainty about the facts of human heredity and their bearing on society is seen in nearly all of the recent literature, whether it comes from biological, medical, or legal sources.

Dr. Morton Birnbaum, a physician-lawyer, made a preliminary survey of every public mental and penal institution in the United States and its territories in order to determine the number of eugenic sterilizations performed in these institutions in 1957. This was part of a critical attempt on his part to compare the handling of eugenic sterilization in the various states that have different approaches to the problem.

He found that approximately 50 additional operations had not been reported in the annual HBA survey for the same year and that several of the cases were not performed on strictly eugenic grounds. Insofar as treatment is concerned, he wrote:

> I submit that in the area of eugenic sterilization in our public mental institutions, just as in many other areas involving the institutionalized mentally ill both the patient and the physician often are more like puppets of the state than moral human beings because of: Lack of proper facilities to allow freedom of choice; and Lack of knowledge of available relevant facts.[143]

Birnbaum concluded his assessment of eugenic sterilization with a call for what he calls the "right to treatment" and for more research:

> In the field of eugenic sterilization where the legal concepts are necessarily vague, where the medical knowledge is limited and where opposing honestly felt and deeply held moral convictions frequently conflict, the partial solutions herein advocated: Improvement of facilities through the recognition and enforcement of "the right to treatment"; and, More knowledge of the available relevant facts through the suggested studies, can be mutually satisfactory and necessary starting points to help solve some of the complex problems inherent in this field.[144]

Much of the recent stimulation for research into the causes of mental defects has come from the White House or from governmental agencies such as the various National Institutes of Health. The late President Kennedy's Panel on Mental Retardation, which was set up in October, 1961 presented its report to the President in October 1962. The Report of the Task Force on Law, with Judge David L. Bazelon as chairman, published its report in January, 1963. On the subject of sterilization, the Panel's findings were somewhat surprising in the light of the much stronger conclusions of the American Neurological Association's report of 1935, but this might be explained by the more limited mandate of the Panel. The Panel stressed the difficulties of reversal operations and clearly distinguished voluntary from involuntary operations, noting that "To the extent that voluntary sterilization may be considered a right, as it is by some people, it is one to which the mentally retarded person should have access if he is capable of voluntary action." On the subject of the involuntary (compulsory sterilization) laws, the Panel reported:

> ...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.[145]

On the question of administrative procedures, the Panel became much more critical:

> ...The procedures by which selection for sterilization is made vary widely. In practice, great discretion is placed in the superintendent of the institution. Legal protections for patients range from the slightest to a very careful system of judicial review. In view of the general irreversibility of sterilization, no laxity in protecting the retarded can be allowed. Although the basis of laws providing for involuntary sterilization is usually claimed to be eugenic, and as such should apply equally to men and women, they are in practice applied more frequently to women. It is clear that in cases where the retarded woman is able to be maintained or to maintain herself economically in the open community, the real issue being decided is whether procreation is to be prevented by segregating her in a controlled environment instead of by surgical means.[146]

Notwithstanding the criticisms of the involuntary laws in some states, the Panel was not -- even in 1963 -- able to make a direct repudiation of the existence of compulsory state laws still on the books of 27 states. They seemed instead to take great pains to fall short of the conclusions that could be drawn from their brief two-page assessment when they concluded:

> We do not take a position on whether sterilization can ever be ethically justified. Our recommendations are limited to urging that the operation not be allowed to result from misjudgment as to its scientific need or from inadequate opportunity for administrative and judicial review.[147]

No mention was made of the Buck or Skinner decisions nor of the more recent "administrative repeal" of sterilizations in states like California, Kansas, and Indiana. Presumably, the Panel could accept a sterilization law if it is administered fairly (that is to say, with all of the necessary procedural safeguards) and is based on a scientifically valid genetic finding. Just what was meant by "scientific need" was not defined. Somehow, the feeling is strong in this writer that the Panel took the "high ground" of due process of law and lost sight of the past 30 years or more of genetic controversy and discussion over the inheritance of certain defects. This is most unfortunate, because the time was ripe for a real re-examination of the Buck and Skinner decisions in the light of new evidence and an official governmental panel might have been an impressive forum for such an endeavor. But, perhaps, the subject was a bit too hot, and the rights of the mentally retarded in the larger sense could not be jeopardized by what is perhaps only a segment of the problem.[148]

Perhaps the most dramatic breakthroughs in the field of mental

retardation research have been in biochemistry and particularly the identification and treatment of metabolic disorders. The well-known work of Dr. Robert Guthrie of the State University of New York at Buffalo on phenylketonuria (PKU) and the subsequent adoption by some states of blood or urine tests for new-born infants for PKU and other metabolic distrubances is but a glimmering of what the future holds for research into the cures for various forms of mental retardation. Dr. Robert E. Cooke of Johns Hopkins University and a member of the President's Panel on Mental Retardation had this to say at the White House Conference on Mental Retardation, held in September, 1963:

> No longer is the doctrine tenable that mental retardation is almost entirely determined biologically at conception or during the first months of gestation. Research during the last decade has shown that biologic as well as behavioral factors operating after birth are responsible for a large and important segment of mental retardation, severe and mild. Even in the presence of mutant genes in the homozygous state, interference with intellectual development may begin only after birth under particular environmental circumstances. Nowhere in this more dramatically demonstrated than in the case of PKU. As you well know, in PKU despite the absence of the enzyme phenylalanine hydroxylase, phenylalanine levels in the

> blood of the fetus are relatively low and metabolites do not rise to neurotoxic levels because of the removal of phenylalanine by the placenta and maternal liver. Thus, the brain of the newborn with PKU is normal at birth, and damage results from dietary exposure to phenylalanine. This fact is illustrated by the quantitative relationship between intelligence quotient and weeks on a normal phenylalanine intake -- namely, a drop in IQ of 5 points for each 10 weeks of delay in instituting a low phenylalanine diet.[149]

Cooke noted the trebling in a period of five years of the list of causes of mental retardation "in which significant retardation can be prevented by proper therapy instituted after birth." And the list continues to grow, and although the percentage of the mentally retarded born each year who might be saved by tests such as the Guthrie Test is still small, the importance of this work is enormous. As Cooke said: "Yet, although these disorder represent only a score of the 200 or more causes of mental retardation, they serve as valuable models for other conditions."[150]

Despite the <u>certainty</u> that modern science has regarding these metabolic disturbances and their cure, Cooke is not willing, at least at the present time, to make Law the guardian of this knowledge:

> The collection and analysis of a urine specimen on every

> baby before discharge from the newborn nursery should be demanded by hospital accrediting and approval bodies, not by laws....[151]

In a speech before the annual meeting of the American Psychiatric Association in 1964, Dr. Stafford L. Warren said:

> Gentlemen, we need your thinking, your experience and your continued best efforts in this program as well as in mental illness. The waiting lines are long and time is short for many who need the help we can give. Let us not keep them waiting. We can enter into a concerted effort to help them. And we shall, for there is much hope today of prevention, amelioration and --- dare one say it yet? -- cure of some types of mental retardation.[152]

The interdependence of genetics and other fields of scientific endeavor, both in the natural and social sciences, is being increasingly recognized by scientists everywhere. In this country, for example, the Social Science Research Council's creation of a Committee on Genetics and Behavior in September, 1961 was a noteworthy step in this direction. The Committee's report, "Genetics and the Social Sciences," which appeared in September, 1964 is an important document in the history of American genetics, and hopefully a portent of future research collaboration. In their discussion of behavior pathology, particularly PKU,

they said:

> ...This is not only an instance where genetic study has provided the pasis for a thorough understanding of a socially significant form of behavior pathology, but also one showing clearly that genetic determination does not necessarily imply immutability or the existence of a fixed characteristic. In this case, identification of the genetic process and associated physiological mechanisms provided the basis for prompt and efficient environmental control of the trait or character.[153]

The World Health Organization (WHO) of the United Nations addressed itself to the subject of human genetics and public health and concluded:

> In general, it would be desirable if persons suffering from serious hereditary diseases carrying high (theoretical or empirical) risks of transmission were to be encouraged to refrain from having children. This may be achieved by education and counselling, but may never be enforced. In this connexion, the founding of genetic counselling services is strongly to be recommended. The very provision of these facilities cannot but have eugenic consequences.[154]

The WHO report's rejection of compulsory governmental action and its reliance on genetic counselling and education is understandable in

the light of the experience of eugenics in Nazi Germany and in some American states, as well as the cultural, national and religious diversity of the United Nations.

> Genetic counselling is the most immediate and practical service that genetics can render to the medical care of individuals and families. Because of the importance of genetic advice to those who need it, and because of its favourable effect on the control of genetic disease, such counselling should be an integral part of medical care services. Popular education on genetic matters of public health importance to the population concerned might also often be of benefit in lightening the burden of genetically determined disability.[155]

Although the overwhelming weight of evidence that has appeared in the past 15 years is critical of certain aspects of the American sterilization experience and dubious of further excursions by government in applying other kinds of genetic data, the residue of extreme hereditarian ideas are still alive in the land. One strong advocate of state compulsory sterilization, Professor Elmer Pendell for example, in an address before the Fifth International Conference on Planned Parenthood in Tokyo in 1955, said:

> Consequently, if the basic quality of the population is to be safeguarded, steps must be taken to offset the

> deterioration of the human stock. *** With a collapse of social organization -- that is to say a failure of civilization -- the quantity guidance would likewise fail, and previous achievement in the direction of quantity guidance would be futile. Contraception, the, cannot stand as a unit program, but must be harmonized and synchronized with a program which safeguards heredity. Logically the additional guidance is via sterilization. *** In America, sterilization would have to be many times more extensive than it has been to date, in order to offset the birth-rate differences. The 60,000 total would have to become 60,000 sterilizations annually; then more. I do not attempt to estimate the number of sterilizations necessary to offset the birth-rate differences.[156]

The myth of the fecundity of the intellectually "inferior" was revived in all its glory and paraded as the basis for future political and social policy by the professor. "A consideration of those fundamentals calls for a reversal of the birth-rate differences -- and a necessary means to that end is sterilization of persons whose excess reproduction imperils society's future." This would call for a simple legislative standard of "fitness" with resulting limitations of the reproduction of the "unfit":

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> Consequently, if the basic quality of the population is to be safeguarded, steps must be taken to offset the

kind of concern with the so-called "fitness" of persons for marriage and procreation:

> I would further suggest that we recognize that nature is not in the habit of producing in every instance perfect specimens of the human being. Geneticists know that in the infinite variations which are possible as sperm meets ovum things do not always turn out the way they are supposed to. The number of genetically defective

> deterioration of the human stock. *** With a collapse of social organization -- that is to say a failure of civilization -- the quantity guidance would likewise fail, and previous achievement in the direction of quantity guidance would be futile. Contraception, the, cannot stand as a unit program, but must be harmonized and synchronized with a program which safeguards heredity. Logically the additional guidance is via sterilization. *** In America, sterilization would have to be many times more extensive than it has been to date, in order to offset the birth-rate differences. The 60,000 total would have to become 60,000 sterilizations annually; then more. I do not attempt to estimate the number of sterilizations necessary to offset the birth-rate differences.[156]

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> children are born unable to meet <u>any</u> standard of fitness unless that standard is a functional one and designed particularly and especially for them.[158]

Oberteuffer does not necessarily advocate the subsequent measures, but he does regard these as "approaches which have a potential of improving over-all fitness":

> Let's be realistic.... We must, however, at least consider all of the possiblities for achieving our goals before we can decide which are acceptable or desirable. Let's take a deep breath and really face the issue of what will be necessary to develop a full-blown program which would have promise of producing fit youth.
>
> 1. We should revive the old program of eugenics and educate our young people to be highly selective as they choose their mates in order to enrich their chances of producing perfect offspring.
>
> 2. We should prohibit the marriage of the genetically unfit if it can be predetermined that such a union will produce defective offspring.
>
> 3. We should legalize the sterilization of both men and women if as a result of their sexual practices defective and unfit offspring are the product.[159]

This has been a long and rather fitful description of the historical

progression of the events and some of the people in America's eugenical and sterilization past and present. Like so much, if not all of our intellectual history, it is interspersed with the elements of social, economic, and political changes in the land, (a veritable gallimaufry) and to unravel the eugenics ideas from the rest of the American legacy of the time is a difficult if not impossible task. Hopefully, this excursion in American social and intellectual history can prepare the reader for the subsequent discussion of sterilization history in the individual states.

CHAPTER ONE -- FOOTNOTES

1 During the course of this research, one excellent study appeared that single-handedly covered this important historical part of the sterilization story. This was Mark H. Haller's Eugenics: Hereditarian Attitudes in American Thought (New Brunswick: Ruters Univ. Press, 1963). Originally prepared as a doctoral dissertation under Prof. Merle Curti at the University of Wisconsin, this work thoroughly explores the interaction of eugenics ideas with the social and political movements in America that developed so quickly in the early 20th century. Because of Haller's exhaustive research, it was felt by this writer that the reader can find most of the factual details in his study. Another good historical treatment of human sterilization in Ameria is found in Causes of Crime; Biological Theories in the United States, 1800-1915 by Arthur E. Fink (Philadelphia: Univ. of Pa. Press, 1938; repr, as Barnes Perpetua Book in 1962). Fink concentrates on the sterilization (earlier, castration) of criminals at pp. 188-210; this is followed by a chapter on feeble-mindedness and a concluding chapter that ties the eugenicists to the psychological testers. Both the Haller and Fink books have useful bibliographies. Two other volumes are also useful: Richard Hofstadter's Social Darwinism in American Thought (Philadelphia: Univ. of Pa. Press, 1944; rev. ed. Beacon Press paperback, 1955), especially his chapter 8 on trends in social theory, 1890-1915, which deals with eugenics at pp. 161-69; David Spitz's Patterns of Anti-Democratic Thought

(N.Y.: Macmillan, 1949), devotes two chapters (6-7 at pp. 137-90) to theories of racial and biological aristocracy and is especially useful in its discussion of two leading American racist eugenicists, Madison Grant and Lothrop Stoddard. This book is now available in a 1965 Free Press of Glencoe paperback edition.

2 Ibid. at 161.

3 For the literature on castration, see Fink's bibliography. Haller's chapter IV is also a good treatment of the asexualization movement in this period.

4 35 Atlantic Monthly 472 (April 1875). Nearly 65 years later, his son, Justice Holmes could apply this to imbeciles in a famous Supreme Court decision.

5 Fink, supra note 1, at 243.

6 The Kallikak Family at 116. One of the earliest advocates of eugenic sterilization legislation in England, and an active propagandist for vasectomy in the early years, Dr. Robert R. Rentoul of Liverpool in a pamphlet, Proposed Sterilization of Certain Mental and Physical Degenerates; An Appeal to Asylum Managers and Others (London: Walter Scott Publishing Co., Ltd., 1903) would have included, among others, in his sterilization law the following persons: confirmed tramps and vagrants, most prostitutes, sexual "degenerates", those who suffer from infectious venereal diseases, and the "backward," "dull" or

"weak-minded" children who are neither idiots nor imbeciles, but who are "unfit to beget healthy offspring." (at 17-21) Rentoul strongly opposed the use of castration, and suggested "....that every safeguard be provided...." for those persons covered by his proposed law, (at 21-22) a view which was adopted by the Brock Committee nearly 30 years later. Rentoul later published a full-scale study entitled Race Culture or Race Suicide (London: Walter Scott Publishing Co., Ltd., 1906).

7 Cited in Haller, supra note 1, at 62. **Psychiatrists figured prominently**

8 Harry H. Laughlin, Eugenics Record Office Bulletin No. 10A (1914) at 5, 6.

9 Keeping a eugenical family archive and patriotism were even linked together in this statement from a descriptive pamphlet issued by the Eugenics Record Office, entitled "Eugenics Seeks to Improve the Natural, Physical, Mental, and Temperamental Qualities of the Human Family" (Cold Spring Harbor, Long Island, N.Y.: n.d., circa 1915): "The principal business of Eugenics is: ***** 5. To encourage every intelligent and patriotic family to establish an Eugenical Family Archive for preserving genealogical and biological materials, and for working out as accurately and as completely as possible a record of the family distribution of natural physical, mental, and temperamental traits. The establishment of this custom would aid greatly the practical application of eugenics." Needless to say, not enough families took

in the development of the eugenics movement in America in the early years of this century. In 1909, the Committee on Eugenics of the American Breeders' Association expanded its activities to include a committed on insanity which included Adolf Meyer, Elmer E. Southard, and Aaron J. Rosanoff; the committee on feeblemindedness included Walter E. Fernald in its membership and the committee on epilepsy, David F. Weeks. The Eugenics Research Association, which was founded in 1913, included as later presidents of that association Adolf Meyer and Stewart Paton. William A. White was for several years a member and chairman in 1917 of Committee "F" of the American Institute of Criminal Law and Criminology, which dealt with the subject of the sterilization of criminals, but also studied the more general applications of eugenic sterilization laws in the United States.

"advantage" of this offer at preserving the "racial" integrity of their family's biological inheritance.

10 Indianapolis: Bobbs-Merritt, (1922) at 99-101.

11 Haller, supra note 1, at pp. 66; 75.

12 In its 1914 report, published as Scope of the Committee's Work by Harry H. Laughlin (Eugenics Record Office Bull. No. 10A, 1914) at 16. Laughlin was Davenport's assistant and an important figure in his own right. Haller thinks the rather bulky title of the Committee's report is the work of Laughlin, who was without doubt one of the leading publicists of eugenics in the United States. Haller's book is an excellent source for critical analysis of the work of Davenport, Goddard, Laughlin, and other leading eugenicists of the time.

13 Segregation and sterilization were far less extreme than the suggestion put forth by Duncan McKim in his book, Heredity and Human Progress (N.Y.: Putnam, 1900), when he wrote: "...the surest, the simplest, the kindest, and most humane means for preventing reproduction among those whom we deem unworthy of this high privilege, is a gentle, painless death" (which would presumably be a "pleasant" lethal chamber in which they could lie down and have happy dreams and never again awaken). This did not gain acceptance for reasons that do not need further explanation. It is curious that the Nazi eugenics program,

which started out much as the draft law in Laughlin's report, with numerous procedural safeguards and a special eugenics court, eventually ended with the kind of program suggested by McKim. Haller mentions a speech by Dr. Henry Hatch before the National Prisons Association in 1904, where he suggested that the incurable insane and confirmed criminals might well be killed, but this suggestion met with the same unfavorable response that Mckim's did. Haller, supra note 1, at 207. A far more subtle form of euthanasia, or if you will, a kind of genocide based on decidedly racist ideas, was suggested in this quotation from the book by Paul B. Popenoe and Roswell H. Johnson, Applied Eugenics: "In the United States are millions of negroes who are of less value than white men in organized industry but almost as valuable as the whites at the front. It would appear sound statesmanship to enlist as many negroes as possible in the active forces, in case of war, thus releasing a corresponding number of more skilled white workers for the industrial machine on whose efficiency success in modern warfare largely rests. " (N.Y.: Macmillan, 1918, at 319).

14 "Sterilization: A Progressive Measure?" 43 Wis. Mag. History 190 (1960) at 201.

15 Id. at 201.

16. Id. at 201-202.

17 Id. at 202. A good example of the collectivist credo was this statement by President Charles R. Van Hise of the University of Wisconsin: "Each should desire only what is right, and right must be defined as that which is best for the future of the race. In short, the period in which individualism was patriotism in this country has passed by; and the time has come when individualism must become subordinate to responsibility to the many." The Conservation of Natural Resources in the United States (New York, 1911) at 377.

18 Ibid. Haller in his book, Eugenics: Hereditarian Attitudes in American Thought came to the same conclusions. He writes: "...Despite the conservative implications of hereditarian thought, eugenics at first was closely related to the other reform movements of the Progressive Era and drew its early support from many of the same persons. It began as a scientific reform in an age of reform. There is, on the other hand, no doubt that a close connection often exists between an emphasis upon heredity and a conservative social outlook. From an assumption that men are chiefly shaped by heredity it can be argued that environmental reforms are largely useless and that the class structure of society reflects innate abilities so that those on the bottom are there, not through deficiencies in the social system, but through their own inevitable failures. Similarly, doctrines concerning the innate inequality of races have notoriously served as pretexts for repression of one group by another. Although many of the studies of

human heredity upon which the eugenists relied were important scientific advances, others resulted from inaccurate and uncritical scientific and statistical methods, and still other were warped and molded by the social predispositions of men who unconsciously allowed their science to serve their social philosophies. As a result, many strands of eugenics thought were a scientific disguise for conservative, often harsh, indictments of classes and races, and eugenics became, for a time, predominately a conservative creed." At 5-6.

19 Id. at 177-78. Like Vecoli, he also notes the appeal of both eugenics and progressivism to the "best people": "Both eugenics and progressivism appealed primarily to the 'best people' -- to upper middle class native Americans. Because of their backgrounds and because many shared a generally nativist attitude, they did not find the race and class consciousness of eugenics necessarily uncongenial. Eugenics had, in fact, much to recommend it. In a period that prided itself upon realism in reform, eugenics appealed to science over sentimentality. Eugenics seemed to follow logically from the assumptions of Darwinian evolution and, in a era much captivated by Darwin, a reform movement appearing in such a guise was hard to resist." Id. at 178.

20 Id. at 124. In an article, "Heredity in Progressive Thought," Haller posed the question: "...Why, on the basis of inadequate information and slipshod studies, did so many important persons attach such

importance to heredity and place such unbounded confidence in simple eugenic solutions?" Part of the answer was found in the fear of "inundation by the unfit" engendered by many persons in the social reform movement and by the body of experts "who provided the assurances and the scientific evidence that the criminal, the impoverished, and the mentally ill were in fact the hereditary unfit of mankind." But despite this extremism, Haller says that "...most Americans were more pragmatic and were perfectly able to live in an intellectual world that stressed both heredity and environment." Our national infatuation with heredity was, in fact, "relatively short-lived. The decline of the infatuation stemmed both from a growing knowledge of the complexity of the relationship between heredity and environment, and from a recognition of the unsavory uses to which extreme hereditarian ideas might be put." 37 Social Service Rev. 166 (1963) at 174-74. Also, see Haller's Eugenics, at 3-7.

21 Davenport, "Inheritance of Physical and Mental Traits," in William Ernest Castle, with James M. Coulter, Charles B. Davenport, Edward M. East, and William L. Tower, Heredity and Eugenics (Chicago: Univ. of Chicago Press, 1912) at 285-86. Michael F. Guyer in his early text, Being Well-Born: An Introduction to Eugenics (Indianapolis: Bobbs-Merrill, 1916) wrote: "The one crying need that stands out most prominently in this whole field is that of careful investigation of individual cases and specific types of malady, together with an accurate census of

conditions as a whole. Our knowledge of individual malign heredities is meager to carry us very far at present. When we have found after adequate investigation in just which specific types of defects heredity is an important factor -- and we shall undoubtedly find it to be one in many cases -- then we can proceed confidently with sterilization, if it will prove to be more practical and desirable than sequestration." (at 329.) Professor Guyer, a zoologist at the University of Wisconsin, felt strongly that the education of the public in the principles of eugenics was the most important factor before either negative or positive eugenic measures could be successful.

22 "Influence of Heredity on Human Society," in the issue on "Race Improvement in the United States," 34 The Annals 17 (July 1909) at 18. The notion, so popular in current literature, especially in the War on Poverty, of "cultural deprivation" or of retardation that is not hereditary, would have been anathema to Davenport. Or a statement by Robert M. MacIver in his book on Community (London: Macmillan, 1924, 3rd ed.): "Life and environment are always correlative." (at 385). David Spitz put the problem nicely in this way: "The crucial question, then, cannot be the issue, heredity or environment. This is to pose an entirely non-existenet problem. Nor can it be an inquiry into the dominance of one as against the other. This is both to presuppose the separateness of the two factors and to postulate a general problem that is inapplicable to a specific situation. The only question that

can legitimately be raised is that of the relative significance of the two variables in terms of a specific characteristic for a specific characteristic for a specific individual in a specific environment..." Supra note 1, at 185.

23 Charles A. Boston, "A Protest Against Laws Authorizing the Sterilization of Criminals and Imbeciles," 4 J.C.L. & Crim. 326 (1913). See a reply to this article by Dr. Henry B. Hemenway in 4 ibid. 747-49 (1914), and Hemenway's especially critical review of the early reports of the Eugenics Record Office in 5 ibid. 623-26 (1914); where he wrote: "Radical action should be based upon demonstrated facts, rather than upon theory or impression, especially where the action involves legislation. ***** What is desired from the Eugenics Record Office is a demonstration of facts. The facts so far published are certainly sufficient to warrant legislation to provide for further investigation; but it may be seriously questioned if the office has as yet demonstrated sufficient evidence to warrant the advice which it gives for sterilization. According to the rules of science, all possible factors must be considered. Apparently the office seems content with simply showing the reappearance of the same trait in successive generations. It is recommending radical operations on a priori reasoning, and on "feeling" generated in hearsay evidence...." (at 624).

24 "Sterilization of Criminals," Report of Committee "H" of the

Institute (Joel D. Hunter, chairman), 128 Amer. Bar Assoc. J. 128 (1916) at 132. Their first report appeared in 5 J.C.L. & Crim. 514 (1914).

25 "Sterilization of Criminals," Report of Committee "F" of the Institute, 8 J.C.L. & Crim. 499 (1917). From this point on, the work of the committee was largely a nullity. In March, 1918 the Eugenics Research Association created a "Committee on Cacogenic Control" replacing the committee (with the lengthy title) that was originally part of the Eugenics Section of the American Breeders' Association. The research studies of this new committee were reported in 9 J. Crim. L. 596 (1919). The more enlightened view in criminology was typified by Maurice Parmelee in his Criminology (N.Y.: Macmillan, 1924) when he discussed sterilization and eugenics: "...It is obvious that criminality per se cannot be inherited. Furthermore, it is hardly justifiable to use a form of mutilation as a punishment. But it is legitimate to impose sterilization when an individual has an unquestionably hereditary trait which is dangerous to society. Most of the legislation on this subject in this country violates this scientific principle, and should be revised accordingly." (at 449) "Excessive emphasis upon the individual factors in criminality has led some persons to the belief that eugenic measures can prevent crime entirely or in large part. These measures may eliminate some of the feebleminded and psychopathic criminals. But it is obvious that it cannot remove the powerful

criminogenic factors in the environment." (at 492) A famous English expert, Sir William Norwood East in Medical Aspects of Crime (Philadelphia: Blakiston's, 1936) later wrote: "...In our present state of knowledge, criminality is primarily a social problem, incidentally a biological concept." (356) "No physician, biologist, eugenist or criminologist is in a position to declare that the criminality of any individual will be transmitted; and amidst so much difficulty, doubt and perhaps misunderstanding, eugenic sterilization, as a means of combatting crime, appears to be previous and unwarranted." (at 362).

26 Quoted in Harry H. Laughlin, Eugenical Sterilization in the United States (Chicago: Psychopathic Laboratory of the Municipal Court of Chicago, 1922) at 36. Laughlin's work is invaluable to an understanding of the earlier history of sterilization in the United States. Laughlin, who taught agricultural breeding at a Missouri normal school was superintendent of the Eugenics Record Office under Davenport, who was resident director. Laughlin was also famous as "Expert Eugenics Agent" of the House Committee on Immigration and Naturalization. Hereafter, his book will be abbreviated ES in US, and distinguished from a shorter pamphlet he published for the American Eugenics Society in 1926 entitled Eugenical Sterilization: 1926 (New Haven, Conn. 1926) which will be abbreviated as ES: 1926. Landman's 1932 volume, Human Sterilization, will be abbreviated as HS and the American Neurological Association study will be abbreviated as ANA, ES.

27 See "Asexualization of Criminals and Degenerates," 6 Mich L.J. 289 (1897); also see, Simeon E. Baldwin, "Whipping and Castration as Punishments for Crime," 8 Yale L.J. 371 (1899), esp. pp. 380-83; "The Proposed Sterilization of Certain Degenerates; A Discussion Before the Medico-Legal Society of London," 23 Med. Leg. J. 684 (1906); Clark Bell, "Hereditary Criminality and the Asexualization of Criminals," 27 ibid. 132 (1909); and Edwin R. Keedy, "Sterilization of Habitual Criminals and Feeble-Minded Persons," 5 Ill. L. Rev. 578 (1911). Baldwin had a distinguished record as a Professor of Law at Yale, Chief Justice of the Connecticut Supreme Court of Errors, Governor, and president of the Association of American Law Schools.

28 In Kansas in the 1890s, the pre-legal castrations by Pilcher at Winfield had the support of a Populist governor, while in Wisconsin a decade later, the Progressives gave sterilization needed support; Woodrow Wilson signed the bill in New Jersey, Hiram Johnson the California statute. Unlike the earlier social Darwinism of Spencer and Sumner, the eugenicists of the 20th century were not laissez-faire, but sought the help of the state in stemming the "tide" of degeneracy in the country. After all, why do the "unfit" (the cacogenic) survive and proliferate? If the germ-plasm was the property of society, then society had the right, through the actions of the government, to decide how to minimize or maximize the future of this germ-plasm. Though this kind of conservatism was desirous of using the power of the state, it had many of the same overtones as the earlier conservatism. Thus, Judge Harry Olson of Chicago, in the introduction to Laughlin's ES in the US could write: "America, in particular, needs to protect herself against

indiscriminate immigration, criminal degenerates, and race suicide. The success of democracy depends upon the quality of its individual elements. If in these elements the racial values are high, government will be equal to all the economic, educational, religious and scientific demands of the times. If, on the contrary, there is a constant and progressive racial degeneracy, it is only a question of time when popular self-government will be impossible, and will be succeeded by chaos, and finally a dictatorship." (at v)

29 This was the first sterilization case, State v. Feilen, 70 Wash. 65, 126 P. 75 (1912) and the law is still technically on the books. The Washington, Nevada and Iowa laws were regarded as punitive laws, although the Iowa law was not restricted to criminals. Most of the courts found the laws "class" legislation.

30 Professor Edwin R. Keedy of the Law School of the University of Pennsylvania, writing in 1916, said: "...Laws are still enacted to meet particular situations without regard to what their effect will be in the future. What is even more striking, our legislatures enact statutes without considering the question whether they can or will be enforced. A notable example of this is found in the recent laws for the sterilization of defectives and criminals. A popular theory was seized upon by enthusiasts and made the basis for legislative proposals, which became law in many States. The theory is now to a large extent

discredited and the laws are not being enforced...." (introduction to Carl Ludwig von Bar, A History of Continental Criminal Law (Boston: Little, Brown and Co., 1916) at 1-li). While Professor Keedy and others in the fields of biology, medicine, and psychiatry may have agreed with the term "discredited," it took more than 30 years and over 60,000 official state sterilizations before this "discredited" theory really began to decline in practice in America. Which goes to show how long a fad, incorporated into law and public policy, can live on and even flower (as sterilization did in the 1930s) long after its rational foundations have been stripped away and its essential trappings debunked. For the views of the opposition, see C. V. Carrington, "Sure Cure for Hereditary Criminals," 1 J.C.L. & Crim. 124 (1910) and Dr. William S. Sadler's letter arguing that sterilization was the only solution for saving America from being undermined by defective members of society, in 5 id. 753, 757 (1917).

31 Note, "Sterilization of Criminals and Defectives," 78 Cent. L.J. 120 (1914) at 121.

32 "Sterilization of Criminals," 22 Law Notes 65 (1918). Shumaker went on to add: "...When the slum and the sweatshop are abolished; when no mother is forced to blight the unborn child by undue toil and insufficient food; when every child is insured proper food, proper play time and proper education, we may find that the surgeon's knife is not

needed to minimize crime."

33 The English were always somewhat "shocked" by the zeal of the American eugenicists. Havelock Ellis, who believed in the necessity of eugenic reform, always felt the necessity of voluntary action. Writing in his book The Task of Social Hygiene (Boston: Houghton-Mifflin, 1912) he said: "...Certainly, also, there are cases in which ... sterilization is desirable, voluntarily accepted. But neither /marriage/ certification nor sterilization should be compulsory. They only have their value if they are intelligent and deliberate, springing out of a widened and enlightened sense of personal responsibility to society and to the race." (at 30-31) In his Essays in War-Time (London: Constable & Co., 1916) he said: "...Eugenic legislation is a secondary matter which cannot come at the beginning. It cannot come before our knowledge is firmly based and widely diffuse; it cannot come until we are clear as to the ideals which we wish to see embodied in human character and human action..." (at 96-97). Eugenic marriage laws passed as early as 1896 in Connecticut; Kansas (1903), New Jersey and Ohio (1904) and Michigan and Indiana (1905) and by the mid-30s, 41 states prohibited marriage of the insane and feeble-minded; 17 prohibited marriage of epileptics and 4 barred confirmed drunkards from marriage. It was this type of law -- along with the earlier sterilization laws -- that Ellis and others felt useless because they could not be enforced. The most notable eugenic (allied with the racists) suggestion -- in

terms of law that could be enforced and was - was the immigration quota system of the 1920s, which has persisted from that time on and is still a source of deep concern to those groups in America that regard these restrictions as a residue of the racial and ethnic elitism that has always characterized the radical right in American political history.

34 For example, the Iowa laws of 1911 and 1913 included criminals, rapists, idiots, feeble-minded, imbeciles, lunatics, drunkards, drug fiends, epileptics, prostitutes, syphilitics, moral and sexual perverts, and diseased and degenerate persons.

35 One of the curious anomalies of American sterilization history is why the criminal (habitual, confirmed, hereditary, sexual as defined in the laws) escaped the surgeon's scalpel. The argument that punitive sterilization was a cruel and unusual punishment, which the Washington Supreme Court denied in the Feilen case in 1912 but which the federal courts accepted in invalidating the Iowa law in Davis v. Berry, 216 Fed. 413 (S. D. Iowa 1914) and the Nevada law in Mickle v. Henrichs, 262 Fed. 687 (D. Nev. 1918) is not the whole story of why the criminal got more solicitous treatment for his civil rights. The answer might be found in the fact that legislatures tied criminals into the law without a clear-cut separation from the other categories covered, and hence, if the courts followed the Iowa and Nevada precedents, they might invalidate whole eugenic sterilization laws. Rather than jeopardize

their sterilization programs, which in no sense were built on sterilization of criminals, administrators preferred to leave these parts of the law dormant and concentrate in the early years on the insane and later on, the feeble-minded. So that, quite ironically, the criminal from these early cases to the 1942 Skinner decision by the U.S. Supreme Court was able to utilize the Constitution for protection against sterilization, but the non-criminal categories covered by the laws were not nearly as successful, even though many state cases were won before and after the Buck decision in 1927.

36 In Essays in War-Time at 97. This was written in 1916, but in 1931 in his essay on "Eugenics and the Future," he wrote: "In the United States a number of laws have been passed in many states for ordinary compulsory sterilization. These laws were often badly made as well as premature, frequently repealed or declared unconstitutional, and sometimes never carried out; they have even at times had the effect of preventing the operation from being any longer performed, thus, as it were, sterilising sterilisation...." From his book More Essays of Love and Virtue, reprinted in On Life and Sex (N.Y.: New American Library Mentor Book, 1957) at 220. Perhaps his clearest statement of doubt about compulsory eugenic sterilization is found in his article, "Sterilization of the Unfit," British Med. J., no. 3254 (May 12, 1923), at 835.

37 Smith v. Command, 231 Mich. 409, 204 N.W. 140 (1925) and Buck v. Bell, 43 Va. 310, 130 S.E. 516 (1925). The Michigan case was most significant because in this case, unlike the Virginia case, the scientific and lay opposition against the law was well represented in the plaintiff's brief, and there was a devastating dissent by Justice Wiest, concurred in by two other justices. If this case, instead of the Buck decision in Virginia, had gone on to the U.S. Supreme Court, it is doubtful if the result would have been different, but at least the opposition to eugenic sterilization legislation would have been heard and the one-sided mockery of the Buck appeal would have been avoided. A more detailed discussion of the Smith case will be found in the discussion of Michigan sterilization history, ch. two, infra.

38 Laughlin, The Legal Status of Eugenical Sterilization (Chicago: Psychopathic Laboratory of the Municipal Court of Chicago, supplement to Annual Report, 1930), at introduction and 53. For an excellent discussion of the legal history of eugenic sterilization through the Buck case, see Jacob B. Aronoff, "The Constitutionality of Asexualization Legislation in the United States, 1 St. John's L. Rev. 146 (1927). One of the great ironies of Holmes' decision in the Buck case is that it was Holmes who could argue in his ringing dissent in the Lochner case in 1905 that "The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics...." and himself turn around and help to incorporate eugenics in American constitutional law in the Buck decision. But he

is nonetheless consistent, notwithstanding what appears to be an "irony", by virtue of the fact that in both cases Holmes argued for the freedom of state experimentation whether in the area of economic regulation of working hours or of state sterilization of the feeble-minded. The real test would have presented itself if the Court in the Buck case had invalidated the Virginia law and Holmes was faced with the problem of doing what the Lochner majority did, but rather than incorporate his eugenics philosophy into the substance of such an opinion, doubtless he would have dissented and argued in exactly the way he did in writing the decision of the Court in the Buck case. For a detailed analysis of the Buck decision, see the Virginia section in ch. 2, infra.

39 One of the hardest setbacks for the eugenicists was the history of the first state, Indiana, to pass a sterilization law. Indiana experience was rocky in the beginning, due to oppostion by the governor, and when a friendly test case was begun in 1919 with the help of some of the great names in American eugenics, everything looked rosy until the Supreme Court of Indiana invalidated the law in Williams v. Smith, 190 Ind. 526, 131 N.E. 2 (1921). Out of a bitter defeat of this kind came the fervent desire to get the "right" case all the way to the United States Supreme Court, and Carrie Buck was that case.

40 The "evidence" (three generations) seemed so sweeping to the Court that there seemed to be no need to look further, and since Carrie Buck

was never really able to make a case in her own behalf, only one side was seen and heard by the august justices. Hence, the earlier adverse court decision in New Jersey, Michigan, New York, Indiana, and Iowa were not part of the case, which was essentially a research effort of Laughlin, Estabrook, and their associates in the Eugenics Record Office of the Carnegie Institution. What was in essence a "test" case was in fact merely a recitation by the dedicated eugenicists, masking behind legal due process. Where was the Brandeis Brief for Miss Buck? The really substantive heart of the case was avoided or glossed over and not touched on until the case of Skinner v. Oklahoma in 1942, and then only tangentially in the concurring opinions of Chief Justice Stone and Justice Jackson.

41 Supra note 38, at 78. But even the zealous Laughlin was wise enough to know that the Supreme Court was not the final arbiter of American Science. He could therefore call "The Next Step" in his conclusions "Research to Evaluate Better the Evidence of Hereditary Degeneracy" in order to build up a "body of knowledge and of legal practice for evaluating evidence of hereditary degeneracy. Such an achievement is reached only by study and practice...." (at 81) Now that the highest court of the land had given American eugenicists a constitutional mandate, they could now develop their skills and find the evidence to substantiate the claims they had been advancing for nearly 25 years.

42 Heredity and Human Affairs (N.Y.: Scribner's Sons, 1927) at 300. While it is true that Holmes did not talk in terms of this kind of genetic "crusade", he did link the sterilization of the "unfit" with the solution to many of society's problems: "...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...." 274 U.S. at 207. Attorney Donald L. Randolph of Kansas City, who figured prominently in a famous Kansas sterilization case, Brown v. MacFarlane et al. (discussed in the Kansas section, ch. 2, infra), expressed this view of Holmes: "...The surface clarity and tough though pretty texture of the opinions of Holmes do not for long conceal the sophistry of them, and the best thing about Holmes, from a juridical standpoint, is that he was so often an unsuccessful dissenter. His view that the state is greater than the individual prevailed in the sterilization case." Letter to author, dated October 21, 1961.

43 In the even shorter space of four years after the decision in the Buck case, five more states (Mississippi, West Virginia, Arizona, Vermont, and Oklahoma) enacted sterilization laws for the first time, while ten states with existing sterilization laws amended or replaced their earlier laws in order to make them correspond to the Virginia statute. Landman reports that in the year 1928 alone, new human sterilization laws were enacted in 11 states, and in the four years of

1928 through 1931, sterilization laws were introduced but were not passed in 18 other states. Human Sterilization at 105. Buck v. Bell in no small measure instigated a swamp fire of sterilization legislation throughout the country.

44 Sterilization for Human Betterment (N.Y.: Macmillan, 1929) at 184.

45 Annual compilation of state sterilizations for the period up to January 1, 1938.

46 Havelock Ellis, George Bernard Shaw, and Leonard Darwin all expressed doubts over the efficacy of compulsion. Darwin, at the Second International Conference of Eugenics in 1923 said: "...I am myself inclined to favour the introduction of sterilization as a voluntary and experimental measure; for if it proved to be successful, its use would certainly be extended, its racial advantages being obvious." In Eugenics in Race and State (vol. II of the Scientific Papers of the Conference; Baltimore: Williams & Wilkins, 1923) at 193.

47 Marriage and Morals (N.Y.: Liveright, Inc. 1929, repr. as Bantam Book, 1959) at 176 in paperback edition.

48 From a paper, "Community Control of the Feeble-Minded," 53 Proc. Amer. Assoc. Stud. Feeble-Minded 161 (1929) at 172. At the 54th annual meeting a year later, a majority of the members of the Association endorsed the principle of selective sterilization. For a discussion of

the entire subject of sterilization, see the special issue entitled "Sterilization --- Facts and Opinions," 12 Birth Control Review 73-91 (March 1928).

49 "Evolution Disproves Heredity in the Mental Diseases: A Preliminary Study," 131 Med. J. & Record 143, 194, 248 (Feb. 5, Feb. 19, and March 5, 1930).

50 The article by Dr. Fisher (now Sir Ronald Fisher) that created the greatest stir was "The Elimination of Mental Defect," 16 Eugenics Rev. 114 (1924), reprinted in 18 J. of Heredity 529 (1927), which analyzed and answered the claims made by Professor R. C. Punnett in an earlier article, "Eliminating Feeblemindedness," 8 J. Heredity 464 (1917). Fisher discussed the statistics of Punnett and H. H. Goddard, and the various estimated calculations of how segregation or sterilization of recessives might reduce the proportion of feebleminded in a single generation, and arrived at three possible estimated reductions in one generation (11, 17, or 36%). Even the careful Landman in his book, Human Sterilization, said that Fisher had said that 11% of the feebleminded of any generation come from the mating of the feebleminded while the remaining 89% come from the matings of the latent or so-called normal carriers (at 150-51). And Deutsch in his The Mentally Ill in America (2nd rev. ed. 1949) also used the magical figures of 11% and 89%. (at 374). As late as 1961, St. John-Stevas in Life, Death and

the Law quoted Fisher's figures (at 181). Actually, Fisher indicated doubts about the accuracy of these estimates, and he criticized the notion held by some people that feeblemindedness was caused by a simple Mendelian recessive, but notwithstanding these doubts, he felt that anti-eugenics propaganda had ignored the possible good results of preventive measures such as segregation and sterilization: "...Even on the assumptions underlying Professor Punnett's figures, it is within our power to leave our children a substantial eugenic legacy. This legacy would be permanent, even if our children decided not to diminish the proportion of feebleminded still further...." (at 114-15) and he concluded his article on this very optimistic note: "Even on the most unfavorable assumptions the segregation or sterilization of the feebleminded would lead to substantial immediate progress in the elimination of the defect." (at 116) These two articles by Punnett and Fisher, coupled with still another article by Edward M. East, "Hidden Feeblemindedness," 8 J. Heredity 215 (1917) barely totalled 8 pages, but they gave rise to some healthy arguments. Among geneticists, Sir Ronald is perhaps best known for two of his earlier books, The Genetical Theory of Natural Selection (Oxford: Clarendon Press, 1930; 2nd rev. edition, New York: Dover Publications, 1958) and Statistical Methods for Research Workers (Edinburgh: Oliver & Boyd, 1925; now in a thirteenth edition, 1957), which is considered a classic in its field. C. D. Darlington, in his book, The Facts of Life (London, George Allen &

Unwin, Ltd., 1953) mentions Fisher in the following quotation: "...As Fisher has said, each generation found in Mendel what it expected to find. Even a part-discovery created a burning crisis, the first of several in our story." (at 108) Fisher succeeded Karl Pearson as holder of the Galton Chair of Eugenics at the University of London in 1933, and was Arthur Balfour Professor of Genetics at the University of Cambridge, 1943-57, a position which Professor Punnett also held at the time of his 1917 article.

51 Tredgold in an article, "The Sterilization of Mental Defectives," 7 Mental Welfare 35 (April 15,1926) said: "As a matter of fact, my own observations show that, in relation to the total number of defectives, the proportion of those who are the offspring of a certifiably defective parent, or parents, is extremely small...In short, in order to produce any marked decrease in the total number of mental defectives a generation hence, it would be necessary to sterilize, or otherwise prevent the propagation of, not merely those who are themselves defectives, but all those who are 'carriers'; that is to say, every person suffering from germ vitiation. Obviously, this is not merely impracticable, but it is impossible... We are compelled to conclude, therefore, that from the point of view of prevention, sterilization would not do what is claimed for it and that its results would be relatively slight." Tredgold authored a famous text on Mental Deficiency (Amentia) (London:

Baillière, Tindall & Cox, 1908)which appeared in nine subsequent editions. The posthumous 10th edition of 1963, which is called Tredgold's Textbook of Mental Deficiency (Subnormality) by R. F. Tredgold and K. Soddy, made this comment: "This question of voluntary sterilization has been confused with the other problem, which we must now discuss, compulsory sterilization, for those who are likely to transmit defect. If they are defective they are likely to be socially less responsible, less-controlled, and less far-sighted, and less capable of using birth control. Therefore, although they may need sterilization more, they are less likely voluntarily to agree to it. It is true they might be persuaded to agree, but the suggestion of persuading a defective raises another question --- what is valid consent?..." Tredgold had also noted in this post-war edition the harm that Hitler's eugenics program had done to the cause of eugenics. Id. at 472.

52 The 1929 Report was most critically analyzed and attacked in a book by Walter M. Gallichan, The Sterilization of the Unfit (London: T. Werner Laurie Ltd., 1929) at 177 ff. For Gallichan,the issue of compulsory as against voluntary sterilization was answered in this way: "For the protection of future generations and the community of today, forcible sterilization is as fully justificable as the execution of murderers, the imprisonment of criminal offenders, the detention of the insane, or any necessary method of protecting citizens of the State, approved by public opinion." (at 94).

53 In The Papal Encyclicals in Their Historical Context, ed. by Anne Fremantle (N.Y.: New American Library Mentor Book, 1956) at 241. In another passage, the Pope also barred individuals from destroying or mutilating their members "...or in any other way render themselves unfit for their natural functions, except when no other provision can be made for the good of the whole body...." (at 242).

54 No. 1, Ulrich A. Hauber, Inheritance of Mental Defect; No. 2, Charles Bernstein, Social Care of the Mentally Deficient; No. 2, Rt. Rev. Msgr. John A. Ryan, Moral Aspects of Sterilization; and No. 4, William F. Montavon, Eugenic Sterilization in the Laws of the States.

55 At 13-14.

56 David J. Danelski, A Supreme Court Justice is Appointed (N.Y.: Random House, 1964) at 189 fn. 28.

57 At 22 of Moral Aspects of Sterilization.

58 For a later view, see Robert Scheffer, Note, "Constitutionality of Sterilization Statutes," 27 Marq. L. Rev. 99 (1943), where he says: "...Segregation is the only rightful way of preventing the use of the procreative faculty of the weak-minded and criminals." (at 102) This comment was made without mention of any theological or religious considerations, Catholic or otherwise, in the law journal of a leading Catholic university.

59 See vols. 42-47 of the Ecclesiastical Review for the period 1910-15. Mayer's book, Gesetzliche Unfruchtbarmachung Geisteskranker (The Legal Sterilization of the Mentally Diseased) was published in Freiburg in 1927. In America, Rev. Charles P. Bruehl supported Mayer's view in his Birth Control and Eugenics in the Light of Fundamental Ethical Principles (N.Y.: Jos. F. Wagner, 1928). For earlier writings, see Thomas Slater, Cases of Conscience (1911), vol. I at 231 and his "Eugenics and Moral Theology," in Questions of Moral Theology (N.Y.: Benziger Bros., 1915) at 252-71; Valére Fallon, Eugenics (N.Y.: Benziger Bros., 1923); T. J. Gerrard, The Church and Eugenics (London: P.S. King & Son, 1912; Oxford: Catholic Social Guild, 1921 third ed.) Austin O'Malley, The Ethics of Medical Homicide and Mutilation (N.Y.: Devin-Adair Co., 1919). For periodical materials, see Bruehl, "Eugenical Sterilization," 26 Homiletic and Pastoral Rev. 1130 (1926); a review of Mayer's book entitled "A Roman Catholic View of Sterilization" by Paul Popenoe, 14 J. of Soc. Hygiene 186 (1928) and Popenoe's translation of Mayer's article, "Eugenics in Roman Catholic Literature," 3 Eugenics 43 (1930); and "Unjustified Sterilization," an editorial in 37 America (May 14, 1927) at 102, criticizing the decision in the Buck v. Bell case in 1927 on the grounds that the circumstances for the legitimate use of this kind of state police power were not present in this case, a view quite similar to Father Mayer's. For materials published after the 1930 encyclical, see Henry Davis, State Sterilization of the Unfit

(London: Burns, Oates and Washbourne, Ltd., 1931); Antoine d'Eschambault, Eugenical Sterilization (Winnipeg, Manitoba: Canadian Pubs. Ltd., 1936); Rev. Edgar Schmiedeler, a pamphlet entitled Sterilization in the United States (Washington, D.C.: Family Life Bureau, National Catholic Welfare Conference, 1943); Rev. Joseph B. Lehane, The Morality of American Civil Legislation Concerning Eugenical Sterilization (Washington: Catholic Univ. of America Press, 1944); Code of Medical Ethics for Catholic Hospitals (St. Louis: Catholic Hospital Association, 1954); Gerald Kelly, Medico-Moral Problems (St. Louis: Catholic Hospital Association, 1958); and Norman St. John-Stevas, Life, Death and the Law (Bloomington: Indiana Univ. Press, 1961) at 185-97; Donald N. Barrett (ed.), The Problem of Population; Moral and Theological Considerations (Notre Dame, Indiana: Univ. of Notre Dame Press, 1964) at 111-112, and the second volume in this series, The Problem of Population; Practical Catholic Applications (Notre Dame, Indiana: Univ. of Notre Dame Press, 1964) at 48-56.

60 In 14 J. Soc. Hygiene 186 (1928) at 189. Msgr Ryan in an earlier 1927 version of his pamphlet Human Sterilization after citing those writers who found sterilization justified only when it was to protect individual life or health, wrote: "Such is the argument for the proposition that sterilization is permissible only to preserve a great good of the person who is mutilated, but not for any public or social end, such as the prevention of mental incompetents. The argument is

not conclusive. Is not the well-being of the community of at least equal importance with the bodily integrity of an individual? If the State may compel a citizen to risk his life on the battlefield for the common good why may it not compel him to be deprived of the power of procreation? It would seem that the moral principle finds more accurate statement in two recent issues of Catholic publications. An editorial in America, May 14, 1927, concedes that the State may be justified in sterilizing mental defectives, 'when two conditions are verified: (1) the number of mental defectives and their degenerate, diseased, and dependent offspring is so great as to create a present or certainly imminent danger to the common welfare, and (2) no other means of protection is feasible.' In substantially the same terms the Rev. Charles Bruehl writes in the Homiletic and Pastoral Review, November, 1926: 'When the welfare of society is actually imperiled by an increase in mental deficiency that cannot be controlled by the ordinary means, the public authority seems to have a right to resort to sterilization of the unfit as a measure of self-defense.'" (at 2) Msgr. Ryan's mention of the sacrifice on the battlefield almost sounds like Holmes in Buck v. Bell in 1927. His view and those of other like him was brought to an end with the issuance of the 1930 encyclical and the decree of the Holy Office of March 21, 1931, issued with approval of Pius XI condemning eugenic sterilization, 23 Acta Apostolicae Sedis 118. See Lehane and Stevas, supra note 59. Pius XII declared that public

authority has no right to prescribe sterilization "or to have it carried out to the harm of the innocent." 43 A.A.S. 844 (Oct. 29, 1951). Also see two other Decrees of the Holy Office, 32 A.A.S. 73 (Feb, 24, 1940) and 32 id. 553 (Dec. 2, 1940).

61 E.G., Marian S. Olden, "The Present Status of Sterilization Legislation in the United States, 31 Eugenical News 3 (1946) at 6-10. A state-by-state analysis of the forces at work during the legislative struggles over the various sterilization proposals might give a clearer picture of the role of Catholic opposition over the years, but this writer did not attempt to gather this kind of data. Another interesting facet of the Catholic Church's role in the sterilization story would be to learn what happened to the views of Father Mayer in Germany after the rise of Hitler and especially with the advent of eugenics legislation in 1933, such as the sterilization law (The Law for the Prevention of Hereditary Disease in Posterity, which was passed July 14, 1933 and went into effect January 1, 1934).

62 White House Conference on Child Health and Protection, The Handicapped Child (Section IV - The Handicapped: Prevention, Maintenance, Protection), Report of the Committee on Physically and Mentally Handicapped (N.Y.: Century Company, 1933) at 371-73. The word "selective" was used to mean only those cases where there was a clear-cut hereditary basis for the defect (this would exclude crime for example) but not where a

feeble-minded person would remain in custody for life and therefore not need this type of "protection"; or where normal children born to parents afflicted with secondary feeble-mindedness "will be exposed to the feeble-minded environment of the home...." Thus, sterilization was regarded in both its eugenic and non-eugenic contexts, much as California and other sterilizing states were enforcing their laws.

63 "Of all the methods mentioned, selective sterilization is perhaps open to the least objection, especially where the feeble-minded are concerned, but in view of the adverse opinion prevailing in some quarters it is probable that many cases, in which it could well be used must, for some time in the future, be dealt with by means of segregation or contraception, in spite of the injustice to the individual and social risks often involved." Ibid. at 372. At about the same time, Medical Aspects of Human Fertility, a survey and report of the National Committee on Maternal Health, Inc. (N.Y., 1932) appeared and heartily approved of American eugenical sterilization laws. (at 29-30).

64 Warren S. Thompson and P. K. Whelpton, "The Population of the Nation," in vol. I of Recent Social Trends in the United States, the Report of the President's (Hoover) Research Committee on Social Trends (N.Y.: McGraw-Hill Book Co., 1933) at 55-56. In vol. II, Charles E. Clark and William O. Douglas (now Mr. Justice Douglas) wrote a chapter

on "Law and Legal Institutions" and mentioned sterilization laws in this way: "...In 1927 the United States Supreme Court gave sanction to such a statute (over only one dissent) and since then the judicial attitude has been one of tolerance in permitting this scientific attempt to improve the conditions of society. While judicial approval has been received only over some vigorous dissents, the standard of legislation has been set, the experimental stage passed, and the realm within which legislatures may operate fairly well defined." (at 1444) When Justice Douglas nearly a decade later wrote the opinion of the Court in Skinner v. Oklahoma (1942), he was no longer an academic man at Yale Law School, but was now making the lines ("the realm within which legislatures may operate fairly well defined") of constitutional permissibility a little clearer and perhaps a bit stronger, from the point-of-view of individual civil liberty.

65 The Eugenic Predicament (N.Y.: Harcourt, Brace, 1933) at 164. In a later book, Human Genetics and Its Social Import (N.Y.: McGraw-Hill, 1936), Holmes said that "It is open to serious question, however, whether measures coming under the head of negative eugenics will be sufficient to prevent the race from being perpetuated mainly by people of subnormal quality. Certainly the segregation or sterilization of the small percentage of persons who are defective enough to warrant official commitment cannot be expected to contribute much toward this end.

Negative eugenics based upon compulsory restrictions probably cannot be carried out on a very extensive scale..." (at 375)

66 The Biological Basis of Human Nature (N.Y.: W.W. Norton, 1930) at 235, 243. Jennings linked the genetic and the environmental: "The genes do not act independently of environment. On the contrary the individual is produced by the interaction of genes and environmental conditions; so that the same set of genes may yield diverse characteristics under diverse environments..." (at 229) "...So long as living conditions are bad, we do not know what ills are due to poor genes. We must therefore correct the bad living conditions, not only for their directly beneficial effect, but also for the sake of eugenics. When this is done, it will be possible to discover what defects are primarily the result of defective genes, and then to plan measures for getting rid of these genes: measures for stopping the propagation of their carriers. That is, as a preliminary to the effective work of eugenics other reforms must be carried through..." (at 250) Thence followed a long list of social and economic reforms typical of a good progressive American reformer, or a British labor socialist. Jennings wrote the article on "Eugenics" in the Encyclopaedia of the Social Sciences and was critical of the uses to which the extreme eugenicists put their ideas: "...National and racial prejudices have entered largely into eugenic propaganda....Both racial arrogance and the desire to justify

present social systems find a congenial field in eugenic propaganda." (N.Y.: Macmillan Company, 1931; vol. 5 at 621). For a more recent view of Penrose, see his book, The Biology of Mental Defect (London: Sidgwick & Jackson Ltd., 1949; 3rd rev. ed. 1963) at 289-92.

67 N.Y.: W.W. Norton, 1934, at 215.

68 Mental Defect (N.Y.: Farrar & Rinehart, 1934) at 171. Similarly, Richard J. A. Berry and R. G. Gordon in their book, The Mental Defective (N.Y.: Whittlesey House, McGraw-Hill, 1931) wrote: "...there can be little doubt that both segregation and sterilization are indispensable methods of handling the problem, but they do not cure. The legal remedies may, therefore, be written down as largely failures, or, at best, only temporary expedients." (at 36) Stanley P. Davies in his Social Control of the Mentally Deficient (N.Y.: Thomas Y. Crowell Co., 1930) could accept the use of selective sterilization on eugenic or non-eugenic grounds, but he opposed the generalized programs of California for example where sterilization was linked with release from an institution: "The whole difficulty, in making possible the application of sterilization on this limited and selective basis, lies in providing legislation which would, on the one hand, not be regarded by the courts as class legislation, and on the other hand, would so hedge about the authority for performing sterilizations as to insure the operation of the law in a discriminating manner. Unless or until

such adequately safeguarded legislation can be devised, the writer feels that the safer course is to rely on measures other than sterilization for the social control of the mentally deficient." (at 119).

69 For example, pro-sterilization discussion in England could range from the strongly pro-sterilization book of Gallichan in 1929 to the less dogmatic presentation of J. P. Hinton and Josephine Calcutt, Sterilization - A Christian Approach (London: Allen & Unwin, 1935) or Cora B. S. Hodson's rather cursory Human Sterilization To-day (London: Watts & Co., 1934); in America, the extreme hereditarian case was put most forcefully in Leon F. Whitney's, The Case for Sterilization (N.Y.: Frederick A. Stokes Co., 1934); a good example of a sharp exchange of ideas was found in the pages of the Kentucky Law Journal: the University of Kentucky Dean of the Graduate School, W. D. Funkhouser wrote a note on "Eugenical Sterilization," 23 Ky. L. J. 511 (1935) which was followed by an article by Robert E. Hatton, Jr., "Is Compulsory Human Sterilization the Long Sought Solution for the Problem of Our Mental Incompetents?" 23 id. 517 (1935). Also, see George T. Skinner, "A Sterilization Statute for Kentucky?" 23 id. 168 (1934), and two articles by Jay F. Arnold, 24 id. 220 (1936) and 25 id. 186 (1937). An example of how a popular genetics text went through gradual changes in its view of sterilization was Herbert E. Walter's Genetics: An Introduction to the Study of Heredity (N.Y.: Macmillan, 1913; rev.ed. 1922;

ed. 1930; 4th ed. 1938). In the 1st edition of 1913, brief mention was made of sterilization as one of several "drastic measures" with what looked like a quote from Davenport (at 254-55); the 1922 revision quoted from Laughlin on the need for public support but ended with this admonition: "The possibility of the abuse of sterilization if legalized is, however, so great that this extreme method of last resort will be for a long time doubtless of very questionable application." (at 330). The 1930 edition, following the Buck v. Bell decision, was not nearly so doubtful: "...The principal task of the states in using eugenical sterilization is to make sure that their administrative machinery will sterilize only individual who, by modern pedigree analysis, are demonstrated beyond reasonable doubt to carry hereditary defectiveness or degeneracy. Eugenical sterilization may be said to have passed the experimental stage and it is now a conservative instrument of the State to be employed in the fight against hereditary degeneracy." (at 325). The 1938 edition was even more enthusiastic about sterilization: "Sterilization is recognized as a protection for society and not as a punishment for the individual and, therefore, it carries no stigma or humiliation with it. It permits patients to return to productive labor and to family life who would otherwise need to be segregated for years in institutions...." (at 326).

70 HS at ix.

71 Ibid. at 255-56.

72 Ibid. at 197. Landman found fault with many of the provisions of the laws, including the failure to specify the particular operation in 22 of the statutes and the lack of counsel in many of the laws. See pp. 240-43 and 276-79. Currently, 9 states still lack specification of the kind of operation, and 8 fail to mention the right to counsel.

73 Report of the Departmental Committee on Sterilisation at 38. The Committee included among others Dr. A. F. Tredgold, and Dr. R. A. Fisher, who succeeded Karl Pearson in the Galton Chair of Eugenics at the University of London in 1933. Dr. Tredgold commented in the later editions of his book on mental deficiency that his experience on the Brock Committee had convinced him that voluntary sterilization with proper safeguards was necessary in some cases. In the posthumous 1956 ninth edition of Tredgold's Text-book of Mental Deficiency by R. F. Tredgold and K. Soddy, the following comment appeared regarding Tredgold's view of eugenic sentiment or conscience: "...A. F. Tredgold, who made a lifelong study of this point, was firmly of the opinion that the education of the community as to the consequences of inheritance, and the development of a sentiment of pride of offspring would do more to prevent the contamination of sound stocks than would any legal prohibition." (at 405).

74 Ibid. at 18.

75 Ibid. at 30. This recommendation was made over 30 years ago, and the two states, North Carolina and Virginia, that enacted voluntary sterilization laws in the 1960s failed to include such a provision. At the 1965 annual meeting of the American Psychiatric Association in New York, a team of psychiatrists from the University of Kentucky Medical Center gave a paper on the possible (and actual) adverse effects of voluntary sterilization operations and strongly urged careful evaluation of subjects before surgery. (Drs. Joseph B. Parker, Helen L. Hallock, and John P. Longstaff, "Sequelae of Sterilization of Self or Marital Partner," Scientific Proceedings in Summary Form (121st Annual Meeting of the American Psychiatric Association, 1965) at 117-18.

76 AHA, ES (N.Y.: Macmillan, 1936) at 177-78.

77 Id. at 56.

78 Id. at 57.

79 Id. at 178-79. The Committee recommended that selective sterilization be considered in the case of certain diseases "with the consent of the patient or those responsible for him." Ibid. But each of the selected categories of cases carried their qualifications and the Committee expressed caution even where sterilization might be indicated. Id. at 179-80. This brought to three the number of prominent groups that had

endorsed selective sterilization: the White House Conference on Child Health and Protection and the American Association for the Study of the Feebleminded (now called the American Association on Mental Deficiency), both in 1930.

80 Id. at 181.

81 Id. at 182-83. A sample of what the Report would include can be found in a devastating critique of "ideal" sterilization legislation which the Committee's chairman, Dr. Abraham Myerson, made before the Annual Meeting of the ANA in 1934. Although Dr. Myerson was concerned with the proposal made by Laughlin in his monograph, The Legal Status of Eugenical Sterilization (Chicago: Report of the Municipal Court of Chicago, supplement, 1929), he was aware of the dangers of such proposals. "...Incredible laws have a way of getting into action though the persistent efforts of those who aim to seize the power in a community. *** Eugenics is, in my opinion, being made ridiculous as well as a threat to civilized life by the law under consideration." Myerson, "A Critique of Proposed 'Ideal' Sterilization Legislation," 33 Arch. of Neur. & Psych. 453 (1935) at 453-54. The article is followed by an instructive exchange by Drs. Walter Timme, Adolf Meyer, Bernard Sachs, and Myerson, at 463-66. Dr. Meyer, a prominent member of the American Eugenics Society, said among other things: "...Legislation at the present time is an emotional affair. Thus Dr. Myerson's presentation

is really, to me, a reminder of a very broad need, namely, the assertion and specification of responsibility in the attitude of the scientifically minded person when dealing humanly with human problems." Id. at 465. The reader should also see Dr. Myerson's famous text, The Inheritance of Mental Diseases (Baltimore: Williams & Wilkins Co., 1925), and his article "Sterilization," 186 Atlantic Monthly 52 (Nov. 1950) and the discussion of it in 187 id. 16 (Jan. 1951).

82 A.M.A. Proc. (May, 1937), at 54.

83 ANA Report, at 22. Typical of the Eugenical News was an article by Dr. C. G. Campbell, Honorary President of the Eugenics Research Association, entitled "The German Racial Policy," 21 Eugenical News 25 (1936). Whitney, in his The Case for Sterilization (1934), at pp. 135-38 also strongly supported the Nazi eugenical sterilization program.

84 The Citizen's Choice (London: Cambridge Univ. Press, 1937) at 136. Barker discussed the differences between racial and eugenic legislation in Nazi Germany at 136-39. Dr. Foster Kennedy in "Sterilization and Eugenics," 34 Amer. J. Ob. & Gyn. 519 (1937) wrote: "...Germany at present has ordained that persons with schizophrenia and manic depressive insanity should be sterilized. When we consider that no man living knows anything of the pathology underlying these two conditions, it would seem premature and improper to lay unwitting hands upon them...." (at 519) This was in a "Symposium on Sterilization" at 499-525 of the Sept. 1937 issue. And in an instructive law journal note on

sterilization laws, Frances R. Schoenbach wrote: "...It cannot be too strongly emphasized that what sterilization needs at this time is more observation and less speculation. If we enforce the sterilization laws without more accurate knowledge than exists at present, we may well find that we have loosed a Frankenstein. A scientific problem whose fundamental principles are so indeterminate must not be incorporated into mandatory statutes...." Note, "Sterilization Laws -- Their Constitutionality -- Their Social and Scientific Basis," 27 B.U.L. Rev. 246 (1937) at 259-60.

85 Heredity and Politics (N.Y.: W. W. Norton, 1938) at 8-9. For a later view by a prominent English writer that differed with Haldane, see Hermann Mannheim, Criminal Justice and Social Reconstruction (London: Kegan Paul, Trench, Trubner & Co., Ltd., 1946) on sterilization and castration at 19-36.

86 Id. at 80.

87 Id. at 111. Haldane was joined by Hogben, Penrose and others in England, and Pearl, Castle, Morgan, Muller, Jennings and others in America in condemning the crudeness of the extreme hereditarians. T. H. Morgan's warning: "It is conceivable that when man undertakes to direct the evolution of his race, he may blunder badly" (quoted in Report of the AMA at 71) typifies the fears of many of the geneticists

of the 1930s and Dr. Myerson, the chairman of the ANA Committee, further typified the belief of many scientists who found some utility in eugenics when he said: "The crying need of eugenics is not legislation, but real research" (quoted in Albert Deutsch, The Mentally Ill in America, N.Y.: Columbia Univ. Press, 2nd rev. ed., 1949, at 512.)

88 24 Eugenical News 2 (1939). All of Osborn's proposals were positive with the intent of improving the environment and especially "influencing births among individuals, rather than among groups or classes, with particular emphasis on increasing births among parents whose socially valuable qualities rise above their neighbors', in whatever environment they may be found." No mention is made of any compulsion (negative eugenics). "Such a eugenic program," said Osborn, "is in accord with democratic ideals..." Haller reports that when the Eugenics Record Office was terminated, Osborn refused back issues of Eugenical News for the files of the American Eugenics Society, which Osborn so diligently helped to nurse through the pre- and post-World War II years. He found the earlier materials on race and social-class differences "thoroughly unscientific" in terms of later data and added: "It is my belief that this material injured the scientific standing of the Record Office, and I have very direct evidence to show that it set back the scientific acceptance of eugenics in this country." Haller, Eugenics: Hereditarian Attitudes in American Thought, at 180.

This marked a clean break with the Davenport-Laughlin era and portended what Haller called the "new direction" which Osborn and others were giving to the American eugenics movement. Osborn's book, Preface to Eugenics, first published in 1940 and revised in 1951 (N.Y.: Harper & Brothers) exemplified this direction which has continued to this day and which has helped to re-establish American eugenics as a respectable branch of scientific inquiry. Also, see his more recent article, "Qualitative Aspects of Population Control: Eugenics and Euthenics," 25 Law & Contemp. Prob. 406 (1960).

89 24 Eugenical News 63 (1939). This Congress, along with the American Association of University Professors, American Anthropological Association, and American Psychological Association in 1938, all took strong stands against racial theories of superiority, whatever the origins.

90 "Compulsory Vaccination and Sterilization: Constitutional Aspects," 18 Annals Int. Med. 637 (1943) at 642; also published in 21 N.C. L. Rev. 253 (1943) under the same title.

91 Id. at 645. In commenting in an earlier passage on the Court's decision in Buck v. Bell, Powell had this to say about Butler's lonely dissent: "...Mr. Justice Butler dissented, but since he gave no opinion we do not know whether he would think that we needed six or a dozen such generations instead of a meager three." Id. at 642. Powell also felt that laws such as this one might be used as a weapon of class or racial discrimination.

92 Kalven on sterilization in "A Special Corner of Civil Liberties: A Legal View I," part of the Symposium on Morals, Medicine, and the Law, 31 N.Y.U.L. Rev. 1157 (1956) at 1233-34. In "The Place of Law in

Medico-Moral Problems: A Legal View II," Morris Plowcowe also took serious note of the Skinner case: "...Unfitness is not capable of objective measurement in a statute and there is no necessary correlation between the unfitness of a parent and the probable unfitness of a child. There may well be a place in any legal scheme for voluntary sterilization to deal with persons suffering from disease and carefully selected sex offenders, as well as mentally disordered or defective individuals. I do not believe, however, that the law can go beyond such voluntary sterilization and encourage the wholesale deprivation of the right to procreate children on the part of persons who may be deemed unfit." Id. at 1244. It should be noted that the majority opinion of the Supreme Court in the Skinner case cited the Eugenical Sterilization report of the American Neurological Association in its first note, 316 U.S. 535, 538 n.1 (1942). For two very different law review comments on Skinner, see the note in 51 Yale L.J. 1380 (1942); and Carpenter, "Current Constitutional Law Decisions," 16 So. Cal. L. Rev. 48 (1942) at 52-53. The Yale note, entitled "Constitutionality of State Laws Providing Sterilization for Habitual Criminals," citing Skinner and other cases, said: "...The requirements of a non-arbitrary basis of classification and of an individual hearing may be relevant to protecting the feeble-minded against abuse of the power to sterilize...." Id. at 1387. On the basis of the Skinner decision, the following statement appeared in Alfred C. Kinsey et al., Sexual Behavior in the Human Female (Philadelphia:

W.B. Saunders Co., 1953): "...Since the United States Supreme Court decision in Skinner v. Oklahoma 1941: 316 U.S. 535, all operations have been 'voluntary'...."/(at 728 n.24) in reference to "some ten states" providing for involuntary asexualization or sterilization of persons for criminal conduct. The authors produced no evidence to corroborate this statement, but recent data on the states with such laws would indicate that few, if any, employ their castration provisions under any circumstances and certainly seldom on criminals who do not come under other provisions of the laws relating to mental illness, mental retardation, or epilepsy and in these cases, the operation employed would usually be either a vasectomy for males or a salpingectomy for females. There are currently 11 states that have compulsory laws that include criminals, habitual criminals, sexual criminals or what Kinsey called criminal conduct. At the time of the book's publication, four other states would also have been included (Connecticut, which in 1965 made its law voluntary; Kansas, and North Dakota, which repealed their laws in 1965; and Nebraska, which revamped its law in 1957 and excluded criminals and castration from the new statute), so that the total would have been 15 states (including California, which still has <u>two</u> separate provisions in its Penal Code dealing with asexualization and sterilization). See Grant H. Morris and James F. Breithaupt, Note, "Compulsory Sterilization of Criminals -- Perversion in the Law; Perversion of the Law," 15 <u>Syr. L. Rev.</u> 738 (1964); and the discussion of California, Oregon and Washington law in ch. 2, <u>infra</u>.

93 "Certain Medical and Legal Phases of Eugenic Sterilization," 18 Annals Int. Med. 580 (1943) at 580, 583. This article also appeared in 52 Yale L.J. 618 (1943).

94 Id. at 583-84. Myerson found the Nazi eugenics program in action a far cry from the description given in the ANA Report of 1935 (see pp. 22-23).

95 Id. at 589. Myerson's and the ANA's suggestions became reality within a decade in the creation of the National Institute of Neurological Diseases and Blindness and the National Institute of Arthritis and Metabolic Diseases, both organized in 1950, and the more recently created National Institute of Child Health and Human Development, set up in 1963. The late President Kennedy's "crash" program on mental retardation gave renewed emphasis to already ongoing research programs supported by the federal government.

96 Id. at 590. This suggestion is in line with the moderate eugenicists in England and Jennings, Osborn and others in the American eugenics movement who recognized the importance of environmental factors. See fns. 66 and 88 supra. Jennings was especially perceptive in writing in 1930: "Even with our present knowledge, eugenics may enable us to get rid of a certain proportion of such defectives as the feebleminded. Beyond this it represents, in the present situation, an aspiration, a hope, rather than a present remedy for present ills. It is an attempt to place ourselves in line with upward evolution, and as such is worthy

of interest and active sympathy; but it must not take the place of efforts for improvement of the conditions of life. Whether eugenics is to become something more quickly practical than this depends upon whether certain requisite discoveries are made by the science of genetics." Supra note 66, at 251.

97 Id. at 590-91.

98 Id. at 591. For an interesting exchange of views on euthanasia in relation to mental retardation, see Drs. Foster Kennedy, "The Problem of Social Control of the Congenital Defective; Education, Sterilization, Euthanasia," 99 Amer. J. Psychiatry 13 (1942) and Leo Kanner, "Exoneration of the Feeble-Minded," id. at 17.

99 "Eugenics or Euthenics," 37 Ill. L. Rev. 287 (1943) at 329.

100 Id. at 332.

101 Sterilization Laws (Springfield: Research Dept., Illinois Legislative Council, Publication No. 71, Nov. 1945) at 26-27. Illinois has never enacted a sterilization law before or since the report.

102 Guy Irving Burch and Elmer Pendell, Population Roads to Peace or War (Washington, D.C.: Population Reference Bureau, 1945) at pp. 103-04. The authors have a long list of socially "inadequate" persons similar to the extravagant use of the term of "cacogenic" in the earlier days

of American eugenics. In the case of compulsory sterilization, they wrote: "In making the judgment about a clear case of non-conformity to established requirements, the prospective sterilee would have no part, just as in a condemnation proceeding in 'eminent domain' to take an owner's land for a social purpose, the owner has no part; or, in another comparison, just as a person has only a voter's right in determining the tax rate which is to apply to persons of the class in which he falls." Id. at 101-102. This is bad analogizing, since even in the eminent domain situation, the requirements of due process of law must be observed, and property and tax rights are not necessarily equivalent (nor should they be) to the rights of the person, especially that of bodily integrity.

103 "State Sterilization Programs for the Prophylactic Control of Mental Disease and Mental Deficiency," 102 Am. J. Psychiatry 289 (1945) at 293. In a later article, Gamble was still primarily concerned with what he regarded as the lay public's misconceptions of sterilization and what it did: "While most of the state laws contain provisions whereby the sterilizations can be performed on a compulsory basis, in practice this is rarely done. The protective program is therefore limited by the difficulties in securing the consent of the patient or his family. This in turn is limited by the lack of public understanding that surgical sterilization removes nothing from the body and involves no change in sexual responses or characteristics. If physicians, to whom this seems

so obvious, would educate their patients and the families of their patients to understand this difference between sterilization and castration, and would let them know that the laity's fear of such changes as beards on feminine faces or soprano voices in masculine throats is unfounded, much suffering could be spared to present and future generations." "The Sterilization of Psychotic Patients Under State Laws," 105 id. 60 (1948) at 61-62. Beyond public opinion, sterilization posed no problems for Dr. Gamble.

104. N.Y.: Columbia Univ. Press, 1949 2nd rev. ed., at 368. In her book, Mental Health in the United States; A Fifty-Year History (Cambridge: Harvard Univ. Press, 1961), Nina Ridenour wrote: "Although by and large the mentally retarded have not been submitted to anything like as much cruelty as have the mentally ill, nevertheless they have suffered more than their share of neglect. An attitude of centuries' standing was put into words by a Connecticut legislative committee in 1856 when it reported that it had found 'a settled conviction of the large majority of citizens of the commonwealth that idiots were a class so utterly hopeless that it was a waste of time even to collect any statistics concerning them.' Such a forthright statement could scarcely get by today, but the attitude it expresses is not as rare as one might wish." (at 46) At pp. 48-49 she discussed the "eugenic alarm" of the early 1900's, the so-called "menace of the feeble-minded" and the enactment of drastic (namely sterilization) legislation.

105 Id. at 377.

106 Note, "Human Sterilization," 35 Iowa L. Rev. 251 (1950) at 269. With the downward trend in reported state sterilizations and the tendency to rely on "consent," it is unlikely that a test case will arise, unless of course, a state that has due process of law in its statute fails to measure up to the law's requirements and a test of constitutionality arises.

107 Manfred S. Guttmacher and Henry Weihofen, Psychiatry and the Law (N.Y.: W.W. Norton & Co., 1952) at 196. Under environmental justification, the authors included the "fitness for parenthood" criteria, which might also encounter judicial difficulties if tested, unless "fitness" could be pinned down to a judicially acceptable standard of legislative fairness in determination.

108 At 2.

109 HBA annual figures were used, except for California, where a more conservative official state figure was used for the period through 6/30/51, since a new statute came into force in that year. The figures were as follows: Alabama (224); California (18,926); Connecticut (520); Delaware (822); Georgia (1,229); Kansas (3,025); Maine (248); Montana (252); New Hampshire (611); Oregon (1,955); South Dakota (757); Washington (685); Wisconsin (1,750). Not included were the figures for

states that had earlier laws invalidated, other than Alabama, Oregon and Washington, but which still have sterilization laws on the books (Michigan 1; New York, 42 (its only law); Indiana, 120; North Carolina, 49) for a total of 212 additional operations. Certainly, it is demeaning to talk about fair laws and fair administration of these laws where so many operations were performed without some or all of the barest essentials of American standards of procedural fair play. Alan S. Engel, in his Eugenic Sterilization: A Study in the Relationship Between Law and Social Control (Unpublished Doctoral Dissertation in Political Science, Northwestern University, 1960) wonders if the administrative use of due process impedes the enforcement of state sterilization laws (at 168). California since 1951 is a prime example of this phenomenon. But the opposite can also be true, e.g., Georgia, North Carolina, and Virginia.

110 Copenhagen: Munksgaard, 1951, at 301.

111 Evolution in Action (N.Y.: Harper & Bros., 1953; repr. as New American Library of World Literature, Inc. Mentor Book, 1957) at 133-34 of Mentor ed.

112 "Eugenics in Evolutionary Perspective," 54 Eugenics Rev. 123 (1962) at 135. For Muller's work, see his articles, "Our Load of Mutations," 2 Amer. J. Human Genetics 111 (1950); "Further Studies Bearing on the Load of Mutations in Man," 6 Acta Genetica et Statistica Medica 157 (1956); and his Ciba Foundation paper entitled "Genetic Progress by Voluntarily Conducted Germinal Choice," in the Ciba Foundation volume, Man and His Future, ed. by Gordon Wolstenholme (Boston: Little, Brown, 1963), at 247-62.

113 Id. at 136.

114 Id. at 139, 140.

115 James V. Neel and William J. Schull, Human Heredity (Chicago: Univ. of Chicago Press, 1954) at 337.

116 Id. at 338.

117 Id. at 344. In noting the low reproduction rates of the mentally defective, especially those who fall into the idiot and imbecile category, they said: "...Assuming that these individuals reproduce to no greater extent than those artificially sterilized reproduce prior to their sterilization, it is apparent that 'natural' sterilization involves some seven or eight times as many people as the present legislative sterilization. There is evidence that the extreme degrees

of mental defect are more often due to single genes than is the borderline type of defect. We have seen earlier that negative selection is far more effective against traits determined by single genes than against traits determined by several genes. It follows that, at present, 'natural' sterilization is many more times as effective as legal sterilization...." Id. at 345. Of course, in many states that had or still have sterilization laws, these facts were well-known, and admittedly much of what was called "eugenic" sterilization was really never based on anything close to hereditary indications, but was solely for the purpose of releasing inmates (especially still fecund females) and for aiding in what was believed to be their "adjustment" to society or to marriage without the burdens of parenthood.

118 Id. at 347-48.

119 Id. at 346-47. The authors conclude on a note of hope, but with the strong urge for more positive knowledge about human heredity: "The day may yet come when man has sufficient accumulated knowledge concerning his heredity and its interaction with his environment that a comprehensive program of self-directed evolution may be undertaken. But for the present the effort which would be expanded on a eugenics program might better go into efforts to explore the many gaps in our present fragmentary information." Id. at 347-48.

120 "The Applications of Genetics to Human Problems," ch. XXIV in Association for Research in Nervous and Mental Disease, Genetics and

the Inheritance of Integrated Neurological and Psychiatric Patterns (Res. Publ. Ass. nerv. ment. Dis.; Baltimore: Williams and Wilkins, 1954) at 398-99. At a 1962 science writers' seminar on birth defects, held at the University of Michigan, Dr. Neel said that "we're just not ready for eugenics legislation," despite the fact that some geneticists felt there was enough known about a few types of hereditary diseases to legislate against them. "But we cannot create life and therefore should not take life. We should not play God". Detroit Free Press, Nov. 16, 1962, at B3. Also, see the article on the conference in the New York Times, Nov. 16, 1962 at 21. Dr. James L. Wilson of the University of Michigan's Department of Pediatrics and Communicable Diseases, who coordinated the meeting, had this to say about state sterilization laws in a letter to this writer dated Nov. 27, 1962: "I am answering your letter because I think I can summarize, without giving you a paper, what would be the opinion of the geneticists, and certainly of myself, about this matter. It is, again, that we do not know enough about genetics to justify sterilization legislation for that purpose. As was brought out in the panel discussion, very much with my approval, sterilization laws in various states are only tangentially related to genetics. I would hope very much that the public's information on this was not distorted. There are social, economic, practical reasons for the sterilization of mentally defective people which enables some of them to live a more happy, useful, and less dangerous life, and

I think such a social program should not be confused with any organized attempt to eliminate 'bad genes'. Most any scientist in this field, who is well versed, would certainly express, as Doctor Neel did, his humility as to the amount of exact knowledge we have, which is far too little to justify, in our opinion, sterilization based on our eugenic, or I would prefer to say, genetic knowledge with an attempt to eliminate bad genes."

121 Morals and Medicine (Princeton: Princeton Univ. Press, 1954; repr. as Beacon Press paperback, 1960) at 168 of Beacon ed.

122 Id. at 167. His views on sterilization, as well as other subjects (artificial insemination, euthanasia, and others) precipitated a great deal of critical discussion of these questions, among them the symposium on "Morals, Medicine, and the Law" in 31 N.Y.U.L. Rev. 1157 (1956). Both Harry Kalven, Jr. and Morris Ploscowe, who dealt with the legal aspects of sterilization, took issue with Rev. Fletcher's views on compulsory sterilization. In another New York University publication in the same year, Martin E. Nachsin, "Sterilization of Criminals and Mental Defectives in the United States," 11 N.Y.U. Intra. L. Rev. 157 (1956) wrote: "...It is submitted, however, that when the courts discover just how much is unknown in the study of inheritance of particular traits, they will begin to sweep the hands of the legal clock back to the position they were in prior to the decision in Buck v. Bell...."

(at 167) For a Catholic view on the problems dealt with by Rev. Fletcher, see Gerald Kelly, S.J., Medico-Moral Problems (St. Louis: Catholic Hospital Association, 1958), esp. pp. 149-67 and 199-217 on sterilization operations, and Rev. Joseph B. Lehane, The Morality of American Civil Legislation Concerning Eugenical Sterilization (Washington, D.C.: Catholic University of American Press, 1944).

123 Williams, The Sanctity of Life and the Criminal Law (N.Y.: Alfred Knopf, 1957); St. John-Stevas, Life, Death and the Law; Law and Christian Morals in England (Bloomington: Indiana Univ. Press, 1961). Williams was closer to the so-called Protestant position of Fletcher (an Anglican) than was the liberal Catholic St. John-Stevas.

124 Id. at 182-83. Relying substantially on Mrs. Moya Woodside's study of North Carolina sterilization practice, Sterilization in North Carolina (1950), Williams found that American practice proved the worth of state programs that are really voluntary in fact if not in law. Id. at 86-92, but he cautioned nonetheless: "It should be pointed out by way of postscript to this discussion of eugenics that there is in any event no case for compulsory sterilization unless milder methods are inadequate; and some milder methods have hardly been tried...." Id. at 95. For an earlier Protestant view favorable to sterilization, see J.P. Hinton and Josephine Calcutt, Sterilization -- A Christian Approach (London, 1935). The Fletcher, Kelly, Williams, and St. John-Stevas books, coming within

a span of seven years, provided in this writer's view, the most spirited discussion of sterilization since the 1930s and all of the authors, regardless of their theology, approached the moral issues without hesitation. For the position of a group of Anglican theologians, see Human Sterilization; Some Principles of Christian Ethics (Church of England Moral Welfare Council, published by the Church Information Board, Westminster, 1951), especially their statement on compulsory governmental sterilization: "The conclusion is that there is no adequate foundation on which to base a right of the State to mutilate innocent subjects, and to mutilate them to the extent of depriving them of the natural power of generation, thus infringing one of the most fundamental of human rights." (at 11) In 1962, the Church of England brought out another pamphlet entitled Sterilization: An Ethical Enquiry (The Church Assembly Board for Social Responsibility; London: Church Information Office, 1962), which in this writer's opinion is probably the most intelligent, single discussion of the subject by a religious group. Though short, this pamphlet deals with the different kinds of sterilization (therapeutic, eugenic, contraceptive as well as voluntary and compulsory programs) and raises the ethical questions that are involved in a rational and perceptive way.

125 Social Legislation (N.Y.: Appleton-Century-Crofts, 1957, 2nd ed.) at 210-11.

126 Id. at 211. Perhaps Clarke should be reminded that the Nazi

eugenics law in its earlier phase was regarded as procedurally and administratively "sound" even by the AMA in its 1935 report. This writer found the Michigan law, on paper, a procedurally sound document, but the records of the Probate Court of Kent County in the 1930s attest to the fact that where human rights are concerned, even that of bodily integrity, courts and public authorities can treat what are commonly called the dregs of the community with self-abandon. In an area such as eugenic sterilization, our own sterilization history (not the Nazi's) should be sufficient proof of the fact that procedural protections are not enough.

127 Richard L. Masland, Seymour B. Sarason, Thomas Gladwin, Mental Subnormality; Biological, Psychological, and Cultural Factors (N.Y.: Basic Books, 1958) at 15. See pp. 15-16 and 196-97, especially their discussion of the family pedigree studies of the earlier eugenicists in America.

128 London: Heinemann, 1959; 2nd ed. 1963 (at pp. 119-20). Penrose himself defines some of the genetic terminology used in the above quotation: "Perhaps the best analogy to the gene is a set of verbal instructions; the whole set of chromosomes can be likened to a book of recipes. These instructions enable cells to manufacture certain substances. In any individual these recipes are supplied in pairs because, as we have seen, one complete set of chromosomal instructions is obtained from the father and the one set from the mother. Each recipe corresponds

to a gene and any corresponding pair of recipes may be identical or they may differ from one another. The person who carries an identical pair of single gene instructions is said to be homozygous at that locus: one who carries an unlike pair is said to be heterozygous...." Id. at 22. When the pair of genes differ, he further points out: "As a rule one instruction is suppressed and then we say that the gene which is active has dominant effect, while the suppressed gene has an effect which is called recessive...."

129 Human Heredity (Cleveland: World Publishing Co., 1959; repr. as a Mentor book by The New World Library in 1960) at 19 of Mentor edition.

130 Id. at 274. For a very critical analysis of the eugenic thesis of the inheritability of certain traits, see Engel, supra note 109, at pp. 79-122 and 156-62.

131 Stanley Powell Davies, The Mentally Retarded in Society (N.Y.: Columbia Univ. Press, 1959) at 64. Davies also discusses the impact of recent trends in research into mental retardation and says: "This discussion of heredity may be briefly summarized. It is believed that in less than half of the cases, inheritance of faulty genes plays a role in the causation of mental deficiency. The expanding field of research on nonhereditary causes promises to reduce the incidence of mental deficiency not hereditary in origin. Some of these causes are now amenable to treatment, and means of conquering others will doubtless be

found. At present science is nearer to prevention than it is to cure." Id. at 88-89.

132 John L. Fuller and W. Robert Thompson, Behavior Genetics (N.Y. John Wiley, 1960) at 327. The authors' concern with the problem of defining the kind of society that we might conceivably "adapt" ourselves to is one of the critical aspects of the whole problem of sterilization that raises enormous moral let alone legal and political implications. Who decides? And what qualities do we really want in future generations? An interesting comment was made by Dr. David Thomas, an English expert on mental retardation before the special meeting of the State of New York Joint Legislative Committee on Mental Retardation on June 22, 1956: "Recent research in genetics has brought to light some factors which have made us think a lot of this problem of mental retardation in a way we haven't thought of it before. We have always been accustomed to talking glibly in terms of the submerged of the population, and we talk of the pruning hook of nature in eliminating physical limitations when people were weaklings, and in the old days, it was thought to be a biological phenomenon to eliminate these deficiencies to strengthen the race. Rather, we have come to recognize that the balance of a race is dependent upon the contributions which all types of individuals, in terms of intelligence, have to make as a composite heterogeneous mass, to what we call normality. The genes that are transmitted from people who are

retarded in their intelligence, may be just as important and valid towards the future fertility of the race, as those of the community which is highly intelligent, and may be leaders of the race." (at 13).

133 Dubos in The Great Issues of Conscience in Modern Medicine (Hanover: Dartmouth College, Sept. 8-10, 1960) at 9. Ethical decisions such as these, according to Dubos, are for society to decide. "Hence, there will have to be choices and these choices are not to be made by physicians. These choices will have to be made by society as a whole, because they will involve judgment values [sic]". Id. at 10. Cf. Sir Charles Snow's views at 13-14, and P. B. Medawar's book, The Future of Man (N.Y.: Basic Books, 1960; originally the BBC Reith Lectures for 1959), especially part 3, "The Limits of Improvement," at pp. 42-56. Medawar writes: "...But whether there is one reason or a multitude of particular reasons, there seems no doubt that some large part of human fitness is vested in a mechanism which provides for a high degree of genetic inequality and inborn diversity, which makes sure that there are plenty of different kinds of human beings; and this fact sets a limit to any purely theoretical fancies we may care to indulge in about the perfectability of men." (at 53).

134 Id. at 18.

135 Id. at 19. Muller's sperm bank idea has always been advanced as

a voluntary choice of the persons concerned, never a decision of government. As he said at the convocation: "At the same time, the storage banks would make these germ cells available for indefinitely long periods of time, so that they could be utilized even after the decease of the individuals themselves, thereby, in a sense, evading their bodily deaths, supposing for instance that they were killed in war. Surely, under these circumstances, many couples desiring to make a significant contribution to the good life, would decide to take advantage of such an opportunity for genetic choice by having, right in their own family, a child who had derived his genes from the source they held in deepest regard, rather than a child whose genes had been determined purely by the chance of what their own genetic composition was. And they would tend to bring up this child of choice rather than chance as their very own, with all their warmth, their tenderness and their justly founded pride." Id. at 18.

136 Id. at 18. Nobel Laureate Muller is not the only prominent figure in American science to advance this idea, but opposition by biologists and geneticists has been loud and clear at times. See the discussion "Eugenics and Genetics" following Muller's Ciba Foundation paper in G. Wolstenholme, supra note 112, at 274-98. Joshua Lederberg's very stimulating paper on the "Biological Future of Man" is also discussed in this section of the book. For an extremely provocative discussion of artificial insemination, see the work of the English writer, Herbert

Brewer, "Eutelegenesis," 27 Eugenics Review 121 (1935) and "Artificial Insemination," 54 id. 106-07 (1962).

137 In "Comments on Genetic Evolution," in the special issue, "Evolution and Man's Progress," 90 Daedalus 451 (1961) at 462. Dobzhansky added this important admonition to his previous comments: "...Shall we deny that in Dostoevsky's genotype the gene that made him liable to epilepsy was perhaps of some value to the rest of mankind? We should not glibly assume that a genetic variant which is biologically and sociologically detrimental in one genetical and environmental constellation will be so in all of them. We know far too little about human biology to equate the genetic leads with the sociological burdens of human populations." Id. at 463. See James F. Crow, "Mechanisms and Trends in Human Evolution," and Hermann J. Muller, "Shall We Weaken or Strengthen Our Genetic Heritage?" Id. at 416-31 and 432-50, and Crow, "Possible Consequences of an Increased Mutation Rate," 4 Eugenics Quar. 67 (1957) at 79; and John Maynard Smith's insightful article, "Eugenics and Utopia," 94 Daedalus 487 (1965).

138 "Adaptation in Man and Animals: A Synthesis," in the issue on "Genetic Perspectives in Disease Resistance and Susceptibility," 91 Annals N.Y. Academy of Sciences 634 (June 7, 1961) at 634.

139 Id. at 635. For an earlier discussion of sterilization, see L.C. Dunn and T. Dobzhansky, "The Case Against Sterilization," 21 Science Digest 75 (Feb. 1947).

140 Amsterdam: Excerpta Medica Foundation, Abstract of Papers Presented, International Congress Series No. 32 at E2. Dr. Kallmann has done seminal work in the field of medical genetics and the reader is referred to his book, Heredity in Health and Mental Disorder (N.Y.: W.W. Norton, 1953), his editorship of the symposium Expanding Goals of Genetics in Psychiatry (N.Y.: Grune & Stratton, Inc., 1962), and chap. 8, "The Genetics of Mental Illness," in Silvano Arieti (ed.), American Handbook of Psychiatry (N.Y.: Basic Books, 1959), Vol. I at 175-96 and particularly his discussion of eugenic considerations at 191-92.

141 "Medical Utopias," in the issue, "Current Work and Controversies," 88 Daedalus 410 (1959) at 419. In another article, "Science and Man's Nature," Dubos wrote: "...The medical sciences themselves are becoming so effective that they can affect unfavorably the fate of immense numbers of people and of their descendants, often creating new pathological processes as they control old diseases. Their greatest impact, probably, will be not so much on the size of the world population as on its genetic qualities, and on its other qualitative characteristics." In the issue, "Science and Culture," 94 id. 223 (1965) at 240.

142 Statement of Gordon Allen, Dudley Kirk, J. P. Scott, Harry L. Shapiro, and Bruce Wallace, 8 Eugenics Q. 181 (1961) at 182. In a more recent article by Frank Lorimer, "The New Outlook in Eugenics," the author wrote: "The challenge of eugenics today is less apocalyptic than it

formerly seemed to be to some people. Humanity is not on the verge of dysgenic disaster. On the other hand, the possibilities of positive advances in influencing the future course of human evolution seem brighter than ever before. In view of these changes, eugenics is likely to be less isolated as a field of interest in the future, and more widely recognized as an important aspect of demographic, social and biological studies in general." 11 Eugenics Quar. 125 (1964) at 126.

143 "Eugenic Sterilization; A Discussion of Certain Legal, Medical and Moral Aspects of Present Practices in Our Public Mental Institutions," 175 J.A.M.A. 951 (March 18, 1961) at 957.

144 Id. at 958. Michael D. Weinberg in a seminar paper for Professor Sheldon Glueck's course in the Administration of Criminal Justice at the Harvard Law School wrote: "Should a sterilization statute be tested by a modern court, it would seem that a more searching constitutional analysis would be necessary than has been provided in the past. Scientific opinion has changed from what it was at the time of the earlier decisions. Generalized conclusions, such as, 'Three generations of imbeciles are enough,' are no longer adequate constitutional bases on which to rest a statute." Sterilization - 1960 (unpublished seminar paper, Feb. 15, 1960, Harvard Law Library). This was the second paper done in two years in Professor Glueck's courses on the subject of sterilization and this writer is aware of other undergraduate papers in colleges around the country on the same subject.

145 Report of the Task Force on Law, at 22.

146 Id. at 23.

147 Id. at 23.

148 Part of the trouble is that sterilization discussions are often "buried" in larger studies of mental retardation, so that public attention is difficult to stimulate or focus on the plight of those who are compulsorily sterilized in the various states. Herbert Goldstein, in a chapter entitled "Social and Occupational Adjustment" in Harvey A. Stevens and Rick Heber (eds.), Mental Retardation (Chicago: Univ. of Chicago Press, 1964) devoted some attention to the question of state sterilization laws: "Selective sterilization appears to be the pattern followed in institutions where state laws provide for this means of social control. Insofar as decision-making is concerned, practices vary from complete electivity on the part of the inmate and his family to complete control by the institutional authority. The criteria for sterilization generally appears to be sexual promiscuity for females and aggressiveness for males. Up to 1949, sterilization of females was almost double that of males in the United States." (at 219) Goldstein regards the adoption of "selective sterilization" in the 1930s as a more "conservative approach" than the more generalized sterilization programs of the earlier period, which were abandoned in many states. He says that the studies showing the allegedly salutary effects of sterilization

operations on parolees ignored many significant factors: "...The studies do not take into consideration the economic, environmental and maturational differences within the group effected by time. Nor do they appear to consider the effect on behavior of supervision following parole as compared with the lack of supervision prior to institutionalization." He concludes: "...Thus, while sterilization of the mentally retarded appears to be a legal procedure in a majority of states, practice shows that it has not been as effective as anticipated at the time that it was proposed as a method of social control." (at 220) The studies showing salutary post-operative effects on the parolees that Goldstein refers to are: J. H. Craft, "The Effects of Sterilization -- As Shown by a Follow-Up Study in South Dakota," 27 J. Heredity 379 (1936); Betsey Scott Johnson, "A Study of Cases Discharged From Laconia State School From July 1, 1924 to July 1, 1934," 50 Amer. J. Men. Def. 437 (1946); Irvin B. Hill, "Sterilization in Oregon," 54 id. 399 (1950); E. A. Whitney and M. M. Schick, "Some Results of Selective Sterilization," 55 Proc. Amer. Assoc. Stud. Feebleminded 330 (1931); W. I. Pritchard, "Sterilization of the Mentally Deficient in Virginia," 53 Amer. J. Men. Def. 542 (1949); and Paul Popenoe, "Success in Parole After Sterilization," 32 J. Psycho-Asthenics 86 (1926). For a more recent view by a psychiatrist on the value of selective sterilization of the so-called subcultural mental defectives, see George A. Jervis, "The Mental Deficiencies," in Silvano Arieti (ed.), American Handbook of Psychiatry (N.Y. Basic

Books, 1959), vol. II at 1295 where he concludes: "Sterilization of carefully selected cases of subcultural defectives is generally conceded to be biologically useful as a preventive measure, but the effectiveness of widely applied sterilization laws in controlling this type of retardation is open to doubt." Also, Frederick E. Kratter, "Negative and Positive Eugenic Programs for Mental Defectives," 63 J. Gen. Psychology 203 (1960).

149 Robert E. Cooke, "The Application of Knowledge" in Proceedings of the White House Conference on Mental Retardation (Washington: U.S. Dept. of Health, Education, and Welfare, 1963) at 95. At a White House seminar launching Project Head Start in March of 1965, Dr. Cooke, who is chief pediatrician at Johns Hopkins, gave this answer to the question "Isn't this a waste of time without having a program of birth control and sterilization?": "Sterilization of persons of low intellect has been shown to be a completely ineffective method of reducing mental retardation. Genetically, humans tend to breed toward the normal. The children of the mentally retarded are higher in intellect than their parents. Defectives come more often from parents of a higher level than a lower one." He added that sterilization and birth control proposals go back to ignorance of genetic principles and in themselves are "no answer whatsoever." From "Genetic Trend Tends to Normal," Washington Post, March 14, 1965, at F3.

150 Id. at 95. Equally fascinating and with enormous potential consequences was the "breaking" of the genetic code and the discovery of

the "mysterious" chemical compounds, DNA and RNA (desoxyribose nucleic acid and ribonucleic acid). See Isaac Asimov, The Genetic Code (N.Y.: New American Library, Signet Science Library Book, 1962) and "DNA's Code: Key to All Life," 55 Life 70ff. (October 4, 1963), which concludes with this rather ominous statement: "There is simply no calculating at this point the amount of benefit man might gain medically through his mastery of the genetic code. This mastery will not only permit him to improve the lot of individuals. By manipulating the DNA in human eggs and sperm cells, he may be able to correct genetic defects and thus save countless future generations from illness and premature death. Most scientists regard this potential as a mixed blessing, however, for if man can manipulate the genes of all human-kind in this fashion, it means he can decide what characteristics he deems desirable in future generations and simply write the genetic messages into the DNA. ****** The DNA molecule has been called the 'atom of life.' When man succeeds in harnessing this atom, the problems raised by the harnessing of the uranium atom will look simple indeed. As they contemplate the golden opportunities the new powers will give man, scientists also stop to think about the opportunities for the abuses of these powers -- and, when they do, their thoughts sometimes make them shudder." (at 90).

151 Id. at 97. A curious future medico-legal and moral problem might arise if (as in Massachusetts, Connecticut, Maryland and 22 other states)

the Guthrie Test is mandatory and a family of a PKU-detected infant, for whatever reason, is not willing or able to undertake the special care of the child. In contrast to the earlier eugenic sterilization laws, where compulsion was used to apply allegedly scientific findings about human genetics to the mentally ill and retarded, the state in the above-mentioned case might compel a family to raise a child on the basis of scientific findings that could save it from a life of retardation. While compulsion is used in both situations, there is a world of difference in the genetic aims of the laws and the certainty involved in the two sets of scientific data about human genetics.

152 "Implementation of the President's Program on Mental Retardation," 121 Amer. J. Psychiatry 549 (1964). For more detailed discussions of some of the current research at the National Institutes of Health, see especially the published reports of the National Institute of Neurological Diseases and Blindness and the National Institute of Child Health and Development, e.g., Research Profile Number 1; Summary of Progress at the National Institute of Neurological Diseases and Blindness (Washington: U.S. Dept. of Health, Education, and Welfare, Nov. 1963); Research Profile No. 9; Collaborative Perinatal Research; "The Collaborative Perinatal Research Project; 5 Years of Progress," Collaborative Project Reporter (autumn 1963); also, see David L. Bazelon, "Mental Disorders: The Need for a Unified Approach," 34 Amer. J. Orthopsychiatry 39 (1964); Pre-School Child Malnutrition; Primary Deterrent to Human Progress, A Summary of an International Conference on Prevention of

Malnutrition in the Pre-School Child, held in Washington, D.C., Dec. 7 to 11, 1964 (Washington: National Academy of Sciences--National Research Council, n.d.); Robert W. Collett, "We're Winning the War on Mental Retardation," This Week Magazine (October 21, 1962) at 38-39; Group for the Advancement of Psychiatry, Basic Considerations in Mental Retardation: A Preliminary Report (formulated by the committee on mental retardation: Report No. 43, New York, Dec. 1959).

153 Gardner Lindzey, "Genetics and the Social Sciences," 18 Social Science Research Council Items 29 (No. 3, Sept. 1964) at 32. The Committee also mentioned significant findings in the area of Down's Syndrome (Mongolism) and schizophrenia, at 32-33.

154 Human Genetics and Public Health, World Health Organization Technical Report Series, No. 282 (Second Report of the WHO Expert Committee on Human Genetics, Geneva: WHO, 1964) at 30-31.

155 Id. at 37.

156 "Quality Guidance of Population is Consistent With Quantity Guidance," Report Proc. Fifth Internat. Conf. Planned Parenthood (Tokyo, Japan, 24-29 October, 1955) at 59-60. Harking back to the early eugenicists, Pendell equates "quality" with amount of education, and as he himself stated: "...So we can be reasonably sure that amount of education correlates roughly with IQ." (at 61). The figure of

60,000 that he uses refers to state sterilizations since 1907, not private voluntary operations.

157 Id. at 62. But Pendell is aware of political pressures in America that would militate against such a proposal, especially what he calls "the Pope's power." But these are not insuperable. He concludes: "...To a country that can reverse the socially adverse differences in the birth-rates the door is open to the solution of other social problems, for wisdom will gradually increase. The future, I believe, belongs to such countries as emphasise sterilization as a major domestic policy." Id. at 63. For a detailed description of Professor Pendell's proposed marriage law with its mandatory limits on reproduction (based on I.Q. and amount of education), see chap. 14 of his book Population on the Loose (N.Y.: Wilfred Funk, Inc., 1951).

158 Report of the Seventh Conference of Physicians & Schools, Wayne County (Detroit: November 14, 1962), n.p.

159 Ibid. Statements such as these and those of Professor Pendell are relatively rare these days. For a somewhat more reasoned approach, see the interview with Dr. William Shockley, "Is Quality of U.S. Population Declining?" 59 U.S. News & World Report 68 (Nov. 22, 1965). Dr. Shockley won a Nobel Prize for physics in 1956, but he has become increasingly interested in population problems and the role of human heredity.

CHAPTER TWO

AN ANALYSIS OF AMERICAN STERILIZATION EXPERIENCE AND CURRENT POLICIES ON A STATE-BY-STATE BASIS

Before examining the individual states and their sterilization history and experiences, it might be well to look at the overall picture of American sterilization in terms of the types of laws passed, the various types of administration of these laws, the types of persons sterilized, and the trends in the number of sterilizations performed over the years.

At the present time, 26 states have sterilization laws that are presumably eugenic in origin or purpose. California, with two provisions in its Penal Code, and Washington have the only punitive sterilization laws still on the books. The Washington law, which dates back to 1909, was upheld by the state Supreme Court in 1912, but the law has been rarely enforced, if at all. Presumably, this also holds true of California's punitive provisions, but not to its general eugenic sterilization law, which leads the nation in point of numbers operated on. Thus, subsequent discussion will pertain to the 27 states with sterilization statutes still on the books today, including that of Alabama, where an advisory opinion of the state Supreme Court in 1935 cast doubt on the law's validity and caused the cessation of operations at that time.

The Language of the Laws

Most of these laws use the language of heredity ("according to the laws of heredity," or an "inherent tendency" of certain named defects, or a person is afflicted with certain conditions that are "likely to

be transmitted" to future descendants or progeny). But some of the laws are extremely vague on this account, as for example, the Alabama law, which makes no mention of heredity but merely says that "...if... they deem it advisable.... to sterilize any inmate" or the Delaware and Wisconsin statutes which employ the language "...that procreation is inadvisable", but give no genetic or eugenic reasons for the operation. Although many states have employed their so-called eugenic sterilization laws for non-eugenic (social and environmental reasons; reasons of "adjustment" to the outside; or "fitness" for parenthood) reasons, North Carolina is perhaps the clearest law on this account when it talks of sterilization of persons inside or outside state institutions "...as may be considered best in the interest of the mental, moral, or physical improvement of the patient or inmate, or for the public good". Nebraska clearly excluded all mention of heredity when it revised its law in 1957, but continued to make sterilization of certain mentally deficient persons a condition of parole or discharge: "No mentally deficient patient, physically capable of bearing or begetting offspring, shall be paroled or discharged from the Beatrice State Home...." until after a determination by the Board of Examiners of Mentally Deficient as to the necessity of sterilization, or by order of a court of competent jurisdiction. The fact that 20 of the states have clearly and specifically mentioned the "laws of heredity" or some approximation thereof is not to say that some of these states do not use their laws for non-eugenic

purposes or even make sterilization a clear condition for discharge or parole. California, the nation's leading state in terms of numbers, (nearly one-third of the cumulative national total), although it employed the language of heredity, also tied sterilization to discharge in its general sterilization law. Utah, in an amendment to its law in 1961, made manifest what many states have done as a matter of policy though not of law. Their earlier 1929 law used the following language:

> ...and by the laws of heredity is the probable potential parent of socially inadequate offspring likewise afflicted and that the inmate or person may be sexually sterilized or asexualized without detriment to his or her general health, and that the welfare of the inmate or person and or society will be promoted by such sterilization or asexualization...

The 1961 amendment replaced this language with the following:

> ...and that the person or inmate with any of these disorders, is in the opinion of the expert witnesses, probably incurable and unlikely to be able to perform properly the functions of parenthood and that the inmate or person may be sexually sterilized without detriment to his or her general health, and that the welfare of the inmate or person and of society will be promoted by such sterilization or asexualization...[1]

Compulsion and Consent in the Laws

With the exception of three states (Connecticut, Minnesota, and Vermont), all of the present 27 laws are compulsory on paper. Three of the 24 compulsory laws (Maine, North Carolina, and South Dakota) have provision for voluntary petition for sterilization and would therefore be classified as states with both compulsory and voluntary sterilization. Another six of the 24 compulsory states (California, Idaho, Iowa, Michigan, Montana, and Oregon) include provision for consent to the operation. When this is not forthcoming, the compulsory provisions can then be enforced. In summary, the lineup of the 27 states with general (or punitive) sterilization laws is as follows: 15 are compulsory only; 6 are compulsory, but have consent provisions which may or may not be exercised; 3 are both compulsory and voluntary; and 3 are voluntary only. It should be noted that in the individual state analyses, several of the strictly compulsory states use consent procedures by virtue of administrative discretion, notwithstanding the character of the law in those states.

Administration of the Laws

In 21 of the 27 states, the application for a involuntary sterilization comes from an institutional superintendent, and may go to a variety of designated state agencies or boards. In the remaining 6 states, applications may come from a host of sources, including physicians, relatives, guardians, state welfare commissions, sheriffs, superintendents

of the poor, courts and other public agencies. Though most states place the actual decision-making power in some kind of hearing or examining board (State Board of Medical Examiners in Arizona; the Director of Mental Hygiene in California; the board of directors or trustees of the hospital in Mississippi; the governing board of the institution or the Board of County Commissioners in New Hampshire; the Mental Health Board in Oklahoma; the Executive Committee of the State Board of Health in South Carolina; the State Hospital Board in Virginia; the Public Health Council in West Virginia; and the Department of Public Welfare in Wisconsin; as examples) 5 states (Georgia, Iowa, Montana, North Carolina and Oregon) have special eugenics boards that are designated by law to enforce the sterilization statutes in those states. These boards vary in size and composition, but in each case they give a kind of centralized direction to the state's sterilization program.[2]

Indiana and Michigan are the only states that designate court-ordered rather than administrative authorization for eugenic sterilization, Indiana through Circuit Court proceedings for commitment of mentally ill or mentally retarded persons, and in Michigan through a Probate Court order for sterilization.[3] Washington's punitive law operates entirely by court order.

The Coverage of the Laws

All of the 27 sterilization laws cover institutionalized persons, but 11 states (Delaware, Idaho, Indiana (during commitment proceedings), Iowa, Maine, Michigan, North Carolina, Oregon, South Dakota, Utah, and

Vermont) contain provision for extra-mural coverage of non-institutionalized persons. With the exception of Vermont, all of these are compulsory states. The annual compilations of the Human Betterment Association did not designate which operations were intramural or extramural and most of the 11 states did not have data of this kind. Iowa had some figures on extra-mural operations, but the state with the most complete statistical data for extra-mural operations is North Carolina, which is not surprising, since at the present time these operations make up 84% of the total number sterilized in the last biennium.

With the exception of Washington, Alabama and Nebraska, all of the remaining 24 laws apply to both the mentally retarded and the mentally ill. In Alabama and Nebraska, only the mentally retarded are covered by their laws. Despite the wealth of recent medical and other kinds of evidence, 15 of the laws still apply to the epileptic, although in most states that include epileptics, the law is seldom applied and when it is, usually mental illness or mental retardation is the reason given for the operation, not epilepsy. Washington's law applies only to persons convicted of certain crimes.

It is in the so-called "others" categories that the laws retain their anachronistic and early extreme hereditarian character. Provisions for the sterilizations of criminals, habitual criminals, persons with criminal "tendencies" or who might transmit "criminality" are found in the laws of 10 states (California, Connecticut, Delaware, Idaho, Iowa, Oklahoma, Oregon, Utah, Washington, and Wisconsin).[4]

Some seven state laws cover sexual criminals or sexual perverts (California, Iowa, Michigan, Oregon, South Dakota (which simply uses the term "perversion"), Utah, and Washington).[5] And seven laws (California's Penal Code sec. 2670, Idaho, Iowa, Michigan, Oregon, South Dakota and Utah) cover such anomalous categories as those of "degenerate" or "moral degenerate", and syphilitic.[6]

Procedural Protections in the Laws

Although one of the salutary results of the Buck v. Bell decision in 1927 was to encourage states to include procedural protections in their laws, not all of the laws presently in force contain these basic fundamental rights, and this is one of several reasons why some of the laws need major overhauling. Of the 24 states that still have compulsory sterilization laws of any kind on the books (whether or not they are enforced), 22 provide notice of a sterilization hearing to the patient or inmate, or to their next of kin or guardian (Alabama and Washington do not); 16 provide a hearing to determine the necessity or advisability of sterilization (California provides a possible hearing only when an objection is filed within 30 days, or where the patient has no known relatives or guardian; Alabama, Delaware, Maine, Oregon, South Dakota (mentally ill only), Washington, and Wisconsin make no provision for the inmate's or the patient's right to a hearing in their laws); 16 states specifically mention the right to counsel (Alabama, California, Delaware, Georgia, Montana, New Hampshire, Washington, and Wisconsin do not); and of these

16 states that have the right to counsel, only 4 (Idaho, Maine, Michigan, and Oregon) specifically call for the appointment of counsel where the patient has failed to do so, and of these states all except Maine will pay for such services; 20 states have provision for the right to appeal a sterilization order to a state court (Alabama, Delaware, Washington, and Wisconsin do not), but only one state, Iowa, provides for an automatic appeal to the courts. Of these 20 states, 17 provide for a possible appeal all the way to the state's highest court (only California, Maine, and Montana failed to provide this). Another right, that of specificity of the type of sterilization operation required by the law, should also be mentioned. 15 of the 24 compulsory state laws mention a specific male and female sterilizing operation, but 9 states do not (Alabama, Delaware, Iowa, Nebraska, North Carolina, Oregon, South Dakota, Washington, and Wisconsin).

The problem of protecting the rights of the mentally disabled, especially in legal proceedings, is a difficult and complex one. Out of the 24 states that have compulsory laws, only 15 specifically provide for the appointment of a legal guardian, where there is no discoverable next of kin or already existing legal or natural guardian, for the person to be sterilized. In Georgia, this can be the solicitor general of the Superior Court of the county, who has the duty of protecting the inmate's or patient's "rights and best interests", which raises the sticky question of whose agent is the solicitor general? Eleven of

(ADD AFTER THE WORD
Wisconsin).

Four states use the term "asexualization" (California in its Penal Code S 2670; North Carolina, Oregon, and Utah), which ordinarily is interpreted to mean an operation that castrates. Michigan and Montana mention specific male and female sterilizing operations, but employ vague additional language ("...or other treatment or operation best suited to the condition of such person" in the Michigan statute; "...or such adequate medical treatment which will surely and permanently nullify the power to precreate offspring...." in the Montana statute). Michigan in S 14.388 of its law also specifically includes X-rays as a possible type of sterilization operation. Of the 9 present states that do not mention a specific male and female sterilization operation, only one (Iowa) specifically bars the use of castration, so that theoretically the other 8 state laws could authorize the use of an operation that castrates.

these states provide for a maximum payment to the appointed legal guardian, but the fees, which range from a low of ten dollars in Mississippi and South Carolina, to twenty five dollars in seven other states, is not calculated to produce the kind of "protection" that the mentally disabled usually need in sterilization proceedings before administrative boards or courts of law. **Only five states (Idaho, Iowa, Maine, Michigan, and Oregon) provide for the appointment of a lawyer, if necessary.**

The problem of court costs, which affects the indigent in America in a variety of ways (and according to the late Judge Jerome Frank and others, usually adversely) is also seen in the costs of appeal to the highest courts of the states. Out of the 17 states that allow for an appeal to their highest state court, only seven (Georgia, Idaho, Iowa, Michigan, North Carolina, Oregon, and South Dakota) provide for payment of the court costs on appeal when an individual is unable to do so himself, and in two of these states (Georgia and North Carolina) this is the case only if the plaintiff wins. Thus, in only five of the compulsory sterilizing states is the indigent patient or inmate given full legal as well as economic advantage in the law. And albeit Buck v. Bell looked promising to some libertarians in 1927, it did not usher in the millenium.

Statistical Trends, 1907-63

The tables at the end of the book will give a detailed breakdown of sterilization, but some of the significant statistical trends will be cited here. Notwithstanding the surge of legislation after the passage

of the first eugenic sterilization law in Indiana in 1907, adverse court decisions, timidity on the part of institutional superintendents, and opposition from governors or state attorneys general, combined with a fear of public opinion to keep the enforcement of these laws at their lowest ebb. From 1907 to 1921, there were only 3,233 reported operations, and 80% of these were in California alone. As discussed earlier, the United States Supreme Court's vindication and validation of state eugenic sterilization laws in the celebrated case of Buck v. Bell in 1927 turned the tide and not only brought numerous new laws or revisions of old laws in its wake, but also a surge of enforcement of sterilization laws that did not recede until during and after the years of World War II.

By 1930, the cumulative total of 10,877 had more than tripled the figure for the first 14 years of sterilization in America, but California's proportion had dropped to 62% of this total. The years of the 1930s, the depression years, opened the floodgates of sterilization insofar as the total history of sterilization is concerned. To some, this will seem a rather strange phenomenon in the light of the forces that would have seemed to militate against the use of sterilization (the adoption of the principle of "selective" sterilization by many of the states and by several prominent national organizations and the White House Conference on Child Health and Protection of 1930; the repudiation at least in spirit of the social Darwinian notion that unemployment was due to "character" defects; the rise and eventual public exposés of the Nazi

eugenic sterilization program; the harsh criticisms of many of the leading geneticists and biologists in America and England of compulsory state sterilization laws; the Pope's strong condemnation of compulsory sterilization laws in his 1930 encyclical on Christian marriage; the decline of the nation's leading sterilization organization, the Human Betterment Foundation of Pasadena and its eventual demise in 1942 together with a general repudiation of extreme hereditarian ideas and proposals), but approximately 23,000 operations were performed in the decade of the 1930s alone, which is over one third of all those performed from 1907-63.[7] By 1941, California's proportion of the national cumulative total had dropped to around 40%, indicating the rise of sterilizations in such states as Indiana, Kansas, Michigan, Minnesota, Oregon, and Virginia, and Wisconsin .

With the advent of the war years, the shortage of physicians, and the Skinner decision in 1942, sterilization began a gradual decline. Coupled with the advent of federal mental health legislation,[8] changes in many of the state health and mental health administrations and a rather general professional repudiation of surgical procedures as a "cure" for or treatment of mental illness and mental retardation (as well as epilepsy), sterilization in the period 1941-51 fell to 16,355 operations and in the decade of the 1950s to a figure of 10,833 performed. While the average annual figure in the 1930s was around 2,400 operations, it fell to approximately 1,600 per year in the 1940s, slightly over

1,000 a year in the 1950s and in the last four years compiled (1960-63), the average was 535 per year, the lowest since the period before 1921.

One of the most important statistics and one that has seen tremendous changes over the years is the ratio of mentally ill and mentally retarded persons in the sterilization totals. Although much of the early eugenicist propaganda was aimed at the predicted "deluge" of feeble-mindedness in America, for a long time the mentally ill bore the brunt of sterilization enforcement. From 1907-1921, when 3,233 operations were reported, 2,700 were on the so-called insane (84% of the total) and Landman reports figures for 1929 that show the mentally ill comprised 67% of the total sterilized up to that time.[9] Even with the surge of operations in the 1930s, the mentally retarded still comprised less than half (46%) of the cumulative total for the period up to January 1, 1941. But this radically changed, as for example in the year 1944, when 821 out of 1,183 operations performed in all the states were on the mentally retarded, or in 1945, when 890 out of 1,336 operations and 1946, when 1,007 out of 1,476 operations were on the mentally retarded. In the last tabulation (for the year 1963), 340 out of 467 reported operations were on the mentally retarded (73% of the total) and the cumulative total up to January 1, 1964 gave the mentally retarded 52.4 per cent of the grand total for the period 1907-63, indicating that the large preponderance of operations on the mentally ill in the early years of American state sterilization did not reverse itself until 1944, when the total for sterilizations of mentally retarded passed the

half-way mark of the cumulative total for the first time. Despite the national trend toward a preponderant use of sterilization laws on the mentally retarded, the mentally [illegible] still outnumber the mentally retarded in the cumulative state totals for Arizona, California (where the figures are 11,785 to 7,542), Connecticut, Georgia (2,531 to 744), Kansas (2,063 to 856), Mississippi (602 to 67), Oklahoma, Virginia, and Washington (under its now defunct eugenic sterilization statute) up to January 1, 1964.

Figures on the number of castrations performed under the various states laws, or even before the advent of state laws (as in Kansas, or in Massachusetts and Pennsylvania, which have never enacted sterilization laws) are difficult to find. The best early source for figures was Laughlin's 1926 compilation of operations performed,[10] but mention is found in other works of rather selective use (with the exception of Kansas, where it was a common practice at one time) and these are discussed in more detail in the individual state sections.

Although the impression given by many writers of American state sterilization is that the major purpose of these laws was to "protect" the sexually delinquent, mentally ill, or mentally retarded female in her fertile years from getting "loose" in society, operations on males predominated until 1930, when the female portion of the cumulative total was better than half (53%) for the first time. From slightly less than 33% of the cumulative total up to 1921, the female portion of the cumulative

grand total has grown to 61% for the period up to January, 1964, the last HBAVS tabulation of annual and cumulative state sterilizations. This is undoubtedly due to the rapid increase of operations on females after the Buck decision and especially during the 1930s. In the most recent period (1960-63), the rate of female operations is running over four out of every five annual operations (in 1960, female operations comprised 78% of the total; in 1961, it rose to 83%; in 1962, it dropped slightly to 79%; and in 1963, the last year tabulated, it rose to a high of 91% of all the operations reported for that year on the basis of 423 out of 467 operations).

Special Reminders to the Reader

In assessing the changes over the years in state sterilization laws and their use, the reader should place special attention on those events that have led to changes in the individual states (court decisions before and after the Buck decision in 1927; the power of state attorney general opinions in California, Iowa, Connecticut, Michigan, Minnesota, Oregon, Vermont, and Wisconsin); and most importantly in recent years, the changes in the personnel and professional philosophy of the administrators clothed with the responsibility for enforcing state sterilization laws (see especially, California, Connecticut, Iowa, Indiana, Kansas, North Carolina, Oregon, Virginia, and Wisconsin). Sensational court cases in California and Kansas are also given special treatment in view of the changes that later occurred in those states.

The first 27 states reviewed are those with laws still on the books including the 26 states with general eugenic sterilization laws and Washington, which still retains an early (1909) punitive sterilization law. These 27 state appraisals will then be followed by a review of states that had laws that were later invalidated in the courts (New Jersey, New York, and Nevada); and states that have sterilized without benefit of law (Illinois, Maryland, Massachusetts, Ohio, and Pennsylvania) or states where sterilization was contemplated. Also included in this section entitled "Others" are Puerto Rico, which repealed its 1937 sterilization law in 1960, and Kansas and North Dakota, which repealed their laws in 1965; and the two Canadian provinces of Alberta and British Columbia, which still have sterilization laws in use.

The statistical summaries that are used at the end of the first 27 states were compiled from many sources. Where the state has supplied its own official figures (as in the case of North Carolina), they are presented in toto. In most cases, the bulk of the figures were supplied in the annual compilations of operations performed under state sterilization laws published in the period from 1928-63, first by the Human Betterment Foundation of Pasadena (1928-42), then Birthright, Inc. (1943-53), which changed its name to the Human Betterment Association of America, Inc. (HBA) and later the Human Betterment Association for Voluntary Sterilization (HBAVS) in 1962 and Association for Voluntary Sterilization (AVS) in 1965.

For the earlier figures, unofficially compiled, this writer has used a series of books, including works by Laughlin, Gosney and Popenoe, Landman, Whitney, and the report of the American Neurological Association.[11] From 1938-63, the figures used are those of HBF and its successors. In some cases, the annual figures reported by HBF, HBAA, and HBAVS do not jibe with the official state figures. This is partly explained by the fact that not all state institutions may have reported their figures, or the state figures may have been compiled on a July 1st to July 1st basis, rather than January to January, or possibly the state may have reported operations that were authorized but not performed in that calendar year. In order to avoid confusion, where there are two sets of figures (the state's own, and the HBF and successors), these have been kept separate rather than interchanged. Even with the discrepancies, the annual compilations from 1928-63 by HBF and successors, and the even earlier compilations of Laughlin are the best and sometimes only sources for an overall picture of American sterilization statistics. Where records and annual statistics are kept on a systematic basis, as in North Carolina, this is a rare exception and hence, the unofficial reporting of the dedicated eugenicists over the years is still an extremely valuable historical source and in many cases the only record of sterilization that is available.

CHAPTER TWO -- FOOTNOTES

1 Utah Code Ann. sec. 64-10-7 (Supp. 1965).

2 Under Georgia law, the State Board of Eugenics is a three man board consiting of the "Director of the Board of Social Security, the Director of the State Board of Health, and the Superintendent of the Milledgeville State Hospital, any two of whom may act as such Board." Georgia Code Anno. sec. 99-1301. In Idaho, a 1950 amendment changed the composition of the State Board of Eugenics to a five man board composed of "five persons who are qualified in either medicine and/or psychiatry, and who shall be appointed by the governor, with the advice and consent of the senate...." Idaho Code, sec. 66-801. However, the State Board of Health Law passed in 1955 dissolved the Board and transferred its responsibilities for adminstering the sterilization law to the Eugenics Section of the State Board of Health. Idaho Code sec. 39-101, par. 15. Technically, Idaho no longer has a State Board of Eugenics, but since she did from 1925-55, she should be included in this discussion. In Iowa, the State Board of Eugenics is the largest of any of the states, consisting of 9 persons, including the medical director of the State Psychopathic Hospital at Iowa City, the Commissioner of Public Health, and the superintendents of 7 state institutions (four mental health institutes, formerly called state hospitals; the institution for mentally retarded children at Glenwood; the hospital for epileptics and

school for mentally retarded at Woodward; and the Women's Reformatory at Rockwell City). Iowa Code sec. 145.1. Montana has a 5 member State Board of Eugenics composed of the chief physician of two custodial institutions, the State Mental Hospital and the State Training School, which treat, train, or care for an "idiot, feeble-minded, insane or epileptic person" as the law defines it; the President of the State Medical Association; a female member named by the State Medical Association; and the Secretary of the State Board of Health, "the last named to be Chairman of the Board." Montana Revised Codes sec. 38.603. The composition of this board is certainly the most unusual in terms of the existence of lay members. North Carolina, which is the nation's leading sterilization state in the years since California's decline in the early 1950s, has a five member Eugenics Board composed of the Commissioner of Public Welfare of North Carolina; the Director of the State Board of Health; the chief medical officer of an institution for the mentally ill or the mentally retarded; the Commissioner of the State of North Carolina Department of Mental Health; and the Attorney General of North Carolina. North Carolina General Statutes sec. 35-40. The State Board of Eugenics in the state of Oregon is composed of the State Board of Health, the Superintendent of the Oregon State Hospital, the Superintendent of the Eastern Oregon State Hospital, the Superintendent of the Portland State Hospital, the Superintendent of the Oregon Fairview Home, the Superintendent of the Oregon State Correctional Institution,

and the Warden of the Oregon State Penitentiary. Oregon Revised Statutes sec. 436.020. Under the Oregon statute, the State Health Officer serves as secretary of the board.

3 Indiana also has provisions for sterilization of those already institutionalized and these cases are handled through the Commissioner of Mental Health, not the courts. The two provisions of the law that deal with commitment proceedings and a possible sterilization order by the Circuit Court are seldom used insofar as current Indiana policy is concerned. See the discussion of Indiana law, infra. In Michigan, the Probate Courts were clearly given the paramount power under their law, but the law has separate provisions for institutionalized and non-institutionalized persons. In both types of cases, a Probate Court order is not necessary if consent as defined by the law can be obtained. The present policy in almost all of Michigan's institutions covered by the law is to obtain a Probate Court order in accordance with the policy established by the state Department of Mental Health, which assumes that patients committed to state institutions are incapable of giving "consent". This is the case even when the initiation for an operation comes from the next of kin or guardian and not the instituion itself.

4 California has two laws in its Penal Code that pertain to sterilization and one of them, sec. 2670, applies to "recidivists who are moral or sexual degenerates or perverts", and calls for their "asexualization." In Utah, the terminology is as follows: "...or person afflicted with

habitual degenerate sexual criminal tendencies..." Sec. 64-10-1. Wisconsin's law, which applies to penal institutions, was applied to mentally deficient female sex delinquents in the 1930s, but there seems to be no further use of the law along these lines. Included in the 10 states is Washington, whose 1909 punitive sterilization law applies to habitual criminals as well as those convicted of rape or carnal abuse of a female under the age of ten.

5 Included in this group was California's second additional penal statute, sec. 645 of the Penal Code which can add sterilization to the penalty for the crime of carnal abuse of a female under ten; and the Utah and Washington statutes mentioned above.

6 Idaho uses the term "degenerate," while Iowa, Michigan and Oregon employ the term "moral degenerate." Oregon includes "incurable syphilitics" while Iowa and South Dakota include "syphilitic." Perhaps the broadest kind of language is used in the Oregon statute, which covers "...all persons who are feeble-minded, insane, epileptic, habitual criminals, incurable syphilitics, moral degenerates or sexual perverts, and who are, or in their opinion will likely become, a menace to society...." Oregon Revised Statutes sec. 436.030. The above-mentioned persons are brought to the attention of the State Board of Eugenics through periodic reports by the State Health Officer and the superintendents of the 8 designated state institutions covered by the statute. In sec. 436.040

of the law, which follows the above-mentioned section, the law reads as follows: "Procedure for examin . of persons convicted of certain crimes. Whenever any person is icted of the crime of rape, incest, sodomy, contributing to the delinquency of a minor by sexual act or act of sexual perversion, or the crime against nature, or any other crime specified in ORS 167.040, or of attempting to commit any of those crimes, the clerk of the court shall forthwith transmit a certified copy of the record of the conviction of such person to the board. The judge before whom such person was convicted may order such person to be examined by the board, and may defer sentence until it is finally determined whether an operation will be performed upon such person." ORS 167.040 refers to the crime of sodomy in the Oregon Code, and includes in addition to the definition of what constitutes sodomy, the crime against nature, and acts or practices of sexual perversity. Thus, under Oregon law, institutional superintendents or the criminal courts can initiate proceedings.

7 The argument most often used in the 1930s was "cost" and many of the sterilizations performed were doubtless not performed for eugenic considerations, but solely to make "room" for other patients, or in the case of females in their child-bearing years, to return them to society without fear of further "charges." Many of the recent proposals for a return to punitive sterilization, especially of women bearing illegitimate children receiving ADC aid, are a throwback to the peak decade of American state sterilization. Another explanation for the spurt in sterilization

in many states in the 1930s can be found in the rather low regard for the civil rights of the downtrodden groups at the bottom of American society then and now. The rights of the mentally disabled, especially those marked for the surgeon's knife, did not merit serious attention in the minds of many Americans, most of whom were probably caught up in their own economic distress and disenchantment.

8 Kansas is an example where the passage of the 1946 federal National Mental Health Act had a direct impact in changing the state's mental health setup and eventually to a complete repudiation of earlier sterilization policies in 1951 and eventual repeal of the law in 1965.

9 Human Sterilization, at 49, citing figures used by Frederick W. Brown in his article, "Eugenic Sterilization in the United States: Its Present Status," 149 The Annals 22 (Part III, May 1930) at 32.

10 Eugenical Sterilization: 1926 at 51-60 gives a breakdown of both male and female castration operations in the states of California, Connecticut, Idaho, Kansas, Michigan, Nebraska, New York, North Dakota, Oregon, and Virginia. Utah and possibly Delaware should also be added to this list. See Delaware note 13, this chapter, infra, for later figures used by Frederick W. Brown in a 1930 article.

11 Harry H. Laughlin, Eugenical Sterilization in the United States (1922) and Eugenical Sterilization: 1926; E. S. Gosney and Paul Popenoe,

Sterilization For Human Betterment (1929); The Human Betterment Foundation, Collected Papers on Eugenic Sterilization in California (1930); J. H. Landman, Human Sterilization (1932); Leon F. Whitney, The Case For Sterilization (1934); and Committee of the American Neurological Association for the Investigation of Eugenical Sterilization, Eugenical Sterilization (1936).

AN ANALYSIS OF THE 27 STATES WITH STERILIZATION LAWS STILL ON THE BOOKS

ALABAMA

The history of Alabama sterilization is somewhat enigmatic, due to the fact that they never actually legislated specifically on the subject of sterilization, and an advisory opinion of the Alabama Supreme Court in 1935 regarding a proposed sterilization law left the subject in doubt.

Sterilization first appeared in Alabama law in 1919 in a law that dealt with the Alabama Home for the Feeble-Minded (referred to in the law as "The Alabama Home"). Section 10 of that law reads:

> The superintendent of the home with the advice and consent of the superintendent of the Alabama Insane Hospitals shall prescribe for the treatment of the inmates of the home and if after consultation the superintendent of the home and superintendent of the Alabama Insane Hospitals deem it advisable they are hereby authorized and empowered to sterilize any inmate.[1]

The law, which contained 24 sections, buried this brief paragraph in detailed analysis of the function of the Alabama Home. In 1923, the law was amended and the sterilization section became Section XIII of a law that contained 23 sections. The wording remained the same, except that the head of the Home was now called "assistant" and "superintendent" referred exclusively to the Superintendent of the Alabama Insane Hospitals. (P. 742, General Acts Alabama 1923).

It was because of the "buried" nature of the sterilization section in Alabama law that the literature on sterilization in America did not even recognize or cite Alabama as one of the sterilizing states until the publication of Collected Papers on Eugenic Sterilization in California (The Human Betterment Foundation, Pasadena, 1930). They included statistics for the country in the introduction to the volume, and Alabama was listed as having had 44 operations up to January 1, 1930.[2] Landman, in his Human Sterilization (NY: Macmillan, 1932) mentioned the 1919 and 1923 provisions, but speaks of them as "laws" (pp. 81-82), thus continuing to confuse the status of sterilization in Alabama.

Perhaps the most thorough writer and reporter on sterilization in the United States, Harry H. Laughlin of the Eugenics Record Office of the Carnegie Institution of America, was also fooled by the failure of Alabama to enact a distinct or separate law on the subject, because in his classic Eugenical Sterilization in the United States (Chicago, 1922), and his supplementary works, Eugenical Sterilization: 1926 (American Eugenics Society, 1926) and The Legal Status of Eugenical Sterilization (Chicago, 1930) he made no mention of Alabama; the 1926 work even says that Alabama has "no legislation" (p. 61). That such an enterprising writer on sterilization with or without statute missed Alabama is one of the curious facts about Alabama law.

To compound the confusion and error in the story of Alabama laws, a recent article on Alabama[3], published in January 1962, says that

"Alabama has no statutory law regarding sterilization, eugenic or voluntary." A letter to the authors of this statement produced no result.[4]

The 1935 Alabama Supreme Court Decision

In an effort to clarify and expand the sterilization program in Alabama, the Legislature proposed and passed a bill in which the sterilization policy of the state would have probably have been as extensive and pervasive as any in the history of the country. This bill called for a program that would have been applied to any person lawfully committed to any hospital for the insane, or institution for mental deficients or feeble-minded; "sexual pervert, Sadist, homosexualist, Masochist, Sodomist, or any other grave form of sexual perversion, or any prisoner who has twice been convicted of rape," any convict who has been previously committed to prison three times or more (habitual criminals), or any recidivist; inmates of any reform school, industrial school, training school, or reformatory, or any institution for delinquents or dependents; persons dependent on public relief or support or charity. Other than adminstrative appeal, no provisions were contained for appeal to the courts of the state. The governor, Bibb Graves, asked the court for an advisory opinion on the constitutionality of the bill.

The Court replied on June 18, 1935, clearly holding the act unconstitutional, particularly because -

> We think that the sterilization of a person is such an

> injury to the person as is contemplated by the quoted provision -- just as much so as to deprive him of any other faculty, sense, or limb -- and that due process of law means that this cannot be done without a hearing on notice before a duly constituted tribunal or board, and, if this is not a court, then with the untrammeled right of appeal to a court for a judicial review from the finding of the board or commission adjudging him a fit subject for sterilization....[5]

The governor vetoed the bill, but unfortunately, the decision did not cast light on the 1919, 1923, or present status of the sterilization section mentioned in the beginning of this discussion. Many writers, such as O'Hara, Sanks and Clarke, regard the present provision as inoperative due to the impact of the 1935 decision.[6]

In 1951, a Report of the Special Joint Legislative Committee Investigating the Alabama Hospitals, erroneously reported that the 1952 Human Betterment Newsletter said that 224 sterilizations had been performed up to 1950 under provisions of the existing law. This Report is confusing, for while it is true that 224 operations had been performed before 1950, none had been done since the court decision of 1935. The Report thought the 224 operations had violated the decision of the Court, and therefore said that -

> ...The Committee cannot erase the damage already done, but

> the Committee does recommend strongly that the Legislature repeal this provision in the law and that the superintendent of the hospitals be instructed not to perform such an operation on any additional patients or inmates pending the repeal of the law. The Committee was unable to obtain the number of patients who had been sterilized from 1950 to the present date.[7]

Believing that this report, while somewhat confused about the affect of the 1935 decision, raised serious questions about the constitutionality of existing Alabama law,[8] I initiated correspondence with Dr. J. S. Tarwater, Superintendent of the Alabama State Hospitals and the Partlow State School, who could clearly substantiate the claim that no operations have been performed since 1935, and that the figure of 224 operations is for the period 1919-1935.[9]

But this question still remains: why did the Special Report's proposal that the present paragraph be repealed go unnoticed? A letter to the Attorney General of Alabama raised this question and also inquired about the alleged relation of the 1935 court decision to the 1919 (1923) sterilization provision that was not before the Court in 1935. His answer was that -

> ...in view of the decision in 1935 by the Alabama Supreme Court, In re Opinion of the Justices, 230 Ala. 543, 162 So. 123, which held as unconstitutional a proposed Act

> on the subject of sterilization, which was similar to the statute in question, the conclusion is obvious.[10]

There is no doubt in this writer's mind that the present provision of Alabama law dealing with sterilization is about as vague as any in this country or Canada. No standards or categories are mentioned. No procedural provisions, let alone safeguards, are mentioned. And lastly - and as the 1935 decision stressed in its discussion of pending legislation - there are no means for appeal (administrative or judicial).[11]

While Dr. Tarwater's assurances are encouraging, there is much in the history of eugenic sterilization in America to indicate that a change in administration might turn the tide, although it would seem that nearly 30 years of dormancy would not be overturned. The recommendation that the provision be repealed is, in the light of American experience, a wise one. The concluding paragraph of the 1935 advisory opinion made it abundantly clear that sterilization is not against state policy:

> 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, or that, when such status is legally ascertained, sterilization will not amount to such cruel and unjust punishment as is prohibited by the Constitution.[12]

In effect, if Alabama wanted to retain sterilization, they could

have expanded existing law to provide for proper legal safeguards and means of judicial review and appeal. This was not done, but this should certainly not deter present authorities, including the state Legislature, from wiping the slate clean. It seems fair to say that the failure to do so is a direct repudiation of the meaning and spirit of the 1935 opinion and a kind of legal mockery. While no Alabamans have suffered from the continued existence of the sterilization provision on the books (assuming no illegal operations in Alabama institutions since 1935), the constitutional questions would be much clearer if the Legislature would act, even if nearly 30 years too late.[13]

ALABAMA STATISTICS

	Totals[1]	
Up to January 1, 1930 (1919-1930)[2]	44	(32 M; 12 F)
Up to January 1, 1932[3]	76	(47 M; 29 F)
Up to January 1, 1933[4]	131	
Up to January 1, 1935[5]	210	(124 M; 86 F)
1919-1935 (time of Court decision 6/18/35)[6]. . . .	224	(129 M; 95 F)

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1 These figures represent cumulative totals from the law's inception (1919) to the date mentioned. Annual figures were not available. The period from Jan. 1, 1932 to Jan. 1, 1933 would be 55; the figure for the year of 1935 would be 14.

2 Human Betterment Foundation (Pasadena), Collected Papers on Eugenic Sterilization in California (introduction).

3 J. H. Landman, Human Sterilization 289.

4 Leon F. Whitney, The Case For Sterilization 302.

5 American Neurological Association (report), Eugenical Sterilization 8.

6 Figure reported in annual statistical summaries of the Human Betterment Foundation; Dr. J. S. Tarwater, and throughout the literature. The average number of annual operations in Alabama for the period 1919-35 would be 14 operations per year.

ALABAMA -- FOOTNOTES

1 General Acts Alabama, 1919, at 1026.

2 On a mimeographed sheet entitled Sterilization Laws - July 1, 1931 found in an old copy of this book, this writer found this comment on Alabama: "Alabama, 1923. This was was but recently 'discovered.'"

3 Harwell G. Davis, Jr. and James L. Shelton, "Alabama Law on Sterilization of Reproductive Function," 23 Ala. Lawyer 71, 78 (1962). The two gentlemen are doctors and may be embarrassed by their faulty legal knowledge on the subject. The classic report of the American Neurological Association on eugenical sterilization, published in 1936 under the title Eugenical Sterilization; A Reorientation of the Problem, discusses sterilization in Alabama and reported 210 operations up to January, 1935. (p. 8) That two medical men would ignore the classic American medical report on the subject is strange to this writer. Also, see the comment by John W. Gillon, 52 A.B.A.J. 116 (1966) regarding Alabama sterilization law.

4 And to compound the confusion, Ralph J. Gampell in a recent article, "Legal Status of Therapeutic Abortion and Sterilization in the United States," wrote that "....Alabama, at the other extreme, requires notice, hearing, and right of appeal as essential elements of procedural due process...." 7 Clinical Obstet. & Gyn. 22, 29-30 (1964). Perhaps the author got confused as to what "extreme" Alabama was at, but this goes to show that lawyers, as well as physicians, are in the dark about the actual status of the Alabama law.

5 In re Opinion of the Justices, 230 Ala. 543, 547, 162 So. 123, 128 (1935). The Court further said that the lack of these procedural protections distinguished the Alabama proposal from the Virginia law upheld by the U.S. Supreme Court in the Buck v. Bell case in 1927. Walter Berns, in his Buck v. Bell: The Sterilization Decision and Its Effect on Public Policy (Unpublished Master's Thesis, Univ. of Chicago Library, 1951) found the Alabama proposal about as "non-eugenical" in its inclusion of sadists, masochists and homosexuals, among others, as one could ever find in a sterilization proposal or law. (at 76).

6 James B. Hara and T. Howland Sanks, "Eugenic Sterilization," 45 Georgetown L. J. 20, 34-35 (1956); Helen I. Clarke, Social Legislation (1957) at 201 n. 30; the annual publication of the Human Betterment Association of America, "Sterilizations Reported in the United States," which as far back as their 1945 issue reported that "the Alabama law was found to be unconstitutional." They altered this in their 1951 report to say that the 1919 law is completely inoperative due to the 1935 decision, which is more accurate than their earlier interpretation.

7 At 9-10. While the battle over numbers and constitutionality is very murky indeed, the Committee is not entirely without a basis for some of its charges. After citing the 1935 advisory opinion and the denial of basic procedural rights (especially judicial review) under present Alabama law, they said: "Since the statute on the books at the present

9 Dr. Tarwater wrote: "The Legislature did not pass the bill over the Governor's veto; and since provisions provided for in Title 45 - Section 243 did not include right of appeal, I think the hospital personnel has rightly concluded that it cannot be operative." He also said that the information in the 1951 special report was incorrect. (Private correspondence to the author, Sept. 11, 1961). In an earlier letter (dated Oct. 17, 1960), Dr. Tarwater said that "no sterilizations on the mental deficients have been done in the State School for mentally retarded since 1935...."

10 Letter from Attorney General Ricmond M. Flowers, dated August 20, 1963.

11 The law examined by the Court in 1935 did have administrative appeal. In fact, in the sections (3 and 4) dealing with habitual criminals, recidivists, and those convicted of certain sexual offenses, the final authority was an order from the Governor. Interestingly enough, criminals in the law seemed to have a more distinctive route of appeal, although not to the courts.

12 Supra n. 5, ibid.

13 The Special Report mentions on page 9: "The Committee was astounded by the revelation that the laws of Alabama as now constituted in the 1940 Code of Alabama in Title 45, Section 243, authorizes the assistant superintendent, with the advice and consent of the superintendent, to sterilize any inmate." That this "revelation" is based on some half-truths should

not blur the fact that the law should be clear, fair, and precise. Sterilization is much too important a subject of human rights to be left to false accusation, and yet without reports such as this one, it might never become public knowledge that Alabama has failed to make its sterilization policy clear to the people of the state. Reports such as this one force the issue into the open and make it clear that the law courts are only part of the process of social policy and social control. Here was a state supreme court doing its proper job and perhaps doing it well, but nevertheless by the very limitations of its authority in this case, unable to really clarify existing Alabama law and policy. Perhaps the Governor, Attorney General, and the Superintendent of the Alabama Insane Hospitals - together with the Legislature - all failed to follow up the court's indictment of sterilization laws that deny fundamental due process of law.

ARIZONA

Arizona's law, passed in 1929, is detailed and fairly extensive in its coverage ("afflicted with hereditary forms of insanity that are recurrent, idiocy, imbecility, feeble-mindedness, or epilepsy ***** and by the laws of heredity is the probable potential parent of socially inadequate offspring likewise afflicted"), but enforcement has been sparing. Only 30 persons have been sterilized during the entire history of the law, 10 of these since 1941. No sterilizations have been reported since 1956, when 8 took place. Although compulsory in character, and with detailed procedures for the right of appeal all the way to the state Supreme Court, enforcement has been kept to a minimum. Efforts to ascertain the reason for this situation were not successful. Since petitions for sterilization must be initiated by the Superintendent (now called Director) of the Arizona State Hospital, it might be inferred that the policy of these officials over the years has been one of "hands off." Except for the year 1956, when there was a brief revival of the law, the history of compulsory state sterilization in Arizona has been largely one of dormancy.

It is noteworthy that Section 6 (now 36-540 of the Arizona Revised Statutes Annotated) makes voluntary sterilization permissible for "sound therapeutic reasons" and "which treatment may incidentally involve the nullification or destruction of the reproductive functions." Therapeutic,

as defined by the above passages, would probably not mean sterilization for contraceptive purposes or socio-economic reasons. This is merely an example of one law that exempts doctors and surgeons from potential liability for incidental or even necessary destruction of the reproductive functions where strong medical reasons are present.

The latest edition of the Arizona Revised Statutes Annotated states that the 1929 law was patterned after that of Virginia, which won the Buck case in the United States Supreme Court in 1927. The Mississippi law (1928) and Oklahoma law (1931) also bear close resemblance to that of Virginia, and these three laws (Arizona, Mississippi, Oklahoma) may have been directly influenced by Virginia's triumph, the only victory for eugenic sterilization in the highest court of the land.

In their 1935 report on sterilization, the American Neurological Association, after noting the figure of 20 operations in six years of the statute's history, said that "Obviously, this law is a dead letter." While this was not completely true, it comes close to describing the present state of sterilization in Arizona.

ARIZONA STATISTICS

TOTAL Up to January 1, 1930[1].....0

Up to January 1, 1932[2].....0

Up to January 1, 1933[3].....20

Up to January 1, 1935[4].....20 (10 M; 10 F)

Up to January 1, 1941[5].....20

Operations performed in -

1942		0
1943		0
1944		0
1945		0
1946		0
1947		0
1948		0
1949	.....	1
1950		0
1951		0
1952		0
1953		0
1954		0
1955	.....	1
1956	.....	8
1957		0
1958		0
1959		0
1960-64		0
CUMULATIVE TOTAL	(1929-64)	30 (10 M; 20 F)

1 Human Betterment Foundation, Collected Papers (introduction).

2 Landman, Human Sterilization 92.

3 Whitney, The Case For Sterilization 302.

4 American Neurological Association, Eugenical Sterilization 8.

5 Figures for 1941-1963 were compiled in the various annual reports of the Human Betterment Foundation, later called Birthright, Inc., and currently called the Association for Voluntary Sterilization, Inc. with national headquarters in New York City.

CONNECTICUT

> ...and if, in the judgment of a majority of such board, procreation by any such person would produce children with an inherited tendency to crime, mental illness or mental deficiency and there is no probability that the condition of any such person so examined will improve to such an extent as to render procreation by any such person advisable, or if the physical or mental condition of any such person will be substantially improved thereby, then....

This is an excerpt from the current language of one of America's oldest and shortest sterilization laws, the 1909 Connecticut sterilization statute. Despite the duration of so many years, Connecticut ranks as a declining state in its present use of the sterilization act. Up until 1963, Connecticut had performed 554 operations under the law, but in the years 1941-63, only 136 operations of that total had been performed. Before discussing the present sterilization policy of the state, it might be well to look at its earlier history.

The 1909 law, which covers prisons, state mental hospitals, and training schools after 1919, was scarcely used in the early years. From 1909-21, only 27 operations were reported, whereas in 1921-30, there were 173 operations, and in the period of the 1930s (1930-41), 218 operations were reported.

In his discussion of Connecticut sterilization, Laughlin regarded the state's policy as conservative. Despite an opinion of the state attorney general, dated December 9, 1912, declaring the law constitutional,[1] the warden of the state prison at Wethersfield, regarded the statute as unconstitutional.[2] In spite of the warden's trepidation and the belief of the Superintendent of the Connecticut State Hospital for the Insane (Middletown) that there was strong antipathy against the law, enforcement in the 1920s and 1930s mounted. As in other states, the individual policies of officials in particular institutions may explain the fluctuations in the operation of the law. The Superintendent at Middletown wrote in 1918:

> ...As the results of such laws appear problematical, it has never been taken advantage of in this institution. As to the medical value of the statute, I have had no personal experience, but am skeptical except in exceptional cases. Its eugenical value is limited. Such laws fail to take into account the large number of individuals capable of transmitting neurotic and psychoneurotic traits without themselves showing such manifestations.[3]

The Connecticut statute is much shorter and less detailed than most other laws of this kind. It contains no provisions for appeal from the decision of the sterilization board of the particular institution involved. In this sense it appears to have the deficiency mentioned

in the 1935 decision of the Alabama Supreme Court, but Connecticut authorities were perhaps sensitive to the possibility of a court test. Although the law never required parental or any other kind of consent for operations, two institutions reported as early as 1918 and 1921 that they required the consent of the nearest relative before they would enforce such an order.[4]

Figures do not speak for themselves, but it might be inferred from the high increase in operations in the period 1920-40 that institutional policy changed with the turnover in officials and the policy of getting consent from the nearest relative may have been less rigorously applied. At the present time, the policy of the Southbury Training School, an institution for the mentally retarded, is to get the permission of the parents or guardian before an operation is performed.[5] There has also been a definite improvement in the consultation required before sterilization is recommended, with medical and social service personnel carefully screening the cases.[6] While it is observed that the law provides no means for judicial review or appeal, present policy is to procede slowly and with consent of those concerned. In fact, Deputy Commissioner of Health Schmickel reports that many requests from parents of children in the Southbury Training School for sterilization are refused because the children do not fall into the category of familial mental retardation.

Despite the apparent care and increased medical expertise in the

operation of Connecticut's sterilization law, it still remains a law without any judicial or procedural safeguards.[7] It would be an easy thing to amend the present law to include rudimentary procedural safeguards without seriously upsetting the medical policies of the various institutions affected by the law. Of course, the religious question might loom large, and present officials might prefer to use their consent procedures in lieu of extensive statutory change (or even outright repeal of the law) for fear of opening up the Pandora's Box of the past. This has been the case in other states and it may be true in Connecticut.

Recent Developments

In April, 1965, Connecticut once again found itself in the nation's press, but this time it was not over birth control litigation, which was pending in the United States Supreme Court at that time. It was the old sterilization law, and all hell seemed to have broken loose. This story, which was pieced together from various newspaper accounts and from personal correspondence with state Representative Katharine A. Evarts of Kent, was a rather complicated one involving administrative and legislative forces.

Although the 1909 law includes the mentally ill and the mentally deficient, administration is divided between the departments of Health and Mental Health. The Department of Health handles the mentally retarded through its Office of Mental Retardation, whereas the Department of Mental Health has jurisdiction over the mental hospitals housing the mentally ill.

The present furor began rather innocuously when the Department of Mental Health asked Rep. Evarts to sponsor a bill that would have amended the law so that "tubal surgery" (salpingectomy) could be performed on females instead of an oöphorectomy (removal of the ovaries) which is now required by the law.[8] Rep. Evarts was not familiar with the law, but some researching by a member of the Associated Press, George Bazan brought out the legislative intent in 1909 and the law's original purpose, which was eugenic rather than social, and which was no longer considered valid.[9] After studying the law and its history, Rep. Evarts decided the entire law was expendable and introduced a bill to repeal it entirely, with the support of Commissioner of Mental Health, Dr. Wilfred Bloomberg, who apparently felt more dissatisfaction with the law than he had before.

At this point, the picture was clouded when the Department of Health entered the picture with its Commissioner, Dr. Franklin Foote, arguing that the law was important to the work of his department because it enabled the release of mentally retarded patients who might have to be continually confined. Outright repeal of the law would work a hardship on these patients.

Thus, what appeared to be a simple amendment of the law led to a call for a complete re-examination of its history and purpose, with two departments of the state's government at opposite poles of the question of retention of the law. In addition, Rep. J. McCullough Turner, House Chairman of the General Assembly's Committee on Public

Health and Safety that reviewed the law, defended the principle of sterilization under state law but nonetheless found fault with some of the "details" of the Connecticut law.

With the General Assembly swamped with work due to reapportionment, the chances of a careful and detailed examination of the law at another session seemed likely, but when Commissioner Foote brought up the needs of his department, it was felt that a thorough revision of the law should be passed in that session, if possible.

Subsequently, a compromise substitute bill came before the Legislature which included, among other things, the requirement of consent for the operation,[10] and the substitution of the words "tubal surgery" for the existing "oophorectomy." The bill passed both houses and was signed into law by the governor on July 1, 1965.[11] Public Act No. 536, "An Act to Modify the Statute Concerning Operations to Prevent Procreation," which was a substitute for House Bill No. 3028, makes a distinction in its consent provision between persons who are considered "competent" to make such a decision (to be sterilized) and those who are considered "incompetent" by the examining board under the law. There is an important difference, however, because the written consent of a "competent" person is not enough, but must be accompanied by the written consent of "the responsible next of kin or guardian of such persons or, if there is none, with the approval of the board of trustees of the institution." Where the person is considered "incompetent" by the board, the law requires the written consent of the "next of kin

or guardian of such person or, if there is none, with the approval of the board of trustees of the institution." Why the so-called "incompetent" requires a lesser standard of just one written consent is not clear from the content of the law.[12] It is also unclear as to why the legislature chose to require the written consent of the "responsible" next of kin or guardian in the case of a person judged competent to consent to a sterilization operation, but dropped the word "responsible" where a person judged "incompetent" to decide such a decision was concerned. This seems like a reversal in form and highly illogical, since the so-called "incompetent" person should not be railroaded to the operating table by irresponsible (whatever that means) next of kin or guardians who presumably know his own "best" interest.

Conclusions

In the Report of the American Neurological Association on eugenical sterilization in 1935, the situation in Connecticut was described thus:

> The average number sterilized each year is about 15, which does not indicate that the compulsion is utilized in anything like full power, and so the law is practically non-operative.[13]

Contrasted with Indiana (1907) and California (1909), early states in the sterilization movement, Connecticut's application of sterilization law has indeed been modest. Three possible explanations might help to explain this difference in Connecticut practice: the opposition

or threat of opposition from religious groups;[14] fear of court test, since the law as pointed out earlier in this discussion was seriously deficient in its failure to provide procedural safeguards and appeal to the ordinary state courts; and, as shown in the more recent explanations of state sterilization policy, the attitudes of those in charge of the individual institutions.[15]

Contrary to Havelock Ellis' belief that the cumbersomeness of American sterilization laws would probably limit their application, Connecticut history flies in the face of that statement. Here the law was brief, short, and without detail, ripe for judicial testing, but no litigation has taken place in the 56 years of the law's history, and despite purported religious opposition to the law in the early years, there seems to be little if any interest at the present time in judicially raising the question of the law's legality. By almost any standard, Connecticut sterilization history is strange and atypical.

While nationally, the figures for state sterilizations of the mentally deficient (now termed retarded) outnumbers those classified as mentally ill (33,374 to 27,917 through December 31, 1963),[16] out of a total of 557 operations performed in Connecticut since 1909, 414 were on the mentally ill and 143 on the mentally deficient. Connecticut figures also indicate a high proportion of female operations (511 out of the 557 total). However, the recent history of the Southbury Training School would clearly indicate that the emphasis of past enforcement of the law is no longer followed insofar as the mentally

ill are concerned.[17]

Although the present Connecticut policy is careful, selective, and appears to place a heavy emphasis on parental consent, this author can only hope that current administration of Connecticut sterilization policy will continue in the hands of those persons who have a high regard for the rights of the patient, but better yet, the Legislature should draft a law that contains all of the necessary procedural safeguards, including notice, hearing, and the right to appeal, particularly where the person adjudged "incompetent" to consent is concerned. The difficulty with a law that now embodies consent is that there is always the taint of duress, of a quid pro quo (release at the price of sterilization). If Connecticut, after 56 years of experience with a law that is grossly deficient in many respects, cannot come up with a reasonable substitute in the light of what the Department of Health considers "necessary" at this time, and fundamental due process of law, then perhaps outright repeal is the answer.[18] With an average of three operations a year from 1950-64, the state of Connecticut can surely find a satisfactory solution to the medico-legal problems involved in a state program of very selective sterilization.

SOUTHBURY TRAINING SCHOOL

RECORD OF STERILIZATIONS PERFORMED

Year	Male	Female	Total
1946	0	1	1
1947	0	5	5
1948	0	8	8
1949	0	10	10
1950	0	1	1
1951	0	3	3
1952	1	3	4
1953	0	5	5
1954	1	1	2
1955	0	1	1
1956	2	5	7
1957	1	1	2
1958	0	2	2
1959	0	1	1
1960	0	1	1
GRAND TOTALS	5	48	53 *

*(For the years 1961 through 1965, there were 7 operations, but not broken down according to sex, 4 in 1962, and 3 operations in 1963, so that the grand total for the years 1946-65 would be 60 operations.)

CONNECTICUT STATISTICS

	Cumulative Total of		
Up to January 1, 1921[1] (1909-21).....	27	(5M	22F)
Up to July 1, 1925[2].....	93	(6M	87F)
Up to January 1, 1928[3].....	158	(8M	150F)
Up to January 1, 1930[4].....	200	(7M	193F)
Up to January 1, 1932[5].....	158		
Up to January 1, 1933[6].....	338		
Up to January 1, 1935[7].....	391	(19M	372F)
Up to January 1, 1938[8].....	400	(23M	377F)
Up to January 1, 1941.....	418	(25M	393F)
Up to January 1, 1942.....	426	(27M	399F)
Up to January 1, 1944[9].....	488	(31M	457F)

1 Laughlin, Eugenical Sterilization in the United States 61.

2 Laughlin, Eugenical Sterilization: 1926 at 60.

3 Gosney & Popenoe, Sterilization for Human Betterment 184.

4 Human Betterment Foundation, Collected Papers (introduction).

5 Landman, Human Sterilization 289. This is probably an error, but Whitney quotes the same figure for 1932.

6 Whitney, The Case For Sterilization 302.

7 Report, American Neurological Association, Eugenical Sterilization 10.

8 Human Betterment Foundation (Pasadena); also responsible for subsequent entries.

9 Birthright, Inc. (Princeton, New Jersey)

Sterilizations reported for the year -

1943.....31	1955.....3
1944..... 2	1956.....7
1945..... 1	1957.....2
1946..... 0	1958.....2
1947..... 6	1959.....1
1948..... 8	1960.....2
1949.....10	1961.....0
1950..... 2	1962.....5
1951..... 3	1963.....3
1952..... 5	557 - HBA GRAND TOTAL (1909-64) (46M, 511F)
1953..... 5	
1954..... 2	

CONNECTICUT -- FOOTNOTES

1 Text of AG opinion entitled "The Act Authorizing Operations for the Prevention of Procreation is Constitutional," dated December 9, 1912. After reviewing the other state laws and court decisions in America, Attorney General John H. Light said: "There are no individual rights under the Constitution superior to the common welfare. The whole of society is greater than any of its parts. No man is permitted to claim the right to beget children with an inherited tendency to crime, insanity, feeble-mindedness, idiocy, or imbecility." This sounds remotely like Holmes' argument in Buck v. Bell (1927). Reprinted in Laughlin, ES in US (pp. 328-333) at 333. In an earlier opinion, dated January 8, 1912, and sent to Dean Henry Wade Rogers of the Law Department of Yale, Attorney General Light in answering the equal protection argument of the Fourteenth Amendment, wrote: "I think that the inmates of the State Prison and the Insane Hospitals at Middletown and Norwish are essentially in a class by themselves, and the State necessarily assumes a different relationship to them than to any other classification of a part of our people." Ibid. at 334. Apparently, the chief law officer of the state saw no good reason for allowing this "different" class of persons the elementary rights of due process of law, such as the right to object or to appeal to a court of law. The preceding Attorney General, Marcus H. Holcomb, issued an opinion on May 26, 1910 refusing to pass on the validity of the 1909

law on the grounds that it was the duty of the Judicial Department of the government to make this kind of determination. These three opinions are officially cited as 6 Op. Atty. Gen. 149 (May 26, 1910); 7 id. 240 (Dec. 9, 1912); and 7 id. 248 (January 8, 1912).

2 Letter dated Feb. 1918 quoted in Laughlin, ES in the US, at 61.

3 Letter quoted in Laughlin, op. cit. at page 62.

4 Letters quoted in Laughlin, ibid.

5 Correspondence to author, dated October 6, 1960 from Deputy Commissioner of Health Bert W. Schmickel. He adds the interesting comment that in the institutions for the retarded "sterilization procedure is not practiced for eugenic purposes but rather for assistance in social adjustment and to obviate the need for permanent institutionalization." This may account for the sharp decrease in the number of operations. Of 58 reported sterilizations in 1946-61, 52 were in the Southbury Training School.

6 Deputy Commissioner Schmickel described the procedure at Southbury in which the institution's Children's Committee, Medical Committee, and Social Service committee are all consulted, in addition to the examination by two outside physicians. And lastly, a written operative permit is obtained from the parents or guardian.

7 Perhaps fearing the potential dangers of sterilization laws, the legislature included a second section in the 1909 law making it a felony to perform an operation for sterilization (other than in the 1909 law) except for medical necessity.

8 Connecticut is the only state in the nation with a sterilization law that requires the more extreme female operation of oophorectomy, (This was amended in 1965 and now reads "tubal surgery"). or female castration. / Even though there have been far more operations on the mentally ill than the mentally retarded under Connecticut law, emphasis in recent years has been on the sterilization of the mentally retarded. One newspaper account said that six mentally ill patients at the Connecticut Valley Hospital had been sterilized in the last 10 years, four of them with the consent of the patient or her family. Ann Arbor (Mich.) News, April 2, 1965, at 26. In correspondence with the Department of Mental Health, this writer was unable to obtain any information regarding its present policies or statistics on the sterilization of the mentally ill in Connecticut institutions. It may be that the Department of Mental Health, even though performing few operations on the mentally ill, might have felt that where sterilization was called for, a less stringent operative procedure was needed and the law did not provide this. Another intriguing element in the story is that the Department of Health in its application of the statute to the mentally retarded has used a fallopian tube ligation (salpingectomy), according to a personal communication to this writer from Deputy

Commissioner of Health Bert W. Schmickel, dated October 6, 1960. Why this discrepancy in the type of female operations employed by the two different state departments existed is beyond the knowledge of this writer. And to further confuse the situation, Laughlin in Eugenical Sterilization: 1926 at 51 reports that up to July 1, 1925, out of 93 reported operations, 75 were salpingectomies and only 12 were ovariotomies (using his terminology, not that of the statute) and 70 of the salpingectomies were performed at the Norwich State Hospital, an institution for the mentally ill. A visit to Hartford in November, 1965 led to the disclosure that the Department of Mental Health was using tubal ligations in the operations performed at the Connecticut Valley Hospital.

9 A New York Times article on the new fight mentioned a proponent of the legislation in the General Assembly of 1909 who was "appalled by the great number of epileptics and mentally deficient persons" and who argued "that these persons should not be allowed to produce children who would be wards of the state." The bill passed the House 130-28 and the Senate unanimously. Fred P. Graham, "New Fight Grows on Sterilization," New York Times, April 4, 1965 at 78. The usually punctilious Times in this same article erroneously defined an oophorectomy as removal of the uterus, instead of the ovaries.

10 Actually, according to Deputy Commissioner Schmickel, the practice in his department is to use consent in the form of a written operative permit from the parents or guardian, even though the law does not require it. Supra note 6. The 1965 revision of the law now incorporates this policy.

11 Rep. Turner, in a letter to this writer dated July 13, 1965, wrote: "For some reason, and even though this had been a Statute on our books for some years, certain Legislators raised a fuss over the permission aspect." The "permission aspect," as he puts it, goes to the heart of due process of law, but this rather shallow view of its importance is not entirely new in the long legislative history of state sterilization laws in America.

12 As used in this law, the word "board" refers to the examining board for sterilization purposes, which is chosen as follows: "...The directors of the State Prison and the superintendents of the state hospitals for mental illness, the superintendent of the Mansfield State Training School and Hospital and the superintendent of The Southbury Training School are authorized and directed to appoint for each of said institutions two skilled surgeons, who, in conjunction with the physician or surgeon in charge at each of said institutions, shall constitute a board the duty of which shall be to examine such inmates or patients of said institutions as are reported to them, by the warden or superintendent or the physician or surgeon in charge, to be persons by whom procreation would be inadvisable." It is this board, not the board of trustees of the institution, which decides the competency of the person in question.

13 Eugenical Sterilization 11.

14 In a letter quoted in Laughlin, op. cit. n. 2 supra, the Superintendent of the Connecticut State Hospital for the Insane at Middletown wrote: "Local public opinion is adverse to eugenical sterilization. In a large part this adversion seems to be of religious origin, thus the present statute is in advance of public opinion." (at p. 62)

15 An example of this in the earlier period is shown in Laughlin, Eugenical Sterilization in the United States, where he reports that all 27 operations performed from 1909 to January 1, 1921 were at the State Hospital at Norwich. (page 61). In Eugenical Sterilization: 1926, his later study, he says that 88 out of the 93 operations reported up to July 1, 1925 were at Norwich, despite the fact that 4 state institutions (the state prison, two hospitals, and a training school) were included in the act. Current policy seems to indicate that Norwich is no longer in the sterilization picture.

16 Annual compilation of sterilizations performed, Human Betterment Association, issued Feb. 1964.

17 Attempts at obtaining information from the medical superintendent of the Norwich State Hospital (one of the state's older institutions for the mentally ill) failed to produce any data. In the case of the Mansfield State Training School and Hospital which serves the mentally retarded, it was learned that its former superintendent, the famed Dr. Neil A. Dayton, was said to have consented to only one operation

on a mentally retarded woman in 22 years at that institution. (Letter from Charles P. Fonda, Ph.D., director of Psychological Services at the Hospital, dated Nov. 23, 1964. It should be noted that in an earlier communication dated Oct. 6, 1960 from Deputy Commissioner Schmickel, he mentioned the fact that he had contacted Dr. Dayton and had learned that no sterilizations had been performed at Mansfield when he was there). Notwithstanding this minute discrepancy in information, Dr. Dayton was unalterably opposed to the use of sterilization on professional grounds. His famous studies of the mortality of the mentally deficient and the mentally ill were instrumental in helping to debunk the myth that America would be "deluged" by the mentally defective whose fecundity was believed to be unlimited.

18 Even with the new consent provision, the case of the "incompetent" person is an example of the dangers involved. If such a person is without either next of kin or a guardian, the board of trustees of the institution can give written consent in his behalf. But is this "consent" or is this really a disguised form of compulsion by state authorities? It would behoove Connecticut legislators and health administrators alike to give the law the needed careful and complete reappraisal that the last session of the General Assembly was unable to find time for. Adding a few words here and there, even though they have a decidedly salutary purpose, is not enough attention for a law that has lasted 56 years and covered over 557 sterilizations at state

behest. Connecticut has now joined the two other states, Minnesota and Vermont, that have state laws calling for sterilization on a voluntary basis only. Under Minnesota law, sterilization of the mentally retarded requires the written consent of the spouse or nearest kin and if no spouse or near relative can be found, the Commissioner of Public Welfare, as legal guardian of the person, can give consent. In the case of the insane, the written consent of the patient and of the spouse or nearest kin, or duly appointed guardian, is required. In Vermont, if the person is of "sufficient intelligence" to understand the nature and effects of the operation, they can make a written request for sterilization; if not of "sufficient intelligence" to understand the nature and effects of the operation, the natural or legal guardian can make a written request on behalf of the person involved. In either case, the law adds a crucial requirement: "Such person voluntarily submits to such operation." And the state's attorney general, in a 1931 opinion, said that a person can change their mind at <u>any</u> time, even on the operating table. In law, as well as in spirit, this is a far more viable definition of consent (of volition) than is contained in the revised Connecticut law of 1965, which still retains much of the anachronistic language of the original 1909 law (<u>e.g.</u>, "...with an inherited tendency to crime....") Discussions with the commissioners of both the Departments of Health and Mental Health in November 1965 led this writer to the conclusion that the sterilization furor was something of a fortuitous "accident," and that the likelihood of further changes in the law is remote indeed. And with consent procedures written clearly into the new law, adverse litigation would also appear unlikely. "Business as usual" would appear to be the case.

DELAWARE

Delaware law goes back to 1923, and after a slow start (5 operations in the first two years) application of the law picked up considerably in the late 1920s and 1930s. Like Connecticut and Alabama, Delaware did not provide for judicial review of sterilization orders and this remains the situation today. The law, which is both compulsory and extramural in its coverage, consists of an application from the superintendent of a state institution to the Department of Public Welfare, which appoints an examining commission (consisting of the superintendent of the institution, one physician and one alienist).[1] Should the commission unanimously determine that sterilization is necessary, they will request the Department of Public Welfare to so order. According to the present Director of that agency, approval is usual.[2]

Although the law provides that the institution that is going to perform the operation "shall give at least 30 days' notice in writing to the husband or wife, parent or guardian, if the same are known and can be located, and if unknown, to the person with whom such inmate last resided if such person can be located,"[3] there seems to be confusion in Delaware at the present time as to the necessity or even the existence of this kind of notice.

Correspondence with the Director of the state Department of Public Welfare, the Attorney General, and the Superintendent of the

major institution involved in sterilization, the Delaware State Hospital at Farnhurst, produced an interesting story of present Delaware sterilization law and practice. Mr. Edgar Hare, Jr., Director of the Department of Public Welfare, reported that:

> ...The law provides that the institution that is going to perform the operation shall inform the next of kin and used to provide that the next of kin could object. However, the provision for objection has been removed from the law and there is no stated process for any kind of an appeal. As a matter of fact, this question has just been raised by the mother of a person whose sterilization has been approved and the Attorney General, the Superintendent of the Hospital for the Mentally Retarded and I are kicking it around. At this point, I don't know how it will come out.[4]

The odd thing about this discussion is that Mr. Hare was not alone in believing that the objection provision had been "dropped from the law." Doctor Charles K. Bush, the Superintendent of the Delaware State Hospital at Farnhurst twice requested clarification from the state Attorney General and received this in opinions dated June 15 and September 25, 1962. In the first, Attorney General Januar D. Gove through the Deputy Attorney General Warren B. Burt wrote that:

> We note that no such provision appears in the chapter as re-enacted in Code of 1953 nor in the current supplement to the code....The statute does provide

> for 30 days' notice. For the purpose of this opinion, we assume that there has been such an amendment; even without an express provision for objection, if one were filed by a parent the same question would arise and it might be argued that since notice must be given to parents, they impliedly may make an objection to the Department of Welfare.[5]

But Mr. Burt clearly cautioned that "The objection of an interested relative should not operate as an absolute bar to the procedure" [an operation for sterilization], and he suggested that --

> The best solution would be to submit the question to the Board of Welfare for a hearing; the reasons for the operation and those in support of the objection would be presented. Procedure at the hearing would be governed by rules of the Board as provided in 31 Del. C. #114. The Board may then rule that the operation be performed despite the objection if, in its judgment, the public interest outweighs the objections presented on behalf of the individual. Thereafter, if the person objecting desires, they may seek a remedy in the Courts.

Apparently this did not satisfy Doctor Bush, since another clarification was found necessary to Mr. Burt's letter of September 25, 1962. After combing the code books, Mr. Burt reported that --

> The statute seems clear in that there is no provision for objections by relatives. Therefore, we agree with your suggestion in your letter of September 13, 1962

> that it is superfluous to notify relatives concerning objections.[6]

Now that the strange provision for objecting had been laid to rest, this would seem to end the story. But Mr. Burt added

> ....However, since, as Dr. Hare points out in his letter of August 20, 1962, there is no Code section which would cover such a hearing, the procedure to be followed would be merely to give the specified relative notice and proceed with the operation unless restrained by the Court.

We now return to the original provision of 30 days' notice in the law. But what Court? And how does one make such an appeal? There is no word on this possibility anywhere in the law.

But even the office of attorney general cannot end the story at this point. In a later letter from Mr. Hare, he still speaks of "deletion of the provision that allowed for objection to the operation." And he added:

> It is possible that it [the repeal] just slipped by when some other amendment to the law was made. However, I can't be sure of this and since I have never heard anybody say that he thought the appeal provision should be removed I can't say whether or not it was done intentionally.[7]

What confuses this writer is that the existence of the provision for objections and its alleged repeal are both in doubt and two letters from the state attorney general did not clear this up for certain. As for the particular case that raised this question of law, Mr. Hare reported that "I have not the slightest idea how it was finally handled." Nor does this writer, but the story is still an exciting one, especially the comments of Doctor Bush regarding the whole question of consent, objections, etc. He writes:

> Consent is not considered necessary since this is a public health problem. *** If the family objects, the Superintendent may or may not accede to their wishes, depending on the urgency of the case. An attempt is made to explain to the family the reasons for the procedure and in most cases they withdraw their objections. Nothing would prevent the family from going to court to stop the proceedings, but so far as I know this has never been done.[8]

After describing the present procedures for deciding who should be sterilized under the law, Dr. Bush adds: "As I see it, there are adequate safeguards in the way the whole matter is handled."

As in Connecticut, it may be that the solicitude of the examining Commission, the Department of Public Welfare, and the medical superintendent are all noteworthy, but we must assume that their consideration

of the rights of patients is largely a matter of the quality of the personnel administering the present Delaware law of sterilization. The law is still grossly deficient and far from clear procedurally speaking. Outside of the 30 days' notice (which is ironic, since it is worthless if it cannot be followed by objections and possible appeal to higher authority), there is nothing in present law that remotely resembles due process of law. The fact that the examining commission is made up of professionals may mean a decision to sterilize is in careful hands, but the lesson of one objecting parent (with or without court action) is an important lesson in the sage of Delaware experience. Doctor Bush's comment on consent being unnecessary is a view that may be shared in other states, but even in those states that have compulsory procedures, the law may make a determined effort to afford the patient administrative and judicial procedures for appeal. Delaware may be medically progressive in its present policies, but backward legally. If three important public officials can not be certain what the law does or does not contain (or what, in the eyes of Mr. Hare and Dr. Bush, it presumably contained in the past), the time may be ripe for a reappraisal of the law.

Delaware sterilization statistics do not show any consistent trend, but nevertheless in the years up to 1940, 1945, and 1950, and in the years 1952, 1962, and 1963, Delaware had the highest number of reported state sterilizations per 100,000 population.[9] In 1963, only

four other states (North Carolina, Virginia, Michigan, Iowa) reported more operations than Delaware did (25).[10] The figures since 1952 indicated a decline until 1962, when the number again picked up. This increase might be accounted for by a more vigorous use of sterilizations at the Delaware State Hospital at Farnhurst, especially under the superintendency of Doctor Bush.[11]

Although the law also applies to habitual criminals, it does not appear that this provision is currently being used in Delaware. The law has never specified what particular sterilizing operation is to be used ("...to have such an operation performed on such person for the prevention of procreation as shall be decided by said physician and alienist as safest and most effective....")[12] Gosney and Popenoe in Sterilization for Human Betterment quoted a claim by Otis H. Castle that as of 1929, "...Oregon and Delaware are the two states in which the use of castration has predominated."[13] Although the early figures on Delaware indicated a preponderance of male operations, including castration, there seems to be no later evidence that this trend continued.

Currently, the policy of the state is to limit sterilizations to the mentally retarded over 16 years of age, with occasional operations of the chronic mentally ill patients.[14] Female operations are presently running about 4:1 to male operations, but over the entire sterilization history in Delaware, they are nearly even.

Although Delaware's annual figures will remain small compared to those of North Carolina, it will continue to rank high, even at times highest, among the sterilizing states in terms of reported operations per 100,000 of population. So long as this kind of enforcement of the sterilization law continues, it might be suggested that Delaware clarify the problem of objection (if it ever existed) in the law, and provide for the clearest kind of procedural safeguards, including appeal to the ordinary courts. It might also improve the situation to have the law state more specifically what kinds of operations are permissible.[15]

Sterilization was given serious attention in August, 1965 when Dr. James A. Flaherty, a Wilmington psychiatrist and a trustee of the State Department of Mental Health reportedly raised strong objections about the operation of the law during a meeting of the Trustees. As a result, applications for the sterilization of 15 mentally retarded persons were held up pending a review of the law's purposes, philosophy and effectiveness in reducing the incidence of mental deficiency.[16] Notwithstanding the fact that the present policy of the state is to obtain the patient's consent, or if they are unable to give such consent, then permission from a member of the patient's family, the present State Mental Health Commissioner, Dr. Daniel Lieberman, has suggested that the law be changed to provide patients to be sterilized or their parents or guardians with the <u>legal right</u> and opportunity to register objections to a sterilization order. Whether the Delaware General Assembly will be asked to make such a change, or even to repeal the law outright, it seems imperative at this stage of Delaware sterilization history that the careful consent policies of the present administration be translated into <u>permanent</u> features of the law, so that Delaware can join the growing ranks of states that regard due process of law as more than a matter of mere administrative discretion.

DELAWARE STATISTICS

Law originally passed April 28, 1923.

Operations up to				Rank among states (operations reported per 100,000 population).
7/1925[1]	---	5	(2M, 3F)	1948....1st
1/1928[2]	---	77	(57M, 20F)	1949....1st
1/1930[3]	---	278	(171M, 107F)	1950....6th
1/1932[4]	---	141	(103M, 38F)	1951....9th
1/1933[5]	---	296		1952....1st
1/1935[6]	---	402	(184M, 218F)	1953....14th
1/1938[7]	---	514	(273M, 241F)	1954....
1/1941[8]	---	610	(322M, 288F)	1955....
1/1942[9]	---	623	(326M, 297F)	1956....3rd
1/1944[10]	---	658	(342M, 316F)	1957....5th
				1958....16th
				1959....
				1960....3rd
				1961....3rd
				1962....1st
				1963....1st

1 Laughlin, ES: 1926, at 52
2 Gosney & Popenoe, SFHB, at 184.
3 Collected Papers, introduction.
4 Landman, HS, at 289. Note discrepancy
5 Whitney, CFS, at 302
6 ANA, ES, at 11.
7-9 HB Foundation
10 Birthright, Inc.

Operations in the years

1943.....17	1951.....7	1959..... 0
1944.....27	1952.....33	1960..... 9
1945.....20	1953..... 4	1961..... 9
1946.....29	1954..... 0	1962.....22
1947.....15	1955..... 0	1963.....25
1948.....34	1956.....12	
1949.....19	1957..... 8	
1950.....13	1958..... 1	GRAND TOTAL: 945 (468M, 477F)*

Subsequent entries, Birthright, Inc. (1943-50); thereafter HBA.

* (Dr. Bush reports that at the present time, most operations are performed on mentally retarded persons, 16 or older, with the ratio of female to male operations about 4:1.)

DELAWARE -- FOOTNOTES

1 Present practice now calls for 3 physicians, one of whom must be a psychiatrist.

2 Letter dated August 22, 1962.

3 Del. Code Anno. (1953), Title 16, para. 5701 (c).

4 Letter, dated August 22, 1962.

5. Letter from Deputy Attorney General Burt to Doctor Bush, June 15, 1962.

6 Letter from Mr. Burt to Doctor Bush dated September 25, 1962.

7 Letter dated May 22, 1963.

8 Letter from Doctor Bush to the author, dated July 31, 1964. Thus endeth the "Saga" of Delaware's missing "objection" procedure.

9 Annual compilations, Human Betterment Association.

10 Ibid.

11 In a letter to this writer, dated July 31, 1964, Doctor Bush said: "I became the Superintendent of all the hospitals on July 1, 1961, and knowing that it would be possible to release more patients to their families if they had been sterilized, I began to push the matter and

more operations were done and more patients were released to their homes."

12 Section 5701 (a) of the Delaware law.

13 At page 168. See Castle, "The Law and Human Sterilization," 53 Amer. Bar Assoc. Reports 556 (1928). Actually, he was partly in error, because Kansas had more castrations than either of these states, and Utah was the castration "front runner" according to the figures of Frederick W. Brown in his article, "Eugenic Sterilization in the United States: Its Present Status," 149 The Annals 22 (Part III, May 1930) at 31. Up to January 1st, 1929, he reports a cumulative total of castrations of both sexes for Kansas (121), Utah (42), Delaware (38), and Oregon (15). The Delaware total of 38 consisted of 36 male castrations and 2 female oöphorectomies, in addition to 27 "Other Types" of undesignated female sterilizations other than salpingectomies, out of a cumulative total of 141 operations performed under their law. For the year 1928 alone, Delaware performed 65 sterilizations on both sexes, including 5 male castrations, 2 oöphorectomies, and 11 "Other Types" of undesignated female sterilizations. The rest were vasectomies and salpingectomies. Percentage-wise, Utah's castrations constituted 53% of their cumulative total up to 1929 (42-79); Delaware's were 27% of their cumulative total (38-141); Kansas castrations comprised 18.7% of their total (121-645); and Oregon's were 2.6 of their total (15-576). Of these states, the only one that continued to

use castration with any degree of regularity was Kansas. Actually, Castle might have been correct in his estimate of Oregon castrations, because H.H. Laughlin in Eugenical Sterilization: 1926 at 60 reports 91 male castrations and 32 ovariotomies out of a cumulative total of 313 operations performed up to July 1, 1925 (or 40% of the total). Laughlin and Brown are obviously far apart in their figures on Oregon castrations.

14 Supra, n. 11. Nearly one third of Delaware's cumulative sterilizations have been on the mentally ill. Notwithstanding this fact, the Director of the Department of Public Welfare, Edgar Hare, Jr., wrote: "... However, I believe that no persons except those mentally retarded have actually been sterilized in this state..." Supra, n. 2.

15 Delaware is not alone in this respect. Alabama, Iowa, Nebraska, North Carolina, South Dakota, and Wisconsin do not designate the operations, but speak vaguely of a "sterilization" operation (South Dakota), or the "safest and most effective" operation (Delaware), or "an operation for the prevention of procreation" (Wisconsin). This opens the door to the more extreme female sterilization operations (e.g., oöphorectomy or hysterectomy), which may not be necessary. Only Iowa within this group of states bars castrations (except for medical necessity), so these would presumably be among the permissible operations.

16 See the Wilmington (Del.) News, August 30, 1965 for a news story entitled "Sterilizing of misfits in Del. hit" and a critical analysis by News columnist Bill Frank, "Sterilization Becomes an Issue". The News followed these with an editorial, "Sterilization on trial" in its August 31st issue.

GEORGIA

The Georgia law, passed in 1937, marks Georgia as the last state to enact a compulsory sterilization act in the country. Though Georgia was late in "starting," sterilizations in the late 1940s and 1950s enabled Georgia to become the fifth highest at the present time in terms of cumulative figures. The Georgia law is noteworthy in two areas: in the creation of a Eugenics Board to supervise the enforcement of the law, and in a complete set of procedural safeguards, including right of appeal to the Supreme Court of the state if necessary. The late Doctor T.G. Peacock, formerly Superintendent of the Milledgeville State Hospital, where most operations have been performed, in his report on the Georgia program of sterilization (1951) said that:

> Sterilization allows additional furloughs, decreasing taxes and increasing freedom for the patient. It has prophylactic value in protecting patients from psychotic episodes induced by pregnancy, and shielding children from mental trauma by psychotic parents."[1]

The Board of Eugenics, which consists of the Directors of the State Board of Health, State Welfare Department, and the Superintendent of the Milledgeville State Hospital has operated in a manner that apparently avoids the perils of litigation. In fact, John A. Dunaway, the legal counsel for the Medical Association of Georgia wrote that -

> ...Although the law has been in effect for 19 years

> not one single case, so far as I can learn, has been carried to the appellate courts of this state, evidencing the fact that this law is either being administered very wisely or that it is not being used at all.[2]

Whether the law is being wisely administered is not easy to judge, but it cannot be said that it is not being used, although the 1963 figures (7 operations) showed a precipitous drop from the previous years of usage. With regard to this change, the present superintendent of the Milledgeville State Hospital, Doctor I.H. MacKinnon writes:

> There have been no changes in the laws relative to sterilization. The changes have been in the philosophy of the superintendent, not making it necessary for the Eugenics Board to make any decisions.[3]

No mention is made of what the "change in philosophy" is caused by, but it is evident from the figures that sterilization is no longer regarded as essential for a patient's release from institutions in the state.[4] It will be interesting to see if the low number of operations continues in Georgia. Although the original law included prisons, reformatories, and other correctional institutions under the law, it does not appear that the law was applied in these institutions.[5]

Outside of the Peacock Report of 1951, this writer has had little data to use in evaluating the program in Georgia.[6]

STERLIZATIONS - GEORGIA
1939 - 1963

Year	Gracewood Training School for Mental Defectives	Milledgeville State Hospital	Annual HBA Figures
1939	22	0	
1940	7	45	
1941	5	1	9
1942	17	31	
1943	84	8	97
1944	50	19	73
1945	46	25	90
1946	38	27	68
1947	22	3	24
1948	35	133	94
1949	28	141	167
1950	37	157	226
1951	36	125	200
1952	22	257	279
1953	5	241	246
1954	12	195	207
1955	3	258	261
1956	39	229	268
1957	4	264	268
1958	21	121	142
1959	40	72	112
1960	14	138	148
1951	22	40	60
1962	21	36	57
1963	0	7	7
GRAND TOTALS	630	2573	3284 (HBA) cumulative total: (1474M; 1810F)

OFFICIAL GA. TOTAL: 3203 (1939-64)

GEORGIA -- FOOTNOTES

1 From excerpts of Dr. Peacock's report, p. 3. This report was later published under the title, "The Georgia Program for Sterilization," in 42 J. Med. Assoc. Ga. 276 (1953).

2 "Sterilization," 45 J.M.A. Ga. 479 (1956) at 479.

3 Letter to author, dated April 29, 1964.

4 The law reads "...that a patient or inmate under the care of or in such institution, would be likely, if released without sterilization, to procreate a child, or children, who have a tendency to serious physical, mental, or nervous disease or deficiency...." (Chapter 99-1303, Ga. Code Anno.) Like the law in California, Georgia tied institutional release to the necessity for sterilization in many cases.

5 "Please be advised that we do not perform any sterilizations at the Georgia State Prison and to my knowledge, there has never been a sterilization program within the penal system of this state." Letter to the author from Warden R.P. Balkcom, Jr. of the Georgia State Prison, dated July 27, 1962.

6 Lawyer John L. Moore, Jr. in an article, "Voluntary Sterilization," 49 J. Med. Assoc. Ga. 463 (Sept. 1960), says that there is renewed interest in the question of sterilization as a result of the critical article on "Reappraisal of Eugenic Sterilization Laws" that appeared

in the July, 1960 issue of the J.A.M.A. He feels that Georgia authorities should completely reappraise the question of sterilization, and after such study, should severely limit the use of involuntary hereditary (eugenic) sterilization. Voluntary sterilization, under present statute, is not in his view legal in Georgia, and therefore Georgia should consider a provision such as that contained in the South Carolina and Mississippi sterilization laws that allows medically therapeutic (voluntary) operations. He continues to caution Georgia physicians against voluntary operations until the law is clarified. A bill to modify the law did not get out of committee in the 1965 Legislative Session.

IDAHO

Idaho's first sterilization act was passed in 1918, but it was vetoed by Governor D.R. Davis, largely on the ground that it was class legislation because it pertained to institutionalized persons only.

> ...it seeks to prevent the procreation by sterilization of feeble-minded, insane, epileptic, moral degenerates and sexual perverts, who may be inmates of institutions maintained by public expense. It does not apply to all persons in such classes, but only to those confined in public institutions -- the persons in fact who by reason of such confinement are the least menace to society. By reason of this discrimination, similar acts have been held unconstitutional in other states.

Though Governor Davis found the object of the bill to be "meritorious," he nevertheless had doubts about the validity of such legislation on scientific grounds:

> ...The scientific premises upon which these laws are based are still too much in the realm of controversy and the results of the legislation still too experimental to justify the proposed law as wise legislation for this state.[1]

The Legislature remedied the lack of equal protection by passing an act in 1925 that did not restrict itself to institutionalized persons.

Although Idaho's law dates back to 1925, and is compulsory and extramural in its coverage, a grand total of only 38 operations have been performed through 1963. The 1925 law created a State Board of Eugenics, but in 1955 the Legislature abolished the Board and created a Eugenics Section within the Division of Mental Health of the State Board of Health. Both the old and the new laws regarding sterilization took great pains to require consent, and where consent to the operation on a mentally ill or retarded person by that person and his legal guardian or nearest kin or personal friend is not forthcoming, the state can go into the district court requesting an order permitting the operation, but the law includes the right of the patient to contest such action and, if necessary, to further appeal to the Supreme Court of the state.

The constitutionality of the Idaho law was upheld in the case of State v. Troutman, 50 Idaho 673 (1931) where the court found no cruel and unusual punishment, nor violation of either due process of law or equal protection of the laws. Instead, they found that the general welfare justified, even demanded, its application. Unlike the U. S. Supreme Court in the 1927 Buck v. Bell case, the Idaho Supreme Court critically analyzed the evidence for the hereditary basis of feeble-mindedness.

Idaho practice can be characterized as highly selective and sparing in its use of the law. The office of the state Attorney General perhaps supplied the most graphic explanation of why Idaho sterilizations have been few and far between since 1925:

> ...First, there must be consent of the person who is to be sterilized, and yet in the case of one who is

> mentally incompetent he is incapable of giving consent. Likewise, one must obtain consent of guardians which is also difficult to obtain. Second, it is difficult for the State of Idaho to prove that mental incompetency is inheritable. The method of proof generally required is to show two or three more generations of mental incompetence, which is difficult to do. Third, the recommendations for sterilizations can only come from State Institutions rather than from local doctors. And lastly, it is difficult to prove that sterilization is the best way to improve the mental deficiency of the populous. It requires a scientific and medical proof which is not available. These are roadblocks found in our present statutes and therefore the statute is not readily used."[2]

An examination of the events since 1949 can show the "internal dynamics" of sterilization law, not only in the hands of a legislature that changes the law, but the administrators whose ideas on enforcement also may change.

From 1949 until 1955, the year the old Board of Eugenics was abolished, 64 cases were presented to the Board. 41 of these cases were rejected by the Board. Of the original total of 64 cases, 18 were sterilized. The State Administrator of Health, Doctor Terrell O. Carver, states that the cumbersome procedure of the old Board of Eugenics

caused the superintendents of the various state institutions to become discouraged and they ceased submitting names (no sterilizations were reported in the years 1956-60).[3] But the New York Times, in an article on May 27, 1959,[4] reported the "reviving" of the Idaho program. Doctor Terrell explained this revival in the following way:

> First of all, there has been a backlog of patients at the state school for retarded who it was felt might have found ready placement extramurally had sterilization been performed to prevent offspring. (Most sterilization candidates came from the institutions for mentally retarded; heriditary transmissions are difficult to establish in other cases). Second, the revival of the law is a function of administrative housecleaning (with the advent of a new health department administration). Beginning two years ago we had witnessed a reexamination of health department law with some revival of programs in accord with the existing law and with some efforts changed the law where the administration felt it was desirable. The group within state government favoring the revival would probably include the administrator of the state school, the chief of the eugenic section, and the administrator and Board of Health.[5]

The so-called "revival" of the law is something of a nullity, since Doctor Carver, in a later communication, reports only one

operation since 1959.[6] Notwithstanding the backlog of patients who might obtain release if sterilization is performed, as well as the abolition of what the present administration calls the cumbersome procedure of the old Board of Eugenics, sterilization in Idaho, as in the past, will be extremely selective. Perhaps Idaho law and practice is a vindication of what Havelock Ellis regarded as "sterilising sterilisation."[7] Certainly, the importance of consent in Idaho law, the right of the patient to subpoena witnesses at the Board of Health hearing, and the presence of judicial review cannot completely explain the state's reluctance to enforce the law. The problem of clearly proving the existence of an hereditary afflication together with the professional competence of the present eugenics section of the Department of Health will continue to account for what Dr. Carver terms a "very selective application of the law."

J.H. Landman, in his study, Human Sterilization, wrote that:

> The state never dared sterilize anyone under its law, but now with its amended statute on human sterilization successfully tried in the supreme court of Idaho on May 29, 1931 in the Board of Eugenics v. Troutman case, it undoubtedly will soon enforce it.[8]

From the decision in 1931 until January, 1935 there were 14 reported operations. From 1935 until 1952, the law was dormant. Since 1952, there have been 24 reported sterilizations, according to the

annual compilations of the HBAVS (now the AVS). The careful, conservative attitude of the present State Board of Health is further explained by Administrator Carver's comment that ---

> ...I do not think the Idaho law covers persons outside, as well as inside institutions in the State. At least, up to this point, the State Board of Health has not so interpreted this part of the State Board of Health law.[9]

It seems evident that Idaho's "revival" is currently non-existent, and sterilization will remain <u>if anything</u> a minor part of the state's health program, unless some recent legislative efforts come to fruition. In the 1965 legislative session, several proposals suggested by the State Board of Health for revision of the State Board of Health law were killed in committee. One bill, S.B. No. 112, would have completely revamped the State Board of Health law, including outright repeal of the portion dealing with the eugenics section of the State Board of Health. Another proposal, H.B. 276, would have re-enacted sterilization in a completely separate act with a revived State Board of Eugenics, consisting of three members ("that physician member of the State Board of Health, who, if there be more than one physician member, has served the longest as a member of the State Board of Health," the administrator of health, and a third member chosen by the first two members), would provide for the initiation of proceedings "by any resident of the state, regardless of any private or official interest or lack of interest" and would have specifically provided for

the legalization of voluntary sterilization ("Nothing in this act shall affect in any way, manner, or form the voluntary sterilization of any individual of the State").

The strategy of the Board of Health for the 1967 session of the legislature, according to Dr. Carver, will be to recodify the State Board of Health Act into appropriate smaller sections so that future changes will not necessitate a complete printing of the entire Act every time there is a minor change in wording. It will probably also be necessary to "educate" public opinion in the interim so that the defeats in the 1965 session are not repeated in 1967.[10]

Thus, if the Idaho Legislature is receptive in 1967, Idaho may join the ranks of those states such as Utah that have moved away from the eugenics of state sterilization laws into the area of social and environmental considerations, and particularly the notion of "fitness" for parenthood as a criteria for selection. Only time can tell what will happen to state sterilization in Idaho.

IDAHO STERILIZATIONS

Cumulative Total to

1/1932.... 0	Landman, at 85.
1/1933....13	Whitney, at 302
1/1935....14 (4M, 10F)	ANA, at 11.

Operations for the years

1935-51.... 0	HBF, and successors
1952..... 5	
1953..... 8	
1954..... 4	
1955..... 2	
1956-59.... 0	
1960..... 1	
1961..... 2*	
1962..... 0	
1963..... 2*	

GRAND TOTAL: 38 (8M, 30F)

* These figures are disputed by the Terrell O. Carver, M.D., the Idaho Administrator of Health. For the period 1949-55, he gave the figure of 18 sterilizations, in contrast to the 19 reported by the HBA. For the period 1956-65, Dr. Carver would report a figure of two sterilizations, one in 1960 and one in 1963.

IDAHO -- FOOTNOTES

1 As quoted in Laughlin, ES in US, at 50. No attempt was made to override the Governor's veto.

2 Letter from Assistant Attorney General William E. Swope to the author, dated August 23, 1962.

3 Letter to author, dated June 10, 1959.

4 At p. 2, col. 3.

5 Supra, note 3. He further added this important observation: "If there are any points of opposition to this revival within or out of the Department, I am unaware of it. However, there may be some repercussions of this revival in the future." Subsequent letters from Administrator of Health Carver in 1962, 1963, and 1965 indicated that there had been no operations performed since 1955 and hence, the so-called "revival" never really began. Whether this is due to the continued reluctance of the superintendents to submit names to the State Board of Health for sterilization, or possibly to a total rejection rate by the Board is not indicated. But in a letter dated July 16, 1965, Dr. Carver said: "...there have been no changes in the policies of the Eugenics Board." This statement plus the statistics over the past decade clearly indicate a complete state of dormancy in the enforcement of the law. Whether

Idaho will become another Kansas, where administrative discretion brought the law to a complete standstill, is not clear to this writer. In a subsequent letter to this writer, dated July 23, 1965, Dr. Carver corrected his statistics as reported above by saying that two sterilizations had been performed under Board orders, one in 1960 and one in 1963. He also mentioned a number of significant legislative proposals which are discussed in n. 10, infra.

6 The HBA reported one operation in 1960 and two in 1961, but Dr. Carver was at a loss to know where the Association got these figures. (Also, two in 1963). Letter to author, dated July 18, 1962. Dr. Carver further added the interesting information that the old Eugenics Board may have rejected 41 cases for requested sterilization in 1949-55 because they were not convinced that the defect was hereditary. This would certainly jibe with the assessment of Assistant Attorney General Swope, supra note 2.

7 Ellis, "Eugenics and the Future," in On Life and Sex (N.Y.: New American Library, 1957 ed.) at 220.

8 N.Y.: Macmillan, 1932 at 85. It was Landman's feeling that the decision in Buck v. Bell (1927) gave Idaho the courage to alter the law in 1929 by saying that an "emergency" existed among the people of Idaho with respect to the quality of the population. Apparently, the legislative intent never became the administrative intent, or in any event, the state

of "emergency" ceased almost at the time the amended law was passed.

9 Supra note 6. On paper, the law appears to be extramural in its coverage, but Idaho has not chosen to be another North Carolina in this regard.

10 In a letter dated July 23, 1965, Dr. Carver wrote: "I might add to this letter that there definitely was antipathy toward our proposed changes in the sterilization law expressed both in the legislature and in the public press. Actually, I don't believe the bill was ever truly considered on its merits. At least, some of the people with whom I talked seemed to believe that it was better to have an unworkable law on the books relating to compulsory sterilization than it was to have either a workable law or no law at all." Dr. Carver repeated his earlier view that the reason why the present law was not used was principally because of its restrictive character in requiring substantial evidence that the condition of mental retardation was inheritable. In the proposed law that was defeated, the definition of policy was much broader and read as follows: "It is hereby declared to be the policy of the State to prevent the procreation by incurably mentally deficient or mentally retarded persons, who because of their known inheritable mental deficiency as defined by subsection (e) of Section 2 of this act would pass on to their progeny such inheritable mental deficiency or because of their mentally deficient condition would be, both at present and in

the future, unable to properly perform the obligations of parenthood, when it is for the best interest of the mental, moral, or physical improvement or condition of said persons, when it is for the public good that said persons be operated on, and where such persons would be likely, unless operated upon to procreate children whom they would be unable to care for." (H.B. 276, sec. 1) Unlike the present Idaho law, this bill made no mention of consent, and like the present bill, it allowed appeal of a Board order only as far as the District Court of the county, and not as far as the state Supreme Court. In a later communication to this writer from the office of the state Attorney General, Allan G. Shepard, dated August 31, 1965, it was made clear that the question of consent was given serious consideration and that as a practical matter, the transcript of a hearing would indicate the patient's knowledge of the operation and his consent to it. Also, though the law provided for an appeal only as far as the District Court, this in no way prohibits further appeal to the state Supreme Court as a matter of right after District Court proceedings. Insofar as the extramural coverage of the proposal (allowing anyone to institute proceedings) is concerned, it was felt "that the administrative review of the record would allow responsible persons to eliminate unworthy and unmeritorious complaints."

add to fn 150

For an extremely perceptive discussion of these and other problems created by the discoveries of modern science (especially medicine, genetics, and the biological sciences), see the four part series entitled "Control of Life" (59 Life, Sept. 10, 17, 24 and Oct. 1, 1965) and particularly the concluding essay, "The New Man; What Will He Be Like?" by Life's Science Editor, Albert Rosenfield in the October 1, 1965 issue at pp. 94-111. He ends his essay on this somber note: "It may be comforting to know that the statesmen and the theologians and the philosophers and the scientists are worrying about all these things, but we cannot let them do all the worrying for us, or make all the decisions for us. The time ahead is wild and uncharted. No one has been there, so there are no experts. Each of us, whose body and brain may be modified or whose descendants' characteristics may be predetermined, has a vast personal stake in the outcome. We can guarantee that good will be done only by looking to it ourselves." (at 111) Also see George W. Beadle, "Genes, Culture, and Man," 8 Columbia Univ. Forum 12 (fall 1965). Dr. Beadle, who was a Nobel Prize winner, is presently the President of the University of Chicago.

INDIANA

The first state to successfully enact a eugenic sterilization law was Indiana in 1907. But the story of sterilization in Indiana and in the United States does not begin in 1907, but in 1899, without the benefit of law.

Famous as the first to use vasectomy in state institutions (as well as perfecting vasectomy as a surgical procedure) was the surgeon at the Indiana State Reformatory, Doctor Harry C. Sharp. The literature abounds in the mention of Sharp's place in the sun, but there is great variation over how many boys at Jeffersonville were vasectomized prior to the 1907 act. Figures range from 176 to 800.[1]

Whatever the numbers involved, the question of what Dr. Sharp was trying to accomplish with the vasectomizing of delinquent boys is also in dispute. Laughlin says that Sharp's motives were "purely eugenical" and that he was practicing vasectomy under the general laws of the state governing medicine.[2] Marie E. Kopp says that Sharp's sterilizations have been misunderstood in the literature. Eugenics was secondary. His essential aim was "therapeutic," that is to say, "...for the purpose of reducing sexual over-excitation..."[3] The operations were presumably all with consent of the inmate, but it is unclear whether the operation was a condition of release or parole.[4]

From the time of the enactment of the law in 1907 until the

inauguration of Governor Thomas R. Marshall in 1909, there were 120 legal operations, 118 of this total at Jeffersonville alone. Governor Marshall (who was later to become Vice President under Wilson in 1912-20) put an end to sterilization in Indiana by threatening to veto appropriations of state institutions enforcing the act.[5]

But state governors come and go, and views on sterilization differ. During the term of Governor James P. Goodrich (1917-20), the views of former Gov. Marshall were ignored by Gov. Goodrich, who notified the heads of the various state institutions that he favored the use of the law. Nonetheless, institution officials (especially medical directors) were fearful of enforcing the act without a test of its constitutionality, and this led the governor to request Indiana reformatory officials to institute a test case in the courts. They complied, and the test case came in the case of Williams v. Smith, 190 Ind. 526, 131 N.E. 2 (1921), when the Indiana Supreme Court held the 1907 act unconstitutional on the grounds of being a gross violation of due process of law under the Fourteenth Amendment in its lack of notice and a hearing, a chance to cross-examine the experts and to bring his own witnesses. Ironically enough, Dr. Arthur H. Estabrook, famed for his study The Jukes ~~published~~ in 1915, sent a detailed analysis of the Smith family history to the Indiana authorities and concluded that the choice of Smith for a test case was a very bad one because of the low rate of defectiveness (8%) found in his family study. He reported:

> ....From the eugenic viewpoint then it would be a question whether the germ-plasm of this group should be cut off. Conservative restriction of the reproduction should be carried out only in those germ-plasms which are giving forth a large percentage of defectives, on the average, much larger than that found here in these peoples. It seems certain that the cutting off of the germ-plasm is recommended from the scientific standpoint, and expedient from the public view only when a family is reproducing practically all mental defectives.[6]

Doctor Sharp's perfecting of the new male sterilization operation, vasectomy, in 1899 and his later fervent battle to obtain a statute in Indiana did not completely die aborning when the 1907 act was invalidated in 1921. Actually, this was only the beginning of the story, but Sharp's place in the early period of Indiana sterilization history is pre-eminent. Legal or not, with or without statutory authority, Sharp's "Indiana experiment" (the term for the subsequent 1907 statute) has left an indelible mark on America law, medicine, and morals. Zealot that he was, Sharp discovered a surgical procedure that is as much a part of modern intellectual (social Darwinian) history as it is a part of modern medicine. The mixture of men, ideas, and events is dramatically illustrated in the story of Sharp and the struggle of other eugenicists to convince legislatures of their brand of Truth.

Sterilization in Indiana at the present time is based on three subsequent statutes passed in 1927 (covering the insane, feeble-minded and epileptic persons confined to various state institutions), 1931 (upon the application to a court for commitment of a feeble-minded person), and 1935 (upon the application to a court for the commitment of an insane person). All are compulsory, as was the 1907 act. Unlike the 1907 law, these acts are detailed (perhaps too detailed) and afford notice, hearing, and appeal rights in the 1927 law and appeal rights in the commitment acts of 1931 and 1935. The 1927 law is by far the most complete in terms of the traditional procedural safeguards of notice, hearing, and appeal rights.

Regarding the use of court commitment procedures, the American Neurological Association report said:

> We are informed that an attempt is being made to reach the acquired cases of feeblemindedness for purely social and economic reasons. Some judges in the state authorize the sterilization of every feebleminded individual, other judges authorize none, and still other judges are selective, attempting to designate the ones which need sterilization from a hereditary standpoint. The law has been applied almost entirely to the feebleminded.[7]

Present sterilization policy in Indiana is a far cry from that described in the classic ANA report of 1936. In 1961, the Indiana legislature enacted the Mental Health Act of 1961 (Title 22-5001 through

22-5031), which created an independent Department of Mental Health with all the previous duties and powers of former hospital and institutional boards transferred to the Commissioner of Mental Health. This change (as well as earlier changes in 1953 which did substantially the same thing, except that the Department was then the Division of Mental Health), has had a profound impact on sterilization policy in Indiana. All requests for sterilization of those presently in state institutions are made directly to the Commissioner of Mental Health by the superintendent having custody of the patient. The Commissioner is responsible for holding the hearing, which is more of an informal than an adversary proceeding. The Commissioner, the Superintendent of the institution, and the Deputy Attorney General assigned to the Mental Health Department usually constitute the board of inquiry, and the patient is given full opportunity to object, to cross-examine witnesses, to present evidence attacking the request,[8] and ultimately to appeal any subsequent order for sterilization to a Circuit Court, and if necessary, to the state Supreme Court.

Perhaps the most important change is in the use of consent procedures. Though compulsory on paper, the law has been given a much different interpretation by the Department of Mental Health and especially the present Commissioner, Doctor S.T. Ginsburg, who views the whole question of consent from a broad medical-psychiatric point of view and not merely the question of whether it is in writing or not.[9] And unlike the policy in many states, there does not seem to be any quid pro quo application of horsetrading release for sterilization. Certainly recent sterilization figures would corroborate this.

Notwithstanding the changes in department procedures and personnel, the Indiana legislature has not left the subject any too clear by its action in 1955 in repealing #22-1607, which required a medical opinion as to the need for sterilization of a person in the procedure for commitment of a feeble-minded person. The analagous provision for commitment of the insane, #22-1613 was left intact and no one seems to know why.[10]

The considerable decline in sterilizations since 1956 can be explained by the changes in the administration in the Department of Mental Health and to what one person described as -

> ...an increased awareness of the conflicting evidence regarding hereditary aspects of mental illness, mental retardation and epilepsy.[11]

The story of sterilization in Indiana is partly the story of sterilization in America writ small. Starting with a crude and legally vulnerable law that came after 8 years of illegal sterilization by a eugenics zealot, the state found itself between the poles of two governors who took diametrically opposite views of the wisdom and utility of the 1907 act. A state supreme court decision in 1921 ended the first phase of Indiana experience. Beginning in 1927, sterilization was revived, but this time with procedural safeguards. But the laws were numerous (1927, 1931, 1935) and cumbersome and the figures for the late 1930s, as in so many other sterilizing states of the Union, indicate a wanton disregard for procedural let alone substantive fairness in the laws.[12] With the post-war years, especially the 1950s, comes a new wave of "enlightenment" in the administration of the laws, leaving the old laws intact with their outmoded language and concepts, while the day-to-day enforcement of the law is affected by new concepts of the treatment of mental illness and retardation.

Indiana officials are aware of the deficiencies of the present laws, but they are not bent on fighting for their repeal. As in many other states, the value of selective and strictly voluntary sterilizations is recognized, which is accomplished by an enlightened use of administrative discretion. As is often the case in other sensitive areas of law and medicine, men change much more readily than the laws, and the lag is not always as bad as it seems. Sometimes it is worse, as in Indiana, where sterilization was not really legal in the period 1899-

1927, a time lag of nearly 30 years and by various estimates, 800 operations. But reliance on the humane and intelligent use of laws that are grossly deficient and anachronistic is perhaps too much of a gamble on the cumulative effects of administrative discretion. Sooner or later, preferably sooner, Indiana must enter the main stream formally. In this way, the legacy of Harry C. Sharp will be balanced off by laws that make sense in the light of mid-twentieth century science and medicine.

INDIANA DEPARTMENT OF MENTAL HEALTH
REPORT OF STERILIZATIONS
INDIANA STATE PSYCHIATRIC HOSPITALS AND
SCHOOLS FOR THE MENTALLY RETARDED
1936 to March 1962*

YEAR	TOTAL	MALE	FEMALE	INSTITUTION		BASIS		
				School	Hospital	Hearing	Court Order	Not Indicated
1962	2	1	1		2	2		
1961	3		3		3	3		
1960	15	1	14		15	15		
1959	7	1	6		7	7		
1958	16	2	14		16	13	3	
1957	20	8	12	8	12	5	6	9
1956	36	12	24	24	12	22	4	10
1955	93	45	48	73	20	34	3	56
1954	89	42	47	80	9	53		36
1953	46	26	20	45	1	14		32
1952	44	26	18	43	1	23		21
1951	50	23	27	50		6		44
1950	88	45	43	88		1		87
1949	43	16	27	43		1		42
1948	59	36	23	59		2		57
1947	52	15	37	52		17		35
1946	159	77	82	159		39		120
1945	123	66	57	123		51		72
1944	77	29	48	77		45		32
1943	54	21	33	53	1	33	1	20
1942	97	51	46	75	22	32	2	63
1941	95	32	63	54	41	30	9	56
1940	132	65	67	60	72	31	14	87
1939	58	20	38	40	18	21	14	23
1938	52	19	43	36	26		22	40
1937	35	13	22	15	20		1	34
1936	21	14	7		21			21
Totals	1,576	706	870	1,257	319	500	79	997

*Figures updated and reprinted in
38 Ind. L.J. 288 (1963).

INDIANA STERILIZATIONS AS REPORTED BY THE HBA AND OTHERS (1907 to 1964)

Cumulative Total to		Source
1/1921	120 (118m, 2f)	Laughlin, 1922, at 63
7/1925	same	Laughlin, 1926, at 52
1/1928	same	G & P, at 184
1/1930	123 (120m, 3f)	CP, introduction
1/1932	120 (118m, 2f)	Landman, at 289
1/1933	217	Whitney, at 302
(1927 law to 1/1935) ..	353 (218m, 135f)	ANA Report, at 11
1/1938	660 (383m, 277f)	HBF
1/1941	1,033 (551m, 482f)	HBF
1/1942	1,129 (582m, 547f)	HBF
1/1944	1,286 (660m, 626f)	Birthright, Inc.

Operations Performed in the years:

1943....55	1950....71	1957....29
1944....74	1951....60	1958....17
1945....122	1952....37	1959....7
1946....192	1953....55	1960....14
1947....89	1954....85	1961....9
1948....77	1955....94	1962....11
1949....49	1956....34	1963....12

Cumulative HBA Total to Jan. 1, 1964: 2,424 (1,167m, 1,257f)

(Note: Dr. Sharp's pre-1907 figures range from 600-700 (highest estimates) to a low of 176 (Sharp's own figure for the period prior to the passage of the 1907 law). The bulk of Indiana sterilizations have been on the mentally retarded (1,751 out of 2,424 or 72%, up to 1964), many of which were performed at the Fort Wayne State School, the institution for the mentally retarded. In some instances, there were several from one family. Note that the total reported for 1959 (7) is the only figure to square with the official figures reported by the Indiana Department of Mental Health in the previous chart.)

INDIANA -- FOOTNOTES

1 Laughlin, in his 1922 book, ES in the US, has several figures. On page 119, he cites the figure of 456 operations found in a pamphlet by Sharp entitled "The Sterilization of Degenerates" (circa 1908), and therefore covering the period after passage of the 1907 act; at p. 146, he mentions the figure of 176 operations performed up to the passage of the 1907 act; at 157, he quotes a portion of the 1912 Feilen decision in Washington citing "over 800 persons"; in his 1930 pamphlet, The Legal Status of Eugenical Sterilization, he speaks of "several hundred operations" up to 1907 (at 56). Deutsch in The Mentally Ill in America uses "several hundred males" (p. 370), as does Landman in his Human Sterilization (at 52). Owens-Adair uses the figure of 456 for operations performed in 1899, and reports 1,000 operations at Jefforsonville from 1907-22 (at 36). Gosney & Popenoe in Sterilization for Human Betterment say that 753 operations were performed prior to adoption of the law (at 16) but later talk of "six or seven hundred males" (at 184). Zenoff, in her article, "Reappraisal of Eugenic Sterilization Laws," uses the low (Deutsch's "several hundred males") and the high (Gosney & Popenoe's "600 or 700 boys"), 10 Clev.-Mar. L. Rev. 149 (1961) at 151, 168. Sharp himself is responsible for different figures: Haller in Eugenics: Hereditarian Attitudes in American Thought uses an article by Sharp published in 1907 for the figure of 223 operations (at 209 fn. 33) and at 136, Haller uses

the figure of 176 operations; Landman cites Sharp's 1908 pamphlet for the figure of 236 (at 231) and Sharp in an article, "Vasectomy as a Means of Preventing Procreation in Defectives," 53 J.A.M.A. 1897 (Dec. 4, 1909) says that he performed 176 operations at the Indiana Reformatory. Gosney & Popenoe say that: "...In July, 1911, when sterilization in Indiana had practically ceased, it was stated that 873 males had been sterilized to date...." Ibid. at 15.

2 ES in the US, at 255. Landman, in Human Sterilization, completely disagrees. He calls Sharp's eugenic surgery illegal and criminal (at 52).

3 "Surgical Treatment as a Crime Prevention Measure," 28 J. Crim. L. 692, 697 (1938). Haller reports that the first vasectomy was on a chronic masturbator and by the end of 1899 he had operated on 76 youths, all on their request (Eugenics, at 49). How many of the pre-1907 vasectomies were on "youths" or "boys" is not clear. Kopp in her article speaks of the Indiana State Reformatory for Delinquent Boys" but as in the case of the pre-legal castrations at the Winfield, Kansas State Home for the Feeble-Minded, the Sharp sterilizations were ostensibly for sexual delinquents who would presumably behave better after the operation. The first eugenic sterilization law ever introduced in a legislature in the United States failed by only a few votes in Michigan in 1897 and this was a bill that called for castration of habitual

criminals, sexual degenerates and others. The author of the bill, Dr. W.R. Edgar admitted that part of his motive was the fear of "onanism" in state institutions. "Asexualization of Criminals and Degenerates," 6 Mich. L.J. 289 (1897) at 291. The worst extreme is seen in Dr. Jesse Ewell's statement: "Castrate the criminal, cut off both ears close to his head and turn him loose to go where he will." In "A Plea for Castration to Prevent Criminal Assault," 11 Va. Med. Semi-Monthly 464 (Jan. 11, 1907).

4 Laughlin says that Sharp performed 176 vasectomies on men "who desired the operation upon being discharged from state custody..." ES in US, at 146.

5 Laughlin says that Gov. Marshall personally disliked the idea of sterilization in theory or practice and threatened to take steps to have the law declared unconstitutional. ES at 63.

6 Laughlin, ES in US, at 317-18. Laughlin differed, but even his required percentage of defectiveness (25%) would have excluded Smith.

7 ES, at 12. Recent figures compiled by the State Dept. of Mental Health show that few of the sterilizations for the period 1936-62 were by court order (79 out of 1576 sterilizations), so that court ordered sterilizations at the time of commitment were probably significant in the period before 1936. Over 2/3 of all operations performed up to 1964 (1751 out of 2424) were on the feeble-minded.

8 I was told this by members of the department when I visited Indiana in 1963. They regard the hearing as a very personal matter, not a State v. Patient proceeding. Also, see note, "Eugenic Sterilization in Indiana, " 38 Ind. L.J. 275 (1963) at 278, 281, where they point out that this is a departure from the statute, based on administrative discretion.

9 "...I approach each hearing with a recognition of the seriousness of the matter and with a feeling of great responsibility. I approach each hearing not only as the Mental Health Commissioner with responsibility to comply with the law, but also as a physician with profound regard for the welfare of the patient, the family and the community." Letter quoted in Ind. L.J. note, ibid., at 281. Clear proof of this view was found by this writer when he talked with the Commissioner, who told of a case of a patient, who had gone through the hearing and had consented in writing to a prospective sterilization. All of the legal requirements had been fully met. When she appeared on the operating table for anesthesia, she balked and screamed at the surgeon not to touch her. Somewhat shocked, he phoned the Commissioner and explained the situation. The Commissioner told him not to operate and to return her to her quarters. In explaining his action, Commissioner Ginsburg said that her (the patient's) action, even at the late date, was a withdrawal of consent, and the harm that might accrue to her if compulsion was used would be too foolish to risk. For the Commissioner, consent

is not a piece of paper or a statutory requirement, but the act of violition at its most crucial point (the operation). This is another clear and dramatic example of how the procedural safeguards of the law must be seen in the light of the discretion used by those who enforce the law. If anything, the hearing process and the requirement of consent have pulled Indiana all the way over to the opposite extreme of what they were doing under the 1907 act when written procedural safeguards were completely absent in the law.

10 Former Deputy Mental Health Commissioner John W. Southworth, explained it thus: "By repealing this portion (22-1607), the remainder of the statute is negated. We do not know why this section was repealed, nor do we know why a similar section pertaining to the commitment of 'insane' persons was not repealed. The statute still in effect pertaining to the insane, however, is not used, because the basic statute (1927 act) has more safeguards for the patient." Letter to author, dated October 11, 1960. The Indiana Law Journal was perplexed by the legislature's action and called on the legislature for clarification: "It would seem that at a minimum the Indiana Legislature should consolidate and eliminate the inconsistencies in its present sterilization statutes. Other states have enacted sterilization statutes which are much more concise than the Indiana statutes, do not contain conflicting provisions and yet provide the patient with all the procedural safeguards enumerated in the existing Indiana statutes. Ibid. at 280.

11 Southworth letter, ibid. Also, see Ind. L.J. note, ibid., at 281. However, the note does not accept present departmental policy as a long-term substitute for a true re-examination of the scientific and legal bases of the law in the light of current knowledge of genetics and medicine. "The Indiana statutes procedurally seem to safeguard the rights of a patient," they conclude, "but in light of the present attitude of the medical profession these statutes conceivably could face a strong constitutional argument if challenged on a substantive basis. However, due to the cautious attitude of the Department of Mental Health, and its awareness of the serious problems underlying involuntary sterilization, the Indiana statutes may avoid a constitutional test for an indefinite period of time. This is especially true in view of the fact that Indiana's compulsory sterilization law is in reality being applied upon a voluntary basis." Ibid. at 288. This writer would add that there is certainly no likelihood of going back to the days of Harry C. Sharp, but on the other hand, it might be wise to make the wise discretionary and certainly humane policies of a Dr. S.T. Ginsburg part of the operational law and not merely something that could conceivably be manipulated by the future policies of other administrators. The fact that present Indiana judges trust the Department by not using two of Indiana's sterilization provisions does not mean a change-of-heart might not occur in the future.

12 Although the 1927 act is procedurally fair on paper, when the

figures for the 1930s and 1940s are seen, as well as some of the records of sterilization, it is extremely doubtful how useful due process of law is to people who were considered the dregs of the community and who had little--if any--conception of their rights under this or any other law. The Department of Mental Health found no accurate figures for the period prior to 1936, so that HBA figures and other sources for the figures for 1927-1936 are not necessarily reliable. Indiana figures begin to get higher at the end of the depression period, in the early 1940s and reach a peak in 1945-46. It is interesting to note that the original wording of the 1931 act regarding commitment of the feeble-minded (sec. 22-1607)contained the words "...in his opinion, such person is the probable potential parent of mentally incompetent or socially inadequate offspring likewise afflicted." In a 1937 amendment, this wording was changed to read: "...in his opinion, the welfare of society and of such person would be promoted by his or her sexual sterilization." It seems obvious that the state was moving from a eugenic or biological to an environmental or sociological standard and this may account for the increase in operations that followed, although court ordered sterilizations were relatively few except for the period 1938-40, and even then the institutional operations were far greater in number. The 1927 act also contained similar wording: "...it is for the best interests of the patient and of society that any inmate of the institution under his care should be sexually sterilized...." (sec. 22-1601)

IOWA

Sterilization in Iowa affords an excellent example of how a compulsory law has been enforced on a voluntary basis. The Board of Eugenics, as a matter of state policy, does not enforce the compulsory provisions, but entertains requests from the patient, or next of kin, or legal guardian. Although, as in the Idaho law, if consent is not forthcoming, the Board's sterilization order automatically goes to the District Court, and if necessary, either party can appeal to the state Supreme Court, Iowa has not found it necessary to resort to such procedures. Litigation has been avoided by the use of consent. The lessons of an earlier day, namely, the case of Davis v. Berry, 216 Fed. 413 (S.D. Iowa 1914)[1] where the then-existing Iowa law was declared unconstitutional by a lower Federal District Court for want of due process of law (among other things), have been learned well. Heightened use of the law did not begin until the late 1930s (see figures for period 1938-42). Out of a total of 1,910 operations reported for Iowa since its first law in 1911, 583 operations were performed in the four-year period of 1948-51. Since that time, there has been a tapering off of operations, with a low of 14 in 1959.

The present law includes the "mentally ill or retarded, syphilitic, habitual criminals, moral degenerates, or sexual perverts and who are a menace to society," but again, as a matter of Board policy, only those applications pertaining to mental retardation or mental illness are approved. There is no evidence of the law being used on criminals, so that the mention of these groups in the law is pretty much of a dead letter.[2]

Under the Iowa law, if the person is mentally ill or retarded, the consent is signed by either the next of kin, the legal guardian, or personal friend, as the particular case may require.

Personal interviews with the executive secretary of the Board of Eugenics convinced this writer that the use of consent was basically voluntary in nature and not a subterfuge. Iowa is one of 11 states having sterilization laws that apply extramurally. The following figures,[3] covering the years 1951-59 give an indication of the number of cases that are institutional and non-institutional:

	Institutional Cases	Non-Institutional Cases
1951	137	16
1952	70	16
1953	62	9
1954	37	10
1955	33	17
1956	61	16
1957	33	18
1958	11	11
1959	4	11

Iowa's State Board of Eugenics seems to this writer to be a very professional and systematic agency, keeping careful records of each case, and taking great pains to see that each case is carefully selected and processed.

Although the early Iowa laws prohibited nontherapeutic voluntary operations, this was repealed in the 1929 law (the present law). A 1932 opinion of the state attorney general[4] and a recent opinion make it clear that voluntary operations, whether therapeutic or not, are not affected by the present law and do not require permission of the Board of Eugenics. Annual figures will probably remain low and will certainly not approach the peak of 1948-51, but the reasons for the decrease are not at all clear, although this writer would probably attribute the decrease

to the attitudes of the personnel now involved in the enforcement of the present law.[5]

In view of Iowa's salutary consent procedures and the present policies of the State Board of Eugenics, it seems that the inclusion of compulsory provisions in the sterilization statute is an anachronism and even superfluous. If consent is not a form of horse-trading for institutional release (and it appears to me that it is not in Iowa), then Iowa should perhaps take a fresh look at its law with a view to making the law completely voluntary in conformity with its present policies.

IOWA STERILIZATIONS

total up to

1/21.....	49	(38M, 11F)	Laughlin 1922, at 65
7/25.....	56	(41M, 15F)	Laughlin 1926, at 53
1/28.....	57	(43M, 14F)	G&P, at 184.
1/30.....	same		CP, at introd.
1/32.....	same		Landman, at 64
1/33.....	94		Whitney, at 302
1/35.....	95	(57M, 38F)	ANA, at 12
1/38.....	153	(70M, 83F)	HBF
1/41.....	336	(112M, 224F)	HBF
1/42.....	439	(135M, 304F)	HBF
1/44.....	551	(170M, 381F)	Birthright, Inc.

operations for the years

1943	58	
1944	46	
1945	52	
1946	45	
1947	70	
1948	127	
1949	165	
1950	113	
1951	178	
1952	70	
1953	85	(HBF and HBA)
1954	72	
1955	47	
1956	69	
1957	48	
1958	21	
1959	14	
1960	28	
1961	51	
1962	28	
1963	30	

HBA GRAND TOTAL (1911-63): - 1,910 (545M, 1365F)

OFFICIAL STATE BOARD OF HEALTH TOTAL (through 1959): 1784 (444M, 1340F)
OFFICIAL STATE BOARD OF HEALTH TOTAL (through 1962): 1890 (484M, 1406F)
HBA TOTAL (through 1959): 1773 (502M, 1271F)
HBA TOTAL (through 1962): 1880 (542M, 1338F)
HBA TOTALS BY CATEGORIES (through 1959): 848 (mi); 853 (md); 102 others)
total: 1773
IOWA STATE BOARD OF HEALTH (through 1959): 815 (mi); 842 (md); 127 (others);
total 1784

IOWA -- FOOTNOTES

1 To sterilize a criminal who has been convicted of two felonies, solely on the grounds of alleged criminality (hereditary), was considered cruel and unusual punishment, a deprivation of due process of law, (no hearing, no presentation of evidence), and a bill of attainder (legislative punishment). Sterilization is just as degrading as castration, and they added: "...Must the marriage relation be based and enforced by statute according to the teachings of the farmer in selecting his male animals to be mated with certain female animals only?...." (416-17) "...One of the rights of every man of sound mind is to enter into the marriage relation..." (419) The Iowa Legislature repealed the 1913 law in 1915, passed a substitute sterilization law which did not apply to the convict in question, and hence, an appeal by the state to the United States Supreme Court resulted in a reversal of the lower court decision and a dismissal of the case for reasons of mootness, 242 U.S. 468 (1916).

2 The environmental emphasis in the application of the Iowa law is an important part of the Iowa story. Those persons "who would probably become a social menace or ward of the state" (sec. 145.9) are not going to be released or paroled unless sterilization is performed, if this part of the law is literally interpreted, and this might appear to be a form of "blackmail" or a quid pro quo at its best. However, this writer was told that all sterilizations authorized by the Iowa State

Board of Eugenics are made on a voluntary basis, and that all requests for sterilizations come to the Board from the patient, or his next of kin or legal guardian, not from superintendents of state institutions. An article published in 1950 also concluded that all Iowa sterilizations from 1915 up to that time were on a genuine consent basis. Note "Human Sterilization," 35 Iowa Law Rev. 251, 261 (1950).

3 Figures supplied by Miss Norma Casserly, Executive Secretary of the State Board of Eugenics, letter to author, February 18, 1964. Regarding the application of the law to epileptics, Miss Casserly wrote: "I have checked our records and find no case where a case has been approved on the basis of epilepsy alone. There are many cases in which the patient has had epilepsy and was also mentally ill or retarded...." Notwithstanding this explanation, the Iowa law as it pertains to epileptics has been under recent attack. See Samuel Livingston, "Restrictive Measures Relative to Epilepsy; Comments on the Medical Aspects," 10 Archives Environmental Health 508 (1965) at 512.

4 1932 O.A.G. at p. 35 and the opinion of Attorney General Evan Hultman, dated November 7, 1963. Also, 1940 O.A.G. at p. 22. All told, there have been 7 opinions by various Iowa Attorneys General.

5 Clarence J. Gamble, in his article "Sterilizations Approved by Iowa's State Board of Eugenics: 1949," 41 J. Iowa Med. Soc. 218 (1951) felt the figures for that period were far too low to really make a

dent in the areas of psychosis and mental deficiency. He attributed the reluctance of the authorities to the "mistaken belief of the public that sexual sacrifice is involved." Doubtless, this would not explain the present policy of the Board of Eugenics. The important role of the State University of Iowa Hosptials in performing sterilization operations ordered by the State Board of Eugenics (nearly a fourth, or 24.6% through December 31, 1963) is found in two articles: J. G. Lee, J. H. Randall, and W. C. Keettel, "Tubal Sterilization; A Review of 1,169 Cases," 62 Amer. J. Ob. & Gyn. 568 (Sept. 1951); and Charles A. White, "Tubal Sterilization," 95 id. 31 (May 1, 1966). The earlier article by Lee et al. states: "...Under an old Attorney General's ruling, sterilization is illegal in Iowa except on the basis of medical indications; social and economic conditions are not considered legitimate...." (at 569) "...Multiparity, as such, was occasionally an acceptable indication up to the time of the Attorney General's ruling; thereafter it was not listed...." (at 570) and seems to be in error in interpreting the 1932 opinion of the state's attorney general in this manner, since that opinion made no distinction between therapeutic and nontherapeutic voluntary sterilizations and ruled that a physician would not be liable for performing a sterilization operation on one who consents, except in the case of negligence.

MAINE

Maine law provides for a voluntary sterilization request from those who are either feeble-minded or have "certain forms of mental disease," or from a relative or guardian when the patient is mentally incompetent to give such consent. This is clearly an extramural voluntary operation and does not involve state authorities, except that a committee of three doctors who decide the question of consent must file their decision at the Pineland Hospital and Training Center. This is a completely voluntary measure, although it would be difficult indeed to find if there are any ulterior motives involved in the request of relatives or guardians for such operations. One would hopefully assume that since the physician who first recommends such an operation to the nearest relative, calls upon the advice of two other physicians for a judgment of the question of consent, and when properly secured, the question of the advisability of sterilization, the precautions would be sufficient to prevent abuse.

On the compulsory side, the statute calls for the state institutions caring for insane or feeble-minded persons to recommend operations to the Department of Mental Health and Corrections, which can approve sterilizations only with the further approval of two out of three state hospital superintendents. Appeal rights are provided for in the state's superior courts.

At the present time, most sterilizations are carried out at the Pineland Hospital and Training Center. From 1943-64, the Pineland

figures and the HBA figures are nearly identical, but the cumulative total for Maine up to late 1960 (320) does not correspond to the Pineland total of that period (189), indicating that other institutions or extramural operations have been involved.

Since 1955 (26 reported operations, all at Pineland), the figures have been progressively lower, none over 5 per year (1957). The Superintendent of Pineland, Doctor Peter W. Bowman writes:

> ....I am not at all concerned with legal provisions, external and internal pressures but rather with scientific, sound, professional standards to indicate when eugenic sterilization should be performed and when not. Neither the American Medical Association nor the American Psychiatric Association has set up such standards, and, having traveled throughout the Country, I am horrified about the approach either because it is promiscuous [sic] or influenced by religious concepts neither of which, in my opinion, is a scientific approach.[1]

Superintendent Bowman's strictures may go a long way in explaining the very selective use of sterilization in recent years, and Maine doctors are apparently not using the extramural provision. The strictness of the extramural requirements, together with the right of appeal in the compulsory situations, have kept Maine cautious in its use of sterilization, and the evidence seems to indicate that annual figures will continue to remain low. The 1935 Report of the American Neurological

Association, which concluded its treatment of Maine thus:

> We are informed that there is very little opposition to sterilization measures. Most of the operations have been performed under the voluntary law. The laws are administered so as to avoid widespread opposition in principle, and the only opposition encountered is of a religious nature. The law differs from most in that it applies to persons outside of institutions. It will be seen that it is selective in its administration. On the whole, the law is entirely eugenic, but is not thoroughly enforced.[2]

would probably be a fitting description of present Maine practice.

PINELAND HOSPITAL AND TRAINING CENTER

Year	Fallectomy	Vasectomy
1925	1	
1926	2	
1927	1	
1928	5	2
1929	2	1
1930	7	
1931	5	1
1932	7	2
1933	1	3
1934	13	2
1935	6	
1936	2	1
1937	3	
1938	4	
1939	2	
1940	7	
1941	6	
1942	5	
1943	1	
1944	0	
1945	2	
1946	8	1
1947	2	1
1948	1	2
1949	3	
1950	4	2
1951	1	3
1952	4	1
1953	7	1
1954	7	8
1955	18	8
1956	1	
1957	4	1
1958	3	1
1959	4	
1960 to Oct.	1	

MAINE STERILIZATIONS

TOTAL UP TO

1/28	5	(5F)	G&P, at 184
1/30	12	(4M, 8F)	CP, at intr.
1/32	42	Whitney at 302	
1/35	85	(7M, 78F)	ANA, at 13.
1/38	139	(14M, 125F)	HBF
1/41	190	(14M, 176F)	HBF
1/42	212	(20M, 192F)	HBF
1/44	218	(20M, 198F)	Birthright, Inc.

OPERATIONS IN

1943	1
1944	0
1945	2
1946	9
1947	3
1948	3
1949	3
1950	6
1951	4
1952	5
1953	8
1954	17
1955	26
1956	1
1957	5
1958	4
1959	4
1960	2
1961	3
1962	2
1963	1

CUMULATIVE TOTAL (1925-63): 326 (46M, 280F)

MAINE -- FOOTNOTES

1 Letter to author, dated October 14, 1960.

2 Eugenical Sterilization, at 13.

MICHIGAN

Michigan has the dubious honor of being the first state to entertain a proposal for a human sterilization law in 1897. The bill, which called for the asexualization (castration) of certain "types" of criminals and degenerates, failed to pass by a few votes. Couched in the terms of the kind of eugenic language that aimed to cure sexual degeneracy and criminality, this bill was merely the harbinger of things to come not only in Michigan but in the nation as a whole.[1]

Not until 1913 did the first Michigan sterilization appear on the statute books. This act applied only to "mentally defective or insane" persons maintained wholly or in part by public expense in state institutions, was compulsory, and contained a provision for notice, hearing, and appeal to a Probate Court. Only one operation was performed under this act before it was declared unconstitutional by the state Supreme Court in 1918 in the case of Haynes v. Lapeer Circuit Judge , 201 Mich. 138, 166 N.W. 938 (1918) on the grounds of being class legislation in violation of equal protection of the laws. This was due to its failure to include persons outside institutions.

A second statute was passed in 1923 that was compulsory and voluntary and that covered "idiots, imbeciles, and feeble-minded, but not the insane" whether in state institutions or at large (extramural). In one of the land-mark cases in American sterilization history, the Michigan Supreme Court held the second act constitutional in the case of Smith v.

Command, 231 Mich. 409, 204 N.W. 140 (1925). The failure to include the insane in the law was not viewed as a defect, but classification based on financial ability to support defective offspring was declared unconstitutional,[2] as another form of class legislation. In what was a portent of Holmes and the Supreme Court in Buck v. Bell in 1927, the Michigan Supreme Court likened a compulsory sterilization statute to a compulsory vaccination law. They also espoused a "collectivist" notion of the right of society to sterilize that was similar to the argument used by Holmes:

> ...what are the legal rights of the class of citizens as to the procreation of children? 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 rights superior to the common welfare. Acting for the public good, the State, in the exercise of its police powers, may always impose reasonable restrictions upon the natural and constitutional rights of its citizens. Measured by its injurious effect upon society, what right has any class of citizens to beget children with an inherited tendency to crime, feeble-mindedness, idiocy or imbecility.... Under the existing circumstances it was not only its [the legislature's] undoubted right but its duty to enact some legislation that would protect the people and preserve

the race from the known effects of the procreation of children by the feeble-minded, the idiots and the imbeciles.[3]

In a ringing dissent, Justice Wiest among other things said that ---

...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....There is a limit even to the power of the state over the bodies of men and women.... ***** ...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, was not lost or surrendered to legislative control in the creation of government, and is beyond the reach of the governmental agency known as the police power.

****

The operation of vasectomy is also said to be a simple one, taking but three or four minutes, and no anaesthetic is ordinarily employed. The same may be said of castration of a hog. It is also said that desire for sexual congress,

> and all concomitants of normal coition remain practically unchanged. This consolation may appeal to idiots.
>
> ********
>
> ...If the purpose is to prevent operation of the defective germ plasm, that plasm must be looked for in all carriers thereof. Short or long reasoning on the subject leads to rejection of the whole scheme.[4]

Smith v. Command came just five months prior to the Virginia Supreme Court of Appeals decision upholding the Virginia statute in the famous Buck v. Bell case. These two very significant state decisions laid the ground for a significant test at the national level, which came in 1927 with the oft-heralded Holmes statement that "three generations of imbeciles are enough."[5]

Another attempt to invalidate sterilization in Michigan failed the following year in the case of In re Salloum, 236 Mich. 478, 210 N.W. 498 (1926). The present Michigan statute dates back to 1929. This act includes the feeble-minded, insane, epileptic (who were exempted in a 1962 amendment), idiots, imbeciles, moral degenerates, and sexual perverts "likely to become a menace to society or wards of the state." It is compulsory and extramural in its coverage. Unless consent to the operation is obtained, a Probate Court order is required whether the petition comes from an institution or from the outside. A rather brief ($1\frac{1}{2}$ pages) treatment of the Michigan law appeared in an article by an

English eugenicist, Hilda F. Pocock, in 1932, with a somewhat startling comment that from 1925 on there had been approximately 20 castrations of sexual criminals performed by order of the Probate Courts.[6] This is presumably the only mention in the literature of Michigan castrations and there is no indication of where Miss Pocock obtained her figures. She also mentions the medical superintendent at the Michigan Home and Training School (Lapeer), a Dr. Dixon, saying that sterilization was not used wholly as a eugenic measure but rather as an aid to the "individual adjustment" of the inmate. The figure of 606 operations performed at Lapeer from 1929 up to September, 1931 was reported, which if correct would mean that Lapeer had by far the most (if not all) sterilizations in this early period of Michigan eugenic sterilization history. There is no question that the 1929 law seemed to spur on the use of sterilization in state institutions, an incentive which came to its greatest fruition in the 1930s.[7]

Because the records of such proceedings before the various Probate Courts are kept in each county, it is difficult to assess the picture in Michigan, except on a county-by-county basis. This writer attempted to contact the various Probate Courts that would presumably get the bulk of cases in those Michigan institutions that seemed by the available evidence to have the most sterilizations probated. The response from the various Probate Court judges was very poor, except for two who were willing to allow the author permission to examine the records.[8] Hence, only one

county was examined (Kent County) and then only for a period in the 1930s when the annual rates were running high. But even this cursory glance at one county during a specific period of time convinced this writer that procedural protections in the law are a far cry from protections in fact.

All of the petitions for sterilization that were examined came from the Superintendent for the Poor for Kent County. Quite obviously, these people were not the cream of the county's elite. The ages of these people ran from a low of 14 years of age to high of 38 years of age. For some reason, most of the petitions dismissed by the Probate Court were males. Seldom was a female saved from a sterilization order. The testimony of the two doctors required for each order was in most cases crude, sketchy, and usually far from what we would today regard as a medically sound examination of mental ability or mental capacity. Here are some examples:

> She has practically no school knowledge and very little general knowledge. Her general comprehension is very limited. She has no ethical concepts.
>
> *****
>
> "...and has had opportunities to learn. She has an exceedingly limited knowledge, either school or general. Moral sense is very vague."
>
> *****
>
> She is practically illiterate. She cannot read or write. She has no general knowledge and no ethical concepts. She

has an I.Q. of 49." "She admits to sexual delinquency."

"...and has practically no moral sense."

"...other children in the family have been problems and are said to be feeble minded."

"...patient and her brother are in an ungraded room."

"...that her home, children, and she herself appears (as) very untidy."

"...stated that population of Grand Rapids was 9,000..."

"...has no general knowledge and has no moral judgment."

"sexually delinquent -- general knowledge very limited."

Some of the cases exhibit a kind of vindictiveness on the part of the judge.[9]

Once the order was issued, the Court would make every effort to find the person, usually a female, if this was possible. One example was that of a husband who petitioned for his wife's sterilization. The request was granted by the judge (without a jury, which is optional and was seldom used in the cases in this county), without opposition of any kind. However, the wife refused to accede to the order. The judge ordered a "pickup" on one day; the following day she was found and the operation performed. Of course, in all of these cases legal counsel, jury trial, and the right to appeal are found in the law, but not readily observable in the cases. The right of the woman to appeal, rather than run away from the law, was doubtless not known to her (and if mentally

ill or retarded, it is doubtful how much she understood at any point of the court hearing). As later writers found in the case of the indigent and the unwanted, due process of law is more often than not what the judges and others provide, not what the law requires. Interestingly enough, Probate judges were careful to observe the five-day waiting period required by the law before enforcing the order, or before ordering a "pickup" if the prospective sterilizee could not be found or would not voluntarily show up.[10]

In one case, a family of five boys was "processed" through a Probate Court proceeding on the same day. Their ages ranged from 14 to 29. All of the petitions were dismissed, but nothing in their records indicated the reason. Perhaps the most astounding case was that of a woman who was ordered sterilized, but the court then ordered a postponement from a Nov. 24 until a May 19th of the following year. Apparently the sloppiness of the report to the court and the hearing in the case had not determined that she was pregnant! She did not appear for her operation, but instead wrote the judge a letter. This letter, written in adequate English and with quite decent penmanship, said in direct and simple terms that she was sorry to inconvenience the Judge, but that she would bear a child in the future and could therefore not comply with the order. In the spring, she graciously allowed the order to be carried out.[11]

Records of operations in these cases varied greatly. In viewing recent petitions to this same court in Kent County, all from relatives, it was clear that the present judges do not issue orders casually. The records, especially the report from two physicians, were detailed

and clearly evidenced an awareness of modern genetic, medical, and psychiatric knowledge. In the past decade, the present judge reported five sterilizations, a far cry from the halcyon days of 1931-42. This is due, in part, to the hesitance of doctors to make probability judgments with regard to inheritance of mental defects.[12]

An attempt to contact the doctors and guardians who participated in these cases was not successful. Time had taken its toll. Some had died, others had moved away, and those still alive had no intention of dredging up the past. Doubtless a novelist or a good modern sociologist could have done a far better job than I have done in reconstructing these events, but one thing is certain: even a casual reading of Probate Court records gives the reader a perspective of man and the state and man and man that you would never find through any other source. The amount of material that can be culled from records of probate is legion. Scholars of the judicial process, the administration of justice, etc. have a virgin territory to tap for any number of purposes. While this data will not order itself, it does avail the researcher of leads to more systematic and organized sources of information. Oftentimes, this data is inchoate and crude, but it is the stuff of human existence and these records are often a mirror of the casual and crude way - even inhumane if you will - in which our courts and public administrators sometimes behave.

Since 1953, there has been a definite decline in operations reported annually. Because there is no single state board or a single state

policy, it is difficult to attribute this decline to any one institution in the state. Some of the hospitals will act only if the petition is initiated by next of kin; others will use very selective procedures that are not always based on eugenics.[13] One state institution relies solely on Probate Court orders of sterilization.[14]

Unlike California, Iowa, Kansas and other states that have altered their attitudes on the basis of a pronounced change in state sterilization policies, Michigan has joined their ranks on an institution-by-institution basis. Doubtless, this is an oversimplification, but in contrast to the 1930s in Kent County, or even the days of the Smith v. Command case in 1925, Michigan is medically and genetically beginning to join the main stream. Outside of the exemption of epileptics from the 1929 law in an amendment in 1962,[15] there seems little likelihood that a general re-examination of the entire law will take place. Unless there are some shakeups in the various institutions which might conceivably lean toward past policy, Michigan's total annual figure will continue to rank relatively low, although it will still show yearly variation.[16]

MICHIGAN STERILIZATIONS

TOTAL UP TO			UNDER
1/1922	1	Laughlin, 1922, at 73	Act of 1913; invalidated in 1918
7/1925	48	(7m, 41f) Laughlin, [illegible]6, at 38	Act of 1923; amended in 1925; upheld by Mich. Supreme Court in 1925, 19[illegible]
1/1928	106	(20m, 86f) G&P, at 184	
1/1930	388	(62m, 326f) CP, intro.	Act of 1929 and prior acts
1/1932	629	(153m, 476f) Landman, at 289	
1/1933	1083	Whitney, at 302	
1/1935	1239	(307 m, 932f) ANA, at 14	
1/1938	1815	(420m, 1395f) HBF	
1/1941	2145	(513m, 1632f) HBF	
1/1942	2263	(546m, 1717f) HBF	
1/1944	2466	(606m, 1860f) Birthright, Inc.	

OPERATIONS FOR THE YEARS

1943	78
1944	107
1945	86
1946	75
1947	117
1948	131
1949	88
1950	72
1951	65
1952	81
1953	103
1954	71
1955	61
1956	27
1957	47
1958	39
1959	27
1960	18
1961	46
1962	26
1963	33

Cumulative Total: 3786 (991 m, 2795 f) - of which 2927 were on men. def. (1913-63)

MICHIGAN -- FOOTNOTES

1 The author of the bill, Dr. W.R. Edgar, was especially fearful of the practice of "onanism" in state institutions. See "Asexualization of Criminals and Degenerates," 6 Mich. L.J. 289 (1897) at 291. A "typical" view was expressed by Dr. William M. Donald who compared the good that castration does to animals with what it might accomplish on humans in Michigan: "Reasoning from analogy it is only fair to conclude that this operation practiced upon certain cases of insanity with a homocidal tendency, or upon habitual criminals of a violent and dangerous temper would have the same soothing and quieting effect." Ibid. at 296. This was the theory that Sharp used on his boys at the Indiana State Reformatory, 1899-1907. However, another Michigan doctor, Dr. Charles S. Morley, was willing to let Nature take its course: "The 'unfit' tend to perish as surely as the 'fit' tend to survive. In a word, Nature herself, interposes the most effectual means against racial degeneracy." Ibid. at 308-09. The Edgar, Donald, and Morley articles were part of a general discussion of the Michigan proposal and the question of castration as a means for protecting society against the propagation of certain types. (pp. 289-316)

2 The second division of section 7 of the act was voided, but this provision did not affect the validity of the entire act. The particular sterilization order in this case was vacated on the grounds of failure of the state to adequately meet various requirements of the law.

3 231 Mich. at 415, 204 N.W. at 142. And, like the United States Supreme Court in 1927, the Michigan court was convinced of the reliability of the findings of human genetics when they held "...that this statute, measured by the purpose for which it was enacted and the conditions which warranted it, and justified by the findings of biological science, is a proper and reasonable exercise of the police power of the State." Id. at 415-16, 204 N.W. at 142.

4 Id. at 428 et seq., 204 N.W. at 146 et seq. Though Wiest and his two fellow dissenting justices did not prevail in the case, it is important to note that one of the concurring judges, Clark, had grave doubts about the scientific validity of the act, especially the question of prediction of the "probability" that a person's condition would not improve and that future progency would inherit the tendency or affliction. He felt that such a finding must be found on evidence and not conjecture or speculation, but he resolved his doubts in favor of the validity of the law, leaving the vote in the case 5-3. Unlike the U.S. Supreme Court, the Michigan court majority mentioned some of the scientific experts on the subject of feeble-mindedness, among others Dr. A.F. Tredgold and Prof. Samuel J. Holmes, and with great confidence could assert that: "Biological science has definitely demonstrated that feeble-mindedness is hereditary...." Id. at 414, 204 N.W. at 141. Later on, they used the phrase "to a reasonable degree of certainty." Id. at 415, 204 N.W. at 142. For an interesting discussion of the

drafting of the Michigan law and surprise that it was found constitutional, see Burke Shartel, "Operations to Produce Sterility: Medicolegal Implications," in Samuel A. Levinson (ed.), Symposium on Medicolegal Problems (Philadelphia: J.B. Lippincott Co., 1948), at 141-42.

5 This writer wonders why the Michigan case was not made a test case. Certainly the evidence presented to prove the invalidity of the law was extensive and quite reputable by the standards of that day. Persons such as the famous lawyer, Louis Marshall and the famed psychiatrist, Dr. William A. White, contributed to a voluminous brief attacking the entire foundations of compulsory eugenic sterilization legislation. Viewing the U.S. Supreme Court's decision in 1927 in retrospect, one might assume that no amount of evidence would have been sufficient to stem the tide of eugenics sentiment coupled with the police power that Holmes and company found so simple to understand and underwrite.

6 Mention of these alleged castrations brought forth this comment by Lionel Penrose relative to one case of a youth who waylaid his schoolmistress: "...It is unbelievable that such a case could not have been dealt with in other ways more in keeping with modern humanitarian standards." Mental Defect (1934), at 173. In a communication to this writer from the Michigan Department of Corrections, dated July 10, 1962, the following statement was made: "Such records as we have available indicate that since the statute was enacted in 1929 only two inmates

in Michigan correctional institutions have been sterilized. One of these was a voluntary operation and the other was performed while the inmate was a patient at the Ionia State Hospital having been transferred there as criminally insane. Both were conducted in the early 1930's."

7 Pocock, "Sterilization in the Empire; An Account of the Working of the Alberta Act," 24 Eugenics Rev. 127 (1932) at 129. The title seems surprising, but Miss Pocock stopped in Michigan en route back from Alberta and devoted half of her 3 page article to Michigan, at pp. 128-30. Frederick W. Brown, in "Eugenic Sterilization in the United States: Its Present Status," in the issue, Some Social Aspects of Mental Hygiene (ed. by Frankwood E. Williams), 149 The Annals 22 (Part III, May, 1930) at p. 32 mentions a total of 4 castrations performed under Michigan law up to January 1, 1929 and he recorded all of these as performed in the year 1928.

8 On the basis of the location of those hospitals that had reported sterilizations, the author wrote to each of the Probate Court judges that would control the records in these cases. Letters were received from the probate courts for Kent, Genesee, Macomb, and Oakland Counties. No replies were received from the judges in Branch, Ionia, Lapeer, Washtenaw, and Wayne counteis. This was quite disappointing to this writer, since at the time, I was located in Detroit.

9 This writer was told by one of the present judges of Probate Court

in this country that hundreds of sterilizations were processed during this period of the depression years, and that one judge in particular had a penchant for enforcing eugenic principles in the law. Following his death, there was a decline in sterilization orders. One can add from an examination of records during this period that the hearings in these cases were very routine indeed, that the guardian ad litem appointed by the judge was usually the same for all of the cases of the poor, and that the same was true of the surgeons or physicians used either for the report to the court or for the examination. While this may not be collusion, one gets the very strong impression of a kind of "eugenics club" in this court that went through scores of petitions with careless self-abandon.

10 In one of these cases, the Judge was "lenient." After issuing his order, he waited 18 days, during which the woman had disappeared and could not be found in the county. He then ordered the Chief of Police of Grand Rapids, the county seat, to find her. Within a day she was found and sterilized. This woman had three illegitimate children, which formed the basis for the order to sterilize, since more public charges were believed to be in the offing.

11 This writer pondered using this woman's letter in his manuscript, but it was a private letter and although it would have been an excellent example of how crude the determinations of feeblemindedness were in the early 1930s, this woman deserves some respect for her actions

in this case. It may be amateurish judgment, but the letter was grammatically far better in many respects than the test papers and term papers this writer has received from many of his undergraduate students over several years of experience. Without being sentimental and maudlin , I would say that there was a poetic simplicity in the way she approached the judge and asked forgiveness for the short "delay."

12 Letter to author from Judge Wallace Waalkes, dated October 4, 1961.

13 One very selective institution was the Traverse City State Hospital, which reported 8 operations in five years, explained their position in this way: "We, no doubt, are somewhat conservative in this respect and probably lean backwards to assure ourselves that surgery in each selected case is necessary or desirable. We have only done this type of surgery on the cases where we felt pretty sure that we were on firm legal ground in that not only was the patient a public charge but any issue was likely to become a public charge because of inability to care for themselves." Letter to author, dated Sept. 21, 1961. One wonders how Justice Wiest would respond to such an explanation today. On the other hand, the Lapeer State Home and Training School went from 54 operations in 1952 to none in 1961, all on persons labelled "trainable" (and presumably able to be released). The explanation for the decline is not known to this writer. These were all cases that went through the Probate Court. Conceivably, as "consent" cases increase, these would not appear in the records of the Court. If one views the total annual figures for Michigan, the assumption would be that Lapeer, like

many other institutions in the state, simply no longer believes in the efficacy of the surgeon's knife. Although Michigan's penal institutions are covered by the law, only two operations have been performed under the 1929 law, which is somewhat ironic indeed. Apparently, persons committed to the state's various hospitals and mental institutions are considered a greater risk, eugenically, than the state's convicts.

14 The Coldwater State Home and Training School had this to say about "consent" procedures: "...no sterilizations are done on a 'consent' basis, in accordance with the policy established by the Department of Mental Health. It is felt that our patients, because of having been committed are incapable of giving consent. A probate court order is required in each case in which a sterilization is done." (letter to author, dated Sept. 20, 1961, from E.J. Rennell, M.D., Medical Superintendent). If this is the policy of the state, it might help to account for the reduction of cases, since the court procedure is detailed and can in some cases be prolonged and cumbersome, especially if objections to the operation are lodged. Also, see the 7 opinions issued by various state Attorneys General, listed in Appendix 8, <u>infra</u>.

15 The author of the bill (which also exempted epileptics from an 1846 law barring their marriage), state Senator John W. Fitzgerald, told this writer that the impetus for the bill came from neurologists at the University of Michigan. Letter to author dated March 1, 1962. Hopefully, these neurologists and others will look into the general categories

of the law, for after all, some of the most significant research on mental retardation and its cure is being done at the University of Michigan Medical School.

16 Because there is no centralized control over sterilization figures for the state, it was impossible to determine the number of extramural (non-institutional) operations in Michigan's cumulative total. In the Report of the Departmental Committee on Sterilisation (the 1934 English report, sometimes called the Brock Report), it was reported that out of the total number of operations up to January 1st, 1933, there were approximately 300 non-institutional sterilizations performed under our various state laws, and that "....Of these 300, more than two-thirds were done in Michigan." (at 112)

MINNESOTA

Minnesota has one of the three programs in the United States (together with Connecticut and Vermont) that is wholly voluntary in nature. The law, which dates back to 1925, covers the insane, and feeble-minded persons who have been lawfully committed to the guardianship of the Commissioner of Public Welfare. The written consent of the patient is required as a matter of state policy, and the law requires the written consent of the spouse or nearest kin. Present policy confines the law to the mentally deficient.

The American Neurological Association report of 1935 was not commendatory of Minnesota policy of that time:

> The law is voluntary, but the recommendations are made by the state board of control.**** We are informed that the board of control never makes a bargain with a family, but also that, practically speaking, the working of the law comes down to this --- the higher grade girls and boys in institutions know, as well as do their families, that sterilization is necessary before release becomes easy or possible. Thus, the slogan of the state board of control, indirectly expressed and with many reservations, is -- the price of freedom is sterilization. The voluntariness may seriously be questioned, at least from an ethical point of view. Moreover, to some extent,

> some persons are kept longer in institutions than they might otherwise be, due to the fact that they will not give consent to sterilization. This probably occurs throughout the country.[1]

Present Minnesota policy and practice is a far cry from this statement made in the 1935 report. But the changes in Minnesota have not been due to changes in law, which has remained unchanged since 1925, but to a change in administrative attitude. Perhaps as much or more than any state in the Union, Minnesota has evidenced a strong sense of the importance of recent scientific knowledge and its impact on present law and policy.[2]

At a meeting of those responsible for the law in 1960, the following summary was given:

> Under Minnesota law, the question of sterilization for an individual patient is reviewed by the hospital superintendent, a psychologist, a physician and the Commissioner of Public Welfare. The law requires the consent of the nearest relative and by policy the consent of the ward is required. No pressure is brought to bear on either the patient or the relatives for this operation. Under the present policy a very careful study is made of every ward who has been recommended for sterilization and any recommendation that

> sterilization be carried out is based upon scientific and objective findings.[3]

Frances Coakley Ames, supervisor of the section for mentally deficient and epileptic in the Department of Public Welfare, has said that sterilization has declined in Minnesota, due not only to new knowledge about retardation, but also to changing attitudes based on this knowledge. Mrs. Ames told this writer that some of the operations performed in the 1930s and early 1940s (when figures ran relatively high) may have been based on a judgment of the ward's ability to raise a family that would not be held today. The figures for 1945 to the present time may well be the result of the feeling on the part of Minnesota administrators that surgical procedures are not the only or best way to handle the problems of the retarded. Interviews with staff people in Saint Paul appeared to this writer to indicate a firm grasp of the importance of respecting the will of the patient in question. Record keeping of each case is systematic and complete and pride is taken by the department in the follow-up procedures after sterilizations. Time and time again, as in the GFAOP report, mention was made of the impact of "social, cultural, and psychological factors on intellectual functioning" - in other words, a broad view of the whole subject, and not merely the question of how to best affectuate the release of a patient and save the state untold dollars and the patient untold misery in an institution. The feeling I received was one of genuine interest in the <u>whole</u> person, and sterilization was discussed in this context.[4]

The Manual of the Department of Public Welfare dealing with mental deficiency and epilepsy (June, 1949) is very careful about the element of consent and bargaining for release:

> Pressure must not be brought to obtain consent. This is true whether the opposition is on religious grounds or on other grounds.[5]
>
> *******
>
> The Commissioner will not make a bargain with anyone to release a ward if the ward is sterilized; however, when a plan is agreed to, based on the fact that the ward will be sterile, it is expected that it will be carried out following the operation.[6]

Minnesota sterilization history illustrates how a law, without statutory change, can go through various cycles dependent on external conditions,[7] changes in scientific knowledge, attitudes of administrators, and a greater awareness of the ambiguities in our knowledge and attitudes toward mental retardation. This state deserves credit for attempting to recognize the relation of science to public policy and for a conscientious attempt to bridge the gap between the two. If the AMA report of 1935 was issued today, it would probably recognize that in Minnesota, consent can actually be consent.[8]

STATE OF MINNESOTA

DEPARTMENT OF PUBLIC WELFARE

STERILIZATION OF MENTALLY DEFICIENT PERSONS

YEAR	FEMALE	MALE	TOTAL
1925-1939	1024	184	1208
1939	99	37	136
1940	82	34	116
1941	79	42	121
1942	68	27	95
1943	23	19	42
1944	18	15	33
1945	6	5	11
1946	1	0	1
1947	0	0	0
1948	0	7	7
1949	3	3	6
1950	10	1	11
1951	13	2	15
1952	14	2	16
1953	9	1	10
1954	7	2	9
1955	6	6	12
1956	16	0	16
1957	10	1	11
1958	7	1	8
1959	5	0	5
1960	3	0	3
1961	3	0	3
1962	1	0	1
GRAND TOTALS	1,507	389	1,896

MINNESOTA FIGURES

TOTAL UP TO

1/1928	232	(214m, 18f)*	G&P, at 184
1/1930	388	(32m, 365F)	GP, introd.
1/1932	508	(48m, 460f)	- Landman, 289
1/1933	693		Whitney, 302
1/1935	971	(113m, 858f)	ANA, at 14
1/1938	1,459	(270m, 1189f)	HBF
1/1941	1,880	(386m, 1494f)	HBF
1/1942	2,010	(428m, 1582f)	HBF
1/1944	2,157	(478m, 1679f)	Birthright, Inc.

OPERATIONS IN

1941	121	official figures
1942	95	" "
1943	46	BIRTHRIGHT & HBAA
1944	34	" "
1945	13	
1946	2	
1947	1	
1948	4	
1949	8	
1950	12	
1951	15	
1952	16	
1953	13	
1954	10	
1955	9	
1956	19	
1957	12	
1958	8	
1959	6	
1960	5	
1961	5	
1962	1	
1963	0	

NOTE: heavy concentration from 1933-1942; during the war years, there were staff shortages, which may account for part of the drop from 1942-46.

GRAND TOTAL (1925-63): 2,350 (519m, 1831f)

*(probably an error in the sexes)

MINNESOTA -- FOOTNOTES

1 Eugenical Sterilization, at 14-15.

2 Commissioner Morris Hursh of the State Department of Public Welfare wrote: "You, undoubtedly, are aware of some of the new concepts in mental retardation and of the new definition of mental retardation proposed by the American Association on Mental Deficiency. Under their new definition, mental deficiency may be descriptive of the current status of individual functioning.*****We recognize that the new concepts in mental retardation have real import in relationship to sterilization." Letter to author, dated November 15, 1960. Mention is made of the Group for the Advancement of Psychiatry's Report No. 43, Basic Considerations in Mental Retardation: A Preliminary Report. (N.Y.: Dec. 1959).

3 Inter-Institutional Meeting, on sterilization, Nov.21, 1960.

4 "We're not as certain of the genetic factors, affecting heredity, as we used to be, and we are more aware of the effects of social deprivation, in both family and general environment." Mrs. Ames as quoted in a newspaper series on sterilization by Miriam Alburn, Minneapolis Star, Sept. 19, 1962. Mrs. Ames is a former President of the American Association on Mental Deficiency.

5 Sterilization, E-2(b), at 60.

6 Ibid., E-2(d), at 60.

7 Commissioner Hursh remarked that "....Although we do not have the breakdown by years for the 1930;s, we believe that there were a large number of operations during those years and that we had large numbers of commitments in mental deficiency due to the inability of individuals to adjust to severe economic pressures of the depression days." Letter to author, dated Nov. 15, 1960.

8 Notwithstanding the fact that Minnesota's law has always been voluntary, there have been no less than 11 opinions by various state attorneys general relative to their sterilization law (M.S.A. 256.07 to 256.10), which indicates that even where the law requires consent, the rights of the patient still need clarification and interpretation. These opinions ranged over the period from 1926-58.

MISSISSIPPI

The Mississippi law was passed in 1928, but was slow-starting, reporting only 12 operations up to January, 1933. Apparently, the depression years changed the emphasis, but the American Neurological Association Report of 1935 stated that

> ....The law is compulsory, but according to information received is carried out on a voluntary basis, and in case of refusal, operation is not performed....[1]

Information regarding Mississippi policy is lacking, especially since the law allows the initiation for operations to come from the various state Institutions covered by the law. Notice, hearing, and appeal of an order for sterilization all the way to the state Supreme Court is allowed. The due process safeguards may, as in other states, make the superintendents of the state institutions reluctant to use the law. This was evidenced at the East Mississippi State Hospital, where Acting Director, Doctor J. Moss Beeler, wrote:

> The law in this State is so complicated that since I took over as the Acting Director of this institution we have tried no sterilization operations.[2]

The period from 1935-41 evidence a real upsurge in Mississippi sterilizations, but the war and post-war years have seen a decided decline in operations. From 1928 to 1942, there were 536 reported operations. From 1942 to 1963, there have been 147 operations. From

1949 to 1956, no operations were performed, but they began again in 1956 and reached the number of 22 operations in 1958. There seems to be little consistency in the annual figures, except that they have been relatively low as compared with the 1930s.

One theory that has been advanced for the explanation of the drop in state sterilizations in Mississippi has been that operations were being performed "voluntarily" through welfare and other state agencies, especially with Negro clients. Although there is some evidence to indicate that voluntary operations are performed, the policy of the Department of Public Welfare does not ostensibly indicate any race projudice in its policies. The director of child welfare services, Hershel Saucier, wrote the author that:

> In summary we give no emphasis to the use of voluntary sterilization in working with our clients but merely deal with the use of voluntary sterilization as the problems are presented and as it seems appropriate. We have had some situations where there was a very definite need for sterilization when families have not agreed to such sterilizations. In such instances we have very little legal direction and very little willingness on the part of physicians to follow through with sterilization in these instances.[3]

That the state's policy in the area of compulsory and voluntary

sterilization is one of reluctance is interesting in view of the fact that the Mississippi Legislature has for the past 7 years entertained bills calling for the sterilization of mothers of illegitimate children to stem the tide of illegitimacy in Mississippi and to allegedly reduce the cost of ADC in the state. In 1964, one such law finally passed and was approved by the Governor,[4] but an earlier version that included a provision for "trading" sterilization for imprisonment was deleted from the final version. Apparently pressures in Mississippi as well as exposure of this provision in the nation's press led to its being dropped. Though Mississippi has not, in the nation's eyes (nor those of other nations) been regarded as the bastion of civil rights, the sterilization story in Mississippi seems to differ from the other areas of criminal due process of law. Possibly, the highly personal character of sterilization has proved too much of a roadblock for either the use of compulsory or voluntary operations in this state. However, the facts are not too well known, and like so many other areas of Mississippi life, it may be a long time before the authentic story of sterilization in Mississippi is really known.[5] One thing is clear: as a matter of state policy, the compulsory state sterilization law has not been used for punitive purposes nor for bargaining for release, if the figures of the last two decades are taken at face value.[6]

MISSISSIPPI STERILIZATIONS

TOTAL UP TO

1/1930	0		CP, intro.
1/1933	12		Whitney, at 302
1/1935	163	(27m, 136f)	ANA, at 15
1/1938	330	(105, 225)	HBF
1/1941	523	(149, 374)	HBF
1/1942	536	(149, 387)	HBF
1/1944	546	(149, 397)	Birthright, Inc.

OPERATIONS IN

1943	5
1944	0
1945	2
1946	15
1947	6
1948	5
1949	8
1950	0
1951	3
1952	2
1953	0
1954	2
1955-63 ..	0

CUMULATIVE TOTAL, 1928-63: 683 (160m, 523f)

MISSISSIPPI -- FOOTNOTES

1 Eugenical Sterilization, at 15.

2 Letter to author, dated March 7, 1962.

3 Letter to author, dated March 30, 1962. Regarding the use of the compulsory features of the law, he adds: "In checking with our administrator of the mental institutions, he reports that this compulsory provision is very seldom used."

4 House Bill No. 180, "An Act to Provide that any Person Who Shall Become the Parent of an Illegitimate Child Shall Be Guilty of a Misdemeanor and to Provide the Punishment Therefor."

5 Though Mississippi's law allows for sterilization of the insane and the feeble-minded, out of 683 operations up to 1964, 602 were performed on the mentally ill. The author has received no reply from repeated inquiries to Doctor W.L. Jaquith, Director of the Mississippi State Hospital, which presumably has been the leading institution for sterilization operations. The policy of this institution, both now and in the past, might prove helpful in explaining the changes in the application of the law in Mississippi.

6 For a discussion of recent efforts to pass punitive sterilization laws in Mississippi, see ~~XXX~~ chapter three on the return to punitive sterilization, infra.

MONTANA

The early years of Montana's law, passed in 1923, saw a gradual use of law, particularly in the 1930s, but since the 1940s, Montana has steadily shown a reluctance to enforce its law. The law is compulsory in nature, but patients can appeal an order of the State Board of Eugenics to the district court. A hearing before the Board, if there is a refusal of the guardian or next of kin, is afforded the patient, and notice and hearing rights appear to be respected.

Though the Board can issue an order even though consent is withheld, Board policy is not to do this. The former chairman of the Board, Doctor G. D. Carlyle Thompson, wrote that:

> ...it (the Board) has not approved sterilization without having received consent of the guardian or nearest living relative even though to do so has menat extensive effort to obtain such a consent from, some time, at long distances ....that is in other states. ***** the Board's functions are limited to persons under the jurisdiction of the state custodial institutions which have been identified by the Attorney General as the State Mental Hospital and the State Training School. There have been frequent requests for approval of sterilizations of persons not under the jurisdiction of these institutions. The Board, of course, has not acted on such cases, and in some instances this

> has probably resulted in dissatisfaction on the part of patients, physicians, and others who feel that the state sterilization law should apply.[1]

The fact that the Board has taken such great pains to get consent, even though the law provides a means to avoid this difficulty, shows how present policy is illustrative of the much higher sense of patient's rights than seems to be the case in many of the states that viewed sterilization with a much more casual sense of rights in the 1930s. Without benefit of legal change, Montana, has, as in Iowa, regarded consent as mandatory. Whether Board policy will remain the same would be hard to predict, although there have been no reported sterilizations since 1954, and Doctor Thompson has moved on to a new position as Director of the Utah State Health Department. Up to January, 1942, Montana had 203 reported operations. Since that time (1942-63), there have been only 53 operations, 15 in 1946 alone. The law, which has never been tested in the courts, still remains procedurally useful if a future Board order is found objectionable.[2]

MONTANA STERILIZATIONS

Total up to

7/1925.....23 (11M, 12F) --- Laughlin 1926, at 54.

1/1928.....35 (20M, 15F) --- G & P, at 184

1/1930.....60 (27M, 33F) --- CP, intr.

(1/1932, Landman, at 289 and Whitney, at 302 both still report 35)

1/1933.....81 Whitney at 302

8/1934.....84 ANA, at 15

1/1938.....109 (35, 74) HBF

1/1941.....186 (58, 128) HBF

1/1942.....203 (60, 143) HBF
1/1944.....213 (61, 152) Birthright, Inc.

*****

OPERATIONS IN

1943.....5
1944.....0
1945.....2
1946.....15
1947.....6
1948.....5
1949.....8
1950.....0
1951.....3
1952.....2
1953.....0
1954.....2
1955-63.....0

CUMULATIVE TOTAL (1923-63): 256 (72M, 184F)

MONTANA -- FOOTNOTES

1 Letter from Doctor Thompson to Dr. H. H. Hutcheson, Commissioner of Public Health, State of Tennessee, dated July 21, 1960.

2 Sec. 93-2711-7 (Table A) of the Montana Rules of Civil Procedure excepts the eugenic sterilization law appeals provision (sec. 38-606) from special statutory proceedings under Rule 81 of the Rules of Civil Procedure. The reasons for this exception are not known to this writer, but it is probably similar to the exception in the West Virginia Rules of Civil Procedure.

NEBRASKA

Nebraska's first sterilization law, passed in 1913, was vetoed by Governor John H. Morehead in a strongly-worded veto message:

> ...This proposed legislation is new and practically untried; at best it is only an experiment and it seems more in keeping with the pagan age than with the teachings of Christianity. Man is more than an animal.[1]

The eugenicists did not wait long, and another attempt was made in 1915, which succeeded without the benefit of the signature of Governor Morehead. The lack of a veto in this case might be explained by section 4 of the act, which read:

> Before any such operation shall be performed, the nature, character and consequences of such operation shall be fully explained to such inmate and to the husband, wife, parent, guardian or nearest kin of such inmate and no such operation shall be performed without the written consent of such husband, wife, parent, guardian, or nearest kin, as the case may be, and the assent of such inmate so far as said inmate is capable of assenting thereto.[2]

Nebraska has always tied its sterilization policy to parole or discharge from state institutions. The 1915 law applied only to the insane and feeble-minded, and was voluntary in nature requiring the

consent of the inmate and next-of-kin. However, in 1929, the law was expanded to include habitual criminals, moral degenerates and sexual perverts. Those inmates convicted of rape, incest, any crime against nature, or rape of a mentally ill person were subject to a court-ordered castration (if male) with the proviso that within one year after such an operation the prisoner was eligible to apply for commutation of sentence. As in other states that took heart with Buck v. Bell in 1927, the 1929 law was compulsory, but it provided for notice and hearing, and possible appeal to the Supreme Court of the state. In re Clayton, 120 Neb. 680, 234 N.W. 630 (1931), the Nebraska Supreme Court relying heavily on the U.S. Supreme Court's decision in the 1927 Buck v. Bell case, upheld the constitutionality of the Nebraska law.[3]

The data does not indicate whether the castration provision was used, and the warden of the State Penitentiary could find no hospital records of sterilization having been performed. In 1957, the Legislature again changed the law in a very distinctive way. Only inmates of the Beatrice State Home (for the mentally deficient) are now covered by the law, which still ties sterilization to parole or discharge from the institution. The castration provision has been dropped from the present law, and the incidence of operations has dropped somewhat since 1957. The reasons for exempting the insane and various criminal classifications from the onus of sterilization as a condition for release is not clear, but it may be that Nebraska has gone through an internal shakeup in

personnel as well as attitudes.[4] A law that has operated for over 50 years and upwards of nearly a thousand operations would not suddenly change without a reason. The repeal of the castration provision might be credited to a more enlightened attitude toward criminality and its causes.

In writing about Nebraska's first law, which was voluntary, Harry H. Laughlin said:

> In the character of the law and the competency of its application, Nebraska shares with California, Washington and Oregon the claim to the most business-like and scientific administration of eugenical sterilization.[5]

The policy in this pre-1929 period was definitely conservative. Nebraska has once again returned to the conservative path, perhaps less certain than it was in 1915 and more mindful of the range of solutions other than the surgeon's knife.[6]

BEATRICE STATE HOME

STERILIZATIONS

YEAR	MALE	FEMALE	TOTAL
1917	1	0	1
1918	1	1	2
1920	0	3	3
1921	1	0	1
1922	1	2	3
1923	3	3	6
1924	1	2	3
1925	4	6	10
1926	4	8	12
1927	6	2	8
1928	5	4	9
1929	7	0	7
1930	0	1	1
1931	2	10	12
1932	6	4	10
1933	9	8	17
1934	9	19	28
1935	6	16	22
1936	4	10	14
1937	9	12	21
1938	7	10	17
1939	7	15	22
1940	8	7	15
1941	4	13	17
1942	82	40	122
1943	48	33	81
1944	10	10	20
1945	6	8	14
1946	6	6	12
1947	1	6	7
1948	9	7	16
1949	8	6	14
1950	2	7	9
1951	4	10	14
1952	20	15	35
1953	17	11	28
1954	12	10	22
1955	8	7	15
1956	2	6	8
1957	1	3	4
1958	1	3	4
1959	5	5	10
1960	2	4	6
1961	1	3	4
1962	4	1	5
1963	6	4	10
1964	0	3	3
	360	364	724

NEBRASKA STERILIZATIONS

TOTAL UP TO

1/1922	155 (87M, 68F)	---	Laughlin, at 74
7/1925	262 (141M, 121F)	---	Laughlin 1926, at 55
1/1928	308 (109M, 199F)	---	G & P, at 184 (note discrep. in sexes)
1/1930	--- same		CP, introduction
1/1932	386 (95M, 291F)	---	Landman, at 289 (note further discrep. in sexes)
1/1935	276 (112M, 164F)	---	ANA, at 16
1/1938	333 (132M, 201F)	---	HBF
1/1941	388 (154M, 234F)	---	HBF
1/1942	408 (157M, 251F)	---	HBF
1/1944	609 (286M, 323F)	---	Birthright, Inc.

OPERATIONS IN

1943	79
1944	23
1945	16
1946	13
1947	7
1948	20
1949	16
1950	19
1951	19
1952	37
1953	27
1954	23
1955	15
1956	8
1957	5
1958	4
1959	10
1960	6
1961	10
1962	5
1963	10

TOTAL: 902 (423M, 479F)

NEBRASKA -- FOOTNOTES

1 In Laughlin, ES in US, at 48. An attempt to override his veto failed. The Governor found all kinds of violations of basic constitutional rights in the law, which was compulsory, and further stated that institutional segregation was already sufficient to guard against the dangers cited in the act.

2 Ibid. at 33. No other procedural safeguards were required in the act.

3 The Nebraska court even looked seriously into the reversability of sterilization. Apparently, they were quite favorably impressed by the testimony of one physician, a medical witness, who performed 50 such reversal operations. He was mentioned in the opinion thus: "...He also testified that the operation does not at all incapacitate the patient and that, should the individual so operated upon at any future time desire it, an operation can be performed resexing him and making him potent as before..." (at 682) While medically it is possible, as the witness said, his optimistic view of the chances are not statistically, nor surgically well-grounded.

4 In the revised statute of 1957, the Board of Examiners of Defectives, which makes the final determination of whether to order sterilization, was revised. Originally, the Board consisted of 5 physicians from the medical staffs of the various state institutions, but in the new law

three of the five must be psychiatrists and one a psychologist. The shift toward a psychiatric orientation might account for a much more restricted use of sterilization.

5 Op. cit. supra note 1 at 75.

6 It is interesting to note that sterilization based on eugenic considerations also spilled over into the area of marriage law in Nebraska, which is the one of the few states that requires sterilization as a condition to marry in the following cases: "...No person who has been adjudged an imbecile, or a feeble-minded person, or a person who is or has been adjudged afflicted with hereditary epilepsy or hereditary insanity shall marry in this state, until after he or she has submitted to an operation for sterilization." R.R.S. # 42-102.

NEW HAMPSHIRE

New Hampshire's first law, passed in 1917, was voluntary, and was not extensively used. In 1929, following the Buck v. Bell decision by the U.S. Supreme Court, the law was made compulsory, with notice, hearing, and the right to appeal to the state Supreme Court. Application of the law picked up considerably in the 1930s. The 1935 report of the American Neurological Association reported that New Hampshire authorities were optimistic about the use of the law, and quoted them as saying that ---

> Selective sterilization cuts off definitely hereditary lines. It grants greater social liberty to the individual. It relieves the community of the support of probable defective offspring....While we know little of heredity, like begets like in a general way, as it always did and as it always will, and sterilization is the only bit of preventive medicine we are exercising.[1]

The depression years seemed to be the peak of this "optimism," but the war years brought a slow-down in operations, and in the period from 1957 to the present time, there have been only one reported operation. In an article published in 1950, Betsey Scott Johnson, a social worker at the Laconia State School discussed the period from 1917-1947 when 264 operations were performed at the School. She argues that many potential retardates were prevented from being born and therefore, becoming a

charge on the state of New Hampshire. Insofar as sterilization's use as a means for institutional discharge was concerned, she estimated a savings of $388,974 in the period 1917-47, and this is based on one dollar-a-day maintenance. And this savings applied only to 125 inmates who were released and who became self-supporting after discharge.[2] Neither the economics of sterilization nor the optimism of 1929 have persisted to the present time. The reasons for what appears to be a change in sterilization policy are not found in the economics of institutionalization, but rather are seen in changing attitudes and knowledge. The present Superintendent of the Laconia State School, Arthur E. Toll explains it:

> 1. The policy of the Board of Trustees during the past few years has been to perform sterilization only as a last resort and only in cases where we can prove that the individual is a potential parent of mentally deficient children. In other words, the present law forbids our staff to recommend sterilization on residents in our charge who are not familial cases. As there are at least ninety different causes of mental retardation, and because we know relatively little about them nor have the necessary information to make a 100% correct diagnosis we would be treading on dangerous ground to recommend sterilization freely.

> 2. We have instituted procedures which permit much closer supervision of residents who are placed in the community. This includes careful screening of foster homes, parents and foster parents before a resident is placed. To date we have been very successful with this preventive procedure.[3]

The acting superintendent of the New Hampshire Hospital, Doctor G. Donald Niswander, wrote:

> I believe this [reduction in operations] is explained by the fact that over the years, with changes in the hospital administration, likewise there have been changes in philosophy regarding sterilization of mentally ill individuals and the sterilization of former patients of the hospital. ***** I believe it is a rarity now for our staff to recommend these procedures. If relatives request sterilization they are urged to take up the matter with their family doctor and have such procedures taken care of and arranged for them when they leave the hospital....[4]

This conservative phase of New Hampshire sterilization policy appears headed for long-term usage. Unless present personnel and policies change radically, sterilization figures will probably remain low in contrast to the late 1930s and the early 1950s.

NEW HAMPSHIRE STERILIZATIONS

TOTAL UP TO:

7/1925.....	41 (4M, 37F)	Laughlin 1926, at 56.
1/1928.....	46 (4M, 42F)	G & P, at 184.
1/1930.....	61 (4M, 57F)	CP, introd.
1/1932.....	85 (10, 75)	Landman, at 289
1/1933.....	165	Whitney, at 302.
1/1935.....	199 (29, 170)	ANA, at 16.
1/1938.....	353 (51, 302)	HBF
1/1941.....	430 (73, 357)	HBF
1/1942.....	436 (76, 360)	HBF
1/1944.....	492 (93, 399)	Birthright, Inc.

OPERATIONS IN

1943.....	24
1944.....	19
1945.....	20
1946.....	9
1947.....	6
1948.....	11
1949.....	14
1950.....	17
1951.....	23
1952.....	18
1953.....	21
1954.....	8
1955.....	4
1956.....	8
1957.....	8
1958.....	0
1959.....	1
1960-63..	0

CUMULATIVE TOTAL: (1917-63) 679 (1524, 527F)

NEW HAMPSHIRE -- FOOTNOTES

1 Eugenical Sterilization, at 16.

2 "A Study of Sterilized Persons From the Laconia State School," 54 Amer. J. of Men. Def. 404, 407 (1950).

3 Letter to the author, dated October 23, 1964.

4 Letter to author, dated October 22, 1964.

NORTH CAROLINA

Although it is currently the leading state in the union in the number of annual sterilizations reported, North Carolina's first two eugenic sterilization statutes ran into adversity. The first law was passed in 1919 and exemplified the cumbersomeness of many of the earlier laws. Though compulsory, the law required the recommendation of the medical staff of the particular institution, the approval of a board of consultation consisting of a member of the medical staff of each of the state institutions and one from the state board of health, and the further approval of the governor and the secretary of the state board of health. Apparently, fear of unconstitutionality prevented its use, and there is no record of sterilizations under this act.[1]

The second law, passed in 1929, even though extramural in its application, was still procedurally deficient and met its end at the hands of the North Carolina Supreme Court in Brewer v. Valk[2] in 1933. Relying on the Buck case for the requirements of due process of law, the court said that:

> In property rights due process requires a forum and a hearing. It goes without saying that the same must apply to human rights. If the Constitution and laws in relation to due process -- notice and hearing....apply to a material thing, they should more so apply to the human element.[3]

Lacking provision for notice and hearing, the law was invalidated because it impinged on the due process clause of the Constitution. 49 persons had been sterilized under the 1929 law prior to its invalidation.

State officials wasted no time in getting the best legal and administrative advice after careful study of existing sterilization laws in other states, and in 1933 the present North Carolina law was enacted. This act provides for notice, hearing, and the right to appeal and although the law is compulsory, in some cases, it has never met with litigation in the courts. The Eugenics Board of North Carolina, created under the act, consists of five members including the Commissioner of Public Welfare, Commissioner of Mental Health, the State Board of Health Director, the Attorney General, and the Superintendent of one of the state's institutions for the mentally ill or mentally retarded. Petitions to the Eugenics Board can be instituted for institutionalized persons through the superintendents of the various state institutions, and for non-institutional persons (the extramural provision) through county superintendents of public welfare.

The philosophy of sterilization under North Carolina law is interesting. Though the law applies to the mentally ill, mentally retarded, and epileptic,

> The purpose of sterilization as it is administered under the North Carolina program is to protect persons from parenthood whose impairments would seriously handicap them in assuming the responsibilities of parents.[4]

Because sterilization in North Carolina is part of a mental health, public welfare, and public health policy of the state, great effort is made to obtain consent to the operation. In the manual of the Eugenics Board (1960 ed.) there are five pages of detailed instructions on what kind of consents are required. Thelack of appeals to the courts, or even the exercise of the right to a hearing in individual cases, is undoubtedly due to the success in getting some kind of consent before petitions are initiated.[5]

It is clear in the law that the grounds for either institutional or non-institutional sterilization are diverse and certainly not confined to genetic grounds, and that state and county officials are given wide lattitude in choosing persons under the law:

> 1. When....it is for the best interest of the mental, moral or physical improvement of the patient, inmate, or noninstitutional individual, that he or she be operated upon.
>
> 2. When....it is for the public good that such patient, inmate or noninstitutional individual be operated upon.
>
> 3. When....such patient, inmate, or noninstitutional individual would be likely, unless operated upon, to procreate a child or children who would have a tendency to serious physical, mental, or nervous disease or deficiency.
>
> 4. When requested to do so in writing by the next of kin

> or legal guardian of such patient, inmate or noninstitutional individual.
>
> 5. In all cases as provided for in 35-55.[6]

The Manual and the biennial reports of the Eugenic Board indicate an awareness of the place of genetic factors in the treatment of mental disorders. In the latest biennial report, the Board said: "Hereditary factors take place among a vast number of other reasons for these disabilities."[7] And in the 1960 edition of the Manual, the Board wrote:

> Sterilization, to be effective, must be regarded as an integral part of a broad system of protection and supervision of those individuals unable to meet their responsibilities as parents and citizens. In the plan for sterilization, it is necessary to have the participation of the individual and of his close family connections, as well as the participation of the social worker in cooperation with the physician, psychiatrist, and psychologist.[8]

The statistical data contained in their biennial reports is perhaps the best material for analyzing the present policies of the Eugenics Board as well as the operation of the law in recent years. Table 1 clearly indicates that the great bulk of petitions and 1962-64 operations (84%) came from the non-institutional (extra-mural) provisions of the law and the annual figures for non-institutional operations performed

contained in Table 14 show a steady increase beginning the late 1940s, remaining high throughout the past decade. Correspondingly, the annual figures for institutional operations show a decrease from 1953 on (Table 13). Table 18 indicates that the great bulk of operations have been on the feeble-minded, (84.2% in the last biennium) single, female (Table 17) and while the cumulative figure would show more Negroes than whites sterilized (Table 16), in the latest period (1962-64), Negroes had a ratio of nearly 2-1 (64%), the highest of the past three biennial periods. In the last biennium, almost 2/3 of all those sterilized were single and 97% were females; 48% were between 20 and 30 years of age, and 31% of all those sterilized in this period were under 20.[8a] Another important statistic in relation to age and single status was the number of children reported. 83% of those sterilized in the last biennium (420) had a total of 1,437 children prior to the operation (111 ~~who~~ had 5 or more children each), and of this number, 679 were reported to have been born out of wedlock. If one takes age, sex, color, and marital status into consideration and especially the number of illegitimate children reported, perhaps some of the arguments advanced by the civil libertarians about the uses (and abuses) of eugenic sterilization are not far off the mark.[9]

The most thorough and scholarly study of the North Carolina experience was the book Sterilization in North Carolina by an English psychiatric social worker, Moya Woodside, which appeared in 1950. She found that

the technical (legal) requirements of the law often perturbed welfare departments, especially the consent procedures, which were particularly difficult when next-of-kin had to be traced. Consent of feeble-minded persons (whether informal or formal) could also be difficult to obtain and several counties thought that the compulsory procedures should be used.[10] Woodside also reported that the long delay in completing the procedures often dampened the enthusiasm of thos concerned. It was noted that the Board has been careful to enforce the consent procedures and never has invoked the compulsory procedures of the law when consent is withheld nor even gone through with the operation where there is a change of mind by the person after the operation has been approved by the Board. While these experiences may have disappointed social workers and others in the county and state agencies who have the job of doing the preliminary work before Board action can be carried through to completion, they also signify that the Eugenics Board over the years has followed a cautious, conservative legally-exacting position that is clearly in order after the adverse litigation that resulted in the decision of Brewer v. Valk in 1933.

But the results of legal protection do not nearly approximate the expectations of those, like Woodside, who feel that the sterilization program in North Carolina could be vastly improved. She called for better methods of identification of the feeble-minded, even to the point of applying sterilization as a routine procedure before discharge -

> "...instead of, as happens at present, picking up odd cases when they are brought to the notice of outside authorities through the birth of a defective child..."[11]

But classification and improvement of consent procedures would not really solve the problem. For Woodside, a more significant change would be amendment of the law providing for voluntary sterilization in "selected cases of normal or borderline intelligence."

> It would clear up present legal uncertainty regarding sterilizations of consent, and enable the surgeon to operate in those cases, such as blindness and transmissible physical defect, where he now hesitates to proceed having possible liability to prosecution in mind. Administrators and social workers could make a wider use of sterilization as a constructive measure of assistance to normal clients; and women in poor circumstances, mothers of large families, obtain that relief from childbearing for which at present they must often ask in vain.[12]

Thirteen years later, in 1963, such a law came to North Carolina in the passage of the voluntary sterilization act of that year. Following Virginia, which enacted a similar law in 1962, North Carolina, prompted by earlier unsuccessful efforts in 1957 and 1959 to pass stringent bills aimed at women with two or more illegitimate children, turned to the voluntary, non-punitive solution. The Eugenics Board explained its role

in its passage:

> The 1963 General Assembly passed a voluntary sterilization law which extends privilege of sterilization under certain conditions to those who are not mentally ill, mentally retarded or epileptic. While the Eugenics Board has no part in the administration of this law, as it is based upon the doctor-patient relationship, the members were instrumental in the passage of the bill and have maintained interest in promoting the use of the legislation.[13]

Since there are no published statistics on the use of the 1963 voluntary act, it is difficult to assess its importance in the total sterilization program of the state. Woodside, writing in 1949, felt that the use of voluntary sterilization even allegedly on "therapeutic" grounds, tended to penalize the poor of the state.

> In practice, the vagueness of the law means that there is considerable social injustice between one class of women and another. A contraceptive sterilization can usually be obtained by the better-off patient, if she searches diligently enough among the gynecologists of her acquaintance; whereas the patient who is unable to pay and who comes from a different social class than the doctor has much less chance of assistance, although on every ground her need is likely to be greater....[14]

If Woodside is correct in assuming that contraceptive sterilization (or certainly the non-eugenic operation based on socio-economic grounds) would be basic in any voluntary sterilization law, the present situation in North Carolina may come close to the kind of program she called for over 15 years ago. But the basic question is how does the voluntary program mesh with the public health, public welfare programs of the state so that those who are most in need of these operations, presumably those at the lowest reaches of the economic ladder, can obtain these operations free of charge? Unless the act of 1963 is intimately bound up with state and country welfare policies and administration, it is doubtful if it will add to the already existing eugenic sterilization program of the state, especially in its extramural coverage.[15]

In every year but one since 1950, North Carolina has led the nation in annual reported operations, replacing California as the nation's leader.[16] But North Carolina's place in present state sterilization history is not solely statistical. Her large extramural application of the 1933 law, coupled with a strong stress on consent procedures, and more lately, the passage of a voluntary sterilization law not under the aegis of the Eugenics Board, places North Carolina in the forefront of American sterilization practice. At her present rate of sterilizations under the eugenic sterilization law, she will soon replace Virginia as the second highest state in the nation in terms of cumulative operations. But what conclusions can be drawn from her position as the nation's

leading sterilizing state?

One can venture to make some careful predictions. Present annual sterilizations under the 1933 law will probably remain steady, with the bulk of petitions coming from the non-institutional sources. Since the bulk of these operations are on the feeble-minded, the impact of the new 1963 voluntary law will probably not be felt too much, since mental deficiency is not really the concern of the lawmakers in that statute. If it is really aimed at illegitimacy and specifically at the poor, and more specifically, at the poor, young Negro female with a history of multi-parity, much of it illegitimate, then figures (if they could be found) for the 1963 act might gradually climb but they would not materially affect the old law. Hence, the two laws are really complimentary and the extent to which the extramural provisions of the 1933 law are brought closer to the 1963 act through the social service agencies of the county and state governments will be the most important facet of the present sterilization program in North Carolina. Since sterilization under both laws is but part of a larger and more general program of fertility control, it will be important to watch North Carolina policy in the entire area of population planning. Viewed in the context of more general public welfare policies, especially with the advent of anti-poverty programs, sterilization will play but a small, though an important part, in an ongoing program of public health and public welfare that other states may emulate.

The role of education of the public to the kinds and purposes of sterilization is another important factor in explaining North Carolina's sterilization history. The Eugenics Board has promoted an educational program, and it has been aided by one particular lay group, the Human Betterment League of North Carolina (a kind of state counterpart though unconnected to the national organization called the Human Betterment Association for Voluntary Sterilization, of New York City, which dropped the words "human betterment" from its title in 1965). The League, founded in 1945, has helped to promote the state's sterilization program through numerous printed publications, lectures, and the like. One of its leading directors, Doctor C. Nash Herdon, is Professor of Medical Genetics at the Bowman Gray School of Medicine of Wake Forest College.[17]

An interesting example of ignorance about the physiology of sterilization was found in a questionnaire given by a department of sociology in a North Carolina college to students in the three upper classes. The results indicated a rather surprising lack of information regarding the physiology of reproduction and especially sterilization. The project, which was sponsored by the committee on research of the Human Betterment League of North Carolina, is just one example of the efforts of dedicated proponents of sterilization to bring their "message" to all kinds of groups and organizations throughout the state.

In the scope of its program, North Carolina is undoubtedly the leading sterilizing state in the nation. The existence of a fully

functioning Eugenics Board with stress on extra-mural sterilizations, the simultaneous operation of compulsory and voluntary statutes, and the existence of a vocal lay organization pushing the message throughout the state all go a long way in explaining why North Carolina has replaced California as the nation's frontrunner in the field of state sterilization. Doubtless as the T.V.A. is the magnet for visiting experts in various fields who come to the United States, North Carolina's sterilization program will be the program "to see in action" for those who want to see a fully-developed state sterilization program. Since sterilization is but one part of a larger program of treatment of the mentally disabled, we can reasonably predict that there will probably be no precipitous jumps in the number of annual operations reported, nor will there be the kind of tailspin in the number of operations that took place in California, Kansas, and other states.

Because North Carolina has dropped the eugenics argument from its policy, and has stressed the social and environmental aspects of its sterilization program, the link with health and welfare programs in the state will remain a close one and will tend to keep sterilization intact.[18] Unless the new voluntary sterilization law cuts into the extramural operations, we can expect that the stress will continue to be in the area of non-institutional cases.[19] Although the entire history of sterilization in North Carolina indicates a far larger number of state sterilizations of whites than on Negroes, the last 4 biennial reports of the Eugenics

Board have shown the reverse. It would be hazardous to say that this is a deliberate attempt by the Board to select Negroes for sterilization purposes, but the figures do not speak for themselves. As late as the 1950 report, only 23% of the cumulative sterilizations up to that time were on Negroes. What seems to be a complete reversal in the racial character of the annual figures might be a factor conditioned by demographic factors such as the number of persons in state institutions and by the incidence of various forms of mental illness and retardation according to race. Nevertheless, the program might come under attack in the near future by those who, as in the 1962 Warrenton, Virginia cause célèbre, regard the program as a subtle or perhaps not-so-subtle form of Negro genocide (by sterilization). Outside of the naked statistics, this writer can find no evidence of this kind, but the burden of proving the non-discriminatory basis of the state's program will rest with those who have responsibility for the state's policies and the administration of the sterilization law in North Carolina.[20]

Perhaps the most drastic change in the North Carolina sterilization picture was found in the sharp decline (30%) in operations reported in the latest 1964-66 biennial report of the Eugenics Board. In the 1962-64 biennium, 591 petitions were presented to the Board, 545 operations were authorized, and 507 sterilizations were performed. During the 1964-66 biennium, 461 petitions were presented, 368 operations were authorized, and 356 sterilizations were performed. For the Eugenics Board, the rapidly changing and improving technology of birth control means seemed to provide the explanation for the drastic drop in operations performed.[21] How far this decline will go would be difficult to predict at this time.

NORTH CAROLINA STATISTICS

Biennial Report
OF
The Eugenics Board of North Carolina

JULY 1, 1964
TO
JUNE 30, 1966

SUE L. CASEBOLT
Executive Secretary

TABLE 1

Operations Performed, by Type of Operation and Origin of Petition

July 1964 - June 1966

Origin of Petition	TOTAL	July 1964-June 1965				July 1965-June 1966			
		Total	Vasectomy	Salpingectomy	Ovariectomy	Total	Vasectomy	Salpingectomy	Ovariectomy
Total	356	199	2	197	—	157	4	153	—
State Institutions	58	38	2	36	—	20	3	17	—
Non-Institutional	298	161	—	161	—	137	1	136	—

TABLE 2

Cases Handled by Fiscal Year

July 1964 - June 1966

Fiscal Year	Petitions Presented	Operations Authorized	Operations Performed
Total	461	368	356
July 1964-June 1965	256	199	199
July 1965-June 1966	205	169	157

TABLE 3

Operations Performed, by Length of Time Between Authorization and Operatio

TABLE 3

Operations Performed, by Length of Time Between Authorization and Operation
July 1964 - June 1966

Length of Time	TOTAL	July 1964-June 1965	July 1965-June 1966
Total	356	199	157
Less than 1 month	184	103	81
1 month, less than 3	96	46	50
3 months, less than 5	45	31	14
5 months, less than 7	9	6	3
7 months, less than 1 year	12	8	4
1 year, less than 2	8	5	3
2 years, less than 4	2	–	2
4 years or more	–	–	–

TABLE 4

State Institutional Operations, by Institution, Type of Operation, and Fiscal Year
July 1964 - June 1966

Institution	TOTAL	July 1964-June 1965			July 1965-June 1966		
		Total	Vasectomy	Salpingectomy	Total	Vasectomy	Salpingectomy
Total	58	38	2	36	20	3	17
State Hospitals:							
Broughton Hospital, Morganton	17	9	–	9	8	1	7
Cherry Hospital, Goldsboro	18	15	1	14	3	–	3
Dorothea Dix Hospital, Raleigh	3	3	–	3	–	–	–
John Umstead Hospital, Butner	5	1	–	1	4	2	2
Centers for Mentally Defective:							
Caswell Center, Kinston	10	6	1	5	4	–	4
Murdoch Center, Butner	3	2	–	2	1	–	1
O'Berry Center, Goldsboro	2	2	–	2	–	–	–
Western Carolina Center, Morganton	–	–	–	–	–	–	–

TABLE 7

Operations Performed, by Type of Operation and Race

July 1964 - June 1966

Type of Operation	TOTAL	July 1964-June 1965				July 1965-June 1966			
		Total	White	Negro	Indian	Total	White	Negro	Indian
Total	356	199	64	131	4	157	60	97	--
Vasectomy	6	2	1	1	--	4	4	--	--
Salpingectomy	350	197	63	130	4	153	56	97	--

TABLE 8

Type of Operation Performed, by Age and Sex of Person

July 1964 - June 1966

Ages in Years	TOTAL	MALE	FEMALE
		Vasectomy	Solpingectomy
Total	356	6	350
10-19	166	2	164
20-29	136	4	132
30-39	51	--	51
40-49	3	--	3
50 and over	--	--	--

TABLE 9

Operations Performed, by Type of Diagnosis, Source of Petition, and Marital Status

July 1964 - June 1966

Diagnosis Shown on Petition	TOTAL	MARITAL STATUS								
		Married			Single			Widowed, Divorced, Separated		
		Total	State Institution	Non-Institutional	Total	State Institution	Non-Institutional	Total	State Institution	Non-Institutional
Total	356	38	12	26	274	35	239	44	11	33
Mental disease	47	12	12	--	21	19	2	14	10	4
Feeblemindedness	308	25	--	25	253	16	237	30	1	29
Epilepsy	1	1	--	1	--	--	--	--	--	--

TABLE 10

Individuals Having Children Prior to Sterilization, by Marital Status and Number of Children

July 1964 - June 1966

Children Born Prior to Sterilization	TOTAL [1]	July 1964-June 1965				July 1965-June 1966			
		Total	Married	Single	Widowed, Divorced, Separated	Total	Married	Single	Widowed, Divorced, Separated
Total	261	154	23	100	31	107	14	81	12
One child	83	45	4	40	1	38	--	36	2
Two children	59	35	4	25	6	24	3	19	2
Three children	37	25	5	16	4	12	2	9	1
Four children	27	15	2	10	3	12	3	6	3
Five children	13	9	3	4	2	4	--	4	--
Six children	25	17	2	3	12	8	1	4	3
Seven children	6	2	1	--	1	4	2	1	1
Eight children	6	3	--	1	2	3	1	2	--
Nine children	2	1	--	1	--	1	1	--	--
Ten or more[2]	3	2	2	--	--	1	1	--	--

[1] Ninety-five persons had no children

[2] Two individuals had 10 children; One had 12.

TABLE 11

Cases Handled by Biennial Periods

July 1933 - June 1966

Biennial Period	Petitions Presented	Operations Authorized	Operations Performed
Total	7888	7624	6802[1]
July 1933-June 1934	39	39	31
July 1934-June 1936	309	301	252
July 1936-June 1938	356	350	296
July 1938-June 1940	352	345	305
July 1940-June 1942	390	385	339
July 1942-June 1944	328	309	269
July 1944-June 1946	282	276	238
July 1946-June 1948	337	330	291
July 1948-June 1950	562	543	468
July 1950-June 1952	743	796	704
July 1952-June 1954	673	650	626
July 1954-June 1956	657	634	556
July 1956-June 1958	674	658	562
July 1958-June 1960	576	564	535
July 1960-June 1962	558	531	467
July 1962-June 1964	591	545	507
July 1964-June 1966	461	368	356

[1] Forty-nine additional operations were performed prior to July 1933 under previous legislation, making a total of 6,851 operations performed.

TABLE 12

Operations Performed Annually, by Sex and Type of Operation
July 1929 - June 1966

Year	TOTAL	MALE			FEMALE		
		Total	Vasectomy	Castration	Total	Salpingectomy	Ovariectomy
Total	6851 [1]	1081	1016	65	5770	5715	55
1929	3	2	1	1	1	..	1
1930	17	2	..	2	15	10	5
1931	11	..	..	..	11	10	1
1932	18	9	..	9	9	7	2
1933	4	1	1	..	3	3	.
1934	61	15	7	8	46	45	1
1935	178	24	17	7	154	152	2
1936	98	12	11	1	86	86	.
1937	128	21	18	3	107	105	2
1938	202	56	53	3	146	144	2
1939	138	36	34	2	102	102	..
1940	159	47	45	2	112	112	..
1941	181	49	45	4	132	132	..
1942	148	36	32	4	112	112	.
1943	152	33	29	4	119	119	..
1943	152	33	29	4	119	119	..
1944	107	20	18	2	87	87	.
1945	117	18	15	3	99	98	1
1946	106	16	16	..	90	90	..
1947	140	26	21	5	114	114	.
1948	189	34	34	..	155	155	..
1949	249	31	31	..	218	218	.
1950	300	60	60	..	240	240	
1951	372	106	104	2	266	266	.
1952	348	82	82		266	266	..
1953	283	40	40	..	243	243	.
1954	298	45	45	..	253	253	
1955	292	75	74	1	217	217	..
1956	217	43	42	1	174	172	2
1957	305	52	52	..	253	250	3
1958	318	29	28	1	289	285	4
1959	260	22	22	..	238	234	4
1960	234	9	9	..	225	221	4
1961	248	8	8	..	240	233	7
1962	230	8	8	..	222	217	5
1963	240	7	7	..	233	226	7
1964	256	2	2	..	254	252	2
1965	167	3	3	..	164	164	.
1966 to June 30	77	2	2	..	75	75	..

[1] Ninety-one of these operations originated in county institutions prior to 1953.

TABLE 13

State Institutional Operations Performed Annually, by Sex and Type of Operation

July 1929 - June 1966

Year	TOTAL	MALE			FEMALE		
		Total	Vasectomy	Castration	Total	Salpingectomy	Ovariectomy
Total	2902	782	737	45	2120	2110	10
1929	..	..	..	..	..	..	..
1930	9	1	..	1	8	4	4
1931	3	..	..	..	3	3	..
1932	15	9	..	9	6	5	1
1933	2	1	1	..	1	1	..
1934	45	13	5	8	32	31	1
1935	82	15	9	6	67	67	..
1936	56	10	10	..	46	46	..
1937	82	16	15	1	66	66	..
1938	152	50	48	2	102	101	1
1939	70	29	28	1	41	41	..
1940	94	36	36	..	58	58	..
1941	103	38	37	1	65	65	..
1942	98	33	29	4	65	65	..
1943	107	32	28	4	75	75	..
1944	63	15	13	2	48	48	..
1945	74	14	11	3	60	59	1
1946	47	11	11	..	36	36	..
1947	65	15	13	2	50	50	..
1948	92	23	23	..	69	69	..
1949	109	21	21	..	88	88	..
1950	187	51	51	..	136	136	..
1951	255	92	91	1	163	163	..
1952	213	62	62	..	151	151	..
1953	115	24	24	..	91	91	..
1954	128	23	23	..	105	105	..
1955	127	52	52	..	75	75	..
1956	70	31	31	..	39	39	..
1957	81	32	32	..	49	49	..
1958	75	13	13	..	62	62	..
1959	45	5	5	..	40	40	..
1960	49	3	3	..	46	46	..
1961	34	2	2	..	32	32	..
1962	37	4	4	..	33	33	..
1963	36	1	1	..	35	35	..
1964	49	1	1	..	48	46	2
1965	26	2	2	..	24	24	..
1966 to June	7	2	2	..	5	5	..

TABLE 14

Non-Institutional Operations Performed Annually by Sex and Type of Operation

July 1929 - June 1966

Year	TOTAL	MALE			FEMALE		
		Total	Vasectomy	Castration	Total	Salpingectomy	Ovariectomy
Total	3858	294	278	16	3564	3522	42
1929	1	1	1	..	..	..	..
1930	5	..	..	..	5	4	1
1931	4	..	..	..	4	4	..
1932	3	..	..	..	3	2	1
1933	2	..	..	..	2	2	..
1934	15	2	2	..	13	13	..
1935	85	8	8	..	77	75	2
1936	37	2	1	1	35	35	..
1937	42	5	3	2	37	36	1
1938	48	6	5	1	42	41	1
1939	59	7	6	1	52	52	..
1940	59	11	9	2	48	48	..
1941	73	10	8	2	63	63	..
1942	43	3	3	..	40	40	..
1943	41	1	1	..	40	40	..
1944	39	5	5	..	34	34	..
1945	42	4	4	..	38	38	..
1946	57	5	5	..	52	52	..
1947	69	11	8	3	58	58	..
1948	96	11	11	..	85	85	..
1949	135	9	9	..	126	126	..
1950	111	9	9	..	102	102	..
1951	112	14	13	1	98	98	..
1952	134	20	20	..	114	114	..
1953	168	16	16	..	152	152	..
1954	170	22	22	..	148	148	..
1955	165	23	22	1	142	142	..
1956	147	12	11	1	135	133	2
1957	224	20	20	..	204	201	3
1958	243	16	15	1	227	223	4
1959	215	17	17	..	198	194	4
1960	185	6	6	..	179	175	4
1961	214	6	6	..	208	201	7
1962	193	4	4	..	189	184	5
1963	204	6	6	..	198	191	7
1964	207	1	1	..	206	206	..
1965	141	1	1	..	140	140	..
1966 to June	70	..	..	..	70	70	..

TABLE 15

State Institutional Operations, by Institution, Sex, and Type of Operation

July 1929 - June 1966

Institution	TOTAL	MALE			FEMALE		
		Total	Vasectomy	Castration	Total	Salpingectomy	Ovariectomy
Total	2902	782	737	45	2120	2110	10
State Hospitals:							
Broughton Hospital, Morganton	825	223	223	..	602	601	1
Cherry Hospital, Goldsboro	480	191	167	24	289	287	2
Dorothea Dix Hospital, Raleigh	626	98	89	9	528	526	2
John Umstead Hospital, Butner[1]	34	7	7	..	27	27	..
Schools for Mentally Defective:							
Caswell Center, Kinston	591	252	240	12	339	338	1
Murdoch Center, Butner[2]	7	..	..	..	7	7	..
O'Berry Center, Goldsboro[3]	12	..	..	..	12	12	..
Training Schools:[4]							
Eastern Carolina Training School	4	4	4	..	..	..	..
Stonewall Jackson Training School	6	6	6	..	..	..	..
State Home and Industrial School for Girls	300	..	..	..	300	296	4
Morrison Training School	..	..	..	..	..	..	..
State Training School for Negro Girls	3	..	..	..	3	3	..
Others:	14	1	1	..	13	13	..

[1] Opened in 1947
[2] Opened in 1958
[3] Opened in 1957
[4] Petitions for children at training schools are now initiated by county directors of public welfare.

TABLE 16

Operations Performed, by Type of Operation and Race

July 1929 - June 1966

Type of Operation	Total	White	Negro	Other
Total	6851	4218	2590	43
Vasectomy	1016	746	268	2
Castration	65	36	29	..
Salpingectomy	5715	3409	2266	40
Ovariectomy	55	27	27	1

TABLE 17

Type of Operation Performed, by Age and Sex of Person

July 1929 - June 1966

Age in Years	TOTAL	MALE			FEMALE		
		Total	Vasectomy	Castration	Total	Salpingectomy	Ovariectomy
Total	6851	1081	1016	65	5770	5715	55
10-19	2599	428	404	24	2171	2149	22
20-29	2689	357	331	26	2332	2315	17
30-39	1384	204	191	13	1180	1164	16
40-49	165	78	77	1	87	87	..
50 and over	12	12	12	..	..	..	..
Unknown	2	2	1	1	..	..	..

TABLE 18

Operations Performed, by Type of Diagnosis, Source of Petition, and Marital Status

July 1929 - June 1966

Diagnosis Shown on Petition	TOTAL	MARITAL STATUS											
		Married				Single				Widowed, divorced, separated			
		Total	State Institution	County Institution*	Non-Institutional	Total	State Institution	County Institution*	Non-Institutional	Total	State Institution	County Institution*	Non-Institutional
Total	6851	1682	928	8	746	4606	1784	76	2746	563	190	7	366
Mental disease	1641	884	847	1	36	580	550	..	30	177	157	..	20
Feeblemindedness	4854	699	37	5	657	3783	1070	70	2643	372	25	7	340
Epilepsy	356	99	44	2	53	243	164	6	73	14	8	..	6

* Ninety-one operations originated in county institutions prior to 1953.

NORTH CAROLINA -- FOOTNOTES

1 Laws of North Carolina, 1919, Chap. 281. The fact that the word "sterilization" does not appear in the text of the law caused it to be missed by Laughlin in his ES in US (1922) and also in his Eugenical Sterilization: 1926. Owens-Adair in her Human Sterilization (1922) also failed to mention it. However, Landman in Human Sterilization (1932) gave it detailed attention, along with the subsequent 1929 statute, which he claimed was passed after the Buck decision in 1927 revived interest in sterilization.

2 204 N.C. 186, 167 S.E. 638 (1933)

3 Id. at 191, 167 S.E. at 640. Though missing in the law, the right to appeal was not assumed by this court to be necessary part of due process of law.

4 Biennial Report of The Eugenics Board of North Carolina (July 1, 1962 to July 30, 1964), at 7. The non-genetic basis of the law is not new, since the 1929 law could operate under similar circumstances. This prompted Landman to criticize the decision in Brewer v. Valk as a bad case because there was no real genetic ground for sterilization in that case. "The Human Sterilization Movement," 24 J. Crim. L. 400 (1933).

5 Ibid. It is often rumored that the reason consent is so easy to obtain, especially in the case of welfare recipients, is because some kind of

crude or sophisticated intimidation is used, presumably in terms of trading the operation for continued payments. This writer found nothing to corroborate this assertion in the published reports of the Board. After two adverse experiences with previous laws, it does not seem likely that the state would welcome another negative experience before the state Supreme Court. Since the overwhelming proportion of North Carolina sterilizations have been on the mentally retarded, it is possible to assume that getting the consent of parents or next-of-kim is not too difficult, especially when sterilization is made a condition of release, parole, or discharge from an institution. The only way that allegations of coercion or even or racial discrimination (more pressure on Negroes than on whites) could be substantiated, if at all true, would be to interview individual sterilizees, or to carefully examine the records kept by the Eugenics Board for all sterilization from 1929 to the present time. Since the latter are not open to public inspection according to sec. 35-53 of the law, this could not be done, and this writer was loathe to pry into the private feelings of sterilizees. A colleague in the field of public law, chairing a symposium for one of the regional political science meetings, suggested that this writer do "follow-up studies" on persons sterilized under state laws. While this would undoubtedly add to the "scientific" credibility of a study of this kind, there are still limits to the invasion of personal privacy, even when advanced in the name of the bitch goddess, Behaviorism.

Add

444A
(after fn. 8)

8a Unfortunately, where minors are concerned, there are no figures on the use of the compulsory features of the law. In the light of this fact, the number of minors sterilized under the North Carolina eugenic sterilization law is rather astounding, and the 10-19 age category does not include all of the minors who have been sterilized under the law. For the biennial period July 1958 to June 1960, 151 out of 535 sterilizations were on those in the 10-19 age bracket (28.2%). For the July 1960 to June 1962 biennium, 146 out of 467 operations were on this group of minors (31.3%) and in the July 1962 to June 1964 biennium, 157 out of 507 operations were on these minors (31%); in the 1964-66 biennium, it jumped to 166 out of 356 operations (46.6%). The cumulative figures for persons in the 10-19 age bracket are even higher: for the period 1929-1960, it was 38.6%; for 1929-1962, it was 38%; for 1929-1964, it dropped to 37.5%, and then rose to 38% in the 1964-1966 biennium. Thus, if we could estimate those persons between 19-21 who were sterilized under the law since 1929, the number would bring the percentage to the 40% mark or higher. (See Tables 8 and 17). Even if consent of the minor was obtained, it is highly questionable how "voluntary" such consents would be when one approaches the ten-year-old category, or even the older minors from, let us say, 15-21, who were mentally ill or mentally retarded, or who were under pressure from their parents, other relatives, or a guardian. The whole question of sterilization of minors under such laws is a very serious question, not only from the standpoint of basic civil rights, but also from the purely medical-genetic standpoint of whether such extreme measures of preventing conception are really necessary or valid in the light of our present state of human genetics and modern contraceptive measures.

6 Sec. 35-39 of the Act. Item no. 5 refers to the section of the law dealing with discharge of patients from state institutions.

7 Op. cit. supra note 4.

8 At 2. In a little pamphlet entitled "The Sterilization Program in North Carolina," reissued in 1960, point no. 9 on What are the effects of sterilization? reads: "Sterilization is permanent birth control. It does not require the removal of glands or organs. Careful consideration is given in each case to evaluate the possible effects of sterilization on the social and emotional adjustment of the individual."

9 The fact that the "typical" person sterilized in the past biennium was a feeble-minded, single Negro female between 20 and 30 years of age does not necessarily impute race prejudice in the administration of the law, but it does clearly indicate the non-eugenic application of the law, especially where illegitimacy was concerned. How much of this is dependent on the "welfare" of the person concerned or the general welfare of the state is not always easy to determine. Over the years, the proportion of the operations that were performed on the feeble-minded has increased. Over the priod of 1929-1966 (Table 18) 70% of the operations were on the feeble-minded while operations on the mentally ill made up nearly a quarter (24%) of those performed, whereas in the 1962-66 biennium, 86.5% of the operations were on the feeble-minded, 13.2% on the mentally ill, and .3% on the epileptic, which is a decline from the cumulative

1929-66 figure of 5.2%. This emphasis on the young female feeble-minded person who has borne children or might bear them in the near future is not atypical of other states that have concentrated their operations on this particular category of persons covered by the laws. Another important statistic, namely, the types of operations performed and their numbers, is found in Table 17. Notwithstanding the fact that North Carolina's law does not designate specific sterilization operations but simply employs the language of "...the necessary operation for asexualization, or sterilization..." (sec. 35-36), very few female or male castrations have been performed. Over a period of 37 years (1929-66), out of a grand total of 6851 reported operations, 65 were male castrations and 55 were ovariectomies, for a total of 120 castrations. It is not clear from the figures on non-institutional operations (see Table 14) why most of the female castrations (ovariectomies) were performed extramurally and in the period since 1956, unless of course the reason was therapeutic (diseased ovaries, for example) and not eugenic or social (contraceptive). But this seems unlikely since the purpose of the law, as clearly defined in the last Biennial Report of the Eugenics Board of North Carolina (July 1, 1964 to June 30, 1966) was as follows: "The purpose of sterilization as it is administered under the North Carolina program is to protect persons from parenthood whose impairments would seriously handicap them in assuming the responsibilities of parents." (at 7).

10 Sterilization in North Carolina (Chapel Hill: Univ. of North Carolina Press, 1950) at 70-71.

11 Ibid. at 171.

12 Ibid. at 171-72. **The passage of such a law was strongly urged in Recommendation No. 22 of the Report of the Commission to Study Public Welfare Programs (December, 1962), at 49-52, submitted to Gov. Terry Sanfor**

13 Biennial Report, 1962-1964, at 8.

14 "Sterilization and Social Welfare, 40 Eugenics Rev. 205, 210 (1949). She adds that this situation also applies to the termination of pregnancy, and in conclusion writes: "To sum up, it is apparent that in North Carolina voluntary sterilization is being extended to borderline groups outside the existing law, although in an uneven manner and without official recognition. It is the writer's view that a broadening of the statute to include mentally normal persons, far from preceding public opinion, would but regularize what is already the common practice." Ibid.

15 In addition to a program of voluntary sterilization, coupled with greater scientific certainty of the transmissibility of hereditary defects, Woodside spoke of yet another possible development, namely, the perfecting of male reversibility operations. Since the rate of vasectomy in North Carolina under the eugenic sterilization statute is so low, it might be easier to convince the male, if an operation was not necessarily permanent. This is, of course, part of a much larger problem of bringing the male into the total birth control, family

planning picture in America. Emphasis has nearly always been on the female, although many of the states with sterilization laws have had a sizable number of vasectomies, notably California and Kansas with more male than female sterilizations under law. It would be interesting to find out the number of men that are using the new 1963 voluntary law in North Carolina. Woodside, supra note 10 at 162-63.

16 In 1956, North Carolina trailed Georgia, 216-268, and following California's demise in reported figures after 1950, Georgia was a close second to North Carolina in several of those years. Currently, Georgia is in a deep dive, reporting 7 operations in 1963.

17 Dr. Herndon counseled a group of educators on sterilization and other aspects of medical genetics in a paper that was reprinted under the title, "Human Resources from the Viewpoint of Medical Genetics," 35 Eugenical News 6 (1950). It is clear that the League in North Carolina realizes that their state, even though it is a leading sterilizer, still has a long way to go in explaining a sterilization program to the masses.

18 Apropos this matter, the latest issue of the AVS Bulletin (summer 1965) carried the following story on North Carolina entitled "North Carolina Moves Ahead in Government Support For Voluntary Contraceptive Sterilization": "AVS has been informed by Dr. H. Fleming Fuller, Chief of Obstetrics and Gynecology at Lenoir Memorial Hospital, North Carolina, that in all counties in that state, the Welfare Department pays at the

rate of $20 per day for the hospital bill of women welfare recipients who elect to have sterilization. In certain counties in North Carolina, the Welfare Department pays the surgeon $50 as a fee -- which is accepted as payment in full to perform the operation for women welfare recipients who request it. Lenoir, Green, Mecklenburg, and Durham counties follow this practice." (at 4) Although it is not made clear, the use of the terms "voluntary contraceptive sterilization" in the title of the story would make it seem likely that these operations were performed under the newer 1963 voluntary sterilization act, not the older and more general eugenic sterilization law. But the cooperation among various public agencies in the state applies to both laws.

19 In a communication to the writer, dated February 23, 1965, Dr. Herndon wrote: "....Economics is likely to have some effect with respect to the voluntary sterilization law because people of depressed economic status are more likely to request sterilization for socio-economic reasons. However, hospitals such as the teaching hospital of this medical school (N. C. Baptist Hospital) have been performing voluntary operations for years on patients of all economic strata, if they meet our medical criteria. Where the patient is mentally capable of giving a legally valid permission for operation, we have had no serious problems in the past. Our only real problems in the past have been with married persons under age 21, where there is a doubt that they are legally able to give an adequate permission." Under the 1963 voluntary sterilization law, a

married person under the age of 21 can be sterilized for any reason, provided a written request is made by both spouses to at least two surgeons or physicians, and there is a 30 day waiting period (a possible "cooling off" period) from the time of the request of the other spouse to the time of the operation.

20 One explanation of the difference in figures for the races might be the vulnerability of Negro clients to the blandishments ("duress") of state health and public welfare officials. Like the use of the third degree or illegal abortion in the United States, the hard facts are sometimes hard to come by. In any event, this writer made no attempt to find out if there was racial bias in the North Carolina program. All that was used for analysis was the data supplied by the state. Woodside raised some of the same questions and came to the conclusion that the state's policy was non-discriminatory: "...Race of person to be sterilized does not influence the Board's decision: all cases are considered solely on the social and psychological evidence presented. In fact, care is taken to avoid any action or propaganda which might savor of racial prejudice or class discrimination..." Op. cit. supra note 10, at 19. For a discussion of the racial overtones in the battle for new punitive sterilization laws in North Carolina, see Joseph L. Morrison, "Illegitimacy, Sterilization and Racism; A North Carolina Case History," 39 Social Service Rev. 1 (1965).

21 "There continues to be a decline in the number of sterilizations requested by State institutions, and the general improvement in as well as wider availability of medical means of birth control have made sterilization of non-institutional persons less pressing." Biennial Report of The Eugenics Board of North Carolina, July 1, 1964 to June 30, 1966, at 9.

OKLAHOMA

Like Alabama, Oklahoma has a sterilization history that has literally confused most persons because of the existence of two quite different kinds of sterilization laws in Oklahoma's history, a sexual sterilization act, and a habitual criminal sterilization act.

The first law was passed in 1931 and applied to inmates of insane hospitals and penal institutions, and included the feeble-minded who are about to be released or paroled. This law was tested in the courts of the state and upheld by the Oklahoma Supreme Court in the case In re Main, 162 Okla. 65, 19 P. 2d 153 (1933). The law provided for notice, hearing, and appeal rights. The first years of its use were nil, but in the late 1930s there was a rash of sterilizations from 1938-42. During the war and post-war years, the law was again virtually a deal letter. To compound the confusion, this 1931 law included habitual criminals in its coverage.

Oklahoma's Habitual Criminal Sterilization Act was passed in 1935. It is this law that led to the famous U.S. Supreme Court decision in the case of Skinner v. Oklahoma, 316 U.S. 535 (1942) that found the law in violation of the equal protection provision of the 14th amendment. It is this case that has confused the present Oklahoma situation. Two examples will suffice. Robert Veit Sherwin in Sex and the Statutory Law and lawyer Harriet F. Pilpel both declare correctly that Oklahoma's second law was invalidated, but they do not distinguish it from the first, which is also a compulsary law.[1]

Then if we look at sterilization policy in the post-war years (or immediately after the 1942 Skinner decision), we see a complete decline in reported operations (3 since 1942), and the easy explanation is to attribute this to the Skinner case.

But the explanation for the waning of sterilization in Oklahoma is found in a legislature change and the resultant administrative confusion over who or what has responsibility for the enforcement of the 1931 law. The Oklahoma Legislature in 1953 enacted a Mental Health Act which divested the former Board of Affairs of control over mental health institutions. However, the old sterilization act became a part of this new 1953 act under the authority of the Department of Mental Health and Mental Retardation.[2]

Another novel aspect of Oklahoma history is why the state passed a special law in 1935 dealing specifically with habitual criminals, when they were already brought within the confines of the more general 1931 sterilization statute. The author was unable to procure evidence that would show whether habitual criminals have been sterilized under the 1931 law. However, no one was sterilized under the 1935 law, and Oklahoma's present (1931) law appears to be a dead letter.

In the 1931-63 history of Oklahoma sterilization there were two very significant events that were quite unrelated; one, a famous U.S. Supreme Court decision and two, a legislative change that led to an administrative shakeup in the control of state mental institutions. It might well be that Oklahoma administrators had some doubts about the earlier law

after the Supreme Court invalidated the 1935 habitual criminal sterilization act, but there is no evidence to corroborate this thesis.[3]

We can conclude that Oklahoma law is presently in a state of dormancy, and may if clarified, be "revived." However, if the administrative situation in Oklahoma is coupled with the kinds of medical attitudes that have taken place in other states in recent years, any revival will be on a highly selective basis and may in time lead to a kind of "administrative repeal" of the law without benefit of legislative intent or action.

OKLAHOMA STERILIZATIONS

TOTAL UP TO:

1/1935	8	(1m, 7f)	ANA, at 17
1/1938	285	(49m, 236f)	HBF
1/1941	470	(97, 373)	HBF
1/1942	525	(122, 403)	HBF
1/1944	553	(122, 431)	Birthright, Inc.

OPERATIONS IN

1943-53	0
1952	2
1953-54	0
1955	1
1956-63	0

CUM. TOTAL (1931-63): 556 (122m, 434f)

OKLAHOMA -- FOOTNOTES

1 Sherwin merely says Oklahoma's law was declared unconstitutional, but he does not say which one. (N.Y.: Oceana Publication, 1949, Part I/at 70). Mrs. Pilpel in her HBA pamphlet, "The Lawyer Speaks on Sterilization," says the "Some years later the Oklahoma compulsory sterilization statute was challenged in a case that also reached the U.S. Supreme Court." This is the Skinner case and is entirely correct, except that both laws are compulsory, and one of them (the 1931 law) still remains valid law today.

2 Morris F. Flynn, Deputy Director of the Department explains it thus: "...Thus, the Mental Health Law contains sterilization laws which cannot be effective because the statutory procedure requires participation of an agency which has been divested of jurisdiction or authority. No attorney general's opinion has been promulgated relative to the problem." Letter to author, dated July 13, 1962. In an earlier letter of Sept. 26, 1961, Mr. Flynn said that the department was seeking such an opinion, but either it was not received or it was not found necessary. He cautioned the author that his view of the present law was a reflection of departmental interpretation and not the official opinion of the attorney general. One wonders how to explain the lack of operations before 1953 in the period from 1942-53.

3 The U.S. Supreme Court in the Skinner case did remand the case to

the Oklahoma Supreme Court for a decision on the severability question. The Oklahoma court held the entire act unconstitutional in Skinner v. Oklahoma, 195 Okla. 106, 155 P.2d 715 (1945), on the ground that the severability clause did not save the entire act from invalidation under the equal protection clause of the Fourteenth Amendment. The original decision of the Oklahoma Supreme Court in Skinner v. State, 189 Okla. 235, 115 P. 2d 123 (1941) was a 5-4 decision upholding the act with a strongly worded dissent by Justice Osborn.

OREGON

Oregon's early sterilization history is closely bound up with the work of the famous female physician, Dr. B. A. Owens-Adair (M.D., Univ. of Mich., 1880), the first practicing woman physician in the northwest and a fervent believer in eugenics. The first sterilization bill that she promoted was passed in 1909 by the Oregon Legislature, but vetoed by Gov. George E. Chamberlain because it was too loosely written and did not in his judgment safeguard the rights of those covered by the law.

In 1913, another bill passed and was signed by Governor Oswald West, but a referendum petition placed it on the ballot and the bill was beaten in the election of November 4, 1913. The opposition of the Anti-Sterilization League of Portland was largely instrumental in placing the bill on the ballot and in its defeat.

But in 1917, Oregon passed a sterilization act which created a State Board of Eugenics. The law allowed a right of appeal to the circuit court. In 1921, the Circuit Court for Marion County declared the law unconstitutional because it violated the due process clause of the 14th Amendment and was class legislation by virtue of not affecting persons extramurally, in the case of Cline v. Oregon State Board of Eugenics.[1] The Board was reportedly appealing the case to the state Supreme Court, but there was no provision in the law for such an appeal, and the case stopped at this point.

Under the 1917 act, 127 operations were performed, including 66 male

and 19 female castrations. On first blush, it might seem that the castrations were performed on inmates of penal institutions, but this accounted for only 2 operations. The author was prone to believe that the use of castration was due to the influence of Doctor Owens-Adair, who in her book, Human Sterilization, wrote:

> That castration causes a severe mental and nervous disturbance is claimed by some authorities and denied by others. But even if there is a somewhat serious disturbance, the end gained is surely worth the risk. ***** There is no doubt in my mind that castration is the remedy for those who have committed revolting sexual crimes or are sexually depraved and incurable.[2]

The outlawed 1917 law and the present law, passed in 1923 (as amended in 1925) both contained provisions that incorporate Doctor Adair's philosophy with respect to criminals incarcerated for sexual offenses. But the data does not clearly indicate whether this provision was used to any extent. But there is evidence of a reluctance to use the compulsory provisions of the law. Perhaps the experience of the 1913 referendum defeat as well as the earlier gubernatorial veto of 1909, and the Circuit Court decision in 1921 militated in the direction of restrained use of the law. The figures in the 1920s and the 1930s do not seem to bear this assumption out, but there is proof that consent rather than compulsion was employed more often than not. Laughlin, in

his 1922 study, reported that Oregon officials did not want to unduly arouse public opinion, and hence, restraint was used.[3]

Adair, in her book, quotes the Superintendent of the Oregon State Institution for Feeble-Minded that -

> ...We put no one before the Board without first obtaining the consent of their parents or guardian. In the beginning there was considerable objection from the parents, and it was our object to educate the people, rather than to force it upon a patient without the consent of the parents...[4]

The American Neurological Association report of 1935 backed up this data when it said:

> Sterilization is not performed without consent of parents, husband, or wife, or nearest of kin, or legal guardian. While the state has the power to protect itself by compulsory operation when necessary, the consent of the family is usually so easy to obtain that court action has not been necessary.[5]

The present policy of the Oregon State Board of Eugenics is the same, namely, not to perform the operation without the consent of the persons concerned.[6] This is true even though the law says that failure to appeal is deemed consent to the operation. The superintendent of the Oregon Fairview Home at Salem, writing in 1950, reported that 30 out of 53 discharges in 1949 (56%) were sterilized prior to release. From 1930-39, the percentage of sterilized discharges was the same. He reports that

the policy of the state has been to sterilize mentally deficient persons before releasing them.[7] As in the case of the Johnson study of the Laconia State School in New Hampshire, Hill cites the economic savings, as well as the alleged social and eugenic benefits of this policy.

Since 1959, there has been a slight down-trend in operations. In contrast to the highs of the period 1920-42, not only in annual figures but in operations per 100,000 population (especially the depression years of 1932-41), Oregon has become much more selective in its use of the law. If there is any "trend" in Oregon, this is it. Though the present law is compulsory and extramural, Tom Garland would probably be a little happier about the present situation in Oregon. And public opinion is not what it was in the days of the Anti-Sterlization League of Mrs. Lora C. Little.[8] Oregon will doubtless remain cautious in its use of sterilization and a repetition of the Cline case is not likely.

OREGON STERILIZATIONS

TOTAL UP TO

1/1921	127 (68M, 59F)	- Laughlin, at 88.
7/1925	313 (97M, 216F)	- L, 1926, at 58
1/1928	511 (179M, 332F)	- G & P, at 184
1/1930	650 (257, 393)	- CP, introd.
1/1932	576 (234, 342)	- Landman at 289 and Whitney at 302, both discrepancies.
1/1933	882	- Whitney, at 302
1/1935	957 (309M, 648F)	- ANA, at 18
1/1938	1,218 (435, 783)	- HBF
1/1941	1,450 (552, 898)	- HBF
1/1942	1,542 (591, 951)	- HBF
1/1944	1,654 (645, 1009)	Birthright, Inc.

BI & HBA FIGURES ON OPERATIONS IN

		OSBE OFFICIAL FIGURES*
1943	57	
1944	24	
1945	21	
1946	49	
1947	30	
1948	43	
1949	32	
1950	60	
1951	42	
1952	72	
1953	59	54
1954	25	24
1955	28	22
1956	38	38
1957	23	24
1958	14	14
1959	40	40
1960	19	19
1961	24	24
1962	21	21
1963	23	

Cumulative total to Jan. 1, 1960
HBA - 2,254 (865M, 1389F)
OSBE - 2,293 (877M, 1416F)
Cumulative total to Jan. 1, 1963
HBA - 2,318 (882M, 1436F)
OSBE - 2,357 (894M, 1463F)

HBA CUMULATIVE TOTAL, 1917-63: 2341 (888M, 1453F)

* (Oregon State Board of Eugenics)

OREGON -- FOOTNOTES

1 Actually, the original 1917 law had been amended in 1919 to include persons outside of institutions. However, the 1920 codification of Oregon law's included both laws on the books. The second (1919) law was extramural, but the Court nonetheless held the 1917 law unconstitutional on the ground that it was class legislation and the 1919 law void because it did not have adequate procedural safeguards, including appeal to the state Supreme Court. The present 1923 law is much more detailed in terms of notice, hearing, and appeal rights, including appeal to the Supreme Court, and has never been tested in the courts. One interesting aspect of the case against the state presented by Jacob Cline's lawyer, Tom Garland, is that he attacked the existence of administrative tribunals (what we now call "quasi-judicial" agencies). In his conclusion to the brief presented to the Circuit Court for Marion County, he wrote: "The greatest menace to the liberty of the American people, today, is the assumption of power, by boards and commissions, that is absolutely unwarranted under our Constitution. An open enemy we can fight---usurpation of Judicial functions by commissioners and boards, with their arbitrary decisions, is the fear of every lover and student of our Constitution. We are fast becoming a government by functionaries, rather than a government by laws." (in Laughlin, ES in the US, at 279) Mr. Garland has an argument that cannot be completely discounted, at least if the history of agency control of

sterilization laws is concerned. In highly sensitive areas such as human procreation, Garland had a right to fear for the worst and history to some extent has borne out his fears.

2 Salem, Oregon, 1922, at 22. There are discrepancies in the figures on castrations in the early years. H.H. Laughlin in his Eugenical Sterilization: 1926 at 60 says that up to July 1, 1925, Oregon had performed 91 male castrations and 32 ovariotomies out of a cumulative total at that time of 313 sterilizations (or 40% of the total). However, Frederick W. Brown, in "Eugenic Sterilization in the United States: Its Present Status," 149 The Annals 22 (Part III, May 1930) at 31 gives Oregon 8 male castrations and 7 oöphorectomies out of a cumulative total of 576 operations performed up to January 1, 1929 (or 2.6% of the total). The gap between these two accounts is quite glaring and no later evidence was found to prove or disprove the authenticity of these figures on castrations. In a letter to the author from the Oregon State Board of Eugenics, dated October 3, 1960, this statement appeared: "There have been a few sterilizations by castration, but this has been only under the procedures for persons convicted of certain crimes. The majority of the operations are either by salpingectomy or vasectomy." Since there had been 2,293 cumulative operations reported by the Board up to January 1, 1960, this might explain why the earlier mention of castrations in the 1920s is now considered a small fraction of the total figure. Yet, the urge to use castration is not entirely dead in Oregon. In a later

communication from the Oregon State Board of Eugenics, dated September 19, 1961, the following information was given: "...As far as we know, castration was never ordered on a person who was not convicted of certain crimes. In going through the minutes of the Board of Eugenics earlier this year gathering material for the Legislature, we found that during the 10-year period, January 1950 through December 1960, 16 prisoners from various county jails had been considered by the Board because of their record of contributing to the delinquency of minors, sexual deviation, sodomy, et cetera. Of these 16, castration was recommended for 7, but we have no record that any of these operations were performed. During that period, castration was recommended for only one prisoner in the Oregon State Penitentiary, but we have no record that this was ever done."

3 ES in the US, at 88-89.

4 Human Sterilization, at 83.

5 Eugenical Sterilization, at 18.

6 Letter to author from the Board of Eugenics, dated October 3, 1960. The Board also has other duties. Under Oregon Revised Statutes, ch. 106.071(b) and 106.074, a committee of three persons appointed by the State Board of Eugenics can deny a license to marry (presumably for eugenic reasons). The second provision is for appeal to the Circuit Court. Under O.R.S., ch. 183.310-510, the Board is not excepted from the administrative procedures and rules of state agencies.

7 Irvin B. Hill, M.D., "Sterilizations in Oregon," 54 Amer. J. Men. Def. 399, 403 (1950).

8 For Mrs. Little's activities, see Mrs. Owens-Adair's book, op. cit. supra note 2, at 71-72. In contrast to the situation in 1913, a flurry of discussion of the Board's work in the Oregon press in 1960 was "nicely handled by the leading newspapers publishing articles as to the professional and ethical medical operation of the Board of Eugenics." Letter to the author from the Board of Eugenics, dated October 3, 1960. Another important factor that keeps the State Board of Eugenics "honest" is the office of the state Attorney General, which in the period 1922-62 issued 13 separate opinions regarding the operation of the sterilization law.

SOUTH CAROLINA

South Carolina's law is one of the later laws, having been enacted in 1935. Although it is compulsory, enforcement has been very selective, except for the years 1955-57 when figures were highest. Though the law provides for notice, hearing, and appeal to the highest court of the state, the policy of the South Carolina State Hospital has added the element of consent to the operation. Doctor William S. Hall, the institution's superintendent and the State Commissioner of Mental Health, writes:

> We do relatively few sterilizations at this hospital due primarily to the volunimous amount of work involved, the difficulty of obtaining consents and sometimes inability to locate relatives who might be interested. Such parties must be served with a petition providing for the procedure and a notice designating a time and place where the hearing is to be conducted. *** While consent is sought from the nearest of kin of parties falling within the above categories for whom sterilization is recommended, consent is not a requirement of law....[1]

Because of a paucity of data on South Carolina, it would be difficult to analyze trends. From 1945-47, there were no reported operations. One three-year period, 1955-57, accounts for more than one third of all

of the operations reported since 1935. The years since 1957 indicate a steady decline in operations, but only the South Carolina State Hospital's policy of requiring consent can help to explain this trend. If South Carolina is like many other states in America, the explanation may lie in a greater awareness of other means than sterilization for dealing with mental retardation and illness, and a conscientious administrative effort to make the principle of voluntariness the heart of any program of selective sterilization.

SOUTH CAROLINA STERILIZATIONS

TOTAL UP TO:

1/1938..... 1 (F) HBF

1/1941.....35 (1M, 34F) HBF

1/1942.....42 (1M, 41F) HBF

1/1944.....74 (8M, 66F) Birthright, Inc.

OPERATIONS IN

1943.....17
1944..... 3
1945-47..... 0
1948..... 4
1949..... 7
1950.....12
1951.....10
1952..... 3
1953..... 7
1954..... 8
1955.....30
1956.....43
1957.....34
1958.....11
1959..... 6
1960..... 7
1961..... 3
1962..... 6
1963..... 9

CUMULATIVE TOTAL, 1935-63: 277 (22M, 255F)

SOUTH CAROLINA -- FOOTNOTES

1 Letter to author, dated June 6, 1963. Data on South Carolina does not indicate the proportion of operations performed in other health or penal institutions in the state. Hence, the policy of this hospital does not necessarily explain the decline in reported operations.

SOUTH DAKOTA

Almost all of South Dakota's sterilizations have been performed on the mentally retarded (748 out of 789 operations since 1917). The first sterilization law was passed in 1917 and applied only to inmates of the State Home for Feeble-Minded Persons. The law was compulsory and lacked provisions for notice, hearing, or appeal of a sterilization order. A 1925 amendment brought the subject of sterilization under the control of the State Commission for Control of the Feeble-Minded and its sub-commissions (the county boards of insanity) and provided for extramural coverage through the continuing census made of the state's feeble-minded population. This was an unusual provision in that the county boards could order sterilization for those persons whom in their judgment it is safe to leave at large and thereby avoid commitment to the State School and Home for Feeble-Minded. Hence, sterilization could be either a quid pro quo for avoiding commitment, or for those already in the institution, a basis for release. This type of catch-all statute did provide for the first time in South Dakota history for notice, hearing, and the right of appeal to the courts, and was a vast improvement over the earlier 1917 statute.

Ironically, the provisions for extramural coverage were far more detailed and far-reaching. Any persons in the state, regardless of "any private or official interest or lack of interest" (# 30.0501) can

file a complaint with a county subcommission asking for an order for sterilization. But unlike the inmate who is about to be released and whom the superintendent orders sterilized, there is a required hearing for the extramural person caught by the law. Hence, the state-wide net of the State Commission and its county subcommissions is such that at-large persons can be committed for purposes of segregation only, or they can be committed for purposes of sterilization only (and then be released), or a feeble-minded inmate in order to be released might be ordered sterilized. Even with these far-flung provisions, probably more detailed than any state in the union, no operations were performed until 1929.[1]

In 1943, the inmates of the Yankton State Hospital were added to the law, which brought persons suffering from (1) "mental diseases which may have been inherited and is liable to be transmitted to descendants; (2) Perversion or marked departure from normal mentality; (3) Diseases of a syphilitic nature" within the sterilization policy of the state. As in the case of the mentally retarded, the operation was the prelude to discharge. Both the 1925 and 1943 laws allow for appeal to the courts of the state; however, again the earlier law was much more procedurally-minded in that notice <u>and</u> hearing rights were provided for those at-large and spelled out in great detail. As with the already institutionalized feeble-minded, no hearing is provided in the 1943 law, although appeal of an order is allowed. Usually, the later laws are the more procedurally-

conscious, and it is difficult to understand why the trend in South Dakota went the other way. In any event, the bulk of reported operations were not on the mentally ill or syphilitic persons covered by the 1943 law, but on the mentally retarded. Out of a cumulative state total of 789 operations performed up to January 1, 1964, nearly 95% (748 operations) were performed on the mentally retarded.

South Dakota's present philosophy of sterilization is most clearly explained in the biennial reports of the State Commission for the Control of the Feeble-Minded:

> Most of the effort with the feebleminded as discussed in this report is devoted to their well being. Sterilization is a phase that is given entirely to the prevention of their procreation. In this respect, it serves two important purposes toward the solution of the problem. First, it prevents feebleminded parenthood, and secondly, it prevents the transmission of defective strain. The feebleminded are poor parents; their children suffer not only because of the social and economic inadequacy, but also for lack of parental pattern and guidance. The feebleminded can transmit their defect to their children; therefore, the sterilization of the feebleminded patient means a potential reduction of the strain in the population.[2]

The State's current policy of "selective" sterilization is explained in

the next paragraph:

> Sterilization of the mentally deficient which has been practiced in South Dakota since the opening of the Institution hospital in 1929 can be designated as selective sterilization. In its practical application, only those who seem likely to become parents are selected for sterilization. Patients who are well supervised in the home, those who are expected to remain permanently in the institution, and those whose physical condition is such that procreation appears improbable are not sterilized. During recent years the number of cases has decreased in numbers. In almost all the instances, the cases have been voluntary in nature, and more reliance has been placed upon the prevention of marriage as the means of controlling procreation.[3]

The fact that South Dakota improved its legislation to include procedural safeguards induced Landman to describe South Dakota as "another one of the states that has had valid compulsory human sterilization legislation for some time but has reluctantly enforced it."[4] This "reluctance" was <u>not</u> seen in the depression years from 1930-42, when the annual output of operations reported was close to 50 per year. In the seven years from 1935-42, there were over 400 operations, and if experience in other states is any guide (especially those with a sterilization-for-release

policy), South Dakota was experiencing a crush in its institutions and had to get things "moving."

Although the validity of their law has never been tested, it is certainly true that in the years since the post-war peak year of 1947 when 46 operations were performed, South Dakota has been very selective in its enforcement of the law. They have reported 14 operations in the past 9 years. The law can be called all but dead in South Dakota, or at the least, quite dormant.

One important factor might be the doubts raised by the Mental Health Committee of the South Dakota Medical Association in its Explanation of the Proposed South Dakota Mental Health Act:

> Medical science has by no means established that heredity is a factor in the development of mental disease with the possible exception of a very few and rare disorders. The Committee holds that the decision to sterilize for whatever reason, should be left up to the free decision reached by patient and family physician mutually and that the State has no good reason to trespass in this area.[5]

Notwithstanding Moya Woodside's favorable mention in her book of South Dakota as a kind of "model state" for control of the feeble-minded,[6] sterilization has ceased to be a significant part of South Dakota's general program in the area of mental retardation.

SOUTH DAKOTA STERILIZATIONS

TOTAL UP TO:

7/25.....0 -- Laughlin 1926, at 58

1/30.....61 (19M, 42F) -- CP, introd.

1/32.....37 (11, 26) -- Whitney, at 302 (discrepancy)
Landman, at 289

1/35.....215 (74, 141) -- ANA, at 18

1/38.....383 (139, 244) -- HBF

1/41.....577 (212, 365) -- HBF

1/42.....617 (229, 388) -- HBF
1/44.....646 (242, 404) -- Birthright, Inc.

OPERATIONS IN

1943..... 3
1944..... 7
1945.....10
1946.....24
1947.....46
1948.....12
1949..... 3
1950..... 5
1951..... 4
1952..... 4
1953..... 8
1954..... 6
1955..... 2
1956..... 2
1957..... 4
1958..... 3
1959..... 1
1960..... 1
1961-62..... 0
1963..... 1

CUMULATIVE TOTAL, 1917-63: 789 (283M, 506F)

(Note: For official biennial figures, cumulative totals and the number of sterilizations for each county in South Dakota, consult the biennial reports of the South Dakota State Commission for the Control of the Feeble-Minded).

SOUTH DAKOTA -- FOOTNOTES

1 For a very favorable view of the success of South Dakota sterilization policy in the early years, see J. H. Craft, "The Effects of Sterilization - As Shown by a Follow-Up Study in South Dakota," 27 Journal of Heredity 379 (1936).

2 Seventeenth Biennial Report of the State Commission for the Control of the Feeble-Minded (for the period ending June 20, 1958), State of South Dakota, at 18. To understand the anachronistic and unscientific character of this explanation, see the 1959 statement of the Mental Health Committee of the South Dakota Medical Association at note 5, infra.

3 Id. at 18-19. Sections 30.0412 and 30.0413 provide for a list of the feeble-minded to be maintained at marriage license agencies as part of the duties of the State Commission for the Control of the Feeble-Minded. The second provision prohibits issuance of marriage licenses to the feeble-minded, except in cases where either party has been sterilized or is incapable of procreation.

4 Human Sterilization, at 78.

5 Mental Health Committee, S.D. Medical Association, Explanation of Proposed S.D. Mental Health Act (1959), at 9.

6 "...Satisfactory control of feeble-mindedness probably cannot be

achieved without a general program of ascertainment and classification, such as that carried out by the State Commission in South Dakota, which gives a basis for intelligent planning of custodial and educational services. Sterilization can then be more effectively applied, and the potential parent of defective offspring come under some official supervision...." Woodside, Sterilization in North Carolina (1950) at 171.

UTAH

Utah presents one of the more interesting case histories of how sterilization laws have fluctuated in their usage and particularly the attitudes of thos clothed with the power of enforcement.

The first law passed in 1925 provided for the sterilization of sexual criminals, idiots, epileptics, imbeciles and the insane. It was compulsory and extramural in its coverage, and contained provision for appeal even to the state Supreme Court.

Perhaps the most important legal event in this story is the famous case of Davis v. Walton,[1] which ranks as one of the significant court tests of sterilization law in this country. Esau Walton, convicted under the habitual criminal laws of Utah, was caught practicing sodomy in prison and ordered sterilized. The court held that the sterilization law was constitutional, but that the prison board's order for Walton's sterilization could not be justified by the evidence, which failed to substantiate the claim that Walton was the potential parent of afflicted offspring or that his welfare would be promoted by the operation. The basic scientific question of what constituted hereditary transmissibility was asked by the Utah Supreme Court and the answer was negative in this case. Since the law was not class or penal legislation nor did it violate due process of law, the Court declared it was within the legitimate police power of the state. The Utah Supreme Court's examination of this

problem vexed Landman, who wrote:

> ...We thus have the anomalous situation in which the human sterilization law is valid and constitutional, yet is vain and futile because eugenicists cannot with certainty decide whether a patient suffers from a hereditary and transmissible mental disorder or an acquired mental disorder. Only hereditary mental deficiencies are amenable to this law....[2]

Apparently, the Davis v. Walton case left Utah authorities in a somewhat confused state, since there were only 6 reported operations from 1930-35. It would appear from the figures that many, if not most, of the operations up to 1935 were performed on the insane. In any event, sterilization of the mentally-retarded at the Utah State Training School did not begin until 1935, although an amendment to the law in 1929 had included this institution for the first time. Almost all operations performed under Utah law since 1935 have been at this institution and have been on the mentally retarded.[3]

One of the most forthright and detailed examinations of institutional practice is found in Doctor Mark K. Allen's description of policy at the Utah State Training School. As Clinical Psychologist at the School, Dr. Allen has been in an exceptionally good position to analyze the law over the years. Here are some of his conclusions:

> ...almost all operations have been on mentally defective

> people, and performed through this Institution. In general, the persons sterilized here have been individuals with IQ's roughly between 40 and 70, who might have some possibility of either: (1) adjusting outside of the Institution provided their responsibilities could be kept at a minimum, and (2) individuals who are such a serious sexual risk either here or when out on visits or temporary employment, that this extreme measure seems advisable. In other words, most of those who have been sexually sterilized have subsequently been placed out in the community to sustain themselves at least marginally. Many of these people have made very good adjustments, and have had no further assistance from us for many years. Some, however, do not succeed and are returned to the Institution for further care and supervision.[4]

The law provides for notice, hearing before a board of the institution involved, the right to obtain counsel, and the right of appeal to the courts, including the Supreme Court of the state. Dr. Allen further notes that at least three specialists study the case and present their findings at the hearing, which is now held before the State Welfare Commission, consiting of three members who sit in a quasi-judicial capacity. An amendment of the law passed in 1961 provides that part of the evidence presented in the sterilization hearing shall consist of "...the opinion of at least one medical doctor, one psychologist, and one social worker

familiar with the inmate or person under judgment, supplemented with any other testimony the board may consider relevant to the case...."[5]

But the ordinary procedural safeguards are not considered enough. Dr. Allen continues:

> In addition to these specific safeguards, care is taken to inform the parents and guardian in advance of the nature of the operation and necessity of its performance. The defendant is also given as clear a picture as his mentality permits, as to the intent to have the operation and its purpose. Our law does not require that we obtain consent either from the defendant or his parent or guardian. However, in actual practice, we generally do obtain consent from all parties. We find that the program works better if we are able to educate all parties concerned as to the necessity of the operation. In some cases, however, particularly when the parents are very limited mentally, consent is not obtained and yet the operation may be performed against their objections. In most of these cases, no further steps have been taken by the way of appeal to the district court. In fact, in only two clear cases in all our history have we actually reached the stage of a district court appeal. When objections are strong and well founded, usually the operation is not performed....[6]

Proof of the fact that strong objections are seldom ignored is found in Dr. Allen's figure of 74 cases where the sterilization procedure was completed, but the operation was not performed. Some of these cases were due to other reasons, such as the health of the patient, lack of surgical facilities, etc. When the objections are formidable, said Dr. Allen, the risk of a possible bitter court action and the jeopardizing and possible destruction of the whole program is too high a price to pay.

Another legislative change made in 1961 was the addition of a phrase after the categories of habitually sexually criminal, insane, mentally deficient, epileptic, and degenerate sexual tendencies that read:

> ...that the person or inmate with any of these disorders is, in the opinion of the expert witnesses, probably incurable and unlikely to be able to perform properly the functions of parenthood....[7]

This shift from eugenic or genetic considerations to social or environmental considerations is an important one. Dr. Allen's explanation for this change was as follows:

> ...One of the problems was that we frequently had brain damaged individuals who would likely have normal heredity, but are quite incurable as far as present knowledge is concerned. We feel that in most of these cases of mental deficiency from causes of this kind that such individuals would be unlikely to perform the normal functions of

> parenthood, even though the offspring might be normal. We also found a great deal of difficulty actually establishing the hereditary nature of many of the cases of so called familial mental deficiency. ***** The law now comes to operate primarily on the basis of social considerations rather than biological ones....[8]

Even with the changes in the purpose and direction of the law, Dr. Allen still has some doubts after watching the law operate for nearly 30 years:

> I, as a psychologist, have often wondered if sterilizing programs have sometimes not been motivated by hostility and punitiveness towards deviant persons. I have seen some of these attitudes in people who have worked with the law. On the other hand, I have also known people who have been extremely sincere and charitable in their attitudes towards mentally defective people. I have taken some comfort, myself, from feeling that incompetent individuals of this kind are done no kindness to permit them to complicate their life situations beyond their capacity to cope with them. On the other hand, in terms of human rights, it seems to me that the freedoms that are so often demanded should always be equated with the capabilities of the individual to be responsible for these

> freedoms. In this case, an individual who is unable responsibly to care for his offspring seems to me thereby not to be entitled to the full right and freedom to procreate.[9]

We might ponder his last comment about freedom and responsibility. Who is to decide questions of "fitness" for parenthood? The coupling of rights and duties with respect to freedom and its exercise is an old proposition in the history of ideas, but does it really operate here? Is the accident of institutionalization to be considered, for after all, many persons on the outside, with or without mental illness or retardation, do not by somebody else's standards deserve the "right" of parenthood. Would we tell them: you cannot further procreate because you are unfit to raise your children, especially after the botched-up job you did in the past? In any event, the shift from biological to social considerations raises a grave question of equal protection of the laws. This is not saying that those authorities clothed with the kind of responsibility that Dr. Allen has are not sensitive individuals, or even humane in their motives. The argument based on potential parenthood is an important one, but when questions of freedom and parenthood are joined, it becomes extremely difficult to know what the meaning of this "right" really is, for personal (in fact, extremely personal and private) and social considerations are inextricably connected. To say that something is a "right" in no way defines its

limits or its purposes, nor certainly the limits of society in defining or even extinguishing this "right". When we look around and see the tremendous variety of what one might loosely call "inadequate" parents for a multitude of reasons, to elevate any of these standards to the standard of administrative fiat is to engage in a very difficult game of playing God. Dr Allen concludes on a humble, even hopeful note:

> Our experience has been that the individuals under this operation, by and large have made fairly happy adjustments. Some of them grieve because they do not have children, but many of them have probably been happier and better adjusted to the world by keeping their lives relatively simple, rather than by multiplying problems they can not adequately solve. The question of scientific facts as to the causes of mental deficiency and its curability are still most difficult issues. The day may come when many conditions we thought were incurable will be cured. Recent advances certainly make us much more cautious in being dogmatic about the future of a mentally defective person. However, I feel that we still have a long way to go before we will actually have a cure for most of these conditions. In the meantime, it seems to me we are justified in limiting the reproduction of these individuals.[10]

Current Utah policy is in a state of limbo due to the 1961 legislative

amendments to the law, changes in the personnel of the State Welfare Commission, and the installation of a new superintendent at the Utah State Training School. Dr. Allen forecasts a re-activation of the law as soon as the new provisions can be applied, despite what he calls "the difficulties of making our law effective under the social criterion."[11]

UTAH STATE TRAINING SCHOOL

Sterilization Operations

Year	Male	Female	Total
1935	2	3	5
1936		17	17
1937	17	21	38
1938	21	14	35
1939	34	1	35
1940	23	8	31
1941	6	5	11
1942	10	32	42
1943	19	47	66
1944	9	7	16
1945	5	17	22
1946	28	25	53
1947	25	29	54
1948		9	9
1949	6	5	11
1950	15	18	33
1951	17	13	30
1952	20	13	33
1953	7	9	16
1954	7	5	12
1955	5	3	8
1956	12	21	33
1957	5	8	13
1958		5	5
1959	4	1	5
1960	8	8	16
Total	305	344	649

UTAH STATE TRAINING SCHOOL

Sterilization Procedure Completed but no Operation

Year	Male	Female	Total
1935			
1936		1	1
1937		2	2
1938		5	5
1939		8	8
1940	4		4
1941	2		2
1942	7	2	9
1943	1		1
1944			
1945			
1946	1	3	4
1947		3	3
1948	4	1	5
1949	2	1	3
1950			
1951	2	4	6
1952	1	2	3
1953			
1954		1	1
1955			
1956			
1957	2	7	9
1958			
1959	3	5	8
1960			
Total	29	45	74

UTAH STERILIZATIONS

TOTAL UP TO:

1/28..... 64 (34M, 30F)	---	G & P, at 184
1/30..... 79 (43M, 36F)	---	CP, introd.
1/32 --- same ---		Landman, at 289.
1/33.....85	---	Whitney, at 302
1/35.....85 (41M, 44F)	---	ANA, at 18
1/38.....145 (63, 82)	---	HBF
1/41.....252 (143, 109)	---	HBF
1/42.....264 (149, 115)	---	HBF
1/44..... 379 (179,200)	---	Birthright, Inc.

OPERATIONS IN

1943	69
1944	16
1945	22
1946	56
1947	58
1948	16
1949	14
1950	34
1951	30
1952	46
1953	16
1954	13
1955	9
1956	15
1957	12
1958	5
1959	7
1960	16
1961-63	0

*Cumulative Total: 772 (354M, 418F)

* (Note: The case of Davis v. Walton was decided in 1929. In 1935, sterilization began at the Utah State Training School, where 649 operations have been performed up to 1964. The figures would therefore indicate that after the Davis case and until 1935, the law was substantially inoperative.)

UTAH -- FOOTNOTES

1 74 Utah 80, 276 Pac. 921 (1929).

2 Human Sterilization, at 88-89. Landman further asks if criminality, per se, is hereditary. Or sodomy? These questions, raised in 1932 in his book, are still most vexing in the light of what many today as well as in the past would call the pseudo-scientific, nay totally fallacious, basis of much of eugenic sterilization law.

3 There is some evidence that prior to 1935, some castrations were performed on inmates at the Utah State Hospital. The present law still includes the words "sterilization or asexualization," but present state policy limits the sterilization operations to vasectomies for males and salpingectomies for females. The first Utah law of 1925 included sexual criminals in its coverage, but the present 1961 amended law is even more specific: "...if it shall find that the inmate or person is habitually sexually criminal, or is insane, mentally deficient, epileptic, or is afflicted with degenerate sexual tendencies...." In keeping with the general trend in most states that still have eugenic sterilization laws on the books, it might be well for the Utah Legislature to delete the word "asexualization" and even to exclude castration from any future list of possible sterilization operations. Since the present law does not list the kinds of operations that are permissible, the chance (remote

as it may seem) that future administrators will "revive" castration is still a possibility. This writer is hard put to explain why in an amendment to the law passed by the Utah Legislature in 1961, the words "or asexualized" were deleted from Section 64-10-7 of the law, but the word "asexualization" was retained in two separate places in that section. The only figures on Utah castrations that this writer could find were in an article by Frederick W. Brown, "Eugenic Sterilization in the United States: Its Present Status," 149 The Annals 22 (Part III, May 1930) at 31, where he lists Utah with 33 castrations on males, 9 oöphorectomies on females (and 1 undesignated "other type" of female operation other than salpingectomy) out of a cumulative total of 79 operations performed up to January 1st, 1929. This was 53% of the total operations, but it is doubtful if this trend which at that time made Utah the leading castrating state, continued in later years.

4 Letter to author, dated August 18, 1962.

5 Section 64-10-6, Evidence at Hearing, etc. Just how the institution's board now becomes the State Welfare Commission is not clear, but this may be an internal change prompted by the belief that the decision is too grave for the authorities at a single institution to make.

6 Supra note 4.

7 Section 64-10-7. When Order for Sterilization Allowable.

8 *Supra* note 4.

9 *Ibid*.

10 *Ibid*. These are the *personal* views of Dr. Allen, not those of the institution, or the State of Utah. His candor and honesty in reporting these feelings and observations is exemplary, and was not duplicated in the course of the author's communication with the other sterilizing states.

11 Letter to author, dated September 20, 1962.

VERMONT

Vermont sterilization history began early in 1913 with a broad compulsory statute that was met with a sharply-worded adverse opinion from the state attorney general, Rufus E. Brown, which served as the basis of a veto by Governor Allen M. Fletcher.[1] Despite the fact that the bill passed the Legislature by a vote of 31-1 in the Senate and 56-1 in the House, sterilization was dead in Vermont for another eighteen years, when Vermont took the cautious and indeed rare step of enacting a voluntary sterilization act.

In the light of the Buck v. Bell decision in 1927, the passage of Vermont's voluntary sterilization law in 1931 seemed like a backward step to some persons.[2]

The key to Vermont law is consent, and even where the mental competency of the person is such that "such person is not of sufficient intelligence to understand that he or she cannot procreate children after such operation is performed,"[3] the person must voluntarily submit to the sterilization if it is to come within the confines of the law. State Attorney General Lawrence C. Jones in a opinion issued July 8, 1931, said:

> ...It should always be remembered that a person at any time, even on the operating table, may change their mind and decide not to submit to such operation. The operation can only be performed, provided that all the requirements

> of the law are carried out and that the person VOLUNTARILY SUBMITS TO IT.[4]

Asin the case of current administrative policy in the state of Indiana, this gives real meaning to consent. Even though a guardian is the person that requests the operation, Vermont is not content to stop at this point.

The great bulk of Vermont sterilizations under the law occurred in the depression years. From 1931 to the advent of the war in January, 1942, 221 operations were performed out of the cumulative total of 253 up to January, 1964.[5]

Since 1946, only 3 sterilizations have been performed. This would clearly indicate the law is dormant at this time. An explanation might be found in the change of attitude toward sterilization evidenced in some of the state's institutions. Regarding the Brandon Training School, Deputy Commissioner Kearns, writes:

> There have been no sterilizations at Brandon since around 1948. It is felt generally that even if all institutionalized people were sterilized, this would not begin to approach the problem of eliminating the birth of mental defectives, etc.[6]

It would appear that the depression surge of operations in Vermont has completely spent itself. There would have to be compelling reasons to sterilize under the law even in the light of its clear-cut salutary consent procedures.

VERMONT STERILIZATIONS

TOTAL UP TO

1/33	30		Whitney at 302
1/35	97	(32m, 65f)	ANA, at 19
1/38	161	(50m, 11F)	HBF
1/41	212	(66m, 146f)	HBF
1/42	221	(72m, 149f)	HBF
1/44	228	(75m, 153F)	Birthright, Inc.

OPERATIONS IN

1943	3
1944	4
1945	8
1946	10
1947	0
1948	1
1949	0
1950	1
1951-56.....	0
1957	1
1958-63.....	0

CUM. TOTAL: 253 (83m, 170f)

VERMONT -- FOOTNOTES

1 See Laughlin, ES in US, at 45-56 for the opinion of Brown.

2 Landman, in his Human Sterilization, wrote in 1932: "It appears that Vermont is fearful of the legal consequences of a compulsory human sterilization law in spite of the legal precedents to the contrary. It expressly provides for voluntary sterilization only and hence is really a retrogressive step in the light of the present status of the eugenic sterilization movement in our country." (at 93)

3 Title 18, Chapter 71, section 3202, IV (c & d) of the Vt. St. Anno. (1959).

4 1932 Op. Atty. Gen. 216. This rather literal interpretation of the meaning consent (withdrawal even on the operating table) was found in only one other state, Indiana, and this was in a case in which consent was actually withdrawn at the time of the operation and accepted as a bona fide withdrawal. In a more recent Vermont opinion, 1946 Op. Atty. Gen. 218, the State Attorney General, Alban J. Parker, said that an imbecilic 23-year-old boy at the Brandon State School who had voluntarily requested an operation and who "thoroughly understands the nature and purpose of the operation" was legally responsible for his own actions and did not require the permission of his father. The School had hesitated to perform the sterilization because his father, "who is an ignorant feeble-minded person," had objected in writing. From

1931 to 1946, six opinions have been issued by the state Attorney General interpreting the law.

5 Deputy Commissioner William F. Kearns, Jr. of the Vermont Department of Institutions writes: "...The sterilization law was adopted originally in 1931 and presumably had its origin in the depression." Letter to author, dated September 27, 1960.

6 Ibid.

VIRGINIA

Virginia emerged on the sterilization scene late in the day, but its place in American sterilization history has never been questioned because it was the 1924 Virginia statute that gave rise to America's most celebrated sterilization case, Buck v. Bell, and to one of the late Justice Oliver Wendell Holmes' most oft-quoted statements: "Three generations of imbeciles are enough." Much of American state sterilization history can be viewed through the history of this case, its aftermath, and its farflung ramifications and implications.

Prior to the passage of the Virginia law in 1924, state sterilization laws in Indiana (1921), Iowa (1914), Michigan (1918), New Jersey (1913), New York (1918), Nevada (1918), and Oregon (1921) had met with adversity in the courts. What the American eugenics movement needed was a procedurally-perfect statute that would meet the standards of American civil rights advocates and especially one that could test the legitimacy of sterilization law in the United States Supreme Court. Virginia provided just that kind of case, and Carrie Buck seemed to be the prize inmate for a test case.

The Virginia law was compulsory and intramural only, but it contained provisions for notice, hearing, counsel, and appeal. The law was passed on March 20, 1924, just three months after Carrie Buck was committed to the State Colony for Epileptics and Feeble-Minded on January 23, 1924. She was 17 at the time and at the commitment proceeding a deposition

of a Red Cross nurse, Miss Caroline E. Wilhelm, claimed that Carrie's illegitimate baby "gave signs" of being mentally defective at the age of one month. Carrie's mother, Emma Buck, had also been adjudged a mental defective and was committed to the same institution, which gave rise to Holmes' use of the three generation argument.[1]

All of the legalistic proprieties of a "fair" proceeding were in evidence. A guardian was appointed and legal counsel was provided by the court, as the statute required. The eugenics forces marshalled two of their heavyweights, Doctors Estabrook, who investigated the Buck family background (as he had earlier done with the reknown Jukes family) and discovered the famous Mendelian recessive for feeble-mindedness, and Laughlin, who assured the Circuit Court that Carrie's feeble-mindedness and immorality were "inherited." The evidence presented by the state, via the eugenicists, was overwhelming in comparison to that presented in defense of Carrie, namely, nothing. As one writer put it, the Virginia Circuit and Supreme Court were able to "escape the responsibility for examining these so-called 'laws of heredity' because of the failure of Carrie Buck's counsel to force such an evaluation."[2]

But the allegedly sound eugenic grounds for sterilizing Carrie Buck were supplemented by testimony of two medical superintendents of Virginia institutions, one of whom, Dr. A.S. Priddy of the Colony, felt that an operation would relieve the state of the burden of spending about $200 a year on Carrie for thirty more years (her productive years). From the initial hearing under the law to the Circuit Court and Supreme

Court appeals in Virginia to the final appeal before the United States Supreme Court, it was apparent that this was a "friendly" suit, not an adversary proceeding, and that the classic case in American sterilization law would be glaringly one-sided in its presentation. That Estabrook, Laughlin, and company were understandably optimistic that the final judicial vindication of their eugenics dream would come is exemplified in this statement by Laughlin on the Virginia law:

> ...I believe the Virginia statute is, in the main, one of the best laws thus far enacted in that it has avoided the principal eugenical and legal defects of previous statutes, and has incorporated into it the most effective eugenical features and the soundest legal principles of previous laws.[3]

In the 1925 Report of the Western State Hospital, Doctor J.S. DeJarnette, who along with Doctor Priddy, urged the passage of the law, wrote:

> In my opinion, the most humane and practical method of handling this unift class is sterilization; for sterilization, unlike segregation, would not interfere with the individual's liberty, sexual gratification or pursuit of happiness, but only with his power of reproduction. The feeble-minded, who are so from heredity, should all be sterilized.[4]

The rest of the story is found in the history of the United States

Supreme Court decision in 1927,[5] in which Justice Holmes, speaking for the eight-man majority, found the law valid on due process and equal protection grounds. To the argument that the law, because of its lack of extramural coverage, was class legislation, Holmes answered:

> ...It is the usual last resort of constitutional arguments to point out shortcomings of this sort. But the answer is 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....[6]

Not only is the Court's opinion in the Buck case devoid of any serious examination of the question of genetics and public policy, and the nature vs. nurture, heredity vs. environment controversy, but it paid no heed to any of the previous state supreme court cases dealing with the problem of sterilization and the Fourteenth Amendment. Certainly, even a fleeting mention of the earlier cases, especially those of New Jersey (1913), New York and Michigan (1918) would have been in order, but since the Court found the argument that the law was "class legislation" easy to dispose of, it found little reason to cite any other decisions, and certainly not those that were without precedents for the Court to follow.

And in congruity with the economic arguments of the eugenicists who argued so persuasively before various tribunals below and above,

Holmes found their economics quite in line with his own notions of equality, eugenics and public policy:

> ...Of course so far as the operations enable those who otherwise must be kept confined to be returned to the world, and thus open the assylum to others, the equality aimed at will be more nearly reached.[7]

It is all too obvious from the terseness of opinion of the Court that the "facts" as stated below relative to proving the hereditary character of Carrie Buck's defect (as well as those of her mother and child), needed no further elaboration or examination. The attack upon the procedures in the law was answered easily with a recital of the numerous technical safeguards of the law, but with a complete ignoring of the kind of "protection" Carrie Buck received from her "guardian and next friend" and her court-appointed counsel. In the light of subsequent cases involving the right of counsel and Fourteenth Amendment due process rights, notably the Powell v. Alabama (1932) and Gideon v. Wainwright (1963) cases, it seems shocking that an allegedly "imbecilic" ward of the state could be properly defended under the circumstances of this case.[8]

But the heart of the case, for Holmes and the Court, was substantive law, or what is basically the fundamental question of whether the state's police power, as evidenced in a state eugenic sterilization law of this kind, can properly be used to deny a person the sacred or supposedly sacred right of procreation. This gave Holmes and the Court

little difficulty, especially Holmes with his well-known patriortic and social Darwinian beliefs:

> ....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. It is better for all the world, if instead of waiting to executive degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind...[9]

No better statement could have come from the Estabrooks, Laughlins, Popenoes, and the other proud defenders of the eugenicist creed.[10] All of the old ogres were properly acknowledged and given the cloak of classic respectability by the nation's highest court.

But the real ammunition was saved for the last. To the scientists of the day, especially the geneticists, and perhaps even the great advocates of public health legislation and the modern science of epidemiology, this statement could serve as the basis for a magnificent symposium on law, legislation, medicine and public policy:

> ...The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes.

> Jacobson v. Massachusetts, 197 U.S. 11. Three generations of imbeciles are enough.[11]

Perhaps it did not occur to the Court that there was no real comparison between compulsory vaccination and compulsory sterilization, but since the court did not require further edification on this or any other matter pertinent to the case, it may appear cavalier at this time to level criticism at their judgment. However, scientific (medical and genetic) considerations aside, it is nothing less than shocking, perhaps even shameful, for the highest court of the land to treat the issue of a human right (procreation) in this slipshod fashion. The so-called Brandeis brief was apparently one-sided in this case (what are all the facts?) And why was the great Justice Louis D. Brandeis silent in this case?[12]

Although California, Kansas, Indiana, Michigan, and North Carolina had a head start on Virginia, the Buck decision turned the tide. By 1932, Virginia was running in second place behind California in cumulative sterilizations, and it still maintains that position currently, although North Carolina is moving up fast on the basis of higher annual figures than Virginia since 1947.

Despite the clean bill of health from both the Virginia and United States Supreme Court, Virginia officials became lax in the 1930s, which necessitated a memorandum to the State Hospital Board from Assistant Attorney General Joseph L. Kelly, Jr.[13] warning the Board that procedural

laxity may be judicially dangerous:

> "...the continued existence of the law is dependent upon a strict adherence to these requirements. Any laxity in this respect would not only impair the legality of particular proceedings, but would endanger the continued existence of the Act itself."

Mr. Kelly was referring to the statutory requirement of a verbatim transcript of the evidence from the hearing, and to the procedure for serving of notice of hearing. There is no subsequent evidence to indicate that any litigation took place, so that we can assume the warning had its intended affect. The Department of Mental Hygiene and Hospitals issued a detailed brochure containing six pages of detailed instructions on sterilization proceedings on August 25, 1952. In the mid-1950s annual figures for reported sterilizations began to decline, and since 1958 the downtrend has been significant. But perhaps the really important recent event in Virginia sterilization history was the series of special legislative commissions and the reports of 1959 and 1961.

The first report, issued October 27, 1959, was by the Commission to Study Problems Relating to Children Born Out of Wedlock. This report strongly opposed any compulsory sterilization measure based on economic or moral grounds,[14] but it did recommend a voluntary sterilization law.

But Recommendation 6 of the Report appeared, on the face, to be one of the most significant steps in American sterilization history since the Report of the American Neurological Association in 1936.

It deserves complete quotation:

Recommendation 6: Study of Compulsory Sterilization Laws

In the course of that phase of this study dealing with the subject of sexual sterilization, it came to the Commission's attention that the grounds upon which compulsory sterilization of a person may be ordered, as set forth in Chapter 9 of Title 37 of the Code of Virginia, are probably not in keeping with advances made in medical science since these laws were enacted. This chapter provides that, after the conclusion of certain proceedings, the operation of sterilization may be ordered to be performed upon an inmate of a State mental institution who is afflicted with hereditary forms of mental illness, mental deficiency or epilepsy. The underlying theory of these grounds for compulsory sterilization is that such an inmate, in the language of the statute, "by the laws of heredity is the probably potential parent of socially inadequate offspring likewise afflicted."

Recent advances in medical science cast some doubt upon the ascribed hereditary nature of some of these afflictions. Furthermore, enormous strides have recently been made in the successful treatment of several of these maladies. On the other hand, a person may

> be afflicted with a mental illness which is not hereditary but which renders him or her incapable of assuming the responsibilities of parenthood.
>
> In view of the lack of time, the Commission did not feel that it could make the necessary investigation and study of the complex phases of this particular problem. Under these circumstances, the Commission was obviously not in a position to recommend any changes in these laws.
>
> However, we felt that we should direct the attention of the legislature to this problem and recommend the creation of a Commission to study this particular subject.[15]

It would appear that the Commission had some very serious doubts about the sterilization law that had been on the books since 1924, irrespective of what kind of new voluntary legislation might be thought necessary at this time. With dispatch, the 1960 Regular Session of the General Assembly passed a joint resolution (No. 18) directing the Virginia Advisory Legislative Council to study the laws relating to sexual sterilization. The language of the resolution was quite similar to the recommendation of the Commission, and resolved -

> ...That the Virginia Advisory Legislative Council is hereby directed to review the provisions of Chapter 9 of Title 37 of the Code of Virginia in the light of knowledge most recently available to the medical profession in the fields of hereditary forms of mental

illness, mental deficiency and epilepsy, and the treatment thereof. The Council shall recommend any changes in such laws which appear necessary in the light of such medical knowledge.[16]

To the casual observer it seemed that the re-assessment of compulsory state sterilization laws in the light of modern evidence which the American Medical Association and the American Bar Foundation had called for[17] was now at hand, and by the one state in American sterilization history that had its law validated by the United States Supreme Court, Virginia. But whatever high hopes geneticists, psychiatrists, and others might have had that a truly scientific reappraisal of sterilization would take place could find only a rude shock when the report of the Virginia Advisory Legislative Council appeared in August, 1961 with the following casual statements:

RECOMMENDATIONS

1. That no change be made in the present Virginia statute providing for the sexual sterilization of a patient in a mental institution upon a finding by the State Hospital Board that such inmate is suffering from a specified mental condition which renders him or her "the probable potential parent of socially inadequate offspring likewise afflicted." *******

THE PRESENT VIRGINIA STERILIZATION LAW

(after citing the case of Buck v. Bell and the procedural

safeguards of the present law) -

There has been no substantial complaint concerning the operation of the statute in Virginia. During the 36 years in which it has been in effect, only 2826 males and 4146 females have been sterilized. We are advised that there are no medical or other scientific data indicating that a change in the basis set out in the statute for sterilization of inmates of institutions is either imperative or desirable. Accordingly, we recommend that no change in this statute be made.[18]

Like the Supreme Court in Buck v. Bell 34 years before them, Virginia's fact-finders could find no facts on which to base a denial of what the eugenicists had preached all along! Although, with the exception of North Carolina, every major sterilizing state in the country had found scientific grounds on which to stop or considerably slow down the present annual pace of sterilization operations, this did not particularly move the investigators, although it must be noted that by 1960, Virginia had joined the ranks of these states.

Why this whitewash and apparent ignoring of all of the pertinent scientific data that raises doubts about the very foundations of state eugenic sterilization laws (including the celebrated 1936 Report of the American Neurological Association that took a dim view of compulsory laws of this kind)? Was it deliberate, or was it merely "casual" in the light of the fact that the real job facing the state was not

the problem of compulsory sterilization, but presumably rising illegitimacy and public welfare costs, especially among Virginia Negroes. Two attempts in the Legislature, one in 1956 and another in 1962, to pass bills that would require the sterilization of women with one or more illegitimate children, failed. This left the field open to a voluntary sterilization proposal, which did pass in 1962.[19]

Present Virginia sterilization policy under the 1924 law is quite different from its enforcement in the late 1920s and 1930s. The present policy of the Department of Mental Hygiene and Hospitals is selective, and generally, an attempt is made to get consent from the person concerned or to avoid the compulsory aspects of the law.[20] Now that a voluntary law is on the books, much if not all of the pressure to reassess the 1924 law has vanished. Despite the decline in annual sterilizations in recent years, Virginia still maintains a second place lead over North Carolina in the cumulative totals, and even with its smaller annual figure still lands in second or third position behind North Carolina in recent annual compilations.

"Three generations of imbeciles are enough" may even in Virginia turn out to be one of the great untruths of our day. As one recent observer said:

> The legal career of sterilization is thus a useful example, first, of the law too quickly adopting a popularized scientific premise without exposing it to adequate scrutiny, and second, of the law's consequent difficulty in keeping

> abreast of the revisions of scientific hypotheses. "Three generations of imbeciles" may no longer be the prediction and even where it is, it may no longer be enough. Buck v. Bell may in the end survive as a monument only to the wit but not the wisdom of Mr. Justice Holmes.[21]

For Carrie Buck and others, the "wit" of Mr. Justice Holmes was a fleeting thing. One can wish that the great state of Jefferson and the Virginia Bill of Rights will once again regard the rights of the person as pre-eminent and the eugenical dogmas of Mr. Justice Holmes and the Supreme Court of 1927 as one passing fancy, nay flight of fancy, in the long zig-zag path of sterilization in the United States.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF MENTAL HYGIENE AND HOSPITALS

Sterilizations - By Sex and Year From 1924 to June 30, 1964

TABLE I

Year ending June 30	Male	Female	Total
1924	NONE		
1925	NONE		
1926	NONE		
1927	NONE		
1928*	X	X	2
1929*	X	X	206
1930*	X	X	395
1931*	X	X	324
1932*	X	X	309
Records show total to this date of	431	805	1,236
1933	108	100	208
1934	127	179	306
To date on hospital	91	68	159
1935	134	159	293
1936	145	161	306
1937	128	136	264
1938	148	173	321
1939	143	181	324
1940	161	188	349
1941	121	168	289
1942	149	183	332
1943	94	125	219
1944	28	103	131
1945	45	92	137
1946	61	119	180
1947	31	84	115
1948	19	113	132
1949	83	131	214
1950	60	148	208
1951	95	111	206
1952	57	96	153
1953	92	77	169
1954	57	114	171
1955	50	61	111
1956	57	30	87
1957	34	79	113
1958	46	69	115
1959	22	40	62
1960	9	53	62
1961	6	33	39
1962	11	20	31
1963	10	29	39
1964	10	13	23
Total	2,863	4,241	7,104

* Sex not recorded in annual reports.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF MENTAL HYGIENE AND HOSPITALS

TABLE II

Total Sterilizations - Through June 30, 1964

Central State Hospital	1,634
Eastern State Hospital	393
Southwestern State Hospital	364
Western State Hospital	1,701
Lynchburg Training School and Hospital	2,781
Petersburg Training School and Hospital	246
* Total:	7,119

* The discrepancy of 15 between the hospital totals and the reported sterilizations by years might be due to the fact that Lynchburg had some operations between 1924-27 that were not reported in the annual figures for those years. The author wishes to thank Edna M. Lantz, Statistician, Department of Mental Hygiene and Hospitals, for compiling the figures in these two tables.

VIRGINIA STERILIZATIONS (1924-1964)

Cumulative Total Up To

	7/1925..... 91 (3M, 88F)	--	Laughlin 1926, at 59
	1/1928..... 27 (1M, 26F)	--	G & P, at 184
	1/1930.....368 (94M, 274F)	--	CP, introd.
*	1/1932.....658 (212M, 446F)	--	Landman, at 289; Whitney, at 302.
*	1/1933.....1,333	--	Whitney, at 302.
	1/1935.....1,914 (755M, 1,159F)		ANA, at 19
	1/1938.....2,916 (1197M, 1719F)		HBF
	1/1941.....3,924 (1636M, 2288F)		HBF
	1/1942.....4,227 (1780M, 2447F)		HBF
	1/1944.....4,675 (1958M, 2717F)		Birthright

* (Virginia had by 1932-33 become the second highest state, cumulatively, behind California, which still remains in first place.

For the Years (Operations)

1943.....203
1944.....105
1945.....178
1946.....152
1947.....122
1948.....134
1949.....215
1950.....204
1951.....207
1952.....153
1953.....169
1954.....171
1955.....111
1956..... 87
1957.....128
1958.....114
1959..... 69
1960..... 61
1961..... 39
1962..... 29
1963..... 39

CUMULATIVE TOTAL: 7,162 (2779M, 4383F)

VIRGINIA -- FOOTNOTES

1 Holmes and the Court were none too accurate in their use of retardation terminology. Actually, Carrie Buck had been adjudged a moron (low-grade moron by Harry H. Laughlin and a middle-grade moron by Dr. J. S. DeJarnette, in their testimony before the Virginia courts) not an imbecile, and there is doubt about the application of this term to Carrie's mother and daughter. For a comprehensive report of the case, together with opinions of the Virginia courts through the U.S. Supreme Court decision, see Laughlin's The Legal Status of Eugenical Sterilization (Chicago: Supplement to the Annual Report of the Municipal Court of Chicago, 1929), especially pp. 16-19 and 22-29. Carrie Buck's mental age at the chronological age of 18 years was 9 years, according to the Stanford Revision of the Binet-Simon test and her mother, Emma Buck's mental age at the chronological age 52 years was 7 years, 11 months according to the same test. Carrie's illegitimate baby was adjudged "mentally defective" by a Red Cross nurse from Charlottesville, presumably at the "early age" of one month: See J.E. Coogan, "Eugenical Sterilization Holds Jubilee," 177 Catholic World 44 (April 1953) at 45.

2 Walter Berns, "Buck v. Bell: Due Process of Law?" 6 Western Pol. Q. 762 (1953), at 765. Bern's searching analysis of the entire case is found in systematic, detailed form in his unpublished Master's thesis, Buck v. Bell: The Sterilization Decision and Its Effects on Public Policy

(University of Chicago Library, 1951). It is true that in the brief before the U.S. Supreme Court, Carrie Buck's counsel did cite the New Jersey and Michigan cases (Smith v. Board of Examiners, Haynes v. Lapeer and Smith v. Command), but the brief was especially conspicuous in the complete absence of any scientific evidence. And the Court was completely unmoved by the eloquence of the warning in the 1913 New Jersey Supreme Court decision.

3 Quoted in his testimony before the Virginia Supreme Court of Appeals in Laughlin, op. cit. supra note 1, at 22-23. It is true that the Virginia statute eliminated criminality and social degeneracy from its list of defectives, and it also answered one of Laughlin's principal objections in his 1922 book, namely, that many of the laws contained phrases such as "no probability" or "no likelihood of improvement" which he called "bad biology": "Eugenical sterilization can be justified only on the grounds of hereditary and constitutional degeneracy. Once a degenerate, so far as hereditary qualities are concerned, always a degenerate." (ES in US, at 113). The Virginia act, tied to parole or discharge from the institution, was also "modern" in that it left the determination of the Superintendent "open-ended" by this statement: "...shall be of the opinion that it is for the best interests of the patient and of society that any inmate of the institution under his care should be sexually sterilized...." This could be interpreted to mean inability to assume the responsibilities of parenthood and other

non-eugenic grounds that are presently used (as they were in the halcyon days of California's mass sterilization) in many of the states. But the Virginia law did lack one important provision that did not bother the Virginia courts or the U.S. Supreme Court: extramural coverage.

4 At page 11. Like Priddy, Dr. DeJarnette found the economic costs of segregation rather staggering, and therefore estimated a savings to the state of at least two million dollars annually (assuming 10,000 persons of reproductive age at any one time at $200 per year, which would undoubtedly be more today). It is important to note that the hospital that Dr. DeJarnette headed was the largest hospital in the state for the insane, and that as of 1964, slightly over half of all the persons sterilized in Virginia under the law since 1924 have been classified as mentally ill. Dr. DeJarnette summarized his eugenics credo in the statement: "For a higher grade and more intelligent citizenship and from the standpoint of State economics, I urge the passage of this law." Id. at 12.

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

6 Id. at 208.

7 Ibid. Yet, in all fairness to Holmes, the eugenicists, and even many of the past and present superintendents of state institutions for the mentally ill and mentally retarded, the notion of giving their patients the freedom to return to society, even if only temporarily, is considered

an almost sacred gift of personal freedom. But somehow the impression that this statement leaves with this writer is that personal freedom was not Holmes' primary interest, but rather the ability of Virginia through the use of sterilization to enable more persons to get the "benefits" of asylum care, which in turn could provide a greater degree of equality.

8 In the transcript of the Record of the Circuit Court of Amherst County, the first court of appeals in the case, as presented in the brief to the U.S. Supreme Court, Superintendent Bell's counsel asked Carrie: "Do you care to say anything about having this operation performed on you?" She replied: "no, sir, I have not, it is up to my people." (Quoted in Berns, supra note 2, at 765-66). The really crucial question of an effective guardian and counsel seemed inconsequential to the majority of the court.

9 Supra note 5, at 207.

10 Or, from the pages of the Nazi era, historical differences notwithstanding. "...For a man who firmly believed in Darwinian evolution, who saw enacted before him in the courts the daily struggle for survival, it is not surprising that Justice Holmes sanctioned sterilization as the modern way of helping along natural selection for the good of the human race." Arnold L. Goldsmith, "Oliver Wendell Holmes: Father and Son," 48 J. Crim. L., C. & P.S. 394 (1957) at 397. This is but one of

several articles that carefully scrutinized the arguments of those who as liberals were shocked by Holmes' statements in this case. See also, Samuel Krislov, "Oliver Wendell Holmes: The Ebb and Flow of Judicial Legendry," 52 Nw. U. L. Rev. 514 (1957); Francis E. Lucey, "Holmes--Liberal--Humanitarian--Believer in Democracy?" 39 Geo. L. J. 523 (1951); Paul L. Gregg, "The Pragmatism of Mr. Justice Holmes," 31 id. 262 (1943); John B. Gest, "Eugenic Sterilization: Justice Holmes vs. Natural Law," 23 Temp. L. Q. 306 (1950). and Charles E. Wyzanski, Jr., "The Democracy of Justice Oliver Wendell Holmes," 7 Vand. L. Rev. 311 (1954).

11 Supra note 5, at 207. **Regarding the entire paragraph, C. Herman**

12 Sociologist J. E. Coogan, S.J. in his analysis of the case in an article entitled, "Eugenic Sterilization Holds Jubilee," 177 Catholic World 44 (April 1953) found that Carrie Buck and her mother were not "imbecilic," but were found to be morons and that the illegitimate daughter of Carrie, who had been the third generation "imbecile" in Holmes' aphorism, had died in 1932 after completing the second grade and was reportedly very bright. Coogan quoted the Superintendent of the State Colony for Epileptics and Feeble-Minded, Dr. G. B. Arnold, who said that "only too often, it is to be feared, immorality and mental deficiency are regarded as synonomous by welfare workers." (at 48). This writer visited Richmond and was allowed permission to look at the Buck family file in the state Department of Mental Hygiene and Hospitals. It read like the story of the Jukes family, and the "moral delinquency"

Pritchett pointedly said: "Seldom has so much questionable doctrine been compressed into five sentences of a Supreme Court opinion. The first two sentences state a completely unacceptable standard for measuring legislative action. If it were true that, because the state can demand the supreme sacrifice of life itself, it is thereby justified in demanding any lesser sacrifice, then every constitutional protection could be disregarded at will. Because the government can require a man to lay down his life in battle, it does not follow that he can be deprived of freedom of speech or the right to trial by jury. Moreover, it is a rather perverse view which sees the Jacobson decision as a precedent broad enough to cover Carrie Buck...." The American Constitution (N.Y.: McGraw-Hill Book Company, 1959) at 562-63.

so rampant in the family pedigree seems to have served in Virginia, as it did in so many other states with such laws, as a basis for penalizing the most vulnerable elements of society. Though Estabrook had some trouble in tracing Carrie's pedigree, Laughlin was still able to testify that Carrie's relatives were difficult to trace because "These people belong to the shiftless, ignorant, and worthless class of anti-social whites of the South." Laughlin, The Legal Status of ES, at 17. But for Laughlin, Estabrook, and company, there was absolutely no question that all of this was genetic in origin, and it was this kind of evidence that the United States Supreme Court bought lock, stock, and barrel. For the views of Dr. J. H. Bell, who succeeded Dr. Priddy as Superintendent of the State Colony for Epileptics and Feeble-Minded, see "Eugenical Sterilization," a speech delivered at the annual meeting of the American Psychiatric Association, Atlanta, Georgia, May 13, 1929.

13 In re: Forms and Procedure in Sterilization Cases, (dated November 25, 1938).

14 "...A majority of the Commission believes that this would be cruel and inhumane treatment and would probably be declared unconstitutional." They were further appalled by this suggestion in that it would penalize only those mothers of two or more illegitimate children receiving or seeking public assistance, and not all mothers of two illegitimate children. (Report, at 15). The Commission's first recommendation (No. 1)

was for passage of a voluntary sterilization law, which the Legislature did in fact in 1962. The dissenting statement, signed by three Commission members, took sharp issue with the majority's view of compulsory sterilization. After indicating that the greatest increase in illegitimate births in Virginia was among Negroes, they said: "...We received strong suggestions from responsible sources regarding compulsory sterilization in appropriate cases. There is some legal precedent for this in our existing law, and although we are not prepared to go that far at this time, we do not think the idea should be summarily dismissed. In the long run it may be found to be one of the most effective answers to the problem." W. R. Gaines added this note to the dissent: "While I have signed the above statement I wish to call attention to the fact that many of the county welfare boards passed resolutions calling for compulsory sterilization after the birth of the second illegitimate child and sent them to the captioned Commission as a recommendation. I, personally, approve such action." (Report, at 23-24).

15 Report, at 22.

16 All agencies of the State assisted the Council in its study, including the Departments of Mental Hygiene and Hospitals, Public Welfare, and Health, and persons familiar with compulsory and voluntary sterilization were on the committee that was to study the problems of sterilization in Virginia. Public hearings were held. "...The Committee had the benefit

of research which has been recently conducted in connection with the subject of sexual sterilization and it sought and received the advice of individuals whose experience has brought them into intimate knowledge of the problems inherent in our present statutes. It held a public hearing at which testimony was received both in advocacy of and in opposition to liberalization of the present law insofar as it relates to voluntary sterilization." Report of the Virginia Advisory Legislative Council, "Sterilization Laws in Virginia," Richmond, August 19, 1961, at 6.

17 "Reappraisal of Eugenic Sterilization Laws," 173 J.A.M.A. 1245 (July 16, 1960); Frank T. Lindman and Donald M. McIntyre, Jr. (eds.), The Mentally Disabled and the Law (the Report of the American Bar Foundation on the Rights of the Mentally Ill, Chicago: Univ. of Chicago Press, 1961) at 183-97. Also, Morton Birnbaum, "Eugenic Sterilization," 175 J.A.M.A. 951 (March 18, 1961).

18 Report of the VALC, op. cit. supra note 16, at 6-7.

19 The fact that both the report of the Commission to Study Problems Relating to Children Born Out of Wedlock (1959) and the Report of the Virginia Advisory Legislative Council, "Sterilization Laws in Virginia," (1961) strongly urged the passage of a voluntary sterilization law, cannot be discounted. But always lurking beneath the surface of the entire discussion of sterilization is the "problem" of increased illegitimacy, welfare costs, and taxation, and ultimately, the fact that the figures

produced always aimed more strongly at the Virginia Negro. An article by Charles Windle entitled "Factors in the Passage of Sterilization Legislation: The Case of Virg. 'a" in the summer, 1965 issue of the Public Opinion Quarterly, (Vol. 29 at 306-14) does an excellent job of analyzing the attitudes of the legislators who voted for and against the compulsory and voluntary sterilization proposals in the 1962 session of the Virginia Legislature. He found that the welfare issue is dominant in the whole discussion, regardless of whether the freedom question (compulsory or voluntary sterilization) is raised, and that once welfare is injected into the discussion, race is another crucial variable, especially when the economic and social background of the voting districts is examined. Windle's analysis may explain the apparent discrepancy between the two Virginia reports of 1959 and 1961. Sterilization was really never the basic issue, but welfare (rising illegitimacy, welfare costs, etc.) was, and a scientific examination of the 1924 law was really never contemplated. The composition of the two special reporting commissions is also an interesting factor. The first was a more laymen-oriented group and hence, more willing to openly assess the present laws on the books. The VALC was more politically oriented, both in terms of the then-current legislature concern with some kind of law to cut down welfare costs, and the departments of government most intimately related to these problems. Hence, it was probably unlikely that the 1961 report would really do the kind of pioneer job on the whole question of eugenic sterilization that thought would be forthcoming. Since opposition to

both voluntary and compulsory proposals came principally from organized Catholic groups, it was probably thought the wiser course to ignore the history of the 1924 law completely and work for a new and less controversial alternative. Windle further notes that the "liberal" concern for some kind of population control "simply as a means of obtaining a desirable population size, will find that considerations concerning population composition may influence the passage of legislation." (italics mine) To put it more bluntly and crudely, the issue for many was how to keep the Negroes fewer and "in their place." (See abstract of Windle's 1962 paper, "Euthenics and Eugenics: A Case Study of Legislation," given at the convention of the Amer. Psychological Association in St. Louis).

20 In personal discussion with Commissioner Davis, this writer felt that Virginia was doing what other states have done, namely, using the compulsory features of the law in a non-compulsory manner. A look at figures from 1959 on will indicate the severe reduction in the number of sterilizations, which is also indicative of a changed professional attitude toward the use of sterilization in connection with the problems of mental illness and retardation. Epilepsy, though still in the law, is seldom a criteria for an operation. In comparing the records of operations in the 1920s (including the record of the Buck case) and recent cases, it is clear that present records indicate a higher degree of professionalism and care in examination of requests for sterilization that come to the Department of Mental Hygiene and Hospitals. I was curious to find out why the Department did not press for either reform

of the law or outright repeal of the law, in the light of the 1959 report of the Commission to Study Problems Relating to Children Born Out of Wedlock. Commissioner Davis said that in view of the fact that the 1924 law had been upheld by both the Virginia and United States Supreme Courts, and there had been no further litigation under the law, it would be highly questionable whether it was advisable to question the present scientific validity of the law at this time. Instead of this kind of public scrutiny of the present law, the changes in the Department's policy relating to selective enforcement of the law are the true indicator of what has happened to compulsory sterilization in Virginia.

21 Harry Kalven, Jr. on sterilization in the symposium, "Morals, Medicine, and the Law," 31 N.Y.U. L. Rev. 1157 (1956) at 1234.

WASHINGTON

Washington is unique in having had two quite distinctive sterilization laws and two decisions by the State Supreme Court. Because of the two laws and two decisions, the present state of Washington sterilization law is confusing, to say the least.

It is therefore necessary to trace these legislative and judicial developments. The first law was passed in 1909, and was strictly punitive in its purpose and nature. It read as follows:

> PREVENTION OF PROCREATION: Whenever any person shall be adjudged guilty of carnal abuse of a female person under the age of ten years, or of rape, or shall be adjudged to be an habitual criminal, the court may, in addition to such other punishment or confinement as may be imposed, direct an operation to be performed upon such person for the prevention of procreation.[1]

This law was upheld by the state Supreme Court in the case of State v. Fellen, 70 Wash. 65, 126 Pac. 75 (1912). Though the statute was clearly punitive, the Court denied that sterilization was a cruel and unusual punishment. Later in the decade, in 1914 and 1918, respectively, Iowa and Nevada sterilization statutes were invalidated by Federal courts on the grounds that sterilization was cruel and unusual punishment.[2] But this statute and its acceptance by the state Supreme Court was quite

insignificant insofar as subsequent sterilization in the state is concerned, for the law has always been a dead letter.[3]

In 1921, a more general sterilization law was passed which applied to all state institutions and covered the following categories: feeble-minded, insane, epileptic, habitual criminals, moral degenerates and sexual perverts. Under this law 685[4] operations were performed until the law was invalidated in the case of In re Hendrickson, 12 Wash. 2d 600, 123 P. 2d 322 (1942) on the grounds that it violated procedural due process of law.[5]

The depression years history of the 1921 act is one of the most significant in the country. From January, 1935 until January, 1942, operations were performed at the rate of just under 100 per year, and the great bulk of all sterilizations in Washington (403 out of 685) were on the mentally ill. All of this came to an end with the 1942 court decision. Most writers regarded sterilization in Washington as dead from this date on. While the HBA annual compilations have correctly reported the court decision of 1942, they erroneously assumed that this meant that there was no sterilization law in the state of Washington.[6] Even some state officials had the same view. A letter of inquiry to the office of the state attorney general regarding eugenic sterilization produced this reply:

> Inasmuch as our Court had declared this law [1921] unconstitutional, this statute was not codified in 1950

> in the Revised Code of Washington. The legislature has not seen fit to enact a new sterilization law. Thus, no sterilization law exists in the state of Washington as of the present time.[7]

An examination of the present Washington code indicated that the 1909 law was still intact and presumably legal.[8] Another inquiry to the office of the attorney general produced a more detailed answer:

> The second section of our code to which you refer, RCW 9.92.100, is still in full force and effect. In the case of State v. Feilen, 70 Wn. 65, 126 Pac. 75, it was attacked as being unconstitutional because it provided for the administration of a cruel and unusual punishment. However, the attack was not well taken and our state supreme court upheld this particular piece of legislation. I am advised by certain individuals within our state's Department of Institutions that to the best of their knowledge, habitual criminals have not been sterilized under the authority of this statute, even though the authority is present, but there has been at least one instance within the last two years when a person convicted of a sex crime was ordered sterilized. This order was never appealed to the state supreme court to the best of our knowledge.

> In conclusion, I think it is fair to say that Washington still allows sterilization pursuant to law, but as a practical matter, such astringent action is restricted to the sex offender rather than the habitual criminal and even the latter sitution appears to be a rare one.[9]

Sterilization ceased in Washington in 1942, and no operations have been reported since that time.[10]

While the confusion in Washington sterilization law might appear to be like that of Alabama, there are important differences. The Alabama law (1919) remains on the books, and although a 1935 advisory opinion of the Alabama Supreme Court clouded the situation, evidence indicates that the law has <u>not</u> been enforced since that time. In Washington, there were two laws, one of which (the 1921 statute) was invalidated in 1942, leaving the 1909 law intact and still on the books. Technically, both states still have sterilization laws, although they differ in terms of the persons covered. It is unclear whether there has ever been any sterilization operation under the 1909 Washington law, even that of Peter Feilen, whose name made sterilization history in Washington.[11]

In summary, Washington's long history of sterilization law, dating back to 1909, is currently a dead letter. After two laws and two state Supreme Court decisions, and a surge of operations in the depression years, Washington is content to keep the subject a matter of past history. Even though the annual compilations of the NBAVS included Washington, it

will doubtless take its place alongside the numerous other states that continue to report zeroes each year.

WASHINGTON STERILIZATIONS

TOTAL UP TO:

1/21.....1	---	Laughlin, at 91*
7/25.....same	---	Laughlin, 1926, at 59
1/28.....9 (1M, 8F)		G & P, at 184
1/30.....same	---	CP, introd.
1/32.....same	---	Landman, at 289
1/33.....20	---	Whitney, at 302
1/35.....30 (6M, 24F)		ANA, at 19
1/38.....293 (48M, 245F)		HBF
1/41.....667 (178, 489)		HBF
1/42.....685 (184, 501)		HBF

CUMULATIVE TOTAL: (1909-42): 685 (184M, 501F)

* (This was probably under the 1909 law, but there is no clear-cut evidence that this was the Feilen case. All other reported operations would probably be under the 1921 law, though the 1909 act was and still is legally operative).

WASHINGTON -- FOOTNOTES

1 Chapter 249, sec. 35 of the Criminal Code, Washington Statutes of 1909. The sentence for carnal abuse of a female under 10 was life in prison.

2 Davis v. Berry, 216 Fed. 413 (S.D. Iowa 1914) and Mickle v. Henrichs, 262 Fed. 687 (D. Nev. 1918).

3 Laughlin reported only one operation up to January, 1921. ES in US, at 91.

4 Assuming that the solitary sterilization up to 1921 was under the 1909 act, the figure would be 684 operations under the 1921 act.

5 Notice came after the board's order of sterilization, and appeal was provided only to the Superior Court level.

6 Beginning with the 1952 annual compilation, the HBA would append a footnote for Washington which read: "Washington: enacted law in 1909; declared unconstitutional in 1942 due to technical deficiencies in the act." Even medical writers picked up some of this confusion. Charles Rieser, in "Vasectomy: Medical and Legal Aspects," 79 Journal of Urology 138 (1958) has a table that refers to Washington as: "Formerly authorized eugenic sterilization. No reference to sterilization in new code." (at 141).

7 Letter to the author from Oliver J. Neibel, Jr., Assistant Attorney General, dated September 29, 1960. Technically, the letter is correct insofar as eugenic sterilization is concerned. But Washington still has the 1909 punitive sterilization statute on the books.

8 RCWA, Title 9, chapter 9.92.100, which deals with the prevention of procreation by sterilization of habitual criminals.

9 Letter to author from Charles E. Siljeg, Assistant Attorney General, dated September 24, 1962. Ironically, it is not even clear from the literature whether Peter Feilen, the defendant in the 1912 decision, was ever sterilized. It would appear from Laughlin's Eugenical Sterilization in the U.S. at 91 and 292 and his later Eugenical Sterilization: 1926 at 59 that he was not sterilized. In fact, doubt over his guilt was such that he was pardoned in 1916. It would indeed be unfortunate if he was sterilized on the mistaken notion of his habitual criminality.

10 Except for the possibility of selective application of the original 1909 law for sexual crimes.

11 Although Assistant Attorney General Charles Siljeg said that he did not believe that the 1909 law had ever been used against an habitual criminal, this does not mean that the 1921 law, which included habitual criminals in its coverage, was not used in some cases. See Laughlin, ES in the US, at 92, where he describes the disposition of two criminal

cases by Superiod Court Judge George B. Holden of Yakima County in 1921-22. The first case involved an habitual criminal who was ordered sterilized by the Court, and who was described by Judge Holden in this way: "This man, about 35 years of age, is subnormal mentally and has every appearance and indication of immorality. He has a strain of negro blood in his veins and has a lustful and disgusting appearance." In the second case, Judge Holden suspended a six months to fifteen year indeterminate sentence on a starving sugar beet farmer after he submitted to a "voluntary" vasectomy. In a recent 1963 case, Superior Court Judge John A. Denoo of Whitman County suspended the one year sentence of a father of ten children who had obtained public assistance through false statements and representations on condition that he "desist from fathering any more children." The defendant was then given a three year probation with the stipulation that "if his wife bore another child more than nine months after the date of the order he would be committed to the county jail for the one year period." Judge Denoo, unlike Judge Holden in the case of the beet sugar farmer in 1922, or the two judges in California who gave some defendants the choice of castration or a prison sentence, or the more recent (1964) Andrade case where vasectomy was a condition of probation, could find no clear authority in Washington law for sterilization other than the limited coverage of the 1909 law, which did not apply to this case. And unlike Judge Sprankle in the Andrade case in the Superior Court of Los Angeles, Judge Denoo felt that

it was not part of judicial discretion to suggest how the defendant might best keep from fathering more children. Letter to writer, dated January 27, 1965. With the advent of the Pill and now the IUCD (intrauterine contraceptive device), this makes good medical and judicial sense.

WEST VIRGINIA

Coming in the wake of the Buck v. Bell decision, one might assume carte blanche authority, yet West Virginia's 1929 law has been sparingly used. Except for a period at the end of the 1930s and a peak of 50 operations in the 1954-56 period, the law has been a dead letter. The American Neurological Association report explained the slowness in enforcement in this way:

> ...The law has rarely been enforced in this state, because the procedure required to sterilize an individual is too complicated to be carried out.[1]

What appears as a "revival" of sterilization in West Virginia in 1954-56 was explained by Doctor N. H. Dyer, the State Director of Health in this way:

> ...A small number of patients were sexually sterilized after the enactment of the law and I have no information of why the procedures were discontinued. However, during the period of 1954 to 1956 the State Board of Health received requests from the superintendents of the mental hospitals for permission to perform sexual sterilizations on certain patients coming within the wording of our sterilization statute. The State Board of Health granted these requests after hearings were held and in compliance

> with the legal requirements. Since that period the State Board of Health has not received requests for such permission.
>
> The State Board of Health does not consider sexual sterilization of inmates of the mental hospitals to be an important factor of the state's health. Therefore, no other means are employed to carry out the objectives of the state law.[2]

Substantially the same explanation of recent policy was given by Robert E. Marshall, a psychiatric social work consultant in the West Virginia Department of Mental Health, who wrote:

> I have learned informally from a reliable source that during the past two (2) years there have been no sterilizations in West Virginia. I would suggest that this downward trend is related to a general feeling that sterilization of the mentally defectives are not necessarily desirable or indicated in most cases.[3]

It is possible, as in Idaho, that there might be a "revival" of the law if superintendents again press their requests, but Doctor Dyer's statement indicates a cautious attitude regarding the usefulness of sterilization and hence, it might be predicted that as in Idaho, this revival would be extremely selective. Again, one must assume that the policies of the present State Board of Health will remain substantially

consistent in the area of sterilization, and that no internal shakeup will affect this statute. After so many years of following a conservative policy, it is doubtful whether West Virginia would risk a constitutional test - even if salutary - at this time.[4]

WEST VIRGINIA STERILIZATIONS

TOTAL UP TO:

1/33..... 1 --- Whitney, at 302

1/35.....10 (F) --- ANA, at 19

1/38.....31 (1M, 30F) -- HBF

1/41.....46 (1 - 45) --- HBF

1/42.....47 (1 - 46) --- HBF
1/44.....48 (1 - 47) --- Birthright, Inc.

OPERATIONS IN

1943.....0

1944-53.....0

1954.....14

1955.....33 (note this is 1/3 of the cumulative total)

1956.....3

1957-63.....0

CUMULATIVE TOTAL: 98 (15M, 83F)

WEST VIRGINIA -- FOOTNOTES

1 Eugenical Sterilization, at 19. There may be truth in this statement in the light of the stiff notice requirement of the law. The superintendent of the institution who petitions the West Virginia Board of Health for a sterilization order must serve notice of hearing and a copy of the petition on the inmate, next-of-kin, or guardian, and failing to do so, must have notice published once a week for two successive weeks in some newspaper in the inamte's county. Provisions for judicial review to the state Supreme Court are also provided.

2 Letter to author from Dr. Dyer, dated October 29, 1962.

3 Letter to author, dated September 18, 1962. Actually, no sterilizations have been reported since 1958.

4 With regard to appeal rights under the law, it should be noted that Rule 81 (a)(1) of the West Virginia Rules of Civil Procedure exempts the orders of the Public Health Council by the following statement: "These rules do not apply to any case which comes before a circuit court upon appeal from or to review the judgment, order, or ruling of any court of record or administrative agency...."

WISCONSIN

Eugenics and politics combined in a strange mixture in Wisconsin. Describing the passage of the 1913 Wisconsin statute, Mark Haller says:

> ...and the Wisconsin law of the same year, urged by the state's physicians and superintendents, indorsed by the Progressives on the University of Wisconsin faculty, and signed by the Progressive governor....[1]

As in the case of the Delaware and Alabama laws, the Wisconsin statute is devoid of procedural safeguards. It does provide for 30 days notice in writing to the next of kin or guardian of a decision by a special board, but there are no specific provisions for objections or judicial review. However, Wisconsin has long been convinced of the necessity for consent. As early as 1918, Dr. Albert W. Wilmarth reported that -

> *** Some of these operations were made at the request of parents, and none of them against the relatives' wishes. Where objections were filed, no operation has been performed.[2]

Present policy calls not only for consent of the person notified, but silence is not deemed to be consent (a non-reply is not a waiver).[3]

Almost all of the operations performed have been on the mentally retarded. Frank Richmond, Director of the Psychiatric Field Service, State Board of Control, writing in 1935, felt that the law was too

embracing. Through a process of administrative selection , the criminal, the insane, and the epileptic were ignored in the enforcement of the law. Sterilization was not applicable to criminals as such, but Richmond felt that it should be applied to mentally deficient criminals, contingent on the state providing adequate provisions for detention prior to sterilization, and legal provision for their parole under proper supervision after sterilization. The lack of such a program, in his view, accounted for the low incidence of male sterilizations. Richmond described the state's sterilization program in that period in this way:

> Compulsory surgical human sterilization without limit or discrimination has been exploited as a eugenical panacea or cure-all for prevention of procreation of the mentally unfit. No such sweeping program has been considered desirable, necessary or practical in Wisconsin. Surgical sterilization without compulsion is applied in a restricted field. As a eugenical and social welfare measure, it is practiced on a selected group of about one quarter of the admissions to the two colonies and training schools maintained for the care, custody and treatment of mentally deficient (feebleminded) and epileptic persons.

And like Wilmarth in the earlier period of Wisconsin sterilization, he emphasized the voluntary nature of the program:

> The Board of Control refuses to approve or order sterilization when objection is made by parents, responsible relative, guardian or the inmate personally. Detention or segregation continues indefinitely in all such cases. Objection is registered in about 20% of the cases by parents, relative or guardian. Perhaps one inmate out of 25 personally refuses to consent to sterilization.[4]

Although Wisconsin policy has been called conservative, the figures in the 1930s do not indicate a reluctance to use the law. The period from 1932-42 brought operations at close to 100 per year (Richmond lists 98 for the year 1932). The decline in Wisconsin sterilizations is most noticeable after the 1954 department/al report. This report, which included the Richmond article, four opinions of the attorney general, and other references, is a model for other states to use, particularly in its listing of sterilization procedure. These suggested procedures are now a part of the administrative orders of the Department of Public Welfare, which presently exercises authority in this area.

The processing of sterilization includes a report by the members of the social service staff, clinical staff team, institution medical staff, and the superintendent of the institution housing the patient. The recommendation of the institution superintendent then goes to the director of the Department of Public Welfare, who appoints a panel of experts to review the request. Consent procedure is carefully outlined and followed. Current policy still excludes correctional institution and the mentally ill.[5]

It may seem odd that a state has no formal means for objection and review in the courts would have had some kind of test of constitutionality. The careful use of consent and the ability of relatives to register effective objections to the operation may account for the lack of such a test case in Wisconsin.[6] Unlike the confused state of Delaware's laws, Wisconsin has worked out explicit procedures, notwithstanding the brevity of its law. Another significant point in the Wisconsin law is the lack of any definition of defectiveness. (Alabama was equally vague) The law merely mentions the categories covered, but lacks any statement about the benefit to society, to the person, etc.[7] It is undoubtedly one of the worst laws of its kind (on paper), and yet over the years, authorities in Wisconsin have worked out a more rational definition of familiar hereditary defect. Despite the lack of clear statutory definition, or provision for objection and appeal, the operation of the law in Wisconsin at the present time seems salutary in many respects.

It might be argued that the careful policies of the present Department of Public Welfare should be made part of the actual law, and that judicial review should be added. However, as long as present consent procedures are followed, the chances of needing judicial review are nil. Yet, this writer must always raise the point that future administrators may have different ideas on these matters. The mere fact that a law that has lasted over 50 years is still working effectively is no reason to believe that the next 50 years will be the same. It

might be well to consider the possibility of including the present administrative orders of the Department of Public Welfare in a new, more up-to-date statute, representing the most knowledgeable attitudes toward the whole subject of state sterilization.[8]

Wisconsin sterilization history is perhaps unique in that there have been four important opinions by the state's attorney general relative to the status of the sterilization act.[9] The strength of these opinions, especially the 1932 opinion, was such that the legal counsel for the Wisconsin State Medical Society in an article in 1965 warned physicians who might contemplate voluntary sterilization operations not covered in the present statute:

> It seems clear that a fair reading of the Attorney General's opinions justifies the conclusion that the Attorney General of this state has taken a consistently conservative attitude toward sterilization surgery whether performed on certain types of institutionalized patients, such as the mentally deficient, or upon normal persons in the ordinary course of private medical practice. The performance of sterilization surgery for any but clearly therapeutic reasons could subject the surgeon to criminal penalties and to civil liability for damages on suit either of the patient, spouse, parent, or guardian....[10]

This admonition to Wisconsin physicians was repeated in 1966, together with an even stronger warning to refrain from performing nontherapeutic vasectomies.[10]

One might conclude a survey of Wisconsin sterilization history by saying that present Wisconsin policy is more "progressive" in its treatment of the subject than the Progressive urge for sterilization in 1913.[11] But there is still room for improvement.

WISCONSIN STERILIZATIONS

TOTAL UP TO:

1/21.....	76 (15M, 61F) (all at Home for F-M,	---	Laughlin, at 93 Chippewa Falls)
7/25.....	144 (26M, 118F)	---	L, 1926, at 59 (all at CF)
1/28.....	218 (28 - 190)	---	G & P, at 184
1/30.....	305 (35 - 270)	---	CP, introd.
1/32.....	248 (28 - 220)	---	Landman, at 289; Whitney, at 302.*
1/33.....	492	---	Whitney, at 302.
1/35.....	645 (69 - 576)	---	ANA, at 20
1/38.....	905 (129 - 776)	---	HBF
1/41.....	1,156 (165 - 991)	---	HBF
1/42.....	1,219 (180 - 1039)	---	HBF
1/44.....	1,420 (261 - 1159)	---	Birthright, Inc.

OPERATIONS IN --- (HBA FIGURES)		WIS. OFFICIAL FIGURES	
1943.....48		1913..... 0	
1944.....47		1914..... 0	
1945.....58		1915..... 1	
1946.....24		1916.....16	
1947.....35		1917.....15	
1948.....46		1918.....29	
1949.....28		1919..... 0	
1950.....42		1920.....17	
1951.....22		1921..... 0	
1952.....12		1922.....18	
1953.....16 **		1923.....16	Number of Sterilization Operations
1954.....14		1924..... 9	
1955..... 0		1925.....26	July 1, 1913 - March 15, 1933 (reported in Richmond article, 2 J. Crim. L. & Crim. 586, 587 (1934)
1956..... 1		1926.....14	
1957..... 7		1927.....28	
1958..... 0		1928.....66	
1959..... 0		1929..... 5	
1960..... 8		1930.....70	
1961..... 2		1931.....53	
1962..... 6		1932.....98	
1963..... 8		1933.....18	
CUM. TOTAL: 1,823	(391M - 1,432F)	Total: 499 operations	

All but 10 on F-M persons (up to the year 1951, all reported operations were on the feeble-minded).

* (probably an error)

** (21 reported by Charles C. Lubcke, Chief Counsel, Bureau of Collection and Deportation, Dept. of Public Welfare, 1961 ed. of 1954 report on sterilization procedures at 31. From 1954 on, the HBA figures and the official figures of the state harmonize.)

WISCONSIN -- FOOTNOTES

1 "Heredity in Progressive Thought," 37 Social Service Review 166, 171 (1963). The most significant influence in convincing Wisconsin legislators was Dr. Albert W. Wilmarth, the first superintendent at the Home for the Feeble-Minded at Chippewa Falls. Wilmarth, an associate of Kerlin and Barr at the Pennsylvania Training School for the Feeble-Minded at Elwyn, was famous along with Kerlin and Barr for his concept of the "moral imbecile." He spared no energy in convincing Wisconsin that it needed eugenic protection. See Rudolph J. Vecoli, "Sterilization: A Progressive Measure?" 43 Wis. Mag. of History 190, 194-95 (1960).

2 In Laughlin, ES in the US, at 95.

3 Report (1954) of the Committee on Sterilization Procedures, Department of Public Welfare, systematized all sterilization procedures. Conversation with persons in the department corroborated the fact that consent must be specific. Also, personal communication to author from Wilbur J. Schmidt, Director, State Department of Public Welfare, dated Sept. 27, 1960.

4 Richmond, "Sterilization in Wisconsin," 25 J.C.L. & Crim. 586 ff. (1934). Note his mention of indefinite detention or segregation when consent is not given. In 1955, the Wisconsin legislature eliminated epileptics from the law. Richmond also suggested that Section 245.03 of the Wis. Statutes barring feeble-minded persons from marrying should

be amended to exempt sterilized persons (as is the South Dakota law) from its coverage. They have not done so up to this time.

5 "In those cases in which sterilization is used, the mental deficiency normally must be of hereditary origin. Use is almost entirely confined to high-grade defective patients and very rarely is it used where long time institutional care is indicated. It is used only where a better health or social adjustment is indicated. In the case of better social adjustment, use is usually limited to those persons who have demonstrated a history of sex promiscuity." Letter of R. C. Davidson, social work administrator, Division of Mental Health, to Commissioner R. H. Hutcheson, Department of Public Health, State of Tennessee, dated Sept. 2, 1960.

6 A good example of consent was given the author when he visited Wisconsin in 1963. A husband, who has been committed to the state hospital for the criminally insane periodically since 1942, objected to a request for his wife's sterilization, she being presently confined in one of the state's institutions. This objection was considered bona fide.

7 # 46.12 (3) reads: "If the experts and superintendent unanimously find that procreation is inadvisable the department may authorize an operation for the prevention of procreation." The experts consisted of a surgeon and a psychiatrist.

8 Curiously, a bill was proposed in the legislature in 1925 which would

have provided for a formal hearing before the Board of Control, with possible appeal to the Circuit Court and to the Supreme Court. The bill passed but was vetoed by the governor because of the conflict over the desirability of such action and the "uncertainty" of the cost of such a procedure. From the "History of the State Board of Control of Wisconsin and the State Institutions 1849-1939," in the 1954 Report of the Committee on Sterilization Procedures, at p. 16. Similar bills failed in 1929, 1931, 1935, and 1937. The author is somewhat shocked as to why a "progressive" state such as Wisconsin was loathe to make its law more amenable with the accepted standards of due process of law. It might well be that the eventual development of internal procedures that made up for this lack was due to the irresponsibility of the legislature in this matter. Or, perhaps the reverse. One curious addition to the Wisconsin story is the opinion of the Attorney General dated October 10, 1928 (17 Op. of the A.G. 524) declaring that a voluntary sterilization, even with consent, is not within the present law: "...That power is so specifically granted and so carefully limited and guarded I do not see how it could be said to grant power excepting in the cases there specified." Whether this would still be the official opinion today is hard to say.

9 12 O.A.G. 483 (1923); 17 O.A.G. 524 (1928); 21 O.A.G. 940 (1932); and 27 O.A.G. 416 (1938). The 1923 opinion dealt with the problem of personal service of notice by registered mail; the 1928 opinion ruled

that an operation on a minor outside of state institutions even with consent is not authorized by the law; the 1932 opinion suggested that physicians should not be party to voluntary sterilization operations except where they are strictly therapeutic in their purpose, and the 1938 opinion sanctioned such an operation where it was "by reason of necessity to preserve health."

10 "Medical Staff Rules and Regulations as to Sterilizations," 64 Wis. Med. J. 23 (Jan. 1965) at 24. Relying strongly on the 1932 opinion, the legal counsel cautioned Wisconsin physicians to use careful consultation of at least two physicians before such surgery is performed.

11 The question of why the earlier Progressives embraced eugenics is an intriguing one, but Vecoli has some useful answers: "As an intellectual creed, eugenics appealed to the progressive-minded as modern and challenging. It was endowed with the glamour which Darwin had lent to the science of biology. ***** The Progressive reformer with his faith in "Science" as the means to his humanitarian ends found the eugenic teachings convincing and congenial, particularly since he was preoccupied with the purpose of preventing social problems...." Supra, note 1, at 201. Also, see chapter 1 on intellectual history, supra.

10a "Medical Staff Rules and Regulations as to Sterilizations," 65 id. 24-25 (Jan. 1966) and "Nontherapeutic Vasectomy" at 25.

OTHERS

(INCLUDING STATES THAT HAD THEIR STERILIZATION LAWS INVALIDATED BY COURT DECISIONS AND DID NOT PASS NEW LEGISLATION; STATES THAT CONTEMPLATED BUT DID NOT PASS STERILIZATION LAWS; STATES THAT HAVE STERILIZED WITHOUT BENEFIT OF LAW; KANSAS, NORTH DAKOTA AND PUERTO RICO, WHICH ENDED STERILIZATION BY LEGISLATIVE REPEAL AND NOT COURT ACTION; TEXAS; AND TWO CANADIAN PROVINCES, ALBERTA AND BRITISH COLUMBIA, WITH EXISTING STERILIZATION PROGRAMS).

PARTS

PART A (Nevada, New Jersey, New York)

PART B (Hawaii, Kentucky, Missouri, Tennessee)

PART C (Colorado, Illinois, Maryland, Massachusetts, Ohio, Pennsylvania)

PART D (Kansas, North Dakota and Puerto Rico)

PART E (Texas)

PART F (Canada: Alberta and British Columbia, including portions of the Diamond Report).

PART A

NEVADA

Nevada passed a purely punitive sterilization law in 1911, which appeared as Section 28 of the Crimes and Punishments Act and read as follows:

> PREVENTION OF PROCREATION: Whenever any person shall be adjudged guilty of carnal abuse of a female person under the age of ten years, or of rape, or shall be adjudged to be an habitual criminal, the court may, in addition to such other punishment or confinement as may be imposed, direct an operation to be performed upon such person for the prevention of procreation; provided, the operation so performed shall not consist of castration.[1]

The law was declared unconstitutional on the grounds that it constituted a cruel and unusual punishment by a Federal District Court in the case of Mickle v. Henrichs in 1918. In discussing the crime of rape, the court said:

> ...True, rape is an infamous crime; the punishment should be severe; but even for such an offender the way to an upright life, if life is spared, should not be unnecessarily obstructed. It will not do to argue that inasmuch as the death penalty may be inflicted for this crime, vasectomy, or any other similar mutilation of the body, cannot be

> regarded as cruel, because the greater includes the less. The fact that the extreme penalty is not exacted is evidence that the criminal is considered worthy to live, and to attempt reformation. For him, and for society, a fair opportunity to retrieve his fall is quite as important as the eugenic possibilities of vasectomy.[2]

The wording of the Nevada statute was an exact replica of the 1909 Washington punitive sterilization law, except that Washington did not include the proviso barring castration. However, Washington's punitive law was upheld by the state Supreme Court in the case of State v. Feilen, in 1912, on the grounds that it was not a cruel punishment,[3] but it should be mentioned that the Constitution of Washington differed from that of Nevada in that Washington forbids only cruel punishment. The Nevada Constitution, similar to the Eighth Amendment of the United States Constitution, uses the language of "cruel or unusual punishment."[4]

No persons were reported sterilized under the Nevada statute, and hence, their sterilization history ended with the court decision of 1918. But it was nevertheless unclear as to what became of the law. Laughlin in 1926 called it a "dead letter" and "inoperative,"[5] and Landman in 1932 had this to say about the law:

> The records are silent as to the number of operations performed under the law but clearly today compulsory sterilization of state dependents in Nevada has fallen into disuse.[6]

Unlike gambling in Nevada, sterilization appears to have lost its virility. After remaining on the law books for 50 years through numerous code revisions, the sterilization provision was finally repealed in 1961.[7]

NEVADA -- FOOTNOTES

1 As quoted in Laughlin, ES in US, at 21.

2 262 Fed. 687 (D. Nev. 1918) at 691. The Court discussed the equal protection issue and mentioned the New Jersey Supreme Court decision in the Smith case in 1913, but it restricted the issue in the case to cruel and unusual punishment.

3 70 Wash. 65, 126 Pac. 75 (1912).

4 The language of the Eighth Amendment reads "cruel and unusual punishment."

5 Eugenical Sterilization: 1926, at 30, 55.

6 Human Sterilization (1932) at 61.

7 In a letter to the author, dated July 14, 1965, the Nevada Attorney General, Harvey Dickerson, wrote: "NRS 207.020, providing for sterilization of criminals convicted of carnal abuse of a female under 10 years of age, rape, or as habitual criminals, was repealed by Chapter 45 of the 1961 Statutes of Nevada. The repeal was based on the Federal Court's decision in Mickle v. Henrichs, 262 Fed. 687." And the Medical Superintendent of the Nevada State Prison at Carson City, in a letter to the author dated July 12, 1965, said there was no record of any action since 1918. Slowly, but surely, Nevada got around to making the record "clear."

NEW JERSEY

New Jersey's 1911 statute (which was signed by Governor Woodrow Wilson) was the first to be found unconstitutional in the nation. The law, which covered the feeble-minded, epileptic, criminals convicted of rape and other crimes that under the law constitute habitual criminality, was tested in a case against an epileptic who was ordered sterilized. In Smith v. Board of Examiners, 85 N.J.L. 46, 88 Atl. 963 (1913), the New Jersey Supreme Court found the act violated equal protection of the laws by being applied only to inmates of state institutions and not the general population. The Court said:

> ...When we consider that such [a] statutory scheme necessarily involves a suppression of personal liberty and a possible menace to the life of the individual who must submit to it, it is not asking too much that an artificial regulation of society that involves these constitutional rights of some of its members shall be accomplished, if at all, by a statute that does not deny to the persons injuriously affected the equal protection of the laws guaranteed by the Federal Constitution.[1]

Similar decisions, in New York and Michigan in 1918 were based on this concept of class legislation. However, it is interesting that Laughlin notes the possibility that the rest of the law, namely, those

classes other than epileptics, would still be valid because of a severability clause in the law.[2] New Jersey showed some interest in carrying the case to the United States Supreme Court, but this never happened. As late as 1921, there was still some interest in a possible amendment of the law,[3] but nothing came of these efforts. This was perhaps unfortunate because the New Jersey Supreme Court was way ahead of its time, especially in this warning that is as appropriate today as it was in 1913:

> There are other things besides physical or mental diseases that may render persons undesirable citizens or might do so in the opinion of a majority of a prevailing legislature. Racial differences, for instance, might afford a basis for such an opinion in communities where that question is unfortunately a permanent and paramount issue. Even beyond all such considerations it might be logically consistent to bring the philosophic theory of Malthus to bear upon the police power, to the end that the tendency of population to outgrow its means of subsistence should be counteracted by surgical interference of the sort we are now considering.[4]

No person was ever sterilized under the New Jersey law, so that their history of one statute and one adverse state Supreme Court decision balanced out to zero, and the current law remains silent on sterilization except for one somewhat ambiguous prohibition.[5]

Ironically, a study of sterilization in Finland published in 1958 mentioned the New Jersey law approvingly. Apparently an adverse state supreme court decision rendered 44 years earlier and a history of no sterilizations under the New Jersey statute did not dampen the enthusiasm of one foreign researcher.[6]

NEW JERSEY -- FOOTNOTES

1 85 N.J.L. at 55, 88 Atl. at 967. The Court very neatly disposed on the argument, often advanced by eugenicists then and now, that the state would save money through its sterilization program: "The suggestion that the classification might be sufficient, if the scheme of the statute were to turn the sterilized inmates of such public institutes loose upon the community and thereby to effect a saving of expense to the public, is not deserving of serious consideration. The palpable inhumanity and immorality of such a scheme forbids us to impute it to an enlightened Legislature that evidently enacted the present statute for a worthy social end upon the merits of which our present decision upon strictly legal lines is in no sense to be regarded as a reflection." Ibid.

2 ES in the US, at 165. Also, his comment at 143: "Statute is unenforceable so far as its application to epileptics is concerned. Apparently the law is still applicable to social inadequates other than epileptics in county and state institutions."

3 George B. Thorn, Superintendent of the Institution for Feeble-Minded Women, Vineland, in a letter to Laughlin dated January, 1921 said: "...The law affecting this institution is not the same, but we have not made a test case as yet. We are having considerable discussion in New Jersey as to how to have this law amended so that it will be constitutional." Ibid. at 81. What Superintendent Thorn meant by the law affecting

Vineland differently from other institutions is not clear, but clearly no test case was started in his institution.

4 85 N.J.L. at 52-53, 88 Atl. at 966. See ch. 3, infra, on the recent return of punitive sterilization proposals in America.

5 This statement appears in the present New Jersey Code: "Nothing in this act or in chapter eleven of title 30 of the Revised Statutes shall give the licensing authority or agency herein provided for the power or authority to require any hospital to practice or permit sterilization of human beings...." contrary to the religious beliefs of any group. N.J. Stat. Ann. sec. 30:11-9 (1964). The state attorney general was unable to give an interpretation of this particular provision to a person outside the official departments and agencies of the state.

6 Carl A. Borgström, Tillämpningen av Lagen om Steriliserings i Finland (Helsinki, 1958). In the English summary, he wrote: "The sterilization law of New Jersey, U.S.A., is of particular interest owing to its stipulation that a specially trained state eugenist shall be in charge of its enforcement. Among his duties is listed the registration of all subjects to whom the law applies." (at 178) Apparently, Borgström confused the New Jersey statute, which did not have such a provision in its law, with the model sterilization law proposed by Harry H. Laughlin in 1914 and later on by the Human Betterment Association of America, Inc.

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NEW YORK

The New York sterilization experience illustrates the hazards of laws of this kind, especially when the certainty even of the officials involved in the law's enforcement leaves much to the imagination.

The statute, passed in 1912, applied to 30 state institutions, but only two used it in the six years the law was followed. Laughlin reports that -

> ...It appears also that the law was originally passed, not at the instance of persons interested in eugenics, but for the primary purpose of creating a commission for "deserving friends." The statute was copied almost bodily from the New Jersey law, and no effort was made to improve or adapt it. In short, the history of this law in New York State is a record of politics, incompetency and discredit. It has set back eugenical progress among the state's institutions more than ten years.[1]

In 1915, a test case began in the Custodial Asylum at Rome. The statute was invalidated on the grounds of violating equal protection of the laws, in the case of Frank Osborn in 1918,[2] but the litigation was never finally decided in the state's highest court, the Court of Appeals, because the legislature repealed the law in 1920, and the case was withdrawn.

Ironically, the Superintendent of the Rome institution, Dr. Charles Bernstein, opposed the operation. According to Laughlin,

> Dr. Charles Bernstein ***** reported that there had been no operation under the law in his institution, that he could not in the ordinary course of professional practice perform any operation under this law that would be forbidden or illegal without it; that, in his opinion, there was no medical value in the statute; and that, instead of being of eugenical value, the statute was a eugenical hindrance.[3]

Dr. Bernstein also testified in the Osborn case that sterilization would lead to increased illicit intercourse and venereal disease, a view expressed by many others at that time.

42 operations were performed before the law was repealed in 1920 --- 12 at Buffalo and 29 at Collins, all on females, and one at the Auburn State Prison, on a male. The latter operation was therapeutic in nature, because of diseased testicles.

There was a brief revival of interest in sterilization in 1934, when the New York State Association of Elementary Principals meeting in December of that year passed a resolution urging a study of sterilization by the state Legislature and Congress:

> Be it resolved, that the secretary write our State and Federal legislators, urging them to give serious study to

> the matter of sterilization of criminals and low mentality classes with a view to future action.[4]

Nothing seems to have come from this resolution at either the state or national level.

NEW YORK -- FOOTNOTES

1 Laughlin, ES in US, at 82

2 In re Thompson, 103 Misc. 23, N.Y. Supp. 638, (Sup. Ct. 1918) aff'd mem. sub. nom., Osborn v. Thompson, 185 App. Div. 902, 171 N.Y. Supp. 1094 (3d Dept. 1918). The case grew out of an "informal agreement" between the Board of Examiners of Feeble-Minded (including idiots, imbeciles and morons), Epileptics and Other Defectives and the officials of the Rome Custodial Asylum. According to Laughlin, the Board of Examiners kept no records of their official proceedings prior to the suit in the Supreme Court, Albany County. Ibid. at 217. The Supreme Court (the lowest court in the New York system) found the law "class legislation" because it did not apply to persons outside of state institutions who might have the same "defects" as Osborn had. After citing the forceful New Jersey Supreme Court decision in the 1913 case of Smith v. Board of Examiners, the New York Supreme Court said: "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?" Ibid. at 226.

3 Reported in Laughlin, ES in US, at 85. In other communications, notably from the two institutions that applied the law, the State Hospital at Buffalo, and the Gowanda State Hospital at Collins, the superintendents

said that no operation was performed without written consent of the relatives. Ibid., at 86.

4 Reported by Norman E. Himes in 27 Eugenics Rev. 21-22 (1935).

*****

(Note to PART A): Technically, the state of Washington could be included in this group, because the 1942 state Supreme Court decision that held their 1921 eugenic sterilization law unconstitutional was not followed by new legislation. However, an earlier punitive sterilization law, passed in 1909 and upheld by the state Supreme Court in 1912, is still currently on the books. Thus, Washington is included in the earlier section dealing with the still current sterilization statutes, supra.

PART B

HAWAII

Hawaii has never had either a compulsory or voluntary sterilization statute. However, both compulsory and voluntary sterilization are mentioned in the literature, as for example in Woodside:

> Once sterilization is understood not as an attack on sexual function but as a safe, simple, and permanent alternative to birth control, there are many women who are willing to undergo even a major operation to this end and thereby save themselves the trouble and uncertainty of contraceptive practice. This has proved to be the experience in the two United States dependencies of Hawaii and Puerto Rico where post-partum sterilization has been undertaken among rural uneducated women on a considerable scale....[1]

The extent to which these voluntary sterilization programs have continued, or have been expanded to include other sections of the population, is not known to this writer.[2]

Compulsory sterilization of the institutionalized feeble-minded and the mentally ill was proposed in House Bill 666 in the 1953 session of the Territorial Legislature, but was not approved.[3]

HAWAII -- FOOTNOTES

1 Moya Woodside, Sterilization in North Carolina (1950) at 113-14. Dr. Abraham Stone, writing on "Sterilization" in the News of Population and Birth Control, published by the International Planned Parenthood Federation, in their March, 1955 issue said: "Hawaii has long been a center for experimental studies in sterilization (see our News, Dec. '52). Under the direction of Dr. Nils P. Larsen, a post-partum sterilization program was initiated nearly two decades ago on the sugar plantations of Hawaii, for mothers of large families where other preventive methods had failed. This program has been continued by the doctors on the plantations who regard sterilization in properly selected cases as a necessary maternal health measure." See Nils P. Larsen, "Field Experiment on Proper Birth Spacing," 9 Human Fertility 1 (1944).

2 However, there was considerable discussion in the 1940s in the pages of the Hawaii Medical Journal over the use of voluntary sterilization, especially by Dr. H. E. Bowles, who did two surveys and published three articles: "Sexual Sterilization: The Physician's Obligation to His Patient," 3 Hawaii Med. J. 65 (1943); "Sexual Sterilization in Hawaii," 4 id. 65 (1944); and "Additional Report on Puerperal Sterilization in Hawaii (1943-1947); A Survey of Operations in Three Honolulu Hospitals," 8 id. 36 (1948). Two other articles also appeared: P. S. Irwin, "Sterilization; Local Aspects of a General Problem," 4 id. 75 (1944) and William M.

Shanahan, "Neuropsychiatric Aspects of Sterilization," 4 id. 76 (1944). An editorial entitled "Sexual Sterilization" followed at 4 id. 79 (1944), and concluded on this note: "Certainly there are many who recognize medical indications but also are convinced that when a family has come to a size where any further increase greatly threatens the social and economic welfare of its members, steps to terminate child-bearing in this family are justified. Obviously, the true and valid answer lies in a decision as to what is best, not only for the individuals concerned, but for the nation and for the society in general. But neither our law-making bodies nor the medical profession have yet made such a decision. Until such a decision is forthcoming from a proper authority, it would seem that the ethical non-Catholic doctor, remembering that his fundamental mission is to relieve suffering and prolong life, must let his own conscience be his guide."

3 For a critical attack on the contents of this proposal, see 89 America 34 (April 11, 1953).

KENTUCKY

Kentucky has had no sterilization laws, either of a voluntary or compulsory nature, but it did have a period of intense interest in a possible compulsory sterilization law in the 1930s. No less than five articles on the subject appeared in the pages of the Kentucky Law Journal in the period 1934-37.[1] Nothing came of these efforts after the defeat of a proposed bill. Sterilization presently appears to be a dead issue in this state, except perhaps for the voluntary "pilot" sterilization programs begun in 1964 under the sponsorship of the Association for Voluntary Sterilization in 22 counties of the depressed Appalachian area of Eastern Kentucky.[2]

KENTUCKY -- FOOTNOTES

1 George T. Skinner, "A Sterilization Statute for Kentucky?" 23 Ky. L.J. 168 (1934); W. D. Funkhouser, "Eugenical Sterilization," 23 id. 511 (1935); Robert E. Hatton, Jr., "Is Compulsory Sterilization the Long Sought Solution for the Problem of Our Mental Incompetents?" 23 id. 517 (1935); Jay F. Arnold, "A Sterilization Law for Kentucky; its Constitutionality," 24 id. 220 (1936) and "Sociological Expediency of Sterilization Statute," 25 id. 186 (1937).

2 The so-called "Hartman Plan."

MISSOURI

Although Missouri never succeeded in putting a sterilization law on the books, an abortive attempt to enact a law in 1929 led J. H. Landman to write the following:

> The height of ignorance concerning heredity which is tantamount to an abuse of the privilege of ignorance is a bill for human sterilization introduced by G. E. Ballew in the 55th General Assembly of the Missouri state legislature in the winter of the year 1929. Section 1 of this House Bill No. 290 provides for the vasectomy or oöphorectomy of those "convicted of murder (not in the heat of passion), rape, highway robbery, chicken stealing, bombing, or theft of automobiles."[1]

Had the Ballew Bill become law in Missouri, and later been tested in the courts, especially the United States Supreme Court, the Skinner decision[2] of 1942 might have had a precedent and a strong one at that. The Court might have found that sterilizing murderers who do not commit their crime in the heat of passion while exempting those that do is a flagrant violation of the equal protection of the laws. But since Missouri spared us this distasteful possibility, they left to the great state of Oklahoma the "honor" of passing the Oklahoma Habitual Criminal Sterilization Act of 1935, and the Supreme Court in its 1942 Skinner

decision the chance to strike at least part of our sterilization "idiocy" from the statute books. Perhaps G. E. Ballew might have succeeded in provoking an earlier test case than the Oklahoma case, but in retrospect, we can breathe a sigh of relief and say, the less absurdity the better.

MISSOURI -- FOOTNOTES

1 Human Sterilization, at 259. The Ballew Bill merited the attention of several other writers on sterilization history because of its absurdness. Landman concluded: "Certainly, G. E. Ballew does not mean that highway robbers, chicken thieves, bombers and automobile thieves have inherited their respective social deficiencies. Perhaps what he intended was to punish these offenders by sterilization. [actually the females by castration] Such a punishment is obviously incommensurate with the gravity of the crime committed, even if the courts had not already disallowed human sterilization legislation for punishment. G. E. Ballew and the state of Missouri were spared the everlasting ignominy of such an absurd piece of legislation by the measure being defeated in the legislature." Id. Haller, in his Eugenics: Hereditarian Attitudes in American Thought, wrote: "...Even Laughlin might have been amused." (at 135).

2 Skinner v. Oklahoma, 316 U.S. 535 (1942).

TENNESSEE

Tennessee has never had a sterilization law, but interest was shown in 1960. Doctor R. H. Hutcheson, Commissioner of the Tennessee Department of Public Health, acting as a member of the Tennessee State Medical Association, collected data from states that have so-called eugenic sterilization laws. This material was turned over to the Secretary of the State Medical Association, together with Commissioner Hutcheson's views on the subject.

A bill was drafted by Dr. Joseph J. Baker, Commissioner of the State Mental Health Department, which was discussed by the House of Delegates of the State Medical Association. Action was deferred on the recommendations until further study, and apparently nothing has happened since that time.[1]

One might conjecture that if all of the states possessing eugenic sterilization laws in the United States answered Commissioner Hutcheson's inquiry, it would be difficult indeed to find a consistent line of development or evidence for a so-called "model sterilization statute." The House of Delegates of the Tennessee State Medical Association is to be congratulated for exercising caution in the matter.

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1 This information is from a letter to the author from Commissioner Hutcheson, dated December 9, 1960.

COLORADO

Colorado has no official sterilization history, but a rather obscure mention of a case appeared in a law journal in January, 1922 describing a case where a judge gave a mother the choice of submitting to a sterilization operation or having her impoverished children placed in a state institution. The editorial entitled "Judicial Birth Control," which appeared in Law Notes, describes a case with overtones that sound recent in the light of current attempts in several states to employ punitive sterilization on mothers of children receiving ADC or other kinds of public assistance:

> According to press reports, in a recent case in Colorado involving an application to take the children of an impoverished family from their parents and put them in an institution, the judge announced that he would grant the application unless before a designated date the mother should submit to a surgical operation to incapacitate her from future child bearing. The decision is without a precedent, and it is hoped that it will be without a following....[1]

The editorial continued to take the judge to task for what it considered to be a cruel decision in the light of legal prohibitions on obtaining contraceptive information, the fact that this was not a criminal action, and the rather excessive use of judicial discretion:

> ...Wisely or not, the law in most jurisdictions denies the right to obtain information as to how conception may be prevented. It is against the policy of the law that parents should be able to make effective a decision that they cannot afford to have another child. Yet this is trivial compared with an order that this woman should never have another child, however the family circumstances may improve. True, in one sense the order is not compulsory, but in its practical aspect what compulsion on a mother could be greater than the threat to take her children from her? Imprisonment would be a trifling penalty in comparison. LAW NOTES has on many occasions urged the desirability of investing judges with a larger discretion, but every now and then a case comes to hand which raises a serious question whether it is not better to endure the inconveniences of a rigid system of procedure rather than take the risk of "cadi justice."[2]

Whether this mother submitted to sterilization in this case is not known, and apparently, as the editorial so strongly urged, the precedent was not followed in Colorado or elsewhere.

COLORADO -- FOOTNOTES

1 "Judicial Birth Control," editorial, 25 Law Notes 184 (Jan. 1922).

2 Ibid. In a middle passage, the editorial noted that the courts had denied state legislatures the power to sterilize the insane in every case passing on this question, and that it was therefore much more shocking to inflict sterilization as a penalty for poverty, especially where it was not due to idleness or incapacity of the victim, but rather from marriage to a man unable to support her. The discussion of judicial discretion and "cadi justice" might aptly apply to the recent sterilizations ordered by Judge Gary in the probate court of Muskingum County, Ohio. See the discussion of Ohio, infra, as well as the single case in the circuit court of Baltimore in the Maryland section, infra.

ILLINOIS

Although it has never enacted a state sterilization law, Illinois received brief mention in the sterilization literature when Laughlin cited one Illinois court case as an interesting case of "eugenical sterilization without specific sanction of the law...."

> In 1916 Judge Marcus A. Kavanaugh of the Superior Court of Cook County (Chicago) set a precedent when he offered a prisoner the choice between going to prison for a crime of which he was convicted or of submitting to sterilization. The particular prisoner seems to have been a degenerate and a pervert, but he finally selected sterilization. The operation was performed and the subject released. It is recalled that Illinois has neither an authorizing nor a restraining statute in reference to eugenical sterilization.[1]

This ended Illinois' brief excursion into American sterilization history, unless there have been other similar unreported cases in the past half century.

ILLINOIS -- FOOTNOTES

1 Harry H. Laughlin, The Legal Status of Eugenical Sterilization (Supplement to the Annual Report of the Municipal Court of Chicago for the Year 1929; 1930) at 56. While this seems like a rare precedent, it had application in one court in the state of Washington in 1921-22 and in three California courts in more recent years. See the state histories of California and Washington, supra.

MARYLAND

Maryland, like Ohio, has no sterilization law, but the courts in both states have been involved in sterilization proceedings. The Maryland case, decided in 1954, was that of Ex Parte in the Matter of Georgia Eaton, Incompetent, in the Circuit Court of Baltimore City.[1]

In this proceedings, Judge Herman M. Moser dealt with an application of the brothers and sisters of one Georgia Eaton, who was committed as an incompetent to the Springfield State Hospital, for the appointment of a committee for the incompetent. This committee petition for a sterilization on the grounds that it "would be beneficial to the health of the Incompetent." All of the brothers and sisters consented, and the husband of the Incompetent had no objection to the operation. Judge Moser then heard testimony from several medical experts, one of them, Dr. Ilsa Kammann of the staff of the Springfield State Hospital, who felt the operation would "promote the mental recovery of Mrs. Eaton." An opinion of the state Attorney General also stated "if it would seem proper and necessary for the health and welfare of the Incompetent to authorize a sterilization operation," the Court had the power to so order.

The Court denied a petition of two lawyers to rescind the decree permitting the operation and a request to be made parties to the case as amici curiae (friends of the Court).[2]

Relying on the Buck v. Bell case and several sources dealing with

private voluntary sterilization, the Court made it clear that sterilization for medical necessity is permissible without any court order in Maryland, but since Mrs. Eaton was a ward of chancery (under the jurisdiction of the Circuit Court), he operated under the broad provisions of the Maryland code, Art. 16, Sec. 132, which reads as follows:

> The court shall have full power and authority, in all cases, to superintend and direct the affairs of persons non compos mentis, both as to the care of their persons and the management of their estates, and may appoint a committee, or a trustee or trustees for such persons, and may make such orders and decrees respecting their persons and estates as to the court may seem proper.[3]

Judge Moser dismissed the petition to rescind his order with the following words:

> Had the Incompetent been suffering from a tumor of the brain this Court questions whether "friends of the Court" would have rushed in to intervene.

One of Mrs. Eaton's lawyers, Allan H. Fisher, Jr. said of the case:

> I distinctly remember that the operation was performed for the reason that it was best for Mrs. Eaton's health and not for the purpose of preventing her from giving birth to offspring who may have been incompetent. I doubt if Maryland would permit sterilization for eugenic reasons.[4]

What the Eaton case shows is that even in the absence of state laws dealing with voluntary or compulsory sterilization (whether eugenic, social, or therapeutic in purpose), the courts in some states (Maryland and Ohio among others) have broad enough equity and probate powers to include sterilization operations in their decrees. Maryland's chancery jurisdiction dates back to a 1785 statute. It should be noted that even the criminal courts in some states, notably Illinois and California,[5] have used sterilization operations as a quid-pro-quo (for reducing sentences or allowing probation) without benefit of any specific sterilization law. How many operations have been performed other than those reported in the California studies is hard to determine, since the two judges in California were comparatively proud of their achievement.[6]

Outside of the Eaton case and a brief flurry of excitement over proposals for punitive sterilization in 1960 (the Sanford Bill) and a combined compulsory-voluntary sterilization bill in 1963, the sterilization situation in Maryland has been relatively quiet.[7]

MARYLAND -- FOOTNOTES

1 Also cited as Ex parte Eaton, Baltimore Daily Record, Nov. 12, 1954 (Balto. Cir. Ct. Nov. 10, 1954). Subsequent quotations from Judge Moser's decision were taken from a transcript of the opinion published by the Human Betterment Association of America (HBAA) entitled "Sterilization of Incompetent."

2 Lawyers Francis J. Meagher and John J. Sweeney, Jr. based their grounds for intervention on the assertion "that as citizens of the State of Maryland and lawyers they believed the sterilization authorized was dangerous to the 'public welfare and morals of the State of Maryland.'" (HBAA transcript at 1) Judge Moser in his opinion answered them in this way: "No one, last of all a Court, would presume to question the right Messrs. Meagher and Sweeney, both obviously sincere persons, to have their opinions. However, the right to such opinions as individuals does not include the right to have a Court provide them with a forum for the expression of their views as to what is dangerous to the 'public welfare and morals' of the State of Maryland or any other general topic, when there is an objection to such intervention and when the Court does not feel in need of their assistance and when they are complete strangers to the litigation." Id. at 4.

3 Md. Code Ann. art. 16, sec. 132 (1951). Judge Moser explained the

statutory situation in this fashion: "In Maryland there is no statute either authorizing or prohibiting sterilization, and the Court may point out in passing that had not Georgia Eaton been a ward of chancery, that is, under the jurisdiction of this Court, the doctors at Springfield or Phipps, or any other qualified hospital under the circumstances in this case could have performed a sterilization operation without asking the permission of any Court. There naturally arises the question: Should one under the control and care of the court be handled less well medically than the same individual in the same condition not under such control and guidance? The question answers itself." Id. at 3.

4 Letter to author, dated July 11, 1962. He adds the comment that the Eaton case is a rarity in Maryland, which is doubtless true. But he also adds: "...as I have heard of only one of two other instances in which this procedure had been followed." This writer has no evidence of these other purported operations.

5 Laughlin, The Legal Status of Eugenical Sterilization (Municipal Court of Chicago, 1930) at 56 mentions a 1916 case in which Judge Marcus A. Kavanaugh offered a prisoner a choice between prison and sterilization. He chose the latter. The California experience was largely confined to the late Judge Collier's Superior Court in Los Angeles, where it is reported over 50 cases of castration as a condition for probation were handled. In Judge Turrentine's court in San Diego County, about 70

castrations are reported. Report of Karl M. Bowman, M. D., Sexual Deviation Research (March, 1952), State of California, at 70 and the Preliminary Report of the Subcommittee on Sex Crimes of the Assembly Interim Committee on Judicial System and Judicial Process, State of California, 1950, at 52.

6 Fred O. Butler says: "...Undoubtedly salpingectomies and vasectomies are being unofficially performed throughout the country on the mentally deficient and others. The number of these operations is not available for reporting." in "Sterilization in the United States," 56 Amer. J. Men. Def. 360 (1951).

7 For discussion of the Eaton case, see James B. O'Hara and T. Howland Sanks, "Eugenic Sterilization," 45 Geo. L. J. 20 (1956) at 39, and Grant H. Morris and James F. Breithaupt, note, "Compulsory Sterilization of Criminals --- Perversion in the Law; Perversion of the Law," 15 Syr. L. Rev. 738 (1964) at 752. On the limits of judicial discretion, see "Judicial Birth Control," editorial, 25 Law Notes 184 (1922). It should be noted that the Hickman proposal of 1963 (House of Delegates No. 563) was patterned after the North Carolina (1963) and Virginia (1962) voluntary sterilization laws, but it differed significantly from those two statutes in that the court-ordered sterilization of minors under twenty one was eugenic in purpose and would not require the consent of the person involved. In this respect, the Maryland proposal was not a truly voluntary sterilization bill. The Sanford proposal was aimed solely at women who give birth to two or more illegitimate children and was similar to numerous proposed laws in other states aimed at women receiving welfare (AFDC) assistance. See Chapter 3, infra.

MASSACHUSETTS

Although Massachusetts never had a sterilization law, there is some strong evidence that sterilization was performed without benefit of law at the Monson State Hospital for Epileptics at Palmer, Massachusetts. Laughlin writes:

> Dr. Martin W. Barr, Superintendent of the Pennsylvania Training School for Feeble-Minded at Elwyn, Pa., and Dr. Everett Flood, Superintendent of the Monson State Hospital for Epileptics at Palmer, Mass., also were early advocates and testers of eugenical sterilization....[1]

Barr, in his book Mental Defectives, mentions the castration of at lease 26 youths and like Harry Sharp's pre-legal vasectomies, these were allegedly for "curative" purposes,[2] not eugenic considerations.

The present Superintendent of the Monson State Hospital, Dr. Roger G. Osterheld, had this to add to the story:

> I have never been able to find any records of sterilization which rumor has it that castration of the males did take place 40 to 60 years ago.[3]

And on this somewhat ambiguous note, the story of Massachusetts sterilization rests.

MASSACHUSETTS -- FOOTNOTES

1 ES in US, at 351-52.

2 "...with 24 the cause for operating was epilepsy and persistent masturbation." Mental Defectives (Philadelphia: J.B. Lippincott Co., 1904) at 196. Of the 26, half of them (13) were on those under the age of 14.

3 Letter to author, dated July 24, 1962. One may add that Laughlin reported the 1911 "M-H case" at the Boston State Hospital, where the institution promised release of an insane inmate if he would consent to sterilization. Consent was received and this supposedly eugenic sterilization took place without benefit of statute. The Legal Status of Eugenical Sterilization (1930) at 56.

OHIO

Although Ohio has never had a sterilization statute, it zoomed into the headlines in the spring of 1962 when a Probate Court judge in Zanesville ordered the sterilization of three females. These cases have enormous implications and the "Ohio story" needs telling in detail.

Perhaps the crucial fact that Judge Holland M. Gary took the pains to spell out his reasons in an opinion in the case of In re Nora Ann Simpson, so that this case appeared in the Ohio bar journals, led to the "exposé" of the cases.[1]

The Simpson case began as a "routine" case for the commitment of a feeble-minded person. The girl, who was 18 at the time, had given birth to an illegitimate child, and Nora Ann's mother appealed to the Probate Court for some kind of custodial care of the child, who was allegedly feeble-minded. Since the county's quota for the commitment of feeble-minded had been filled and with a long waiting list for 1963, the judge turned to another provision of Ohio law to dispose of the matter. Sec. 5125.30, Revised Code, provides that when the hospital is unable to receive such feeble-minded person,

> The probate judge shall then take such action and make such order as he deems necessary 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.

And Sec. 2101.24, Revised Code, adds that -

> The Probate Court shall have plenary power at law and in equity fully to dispose of any matter properly before the court, unless the power is expressly otherwise limited or denied by statute.

Ohio has no permissive or compulsory sterilization law, nor any statutory prohibitions on the same. Judge Gary interpreted these provisions in the light of a number of personal and social factors in the case. Nora Ann was not caring for the child, who was being cared for by the grandmother.[2] Judge Gary called on the Muskingum Valley Guidance Center for an examination of Nora Ann and for their recommendations in the case. Portions of their report are as follows:

> Because of the combination of normal physical appearance and serious mental limitations, this girl is likely to become pregnant repeatedly and produce children for whom she cannot provide even the rudiments of material care. ....It is our feeling that such pregnancies can be prevented only by commitment to a custodial institution for the mentally deficient and ultimately a sterilization procedure would be most desirable.[3]

Since Nora Ann was, according to her own and her mother's testimony, promiscuous before and after the birth of the child, and since she could not presently be committed because the county's quota was used up, Judge Gary became a prophet (both eugenic and economic) in the

case by saying that:

> ...There is the further probability that such offspring will also be mentally deficient and become a public charge for most of their lives...[4]

Then the storm broke. Marc D. Gleisser, law reporter on the City Room staff of the Cleveland Plain Dealer, wrote a series of articles in early June that blew the lid off the story. The Newman and other newspaper stories followed. The Ohio Civil Liberties Union issued a statement in June that included the following comments:

> ...Sterilization is a drastic remedy and a permanent infringement of bodily integrity. Those affected by such procedure are entitled to every reasonable medical and legal precaution and safeguard....It is the position of the Ohio Civil Liberties Union that the present Probate statutes of Ohio, in the absence of any specific sterilization law, cannot be so broadened and expanded as to compel a person to submit to a surgical procedure that would violate bodily integrity and affect the right of procreation. The Probate Court of Muskingum County, in ordering the sterilization of the young woman described above, violated her civil rights and liberties in view of the fact that no statute in Ohio specifically authorizes the sterilization of the feeble-minded or of any other person. Further, sterilization in Ohio by order of Court should be prohibited until such time

> as there exists specific authority given by the Legislature so that the constitutionality of said specific legislation has been reviewed and approved by the Appelate Courts of the State of Ohio.[5]

Judges, religious leaders, and others joined in the fray. But while the activities of the court at Zanesville may have abated, the issue was still very much alive. In the Simpson case, Judge Gary waited a month before the operation was performed. The hearing on Nora Ann, which took place in his chambers and was informal, at best. Since the parents consented, or in any event did not object to the operation, and the lawyer who was listed as their counsel did not in reality represent anything, the month of waiting was pretty much of a waste of time. It wasn't until the case report appeared that hell broke loose. But since there is no statute, the judge may have felt little need for testing the constitutionality of his actions. After talking to the Judge, I got the feeling that the whole proceeding was a "friendly one" and that even the psychiatrist and the psychologist were not present for cross-examination because their report was adequate on the face. But Judge Gary is no mere foolhardy reformer. He wants a law in Ohio, one that will provide procedural protections and one that will solve or attempt to solve the problems he recognizes. And he feels the "cause" is worth the furor that has broken over his three sterilization orders.

But the Judge's actions leave much to critical discussion and counter-

claim. Aside from the shoddy scientific bases of his judgments about the retardation factor in future progeny, Judge Gary has found himself under attack for his interpretation of the use of legal discretion in the case. A case note in the Michigan Law Review was especially biting in its examination of the Simpson opinion. Its author, William R. Warnock, writes:

> ....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.[6]

Warnock believes that a broad construction of the words "detention, supervision, care, and maintenance" might include necessary medical treatment, but does not suggest sterilization.

> ...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.[7]

The only other known case where a judge used the equity powers of the court to order a sterilization was in the case Ex parte Eaton in Maryland, but in that case the Judge clearly obtained consent of the parties. Judge Gary has a different view of the necessity of consent in such cases:

in such cases:

> ...in the matter of consent we would try to get consent in each case, but if consent were not given, it would be proper to proceed with the order, provided due service had been given to the next of kin.[8]

In an address before the Ohio Welfare Conference, Judge Gary spelled out his eugenic philosophy and called for the people in the various fields of welfare to press for a compulsory sterilization law in Ohio.[9]

Ohio has certainly tried -- 5 times in nearly 50 years -- but just can't bring itself to enact a sterilization statute, including the latest attempt following the furor over Judge Gary's actions in 1963. But let us first examine the earlier history of sterilization bills in Ohio. The first proposal in 1915 died in committee. A similar second proposal in 1925 applied to all male feeble-minded, epileptic, criminal or "other male defective inmate" confined to the various Ohio hospitals and penal institutions, prior to release or parole. It contained no provision for notice, hearing, or appeal rights and had no definition of the "defects" mentioned in the law or of the law's purpose. A substitute bill made the bill apply to both sexes, limited its application to the feeble-minded and epileptic, and added provisions that allowed for appeal of such a sterilization order to the ordinary courts. This bill passed both houses, but was vetoed by the governor on May 1, 1925.

Two proposals died in 1939; the first one was similar to the 1925

bill, passed the House but died in committee in the Senate. Another House bill, completely devoid of definitions or of procedural protections, died in committee in the House.

The latest attempt was the Zuber proposal in the House in 1963. This proposal would allow sterilization of "mentally deficient" or "feeble-minded" persons through either institutional (intramural) or extramural petition. The institutional petition would lead to a hearing before a sterilization board consisting of five physicians appointed by the Director of Mental Hygiene and Correction. If objections were raised to a board order of sterilization, an independent examination of the case by the Probate Court, and the right to appeal a Probate Court order (if it occurred) was provided in the bill. The extramural petition would lead directly to a hearing before the Probate Court with the same right to appeal a Probate Court order. The Zuber bill went much further than any of the earlier bills in providing procedural protections such as notice, hearing, right to counsel, and the right to appeal orders of the sterilization board or the Probate Court.

After public hearings were held, and after a number of organizations expressed their views on the bill, it was tabled, and eventually died in committee. Judge Gary, another Probate Court Judge, Omar A. Schwart, and Dr. Seaton, the psychologist, testified in behalf of the 1963 bill. The highlight of the hearing was a dramatic unrehearsed speech by Reverend Leopold Bernhard of the First English Lutheran Church in Columbus in

opposition to the bill. A naturalized American citizen who had seen the Nazi program in action, Rev. Bernhard pointed out that even a bill with safeguards can still fall into wrong hands and do appalling harm.

The Ohio Association for Retarded Children, Inc. passed a resolution at its 1963 convention in strong opposition to the law:

RESOLUTION

May 7, 1963

WHEREAS, Mental Retardation is almost always a symptom of neurological impairment which may have been brought on by any of a number of pre-natal peri-natal and post-natal disturbances, accidental or other disturbances,

WHEREAS, normal parents have retarded children,

WHEREAS, Mental Retardation may have been caused by lack of obstetrical care and skill at the delivery of a child,

WHEREAS, forced sterilization transcends religious belief of many people,

WHEREAS, parents are forced by such laws to do that which they do not believe in and cannot afford legal means of prevention,

WHEREAS, sterilization of the mentally retarded is only speculation as to the eradication of Mental Retardation,

WHEREAS, research and prevention are more than a probability,

BE IT RESOLVED, by the OHIO ASSOCIATION FOR RETARDED CHILDREN

> in convention assembled this 7th day of May, 1963, that it oppose a law which takes the final decision away from the parent and forces them to accept the sterilization of the mentally retarded rather than making it permissive.[10]

The Ohio story is not merely the Gary cases and the abortive attempts to pass laws. It is, after all, caught up in the larger questions of due process of law, the problems of welfare and taxation, the limits of judicial discretion, and many other questions. Judge Gary can at least by congratulated for having brought many of these questions out into the open, even if his method of doing so is suspect. Unlike many of the earlier eugenics enthusiasts, Judge Gary is not a dogmatic zealot. He believes strongly in his "cause," if one can call it that, but he also believes the job is one that belongs in the hands of the legislature, not the courts. His makeshift solution in the three cases is makeshift at best, and Judge Gary would probably be the first to admit that if the quota for commitments had been filled, these cases would not have arisen. But they did arise. The quota was filled, and Judge Gary acted in a fashion that raises fundamental questions about compulsory eugenic sterilization in the 1960s. Certainly, the use of the Buck v. Bell opinion and the Eaton case in Maryland in the opinion that Judge Gary issued in the Simpson case are very slim reeds indeed for the kind of action he took in the three sterilization decrees in Zanesville. And if Judge Gary had carefully read the legal history of sterilization in

America, he would have easily seen that either due process or equal protection has been a key factor in almost all of the cases. It is hard to avoid the conclusion of the Warnock article:

> ...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.[11]

Ostensibly, a Probate Judge using Judge Gary's argument could not order sterilization when the quota was not filled, since he could not justify his decree on the same grounds used by Judge Gary in citing Sec. 5125.30, Ohio Revised Code. However, in the light of the crowdedness of many of our mental hospitals and institutions, it is not too far-fetched to think that Judge Gary's action might become an "interim" solution in other countries, or even other states not now possessing sterilization statutes. There are other forces that militate against this possibility, but with the tremendous attention in the political arena over rising taxation, relief rolls, the ADC program, illegitimacy, etc.,[12] "interim" solutions may be used with greater diligence than before.

It is for this reason that the Ohio experience is dangerous[13] and can only give rise to grave doubts about sterilization generally, for if after nearly 60 years of state sterilization laws, numerous cases of unconstitutionality, and widespread medical, genetic, and psychiatric doubts about the wisdom and the validity of compulsory sterilization, a

state judge in 1962-1963 makes this the basis of a legal and legislative crusade, then perhaps we have come full circle. For, after all, most of Judge Gary's arguments, genuine and honest as they seem, are the same old, hackneyed ones that have been bandied about since the late 19th century beginnings of modern eugenics.[14] Ohio reminds us that we do not always learn from our experience. Nor does scientific knowledge necessarily prevail on judges or legislators. But there is still hope, for notwithstanding Buck v. Bell and 27 present state sterilization laws, and five abortive attempts at legislation, Ohio may still believe in its bumbling way in Governor Pennypacker's philosophy of idiocy.

Postcript

Judge Gary's "precedent" was followed by another Ohio probate court judge, Charles H. Freehafer of the Richland County Probate Court (Mansfield, Ohio) in February, 1966. The mother (who was also the legal guardian) of two unmarried female retardates, ages 19 and 22 years, found her daughters pregnant and asked two doctors to "protect" them against future pregnancies through sterilization. Both doctors were uncertain of the legal rights involved and approached Judge Freehafer for advice. He then had the mother sign an affidavit alleging that both of the daughters were feeble-minded, and held a hearing at which the two doctors (who were pediatricians) and a psychologist testified under oath. On the basis of this evidence (the psychologist reported IQs of 35 and 44), the judge ruled that both of the sisters were feeble-minded and the mother signed a consent

for their sterilization, which was to be post partum. At no time were the girls or the mother represented by legal counsel. In his opinion in the case, Judge Freehafer mentioned the fact that the quota for Richland County was "always filled" at the Columbus State School, and on the basis of the medical testimony at the hearing he said:

> ...Due to their physical attractiveness and considering their mental capacity and further considering the medical testimony these girls would in all probability continue to be promiscuous and likely to again become pregnant. There is still the probability that such offspring would be mentally deficient and become public charges the same as the two young mothers are at the present time. This would present an additional burden upon the mother, State and County Welfare Departments, where support payments have of necessity been reduced due to lack of funds.[15]

Unlike Judge Gary, who carried his crusade to the state legislature without success in 1963, Judge Freehafer limited himself to the circumstances in the cases at hand and apparently has no interest in furthering the cause of eugenic or non-eugenic sterilization. But though he is no crusader, Judge Freehafer, like Judge Gary before him, has given Ohio probate power a discretion to order surgical sterilizations which the Ohio Legislature never envisioned. And like Doctor Harry Sharp, the famed prison surgeon at the Indiana Reformatory who vasectomized hundreds of inmates nearly a decade before the Indiana legislature legalized the procedure in 1907, these judges can always argue that these sterilization operations were "voluntary" and that due process of law was therefore honored. But their words sound hollow, and Ohio would do well to face the issue squarely and

not let state probate judges manipulate discretionary authority for presumed socio-economic ends.[16]

OHIO -- FOOTNOTES

1 88 Ohio Law Abstract 193; Ohio Bar Journal, April 30, 1962; 180 N.E. 2d 206 (Ohio P. Ct. 1962). The last citation came much later, but the first two were seen by Ohio people not too long after the Simpson was accounced on Feb. 10, 1962. The subsequent two cases were merely journal entries in February and June, of that same year.

2 The baby, a girl, was examined in August 1962 by Dr. Eugene Capocasale, director of the Muskingum Valley Guidance Center. She had a developmental quotient of 75, (or a 9 month mental age at the age of one year). The psychiatrist recommended that she be placed in a good foster home because she was not receiving good maternal care and the grandmother was inadequate.

3 Extracted from the decision in the case, an article by James T. Flannery, "Sterilization and the Law," 95 Ave Maria 26 (June 23, 1962), the Center's report, and a personal visit to the court in September, 1962. Nora Ann's IQ was placed at 36 and her mental age slightly over six years. In an article "Sterilization: Pro and Con", published in the Detroit Free Press, M. W. Newman reported that Dr. Capocasale said "But I did not recommend sterilization. I never would do that." (July 4, 1962 at p. A-7, col. 2). In fairness to Dr. Capocasale and the statements contained in his medical report to Judge Gary, he did not recommend the operation, but suggested that in the future it would be desirable. The reader is left to judge the difference in meaning in the two statements.

4 It is interesting that Judge Gary takes complete responsibility for this genetic prediction in the Simpson case. Yet, the testimony of Dr. Capocasale, a psychiatrist, and Dr. John Seaton, a psychologist, cannot be discounted. In the second case, involving a married woman, 21 years of age with an IQ of 62, Dr. Capocasale said that she "needs protective custody" and recommended the transfer of her child to some other situation at birth "as she will be unable to give it proper care. There is a grave possibility that this child and any others which she might bear will in their turn become a public charge. It is to be hoped that repeated pregnancies may be prevented in this case." (Report by Dr. Seaton and Dr. Capocasale to Judge Gary). In case no. 3, involving very serious mental deficiency, the report said: "She is certainly not capable of discharging the responsibilities of motherhood, and the child she is about to bear must be cared for by others...." The stress in all three reports is on the capacity to discharge the responsibilities of motherhood, not potential mental retardation of the child or some attendant affliction. But note that the medical and psychological testimony veers off into the question of "public charge" and the cost factor. For Judge Gary, the community has a right, perhaps a duty, to stop this needless waste of expenditure before it starts and hence, he argues, sterilization is the only sound "remedy" for the problem. A very interesting afterthought is that there is no evidence that I could discover in any of the three cases that the offspring (the real ones, not future ones) of these

mothers were mentally retarded, although some might believe that the test of the one-year-old Simpson baby is modest proof that the Judge is "right". In an ironic about-face, the Judge predicts the genetics of the case, and the psychiatrist predicts the economic and sociological future. Whether either judgment was close to the mark is left to the judgment of the reader. Judge Gary, in a letter to the author dated November 18, 1964, noted that in the second and third cases, "the order was made before the birth of the child and the operation was performed at the time of birth." This would certify this writer's belief that solomonic judgments were being made by all the participants except the women themselves.

5 "Statement of the Ohio Civil Liberties Union," Nelson G. Karl, Chairman, Legal Committee.

6 61 Mich. L. Rev. 1359 (1963) at 1361.

7 Ibid. at 1362. Judge Gary does not feel that these suggestions would have been adequate in the long-term solution of the problem. Like many believers in the use of eugenic procedures such as sterilization, the finality of the procedure is what makes it so useful. Any of Warnock's suggestions might work, so these eugenicists would argue, but in the long run, the ADC rolls will grow larger, illegitimacy will increase, and the cost (largely seen in taxation terms) to the community will grow by geometric proportions. It is the Jukes family story in mid-twentieth century

clothing, and Judge Gary is well aware of the similarities.

8 Letter to author, dated September 18, 1962. So far as I could determine, there were no stated objections to any of the three sterilization decrees, but the procedural adequacy of the "hearings" and the lack of appeal in these cases raises a serious question of the meaning of "consent." So long as objecting parties are either unfamiliar with their legal rights or unwilling to defend them, cases of this kind can go by the boards, unseen, unheard, and even in some situations, unreported.

9 Entitled, "Bold Step Forward," his address spent much time on a case similar to the famed Jukes-Kallikak reports, calculating a cost of over $582,000 to the state in the case of one family and its progeny. "...I appeal to you," he said, "to start a campaign in your own community for compulsory sterilization. This is positive action which can be taken to help reduce the ever-expanding cost of public welfare."

10 Submitted by Miss Stella Altiere, Executive Secretary, OARC, Columbus, Ohio, May 7, 1963.

11 Supra note 6, at 1364. While acknowledging the use of the Eaton case in the Simpson opinion, Warnock nonetheless says that "...No court of record has ever asserted power to order the sterilization of incompetent persons in the absence of express legislative authorization...." Ibid.

12 Even in the case of Judge Gary, what looked like an "interim" solution is continuing unabated. In a letter to the author dated November 18, 1964, Judge Gary wrote: "...I may advise you that we have two cases now pending for sterilization, one involving a fifteen year old girl, and the other a young married woman." In a subsequent letter dated December 2, 1964, he wrote: "...As I indicated in may last letter, we have two cases now pending and since we have about six cases ahead on our quota for the Columbus State School, I will continue to follow the same procedure set forth in the Opinion in the Simpson case."

13 A recent discussion of Judge Gary's action ended on this note: "The decision of the probate court in In re Simpson is the best example of 'perversion of the law'...." Grant H. Morris and James F. Breithaupt, note, "Compulsory Sterilization of Criminals --- Perversion in the Law; Perversion of the Law," 15 Syr. L. Rev. 738 (1964) at 753.

14 In private conversation with Judge Gary in September, 1963, I found him intelligent, amiable, and extremely conscious of the criticisms made of his actions. By any standard, he is probably a very fine judge, but I cannot help feeling as many others do for many different reasons, that he let the cause get the better of judicial precedent and experience in this case. A test case would have been far better than 3 sterilizations followed by a legislative attempt. Yet, I feel that the lawyers, doctors, psychologist, psychiatrist, and others that were parties to these actions

also deserve a part of the spotlight for much of the critical blame placed on Judge Gary. There is one point in the Zanesville story that should be stressed: while much of the recent pressure in other states to pass what are essentially punitive sterilization laws aimed at mothers of illegitimate children receiving ADC monies is in reality aimed at Negroes (whether admitted or not), there were no racial overtones in Judge Gary's actions, notwithstanding the fact that there is an "elitist" element in much of his philosophy. But then all of American eugenics has rested on these foundations and the Ohio cases show us how our intellectual legacy (Social Darwinian and hereditarian ideas in our late nineteenth century and early twentieth century progressive and reform movements) is not easily shaken loose and continues to persist despite the advances of modern science and the lessons of the Nazi era. The War Relocation Authority (the so-called Japanese relocation program) of World War II and the more recent Goldwater phenomena of 1964 are vivid reminders that our atavistic past is never totally obliterated.

15 The judge gave this writer a copy of the opinion, but did not date his decision and he deleted the names of the parties involved in the cases.

16 See the article by staff writer Donn Gaynor, "Mansfield Supports Sisters' Sterilization," Akron Beacon-Journal, Feb. 20, 1966, at A-1. He reported that local approval of Judge Freehafer's ruling was "qualified, however. Mansfielders feel that while the case is an extraordinary one, the ruling should not constitute a precedent, and that the court's power

to order sterilization should be highly restricted." Dr. C. J. Shamess, president of the Richland County Medical Society, was quoted as saying: "It is not a question of ethics. As long as the mother has given consent and the judge has given the order, I don't see any question of ethics involved. It is done frequently [sterilization operations] for persons who can make their own decisions. The only question is, can the court make the decision for those who can't. I believe most doctors would agree with the decision in this case. Maybe some would disagree. I attended a medical society meeting last night and didn't hear the matter discussed." Id. at A-17. Unfortunately, there is little likelihood of a constitutional test of these sterilization orders by state probate judges so long as they are presumed to be "voluntary" operations and the parties involved take no further steps in challenging the propriety of the orders.

PENNSYLVANIA

Although Indiana's Dr. Harry Sharp can claim the first use of vasectomy in a public institution in America, Pennsylvania can claim two firsts in the history of sterilization in America: the first known sterilization (more accurately, castrations) in America in a public institution and the passage of the first sterilization law. It is ironic that notwithstanding these two events, Pennsylvania has never had a sterilization law on its books,despite persistent efforts.

Pennsylvania's place in the horizon began in the 1880s with the famous Dr. Isaac Newton Kerlin, the superintendent of the Pennsylvania Training School for Feeble-Minded Children at Elwyn. It was out of Elwyn that two subsequent figures in the sterilization movement appeared, Dr. Martin W. Barr, who succeeded Kerlin as superintendent at Elwyn, and Dr. A. W. Wilmarth, an Assistant Superintendent under Kerlin who later went on to fame in Wisconsin eugenic sterilization history. Kerlin and Barr are the chief figures in the Pennsylvania story.

Kerlin reported his first sterilization (probably castration) at Elwyn in a speech he delivered as president of what is now known as the American Association on Mental Deficiency in 1892, declaring to the assemblage: "What [whose] state will be the first to legalize this procedure?" He claimed he did this operation in 1889, but there is considerable confusion over the dates of 1889 and 1892.[1]

The spark lit by Kerlin was largely carried on by Barr, who not only continued to castrate at Elwyn without benefit of statute, but who was also instrumental in the preparation and passage of the first sterilization bill in the country in 1905. Although both houses in Pennsylvania approved the bill, it was vetoed by Governor Samuel W. Pennypacker whose famous veto message had this to say about "An Act for the Prevention of Idiocy": (STATUTE)

> ...The subject of the act is not the prevention of idiocy, but it is to provide that in every institution in the state, entrusted with the care of idiots and imbecile children, a neurologist, a surgeon and a physician shall be authorized to perform an operation upon the inmates "for the prevention of procreation." What is the nature of the operation is not described but it is such an operation as they shall decide to be "safest and most effective." 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. It is not probable that they would resort to this means for the prevention of procreation, but it is probable that they would endeavor to destroy some part of the human organism. ***** If this plan is to be adopted, to make it effective

> it should be carried into operation in the world at large, and not in institutions where the inmates are watched by nurses, kept separate, and have all the care which is likely to render procreation there very rare, if not altogether impossible.... ***** To permit such an operation would be to inflict cruelty upon a helpless class in the community which the state has undertaken to protect. However skillfully performed, it would at times lead to peritonitis, blood poisoning, lockjaw and death.[2]

Efforts to pass a bill followed in 1911 (died in committee in Senate), 1913 (died in committee in Senate and defeated on final passage in House), 1915 (died in both houses in committee), 1917 (died in House committee), 1919 (reported out of House committee but with negative recommendations). Finally, another bill did manage to pass in 1921, but was vetoed by Governor William C. Sproul on grounds that it was in violation of the equal protection requirements of the 14th Amendment particularly in not applying to persons at-large.[3] From 1929 through 1951, the superintendent at Elwyn, Dr. E. Arthur Whitney, presented sterilization proposals to every biennial session of the state legislation, all of which failed. In an article written with the collaboration of Mary McD. Shick, Doctors Whitney and Shick report a total of 270 sterilizations performed at Elwyn since Kerlin's first up to 1931,[4] all without benefit of law. It is not clear if these were "voluntary" operations in the sense that

some type of "consent" was secured, nor is it made clear how many castrations (both male and female) were performed.

While Elwyn was perhaps exceptional, it is important to note that not all of the institutional authorities in Pennsylvania agreed with the programs of Kerlin, Barr, and their successors. In a 1930 discussion at the 54th annual meeting of the American Association for the Study of the Feeble-Minded, Dr. Harvey M. Watkins, then superintendent at the Polk State School and Hospital, suggested a limited program of selective sterilization of selected morons and carefully selected high grade imbeciles who are eligible for parole:

> It would be well first to have it a permissive law rather than a compulsory law. Such a permissive law, plus a program of conservative and sane education on the part of the public and relatives, tried out over a period of years, carefully analyzing those cases done, would point the way toward further improvements and recommendations as to statutory changes.[5]

Correspondence with Pennsylvania authorities produced the following reactions. The present superintendent at the Elwyn School, Dr. Gerald R. Clark, reported that "Sterilizations are no longer performed at Elwyn."[6] The superintendent of the Laurelton State School and Hospital, Dr. Bernard A. Newell wrote that -

> Sterilization operations are not performed at this institution. Such operations are not permitted by Pennsylvania laws.[7]

The Deputy Attorney General, Mr. Edgar R. Casper, did a brief study of the matter on his own and reported that the records at Elwyn were "inadequate" and Dr. Whitney was unavailable for comment because of prolonged illness. He also reported that Dr. John E. Davis, Commissioner of Mental Health for the state, had stated that "present policy prohibits any sterilization in any State school, hospital or institution for purely eugenic purposes."[8]

The most intelligent and detailed reply came from Doctor James H. McClelland, the superintendent at the Polk State School and Hospital. He points out that sterilization was never a part of the formal and officially recognized program at Polk "at anytime in its history," and he adds, "It could not well be, for there was never any Pennsylvania statute either approving or regulating such matters." Superintendent McClelland's experience covered 22 years at Polk. After discussing the relative merits of the Whitney-Shick and Watkins papers on selective sterilization, Dr. McClelland made some subjective judgments of his own about the general question of sterilization by law:

> I have a few other thoughts on this matter which are not primarily medical, and would like to take this opportunity to set them down. This is an age of steady encroachment on the rights and personal liberties of individuals. What can be done to somebody because he is mentally retarded may sometime become legally permissible to another individual, not because he is mentally retarded,

> but because there is something else the matter with him. This process can go on somewhat in the manner that the sea nibbles at a hole in the dike. Since there are so many individuals in high places today who feel that they know better what is good for the ordinary citizen than he does himself, is it not possible, conceivably, that an initial encroachment on the right of a particular kind of citizen to reproduce, if he can, might eventually lead, over a period of decades or centuries, to governmental decree establishing euthanasia at age 150. I know this sounds far-fetched, but I have observed and have read that the process by which governments gain control of the lives of their citizens often starts quite insidiously. To my mind, therefore, the Governor who vetoed the act in 1905, whoever he was, has my admiration.[9]

But notwithstanding the vetoes by Governors Pennypacker and Sproul and the repeated rejections by the Pennsylvania Legislature of various sterilization proposals, efforts continue, sometimes even the most extreme ones. The latest was State Senate James Berger's 1961 bill providing for the emasculation (castration) of certain sex offenders. Highly vocal opposition to the law from such groups as the American Civil Liberties Union Pennsylvania branch prevented passage of this proposal.[9a]

MENTION (JUDGE R.P. ALEXANDER — RUTLEDGE CASE 1966) Ph.

Needless to say, from Kerlin to Barr to Berger, Pennsylvania sterilization (or emasculation) ASEXUALIZATION history has been bizarre. Though there is little humor in the Pennsylvania story, perhaps the following anecdote about Governor Pennypacker might suffice to conclude the story of sterilization in Pennsylvania. The Governor was invited to a newspaper dinner at the end of the legislative session which was a kind of gridiron club affair of that day. When he began to speak, he was greeted with catcalls, whistles, and booing in the usual manner of these dinners. After some minutes of pandemonium he raised his arms for silence and then squeaked out in his funny high-pitched voice: "Gentlemen, gentlemen! You forget you owe me a vote of thanks. Didn't I veto the bill for the castration of idiots?" It was reported that this brought down the house and assured him a respectful hearing from there on.[10]

AND FINALLY, LET ME BEG YOUR INDULGENCE IN READING THE CONCLUSION TO A PAPER I DELIVERED AT THE ANNUAL MEETING OF THE APA IN 1966:

PENNSYLVANIA -- FOOTNOTES

1 A later Superintendent of the staff at Elwyn, Dr. E. Arthur Whitney, says that Kerlin did the first sterilizations at Elwyn in 1889 with the consent of the parents. "Some Stalwarts of the Past," 57 A.J.M.D. 345 (1953) at 349. Barr reports the first two castration operations were performed in 1892 in his article, "Some Notes on Asexualization; With A Report on Eighteen Cases," 51 J. Nerv. and Mental Disease 231 (1920) at 233. The confusion is probably due to the fact that Kerlin did not report his 1889 operations until the 1892 meeting. Like Doctors Hawke, Pilcher, Flood, and Sharp who came later, Kerlin was not acting in the name of eugenics. Kerlin's 1892 speech, which is often cited in the literature, is quoted in detail in a paper by Whitney and M.M. Shick, "Some Results of Selective Sterilization," 55 Proc. Annual Session Amer. Assoc. for the Study of the Feeble-Minded 330 (1931) at 331 where Kerlin says: "Whose state shall be the first to legalize oophorectomy and orchotomia for the relief and cure of radical depravity?" Whatever the words he used, the bait was clear and Kerlin's own state was the first to pass such a law, though it failed to become law because of Governor Pennypacker's veto. It was Dr. Kerlin who organized the Association of Medical Officers of American Institutions for Idiotic and Feeble-Minded Persons in 1876, and it was this organization which became the American Association for the Study of the Feebleminded in 1906 and the American Association on Mental Deficiency in 1933. Kerlin was President in 1892 and his successor at Elwyn, Dr. Martin W. Barr,

was President in 1897, and like Kerlin in 1892, he strongly urged the use of sterlization as the most practical step in a preventive program to reduce the numbers of the feeble-minded. See his "President's Annual Address," 2 J. Psycho-Asthenics 1 (1897) at 6-11; also reprinted in 18 Alienist & Neurologist 477 (1897). Kerlin is also famous for his conversion of the concept of moral insanity into "moral imbecility" by stressing what he regarded as the congenital origin of moral defect, but his writings gave the strong suspicion that mental defect was part of this concept, e.g., "The Moral Imbecile," Proceedings of the National Conference of Charities and Correction (1890) at 245. Barr credited Kerlin with being the first to classify the "moral imbecile" as a distinct type. See Fink, Causes of Crime (1962 Perpetua ed.) at fn. 6, p. 213, and his chapter on moral insanity at pp. 48-75.

2 As quoted in Laughlin ES in US, at 36. Barr, in his book Mental Defectives, Their History, Treatment and Training (Philadelphia: Blakiston's, 1904) explained the purpose of such legislation in this fashion: "Let asexualization be once legalized, not as a penalty for crime but a remedial measure preventing crime and tending to the future comfort and happiness of the defective; let the practice once become common for young children immediately upon being adjudged defective by competent authorities properly appointed, and the public mind will accept it as a matter of course in dealing with defectives; and as an effective means of race preservation it will come to be regarded

just as is quarantine --- simply a protection against ill. The fact that the practice has been perverted to selfish and vicious uses, does not affect the argument that the experience of many peoples in many ages has compelled a resort to it to preserve order in special social conditions of the times...." (at 191). The above quotation is only a modest example of Barr's writing style. For a real tirade against "degenerates," see Barr's article, "Some Notes on Asexualization; With a Report on Eighteen Cases," supra note 1, at 234.

3 Just prior to Gov. Sproul's veto, Dr. H.W. Mitchell, then Secretary-Treasurer of the American Medico-Psychological Association and Superintendent of the State Hospital at Warren, wrote to Harry H. Laughlin saying that: "At this hospital we are quietly using the method occasionally, with the consent of all concerned, though the surgical treatment is given in some general hospital." Letter of October 16, 1920, as quoted in Laughlin, ES in US, at 40.

4 "Some Results of Selective Sterilization," supra note 1, at 332. In 1951, Dr. Fred O. Butler, famous for his role in the sterilizations at the Sonoma State Home in California when he was medical director and superintendent, wrote: "...Undoubtedly salpingectomies and vasectomies are being unofficially performed throughout the country on the mentally deficient and others. The number of these operations is not available for reporting." In "Sterlization in the United States," 56 A.J.M.D. 360 (1951). No mention is made of Pennsylvania, where there could

be no official reporting of such operations since there was no statute.

5 In "Selective Sterilization," Proceedings (1930), at 63. Watkins sent a sterilization questionnaire to the then 317 members of the Association. He received 258 returns, of which 243 responded to his questions. Of the 243 respondents, 94% or 227 voted "yes" for sterilization and out of this figure 214 were for selective sterilization, or 97% of those favorable to some kind of sterilization program. All those responding from states with laws wanted these laws retained. Ibid. at 54-56. Dr. Mary M. Wolfe, Superintendent at the Laurelton State Village for girls at Laurelton, Pa., in commenting on Dr. Watkins' paper, said that with a village composed of from 80 to 90% of moron class, "we soon came to the conclusion that selective sterilization was a measure that should be taken. Today we are sending out on parole approximately from eight to ten per cent of our girls. I believe we could send out from thirty-five to forty per cent if we had selective sterilization." Ibid. at 66. Apparently, Dr. Wolfe was not willing to act without benefit of law, unlike some other Pennsylvania administrators, notably those at Elwyn. It was Watkins' paper that inspired the subsequent discussion by Doctors Whitney and Shick at the 1931 meeting, where they called for selective sterilization as one means of care, "...not a panacea but a proposition that should be a part of our therapeutics in handling mental deficiency." Supra note 1, at 335. As the ANA report of 1936 described the results of the questionnaire, selective sterilization meant non-compulsory sterilization, and they added: "...The opinion was that heredity has been overemphasized and that emphasis in sterilization should be laid upon the term selective rather than eugenic." Eugenical Sterilization, at 68.

6 This was in answer to my inquiry about whether any sterilizations had been performed after those that were reported in the 1931 Whitney-Shick

9a Senate Bill 322 (Providing for Emasculation of Sex Offenders), introduced in the 1961 Legislative Session, read as follows:

> Any court of common pleas of the county in which the defendant resides, is lawfully confined, or was convicted of any of the hereinafter enumerated crimes may order the emasculation of any person upon proof of either of the following: (1) That such person has been convicted of the crime of commonlaw rape or of assault with intent to ravish, or of murder committed in the perpetration of rape, or of an attempt to commit any of such crimes upon any female child under the age of sixteen years. (2) That such person has been convicted of a crime in the commission of which he engaged in sexual activity of any nature with a child under sixteen years of age and has been declared to be a constitutional psychopathic inferior by three psychiatrists and two qualified physicians acting as a board under appointment by the court hearing the case....

In their press release of June 19, 1961, the Philadelphia Branch of the American Civil Liberties Union denounced the measure as "vague, sweeping, carelessly drafted, and unconstitutional."

article. He answered: "I do not know of any later statistics than those mentioned." Letter to author, July 30, 1962. This might tend to confirm the statistics reported in the article. Just when sterilization ended at Elwyn is not indicated. However, Dr. Clark in a letter to Dr. Jens A. Dalgaard, Director of the Bureau of Mental Health Services for Children in the state Department of Public Welfare, said that he (Clark) had advised me that there was no further information that he knew of more current than the 1931 Whitney and Shick article and also, that he had advised me that "sterilizations were discontinued at Elwyn many years ago." (Letter dated August 27, 1962, copy sent to author by the Commissioner of Mental Health, Dr. John E. Davis, October 4, 1962). Superintendent Clark's letter to me dated July 30, 1962 was two sentences long (as quoted above) and did not mention when sterilizations discontinued.

7 Letter to author, August 1, 1962.

8 Letter to author, August 17, 1962.

9 Letter to Dr. Dalgaard, dated Sept. 21, 1962, copy sent to author by Commissioner of Mental Health Davis on October 4, 1962. The governor was Pennypacker, supra note 2.

10 Paraphrasing of story furnished by Samuel R. Rosenbaum, Esquire, of the Philadelphia Bar, and printed in Edward Leroy Van Roden, "The Legal Trend of Sterilization in the United States," 22 Pa. Bar Assoc. Q. 282 (1951) at 291-92.

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(Note to Part C) - The states of Indiana and Kansas also sterilized (or in the latter case, castrated) extra-legally, but both of these states eventually passed sterilization laws and are therefore discussed in the section dealing with still current legislation, supra, (Indiana), and the next section dealing with laws that have been repealed, infra (Kansas).

KANSAS

Like the states of Indiana, Massachusetts, and Pennsylvania, Kansas is in that very "select" class of states that have a distinct history of institutional sterilizations done without the benefit of law. But unlike the "Indiana experiment" of Harry Sharp, Kansas in its pre-legal phase was known exclusively for the use of castrations performed at the Kansas State Home for the Feeble-Minded at Winfield under its superintendent, Dr. F. Hoyt Pilcher. Beginning in 1894 with 11 in the first year (the first with the parents' permission), Pilcher performed 58 castrations, 44 on boys and 14 on girls, but these were not for eugenic purposes, but "to help control" excessive masturbation and perverted sexual acts.

While Pilcher's castrations may have been "herioic" to the eugenicists of his day, the public repercussions were great. According to a later superintendent, Dr. F.C. Cave, some people thought of burning Dr. Pilcher at the stake, but instead, Pilcher and the institution were engulfed in political struggle. Pilcher had received permission from the Governor and the Board of Charities to use castrations, but as a result of strong public protests, sterilization became the issue at the next state election and the entire state administration went down to defeat, resulting in a subsequent shakeup of the Winfield administration. Pilcher was removed, but not for long. Two years later, the Populists were back in power, and Pilcher was back as superintendent.[1]

Like the Progressives in Wisconsin, Kansas Populists apparently found Eugenics the answer to the projected "flood" of degenerates that would swamp the nation, and Kansas in particular.

Although Pilcher's pre-legal castrations are the best known, the superintendent of the Larned State Hospital, Dr. L.R. Sellers, reported "seven or eight" castrations on males done at the Osawatomie State Hospital, and also castrations to his knowledge at the state hospitals at Topeka and Parsons, presumably with the consent of the patient.[2]

It was nearly two decades after Pilcher's first castration before the Kansas legislature enacted the state's first sterilization law in 1913. The law was compulsory and required institution authorities to examine all persons adjudged habitual criminals, idiots, epileptics, imbeciles and insane to determine the advisability of allowing these persons to procreate. Such recommendations were reported to the district or other state courts, which then decided the question of sterilization. There were no provisions for notice, hearing, or appeal of a court order. Many heads of institutions felt the law was far too technical and ambiguous and refused to enforce it. One superintendent, Dr. F.A. Carmichael, of the State Hospital for Insane at Osawatomie, said:

> The statute is ambiguous and involved, and smothered in red tape to a degree that makes it practically inoperative. The medical value of the statute is practically nil and its eugenical value is slight.[3]

In 1917, a second law was passed which eliminated the courts from the decision as to whether sterilization (including male or female castration operations) was necessary. The chief medical officer and governing board of each institution, together with the secretary of the State Board of Health, would constitute a board of examiners for each institution. Requests would come from the wardens or superintendents. Notice, hearing, and the right to counsel were provided by this statute, but as in the 1913 law, there were no provisions for judicial review of a board order. Again, there was feeling among the administrators of the institutions that this law was also too technical. Part of the reluctance to enforce can be traced to Pilcher's castrations and the political aftermath, together with a provision contained in both the 1913 and 1917 statutes which made it a felony to sterilize a person outside the provisions of the law, except for medical necessity. Up to 1921, only 54 sterilizations were reported under the two laws.

However, "conservatism" ceased in the period from 1925-28, when over 300 operations were reported, but Buck v. Bell in 1927 was a turning point, which the Kansas Supreme Court followed in 1928 by upholding the constitutionality of the 1917 act in State v. Schaffer, 126 Kan. 607, 270 Pac. 604, despite the lack of an appeal provision in the Kansas law. The glaring differences between the Virginia and Kansas laws did not move the Kansas Supreme Court, which felt that a quasi-judicial board of examiners was eminently competent to deal with the subject at hand.

The right of appeal, for the Kansas court, was not essential to due process of law. It is very doubtful if such a finding, especially where the affect of state action on the privacy (let alone parts) of the person is so crucial, would be upheld by the U.S. Supreme Court today.

Following this decision in 1928 and with the onset of the depression of the 1930s, sterilization in Kansas went ahead at a rapid pace. From 1932 to 1942, the brief period of just one decade of Kansas sterilization history, nearly 2,000 operations were reported in stark contrast to the conservatism of institutional authorities in the 1913-21 period.[4]

But Winfield was not alone in being ripe for public exposure. In the late 1930s, the state Industrial School for Girls at Beloit broke into the news because the superintendent had 62 inmates sterilized on such grounds as "insubordination." These were girls 19 and under convicted of minor offenses.[5]

The abrupt ending - without legislative repeal of the law - of sterilization in Kansas is due to two important events that appear to have little connection. Irrespective of the impact of one event on the other, there is almost unanimous agreement among the state officials in Kansas that these two events played a significant role in the abrupt change in policy.

The legal event and one that stirred up a great deal of attention was a case instituted in the federal district court in Kansas City in

1950 under one of the Civil Rights Acts of the U.S. But the story begins much earlier. Unlike the thousands sterilized in the roaring 20s and 30s, Kansas authorities were apparently lax in at least one case, and this one really touched off a furor. One Paul Jacob Brown was adjudged insane and committed to the Osawatomie State Hospital on June 30, 1942. He was classified as schizophrenic, catatonic type. Nancy N.R. Brown, the patient's mother, was appointed guardian on July 13, 1942. On September 16, 1943, an order of sterilization was issued by the board of sterilization examiners at Osawatomie State Hospital, which included the superintendent of the hospital, members of the State Board of Social Welfare, and the secretary of the State Board of Health. The board failed, however, to serve notice of hearing on Mrs. Brown, and also failed to afford her a hearing on the proposed sterilization (due to her failure to receive the notice), both of which were violations of Kansas statute. On December 8, 1947, Mrs. Brown was removed as guardian by the Probate Court for refusal to obey the orders of the court, but she was again appointed guardian for Paul on December 13, 1949. On June 6, 1950, Mrs. Brown filed her complaint in the United States District Court for the District of Kansas at Kansas City against all the members of the Board of Social Welfare, as well as the Governor, the Attorney General, the Superintendent of the hospital, and the surgeon, asking $500,000 actual plus $500,000 punitive damages, alleging that had she known of the hearing, she would have appeared with a lawyer and a doctor and strenuously objected to

the entire proceeding.[6] Undoubtedly, Mrs. Brown felt that her son might be cured in the future, released from the institution, and hopefully returned to a normal existence, including parenthood.

As a result of the original complaint and four amended complaints, the case dragged on for four years. On February 24, 1954, there was a trial before a jury and a motion for a directed verdict for the defendants was sustained by the judge.[7] A notice of appeal was filed on April 29, 1954, but was dismissed by the Tenth Circuit Court of Appeals on January 15, 1955. Thus, after nearly five years, the case of Brown v. MacFarlane et al. came to an end. Although Mrs. Brown did not obtain her million dollars of damages (not even one dollar), nor vindicate her rights under either United States or Kansas law, the impact of the case on subsequent sterilization policy is important. The then Assistant Attorney General of Kansas, Paul E. Wilson, who represented the State Department of Social Welfare when the suit was filed, writes:

> Although it is not a matter of record, I am certain that the suit had some impact on the sterilization policies in the mental hospitals of Kansas. Only a few patients were sterilized after the suit was filed. In part this may be a result of a considerable change in hospital personnel. New superintendents and medical staffs were less inclined to look with favor upon sterilization as part of the hospital treatment. But as I was attorney

> for the Board at that time, I can say with assurance that the suit had the effect of creating an attitude of extreme caution on the part of the Board.[8]

The second and by no means lesser event was a change in the administrative apparatus of mental health in Kansas, with its accompanying changes in viewpoint and policy. Following the passage by Congress of the National Mental Health Act in 1946, the Governor of Kansas designated the State Board of Health as the state mental health authority. This was followed in April, 1948 by the State Board of Health's creation of a division of mental hygiene charged with the responsibility for administering the mental health program in the state,[9] which would include the sterilization program.

Though not officially tied to these changes in the makeup of the mental health program in the state, the response of fourteen Kansas psychiatrists to a questionnaire on sterilization is significant. These psychiatrists expressed a distrust even of limited sterilization, which they felt "offers more pitfalls than benefits to society," and they raised some of the lingering doubts over the post-operative effects of the operations, and were especially dubious as to whether "the diseases for which the sterilized patients were institutionalized were hereditary."[10] This last comment is extremely significant, in view of the fact that 2/3 of all sterilizations performed under Kansas law have been on the <u>insane</u>, a record which only Connecticut, Georgia, and Mississippi can surpass.

An enlightened and much more advanced view of the entire mental health problem, combined with what appears to be a considerable amount of professional doubt over the worth of state sterilization can be summarized in this brief communication:

> In 1950, after the intorudction of modern methods of treatment and rehabilitation, sterilization ceased to be used as a method of treatment in Kansas institutions. ***** The law was not repealed, it just was not considered necessary to use this operation after the introduction of modern methods of treatment.[11]

Kansas, in summary, has had one of the most diverse sterilization histories of any state in the country, ranging from the pre-legal castrations of Pilcher and company with its explosive political impact at the time, to the passage of laws in 1913 and 1917 and a period of dormancy, a surge of operations in the early 1920s, capped by a decision of the state Supreme Court in 1928 upholding the constitutionality of the law, lack of appeal notwithstanding. Thence follows the revival of sterilization in the 1930s (with Time's 1937 Beloit "exposé") with a slight leveling off in the war years. The Brown v. MacFarlane case, finally ended in 1955, the changes in administrative procedures and personnel in the mental health program of the state in the late 1940s and early 1950s, and the impact of psychiatric opinion regarding the desirability of state sterilization, all played their part in the demise

without repeal of the Kansas law in the period from 1951 on.

In the light of recent history, it seems advisable to question the desirability of retaining the Kansas statute. Voluntary therapeutic operations have always been permitted, and these could certainly be allowed even if the compulsory statute were repealed. While it does not appear to be too probable that a return to the past policy will take place, the scientific advances of the state in the area of sterilization, and the most recent professional knowledge of the subject should finally nullify the policies of the past. Kansas could be a pioneer in the law of the subject by erasing this phase of their history.

Final Note

After this was written, Kansas did in fact become a pioneer state when it repealed its sterilization law on June 30, 1965.[12] Thus, Kansas, which began its history ultra vires in the castrations of a Pilcher, now becomes the first American state to repeal its sterilization law without either adverse litigation or re-enactment of a new law. The Commonwealth of Puerto Rico did the same in 1960, and it is the hope of this writer that other states will follow the precedent set by Kansas, which after 15 years of non-use of its law had the good sense to wipe the law off the books for good. North Dakota joined Kansas by repealing its law in the 1965 Legislative Session.

KANSAS STATE BOARD OF HEALTH

DIVISION OF MENTAL HYGIENE

BREAKDOWN OF KANSAS STERILIZATIONS, 1940-1945

ACCORDING TO TYPE OF OPERATION PERFORMED

Type	1940	1941	1942	1943	1944	1945
Vasectomy	83	39	47	27	22	16
Salpingectomy	66	45	39	29	22	14
Castration	16	6	0	0	0	0
Asexualization	7	15	1	0	0	0
Oophorectomy	0	0	3	4	3	1
Totals	172	105	90	60	47	31

KANSAS STERILIZATIONS

TOTAL UP TO

1/21 ..... 54 (12m, 42f) - Laughlin, 1922, at 70
7/25 ..... 335 (206m, 129f) - Laughlin, 1926, at 60.
1/28 ..... 647 (430m, 217f) G & P, at 184
1/30 ..... 657 (414m, 243f) CP, introd.
1/32 ..... 657 (Landman, at 289; Whitney, at 302)
1/33 ..... 976 (Whitney, at 302)
9/34 ..... 1,244 (771, 473) ANA, at 12-13*
1/35 ..... 1,362 (839, 523) ANA, at 13
1/38 ..... 1,915 (1151, 764) - HBF
1/41 ..... 2,404 (1415, 989) - HBF
1/42 ..... 2,583 (1504, 1079) - HBF
1/44 ..... 2,794 (1629, 1165) - Birthright, Inc.

OPERATIONS FOR THE YEARS

1943 ..... 88 (one of 6 state inst. failed to report)
1944 57
1945 32
1946 71
1947 29
1948 18
1949 0
1950 24
1950-60 .. 0
1961 ..... 7**
1962-63 .. 0

CUM. TOTAL: 3032 (1763 m, 1269 f) almost 68% on mentally ill

*(of which 187 were (male) castrations and 51 oophorectomies (female castrations) for a total of 238 castrations performed up to that time)

** (this figure is disclaimed by the Kansas State Department of Social Welfare, which finds no record of any sterilization for that year and therefore claims a cumulative total of 3025 operations)

KANSAS -- FOOTNOTES

1 Laughlin, ES in US, at 70-71 and Charles C. Hawke, "Castration and Sex Crimes," 55 Am. J. Men. Def. 220 (1950). Pilcher's castrations, like those of Dr. Flood, performed without statutory authority in Massachusetts, presumably "improved" the mental and physical well-being of the inmates. Castration continued to be used as one means of sterilization at Winfield from 1923 until Dr. Hawke, then its medical director, retired in 1951. The records at Winfield were destroyed in a fire in 1904 and hence, there is some difference over the exact number of castrations performed during the Pilcher tenure. Hawke reports that Cave said that Pilcher performed 50 castrations, half on each sex. In "Castration vs. Vasectomy in the Feebleminded as a Surgical Problem," 46 A.J.M.D. 129 (1941) at 134. However, most of the literature mentions the figure of 58, and Cave, in an article, "Report of Ster lization in the Kansas State Home for Feeble-Minded," 15 J. of Psycho-Asthenics 123 (1911) reports the 58 figure. The ages of these castrates ranged as low as 8, 9, and 10 years of age.

2 Reported in Laughlin, ibid. at 71-72. The Sellers report is the only one of its kind. Since he served at Osawatomie for 15 years before coming to Larned, we can assume he had some knowledge of sterilizations in the state institutions. However, his is the only report this writer has seen on pre-legal operations at institutions other than Winfield.

3 Ibid. at 70. There was also non-medical opposition to using surgical means as a solution to the problem of limiting the numbers of

so-called defectives. H.C. Bowman wrote: "...The most practical and effective way to prevent the increase of the feeble-minded is by segregation...." In "Defective Laws and Dependent Persons, " 1914 Kans. St. Bar. Assoc. Proceedings. 98, at 100.

4 It should be noted that castration,which fell under the title of "asexualization" for males and "oöphorectomy" for females in the 1917 law, did not cease, but was given legitimacy in the act. In the 1913 act, the impact of the Pilcher episode was seen in the absence of male castration, but the inclusion of oöphorectomy for females. The late Dr. Charles C. Hawke, medical director at the State Training School at Winfield (the name changed over the years) in 1950 reported a cumulative total of 330 castrations at Winfield, 229 of them in the period from 1923 to 1940. These were performed on sexual criminals or perverts and as in the earlier Pilcher castrations, were presumed to benefit the inamte. Hawke also reports 79 castrations at the insane hospital and 13 castrations at the epileptic hospital on a non-eugenic basis to "improve" their sexual behavior." Quite obviously, up to the end of Dr. Hawke's tenure at Winfield, the use of castration was a significant part of that institution's policy. Hawke reports that in the period of 1923-41, when castration was resumed at Winfield on what appears to be a rather steady scale, one of six persons either in or admitted to Winfield was castrated. See his two articles, "Castration vs. Vasectomy in the Feebleminded as a Surgical Problem," 46 A.J.M.D.

129 (1941) at 135 and "Castration and Sex Crimes," 55 ibid. 200 (1950). In the United States, Winfield from the days of Pilcher through Hawke, is regarded as the prime example of using castration as a means for reducing the sexual drives of the sexual criminal or deviate. Castration at Winfield, and state sterilization in Kansas, came to an abrupt half in 1951. Manfred S. Guttmacher, in his book, Sex Offenses (N.Y.: W.W. Norton, 1951), wrote: "In the United States the chief public proponent of castration for the control of sexual offenders is the surgeon, C.C. Hawke..." (at 108) For a view that is critical of castration of sexual offenders, see Gerhard Mueller, Legal Regulation of Sexual Conduct (N.Y.: Oceana Publications, 1961) at 30; and for a survey of various studies of castration of adult human males, see Alfred C. Kinsey et al., Sexual Behavior in the Human Female (Philadelphia: W.B. Saunders, 1953) at 738-45. For more recent views, see Johan Bremer, Asexualization; A Follow-up Study of 244 Cases (N.Y.: Macmillan, 1959) and synopses of articles by A. Ohm and other writers on castration as a treatment for criminal behavior in 2 Excerpta Criminologica (July and August, 1962) and subsequent volumes. The earlier castration figures on Kansas are quite high: H.H. Laughlin in Eugenical Sterilization: 1926 at 53 gives Kansas 58 male castrations and 25 ovariotomies out a cumulative total of 335 operations performed up to July 1, 1925 (or 24.8% of the total); Frederick W. Brown in "Eugenic Sterilization in the United States: Its Present Status," 149 The Annals 22 (Part III, May 1930) at 31 reports 94 male castrations and 27 oöphorectomies out a cumulative total of

645 operations performed up to January 1, 1929 (or 18.7% of the total); and the ANA report, Eugenical Sterilization (1936) at 13 reports 187 male castrations and 51 oophorectomies out of a cumulative total of 1,244 operations performed up to September, 1934 (or 19% of the total). Using Hawke's figures of 422 castrations performed up to 1950 at three Kansas institutions out of a cumulative total of 3,001 operations performed up to that time, the percentage of castrations still remained relatively high (14%) even at that late date.

5 See Dwayne L. Oglesby, "What Has Happened to Kansas' Sterilization Laws?" 2 Kan. L. Rev. 174, 176-77 (1953) and "Finishing Schools: Girls' Industrial School, Beloit, Kansas," 30 Time 15-17 (Nov. 8, 1937). While this seems like an extreme case of sterilization on the most specious of grounds, it is probably not too far different from states that used sterilization as a means for penalizing the delinquent poor in the depression years. Apparently, even incidents such as the Beloit one did not excite the general public to a revulsion against sterilization, although it is possible that the Beloit sterilizations slowed down. Sterilization laws have hard skins. In Kansas, it took much more than the Pilcher furor, the Beloit exposé and the Brown case, among other things, to bring significant changes in the administration of the law.

6 The case was tried under the Third Civil Rights Act of the United States (8 U.S.C.A. #43, 47) claiming denial of due process of law under the 14th Amendment of the U.S. Constitution. Mrs. Brown's attorney,

Donald L. Randolph, says that this action was not aimed directly at the constitutionality of the Kansas sterilization act, but they intended to question the constitutionality of the act. Letter to author, October 2, 1961. The defendants argued that the million dollar sum was so astronomical as to indicate a lack of good faith, to which lawyer Randolph answered for the plaintiff: "Where would you find a man who would give up his right to beget and raise children of his own blood, which is man's primary function and chief pleasure in life, for a million times a million dollars?" (Contained in materials on the case sent to the author by Dwayne L. Oglesby)

7 Although there was no official opinion in this case, attorney Randolph reports that the Court felt that while some "trifling" Fourteenth Amendment rights might have been violated, the hospital was "acting for the good of the patient" and no damage was done. Id.

8 Letter to author, October 18, 1961. The author wishes to thank Mr. Kirke W. Dale of the firm of Dale and Hickman, lawyers of Arkansas City, Kansas, for loaning me their file on the case. On the basis of these materials, I determined the original filing date of the complaint as June 6, 1950. Attorney Dale says the case was filed in 1948. In any event, the case was long and delayed and from the time of sterilization to the dismissal of the appeal by the Circuit Court of Appeals it was nearly 12 years. It is unfortunate that almost all of the principal lawyers in the case, including the office of the state Attorney General,

had thrown away their case files on the case, so that this writer was unable to read any briefs or supporting data in the case. Everybody seemed to consider it an "unusual" case and attorney Donald L. Randolph wrote a masterful three-page single-spaced letter relating the events of the case to the Holmes decision in Buck v. Bell and Douglas in Skinner v. Oklahoma. Mention will be made later on in this study of Mr. Randolph's ideas.

9 Information found in Harriet S. Pfister, Kansas State Board of Health (Univ. of Kansas Publications, Governmental Research Series No. 13, 1955). at 139-40.

10 Oglesby, supra note 5 at 177-79. The questionnaire was conceived by Oglesby when he was a student at the University of Kansas School of Law. When one of his law professors prompted him to study the sudden demise of Kansas sterilization, Oglesby wrote to many of the state officials connected with the sterilization program and then sent a four-question questionnaire to 26 practicing psychiatrists in the state of Kansas. The 14 replies he received were terse and usually to the point and were reprinted in full in the article. It is obvious that psychiatric opinion was strongly critical of the earlier sterilization policies and undoubtedly played an important part in the changes in policy of the state Department of Public Welfare and of the individual institutions. On the basis of his research, Oglesby concluded that the sudden ending

of institutional sterilization in Kansas was due to a combination of factors including recent medical advances which took a dim view of the therapeutic effects of sterilization in mental illness and retardation; changes in personnel and policy in the state institutions and the state agencies clothed with responsibility for enforcing the act, especially the State Board of Public Welfare; and the anxiety over the possible outcome of the Brown case. He found no evidence of organized public pressure to change or repeal the Kansas law. The author wishes to thank author Oglesby, who is now a Professor of Business Law at Louisiana Polytechnic Institute, for his kindness in letting me examine the data of his research.

11 Letter to author from G.C. Coniglio, Psychiatric Social Work Consultant, Division of Mental Hygiene, Kansas State Board of Health, dated December 16, 1960. Mr. Coniglio reported that no sterilizations had been performed since 1950. When the figure of "7" operations was reported in the Human Betterment Association's compilation for 1961, I was curious to know what had happened to current Kansas policy. R.A. Haines, M.D., the Director of Institutions in the State Department of Social Welfare, informed me that his department did not issue figures concerning sterilization in Kansas penal institutions. (Letter, dated February 1, 1963). I then wrote to the Director of Penal Institutions, and the Director, Robert J. Kaiser could not recall any operations in penal institutions during 1961. (Letter dated March 15, 1963). Since

HBA receives its figures either from departments or from individual institutions, it is a mystery where this strange figure of "7" came from. Mr. Coniglio also reported that the Division of Vital Statistics of the State Board of Health has no record of sterilizations for the year 1961. (Letter dated July 24, 1962). Since the Board is part of the examination procedure under the act, this would seem to be firm proof that no operations were performed in 1961, nor for that matter at any time since 1950.

12 Senate Bill No. 323, an act repealing existing K.S.A. 76-149 to 76-155.

NORTH DAKOTA

Though North Dakota passed its first law in 1913, the policy of the state was a conservative one in the early years, even though the law was compulsory,[1] and lacked provision for notice, hearing, and appeal rights. In 1927, the Legislature rectified this with the passage of the present law, which provides notice, hearing, and appeal rights, but still remains compulsory (although consent of patient or their request for an operation eliminates the use of these provisions).

The depression years brought a sharp rise in operations, especially in the period from 1930 (up to January, 1930, there had been only 39 operations in 17 years) to January, 1942, when a total of 536 operations were performed. Apparently, the trepidation mentioned by Laughlin did not operate in the depression years when the institutions were probably full and waiting lists were growing larger.

Operations since the war years have dropped from the highs of the 1930s, but there is no consistent trend, although in 1954 and 1963, no operations were reported. There is no data on the application of the law to criminals, but it would appear that they have not been sterilized under the law.[2] A 1961 revision of the law dropped epileptics from those covered by the statute. The Grafton State School has been the main source for reporting operations, since this is the institution for the feeble-minded and most sterilizations in North Dakota have been performed on these persons (634 out of a cumulative total of 1049 up to January, 1964).

In summary, North Dakota is a good example of a state that has not been too certain of its policies. In the original 1913 law, the last section was titled "emergency" and read:

> WHEREAS, heredity plays a most important part in the transmission of crime, insanity, idiocy, and imbecility, and our institutions for degenerates are overcrowded on account of the lack of adequate means of checking the ever-increasing numbers of this class; and whereas, there is now no provision in law authorizing an operation for the sterilization of defective persons, this act shall take effect.....[3]

Though the Legislature declared an emergency, those clothed with power to enforce the law were not quite as convinced, partly because of their fear of public opinion where compulsion was used. These fears vanished in the 1930s, and at the present time, sterilization seems to be highly selective, though not as selective as the first 17 years of the law's use from 1913-1930. Though North Dakota's present law allows for notice, hearing, and appeal to the courts, patient consent obviates the need for the hearing process. There are no figures on how many of the sterilizations performed in North Dakota were the result of initial patient "consent," but as in other states, an institutional discharge is always a good quid pro quo for the operation.[4]

Figures on sterilization since the end of the war indicate an inconsistent trend. The trend appears downward, especially in 1954

and 1963 when no operations were reported. The Mental Health group in the state was instrumental in getting some legislative changes (including the deletion of epileptics from the law) in 1961, but it is not clear whether these pressures have had any effect on institutional policies.[5]

After 52 years of sterilization history, and approximately 1,049 operations, North Dakota repealed its statute in the 1965 Legislative Session (S.L. 1965, ch. 203, S. 86).

NORTH DAKOTA STERILIZATIONS

TOTALS UP TO

1/1921 ..... 23 (15m, 8f) Laughlin at 87

7/1925 ..... 33 (18m, 15f) Laughlin 1926, at 57.

1/1928 ..... same G & P, at 184

1/1930 ..... 39 (22m, 17f) CP, introd.

1/1933 ..... 93 Whitney, at 302 (might be an error, and mean 39)

1/1935 .....150 (60m, 90f) ANA, at 17

1/1938 .....353 (90m, 263f) HBF

1/1941 .....534 (185m, 349f) HBF

1/1942 .....575 (205m, 370f) HBF
1/1944 .....671 (235m, 436f) Birthright, Inc.
(Note: sharp rise in female operations from 1935 on; heavy concentration from 1933-1941)

OPERATIONS IN		RANK AMONG STATES (Operations reported per 100,000 pop.)
1943	43	
1944	13	
1945	21	
1946	29	
1947	17	
1948	33	6
1949	23	5
1950	23	8
1951	42	2
1952	22	7
1953	37	3
1954	0	
1955	16	5
1956	14	6
1957	14	4
1958	9	4
1959	22	2
1960	12	4
1961	16	2
1962	15	3
1963	0	

CUMULATIVE TOTAL (1913-63).....1,049 (397m, 652f)

NORTH DAKOTA -- FOOTNOTES

1 Laughlin noted that several of the institutional authorities were adverse to the use of the law, and when used, they obtain consent from the parents or next of kin. ES in the US., at 87-88. The Report of the ANA on eugenical sterilization said: "Although the law is compulsory, it has been conducted on a voluntary basis, yet with the same compulsions of being a prelude to discharge or parole from an institution. On the whole, the cause of eugenics is not being thoroughly served in the state." At 17.

2 It should be emphasized that North Dakota's total figures per year do not indicate valid comparisons with other states. The figures for sterilizations per 100,000 population place North Dakota at the top or near the top for many of the years since 1948. North Dakota has never ranked below 8th, and has been 2nd or 3rd in 5 of the years since 1948. Hence, even in the more or less "conservative" post-war years, North Dakota is still one of the leading states still enforcing its sterilization law, when viewed in these statistical terms. For a discussion of sterilization in the state of North Dakota, see Duane R. Nedrud, comment, "Scope of State's Power to Use Sterilization on Mental Defectives and Criminals -- Operation of the North Dakota Statute," 26 N.D. Bar Briefs 183 (1950). He says that only certain habitual criminals, namely, "moral degenerates and sexual perverts" as the law describes them, are covered by the law but gives no indication of whether this portion of the law has been used, if at all. The portion

of the law dealing with criminals reads: "...the criminals who shall come within the operation of the provisions of this chapter shall be those who are moral degenerates and sexual perverts or who are addicted to the practice of sodomy, the crime against nature, or to other gross, bestial, and perverted sexual habits and practices prohibited by statute." (sec. 23-08-03). Out of North Dakota's cumulative total up to 1964 (according to the HBAVS compilation), only 36 operations were classified as "others" and these could conceivably have been sterilizations of epileptics and not criminals. If these were criminals, the/ir percentage of North Dakota's grand total would indeed be small.

3 Section 11, Act of March 13, 1913 (as quoted in Laughlin, op. cit. supra note 1, at 28).

4 Nedrud says that compulsion is seldom used, and certainly the use of "consent" procedures offsets the possibility of adverse litigation. According to Nedrud, the weakness of the law is that it is not extramural in coverage: "...This omission detracts from the effectiveness of the statute since most feeble-minded, insane, epileptic, morally degenerate and sexually perverted persons are not confined in state institutions. This weakness is the most apparent drawback of the North Dakota law as it exists today." Supra note 2, at 189. He also says that public opinion has forced the virtual curtailment of any use of sterilization laws in Arizona, Idaho, Maine and West Virginia (fn. 49 at 191) but gives no proof for this assertion.

5 As reported by Doctor Charles C. Rand, Superintendent of the Grafton State School, letter to the author, dated July 19, 1962. He was unclear about the specific arguments of the Mental Health group.

COMMONWEALTH OF PUERTO RICO

The Commonwealth of Puerto Rico is unique in that it is the only place (prior to 1965) where a eugenic sterilization law has been repealed without either prior adverse court action, or replacement by a subsequent law.

The law, which was passed in 1937, had compulsory and extramural provisions, but provided notice, hearing, and appeal rights as far as the Supreme Court of the then territory. It was enforced from 1937 to 1946, but from 1946 to 1960, the Board of Eugenics was inactive. According to the records of the Commonwealth Department of Health, obtained from the Eugenic Sterilization Board, there were 96 operations under the act.[1]

The reasons for the repeal of the act in 1960 are interesting. In the same year, 1937, that the eugenic sterilization law was passed, the legislature enacted two laws, one, an amendment (Public Law 33) to a previous law that made it a felony to disseminate contraceptive information or services was changed to exempt this action from the act; and another (Public Law 136) that called for the "teaching and divulgation of eugenic principles" and contraceptive information. Both of these laws were aimed at illegal abortions and its attendant dangers, and were clearly calculated to improve the health of the territory by a reduction of infant and maternal mortality.

During the political campaign in 1960, the Popular Democratic Party and the Catholic Church clashed over a number of questions

including birth control, sterilization, religious instruction in the schools, etc. Since Puerto Rico has a high rate of voluntary sterilizations performed in private and public hospitals, one might have expected the Church to attack these programs, but the brunt of their attack was on the eugenic sterilization law, which was a dead letter anyway. Since the law was an embarrassment to the Popular Party, it was repealed,[2] leaving the general birth control statute intact.

Puerto Rico's major claim to fame is in the high incidence of voluntary sterilization operations that have been reported in various studies. Guttmacher reports that 20% of women on the island between the ages of 15 and 45 have been sterilized.

> ...It is the commonest operation on the island, commoner than appendectomy or tonsilectomy, and therefore referred to as "la operación."[3]

But voluntary sterilization is only part of the story. Puerto Rico has also been an important experimental center for research on various contraceptives, including the "Pill" and foam cream,[4] and will doubtless remain a useful place for pilot studies of the future. The ironic note in the Puerto Rican story is that the religious composition of the Commonwealth (predominately Catholic) has not prevented programs of family planning and contraception, nor the high incidence of la operación.[5]

PUERTO RICO -- FOOTNOTES

1 Information supplied by Rosa Luz Silva, Chief, Legal Office of the Department of Health, letter dated October 9, 1961. In the 1948 annual tabulation of sterilizations published by Birthright, Inc. (now the AVS of New York), there were 986 operations listed for Puerto Rico. It was not reported thereafter in their tabulations and a communication from the HBAA, dated November 11, 1961 stressed the lack of factual data on eugenic sterilization in Puerto Rico at that time. The figure could have been a misprint or could have included voluntary operations. The 1937 law was repealed by Public Law No. 69, approved June 8, 1960.

2 Information in a letter from Prof. J.M. Stycos, Cornell University, dated October 4, 1961. The success of a birth control program, including voluntary sterilization, is in dispute. Compare Stycos, "Female Sterilization in Puerto Rico," 1 Eugenics Quarterly 3 (1954) and Manuel E. Paniagua, "Female Sterilization in Puerto Rico," paper given at HBAVS International Conference on Voluntary Sterilization, New York City, April 16, 1964, and his article (with Tayback, Janer, and Vazquez), "Medical and Psychological Sequelae and Surgical Sterilization of Women," 90 Am. J. Ob. & Gyn. 421 (1964). Also, see Stycos, Family and Fertility in Puerto Rico (N.Y.: Columbia Univ. Press, 1955).

3 Alan F. Guttmacher, "Sterilization: Facts and Arguments," 198 The Nation 344 (April 6, 1964) at 345. Also, see Reuben Hill, J. Mayone

Stycos, and Kurt W. Back, The Family and Population Control; A Puerto Rican Experiment in Social Change (1959) at 175-181; Lee Rainwater, And The Poor Get Children (1960) at 177; Clyde V. Kiser (ed)., Research in Family Planning (1962) at 321-22; Beatrice B. Berle, Eighty Puerto Rican Families in New York City (1958) at 133-47; and the articles by Stycos and Paniagua et al., supra note 2.

4 John Rock, The Times Has Come (N.Y.: Alfred A. Knopf, 1963) at 165-66; and Aquiles J. Sobrero, "Evaluation of a New Contraceptive," 11 Fertility & Sterility 518 (1960).

5 See Marguerite N. King, "Cultural Aspects of Birth Control in Puerto Rico," 20 Human Biology 21 (1948); and the discussion of sterilization in Paul K. Hatt, Backgrounds of Human Fertility in Puerto Rico (1952) at 443-54.

TEXAS

Although Texas does not have sterilization legislation, the annual reports of sterilizations published by the Human Betterment Association have mentioned Texas since 1959. This is in the form of a note which reads:

> The State of Texas has no statute providing for sterilization of inmates of state institutions. While an Act of 1955 has not been interpreted by the Courts, the Superintendent of State Hospitals, upon legal advice, believes that sterilizations are prohibited in their institutions.[1]

The provision that is referred to is not a statute, but a provision of one that deals with state institutions. It is Article 3174b-2 of Vernon's Civil Statutes of Texas Annotated and reads as follows:

> Medical treatment and services, power to provide without consent of relatives, etc.
>
> ....This authority shall not allow the performance of any operations involving sexual sterilization or frontal lobotomies. (passed 1955).

The question of consent arises in cases where next of kin or guardians cannot be reached and urgent medical care is necessary for patients in state institutions.

The clearest explanation of the provision was provided by Russell G. Poling, Chief of Legal Services for the Board for Texas State Hospitals and Special Schools:

> The statute cited above is not necessarily prohibitive legislation as the subject matter deals primarily with power of the Board for Texas State Hospitals and Special Schools to provide or perform recognized medical treatment or services to persons admitted or committed to its care. The clause that mentions eugenic sterilization also specifies another surgical procedure both of which were included as a precautionary measure. It was not intended that this statute be interpreted to include these two procedures as each requires the consent of the person involved in Texas.[2]

One might assume that since sexual sterilization operations require consent of the party in Texas, this would clearly apply to all sterilizations, in or out of institutions, and that doctors performing voluntary sterilizations, even where the justification was therapeutic (medical necessity) would proceed accordingly. The explanation might actually be a much simpler one, namely, that Texas Common Law requires patient's consent for all surgical procedures. The Legislature has made special exception for emergency treatment in state institutions, but specifically excepted sexual sterilizations and frontal lobotomies, which left these two operations intact in Texas law.

However, since the author has not seen any specific legal or statutory statements on the subject, other than Article 3174b-2, this interpretation is not authoritative.

Although Texas has never had a law authorizing sterilization, Dr. F.E. Daniel, then President of the State Medical Association of Texas, advocated sterilization in 1893, and specifically recommended castration for certain types of institutionalized persons as a means of "race improvement," and as a penalty for sexual crimes. Unlike Michigan and Pennsylvania, Texas legislators did not respond to this clarion call.[3] Thus, although Texas has many claims to fame, sterilization has no official place in the fabled history of this great state.

TEXAS -- FOOTNOTES

1 Compilation, issued February 1964.

2 Letter to author, dated September 14, 1961. Whether these two operations require consent in Texas because of legislation, or opinions of the State Attorney General, or possibly court action, is not clear, but they were deliberately exempted. To my inquiry as to whether unauthorized operations prompted this exemption, Mr. Poling replies: "To this writer's knowledge, there has not been any pressure to pass a eugenic sterilization law in this state nor did unauthorized sterilization operations in state institutions prompt the statute in question." Ibid.

3 But his writings were nevertheless numerous. Laughlin, ES in US, at 351, cites two of Daniel's articles: "Should Insane Criminals, or Sexual Perverts, Be Allowed to Procreate?" 11 Medico-Legal Journal 275 (Dec. 1893) and "The Cause and Prevention of Rape," 19 Texas Med. J. 452 (May 1904). Daniel is also cited by Havelock Ellis in his discussion of castration in Studies in the Psychology of Sex (vol. II, at 614 ff.) In his 1893 article, Daniel spoke glowingly of the value of castration "...for the purpose of prophylaxis as applied to race improvement and the protection of society...." (at 286) His other writings include "Castration of Sexual Perverts," 9 Tex. Med. J. 255 (1893-94); a letter

entitled "Castration as a Treatment for Crime, Not as a Punishment," 26 J.A.M.A. 239 (1896); and "A Plea for Reform in Criminal Jurisprudence," 27 id. 1085 (1896) recommending regulation of marriage and sterilization at 1090 and printed in two other sources, 11 Texas Med. J. 597 (1895-96) and 28 Trans. Texas State Med. Assoc. 257 (1896) with a discussion at 275-76 in which one physician persisted in calling him an "infidel." The Texas Medical Journal, which Daniel edited in this period, carried numerous articles by other writers on the same general subject of sterilization and criminality.

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(Note to PART E) - Texas, as could be expected, was unique insofar as sterilization is concerned, and did not fit into any of the other categories. However, without tarnishing Texas' reputation for uniqueness, the reader should compare the Texas statutory prohibition on sterilization in state insitutions with the prohibition in the New Jersey law, discussed in Part A, New Jersey, supra note 5.

PART F (CANADA, INCLUDING PORTIONS OF THE DIAMOND REPORT)

CANADA

Alberta

The provinces of Alberta and British Columbia are the only two in Canada which presently have sterilization laws. The Sexual Sterilization Act of Alberta, enacted in 1928, set up a Eugenics Board which is quite unique in its composition. Two members must be medical practitioners, one nominated by the Senate of the University of Alberta and one by the Council of the College of Physicians and Surgeons; the other two are persons other than physicians who are well known and reputable citizens of the province. Consent of the patient, parent or guardian, or of the Minister of Health was required in all cases until an amendment to the act in 1937 exempted required consent in the case of mental defectives.[1]

Up to 1963, there had been 2103 operations performed. The Director of the Province's Division of Mental Health, Dr. Randall R. MacLean, says that --

> In reply to your question regarding how "strict" the enforcement of the Alberta statute is, I may say that the Board refuses to rule on cases which do not specifically fall within the jurisdiction of the Alberta Sterilization Act. In regard to instances where because of religious or other reasons parents, or the wife or husband, as the case might be, or in the case of psychotic

> cases with normal intelligence, if there is any objection which cannot be overcome, the Board has ruled that the Medical Superintendents of the various institutions deal with each case on its own merits and insofar as possible accede to the requests of the responsible relatives that the sterilization operation not be done. There have not been many such requests. I am also happy to say that to the present time no court action has ever been taken against the Provincial Eugenics Board or any others who are involved in the carrying out of this work.[2]

There has been no litigation in connection with the act partly because the law makes no provision for judicial review of Board orders. In the light of the total absence of procedural safeguards (except for consent in the case of psychotics), and the fact that the law is still very much alive in the province of Alberta, one might conclude that the enforcement of the law is careful enough to avoid the pitfalls of constitutional test cases.

However, in December, 1963, Roman Catholic and Socialist groups in Alberta attacked the law. The Alberta Catholic Welfare Association considered a resolution that urged the government to eliminate the provisions authorizing sterilization of mental defectives without consent. The Socialists (the Calgary West Constituency Association of the New Democratic Party) thought the law was too loosely worded, and

called for an investigation of the operation of the law. The government (through a Dr. Ross) replied that parental consent is obtained wherever possible. It is interesting to note that Dr. Ross said that sterilization is recommended only when it was obvious "that the persons involved are psychotic or so mentally retarded that they would not be capable of looking after their progeny."[3]

Social or environmental considerations are not found in the law, as it now stands, and as in many American states (such as Utah), the Province authorities may have shifted from an allegedly genetic basis (eugenic in character) to one that stresses parental ability and social considerations.

Mr. David Gravells, President of the Calgary group, who placed the resolution before his constituency, is in favor of voluntary sterilization, if at all.[4] In the light of the present attack on the amendment of 1937, and an annual average of 60 operations, it will be interesting to see how the argument over the use of compulsion (in the case of mental defectives) in Alberta ends.[5]

ALBERTA -- FOOTNOTES

1 There were several significant changes made in the 1937 amendment to the Sexual Sterilization Act of 1928, but the most important was perhaps the exemption of mental defectives from the consent requirement. To the original category of "transmission of the disability to progeny" the amendment clearly designated the categories of "psychotic person" and "mentally defective person" in the law and added a provision in both which says that where the exercise of the power of procreation "involves the risk of mental injury to such person or to his progeny" sexual sterilization may be specified. While the original 1928 law mentioned discharge as a prior condition to the operation of the law, it is no longer necessary for discharge to be a factor in the case, although it might be argued that sterilization is never eugenically necessary if institutional supervision is adequate. This was apparently not the belief in Alberta, where it was felt that institutionalized mental defectives should also be sterilized in certain cases. The report of the ANA in 1936 said that 205 operations had been performed in Alberta up to 1934 under the first act. "The law is not strictly eugenic," they said, "in that heredity does not have to be proved, and in fact only 62% of the female cases and 58.8% of the male cases had a psychopathic heredity. The number of cases indicates that the law is only sparsely enforced." (ES, at 8) This same criticism (that of lack of clear-cut proof of transmissibility) was probably true of

most American sterilization laws. For a very brief early account of the Alberta sterilization law, see Hilda F. Pocock, "Sterilization in the Empire: An Account of the Working of the Alberta Act," 24 Eugenics Rev. 127 (1932).

2 Letter to author, dated July 20, 1960. Dr. MacLean together with E.J. Kibblewhite in an article "Sexual Sterilization in Alberta, " 28 Can. Pub. Health J. 587 (1937) concluded: "In conclusion, the work of sterilization in the province of Alberta has been carried on very quietly and efficiently and the results have been pre-eminently satisfactory." (at 590). To get an idea of how the element of consent is handled, Dr. MacLean reported that up to the end of 1959 a total of 3,566 patients had been considered by the Provincial Eugenics Board. Of that number, only 1831 had been sterilized. (Letter, supra.)

3 As reprinted in the New York Times, Dec. 22, 1963 at p. 10.

4 Personal letter to author dated January 14, 1964. Mr. Gravells did not report what happened to the resolution, but presumably there has been no further action in this matter. Regarding the amendments of 1937, the MacLean-Kibblewhite article said: "Since the passing of the amendments, it has been possible to sterilize a number of defectives from whom consent could not be obtained formerly." Supra note 2, at 589. Their table of figures in the article indicated a large number of cases prior to 1937 where this was the case. In an earlier article

by C.A. Baragar, George A. Davidson, W.J. McAlister, and D.L. McCullough entitled "Sexual Sterilization - Four Years Experience in Alberta," 91 Amer. J. Psychiatry 897-923 (1935), the authors reported that up to June 15, 1934 there were 414 cases "presented and passed," whereas there were only 261 "operations performed." (at 900) Notwithstanding the difficulty in obtaining consent, the authors felt that the Alberta sterilization program was an effective one. A large number of detailed tables at the end of the article give valuable data on the operation of the law from 1929-1934.

5 Curiously, Dr. T.L. Fisher, the Secretary-Treasurer of the Canadian Medical Protective Association and undoubtedly one of the country's leading authorities on sterilization and Canadian law, wrote the following in a letter to this writer dated April 12, 1963: "To the best of our knowledge the sexual sterilization Act in the Province of Alberta did not get to the place where it was proclaimed - it is quite possible it was stopped some time before that stage but the only thing I carry in my mind about it is that it did not come into effect." And this was said after over 2,103 sterilizations.

BRITISH COLUMBIA

The Province of British Columbia passed a Sexual Sterilization Act in 1936, providing for a Board of Eugenics consisting of a Judge of a Court of Record in the Province, a psychiatrist, and a person experienced in social-welfare work. The act clearly requires consent of patient or next-of-kin if the patient is not capable of giving consent. As in the case of Alberta, there are no provisions for procedural protections or review of such action, although conceivably no litigation would be necessary if consent procedures are strictly followed.

There are no records for the period prior to 1942, but the number of operations performed from 1942 to February, 1963 was 152, of which 141 were on women.[1] The small number of reported operations would seem to indicate that the Province of British Columbia was following a program of very selective sterilization.

In 1960, Doctor Bernard L. Diamond of San Francisco, served as a special consultant to the American Psychiatric Association for their report on mental health legislation in British Columbia. Part of his recommendations dealt with their Sexual Sterilization Act. Doctor Diamond found the act to be legally sound --

> ...If anything, it provides greater safeguards for the rights of the individual than do many similar American statutes.[2]

However, when he turns to a substantive analysis of this act, his critique becomes essentially a critique of sterilization laws in general.

Section 4 (1) of the Act reads as follows:

> When it appears to the Superintendent of any institution within the scope of this Act that any inmate of that institution, if discharged therefrom without being subjected to an operation for sexual sterilization, would be likely to beget or bear children who by reason of inheritance would have a tendency to serious mental disease or mental deficiency, the Superintendent may submit to the Board of Eugenics a recommendation that a surgical operation be performed upon that inmate for sexual sterilization.[3]

Addressing himself to this provision of the act, Dr. Diamond, in the remainder of his report, makes a significant contribution to the contemporary literature on sterilization laws and their implications. For this reason, it is substantially reprinted as follows:

> However, all laws providing for the sterilization of the mentally ill or defective which have as their basis the concept of the inheritability of mental illness and mental deficiency are open to serious question as to their scientific validity and their social desirability.
>
> Laws of this type followed logically from prevailing psychiatric concepts of the late 19th and early 20th centuries, in which mental illness, be it psychosis, psychoneurosis, or mental deficiency, were regarded

as inherited deficiencies or weaknesses. Particularly in relation to mental deficiency, the development of fairly precise tests of intelligence, such as the Stanford-Binet test, promulgated the idea that intelligence was a fixed attribute of the individual and was primarily determined by genetic factors. Legislative bodies were impressed by lurid clinical descriptions of the Jukes and the Kallikaks -- families in which antisocial behavior or mental deficiency recurred in generation after generation.

Present day psychiatry, although still vitally interested in the possible genetic factors in mental illness and mental deficiency, avoids the sweeping generalizations so prevalent in the past. Genetics has evolved into a much more precise science and very significant work is being done on the inheritance of mental illness. Nevertheless, this is a field of great conflict; there has been much learned in recent years of the impact of environment on child development; of the essential role of psychodynamic factors in personality development and production of mental illness; and of the susceptibility of the child in utero to unfavorable metabolic and infectious conditions of the mother.

In short, the present state of our scientific knowledge

> does not justify the widespread use of the sterilization procedures in mentally ill or mentally deficient persons. Particularly, it is doubtful whether the highly specialized scientific knowledge which is required to determine the "nature" versus "nurture" elements in a given case are available to a Board of Eugenics composed of a judge, a psychiatrist, and a social welfare worker. Even if the Board were to be composed of highly trained specialists, it is improbable that the clinical information concerning the particular patient to be sterilized would be sufficient for them to be able to form a rational decision as to the justification for sterilization on genetic grounds.
>
> It is sometimes proposed that sterilization is demanded, irrespective of the uncertainties of our knowledge of heredity, in that a mentally ill or feebleminded person is incapable of providing the emotional and material environment required to raise a normal child. Perhaps this is so, but it raises issues of a sociological and political nature of a very uncertain character and it may be most dangerous to apply such sociological concepts under the guise of a genetic thesis that is far from proven and highly uncertain in its application.[4]

Other Canadian provinces have considered sterilization legislation,

but Alberta and British Columbia are the only ones to enact such laws in Canada. In the light of the fact that voluntary non-therapeutic sterilization seems too extreme for such organizations as the Canadian Medical Protective Association, it is unlikely that any other provinces will follow the precedents set by Alberta and British Columbia.

BRITISH COLUMBIA -- FOOTNOTES

1 Information supplied by the office of Provincial Mental Health Services, Essondale, B.C. The Mental Health Division of the Department of National Health and Welfare, Ottawa, gave the figure of an average of 15 operations yearly, but this could conceivably have been based on figures beginning in 1936. If so, the annual average is declining to around 6 sterilizations per year.

2 His comparison to the American laws is probably accurate, since only Connecticut, Vermont and Minnesota out of 26 present laws (27 if we count the Washington law) are voluntary in nature, at least if we examine the laws on paper only. In comparison to the Alberta sterilization act, it is not "half-and-half", but its consent provision applies to all persons covered in the law.

3 The use of sterilization prior to discharge, and as a condition for its use, is not unusual in the American laws. Also, one should note the presence of terms such as "would be likely to beget or bear" and "would have a tendency to...." American laws often use the terminology of "probable potential parent of...." or affliction (disease, deficiency, etc.) which is "likely to be transmitted to descendants...."

4 Taken from section III on Miscellaneous Statutes of the Diamond Report,

at 10-11. This Report represents Dr. Diamond's personal views, not those of the American Psychiatric Association. Dr. Diamond's last statement would clearly apply to such recent situations as the Ohio sterilizations ordered by Judge Gary in the Probate Court at Zanesville.

5 For the latest statement, see T. L. Fisher, "Legal Implications of Sterilization," 91 Can. Med. Assoc. J. 1363 (Dec. 26, 1964). Dr. Fisher, who is Secretary-Treasurer of the Association, also wrote several earlier articles: "The Legal Aspects of Sterilization," 58 id. 512 (1948) and Part II, 59 id. 80 (1948); "Sexual Sterilization Without Permission," 61 id. 183 (1949); and "Sexual Sterilization," 76 id. 785 (1957). For a discussion of eugenical and other types of sterilization and the law in Canada, also see Bernard Green, "Family Planning and Canadian Law," 6 Applied Therapeutics 331 (1964), at 333-34; and Elinor F. E. Black, "Abortion and Sterilization," 33 Manitoba Bar News 33 (1961) and comments at 38-45.

CHAPTER THREE

THE RETURN OF PUNITIVE STERILIZATION: CURRENT ATTACKS ON ILLEGITIMACY AND THE ~~AFD~~ AFDC PROGRAM

THE RETURN OF PUNITIVE STERILIZATION: CURRENT ATTACKS ON ILLEGITIMACY AND THE ~~ADC~~ AFDC PROGRAM

In addition to the sharp decline in the use of compulsory state sterilization laws, and the increased use of voluntary (private) sterilization, another significant development in the field of sterilization has taken place in the past decade. This is the return of punitive sterilization proposals aimed particularly at the mothers (in some cases both parents) of illegitimate children, especially those receiving help from the Aid to Families With Dependent Children Program ~~(A.D.C.)~~ (A.F.D.C.).

Numerous legislative attempts have included sterilization as part of a program of recommended punitive action that may include the loss of welfare benefits, the imprisonment and/or fining of the mother, the loss of custody of the children, and various combinations of the above. The arguments in favor of these proposals are couched in economic terms (the purported rising costs of welfare services), or "moral" terms (the alarming rise of illegitimacy, especially among Negroes), and sometimes covertly or overtly on racial grounds. The motivations surrounding these proposals are not always as obvious as they seem on first glance, but the reactions to some of these proposed laws have at times been sharp and without pretense.[1]

Since all of the punitive non-eugenic sterilization proposals have failed to pass, and in some states have not created widespread discussion in the press, there may be state proposals that are not included in the

subsequent summary of these proposals. Or, it is possible that the inclusion of sterilization was an "afterthought" or part of a larger (anti-) welfare measure. In any event, the following states have evidenced interest in the problem.

Delaware

The mother of more than two illegitimate children, in their proposed law, would have to request sterilization in order to receive aid to dependent children for additional children.[2]

Georgia

Three grand juries in 1959 considered recommending sterilization of all mothers of illegitimate children (not merely those covered by ADC).[3]

Illinois

This state's battle over welfare policy and birth control information broke into the headlines in late 1962 and early 1963. During a special CBS Reports program entitled "Birth Control and the Law" (presented on TV on May 29, 1963), State Senator Morgan M. Finley mentioned a proposed bill in the legislature to penalize either parent of two or more illegitimate children (Senate Bill No. 1066). The first illegitimate child would not "count"; the second would be a misdemeanor subject to fine and/or imprisonment up to one year, and the third would be a felony subject to one to 5 years of imprisonment for either or both parents. Another bill, House Bill No. 1561, provided for a Family Court order to have the child removed from the custody of its parents. Neither bill had any provisions for sterilization. In the midst of the struggle over the

ADD

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California

A proposal by District Attorney Lawrence Drivon of San Joaquin County that a study be made of the possibility of sterilizing unfit parents who are drawing state aid was firmly rejected by J. M. Wedemeyer, the state director of social welfare, in September, 1961. Wedemeyer called sterilization a "dubious" form of punishment and said that the percentage of serious offenders on the relief rolls is small. "There are many areas where services can be given short of sterilization."[1a] The proposal died aborning.

While such proposals have not reached the legislative stage in California, action in the lower state courts has been dramatic, even sensational at times, and sterilization as the "price" of probation in certain criminal cases has received national attention in recent years, especially where welfare recipients are involved.

The first case involved Miguel Vega Andrade, who was convicted of non-support in the Municipal Court of Pasadena in December, 1963. He "consented" to be vasectomized (along with marrying the woman with whom he was then living with and partially contributing for the support of his 4 minor children by his previous marriage, who were receiving public assistance), and on February 6, 1964, Judge Joseph A. Sprankle, Jr. granted him probation. Andrade later regretted his decision and petitioned the California Supreme Court for a writ of habeas corpus, and later the United States Supreme Court on certiorari, but both appeals were denied and presumably any efforts by him to obtain a reversal operation would have to be private in nature.

In a case more directly related to public welfare, two persons, Victoria Tapia and Marcos Palafox, who were convicted of defrauding the county welfare department, were given reduced sentences and probation in the Superior Court of Santa Barbara County after they submitted to sterilization in August, 1965.

But the really sensational case was that of Mrs. Nancy Hernandez in May, 1966. She had been convicted of the misdemeanor of being in a place where marijuana was in use, had pleaded guilty, and would have received a suspended sentence and probation had she submitted to sterilization. But unlike Andrade, who changed his mind after the operation, Mrs. Hernandez had agreed to the judge's terms, but then changed her mind and refused to go through with the operation. Her probation was revoked and she was ordered to jail. Her lawyer, Louis Renga, called the probation order "unreasonable, capricious, illegal and unconstitutional" and filed for a writ of habeas corpus and her release, which was later granted. Municipal Judge Frank P. Kearney, the sentencing judge, had called the sterilization-probation proviso "nothing novel---legally, medically or sociologically." He later told newsmen that Mrs. Hernandez, the mother of two young children "...should not have more children because of her propensity to live an immoral life." And he further explained:

> It is my sincere belief that the interests of society and of this defendant would have best been served by the proposed probationary terms. I believe this woman is in danger of continuing to live a dissolute life and to be endangering the health, safety and lives of her minor children.[1b]

Although she was the recipient of welfare assistance for her illegitimate baby and herself, there was no record of misuse of these funds. Mrs. Hernandez had no previous criminal record, and the pre-sentence probation report was a favorable one, with no mention of sterilization as a condition for probation.

The decision of Superior Court Judge C. Douglas Smith of Santa Barbara County was a stinging rebuke to Judge Kearney. In his opinion in the habeas corpus case, Judge Smith struck down the sterilization order contained in the proposed probation, vacated the execution of the sentence, recalled and vacated the commitment, and released Mrs. Hernandez "to the supervision of the probation officer under the terms and conditions of probation recommended by said probation officer in the original report." Perhaps the most significant aspect of Judge Smith's decision is his discussion of Mrs. Hernandez's alleged "immorality." While the taxpayer might not like supporting the likes of Mrs. Hernandez and her illegitimate child, and notwithstanding Judge Kearney's view of Mrs. Hernandez's "unfitness" as a mother, the law is the law, and must be followed.

> In short, as applied to cases such as the one before this Court, if the aid to needy children provisions of our welfare statutes are not to the liking of a particular Judge, he may not ignore them or change them, or substitute a penalty of his own which is not authorized by law. It is for the people or their legislative representatives to make any change in the law that they deem desirable.[1c]

Judge Smith could find no logical or legal connection between the use of narcotics and sterilization as a means of rehabilitation. (The layman would also be hard put to find one, too). In conclusion, Judge Smith found that the order for sterilization was in excess of the judicial power of the Municipal Court, and therefore that order, the revocation of the probation order, and the subsequent sentence were all void. While Judge Smith's opinion is a ringing affirmation of the Rule of Law and a warning against the slipshod and biased use of judicial discretion in cases of this kind, it is difficult to predict what other lower court California judges will do in similar cases in the future, notwithstanding the comment by the general counsel of the American Civil Liberties Union's Southern California affiliate, A. L. Wirin, who said that Judge Smith's action on appeal represented "an important precedent that will discourage other judges from imposing sterilization on the indigent."[1d] The ACLU filed an amicus brief with Judge Smith attacking Judge Kearney's actions.

public aid-birth control controversy, nothing further was heard on this proposed legislation.

But sterilization as a "solution" to the problem of rising welfare costs and illegitimacy did appear in a controversial memorandum by a then member of the Illinois Public Aid Commission, Mr. William L. Rutherford, which was sent to the other members of the PAC and the members of the General Assembly. Dated March 20, 1963, this Memorandum recommended statutory changes in the Illinois Statutes regarding prostitution. All persons convicted of being prostitutes "should be sterilized." For purposes of definition, the Memorandum included under the rubric "prostitute" the following persons: male frequenters of prostitutes, including procurers; persons who bear more than one illegitimate child; and any male proven "to have sired more than one illegitimate child." To further extend the sterilization coverage, the Memorandum included the following: "For purposes of this act, illegal abortion shall be treated the same as [sic] giving an illegitimate birth."

The Rutherford Memorandum did not result in any legislation, but it was not without impact on the larger, and perhaps noisier, birth control controversy.[4]

Mr. Rutherford, in answer to this writer's inquiries about the motives for this Memorandum, wrote as follows:

> ...I believe from the experience we had in Public Aid that we can honestly say this is not a desire to be punitive,

> but it is a desire to find a desperately needed protection for the public. The tremendous unkindness to unwanted and uncared for illegitimate children increasing in numbers by geometric proportions makes the problem of Aid for Dependant [sic] Children anything but academic. The public should be protected from the calloused indifference and the deliberate use of innocent children as a substitute for personal responsible behavior to obtain economic advantage....
>
> ...My deep concern is for the welfare of children first and the integrity of good government and tax structure as a close second. We simply need respect for the law and the basic morals that underlie the law if we are to continue as a free people. The increase in expenditures will mean State bankruptcy if we subsidize this sort of parent indefinitely.[5]

Illinois still does not have a criminal illegitimacy or sterilization (for prostitutes) act, but the economic and racial overtones are by no means dead.

Louisiana

The Legislature of the State of Louisiana set up a special committee to study the problem of illegitimacy in 1956. In their report dated June 5, 1958, the Committee reported that sterilization had been considered

Iowa

In December, 1963, State Senator Howard Buck suggested the compulsory sterilization of Iowa mothers receiving ADC assistance who continue to have illegitimate children, at a meeting of the Iowa Legislative Committee studying ADC problems. Buck, who was a member of this committee, said:

> It is an injustice to the children and an injustice to society to bring youngsters into the world under such extreme conditions. I think public opinion would be favorable to the sterilization idea.[5a]

His proposal provoked vigorous arguments in the Iowa press, as exemplified by an editorial in the Des Moines Register, which said among other things:

> It's difficult to believe that any court this side of the Iron Curtain would uphold such a plan. It's equally difficult to imagine a case ever reaching the courts, because no legislature or administrative agency would be willing to subject Americans to this kind of treatment. The plan in effect would deny women the chance to bear children -- legitimate as well as illegitimate -- solely because of their poverty.
>
> But if the senator's solution is unacceptable, the problem is nevertheless real. Mothers who have inadequate support for their children should not continue to produce more children.
>
> Sterilization, which the senator suggests, is a form of birth control. Other forms of birth control are available that are effective and far more acceptable. Although it is not easy to make them compulsory, more effort could be made to have them used.[5b]

Apparently, no new legislation resulted from the furor over the Buck proposal.

as one of several possible solutions to the problem, but was soundly rejected in the following language:

> ...Laws of this type are intrinsically evil, completely immoral and violative of all concepts of Christianity. Notwithstanding the fact that the U.S. Supreme Court has upheld the use of sterilization as a punishment for certain types of offenses in cases arising under the laws of other states, this Committee refuses to recommend in any form either as remedial or punitive legislation anything that would impair, avoid or destroy the basic function of any human being to conceive or to procreate.[6]

As part of a "package" of civil rights (anti-civil rights to be exact) laws passed in 1960, the Legislature included Act 75 of 1960 which declares that "conceiving and giving birth to two or more illegitimate children is a crime punishable by a fine of not more than one thousand dollars, or imprisonment for not more than one year, or both." Both parents "shall be equally guilty" under this law. Sterilization was not a part of this law (Louisiana has never had any type of sterilization law). The question of how rigorous the enforcement of the act has been is not known at this time.

Maryland

The strongest of any of the recent punitive sterilization proposals for the purpose of curbing illegitimacy was that of Maryland in 1960.

Senate Bill No. 91, proposed by State Senator John L. Sanford, Jr. of Worcester County, would have subjected any woman convicted of giving birth to more than two illegitimate children to a fine of not to exceed one thousand ($1,000) dollars or imprisonment for not exceeding 3 years or both. In addition, the convicted woman would be declared as "morally unfit for the care, custody and control of any of her existing children" and the state would remove these children permanently from her care, custody, and control and would permanently bar her from receiving any payments from any public welfare programs within the state. And finally, "there shall be performed forthwith upon the mother who is convicted, the operation of sterilization, which is here defined as the operation of salpingectomy."

This proposal passed the Maryland Senate by a vote of 23 to 3, but was defeated in the House of Delegates after a public hearing before the House Committee on Judicial Proceedings.

In this same 1960 session, the General Assembly requested the Governor to appoint a special commission to study the problem of illegitimacy. The Commission to Study Problems of Illegitimacy Among the Recipients of Public Welfare Monies in the Program for Aid to Dependent Children submitted its report to Governor Tawes on December 6, 1961. In Recommendation Four of the Report, the Commission soundly rejected any attempt to use sterilization as a "solution" to the problem of illegitimacy: "The Commission does not recommend legalization of abortion or sterilization as a method of solving the illegitimacy problem." And in a

comment on this recommendation, they said:

> The Maryland Commission disapproves the use of sterilization and abortion as a remedy to solve the illegitimacy problem on humanitarian and practical grounds. Contrary to popular opinion, such methods would be "just a drop in the bucket" insofar as the solving of illegitimacy is concerned.[7]

But the Commissions's report did not quiet the sterilization proponents in Maryland. In the 1963 session, Delegate Russell O. Hickman of Worcester proposed a bill that would have embodied a voluntary sterilization provision similar to the present voluntary laws in Virginia and North Carolina, coupled with a compulsory sterilization section applying to persons under 21 with hereditary mental illness, mental deficiency, or epilepsy. The bill was tabled for a year and apparently no further progress has been made on this legislation. The Hickman proposal, unlike the Sanford bill, did not concern itself with the problem of illegitimacy. It would also provide procedural safeguards (appointment of a guardian ad litem and Circuit Court review for minors and a 30 day waiting period in all cases) that were totally absent in the Sanford bill.[8]

An important sidelight in the discussion of the Hickman proposal in 1963 was the stand of the State Medical Society, which took no firm position on the bill. However, Doctor Karl F. Mech, speaking as legislative chairman of the society, noted that the bill had a significant weakness in limiting (as do the Virginia and North Carolina voluntary

laws) the surgical procedures to two. He added that "there is a psychological factor involved in such operations which brings psychiatrists into the picture as well."[9]

Further efforts at sterilization legislation of any kind in Maryland seemed to have reached a state of limbo, but the overtones of such efforts still remain.[9a]

Mississippi

The most persistent state in the nation in its efforts to "solve" the problem of illegitimacy through punitive sterilization is Mississippi. Since 1958, legislative proposals of various kinds have made headlines. In the 1958 legislative session, State Representative David H. Glass of Kosciusko proposed House Bill No. 479, "An Act to Discourage Immorality of Unmarried Females by Providing for Sterilization of the Unwed Mother Under Conditions of This Act; And for Related Purposes." The bill provided for the chancery court to institute proceedings against any unmarried female giving birth to a second or subsequent illegitimate child. If the court finds that the "immorality of the said female is detrimental to the welfare of the state or community," it could order the state board of health to accomplish a "temporary or permanent sterilization" of the woman.[10]

Sterilization could be avoided by two means: if the unmarried female provides evidence at the hearing that she is now married and living with her husband, the proceeding is dropped. Or, after the court orders a

sterilization, if the unmarried female objects to the operation, she can be "relieved" from such sterilization by providing a bond of not less than three thousand ($3,000) dollars "conditioned that she will cease and desist from such immorality and will amply support and maintain any illegitimate heretofore borne to her and give them the benefit of a common school education." However, if she gives birth to another illegitimate child, she forfeits the bond unless she has married and is living with her husband.

The Glass proposal died on the House calendar. The racial implications of the proposal were clearly set out by Rep. Glass in a communication to this writer:

> During the calendar year 1957, there were born out of wedlock in Mississippi, more than 7,000 negro children, and about 200 white children. The negro woman, because of child welfare assistance, [is] making it a business, in some cases of giving birth to illegitimate children. ***** The purpose of my bill was to try to stop, or slow down, such traffic at its source.[11]

Although Rep. Glass retired from politics after serving 28 years in the Mississippi Legislature, the efforts to legislate illegitimacy out of existence continued. In the 1962 regular session of the Legislature, State Senators Montgomery and Williams proposed an act (Senate Bill No. 1984) establishing planned parenthood clinics under the State Board of

Health. The bill required mothers delivered at state expense to attend the clinic and included provisions for penalizing certain mothers of illegitimate children and for authorizing voluntary sterilization operations for designated persons under the law. Any woman who is the mother of at least one illegitimate child "shall attend the planned parenthood clinic a reasonable number of times" and failure to comply with this provision would be a misdemeanor punishable by a fine of not more than five hundred (500) dollars or imprisonment for not more than six months, or both. This bill passed the Senate but died in House Committee and did not become law. It was reintroduced in the 1964 session by Senator Williams (Senate Bill No. 1648), but again failed, partly because attention was focused on another bill, House Bill No. 180, which made it a felony to become the parent of an illegitimate child. It was this latter bill that created a national furor.

House Bill No. 180, introduced by Rep. W. B. Meek and six others, made it a felony for any person to become the parent of a second or subsequent illegitimate child within the state of Mississippi and conviction carried a penalty of not less than one year nor more than three years in the State Penitentiary. A subsequent conviction was punishable by a prison sentence of not less than three years nor more than five years. This bill was novel in several respects. It made both parents punishable under the law. And in an amendment to the original proposal, Rep. W. Todd McCullough added a section that would enable

"any parent convicted hereunder may submit to sterilization in lieu of imprisonment." It was this provision which led to national attention (together with the rather stiff criminal penalties in the original bill).[12]

The bill passed the House by a vote of 72 to 37. Then came the crash of criticism. The March 30, 1964 issue of Newsweek reported the details of the bill's passage and said that the Human Betterment Association for Voluntary Sterilization opposed the bill (calling it "shocking") because it was compulsory.[13] Religious leaders became vocal, and the news of the bill's provisions was carried in many leading papers across the nation. The Student Nonviolent Coordinating Committee (SNCC) issued a pamphlet entitled Genocide in Mississippi, which clearly detailed the racial overtones of the bill.[14] Figures on illegitimate births in the state for the year 1962 were cited by the backers of the bill to prove the necessity of stopping illegitimacy, and as in the earlier Glass proposal, the figures showed a preponderance of Negro illegitimate births (8,203 to 444 whites; 26.1% of all Negro births were illegitimate and 1.6% of all white births were illegitimate).

Under heavy pressure, the Senate relented. The sterilization section was dropped from the bill, and the penalties greatly reduced.[15] In its final form, the bill made it a misdemeanor to become the parent of an illegitimate child, punishable by a sentence of not less than 30 nor more than 90 days in the county jail or a fine of not more than 250 dollars, or both. The bill passed and was approved by the governor, and Mississippi now joins Louisiana in the ranks of those states that make

unmarried parenthood a crime.

Apparently the 1964 regular session of the Mississippi Legislature may go down in history as the "sterilizing" session because a third, though unheralded proposal, was presented by the former Superintendent of the Mississippi State Penitentiary, now Rep. Fred Jones of Sunflower County. Mr. Jones' House Bill No. 788, "An Act to Provide for the Sexual Sterilization of Habitual Criminals", died in House Committee, but he may introduce the bill again at a future session.

It is important to note that not all of the pressure for new sterilization laws in Mississippi are racial in origin. There may be genuine medical (obstetrical and gynecological) support for voluntary sterilization programs without the genocidal stamp that the SNCC pamphlet applied to the original House Bill No. 180. During the heated debate after that bill passed the House, an article by Dr. John E. Lindley of Meridian appeared in the Journal of the Mississippi State Medical Association, which indicated the strong support of the state medical association for a voluntary sterilization proposal such as that proposed in 1962 and 1964. As in Virginia, medical interest was largely motivated by medical interest in legal liability. In speaking of the 1962 proposal (Senate Bill No. 1984), Dr. Lindley wrote:

> ...This would protect the physician from legal liability when performing sterilization procedures requested by the patient for nontherapeutic reasons and thereby allow

> more liberal use of this procedure especially in the indigent patient. *****
>
> It is admittedly difficult for any person or group of persons to say at what point voluntary non-therapeutic sterilization should begin and end. However, we as obstetricians and gynecologists are in a position to be more familiar with this aspect of life than others, and we have the responsibility of trying to help provide a satisfactory solution to the massive population explosion... It is ironical that the population group which most needs this service and in general desires it, the indigent patient, is in the least favorable position for obtaining it. Therefore, it falls the responsibility of the agency which handles the large health problem of these indigent patients to provide a means whereby voluntary sterilization can be obtained at State expense....[16]

Perhaps the most startling development in the Mississippi sterilization picture was the statement by Mrs. Fannie Lou Hamer of Sunflower County in a speech in Washington before the Women's International League of Peace and Freedom. Mrs. Hamer said that -

> six out of every ten Negro women were taken to Sunflower City Hospital to be sterilized for no reason at all. Often the women were not told that they had been sterilized until they were released from the hospital.[17]

If Mrs. Hamer's statements can be publicly corroborated, the pamphlet on Genocide in Mississippi will be far from extreme in its title, although it might be closer to the truth to call it genocide by sterilization.

North Carolina

Despite the fact that North Carolina has the most far reaching sterilization program in the country (see the section on the operation of North Carolina law, supra), efforts at extending sterilization to non-eugenic uses (namely, illegitimacy) have appeared. Senator W. M. Jolly introduced a bill in the 1957 and 1959 sessions of the North Carolina General Assembly that would have extended the existing eugenic sterilization law to include "grossly sexually delinquent persons." Giving birth to a second or subsequent illegitimate child would be grounds for a hearing before the State Eugenics Board, which could order sterilization. The mere fact of the birth of a second illegitimate child would not be sufficient for an order for sterilization, but would be considered along with other factors (such as prostitution, repeated vagrancy, drug addiction, chronic alcoholism, feeble-mindedness) for determining whether the woman was a "grossly sexually delinquent" person. The Eugenics Board had three choices: an order of sterilization; an order for the woman to undergo psychiatric treatment at a state facility; no order due to insufficient proof of grossly sexually delinquent behavior.

The birth of a third illegitimate child would shift the burden of proof to the allegedly grossly sexually delinquent female:

> (3) Upon the birth of a third illegitimate child, the mother shall be ordered by the Eugenics Board to show cause why said Board should not find as a fact that she is a grossly sexual delinquent and upon that basis order her sterilization.[18]

The Jolly bill was opposed by religious and medical representatives, including Dr. Claude R. Nichols of the Department of Psychiatry at Duke University Medical Center. The failure of this proposal marked a turn in the sterilization history in this state. Attention now turned to non-punitive measures, such as a voluntary sterilization law, which was passed in 1963. As early as 1950, persons in North Carolina were calling for a clarification of the problem of liability of physicians for voluntary operations. John S. Bradway, Director of the Duke University Legal Aid Clinic, called for the Medical Society of North Carolina to give consideration to a statute to clarify this defect in the existing eugenic statute.[19] A physician, Dr. John C. Burwell, Jr., in an article, "The Physician Looks at Sterilization" said:

> Recent legislative attempts in North Carolina to ameliorate the problem of illegitimacy by some form of compulsory sterilization may be both detrimental and beneficial to those of us interested in voluntary sterilization.

> Detrimental in that these attempts leave an implication in the public mind that any consideration of sterilization is on a compulsory basis, but beneficial in that at least the problem is brought to light.[20]

Strong racial overtones in these recent attempts at passing punitive sterilization laws in North Carolina were discussed in a recent article in which the author, Joseph L. Morrison, referred to Negro illegitimacy as a "shibboleth" used by those resisting public school desegregation in the south, and concluded:

> It is not contended here that the welfare debate, the civil rights struggle, and North Carolina's flirting with compulsory sterilization for illegitimacy were casually related. Nevertheless, those sincerely concerned persons who sought to enact such a law operated not in a vacuum but in a climate of opinion favorable to certain punitive action. The Jolly-Davis Sterilization Bill was defeated not by the established social welfare agencies, however much they have privately inspired resistance in other quarters, but by ordinary people offended in their religion and in their sense of humanity -- and by a talented publicist, Harry Golden. The inference seems unavoidable: the friends of enlightened social service must unceasingly cultivate allies; their educational effort must be vastly extended and intensified.[21]

In 1963, North Carolina joined Virginia as the second state in the country to pass a voluntary sterilization law. It is too early to make an assessment of the law's operation, but it is apparent that coupled with its already existing eugenic sterilization statute, North Carolina now has the most systematic sterilization program in the country.

Virginia

Like its sister state, North Carolina, Virginia possesses a eugenic sterilization law of long standing, but nonetheless Virginia has entertained proposals for punitive (non-eugenic) sterilization of woman producing illegitimate children. Rep. E. Ralph James of Hampton presented a proposal in the 1956 legislative session which would have provided for the superintendent of public welfare in any county of the state to petition the judge of the Circuit or Corporation Court of his county or city to order any woman who has given or who gives birth to more than one illegitimate child to show cause why she should not be sexually sterilized. Following the failure of this proposal, (House Bill No. 394) several studies appeared reporting on illegitimacy and the ADC program in the state.[22] Interest in the problem of illegitimacy led to the creation of a Commission to Study Problems Relating to Children Born Out of Wedlock by the Virginia General Assembly in 1958. The Committee's Report was issued in 1959 and made several suggestions in the area of sterilization. A majority of the Commission opposed any form of compulsory sterilization based on economic or moral grounds (illegitimacy, for

Pennsylvania

The Pennsylvania Senate passed a bill (Senate Bill No. 297) in the 1963 Legislative Session providing the state with the power to remove children from the custody of unwed mothers of two or more illegitimate children receiving ADC assistance on the theory that they were not providing a "suitable home" within the meaning of the law.

> (10) As used in this subsection, "suitable home" means a home wherein food, clothing, shelter and a moral atmosphere in conformance with the accepted standards of the community are maintained for a child or children Provided however That the birth of more than two children to an unwed mother shall create a rebuttable presumption that the habitation maintained by her is not a suitable home. (p. 6)

The bill passed the Senate by a vote of 29-15, but failed to be reported out of the Public Health and Welfare Committee of the House. A similar proposal (Senate Bill No. 259) was introduced by Senator Albert R. Pechan in the 1965 Legislative Session, but it was dropped from the Senate Calendar. Senator Pechan, who introduced the 1963 proposal with Senators Berger and Beers, did not include subsection 10 in his later bill. Neither of these proposals included any provisions for sterilization of the "errant" mothers, but they are typical of the current campaign in many states against mothers of illegitimate children who are receiving AFDC ~~ADC~~ or other forms of public assistance. Senator Pechan plans to introduce similar legislation in the next regular legislative session.[21a]

Although Pennsylvania is without any compulsory or voluntary sterilization legislation, sterilization was proposed and accepted in an unusual aftermath of a murder case in Philadelphia in May, 1966. A 24-year-old woman,

Francine Rutledge, was found guilty of second degree murder for having thrown her 4-day-old baby to its death down an apartment building incinerator chute the previous September. This child was her fourth illegitimate baby, the other three illegitimate children having since been placed in foster homes. According to newspaper accounts, she has an IQ of 62 and a mental age of 12, and was under great strain following the birth of her fourth child. Before sentencing her to an indefinite term in the State Correctional Institution for Women at Muncy, Judge Raymond Pace Alexander of the Court of Common Pleas (No. 7) of Philadelphia advised her to undergo a sterilization operation. He pointed out that he could not order her to be sterilized, and told her, "This is a recommendation, not a compulsion....you ought to do it."[22a] He emphasized the fact that he was not ordering sterilization, but that he was merely suggesting it "as the best solution in a situation of this sort." Following the imposition of sentence, he told her that if she underwent sterilization he would consider releasing her in 3-1/2 years.[23a]

While the factors in the Rutledge sentence may be unique (four illegitimate pregnancies, low I.Q., mental strain prior to the murder of the fourth child), and a "voluntary" choice was presumably made under these circumstances, the use of sterilization "offers" in criminal cases of this kind still raises some serious questions. Is sterilization, which is usually irreversible in female cases, the only "solution" to a situation of this sort? Does a defendant, under these circumstances (and mentally retarded in this case) fully understand not only the nature of the offer, but the consequences (and especially the long-term ones) of such a surgical action?[24a] Doubtless, Judge Alexander was conscientious and responsible in considering the unique factors of Miss Rutledge's case in his sentence, and no Solomonic jurist has the answers (ideal or final) to the complex and agonizing questions that cases like that of Francine Rutledge raise for Law, Society, and that abstract thing we call the

example). They strongly urged the enactment of a statute making it clearly legal to perform voluntary sterilization operations for non-therapeutic reasons. And lastly, they called for a study of the existing eugenic sterilization statute in Virginia.[23]

Pursuant to the recommendation (no. 6) of the Report of the Commission, the Virginia Advisory Legislative Council studied the existing compulsory sterilization law in Virginia and issued its report, "Sterilization Laws in Virginia" in August, 1961. They completely whitewashed the existing statute and its operation and stressed the need for a voluntary sterilization law.

The House of Delegates of the Medical Society of Virginia adopted a committee report supporting the report of the VALC, which included the proposed voluntary sterilization bill. In the 1962 legislative session, Virginia passed the first voluntary (non-eugenic) sterilization bill in the country and set a precedent that may be followed in other states.[24] Virginia, like North Carolina a year later in 1963, enacted a voluntary bill after punitive non-eugenic sterilization measures had failed to receive legislative approval. The urge to punish "immoral" females seems to be quieted, insofar as legislation is concerned. It will probably spend its energies on attacks on welfare practices, especially where mothers of illegitimate children are involved,[25] or be used as emotional fodder in state political campaigns, which was the case in the 1965 party platform of the Virginia Conservative Party.[25a]

Wisconsin

A simply worded statute was proposed in the 1963 legislative session to make the bearing of children out of wedlock a crime, but no attempt was made to make sterilization a part of the punishment. The bill (No. 259, A). presented by Assemblyman Ronald F. Schuele, read as follows:

> 944.19 REPEATED BEARING OF CHILDREN OUT OF WEDLOCK. Any woman who bears more than 2 children out of wedlock may be imprisoned not less than 6 months nor more than 2 years. Each subsequent birth of a child out of wedlock constitutes a separate offense.

This bill apparently died in committee.

****

Except for the states of Illinois, Louisiana, ~~and~~ Maryland, and Pennsylvania, all of the states that have sought punitive non-eugenic means for the punishment of conceiving or giving birth to illegitimate children are states with already existing sterilization laws. The two states that finally passed some kind of criminal law aimed at checking the rise of births out of wedlock (Louisiana and Mississippi) did not include sterilization in the punishment for the crime.

Efforts at making it a crime to beget illegitimate children is part of a much larger attack by various persons and organized groups on the public welfare programs (especially ~~ABC~~ AFDC) of our states and nation. The famous "battle" of Newburgh, New York in 1961 which dramatically

brought the issues before the American public, in the press and mass media and on TV, was a kind of turning point in the struggle to stigmatize woman on relief as persons who deliberately "make money" out of having additional illegitimate children. Letters-to-the-editor in newspapers in Detroit, Washington, Chicago, and other of our larger cities raise questions about illegitimacy and AFDC payments and sometimes sterilization is suggested as a solution. In a recent Gallup Poll, interviewers asked the following question:

> Sometimes unwed mothers on relief continue to have illegitimate children and get relief money for each new child born. What do you think should be done in the case of these women? How about the children?

About half of the persons in the survey thought the solution was "to stop giving them relief money." Roughly 20% of the persons interviewed (one out of five) suggested that the solution was "sterilize the women."[26]

If the results of the Gallup Poll are at all accurate, they indicate that the many studies of illegitimacy by the Department of Health, Education and Welfare,[27] many of the state welfare agencies, and especially the Greenleigh Associates study of ADC in Cook County, Illinois[28] have failed to dispel the oft-repeated myth of the connection between AFDC programs and the rise of illegitimacy in the country.

Efforts at punishing "immorality," "grossly sexually delinquent"

behavior and just plain procreation is much akin to the efforts at the end of the last century and beginning of this century to sterilize criminals, sexual perverts, and other variously defined "socially degenerate" persons. Even though couched in pseudo-genetic terms, these earlier attempts were aimed at particular groups or types of persons in the society who, the eugenicists feared, would "swamp" the nation with crime, disease, mental disability, and assorted other evils (drunkenness, drug addiction, vagrancy, etc.) Economic arguments almost always come out of such discussions ("can society afford the costs of this degradation?"), and the fight over welfare programs, AFDC included, nearly always begin or end on an economic note, especially that of the allegedly cheated taxpayer. The surgeon's knife (sterilization) seems to have the same magical quality in the minds of some people for "saving" American from its shame, its squalor, its various miseries of human instigation as it did over 50 years ago. History apparently does repeat itself, for the same arguments seem to be used for the same reasons. The racial (Negro) and socio-economic overtones of the earlier attacks are again heard and oftentimes not too covertly. Whereas the earlier eugenic efforts were aimed at cutting off the "defective germ plasm" of the American population before it "drowned" us, current efforts would be aimed at cutting off both the germ-plasm and welfare payments in order to avoid economic strangulation of the public purse. In 1900, the Welfare State was still in its rudimentary stage of development, but figures on mental illness and retardation made some persons

believe that in time, given unchecked births and no sterilizations of the "unfit," we would soon become a nation of institutionalized persons with the minority "fits" supporting the majority "unfits."

Punitive methods of stopping or limiting so-called "immoral" acts have met with repeated failure in numerous other areas of the criminal law (witness fornication, adultery, abortion, homosexuality, and anti-contraception laws). Not only is enforcement of such laws ineffective or even sometimes impossible - or better yet - undesirable, but such laws often times have unexpected injurious effects. In commenting on the 1960 Louisiana law making it a crime to conceive or give birth to two or more illegitimate children, Louisiana State University law professor Robert A. Pascal wrote:

> Although the writer, like almost everyone, is against the conception of a child outside of marriage precisely because it requires a sinful act on the part of its progenitors, he cannot find words strong enough to condemn legislation such as this. It is not reasonable to expect that its enactment will have a noticeable effect in discouraging extra-marital intercourse. Thus the number of illegitimate conceptions is not likely to be reduced. On the other hand, it is reasonable to foresee that, if the article is enforced, once conception has taken place the parents may take steps to avoid prosecution. The best that can be expected is that secret deliveries, often unattended or

> attended by unskilled help under less than medically appropriate conditions, will be attempted, much to the prejudice of the mother and her child. More seriously, there can be little doubt that the number of abortions will increase, not only to the prejudice of the health of the mother, but to the denial of life to the child itself....[29]

It is not unlikely that other states will entertain punitive proposals of the kind discussed above, but in this writer's opinion, increased attention will be given to the passage of voluntary sterilization laws, or possibly the increased use of the extramural provisions of existing sterilization laws (such as that of North Carolina) where compulsion is replaced by consent procedures. If there is any lesson to be learned from the recent rash of punitive non-eugenic proposals aimed primarily at the problem of illegitimacy and primarily (though not always admitted) **at the poor and** at Negroes, it is that complex personal, family, and social problems are not amenable to legal "solutions", especially those that use the theory of punishment or deterrence. More often than not, punitive solutions exacerbate the problem or force it into new outlets, but the core problems (what causes desertion? what causes the lack of effective contraceptive practice? what is the relation between poverty, illiteracy, ~~and~~ jobless-ness and public welfare, especially ~~ADC~~ **AFDC** programs?) are seldom studied with any degree of precision or interest by those who believe fervently in the punishment theory.

So long as the economic and racial implications of these proposals are caught up in the maze of rightwing attacks on government spending programs of various kinds, it will be necessary for public-spirited groups to fight off further attempts to write criminal laws like those described in Louisiana and Mississippi. If vigilance was ever needed, it will be in the coming decade because the Goldwater "syndrome" is but a symptom of the kind of pressures within American society that seek their vindication in the political arena. People on relief are always vulnerable to the kinds of attacks that the man on the street is willing to believe (chiselling on relief, drinking away the money, having more illegitimate children, etc.). The criminal law, always a necessary part of a civilized society, must not be manipulated into a vengeful instrument aimed at particular groups in our society who are not wholly responsible for their present economic and social situation. The history of compulsory state eugenic sterilization laws in America, especially in the 1930s, should have taught us a lesson in human compassion and especially in the dangers that come from using the criminal law as an instrument of social reform. The results were all too obvious, but apparently the blind still lead the blind. The cruelty of stripping mothers of ADC assistance (as happened in Louisiana in 1960 through so-called "suitable home" legislation) can only lead to the increase of untold misery for helpless children. When a legislature through a deliberate state policy practices this kind of lex talionis on children who have committed no crime, except

to be born illegitimate, poor, or deserted by their father - it is time to take a long, hard, serious look at the state of our society.[30] For any society that penalizes (or even starves) its weakest and most helpless link, whether by persistent violation of elementary procedural safeguards, or through the stomach, has taken a long step in the direction of legislating injustice and misery. And these two evils can only bode danger for the future of a society that claims to be democratic and humane.

CHAPTER THREE -- FOOTNOTES

1 An example would be the latest attempts at passing punitive sterilization bills in Mississippi in 1964, which prompted the Student Nonviolent Coordinating Committee to issue a pamphlet entitled Genocide in Mississippi. The pamphlet, together with coverage in the national press and mass periodicals brought revision of the proposal, which eventually passed without any sterilization provision.

2 This data was gathered by the Department of Health, Education, and Welfare, but no date was cited, although the proposal probably appeared in the late 1950s. See the pamphlet, Illegitimacy and its Impact on the Aid to Dependent Children Program (U.S. Dept. of Health, Education, and Welfare, Social Security Administration, Bureau of Public Assistance), April 1960, at pp. 51-52 for discussion of this and other proposals. Dr. Alan F. Guttmacher mentions a later proposal, H.B. 571, General Assembly, Delaware, 1962, which died in Committee. This proposal would have restricted a mother of two or more illegitimate children from receiving welfare aid unless she could produce a medical certificate showing she was unable to have more children. (from Planned Parenthood-World Population, Birth Control Services in Tax-Supported Hospitals, Health Departments and Welfare Agencies (May 1963) at 55 (reference 3).

3 In a letter to the author from John J. Hurley, Acting Director of the Bureau of Family Services, HEW, dated May 28, 1963.

1a As quoted in the Sacramento (Calif.) Bee, Sept. 14, 1961.

1b As quoted in the Washington Post, May 25, 1966, at A9. Also, see the stories in the May 22 and 24 Los Angeles Times and two stories by their staff writer, Harry Trimborn, "Mother and Marijuana Shake Pillars of Law," May 31, 1966, Part II, pp. 1-2, and "Court Upsets Judge's Sterilization Ruling," June 9, 1966, Part II, at 1.

1c At page 11 of the mimeographed opinion of the Court. Also, see the New York Times, June 9, 1966, at 51.

1d Civil Liberties (monthly publication of the ACLU), No. 238, July 1966, at 1. For an earlier California case involving a sterilization-for-probation proviso, see People v. Blankenship, 16 Cal. App. 2d 68, 61 P.2d 352 (1936).

4 Mr. Harold O. Swank, Director of the State Department of Public Aid, which replaced the old IPAC, in a letter to the author dated October 3, 1963 said the following in answer to the author's question about the sources of Catholic and other opposition to the Commission's program of birth control information: "Mr. Rutherford's memorandum was by no means the event that triggered 'strong Catholic opposition to the Commission's program.' There was opposition from the beginning from this religious group, ********. There was also opposition expressed by some other groups, including some Negro organizations. Rather than triggering opposition the Rutherford memorandum exacerbated opposition."

5 Letters to author, dated August 27 and September 10, 1963, respectively. Two bills were proposed in the 1963 session of the Legislature to amend the Public Assistance Code of Illinois, both of which failed to pass. One would have made the birth of a second illegitimate child prima facie evidence of an "unsuitable" home, with possible removal of the child from the mother's custody and even possible adoption. The second proposal would have cut off assistance payments for children of mothers of more than one illegitimate child.

6 Text of the Committee Report (Rep. Walter Chachere, Chairman) , at 7. See note 29, infra, and discussion thereof.

7 Report of the Commission to Study Problems of Illegitimacy, State of Maryland, at 26.

(add after fn. 5)

5a As reported in the Des Moines (Iowa) Register, Dec. 18, 1963, in a news story, "Would Force Sterilizing on Illegitimacy," by George Mills. Also, see the story, "Argue Compulsory Sterilization of Unmarried Mothers on ADC," in the Dec. 22nd issue of the same paper.

5b The editorial, entitled "Compulsory Sterilization," appeared in the Mar. 24, 1964 issue. The faith which this paper placed in the legislative and administrative agencies (not to use compulsory sterilization in such cases) is not born out by the laws passed in Louisiana and Mississippi, which penalize persons for the crime of begetting illegitimate children. Perhaps the Register limited its faith to Iowa officials, and in this sense they may be right.

(continuation of fn. 6)

The Report was entirely incorrect in asserting that the United States Supreme Court had upheld the use of sterilization as a punishment for certain types of offenses. In the classic case, Buck v. Bell, 274 U.S. 200 (1927), the Court upheld the Virginia eugenic sterilization statute, which covered mental illness, mental deficiency, and epilepsy. This same type of error was also repeated in a statement by attorney A. L. Wirin, which was mentioned in the press during the celebrated Hernandez case in California: "Wirin said the case in which Holmes ruled involved a person convicted of a number of crimes". (Washington Post, May 24, 1966, at A1) Miss Buck was allegedly an imbecile.

8 Senator Sanford's motives in proposing his bill also seemed far simpler: "When you have a woman who has seven or eight illegitimate children and she keeps on having them at the expense of the taxpayers it's time to do something about it." As quoted in the Washington Star, February 12, 1960. Neither proposal mentions Negroes, but one might surmise from the detailed statistical tables of the Report of the Commission to Study Problems of Illegitimacy that the racial differences were significant and certainly a major factor in the extremely punitive tone of the Sanford bill.

9 Id.

10 In a letter from Rep. Glass dated April 17, 1963, he explained this language by saying that he had "been told by surgeons that this can be done on a temporary and on a permanent basis." Presumably, he was referring to tubal ligation and possible reversal, and to the more complete sterilization such as hysterectomy or oöphorectomy (ovariectomy) or their combinations.

11 Letter dated October 11, 1958. The editor and publisher of the Delta (Miss.) Democrat-Times, Hodding Carter, gave the following explanation: "The nature of the bill gives a pretty clear indication of its origin. Although it was not officially endorsed by the Citizens Councils, it is part of the general pattern of legislation sponsored by that group, with the theme of racial misbehavior paramount. As you know, the measure was tabled but there is widespread sentiment for some sort of means for coping with the fantastically high number of illegitimate Negro

9a One example would be the action of Circuit Judge Robert B. Mathias of Prince George's County, Maryland in sentencing a 23-year-old woman to two years in the Maryland Woman's Reformatory for violating her probation by giving birth to her fifth illegitimate child. Circuit Judge Ernest A. Loveless, Jr. had given the woman an indeterminate sentence and placed her on probation in September, 1964 after she was charged with neglecting one of her four children. Judge Loveless added three special conditions to her active probation: that she find a job to support her children, that she "not live with any man not her husband," and that she "not become pregnant out of wedlock." Probation officials said she failed to meet any of these conditions, but were unable to find where she was living, despite the fact that a warrant for her arrest, on a charge of violation of probation, had been issued December 8, 1964. She was found a year later, and Judge Mathias' sentence followed. "This was a direct violation of probation, almost vicious in its nature," he said. "It was not only against the law but against the rules of society in our Country, State and Nation. You cannot continue to bring into life these unfortunate little children without the benefit of a legal father. It's apparent you disregard everything Judge Loveless told you. You leave the court with no other prerogative but to give you the maximum sentence. The court hopes you will go to the reformatory, get help...and somewhere along the line find a way in which you can become a useful member of society." Probation officials noted that the woman would be eligible for parole in six months. (As reported in a news story by Richard Homan, "Mother Gets 2-Yr. Jail Term for Fifth Illegitimate Child," Washington Post, Dec. 23, 1965 at A3.) Just how she will "get help" in the Maryland Woman's Reformatory is beyond this writer's imagination, although it is noteworthy that neither Judge Loveless nor Judge Mathias offered her sterilization as an alternative to imprisonment (the price of probation, as happened in the recent Andrade case in Pasadena, California). Doubtless at 23, and already with 5 illegitimate children, society may expect to see much of this woman unless some truly practical measures are employed in her and society's behalf, as well as that of the children.

births. They do add an onerous burden and provide a readily employed argument as to asserted Negro inferiority." Letter to author, dated September 26, 1958.

12 Rep. McCullough explained his desire to allow a quid pro quo (sterilization in lieu of a prison sentence) by saying he did this with "the hope of curing the disastrous results of the crime" rather than punishing the crime. Letter to author, May 16, 1964.

13 At 21. They also reported the opposition of the state welfare department, which figured out "that it would cost more than three times as much to put a child in a home, if the mother chose jail over sterility, than it would if the mother received a dole to care for the child. And that didn't even include the cost of jailing the mother." HBAVS had earlier been on record against laws of this kind. In their HBAVS News for spring, 1963, they said: "...Regrettably, legislation is introduced from time to time which seeks to use sterilization as a punitive measure against mothers of illegitimate children. ***** HBAVS can make a great contribution at legislative hearings whether in opposition to poorly drawn statutes with punitive implications or in support of those groups with a positive and ethical approach. The Association will keep informed on state legislative developments and will actively seek the opportunity to be heard." (at 4) The Planned Parenthood Federation of America also strongly opposed the Mississippi proposals: "This approach is not only

unworthy of a society which considers itself humane, but it is futile: Birth control cannot be imposed on anyone by edict or by official pressure; it is a self-administered medical procedure which requires the continuing cooperation of the individuals concerned. The kind of approach embodied in this Mississippi proposal betrays an appalling insensitivity to the human dignity of even the least of us." Dr. Alan F. Guttmacher in PPF's publication, Birth Control Services in Tax-Supported Hospitals, Health Departments and Welfare Agencies (May 1963) at 4. In their amicus curiae brief in the recent case of Griswold and Buxton v. Connecticut before the U.S. Supreme Court, PPF said that such laws would "threaten basic liberties and be equally unconstitutional." (fn. 5 at 20).

14 SNCC quoted from local and out-of-state newspapers, e.g., a statement from Rep. Stone Barefield, during floor debate on the bill: "When the cutting starts, they'll (Negroes) head for Chicago." (at p. 4).

15 Another sentence in the bill passed by the House was also deleted. This was an ambiguous sentence which read: "...Provided that the emotional and psychological make-up of the offender shall be taken into consideration by the court of jurisdiction...." Rep. McCullough, the author of the sterilization rider, explained the sentence in this fashion: "I think the phrase at the end of section 1 makes provision for those who need mental care. In some cases correction could be made in a mental institution and the person restored to a normal life." Letter to author,

May 16, 1964. It is not clear if this meant that in lieu of a jail sentence or sterilization or both, the offender would be committed to a mental hospital. Certainly the various combinations in this bill were ominous indeed, and a psychiatrist like Dr. Thomas Szasz would not have to look far for the kind of legislative demons that make a mockery of due process of law and individual freedoms.

16 "Sterilization and the Law in Mississippi," 5 J. Miss. S.M.A. 54 (Feb. 1964) at 55-56. This entire issue was devoted to contraceptive methods, contraception and the law in Connecticut, legal problems of sterilization in Mississippi and other states, and to the problem of maternal mortality in Mississippi. It was probably mere coincidence that this issue appeared at the time the punitive sterilization act was being discussed in the Senate. Apparently, the state medical association took no public stand on the sterilization provisions of the Meek bill. Welfare and adoption agencies in the state did oppose the bill, but this is no reason for assuming that the doctors in the state were in favor of punitive sterilization measures. Doctors are generally not willing to take public stands on issues that do not directly relate to the practice of medicine or medical problems. A bill aimed at illegitimacy might be viewed as a non-medical question. This is not to say that doctors, as persons, are without their own private feelings about laws and public policies that relate to race questions.

17 As reported in a news story by Washington Post writer Ellen Key Blunt, January 27, 1965, at C1. Presumably, the women were in the hospital as clinic patients to deliver their babies and were given post-partum sterilizations without either their permission or knowledge. Several persons have attempted to get affidavits from those who have knowledge of these operations, including the women themselves, but fear of possible physical and/or economic reprisal has prevented these people from giving this data in public. Mrs. Hamer sent a communication to the Washington Post, saying that she was willing to give the facts and complete proof of the events that took place, beginning with herself. Thus far, no further public statements have appeared.

18 S. B. No. 113 and H. B. No. 248, Session 1959, at 3. Apparently there were several variants of this proposal, one of which allowed the entire procedure before the Eugenics Board to be terminated upon marriage of the woman concerned. In still another proposal, the illegitimate children supported by welfare payments could be taken from the custody of the mother and placed in orphanages or in foster homes. (Data obtained from a communication from the Bureau of Family Services, Department of Health, Education, and Welfare dated May 28, 1963.) Statistical data for Mr. Jolly's cause was inadvertently supplied in an official publication, Facts on Aid to Dependent Children in North Carolina, by Robert H. Mugge, director of the division of research and statistics, published by the State Board of Public Welfare, March 31, 1959, with a

section on "Children Born Out of Wedlock" (pp. 21-24). Perhaps the soundest evidence for not enacting punitive legislation was found in a publication of the North Carolina Conference for Social Service entitled "The Problem of Births Out of Wedlock" (Raleigh, April 1959): "Enforcement of laws dealing with human behavior is difficult. Up to this time in our society we have deemed it necessary to provide for considerable flexibility in the interpretation and enforcement of such laws. The necessity for flexibility weakens rather than strengthens the law, but the need for flexibility arises from the sound basis of human differences among those who break the law. ***** In view of what has been said, it would appear that in the search for answers to the problem of births out of wedlock, there must be the realization that we are dealing primarily with a social problem and not a legal one." (at 24-25.). Happily, the North Carolina legislature followed their advice, rather than the suggestion

19 "The Legality of Human Sterilization in North Carolina," 11 North Carolina Medical Journal 250 (1950). Said Bradway: "...A properly drawn statute prescribing the conditions and safeguards under which voluntary sterilization may be performed would be helpful to both physician and patient." (at 252).

20 Publication issued by the Human Betterment League of North Carolina, n.d. Dr. Burwell reported that a 1959 study of tubal ligations in North Carolina indicated that in the years 1955 through 1957 there was one

made in the Report of the Commission to Study Public Welfare Programs (December, 1962), where its Recommendation No. 21 made the birth of a third child out of wedlock a/legal presumption rebuttable that the mother of such child is an unfit person for the rearing of her children...." and further made this "unfitness" the basis of removal of one or all of the children from her custody. This recommendation applied to all mothers with three children born out of wedlock, regardless of whether they received public assistance. Recommendation No. 22 called for the passage of a voluntary sterilization law, which the Legislature did in fact in 1963. See the Report, which was submitted to Governor Terry Sanford, at 47-52.

ligation for each 30 deliveries and that 75% of these are voluntary sterilizations done either for the convenience of the patient or for socio-economic indications. (see F. E. Flowers et al., 20 North Carolina Med. J. 489 (1959)) "From this study it is quite obvious that tubal ligation as a voluntary procedure is being done on a fairly widespread basis in North Carolina. We have every reason to believe further that it is done on very strong patient insistence. We believe further that it is now time for the legislature to take cognizance of the situation and take steps aimed at alleviation of any possible patient or physician liability. Family security, family stability, and family happiness will be assured when the law is clarified." Moya Woodside, in an article, "Sterilization and Social Welfare: A Survey of Current Developments in North Carolina," 40 Eugenics Review 205, 210 (1949) also called for regularizing through statute what was already the common practice (voluntary sterilization, but mainly for the well-to-do- patient).

21 Joseph L. Morrison, "Illegitimacy, Sterilization, and Racism -- A North Carolina Case History," 39 Social Service Rev. 1 (1965), at 10.

22 The Department of Welfare and Institutions of the Commonwealth of Virginia published several studies: "Report on Illegitimacy in the Aid to Dependent Children and Foster Care Programs - September 1958" and a similar study in September 1961; "State Summary of Illegitimate Children Receiving Aid to Dependent Children, September 1958"; The Department of

21a See the story, "Senate OKs State Custody of Illegitimate Children," in the Philadelphia Bulletin, July 10, 1963. For the floor debate, see the Pennsylvania Legislative Journal-Senate, July 9, 1963, at 757-62. Senator James Berger, who co-sponsored the 1963 proposal, was the author of an unsuccessful 1961 Senate bill (No. 322) providing for the emasculation of sex offenders.

22a Philadelphia Inquirer, June 1, 1966, at 11.

23. New York Times, June 2, 1966, at 37.

24a Such questions were included in a letter to the Judge for further edification on these and similar questions, but a reply was not forthcoming.

Public Assistance, Social Service Bureau of the City of Richmond published two studies: "A.D.C. is Everybody's Business" (September 1959) and "Illegitimacy in Richmond, Virginia, 1910-1955" (April 1957). These and similar studies in other states explode the myth that most children receiving ADC aid are illegitimate.

23 The issue of race and illegitimacy was clearly shown in the statement by the minority of the Commission in their dissenting statement (at 23): "The data in the report show clearly the race in which the problem is greatest, and that the number of illegitimate births has been increasing both quantitatively and relatively among the Negro race. The proposals of the majority will do little to stem this tide which can be expected to increase and become even more aggravated until illegitimacy becomes uneconomical or the Negro race develops a sufficient sense of pride or moral values which will no longer condone illegitimacy...." The recommendations of the majority and the dissenting statement are fully discussed in the section on Virginia sterilization, ch. 2, supra. In the 1960 legislative session, two compulsory and one voluntary sterilization proposals were defeated. For a comparison with the North Carolina situation, see the article by Morrison, supra note 21. Along with Windle's work on the passage of the Virginia voluntary sterilization law, this article is the most definitive analysis of the role of racist motives in the recent urge for new and largely punitive sterilization legislation.

24 The punitive sterilization diehards fought to the last, however. In the same 1962 session, Senate Bill No. 37, a replica of the James proposal of 1956 to sterilize mothers of more than one illegitimate child, was killed in Senate Committee.

25 For a discussion of the socio-economic, religious, and racial factors present in the political struggle over the passage of the 1962 voluntary sterilization bill, see Charles Windle's paper, "Euthenics and Eugenics: A Case Study of Legislation" (presented at the American Psychological Association convention, St. Louis, Sept. 3, 1962) which was published in revised form in 29 Public Opinion Quarterly 306 (1965) under the title, "Factors in the Passage of Sterilization Legislation: The Case of Virginia." In his APA paper, Windle concluded: "So we see that the achievement of population control will involve many values. Some of these are as wide-spread as our cultural bias against stupidity (Dexter, 1962), but others are parochial. Some, as in the case of the voluntary sterilization bill in Virginia, may conflict with the liberal's usual biases and he may have to choose which conflicting principles to uphold. Put differently, overcoming the obstacles to population control may require working with groups with greatly different aims. And this brings us back to the initial question of which is better, euthenics (improving the environment so man is more efficient) or eugenics. To achieve population control one may cooperate too much with segments of society which want to use power. It may often be wiser to work toward a better environment, one in which population control can be practiced without potential abuse, than to work directly for population control without regard for whose hands will grasp the reigns."

25a In the political campaign conducted in the fall of 1965, the Virginia Conservative Party presented a platform containing eight planks, and the second of these planks read as follows: "Offer employment to all able-bodied men applying for relief, and sterilize all unmarried mothers who apply for relief after the birth of a second child." As quoted in an interpretive report, "The Virginia Conservatives," by Alex R. Preston in the Washington Star, October 17, 1965 at B-5. Needless to say, the Virginia Conservatives did not sustain a victory in this election. The Virginia Conservative Party is not the only political group to make such proposals. At a meeting of the National Renaissance Party, a neo-Nazi group, in New York City, Robert Burros, the Party's candidate for the State Assembly from Orange County, said that "...Negroes who are on relief should be sterilized." As reported in the New York Times, March 19, 1966, at 60.

26 As reported in the Washington Post, Jan. 27, 1965 at 2A. Also, see Earl and Anne Selby, "Why the Dole Doesn't Work," Reader's Digest, March 1965, at 79-83.

27 Op. cit. supra note 2.

28 The complete two-volume report, Facts, Fallacies, and Future -- A Study of the Aid to Dependent Children Program of Cook County, Illinois (1960), which was done at the instigation of the Board of County Commissioners is probably the most extensive study of a local welfare program in the United States. In the summary of the Cook County study, published in 1962, the first section entitled "The ADC Mother is 97 Per Cent Better Than the Public Thinks" is a must for anyone interested in the problems discussed in this chapter. NBC's White Paper No. 9, entitled "The Battle of Newburgh", which was telecast nationally on January 28, 1962, was an extremely able attempt to present the life of welfare recipients in realistic, though certainly not sentimentalized, terms.

29 "Civil Code and Related Subject Matter; Criminal Legislation on Marriage and Procreation," 21 Louisiana Law Review 53 (1960) at 54-55. A letter from the Department of Justice for the State of Louisiana, dated April 11, 1963 noted that there were no reported prosecutions under the law up to the 1962-63 period. The famous obstetrician-gynecologist, Dr. Alan F. Guttmacher, in commenting on the then pending Mississippi proposal to make it a felony to give birth to a second or subsequent illegitimate child (with sterilization in lieu of punishment) said that laws of this kind would probably lead to more illegal abortions

(self-induced or by quacks) or to infanticide. (Speaking at the International Conference on Voluntary Sterilization, New York City, April 1964).

30 For an example of judicial and not legislative cruelty practiced on the impoverished of a bygone era, see the editorial, "Judicial Birth Control," 25 Law Notes 184 (1922), which criticizes a Colorado judge for giving a mother the "choice" of submitting to sterilization or having her impoverished children placed in a state institution. See the Colorado discussion, ch. 2, supra. For a voluntary or non-coercive alternative to the solution of some of these problems, see H. Curtis Wood, Jr., "A Prescription for the Alleviation of Welfare Abuses and Illegitimacy," 61 J. Ky. State Med. Assoc. 319 (1963), reprinted in 12 Henry Ford Hosp. Med. Bull. 75 (1964); also see a penetrating article by Frederick S. Jaffe, "Family Planning, Public Policy and Intervention Strategy," Journal of Social Issues (in press).

CHAPTER FOUR

VOLUNTARY STERILIZATION

VOLUNTARY STERILIZATION

Although all of the existing eugenic sterilization laws pertain to persons in state institutions, or in some states, to both institutional and extramural coverage, the question of how far a physician can go in performing a sterilization operation on a purely private basis for medical necessity (therapeutic) or non-therapeutic reasons is still very much dependent on the particular state law or lack of law.

Three states with eugenic sterilization laws (Connecticut, Montana, and Utah) have provisions that limit through the threat of criminal punishment the type of operations that can be performed. Connecticut limits operations outside of the statute only to those operations that are required by "medical necessity":

> Sec. 53-33. Penalty for unlawful operation. Except as authorized by section 17-19, any person who performs, encourages, assists in or otherwise promotes the performance of either of the operations described in said section, for the purpose of destroying the power to procreate the human species, or any person who knowingly permits either of such operations to be performed upon such person, unless the same is a medical necessity, shall be fined not more than one thousand dollars or imprisoned in the State Prison not more than five years or both. (1909)

Up to the time of the repeal of its sterilization law in 1965, Kansas used the standard of "medical necessity," but with a much lighter penalty than that of Connecticut:

> Section 76-155. Penalty for unlawful operations. Except as authorized in this act, every person who shall perform, encourage, assist in or otherwise promote the performance of either of the operations described in this act, for the purpose of destroying the power to procreate the human species, unless the same shall be a medical necessity, shall be fined not less than $100 nor more than five hundred ($500) dollars, and imprisoned in the county jail not less than six months nor exceeding one year. (1917; repealed 1965).

The Montana punitive provisions of their sterilization law are limited to inmates only and apparently limit state authorities from sterilizing for reasons other than eugenic ones:

> Section 38-607. Liability. Neither the members of the State Board of Eugenics, the chief physicians, nor assistants concerned, nor any other persons legally participating in the execution of the provisions of this Act, shall be liable, either civilly or criminally on account of said participation, provided, however, that sterilization of the said inmate or inmates, by the chief physician of

> the custodial institution or his assistants, for other than the purpose named in this Act, or by fraud or duress, or without the approval of the State Board of Eugenics, shall constitute a felony punishable by a fine of not more than $1,000, or imprisonment in the State prison for no more than five years, or both. (1923).

It seems doubtful if the literal meaning of this bar to non-eugenic sterilizations would mean that an operation on an inmate for reasons of medical necessity would be criminal. Regardless of how far this provision goes in making it a crime to perform non-eugenic sterilizations on inmates of Montana institutions, the provision in no way bars voluntary sterilizations of any kind outside of institutions.[1]

Utah also follows the doctrine of "medical necessity" in its law:

> Section 64-10-12. Unlawful Destruction of Power to Procreate, A Felony. Except as authorized by this title, every person who performs, encourages, assists in or otherwise promotes the performance of any of the operations described in this title for the purpose of destroying the power to procreate the human species, unless the same shall be a medical necessity, is guilty of a felony.

Interestingly enough, the preceding section of the Utah law typifies the kind of provision that appears in the eugenic sterilization statutes of eight other states (Arizona, Mississippi, New Hampshire, North Carolina,

Oklahoma, South Carolina, Virginia, and West Virginia).[2] It reads as follows:

> Section 64-10-11. Legitimate Treatment by Physicians Not Affected by Title. Nothing in this title shall be construed to prevent the medical or surgical treatment, for sound therapeutic reasons, of any person by a physician or surgeon licensed by this state, which treatment may incidentally involve the destruction of the reproductive functions.

This provision in the Utah sterilization law is the same as the provisions in each of the enabling provisions in the other eight states, which also use the language of "sound therapeutic reasons." These 9 states are clearly on record as permitting private voluntary sterilizations in certain circumstances, although the language is phrased in a negative way ("nothing in this title shall be construed to prevent....").[3] The question of how "medical necessity" or "therapeutic reasons" are defined has caused much anguish in some medical circles. Those cases that clearly involve, in the judgment of the doctor, the physical and/or mental health or life of the patient would clearly permit sterilization, but the difficult area for judgment is sterilization for genetic reasons, (as for example, in the case of hemophilia, Huntington's chorea, etc.) where the health of the potential child is involved, not that of the mother. An even more uncertain area of sterilization would seemingly be contraceptive sterilization for strictly socio-economic reasons. It is

important to note that some physicians would not regard psychiatric indications as within the definition of "medical necessity," or "therapeutic", but if the entire present and future health of the woman is viewed broadly, the distinction between medical and psychiatric indications might appear less fuzzy. In the case of genetic reasons for sterilization, the possibility of giving birth to a mental deformed or retarded child might have a deleterious effect on both parents, but as in the case of psychiatric indications for sterilization, the physician is making a prediction about the possible impact of future pregnancies, based in some cases on the experience of previous pregnancies. As in the case of therapeutic abortion, there is divided opinion on the question of psychiatric indications.[4]

Yet, more and more articles are appearing in the professional literature discussing the possible or real post-operative effects of sterilization operations. In a recent paper read at the 1965 annual meeting of the American Psychiatric Association, the authors stated:

> ...This report only briefly reappraises possible medical reasons for abortion and sterilization, but illustrates the need to evaluate the possible effects or consequences, even when medically indicated, of sterilization on the psychic structure of the individual concerned and the marital partner of the one sterilized. *** These cases highlight the need to evaluate before surgery the possible

> effects of interference with reproductive capacity even when logical or "legitimate" reasons are offered as a basis of request.[5]

An interesting example of divided opinion is an exchange that took place in the Journal of Urology in 1958-59. Dr. Charles Rieser concluded an article on vasectomy by saying that:

> ...The physician would be well advised to abandon the procedure entirely except for legally authorized eugenic reasons and specific therapeutic indications.[6]

In a subsequent issue, a professor of law from Yale, Richard C. Donnelly and a urologist, Dr. William L. F. Ferber answered Rieser and spelled out what they meant by "therapeutic indications" for sterilization. These include "afflictions of an hereditary nature involving previous offspring of a marriage or in some instances the involvement of one or both actual or potential parents" (e.g., Huntington's chorea, hemophilia, gargoylism, etc.); "conditions which are aggravated by repeated pregnancies" (such as chronic hypertensive vascular disease, advanced cardiac changes, etc.); "physical, mental or emotional defect which may seriously impair the patient's functioning as an adequate parent and/or which causes the physician to conclude that parenthood, at any future time, would be hazardous"; and "multiparity to a degree affecting adversely the patient's health or well-being."[7] This is a rather extensive view of the word "therapeutic" sterilization, particularly in placing genetic considerations

(of past or future progeny) as a primary indicator, but the pragmatic question is the minds of some (perhaps most) physicians would be both medical and legal (am I potentially liable?). Here, the authors are probably correct in saying that if doctors take the necessary legal precautions (signature of both spouses, etc.), the question of what is "therapeutic" remains largely a question of medical discretion and is not defined by any precise legal standard. And since the use of "therapeutic" in voluntary sterilization operations is not limited by its application to the abortion laws of 42 states (where it must be done to "preserve or save the life of the mother"), it is logical and medically sound to assume that what is necessary to preserve the present or future health of the mother can be viewed from many points of view. Much of the recent medical literature would support the Donnelly-Ferber view that medical indications are viewed broadly, especially where multiparity and socio-economic considerations are concerned.[8] In some cases, the two (multiparity and socio-economic considerations) are viewed as synonomous. There is very little doubt that the literature indicates a very high number of voluntary sterilization operations carried out at the request of the patient that are contraceptive in character ("reasons of convenience" is sometimes the term used, or more often, "socio-economic" indications).[9]

Statistics on the number of female and male voluntary sterilization operations performed in the United States are not nearly as easy to discover as in the case of compulsory state sterilization laws, partly

because the male operations (vasectomies) are usually performed in doctor's offices and the female sterilizations can only be found in hospital records, which would not be nationally reported. However, there have been two excellent efforts made in recent years to determine the incidence of such operations. The first systematic study was that of Ronald Freedman, Pascal K. Whelpton, and Arthur A. Campbell, Family Planning, Sterility and Population Growth, published in 1959, which used a base group of 2,713 married couples. Nine (9) percent of all of the wives reported a sterilizing operation on either the wife or the husband (most of which were on the wife, 220; 24 on the husband (vasectomies) and both in 1 case).

> That almost 1 out of every 10 couples in the childbearing years had such an operation was considered so startling a finding that all the interviews involving them were carefully reread to make certain that the question was not misunderstood. On the contrary, in most cases the wives volunteered comments about the nature or circumstances of the operation, which strengthened confidence in the validity of the information.[10]

The percentage of these sterilizations that were contraceptive in purpose is not clear, but the authors felt "at least a significant minority of these operations are substitutes for effective contraception. However, their greater prevalence among the older than the younger women in our sample may in part reflect changes in medical practice."[11] In a more

recent study of the same kind of data done in 1960 on 2,414 couples, it was found that 10% of all of the couples had a sterilizing operation, of which 6% were clearly labelled contraceptive operations and 4% were called remedial operations.[12]

Using the 1959 Freedman GAF study as a base, Dr. Christopher Tietze, director of Research for the National Committee on Maternal Health, Inc. estimated a minimum of 75,000 voluntary sterilizations. He increased his estimate to 100,000 voluntary operations (60,000 on women, and 40,000 vasectomies) based on the data from the second GAF study.[13]

Another study that based its findings on actual hospital records of gynecological surgery was that of Drs. William W. Jack and Vergil N. Slee of the Commission on Professional and Hospital Activities at Ann Arbor, Michigan. Their study, "Gynecological Surgery: Its Profile,"[14] reported the breakdown of 49,000 gynecological operations performed from July-December 1960 in 134 hospitals reporting their data to PAS at that time. Based on the number of discharges from these PAS hospitals in 1960, the PAS was recording information for roughly 6-7% of all the discharges in the country at that time (this has now gone to 10% or more of all discharges). Using conservative standards, this writer took the figure for all sterilizing operations during that period (9,957) and eliminated all but priority 5 (Bilateral Salpingectomy or Bilateral Tubal Ligation), which consisted of 2,129 operations. This latter figure was further refined by eliminating all malignant or other disease categories and then doubling the figure (1,669) to get an annual figure of 3,338 sterilizations. Finally, the figure of 15 was used

to multiply again in order to get a crude approximation for all hospital discharges in the nation. A figure of approximately 50,000 female sterilizations for contraceptive purposes was arrived at. Actually, if other sterilizing operations were included where non-malignant or benign disease indications are eliminated from the sample, the figure would climb to 54,000, which is very close to the Freedman GAF figures (65,000) for female contraceptive sterilizations. For purposes of projecting the figures in the Jack-Slee study to get a picture of all sterilizing operations, regardless of purpose, I took their total of 9,957 operations for a six-month period (1960) and doubled that to get the annual figure and again multiplied by 15 to arrive at a projected national figure for the year 1960 of nearly 300,000 female sterilizations (298,710) per year.[15]

Although the 300,000 figure might appear high in comparison with the Campbell GAF figures for female operations, it should be noted that the PAS figures covered women in all age brackets, while the GAF figures ended at the age of 40. By subtracting the female sterilizing operations of all kinds in women 40 and over in the PAS study, (158,160 operations) I arrived at the figure of 140,550 for women through the age of 39, which comes much closer to the GAF figure for all female sterilization operations, both remedial and contraceptive (155,000 on the average per year). When the collection of figures on vasectomies is more systematic, a really useful figure on the total of all sterilizations in the country will be within the reach of researchers.[16]

Recent Developments

Because the law even in the states with existing sterilization laws is far from clear on the question of what types of medical situations justify a legal voluntary sterilization, physicians in some states, prodded by their state medical societies, have sought clarification through special statutory provisions. Two such states, Virginia and North Carolina, passed new laws on ~~the~~ voluntary sterilization in 1962 and 1963. Both of these states are interestingly enough states that already have existing sterilization laws dating back to 1924 and 1919 (North Carolina's first eugenic sterilization statute) and both of their present eugenic sterilization statutes include provisions for voluntary sterilizations for "sound therapeutic reasons." "Therapeutic" was regarded by most physicians as excluding contraceptive or socio-economic reasons, even multiparity[17] which may or may not be connected to a genuine physical and/or psychiatric indication.

The Virginia and North Carolina voluntary laws are relatively simple in their requirements: any adult (21 or over, or less than 21 if legally married) may request sterilization and with the written permission of two physicians or surgeons (as well as the spouse, if a married person) can obtain either a vasectomy for males or salpingectomy for females after a 30 day period that provides an opportunity to have "second thoughts" on the matter. Any unmarried person under the age of 21 can request a sterilization in writing but in addition to the above-mentioned requirements,

the parents, committee, guardian, or next of kin must petition the circuit court of the county or corporation court of the city where the minor resides for a court order determining "that the operation is in the best interest of such minor".[18] The Virginia law further requires that "said infant is afflicted with any hereditary form of mental illness that is recurrent, mental deficiency or epilepsy" and requires the appointment of a lawyer as guardian ad litem to represent and protect the interest of such persons in proceedings of this kind. North Carolina did not feel compelled to include these procedural safeguards for minors, although it does apply the 30 day waiting period to all persons, as does Virginia. Clearly, both statutes allow non-therapeutic sterilizations, since there is no mention of saving life or preserving health, and except for minors in Virginia, both laws give physicians wide latitude in deciding the propriety of voluntary surgical sterilization.

The Virginia sterilization law may be the prototype for future voluntary sterilization laws in other states, but it is still open to criticism on non-religious grounds, the most notable being the possible psychiatric harm that sterilizations can produce. One writer, Roger C. Wolf, feels that the Virginia law is lacking in not placing psychiatric considerations in the law:

> ...The new statute in Virginia clarifies the legal status of voluntary sterilization and also approaches the problem of preventing the sterilization of those likely to suffer

> from it later. But psychiatric studies lead one to believe that the statute could be improved by requiring the approval of a psychiatrist when the patient is too young, has too few children or has had prior psychiatric problems. Virginia's statute, with the above improvement, should be copied by other states.[19]

The director of the Law Department of the American Medical Association, Bernard D. Hirsh, finds other flaws in the Virginia law:

> Marital cohabitation is not conducive to abstinence, and physicians might question the wisdom of a 30-day waiting period where there is a bona fide therapeutic reason for sterilization.[20]

Even with permissive voluntary sterilization laws on the books, and with the possibility of their spreading to other states in the nation, medical and psychiatric questions arise in the periodical literature about the necessity of such operations in given cases. Doctors Lewis E. Savel and Irving K. Perlmutter summed up 3 years of experience at the Beth Israel Hospital in Newark in this way:

> ...it would seem almost advisable to have psychiatric evaluation of every patient in whom therapeutic abortion and/or sterilization is contemplated to ascertain the stability of the individual and her capacity to accept the performance of either act. Thus, it is urged that the

> evaluation of the problem at hand, and its solution, be weighed against the possible conflicts which may be created.[21]

But medical and psychiatric considerations are not the only important variables in the discussion of voluntary human sterilization. There are also broad political, legal, and social policy considerations, and at times religious forces, that increasingly appear in the controversies that often surround discussions of the question. Perhaps the most heated and angry debates took place during the fall of 1962 when newspapers made public the voluntary sterilization program of the Fauquier County Maternity Clinic at Fauquier Hospital in Warrenton, Virginia. This clinic, established in 1959, had been performing voluntary sterilizations on indigent women from January, 1960, even before the passage of the Virginia voluntary sterilization law of March, 1962, which Fauquier Hospital helped to draft. But the storm that broke when the facts were made public, followed by the condemnation of Fauquier by Washington's Catholic Archbishop, The Most Rev. Patrick A. O'Boyle on September 9, 1962 is quite unprecedented in recent American sterilization history.[22]

The Archbishop called the program "grossly immoral" and a very crude attempt to obtain "the induced consent of the individual." And he added that "its obvious and crudely selfish materialistic purpose is to reduce the tax rate in Fauquier County." He was joined by other clergymen of many faiths. Rabbi Jay Kaufman, vice president of the Union of American

Hebrew Congregations (Reform Judaism) said that "no government should permit such prenatal euthanasia, even when it comes at the well-intentioned nonetheless homocidal hand of a 'compassionate' physician." Another rabbi, Dr. Julius Mark, called it "suicide:"

> I am opposed to sterilization on principle, but I do believe in birth control among married women who should have the right to say how many children they would like to have. I am opposed to sterilization even voluntarily. It's like suicide -- if someone wants to commit suicide, voluntarily, you try to stop them.

Evangelist Rev. Billy Graham called the Fauquier Hospital program of voluntary sterilization "morally dangerous" and said that "we are in serious danger when we take it upon ourselves to sterilize women, even with their consent."[23]

The Daily Worker of England attacked the program as another attempt to help the rich to save the costs of taxation necessary to support the poor,[24] but the most extreme view was expressed by the Black Muslim publication, Muhammad Speaks which headlined its December 15, 1962 issue with "Birth Control Death Plan!" and termed the program a "Nazi formula for extinction," a "Hitler-like sterilization program" aimed at "purging the reproductive organs of Negro women who live in the desolate valleys below."[25] The implication was all too obvious that Negro women were forced to accept sterilization for fear of losing welfare aid. And

according to one story in the issue, all of the Negro women who were sterilized were not 21 years of age, as required by the hospital's procedures, nor did they all have at least 3 children (required if the voluntary operation is for economic and not medical reasons).

The New York Times correspondent, David Binder, could find no proof that the clinic's sponsors were seeking to cut relief rolls. And the liberal Catholic weekly, The Commonweal, said in an editorial:

> On the question of whether the clinic's program has, as its real aim, the reduction of taxation or relief from welfare pressures, there may well be some doubt. Certainly, the sponsors of the clinic have vehemently denied that accusation made by the Archbishop and there seems no special reason to disbelieve them . On the other hand, the reports we have read of the clinic do suggest that it is permeated by a strong flavor of paternalism toward the poor.[26]

Notwithstanding the accusations made in Muhammad Speaks, there seems no clear proof that direct or indirect coercion was employed, either of an economic or any other kind. However, even with medically sound procedures and a healthy regard for patient rights, the mere fact of abject poverty, welfare assistance, and a rather bleak future can militate in the direction of making people living in these conditions more vulnerable to the blandishments, however well meaning, of Mrs. Alice du Pont Mills and the 15

volunteer workers. For as Binder in his excellent series on Warrenton pointed out, "the almost feudal disparities between landlord and tenant, millionaire and poor man, fox hunting and 'finding' will persist" unless substantial economic assistance, especially industry, is brought in "and no amount of free medical care for the indigent or sterilization will change these disparities."[27]

It should be noted that many prominent clergymen supported voluntary sterilization in the Warrenton clinic program, including Methodist Bishop John Wesley Lord of Washington, Rev. Duncan Howlett, a leading Unitarian, Rev. Harry Emerson Fosdick and the Rev. Dr. Joseph C. Fletcher (Episcopal). Perhaps even more striking was the November, 1962 issue of New Medical Materia, which devoted a section to "Sterilization Today -- Virginia and Elsewhere." The journal took a nationwide sample of physicians and found that of 91.5% of the physicians who said that sterilization was justified under certain conditions, a considerable number would sterilize for non-medical or socio-economic indications. The complete breakdown was as follows:

Mental deficiencies could be transmitted to children (79.5%)

Pregnancy would affect woman's physical health (75.3%)

Pregnancy would affect woman's mental health (67.6%)

Too many children in relation to income (66.0%)

Man has sex compulsions dangerous to women (55.3%)

Patient requests sterilization (47.7%)

Family wants 'no more children' (31.3%)[28]

No law which deals with as sensitive a subject as voluntary human sterilization could be perfect, and perhaps the Warrenton furor and the criticisms of flaws in the Virginia and North Carolina voluntary sterilization laws point out the need for more careful reflection and deliberation before laws, programs of action, and other activities in the sterilization area are undertaken. Harriet F. Pilpel, the legal counsel for the Association for Voluntary Sterilization (formerly Human Betterment Association for Voluntary Sterilization) and a leading expert on birth control, abortion, and sterilization laws, warns against too hasty or premature law-making in this area:

> Lastly, as to legislation -- one of the problems we have in this country is that many people rush to make a law before any intelligent public or even professional opinion on the subject has crystallized. Today there is a wide diversity of views as to whether or not a man or woman should be permitted to be sterilized in the absence of clear-cut medical indications. We are still in a period of testing -- of trial and error. If a "model" statute were to be passed now, there would be a grave danger that it would be far more prohibitory and restrictive than the present experimental status. Until there is a conscious and informed consensus on this subject we will do better to let matters rest and have meetings such as this

> Conference which help in the direction of figuring out what, if any, laws we should have on the subject of voluntary sterilization.[29]

The A.M.A. Law Department has from time to time issued its pamphlet entitled Medicolegal Forms With Legal Analysis. In their 1957 edition, it was stated that because sterilization is contrary to public policy, consent to it will probably be invalid,[30] a view which was opposed by the Shartel and Plant volume on The Law of Medical Practice, which appeared in 1959.[31]

In the 1961 edition of the A.M.A. pamphlet, it is stated that:

> From the standpoint of the religious and moral beliefs of many people, sterilization of convenience is comparable to non-therapeutic abortion. However, until declared illegal by the legislature or the courts in the physician's state, non-therapeutic sterilization is largely a matter of individual conscience and principle. With regard to civil damages, sterilization does not present any greater exposure to liability than other medical and surgical procedures alleged to have been negligently performed. One possible exception is the case where the physician neglects to obtain the consent of the patient's spouse to a non-therapeutic sterilization operation....[32]

Notwithstanding the more optimistic view of the A.M.A. in recent

years to the dangers of liability for non-therapeutic voluntary sterilizations, Dr. Murray Russell, in a discussion of the medicolegal aspects of voluntary sterilizations, wrote:

> ...However, as previously indicated, most thereapeutic and nontherapeutic sterilizations are performed outside state institutions by private practitioners who have no state laws to protect them in the event of a suit. In California, for instance, insurance companies that provide malpractice insurance for physicians and surgeons do not cover or protect the physician in the event he performs a vasectomy and is sued....[33]

The medicolegal implications of voluntary sterilizations are far from solved by statutes or by hospital rules. The examples of Virginia and North Carolina may be followed by other states, but if so, on a basis that fits the special needs and experiences in the particular state. If our present practices in the area of voluntary non-therapeutic sterilizations are translated into law, state-by-state, it will probably result in a national hodge-podge of laws that will defy generalization, but will perhaps give doctors a clearer picture of their limits of liability. Irrespective of what kinds of laws are written, or even left unwritten in most of the states, the increased use of voluntary sterilizations for non-therapeutic purposes will probably continue unabated and will in time be an accepted part of general medical practice in the nation as a whole.[34]

And the discussion of the propriety of voluntary sterilization will continue unabated. Two recent examples are in order to illustrate the wide gamut of opinion, even among professionals.

Dr. Fritz Kant, who is a clinical professor of psychiatry at the Medical College of Alabama, feels that the people who really "need" voluntary sterilization cannot be reached and hence, the wrong people (those he regards as "fit") are using voluntary birth control and voluntary sterilization in the United States. This is because of our economic double-standard in which the rich and not the needy poor are able to use these procedures with relative ease.

> It is always difficult to foresee the final effect of any measure, but the problem of over-population is a formidable one and only unusual means will be able to cope with it. Doing nothing in the face of danger is wrong, facing the danger in a thoughtless way is even worse. Propaganda for voluntary birth control and voluntary sterilization can only lead to deterioration of the population and should definitely be avoided.[35]

Another physician, Dr. Robert E. Hall, mentions another aspect of the socio-economic double standard, namely that of the ward as against the private patient where parity and medical indications for voluntary sterilization are concerned. Voluntary laws such as those in Virginia and North Carolina are a hindrance to the conscientious doctor, according

to his view, and he feels that professionals must face up to the situation:

> Once again, since this is primarily an obstetrical issue, it should be resolved by obstetricians. With or without formality of legislation, some representative body of obstetricians should establish an acceptable code of sterilization ethics.
>
> **********
>
> The institution and implementation of birth control measures are primarily medical matters. The obstetrician's obligation to provide abortion, sterilization, and contraception is inadequately and inevitably met at the moment. The obstetricians of America must individually and collectively review these vital issues in an effort to establish a more uniformly humane birth control ethic.[36]

Reversibility

Of all the questions that emerge from a discussion of voluntary human sterilization, none is more vexing than the question of a reversal operation. A 1931 decision of the Nebraska Supreme Court upheld the constitutionality of the Nebraska compulsory sterilization law partly on the basis of the testimony of a physician who had performed 50 reversal operations,[37] yet the United States Supreme Court in the 1942 Skinner decision spoke the language of finality when it said: "...There is no 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." But courts of law are not the medical arbiters of whether reversal operations are possible, and if so, under what conditions and with what percentage of possible success?

Figures on the rate of success vary greatly, and although the President's Panel on Mental Retardation in the 1963 Report of the Task Force on Law noted that "the operations are very rarely, if ever, reversible in women; and reversible in men in a very small percentage of cases"[38] Time claims "...the chances for desterilization range from 50% to 80%,[39] in the case of vasectomies. Brewer reports that success rates of 77, 80, 88, and a prediction of 90 percent in the case of reversibility following vasectomy,[40] have been reported.

Perhaps the most optimistic reports on success in reversal operations comes either from the west coast or from India, or from groups such as the Hugh Moore Fund that strongly recommend voluntary sterilization as the possible answer to the "population bomb".[41] The more guarded estimates are exemplified in the statements of Drs. Christopher Tietze and Alan F. Guttmacher. Tietze says:

> Attempts to restore fertility by a second operation have been made in a limited number of cases involving both tubal sterilization and vasectomy. The results of these efforts have not been encouraging. In general, therefore, surgical methods of fertility control are irreversible....[42]

Guttmacher, on the chances of reversing a vasectomy, writes:

> The operation to restore fertility, however, requires extremely skillful surgical technique and the odds on success are too small to depend on. Therefore one should view vasectomy as permanent, not temporary, and should not decide to have it performed unless he is absolutely certain he will not want to have more children, no matter what may happen.[43]

Certainly the most nevel and in some respects the most ominous modern "solution" to the problems of reversibility was advanced by Herbert Brewer in his suggestion that vasectomy could be combined with the preservation of male sperm and its possible future use in artificial insemination if a reversal operation is a failure.[44]

Even when surgical procedures for reversing sterilizations are brought to a point where the odds for success are overwhelming, or, pushing history of the future even further, when there is widespread favorable agreement on the use of sperm banks and artificial insemination (by the husband or outside donors), individual couples, not the state or some politically-conceived committee of experts, must make the decision. Even then, the moral implications of such a decision will be great, and the wide-spread implications of such medical procedures for marriage, the family, and society in general are too numerous and complex to discuss with any clarity at this point.[45] What can be said with certainty is that science can show us how to desterilize or preserve sperm or artificially

inseminate: what it cannot do is to tell us why we should choose these procedures. For the value questions, we will have to look into our long, human past history and find ways of combining our age-old values with the changing technology of modern medicine and biology. And for this quest, the agony will be as great, if not greater, than any our predecessors endured.

CHAPTER FOUR -- FOOTNOTES

1 In the earlier discussion of Montana sterilization practice, ch. 2, supra, it was pointed out that the Montana Board of Eugenics has been scrupulous in turning down requests for sterilizations of persons not under the jurisdiction of the institutions covered in the law. What happens to these people was not made clear, but it would seem to this writer that the legal jurisdiction of the Board of Eugenics, together with section 38-607, would leave the entire area of voluntary sterilization to the medical discretion of the physician in charge. Section 38-604 includes among the duties of the Board the following: "This board is also hereby empowered to exercise general supervision of matters pertaining to sterilization...." This clearly means sterilization in state institutions and not to sterilization as a general matter, either public or private.

2 Arizona (36-540); Mississippi (Title 25, sec. 6964); New Hampshire (174:12); North Carolina (35-52); Oklahoma (43A, sec. 346); South Carolina (32-679); Virginia (37-246); West Virginia (Ch. 16, art. 10, sec. 1399). Ten states (Arizona, California, Indiana, Iowa, Mississippi, New Hampshire, Oklahoma, South Carolina, Virginia, and West Virginia) specifically prohibit castration, as for example, in the Arizona law: "...provided that nothing in this act shall be construed to authorize the operation of castration nor the removal of sound organs of the body." (36-536). But these prohibiting sections would apply only to the use of

castration for the specific (eugenic) purposes of the law and not to those exceptional medically necessary or therapeutic situations where removal of diseased organs would be necessary for the preservation of health or even of life.

3 A tenth state, Indiana, in Section 22-1606 of its sterilization law, has the same kind of language, but at the end of the section the following language appears: "Provided, that such treatment shall be that which is recognized as legal and approved after due process of law." In a letter from the Indiana Attorney General, Edwin K. Steers, dated June 3, 1963, I was informed that this provision would mean that a private, voluntary sterilization would not require a court order and would therefore be completely outside of the existing state laws for the sterilization of the mentally ill and the mentally retarded. An eleventh state, Iowa, should also be included in the list of states permitting designated voluntary sterilizations. In its explanatory pamphlet, "The Iowa Law on Eugenic Sterilization," issued by the Iowa State Department of Health in 1948, it is clearly stated that medical or surgical treatment for "sound therapeutic reasons" that incidentally results in the destruction or nullification of the reproductive functions is permissible, and does not require an order from Iowa State Board of Eugenics (at p. 9). Why this language was not put in the law is not known, but as a matter of policy, Iowa should be included with the other 10 states that have statutory provisions for medically therapeutic sterilizations. Three

previous Iowa sterilization laws prohibited sterilization except as authorized by statute or where the operation was performed because of medical necessity. No such provision appeared in the present Iowa law, but an opinion of the Attorney General in 1932 ruled that a voluntary sterilization on one who consents would be legal and the physician would be exempt from liability except for negligence. Ops. Att'y. Gen. Iowa 35 (1932). This opinion did not distinguish between therapeutic and non-therapeutic operations. See the note, "Human Sterilization," 35 Iowa L. Rev. 251 (1950) at 266.

4 In an article, "The Role of the Psychiatrist in Therapeutic Abortion and Sterilization," 20 Med. Bull. U.S. Army, Europe 322 (1963), Lt. Col. Thomas B. Hauschild writes: "There seems to be a danger here in minimizing established psychotherapeutic principles in favor of prediction. There is also the risk of looking upon therapeutic abortion and sterilization as an expedient or as a substitute for psychiatric treatment, ignoring the fact that these procedures may engender more deleterious effects than the continuation of the pregnancy. There is no convincing proof that psychosis will recur with future pregnancies, that the woman who has had a psychosis will necessarily be a poor mother, that a completed pregnancy will interfere with the therapy of neurosis or psychosis, or that a woman threatening suicide is an appreciable risk. Indeed, in my experience, it is more likely there will be greater difficulty with the emotional reactions subsequent to the interruption of pregnancy than in

treating those psychiatric disorders which provide impetus to the request for abortion. This also applies to sterilization." (at 325)

5 Drs. Joseph B. Parker, Jr., Helen L. Hallock, and John P. Longstaff, "Sequelae of Sterilization of Self or Marital Partner," in Scientific Proceedings in Summary Form (121st Annual Meeting of the Amer. Psychiatric Association, New York City, 1965) at 118. The authors, who are all members of the department of psychiatry of the University of Kentucky Medical Center, Lexington, called for a good psychiatric screening test that might prevent "some of the tragic consequences of such elective surgery." They concluded from their studies that "the effects can result in a major psychological upheaval for enough individuals and for sufficient length of time that there needs to be a means of predicting possible adverse responses." Nate Haseltine, "Psychiatric Test Urged in Sterilization Cases," Washington Post, May 7, 1965, at B7. Also, see Milton H. Erickson, "The Psychological Significance of Vasectomy," in Harold Rosen (ed.), Therapeutic Abortion (N.Y.: Julian Press, 1954) at pp. 57ff. (on the psychiatric effects of vasectomy); Peter Barglow, "Pseudocyesis and Psychiatric Sequelae of Sterilization," 11 Archives Gen. Psychiatry 571 (1964) and Barglow et al., "Hysterectomy and Tubal Ligation: A Psychiatric Comparison," 25 Obst. & Gyn. 520 (1965); R. M. Ellison, "Psychiatric Complications Following Sterilization in Women," 2 Med. J. Australia 625 (Oct. 17, 1964); and a very favorable view of voluntary sterilization in Robert W. Laidlaw and Medora S. Bass, "Voluntary Sterilization as It Relates to Mental Health," 120 Am. J. Psychiatry 1176 (1964). Two very

(continuation of footnote 5

thoughtful studies of sterilization under Swedish law by Dr. Martin Ekblad of the Department of Psychiatry of the Karolinska Institutet Medical School, Stockholm, Sweden, should also be cited: "The Prognosis After Sterilization on Social-Psychiatric Grounds; A Follow-Up Study of 225 Women," 37 Acta Psychiat. Scand. 1-162 (Suppl. 161, 1961), and "Social-Psychiatric Prognosis After Sterilization of Women Without Children; A Follow-Up Study of 60 Women," 39 id. 481 (1963).

6 "Vasectomy: Medical and Legal Aspects," 70 J. Urology 138 (1958) at 143.

7 "The Legal and Medical Aspects of Vasectomy," 81 J. Urology 259 (1959) at 260. In a more recent article on the "Legal Implications of Sterilization" by the secretary-treasurer of the Canadian Medical Protective Association, Dr. T. L. Fisher warned Canadian physicians about the dangers of stretching medical reasons too far in the direction of non-medical indications: "What, then, should be a doctor's attitude when he is faced with a request from a patient that the patient be sterilized sexually? The doctor should apply to the problem exactly the same kind of thinking he would apply to any other problem in his professional field: scientific, logical, impersonal thinking. He should consider, first, whether the size of a patient's family is properly a medical concern. It may not be, and the problem then in not one with which the doctor should deal. ***** In all probability most requests from males for sexual sterilization can be answered promptly and unequivocally: no benefit will be conferred on the male and therefore the doctor should refuse to sterilize him. ***** The conclusion, therefore, that one reaches when he has thought the problem through is that sexual sterilization should be done, broadly speaking, only for the preservation of the health or life of the individual concerned, and that doctors should refuse to do it for any other reasons." In 91 Canadian Med. Assoc. J. 1363 (1964)at 1365. Canada has no national laws on either voluntary or compulsory sterilization, although two provinces, Alberta and British Columbia have eugenic sterilization statutes.

Nevertheless, there is evidence of voluntary male operations (vasectomies), especially through the cooperation of A. R. Kaufman of Kitchener, Ontario and his Parents' Information Bureau. See C. P. Blacker, "Voluntary Sterilization: Transitions Throughout the World," 54 Eugenics Review 143 (1962), fn. at 156. For a somewhat earlier American discussion entitled "Operations to Produce Sterility: Medicolegal Implications," by Dr. Frederick H. Falls and Professor Burke Shartel, see Samuel A. Levinson (ed.), Symposium on Medicolegal Problems (Philadelphia: J. B. Lippincott Co., 1948), at 123-154 and a discussion of their papers at 155-65.

8 Theodore W. Adams in "Female Sterilization," 89 Amer. J. Ob. & Gyn. 395 (1964) reports little difference in post-operative dissatisfaction between those women sterilized for socio-economic indications (7% of the group dissatisfied) and medical indications (5%), but he does note age differences and warns: "...The attending physician should then discourage sterilization in any woman under thirty unless the indications are extremely pressing." (at 400-401). Another study by Drs. Silas H. Starr and Harold J. Kosasky, "Puerperal Sterilization," 88 ibid. 944 (1964) reports that the "commonest indication for puerperal sterilization is multiparity, a socio-economic, indication, stated in 68.6 per cent of the 31 replies, and reflecting the changing attitude of obstetricians and gynecologists concerning the procedure...." (at 946) In discussing this question, Dr. Edmund W. Overstreet said: "Finally, it must be emphasized that

multiparity is not a purely socioeconomic indication for sterilization. ***** While the socioeconomic motivations for multiparity-sterilization are obvious, its justification often has a reasonably firm medical content." Ibid. at 948. And still another doctor, Manuel E. Paniagua (with Tayback, Janer and Vazquez) reporting a followup study of voluntary sterilization in Puerto Rico done primarily for socioeconomic reasons found that where the mothers "have attained a family size of 3 or more living children, desire to limit their family to this number, and share with their husband the desire to seek a permanent solution to the problem of fertility control" that there are no appreciable psychological consequences and "the state of happiness of a group of sterilized patients is significantly improved as a result of the operation." In "Medical and Psychological Sequelae of Surgical Sterilization of Women," 90 ibid. 421 (1964) at 429. Also, see A. S. Norris, "An Examination of the Effects of Tubal Ligation: Their Implications for Prediction," 90 ibid. 431 (1964) and the special issue on therapeutic abortion and sterilization of Clinical Obstetrics and Gynecology (Vol. 7, March 1964) at pp. 11-125, also published as Edmund W. Overstreet (ed)., Therapeutic Abortion and Sterilization (N.Y.: Hoeber Medical Div. of Harper & Row, Inc., 1964). For a discussion of sterilization a generation ago, see the "Symposium on Sterilization," 34 Amer. J. Ob. & Gyn. 499-525 (1937), and the earlier special issue entitled "Sterilization -- Facts and Opinions," 12 Birth Control Review 73-91 (March 1928). Regarding post-operative morbidity or mortality, see H. Melvin Radman, "Sexual Sterilization in the Female at the Sinai Hospital: A Two Year Study," 58 Southern Med. J. 953 (1965) at 955.

9 "Although the Law is almost voiceless on the subject of voluntary sterilization, the physician who operates on selected patients on the basis of multiparity may rest assured his action is supported by a well-established medical precedent." E. Stanley Young, "The Moral Implications of Sexual Sterilization," 54 J. Maine Med. Assoc. 252 (1963) at 254. On the question of socio-economic indications for voluntary sterilizations, see Richard W. Te Linde, Operative Gynecology (Philadelphia: J. B. Lippincott Co., 1962 3rd ed.) at 631-32. In England, where there has never been any sterilization legislation of either a compulsory or voluntary nature, the following statement appeared regarding sterilization for therapeutic or eugenic considerations: "It is desirable that the ambiguities of the law should be resolved. But this is only a part of a question to which society itself must find the answers. The Law, the Churches, informed public and medical opinion, must all be brought to bear on a matter which in its implications goes far beyond the few rare cases in which the medical indications can be clearly defined." In "Legality of Sterilization," editorial, in British Med. J., n. 5211, (Nov. 19, 1960), at 1510, repr. in 53 Eugenics Rev. 33 (1961). Also, see C. P. Blacker, Voluntary Sterilization (London: Oxford Univ. Press, 1934), and "Voluntary Sterilization: The Last Sixty Years," 53 Eugenics Rev. 145 (1961) and 54 id. 9 (1962); and the discussion of Lord Justic Devlin's address to the Medical Society of London, a summary of two, joint opinions delivered to the Medical Defense Union by members of the English and Scottish bars, and comment on the need for a clearer statement of the legitimacy and liabilities of

sterilization in present English and Scottish law in the British Medical Journal, supra, at 1516-18.

10 N.Y.: McGraw-Hill, 1959, at 27. Data for this GAF (Growth of American Families) study was collected in 1955. These operations were most prevalent in the lower-status groups and especially among poorly educated wives and wives in their late 30s. The study covered women from the ages of 18-39, the fertile years. "The fact that almost 1 in every 6 wives aged 35-39 has had an operation which prevents childbearing indicates how important this phenomenon is in our population. Ibid. at 29.

11 Ibid. at 29. Prior to this statement, the authors said: "Further research is needed to determine to what extent the widespread incidence of 'sterilizing' operations is a result of failure to adopt other means of family limitation or of inability to use them successfully...." Also, see Reuben Hill, J. Mayone Stycos, and Kurt W. Back, The Family and Population Control (Chapel Hill: Univ. of North Carolina Press, 1959) at 174-79, Lee Rainwater, And the Poor Get Children (Chicago: Quadrangle Books, 1960) at pp. 37-38, 135, 176-77; Clyde V. Kiser (ed.), Research in Family Planning (Princeton: Princeton Univ. Press, 1962) at 174, 494-95; and Beatrice B. Berle, Eighty Puerto Rican Families in New York City (N.Y.: Columbia Univ. Press, 1958) at 133-47.

12 This newer Freedman et al. (GAF) study is due for publication in 1965. It is interesting to note that of the 238 sterilizing operations

reported, 53 were vasectomies on males, a considerable change from the 1959 figures. Another interesting finding of the later study was that couples that have contraceptive operations for nonhealth reasons have nearly the same number (3.4) births as do those who are sterilized for health reasons (3.6). Couples who seek contraceptive operations, according to this sample, do not do so because of large families.

13 See Tietze, "The Current Status of Fertility Control," 25 Law and Contemp. Problems 426 (1960), esp. sterilization at 440-441. The figure of 100,000 was in reference to sterilizations for contraceptive purposes. In a letter from one of the authors of both ~~the~~ GAF studies, Arthur A. Campbell, the following figures were given: average annual number of all operations that prevent conception (for 1955-1960) was 200,000 operations, including 90,000 remedial female and 65,000 contraceptive female and 45,000 male operations. (Letter dated Jan. 20, 1964). These figures later appeared in his article, "The Incidence of Operations That Prevent Conception," 89 Amer. J. Ob. & Gyn. 694 (1964).

14 89 Amer. J. Ob. & Gyn. 186 (1964). PAS refers to Professional Activity Study, which is the main endeavor of Dr. Slee's organization.

15 Ibid. at 188, 193 (Tables II and IV). This writer discussed these findings with Dr. Slee and he is in no way responsible for the projected figures that are included here. Actually, he clearly warned against the use of PAS figures for projections of this kind because the 6-7% "sample"

is not an accurate one in terms of kinds of hospitals, regions of the country served, and public, private, and religious identifications which would all affect a "true" estimate of sterilization in the nation as a whole. It is possible, however, to use the PAS figures in a carefully programmed way, taking these factors into consideration, but this was not done because of the costs involved. Notwithstanding the crudity of this writer's calculations, even the conservative use of PAS figures would probably be as good a figure as can be found at the present time. I wish to thank Dr. Slee and his associates for the co-operation and help they gave me in obtaining data that is unique and in my opinion probably the best gynecological surgery data that we have at the present time. This is not to denigrate the interview techniques used by Freedman and associates, but hospital records come much closer to a true statistical index of the degree of voluntary sterilization in the nation. For a summary of various select studies of voluntary sterilizations, see Robert E. Hall, "Therapeutic Abortion, Sterilization, and Contraception," 91 Am. J. Ob. & Gyn. 518 (Feb. 15, 1965), esp. his statistical summary at 528-29.

16 The GAF study and other literature indicates a rather high incidence of vasectomy in the western part of the county. Prof. Judson T. Landis of the Institute of Human Development at the University of California (Berkeley) has been studying sexual adjustment and related questions that relate to the use of vasectomy. In a study that he did with Prof. Thomas

Poffenberger entitled "The Marital and Sexual Adjustment of 330 Couples Who Chose Vasectomy As a Form of Birth Control," it was found that although the sample was weighted with men from the lower socio-economic levels, the "major reason for having the vasectomy was that they did not want more children, although they had relatively small families." (Paper read before the Research Section of the annual meeting of the National Council on Family Relations, August 1963, p. 13). Vasectomy was preferred to a female sterilization for the wife because it was cheaper and easier. Landis found to no one's surprise that marital and sexual adjustment improved when the fear of unwanted pregnancy was eliminated. See Thomas Poffenberger, "Two Thousand Voluntary Vasectomies Performed in California: Background Factors and Comments," 25 Marriage & Family Living 469 (1963); Thomas and Shirley B. Poffenberger, "Vasectomy as a Preferred Method of Birth Control; A Preliminary Investigation," 25 id. 326 (1963); and Judson T. Landis and T. Poffenberger, "The Marital and Sexual Adjustment of 330 Couples Who Chose Vasectomy as a Form of Birth Control," 27 J. Marriage & the Family 57 (1965); and two articles by David A. Rodgers et al., "Sociopsychological Characteristics of Patients Obtaining Vasectomies from Urologists," 25 Marriage & Family Living 331 (1963), and "A Longitudinal Study of the Psycho-Social Effects of Vasectomy," 27 J. Marriage & the Family 59 (1965), all of which found voluntary sterilization, for the most part, a satisfactory solution. (Note the journal's change of name in 1965) For a recent study of 200 consecutive vasectomies with what the author regards as very favorable results, see C. W. Truesdale, "Assessment of Vasectomy as Means of Voluntary Sterilization," 85 Journal-Lancet 155 (1965). For a comparison with experience in India, see K. T. Chitre, R. N. Sexena, and H. N. Ranganathan, "Motivation For Vasectomy," 11 J. Family Welfare (Bombay) 36 (1964).

17 Dr. Alan Guttmacher writes: "Multiparity. There is no reason to delude one's self: When today multiparity alone is listed as the reason for sterilization, the indication is 1 percent medical and 99 percent

socioeconomic. **** Cognizant of the almost insuperable socioeconomic burden excessive fecundity places upon poor families living in a great metropolis, we determined to offer puerperal sterilization to those clinic patients desiring it who were being delivered of at least a sixth living child, regardless of the mother's age...." In "Puerperal Sterilization on the Private and Ward Services of a Large Metropolitan Hospital," 8 Fertility & Sterility 591 (1957) at 592. Dr. Guttmacher went on to say that: "...As it was felt that older women were more mature and less likely to act impulsively in respect to sterilization, we permit mothers 30 to 35 years old to be sterilized with their fifth living child, and those over 35 with the fourth. Soon after these rules were put in force [in 1952] for the clinic population, the staff requested that the private patient should not be discriminated against and asked that the same rules be applied to all, regardless of socioeconomic status. The logic of the request made its acceptance automatic." (at 593) Dr. Guttmacher is speaking of the rules of Mount Sinai Hospital in New York City, where he was Chief of Obstetrics and Gynecology. In the first of his conclusions at the end of his article he said that "Multiparity as an indication for puerperal sterilization is in essence a socioeconomic one." (at 602) In another later article, "The Influence of Fertility Control Upon Psychiatric Illness, " 115 Am. J. Psychiatry 683 (1959), Dr. Guttmacher discussed sterilization at pp. 684-86 and said: "In its first 5 years of existence, 1953 to 1957, the obstetric department of The Mount Sinai Hospital delivered

21,169 women; 796 were sterilized at or after delivery (1% of private and 9% of clinic patients)." (at 685) And of these, 77% were on an age-parity criteria, 116 were sterilized for reasons other than parity, of which 10 (or 8.6%) were for psychiatric indications (2 on the private and 8 on the ward service). The "economics" of sterilization at Mount Sinai, that is to say, those classes most likely to be sterilized, is most striking in these figures. In his book, Planning Your Family (1964), Dr. Guttmacher wrote: "...A follow-up study made at the end of the first four years of the service revealed that 95% of the patients were happy and grateful that the operation had been done." (at 158) He described this same study in his Fertility & Sterility article in this way: "On the basis of this study one may hazard the guess that nineteen patients in twenty will be happy and grateful for the permanent prevention of conception, which they wished and still wish. However, one patient in twenty will change her mind, frequently because of circumstances beyond her control. Can we pick out this twentieth patient? I think not." (at 601-2)

18 In the North Carolina law, a petition by an unmarried minor under 21 is handled by the juvenile court of the county and there is a significant difference in the language describing the two permissible surgical procedures: "a surgical interruption of vas deferens or Fallopian tubes." The law was revised in 1965 in two respects: vasectomies do not have to be performed in hospitals; and a wife does not require her husband's written request if she can furnish an affidavit that he abandoned her and failed to support her for at least the preceding six months. The law also originally exempted the mentally incompetent spouse and those separated or divorced.

19 "Legal and Psychiatric Aspects of Voluntary Sterilization," 3 J. Family Law 103 (1963) at 123. Dr. Karl F. Mech of Baltimore, in testifying on a proposed voluntary sterilization bill in Maryland in 1963 felt that psychiatrists ought to be included in the decision to voluntarily sterilize. He also felt, as did Wolf, that a principal weakness of the Virginia law is its limitation of two surgical procedures. Wolf also points out that the requirement of performing these operations in a "licensed hospital" would preclude vasectomy in a doctor's office, (no longer true in North Carolina) which "may be a stronger deterrent to sterilization than the legislature thought..." (at 121). These same criticisms (the lack of psychiatric consultation and the licensed hospital requirement) also apply to the North Carolina voluntary law, but the two states differ on the question of limiting the surgical procedures to two. Although North Carolina mentions only two ("a surgical interruption of vas deferens or Fallopian tubes"), it should be noted that the female operations might include several different types of procedures (Robert L. Dickinson and Clarence J. Gamble in Human Sterilization (1950) speak of some 43 procedures for obstructing the oviducts, at p. 9). In a later version of his article, Wolf mentioned the weaknesses in both statutes and concluded: "...The Virginia and North Carolina statutes, with the above improvements, should be supported by medical societies and copied by other states." "Can New Laws Solve the Legal and Psychiatric Problems of Voluntary Sterilization?" 93 J. Urology 402 (1965) at 406.

For the latest discussion of voluntary sterilization and the law (together with an excellent survey of medical rules and folkways regarding sterilization operations in Philadelphia), see Linda K. Champlin and Mark E. Winslow, note, "Elective Sterilization," 113 U.Pa. L. Rev. 415 (1965), especially their discussion of the North Carolina and Virginia voluntary laws at 439-41 and the authors' proposed voluntary sterilization statute at 441-44. They accept most of Wolf's criticisms of the North Carolina and Virginia laws and even add some of their own.

20 "Legal Problems in Human Sterilization," 5 J. Miss. State Med. Assoc. 49 (1964) at 51. Hirsh also believes that some of the requirements of the Virginia law, namely, the permission of the spouse, could conceivably open the physician to a malpractice suit when an adult male claimed to be unmarried but was not. Even with the support of the Medical Society of Virginia, lawyers and doctors alike can find flaws in the Virginia voluntary law.

21 "Therapeutic Abortion and Sterilization Commttee; A 3 Year Experience," 80 Amer. J. Ob. & Gyn. 1192 (1960) at 1198. Dr. Merlin H. Johnson, in an article "Social and Psychological Effects of Vasectomy," 121 Amer. J. Psychiatry 482 (1964), writes that "The impact of operations which render women sterile has long been a matter of common medical knowledge. Certainly it seems possible that sterility may be equally upsetting to men. In this group of patients adequate reasons can be

found for limiting family size, but it is quite possible that failure to do so by means other than surgical intervention really reflects other problems in the marriage which pass unnoticed. A still unexplored area concerns the stress that may be involved in the unusual nature of the operation, namely, the performance of a surgical procedure on one person (husband) for the benefit of another (wife)." (at 485-86) Still another physician, William S. Kroger says: "Surgical sterilization is not a simple procedure, but one which in emotionally disturbed persons often can lead to serious involvement of the personality. Usually those patients who request sterilization because they object to the more usual contraceptive methods should be questioned over their rationalizations. Primary considerations should be directed to the underlying psychological factors rather than to the need for sterilization per se. It would seem, therefore, that even when excellent medical indications are present, the physician should thoroughly consider the emotional make-up, religion and interpersonal and socioeconomic factors prior to any type of sterilization in the male and female." In "Hypnotic Pseudo-orientation in Time as a Means of Determining the Psychological Effects of Surgical Sterilization in the Male and Female; A Preliminary Report," 14 Fertility & Sterility 535 (1963) at 538. The pioneer study of psychiatric aspects of female sterilization which Roger Wolf relied heavily on was by Hans Binder, "Psychiatrische Untersuchugen uber die Folgen der operativen Sterilisierung der Frau durch partielle Tubenresektion," 15 Schweizer Archiv fur Neurologie

und Psychiatrie, 1-49, 249-276 (1937). See Wolf, supra n. 17 at 109-114, citing principally the finding that 40% of the cases in Binder's sample had (or claimed) significant adverse effects of sterilization, but in only 10% were the adverse effects greater than the beneficial. For an earlier psychiatric view, see the abridged translation of an article by Dr. Ernest Rüdin, Psychiatric Indications for Sterilization (pamphlet issued by The Committee for Legalising Eugenic Sterilization, obtainable from the Eugenics Society, London, n.d., but probably the early 1930s).

22 For the best coverage, the reader should consult the New York Times or New York Herald-Tribune and the Washington Post for the period September 10-16 (the Tribune began its coverage on Sept. 9, even before the Archbishop's speech, and the Wash. Post printed an article by Gerald Grant on September 4, 1962 (at B I) that was the first to break the news publicly). The series by Gerald Grant in the Post was summarized and expanded in the January, 1963 Background Reports published by the National Conference of Christians and Jews under the title "The Fauquier Hospital Sterilization Story." David Binder's series in the Times is also very useful in analyzing the clinic and its activities.

23 These comments and those above are found in Grant articles as summarized in the "Fauquier Hospital Sterilization Story."

24 October 17, 1962. Just another example of bourgeois "immorality"!!

25 See pp. 1, 3-5 of that issue. At a Senate subcommittee hearing on a proposal by Senator Gruening (D-Alaska) to set up two Government posts to coordinate and supply birth control information at home and abroad upon request, William B. Ball, who spoke with the unofficial endorsement of the National Catholic Welfare Conference, was quoted as saying: "But we must remember that the planning of families is a thing radically different from the planning of highways, and the Government control of birth may come close to being Government control of life. We think that this is no place for Government." He injected the phrase, the "note of racial eugenicism" into the discussion and went on to state: "No one asserts that it is the intention of the bill's supporters to 'limit the production of American Negro offspring'", but then he went on to add that "no one can doubt that this is what will happen under large-scale programs of Government-backed birth control among the poor." From an article by Jean M. White, "2 Catholic Views Heard on Birth Control Bill," Washington Post, August 25, 1965, at A9, col. 1.

26 Grant, "The Fauquier Hospital Sterilization Story," at 9. This writer visited the clinic in December, 1962 and talked with the hospital's administrator C. Robert Peery, and found some support for the comments in Commonweal. See 77 Commonweal 3 (Sept. 28, 1962); 60 Newsweek 88 (Sept. 24, 1962); 53 U.S. News & World Report 55 (September 24, 1962); and three articles in another Catholic journal, 107 America 764 (Sept. 22, 1962) and 107 id. 804 (Sept. 29, 1962) and an earlier pre-Warrenton article on voluntary sterilization in 98 id. 528 (Feb. 8, 1958).

27 N.Y. Times, Sept. 14, 1962 at 20. He adds: "For all the enthusiams of the clinic personnel about the maternity clinic, they left one matter untouched in their conversations with a visitor. That was the matter of how the general conditions of the many impoverished citizens of this county, white and Negro, might be improved. To hear some of the sponsors talk one might think that the clinic, including sterilization, was the best means. Certainly the clinic has done much to raise health standards here, and incidentally, the living standards of some of the indigents. But there are still a dozen one-room wooden structures that serve as county schools for Negroes, and will continue to serve until several new consolidated schools for Negroes are completed. Furthermore, incomes for tenant farmers and domestic servants remain miserably low -- $125 a month for some, as little as $40 for others." Fauquier County, which possesses natural beauty, handsome estates with dairy and beef cattle, flocks of sheep, fruit orchards and hunting foxes, is also a county with abject poverty, poor tenant farmers, shacks, free supplies of surplus foods, (the local name is "findings") and human misery. Ironically, this was the area where the late President Kennedy built a beautiful home (Wexford) for his family, which was later sold after his death.

28 Vol. 4, No. 11, November 1962, at 19. See pp. 11-24 for the full section. The journal is to be congratulated for giving balanced coverage to several medical and religious points-of-view, including Archbishop O'Boyle's speech, a statement by Fauquier Hospital administrator Peery, and others.

29 "The Lawyer Speaks on Sterilization," from the Conference on Surgical Birth Control - One Answer to Involuntary Parenthood," sponsored by the Human Betterment Association of America, April 13, 1961 and published as a separate pamphlet under the same title by the Association, now called by its shorter title, Association for Voluntary Sterilization, Inc. The use of the words "if any" is important, because the subsequent passage of voluntary sterilization laws in Virginia and North Carolina has not completely satisfied the group's objectives, as for example, in this comment from the HBAVS Bulletin for the fall 1963: "In May North Carolina joined Virginia as the second state to enact legislation spelling out the conditions under which voluntary sterilization operations may be performed. These two statutes should not be confused with those laws in twenty-seven states that provide for compulsory sterilizations of the institutionalized mentally ill and deficient. In the opinion of HBAVS' legal counsel, these permissive statutes on voluntary sterilization merely confirm in law the freedom of action in this area which the physician has always had. Therefore, in some instances, these statutes may prove more a hindrance than a help." (at 2)

30 At 2.

31 Burke Shartel and Marcus L. Plant, The Law of Medical Practice (Springfield, Illinois: Charles Thomas, Publisher, 1959). They discussed sterilization and the law at pp. 42-48, and make the important

distinction which the A.M.A. Law Department did not make that statutes that restrict (but not prohibit) birth control devices, information, etc. are a poor basis for assuming that sterilization (voluntary) is against public policy. They concluded: "While the present authors do not favor a policy of compulsory sterilization for eugenic reasons.... neither are the authors impressed by the expediency of a legal approach which would allow what is probably a minority view as to the morality of contraception to be plucked from the air, read into our case-law under the guise of 'public policy,' and thus made binding on the whole community." (at 47 n. 23) And they further said: "...In our opinion the legal status of contraceptive sterilization is still an open one..." (at 48) For another view of the law and voluntary sterilization, see C. Joseph Stetler and Alan R. Moritz, Doctor and Patient and the Law (St. Louis: C.V. Mosby Co., 4th ed. 1962) at 108-13. Earlier editions were written by the late Dr. Louis J. Regan.

32 At 28. /See pp. 27-32 of the pamphlet. The force of this statement is further clarified by Bernard D. Hirsh, LL.B., the director of the A.M.A. Law Department, in an article "Legal Problems in Human Sterilization," where he said: "Outside of the three states /Connecticut, Kansas, and Utah/ where nontherapeutic sterilization is expressly prohibited by law, the physician who performs these procedures does not expose himself unduly to civil or criminal liability." 5 J. Mississippi State Med. Assoc. 49 (1964) at 51. Kansas repealed its law in 1965. Compare

this view with that of Emanuel Hayt, Lillian R. Hayt, and August H. Groeschel in their book, Law of Hospital, Physician, and Patient (N.Y.: Hospital Textbook Co., 2nd rev. ed. 1952), where in their discussion of sterilization and the law at pp. 552-57, they clearly condemn the performance of non-therapeutic sterilizations for economic reasons: "Although sterilization laws may differ from state to state, one principle may be accepted as almost universal: non-therapeutic sterilizations are prohibited as in violation of some criminal statute or of the common law, and are against public policy. Economic conditions which make the birth of additional children burdensome are no justification in the eyes of the law for such an operation. There must be a definite pathologic reason for the procedure, the conclusion for which should not be reached without the benefit of consultation, or specific authorization by statute." (at 554) This book was prepared in collaboration with The American College of Hospital Administrators, and notwithstanding that fact and the book's datedness, the above statement seems to be far out of line with present obstetrical and gynecological practice in this country. Shartel and Plant note that other than in the present Connecticut, Montana, and Utah sterilization laws that give an authoritative negative answer to contraceptive sterilization, "...the lawyer can do no more than offer an informed guess as to how the courts would regard a possible prosecution or damage suit, based on the performance of a contraceptive sterilization." Supra note 31, at 44.

Also, see Allan C. Barnes (ed.), The Social Responsibility of Gynecology and Obstetrics (Baltimore: Johns Hopkins Univ. Press, 1965).

33 From "Sterilization," in Albert Ellis (ed.), The Encyclopedia of Sexual Behavior (1961) at 1007. In the light of the allegedly large number of voluntary vasectomies performed in the west, especially in California, this comes as something of a shock. Rieser reports a survey of urologists (971) in which nearly 9% (84 replies) indicated legal complications. "Vasectomy: Medical and Legal Aspects," 79 J. Urology 138 (1958). In four states, California, Minnesota, Pennsylvania and Washington, unsuccessful suits were brought against physicians for breach of contract where pregnancy of the wife occurred following a vasectomy of the husband. In none of the cases was the performance of a non-therapeutic sterilization held to be contrary to public policy, but it should be mentioned that in each case a normal delivery of a normal child occurred, and hence, the plaintiff could not show damages. But harm or even death of the wife during delivery or the birth of a deformed child might conceivably move a jury to hold for the plaintiff. See Christensen v. Thornby, 192 Minn. 123, 255 N.W. 620 (1934); Shaheen v. Knight, 6 Lyc. 19, 11 Pa. D & C. 2d 41 (1957); an unreported case, Corman v. Anderson, memorandum trial court decision No. 701.588, Superior Court, Los Angeles, California (Nov. 16, 1960); Ball v. Mudge, 64 Wash. 2d 247, 391 P.2d 201 (1964) and discussion of it in 6 Ariz. L. Rev. 318 (1965); and the warning of Miley B. Wesson, "The Perils and Pitfalls of the Vasectomist," 97 Amer. J. of Surgery 84 (1959). On the question of consent to voluntary sterilizations, see two California District Court of Appeal cases, Kritzer et al. v. Citron et al., 101 Cal. App. 2d 33,

224 P. 2d 808 (1950) at 811; and Danielson v. Roche et al., 109 Cal. App. 2d 832, 241 P. 2d 1028 (1952). In another rather novel California case, Wiley v. Wiley, 59 Cal. App. 2d 840, 139 P. 2d 950 (1943), the court assumed without discussion that a contraceptive (non-therapeutic) sterilization is a wrongful act. But the question of sterilization was not the heart of the case, which involved an action by a husband to annul a marriage, and therefore this decision adds very little to the law of voluntary sterilization, even in California, except for the finding in this case that the party requesting the operation (the wife) is in no position to rely on its unlawfulness. For consent to sterilization in Coloardo, see the case of Maercklein et al. v. Smith, 129 Col. 72, 266 P. 2d 1095 (1954) discussed in 159 J.A.M.A. 1149 (Nov. 12, 1955). The often-discussed 1934 Minnesota case is especially interesting in that the husband was vasectomized to protect the health of his wife, not himself, but the Minnesota Supreme Court had no difficulty explaining this fact on the grounds that vasectomy is much simpler than salpingectomy and achieves the same purpose of preventing future pregnancies. This makes the definition of "therapeutic sterilization" a maritial or familial matter, not merely a matter of protecting one's own life or health, and goes beyond the older, more gynecological (medical) indications. For an excellent survey of voluntary sterilization around the world, see L.C. Green, "Medico-Legal Aspects of Sterilisation," 4 Singapore Med. J. 98 (1963). **Also, Stanwood S. Schmidt, "Technics and Complications of Elective Vasectomy," 17 Fertility & Sterility 467 (1966).**

34 In discussing sterilization trends, Dr. Alan F. Guttmacher in a letter to the writer, dated Oct. 3, 1963, remarked that institutional sterilizations for eugenic grounds was a "shrinking terrain. However, in actual practice the number of sterilizations is swinging up quite dramatically because they are now being done all over the country on normal patients (non-eugenic) for socio-economic and parity reasons." See Guttmacher, supra note 17. Binder at the end of his study presents this very sound advice to all concerned: "With regard to the practical, we can assert as an important result of our research the following: the relationships are so complicated, the sterilization reaches into so many and so different and often so contrary concerns of individuals and society, that it is impossible to prepare any schematic principles as indications for sterilization. In a concrete case it must be decided whether operative sterilization is indicated or not; then the individual, family and social relationships of the woman concerned must be looked into as precisely as possible." Quoted in Wolf, supra note 19, at 114.

35 "Propaganda For Voluntary Birth Control and Voluntary Sterilization a Danger," 30 J. Med. Assoc. Ala. 417 (1961) at 419. Dr. Kant , who is German-trained, favors compulsory sterilization of the mentally deficient only after an evaluation by a commission of experts and the consent of a guardian. He does not feel that expansion of present eugenic sterilization programs in America is likely. An entirely different view of the economics of contraception was presented in the oral

argument of the Planned Parenthood Federation before the United States Supreme Court in the recent birth control case, Griswold v. Connecticut where counsel Thomas I. Emerson argued that the poor were often prevented from obtaining needed birth control services, but the implication was that this was a denial of basic freedom. Unlike Kant, the PPF did not argue that the needy poor should have contraceptive services because they are "unfit" but because this is a necessary part of modern public health for all people, as well as a constitutional right.

36 "Therapeutic Abortion, Sterilization, and Contraception," 91 Am. J. Ob. & Gyn. 518 (Feb. 15, 1965) at 529, 531. See his discussion of the double-standard at 527.

37 Clayton v. Board of Examiners, 120 Nebr. 680, 234 N.W. 630 (1931).

38 At 22.

39 85 Time 44 (Jan. 15, 1965). Just two months earlier, Time had made the claim that vasectomies could be undone, but that it was a "feat successful in only about 50% of such cases...." 84 Time 88 (Nov. 13, 1964). But accuracy has never been a virtue of Time. Richard L. Meier, in Modern Science and the Human Fertility Problem (N.Y.: Wiley, 1954) in a discussion of various birth control methods mentions sterilization in this way: "...sterilization, perhaps even with various degrees of reversibility...." (at 14) See 6 Medical World News 73 (Oct. 29, 1965) for a description of the Columbia-Presbyterian Medical Center's study of reversal of vasectomy operations, financed by a three-year grant from the Rockefeller Foundation.

40 Herbert Brewer, "Reversibility Following Sterilization by Vasectomy," 56 Eugenics Rev. 147 (1964). Also, see 55 id. 55-56 (1963) and "Legality of Sterilization: A New Outlook" in British Med. J., n. 5211 (Nov. 19, 1960) at 1518 where their legal correspondent said that the possibility of reversal operations would probably affect the liability of physicians and the problem of criminal violations. Even in the case of compulsory sterilization laws in the United States, a fairly certain possibility of reversal could have a profound impact on courts dealing with the constitutionality of such legislation.

41 See Elmer Belt, "Sterilization: Can It Be Undone?" Sexology (Dec. 1961), reprinted as a Human Betterment Association pamphlet, 1964; Dr. W.E. Goodwin's correspondence with Brewer, supra note 40 at 147; P.S. Jhaver, 9 J. Family Welfare (Bombay) 57 (1962), G.M. Phadke, 36 J. Ind. Med. Assoc. 19 (1959) and 11 Maharashtra Med. J. 217, 227 (1964), and V.N. Shirodkar in 11 id. 231 (1964) on the reversible method of sterilisation in the female; and the Hugh Moore Fund pamphlet, The Population Bomb: Is Voluntary Sterilization the Answer? (N.Y., n.d.) where they mention urologists who claim a one-third to two-thirds success rate, but they nonetheless show caution: "As of now, however, no physician would guarantee to render a man fertile again. More research is of prime importance. When men can be assured of a return of fertility, if desired, the high barrier to male sterilization will

fall." (at 16) Drs. Belt and Goodwin are both on the staff of the University of California Medical School.

42 "The Current Status of Fertility Control," 25 Law and Contemp. Probs. 426 (1960) at 439-40.

43 Planning Your Family; The Complete Guide to Contraception and Fertility (N.Y.: Macmillan, 1964) at 178. His advice on possible reversal of salpingectomy (by Pomeroy technique) is substantially the same (at 172). In the early 1960s, when Dr. Guttmacher was chairman of the medical and scientific committee of the Human Betterment Association, there was an attempt to conduct vasectomy follow-ups in order to obtain more information on voluntary vasectomy, including attempts at reversal. Nothing seems to have come from this effort, insofar as published accounts are concerned. Experimental work was also carried on at Mount Sinai Hospital. In a personal correspondence to this writer, dated October 3, 1963, Dr. Guttmacher reported that this work was entirely on dogs and that it had not progressed very far at that time. The research is now being carried on by Dr. William Ferber. In the HBAVS News (spring, 1963), Dr. Guttmacher mentioned the Mount Sinai research and was quoted as saying that "....success in this area would remove many of the psychic disadvantages in voluntary sterilization." (at 2)

44 For his earliest discussion of artificial insemination, see his article, "Eutelegenesis," 27 Eugenics Rev. 121 (1935) and for a more

recent discussion, see "Ethical Parenthood and Contraception," Balanced Living (Brookville, Ohio, March, 1961). The word "ominous" is used because the possible uses of such a combination by future governments and societies is unpredictable, but doubtless recent history would warn us against a premature adoption of such an ingenious plan. Professor A.S. Parkes of Cambridge University, England has also referred to the advantages of combining vasectomy with telegensis in 174 Nature 813 (1954). For a fascinating discussion of what modern biological discoveries might do to man's future, see Jean Rostand, Can Man be Modified? (N.Y.: Basic Books, 1959).

45 Two sober attempts to discuss the moral implications of questions such as these are: John G. MacKinnon, "A Moral Basis for Genetic Improvement," 20 The Humanist 89 (1960) and Thomas S. Szasz, "The Ethics of Birth Control -- Or: Who Owns Your Baby?" 20 id. 332 (1960). For a sometimes humorous attempt to relate the foibles of man-made birth-control law to animals (in this case, the oral contraceptive for dogs), see Alan R. Novak, "Man, His Dog and Birth Control: A Study in Comparative Rights," 70 Yale L.J. 1205 (1961)

CHAPTER FIVE

STERILIZATION ORGANIZATIONS IN THE UNITED STATES

STERILIZATION ORGANIZATIONS IN THE UNITED STATES

E.S. Gosney's Human Betterment Foundation of Pasadena, founded in 1928, was the most energetic organization in the country for the espousing of compulsory state sterilization laws and in the spreading of the "word" about the wonders of sterilization. It was HBF that began annual state sterilization compilations that have provided the most significant (if not the only) figures on the incidence of state sterilizations in the country. By the time HBF came into existence, sterilization was already in progress in 21 states, and the Buck v. Bell decision in the United States Supreme Court in 1927 had given other states the "go ahead" signal. With legal validation, the job of HBF was to spread sterilization as far as possible into other states of the union, largely through educational media, reprints, and the like. Although a great deal of the organization's attention was concentrated on the California sterilization program, they were not adverse to developments elsewhere, including Germany. In the 1934 annual report, Secretary Paul Popenoe wrote:

> Still greater attention has been aroused by the inauguration of eugenic sterilization on a large scale by Germany. The German law is well drawn and in form is better than that of most American states. The success of any such law, of course, depends largely on its being administered conservatively, intelligently, and sympathetically.[1]

Enthusiasm for the Nazi sterilization program, which also appeared in the eugenics periodical literature[2], was continued in subsequent reports of HBF. In the 1935 annual report, Popenoe reported:

> ...An outstanding feature of the meeting was also the eugenics exhibit of the German government, which was devoted largely to sterilization. This is regarded by competent judges as by far the best eugenics exhibit ever assembled, and it will be retained in the United States indefinitely.[3]

One of HBF's original incorporators, philanthropist C.M. Goethe of Sacramento, after a visit to Nazi Germany, wrote to the group's founder, E.S. Gosney:

> You will be interested to know that your work has played a powerful part in shaping the opinions of the group of intellectuals who are behind Hitler in this epoch-making program. Everywhere I sensed that their opinions have been tremendously stimulated by American thought, and particularly by the work of the Human Betterment Foundation. I want you, my dear friend, to carry this thought with you for the rest of your life, that you have really jolted into action a great government of 60,000,000 people.[4]

The advent of the war years and the knowledge of what happened to the eugenics policies of the Nazi regime slowed down the pace of

state sterilization in the 1940s, and the death of Gosney in 1942 brought an end to the Human Betterment Foundation of Pasadena. But the work of sterilization education was to continue. In the annual report of HBF dated February 14, 1939 there appeared this statement: "...We have had a great deal of interesting correspondence with the New Jersey Sterilization League, which seems to be a flourishing organization." This local organization, supplemented by the interest of a small group of members of the League of Women Voters who had visited a mental institution and observed several generations of the same family,[5] became a national organization in April, 1943 under the name of Birthright, Inc., with headquarters in Princeton, New Jersey. Birthright secured the services of Dr. Fred O. Butler as its Medical Director. Butler had been medical superintendent of the Sonoma State Home in California for 30 years and was probably the nation's most outspoken and experienced advocate of institutional sterilization. The title of the organization, Birthright, was probably taken from the famous statement of the 1930 White House Conference on Child Health and Protection: "There should be no child in America that has not the complete BIRTHRIGHT of a sound mind in a sound body, and that has not been born under proper conditions." [5a]

Additional education work was begun in 1945 and 1947 with the formation of the Human Betterment Leagues of North Carolina and Iowa. The North Carolina League helped in the formation of the Human Betterment League of Georgia in 1949, and the Iowa League helped in the formation

of a Human Betterment League of Nebraska in that same year, and these four state leagues formed the Human Betterment Federation in 1949, with offices in Des Moines, Iowa. The Human Betterment League of Alabama was added to the four groups in 1950.

Birthright became heir to the records, statistical data, and materials of Gosney's defunct Human Betterment Foundation in 1949 and changed its name in 1950 to the Human Betterment Association of America, thus continuing as the only national organization in the field of sterilization. The Des Moines federation was to continue for several more years, but gradually petered out. Today, the only really viable leagues still at work are the Human Betterment Leagues of North Carolina and Iowa, where Mrs. James L. Daugherty of Des Moines has been the prime mover.[6]

The guiding spirit behind HBA in the early years was Dr. R.L. Dickinson until his death in 1951, when the organization moved to its own headquarters. Dr. Butler was to continue as medical director of HBA, as he had been for Birthright. Although some of the older literature (for example, a suggested sterilization bill with voluntary and compulsory provisions) was still distributed, the literature of HBA in the 1950s did not use the language of compulsion, but talked instead of "selective sterilization"[7] and later on, talked exclusively in terms of voluntary sterilization, and went beyond purely eugenic considerations.

Another early HBA publication, "Sterilization for Human Betterment," combined the words "selective" and "voluntary" in this way:

> The association is concerned with research, education and service in the field of selective sterilization. The purpose is to develop public understanding not only of the meaning and use of voluntary sterilization with proper safeguards, but also of the contribution this voluntary procedure can make toward the solution of family and community problems.[8]

Among the questions that the association thought too little was known about were:

> 1. How many persons request sterilization, or how many are refused and for what reasons.
> 3. How many sterilizations are actually performed outside of institutions, for what reasons, and how classified for the records.
> 5. To what extent the rights of patients in regard to sterilization are infringed -- in or outside institutions, in states with or without specific sterilization statutes.[9]

The stress on the voluntary, family planning side of the organization's work led to the creation of a subtitle "voluntary sterilization," in February, 1959 and the organization eventually became HBAVS (Human Betterment Association for Voluntary Sterilization, Inc.) in 1962.

In 1965, this name was shortened to its present Association for Voluntary Sterilization.[10] What appears to be a simple change in title is really an important change in spirit, because with the dropping of Human Betterment from their title, the stress on voluntary sterilization and the equally significant stress on socio-economic and family planning purposes as against eugenic considerations is now much clearer.[11]

Two recent events dramatized the work of AVS (then HVAVS) to the national public and perhaps did more to bring voluntary sterilization to the forefront than any others. The first was the already-discussed furor in the fall of 1962 over voluntary operations in the maternity clinic at the Fauquier Hospital at Warrenton, Virginia. Human Betterment played a significant role in this furor, especially since the trip to the hospital by the visiting sociologists was arranged by the organization and one of the hospital's staff members, Dr. H. W. Stinson is a vice-president of the organization. HBAVS was instrumental in organizing the program, and although much of the publicity, especially from religious sources, was adverse to the Warrenton clinic's voluntary sterilization policies, no other single event has more cogently brought home to the general public the "message" of the association and of voluntary sterilization.

A second notable event was the announcement of the so-called Hartman "Plan" in July, 1964. Jesse Hartman, a New York businessman, gave $25,000 to HBAVS to set up a voluntary sterilization program in a poverty-stricken section of eastern Kentucky.[12] He later added another

$25,000 gift for a similar program in needy counties of Florida. The program in Kentucky Appalachia and in Florida are part of what a recent HBAVS publication called HBAVS' "War on Poverty," and "One Effective Answer to the Population Explosion."[13] The two Hartman Plans have been prepared with the cooperation of local public health authorities, including the Frontier Nursing Service in the Kentucky program.

Unlike the Warrenton, Virginia program, the "war on poverty" via voluntary sterilization did not stir up too much fuss, and publicity was generally favorable.[14] Careful groundwork by agencies in the depressed area of Kentucky that was to receive Hartman Plan help included meetings attended by representatives of HBAVS, the Mountain Maternal Health League (whose president, Dr. Louise G. Hutchins is the wife of Berea College President, Dr. Francis Hutchins, a brother of the famous Robert Hutchins), the state's regional health officer, and the Council of the Southern Mountains. Efforts were made to acquaint local health officers, physicians, and social workers in each of the 22 counties served by the Plan. Because the cost of the female operation is much higher than a vasectomy on males, Mrs. Hutchins suggested that health and welfare workers concentrate on the men, saying; "We hope that our grateful men will spread the word to others."[15]

In addition to its educational activities and its organizational efforts in Virginia, Kentucky, Florida and elsewhere, AVS's most important work is in the assessment of requests for sterilization by its

Medical Committee. Those approved are then referred to one of the Association's 1500 cooperating physicians throughout the nation. In 1960, for example, following distribution of a reprint of an article, 2,603 requests for help were received from 48 states, the Philippines, Canada, and Mexico.[16]

With the increasing popularity of voluntary sterilizations, especially for non-therapeutic reasons, the work of AVS can be expected to increase in the near future.[17] With gifts such as the Hartman Plan, efforts to reach those who are without funds for such operations will probably increase and will be limited solely by the funding abilities of the organization and its future success in reaching the families in the lower socio-economic levels of American society. Only recently, an AVS Board member, Mrs. Harvey McClintock, contributed $15,000 and offered to raise another $5,000 for a voluntary contraceptive sterilization pilot program in New York City similar to the earlier "Hartman Plans."[18]

AVS's "war on poverty" showed amazing success in 1965 when it was reported that -

> As a result of a recent letter sent to our Association's roster of cooperating physicians, about 135 doctors in 32 states have agreed to perform over 2100 contraceptive sterilization operations for poor people who request them, and whose applications are accepted by AVS's

> Medical Committee. This, we feel, is a remarkable display of public-spirited generosity by these physicians, and we take this opportunity to thank and congratulate them.[19]

Perhaps a temporary defeat in the aims of AVS was sustained in 1965 when the federal government's Office of Economic Opportunity (the "War on Poverty" office) sent a bulletin to social agencies listing 10 "special conditions" for the use of federal funds in family planning and birth control programs. "Special condition No. 7" read:

> No program funds shall be expended for any surgical procedures intended to result in sterilization....[20]

On the state political front, an explosive situation in Michigan may set off a chain reaction that could gravely affect the use of voluntary sterilization in a number of states. On July 8, 1965, the St. Joseph County (Michigan) Board of Supervisors passed a resolution authorizing payment for sterilization of either husband or wife in eligible public welfare cases in that county, as part of a general family planning program that would include the dispensing of birth control pills by the county health department and payment of fees for insertion of intrauterine devices. These services and materials would be available only to those persons receiving public assistance and then only after investigation of the family background, number of children and financial circumstances, and approval by the board's health and welfare committees.[21] State Attorney General Frank J. Kelley declared the program "clearly

illegal and a shocking misuse of public authority" and threatened to take legal steps to halt the program if it went into effect. St. Joseph County Prosecutor William L. McManus answered by saying the county had ample general authority for such a voluntary service and stressed the voluntary character of the program.

> Every step of the way has to be approved in writing by both the husband and the wife. We're not giving it out to divorcees, teenage girls, or anything of that sort.[22]

With family planning services for the indigent sprouting across the country, the use of city, county, state or federal funds for voluntary sterilization operations may set off a storm equivalent to the not-too-distant battles over the Planned Parenthood Federation's program in Connecticut and general birth control programs in Chicago and New York City. Once again, AVS will have to use the political arena with maximum effectiveness if obstacles such as those in Michigan and the OEO are to be removed. But the strategies and behavior of the organization will doubtless be far different from the rambunctious, and at times, self-righteous moralizing of the early extreme hereditarians.[23] This time, AVS will be in "good company" and its arguments will be couched in terms of "freedom of choice" and what is essentially the "right" to choose one's particular form of contraception. The days of compulsion, of the allegedly overriding dictates of the common or "collective" welfare, are things of a darker past.[24] AVS, as it apparently desires,

can firmly plant itself and its objectives in the American democratic tradition, depending for its sutenance on the twin principles of rational inquiry and voluntariness.

CHAPTER FIVE --FOOTNOTES

1 HBF, Annual Report of the Secretary for the Year Ending February 13th, 1934, at 3.

2 An example was Dr. C.G. Campbell, "The German Racial Policy," 21 Eugenical News 25 (March-April 1936): "...No one who knows the strict legality that pervades all German court procedure can doubt that these laws will be administered with entire fairness. And the allegations that they would be made a subterfuge for racial discrimination and persecution is only one of the irresponsible and hysterical charges that have been made about this policy." (at 27)

3 At 1. The meeting referred to was the annual meeting of the American Public Health Association in Pasadena. In this report, dated Feb. 12, 1935, Popenoe noted that the "President has worked out a bill which would revise the present statutes and undoubtedly give California the best sterilization law in existence." California was without any procedural protections in its sterilization statute until 1951, long after HBF went out of business.

4 Ibid. at 3. Also considered "among outstanding events of interest in the United States" in that year was the championing of sterilization by the Presidents of the National Federation of Women's Clubs and the Pennsylvania State Federation of Women's Clubs. This was followed in the annual report of Feb. 11, 1936 by mention of "inquiries and

suggestions from the representatives of both state and national officers of the League of Women Voters and of the General Federation of Women's Clubs, seeking to enlist our help in the work of informing their members and the public as to the facts in regard to eugenic sterilization." (at 3). In the annual report of Feb. 14, 1939, secretary Joe G. Crick reported distribution of 140,000 pamphlets and more than 130,000 leaflets for classroom work, an increase of approximately 100% over the previous year.

5 "This led to a eugenic interest in sterilization -- primarily to halt the production of mentally deficient offspring." From a newspaper story reprinted in the HBAA News (Human Betterment Assoc. of America), spring 1962 at 3.

6 The HBAVS Bulletin for fall 1963 reported that Mrs. Daugherty "is the leader of a valiant group in that state carrying on its own sterilization service program and spearheading the drive to have voluntary sterilization performed in tax-supported hospitals for socio-economic indications. At present, Mrs. Daugherty states that this medically approved procedure is available to the well-to-do, but withheld from the medically indigent." (at 1)

7 An early HBA pamphlet entitled "This is Your Concern" said: "Through educational methods based on medical, sociological and legal research, the Human Betterment Association of America works toward more intelligent

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5a Reprinted in the HBAA pamphlet, Sterilization For Human Betterment (n.d.) at page 12, and also in the pamphlet, Speaking of Sterilization, issued by the Human Betterment League of North Carolina, which followed the quotation with their own statement: "Selective sterilization can help to attain this goal."

and extensive use of selective sterilization." (at 9). Another pamphlet, "The Physician and Sterilization," suggested that state medical societies might well "consider the desirability of sponsoring and instituting legislation prescribing the circumstances under which sterilizations for socio-economic reasons could be performed. This is in contrast to a pamphlet that appeared after the passage of the 1962 Virginia voluntary sterilization law which said in part: "...It should be pointed out that the Virginia statute merely confirms in law the freedom of action in this area which the physician has always had. For this reason Human Betterment does not believe it necessary to advocate legislation. However, the Association is constantly alert to legislative developments and offers assistance, including a model voluntary sterilization statute." From Human Betterment Association for Voluntary Sterilization: A Statement of Purpose and Program. In the HBAVS News for spring, 1963, this comment appeared: "While an improved understanding of the legal realities of voluntary sterilization, particularly on the part of physicians, is basic to increasing availability of the surgical method of birth control, HBAVS does not believe that legislation is required...." (at 4)

8 Program of the HBA, at 6. In still another publication, "Basic Facts About Vasectomy," Humman Betterment's purpose was to "develop public understanding of the meaning and use of voluntary sterilization, with proper safeguards..... *** Participate in and encourage fact-finding

studies of medical, legal, eugenic, psychological and socio-economic aspects of sterilization." The word "selective" was dropped and did not appear in subsequent publications. And in a revised, more recent edition of "Sterilization for Human Betterment," this sentence was added to the organization's list of activities: "To inform professional groups and laymen about the status of sterilization for male and female, by means of factual material prepared with legal advice, dispelling the often erroneously held conviction that voluntary sterilization is illegal."

9 Ibid. at 13. As to question no. 5, this writer could find no evidence that HBA was ever interested in finding out for itself what violations of patient rights might have occurred under the compulsory state statutes. Whatever interest it ever had in legal rights was confined to voluntary operations, both from the viewpoint of the patient and the physician involved.

10 Mrs. Ruth P. Smith, a former Executive Director of HBA, in a letter to this writer dated Feb. 19, 1962 wrote: "The emphasis of Human Betterment's interest was changing from eugenic to socio-economic sterilization when I came to the organization in 1955. Since then, we have compiled annually, Sterilizations Reported in the United States, but have paid little more attention to the eugenic aspect. In fact, our doctors, lawyers, sociologists and other supporters are for the most part opposed to any form of compulsory sterilization and strongly in favor of voluntary." In another communication dated June 24, 1963, Mrs. Smith

said that her organization was concerned about the attempted passage of new compulsory sterilization laws. "If it is at all possible financially, we hope in the future to send a spokesman. We would appreciate having you notify us if you hear of any bills coming up. We would oppose a compulsory bill." The association no longer sends out its model sterilization bill with compulsory provisions, but has replaced it with a short "Suggested Sterilization Bill" that is a purely voluntary, non-institutional proposal, similar to the laws passed in Virginia and North Carolina in 1962 and 1963. Perhaps the organization's apparent dereliction in attending hearings on some of the recent proposed punitive sterilization bills in various states was due to the fact that these were not actually sterilization bills in the formal sense, but were anti-illegitimacy or anti-ADC bills with sterilization as part of the punishment for the crime. This writer attended hearings on a compulsory sterilization bill in Ohio in April, 1963 and saw no evidence of HBA representatives at the public hearing, but it may be that knowledge of these events was not well-known nationally.

11 AVS did not issue its annual compilation of sterilizations performed in the various states in 1965, which may indicate (if this is the end of such compilations) that a complete break with the past has been made. Since these were compilations of institutional or extramural operations done pursuant to state laws, they do not fit into the voluntary sterilization program of AVS. These compilations had a 35 year history that

traced back to E.S. Gosney's Human Betterment Foundation of Pasadena, organized in 1928. Perhaps an even more significant indication of the break with earlier eugenic history is seen in a recent newspaper story in the New York Times which discussed a fight in Connecticut over their sterilization law. Fred P. Graham in "New Fight Grows on Sterilization" mentions the views of Donald H. Higgins of AVS, who is quoted as saying that "medical science now doubts that epilepsy is normally inherited and that there are more questions about the hereditary nature of other undesirable characteristics. Also, the Nazi experiments with compulsory sterilization made it unpopular with many Americans." New York Times, April 4, 1965, at 78. If these views are representative of AVS, then the break with the past is truly complete.

12 Hartman was moved by a Newsweek article (Sept. 16, 1963 at 84) on vasectomy.

13 "We have not lost sight, however, of the fact that the 'population explosion' is not an impersonal, far-off, mass problem. It is right here --- right now -- in the United States as well as in Asia, Africa and South America." From a letter attached to the HBAVS News for spring 1964. In a HBAVS Bulletin for summer 1964, half of the issue was devoted to a story entitled "HBAVS Makes War on Poverty in Kentucky Appalachia" describing the Hartman Plan as a pilot project "intended to show the way for government to assume full responsibility for similar birth control programs nationwide." (at 2)

14 Articles appear in The New Republic ("Birth Control by Surgery" by James Ridgeway, Nov. 14, 1964 at 9-11) and in Time on voluntary sterilization (January 15, 1965 at 43-44). Time reported 115 operations performed in the Kentucky program in the first six months. Ridgeway reported that Kentucky hospitals performing sterilizations for non-medical (socio-economic) indications insist that the woman be over 30 and have four or five children, and that men have four children.

15 As reported in the Lexington (Ky.) Leader, July 9, 1964, at 2. The article concluded in this fashion: "As in other wars on overproduction, then, the problem still is one of education and salesmanship." Whether in Kentucky Appalachia or in the state of Madras, India, the problems of male sterilization seem similar.

16 The article was "Surgical Birth Control" by Dr. Alan F. Guttmacher, and appeared in True Story for Feb. 1960.

17 The number of requests for sterilization operations that come to the attention of the AVS' Medical Committee might appear to be quite small in comparison to the estimated number of voluntary contraceptive operations performed annually (100,000), but it should be noted that AVS has not until the last few years been able to reach the mass public through the media of radio, TV, and national periodicals. It would be interesting to find out where the other 97% of the estimated figure get information on voluntary sterilization. Certainly, when one looks at the number of

voluntary operations performed in the Fauquier Hospital, and the Kentucky and Florida Hartman Plan programs, they do not strike one as a "massive" attack on the population explosion, and this is perhaps a good thing. For as an organization admittedly sensitive to the many factors that affect people before and after sterilization operations, AVS is not prone to rash actions. If their "success" is measured by numbers alone, this fact is lost sight of, and the real impact on specific individuals is not seen. Sterilization is necessarily personal, and a sensitive organization dedicated to the education of the national public would be wise, as I believe AVS is, to pursue a gradualist, well-reasoned program. "Salesmanship" may be a part of the story, but the well-being of the people involved must always be given primary consideration.

18 As reported in the AVS Bulletin (summer 1965) at 3.

19 Id. at 1. The comparison with previous years is striking: "By way of comparison: In 1963, AVS arranged 274 operations. In 1964, we arranged 493 operations and spent about $30,000 on loans to patients. The 2100 operations recently pledged by 'our' doctors would cost over $150,000 if we had to pay for them at an average of $75 each."

20 As quoted in id. at 5. Also see the statement by Hugh Moore, AVS President, challenging the anti-sterilization edict of the OEO: "It cannot be over-emphasized that what is called 'administrative discretion' in the OEO's letter is in fact usurpation of the people's freedom of choice." Id. at 3.

21 Detroit News, July 9, 1965, at 15-A.

22 Detroit News, July 16, 1965, at 10-A. The following day, he said that "if the county board of supervisors found enough public opinion against sterilization they might put a stop order to delete that particular section" of the family planning program. Id., July 17. Four days later, Attorney General Kelley again warned St. Joseph County officials to immediately halt the family planning program that included sterilization. "I request that you advise the county board of supervisors that such [a] family planning program may not be implemented and that the resolution adopting same is null and void. Please advise me as soon as this action has been taken. Not only is this program illegal but in its coercive nature it is a shocking violation of the fundamental principles of human dignity and marital privacy. Nor does the fact that the resolution of the St. Joseph board of supervisors contains statements of its 'voluntary basis' alter the obvious fact that in its lack of selectivity and in the mandatory nature of the notice requirements, the program has been cloaked in a mantle of coercion." As quoted in an article by Carl B. Rudow, Detroit News, July 21, 1965, at 4-B.

23 An example in this regard was the special AVS Conference on "Public Welfare, Voluntary Sterilization and the Public Health," which was held October 7, 1965 in New York City. AVS made a concerted effort to obtain governmental support of and participation in birth control programs

"which include voluntary contraceptive sterilization and are organized for maximum benefit to the poor." Supra note 18, at 1. Emphasis at this AVS conference was on the representatives of the Public Welfare, Public Health, and allied disciplines, and in the light of the recent events in Washington and in Michigan, it is obvious that AVS will need all of the political support it can get at any level of government in the years ahead. Over 200 people attended this conference, which passed a strongly-worded resolution protesting the ruling of the OEO and urging that it "rescind the regulation which excludes voluntary sterilization from eligibility for federal funds as part of family planning programs." See the AVS Bulletin, December 1965, at 1-2.

24 This does not mean, however, that difficult social, family, and personal questions relating to sterilization have been answered, as for example, the following two questions in HBA's pamphlet, Sterilization: Basic Facts For Educators and Their Students (under the heading of "Study or Research Points of Focus" - Mental Health): "a) Does sterilization have a place in relieving the overall mental health problems; b) Are the retarded and mentally deficient unfit for parenthood?" Often the questions are easier to raise than the answers are to find, as in this quotation from the National Resources Committee (which existed from 1935-1939) in reporting on the increase of mentally deficient and handicapped persons in the country: "The proportion of persons handicapped by hereditary deficiencies might be reduced by intelligent social action.... It seems clear that the prevention of reproduction by persons handicapped by severe mental deficiency or by disabling physical conditions, that appear to be hereditary, is socially desirable." From the pamphlet, What Do You Know About Sterilization? issued by the Human Betterment League of North Carolina and the now-defunct Human Betterment Federation of Des Moines.

CONCLUSION

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"We deal with a right of privacy older than the Bill of Rights---older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or

social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions."

JUSTICE WILLIAM O. DOUGLAS (1965)[1]

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1 From the opinion of the Supreme Court in the famous Connecticut birth control case, Griswold v. Connecticut, 381 U.S. 479 (1965) at 486.

CONCLUSION

Perhaps in our own bumbling, inimitable way, American sterilization experience can teach us a few basic lessons in the history of science, the legislative and judicial processes, and the complex and at times agonizing relation between science and public policy. An experience that covers so many different states over a period of nearly sixty years operating in a variety of different ways is not amenable to generalization, but perhaps some are in order.

In all of the states still enforcing their sterilization laws, the extreme hereditarian fervor of the early part of the century is gone, but some of this zeal and in many cases the same kind of arguments is coming to the surface again in the attacks on the recipients of public assistance, ADC aid, or the poor in general. One could almost say that just as our recurrent national phobia for hatred of the foreigner or the stranger or the group on the make in American society brings out the "worst" in us, so, too, contempt for the weak and downtrodden has its recurring themes in American social, political, and intellectual history.[1] Always, there seem to be contradictions, as for example, at the very moment when the Goldwater candidacy summarized the attack on the welfare state, on social security and medicare and reflected such blatant sporadic occurrences as the Battle of Newburgh, President Johnson was pushing the "War on Poverty," and the late President Kennedy's crash program in the area of mental retardation was bearing important results.

The weak, the poor, the downtrodden masses of American society have

alternately been regarded as the scourge of our national existence, and at other times the source of our strength as a people - and what is more, the test of how humane and compassionate and truly sensitive our society has become. Today, mental retardation and poverty, among other things, are regarded as a challenge to greatness by the present national administration. Their existence is a blight on the fulfillment of the American dream of enabling every human being to fulfill his highest degree of attainment and happiness, and rather than viewing them as "character" defects or the result of a defect in either nature or nurture, or perhaps both, we have begun the slow and at times arduous task of bringing all of our resources as a people to bear down in some kind of coordinated fashion on these blights. Rather than to moralize, or to find simplistic explanations,[2] which so typified the writings of the extreme hereditarians of an earlier period, we now find public authorities showing an attitude of solicitude and compassion toward the mentally disabled. And no longer is the language of either/or used (segregation or sterilization), but rather a massive attempt to find multiple origins, as well as multiple solutions, even cures, for these maladies.

At the mid-point of American sterilization history, the American Neurological Association's pioneering 1935 report on eugenical sterilization marked an important milestone in the story, for this was the first and in fact the only official report by any public or private agency on the whole subject. Despite the passage of 30 years, the report in many respects is still a fresh and provocative document. In its

section on the various state sterilization laws, the report began:

> The laws are here briefly analyzed in respect to the following points: first, date of passage; second, to whom applied and whether or not for social, as well as eugenic, purposes; third, whether voluntary of compulsory; and fourth, thoroughness of application to the individuals involved by the wording of the law.

Then these points were summarized in the following way:

> These points are selected for the following reasons: first, to discover whether or not there is any discrimination in the intent of the law. Thus, the limitation of the law to persons in state institutions eliminates those whose cacogenesis is as great but who happen to be cared for at home or in private institutions. Second, the word voluntary is frequently a mere subterfuge, in that it is often a condition of discharge from the institution that the patient be sterilized, and consequently the individual involved is in the position of being confined or confinable until he gives his consent for sterilization, which hardly makes the bargain free and equal and nullifies the real meaning of the word voluntary. Furthermore, the term compulsory, as will be seen, cannot be taken literally when the number of the sterilized is nowhere near the

> number of people involved by the act of the legislature. The number sterilized throws light on the handicaps of the authorities in the carrying out of the law and, consequently, gives indirect knowledge of the public sentiment of the community. In general, vasectomy and salpingectomy are the only two operations followed. In some states the law permits asexualization which, however, is rarely enforced.[3]

The data of this study would certainly re-emphasize the Committee's comment that the word voluntary may be a subterfuge, but this is not to say that every state that employs a consent procedure of some kind (even where the law does not call for this) is playing an unfair game of quid pro quo on persons who may be in no condition to know the rules or the implications of what may follow. Certainly, the literal meaning given to consent in Indiana and Vermont, where oral withdrawal of consent at the point of the surgeon's knife is recognized as valid, is not a subterfuge.

When then is true consent to sterilization on the part of a mentally disabled person? When is volition genuine, not only in the sight of the law, but in the light of our historical moral and philosophical sense of what constitutes a "free" choice.[4] But, we might inject, this begs the question. For volition must always involve a choice, a real choice among real alternatives, not a hypothetical or abstract choice among possible alternatives. It would take more than academic

philosophy, theology, and psychiatry to answer this question, because all are intimately involved in this dilemma. Can a mentally disabled person make decisions such as this one to be sterilized or segregated, freely, responsibly, and voluntarily? If the answer is in the negative, who can? Does the state have the right to substitute its choice over that of the mentally disabled person? Can a guardian or next of kin be entrusted to make a choice that so intimately affects the bodily integrity and future freedom of the person involved?[5] It would be vain to say that questions such as these go to the bedrock of a free society and will always to a degree remain unanswered. But, nevertheless, they must be faced even if the answers we get are provisional, equivocal, and nearly always unsatisfying to some. And statistics, by themselves, are neither satisfying nor qualitative.[6]

State sterilization goes to the very heart of the police power and its use. One writer, a lawyer in a famous sterilization case in Kansas, put the question in this way:

> From a moral point of view, you have chosen a difficult question to explore. Can the State deprive me of life, liberty, property or progeny when I have done no wrong? In many fields, the answer seems to be yes. I am taxed although "the power to tax is the power to destroy" (Marshall) but "not while this Court sits" (Holmes). I go to war. I can't make a U turn. One will say that my individual literties are bounded by the corresponding

> liberties of others. He will say that the question you explore is whether or not sterilization is punishment and will possibly answer that it is not. I suppose your immediate moral question is, does the State have the right to practice eugenics. Can it decide who are misfits, and then, assuming that misfitting is hereditary, prevent them from having children?[7]

The State does, even now, practice eugenics to a degree through its marriage laws, restrictions on the epileptic (which is far from eugenic in fact), and in a curiously outrageous way through the still existing miscegenation and other "race mixing" laws that are still on the books in several states.

Has the Law kept pace with the dictates of modern science? In the light of Darwinian and Mendelian ideas, and their extension into a variety of public policies, and particularly two significant Supreme Court decisions on sterilization, have the goals of our society been enhanced?

In a rather pointed, though somewhat jocular way, Professor Glendon A. Schubert says yes, in a discussion of the implications of ordered liberty and the survival of the fittest:

> When eugenic sterilization reached the Supreme Court as an issue of constitutional policy, over two decades had elapsed since the majority had embraced the theories of social Darwinism against which Holmes had protested

so vigorously in his dissent in the Lochner case. In its first and leading decision dealing with compulsory sterilization, the Court once again made social Darwinism its major premise; but the spokesman for the majority who had seen the vision of the Brave New World that science could create was this time none other than the great dissenter himself. In a sense, Holmes' position in the two cases was quite consistent; in both Lochner and Buck v. Bell, Holmes voted -- and with the support of Brandeis and Stone, among others, in the later case -- to uphold socioeconomic experimentation by the legislative representatives of a majority of the people in the "cloistered laboratories" of the states. It is the more regrettable that, since the decision in Buck v. Bell purported to subserve the goals and the values of science, it appears to have been itself the fruit of a more unscientific process of decision-making, reflecting most proximately the insistent pressures of organized interest groups who sought and obtained the support of the Court in order to "get the law" on their side. Yet, it could not be said that science and society had not progressed during the preceding two centuries. In seventeenth-century Salem, the judges would most likely have decreed that moron Carrie Buck should be burned

> as a witch while mutilation would suffice for chicken-thief Skinner.....; in twentieth-century America, the judges agreed that mutilization was appropriate only in the case of the moron (and, although the point was not expressly decided, it seems fair to infer that the Court would have approved burning-at-the-stake in neither case). To this extent, at least, had a free society grown in wisdom.[8]

That we have progressed since the Salem witch trials seems small consolation indeed for the nearly 65,000 persons who have been sterilized under laws that may still lack scientific validity and procedural fairness.

The twin problems of the substantive nature of the laws (can the state sterilize without adequate proof of hereditary transmissibility? do we know enough at this stage of our knowledge of genetics to make judgments of this kind?) and their procedural character (do they provide for consent? and what constitutes consent? can objections be registered all the way to the supreme court of the state? are the fundamentals of notice, hearing, the right to produce evidence, the right to counsel, etc. given adequate treatment) apply graphically to the American sterilization experience.

When we look back on the earlier years of American state sterilization, especially the zenith decade of the thirties, we are reminded of the late Mr. Justice Frankfurter's statement: "The history of liberty has largely been the history of the observance of procedural safeguards."[9]

To be sure, there are evidences of what some would call fair treatment despite the obvious deficiencies of many of the laws, but the overall picture leaves much to be desired, especially when the choice was between indeterminate institutional segregation and sterilization (freedom to leave). And often the impression is left that the primary motivation of the institutional superintendent was economy (look how much we save per person when we release them and hopefully they do not return?) rather than the alleged "freedom" of their inmates or patients.

If we view "freedom" in these cases as the mere equivalent of being released from any kind of state hospital or institution, then of course, there is little to argue about. The argument of Dr. Thomas Szasz and others that indeterminate commitment to a mental institution may be worse than a determinate prison sentence and that the mentally disabled person may be more a prisoner than a patient is not at issue here.[10] Perhaps the issue is one of finding the kind of procedures that would best fit the administrative problem involved, namely that of determining who should be sterilized. For several generations, this has been at the heart of the battles over administrative rule-making and adjudication in this county and particularly in view of the enormous proliferation of our governmental machinery and the tremendous variety of administrative functions and decisions that are required by a twentieth century technological society. Perhaps the time-honored procedural safeguards must be made to "fit" the conditions, needs, and contingencies of a radically different kind of society from that of the Founding Fathers.[11]

The explanation for what might be termed "administrative repeal" of many current sterilization laws is found neither in the fear of adverse litigation of an earlier day, nor in critical public opinion that could have political consequences, but rather in the post-war changes in administrative personnel and philosophy in the treatment of mental illness, mental retardation, and epilepsy. Sterilization laws that are genetically anachronistic and seriously deficient in the basic essentials of due process of law, have often been "updated" by physicians or psychiatrists acting as hospital superintendents or through state mental health, health, or public welfare departments using very selective programs of voluntary, non-eugenic sterilization geared largely to the ability of the parolee to "adjust" to the outside world. Genetic factors, though present in some cases, have often been subsidiary to other social or environmental considerations. But this raises some other perplexing questions.

What is the obligation of a psychiatrist, for example, acting as a public administrator to advance scientific knowledge in his state hospital or department? If a law results from quackery, gross misconceptions, or from premature application of scientific knowledge to public policy, should the psychiatrist-as-administrator risk enraging public opinion, the state legislature, or both, by openly repudiating a law that in his professional psychiatric judgment is flagrantly unscientific and perhaps (e.g., eugenic sterilization laws) an historical "monstrosity"?

American sterilization history affords no easy answers to these vexing questions, even though Mr. Justice Holmes' famous adage, "Three generations of imbeciles are enough" is no longer the vogue, and the surgeon's scalpel is no longer regarded as a "cure" for mental illness and mental retardation, and certainly not for "criminality." While psychiatrists and other professionals should share credit for updating many of our state sterilization laws with the findings of modern medical and biological science, and for making state sterilization (through the use of various "consent" procedures) a more humane instrument of public policy, they should be as certain as possible that these procedures are truly voluntary, and not a facade for exercising duress on either patients or their relatives in the obtaining of institutional release.

One of the difficulties in trying to find administrative procedures that "fit" is that we must never lose sight of our classical conceptions of the dignity of the individual and the important role of the State in a free society in the development of individual freedoms. Neither the procedures nor the freedoms exist in a static vacuum, and as our public and private attitudes toward the mentally disabled change, so, too, the procedures that a free society will employ on behalf of the mentally disabled will necessarily change. A dramatic example can be seen in the fact that most of the compulsory states have shifted to consent (voluntary, so-called) procedures despite the fact that few of the laws have been changed and in most cases there was little or no pressure from outside organizations or pressure groups. Two examples in 1965 show how informal changes through the administration of the law may eventually find their way into later formal statutory changes. Connecticut, which had been operating under consent procedures, notwithstanding a very old compulsory law, changed its law in 1965 to include voluntary sterilization only; and Kansas, which had a long sterilization history, some of it even before legislation, decided in 1965 to make the non-use of the law in the period from 1950-65 permanent and repealed the law. The present national trend toward a lower and lower annual enforcement of the currently operative sterilization laws is almost like the early period of sterilization, 1907-21, when there was extreme reluctance to use the laws. But the reasons are quite different. Whereas in the early period, adverse litigation scared many institutional superintendents and public

opinion was often strongly voiced against the use of the laws, in the 1950s and 1960s the greatest factor influencing non-enforcement is the belief in most states that modern scientific knowledge does not justify their continued use.[12]

But despite the use of so-called consent procedures, and a kind of "administrative repeal" of the sterilization laws of several of the states, the procedural rights of the mentally disabled still remain an urgent problem and the conclusions and recommendations of the American Bar Foundation's report on the rights of the mentally ill remains as cogent as ever:

> 2. Statutes authorizing compulsory sterilization of the mentally disabled should afford every reasonable procedural protection to the individual concerned. Generally, on the face of such statutes there appears to be a failure to recognize or admit the gravity of sterilization and the basic human rights involved. The very disability which gives rise to the alleged need for sterilization also may preclude the person from appreciating his position and the consequences of sterilization. The providing of such procedural safeguards as adequate notice, a right to counsel, an opportunity for a hearing and a right to have the proceedings reviewed by a court are necessary as precautionary measures for the protection of the

rights of the mentally disabled in this area of the law.[13]

It is probably unlikely that we will ever go back to the period of the extreme hereditarians or to the somewhat wild use of sterilization in some states in the depression years of the 1930s. But if unwise or undesirable laws remain on the books, they are always susceptible to future use, whatever the reason. The cloak of dormancy may move, as it did in Kansas, to outright repeal of the law, or it could lead to a revival of sterilization at a later date, especially where an administrative shakeup in personnel also brings a change in medical or legal philosophy in its wake.

Predictions are hazardous, but in the area of sterilization history, bizarre events can be quite natural in the light of past history. For example, a recent New York State Court of Claims decision ruled that a child born of a woman patient in a state mental hospital who was raped by another inmate, has the power to sue the state for damages for "having been born out of wedlock to a mentally deficient mother."[14] Is it too far fetched to predict that some institutional superintendents in other states (since New York has not had a sterilization law since 1920) might sense that the New York case might be followed in <u>their</u> state and therefore, to avoid such costly possible damage suits, sterilization of institutionalized females in their fertile years would be a much "cheaper" expedient than waiting for an eventual rape, possible birth of an illegitimate baby, and a damage suit. If one reads

the early literature of the pro-sterilization camp, this kind of argument would have been made with great vigor - and not to save the state money from a costly damage suit - but the nation from the "scourge of the feeble-minded." Doubtless, incorrigible girls and young women in the child bearing years were sterilized in some states in order to aoivd the cost of further institutionalization of their babies, not damage suits. But with this new and far more costly threat (Mr. Williams is asking $50,000 damages for his daughter and $100,000 for his granddaughter), some states may want to reevaluate their procedures.[15] The new tort which Judge Squire helped bring into this world may spawn all kinds of new legal and social implications in its wake, but no prophet could predict the future in this area.

Turning now to the substantive question of the content of state sterilization laws, particularly in the light of the relation of scientific knowledgeto public policy, we can draw conclusions from the American sterilization experience, but it is extremely hazardous to apply these conclusions across the board to all other kinds of scientific knowledge that are or will be part of public policy and the law. Human genetics has its own pecularities and the law reflects in a crude measure society's desires, often times inchoate and immature, to "improve" the race and to preserve what a particular consensus of Americans at a particular point in American history regard as the "fit." If any word runs through the entire discussion from the earliest beginnings of American sterilization history, it is human "fitness"

in all of its ramifications and implications. And with it comes all of the age-old problems of freedom and authority: the legitimate limits of the power of the state to define "fitness"; the procedures by which a government through its various administrative agencies defines "fitness"; the procedural means by which a stigmatized person can attack the charge of "unfitness" and even repudiate it successfully. The agonizing problem of public utility rate-making, which so plagued American courts earlier in this century, seems to pale when placed against the problem of genetic "rate-making" in the form of deciding the present and future "fitness" of countless numbers of our citizenry for the responsibilities of parenthood.

There are some who will argue that "too much" has been made of the so-called right to procreate, as proclaimed by Justice Douglas and the Supreme Court in the Skinner case. With the population "explosion" beginning to appear even in affluent America, these critics say that the freedom to copulate needs enormous reappraisal in the light of our modern demands for schools, transportation, living space, water to drink, and even perhaps in the not-too-distant future, air to breathe.[15a] Again, as in the case of Szasz's criticisms, this is a side issue for the moment. We have seen in the past how certain of our freedoms have been "bent" during times of crisis (note the War Relocation Authority and the Japanese in World War II, or Lincoln in the Civil War), and perhaps even before the proverbial 1984, our population crush could lead state legislatures, even the Congress, to pass measures that would make the

older eugenic sterilization laws seem like child's play. But if this should ever occur, we would still measure these changes, or even fight their passage in either the political, legislative or judicial arena, on the basis of our accumulated legacy as a nation and as a society in the area of substantive and procedural freedoms.

The threat and the fear which eugenic sterilization set out to ameliorate appears false and exaggerated in the light of later history. This is the risk of democracy, the gamble if you will of a free people or a people who act in terms of freedom. Good men with the best of motives and intentions can do unspeakable things, and the lesson of American sterilization -- if there is one crucial lesson to be learned - is that when vital human rights are involved and our knowledge (in this case, human not animal genetics) is crude, grossly incomplete, and contingent, we must go slowly, if at all, or we risk making even greater mistakes than when our scientific knowledge is fairly certain and agreed upon.[16] American state legislators by the thousands were sold a bill of goods that turned out to be a fraud for the most part. Through a combination of factors, many salutary, the legislative intent did not materialize, and in the words of Havelock Ellis, we "sterilized sterilization." But the same error could be made again in another area of science, and with even more devastating affects,[17] for we live in an ever-changing scientific age when the nuances, discoveries, implications, and extensions of modern scientific discovery are constantly upon us and we dare not turn back. But we must occasionally halt and ask: how

much? how far? and why? Science will continue to shape the kind of life and the kind of society we live in and there is no denying that fact, but we must never stop asking the basic question of a free society: for what ends? The normative question can never be forsaken no matter how many scientific discoveries we make, or Nobel Prizes we win. The application of this learning to matters of public concern must still be determined on a variety of grounds,many of them non-scientific and most of them evaluative.

Science can make life richer, more expansive, and at times when we think of space exploration, even wondrous. But it also greatly complicates the ordeal of Democracy. It is almost a cliché to say that in order to get the "right" answers, we must ask the right questions. But perhaps it is really a truism. Eugenic sterilization, in the jargon of public law, is a "hard case," and hard cases do not make good law. But they must be confronted, nonetheless.

From this history and appraisal of American state sterilization experience, no theories of the administrative process, or of legislation, or of judicial behavior (notwithstanding the sharp attack on the Court's decision in the case of Buck v. Bell) were forthcoming, nor was even the glimmering of a good law-and-social control theory fashioned. For the most part, this was and is old-fashioned, if at times crude, story telling, and nothing more. The lessons to be learned must be extracted by each reader in his own way. The American Saga is many-splendored and rich in diversity; eugenics and its impact on American political,

social, intellectual, and legal history is but a small part of the American story. But the little bits and pieces are important parts of a mosaic that still remains in many respects a virgin territory in terms of intellectual exploration and analysis.

Perhaps in a small, but distinctive, way, the story of state sterilization in America can help to explain American ideals and American actions in the light of American history. If we as a nation are to grow in more than the outward material trappings of a rich and affluent society, we must constantly re-examine our actions in the light of our deepest and most cherished general principles. Due process of law, equal protection of the law, nay, even human compassion, must never be allowed to be mere window-dressing for the contingent and the mere pragmatic.[18] We must as a nation truly seek to "Know Thyself" and we were perhaps never more in need of an Emerson or a Thoreau to help us chart our course of action.

For this reason, this story was told in terms of American ideals, and not in contrast to the Nazi experience. Looking back, we can be eternally grateful and thankful that the American sterilization story was but a footnote in the Nuremberg story, rather than on trial itself. We may never know why the reverse was not the case, but we can be certain from our short history as a nation that eternal vigilance is never too high a price to pay for the fruits of freedom. And in an age of modern Science bearing down with all its might on modern Government, the price may be much, much higher than any previous generation of Americans has ever dreamed.

CONCLUSION -- FOOTNOTES

1 For an excellent historical discussion of this phenomenon, see Richard Hofstadter, "Paranoid Politics," the Sunday Outlook section of The Washington Post, Dec. 20, 1964, at E5; and his essays, "The Pseudo-Conservative Revolt" and "Pseudo-Conservatism Revisited: A Postscript" in Daniel Bell (ed.), The Radical Right (N.Y.: Doubleday Anchor Book, 1964) at 75-103.

2 Dr. Martin W. Barr, one of the most famous of the extreme hereditarians and a fervent advocate of castration of "defectives" wrote in a 1920 article: "We must face the fact that the very life-blood of the nation is being poisoned by the rapid production of mental and moral defectives, and the only thing that will dam the flood of degeneracy and insure the survival of the fittest, is abrogation of all power to procreate. The shibboleth of the day is 'lock up all degenerates once so proven.' And this we do. But sooner or later the brighter ones, whose defects for a time are masked by the benefits received from training, are removed from the protection of sequestration, either by parents or guardians convinced of 'cure' so called; or again by the misdirected philanthropy of idle women; or some charitable societies, eager to set them at liberty 'that they may have their chance.' They have it all right! And pressing forward they go out to meet the 'Years to Come,' and tramp through the black morasses of sexual filth until precipitated into the whirlpool of

the stormy "Sea of Life' from which few, if any, ever return: and double prisoners and captives of the vicious, and their own passions, they sink lower and lower, consorting with the ruck and filth, the skum and dregs of mankind. Then these hereditary irresponsibles --- degenerates, imbeciles, defective delinquents and epileptics --- the very nightmare of the human race, ever with sexual impulses exaggerated, find their 'chance' in reproduction. Unconsciously innocent prisoners of a normal race, they are nevertheless its worst enemy. In regard to the character of operation: Personally I prefer castration for the male, and oöphorectomy for the female, as insuring security beyond a peradventure; and when performed on the young, desire almost entirely ceases, or is at least held in reasonable abeyance. If for sentimental reasons the removal of the organs are objected to, vasectomy or fellectomy /sic/ may be substituted." Barr, "Some Notes on Asexualization; With a Report of Eighteen Cases," 51 J. Nerv. & Mental Disease 231 (1920) at 234. This tirade against defectives was followed by case studies of female and male castrations at the Elwyn (Pa.) State School at pp. 235-41. Barr was president in 1897 of what is now known as the American Association on Mental Deficiency.

3 Eugenical Sterilization, at 7-8.

4 Definitions and discussions of "freedom" abound in ancient and modern literature. This writer thought the following quotation from philosopher Henry Nelson Wieman was in order: ",..But when we speak of freedom we are referring to one part of the total aggregate of conditions, namely, the individual

exercising his insight, his reason and all other resources relevant to the decision. In this sense freedom is a form of causation but different from every other kind of causation in that a cause acting on the individual brings into action all the resources of his mind and personality to determine the further consequences of that cause. When a cause acting on an individual does not bring into action all the resources of his mind and personality to determine the further consequences of that cause, he lacks freedom to that degree. Thus freedom of the individual is more or less, depending on the degree to which his personal resources are operative in determining further consequences. When the cause produces a conditioned reflex and nothing more, there is no freedom of the individual. Under changing conditions the freedom we exercise can vary from zero to a maximum. Perhaps no one exercises the freedom he might have if his potentialities were fully realized." Man's Ultimate Commitment (Carbondale: Southern Illinois Univ. Press, 1958; Arcturus Books ed.) at 151. Professor Wieman's use of gradations is quite appropriate to the sterilization case in two senses: at the point of deciding whether to be sterilized; and after the operation, if it occurs. Is the mentally disabled person "free" to decide this question of sterilization (or put differently, whether he wants to continue to be a procreating being); and second, if sterilized (by his own consent or that of others), how "free" is he in terms of his full potentialities as a human being? Questions of freedom are always interlocked in a whole set of further

questions and variables that make it impossible to answer with a pat "yes" or "no". This is why the notion of "degrees" of freedom is useful.

5 In looking at the three states (Connecticut, Minnesota, and Vermont) that had completely voluntary laws, three states (Maine, North Carolina, and South Dakota) which had both voluntary and compulsory provisions, and six states (California, Idaho, Iowa, Michigan, Montana, and Oregon) which are compulsory only, but where consent can cut off the compulsory features of the law, none of these 12 laws allowed the mentally ill or mentally retarded patient or inmate to consent by himself, unless as in Connecticut and Vermont, such persons are found "competent" or "of sufficient intelligence" to make such decision, or as in South Dakota, where the law reads: "...If no parent, guardian, or spouse of said person be known to said Superintendent, the signing of written consent to such sterilization by said feeble-minded person shall constitute sufficient authority for the performance thereof." S.D. Code, sec. 30.0511 (Supp. 1960). Under Idaho law, if the person is feebleminded or mentally ill, his written consent must be accompanied by the consent of the guardian, if any, the spouse, if any, and the natural or adoptive parents, if any. If their existence or whereabouts are not known to the State Board of Health, then the Board if it desires may institute a suit in the District Court. In effect, the law is saying that the sole consent of the person involved is not sufficient in the latter situation, and therefore the burden of proving the necessity of the operation shifts to the State and from an

administrative decision to a judicial one. Assuming for the moment that some mentally ill and mentally retarded persons are not "competent" to decide this question, what makes a guardian, spouse, parent, personal friend, county solicitor (as in North Carolina), or custodial guardian (Montana and Oregon), or the board of trustees of the institution as in Connecticut, competent to make this decision in the name of the person involved? The fact that most of these states require plural consents is proof that they do not trust one person to make this kind of judgment, but the essential question is still the same: can any other person or agency truly act in the interest of another person in a situation involving sexual sterilization?

6 For example, in the form that HBAA used for compiling annual state sterilization statistics, there was a place where the number of written or verbal consents could be tabulated. These forms were sent annually to the superintendents of each of the state institutions in the states with sterilization laws. Yet, in only one tabulation, that for the year 1949, was this consent figure reported. Out of a total of 1500 operations for the year 1949, HBAA reported 1,177 consents on file or 78% of the total. Out of 29 states with laws at that time, 20 reported consents, and of this group, 14 claimed consent in all of the operations performed during that year. Furthermore, in these same 14 states, out of the total of 1,285 operations performed in 1949, the HBAA compilation reported that 1,177 or 92% were performed with consents on file. And with 8 states reporting no operations during this year (1949), this left only one state,

Virginia, that presumably sterilized 215 persons without consent in that year, and this policy has been changed in the past decade or more. Yet, the agonizing question still remains: what kind of consents were obtained? Was their subtle or not-so-subtle pressure on the patient or his next of kin or guardian to obtain consent? And once obtained, was it truly genuine? The figures do not tell this part of the story, and except on a case-by-case basis, it would even then be extremely difficult to get at the "truth" of the matter.

7 Attorney Donald L. Randolph of Kansas City, Missouri in a letter to this writer dated October 2, 1961. The Kansas case was Brown v. MacFarlane et al. See the Kansas discussion, in ch. II supra, for a detailed analysis of the case.

8 Constitutional Politics (N.Y.: Holt, Rinehart and Winston, Inc., 1960) at 657.

9 McNabb v. United States, 318 U.S. 332 (1943) at 347.

10 See especially, Szasz's book, Law, Liberty and Psychiatry (N.Y.: Macmillan, 1963); "Some Observations on the Relationship Between Psychiatry and the Law," 75 A.M.A. Arch. Neur. & Psychiat. 297 (1956); "Psychiatry, Ethics, and the Criminal Law," 58 Colum. L. Rev. 183 (1958), and "Commitment of the Mentally Ill: Treatment or Social Restraint?" 125 J. Nerv. & Ment. Diseases 293 (1957). This writer substantially agrees with much of Szasz's writing on this subject.

11 Sanford H. Kadish in an excellent article, "A Case Study in the Signification of Procedural Due Process -- Institutionalizing the Mentally Ill," 9 Western Pol. Q. 93 (1956) concludes a discussion of the traditional formalities of criminal procedure and summary institutionalization in this way: "If procedures for summary institutionalization of the mentally ill are to be sustained, a franker and ultimately more salutary justification must be found in terms of a flexible due process. It is not really the fact that notice and hearing prior to physical restraint are unnecessary where subsequent judicial procedures are available that supports provisions of the kind contained in the Draft Act. /A Draft Act Governing Hospitalization of the Mentally Ill, Federal Security Agency, Public Health Service Pub. No. 51, rev. 1952/. It is rather that a pragmatic inquiry into the objectives of institutionalization suggests their incompatibility with certain traditional concomitants of due process in other areas and the possibility of attaining those objectives without substantial impairment of the values and function of the concept of due process through substitute procedures which, however unacceptable they may be in the criminal law, may be wholly acceptable to a free society in the area of institutionalization of the mentally ill." (at 115) For an able discussion of the effects of various kinds of medical diagnosis, especially psychiatric, see the works of Thomas J. Scheff: "Decision Rules, Types of Error, and Their Consequences in Medical Diagnosis," 8 Behavioral Sci. 97 (1963); "The Societal Reaction to Deviance: Ascriptive

Elements in the Psychiatric Screening of Mental Patients in a Midwestern State," 11 Social Problems 401 (1964); "Social Conditions for Rationality: How Urban and Rural Courts Deal with the Mentally Ill," 7 Amer. Behavioral Scientist 21 (March 1964); and an unpublished paper, "The Presumption of Mental Illness: Or, Through the Psychiatric Looking-Glass," delivered at the annual meeting of the American Association for the Advancement of Science, Montreal, Dec. 30, 1964.

12 The downward national trend, which began in 1950, has continued unabated (except for North Carolina, which currently has sterilized nearly half (45%)of all those reported sterilized under states laws in the 1960s), but this should not blind us to what Koestler calls the "numbers game" when ethical questions are involved. The rights of those affected by these laws is just as important today as it was in the days of the 1930s, and the fact that voluntary private sterilizations overwhelmingly overshadow state sterilization in point of numbers is no reason to ignore the scientific, political, and moral questions that state eugenic sterilization laws still pose today.

13 Frank T. Lindman and Donald M. McIntyre, Jr. (eds.), The Mentally Disabled and the Law (1961) at 190.

14 Frank Williams (as Guardian ad Litem for Christine Williams and Lorene Williams) v. New York, State of New York, Court of Claims, June 23, 1965, at 2 of the typewritten opinion. Judge Sidney Squire, in dismissing

the relevance of an Illinois decision that would have not allowed such a cause of action, wrote: "This approach and these asserted ingenious analogies are not legally impressive to me. I do not comprehend judically how the maintenance of the action at bar can be equated with the quoted anticipations. To me, they are unrealistic, illogical and unsupportable. Tangential reasoning should not be utilized as a sledge hammer or chisel to destroy a fundamental right which cries out for justice. Our courts in New York have not been swayed this easily." (at 10)

15 In an article, "Rape Case May Bring New Implications," 8 AMA News 9 (July 12, 1965), it was said: "If upheld by the State Court of Appeals, New York's highest tribunal, the ruling could have implications far beyond the facts of the particular case, said legal authorities. It would make New York the first state to recognize a cause of action for wrongful birth." Another crucial issue, that was not dealt with in Judge Squire's opinion, was that of using therapeutic abortion in a case of this kind. Both abortion and sterilization are questions that will undoubtedly be dealt with at the administrative level and largely on a case-by-case basis.

16 Out of the 27 states with eugenic or punitive sterilization laws still on the books, the great majority of the laws lean in the direction of "probability" or "potentiality" of transmitting certain listed defects. Three states (Connecticut, Idaho, and Iowa) use the language of "probable"

15a Perhaps it should be made clear that the right to fornicate and even to have children is not necessarily a "natural" right in the sense that Rousseau, Locke, or Jefferson spoke of natural rights, nor is it absolute in any extra-political or divine sense. But neither can it be said that the individual's germ-plasm is the property of the government or of society, although society, and even more specifically, a democratic society acting in the mid-twentieth century, should seriously and dispassionately confront the problems of child care and protection, and the quality as well as the quantity of its family and individual life in terms of that society's most cherished ideals, but never forgetting or ignoring its time-honored procedures for protecting the rights of the individual person. For an interesting and novel interpretation of marital privacy and the right to bear children, see Mr. Justice Goldberg's concurring opinion in Griswold v. Connecticut, 381 U.S. 479, 496-97 (1965). For a stimulating discussion of some of these problems, see Frederick S. Jaffe, "Family Planning, Public Policy and Intervention Strategy," Journal of Social Issues (in press).

or "probability". The most common language, used in 10 states (Arizona, Indiana, Mississippi, New Hampshire, North Dakota, Oklahoma, South Carolina, Utah, Virginia, and West Virginia) combines "probable" and "potential" in the following fashion, patterned after Virginia's law, which reads: "...and by the laws of heredity is the probable potential parent of socially inadequate offspring likewise afflicted...." Eight other laws (as well as the now repealed Kansas law) use the language of "likely to transmit" or "likely to become" or some variant (California, Georgia, Maine, Michigan, North Carolina, Oregon, South Dakota, and Vermont). Thus, 21 of the present laws are far from certain about the likelihood of the genetic (and sometimes eugenic) predictions made by the legislature and the administrative authorities in turn, and sixty years ago these assertions were far closer to the laws of animal or plant genetics than they were to human genetics, insofar as probabilities were concerned. That three-quarters of our present sterilization laws lack scientific certainty is, in itself, substantial reason for completely re-evaluating these laws in the light of present scientific evidence, not the language of the Laughlins, Davenports, and the old Eugenics Record Office of Cold Spring Harbor.

17 In a 1937 article, Frances R. Schoenbach wrote: "...If we enforce the sterilization laws without more accurate knowledge than exists at present, we may well find that we have loosed a Frankenstein. A scientific problem whose fundamental principles are so indeterminate must not be

incorporated into mandatory statutes...." Note, "Sterilization Laws -- Their Constitutionality -- Their Social and Scientific Basis," 27 B.U. L. Rev. 246 (1937) at 259-60. That we did not loose a Frankenstein is to our credit, but science has many "goblins" up its sleeve with far more devastating potentialities than the early eugenic sterilization laws, and the sooner we become aware of this fact, the better for all of us.

18 It is perhaps fortunate that hospital superintendents in several of the states, together with commissioners of health and mental health and other state agencies, did make an effort to bring the policy behind the laws into greater conformity with the evidence of modern science, but it is unfortunate that this was seldom accompanied by an effort to educate the public or the state legislatures to the possible need for formalized statutory changes. In the area of state sterilization laws, the law (not unlike many other areas of forensic medicine, such as our laws on abortion, homosexuality, suicide, etc.) remains far behind the findings of modern science, and the sooner we attempt to cope with this lag, the better for the law, medicine, and the moral aspirations of the community. Each state with a current sterilization statute has a unique problems in this regard, and the question of whether the price of "digging up" the state's sterilization past history, or bringing down a hornet's nest of public criticism on state authorities, or pushing the general public into an irrational, frenzied discussion of the problems involved, is too high must be decided on a state-by-state basis, and not some abstract (and non-existent) principle that presumably defines the "ideal" relationship

between science and public policy. Also, if there is any latent functionality (or utility) in retaining what are regarded as anachronistic, outmoded or even unscientific laws, this should not be imputed casually by the researcher, but should be studied empirically in each state's individual case.

APPNEDIX 9

SELECTED MATERIALS ON STATE STERILIZATION PROCEEDINGS

SELECTED STATE STERILIZATION LAWS