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Elyce Zenoff

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Elyce Zenoff*

It is often observed that the law is painfully slow in its acceptance of scientific progress. However, in one area, eugenic sterilization, the law has moved with such rapidity that today many persons question whether this swift acceptance was wise from either a scientific or legal point of view.

Although in 1895 the word “eugenics” as it is used today was completely unknown, by 1917 fifteen states had adopted eugenic sterilization laws, and at the end of another twenty-year period a total of thirty-two states had enacted such legislation. An examination of all the factors responsible for this rapid growth would encompass many economic and political factors which are beyond the scope of this study, but there is no doubt that three events which occurred at the end of the nineteenth century played a most important part in the adoption of legislation authorizing compulsory sterilization. They were the launching of the eugenics movement by Sir Francis Galton, the re-discovery of Mendel’s laws of heredity, and the development of simple, non-dangerous surgical techniques for the prevention of procreation.

The term “eugenics” is derived from a Greek word meaning “well born.” In 1883 Sir Francis Galton coined the word and defined it as the study of agencies under social control that may improve or impair future generations either physically or mentally.¹ In 1904 he officially launched the eugenics movement which had a two-fold aim: (1) Positive eugenics—encouragement of the propagation of the biologically fit and (2) negative eugenics—discouragement of the reproduction of inferior stock. During this same period, the laws of heredity formulated by the Austrian monk, Gregory Mendel, forgotten since their publication forty years earlier, were rediscovered. Although Mendel’s work had been confined to plant life, it was seized upon as being applicable to human beings. The proponents of this view decided that mental illness, mental deficiency, epilepsy, criminality, pauperism and various other defects were hereditary. Based upon the premise that these various conditions were hereditary there was considerable agitation for corrective action. Since attempts at cure were considered futile for hereditary defects, preventive measures appeared to be the only way to eliminate these conditions.

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¹ Deutsch, The Mentally Ill in America 357-358 (2d ed. 1952). The historical background of the eugenic movement is summarized from an excellent discussion on pages 355-370 of this book.
A few years prior to the rediscovery of Mendel's laws, Dr. Harry C. Sharp of the Indiana State Reformatory developed a method of sterilizing males (vasectomy) and at approximately the same time the now standard method of sterilizing females (salpingectomy) was discovered in France. Neither of these procedures are hazardous under modern surgical conditions nor do they materially lower sexual powers.

The first sterilization law was passed only three years after Galton started the eugenic movement, and as mentioned earlier, this legislation was soon followed by statutes in many other states. In 1927 the United States Supreme Court upheld the Virginia sterilization law and ten years later Georgia became the 32d and to date the last state to adopt this type of legislation.

It might be assumed from this acceptance by the state legislatures and the Supreme Court that the status of eugenic sterilization is well settled in the United States. However, there is still considerable controversy concerning these laws. Several scientific studies undertaken during the last twenty-five years disagree with the conclusions of the eugenicists. In addition, the laws are often attacked on constitutional, moral, social, and theological grounds. In view of this conflict a reappraisal of sterilization laws appears necessary, especially since they involve the very important right of procreation.

The reappraisal of sterilization laws undertaken by this study will be limited to the effect of these laws on the mentally ill and the mentally deficient. Although in many states the laws are applicable to other groups such as epileptics, "hereditary criminals," and sex deviates, 95% of all reported sterilizations have been performed on mentally ill or mentally deficient persons.

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2 Hughes, Eugenic Sterilization in the United States 7 (Public Health Reports, Supp. No. 162, 1940). A vasectomy requires the cutting of the vas deferens and a salpingectomy involves the tying or cutting of the fallopian tubes.


4 Committee of the American Neurological Association, Eugenical Sterilization 4 (1936).


6 Hughes, op. cit. supra n. 2 at 1.


8 It is worthy of note that although many persons believe that the majority of sterilizations are performed on the mentally deficient, as of January 1, 1960 a total of 27,436 mentally ill persons and 31,931 mentally deficient persons had been sterilized. See Appendix C, Part I infra.
Historical Background

Some of the proponents of eugenic sterilization were so zealous that they began sterilizing people before there was legislative authorization for the procedure. In the middle of the 1890's, F. Hoyt Pilcher, Superintendent of the Winfield Kansas State Home for the Feeble-Minded, castrated forty-four boys and fourteen girls. Public sentiment is considered responsible for the ending of this activity. Dr. Martin W. Barr, Superintendent of the Pennsylvania State Training School, claimed that he performed the first sexual sterilization to prevent procreation in 1889. Three years later when he was president of what is now known as The American Association on Mental Deficiency he reported the operation and asked "What state will be the first to legalize this procedure?" Another impatient eugenicist was Dr. Harry C. Sharp who devised the surgical operation known as vasectomy. He reportedly sterilized 600 or 700 boys at the Indiana reformatory before the adoption of the Indiana Act. It is also claimed that superintendents of institutions in several states were secretly sterilizing feeble-minded persons.

The legislative history of eugenic sterilization began in 1897 when a bill authorizing such operations was introduced in the Michigan legislature. This bill was defeated and it was Pennsylvania, eight years later, which became the first state to pass a sterilization bill. It was entitled "An Act for the prevention of idiocy" and required that "each and every institution . . . entrusted . . . with the care of idiots and imbecile children to appoint a neurologist and a surgeon . . . to examine the mental and physical condition of the inmates." If, in their opinion, procreation was inadvisable, and there was no probability of improvement of the mental condition of the inmate, the surgeon was authorized "to perform such operation for the prevention of procreation as shall be decided safest and most effective." Governor Pennypacker refused to sign the bill and returned it to the Senate with this message:

This bill has what may be called with propriety an attractive title. If idiocy could be prevented by an Act of Assembly, we may be quite sure that such an act would have long been passed and approved in this state. . . . What is the

11 Gosney and Popenoe, op. cit. supra n. 9 at 184; Laughlin, Eugenical Sterilization in the United States 325, 352 (1922).
12 Deutsch, the Mentally Ill in America 370 (2d ed. 1952).
13 Ibid.
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. . . . The bill is, furthermore, illogical in its thought. . . . A great objection is that the bill . . . would be the beginning of experimentation upon living human beings, leading logically to results which can readily be forecasted. The chief physician . . . has candidly told us, . . . that ‘Studies in heredity tend to emphasize the wisdom of those ancient peoples who taught that the healthful development of the individual and the elimination of the weakling was the truest patriotism—springing from an abiding sense of the fulfillment of a duty to the state.’ . . . 15

Although many sterilization bills have been introduced in Pennsylvania subsequent to this veto, none has succeeded in becoming law.

It was Indiana which finally enacted the first sterilization law in 1907, two years after Pennsylvania’s first attempt. 16 However, the Indiana statute was eventually declared unconstitutional 17 as were all other similar laws which came before the courts prior to 1925. 18

The statistics concerning sterilization during this early period are quite interesting. As of January 1, 1921, the states reported a total of 3,233 sterilizations performed since 1907, the beginning of legalized operations. 19 If we add the known unauthorized operations in Kansas and Indiana the total sterilizations up to 1921 is approximately 3,900. More than 20% of these operations were executed either without any statutory authority or under statutes which were subsequently declared unconstitutional. 20 The balance of the sterilizations took place under laws

15 Vetoes by the Governor of Bills Passed by the Legislature, Session of 1905, p. 26.
16 Ind. Acts 1907, c. 215.
17 Williams v. Smith, 190 Ind. 526, 131 N.E. 2 (1921).
18 Smith v. Bd. of Examiners, 85 N. J. L. 46, 88 Atl. 963 (1913); Haynes v. Lapeer, 201 Mich. 138, 166 N.W. 938 (1918); In re Thompson, 103 Misc. 23, N.Y. Supp. 638, aff'd mem sub nom., Osborn v. Thompson, 185 App. Div. 902, 171 N. Y. Supp. 1094 (3d Dept' 1918); Oregon State Bd. of Eugenics v. Cline, Circuit Court, Marion County (Dec. 13, 1921). This case was not appealed to the state supreme court because “the statute of this state does not authorize an appeal from the decision of the Circuit Court in this kind of case,” letter from I. H. Van Winkle, Atty. Gen. of Oregon, June 23, 1922 quoted in Laughlin, 289 n. 1 (1922).
19 Appendix C, Part I infra.
20 The states where statutes were declared unconstitutional reported the following total sterilizations: Ind. 120 (this figure represents only post 1907 sterilization); Mich. 1; Nev. 0; N. J. 0; N. Y. 42; Ore. 127. Laughlin, op. cit. supra n. 11 at 96.
the constitutionality of which had never been tested. It is also noteworthy that although many people believed that sterilization is usually recommended for the mentally deficient rather than the mentally ill, more than 80% of the sterilizations reported in 1921 were performed upon mentally ill persons.

**Buck v. Bell**

The advocates of eugenic sterilization achieved a substantial victory in 1925 when the courts of two states held their sterilization laws valid. The first decision was rendered on June 18, 1925 by the Supreme Court of Michigan in the case of *Smith v. Command.* A few months later on November 12, 1925, in the case of *Buck v. Bell,* the Supreme Court of Appeals of Virginia held a sterilization statute to be a valid enactment under the State and Federal Constitutions. An appeal was taken from this decision to the United States Supreme Court. In a brief opinion which is probably best remembered for Mr. Justice Holmes' comment: "Three generations of imbeciles are enough," the Court held that the law in question was a reasonable regulation under the police power of that state and did not violate either the due process or the equal protection clause of the 14th Amendment.

Carrie Buck, the plaintiff in the case, was an eighteen-year-old woman committed to the Virginia State Colony for Epileptics and Feeble-Minded. She was the daughter of a feeble-minded mother and the mother of an illegitimate feeble-minded child. The Virginia court found that Carrie Buck was "the probable potential parent of socially inadequate offspring likewise afflicted."

No objection was made to the procedural provisions of Virginia law. Instead the attack was made upon the substantive law, the contention being that the sterilization order could not be justified upon the existing grounds. Justice Holmes speaking for the court said:

> We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be

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22 See Appendix C, Part I infra.

23 231 Mich. 409, 204 N.W. 140 (1925).

24 143 Va. 310, 130 S.E. 516 (1925).


26 Va. Acts. 1924, c. 394, at 569. Subsequently, the facts presented to the courts concerning the Buck case have been subject to dispute. It is alleged that (1) Carrie Buck was a moron not an imbecile, (2) her daughter, the third generation imbecile, was only one month old when adjudged an imbecile by a Red Cross Nurse and (3) that this daughter who died in 1932 of measles, after completing the second grade, was reported very bright. O'Hara and Sanks, Eugenic Sterilization, 45 Geo. L. J. 20, 31 (1956).
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 execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. . . . Three generations of imbeciles are enough. 27

This decision was followed by an abundance of eugenic sterilization legislation. Twenty statutes were passed in the ensuing ten years, 28 most of them closely patterned after the Virginia law. Only nine cases 29 have been found, involving the validity of sterilization laws applicable to the mentally ill and the mentally deficient, since Buck v. Bell. Three of these laws 30 were declared unconstitutional, but they were based on procedural deficiencies rather than the substantive issues determined in Buck v. Bell. In the six cases which upheld the laws, five 31 rely on the decision in Buck v. Bell and the sixth was concerned with the adequacy of the law’s procedural provisions. 32

The only sterilization law considered by the United States Supreme Court subsequent to Buck v. Bell was an Oklahoma statute which provided for the sterilization of habitual criminals. 33 The Court held the law unconstitutional on the grounds that its exception of “persons convicted of offenses arising out of violation of the prohibitory laws, revenue acts, embezzlement or political offenses” violated the constitutional prohibition against class legislation. Although this case did not consider the same issues as Buck v. Bell, some legal scholars have suggested that Justice Jackson’s concurring opinion might be interpreted as

27 274 U. S. at 207 (1927).
29 State v. Schaffer, 126 Kans. 607, 270 Pac. 604 (1928); Davis v. Walton, 74 Utah 80, 276 Pac. 921 (1929); Clayton v. Board of Examiners, 120 Nebr. 680; 234 N. W. 630 (1931); State v. Troutman, 50 Idaho 673, 299 Pac. 668 (1931); Brewer v. Valk, 204 N. C. 186 S. E. 638 (1933); In re Main, 162 Okla. 65, 19 P. 2d 153 (1933); In re Opinion of Justices, 230 Ala. 543, 162 So. 123 (1935); Garcia v. State Dep’t of Institutions, 36 Cal. App. 2d 152, 97 P. 2d 264, (1939); In re Hendrickson, 12 Wash. 2d 678, 123 P. 2d 322 (1942).
31 State v. Schaffer, 126 Kans. 607, 270 Pac. 604 (1928); Davis v. Walton, 74 Utah 80, 276 Pac. 921 (1929); Clayton v. Board of Examiners, 120 Nebr. 680; 234 N. W. 630 (1931); State v. Troutman, 50 Idaho 673, 299 P. 668 (1931); In re Main, 162 Okla. 65, 19 P. 2d 153 (1933).
casting doubt upon the validity of all sterilization laws. Critics of the *Buck v. Bell* decision have also speculated on the possibility of a reversal of opinion by the Supreme Court if a question is raised with respect to another eugenic sterilization law. The reasons for this view and criticisms of *Buck v. Bell* will be discussed in the section *Current Views on Sterilization Legislation*.

**Analysis of Current Statutes**

At present twenty-eight states have eugenic sterilization laws, twenty-six of which are compulsory. Mentally-deficient persons are subject to the laws in all of these states and in all but two they are also applicable to the mentally-ill. Seventeen states include epileptics in the groups designated by such laws. Nineteen of these laws apply to persons confined in hospitals or other institutions caring for afflicted persons with the named conditions while the remaining laws include persons who are not confined.

The involuntary procedure is usually commenced by an application from the superintendent of the institution to a designated administrative agency which has the authority to grant a sterilization order. Although most of the states now require notice, a hearing and judicial appeal, there are five states which do not require a hearing and four that make no provision for judicial appeal. The majority view of the few State Supreme Courts which have considered the procedural provisions of

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37 Minn. and Vt. have voluntary sterilization laws.


39 See Appendix A, *Criteria for determining Applicability of Involuntary Sterilization Laws*, infra. According to a recent study: "The incidence of inheritance of the tendency to seizures is insignificant and the disabling effects of epilepsy have been minimized by medical control of seizures... the eugenic purpose of the statutes is genetically unsound." Barrow and Fabing, *Epilepsy and the Law* 34 (1956).

40 Some states also apply sterilization laws to groups outside the scope of the study, such as "hereditary criminals," sex offenders and syphilitics. O'Hara and Sanks, *Eugenic Sterilization*, 45 Geo. L. J. 20, 42 (1956).


sterilization laws is that the patient must be given notice and
accorded a hearing or else be allowed to appeal the sterilization
order to a court.\textsuperscript{43} Although a California district court of appeals
came to a contrary decision,\textsuperscript{44} the California sterilization law
was subsequently amended in 1951 and now provides for both
notice and judicial appeal.\textsuperscript{45} The usual ground for issuing the
sterilization order is that "according to the laws of heredity, the
person is the probable potential parent of socially inadequate
offspring likewise afflicted."\textsuperscript{46}

On only twenty-three occasions have cases involving the
sterilization of inmates of state institutions come before the
courts.\textsuperscript{47} According to the Human Betterment Association, one
would expect to find the curtailment of rights in an area as im-
portant as procreation strongly contested. They conclude that
the dearth of cases "speaks well not only of the care and fore-
thought state legislators have given to the consideration of the
provisions of the laws but also of the care exercised in their
application by administrators."\textsuperscript{48} However, an examination of
the sterilization picture in Alabama casts considerable doubt on
the validity of this conclusion.

Alabama has had a sterilization law since 1928 which merely
says that the Assistant Superintendent of the Institution for
Mental Defectives may have patients sterilized after consultation
with the Superintendent.\textsuperscript{49} There are no provisions for notice,
a hearing or judicial appeal. The statute has the same pro-
cedural deficiencies as the 1928 law.

Although this bill has not been amended since 1928, in 1935
the Alabama legislature passed a law which would have added
the mentally ill and certain sexual offenders, etc. to the groups
of persons subject to sterilization.

On June 10, 1935 the Governor of Alabama asked the Justices
of the Supreme Court of the state for an advisory opinion as to
whether the bill was a valid exercise of the police power of the
state.

\textsuperscript{43} In re Opinion of the Justices, 230 Ala. 543, 162 So. 123 (1935); Brewer
v. Valk, 240 N. C. 186, 167 S. E. 638 (1933); State v. Schaffer, 126 Kan. 607,
270 Pac. 604 (1928); Williams v. Smith, 190 Ind. 526, 131 N. E. 2. (1921).

\textsuperscript{44} In Garcia v. State Dep't of Institutions, 36 Cal. App. 2d 152, 97 P. 2d
264 (1930), the plaintiff sought a writ of prohibition on the ground that
the statute did not provide notice, hearing, or judicial review. The court
held that "The petition . . . does not state facts sufficient to justify the
Court in issuing the writ as prayed." Id. at 153, 97 P. 2d at 265.

\textsuperscript{45} Cal. Welfare and Institutions Code, §6624 (West's 1956).

\textsuperscript{46} See Appendix A, infra, for specified conditions justifying the granting
of a sterilization order in the various states.

\textsuperscript{47} Human Betterment Association of America, Summary of United States
Sterilization Laws 2 (1958). See also Clarke, Social Legislation 263 (1957);
Hughes, Eugenic Sterilization in the U. S. 22-41 (Public Health Reports,

\textsuperscript{48} Human Betterment Association of America, op. cit. supra n. 47 at 2.

\textsuperscript{49} Ala. Code tit. 45 § 243 (1940).
The court concluded that the law would be unconstitutional on the grounds that the sterilization of a person cannot be effected without a hearing on notice before a duly constituted tribunal or board, and if this be not a court, then with the right of appeal to a court for judicial review of the findings of the board. The Governor, consequently, vetoed the bill.

According to several articles on sterilization laws, this decision cast such doubt on the validity of the existing Alabama law that it has not been used since 1935. However, in 1951, a legislative committee investigating the State Hospitals stated that 224 patients had been sterilized since the 1935 decision. The Committee was of the opinion that the Alabama law was unconstitutional because of the advisory opinion and deplored the fact that the above mentioned patients had been denied their constitutional rights. It strongly recommended that the law be repealed and that the superintendent of the Institution for the Mentally Deficient be instructed not to perform any more operations pending repeal of the law. Although it is not known whether this latter instruction was carried out, the law has not been repealed.

It is not reasonable to assume, at least in the case of Alabama, that the lack of cases attacking sterilization laws stems from the excellence of the law or the wisdom of the administrators in its application.

It is possible that the lack of cases is due to the mentally ill and the mentally deficient person’s inability to handle their defense. For that matter it is possible that he does not even understand the nature of the action. In most proceedings affecting personal or property rights, it is taken for granted that the parties are represented by attorneys. Where they cannot afford legal representation, it is usually provided by Legal Aid, a Public Defender or a court-appointed counsel who receives compensation from the state. It will be noted from Appendix B, infra, that very few states provide for court appointed counsel in sterilization proceedings. It is impossible to estimate what effect this policy may have had on the status of sterilization legislation. For example, it has been asserted that the suit in Buck v. Bell was a friendly one selected by the superintendent of the State Colony for Epileptics and Feeble-minded to be used as a test case. Carrie’s guardian is alleged to have been appointed by the state, not the county, and to have been paid $25 for the entire case which averaged out to one dollar a month.

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50 In re Opinion of the Justices, 230 Ala. 543, 162 So. 123 (1935).
51 Human Betterment Association, Sterilizations Reported in the United States to January 1, 1960 2 (1960); Clarke, op. cit. supra n. 47 at 201 n. 30; O’Hara and Sanks, op. cit. supra n. 35 at 31.
52 Report of the special joint legislative committee investigating the Alabama hospitals 9, 10 (1951).
53 O’Hara and Sanks, op. cit. supra n. 35 at 31.
54 Ibid.
Current Views on Sterilization Legislation

A. Scientific

The American Neurological Association’s Committee for the Investigation of Eugenical Sterilization summarized the main arguments of the proponents of sterilization as follows:

1. Mental illness, mental deficiency, epilepsy, pauperism and certain forms of criminality are steadily increasing;
2. Persons with these diseases propagate at a greater rate than the normal population;
3. These conditions are hereditary;
4. Environment is of less importance than germ plasm in the creation of these conditions. Implicit and sometimes explicit in this point of view is that eugenics is against natural selection because it keeps alive the unfit and therefore, is against the racial welfare.

Although it was accepted by the state legislatures and the courts that at least the inheritability of these conditions had been scientifically proven, studies undertaken in the last twenty-five years have thrown substantial doubt upon this conclusion. The most important of these studies was that conducted by the American Neurological Association. They made the following answers to the statements of the advocates of eugenic sterilization laws:

1. 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.
2. The reputedly high fecundity of the mentally defective groups ... is a myth based on the assumption that those who are low in the cultural scale are also mentally and biologically defective.
3. Any law concerning sterilization ... under the present state of knowledge (of heredity) should be voluntary ... rather than compulsory.
4. 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.

56 For comprehensive discussions of the various studies see Deutsch, The Mentally Ill in America 354-386 (2d ed. 1952); Cook, Eugenics or Euthenics 37 Ill. L. Rev. 287, 291-326 (1943); Comm. of A. N. A., op. cit. supra n. 55 at 28-175.
57 Comm. of A. N. A. op. cit. supra n. 55 at 56.
58 Id. at 57.
59 Id. at 178.
60 Ibid.
Concerning the claim of eugenicists that the efforts of society to help the unfit works against the welfare of the race the Committee said:

It is precisely in those communities where social care is good that we find the evidence of the finest culture and, on the whole, the best biology. It is in those communities where social care is poor that the population presents an appalling spectacle of degradation. 61

One year later the American Medical Association's Committee to Study Contraceptive Practices and Related Problems reported:

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. 62

A recent opinion to the same effect is that expressed by the Mental Health Committee of the South Dakota Medical Association in the 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. 63

There appears to be little doubt that there is a conflict of opinion over the inheritability of the conditions covered by eugenic sterilization laws. This conflict is important because the legislatures and the courts have assumed to date that the conditions are hereditary.

B. The Legal View

There are two legal viewpoints concerning the constitutionality of compulsory sterilization laws. The first theory which became prominent was that the constitutionality of sterilization statutes depends upon their scientific validity. Many proponents of this view believe that the scientific premises upon which the statutes rest are erroneous and that consequently compulsory

61 Id. at 58.
63 Mental Health Committee, S. D. Medical Association, Explanation of Proposed S. D. Mental Health Act 9 (1959); See also Oglesby, What Has Happened to Kansas Sterilization Laws?, 2 Kan. L. Rev. 178, 181 (1953) for results of questionnaire sent to psychiatrists concerning desirability of Kansas sterilization law.
sterilization is an arbitrary and unreasonable deprivation of liberty.64

The second theory considers the right of procreation as a fundamental liberty and one which cannot be interfered with by a government order.65 The analogies used by Justice Holmes to uphold this type of legislation have been severely criticized by some of the proponents of this view. Justice Holmes said “The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes.”66 However, when the Massachusetts Supreme Court upheld the vaccination law, it said:

If a person should deem it important that vaccination should not be performed in his case, and the authorities should think otherwise, it is not in their power to vaccinate him by force, and the worst that could happen to him under the statute would be the payment of the penalty of five dollars.67

Thus it has been argued that the vaccination and sterilization laws are not analogous because “so far as concerns liberty, there would appear to be a real difference between assessing a fine and compelling submission.”68

Justice Holmes also believed that if the nation could call upon its best citizens to sacrifice their lives in time of war, it should be able to “call upon those who already sap the strength of the state” to make a lesser sacrifice. This analogy has been contested on the ground that there is a necessity and an urgency that causes us to sacrifice men in self-defense which is wholly lacking in the case of eugenic sterilization.69

The fear has also been expressed that the logic in the decision in Buck v. Bell might be extended beyond its present limited boundaries.

There are other things besides physical or mental disease 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


66 274 U. S. at 207.


69 O’Hara and Sanks, op. cit. supra n. 65 at 29-30.
opinion in communities where the question is unfortunately a permanent and paranoid issue.  

In view of suggestions made by some eugenicists, the fear that the scope of eugenic sterilization laws may be expanded is not irrational. A Model Eugenical Sterilization Law proposed that the following persons be subject to sterilization: "(1) Feebleminded; (2) Insane (including the psychopathic); (3) Criminalistic (including the delinquent and wayward); (4) Epileptic; (5) Inebriate (including drug-habitues); (6) Diseased (including the tuberculous, the syphilitic, the leprous, and others with chronic, infectious and legally segregable diseases); (7) Blind (including those with seriously impaired vision); (8) Deaf (including those with seriously impaired hearing); (9) Deformed (including the crippled); and (10) Dependent (including orphans, ne'er-do-wells, the homeless, tramps and paupers)."  

This model law also recommended the sterilization of those persons who although they did not exhibit any of the above traits, have offspring, one-fourth of whom show such traits or one-half of whom carry genes for such qualities even if the offspring does not function as a socially inadequate person.

In recent years there have also been proposals for sterilization on an environmental basis. It has been alleged that existing laws would need few, if any, changes in wording to provide for such procedures.

A discussion of the merits and defects of environmental sterilization are outside the scope of this paper. However, in regard to the constitutionality of such laws, it appears that if the courts should decide that the State has no right to invade the bodily integrity of an innocent person who has committed no crime, this decision would probably apply to both eugenic and environmental sterilization laws.

Conclusion

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 without legal authorization, before testing the constitutionality of the laws, sterilization under unconstitutional laws, and the lack of representation by counsel, are all clear illustrations of this disregard of rights.

71 Laughlin, Eugenical Sterilization in the United States 446-447 (1922).
72 Ibid. For a criticism of these suggestions, see Myerson, Ideal Sterilization Legislation, 43 Arch. Neur. & Psych. 453, 460-463 (1935).
73 Clarke, op. cit. supra n. 47 at 194, 210-211, Guttmacher and Weihofen, Psychiatry and the Law 195-196 (1952).
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.

In recent years it has been questioned whether sterilization is constitutional even if scientific studies could demonstrate its effectiveness in reducing mental disability. In fact it has been suggested that in the near future "three generations of imbeciles may no longer be the prediction and even where it is, it may no longer be enough" and that "Buck v. Bell may in the end serve as a monument only to the wit but not the wisdom of Mr. Justice Holmes." 75

## APPENDIX A

### Criteria For Determining Applicability of Involuntary Sterilization Laws

<table>
<thead>
<tr>
<th>Summary of Specifications</th>
<th>State</th>
<th>Mentally Ill</th>
<th>Mentally Deficient</th>
<th>Epileptic</th>
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<tbody>
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<td>According to laws of heredity, person is probable potential parent of socially inadequate offspring likewise afflicted.</td>
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<td>Arizona</td>
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<td></td>
</tr>
<tr>
<td>Oklahoma</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>South Carolina</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Utah</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Virginia</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>West Virginia</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Procreation would produce children with an inherent tendency to named conditions, i.e., mental illness; or if the physical or mental condition of the patient would be improved by sterilization.</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Connecticut</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Georgia</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Idaho</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Iowa</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Kansas</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Maine</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Michigan</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>North Dakota</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Oregon</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Procreation deemed inadvisable.</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Delaware</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Wisconsin</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Person is afflicted with mental disease which may have been inherited and is likely to be transmitted to descendants; mental deficiency; or marked departures from normal mentality.</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>California</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>South Dakota</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>When deemed advisable</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Person afflicted with hereditary forms of insanity that are recurrent; epilepsy or primary or secondary types of feeble mindedness.</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Indiana</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
</tbody>
</table>

Published by EngagedScholarship@CSU, 1961
<table>
<thead>
<tr>
<th>Summary of Specifications</th>
<th>State</th>
<th>Mentally Ill</th>
<th>Mentally Deficient</th>
<th>Epileptic</th>
</tr>
</thead>
<tbody>
<tr>
<td>Idiot, feeble minded or insane person who is treated, trained or cared for within a custodial institution.</td>
<td>Montana</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Mentally deficient patients eligible for parole or discharge.</td>
<td>Nebraska</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>If considered in the best interest of the mental, moral or physical improvement of the patient, or for the public good.</td>
<td>North Carolina</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
</tbody>
</table>
# APPENDIX B
Procedural Requirements

<table>
<thead>
<tr>
<th>State</th>
<th>Initiation of Proceedings</th>
<th>Notice</th>
<th>Adjudicating Agency</th>
<th>Judicial Appeal</th>
<th>Right to Counsel</th>
</tr>
</thead>
<tbody>
<tr>
<td>ALA.</td>
<td>Asst. Supt.</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>ARIZ.</td>
<td>X</td>
<td>X¹</td>
<td>30 days</td>
<td>X X</td>
<td>X X</td>
</tr>
<tr>
<td>CAL.</td>
<td>X</td>
<td>X X X X X</td>
<td>30 days</td>
<td>X²</td>
<td>X</td>
</tr>
<tr>
<td>CONN.</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>DEL.</td>
<td>X³</td>
<td>X</td>
<td>30 days</td>
<td>Supt., physician and alienist⁴</td>
<td></td>
</tr>
<tr>
<td>GA.</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>IDAHO</td>
<td>X</td>
<td>X X</td>
<td>30 days</td>
<td>State Bd. of Eugenics⁵</td>
<td>X</td>
</tr>
<tr>
<td>IND.⁷</td>
<td>X</td>
<td>X X X¹</td>
<td>30 days</td>
<td>Governing Bd. of institution⁸</td>
<td>X X</td>
</tr>
<tr>
<td>IOWA</td>
<td>X</td>
<td>X X X</td>
<td>10 days</td>
<td>X X</td>
<td>X⁶ X⁹</td>
</tr>
<tr>
<td>KAN.</td>
<td>X</td>
<td>X X X</td>
<td>30 days</td>
<td>Chief Med. Officer of institution, its governing bd. and Secy. Bd. of Health</td>
<td>X</td>
</tr>
<tr>
<td>ME.</td>
<td>X</td>
<td>X X X X X</td>
<td>X¹⁰</td>
<td>Central Agency and 2 of 3 state hosp. supts.</td>
<td>X X⁹</td>
</tr>
<tr>
<td>MICH.</td>
<td>X</td>
<td>X X X¹</td>
<td>10 days</td>
<td>X¹¹ X¹²</td>
<td>X X</td>
</tr>
<tr>
<td>MISS.</td>
<td>X</td>
<td>X X</td>
<td>30 days</td>
<td>Bd. of Directors or trustees of hospital</td>
<td></td>
</tr>
<tr>
<td>MONT.</td>
<td>X</td>
<td>X X X</td>
<td></td>
<td>Created board¹³</td>
<td>X</td>
</tr>
</tbody>
</table>

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# APPENDIX B (Cont.)

<table>
<thead>
<tr>
<th>State</th>
<th>Institution Superintendent</th>
<th>Others</th>
<th>Patient</th>
<th>Relatives</th>
<th>Central Agency</th>
<th>Guardian</th>
<th>Minimum Notice Required</th>
<th>Independent Medical Examination</th>
<th>Hearing</th>
<th>Presence of Patient</th>
<th>Adjudicating Agency</th>
<th>Judicial Appeal</th>
<th>Right to Counsel</th>
</tr>
</thead>
<tbody>
<tr>
<td>NEB.</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X¹</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>X</td>
<td>X</td>
<td>Bd. of Examiners composed of 5 physicians¹⁴</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>N. H.</td>
<td>X</td>
<td>X</td>
<td></td>
<td>X¹</td>
<td>14 days</td>
<td>X¹⁶</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>Bd. of institution</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>N. C.</td>
<td>X</td>
<td></td>
<td>X</td>
<td>X¹</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>X</td>
<td>X</td>
<td>State Bd. of Eugenics</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>N. D.</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td></td>
<td>X</td>
<td></td>
<td></td>
<td>X</td>
<td>Three physicians appointed by Bd. of Examiners</td>
<td>X</td>
<td>X⁹</td>
<td></td>
</tr>
<tr>
<td>OKLA.</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X¹</td>
<td>10 days</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>Mental Health Bd.</td>
<td></td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>ORE.</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td></td>
<td>X</td>
<td></td>
<td></td>
<td>X</td>
<td>State Bd. of Eugenics</td>
<td></td>
<td>X</td>
<td>X⁹</td>
</tr>
<tr>
<td>S. C.</td>
<td>X</td>
<td></td>
<td>X</td>
<td>X</td>
<td>30 days</td>
<td>X</td>
<td>X</td>
<td>Exec. Comm. of State Bd. of Health</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>S. D.</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>10 days</td>
<td>X¹⁶</td>
<td>X¹⁶</td>
<td>County Sub-commission for control of feeble-minded</td>
<td>X</td>
<td></td>
<td></td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>UTAH</td>
<td>X</td>
<td>X</td>
<td></td>
<td>X¹</td>
<td>30 days</td>
<td>X</td>
<td>X</td>
<td>Governing Bd. of institution</td>
<td>X</td>
<td></td>
<td></td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>VA.</td>
<td>X</td>
<td>X</td>
<td></td>
<td>X¹</td>
<td>30 days</td>
<td>X</td>
<td>X</td>
<td>State Hospital Bd.</td>
<td>X</td>
<td></td>
<td></td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>W. VA.</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>30 days</td>
<td>X</td>
<td>X</td>
<td>Public Health Council</td>
<td>X</td>
<td></td>
<td></td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>WIS.</td>
<td>Dept. of Public Welfare</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>30 days</td>
<td>X¹⁷</td>
<td></td>
<td>Dept. of Public Welfare</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
EUGENIC STERILIZATION

1. If the patient has no guardian, one must be appointed for him. Ariz. 36-533; Ind. 22-1602; Mich. 720-305; Neb. 83-505; N. H. 174-3; N. C. 35-44; Okla. 43A-342; Utah 64-10-14; Va. 37-235.

2. If an objection to sterilization is filed, the Director of the Department of Mental Hygiene is to make full inquiry into the matter. Cal. WI S 6624.

3. The board or commission having control over the state or county hospital for the mentally ill or the home for the mentally deficient. Del. 16-5701-02.

4. Physician and alienist are appointed by the Department of Welfare. Written consent of Department of Welfare is also necessary. Del. 16-5701-02.

5. State Board of Eugenics is composed of the directors of the Social Security Board and the State Board of Health and the superintendent of the state hospital. Any two of the above may act as the Board. Ga. 99-1301-2.

6. Written consent of patient and guardian is necessary or the Board's decision must be judicially reviewed. Idaho 66-807-8; Iowa 145-15.

7. Court may enter order for sterilization on the basis of the examining doctor's certificate at the same time as commitment order is made. Ind. 22-1613-14.

8. Decision must be reported to the Indiana Council for Mental Health which may approve or reverse the decision. Ind. 22-1602.

9. Court will appoint attorney if defendant does not have one. Iowa 145-17; Mich. 720-307; N. D. 23-0609; Ore. 436-120. If there are no known relatives or legal guardian. Me. 27-152.

10. Physician in charge of the case must call in a physician and surgeon to examine the patient and to decide if he is capable of consenting to the operation. Me. 27-149.

11. Two physicians are to be appointed by the court. Mich. 720-306.


14. Five "physicians" are to be from the state hospitals including three psychiatrists and one psychologist. Neb. 83-502.

15. Two or more physicians with two years of experience who are registered in the state. N. H. 174-2.


17. Psychiatrist and surgeon. Wis. 46-12.
## APPENDIX C*

### EUGENIC STERILIZATIONS IN THE UNITED STATES 1907-1960

#### Part I NATIONAL TOTALS

<table>
<thead>
<tr>
<th>Year</th>
<th>Cumulative Mentally Ill</th>
<th>Mentally Deficient</th>
<th>Others</th>
</tr>
</thead>
<tbody>
<tr>
<td>1921</td>
<td>3,233</td>
<td>2,700</td>
<td>403</td>
</tr>
<tr>
<td>1928</td>
<td>8,515</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1935</td>
<td>20,070</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1946</td>
<td>45,127</td>
<td>21,311</td>
<td>22,153</td>
</tr>
<tr>
<td>1956</td>
<td>58,285</td>
<td>28,407</td>
<td>30,101</td>
</tr>
<tr>
<td>1960</td>
<td>61,540</td>
<td>27,436</td>
<td>31,931</td>
</tr>
</tbody>
</table>

1. 1907 is the first year in which eugenic sterilization legislation was passed.
2. Totals given are for January 1st of each year.
6. Deutsch, the Mentally Ill in America 372 (1952).

*Note*

The number of eugenic sterilizations which have taken place in the United States is larger than the total shown in this table. The table reflects sterilizations since 1907 when the first sterilization law became effective, and unauthorized sterilizations took place before this date. “Even before 1907, superintendents of institutions were secretly sterilizing feeble-minded persons. Several hundred males were sterilized secretly and illegally by Dr. H. C. Sharp . . . before the passage of the pioneer law.” Deutsch, The Mentally Ill in America 370 (1952). It is also reported that in the middle of the 1890’s the Superintendent of the Winfield, Kansas State Home for the Feeble-Minded castrated 58 children, Gosney and Popenoe, Sterilization for Human Betterment 14-15 (1929).

There have also been more persons sterilized since 1907 than this table reflects. For example, the Human Betterment Association states that the Alabama law has been inoperative since 1935 while the 1951 Report of the Joint Legislative Committee Investigating the Alabama Hospitals asserted that 224 persons had been sterilized between 1935 and 1951.
## APPENDIX C

### Part II STERILIZATIONS IN THE UNITED STATES

#### STATE TOTALS FOR 1959 and 1949¹

<table>
<thead>
<tr>
<th>State</th>
<th>1959 Total</th>
<th>1949 Total</th>
<th>State</th>
<th>1959 Total</th>
<th>1949 Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ala.</td>
<td></td>
<td></td>
<td>Mont.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ariz.</td>
<td>1</td>
<td></td>
<td>Neb.</td>
<td>10</td>
<td>16</td>
</tr>
<tr>
<td>Cal.</td>
<td>12</td>
<td>381</td>
<td>N. H.</td>
<td>1</td>
<td>14</td>
</tr>
<tr>
<td>Conn.</td>
<td>1</td>
<td>10</td>
<td>N. C.</td>
<td>260</td>
<td>249</td>
</tr>
<tr>
<td>Del.</td>
<td>19</td>
<td></td>
<td>N. D.</td>
<td>22</td>
<td>23</td>
</tr>
<tr>
<td>Ga.</td>
<td>112</td>
<td>167</td>
<td>Okla.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Idaho</td>
<td></td>
<td></td>
<td>Ore.</td>
<td>40</td>
<td>32</td>
</tr>
<tr>
<td>Ind.</td>
<td>7</td>
<td>49</td>
<td>S. C.</td>
<td>6</td>
<td>7</td>
</tr>
<tr>
<td>Iowa</td>
<td>14</td>
<td>165</td>
<td>S. D.</td>
<td>1</td>
<td>3</td>
</tr>
<tr>
<td>Kan.</td>
<td></td>
<td></td>
<td>Utah</td>
<td>7</td>
<td>14</td>
</tr>
<tr>
<td>Me.</td>
<td>4</td>
<td>3</td>
<td>Vt.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Mich.</td>
<td>27</td>
<td>88</td>
<td>Va.</td>
<td>69</td>
<td>215</td>
</tr>
<tr>
<td>Minn.</td>
<td>6</td>
<td>8</td>
<td>W. Va.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Miss.</td>
<td>15</td>
<td></td>
<td>Wis.</td>
<td>28</td>
<td></td>
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</table>

**Totals:**

<table>
<thead>
<tr>
<th></th>
<th>1959</th>
<th>1949</th>
</tr>
</thead>
<tbody>
<tr>
<td>1959</td>
<td>614</td>
<td></td>
</tr>
<tr>
<td>1949</td>
<td>1500</td>
<td></td>
</tr>
</tbody>
</table>

¹ Human Betterment Association of America.