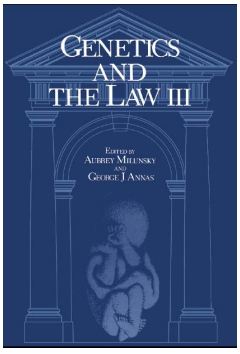

EUGENIC STERILIZATION IN THE UNITED STATES

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The most important event in the rise of state-supported programs to sterilize the feebleminded, the insane, and criminals was the rediscovery in about 1900 of Mendel's breeding experiments. The elegant laws of inheritance were seductive, and a few influential scientists, convinced that even conditions such as pauperism were caused by defective germ plasm, rationalized eugenic programs.[1] But by the close of the nineteenth century, the science of eugenics was already well established.

The founding father was Francis Galton, who, in 1864, began to study the heredity of talent. His investigations of the accomplishments of the children of eminent British judges first appeared in the popular press in 1865.[2] Four years later his book *Heredity Genius: An Inquiry into Its Laws and Consequences*[3] provided a cornerstone for eugenics. A man obsessed with measuring, Galton returned to the problem of heredity many times throughout his long life.[4]

In the United States, evolutionary theory was complicated by the race problem. Some scientists argued that human races had degenerated from a common type and that color was a rough index of departure from the original (white) type.[5] Such notions accommodated the Old Testament and reinforced the convictions of Europeans and North Americans that the Negro was inferior. Particularly important was Morton's 1839 study of the cranial volume of 256 skulls from the five major races. He reported that the average Caucasian skull was 7 cubic inches larger than the average Negro skull—a powerful finding to explain "obvious" cultural superiority.[6]

Another important progenitor of eugenical theory was Cesar Lombroso, an Italian criminologist. Lombroso argued that the behavior of many criminals was the ineluctable product of their germ plasm. During the postmortem on a famous brigand, Lombroso

noted a median occipital fossa, rarely found in human skulls, but commonly seen in rodents. That and similar findings convinced him that the criminal was "an atavistic being who reproduces in his person the ferocious instincts of primitive humanity and the inferior animals."[7] Late-nineteenth-century American criminology felt his influence. For example, a Pennsylvania prison official wrote that "everyone who has visited prisons and observed large numbers of prisoners together has undoubtedly been impressed from the appearance of prisoners alone, that a large portion of them were born to be criminals."[8]

Perhaps the single most important event in the rise of eugenics was a report written by Richard Dugdale, a reform-minded New York prison inspector. At one upstate prison, he was struck by the large number of inmates who were relatives. He eventually amassed a pedigree spanning five generations that included 709 individuals, the collective offspring of an early Dutch settler, all with a propensity for almshouses, taverns, and brothels. His study of "the Jukes" had an immediate success with the general public.[9] The family entered American folklore and came to symbolize a new kind of sociological study, one that eugenicists would repeat and refine in the early years of the twentieth century.

During the 1870s, there was a marked increase in the number of state institutions dedicated to the care of the feebleminded. But by 1880, lawmakers were reassessing their relatively generous funding of these institutions. The U.S. Census of 1880 alarmed those who cared for defective persons; it reported that whereas the general population had grown by 30%, the apparent increase in "idiocy" was 200%.[10] By the 1880s, optimistic views on the educability of the feebleminded were fading, and there was a steady increase in the number of "custodial departments." The "Jukes" stimulated much interest in calculating the cost of providing for the nation's feebleminded, insane, or criminal.

The rediscovery of Mendel's laws was timed perfectly to reinforce the popular suspicion that the defective classes were the products of tainted germ plasm. It prompted a deluge of articles on eugenics in the pages of the popular press. Between 1905 and 1909, there were 27 articles on eugenics listed in *The Reader's Guide to Periodical Literature.* From 1910 to 1914, there were 122 additional entries, making it one of the most referenced subjects in the index. Not a few of them were alarmist in tone.

The popularity of this new subject owed much to Charles B. Davenport, the first director of the Station for Experimental Evolution at Cold Spring Harbor, New York. Trained in mathematics and biology (he took a Ph.D. from Harvard in 1892), young, and ambitious, Davenport was well placed to capture the dramatic implications of Mendelism.[11] After convincing the newly endowed Carnegie Institute to create a research facility, he embarked on genetic studies in domestic animals and plants. But the appeal of human studies was irresistible, and he was soon publishing papers on the inheritance of eye color and skin color.

In 1909, Davenport convinced Mrs. E. H. Harriman, the wealthy matron of a railroad fortune, to underwrite the creation of a Eugenic Record Office (ERO) for five years. His first task was to build a cadre of fieldworkers, young women trained to conduct family studies, to amass the raw data of eugenics. Progress was swift, and the ERO soon was publishing monographs arguing that degeneracy was highly heritable and that affected persons tended also to have large families.[12]

Significant as these works were, the major eugenics document of this century was probably Goddard's 1912 study of "the Kallikaks."[13] In 1907, Goddard, a psychologist doing research at the Vineland Training School, traveled to Europe. In Paris, he visited Simon and Binet and learned their new methods for testing intelligence. When he returned to New Jersey, Goddard, closely assisted by an ERO-trained fieldworker, used the methods to study the families of Vineland patients.

One family fascinated them. It was composed of two branches, both descendants of Martin Kallikak, a soldier in the Revolutionary War. While in tbe army, Martin had got a girl in the "Piney Woods" pregnant. After the war, he married a respectable Quaker maid and engendered a line of eminent New Jersey citizens. Goddard believed that this natural experiment proved the power of heredity. For generation after generation, the "Piney Woods" line produced paupers and feebleminded persons who, often unaware of their biological ties, sometimes worked as servants to their more eminent cousins.

The Kallikak Family was an immediate success. Written in clear language, embellished with many photographs of the moronic, sinister-looking family, and relatively short, the book hit home with the public. Reprinted in 1913, 1914, 1916, and 1919, it earned Goddard not a little celebrity. Only recently did Stephen Gould discover that the photographs had been altered, thus casting doubt on the integrity of the entire enterprise.[14] But in 1912 or 1919, one could hardly read *The Kallikak Family* without worrying about the consequences of childbearing by the weaker stock in the human family.

The climate of nativism made a large number of Americans particularly receptive to the argument that, if the wrong people had too many children, the nation's racial vigor would decline. No study of eugenic sterilization in the United States can ignore the impact of immigration. The history of the growth of nineteenth-century America is a history of immigration. The first of four great waves rolled across the land in the 1840s. During the 1890s, immigration exceeded the wildest predictions, rising from 225,000 in 1898 to 1,300,000 in 1907. Large-scale assimilation was painful, sometimes agonizing. Perhaps the most dramatic perturbation was competition for jobs. Despite their commitment to internationalism, even the great unions favored restrictive immigration laws. Several states passed laws excluding immigrants from the public works.[15]

Beginning about 1875 proposals to curtail the entry of aliens became a perennial topic before the U.S. Congress. The earliest laws were stimulated by fears in California that the importation of coolie labor had gone too far. Starting with the "Chinese Exclusion Acts," the federal government built the walls even higher. In 1882, a new law expressly excluded lunatics, idiots, and persons likely to become a public charge. During the late 1890s, the most ardent restrictionists sought to condition entry on a literacy test, but success in Congress was damped by President Cleveland's veto.

The early responses to fears of a rapidly growing number of defective persons were proposals that they be incarcerated. The first asylum dedicated to segregating feebleminded women during their reproductive years was opened in New York in 1878. But by the 1890s, it was obvious that only a tiny fraction of feebleminded women would ever be institutionalized. This harsh reality engendered a successful campaign to enact laws to prohibit marriage by the feebleminded, epileptics, and other "detective" types. Beginning

with Connecticut in 1895, many states passed eugenic marriage laws, but this solution was unenforceable. Even the eugenicists dismissed it as ineffective.[16]

Perhaps the most lurid alternative to proposals for lifetime segregation was mass castration. Although never legally implemented, proposals to castrate criminals were seriously debated in a few state legislatures during the 1890s.[17] With the development of the vasectomy, a socially more acceptable operation, procastration arguments (usually aimed at male criminals) faded.

The Surgical Solution

The first American case report of a vasectomy was by Albert Ochsner, a young Chicago surgeon. He argued that the vasectomy could eliminate criminality inherited from the "father's side" and that it "could reasonably be suggested for chronic inebriates, imbeciles, perverts and paupers."[18] Three years later, H. C. Sharp, a surgeon at the Indiana Reformatory, reported the first large study on the effects of vasectomy. He claimed that his 42 patients felt stronger, slept better, performed more satisfactorily in the prison school, and felt less desire to masturbate! Sharp urged physicians to lobby for a law to empower directors of state institutions "to render every male sterile who passes its portals, whether it be almshouse, insane asylum, institute for the feebleminded, reformatory or prison."[19]

In 1907, the governor of Indiana signed the nation's first sterilization law. It initiated the involuntary sterilization of any habitual criminal, rapist, idiot, or imbecile committed to a state institution whom physicians diagnosed as "unimprovable." Having operated on 200 Indiana prisoners, Sharp quickly emerged as the national authority on eugenical sterilization. A tireless advocate, he even underwrote the publication of a pamphlet *Vasectomy*.[20] In it, he affixed tear-out post cards so that readers could mail a preprinted statement supporting compulsory sterilization laws to their legislative representatives.

Although the simplicity of the vasectomy attracted their attention to defective males, the eugenicists were also concerned with defective women. But the salpingectomy was not yet perfected, and the morbidity from intraabdominal operations was high. Eugenic theoreticians had little choice but to support the long-term segregation of feebleminded women. They were, however, comforted in their belief that most retarded women became prostitutes and were rendered sterile by pelvic inflammatory disease.[21]

Prosterilization arguments peaked in the medical literature in 1910, when roughly one half of the 40 articles published since 1900 appeared. The articles almost unanimously favored involuntary sterilization of the feebleminded. Appeals to colleagues that they lobby for enabling laws were commonly heard at meetings of state medical societies.[22] At the annual meeting of the American Medical Association, Sharp enthralled his listeners with reports on a series of 456 vasectomies performed on defective men in Indiana. After hearing him, a highly placed New Jersey official announced that he would seek a bill for the compulsory sterilization of habitual criminals in his state.[23] New Jersey enacted such a law 18 months later.

The most successful physician lobbyist was F. W. Hatch, Secretary of the State Lunacy Commission in California. In 1909, he drafted a sterilization law and helped convince the legislature (made highly sensitive to eugenic issues by the influx of "racially inferior" Chinese and Mexicans) to adopt it. After the law was enacted, Hatch was appointed General Superintendent of State Hospitals and was authorized to implement the new law. Until his death in 1924, Hatch directed eugenic sterilization programs in 10 state hospitals and approved 3,000 sterilizations, nearly half the nation's total.[24]

The Early Sterilization Laws

In studying the rapid rise of the early sterilization legislation, one is hampered by a paucity of state legislative historical materials.[25] Four small, but influential, groups lobbied hard for these laws: physicians (especially those working at state facilities), scientific eugenicists, lawyers and judges, and a striking number of the nation's richest families. There were, of course, opponents as well. But except for a handful of academic sociologists and social workers, they were less visible and less vocal.

The enthusiastic support that America's wealthiest families provided to the eugenics movement is a most curious feature of its history. First among many was Mrs. E. H. Harriman, who almost single-handedly supported the ERO in its first five years. The second largest financial supporter of the ERO was John D. Rockefeller, who gave it $400 each month. Other famous eugenic philanthropists included Dr. John Harvey Kellogg (brother to the cereal magnate), who organized the First Race Betterment Conference (1914), and Samuel Fels, the Philadelphia soap manufacturer. Theodore Roosevelt was an ardent eugenicist, who favored large families to avoid racial dilution by the weaker immigrant stocks.[26]

Of the few vocal opponents to the eugenics movement, Alexander Johnson and Franz Boas were the most important. Johnson, leader of the National Conference of Charities and Correction, thought that sterilization was less humane than institutional segregation. He dreamed of "orderly celibate communities segregated from the body politic," where the feebleminded and the insane would be safe and could be largely self-supporting.[27] Boas, a Columbia University anthropologist, conducted a special study for Congress to determine whether immigrants were being assimilated into American culture. His findings argued that Hebrews and Sicilians were easily assimiliable—a conclusion that was anathema to eugenicists.[28]

The extraordinary legislative success of proposals to sterilize defective persons suggests that there was substantial support among the general public for such a plan. Between 1905 and 1917, the legislatures of 17 states passed sterilization laws, usually by a large majority vote. Most were modeled after the "Indiana plan," which covered "confirmed criminals, idiots, imbeciles, and rapists." In Indiana, if two outside surgeons agreed with the institution's physician that there was no prognosis for "improvement" in such persons, they could be sterilized without their consent. In California, the focus was on sterilizing the insane. The statute permitted authorities to condition a patient's discharge from a state

hospital on undergoing sterilization. California law was unique in requiring that the patient or the family consent to the operation, but as the hospitalization was of indeterminant length, people rarely refused sterilization; thus the consent was rendered nugatory.[29]

How vigorously were these laws implemented? From 1907 to 1921, 3,233 sterilizations were performed under state law. A total of 1,853 men (72 by castration) and 1,380 women (100 by castration) were sterilized. About 2,700 operations were performed on the insane, 400 on the feebleminded, and 130 on criminals. California's program was by far the largest.[30]

Sterilization programs ebbed and flowed according to the views of key state and institutional officials. For example, in 1909, the new governor of Indiana squashed that state's program. In New York, activity varied by institution. In the State Hospital at Buffalo, the superintendent, who believed that pregnancy exacerbated schizophrenia, authorized 12 salpingectomies, but in most other hospitals, no sterilizations were permitted despite the state law. Similar idiosyncratic patterns were documented in other states.[31]

The courts were unfriendly to eugenic policy. Between 1912 and 1921, eight laws were challenged, and seven were held unconstitutional. The first two cases were brought by convicted rapists who argued that sterilization violated the Eighth Amendment's prohibition of cruel and unusual punishment. The Supreme Court of the State of Washington, impressed by Dr. Sharp's reports that vasectomy was simple, quick, and painless, upheld its state law.[32] But a few years later, a federal court in Nevada ruled that the vasectomy was an "unusual" punishment and struck down a criminal sterilization law.[33] Peter Feilen, the appellant in the Washington case, was probably the only man ever forced to undergo a vasectomy pursuant to a law drafted expressly as a punitive rather than an eugenic measure.

In six states (New Jersey, Iowa, Michigan, New York, Indiana, and Oregon), constitutional attacks were leveled at laws that authorized the sterilization of feebleminded or insane persons who resided in state institutions. The plaintiffs argued that laws aimed only at institutionalized persons violated the Equal Protection Clause and that the procedural safeguards were so inadequate that they ran afoul of the Due Process Clause. All six courts invalidated the laws, but they were divided in their reasoning. The three that found a violation of the Equal Protection Clause did not clearly oppose eugenic sterilization; their concern was about uniform treatment of all feebleminded persons. The three that relied on due process arguments to reject the laws were more antagonistic to the underlying policy. An Iowa judge characterized sterilization as a degrading act that could cause "mental torture."[34]

From 1918 to 1921, the years during which these cases were decided, sterilization laws faded as quickly as they had appeared. One reason that the courts were less sympathetic to sterilization laws than the legislatures had been was that sterilization petitions (like commitment orders) touched the judiciary's historic role as protector of the weak. The judges demanded clear proof that the individual would benefit from being sterilized. Another important reason was that scientific challenges to eugenic theories about crime had appeared. For example, two physicians who studied 1,000 recidivists to determine whether inheritance was a factor in criminal behavior found "no proof of the existence of

hereditary criminalistic traits."[35] But their voices were soon lost in the storm as another huge wave of immigrants swept across America.

The Resurgence of the Sterilization Movement

Despite the judicial rejection of the earlier laws, after World War I arguments that mass eugenic sterilization was critical to the nation's "racial strength" resurfaced. Probably the major impetus was the sudden arrival of hundreds of thousands of southeastern European immigrants.[36] The xenophobia triggered by this massive influx had widespread repercussions. It reinforced concern about the dangers of miscegenation and helped to renew interest in biological theories of crime.

The concurrent concern about miscegenation reflected the weakening of southern white society's control over the lives of blacks. During the eighteenth and nineteenth centuries, the southern states forbade marriages between whites and Negroes. After the Civil War, the burgeoning "colored" population (largely a product of institutionalized rape before then) stimulated amendments that redefined as "Negro" persons with ever smaller fractions of black ancestry.[37] This trend culminated when Virginia enacted a marriage law that defined as white "one who has no trace whatsoever of any blood other than Caucasian." It forbade the issuance of marriage licenses until officials had "reasonable assurance" that statements about the color of both the man and the woman were correct, voided all existing interracial marriages (regardless of whether they had been contracted legally elsewhere), and made cohabitation by such couples a felony. Several other states enacted laws modeled on the Virginia plan. It was not until the 1940s that states began to repeal miscegenation laws, and only recently did the U.S. Supreme Court declare them to be unconstitutional.[38]

The early 1920s were also marked by an interest in biological theories of criminality somewhat akin to those legitimized by Lombroso. Orthodox criminologists were not responsible for this development.[39] The notion of biologically determined criminality was fostered largely by tabloid journalists and a few eugenically minded officials. For example, *World's Work*, a popular monthly, featured five articles on the biological basis of crime. One recounted the innovative efforts of Harry Olson, Chief Justice of the Chicago Municipal Court. Convinced that most criminals were mentally abnormal, Olson started a Psychopathic Laboratory and hired a psychometrician to develop screening tests to identify people with criminal minds.[40]

During the 1920s, many eugenics clubs and societies sprouted, but only two, the American Eugenics Society (AES) and the Human Betterment Foundation (HBF), exerted any significant influence on the course of eugenic sterilization. The AES was conceived at the Second International Congress of Eugenics in 1921. Dr. Henry Fairfield Osborn, President of the American Museum of Natural History, and a small group of patrician New Yorkers initiated the society. By 1923, it was sufficiently well organized to lobby against a bill to support special education for the handicapped, an idea that it considered dysgenic.

In 1925, the AES relocated to New Haven, Connecticutt. For the next few years, its major goal was public education. The Great Depression caused a great fall in donations, and when Ellsworth Huntington, a Yale geographer, became president in 1934, the society was moribund. With the aid of a wealthy relative of the founder, Huntington breathed new life into the organization and realized that politically the AES would fare better if it pushed "positive" eugenics policies, such as family planning and personal hygiene. By 1939, the AES had dissociated itself from hard-core sterilization advocates.

The wealthiest eugenics organization was the Human Betterment Foundation (HBF), started by California millionaire Ezra Gosney, who in 1926 convened a group of experts to study the efficacy of California's sterilization program. This group eventually published over 20 articles confirming the safety of being sterilized and concluded that the state had benefitted. Gosney was convinced that a massive sterilization program could reduce the number of mentally defective persons by one half in "three or four generations."[41]

For five years after sterilization statutes were struck down by the courts, there was little legislative activity. Then, in 1923, four states (Oregon, Montana, Delaware, and Ohio) enacted new laws, and by 1925, eight other states had followed suit. The new statutes were drafted with much greater regard for constitutional issues. Besides frequently requiring the assent of parents or guardians, the laws preserved the right to a jury trial of whether the patient was "the potential parent of socially inadequate offspring." Despite concern about the Equal Protection Clause, most laws were still aimed only at institutionalized persons.

Opponents of sterilization quickly attacked the new laws. Battle was joined in Michigan and Virginia. In June 1925, the highest Michigan court ruled that the state's sterilization statute was "justified by the findings of Biological Science."[42] But the crucial case involved a test of the Virginia law. Dr. A. S. Priddy, Superintendent of the State Colony for Epileptics and Feeble-Minded, filed a sterilization petition to test the judicial waters. Carefully amassing a wealth of proeugenic testimony, he shepherded the case through the courts. His strategy paid off. In May 1927, Oliver Wendell Holmes, writing for the majority of the U.S. Supreme Court, upheld involuntary sterilization of the feebleminded, concluding:

> It is better for all the world, if instead of waiting to execute degenerative 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.[43]

Years of Triumph

The Supreme Court's decision to uphold the Virginia law accelerated the pace of legislation: in 1929, nine states adopted similar laws. As was the case before World War I, a small group of activists from influential quarters persuaded scientifically unsophisticated legislators that sterilization was necessary, humane, and just.

The lobbyists succeeded in part because of favorable views expressed in the medical profession. During 1927–1936, about 60 articles, the vast majority in favor of eugenic sterilization, appeared. In the general medical community, support was strong, but not uniform. Only 18 state medical societies officially backed sterilization programs.[44]

The legislative victories of the early 1930s were impressive, but the crucial measure of whether eugenic notions triumphed is to count the number of sterilizations. Data from surveys that were conducted by the Human Betterment Foundation and other groups permit minimal estimates of the extent of mass sterilization and compel some striking conclusions:

1. Between 1907 and 1963, there were eugenic sterilization programs in 30 states. More than 60,000 persons were sterilized pursuant to state laws.
2. Although sterilization reached its zenith during the 1930s, several states vigorously pursued this activity throughout the 1940s and 1950s.
3. At a given time, a few programs were more active than the rest. In the 1920s and 1930s, California and a few midwestern states were most active. After World War II, several southern states accounted for more than half of the involuntary sterilizations performed on institutionalized persons.
4. Beginning in about 1930, there was a dramatic rise in the percentage of women who were sterilized.
5. Revulsion with Nazi sterilization policy did not curtail American sterilization programs. Indeed, more than one half of all eugenic sterilizations occurred after the Nazi program was fully operational.

During 1929–1941, the Human Betterment Foundation conducted annual surveys of state institutions to chart the progress of sterilization. Letters from hospital officials indicate what factors influenced the programs. The most important determinants of the scope of a program's operation seems to have been the complexity of the due process requirements of the relevant laws, the level of funding, and the attitudes of the superintendents themselves. The HBF surveys strongly suggest that the total number of sterilizations performed on institutionalized persons was underreported. Respondents frequently indicated that eugenic operations were conducted outside the confines of state hospitals.[45]

Until 1918, there were only 1,422 eugenic sterilizations reportedly performed pursuant to state law. Ironically, the sterilization rate began to rise during the very period when the courts were rejecting the first round of statutes (1917–1918). From 1918 to 1920, there were 1,811 reported sterilizations, a fourfold increase over the annual rate during the prior decade. During the 1920s, annual sterilization figures were stable. But in 1929, there was a large increase in sterilizations. Throughout the 1930s, more than 2,000 institutionalized persons were sterilized each year, triple the rate of the early 1920s.

This rapid increase reflected changing concerns and changing policy. In the Great Depression years, the superintendents of many hospitals, strapped by tight budgets, decid-

ed to sterilize mildly retarded young women. Before 1929, about 53% of all eugenic sterilizations had been performed on men. Between 1929 and 1935, there were 14,651 reported operations, 9,327 on women and 5,324 on men. In several states, (e.g., Minnesota, and Wisconsin), virtually all the sterilized persons were women. This fact becomes even more impressive when one recognizes that salpingectomy incurred a relatively high morbidity and a much higher cost than did vasectomy. In California, at least five women died after undergoing eugenic sterilization.[46]

During the 1930s, institutionalized men were also being sterilized in unprecedented numbers, largely because of the great increase in the total number of state programs. Unlike the "menace of the feebleminded" that had haunted policy before World War I, the new concern was to cope with harsh economic realities. As the superintendents saw it, fewer babies born to incompetent parents might mean fewer state wards.

The triumph of eugenic sterilization programs in the United States during the 1930s influenced other nations. Canada, Germany, Sweden, Norway, Finland, France, and Japan enacted sterilization laws. The most important events took place in Germany, where the Nazis sterilized more than 50,000 "unfit" persons within one year of enacting a eugenics law.

The German interest in eugenics had roots that twined with nineteenth-century European racial thought, a topic beyond the scope of this chapter. In the early years of this century, there was a spate of books that preached the need to protect Nordic germ plasm. A German eugenics society was formed in 1905, and in 1907, the first (unsuccessful) sterilization bill was offered in the Reichstag. The devastation of World War I halted the German eugenic movement, but by 1921, groups were again actively lobbying for eugenics programs. Hitler advocated eugenic sterilization as early as 1923.

When the Nazis swept to power, they quickly implemented a program to encourage larger, healthier families. Tax laws were restructured to favor childbearing. In 1933, a companion law was enacted to prevent reproduction by defective persons. The work of Gosney and Popenoe was extremely influential on the Nazi planners.[47]

The law created a system of "hereditary health courts," which judged petitions brought by public health officials that certain citizens burdened with one of a long list of disorders (feeblemindedness, schizophrenia, manic-depressive insanity, epilepsy, Huntington's chorea, hereditary blindness, hereditary deafness, severe physical deformity, and habitual drunkenness) would be subjected to compulsory sterilization. In 1934, the courts heard 64,499 petitions and ordered 56,244 sterilizations, for a "eugenic conviction" rate of 87%.[48] In 1934, the German Supreme Court ruled that the law applied to non-Germans living in Germany, a decision that had special import for Gypsies. From 1935 through 1939, the annual number of eugenic sterilizations grew rapidly. Unfortunately, key records perished during World War II. But in 1951, the "Central Association of Sterilized People in West Germany" charged that, from 1934 to 1945, the Nazis sterilized 3,500,000 people, often on the flimsiest pretext.[49]

The Nazi program was eugenics run amok. In the United States, no program even approached it in scope or daring. But there is no evidence to support the argument, frequently heard, that stories of Nazi horrors halted American sterilization efforts.

The Quiet Years

With the onset of World War II, there was a sharp decline in the number of eugenic sterilizations in the United States. Although manpower shortages (surgeons were unavailable) directly contributed to the decline, other factors were also at work. In 1939, the Eugenics Record Office closed its doors; in 1942, the Human Betterment Foundation also ceased its activities. Later that year, the U.S. Supreme Court, considering its first sterilization case in 15 years, struck down an Oklahoma law that permitted certain thrice-convicted felons to be sterilized.[50] After the war, as the horror of the Nazi eugenics movement became more obvious, the goals of the lingering American programs became more suspect. Yet, despite these changes, many state-mandated sterilization programs continued, albeit at a reduced level of activity.

Between 1942 and 1946, the annual sterilization rate dropped to half that of the 1930s. Reports of institutional officials make it clear that this decline was largely due to a lack of surgeons and nurses.[51] There is little evidence to suggest that the Supreme Court decision had a major impact. Avoiding an opportunity to broadly condemn involuntary sterilization and overrule *Buck v. Bell*,[52] the justices demanded instead that such practices adhere to the precept of the Equal Protection Clause that like persons be treated in a similar fashion. The Oklahoma law was struck down because it spared certain "white-collar" criminals from a punitive measure aimed at other thrice-convicted persons, not simply because it involved sterilization.

During the late 1940s, there was no definite indication that sterilization programs were about decline. After hitting a low of 1,183 in 1944, there were 1,526 operations in 1950. Slight declines in many states were balanced by rapid increases in North Carolina and Georgia. By 1950, however, there were bellwether signs that sterilization was in disfavor even among institutional officials. For example, during the 1930s and 1940s, 100 persons in San Quentin prison had been sterilized each year. But in 1950, new officials at the California Department of Correction were "entirely averse" to the program.[53] During that year, sterilization bills were considered in only four states, and all were rejected.[54]

There were major changes in state sterilization programs in 1952. The California program, for years the nation's most active, was moribund, dropping from 275 sterilizations in 1950 to 39 in 1952. By that year, Georgia, North Carolina, and Virginia (having sterilized 673 persons) were responsible for 53% of the national total. General declines in most other states continued throughout the 1950s, and by 1958, these three states were responsible for 76% (574 persons) of the reported operations. The North Carolina program was unique in that it was directed largely at noninstitutionalized rural young women.[55] As recently as 1963, the state paid for the eugenic sterilization of 193 persons, of whom 183 were young women.[56] Despite their persistence, the southern programs must be seen as a local eddy in a tide of decline.

Involuntary Sterilization Today

During the 1960s, the practice of sterilizing retarded persons in state institutions virtually ceased. But the laws remained. In 1961, there were eugenic sterilization laws on

the books of 28 states, and it was possible to perform involuntary sterilizations in 26.[57] Between 1961 and 1976, five laws were repealed, six were amended (to improve procedural safeguards), and one state (West Virginia in 1975) adopted its first sterilization statute. Currently, eugenic sterilization of institutionalized retarded persons is permissible in 19 states, but the laws are rarely invoked. A few states have enacted laws that expressly forbid the sterilization of any persons in state institutions.

If the mid-1930s saw the zenith of eugenic sterilization, the mid-1960s saw its nadir. But the pendulum of policy continues to swing. The late 1960s saw the first lawsuits brought by the parents of noninstitutionalized retarded females arguing that sterilization was both economically essential and psychologically beneficial to their efforts to maintain their adult daughters at home.[58]

In 1973, the debate over sterilzing institutionalized persons who officials had decided were unfit to be parents flared in the media. The mother of a young man whom physicians at the Partlow State School in Alabama wished to sterlize challenged the constitutionality of the enabling statute. When Alabama officials cleverly argued that they did not need statutory authority as long as consent was obtained from the retarded person, the federal judge not only overturned the law but decreed strict guidelines to control the process of performing "voluntary" sterilizations at Partlow. The key feature was the creation of an outside committee to review all the sterilization petitions.[59]

Also in 1973, the U.S. Department of Health, Education, and Welfare (HEW) became enmeshed in a highly publicized sterilization scandal. That summer, it was reported that an Alabama physician working at a family-planning clinic funded by HEW had sterilized several young, poor black women without their consent. The National Welfare Rights Organization joined with two of the women and sued to block the use of all federal funds to pay for sterilizations. This move prompted HEW to draft strict regulations governing the use of federal money for such purposes, but a federal judge struck them down and held that HEW could not provide sterilization services to legally incompetent persons.[60] Revamped several times, the HEW guidelines were the subject of continuous litigation for five years. Late in 1978, "final rules" were issued that prohibited the sterilization of some persons (those under 21, and all mentally incompetent persons) and demanded elaborate consent mechanisms when a competent person requested to undergo sterilization to be paid for by public funds.[61]

During the last few years, the debate over sterilizing the mentally retarded, although no longer cast in a eugenic context, reheated. The key issue was to resolve the tensions between the society's duty to protect the incompetent person and the *right* of that person to be sterilized. Of course, exercise of this right presupposes that a family member or guardian is, in fact, properly asserting a right that the subject is incapable of exercising on her own (almost all requests are filed on behalf of retarded young *women*), a matter to which judges devote most of their attention. The court must be convinced that the operation will benefit the patient.

More than 20 appellate courts have been asked to consider sterilization petitions. This spate of litigation has resulted because physicians are now extremely reluctant to run the risk of violating the civil rights of the retarded. The courts have split sharply. In the

absence of express statutory authority, six high courts have refused to authorize sterilization orders.[62]

In the more recent decisions, most appellate courts have ruled that (even without statutory authorization) local courts of general jurisdiction do have the power to evaluate petitions to sterilize retarded persons. In a leading case, the highest court in New Jersey held that the parents of an adolescent girl with Down syndrome might obtain surgical sterilization for her if they could provide clear and convincing evidence that it was in "her best interests."[63] Since then, high courts in Colorado, Massachusetts, and Pennsylvania have ruled in a similar manner. These decisions promise that, in the future, the families of some retarded persons will be able to obtain sterilizations for them, regardless of their institutional status.

The great era of sterilization has passed. Yet, grim reminders of unsophisticated programs that once flourished linger. In Virginia, persons sterilized for eugenic reasons decades ago have sued the state, claiming a violation of their civil rights. Although they lost their argument that the operations were performed pursuant to an unconstitutional law, litigation over whether the state failed in its duty to inform them of the consequences of the operations continues. From pretrial discovery, it appears likely that not a few of the persons who were sterilized were not retarded.[64]

What of the future? Is the saga of involuntary sterilization over? Our knowledge of human genetics makes the return of mass eugenic sterilizations unlikely. However, it is more difficult to predict the future of sterilization programs founded on other arguments. During the 1960s, a number of state legislatures considered a bill to tie welfare payments to "voluntary" sterilization.[65] In 1980, a Texas official made a similar suggestion.[66] Unscientific opinion polls conducted by magazines and newspapers in Texas and Massachusetts found significant support for involuntary sterilization of the retarded.[67]

Although it is unlikely to happen in the United States, the pressing demands of population control in India and China have resulted in social policies that create strong incentives to be sterilized. Since launching the "one-child" program in 1979, China has rapidly altered the social fabric of 1 billion people.[68] As our resources continue to shrink and our earthly neighborhood becomes more crowded, compulsory sterilization may someday be as common as compulsory immunizations, but the eugenic vision will no longer provide its intellectual rationale.

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Discussion

Mr. Norman Fost: As I'm sure you realize, what is going on today, in part, is a reaction against sterilization excesses, although excesses and eugenic ideas are alive in other ways than sterilization. We do have a reaction, and one of them involves the case Ruth Macklin just mentioned. As you know, in Wisconsin, a State Supreme Court Decision has made it impermissible to sterilize a retarded person involuntarily even when pregnancy is a significant risk and such pregnancy would offer little or no benefit and probably considerable harm, psychological and otherwise. The Wisconsin Supreme Court said that, in the absence of a statute, it would not be permissible to do that. Realizing the dangers of statutes and the excesses, I wonder if you could concisely tell us what sort of enabling statutes you would favor, if any, that would allow these therapeutic sterilizations.

Dr. Philip R. Reilly: I detect several trends in the current legal climate. One is for the courts to take a very conservative approach and to wait for enabling legislation. In other states, there's been a willingness for higher courts to say that courts of lower jurisdiction should have the right to act on such petitions without enabling legislation. I personally would not let "excesses in the past" take away rights from a family or a retarded individual. After all, a retarded individual, in my view, has as much right to be sterilized if he or she wishes, or if any appropriate proxy directs in his or her behalf, as anyone else. To be overly paternalistic is an ethical crime in the other direction. So I am opposed to states that take such an inflexible approach to the problem.

Ms. Sylvia Rubin (Columbia Presbyterian Medical Center): Professor Dickens, as a geneticist, I am specifically involved with genetic counseling, and I deal almost daily with issues that have been presented in this symposium. My question involves problems that will certainly come up with surrogate mothers but can involve any pregnancy. Can, for instance, a husband legally restrict a wife or a couple restrict a surrogate mother from smoking during pregnancy or drinking alcoholic beverages, and if so, how can the restriction be enforced? Both of these are harmful to a developing fetus. What

about the birth of an anomalous child? I'm sure everyone here knows there is a 2%–3% risk of any baby's being born with a severe defect. Is it genetic? Or can it be due to, or blamed on, the transplant process, whatever that process may be, and thereby, the physicians or anyone involved in the process would be to "blame." Or could the blame be put on an environmental factor in the womb and thereby be the "fault" of the surrogate mother? Are there precedents for lawsuits before or after delivery for any of these problems? As a scientist without any real legal knowledge, I feel that the potential problems haven't even begun to be recognized, and I wonder whether there's anything that individuals cannot be sued for regarding childbearing.

MR. BERNARD M. DICKENS: The problems certainly exists. I think you've located them in the right arena, in that they are inherent in childbearing. They're not special to surrogate motherhood. Where one has an adequately drafted agreement, one would expect the potential surrogate to give contractual guarantees about her conduct, such as not smoking, not drinking, and not having recourse to vigorous exercise. If a woman gives that guarantee, there would be no means of enforcement by specific restraints. On the other hand, a breach of contract could affect subsequent matters: it could affect her being entitled to payment, or to a bonus on the delivery of a healthy as opposed to an unhealthy child. In that sense, one could try to anticipate the problem and try to reduce it, but one couldn't eliminate it.

The question arises whether a woman who serves as a surrogate would have the right of recourse to nontherapeutic abortion if she chose to break the contract. The contract provisions could anticipate that right through a system either of sanctions or of proportionate rewards. There might also be a special obligation on those who screen potential surrogate mothers to eliminate those who would predictably pursue a wanton or inimical lifestyle. In a sense, one could try to deal with it.

Regarding the risk of anomalies (as you say, 2%–3% in "ordinary" pregnancies), one would have to rely on the doctrine of informed consent, so that both the social parents and the surrogate mother are aware of the inherent risk. It's fairly clear that the social parents would have obligations to accept the child even if it was born with anomalies. Some current contracts not only point out these risks but go so far as to require the payment of an insurance premium regarding the surrogate mother, her life, and perhaps her health. These are techniques of anticipation of problems and accommodation to them.

Regarding lawsuits, there is a so-called action for wrongful birth. The difficulty with surrogate motherhood is that one considers the action of the child, and that would be an action for a wrongful life (or sometimes for "dissatisfied life"). The courts fairly uniformly have rejected these claims. Indeed, only three decisions—two from California, and one from Washington State—have allowed children to sue for wrongful life. The philosophy underlying wrongful life actions is very complex and contentious. To that extent, I think that one could say that, if the alternative to the child's being born with the handicap is the child's not being conceived or, having been conceived, not being born, then all but two jurisdictions would conclude that wrongful life is not a legal cause of action. One normally sues for compensation: the measure of damages is

the difference between the condition that one has and the position one would have been in had the wrong not occurred. The courts can accommodate the difference between normality and abnormality. They can't accommodate very easily the difference between abnormality and what the New Jersey Supreme Court calls the "utter void of non-existence."

MS. TABITHA M. POWLEDGE (Bio/Technology Magazine): I'm a little troubled by the way in which we use the word *eugenics*, which has become a kind of umbrella term. Yesterday, we were talking about it mainly in the context of making changes in the gene pool. Today, Dr. Reilly used it in one context to mean either allowing the old or the handicapped to die or actually engaging in active killing, and this is a usage also honored by time. That is a preamble to my reiterating a suggestion I have made to Dr. Reilly before, that his extremely interesting data showing a change from sterilization of men to sterilization of women reveal a movement away from eugenic thinking, at least in the strict sense of alterations in the gene pool. The arguments for sterilizing men were very often couched in terms of not passing on criminal genes or genes for alcoholism and so forth, whereas the arguments for sterilizing women (beginning in the early 1930s) are couched in terms such as, "this woman is retarded," and she is therefore "not equipped to care for a child," or "This woman is retarded and therefore the state will have to bear the burden of caring for the child." I suppose you could say that that's eugenics once removed, but it seems to me to be quite a different sort of motivation from preserving the gene pool from harm. Would you comment?

DR. PHILIP R. REILLY: I agree with you that where we diverge may depend on how precisely we use the term *eugenics*. My view is that the restatement of the rationale for sterilizing young retarded women came about because the purely genetic argument for sterilization was beginning to fade, that is, as more and more people said, "The simplified views of Davenport and Loughlin don't hold." People who still didn't want those retarded folks to have babies sought a new explanation and turned to the social cost argument. In fact, they still passionately believed that the retarded had bad genes and shouldn't be reproducing. I think that's part of it. I also do agree with you that there is still a eugenic argument implicit in what they did even if it is one step removed. But I think the original letters and the literature suggest that they were seeking a more palatable policy explanation to continue the same archaic eugenic goals.

MS. TABITHA M. POWLEDGE: Was it a cover-up argument or was it a real argument? You made the case that the Great Depression provided all sorts of financial constraints.

DR. PHILIP R. REILLY: I think it was a combination. I think there was definitely an impact of the Depression. One of the things that many of these state institutions did was to create a revolving door, where they admitted young women (there's some evidence that a significant number of them were not retarded by today's standards), sterilized them, and sent them out in a matter of weeks, so that they could not have children who would turn up in the institutions 20 years later. That suggests to me a financial argument to some degree. But when you become familiar with the people who were running these

policies, you know they really thought that these women had bad genes, too. If you read their private letters, you see what they thought about.

MS. TABITHA M. POWLEDGE: So it really was a mixture of motivations?

DR. PHILIP R. REILLY: That's my own feeling.

MS. TABITHA M. POWLEDGE: To Bernard Dickens: I was absolutely fascinated to suddenly be faced with the notion that it is our tax laws that are going to solve all our regulatory problems. You may well be right. Are there any present examples where the taxing authorities in any country have made decisions on the questions you raised?

DR. BERNARD M. DICKENS: No, they remain very open. The difficulty is that a lump sum payment under an agreement could well be a payment under an unlawful agreement. That's not to say it's not taxable, but the tax authorities haven't made any systematic response.

MS. BARBARA KATZ ROTHMAN (City University of New York): You called for an anthropologist to give us some language. As a sociologist, I would like to say that we don't have to look beyond our own culture and society. We have some language to use for the issue of surrogate parenthood, but we are very reluctant to use it. What we normally call a person who is a genetic parent is a *father*. What we are looking at in embryo transfer is the issue of women fathering children, and we are really reluctant simply to use that language. In all of our model building, there's been a real problem in the underlying assumptions. I think this is also the moment to respond to the issues that George Annas raised about surrogate motherhood: the issues of exploitation, the concern about the cheapening of embryonic and fetal life as they become purchasable commodities. I believe this issue builds on adoption, which has been largely and predominantly the purchase of babies. When we start building on models like that for the new technology, we are faced with the inherent problems of the exploitation of women.

What happens, for instance, when George Annas says that he's really uncomfortable about the sale of embryos (and I share that discomfort) is that as we focus on the problem that there really is something terribly wrong with selling embryos. But then, we go on to discuss the possibility of "renting wombs." One cannot rent a womb. One purchases a woman for the duration. Our wombs don't separate out that way. If we were really talking about taking a uterus out of one woman's body and putting it in another, it would be a very different issue. What we are talking about here, however, is something that is done either out of very, very great love (and it is the real contribution of one woman to another) or out of exploitation of one sort or another. And it's being purchased by what we are also calling one "couple" from a woman. So that the issues of exploitation are fundamental to the original models that we were building on: artificial insemination was based on the purchase of sperm, and adoption was based on the purchase of babies. As we start moving into new technologies, we are still looking at the same fundamental flaws. We are leaving out the meaning of the experience to the

women involved, so that the meaning of the pregnancy can be eliminated as a significant moral factor in the surrogate motherhood issue. And this leaves out the exploitation that underlies all of this exploitation of some women for other women, often on a class basis.

DR. ELVING ANDERSON (Dight Institute, University of Minnesota): For Dr. Reilly: Do you think there are any acceptable or ethical concerns about the genetic constitution of future generations? If so, what label might be attached to them?

DR. PHILIP R. REILLY: If I understand you correctly, an ethical argument about a duty to the future that would justify some action in the present directed at an individual. Is that your concern?

DR. ELVING ANDERSON: It could be that, or it could be as simple as trying to find out what present policies may do. It could be either research along this line or something directed toward action. In other words, is it reasonable to have some concern about the genetics of the future, and then, because of the problem with the term *eugenics*, is there some other term that could be more acceptable?

DR. PHILIP R. REILLY: One of the bedrock documents in our society uses the term *posterity*, which is one I actually like very much. I would never attempt in this audience to engage in discussions of population genetics. I am ill equipped. However, having said that, I can imagine the development of policy arguments to shape reproductive behavior in gentle ways, because of proven concerns about the impact of failure to do that.

DR. BERNARD M. DICKENS: I think there is a cohesive link between Philip Reilly's observations and what we heard at the first session this morning. In discussing sterilization policy, one can assess the legislation that exists regarding screening for sperm donation, where certain particular traits have to be identified and eliminated. How far that can go is a speculative matter, but there seems to be some sense that one ought to undertake a form of positive eugenics in selecting gamete donors for artificial reproduction.

MR. JOHN L. COX, II (Chappaqua, New York): In connection with Dr. Reilly's discussion, I have a little information that might be interesting. I used to know the head of the Sonoma Home in California, and I know what his thinking was about the sterilizations that were being performed there. Well, I heard him, over and over again, say that he felt that the patients were being helped by what was being done. He felt that it was a mistake to keep them in institutions when they could live perfectly well on the outside, provided they didn't have things to take care of beyond their capability. He cited numbers of cases where a retarded person was brought to the institution and the people would say, "Don't ever let this person out. If you let them out, they are going to be in all kinds of trouble." He would respond, "It looks as though they could handle the situation if they didn't have any children." He cited any number of cases where people, who had been in the institution and had been sterilized, were released, got married,

and lived perfectly happy lives. It was not a matter of eugenics primarily with him, but a matter of the social arrangement that would be more favorable for the patient.

DR. PHILIP R. REILLY: I don't think I said that the eugenicists were evil people. Indeed, I think many of them had the highest motivation for helping the persons whom they sterilized. However, when one looks closely, one begins to be concerned about the criteria used to decide who needed to be sterilized and how accurate they were. In fact, some of these people might have been able to raise children successfully. I'm not sure that intelligence is the *sine qua non* for being a parent. Indeed, it may sometimes be counterproductive.

MR. JOHN L. COX: The thing that made him saddest was when children would come to the institution to visit their defective parents. He said it was a tragedy.

A PARTICIPANT: I wonder whether Dr. Butler considered more reversible methods of contraception than surgical sterilization.

DR. PHILIP R. REILLY: The program in California had, among its prices, the death of five women from intra-abdominal procedures for involuntary sterilization conducted for their benefit. Those deaths would never have occurred if not for the well-meaning program, so there is a social cost in each direction.

A PARTICIPANT: We have a long history of paternalistic justifications for all kinds of behavior.

MS. PEGGY GLATNER (Albert Einstein College of Medicine, New York): I'd like to know how legally significant informed consent is in the eyes of the law as we use it in our institutions. A problem in obstetrics and gynecology arises when someone becomes impregnated in an institution and the person is of age to sign for consent for abortion but is unable to because of retardation, and there are no parents or next of kin responsible. Therefore, we can't have the consent signed, the pregnancy can't be terminated, and it goes to term. Would you comment on that, please?

MR. BERNARD M. DICKENS: The doctrine of informed consent can be analyzed in a number of ways. It is traditional to separate informed consent from free consent if one is dealing with a nonfree population. Then, it well could be that simply giving them data, even if the data are comprehensible, wouldn't resolve the legal problem. The issue may be that they are not in a position to exercise free choice, based on the data that they have.

MS. PEGGY BLATNER: How legally binding is informed consent when they understand the information conveyed?

MR. BERNARD M. DICKENS: Normally, if it's an exercise of their autonomy and is adequately informed and free, the courts would recognize it. If we are dealing with a dependent population, and if we are dealing with a legal guardian, then questions arise about whether the guardian can indulge his or her own wishes or whether the limitation of the power is to discharge the function of serving the best interests of the dependent individual.