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## EUGENIC STERILIZATION IN INDIANA

In the early 1900's the advocates of sterilization for eugenic purposes began to encourage state legislatures to enact compulsory sterilization statutes. They contended that through the use of sterilization, the surgical

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58. See text following n. 31.

59. *Daugherty v. Herzog*, 145 Ind. 255, 44 N.E. 12 (1896).

means by which both the male and female are rendered incapable of reproduction,<sup>1</sup> propagation by the mentally ill and mentally deficient could be prevented, and thereby, the birth of children with similar mental characteristics could be reduced. Although heredity factors in mental illness and mental deficiencies were considered significant prior to the turn of the century, the impetus for the movement at that particular time can probably be best explained by the fact that practical and satisfactory methods of sterilization had only recently been developed.<sup>2</sup> Doctor Harry C. Sharpe of the Indiana State Reformatory is credited with developing a method for sterilizing males known as vasectomy during the 1890's,<sup>3</sup> while a standard method of sterilizing females, known as salpingectomy, was developed in Europe at about the same time.<sup>4</sup> Indiana was the first state in the United States to accept eugenic sterilization; the legislature enacting a compulsory statute in 1907.<sup>5</sup> The statute remained in effect until 1921 when the Indiana Supreme Court in *Williams v. Smith*<sup>6</sup> held that the initial legislative attempt violated procedural due process under the fourteenth amendment of the federal constitution because it failed to give the patient an opportunity for a hearing or the right to cross-examine the doctors who had made the decision that the sterilization operation was necessary. Subsequent to the *Williams* decision, however, procedurally refined statutes providing for the sterilization of the mentally ill and mentally defective were enacted and remain a part of the present law of Indiana.<sup>7</sup>

Even though the first of the contemporary Indiana sterilization statutes was enacted in 1927 it is interesting to learn that there have been no reported decisions testing either the substantive or the procedural

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1. See LINDMAN & McINTYRE, *THE MENTALLY DISABLED AND THE LAW* 183 (1961).

2. "Before the end of the 19th century, sterilization was impractical, since castration, the only method known at that time, caused undesirable changes in secondary sexual characteristics and was usually considered too radical an operation in view of the results." O'Hara & Sanks, *Eugenic Sterilization*, 45 *Geo. L.J.* 20 (1956). Today, however, sterilization of the male can be satisfactorily carried out in a surgeon's office under local anesthesia, by means of small scrotal skin incisions through which segments of the vas deferens are removed, and the proximal ends of the vas are tied. There is no mortality and almost no discomfort. The operation is more serious in the female, requiring an abdominal operation, under general anesthesia, in which the physician enters the abdominal cavity, removes segments of the Fallopian tubes and ties off the cut ends. Mortality rate is nearly zero with modern surgical methods. See GUTTMACHER & WEIHOFEN, *PSYCHIATRY AND THE LAW* 200 (1952).

3. See GOSNEY & POPENOE, *STERILIZATION FOR HUMAN BETTERMENT* 77 (1931); Donnelly & Ferber, *The Legal and Medical Aspects of Vasectomy*, 81 *J. UROLOGY* 259 (1959).

4. See GOSNEY & POPENOE, *op. cit. supra* note 3, at 70.

5. See Ind. Acts 1907, ch. 215.

6. 190 Ind. 526, 131 N.E. 2 (1921).

7. See Ind. Acts 1927, ch. 241; Ind. Acts 1931, ch. 50; Ind. Acts 1935, ch. 12.

aspects of the existing statutes. Although it may be argued that the constitutionality of the substantive aspects of eugenic sterilization was established in 1927, when the United States Supreme Court upheld a Virginia sterilization statute in *Buck v. Bell*,<sup>8</sup> it should be pointed out that concepts concerning the importance of hereditary factors in mental disorders have undergone substantial change since that decision was handed down. The absence of any serious legal controversy over a normally controversial subject raises three significant questions. First, it is necessary to consider the actual application of the Indiana statutes dealing with eugenic sterilization. Secondly, it is important to determine whether the existing laws, measured by contemporary scientific knowledge, are fulfilling a valid purpose. Finally, it is necessary to consider, in light of the application and desirability of the existing statutes, possible legislative abandonment or modification of the Indiana sterilization laws.

#### THE APPLICATION OF THE INDIANA EUGENIC STERILIZATION STATUTES

There are twenty-eight states which have sterilization laws.<sup>9</sup> Twenty-six of the statutes are compulsory and authorize sterilization of a patient without his consent if the statutory procedure is observed.<sup>10</sup> In 1961 there were 561 sterilization operations reported by the states having sterilization laws, bringing the cumulative total of recorded operations in the United States under such laws to 62,723.<sup>11</sup> Under the Indiana statutes there were only three reported sterilization operations in 1961, bringing the total of sterilization operations reported to 1,576 since 1936,<sup>12</sup> of which 870 involved female patients and 706 involved male patients.<sup>13</sup> Although the United States cumulative total appears large, during the past fifteen years eugenic sterilization has been on the decline in the nation.<sup>14</sup> In Indiana there has been a noticeable drop in sterilization operations since 1957.<sup>15</sup>

The three Indiana sterilization statutes are compulsory in form and are applicable to persons (1) in the care or custody of any hospital or other institution of the state,<sup>16</sup> or who are applicants to enter the state

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8. 274 U.S. 200 (1927).

9. The states are Alabama, Arizona, California, Connecticut, Delaware, Georgia, Idaho, Indiana, Iowa, Kansas, Maine, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Hampshire, North Carolina, North Dakota, Oklahoma, Oregon, South Carolina, Utah, Vermont, Virginia, West Virginia, Wisconsin.

10. HUMAN BETTERMENT ASS'N OF AMERICA, INC., STERILIZATIONS REPORTED IN THE UNITED STATES THROUGH DEC. 31, 1961, (1962).

11. See HUMAN BETTERMENT ASS'N OF AMERICA, INC., *op. cit. supra* note 10.

12. See Appendix A *infra*.

13. *Ibid.*

14. See O'Hara & Sanks, *supra* note 2, at 35.

15. See Appendix A *infra*.

16. See IND. ANN. STAT. § 22-1601 (Burns 1950).

institutions for feeble-minded,<sup>17</sup> or who are applicants for commitment to state institutions for the insane<sup>18</sup> and (2) who are found to be afflicted with ". . . hereditary forms of insanity that are recurrent, epilepsy, or incurable primary or secondary types of feeble-mindedness."<sup>19</sup>

Since, in Indiana, sterilization is authorized for both patients in the custody of a hospital or institution and applicants for commitment to state institutions for the feeble-minded or insane, distinctive methods are provided for the initiation of sterilization proceedings. In the case of an institutionalized patient, the proceedings are commenced by an application from the superintendent of the institution in which the patient is confined, to the Commissioner of Mental Health who is responsible for holding the sterilization hearings.<sup>20</sup> In the case of an applicant for state feeble-minded and mental institutions, the necessity of sterilization is determined in conjunction with the circuit court proceedings ordering a commitment of the applicant.<sup>21</sup>

Since the statutory language authorizing sterilization on the basis of (1) an administrative hearing or (2) a court order is very broad, official discretion becomes an important factor in Indiana sterilization. The initiation of administrative hearing with the filing of an application rests with the discretion of the superintendent of the hospital or institution which is caring for the patient.<sup>22</sup> Unlike the first sterilization statute which was declared unconstitutional, the present statutes adequately safeguard the procedural rights of the patient by providing him with adequate notice that a sterilization hearing is to be held,<sup>23</sup> an extensive hearing to determine if sterilization is required,<sup>24</sup> the right to

17. See IND. ANN. STAT. § 22-1608 (Burns 1950).

18. See IND. ANN. STAT. § 22-1613 (Burns 1950).

19. IND. ANN. STAT. § 22-1601 (Burns 1950).

20. See IND. ANN. STAT. § 22-5007 (Burns Supp. 1961). The hearings are usually held before the Commissioner of Mental Health, the superintendent of the school or hospital which has custody of the patient and the Deputy Attorney General of Indiana assigned to the Mental Health Department. This is a departure from the previous Indiana procedure, which authorized the superintendent of school or institution to submit the petition for sterilization to the governing board of the school or institution, for an administrative hearing. See IND. ANN. STAT. § 22-1602 (Burns 1950).

Twenty-three states, including Indiana, commence sterilization proceedings with a petition by the superintendent of the institution in which the patient is confined. See LINDMAN & McINTYRE, *op. cit. supra* note 1, at 192-94. A majority of the states use an administrative agency to act upon the applications, with a patient right to appeal to the state judicial system. For a comparative analysis of the statutory provisions of the various states see LINDMAN & McINTYRE, *op. cit. supra* note 1, at 184-85, 192-94.

21. See IND. ANN. STAT. §§ 22-1608, -1614 (Burns 1950).

22. A superintendent can petition for sterilization "[w]henever . . . [he is] . . . of the opinion that it is for the best interests of the patient and of society. . . ." IND. ANN. STAT. § 22-1601 (Burns 1950).

23. See IND. ANN. STAT. § 22-1602 (Burns Supp. 1962).

24. *Ibid.*

appeal to the circuit court<sup>25</sup> and the right to petition the Indiana Supreme Court for a review of the circuit court hearing.<sup>26</sup> Likewise, when a court, in considering a commitment application to either a state hospital for the insane or a state school for the feebleminded, concurrently hears evidence concerning the need for sterilization, the judge has broad discretion in determining whether such sterilization serves the best interests of society and the interests of the patient.<sup>27</sup> The procedural rights of the applicant are also protected in the case of a court ordered sterilization since he is afforded the same right of appeal as is authorized in any other civil proceedings.<sup>28</sup>

As has been indicated, the Indiana sterilization law is composed of three separate acts with amendments and, as a result, in providing the patient with procedural safeguards and in setting forth statutory requirements, the statutes have become unnecessarily lengthy and conflict in certain respects.

For example, the act of 1931 deals with persons whose admission to feebleminded institutions is sought. Prior to its amendment, it provided that the applicants should be examined and that a determination of the need for sterilization should be made by the examining physicians at the time of the application.<sup>29</sup> The examination provision, section 22-1607, was repealed in 1955.<sup>30</sup> Section 22-1608, however, is still in effect and authorizes the committing court, as part of the judgment and decree committing the feebleminded person, to order the sterilization of the applicant. In light of the repeal of section 22-1607 a question arises as to what basis the court uses in determining that sterilization of the applicant to the feebleminded institution is necessary. It may be that section 22-1608 should be read in conjunction with section 22-1742<sup>31</sup> which concerns applications to Fort Wayne and Muscatatuck, the two state schools for feebleminded. Under the latter statute, however, the examining physicians only certify to the judge that the applicant is feebleminded, as opposed to insane. No mention is made as to the ad-

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25. The inmate or his guardian shall, within 30 days of an order for sterilization have an appeal as a matter of right to the circuit court of the county in which the institution is located. *IND. ANN. STAT. § 22-1602* (Burns Supp. 1962).

26. The pendency of an appeal to the court operates to stay the sterilization proceedings. *IND. ANN. STAT. § 22-1604* (Burns 1950).

27. See *IND. ANN. STAT. §§ 22-1608, -1614* (Burns 1950). It would appear that even though a court might not order a sterilization in conjunction with a commitment order under § 22-1608 or § 22-1614, a superintendent would not be barred subsequently from instituting proceedings under authority of § 22-1601.

28. See *IND. ANN. STAT. §§ 22-1608, -1614* (Burns 1950).

29. *IND. ANN. STAT. § 22-1607* (Burns 1950).

30. See *Ind. Acts 1955, ch. 339, § 15*.

31. *IND. ANN. STAT. § 22-1742* (Burns 1950).

visibility of a sterilization operation. Whether section 22-1742 is broad enough to offer a basis for a court ordered sterilization is open to question and has yet to be resolved in the courts.

To add to the confusion over the repeal of the feebleminded applicant examination provision, a provision similar to the section 22-1607 sterilization examination provision was enacted in the act of 1935. The latter act deals with the examination of insane persons pursuant to an application for court commitment and is still in effect.<sup>32</sup> There appears to be no valid reason for the repeal, in the case of feebleminded applicants, and retention, in the case of insane applicants, of a preliminary examination provision, since in both situations a court has to answer the identical question of the need for sterilization.

Another inconsistency between the separate acts is found in regard to the immunity of physicians from liability growing out of sterilization operations. Both the 1927 act for institutionalized persons and the 1931 act for the feebleminded applicant immunize a superintendent or any other person legally participating in the sterilization of a patient from possible civil and criminal liability for their actions.<sup>33</sup> The 1935 act for the insane applicant, however, only grants civil immunity,<sup>34</sup> and leaves the question of possible criminal liability unanswered.

It would seem that at a minimum the Indiana Legislature should consolidate and eliminate the inconsistencies in its present sterilization statutes. Other states have enacted sterilization statutes which are much more concise than the Indiana statutes, do not contain conflicting provisions and yet provide the patient with all the procedural safeguards enumerated in the existing Indiana statutes.<sup>35</sup>

Although the sterilization act of 1907 was ruled unconstitutional in 1921 by the Indiana Supreme Court, the constitutionality of the present sterilization acts has never been tested. This may be explained partially on the ground that most sterilization hearings are non-adversary proceedings.<sup>36</sup> An additional reason may lie in the fact that, although the Indiana statutes are compulsory in nature, they are being applied

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32. See IND. ANN. STAT. § 22-1613 (Burns 1950).

33. See IND. ANN. STAT. §§ 1605, -1611 (Burns 1950).

34. See IND. ANN. STAT. § 22-1617 (Burns 1950).

35. See, e.g., CAL. WELFARE & INST'NS CODE, § 6624 (West 1956). The California Code sets forth its sterilization law in five paragraphs covering two pages of print, as compared to sixteen sections covering seven pages in the Indiana statutes.

36. "The lack of representation by counsel in sterilization proceedings is undoubtedly a partial explanation for the infrequency of legal contests in sterilization areas." LINDMAN & McINTYRE, *op. cit. supra* note 1, at 190.

on a voluntary basis.<sup>37</sup> The voluntary application would seem attributable to the fact that although the language of the statute grants broad power, it also allows significant discretion in administration of the power and the decision to sterilize is therefore carefully weighed by the Department of Mental Health.<sup>38</sup> Whether individual discretion is a controlling factor in these cases is undetermined; however, a noticeable drop in sterilization operations performed is observable between 1956 and 1957 when the administration of the Mental Health Department changed hands. This drop may possibly be explained on the basis of different attitudes on the part of medical persons as to the scientific validity of hereditary factors in mental health.<sup>39</sup> Since the number of court ordered sterilizations constitutes a relatively minor part of the total sterilization operations in Indiana,<sup>40</sup> it would seem that committing courts drastically restrict the use of their sterilization powers.

#### THE VALIDITY OF HEREDITY AS A BASIS FOR STERILIZATION

There are several basic reasons advanced as grounds for sterilization: (1) therapeutic purposes based on sound medical practice, as in the case of a woman with a heart condition, kidney defect, advanced diabetes or other serious physical complications;<sup>41</sup> (2) social birth control;<sup>42</sup> (3) punitive measures authorizing sterilization of hereditary criminals and sex offenders;<sup>43</sup> and (4) eugenic purposes. Most of the sterilization statutes which have been enacted in the United States, however, have been only directed at hereditarily feeble-minded, insane and epileptic persons,<sup>44</sup> are grounded on the prevention of procreation for eugenic reasons<sup>45</sup> and provide for compulsory sterilization.<sup>46</sup> While there is general agreement

37. The Commissioner of Mental Health stated that in each case where an operation was authorized, the family of the patient had either requested it or were in full agreement after the matter was explained. Letter from Dr. S. T. Ginsburg, Mental Health Commissioner to the *Indiana Law Journal*, March 30, 1962.

38. The Commissioner in his letter stated: ". . . I approach each hearing with a recognition of the seriousness of the matter and with a feeling of great responsibility. I approach each hearing not only as the Mental Health Commissioner with responsibility to comply with the law, but also as a physician with profound regard for the welfare of the patient, the family and the community." *Ibid.*

39. ". . . [W]hile there is sufficient evidence to show that mentally deficient persons have more subnormal children than do persons of normal intelligence, it is also recognized that, in addition to the hereditary factor, there are other causes for mental deficiency, including birth injuries and thyroid deficiency." LINDMAN & McINTYRE, *op. cit. supra* note 1, at 186.

40. See Appendix A *infra*.

41. See Donnelly & Ferber, *supra* note 3, at 259.

42. See GUTTMACHER & WEIHOFEN, *op. cit. supra* note 2, at 188.

43. See LINDMAN & McINTYRE, *op. cit. supra* note 1, at 183.

44. See Myerson, *Summary of the Report of the American Neurological Association Committee for the Investigation of Sterilization*, 1 AM. J. M. JURIS. 253 (1938).

45. See O'Hara & Sanks, *supra* note 2, at 43. See generally Appendix B *infra*.

46. See note 10 and accompanying text *supra*.



as to the validity and need for sterilization based on medical determination and administered upon a therapeutic basis, eugenic sterilization has faced constitutional attack on several grounds.<sup>47</sup> Even though the United States Supreme Court in *Buck v. Bell*<sup>48</sup> upheld the validity of the substantive law of sterilization, the contemporary question of the substantive constitutionality depends upon the continuing scientific validity of the standards upon which the statutes are based.<sup>49</sup> Since most of the statutes are directed toward hereditary factors,<sup>50</sup> the problem lies in the accurate determination of what mental illnesses and mental deficiencies may be accurately classified as "hereditary."

"Hereditry is that [either physical or mental] which is passed from parent to child through the chromosomes and the genes."<sup>51</sup> It is upon this theory that advocates of eugenic sterilization have advanced arguments favoring compulsory sterilization laws.<sup>52</sup>

During the first twenty years of this century the theory of institutional care grounded on the protection of the patient from the dangers of society was abandoned. It was replaced with the attitude that the protection of society from the problems caused by the mentally disordered should be paramount in the institutionalization of mentally ill and defective persons.<sup>53</sup> This change in attitude gave rise to several notions

47. Sterilization legislation has faced constitutional attack on the following grounds: (1) substantive due process, involving broad issues of public policy and the basic scientific validity of eugenic sterilization; (2) equal protection, involving the scope and limitation of the statutes in their designation of persons covered by such laws; (3) procedural due process, with attention of the courts being directed to matters of hearings, notice, counsel and appeal; and (4) the avoidance of cruel and unusual punishment, under statutes which designate "hereditary criminals" and sex offenders as persons subject to compulsory sterilization.

LINDMAN & MCINTYRE, *op. cit. supra* note 1, at 187.

48. 274 U.S. 200 (1927). "It has commonly been assumed that . . . [*Buck v. Bell*] . . . broadly sustains the constitutionality of sterilization laws as against the due process argument, but it is not at all clear how far the present court would go in cases where the evidence of inheritability is less convincing." GUTTMACHER & WEIHOFEN, *op. cit. supra* note 2, at 194.

49. GUTTMACHER & WEIHOFEN, *op. cit. supra* note 2, at 189.

50. Myerson, *supra* note 43, at 253.

51. LANDIS, TEXT BOOK OF ABNORMAL PSYCHOLOGY 256 (1946).

52. Arguments advanced by eugenicists:

(1) Socially inadequate persons, *i.e.*, the feeble-minded, the epileptics, the insane . . . are inimical to the human race. They perpetuate their deficiencies and thus threaten the quality of the ensuing generations. (2) Nations must defend themselves against national degeneration as much as against the external foreign enemy. (3) Regardless of the indefiniteness of the laws of heredity, there are numbers of habitual criminals and defective delinquents who should be prevented from procreating because of the fact that they are manifestly unfit for rearing children.

Landman, *The History of Human Sterilization in the United States—Theory, Statute, Adjudication*, 23 ILL. L. REV. 463, 465 (1928).

53. DEUTSCH, THE MENTALLY ILL IN AMERICA 368 (1949).

regarding mental health which gave impetus to the eugenic movement.<sup>54</sup> Institutional care became a means of segregating persons from society and preventing them from propagating. It became evident that segregation as a eugenical means was unsatisfactory because the cost of institutionalizing all mentally ill and mentally deficient persons would be economically unfeasible. In addition it would seem questionable to institutionalize a person simply to keep him from propagating, when other factors did not require such care.

Eugenic sterilization gained in importance as a result of the change in the institutional care theory and the economic unfeasibility of segregation by institutionalization.<sup>55</sup> With its increasing use, however, many questions were raised concerning the validity of heredity as a factor in mental illnesses and deficiencies, and in 1936 an extensive investigation was conducted by the American Neurological Association under the leadership of Doctor Abraham Myerson. As a result of this investigation the committee, unable to absolutely relate hereditary factors to mental illness and mental deficiency, recommended that sterilization only be performed in selected cases of certain diseases, with the consent of the patient or those responsible for him.<sup>56</sup> The committee further recommended (1) that the laws should be made voluntary rather than compulsory, (2) that sterilization laws be made applicable not only to patients in state institutions, but to those in private institutions and those at large in the community and (3) that a permanent committee be organized to conduct scientific research in the field of mental disorders.<sup>57</sup> Doctor Myerson later commented that “. . . the bulk of feeble-mindedness is utterly unknown as to genus, pathology and disorders of physiology. I stress this because it is insufficient to say ‘heredity’ is a cause, since heredity is no unified set of mechanisms.”<sup>58</sup>

Notwithstanding the early impetus toward compulsory sterilizations,

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. . . [T]he following notions regarding mental defect dominated the first 20 years of the century: (1) This condition represented a major menace to civilization; (2) it was mainly hereditary in origin; (3) drastic action was required to check its incidence; (4) a preventive program must be sought in cutting off the defective germ plasm from the human race; (5) segregation and sterilization afforded the two principal means for attaining this end.

*Ibid.*

55. See DEUTSCH, *op. cit. supra* note 53, at 368.

56. Myerson, *supra* note 44, at 256.

57. *Ibid.*

58. Myerson, *Certain Medical and Legal Phases of Eugenic Sterilization*, 52 *YALE L.J.* 618, 622 (1943). The author stated that “[M]any myths have been developed in the field of feeble-mindedness which have no scientific basis whatever.” *Ibid.* “When we turn to vaguely understood diseases and ascribe them to heredity, we are at least in part explaining one unknown by another.” *Id.* 623.

several factors have played an important part in limiting the application of such laws. First, in light of the scientific knowledge gained from investigations, such as Doctor Myerson's, the medical profession has re-evaluated its early position concerning the importance of hereditary factors in mental disorders and has adopted a new position in regard to eugenic sterilization.<sup>59</sup> The basic tenet in the adoption of the new position is based on scientific findings that not as many disorders are attributable to hereditary factors as was supposed in the infancy of the compulsory sterilization movement.<sup>60</sup> In addition to the diminution of the hereditary factor as a basis of mental illness and mental deficiencies, it has been determined that environment plays an important part in such disorders.<sup>61</sup> Sterilization has been advocated on the basis of environmental effects on the ground that mental defectives and habitual criminals in most cases make poor parents; that ". . . the task of parenthood in a complex society is difficult enough without this throw back."<sup>62</sup> In regard to the declining scientific validity of heredity and the increasing concern about environment in sterilization, it has been suggested that a hereditary-environmental basis for sterilization may be stronger factually and, therefore, stronger constitutionally, than the earlier overemphasis on heredity as the casual factor in mental illnesses and deficiencies.<sup>63</sup>

The position for limiting the use of eugenic sterilization has recently been affirmed in a report by a medical association committee on mental health in South Dakota which made the following statement concerning heredity in sterilization cases:

Medical science has by no means established that heredity is a factor in the development of mental diseases 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 the patient and family

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59. "Today, in view of our scant scientific data on the laws of human heredity in respect to defective stock, and socially dangerous uses that can be made of too little knowledge, it is well to hold ambitious schemes such as eugenic sterilization in abeyance until a more opportune time." DEUTSCH, *op. cit. supra* note 53, at 377.

60. O'Hara & Sanks, *Eugenic Sterilization*, 45 GEO. L.J. 20, 37 (1956).

61. "Much work has been done in the field of physiological genetics to show that environment at all times plays a role in the evolution and evocation of hereditary qualities and that a drastic change of environment may call into play what seem like opposing or at least markedly different hereditary qualities." Myerson, *supra* note 58, at 623. See GUTTMACHER & WEIHOFEN, *PSYCHIATRY AND THE LAW* 195 (1952); JENNINGS, *THE BIOLOGICAL BASIS OF HUMAN NATURE* 124 (1930).

62. GUTTMACHER & WEIHOFEN, *op. cit. supra* note 61, at 196.

63. See GUTTMACHER & WEIHOFEN, *op. cit. supra* note 61, at 196.

physician mutually and that the state has no good reason to trespass in this area.<sup>64</sup>

Furthermore, in order to ascertain the sentiments of both professional and lay people concerning sterilization statutes, a survey was conducted by Doctor Fred O. Butler in 1950.<sup>65</sup> At the Second International Congress of the American Association of Mental Deficiency he listed the following suggestions for reform of the sterilization laws: (1) there was a need for more standardization in establishing an acceptable criteria for the basis of sterilization and (2) there was indicated a desire to have sterilization laws apply to the mentally disordered who were not in institutions as well as to patients of such institutions. In addition, it was reported by Doctor Butler that there was a general overall fear that compulsory sterilization laws would place too much power in the hands of the appointed agency.<sup>66</sup>

Doctor Butler's survey is but one indication of the concern about sterilization, since in many qualified groups there has been increasing opposition to the sterilization of the mentally disordered on moral, theological, social and scientific grounds.<sup>67</sup>

Finally, even the eugenists, who consider eugenic sterilization a desirable means of obtaining their objective, realize that there is a danger that extensive sterilization may become a "perilous weapon,"<sup>68</sup> since they now realize that there are many limitations on the validity of eugenics.

In view of (1) the changing attitude of the medical profession as to the importance of hereditary factors in mental disorders, (2) the general attitude of both professional and lay persons concerning the application of eugenic sterilization statutes, (3) the awareness of eugenists, themselves, as to potential dangers of their theories and (4) in light of the fact that sterilization operations violate the bodily integrity of the person and are generally permanent in effect, a careful evaluation of the standards upon which sterilization is ordered must be made in order to protect the rights of the person. Therefore, states may be well advised to re-examine their sterilization statutes, in light of present medical

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64. S.D. MEDICAL ASS'N MENTAL HEALTH COMM'N, EXPLANATION OF PROPOSED SOUTH DAKOTA MENTAL HEALTH ACT 9 (1959).

65. See Butler, *Sterilization in the United States*, 56 AM. J. MENTAL DEFICIENCY 360 (1951).

66. *Id.* at 362.

67. "The majority of psychiatrists in America do not advocate the sterilization of the mentally disordered, except perhaps where both husband and wife have been definitely psychotic." GUTTMACHER & WEIHOFEN, *op. cit. supra* note 61, at 193. See DEUTSCH, *op. cit. supra* note 53, at 367; S.D. MEDICAL ASS'N, MENTAL HEALTH COMM'N, *op. cit. supra* note 64, at 9.

68. DEUTSCH, *op. cit. supra* note 53, at 373.

knowledge, to consider possible abandonment or modification of the statutes.<sup>69</sup>

#### THE REFORMATION OF EXISTING STERILIZATION STATUTES

In regard to future compulsory sterilization legislation it has been suggested that (1) the statutes be restricted in scope to a fairly narrow category of cases, including only those illnesses for which there is strong supporting evidence of inheritability or (2) if the laws grant broad sterilization power, there should be a hearing to determine if the mentally ill or defective person's condition is in fact inheritable.<sup>70</sup> The problem is not in distinguishing those diseases and deficiencies that are inheritable from those that are not, but rather in *predicting* accurately that a given disease or deficiency will be transmitted through heredity in a given case. For example, primary feeble-mindedness is capable of being transmitted hereditarily. It is not possible, however, to definitely state that an offspring of such a person also will be feeble-minded. About all that can be predicted is that there is a greater probability that the offspring of a feeble-minded person will be born with a similar affliction, than is the probability that a normal person will have an offspring afflicted with some form of deficiency.<sup>71</sup> It is the difficulty of resolving the probability into some accurate standard of predictability which gives rise to the question of the substantive constitutionality of compulsory sterilization laws which seek to prevent the procreation of an offspring who might inherit some form of mental disorder. It is, also, the lack of predictability that strengthens the position for voluntary sterilization of the mentally ill and mentally deficient, especially when sterilization is applied as a step toward rehabilitation of the patient, rather than eugenically for the purpose of preventing the birth of a child with a similar affliction.

A sound community oriented basis upon which voluntary sterilization might be predicated is the rehabilitation of the patient with a view toward his release into the community. Although a mentally deficient person may be able to look after his own needs, he may be inadequate in coping with the problems of rearing a family in a demanding society.<sup>72</sup> Voluntary sterilization could free the person from this anxiety and enable

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69. "Legislators generally have shown an amazing ignorance of the purpose and utility of eugenic measures. In enacting laws on sterilization, they have frequently rushed in where scientists fear to tread, and have claimed a knowledge of laws of heredity far beyond the reaches as yet attained by the humble scientist." DEUTSCHE, *op. cit. supra* note 53, at 375.

70. GUTTMACHER & WEIHOFEN, *op. cit. supra* note 61, at 196.

71. See generally GUTTMACHER & WEIHOFEN, *op. cit. supra* note 61, at 194; LANDIS, *op. cit. supra* note 51, at 256.

72. See note 62 and accompanying text *supra*.

him to adequately fit into the community. Although a community oriented basis for voluntary sterilization is sound, it would seem that the better program of voluntary sterilization would also focus on the problems of the patient and his family, as a personal non-community matter. Such a program has been advocated by the Human Betterment Association of America. In addition to concern over community problems, it advocates orientation of a voluntary sterilization program to the problems of the health and well-being of the couple and the family and has promoted a threefold program of education, research and service in the field of voluntary sterilization.<sup>73</sup>

Since a fundamental purpose in the treatment and education of the mentally disordered is rehabilitation, a voluntary sterilization statute drafted with rehabilitation in mind would be a definite step toward making the law compatible with the current psychological and social ideas for treating mental disorders. Future statutes should also reach those persons in the community who can show an actual need for sterilization, whether based on mental disorders or some other valid ground, in order to meet the objection that the present laws that apply only to patients and applicants of mental institutions are too narrow.<sup>74</sup>

Notwithstanding the arguments for applying sterilization laws on a voluntary rather than compulsory basis, present laws must be examined in view of the fact that they are predominantly compulsory. It would seem that several recommendations can be made in regard to existing compulsory statutes to make them relatively compatible with present scientific knowledge. First, a re-evaluation of the statutory grounds upon which compulsory sterilization is based should be made. Secondly, the basic rights of the patient must be fully protected through an adequate procedural system which would take into account the facts of each individual case. And finally, continued scientific research must be directed at relating mental disorders with hereditary factors if eugenic sterilization laws are to have a valid basis.

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73. The program of the Association is:

(1) *Education*. To develop professional and public understanding of the meaning and use of voluntary sterilization and the contribution it can make toward the solution of family and community problems. (2) *Research*. To participate in and encourage fact-finding studies of the medical, legal, psychological and socio-economic aspects of sterilization. (3) *Service*. To refer individuals to qualified specialists when sterilization is requested and has been approved by the Association's Medical Committee; to provide financial assistance for those unable to pay for these medical services.

HUMAN BETTERMENT ASS'N OF AMERICA, INC., STERILIZATION FOR HUMAN BETTERMENT (1959).

74. See Butler, *supra* note 65, at 362.

The Indiana statutes procedurally seem to safeguard the rights of a patient, but in light of the present attitude of the medical profession these statutes conceivably could face a strong constitutional argument if challenged on a substantive basis. However, due to the cautious attitude of the Department of Mental Health, and its awareness of the serious problems underlying involuntary sterilization, the Indiana statutes may avoid a constitutional test for an indefinite period of time. This is especially true in view of the fact that Indiana's compulsory sterilization law is in reality being applied upon a voluntary basis.

REPORT OF STERILIZATIONS  
INDIANA STATE PSYCHIATRIC HOSPITALS and SCHOOLS FOR  
THE RETARDED 1936 to March 1962\*

YEAR	PATIENT BY SEX		INSTITUTION		BASIS OF ORDER		
	Male	Female	School	Hospital	Hearing	Court Order	Unknown
1962	1	1		2	2		
1961		3		3	3		
1960	1	14		15	15		
1959	1	6		7	7		
1958	2	14		16	13	3	
1957	8	12	8	12	5	6	9
1956	12	24	24	12	22	4	10
1955	45	48	73	20	34	3	56
1954	42	47	80	9	53		36
1953	26	20	45	1	14		32
1952	26	18	43	1	23		21
1951	23	27	50		6		44
1950	45	43	88		1		87
1949	16	27	43		1		42
1948	36	23	59		2		57
1947	15	37	52		17		35
1946	77	82	159		39		120
1945	66	57	123		51		72
1944	29	48	77		45		32
1943	21	33	53	1	33	1	20
1942	51	46	75	22	32	2	63
1941	32	63	54	41	30	9	56
1940	65	67	60	72	31	14	87
1939	20	38	40	18	21	14	23
1938	19	43	36	26		22	40
1937	13	22	15	20		1	34
1936	14	7		21			21

<b>TOTALS</b> (1576)	706	870	1257	310	500	79	997
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APPENDIX A  
TYPES OF STATE LAWS\*\*

STATE	Voluntary <sup>1</sup>	Compulsory <sup>2</sup>	Voluntary & Compulsory <sup>3</sup>	Extra-mural <sup>4</sup>	Eugenics Boards <sup>5</sup>
Alabama		X			
Arizona		X			
California		X			
*Connecticut		X			
Delaware		X		X	
Georgia		X			X
Idaho		X		X	X
Indiana		X			
Iowa		X		X	X
*Kansas		X			
Maine			X		
Michigan		X		X	
Minnesota			X		
Mississippi		X			
Montana		X			X
Nebraska		X			
New Hampshire		X			
North Carolina			X	X	X
North Dakota		X			
Oklahoma		X			
Oregon		X		X	X
South Carolina		X			
South Dakota		X	X	X	
*Utah		X		X	
Vermont	X				
Virginia			X		
West Virginia		X			
Wisconsin		X			

\*\* Reproduced with permission of Human Betterment Association of America, Inc.

\* Section included which prohibits sterilizations not within the statutes.

1. Consent of defective person, spouse or guardian required.
2. Consent of defective person not required.
3. Law contains provision for either voluntary or compulsory.
4. Law contains provision for individuals outside of institutions.
5. Authorization agency for sterilization operation. (Other states: operations passed on by designated state agencies.)

APPENDIX B