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Rights of Mentally Ill--Involuntary Sterilization--Analysis of Recent Statutes

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RIGHTS OF MENTALLY ILL—INVOLUNTARY STERILIZATION—ANALYSIS OF RECENT STATUTES

With the enactment of an involuntary sterilization procedure for use upon the mentally incompetent, West Virginia has placed itself in a bare majority of states that regulate such a treatment. Twenty-six states currently regulate involuntary sterilization by statute; however, the classification of individuals that fall within the statutory boundaries varies widely. Specifically, four states deal only with the feeble-minded and the insane,[1] seven others add epileptics to this class,[2] whereas Mississippi omits the insane, administering only to feeble-mindeds and hereditary epileptics.[3] Two states restrict the procedure to the feeble-minded only,[4] one to certain classifications of criminals only,[5] and two include criminal offenders with the feeble-minded and insane (omitting epileptics).[6] Six states include all four classes,[7] and two states have repealed their sterilization statutes.[8] West Virginia's statutory classification is unique in that it uses only the broad term "mentally incompetent" to bring the patient within its parameters.[9]

In the only sterilization case to reach the United States Supreme Court, *Buck v. Bell,* the sterilization statute of Virginia was upheld as constitutionally valid.[10] The Court emphasized that in order for a statute of this nature to be valid, its provisions must

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[1] ARK. STAT. ANN. §§ 59-501 to -02 (1971 Rep. Vol.); ME. REV. STAT. ANN. tit. 34 §§ 2461 -68 (1964); MICH. STAT. ANN. §§ 14.381 - .390 (1969); S.D. COMPILED LAWS ANN. §§ 27-11-1 to -6, §§ 27-17-1 to -34 (1967).

[2] ARIZ. REV. STAT. ANN. §§ 36-531 to -540 (1956); DEL. CODE ANN. tit. 16, §§ 5701-05 (1975); IND. ANN. STAT. §§ 16-13-13-1 to -6, 16-13-14-1 to -5 (1973); MONT. REV. CODES ANN. §§ 38-601 to -08 (1947); N.H. REV. STAT. ANN. §§ 174:1 to :14 (1964); S.C. CODE ANN. §§ 32-671 -80 (1962); VA. CODE ANN. §§ 37.1-156 -71 (1970 Rep. Vol.).

[3] MISS. CODE ANN. §§ 41-45-1 to -19 (1972).

[4] IDAHO CODE §§ 39-3901 to -10 (Supp. 1975); MINN. STAT. ANN. § 256.07 (1971).

[5] WASH. REV. CODE ANN. § 9.92.100 (1961).

[6] CAL. PENAL CODE ANN. § 2670 (Deering 1970); CONN. GEN. STAT. ANN. §§ 17-19 (1975).

[7] IOWA CODE ANN. § 145.9 (1972); N.C. GEN. STAT. §§ 35-36 (1966); OKLA. STAT. ANN. tit. 43A, §§ 341-46 (1951); ORE. REV. STAT. §§ 436.010 -.090 (1973 Rep. Vol.); UTAH CODE ANN. §§ 64-10-1 to -14 (1953); WISC. STAT. ANN. § 46.12 (1957).

[8] NEB. REV. STAT. § 83-501 (repealed 1969); N.D. CENT. CODE §§ 23-08-01 to -15 (repealed 1965).

[9] W. VA. CODE ANN. § 27-16-1 (Cum. Supp. 1975).

[10] 274 U.S. 200, 207 (1926).

be very carefully drawn to meet stringent standards of due process—guaranteeing all citizens an impartial adjudication by a tribunal vested with lawful authority and preserving all constitutional rights.[11] In fact, most challenges to the sterilization procedures have been of a constitutional nature, based upon deprivation of constitutionally guaranteed rights, or upon abuse of the state's police power. The West Virginia statute appears to have been well drafted in that it complies with the guidelines laid down in *Bell,* and should withstand an attack based upon constitutional deficiencies. It provides for notice, hearing, right to counsel (appointed if necessary, with reasonable costs paid by the court once substantial service is rendered), right to a transcript for appeal, right to present evidence and cross-examine witnesses, and appeal to a judicial body. Furthermore, absent a showing of negligence, physicians performing the operation are protected both civilly and criminally. Castration and the removal of sound bodily organs for other than therapeutic reasons is expressly forbidden.[12]

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[11] *Id.*

[12] West Virginia's involuntary sterilization procedure is found in W. VA. CODE ANN. §§ 27-16-1 to -5 (Cum. Supp. 1975). W. VA. CODE ANN. § 27-16-1 (Cum. Supp. 1975) provides:

> Whenever any parent, guardian, committee or authority responsible for a person who has been declared mentally incompetent shall be of the opinion that it is in said person's best interest and the best interest of society that the said person be sterilized, such parent, guardian, committee or authority shall apply to the circuit court of the county of which such incompetent person is a resident or where he may be found by petition setting forth, under oath, all of the facts of the case and the grounds of his opinion, and praying that an order may be entered by said court authorizing and requiring him to have performed, by a duly licensed physician to be designated in the petition and order, upon such incompetent person named in such petition, sterilization procedures as medically indicated.
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> The court in which such petition is filed, or the judge thereof in vacation or a referee appointed by the court for this purpose shall review the circumstances under which the individual was declared incompetent and shall take evidence to determine that the circumstances warrant continuation of the incompetent status of the individual.
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> If, as a result of such review it is determined that the incompetent status should be continued, a further hearing shall be scheduled.
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> A copy of such petition shall be served upon such incompetent person, together with a notice, in writing, designating the date and time when the court, or the judge thereof in vacation, will hear the matters arising upon such petition. Such notice shall be served not less than fifteen days prior to the date of such hearing.
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> After the notice required by this article to be served shall have been

given, as herein provided, the court, or the judge thereof in vacation or referee appointed for this purpose shall proceed to hear and consider the petition and the evidence offered in support of and against the same. For every such incompetent person who is not represented by counsel the court shall appoint competent legal counsel who shall represent the rights and interests of such incompetent person who shall have the right, but shall not be required to be present at such hearings in person, and shall have the opportunity to present evidence in his own behalf and cross-examine witnesses. A transcript of all testimony at such hearing shall be made a part of the record filed with the clerk and shall be made available to the incompetent person or his counsel.

However, prior to such hearing the court shall order a complete medical-social evaluation by one licensed physician and one licensed psychologist or by two licensed physicians, at least one of whom shall be qualified in the field of psychiatry, neurology or genetics. Such examiners shall be present at the hearing and may be examined and cross-examined.

Upon consideration of the full record, the court, the judge thereof in vacation or the referee may find:

(1) That sterilization is unwarranted and the proceedings shall be dismissed;

(2) That the individual is mentally impaired and that such defect is of a genetic nature that is likely to be passed on to any children, or

(3) That the individual is mentally impaired to such a degree as to be unable to care for a child and that the individual is unlikely to recover from such mental impairment.

If the finding is made as enumerated in (2) or (3) above, and it is further determined that no alternative method of birth control is feasible, the court or the judge thereof in vacation may order that medically appropriate sterilization procedures shall be performed, and for a female, that such procedures be performed in a medical facility licensed by the state board of health. In no case shall such procedures be carried out until sixty days have elapsed from the date of such order.

W. VA. CODE ANN. § 27-16-2 (Cum. Supp. 1975) provides:

From any such order so entered by the court, or the judge thereof in vacation, any party thereto shall have, within sixty days after the entry of such order, the right to apply for an appeal to the supreme court of appeals, which may grant or refuse such appeal and shall have jurisdiction to hear and to determine the same upon the record of the hearing in the circuit court and to enter such order as it may deem appropriate. The filing of such an appeal in the supreme court of appeals shall operate as a stay of proceedings under any such order of the circuit court until such appeal shall be determined by the supreme court of appeals.

W. VA. CODE ANN. § 27-16-3 (Cum. Supp. 1975) provides:

Except as to the laws governing negligence, no such physician shall be liable either civilly or criminally by reason of having performed any procedure authorized by the provisions of this article upon any person in this State.

W. VA. CODE ANN. § 27-16-4 (Cum. Supp. 1975) provides:

Nothing in this article shall be construed to authorize the operation of castration nor the removal of sound organs from the body; but this provi-

In *Bell,* an action was brought against the superintendant of a state hospital to dismiss his order of a salpingectomy[13] upon Carrie Buck, a feeble-minded inmate. The challenge, based upon constitutional grounds, alleged denial of due process, equal protection, and subjection to cruel and unusual punishment. Carrie Buck was seventeen years old upon admission, the daughter of a feeble-minded woman, and already the mother of a feeble-minded child.

A special review board created by the Virginia statute had granted permission to perform the operation upon petition from the superintendent. The operation was a pre-requisite to release from the hospital. In affirming the Virginia Supreme Court's decision that all the necessary constitutional mandates had been met, the United States Supreme Court noted that it is within the state's power to regulate patients afflicted with a *hereditary* form of insanity or imbecility. An attack on the procedure failed to gain a reversal, as did a corollary attack on the substance of the law. In the words of the Court, "three generations of imbeciles is enough."[14]

The Virginia Supreme Court in *Bell* had held that sterilization of a mentally defective person was not a deprivation of due process as long as a constitutionally valid procedure was used.[15] Under these circumstances, sufficient due process required the issuance of a court order by an impartial tribunal vested with lawful jurisdiction, adequate provisions affording reasonable notice to the person to be sterilized (or his guardian), and an appropriate forum in which the individual could be heard.[16] At least one state opinion

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sion shall not be construed so as to prevent the medical or surgical treatment for sound therapeutic reasons of any person in this State, by a physician licensed by this State, in such a way as may incidentally involve the nullification or destruction of the reproductive functions.

W. VA. CODE ANN. § 27-16-5 (Cum. Supp. 1975) provides:

When, in any case, the court, or judge thereof in vacation, is satisfied that the counsel appointed by the court has rendered substantial service to the mental incompetent, it may allow him reasonable compensation therefor, and his actual expenses, if any, to be paid by the petitioners.

The costs of any proceeding pursuant to this article shall be paid by the petitioner.

[13] "A salpingectomy is the incision or excision of the Fallopian Tube, i.e., either cutting it off or cutting it out." *Smith v. Board of Examiners of Feeble-Minded,* 88 N.J.L. 46, 50 88 A. 963, 965 (1933).

[14] 274 U.S. at 207.

[15] Buck v. Bell, 143 Va. 310, 314, 130 S.E. 516, 518 (1925).

[16] *Id.*

expanded this requirement to encompass any state-sought deprivation of "faculty, sense, or limb," and assured an appeal to a judicial body if the original determination was made before a non-judicial body (as is usually the case).[17] The value to any inmate-defective is obvious in that these safeguards allow him to present his own witnesses to testify that there is no basis for selecting him to be involuntarily sterilized. In effect, he can challenge his inclusion in the class delineated by the sterilization statute. The right to have one's day in Court is as old as the Magna Charta,[18] and West Virginia has ample provision for this in the new statute.

Contentions based upon denial of equal protection have had some success where the patient could show that the statute drew boundaries leading to unconstitutional class legislation, carving an unreasonable sub-class within the group designated by the sterilization statute.[19] To meet the constitutional standard, the class defined must be a reasonable classification, with provisions that apply uniformly to all members of the class.[20] For instance, the legislative intent of involuntary sterilization statutes is to sterilize the natural class of defectives whose children will have an inherited tendency to be feeble-minded. Thus, the class as a whole must bear a reasonable relation to the legislative purpose by affecting only those individuals specifically within the chosen class. Attempts to limit these classes by such qualifying clauses as "those feeble-minded within a charitable institution *who were not able to support children*" carves an unconstitutional delineation by omitting from its scope those within the institution that are financially able to support their own offspring. Extending immunities and privileges to one portion of the class that are denied to others by such unreasonable or arbitrary classification is unconstitutional class legislation.[21] Involuntary sterilization statutes that apply only to individuals in public institutions have been rendered in-

[17] *In re* Opinion of the Justices, 230 Ala. 543, 167 So. 123 (1935).

[18] Williams v. Smith, 190 Ind. 526, 527, 131 N.E. 2, 3 (1921).

[19] State v. Troutman, 50 Idaho 673, 299 P. 668 (1931) (can not create a class, nor discriminate against any within the class affected). *See also* Smith v. Command, 231 Mich. 409, 420, 204 N.W. 140, 146 (1925); Haynes v. Lapeer, 201 Mich. 138, 166 N.W. 938 (1918) (general discussion); and Smith v. Board of Examiners of Feeble-Minded, 85 N.J.L. 46, 88 A. 963 (1913) (distinction drawn on probability of pregnancy of those residing inside institutions versus those residing outside).

[20] 231 Mich. at 438, 204 N.W. at 144.

[21] *Id.*

valid as unconstitutional class legislation by some lower courts,[22] but the United States Supreme Court in *Bell* found this reasoning defective in that performing the operation allowed a patient previously confined to return to the outside world, thereby opening the asylum to others in need of the available treatment.[23] Thus the construction of the statute in *Bell* actually served to break through the constitutional barrier prohibiting class distinction and strengthened the uniformity of its application. No such challenge is foreseen in West Virginia since its statute is applicable to any mental incompetent within the borders of the state whether institutionally confined or not. However, an attack might be possible if practice generates applicability to the poor, the black, or some other minority, thereby carving an unreasonable sub-class.

Cruel and unusual punishment has been consistently dismissed as a bar to involuntary sterilization operations.[24] The operation is one that involves little pain or danger (in fact, a vasectomy can be easily performed in the doctor's office under local anesthetic). Sterilization is not within the rubric of severe punishments that have disgraced the civilizations of former ages. It has been uniformly held that such a statute is not penal in nature, but is merely preventive in the same sense that a compulsory polio vaccination would be.[25]

Challenges based upon abuse of the state's police power have also uniformly fallen, inasmuch as the that power has been construed to be the state legislature's power to enforce what its judgment dictates to be best for the welfare of the society. Any burdens so imposed must be for the safety and welfare of the public at large and are limited only to the boundaries drawn by constitutionally guaranteed rights.[26] The *Bell* case recognized the public welfare

[22] 50 Idaho 673, 299 B. 668; 231 Mich. 409, 204 N.W. 140; 201 Mich. 138, 166 N.W. 938; *In re* Clayton, 120 Neb. 680, 234 N.W. 630 (1931).

[23] 274 U.S. at 208.

[24] 50 Idaho 673, 299 P. 668; *In re* Thompson, 103 Misc. 23, 169 N.Y.S. 638 (1918); 143 Va. 310, 130 S.E. 516.

[25] In *Bell* the Virginia Supreme Court, later affirmed by the United States Supreme Court, held the statute not penal in nature. The court stated that "[t]he purpose of the legislature was not to punish, but to protect the class of socially inadequate citizens named therein from themselves." 143 Va. at 316-7, 130 S.E. at 519. *See also* 231 Mich. at 416, 204 N.W. at 142, and 50 Idaho at 676, 299 P. at 670.

[26] 143 Va. at 316-17, 130 S.E. at 519. *See also* 85 N.J.L. at 51, 88 A. at 965; 50 Idaho at 674, 299 P. at 669; *In re* Clayton, 120 Neb. 680, 234 N.W. 630; and Brewer v. Valk, 204 N.C. 186, 167 S.E. 638 (1933).

argument, but concluded that if the government can ask the best citizens of the society for their lives in defense of the country, surely it is within the scope of public welfare to authorize reduction of *potential* offspring who would sap the vitality of that society.[27] An extreme extension of this philosophy was adopted in *In re Main*[28] and *Smith v. Command.*[29] Each of these cases held that no citizen has any rights superior to the common welfare. The Utah Supreme Court went so far as to recognize that any such law will be open to abuse, but upheld Utah's sterilization statute in the interest of the public welfare anyway.[30]

A powerful economic argument lies at the end of the continuum that advocates forced sterilizations of the mentally defective. A 1971 federal study that focused on one hundred and ninety (190) public institutions for the mentally retarded revealed that 15,370 patients were admitted for treatment during calendar year 1971.[31] This is the equivalent of 7.5 patients per 100,000 people in our population and represents an average daily resident patient population of 181,058.[32] Although this figure shows a slight decline from the peak year of 1968, during the same four-year period, the annual cost of institutional care per patient rose from $3,472.00 to $5,537.00, or, stated another way from $9.00 per day to $15.00 per day—a substantial 66% increase.[33] Yet, in spite of the increased expenditure, it is almost universally recognized that the majority of such institutions are inadequate to treat patients on an individual basis. In West Virginia alone, by 1973, the state and county mental hospitals had 3,475 resident patients[34] and an incoming patient total (returnees from leave, new admissions treated and released, and readmissions) of 4,894.[35] Private hospitals added 32

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[27] 274 U.S. at 207.

[28] 162 Okla. 65, 19 P.2d 153 (1933).

[29] 231 Mich. 409, 204 N.W. 140 (1925). The Supreme Court of Michigan declared ". . . it is not only its [legislature's] undoubted right, but it was its duty to enact some legislation that would protect the people and preserve the race from the known effects of the procreation of children by the feeble-minded, the idiots, and the imbeciles." *Id.* at 415, 204 N.W. at 142.

[30] Davis v. Walton, 74 Utah 80, 87, 276 P. 921, 923-24 (1929).

[31] UNITED STATES BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 82, (95th ed. 1974).

[32] *Id.*

[33] *Id.*

[34] *Id.* at 83.

[35] *Id.*

and 976 respectively, to these totals.[36] Furthermore, public institutions for the mentally retarded accounted for 469 additional patients.[37]

Figures released by the College of Business and Economics of West Virginia University show that six mental institutions located in the state spent a total of $16,151,000 on patient care and maintenance in 1972.[38] This averages out to a per capita expenditure of $3,682.41 per patient.[39]

Unfortunately, figures were not available for West Virginia to show the percentage of inmates/patients who are the offspring of mental defectives, who have produced defective progeny, or who exhibit highly fecund behavior. But a comparable study done by the 1970 federal census researchers showed that out of a total reporting population of 21,240 Anglo women that had spent time in a mental hospital, 6,806 (32%) had been the mother of three or more children.[40] (For the sake of constancy, the sample was restricted to women who bore children while between the ages of 15-54.) Out of a similar group of 5,046 Negro women, also between the ages of 15-54, 1,845 (37%) had borne three or more children. Reporting schools or homes for the mentally handicapped showed that 267 of 944 (28%) Anglo institutionalized women and 78 of 203 (38%) Negro institutionalized women had produced three or more children.[41] Considering the cost to society when reflected against a simple sterilization that costs approximately $100.00 for males and $300.00 for females,[42] the economic advantages of sterilization become awesome. (Consider also that if the West Virginia legislature had made sterilization a prerequisite to release from confinement, the economic aspect would be multiplied because the possibility of increased sexual contact that is probable outside the confines of the institution would not result in offspring).

Moral objections present another area of concern that is cer-

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[36] *Id.*

[37] *Id.*

[38] 12 BUREAU OF BUSINESS RESEARCH, WEST VIRGINIA UNIVERSITY COLLEGE OF BUSINESS AND ECONOMICS, WEST VIRGINIA STATISTICAL HANDBOOK 26, (No. 1, 1974).

[39] *Id.*

[40] U.S. DEPT. OF COMMERCE, 1970 CENSUS OF THE POPULATION - WOMEN BY THE NUMBER OF CHILDREN EVER BORN 353 (Subject Report PC (2)-3A, 1973).

[41] *Id.*

[42] Figures based on a confidential assessment by a licensed medical practitioner of West Virginia, who requested anonymity.

tain to arise any time the state exercises its police power in such a way that the sanctity of the body is disturbed. The concept of population control geared to a thinning out of the weak and perpetuation of the healthy and vigorous has long been with us, dating back at least to the glory days of the Greeks and Romans. Plato's *Ideal Republic* recognized selective breeding and advocated the practice.[43] The Laws of Rome went even further and compelled the father of a defective child to kill it immediately.[44] Harsh practices by the Troglodite society of ancient Ceylon involved a form of circumcision; if the newborn was strong and healthy, only the customary foreskin was removed, but if the child was weak or deformed, the entire appendage was removed, often resulting in death by bleeding.[45] The abhorrence of such practices, once deemed eugenically essential, foreshadows current objections to any bodily violation tending to eliminate procreation.

Furthermore, our forefathers broke away from castration as a penal tool even though the practice was entrenched in the laws of England. Henry II created the practice and coupled it with blinding to deter those who would smuggle papal mandates into England.[46] But even our own nation, by the practices of racial hate groups, has not escaped the scepter of violent emasculation. The carefully drawn provisions of the West Virginia statute coupled with the advances of modern medicine make it easily distinguishable from the cruel penal provisions of these earlier societies.

Several factors must be considered in justifying the need for an involuntary sterilization statute. The number of progeny being born to the mentally deficient certainly must be considered. A succinct summary of many studies conducted over a fifty year period shows that in a vast majority of cases, increase in family size or increase in progeny occurs in correlation to a decrease in intelligence levels of the parents and/or a decrease in socio-economic status.[47] This is not to say that feeble-minded women are more extraordinarily fecund or prolific *per se,* in fact there are many "normal" people on record for having inordinately large families, and some religious practices encourage it. So, instances of extraordi-

[43] See Justice Weist's dissenting opinion in 231 Mich. 409, 429-441, 204 N.W. 140, 146-153, for a complete historical discussion.

[44] *Id.* at 432, 204 N.W. at 147.

[45] *Id.* at 431, 204 N.W. at 147.

[46] *Id.* at 434, 204 N.W. at 148.

[47] J.E.W. WALLIN, MENTAL DEFICIENCY 18 (1956).

nary fertility can easily be duplicated in samples drawn from the normal population. Dispensing with fecundity as the cause of more progeny being born to the feeble-minded and incompetent if such is the case, a more likely explanation can be based on several factors of their environment; among these being early marriage, early conception, lack of personal discipline or determination of control in enticing situations, inability to grasp the principles of birth control, and economic pressures leading to amoral living conditions, prostitution, and the like.[48]

With the exception of the extremely defective lower level groups, there is little evidence to show any substantial difference in fertility rate between the defectives and the population at large. Moreover, other factors can restrict the tendency of the defective population to expand in proportion to the general population. For instance, institutional confinement and its concomitant segregation reduces copulatory opportunities, yet as a practical matter, such segregation may hinder therapy. In addition, potential offspring of the defective have a substantially higher mortality rate due to miscarriages and stillbirths, resulting in a lower percentage reaching a procreative maturity level.[49] Also, there is a certain group that is so defective as to be functionally unable to reproduce at all.[50] In spite of these balancing factors, one research study predicted a fall in intelligence in this country from generation to generation to an extent that would reduce potential scholarship students by 50% and double the number of feeble-minded within 50 years.[51]

The predictability of transmission of defective traits to offspring should also be considered in justifying the need for an involuntary sterilization statute. The exact interaction of heredity and environment is still unresolved, yet we know that heredity is more important in determining intelligence capacity than the other personality traits, whereas environment influences a wider variety of traits in varying degrees of influence.[52] Human genetic research has been slower to develop than the study of the lower organisms, due to the long generations span of humans and lack of availability of subjects. Most of our knowledge came from the early pedigree or

[48] *Id.* at 20.
[49] *Id.*
[50] *Id.*
[51] *Id.* at 39.
[52] *Id.* at 54.

family-tree studies. Even these are inexact due to the necessity of hearsay evidence concerning ancestors who might have displayed the particular trait sought to be traced. Breakthrough discoveries in physiological genetics have led to the reduction of many disorders caused by tissue response to the internal secretions of the body, and studies of concordant deficiencies in twins have also strengthened our accumulation of information concerning inborn error that result in retardation and physical disorders due to genotypic basis. Furthermore, the very mobility of today's population tends to reduce the pocketed areas that caused inbreeding and forced marriages. Increased choice as to marital and sexual partners will enhance the gene pool by a hybrid vigor, resulting in less frequent appearances of crippling recessive genotypes.

Formalized research on transmissability of feeble-minded tendencies dates back to 1848 in the United States, when a Massachusetts commission concluded at that time that 22% of the "idiots" examined were hereditary cases[53] (this number would no doubt be drastically lower today with advances in knowledge of genetic mechanisms). Two early pedigree studies deserve mention as exemplary determinations of the burden on society of unrestricted genetic transmission—the infamous Juke and Kallikak families.

The Juke study project was headed by R. L. Digdale in 1877.[54] The Dutchman Max Juke lived in an inaccessible region of Ulster County in upstate New York. Max's two sons married two of six sisters in a local feeble-minded family. One other sister left the area, and the other three all married mental defectives. From these five sisters, 2,094 direct descendants and 726 consortium descendants had been traced into fourteen states by 1915. All of them were feeble-minded and the cost to society from their welfare payments, illicit enterprises, jail terms, and prostitution brothels had reached $2,516,685.00[55]

Even more striking is the case of Martin Kallikak, Sr., a Revolutionary War soldier who fostered a son, Martin Jr., by a feeble-minded bar girl during the war. Martin Jr. married a feeble-minded girl and they had seven children, five of whom were afflicted. From these progeny sprung 480 descendants, 143 feeble-

[53] *Id.* at 43-44.
[54] *Id.*
[55] *Id.*

minded, 46 normals, and 291 of unknown mental status. Martin Sr. in the meantime returned from the war, married a normal woman and started a line of 496 descendants, all of whom were normal (with the possible exception of two alcoholics and one of amoral character).[56] Viewed in the light of the declaration in *Bell* that "three generations of imbeciles is enough," one can only wonder as to the cost to our society that has been perpetrated by countless other familial descents that have gone untreated and unreported.

Finally, the post operative behavior of all patients undergoing involuntary sterilization should be considered in justifying the need for an involuntary sterilization statute. Arguments have been made that, in the absence of strict sexual segregation in our mental hospitals, the sterilized patients will actually increase their promiscuity, and thereby enhance the spread of venereal disease and other communicable diseases.[57] This should be of paramount importance in states that require the sterilization of the patient as a prerequisite to release from confinement. Since West Virginia does not have such a provision, it is of less merit, as a confined population should be more readily treatable for venereal infections than a population that is being steadily disgorged back into the mainstream of society. For this state's purposes, a balancing test considered along these lines should still find the sterilization procedure desirable.

Assuming the desirability of an involuntary sterilization statute, criticism of the West Virginia statute will likely flow from the statute's failure to specifically define who is to be classified as a "mental incompetent". This presently remains an individual determination that can vary from county to county. It is certainly arguable under the current wording that the insane would not be included, since medically recognized forms of insanity such as psychotic disorders are often characterized by high intelligence. Nor does it require that the incompetency be of a permanent nature, only that the debility be of such a genetic nature that it is "likely to be passed on to any children." Thus, West Virginia's statute could be improved considerably by defining "mental incompetency" and by limiting involuntary sterilization to those whose mental incompetency was both permanent and genetic.

[56] *Id.* at 44-45.

[57] *In re* Thompson, 103 Misc. 23, 169 N.Y.S. 638 (1918).

The specifics of definition and limitation concerning who is to be classed as a "mental incompetent" are unfortunately fraught with many difficulties. Should the permanence of a defective condition be established as an absolute before ordering the involuntary sterilization? Or should this standard be less—beyond a reasonable doubt, for instance? This issue is yet unresolved. Ever expanding knowledge of the physiological workings of the body metabolism and its inborn errors that lead to severe retardation yields a conclusion that many defective conditions once thought to be permanent are now easily corrected by prompt diagnosis and treatment. Should the court therefore narrow its definition of "incompetent" to disallow sterilization of one suffering from a genetic disorder that could be corrected if passed on to the progeny? Genetically inherited errors can also result from gene mutation to the parent due to exposure to radiation, certain drugs, and chemical agents.[58] The resultant offspring will occasionally be severely defective, but, since these errors are physiologically induced after the genetic pattern has been set, this is not generally a continuous debility that will pass to the next generation.

Consider also that in the definition problem, two arbitrary delineations must necessarily arise: first, the criteria by which the levels of intelligence function are judged (several different tests may yield a wide range of results), and, second, the cut-off point on the continuum below which one is classed as sub-normal. Two researchers, Slater and Cowes, divide the sub-normal range into "subcultural defectives" and "pathological defectives," the former consisting of the lower end of the distribution curve for normal intelligence (about 2% of the population, generally with normal fertility), and the latter being those individuals falling outside the range of normal variation (approximately .25% of the population, normally infertile or nearly so).[59] The pathological case, by far the most defective, is usually the result of some environmental accident, a rare single gene (spontaneous mutation or autosomal recessive), or a chromosomal anamoly.[60] In any event, they almost invariably will not pass the condition on to the progeny and, therefore, arguably do not fall within the scope of intent of the statute. Hence, according to Slater and Cowes' analysis, both groups would escape the legislative intent of West Virginia's sterilization stat-

[58] V. GRANT, THE ORIGIN OF ADAPTATIONS 164 (3rd ed. 1971).
[59] E. SLATER & V. COWES, THE GENETICS OF MENTAL DISORDERS 185-186 (1971).
[60] *Id.*

ute; the first group, not being mentally incompetent and the second group not being procreative for the most part.

West Virginia does not make it clear what the standard of proof must be to conclude that the patient should be sterilized. One jurisdiction noted that it took a standard of "beyond a reasonable doubt" for the court to overturn a sterilization order, that is, the court had to be convinced beyond a reasonable doubt that the facts prescribed by statute requiring sterilization did *not* exist before they could overturn the order.[61] By implication, this seems to suggest that a lesser standard is permissible to issue the original order; perhaps merely a preponderance of the evidence would be sufficient. However, the legislature's statutory language may run *contra* to that idea in West Virginia. The West Virginia statute seems to recognize that sexual sterilization is a last resort measure by their proviso that it is to be used "only if no alternative measure of birth control is feasible."[62] It is suggested, however, that anyone who is truly a mental incompetent is less than likely to be able to effectively practice other methods.

The majority opinion of *Smith v. Command* hypothesized that every forward step of mankind has always been marked by some interference with individual liberties.[63] Considering the contemporary realization that the world's resources are truly finite, with attendant energy crises and multiple shortages, it is germane to reflect on the necessity of reducing the societal burdens and to applaud the legislature for the inception of this statute.

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[61] 231 Mich. at 424, 204 N.W. at 145.
[62] W. VA. CODE ANN. § 27-16-1 (Cum. Supp. 1975).
[63] 231 Mich. at 425, 204 N.W. at 145.