

Sterilization

In 1791, Congress adopted the Eighth Amendment to the U.S. Constitution. As part of the Bill of Rights, the federal government was prohibited from imposing excessive bail or excessive fines, and from inflicting cruel and unusual punishment.

On July 9, 1868, Congress adopted the Fourteenth Amendment to the U. S. Constitution. It recognized the citizenship of all persons born or naturalized in the United States. It further stated that:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

In spite of these protections, more than 60,000 men, women and children in the United States were sterilized without their consent. More women than men were the victims of involuntary sterilization; and twice as many of those sterilized were black women as white women. (Lombardo, 2003).

Sterilization Laws

Laws requiring sterilizations have been passed throughout the 20th century. The first sterilization laws were passed in Indiana in 1907; the last was passed in Georgia in 1970. While no new laws were *passed* after 1970, some states continued to *modify* their sterilization laws well into the decade. But by the end of the 1970s, most states had repealed their sterilization laws. In the early years of the 21st Century, Virginia, South Carolina, Georgia, and Oregon apologized for passing these laws in the first place.

While most forced sterilizations took place in institutions, some did not. Individuals with developmental disabilities who lived in the community with their families also were sterilized without their consent. All that was needed was agreement from the individual's parents and doctors.

A landmark case in New Jersey in the 1970s supported the rights of parents and other guardians to approve the sterilizations of people who were considered incapable of making their own decisions. The court positioned its ruling in the context of the Fourteenth Amendment, which protects every citizen's right to equal protection under the law. The ruling stated that since institutionalized adults were being sterilized with the approval of substitute decision makers, therefore it was unequal protection to deny the same "right" to people living in the community.

The Eugenics Movement

The initial motivation for sterilization laws came from the Eugenics Movement that was popular during the early decades of the 1900s.

The first state law requiring sterilization was passed in Indiana in 1907. It allowed the “prevention of the procreation of ‘confirmed criminals, idiots, imbeciles, and rapists.’” On May 11, 1921, the Supreme Court of Indiana declared this statute unconstitutional. However, a second law passed on March 27, 1927 was ruled constitutional. (Wehmeyer, 2003, p. 57)

California passed mandatory sterilization laws in 1909 and 1913. The California legislation provided for sterilization of “the insane and feeble-minded inmates of state hospitals and of convicts and idiots in state institutions.” A later amendment authorized the Board of Trustees of the Pacific Colony for the Feeble-Minded and Epileptic to “sterilize committed feeble-minded, chronic manic and demented people, with or without their consent, before discharging them.”

In 1914, Harry Hamilton Laughlin of the Eugenics Records Office² published a “Model Eugenical Sterilization Law” (<http://www.people.fas.harvard.edu/~wellerst/laughlin/>). This proposed law authorized sterilization of the “socially inadequate.” Laughlin’s goal was to ensure the law’s constitutionality and consistency with eugenics principles. Laughlin’s Model Law was adopted by a number of states. By 1924, 22 states had passed similar legislation. In 1927, the U. S. Supreme Court ruled in *Buck v. Bell* that the Virginia version of Laughlin’s Model Law was constitutional.

Ezra Gosney and Paul Popenoe were leaders of the Human Betterment Foundation. The group was established solely to promote the use of eugenic sterilization for purposes of race and human betterment. They reported on the “success” of the California program. The report bolstered the German Eugenics Movement and Laughlin’s Model Law formed the basis of Germany’s 1933 sterilization law. In 1936, Laughlin received an honorary degree by the University of Heidelberg for his work behalf of the "science of racial cleansing."

² The Eugenics Record Office (ERO) at Cold Spring Harbor Laboratory in Cold Spring Harbor, New York was a center for eugenics and human heredity research in the first half of the 20th century. Founded in 1910, the ERO was financed primarily by Mary Harriman (widow of railroad baron E. H. Harriman) and then the Carnegie Institution until 1939. It closed in 1944. Its records were transferred to the Charles Fremont Dight Institute for the Promotion of Human Genetics at the University of Minnesota.

**EFFECTS OF EUGENIC STERILIZATION
AS PRACTICED IN CALIFORNIA**

1. One effect only—it prevents parenthood.
2. It in no way or degree unsexes the patient.
3. It in no way impairs the health of the patient.
4. It is a protection, not a punishment; therefore carries no stigma or humiliation.
5. Patients and their families are among the best friends of sterilization. They know by experience what its protection means to them.
6. It is approved by the medical staffs, social workers, probation and parole officers, who have come in contact with the patients before and after the operation.
7. It permits many patients to return to their homes who would otherwise be confined in institutions for years. It thus prevents the break-up of families.
8. It prevents the birth of children who would probably have a bad heredity, who could not be cared for properly, by their parents, and who would be likely to become state charges.
9. It releases sterilized patients from confinement in state institutions, and leaves room for other waiting patients; thus increasing the efficient care for more defectives without increasing the cost to the tax-payer.
10. It has not increased sex offenses; on the contrary, sterilized patients in California, for various reasons, chiefly educational discipline, show a great improvement over their former record of sex delinquency.
11. It enables many handicapped persons to marry and to have a life normal in most respects, whose marriage without sterilization would be unwise if not disastrous.
12. Conservatively and sympathetically administered, it is a practical, humane, and necessary step to prevent race deterioration.

NOTE: California has had in effect since 1909, a sterilization law applying only to inmates of state institutions. Up to January 1, 1937, the state had sterilized under this law, 11,484 patients (5933 men, and 5551 women). The Human Betterment Foundation has, for the past eleven years, been making an intensive study of the results to the patient, the family, and the community. For further details write—

THE HUMAN BETTERMENT FOUNDATION
321 PACIFIC SOUTHWEST BUILDING
PASADENA, CALIFORNIA

“Effects of Eugenic Sterilization as Practiced in California” leaflet disseminated by the Human Betterment Foundation, Pasadena, Calif, from the late 1920s to the early 1940s.

***Buck v. Bell* – “Three Generations is Enough”**

The superintendent of the State Colony for Epileptics and Feeble-Minded in Virginia had been sterilizing people in the early 1900s. Because the legislation establishing the Colony did not clearly allow sterilization, a 1918 court ruling warned the superintendent that he was personally liable. He discontinued the operations but then pushed for legislation that would allow sterilization of residents.

In 1924, Virginia passed legislation that allowed residents who otherwise might require permanent institutionalization, to be released on condition that they were first sterilized. The law outlined the procedures to be followed, including approval from the institution's board, appointment of a guardian, a hearing, and appeals to the courts.

Carrie Beck, a young woman who had been raped and became pregnant, came to live in the Colony where her mother also had been institutionalized. After Carrie's baby was born, the superintendent recommended her sterilization and went to court to make sure it did not make him personally liable.

The case eventually reached the U.S. Supreme Court. Justice Oliver Wendell Holmes wrote the opinion for the court in *Buck v. Bell*. He rejected the argument for equal protection under the law. Accepting the arguments presented by supporters of eugenics, Justice Holmes wrote that procedural guarantees had been “scrupulously” followed. Holmes contended that if the nation could call upon its “best citizens” for their lives during war it could demand a “lesser” sacrifice of those who “sap the strength” of society. Preventing people with disabilities (he called them “degenerates”) from having children would benefit society. He said, “three generations of imbeciles are enough” in reference to Carrie, her mother, and her daughter.

Buck v. Bell became the standard and opened the floodgates for forced sterilization across the nation. *Buck v. Bell* has never been overturned.

Skinner v. Oklahoma

In 1942, Oklahoma's Habitual Criminal Sterilization Act of 1935 was challenged on the grounds that it constituted “cruel and unusual punishment” and did not provide “equal protection.” The Act was overturned on “equal protection” grounds since some crimes such as embezzlement, which were felonies in Oklahoma, were excluded from the jurisdiction of the Habitual Criminal Sterilization Act. Neither the Act nor the 1942 ruling had any impact on the forced sterilization of people with disabilities.

In his opinion for *Skinner v. Oklahoma*, Justice William O. Douglas noted that the fundamental right of procreation required close scrutiny by the courts.

We are faced with legislation which involves one of the basic rights of man. Marriage and procreation are fundamental to the very existence of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races of types which are inimical to

the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment the state conducts is to his irreparable injury. He is forever deprived of a basic liberty.

The End of the Inheritability Argument

Although *Skinner v. Oklahoma* did not apply to people with disabilities, it raised the anxiety level surrounding the issue of forced sterilization. Even more importantly, the horrors committed by Nazi Germany in the name of eugenics undercut the philosophical basis for much of the legislation.

Most laws requiring sterilization were linked to procreation, especially in situations where institutionalized citizens were to be released to the community, and some demonstration that the individual had an inheritable trait linked to mental disability.

Thinking about sterilization began to change in the 1960s. The argument that developmental disabilities were inherited was replaced by another eugenics argument – “social cost analysis.” Supporters argued that “defective people” made bad parents and would create children who would be a burden on society. In effect, this argument loosened the criteria used to decide who should be sterilized. In the 1950s, sterilizations began to decrease in response to a required “demonstration of inheritability”.

The final substantial year for California’s sterilization program was 1951, with 255 operations performed. The following year, the number dropped considerably to 51, undoubtedly because of a revision to the statute inserting administrative requirements for physicians and safeguards for patients. This amendment, and another 1953 bill, deleted any references to syphilis (long since understood as microbial, not genetic, in etiology) and sexual perversion; instituted more demanding processes of notice, hearing, and appeal; and removed the terms “idiots” and “fools” from the law. By turning what had been a mere formality into a more taxing ordeal, these modifications deterred many physicians from requesting sterilization orders. Nevertheless, surgeries continued sporadically at every state institution into the 1970s. (Stern, 2005, p. 1132)

The social cost argument fueled acceptance of sterilization in the South where it became a tool for repressing African American and poor women. California employed a similar strategy to repress Mexican-American women. (Stern, 2005, p. 1132).

After World War II, however, while the numbers of sterilizations performed elsewhere in the country were slowly decreasing, the numbers rose substantially in Virginia, Georgia, North Carolina and, to a lesser extent, South Carolina. During the late 1950s, sterilizations in Virginia, Georgia, and North Carolina together comprised about three-fourths of the operations performed under eugenic statutes in the United States. (Castles, 2002, p. 8)

In the 1960s, there was increasing pressure to change the laws in Nebraska by replacing the social-cost analysis argument with the inheritability assumption.

The old law in Nebraska identified five prerequisites to sterilization:

- That the person was feeble-minded.
- That the person was able to beget offspring.
- That the offspring would inherit a tendency to feeble-mindedness.
- That procreation would be harmful to society.
- That the person could not be paroled or discharged unless sterilized.

In 1966, the Nebraska law was broadened to include:

- That the person is mentally deficient.
- That the person is apparently able to beget offspring.
- In the opinion of the Board of Examiners, the person should be sterilized as a condition prerequisite to parole.

The Nebraska Supreme Court upheld the law. Part of the ruling argued that the sterilization was not forced. The justices stated that “the order does not require her sterilization. It does provide, in accordance with the statute, that she shall not be released until she is sterilized.” The justices emphasized, “*The choice is hers.*” This reasoning caused such an uproar that Nebraska repealed the law. (Bruinius, 2006)

In 1980, a case in Virginia had a similar outcome. Even though the Virginia law had been repealed in 1974, the ACLU filed a case, known as *Poe v. Lynchburg Training School and Hospital*. The ACLU argued that the state had violated the constitutional rights of anyone who had been sterilized without their consent. The court disagreed and ruled that the sterilizations did not violate the individual’s constitutional rights, remaining consistent with *Buck v. Bell*.

Despite these court rulings, the tide had begun to turn. Sterilization laws across the United States began to be repealed.

In 2001, the state of Virginia formally apologized for its role in eugenics. A highway marker outside Charlottesville was dedicated to *Buck v. Bell*. South Carolina, Georgia, and Oregon also apologized for passing mandatory sterilization laws. The state of Georgia’s apology also recognized that forced sterilization and bans on interracial marriage often went together in an effort to ensure “racial integrity.”

Voluntary Sterilization

The end of forced sterilizations as a convenience for institutions and as a condition of release is only part of the story.

“Voluntary” sterilizations also were routinely performed in the community. For years, parents and doctors agreed to sterilize people with developmental disabilities, usually to make it easier for parents to care for their daughters’ personal needs and to avoid unwanted pregnancies and parenthood. Sterilization and bans on marriage were seen as justifiable.

In 1979, a New Jersey court (*In the Matter of Grady*) ruled that it was constitutional for parents to have their daughter sterilized. Lee Ann Grady’s family thought sterilization would enhance and protect her independence in the community. The court ruled that because people living in institutions were allowed to choose whether or not to be sterilized, this same right should be extended to people in the community. For people who were judged unable to decide for themselves, the New Jersey court agreed that the parents should be able to make the decision on behalf of their children.

The court outlined the “Grady Rules” to determine when a sterilization decision could be made with “clear and convincing” proof of nine elements:

1. The possibility of pregnancy.
2. The possibility of physical or psychological trauma
3. The possibility of sexual activity.
4. The inability of the incompetent person to understand the likely permanence of the procedure
5. The advisability of less drastic measures.
6. The advisability of postponement.
7. The ability of the incompetent person to care for a child.
8. The possibility that future scientific developments will offer preferable alternatives.
9. A demonstration of good faith on the part of sterilization proponents.

Other states decided that the courts had to make the decision. Oregon’s law on informed consent for sterilization, for instance, specifically states that a natural parent or the legal guardian or conservator of a minor child or protected person may *not* give substitute consent for sterilization. A court must decide.

Recognizing the “Best Interests” of the Individual

Oregon, and other states, made it perfectly clear that a final decision about sterilization must be in the “best interest of the individual,” not simply in the interests of the individual’s parents or guardians.

“Best interest” means that:

(a) The individual is physically capable of procreating;

(b) The individual is likely to engage in sexual activity at the present or in the near future under circumstances likely to result in pregnancy;

(c) All less drastic alternative contraceptive methods, including supervision, education and training, have proved unworkable or inapplicable, or are medically contraindicated;

(d) The proposed method of sterilization conforms with standard medical practice, is the least intrusive method available and appropriate, and can be carried out without unreasonable risk to the life and health of the individual; and

(e) The nature and extent of the individual's disability, as determined by empirical evidence and not solely on the basis of standardized tests, renders the individual permanently incapable of caring for and raising a child, even with reasonable assistance. (Oregon Statutes - Chapter 436 - Sterilization - Section 436.225 - Obtaining informed consent. 2007)

In 1986, the Supreme Court of Canada ruled in the case of *Eve* that neither parents nor the court had the right to authorize non-therapeutic treatments such as sterilization for a person with developmental disabilities. Only the individual can decide and if the individual is not capable of deciding, sterilization is not an option (*Re Eve* (1986), 31 D.L.R. (4th) 1). Some continue to argue that the Supreme Court of Canada went too far in denying the option of sterilization to people with developmental disabilities who were considered unable to consent.

Laws forbidding sterilization of the mentally incompetent may be nearly as dehumanizing as the forced sterilization laws they replaced. Weighing the complex medical and ethical issues involved, judging whether guardians' fears are reasonable, and determining patients' best interests require careful, individual case reviews with strict procedural safeguards. Families are often the best substitute voice for incompetent adults. Not allowing a caring family to express preferences regarding such life-altering experiences as pregnancy and childbirth may paradoxically silence the patient's voice. (Pham and Lerner, (2001)

Gerald Robertson supports the opposing view, saying that this was a case of "affirmative discrimination."

*We must accept that these [forced sterilization] abuses were so significant, so horrific, and so recent, that they are inextricably linked to the very word "sterilization." The abuses may have been in the past, but their legacy lives on. Sterilization has become a symbol of a particular attitude towards mentally disabled people: that they are less deserving, less productive — less human — than the rest of society. In my view, the decision in *Eve* is a courageous attempt to reverse that attitude.*

*Hence the term "affirmative discrimination." Even if the decision in *Eve* does discriminate against some mentally disabled individuals by denying them access to sterilization where this would be in their best interests, this result is justifiable in order to ameliorate the condition of mentally disabled people as a whole. In the*

interests of the group as a whole, it is preferable that the law be seen to put an end to non-therapeutic sterilization of the mentally disabled. (Robertson, 1994, p 455-456)

In the United States, however, laws vary from state to state. Most states require the courts, not a guardian, to make the decision. Some courts have noted that allowing the parents or guardians to substitute their decision and consent is not adequate because parental consent to sterilization has a history of abuse.

As a result, it cannot be presumed that the parents have the same interests as their child. This is significantly different from “permitted delegated consent” related to abortion where parents and guardians are frequently given the responsibility to decide on behalf of the child. Courts may be less inclined to allow for the possibility of self-interested third parties when the result of consent permanently affects the individual’s future choices. (Pollack, 2005)

Medicaid’s position is clear. Medicaid funds cannot be used to pay for the sterilization of any individual who is less than 21 years old or who has been declared mentally incompetent by a federal, state, or local court, unless the individual has been declared able to consent to sterilization. If a judicial court orders sterilization for a recipient who is a ward of the county, and is determined to be mentally incompetent, Medicaid is not responsible for reimbursing the costs of the sterilization.