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A postulated alternative to current Oregon marital statute (ORS 106.71): a frankly revisionist analysis of the concrete situation

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(A POSTULATED ALTERNATIVE TO A CURRENT OREGON MARITAL STATUTE)(ORS 106.071): A FRANKLY REVISIONIST ANALYSIS OF THE CONCRETE SITUATION

by

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According to the Oregon Marriage statute an applicant for a marriage license must present a physician's statement that he is free from certain mental and physical conditions. When the examining physician is not satisfied that the applicant is free from these conditions, the applicant is referred to the Committee of Three, a special standing committee appointed by the Board of Social Protection for determining whether or not a license to marry should be granted.

In the spring of 1970 such a situation was referred to the committee for its consideration. As a result of the committee's involvement with this applicant, the question of enforcability of the current physical mental prerequisites to marriage became a concern. The committee noted that no specific definition of the individual categories was included in the statutes that could be applied objectively tbe the committee in determining an applicant's fitness to marry.

In an attempt to clarify these areas the committee and its parent group, the Board of Social Protection, determined to investigate marriage laws of other states seeking more valid (and/or realistic) definitions of physical and mental prerequisites to marriage. After making preliminary inquiries it was realized that a more comprehensive study and evaluation were required. A study of this nature, however, required considerable time and expense, neither of which were

available under the existing program structure.

It was at this point that we four students from the School of Social Work became interested in the possibility of working with the Board of Social Protection in this endeavor.

Both to meet the research requirement of the School of Social Work and to provide pertinent information to the Board an informal contract was formulated between us and Dr. Edward Press, State Health Officer, who serves as Secretary of the Board of Social Protection. We were requested to research and propose an enforceable marriage law to the Board which might be presented to the Oregon State Legislature for consideration.

DISCUSSION

Much of what was presented was relatively objective data. We feel that a necessary bridge to our final recommendation is a statement of our value positions - which necessarily filtered the data. We will explicate these values by briefly discussing what we see to be central issues.

What is the function of law in United States society today? Law is certainly regulatory - but more important is the basis for regulation. As we have seen our legal heritage gives both the individual and society rights and responsibilities. The problem has been in defining the balance among these four elements. Obviously we have a long-time legal tradition of individual rights. These rights were limited with the coming of social legislation and court decisions stressing societal rights to protect the general welfare; the individual's responsibility was then stressed along with his rights. It seems to us that the fourth element - societal responsibility - has not been as clearly defined.

It would seem to us that a conscious effort must be made toward balancing all four of these elements. Not only does the individual assume a responsibility as a spouse, but perhaps society has a responsibility to prepare him to fill this role. Not only does the individual have a respon-

sibility as a parent, but perhaps society has the responsibility to help him fulfill that role. We are not saying that society does not have the right to intervene but this has to be within the context of individual rights.

Using this as a value base, two broad relationships seem important to us in considering legal change: law and research data, and law and societal values.

In looking at the research data, we were consciously using the basis on which the Loving decision struck down a marriage law as unconstitutional: "insupportable basis". The decision specifically states:

> To deny this fundamental freedom on so insupportable a basis as racial classification...so directly subversive to the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law.

This seemed to suggest two things. First, the courts are defining and delimiting the power of the state to protect the general welfare at the expense of individual rights. There is support for this in other areas as well, as in the decisions protecting the rights of both juveniles and adults accused of criminal offenses. Secondly, in an age in which much has been objectified, the courts are looking not only at social values but at scientific data; simplistic cause-and-effect explanations of arbitrary categories of people have been rejected and the court seems to be saying that no other "support" seems evident to them. In commenting

on the Loving decision, one author points out that it "provides a rationale for questioning state marriage statutes that may not be justified on sound social or moral principles and are supported only by custom and prejudice." (Foster, 1968)

After a review of the research literature we find real problems in two areas: definition and prediction.

The categories specified in the Oregon statute are not defined in the statute (as we noted in our preliminary paper), they are impossible to define clearly at our present level of knowledge. It seems paradoxical to deny the right to marry to certain specified populations, in the light of contemporary scientific knowledge, and not define the specific labels nor make any attempt to determine whether, in fact, the individual can function as a spouse or as a parent.

Interestingly, the kinds of predictions regarding progeny that we can make are not the categories included in the law (i.e., hemophilia), and the categories which are included are not widely accepted as passing their "objectionable" traits genetically to their children. Probably most distasteful to us is that such arbitrary categories seem discriminatory in intent and certainly "insupportable". Without support it is conceivable that any number of categories could be added. Having parented illegitimate children, receiving welfare, being epileptic, or having other chronic physical

disease might be evaluated also.

Although the data we have seems insufficient to validate the continued use of such mental and physical prerequisites, it is sufficient to indicate to us that if a decision must be made it should not be a medical-only decision.

Societal values seem to us to be even a more important area of consideration. The statute in question obviously mirrors past values. It is our position that legislation must be kept reasonably current in an age of rapid social change.

What are current values? What, for instance, is marriage today? What is family? Sociologists have long differentiated the two but for practical purposes they have tended to merge in western culture. While the Oregon statute on mental and physical prerequisites could be an attempt to protect the rights of the contracting parties, the Attorney General's opinion implies protection for dependent children. (Preliminary Paper) So this statute also equates marriage and family.

Within the culture the two concepts are now diverging in some ways. With increasingly reliable birth control some marriages are not resulting in children; on the other hand extra-marital unions, many with children, are increasingly common. With the divorce rate rising it is impossible to predict who will be providing the parenting for children

of any union. Marriage and parenting are simply not synonomous. Consequently we do not feel that marriage and family can now be sufficiently reliably equated as the basis for law.

Why is marriage the point of intervention? As one man observed in regard to the V.D. testing prerequisite: "You might just as well test any group, say, all bicycle riders." For a complex of reasons society has invested in marriage as a major point where responsibility for the general welfare is centered. It is obvious to us that it is not fulfilling this responsibility. It is our feeling that social responsibility must be broader if it is to be effective - and the points of intervention changed to include such things as better preparation for adult roles and special services to children. Only then do we see social rights and responsibilities as complementary to individual rights and responsibilities -- and not excercised at the expense of the individual.

PROCESS

After formulating the contract with Dr. Press we began a review of legal literature, philosophy and history for perspective. We talked with attornies, a psychiatrist and two legislative dandidates.

We developed a rough statement of positions which fell rather naturally on a continuum from a very liberal to a very restrictive position and discussed them with Herbert Hansen who has acted as our faculty advisor and is also a member of the Board of Social Protection and of the Committee of Three.

We concurrently began a large scale review of social and psychological literature regarding the specific categories, the institutions of marriage and family, and of genetics. We explored emerging and changing cultural values about parenting with people from Zero Population Growth and Planned Parenthood.

By late October we had refined the positions and the research material into a "Preliminary Paper" which was presented to the Board of Social Protection with a request for specific direction in terms of the original informal contract. No decision was reached.

We shared our information and material with the Oregon Medical Association Legislative Committee as Dr. Press was hopeful of coordinated efforts with them and their concern

about the marriage statute. They have subsequently developed and defined their own proposal which reflects a different value base than ours.

We met a second time in December 1970 with the Board of Social Protection. Again no further clarification of the wishes of the Board. A further meeting was held in January and again no clear decision was reached by the Board. Although we have done further research which could be used in proposing legislation the Board's indecision has resulted in a mutual agreement that the contract has been fulfilled.

From the time of the original commission to the present our research has moved through three roughly discernable phases: (1) beginning with primarily legal data to (2) consideration of relevant social and psychological literature to (3) consideration of specific individual values culminating in behavior which often limits and restricts the objectivity of the type of data noted in the first two phases.

The data has increasingly reinforced us in the direction of the present recommendation. By October we had sufficient information and documentation to formulate the Preliminary Paper which remains the heart of our research. Further documentation in some of the areas since has increasingly reinforced our conviction of the validity of a refinement of Position One.

RECOMMENDATION

It is our recommendation that the mental and physical prerequisites specified in the Oregon Marriage Law be removed. Of the various positions and their variations discussed in the Preliminary Paper we recommend registration rather than licensing and the provision of pertinent related medical and social information and resources. We specifically advocate provision of adequate and expanded voluntary pre- as well as post-marital counseling. We urge development of broad and pervasive specific education as well as philosophical base for marriage both in the formalized school system and in the broader community.

We are cognizant that the cost to society is a significant factor. However, the possibility of infinite savings in terms of problem marriages and parenting and more successful and satisfying modes of living may well justify the expenditure.

APPENDIX A

Preliminary Paper

PRELIMINARY PAPER

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..we are only the technicians who translate the ideas of other people into legalease. But before we can try translating, we have to have something to translate furnished by people other than lawyers, ..either the people at large or the specialists in those fields who are supposed to have some..knowledge as to what is good or bad in the family field..We cannot say whether sterilization.. or divorce is good or bad, we can only give it the proper form.

Professor Max Rheinstein
University of Chicago,
School of Law
spoken at the Institute
of Family Law, 1959

In the request to develop a proposal for a revision for the Marriage Law in the State of Oregon we have only had the guideline of "enforceability". This allows a rather broad spectrum of possibilities. We have, therefore, developed the following continuum of positions and ask that we be given guidance in the direction to pursue. It is our plan that with the selection by the Board of Social Protection of one of these positions that we can refine and enlarge upon that position and provide appropriate background relevant to it for presentation to the 1971 Legislative Session.

POSITIONS

Position I

To marry a couple has only to register with the County Clerk or other designated public official their statement of marriage or obtain from a designated public official a license to marry.

A. With a time period ("waiting period") between applying for a registration certificate or license and its final filing.

B. With provision for voluntary counseling.

C. With provision for voluntary sterilization - at public cost if necessary.

Discussion:

Either registration or license procedure would comply with society's need to tabulate, regulate as to age, parental consent and offer figures to compare with divorce rates.

This is an enforceable requirement. The only violations of such a law would be "common law", bigamy, age violations, use of force or fraud and relationships of consanguinity.

Licensing implies meeting certain standards to receive the permission of the state to marry. It has traditionally implied public notice of the initition of marriage relationship through a ceremony. A possible benefit of retaining the licensing procedure is recognition of a minimum age requirement which must be met.

Registration as a recording of intent to marry would seem to us to satisfy the same purposes as licensing if the

arbitrary categories are dropped. Age of consent, for example, could be the one pre-requisite to registration of marriage.

Licensing has historically required a ceremony to sanctify or complete the marriage process. Registration would recognize differing values within our society yet allow a ceremony if the couple desired.

Such legislation releases the medical profession from sole initial responsibility for making judgments as to the "ability" to marry of individuals. We understand the opinion of the Attorney General (letter July 7, 1970 to Dr. Press) to mean that the ability to marry is tantamount to the "ability" to responsibly parent.

The rights of individuals to marry is protected and recognized.

> "All would agree that there must be some minimal legal regulation of marriage but that this regulation is not to be inconsistent with the conviction that marriage is and should remain the most intimate, personal, and legally unsupervised contract known to law...This consensus received a certain constitutional status when a unanimous Supreme Court, writing through Chief Justice Earl Warren in the Loving decision of June 12, 1967, stated: The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. The Loving decision ruled that the government, in the exercise of whatever power it might have with respect to the formation of a marriage, may exercise that power only to safeguard some public objective which is demonstrably more important than the diminution of the human freedom to marry a person of one's choice...
>
> ...The crucial principle for all thinking on the matter might be Chief Justice Warren's statement, in Loving, that: 'Marriage is one of the basic civil

> rights of man, fundamental to our very existence and survival.' If one starts with the primacy of each individual's freedom to marry, not a few of the statutory restrictions on the right to marry would be set aside...
>
> ...Although persons applying for a 'license' to marry may not feel any particular resentment at the fact that the state cannot really grant permission or a 'license' to exercise a fundamental human right, it would nonetheless be more appropriate to have a marriage registration act rather than a marriage license law."(Drinan, 1969)

A disadvantage would be the elimination of the identification of active venereal disease cases. We understand, however, that relatively few active cases are identified at the present time through the pre-marital certification process and that the processing cost to the State of Oregon is rather high. We also have been told that the Oregon Medical Association is seeking a change in this part of the code in terms of the high cost vs. the low case identification. (See the Section which discusses syphilis.) (1)

Another control which would be removed by the registration/license only concept is that of propogation by mentally retarded, mentally ill, etc. -- at least the <u>legal</u> propogation. Is it realistic to suggest that many persons of whatever mental or physical conditions do not and would not engage in sexual activities sans benefit of the license and ceremony?

Perhaps most critical, this position is possibly somewhat liberal and permissive to gain legislative support.

Variations of this position are noted. We suggest a "waiting period" provision might be a realistic and

constitutionally admissable limitation which might be included. It would require that those marrying have at least a few days to consider the implications of the act and would, perhaps, eliminate a few "impulsive" contracts.

There seems to be a movement for the concept of pre-marital counseling to cut down the divorce rate -- particularly among the late teens and early twenties. Marion County statistics appeared in The Statesman August 16, 1970, noting that nearly half of the 574 divorces in Marion County last year involved couples who had been married as teen-agers. Judge Joseph Felton, Department of Domestic Relations, believes, according to this article, that more pre-marital counseling for young people would help cut the divorce rate and advocates that the legislature provide measures requiring teen-agers to present a certificate from a qualified counselor prior to the time their marriage license is issued. We find, however, that when and where ver- pre-marital counseling is <u>required</u> that costs have been high and results negligible. (2)

We suggest that provision be made for <u>voluntary</u> pre-marital counseling -- available to all, not just to teen-agers. (3) The multi-responsibilities of marriage and child rearing, the vast personal and interpersonal adjustments of early marriage are as significant and difficult to older people as to teen-agers. Imposed and required counseling reaps resistance to acceptance of the counselor's goals. We suggest a pilot study project in one or two

counties during the next biennium providing voluntary counseling service to any contemplating marriage to determine the need, acceptance and effectiveness of such specific services.

We also suggest provision for voluntary sterilization -- at public expense if necessary:

> In terms of the current recognition of the population explosion and the need for a control of the birth rate -- but with recognition of individual rights.
>
> As of August 1, 1970, physicians in Oregon were notified by State Public Welfare that the agency would allow payment for medical procedures for sterilization, male or female, and for abortions within state statutes.
>
> There are, however, many Oregonians who are not on Welfare but cannot afford the costs of the above medical procedures. We suggest that they be made available to all. Such a provision logically parallels legalizing abortion as a societal recognition of the changing needs and values of society.

Position II

We suggest the registration/license concept of Position I plus continuing to require the blood test for identification of active venereal disease.

Discussion:

The discussion following Position I, except for that about venereal disease requirement being waived, applies as well as the following.

Requiring the blood test would maintain a direct attempt to control the venereal disease rate. We have, however, already commented on the high cost versus the low case identification ratio of the present system and

recommended use of the funds for expanding other educational and social tools in an attempt to control venereal disease -- especially in terms of the current soaring rate of veneral disease and the changing population effected.

Position III

As with the first two positions, registration/license concept with a designated public official with the possible variations of voluntary counseling, voluntary sterilization, and/or time or waiting period, but requiring a medical clearance with present limits as to mentally retarded, mentally ill and active venereal disease. We would provide a specific definition of mental retardation and mental illness. (See Appendix A.)

Discussion:

The present law does NOT define these categories. Enforcement is highly dependent on the individual interpretation by the doctor involved. This would be an attempt to provide specific guidelines.

We question, nonetheless, if there would in fact be more uniform enforcement and interpretation than of the present law. We have concern as to whether the family physician who has a personal knowledge of an individual might use this knowledge as a base for a more personal judgment than the doctor who does not know the person? Would this be more <u>enforceable</u> than the present statute?

Position IV

Retain the present law.

Discussion:

This law does identify and allow some societal control of some problem populations -- or at least allows society a feeling of well-being in that it feels it is taking great steps in the breeding of a better race. (Cook, 1950.)

It is not, according to the original request for this study, enforceable: It is not uniformly interpreted or practiced medically.

Position V

Provision of stricter marriage requirements. For example, compulsory pre-marital counseling or perhaps meeting with a screening board representing the medical, legal and social disciplines to evaluate the ability and readiness of the couple to assume marital and familial responsibility.

Discussion:

The counseling approach would allow opportunity to dispense appropriate social, legal, economic (budgeting) information so couples can be at least more knowledgable prior to marriage.

But would this be an enforceable provision? Will as many or even more couples marry out of state to avoid the requirement? Who would select the counselors, the content of the counseling experience and pay the counselor?

Would such a requirement in fact be productive? There is no real evidence that imposed counseling, as earlier noted, reaps success.

The multi-discipline screening board would, at least, broaden the decision making from a medical only base. Society has a stake in problem areas of marriage and family relationships far broader than these narrow physical ones. But again the question of enforceability must be raised as well as: Who would serve on such a board? What bases of judgments could be provided to insure uniformity of enforcement? Who would finance the cost of such an approach? Is such a restriction truly harmonious with the right to marry earlier cited in the Loving decision? (Drinan, 1969.)

FOOTNOTES

1. Georgia, District of Columbia, Minnesota, Maryland, South Carolina and the Virgin Islands do not have the venereal disease test requirement. We are corresponding with them for statistics and comment.

2. Adams reports an Iowa experiment of a 2½ year program of compulsory premarital counseling for teenagers which produced negative results. Fewer than one half of the parents or teenagers felt they had received any help. More significantly The Family Service Agency felt that many couples had reacted very negatively and the agency had become merely a police force.

3. In an attempt to offer premarital counseling an interagency effort is being made in Grand Junction, Colorado. This program is scheduled to go into operation later this month. It is anticipated that it will be repeated for a total of four times during the coming calendar year, each session to correspond with the peak seasons in marriages. The program is to cover a total of five sessions, distributed over a period of five weeks. Each session is to be devoted to a specific area of marriage, such as finances, sexual and interpersonal adjustment, and others. Each meeting will be divided into two sections, dealing with a speaker on the topic and followed by group sessions led by professional people.

LEGAL HISTORY AND TRENDS

The concept of the family as the basic unit of society has been a part of every culture. And every culture has developed rules — both formal and informal — which have limited the freedom of the individual and thus protected the welfare of the larger group. Marriage laws have been such rules, ways of assuring mutual obligations of the marital partners in regard to such matters as child-rearing and property rights.

The American family is governed by rules within the English tradition and American family law cannot be seen apart from this tradition. English law — common law, statutory law and judicial decision — can be seen to form the basis of many of the stipulations of our present marriage law and a brief history is necessary to see the law in perspective.

Common law was the total system of English justice through the Fourteenth Century. Theoretically it is the customs and traditions of the people as defined (<u>not created</u>) by the courts. (Pound, 1921) Over the centuries common law became ossified — old customs became inflexible legal rules of conduct — and common law decisions were then supplemented by "equity jurisdiction" or the defining of conduct in terms of "good conscience." (Clark, 1957) Judicial decision then came to include both of these traditions. The development of a parliamentary body added the dimension of statutory law. All three areas continue to overlap and change in one area

demands adjustment in the whole legal system.

The American colonies were bound by English law and following the American Revolution, the various states adopted constitutions, and common law not in derogation of these constitutions, as the basis of their government. Oregon marriage law shows many of the inconsistancies inherent in this heritage. For instance, the concepts of void marriage — a null marriage — and voidable marriage — a marriage which can be repudiated by a marital partner and which is for practical purposes neither null nor valid — is a product of an early dispute and compromise between ecclesiastic and secular courts in England and has been seen by some to be unworkable and certainly confusing today. (Drinnan, 1969) States differ in what they today define as void and voidable and many of the categories, such as non-age, mental capacity and physical capacity, come from the customs of early England and have limitations in their application to contemporary situations.[1] One of the categories of a void marriage in Oregon is degree of relationship (consanguinity), an outgrowth of the Church's ideas of improper marriage in the inbred Medieval community; such a legal stipulation does not allow flexibility in an age when a more realistic genetic decision could be made on an individual level.

Another instance of an inconsistancy is the current concept of licensing marriage. This was England's answer to "secret marriages" (Hardwicke Act, 1753). Privately said vows had raised significant questions about illegitimacy and

property rights. Centralized government had been too weak to make registration effective and licensing with a public ceremony was considered the necessary alternative.

While much that is seemingly unnecessary has been perpetuated, law has also continued to evolve in many areas which have paralleled social trends. In America, early family law emphasized alienation of affection, breach of promise, etc. This gave way by mid-Nineteenth Century to increased emphasis on the rights of women and children, and consequently to legislation such as divorce law, as well as broader social protections. New theories of biological and social science stressed inheritability of insanity and criminality, and states passed laws limiting the right to marry for such groups.[2] The idea of marriage as an act implying responsibility to society was stated in the 1888 Maynard-Hill decision (125 US 190, 205 1888) in which marriage was considered one contract in which the state had the right to intercede to protect the general welfare. Interestingly, the law we are now considering seems to be an attempt to use categories which might otherwise make a marriage voidable in an attempt to prevent marriages of persons who will "..procreate children who could themselves become burdens upon society." (July 7, 1970 letter of the Attorney General to Dr. Edw. Press)

Not only family law but law in general seems to have paralleled broad social trends. In his five volume work on jurisprudence, Roscoe Pound sees common law and equity law as maturing and making a "..permanent contribution [in the]

idea of individual legal rights." He sees beyond this a stage of "socialization of law" in which there is "..increasing recognition of groups.." (Pound, Vol. I, 1959) This latter seems to describe the social legislation of the late Nineteenth and Twentieth Centuries noted above.

At this point, the law appears (through judicial decision) to be attempting to more narrowly define the boundaries of acceptable social legislation. Probably the best example of this can be seen in two Supreme Court decisions which show a changing approach to legislation to protect the social welfare. In 1942, in Skinner v. Oklahoma, a compulsory sterilization law for "habitual criminals" was declared unconstitutional. However, the basis was that the statute lacked procedural due process of law (whether the procedure insured his rights, i.e., adequacy of notice and hearing) not substantive due process (whether the liberty is important in our society or whether the process was an imposition on the individual). (Hastie, 1956) In other words, the defect was lack of a hearing, not whether compulsory sterilization was just or justifiable. More recently, in Loving v. Virginia (388 US 1 1967), the Supreme Court found a law against miscegenous marriage unconstitutional on substantive grounds:

> To deny this fundamental freedom on so insupportable a basis as racial classification..so directly subversive to the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law. (italics mine)

In commenting on the Loving decision, one author points out that it "..provides a rationale for questioning state

marriage statutes that may not be justified on sound social or moral principles and are supported only by custom and prejudice." (Foster, 1968)

It would seem that the states have a responsibility to consider what sound social principles are. Judicial decision demands a "supportable basis" and state laws should be reconsidered. We will now turn to discussion of social science "fact" to see what can be supported.

FOOTNOTES

[1]For instance, non-age was much more important when children were legally chattels; mental incapacity in common law gave the right to invalidate marriage to the privileged party, i.e., the insane party (Harper, 1962) and has nothing to do with limiting the right of marriage to those who can provide responsible parenting; physical capacity to sexually consummate marriage implies the Catholic Church's idea of marriage as primarily for procreation and does not take contemporary population explosion problems into account.

[2]Drinnan found in 1968 that 35 states still have laws limiting the right to marry to classes which imply inheritable tendencies.

SYPHILIS

A review of the literature concerning syphilis, as a social problem, reveals that much of the current knowledge and practice in this area is based on weak and often unsubstantiated basis. Casual and often unprovable assumptions are given as premises rather than sound scientific knowledge.

Although it is acknowledged that continuing high rates of syphilis infections are occurring, there is little evidence to substantiate premarital requirements as an effective means of detection and control. There is however, evidence to indicate the contrary. The changing population of those infected, namely teen-agers, prostitutes, and homosexuals, along with the low rates of "discovery" from state required premarital testing indicates the unrealistic and inappropiate nature of such an approach.

Syphilis, once thought to be a defeated communicable disease (mid 1950's), has made a devastating comeback that again places it near the top of communicable diseases of grave concern.

The new rise has been attributed to significant higher proportions of cases effecting three catagories of people: teen-agers, prostitutes, and homosexuals.

Changes in social enviornment, such as industrialization, increase and/or new patterns in homosexuality and

prostitution are partly responsible for the rise of infection in these categories. The increasing mobility of young people, breaking of old family patterns and old ways, has resulted in a subsequent breaking of traditional sexual taboos.

> "Old cultural patterns have given way to mass conformity. Scientific, religious, and social concepts have changed with often bewildering rapidity. Adolescents are frequently left with no clearly defined ethical values- no rules of behavior. In a mobile society, their relationships are often of a transient nature from which amoral attitudes and casual sexual encounters can easily grow." (McCary, 1967).

Studies conducted by Public Health Agencies in connection with youth, show that teen-agers infected come from families lacking in wholesome interpersonal relations, and a serious lack of realistic knowledge about sexual activity and venereal idsease. Religious conflict and guilt over their sexual activities was common, and stated as partial explanation of their infections not coming to attention of treating clinics

Eradication, or control of syphilis in these catagories is difficult, due to the nature of the circumstances of each. The teen-ager fears parents gaining knowledge of their sexual behavior, and the prostitute and homosexual fear legal repercussions should their situation come to the attention of the authorities.

When examining the current marital laws of the United States is is noted that the only premarital requirement added to American law during the twentieth century is the

test for venereal disease. Because of advances in medical science, and the changing populations effected, it has been questioned whether the enormous expenses connected with this type of requirement can be justified at the present time.

Under Oregon's compulsory premarital syphilis tes t, 15,728 individuals were tested in private labs, and 19,975 were tested through the state facilities in 1969. Out of these tests 100 were found to be reactive and 96 weakly reactive. Number of syphilis cases brought to treatment through follow-up of the premarital tests were a total of 5. The total cost to the state, at 70¢ per test, was $13,982.50.

In a special report to the House of Representives in the state of Georgia in 1965, it was recommended by the committee to study the Marriage Laws of the state, to repeal the requirement of a premarital blood test for syphilis. This was based on the fact that only one percent to the tests resulted in the discovery of infectious syphilis. This recommendation was made in opposition to statements made by; The Ministerial Assio., State Board of Health, Medical Assio. of Georgia, Federation of Women's Clubs, Georgia Congress of Parents and Teachers, and the Georgia Dept. of Public Health. In their statements, the State Board of Health stated, "that even though the premarital blood test is relatively ineffective in uncovering cases of contagious syphilis, the State Board of Public Health

would like it to remain as a prerequisite to the issuance of a marriage liscense,for it serves as a very effective educational tool."

It is evident that syphilis is a grave social problem that is much in need of our attention and energies. It appears logical however, that our efforts and funds should be directed towards more effective means of detection and control that the tradition of premarital examination.

MENTAL RETARDATION
(Feeblemindedness)

It is assumed by many that because the mentally retarded do not learn as easily as the rest of us, they do not share in feelings of love, our needs for recognition and dignity or our desires for intimacy and meaningfulness. Historically mental retardation has been viewed for the most part as a static unchanging incurable condition. Although there were some brilliant thinkers and gifted practitioners who envisioned the potentials of treatment for the retarded, the idea "once retarded always retarded" led over the years to the general practice of providing humane treatment with little hope that the afflicted individuals could ever participate in the competitive world of civic responsibility. (Dunn, 1965.) It was a widely held belief that mental retardation was inherited, that mental growth stopped in adolescence and that since intelligence was a general problem-solving behavior, then if one was retarded at all, one was retarded in each specific area of human functioning.

Segregation was widely used in the early part of this century for the sole purpose of preventing reproduction. Young women were sent to institutions established especially for females of child-bearing age. When their reproductive years were past they were released to the community. (Dunn, 1965.)

Since that time we have, of course, become aware that mental retardation is not a single entity but rather a com-

plex problem resulting from many causes and having many ramifications. There are at least three areas in whibh the problem must be considered: individual factors, social factors, and cultural factors. The past twenty years have seen our awakening to the realization of our obligations. We know today that the vast majority of the retarded can be successfully integrated into the mainstream of our nation's life. Governments have interested themselves, recognizing that mentally retarded are entitled, according to their capabilities and needs, to the same privileges, opportunities and protection as other citizens.

It is now quite clearly spelled out that society's responsibility is to provide the mentally retarded with: (1) the opportunity for self-fulfillment; (2) the preservation of personal dignity and protection of rights; (3) the opportunity to participate and to contribute; and (4) the opportunity to attain happiness. There is also increasing recognition that he is capable of maintaining a a reasonably happy marriage. (Hilliard, 1956.) However, before recommending marriage it should be noted that marriage for the "weak-minded" is prohibited in Iowa, Pennsylvania, and South Dakota, and is probably illegal in fifteen other states: Delaware, Indiana, Kansas, Maine, Minnesota, Missouri, Montana, New Hampshire, New Jersey, North Carolina, North Dakota, Vermont, Virginia, Washington and Wisconsin. (Strubing, 1960.) The uncertainty is due to the interpretation which may be given to the different wording of the statutes.

in each state.

Definitions and trends:

The many definitions of mental deficiency (retardation) (1) reflect different concerns of their authors with respect to causes and/or manifestations, organic impairment, arrested development, social inadequacy, level of intelligence, and even cultural factors. While there has been a continuous tradition of biological definitions of mental deficiency, other definitions have existed as well. Legal definitions have been prominent in England and in the United States. Many states have legal definitions of mental deficiency (often established in relation to sterilization acts). As the concept of mental deficiency became broader, the social problems connected with the condition became recognized and the general attitude toward the condition changed. Some of the definitions adopted by state legislatures are in terms of I.Q. Sarason in his writings on mental deficiency has taken strong exception to the tendency to construe the retarded individual from the standpoint of the I.Q. score. He recommends that while intelligence tests may be adequate, even excellent, predictors of scholastic achievement, they are poor indicators of non-test or non-intellectual activity. (Sarason, 1959.) On the other hand, Mac Andrew and Edgerton found that the scores of a sample group of retardates were highly stable indicators of judged capacity for competent conduct. (MacAndrew, et al, 1964.)

Mental retardation can be defined as significantly sub-average intellectual functioning, manifested during the development period and associated with distinct impairment in adaptive behavior of the social performance in day-to-day living normally expected from a person of a particular age by the community of which he is part. Thus, if a person who scores in the I.Q. range generally accepted as retarded, but who functions well in his particular community environment, is not considered retarded. This makes it impossible to determine definitely who are the mentally retarded. (Heller, 1968.)

FOOTNOTE

(1) Terminology:
The terms "mentally deficient" and "mentally retarded" have been used synonomously as well as in relationship to dochotomic grouping. The professional organization AAMD both in title and organization of its journal has used the term deficiency and the Official Manual defines deficiency as a synonym for retardation. The organization of a symposium of the Association for Research in Nervous and Mental Diseases and many others have used the term interchangeably. Sarasen argued for separate definitions: mental deficiency would apply to cases where organic factors were found to be the cause of the condition; mental retardation would be used for cases where organic signs are not present but where there is reason to believe that social factors are operating. If the attempt to distinguish between major types of deficiency should be abandoned there would be no need to differentiate between the two as to definition. There are indicators that retardation is preferred over deficiency because of less harsh implications. Retardation could be rejected because it suggests a delay in development rather than a deficiency in attainment. (Clausen, 1967.)

MENTAL ILLNESS

Mental illness is as old as the history of man. Prehistoric man sometimes treated disturbances of the mind by drilling holes in the skull to let the evil spirits escape. The people of ancient Greece believed that mental illness was caused by breathing diseased air. During the Middle Ages people still believed that mentally ill persons were possessed by devils. As late as the 1600's the mentally ill were still tortured or put to death as witches or chained in dungeons. By the early 1800's physicians began to recognize mental illness as a form of illness, and it became the subject of medical research and treatment. During the late 1800's Sigmund Freud developed his concepts of how unconscious forces can disrupt mental health. Early in the 1900's Clifford W. Beers, once a mental patient, helped establish the committee which became the National Association for Mental Health. World War II brought additional emphasis on the treatment of mental illness. The 1950's brought intensive research into the relationship of body chemistry and mental disorders. The discovery of the benefits of tranquilizing drugs aided psychiatrists in treating many so-called "hopeless" patients and opened new channels for research and investigation. One result of this research is that the notion that a mentally ill person is an exception

is gone forever. It is now accepted that most people have some degree of mental illness at some time and many of them have a degree of mental illness most of the time. (Menninger, 1967.) This really should not seem surprising for most of us have a physical illness some of the time and some of us most of the time.

To intelligently discuss mental illness a variety of facts is needed. What is the extent of the problem? How many are affected? What are the characteristics of the mentally ill as a group and as compared to the rest of the population with respect to such factors as age, sex, race, and occupation? How does mental illness develop in the individual and what factors explain its distribution in the population? What are the psychological, physiological, and socio-economic factors that may be related to cause and course of the illness? There exists a wide gap between the facts that we have now and those that we need to have. To make any kind of statement that relates to the number of mentally ill persons we need find a definition of whom we are to count -- who are the mentally ill? Second, we need techniques for detecting cases, and for mental disorders this is not an easy task. We are not dealing with a single entity but with a broad variety of disorders characterized generally by abnormal patterns of behavior. Some are due to known organic etiological factors; others are of psychogenic origin or without clearly defined physical cause. It should

be noted that a significant number of people question the validity of the medical models of mental illness.

Although mental disorders are sometimes considered as chronic illnesses, many have acute and reversible phases. Thus in addition to defining types of abnormal behavior, we must also specify whether we are looking for individuals who have exhibited such behavior at any time in their lives or only during a specified period of time. Even if it could be agreed upon whom to count, there still remains the problem of devising standard methods for case finding and diagnosis needed for separating the population into those who have a mental disorder and those who do not. Despite difficulties of definition and case finding, estimates have been made of the extent of the problem of mental disorders. With all the shortcomings of these data, it is still apparent that they point to a single fact -- mental disorders are a major cause of illness and disability in the nation. A primary stumbling block in attempting to determine the scope of mental disorders is definition, and a primary stumbling block to define such abnormal behavior is to define adequately and acceptably what is normalcy. This is a task of almost insurmountable complexity. It is of equal importance to consider the perspective and the value system of the person or persons who is attempting to supply the definition of "normal".

In the consideration of mental illness in relation to marriage (as well as other social factors) is the significance

of an increasing awareness that mental illness is not particularly linked to social class. As it is acknowledged as affecting the middle class, more positive sanctions for programming become evident. Mental illness affecting this class is often referred to as neurotic, while a member of the lower class so afflicted is considered psychotic. Medical definitions take precedence over the legal, and the afflicted individual is perceived as ill. Defining mental illness as medical places legal and moralistic approaches in perspective.

Marriage restriction laws are forms of negative eugenics which seem "aimed at purifying the American population of its allegedly defective germ-plasm" and hence improving the social as well as biological quality of the American People. (Paul, 1967.) Such standards as whether a marriage would result in the birth of children with inherited tendencies to mental illness or who would become neglected or dependent because of mental illness, leave much to the imagination and discretion of the physician involved. These standards should be constantly scrutinized and re-assessed in terms of the right of the individual to question or contradict them.

For centuries, as has been noted, it was the accepted belief that mental illness led regularly to mental disintegration and implied an irretrievable loss. Today we know this is absurd. The great majority of mental illnesses reveal themselves as episodes and disappear, some in a matter of

days, others often weeks or months. Some persons, even with the most intensive treatment, remain ill for years or for a lifetime, but these constitute a very small percentage. These generalities imply that no "natural course" of mental illness exists. Being an aspect and phase of a human life, mental illness fluctuates and varies with the ebb and flow of living. (Menninger, 1967)

There remains a great deal of controversy as to the relative importance of heredity and environmental factors, such as birth injuries, early experiences, emotional shocks, glandular disorders or general infections in the causation of mental disorders. If one accepts the gene theory, then one must accept that it still remains an impossibility to predict genetically. However, the gene theory has never been proved. Setting aside the test of mental capacity to contract a valid marriage would be a recognition that the laying down of a general test is futile and that every individual has to be scrutinized and assayed. (Dittman, 1957.)

DRUG USAGE

A review of the literature concerning drugs and drug abuse shows that this topic has become a controversial one resulting in little progress being made in effectively dealing with them.

The main reason for failure to come to grips with this problem is lack of knowledge about its causes, effects and aspects of rehabilitation. It is not clear as to what constitutes a drug, nor what constitutes a drug addict. The scope of the problem and the population affected appears based on estimates, rather than scientific data (1) (2) (3) (4).

The scope of the problem is difficult to determine. There are indications, however, of the magnitude of the problem. It is estimated that the retail value of marijuana entering the U. S. from Mexico is in excess of $100 million annually. Officials in Washington estimate that nearly one half of all amphetamines produced in legal laboratories reach the back market. The percentage is believed to be somewhat smaller for the barbituates.

Statistics on the abuse of amphetamines and barbituates are difficult to gather because their widest use seems to be in a segment of society that does not otherwise break the law or associate with criminal elements.

Much attention is given to Youth in regard to the drug problem since this is where the greatest increases are being detected. But then again, it must be pointed out that

young people comprise the group where drug abuse is most likely to be recognized because of Youth activities. It is however, strongly indicated that drug abuse is also showing significant increase among adults although this is more difficult to substantiate.

In attempting to gain insight, some authorities have blamed the "generation gap" for the current use of drugs among young people. They state that the shift from rural America where youth played a very important part, to Urban America where youth's role has become confused is the basic problem. However, this again is speculation.

Others speculate that youth will respond favorably if given meaningful responsibilities that lead to some identifiable sense of purpose.

Dr. Robert Peterson, a psychologist with the National Institute of Mental Health, says: one of the real problems, of course, is that drug abuse is an "emotionally-laden" issue, which makes it difficult for parents and young people to deal with. (Blue Cross, 1969.)

In the same vein it is felt that parents because of ignorance are scared. They do not understand drugs as they have no similar experience in their own background. It is this lack of information which results in parents and public reaction to drug usage on an emotional level. It is felt that we will not be able to view the area of concern in reality terms.

To overcome the emotional reactions some authorities state that knowledge and education is needed that must focus not only on medical aspects but on sociological and psychological aspects as well, especially as they relate to motivation for using drugs.

Drug use breeds on certain forms of human misery. The major problem posed by addiction is not at all the problem of getting people to stay away from drugs. It is the problem of getting at the sources of such misery. Until we begin to effectively cope with them we will not have begun to touch on the real problem of addiction with respect to marriage or any other social factor.

FOOTNOTES

(1) In Goodman and Gilman's textbook of Pharmacoloby (Goodman et al, 1941), the term "drugs" is defined as "any chemical agent which affects live protoplasm". They comment that few substances would escape inclusion by this definition, but they make no attempt at further definition. It would seem then that terms such as "drug user" and "drug addict" are popular misuses of the term.

The term "drug" is avoided for a great variety of products pruchased openly in drug stores (vitamins, analgesics, some non-prescription anti-biotics, etc.) In short, what the physician terms a drug, the layman calls a medicine or a remedy.

A clear exception is the term "wonder-drug" (penicillin, aureomycin, etc.). It seems that "drug" is acceptable and common where the use of the substance is novel or "wonderful".

It may also be noted that the term "drug user" is generally perjorative. When an elderly person with chronic pain uses drugs, he is not regarded as a drug user, nor are those who use alcohol, coffee, tea, tobacco, insulin, vitamin preparations, or those who use "wonder drugs".

The term "drug user" is applied only to those who use substances in a way regarded negatively and critically. The use of so undisciplined a word warrants caution.

(2) Drug Addiction is a state of periodic or chronic intoxication produced by repeated consumption of a drug (natural or synthetic). Its characteristics include: (1) an overpowering desire or need to continue taking the drug and to obtain it by any means; (2) a tendency to increase the dose; (3) a psychic and often physical dependence on the effects of the drug; (4) detrimental effect on the individual and on society.

(3) Addiction: A bio-physical need or dependence for the use of a drug or chemical substance to satisfy adequate cellular function. Lack of these substances creates painful physical symptoms.

(4) Chein, et al, distinguish between users and addicts

and state that a person with a history of drug use and psychological dependence on the drug might conceivably not be an addict. The factors responsible for drug use might be different from the factors responsible for addiction. They describe three dimensions of addiction:

1. Presence versus absence of some significant degree of physiological dependence
2. Presence versus absence of some significant degree of total personal involvement with narcotics
3. Presence versus absence of some significant degree of craving.

(Chein, 1968.)

ALCOHOLISM

Chronic alcoholism has become one of the great public health problems of the world. It is currently rated among the top four of the United States.

Attempts to deal with this problem in the United States has not been productive. It has been stated that perhaps the most important problems is the failure to develop rational public policies on the use, sale, and distribution of alcoholic beverages. Blamed for this is clashes between various interest groups where conflicts between "wet" and "dry" idealogies have been so energy-consuming that a detached examination of American drinking patterns and systems of control and intervention has not been possible. Conclusions about alcohol and drinking frequently seem to stem directly from the 19th century philosophy of the American Temperance Movement, which held that all drinking led to drunkeness, and that by reducing the availability of the beverages, was the key to control.

The lack of agreement about what amount of drinking is acceptable has contributed to the wide spread neglect of problem drinking. There has also been confusion regarding the nature of alcoholism, and who should assume the responsibility to deal with it.

Historically, alcoholism was believed to be a result of moral or personal weakness. Early attempts to eradicate

this "foulness" from society was punishment. It was believed that if the punishment was severe enough the person afflicted would be forced to "mend his ways." It was the failure of this method that lead to the philosophy of making alcoholic beverages unatainable. The result of the latter was the 18th amendment to the Constitution of the United States.

Emerging from the experiences of the Prohibition period were new patterns of alcoholic consumption. During the Prohibition, it became fashionable for both men and women to drink in public. It also became quite fashionable to attend speak-easies, and later bars selling alcoholic beverages.

However, new concepts about alcoholism did not evolve along with the new acceptance of drinking. It was still felt that responsible and respectable people did not become alcoholics.

The "new approach" to alcoholism, viewing it as an illness, began to emerge during the 1940's. Community groups composed of alcoholics concerned with their problems began to emerge. These groups later unified into what is known today as Alcoholics Anonomous. Articles by medical and science writers dealing with the new concept began to appear. During the 1940's and 1950's, various organizations appeared based on this premise. By 1959 this concept had been accepted by many Americans. However, many people questioned this

premise, regarding it as an excuse for lack of personal control on the part of the alcoholic. Though a lessening of the stigma attached to alcoholism became more noticeable, the controversy continues.

The shift in emphasis from that of personality weakness to the concept of illness became noticable in 1955 when an attempt was made to legislate relief for alcoholics (H.R. 7225) which proposed that alcoholism be recognized among the totally and permanently disabling diseases meriting disability allowances. The criticism that kept this bill from passage implied that it was too fatalistic. It was pointed out that under the right circumstances, the alcoholic was amenable to change that lead to a more meaningful life.

The current evolving philosophy reflects this dual philosophy of alcoholism. It is viewed as an illness, yet it is felt that with the proper resources available, along with a more comprehensive view of alcoholism, the alcoholic is treatable.

The major handicap in overcoming alcoholism at the current time appears to be the great lag of much-needed information concerning it. Past attempts to clarify the problem have been criticized for not viewing the problem in a comprehensive manner. It is felt that only when we are able to understand the phenomenon in all areas, and how the factors interact to cause the current problem, will we make significant gains in attempting to deal with this.

The need for such information was recognized on a national level in 1966 when President Lyndon B. Johnson said, in his message to Congress on health and education:

> The alcoholic suffers from a disease which will yield eventually to scientific research and adequate treatment. Even with the present limited state of our knowledge, much can be done to reduce the untold suffering and uncounted waste caused by this affliction.
>
> I have instructed the Secretary of Health, Education and Welfare to appoint an Advisory Committee on Alcoholism; establish in the Public Health Service a center for research on the cause, prevention, control and treatment of alcoholism; develop an education program in order to foster public understanding based on scientific fact; and work with public and private agencies on the State and local level to include this disease in comprehensive health programs. (Smithers Foundation, Understanding Alcoholism, 1968)

STERILIZATION

Early demonstrations in genetics led to a highly successful activity in agriculture and animal husbandry called selective breeding. Brilliant successes in producing highly specialized stocks were widely recognized. There was a suggestive parallel between this experience and the existence of whole superior families. From this a handful of people in the U.S. made a completely erroneous inductive leap and promulgated, fifteen years before Hitler, a theory of building a "Master Race." Seventeen states passed sterilization laws between 1919 and 1937. The segregationist character of the 1924 Immigration Act derived directly from this same group. The theory may be thought of as "negative eugenics" in which people showing an undesireable trait are to be prevented from reproducing. This will presumably eliminate the trait. Modern genetics, of course, underscores the absurdity of the idea. Sociologically it is in the main repugnant and in practice it is a ridiculous delusion. This collectively compounded error became the second propulsive force in establishing the pre-marital examination. The Oregon form still has a long list of maladies to which the patient is supposed to admit if present and his statement must be notarized. It is then passed to the State Board of Protection. This is the "classic" inquiry of negative eugenics, into the occurence of feeble-mindedness, drug addiction, alcoholism, epilepsy, etc.

Thus, a rather general set of laws exists to provide a pre-marital examination to find cases of syphilis and lesser venereal diseases, and to identify individuals suffering from an arbitrarily selected list of diseases, presumably either to prevent their marriageor possibly even to sterilize them.

With the greater awareness of the retardate's ability to assume a useful role in the community has come a greater understanding of his need to live as normal and as full a life as possible. Constant supervision may limit his social relationships to a frustrating degree. Constant supervision is also a burden to the parents which may lead to resentment and be reflected in their attitude toward the child so that he may experience greater rejection. While sterilization will not eliminate the need for supervision, it will lessen the parents' anxiety regarding possible pregnancy and this reduced anxiety will usually improve parent-child relationships. At present there is a recognition of the normal sexual needs of the retarded individual and a realization that in some cases the retardate is capable of sustaining a reasonable, stable, and happy marriage and that marriage may be beneficial to him.

There is little in the literature regarding the degree of success with which the mental defective can practice temporary methods of birth control. Because of the growing realization that the retarded should lead a full and normal life; because of the concern that he should not

be overburdened by children if he does not have the competency to rear them properly; and because of the greater acceptance of surgical birth control there should be a re-evaluation on an individual voluntary basis.

What factors limit the use of sterilization? The objections most often encountered are that sterilization might encourage promiscuity, that persons might be sterilized for insufficient reasons, or there might be psychological ill-effects. In view of the abuse to which such regulation is subject (Nazi Germany as an example), the unsettled political conditions of our time, and the paucity of evidence regarding its effectiveness, this program does not recommend itself for mental disease prevention, at least on an involuntary basis. However, we feel the individual's rights are best protected if such a step is a voluntary one.

GENERAL DISCUSSION

In considering the possibility of modifying the present Oregon Law regarding marriage we are in fact exploring and evaluating the significance and meaning of both Marriage and Family in today's world. We are, additionally, discussing whether the law is a reflection of society's values today or of the recent past -- or rather an attempt to control by the society of the society or of its parts.

The present code encumbers the family doctor with a terribly significant kind of decision about the future of the individual. He is asked to evaluate in what is likely a brief contact the potential of the individual to be responsible as a marriage partner and potentially as a parent. The implications of his decision are far broader than medical only: they surely are equally legal and social.

The present code defines explicitly one of the specific population segments on which it places limits: those with active and communicable venereal disease. As earlier noted there is feeling and opinion that the results do not justify the cost of identifying these cases in terms of the marriage but the identification of active venereal disease is seen to be pertinent at the time of early pregnancy.

The other population segments identified as those on whom limits and restrictions as to the right to marry shall be placed are not defined, described, but merely labeled.

The concern for "Enforceability" is based on the inability for all doctors in one state to automatically know and agree on what those labels mean and to uniformly interpret and enforce them. Personal philosophy, kind of training or experience, pressure from (or lack of pressure from) the individual's family dramatically vary in each process of decision making. Reviewing the literature there is no consistent functional definition of any of the categories on which there is concensus within any one profession -- much less among professions. In fact, we see rather a large body of belief and tradition and little proved or provable fact. Major decisions are thus made daily which may well be challenged in terms of human and/or legal rights of the individual.

Additionally, we know of no evidence that absolutely or even strongly links the divorce rate with, for example, I.Q., Neither is there solid evidence in the literature that a "mildly retarded" person will -- or is even more likely to -- produce retarded children. There are studies in process to better identify causes of retardation as well as one study to test the effects of long term programmed enrichment contacts with the children of retarded parents and early results indicate that the children are not retarded. We see a trend to view and evaluate human functioning in a more holistic way than, for example, categorizing a person as feebleminded because he scores at a given place on a culturally skewed academic-skills oriented I.Q. test. Is

it more reasonable to scrutinize the person in terms of how he functions in several areas, whether his family is supportive emotionally, whether he might have developed social skills which more than compensate for his learning handicap? An institutionalized or emotionally neglected "feebleminded" individual with no supportive family involvement might well be less able to manage the responsibilities of marriage and child rearing than his counterpart with an identical I.Q. who is cherished and respected in his family and community.

If we do not have solid evidence the "feebleminded" persons who are likely to want to marry will definitely produce retarded or neglected children can we morally or legally deny the right to marry to them?

Equally, it seems incongruous to restrict the right to marry to "mentally ill", "chronic alcoholics", and "drug addicts" with no definition of any of these categories and some exploration of whether, in fact, the individuals can function as spouses and parents. With no solid evidence that they cannot has the state the constitutional right to deny marriage? Would it be as valid to be concerned with the population <u>likely</u> to fall into one of these categories at some point in their history and be just as "right"?

If, however, the state has this right and responsibility to select groups of people with social, physical, emotional and intellectual disabilities and place such limits on them we suggest consideration be given of broadening the categories

to be scrutinized and judged. There may be just as much validity to place an age maximum on the right to marry as to place a minimum as the individual may be or become senile. Neurotics are supposedly not included in the "mentally ill" category and yet neurotics can be proved to be poor marriage risks and either potential psychotics or potentially damaging to the mental health of progeny. Perhaps the individual who has been found guilty of a felony or is identified as an "habitual criminal" can be viewed as a poor marriage risk as well as a poor parental figure potential. There is much public concern about the value systems of women who produce one or more illegitimate children. Perhaps individuals -- female or male -- who have produced two illegitimate children can be denied the right to marry. Some states have concern about the sense of personal responsibility of those who receive Public Assistance. Perhaps those who have been on Welfare, for example, for a two year period of time should be denied the right to marry. Several states have a similar concern about the epileptic. Qualifications could be established in terms of persons with chronic physical disease or damage, the level of education, proof of employ-ability and ability to support a family. Enforced use of contraceptive devices might be a consideration.

It is our position, however, that to place greater restrictions on the right to marry does not seem to meet the request for "enforceability" nor would we suspect it would stand the scrutiny of constitutional challenge in

view of the Loving decision. Society has not only a right but a responsibility to concern for the number and "quality" of its progeny but must this not be in the framework of the basic human and legal rights of the individual? Perhaps far more in the way of improving the "quality" of the coming generations can in fact be accomplished through greatly improved and increased educational tools and voluntary services in terms of these areas of concern. The lack of hard proved facts as to the very states of "mental illness" etc. as well as to what can be inherited (and cannot) and what predictably will happen because a child's environment included an alcoholic parent places back on society a responsibility to research the validity of widely accepted beliefs before denying any of its members the right to marry and to produce children.

APPENDIX A

The Diagnostic and Statistical Manual of Mental Disorders published by the American Psychiatric Association delineates definitional descriptions of significance to this.

They state "Mental retardation refers to subnormal general intellectual functioning which originates during the developmental period and is associated with impairment of either learning and social adjustment or maturation, or both..." They define the usual I.Q. score scales and comment that this cannot be the only criterion used in making a diagnosis of mental retardation or in evaluating its severity. They recommend additionally considering and weighing the developmental history and present functioning academic and vocational, motor skills, social and emotional maturity. These necessarily are subjective judgments.

Similarly they describe mental states listing major categories of Organic Brain Syndromes, Psychoses not attributed to physical conditions listed previously, Neurosis, Personality Disorders and certain other non-psychotic mental disorders not mentioned previously, Psychophysiologic disorders, Special Symptoms, Transient Situational Disturbances, Behavior Disorders of Childhood and Adolescence, and Condtions without manifest Psychiatric Disorder and Non-Specific Conditions. There appears to be in this a continuum with few clues as to discreet states. At what point do all doctors uniformly agree a person is, for any legal or moral purpose, not mentally able to be responsible for himself and his decisions? Is, in fact, the person on whose emotional state they all can agree even interested in or likely to be imminently interested in entering a marriage contract? If and when his emotional state changes at what point can his legal and human rights again be restored?

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