STERILIZATION: A CONTINUING CONTROVERSY

I

INTRODUCTION: A CASE OF NON-SUPPORT

On October 3, 1963, Miguel Vega Andrade was charged with having violated Section #270 of the California Penal Code.[1] On December 2nd, Andrade entered a plea of guilty and applied for probation. The case was called for hearing in the Municipal Court of Pasadena before Judge Joseph A. Sprankle, Jr. on January 6, 1964. Ten days later, Andrade was sterile.

Andrade's marriage had ended in divorce and his former wife had filed a complaint charging him with failing to support their four children. At the time of this action Andrade was living with another woman who had borne him one illegitimate child. Andrade's earnings were meager and the additional expense of this child was part of the reason he had fallen behind in support payments. Judge Sprankle advised Andrade in chambers (only Andrade, his attorney, and Judge Sprankle were present) that he would consent to probation if two conditions were fulfilled. These conditions were: (1) that Andrade marry the woman with whom he was then living; (2) that Andrade submit to an operation for the prevention of procreation. The judge allegedly told the defendant that: . . . "you are either to bring in the certificate of marriage and a letter from the doctor, or you will go to jail."[2] A successful vasectomy was performed on Andrade on January 16, 1964; he was married on January 24th.

Subsequently, Andrade applied for a writ of habeas corpus to the California Supreme Court. The petition asked that the court strike that condition of probation which required sterilization and that it be decreed that petitioner be authorized to seek further surgery to undo the vasectomy. On November 10, 1964, the state Supreme Court denied, without opinion, the relief sought.[3] On February 5, 1965, petition for certiorari was filed with the United States Supreme Court and on the following March 29th that petition was denied, also without opinion.[4]

Even more recently the sterilization controversy flared anew. On April 14, 1966, Mrs. Nancy Hernandez was among sixteen persons arrested in

---

[1] California Penal Code §270 provides in part: "A father of either a legitimate or illegitimate minor child who wilfully omits without lawful excuse to furnish necessary clothing, food, shelter, or medical attendance or other remedial care for his child is guilty of a misdemeanor . . .".

[2] Memorandum of Points and Authorities in Support of a Petition for a Writ of Habeas Corpus, page 3, filed by Andrade's attorney.

[3] 62 A.C. No. 2: Minutes page 2, San Francisco, November 10, 1964.

[4] In re Andrade, 380 U.S. 953 (1965).

Santa Barbara, California in a crack-down on suspected marijuana users. At the time she was living with one Joe Sanchez who was not her husband but who was the father of her second child, then three months old. Mrs. Hernandez pleaded guilty to the misdemeanor charge of being found in a place where narcotics (marijuana) were being used. Mr. Sanchez was charged with possession. Municipal Court Judge Frank P. Kearney offered her probation conditioned upon her sterilization in lieu of a six month jail term. The judge expressed concern over the well-being of Mrs. Hernandez's two children and that of any future children she might have. In the background was the fact that Mrs. Hernandez was receiving $145.00 a month in county welfare for the support of her two children, one of whom was illegitimate. This, incidentally, was Mrs. Hernandez's first offense.

She decided to contest the sterilization order after first agreeing to it. Consequently, probation was then revoked and she was sentenced to 90 days. However, on June 8, 1966 Mrs. Hernandez was freed by Superior Court Judge C. Douglas Smith and placed on three years routine probation. Judge Smith ruled that the lower court had acted arbitrarily and in excess of its judicial power and further noted that sterilization would have little effect on the probabilities of Mrs. Hernandez becoming an addict. It should be noted that the lower court was not without some precedent. The denial of the writ of habeas corpus in *Andrade* was an implicit holding that a sterilization order is within a judge's discretion in setting probation. It is clear that sterilization was more closely related to Andrade's crime of failure to support minor children than it was to Mrs. Hernandez's crime of being in a place where narcotics were used; moreover, Andrade was seeking court sanction to undo a sterilization operation and Mrs. Hernandez was seeking to prevent such an operation. Unfortunately, however, it is not known what weight, if any, was given to these factors.[5]

Few people are aware of the extent to which sterilization has been advocated and practiced in this country. One reason for this is that very few sterilization cases ever reach the appellate courts, and fewer yet are factually reported. The facts of the cases mentioned above have never been reported other than in the press.[6]

The purpose of discussing the *Andrade* and *Hernandez* cases by way of introduction is to emphasize the two questions with which this study is

[5] See, for example, Memorandum of Points and Authorities in Support of a Petition for a Writ of Habeas Corpus, note 2 *supra*.

[6] San Francisco News-Call Bulletin, March 29, 1965 page 2 col. 3.

primarily concerned. First, how widespread is the practice of sterilization and related practices throughout this country? Second, to what extent is sterilization legal in the United States?

II

THE MEDICAL ASPECTS OF STERILIZATION

The two most popular types of sterilization operations are the vasectomy for the male and the salpingectomy for the female. Neither are particularly severe.[7] The vasectomy is performed by ligating and resecting a small portion of the vas deferens thus stopping the passage of spermatozoa into the seminal fluid and so rendering it sterile. The operation is an extremely simple one. It takes about three to ten minutes, can be performed in a doctor's office with local anesthetic, and the patient can resume normal activities the same day. The female operation is more serious, must be performed in a hospital, and requires about a week recovery time. The salpingectomy entails the severing or tying of the Fallopian tubes to prevent the ovum from passing to the womb.

There is another simple male operation which is rarely used. It involves cutting the nerve leading to the penis, thus preventing erection. This, like castration, is sterilization by impotence and obviously affects the desire and ability to participate in sexual intercourse. The vasectomy and salpingectomy have no medical effect on the ability to perform coitus, although there could be a psychological advantage in cases where desire had been held in check by fear of pregnancy. The mere possibility that such operations may psychologically increase desire raises questions as to the effectiveness of sterilization as applied to sexual criminals.

Salpingectomy is at present irreversible, although research to effect reversibility is continuing. The rate of failure of this operation is about 1%–2%.[8] The failure rate on vasectomies is comparable but this operation is reversible on occasion. There is considerable dispute, however, on the chances of success. One of the difficulties is the atrophy of the cut ends of the seminal ducts with their supporting tissues. This explanation, however, is not entirely satisfactory because there have been cases of successful reversal after twenty years of occluded seminal ducts.[9] Some estimates place the chance of success at 35%–40%,[10] some profess a 50% chance of restoration,[11] and a worker in India has recorded that out of twenty

[7] Woodside, STERILIZATION IN NORTH CAROLINA 192 (1950).

[8] St. John-Stevas, LAW AND MORALS 95 (1964).

[9] Landman, HUMAN STERILIZATION 95 (1932).

[10] Woodside, STERILIZATION IN NORTH CAROLINA 162 (1950).

[11] Landman, HUMAN STERILIZATION 233 (1932).

attempts to reverse vasectomies over a period of eight years, seventeen were successful.[12]

Figures as to the number of operations performed are not widely available, nor is it known how many operations are performed but not reported. An example of the latter is the hypothetical case of a welfare worker pressuring an indigent recipient who has illegitimate offspring to undergo an operation or face a cutoff of funds. Compulsory state sterilizations categorized by sex during the period 1907–1958 are 24,008 male and 36,158 female—a total of 60,166.[13] Other figures, apparently the latest available, indicate a cumulative total through 1960 of 61,540.[14] These statistics would not include sterilizations which were not done pursuant to specific sterilization statutes. *Andrade* is a case in point. Nor do these figures include voluntary operations for contraceptive purposes.

On a state basis, California is the acknowledged leader in this field. As of 1949 there were 19,042 involuntary sterilizations performed in California. Virginia ranked second with 5,366 operations, thus showing the wide disparity between California and other states.[15]

III

HISTORICAL DEVELOPMENT—CURRENT LAWS IN CALIFORNIA

The first recorded sterilization operations were performed in the United States in 1889.[16] The most common male operation, the vasectomy, was initiated by Dr. Harry C. Sharp who developed this technique in an Indian reformatory in 1899. The first proposed legislation was in 1897 in Michigan,[17] but it was Dr. Sharp's state of Indiana which enacted the world's first sterilization statute in 1907.[18] This statute was later declared unconstitutional by the State Supreme Court as violative of due process in *William v. Smith*.[19] At one time or another thirty-three states have had sterilization statutes in force.[20] Presently thirteen states have statutes applicable to criminals[21] and twenty-eight have some form of

[12] St. John-Stevas, LAW AND MORALS 95 (1964).

[13] *Id.* at 108.

[14] Zenoff, *Reappraisal of Eugenic Sterilization Laws,* 10 Clev.-Mar. L. Rev. 149 at 168 (1961).

[15] Woodside, STERILIZATION IN NORTH CAROLINA 194 (1950).

[16] Nachsin, *Sterilization of Criminals and Mental Defectives in the United States,* 11 N.Y.U. Intra. L. Rev. 157 (1955–6).

[17] 30 Calif. L. Rev. 189 (1941–2).

[18] Ind. Acts 1907, ch. 215.

[19] 190 Ind. 526, 131 N.E. 2 (1921).

[20] St. John-Stevas, LAW AND MORALS 95 (1964).

[21] 15 Syracuse L. Rev. 738 at 739 (1963–4).

compulsory sterilization for inmates of state mental institutions.[22]

California currently has three sterilization statutes in effect. The Welfare and Institutions Code Section 6624 provides for the sterilization of patients in state hospitals for the mentally ill. The patient must be committed or admitted to a state hospital and must suffer from any of the following conditions: (a) mental disease which may have been inherited and is likely to be transmitted to descendants; (b) mental deficiency, in any of its various grades; (c) marked departures from normal mentality. There are provisions for notice and procedures for objections. The notice factor is particularly crucial under due process since many of the early sterilization cases, as will be discussed, found eugenic statutes constitutionally deficient because of the lack of notice to interested parties. Although there have been thousands of sterilizations performed since this statute was enacted in 1913, its constitutionality has never been challenged.

The same has held true for Section 2670 of the California Penal Code which was also enacted in 1913. This section provides for the asexualization of imprisoned recidivists who have been incarcerated at least twice for rape or seduction, or at least three times for any other crime or crimes evidencing that the subject is a moral or sexual degenerate. This section also includes convicts sentenced for life who exhibit moral or sexual depravity, whether or not they have been an inmate in a state prison more than once. This section is referred to in the codes as an "asexualization" statute whereas the other two code provisions are labelled "sterilization" statutes. Inferentially, this statute would seem to authorize castration.

California Penal Code Section 645 provides:

> Whenever any person shall be adjudged guilty of carnal abuse of a female person under the age of ten years, the court may, in addition to such other punishment or confinement as may be imposed, direct an operation to be performed upon such persons, for the prevention of procreation.

There is no case law in California or other states on this or similar statutes and its constitutionality may well depend on whether it is construed to be eugenic, therapeutic, or punitive.

Both this statute and the hardened criminal provision in California permit sterilization for felony convictions under Superior Court jurisdiction. Yet Miguel Andrade was sterilized pursuant to a Municipal Court order incidental to conviction for a misdemeanor. Implicitly then, by

[22] Association for Voluntary Sterilization, Inc., *A Lawyer Speaks on Sterilization* (1964).

virtue of *Andrade, Hernandez* and *People v. Blankenship*[23] (to be discussed in the following pages), a sterilization decree is not dependent on statutory authorization in California and is within the broad discretionary powers of the court.

IV

STERILIZATION STATUTES IN THE COURTS

There are only two United States Supreme Court decisions, *Buck v. Bell,*[24] and *Skinner v. Oklahoma,*[25] involving sterilization. The *Skinner* case was concerned only with the equal protection aspects of applying the sanction of sterilization under the statute involved and not with whether, as penal methodology, such was constitutionally prohibited.

Generally, sterilization statutes have been attacked on the following constitutional grounds: (a) denial of equal protection; (b) *ex post facto* legislation and bills of attainder; (c) denial of procedural and substantive due process; (d) the infliction of cruel and unusual punishment.

A. Equal Protection

Historically, the mental defective statutes were first attacked. The most prevalent argument was that there was a denial of equal protection because the statutes involving the sterilization of inmates in mental institutions did not apply to those who were equally defective but not institutionalized, because, for example, they had adequate financial support. The New York court in *Osborn v. Thomson*[26] followed this reasoning and found the sterilization of feebleminded and criminal persons unconstitutional because the law did not apply to those not in state institutions. The court incidentally expressed the feeling that sterilization would be an undesirable policy because it would lead to loose morals.

The New Jersey court, in *Smith v. Board of Examiners,*[27] felt that the classification between those institutionalized and those not bore no reasonable relation to the object of such police regulation and denied the individual in the class selected the equal protection of the law. Smith was an institutionalized epileptic but the court held that the statute, to be acceptable, must include all epileptics. Michigan also found class legislation in contravention to the Fourteenth Amendment's equal protection clause in *Haynes v. Lapeer Circuit Judge,*[28] a matter involving mental defectives.

---

[23] 16 Cal.App.2d 606, 61 P.2d 352 (1936).

[24] 274 U.S. 200 (1927).

[25] 316 U.S. 525 (1942).

[26] 103 Misc. 23, 169 N.Y.Supp. 638 (Sup. Ct. 1918).

[27] 85 N.J.L. 46, 88 A. 963 (1913).

[28] 201 Mich. 138, 166 N.W. 938 (1918).

The "equal protection" argument was abandoned after it was summarily dismissed by Justice Holmes in *Buck v. Bell,* the single most important case in the field of sterilization. The Virginia statute there involved applied only to mental defectives and Carrie Buck was demonstrably within this classification. She was the daughter of an incompetent, was incompetent herself, and had given birth to a defective child. It was this fact situation which led to Justice Holmes' oft-quoted remark: ". . . Three generations of imbeciles are enough."[29] It was strongly urged in *Buck* that the statute was a denial of equal protection since it only applied to state inmates. The court's answer was that such legislation is not unreasonable merely because it does not include the entire class. Furthermore, the practice in Virginia was to free those defective inmates who were sterilized, thus creating vacancies in the hospitals which would be filled by those formerly outside the confined class of persons and eventually creating near egalitarian administration of the sterilization program.

The *Buck* decision has been severely criticized but it did greatly aid the "eugenic movement" which was in its heyday in the 1920s and 1930s. It also served to effectively silence the equal protection argument which had been advanced in prior cases.[30]

B. Ex Post Facto, Bill of Attainder

The only case to seriously consider the *ex post facto* and bill of attainder objections was *Davis v. Berry.*[31] These arguments had been pressed in *Skinner v. State*[32] but the court did not give them great weight. In *Davis,* the defendant had been convicted of two felonies, one before the statute had been enacted and one afterwards. The act applied to all criminals twice convicted of a felony. There was no differentiation between types of felonies. The court held that it was not unconstitutional as an *ex post facto* law even though applicable to criminals convicted one or more times for a felony prior to its enactment. It did hold, however, that the law was a bill of attainder, reasoning that it inflicted a punishment for past offense by legislative act without a jury trial. And the court also declared sterilization to be cruel and unusual punishment in the circumstances presented. Opining that castration belonged to the Dark

[29] 274 U.S. 200 at 207.

[30] Gest, *Eugenic Sterilization: Justice Holmes vs. Natural Law,* 23 Temp. L. Q. 306, 312 (1949–50).

[31] 216 Fed. 413 (S.D. Iowa 1914), rev'd., 242 U.S. 468 (1916). Case became moot because of subsequent state legislation passed while case was before Supreme Court. The new act did not apply to plaintiff.

[32] 189 Okl. 235, 115 P.2d 123 (1941).

Ages because of the resultant shame and degradation, the court felt that sterilization was equally cruel and degrading because the court could ascertain no substantial distinction between the two operations. Important to the result, however, was the fact that the act applied indiscriminately to all felonies including, for example, the breaking of an electric light bulb.

C. Due Process

Another popular objection to sterilization legislation was that it denied either substantive or procedural due process. Great attention was given the type of notice the affected parties received, the opportunities to object, provisions to supply attorneys for indigents, and the like. These objections were deemed so important that the governor of Alabama, before signing a proposed sterilization bill, asked for an advisory opinion as to its constitutionality from the State Supreme Court. This court in *In re Opinion of the Justices*[33] said that there was a denial of due process because of the failure to provide for a hearing on notice before a duly constituted board. The court added, however, that it did not believe it would be cruel and unusual punishment to sterilize mental defectives.

Section 6624 of the California Welfare and Institutions Code was implicitly held to be constitutional against an attack of lack of notice in *Garcia v. State Department*[34] which denied a petition for a writ of Prohibition.

As previously stated, the world's first sterilization statute was held unconstitutional as a denial of due process by the Indiana court in *Williams v. Smith*.[35] The proposed operation was enjoined. The basic objection was that there was no opportunity to cross-examine the experts who had decided that the operation should be performed.

A North Carolina court found the sole due process issue in *Brewer v. Valk*[36] to be: "Can this sterilization be done without notice or hearing."[37] Under the statute it was the duty of the state to sterilize mental defectives who were not inmates of state institutions upon petition by the next of kin. Since the statute failed to give notice to the person who was to be sterilized, it lacked due process.

Although a Utah statute for the sterilization of mental defectives was found not to be cruel and unusual punishment and not class legislation

---

[33] 230 Ala. 543, 162 So. 123 (1935).

[34] 36 Cal.App.2d 152, 97 P.2d 264 (1939).

[35] 190 Ind. 526, 131 N.E. 2 (1921).

[36] 204 N.C. 186, 167 S.E. 638 (1933).

[37] *Id.* at 191, 167 S.E. at 640.

denying equal protection, a Utah court reversed a sterilization order on due process grounds.[38] The court felt that the defendant was denied due process because the evidence was not sufficient to show that he was the probable potential parent of socially inadequate offspring or that his welfare would be promoted by sterilization. The court assumed the statute to be eugenic and therapeutic rather than penal but, "We doubt . . . that even the most ardent advocate of the immutability of the law of heredity would wish to determine the probable nature of the offspring of Esau Walton without more facts than appear in the record before us."[39]

An "established case of hereditary feeblemindedness"[40] was found in the case of *In re Clayton*.[41] Clayton had two brothers and two sisters; one brother and one sister were in the same institution for feeblemindedness. It was held that the statute was within the police power of the state and that it was not unconstitutional under the Fourteenth Amendment to enact a law providing for the sterilization of mental defectives as a condition prerequisite to their release from a state institution.

A sterilization order was held to be reasonable and within the police power of the state in *State v. Troutman*.[42] The court also found that the order was not cruel and unusual punishment, nor a denial of equal protection. The family history of the defendant is startling documentation for the eugenic viewpoint. Troutman was a congenital defective. He was twenty-six years old with a mental age of four to five years. His mother, father, five brothers, and six sisters were feebleminded. His mother's sister had seven children, three of whom were feebleminded. One of these three had ten children; all ten were feebleminded. Obviously the state of Idaho had a considerable financial interest in this family.

The California case of *People v. Blankenship*[43] is similar in some ways to *In re Andrade*.[44] The defendant in *Blankenship* was convicted for raping a thirteen year old girl and both the defendant and the victim were syphilitic. There was no evidence that the defendant had infected the girl. A vasectomy was required as a condition prerequisite to probation and it was contended that this condition was unreasonable. The court, however, felt that the state was certainly interested in preventing the contamination of its citizens by venereal disease.

---

[38] Davis v. Walton, 74 Utah 80, 276 Pac. 921 (1929).

[39] *Id.* at 89, 276 Pac. at 925.

[40] 120 Neb. 680, 682, 234 N.W. 630, 632 (1931).

[41] In re Clayton, *supra* note 40.

[42] 50 Idaho 673, 299 Pac. 668 (1931).

[43] 16 Cal.App.2d 606, 61 P.2d 352 (1936).

[44] In re Andrade, 380 U.S. 953 (1965).

> However, as the trial court very properly observed, it was not so much concerned with curing the disease with which appellant was afflicted as it was with preventing appellant from transmitting the disease to his possible posterity. If reproduction is desirable to the end that the race shall continue it is equally desirable that the race shall be a healthy race and not one whose members are afflicted by a loathsome and debilitating disease.[45]

Obviously this case is different from *Andrade*. The crime of rape is considerably more aggravated than that of failure to support, and moreover, the defendant was infected with a "loathsome" disease. Yet the cases are similar in that both required sterilization as a condition of probation.

Another case where a sterilization order was made under the discretionary powers of the court without implied or express statutory authorization is the recent Ohio Probate Court decision, *In re Simpson*.[46] The judge ordered an eighteen year old mentally defective girl to undergo a salpingectomy even though as probate judge his jurisdiction over her was only temporary. The court found authority from the fact that the probate court had the plenary power at law and equity to fully dispose of any matter properly before it. The institutions in Ohio were overcrowded and the law provided that when such was the case the probate judge shall take such action and make such order as he deems necessary to provide for the detention, supervision, care and maintenance of a feebleminded person. The court cited the conditions of the institutions and felt that due to the promiscuity of the girl it was likely that she would become pregnant before she could be committed and segregated from society. The court also cited a case from the Circuit Court of Baltimore, Maryland, which allegedly stated, in an unpublished memorandum opinion, that a sterilization order could be made under the general equity powers of the court. The Ohio court also felt that the operation was necessary to the health and welfare of the girl.

D. Cruel and Unusual Punishment

The general judicial attitude expressed toward the issue of cruel and unusual punishment has been one of avoidance. The tendency has been to construe these laws as non-punitive, thus negating the need for consideration of cruel and unusual punishment. Of course, even where it is considered that the statute is punitive, there is disagreement as to whether this is cruel and/or unusual. A case illustrative of this point is *Smith v. Command*.[47] Smith was a sixteen year old defective confined to a state

[45] 16 Cal.App. 2d 606, 609, 61 P.2d 352, 355 (1936).

[46] 180 Ohio 2d 282, 180 N.E.2d 206 (1962).

[47] 231 Mich. 409, 204 N.W. 140 (1925).

home. His father, with his mother's consent, filed a petition to have him sterilized. The statute provided for a full hearing as to the history of the person, the probability of defective offspring, etc. The court took judicial notice that: "Biological science has definitely demonstrated that feeblemindedness is hereditary."[48] It held that there was no element of punishment in the sterilization of a mental defective (a common viewpoint) and therefore the ban against cruel and unusual punishments was not applicable. The court implied that a vasectomy would not be cruel and unusual because the operation only takes about three minutes, there is no anesthetic, and the subject returns to work immediately thereafter. The court concluded that the "great weight of authority supports the right of the state in the exercise of its police powers to enact reasonable legislation for the sexual sterilization of certain natural classes of mental defectives and degenerates."[49]

The Eighth Amendment to the Constitution of the United States reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[50] Originally, this amendment applied only to the federal government, but now the ban against such punishments is applicable to the states. *Robinson v. State of California*[51] could be authority for striking down any punishment which offends due process. The majority of the United States Supreme Court in that decision held that the California law, which made the "status" of narcotic addiction a criminal offense for which the offender could be prosecuted any time prior to his reformation, inflicted a cruel and unusual punishment in violation of the Fourteenth Amendment. Concurring, Mr. Justice Douglas' emotive definition of the function of the Eighth Amendment is interesting when placed in a sterilization context: "The Eighth Amendment expresses the revulsion of civilized man against barbarous acts—the cry of horror against man's inhumanity to his fellow man."[52]

Although the death penalty does not fall within the prohibited category, cruel and unusual punishment ". . . was, doubtless, intended to prohibit the barbarities of quartering, hanging in chains, castration, etc."[53] The punishment of cadena (a minimum of twelve years and one day at hard labor while chained at both ankles and wrists) was held by the Supreme Court in *Weems v. United States* to be cruel and unusual as

---

[48] *Id.* at 414, 204 N.W. at 141.
[49] *Id.* at 422, 204 N.W. at 144.
[50] U.S. CONST., amend. VIII.
[51] 370 U.S. 660 (1962).
[52] *Id.* at 676.
[53] Whitten v. State, 47 Ga. 298, 302 (1872).

applied to a person convicted of falsifying public documents.[54] It was therein ruled that the punishment for a crime should be related to the gravity of the offense. Recently, a Delaware court has held that whipping, per se, was not cruel and unusual, although the case was remanded to determine if it was proscribed under the facts of the case.[55]

The most important case to the effect that sterilization is not cruel is *State v. Feilen.*[56] The issue there was whether a vasectomy operation violated the state constitutional ban against "cruel" punishments. There was no provision in the Washington Constitution with respect to "unusual" punishments. It was held that vasectomy could not be judicially determined to be cruel where sentence required that it be carefully and skillfully performed and where there was no showing that it was attended with any marked degree of physical torture, suffering, or pain. The court specifically concluded that vasectomy is ". . . less serious than the extraction of a tooth."[57] The court accepted the argument that death was not a cruel penalty and therefore anything less than death was acceptable. The defendant had been convicted for the rape of a female under the age of ten—a situation also covered by California Penal Code §645 which authorizes sterilization at the judge's discretion.

A federal court in *Mickel v. Henricks*[58] found that a vasectomy for an epileptic convicted of rape was cruel and unusual punishment. There was no attempt by the state to support the sterilization on the basis of the promotion of general welfare and the court took judicial notice that "as a preventive of this crime vasectomy is without effect."[59] The court's basic reason is found in the following excerpt:

> Vasectomy in itself is not cruel; it is no more cruel than branding, the amputation of a finger, the slitting of a tongue, or the cutting off of an ear; but, when resorted to as punishment, it is ignominious and degrading, and in that sense cruel. Certainly it would be unusual in Nevada. . . . Reformation of the criminal is a wise and humane purpose of punishment, to be disregarded only when the death penalty is inflicted. It needs no argument to establish the proposition that degrading and humiliating punishment is not conducive to the resumption of upright and self respecting life. . . . It will not do to argue that, inasmuch as the death penalty may be inflicted for this crime, vasectomy, or any other similar mutilation of the body, cannot be regarded as cruel, because the greater includes the less.[60]

[54] 217 U.S. 349 (1910).

[55] Cannon v. State of Delaware, 196 A.2d 399 (1963).

[56] 70 Wash. 65, 126 Pac. 75 (1912).

[57] *Id.* at 69, 126 Pac. at 77.

[58] 262 Fed. 687 (D.Nev. 1918).

[59] *Id.* at 688.

[60] *Id.* at 690.

The court distinguished the case from *State v. Feilen*[61] in the difference between the Washington and Nevada constitutions. Nevada forbade punishments which were "cruel or unusual" whereas Washington proscribed only the "cruel." Therefore it was enough for the court to find under Nevada law that the operation was "unusual," irrespective of whether it was also cruel. The Eighth Amendment applies to punishments which are both cruel and unusual and it is doubtful that a penalty which was novel but not cruel would be prohibited. Furthermore under the laws of other states the fact that the defendant was an epileptic would have been sufficient reason to sterilize him under the mental defective statutes.

V

JUSTIFICATIONS AND OBJECTIONS TO INVOLUNTARY STERILIZATION

Often the moral as well as the legal justification for sterilization depends on the validity of the scientific premise that undesirable traits are inheritable. "Since Galton first published his studies in heredity some eighty years ago, the importance of hereditary factors in the transmission of mental and physical abnormality has been established without scientific doubt."[62] But most defective children come from normal parents who are carriers of the defects but not defective themselves. ". . . (the) greatest eugenic danger to posterity lay not in the reproduction of a comparatively small number of certified insane and defective, but in that much larger group of subnormal persons, most of them likely to be 'carriers' of defect."[63]

While hereditary characteristics are easily demonstrated in cases of feeblemindedness, the inheritability of criminal attributes is difficult to prove. Although thirteen states have sterilization statutes applicable to criminals,[64] there is no concrete evidence that any criminal trait is likely to be passed on to succeeding generations. Furthermore, it has been forceably argued that a sterilization operation will increase the chance of future criminal behavior as the sex criminal can operate without fear of impregnating the victim.

This argument has more weight in cases of statutory rape wherein the female is a consenting partner. Often these cases are prosecuted only because of the girl's parents who became aware of the "rape" only after their daughter became pregnant. It follows that if this type of man were

[61] 70 Wash. 65, 126 Pac. 75 (1912).

[62] Woodside, STERILIZATION IN NORTH CAROLINA 23 (1950).

[63] *Id.* at 110.

[64] 15 Syracuse L. Rev. 738 at 739 (1963–4).

sterilized he would, in the majority of instances, escape detection. Since a vasectomy does not affect the sexual desire, the argument is that if it does not effectively operate as a deterrent, and cannot be scientifically shown to be eugenic, it serves no purpose and any discussion of whether it encourages crime is moot.

Another argument in favor of these laws is that the sterilization of habitual criminals would tend to prevent children from being brought up in a criminal environment. The segregation of the criminal from society, however, seems to accomplish the same end. The only alternative motive would be that these laws are for the protection of society, particularly that portion of society likely to be victimized by the sex criminal. This would apply especially in states which outlaw abortions for rape victims. However this position is not supported by any authority.

The most highly charged emotional opposition is based on the history of sterilization in Nazi Germany as a measure of race extermination. It is feared that such programs could be similarly used in this country to persecute a minority, though statistics available on races sterilized do not bear this out.[65] There is also the generalized moral objection that sterilization encourages promiscuity and immoral behavior.

Significant opposition to sterilization has also been presented by representatives of organized religions. For example, one publication has stated the Catholic position as follows:

> The Catholic Church condemns all forms of direct sterilization, whether compulsory or voluntary . . (the) procreative faculty is one of man's most important endowments and save in cases of grave necessity he is not free to do away with it at will. . . . Catholic theologians recognize that therapeutic sterilization is morally justified if it is the only means of securing the welfare of the body as a whole. . . . Sterilization in circumstances where a woman's health would be gravely endangered by a future pregnancy would not, however, be justified since there is always the alternative of refraining from sexual intercourse.[66]

Furthermore, where the law provides for compulsory sterilization of a person who is, for example, a Catholic, a strong argument could be drafted on the basis of the First Amendment. Sterilization would seem, arguably, to be an infringement of the free exercise of religion. If one believed that the procreative faculty is "one of man's most important endowments" even to the extent that one would be willing to eschew participation in sexual intercourse as the only alternative to sterilization, compulsory sterilization might be an infringement of his religious beliefs as guaranteed by the free exercise clause of the First Amendment. On the

[65] Woodside, STERILIZATION IN NORTH CAROLINA 192 (1950).

[66] St. John-Stevas, LAW AND MORALS 108 (1964).

other hand, to allow exception to one whose religion condemned sterilization may violate the establishment clause of the First Amendment.[67] It is enough for the purposes of this discussion that the religious objections are not easily swept aside.

VI

STERILIZATION PRACTICES THROUGHOUT THE WORLD

The United States is not the only country in which sterilization has been practiced. As previously mentioned, Nazi Germany had a program of enforced sterilization based on their racial philosophy. The German Sterilization Law of 1933 had sanctioned approximately 225,000 operations by 1937.[68] There are also such laws in Norway, Sweden, Denmark, Finland, Alberta (Canada), British Columbia (Canada), Vaud (Switzerland), Vera Cruz (Mexico), and Japan.[69]

Perhaps the most startling to the American mind is the Denmark law which permits the castration of sexual offenders.[70] Under the Danish law, which has been in effect since 1927, permission may be granted by the Minister of Justice to castrate a person when the Medico-Legal Council has declared that the sexual urges of such person render him likely to commit sexual offenses which make him dangerous to the general public and personally cause him great mental suffering. A sexual crime is defined as any crime which is traceable to sexual attributes. This includes any crime committed for the purpose of gain, such as theft, and it even includes the crime of arson—an act purportedly related to sexual gratification. The Danish view the law as therapeutic and voluntary, and the usual practice is to release a prisoner from confinement after a castration operation. This is considered more humane than long incarceration. As of 1957 some 600 persons had been castrated under this law.[71]

Perhaps the most significant result of the Danish experience has been the dramatic reduction of recidivism. While it seems obvious that one who has been castrated is not likely to embark on a career of rape or similar offenses, the results indicate that the castrated criminal is not

---

[67] Donnici, *Government Encouragement of Religious Ideology,* 13 J.Pub. Law 16 (1964). Compare Reynolds v. United States, 98 U.S. 145 (1878) and Sherbert v. Verner, 374 U.S. 398 (1963).

[68] Woodside, STERILIZATION IN NORTH CAROLINA 24 (1950).

[69] Bartholemew, *Legal Implications of Voluntary Sterilization Operations,* 2 M.U.L.R. 77 (1959–60).

[70] Le Maire, *Danish Experiences Regarding the Castration of Sexual Offenders,* 47 J. Crim. L., C.&P.S. 294 (1956–7).

[71] *Ibid.*

likely to commit further crimes of any nature. This Danish experience has led a member of English Parliament to ask for a British inquiry.[72]

Japan is a country which is illustrative of current trends. As opposed to compulsory sterilizations for eugenic reasons, voluntary sterilization is being strongly urged as a method of birth control. Although Japan is well known for the ease with which an abortion is obtainable, it is endeavoring to change this image. It is de-emphasizing its permissive abortion laws and vigorously stressing contraceptive sterilization as being preferable to abortion as a means of population control. Both were legalized with the Eugenic Protection Law of 1948.[73]

India and other countries suffering from over-population urge contraceptive sterilization. Officials in Madras, India pay a man 30 rupees to become sterilized.[74]

VII

VOLUNTARY STERILIZATION IN THE UNITED STATES

While involuntary sterilization in the United States is declining (only about 500 such operations were performed last year[75]), and eugenic sterilization is no longer a significant social theory in this country, voluntary sterilization is one of the most popular (in terms of number performed) operations in the United States. It is estimated by the Association for Voluntary Sterilization, Inc. that 100,000 Americans choose this method of birth control each year.[76]

At the present time there are only three states, Connecticut, Kansas and Utah which have legislation regarding voluntary sterilization.[77] These statutes permit voluntary sterilization only in cases of medical necessity. It is predictable that "medical necessity" will be the criterion of future

[72] San Francisco Chronicle, April 4, 1965 page 7 col. 1, "Castration For Sex Criminals—British Inquiry."

[73] Guttmacher, *How Births Can Be Controlled,* National Review 642 (July 27, 1965).

[74] *Ibid.*

[75] Letter from Association For Voluntary Sterilization, Inc., 515 Madison Avenue, New York, New York 10022, on file at U.S.F. Law Review office.

[76] *Ibid.* The Association for Voluntary Sterilization, Inc., whose purpose is "to make known the benefits of voluntary sterilization in the solution of family and population problems," is now the leading organization in this field.

[77] General Statutes of Connecticut 53-33; Kansas Statutes Annotated 76–155; Utah Code Annotated 64-10-12. As representative, see General Statutes of Connecticut 53-33: "Except as authorized by section 17-19, any person who performs, encourages, assists in or otherwise promotes the performance of either of the operations described in said section, for the purpose of destroying the power to procreate the human species, or any person who knowingly permits either of such operations to be performed upon such person, unless the same is a medical necessity, shall be fined not more than one thousand dollars or imprisoned not more than five years or both."

laws on sterilization, just as it is in the fields of contraception and abortion.

Under the recent Supreme Court case of *Griswold v. State of Connecticut*,[78] legislation prohibiting voluntary sterilization except in cases of medical necessity could be unconstitutional. This case involved the contraceptive laws of Connecticut which have been the subject of extensive litigation. On June 7, 1965 Mr. Justice Douglas writing for a majority of the court in *Griswold* declared this legislation unconstitutional. There was wide agreement that these laws should be struck down, but there was some dispute as to what should be the constitutional basis for the decision. Justice Douglas used the penumbra theory of rights: those rights which emanate from the Bill of Rights and form a metaphorical umbrella protecting the liberties of the citizens from storms which would erode these rights.

Using *Griswold* as authority, it may be unconstitutional to deny someone, especially marital partners, voluntary sterilization (independent of medical necessity) as a means of contraception. It is obviously difficult to show medical necessity in such cases. Assuming that the wife cannot have any more children without risking her life and possibly that of the baby, there would be a medical necessity for her to be sterilized since sterilization is more reliable than birth control. Conceivably, however, the wife would be called upon to prove that her condition was permanent and this might be difficult to definitely prove. Moreover, since vasectomy is a far easier and less expensive operation, the husband in such a situation may seek the operation. But does the medical necessity which exists as to the wife exist as to him?

Furthermore, the state interest would be virtually the same under a voluntary sterilization statute as it was in the *Griswold* case. The state has slight interest in the fecundity of parents. The state's interest in preventing illicit sex would have only the most tenuous connections with a statute forbidding voluntary sterilization of a married person. The right of privacy which was held to extend over a married couple's decision to use contraceptives could logically be extended over their choice of contraceptive operations. The distinctions are not great, and it would seem that if the umbrella of privacy covers one it should cover the other. Granted that sterilization is likely to be permanent, there should be no legal prohibition against an adult with all of his mental faculties exercising his freedom of choice over his method of family planning. The right to procreate presumably includes the right not to procreate if that is one's choice. It is a harsh sanction to deem one who exercises this right a felon.

[78] 381 U.S. 479 (1965).

VIII

CONCLUSIONS

In general, statutes providing for the sterilization of persons with undesirable traits which can be demonstrated to be inheritable by a medical authority and which provide for notice, counsel for indigents, etc. are constitutional. Statutes which are so vaguely worded as to implicitly allow castration and like operations are at best suspect. A case can be made against statutes providing for criminal sanctions for those who have operations without the requisite medical necessity.[79] Perhaps the best position a state may take on voluntary sterilization is the position taken by 47 states, to wit, no position. Whether contraceptive sterilization is a good policy is debatable, but it is hardly felonious.

For pragmatic reasons compulsory sterilization of criminals should be abolished. Nothing is accomplished. Sterilization will not prevent Nancy Hernandez from smoking marijuana. Nor will it prevent Miguel Andrade from failing to support his children. While the sterilization of hardened criminals is no longer in vogue, there is a frightening tenor in these two recent cases. Sterilization is being used to exhibit the people's displeasure over the payment of welfare funds for the support of illegitimate children. In a sense Andrade and Mrs. Hernandez were ordered punished because they had illegitimate children. It is submitted that two factors caused the Municipal Court to order Mrs. Hernandez's sterilization as a condition of probation: (1) that there was an illegitimate child; (2) that public funds were disbursed for the support of the child. These factors were also present in the *Andrade* case. Whatever the social opprobrium attendant to the conduct of these parties, they should be punished only for the crime with which they are charged. There must be a significant relationship between the punishment and the crime charged. In *Andrade* the relationship was tenuous; in *Hernandez* it was non-existent.

To say that compulsory sterilization (and sterilization as a condition of probation is to all intents and purposes compulsory) of criminals should be abolished for pragmatic reasons is not to say that it is unconstitutional. Whether or not it works is not a constitutional consideration. The authority indicates it is constitutional.

Sterilization is as controversial now as it ever was. It is only hoped that this discussion will add somewhat to the reader's perspective as he girds for the fray.

Richard W. Millar

[79] See, for example, the statutes mentioned in note 77, *supra*.