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THE CONSTITUTIONALITY OF ASEXUALIZATION LEGISLATION IN THE UNITED STATES

Notwithstanding the fact that some twenty-three states¹ have at sometime or other passed asexualization laws requiring or authorizing the sexual sterilization of cacogenic or alleged cacogenic persons,² legislation of this type can hardly be called popular. Much of the antipathy against laws of this sort is undoubtedly due to religious opposition to birth control for any purpose and much of it is due to revulsion at mutilation of the bodies of helpless persons whether committed as revenge or punishment or with cold calculation of benefits to be derived therefrom by society. As a matter of fact, the more scientific the purpose, the more it acquires the stigma of vivisection.

Then too eugenical legislation has suffered from the advocacy of some of its friends. The eagerness of the scientist to demonstrate the practical value of his studies has led many advocates of eugenic legislation to stress its worth to taxpayers in dollars and cents, rather than the human considerations which popular feeling always associates with legislation dealing with the unfortunate.

¹ California, Connecticut, Delaware, Idaho, Indiana, Iowa, Kansas, Maine, Michigan, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Dakota, Oregon, South Dakota, Utah, Virginia, Washington and Wisconsin.

² "A cacogenic person is a potential parent whose hereditary nature is such that the immediate offspring, or the descendant family stock of such person, would, because of inadequate or defective inheritance from such person, be represented, in abnormally great percentage, by individuals who, under normal environment of the State, would fail to function as socially adequate persons." Section 3 of Text of Proposed Sterilization Law "Eugenical Sterilization, 1926," H. H. Laughlin. Dr. Harry H. Laughlin is Eugenics Associate of the Psychopathic Laboratory of the Municipal Court of Chicago, and Eugenics Director of Carnegie Institution of Washington, Cold Spring Harbor, N. Y. His "Eugenical Sterilization in the United States (1922)" and his "Eugenical Sterilization (1926)" contain a great many statistics and documents relative to the subject not elsewhere obtainable. Dr. Laughlin was the state's expert in the case of *Buck v. Bell* (see note 13 infra).

"Eugenics," says Professor Irving Fisher, "stands *against* the forces which work for racial deterioration, and *for* improvement and vigor, intelligence and moral fiber of the human race. It represents the highest form of patriotism and humanitarianism, while at the same time it offers immediate advantages to ourselves and to our children. By eugenic measures, for instance, our burden of taxes can be reduced by decreasing the number of degenerates, delinquents and defectives supported in public institutions; such measures will also increase safeguards against crimes committed against our persons or our property."³

This type of argument has an appeal to the general public inversely to its appeal to chambers of commerce and real estate boards. Notwithstanding the efforts of economists and would-be economists, the general public is not convinced that it pays taxes, and on the basis of argument like Professor Fisher's, asexualization looks like a heartless method on the part of the tax-paying classes of getting rid of the duty of caring for the helpless and unfortunate of the poorer strata of society—those classes who cannot keep their idiots, imbeciles, epileptics and insane at home.

Other factors too have worked to impede the spread of this type of legislation. One is an uncomfortable feeling on the part of laymen that the scientific proponents of asexualization are rather obscenely eager in their propaganda, especially since the general public is not yet familiar with the results of scientific investigation in the field of heredity. Another is the fact that much of the proposed legislation has not even the pretence of scientific purpose but is frankly punitive, a third is the admitted fact that the factor of heredity in criminality is not yet known with any degree of certainty, a fourth is a popular distrust of scientists who, not content with announcing the results of their investigations, seek to actively influence legislation to impose their theories on the community, a fifth is the fact that the general public knows of only one method of sterilizing males, castration, and knows of it primarily as a bestial preliminary to lynching.

As a result we have had a series of gubernatorial vetoes, and decisions holding asexualization laws unconstitutional, many

³Quoted in introduction to H. H. Laughlin, "Eugenical Sterilization in the United States (1922), by Chief Justice Harry Olson, of Municipal Court of Chicago.

of them giving cogent legal reasons in support of the position adopted, but all of them betraying dread and repulsion, and a dislike not only of the legislation proposed or passed, but of the proponents of it.

The first asexualization bill in the United States was passed in Pennsylvania in March, 1905. It was promptly vetoed by Governor Pennypacker in a message reflecting clearly popular objection to the meddling of scientists with public affairs. He wrote in part:⁴

"* * * The subject of the act is not the prevention of idiocy, but it is to provide that in every institution in the state, entrusted with the care of idiots and imbecile children, a neurologist, a surgeon and a physician shall be authorized to perform an operation upon the inmates 'for the prevention of procreation.' What is the nature of the operation is not described but it is such an operation as they shall decide to be 'safest and most effective.' It is plain that the safest and most effective method of preventing procreation would be to cut the heads off the inmates, and such authority is given by the bill to this staff of scientific experts. It is not probable that they would resort to this means for the prevention of procreation, but it is probable that they would endeavor to destroy some part of the human organism. Scientists like all other men whose experiences have been limited to one pursuit, and whose minds have been developed in a particular direction, sometimes need to be restrained. Men of high scientific attainments are prone, in their love for technique, to lose sight of broad principles outside of their domain of thought. A surgeon may possibly be so eager to advance in skill as to be forgetful of the danger to his patient. Anatomists may be willing to gather information by the infliction of pain and suffering upon helpless creatures, although a higher standard of conduct would teach them that it is far better for humanity to bear its own ills than to escape them by knowledge only secured through cruelty to other creatures. This bill whatever good might possibly result from it if its provisions should become a law, violates the principles of ethics. These feeble-minded and

⁴ Veto Message, March 30, 1905, Senate bill 35, passed March 21, 1905, Gov. S. W. Pennypacker, Pennsylvania, contained in Laughlin, *supra*, note 3 at 35, 36.

imbecile children have been entrusted to the institutions by their parents and guardians for the purpose of training and instruction. It is proposed to experiment upon them, not for their instruction, but in order to help society in the future. It is to be done without their consent, which they cannot give and without the consent of their parents, or guardians, who are responsible for their welfare. It would be in contravention of the laws which have been enacted for the establishment of these institutions. These laws have in contemplation the training and the instruction of the children. This bill assumes that they cannot be so instructed and trained. Moreover, the course it is proposed to pursue would have a tendency to prevent such training and instruction. Every one knows, whether he be a scientist or an ordinary observer, that to destroy virility is to lessen the capacity, the energy and the spirit which lead to effort. The bill is, furthermore illogical in thought. Idiocy, will not be prevented by the prevention of procreation among these inmates. This mental condition is due to causes many of which are entirely beyond our knowledge. It existed long before there were ever such inmates of such institutions. * * * To permit such an operation would be to inflict cruelty upon a helpless class in the community which the state has undertaken to protect * * *

This is typical of the non-legal objections directed to legislation of this type. Other grounds given for similar vetoes are: that it is difficult from the phrasing of some of the laws proposed or passed, to judge whether habitual criminals were to be sterilized because their habitual criminality was considered a sign of mental unsoundness or merely because of the fact that they were habitual criminals;⁵ that the decision of a board should not be final when individuals are to be deprived of God-given powers, functions and rights;⁶ that legislation so far reaching in its consequences and so imminently related to the social life of mankind should not be taken thoughtlessly or heedlessly since it was a type of legislation new

⁵ Veto Message, Feb. 22, 1909, Senate bill 68, passed Feb. 17, 1909, Gov. G. E. Chamberlain, Oregon, contained in Laughlin, *supra*, note 3 at 40, 41.

⁶ Opinion of Attorney General R. E. Brown on which Senate bill 79, passed Jan. 21, 1913, was vetoed by Gov. Fletcher, Vermont, Jan. 31, 1913, contained in Laughlin, *supra*, note 3 at 45, 46.

and practically untried and more in keeping with the pagan age than with the teachings of Christianity;⁷ that laws providing for the sterilization of criminals and insane, while adopted in some jurisdictions and enforced in one or two states, are a dead letter in most of them and that the scientific premises upon which these laws are based are still too much in the realm of controversy and still too experimental to justify this type of legislation.⁸

It is apparent that a great many of the motives which prevented the approval of such asexualization laws as were proposed, were what might be termed moral and ethical rather than strictly legal. Most of these laws fared no better after approval when litigated in the courts of various jurisdictions, although naturally the opposition to these laws as shown by the courts was on the basis of their unconstitutionality from various points of view. There is nevertheless, evident in most of these decisions the same repulsion and dislike on moral and ethical grounds. Where sterilization is ordered as a punitive measure, the ethical consideration is merged in the constitutional objection of cruel and unusual punishment. One court holding such a law unconstitutional on the ground that it denies to the proposed subject of the operation equal protection of the laws, expressed the fear that such legislation might be extended to include those who suffered from certain contagious diseases, or any persons who, in the opinion of the majority of a prevailing legislature, might be considered undesirable citizens, citing as an example racial differences which might afford a basis for such an opinion in communities where that question is unfortunately a permanent and paramount issue.⁹ Another asked,

“Must the marriage relation be based and enforced by statute according to the teachings of the farmer in selecting his male animals to be mated with certain female animals only?”

⁷ Veto Message, Apr. 14, 1913, Senate bill 132, passed Apr. 8, 1913, Gov. J. H. Morehead, Nebraska, contained in Laughlin, *supra*, note 3 at 47, 48.

⁸ Veto Message, Mar. 19, 1919, Senate bill 150, passed Mar. 6, 1919, Gov. D. R. Davis, Idaho, contained in Laughlin *supra*, note 3 at 50.

⁹ *Smith v. Board of Examiners*, 85 N. J. Law 46, 88 Atl. 963 (1913).

—and declared the law unconstitutional on the grounds that it was a bill of attainder and inflicted cruel and unusual punishment.¹⁰

Another decision which based its declaration of unconstitutionality on the ground that the proposed subject of the operation was denied the equal protection of the laws, cites a biologist who testified at the trial to the effect that included within the class of defective persons are to be found the most gifted as well as the most vicious, giving such instances as Chatterton, Goldsmith, Coleridge and Charles Lang. The court referred to the law as inhuman, and went so far as to state that there is to be found much of good in the most degenerate families, even the Jukes and the Nams.¹¹

One court states frankly that it is a notorious fact that many justices do not regard mutilation as a wise or lawful method of punishment and classed the operation of vasectomy with branding; the amputation of a finger, the slitting of a tongue or the cutting off of an ear.¹² On the ten occasions in which various state statutes were passed upon by highest court to which they were carried, only three were held by such courts to be constitutional.¹³ The others on various grounds refused to uphold the validity of the laws.¹⁴

¹⁰ *Davis v. Berry*, 216 Fed. 413, 416, 417 (D. C. S. D., Iowa E. D. 1914).

¹¹ *Osborne v. Thomson*, 103 Misc. 23, 169 N. Y. Supp. 638 aff'd. 171 N. Y. Supp. 1094 (3rd Dept. 1918).

¹² *Mickle v. Henrichs*, 262 Fed. 687 (D. C. D. Nev. 1918).

¹³ *State v. Feilen*, 70 Wash. 65, 126 Pac. 75 (1909); *Smith v. Wayne Probate Judge*, 231 Mich. 409, 204 N.W. 140 (1925); *Buck v. Bell*, 143 Va. 310, 130 So. 516 (1925), this case was affirmed by the United States Supreme Court, May 2, 1927, U. S. Sup. Ct. Oct. 1, 1926, 292. This is the second case on legislation of this kind to go up to the Supreme Court but the first to be decided on the merits. *Davis v. Berry*, supra, note 10, was appealed and judgment of the district court was reversed because in the meantime the state of Iowa had repealed the statute which the district court had declared unconstitutional. 242 U. S. 468 (1917).

¹⁴ *Smith v. Board of Examiners*, supra, note 9; *Osborne v. Thomson*, supra, note 11; *Haynes v. Williams*, 201 Mich. 138, 166 N. W. 938 (1918); *Davis v. Berry*, supra, note 10, 13; *Mickle v. Henrichs*, supra, note 12; *Williams v. Smith*, 190 Ind. 526, 131 N. E. 2 (1921); *State Board of Eugenics v. Jacob Cline*, cited in Laughlin, supra, note 3. The decision of the Circuit Court of Oregon for the County of Marion, Department No. 1, No. 15442, is not officially reported.

This article has so far made no distinction between those statutes which were eugenic in their purpose and those which were frankly punitive or those in which the motives were both eugenic and punitive. The undercurrent of objection on moral and ethical grounds is strong in most of the decisions whether the statute construed belonged to one classification or the other.

The decision of the Supreme Court of the United States in the case of *Buck v. Bell*,¹⁵ is bound, however, to effect a change in the judicial as well as the popular attitude to this type of legislation. This is due largely to the fact that the opinion was written by Mr. Justice Holmes. Judge Holmes is recognized as a jurist whose social and political philosophy is essentially humane and who recognizes the fact that in constitutional questions the decision of a court is influenced largely by the court's social and political philosophy. An opinion by him finding an asexualization law constitutional will inevitably cause a re-examination of the subject not only from the point of view of the legal questions involved but also with a view of re-evaluating the basis of the non-legal objections directed to all such legislation. He states:¹⁷

"We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind."

It is evident that the non-legal objections generally urged against asexualization for any reason is based on an ill-considered sentimentality which fails to properly consider the good of the very class of human beings whom these statutes affect. It must be kept in mind that the Virginia statute which was passed upon by the Supreme Court affects only inmates of state institutions for the insane, feeble minded or epileptic who are inflicted with hereditary recurrent insanity, idiocy, feeble mindedness or epilepsy and who after sterilization could be paroled or

¹⁵ *Supra*, note 13.

¹⁷ *Buck v. Bell supra*, note 13.

discharged and could become self-supporting.¹⁸ It is in no sense punitive and does not affect criminals of any kind, as criminals. An operation whose sole effect would be the prevention of procreation and which in no way affects the emotional or mental capacity of the subject could not in the case of the mentally defective be held inhuman, and as pointed out by Judge Holmes, it often would not be felt to be a sacrifice by those upon whom the operation is performed. Certainly nothing that tends to diminish the number of those who in their degeneracy and helplessness continually run afoul of the law or suffer want because of the incapacity of self-support could be inhuman, provided, of course, that those upon whom the operation is performed are not brutally mutilated. If we consider the objections of the tender-minded as answered by Mr. Justice Holmes, there only remains to be considered the question as to what must be included in the provisions of an asexualization law to make it conform to the Constitution of the United States and the constitutions of the various states.

Here it is important to discriminate between such statutes as call for the sterilization of the mentally incompetent as a eugenic measure and those which call for the sterilization of criminals as a punitive measure. The considerations involved in passing on the laws requiring or authorizing the sterilization of these classes differ in that those statutes which permit or command sterilization of criminals as punishment involve the consideration of whether or not sterilization constitutes cruel and unusual punishment, and whether such a statute is a bill of attainder or an *ex post facto* law. These cannot be questions in those cases which involve the sterilization of the mentally unfit since with regard to this class the element of punishment is absent.¹⁹ We will take up these questions first.

CRUEL AND UNUSUAL PUNISHMENT.

Of all the states which have passed sterilization laws, only in Washington has a sterilization law frankly punitive in its purpose been held constitutional. In the case of *State v. Feilen*,²⁰ the

¹⁸ Va. Laws 1924, ch. 394, p. 569 [S. B. 281].

¹⁹ *Osborne v. Thomson*, *supra*, note 11. *Smith v. Wayne Probate Judge*, *supra*, note 13.

²⁰ *Supra*, note 13.

defendant was convicted of the crime of statutory rape upon a female person under the age of ten years and was sentenced to a period of not less than five years in the state prison, and the sentence further ordered that ²¹

"An operation to be performed upon said Peter Feilen for the prevention of procreation, and the warden of the penitentiary of the state of Washington is hereby directed to have this order carried into effect at the said penitentiary by some qualified and capable surgeon by the operation known as vasectomy; said operation to be carefully and scientifically performed."

This punishment is authorized by the Washington statute,²² which provides:

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

The Washington constitution,²³ has the customary provision that:

"Excessive bail should not be required, excessive fines imposed, nor cruel punishment inflicted."

The statute does not provide for any particular type of operation for the prevention of procreation and the trial judge ordered that the operation known as vasectomy be carefully and skillfully performed. The question then presented for the consideration of the Supreme Court of the State of Washington was whether the operation of vasectomy carefully and skillfully performed must be judicially declared cruel punishment forbidden by the constitution. The court cited from an article by Dr. Clark Bell ²⁴ which quoted the following language from an article by Judge Warren W. Foster

²¹ *Ibid.*, 66, 76.

²² Wash. Comp. Stat. (Remington, 1922) sec. 2287, Wash. Laws 1909, ch. 249, sec. 35.

²³ Art. 1, sec. 14.

²⁴ *27 Medico-Legal Jour.* 134.

of the Court of General Sessions of the Peace of the County of New York,²⁵ as follows:²⁶

"Vasectomy is known to the medical profession as 'an office operation' painlessly performed in a few minutes, under an anaesthetic (cocaine) through a skin cut half an inch long, and entailing no wound infection, no confinement to bed. It is less serious than the 'extraction of a tooth' to quote from Dr. William D. Belfield, of Chicago, one of the pioneers of the movement for the sterilization of criminals by vasectomy, an opinion that finds ample corroboration among practitioners * * * Dr Sharp has this to say of this method of relief to society: 'Vasectomy consists of ligating and resecting a small portion of the vas deferens. This operation is indeed very simple and easy to perform; I do it without administering an anaesthetic, either general or local. It requires about three minutes' time to perform the operation and the subject returns to his work immediately, suffers no inconvenience, and is in no way impaired for his pursuit of life, liberty, and happiness, but is effectively sterilized."

On the basis of this expert opinion the court found that vasectomy is not such a cruel punishment as cannot be inflicted. This decision runs counter to the general opinion of the courts who were called upon to pass on the operation as a punitive measure.

In the case of *Mickle v. Henrichs*,²⁷ the defendant was convicted of the crime of rape and was sentenced to an indeterminate period of not less than five years in the Nevada Penitentiary and was further sentenced to have an operation performed upon his person and body to prevent procreation. The Nevada statute,²⁸ was copied after the similar statute of the state of Washington and the sentence ordering the defendant to be sterilized was based on the authority of that statute.

On appeal, the statute was held unconstitutional. The court after citing the opinion of *Davis v. Berry*,²⁹ went on to say:³⁰

²⁵ Pearson's Mag. Nov., 1909.

²⁶ Supra, note 13, at 69, 77.

²⁷ Supra, note 12.

²⁸ Crimes and Punishment Act, sec. 28, Nev. Rev. Laws (1912) sec. 6293. The Nevada Law, however, in addition provides that the operation shall not consist of castration.

²⁹ Supra, note 10.

³⁰ Supra, note 12 at 690.

"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 a punishment, it is ignominious and degrading, and in that sense it is cruel. Certainly it would be unusual in Nevada."

The court in its decision in attempting to explain why it construed a statute similar to the Washington statute differently from the construction placed on it by the Washington Supreme Court drew a distinction between the Washington constitution and the constitution of Nevada. The Washington constitution forbids "cruel punishment,—the Nevada constitution forbids 'cruel or unusual punishments.'"³¹

The distinction seems to be due to the usual disinclination of courts to openly disagree with each other. The court's discussion shows clearly that the basis of its objection to the statute was the cruelty of the provision rather than its unusualness.

In the nature of things there cannot be a clear definition as to what constitutes cruel or unusual punishment. The classification is purely relative, and what constitutes cruelty at one time and place is not necessarily cruelty absolutely. The Nevada court in defining the word "unusual," cited *Hobbs v. The State*,³² to the effect that "unusual" as used in the Constitution, means a class of punishments which never existed in the State, or that class which public sentiment regarded as having condemned.

Just when castration was first authorized in England is not known, but it was a recognized penalty for rape in Anglo-Saxon England and in the reign of Henry II secular clergymen guilty of treason in bringing over any mandate from the Pope or any one in authority in church affairs were punishable by loss of their eyes and by castration.³³

The opinion in *Whitten v. George*,³⁴ lists castration with

³¹ *Supra*, note 22 and Nevada Constitution, Art. 1, sec. 6.

³² 133 Ind. 404, 32 N.E. 1019 (1893).

³³ *Davis v. Berry*, *supra*, note 10. *Smith v. Wayne*, Probate Judge, *supra*, note 13.

³⁴ 47 Ga. 298 (1872).

punishments of former days, as does the opinion of *Weems v. U. S.*³⁵

The Eighth Amendment of the Constitution of the United States forbidding cruel and unusual punishment was taken from the Bill of Rights framed at the Revolution of 1688,³⁶ and it is certain that castration was never inflicted after the Revolution of 1688.³⁷

Blackstone lists methods of punishment common in England, as follows:³⁸

“Of these some are capital, which extend to the life of the offender, and consist generally in being hanged by the neck till dead; though in very atrocious crimes, other circumstances of terror, pain, or disgrace are superadded; as, in treasons of all kinds, being drawn or dragged to the place of execution; in high treason, affecting the King’s person or Government, emboweling alive, beheading, and quartering; and in murder a public dissection. And, in cases of any treason committed by a female, the judgment is to be burned alive. But the humanity of the English nation has authorized, by a tacit consent, an almost general mitigation of such parts of these judgments as savor of terror or cruelty; a sledge or hurdle being usually allowed to such traitors as are condemned to be drawn; and there being very few instances (and those accidental or by negligence) of any person’s being emboweled or burned until previously deprived of sensation by strangling. * * * Some, though rarely, occasioned a mutilation or dismembering, by cutting off the hands or ears; others fix a lasting stigma on the offender by slitting the nostrils, or branding in the hand or cheek.”

In the *Feilen* case the Court cites with approval the case to *State v. Woodward*,³⁹ to the effect that to define cruel and unusual punishment one must go back to those with which the authors of the constitutional provision were familiar, and refers to the punishments mentioned by Blackstone. The weakness of this reasoning

³⁵ 217 U. S. 349 (1910) 54 L. Ed. 793.

³⁶ 2 Story, *Constitution* (4th Ed. 1873) sec. 1903.

³⁷ *Davis v. Berry*, *supra*, note 10.

³⁸ 4 Bl. Comm. * 376, 377.

³⁹ 68 W. Va. 66, 69 S.E. 385 (1910).

lies in the fact that some punishments are so horrible that they had long been obsolete even in Blackstone's day. One cannot argue that because crucifixion had ceased to be inflicted eighteen centuries before the days of the authors of the Eighth Amendment to the Federal Constitution and similar provisions in state constitutions, and was no longer considered possible in a civilized country, that it was not included in the prohibition of that amendment. Further, the amendment should not be limited so as to prohibit in only those recognized as cruel and unusual at any one period. Time may serve to enlighten the minds of men to an extent which will render some of our most approved forms of punishment odious, and the prohibition of the Eighth Amendment and similar provisions in the various State constitutions may then well apply to such punishments. It is doubtful if a statute restoring the penalty of death by hanging in those States which had substituted electrocution would be upheld.

In *Weems v. United States*,⁴⁰ the Court said:

"Cooley in his *Constitutional Limitations* says that it may be well doubted if the right exist 'to establish the whipping post and the pillory in those States where they were never recognized as instruments of punishment, or in those States whose constitutions, revised since public opinion had banished them, have forbidden cruel and unusual punishments.' The clause of the Constitution in the opinion of the learned commentators may be therefore progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice."

The argument that vasectomy because of its painlessness and simplicity cannot be held to be cruel narrows cruelty down to physical cruelty only. Even in times less enlightened than the present the element of mental suffering in punishment was recognized, and Blackstone points out that in punishment for treason the bodies of women were not exposed and mutilated after the culprit's death, as was true with those of men.⁴¹

In the case of *Berry v. Davis* the court said:⁴²

⁴⁰ *Supra*, note 35 at 378.

⁴¹ 4 Bl. Comm.* 93.

⁴² *Supra*, note 10 at 417.

“No one can doubt but that under our present civilization if castration were to be adopted as a mode of punishment for any crime, all minds would so revolt that all courts without hesitation would declare it to be a cruel and unusual punishment. * * * While it is true that there are differences between the two operations of castration and vasectomy, and while it is true that the effect upon the man would be different in several respects, yet the fact remains that the purpose and the same shame and humiliation and degradation and mental torture are the same in one case as in the other. And our conclusion is that the infliction of this penalty is in violation of the Constitution, which provides that cruel and unusual punishment shall not be inflicted.”

The movement to add sterilization to the list of punishments for crime common in the United States has made no headway. On the contrary, the tendency has been to condemn punitive asexualization as repugnant to our institutions.⁴³

BILL OF ATTAINDER AND EX POST FACTO LAWS

The question whether a sterilization law as a punitive measure is cruel and unusual punishment or whether as a eugenic measure it gives the proposed subject due process of law, or denies him the equal protection of the laws, is inherent in the nature of this novel type of legislation, but the fact that provisions in certain punitive asexualization laws may constitute them bills of attainder, or ex post facto laws is merely accidental.

Due to the limited space allotted to the discussion of this subject and its consequent limited scope this article cannot deal with every type of objection which may be directed against a specific statute, but must confine itself to such questions as inevitably arise in connection with asexualization in general.

Only one sterilization law was specifically held to be a bill of attainder. In *Davis v. Berry* the court held that the Iowa statute came within the constitutional prohibition against bills of attainder in that it provided that when it appeared that a convict had twice been convicted of a felony, the State Board of Parole with the managing officer and surgeon of each institution were immediately required to sterilize him. The court said:⁴⁴

⁴³ *Supra*, note 2.

⁴⁴ *Supra*, note 10 at 419.

"But assuming that the prior convictions all appear of record, and assuming there is no conflict in the testimony and no difficulty in reaching the conclusion, but little or no advance is made in determining the question. If it be said that the statute automatically decides the question and nothing remains for the prison physician to do but to execute that which is already of record then the statute becomes a Bill of Attainder. One of the rights of every man of sound mind is to enter into the marriage relation. Such is one of his civil rights, and deprivation or suspension of any civil right for past conduct is punishment for such conduct, and this fulfills the definition of a Bill of Attainder, because a Bill of Attainder is a legislative act which inflicts punishment without a jury trial, as is fully discussed in the case of *Cummings v. Missouri*, 71 U. S. 277, *The Federalist*, No. 44 by Madison, Justice Samuel F. Miller on the Constitution 584; *Watson on the Constitution*, 733-738."

American courts are so unfamiliar with bills of attainder that considerable confusion exists as to their nature.⁴⁵ Judge Story's summary is still the best analysis of the subject in American legal literature. He says:⁴⁶

"Bills of Attainder, as they are technically called, are such special acts of the legislature as inflict capital punishments upon persons supposed to be guilty of high offences, such as treason and felony, without any conviction in the ordinary course of judicial proceedings. If an act inflicts a milder degree of punishment than death, it is called a bill of pains and penalties. But in the sense of the Constitution, it seems that bills of attainder include bills of pains and penalties; for the Supreme Court has said, 'A bill of attainder may affect the life of an individual, or may confiscate his property or both.' In such case, the legislature assumes judicial magistracy, pronouncing upon the guilt of the party without any of the common forms and guards of trial, and satisfying itself with proofs, when such proofs are within its reach, whether they are conformable to the rules of evidence, or not. In short, in all such cases, the legislature exercises the highest power of sovereignty, and what may be properly deemed an irresponsible despotic dis-

⁴⁵ *Ex Parte Garland*, 4 Wall (U. S.) 333, dissenting opinion of Miller J., at 386 (1866).

⁴⁶ 2 Story, *Constitution* (5th Ed. 1891) sec. 1344.

cretion, being governed solely by what it deems political necessity or expediency, and too often under the influence of unreasonable fears, or unfounded suspicions. * * * The punishment has often been inflicted without calling upon the party accused to answer, or without even the formality of proof; and sometimes, because the law, in its ordinary course of proceedings, would acquit the offender."

Under this construction of bills of attainder the Iowa statute cannot be said to be one. The convictions for felony were had by due process of law and the law did not pretend to apply to all persons who previous to its passage had been twice convicted of felony. The convict brought himself within the law by a felony committed after the law took effect and it was an additional penalty for such offense. It was conceded that the statute was not an *ex post facto* law for this reason,⁴⁷ and the same reasoning applies to the objection that it was a bill of attainder.

The person charged with a felony had to be duly convicted of such crime and the punishment then applied to him. It was the court that found the guilt, not the legislature.

The only question left open was the manner of finding the fact of previous convictions. Where the person charged with the felony is indicted as a third offender, then of course, the conviction settles both his guilt of the third offense and the fact of the prior convictions. Where the indictment does not so charge him and he is only found guilty of the felony charged, then in order to bring him within the statute the prior convictions

⁴⁷ *Davis v. Berry*, supra, note 10. See also *State of Iowa ex rel, Gregory v. Jones*, 128 Fed. 626 (D. C. S. D. Iowa, W. D. 1904); *Kelly v. People*, 115 Ill. 583, 4 N. E. 644 (1886); *Commonwealth v. Graves*, 155 Mass. 163, 29 N. E. 579 (1891); *In re Miller*, 110 Mich. 676, 68 N. W. 990 (1896); *Blackburn v. State*, 50 Ohio 428, 36 N. E. 18 (1893); *Moore v. State of Missouri*, 159 U. S. 673 (1895); *Cooley, Constitutional Limitations* (7th Ed. 1903) 382; "And a law is not objectionable as *ex post facto* which, in providing for the punishment of future offences, authorizes the offender's conduct in the past to be taken into the account, and the punishment to be graduated accordingly. Heavier penalties are often provided by law for a second or any subsequent offence than the first; and, it has not been deemed objectionable that, in providing for such heavier penalties, the prior conviction authorized to be taken into the account, may have taken place before the law was passed. In such a case the second or subsequent offence is punished, not the first; and the statute would be void if the offence actually to be punished under it had been committed before it had taken effect, even tho it was after its passage."

should be found by due process of law. The Iowa Statute,⁴⁸ made no provision for a hearing or trial on the question of prior convictions. It did not give the convict an opportunity to combat the presumption of the records that he was a second offender. As the court said:⁴⁹

"The records of two convictions may show the same name of the party or parties convicted; but there are many men of the same name, but which is no proof that the person in the one case is the same person convicted in the other case.

* * * Due process of law means that every person must have his day in court, and this is as old as Magna Charta; that sometime in the proceedings he must be confronted by his accuser and given a public hearing."

A bill of attainder implies a lack of due process, but a lack of due process does not necessarily arise only from a bill of attainder. The Iowa court seemed to make no distinction.⁵⁰

The question of due process is more fully dealt with below.

THE EQUAL PROTECTION OF THE LAW

The ground on which asexualization laws directed to the sterilization of the mentally incompetent which is most commonly given as the reason for holding such laws unconstitutional is that they deny the proposed subject of the operation equal protection of the laws. In the nature of things the state has actual control only of the mentally incompetent in its own institutions. With few exceptions,⁵¹ these laws authorize the sterilization only of mentally incompetent persons confined in state institutions. This naturally raises the question whether the inmates of state institutions subject to these laws are denied the equal protection of the laws. The Supreme Court of the United States in the *Buck v. Bell* case has answered this question in the negative, but the majority of courts to whom this question has been presented, have held that

⁴⁸ Iowa Comp. Code (Supp. 1915) sec. 2600, Iowa Laws, 1913 ch. 189.

⁴⁹ *Davis v. Berry*, supra, note 10 at 418.

⁵⁰ See *Cumming v. Missouri*, 4 Wall. (U. S.) 323 (1866); *Ex Parte Garland*, supra, note 45; *Calder v. Bull*, 3 Dall. (U. S.) 386 (1798).

⁵¹ The Washington, Nevada, Maine and Michigan Statutes are among the few that apply to the population at large equally with the inmates of state institutions.

those laws which are limited in their application to inmates of state institutions deny such inmates the equal protection of the laws.

Such was the position adopted by the New Jersey Supreme Court to whom this question was first presented and whose well considered opinion is the basis of most of the decisions following it.⁵²

The New Jersey statute,⁵³ applied only to the feeble minded epileptic, certain criminals and other defective inmates confined in the several reformatories, charitable and penal institutions in the counties and state. The New Jersey Supreme Court's objection was based upon.⁵⁴

“* * * the classification upon which the present statute is based, which is of such a nature that the persons included within it are not afforded the equal protection of the laws under the Fourteenth Amendment of the Constitution of the United States, which provides that ‘no State shall deny to any person within its jurisdiction the equal protection of the laws.’ Under this provision it has been uniformly held that a state statute that bears solely upon a class of persons selected by it must not only bear alike upon all the individuals of such class, but that the class as a whole must bear some reasonable relation to the legislation thus solely affecting the individuals that compose it.

“‘It is apparent’ said Mr. Justice Brewer in *Gulf Colorado, etc., R. R. Co. v. Ellis* (165 U. S. 150) after a review of many cases, ‘that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear, not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection.’”

With the criterion set up by Mr. Justice Brewer in mind the New Jersey Court held that by the classification of incompetents into those who are, and those who are not, inmates

⁵² *Smith v. Board of Examiners*, *supra*, note 9.

⁵³ N. J. Comp. Stat. (1st Supp. 1915) vol. 2, p. 1493, N. J. Laws 1911, ch. 190.

⁵⁴ *Smith v. Board of Examiners*, *supra*, note 9 at 53, 966.

in public charitable institutions, a principle of selection is adopted that bears no reasonable relation to the objective sought, the improvement of society. The opinion points out that the mental incompetents who are not confined in institutions subject to the law vastly outnumber those who are and are much more exposed to the temptation and opportunity of procreation. The Court went on to say:⁵⁵

"The particular vice, therefore, of the present classification is not so much that it creates a sub-classification, based upon no reasonable basis, as that having thereby arbitrarily created two classes, it applies the statutory remedy to that one of those classes to which it has the least, and in no event a sole application, and to which indeed, upon the presumption of the proper management of our public institutions, it has no application at all. When we consider that such statutory scheme necessarily involves a suppression of personal liberty and a possible menace to the life of the individual who must submit to it, it is not asking too much that an artificial regulation of society that involves these constitutional rights of some of its members shall be accomplished, if at all, by a statute that does not deny to the persons injuriously affected the equal protection of the laws guaranteed by the Federal Constitution."

This seems sound law. Assuming that the fear of the operations of vasectomy or salpingectomy as a menace to the life of the individual upon whom it is proposed to be performed is exaggerated, if it serves no practical purpose it is still an abuse of the police power. Had the court stopped there its opinion would be above criticism. But it continued with a dictum to the effect that the suggestion that the classification might be sufficient, if the scheme of the statute were to release the sterilized incompetents is not deserving of serious consideration.

For it is just this additional provision in the Virginia statute construed in *Buck v. Bell*,⁵⁶ that was suggested by Mr. Justice Holmes as rendering the objection less valid.

On reading the opinion in the New Jersey case and the United States Supreme Court case one is impressed by the evident fact

⁵⁵ *Ibid.*, 55, 967.

⁵⁶ *Supra*, note 13.

that both Courts started with their discussions and then wrote their opinions, and that their decisions were really not dependent on constitutional arguments advanced. The New Jersey State Supreme Court after giving a number of illustrations of how the proposed law could be extended to bring within its provisions temporarily unpopular groups, or even to check the tendency of the population to outgrow its means of subsistence in accordance with the Malthusian theory, frankly states:⁵⁷

“Evidently the large *and underlying* question is how far is government constitutionally justified in the theoretical betterment of society by means of the surgical sterilization of certain of its unoffending but undesirable members. If some, but by no means all of these illustrations are fanciful, *they shall serve their purpose of indicating why we place the decision of the present case upon a ground that has no such logical results or untoward consequences.* (Italics ours.)

The opinion of the Supreme Court of the United States after showing that the propositus in the case before it was an imbecile, the daughter of an imbecile and in turn the mother of an imbecile, says, “Three generations of imbeciles are enough.”

The underlying differences between the two opinions are differences between their respective attitudes on the relation between the state and the individual rather than in the differences between the two statutes construed.

And, yet there is a real difference between the two statutes which merits attention. Accepting the philosophical basis of the United States Supreme Court opinion and conceding that the police power of the state can legitimately be extended to cover asexualization as it has been extended to cover vaccination,⁵⁸ it still remains true that while the Virginia statute does not violate the provisions of the Fourteenth Amendment to the Federal Constitution, the New Jersey statute did. Of course as seen from the dictum of the New Jersey Supreme Court, it was not in favor of the law in any form, but had the New Jersey statute been worded in the manner of the Virginia statute it could not so easily have been declared unconstitutional under the Fourteenth Amendment.

⁵⁷ Id., note 54.

⁵⁸ Jacobson v. Massachusetts, 197 U. S. 11 (1905).

The difference is primarily this. The Virginia law provides for the sterilization *only of those incompetents who if sterilized, could be paroled or discharged and could become self-supporting*,⁵⁹ the New Jersey statute merely provided for the sterilization of those committed to its asylums. This brings us to a consideration of the extent to which the state in the exercise of its police power can go in controlling the lives of its citizens. Vaccination physically consists of scarifying the skin and inoculation with a serum. The aim is to render the subject immune to small-pox and thereby prevent its spread. Admittedly there is some slight danger that the subject vaccinated may become infected and there is some slight pain and discomfort suffered from the operation. No one would argue that the state may subject its citizens to even slight pain and discomfort and even a remote chance of infection arbitrarily. It is when the exercise of its power is for the purpose of achieving some recognized good and there is a reasonable relation between the exercise of that power and the good sought, that the police power, all other things being equal, will be sustained.⁶⁰ Further what is otherwise an injury from which the citizen must be protected by constitutional safeguards, becomes in relation to the end achieved a good, and it becomes absurd to talk of safeguards. One does not need constitutional protection from immunization to small-pox.

A statute that orders the asexualization of inmates of state institutions who are committed for life and who cannot be released because of lack of means to live, or lack of ability for self support does no good to the subject or to society. In such case it is injury pure and simple, no matter how slight. It is an abuse of the police power which by its nature is the power of the state to pass laws for the good and welfare of its citizens.⁶¹

But where the statute provides for the selection of those incompetents who can be self-supporting and for the release of such incompetents after effective sterilization, then the operation becomes a benefit and not an injury, both to the subject and to the state.

⁵⁹ *Supra*, note 18.

⁶⁰ *Jacobson v. Massachusetts*, *supra* note 58; *People v. Tait*, 261 Ill. 197, 103 N. E. 750 (1913); *J. T. McMillan Co. v. State Board of Health*, 110 Minn. 1215, 124 N. W. 828 (1910); *State v. Barberton*, 76 Ohio, 297, 81 N. E. 568 (1907); *Matter of Viemeister*, 179 N. Y. 235, 72 N. E. 97 (1904).

⁶¹ *Id.*

The imbecile is benefited by his liberty and by the fact that while at liberty he is freed from, what to him must be a danger, parenthood. By reason of his very mental deficiency he is not deprived of anything, for if the imbecile were intelligent enough to suffer from the fact that he is deprived of the power of procreation, he would be intelligent enough to be out of the class to whom the statute would apply. Asexualization to a sane criminal causes untold mental suffering and humiliation, to an imbecile it means nothing at all.

Judging it purely from the incompetent's point of view the power of procreation is not only of no benefit to him, but it is distinctly detrimental to him. The power of procreation gives him no joy, it only adds to economic difficulties already great enough.

Something of the same misconception appears in the decision in *Smith v. Wayne Probate Judge*^{61a} which, while upholding the constitutionality of the new Michigan^{61b} in the main, declared one section of it unconstitutional. This section^{61c} made an exception in those cases where the adjudged defective as a probable parent would probably be able to support his children, if any. The court held that this discriminated against the mental defective of the poorer classes. As a matter of legislative policy such an exception may be unwise and may tend to defeat the purpose of the statute, but it cannot be held to deprive the poorer class of incompetents of the equal protection of the laws, any more than a statute requiring the commitment of homeless imbeciles to state asylums would do so. Sterilization of such individuals is a benefit conferred on them. It does not deprive them of anything which to them is of value.

There is food for thought in the fact that most of the laws providing for the asexualization of the mentally unfit make it a crime for physicians to sterilize normal persons where the aim is not therapeutic.⁶²

^{61a} *Supra*, note 13.

^{61b} Mich. Pub. Acts, 1923, Act 285.

^{61c} Section 7.

See provisions in the following statutes:

⁶² Connecticut: Conn. Gen. Stat. (1918), sec. 2691, 2692, sec. 2, ch. 209, Public Acts 1909; Iowa: Iowa Laws 1911, ch. 129, sec. 2, Iowa Laws 1913, ch. 187, sec. 4, Iowa Laws 1915, ch. 202 sec. 4; New York: N. Y. Cons. Law 44 sec. 353; Michigan: Mich. Laws 1913, act 34, sec. 5; Kansas: Kan. Laws 1913, ch. 305, sec. 2, Kan. Laws 1917, ch. 299, sec. 7.

Innumerable persons who for various reasons desire to put an end to their procreative powers without affecting their emotional life or their potency wonder from what it is that the Fourteenth Amendment is invoked to protect the mentally incompetent, to whom surely children are no blessing.

These considerations compel the conclusion that apart from the underlying differences in point of view on the extent of the police power, one who accepts the position of the Supreme Court of the United States may still oppose on constitutional grounds a statute which orders sterilization under conditions which serve no practical purpose either to the individual involved or the state.

The answer to the objection that a statute which confines its application to incompetents who are committed to state institutions, denies them the equal protection of the laws is stated by Mr. Justice Holmes to be⁶³

“that the law does all that is needed, when it does all that it can, indicates a policy, applies it to all within the lines, and seeks to bring within the lines all similarly situated so far and so fast as its means allow. Of course so far as the operations enable those who otherwise must be kept confined to be returned to the world and thus open the asylum to others, the equality aimed at will be more nearly reached. (Italics ours.)

This is an answer only to such objection when directed to the Virginia statute. It is not an answer when statutes like the New Jersey law are involved.

It may be argued further that the classification of incompetents into two subdivisions on the basis of whether they are within or without state institutions is a legitimate classification from the point of view of the purpose of the statutes. Incompetents who find their way into state institutions in the main are those whose families cannot or will not take care of them. This is the very class of incompetents that needs state protection most. It is this class, whose members are permitted by those who by ties of relationship are obligated to safeguard them from the danger of parenthood, to indulge as opportunity presents itself and thus burden themselves and the state with their progeny. The families of such incompe-

⁶³ Buck v. Bell, supra, note 13.

tents may be unwilling to protect them, or may be too poor to be able to do so. It makes no difference. Asexualization of such as these, far from discriminating against them in favor of incompetents more fortunately situated, really enables them to overcome the handicap of their circumstances and places them more nearly on the bases of equality with those whose families are willing and able to exercise proper supervision over them. From that point of view the equal protection clause of the constitution has no application.⁶⁴

DUE PROCESS

At this point due process of law becomes an important consideration. As we have seen while asexualization is a benefit conferred on an incompetent, it is an injury committed on one who does not come under that classification, and an asexualization law to be constitutional must provide a procedure which adequately safeguards the individual against unjust and unwarranted enforcement.

What constitutes due process of law is regulated and determined by the law of each state but it must have as its basis the principle that the method of procedure adopted gives reasonable notice and affords a fair opportunity to be heard before a decision is made.⁶⁵

There is no special point involved in the application of due process to the sterilization of criminals as a punitive measure which requires separate discussion from due process in its application to mental defectives, as a eugenic measure. Both classes must be given protection by a procedure adopted to the importance of the right or liberty of which it is proposed to deprive the individual.

The power of procreation is certainly of primary importance in life. In the case of *Cline v. State Board of Eugenics*,⁶⁶ it was

⁶⁴ Cases of *Haynes v. Williams*, *Osborne v. Thomson*, followed the case of *Smith v. Board of Examiners*, in toto holding that a statute limited in its application to inmates of institutions denied such inmates the equal protection of the laws. This was also the holding of the Oregon Court in *State Board of Eugenics v. Cline*, supra, note 14, on the first Oregon asexualization law (Or. Laws (Olsen 1920) sec. 2887, 2898, Or. Laws 1919, ch. 264, sec. 85-96).

⁶⁵ *Hollinger v. Davis*, 146 U. S. 314, 320 (1892); *U. S. v. Cruikshank*, 92 U. S. 542 (1875); *In re Kemmler*, 136 U. S. 436, 448 (1890), *Storti v. Massachusetts*, 183 U. S. 138 (1901).

⁶⁶ *Supra*, note 64.

held to be included in the term "life" as used in Sec. 1 of the Fourteenth Amendment to the Constitution, citing the decision in *Munn v. Illinois*,⁶⁷ to the effect that

"The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The deprivation, not only of life, but of whatever God has given to everyone with life, for its growth and enjoyment is prohibited by the provision in question."

Reasoning from this construction the court held that the procedure adopted for the decision of the issue whether the proposed subject of the operation comes within the provisions of the asexualization statute, must provide for trial as formal as a criminal trial for a capital crime.⁶⁸

"Unquestionably," the court says, "this case belongs to the class requiring strict rules of procedure for it is in the class providing the direct consequences, namely: deprivation of life. In such cases, the settled maxims of law require the application of the rule of evidence demanding at every stage of the proceeding, proof beyond a reasonable doubt. The statute in question, however, beyond declaring that it is in any manner a punitive measure is silent as to the rules of evidence applicable thereto. It is true that there is a provision to the effect that after appeal the trial shall be a trial *de novo* at law as provided by the statutes of the state for the trial of actions at law; but it nowhere indicates whether it shall be tried as a criminal action or as a civil action."

The court further criticized the absence of provisions prescribing the method of joining the issues, the manner of forming the jury, the number of peremptory challenges, the grounds for challenges for cause, the number of concurring jurors necessary to warrant the return of a verdict, and the absence of provision for complaint, information or indictment, motion, demurrer, answer or plea, or the imposition of the affirmative of the issue upon either party.

The provision that an informal notice of appeal filed with the secretary of the board ordering the operation shall be all that is necessary to make the appeal, impressed the Court as an indication

⁶⁷ 94 U. S. 113, 142 (1876).

⁶⁸ *Supra*, note 64 at 288.

that the matter should be treated informally and without the safeguards demanded by the importance of the issue to be determined.

"Moreover," the court continued,⁶⁹ "the statute does not state what court shall entertain an appeal * * * no method is provided by statute for determining which one [circuit court] is the appellate tribunal in these cases.

"We realize that if after due notice, before an impartial judicial tribunal having competent jurisdiction is provided, even by way of appeal only, the constitutional guaranty is preserved, and that an appeal from the judgment rendered after such trial, need not be prescribed; *but in a case of such importance as this, every judicial impulse inclines to the wisdom of providing for such an appeal to the highest court of this state.*" (Italics Ours.)

This decision demands the extreme in procedure to constitute due process of law in asexualization cases. As it admits, the Court demands more than is strictly required by the generally accepted definition of due process.

It is unquestionably true that the importance of the subject involved warrants a procedure as meticulously careful as a trial for a capital crime but it need not be the *same* procedure. Due process is not necessarily judicial process. Any tribunal whether called a court, commission or otherwise may be given by the legislature the determination of a legal question.⁷⁰

The Virginia statute which was upheld by the Supreme Court of the United States provides a procedure as scrupulously careful as can be required, yet it does provide a jury trial, and the hearing in the first instance is held before a board. But ample provision is made for review by the courts and indeed the statute is exceptional in its careful phrasing and intelligent regard for public feeling.

The opinion of Mr. Justice Holmes in the *Buck v. Bell* case contains a summary of the law as follows:⁷¹

It recites that the health of the patient and the welfare of society may be promoted in certain cases by the sterilization of mental defectives, under careful safeguard, &c.; that the steriliza-

⁶⁹ Id.

⁷⁰ *Ex Parte Wall*, 107 U. S. 265 (1882); *Ballard v. Hunter*, 204 U. S. 241 (1907); *Murray v. Hoboken Land, etc., Co.*, 18 How. (U. S.) 272 (1855).

⁷¹ *Supra*, note 13.

tion may be effected in males by vasectomy and in females by salpingectomy, without serious pain or substantial danger to life; that the Commonwealth is supporting in various institutions many defective persons who if now discharged would become a menace but if incapable of procreating might be discharged with safety and become self-supporting with benefit to themselves and to society; and that experience has shown that heredity plays an important part in the transmission of insanity, imbecility, &c. The statute then enacts that whenever the superintendent of certain institutions including the above named State Colony shall be of opinion that it is for the best interest of the patients and of society that an inmate under his care should be sexually sterilized, he may have the operation performed upon any patient afflicted with hereditary forms of insanity, imbecility, &c., on complying with the very careful provisions by which the act protects the patients from possible abuse.

The superintendent first presents a petition to the special board of directors of his hospital or colony, stating the facts and the grounds for his opinion, verified by affidavit. Notice of the petition and of the time and place of the hearing in the institution is to be served upon the inmate, and also upon his guardian, and if there is no guardian the superintendent is to apply to the Circuit Court of the County to appoint one. If the inmate is a minor notice also is to be given to his parents if any with a copy of the petition. The board is to see to it that the inmate may attend the hearings if desired by him or his guardian. The evidence is all to be reduced to writing, and after the board has made its order for or against the operation, the superintendent, or the inmate, or his guardian, may appeal to the Circuit Court of the County. The Circuit Court may consider the record of the board and the evidence before it and such other admissible evidence as may be offered, and may affirm, revise, or reverse the order of the board and enter such order as it deems just. Finally any party may apply to the Supreme Court of Appeals, which, if it grants the appeal, is to hear the case upon the record of the trial in the Circuit Court and may enter such order as it thinks the Circuit Court should have entered. As the court said:

“There can be no doubt that so far as procedure is concerned the rights of the patient are most carefully considered, and as every step in this case was taken in

scrupulous compliance with the statute and after months of observation, there is no doubt that in that respect the plaintiff in error has had due process of law."

The second Michigan statute⁷² was as careful in providing due process as that of Virginia. It requires ample notice of the time and place of hearing by personal service not only on the alleged defective but upon the prosecuting attorney of the country, upon the relatives, father, mother, wife or child of the defective, or upon the person with whom he resides, or at whose house he may be, and in case no relative can be found service is required upon a guardian *at litem* appointed by the court to receive such notice and to represent the defective at the hearing. Regular proceedings are followed and opportunities to defend with the right of appeal are provided.

As the court said:⁷³

"Nothing further is required by the 'due process of law' clause of the Constitution."

Neither the Iowa nor the Indiana statutes⁷⁴ made any provision for a hearing of any sort, much less for any appeal to the courts. The Indiana court⁷⁵ followed the decision in *Davis v. Berry*⁷⁶ in declaring the Indiana statute unconstitutional on the ground that they denied the proposed subject due process of law.

SUMMARY

Two decades of experimentation and litigation have made it possible to draw fairly definite conclusions of what is required of a law authorizing or making mandatory the sterilization of the socially unfit, to keep it within the provisions of the bill of rights as included in the Federal and the various state constitutions.

First: Punitive sterilization is generally looked upon as contrary to civilized practice and as contravening the various constitutional provisions against cruel and unusual punishments.

⁷² *Supra*, note 61b.

⁷³ *Smith v. Wayne Probate Judge*, *supra*, note 12 at 411.

⁷⁴ *Supra*, note 62.

⁷⁵ *Supra*, note 32.

⁷⁶ *Supra*, note 10.

Second: Most courts have to date regarded a law for the sterilization of incompetents, limiting its application to inmates of state asylums, as denying such inmates the equal protection of the laws, but the tendency is in the direction of upholding such a classification if combined with a policy which will bring into such asylums similar incompetents and thus subject them to the operation of the law.

Third: It is absolutely essential that provision be made for a hearing which will enable the proposed subject of sterilization to contest the application of the law to him, whether that hearing be before an administrative board or a judicial tribunal, and adequate provision should be made for the review by appellate courts of the decision on such hearing.

The spread of this type of legislation in the United States is significant when we consider the fact that the popular mind does not contemplate it with any degree of enthusiasm.

But in view of the fact that the inheritance of mental defectiveness is no longer a theory, it is inevitable that the public should ultimately acquiesce to the enactment and enforcement of laws which will check the increase of the incompetent classes—provided such laws adequately safeguard the members of such classes from discrimination and abuse and provide a procedure so careful in its fact-finding methods that ample protection is given against the chance asexualization of persons who do properly belong to them.

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