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A PROTEST AGAINST LAWS AUTHORIZING THE STERILIZATION OF CRIMINALS AND IMBECILES.

CHARLES A. BOSTON.^a

Good and wholesome laws. Some one's idea of the public weal is the excuse for every abuse ever committed by power! For example: By the Act of 22 Henry VIII, Ch. 9, passed in the year 1530, after reciting that

"The King's Royal Majesty calling to his most blessed remembrance that the making of good and wholesome laws and due execution of the same against the offenders thereof is the only cause that good obedience and order hath preserved in this realm."

It was enacted by authority of Parliament that Richard Rouse, otherwise called Richard Cook,

"of his most wicked and damnable disposition, did cast a certain venom of poison into a vessel replenished with yeast or barm, standing in the kitchen of the reverend father in God, John, Bishop of Rochester, at his place in Lambeth Marsh; with which yeast or barm, and other things convenient, porridge or gruel was forthwith made for his family there being; whereby not only the number of seventeen persons of his said family did eat of that porridge, were mortally infected or poisoned, [but] one of them, that is to say, Bennet Curwan, gentleman, is thereof deceased, * * *"

And therefore,

"our said sovereign lord the king, of his blessed disposition inwardly abhorring all such abominable offenses * * *"

Ordained and enacted that the said Richard should stand and be attainted of high treason; and because the detestable offense required condign punishment, it was enacted that the said Richard Rouse should be *boiled to death*, (which was accordingly done¹), and that similar

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¹Froude's Henry VIII, C. iv.

PROTEST AGAINST STERILIZATION LAWS

offenders in the future should be "committed to execution of death by boiling for the same."

The case of Richard Rouse, selected for illustration, (and there might be hundreds of others chosen in which diabolical punishments were meted out, dictated by the same sentiment of supposedly good and wholesome laws), suggests now to the man reflecting upon it in the light of present day knowledge and intervening history, that both the king's royal majesty and his lords and commons in parliament assembled, were ignorant of a scientific fact; that they knew nothing of the possibility of "ptomaine poisoning," and that Richard Rouse was or may have been unjustly condemned by ignorant judges without a fair hearing, even though they were the king's royal majesty and the assembled political wisdom of England.

The Indiana Sterilization law. The legislature of Indiana, by C. 215 Laws 1907, approved by the governor of that state, enacted that

"Whereas heredity plays a most important part in the transmission of crime, idiocy and imbecility."

Therefore every institution entrusted with the care of *confirmed criminals, idiots, rapists and imbeciles*, should appoint two skilled surgeons, in conjunction with its chief physician, to examine the mental and physical condition of such inmates as may be recommended by the institutional physician and board of managers; and if in the *judgment of this committee* of experts and the board of managers, *procreation is inadvisable*, and there is no probability of improvement in the mental condition of the inmate, it shall be lawful for the surgeons to perform an operation for the prevention of procreation, but not unless the case shall have been pronounced unimprovable, *provided* that in no case shall the consultation fee be more than \$3.00².

Thus, after nearly four centuries of human experience, political and scientific, since Richard Rouse was boiled to death under a "good and wholesome law," for an offense of which he may not have been guilty, and for which he was not tried, we find the legislative wiseacres of Indiana, declaring that two skilled surgeons and a chief physician, after forming a \$3.00 opinion, may, upon the recommendation of a board of lay managers, sterilize a human being, if they think his case is beyond improve-

²It is interesting to note that the next law of this State, approved the same day, March 9, 1907, is for the *absolute* protection of quail, grouse and prairie chicken, during 10 1/3 months in every year, and of geese, ducks and other water fowl during 5 months, under penalty of \$10.00, and requiring a license to shoot them at any other time.

ment and if he happens to be in their power, because forsooth
 "heredity plays a most important part in the transmission of crime, idiocy and imbecility."

That is to say, heredity is reduced by the Indiana legislature to such exactitude that they know that if a "rapist" shows signs of improvement, his tendencies are not so far transmissible to his offspring as to make them a danger to the community; but if a board of managers, two surgeons, and a physician, conclude that there is no probability of improvement in the mental condition of a "rapist," then they may conclude that procreation is inadvisable because

"heredity plays a most important part in the transmission of crime, idiocy and imbecility."

I defy anyone to prove that the fact that a man has committed rape, is any indication that there will be transmitted to his offspring any undersirable hereditary trait.

Of course, I have selected, in order to illustrate the weakness of the law, perhaps the extreme possibility under it. It is possible, logically at least, and if the judges of the facts and probabilities are not restrained by their own good nature or better judgment, that a man who has been convicted of rape upon false testimony, and who shows not the slightest mental defect, shall be emasculated at the will of indifferent or malicious custodians.

The Indiana legislature has declared that crime, idiocy and imbecility are transmissible. This is the assertion of a fact of nature; the legislative declaration does not make it true; and it is by no means established as a universal truth, and perhaps not at all. But the legislature has, by implication gone further, and asserted that if a confirmed criminal, idiot, rapist or imbecile shows signs of probable improvement his defect is not so far transmissible as to make procreation undesirable. In short, the legislature has accepted as established fact, the finest shading in the laws of heredity, which are not yet established as a fact in their very broadest outlines.

Heredity. Being a mere lawyer, it certainly does not behoove me to be dogmatic upon the subject of heredity, upon which I confess my knowledge is that of a tyro. But the fact which strikes me forcibly is that the suggestions which lead to the sterilization of criminals and imbeciles come from sociologists and amateur reformers, and not from biologists or students of heredity. It might be demonstrated by many illustrations that a popular belief respecting a common fact of heredity may be an actual mistake. Let me take but one example: one of the most firmly fixed of the ideas of heredity is what is known among stu-

PROTEST AGAINST STERILIZATION LAWS

dents of the subject as Telegony, or the transmission to offspring by a later sire of the physical characteristics of a former sire with which the dam had previously bred. I have read some particularly cogent illustrations of this contention, which, taken by themselves, seemed to the lay mind convincing. And yet in the Article on Heredity in the latest edition of the Encyclopedia Britannica, the author says:

“Although breeders of stock have a strong belief in the existence of this, there are no certain facts to support it, the supposed cases being more readily explained as individual variations of the kind generally referred to as ‘atavism.’”³

But this merely serves as an illustration of the possibility of a too confident belief in notions of the heritability of *physical* qualities even among those whose business it is to breed animals for profit. It does not settle or tend to settle the question whether *mental* defects or criminal tendencies in human beings are transmissible.

I know of no reason to believe that mental characteristics are more transmissible than physical ones. Indeed, the scientific students of the subject of heredity do not yet seem to have made bold to dogmatize about the inheritance of mental characteristics in man; and the subject itself appears, so far as I can learn, among those who follow it systematically, to be still in the observational, rather than in the later stage, in which ultimate conclusions are formulated. Physical characteristics are still the subject of hazardous conjectures, such as, for instance, that because a man has 1024 tenth grandparents, this heavy weight of ancestral mediocrity produces regression or progression to type; so that while in a large number of cases of fathers 72 inches in height, the mean stature of sons was 70.8 inches—a regression toward the normal stature of the race,—in another large number of cases of fathers 66 inches in height, the mean height of the sons was 68.3 inches—a progression toward the normal.⁴ Of course, even here the maternal height is not taken into consideration, but it may be assumed either that there was a normal average of height among the mothers, or perhaps that the impulse toward normality drove the tall fathers to select short wives, and, vice versa, the short fathers to choose tall mothers for their sons. But be that as it may, how can we with any show of reason, unless we rely upon actual data from experience, collated and properly considered by those specially equipped by education for the purpose, know that “rapists” are more apt to beget criminal sons, independent of environment, than that 72

³See also article, Telegony, in same publication.

⁴“Heredity,” Enc. Brit., 11th Ed.

inch fathers will get 72 inch sons; why not rather assume that the tendencies in mental as in physical inheritance is progression toward the normal type represented in the average of the 1024 grandparents in the tenth previous generation with all of the additional grandparents in the intermediate generations. It is true that after comparison of physical characteristics, a so-called "ancestral law" of heredity has been ventured, to the effect that each parent on the *average* contributes $\frac{1}{4}$, each grandparent $\frac{1}{16}$, and each ancestor of the *n*th place $(0.5)^{2n}$. But this means that on the average no parent influences his offspring more than one-fourth in any physical peculiarity; and the remaining three-fourths, on the average, are determined (subject always to environment, or post-natal influences) by his other parent, and his more remote ancestors on both sides. Even upon this hypothesis, the writer upon heredity already quoted says, "But this like all other deductions, is applicable only to the mass of cases and not to any individual case."

I pause to ask what reason or data have we to suppose that mental traits differ in their relative transmissibility from physical traits? And of physical traits the same writer says:

"It follows that the study of variation must be associated with, or *rather* must *precede*, the empirical study of heredity, and we are beginning to know enough now to be *certain* that in both cases the results to be obtained are *practically useless* for the individual case, and of value only when large masses of statistics are collected. No doubt when general conclusions have been established, they must be acted on for individual cases, but the results can not be predicted for the individual case, but only for the average of a mass of individual cases." (The italics are mine.)

But these sterilization laws deal with individual cases; and they authorize probably ignorant boards of managers, probably ignorant, if not to say malicious, wardens and superintendents, and possibly, if not probably, ignorant institutional physicians to select individual victims for the sacrifice.

Of course, I have some intimation of the dominant and regressive characteristics assumed by Mendel's law, and of the assumption of prepotency in certain ancestors, such as negroes, Chinese and Jews, but I am not aware that it is yet established that criminals, or rapists are either dominant or prepotent, whatever may be said of imbeciles or idiots.

I select the sterilization law of Indiana for discussion at this point because it is both the crudest and, as I understand, the earliest of the laws, relating to sterilization in this country.

PROTEST AGAINST STERILIZATION LAWS

I have purposely brought it into juxtaposition with the legislative condemnation of Richard Rouse, because to my mind, they both illustrate a thoroughly bad tendency in legislation; the assumption by the legislature to declare facts of which it is not fully advised, and the attempt to prescribe a penalty unnecessarily harsh, and which in the particular case may be unjust and not calculated to produce the desired result or any substantial benefit to the community. Unless sterilization has a well ascertained beneficial result upon the community itself, it is a punishment simply; and has no justification except as a penalty. Whether it has any beneficial effect upon the community is most assuredly debatable as a fact.

While I would not assume to declare the laws of heredity with that degree of confidence which marks the enactment of the Indiana legislature, I am aware that the transmissibility of acquired characteristics has been one of the most hotly debated questions among biologists, even when they concern only the external physical appearance, such as the feathers of a bird. I am not aware that biologists have ventured to dogmatize with any certitude upon the transmissibility of mental characteristics in human beings. I am aware that alienists have so far thought that they recognized family peculiarities in mental traits, that they have induced courts, within limits of close relationship, where the mental condition of a person is in question, to permit evidence of a similar mental condition in others of the same family, and that certain students of social conditions have compiled the statistics of certain families, whose environment was unfavorable to high mental development in the individual, and have apparently found an abnormally large number of mental or social defectives in such families, when compared with other families more favorably situated. I am aware also that it is these students of social conditions, rather than alienists or biologists, who have sought to inculcate the conclusion which they have drawn that mental defects and tendencies to crime are transmissible. But I am not aware that anyone, except the Indiana Legislature and its advisers, has yet been so bold as to advance the theory that from the standpoint of heredity a man who shows an individual tendency to improve is a desirable father, while one who exhibits a tendency to remain stationary is an undesirable father, and particularly where the extent of his present deterioration is not defined. It may be that I have misapprehended the meaning of the term *rapist*, as used in this law; and that it does not mean a person who has been convicted of a single rape; but that it means rather a person who has exhibited a confirmed mental

idiosyncrasy in that direction. If the preamble of the law is to be taken as the excuse for its enactment, then it means that whereas confirmed criminals (whatever that may mean), rapists (whether confirmed or not, as the case may be), idiots, and imbeciles have been demonstrated to transmit their defective characteristics to their offspring, unless they themselves show signs of improvement, therefore those of these who show no signs of improvement ought to be the subjects of sterilization.

The objections to the laws.—I contend that there is no sufficient justification in established and accepted fact for this; that the facts are yet debatable; that if the facts were established beyond dispute, the remedy would be of doubtful utility; and that as a dangerous precedent, it should be most carefully scrutinized, if not utterly condemned; and that finally, from the standpoint of sound practical philosophy, it belongs to a class of legislation which has been left behind in the cast off junk of ignorant efforts, with which the past is filled.

While I have, for reasons already explained, taken the Indiana statute as the type for discussion, I shall speak later of the statutes of a similar nature in other States.

The legislation is premature and its theory possibly unsound.—The Indiana legislature in taking it for granted that criminal tendencies are transmissible, and perhaps even in the case of idiots and imbeciles, has failed to consider the effect of environment in producing undesirable traits in offspring. There are those who earnestly contend that every such undesirable trait is the result of surroundings and example, and not of heredity. It seems certain, to me at least, that the subject has not yet been so fully studied, or the facts so far ascertained, as to establish that criminal traits are transmissible, even if we are agreed upon what constitute criminal traits. Many of our crimes are statutory only, and they do not necessarily indicate depraved tendencies even in the perpetrator, not to speak of their transmissible character. And many of the traits, which in an orderly community are crimes, are those which among leaders of men in political communities have in the past constituted them popular heroes. So there is really no fixity about what constitutes a criminal trait. Napoleon Bonaparte, for instance, had enough traits of a reprehensible kind, to fill a jail with confirmed criminals, if distributed among the common herd, and not united under a single crown.

In a recent communication to the New York Times (dated Dec.

PROTEST AGAINST STERILIZATION LAWS

11, 1912) Leonard Darwin, President of the Eugenics Education Society of Great Britain, said of those whom *he* regarded as certain to pass on mental or bodily defect to offspring:

“As to whether surgical sterilization should ever be enforced on such persons, we still have an open mind, *but certainly not till further information on this subject is available.*”

In the report of the Wisconsin Branch of the American Institute of Criminal Law and Criminology for 1912 (p. 56), it is said that the combined study of plants, animals and the human race has not yet ascertained the laws of heredity applicable to habitual criminals, imbeciles and lunatics.

“And it will be only after united collaboration of many investigators and study of vast data of family traits and family pedigrees that we will be able to find out the fixed laws which govern heredity.”

But with us, notwithstanding these conservative views, the legislation moves on apace. In the American Year Book for 1912 it is stated that the Sterilization Law of Wyoming has been held constitutional in an appeal, the case being that of a man convicted of unnatural crime;⁵ that in Idaho the operation is being used in the hospital for the insane; that in Indiana the operation has been temporarily suspended in deference to the opinion of the governor, who believes it unconstitutional, though no effort has been made to secure a court decision.

In the International Year Book for the same year it is said, under the head Penology: “Very recently about eight states have assented to the principle of sterilization of certain classes of congenital criminals.” As a matter of fact, however, the laws do not pretend to confine the operation to “congenital” criminals, and no trustworthy means exist for the determination who is a “congenital” criminal.

One who reads the history of the reformation and counter-reformation period in England, when successive generations of distinguished families were sacrificed to the ideas of criminality which then prevailed, might consider therefrom that at last he had struck a line of really congenital criminals, but if he should follow the line he would doubtless find that with changing ideas of criminality, succeeding generations have taken their place as distinguished servants of the common good.

In England for many years the severity of the criminal law was such that we might reasonably expect that if criminal tendencies are

⁵It would seem that this is a mistake and that reference is here intended to the case in Washington mentioned below.

heritable, all criminal traits should have been eradicated long since by the elimination of the criminal stock; every crime of any seriousness whatsoever was capital and no compunction was felt about exacting the penalty; possibly the benefit of clergy or the right of sanctuary saved some of these criminals to propagate their kind, but we may perhaps get some idea of the stamping out process if we ponder the assertion that for the single offense of vagrancy, during 36 years of the reign of Henry VIII, 72,000 persons were hanged;⁶ yet the prisons of England have never been empty. Assuredly it is not contemplated that 72,000 persons shall be sterilized in Indiana; yet, if not, what substantial effect shall we consider that the sterilization of a few may have on the criminality or idiocy of its population of 2,700,876.⁷

If criminal traits were hereditary, there are some parts of the civilized world to which we could look with certainty for a depraved population obviously inferior to the rest of mankind, namely, those places which have in time past been used as penal colonies, or to which criminals have been banished. It would perhaps be invidious to name them, but they will readily occur to the reader. As they pass before me in reflection, so far as I am advised, they appear, on the contrary, to have produced an unusually high grade of citizenship. But in answer to this reflection it might be urged, that the crimes of which these ancestors were convicted were in many instances not those which involved real moral turpitude or indicated an actually depraved disposition; that they were largely, if not mostly, merely the protest of an independent spirit against the legally established order of things. In a great measure this is possibly true, but it is not universally true; and enough of crimes of moral turpitude were, it seems to me, involved in the offenses, to afford a fair test of the theory, which the Indiana legislature has accepted and declared as fact. So far, however, as my information goes, there is no confirmation of the theory respecting criminals in the study of the qualities of the present population or the political history of those communities which were the dumping ground for those criminals who escaped with their lives the severity of the "good and wholesome laws" of our righteous ancestry.

As for the idiots and imbeciles, they are doubtless in another class; and it is entirely possible that their mental incompleteness is a transmissible blemish. Indeed, so far as I am advised upon this point,

⁶Fisher, *History of Landholding in England: "The Tudors;"* questioned, however, by Froude; Froude's *Henry VIII*, Vol. III, Ch. 16 "The Six Articles."

⁷Census, 1910.

PROTEST AGAINST STERILIZATION LAWS

it seems probable. But I am not sufficiently fortified with statistics to know whether this is inevitable, or whether environment and example are not here also factors of large influence. I am not unaware of the result of experimentation in animal and plant selection, but these experiments relate to physical qualities, and are not themselves free from the favorable influences of environment, if not of example. I am even aware of some theories of heredity to which I have already adverted; but here too, as I understand, it is physical characteristics which are reduced to a probability of recurrence in a fairly calculable number of cases. It would, it seems to me, be premature yet to base legislation upon the acceptance of these theories of heredity in animals and plants; while it would be a bad step indeed, even for a speculative scientist, to extend their operation to the effect upon offspring, of the perhaps accidental arrest of mental development in a human ancestor. Idiocy and imbecility may be due merely to arrested mental development in an individual, and it does not seem to me that the time has yet come when we can safely predicate civil laws upon the possibility that such accidents in individual cases project their consequences through all subsequent time. It is indeed pitiful, from the study of the immediate results, largely economic, to consider an imbecile or an idiot as a parent. But also from the standpoint of immediate offspring it is often likewise pitiful to reflect upon the wrecks, socially considered, who trace their ancestry to the eminently successful men of great wealth whose acquisitive shrewdness not only removed them from the category of idiots and imbeciles, but even of ordinary men. In many instances, it seems to me, the lack of desirable traits in the offspring could be traced to the lack of proper care and example, rather than to any inherited defect. Nor do I mean to say that idiocy or imbecility may not be the outward index in an individual of a transmissible defect. All I mean is that it is not yet established that it is necessarily so; or that the mere fact of idiocy or imbecility, though without hope of improvement in the individual, makes it certain or even probable that offspring will not be as fully equipped for the battle of life as the offspring of those in the same social environment who are neither imbeciles or idiots.

It is from these considerations and reflections, which it is true are merely those of the average layman, somewhat informed and capable of reflection, that I deduce the proposition that the time has not yet arrived when a legislature, composed perhaps of ill-informed and non-reflective membership, can safely determine, or enact a law predicated upon, the proposition that "heredity plays a most important part in the

transmission of crime, idiocy and imbecility." And I even doubt whether a legislature can delegate to a commission the right or power to determine when in their opinion procreation is undesirable, and therefore whether the legislation would be any protection against a suit for damages by the injured person.

The legislation is of doubtful utility.—But I have also spoken of the doubtful utility of these laws, and here I shall assume for the purpose of the argument, that it is established beyond peradventure that criminal tendencies, as well as idiocy and imbecility, are transmissible traits. Let us consider the practical effect upon the community of such operations. Once again taking the Indiana law as the type (for it is the one least characterized by legal safeguards and consequently the one under which presumably the greatest number of these operations may be expected to be performed), we must consider that even here there are many limitations upon the class of subjects to be treated, and even within the eligible class, I shall assume that the persons charged with the duty of deciding will act with sound discretion and in good faith. The more discrimination they exercise, the less universal will be the supposed benefit. Looking first at this power of discrimination, we see that the responsibility for its exercise is shared by a board of managers, two surgeons and a physician; it must be first recommended by the chief physician and the board of managers (presumably a majority of the latter); and as I construe the law, the two surgeons must share their view. It is, therefore, only in case of this necessary concurrence that the operation can be performed. The greater the care, the less the utility, unless the judges so constituted are so accurate in their judgment that they include every possible case of danger to progeny and exclude every possible case of non-danger. It is fair to assume, I think, that the institutions of Indiana have not progressed so far toward perfection of judgment, that these functionaries will develop just 100 per cent. of efficiency in exercising the discretion thus committed to them by law. If they err on the side of over-exercise of power, they will sterilize those who ought not to be sterilized, and thus impair their utility, and if they err on the side of moderation, the State will be correspondingly deprived of the usefulness of their function. That they have been fairly liberal is apparent from the fact that at one institution up to January, 1912, from 1899, the number of operations had been over 700.⁸ But even this practical illustration is not over-

⁸"Social Diseases," Vol. III, No. I, Jany., 1912, p. 11. The submissions from 1899 to 1907, were voluntary.

PROTEST AGAINST STERILIZATION LAWS

whelmingly convincing to me. While every one of these is presumably, physically a potential parent, it would seem that the social opportunities for parenthood were actually far less. The law itself exercises some restraint upon the use of the discretion upon which the operation must be prescribed, for it requires, not only that the functionaries shall determine that procreation is inadvisable, but also that there must be no probability of improvement in the mental condition of the inmate. I shall assume that the functionaries will act in such good faith that they will construe this to mean that the mental condition of the inmate is impaired to such an extent that it may be described as hopeless. Literally, however, the inmate's mental condition may be absolutely normal and altogether unimpaired, for there is no reasonable probability of improvement of the mental condition of a normal man; and yet absence of the probability of improvement is all that the law requires beyond the opinion of the functionaries that procreation is undesirable. But I shall assume that the law actually applies only to a person of impaired mental faculties whose condition admits of no reasonable hope of restoration, and that the impairment is of such nature as to justify an honest body of functionaries in concluding that procreation is inadvisable for fear of the effect on offspring and that there is no probability of improvement in the individual.

But let me pause to ask how many persons of impaired mental condition, who are under treatment in an institution for their care, and in whom there is no reasonable hope of improvement, and by whom procreation is unadvisable, are in the ordinary course of events likely to procreate. Is it not a fact that in the large majority of instances procreation by such persons is most unlikely? I am well aware that if not confined in institutions they might not be restrained in the exercise of their power of procreation; but is not their presence in the institution a practical restraint, and is not the hopelessness of their condition an earnest of their continual restraint? Of course, I am likewise acquainted with the scandals which have occasionally come from such institutions (not, however, so far as I know, in Indiana) as the result of misconduct in the institution. But these occasional instances are certainly not any more sufficient excuse for sterilization of all inmates, procreation by whom is undesirable, than was Herod's purpose of terminating the existence of a possible rival, an excuse for his slaughter of all infants two years old and under.⁹

⁹Matt. II, 16.

It seems to me that this much may be said as bearing upon the utility of such sterilization; idiots and imbeciles are less likely to procreate than normal persons; those who are hopelessly so are still less likely to procreate than those who are still not beyond hope; and those who are in institutions are less likely still than those who are unrestrained; so that those upon whom this operation is to be performed are least likely of all persons in the entire community, excepting the impotent and those confined for life, to beget their kind. It seems to me that no law could be conceived which for its beneficial effect upon posterity would be more negligible than this, measured by these considerations. I know it is contended that the effect upon the patients themselves is beneficial,¹⁰ but I assume, that where demanded for this reason, like every other surgical operation, it may be legally justified without the license of a statute.

Let us pause also to consider the statistics of the situation. In Indiana, as far as I am advised, the number of operations in 13 years was 700, an average of 54 a year. The census of 1910 showed the population of Indiana to be 2,700,876. Assuming that the operation has now attained its normal rate, that its rate is 54, and that it is performed in all cases at the age of puberty, so as to prevent all procreation whatsoever by such undesirable parents, and that the average number of children for such parents would be five in a lifetime, then the total number of children directly prevented by such an operation during a half century would be 13,500, that is to say, only one-half of one per cent of a stationary and unchanging population of 2,700,000, or one-half of one per cent of a population stationary in numbers, but renewed in individuals once in thirty-three years. If we consider the total population of the State in a period of fifty years, including all of those born and all of those dying, we will see that sterilization of such a small part of the population would have statistically a negligible effect, even if we should include in the calculation of benefits the children in the third and fourth generations whose being is thus prevented.

The legislation in respect to criminals.—Thus far, I have assumed in considering the utility that the Indiana law applied only to idiots and imbeciles, for those are the only persons of whom it seems to me it can with any sort of reason be predicated that there is no probability of improvement in mental condition. But let us now assume that it can be said of a *confirmed criminal* or *rapist* that, though not an idiot or

¹⁰See discussion *pro* and *con*, in "Social Diseases," Vol. III, No. I, Jan., 1912.

PROTEST AGAINST STERILIZATION LAWS

imbecile, there is no probability of improvement in mental condition, then what would be the utility, from the standpoint of diminished posterity, of such operations upon such classes. Assuredly the probability of improvement of the mental condition of a criminal or rapist is a matter which could not be so certainly settled as that of an idiot or imbecile, and therefore, boards of managers in Indiana, being presumably neither reckless nor bloodthirsty, nor yet bent solely upon revenge, could not be expected to sterilize as great a proportion of criminals as of idiots, at the present stage of our knowledge of heredity, notwithstanding the preamble of the law. So that the influence of sterilization upon the diminution of the "hereditary criminal" might reasonably be expected to be far less than upon the hereditary idiot.

But how soon may it be determined that one is a *confirmed* criminal? I confess I do not know what is the legal measure of a confirmed criminal. But I assume that whatever may be the tendencies of a person at the age of puberty toward confirmed criminality, the fact must be ascertained by the event and not by the prophecy; and therefore *confirmed* criminality can not be ascertained until a somewhat advanced age. The character of crime which a "confirmed criminal" commits is such that presumably it is attended by a somewhat prolonged punishment; therefore before it is demonstrated that a criminal is confirmed or "that there is no probability of improvement in (his) mental condition" he must in the nature of things be so far along in years that it is improbable that he will become the parent, after such time, of the average number of children. The progeny born to such a parent before the determination of his candidacy for sterilization will not be influenced by the operation, and the older he is when he becomes a candidate, the less benefit will the operation confer upon the community. In fact, it seems to me when we consider age, incarceration, and the necessity for determination against the probability of improvement in mental condition, that society has so little benefit to expect from the sterilization of confirmed criminals that it may be considered negligible; and as for the benefit to society from the sterilization of "rapists," except *ad terrorem*, it is certainly negligible. The number of "rapists" is so inconsiderable that their progeny, even if they had fully developed the instincts of their ancestors, would be no substantial menace to the peace and safety of the community. The number of convictions of rape annually in Indiana is unknown to me, but I hazard the surmise that it is a smaller number, doubtless, than the number of persons killed by automobiles. If criminal tendencies were hereditary, then

there would be more substantial reason for sterilizing reckless chauffeurs than "rapists."

I have assumed in considering the utility of sterilization, not only that the characteristics of the defective parent are transmissible, but that they are transmissible unmodified. Here again, however, it is necessary for scientific accuracy to consider the modifying influence of the inherited qualities of the other parent, and in later generations, of other stocks. I am not ignorant of the investigations, and particularly in New Jersey,¹¹ into the family histories of selected defective stocks, but even here there are at least four elements which are to be considered before any correct conclusion can be reached and I am not aware that they have been fully considered or that the basis for a correct deduction has yet been laid. These are: the proportion in which the results in the particular cases hold true for like cases; the proportion of normal or super-normal offspring from the same parentage; the influence of environment, including parental example; and the relative frequency in which similar results follow normal parentage in like environment.

Considered therefore wholly in its utilitarian aspect, it seems to me that it is fairly demonstrable that this legislation is either altogether unnecessary or of such slight benefit to the community as to be negligible, and in view of the scientific uncertainties of the premise upon which it is based, that it is positively undesirable legislation, in that it accepts as true that which is not yet ascertained and therefore is too likely to stand in the way of actual progress.

From my own standpoint, it is legislation which visits upon the individual the penalty for bad economic conditions; and is one of those raw pseudo-reforms which is wrought on the demand of a dangerous, though sincere element in the community, which on account of its obvious sincerity is too influential in securing the enactment of its emotional conclusions into law to be enforced against its less influential fellows in their common State.

I am not in sympathy, however, with those who would discourage such legislation upon religious grounds. I should regard it as fully justified if the facts seemed to me to justify the premise that the parental qualities were so certainly or even probably transmissible as to be a menace to the welfare of the community, and that in the light of such premise the operation could be considered to be practically useful to the community.

¹¹Social Diseases, Vol. III, No. I, Jany., 1912. Also recent investigation in Burlington Co.

PROTEST AGAINST STERILIZATION LAWS

Let me now, for illustration of the really dangerous tendency of such laws, press just slightly further the emotionalism which now demands the sterilization of confirmed criminals, rapists, idiots and imbeciles. I shall embody it in the form of a statute, and leave it without comment, except to say that such legislation is not unthinkable as the legitimate and logical extension of the principle embodied in the actual present law of Indiana.

"Whereas inordinate individual wealth is damaging to society, and undesirable civic tendencies are transmissible by heredity, it is hereby enacted that each association for the improvement of the poor shall call in two philosophic anarchists and one socialist, who shall determine whether any person who shall have acquired inordinate wealth is by reason of the over development of his acquisitive greed a menace to the peace and welfare to the community, and if they so determine, they may cause to be performed upon him an operation for sterilization to prevent procreation, provided, in no event shall anarchists and socialist receive more than \$3.00 for their consultation fee."

The helplessness of the victim.—Nor can I forbear a warning based upon the helpless condition of the person upon whom the operation is to be performed. Such a law places him absolutely in the power of those who have control over him; he has no power to speak for himself, and no right to an intercessor; he is to be subjected to the uncontrolled will of those who sit in judgment upon him. And so far as Indiana is concerned, it may be practiced in every institution having the care of individuals of any of the classes indicated. There are *private* institutions of that character in some states, and the methods of commitment are not always such as to prevent the commitment of those who ought to be at large. It has frequently been charged that cupidity or other selfish reasons have lain at the foundation of such commitments; but under such a law, onœ a person should be so committed, his future progeny would be subject to the will of the management and its medical assistants. The temptation to affect the devolution of large fortunes would be such as to make it imaginable that a conspiracy could be successfully carried out under the guise of such a law, to make the temptation direct the accomplished fact.

The constitutional aspects of the legislation.—But finally, even if the facts of heredity and statistics should demonstrate the utility of such a law, it would in my opinion, nevertheless override a wise precept of sound political philosophy which is embodied in our Bills of Rights in the phrase:

"Nor cruel and unusual punishments inflicted."

It is not often that our modern progressives can get a sound lesson in individual liberty from one of the statesmen of Continental Europe during the troubled times of the Protestant reformation, but the fol-

lowing observations from Marillac, a French diplomat, to his master, Francis I, in 1540, following the execution in England of Thomas Cromwell, prime minister of Henry VIII, and immediately afterward of three priors of Doncaster, hanged as traitors for having spoken in favor of the pope, and three Protestants as heretics, seem to me to be pertinent reflections upon the Indiana sterilization law:

"The scene was painful as it was monstrous. Both groups of sufferers were obstinate or constant; both alike complained of the mode of sentence under which they were condemned. They had never been called to answer for their supposed offences; and Christians under grace they said were now worse off than Jews under the law. The law would have no man die unless he were first heard in his defence, and heathen and Christian, sage and emperor, the whole world, except England, observed the same rule.

"Here in England, if two witnesses will swear and affirm before the council that they have heard a man speak against his duty to his king, or contrary to the articles of religion, that man may be condemned to suffer death, with the pains appointed by the law, although he be absent or ignorant of the charge, and without any other form of proof. *Innocence is no safeguard when such an opening is offered to malice or revenge. Corruption or passion may breed false witness; and the good may be sacrificed, and the wicked who have sworn away their lives may escape with impunity. There is no security for any man unless the person accused is brought face to face with the witnesses who depose against him.*"¹²

Let us hold up the Indiana statute, for instance, before the criticism of the 16th century indictment and see how poorly it withstands it; and yet 16th century French diplomacy was not notable for its overwhelming mercy; nor do I conceive that our sociologists wish to return to the horrible scenes which Marillac thus depicted; but they have by their ill-considered legislation opened up, in a minor degree, as sterilization is less than immolation, precisely the same sort of iniquitous possibilities which shocked even a 16th century-French-diplomatic sense of justice.

In our days when the political wisdom of the past is being impatiently questioned as an unnecessary restraint upon the present, although we were suffering the dead and ignorant to curtail the liberty of the present, it were well that we should substitute for the term

¹²Froude's Hy. VIII, C. XVII, "Anne of Cleves and Fall of Cromwell."

PROTEST AGAINST STERILIZATION LAWS

"Bill of Rights" the phrase "The *Never Again* Clauses" of our Constitutions.

What is not sufficiently impressed upon present-day emotionalists, is that these "iron-bands of the dead," are not the *priori* conclusions of ignorant speculators, but they are the solemn warnings of experience. It is as though they said "So much is clear gain! Profit by our horrible experience to the extent that you should adopt for your guidance, the *knowledge* that the welfare of any community demands, that—*Never Again* * * * !"

Those sages who framed the Constitution of the United States, and submitted it to the people of the States for ratification by their local representatives, framed a preamble that the purpose of the People of the United States in adopting a Constitution was, among other things, "to establish justice," "and secure the blessings of liberty to ourselves and our posterity." And that instrument, as the result of *experience*, and not of speculation, provided that no State should pass any bill of attainder or *ex post facto* law (Art. I, Sec. X, 1.), and that, while Congress might declare the punishment of treason, no attainder of treason should work corruption of blood, or forfeiture, except during the life of the person attainted (Art. III, Sec. III, 2).

These were among the "*Never Again*" clauses of the original Constitution. Such intelligent and well informed patriots as Patrick Henry and George Mason of Virginia and Luther Martin of Maryland opposed its adoption, however, because it failed to embody other "*Never Again*" clauses which in their opinion experience had demonstrated to be equally desirable and necessary. The result of that opposition was a promise or understanding that amendments would promptly be adopted rectifying this omission, and consequently in the First Congress amendments were proposed, and subsequently adopted, incorporating into the Constitution a few other "*Never Again*" clauses, including these:

"The right of the people to be secure in their *persons* * * * against unreasonable searches and seizures shall not be violated" (Art. IV, Amdts.)

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except, &c., * * *; nor shall any person be subject for the same offense to be twice put in *jeopardy* of life or limb" * * * "nor be deprived of life, liberty or property without due process of law," (Art. V, Amdts.)

"The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people," (Art. IX, Amdts.)

Subsequently in the light of similar hard bought experience, additional "*Never Again*" amendments were added, which incorporated a prohibition of slavery or involuntary servitude except as a punishment

for crime whereof the party shall have been duly convicted (Art. XIII, Amdts.), and the prohibition of the making or enforcing of any law by any State which shall abridge the privileges or immunities of citizens of the United States, or deprive any person of life, liberty or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws (Art. XIV, S. 1).

Of these articles only that respecting bills of attainder and *ex post facto* laws, and of the amendments only the XIIIth and XIVth are operative upon the State legislatures, but the others are types of similar provisions in most of the State Constitutions.

To my mind the forcible sterilization of a human being, because of crime is or may be a violation of the spirit if not of the letter of the principle which prohibited the States to pass any bill of attainder or *ex post facto* law, and which refused to Congress the power to enact that an attainder of treason should work corruption of blood, or forfeiture beyond the life of the person attainted; it also may have in it the element of unreasonable seizure of a person; it adds to the punishment for an infamous crime, and subjects the individual to a double jeopardy for the same offense; and it may deprive him of liberty without due process of law; it deprives him of the assistance of counsel; and it is or may be a cruel and unusual punishment; it is dangerously allied to involuntary servitude, in that it makes one creature absolutely subservient to the will of another, when the other chooses to exercise the will; it may be the abridgment of a privilege or immunity of a citizen of the United States, and it may be the denial of the equal protection of the laws.

I do not mean to say at this point that the Indiana, or any other law, is unconstitutional for any of these reasons, for in many of the above respects the Federal Constitution does not restrain the States, and in others it may be doubtful whether the particular law may be found to violate the prohibition. I am speaking now, however, of the *spirit* of individual protection which the Federal Constitution and most of the State Constitutions breathe, and I do say that the Indiana law does, more than some others of these laws, ignore this spirit. It starts with the assumption that the good of posterity and of the community, including that posterity, justifies subjecting a helpless individual to the irreparable dictation of others in whose power it places him, and makes the possibility of his posterity subject to their uncontrolled judgment, if not their uncontrolled will. It goes farther, therefore, than corruption of blood or forfeiture of property; it makes

PROTEST AGAINST STERILIZATION LAWS

posterity and inheritance impossible; it allows an irresponsible body of persons to impose upon a person already convicted and punished, a further penalty for the same offense if they in the exercise of their uncontrolled judgment guess it to be desirable (for of course they cannot with any certainty foretell the character of the unborn children); and it gives him no opportunity to show the contrary or to have any assistance of counsel therein.

Much is said in these days of the reprehensibility as a political precept, of the doctrine of individual liberty; and it is frequently asserted, as though individual liberty were inconsistent with it, that in the good of the community lies the true solution of all political problems. But the liberty secured by these constitutional precepts was not secured except for the good of the community. Those who framed the precepts as propositions of sound political philosophy were only considering the good of the community; their idea was that experience had taught that the actual good of the community demanded that each individual of which it is composed should have a degree of protection, though he should be only one man in a given case, from the cruelty or injustice of the remaining members of the community, and that this made for the peace and welfare of the entire community, when each individual of which it was composed had similar protection. It is the individual mind that experiences the benefits of domestic tranquillity and the blessings of liberty; and the liberty accorded by the Constitution is not liberty to injure the community, but the liberty to be let alone, for the true good of the community. In order that the community may be one in which tranquillity is enjoyed and the blessings of liberty experienced, each unit that composes it must be free from unnecessary, unjust or unregulated interference from others even though they be the remainder of the community. It is no more just, for instance, that the community shall deprive one of its members of his individual property or rights without other cause than its own will, than that the one should do the same to the remainder; the injustice is the same regardless of numbers.

I have said that the *Never Again* clauses are the result of actual experience. Let us take for illustration, the prohibition of the infliction of cruel and unusual punishment. It is, I think, safe to say that no cruel or unusual punishment was ever inflicted except under pretense of the good of the community. Richard Rouse was boiled to death pursuant to a law enacted by the king and parliament, because his detestable offense required condign punishment.

It has been said that the phrase embodied in our constitutional prohibitions of the infliction of cruel and unusual punishments has its origin in the Declaration of Rights¹³ affirmed in the Act of Parliament settling the succession of the crown.¹⁴ In this act, ordinarily styled the Bill of Rights, it is recited that King James second by the assistance of divers evil counselors, judges and ministers employed by him, did endeavor to subvert and extirpate the Protestant religion and the laws and liberties of the kingdom, and among other enumerated matters complained of, it was asserted that "excessive fines have been imposed, and illegal and cruel punishments inflicted * * * all of which are utterly and directly contrary to the known laws and statutes, and freedom of this realm" and the lords and commons "for the vindicating and asserting their ancient rights and liberties declare: * * * that excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted" * * * "and they do claim, demand and insist upon all and singular the premises, as their undoubted rights and liberties; and that no declarations, judgments, doings or proceedings, to the prejudice of the people in any of the said premises ought in any wise to be drawn hereafter into consequence or example."¹⁵

The constitutional provision against cruel and unusual punishments derived from this Declaration and Bill of Rights has been adopted in 36 States of the United States, including Indiana, Connecticut, New Jersey, New York and Michigan, which have recently adopted sterilization laws. At one time it was seriously questioned whether the prohibition in the Federal Constitution did not extend to State legislation, but this view was overruled.¹⁶

Cruel and unusual punishments.—Many illustrations might be cited of what has been considered a cruel and unusual punishment, but I shall be content to cite only those which are somewhat analogous to sterilization; among which are those which inflict torture, such as the rack, the thumbscrew, the iron boot, the stretching of limbs and the like, which are attended with acute pain and suffering (dissent of Field, J., *O'Neil vs. Vermont*, 144 U. S., at 339). One of the illus-

¹³Hallam's Constitutional History of England, p. 106.

¹⁴Wm. & M. Session 2, C. 2 (A. P. 1688).

¹⁵Stubbs Select Charters, Bill of Rights, p. 523.

¹⁶(See dissent of Field J., in *O'Neil vs. Vermont*, 144 U. S. 337, in which he took the view that by reason of the prohibition of the XIVth amendment it is one of the privileges and immunities of citizens of the United States which no state can abridge, to be free from the infliction of cruel and unusual punishments).

PROTEST AGAINST STERILIZATION LAWS

trations of unconstitutional cruel and unusual punishments which has been more than once suggested in judicial opinions is *castration*.¹⁷

In the recent case of *Weems vs. U. S.*, 217 U. S., at p. 372, Mr. Justice McKenna, speaking for a majority of the court, said of the views which caused Patrick Henry and others to advocate a Bill of Rights in the Federal Constitution:

"They were men of action, practical and sagacious, not beset with vain imagining, and it must have come to them that there could be exercises of cruelty by laws other than those which inflicted bodily pain or mutilation. With power in a legislature, great, if not unlimited, to give criminal character to the actions of men, with power unlimited to fix terms of imprisonment with what accomplishments they might, what more potent instrument of cruelty could be put into the hands of power? And it was believed that power might be tempted to cruelty. This was the motive of the clause, and if we are to attribute an intelligent providence to its advocates we cannot think that it was intended to prohibit only practices like the Stuarts, or to prevent only an exact repetition of history. We can not think that the possibility of a coercive cruelty being exercised through other forms of punishment was overlooked. We say 'coercive cruelty' because there was *more to be considered than the ordinary criminal laws*. Cruelty might become an instrument of tyranny; of *seal for a purpose*, either honest or sinister."

In the *Weems* case (p. 390), in a dissenting opinion, Mr. Justice White summarizes the cruel and inhuman punishments condemned in the English Bill of Rights as the inhuman bodily punishments of the past, or the infliction of usual punishments to an unusual extent, such as the annual exposures in the pillory and the annual whippings imposed upon Titus Oates for the balance of his natural life, or the infliction of illegal punishments under claim of judicial discretion.

In respect to a "criminal" or "rapist" sterilized under the Indiana law, I think I can aptly quote again from the opinion of Mr. Justice McKenna in *Weems vs. U. S.* (217 U. S., at p. 366), in condemning as contrary to the spirit of our Bill of Rights a sentence imposed in the Philippine Islands which directed confinement for a period, with chain at ankle and wrist, hard and painful labor, no assistance from friend or relative, no *marital authority or parental rights* or rights of property, and no participation in the family council; and after his release from prison a perpetual limitation of his liberty:

"He is forever kept under the shadow of his crime. * * * He may not seek, even in other scenes and among other people, to retrieve his fall from rectitude."

The punishment of sterilization visited upon Peter Abelard by or with the connivance of the Canon of Notre Dame, possibly with a sense of rectitude, that it was a just revenge, was at the foundation of one of

¹⁷See *Weems vs. U. S.* 217 U. S., at p. 377; *Whitten vs. State*, 47 Ga., at p. 301.

the most pathetic tragedies that has saddened the annals of mankind. Both he and the wonderful Heloise were forever kept under the shadow of this revenge; and he was driven in other scenes and among other people to a fruitless effort to retrieve his fall.

I know of course that in the case of sterilization, it is claimed that it is for the good of society to deprive the victim of the right of posterity and is therefore not to be viewed as a punishment at all. But is society any more greatly benefited by its regard for posterity than for its own present good, supposed to be derived from inflicting a punishment, cruel and unusual, as a deterrent to like offenders? Yet cruel and unusual punishments are forbidden, regardless of any possible good to present or prospective society.

In Patrick Henry's opposition to the ratification of the United States Constitution, without a Bill of Rights, he said:

"But Congress may introduce the practice of the civil law in preference to that of the common law. They may introduce the practice of France, Spain and Germany, of torturing to extort a confession of crime. They will say that they might as well draw examples from these countries as from Great Britain; and they will tell you that there is such a necessity of strengthening the arm of the government that they must have a criminal equity, and extort confession by torture, in order to punish with still more relentless severity. We are then lost and undone. And can any man think it troublesome when we can by a small interference prevent our rights from being lost?"¹⁸

Just as France, Germany and Spain, and occasionally English sovereigns, justified torture, in the interest of public safety, so now the sponsors of the sterilization laws justify mutilation in the fancied interest of the public welfare. But my thesis is that the public welfare requires neither torture nor sterilization, and that it weakens our sense of respect for the rights of each individual man to give way to the clamor of a few enthusiasts, that the rights of the helpless or condemned shall be committed to the discretion of others, who may or may not sterilize them if they see fit, provided they fall within certain categories of beings committed to their care.

From the historical grounds upon which the constitutional prohibition is based, it might be reasonably contended that punishment, in the constitutional sense, includes cruel and unusual bodily inflictions under color of law or in the exercise of official power, whether imposed as a penalty for crime, or because of crime or incapacity, either under pretense of or because of a fancied, assumed or actual benefit to society; and that sterilization, even though not painful, is both cruel and unusual and falls within the province of the prohibition.

¹⁸Quoted by Mr. Justice White in Weems case, at p. 396.

PROTEST AGAINST STERILIZATION LAWS

But I do not base my general argument upon the fact or contention that any such law is beyond peradventure unconstitutional. I recognize that it may escape on the ground that it does not authorize *punishment*.¹⁹ But I contend that it is nevertheless undesirable because it weakens that spirit of respect for the clauses of our Bills of Rights, derived from painful experience, whose continued observance is essential to the establishment of justice and the enjoyment of domestic tranquillity; for, what a few sincere emotional enthusiasts accomplish today for a fancied public good, may show the way hereafter to a few purely selfish sinister interests, how they also may weaken the constitutional safeguards, to the utter destruction of domestic tranquillity or the disestablishment of actual justice.

In the making of laws we argue much from analogy; and if it has appeared proper to some sincere people to relax our constitutional vigilance over the rights of the individual man for the fancied good of the community, then shortly a few more other people, prompted by selfish interests or their peculiar views of the common good, will see in the precedent of sterilization of idiots, imbeciles, confirmed criminals and rapists, an incomplete list, and we may expect the list to be enlarged to suit the views of other reformers.

The fancied good of the community in the infliction of punishment has already called upon courts in this land to determine whether or not the following punishments were cruel and unusual, with varying results: a sentence by a justice of the peace to pay a fine of \$9,140 and costs or suffer imprisonment for 79 years for selling intoxicating liquor in Vermont (where it was illegal) from New York (where it was legal); sentence reduced on appeal to the County Court in Vermont²⁰ to \$6,638.72 or 54 years; not considered by the Supreme Court of the United States to violate the Federal Constitution,²¹ though this caused a vigorous dissent from Mr. Justice Field; and I venture to suggest that the sentence itself, in the extent of its possible imprisonment ought to shock the sense of justice of mankind; but it followed as a consequence upon the power committed to a justice of the peace by sober-minded citizens of Vermont.

In Louisiana, where defendants were convicted of violating a city ordinance by trespassing on a city park 72 times in 100 minutes, they

¹⁹E. g., *Hawker vs. New York*, 170 U. S. 189, *People vs. Hawker*, 152 N. Y. 234.

²⁰*State vs. O'Neil*, 58 Vt. 140. See statement of Justice Field, *O'Neil vs. Vermont*, 144 U. S., at pp. 338-339.

²¹*O'Neil vs. Vermont*, 144 U. S. 323.

were sentenced to pay a fine of \$720 or to be imprisoned 2,160 days (5 years, 334 days). This was held a cruel and unusual punishment.²²

In Michigan a sentence of 50 years for an attempt, not amounting to rape, was considered unusual and excessive, and it was said that punishments are not left to the mere caprice of the judiciary.²³

In Kentucky the corporal punishment of a free black for raising his hand against a white in self defense was held cruel and unusual.²⁴

In a Federal Court, it was held a cruel and unusual punishment to chain a prisoner by the neck so that he could neither lie nor sit down.²⁵

In Michigan it was held a cruel and unusual punishment to authorize the arrest and remand without warrant, of a pardoned convict upon an alleged breach of condition of his pardon.²⁶

In Wisconsin a law making it a felony for a tramp to travel outside of the place of which he was an inhabitant, and prescribing a diet of bread and water upon conviction, was considered probably unconstitutional.²⁷

These instances of cruel and unusual punishments are not all analogous to the punishment of criminals by castration or sterilization; but they serve to show that all over this land, the constitutional safeguard against cruel and unusual punishments is a necessity for the protection of individuals against the uncontrolled judgment of other individuals acting under the color of authority.

In Michigan, in commenting upon the arrest and remand without warrant of a pardoned convict, above mentioned, the court said:

"The consequences of this act, if sustained, may not always be visited upon those who have been convicts. It is liable to be used against an innocent and unattainted man. * * * The iniquity of such a statute is not to be measured in words. It is a menace against the personal liberty of the citizen, to be removed at once, when the attention of the court is called to it."²⁸

It requires no great stretch of one's imagination to picture some zealous advocate of a return to simplicity of life, reasoning that a criminal of high finance, who chances to be one of the few convicted, should be subjected to this treatment merely because the reformer abhors

²²*State vs. Garvey*, 48 La. Ann. 527, 35 L. R. A. 561.

²³*People vs. Murray*, 72 Mich., 10.

²⁴*Ely vs. Thompson*, 3 A. K. Marsh, 70, 74.

²⁵*Re Birdsong*, 39 Fed. Rep. 599, 4 L. R. A. 628.

²⁶*People vs. Moore*, 62 Mich. 502.

²⁷*Johnson vs. Waukesha Co.*, 64 Wis. 281, 288.

²⁸*People vs. Moore*, 62 Mich. 502.

PROTEST AGAINST STERILIZATION LAWS

his conduct; and this would be possible under the literal terms of the Connecticut sterilization law (of which I shall speak later), if the board should conclude that his children would have an inherited tendency to crime, though I can not conceive that any one could reasonably maintain that the traits of such an offender are hereditary.²⁹

It may be recalled that in the Petition of Right presented by Parliament to Charles I in 1628 one of the grievances set forth as against the Great Charter was the appointment of various Commissions under his Majesty's seal with power to proceed according to justice of martial law, by pretext whereof persons had been put to death by the Commissioners; though Parliament had declared that no man should be forejudged of life or limb against the form of the Great Charter and the law of the land.³⁰

Now these Boards of Managers, and physicians and surgeons, and other functionaries empowered by these sterilization laws to determine whether persons in their custody shall be sterilized, appear to me to be closely analogous to the Commissions complained of in the Petition of Right; they are authorized to "forejudge life or limb" according to their own judgment as to whether procreation is undesirable.

In one well known case that has recently been much talked about in the newspapers, a man has been adjudged incapable of managing his affairs in New York, while in Virginia he has been adjudged competent. In New York, such a person, if committed to an asylum, might be sterilized, while in Virginia he could not be lawfully deprived of any liberty.

The limits of legislative authority.—If a legislature can constitutionally sterilize a criminal or an insane person, it can constitutionally sterilize any other class of persons whom it deems it desirable for similar reasons to sterilize. Using an illustration of a class, which I have already used, it could sterilize multi-millionaires, whom it might consider "undesirable citizens" or "malefactors of great wealth," for it might declare in a preamble that the sons of these tend to become a menace to the community, as an idle and licentious class; similarly it could sterilize clergymen, pursuant to a preamble that their sons are frequently charged with being on the average, worse than other men's sons.

When one admits the power of the legislature to authorize the act of sterilization and to define the class to be sterilized, he must

²⁹Conn. Law, 1909, C. 269.

³⁰Petition of Right, 7, Harpers Enc. U. S. History, p. 155.

admit the power to extend the class, if statistics more or less convincing could be cited to show the tendency of the offspring of any particular class in the community to exceed the average, or indeed to lower the average moral tone of the community. There is scarcely any class which they might not plausibly invade with a supposedly philanthropic sterilizing scheme.

But so long as we have any constitutional guaranties of individual liberty it might be reasonably argued that the individual's right to have a family and to be a parent is analogous to his right to live, to have liberty and to acquire property; it is certainly as ancient and as universal. It might be reasonably questioned whether a legislature has the power to prohibit a marriage of adult sane persons; it certainly cannot transfer the property of an adult competent; his right of property is beyond its reach.³¹

And similarly his right of liberty should also be beyond its reach, except as a punishment for crime, in military service, and because of his incompetency and consequent danger to himself and the community by his conduct. But I have already demonstrated that as a mere punishment sterilization seems to me to be unconstitutional, and that the good of the community or of posterity can not excuse it; while a person does not by insanity lose his constitutional rights and the constitutional custody is only to the extent reasonably necessary to protect him and society from his possible violence.

However, such legislation might be held to be constitutional on grounds of public welfare, and because the courts might not question the legislative conclusion that sterilization does prevent the transmission of heritable undesirable qualities, and is therefore for the benefit of the community, I have still said enough to satisfy myself at least, that upon constitutional grounds such legislation is unwise; and from any other standpoint it is of most doubtful utility and therefore it ought to be discouraged.

I shall not attempt to criticize it from the standpoint of special provisions of State Constitutions, not already mentioned.

Sterilization laws in other States.—But before closing I shall point out a few of the differences in the several State laws on the subject. I have taken the Indiana law as the type, merely because it is, so far as I know, the prototype; but other legislatures appear to have recognized the soundness of some of the criticisms, though they have yielded to the persuasion of the advocates of the law. It seems to me that it

³¹*Brevoort vs. Grace*, 53 N. Y. 245.

PROTEST AGAINST STERILIZATION LAWS

must be admitted that if there is any utility whatsoever in the operations, it is impaired by the individual safeguards; for the more the safeguards the fewer the operations.

For instance, in New Jersey (Act 1911, c. 190) the subject may have counsel. There is a formal hearing, evidence is taken, and the Supreme Court may review the determination and stay the order and there is a delay of five days after a final order, before it can be carried into effect; thus giving an opportunity to apply to the court before rather than after the operation.

In Connecticut (Act 1909, c. 209) provision is made for examining the record and family history of the subject, so far as ascertainable. But the law applies as well to State prisons as to State hospitals for the insane; and the report as to the inadvisability of procreation may first emanate from the warden, but is passed on by a board of two surgeons and the physician or surgeon in charge; the *surgeons* are presumed to be able to form an opinion whether procreation would produce children with an inherited tendency to crime, as well as insanity, feeble mindedness, idiocy or imbecility; they are selected by the directors of the State prison and State hospitals for the insane respectively.

One may be permitted to doubt whether even skilled surgeons can safely predict whether a person in State prison will have a criminal for a son; yet under the law a majority of the board (consisting of the physician or surgeon in charge and two skilled surgeons) may form and act upon their *opinion* on this point. There is no provision for counsel, hearing, formal evidence or court interference or review. Here again is a "Commission" proceeding at variance with the established course of the common law, which caused the remonstrance in the "Petition of Right."

In New Jersey, though the right to counsel, hearing and court review is prudently preserved, the right to sterilize extends to feeble-minded, epileptic, certain criminal and *other* defective inmates confined in reformatories, charitable and penal institutions (Act 1911, c. 190). And it even extends to "Morons," a class of human beings not yet defined by the Century Dictionary, but which I understand to be individuals of intellect developed below the standards of certain tests for age; for instance, a person of mature years who has the mental equipment of a child is a moron, though neither idiot or imbecile.

Thanks to the conservatism of lawyers who have "technical" rules of construction of which one is the maxim "*noscitur a sociis*," *other*

defectives will probably not be construed in the courts, at least, to be men with one leg, or one eye, or who are merely color-blind, and whose hereditary tendency in this direction is not yet fully ascertained or declared even by a State legislature.

The New Jersey law also provides for such operation as shall be decided by the board to be most effective; I shall assume until disillusioned, that this would not include or exclude *homicide* under the auspices of the board! The act also declares that if its provisions with reference to any class of persons shall be held unconstitutional and void, it shall not invalidate the entire act.

I say that acts of this sort are flirtations with danger, and show that we *need* a constitution to prevent a chaos of *isms* and *asms*, destructive of justice, the blessings of liberty and domestic tranquillity. The New Jersey act would, if it were not for the presumable good faith of the examiners, literally authorize the sterilization of anybody and everybody in all reformatories, charitable and penal institutions of the State, who were in anywise howsoever defective, upon the mere irresponsible opinion of an irresponsible board.

The New York law³² is substantially similar to the New Jersey law, in its material provisions, though silent on "morons"; it applies to the State hospitals for the insane, State prisons, reformatories, charitable and penal institutions; the operation may be performed if in the judgment of a majority of the board procreation would produce children with an inherited tendency to crime, insanity, feeble-mindedness, idiocy or imbecility, and there is no probability of improvement to an extent to render procreation advisable, or if the physical or mental condition will be substantially improved. Both under the New Jersey and the New York laws, the criminals to be so treated are those who have been convicted of rape or of such succession of offenses against the criminal law, as in the *opinion* of the board shall be deemed to be sufficient evidence of confirmed criminal tendencies.

What possible basis can such a board have for any such opinion? And what possible ground can exist for any opinion that a man who has once been convicted of rape, will produce children with an inherited tendency to crime, insanity, feeble-mindedness, idiocy or imbecility? Is it not irresistibly obvious that in the case of such a man at least any such operation is simply and unquestionably a punishment for crime, and as such cruel, unusual and unconstitutional, and the statute

³²C. 445, N. Y. Laws, 1911.

PROTEST AGAINST STERILIZATION LAWS

not the slightest protection to the participants in the operation for civil liability to him?

The New York law lacks the provision of the New Jersey law, that if one of its provisions is held unconstitutional it shall not invalidate the remainder.

In Washington (Act 1909, c. 249, s. 35) the Criminal Code authorizes the penalty of sterilization for criminal abuse of a female under 10 years, or rape, or habitual criminality, in the discretion of the court.

This act would appear to me to be a violation of the constitutional principle prohibitive of cruel punishments.³³

The Supreme Court of Washington has, however, held that the Washington statute authorizing vasectomy upon a person convicted of rape is not a cruel punishment; it therefore refused to disturb the judgment of the legislature.³⁴ In reaching this conclusion it pointed to the statutes of California (1909, c. 720), Connecticut (1909, c. 209), Indiana (1907, c. 215), Iowa (1911, c. 129), New Jersey (1911, c. 190), as based on the theory that modern scientific investigation shows that idiocy, insanity, imbecility and criminality are congenital and hereditary. It quoted from such "authorities" as one medico-legal journal and one medical journal and two daily papers, from one judge and two physicians, and cited the approval of one local physicians' club, one district medical society and one local society of social hygiene. I submit that the daily papers are not eminent scientific authorities, and should not be accepted as such; that an eminent judge is not necessarily a scientific investigator respecting heredity, and that the two physicians cited were speaking of the painlessness of the operation as performed by them. The court refused to consider the operation cruel, after citing these "authorities" on its painless and praiseworthy character. But are we then to understand that with the introduction of anaesthetics mutilation became constitutional? For if vasectomy is sustained because it is painless why not also sustain every other operation for mutilation as a punishment which a legislature may choose to inflict, regardless of its permanent after effects upon the victim, if a few physicians and newspapers may be found to assert that it may be performed without physical pain? I submit that sober second thought ought to require higher authority for propositions in the laws of heredity, and greater reasons for justifying unusual punishments than

³³Wash. Const., Art. 1, S. 14.

³⁴*State vs. Feilen*, 26 Pac. R. 75, Sept. 3, 1912.

that the operation may be inflicted under the supervision of skilled surgeons without severe pain.

It may be that recent legislation may have extended similar activities to other states, for "reform," like measles and scarlet fever, is contagious. But I have said enough to indicate the character of the statutes. In the report of the Wisconsin Branch of the American Institute of Criminal Law and Criminology for 1912 (p. 78) the states then having such laws were enumerated as follows: Indiana, Iowa, New Jersey, California, Washington, Connecticut, New York and Utah. Since that time Michigan has been added to the list.

A Veto in Vermont.—In the light of these laws, it is refreshing and reassuring to me, at least, to note that it is not all men in responsible positions who have lost sight of these objectionable tendencies.

The Governor of Vermont, at the legislative session of 1913, was called upon to consider and veto a bill which was, according to the legislative standard for such laws, carefully framed, for it was limited to those in hospitals for the insane, state prison, reformatories and charitable and penal institutions; it excluded women over forty-five years of age; it provided for written notice to the insane and feeble minded, and to parents and guardians of minors; for a hearing of those who desired to make defense, a fair and impartial trial by the board, the right to introduce witnesses and the right to representation by counsel; and it authorized an agreement on the part of the subject (though lunatic or imbecile). I am advised that the Governor justified his veto by a written opinion of the Attorney General, who criticized the bill as making an unfair, unjust, unwarranted and inexcusable discrimination against persons so confined, while it made no similar provision for those similarly afflicted but not confined, or for criminals who had served their sentences; this he regarded as intolerable under the constitution of the state; he regarded the discrimination in favor of women over 45 years of age as equally unconstitutional, in that 45 is not the natural limit of conception in child-bearing;³⁵ he criticised the act because it made no express provision to enable persons in confinement to appear before the board, though it required the board to hear them, and because it ignored the incapacity of the person to make a request or perform a legal act. (I assume this had reference to the physical incapacity of a lunatic or imbecile, and not to the factitious incapacity of a criminal, though perhaps he considered that the bill did not by implication remove the legal incapacity of the criminal). He also condemned it because it authorized

³⁵*Washington vs. Bank for Savings*, 65 App. Div. N. Y. 338, at p. 341.

PROTEST AGAINST STERILIZATION LAWS

the board to act on the evidence adduced, but prescribed nothing in respect to the kind of evidence which it might receive; and because it made the decision of the board absolute, without any appeal; he stated that the Supreme Court of the state had repeatedly held that the taking of land for a public highway under similar provisions was not due process of law; he indicated that the bill would permit the infliction of an additional penalty for crimes already committed and upon one who had already reformed; this he regarded as unconstitutional (doubtless as an *ex post facto* law). He further objected that it authorized imbeciles and lunatics to bind themselves by agreement, something which had never been permitted by any court of justice.

Notwithstanding the possibility of this arraignment from a cursory examination of the bill, I understand that the Vermont House adopted it originally by a vote of 85 to 72, 66 members not voting, while the Senate passed it over the veto by a vote of 13 to 10. I am advised, however, by the Secretary of Civil and Military Affairs that the veto was sustained by the Legislature.

Conclusion.—Whatever may be the conclusion of the reader in respect to the soundness of my views upon the utter impropriety of these laws in the present state of our knowledge of heredity and from the standpoint of conservative regard for constitutional principles, it seems to me that even the advocates of the laws must see, if they consider the foregoing assault upon them, that they ought to take into their counsels some conservative who will help them frame a uniform statute which will offer some sort of reasonable and ordinarily decent protection to a helpless unfortunate, be he lunatic or criminal, against the ignorance or indifference of incompetent persons who may sit in judgment upon him.

I have written this article as a danger signal against unnecessary and dangerous nostrums in legislation. Some philanthropist, whose notions of heredity are not well grounded, rushes to the legislature with the panacea of sterilization; another with regulation but authorization of benevolent monopolies, and before long there is an avalanche of legislation which destroys the ancient landmarks of peace and safety to the honest, hard working, or merely unfortunate citizen, and domestic tranquillity and the reign of justice are alike destroyed.

Our Bills of Rights are full of the concise expressions of the experience of political philosophers after viewing reflectively the mistakes of ardent enthusiasts of the past. These may not be the last words of political wisdom, but they are at least wise brakes.

Before advocating such laws, I would wish to be assured that the interests of the community demand them; that the assumed principle of heredity be true; that the safeguards of liberty are not to be thrown aside for a merely imaginary good; that they be preserved as far as possible and that crude legislation (and in my view it is all crude) be avoided.

Nor can I close without the warning that prisons and insane asylums have been the most shameful institutions of so-called Christian civilization; that in them cruelty has been systematically practised and in many instances the innocent made to suffer more than in any other establishments.³⁶ After a great and continuing struggle, civilized governments are just succeeding in throwing the safeguards of enlightened law about their management.

But now we are confronted with a new flood of laws, which leaves the personal liberty and a part of the life of individual and posterity to the arbitrary judgment and guess, if not the mere whim or caprice, of possibly unskilled and unsympathetic judges, without any of the substantial safeguards, which we all regard as our greatest inheritance from the English Constitution and the founders of our own nation.

³⁶On the very day when I write this, in my own state, a report to the governor arraigns a prison physician as both cruel and indifferent.