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# A Sterilization Statute for Kentucky?

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## NOTES

### A STERILIZATION STATUTE FOR KENTUCKY?

Since time immemorial, the criminal and defective have been the "cancer of society". Strong, intelligent, useful families are becoming smaller and smaller; while irresponsible, diseased, defective families are becoming larger. The result can only be race degeneration. To prevent this race suicide we must prevent the socially inadequate persons from propagating their kind, i. e., the feeble-minded, epileptic, insane, criminal, diseased, and others.

In America alone there are 18 million persons who are, or at some time during life will be burdened by mental disease or mental defect, and in one way or another the burden will be shifted upon the rest of the population. Every stratum of society suffers from the misery resulting from insanity and feeble-mindedness. The economic burden may be conservatively estimated at a billion dollars a year for their care either in or out of institutions. Also, there is a noticeable effect upon our government, because of the weakening effect of so large a number of voters mentally abnormal.

The problem can best be solved by a harmless surgical operation, namely sterilization of men and women who are so seriously defective, that, for the protection of themselves, and their families, of society and of posterity, they should not bear and rear children.<sup>1</sup>

However, the opponent of sterilization would say that the above statements are mere axiomatic truisms: that they show no true causal relation between the delinquency and sterilization. There is a woeful condition, to be sure, but can science put its finger on the exact cases of heredity and those of environment? The problem regarding the inheritance of mental disorders has not been fully worked out. Estimates on feeble-mindedness due to heredity range practically from twenty percent to eighty percent, the results being not altogether concordant.<sup>2</sup> Eugenics

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<sup>1</sup> Gosney and Popenoe, *Sterilization for Human Betterment*.

<sup>2</sup> 23 Ill. L. R. 463. "Sterilization of Mental Defectives," Landman.

is a young science, needing "more research and less propaganda. . . . The future of the science is promising, but at present it needs debunking."<sup>3</sup>

The United States was the pioneer in the movement for sterilization, and today is considered the foremost champion and advocate of the cause in the world. Other countries that have followed our lead are Alberta, Denmark, Finland, Canton of Vaud, Switzerland, Vera Cruz, and Germany.

It was in Indiana, 1907, that the first compulsory eugenic act was enacted. Under this act 120 operations were performed before it was declared unconstitutional (1921). In 1909, Washington followed suit. In the same year, California enacted its first statute in the field. Up to the year 1929 California had allowed 5,820 operations—four times as many as had been performed in all the rest of the world together.<sup>4</sup>

All with the same purpose of preventing the propagation of unsocial people who have inherited their insufficiencies, twenty-seven states have provided for human sterilization. Since the unsuccessful attempt to pass a human sterilization act in the 1897 Michigan legislature, and beginning with the act of 1907 of Indiana, there have been sixty-four different human sterilization acts enacted in the United States. About 12,145 individuals have been sterilized under the authority of this legislation. H. H. Laughlin estimates that 15,156 people had been sterilized by Dec. 1, 1931.

The different statutes of the different states vary from one extreme to the other in regard to flexibility and forms of procedure. However, no state statute provides for such summary procedure as that of the sterilization laws passed in Germany where the defective who is possibly unfit to have children is haled before a court by parent, guardian, or attending physician, an order for sterilization being then usually given.<sup>5</sup>

In California nearly all of the feeble-minded are sterilized before release from state institutions. One in twelve of the insane have been sterilized. The operation is rarely performed in the institutions without the consent of the parents, husband or wife, or next of kin. However, the state has the power of com-

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<sup>3</sup> *The Journal of Criminal Law and Criminology*, July-August, 1933.

"The Human Sterilization Movement," J. H. Landman.

<sup>4</sup> 23 Ill. L. R. 463. Landman (op.cit.).

<sup>5</sup> *Collier's*, Oct. 14, 1933. "Trained to Take It."

pulsory operation in extreme cases. Individual rights are safeguarded by recommendation of the hospital, approval of the Director of Department of Institutions and the approval of the Director of the Department of Public Health, and also appeal to the courts.<sup>6</sup>

The Michigan act of 1923 leaves the matter of deciding whether an operation shall be performed to court process and judicial determination, aided by the expert knowledge of three competent physicians. The court shall order sterilization if the defective manifests sexual inclinations, if defective's children shall have inherited tendency to mental defectiveness, and if there is no probability that his condition will improve. In addition to vasectomy and salpingectomy there is provision for sterilization by X-Ray.<sup>7</sup>

The Iowa statute provides for the sterilization of insane, imbeciles, feeble-minded, syphilitics in institutions under a board of control after the following conditions have been complied with: the superintendent of the hospital with a majority of his staff must determine that the operation is for the best interests of the patient and of society; a majority of the board of control must approve the performance of the operation; the husband or wife must consent in writing to the operation on the other spouse, or if the defective is unmarried, the parent, guardian, or next of kin must do so.<sup>8</sup>

Virginia passed a sterilization statute in 1924. The application was limited to inmates of State institutions who were affected with hereditary insanity, idiocy, imbecility, feeble-mindedness, or epilepsy. The procedure is provided for as follows: the superintendents of the state institutions will advise the operation for the best interests of the patient and society; after notice has been given, and guardians have been appointed in proper cases, a hearing will be held before a hospital board, the defective being allowed representation by counsel; there will be appeal to the courts of the State.<sup>9</sup>

Each time a state ventured forth into the field of steriliza-

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<sup>6</sup> Gosney and Popenoe, *Sterilization for Human Betterment* (1929).

<sup>7</sup> 24 Mich. L. R. 1 (1925). *Sterilization of Mental Defectives*, Shartel.

<sup>8</sup> 11 Iowa L. R. 262 (1926). "Constitutionality of the Iowa Sterilization Statute."

<sup>9</sup> 11 Va. L. R. 296 (1925). "Sterilization of Defectives," A. E. Strode.

tion the constitutionality of the acts was questioned. Among the cases on this question *Buck v. Bell*, 274 U. S. 200, "evinces a liberal attitude" and forms a solid foundation for the many sterilization statutes. The United States Supreme Court in the opinion delivered by Mr. Justice Holmes held that the Virginia law, authorizing the sterilization of mental defectives and others, under careful safeguards, is not void under the Fourteenth Amendment to the Federal Constitution, since it does not deny due process, for Carrie Buck was given an adequate trial, and since it does not deny equal protection of the law for she was not discriminated against arbitrarily as against similar people who are at liberty and are a greater menace to society.

Another important case is *Davis, warden v. Walton* (1929), 276 Pac. 921, which upheld the constitutionality of the Utah statute of 1925 providing for petitions from the superintendent of the state institution to a special board of directors of his institution, special hearing by the board allowing defense by the inmate and legal representative, and appeal to the state courts. The significance of the case is that "although the modern sterilization laws are constitutional, they shall be enforced only in those instances where the patient has inherited his insufficiency and will in all likelihood transmit it to his or her offspring."<sup>10</sup>

In Idaho the statutes provided for a state board of eugenics to make inquiries into hereditary degeneracy in the state, and to initiate proceedings toward eugenic and therapeutic sterilization of those delinquents and degenerates listed as being a menace to society. Provision was made for adequate court review, and appeal to the State courts. The statute was declared constitutional in *Board of Eugenics v. Troutman* (1931), 299 Pac. 668.

The cause of sterilization received a setback recently when the court in *Brewer v. Valk* (1933), 204 N. Car. 186, declared the North Carolina statute unconstitutional.

In reviewing all of the cases involving the constitutionality of the sterilization statutes, one finds that in nine instances constitutionality of the acts was upheld; once in the federal Supreme Court, and eight times in the higher State courts. On eight occasions the acts were declared unconstitutional: four

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<sup>10</sup> *Journal of Criminal Law and Criminology*, July-August, 1933, J. H. Landman.

decisions pointed to denial of due process of law, thereby violating the Fourteenth Amendment; four cases involved a denial of equal protection to all classes, thereby violating the Fourteenth Amendment; four, treatment was a "cruel and unusual punishment", thereby violating respective state constitutions; one, bill of attainder, thereby violating Art. I, Sec. 10, of the Federal Constitution.

In regard to "cruel and unusual punishment" the Eighth Amendment of the Federal Constitution does not apply to State legislation. It is doubtful whether the due process clause of the Fourteenth Amendment can be construed to apply. The only bar would be the State constitutions that have a "cruel and unusual punishment" clause. However, if the particular statute is not penal in nature, sterilization will not be considered cruel or unusual, as was held in *Buck v. Bell*. There is a distinction between "those statutes that have punishment as their express purpose, and those whose obvious purpose is to protect the class of the socially inadequate from themselves, and to promote the welfare of society by mitigating race degeneracy, and raising the average standard of intelligence of the people of the state."<sup>11</sup>

Those who criticize the sterilization statutes on the ground that the acts seem to be class legislation must remember that the "Fourteenth Amendment to the Federal Constitution does not forbid the passage of an act which applies to a class only, provided the classification be reasonable and not arbitrary, and applies alike to all persons similarly situated."<sup>12</sup> Limiting sterilization statutes to inmates within state institutions is reasonable in classification. *Buck v. Bell*, supra. Defectives outside of institutions may become members of the class by becoming inmates. For that matter, institutional inmates are perhaps more in need of sterilization since they have no persons vitally interested in them to care for them as do other defectives. When there is sterilization at the time of parol or discharge such sterilization offers the prospect of a more stable life than where there is the possibility of children. The burden of proof that the classification is unreasonable falls upon the one desiring to assert it, since its validity will be presumed. Not being a mathematical nicety or not being strictly equal does not invalidate a

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<sup>11</sup> 7 Wis. L. R. 39-42. "Constitutionality of Sterilization Statutes."

<sup>12</sup> *Hayes v. Missouri*, 120 U. S. 68 (1887).

reasonable classification, for as a policy the classification may still function.<sup>13</sup>

A statute may be questioned as denying "due process" in violation of the Fourteenth Amendment of the Federal Constitution. Asexualization committed on one who is not an incompetent is such an injury; the law must adequately safeguard the individual against unjust and unwarranted enforcement. *Williams v. Smith*, (1921), 190 Ind. 526. Where there is a court decision, as in Michigan, the validity of the procedure is of course clear. Even when the hearing is before an administrative tribunal, the procedure would be valid, if there is provision for notice and hearing, examination and cross-examination of witnesses, notification of guardian and relatives, and appeal and review in the courts.

There is the objection that these sterilization statutes violate the police power. In 1885 the Supreme Court said that "neither the Fourteenth Amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and to add to its wealth and prosperity". The issue is really the reasonableness of the statutory measures. Police power is probably broad enough to cover the sterilization statutes. In the words of Mr. Justice Holmes in *Buck v. Bell*, "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 these who already sap the strength of the state for these lesser sacrifices. . . . 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. . . . Three generations of imbeciles are enough."

Kentucky greatly needs a sterilization statute. The reason lies not just in the fact that twenty-seven other states have sterilization laws, but in the situation at the State institutions, in particular. At the Kentucky State Institution for the Feeble-

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<sup>13</sup> 10 Neb. L. B. 164-169 (1931). "Constitutionality of Sterilization Statutes," Orfield.

mind ed there are 805 inmates, each inmate costing the state one hundred dollars yearly. Of these there are 35 percent who if sterilized could safely be released in good times, and could make their own way. Of course this institution does not contain all of the defectives of the state. There is always a large waiting list at the above-mentioned institution. In addition, there is the Eastern State Hospital, which contains many socially inadequate persons.

Sterilization bills have been presented in the State legislature. In fact, a bill has already passed the House of Representatives upon two different occasions, but each time the bill failed to pass the Senate. The last bill was patterned after the Virginia statute and provided for (1) a petition of the superintendent of the state institution, (2) notification of the guardian of the defective, (3) a hearing before a board for a decision whether or not to perform the operation, (4) appeal to the State courts.<sup>14</sup>

In summary, science reasonably knows what diseases are hereditary. Our people are in danger of race degeneration because of the rapid increase in the ranks of the defective. Kentucky is confronted by this problem to a greater extent by not having a sterilization statute. Because of Section 17 of the Kentucky Constitution forbidding "cruel punishment," it would probably be unwise to attempt to pass a penal statute of sterilization. However, the solution of the problem of our increasing defectives could be reached by a statute providing for sterilization of those patients legally committed to state institutions as insane or feebleminded, who, if not sterilized before release, would probably have defective children. The statute should outline in detail the procedure, and provide for safeguarding the patient's rights by hearings and appeals. The law should be applied to inmates of the other state institutions, including the reformatory, whenever they are found to be insane, feebleminded, or have some other serious hereditary defect. Border line cases should never be sterilized without consent of the individual.

GEORGE T. SKINNER.

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<sup>14</sup> Interview with A. M. Lyon, M. D., Superintendent of the Kentucky State Institution for the Feebleminded (Nov., 1933).