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Vasectomy

C. Severin Buschmann
Indianapolis Bar Association

COMMENTS

VASECTOMY

The State Legislature undoubtedly will be confronted at the next session with proposed bills for the sterilization of mental defectives and criminals. The general approval of the medical profession and the courage with which modern legislatures have met the question have resulted in the passage in a number of States, of bills providing for sterilization.[1] This is usually accomplished by the operation of vasectomy in males and salpingectomy in females.[2] These operations do not impair the general health, or affect the mental or moral status of the patient.[3] It has been stated that the operation of vasectomy upon a convict was actually performed for the first time in 1899 by Dr. H. C. Sharpe, of Indianapolis, who was physician to the Indiana State Reformatory then at Jeffersonville.[4]

Statutes providing for sterilization cover two classes of persons, namely, the mentally defective,[5] criminals,[6] or both.[7] The constitutional questions surrounding the statutes are substantially the same with the possible exception, hereinafter dis-

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[1] For an excellent article on Eugenics see the November, 1926, issue of World's Work, "The Rising Tide of Degeneracy," by Albert Edward Wiggam. The writer states that twenty-two states now have sterilization laws.

[2] In *Smith v. Command*, 231 Mich. 409, 204 N. W. 104, the court says: "These operations are the least radical known to medical science. None of them requires the removal of any of the organs or sex glands, the result being accomplished by a severance of the sex germ-carrying ducts. The operation does not destroy sexual desire or capacity for sexual intercourse, but renders procreation impossible." 8 B. C. L., p. 268.

[3] *Buck v. Bell*, (Va.) 130 S. E. 517.

[4] *State v. Feilen*, 70 Wash. 65, 126 Pac. 75, 41 L. R. A. (N. S.) 419. *Smith v. Command (supra).*

[5] *Buck v. Bell, (supra)*; *Smith v. Command (supra)*; *Haynes v. Williams*, 201 Mich. 138; 166 N. W. 938, L. R. A. 1819 D. 233; *Smith v. Board of Examiners*, 85 N. J. L. 46, 88 Atl. 963; *Osborn v. Thomson*, 169 N. Y. Supp. 638, 185 App. Div. 902, 171 N. Y. Supp. 1094; *Williams v. Smith*, 190 Ind. 526, 131 N. E. 2.

[6] *State v. Feilen (supra): Davis v. Berry*, 216 Fed. 413, reversed in 242 U. S. 468, 61 L. Ed. 441, 37 Sup. Ct. 208, for the reason that, pending appeal, the statute in question was repealed; *Mickle v. Henrichs*, 262 Fed. 687.

[7] *Smith v. Board of Examiners (supra)*; *Davis v. Berry (supra)*.

cussed, of statutory provisions against cruel and unusual punishment.

That defective mentality is transmissible is supported by the opinions of the greatest authorities on feeblemindedness.[8] Whether criminals, generally speaking, are in fact mentally defective, and likely to procreate children who will in all probability inherit the defects of the parent, is not so clear. Moreover, the practicability of sterilization as a punishment may be questioned. Unless the defective qualities, for example, of a rapist are highly transmissible to his offspring (in which the purpose of the operation would be solely to remove the possibility of procreating) the only result of the enforcement of the act would be to lessen the danger of detection for a subsequent offense.[9] In Mickle v. Henrichs[10] the court expresses its doubt in the following language: "It is easy to imagine that a brute guilty of rape, or who has a tendency to commit such a crime, might regard it rather an advantage than otherwise to be sterilized. As a preventive of this crime vasectomy is without effect. Once free, the convict who has been so punished is still physically capable of committing the offense."

The usual constitutional objections to this class of statutes are that it violates the "due process of law" clause of the Constitution, that it provides for cruel or cruel and unusual punishment, and that it denies equal protection of the laws. Certain early statutes violated the due process of law clause and hence were declared unconstitutional, most important of which was the act passed in 1907 by our legislature, providing for an operation for the prevention of procreation upon certain inmates of institutions entrusted with the care of confirmed criminals, idiots, rapists and imbeciles, if in the judgment of a committee of surgeons and the board of managers upon a physical and mental examination of the inmate, procreation is inadvisable and there is no probability of mental improvement.[11] The efforts of the legislature suffered a like fate in Iowa.[12] Neither

[8] *Smith v. Command (supra).*

[9] 8 R. C. L. p. 688, 41 L. R. A. (N. S.) 419, note.

[10] 262 Fed. 687, 688.

[11] Acts 1907, p. 377. In *Williams v. Smith,* 190 Ind. 526, a judgment enjoining the performance of vasectomy upon an inmate of the state reformatory was affirmed, the statute being held violative of the fourteenth amendment to the Federal Constitution in that it denied due process, the court finding it unnecessary to pass on the question of whether it constituted cruel and unusual punishment.

[12] *Davis v. Berry,* 216 Fed. 413, reversed in 242 U. S. 468. The district court, however, held that the act was not unconstitutional as an *ex post facto* law in requiring criminals twice convicted of a felony, to be vasec-

of said acts provided for due process as prescribed by the Supreme Court of the United States in Leeper v. Texas.[13]

"Law in its regular course of administration through courts of justice is due process, and when secured by the law of the state the constitutional requirement is satisfied."

The objection of cruel and unusual punishment obviously has two phases. The statutory inhibition applies to punishment, but acts providing for sterilization of feebleminded persons are in no sense penal statutes and therefore not within the usual provisions prohibiting cruel and unusual punishment.[14] Moreover the provision in the Federal Constitution (Amend. 8) quite similar in its language, has no application to state legislatures.[15]

However, the authorities are divided upon the question of whether or not vasectomy and salpingectomy are in fact cruel and unusual.[16] The earliest case holding that these operations are not within the inhibition of statutes against "cruel and unusual" punishment or similar ones in State v. Feilen.[17] There the Supreme Court of Washington upheld a statute providing for an operation preventing procreation upon any person adjudged guilty of carnal abuse of a female person under the age of ten years, or of rape, or shall be adjudged to be an habitual criminal, and sustained an order directing appellant to be vasectomized in addition to receiving life imprisonment for the crime of statutory rape upon a child of less than ten years. In a clear dictum, the majority opinion of the Supreme Court of Michigan, in the case of Smith v. Command.[18] In that case the court upheld a statute providing for sterilization of mentally defective persons but vacated and set aside the order for failure to substantially comply with the provisions of the statute.[19] The

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tomized, even though applicable to criminals convicted one or more times prior to the passage of the act.

[13] 139 U. S. 642, 11 S. Ct. 577, 35 L. Ed. 225.

[14] *Smith v. Command* (*supra*); *Buck v. Bell* (*supra*).

[15] *Smith v. Command* (*supra*); *Weems v. United States*, 217 U. S. 349, 54 L. Ed. 793, 30 S. Ct. 544.

[16] Many authorities advocate radiation of the ovaries, which produces menopause, as more simply and satisfactory than salpingectomy. The latter is much more severe than vasectomy, requiring the cutting of the fallopian tubes, and the tying of the ends. *Buck v. Bell (supra).*

[17] *Buck v. Bell*, (Va.) 130 S. E. 517. In this case the state Constitution provided that "excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted."

[18] The article on "The Rising Tide of Degeneracy," by Albert Edward Wiggam, in the November, 1926, issue of World's Work, expresses the view that the methods prescribed for sterilization are not cruel or inhuman.

[19] The dissenting opinion in its syllogistic argument ably presents the usual objections to sterilization, but falls into the common error of relying

case of Buck v. Bell[20] cites with approval the holding of the court in State v. Feilen (supra) to the effect that the operation of vasectomy was not a cruel punishment. Two Federal Courts, however, have held that such a statute violates a provision against cruel and unusual punishment.[21] In other cases, courts have found it unnecessary to pass upon the question. Our own Supreme Court in the case of Hobbs v. State[22] ventured the inquiry whether the provision was not obsolete except as an admonition to the courts against the infliction of punishment so severe as not to fit the crime, in other words, that it had ceased to be a restraint upon legislatures and had become an admonition only to the courts not to abuse the discretion which might be entrusted to them.[23]

The question remains of whether these statutes deny the equal protection of the law. The most recent case dealing with an act for the sterilization of defectives is the case of Buck v. Bell.[24] There the court was called upon to pass upon the validity of the Virginia Sterilization Act, which provided for sexual sterilization of certain defectives, after service of a copy of the petition and notice of the time and place when the special board of directors of the State Colony for Epileptics and Feebleminded will hear and act on the petition, upon the inmate and her guardian, giving the right to the inmate to be represented by counsel, and giving the board the power to deny the prayer, or if the inmate is insane or feebleminded or epileptic and the potential parent of a socially inadequate offspring likewise afflicted, that the inmate may be ordered to undergo the operation of vasectomy if a male, or salpingectomy if a female. The statute further provides for an appeal from the board to the Circuit Court and to the Supreme Court of Appeals. In an appeal by Carrie Buck from an affirmance by the Circuit Court of an order of the board ordering the operation of salpingectomy, the court affirmed the judgment of the Circuit Court. The appellant claimed that the act does not provide for due process of law, imposes a cruel and unusual punishment and denies her the equal protection of the law. The court rejected these objections, holding that the act complied with the requirements of due process of law, that

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on a false premise, namely, that the statute orders mutilation, or what is substantially castration.

[20] *Smith v. Command*, 231 Mich. 409, 204 N. W. 104. The statute was only directed toward mental defectives.

[21] *Davis v. Berry* (*supra*); *Mickle v. Henrichs* (*supra*).

[22] 133 Ind. 404, 32 N. E. 1019.

[23] *Weems v. United States*, 30 S. Ct. 544, 553.

[24] *Smith v. Command*, 231 Mich. 409, 204 N. W. 104.

the act was not a penal statute, and therefore not within the provisions prohibiting cruel and unusual punishment nor did it deny the appellant and other inmates of the State Colony the equal protection of the law. The court held there was no discrimination against the inmates of the Colony since those on the outside could, by process of commitment and a hearing, be sterilized under the act.

The above result was apparently reached by the court without reference to the decisions handed down a few months earlier by the Supreme Court of Michigan of Smith v. Command[25] where a like result was reached. In the latter case, however, a part of the statute providing for sterilization of mental defectives applying to those who probably could not support their children, was held unconstitutional as making an arbitrary classification, by carving a class out of a class. In the earlier cases of Smith v. Board of Examiners[26] and Haynes v. Williams[27] statutes were held to violate the provisions granting equal protection of the laws, in that provision was only made for sterilization of mentally defective persons maintained in public institutions, but not providing for such persons located elsewhere.

It seems, therefore, that the modern tendency is to uphold proper legislation providing for sterilization of mental defectives. Whether or not such statutes should be extended to include criminals is a question for the determination of authorities in that particular field, and while it presents greater constitutional difficulties, none of them should prove insurmountable.

C. SEVERIN BUSCHMANN.

Of the Indianapolis Bar.

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[25] *Supra* note one, decided June 18, 1925.

[26] *State v. Feilen*, 70 Wash. 65, 126 Pac. 75, 41 L. R. A. (N. S.) 419, and *Haynes v. Williams*.

[27] *Supra*, note four.