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# Sterilization of Habitual Criminals

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previously sold has reverted to the landowners. These decisions may encourage numerous landowners who plan to sell their land to reserve the *reversionary* interests as well as the mineral interests, as a part of the consideration and price of the sale in an effort to extend the life of a servitude beyond the ten year period without user. They may also encourage the owners of land who are about to sell mineral interests to delimit the term of the servitude so as to prevent the life of the servitude sold from extending until the oil sand is drained, if there is production within the life of the servitude. The implications of the decisions are many. If they are permitted to develop without restriction to extremes, the ownership of mineral interests in Louisiana may develop into as complicated a system of land tenure as has developed in the common law states where vested and contingent remainders, fee tail and possibility of reverter interests create complications in the ownership of land and minerals. The Louisiana court has avoided such entanglements in the past and will no doubt avoid them in the future.

R. O. RUSH

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### STERILIZATION OF HABITUAL CRIMINALS

Human sterilization for social good has been one of the most controversial problems of recent decades.<sup>1</sup> Legislation involving the sterilization of human beings<sup>2</sup> was first attempted in the United States in the form of a measure introduced in 1897 in the Michigan legislature.<sup>3</sup> The first asexualization bill to run successfully the gamut of legislative approval was enacted by the Pennsylvania legislature in March 1905, but it was vetoed by the governor. The first such statute to receive both legislative and

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1. See Comments (1933) 8 Notre Dame Lawyer 327; (1936) 24 Ky. L.J. 220; (1937) 17 B.U.L. Rev. 246. See also cases cited and annotations (1926) 40 A.L.R. 535; (1927) 51 A.L.R. 862; (1933) 87 A.L.R. 242.

2. Sterilization is usually accomplished by vasectomy in the male and salpingectomy in the female—surgical operation the purpose of which is to cut and seal the tubes through which the reproductive cells must pass. Often in the case of the male the operation is conducted under a local anesthetic and requires about fifteen minutes. The patient need not be confined to bed. In the female, sterilization demands an operation of more complexity: the abdomen is opened and the patient must remain in bed for at least one week. It must be emphasized that such operations do not in any degree unsex the patient, but he is irreparably precluded from producing offspring. For a detailed discussion, see Landman, Human Sterilization (1932) cxi, xii.

3. This bill was defeated by only a few votes.

executive sanction was passed in 1907 by the Indiana legislature.<sup>4</sup> Shortly afterward numerous other states enacted similar statutes.<sup>5</sup> Not until twenty years later was the constitutionality of this kind of legislation tested in the Supreme Court of the United States. In 1927 that court, in the celebrated case of *Buck v. Bell*,<sup>6</sup> held constitutional a sterilization statute which applied solely to the insane and feebleminded. Other statutes have provided for the sterilization of criminals as well as of the insane and feebleminded. These laws have usually been stricken by the courts,<sup>7</sup> mainly on the ground that they were punitive and therefore unconstitutional as providing "cruel and unusual punishment."<sup>8</sup>

The Oklahoma Habitual Criminal Sterilization Act was upheld by the state supreme court in *Skinner v. State*.<sup>9</sup> The statute provides machinery for the institution by the attorney general of a proceeding in the Oklahoma courts against any "habitual criminal" as defined in the act,<sup>10</sup> for a judgment that such person be rendered sexually sterile.<sup>11</sup> Service of summons, time for filing an answer, and the right to a jury trial are provided.<sup>12</sup> The issues triable in this proceeding are confined to (a) is the defendant

4. Ind. Laws (1907) 377, c. 215 [Ind. Stat. Ann. (Burney, 1933) §§ 22-1601-22-1612]. This act was held unconstitutional in 1920 as violative of the due process clause of the Federal Constitution.

5. Conn. Pub. Act of 1919 [Conn. Gen. Stats. (1930) § 2683]; Cal. Stats. (1909) c. 719 as amended [Cal. Pen. Code (Deering, 1941) § 645]; New Jersey Stats. (1911) c. 190; Kansas Session Laws 1913, c. 305 [Kan. Gen. Stat. Ann. (Corrick, 1935) §§ 76-149 - 76-155]. As late as 1937 there were twenty-eight states with valid sterilization laws: Alabama, Arizona, California, Connecticut, Delaware, Idaho, Indiana, Iowa, Kansas, Maine, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Hampshire, North Carolina, North Dakota, Oklahoma, Oregon, South Carolina, South Dakota, Utah, Vermont, Virginia, Washington, West Virginia, and Wisconsin. For a brief summary of foreign laws and their administration, see Committee of the American Neurological Association, *Eugenical Sterilization*, pp. 21-23.

6. 274 U. S. 200, 71 L. Ed. 1000, 47 S. Ct. 584 (1927).

7. Iowa statute held invalid in *Davis v. Berry*, 216 Fed. 413 (1914) as a denial of due process, and inflicting cruel and unusual punishment; Indiana statute declared unconstitutional as denial of due process in *Williams v. Smith*, 190 Ind. 526, 131 N.E. 2 (1921); Nevada statute held in conflict with the constitution of that state forbidding the infliction of cruel and unusual punishment. *Mickle v. Henricks*, 262 Fed. 687 (1918).

8. The case of *State v. Feilen*, 70 Wash. 65, 126 Pac. 75 (1912) seems to be a lone example of where a sterilization law having a purely punitive purpose has been held constitutional. However, the state constitution forbade only cruel punishment and was silent as to unusual punishment.

9. 189 Okla. 235, 115 P. (2d) 123 (1941).

10. The act by Section 173 defines a habitual criminal as a person who, having been convicted two or more times for crimes "amounting to felonies involving moral turpitude" either in an Oklahoma court or in a court of any other state, is thereafter convicted of such a felony in Oklahoma and is sentenced to a term of imprisonment in an Oklahoma penal institution.

11. Sections 176, 177.

12. Sections 177-181.

a habitual criminal within the meaning of the act? (b) Will the operation be detrimental to defendant's general health? There need not be a finding that the defendant's offspring will probably inherit his criminal tendencies. Furthermore the defendant can offer no evidence regarding this proposition. The statute further provides for an appeal to the state supreme court from the orders and judgments of the trial court.<sup>13</sup> Finally, the act provides that "offenses arising out of violation of the prohibitory laws, revenue acts, embezzlement, or political offenses, shall not come or be considered within the terms of this Act."<sup>14</sup>

It was argued in the Oklahoma court that inasmuch as the act does not require a finding by the court or jury that by the laws of heredity the defendant is the probable potential parent of children with criminal proclivities, the defendant is thereby deprived of a full hearing. The Supreme Court of Oklahoma said that this objection "really goes to the question of due process in relation to substantive law, rather than procedure." The majority held that this was a reasonable exercise of the police power in that the act bears a real relation to the public welfare;<sup>15</sup> that the finding that a habitual criminal is likely to have children who probably would inherit criminal tendencies is one which the legislature had already made by enacting the law. "That determination by the co-ordinate branch of the government having the duty to formulate the public policy of the state must be given great weight by the courts."<sup>16</sup>

The dissenting opinion emphasized the idea that the failure of the enactment to provide for a determination in each individual case vitiated the statute under the due process clause of the state and federal constitutions. Each contention is not without merit, but it would seem that under strict principles of constitutional interpretation the majority view is the sounder. The legislature

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13. Section 186.

14. Section 195.

15. The court said on this point: "In every case, where the court is called upon to decide whether a particular statute is a proper exercise of the police power as against an improper infringement upon constitutional rights, the court must, before it can strike down the act, decide that the existing facts do not justify the conclusion of the lawmaking body that the law which they have enacted bears a real relation to health, safety or public welfare." *Skinner v. State*, 189 Okla. 235, 238, 115 P. (2d) 123, 127 (1941).

16. 189 Okla. 235, at 239, 115 P. (2d) 123, at 127. Farther on the opinion quotes from the case of *Cuthbertson v. Union Pacific Coal Co.*, 50 Wyo. 441, 62 P. (2d) 311, 317 (1936). "The authorities go so far as to say that, 'if a state of facts which would justify the legislation can reasonably be conceived to exist, the court must presume that it did exist when the law was passed.'"

has liberal discretion in the exercise of the police power,<sup>17</sup> and the presumption of constitutionality supposes "that the legislature has carefully investigated and determined that the interests of the public require such legislation."<sup>18</sup> Constitutionality does not necessarily mean social or scientific desirability. Furthermore, a determination in each individual case is not without objection. For example, each side could produce expert testimony and amass evidence to substantiate its respective contention. In the very nature of the case, testimony by expert witnesses on this question would be highly speculative and a finding by a court or jury, based upon such testimony, would likewise be speculative. Much of the scientific information which such expert witnesses would employ probably was considered by the legislature in enacting the sterilization law.<sup>19</sup>

The United States Supreme Court granted certiorari in the *Skinner* case and, by a unanimous opinion,<sup>20</sup> reversed the Oklahoma Supreme Court and declared the statute unconstitutional. The question of due process did not figure in the principal opinion but was the very basis of a concurring opinion of the Chief Justice.<sup>21</sup> The act was stricken as being in contravention of the equal protection clause of the Fourteenth Amendment.<sup>22</sup>

The statute applied to persons convicted three times of larceny, but expressly excepted those guilty of embezzlement.<sup>23</sup> Therefore, in view of the fine line of technical distinction between larceny and embezzlement the court held that the act denied equal protection of the laws.<sup>24</sup> "In terms of fines and imprison-

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17. 11 Am. Jur. 1081, 6 R.C.L. 240; *Stephenson v. Binford*, 287 U.S. 251, 77 L.Ed. 288, 53 S.Ct. 181, 87 A.L.R. 721 (1932); *Erie R. Co. v. Williams*, 233 U.S. 685, 58 L.Ed. 1155, 34 S.Ct. 761, 51 L.R.A. (N.S.) 1097 (1914); *Manigault v. Springs*, 199 U.S. 473, 50 L.Ed. 274, 26 S.Ct. 127 (1905); *Austin v. Tennessee*, 179 U.S. 343, 45 L.Ed. 224, 21 S.Ct. 132 (1900).

18. *Durand v. Dyson*, 271 Ill. 382, 111 N.E. 143, Ann. Cas. 1917D 84 (1915).

19. "If a court or jury can make a finding of fact based upon such speculative evidence, we see no reason why the Legislature cannot find or assume facts, based upon the same speculative evidence, as a basis for the exercise of the police power." *Skinner v. State*, 189 Okla. 235, 239, 115 P. (2d) 123, 128 (1941).

20. There were concurring opinions by Mr. Chief Justice Stone and Mr. Justice Jackson.

21. He argued that there should be an opportunity to any individual to show that his is not the type of case which would justify resort to sterilization, that is, that his criminal tendencies are not of an inheritable type.

22. ". . . nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."

23. Section 195 reads: "Provided, that offenses arising out of the violation of the prohibitory laws, revenue acts, embezzlement, or political offenses, shall not come or be considered within the terms of this act."

24. The court gives as an example the highly technical and arbitrary distinction between embezzlement and larceny by fraud. The latter occurs even

ment the crimes of larceny and embezzlement rate the same under the Oklahoma Code. Only when it comes to sterilization are the pains and penalties of the law different. The equal protection clause would indeed be a formula of empty words if such conspicuously artificial lines could be drawn."<sup>25</sup> The court thereby avoided passing judgment on the most important and difficult aspects of this kind of case—whether there was due process, both substantive and procedural<sup>26</sup>—and expressly reserved an opinion on them. This would indicate that perhaps that high tribunal considers it undesirable at this time to establish a precedent one way or the other inasmuch as there now exists more vehement feeling than scientific certainty relative to this problem.<sup>27</sup>

It must be admitted that science has not yet told us that criminality per se is inherited. Overwhelming evidence points to the view that criminality as such is not, like blue eyes, carried in the genes from one generation to another.<sup>28</sup> The consensus of scientific belief is that criminal tendencies are not inheritable.<sup>29</sup>

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where the owner of the property delivers it to the defendant, if the defendant has at that time "a fraudulent intention to make use of the possession as a means of converting such property to his own use, and does so convert it." *Bivens v. State*, 6 Okla. Cr. 521, 529, 120 Pac. 1033, 1036 (1912). But if the fraudulent intent should occur later, the crime of embezzlement, not larceny, has been committed. *Bivens v. State*, supra; *Flohr v. Territory*, 14 Okla. 477, 78 Pac. 565 (1904). Thus whether a certain criminal act is larceny or embezzlement depends not on the intrinsic quality of the act but on when the felonious intent occurred in defendant's mind. Concomitantly, whether defendant is to be sterilized or not also reposes on this arbitrary distinction.

25. 62 S.Ct. at 1113, 86 L.Ed. at 1134.

26. In this connection the Court said: "We pass those points without intimating an opinion on them, for there is a feature of the Act which clearly condemns it. That is its failure to meet the requirements of the equal protection clause of the Fourteenth Amendment." 62 S.Ct. 1110, 1112, 86 L.Ed. 1130, 1132 (1942).

27. The concurring opinion of Mr. Justice Jackson constitutes a faint indicium as to whether the Supreme Court would consider the requirements of due process met in a statute which extends sterilization to habitual criminals. He implies that the act would be invalid on this score when, after admitting that sterilization of the feeble-minded has been upheld by "this court," he says: "there are limits to the extent to which a legislatively represented majority may conduct biological experiments at the expense of the dignity and personality and natural powers of a minority—even those who have been guilty of what the majority define as crimes." 62 S.Ct. 1110, at 1116, 86 L.Ed. 1130, at 1136.

28. Dr. Paul Popenoe, an eminent contemporaneous biologist and sociologist says after much study: "That criminality as such cannot be inherited goes without saying. It is a social, not a biological concept. This fact alone makes any proposal to sterilize criminals as such, unscientific, if it is based on the idea of cutting off certain lines of heredity." Popenoe, *Sterilization and Criminality* (1928) 53 A.B.A.R. 575, 577.

29. *Eugenical Sterilization, A Report of the Committee of the American Neurological Association* (1936) 150-152; Myerson, *Summary of the Report* (1938) 1 *American Journal of Medical Jurisprudence* 253; Jennings, *Eugenics*, 5 *Encyclopedia of the Social Sciences* 617, 620, 621; Montagu, *The Biologist Looks at Crime*, 217 *Annals of American Academy of Political and Social Science* 46.

However, one writer claims that with the proper program of sterilization "at the end of three generations society will have to deal with only an occasional biological 'throwback.' Crime as we know it today would be extinct."<sup>30</sup> Also, it has been authoritatively said "that the differences between men are to no small extent the result of inborn differences. . . . Inborn characters are thus of great importance and they are derived from the parents."<sup>31</sup> An intelligent consideration of the problem would not exclude the possibility that scientific investigation in this connection may be in its embryonic stage, and conceivably there is a closer relation between crime and heredity than now appears.

It must be said in arguing for the sterilization of habitual criminals that definite proof that criminality per se is hereditary is by no means the *only* justification for sterilization. The factor of environment cannot be overlooked. Criminals move and have their being in a criminal environment. The children of criminals are born into such an environment, and to the extent that the young strive to emulate their elders, they learn habits conducive to anti-social behavior. It is more than possible that the offspring of oft-convicted criminals will have no deep respect for the law. They are not likely to feel the normal moral and religious restraints. The mere fact of their exposure to and intimate existence with hardened criminals would tend to make the children of such individuals less susceptible to acceptance of socially prescribed modes. Habitual criminals are prima facie unfit to rear their children as good citizens.<sup>32</sup> Sterilization of habitual criminals would obviously prevent children from being born into such an environment.<sup>33</sup>

The view that a sterilization statute must provide for a determination that the defendant's children will *inherit* his criminality rests solely on the factor of heredity. It completely neglects the powerful, inescapable, and omnipresent factor of environment. Possibly the legislature did not minimize this consideration in providing that its judgment should displace a special determination in each individual case.<sup>34</sup>

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30. Strother, Articles in *The World's Work*, July 1924, p. 282, Aug. 1924, p. 396, Sept. 1924, p. 556.

31. Alexander Morris Carr-Sanders, Professor of Social Science in the University of Liverpool, in 8 *Encyclopedia Britannica*, 806, 807.

32. Popenoe, *op. cit.* supra note 28, at 579.

33. "The bad environment among which children of such families are usually raised makes paupers, vagrants or criminals of many who otherwise might have led useful lives." Holmes, *The Trend of the Race*, p. 94.

34. It should also be noted that it is not easy for the legislature to establish a legal standard by which individual cases shall be judged.

Finally, much of the opposition to sterilization is prompted by the idea that procreation is a "God-given" privilege which is sacrosanct and not to be expunged by a legislative majority. In answer to this argument it may well be said that there is little reason why a forfeiture of such privilege should not be one of the prices which a habitual criminal must pay for his crimes. Certainly if, in times like the present, the general welfare demands a possible sacrifice of the very lives of the best of law-abiding citizens, it does not seem an intolerable imposition to require a far lesser exaction from those who repeatedly display their costly disregard for the general welfare.

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