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Sterilization Laws from a Legal Standpoint

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STERILIZATION LAWS FROM A LEGAL STANDPOINT.[1]

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In recent years the legislatures of New Jersey, New York, Indiana, Connecticut, Iowa, Nevada, Washington and perhaps other commonwealths have passed laws intended to prevent procreation by criminals, and idiots, imbeciles and insane persons. The whole subject of the advisability of sterilization laws had its inception in what we may term the social view of the problem requiring solution. According to this social aspect, it was first determined that the welfare of the race demanded that incompetents and criminals be prevented from producing their kind; secondly, that such prevention could be attained by proper laws, and finally that a rigid and full compliance with such laws would result in comparatively few years, in a race of sounder mind and sounder body.

Whether the criminal produces a criminal more often than a non-criminal, is still, in my opinion, an open question, with the weight of the evidence against the proposition. It is beyond question, however, that in the enactment of the statutes to which reference has just been made, the belief was accepted that criminal traits are hereditary. Whether or not there is sufficient foundation in fact for the acceptance of this belief is one of the points to be discussed in this paper.

Upon the passage of these laws, the problem and the attempt at its solution presented certain questions which gave it a legal aspect, and the methods to be employed in carrying out the intent of the laws at once brought the subject into prominence from the viewpoint of the physician and surgeon. And so we have the problem and its proposed solutions, to be viewed from the three standpoints, social, legal and medical.

The social view and the medical view, closely allied as they are, have been brought to the attention of the public far more often than the legal view. In the last analysis, however, it is the view that the courts will take that must influence and control the zeal of the social welfare worker, as well as the activity of the surgeon.

It is the purpose of this paper to bring more prominently before those who advocate sterilization of defectives and criminals the

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view that has been taken by one of the appellate courts and to direct attention to what may be reasonably expected from tribunals not yet called upon to decide the questions here involved. In several instances these acts of the state legislatures have been questioned and their constitutionality passed on by the courts.

I approached the consideration of this subject with a decided leaning toward the view of the social worker, and with a lingering hope that a study of the law would confirm the opinion that sterilization laws, as applied to both the defective and the criminal, ought to be upheld as proper means of placing legal restrictions upon procreation. As the result of this study, I have reached the conclusion that the time is not ripe for the enactment of such laws.

We are prone to believe that much of the legislation, and the proposed legislation of the present day, both in the federal congress and in the legislatures of the states, has its inception in plans or schemes which promise reward in one form or another for a favored few. And, indeed, one needs but to read the debates of a single session of Congress to find justification for such a belief, at least as regards much of the proposed legislation. As to sterilization laws, however, one must be impressed by the fact that those who have advocated their passage have been actuated solely by a sincere desire to better the great body social. The public spirit which has thus inspired legislative activity in the direction indicated, and the undoubted absence of self motives must be given the stamp of the public's approval, even though such motives may have little or no weight from the legal standpoint.

As to the sterilization of criminals, one of the most interesting decisions is the one of the Supreme Court of Washington, handed down September 3rd, 1912, in the case of *State v. Feilen,* reported in 126 Pac. Rep. 75. The statute under consideration was Sec. 2287, Rem. & Bal., providing that:

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

In addition to imposing a sentence of life imprisonment, the court ordered that:

> "An operation be performed for the prevention of procreation, and the warden of the penitentiary for the State of Washington

is hereby directed to have this order carried into effect at the said penitentiary by some qualified and capable surgeon, by the operation known as vasectomy, said operation to be carefully and scientifically performed."

The case went to the Supreme Court on the defendant's contention that the section just quoted imposed cruel punishment, and was therefore unconstitutional, and further, that a sentence illegal in part was illegal in toto. The Supreme Court in affirming the sentence disposed of defendant's objections by citing numerous medical authorities to the effect that the operation of vasectomy is a very simple one. Dr. H. C. Sharp, of the Indiana Reformatory, one of the very first to perform the operation, was quoted as saying that he performed it without administering an anaesthetic either general or local, and Dr. William D. Belfield of Chicago, as reporting that the operation of vasectomy "is less serious than the extraction of a tooth." From these and other authorities the Supreme Court arrived at the conclusion that the operation of vasectomy was not a cruel punishment. The court had before it some authority for the belief that vasectomized patients become of a more sunny disposition and brighter of intellect, but it seems very clear from a careful reading of the decision that the court confined its interpretation of cruelty to the actual physical pain incident at the time of the operation. Now the Washington statute is purely punitive. It provides for sterilization as a punishment in addition to such other punishment as may be administered. An operation for sterilization under this law is to be performed on those convicted of a criminal offense. And so we are confronted with the two questions, the first as to whether such a sentence is in violation of the constitutional prohibition against cruel punishment, and the second as to whether one who does violence to criminal laws is mentally responsible for his unlawful act. This latter point opens for argument the question which has bothered our sociologists, psychologists and alienists for many years, a question as yet unanswered, whether or not the so-called criminal can be treated for constitutional weakness instead of being subjected to punishment. Until we know an effective treatment for such shortcomings and make adequate provision for its administration, legal punishment will of course continue to be meted out to those who violate the criminal laws. There is, therefore, at this time no valid objection from the purely legal standpoint to the infliction of punishment to those convicted of crime. As to a sentence involving cruel punishment,

however, there is the fundamental objection based on the constitutional prohibition found in the Eighth Amendment:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

It may well be claimed that maiming one's body and removing a normal function is cruel *per se*. And the fact that an operation which results in maiming the body and destroying a natural function can be performed with little or no pain, ought not be the sole criterion in determining that such an operation is not cruel. Indeed, the question of physical pain at the time of an operation, or of an assault enters very slightly into a determination of the question whether the operation or the assault was in fact cruel. The question to be decided is whether sterilization, by whatever means accomplished, is cruel punishment. I am constrained to believe that this question must be answered in the affirmative. We must know, or we must be far more certain than we are at present, that sterilization is the only method of eliminating a criminal class in the years to come, and we must have some evidence —which I concede will be very difficult to obtain—tending to show that the prospect of sterilization will be a deterrent factor in the mind of one who is inclined to commit rape.

For centuries the fact that murder was punishable by death has not prevented murders being committed. The records of the criminal courts very clearly indicate that neither the prospect of punishment nor the character of the punishment are taken in account before the commission of criminal acts. So the weight of authority seems to be against the view that the prospect of sterilization will be a deterrent factor in the mind of the would-be rapist.

The most recent decision of an appellate tribunal on the question of the constitutionality of a law providing for sterilization of defectives is that handed down November 3rd, 1913, by the Supreme Court of New Jersey in the case of *Alice Smith v. the Board of Examiners,* etc. The statute under review was P. L. of N. J. 1911, p. 353, having for its preamble:

> "Whereas, Heredity plays a most important part in the transmission of feeble-mindedness, epilepsy, criminal tendencies and other defects."

Following the preamble the statute provides that the governor appoint a surgeon and a neurologist to serve in conjunction with the Commissioner of Charities and Corrections and to constitute a board called the "Board of Examiners of Feeble-minded (including idiots,

imbeciles and morons), epileptics, criminals and other defectives," and that this board shall examine into the mental and physical condition of feeble-minded, epileptics, certain criminal and other defective inmates in the state institutions. The criminals coming within the purview of the law are declared to be those convicted of rape, or of such succession of offenses against the criminal law as in the opinion of the board is deemed sufficient evidence of confirmed criminal tendencies. The board is authorized, in conjunction with the chief physicians of the several state institutions, to take evidence and examine such inmates as shall be certified by the chief physicians aforesaid, and if the board is unanimous in the opinion that procreation is inadvisable and that there is no probability that the condition of the patient shall improve in this respect, the board shall direct such operation for the prevention of procreation as shall be most effective and thereupon any qualified surgeon, under the direction of the chief physician of the institution in which the patient is confined, may perform such operation.

The brief filed in this case, prepared by the distinguished assistant attorney general of New Jersey, in collaboration with Elmore T. Elver, Esq., of the Wisconsin bar, is a most exhaustive presentation of the need for restrictions upon or prohibition of procreation by criminals and defectives. In addition to citing a very considerable number of court decisions, it quotes *in extenso* what it terms unjudicial authorities, including under this head the discussions of some of the foremost men in the American field of medicine.

In the opinion of the New Jersey Supreme Court, declaring the act unconstitutional, the court holds:

> "The artificial regulation of the welfare of society by means of surgical operations for the prevention of procreation being based upon the suppression of the personal liberty of individuals must be accomplished, if at all, by a statute that does not deny to the persons thus injuriously affected the equal protection of the laws guaranteed by the Fourteenth Amendment to the constitution of the United States. * * *
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> "Held, that the statute in question was based upon a classification that bore no reasonable relation to the object of such police regulation, and hence denied to the individuals of the class so selected the equal protection of the laws guaranteed by the Fourteenth Amendment to the constitution of the United States."

In this opinion the court discusses the operation of salpingectomy, which was the operation directed by the board of examiners to be

performed on Alice Smith, and the court arrives at the conclusion that it is:

> "In effect, two operations, both requiring deep-seated surgery under profound and prolonged anaesthesia and hence involving all of the dangers to life incident thereto, whether arising from the anaesthetic, from surgical shock or from the inflammation or infection incident to surgical interference with the peritoneal cavity."

The court, speaking through Justice Garrison, proceeds in a most interesting and lucid manner to describe its position. The decision continues:

> "It is clear that the order with which we have to deal threatens possibly the life, and certainly the liberty of the prosecutrix in a manner forbidden by both state and federal constitutions, unless such order is a valid exercise of police power. The question thus presented is, therefore, not one of those constitutional questions that are primarily addressed to the Legislature, but a purely legal question as to the due exercise of the police power, which is always a matter for determination by the courts.
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> "This power, stated as broadly as the argument in support of the order requires, is the exercise by the legislature of a state of its inherent sovereignty to enact and enforce whatever regulations are in its judgment demanded for the welfare of society at large in order to secure or to guard its order, safety, health or morals. The general limitation of such power, to which the prosecutrix must appeal is that under our system of government the artificial enhancement of the public welfare by the forcible suppression of the constitutional rights of the individual is inadmissible.
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> "Somewhere between these two fundamental propositions the exercise of the police power in the present case must fall and its assignment to the former rather than to the latter involves consequences of the greatest magnitude. For while the case in hand raises the very important and novel question whether it is one of the attributes of government to essay the theoretical improvement of society, by destroying the function of procreation in certain of its members who are not malefactors against its laws, it is evident that the decision of that question carries with it certain logical consequences having far-reaching results. For the feeble-minded and epileptics are not the only persons in the community whose elimination as undesirable citizens would, or might in the judgment of the legislature, be a distinct benefit to society. If the en-

forced sterility of this class be a legitimate exercise of governmental power, a wide field of legislative activity and duty is thrown open to which it would be difficult to assign a legal limit."

The mischief of this legislation and similar legislation proposed in other states is that in addition to being in violation of the Eighth Amendment as previously suggested, and of the Fourteenth Amendment, as pointed out in the decision just quoted, it is founded on hope and not founded on fact. It presupposes, in the language of the New Jersey act of 1911, that:

"Heredity plays a most important part in the transmission of feeble-mindedness, epilepsy, criminal tendencies and other defects,"

and as set forth in the preamble of the Indiana act of 1907, that:

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

I find no record of scientific research which presented the subject in 1911, when the New Jersey law was written, on any different plane than it occupied in 1907 when Indiana passed its sterilization law. The language employed in the preambles of these two acts is so strikingly similar as to lead one to believe that the New Jersey law was patterned after that of Indiana. But it is of more than passing importance to note that the dictum of the New Jersey act is more far-reaching than that of its predecessor. The legislature of Indiana sought to determine in the opening sentence of its act that:

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

Four years later New Jersey, using the same language, in the beginning of its statute is not satisfied with the designations, "crime, idiocy and imbecility," and makes its dictum apply to "feeble-mindedness, epilepsy, criminal tendencies and other defects." Thus do we observe the zeal of some who work for worthy social ends. The activities of such laborers seem destined to be crowned with some measure of abiding success, and the end sought to be attained, i. e., the betterment of the body social, is one which cannot fail to command the support of every man who would do his share in the uplift of the race. But the method of attaining this end by securing the passage of sterilization laws is a method not warranted at this time and one which I believe will not bear legal scrutiny. In the first place, as pointed out by the New Jersey Supreme Court in the Smith case, your law must apply to all of a class, and not alone to those who happen to be inmates

of state institutions, and in the second place, and this I believe the crux of the matter, we have not sufficient foundation in fact for branding persons as unchanging criminals and incurable mental defectives. The mere fact that investigators in the field of eugenics have compiled innumerable family trees showing most interesting and indeed, alarming pedigrees, is not in itself such a positive and substantial basis as should be required for the enactment of laws of the nature of those which we are discussing. The investigations that have been made may be accepted as sufficient to indicate that there is an existing condition that demands a remedy. This, however, is as far as we have gone, and our investigations and research have not been sufficient to enable us to determine the proper remedy. Manifestly, we ought not seek to cover our ignorance on the subject by providing a questionable remedy which does violence to the constitutional rights of a very considerable number of our citizens. On this subject I quote a paragraph from White:

> "It will be seen that by constructing elaborate family trees reaching back over several generations, it may not infrequently be possible to trace a bad strain and see its culmination in certain individuals; but that is a very different matter from predicting what the next generation is going to show. It is the difference between explanation and forecasting."

One of the cardinal points for which the law stands is the protection of the present individual, and the present individual is entitled to the protection of his person, no less than that of his property, and he cannot be deprived of this protection by a mere guess or speculation calculated to possibly benefit some future generation. If we knew our ground, if there was definite and positive scientific knowledge upon which to base such legislation, the conditions would be different. There is such knowledge as regards some forms of mental and physical disorder and there is no reason to assume that because at this time we know very little concerning criminal traits and some forms of mental disease, we will not come into possession of knowledge on these subjects.

Charles A. Boston, Esq., of the New York bar, in a protest published in the JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY, in September, 1913, held up the danger signal against what he characterized as "unnecessary and dangerous nostrums in legislation." In reaching the view that much of the sterilization legislation is unconstitutional, he also called attention to the loose and indefinite phraseology of some of these statutes. With reference to that part of the New Jersey act which

authorized the sterilization of "other defectives," he facetiously remarks:

> "Thanks to the conservatism of lawyers who have technical rules of construction, '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 the state legislature."

With further reference to the New Jersey law he adds:

> "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, and the blessings of liberty and domestic tranquility. 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 any wise howsoever defective, upon the mere irresponsible opinion of an irresponsible board."

Let us recall for a moment some of the progress made as to the prevention and the treatment of various ills to which flesh is heir.

It might well have been contended ten years ago that euthanasia should be permitted as to those afflicted with cancer; today, through the use of radium, Roentgen rays and in the light of the investigations being made in several of our laboratories, it is possible that we are at the threshold of entering upon the use of a cure for this disease.

We know that from the end of the eighteenth century, at least, so Kraepelin records, men have been dying of general paresis. In all this intervening period the prognosis in such cases has been positively unfavorable. Now, through the research and the experiments of Wasserman, Ehrlich, Swift, Ellis and others, we are taking steps that give us assurance of arresting the progress of the disease, and some promise of a treatment, which, given in time, will prevent the development of a psychosis.

Diphtheria claimed its victims by the thousands until Loeffler gave to the world an anti-toxin which reduced the percentage of fatalities to an insignificant minimum. The astounding results of prophylactic vaccination against typhoid are known to all of us. We look most hopefully to the field of preventive medicine for discoveries calculated to prevent all forms of mental and physical disorder, and as to some ailments, this hope has been abundantly realized; as to others, some of

which I have enumerated, the discoveries as to treatment that have been made, have saved the lives of thousands who might otherwise have perished. The list is long. All honor to these benefactors of mankind. Who, then, can say with any degree of authority that the criminal of today, yes and the feeble-minded and the epileptic of today, are doomed and that their status is to be forever the same. If we comprehend the far-reaching results of the scientific discoveries to which I have just alluded, and if we can form an appreciation of that spirit which dominates the lives of these scientific men and their collaborators, and those who are following on in the work, we must realize that there is due from us a faith for the development of the days that are to come. I speak not of the dim distant future, but of the days of the lifetime of living men. It was but a few days ago that Dr. Edwin F. Bowers, in a paper in a popular magazine, directed attention to the probable important and far-reaching influence of the ductless glands, concluding his article with the hopeful comment:

> "Our knowledge of the marvelous functions and intricate chemistry of the ductless glands is still limited; but it was noticeably more so very recently."

For relief from the condition which seems to demand a remedy, we look first to the field of scientific research, and until more positive reports are made from that field we are not in position to seek legislative aid in the form of sterilization laws. Such legislative aid as can be rendered toward a segregation of defectives, toward keeping such persons in colonies, is to be strongly urged and our activities, as I believe, should be in this direction while we await something definite from our laboratories.

There is one reason advanced in support of sterilization laws which, to my mind, takes rank as of first importance. I refer to the therapeutic value in the cases in which the psychosis is the result of childbirth. Often the psychosis recurs with each birth; if, however, an operation were performed it would doubtless eliminate this feature as an etiological factor in mental trouble and quite likely prevent recurrences. The sum total of such cases is relatively very small, and the advantages accruing to this small number are not sufficient to warrant a wholesale sterilization of individuals of the various classes contemplated in the laws under consideration.

In writing these sterilization laws into our statutes we have been seeking in the words of the eminent jurist whom I have heretofore quoted:

"The artificial enhancement of the public welfare by the forcible suppression of the constitutional rights of the individual."

Rather it is for us to bring about a true enhancement of the public welfare, an actual, positive betterment of the race by methods which shall not do violence to the rights of any, and which shall be in themselves the means of uplift to the whole people. And this will come through the efforts of Ehrlich, Plaut, Alzheimer, Bonhoeffer, Biedel, Lewandowsky, and their associates and disciples in the old world, and the researches being conducted on this side at the Rockefeller Institute, Harvard Univerity, the Phipps Psychiatric Clinic and kindred laboratories, supplemented by the scientific observations being made at hospitals, such as the Government Hospital under White, the New Jersey State Hospital under Cotton and the Boston Psychopathic Hospital under Southard. Out of all of this patient research, this life work of men of marked attainments, we indulge the expectation that we will be able to give treatment instead of punishment to the criminal, and to the weak-minded and the epileptic hold out that same ray of hope which shines now for many who in years bygone would have seen no light.