STERILIZATION OF DEFECTIVES.

WHAT are the limits of the police power of an American state over the liberty of persons within its jurisdiction to reproduce their kind?

This question is suggested by recent court decisions passing upon statutes of some of the states moving in the light of modern advanced eugenical science with the aid of enlightened medical practice to lessen the transmission of certain hereditable mental defects admittedly harmful both to the afflicted individual and to society.

If it be established that crime, insanity, epilepsy or feeblemindedness transmitted under ascertained laws of heredity will be increased from unrestricted procreation by the criminal, insane, epileptic and feebleminded, what power has the State to protect these against themselves and itself against such certain multiplication of the defective and socially inadequate?

That the State has the power, exercised by every state, to take and keep in custody both for their own good and for the welfare of society persons so afflicted is well settled, nor is it to be doubted that when thus held in custodial care such persons may by segregation be prevented from procreating.

Is this the sole remedy available to organized society? Must such persons languish for life in custody and must the government bear the perpetual burden of thus maintaining them if it would protect itself against the multiplication of their kind, and must this be so even when through a simple surgical operation not appreciably dangerous and involving the removal of no sound organs from the body such persons might be discharged from custody and become self supporting to the great advantage both of themselves and of society? May one liberty be thus restored through the deprivation of another liberty?

Within the past two decades some sixteen of the states have endeavored by statute to deal with this problem.

The State of Washington by statute,[1] provided for the operation of vasectomy for the prevention of procreation as a part of

[1] Rem. and Bal. Code, § 2287.

the punishment that might be imposed in certain cases. The Constitution of Washington,[2] contained a prohibition against the infliction of cruel punishments. In *Feilin's Case*,[3] decided by the Washington Supreme Court, Sept. 3, 1912, it was said:

> "Guided by the rule that, in the matter of penalties for criminal offenses, the courts will not disturb the discretion of the legislature save in extreme cases, we cannot hold that vasectomy is such a cruel punishment as cannot be inflicted upon appellant for the horrible and brutal crime of which he has been convicted."

In New Jersey the Board of Examiners created by "an act to authorize and provide for the sterilization of feeble minded (including idiots, imbeciles and morons), epileptics, rapists, certain criminals and other defectives," [4] ordered that the operation of salpingectomy be performed on an epileptic inmate of a state charitable institution as the most effective operation for the prevention of procreation. In the case of *Smith* v. *Board of Examiners of Feeble Minded*,[5] the court held that the statute in question was based on a classification that bore no reasonable relation to the object of such police regulation, and hence denied to the individuals so selected (inmates of state institutions) the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

The court said:[6]

> "Prosecutrix falls within the classification of the statute in that she is an inmate of the State Village for Epileptics, a state charitable institution, 'the objects of which,' as stated in the act creating it, are 'to secure the humane, curative, scientific and economical care and treatment of epilepsy,' 4 Comp. Stat. p. 4961. The prosecutrix has been an inmate of this charity since 1902, and for the five years last past she has had no attack of the disease. From this statement of the facts 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 the state and federal constitution, unless such order is a valid exercise of

[2] Art. I, § 14.
[3] 70 Wash. 65, 126 Pac. 75, 32 Ann. Cas. 512.
[4] N. J. P. L., 1911, 353.
[5] (N. J.), 88 Atl. 963, 32 Ann. Cas. 515.
[6] *Ibid.*, pp. 516-517.

the 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. 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. 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.

"Evidently the large and underlying question is, how far is government constitutionally justified in the theoretical betterment of society by means of the surgical sterilization of certain of its unoffending, but undesirable, members?

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"For not only will society at large be just as injuriously affected by the procreation of epileptics who are not confined in such institutions as it will be by the procreation of those who are so confined, but the former vastly outnumber the latter, and are, in the nature of things, vastly more exposed to the temptation and opportunity of procreation, which indeed in cases of those confined in a presumably well conducted public institution, is reduced practically to nil. The particular vice, therefore, of the present classification is not so much that it creates a subclassification, based upon no reasonable basis, as that, having thereby arbitrarily created two classes, it applies the statutory remedy to that one of those classes to which it has the least, and in no event a sole, application, and to which indeed upon the presumption of the proper management of our public institutions it has no application at all. When we consider that such statutory scheme necessarily involves a suppression of personal liberty and a possible menace to the life of the individual who must submit to it, it is not asking too much that an artificial regulation of society that involves these constitutional rights of some of its members shall be accomplished, if at all, by a statute that does not deny to the persons injuriously

affected the equal protection of the laws guaranteed by the Federal Constitution."

The foregoing may, perhaps, be accurately termed both the earliest and the two leading cases upon the subject.

It will be observed that while the motive of the Washington statute was punitive, it was also eugenical in its operation. The New Jersey statute was purely eugenical. Other statutes suggest a therapeutic motive—the welfare of the patient, though in operation they would be eugenical also.

Similar legislation has run a varied course both with the law making authorities and in the courts.

The governors of Pennsylvania,[7] Oregon,[8] Vermont,[9] and Nebraska[10] have vetoed sterilization bills passed by their respective states. Of these states, however, Nebraska and Oregon finally succeeded in securing sterilization statutes.

In *Rudolph Davis* v. *William H. Berry et al.*,[11] the Iowa statute was held invalid as a bill of attainder, providing for a cruel and unusual punishment and having no provision for due process of law. This case went to the United States Supreme Court but was not there decided upon the merits because pending the appeal the statute involved was superseded by the enactment of a substantially different statute upon the same subject.[12]

No other case involving a like statute appears to have reached the Supreme Court.

In *Haynes* v. *Williams*,[13] the Michigan statute was held unconstitutional as not affording those affected by it the equal protection of the laws.

The Supreme Court of Indiana, May 11, 1921, in *Smith* v. *Williams*,[14] held the Indiana statute invalid, saying:

"In the instant case the prisoner has no opportunity to cross examine the experts who decide that this operation should be performed upon him. He has no chance to bring ex-

[7] Pennypacker, 1905; Sproul, 1921.
[8] Chamberlin, 1909.
[9] Fletcher, 1913.
[10] Davis, 1913.
[11] 216 Fed. 419.
[12] Berry v. Davis, 242 U. S. 468.
[13] (Mich.), 166 N. W. 938.
[14] (Ind.), 131 N. E. 2.

perts to show that it should not be performed; nor has he a chance to controvert the scientific question that he is of a class designated in the statute. And wholly aside from the proposition of cruel and unusual punishment, and infliction of pains and penalties by the legislative body through an administrative board, it is very plain that this act is in violation of the Fourteenth Amendment of the Federal Constitution in that it denies appellee due process."

It will be observed from the foregoing cases, which are fairly typical of the limited number of court decisions upon the subject, that none of them holds that the State is without the power in question provided it be exercised through a statute that both affords due process of law and operates alike upon all individuals of the class affected, but those courts which follow the New Jersey case hold that limiting the operation of such a statute to inmates of State custodial institutions denies such inmates the equal protection of the laws and renders the statute unconstitutional and void *in toto*.

The Virginia Statute.

Most recent of the states to enact a statute of the character under discussion is Virginia, where an act to provide for the sexual sterilization of inmates of State institutions in certain cases passed both houses of the Legislature without dissent and was approved by the Governor, March 20, 1924.[15]

Drawn in the light of the experience of other states the Virginia statute reflects a diligent effort to avoid the defects that have brought disapproval from the courts of some similar enactments.

This statute provides for a hearing after notice before a Hospital Board, the appointment of guardians in proper cases, gives the right of representation by counsel with an appeal of right to the Circuit Court, with a further right of appeal to the Supreme Court of Appeals, and contains other provisions which altogether appear to meet the requirements of due process of law.

The operation of the statute, however, is limited as its title indicates to inmates of State Institutions, the body of the act making it applicable to "any such patient confined in such insti-

[15] Acts of Assembly, 1924, 569, Pollard's Code Bien., 1924, 475.

tution afflicted with hereditary forms of insanity that are recurrent, idiocy, imbecility, feeble-mindedness or epilepsy."

Sterilization under the Virginia statute shall not be ordered in any case unless the Special Board of the institution after the notice and hearing above referred to shall find upon the evidence adduced "that the said inmate is insane, idiotic, imbecile, feeble minded or epileptic, and by the laws of heredity is the probably potential parent of socially inadequate offspring likewise afflicted, that the said inmate may be sexually sterilized without detriment to his or her general health, and that the welfare of the inmate and of society will be promoted by such sterilization."

Thus it will be seen that while this statute has a eugenical motive, sterilization can in no case be ordered under its authority unless it shall have been first judicially ascertained that the welfare of the inmate also will be promoted thereby.

When it is considered that those who are subject to commitment to these institutions constitute classes well defined by the statutes [16] and thus become because of mental defectiveness wards of the State, and being because of mental defects themselves incapable of deciding what is best for themselves, can it be said that it involves an unreasonable classification to provide for them tribunals judicially to determine what in the respect indicated will promote their welfare and having so found to order their sterilization—an adjudication which the Virginia statute requires further to be supported by the finding that the action proposed will also promote the public welfare.

The field here is a broad one involving what were formerly at least regarded as elemental personal rights. To exhaust this field has not been attempted.

If this article shall stimulate consideration and discussion of the questions suggested it will have served its purpose.

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[16] Va. Code, §§ 1066-1077.