THE SUPREME COURT AND STATE POLICE POWER, 1922-1930—III [1]

II. Personal Conduct and Condition

DOUBTLESS most exercises of police power have to do directly or indirectly with personal conduct in some form. The cases to be treated here involve for the most part conduct unrelated to business activity and to property and financial interests. While some of the legislation might be questioned as a deprivation of property even if there were no constitutional protection of liberty, it all falls more directly under the rubric of deprivation of liberty. Scholars and judges have from time to time sought to determine the scope of the personal liberty that may claim constitutional protection under the Fourteenth Amendment. The results of the cases seem to show pretty clearly that the quest for a definition of liberty is not likely to prove fruitful, unless the definition goes to the limit of freedom from any and all restraint. It is no longer worth while to spend time in considering whether there are liberties not within the assumed contemplation of the official progenitors of the Fourteenth Amendment. When restraints on liberty are sanctioned by the court, it is because the restraints are approved rather than because the liberty involved is not the kind of liberty that may claim the right to raise a constitutional issue. This, however, does not mean that the justifications for restraint are unrelated to the particular freedom that is curtailed. Conceivably we might rank various liberties in some order of sanctity distinct from any consideration of the degree of restraint or the justifications therefor. Yet it is likely that most statements of particularistic liberties would involve inclusion of a particular restraint or be expressed in terms of the restraint. Often the indication of the restraint would point to the considerations involved in its justification. So it may well be precarious to seek to set up separate categories of particular liberties and assign to them intrinsic

[1] For previous instalments, see 17 Va. L. Rev. 529-556, 653-675.

the ordinance or of the authority of the officials and therefore not to be one cognizable on writ of error but only on certiorari.[42]

A Virginia statute authorizing the sterilization of mental defectives confined in state hospitals by methods involving no serious pain or substantial danger to health was sustained in *Buck* v. *Bell* [43] in the case of a feeble-minded female who had a

[42] Legislation relating to bodily condition and activity is discussed in Geoffrey May, *Experiments in the Legal Control of Sex Expression*, 39 YALE L. J. 219; J. P. Chamberlain, *Eugenics and Limitations of Marriage*, 9 AM. B. A. J. 429; *Eugenics in Legislatures and Courts*, 15 AM. B. A. J. 165; James A. Tobey, *Public Health and the United States Supreme Court*, 11 AM. B. A. J. 707; *Public Health and the Police Power*, 4 N. Y. U. L. REV. 126; and a note in 38 YALE L. J. 684, on power to order a blood test.

Issues involving responsibility for crime are considered in Dwight G. McCarty, *Mental Defectives and the Criminal Law*, 14 IOWA L. REV. 401; Albert K. Stebbins, *Legal Responsibility for Criminal Acts*, 76 U. PA. L. REV. 704; and Francis Bowes Sayre, *Criminal Attempts*, 41 HARV. L. REV. 821.

[43] 274 U. S. 200, 47 Sup. Ct. 584 (1927), discussed in Jacob Broches Aronoff, *The Constitutionality of Asexualization in the United States*, 1 ST. JOHNS L. REV. 146; John A. Ryan, *Unprotected Natural Rights*, 11 CONST. REV. 223; and notes in 2 ALA. L. REV. 258; 8 BOST. L. REV. 50; 17 CAL. L. REV. 270; 27 COL. L. REV. 873; 23 ILL. L. REV. 185; 31 LAW NOTES 101; 1 LINCOLN L. REV. (*No. 1*) 3; 12 MARQ. L. REV. 73; 25 MICH. L. REV. 908; 12 ST. LOUIS L. REV. 299; 1 SO. CAL. L. REV. 73; 6 TENN. L. REV. 136; 2 U. CIN. L. REV. 103; and 13 VA. L. REG. [N. S.] 370. For consideration of the case below or of the constitutional issue involved, see Otis H. Castle, *The Law and Human Sterilization*, 53 REP. AM. BAR ASS'N 556; J. H. Landman, *The History of Human Sterilization in the United States—Theory, Statute, Adjudication*, 23 ILL. L. REV. 463, reprinted in 63 AM. L. REV. 48; Clarence J. Rudy, *Compulsory Sterilization; An Unwarranted Extension of the Powers of Government*, 3 NOTRE DAME LAW. 1; Burke Shartel, *Sterilization of Mental Defectives*, 16 J. CRIM. LAW 537; Burke Shartel, *Sterilization of Mental Defectives*, 24 MICH. L. REV. 1, reprinted in 59 AM. L. REV. 841; Laurence A. Stith, *Sterilization of the Unfit*, 32 LAW NOTES 108; Aubrey E. Shrode, *Sterilization of Defectives*, 11 VA. L. REV. 296; and notes in 26 COL. L. REV. 356, reprinted in 60 AM. L. REV. 273; 11 CORN. L. Q. 74; 39 HARV. L. REV. 770; 2 IND. L. J. 259; 11 IOWA L. REV. 262, 279; 15 IOWA L. REV. 238; 24 MICH. L. REV. 500; 10 MINN. L. REV. 343; 14 ST. LOUIS L. REV. 327; 12 VA. L. REV. 419, 426; and 11 VA. L. REG. [N. S.] 691. For law review discussions prior to 1922, see Charles E. George, *Sterilization of Criminals, Idiots, and Insane*, 75 CENT. L. J. 91; J. Miller Kenyon, *Sterilization of the Unfit*, 1 VA. L. REV. 91; W. A. S., *Sterilization of Criminals*, 22 LAW NOTES 65; and notes in 26 HARV. L. REV. 163, 175; 27 HARV. L. REV. 484; 15 LAW NOTES 47; 17 LAW NOTES 181; 18 LAW NOTES 83; 20 LAW NOTES 143; 13 MICH. L. REV. 160; 2 MINN. L. REV. 540; 1 VA. L. REV. 414; and 28 YALE L. J. 189.

feeble-minded mother and a feeble-minded illegitimate child. The procedure provided by the statute gave ample protection against hasty or incorrect determination of the facts of mental defectiveness, and was not contested as inadequate under the due process clause. The complaint of denial of equal protection because the law applied only to those in public institutions was declared to be without merit. In answer to the substantive complaint Mr. Justice Holmes observed:

> "* * * In view of the general declarations of the legislature and the specific findings of the Court obviously we cannot say as matter of law that the grounds do not exist, and if they exist they justify the result. 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 those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. 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. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tube." [44]

To this he added: "Three generations of imbeciles are enough." Mr. Justice Butler dissents.

Calm as may be the judicial recitals of these issues of personal liberty, the conflicts are ones that stir men's souls. In three of the cases the matter was of grave moment to the most important single religious organization in the country and the only religious organization of international significance in the Christian world. Unanimously the Court sustained regulation of the Ku Klux Klan,[45] and unanimously it annulled the abolition of parochial and other private schools.[46] From the decision that imbeciles have no constitutional right to retain physical power to procreate,[47] Mr. Justice Butler dissented. One wishes

[44] 274 U. S. 200, 207, 47 Sup. Ct. at 585.
[45] Bryant v. Zimmerman, *supra* note 23.
[46] Pierce v. Society of Sisters of Holy Names, *supra* note 35.
[47] Buck v. Bell, *supra* note 43.

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[48] Gitlow v. New York
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[50] Meyer v. Nebraska,

that he might have come forward with his reasons. The religious reasons that animate objectors to such legislation are set forth in some of the notes and articles evoked by the decision. To such objections, three generations of imbeciles are not too many if, to curtail the succession, we run counter to tenets that transcend matters of this mortal world. Such is the stuff with which the Supreme Court must deal, however little the deeper considerations touched by the legislation are brought to the surface in the opinions.

Other fires burn beneath the contentions raised by legislation that sends to prison men and women who belong to groups that seek a new economic order in the present world.[48] Prophecy must not be put with such passion as to partake of the quality of incitement. A cautious literary reserve is an essential of constitutionally-protected propaganda for far-reaching changes in the social order. After the decisions and opinions here reviewed, there should be increased scope for the activities of so-called public-relations counsel who are skilled in preparing copy for the press. Manifestoes should be drafted with the legal care that antedates the issue of municipal bonds. Much as we may appreciate the judicial criteria that tell us when words are too wild, it still remains open to wonder whether after all Mr. Fiske was so much more meritorious than Miss Whitney and Mr. Gitlow. We may wonder, too, whether the present-danger test which the minority sought to establish is one that could be applied with anything approaching factual accuracy by an appellate court.

Judicial government dictated by judicial views of policy finds perhaps its clearest expression in the cases preventing the states from suppressing private schools [49] or from restricting their use of foreign languages.[50] Those who put their trust in labels are likely to brand the views of the court in these cases as liberal. The efforts at regimentation involved in the offending statutes are of a nature which at one season it was fashionable to call Prussian. Yet it may be questioned whether in the long run it would not be better to suffer the legislatures to have their wilful

[48] Gitlow v. New York, *supra* note 2; Whitney v. California, *supra* note 13; Fiske v. Kansas, *supra* note 19.

[49] Pierce v. Society of Sisters of Holy Names, *supra* note 35.

[50] Meyer v. Nebraska, *supra* note 28; Bartels v. Iowa, *supra* note 33.

pay the $500 fee contended unsuccessfully that this was an unconstitutional regulation of his occupation. Mr. Justice Sanford answered that he had no constitutional right to represent an insurance company unless the insurance company had a right to appoint him, and that he cannot complain solely on the ground of the possible indirect effect of the statute on him, when the rights of the company are not duly brought in issue. So far as appeared, the company made no complaint, and no rights of the company were adequately adduced in the proceedings brought on behalf of Mr. Herbring.

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(*To be continued.*)