Superannuation Act, 1922, even with modifications, to the Asylum Service would work out unsatisfactorily to all concerned. We submit, therefore, that Asylum Service should be regarded as an "excepted service."

(*Signed*) FRANCIS BATE.
" R. WORTH.
" WM. MORGANS.
" GEO. GIBSON.

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## *Sterilization of Mental Defectives (America).**

FEW people who have not made a study of the subject realize to what extent the sterilization of criminals and mental defectives has been sanctioned by the Legislatures and courts of this country. The recent case of Smith *v.* Command (204 N. W., Mich. 140, 1925), which upheld the main provisions of the present Michigan statute (1) authorizing the sterilization of mentally defective persons, is one indication of what seems to be a growing popular approval of such statutes. In this case, however, the order of the probate judge for the sterilization of Smith was vacated and set aside because there had been no substantial compliance with the requirements of the statute. McDonald, C. J., says in this case that the Michigan statute "is expressive of a state policy apparently based on the growing belief that due to the alarming increase in the number of degenerates, criminals, feeble-minded and insane, our race is facing the greatest peril of all time" (2).

Laws providing for sterilization in specified cases have been placed on the statute books of twenty-two states (3). The Legislatures of other states have considered the subject (4), and at least two of them have passed laws which were vetoed (5). Such laws in Indiana, Iowa, Michigan, Nevada, New Jersey and New York have been declared unconstitutional (6). Iowa and Michigan have since enacted new laws (7). The New York law of 1912 was repealed in 1920 (8). The latest laws of the other states have not yet been tested in the courts.

Enforced sterilization has been practised by many peoples, usually as a punishment for sexual offences, but it is only within the last twenty years that it has been given serious consideration by our state Legislatures as a eugenical measure.

Some of our state statutes are purely punitive (9), but the great majority of them are eugenical and therapeutic, or purely eugenical. For these purposes the statutes are made to apply to certain classes

* Reproduced from *The Medico-Legal Journal*, January–February No., 1926; by kind permission of Dr. Alfred W. Herzog of New York.

of people. Those that are punitive of course apply only to criminals, and are usually confined to those who have been convicted three or more times of a felony, or to those guilty of rape or other sexual crimes. The great majority of our eugenical or therapeutic laws apply only to inmates of state institutions, including penitentiaries and state hospitals for insane, feeble-minded, idiots, imbeciles and epileptics. Authority is given to sterilize such inmates when in the opinion of the examining board procreation is inadvisable because their children would have inherited tendencies to crime, feeble-mindedness, insanity, etc., and would be a menace to society. The present Michigan statute even goes to the extent of including those mental defectives who would not be able to support and care for their children ([10]), and that part of the statute was declared unconstitutional in Smith *v.* Command as being an arbitrary and unreasonable classification. A few statutes include those inmates who have a disease of a syphilitic nature ([11]), and some include sexual perverts ([12]). The more recent statutes are not limited to inmates of state institutions, but apply to all mental defectives found within the state ([13]). This is probably because some of the older statutes applying only to inmates have been held unconstitutional as being class legislation ([14]). The present California statute provides in addition that *any* "idiot" may be asexualized with written consent of parent or guardian. In 1921 the Oregon Legislature passed a law providing that a marriage licence would not be issued to anyone having communicable or contagious venereal disease or very low mentality unless one or both of the couple are rendered sterile ([15]). Upon being referred to the voters, however, this law was disapproved.

The majority of the statutes provide for the operation of vasectomy on males or salpingectomy on females as the method of sterilization. Vasectomy is a comparatively simple operation, and may be performed without an anæsthetic. Salpingectomy is more serious. Neither requires the removal of any organs or sex glands, and neither destroys sexual desires or capacity for sexual intercourse, but both render procreation impossible ([16]). Some statutes leave the method to be used to the discretion of the examining board as to what is the safest and most efficient manner in each particular case ([17]). Some allow castration ([18]) and some specifically prohibit it ([19]). The present Michigan statute is the only one to speak of treatment by X-ray.

Under some of the laws the written consent of the parents, guardian, spouse or next of kin is necessary, but under the majority of them no consent is necessary.

The statutes differ in their provisions for administration. Most

of them create a board made up of the heads of different state institutions. This board is assisted by a certain number of physicians and neurologists and passes upon the advisability of procreation after examination of the person and family history of the defective. Some laws provide for a hearing in the state courts, with appeals to higher courts. The present Michigan statute probably goes the farthest in the number of safeguards it throws around the individual by provisions for notice, jury trial, appeal, permanent records, etc.

All the statutes except those that are purely punitive apply to males and females alike. Many of them provide that anyone performing an operation of sterilization other than authorized by the act is guilty of a felony or a misdemeanour.

Recent statistics on the operation of these statutes are not available, but up to March 1, 1918, the number of operations performed under these statutes was as follows: California 1,077, Connecticut 12, Indiana 118, Iowa 67, Kansas 3, Oregon 17, Nebraska 25, New York 9, North Dakota 32, Washington 1, Wisconsin 61, other states 0. Total 1,432 [20]. From 1907 to 1921 in California 2,588 persons were sterilized, and during the same period in the various states a total of 3,233 were sterilized [21].

The first recorded case under any of these statutes was State *v.* Feilen [22]. The Washington statute under which this arose was purely punitive [23]. It was held that the operation of vasectomy prescribed was not a cruel punishment such as was prohibited by the Washington Constitution.

The New Jersey statute [24], which applies only to the inmates of state institutions, was held unconstitutional as class legislation [25], for it denies to the individuals of the class so selected the equal protection of the laws guaranteed by the Fourteenth Amendment of the Federal Constitution.

The Iowa statute of 1913 [26] requiring the performance of vasectomy on criminals twice convicted of a felony was held in violation of the Iowa constitutional provision that "cruel and unusual punishments shall not be inflicted" [27]. This case was carried to the United States Supreme Court [28], but was not there argued on its merits, for the Iowa statute had in the meantime been repealed.

The New York law [29], modelled after the New Jersey statute, was held unconstitutional [30] by the lower courts before it was repealed on the ground that it was an improper use of the police power because it violated the equal protection clause of the Federal Constitution.

The Nevada statute [31] authorizing the trial court to compel

criminals convicted of sexual crimes to submit to the operation of vasectomy was held to be in violation of the provision of the Nevada Constitution prohibiting cruel or unusual punishments (32).

In 1918 a previous Michigan statute which applied only to inmates of state institutions (33) was held unconstitutional as class legislation (34).

The Indiana Supreme Court has held that an act authorizing the sterilization of certain inmates (35) denied due process because it gave the inmate no opportunity to cross-examine the experts who decided upon the operation, to controvert their opinion or to establish that he was not within the class designated in the statute (36).

Upon considering the decisions in these cases it will be seen that in all probability a statute could be framed that would overcome any objection as to constitutionality. If the measure is not made punitive the element of cruel or unusual punishment is not involved (37). If the statute provides for the sterilization of all persons within the state who present a certain constitutional condition the objection that it is "class legislation" is overcome (38). If proper safeguards are thrown around the individual, with adequate provisions for notice, examination, hearing and appeal, it cannot be objected that due process is denied (39). In view of these observations it is submitted that besides the main provisions of the Michigan statute the present untested laws of Idaho, Oregon and South Dakota would also stand the test of constitutionality.

The advisability of passing such statutes which may be entirely constitutional has been seriously questioned. Since the great majority of the statutes are eugenical they are necessarily based upon two assumptions: (1) That feeble-mindedness, insanity and criminal tendencies are inheritable; (2) that it is possible to determine in a particular case that children procreated by a certain defective will have such inherited tendencies. These are assumptions about which there is difference of opinion. McDonald, C. J., in Smith *v.* Command, states that "biological science has definitely demonstrated that feeble-mindedness is hereditary" (40). On the other hand, it is stated in a recent scientific work (41) that "there has always been some uncertainty, however, in making a diagnostic distinction between native feeble-mindedness on the one hand and the acquired defect resulting in retardation on the other. That uncertainty may always obtain." The prevailing opinion in the principal case goes on to say that the only serious question in the operation of the statute is "whether it can be determined with reasonable certainty" in any particular case that the children of the mentally defective person will have an "inherited tendency to mental defectiveness" (42). It is also argued that there is at present

no universal standard which can be applied to such cases. Many scientists are also dubious as to what will be the ultimate result of these sterilization statutes. It is contended that these laws open the door to other and greater evils; that since the sterilization does not in the least interfere with the physical act of sexual intercourse there will be an increase of promiscuous sexual relations, and "the effect would be the exchanging of the burden of feeble-mindedness for the burden of sex immorality and sex diseases" (43).—(*Cornell Law Quarterly*, December, 1925.)

(1) Pub. Acts, 1923, No. 285, amended Pub. Acts, 1925, No. 71.—(2) 204 N. W., Mich., 140, 145, 1925.—(3) The following is a list of the latest sterilization laws passed by the various states up to May, 1925: California, Stats., 1913, p. 775, amended Stats., 1917, p. 571, see also Penal Code, sec. 645; Connecticut, Stats., 1909, ch. 209, amended Stats., 1919, ch. 69; Delaware, Laws of Del., ch. 62, 1923; Idaho, Laws 1925, ch. 194; Indiana, Laws 1907, ch. 215; Iowa, Code of Iowa, ch. 167, sec. 3361, 1915; Kansas, Rev. Stats., sec. 76-149 to 76-155, 1917; Michigan, *supra*, n. 1; Minnesota, Laws 1925, ch. 154; Montana, Laws 1923, ch. 164; Nebraska, Comp. Stats., sec. 7059-7063, 1915; Nevada, Rev. Laws, sec. 6293, 1911; New Hampshire, Laws 1917, ch. 181, amended Laws 1921, ch. 152; New Jersey, Comp. Stats., sec. 34-35 to 34-40, 1911; New York, Public Health Law, art. 19, sec. 350-351, 1912; North Dakota Comp. Laws, sec. 11,429, 1913; Oregon, Laws 1923, ch. 194, amended Laws 1924, ch. 198; South Dakota, Laws 1921, ch. 235, amended Laws 1925, ch. 164, see also Rev. Code, sec. 5538; Utah, Laws 1925, ch. 82; Virginia, Laws 1924, ch. 394; Washington, Comp. Stats., sec. 6957-6968, 1921; Wisconsin, Stats., i, sec. 46, 12, 1917.—(4) 5 Ill. L. Rev., 578.—(5) Pennsylvania, Gov. Pennypacker, 1905, Gov. Sproul, 1921; Vermont, Gov. Fletcher, 1913.—(6) *Infra*, n. 25, N. J.; n. 27, Iowa; n. 30, N. Y.; n. 32, Nev; n. 34, Mich.; n. 36, Ind.—(7) *Supra*, n. 3.—(8) Laws, 1920, ch. 619.—(9) California, Penal Code, sec. 645; Nevada, *supra*, n. 3.—(10) *Supra*, n. 1, sec. 7, subdiv. 2.—(11) California, Iowa, *supra*, n. 3.—(12) California, Idaho, Indiana, New Jersey, New York, Oregon, Utah, Washington, *supra*, n. 3.—(13) California, Idaho, Michigan, New Hampshire, Oregon, South Dakota, *supra*, n. 3.—(14) *Infra*, n. 25, N. J.; n. 30, N. Y.; n. 34, Mich.—(15) Laws 1921, ch. 184.—(16) *Medico-Legal Journal*, xxvii, p. 134; *Surgical Treatment*, Warbasse, iii, p. 429.—(17) California, Delaware, Idaho, Indiana, Michigan, Montana, Nebraska, Nevada, North Dakota, Oregon, Washington, Wisconsin, *supra*, n. 3.—(18) California, Kansas, *supra*, n. 3.—(19) Nevada, Virginia, *supra*, n. 3.—(20) 9 *Journ. of Amer. Inst. of Crim. L. and Criminology*, p. 596.—(21) Langlin's Statistical Summary in *Eugenical Sterilization in the United States*.—(22) 70 Wash., 65, 1912, 41 L. R. A., 418.—(23) Rem. and Bal. Code, sec. 2287.—(24) *Supra*, n. 3.—(25) Smith *v.* Board of Examiners (85 N. J. L., 46, 1913).—(26) Acts 35th Gen. Assem., ch. 187.—(27) Davis *v.* Berry (216 Fed., 413, 1914).—(28) Berry *v.* Davis (242 U.S., 408, 1917).—(29) *Supra*, n. 3.—(30) Osborn *v.* Thomson (103 Misc., 23, 1918, 169 N. Y. S., 638, aff'd without opinion in 815 App. Div., 902, 1918, 171 N. Y. S., 1094).—(31) *Supra*, n. 3.—(32) Mickle *v.* Henrichs (262 Fed., 687, 1918).—(33) Pub. Acts, 1913, Act 34.—(34) Haynes *v.* Williams (201 Mich., 138, 1918, L. R. A., 1918D, 233).—(35) *Supra*, n. 3.—(36) Williams *v.* Smith (190 Ind., 526, 1921).—(37) Osborn *v.* Thomson (103 Misc., N. Y., 23, 34, 1918); see also Weems *v.* United States (217 U. S., 349, 1910).—(38) *Supra*, n. 37, at p. 35; see also *supra*, n. 25, at p. 53.—(39) *Supra*, n. 2, at p. 144.—(40) *Supra*, n. 2, at p. 144; see also articles by Mr. French Strother in *The World's Work* July, 1924, p. 556; he claims that with the proper programme of sterilization "at the end of three generations society will have to deal with only an occasional biological 'throw-back.' Crime as we know it to-day would be extinct."—(41) *Crime, Abnormal Minds and the Law* (Hoag and Williams, p. 31, 1923); see also article by Mr. Clarence Darrow, "The Edwardses and the Jukses," in *The American Mercury*, October, 1925, p. 156.—(42) *Supra*, n. 2, at p. 144. The dissenting justice speaks of this at some length and gives authorities (pp. 149-150); Mr. Darrow in his article (*supra*, n. 41) states:

"Mr. Stanley P. Davies, in an instructive and critical analysis of the question published by the National Committee for Mental Hygiene, says, by way of summing up his investigation: 'It is apparent from the foregoing that we can be certain of only one thing at present with regard to the mode of transmission of hereditary mental defects, and that is our uncertainty.' "—([48]) Osborn *v.* Thomson (*supra*, n. 37, at p. 30); see testimony of the alienists reviewed in the opinion, pp. 26–31.

## Part II.—Reviews.

*Tenth and Eleventh Annual Reports of the General Board of Control for Scotland*, 1923 *and* 1924.

We learn from the Tenth Report that the Board are not in favour of an asylum exceeding 700 beds, and to obviate extensions beyond that number advocate the establishment of observation wards, the boarding-out of all quiet and harmless cases ("The average cost to the ratepayer for a boarded-out lunatic is about half the amount it costs for institutional treatment"—Eleventh Report), and the separating of all mentally defective persons from those who are of unsound mind. Observation wards exist in Glasgow, Paisley and Dundee. (These are run under the Poor Law, and we agree with the finding of the Scottish Hospitals' Commission that all the Poor Law hospitals should be transferred to the public health authorities.) The Board, however, rightly advocate that district boards and directors of Royal asylums should be empowered to establish outdoor and indoor clinics by arrangement with the managers of general hospitals.

There is an interesting report in the Appendix on the methods of treating the insane in France, and the Clinic at Rue Cabanis in Paris is taken as an example of the method pursued in France of using the clinic and asylum in conjunction. The treatment at these clinics as regards hydrotherapy, electricity and massage "is carried out with a zeal and efficiency seldom equalled in this country." There is no limit placed on the number of patients in an asylum; the staffs have an eight-hour day; many of them are married, and "a good deal of feeling" exists between the nursing and medical staffs owing to the married couples of the staff not being off duty at the same hours.

On January 1, 1925, there were 20,850 certified persons in Scotland, 18,398 being certified insane and 2,452 certified as mental defectives—an increase of 9 and 144 respectively. During the year 3,176 were certified insane, 1,541 discharged (recoveries being 33·4%) and 1625 died (9·6%).

Apart from these there were 431 voluntary inmates admitted—mainly consisting of private patients, though a number of parish councils have agreed to forego the Government grant payable to them for certified cases in order to allow of their patients entering the district asylums as voluntary inmates.

There are 13 institutions for the care of mental defectives, though