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## STERILIZATION OF MENTAL DEFECTIVES

BY BURKE SHARTEL\*

**I**N 1923 the legislature of Michigan passed an act "to authorize the sterilization of mentally defective persons".<sup>1</sup> This act has recently been sustained in its main provisions by the Michigan supreme court in a case brought to test its constitutionality.<sup>2</sup> Probably the United States Supreme Court will also have an opportunity to pass upon the validity of this law, but the Michigan decision, although not final on the question whether the sterilization of defectives is violative of the "due process clause" of the Fourteenth Amendment, is nevertheless very significant. It is the first instance so far as the writer can find in which a court of last resort has sustained a law providing for what is termed "eugenical sterilization".<sup>3</sup> A brief consideration of this legislation ought therefore to be of interest.

Let us examine: I. The Provisions of the Michigan Act, and then II. The Constitutional Power of the Legislature to Provide for Sterilization of Defectives.

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<sup>1</sup>Public Acts 1923, No. 285.

<sup>2</sup>Smith v. Command, Probate Judge, decided on June 18, 1925 and reported in 204 N. W. 140.

<sup>3</sup>In *State v. Feilen*, 70 Wash. 65 (1912), an act providing for sterilization as a part of the punishment for rape was upheld; however the law was attacked on the ground that this was cruel and unusual punishment and the court was not required to and did not profess to pass upon the validity of sterilization as a eugenical measure. (See further on questions of constitutionality, the latter portion of the present article.)

## I.

## THE PROVISIONS OF THE MICHIGAN ACT

(a) *Persons Subject to Sterilization. Secs. 1 and 2*:—The act is applicable to persons duly adjudged by the probate court to be “mentally defective”. “Mentally defective persons shall be deemed to include idiots, imbeciles and the feeble-minded, but not insane persons”.

One of the main contentions of counsel for Willie Smith in the instant case was that the sterilization statute makes an unconstitutional classification—“it selects out of the mentally defective only idiots, imbeciles, and feeble-minded.”<sup>5</sup> “Why should the insane be excluded from its operation? Chief Justice McDonald in holding the classification made by the statute not to be arbitrary or unreasonable, suggests two reasons why it is proper. “While we do not know, of course, what the Legislature had in mind, it is reasonable to suppose they knew that the insane have less of the sexual impulses than the feeble-minded, and that biological science has not so definitely demonstrated their inheritable tendencies.”<sup>6</sup> And in the brief of the Attorney General it is said, “Undoubtedly insane persons were exempted because it is usually necessary to confine them in institutions and the great majority of them would not be safe at large even though sterilized and the insane persons who are not confined in institutions are either curable or do not, as a class, show any tendency toward sexual relations, as is the case with idiots”, etc.<sup>7</sup> The long

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<sup>4</sup>The writer drew the Michigan Act. However he had no personal interest in it, nor part in initiating or sponsoring it; the draft was made at the instance of an organization interested in social welfare work.

<sup>5</sup>At p. 44 *et seq.* of the brief. A number of points raised by counsel and discussed by the court are not of sufficiently general interest to be discussed in this article—such as for example, whether the statute corresponds to its title, whether the statute clearly provides what court shall have jurisdiction to order sterilization, and whether it makes provision for the payment of medical fees.

There are faults in the Act; but many of the criticisms directed at its provisions are not sound at all; they are due to unfamiliarity with the matter in hand. While other criticisms are explainable in the sense that whoever enters, as legislator or draftsman, into a constitutional “no man’s land” like the field of sterilization, is certain to be shot at from all sides.

<sup>6</sup>At p. 143.

<sup>7</sup>At p. 7.

and short of the matter is, practical experience requires a distinction to be made between the feeble-minded and the insane. That is what makes this classification a natural and reasonable one.<sup>8</sup>

A feeble-minded person is a mental dwarf, a person whose mind has never developed, sometimes because his ancestors are also underdeveloped mentally, sometimes because of disease, or of an accident at birth or in early childhood; but always he is a person with sub-normal mentality. The insane person is in theory at least a person who has at one time enjoyed normal mentality, but who has, owing to disease or accident, lost it. Roughly, the distinction between the two is that between a person *who never has a complete mind, and a person who does have one but loses it through the action of disease or accident*. We would not need any special experience to confirm the impression that these mental children, who are only too often endowed with normal sexual power and appetite, but entirely devoid of ordinary feelings of shame, responsibility, and so on, would require different care, and would present different social problems, from the mental adults who are affected by disease, possibly only late in life or only in one limited mental sphere. Perhaps the most marked characteristic of the feeble-minded—and this ought to weigh heavily in making a distinction such as we are discussing—is the hopelessness of cure. It is as much, but no more according to human experience to cause a feeble-minded person to attain full mentality as it is to cause an adult dwarf to grow to normal stature. To be sure few cases of insanity are ever cured either, but some are. And if nothing else is to be considered, the affectionate hope of the insane man's relatives for a restoration of the personality which they once knew and cherished, is worthy of some consideration. The relatives of the feeble-minded man have never known him other than he is and they can hardly wish him to have children. Besides these differences there are the differences pointed out in the passages above quoted,—the difference in the probability of uncontrollable sexual impulses,

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<sup>8</sup>The writer is greatly indebted to Dr. Harley A. Haynes for advice on points touching the feeble-minded which are discussed in this article. Dr. Haynes was from 1907-1912 Assistant Medical Director of the Michigan Institution for the Care of the Feeble-Minded, and from 1912-1924 the Medical Director; he is at present Director of the University of Michigan Hospital at Ann Arbor.

the difference in the degree of proof that insanity and feeble-mindedness respectively are inheritable, and the difference as regards the effectiveness of sterilization as a means of fitting the two classes of persons for life outside of an institution. An appreciation of these various differences we find already expressed in legislation establishing separate institutions for the care of the insane and for the care of the feeble-minded respectively. The sterilization act under consideration applies to just that class of persons who under laws of long standing are subject to be committed to institutions for the care of the feeble-minded.

Another reason for criticising the classification made in the act, is stated in the question of Wiest J.,—"Where is the borderline between the feeble-minded to be sterilized and those to be left immune?"<sup>9</sup> As said by Judge Lumpkin, "The mind grades up from zero to the intellectual boiling point so gradually that dogmatic tests are of little value."<sup>10</sup> "Can we or can we not fix a *standard of mental defectiveness*, or as we more commonly express it, feeble-mindedness? There is much authority, medical and scientific, to the effect that this is an impossible task. So that considered in this light, and all by itself, the legal problem here presented might appear insurmountable. But have we not many other problems like this? Take the standard to which we so commonly refer,—the ordinary prudent man. Where is he? Just how shall we know him? Where is the "borderline" between him and the careless man? Again consider the cases where insanity comes in question. Our courts are called on daily to draw an impossible line between sanity and insanity, and on their decisions may depend property rights, or liberty of person, or even the question of life or death. And finally, our statutes already provide for the *commitment* of feeble-minded persons. Certainly the issue of feeble-mindedness or normal-mindedness is no different in substance whether it occurs in a sterilization or in a commitment case; and certainly too, sterilization is not a more momentous result of this issue of fact than is a perhaps permanent and involuntary confinement. The sum and substance of the matter is, the law cannot "back away from" this question simply because it is hard to decide. We are no more apt to get different views in different cases as to who is

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<sup>9</sup>At p. 151.

<sup>10</sup>In *Slaughter v. Heath*, 127 Ga. 747, 57 S. E. 69 (1907).

feeble-minded, than we are to find different courts or juries taking divergent views on whether a certain defendant's conduct has been, in a particular situation, that of a reasonably prudent man. Perhaps scientifically speaking, people cannot be classified, cannot be put into two, three, or even more classes with lines drawn between. But what is good scientific theory is not necessarily good law. The law has to speak in general terms—we have not gotten to the point of furnishing a law for each case and never shall. The law must classify persons, things, acts, and so on—and in so doing, it has to draw what general practical lines it can. The best the law can do in many situations is to set up a general standard and trust to common sense to secure a *reasonably uniform* application of it. A general standard to serve in this way which the writer suggests on the basis of a formulated test of the Royal College of Physicians, London, is this,—a feeble-minded person is one who, because of inherent or acquired mental weakness, cannot compete on equal terms with his fellowmen, and cannot manage himself and his affairs with ordinary prudence.<sup>11</sup>

Numerically the class of persons subject to sterilization under the Michigan Act is not large. There are perhaps twenty thousand feeble-minded persons in the state,<sup>12</sup> according to Chief Justice McDonald. This would not be too many to sterilize, considering the population as a whole, but the fact is, it would never be necessary to sterilize all of these persons; many of the feeble-minded never arrive at sexual maturity or never become social problems in a sexual sense.<sup>13</sup>

In the earlier sterilization acts other classes of persons are included along with the feeble-minded,—for example, criminals, epileptics, habitual drunkards, and morons. This inclusion seems to the writer bad policy.<sup>14</sup> As compared with the difficulty of deciding

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<sup>11</sup>Wiest J. refers to this test with disapproval at p. 151 in his opinion. His objections are however scientific only, and are answered, it is submitted, by what is said above.

<sup>12</sup>This is roughly one person in two hundred—an estimate with which Dr. Haynes agrees. See note 8 above.

<sup>13</sup>See further regarding the age of persons subject to sterilization, *post*,—(d) *The Necessary Findings of Fact.*"

<sup>14</sup>For all the legislation on this subject see pp. 1-50 in LAUGHLIN, EUGENICAL STERILIZATION (1922), published as a report of the Psychopathic Labora-

whether a man is a moron or a normal person, the difficulty of deciding between a feeble-minded man and a normal person would be as nothing. Our intelligence tests and other standards are usually considered by experts to be tolerably satisfactory for detecting gross inadequacy of mind (such as feeble-mindedness) but hardly reliable at all for testing the higher degrees of intelligence. Moreover all of the arguments about the lack of evidence to show the inheritability of feeble-mindedness can be made in regard to criminals, epileptics, habitual drunkards, and morons—and with much more force. The proof that some form of social inferiority will be passed on to offsprings by these persons is far from conclusive. So that the present act is certainly stronger in both a constitutional and a practical sense for leaving these classes out. The constitutionality of any sterilization measure will depend primarily on whether it is calculated to meet a well-proven social danger. And on the policy side—if we are going to sterilize for eugenical reasons, it is better to begin where the need is clearest, and to adopt a modest program which will not discredit the whole idea at the start.<sup>15</sup>

(b) *Application for Sterilization Order.* Sec. 3 specifies who may apply for an order to sterilize an adjudged defective—to wit: certain relatives, certain public officers and “any person whom the judge of probate upon examination into the facts and circumstances of any particular case, shall determine to be a proper person to make such application”.

“Said order may be made at the time when the person is adjudged defective or at any later time”.

This section leaves it open to almost anyone who could properly desire to obtain a sterilization order to make application for it—whether he acts in the interest of the defective (see Sec. 8 below) or of the public (see Sec. 7 below). At the same time there is some check on indiscriminate applications, in the requirement of the judge’s approval as provided in the passage quoted.

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tory of the Municipal Court of Chicago. See also a number of acts and proposed acts in *AMERICAN JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY*, Vol. 5 p. 535, Vol. 7 p. 611, and Vol. 8 p. 126.

<sup>15</sup>Chief Justice McDonald at page 145 says,—“In comparison our statute is much more reasonable and conservative than the laws of other states” . . . “The Michigan statute is not perfect. Undoubtedly time and experience will bring changes in many of its workable features”.

(c) *Notice, Examination, Hearing and Appeal.* Sec. 4 directs that a day for hearing the application be fixed, and notice thereof be served personally at least ten days beforehand, on the defective if over the age of ten, on the public prosecutor and on certain relatives, or if none of these can be found upon a guardian ad litem to be appointed by the court.<sup>16</sup>

And "in its discretion the court may cause notice to be served in any part of the state upon any relative of the defective or upon any interested person."

Sec. 5: The court shall cause the defective to be examined by three reputable physicians with a view to obtaining their opinion whether he "should be dealt with under the terms of this act".<sup>17</sup>

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<sup>16</sup>The appointment of a guardian to receive service of notice and represent the defective at the hearing is mandatory, where the designated relatives can not be served. In the Willie Smith case the guardian *ad litem* was not appointed until a month after the petition for sterilization was heard and submitted. The guardian then filed objections to the sterilization order and appealed. This the court held was not a substantial compliance with the statute so as to confer jurisdiction to make the order. The statute "contains specific provisions as to the procedure in such cases. When the petition is filed, an order of hearing shall be made and served as directed in Section 4. A copy must be served on the guardian *ad litem*. Clearly the guardian must be appointed when the order of hearing is made." (At p. 145).

However in the instant case the court seems to have overlooked the fact that the petition for sterilization was filed by the defective's father with the mother's consent. In view of this it is not easy to see how these relatives cannot "be found"; indeed they appear to have notice just as if they had been served. And it is only when none of the relatives designated can be served, that the appointment of a guardian *ad litem* is mandatory. The guardian was named here by the probate court in the exercise of its general powers.

<sup>17</sup>In the Willie Smith case the physicians merely filed a certificate setting out their opinions in the terms of the statutory required findings; the court held this was not a compliance with the statute.

McDonald C. J. says: "There is no provision for the filing of certificates made by the physicians. The procedure is in no way similar to that provided for on petitions to commit to an insane asylum. 1. Comp. Laws 1915, Art. 1325. Section 5 provides that: 'The court shall cause the defective to be examined by three reputable physicians \* \* \* with a view to obtaining the opinion of said physicians on the question whether the adjudged defective should be dealt with under the terms of this act.' The intent is clear that the physicians shall appear in court at the hearing and submit to an examination by the court, the prosecuting attorney, the guardian or other person upon whom notice has been served. The certificates filed in this case are simply statements in the language of the statute that the facts are present which the court must find



*Sec. 6:* "The court shall take full evidence in writing at the hearing<sup>18</sup> as to the mental and physical condition of the adjudged defective and the history of his case and shall, if no jury is required, determine whether he is a person subject to be dealt with under this act for his own welfare (sec. 8 below) or the welfare of the community" (sec. 7 below).

On motion of the court, or demand of the defective or the guardian or relative representing him, the hearing shall be by jury.

The defective shall have the right to be present at the hearing "unless it shall appear to the court by certificate of two reputable physicians" that this would be "improper or unsafe".

*Sec. 9:* Any defective ordered sterilized may appeal on the same terms as a person found feeble-minded may appeal, and while the appeal is pending, the order shall be suspended.

These sections follow largely the provisions of the Michigan statutes covering the commitment of the feeble-minded<sup>19</sup> and the insane.<sup>20</sup> Wherever a departure has been made from the older models, it has always been made with the idea of safeguarding more carefully the rights of the person sought to be sterilized.<sup>21</sup> In commenting on these parts of the act, McDonald C. J. says,—

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to warrant the making of the order. It is not for the physicians to determine the question before the court. While, of course, they may express their opinions concerning it, the reasons for such opinions should be inquired into in order that the court may, after due consideration thereof and of the other proof submitted, as provided for in section 6 determine whether the person examined should be dealt with under the terms of the act. Section 6 reads:

"The court shall take full evidence in writing at the hearing as to the mental and physical condition of the adjudged defective and the history of his case. No witnesses were examined. This provision is mandatory, and must be complied with. No more important duty devolves on a probate judge than that imposed on him under this act. The responsibility of determining that a surgical operation shall be performed on a human being who is mentally defective 'for his own welfare or the welfare of the community' rests upon him, and it may properly be discharged by him only on the most painstaking and thorough investigation of the facts disclosed upon the hearing." At pp. 145, 6.

<sup>18</sup>See the statements of the court in the preceding note.

<sup>19</sup>Compiled Laws 1915, secs. 1546, 1547.

<sup>20</sup>Compiled Laws 1915, secs. 1324, 1325.

<sup>21</sup>For example here the provisions as to the appointment of a guardian *ad litem* are mandatory in some cases, and the defective or his relatives or his guardian may demand a jury trial, and notice must be served ten days instead of

"Nothing further is required by the 'due process clause' of the Constitution"—and further, "In examining the recorded decisions of other jurisdictions, we have read the sterilization statutes of ten states. In most of them the matter of determining whether a defective shall be dealt with under the act is left to an administrative officer or board. In the Michigan statute that matter is left to court procedure and judicial determination, aided by the expert knowledge of three competent physicians. The distinguishing feature of our statute is found in these provisions, and in the safeguard which it throws around those of the class who have not the inherited tendencies which bring them within the operation of the law. It provides for a jury trial and the right of appeal. It requires all testimony to be taken in writing and a complete record made, so that it may be reviewed."<sup>22</sup>

Eugenicists, physicians and other scientists may not heartily approve the policy of requiring a judicial or jury hearing in all sterilization cases; they are apt to be impressed with the unfitness of courts and juries to pass upon these highly technical questions of fact. But as a matter of constitutional right the person to be sterilized cannot be deprived of "his day in court". He is entitled to a fair and impartial hearing, and an opportunity to present testimony, examine and cross-examine witnesses and so on. Even if medical boards could be created to serve as expert triers in these cases, there seems to be little practical advantage in setting up boards to perform this function. Our courts are already organized and operating; they pass on many other questions quite as difficult; they must base their findings on the opinions of experts anyhow; and finally, the findings of any board of experts which might be substituted would have to be subject to court

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twenty-four hours before hearing, and the provisions as to hearing are somewhat more specific.

<sup>22</sup>At p. 144. In *Williams v. Smith*, 190 Ind. 526 (1921) the supreme court of Indiana held unconstitutional, as denying due process of law, the Indiana act, "authorizing the Board of Managers of institutions intrusted with the care of confirmed criminals and defectives and a committee of experts to perform an operation of vasectomy on an inmate, in cases pronounced unimprovable, to prevent procreation, but giving the inmate no opportunity for a hearing or to cross-examine the experts who decided upon the operation, or to establish that he was not within the class designated in the statute." See comment on this case in 20 MICH. L. REV. 101. Compare also *Davis v. Berry*, 216 Fed. 413.

review in order to meet constitutional requirements, and a review here would not be substantially different from a judicial hearing in the first place.

(d) *The Necessary Findings of Fact. Sec. 7—(1)*—The court shall order sterilization whenever upon the hearing it shall be found,—

“(a) That the said defective manifests *sexual inclinations* which make it probable that he will procreate children unless he be closely confined, or be rendered incapable of procreation;

“(b) That children procreated by said adjudged defective will have an *inherited tendency* to mental defectiveness; and

“(c) That there is *no probability* that the condition of said person *will improve* so that his or her children will not have the inherited tendency aforesaid.” (Italics ours)<sup>23</sup>

These findings were the object of more direct or implied criticism by court and counsel than anything else in the act. And yet they are absolutely fundamental. One only needs to examine the many enacted or proposed sterilization statutes, set out in LAUGHLIN'S EUGENICAL STERILIZATION, to find that every draftsman of a sterilization act has felt obliged to require findings of somewhat similar purport. In every case coming before the court the ultimate fact to be found is, this defective needs to be sterilized for the social good. The findings here required are simply facts upon which that conclusion is based. The writer believes one cannot say a defective ought to be sterilized without finding or assuming every fact here mentioned. Now let us consider these findings separately.

1. *Manifestation of “sexual inclinations.”* Clark J. regards this as an unnecessary finding, a finding of something obvious. He cites the brief of counsel to the effect that this finding “may be satisfied by evidence that the subject is either male or female”.<sup>24</sup> This opinion cannot however be supported by the word of experts in this field. The

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<sup>23</sup>Sec. 7 (2) provides for sterilization likewise where it is found,—“(a) That said defective manifests sexual inclinations which make it probable that he will procreate children unless he be closely confined, or be rendered incapable of procreation; and (b) That he would *not be able to support and care for his children*, if any, and such children would probably become public charges by reason of his own mental defectiveness.” (Italics ours).

This part is held unconstitutional without however affecting the validity of Sec. 7 (1). See opinions pp. 144, 148, 150.

<sup>24</sup>At p. 146.

clause in question was inserted upon the advice of such experts. Dr. Harley A. Haynes, who had charge of the Home for Feeble-minded at Lapeer for many years, says a large percent of feeble-minded persons are infantile in sexual development either physically or mentally or both and always remain so. Many also die before they reach maturity. As to all these, sterilization is quite unnecessary. It is therefore desirable to include this finding of "sexual inclinations"—based on attempts at intercourse, solicitation to intercourse, or whatever else would show a probability that the defective will "procreate children".

Another aspect of the finding of "sexual inclinations which make it probable he will procreate children" is that this finding serves virtually as a requirement that the person sterilized be over the age of puberty.<sup>25</sup> This is important, for sterilization before maturity does have serious effects upon the development of the individual, while sterilization thereafter does not.<sup>26</sup>

2. *That children of the defective will have an inherited tendency to mental defectiveness.* Here we are on less certain ground. Can these facts be determined? Many think they cannot. All the justices who write opinions in the Willie Smith case call attention to this difficulty and stress the point that this and the other findings must be based on evidence. In particular, Mr. Justice Clark says:

"But what of paragraph (b). Can it be determined as a scientific fact upon competent evidence that a child not in being, but to be procreated, 'will have an inherited tendency to mental defectiveness'? . . . I have grave doubts that paragraph (b) is capable of proof, and, before sterilization can be ordered, such finding must be made and it must be based on evidence".<sup>27</sup>

The difficulty of proof is not one which appeals to the average man at all. He takes it for granted that all kinds of traits can be shown to pass from one generation to the one which follows. The

<sup>25</sup>Wiest J. overlooks this point, for he assumes that the operation may be performed on infants—this appears from his frequent references to eunuchs and from his reference to the "ablation of sexual organs \* \* \* in infancy" at p. 152.

<sup>26</sup>Of course when (if ever) such sterilization is indicated as the proper medical treatment for a particular individual, it is permissible under the provisions of sec. 8.

<sup>27</sup>At p. 146.

writer has yet to find a man of only fair education who disapproves of the policy of eugenical sterilization when that policy is stated for his opinion. Scientifically, however, the case is not so clear. Many scientists question, whether the *probability* of transmitting mental defect to offspring can be found as a "scientific fact".<sup>28</sup> The great majority think that it can be. But whichever opinion one accepts as one's personal view, the conclusion reached by Mr. Justice Clark must be accepted as sound. He puts aside his doubts and says the finding of a "tendency" must be made on the facts of each particular case, just as the act provides. The supreme court is emphatically not warranted, on the basis of existing scientific opinion, in declaring as a matter of law that the probability of transmitting mental defect is not possible of proof.

In substance and effect the act requires a finding of a *reasonable probability* that this feeble-minded individual will *transmit mental defect to his children*. If mental defect is inheritable at all, this finding is not so hard to support as one might suppose on first thought. Normal persons seldom mate with the feeble-minded. A feeble-minded man can rarely lure a normal woman into marriage or illicit intercourse. A normal man will quite as rarely marry a woman with the mentality of a small child; he may perhaps have illicit intercourse with her in an unbridled moment. Feeble-minded persons are, as it has been expressed, "a different kind of people"; their marriages are naturally and usually with persons of their own sort. And of course the probability of feeble-mindedness in the offspring of two feeble-minded persons is very great.<sup>29</sup> If it be true that normal per-

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<sup>28</sup>For example the late Dr. Walter E. Fernald and Dr. William A. White.

<sup>29</sup>Dr. William A. White, an avowed opponent of sterilization laws, says, "I challenge you or any other person to point one of these carefully worked out families and give me in a single instance a prediction of what the heredity of any one of the numerous individuals therein contained will be as shown by our charts that it actually is. Now if we cannot predict we have no right to interfere. It is simply and solely to my mind a case of 'fools rushing in where angels fear to tread' and I have absolutely no sympathy with any such legislation for that reason. *I have yet to see a chart upon which an absolute prediction could be made, except perhaps in the case of the union of two feeble-minded persons, and even there I would want to know something about the basis for the diagnosis of feeble-mindedness.*" (Italics ours).

And again, "It is out of the question to undertake to predict what sort of progeny he will have without taking into consideration the individual with whom

sons and feeble-minded persons seldom intermarry, what can it profit the opponent of sterilization to show that a large percentage of the fruit of such unions would be of sound mind? He can derive no comfort from the soundness of their children born out of wedlock. The long and short of the matter is, one cannot consider in the abstract what this or that feeble-minded individual's contribution to a bad heredity will be, and ignore the probability that his legitimate offspring will suffer from "a double dose".

3. *That there is no probability that the condition of said person will improve so that his children will not have the inherited tendency to mental defectiveness.* In the light of what has been said about the incurability of feeble-mindedness, it might have been proper to omit this third finding entirely; the courts might have taken judicial notice of these medical facts; however these facts are not hard to deal with where the evidence is sufficient as to the others. As Mr. Justice Clark says, if a finding can be made that the children of the defective will have an inherited tendency to mental defectiveness, this finding that there is no prospect of change or improvement can also be made. And since these facts must be found or assumed, their inclusion among the required findings of fact can hardly be seriously objected to.<sup>30</sup>

(e) *Sterilization for the Welfare of the Defective.* The present act provides primarily for sterilization as a social welfare measure.

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he is going to mate, and this is precisely the feature in all matters of sterilization that is not taken into account. It is always practically unknown." (Extracts from a letter to Mr. William Van Dyke, counsel for Willie Smith, set out in the brief at p. 99 *et seq.*)

With deference it is submitted that Dr. White himself reaches his conclusions "without taking into consideration the individual with whom he (the feeble-minded person) is going to mate."

<sup>30</sup>This type of finding which occurs in almost all of the statutes is said by Mr. Laughlin to be "bad biology". It "implies that an individual may, because of his condition, be today a potential parent of defectives and undesirable, and in the future on account of some recovery, may become so changed that parenthood on his or her part becomes desirable for the state. This is equivalent to saying that an individual may be a mongrel today and a thoroughbred tomorrow, which, of course, is contrary to all practical observation and to all biological teaching". *EUGENICAL STERILIZATION*, p. 113. But practically, whether "bad biology" or not, it is perhaps wise to include this finding; we can not expect our courts always to know and take judicial notice of the views of biologists.

The notion is that the defective with his feeble mentality and procreative tendencies is a serious social menace. Under section 8, however, sterilization for the defective's own welfare may be ordered by the court. "The court may, with the consent of the parents or guardian" order sterilization "whenever at such hearing it shall be found that the mental or physical condition of said defective would be substantially improved by such operation or treatment, or such operation or treatment is otherwise for the welfare of such defective."

The physician may sterilize a patient just as he may give his patient any other form of medical or surgical treatment, viz., for the latter's good. In so doing, he is "taking no chances" if the patient is a normal adult person and consents to be sterilized, and probably not if the patient is a minor whose parents consent in its behalf and in its interest. But the situation is not always so clear. Can a parent consent to the sterilization of his adult feeble-minded son, for example? Can a guardian authorize the sterilization of his ward for the ward's good, either with or without court order? These and other doubts might arise. Physicians have been sterilizing the feeble-minded not infrequently (so the writer is reliably informed), provided the consent of what are regarded as the proper persons may be obtained. Practically the risk here has not been great, but occasionally a serious law suit might result. This statute offers the physician and other interested persons a safe way in which to proceed.

(f) *The Operation or Treatment.* Under Sections 2 and 10 the "court may, after hearing as herein provided, order such treatment by X-rays or the operation of vasectomy or salpingectomy or other treatment as may be least dangerous to life to render said defective incapable of procreation."<sup>81</sup> The court "shall direct a competent physician or surgeon with proper assistance to perform said operation or give said treatment".

Regarding these sections McDonald C. J. says,—“But the methods provided by the statute to accomplish its purpose are not cruel or inhuman. It requires treatment by X-rays or the operation of vasectomy on males or salpingectomy on females, or other treatment as may be least dangerous to life. These operations are the least radical known to medical science. None of them require the removal

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<sup>81</sup>Sec. 10 is borrowed from the earlier Michigan Sterilization Act.

of any of the organs or sex glands; the result being accomplished by a severance of the sex germ-carrying ducts. The operation does not destroy sexual desires or capacity for sexual intercourse, but renders procreation impossible."<sup>32</sup>

Speaking medically none of the three forms of operation or treatment mentioned in the statute is very dangerous (in a proper case). Vasectomy (in males) may be done in a few minutes under local anesthetic. Salpingectomy (the corresponding operation in females) is of course more serious; it requires a general anesthetic and an abdominal incision; but it is not attended with the dangers of most abdominal operations, because here the patient goes into the operation while in good health. X-ray treatment, often used to sterilize women, has some definite limitations. It is quite as serious as is the surgical operation. Also sterilization by this method is not always sure. And finally X-ray treatment is only advisable as a method for sterilizing women over forty; in younger women it is apt to produce serious physical and psychic consequences, because it destroys all functions of the sex glands and brings on a premature menopause. The sex glands in both men and women perform two general functions—a reproductive function and a function of internal secretion, closely related to general mental and physical well-being. The surgical operations mentioned consist in the severance of ducts necessary in reproduction, but they do not disturb the secretive function of the glands, nor affect the well-being of the patient.<sup>33</sup>

## II.

### CONSTITUTIONAL POWER OF THE LEGISLATURE TO PROVIDE FOR STERILIZATION OF DEFECTIVES—PURPOSE OF PRESENT ACT.

The reasons on which four justices of the supreme court sustain the legislative power to provide for eugenical sterilization, as well as the legislative purpose and policy in passing the present act, are well stated in the opinion of Chief Justice McDonald. He says,—

“From this and a great quantity of other evidence to which we

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<sup>32</sup>At p. 142 of the opinion.

<sup>33</sup>The writer is indebted for the medical facts here stated to Dr. Hugh Cabot, Dean, Dr. E. A. Pohle, Assistant Professor of Roentgenology, and Dr. N. F. Miller, Assistant Professor of Gynecology, of the University of Michigan Medical Faculty.



will not here refer, it definitely appears that science has demonstrated to a reasonable degree of certainty that feeble-mindedness is hereditary. This fact, now well known with its alarming results, presents a social and economic problem of grave importance. It is known by conservative estimate that there are at least 20,000 recognized feeble-minded persons in the state of Michigan—eight times as many as can be segregated in state institutions. The Michigan Home and Training School at Lapeer is full to overflowing with these unfortunates, and hundreds of others are on the waiting lists. That they are a serious menace to society no one will question.

“In view of these facts, what are the legal rights of this class of citizens as to the procreation of children? It is true that the right to beget children is a natural and constitutional right, but it is equally true that no citizen has any rights superior to the common welfare. Acting for the public good, the state, in the exercise of its police powers, may always impose reasonable restrictions upon the natural and constitutional rights of its citizens. Measured by its injurious effect upon society, what right has any citizen or class of citizens to beget children with an inherited tendency to crime, feeble-mindedness, idiocy, or imbecility? This is the right for which Willie Smith is here contending. It is a right which this statute, enacted for the common welfare, denies to him. The facts and conditions which we have here related were all before the Michigan Legislature. Under the existing circumstances it was not only its undoubted right, but it was its duty, to enact some legislation that would protect the people and preserve the race from the known effects of the procreation of children by the feeble-minded, the idiots, and the imbeciles . . . this statute measured by the purpose for which it was enacted and the conditions which warranted it, and justified by the findings of biological science, is a proper and reasonable exercise of the police power of the state.”<sup>84</sup>

Squarely to the contrary effect on the vital issues here discussed is the opinion of Justice Wiest, dissenting:

“This act violates the Constitution, goes beyond the police power, and is void. I am wholly at variance with the theories sanctioned by the Chief Justice. The bodies of citizens may not, under legislative

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<sup>84</sup>At p. 142.

mandate, be cut into, and power of procreation destroyed by ligation or mutilation of glands or carving out of organs. It is not my purpose to trench upon legislative prerogative, neither shall I hesitate to view the whole subject involved in this claimed exercise of the police power. Conceding the power of government to protect society from the evils of preventable human deterioration, I cannot agree that this power extends to the mutilation of the organs or glands of generation of citizens or any class thereof. The power to segregate exists, and the protection afforded thereby is ample.

"The inherent right of mankind to pass through life without mutilation of organs or glands of generation needs no declaration in Constitutions, for the right existed long before Constitutions or government, and is beyond the reach of the governmental agency known as the police power."<sup>35</sup>

The constitutional issue is here well marked—five justices (Clark J. only with "reluctance" and "doubt") hold that eugenical sterilization is within the "police power" of the state, while three justices think it is not. We cannot strongly disapprove of the dissent of the minority nor of Mr. Justice Clark's doubts; the issue is certainly new and very delicately balanced.<sup>36</sup> However, it does not seem possible

<sup>35</sup>At pp. 146, 149.

<sup>36</sup>All of the decisions touching sterilization of defectives, and much other useful material, legal, medical, and eugenical, is collected in LAUGHLIN, *EUGENICAL STERILIZATION*.

According to counsel for Willie Smith, *sterilization acts* have been passed in nine states (not counting the present act), declared unconstitutional in eight, and upheld in one. Counsel cites the following cases,—Mickle v. Henrichs, (Nev.) 262 Fed. 687; Smith v. Board of Examiners, 85 N. J. L. 146; Haynes v. Judge, 201 Mich. 138; Davis v. Berry, (Ia.) 216 Fed. 413; Williams v. Smith, 190 Ind. 526; Osborne v. Thompson, 185 Ap. Div. 902; 103 Misc. 32 (N. Y.); Cline v. Oregon, (Circ. Ct. 1921) en banc Dept. 1; State v. Feilen, 70 Wash. 65 (held constitutional to provide for sterilization as part of punishment for rape).

In California the statute was declared unconstitutional by the attorney general. Acts were vetoed in Pennsylvania, Oregon, Vermont, Nebraska, and Idaho. The acts are apparently in force in Connecticut, Wisconsin, North Dakota, South Dakota, Kansas and Washington.

In all of the cases cited where the sterilization act has been held invalid, the decision has turned on some other point (such as improper classification, deprivation of opportunity for fair hearing, cruel and unusual punishment) than the question of power to provide for eugenical sterilization, though in some

to support, on any modern theory of rights or constitutional limitations, the broad language of Mr. Justice Wiest in which he denies utterly all legislative power to provide for sterilization. Rather his meaning must be taken to be that the exercise of such power is not necessary or advisable in any sense, and would accordingly be arbitrary, unreasonable and unconstitutional, for as McDonald, C. J., says at another point in his opinion: "It is an historic fact that every forward step in the progress of the race is marked by an interference with individual liberties".<sup>37</sup> If the social need be great enough the state can deprive of liberty (as it does do with the insane, the criminal, the man who objects to vaccination and so on) or it may take life (as it does as a penalty for crime or by drafting into the military service and exposing to death, etc.). The real issue seems to be whether in fact as McDonald, C. J., says, "Science has demonstrated to a reasonable degree that feeble-mindedness is hereditary", or at least that it is hereditary in enough cases to justify a resort to a strenuous measure like sterilization. The turning point is the degree of the social danger from the transmission of feeble-mindedness to posterity. Closely connected with the question of social danger is also the question of the effectiveness of sterilization as a means of meeting that danger. As to both questions the most that can be said is "We are not sure". We cannot say "beyond rational doubt", however, that the legislative notions on these questions are wrong. Simple doubt of the wisdom or policy of a statute is not decisive against its constitutionality. The sterilization 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. Whether this belief is well founded is not for this court to say. Unless for the soundest constitutional reasons, it is our duty to sustain the policy which the state has adopted."<sup>38</sup> And Clark J. says, "But doubts should be resolved in favor of the validity of the act. With reluctance I have concluded to concur in the result reached by Mr. Justice McDonald."<sup>39</sup>

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of them doubts regarding this power are expressed. (Cf. *Davis v. Berry and Smith v. Board of Examiners, supra*).

<sup>37</sup>At p. 145.

<sup>38</sup>McDonald C. J. at p. 145.

<sup>39</sup>At p. 146.

This attitude of solving all doubts in favor of the validity of the law seems particularly appropriate in a situation like the one surrounding the sterilization act. The decision of the court as well as the decision of the legislature must be based largely<sup>40</sup> on medical facts or at least on facts rather special in character. When the supreme court passes on the constitutionality of a "police power" measure it exercises a sort of supervisory fact-finding power like that which it exercises with regard to jury findings of fact. The legislature has before it certain evidence which it deems to justify the enactment of a certain law. It does enact it. The supreme court then has the duty (in a test case) of deciding whether the facts reasonably justified the conclusion and action of the law-making body. But the evidence of these facts is not contained in a record made up from the examination and cross-examination of witnesses, as a record in a jury case would be. The facts which affect constitutionality appear for the most part outside the record of the particular case.<sup>40</sup> For

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<sup>40</sup>On this general subject, see an excellent article by Henry Wolf Birké, "Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action," 38 HARV. L. REV. 6. In part that author says,— "Moreover, these underlying questions of fact, which condition the constitutionality of the legislation, are at times questions on which the layman feels justified in forming his own opinion and in declining to yield it to that of the judge, at least when the judge bases his determination, not on evidence produced in the case before him, but on his general information,—the same foundation upon which the layman builds his conclusion. As an example, the layman may be quite ready to defer to the opinion of the court when the decision requires a definition of the legal significance of the phrase 'ex post facto law;' but when the court decides that a law limiting the hours that people may work in bakeries has no substantial relation to the promotion of the public health, he is inclined to doubt the finality of this finding, since he knows of no particular reason for supposing that the judges are better able to decide such a question than other intelligent persons, unless their determination is based upon evidence produced before them in the usual way, carefully weighed and considered.

"Since it is believed that a substantial part of the criticism which has been levelled against the exercise by the judiciary of the power to hold legislation unconstitutional is due to the fact that decisions have been made which turn on the resolution of these underlying questions of fact, it has seemed worth while to consider how the courts should be enlightened with reference to such questions, so that their determinations may be based upon correct information and not upon assumption.

"The validity of the Massachusetts vaccination statute turned essentially on the question whether such a requirement was an arbitrary interference with

example in the present case the record before the supreme court contained only a perfunctory certificate of the physicians, following the terms of the statutory required findings, to the effect that Willie Smith should be sterilized. How can the supreme court know that it is fully informed as to the facts? How is it to get its information? And if it is not properly informed how can the court intelligently discharge its constitutional function? The legislature is not heard, nor is the court required to have any part of the legislative record before it. The court must depend chiefly on the briefs of counsel for the evidence of the facts as well as for the usual legal argument. (The brief of counsel for Willie Smith contains a vast amount of quotation and citation of medical and other special authors—much more indeed than it does of strictly legal argument.) And outside of the brief the Justices will no doubt do some exploring as to the facts on their own initiative. (Mr. Justice Wiest's opinion shows a great deal in the way of special reading which cannot be accounted for by the briefs of counsel in the present case.) The difficulty with those ways of getting at the facts is not much different from the difficulty we would see in having the jury get its knowledge anywhere and everywhere. The facts simply cannot be adequately tested and proved without some real opportunity to explain and controvert, and even more important, without a real opportunity for the court itself to investigate the facts. In the case before us we see brought out the weakness of these haphazard ways of getting at the facts. We find the Justices taking judicial notice of more than one medical or scientific fact "that ain't so". The writer has already spoken of the remarks of Mr. Justice Clark on the sexual inclinations of the

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personal liberty and therefore a violation of the due process clause of the Constitution; and, as in the bakeshop case, this question could only be resolved by an intelligent consideration of the efficacy of vaccination." At pp. 7, 11.

Cf. the remarks of A. B. Hall, *POPULAR GOVERNMENT*, pp. 185-193.

And in *Gitlow v. People of the State of New York* (1925) 45 Sup. Ct. Rep. 625, the United States Supreme Court speaking through Mr. Justice Sanford says, "By enacting the present statute the state has determined, through its legislative body, that utterances advocating the overthrow of organized government by force, violence and unlawful means, are so inimical to the general welfare and involve such danger of substantive evil that they may be penalized in the exercise of its police power. That determination must be given great weight. Every presumption is to be indulged in favor of the validity of the statute.

feeble-minded. And the opinion of Mr. Justice Wiest shows several instances of the assumption of medical truths which cannot be supported. Indeed a reading of all the opinions will convince anyone familiar with the subject that none of the Justices understands very well the nature of the social problems arising from feeble-mindedness or the medical procedures in sterilization, though the nature of these problems and the seriousness of the treatment or operation seem to be highly important in deciding whether sterilization is an arbitrary and unconstitutional measure. But it is not at all the writer's purpose to play the carping critic of the court for its lack of information in medical and psychological matters; everyone must appreciate that busy justices cannot go to the bottom of every scientific question coming before the court. Rather the writer's point in this discussion is to stress the difficulties confronting the court in these matters and to draw a moral, which is quite properly recognized in the majority opinions,—the court should indulge every presumption in favor of the existence of facts which the legislature assumed and acted upon, or what amounts to the same thing, the court ought to require the facts on the basis of which the constitutionality of a law is assailed to be established by the assailant "beyond a reasonable doubt."