Constitutional Law: State Sterilization Law Not Contrary to the Fourteenth Amendment Giving Due Process and Equal Protection of the Law

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ultimate authority that the public welfare will be better served by inflicting less than the judgment fixed.—(See ex parte Crossman, 267 U.S. 87, 120, 121; 45 S.Ct. 332; 69 L. Ed. 527; 38 A.L.R. 131.

Generally a convict cannot demand a pardon. Yet a person may contract with the state under certain condition and on the fulfillment of those requirements the state may grant a pardon on the basis of the previous contract. There was no contract in this case to that effect and the state owed the convict no obligation, therefore he could not say what should be done in this case.

When we come to the commutation of death to imprisonment for life it is very difficult to see how consent has any more to do with it than a pardon in full. Supposing that Perovish did not accept the change, he could not have got himself hanged against the executive orders. Supposing that he did accept, he could not affect judgment to be carried out. The consideration that led to the modification had nothing to do with his will.

The last question: Did the president have power to change the sentence or in other words was the substituted punishment authorized by law or did it come within the scope of the words of the constitution, Article 2, sec. 2, which says “the President shall have power to grant reprieves and pardons for offenses against the United States except in the case of treason?” This section gives the President power to grant clemency in all cases except treason. And that it is left within his discretion to impose a lesser penalty for a greater punishment when the public welfare will be better served by inflicting a less punishment than fixed by the judgment.

There is no doubt that his power extended to this case as it is an evidential fact that imprisonment for life is a less penalty than death. It was treated so under the statute under which Perovish was tried. Which provides that “the jury may qualify their verdict (guilty of murder) by adding thereto without capital punishment; and whenever the jury shall return a verdict qualified as aforesaid the person convicted shall be sentenced to imprisonment at hard labor for life criminal code of Alaska, Act of March 3, 1899 c. 429, P. 4; 30 Stat. 1253. See ex parte Wells, 18 How. 309, 15 L. Ed. 421; ex parte Crossman, 267 U.S. 87, 109 45 S.Ct. 332, 69 L. Ed. 527, 38 A. L.R. 131. The opposite answer would permit the President to decide that justice requires the diminution of a term of fine without consulting the convict, but would deprive him in most cases of the power and require him to permit an execution which he has decided ought not to take place unless the change is agreed to by one who on no sound principle ought to have any voice in what the law should do for the welfare of the whole. It is evident that the opinion that the doctrine of Burdick v. United States does not extend to the present case.


What is meant by the provision against cruel and unusual punishment? It is hard to say definitely. Within the pale of due process the legislature has power to define crimes and fix punishments, great though
they may be, or disproportionate to the character of the offense. Going back to ascertain what was intended by this constitutional provision, the history of the law tells us of the terrible punishment visited by the ancient law upon convict criminals. In our days of advanced Christianity and civilization this review is most interesting, yet shocking and heartrending. After discussing the English Bill of Rights and other documents, Justice Brannon says, “In short, the text writers and cases say that the clause is aimed at those ancient punishments, those horrible, inhuman, barbarous inflictions.” In re O’Shea, 11 Cal. App. 575, the California Court of Appeals for the first district said: “Cruel and unusual punishments are punishments of a barbarous character and unknown to the common law. It was such severe, cruel, and unusual punishments as disgraced the civilization of former ages, and made one shudder with horror to read them.”

In Peter Feilen v. State of Washington, 126 Pac. 75, 70 Wash. 65, the court 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 the appellant for the horrible and brutal crime of statutory rape upon a ten year old girl.” Again, in the case of Whitten v. State, 47 Ga. 297, while dwelling upon the subject of legislative power in regard to punishments, that court said: “It would be an interference with matters left by the Constitution to the legislative department of the government for us to undertake to weigh the propriety of this or that penalty fixed by the legislature for specific offenses. The Constitution does not put any limit upon legislative discretion.” On the theory that modern scientific investigation shows that idiocy, insanity, imbecility, and criminality are congenital and hereditary, the legislatures of California, Connecticut, Indiana, New Jersey, and perhaps some other states, in the exercise of police power, have enacted laws providing for the sterilization of idiots, insane, imbeciles, and habitual criminals. The Chicago Evening Post, some twelve or fifteen years ago, speaking of the Indiana law, mentioned above, says that it is one of the most important reforms before the people, that “rarely has a thing come with so little fanfare of trumpets.” The Chicago Tribune about that same time, said, “That the sterilization of defectives and habitual criminals is a measure of social economy.” The first of these operations, which are claimed in almost every case to be cruel and inhuman, was performed by Dr. H. C. Sharp, of Indianapolis, in 1899, who was at that time the physician to the Indiana State Reformatory. He performed these operations without legislative authority, and through his work the legislature later

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1 Whitten v. State, 47 Ga. 301; Wyatt’s Case, 6 Rand (Va.) 634; Wilkerson v. Utah, 99 U.S. 130; Wharton, Criminal Law, 7th ed. Par. 3405; Weens v. United States, 217 U.S. 349.

2 According to Dr. George M. Gould’s Medical Dictionary, vasectomy consists of ligating and resecting a small portion of the vas deferens. The vas deferens is the excretory duct of the testis.

3 California (Stat. 1909, p. 1093, Chap. 720); Connecticut (Laws of 1909, Chap. 209); Indiana (Laws of 1907, Chap. 215); Iowa (Laws of 1911, Chap. 129); New Jersey (Laws of 1911, Chap. 190).
enacted its law in regard to sterilization. Dr. Sharp has this to say of this method of relief to society: "Vasectomy consists of ligating and resecting a small portion of the 'vas deferens.' This operation is, indeed, very simple and easy to perform; I do it without administering an anesthetic, either general or local. It requires about three minutes to perform the operation, and the subject returns to his work immediately, suffers no inconvenience, and is in no way impaired for his pursuit of life, liberty, and happiness, but is effectively sterilized." Dr. William D. Belfield, of Chicago, a pioneer in this work, says it is less serious than the extraction of a tooth.

The State of Virginia has recently gone a step further in this line of legislative authority, and has enacted a statute\(^\text{5}\) which gave the superintendent of the Homes for the Insane the power to order an operation performed upon inmates who he thought would be able to support themselves if allowed to go back to their homes, and out into the world of freedom. This statute called for a certain procedure which gave the insane party a hearing before a board of directors, with the privilege of counsel or guardian-ad-litem. In the case of *Buck v. Bell*, a Supreme Court case, decided May 2, 1927, this statute was challenged and upheld. It appeared that one Miss Buck, a feeble-minded woman, was committed to the State Hospital. She was the daughter of an insane mother, and the mother of an illegitimate feeble-minded child. After a careful consideration of the condition of the woman, the superintendent applied to the board of directors for an examination, and this was taken very thoroughly as well as all other matters of the procedure. The case was appealed to the Supreme Court of Appeals in Virginia, after the directors had ordered that the operation of salpingectomy\(^6\) be performed upon Miss Buck to make her sterile. The Court of Appeals affirmed the order of the board of directors, and the inmate appealed, on the ground that the statute authorizing the judgment is void under the Fourteenth Amendment of the United States Constitution as denying the plaintiff in error due process of law and the equal protection of the laws. It was decided that the plaintiff had due process because the rights of the patient were very carefully considered as far as the procedure was concerned and that the procedure authorized by the Virginia statute was valid. However, the real attack was upon the substantive law and not the procedure. To this the court answered that Miss Buck was the probable potential parent of socially inadequate offspring, likewise afflicted, and that she might be sexually sterilized without detriment to her general health and that her welfare and that of society would be promoted by her sterilization. To quote the opinion of Justice Holmes, "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 their lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetents. It is better for all the world, if instead of waiting to execute degenerate offspring

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\(^{\text{4}}\) Laws of 1907 of Indiana, Chapter 215.  
\(^{\text{5}}\) Act of Virginia, Laws of 1924, Chapter 394.  
\(^{\text{6}}\) Gould's Medical Dictionary defines salpingectomy as the excision of the Fallopian tubes.
for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit for continuing their kind." The court points out that the principle that sustains compulsory vaccination is broad enough to cover the cutting of the Fallopian tubes. And they say that three generations of imbeciles are enough.

Thus we can draw the rule that a state law authorizing sterilization of mental defectives under careful safeguards are valid under the Fourteenth Amendment of the United States Constitution, and do not deny due process and equal protection of the law.

There apparently is no such legislation in Wisconsin; at least, the writer has not been able to find any relative statute or law within the confines of the Wisconsin Statutes.

AL WATSON, '28

Fraud: Public Lands; Bona Fide Purchasers.

The late case of Independent Coal and Coke Company v. United States, was in the nature of an ancillary suit brought by the government, in aid of a former, for the restoration to the government of some 5,500 acres of public lands located in Utah, title to which was procured by a fraud perpetrated upon the land officers of the United States. The government had, in 1894, granted these lands to the State of Utah to aid in the establishment of an agricultural college, certain schools and asylums, and for other purposes.

The lands were later purchased from the state, upon application and agreements, supported by affidavits that such lands were non-mineral and did not contain deposits of coal. In January, 1907, the United States brought the first suit against the purchasers of the lands, and founded its action upon the charge that the procurement of the lands was had by the employment of fraud and misrepresentation, as the purchasers had, at the time of the certification, been fully cognizant of the presence of coal deposits on the lands. The litigation resulted in a judgment for the government. Milner v. United States and United States v. Sweet.

A decree was subsequently entered by the district court declaring that the United States "is the owner" and "entitled to the possession" of the lands in question, and perpetually enjoining the defendants from setting up a claim to such premises. This declaration was firmly established by a later affirmation by the Supreme Court.

The resultant holding of the second suit was to the effect that one acquiring title to public land through the title of a state subsequent to the certification by the United States to the state takes subject to the equities of the United States existing at the time of the certification. Furthermore, intervention by the state, as a party, was deemed unnecessary, even though an agent of the government; upholding Williams v. United States, wherein this court said, "The state was

9 143 C.C.A. 13, 228 Fed. 431, 439.