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## EUGENIC LEGISLATION AND THE LAWYER

In the waning months of 1932, Associated Press dispatches from Vera Cruz called our attention to a rather startling legislative measure, having as its purpose the establishment of new and radical eugenic ideals. According to the lawyer who drafted the bill, it proposed to establish a State birth control board before which parents wishing to have children would be required to appear in order to receive official permission. In addition, it provided for the sterilization of mental defectives and delinquents, for the "conservation and improvement" of the physical and mental state of the people of Vera Cruz, as the governor explained. About the same time, Associated Press dispatches from Wisconsin stated that a deputy attorney general had just given his official opinion to the effect that poor relief officials who, in order to prevent offspring, became a party to the performance of sterilization operations upon the indigent, would be liable, along with the physician, to the penalties of the criminal law relating to mayhem.

To most lawyers, the extensions of the doctrine of *parens patriae* involved in the situations mentioned above will suggest Marx and Lenin, rather than Blackstone and Marshall. Yet it is hardly a secret that for some years now, many social service agencies spending public contributions, have "requested" their indigent clients to practice contraception. The Wisconsin opinion makes one pause and wonder if compulsory sterilization is to be the new mode of attack along the bread line. Perhaps these proposals are not so strange, after all, since Bertrand Russell and Julian Huxley advocated some time ago that contraception be made compulsory. Possibly the philosophy of the land of the Soviet is gradually working westward. Someone has well said that we can resist an invasion of bayonets, but not of ideas. To the lawyer or law student who is unruffled by these "new ideas," the chief interest aroused will probably concern changes these propos-

als would, if accepted, eventually bring into the criminal code. Family-raising-by-the-poor would become a new crime. Boot-legging of babies might develop, and further increase the court dockets. The majority of lawyers, it is hoped, will be roused at least to the point of wanting to find out just what basis there is, or whether indeed there is any basis at all, for such legislation.

Sterilization legislation, though enforced chiefly in two states, is in effect now in twenty-seven states, and has had a rather rapid development for this, a Christian country, since the passage of the first law in Indiana in 1907. Yet the advocates of this type of legislation "have hardly commenced the task they have undertaken," according to Professor J. H. Landman, of the College of the City of New York, in his recent exhaustive study of the movement.<sup>1</sup> One of the chief obstacles to the enforcement of sterilization laws in the past has been that of unconstitutionality. Apparently this hurdle has been cleared by the recent United States Supreme Court decision upholding the Virginia sterilization law.<sup>2</sup> It might be added that this ruling brought home to many citizens a fact which all lawyers know, namely, that constitutionality does not necessarily mean social and scientific desirability. Let us hope too, that this decision awakened those who slumbered with the false idea that a statute, in conformity with the scientific provisions of the written Constitution, will be declared void simply because it menaces fundamental natural rights. This fallacy is exploded by Rev. Dr. John A. Ryan: "What the Constitution protects is certain forms of liberty, certain immunities from arbitrary interference, certain property rights. It does not pretend to safeguard all natural rights, much less to prohibit statutory infringements of the moral law. In general, Catholics are too prone to trust to the Supreme Court for protection of their rights and interests, instead of actively defending these

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<sup>1</sup> Landman, J. H., *Human Sterilization*.

<sup>2</sup> *Buck v. Bell*, 47 S. Ct. 584, 274 U. S. 200 (1927).

in legislative bodies before the obnoxious proposals have been enacted into laws.”<sup>3</sup> Dr. Landman expresses a similar view of the importance of the legislature. “Protection against unsound, unwise, and oppressive legislation, which might otherwise be constitutional, is by an appeal to the wisdom, justice and protection of the legislatures, and not to the courts. The state legislatures do not necessarily have to consult public opinion in their proposed enactments. Nor are they obliged to consult the best scientific knowledge. Our salvation thus turns on the knowledge, wisdom and justice of our legislatures.”<sup>4</sup>

Traditionally, the American citizen has relied pretty much upon the lawyer-legislator to shape his legislation. Evidence points to the fact that the lawyer is still regarded as the American leader in legislative matters. A recent study of the occupational make-up of legislative bodies showed that about sixty-one per cent. of the seventy-first congress were lawyers, three times the number in the next largest occupational group.<sup>5</sup> In state legislatures the legal profession is still by far the dominant numerical group. Such being the case, one would naturally expect that adequate recognition of the responsibilities of this leadership has been demonstrated by those who are training lawyers. Unfortunately, recent evidence indicates that this recognition is often lacking. After an important survey, which included a study of the curricula of a number of leading law schools, Clara Bassett concluded that the lawyer-legislator is unworthy of the confidence that the public reposes in him, as far as his law school training for the post is concerned. “If it had been hoped that modern law schools were including as a required part of the training of all lawyers, in either pre-legal or legal courses, a fund of information and experience which would equip them to take leadership in the evolution of a more socialized, humane and

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<sup>3</sup> “Unprotected Natural Rights,” *The Commonwealth*, pp. 51-52.

<sup>4</sup> *Op. cit. supra* note 1, at pp. 120-1.

<sup>5</sup> Clara Bassett, “Mental Hygiene and the Law,” *Journal of Criminal Law and Criminology*, Vol. 22, 819-32 (March, 1932).

scientific handling of delinquency in either juvenile or adult courts, of domestic relations problems, of governmental and legislative activities relating to social problems, this hope is doomed to disappointment at the present time. In spite of the loud and widespread volume of dissatisfaction and criticism of our legal machinery and of the rigid, traditional legalistic handling of social problems relating to the administration of law, we find that law schools are still comfortably impervious to these accusations and are still busy grinding out thousands of lawyers unprepared to meet these pressing social needs.”<sup>6</sup> After studying the history of sterilization legislation, Dr. Landman concludes: “Our lawmakers themselves in our state legislatures are incompetent to treat with such intricate and profound fields of knowledge as heredity, eugenics and human sterilization. They thus depend upon their informants, who are eager, well-meaning representatives of well endowed race betterment institutions, such as the Race Betterment Foundation of Pasadena, California. Our legislators fall a prey to their pessimistic eugenics, which they preach so convincingly and sincerely that they seem to discourse with authority.”<sup>7</sup>

As far as eugenic legislation is concerned, it would seem rather difficult for the law school itself to offer very much in the way of educational equipment to the future legislator. Since law schools must, first of all, prepare their graduates to pass state bar examinations, and since bar examiners continue to insist solely upon the traditional type of training, it is difficult to see how the curriculum can be “socialized” to any great extent at present. Yet, the possibility of equipping the future lawyer for his important function as a lawmaker and civic leader through required pre-legal training would seem to be much more hopeful. A more widespread and intelligent enforcement of the two year pre-legal college requirement, set up by the Association of American Law

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<sup>6</sup> *Op. cit. supra* note 5, at p. 830.

<sup>7</sup> *Op. cit. supra* note 1, at p. 120.

Schools, could go a long way towards preparing the lawyer for civic leadership. The basic information necessary for an evaluation of sterilization legislation, for example, is given in the sociology and biology courses, and these might well be made a part of the two year college work minimum required by law schools, just as medical schools require certain subjects in the applicant's college background. The present requirement of the Association of American Law Schools, "one half of the work acceptable for a Bachelor's degree," tacitly approves of work towards a Bachelor's degree in commerce, engineering, or agriculture, and requires no training in the social sciences.

Most of our existing sterilization legislation is the result of fear, if not panic, induced by the "alarmists" of about fifteen years ago, rather than the product of trained minds. When the terrifying warning of writers such as Stoddard, Grant, East and Wiggam was first brought to the attention of legislators, it was felt that "something had to be done about it," and in accordance with the unfortunate American tradition, a new law seemed necessary. In the minds of that organized minority which delights in seeking social reform by fiat, sterilization legislation was the only solution. In response to such alarming statements as: "The first warning which biology gives to statesmanship is that the advanced races of mankind are going backward; that the civilized races of the world are, biologically, plunging downward . . . that weaklings, paupers, hoboos, and imbeciles are increasing; that leadership and geniuses—great men and first class workers—are decreasing,"<sup>8</sup>—quick action seemed to be the necessary legislative order of the day.

Sound eugenic legislation cannot be based upon mere wish, fear, prejudice or even common sense. Nor can it be based upon the extreme point of view of a minority group of biologists. It must be founded upon biological and sociological facts. To deal with eugenics intelligently, the legislator must

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<sup>8</sup> Wiggam, A. E., *New Decalogue of Science*, p. 25.

be equipped with certain fundamental information—for instance, the knowledge that neither crime nor poverty is inherited, nor most of insanity, according to the best opinions in the social sciences today. As to feeble-mindedness, the legislator should know that not more than fifty per cent. of this disorder seems to be of hereditary origin.<sup>9</sup> Furthermore, it is almost impossible, in practice, to tell whether or not a particular case of feeble-mindedness is due to heredity, and so, capable of being passed on to offspring.<sup>10</sup> Consequently, one would have to be pretty ruthless in his disregard of natural rights to insist upon sterilization of all the feeble-minded, when fifty per cent. would be so treated needlessly.

When we consider that segregation will remove any of the more objectionable<sup>11</sup> feeble-minded from the general population, and prevent offspring, without any of the dangers of sterilization, we see why the best authorities frown upon sterilization, today. Davies concludes: "To the writer, who has endeavored to weigh available evidence and opinions on all sides of the question, sterilization fails to recommend itself in the present state of our knowledge, as a measure of social control to be *generally* applied to the feeble-minded, or even to large classes of the feeble-minded. From the point of view of succeeding generations, it appears doubtful that sterilization would reduce the number of mental defectives sufficiently to be of any general social significance, or to have any appreciable effect on public expenditures for social control.

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<sup>9</sup> Dr. Pratt, *Mental Hygiene Bulletin*, January, 1926. V. E. Fisher estimates that the feeble-minded constitute but one half of one per cent. of the population. *An Introduction to Abnormal Psychology*, p. 463, New York, 1929. Dr. Fisher thinks that the Kallikak and other former "horrible examples" of "inherited" feeble-mindedness are capable of different interpretations. (p. 471.)

<sup>10</sup> "Sterilization laws are enacted on the bald assumption that public officials will be competent to decide which of the feeble-minded should be sterilized, whereas we actually know next to nothing about the transmission of mental defect." *Mental Hygiene Bulletin*, December, 1930.

<sup>11</sup> Unfortunately, the newspaper's use of the term "moron" when referring to the perpetrator of an unnatural sex crime, has given the public the false impression that the feeble-minded are particularly prone to commit sex offenses. In order to appreciate the inaccuracy, one needs only to recall that the college trained defendants in the Loeb-Leopold case were described as morons prior to their detection and arrest.

From the point of view of the present generation, sterilization can in no sense be a substitute for segregation, training, and community supervision in the mental deficiency program."<sup>12</sup> Landman is even more emphatic in rejecting eugenic sterilization: "Human sterilization is not by any means the solution of the problem of the feeble-minded and the mentally diseased. Instead, it creates new problems. Remove the fear of pregnancy and you invite an increase in the amount of promiscuous sexual intercourse and with that you accelerate the spread of the venereal diseases. . . . Segregation would do all that sterilization would do in preventing the propagation of these social unfits and misfits but in addition remove the many dangers to society which would arise from their freedom. It is on the whole more conducive to their happiness and is less costly by and large than would be their discharge from care which sterilization would entail."<sup>13</sup> Jennings, who is now regarded as one of the best authorities on human heredity cautions the impatient reformer who would sterilize in order to get results quickly: "It has been computed that if the proportion of feeble-minded in the population is one per thousand, to decrease that proportion to one per ten thousand will require about sixty-eight generations, or two to three thousand years, if it is done merely by stopping the propagation of all feeble-minded individuals."<sup>14</sup>

In view of the scientific attitudes just seen, one can only wonder what concept of heredity existed in the mind of the legislator who, not satisfied with sterilizing the feeble-minded introduced a bill which would have compelled Missouri judges to require the sterilization of all individuals convicted of "chicken stealing, bombing or the theft of automobiles."<sup>15</sup> And technocracy's electric eye is myopic when compared to the diagnostic ability attributed to the psychiatrist by another state legislator. This legislator sponsored a bill which

<sup>12</sup> Davies, S. P., *Social Control of the Mentally Deficient*, pp. 117-8.

<sup>13</sup> *Op. cit. supra* note 1, at p. 268.

<sup>14</sup> Jennings, H. S., *The Biological Basis of Human Nature*, p. 242.

<sup>15</sup> House Bill, No. 290, Missouri State Legislature, 1929.

provided that all cases of "*mental weakness*" were to be reported to the State Health Officer within one week. For failure to make such a report the doctor was to be held responsible for the crime committed by his patient "should such patient later become criminally insane."<sup>16</sup> No wonder that Landman criticises legislators for their lack of scientific knowledge in presuming to deal with eugenics. "Many legislators ignore these facts and have launched upon this momentous program of legislation as if they knew with certainty which psychological conditions and functions are hereditary and which are acquired. It seems what the psychiatrists and psychologists do not know, some legislators do know concerning psychiatry and psychology."<sup>17</sup>

Space will not permit us to discuss adequately the false emotions and misleading ideas underlying most of our Birth Control propaganda.<sup>18</sup> It seems only yesterday that the advocates of artificial contraception were warning us that Europe and America would soon face a condition of overpopulation in which there would be "standing room only." And today, all along the statistical front, we are warned that just the opposite is true, that we face not only a stationary but a declining population in the United States and Western Europe. Pacifists and Birth Control advocates decry any suggestion that our national future depends to a large extent upon man power. Yet with China and Japan refusing to practice contraception, we cannot deny the fact that these nations are growing numerically, while we are preparing for a decrease. Call it the "cannon-fodder" argument, if you will, but it is hard to see how a public officer can lend his

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<sup>16</sup> *Mental Hygiene Bulletin*, February-March, 1932.

<sup>17</sup> *Op. cit. supra* note 1, at pp. 258-9.

<sup>18</sup> That there is a close connection between sterilization and Birth Control legislation, is suggested by the so-called "model eugenical sterilization law" proposed by the American Eugenics Society. The law would apply to all "socially inadequate persons," an "inadequate" person being defined as one who "fails chronically in comparison with normal persons to maintain himself or herself as a useful member of the organized social life of the state." Under such a clause might it not be possible to give financially embarrassed parents the option of practicing contraception, or of being sterilized?

encouragement to the Birth Control group, with his nation's future in the balance. A recent statistical study of population trends suggests that Birth Control is, after all, only race suicide: "Thus it is seen that the whole of western civilization is facing possible extinction. It is not due to some inherent biological weakness. It seems rather generally agreed that Western civilization is committing suicide. The main cause of the birth decline, says *The Daily Mail*, must evidently be the widespread adoption of birth control."<sup>19</sup> Viewing Birth Control from another angle, technocrats appear to be sentimental humanitarians, when compared to the cold-blooded reformers who have been urging man to reduce the size of his family, in order to meet the proportions of the fraudulent pay envelopes of the machine age. One wonders if some future historian will not describe much of the recent Birth Control propaganda as an insidious "smoke screen," raised to blind workers to the fact that they were being deprived unjustly of a living wage.

Up to this point we have not mentioned the deeper ethical issues involved in sterilization and birth control measures. A generation ago one could have said that the ethical teachings of all Christian Churches condemned such measures, and could have pointed out that the Statutes against Birth Control were passed at the instance of Protestant leaders. Today it is difficult to group Church opinion, since so many of the Christian Churches have apparently accepted the unfortunate sociological concept that ethics are only *mores*, that is, the rules of conduct which the group, at the

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<sup>19</sup> "World Suicide by Birth Control," *Literary Digest*, July 9, 1932, p. 19. At the annual meeting of the Population Association of America, in New York, in April 1932, Dr. O. E. Baker, senior agricultural economist for the United States Department of Agriculture, declared that in the absence of a notable increase in immigration and the reversal of the downward trend, which he viewed as improbable, it appeared likely that the United States might have a stationary population at the end of about twenty-five years, which would be followed by a decline. This prediction would seem to be in keeping with the figures released in December 1931 by the Office of Education, United States Department of the Interior, which showed that there were 128,840 fewer children under five in the United States than there were in 1920.

time, agrees to accept.<sup>20</sup> The Catholic Church, on the other hand, still insists that the fundamental or basic principles of ethical conduct do not fluctuate with time or circumstance, and that the principle of morality which made Onan's act sinful, still operates today. On account of this growing difference in viewpoints upon ethical principles, it is becoming increasingly difficult to explain the moral evil of Birth Control to non-Catholics. Consequently the Catholic lawyer-legislator should be aware of the other objections to Birth Control. As to sterilization, following the axiom that the unwarranted violation of the natural rights of an individual by the State is unethical, the recent encyclical of Pope Pius XI on Christian Marriage seems to make it pretty clear that no Catholic is justified in promoting either the enactment or the execution of sterilization laws.

It can be safely presumed that the Catholic lawyer-legislator, worthy of the name, would know the Church's teaching upon the ethical aspects of these matters, without pre-legal college training. But it is hard to see how he could point out the dangers in eugenic measures to his non-Catholic confreres, without such an acquaintance with the scientific aspects of the subject as would be given in a properly arranged pre-legal college curriculum. Then too, eugenic problems are only one of many that require a background of knowledge which cannot be imparted in the three year law curriculum anticipated by present-day bar examiners. Unless we are to

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<sup>20</sup> The rejection of an objective standard of morality is frankly admitted in a United Press dispatch of October 21, 1931. A minister stated before the American Unitarian Association in session at Philadelphia: "We must remind ourselves that there is no standard of morality. The only thing we can do is to find the best workable method that can be adjusted to life, and to try to approach any readjustment which must be made with open minds. The church can only create a social standard and not a moral standard. This social standard must be based on good taste, coupled with self-respect." Similarly, the changing attitude toward Birth Control is justified by some sociologists who claim that the sin of Onan (Genesis, Ch. 38) is no longer a sin in our mores. Says Professor Goodsell of Columbia, "Setting aside the story of Onan, as referring to the Jewish people in a primitive stage of social development and thus inapplicable to the moral ideas and customs of the twentieth century, etc." Goodsell, W., *Problems of the Family*, p. 359.

resort to a new American grading of the members of the law profession, somewhat along the lines of barristers and solicitors, it would seem rather necessary that all law students be required to take at least two years of appropriate, rather than miscellaneous college courses, prior to their study of law, if the legal profession is to continue to retain its position of leadership in civic affairs.<sup>21</sup> For those who might object to these requirements, through sympathy with the democratic movement so conspicuous in legal education nearly a century ago, some solace may be found in the resolution concerning pre-legal training, adopted by the American Bar Association in 1927—"we recommend the establishment in each state, where none now exists, of opportunities for a collegiate training, free or at a moderate cost, so that all deserving young men and women seeking admission to the Bar, may obtain an adequate preliminary education."

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<sup>21</sup> At Notre Dame three years of college work are required for entrance to the College of Law. Practically all students who take this training at the university complete a year each of sociology and economics, and a semester of biology, among other courses. Those who major in sociology, probably the majority in recent years, take in addition, courses in The Family, Criminology, Clinical Psychology, and Social Legislation.