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COMPULSORY STERILIZATION: AN UNWARRANTED EXTENSION OF THE POWERS OF GOVERNMENT

By CLARENCE J. RUDDY

The most casual observer of political thought in the United States cannot help noticing a growing tendency among individuals to submit their will to that of the government, and let the state prescribe rules for even the most personal conduct. Citizens no longer trust either themselves or their neighbors, but pass all questions of prudence and morality to the state. The power of government is the only thing recognized; individual conscience is surrendered to the will of the legislators. Every session of the universal desire to correct all ills by law. Eight-hour day laws have become an accepted part of the legislators' program; every municipality has passed, or is considering, a zoning ordinance; economists urge minimum-wage legislation; puritans demand more stringent regulations for books and plays; and some persons, believing that marriage should be an unmixed pleasure, not to be marred by unwelcome children, advocate legislative sanction of birth-control.¹

This public sentiment, crystallized in newspapers, magazines and discussion clubs, is startlingly reflected in our courts. In an effort to respond favorably to the ever-increasing demand of the populace for closer state supervision of personal activities, courts have played havoc with constitutional principles once be-

Since this article was prepared the United States Supreme Court in its decision in the case of *Buck v. Bell*, (47 *Supreme Court Reporter* 584) has held a sterilization law to be constitutional.

¹ We must not forget, either, the activities of the No-Tobacco League. This society publishes monthly "The No-Tobacco Journal," edited by H. J. Higson at Butler, Indiana. After an extensive educational campaign League members intend to strive mightily for the National Prohibition of Tobacco. Scoffers should note that membership in this League is constantly growing.

lieved firmly established. Freedom of contract, for one thing, is subverted; recently a Federal Court upheld a City Ordinance which established a public cabstand on the private station grounds of a railroad company, thus invalidating a concession given by the road to one cabman. The ordinance "is constitutional as a valid exercise of the police power."² Zoning ordinances, although undeniably extinguishing a valuable right of landowners, are getting common, and hope that they may be declared unconstitutional is being abandoned.³

This modern tendency presents a strange anomaly in our country's history. We formerly believed that the individual had some rights which could not, by any means, be taken away. We had hailed Washington, Jefferson, Madison, Henry and the Adamases for their sublime declarations of belief in the right to individual existence and development; now we deny all that they ever said. Jefferson's trinity of rights is rapidly becoming meaningless. Even his assertion of the inviolability of human life is being seriously questioned by some sociologists who urge euthanasia as a means of putting the hopelessly ill out of misery.⁴ Rights are once more being held on a precarious tenure. Nothing appertaining to the individual is sacred; not liberty, nor property, nor even life itself.

The most drastic means so far adopted for the extinction of the individual is sterilization. This type of legislation is designed to reduce men and women, so far as breeding is concerned, to the level of domestic animals, and to prevent, by the strong arm of the state, the birth of all children not likely to be of a high degree of perfection. Advocates of sterilization seek

²D., *L. & W. R. R. v. Mayor, etc. of Morristown*, 14 Fed. (2nd) 257

³In *Village of Euclid v. Ambler Realty Co.*, 47 Sup. Ct. 14, the Supreme (C. C. A. 3d, 1926). Court of the United States declared zoning ordinances to be constitutional; and many States are in accord. The zoning cases are reviewed in a note in 40 *Harv. Law Rev.* 664. For a very materialistic defense of this type of legislation, see "Aesthetic Zoning Regulations" by Newman F. Baker XXV *Mich. Law Rev.* 124. It is to be noted that none of these ordinances eminent domain is not involved.

⁴Euthanasia is a peaceful, painless death, produced by a gas. It is recommended for lepers and victims of other hideous diseases. Advocates of this form of homicide, forgetting that God alone has dominion over life, argue that if a person cannot be happy in this world, he should be sent out of it. Maurice Maetehlink, Belgian poet, champions euthanasia in his essay, "Our Eternity". The principal character in "Sorrel and Son" (by Warwick Deeping) kills his stricken father by this method. In "Lord of the World", Robert Hugh Benson's depressing account of life under a regime of state-worship, Mabel, spouse of a Humanitarian leader, convinced of the futility of existence without a God greater than man, administers euthanasia to herself, with state approval.

to restrict propagation to such an extent that the only children born will be healthy, strong, brilliant and useful. They have in mind a sort of earthly Utopia, where "glory be to the goddess Eugenia, there has been a certain deliberate elimination of ugly, malignant, stupid and narrow types of men and women."⁵ In other words, persons are to be born only if the parents have measured up (or down) to the qualifications established by politicians in the legislature. As yet, it is true, sterilization has been urged only as a means of preventing the propagation of criminals and mental defectives; but once this end is attained, there is no reason why the forcible elimination of undesirable types will not be extended to apply to all persons thought to be inimical to society. For instance, a person with erroneous ideas of price in business surely is a danger to people who must patronize him; is he therefore not a fit candidate for sterilization? The difference between the evil wrought by a polite merchant and that by an uncouth robber is one of manners only. Both types of men are inimical to society; should not both therefore be sterilized?

The problems which arise from an analysis of sterilization are fundamental. About their correct solution are hinged all of the theory of governmental powers. If the right of the state to rid itself of unfortunates be admitted, then the individual as such has ceased to exist. He has no right to use his natural faculties according to his own reason, no right to render his duties to God according to his own conscience, no right even to live—except by the arbitrary will of a fickle majority. Before this state of affairs has finally been sanctioned, we would do well to study all of the implications of sterilization (the first step towards individual extinction), to reflect upon its awful significance. Sterilization is too vital to be approved with a few perfunctory remarks, too terrible to be condoned without thorough reflection.

The first requirement of any criticism of sterilization is a definition of terms. What, in the first place, is sterilization? Then, what is its purpose? how is it performed? and what are its effects?

⁵ Owen Francis Dudley, "Will Men Be Like Gods?", p. 28, quoting H. G. Wells.

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Sterility is the incapacity of the male to impregnate, or of the female to conceive, when copulation is natural and complete.⁶ Sterilization therefore may be defined as any act, treatment or operation whereby a person may be made sterile; it does not produce impotency for copulation. The purpose of all sterilization laws is two-fold: To be a punishment for sexual crimes, and to prevent the propagation of certain well-defined, undesirable types.⁷ Compulsory Sterilization Acts to date have been confined in their application to criminals and mental defectives. The laws apply both to men and women.

Sterilization is effected upon a man by an operation called vasectomy. This is an operation whereby the duct bearing the fructifying part of the semen from the testicles is cut, and the ends are tied. Imposed under local anaesthesia, the operation consists of a slit being made through the scrotum, an opening of the sheath of the spermatic cord, and a ligation or tying of the vas (the duct), thereby isolating it and preventing the flow of spermatozoa, which is the fructifying part of the semen.⁸ The equivalent operation used upon women is called salpingectomy, performed by cutting one of the Fallopian tubes between the ovaries and the womb, and tying the ends of the womb. It is a more difficult operation than vasectomy, and requires a sleep-producing anaesthetic.⁹ Salpingectomy does not generally cause ill health when performed by a skilled physician; when it does, of course, another element arises, and the evil wrought by the State is even more proximate.

An important characteristic of both these operations is that the sterilized person is not rendered incapable of intercourse. Says Dr. O'Malley, "the person upon vasectomy has been done is conscious of no change."¹⁰ In the words of the Virginia court

⁶ Keysor, Med. Leg. Manual, p. 219.

⁷ Sterilization is sometimes effected without the aid of law. When the operation is necessary to the life or the well-being of the subject it is licit, just as to amputate a poisoned arm to save a life is licit. We are here dealing with laws which make sterilization compulsory, without regard to the well-being of the subject.

⁸ Austin O'Malley, Ethics of Medical Homicide, p. 219. For the purpose of this essay a technical study of the medical aspects of sterilization is not deemed necessary. Medical terms will be used only when essential to an understanding of the effects of the operations. Unless otherwise noted, all medical definitions and explanations are taken from Dr. O'Malley's work.

⁹ There are many other ways of sterilizing women, but salpingectomy is the only one used by the State; it is practically the only harmless one. We assume here that salpingectomy has been perfected to such a degree that subject will suffer no injurious physical effects, that it has no other result besides sterilization.

¹⁰ Op. cit., p. 249.

in a recent case,¹¹ "these operations (vasectomy and salpingectomy) do not impair the general health, or affect the mental or moral status of the patient, or interfere with his or her sexual desires or enjoyment. They simply prevent procreation."

Before leaving the technical aspect of these operations, we had best consider some practical results of sterilization. . . . The fact that the subject is not rendered incapable of intercourse is frequently urged as an argument for sterilization,¹² but sober reflection should convince the most enthusiastic proponent that in reality this characteristic is a strong reason for the abandonment of compulsory sterilization. One of the express purposes of sterilization laws is to punish for crime. In the State of Washington, for instance, rape is punishable by vasectomy; the legislators believe that since rape is a severe offense, it should be just as severely punished. But is it to be supposed for an instant that a rapist will be deterred from his beastly designs merely because he can never beget illegitimate children? The rhetorical questions propounded by Dr. Davenport in "Heredity in Relation to Sex" are illuminating: "Is not many a man restrained from licentiousness by recognizing the responsibility of possible parentage? . . . Is there any danger that the person operated upon shall become a peculiar menace to the community through unrestrained dissemination of venereal disease? Will the frequency of the crime of rape be diminished by vasectomy? To many it would seem that to secure to a rapist his eroticism and uninhibited lust while he is released from any responsibility for offspring, is not the way to safeguard female honor."¹³ To the same effect is the observation made by the editors of *Lawyers' Reports Annotated* in their note to *State v. Feilen* (the pioneer case in the field); they wonder if the operation does not remove the "only existing deterrent, namely the danger attending the gratification of such immoral desires. . . About the only effect of a statute prescribing sterilization is to relieve rapists and seducers of the fear of possible bastardy proceedings."¹⁴ Salpin-

¹¹ *Buck v. Bell*, 130 S. E. 516.

¹² Dr. Sharp, godfather of vasectomy legislation, stresses this point in his article in the *Journal of the Am. Med. Assn.*, quoted *infra*; cases sustaining the constitutionality of these Acts rely on unimpaired sexual capacity to justify their decisions.

¹³ Quoted in XXVII *Homiletic and Pastoral Rev.* 341 (Jan., 1927) wherein are presented some excellent practical arguments against sterilization.

¹⁴ 41 L. R. A. (N. S.) 418.

gectomy, used as a punishment for prostitution, will have an equivalent effect on women. One very practical reason has hitherto obtained to prevent women from copulation without the marital relation: the fear of confinement and the subsequent production of illegitimate children. Few women care to brave the scorn of a moral community attendant upon the birth of a bastard. Quoting Dr. Davenport again, "is not the shame of illicit parentage the fortress of female chastity?" Salpingectomy at once removes the fear, eliminates the scorn, and prevents the shame; but it does not destroy the pleasure. The value of such an operation as a punishment is hard to appreciate.

The other purpose of sterilization statutes is to prevent the propagation of mental defectives. We will admit that feeble-mindedness is inheritable; but heredity is not the only cause of feeble-mindedness and other mental diseases. "In a community free from degenerates at the time, degeneracy could arise *de novo*."¹⁵ Furthermore, sterilization would be used only on abnormal persons; but "the persons who would be thus eugenically exiled (by sterilization) so to speak, constitute but a tiny fraction of society, only one-half of one per cent."¹⁵ This fraction is responsible for very few of the feeble-minded children born. "Feeble-minded children may come from homes of the better type, and have parents who are quite intelligent."¹⁶ And it is exceedingly doubtful whether even this one-half of one per cent will be effectively stopped from harming society. Sterile feeble-minded women will not be more reluctant to engage in licentious intercourse, unless of course they are segregated (and if segregated, why sterilize them at all?); on the contrary they will be more than ever to prey of libertines. Now, a sterile person is not rendered immune from venereal disease. It is entirely possible that the salpingectomized woman will acquire either gonorrhea or syphilis, transmit it to a non-sterile patron, who may in turn pass it on to an innocent wife, and become the father of blind or deformed children. From a purely practical standpoint, compulsory sterilization defeats its own ends.

Despite these grave practical objections to legalized steriliz-

¹⁵ Dr. Chas. Todd, *Theories of Social Progress*.

¹⁶ Remedial Possibilities in Juvenile Delinquency, a paper read at the twelfth annual meeting of the National Conference of Catholic Charities at Buffalo, N. Y., Sept. 29, 1926.

ation, many States have nevertheless passed sterilization statutes. After all, to the minds of many people, such laws have a laudable purpose and have therefore been approved. Here we will dismiss all questions of expediency, and proceed immediately to the legal phase. In so doing, we find overwhelming objections to the constitutionality of all sterilization laws. We need not address our remarks to legislators, but to constitutional lawyers and believers in the American idea of government. Adequately to present the legal objections, we must first trace the history of this type of statute, study its operation and constitutional experiences, and apply certain fundamental rules of law and politics.

Modern legalized sterilization had its start approximately twenty years ago. Indiana, I believe, was first to pass the law; This was done in 1907.¹⁷ After the law had been in effect for two years, one Dr. H. C. Sharp of Indianapolis published an article in the Journal of the American Medical Association, reporting his experiences in performing vasectomy on the inmates of the State Hospital at Jeffersonville, and urged that the operation be used as a general check on crime and inheritable diseases. At first blush, the article seemed to present radical views; and medical experts feared that the conclusions reached by Dr. Sharp were somewhat exaggerated. Assiduous investigations appeared to attest the truth of the claims, however, and the Indiana law was urged as an example to be followed by other jurisdictions. The assertion made by Dr. Sharp, that "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," substantiated by doctors generally, coupled with the fact that the quality of citizens would be improved, had a dynamic effect on legislators, and soon a number of States had passed sterilization statutes. Connecticut,¹⁸ California,¹⁹ Iowa,²⁰ New Jersey,²¹ Michigan,²²

¹⁷ Laws of 1907, c. 215.

¹⁸ Acts of 1909, c. 209, designed to prevent the birth of various unsocial types.

¹⁹ Stat. 1909, c. 720. This was for "sexual perverts".

²⁰ Laws of 1911, C. 129. This law was rather comprehensive, directed at "drunkards, persons addicted to drugs, epileptics and syphilitics." It was also to be applied as a punishment for prostitution and detaining females for prostitution. How the prospective subjects must have chuckled at such sublime legislative benevolences!

²¹ 4 Comp. Stats., p. 496.

and Washington²² all provided for sterilization by State law. Due to inexperience in drafting this type of legislation, however, most of these States were not astute enough to evade the prohibitions of the Fourteenth Amendment, and several of the statutes were declared unconstitutional. The laws either did not comport with the court's idea of what constituted due process of law, were considered to be a denial of equal protection of the law, or were held to provide a cruel and unusual punishment.²³

Not a bit daunted by the refusal of the courts to sanction sterilization, various States tried again, this time taking a little more care in phrasing their Acts. They took their cue from the laws which had escaped judicial condemnation, dressed their measures in less offensive language than they had before, and again submitted sterilization statutes to the courts. The new Acts are generally meeting with judicial approval, and it seems that sterilization is here to stay—for a while, at least. Mr. Albert Edward Wiggam, writing in "The World's Work" for November, 1926, states that twenty-two States now have sterilization laws.²⁴ The legislatures of Ohio and Indiana are now considering the passage of similar laws, and it is estimated that within another decade, if everything runs smoothly, virtually every State in the Union will have a provision for compulsory sterilization.

The argument relied upon by the advocates of legalized sterilization is, of course, the good that will come to society by the systematic elimination of imperfect and malicious specimens of humanity. Contemporary sociologists prefer sterilization to segregation. "Segregation entails too much expense, and the much simpler and more humane method of sterilizing those

²² Act. No. 34 of the Public Acts of 1913.

²³ The Indiana Law was held to be unconstitutional in *Williams et al v. Smith*, (1921) 131 N. E. 2, as depriving defendant of his day in court; the New Jersey Law fell in *Smith v. Board of Examiners*, 88 Atl. 963 (the due process clause violated, and the punishment held to be cruel and unusual. The court considered the humiliation attendant upon sterility to be cruelty.); The Michigan statute was held invalid in *Haynes v. Lapeer Circuit Judge*, 201 Mich. 138, 166 N. W. 938 (the law, limited in its application to inmates of institutions, held to be based on an unreasonable classification); and the Iowa Act of 1913 (passed by the 35th General Assembly) was condemned in *Davis v. Berry et al.*, 216 Fed. 413 (cruel and unusual punishment, and a denial of due process). Constitutionality of the Washington Act was sustained in *State v. Feilen*, 126 Pac. 75.

²⁴ Mr. Wiggam reports that certain States up to 1926 had sterilized the following number of mental and emotional defectives: California, 4500; Kansas, 335; Nebraska, 260; Oregon, 313; Wisconsin, 144; Indiana, about 100; Michigan, about 100. So the smug claim that sterilization Acts are never enforced, is without foundation.

male members of the defective class that can be safely trusted outside of an institution has of late met with great favor among biologists and physicians. If this policy were systematically pursued it would be conservative to state that in fifty years the defective and degenerate classes would disappear and the criminal class would be reduced more than one-half."²⁵ Truly, these materialistic eugenisists have an ambitious program. The leading modern case relied upon to sustain their Utopian views is *Smith v. Command*, 231 Mich. 409, 204 N. W. 140. Smith was convicted under the second Michigan Statute which provided for the sterilization of the mentally unfit; he appealed, contending that vasectomy is a cruel and unusual punishment, and that the statute denied him due process of law and equal protection of the laws. A divided Michigan court, in an opinion by Chief Justice McDonald, denied each of these contentions, and upheld the validity of the law. The court, in unequivocal language, declared it to be a fact that "mental defectives" are harmful to society, and ventured the conclusion that sterilization, painless and not a bit cruel, is a valid means of preventing the birth of defectives. The right of man to marry and beget children (subject to legal restrictions as to marriage, of course) was dismissed in a few short paragraphs, the learned judge saying, *inter alia*: "It is an historic fact that every forward step in the progress of the race is marked by an interference with individual liberties." So, thanks to Chief Justice McDonald and a divided Michigan court, the right of man to marry is subject to the ideas a fallible State Board possesses on the subject of sanity. The Michigan decision was not the first of its kind, for the Washington and California statutes had already been in operation a good many years, but it was the first case decided after a thorough analysis of all phases of the question. *Smith v. Command* was followed in *Buck v. Bell* (1925), 130 S. E. 156, in which the Virginia statute similarly drafted was upheld. It seems sterilization will soon become as vital a part of our judicial system as the Star Chamber once was of the English; and with results just as evil. There is but one salvation: people who have so far condoned this type of liberty-curtailling legislation must take stock of their philosophy, real-

²⁵ Harry Elmer Barnes, *The Repression of Crime*, p. 181

ize what departures from it they have authorized, and demand a return to fundamental principles.

An intelligent criticism of sterilization based upon legal, political and constitutional grounds, requires an understanding of the ethical, historical and constitutional basis of our government. A law as vital as this cannot be nullified by a simple appeal to the emotions, nor by a sentimental cry about the helplessness of degenerates. The real answer to sterilization adherents will not be found in drooling speeches of social workers; it will be found at the base of the American system, in the eternal principles of good government. To understand clearly the true character of sterilization is to know the basal principles of American government. We must go back to the fundamental truths relating to the purpose of government, impress them firmly on our minds, and apply them to present-day tendencies. We must understand the nature of the "perfect government", the attempt of the United States to attain that perfection, and the implications of such attempt.

"I BELIEVE IN ONE GOD"

No four words ever uttered have a more vital significance than these. Around the simple profession of faith of the Christian are built, not only the various forms of religious worship, but also the most enduring forms of temporal government. In politics, as truly as in religion, everything starts with God. He is the First Principle to which everything must be reduced, the Eternal Ruler to whom everything is subject. Every nation in the world, whether Christian or pagan, has recognized the existence, the supremacy, of God. Not all have ascertained His precise attributes, true—it takes Revelation for that—but no tribe, no nation, has ever denied his existence. History presents no record of an atheistic country. A belief in God is natural, human.

We start then with God. God created man. He was not bound to create him, but He did. His act of creation was voluntary, free. From the transcendent Goodness of His Being He "breathed the soul of life into man". Because of this gift it follows that we owe certain duties to God. In the words of Joseph Addison, "if gratitude is due from man to man, how much more from man to his Maker?" It is the basest sort of treachery

not to pay homage to a benefactor; we must honor God by rendering duties to Him. These duties naturally must be consistent with the nature of the gifts received, and consonant with our ability to perform them. Now, man is pre-eminently a rational being; it is this characteristic which distinguishes him from the brute. Because of this rationality, man therefore has a duty to act rationally. We must develop to the fullest extent all of the rational powers which God has granted to us. And since we have a duty to act rationally, we are entitled to all the means of a rational life, i. e., we must not be hampered in the rendering of our duties to God. The various conditions essential to a rational life must be recognized; we have a *right*²⁶ against our fellows to the observance of each of these conditions. Because these rights accrue to man by the mere fact of his being a man, they may properly be called natural. But man, as an individual, is too weak to defend his natural rights against unscrupulous enemies. Organized strength is necessary to repel unwarranted invasions of personal prerogatives; there must exist some strong, self-perpetuating body that can enforce respect for rights. This body is the state. That the attempt to enforce duties will be efficacious; the state is entitled to make rules, violations of which may be punished. At no time, however, may any rule be made which is a denial of man's rights, for that would be a perversion of the very purpose of the state. This theory of the origin and nature of the state arises naturally from a consideration of ethics; it flows inevitably from a belief in the existence of God.²⁷ It does not depend upon time, nor place, nor circumstance; it is exactly what the name itself indicates—natural. It is binding upon all states, no matter what the race or creed of their constituents.

²⁶ Confusion frequently results here from a failure to define "right". A right does not depend upon the will of a legislature; it comes directly from God, and imposes a duty upon mankind for its observance. Right is essentially a moral quality. "Right," says Cronin, "is the moral power of doing or possessing something." Ethics, 1: 624. "It is a moral power vested in a person, owing to which the owner of that power may claim something as due to him, or as belonging to him, or demand of others that they should perform some acts or abstain from them." Charles C. Miltner, Elements of Ethics, p. 162. Legislatures do not create rights; merely assert and protect them. Eminent legal writers recognize this. Thus, Blackstone says that a right is that which enables a man to keep and enjoy a thing, "and to be protected by law in its enjoyment." 1 Comm. 129.

²⁷ The philosophy of natural rights is explained at length in the following works: Pope Leo XIII's Encyclical, "De Naturale Dei"; Cronin, Ethics, volume II, chapter XV; Ryan and Millar, The State and The Church; Lilly, First Principles of Politics; Miltner, Elements of Ethics, Chap. XVII.

All of the States in America are subject to man's natural rights, and are given sufficient power to preserve them. When the thirteen original colonies emancipated themselves from England by that bold act which history has shown to have been justified, they succeeded immediately to all the rights and powers of sovereignties; but to no more. Each of the newly created States became instantaneously endowed with all of the powers that England ever had. But they did not have more powers; there is nothing peculiar to the American States that gives them the right to crunch individual liberties under the heel of majority opinion. The government of Massachusetts—and even of tobacco-prohibiting Kansas—must observe the natural rights.

Chief among the natural rights of man is of course the right to life itself. This is the most important, the source of all the other rights. But life means more than mere physical existence; it means that kind of existence which is consonant with man's capacities, either actual or potential, and which is necessary for him to enjoy to the fullest extent the powers given him by God. The words of Mr. Justice Field in *Munn v. Illinois*, 94 U. S. 113, 142, are here pertinent: "By the term life . . . something more is meant than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provisions (in the Fourteenth Amendment) equally prohibits the mutilation of the body by the amputation of the arm or leg, or the putting out of an eye, or the destruction of any other organ through which the soul communicates with the outer world. The deprivation not only of life, but of whatever God has given to everyone with life for its growth and enjoyment, is prohibited by the provision in question, if its efficacy be not frittered away by judicial decision."

One of the gifts along with life that man has received from God is the power of reproduction; to man himself has been entrusted the faculty of perpetuating the race. This faculty is to be exercised within the limits of marriage, for otherwise there would exist no adequate means for determining parentage or enforcing fathers to support their children. But beyond directory regulations for marriage, the State cannot legitimately curtail the propagation of mankind. The power of regeneration was not given to man for the purpose of supplying the state with

able-bodied citizens; it was given him for the sole purpose of honoring God. Whether he chooses so to honor Him or not, is a matter of private conscience, not to be determined by State law. No state can sterilize people to insure a healthy, moral citizenry. Dr. O'Malley very tersely sums up the matter as follows: "The State has no direct dominion over the lives or members of its citizens, nor are citizens naturally mere instruments for the good of the government; on the contrary, the government exists solely for the good and utility of the citizen. The State may not take the life of an innocent person, nor mutilate him, unless these acts be necessary either (1) to protect the lives or rights of individuals; or (2) to preserve the social life of the commonwealth. Now, neither of these two requisites is present when there is question of vasectomizing a man. The right of no individual is at stake. The rights of the possible children, yet unborn, are not injured, because, as these children are not yet in existence, they have no rights. Should they come into being, it is always better to be, even though diseased, than not to be. The methods of cattlebreeders in dealing with human beings is not a virtue in a State, but an outrage and a degradation of human nature. The rights of the wife are not injured, because she personally receives no injury."²⁸ To the same effect are the words in the *Ecclesiastical Review* (Vol. XLIV, p. 702): "The State may not wrest the life of its members to its own utility, or destroy it for its utility, because the citizens are not for the State; on the contrary, the State is for them and their utility. That a rational being should be for the benefit of another makes him a slave, and supposes dominion in the user." The State, created by men, cannot subject its creators to an aesthetic inspection; an agent must not issue commands to his principal. Man's right to marriage does not depend upon the State's ideas of health and well-being. Sterilization by State law is a denial of one of man's natural rights, i. e. to use the faculty of reproduction in the marital relation, and is therefore intrinsically evil, an unjustified assumption of State power.

Until recently American jurists and statesmen have recognized the limitations of governmental power. Indeed, the country was established expressly to secure individual rights.

²⁸*Ethics of Medical Homicide*, p. 266.

Thomas Jefferson's sublime paragraph in the Declaration of Independence is but a paraphrase, short and concise, of the natural-right theory of government. He asserted forcibly and unequivocally that man is endowed with certain, unalienable rights; although he did classify them, he did not enumerate them all, as his Declaration did not purport to be a philosophical treatise, but a political document. His statement that man has a right "to life, liberty, and the pursuit of happiness" is but another way of saying that man has a right to life and all the means of life.

Jefferson's assertions, approved immediately by the members of the Continental Congress and later by every American, were given more definite expression in the Federal Constitution. When the government of the United States was established in 1787 (it was not established before; prior to that year each of the thirteen States was an independent sovereignty) its powers were definitely limited, and "that those limits may not be mistaken, or forgotten, the Constitution was written."²⁹ Even then the people were not satisfied; they insisted upon still more definite assurance that the rights of individuals would not be violated. So within two years of the adoption of the Constitution, the First Ten Amendments, known as the Bill of Rights, were added and made an integral part of the fundamental law. The Fifth of these Amendments forbids the Federal Government from depriving any person "of life, liberty, or property without due process of law". Like restrictions had already been imposed on the various states by their own Constitutions, but the grave situation precipitated by the Civil War tended to make several States somewhat reckless; so in 1866 the Fourteenth Amendment to the Federal Constitution was added, tersely reminding the States that they too must respect life, liberty and property.

Neither the States nor the Federal Government may take away life without "due process of law". But what is this due process of law? The best definition is probably the one written by Judge Cooley; "due process of law in each particular case means such an exertion of the powers of government as the settled maxims of the law permit and sanction, and under such safeguards for the protection of individual rights, as those max-

²⁹ *Marbury v. Madison*, 1 Cranch 137, 2 L. Ed. 60.

ims prescribe for the class of cases to which the one in question belongs."³⁰ All legislative acts, all judicial proceedings, must comply with "these settled maxims", these established propositions. There is nothing more firmly entrenched in our system of jurisprudence than that "due process" means more than legislative act. Thus, in *Hurtado v. California*, 110 U. S. 356, 4 Sup. Ct. 111, Mr. Justice Matthews says: "It is not every act, legislative in form, that is law. Law is something more than mere will exerted as an act of power." The law of God, whence natural rights are derived, is superior to any legislative body. Due process of law has never been held to be satisfied when individual rights were taken away.³¹ Judicial approval of modern Sterilization Acts is a unique departure from the historic path taken by our courts. The true American principle never sanctioned the violation of rights residing inherently in the individual. It never gave utterance to the doctrine that the state is the source, the creator, of all rights.

Sterilization bespeaks a tendency. Propagation, exercised in the natural institution of marriage, is a matter for individual conscience, for which man is responsible to his Maker: yet great majorities pass its propriety on to the state. The use of man's rationality is being subjected to State law. This is an altogether unnatural proceeding, for man must be allowed to work out his own destiny. Free will must not degenerate into an empty phrase. Conscience, that function which enables a man to distinguish between right and wrong, must not be destroyed by the will of an interfering legislature. Man himself must be the judge of whether to be moral or immoral. Emphatically, the

³⁰ Constitutional Limitations, sec. 356.

³¹ Natural limitations on the powers of government are recognized by the common law. Thus, John Milton, in his *Prose Works*, p. 204, appeals to "that fundamental maxim in our law, by which nothing is to be counted a law that is contrary to God, or to reason". James Otis, in his arguments against the Writs of Assistance, urged recognition of the natural governmental limitations; see note to *Paxton's Case of the Writs of Assistance in Quincy's Rep.*, App. 1, 520. In *Fulmerston v. Steward*, *Plow.* 109, the court said: "Acts of Parliament are always to be construed according to the common law and natural right, even though it should be necessary for the purpose to adopt what otherwise would be a forced construction." See also: *Webster's Works*, 11: 592; *Alpheus H. Snow, The American Philosophy of Government*; *Logan v. United States*, 144 U. S. 265; *Sante Fe v. Ellis*, 165 U. S. 150, an early South Carolina case, *Bowman v. Middleton*, 1 Bay 252, nullified a statute for no other reason that it was "against common right." For modern works on the legitimate functions of government, see "The Faith of a Liberal" by Nicholas Murray Butler, and "The Constitution, Yesterday, Today,—and Tomorrow?" by James M. Beck.

state cannot make men good: that is for the Church to do, by an appeal to the rationality of man. But the choice finally is with the individual. The state must protect man from others—but not from himself. Right and wrong are not determinable by State law.