The Trial of FRANK OSBORN – September 17, 1915

FRANK OSBORN vs. LEMON THOMSON, CHARLES H. ANDREWS and WILLIAM J. WANSBORO, composing the Board of Examiners of Feeble- Minded, Criminals and other Defectives.

CHAPTER VII.

DETAILED REVIEW OF LITIGATION – NEW YORK – PAGE 217 - 241
(V.) NEW YORK. (Chapter 445, April 16, 1912.) Similarly to the New Jersey statute, the New York law required a court review of each particular case nominated for sterilization.

1. STATE BOARD OF EXAMINERS.
In the spring of 1915, the **Board of Examiners of Feeble-minded (including Idiots, Imbeciles and Morons), Epileptics and Other Defectives**, made their first move. No records were kept of their meetings, nor were the members upon formal request able to supply any data from memory. The only documentary evidence of their official activity prior to the court procedure in the test case was found in the auditors' records of their expenditures.

a. Origin of Test Case. Litigation grew out of informal agreement made in the Spring of 1915 between the **Board of Examiners of Feeble-minded (including Idiots, Imbeciles and Morons), Epileptics and Other Defectives** on the one part, and the **Rome Custodial Asylum** on the other, that **Frank Osborn**, a feeble-minded inmate of said asylum, about 22 years of age, and known to belong to a family of degenerates, be made the subject of a test case. The trial was begun September 17, 1915, and hearings were had at intervals covering a period of several months.

2. SUPREME COURT, ALBANY COUNTY.
On March 5, 1914, **Mr. Justice Rudd of the Supreme Court, Albany County**, handed down an opinion declaring the Act unconstitutional on the ground that "the provisions of the Federal Constitution, to which this law is offensive, is that part of the Fourteenth Amendment which declares 'that no state * * * shall deny to any person within its jurisdiction the equal protection of the laws.'" The opinion reviewed the testimony of the witnesses, and **Judge Garrison's** decision on the New Jersey law. In reference to a possible punitive aspect **Mr. Justice Rudd** held "the operation upon feeble-minded is in no sense in the nature of a penalty, and therefore, whether it is unusual and cruel punishment, is not involved."

The principal documents of the case follow:
SUPREME COURT, ALBANY COUNTY.
(103 Misc. Rep. 23.) (169 N. Y. Sup. 638.) (171 N. Y. Sup. 1094.)

a. Affidavit and Order Appointing Counsel.
In the Matter of the Application of **LEMON THOMSON, M.D.**, and **CHARLES H. ANDREWS, M.D.**, and **WILLIAM J. WANSBORO, M.D.**, Composing the **Board of Examiners of Feeble-minded, Criminals and Other Defectives**, Appointed Pursuant to Section 350 of the Public Health Law of the State of New York, for the Appointment of Counsel to Represent **FRANK OSBORN**, a Person to be Examined Pursuant to Section 352 of the Public Health Law.

On reading the annexed affidavit of **Lemon Thomson, M.D.,** by which it appears that the **State Board of Examiners of Feeble-minded Criminals and other Defectives** have examined into the mental and physical condition of **Frank Osborn**, now confined in the **Rome Custodial Asylum**, and have decided that it is advisable to perform an operation upon him for the prevention of procreation, and in pursuance to Sections 351 and 352 of

the Public Health Law, I hereby appoint **Ellis J. Staley, Esq.**, counselor at law, of the City of Albany, N. Y., to represent said **Frank Osborn**, and said **Staley** is to act at a hearing before me and in any subsequent hearings, for said **Frank Osborn**, which hearing I fix for the 12th day of June, 1915, at ten thirty o'clock in the forenoon, or as soon thereafter as I can hear counsel, at the place for holding special term in the City Hall, Albany, N. Y.
I direct that this order be filed with the clerk of Albany County and a copy served upon said **Staley**, counsel appointed to represent said **Frank Osborn**, within ten days from this date, and that proof of service of a copy of the order be served on the said **Staley**.

The compensation to be allowed said counsel shall be twenty dollars a day, while he is actually engaged in this matter.

Dated, June 2, 1915. **ALDEN CHESTER, Justice Supreme Court**. SUPREME COURT, ALBANY COUNTY.

SUPREME COURT, ALBANY COUNTY.
In the Matter of the Application of **LEMON THOMSON, M. D.**, **CHARLES H. ANDEWS, M.D.**, and **WILLIAM J. WANSBORO, M.D.**, Composing the **Board of Examiners of Feeble- minded Criminals and Other Defectives**, Appointed Pursuant to, Section 350 of the Public Health Law of the State of New York, for the Appointment of Counsel to Represent **FRANK OSBORN**, a Person to be Examined Pursuant to Section 352 of the Public Health Law.

STATE OF NEW YORK, County of Albany, ss:
Lemon Thomson, being duly sworn, says: I reside in the City of Glen Falls, N. Y. I was appointed by the Governor of the State of New York a member of the **Board of Examiners of Feeble-minded Criminals and other Defectives**, pursuant to Chapter 445 of the Laws of 1912, which law has become Article XIX of the Public Health Law. The other members of the Board are **Charles H. Andrews, M.D.,** and **William J. Wansboro, M.D.,** and said **Andrews**, **Wansboro** and myself are now acting members of said Board of Examiners.

Section 351 of the Public Health Law prescribes the general powers and duties of our **Board**. It authorizes us to examine into the mental and physical condition and the record and family history of the feebleminded, epileptic, criminal and other defective inmates confined in the several State hospitals for the insane, state prisons, reformatories and charitable and penal institutions in the State and if, in the judgment of the majority of said **Board**, procreation by any such person would produce children with an inherited tendency to crime, insanity, feeble-mindedness, idiocy or imbecility, and there is no probability that the condition of any such person so examined will improve to such an extent as to render procreation by any such person advisable, or that the physical or mental condition of any such person will be substantially improved thereby, then our **Board** shall appoint one of its members to perform such operation for the prevention of procreation as shall be decided by said **Board** to be most effective.

By Section 352 of the same law, before any such operation is performed, our **Board** is required to apply to any judge of the Supreme Court or county in which such person is confined, for the appointment of counsel to represent the person to be examined, said counsel to act at a hearing before the judge and in any subsequent proceedings, and no order made by said **Board** shall become effective until five days after it shall have been filed with the clerk of the court and a copy shall have been served upon the counsel appointed to represent the person examined, and proof of service of said copy of the order to be filed with said clerk of the court.

The Board came into existence by the appointment of its members in 1912. **Dr. Andrews** and myself have continued as members of the **Board of Examiners** since its inception. **Dr. Wansboro** succeeded **Dr. Hennessey**, and **Dr. Hennessey** succeeded **Dr. Duryee**. No operations have ever been performed pursuant to said Sections 351 and 352 and no application has ever been made to the court for the appointment of counsel to

represent persons to be operated upon, and so far as I know, the law has never been passed upon by the courts of this State.

The Board has made an examination of one **Frank Osborn**, who is about twenty-two years of age, and was sent to the **Rochester Industrial Institution** in 1907, and from there to the **Rome Custodial Asylum, at Rome**, where he is now confined. He has cost the State, while in its institutions, approximately $2,000, up to October 1, 1914, and since that time has been an expense to the State of about $175 per year. After a careful examination by the **Board** we have learned that said **Frank Osborn** comes from a family of degenerates. He is one of sixteen children, eight of whom are dead. Five brothers and sisters besides himself are confined in State institutions for the feeble-minded; one, a feeble-minded brother, lives with a farmer and is intemperate, incapable and untrustworthy; one sister, the brightest of the family, lives with and keeps house for a man to whom she is not married, though she has a husband living. She is immoral and has been an inmate for two years of a house of prostitution. Of his dead brothers and sisters one died in an institution for feeble-minded and seven died before becoming one year of age. The father of said **Frank Osborn** was feeble-minded and the son of a man who was an epileptic and who lost his mind before death. Said **Frank Osborn's** mother is living, is feeble-minded and comes from a family of defectives. Her mother was feeble-minded and one sister and two brothers of **Frank's** mother were feeble-minded.

The family of **Osborn**, from which **Frank Osborn** comes, have always been a charge to either the county or the State, and they have cost the State approximately $10,000 since they became State charges.

The sources of our information are examinations of individual records, examination of said **Frank Osborn** and members of his family, relatives and neighbors who have been intimately acquainted with his family during their lifetime.

The said **board** have carefully examined into said **Frank Osborn's** mental and physical condition and it is the judgment of a majority of said board that procreation by said **Frank Osborn** would produce children with an inherited tendency to feeble-mindedness, and there is no probability that his condition will improve to such an extent as to render procreation advisable. His physical condition is such that no harm will come to him, so far as the board is able to ascertain, from the operation.

If said **Frank Osborn** was operated upon so that he could not procreate, in my opinion he would be able to earn his living if placed in the care and custody of some other person, but without such an operation, it would be inadvisable to release him, even under such circumstances.

Before the operation is performed on said **Frank Osborn**, your **board** asks, in accordance with the provisions of said Section 352 of the Public Health Law, that the court appoint counsel to represent him. I also ask that a hearing be had before the judge who signs the order for which I am now applying and that said counsel be instructed to represent said **Frank Osborn** upon such hearing.

I therefore apply for an order in accordance with said Section 352 of the Public Health Law. No previous or other application has been made to any judge for the order herein asked for.

LEMON THOMSON. Subscribed and sworn to before me this 1st day of June, 1915.
W. M. THOMAS, Notary Public, Albany, N. Y.

b. Summons and Complaint.
SUPREME COURT, COUNTY OF ALBANY.

FRANK OSBORN, Plaintiff, against **LEMON THOMSON**, **CHARLES H. ANDREWS** and **WILLIAM J. WANSBORO**, composing the **Board of Examiners of Feeble- Minded, Criminals and other Defectives**, Defendants.

To the Above-named Defendants:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Trial to be held in the County of Abany. Dated, July 19, 1915.

ELLIS J. STALEY, Plaintiff's Attorney. Office and Postoffice address: 95 State St., Albany, N. Y.

SUPREME COURT, ALBANY COUNTY.
FRANK OSBORN, Plaintiff, against **LEMON THOMSON**, **CHARLES H. ANDREWS** and **WILLIAM J. WANSBORO**, composing the **Board of Examiners of Feeble-Minded, Criminals and other Defectives, Defendants**.

The plaintiff, complaining of the defendants, alleges, upon information and belief:

First: That the plaintiff is a resident of the State of New York, a citizen of the United States of America and of the age of twenty-two years.

Second: That on or about the 16th day of April, 1912, a certain bill which had been theretofore duly passed by the Senate and Assembly of the State of New York, was signed by the Governor of said State and filed in the office of the Secretary of State as an Act of the Legislature, being known as Chapter 445 of the Laws of 1912, a copy of which said Act is hereunto annexed marked "Schedule A."

Third: That pursuant to the provisions of said Chapter 445 of the Laws of 1912, **Lemon Thomson, M.D.**, **Charles H. Andrews, M.D.**, and **William J. Wansboro, M.D.**, were appointed as members of the **Board of Examiners of Feeble-minded, Criminals and other Defectives**, and at all the times hereinafter mentioned did, and now do, compose the said Board of Examiners of Feeble-minded, Criminals and other Defectives.

Fourth: That the said Act, Chapter 445 of the Laws of 1912, in many respects violates the Constitution of the United States and does not secure the blessings of liberty to the citizens of the United States and their posterity as therein guaranteed, and is therefore, unconstitutional and void, and particularly in that it violates Section 10 of Article I thereof in being a Bill of Attainder and an ex post facto law; subdivision 3 of Section 2 of Article III in depriving citizens of the right to trial by jury; Section 2 of Article IV in depriving citizens of the State of New York of privileges and immunities to which citizens of other states are entitled; Article V of the amendments to said Constitution in compelling a citizen to be a witness against himself and depriving citizens of life, liberty and property, without due process of law; Article VIII of said amendments in authorizing the infliction of cruel and unusual punishment; Section 1 of Article XIV of said amendments in abridging privileges and immunities of citizens and depriving persons of life, liberty and property without due process of law and denying to persons within its jurisdiction the equal protection of the laws.

Fifth: That the said Act, Chapter 445 of the Laws of 1912, in many respects violates the Constitution of the State of New York and does not secure the blessings of freedom to the people of said State, as therein guaranteed, and is therefore, unconstitutional and void, and particularly in that it violates Section 1 of Article I thereof in depriving

citizens of rights and privileges without the law of the land; Section 2 of Article I thereof in depriving citizens of the right to trial by jury; Section 5 of said Article I thereof in authorizing the infliction of cruel and unusual punishment; Section 6 of said Article I thereof in depriving persons of life, liberty and property, without due process of law, and Section 1 of Article VI thereof in conferring upon a board or commission and a justice of the Supreme Court or certain county judges, powers exclusively vested in the Supreme Court.

Sixth: That this plaintiff is, and for several months last past, has been, confined in the **Rome Custodial Asylum**, a State charitable institution, at Rome, N. Y., and that while so confined therein was examined by the defendants herein, and that said defendants composing the said **Board of Examiners**, threatened to have performed, and are about to perform, an operation upon this plaintiff for the prevention of procreation pursuant to the power and authority so attempted to be conferred as aforesaid, by the provisions of said Act, known also as Article XIX of the Public Health Law; and that in pursuance of its said purpose so to perform said operation upon this plaintiff, the said defendants presented through the Attorney-General of the State of New York, an application to the **Hon. Alden Chester**, a justice of the Supreme Court, for the appointment of counsel to represent this plaintiff pursuant to Section 352 of said Act, and that an order was accordingly made thereon by said justice appointing **Ellis J. Staley**, counselor at law, of the City of Albany, N. Y., as such counsel.

Seventh: That unless said defendants are enjoined and restrained from so performing, or causing to be performed, the said threatened operation, this plaintiff will suffer irreparable injury and damage for which no adequate remedy at law exists.

Wherefore, the plaintiff demands judgment that the said defendants, composing the said **Board of Examiners**, and each of them, and their successors in office, be perpetually enjoined and restrained from performing or permitting to be performed the aforesaid threatened operation and that during the pendency of this action the said defendants be enjoined and restrained from performing, or permitting to be performed, said threatened operation; and that plaintiff may have such other or other and further relief as may be just, together with costs of this action.

ELLIS J. STALEY, Attorney for Plaintiff. Office and Postoffice Address: 95 State St., Albany, N. Y.

STATE OF NEW YORK, COUNTY OF ALBANY, ss:
Ellis J. Staley, being duly sworn, says that he is the attorney for the plaintiff herein; that he has read the foregoing complaint and knows the contents thereof, that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief and that as to those matters he believes it to be true. Deponent further says, that the reason why this verification is made by deponent and not by the plaintiff is that the plaintiff is not now within the County of Albany, which is the county within which deponent resides and has his office, and that the sources of deponent's information and grounds of his belief are an examination of an affidavit of the defendant **Thomson** verified June 1, 1915, and filed in the Albany County Clerk's office, and conversations had by a representative of deponent with the plaintiff relating to the matters set forth in said complaint.

ELLIS J. STALEY. Sworn to before me this 19th day of July, 1915.

G. LEROY BUTLER, Notary Public, Albany, N. Y.

c. Answer.
SUPREME COURT, ALBANY COUNTY.
FRANK OSBORN, Plaintiff, against **LEMON THOMSON**, **CHARLES H. ANDREWS** and **WILLIAM J. WANSBORO**, composing the **Board of Examiners of Feeble-Minded, Criminals and other Defectives,** Defendants.

The defendants for an answer to the complaint of the plaintiff herein:

First: Deny upon information and belief the allegations set forth in paragraphs "Fourth," "Fifth," and "Seventh" of the complaint.

Wherefore, defendants demand judgment dismissing the complaint, with costs. Dated, September 2, 1915.

EGBURT E. WOODBURY, Attorney-General and Attorney for the Defendants. Office and Postoffice Address: Capitol, Albany, N. Y.

STATE OF NEW YORK,COUNTY OF ALBANY, ss:
Lemon Thomson, being duly sworn, says: I am one of the defendants in the above entitled action. I have read the foregoing answer and know the contents thereof, and the same is true of my knowledge except as to the matter therein stated to be alleged upon information and belief, and that as to those matters I believe it to be true.

LEMON THOMSON. Sworn to before me this 7th day of September, 1915.

FLORENCE E. BUSHWELL, Notary Public, Albany County.

d. Findings of Fact and Conclusions of Law.
At a Special Term of the Supreme Court of the State of New York held at the City of Albany, N. Y., on the 17th day of September, 1915.

Present: **HON. WILLIAM P. RUDD, Justice.**

SUPREME COURT, COUNTY OF ALBANY.
FRANK OSBORN, Plaintiff, against **LEMON THOMSON**, **CHARLES H. ANDREWS** and **WILLIAM J. WANSBORO**, composing the **Board of Examiners of Feeble-Minded, Criminals and other Defectives**, Defendants.

The issues in this action coming on to be tried by the court at the above Special Term held by the undersigned, without a jury, and having been tried commencing on the 17th day of September, 1915, and the allegations and evidence of the parties having been heard; now, after hearing **Ellis J. Staley**, attorney for plaintiff, and **J. Sheldon Frost** of counsel and **Wilber W. Chambers**, Deputy Attorney-General of counsel for the defendants; due deliberation having been had; I find and decide as follows:

FINDINGS OF FACT.
First: That the plaintiff is a resident of the State of New York, a citizen of the United States of America, and of the age of twenty-two years.

Second: That on or about the 16th day of April, 1912, a certain bill which had been theretofore duly passed by the Senate and Assembly of the State of New York, was signed by the Governor of said State and filed in the office of the Secretary of State as an Act of the Legislature, the same being known as Chapter 445 of the Laws of 1912.

Third: That pursuant to the provisions of said Chapter 445 of the Laws of 1912, **Lemon Thomson, M.D.**, **Charles H. Andrews, M.D.**, and **William J. Wansboro, M.D.**, the defendants herein, were appointed as members of the **Board of Examiners of Feeble-Minded, Criminals and other Defectives**, and now compose the said board of examiners of feeble-minded, criminals and other defectives.

Fourth: That said **Frank Osborn** is, and since 1907 has been confined as an inmate in the **Rome Custodial Asylum**, a State charitable institution located at Rome, New York, and is a person physically strong but mentally defective and in the class known as feeble-minded, possessing a mental capacity according to the Binet test of about eight years.

Fifth: That shortly prior to the commencement of this action the said **Board of Examiners** pursuant to the said act examined into the mental and physical condition and the record and family history of said **Frank Osborn** and determined that procreation by him would produce children with an inherited tendency to feeble-mindedness; that there was no probability that this condition would improve to such an extent as to render procreation advisable and prepared for the performance of the operation of vasectomy upon him.

Sixth: That the said Board of Examiners, unless restrained by this court, will cause to be performed upon said **Frank Osborn**, the aforesaid operation.

CONCLUSIONS OF LAW.
First: That the plaintiff, **Frank Osborn**, has no adequate remedy at law for the aforesaid threatened injuries and damage.

Second: The Chapter 445 of the Laws of 1912, known as Article XIX of the Public Health Law, is unconstitutional and invalid.

Third: That the defendants, **Lemon Thomson**, **Charles H. Andrews** and **William J. Wansboro**, composing the **Board of Examiners of feeble-minded, criminals and other defectives**, and each of them and their agents, representatives and successors in office be perpetually enjoined and restrained from performing or permitting to be performed the aforesaid threatened operation.

Fourth: That the plaintiff recover of the defendants the costs and disbursements of this action to be taxed by the clerk.

Judgment in accordance with the foregoing is hereby directed.
WM. P. RUDD, Justice Supreme Court.

e. Exceptions of Defendant to Conclusions of Law.
SUPREME COURT, COUNTY OF ALBANY.
FRANK OSBORN, Plaintiff, against **LEMON THOMSON**, **CHARLES H. ANDREWS** and **WILLIAM J. WANSBORO**, composing the **Board of Examiners of Feeble- Minded, Criminals and other Defectives**, Defendants.

The defendants hereby except to the conclusions of law made by **Hon. William P. Rudd**, Justice of the Supreme Court, and filed in the office of the clerk of the County of Albany on the 8th day of March, 1918, as follows:

First: Except to the conclusion of law marked "First."
Second: Except to the conclusion of law marked "Second."
Third: Except to the conclusion of law marked "Third."
Fourth: Except to the conclusion of law marked "Fourth."

Dated, March 10th, 1918.

Yours, etc.,

MERTON E. LEWIS, Attorney-General and Attorney for Defendants. Office and Postoffice Address: Capitol, Albany, N. Y.

To:
HON. ELLIS J. STALEY, Attorney for Plaintiff, 93 State St., Albany, N. Y.
HON. LUTHER C. WARNER, County Clerk of Albany County.

f. Opinion of Rudd, J.
SUPREME COURT, ALBANY COUNTY.
In the Matter of the Application of **LEMON THOMSON, M.D.**, **CHARLES H. ANDREWS, M.D.**, and **WILLIAM J. WANSBORO, M.D.**, composing the **Board of Examiners of Feeble-Minded, Criminals and Other Defectives**, appointed pursuant to Section 350 of the Public Health Law of the State of New York, for the appointment of counsel to represent **Frank Osborn**, a person to be examined pursuant to Section 352 of the Public Health Law.

Merton E. Lewis, Esq., Attorney-General, for the Applicants.
Wilber W. Chambers, Esq., Deputy Attorney-General, of Counsel.
Ellis J. Staley, Esq., Attorney for Respondent.
J. Sheldon Frost, Esq., of Counsel.

SUPREME COURT, ALBANY COUNTY.
FRANK OSBORN, v Plaintiffs.
against **LEMON THOMSON**, **CHARLES H. ANDREWS** and **WILLIAM J. WANSBORO**, composing the **Board of Examiners of Feeble- minded, Criminals and Defectives**, Defendants.

Ellis J. Staley, Esq., Attorney for Plaintiff.
J. Sheldon Frost, Esq., of Counsel. Merton E. Lewis, Esq., Attorney-General, for the Defendants.
Wilber W. Chambers, Esq., of Counsel.

Trial had before **William P. Rudd**, Justice of the Supreme Court, at Special Term, under Stipulation signed by the Attorneys representing the respective parties.

MEMORANDUM.
Rudd, J.: Chapter 445 of the Laws of 1912 is an act amending the Public Health Law by adding Section 19 thereto, in relation to operations for the prevention of procreation. It provides in substance as follows:

1. The appointment of a **Board of Examiners** consisting of one surgeon, one neurologist and one practitioner of medicine to be known as the **Board of Examiners of Feebleminded, Criminals and other Defectives**.

2. Making it the duty of this board to examine into the mental and physical condition and the record and family history of the feeble-minded, epileptic, criminals and other defectives confined as inmates in the several State hospitals for the insane, State prisons, reformatories, and charitable and penal institutions of the State, and if, in the judgment of the majority of said board, procreation by any such person would produce children with an inherited tendency to crime, insanity, feeble-mindedness, idiocy or imbecility, and that there is no probability that the condition of any such person will improve to such an extent as to render procreation by any such person advisable, or if the physical or mental condition of such person, will be substantially improved thereby, that then the board shall appoint one of its members to perform such operation for the prevention of procreation as shall be decided by said board to be most effective.

The criminals who shall come within the operation of this law shall be those who have been convicted of the crime of rape or of such succession of offenses against the Criminal Law as in the opinion of the **board** shall be deemed in the criminal examined to be sufficient evidence of confirmed criminal tendencies.

3. It is the duty of this **board** to apply to any Judge of the Supreme Court or County Judge of the county in which said person is confined for the appointment of counsel to represent the person to be examined. The counsel shall act for such person at a hearing before the judge or in any subsequent proceedings, and no order made by the board shall become effective until five days after it shall have been filed with the clerk of the court and a copy shall have been served upon the counsel appointed to represent the person examined. Orders made by the **board** are subject to review by the Supreme Court or any justice thereof.

Under this law a **Board of Examiners** was appointed consisting of the petitioners herein. Such **board** determined to perform the operation known as vasectomy upon **Frank Osborn**, an inmate of the **Rome Custodial Asylum**, 22 years of age, strong physically, who has been an inmate of that institution for several years, and who is in the class known as feeble-minded.

As indicated by the title above, **Frank Osborn** through counsel appointed by **Mr. Justice Chester**, began action against the members constituting the **Board of Examiners** asking a permanent injunction restraining the carrying out of the determination of the board with reference to an operation upon him; and in the action thus brought are raised questions as to the constitutionality of the act.

We have under consideration the questions which have arisen in review of the determination of the **board** and those which result from the challenge by the counsel of **Frank Osborn**, against the constitutionality of the act. We will first consider the determination of the board.

Dr. Lemon Thomson, one of the **Board of Examiners**, testified in substance that the **board** had selected **Frank Osborn** after learning as to his family and after submitting him to a somewhat superficial examination physically and mentally; and that such selection was made because in the opinion of the commission **Osborn** could not probably procreate normal offspring. His was what the **Board of Examiners** thought a bad case.

Dr. Thomson says that he has never performed the operation of vasectomy for sterilization; that in his opinion no benefit would come to the patient from the operation so far as rendering him free from the dangers of the infection of a venereal disease; that the operation would not weaken in **Frank Osborn** the tendency of the rapist.

Dr. Andrews, a member of the **Board of Examiners**, testified that he had never performed the operation, and that he had never seen it performed; and while the statute required that the board should determine upon the operation which would be most effective, he stated that vasectomy would not be the most effective operation but, on the other hand, that castration would be. He further testified that he had not given any study to any particular phase of this question.

Dr. Wansboro, of the **Board of Examiners**, was not called.

Dr. Bernstein, superintendent of the **Rome Custodial Asylum**, where **Frank Osborn** has been, as an inmate, since 1907, and in which there are cared for over 1,300 patients, testified that **Osborn** was of a higher grade of feeble-mindedness; that the actual number of feeble-minded in our state had not proportionately increased in 25 years; that because of the demands of society there developed many social failures; that there had been a persistent demand for the removal of such individuals from temptations in the community; and these social failures are forced upon the attention of the state, and it has been accepted as a principle that the state must care for defectives; that such people should not be looked after by any social or political division of the state. The doctor testified that he had observed 5,000 feeble-minded patients; that **Osborn** could not earn his living outside of the

institution if he were turned out into the world; that he had an "eight year" mental capacity; that all patients in the institution are segregated; and upon the question of **Osborn** being able to procreate normal children he said: "We are taught that the dominant traits appear in one-quarter, when the parentage is mixed as regards traits; that it is only in cases of feeble-mindedness of both parents that you would look generally for an increase of feeble-mindedness among offspring."

In other words, that when one parent is feeble-minded and the other of normal mental capacity that the tendency is recessive, that is, towards the normal.

The doctor testified that vasectomy would not change any of the criminal tendencies of the feeble-minded at all; it would only eliminate the one element of procreation; that in his opinion one of the conditions which would result from a general enforcement of the law, as is here determined, would be to tend to create a class of people by themselves who would feel that they were so different from normal humanity that they would go back to promiscuous sexual relations and that there would be known places where these people were harbored and there they would tend to collect. That among a class of such persons upon whom the operation of sterilization has been performed you would find increased sexual intercourse, and that such increased illicit intercourse is a promoter of disease and general demoralization.

Dr. Bernstein, knowing **Frank Osborn** as an inmate of the institution of which he was superintendent, testified that he was not in favor of the operation upon **Osborn** which has been recommended. He further said that he did not know of one case in the 1,300 in the institution that it would be desirable to operate upon, giving as a reason that it would not help the boy, and it would not help society. **Osborn** will have to be supervised and cared for just as well and just as much after the operation as before; after the operation of vasectomy he will want to go where the girls are just as much as he does now; that society needs protection from the raping of little girls and the frightening of them just as much as it wants protection from a future generation of dependents and delinquents. That vasectomy upon **Osborn** is not going to give us the thing society wants to have, protection from his possible ravages. In the doctor's opinion this legislation is in advance of our enlightenment - we don't know today what we are dealing with; that a careful and scientific study of ductless glands and their secretions shows that when such secretions forming in the body are interfered with, physiological teaching indicates that conditions are created which affect the brain and the nervous system; and that such interference with the secretions does not cause or bring about a cure or a remedy such as is sought.

Frank Osborn testified. He did a small sum in addition; knows the days of the week; knows his age; but said he did not know what this inquiry or proceeding meant.

Dr. Davenport, a biologist, testified that he agreed with the statements made by **Dr. Sharp** of Indianapolis in an article entitled, "Vasectomy as a means of preventing procreation in defectives," in the statement there contained that "defective persons are not necessarily to become a public charge, for included within this class are to be found the most gifted as well as the most vicious, weakest and ordinarily the most unhappy of mankind," and mentioning a few of such instances in the names of **Chatterton**, **Goldsmith**, **Coleridge** and **Charles Lamb**.

This statute grows out of studies and efforts of those who are interested in the subject of eugenics, which has to do with the improvement of the population by taking advantage of laws of heredity; with improving through better breeding. It deals with the inheritance of traits; with changes in population through differential fecundity; the greater or less fecundity of the different classes of population; with changes of population from emigration; or better or worse strains, with hereditary basis of the traits of population. That there is to be found much of good in the most degenerate families known in our land, mentioning the **Jukes** and the **Nams**.

The doctor testified that he has not advocated the operation of vasectomy, and that in his opinion segregation of the sexes would be better.

Mr. Van Wagenen, who has studied and written upon the problems of eugenics, testified that it would be well if voluntary acceptance of such an operation could be had; that when such operations have been done against the will of the patient the psychic effects have been bad; that he would never recommend such an operation except upon those who consented.

Dr. Coakley, a specialist in vivisection, testified as to the danger of infection because of the retained secretions in the body; that in the operation the vas deferens is severed, but that it can be reunited even after a considerable length of time, and therefore, nothing is accomplished.

Dr. Fernald, superintendent of the school for feeble-minded in Massachusetts, testified that he had never seen an authorized medical statement based upon actual facts which would justify claims made for the results in Indiana where such a law is in operation; that the operation of vasectomy does not in the slightest interfere with the physical act of sex intercourse; that illicit intercourse would result, and the effect thereof would be the exchanging of the burden of feeble-mindedness for the burden of sex immorality or sex diseases and of insanity resulting in that condition which would be quite as serious and would affect people who are producers and burden bearers. It would prejudice many right-thinking persons who are interested in those who are afflicted against institutions, when it is known that under the law such an operation would be possible against the wishes of the person upon whom the operation is to be made.

The testimony shows that the operation of vasectomy upon the male is simple in its character; that it can be done without anesthesia, quite painless. That upon the female is serious in its character, requiring an abdominal section and the risks incident thereto.

A well authenticated case upon the records shows that in the case of a woman having been sterilized because of feeble-mindedness she was freed from any danger incident to childbirth, was therefore freely inclined to improper sexual relations, and her lack of moral character becoming generally known she was the victim of constant sexual relations with the boys and men of the little village where she lived; that she became diseased resulting in an epidemic of venereal disease in the locality.

The court has set forth sufficient of the testimony and of that portion of it which is practically uncontradicted to indicate that the determination of the **Board of Examiners** to cause the operation of vasectomy upon **Frank Osborn** is not justified either upon the facts as they today exist or in the hope of benefits to come.

The members of the **Board of Examiners** apparently know very little about the subject. They have given it no particular study. They are not, in the opinion of the court, justified in the determination which they have reached, and, therefore, upon review of the determination which the board has made, this court reverses the same.

The action above entitled was brought by **Frank Osborn** against the defendants as members of the **Board of Examiners** for an injunction restraining the board from causing to be performed an operation upon him to prevent procreation.

It is claimed that the law in question violates the Constitution of the United States in many respects; that it is a Bill of Attainder; that it is depriving citizens of a trial by jury; and also of the privileges or immunities to which citizens of other states are entitled; that it is compelling a citizen to be a witness against himself, and depriving him of life, liberty and property without due process of law; that it permits infliction of a cruel and unusual punishment; that it abridges the privileges and immunities of citizens in depriving persons of life, liberty and property without due process of law, and denying to persons within its jurisdiction the equal protection of the law.

It is conceded that the proper form of raising the question of unconstitutionality herein involved, is by an action asking a permanent injunction.

A similar law has been declared unconstitutional by the Supreme Court of New Jersey in the case of **Smith** against the **Board of Examiners**, 88 Atlantic Reporter, 963, in an opinion written by **Judge Garrison**.

The **New Jersey statute** gave to the **Board of Examiners** discretion to determine the form of operation most effective, as does the New York Law.

It was thus given to the **board** to do almost anything which in their opinion would effectively destroy the power of procreation in **Frank Osborn**, or of any male or female feeble-minded inmate of a State hospital.

The statute seems to vest in the board the discretion to do what **Judge Garrison** said of the New Jersey Law: "The statute is broad enough to authorize an operation for the removal of any one (in the female) of these three organs, that is the ovary, the fallopian tube and the uterus, which are essential to procreation."

The subject of the operation in the New Jersey case was an inmate of the **State Village for Epileptics**, and the New Jersey court said: "While the case in hand raises the very important and novel question whether it is one of the attributes of government to essay the theoretical improvement of society by destroying the function of procreation in certain of its members who are malefactors against its laws, it is evident that the decision of that question carries with it certain logical consequences, having far-reaching results. For the feeble-minded and epileptics are not the only persons in the community whose elimination as undesirable citizens would or might in the judgment of the legislature, be a distinct benefit to society. If the enforced sterility of this class be a legitimate exercise of governmental power, a wide field of legislative activity and duty is thrown open to which it would be difficult to assign a legal limit."

Frank Osborn is not a malefactor. He is mentally deficient. He is defective without personal responsibility for such defect. It must be assumed that he is poor in the sense that there are no parents or friends to give him a home and provide for him, and so he becomes a ward of the state to be cared for and treated and strengthened and developed, if possible. He is no different from many others running no doubt into the thousands in our state who are not within the confines of a State institution, and who together taken with those who are in institutions and similarly situated, mentally and physically, make up a large class of mentally deficient people.

Can it be said that the law can direct the physical mutilation of the bodies of those who are in the State's care, and not be concerned with the same class of persons who are in the world at large?

The laws of our State which have been sustained by our courts as a proper exercise of the police power are not found to be a justification of this law.

The statute under consideration concerns certain classes of criminals as well as defectives. In the consideration of the question here we have properly confined our thoughts to the facts which have developed in the testimony, and those facts only relate to the feeble-minded.

The operation upon the feeble-minded is in no sense in the nature of a penalty, and therefore, whether it is an unusual and cruel punishment is not involved.

The entire purpose of the enactment seems to be to save expense to future generations in the operation of eleemosynary institutions organized by the people of the State to care for those who are afflicted; the theory being that if the **Board of Examiners** should conclude that every feeble-minded inmate of a public institution should be operated upon either by the operation known as vasectomy or the more radical operation of castration that then the State would be justified in turning all the people of this class at large to find their own way, trusting that they, in accordance with the theory of the law, could no longer procreate; the State being thus relieved of their care during their lives and freed from the danger of the burden in the future of their abnormal offspring.

Such does not seem to this court to be the proper exercise of the police power. It seems to be a tendency almost inhuman in its nature. The subject of this inquiry is, according to the testimony of physicians, physically strong. The same witnesses testified that if turned out into the world after or without the operation he could not care for himself or make a living; that at present, situated as he is, he works and helps the State in meeting the burden upon it in his care.

The last section of the statute under consideration provides that "Except as authorized by this act every person who shall perform, encourage, assist in or otherwise permit the performance of the operation for the purpose of destroying the power to procreate the human species, or any person who shall knowingly permit such operation to be performed upon such person, unless the same shall be a medical necessity, shall be guilty of a misdemeanor."

It seems clear that **Frank Osborn** is not given the equal protection of the laws, having in mind many others situated as he is who are not within the walls of a public institution, to which equal protection he is entitled with them. There is afforded to the young man similarly situated as to his physical and mental makeup, who is cared for by his parents in his own home, whose sexual tendencies and capacity may be the same as **Osborn's**, the protection of the law which makes it a misdemeanor for any person to assist or take part in the operation of vasectomy upon such a subject, while **Frank Osborn**, because he is an inmate of a State hospital, is not only not protected, but he is subject to such operation without his consent when determination is reached by the board created under this statute.

It seems, therefore, that the provisions of the Federal Constitution to which this law is offensive is that part of the Fourteenth Amendment which declares "that no state * * * shall deny to any person within its jurisdiction the equal protection of the laws."

The law certainly denies to some persons of a class and similarly situated the protection which is afforded to others of the same class.

The State has power, many times sustained by the courts, to protect the health, morals and welfare of the people, but such protection cannot be afforded unless it applies to all alike.

The courts have sustained the laws which prohibit the marriage contract between epileptics within certain ages, enacted for the same purpose and to accomplish the same end as the law we are considering, but such laws thus sustained have related to all epileptics, they do not alone relate to the unfortunates within hospitals.

Our attention is called to an interesting and most readable opinion by the **Attorney-General of California**.

His conclusion is "as regards the castration of confirmed criminals and rapists, and those guilty of sexual crimes, I am of the opinion that these are grave constitutional questions" but "as restricted to the sterilization of the inmates of prisons and hospitals by the method of vasectomy, I am of the opinion that there are no legal inhibitions upon this enlightened piece of legislation which is an awakening note to a new era and a great advance toward that day when man's inhumanity to man will have acquired a meaning beyond mere frothy sentiment."

Why sterilization by vasectomy of patients in a hospital, who are grouped as a class with rapists in a State prison, strikes an awakening note in a new era and will lead to the day to which the Attorney-General so poetically refers, is beyond the comprehension of this court and is not enlightening.

Our conclusion is that the statute is unconstitutional and therefore invalid. Judgment may be entered accordingly.

g. Judgment of Supreme Court.

At a Special Term of the Supreme Court of the State of New York, held at the City of Albany, N. Y., on the 17th day of September, 1915.

Present: **HON. WM. P. RUDD**, Justice.
SUPREME COURT,COUNTY OF ALBANY.
FRANK OSBORN, Plaintiff, against **LEMON THOMSON**, **CHARLES H. ANDREWS** and **WILLIAM J. WANSBORO**, composing the **Board of Examiners of Feeble-Minded, Criminals and other Defectives**, Defendants.

The defendant above named having voluntarily generally appeared in this action by **Hon. Egburt E. Woodbury**, Attorney-General, as their attorney and having served an answer herein; and the issues raised thereby having been duly brought on for trial at the above Special Term and a trial thereof having been had before the undersigned, without a jury, commencing on the 17th day of September, 1915; and the plaintiff having appeared upon said trial by **Ellis J. Staley**, his attorney, and by **J. Sheldon Frost**, of counsel, and the defendants having appeared by **Hon. Wilber W. Chambers**, Deputy Attorney-General, of counsel; and a decision containing a statement of the facts found and the conclusions of law thereon and directing judgment as hereinafter set forth having been duly made and this day filed herein; and the plaintiff's costs and disbursements having been duly taxed at the sum of one hundred and eight dollars. Now, upon filing the summons, complaint and answer, and upon the decision filed herein as aforesaid, it is, on motion of **Ellis J. Staley**, attorney for plaintiff,

Adjudged and decreed as follows:
First: That the defendants, **Lemon Thomson**, **Charles H. Andrews** and **William J. Wansboro**, composing the **Board of Examiners of Feeble-minded Criminals and other Defectives**, and each of them and their agents, representatives and successors in office, be perpetually enjoined and restrained from performing or permitting to be performed upon said **Frank Osborn** the operation of vasectomy.

Second: That the plaintiff, **Frank Osborn**, recover of the defendants, **Lemon Thomson**, **Charles H. Andrews** and **William J. Wansboro**, composing the **Board of Examiners of Feeble-minded Criminals and other Defectives**, the sum of one hundred and eight dollars, his costs and disbursements of this action.

Judgment entered this 8th day of March, 1918.
WILLIAM P. RUDD,Justice Supreme Court.
L. C. WARNER, Clerk.

h. Notice of Appeal.
SUPREME COURT, ALBANY COUNTY.
FRANK OSBORN, Plaintiff-Respondent, against **LEMON THOMSON**, **CHARLES H. ANDREWS** and **WILLIAM J. WANSBORO**, composing the **Board of Examiners of Feeble-Minded Criminals and other Defectives**, Defendants-Appellants.

PLEASE TAKE NOTICE that the above named defendants hereby appeal to the Appellate Division of the Supreme Court for the Third Department, from the judgment of the Supreme Court herein entered in this action in the office of the clerk of Albany County on the 8th day of March, 1918, wherein it was adjudged that the defendants be perpetually enjoined and restrained from performing an operation on plaintiff, and the said defendants appeal from each and every part of said judgment as well as from the whole thereof.

Dated, March 26, 1918.
MERTON E. LEWIS, Attorney-General and Attorney for the Defendant. Office and Postoffice Address: Capitol, Albany, N. Y.

To:
HON. ELLIS J. STALEY, Attorney for Plaintiff, 95 State Street, Albany, N. Y.
HON. LUTHER C. WARNER, Clerk of the County of Albany.

i. Stipulation for Settlement of Case.
It is hereby stipulated that the foregoing case contains all the evidence given in the trial of this action, and may be settled as hereinbefore set forth and signed and ordered 'filed by the justice before whom this case was tried.
Dated, May 1, 1918.
MERTON E. LEWIS, Attorney-General; Attorney for Appellant.
ELLIS J. STALEY, Attorney for Respondent.

j. Order Settling Case.
The foregoing case contains all the evidence given and proceedings had upon the trial of this action, and is hereby settled and signed by the undersigned, before whom this action was tried without a jury, and ordered filed in the office of the Clerk of Albany County.
Dated, May 1, 1918.
WILLIAM P. RUDD, Justice.

k. Stipulation Waiving Certification.
It is hereby stipulated by the attorneys for the respective parties herein that the foregoing summons and complaint, answer, order appointing counsel, minutes of trial, findings of fact and conclusions of law, exceptions to conclusions of law, and opinion of **Mr. Justice Rudd**, judgment and notice of appeal therefrom are true and correct copies of the originals thereof, and of the whole of such originals, and certification of the same is hereby waived.
Dated, May 1, 1918.
MERTON E. LEWIS, Attorney-General; Attorney for Appellant.
ELLIS J. STALEY, Attorney for Respondent.

3. APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK FOR THE THIRD DEPARTMENT. (185 App. Div. 902.)

PRINCIPAL DOCUMENTS.

a. Brief for Plaintiff-Respondent, by his Attorney, **Ellis J. Staley**. Argued by **J. S. Frost**, Albany, N. Y.
FRANK OSBORN, Plaintiff-Respondent, against **LEMON THOMSON**, **CHARLES H. ANDREWS** and **WILLIAM J. WANSBORO**, composing the **Board of Examiners of Feeble-Minded, Criminals, and Other Defectives**. Defendants-Appellants.

The defendants, composing the **Board of Examiners of Feeble-minded, Criminals and other Defectives**, have appealed from the judgment of the Special Term whereby they were perpetually restrained from performing the operation of vasectomy upon **Frank Osborn**, the plaintiff in this action. (Case on Appeal, fol. 1074.)

The trial was had before **Mr. Justice Rudd** at the Albany Special Term. The opinion of the Special Term is printed at folios 9951066.

The act under which the operation is proposed to be performed was passed in 1912 and is known as Chapter 445 of the laws of that year. No operations have been performed thereunder (fol. 76) and the application for the appointment of counsel and for a hearing in respect to the proposed enforcement of such law was not made until June, 1915. (fol. 86.)

The selection of **Frank Osborn** as the subject for such operation was the first made by the **Board** (fol. 177) and this action was thereafter brought in order that all questions might be presented in a manner recognized by established procedure. Evidence was received without technical objection in order that the fullest presentation of facts and of the opinions of those who had made a study of the transmission of mental qualities might be had.

A very clear and comprehensive statement of the facts is to be found in the opinion of the learned Special Term.

The benefit of the proposed operation, assuming the same might be so effective as to prevent subsequent restoration of procreative powers, in this particular instance is clearly of a financial nature only. It is undisputed that **Osborn** would be unable to maintain himself were he left to his own resources, possessing as he does, a mental development, according to established tests, of an eight-year-old child. (Fols. 410, 420, 965-967, 978.)

Dr. Thomson, the chairman of the Board, testified at folio 234:
"Q. The sole benefit then it is claimed by "your board for this operation is that it "prevents procreation of persons liable to "feeble-mindedness?" A. "Yes, sir."

Bleeker Van Wagenen, who as appears from the testimony has given much study to the subject of sterilization, testified at folio 781:
"I have seen cases where the operation has been performed compulsorily under the state law against the will of the individual, and against his violent protest, where the psychic effect has been bad. And along with that there has seemed to be some measure of bad effect physically as well as mentally."

Dr. Fernald testified at folio 929, in speaking of persons upon whom the operation of castration had been performed, as follows:
"Q. Have you observed as to whether or not those persons were treated generally as a class by themselves, in a sense? A. Well, my own patients have been jeered at and have been ridiculed.
"Q. What have you observed with respect to the confidence of the patient himself after the operation, with respect to his dealings with the public? A. Well, the male patients who have been castrated had very much less self-confidence - why, less self-respect and confidence, I think, expresses it fully."

Dr. Bernstein testified, upon examination by the court beginning at folio 20: "By the Court:
"Q. Referring to the situation that the counsel just mentioned, are you in favor of taking this step with reference to **Frank Osborn**? A. No. Q. Why? A. This step of vasectomy you mean? Q. Yes. Why? A. Because it won't help the boy; it won't help society. The boy will have to be supervised and cared for just as well and as much as if he had the operation as if he does not have the operation. I have the personal history of the boy here showing his tendency to go where the girls are, showing that he has had to be disciplined several times for it. After the operation of vasectomy he will want to go where the girls are just as much as he does now. Now society wants protection from the raping of little girls and frightening them just as they want protection from a future generation of dependents and delinquents."

Osborn is now a State charge, segregated from persons of the opposite sex. He would be a public charge were the operation performed. It is not apparent wherein the State would be financially benefited by the performance of the proposed operation, but, assuming that it might be thus benefited, the question resolves itself into this: Is mutilation of the person of an innocent but physically unfortunate human being permissible to that, or any, end?

Dr. Charles Bernstein, who for twelve years has been the superintendent of the **Rome State Custodial Asylum** where **Osborn** is held as a patient, testified to having observed approximately five thousand cases of feeble-mindedness (fol. 408) and under whose direction seven operations of vasectomy had been performed (fol. 444), described the method of operation as consisting of opening the skin directly on the groin and a few tissues below the skin bringing to view the spermatic cord, consisting of the artery and veins to the testicle, the vas deferens

which carry the spermatic fluid or nerve supply to the testicle and some other tissue; then the vas deferens, which is tortuous or worm-like and two or three times as long as the artery, veins and nerves which are associated with it, is selected from this mass of tissue and about an inch thereof cut out, tying the ends and sewing the wound together. Sometimes the tissue of the scrotum is pulled up to the groin and the cut made through the skin so as not to have a scar appear in the groin, but in either event the tissues under the skin are opened above the groin. (Fols. 445-449.)

That but little force is to be given to the assertion of the chairman of the **Board of Examiners** that the operation is of a most simple and safe character will be manifest from an examination of his testimony upon this subject appearing at folios 204-230.

Dr. Coakley testified that while the operation could be performed with one incision, it would be better to make two incisions and that any incision in the human body involves elements of danger. (Fol. 873.) He said "there is always danger of infection regardless of the most positive asepsis and the danger of shock can not be explained at all."

There is no evidence to show that **Osborn** possesses the reproductive plasm (spermatozoa). It is here proposed to perform the operation upon the mere presumption of the possession of such powers. In a normal person and in matters of property or matrimonial rights, indulgence in such presumption might be, and doubtless is, permitted; but it should not be assumed in the case of a defective where physical mutilation is involved.

Dr. Bernstein testified at folio 459: "What we need to know is in what percentage of our feeble-minded cases are spermatozoa present at the present time and in how many of these will it reappear after one or two years following the vasectomy.

"Q. In other words, in your opinion, Doctor, there may exist among the feeble-minded patients under the charge of the State a considerable number who might be correctly described as being sterile at the present time? A. Yes, sir."

The operation of vasectomy does not necessarily prevent procreation. **Dr. Bernstein** found the presence of spermatozoa nearly a year after the operation had been performed (fol. 455), and he stated at folio 457, referring to cases where the operation had been performed under his direction: "The real unfortunate situation here is that these cases should have been studied as regards the presence or absence of spermatozoa in the ejaculated fluid before as well as after the operation."

Dr. Coakley testified that the vas deferens could be reunited after the operation. (Fol. 843.)

Dr. H. C. Sharp, of Indiana, under whose direction most of the operations were performed in that state, on October 6, 1915., wrote to the counsel for the respondent a letter which is here inserted by permission of the counsel for the appellants and of which the following is a copy:
"The operation to which you refer of reuniting the severed ends of the vas is possible, although a delicate but very simple operation. However, I have never done this operation but in one case, and I did this for the purpose of demonstrating that it was possible."

Mr. Boston states that sterilization is a punishment unless a benefit results. (See Appendix.)

Mr. Justice Rudd, in his very able opinion, says, at folio 1148: "**Frank Osborn** is not a malefactor. He is mentally deficient. He is defective without personal responsibility for such defect."

The proposition of **Justice Rudd** is that of an undisputed fact; the proposition of **Mr. Boston** is manifestly correct. This court may and should assume the accuracy of both. If both are true, no authority can be found for the performance of the proposed operation unless it appears from the record that **Osborn** is to be benefited thereby. We respectfully submit that the appellants have failed in such respect.

To deprive an individual of all hope of progeny, where he has been guilty of no offense, is at least a close approach to cruel and unusual punishment. The case of **State v. Feilen** (70 Wash., 65, 126 Pac. 75), from which the appellants quote at considerable length, was one where the defendant had been convicted of the crime of rape committed upon a child under ten years of age, sentenced to imprisonment for life and to have the operation of vasectomy "carefully and scientifically performed." The court said the nature of the crime would permit the death penalty had the legislature so determined and concluded as follows: "We can not hold that vasectomy is such a cruel punishment as can not be inflicted upon appellant for the horrible and brutal crime of which he has been convicted."

The assertion would seem to be justified that vasectomy might not be cruel punishment when applied to one convicted of a brutal sexual crime, but as applied to any other crime, much less to an innocent, it becomes cruel and inhuman.

Cruel and unusual punishment under the **Philippine Bill of Rights was held in Weems vs. United States,** 217 U.S. 349; 30 Sup. Ct. Rep. 544, to invalidate a sentence of carrying during the term of imprisonment a chain at the ankle hanging from the wrist and perpetually disqualifying from the exercise of political rights. In connection with the review by the Court of a considerable number of cases it is said: "In the application of a constitution, therefore, our contemplation cannot be only of what has been, but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power."

The New York State statute here in question assumes to authorize the prevention of procreation by such operation "as shall be decided by **said board** to be most effective." Under the rule stated by the Supreme Court of the United States in the recent case above cited, it is permissible for this court to consider the possibility of the amputation of the sexual organ or even, as was said by **Governor Pennypacker of Pennsylvania** in his veto message of March 30th, 1905, of a similar statute: "It is plain that the safest and most effective method of preventing procreation would be to cut the heads off the inmates and such authority is given by the bill to this staff of scientific experts."

In Fisher Co. vs. Woods (187 N. Y, 80), **Haight, J.**, in writing the unanimous opinion of the court, said, at page 95:
"The legislative determination as to what is a proper exercise of the police power, is subject to the supervision of the court and in determining the validity of an act it is its duty to consider not only what has been done under the law in a particular instance, but what may be done under and by virtue of its authority. Liberty, in its broad sense, means the right not only of freedom from servitude, imprisonment or restraint, but the right of one to use his faculties in all lawful ways; to live and work where he will, to earn his livelihood in any lawful calling and to pursue any lawful trade or avocation." (Citing numerous cases.)

The testimony of **Dr. Walter E. Fernald**, for twenty-eight years **Medical Superintendent of the Massachusetts School for Feeble-Minded**, and who has had under his charge during the past ten years an average of over 1,000 patients, is entitled to very great consideration because of his high standing in his profession and his knowledge gained from specific cases. He states that in the **New York Hospitals for the Insane** from twelve to twenty-five per cent are public charges because of mental diseases caused by syphilis. (Fol. 948, 930.)

He further states that some thirty to thirty-five per cent of his patients are not of the hereditary class. (Fol. 953.)

In his opinion, in which **Dr. Bernstein** concurs, the unsexing of the individual leads to more promiscuous illicit intercourse.

Beginning at folio 934, he says: "I feel that sterilization would enormously increase the likelihood of illicit sex intercourse. I believe that with the female the fear of impregnation, in the case of very many - I say this without disrespect - but in the case of very many women is a deterrent to illicit sex intercourse, and with that restraint removed I believe there would be an enormous increase in the intercourse of women so operated upon. In fact, that has been before the committees of our legislature for the last six or seven years, and I have given that as my principal reason, or one of the principal reasons, for my opposition to the whole principle of sterilization. On the other hand, the sterilization of male patients which renders them incapable of impregnating women would have the same effect in that it would cause girls and women to feel that intercourse with that man was absolutely safe and could be indulged in without any of the fear of detection, which is within a certain class of women the only thing which keeps them from promiscuous sex relations. * * * **I had one female patient who was a girl of 17, who was taken home by the overseer of the poor of a certain town and subjected to the operation of ovariotomy. She had been a public charge up to the time because of the fear of the town officials that she would bring other children into the world. After the operation she was turned over to her mother and told that as there was no longer any danger of her having children the town would no longer assume responsibility. That girl immediately - her mother was a working woman and was not able to safeguard her and not able to watch her - and I was visited in about three months by the clergyman and physician of that village, who told me that that morning their children, a boy of five and a girl of seven, had peeped through a picket fence, with other children, and watched a line of boys who in turn had sex intercourse with this sterilized feeble-minded girl. The physician told me that he thought that very many of the boys and young men in that town had intercourse with her. That she had acquired gonorrhea and that she transmitted gonorrhea to a very large number of the boys, who in turn had infected other girls and women, and that there was an epidemic of gonorrhea in that little village from the sex relations with this one girl. That was a rather remarkable opportunity to judge of some of the possibilities of the presence in the community of women who were known to be incapable of becoming pregnant. Of course that is partly social. The fact that she was sterile made the authorities feel that it was not a matter for them. I have no doubt that that fact influenced her mother somewhat in being willing to allow her to be exposed as she was. I have no doubt it was a factor in making those boys and men feel that intercourse with her was fairly safe. I have always felt that the danger of the transmission of venereal diseases would be enormously increased if we should sterilize large numbers of boys and girls, men and women, and allow them to be at large, for those reasons."**

Supporting the observation of **Dr. Fernald**, **Dr. Bernstein** testified at folios 478-479:
"Q. Has it been your observation, Doctor, that the probability of offspring is deterrent to illicit intercourse? A. Yes, sir.
"Q. So that among a class of persons such as you describe, namely, persons among whom the operation of sterilization has been performed, you would expect to find increased intercourse, would you not? A. Oh, decidedly.
"Q. And increased illicit intercourse is a promoter of disease and of idleness, is it not? A. It is very commonly recognized as that."

On cross-examination, **Dr. Thomson**, of the **Board of Examiners**, testified, beginning at folio 230:
"Now, Doctor, the performance of the operation of vasectomy is not an interference with the sensation incident to cohabitation? A. It is not.
"Q. So that a feeble-minded individual or any other individual upon whom the operation of vasectomy might be performed would be equally desirous to have intercourse? A. He would be deprived absolutely of nothing than power to procreate.

"Q. And one of the purposes of the performance of this operation upon inmates of State charitable institutions is that they may be safely allowed their liberty and not kept in enforced segregation from females? A. Yes, sir.
"Q. There is a menace to society from illicit intercourse and from intercourse between individuals under unsanitary conditions, is there not? A. Yes, sir.
"Q. And that condition, and that of venereal diseases is a serious menace to the future of the race, is it not? A. Why, yes, sir; those who get it.
"Q. Then so far as any benefit might come in the direction of the venereal disease wouldn't be affected one way or the other by this operation? A. No effect whatever.
"Q. The sole benefit then it is claimed by your Board for this operation is that it prevents procreation of persons liable to feeblemindedness? A. Yes, sir."

Manifestly an increase of illicit intercourse means an increase in venereal and other diseases, including syphilis, with the resulting increase in the number of feeble-minded. On this phase, **Dr. Fernald** testified, at folio 930: "The evidence which has been obtained by the use of the modern blood reactions show that different observers have found from ten to thirty per cent of the inmates of our institutions for the feeble-minded are feeble-minded because of the congenital syphilis which they inherited from their parents."

In matter of **Jacobs** (98 N. Y., 98) a statute entitled, "An Act to improve the Public Health by prohibiting the manufacture of cigars and the preparation of tobacco in any form in tenement houses in certain cases and regulating the use of tenement houses in certain cases," was held unconstitutional upon the ground that the court was not able to see in the law a sufficient adaptation to the end claimed.

In other words, the proposition resolves itself into this: Is not the proposed remedy fraught with more danger than the disease itself?

It seems quite certain that the right to trial by jury is denied by this statute. The procedure is not clearly indicated therein. Apparently a majority of the **Board** may appoint one of its members to perform the operation on a selected criminal or defective inmate of state institutions after an examination into the mental condition, record and family history. **The Board** then applies to a judge of the Supreme Court or a county judge to appoint counsel; such counsel "to act at a hearing before the judge and in any subsequent proceedings." Then an order may be made by the **Board** for the operation, which orders are subject to review "by the Supreme Court or any justice thereof." In what manner this review is to be had is not set forth in the statute, but in the absence of any provision for submitting the questions to be reviewed to a jury it would seem that the method must be either by appeal or by certiorari based upon the "record taken upon the examination." The absence of the right to trial by jury would seem to make this statute objectionable as being a Bill of Attainder.

The important decisions dealing with the general question of constitutionality of laws of this character are: **Smith vs. Board of Examiners**, 88 N. J. Law, 146; 88 Atlantic Rep., 963. **Davis vs. Berry**, 216 Fed. Rep., 413. The only other decision, so far as we have been able to ascertain, is that of **State vs. Feilen** (70 Wash., 65; 186 Pac. Rep., 75.) An examination of this last case shows that the only constitutional question considered is that of cruel and unusual punishment, and for reasons heretofore pointed out in this brief, it seems wholly inapplicable to **Osborn's** situation.

The respondent refrains from a discussion of the first two cases above, not because of a belief in their lack of importance, but because of a belief that by reason of their very great importance this court will desire to examine the reported decisions in their entirety, rather than to accept such portions thereof as counsel might select for insertion within the limitations of a brief of reasonable length.

Among the cases upon which the appellants rely are Matter of **Viemeister** (179 N. Y., 235), and **Jacobson vs. Commonwealth of Massachusetts** (197 U. S., 11). These cases deal with vaccinations as a health proposition

and to avoid the spread of a contagious disease involving no loss or destruction of natural power, physical ability or of a function of life.

We submit the following taken from the brief filed by the complainant in **Smith vs. Board of Examiners** (supra): "Medicine is admittedly an uncertain science, it is to a large degree experimental and theoretical, for it deals with the mystery of life, death and the infinite phenomena of physical production and reproduction and nothing short of infinite knowledge should be taken as absolute authority when we undertake to finally determine the source of human imperfections, mental and physical.

"There is and can be no guarantee that this or that disease is incurable and never will be curable or is necessarily transmittable from one generation to another.

"There can be no definite line drawn to make a division line between the healthy and the unhealthy, the normal and the abnormal, for no human is perfect either in mind or body. We are sick or well, sane or insane by comparison only.

"This act applies only to those confined in institutions of the State and does not include any of its subjects who may be similarly afflicted who are at large. It is, therefore, directed at a particular class of unfortunates who, by reason of their confinement alone, are denied the usual pursuits of happiness, and the ordinary opportunity of procreation and sexual enjoyment. They, however, have forfeited no constitutional right.

"There is no immediate danger to society for owing to their present situation the possibility of the social evil in mind is remote and contingent. It seems a dangerous innovation to give any board or constituted authority, created by legislative enactment only, the power to physically harm one of the State's subjects under less safeguard and formality than is required to inflict a penalty upon criminals who have violated the rules of society and forfeited its protection.

"The victims of the operation of this law are unfortunates merely - heirs, perhaps, of the transgressions of others, they have not wronged society, they bear the penalties of an effete civilization, are mentally and physically helpless, the wards of the State."

An article written by **Mr. Charles A. Boston** of the **New York Bar** and published in the **Journal of Criminal Law and Criminology**, in the issue of September, 1913, contains such an able, interesting and exhausting argument upon the question of sterilization that we take the liberty of attaching the same as an appendix to this brief.

The respondent contends that the judgment of the Special Term should be affirmed, with costs.

Respectfully submitted,
ELLIS J. STALEY, Attorney for Plaintiff-Respondent.
J. S. FROST, Of Counsel.
b. Decision of Appellate Division of Supreme Court. July 1, 1918.
"Judgment unanimously affirmed as the opinion of **Rudd, J.**, at special term."

4. COURT OF APPEALS. (Adv. Sheets No. 950, March 15, 1919.

PRINCIPAL DOCUMENTS.
a. Brief on Behalf of Defendants-Appellants, by **Merton E. Lewis**, Attorney-General. Argued by **Wilber W. Chambers**, Deputy Attorney-General.

IN THE COURT OF APPEALS OF THE STATE OF NEW YORK.
FRANK OSBORN, Plaintiff-Respondent, against **LEMON THOMSON**, and others, composing the **Board of Examiners of Feeble-Minded Criminals and other Defectives**, Defendants-Appellants.

This is an appeal by the **Board of Examiners of Feeble-Minded, Criminals and other Defectives** from the judgment of the Appellate Division of the Supreme Court, entered herein in the office of the clerk of said Appellate Division on July 5, 1918, affirming a judgment entered in this action on March 8, 1918, in the office of the clerk of Albany County, perpetually enjoining and restraining the defendants from performing an operation on plaintiff for the prevention of procreation (fols. 1068-1075, 1079-1080, 1098-1107).

Chapter 445 of the Laws of 1912, which is now Article XIX of the Public Health Law, Sections 350-353, created a **Board Of Examiners of Feeble-Minded Criminals and other Defectives**.

The defendants in the above-entitled action compose the said **Board**.

This action was brought by plaintiff against the defendants for an injunction restraining them from performing or causing to be performed an operation upon him to prevent procreation which it is alleged they had threatened to perform.

The complaint alleges that Chapter 445 of the Laws of 1912 in many respects violates the Constitution of the United States, particularly in that it violates Section 10 of Article I, being a Bill of Attainder, and an ex post facto law; subdivision 3 of Section 2 of Article III in depriving citizens of a trial by jury; Section 2 of Article IV in depriving citizens of the State of New York of the privileges and immunities to which citizens of other states are entitled; Article V of the amendments to the State Constitution in compelling a citizen to be a witness against himself and depriving citizens of life, liberty and property without due process of law; Article VIII of said amendments in authorizing the infliction of cruel and unusual punishment; Section 1 of Article XIV of said amendment in abridging privileges and immunities of citizens and depriving persons of life, liberty and property without due process of law, and denying to persons within its jurisdiction the equal protection of the laws.

In the proceeding which was instituted under said statute, **Mr. Ellis J. Staley** was appointed by the court as required by statute, to represent said **Frank Osborn**, and the court fixed a day in the order made on June 2, 1915, for a hearing on the advisability of performing an operation for the prevention of procreation, in pursuance of said statute.

This action and the proceeding under the statute were consolidated by agreement between the attorneys for the respective parties. The stipulation to this effect provided:
"That any and all evidence there produced upon said hearing and upon said trial shall be deemed to have been taken and received so far as the same may be properly applicable thereto in both of said hearings and upon said trial, and that .both said hearings and said action may be prosecuted by filing a determination in the same manner as if such evidence had been separately taken and received therein."

The question involved is one of law. The testimony was taken in order that the court might have the benefit of the opinions of men who had made a study of the subject.

Mr. Justice Rudd, at Trial Term, wrote an opinion (pp. 202-216) in which he reached the conclusion that **Osborn** was denied the equal protection of the laws.

POINT I.
THE WEIGHT OF EVIDENCE PRODUCED UPON THE TRIAL IS TO THE EFFECT THAT THE OPERATION PRESCRIBED IN THE STATUTE WILL BE BENEFICIAL TO SOCIETY AND

THE PERSON OPERATED UPON AND WOULD PROBABLY SAVE THE STATE A VAST AMOUNT OF MONEY.

On this head the evidence of **Dr. Thomson**, a member of the **Board of Feeble-Minded Examiners**, was to the effect that he had made a careful examination of **Osborn** (fols. 118-120) and his family history (fols. 120-153-154), and that from his investigation, the **Osborn** family alone had cost the State upwards of $10,000 to maintain (fol. 154).

He further testified, as did also **Dr. Andrews**, that no harm would come to **Osborn** from the operation (fols. 156-157, 290-292).

Doctors Thomson and **Andrews** very carefully described the operation which they intend to perform on **Osborn** - that of vasectomy, which is the operating for sterilizing males to prevent procreation. It is a minor operation in a male and not serious, and from observation, no ill effects come from it (fols. 157-168, 288-290).

The weight of the evidence is to the effect that vasectomy would absolutely prevent procreation (fols. 249-252, 288), and that it is a desirable thing to do in cases of feeble-minded persons.

Dr. Bernstein testified that the proportion of feeble-minded in this State is one to every five hundred or one to every three hundred and fifty persons. That is, there is one mental defective to every five hundred or every three hundred and fifty normal individuals, and there are over 32,000 feeble-minded persons in this State (fols. 371-372). There are 10,000 feeble-minded persons under State care, and it costs the State $1,766,000 to care for them, or at the rate of $176.60 per person (fol. 372-373). **Dr. Bernstein** said that there were not as many as 10,000 cared for in New York in State institutions, but there were 6,000 in State and county institutions, and that the cost of these was from $150 to $225 a person (fols. 374-375). In his institution alone there were 1,570 patients.

Dr. Davenport, who is connected with the **Carnegie Institution of Washington**, and who has made a study of heredity and feeblemindedness (fol. 580), testified:

"I have long felt that sterilization laws as they have been enacted by the different states, are premature, because in advance of public sentiment now. On the other hand, I would say, on broad theoretical grounds, I think that the state has a right to prevent procreation, as it has, or does, the right of every one of the functions of the individual, including his life and his liberty. A state which limits itself in its control of the individual is weak, and such limitations tend to destroy society. I hold it to be a loftier duty of the state to protect the happiness of the children and adults of the next generation than to protect from assault adults of this generation. I am inclined to think it better, now that the law has been put on the statute books, to retain or amend it, and act conservatively under it."

Dr. Bleecker Van Wagenen, who testified on behalf of **Osborn**, said that he was in favor of the operation, where he would get the consent of those who were to be operated upon. He said:

"I don't say that I would continue that always and forever, but at this present state, to my mind, it is of the utmost importance to the future, that it should for the present. Now, that does not necessarily mean that they cannot do any cases. Quite to the contrary, some hundreds of cases have been done and are continuing to be done under that basis in **California**, on various types of insane, feeble-minded and epileptics, and so far as I have been informed, at this comparatively late date, they have not performed compulsory operations, but several hundred of the kind through first investigating the family line, * * and persuading them all, including where it is possible the patient himself or herself, whatever the case may be, that that is a good thing to do, and then performing the operation." (Fols. 813814).

Dr. Fernald, called on behalf of **Osborn**, in speaking of the effect of the operation on the patient, testified:

"I doubt if the operation of vasectomy, if it was safeguarded by proper mental preparation, which would undoubtedly be given, would have any effect whatsoever, so far as that is concerned." (Fol. 923.)

So, in the main, the doctors and experts agree that the operation, which is known as a minor one, and which merely consists, in the male, of severing the spermatic duct, is a simple operation, not necessary to give an anaesthetic, and could be performed without the use of cocaine even, and the patient suffers no more pain than that of a pinch. The patient would not be confined to his bed.

In the female, the operation is not so simple, but would not be attended with seriousness (Fols. 166-167). The operation in the female is performed by the excision of a small portion of the heel of the Fallopian tube and is not severe. The evidence established that the operation does prevent, as **Dr. Thomson** testified, procreation.

POINT II.
THE STATUTE DOES NOT VIOLATE THE CONSTITUTIONAL RIGHTS OF THE PERSON UPON WHOM THE OPERATION IS TO BE PERFORMED.

In our researches we have been able to find only three cases on the subject. Two seem to be against the validity of the law, while one is in favor of it. **The Attorneys-General of both California and Connecticut** have upheld the constitutionality of such a law in opinions (see appendix to this brief).

The cases we have in mind are **Smith vs. Board of Examiners**, 85 N. J. Law, 146; **Davis vs. Berry**, 216 Fed. Reporter, 413. Those two are against similar legislation.

The case of the **State vs. Feilen**, 41 Lawyers' Reports (N. S.), 418, also reported in 70 Wash. 65, 165 Pacific, 75, favors the law.

But these cases, we urge, are not decisive of the question here. It seems to us that the constitutionality of the statute should be upheld, as being a proper exercise of the police power, in promotion of the health laws of the State.

In the case of **Davis vs. Berry**, supra, the court had before it an **Act of the Iowa legislature**, requiring the performance of the operation of vasectomy on criminals who had been twice convicted of a felony. The District Court distinctly held that the law in question was not void by reason of its being ex post facto, but did condemn the law because it denies the right of a hearing, and that depriving him of the right to be heard took away the right he had under the Constitution to have his day in court, which meant due process of law. The law was not absolutely condemned more than to say that it was the opinion of the court that vasectomy provided the infliction of a cruel and unusual punishment.

In the case of **Smith vs. Board of Examiners of Feeble-Minded Persons, of New Jersey**, the court condemned the law, which provided for surgical operations for the prevention of procreation upon feeble-minded persons, because the statute was based upon a classification that bore no reasonable relation to the subject of police regulation, and hence denied to the individual of the class so selected the equal protection of the law, granted by the Fourteenth Amendment to the Constitution of the United States. The condemnation of the law as being an improper classification was directed against that part of it which required the operation to be performed upon inmates confined in the several charitable institutions in the counties and State.

The learned judge pointed out that, "If such object requires the sterilization of the class so selected, then a fortiori does it require the sterilization of the vastly greater class who are not protected from procreation by their confinement in state or county institutions."

The learned judge concluded: "The conclusion we have reached is that, without regard to the power of the State to subject its citizens to surgical operations, that shall render procreation by them impossible, the present statute is invalid, in that it denies to the prosecutrix of this writ the equal protection of the laws to which, under the Constitution of the United States she is entitled."

In the case of the **State vs. Feilen**, the court upheld the right of the State to sterilize by means of vasectomy persons convicted of statutory rape, and the learned judge who wrote for the court has covered the ground so thoroughly that we quote liberally therefrom:
"On the theory that modern scientific investigation shows that idiocy, insanity, imbecility, and criminality are congenital and hereditary, the legislatures of California (Stat . 1909, p. 1093, Chap. 720), Connecticut (Pub. Laws 1909, Chap. 209), Indiana (Laws 1907, Chap. 215), Iowa (Laws 1911. Chap. 129), New Jersey (Laws 1911, Chap. 190), and perhaps other states, in the exercise of the police power, have enacted laws providing for the sterilization of idiots, insane, imbeciles, and habitual criminals. In the enforcement of these statutes vasectomy seems to be a common operation. **Dr. Clark Bell**, in an article on hereditary criminality and the asexualization of criminals, found at page 134, Vol. 27, **Medico-Legal Journal**, quotes with approval the following language from an article contributed to **Pearson's Magazine** for November, 1909, by **Warren W. Foster**, senior judge of the **Court of General Sessions of the Peace of the County of New York**: 'Vasectomy is known to the medical profession as "an office operation," painlessly performed in a few minutes, under an anaesthetic (cocaine), through a skin cut half an inch long, and entailing no wound infection, no confinement to bed.' 'It is less serious than the extraction of a tooth,' to quote from **Dr. William D. Belfield, of Chicago**, one of the pioneers in the movement for the sterilization of criminals by vasectomy, an opinion that finds ample corroboration among practitioners. * * * There appears to be a wonderful unanimity of favoring opinion as to the advisability of the sterilization of criminals and the prevention of their further propagation. **The Journal of the American Medical Association** recommends it, as does the **Chicago Physicians' Club**, the **Southern District Medical Society**, and the **Chicago Evening Post**, speaking of the Indiana Law, says that it is one of the most important reforms before the people, that 'rarely has a big thing come with so little fanfare of trumpets.' **The Chicago Tribune** says that 'the sterilization of defectives and habitual criminals is a measure of social economy.' The sterilization of convicts by vasectomy was actually performed for the first time in this country, so far as is known, in October, 1899, by **Dr. H. C. Sharp**, of Indianapolis, then physician to the **Indiana State Reformatory**, **at Jeffersonville**, though the value of the operation for healing purposes had long been known. He continued to perform this operation with the consent of the convict (not by legislative authority) for some years. Influential physicians heard of his work and were so favorably impressed with it that they indorsed the movement, which resulted in the passage of the law now upon the Indiana statute books.

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 anaesthetic, either general or local. It requires about three minutes' time to perform the operation, and the subject returns to his work immediately, suffers no inconvenience, and is in no way impaired, for his pursuits of life, liberty, and happiness, but is effectively sterilized.' "Must the operation of vasectomy, thus approved by eminent scientific and legal writers, be necessarily held a cruel punishment under our constitutional restriction, when applied to one guilty of the crime of which appellant has been convicted? Cruel punishments, in contemplation of such constitutional restriction, have been repeatedly discussed and defined, although we have not been cited to, nor have we been able to find, any case in which the operation of vasectomy has been discussed."

The court held the punishment was not cruel and inhuman and upheld the law.

Appended to this brief, the court will find the opinion of **Attorney-General Webb of California** by his deputy, **R. C. Van Fleet**, upholding the constitutionality of the Sterilization law of that state (Stat. 1909, p. 1093, Chap. 720) and the opinion of **Attorney-General Light of Connecticut**, in favor of the constitutionality of the same kind of law of that state (Pub. Laws Connecticut, 1909, Chap. 209).

These opinions so fully cover the ground that we use them as a part of our brief and in that way simplify the extent of our argument.

POINT III.
THE LAW IN QUESTION IS A VALID EXERCISE OF THE POLICE POWER AND DOES NOT OFFEND THE CONSTITUTION.
For the convenience of the court we shall divide this point into various subheads.

(1) POLICE POWER.
The police power is an attribute of sovereignty which is possessed by every sovereign state and is a necessary attribute of every civilized government.

Judge Cooley defines police power of a state as that which "embraces its whole system of internal regulation, by which the state seeks not only to preserve the public order and to prevent offenses against the state, but also establish for the intercourse of citizens with citizens those rules of good manners and good neighborhood which are calculated to prevent conflict of rights, and to insure to each the uninterrupted enjoyment of his own so far as is reasonably consistent with a like enjoyment of the rights of others."

This definition has been quoted with approval many times.

Hathorn vs. Natural Carbonic Gas Co. 194 N. Y., 326, p. 344.
By means of this power the Legislature exercises supervision over matters involving the common weal and enforces the observance by each individual member of society of the duties which he owes to others and to the community at large.

People vs. King, 110 N. Y. 418.
The courts have been unable or unwilling to definitely describe a rule that may be followed which will cover all cases, but instead have determined as each case is presented whether it falls within or without the appropriate limits.

People vs. Budd, 117 N. Y. 1.
With this very brief reference to the police power, suffice it to say that it has been defined as the law of necessity and as the power of self protection on the part of the community.

State of Wis. vs. Redmon, 14 L. R. A. (N. S.), 229.

(2) OVER WHAT SUBJECTS GENERALLY THE POLICE POWER EXTENDS.
One of the most important fields of legislation in which the State may enact measures under the police power, consists of regulations in the interest of public health and safety.

Jacobson vs. Massachusetts, 197 U. S. l:
For instance, it has been held that law; may be passed providing for drainage and sewer systems. (New Orleans Gas Light Co. vs. Drainage Com., 197 U. S. 453).

Requiring the owners of a lot which has been declared to be dangerous to the public health to fill it up to a certain level. (**Charlestown vs. Werner**, 38 S. C. 488.)

Making it a penal offense to discharge any refuse matter in a running stream. (**People vs. Hupp**, 53 Colo., 80, 123 Pac. 651.)

Forbidding a riparian owner on a pond from which a municipal water supply is taken, to bathe in the pond. (**State vs. Morse**, 84 Vermont 387.)

For bidding any one to make use of, for the purpose of drinking, of polluted water supply. (**State Board of Health vs. St. Johnsbury**, 82 Vermont, 276.)

Providing for the collection and removal of refuse in thickly populated cities. (**State vs. Robb**, 100 Me. 180.)

Establishing quarantine regulation notices to owners of live stock. (**Kimmish vs. Ball**, 129 U. S. 217.)

Providing for the destruction of noxious weeds. (**St. Louis vs. Gait**, 179 Mo. 8.)

Providing for the destruction of trees attacked by incurable infectious diseases. (**State vs. Main**, 69 Conn. 123.)

For regulation in behalf of public morals like the suppression of gambling. (**Ah Sun vs. Wittman**, 198 U. S. 500.) For the prevention of fraud and deceit. (**People vs. Freeman**, 242 I11. 373.)

To regulate skill and learning in professions. (**Dent vs. State of W. Va**., 129 U. S. 114.)

To enact laws in the promotion of the general welfare. (**Chicago, B. and Q. R. R. Co. vs. Illinois**, 200 U. S. 561.)

It may enact laws to preserve and promote the public welfare even at the expense of private rights. (**Walker vs. Jameson**, 114 Ind. 591.)

An important class of statutes sustained as tending to promote the public welfare are those which relate to physical welfare of the members of the body politic. It has been said that it is to the interest of the State to have strong, robust, healthy citizens, capable of self-support, of bearing arms and adding to the resources of the country. Laws for this purpose are made for the protection of citizens from overwork and requiring a general day of rest to restore his strength and preserve his life for the obvious protection of the public welfare.

Holden vs. **Hardy**, 169 U. S. 366.
People vs. Havnar, 149 N. Y. 195.

And so we might go on with many more cases which cover the police power, and which cases have been held to be valid.

(3) THE ACT IN QUESTION DOES NOT OFFEND BECAUSE IT IS AN EX POST FACTO LAW.
This was clearly held in **Davis vs. Berry** (supra). The Relator Says It Deprives Him of His Life and Liberty Without Due Process of Law. But it is fundamental that the possession and enjoyment by the individual of all of his rights, even that of liberty itself, are subject to such reasonable regulations and restraints as are essential to the preservation of health, safety and the welfare of the community.

People vs. Morse, 84 Vermont 387.

(4) THE RELATOR SAYS IT DEPRIVES HIM OF HIS LIBERTY AND THE EQUAL PROTECTION OF THE LAWS.
It has been repeatedly said that the guarantee of equal protection of the laws means that no persons or classes of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes under like circumstances and their rights, liberty and property, and in the pursuit of happiness.

Santa Clara County vs. So. Pacific R. R. Co., 118 U. S. 394.
Moore vs. Missouri, 159 U. S. 673.

The act in question operates against all feeble-minded, epileptics, criminals and other defective inmates confined in State institutions.

It has been held that the State may classify persons and objects for the purpose of legislation so long as the classification is based on proper and justifiable distinction.

Chicago, M. and St. Paul R R Co. vs. Westby, 178 Fed. 619.

And the legislature has a right to discriminate amongst those persons and to limit the application of its laws to a portion of them only.

Grainger vs. Douglass Park Jockey Club, 148 Fed. 513.

The law will be upheld so long as it operates alike on all persons and property similarly situated.

Barbier vs. Connell, 113 U. S. 27.

It does so operate here - on all persons confined in State institutions, etc.

Therefore, it seems to us the classification is reasonable and should be held to not offend the provisions of the Constitution denying relator the equal protection of the laws.

(5) THE STATUTE DOES NOT DEPRIVE OSBORN OF HIS LIFE, LIBERTY AND PROPERTY WITHOUT DUE PROCESS OF THE LAW.

The statute specifically gives him notice and opportunity to be heard through an attorney to be appointed by him and to thus defend the proceedings.

That is all that the law requires to be done.

Simon vs. Craft, 182 U. S. 427.

We urge that the law in question may be likened unto that which requires compulsory vaccination as a condition of the privilege of attending public schools. Such legislation has been upheld.
Matter of Viemeister, 179 N. Y. 235.

Jacobson vs. Massachusetts, 197 U. S. 11.

In the case of **Matter of Viemeister** (supra), Section 210 of the Public Health Law which excluded children and persons not vaccinated from the public schools until vaccinated, was attacked on the ground that it violated the constitution.

To sustain the law in question here we call the court's attention to the decision of the Court of Appeals in that case in an able opinion written by **Judge Vann** in 1904. The attack on the law was that it violated the Constitution which guarantees the rights, privileges and liberties of its citizens, but the Court of Appeals sustained the statute as a valid exercise of police power.

Judge Vann said (p. 238):
"The police power, which belongs to every sovereign state, may be exerted by the legislature subject to the limitations of the Constitution, whenever the exercise thereof will promote the public health, safety or welfare. The power of the legislature to decide what laws are necessary to secure these objects is subject to the power of

the courts to decide whether an act purporting to promote the public health or safety has such a reasonable connection therewith as to appear upon inspection to be adapted to that end. A statute entitled a health law must be a health law in fact as well as in name, and must not attempt in the name of the police power to effect a purpose having no adequate connection with the common good. As we have recently said, it 'must tend in a degree that is perceptible and clear towards the preservation of the * * * health * * * or welfare of the community, as those words have been used and construed in the many cases heretofore decided.' (**Health Dept. of N. Y. vs. Rector, etc.**, 145 N. Y. 32, 39.) When the sole object and general tendency of legislation is to promote the public health, there is no invasion of the Constitution, even if the enforcement of the law interferes to some extent with liberty and property. These principles are so well established as to require no discussion, and we cite but a few of many authorities relating to the subject. * * *

"The fact that the belief is not universal is not controlling, for there is scarcely any belief that is accepted by every one. The possibility that the belief may be wrong and that science may yet show it to be wrong is not conclusive, for the legislature has the right to pass laws which, according to the common belief of the people, are adapted to prevent the spread of contagious diseases. In a free country where the government is by the people through their chosen representatives, practical legislation admits of no other standard of action, for what the people believe is for the common welfare must be accepted as tending to promote the common welfare, whether it does in fact or not. Any other basis would conflict with the spirit of the Constitution and would sanction measures opposed to a republican form of government.

"While we do not decide and cannot decide that vaccination is a preventive of smallpox, we take judicial notice of the fact that this is the common belief of the people of the State and with this fact as a foundation, we hold that the statute in question is a health law, enacted in a reasonable and proper exercise of the police power. It operates impartially upon all children in the public schools and is designed not only for their protection but for the protection of all the people of the State. The relator's son is excluded from school only until he complies with the law passed to protect the health of all, himself and his family included. No right conferred or secured by the Constitution was violated by that law or by the action of the school authorities based thereon."

We respectfully submit that that part of the health law in question tends to promote the welfare of the community and protect the public health and hence, is a valid exercise of the police power.

In deciding the questions here involved, we call the court's attention to the fact that in a number of cases the judicial branch of our government has held that the presumption is always in favor of the constitutionality of the statute.

People vs. West, 106 N. Y. 293.

And the courts have gone so far as to pronounce that in no doubtful case should they determine legislation to be contrary to the Constitution.

Munn vs. Illinois, 94 U. S. 113.

And that the courts will resolve every reasonable doubt in favor of the validity of the enactment.

Sinking Fund Cases, 99 U. S. 700, on p. 718.

POINT IV.
THE JUDGMENT APPEALED FROM SHOULD BE REVERSED AND THE STATUTE HELD CONSTITUTIONAL.
Dated, September 30th, 1918.

Respectfully submitted,
MERTON E. LEWIS, Attorney-General, Attorney for Defendants.
WILBER W. CHAMBERS, Deputy Attorney-General, Of Counsel.

Appendix:
This brief was accompanied by the opinion of the **Attorney-General of California** upholding the validity of the sterilization statute of that state. (For full text of the opinion see Chapter IX, Sec. 1.)

b. Case pending at time of repeal of statute.
Pending decision by the Court of Appeals, the legislature of the State of New York repealed the statute on May 10, 1920 (Chapter 619 of the Laws of 1920).

Upon this repeal the questions involved became purely academic and the appeal in the Court of Appeals was withdrawn. Thus the litigation in the matter of eugenical sterilization in the State of New York, based upon the Law of 1912 (Chapter 445), never received a final judicial opinion of the highest court of the state."

SOURCE: Reprinted from *Eugenical Sterilization in the Untied States*, Harry Hamilton Laughlin, D.Sc., Assistant Director of the Eugenics Record Office, Carnegie Institution of Washington, Cold Spring Harbor, Long Island, New York, and Eugenics Associate of the Psychopathic Laboratory of the Municipal Court of Chicago. Published by Psychopathic Laboratory of the Municipal Court of Chicago, December, 1922, Pages 217-241.