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Prevention of Opthalmia Neonatorum

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EDITORIALS

PREVENTION OF OPHTHALMIA NEONATORUM

Since 1915 there has been on the Illinois statute books a law designed to prevent a diseased condition known as ophthalmia neonatorum. First, it defines the disease as the condition of the eye or eyes of an infant in which there is any inflammation, swelling, or redness at any time within two weeks after its birth. Section 2 requires a report of such a disease when observed. Section 3 provides that maternity homes and like places shall post copies of the act, instruct employees of their duties under the act, and keep records of the cases. This section also provides that physicians and midwives are to advise the use of a prophylactic to

combat the disease and also to inform parents of "the dangers and dire consequences" of the disease for the purpose of preventing its development "in cases of childbirth attended by midwives."

It should occasion no surprise that the act is weak and unsatisfactory. Accordingly the 57th General Assembly passed a bill amending sections 3 and 8 of the act of 1915. By virtue of this bill the law would have been so changed that in the future every physician, midwife, or nurse who assists or is in charge of the birth of any child "shall instill into each eye of the newly-born child, within one hour after birth, one per cent (1%) solution of silver nitrate, or some equally effective prophylactic . . . ."

Governor Emmerson submitted the bill, known as House Bill No. 67, to Attorney-General Carlstrom for his opinion as to its constitutionality. In due time the Attorney-General delivered his opinion that the proposed law was unconstitutional and Governor Emmerson gave this as his excuse for vetoing it. So far as is known, this is the first time that any law or proposed act has been officially or semi-officially held to be unconstitutional where the purpose of the law was to prevent ophthalmia neonatorum.

A careful reading of the opinion of the Attorney-General fails to disclose anything very tangible as a basis for his conclusion that the proposed legislation was invalid. In the main his ten page opinion is a wearisome repetition of the familiar constitutional bromides. There is very little attempt to analyse previous decisions which have passed upon somewhat similar legislation. However, the point of view of the Attorney-General seems to be as follows: The act must be justified under the police power and the police power is not illimitable. The proposed law interferes with one's liberty to rear one's child according to one's desires. It is therefore arbitrary and an unreasonable limitation upon that liberty because it requires the instillation of a prophylactic as a matter of routine, not merely when there are symptoms or when there is an epidemic in the neighborhood. Thus there is a possible inference in the opinion that if the proposed act were so limited it would be constitutional. This seems to be a fair statement of the essence of the opinion of the Attorney-General.

One constitutional bromide, however, is noticeable by its omission. What of the very great respect that should be accorded the opinion of the Illinois General Assembly that the bill is constitutional? Its members, as well as judges and the Attorney-General, take oaths to obey the constitution. Heretofore in constitutional opinions judges have said as much as if it were a matter of im-

portance.[1] More frequently judges have said that a legislative act is not unconstitutional unless that clearly and palpably would appear to be the situation to reasonable men everywhere.[2] But this bromide appears to be a bitter one for the Attorney-General and accordingly he practically ignores it.[3]

Without knowing Mr. Carlstrom's strength or weakness in this respect, it is something of a habit with practical politicians and business men to refer to professors as impractical men of wild theories. Why is it, then, that professors are so frequently prodding the guardians of our constitutions into considering the *facts* as objectively as humanly possible before they deny the constitutionality of a proposed reform? In this instance the reform is apparently offered in good faith as one step in the betterment of conditions that human beings should face. It seems to be a paradox, if politicians and business men are correct, that the honorable Attorney-General of the State of Illinois ignored the facts and that two professors (we hope that we are not given to wild theories) now propose to present the facts which have been gathered from all available sources known to them.

Public Health Bulletin No. 49 (revised edition April, 1923) was printed by the Government Printing Office in Washington and was secured by merely writing for it. There is nothing in Mr. Carlstrom's opinion to indicate that he was familiar with its contents. The bulletin deals with ophthalmia neonatorum, analysing the laws and regulations relating thereto in the United States as of

1. Mr. Justice Holmes in *Gray* v. *Taylor* (1913) 227 U. S. 51, 56, 33 Sup. Ct. 199, stated: "But it is not lightly to be supposed that a legislature is less faithful to its obligation than a court." A similar utterance will be found in *State* v. *Fairmont Creamery Co.* (1912) 153 Iowa 702, 133 N. W. 895.

2. In *Sharpless* v. *Mayor of Philadelphia* (1853) 21 Pa. 147, 59 Am. Dec. 759, it is stated that "There is another rule which must govern us in cases like this; namely, that we can declare an Act of Assembly void, only when it violates the Constitution clearly, palpably, plainly; and in such manner as to leave no doubt or hesitation on our minds. This principle is asserted by judges of every grade, both in the federal and in the state courts; and by some of them it is expressed with much solemnity of language."

A book could be filled with similar utterances by courts in this country.

3. The only statement in the opinion of Attorney-General Carlstrom that is in point is as follows: "The general rule is that statutes enacted to promote the public health should be liberally construed to carry out such purpose, and every intendment is to be allowed in favor of their validity." Compared with the utterance from the Pennsylvania court, supra, note 2, the assertion of the Attorney General is altogether too weak. Apparently, he was placing a soft pedal upon the presumption that the statute in question was constitutional.

date set forth. From this bulletin we quote the following statements:

"A Committee of the British Medical Association found that more than one-third of those in the schools for the blind of Great Britain owed their affliction to this disease. In the various blind asylums and schools of Scotland, in 1912, the percentage of cases due to ophthalmia neonatorum varied from 27 to 75 per cent, the average being about 35 per cent. . . . It has been conservatively estimated that ophthalmia neonatorum is responsible for about 20 per cent of the blind in the United States. . . . In no field of disease control is the probability of success so certain as the prevention of eye infections in the new born. . . . Notwithstanding this great economic loss to the state on account of ophthalmia neonatorum, it was not until 1881 that Credé gave to the world a prophylactic, thereby connecting forever his name with the prevention of the disease, and the subsequent saving of the sight of infants. The effective and simple way in which he checked the infection by the use of silver salts, and the statistics compiled by him and others gave substantial support to his theories, which have been gradually incorporated in the sanitary policy of all civilized countries. Legislative bodies, both in this country and abroad, having had impressed upon them the importance of the disease, have adopted various legal measures for its control. . . . Eye infections of new-born infants may be practically eliminated by the timely use of a reliable prophylactic, yet a very large majority of the physicians officiating at childbirth do not use a prophylactic as a routine procedure, even in the states where its use is mandatory. Owing to the popular belief that eye inflammations of the new born are caused only by venereal disease infection, it is very probable that many physicians refrain from the routine use of a prophylactic because of the implied stigma."

In Reprint No. 14 from Venereal Disease Information Vol. 10, No. 4, April 20, 1929, as issued by the United States Public Health Service, appears the following on page 16:[4]

"Gonorrheal ophthalmia neonatorum.—This is a preventable and, therefore, controllable condition. It is a disease of the innocent, as the child receives the infection in its passage through the birth canal. The symptoms occur usually twenty-four hours after birth, and even when the infection is in the hands of the skilled specialist, partial or total blindness may result. One-half of the blindness dating from birth, and upward of one-third of the blindness in institutions, is caused

4. In Volume XI, No. 3, page 118 of the same publication there is a summary of an article by George Mackay from the British Medical Journal, London, 1930, I, 61. This summary contains an interesting statement of the experience in Scotland with reference to opthalmia neonatorum and the successful treatment of the disease by the instillation of a silver nitrate solution into the eyes of newly born infants. The summary is omitted here solely because of the lack of space. See also, "A Veto on Prophylaxis for Opthalmia Neonatorum" (1931) 96 Jour. of the Am. Med. Ass'n 1874.

by the gonococcus. The prevention of such tragedies is readily accomplished by the use of a one per cent solution of silver nitrate which is dropped into the eyes immediately after birth. Most states have laws which make this procedure mandatory."

We are indebted to the National Society for the Prevention of Blindness, 450 Seventh Avenue, New York City, for the following recitation of facts:

"At the annual meeting of the American Medical Association in June, 1906, the following resolution was adopted: 'Whereas, notwithstanding the long-continued efforts of the medical profession to make generally known the infectious character of ophthalmia neonatorum and its dangers to sight, the ranks of the blind are still largely increased annually by those who have unnecessarily lost their vision as a result of this disease, and whereas we possess in the silver salts an almost absolute specific for its prevention and treatment, therefore, be it resolved, that this Section recommends that a committee . . . be appointed . . . to formulate and make effective the details of a plan that may give uniform legislation and definite instruction to the profession and laity concerning the prevention and treatment of this disease.' . . .

"The . . . number of states requiring the use of a prophylactic in eyes at birth has increased as follows:

1905— 0 states having law or regulation requiring prophylactic.

1915— 6 states having law or regulation requiring prophylactic.

1930—35 states having law or regulation requiring prophylactic.

"Replies to questionnaires . . . showed that all of the fifty-four departments of obstetrics in medical colleges of the United States and Canada replying teach that a prophylactic should be used in the eyes of all babies at birth. In the same inquiry all maternity hospitals replying state that a prophylactic is used routinely at all births. . . .

"It will be noted that in the above the recommendations apply to all births. Those who do not recommend it for all babies are disregarding the fact that cases in which it will be used cannot be selected on the basis of exposure, or suspected exposure, to gonorrheal infection. It is now known that about forty per cent of the infections of eyes are due to pneumococcus, bacterium coli, streptococcus, staphylococcus, etc. Such infections cannot be so readily predicted, and therefore should be guarded against by means of the prophylactic which is considered equally effective in these cases.

"The treatment which is most generally recommended (one per cent silver nitrate) is simple. In fact it is more nearly comparable to good antiseptic cleansing technique than to medical treatment. Proof of this is the fact that the illiterate southern negro midwife can readily learn to do it and in her hands it is not proving dangerous. . . .

"The wax ampules containing silver nitrate as supplied by boards of health are practically fool-proof at present and improvements are constantly being made in such products. . . .

"It is true that in response to an inquiry in 1925 some complaints of cases resulting in slight irritations were received from health officers, etc., but none of these reported serious consequences. . . .

"Reports of bad results when investigated prove to be due to accidental use of the wrong medicament. The necessity for adopting measures that will insure prevention of this disease is indicated by the fact that twenty-five years ago about one-third of the pupils entering schools for the blind were cases due to ophthalmia neonatorum. In some schools the rate was even higher. Evidence of the effectiveness of the preventive measures is plentiful. See the following statistical proofs:

"(*a*) Cause figures from schools for the blind in the United States show that whereas, of the pupils entering in the school year, 1906-07, 28.2% were blinded by ophthalmia neonatorum, in the year 1929-30 the per cent was 9.2%, a decrease of 67%.

"(*b*) Figures based on midwife births in Philadelphia show that in 1914 (the year before the adoption of the regulation requiring the use of a prophylactic by midwives) there were 52.3 cases of sore eyes from all causes per 1000 births. In 1916 (the year following the adoption of the regulation) the rate was 10.3. By 1928 it had fallen to 5.1.

"(*c*) Also in Philadelphia at the Wills Eye Hospital among 21,888 patients applying for treatment in 1929, only one was a case of ophthalmia neonatorum, a rate of .05 per 1000, while in 1914 the rate had been 1.23 per 1000."

Through the courtesy of the Illinois Society for the Prevention of Blindness, 203 N. Wabash Avenue, Chicago, we were furnished a copy of a letter dated February 27, 1931, from the State Board of Health of Madison, Wisconsin, to Dr. Andy Hall, Director of Public Health, Springfield, Illinois. This letter stated that during the past calendar year only twelve cases of ophthalmia were reported by the various local health officers and that for "several years" no case of total blindness resulting from ophthalmia had been reported, and as far as could be determined no case of total blindness was traceable to that cause. In the State of Wisconsin, according to the letter, the use of the silver nitrate solution is mandatory in all cases.

By way of contrast the Illinois Association has stated that its records show that since the present law was adopted in Illinois in 1915, seventy-one babies have lost their vision unnecessarily. It also estimated that these seventy-one babies will cost the State of Illinois $651,780 to educate and that to pension them for fifty years will cost the state $1,295,750. There is also a statement in the literature of this organization that "last year in Chicago seventy babies were saved from blindness by our ophthalmia nurse."

The facts above set forth should demonstrate to any person who is willing to believe in the germ theory of disease that: (1) Ophthalmia neonatorum is a serious infection which can be prevented or cured in nearly all instances by proper precautions and treatment. (2) The disease does not seem to be one that occurs in the form of epidemics as that term is popularly interpreted. (3) A great risk is being incurred if silver nitrate or other effective prophylactic is not instilled in the eyes as soon as possble after birth. To await the occurrence of symptoms is to invite unnecessary danger. (4) The instillation of a prophylactic is exceedingly simple and involves no more than a minimum amount of danger. The prophylactic itself causes no unfavorable reaction beyond a temporary irritation. Human imperfection is such that it cannot be expected that where so many are instilling a prophylactic no mistakes will occur. (5) The beneficial results by virtue of such preventive treatment have been demonstrated as certainly as anything in the prevention of diseases can be demonstrated. (6) The instillation of a prophylactic can occur and normally will occur in such a way as to give as little offense as possible to the sensitiveness of parents who are committed to faith cures. (7) The welfare of helpless infants and the cost of blind children to the state have been the propelling causes in the adoption of much legislation similar to that sought in Illinois. This legislation has proved to be exceedingly beneficial and there is reason to hope that if it becomes universal and is accepted in a good spirit the disease of ophthalmia neonatorum will cease to be of any moment.

In view of these conclusions how is it possible for one to argue that a legislature in providing for the compulsory instillation of a prophylactic is passing an arbitrary measure and is, therefore, infringing unconstitutionally upon the liberty of parents? What is there in our law that justifies any such conclusion?

The closest analogy that seems to exist in Illinois is a series of decisions concerning compulsory vaccination for smallpox. That matter has been considered in *School Directors* v. *Breen*,[5] *Potts* v. *Breen*,[6] *Lawbaugh* v. *Board of Education*,[7] and *People* ex. rel. v. *Board of Education*.[8] The Illinois General Assembly, apparently, never has passed a law providing for vaccination under the sanc-

5. (1895) 60 Ill. App. 201.
6. (1897) 167 Ill. 67, 47 N. E. 81. See also, *State* ex rel. v. *Burdge* (1897) 95 Wis. 390, 70 N. W. 347.
7. (1899) 177 Ill. 572, 52 N. E. 850.
8. (1908) 234 Ill. 422, 84 N. E. 1046. Cf. *People* v. *Robertson* (1922) 302 Ill. 422, 134 N. E. 815.

tion of a penalty, nor has it ever passed a law directing any administrative board or official to issue such an order in the case of an epidemic. The first three cases arose under an order of the State Board of Health to deny admission to the public schools unless the pupil had been vaccinated. In the *Lawbaugh* case in addition to this fact the city council had formed a local board of health and had provided that this board might suspend a pupil who failed to obtain a certificate of vaccination. The result of the first two cases is most clearly expressed by Judge Carter in *Potts* v. *Breen*. There the decision was that the Board of Health lacked the power to make such a regulation. The General Assembly had conferred upon the Board of Health no such specific power but general powers such as "the general supervision of the interests of the health and life of the citizens of the state," and the making of regulations to preserve the same. These general provisions were included among certain more specific powers such as quarantine and the registration of births and deaths. The reasoning was that the general terms must be construed in relation to the more specific provisions. Accordingly there was no decision that general legislation providing for vaccination for smallpox under penalty for non-compliance was unconstitutional. Judge Carter specifically stated that "that question is not involved here." It is true, however, that in the first two cases and in the *Lawbaugh* case there is discussion to the effect that a regulation by an administrative board requiring vaccination as a condition to the admission to a public school would be unreasonable and arbitrary unless the disease was prevalent or threatened the particular community.

In the last case cited, supra, an ordinance of the City of Chicago excluded from public schools all who had not been vaccinated for smallpox. This ordinance was declared to be void even though the legislature had given the city council the power to "make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease." The Supreme Court of Illinois, however, stated that the legislature had enacted no statute which required vaccination and that it had conferred no such power on the City of Chicago. Particular emphasis, however, was placed on the argument that the ordinance was void because it was not a reasonable measure and not a necessary means for preserving the public health. There was no epidemic in Chicago at that time, and the court seemed to assume that a certain amount of smallpox was to be expected in a large city. The court failed to explain why the

city council did not have the power it assumed to exercise on the theory that such an ordinance, if not necessary, was at least expedient. This decision, therefore, cannot be commended as being very progressive but nevertheless it still remains true that, so far as is known, no Illinois court has ever held unconstitutional a statute requiring the vaccination of human beings. That particular question has never been presented in Illinois.

On the other hand it is well known that in 1904 the Supreme Court of the United States decided in *Jacobson* v. *Massachusetts*[9] that a state law requiring under penalty vaccination for smallpox whenever a local board of health determined that such was necessary for the public health was not offensive to the Fourteenth Amendment. This is in accord with several state decisions. Indeed no known decision in any state has ever held such a law to be unconstitutional.[10]

The Supreme Court of Connecticut in *Gould* v. *Gould*[11] held valid a statute which forbade the intermarriage or the cohabitation of a man and woman, where either of them was an epileptic, provided the woman was under forty-five. Proposals to operate upon certain types of human being to prevent procreation have been the subject of some debate and difference of judicial opinion. The Supreme Court of Michigan has held that it is constitutional to provide for the sterilization of mental defectives for eugenical purposes,[12] and within recent years the Supreme Court of the United States has held that a Virginia statute providing for the operation

9. (1904) 197 U. S. 11, 25 Sup. Ct. 358. The board of health made a finding that smallpox was prevalent in the community "to some extent" and "still continues to increase." This is hardly a statement that there was an epidemic, but it is a conclusion that there was danger of an epidemic and therefore that a medical necessity for vaccination existed. Such was not true in the cases arising in Illinois except *People* v. *Board of Education*, supra, note 8.

Some courts have decided that laws providing for routine vaccination as a condition to admission to public schools are constitutional even though there was no claim that there was an epidemic: *Abeel* v. *Clark* (1890) 84 Cal. 226, 24 Pac. 383; In re *Walters* (1895) 84 Hun (N. Y.) 457, 32 N. Y. Supp. 322; *Bissell* v. *Davidson* (1894) 65 Conn. 183, 32 Atl. 348; Matter of *Rebenack* (1895) 62 Mo. App. 8. In *State* v. *Hay* (1900) 126 N. C. 999, 35 N. E. 459, it is not clear that there was an epidemic.

10. See the citations in the *Jacobson* case (1904) 197 U. S. 11, 16, 21, 33.

11. (1905) 78 Conn. 242, 61 Atl. 604.

12. *Smith* v. *Wayne Probate Judge* (1925) 231 Mich. 409, 204 N. W. 140, 40 A. L. R. 515 (note). See an excellent review of this decision by Professor Burke Shartel (1926) 16 Journal Cr. Law and Crim. 537 (1925), 24 Mich. Law Rev. 1.

of salpingectomy where the woman was feebleminded did not violate the Fourteenth Amendment.[13]

None of these decisions, except two of the Illinois cases dealing with vaccination for smallpox, was considered in the opinion of Attorney-General Carlstrom. If the state may penalize the failure to inject a vaccine virus into the blood stream of a human being; if the state may prevent by penalty the marriage of epileptics; if the state over objection may cause to be performed an operation upon a female which involves cutting through the abdominal wall in order to prevent procreation by a feebleminded person, then it seems to approach the ridiculous to hold that a state, within the constitutional concept of liberty, cannot prevent a loss of vision by dropping into the eyes of an infant within an hour after birth a solution which at most will cause only a temporary irritation.

KENNETH C. SEARS and ARTHUR H. KENT.

THE FEDERAL SENATE'S NEGLECT OF THE NATION'S INTERNATIONAL INTERESTS

1. When the curtain rose last December on the third session of the 71st Congress, it revealed in the stage-setting one feature as changeless as usual, viz., the Senate table covered with papers representing the nation's international interests, unattended to. The Constitution unfortunately requires the Senate's "advice and consent" before the Executive can make contracts deemed necessary for the protection of our international rights and the improvement of our international relations. But to those rights and relations the Senate is callously indifferent.

We do not refer simply to the pending World Court treaty; we refer to the whole field of foreign relations. The President early in the session sent to the Senate a special message asking for prompt action on ten other treaties. Two of these treaties have been pending before the Senate for *five and six* years respectively, three for *three* years; three for *two* years; and one for *one* year. "Inasmuch as these treaties affect numerous phases of private and public endeavor," the President wrote, "I earnestly commend their *early* conclusion to the attention of Congress." And they have already been waiting there for years!

There are also nine other international pacts, not technically

13. *Buck* v. *Bell* (1927) 274 U. S. 200, 47 Sup. Ct. 584, reviewed in (1929) 23 ILLINOIS LAW REVIEW 463. See also many comments listed in Index to Legal Periodicals (1926-28) pp. 176-181.