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Contributors

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MARRIAGE LAWS AND STATUTORY EXPERIMENTS IN EUGENICS IN THE UNITED STATES

By R. Newton Crane, M.A.

There is no epoch in American History of greater interest or of greater importance to the student and the sociologist than that which followed the landing of the Pilgrims upon the continent of North America. In England and in the Netherlands and in Switzerland, they had lived in protest against the constituted authority of their native land in matters of faith and dogma. They claimed the fullest freedom of action where religious and social observances were concerned, and at the same time they denied to their opponents a like liberty. Controversies which at first centred about forms and ceremonies and vestments, were modified by disputes over the personal character of the sovereign and became identified with the political parties in the state. Laws were good or were bad according to the interpretation they put upon them. But, however intolerant we, in this age, may be of their intolerance, we cannot fail to recognise that they evinced a purity and consistency of conduct in morals which exalted their lives and exercised a wholesome influence upon their domestic relations.

These pilgrims, all Englishmen, self-exiled for their form of religion, disciplined by misfortune and by their sufferings for conscience sake, cultivated by extensive observation of the laws of at least three countries, equal in rank as in rights, and bound by no code but that of religion and their idea of the public will, must have rejoiced, when they sailed from Plymouth, at the prospect of an opportunity to put into practice their exalted ideals with respect to liberty and their theories of what laws a state should have and how its government should be constituted

and administered. In the cabin of the "Mayflower," before they disembarked to establish their colony in the new country, they formed themselves into a self-governing political community by a solemn voluntary compact, to which each of the male adventurers subscribed his name. There were but one hundred souls in all, men, women and children, and infants born during the voyage. In this compact they professed to combine themselves together "into a civil body-politic for their better ordering and preservation," and in order "to frame such just and equal laws, ordinances, acts, constitutions and offices, from time to time, as shall be thought most convenient for the general good of the colony." They began with a clean slate. They were not bound by any local laws or traditions, for none such existed in the wilderness in which they sought refuge. They had only themselves to govern, and they had the widest possible field for experiment in legislation. Nearly a generation was passed in a struggle with adversity, with the deep snows and the cold of protracted winters, with the heat and droughts of summer, with famine and pestilence and with contests with savage Indians. The instinct of legislation, nevertheless, was inherent in them. They justified their compact, and they passed laws for their "better ordering and preservation," according to their promise in the "Mayflower's" cabin. Some of the laws were repressive enough to warrant the thought that they were intended to wreak upon the less fortunate of their fellow colonists the vengeance they had prayed Heaven to mete out to their oppressors in the land from which they had escaped. Liberty of worship was practically restricted to those, and those only, who subscribed to the Westminster catechism, and any garb save that of the covenant-pattern, and any conduct which was not a mild variation of austerity, were rigorously suppressed.

There is more truth than cynicism in the trite observation that virtue is the absence of temptation. The paucity of numbers in the infant settlements, where attendance upon religious meetings was strictly inforced by local civil ordinances, as well as by public sentiment, enabled every individual to be a censor of his neighbour's morals. Infractions of virtue were practically impossible, and consequently any lapse from the established law

was quickly discovered and vigorously dealt with. Adultery was a capital offence, and if the extreme penalty was mitigated, the reprieve assumed the less merciful form of the public badge and the cruel social ostracism of which the pathetic story of Hester Prynne, in Hawthorne's *Scarlet Letter* is an illustration. But, however contemptuous modern criticism may be of the narrowness of these legislators, it must be admitted that their influence has been of a salutary character upon the American people. The laws which the Puritans passed, the customs they established and the observances they instituted, still survive, after three centuries, in more or less modified form, and well-marked traces of them may be found impressed not only upon the ideas of the populace but imprinted in the statutes of nearly all of the states which now, forty-six in number, constitute the great area of the United States of America, with its population of approximately ninety millions of people, a people sprung from English stock but admixed with the flux of every diverse kind of continental emigration.

Generally speaking, the traces of the most salutary of the old Puritan laws which are observable in the legislation of the various states, relate to the regulation of marriage, its restraint and its encouragement, the measures for preventing procreation by undesirable spouses, the restriction of employment of women of child-bearing age, the prevention of contagious diseases, the prohibition of the use of alcohol and drugs by adults and tobacco by infants, and the regulation of what is commonly and euphemistically known as the "social evil."

From the outset, long before the word "eugenics" had been coined, or what it is supposed to mean had been formulated into a science, American legislatures were moved to make laws and to enforce regulations with respect to marriages, not merely to thereby execute the ordinances of the Church or to promote ecclesiastical authority, which was held in scant respect, but solely to insure a healthy product of the marriage. As Puritans and the descendants of Puritans they undoubtedly recognised the Levitical law, provided always that they could give it their own dogmatic interpretation, but they were very loth to acknowledge any canons of ecclesiastical law, and certainly attached no

sanctity to them. Such portions of the various statutes of Henry VIII. on the subject, and particularly that of the thirty-second year of his reign, which declared lawful the marriage of all persons "not prohibited by God's law" to marry, became, it is true, a part of the common law of the American states, but the table of affinities was never at any time a part of that law.

For this reason consanguinity, as a bar to inter-marriage between those of the same blood, appears to have had more importance in public opinion, and consequent legislation, than affinity. Thus it happens that at the present time, where affinity is a legal impediment, such impediment continues only with the marriage which created it, and terminates, except in five of the states, upon the death of one of the parties, leaving the survivor free to marry the relative of the deceased. Thus, and for this reason, the marriage of a deceased wife's sister is now, and always has been, permissible in all the American states. In Blodgett *v.* Brinsmead (9 Vermont, 27) the Supreme Court of Vermont said, by way of dictum: "The relationship by consanguinity is, in its nature, incapable of dissolution, but the relationship by affinity ceases with the dissolution of the marriage which produced it. Therefore, though a man is, by affinity, brother to his wife's sister, yet upon the death of his wife he may lawfully marry her sister. Such is the law of this state, whatever may be the statute of Henry VIII." This reasoning has been followed in all the discussions upon the subject in America, and underlying them all is the idea that the inter-marriage of affinities is more likely to result in purer blood and greater virility than where those inter-marry who have any blood in common.

Each state of the United States is sovereign so far as its domestic laws are concerned. There are, therefore, forty-six different codes in the United States, in each of which there are regulations with respect to marriage. Each of the forty-six states defines marriage, regulates the age at which minors are capable of marrying, indicates below what age parental consent is required and the nature of the consent, establishes prohibited degrees, imposes rules respecting licenses to marry, explains who may solemnise the marriage, and provides what, if any, form of solemnisation is necessary.

The age at which minors were capable of marrying, known as the age of consent, was fixed by the common law at fourteen years for males and twelve years for females, and this was the rule in the earlier history of legislation in the United States. But there has been a steady advance in the age, until at the present time there is but one state, Virginia, which adheres to the old common law rule. With but very few exceptions the limit is now eighteen years for males and sixteen years for females. But while a valid marriage may be contracted by a male of eighteen years of age and a female of fourteen or sixteen years of age, as the case may be, the consent of the parents is necessary to such a union. All of the states now have statutes which require that males under twenty-one years of age and females under the age of eighteen may not marry without parental consent, and licenses may not be issued for such marriages. In some instances it is necessary that both parents attend before the licensing authority and signify such assent, but more generally it is sufficient if the written consent of the parents be produced at the time the license is applied for, or when the marriage ceremony is performed. In some states, in addition to the consent of the parents or guardians, the Probate Judge, or other official having jurisdiction in marital matters, must require a bond to be executed in a penal sum, generally of $200, payable to the state, with the condition to be void if there is no legal cause why the marriage should not be celebrated.

Recent legislation in California has resulted in an Act which provides that no license shall be issued when either party is an imbecile or insane, or who at the time of making the application for the license is under the influence of any intoxicating liquor or narcotic drug. In Indiana a similar Act provides that "no license to marry shall be issued where either of the contracting parties is an imbecile, epileptic, of unsound mind or under guardianship as a person of unsound mind, nor to any male person who is or has been within five years an inmate of any county asylum or home for indigent persons, unless it satisfactorily appears that the cause of such condition has been removed and that the male applicant for the license is able to support a family and likely to so continue, nor shall any license issue when

either of the contracting parties is affected with a transmissible disease, or at the time of making application is under the influence of an intoxicating liquor or narcotic drug." The New Jersey law is practically to the same extent, the language being that "any person who has been confined in any public asylum or institution as an epileptic, insane, or feeble-minded patient" shall not inter-marry in that state, "without a certificate from two regularly licensed physicians of the state, that he has been completely cured of such insanity, epilepsy, or feeble-mind, and that there is no probability that such person will transmit any such defects or disabilities to the issue of such marriage." The tendency of modern legislation is on these lines. The scope of such Acts as have been passed or such legislation as is proposed, is based upon the requirement that all who enter into the marriage state shall be sound in mind and body, and unlikely to bring offspring into the world who may be tainted by the ailments, disorders and mental weaknesses of their progenitors. It is for this reason that in a majority of the states marriages between first cousins are forbidden, and that in some of them such marriages are declared incestuous and void.

The view upon which this legislation is based is expressed by Governor Durban of Indiana, in his message in 1905 to the legislature of that state. In it he uses the following language: "The state should exercise the right of preventing the contract of marriage between persons manifestly unfit to assume its obligations, and particularly of such marriage as insures the propagation of defectives who are certain to become a charge upon the state. . . . . We may reasonably consider the advisability of requiring, on the part of those applying for licenses to marry, medical evidence that the contraction of marriage will not threaten society by the perpetuation of mental or physical deficiency." In certain of the states laws have been introduced making the passing of a medical examination a pre-requisite to the obtaining of a license to marry, and for this purpose empowering the licensing officer to call the parties before him and to examine them upon oath touching their physical condition. The Michigan Act provides that "no person who has been afflicted with syphilis or gonorrhœa and has not been cured of the

same shall be capable of contracting a marriage," and those offending against this law incur a penalty of from $500 to $1,000 fine, and imprisonment for five years, or both, and in case of prosecution the husband and the wife may be examined against each other, and the attending physician may be compelled to testify and may not be permitted to shelter himself under the plea of professional privilege. In other states it is made a misdemeanour for any clergyman or magistrate to perform a marriage ceremony between persons one or other of whom was defective in body or mind, and for any person to abet such a marriage.

The tendency to "race suicide" in the United States has been emphasised by President Roosevelt, and a number of societies have been organised to counteract its effect upon the community, by encouraging marriage and by promoting all influences which tend to increase the birth rate. In the language of Mr. Roosevelt, "the institution of marriage is at the very foundation of our social organisation, and all influences that affect that institution are of vital concern to the people of the whole country." Marriage is rendered easier by a law common to a majority of the states which, in effect, provides that where any husband abandons his wife, or a wife her husband, and resides beyond the limits of the state for five successive years, without being known to such person to be living during that time, death is presumed, and any subsequent marriage entered into after the end of the five years, is as valid as if such husband or wife were dead. Furthermore, to encourage matrimony it is now an almost invariable rule that the subsequent marriage of parents legitimatises children born out of wedlock, provided the father recognises the child so born. In other instances this salutary regulation has been advocated in the interests of children who would otherwise have had to bear throughout their lives a stigma which they would have no power to remove. But the rule has been enacted in certain of the states as a direct encouragement to matrimony.

There is also an encouragement to marriage in the facility afforded for its celebration. Marriage is defined by statute in most of the states as a civil contract. It is not a sacrament, and it is not, in any state, necessarily attended or evidenced by

any religious rite. It may be performed at any time of the day or the night, and anywhere. Until very recently no form whatever was necessary. A mere agreement of the parties to be man and wife, provided the mutual consent is *per verba de praesenti*, followed by marital relations, sufficed, and at the present time Scotch, or common law, marriages are legal in a majority of the states, even where licenses to marry are required, The various statutes on marriage indicate who may perform the ceremony, and a wide range, extending from ordained ministers to civil magistrates, justices of the peace, aldermen and even coroners, is afforded to the intending celebrants. These officials usually charge a nominal fee and expense is therefore not a necessary consideration. It is a well-established fact that the marriage rate is quickly responsive to changes in economic conditions, increasing in periods of prosperity and declining after a commercial crisis or panic and during hard times. It is therefore fair to assume that those contemplating marriage, count the cost, at least so far as the expense is concerned.

Paradoxical as it may seem, the facility for divorce in the United States may be considered as an encouragement to marriage. Statistics which have been carefully collected by the United States Government show that during a period of twenty years past the ratio between the number of marriages dissolved by divorce and the number of marriages celebrated, would seem to be between one to thirteen and one to fifteen. In other words, out of every fifteen marriages contracted in the United States one at least is dissolved by divorce. The inference is incontestable, however the fact may be regretted, that the young of both sexes enter into the contract of marriage with the knowledge that if it proves unsatisfactory it may be revoked without disgrace to either party and without impediment to a subsequent fresh contract. The grounds for divorce are of such, and so diverse, a nature that some pretext may be found, or even be agreed upon, for dissolution of the marital tie. From the point of view of both morals and religion such an aspect of marriage is most detrimental to domestic life, but so far as race development is concerned the result is probably beneficial. The union of ill-assorted couples tends to produce either no offspring or offspring

of a degenerate type, and the dissolution of the contract may enable one or other of the spouses to join with a more congenial mate for a more numerous and better reproduction of the species.

Reference has been made to the intent of the legislators to prevent the union of degenerates by the enactment of laws which prohibit the issuance of marriage licenses to epileptics, lunatics, victims of the drug habit, and confirmed inebriates. And it is not only with reference to marriage that such laws have been passed. Sexual intercourse between such persons has been made a misdemeanour, punishable with heavy fine and imprisonment in several states. But the most advanced legislation tending to the improvement of offspring is that which has recently been enacted in two or three of the Western states, where a novel treatment has been devised to prevent the possibility of physically unfit persons and depraved characters producing offspring. In California, in 1909, the legislature passed a statute which provides that whenever in the opinion of the medical superintendent of any state hospital, or the superintendent of the California Home for the Care and Training of Feeble-minded Children, or of the resident physician in any state prison, it would be conducive to the benefit of the physical, mental or moral condition of any inmate of such home, hospital or state prison, to be asexualised, then such superintendent or resident physician shall call into consultation the General Superintendent of State Hospitals and the Secretary of the State Board of Health, and they shall jointly examine into all the particulars of the case, and if, in their opinion, or in the opinion of any two of them, asexualisation will be beneficial to such inmate, patient, or convict, they may perform the same. This Act is on the lines of a similar statutory provision, passed two years before, by the State of Indiana, under which a staff of skilled surgeons is appointed to examine the mental and physical condition of the inmates of certain State institutions, including prisons, having the care and custody of confirmed criminals (and all persons who have been three times convicted of felony are deemed to be "confirmed criminals"), idiots, rapists, and imbeciles, and, where the board of managers and the surgeons unite in deeming a case unimprovable, the surgeons may perform an operation for

the prevention of procreation. It is, perhaps, upon this theory that in Maine, Michigan, Wisconsin and Arizona all marriages become void without a decree of divorce, and therefore without the necessity of the other spouse to resort to the courts, where either party is sentenced to imprisonment for life, and no pardon granted shall restore the convict to his conjugal rights. In the former of these Acts the operation is expressed to be for the benefit of the person operated upon, and this may be the intent of the other statutes of like nature, but the law is claimed to be for the advantage, as well, of the community at large, by preventing the possibility of such degenerates and defectives having offspring.

The regulation of the "social evil," and its efficacy in preventing the spread of contagious disease, has had at least one illustration in the United States, but unfortunately the law was repealed, and a search of the statutes of the various states discloses no recent attempts in this direction. In 1870 a law was enforced in the City of St. Louis which provided that every woman who followed the vocation of a prostitute should be compelled to register her name and her address, and to make application for a license. The license was granted to her upon the condition that she should be subject to medical examination at stated intervals, and that she should ply her vocation in a certain area of the City. Failure to comply with these provisions, and any act in the nature of solicitation, either by word or manner, or even in the character of her dress, caused an immediate revocation of the license. By universal consent most beneficial results followed upon the enforcement of the law. Prior thereto the thoroughfares of the city were infested by lewd characters who paraded through the principal streets in open vehicles and thronged the pavements, not only during the nigh but in the afternoon. After the Act was put in force the streets were absolutely cleared of such passengers, and were secure to the use of all classes of citizens. The records of the police showed an almost instantaneous and marked decrease in all kinds of vice and intemperance. The cases of infectious diseases in the dispensaries and hospitals and under private treatment were likewise and correspondingly diminished. Unfortunately

certain individuals, and those least likely to be affected by the enforcement of the law, raised the outcry that the licensing of prostitutes was in principle the legalising of crime, and they demanded a repeal of the municipal ordinance. Although small in numbers these individuals were supported by the ministers of various influential denominations of religion, and as the promoters of the ordinance were without organisation, a municipal assembly was elected pledged to undo the work which had been accomplished, and the ordinance was repealed. Fortunately, however, it had been long enough in force to establish, and insure the continuance of, some degree of order and propriety. The women themselves had learned that their condition was much better when their lives and their practices were properly regulated, and as a result they chose to continue, at least to a great extent, voluntarily, that which the law had forced upon them. It is significant that while so beneficent a law was repealed, an Act was passed last year in an adjacent state making it unlawful for any person to follow the occupation of a barber unless he should first obtain a certificate of registration. The Act provides for a board of examiners of three persons, to be appointed by the governor, and to consist of practical barbers, and that they shall hold examinations and inspect barbers' shops, and issue certificates of registration which shall be granted to those having the requisite skill and sufficient knowledge of common diseases of the face and skin to avoid the aggravation or spreading thereof.

Regulations for the restriction of the sale of intoxicants in America are common to most of the states, but differ widely in their nature and purpose. In America there are no "tied-houses," and the license for the sale of drink being issued to the individual and not to the public house, no interest in it becomes vested. Legislation in America on the subject of drink is therefore more simple, and is less likely to be opposed than in England. The extremist form of restraint is total prohibition, which has been adopted in a number of the Western states, and is more or less strictly enforced. Local option has its advocates in many communities, and it is contended that it is more consistent with the expression of the will of the people in small localities than

prohibition could possibly be, as in every instance the latter must be indiscriminately enforced, in large and small communities alike, throughout the entire area of a given state. Still a third form which legislation for the restraint of the sale of intoxicants has taken, that is, what is called "high license," has many advocates, who base their arguments in its favour upon the ground that it permits the people to be served, while at the same time it yields a large revenue for the state and improves the condition of the houses in which the drink is sold. In the prohibition states special laws have been passed forbidding the manufacture of all kinds of intoxicants as well as their sale, and in some instances authorising a search in private as well as public places for them. In Texas it is a misdemeanour to drink intoxicating liquors on a railway train except in a restaurant car, and in many states there are Acts providing that liquor shall not be sold within a certain distance, in some cases as far as four miles, of schools or educational institutions of any kind or of railway construction camps or barracks. In nearly all of the states it is an offence to serve women as well as minors in a public house. The Missouri legislature passed an Act making it a misdemeanour to give away intoxicants in districts where the supply of drink had been prohibited. This, however, the Supreme Court held to be an infringement of the liberty of the subject so far as it was an act of hospitality, but otherwise, if it was connected with a business transaction. Apparently a general idea prevails in many of the states that the greater inconvenience there may be in the consumption of drink, or in the opportunity for obtaining it, the less there will be consumed. In New Hampshire, for example, innkeepers are prohibited from serving drink at any table in a room where drink is usually sold, while in Vermont booths, stalls or obstructions in a bar room, and furniture of any description whatever, is forbidden. In other communities it is provided that the windows of a room where intoxicants are sold shall have no blinds or screens, and that there shall be no obstruction between the bar and the view of a passer-by. Where licenses are imposed, as much as $1,000 is levied upon railway companies for each restaurant car in which drink is served.

Akin to the restrictions upon the sale of intoxicants are

those which seek to prevent the use of tobacco. In Arkansas, Washington and South Dakota it is a misdemeanour to sell or even give away cigarettes or cigarette papers, to adults as well as to minors. In Florida, also, it is unlawful to sell cigarettes to minors, and in Illinois persons under eighteen, and, oddly enough, "over seven years of age," are forbidden to smoke cigarettes in public places. These sumptuary laws, which are a type of those prevailing in a number of states, would have delighted the hearts of the old Puritans, but it can hardly be conceived that even they would have impliedly given permission to children under seven years of age to smoke cigarettes in public places.

The appalling increase of pulmonary diseases in all sections of the United States has led to a well-organised campaign for their abatement and extinction, if possible. In nearly every state sanatoriums are now provided at public expense in which patients in any stage of the disease may be isolated and carefully attended by expert physicians. In many cases provision is made for the instruction of children in the public schools in matters relating to the detection of the malady and the use of its prophylactics. Last year the New York legislature passed a law declaring tuberculosis to be an infectious and communicable disease, and requiring reports, as in the case of scarlet fever, from physicians and others of all those known to have had the malady. It also provides for examination of patients and the keeping of a register as to their condition, and for disinfection of premises, which may not be subsequently occupied until they have been disinfected. It declares that any person having tuberculosis who shall not exercise proper care to prevent disseminating it, shall be guilty of a nuisance, and upon failure to comply with prescribed regulations, shall be guilty of a misdemeanour.

It is not possible, as yet, to collate statistics which will demonstrate what, if anything, has been accomplished by these or other of the various measures which have been enacted for "the better ordering and preservation" of the American community, but it is certain that the mere agitation which has resulted in this legislation, however tentative it may be, has had a salutary effect upon the body-politic.

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