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Ralph Potter has noted that "the use of a label such as 'mentally retarded' is a highly risky and ambiguous moral enterprise."[1] In this essay I will examine the ways in which the application of labels supposedly denoting some form of mental inability has exposed men and women to a particularly serious risk: the threat of being permanently sterilized by the state independently of any personal choice. Since 1907, thirty states have at one time or another had laws which permitted the state to sterilize coercively those who were regarded as "feebleminded," "mentally ill," or perhaps "habitually prone to crime."

Originally passed during the height of the eugenics craze, these laws have, in some cases, been rewritten to meet the scientific skepticism which has rejected their original basis; nevertheless, the risk of being permanently sterilized still faces those who are deemed mentally inadequate by the state.[2]

In many cases these laws have been tested in the courts to determine what power the state has to prevent those it labels "undesirable" from ever bearing children or ever bearing them again. This essay will examine these judicial decisions in an effort to uncover: first, a series of assumptions about the meaning of the label "retarded" which definitely color judicial perceptions of retardation, and second, basic patterns of ethical reasoning about the nature and status of the rights of the retarded which underlie these court decisions. I shall attempt to lay open the interaction between assumptions about labels and patterns of moral reasoning which shape these decisions, and indeed, much of our public policy with regard to the retarded.[3]

In these decisions, courts were faced with serious new questions for which "mechanical jurisprudence," in Pound's famous phrase, left them ill prepared. Deductive appeals to precedent were not enough and rarely are in these difficult areas where law, ethics, and political philosophy intermingle,[4] as a number of writers have shown. Hence, these

decisions are marked by frequent expressions of ethical reasoning exemplified in the avowal of one supreme court that "every forward step in the progress of the race has been marked by an interference with individual liberties."[5] It thus becomes an important enterprise to examine the impact of labeling in the context of specific types of ethical reasoning which have exerted a powerful influence in shaping state action toward the retarded and the insane.

I.

Though courts have not been unanimous in their judgments as to the rights of the retarded and the powers of the state, most have manifested little concern for any fundamental rights of the retarded.[6] For example, in *Buck vs Bell* (1927), the major Supreme Court decision in this area, Justice Holmes never referred to any supposed rights of the individual. He simply referred to state sterilization as a "lesser sacrifice" that some persons are called upon to undergo for the state. For purposes of precedent, he compared it to compulsory vaccination which the Court had already upheld.[7] Precisely the same analogy had been employed earlier by courts in Michigan and Virginia to legitimate state sterilization of the retarded.

This analogy to "public health" legislation is interesting for two reasons. First, it clearly suggests the essentially "social health" claim which was at the base of the early legislative activity in this area. Second, it suggests an important assumption about the threat posed by retardation. Retardation is likened to a disease which spreads throughout the community if not checked. Furthermore, it would seem that if this analogy is really serviceable, one would have to see some imminent threat to all the members of the community to justify this vaccination against the disease. This was precisely the situation in which the Supreme Court upheld compulsory vaccination.[8]

While Holmes simply ignored anything that might be called a right to procreate, a somewhat more obvious discussion is found in *State vs Troutman*, a 1931 Idaho case involving sterilization on strictly eugenic grounds, in which the court said in part: "If there be any natural right for mental defectives to beget children, that right must give way to the police power of the state in protecting the common welfare, so far as it can be protected, against this type of hereditary feeblemindedness."[9] This court recognizes at least a potential human right involved, but it is not even sure that such a right exists. Even if it granted that such a right exists, it seems clear that this court would view the state as possessing the power to suppress it permanently for eugenic reasons. In such a situation, it is a serious question whether or not the right is seen as a fundamental human right or merely as one interest among many. Furthermore, we must note again the adoption of a definite perception about the meaning of retardation as a threat which

stands ready to inundate the society with genotypically retarded offspring unless stopped.

This decision appeared as one of five that were handed down by state supreme courts in the five years immediately after the Supreme Court ruling in *Bell.* Courts in Utah, Idaho, Kansas, Nebraska, and Oklahoma all relied upon *Bell* to uphold the power of the state to sterilize the retarded and the insane. Among these, even *State vs Schaffer,* which seems most sensitive to the issues involved, still did not see any fundamental right of the individual involved:

> The interest of the individual invaded by the statute is of the highest order, and the invasion can be justified only as a major necessary protection to some more important interest. Reducing this problem of reconciliation of personal liberty and government restraint to its lowest biological terms, the two functions indispensable to the continued existence of human life are nutrition and reproduction. Without nutrition the individual dies; without reproduction the race dies. Procreation of defective and feebleminded children with criminal tendencies does not advantage, but patently disadvantages, the race. Reproduction turns adversary and thwarts the ultimate end and purpose of reproduction. The race may insure its own perpetuation and such progeny may be prevented in the interest of the higher general welfare.[10]

This passage does not actually discuss procreation in terms of rights. It begins by describing the activity as an interest which a general concern for human liberty might protect from state intrusion. Describing the activity only as an interest means that the court can easily decide that when some state interest (defined here in eugenic terms) is asserted, it can overwhelm this merely private interest. Here there is no balancing of rights, but only a view that allows a somewhat vague personal interest to be sacrificed when it runs afoul of the benefits to be derived from state action.

A similar lack of serious consideration of procreative rights has continued to appear in court decisions relating to the retarded in the last decade. Local courts in Ohio, Maryland, and Missouri have ordered sterilization of the retarded in the absence of specific state law when existing statutes gave them broad but ambiguously defined power to care for retarded persons who could not be committed to state institutions.[11]

Judge Concerned for Budget

In the Ohio case (*In re Simpson*), the judge was explicit in his concern for the state budget and the monetary burden of the retarded. His decision is a superb example of the way in which the benefits to be derived from sterilization need not be seen in strictly eugenic terms, but in the simple framework of increased taxation and monetary expenditure:

> This girl is likely to become pregnant repeatedly and produce children for whom she cannot provide even the rudiments of maternal care. There is the further probability that such offspring will also be mentally deficient and

become a public charge for most of their lives. Application has been made to the Muskingum County Welfare Department for aid for dependent children payments for the child already born. To permit Nora Ann to have further children would result in additional burdens upon the county and state welfare departments which have already been compelled to reduce payments because of a shortage of funds. . . . It is the opinion of this court that the welfare of both Nora Ann Simpson and society would best be served by having an operation performed which would prevent further pregnancies.[12]

Aside from the obvious monetary considerations in this passage, there are also several crucial assumptions about the condition of the mentally retarded person involved. The court assumes that 1) she will be promiscuous, 2) she will provide no maternal care, and 3) her children will likewise be retarded. There is unfortunately little evidence given from which one could test the accuracy of applying such serious labels to the defendant in this case.

Cases of this nature in which such broad statutory language was used to authorize sterilization have generally occurred in local probate or juvenile courts. In the last five years, however, two major decisions by state supreme courts in Nebraska and Oregon have upheld the power of the state to sterilize the retarded under specific provisions of state law. In Oregon (*Cook vs State*), the court held constitutional a law permitting state sterilization of those found by a board to be unable to provide adequate care for their children. Though the statute does specifically refer to the "parent's inability by reason of mental illness or mental retardation to provide adequate care," the aim of the law would force its expansion to a broad class of those deemed "bad parents." In upholding the law, the court failed to mention any supposed procreative rights of the retarded. The court felt that the Supreme Court had already dealt with these questions, and that in other decisions, "the premise that state sterilization laws are constitutional when validly drawn was not disturbed." In its most explicit defense of the power of the state, any mention of rights is noticeably absent:

The state's concern for the welfare of its citizenry extends to future generations and when there is overwhelming evidence, as there is here, that a potential parent will be unable to provide a proper environment for a child, because of his own mental retardation, the state has sufficient interest to order sterilization.[13]

In Nebraska (*In re Cavitt*), the state supreme court, by a one vote margin, upheld a law found unconstitutional by a lower court which permitted a board to order sterilization as a precondition of release from a state home for the retarded. Here, the majority opinion did at least consider the question of individual rights, but as in the other cases, the state power was judged greater:

It can hardly be disputed that the right of a woman to bear and the right of a man to beget children is a natural and constitutional right, nor can it be successfully disputed that no citizen has any rights that are superior to the common welfare. Acting for the common good the state in the exercise of

its police powers may impose reasonable restrictions upon the natural and constitutional rights of its citizens.[14]

The court went on to claim that mental retardation is precisely such a situation where reasonable restrictions are justified. The assumption that sterilization is only a "reasonable restriction" was not unique to this court. It appears in many of the other decisions.[15] Yet the permanent nature of sterilization does seem to differentiate it qualitatively from other activities like compulsory vaccination or even obscenity laws.

Frequent Recurrence of Two Points

In these cases which uphold the sterilization of the retarded and the insane, two points recur with great frequency. The first is the way in which the label "mentally retarded" is expanded and re-phrased to include much more than the original expression may mean. The mentally retarded are referred to in terms which stress their status as onerous and burdensome to others. In an earlier era, this burdensome status was reflected in the fact that the label "feebleminded" almost always meant that the person was liable to have other "feebleminded" children who would have to be cared for by the state. Most courts simply assumed this, as did the Michigan State Supreme Court in *Smith vs Wayne* (1925), when it wrote: "It definitely appears that science has demonstrated to a reasonable degree of certainty that feeblemindedness is hereditary."[16] This simple Mendelian picture of genotypically retarded offspring has been replaced by more complex explanations; but new meanings of the label "retarded" have been developed which still stress the burden of the retarded. Before, the emphasis was on bearing retarded offspring. The new claim is that the retarded will be unable to provide care for their children, who will thus become a burden to the state. A good example of this approach is the Oregon law noted above which provided for sterilization when a board found these persons likely to have children they could not care for.[17]

Aside from the underlying interpretation of retardation which stressed the burden of the retarded, courts frequently referred to these persons as "degenerate," which is a significantly more lurid term. At other times they are referred to as "socially inadequate" in an undefined manner. Often the terms idiocy and imbecility are used in vague ways, so that mental retardation comes to be equated with "idiocy" and "imbecility" which are much more emotively laden terms. The most revealing example of this transformation of labels comes from Holmes' opinion in *Buck vs Bell*:

> We have seen more than once that the public welfare may call on the best citizens for their lives. It would be strange if it could not call upon those already who sap the strength of the state for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped

by incompetence. It is better for all the world, if instead of having to execute degenerate offspring for crime, or let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind.[18]

Here the risks in labeling are readily apparent. Carrie Buck is not simply retarded. She is described as an "imbecile," as one who will bear "degenerate" offspring, and as "manifestly unfit" for procreation. Furthermore, the danger inherent in such use of labels is highlighted when one realizes that the "third generation of imbeciles" referred to by Justice Holmes was a baby who was only one month old at the time when it was appraised as retarded.[19]

The second and even more crucial element in these cases is the moral outlook which contains a definite view of the relation between supposed rights and benefits. In a general way, this view saw rights as a personal interest which had to be adjudicated in terms of the benefits derived from the pursuit of this interest. This outlook can be seen in several of the passages quoted above, most notably in Holmes' famous dictum. A more outright formulation of this perspective comes from *Smith vs Wayne*, in which a court for the first time held constitutional a strictly eugenic sterilization law:

In view of these facts what are the legal rights of this class of citizens as to the procreation of children? It is true that the right to beget children is a natural and constitutional right, but it is equally true that no citizen has any rights superior to the common welfare. Acting for the public good, . . . the state may always impose reasonable restrictions upon the natural and constitutional rights of its citizens. Measured by its injurious effect upon society what right has any citizen to beget children with an inherited tendency to crime, feeblemindedness, idiocy or imbecility? This is the right for which Willie Smith is contending. It is a right which the statute enacted for the common welfare denies him.[20]

This is quite clearly an adjudication of the exercise of rights in terms of benefits and harms. The court explicitly says that this is the measurement used. Later on in this same opinion, the court provided the most outlandish statement of this position when it wrote: "It is an historic fact that every forward step in the progress of the race has been marked by an interference with individual liberties."[21]

Courts Not Precise in Definitions

In utilizing this general perspective, the courts were not very precise in their definitions of either of the key terms "benefits" or "rights." The former was commonly referred to as the "general welfare," but this is not very helpful in understanding the kinds of benefits or goods that could override the presumed rights involved. Generally in the cases cited above, the consequences which are described as sufficient to override the presumed rights involved are two. First, there is the obvious concern with "racial health" which marks the eugenic basis of much of the early legislative activity in the field. This is manifested in

phrases about "race degeneracy" or "racial progress" which dot the judicial landscape on these matters before and after *Bell.* One particularly good example is the view of the Virginia State Supreme Court in the case of *Bell.* Here the court held state sterilization a valid exercise of the police power in order "to promote the welfare of society by mitigating race degeneracy and raising the average standard of intelligence of the people of the state."[22]

This patently eugenic definition of the welfare secured or enhanced by the sterilization of the retarded has been supplemented in some cases by a second monetary consideration. Several of the decisions quoted above make explicit references to the increased costs to the state of allowing these persons to reproduce. This is a much broader and less easily disproved concern than the older eugenic basis. If the Mendelian picture of inherited retardation is accurate, then the costs are obvious. If it is not, it may still be possible to point to the notion that the retarded will be unable to care for their children and the state will be called in to assume responsibility.

These two understandings of the welfare that would be adversely affected if the retarded had children were both general in nature and could easily serve to justify state action in this area. This, however, seemed to leave the exercise of possible right involved here to be determined by the benefits that might accrue to a large number of people through the exercise or suppression of those rights. One way of altering the statist implications of this result was to argue in terms of benefits which would also come to the individual who would be sterilized. Frequently this was done on the assumption that certain individuals could function outside of institutions if they did not have to worry about pregnancy or the care of children. For example, in *In re Cavitt*, the Nebraska Supreme Court wrote of "the probability that additional reponsibilities of parenthood would in all likelihood handicap her potential rehabilitation." In a later section of the opinion, the court was at pains to point out that "sterilization does no harm to the patient other than to eliminate his capacity to procreate."[23] Similar applications of a benefit-harm calculus to individuals themselves appear in several other court opinions.[24]

A more forceful method was followed by the Utah legislature when in a 1925 law, it specifically granted to the boards of control of various state institutions, including the prison, the power to order sterilization when, in the opinion of the board, "The welfare of the inmate and of society will be promoted by such sterilization." Further, the act specified that when the warden or superintendent of any institution "shall be of the opinion that it is for the best interests of any inmate of the institution under his care and of society that such inmate be sexually sterilized," he is required to present a petition to the governing board seeking approval for such action.[25] Subsequently

the law was held valid by the state supreme court, but in the instant case, the court held that the requirement of benefit to the individual had not been met and thus reversed an order for sterilization.[26]

In conjunction with the various meanings given to the concept of "welfare" or "benefit," the courts were also unclear about the status of the right involved. As we saw before, some courts were not even sure that it was a right, and others were only willing to call procreation an "interest" of the individual. In general, most of these courts were reluctant to discuss procreation as a fundamental human right, at least until recently. This can be brought into sharp relief by a contrast that can be seen right in the cases themselves. Several of the early laws establishing state sterilization of the retarded failed to provide for a hearing at which the affected person or his/her attorney could present counter evidence and cross-examine those desiring his/her sterilization. Every court that considered this question struck down the omission of a hearing as a gross violation of a fundamental right to procedural justice embodied in the "due process" clause of the Constitution.[27]

If this is a paradigm of a fundamental right which the court was willing to uphold, even for the retarded, it is clear that any supposed right of reproduction was a good deal less fundamental than that in the minds of the courts.[28] Perhaps the idea of "interest" best elucidates the uncertain meaning of the "rights" language that appears in these decisions. A right to procreate is not a fundamental human right, but only one personal interest among many that an individual may pursue. This seems also indicated by the approach noted above which argued that there might be other benefits to the individual from sterilization. Here the courts simply place reproduction as one interest among many which may be fostered by state action, with nothing more fundamental about it than other types of activity.[29]

In these cases, we find a consistent pattern which combines onerous labels that stress the burden of the retarded, with a pattern of reasoning which employs that perception of the burden to justify permanent elimination of the reproductive powers of the retarded. By labeling the retarded in ways which stress and magnify their burden on society, these courts make it a simple matter to employ a rather crude cost-benefit analysis to determine if the retarded shall be allowed any potential reproductive power at all; their alleged burdensome status makes the outcome of such an analysis almost a foregone conclusion.

II.

This rather obvious form of cost-benefit reasoning was not the only pattern of ethical reasoning employed by the courts in dealing with the question of sterilization by the state of those labeled retarded. Though it was widely employed, it was by no means universal. Several important court decisions involving state sterilization discussed the

procreative process in terms clearly implying a rejection or serious modification of the framework analyzed above.

To begin with, the Supreme Court itself in *Skinner vs Oklahoma* (1941) declared a state punitive sterilization law unconstitutional on equal protection grounds. In the opinion written by Justice Douglas, a new concern, procreative rights, appears clearly in the foreground:

> Marriage and procreation are fundamentals of the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to disappear. There is no redemption for the individual whom the law touches. Any experiment which the state conducts is to his irreparable injury. He is forever deprived of a basic liberty.[30]

The outlook here has shifted a great deal from that espoused in *Bell*. Procreation is seen as a basic liberty which the state must protect against intrusion and suppression. This is made evident at the outset of the decision. Justice Douglas's first sentences read: "This case touches a sensitive and important area of human rights. Oklahoma deprives certain individuals of a right which is basic to the perpetuation of a race — the right to have offspring."[31] In reading this decision, one receives the strong impression that the police power of the state is not seen as including the power irrevocably to suppress this basic right. This view is stated more openly by Justice Jackson who wrote in a concurring opinion to *Skinner:* "There are limits to the extent to which a legislatively represented majority may conduct biological experiments at the expense of the dignity and personality and natural powers of the minority — even those who have been guilty of what the majority defines as a crime."[32]

The emphasis in this last passage on limits beyond which the police power of the state cannot go was voiced earlier than *Skinner* in several important court decisions and dissenting opinions concerning the sterilization of the retarded. The most direct and forceful enunciation of this view of fundamental rights involved is contained in a dissent to *Smith vs Wayne*. Writing for himself and two others, Justice Weist of the Michigan state supreme court argued:

> Bills of rights in American constitutions are not grants of rights to the creators thereof nor do they measure the rights of the governed. They declare some inherent rights superior to the police power and inhibit violation thereof. The inherent right of mankind to pass through life without mutilation of organs or glands of generation needs no declaration in constitutions, for the right existed long before constitutions of governments, was not lost or surrendered to legislative control in the creation of government, and is beyond the reach of the governmental agency known as police power.[33]

This passage is evidence of a basic difference of moral outlook from the majority opinion which referred to interference with the liberties of the individual on behalf of the progress of the race. It should be noted, however, that the right which is here so vigorously defended is

not quite the same as the "right to procreate" enunciated in *Skinner*. Here the right seems associated with "bodily integrity" or a right not to be mutilated by the state. This is still a stress on basic human rights, but the precise nature of the right appealed to has changed.

Two cases from the first decade of litigation on this issue, from 1910 to 1920, broached the subject of fundamental rights in a similarly direct manner. In a 1917 case, *In re Thompson*, the New York Supreme Court specifically held a eugenic sterilization law to be unconstitutional on two grounds.[34] The first was an equal protection basis that held that the burden of sterilization would fall hardest on those already under state care and thus would be inherently unjust with reference to those selected to be sterilized. It would tend to miss those who were wealthy enough to be cared for at home or in a private hospital, and this would deprive some of the retarded of the equal protection of the law.

The other ground for the holding was "that 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." In short, the forceable sterilization of the mentally retarded was a power that the state did not possess. The court saw the mentally retarded man who was the subject of the case as a unfortunate poor victim of retardation. As such, they reasoned, he was not a harm to the state but rather, because of his condition, ought to be "cared for and treated and strengthened and developed if possible." Sterilization in order to save future expense was not, in the opinion of this court, a caring act. According to the court, "such does not seem to this court to be the proper exercise of the police power. It seems almost inhuman in its nature."[36] Though the New York court did not discuss the rights involved in any detail, it is significant that it saw a limit beyond which the police power of the state could not go.

Court Cites Precedent

As basis for its concerns, the New York court cited as precedent the New Jersey Supreme Court decision of 1913 (*Smith vs Board of Examiners*) which held a eugenic sterilization law unconstitutional.[37] Prior to the Supreme Court decision in *Bell*, this decision was cited by several other state courts as precedent for finding state sterilization laws unconstitutional.[38] Reading the decision, it is clear that the court saw this as a threat to the liberty of the individual "of the gravest magnitude." They specifically noted that the law "with which we deal threatens the life and certainly the liberty of the prosecutrix in a manner forbidden by both the state and federal constitutions unless such an order is a valid exercise of the police power."[39] Seeing the right involved in such fundamental terms, they were hence

extremely reluctant to sanction state intrusion in this area. Some passages will serve to capture the concerns of the court:

> For 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 not 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 feebleminded 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.[40]

The court went on to suggest that racism or Malthusian considerations could be used by some legislatures to enforce sterility on certain classes in society. It concluded, on the basis of such concerns, thus:

> Evidently the large and underlying question is how far government is constitutionally justified in the theoretical betterment of society by means of the surgical sterilization of certain of its unoffending but undesirable members. If some, but by no means all of these illustrations are fanciful, they still serve their purpose of indicating why we place the decision of the present case upon a ground that has no such logical results or untoward consequences.[41]

The court declared the law unconstitutional on equal protection grounds because the law applied only to those in state institutions. It is clear, however, that the court was gravely concerned with granting to the state the power to sterilize some of its citizens. The New Jersey court's perception of a serious invasion of personal liberty involved in this new acquisition of power by the state is a forceful example of the difference in judicial outlook from such a case as *Bell* where one of the most famous jurists in American history did not discuss some of the issues raised almost 15 years earlier.

In this group of judicial opinions, we find a very different perspective in precisely the same areas of concern that we examined in the previous set of cases. First, these courts are more aware of the ambiguous process of labeling and of the potential for harm in labels themselves. Second, they seem much less willing to view procreation and procreative rights in the broad cost-benefit terms employed by the other courts.

The New Jersey case just discussed is an excellent example of a much different sensitivity to the labeling process. The court here expressed deep concern that if the sterilization of one class, like the retarded, is permitted, then other groups arbitrarily labeled as undesirable by a legislature could also be sterilized: "There are other things besides physical or mental diseases that may render persons undesirable, *or might do so in the opinion of a majority of a prevailing legislature.*" (Italics mine.)[42] The evident concern here is that a simple majority of a legislature might label whole groups as "manifestly

unfit" or "degenerate" and set them up as target groups for a sterilization program.

In another set of cases, the concern for the onerous and degrading label of "having been sterilized" was itself severely challenged. In two separate decisions, state sterilization of criminals was ruled unconstitutional as "cruel and unusual punishment." The thrust of both decisions was that the permanent mark or label of sterilization is degrading in the extreme. The judge in the first case (*Davis vs Berry*) explicitly wrote: "The physical suffering may not be so great but that is not the only test of cruel punishment; the humiliation, the degradation, the mental suffering are always present and known by all the public and will follow him wherever he may go. This belongs to the dark ages."[43] This conclusion was reinforced in *Mickle vs Henricks* which pointed to the onerous status of the sterilized as a permanent punishment which could not be removed once an offender paid a specified penalty for his crime.[44]

In each of these cases, a perception of the ambiguous and potentially harmful nature of labels is clearly before the mind of the court. Another significant departure from the use of labels exemplified by Holmes comes from the New York Supreme Court. *In re Thompson* challenged sterilization as an exercise of police power directly. In this decision, the court also challenged the very labels used by other courts and legislatures. First, they pointed not to what "science has proved," but to contradictory testimony and evidence of the desirability of sterilizing the retarded. Second, they do not refer to the retarded in the lurid language of Justice Holmes. They are never referred to as "degenerate." They are "patients," "unfortunates," or "unfortunate victims," but never "manifestly unfit" or "imbecilic."[45]

The most illuminating differences over the use of labels and their meanings comes from the strong dissenting opinion in *Smith vs Wayne*. Throughout his vigorous attack on the majority, Justice Weist constantly refers to these people as "unfortunates," unlike the majority which used the terms "idiot," "imbecile," and "degenerate" rather indiscriminately. Furthermore, he challenged the accuracy and meaningfulness of the labeling process itself and cited a great deal of evidence on the ambiguity of labels like "imbecile" or "idiot." Finally, he challenged the assumption that the label "feebleminded" also meant "manifestly unfit" for procreation.[46] Alongside of the open preference of the majority for a cost-benefit calculation to justify the sterilization of "degenerates," this dissent launches a frontal attack on both the use of labels and the ethical reasoning which were pillars of the majority opinion.

Opinion Exemplifies Differences

This dissenting opinion provides the strongest example of the differences between this group of cases and those previously discussed in

the second major area of concern: the ethical reasoning employed. All of these judges do recognize that there will be some additional expense to the state if these people do have children. Even if the children are perfectly normal, at least some of these people may not be able to provide adequate care and adoption agencies will be called into the picture. Furthermore, one of the favorite arguments of the proponents of sterilization was that these people could be sterilized and then released from permanent care facilities. These decisions that we are now considering recognize that their alternative of providing permanent care *where necessary* would be more costly than such a scheme. In all of these ways these courts recognized increased costs of the failure to sterilize. What they did not grant was that such considerations were the only ones that counted in such decisions. Specifically, there were certain fundamental rights which could not be reduced to the confines of such a calculation of "welfare" as it was often vaguely defined. As we have noted above, the courts were not as precise as one might wish in specifying just what these rights were. Three different rights were employed, generally with the same result: sterilization by the state was a violation of such rights and its constitutional status was at least doubtful.

The first right relied on was a "right to procreate," which was usually seen as an aspect of personal liberty protected from state suppression by the 14th Amendment. This was the right stressed by the Supreme Court in *Skinner vs Oklahoma* and by the New Jersey Supreme Court in *Smith vs Board of Examiners.* It is a straightforward claim that the liberty protected by the Constitution encompasses the liberty to procreate and is thus beyond the reach of state law. The second right which was sometimes utilized might be referred to as a right to "bodily integrity." This is perhaps analogous to the principle of totality in Catholic moral theology in that it does not stress procreation as a personal liberty so much as a right not to be "mutilated" or to have bodily functions destroyed on the basis of some vague notion that it will lead to some desirable consequences. Such an arrangement as this is openly embedded in the dissent in *Smith vs Wayne* which speaks of "an inherent right of mankind to pass through life without mutilation of organs," and earlier, of "the inherent right of bodily integrity."[47]

These two types of rights were employed to attack the general claim of the state to have the power to sterilize the retarded on behalf of benefits secured to the public welfare. A third type of right seems to be employed in a more limited fashion. This is the concept of a right to humane care by the state. This right was put forward by some courts to counter the argument discussed earlier that linked sterilization with release from permanent care facilities. Though the argument was not very well developed, these courts argued that this was an inhumane way to deal with seriously retarded and unfortunate people.

The New Jersey court was enraged by the idea: "The palpable inhumanity and immorality of such a scheme forbid us to impute it to an enlightened legislature." In New York the court flatly rejected the idea that sterilization was a humane act toward the retarded: "It seems to be a tendency almost inhuman in its nature." The poor, unfortunate victims of retardation had a claim to be cared for and "strengthened if possible" by the state; sterilization was seen as hardly a caring act.[48]

These rights differ in important ways. The first two are examples of what Golding has termed "option-rights."[49] These are rights bound up with the notion of human liberty, of being free from restraint or coercion in the performance of the actions in question. The "right to procreate" is a good example of such a claim to freedom in the performance of certain actions. The second right, involving notions of "bodily integrity," is also a claim to be free from the infringement imposed by the actions of the state, but it differs from the former in significant ways. It is not a claim to be allowed to act in certain ways. It is a claim to freedom from harms which may be done to the person by the state. The notion of "freedom from" is still involved, but it is not necessary to include the notion of an option to perform certain types of action, e.g., reproduction. One could still respect this right and yet, through a system of institutional care, prevent the exercise of the reproductive capacity.[50]

Rightness and Freedom

This right seems to be bound up with the notion of the rightness of certain "states of being" and of freedom from harm or damage to these states of being. Another avenue which the courts did not explore to support this freedom from "mutilation" would be to examine the irreversibility of such mutilation as contrasted with other types of restriction on the exercise of the procreative capacity. This would not necessitate a long discussion of what constitutes "bodily integrity" that the former approach ultimately seems to demand. The discussion of the irreversible nature of the mutilation involved would correlate well with the way in which these courts recognize the imperfection of the human labels given to the retarded and the insane. If the process of social designation is so ambiguous and uncertain, then there would seem to be a strong presumption against the irreversible destruction of a basic human capacity on the basis of the meaningfulness of such labels.[51]

The third type of right that is appealed to in these cases is an example of what Golding calls "welfare-rights." These involve not freedom from coercion, but claims or entitlements[52] to certain types of goods which may be necessary for minimal human dignity, preservation of life, self-perfection in virtue, or other worthwhile ends. With

respect to the treatment of the retarded, this type of right has received a great deal of attention in recent years as courts and experts have developed the notion of a "right to treatment" or a "right to a certain standard of care" for those committed to institutions for the retarded or the insane.[53]

Though the two types of rights, welfare-rights and option-rights, are distinct in theory, they often combine in complex ways in most of our common discourse about rights.[54] One can see this here. The right to humane care or right to treatment seems to be predicated upon some notion of human dignity which may also include limitations on what others may do to the person, e.g., not mutilate him. Alternatively, the capacity to procreate may be an important, if not essential aspect of human dignity,[55] and maintaining the right of the individual to procreate may be an element in the respect for the dignity of persons which lies at the base of the right to humane care which is present, if only in a truncated form, in these cases.

It is unnecessary to explore all the ramifications of the notions of rights discussed above. But it is important to keep in mind the different types of rights being claimed and the different way in which each right functions and interacts with other moral claims.

We find thus that in both of the areas that we are examining, there are significant disagreements in these cases from that large majority we examined earlier. Where they spoke of degenerates, these judges speak of unfortunates; where they spoke of racial decline and increased welfare costs, these judges speak of the right of the retarded to bodily integrity and humane care by the state.

The first group of cases which we considered represents an obvious, if rather unsophisticated form of utilitarianism. The cost-benefit analysis of human rights was supported by Bentham and has been suggested by many of his followers. It must be noted, however, that this is not the only form of utilitarianism which could be employed, perhaps with different results. Rule utilitarians, however, would face the issue of labeling in a much more stark fashion. The simple cost-benefit calculus disposes of rights rather quickly; but the subtler forms of utilitarianism may be strong supporters of rights in the context of an overall utility to the system of rights. They would, however, be faced squarely with the question of how to respond to the rights of "degenerates" whose reproduction is thought to threaten either the intelligence or the pocketbook of the state.

Rule utilitarians would be faced with the difficulty of deciding between the qualitative worth of various kinds of beneficent outcomes. If they opt for fidelity to the rights of the retarded at each juncture, then it is questionable whether or not they can be called utilitarians in any meaningful way. They would then be making qualitative judgments which their basic position does not seem to allow for.

If, on the other hand, they wish to judge fidelity to the rights of the retarded along with other conceivable outcomes of policy decisions, they will be faced with the question of the accuracy of labels like "degenerates." In this way, the labels given to the retarded might have an even more powerful influence in the context of a more sophisticated form of utilitarianism than they do here in the simple analysis of the courts convinced of the importance of protecting the taxpayers' pocketbooks.[56]

The alternative views that we have seen in some judicial opinions were sensitive to a broader range of concerns than these utilitarian considerations. Though they did believe that such calculations were important, they were not definitely determinative of the result. There were limits on what the state could do even when such quantitative analysis seemed to support it. This renewed sensitivity to the fundamental rightness of certain acts, relationships, or states of being independent of considerations of utility is supported by a renewed sensitivity to the moral issues of labeling itself.

Retarded As Victims, Not Threat

By seeing the retarded as unfortunate victims and not as an imminent threat, these courts reversed the cost-benefit analysis in favor of the retarded. They spoke not of benefits to the state or the race, but of humane care for the retarded. In this case, the renewed sensitivity to other than utilitarian considerations combined with a sensitivity to the vagaries of labeling. This combination meant that the cost-benefit analysis was questioned both in terms of ethical theory and in terms of its application to the retarded. If the labeling of the retarded was as uncertain as these courts suggested, then it was not even certain that the cost-benefit analysis itself would justify sterilization, aside from the limits of the theory in general. Furthermore, if, as some courts recognized, there is a serious degradation and psychological harm associated with sterilization, especially coercive sterilization, then it may be that even marking someone in this way could be seriously counterproductive even in utilitarian terms.

In this essay, I have examined the way in which courts have dealt with the reproductive rights of the retarded. In the process, I have examined the way in which conflicting labels have functioned in the context of two very different types of ethical theory which have shaped state action on behalf of the retarded. If we are to act on behalf of the retarded in morally sensitive ways, we must recognize the serious conflict over fundamentally moral issues which lies beneath the surface of public policy disputes. It is hoped that this essay helps to illuminate these questions.

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5. *Smith vs Wayne* 231 Mich 409, Michigan, 1925, p. 425.

6. I am using the term "right" or "rights" in the sense of a claim or entitlement to other persons acting in certain ways or refraining from acting. Human or "natural rights," in the sense understood here, are fundamental entitlements of the person which are essential to the nurture or preservation of the moral life and of that human dignity which the moral life enhances. They are not dependent on personal desire for recognition or defense, and the mere fact of a personal interest is not sufficient to justify a right. Rights are not "indefeasible," but human rights require particular compelling moral counterclaims (such as other rights) before that to which one is entitled may be justifiably denied.

7. *Buck vs Bell* 274 US 200, U.S. Supreme Court, 1927, p. 207.

8. *Jacobson vs Massachusetts* 197 US 11, U.S. Supreme Court, 1905.

9. *State vs Troutman* 299 Pac. 668, Idaho 1931, p. 670.

10. *State vs Schaffer* 270 Pac. 604, Kansas 1928, p. 605. Cf. *In re Main* 19 P.2d 153, Oklahoma 1933; *Davis vs Walton* 276 Pac. 921, Utah 1928; and *In re Clayton* 234 N.W. 630, Nebraska 1931.

11. *In re Simpson* 180 N.E. 2d 206, Ohio 1962; *Ex Parte Eaton*, Baltimore City Court, 1954; *In re Doe*, St. Louis County Circuit Court, 1974.

12. *In re Simpson*, 1962, p. 207.

13. *Cook vs State* 495 P.2d 768, Oregon 1973, pp. 771-772.

14. *In re Cavitt* 157 N.W. 2d 171, Nebraska 1968, p. 175.

15. See, for example, *Buck vs Bell* 143 Va. 310, Virginia 1925; *Buck vs Bell*, 1927; *Smith vs Wayne*, 1925.

16. *Smith vs Wayne*, 1925, p. 415.

17. *Oregon Rev. Statutes* 436:070.

18. *Buck vs Bell*, 1927, p. 207.

19. Sanks and O'Hara, "Eugenic Sterilization," p. 31.

20. *Smith vs Wayne*, 1925, p. 415.

21. *Ibid.*, p. 425.

22. *Buck vs Bell*, 1925, p. 318.

23. *In re Cavitt*, 1968, pp. 176, 178.

24. See, for example, *In re Simpson*, 1962, and *Wyatt vs Aderholt* 368 F. Supp. 1383, Alabama 1973.

25. *Utah Code Annotated:* 64.10.1-4.

26. *Davis vs Walton*, 1928.

27. *Williams vs Smith* 190 Ind. 506, Indiana 1921; *Davis vs Berry* 216 Fed. 413, Iowa 1914; *Brewer vs Valk* 167 S.E. 638, North Carolina, 1933; *Wyatt vs Aderholt*, 1973.

28. Even in areas where rights are circumscribed, it seems that courts usually invoke other overriding considerations of a uniquely moral character, such as other rights. A good example would be obscenity cases in which a line of recent English and American cases stress the role of the law in suppressing certain kinds of gross immorality as a proper justification for circumscribing a basic right to freedom of the press. Furthermore, even here courts seem wary of sanctioning state intrusion into an area protected by such rights. (Cf. *Paris Adult Theater vs Slaton* 413 U.S. 48 U.S. Supreme Court, 1973; Harry Clor, *Obscenity and Public Morality*, Chicago: University of Chicago Press, 1969.)

It is also important to note the context of this lack of serious concern given to human rights in the procreative area. This was an era in which the reigning constitutional interpretation allowed courts to strike down state laws regulating hours worked and wages paid. This was done on the basis of a supposed constitutional right of "liberty of contract," which protected workers from the infringement of liberty involved in preventing them from contracting to work more than 60 hours per week (*Lochner vs N.Y.* 198 US 45 U.S. Supreme Court, 1905; C. Herman Pritchett, *American Constitutional Issues*, New York: McGraw Hill, 1962, pp. 421-425). In an era which expanded the meaning of the Constitution to include sanctions against this "meddlesome interference with the rights of the individual," the lack of similar vigorous analysis of the sterilization issue in terms of fundamental rights is quite instructive.

29. It may have been possible to see the right to reproduce as fundamental and then played off against other fundamental freedoms which would have to be denied if the individual had to be permanently institutionalized. If one then made the very large assumption that the factual situation left one with the choices of sterilization and release vs. permanent care, then it would perhaps be possible to justify sterilization in defense of these other compelling human rights. I do not wish to examine how far such a case can be made. It is sufficient merely to point out that none of the courts remained within the confines of such a stringent argument, but merely allowed sterilization upon a showing of "benefit" to the retarded person.

30. *Skinner vs Oklahoma* 361 US 535, U.S. Supreme Court, 1941, p. 541.

31. *Ibid.*, p. 536.

32. *Ibid.*, p. 546.

33. *Smith vs Wayne*, 1925.

34. *In re Thompson* 139 N.Y. Supp. 638 New York, 1917.

35. *Ibid.*, p. 645. This argument was used successfully in other early decisions which overturned state sterilization laws (see, for example, *Haynes vs Lapeer* 210 Mich. 138, Michigan 1918, and *Smith vs Board of Examiners* 85 N.J.L. 46, New Jersey 1913), until it was decisively rejected by Holmes in *Buck vs Bell.*

36. *In re Thompson*, 1917, p. 644.

37. *Smith vs Board of Examiners*, 1913.

38. *In re Thompson*, 1917; *Haynes vs Lapeer*, 1918; *Mickle vs Henricks* 262 Fed. 687 Nevada, 1918.

39. *Smith vs Board of Examiners*, 1913, p. 50.

40. *Ibid.*, p. 52.

41. *Ibid.*, p. 53.

42. *Ibid.*, p. 52.

43. *Davis vs Berry*, 1914, p. 416.

44. *Mickle vs Henricks*, 1918, p. 691.

45. *In re Thompson*, 1917, p. 639.

46. *Smith vs Wayne*, 1925, pp. 437-443.

47. *Ibid.*, p. 433.

48. *Smith vs Board of Examiners*, 1913, p. 53; *In re Thompson*, 1917, p. 644.

49. Golding, Martin, "Towards a Theory of Human Rights," *The Monist* 52, 1968, pp. 521-549.

50. Cf. *In re Thompson*, 1917.

51. Boeyink, David, "Finitude and Irreversibility," unpublished paper, 1974.

52. There has been a good deal of inconclusive discussion in recent years over whether rights should be seen as "claims to," "claims against," or "entitlements." The answer to that question does not affect the present discussion. (See Joel Feinberg, "The Nature and Value of Rights," *Journal of Value Inquiry* 4, 1970, pp. 243-257; A. I. Melden, *Rights and Right Conduct* (Oxford: Basil Blackwell, 1959); H. J. McClosky, "Rights," *Philosophical Quarterly* 15, 1965, pp. 115-127.

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