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COMMENTS

NATURAL RIGHTS, THE SOCIAL COMPACT, AND PROCREATION: A MODERN APPLICATION OF AN ABANDONED DOCTRINE

*"You pays your money and you takes your choice."**

INTRODUCTION

Very few students in America pass through their high school education without reading Aldous Huxley's classic work *Brave New World*.¹ Most find in it, profound and terrifying evocations of the future. Probably the most distasteful aspect of Huxley's futuristic society was the totalitarian control exercised by the government over the creation of life. Huxley prophesies a society in which babies are manufactured in test tubes under the complete control of the government.

To one living in our contemporary society, where the problems of overpopulation and birth control are real, perhaps *Brave New World* is not as farfetched and fantasy-like as it may have appeared to the readers of the era in which it was written. Of course many things have occurred since 1932—Nazi Germany, Nurenberg, and "the pill"—have forced us to recognize the potential proximity of *Brave New World*.² The events at such infamous places as Auschwitz and their legal manifestations at Nurenberg³ have forced a re-examination and re-evaluation of the role of government in its relation to the individual in a present day context.

THE PROBLEM

In a case of recent vintage, *Griswold v. Connecticut*,⁴ the Supreme Court was given the opportunity to discuss a vital question which *Brave New World*

* *Infra* note 174.

¹ HUXLEY, *BRAVE NEW WORLD* (1946).

² A recent news article reporting the development of an artificial womb noted that "the artificial womb could be used to shelter test-tube babies that scientists might create in years to come. The release then went on to quote one of the members of the scientific team who developed the womb, Dr. Warren Zapol, who stated: "I can see the day when we grow babies this way." Chicago Sun Times, May 26, 1968 at 20.

³ Bassiouni, *The War Power and the Law of War: Theory and Realism*, 18 DE PAUL L. REV. 198 n.39 (1969).

⁴ 381 U.S. 479 (1965).

raised, namely, to what extent does the individual have the right of control over his procreative faculties without state interference. *Griswold* laid bare the area of governmental limitations on a basic individual right not explicitly or impliedly delineated in the federal Constitution. Although *Griswold* concerned the constitutionality of a statute⁵ forbidding the "use" of contraceptives, and the court chose to deal with the problem in terms of marital privacy, there can be little doubt that what was really in issue was the right of procreation—the right to control the use of one's procreative faculties.

Although the problems of contraception and birth control are the obvious areas which relate directly to the right of procreation, they are not the only areas in which this right is directly encountered. As important as birth control, albeit not as obvious, is the practice of involuntary sterilization under state eugenic sterilization laws. Such laws allow the states the power to sterilize criminals declared to be habitual offenders, those guilty of certain sex offenses, and inmates in certain institutions suffering from forms of mental illness or deficiency. Although the exercise of this power has declined in recent years, the United States Supreme Court has consistently refused to attack the substantive constitutionality of these statutes. That this decline in the use of involuntary sterilization laws may merely be a temporary phase is evidenced by the recent decisions of certain lower court judges who, in the absence of statutory authority, have ordered sterilization and in a few cases have used sterilization as a special form of criminal sanction.

Although these contemporary problem areas involving procreation may appear at first blush to be somewhat unrelated and diverse, a close analysis would reveal that they all relate directly to the personal right of procreation and the limits, if any, which the state or federal government may impose upon it. A great deal of confusion has arisen in examining areas involving the right of procreation, to some extent due to the fact that two of the areas—contraception and voluntary sterilization⁶—deal with limitations the state may place on the right to *prevent procreation*, whereas involuntary sterilization deals with the limitation the state may place on the right to *procreate*. It is probably this confusion that has caused the failure to recognize the right of procreation as a unitary concept. Although our courts have not always agreed, it would appear axiomatic to say that the right to control procreation necessarily implies the right to procreate as well as not to procreate. It must then follow that if this basic right to control procreation exists and is protected from government control, then any restrictions, be they in requiring, forbidding, preventing or depriving one of that control, are all violations of the same right.

The failure of the *Griswold* majority to discuss the case in terms of pro-

⁵ GEN. STAT. OF CONN. §§ 53-32, 54-196 (1938).

⁶ For a medical viewpoint concerning voluntary sterilization see *supra*, Forbes, *Voluntary Surgical Sterilization as a Right of Women*, 18 DE PAUL L. REV. 560 (1969).

creation is unfortunate in light of the need for a unifying analysis of the right of procreation. It is somewhat surprising when one considers that the group most influential in the appeal—"Planned Parenthood"—is an organization devoted to the advocacy of birth control, which bears directly on procreation and only peripherally on marital privacy.

The failure to recognize the right in question to be procreation, was furthered and magnified by the majority, concurring and dissenting opinions' apparent confusion between the concept of natural rights and the constitutional doctrine of substantive due process. This apparent confusion was detrimental to an adequate answer to the fundamental question raised by the appeal. Simply stated, the focal question was from what authority do the rights of an individual in a society and particularly, the right to procreate, emanate? Are all these rights guaranteed by the state, and as such, may they be limited by the state, as the positivist philosophers contend, or is there some higher authority independent of the state from which certain rights emanate, and are they therefore beyond the interference of the state, as the natural law philosophers contend?

If the positivist theory is accepted, our inquiry comes to an end, for that view leads to the conclusion that the state or federal government may enact any legislation within their granted or implied power, limited only by the Bill of Rights and the fourteenth amendment. Under this positivist theory, however, even those rights which are expressed or implied in the Bill of Rights or the fourteenth amendment are not absolute, but are subject to be balanced with the "general welfare." A total acceptance of such a philosophy would permit the state to declare that a woman could have but one child, or perhaps no children, or even that the state may manufacture children. It is believed that these alternatives are repugnant to most members of our society. If on the other hand there are certain rights which do not emanate from the state or a written constitution, as the natural law philosophers contend, then we must inquire into the source of these rights, what they are, and when, if ever, they lose their dignity as *natural rights*.

In pursuit of the answers to these questions, the basic underlying hypotheses will be that the doctrine of natural rights, given recognition by the ninth amendment has been and should be a viable doctrine, and that procreation is one of these *natural rights*. In analyzing these hypotheses it will be necessary to define and examine very briefly the development of natural law into *natural rights*, as propounded by Locke, and its effect on the Constitution. This development will serve basically as a summary and background, for a detailed analysis would be a pretentious undertaking in light of the great thinkers who have so adequately accomplished this goal.⁷

⁷ CORWIN, THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW (1955); NATURAL LAW AND NATURAL RIGHTS (1955); POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW (1964).

This comment will then examine and analyze the development of the theory of natural rights in Supreme Court decisions. This analysis will attempt to show how the concept of natural rights, through misinterpretation and misapplication, prompted the rise of the constitutional doctrine of substantive due process, and of the intermingling and confusion between these doctrines. The *Griswold* opinions represent the most recent example of this confusion. Further, without attempting to present a list of natural rights, it will be proposed that the right to control one's procreative faculties (hereinafter called the right to procreate) is one of these natural rights.

Through an examination of the cases challenging the constitutionality of eugenic sterilization laws, it will be noted that most of the courts recognized the great dignity of the right to procreate although not always placing it in the immune position of a *natural right*. It will be further shown that the failure of the courts to recognize this right, as a unitary concept, necessarily existing in any analysis of contraception and voluntary or involuntary sterilization, has given rise to such diverse, absurd results that presently, as regards contraceptives, the state cannot prohibit their use, whereas, regarding eugenic sterilization, the state has the right to completely end an individual's ability to procreate. These diverse absurd results have created a vacuum which could be filled by totalitarian control over procreation.⁸

The object of this work is not to define the limits within which rights are to be clothed with the name *natural rights*, but rather to assert that included in any list of rights which deserve this dignity is the right of procreation. In light of the lessons of the past—Hitler and Nuremberg, the problems of the present—birth control, and the prophecies of the future—*Brave New World*, this inquiry is imperative.

In attempting to answer inquiries of such a philosophical nature as the source of individual rights in a society, a system of basic legal definitions is essential to avoid an arbitrary and chaotic result. In an era when the word "right" is used interchangeably with "privilege" and "immunity," Hohfeld's scheme is particularly relevant:

A right is one's affirmative claim against another and a privilege is one's freedom from the right or claim of another. Similarly, a power is one's affirmative "control" over a given legal relation as against another; whereas an immunity is one's freedom from the legal power or "control" of another as regards some legal relation.⁹

In applying these Hohfeldian definitions it becomes apparent that natural

⁸ Engel, *The Race to Create Life*, HARPER'S, Oct. 1962, p. 40: "Before long we will have to decide whether we want chemical control of human heredity . . . and if so how it should be exercised. . . . There are problems that are much too important to be left to scientists alone. This is one of them."

⁹ HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS* 60 (1923).

rights are not really rights, but rather immunities—that is to say a freedom from the legal power or control of the state. Corwin, in apparent agreement with this application of Hohfeldian definitions to natural rights, stated:

There are, it is predicated, certain principles of right and justice which are entitled to prevail of their own intrinsic excellence, altogether regardless of the attitude of those who wield the physical resources of the community. Such principles were made by no human hands; indeed, if they did not antedate deity itself, they still so express its nature as to bind and control it. They are external to all Will as such and interpenetrate all Reason as such. They are eternal and immutable. In relation to such principles, human laws are, when entitled to obedience save as to matters indifferent, merely a record or transcript, and their enactment an act not of will or power but one of discovery and declaration.¹⁰

Corwin further points out that this concept of natural rights was embodied in the ninth amendment. However, as Corwin saw it, the constitution was not the source of authority for such rights, but rather natural rights “owe nothing to their recognition in the Constitution—such recognition was necessary if the Constitution was to be regarded as complete.”¹¹ Although the term *natural right* shall continue to be used, hereinafter it is the intention of the writer that it be interpreted, jurisprudentially speaking, as referring to an immunity.

NATURAL LAW AND NATURAL RIGHTS: A BACKGROUND

The evolution of Natural Law into *natural rights* has been sporadic and at times divergent. Yet, within all the concepts and theories defining natural law and its source, one common idea appears to pervade. Simply stated, it is that man has certain qualities, regardless of the terms used to describe them, which are or should be immune from the control of the state. That natural law philosophers have differed and continue to differ in their acceptance of a limitation on the positive law may be considered universal. Natural Law has been defined in many ways: “writers customarily list anywhere from four upward to a dozen definitions.”¹² Basically there have been two broad conceptions of natural law, one based on the existence of a “divine reason,” the other based on “a set of principles of human conduct which have the same kind of immutable and invariant truth or rightness which is inherent in the physical order of the universe.”¹³

For our purposes the technical philosophical basis of these two schools is

¹⁰ CORWIN, *supra* note 7, at 4, 5.

¹¹ CORWIN, *supra* note 7, at 5.

¹² PATTERSON, JURISPRUDENCE §§ 4.10 *et. seq.* (1953).

¹³ PATTERSON, *A Pragmatist Looks at Natural Law and Natural Rights in NATURAL LAW AND NATURAL RIGHTS* 49 (1955).

not as important as the fact that all were striving for a universal which would give individuals "immunity from" state control when certain human qualities were in issue. Aristotle alluded to this in advising advocates "that when they had no case according to the law of the land, they should appeal to the laws of nature."¹⁴ As society developed, a system of natural law based on the foundations of "divine reason" or "physical order" became more difficult to maintain, and these concepts necessarily gave way to a theory of natural rights.¹⁵ This "theory of natural rights, for which we are indebted to . . . John Locke, is essentially different from the theories of natural law in that it lacked the two important characteristics above mentioned: the concept of an immutable physical order and the concept of divine reason."¹⁶

According to Locke, man had *natural rights* in a state of nature. In this state of nature man would have certain disadvantages, the main one being the "absence of an established" law. Due to these disadvantages, individuals in society would enter into a social compact whereby they would transfer to the government certain rights which the government would need to function so as to justify its existence.¹⁷ "All other rights, privileges, and immunities he [the individual] reserved. . . ."¹⁸ As has been previously pointed out, the ninth amendment seemingly gives verbatim recognition to this principle.

It is of vital importance to recognize the perspective that Locke had in mind when proposing his theory of the social compact. One writer has illustrated this by comparing Coke and Locke:

Coke's endeavor was to put forward the historical procedure of the common law as a permanent restraint on power Locke, in the limitations which he imposes on legislative power, is looking rather to the security of substantive rights of the individual—those rights which are implied in the basic arrangements of society at all times and in all places.¹⁹

It would be a denial of the obvious if these Lockian concepts of *natural rights* were not acknowledged as having influenced our founding fathers in their writing of the Declaration of Independence and Constitution:

The framers of our Constitution, deriving their political theories from Locke and others, conceived that the individual possessed certain indefeasible, primary rights, and that the function of the state was to protect these rights against government or group encroachment In this sense, the American Constitution, strongly suggestive of Locke's philosophy, emphasizes individual freedom with limitations on

¹⁴ KATZ, WILD AND SHEPARD, *NATURAL LAW AND HUMAN NATURE* 17, 18 (1954).

¹⁵ See Patterson, *supra* note 13.

¹⁶ Patterson, *supra* note 13, at 61.

¹⁷ Patterson, *supra* note 13, at 61.

¹⁸ Patterson, *supra* note 13, at 61.

¹⁹ CORWIN, *supra* note 7, at 72.

governmental power. Thus, natural rights are subject to legal guarantees embodied in the Constitution²⁰

Hamilton recognized these *natural rights* as immunities in stating "that it [the government] was not granted the power to intrude upon basic individual rights."²¹ Although the historical development of *natural rights* evidences a divergence of opinions as to approach and source, there appears to be inherent in all one underlying unifying motivation—a desire to limit the power of the government over the control of certain basic human characteristics of an individual in a society, be they called *natural rights*, "basic liberties" or "fundamental freedoms." This motivation is no less important today, as the trials at Nurenberg so dramatically pointed out. "Unless we are willing to contend that the concept of a law *that ought to be* is an inadmissible one, the basis of natural law remains untouched."²²

NATURAL RIGHTS: JUDICIAL PRONOUNCEMENTS

Natural rights, as Locke envisioned them in the social compact, found judicial recognition very early in the pronouncements of the United States Supreme Court and the supreme courts of the several states. As early as 1798, Justice Chase, speaking for the majority in *Calder v. Bull*,²³ stated:

The nature, and ends of legislative power will limit the exercise of it There are acts which the federal, or state legislature cannot do, without exceeding their authority. There are certain vital principles in our free republican governments, which will determine and overrule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof the government was established. An act of the legislature (for I cannot call it a law), contrary to the first great principles of the social compact, cannot be considered a rightful exercise of legislative authority To maintain that our federal, or state legislature possess such powers, if they had not been expressly restrained would, in my opinion, be a political heresy, altogether inadmissible in our free republican government.²⁴

Without delving into the limits of *natural rights*, there can be no doubt that Justice Chase was giving recognition to the existence of this principle. This statement of judicial policy interpreting the intentions of the framers of our Constitution takes on greater significance in light of the date of the case.

²⁰ Pollack, *Natural Rights: Conflict and Consequence*, 27 OHIO ST. L.J. 559, 560 (1966).

²¹ THE FEDERALIST No. 84, at 578, 579 (Cooke ed. 1961) (A. Hamilton).

²² WRIGHT, AMERICAN INTERPRETATIONS OF NATURAL LAW 323 (1931) (emphasis added).

²³ 3 U.S. (3 Dall.) 386 (1798); see also, *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810).

²⁴ 3 U.S. (3 Dall.) 386, 388 (1798).

Justice Chase was a contemporary of many of the framers and it is not invalid to presume that his opinion reflected, in some part, the opinions of the times and of many of the framers.²⁵

Later cases, as a rule, did not refer expressly to the social compact. They continued, however, to refer to the existence of the principle that certain basic rights were immune from state and federal control although such rights were not necessarily labeled *natural rights*. It is important to note that earlier cases immediately succeeding *Calder*, which relied on *natural rights*, were decided in a time of our country's history when we were basically an agrarian society. The problems arising out of the growth of the great urban centers, brought about by the technical revolution, had not yet appeared. As such, any limitation by the state stood in marked contrast to the minor exigencies of the situation. Because of the closeness in time to the American Revolution against invasions of individual rights and freedoms, artificial importance was placed on *all* individual rights. It is not surprising that in this era the Supreme Court would be prone to label many violations of individual freedoms as interferences with *natural rights* even though the right involved, as would become apparent later, did not deserve such high treatment. In 1856, the Supreme Court of New York declared:

In a government like ours, theories of public good or public necessity may be so plausible, or even so truthful, as to command popular majorities. But whether truthful or plausible merely, and by whatever numbers they are assented to, there are some *absolute private rights* beyond their reach . . .²⁶

The court went on to hold "the act in question . . . void, as against fundamental principles of liberty, and against common reason and *natural rights*."²⁷ It is of importance to note the insistence of the court on the principle that the plausibility of the act or its popularity in numbers cannot act so as to violate these "*natural rights*." It was the antithesis of this pronouncement that was to later be utilized by the Court in its formulation of the concept of "substantive due process." As will be shown, this position of making these rights totally immune was abandoned by the courts of the early twentieth century during their development of the constitutional doctrine of "substantive due process" as a means of limiting legislative action.²⁸

During the very late nineteenth century the Justices of the Supreme Court

²⁵ Jefferson stated: "All human constitutions which contradict his laws, we are in conscience to disobey." JEFFERSON'S (VA.) REPORTS 114 (1772).

²⁶ *Wynchamer v. the People*, 13 N.Y. Reports 387 (1856) (emphasis added).

²⁷ *Id.* at 390 (emphasis added).

²⁸ PRITCHETT, *THE AMERICAN CONSTITUTION* 656 (2d ed. 1968); Pritchett distinguished substantive due process from procedural due process stating: "Due process was, as the term implies, originally a procedural concept. . . . But due process has also developed, in the hands of the Supreme Court, a substantive guise under which it serves as a constitutional limitation, not merely on legislative or executive *procedure*, but on legislative or executive power to *act at all*."

started to move away from a concept of *natural rights* as being a limit on legislative authority, basing such limitation, rather, in terms of the wisdom of a grant by the legislature. This approach was taken by the majority in the *Slaughter House Cases*.²⁹ There, the court upheld a Louisiana statute giving one company a slaughter house monopoly, although the court pointed out that the "wisdom of the monopoly granted by the legislature may be open to question."³⁰ Justice Field, dissenting, disagreed with this approach, declaring: "that the fourteenth amendment was intended to give practical effect to the declaration of 1776 of inalienable rights, rights which are the gift of the Creator, which the law *does not confer but only recognizes*."³¹ In the *Slaughter House Cases*, the effect of urbanization was starting to become a reality. With this, the need of restrictive legislation became more apparent. In this background, there appeared the view that these economic property rights which had previously been discussed in terms of absolute rights, were not *natural rights* at all. In the opinion of the majority, limitation of the rights there involved should have been restricted only by a test of reasonableness.³² Justice Field in his dissent still considered these economic rights as *natural rights*.³³ This theory of limiting the police power of the state by looking to the reasonableness of the legislation became known as the doctrine of "substantive due process."³⁴

It is believed that it was the earlier misapplication of the term *natural rights*, to economic interactions, considered in light of the times in which the *Slaughter House Cases* and succeeding cases were decided, that was responsible for the decline of *natural rights* as a constitutional theory. This decline, it is further believed gave rise to the concept of substantive due process, which rather than being an *absolute* limitation on the state, was merely a limited restriction based on the "reasonableness" of the legislative enactment. The later courts, however, would still continue to describe limitations in terms of natural, or inalienable rights although not treating them as such. This merely tended to add further confusion to the proper application of the *natural rights* doctrine, eventually causing its blurring with substantive due process.

Following the *Slaughter House Cases*, the case of *Munn v. Illinois*³⁵ gave

²⁹ 83 U.S. (16 Wall.) 36 (1872).

³⁰ *Id.* at 61.

³¹ *Id.* at 105 (emphasis added).

³² *Id.* at 65: "And in this respect we are not able to see that these privileges are especially odious or objectionable. . . . The prices or charges to be made . . . are limited by the statute, and we are not advised that they are on the whole exorbitant or unjust."

³³ *Supra* note 29, at 105.

³⁴ See PRITCHETT, *supra* note 28, at 656-88.

³⁵ 94 U.S. 113 (1876).

clear recognition to the thesis that property interests of an individual were not absolute, but subject to control for the public good:

This does not confer power upon the whole people, to control rights which are purely and exclusively private . . . ; but it does authorize the establishment of laws requiring each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another.³⁶

Although the *Munn* court found that an economic property right could be limited in the public interest, thus removing the absoluteness of a right once considered (though improperly) a *natural right*, they still alluded to the existence of *natural rights* in concluding that certain purely and exclusively private rights were not subject to control. Some nine years later the Supreme Court in *Mugler v. Kansas*³⁷ quoting the above cited passage from *Munn* as authority, announced that they were prepared to examine the substantive reasonableness of state legislation.³⁸ Although not actually invalidating the statute in question, *Mugler* not only gave recognition to the *Munn* conclusion that certain economic rights were not *natural rights*, and were subject to state control, but also announced the test to be applied in limiting these economic rights. Although *Mugler* announced this test of reasonableness as a limitation on these economic rights (generally referred to as "substantive due process"), it was not until the well known case of *Lochner v. New York*³⁹ that the Court actually applied this doctrine to strike down state legislation.

After *Lochner* the Court continued to invalidate state legislation on grounds of "substantive due process."⁴⁰ However, it is not surprising that substantive due process should have lost its viability in areas of economic and contract rights, for in the final analysis it was eventually used to allow a few people to work injustices upon segments of society.⁴¹

The Bill of Rights, originally intended to protect men against political oppression, have become the legal basis of economic exploitation. The principal device by which this has been achieved is the invention of a new legal doctrine previously unknown to jurisprudence, to wit, that the right to make contracts is itself property.⁴²

This abuse of "substantive due process" is somewhat paradoxical in light of the reasons for the rise of the doctrine—protection of the individual over unreasonable state restriction of "*constitutional*," not *natural rights*. This

³⁶ *Id.* at 124.

³⁷ 123 U.S. 623 (1887).

³⁸ *Id.* at 660.

³⁹ *Lochner v. New York*, 198 U.S. 45 (1905).

⁴⁰ See PRITCHETT, *supra* note 28, at 672-79.

⁴¹ See PRITCHETT, *supra* note 28, at 678, for a discussion of the abandonment of economic due process.

⁴² COHEN, *LAW AND THE SOCIAL ORDER* 149-50 (1933).

discussion is not intended to put forth the position that substantive due process should not be a viable doctrine. It is rather to show that the doctrine of *natural rights* does exist and has been recognized in judicial pronouncements, but that a misapplication of the *natural rights* doctrine in the mid-nineteenth century by a court too anxious to protect all individual rights, led to the need for the development of substantive due process, a more limited check on the police power of the state. The latter doctrine, though different, used much of the traditional *natural rights* phraseology thereby confusing the two doctrines. When economic substantive due process later lost much of its viability as a constitutional doctrine, the theory of *natural rights*, because of its close association with substantive due process suffered a similar fate.

Substantive due process has not withered completely as a constitutional doctrine. "[D]uring the same period when it was being abandoned as a source of judicial control over state regulation of *business* and *industrial* conditions, it was being developed by the Court into an unprecedentedly strong check on the substance of legislation infringing *civil liberties*."⁴³ During this transitional period, *natural rights* continued to be mentioned in judicial pronouncements although once again being confused with rights which were more properly the subject of a substantive due process discussion.⁴⁴ The confusion or intertwining of *natural rights* with substantive due process through misapplication has led to somewhat of a blending of *natural rights* with rights existing merely because of their protection by the Constitution:

The penumbra of the Bill of Rights reflects human rights, which though not explicitly, are implied from the very nature of man as a child of God. These human rights were the products both of political thinking and of moral and religious influences."⁴⁵

This blending should be distinguished from *natural rights* being given constitutional recognition via the ninth amendment.

THE NINTH AMENDMENT: A CONSTITUTIONAL RECOGNITION OF NATURAL RIGHTS

As Corwin has contended, the ninth amendment is a constitutional recognition of natural rights, yet not the source for their authority.⁴⁶ A similar view of the ninth amendment was proposed by Roscoe Pound:

⁴³ PRITCHETT, *supra* note 28, at 684 (emphasis added).

⁴⁴ See, e.g., *McGovern v. Von Riper*, 137 N.J. Eq. 24, 33, 43 A.2d 514, 519 (1945) in which the court stated: "[T]he right of privacy, having its origin in natural law, is immutable and absolute, and transcends the power of any authority to change or abolish it."

⁴⁵ DOUGLAS, *THE RIGHT OF THE PEOPLE* 89-90 (1958).

⁴⁶ Text and notes, *supra* notes 10 to 11.

[I]t declares that there are natural rights but makes no attempt to define those not expressly provided for in the Bill of Rights nor to provide for securing them. . . . So far as inherent rights are not committed to the federal government, defining and securing them is left to the states or to be taken over by the people of the United States by constitutional amendment. Are not the Ninth and Tenth Amendments authority for state legislation to define it and secure inherent reasonable expectations in life in civilized society as it is today and is not the Ninth Amendment a challenge to the states to undertake that work as the conditions of life today demand it?⁴⁷

This view of the ninth amendment, as a recognition of *natural rights* retained by the people, appears to have been the motivation, at least in part, of the framers of our constitution. Madison made this clear when, in discussing the last clause of a resolution which was eventually to become the ninth amendment, he stated:

The exceptions here as elsewhere in the Constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the Constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.⁴⁸

Apart from Justice Goldberg's concurring opinion in *Griswold*, there have been very few cases interpreting the ninth amendment.⁴⁹ A recent Colorado Supreme Court case⁵⁰ held that the ninth amendment and a similar provision of the Colorado Constitution were constitutional recognitions of *natural rights*. The case lends itself to analysis as it is clear in its advocacy of natural rights and their recognition through the ninth amendment and, further, in that the court apparently distinguishes between *natural rights* and substantive due process, thus avoiding the mistake of earlier courts in applying *natural rights* to economic property rights. The appellant was found to have violated the Colorado Fair Housing Act by discriminating against Negroes in the sale of homes. The appellant contended that his *natural rights* in his property, as protected by the ninth amendment and the Colorado Constitution, were violated by the Act and therefore that the Act was unconstitutional. The court although rejecting the total immunity of the appellant's property rights, emphatically accepted the contention that there are *natural rights*:

We have no hesitancy in stating that there are fundamental and inherent rights with which all humans are endowed even though no specific mention is made of them

⁴⁷ Pound, *Introduction* to PATTERSON, *THE FORGOTTEN NINTH AMENDMENT*, VI, VII (1955).

⁴⁸ I ANNALS OF CONGRESS 435 (1789).

⁴⁹ For a list of cases touching upon the ninth amendment, see Call, *Federalism and the Ninth Amendment*, 64 DICK. L. REV. 121, n.3 (1960).

⁵⁰ Colorado Anti-Discrimination Commission v. Case, 151 Colo. 235, 380 P.2d 34 (1963).

in either the national or state constitutions. . . . Natural rights—inherent rights and liberties, are not the creatures of constitutional provisions either at the national or state level. The inherent human freedoms with which mankind is endowed are “antecedent to all earthly governments; rights that cannot be repealed or restrained by human laws; rights derived from the great legislator of the universe.”⁵¹

The court then went on to state:

[T]hat all men have rights which have their origin as natural rights independent of any express provision of law, and that constitutional provisions are *not the sources* of these rights.⁵² [emphasis added]

The court, however, found that the Negroes who were discriminated against, were having their *natural rights* violated. The court held that the rights that the appellant contended were his *natural rights* were in conflict with the appellee's and further that they were subject to reasonable state regulation. Thus, as to the appellant, the court applied a substantive due process approach. The court removed the rights that the appellant contended were *natural rights* (freedom of choice in the sale of one's property) from that framework, and discussed them as constitutional rights subject to reasonable regulation.⁵³ This position was supported by relying on *Nebbia v. New York*:⁵⁴

. . . [B]ut neither property rights nor contract rights are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm. Equally fundamental with the private right is that of the public to regulate it in the common interest.⁵⁵

The court then held that *natural rights* were recognized by the ninth amendment and that it was therefore constitutional for the state to enact legislation to protect these rights. Thus the concept of *natural rights* and the recognition given them by the ninth amendment were acknowledged. Justice Goldberg, in his concurring opinion in *Griswold*, took a similar view of the ninth amendment. One recent writer proposed that the ninth amendment might be a means of limiting the decision reached in the Supreme Court cases reviewing the constitutionality of state eugenic sterilization laws.⁵⁶

⁵¹ *Id.* at 243-44, 380 P.2d at 39, 40.

⁵² *Id.* at 244, 380 P.2d at 40.

⁵³ *Id.* at 246, 380 P.2d at 41. “We recognize that there are certain ‘essential attributes of property’ which cannot be unreasonably infringed upon by legislative action. However there are no absolutes in these rights.”

⁵⁴ 291 U.S. 502 (1934).

⁵⁵ *Id.* at 523.

⁵⁶ Redlich, *Are There “Certain Rights . . . Retained by the People”?*, 37 N.Y.U. L. REV. 787, 810 (1962).

Thus it may be seen that the doctrine of *natural rights* given recognition by the ninth amendment has been, and should be, a viable doctrine and should be accepted by the Supreme Court. The next step in our inquiry is to examine the right of procreation as a natural right.

NATURAL RIGHTS: THE RIGHT TO PROCREATE

AN INTRODUCTION: EUGENIC STERILIZATION STATUTES

In analyzing the right to procreate as a natural right, those cases discussing the eugenic sterilization statutes of the individual states, and those cases in which involuntary sterilization was ordered in the absence of a eugenic sterilization statute will be used as a conduit. This is the only area, of the three areas involving the right to procreate, in which the courts actually recognize and clearly discuss procreation as a right.

There were as of 1966 twenty-eight states having eugenic sterilization statutes.⁵⁷ The present California statute⁵⁸ is close enough to being typical of most of these statutes for use as an example in our discussion. The pertinent parts of the California statute declare:

The provisions of this section apply to any person who has been lawfully committed or admitted to any state hospital for the mentally disordered or mentally retarded and who is afflicted with, or suffers from, any of the following conditions:

- (a) mental disease which may have been inherited and is likely to be transmitted to descendants.
- (b) mental retardation, in any of its various grades.
- (c) marked departures from normal mentality.

California also makes a similar provision for certain sex offenders.⁵⁹ These statutes provide a clear background in which to view the area of procreation in the context of legislative limitations.

BUCK V. BELL: THE SOURCE

The first Supreme Court case to decide the constitutionality of a eugenic sterilization statute was *Buck v. Bell*,⁶⁰ in which Justice Holmes wrote the majority opinion. Before discussing *Buck*, two aspects which must have effected the outcome of the case, are worth noting.

First, the *Buck* decision was written in 1926. Prior to this period of our constitutional history, the doctrine of *natural rights*, through misapplication,

⁵⁷ For a full discussion of these statutes, see Ferster, *Eliminating the Unfit—Is Sterilization the Answer?*, 27 OHIO ST. L.J. 591 (1966).

⁵⁸ CAL. WELF. & INST'NS. CODE § 7254 (West 1968).

⁵⁹ CAL. PENAL CODE §§ 645, 2670 (West 1968).

⁶⁰ *Buck v. Bell*, 274 U.S. 200 (1927).

had become inextricably intertwined with that of "substantive due process."⁶¹ It was only to be eight years from this time that "substantive due process" was to be rejected in the courts.⁶² Second, and probably more important, was the philosophy of Justice Holmes prior to 1926. Justice Holmes was probably one of the leading proponents of the positivists' philosophy. This is evident in some of his dissenting opinions in cases where state legislation was struck down on "substantive due process" grounds.⁶³ Perhaps the best insight into the man may be gleaned from a letter written by him in 1926 to the noted philosopher Dr. Wu:

I don't believe it is an absolute principle or even a human ultimate that man always is an end in himself—that his dignity must be respected, etc. We march up a conscript with bayonets behind to die for a cause he doesn't believe in. And I feel no scruples about it. Our morality seems to me only a check on the ultimate domination of force, much as our politeness is a check on the impulse of every pig to put his feet in the trough. When the Germans in the late war disregarded what we called rules of the game, I don't see there was anything to be said except: we don't like it and shall kill you if we can. So when it comes to the development of a corpus juris the ultimate question is what do the dominant forces of the community want and do they want it hard enough to disregard whatever inhibitions may stand in the way.

It is not surprising, in light of Holmes' philosophy and the constitutional tenor of the times, that when the court finally was confronted with the violation of a *natural right*, as in *Buck*, the case was decided as it was.

Buck came to the Supreme Court from the Supreme Court of Appeals of Virginia,⁶⁴ as an appeal from the latter's affirmation of a judgment of the Circuit Court of Amherst County ordering the superintendent of the State Colony for Epileptics and Feeble-minded to perform a salpingectomy upon Carrie Buck.⁶⁵

Justice Holmes answered the substantive attack on the sterilization statute as a violation of due process of law with a one page reply. It seems strange that a question of such magnitude concerning so vital a right could be dismissed with so summaral a discussion. Pritchett commenting upon this noted that "seldom has so much questionable doctrine been compressed into five sentences of a Supreme Court opinion."⁶⁶

⁶¹ Text and notes, *supra* notes 23 to 41.

⁶² See *Nebbia v. New York*, *supra* note 54.

⁶³ *Lochner v. New York*, *supra* note 39, at 76: ". . . [u]nless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of the people and our law."

⁶⁴ 143 Va. 310, 130 S.E. 516 (1925).

⁶⁵ *Supra* note 60, at 205.

⁶⁶ PRITCHETT, *supra* note 28, at 663.

Holmes, through some unintelligible process, found an analogy between the power of the state to ask citizens to risk their lives in defense of their country and sterilization:

We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already 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 with incompetence [sic].⁶⁷

One writer commenting upon these sentences noted that they were "a completely unacceptable standard for measuring legislative action."⁶⁸ He aptly pointed out the weakness in Justice Holmes' rationale:

If it were true that, because the state can demand the supreme sacrifice of life itself, it is thereby justified in demanding any lesser sacrifice, then every constitutional protection could be disregarded at will.⁶⁹

Justice Holmes further justified sterilization on the ground that it is wiser to sterilize a person now than to allow his "offsprings to starve due to their imbecility, or be executed for their crimes."⁷⁰ Apparently, Justice Holmes saw little middleground between these choices. There did not seem to be the possibility, in his mind, that if imbeciles were the result, a *questionable postulate*, then they might neither commit crimes requiring execution nor be left in the streets to starve. Perhaps Justice Holmes' next statement in the opinion might never have been made had he the privilege of peering twenty-five years into the future to observe Nazi Germany: "[s]ociety can prevent those who are manifestly unfit from continuing their kind."⁷¹

Justice Holmes' opinion, when viewed in its totality, was basically a dissertation of his own philosophy. The only authority cited in the opinion in support of his views was *Jacobson v. Massachusetts*,⁷² a case allowing the state to require a citizen to take a small-pox vaccination. Justice Holmes was of the opinion that "[t]he principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes."⁷³ This reasoning appears at best to be somewhat stretched. *Jacobson* dealt with a statute giving authority to a city or village to require vaccination of its inhabitants. The case, although finding the statute constitutional, did so on the basis of its reason-

⁶⁷ *Supra* note 60, at 207.

⁶⁸ PRITCHETT, *supra* note 28, at 663.

⁶⁹ PRITCHETT, *supra* note 28, at 663.

⁷⁰ *Supra* note 60, at 207.

⁷¹ *Supra* note 60, at 207.

⁷² 197 U.S. 11 (1905).

⁷³ *Supra* note 60, at 207.

ableness, thereby using a substantive due process approach. However, at the same time it recognized the existence of certain other rights which would stand above the public welfare.⁷⁴ The two cases were distinguished by one writer as follows:

It is a broad principle indeed that sustains a needle's prick in the arm and an abdominal incision, if only in terms of the equipment used. It becomes something else again in terms of the results obtained: No smallpox in the one case and no children in the other.⁷⁵

The Supreme Court in *Buck* took notice that the plaintiff in error was the daughter of an imbecilic mother, was herself an imbecile, and was the mother of an illegitimate imbecilic child.⁷⁶ The decision concluded with Holmes' oft quoted aphorism—"three generations of imbeciles are enough."⁷⁷ It is worth noting that the facts relied on have subsequently been questioned.⁷⁸ It has been alleged that both Carrie Buck and her mother were not imbeciles, but only morons. In addition, Carrie Buck's child was only a month old when it too was adjudged to be an imbecile by a Red Cross nurse. In fact, however, although dying of measles in the second grade, the child reportedly was very bright.⁷⁹ In light of the criticism and obvious faults of *Buck* it is surprising to find *Buck* being cited by later courts as THE authority on the subject of involuntary sterilization. "[I]t is highly unlikely that the court of the 1960's would accept the Holmes decision."⁸⁰

It is to be noted that even were substantive due process a viable doctrine, constitutional theorists have recognized that it would, in and of itself, be inadequate in certain instances such as procreation:

It (substantive due process) protects the libertarian goals stated in the Bill of Rights, but it does not state a basis for judicial protection of newer values not adequately perceived when the Bill of Rights was drawn up.⁸¹

This comment would be unnecessary and the question therein answered,

⁷⁴ *Supra* note 72, at 31. The court quoting *Mugler v. Kansas*, *supra* note 35 stated: "[I]f a statute purporting to have been enacted to protect the public health, the public morals or the public safety, . . . or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

⁷⁵ Berns, *Buck v. Bell: Due Process of Law?*, 6 WESTERN POLITICAL QUARTERLY 764 (1953).

⁷⁶ *Supra* note 60, at 207.

⁷⁷ *Supra* note 60, at 207.

⁷⁸ O'Hara & Sanks, *Eugenic Sterilization*, 45 GEO. L.J. 20, 31 (1957).

⁷⁹ *Id.* at 31.

⁸⁰ PRITCHETT, *supra* note 28, at 685.

⁸¹ *Id.*

had the *Buck* opinion been written by a member of the court other than Holmes, and had recognition been given to the fact that for the first time the court was truly dealing with a right deserving the dignity of the name *natural right*. It is unfortunate that this recognition was never given in *Buck*, for the cases subsequent to *Buck* apparently became aware of the dignity of the right of procreation, but relying upon Holmes' opinion as authority continued upholding the substantive aspects of sterilization laws with some quite confused rationales for so doing.

THE BUCK PROGENY

The Background

Although *Buck* was the first United States Supreme Court case to review the constitutionality of a eugenic sterilization statute, a few state supreme courts had already reviewed similar statutes. The state cases preceding *Buck* found such statutes unconstitutional. However those rationales, for the most part, differed. Most applied somewhat of a substantive due process approach, which might be expected since this was a time when substantive due process was still a viable doctrine.⁸²

The first of these cases, *Smith v. Board of Examiners of Feeble-minded*,⁸³ recognized that the question of regulating control of procreation "carries with it certain logical consequences having far reaching results."⁸⁴ The court recognized the limitless power a legislature would have in determining who should be sterilized if this statute were upheld. The court found the statute unconstitutional as a denial of equal protection, but in so doing, implied, by way of dictum, that the right to procreate was totally immune from state limitation.

[I]t is not asking too much that an artificial regulation of society that involves these constitutional rights of some of its members shall be accomplished, *if at all* by a statute that does not deny . . . equal protection of the laws . . .⁸⁵ [emphasis added]

The following year a case dealing with a criminal sterilization statute,⁸⁶ brought before a three judge federal district court, held the statute was "in violation of the Constitution, which provides that cruel and unusual punish-

⁸² Text and notes, *supra* notes 37 to 41.

⁸³ *Smith v. Board of Examiners of Feeble-minded*, 85 N.J.L. 46, 88 A. 963 (1913).

⁸⁴ *Id.* at 48, 88 A. at 965, 966: "[I]s one of the attributes of government to assay the theoretical improvement of society by destroying the function of procreation? . . . it is evident that the answer to the question carries with it certain logical consequences, having far reaching results."

⁸⁵ *Id.* at 49, 88 A. at 967.

⁸⁶ *Davis v. Berry*, 216 F. 413 (S.D.E.D. Iowa 1914).

ment shall not be inflicted."⁸⁷ The concurring opinion found procreation a right of such dignity that it stated:

It seems so manifest to me that the law which provides that such operation (vasectomy or ligation of the Fallopian tubes) . . . performed . . . upon any convict . . . deprives the party in question of due process of law that it can scarcely be discussed.⁸⁸

A later federal court⁸⁹ found a similar statute to be in violation of Nevada's constitution prohibiting cruel punishment.⁹⁰ Three other cases prior to 1925 also found similar statutes void.⁹¹

In the same year in which *Buck* was decided, the Michigan Supreme Court,⁹² with some rather confusing language and apparent misconception as to the immune position of *natural rights*, stated by way of dicta, that the right of procreation could be controlled by state legislation, although vacating the sterilization order of the lower court on the grounds that they failed to comply with procedural requirements of the statute. The court stated: "[I]t 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."⁹³ In light of the confusion and intertwining of substantive due process with *natural rights*⁹⁴ by 1925, this contradictory language, which although recognizing the right, fails to grant it the proper immune position, might well have been expected.

It appears to be a characteristic of human history that amidst confusion and ignorance of a particular era, there are always a few enlightened minds who bring order and wisdom to the area in confusion. Yet it is usually left for later generations to recognize this wisdom. Justice Cardozo, one of our greatest jurists probably had this in mind when he wrote: "The point of view seems obvious, yet it wins its way slowly, and with hesitant avowal."⁹⁵

⁸⁷ *Id.* at 417.

⁸⁸ *Id.* at 419.

⁸⁹ *Michel v. Hendrichs*, 262 F. 687 (D.C. Nev. 1918).

⁹⁰ *Id.* at 690: "Vasectomy in itself is not cruel; it is no more cruel than branding, the amputation of a finger, the slitting of a tongue, or the cutting off of an ear; but when resorted to as punishment, it is ignominious and degrading, and in that sense is cruel. Certainly it would be unusual in Nevada."

⁹¹ *Haynes v. Lapeer*, 201 Mich. 138, 166 N.W. 938 (1918); *Osborne v. Thomson*, 103 Misc. Rpts. 23, 169 N.Y. Supp. 638 (Sup. Ct.), *aff'd. mem.*, 185 App. Div. 902, 171 N.Y. Supp. 1094 (1918); *Williams v. Smith*, 190 Ind. 526, 131 N. E. 2d (1921).

⁹² *Smith v. Command*, 231 Mich. 409, 204 N.W. 140 (1925).

⁹³ *Id.* at 415, 204 N.W. at 142 (emphasis added).

⁹⁴ Text and notes, *supra* notes 23 to 41.

⁹⁵ CARDOZO, *THE GROWTH OF THE LAW* 112 (1924).

Justice Weist, dissenting in *Smith v. Command*,⁹⁶ appears to be that figure who attempted to bring order and wisdom in the area of procreation. His enlightened dissent, written in the same year as *Buck*, stands in sharp contrast with Holmes' opinion. The dissent leaves little doubt that the state cannot violate the right to procreation:

The bodies of citizens may not, under legislative mandate, be cut into, and power of procreation destroyed by ligation or mutilation of glands or carving out of organs.⁹⁷

The opinion points out quite well the inhuman unjustified rationale employed by the majority in upholding the statute.

When pity and mercy and humanitarianism are subordinated to utilitarian considerations, and power of the state is employed to destroy the virility of unfortunate human beings rather than their segregation and treatment toward recovery or amelioration, we as a people invite atavism to the state of mind evidenced in Sparta, ancient Rome, and the Dark Ages, where individuality counted for naught against the mere animal breeding of human beings for purposes of the state or tribe.⁹⁸

There is no doubt that those dissenting considered the right of procreation a *natural right*, deriving its authority from a higher source than the Constitution, and unquestionably beyond the police power of the state.

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 government, was not lost or surrendered to legislative control in the creation of government, and is beyond the reach of the governmental agency known as the police power.⁹⁹

The dissent concludes with a warning regarding the potential abuse of this legislative power over procreation, which was prophetic of Nazi sterilization practices.¹⁰⁰

In light of the fact that all the cases prior to 1925 invalidated sterilization statutes on one ground or another, and the enlightened dissenting opinion of Justice Weist, *Buck* must be considered in great part the result of the power and prestige of one man—Justice Holmes—and in small part due to confusion over the *natural rights* doctrine.

⁹⁶ *Supra* note 92, at 428, 204 N.W. at 146.

⁹⁷ *Supra* note 92, at 428, 204 N.W. at 146.

⁹⁸ *Supra* note 92, at 430, 204 N.W. at 147.

⁹⁹ *Supra* note 92, at 436, 204 N.W. at 148.

¹⁰⁰ *Supra* note 92, at 448, 204 N.W. at 153: "If this law is held valid, then the measure of power of asexualization has not yet been marked, and classes may be added, and tyranny expanded."

BUCK V. BELL: THE AFTERMATH

If the power and prestige of Justice Holmes was evidenced by his ability to persuade the court to accept his reasoning in *Buck*, it became more obvious by the blind acceptance of later courts, at least as to the substantive validity of state sterilization statutes.

Three years after *Buck* the Kansas Supreme Court¹⁰¹ held a eugenic sterilization statute constitutional, relying upon *Buck* for authority. Although so holding, the opinion advanced the following argument:

The interest of the individual invaded by the statute is of the highest order [T]he two functions indispensable to the continued existence of human life are nutrition and reproduction. . . . without reproduction the race dies.¹⁰²

In light of this argument it seems paradoxical that the court concluded that the state had the right to place limitations on this "interest of the highest order." Even more surprising is the rationale of the court. It supported its conclusion by further explaining that the phrase "without reproduction the race dies" was only used to refer to the human race, but minus unfits such as defective and feeble-minded children.¹⁰³ This rationale was advanced again three years later when the court in *State v. Troutman*,¹⁰⁴ following *Buck*, upheld a similar statute. In reply to the appellant's contention that the statute in question was an opening wedge for tyranny, the court stated: "[H]ere we are administering a fixed and definite law, and are only concerned with that present law, not with what future legislatures may do. Nor are we concerned with what political enthusiasts may do."¹⁰⁵ It is of no small wonder that this rationale was not to appear again in the cases decided after Hitler's rise to power.

The recognition of the right to procreate, as a *natural right*, was seen again in later cases although once again confused by not placing it in an immune position.

[A]ssuming that the right to beget children is a *natural and constitutional right*, yet this right cannot be extended beyond the common welfare.¹⁰⁶

That the courts were quite confused as to the theory of *natural rights* in the first half of the nineteenth century is best evidenced by the Supreme Court of North Carolina in the case of *Brewer v. Valk*.¹⁰⁷ The court, in

¹⁰¹ *State v. Schaffer*, 126 Kan. 607, 270 P. 604 (1928).

¹⁰² *Id.* at 608, 270 P. at 605.

¹⁰³ *Id.*

¹⁰⁴ 50 Idaho 673, 299 P. 668 (1931).

¹⁰⁵ *Id.* at 679, 299 P. at 670.

¹⁰⁶ *In re Main*, 162 Okla. 65, 67, 19 P.2d 153, 156 (1933) (emphasis added).

¹⁰⁷ *Brewer v. Volk*, 204 N.C. 186, 167 S.E. 638 (1933).

somewhat of a strange mutation of the *natural rights* doctrine, which was always viewed as the rights of an individual, upheld a sterilization statute on the grounds that the police power of the states "is inherent in the states of the American Union and is not a grant derived from or under any written constitution."¹⁰⁸

While the courts were recognizing the great dignity of the right to procreate, although paradoxically upholding the substantive validity of sterilization statutes, a subtle shift appeared in the rationale for so doing, which was to later unfortunately find its way into the decisions of modern cases ordering sterilization in the absence of legislative authority. The court in *Brewer* in finding the statute to be a reasonable exercise of the police power, although finding it unconstitutional on procedural grounds, only alluded to eugenics but rather spoke basically in terms of the welfare of both the party to be sterilized and the economic hardship that would result:

Those welfare organizations and humane officials who appear in the picture are to be commended for their care and interest in this mother and child . . . Mrs. Brewer states that before Margaret was born she went hungry often, and that the family is often hungry now.¹⁰⁹

Thus, the eugenic sterilization statutes were first held unconstitutional on a basis other than *natural rights*. Then, after *Buck*, such statutes were treated as constitutional on the theory that eugenics was a reasonable exercise of the police power. A third step, in case treatment of this area then modified the emphasis placed on eugenics to an emphasis on the public need and public benefits obtained, with an eye toward the welfare system.

After the rise to power of Hitler in Germany the number of cases dealing with sterilization declined and with this decline came a shift in position regarding the substantive aspects of eugenic sterilization statutes.

In 1941 the Supreme Court of the United States in the case of *Skinner v. Oklahoma*,¹¹⁰ once again granted certiorari in a case questioning the validity of a eugenic sterilization statute. The statute provided for sterilization of a habitual criminal.¹¹¹ The "Act defines an 'habitual criminal' as a person who, having been convicted two or more times for crimes 'amounting to felonies involving moral turpitude.'"¹¹² Skinner, the petitioner, was convicted of chicken stealing in 1926, and robbery with firearms in 1929; both times he was sentenced to the Oklahoma State Reformatory. In 1936 he was arrested again for robbery with firearms and sentenced to the peniten-

¹⁰⁸ *Id.* at 190, 167 S.E. at 639.

¹⁰⁹ *Id.* at 190, 167 S.E. at 640.

¹¹⁰ *Skinner v. Oklahoma*, 316 U.S. 535 (1941).

¹¹¹ *Id.* at 536.

¹¹² *Id.*

tiary. The majority opinion, written by Justice Douglas, mentioned that "[i]t is urged that the Act cannot be sustained as an exercise of the police power, in view of the state of scientific authorities respecting inheritability of criminal traits."¹¹³ However he declined discussion on this point, finding it unnecessary, since the court found "a feature of the Act which clearly condemns it [is] its failure to meet the requirements of the equal protection clause."¹¹⁴

The majority, while deciding the case on equal protection grounds, seemed to indicate that the right of procreation was a *natural right*, although not using that term.

Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far reaching and devastating effects . . . 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.¹¹⁵

The Court distinguished the present case from *Buck*, and found contrary to *Buck* that the equal protection clause was violated. The majority further indicated that they would probably strike down any criminal eugenic sterilization law.¹¹⁶ Chief Justice Stone concurred, and although finding the statute violative of due process, started to chip away at *Buck* on substantive grounds.¹¹⁷ Justice Jackson in a separate concurring opinion also attacked the validity of the sterilization statute on the grounds that the relationship between the statute and the ends desired was only "vaguely identified"¹¹⁸ (a substantive due process argument). He implied that the only reason *Buck* was not overturned was that there were other grounds for finding the statute unconstitutional.¹¹⁹

One year later the Supreme Court of Washington in *In Re Hendrickson*,¹²⁰

¹¹³ *Id.* at 537, 538.

¹¹⁴ *Id.* at 538.

¹¹⁵ *Id.* at 541.

¹¹⁶ *Id.* at 543: "It is by no means clear whether, if an excision were made, this particular constitutional *difficulty might be saved* by enlarging on the one hand or contracting on the other . . . the class of criminals who might be sterilized." [Emphasis added.]

¹¹⁷ *Id.* at 544: "Moreover, if we presume that the legislature knows—what science has been unable to ascertain—that the criminal tendencies of any class of habitual offenders are transmissible regardless of the varying mental characteristics of its individuals. . . ."

¹¹⁸ *Id.* at 546.

¹¹⁹ *Id.*: "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 a minority. . . ." [Emphasis added.] See also PRITCHETT, *supra* note 28, at 685.

¹²⁰ 12 Wash. 2d 600, 123 P.2d 322 (1942).

struck down a eugenic sterilization statute for mental defectives on procedural due process grounds. The dissenting opinion appeared to imply that the majority was using due process merely as the most efficient way of striking down the statute.¹²¹

The opinions of *Hendricks* and *Skinner*, and the lack of cases in the forties and fifties are probably attributable in great part to "the abuse of sterilization legislation in Nazi Germany," which resulted "in turning American Public Opinion against the whole concept of compulsory state action."¹²²

BUCK V. BELL: THE MODERN SETTING

It has been often quoted that "time heals all wounds" and to that may be added "and dulls the memory." Although there was a great outcry against sterilization in the war and post-war years, the lessons of Nazi Germany appear to be growing dim to some people in our present day society, as indicated by a recent rebirth of sterilization practices by some courts of the several states.

In 1962 the spectre of involuntary sterilization reared its ugly head once again, although without legislative authority and based on a rationale that was only vaguely suggested in some earlier cases.¹²³ In 1962, a probate court in Ohio¹²⁴ ordered the sterilization of a feebleminded girl. Ohio has no statutory enactment providing for involuntary sterilization. The court found the authority for this order in an Ohio statute giving a probate judge discretion to take action "for the attention, supervision, care, and maintenance of said feeble minded person when the state hospital is to receive them."¹²⁵ The court took judicial notice of the overcrowding of state hospitals. The court noted part of the medical record which stated: "because of the combination of normal physical appearance and serious mental limitations, this girl is likely to become pregnant repeatedly and produce children for whom she cannot provide even the rudiments of maternal care."¹²⁶ The court then made a factual finding that if the feebleminded girl had any more children, financial burdens would be placed on the welfare departments of the county and the

¹²¹ *Id.* at 613, 123 P.2d at 328: "It does not seem to me that the invalidated portions of the act are so inextricably connected with and related to the remainder of the act that it must perforce be held, as the majority states, 'that the legislature would not have passed the act without them.'"

¹²² O'Hara, *supra* note 78, at 36, 37.

¹²³ *Supra* note 107.

¹²⁴ *In re Simpson*, 180 N.E.2d 206 (Ohio P. Ct. 1962); *Contra*, 37 U.S.L.W. 2624 (4/24/69).

¹²⁵ OHIO REV. CODE § 5125.30 (1968).

¹²⁶ *In re Simpson*, *supra* note 124, at 207, 208.

states which were already short of funds.¹²⁷ The court concluded that in the interests of the welfare of the state and the girl the sterilization procedure should be performed.¹²⁸ The court, although citing *Buck*, made no mention of eugenics but relied totally on a rationale of financial expediency to the state and the supposed welfare of the party to be sterilized. If there was any ambiguity as to the position of the judge who wrote the *Simpson* decision, this was alleviated when in a speech before the legislature favoring a sterilization statute, he said:

I appeal to you to start a campaign in your own community for compulsory sterilization. This is a positive action which can be taken to help reduce the ever expanding cost of public welfare.¹²⁹

Judge Gary was apparently not speaking on the spur of the moment for he has said on a later occasion that he intends to continue following *Simpson*.¹³⁰ In 1966, another Ohio probate judge, in an opinion similar to *Simpson*¹³¹ ordered the sterilization of two mentally retarded sisters.

These were not the only cases in which lower court judges found it in their discretion to utilize involuntary sterilization. The Santa Barbara Superior Court of the State of California has evidently found this procedure acceptable. The first of these cases¹³² involved a criminal non-support action in which the defendant pleaded guilty, and he was given the choice between probation, if he submitted to sterilization, or a jail sentence. After accepting probation and sterilization, the defendant changed his mind and brought a state habeas corpus action to the California Supreme Court, which was denied.¹³³ The case eventually was taken to the United States Supreme Court in 1965, upon a writ of certiorari, on the grounds that sterilization was cruel and unusual punishment. The United States Supreme Court denied certiorari.¹³⁴ With this apparent approval from the California and United

¹²⁷ *In re Simpson*, *supra* note 124, at 207, 208.

¹²⁸ *In re Simpson*, *supra* note 124, at 208: "It is the opinion of the 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."

¹²⁹ Quoted in PAUL, STATE EUGENIC STERILIZATION LAWS IN AMERICAN THOUGHT AND PRACTICE 601 n.9 (unpublished manuscript of Walter Reed Army Institute of Research 1960).

¹³⁰ "We have about six cases ahead on our quota for the Columbus State School. I will continue to follow the same procedure set forth in the opinion of the Simpson Case." Letter from Judge Gary to Julius Paul dated December 2, 1964.

¹³¹ Quoted in PAUL, *supra* note 129, at 597 A.

¹³² Case not reported but noted in Note, *Sterilization: A Continuing Controversy*, 1 U. SAN. FRAN. L. REV. 159 (1967).

¹³³ 33 U.S.L.W. 3278 (1965).

¹³⁴ *In re Andrada*, 380 U.S. 953 (1965).

States Supreme Courts, another judge of the same court ordered sterilization as a condition precedent to probation for a man and a woman found guilty of a conspiracy to defraud the welfare department. The judge, although noting that one of the defendants had no prior criminal record, and had held a job and voluntarily supported his own children for many years, believed both defendants had brought enough children into the world.¹³⁵ The next year a woman was charged with and pleaded guilty to being in a room where narcotics were being unlawfully smoked or used, with knowledge that the activity was occurring.¹³⁶ The probation officers report noted that this was her first conviction and recommended three years probation. The municipal court judge then added the sterilization provision at the probation hearing. When later asked why he added this provision to the probation order, the judge answered: "[T]his woman is in danger of continuing to lead a dissolute life and to be endangering the health, safety and lives of her minor children."¹³⁷ After agreeing to the probation order, Mrs. Hernandez changed her mind regarding the sterilization order and was thereby sentenced to three months in jail. A writ of habeas corpus was filed with the superior court. The superior court granted the writ and had Mrs. Hernandez released on probation. The court found that the municipal court had exceeded its power in ordering the sterilization since there was no violation of any of the three applicable California statutes allowing sterilization.¹³⁸

All of these modern cases have two things in common. They were all cases decided by lower court judges in the absence of statutory enactments. Further, none of them relied on a principle of eugenics to support their decisions, but rather on the individual justices' somewhat warped view of the problems inherent in our welfare systems. It must be wondered if even Justice Holmes, whose opinion in *Buck* may be regarded as a source of these decisions, could have upheld such decisions as being constitutional.

The transition in the abandonment of eugenics as a rationale for sterilization laws was recently completed by the Nebraska Supreme Court holding in the case of *State v. Cavitt*,¹³⁹ which has been appealed to the Supreme Court.¹⁴⁰ The court held that a statute making sterilization a condition precedent for release from a state mental institution, containing no provision requiring a finding that the mental deficiency or retardation was inheritable,

¹³⁵ *People v. Tapia*, Record Case No. 73313, Santa Barbara Super. Ct., July 7, 1965.

¹³⁶ *In the Matter of Hernandez*, No. 76757, Santa Barbara Super. Ct., June 8, 1966.

¹³⁷ *Washington Post*, May 25, 1966, p. A9.

¹³⁸ *In the Matter of Hernandez*, *supra* note 136, at 4.

¹³⁹ *State v. Cavitt*, 182 Neb. 712 (1968).

¹⁴⁰ Docketed 4/1/69—*Cavitt v. Nebraska*, 182 Neb. 712, No. 1083.

was constitutional as a valid exercise of the police power.¹⁴¹ The Nebraska statute which was originally based on eugenics was amended in 1957 removing this requirement.¹⁴² The court announced that procreation was a natural right, but then as earlier courts had, found that the state could limit this natural right.¹⁴³ The court went on to note that the factor of inheritability of the mental deficiency was not necessary,¹⁴⁴ but rather that the order was based on the medical board's finding that the plaintiff had "an I.Q. of 71" which placed her "in the lower two or three percent of the population in intelligence,"¹⁴⁵ and that her difficulty in making social adjustments and the potentiality of added children would burden her rehabilitation.¹⁴⁶ In the court's opinion, eugenics as a basis for sterilization was founded on a medical theory no longer recognized.¹⁴⁷ The court found that "the Legislature . . . may make reasonable regulations consonant with the public welfare in dealing with mentally defective people."¹⁴⁸ Eugenics was not the only basis for such legislation but rather it could be based on much broader grounds.

The effect of mental deficiency upon the patient, children born to him, the community, and the general welfare, as well as the conditions leading to his commitment, are pertinent considerations in the area of sterilization.¹⁴⁹

The factors that the court found controlling in the present case were the plaintiff's I.Q. of 71,¹⁵⁰ her potential inability to cope with and raise more children¹⁵¹ and the overcrowding of state mental institutions.¹⁵²

¹⁴¹ *Supra* note 139, at 719: "It is now the settled law that the Legislature, in exercise of the police power, may make reasonable regulations consonant with the public welfare in dealing with mentally defective people."

¹⁴² NEB. REV. STAT. §§ 83-501 to 83-508 (1959).

¹⁴³ *Supra* note 139, at 715: "It can hardly be disputed that the right of women to bear and the right of men 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."

¹⁴⁴ *Supra* note 139, at 719, 720.

¹⁴⁵ *Supra* note 139, at 717.

¹⁴⁶ *Supra* note 139, at 717: "Consideration was given to the probable effect upon her having more children, her minimal capacity to handle the responsibilities of parenthood, the possibility of producing mentally defective children, and the probability that added responsibilities of parenthood would in all likelihood handicap her potential rehabilitation."

¹⁴⁷ *Supra* note 139, at 719.

¹⁴⁸ *Supra* note 139, at 719.

¹⁴⁹ *Supra* note 139, at 720.

¹⁵⁰ *Supra* note 139, at 717.

¹⁵¹ *Supra* note 146.

¹⁵² *Supra* note 139, at 721: "The Beatrice State Home is full to overflowing with

The *Cavitt* case is significant in its rejection of eugenics as the only ground for sterilization laws and more important, for its broad expansion of the grounds for such laws. Under the rationale of *Cavitt*, sterilization would be valid for a number of reasons, including a medical board's opinion that the party would not adequately be able to cope with additional children, a sin of which many people not suffering from mental deficiency or illness are guilty. It would appear that the next logical step under this rationale may be sterilizing women who have a certain number of children and are on welfare. Perhaps a future day Holmes may find it necessary to declare "three generations of welfare recipients are enough." The limits to which sterilization may be employed seem indefinable, and dependent upon the whims and desires of the legislature so long as they make some utterances relating to the general welfare. In reply to the court's rather strained reasoning that sterilization is not compulsory under the statute in that the plaintiff can choose to remain confined in an institution, one need only look to the dissenting opinion:

The law applies, according to the court, to voluntary sterilization alone—an interpretation which I do not concur. The court supplies however little guidance to anyone in solving problems of effective consent. . . . More important, the coercive feature is hardly masked by the fictive option of sterilization or life imprisonment.¹⁵³

When the Supreme Court reviews the *Cavitt* case it will probably take one of four alternatives. It may elect to find the statute unconstitutional on procedural grounds, thereby leaving the present state of involuntary sterilization intact. Another alternative would be to either overrule the statute on substantive due process grounds or apply the *Griswold* rationale of marital privacy. If the Court chooses to apply a substantive due process approach it will probably leave all prior cases and statutes intact since these earlier statutes relied on eugenics. It is possible that the Court will not limit itself and find any sterilization law, whether based on eugenics or welfare, unreasonable. This would be preferable. However, even with this approach, procreation would not be given the complete protection required. If the Court applies *Griswold*, it will be required to further stretch the concept of marital privacy, as the plaintiff is not married.

The most preferable approach would be for the Court to recognize procreation as a natural right, given recognition through the ninth amendment, and therefore any statute preventing or requiring procreation would be unconstitutional.

these unfortunates as is evidenced by the fact that Gloria was compelled to wait ten days after commitment before being admitted to the home because of a lack of room."

¹⁵³ *Supra* note 139, at 723.

NATURAL RIGHTS AND THE RIGHT TO PROCREATE
GRISWOLD: WHERE THE PATHS CROSS

It is fitting that Justice Douglas wrote the majority opinion in *Griswold*, in light of his dissent in *Poe v. Ullman*,¹⁵⁴ wherein the Court refused to hear a case similar to *Griswold* on the grounds of lack of standing. The majority opinion in *Griswold* found that the Connecticut anti-contraception statute violated the right of marital privacy, which although not explicit in the Bill of Rights, is implied from a penumbra of rights guaranteed in the Bill of Rights.¹⁵⁵ Justice Douglas declined to take a substantive due process approach, appearing to take a *natural right* approach.

[W]e decline that invitation (referring to the *Lochner* case as a guide) . . . We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions. This law, however, operates directly on an intimate relation of husband and wife¹⁵⁶

Yet Justice Douglas finds need to rely on the Bill of Rights as the source of authority for this right,¹⁵⁷ a position somewhat inconsistent with the *natural rights* doctrine. He then, however, conceded that the "right of privacy (is) older than the Bill of Rights."¹⁵⁸ Although some confusion exists in the opinion, it is apparently a recognition of *natural rights*. It is believed that the right of marital privacy should not be considered a natural right. The right that should have been discussed and considered a natural right was the right to procreate. The statute under consideration sought to prevent the use of contraception, which is directly related to the right to procreate, and touched the marital relationship only peripherally.

The process of confusion which it is believed *Griswold* will bring about appears to have started, as evidenced by a decision of the United States Court of Appeals¹⁵⁹ challenging the constitutionality of an Indiana criminal sodomy statute.¹⁶⁰ The defendant pleaded guilty to the sodomy charge. The

¹⁵⁴ 367 U.S. 497 (1961).

¹⁵⁵ *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965): "In other words, the First Amendment has a penumbra where privacy is protected from governmental intrusion."

¹⁵⁶ *Supra* note 155, at 482.

¹⁵⁷ *Supra* note 155, at 484: "The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."

¹⁵⁸ *Supra* note 155, at 486.

¹⁵⁹ *Cotner v. Henry*, 394 F.2d 873 (7th Cir. 1968), *cert. denied*, 393 U.S. 847.

¹⁶⁰ BURNS IND. ANN. STAT. § 10-4221 (1956): "Whoever commits the abominable and detestable crime against nature with mankind or beast; or whoever entices, allures, instigates or aids any person under the age of twenty-one (21) years to commit masturbation or self-pollution shall be deemed guilty of sodomy. . . ."

court held the statute unconstitutional as an invasion of marital privacy citing *Griswold* as authority,¹⁶¹ notwithstanding the fact that the wife brought the complaint.¹⁶² The dissent takes note of the fact that murder committed in the bedroom would not be considered different than murder outside the bedroom.¹⁶³ Thus, from a decision dealing with a real and important problem for modern society—the control of contraception—there has emanated a decision protecting marital sodomy. It should be noted that a misapplication of the *natural rights* doctrine by the Supreme Court of the early 1800's originally led to the decline of the viability of *natural rights* as a legal doctrine.¹⁶⁴ It is not the result which the majority opinion in *Griswold* reaches that is unfortunate, but rather the failure to recognize the right to procreate and the failure to describe it as a *natural right*. The use of "marital privacy" as the right in question, is one of such flexibility and ambiguity that the limits may logically find their way past those which the majority had in mind when writing the opinion.

Mr. Justice Goldberg's concurring opinion in which he was joined by Chief Justice Warren and Justice Brennan comes a great deal closer to a consistent logical opinion than does the opinion of the majority. Justice Goldberg discussed at great length the ninth amendment.¹⁶⁵ He placed greater emphasis on the ninth amendment as the constitutional embodiment for basic fundamental rights not guaranteed in the first eight amendments but still retained by the people. This analysis comes very close to Corwin's analysis of the ninth amendment as the recognition of certain "immutable" rights retained by the people.¹⁶⁶ In deciding what rights should be considered fundamental, Justice Goldberg suggested that it is "a right . . . 'of such a character that it

¹⁶¹ *Cotner v. Henry*, *supra* note 159, at 875: "The import of the *Griswold* decision is that private, consensual, marital relations are protected from regulation by the state through the use of a criminal penalty."

¹⁶² *Cotner v. Henry*, *supra* note 159, at 875 n.2: "We think that Cotner has standing to complain about Indiana's intrusion into the privacy of Cotner's marriage relation, even though his wife has made the complaint against him. It is essential to the preservation of the right of privacy that a husband have standing to protect the marital bedroom against unlawful intrusion."

¹⁶³ *Cotner v. Henry*, *supra* note 159, at 876: "I take it that if Cotner had shot his wife in the privacy of their bedroom, the majority of the panel which heard this appeal would not proclaim that there is a difference between a crime committed in the bedroom and otherwise."

¹⁶⁴ Text and notes, *supra* notes 23 to 41.

¹⁶⁵ *Supra* note 155, at 491-94.

¹⁶⁶ *Supra* note 155, at 492: "The Ninth Amendment simply shows the intent of the Constitution's authors that other fundamental personal rights should not be denied such protection or disparaged in any other way simply because they are not specifically listed in the first eight constitutional amendments." See also CORWIN, *supra* note 7, at 4, 5; Pound, *Introduction to PATTERSON supra*, note 47.

cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'"¹⁶⁷ Although the concurring opinion upholds the right in question as that of marital privacy, its perspective is not towards a trespass of the marital bedroom concept as was the majority's¹⁶⁸ but rather towards "the right to bear children."¹⁶⁹ The concurring opinion stated rather clearly its opposition to the control of procreation.

[I]t is far more shocking to believe that the personal liberty guaranteed by the Constitution does not include protection against such totalitarian limitation of family size. . . . Yet, if upon a showing of a slender basis of rationality, a law outlawing voluntary birth control by married persons is valid, then, *by some reasoning, a law requiring compulsory birth control also would seem to be valid.*¹⁷⁰

It is interesting to note that after this discussion the opinion found it necessary to say that the state may find a statute of such necessity to its interests that the Court may uphold it.¹⁷¹

In viewing the background of Justice Black in relation to his absolutist position regarding first amendment rights, his dissent in *Griswold* appears to be somewhat paradoxical. Although Justice Black views first amendment rights as absolute,¹⁷² and therefore akin to natural rights in that both are totally immune from governmental limitation, he finds that all rights not found in the Constitution are subject to state limitation,¹⁷³ implying that all rights have their source in the Constitution, a position Justice Holmes and positivist philosophers would readily agree with. It certainly would appear contrary to Locke's perspective of the social compact and natural rights.¹⁷⁴ Justice Black's somewhat positivist approach is further highlighted by his strong denial of a substantive due process approach, and unfortunately, his confusion between natural law and substantive due process. "I merely pointed out that the reasoning stated in *Meyer* and *Pierce* was the same natural law due process philosophy which many later opinions repudiated. . . ."¹⁷⁵

¹⁶⁷ *Supra* note 155, at 493 quoting *Powell v. Alabama*, 287 U.S. 45, 67 (1932).

¹⁶⁸ *Supra* note 155, at 485: "Would we allow the police to search the sacred precincts of marital bedrooms for tell-tale signs of the use of contraceptives?"

¹⁶⁹ *Supra* note 155, at 497.

¹⁷⁰ *Supra* note 155, at 497 (emphasis added).

¹⁷¹ *Supra* note 155, at 498.

¹⁷² See Black, *The Bill of Rights*, 33 N.Y.U.L. REV. 865 (1960).

¹⁷³ *Supra* note 155, at 510: "I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision."

¹⁷⁴ Text and notes, *supra* notes 17 to 20.

¹⁷⁵ *Supra* note 155, at 516.

The total blurring between *natural rights* and substantive due process, coupled with the decline of due process in economic areas, appears in part to be responsible for Justice Black's somewhat paradoxical stand in his *Griswold* dissent and his philosophy in first amendment cases:¹⁷⁶

I cannot rely on the Due Process Clause or the Ninth Amendment or any . . . natural law concept as a reason for striking down this state law. The Due Process Clause with an "arbitrary and capricious" or "shocking to the conscience" formula was liberally used by this court to strike down economic legislation in the early decades of this century, threatening, many people thought, the tranquility and stability of the Nation. See, e.g. *Lochner* . . . That formula, based on subjective considerations of "natural justice", is no less dangerous when used to enforce this Court's views about personal rights than those about economic rights.¹⁷⁷

CONCLUSION

It is often said that "hard cases make bad law" and in a great many instances this may be so. Many times courts are so desirous of reaching a conclusion which the equities of the particular case demand, that the conclusion is reached first and the supporting rationale is later filled in. In many instances, however, this need not be necessarily so, for a careful, thorough analysis will show an approach and rationale which would inevitably lead to the desired end, and in so doing, would protect the rights which should be protected and prevent virtually unlimited extension of the artificial rationale into areas which the justices never conceived of in writing the opinion. Unfortunately, this criticism must be leveled at the *Griswold* decision.

The ability to create and nurture human life in a test tube is close to being a reality,¹⁷⁸ and in light of this, it is difficult to imagine that the posture of the law concerning so vital a right as procreation is on such diverse irreconcilable paths with the potential for great wrongs arising from the flames of confusion. Inconceivable as it may be to the rational mind, we presently live in an era in which some states prevent voluntary female sterilization for non-medical reasons¹⁷⁹ while other states have statutes to force people in institutions to submit to sterilization where they may become wards of the state.¹⁸⁰ Another state has introduced legislation which would require a woman on

¹⁷⁶ *Supra* note 172.

¹⁷⁷ *Supra* note 155, at 522.

¹⁷⁸ *Supra* note 2.

¹⁷⁹ See, e.g., CONN. GEN. STAT. REV. § 53-33 (1958); KAN. GEN. STAT. ANN. § 76-155 (1949); UTAH CODE ANN. § 64-10-12 (1961). These statutes make it a crime to perform sterilization unless for a medical necessity or under the compulsory eugenic sterilization statutes. See generally Comment, *Elective Sterilization*, 113 U. PENN. L. REV. 415 (1965).

¹⁸⁰ ORE. REV. STAT. § 436.050 (1965).

welfare with one illegitimate child to seek birth control assistance.¹⁸¹ Thus, there are certain statutes preventing poor people from gaining sterilization when that desire is motivated by the fear that added children could not be cared for, and other proposed statutes declaring that people who are financially unable to properly care for more children must be given birth control assistance.

Further, there are statutes calling for sterilization of certain members of our society based on some theory of eugenics,¹⁸² many of which are discredited today. Probably the most dangerous aspect of this confusion, however, is the added problem that certain individual judges, in the absence of statutory authority, have found in sterilization a convenient form of punishment, and in its implication an avenue of expression for their rather perverted conceptions of the problems of our penal and welfare systems. The tragedy of this confusion lies in the fact that due to the potential problems of overpopulation, an over-reaction, in part aided by this confusion, will cause excessive totalitarian control over procreation, and, at least as to this aspect, *Brave New World* will be upon us.

It is illuminating to note that although *natural rights* as a legal doctrine is generally not accepted today, most of the courts and even such staunch positivists as Holmes¹⁸³ have recognized the necessity of man having some dignity above that which the state bestows. From Socrates, to Cicero, to Locke, to our present Supreme Court, one universal characteristic appears to exist. Although calling it by different terms, all have sensed the need for the recognition that man does have certain rights upon which no limitation may be placed by the government.

Had the Supreme Court in *Griswold* chosen to accept the view that the right in question was the right of procreation, and further, that it was a natural right given recognition by the ninth amendment, certain desirable results would have logically followed instead of the undesirable results which have arisen from the confusion.

Any statute or court order providing for compulsory sterilization as a penalty, or a condition precedent to release from incarceration of any type, would be unconstitutional. Any statute which prohibited voluntary sterilization for any reason would be unconstitutional. Any state hospital's action in

¹⁸¹ S.B. 1648, Regular Session of Miss. Legislature (1964); See also Paul, *The Return of Punitive Sterilization Proposals—Current Attacks on Illegitimacy and the AFDC Program*, 3 LAW AND SOCIETY REV. 77 (1968).

¹⁸² See Ferster, *supra* note 58.

¹⁸³ *Lockner v. New York*, *supra* note 39, at 75, “. . . unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe *fundamental principles* as they have been understood by the traditions of the people and our law.” (emphasis added).

not allowing a consenting doctor to sterilize a consenting patient would be likewise unconstitutional. (This would not, of course, prevent a doctor from refusing such an operation, or a board of a hospital refusing to allow a consenting doctor to use its facilities where good medical judgment would dictate abstinence, with the failure to do so resulting in criminal or civil liability.) Lastly, any anti-contraception laws would be equally void. Procreation would be an individual right, as well it should be, with all avenues of prevention open but not forced upon the individual. The possibility of governmental control, and the potentialities therein as manifested in *Brave New World*, would not exist.

No longer would poor helpless citizens afflicted with mental defects be subject to judges who administer justice in their own peculiar perverted fashion, or be left to the mercy of law in the hands of "enlightened" people like the official of a state institution where sterilization was practiced, "who had a theory that the operation had beneficial effects on a variety of conditions including excessive masturbation, menstrual problems, excessive body hair and acne."¹⁸⁴

The failure of the court to recognize the existence of *natural rights*, as an immunity, was due to the misapplication of *natural rights* by earlier courts, leading to the rise of substantive due process which so confused and intertwined the two concepts that when due process was used as a tool of oppression in the thirties and went out of vogue, *natural rights* did also. This is evidenced by the failure of the majority, concurring and dissenting opinions in *Griswold* to properly differentiate between the two concepts—on one hand *natural rights*, an immunity, and substantive due process, a constitutional right subject to limitation by the state.

Perhaps when the court again has the opportunity to rule on a case involving this area of the law, as in the *Cavitt* case, it will consider the incongruous results that now obtain and, for the first time, properly apply the doctrine of *natural rights*.

The right of procreation will perhaps finally be seen as a *natural right* and will lose the dignity of a *natural right* only when it conflicts with the *natural right* of another person. This is not to say a collective right of society, ergo the general welfare, but an individual right. An analogy to this may be seen in the law of self defense.

To those who feel no necessity for protecting this individual right, to the extent advocated, one can only remind them that Hitler did exist. There are still those who might find this reference invalid on the grounds that we are of a different culture than Nazi Germany and are too humane to abuse such things as compulsory sterilization laws. If the remarks of the Ohio and

¹⁸⁴ Ferster, *supra* note 57, at 605.