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Compulsory Eugenic Sterilization: For Whom Does Bell Toll

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COMMENT

COMPULSORY EUGENIC STERILIZATION: FOR WHOM DOES *BELL* TOLL?

INTRODUCTION

> Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficient. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.[1]

Compulsory sterilization[2] on non-criminal grounds is provided for by statute in twenty-six states.[3] In a questionable exercise of the police power, these states have attempted to prevent the procreation of children by persons with certain enumerated mental disorders or by persons

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1. Olmstead v. United States, 277 U.S. 438, 479 (1928).

2. "The operation is much more serious in women than in men. In females the surgeon must do an abdominal operation, removing segments of the fallopian tubes (salpingectomy) and tying the cut ends. In men the operation is relatively simple. Segments of the *vas deferens* are removed (vasectomy) and the proximal ends of the *vas* are tied. Neither interferes with the desire for sexual intercourse or with its gratification." Lindman & McIntyre, THE MENTALLY DISABLED AND THE LAW 183 (1961).

3. ALA. CODE tit. 45, § 243 (1959). *But see In re* Opinion of the Justices, 230 Ala. 543, 162 So. 123 (1935). ARIZ. REV. STAT. ANN. § 36-531 (1956); CAL. WELF. & INST'NS CODE § 6624 (West 1966); CONN. GEN. STAT. REV. § 17-19 (Supp. 1965); DEL. CODE ANN. tit. 16, §§ 5701-5705 (1953); GA. CODE ANN. § 99-1301 (1955); IDAHO CODE ANN. § 66-801 (1949); IND. ANN. STAT. § 22-1601 (1964); IOWA CODE § 145.9 (1966); ME. REV. STAT. ANN. tit. 34, § 2461 (1964); MICH. STAT. ANN. §§ 14-381-82 (Supp. 1965); MINN. STAT. ANN. § 256.07 (1965); MISS. CODE ANN. § 6957 (1942); MONT. REV. CODES ANN. §§ 38-601-08 (1947); NEB. REV. STAT. §§ 83-501-09 (1943); N.H. REV. STAT. ANN. § 174:1 (1964); N.C. GEN. STAT. § 35-36 (1966); OKLA. STAT. ANN. tit. 43a, §§ 341-46 (1961); ORE. REV. STAT. § 436.070 (1965); S.C. CODE ANN. §§ 32-671-80 (1962); S.D. CODE §§ 30.0501-14 (1939); UTAH CODE ANN. § 64-10-1-14 (1953); VT. STAT. ANN. tit. 18, §§ 3201-04 (1959); VA. CODE ANN. § 37-231 (Supp. 1966); W. VA. CODE ANN. § 16-10-1 (1966); WIS. STAT. § 46.12 (1965). In 1905 the Pennsylvania legislature passed a sterilization bill "for the prevention of idiocy." See Challener, *The Law of Sexual Sterilization in Pennsylvania*, 57 DICK. L. REV. 298 (1952). The Bill was vetoed by Governor Pennypacker who returned it with this message:

> This Bill has, what may be called with propriety, an attractive title. If idiocy could be prevented by an Act of Assembly, we may be quite sure that such an act would have long been passed and approved in this State. . . . The nature of the operation is not described, but it is such an operation as they shall decide to be the safest and most effective. It is plain that the safest and most effective methods of preventing procreation would be to cut off the heads of the inmates, and such authority is given by the Bill to the staff of scientific experts . . . .

VETOES BY THE GOVERNOR OF BILLS PASSED BY THE LEGISLATURE, Session of 1905, p. 26.

who are not considered capable of properly caring for them for one reason or another. In most states there is a two-stage determination of applicability of the statute. Initially the individual is examined to determine if he is afflicted with one of the enumerated mental disorders: a pre-requisite to inquiry into the advisability of sterilization. These disorders include the various degrees of mental deficiency, mental illness, epilepsy and other novel classifications like "moral degenerates."[4]

This initial classification is usually followed by limitations on the authorization of sterilization, based on the appropriate statutory probability that the person subject to the statute will have issue with mental disorders or who will become wards of the state. This second pre-condition to sterilization varies widely from state to state.[5]

CONSTITUTIONAL OBJECTIONS

Despite the fact that close to seventy-thousand persons have been sterilized,[6] there are less than twenty-five appellate court cases involving the validity of a compulsory sterilization statute. The paucity of cases has been explained away by the Association for Voluntary Sterilization as due to the careful drafting and application of the statutes.[7] This explanation taxes credulity. There are other cogent factors that better explain the absence of litigation. A patient requiring continued confinement in a mental institution may die there after a needless sterilization. A patient, if he is permitted to be present, may be unable to make a rational defense in the sterilization hearing. In those states where counsel is provided, the compensation may be limited to as low as twenty-five dollars.[8] While notice to the guardian or relative may be required, it can easily be ignored by one who has "forgotten" about his relative in the mental hospital. The patient or his relative may consent to the operation. Consent by an incompetent is illusory and consent by a guardian is

4. MICH. STAT. ANN. § 14-382 (Supp. 1965).

5. CAL. WELF. & INST'NS CODE § 6624 (West 1966): "When the superintendent of the state hospital or state home is of the opinion that a patient who is afflicted with or is suffering from any of the conditions specified in this section should be sterilized . . . ." DEL. CODE ANN. tit. 16, § 5701 (1953): a three member board determines that "procreation is inadvisable." ARIZ. REV. STAT. ANN. § 36-536B (1956): "by the laws of heredity is the probable potential parent of socially inadequate offspring likewise afflicted, and that the inmate may be sexually sterilized without detriment to his or her general health, and that the general welfare of society will be promoted by the sterilization."

6. This includes a number of sterilizations performed prior to the adoption of the first compulsory sterilization statute in 1907 (Indiana). Statistics from Human Betterment Association of America, *Summary of United States Sterilization Laws* 2 (1958).

7. Human Betterment Association of America, *Summary of United States Sterilization Laws* 2 (1958). The Association for Voluntary Sterilization, formerly the Human Betterment Association for Voluntary Sterilization, advocates the legality of voluntary sterilization as a means of birth control and as a means of control over the population explosion. Interested persons may write them at 14 West 40th Street, New York, N.Y. 10018.

8. NEB. REV. STAT. § 83-505 (1943).

certainly questionable. This is certainly true of a patient's consent where sterilization is a pre-condition to release from the hospital. If relatives come forth to protest the sterilization they may have to pay counsel fees or psychiatrist's fees and many may be unwilling or unable to do it. Finally, and most important is the United States Supreme Court's decision in *Buck v. Bell.*[9] This case, upholding Virginia's eugenic sterilization statute in 1927, significantly lessened litigation in the state courts. *Bell* made the claims of equal protection and substantive due process violations insubstantial, and the state courts relied almost exclusively on the Supreme Court opinion, the reasoning of which is not construed or discussed in the cases. But *Bell* has withered in the face of new medical knowledge and expanding concepts of constitutional law.

PROCEDURAL DUE PROCESS

If people are to be sterilized against their will, the procedure determining the application of a compulsory sterilization statute must be fair.[10] Partial procedural protections are not enough to satisfy the commands of due process. The protection of the fourteenth amendment attaches to "persons," and does not deteriorate if the person happens to have a mental disorder. Under the Due Process Clause a person subject to a sterilization order should receive reasonable notice of the hearing,[11] have the right to counsel, retained or appointed;[12] have an opportunity to be heard; have the right to be confronted with the witnesses against him; and have the right to cross-examine and to offer evidence of his own. There must be findings adequate to make meaningful any appeal that is allowed.

All of these procedural safeguards are required in civil and criminal mental hospital commitments,[13] in application of a post-conviction sentencing act for sex offenders,[14] and in the application of a recidivist

9. 274 U.S. 200 (1927).

10. Procedural fairness, if not all that was originally meant by due process of law, is at least what it most uncompromisingly requires. . . . Only the untaught layman or the charlatan lawyer can answer that procedures matter not. Procedural fairness and regularity are of the indispensible essence of liberty. Severe substantive laws can be endured if they are fairly and impartially applied. Indeed, if put to the choice, one might well prefer to live under Soviet substantive law applied in good faith by our common law procedures than under our substantive law enforced by Soviet procedural practices.

Shaughenessy v. United States *ex rel.* Mezei, 345 U.S. 206, 224 (1953) (dissent).

11. Brewer v. Valk, 204 N.C. 186, 167 S.E. 638 (1933); *In re* Hendrickson, 12 Wash. 2d 600, 123 P.2d 322 (1942).

12. Lindman & McIntyre, *supra* note 2 at 190: "The lack of representation by counsel is undoubtedly a partial explanation for the infrequency of legal contests in the sterilization area."

13. Baxtrom v. Herold, 383 U.S. 107 (1965).

14. Specht v. Patterson, 386 U.S. 605 (1967).

statute where an habitual criminal issue is distinct.[15] The finding of fact that procreation is inadvisable is pertinent only in a sterilization proceeding. Therefore, all requisite procedural requirements are meaningless unless carried out after the question of sterilization is raised. When a person is in jeopardy of being deprived of a basic liberty[16] he should be entitled to the full protection which due process requires in a normal criminal case.[17]

SUBSTANTIVE DUE PROCESS

The thrust of non-criminal[18] sterilization statutes may be either to prevent procreation by persons with mental disorder because the disorder is hereditary, or because the person is incapable of properly carrying out the obligations of parenthood. The argument in favor of this latter purpose is that the child born to such a parent will be seriously handicapped or become a burden on the state's welfare rolls. Sterilization on these grounds in the absence of statute has been upheld in one state,[19] while another has rejected an attempt to make the likelihood of an increase in welfare recipients proper grounds for sterilization.[20] What criteria may a state use in determining who shall be forbidden from becoming a parent? "In my twenty years of psychiatric work," one psychiatrist asserts ". . . I have seen percentually at least as many 'intelligent' adults unfit to rear their offspring as I have seen such 'feebleminded' adults."[21] If sterilization is reserved for the poor because the children born to them will be welfare recipients then those in poverty will be put to the "cruel choice"[22] of economic survival or loss of a constitutional right.[23] Furthermore, sterilization on these grounds does not reckon with the fact that not being born as a welfare recipient is not a pre-condition to a productive life.

In discussing the constitutionality of sterilization to prevent the procreation of defective children, one starts, as one must, with the case of *Buck v. Bell.*[24] Although it has been alleged that the case was collusive, and that the medical testimony in the trial court was subject to question,[25] the holding has remained the law for the last forty years:

15. Graham v. State of West Virginia, 224 U.S. 616 (1912).

16. Meyer v. State of Nebraska, 262 U.S. 390 (1923).

17. *Cf.* United States *ex rel.* Gerchman v. Moroney, 355 F.2d 302 (3d Cir. 1966).

18. In addition to punishment, a criminal sterilization statute may also have eugenic purposes.

19. *In re* Simpson, 180 N.E.2d 206 (Ohio Probate Court 1962).

20. In the Matter of Hernandez, No. 76757 Santa Barbara Superior Ct., June 8, 1966.

21. KANNER, A MINIATURE TEXTBOOK OF FEEBLEMINDEDNESS 4 (1949).

22. Braunfeld v. Brown, 366 U.S. 599, 616 (1961) (dissent).

23. Meyer v. State of Nebraska, 262 U.S. 390 (1923).

24. 274 U.S. 200 (1927).

25. Coogan, "Eugenical Sterilization Holds a Jubilee," The Catholic World, April, 1953, at 44.

> The judgment finds . . . that Carrie Buck "is the probable potential parent of socially inadequate offspring, likewise afflicted, that she may be sexually sterilized without detriment to her general health and that her welfare and that of society will be promoted by her sterilization," . . . [W]e cannot say as a matter of law that the grounds do not exist, and if they exist they justify the result. 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.[26]

Bell assumed that the conditions covered in the statute were hereditary. Monolithic scientific opinion on this question has disintegrated. The Report of the American Bar Foundation on the Rights of the Mentally Ill had the following to say on the subject:

> The sterilization of the mentally ill is on even more precarious grounds than the sterilization of the mentally deficient. Little is known of the organic pathology of the two major mental diseases, schizophrenia and manic-depressive psychosis. Since heredity mechanisms by which these diseases may be transmitted are unknown and the separation of environmental factors from hereditary factors is most difficult, the American Neurological Association Commission for the Investigation of Eugenical Sterilization concluded that compulsory sterilization could not be advocated.[27]

> When considered in the light of recent scientific thinking the validity of sterilization for eugenic purposes is certainly open to serious questioning. In evaluating the advisability of compulsory sterilization it is important to keep in mind that mental illness and epilepsy have shown an increased response to medical treatment. It is also important to remember that though there is some relationship between heredity and mental deficiency, it has been estimated that about 89 per cent of inheritable mental deficiency is passed on by individuals not themselves deficient. At the present time there is no way of ascertaining who these normal carriers are.[28]

The medical testimony as to the lack of a reasonable basis on which to bottom eugenic sterilization is legion.[29] The legal comments are over-

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

27. Lindman & McIntyre, *supra* note 2 at 186.

28. *Id.* at 187. *See also* Cook, *Eugenics or Euthenics*, 37 ILL. L. REV. 287 (1943).

29. Plunkett & Gordon. EPIDEMIOLOGY AND MENTAL ILLNESS 28-30 (1960); Sarason &

whelmingly against any form of compulsory sterilization.[30] Furthermore, many of our religious sects forbid sterilization on theological grounds.[31]

Many of the statutes provide that the appropriate board must find that the operation is in the best interest of the patient. The possibility that the operation itself may have a harmful psychiatric effect should be weighed along with other factors in determining the reasonableness of the legislation. The possibility of harm from the operation is significant.[32] This aspect of sterilization makes justification of these statutes all the more difficult. Sterilization has been said to be a ". . . symbol of the 'reduced' or 'degraded' status of self. In retrospect, sterilization becomes a permanent mark on the mortification that the patient had to endure."[33] Thus, the question of sterilization on eugenic grounds is ". . . also empirical, for if some patients are to be rehabilitated and returned to the community, the role of sterilization in hindering or facilitating their adjustment in the community must be carefully considered and analyzed."[34]

The substantive due process argument then, is that a eugenic sterilization statute is a deprivation of liberty without due process of law since the attempted exercise of the police power is unreasonable. The "liberty"

Gladwin PSYCHOLOGICAL PROBLEMS IN MENTAL DEFICIENCY 448 (1958); Hutt & Gibby, THE MENTALLY RETARDED CHILD 128-29 (1958); Barrow & Fabing, EPILEPSY AND THE LAW 50 (rev. ed. 1964); and Weihofen, MENTAL DISORDER AS A CRIMINAL DEFENSE 41-2 (1954).

30. Kalven, *A Special Corner of Civil Liberties: A Legal View* I, 31 N.Y.U.L. REV. 1223 (1956); Ferster, *Eliminating the Unfit—Is Sterilization the Answer?*, 27 OHIO STATE L.J. 591 (1966); O'Hara and Sanks, *Eugenic Sterilization*, 45 GEO. L.J. 20 (1966). Note, Compulsory Sterilization of Criminals—Perversion in the Law; Perversion of the Law, 15 SYRACUSE L. REV. 738 (1964); Bligh, *Sterilization and Mental Retardation*, 51 A.B.A.J. 1059 (1965); Kindregan, *Sixty Years of Compulsory Eugenic Sterilization: "Three Generations of Imbeciles" and the Constitution of the United States*, 43 CHI-KENT L. REV. 123 (1966); Gest, *Justice Holmes v. Natural Law*, 23 TEMP. L.Q. 306 (1960).

31. Hassett, *Freedom and Order before God: A Catholic View*, 31 N.Y.U.L. REV. 1170, 1181 (1956); Rackman, *Morality in Medico-Legal Problems: A Jewish View*, N.Y.U.L. REV. 1205, 1210 (1956). *See also* Pope Pius XI, *Casti Conubii: Encyclical Letter on Christian Marriage* (1930), PAPAL ENCYCLICALS IN THEIR HISTORICAL CONTEXT 235, 236 (Mentor ec. 1956).

32. ". . . that psychiatric problems follow sterilization procedures is not open to question." Kaltreider, *Changing Attitude toward Abortion, Sterilization and Contraception*, 62 TEXAS MEDICINE 40, 45 (1966).

33. Sabagh & Edgerton, *Sterilized Mental Defectives Look at Eugenic Sterilization*, 9 EUGENICS Q. 213, 220 (1962). *See also* Wolf, *Can New Laws Solve the Legal and Psychiatric Problems of Voluntary Sterilization*, 93 J. UROLOGY 402-406 (1965):

> The only thorough psychiatric study of male sterilization is that by the Swiss psychiatrist Hinderer, done in 1947. Hinderer, M., "Uber die Sterilisation des Mannes und ihre Auswirkungen." Schweiz. Arch. F. Neurol. u. Psychiat., 60:145 (1947). Hinderer's conclusion was that male sterilization was by no means a harmless operation, and it should always be preceded by a thorough psychiatric examination . . . .

34. Sabagh & Edgerton, *supra* note 33 at 222.

protected by the fourteenth amendment includes the right ". . . to marry, establish a home and bring up children."[35] Mr. Justice Douglas, in speaking of a criminal sterilization statute said:

> We are dealing here with legislation which involves one of the basic civil rights of man. 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 this law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty.[36]

How can the uncertain relationship between heredity and mental disorder be applied in a particular sterilization case? Since the relationship is impossible to determine in most instances, a sterilization statute should be void as an unreasonable exercise of the police power. Since the Supreme Court has not considered the substantive due process issue in a sterilization statute for forty years, it is necessary to argue by analogy that such statutes are unconstitutional. The *Skinner* case described the right of procreation as a basic liberty. It is difficult to imagine such a right as not being protected by the same standards due process requires of other basic rights. Sterilization statutes relying on medical knowledge four decades old cannot be squared with the "familiar principle, . . . that a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms."[37] Is not the deprivation of a basic liberty subject to the rule that ". . . precision of regulation must be the touchstone in an area so closely touching our most precious freedoms?"[38] More than mere recitals of public policy are necessary to sustain these statutes.[39] Despite the fact that these statutes must be shown *necessary*[40] to the accomplishment of a permissible state policy, none are even rationally related to one.[41] With the "strict scrutiny" required by *Skinner*, compulsory sterilization must fail the test due process requires analogous encroachments to pass.

35. Meyer v. State of Nebraska, 262 U.S. 390, 399 (1923).

36. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942). It is also interesting to note that the opinion cites the report of the American Neurological Association Committee for the Investigation of Sterilization which concluded that sterilization could not be advocated.

37. Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (concurring opinion).

38. N.A.A.C.P. v. Button, 371 U.S. 415, 438 (1963).

39. *Cf.* Korst, *Legislative Facts in Constitutional Litigation*, 1960 THE SUPREME COURT REVIEW 75, 108.

40. *Cf.* Bates v. City of Little Rock, 361 U.S. 516, 524 (1960): "Where there is a significant encroachment upon personal liberty, the state may prevail only upon showing a subordinating interest that is compelling."

41. *Cf.* McLaughlin v. State of Florida, 379 U.S. 184, 196 (1964).

CRUEL AND UNUSUAL PUNISHMENT

The eighth amendment of the United States Constitution prohibits cruel and unusual punishments.[42] Despite earlier cases holding otherwise,[43] the Supreme Court first "assumed" that the eighth amendment applied to the states,[44] and subsequently in *Robinson v. California* treated that assumption as a holding that it does.[45] Thus the *Robinson* case[46] now stands for the proposition that the eighth amendment is made applicable to the states through the due process clause of the fourteenth amendment.

While all that is said in this section applies to criminal sterilization statutes,[47] the argument is presented that compulsory eugenic sterilization also constitutes a cruel and unusual punishment within the meaning of the eighth amendment. Necessary to such a finding would be that sterilization is cruel and unusual and that it is also a punishment. The concept of cruel and unusual[48] is organic in nature; it is ". . . not static. The amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[49]

Robinson declared unconstitutional as violative of the eighth and fourteenth amendments a California criminal statute which the state court construed to make the status of narcotic addiction a crime. In dicta significant for the inquiry here, the Court said:

> It is unlikely that any State at this moment in history would attempt to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease. A State might determine that the general health and welfare require that the victims of these and other human afflictions be

42. U.S. CONST. amend. VIII: "Excessive bail shall not be required, nor cruel and unusual punishments inflicted."

43. *In re* Kemmler, 136 U.S. 436 (1890); O'Neil v. Vermont, 144 U.S. 323 (1892).

44. Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947).

45. 370 U.S. 660 (1962).

46. *See* Robinson v. California, 371 U.S. 905 (1962). Petition for rehearing was denied, three justices dissenting. Robinson had died more than ten months before the Court's decision in the principal case.

47. Sterilization has been upheld against a cruel and unusual punishment claim in State v. Troutman, 50 Idaho 673, 299 P. 668 (1931); Smith v. Command, 231 Mich. 409, 204 N.W. 140 (1925); *In re* Main, 162 Okla. 65, 19 P.2d 153 (1933); and State v. Feilen, 70 Wash. 65, 126 P. 75 (1912). *Contra*, Mickle v. Henrichs, 262 F. 688 (D. Nev. 1918) and Davis v. Berry, 216 F. 413 (S.D. Iowa 1914).

48. "On the few occasions this court has had to consider the meaning of the phrase, precise distinctions between cruelty and unusualness do not seem to have been drawn . . . . If the word 'unusual' is to have any meaning apart from the word 'cruel,' however, the meaning should be the ordinary one, signifying something different from that which is generally done." Trop v. Dulles, 356 U.S. 86, 101 n. 32 (1958).

49. Trop v. Dulles, 356 U.S. 86, 101 (1958).

> dealt with by compulsory treatment, involving quarantine, confinement, or sequestration. But, in the light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.
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> . . . .
>
> To be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the crime of having a common cold.[50]

Mr. Justice Douglas concurred, adding:

> If addicts can be punished for their addiction, then the insane can also be punished for their insanity. Each has a disease and each must be treated as a sick person.[51]
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> . . . .
>
> We would forget the teachings of the Eighth Amendment if we allowed sickness to be made a crime and permitted sick people to be punished for being sick.[52]

The status of being a drug addict cannot be made a crime since any punishment would be cruel and unusual. Since mental disorder cannot be made a crime, the question becomes: "Can a state escape the force of the cruel and unusual punishment prohibition by simply denominating its deprivations as eugenic rather than punitive?"[53]

Robinson must at least stand for the proposition that a person with a mental disorder cannot be punished because of his status. "It would be archaic," the Supreme Court has said, "to limit the definition of 'punishment' to 'retribution.' Punishment serves several purposes; retributive, rehabilitative, deterrent—and preventive."[54] In those states having a criminal sterilization statute what is *punishment* to a criminal is regarded as *treatment* to a person with a mental disorder. This has caused one author to comment: "Surely, sterilization as a punishment for habitual criminals does not become nonpenal simply because it is applied to sick

50. Robinson v. California, 320 U.S. 660, 666-7 (1962).

51. *Id.* at 674.

52. *Id.* at 678.

53. Kindregan, *Sixty Years of Compulsory Eugenic Sterilization: 'Three Generations of Imbeciles' and the Constitution of the United States*, 43 CHI-KENT L. REV. 123, 130 (1966); McWilliams, *Cruel and Unusual Punishments: Use and Misuse of the Eighth Amendment*, 53 A.B.A.J. 451 (1967).

54. United States v. Brown, 381 U.S. 437, 458 (1965).

people."[55] The critical *non sequitur* here, however, is that the similarity of a criminal penalty to an alleged treatment of sickness is not dispositive of the cruel and unusual punishment question. Sick people may be institutionalized because of their status just as may be done to criminals because of their crimes. Yet there is no cruel and unusual punishment in either of these cases. The proper inquiry should be whether the deprivation sought to be imposed on a sick person because of his status is treatment or a punishment,[56] "In the light of contemporary human knowledge, . . ."[57] and ". . . evolving standards of decency that mark the progress of a maturing society, . . ."[58] sterilization on eugenic grounds cannot be viewed as a treatment, and therefore comes into fatal contact with the eighth amendment. The concept of treatment in the field of mental health is, of necessity, amenable to broad discretion. But surely treatment involves some attempt to help the condition of the patient. The limit of the power of the State over the bodies of men and women is overreached when in the guise of treatment it sterilizes to prevent the procreation of children it *cannot know* will be disordered, to prevent an increase in welfare recipients, or when it feels that specific consent is needed for one to procreate children. Neither legislative declarations of non-existent medical fact nor utilitarian considerations of the above nature should be allowed to transmute a constitutional right into nothing more than a frozen formalism.

EQUAL PROTECTION OF THE LAWS

A significant question of denial of equal protection arises in those states whose statutes only apply to patients in a *state institution.* While some cases held this defect a violation of equal protection,[59] the Supreme Court decided in the *Bell* case that the classification did not violate equal protection. The Court said:

> It is the usual last resort of constitutional arguments to point out shortcomings of this sort. But the answer is that the law does all that is needed when it does all that it can, indicates a policy, applies it to all within the lines, and seeks to bring within the lines all similarly situated so far and so fast as its means allow. Of course so far as the operations enable those

55. McWilliams, *supra* note 53 at 454.

56. State designation is not controlling. "How simple would be the tasks of constitutional adjudication and of law generally if specific problems could be solved by inspection of labels pasted on them." Trop v. Dulles, 356 U.S. 86, 94 (1958).

57. Robinson v. California, 320 U.S. 660, 666 (1962).

58. Trop v. Dulles, 356 U.S. 86, 101 (1958).

59. Haynes v. Lapeer, 201 Mich. 138, 166 N.W. 930 (1918); Smith v. Board of Examiners, 85 N.J.L. 46, 88 Atl. 963 (1913); and *In re* Thompson, 103 Misc. 23, 169 N.Y. Supp. 638 (Sup. Ct.), *aff'd*, Osborne v. Thompson, 185 App. Div. 902, 171 N.Y. Supp. 1094 (1918).

> who otherwise must be confined to be returned to the world, and thus open the asylum to others, the equality aimed at will be more nearly reached.[60]

Sixteen years later the same court decided the *Skinner* case. The Court reiterated the above language from *Bell* and after reciting that sterilization involves the deprivation of a basic liberty said that ". . . strict scrutiny of the classification which a state makes in a sterilization law is essential, . . ."[61] The Court also pointed out that the "saving feature"[62] in *Bell* was the "opening of the asylum to others" argument of Justice Holmes.

The Holmes view of the equal protection clause has not been sustained in subsequent decisions of the Court. It is no longer the last resort in constitutional argument. Equal application among the patients of a state institution does not end inquiry under the equal protection clause. "The courts must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose. . . ."[63] The purpose of eugenic sterilization statutes is to prevent what is alleged to be dangerous procreation by certain persons. As between persons inside and outside a state institution, when, if ever, would the danger be greater from the former? If reasonableness is assumed on the basis that a state has done "as much as it can as fast as it can"[64] then equal protection inquiry will be effectively precluded. No court is competent to apply this test of "reasonableness" since the test itself is unreasonable. To bottom reasonableness here on the capacity of a state's mental institutions would be to encourage crowded conditions and allow the protections of the Constitution to be determined by appropriations of the state legislatures.[65] To apply the safeguards of the Constitution

60. Buck v. Bell, 274 U.S. 200, 208 (1927).

61. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

62. *Id.* at 542.

63. McLaughlin v. Florida, 379 U.S. 184, 191 (1964).

64. *Id.* at 194. This language was cited in the State's brief in the case of Nebraska v. Cavitt, now on appeal in the Supreme Court of Nebraska. Brief for Appellant, p. 26: "The case before this court is on all fours with Buck v. Bell, which is examined and approved in Skinner and McLaughlin v. Florida . . . ." The Nebraska district court held the compulsory sterilization statute unconstitutional as applied to Gloria Cavitt since there was no finding by the Board of Examiners of Mentally Deficient that the mental deficiency of the person to be sterilized was hereditary; since the statute did not provide for adequate compensation of the guardian ($25.00); since the statute did not provide for release from the hospital after sterilization; since the term "mentally deficient" was not defined (four of the experts produced by the State did not agree on what the term meant) thus making the statute vague, uncertain, and indefinite; and since the statute violates the constitutional inhibitions against cruel and unusual punishment. Both parties have indicated they will appeal to the United States Supreme Court.

65. The entire purpose of the enactment seems to be to save expense to future generations in the operation of eleemosynary institutions . . . ; the theory being

on a cost-plus basis is to make its protections nothing more than ". . . a formula of empty words."[66]

While no suggestion is made here that the statutes are being applied in a discriminatory fashion among those determined to be within its scope, the danger of such an application is real and the proof of it is difficult.[67] Discrimination on racial, political, or personal grounds is found in many areas of our society. Although a discriminatory application would be unconstitutional here, one wonders how many non-eugenic sterilizations have taken place in spite of the constitutional ban.[68]

CONCLUSION

These attempts by states to cure or prevent mental disorder by eugenic sterilization suffer from many constitutional infirmities. The omnibus generality of *Bell* ". . . leaves wide open the standard of responsibility"[69] for those who must apply the statutes. The odious forfeiture of a precious freedom should not be allowed merely because, as yet, we have no other answer to the myriad questions presented by a mental health problem. As a matter of constitutional law, we can afford to wait.

Patrick J. McKinley

> that if the Board of Examiners should conclude that every feeble-minded inmate of a public institution should be operated upon, . . . , then the state would be justified in turning all the people of this class at large to find their own way, trusting that they, in accordance with the theory of the law, could no longer procreate; the state being thus relieved of their care during their lives and freed from the danger of the burden in the future of their abnormal offspring . . . . It seems clear that Frank Osborn is not given the equal protection of the laws, having in mind many others situated as he is who are not within the walls of a public institution, to which equal protection he is entitled with them.

In re Thompson, 103 Misc. 23, 34, 169 N.Y. Supp. 638, 644 (Sup. Ct. 1918).

66. Skinner v. Oklahoma, 316 U.S. 535, 542 (1942).

67. *Cf.* Smith v. Board of Examiners, 85 N.J.L. 46, 53, 88 Atl. 963, 966 (1913): "There are other things besides physical or mental diseases that may render persons undesirable citizens, or might do so in the opinion of a majority of a prevailing Legislature. Racial differences, for instance, might afford a basis for such an opinion in communities where that question is unfortunately a permanent and paramount issue."

68. See Meltsner, *Equality and Health*, 115 U. PA. L. REV. 22 (1966).

69. Ashton v. Kentucky, 384 U.S. 195, 200 (1966).