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Constitutional Law—The Sterilization of the Mentally Deficient—A Reasonable Exercise of the Police Power?—*State v. Cavitt*, 182 Neb. 713, 157 N.W.2d 171 (1968)

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CONSTITUTIONAL LAW—THE STERILIZATION OF THE MENTALLY DEFICIENT—A REASONABLE EXERCISE OF THE POLICE POWER?—*State v. Cavitt*, 182 Neb. 713, 157 N.W.2d 171 (1968).

The Compulsory Eugenic Sterilization (hereinafter referred to as *CES*) of certain classes of individuals within our society has been practiced in the United States since 1907. This practice is based upon a theory of eugenics which assumes that certain types of people are socially more desirable than others and that the improvement of future generations can be accomplished through decreasing the rate of propagation of the inferior individuals and thus increasing the proportion of the desirable types. Proponents of the principle, relying on scientific claims that certain types of mental disabilities are inheritable traits, advocate the sterilization of those persons possessing these traits.[1]

Litigation in this area has been limited, particularly after the landmark United States Supreme Court decision in 1927 which gave a stamp of constitutionality to *CES*.[2] In the decisions which have examined this area, however, one consistent factor is notable. All statutes which have been examined by the courts have contained a requirement that the proposed patient have an inheritable trait towards a mental disability which would be passed to any offspring which they might bear.

This requirement would seem in accord with the theory upon which *CES* is based. Recently the Nebraska Supreme Court upheld the constitutionality of the Nebraska *CES* statutes in *State v. Cavitt*.[3] The Nebraska plan for the sterilization of the mentally deficient does not require such a finding of inheritability as a prerequisite for the operation. In sustaining this plan against Gloria Cavitt's constitutional attack, the Nebraska Supreme Court has extended the boundaries of the police power of the state one step beyond its previously defined limits. At a time when statutory *CES* plans are under attack as being based on a scientifically invalid premise[4] *i.e.* the inheritability of mental deficiency, the court has opened new horizons for the eugenicists' dream of eliminating the unfit from our society.

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[1] THE REPORT OF THE AMERICAN BAR FOUNDATION, THE MENTALLY DISABLED AND THE LAW 183 (Lindman & McIntyre ed. 1961).

[2] Buck v. Bell, 274 U.S. 200 (1927).

[3] 182 Neb. 713, 157 N.W.2d 171 (1968).

[4] *See, e.g.*, Ferster, *Eliminating The Unfit—Is Sterilization The Answer?*, 27 OHIO ST. L.J. 591 (1966).

The decision in the *Cavitt* case was that of a minority of the court. This minority opinion was given effect by the Nebraska constitutional provision which requires a vote of five of the seven judges of the supreme court to declare an act of the legislature unconstitutional. While such an issue raises interesting constitutional questions in itself, it is not central to the theme of this article and will not be discussed at length here.[5] It is the purpose of this note to examine the decision in *Cavitt* with respect to the constitutional attacks advanced and the scientific basis upon which *CES* schemes rest.

STATE V. CAVITT—BACKGROUND

Gloria Cavitt is thirty-six years old and has been an inmate of the Beatrice State Home for approximately six years. She has an I.Q. of 71. Prior to her commitment to the State Home, she lived with one William Cavitt for a period of fourteen years, the relationship resulting in eight children. She comes from a low social and economic brackground. Both she and the children were largely provided for by public aid.[6]

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[5] NEB. CONST. art. V, § 2 provides in part that: "No legislative act shall be held unconstitutional except by the concurrence of five judges." The question of the constitutionality of such a provision in a state constitution has been examined by the United States Supreme Court in Ohio *ex rel.* Bryant v. Akron Metropolitan Park District, 281 U.S. 74 (1930). In upholding the Ohio constitutional provision, the Court relied on the Guaranty Clause of the Federal Constitution saying that this allowed the states to structure their courts as they pleased. This was deemed a "political question" and thus the Court would not pass on it. It is interesting, and perhaps critical, to note here that the merits of this case were examined and rejected as not presenting a substantial federal question.

Although the issue has not been litigated, it would appear that the logical grounds for an attack on such a provision would be the Supremacy Clause of the Federal Constitution which states that the Constitution is the supreme law of the land: "[A]nd the Judges of every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI. The question is thus formed: Can a federally protected right be preempted by a state constitutional provision allowing a minority of the court to prevail? In a somewhat analogous situation, the Supremacy Clause was used to strike down a Colorado provision for the recall of judicial decisions. People v. Western Union Telegraph Co., 70 Colo. 90, 198 P. 146 (1921). The basis for the decision was that the law did not provide for the separation of state and federal questions. Since the state could not provide for the recall of judicial decisions holding statutes in violation of the Federal Constitution, the recall law was void.

[6] State v. Cavitt, 182 Neb. 713, 157 N.W.2d 171 (1968).

In 1967 the superintendent of the Beatrice State Home, contemplating Gloria's discharge, certified her to the Board of Examiners of the Mentally Deficient under authority of Neb. Rev. Stat. § 83-503 (Reissue 1966). It is the duty of the Board of Examiners to investigate each potential dischargee from the Beatrice State Home who may be capable of begetting offspring and determine whether such person should be sterilized as a condition prerequisite to his release.[7] A hearing was held with Gloria represented by appointed counsel. The Board, at the close of the hearing, found that in their opinion Gloria was mentally deficient, of child bearing age, and should be sterilized prior to her release from the Home.[8] Gloria appealed the decision of the Board to the District Court for Gage County which held that the evidence was insufficient to sustain the order of the Board and that the controlling statutes authorizing Gloria's sterilization were unconstitutional and void. From this decision, the State appealed to the Nebraska Supreme Court which reversed the lower court decision.

Three basic constitutional arguments were used to attack the Nebraska *CES* statutes: (1) that they are in violation of the due process clause, (2) that they deny equal protection of the law, and (3) that the practice of sterilizing the mentally deficient constitutes cruel and unusual punishment.

DUE PROCESS

The sterilization of mental defectives has been viewed as a valid application of the police power of the state.[9] However, as Justice Newton points out in his dissenting opinion in the *Cavitt* case, there must be a reasonable relationship between the methods which are employed by the state in its programs and the goals that the law seeks.[10] If the relationship is vague or uncertain, the law constitutes a violation of substantive due process guaranteed the individual by the Fourteenth Amendment.

Buck v. Bell[11] has been considered by the courts of this country as settling the question of substantive due process in the area of the sterilization of the mentally deficient. Justice Holmes, in this case, assumed the validity of the role of heredity in mental deficiency.

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7 NEB. REV. STAT. § 83-504 (Reissue 1966).

8 Procedure for the determination is outlined in NEB. REV. STAT. § 83-505 (Reissue 1966). It was not contended that the method was procedurally faulty.

9 Buck v. Bell, 274 U.S. 200 (1927); Smith v. Command, 231 Mich. 409, 204 N.W. 140 (1925).

10 182 Neb. at 726, 157 N.W.2d at 181 (dissenting opinion).

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

The scientific fact to Holmes that the state might, by sterilizing the mentally deficient, reduce their numbers in subsequent generations is sufficient justification for the assumption of the power by the state to render such individuals sterile.[12] Since this decision, the scientific validity of this premise has never been questioned by an appellate court.[13]

As a result of medical investigation since the implementation of the original sterilization laws, there now exists serious doubt as to whether the genetic principles upon which they are based are sound. At the present time, medical and legal opinion on this point almost universally reject the view that there is a definable relationship between heredity and mental deficiency upon which to base such measures. The listing of those authorities rejecting or seriously questioning this premise is long and impressive.[14] This question also forms the basis for the dissenting opinion written by Justice Smith in the *Cavitt* case.[15]

It would appear that the Nebraska Legislature has not been entirely insensitive to the changing views of medical authority. Until 1957, Nebraska provided *CES* for not only the mentally deficient, but also the insane, the habitual criminal, the moral degenerate, and the "sexual pervert." This statute also provided for the castration of any inmate in a Nebraska institution if he was there under conviction for "rape, incest, any crime against nature, or violation of section 28-901."[16]

All classes except the mentally deficient were dropped in 1957. No committee testimony is available as to why these sections were deleted. While the process for the sterilization of the mentally deficient was retained, certain changes were made in its structure.

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12 *See* Gest, *Eugenic Sterilization: Justice Holmes vs. Natural Law*, 23 TEMP. L.Q. 306 (1950).

13 THE REPORT OF THE AMERICAN BAR FOUNDATION, THE MENTALLY DISABLED AND THE LAW 183 (Lindman & McIntyre ed. 1961).

14 COMMITTEE OF AMERICAN NEUROLOGICAL ASSOCIATION, EUGENICAL STERILIZATION (1936); THE REPORT OF THE AMERICAN BAR FOUNDATION, THE MENTALLY DISABLED AND THE LAW (Lindman & McIntyre ed. 1961); American Medical Association, *The Report of the AMA Committee to Study Contraceptive practices*, PROCEEDINGS 54 (May, 1937); American Psychiatric Association, *Diamond Reports, Section III*, MISC. STATUTES (1960); Nebraska Psychiatric Association in Nebraska Legislative Council Report on the Mentally Retarded No. 99 at 15 (1960).

15 182 Neb. at 723, 157 N.W.2d at 179 (dissenting opinion).

16 Neb. Laws 1929, c. 163, § 4, p. 565 (repealed 1957) (now Neb. Rev. Stat. § 83-504 (Reissue 1966)).

By Neb. Rev. Stat. § 83-504 (Reissue 1950) and in accordance with an Attorney General's opinion,[17] the old law required five prerequisites to sterilization:

1. that the person is feebleminded,
2. able to beget offspring,
3. *that the offspring would inherit a tendency to feeblemindedness,*
4. that such procreation would be harmful to society,
5. that such inmate not be paroled or discharged unless sterilized.

These requirements were replaced by Neb. Rev. Stat. 83-504 (Reissue 1966) which allows sterilization if:

1. the person is mentally deficient,
2. is apparently able to beget offspring,
3. in the opinion of the Board of Examiners should be sterilized as a condition prerequisite to parole.

The avowed purpose of this change as seen from the testimony presented to the Public Health Committee and from the Committee's statement on LB 518 was to broaden the base of the sterilization practice.[18] The committee's statement on LB 518 notes: "This bill would permit an individual to leave the institution and take care of himself, but not burden society with children."[19]

Evidently Justice Carter in the *Cavitt* case has adopted this view of the state's power to sterilize the mentally deficient although his position is somewhat unclear. He states: "[T]he state may limit a class of citizens in its right to bear or beget children with an in-

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[17] 221 Att. Gen. Reports 379 (1958).

[18] Dr. E. L. Spradling, then superintendent of the Lincoln State Hospital, testified that the five prerequisites practically eliminated sterilization practices as all five conditions were rarely found in one person. It will be noted here that what he was saying was that since the person must be feeble-minded and of child bearing age to even be considered for sterilization and requirement "5" is of only a general nature, the requirement of a finding of a hereditary trait toward mental deficiency in an individual had practically eliminated the practice. *Hearings before the Public Health Committee,* 1957 Legislature, LB 518 (1958).

[19] *Hearings before the Public Health Committee,* 1957 Legislature, LB 518 (1958).

[20] 182 Neb. at 715, 157 N.W.2d at 175.

herited tendency to mental deficiency[20]...." Then: "It is the function of the Legislature, and its duty as well, to enact appropriate legislation to protect the public and preserve the race from the known effects of the procreation of mentally deficient children by the mentally deficient."[21] Both of these statements seem to indicate that the court feels heredity is the prime factor in these laws. However, Justice Carter continues: "It is apparent here that the Board could order the sterilization of a patient who had suffered mental deficiency from an accident or disease, or some other form of mental deficiency entirely unrelated to the transmission to offspring of a tendency to mental deficiency."[22] He notes: "They [sterilization laws] have been applied to mental defective where transmission of mental weakness is not possible."[23] Finally the court says: "The effect of mental deficiency upon the patient, children born to him, the community, and the general welfare... are pertinent considerations in the area of sterilization."[24]

The court apparently arrives at this standard: If you are mentally deficient but emotionally stable and financially able to support children, you will escape the sterilizer's knife. If not, you must be sterilized as a prerequisite to release from the Beatrice State Home. This position is, in fact, the social cost theory advanced by the early eugenicists that even a normal child born to abnormal parents will probably become a burden on society by adding to its welfare roles.[25] This view is coming back into vogue now that the heredity factor has been seriously questioned by medical authorities.

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21 182 Neb. at 715, 157 N.W.2d at 175. This language is verbatim from the 1925 Michigan case of Smith v. Command, 231 Mich. 409, 204 N.W. 140 (1925) where the Michigan Court upheld the state sterilization law which was based upon the heredity factor.

22 182 Neb. at 716, 157 N.W.2d at 175.

23 182 Neb. at 716, 157 N.W.2d at 175. It would have been helpful here if the court would have cited instances where this was done. Justice Newton, in his dissenting opinion, states: "It may be noted that in the great majority of cases, *and perhaps without exception,* where other jurisdictions have held sterilization statutes to be constitutional, the thinking of the legislature [*i.e.* the inclusion of a heredity factor] was incorporated in the statute in the same manner as it may be found in the old Nebraska act now repealed." State v. Cavitt, 182 Neb. 713, 728, 157 N.W.2d 171, 181 (1968) (dissenting opinion) (emphasis added).

24 182 Neb. at 720, 157 N.W.2d at 177.

25 At this point, one wonders what effect the fact that Gloria Cavitt had eight children largely provided for by public aid had on the Board of Examiners and the court and, also, whether they were in fact sterilizing an ADC mother as opposed to a mentally deficient person.

The Nebraska *CES* law as interpreted by the supreme court would appear open to attack on two grounds relating to the requirement of substantive due process to be met in this type of governmental action. The question first arises as to the existence of guidelines as limitations on the exercise of this power by the Board of Examiners. It is axiomatic that delegations of power to administrative boards must be accompanied by such safeguards against the arbitrary exercise of the discretion vested in them. As Justice Carter observed in an earlier opinion devoted to this issue: "The limitations of the power granted and the standards by which the powers are to be administered must, however, be clearly and definitely stated in the authorizing act."[26] Justice Newton, in his dissenting opinion in the *Cavitt* case has developed the question of such power delegations at length.[27]

There are three requirements in the Nebraska *CES* law which could ostensibly be called standards to be met in each individual sterilization case. The person must be mentally deficient and of child bearing age. These would appear to be truisms as opposed to standards assuming that those committed to the Beatrice State Home are, indeed, mentally deficient and realizing the futility of sterilizing those who are not of child bearing age. The final requisite is that in the opinion of the Board the person should be sterilized as a condition prerequisite to release. In other words, the decision as to the potential social undesirability of offspring is left entirely in the hands of the administrators. Commenting on this fact, Justice Newton noted: "[T]he statute fails to make clear in what manner, if any, the Legislature now considers procreation by a feeble-minded person to be detrimental to society and it clearly does not require the finding of any facts whatsoever that point in that direction."[28]

The court has apparently attempted to fill the legislative gap in this area by suggesting several general guidelines for consideration by the Board. Not wishing to develop at length the issue of judicially suppplied standards, for the purpose of this Note it is sufficient to consider the comments of the United State Supreme Court in this area:

> It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case.[29]

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[26] Lincoln Dairy Co. v. Finigan, 170 Neb. 777, 783, 104 N.W.2d 227, 231 (1960).

[27] 182 Neb. at 726, 157 N.W.2d at 181 (dissenting opinion).

[28] *Id.* at 728, 157 N.W.2d at 181 (dissenting opinion).

[29] Giaccio v. Pennsylvania, 382 U.S. 399, 402 (1966).

Turning to the second problem area under the due process clause, the question might be asked as to whether the state, acting under its police power, has the power to sterilize an individual showing no inheritable trait towards mental deficiency because he might not be able to psychologically or financially support normal children born to him? The Nebraska Supreme Court answers this question in the affirmative. While *Buck v. Bell* seemingly foreclosed the discussion of the legitimacy of police power exercised in this area, it must be remembered that Justice Holmes based his decision on the inheritability of mental deficiency. To the extent that this premise has been proven false, the power of the state to move in this way has been compromised.

While realizing that men in a free society are sometimes required to relinquish certain rights for the benefit of the common welfare, it is submitted that speculation as to whether potential offspring might be socially undesirable is not a valid basis upon whch the state may destroy the bodily integrity of its citizens. The exercise of the police power by the state is not unlimited.

> While this Court has not attempted to define with exactness the liberty thus guaranteed [by the due process clause], the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, to establish a home and bring up children,... The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect.[30]

EQUAL PROTECTION

Another avenue for attack on sterilization statutes has been that they represent a denial of equal protection of the law.[31] This argument was successfully advanced in the early years of sterilization litigation. It was held that application of such laws to inmates of state institutions and not those living within the community constituted such denial.[32] However, Justice Holmes in the *Buck* case seemingly answered this argument saying that equal protection is satisfied by the fact that "the law does all that is needed when it

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[30] Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

[31] U.S. CONST. amend. XIV.

[32] Haynes v. Lapeer, 201 Mich. 138, 166 N.W. 938 (1918); Osborn v. Thompson, 185 App. Div. 902, 171 N.Y.S. 1094 (3d Dep't 1918); Smith v. Board of Examiners, 85 N.J.L. 46, 88 A. 963 (1913).

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."[33] Equal protection arguments on this basis have been rejected in all cases on point after Holmes' statement.[34]

Nebraska *CES* laws apply only to the Beatrice State Home. The court in the Cavitt case observed that if the plan of the legislature is changed to add a second institution for the care of the mentally deficient, it would be necessary to change the classification of those institutions to which sterilization statutes apply in order to avoid a denial of equal protection of the law as class legislation. The court reasoned that as Beatrice was the only institution authorized to accept mentally deficient persons, there was no denial of equal protection.

Justice Carter's argument, however, is based on a false premise. Under existing Nebraska law, mentally deficient persons may be committed to any state institution either at the discretion of the committing judge,[35] or at the discretion of the Department of Institutions.[36] Considering the dicta of the court, it would seem that these provisions would violate equal protection warnings. This is particularly true if the persons restrained in other institutions are released without being subject to sterilization hearings.

It will be noted that Justice Holmes' statement in the *Buck* case has not entirely foreclosed the area of sterilization with respect to equal protection arguments. Commenting generally on the equal protection clause recently, the United States Supreme Court said:

> [T]he equal protection clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historical notions of equality, any more than we have restricted due process to a fixed

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[33] Buck v. Bell, 274 U.S. 200, 208 (1927).

[34] Note, *Sixty years of compulsory sterilization, "three generations of imbeciles", and the Constitution of the United States*, 43 CHI.-KENT L. REV. 123 (1966). Not all are in accord with this view, however. As the Committee of the American Neurological Association points out concerning laws applicable to state institutions: "The laws are discriminatory..., it is simple justice to state if legislation is necessary, [deferring judgment as to the need for sterilization laws] then it should be applied to individuals confined in private institutions and whenever possible to individuals who are not in hospitals at all." COMMITTEE OF THE AMERICAN NEUROLOGICAL ASSOCIATION, EUGENICAL STERILIZATION 21 (1936).

[35] NEB. REV. STAT. § 83-223 (Reissue 1966).

[36] NEB. REV. STAT. § 83-109 (Reissue 1966); NEB. REV. STAT. § 83-227 (Reissue 1966).

> catalogue of what was at a given time deemed to be the limits of individual rights. Notions of what constitutes equal treatment for purposes of the equal protection clause *do* change.[37]

Keeping this comment in mind, a much more serious argument arises from the court's decision in the *Cavitt* case. *Smith v. Command*,[38] cited by the court in support of its decision, held that those mentally deficient constituted a valid class upon which sterilization could be practiced. In this case, however, the Michigan court struck down as a denial of equal protection a provision of the Michigan statute presented to them which provided that the feeble-minded who would be unable to financially support their children (placing the burden on the state) should be sterilized. The court found this to be a violation of the equal protection clause, creating a subclass within a class, thus allowing the rich who could support their children to escape the law.

In the *Cavitt* case the Nebraska Supreme Court has also created a subclass within the class of the mentally deficient. As mentioned, not all mentally deficient are subject to sterilization, only those who *may* be unfit parents thus placing the burden of raising their children on the state.

Carrying the argument one step further, the drawing of a classification on this basis would indeed seem to approach the "invidious discrimination" test applied by the United States Supreme Court.[39] Distinctions between the mentally deficient with respect to the burden on society of caring for their children and other classes, such as ADC mothers, for example, would seem tenuous at best.

From the above it can be seen that if the present Nebraska statute is to be based on the detrimental effect to society of normal children born to mentally deficient parents rather than the production of mentally deficient children by the mentally deficient, new equal protection arguments can be advanced.

CRUEL AND UNUSUAL PUNISHMENT

Sterilization statutes have from time to time been attacked on the grounds that they are in violation of the Eighth Amendment prohibitions against cruel and unusual punishments.[40] These attacks have been successful only where the statute applied to those con-

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[37] Harper v. Virginia State Board of Elections, 383 U.S. 663, 668 (1966).

[38] 231 Mich. 409, 204 N.W. 140 (1925).

[39] Yick Wo v. Hopkins, 118 U.S. 356 (1885).

[40] U.S. CONST. amend. VIII.

victed of a crime.[41] In *In re Clayton*,[42] the Nebraska Supreme Court found that the sterilization of a mental defective by the operation of vasectomy (male) or salpingectomy (female) was not cruel and unusual punishment. The court clearly limited its holding to the facts as presented by the case. In accompanying dicta, it indicated that the application of such sterilization procedures to any person outside of this class would violate the Eighth Amendment. At that time, the Nebraska statute applied to habitual criminals. One authority has concluded from his research that no appellate court has ever held that the sterilization of a defective was in violation of the Eighth Amendment unless he was also a convicted felon.[43]

In line with the *Clayton* decision and its affirmation by the court in the *Cavitt* case, it should be noted that the Nebraska statutes do not provide for the type of operation to be used in the sterilization. Both courts assume salpingectomy and vasectomy will be used. But, in fact, this decision is left to the Board of Examiners to order that type of operation which would be most appropriate to each given case. Apparently catching this oversight, the court in the supplemental opinion written upon the denial of a motion for rehearing notes: "We would interpret the statute to require the simplest procedure possible to effect sterilization."[44] Vetoing a sterilization bill presented to him in 1907, the Governor of Illinois returned the bill with this message:

> The nature of the operation is not described but it is such 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...[45]

While it is difficult to relate the word punishment as used in the Eighth Amendment and *CES* laws generally, it is well to remember that we have here an invasion of the individual's body while he is under restraint by the state. Commenting on the use of the blood test in Driving While Intoxicated investigations, the United States Supreme Court has said: "The integrity of an individual's body is a cherished value of our society. That we today hold that the Constitution does not forbid minor intrusions into the individual's body

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41 Davis v. Berry, 216 F. 413 (S.D. Iowa 1914).

42 120 Neb. 680, 234 N.W. 630 (1931).

43 Note, *Sixty years of compulsory sterilization, "three generations of imbeciles," and the Constitution of the United States*, 43 CHI.-KENT L. REV. 123, 128 (1966).

44 183 Neb. 243, 245, — N.W.2d —, —, (1968).

45 Vetoes by the Governor of Bills Passed by the Legislature, Session of 1905, 26. Cited in THE REPORT OF THE AMERICAN BAR FOUNDATION, THE MENTALLY DISABLED AND THE LAW 184 (1961).

under stringently limited conditions, in no way indicates that it permits more substantial intrusions."[46]

For some reason the Nebraska Supreme Court has attempted to characterize the operation to be performed as voluntary. Remaining in the Beatrice State Home makes the statute inapplicable. Gloria Cavitt may now choose between being sterilized and remaining in the Home the rest of her life. Justice Carter observes that: "[T]he right of a woman to bear ... children is a natural and constitutional right...."[47] The situation he proposes, then, is the waiver of a natural and constitutional right as a condition of freedom. As Justice Smith points out in his dissenting opinion, "[T]he coercive feature is hardly masked by the fictive option of sterilization or life imprisonment,"[48] But Justice Spencer, in the supplemental opinion concludes: *"The choice is hers."*[49]

In the *Cavitt* case, the court says that sterilization is in no sense a punishment for a crime. If, however, one accepts the prevailing theory that the inheritability quality of mental deficiency is too uncertain to use as a basis for sterilization, and would subscribe to the theory that even normal children born to abnormal parents will be a burden on the state, another argument arises under the Eighth Amendment. In *Robinson v. California,*[50] the United States Supreme Court found an Eighth Amendment violation in the imprisonment of a drug addict. The fact that the drug addict may be a potential threat to the state does not give it the right to restrain him.

May a state then sterilize a mentally deficient person on the basis that any potential offspring might become a burden upon society? Or, as one commentator put it, because the mentally deficient person is considered to be an antisocial threat, he is forced to surrender a more basic right than the ninety days California attempted to take fro mthe drug addict.[51]

CONCLUSION

Justice William O. Douglas, speaking in a sterilization case before the Supreme Court observed:

> We are faced with legislation [the sterilization of habitual criminals] which involves one of the basic rights of man. Marriage

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[46] Schmerber v. California, 384 U.S. 757, 772 (1966).
[47] 182 Neb. at 715, 157 N.W.2d at 175.
[48] 182 Neb. at 723, 157 N.W.2d at 179.
[49] 183 Neb. at 247, — N.W.2d at — (Court's emphasis).
[50] 370 U.S. 660 (1964).
[51] McWilliams, *"Cruel and Unusual Punishments": Use and Misuse of the Eighth Amendment,* 53 A.B.A.J. 451 (1967).

> and procreation are fundamental to the very existence of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races of types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment the state conducts is to his irreparable injury. He is forever deprived of a basic liberty.[52]

Aside, then, from the legal and moral issues raised by the issue of Compulsory Eugenic Sterilization, this power in the hands of a legislature as a tool for "purifying the race" or "eliminating the unfit" could result in frightening consequences. At the risk of overstating the possible results of such a program, an example from recent history would serve to illustrate this point. Albert Deutsch, in a book written in 1936,[53] notes the application of sterilization laws in Nazi Germany. Originally feeble-mindeds were to be sterilized. At the writing of the book, nine various vaguely-defined categories were subject to the law including the "slightly feeble-minded". In an ominous forewarning of what was to come, Nazi officials were already referring to enemies of the coordinated state as *per se* feeble-minded while the government was studying the possibility of the sterilization of certain religious and racial "non-Aryan" groups. The escalation of such programs into the final solution is well documented.

The effect of the court's decision in the *Cavitt* case is to extend the police power of the state to new limits. Careful consideration should be given by the legislature in any attempt to fulfill the court's mandate. Artificially structured societies can leave much to be desired.

> For the welfare of his Ideal Commonwealth, Plato suggested a law which should provide: "That the wives of our guardians be held in common, and no parent is to know his own child, nor any child his parent... The proper officers will take the offspring of the good parents to the pen or fold and there they will deposit them with certain nurses who dwell in a separate quarter; *but the offspring of the inferior, or of the better when they chance to be deformed, will be put away in some mysterious, unknown place, as they should be.*"[54]

Or better that they are never born?

Larry L. Langdale '69

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[52] Skinner v. Oklahoma, 316 U.S. 535, 541 (1943).

[53] A. DEUTSCH, THE MENTALLY ILL IN AMERICA 375 (1936).

[54] Meyer v. Nebraska 262 U.S. 390, 401 (1922) (emphasis added).