

1956

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Recommended Citation

Harry Kalven, Jr., "Special Corner of Civil Liberties: A Legal View I, A Symposium," 31 New York University Law Review 1223 (1956).

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A SPECIAL CORNER OF CIVIL LIBERTIES: A LEGAL VIEW I

HARRY KALVEN, JR.

DR. FLETCHER has carved out a special area of civil liberties far removed from the familiar concerns with criminal procedures, race discrimination, and freedom of speech and religion. He is concerned with the privilege to know when you have a fatal illness; the freedom to enjoy the sexual side of marriage for its own sake; the freedom to enter parenthood voluntarily; the freedom to overcome material impediments to having children; the freedom to foreclose risks of child-bearing by sterilization; and the freedom to choose a merciful death by euthanasia. He is thus constantly taking up the gauntlet against what Morris Cohen once called "the old religious taboo against touching the gates of life and death." Cohen added—"a taboo which science daily disregards." And Dr. Fletcher has as a constant theme the new moral issues presented not only to the individual as a result of scientific advances but to the physician as well.

There are other issues of sex morality and medical ethics he might have included. But his book has a unified theme, and although at times less than rigorous in its analysis and argument, it is always humane. Dr. Fletcher's book serves also as a useful occasion to reflect on the ways in which the law touches these issues of sex and death.

I

THE PATIENT'S RIGHT TO KNOW THE TRUTH

Dr. Fletcher raises a perplexing question in his special corner of what he aptly calls the ethics of communication. He argues forcefully that a man is entitled to know when he has a fatal disease and that a physician, however well intentioned, is depriving him of something basic if he deceives him. Perhaps, conscious of mortality, we should live as though each day might be our last. But in fact we do not, and the knowledge that his death is imminent and inevitable is knowledge a man should have the chance to face. From the little I know of such cases, I have been impressed with how often knowledge of death rather than demoralizing is tranquilizing and ennobling. I would agree, therefore, that it is misplaced benevolence for the doctor to dissemble.

If then the knowledge is of high importance to the individual and

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it is better policy for the physician to be candid, should the law step in to implement the policy against benevolent medical fraud? One is attracted momentarily by the doctrinal analogies involved. The tort law is increasingly protecting emotional tranquility and in England has given recognition to "right to life itself." Why not then continue the evolution of more complete protection of subtle personal interests and include the right to know of death? But such speculation is cut short by the consideration that a tort remedy here is totally incommensurate with the dignity of what is involved. This is simply an extreme instance of the grossness and inappropriateness of a legal remedy in much of the area of harms to dignity and emotional tranquility. It is difficult to think of a dying man, wishing to amuse himself, suing a doctor for failure to disclose his true condition and it is difficult to think of the law encouraging him to do so. And if the "fraud" is discovered only after death it is awkward and unseemly to provide a remedy for his survivors.

Should then the sanction be limited to some form of discipline for the doctor? I would not think so. The question is too close and too controversial within the medical profession for the law to step in. In the end the ethics of communication in this stressful area should be left to the conscience of the doctor and the sole remedy should be the one Dr. Fletcher has adopted—an appeal to medical conscience by careful discussion of the ethical issues involved.

II

CONTRACEPTION

This raises the least puzzling of Dr. Fletcher's issues and I find myself in total agreement with him on the overall policy. As he points up there are two impressive reasons for permitting the use of contraceptives. First, the sexual side of marriage should be recognized as a major human value in its own right. Second, and perhaps even more important, it is an enormous increase in human dignity and happiness to render the conception of children a fully voluntary choice of the parents. Both of these premises, it should be observed, are supportive of the family as a key institution. It is difficult, therefore, to find an issue of policy for debate.

It is of course a basic social fact that there is a strong and firm Catholic position against the use of mechanical contraceptives, which Dr. Fletcher traces with care. It is a position that should be respected, and there may be some problem in keeping the state sufficiently neutral in the matter.¹ But there seems to me no case for the state's imposing

¹ A few states now have public birth control clinics. There is perhaps a small issue

Catholic sexual morality on the unwilling non-Catholic part of the community. The clear policy conclusion therefore is that the law should permit the distribution of contraceptives and should confine its regulation to seeing that the devices meet health standards.

This is also the legal conclusion today in most jurisdictions and perhaps in all except Massachusetts and Connecticut.² The one interesting legal issue left, therefore, is not whether the state should prohibit contraceptives, but whether constitutionally it has the power to do so. The answer is still in doubt and a brief review of the law may be in order.

As is well known, the federal courts within the last two decades have succeeded in writing an exception for doctors and druggists into the apparently flat prohibitions against contraceptives in the postal and tariff statutes. The sequence begins amusingly enough in 1930 with a dictum in an action for trade-mark infringement by a manufacturer of prophylactics, who sold approximately 20,000,000 per year.³ One defense was that the business was contrary to public policy since it violated the express words of the federal postal statute. Judge Swan in disposing of the point agrees that "taken literally" the statute would seem to be a bar but argues that this would prevent use by a physician for medical purposes. "The intention to prevent a proper medical use of drugs or other articles merely because they are capable of illegal uses is not," he said, "lightly to be ascribed to Congress."⁴ Three years later the Court of Appeals for the Sixth Circuit applied Judge Swan's reasoning in a criminal case on behalf of a wholesale druggist.⁵ The decisive opinion came in 1936 in *United States v. One Package*,⁶ a libel action under the tariff statute against a package of vaginal pessaries imported into the United States by Dr. Hannah Stone. Said Judge Augustus Hand in reading an exception into the statute:

It is true that in 1873, when the Comstock Act was passed, information now available as to the evils resulting in many cases from conception was most limited, and accordingly it is argued that the language prohibiting the sale or mailing of contraceptives should be

here as to whether a Catholic taxpayer has any basis for protesting this use of public funds. There is a difference between permitting contraception and sponsoring it.

² Dr. Fletcher recognizes that it may be late in the day to argue the case for contraception. See Fletcher, *Morals and Medicine* 73 (1954). There are several excellent reviews of the law: Stone and Pilpel, *The Social and Legal Status of Contraception*, 22 N.C.L. Rev. 212 (1944); Notes, 7 Wyo. L.J. 138 (1953), 50 Yale L.J. 682 (1941). While it is generally said there is no longer a legal problem in the other 46 states, I do not have first hand knowledge of the existing legislation.

³ *Youngs Rubber Corp. v. Lee*, 45 F.2d 103 (2d Cir. 1930).

⁴ *Id.* at 108.

⁵ *Davis v. United States*, 62 F.2d 473 (6th Cir. 1933).

⁶ 86 F.2d 737 (2d Cir. 1936).

taken literally and that Congress intended to bar the use of such articles completely. While we may assume that section 305(a) of the Tariff Act of 1930 (19 U.S.C.A. § 1305(a)) exempts only such articles as the act of 1873 excepted, yet we are satisfied that this statute, as well as all the acts we have referred to, embraced only such articles as Congress would have denounced as immoral if it had understood all the conditions under which they were to be used. Its design, in our opinion, was not to prevent the importation, sale, or carriage by mail of things which might intelligently be employed by conscientious and competent physicians for the purpose of saving life or promoting the well being of their patients.⁷

The final step, if one was needed, was taken in 1938 by the same court in authorizing the distribution of information on contraception to physicians.⁸ Thus the federal story stops short of the constitutional question but is a striking illustration of the court adjusting a statute to changing public information and sentiment.

Connecticut and Massachusetts have provided further light on the matter. The supreme courts of both states in recent years have upheld a total ban on contraceptives as constitutional. Massachusetts law makes the distribution of contraceptives a felony.⁹ In *Commonwealth v. Gardner*¹⁰ in 1938 the Massachusetts Supreme Court was faced squarely with the application of the statute to the prescribing of contraceptives by a physician for reasons of health. The court refused to follow the recent federal precedents and read its statute as a total bar. It dismissed the constitutional issue with a brief comment: "In framing legislation under the police power the Legislature, without any denial of rights under either the State or the Federal Constitution, might take the view that the use of contraceptives would not only promote sexual immorality but would expose the Commonwealth to other grave dangers."¹¹ And it cited the *Allison* case¹² in which it had upheld the constitutionality of obscenity regulation. An appeal to the United States Supreme Court was dismissed per curiam "for want

⁷ Id. at 739. Judge Learned Hand concurring was not so enthusiastic about the construction argument, observing: "There seems to me substantial reason for saying that contraceptives were meant to be forbidden, whether or not prescribed by physicians, and that no lawful use of them was contemplated. Many people have changed their minds about such matters in sixty years, but the act forbids the same conduct now as then; a statute stands until public feeling gets enough momentum to change it, which may be long after a majority would repeal it, if a poll were taken. Nevertheless, I am not prepared to dissent." Id. at 740.

⁸ *United States v. Nicholas*, 97 F.2d 510 (2d Cir. 1938). Earlier decisions had held that information about birth control was not as such obscene. *United States v. One Book, Entitled "Contraception,"* 51 F.2d 525 (S.D.N.Y. 1931).

⁹ Mass. Laws Ann. c. 272, § 21 (Michie 1951).

¹⁰ 300 Mass. 372, 15 N.E.2d 222 (1938).

¹¹ Id. at 375, 15 N.E.2d at 223.

¹² *Commonwealth v. Allison*, 227 Mass. 57, 116 N.E. 265 (1917).

of a substantial federal question."¹³ *State v. Nelson*¹⁴ in 1940 put the same issue before the Supreme Court of Connecticut under an equally flat prohibition in the Connecticut criminal statutes. In a three-to-two decision, the Connecticut court, relying in part on the *Gardner* decision and in part on the repeated failure of the legislature to pass bills providing for a medical exception, again read the statute as a complete bar. The court elaborately discusses and rejects the constitutional challenge, relying in part on the Supreme Court's refusal to hear the *Gardner* appeal. The regulation is viewed as having "a real and substantial relation" to "public safety and welfare, including health and morals."¹⁵ To the argument that there is a "natural" right to a free choice in parenthood, the court replies that civil liberties are subject to the limitation that they not be used "so as to injure . . . fellow citizens or endanger vital interests of society."¹⁶ It relies further on the obscenity analogy, and on the propriety of the possible state objectives of maintaining the population and keeping the deterrent of illegitimate pregnancy. It concludes with the traditional invitation to appeal to the legislature, not the courts, if the law is unwise. The court thus unequivocally answers the constitutional arguments, but in a diffuse and unpersuasive way.

At about the same time, Massachusetts had a second look at the problem and in a surprising reversal in the *Corbett* case¹⁷ held that the distribution of prophylactics did not violate the statute unless it was shown they were intended to prevent conception rather than venereal disease. The practical result is to legalize a considerable area of contraception in Massachusetts but with the ironic consequence, noted by Miss Pilpel, that now "only the best type of contraceptives . . . are effectively barred from use in Massachusetts."¹⁸

Two years later the scene shifts back to the Connecticut Supreme Court with a model test case.¹⁹ In issue now is the legality of contraceptives for married women where pregnancy would entail specific hazards to health because of high blood pressure or tuberculosis or three pregnancies in 27 months. Again by a three-to-two decision the court holds that even such narrow medical justifications fail and the statute stands as a total bar. In a remarkable passage for the year 1942 the court states:

¹³ *Gardner v. Massachusetts*, 305 U.S. 559 (1938).

¹⁴ 126 Conn. 412, 11 A.2d 856 (1940).

¹⁵ *Id.* at 422, 11 A.2d at 860.

¹⁶ *Id.* at 424, 11 A.2d at 861.

¹⁷ *Commonwealth v. Corbett*, 307 Mass. 7, 29 N.E.2d 151 (1940).

¹⁸ *Stone and Pilpel*, *supra* note 2, at 223.

¹⁹ *Tileston v. Ullman*, 129 Conn. 84, 26 A.2d 582 (1942).

The sweeping decision of the Massachusetts court is believed by the plaintiff to be harsh and unreasonable. In the instant case the state urges a consideration not stated in the Massachusetts opinion. The prescription of contraceptives is not the only method open to the physician for preventing conception. He knows that intercourse would very likely result in pregnancy which might bring about the death of the patients. His problem is to advise them how to prevent conception. The common denominator of the opinions of the various medical authorities, made a part of the record, is the professional opinion that the safest medical treatment which could be prescribed for these patients would be to inform them of proper methods of preventing conception by means of drugs, medicinal articles and instruments which can be used by them safely and effectively to prevent conception and avert the unfortunate consequences which would flow from pregnancy. The sincere and well-reasoned opinion of all these authorities is that the use of contraceptives is the safest medical treatment for bringing about the desired and necessary result. The state claims that there is another method, positive and certain in result. It is abstention from intercourse in the broadest sense—that is, absolute abstention. If there is one remedy, reasonable, efficacious and practicable, it cannot fairly be said that the failure of the legislature to include another reasonable remedy is so absurd or unreasonable that it must be presumed to have intended the other remedy also. The claim of the state on this point comes down, then, to a consideration of whether abstinence from intercourse is a reasonable and practicable method of preventing the unfortunate consequences. Certainly it is a sure remedy. Do the frailties of human nature and the uncertainties of human passions render it impracticable? That is a question for the legislature, and we cannot say it could not believe that the husband and wife would and should refrain when they both knew that intercourse would very likely result in a pregnancy which might bring about the death of the wife.²⁰

“Birth control,” the court says, “is a highly controversial subject” and for it the legislature is the proper forum.²¹ Justice Avery filed a vigorous dissent, but rested his argument on the proper construction of the statute.

Appeal was again taken to the United States Supreme Court and again failed.²² But this time the court rested its brief per curiam decision on the physician’s lack of standing to raise the constitutional question, perhaps leaving the door open to a more serious challenge by the individual woman patient.

The story rests here but, to risk a metaphor, there may be life in the constitutional argument yet. Despite the lack of judicial success to date it would seem that the freedom of sex relations within marriage and the freedom to have children when wanted rank high among the basic personal liberties in our society and their curtailment presents a

²⁰ *Id.* at 91-92, 26 A.2d at 586.

²¹ *Id.* at 94, 26 A.2d at 587.

²² *Tileston v. Ullman*, 318 U.S. 44 (1943).

serious civil liberties issue.²³ And in any event, the story is rich in the nuances of the American political and judicial process where a controversial issue of sex morality is involved.

One final comment. Regulation of contraception began near the end of the nineteenth century as a by-product of the regulation of obscenity. This is perhaps the appropriate rubric for it after all, for it reflects, as does obscenity, the legal anxiety and lack of candor in dealing with sex.

III

ARTIFICIAL INSEMINATION

I have little to say of Dr. Fletcher's discussion here. The privilege of raising children is surely one of the great human experiences. Any decent way of providing that experience for those who are unable to have their own children is surely something the state should permit and endorse. I am willing to believe that adoption does not fully meet the need and that, in any event, the experience of bearing her own child should not needlessly be denied the wife.

Artificial insemination would appear to provide a significant and humane alternative to adoption. The case for fully legalizing it thus appears as persuasive to me as it does to Dr. Fletcher. And like contraception it appears to be basically supportive, rather than disruptive, of marriage and the family.

The legal difficulties here, although at the moment they may be considerable,²⁴ are, I think, transient and not indicative of a deeply controversial issue. Clearly, artificial insemination is a new way of having a son, and the closest legal analogies are not very helpful. While a series of legal issues are involved affecting adultery, divorce, alienation, support, adoption, and inheritance, they are closely related and present only one basic question—should artificial insemination be permitted? If it should, the answers to the subordinate legal questions follow simply and inexorably. Since, however, it touches law at several points and since the court is not the ideal forum for the presentation of the full case for it, it is probably desirable that it be handled by comprehensive legislation.²⁵

²³ See Note, 7 Wyo. L.J. 138 (1953). It might well be argued, the *Tilston* case notwithstanding, that the physician too has a constitutional right to practice his profession properly.

²⁴ The law reviews in the past decade have devoted considerable attention to the topic. See, e.g., Koerner, *Medicolegal Considerations in Artificial Insemination*, 8 La. L. Rev. 484 (1948); Symposium on Artificial Insemination, 7 Syracuse L. Rev. 96-113 (1955); Notes, 5 Catholic U.L. Rev. 189 (1955), 28 Ind. L.J. 620 (1953), 1955 U. Ill. L. Forum 759, 34 Iowa L. Rev. 658 (1949), 12 Modern L. Rev. 384 (1949).

²⁵ The medical profession thus far has been careful in selecting couples. It is an interesting question whether the law should regulate eligibility for parenthood here to the same degree it does in adoption.

What then of the issue of A.I.H. versus A.I.D.? It strikes me as mechanical to distinguish sharply between them. In either case, the conception process is novel and in one sense "unnatural." And in either case the integrity of the marital relationship is fully respected by having it a fully cooperative venture in child rearing by the husband and wife.

If, however, the husband does not consent, a troublesome question is left. A.I.D. in this form is not adultery in any meaningful sense, but it may be a genuine harm to the husband and one from which he is entitled to be protected. Perhaps the appropriate sanction is one which should fall on the doctor to prevent the practice. I would hesitate to go farther and make it a grounds for divorce or illegitimacy.

One final query: should artificial insemination be permitted on eugenic grounds alone where the parties are not impeded naturally from having a child? This is perhaps an unlikely case in any event, but I would not favor putting private theories of eugenics into action even voluntarily. And it goes without saying that the state's permission to conceive children by artificial insemination is in no sense a premise for the state's power to compel it in an official enterprise to breed a better race of humans.

IV

STERILIZATION

In keeping with his general thesis, Dr. Fletcher is primarily interested in voluntary sterilization and devotes only a few pages at the end of chapter five to the state's power to compel it. It is appropriate, therefore, to begin with a few comments about sterilization when the subject consents. The legal question here is whether the law should permit it or, more precisely, whether there are some circumstances under which it should prohibit it. The latter is a question Dr. Fletcher scarcely touches since his principal concern is with justifying sterilization where there is medical necessity for it. And he argues cogently that it should be permitted not only where it would be curative, as in the case of a diseased organ, but also where it would be preventive as where pregnancy would be harmful to the mother's health or to the child.

These are undoubtedly the more frequent and important instances and as to these the law is no problem. In many states there is statutory authorization and even without it, it is probable that sterilization for medical reasons and with consent is neither a crime nor a tort.²⁶ However, if we move a step past medical reasons, we have a

²⁶ Smith, *Antecedent Grounds of Liability in the Practice of Surgery*, 14 *Rocky Mt. L. Rev.* 233, 276-84 (1942); Note, 35 *Iowa L. Rev.* 251, 265-69 (1950).

troublesome issue: Is sterilization permissible simply as a stringent form of birth control? Does the case for voluntary contraception extend this far? I would doubt it. The case for contraception rests on the voluntary having of children. It is quite another matter to foreclose altogether one's choice in these matters. In the extreme case where the operation is performed without the consent of the other spouse, it may well be a crime, and arguably a tort, although the consent touches the familiar split of authority found in the abortion and breach of peace cases; and as Hubert Winston Smith suggests, it may be a tort upon the other spouse as well.²⁷

Compulsory sterilization is, of course, the more exciting issue for the lawyer, and here Dr. Fletcher is disappointing in the thoroughness of his analysis. The legal career of sterilization statutes has been often traced²⁸ and is, I think, a story with an important moral. Granted the community is mightily interested in the welfare and health of its next generation, is this a sufficient predicate for the state's claim of power to decide that those unfit for parenthood shall not be permitted "to conceive and bring forth a child"?²⁹ Certainly a broad claim of power here is intolerable. It is one of the truly architectonic laws of our society that in general one does not need specific consent from the state to become a parent. And it is difficult to envisage as tolerable a society in which the state took seriously the task of systematically eliminating from parenthood those unfit for parenthood. No doubt the differences in cultural inheritance through the family are one of the deep and durable causes of inequality in our society.³⁰ But the enormous reduction in personal freedom and dignity that the remedy would require is too high a price.

This of course overstates the contemporary issue. The state makes no such total claim but seeks only to compel sterilization of the insane and the criminal. About 26 states have compulsory laws in some form, and 13 of these include criminals as well as insane and defectives. Is this modest exercise of jurisdiction over parenthood a sound policy?

²⁷ Smith, *supra* note 26, at 276-84.

²⁸ Landman, *The History of Human Sterilization in the United States—Theory, Statute, Adjudication*, 23 *Ill. L. Rev.* 463 (1929); van Roden, *The Legal Trend of Sterilization in the United States*, 22 *Pa. Bar Ass'n Q.* 282 (1951); Notes, 35 *Iowa L. Rev.* 251 (1950), 5 *La. L. Rev.* 124 (1942), 29 *Va. L. Rev.* 93 (1942), 51 *Yale L.J.* 1380 (1942). There have been about twenty state and Supreme Court decisions passing on the constitutionality. The earliest is *State v. Feilen*, 70 *Wash.* 65, 126 *Pac.* 75 (1912).

²⁹ Dr. Fletcher appears to state the question this broadly at the start of his discussion: ". . . we cannot avoid asking the question: if the law will not permit unfit persons to adopt a child, why should it permit them to conceive and bring forth a child?" Fletcher, *Morals and Medicine* 141 (1954).

³⁰ See Blum and Kalven, *The Uneasy Case for Progressive Taxation* 88 (1953); Knight, *The Meaning of Freedom*, 52 *Ethics* 86 (1941).

Let us turn first to the sterilization of criminals. Dr. Fletcher is indeed casual here, apparently approving such measures for purposes of preventing, say, the rapist from procreating.³¹ The justification for criminal sterilization is a shifting one. It is seldom urged any longer that its purpose is punishment. Most statutes out of deference to the "cruel and unusual punishment" clause of the eighth amendment are careful to disclaim a penal purpose. And whether sterilization is cruel and unusual, it is certainly a foolish and degrading form of punishment for a civilized society to employ. More frequently, however, such laws have an avowed eugenic purpose. But the difficulties here are equally great. There is simply no scientific warrant for a view that criminality is hereditary. What is left is the environmental justification. Habitual criminals will not make good parents, heredity quite apart. And so they won't in many cases. But we are back now full circle to the broad and ominous premise for state power—there are many other environments in which it may be harmful for children to be raised. And for the sake of a free society, it is better that the question not be asked. I would conclude therefore that there is no case on the grounds of policy for the sterilization of criminals, insanity apart.

We come then to the best case for the eugenicist—the insane and mentally defective. Here the objective is solely to prevent the procreation of defective children. But here the changing fashions of science cause difficulty. Whatever the hope early in the century of finding the key to human heredity in the area of insanity and mental deficiency, that hope today seems largely dissipated. Modern genetics is so cautious and perplexed in its assertions as to the hereditary nature of mental disease that one is tempted to say the scientific basis for such measures has evaporated—at least in the view of many serious students.³² Nor, as Walter Wheeler Cook observed in a remarkable law review article on eugenics, does it appear that the sterilization of all mental defectives would materially reduce on any hypothesis the number of defectives born into the next generation.³³ In brief, the case for sterilization of the insane on grounds of heredity is only a little more secure scientifically than the case for sterilization of criminals. And the environmental premise is no more welcome here. The case against sterilization of the insane then is that there is no urgent social problem that will be solved by it, and at present the scientific basis for it is too much in controversy to warrant acknowledg-

³¹ Sterilization alone, however, will not prevent the rape, and castration raises additional issues.

³² Cook, *Eugenics or Euthenics*, 37 *Ill. L. Rev.* 287 (1943); Myerson, *Certain Medical and Legal Phases of Eugenic Sterilization*, 52 *Yale L.J.* 618 (1943).

³³ Cook, *supra* note 32, at 287.

ing even here so formidable a power in the state. This is not to say that some day the scientific predictions may not be so high as to outweigh the invasions of personal dignity involved. It is to say that they do not do so yet. We can afford to wait.

There is the final question of constitutionality. Twenty years ago it was fashionable to trace the progress from the early state decisions holding sterilization statutes unconstitutional to the decision in *Buck v. Bell*³⁴ and the consequent ratification by state courts of their statutes. But the story does not end with the bons mots of Mr. Justice Holmes in *Buck v. Bell*.³⁵ It is instructive to compare the tone of the *Buck* opinion with that only sixteen years later in the *Skinner* case,³⁶ where a unanimous Supreme Court invalidated an Oklahoma statute authorizing the sterilization of habitual criminals.³⁷ It is true that the majority speaking through Justice Douglas rested their decision on a narrow and easily cured point—the arbitrariness of the felon classification under the statute in question. But a distaste for the law, a recognition of scientific perplexities, and a concern for the civil liberties aspect permeate the majority opinion and the concurring opinions of Chief Justice Stone and Justice Jackson. Says Justice Douglas:

We are dealing here with legislation which involves one of the basic civil rights of man. . . . The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the state conducts is his irreparable injury. He is deprived forever of a basic liberty.³⁸

And Justice Jackson adds: "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—even those who have been guilty of what the majority define as crimes."³⁹ And the majority opinion significantly cites in a

³⁴ 274 U.S. 200 (1927).

³⁵ For a bitterly critical comment on the Holmes opinion, see Gest, Eugenic Sterilization: Justice Holmes vs. Natural Law, 23 Temp. L.Q. 306 (1950).

³⁶ *Skinner v. Oklahoma*, 316 U.S. 535 (1942). It was the *Skinner* case which moved Walter Wheeler Cook to make his report to the legal world on the current state of eugenics.

³⁷ Okla. Stat. Ann. tit. 57, §§ 171-95 (West 1950). An interesting feature of the statute was the provision for a jury trial, limited, however, to the two questions: (1) whether the defendant is an habitual criminal; (2) whether sterilization will be "without detriment" to his general health.

³⁸ *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

³⁹ *Id.* at 546. The opinion of Chief Justice Stone goes to the failure of the Oklahoma law to provide any opportunity for the individual to offer evidence on whether his criminality will be hereditary. This, he said, did not satisfy "the most elementary notions of due process."

note the report of the American Neurological Association Committee on Sterilization which favored limiting statutes to voluntary sterilization, given the current state of knowledge about human heredity.⁴⁰

Technically, the *Skinner* decision is narrow. It goes only to certain features of the Oklahoma statute. It deliberately avoids passing on the status of criminal sterilization generally and it acknowledges *Buck v. Bell*. But I would conclude that the constitutionality of all criminal statutes is in grave doubt today and would hazard the further guess that the sterilization of many insane is equally insecure.

The legal career of sterilization is thus a useful example, first, of the law too quickly adopting a popularized scientific premise without exposing it to adequate scrutiny, and second, of the law's consequent difficulty in keeping abreast of the revisions of scientific hypotheses. "Three generations of imbeciles" may no longer be the prediction and even where it is, it may no longer be enough. *Buck v. Bell* may in the end survive as a monument only to the wit but not the wisdom of Mr. Justice Holmes.⁴¹

V

EUTHANASIA

Characteristically, Dr. Fletcher in discussing euthanasia is chiefly concerned with the personal moral issue involved: with the right of the individual to avoid by his own free choice a hopelessly painful and degrading death, and with the right of the physician to assist him in that choice. Dr. Fletcher speaks with humanity and with the accents of mercy. He speaks also as a man with reverence for life. I would not quarrel with his conclusion that death, under stringent and limited circumstances, may be more humane and merciful and consonant with respect for human dignity than continued life.

But, as he recognizes, of all his topics euthanasia is the one most inextricably tied into law. If euthanasia were already permissible under our law, there would be no strong case for changing law to prohibit it. In all of the United States and apparently all of the

⁴⁰ Id. at 538 n.1. Dr. Myerson who was chairman of the Committee has summarized his views in his article, *supra* note 32. The conclusions of the Committee Report are reprinted in Michael and Wechsler, *Criminal Law and its Administration* 1057-58 (1940).

⁴¹ There is considerable question as to whether the laws are today in fact used with compulsion in many states or used with any frequency. See Myerson, *supra* note 32, at 618, 625-26; Notes, 35 *Iowa L. Rev.* 251, 261 (1950) (reporting that the 995 sterilizations under the Iowa statute since it was passed in 1915 were all done with consent), 2 *Kan. L. Rev.* 174 (1953) (noting that after being a leader in the sterilization movement for many years, Kansas had recently shifted to a policy of no sterilization, although the statute remains on the books).

world, the matter is the other way around.⁴² Euthanasia is illegal and the issue is whether and how the law should be adjusted to accommodate it. And whatever the merits of the moral issue, the adjustment of existing law on behalf of euthanasia is perplexing.⁴³

At the outset, it is important to distinguish two questions. First, out of compassion for the actor, do we wish simply to mitigate the harshness of formal law under which euthanasia is treated as a deliberate killing? Second, out of compassion for the suffering of the subject, do we wish to legalize euthanasia altogether? That is, would we prefer that mercy killings do not occur at all, but, if they do, to be understanding in our handling of the one who kills? Or do we wish to affirmatively sponsor such killings? It is noteworthy that so careful a student of the problem as Helen Silving favors only mitigation of the penalty,⁴⁴ while Dr. Fletcher clearly favors legalizing it and eliminating all penalty and aura of disapproval.

As Miss Silving's excellent article indicates, there are many techniques of mitigation and instances of them are found in the contemporary law of other countries. The American device, of course, is to leave the law intact and to rely on the discretion of the prosecutor, the jury, and the judge. As the record in the celebrated *Repouille* case⁴⁵ illustrates, that discretion may be exercised very generously. There is thus built into the administration of the existing law considerable play for mercy. If we stop here we have considerable de facto mitigation and we avoid any publicly disturbing ceremony of even a small break in the united front of law against deliberate killing. We do so, however, as Miss Silving argues, at the price of unequal application of law⁴⁶ and at the further price of the ceremony of public debate in the occasional newsworthy case and of public awareness that not all laws mean what they say.

⁴² See the excellent article by Helen Silving, *Euthanasia: A Study in Comparative Criminal Law*, 103 U. Pa. L. Rev. 350 (1954).

⁴³ Some of these perplexities such as its effect on life insurance or the law on suicide will not be treated here.

⁴⁴ Silving, *supra* note 42, at 388.

⁴⁵ *Repouille v. United States*, 165 F.2d 152 (2d Cir. 1947). *Repouille* who mercifully killed his horribly deformed child after years of patient care was indicted for manslaughter in the first degree; the jury found him guilty of manslaughter in the second degree and recommended "utmost clemency"; he was sentenced to five to ten years, execution to be stayed, and was placed on probation. The issue in the *Repouille* case was whether his "crime" defeated his petition for naturalization under the "good moral character" requirements. The court, speaking through Judge Learned Hand, held with great reluctance that it did defeat the petition but only because "the crime" fell within the statutory five year period. The court virtually invited him to apply again. The opinions of Judge Hand and Judge Frank are splendid explorations of the dilemma presented by euthanasia today. On the public opinion aspects of the case, see Note, 16 U. Chi. L. Rev. 138 (1948).

⁴⁶ She cites several instances of unequal treatment in recent cases. Silving, *supra* note 42, at 354.

If such "real-politick" equity is rejected, the problem is one of legal engineering. Should the entire system be overhauled so as to provide gradations of homicide keyed more to motive than intent, or should a specific narrow *ad hoc* category be provided for euthanasia proper? This might better be left to the criminal law expert, but I rather doubt euthanasia is a sufficiently general and important issue to warrant rethinking the entire plan of criminal law just to accommodate it. The specific category, on the other hand, presents familiar difficulties of definition and of patchwork law. All in all, despite the apparent elegance of some of the continental models here, I think the objective of mitigation is pretty adequately met by leaving the law alone and trusting to good sense in its administration.

The harder question is the one Dr. Fletcher answers. Should euthanasia be fully legalized? The argument for it rests on concern for the sufferer. The society would not only forgive, it would sponsor. Would such official approval have unwanted repercussions on the delicate forces which restrain killing? Perhaps any endorsement by the society here will be read by some as a general approval of suicide and a general ratification of crime done for a benevolent motive. I should like to know more from the physician about the incidence of cases of incurable illness accompanied by unrelievable suffering.⁴⁷ Perhaps there just isn't enough of a problem here, despite the dramatic intensity of the individual case, to warrant tampering with the law.

In any event, there remains the question of how to legalize it. The same engineering problems are presented if we are to write a new defense into criminal law as were met in mitigating the penalties. But the proposed statute Dr. Fletcher discusses raises additional problems.⁴⁸ It would of course afford complete protection in advance to the physician and quite possibly some protection to the subject. It is narrow in scope and well intentioned. Nevertheless, I am somewhat repelled by it. In effect it has the court issue a license for death. I cannot down the emotional reaction that this is unseemly business for a court. Since the function of the judge under the statute is in fact nominal, it would be better form to forego this particular legal ceremony and to rely on a direct change in the substantive law.

My discussion, like Dr. Fletcher's, has kept within a narrow scope. The case has involved incurable and hopelessly painful illness and the subject has consented and the objective has been the merciful one of reducing the needless suffering of the subject for his sake.

⁴⁷ See Frohman, *Vexing Problems in Forensic Medicine: A Physician's View*, 31 N.Y.U.L. Rev. 1215, 1221 (1956) (*supra*).

⁴⁸ For a severely critical review of the proposed legislation, see Martin, *Euthanasia and Modern Morality*, 10 *Jurist* 437 (1950).

Changing any of these criteria substantially expands the area under consideration. Is the case for euthanasia naturally limited to the case so defined? Euthanasia for a social purpose is the easiest to reject flatly, even if we did not have the benefit of the Nazi example.⁴⁸ But many of the troublesome cases, as in *Repouille*, have involved a subject who could not consent, and they will continue to do so. And there is some merit in the claim to a merciful death for the monstrously disfigured or the degradingly senile. To legalize euthanasia in the narrow area may well complicate and perplex the problem of equitable treatment of the many marginal cases near it.

In the end and with no great conviction in my conclusion, I would favor leaving things as they are and trusting for awhile yet to the imperfect but elastic equity in the administration of the law as written.

⁴⁹ See, e.g., Koessler, *Euthanasia in the Hadamar Sanatorium and International Law*, 43 J. Crim. L., C. & P.S. 735 (1953).