COMPULSORY VACCINATION AND STERILIZATION: CONSTITUTIONAL ASPECTS*

THOMAS REED POWELL†

Any statute or administrative order authorizing or compelling involuntary medical or surgical treatment has the possibility of being scrutinized and countermanded by the Supreme Court of the United States. Where the deed is done before the Supreme Court can forbid it, there still may be suits against the perpetrators for damages, and the Supreme Court can decide whether the statute relied on for justification is one entitled to constitutional sanction. In deciding such issues the Supreme Court has no other primary guide than the provision of the Fourteenth Amendment to the Federal Constitution that "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." As a guide to judgment, this is no guide at all. Nevertheless the Supreme Court has for years, in the name of these provisions, condemned legislation that a majority of its members deemed to be sufficiently arbitrary and unreasonable. The exercise of this power has not been confined to the procedures by which governmental action is taken, but has extended to the substance of the commands and prohibitions.

Few, if any, are likely to contend that this power has invariably been wisely exercised. On several issues the average of the Supreme Court is zero. The Court has held that an employer may not be forbidden to exact as a condition of employment that the employee will not become or remain a member of a labor union. The Court has held the contrary. It has similarly reversed itself on the issue of a ten-hour limitation of labor in factories and on the issue of legislative prescription of a minimum wage for women in industry. In thus referring to "the Court" as though it were a continuing body, a caution would be necessary if it were not so obvious. While, through the somersault of Mr. Justice Roberts, the same bench both condemned and sustained a minimum wage law, usually any decided shift in decision comes after a shift in the composition of the tribunal. This could not be denied as a matter of fact. Yet what to a plain man would seem a necessary inference from the fact, is not so universally acknowledged.

The law books have been full of foolish statements from judges which would make them out to be mere automatons in applying meaning-

*Pursuant to the plan of the Medico-Legal Symposium this article will also appear in 18 ANNALS OF INTERNAL MEDICINE (April 1943) —.

†Professor of Law, Harvard Law School.

less constitutional phrases to determine the validity of statutes. From dissenting judges, however, often comes the charge that the majority have unjustifiably transformed their own views of public policy into constitutional commands or prohibitions. Most amusingly a distinguished lawyer and former judge in protesting against the President's so-called "court packing plan" asserted the theory of judicial automatism, apparently unaware that if it made no difference who was on the bench, it made no difference who was on the bench. We know well enough from recent history that it does make a difference. We have seen too many new judicial attitudes substituted for former ones. Not a few of them have been direct and confessed recantations. Others have been decisions which clearly would not have been reached by an earlier bench but which found no direct precedents in their way. Still others have been decisions accompanied by opinions which made such sleazy distinctions between the case at bar and its predecessors that it was apparent to persons with a modicum of discernment that the current had changed its course.

From this propensity of judges to pretend that they are consistent with the past when it is obvious that they are not, arises a major difficulty in prophesying what they will do next. The old precedents hang on, not overruled. A later court may follow them and rely on the unjustifiable distinction drawn in the interim. Or the unjustifiable distinction may be repeated a number of times and later be officially recognized as a contradiction rather than a distinction and hence an inflicter of a mortal wound on the law that lived before. Such are the perils to prophecy when it is pretty obvious that the judicial distinctions are skating on very thin ice. When it is not obvious, the lot of the would-be prophet is certainly no happier. There are too many cases where clearly tenable distinctions have been made the sensible basis of judgment and yet have later turned out to be forerunners of an erosion or an abandonment of what had been well established earlier. An expert can report what a court has said and done and can weave it all into an apparently neat and harmonious pattern. It still remains true that it is often a gamble to try to forecast what the court will say and do next.

Akin to the difficulties of prophecy when there are a number of decisions and opinions to be taken into consideration is the difficulty of knowing how wide is the scope of a single decision. By approved canons a court wisely confines itself to the decision required by the facts; and technically the decision, as distinguished from dictum, does not extend beyond the issue or issues which must be settled to dispose of the dispute. Yet often the reasons given in the court's supporting opinion warrant the belief that the principle on which the decision rests is broad enough to embrace a much wider range of facts. Nevertheless, later the decision

may be narrowly limited to the minimum grounds sufficient to support it. On the other hand, a court in deciding a case may lay stress on each individual element so as to leave itself unfettered by precedent when presented with a new problem containing any variant in the facts. Seldom are two cases exactly on all fours. When they are, there is not likely to be litigation unless a contender fights chiefly for delay or is ready to bet that a court will change its mind. Almost always there is the question whether the differences in the facts are enough to make a difference in result. Hence, the law remains a congeries of particulars but imperfectly subsumed under general principles.

I

One aspect of this perennial problem of uncertainty appears in *Jacobson v. Massachusetts*[1] which in 1905 by a vote of seven to two sustained a compulsory vaccination law. The particular statute vested power in Boards of Health to require vaccination when in their opinion it was necessary to the public health. There was an exception in favor of children who present a certificate, signed by a registered physician, that they are unfit subjects for vaccination. There was no such exception in favor of adults. The adult convicted of violating the statute by refusing to comply with an order did not allege that he was in fact an unfit subject for vaccination. He did not present or ask leave to present any physician's certificate. Smallpox was prevalent to some extent in the city at the time of the Board's order. The defendant sought to introduce evidence tending to show the ineffectiveness and the dangers of innoculation. The evidence was excluded by the trial court. On this state of facts, the conviction was sustained by the Supreme Court of the United States. The compulsory requirement was held under the circumstances to be within the police power of the state for the protection of health.

We must go to the opinion of the Court to attempt to ascertain how far the decision goes. The refusal to hear the evidence offered by the defendant was justified on the ground that it went only to a dispute between two theories. The Court knew judicially (i.e., without having to take formal evidence) that the theory favoring vaccination accords with common belief. It said that it must assume that the state was not unaware of the opposing theories and that it was compelled of necessity to choose between them. This, it had power to do. "It was not compelled to commit a matter involving the public health and safety to the final decision of a court or jury."[2] This declaration, isolated from the rest of the opinion, would seem to go far to sanction all sorts of compulsory inoculation for all sorts of menaces however disputable and disputed

[1] 197 U. S. 11, 25 S. Ct. 358, 49 L. ed. 643 (1905).
[2] *Id.* at 30, 25 S. Ct. 363, 49 L. ed. 651.

their value. But the Court had pointed out that vaccination was favored by "common belief."[3] It cited legislation in England beginning in 1853 which encouraged or compelled vaccination. The Court knew what every other sensible person knew, and this knowledge lay in the background of its decision and opinion and must be recognized in qualification of occasional statements of broad general tenor.

Thus, as the decision does not go beyond vaccination against smallpox, so it does not surely go beyond compulsion when the malady is prevalent. For after invoking recitals of such prevalence in the order of the Board of Health, the opinion continued:

"If such was the situation,—and nothing is asserted or appears in the record to the contrary,—if we are to attach any value whatever to the knowledge which, it is safe to affirm, is common to all civilized peoples touching smallpox and the methods most usually employed to eradicate that disease, it cannot be adjudged that the present regulation of the board of health was not necessary in order to protect the public health and secure the public safety. Smallpox being prevalent and increasing at Cambridge, the court would usurp the functions of another branch of government if it adjudged, as matter of law, that the mode adopted under the sanction of the state to protect the people at large was arbitrary, and not justified by the necessities of the case. We say necessities of the case, because it might be that an acknowledged power of a local community to protect itself against an epidemic threatening the safety of all might be exercised in particular circumstances and in reference to particular persons in such an arbitrary, unreasonable manner, or might go so far beyond what was reasonably required for the safety of the public, as to authorize or compel the courts to interfere for the protection of such persons."[4]

Here is warning enough that the Court is going only so far as the particular circumstances require. A more specific caveat appears in the treatment of the apparent absoluteness of the statute in dealing with adults. While it was held to be a reasonable classification for the statute not to embrace adults in an exception in favor of children presenting a physician's certificate of unfitness for vaccination, this holding was substantially nullified by saying that there might be extreme cases in which the Court would interfere by in effect importing into the statute a dispensation for abnormal adults. After saying that general language should be interpreted to exclude injustice, oppression, or an absurd consequence, the opinion continues:

"Until otherwise informed by the highest court of Massachusetts, we are not inclined to hold that the statute establishes the absolute rule that an adult must be vaccinated if it be apparent or can be shown with reasonable certainty that he is not at the time a fit subject of vaccination.

[3] *Ibid.*

[4] Jacobson v. Massachusetts, 197 U. S. 11, 27-28, 25 S. Ct. 358, 362, 49 L. ed. 643, 650 (1905).

that vaccination, by reason of his then condition, would seriously impair his health, or probably cause his death. No such case is here presented."[5]

This does not say that an adult who failed to make any appearance to claim a dispensation could escape from punishment by later evidence before a court. It does not say with certainty that failure to excuse an adult with a certificate would render compulsory vaccination unconstitutional. It seeks to avoid the issue by suggesting to the state court that it should read an exception into the statute.[6]* Such a hint would in all likelihood

[5] *Id.* at 39, 25 S. Ct. 366-367, 49 L. ed. 655.

[6]* [The North Carolina compulsory vaccination statute of 1893 vests discretion in the local Board of Health to impose the vaccination requirement. N. C. Public Laws 1893, c. 214, N. C. CODE ANN. (Michie, 1939) §§7162-7164. Also, the governing body of any North Carolina city may cause all persons within the city limits to be vaccinated in order to prevent or stamp out contagion. N. C. CODE ANN. (Michie, 1939) §2796; Levin v. Town of Burlington, 129 N. C. 184, 39 S. E. 822 (1901). The compulsory vaccination law has been held constitutional even though it makes no exception in favor of persons whose health is in such a condition that it would be dangerous to require them to be vaccinated. State v. Hays, 126 N. C. 999, 35 S. E. 459 (1900). Though the statute itself makes no such exception the North Carolina court has, in effect, wisely read it in as an additional term, placing the burden of proving that vaccination would be unsafe in an individual case upon the person seeking to escape such vaccination. State v. Hay, 126 N. C. 999, 1003-1004, 35 S. E. 459, 461 (1900); and see the concurring opinion of Douglas, J. in State v. Hay, 126 N. C. 999, 1004-1006, 35 S. E. 459, 462 (1900); *approved*, Morgan v. Stewart, 144 N. C. 424, 428, 57 S. E. 149, 150 (1907). However, where a School Board required vaccination as a prerequisite to attendance at the public schools it was held that there need be no exception made so as to allow attendance by an individual whose health would not permit vaccination. The court pointed out the obvious distinction: "The fact that it would be dangerous to vaccinate the plaintiff's daughter, owing to her physical condition, would be a defense for her to an order for general compulsory vaccination (State v. Hay, *supra*), but is no reason why she should be excepted from a resolution excluding from the school all children who have not been vaccinated. That she cannot safely be vaccinated may make it preferable that she herself should run the risk of taking the small-pox, but is no reason that the children of the public school should be exposed to like risk of infection, through her, or others in like case. Though the school children are vaccinated, there are always some whose vaccination is imperfect, and danger to them should not be increased by admitting those not vaccinated at all. Besides, a rule not enforced to all alike will soon cease to be a rule enforcible at all." Hutchins v. School Committee of Durham, 137 N. C. 68, 71-72, 49 S. E. 46, 47 (1904).

In 1939 North Carolina became the first state to subject diphtheria to compulsory public control. N. C. Public Laws 1939, c. 126, N. C. CODE ANN. (Michie, 1939) §7169(1), *A Survey of Statutory Changes in North Carolina in 1939* (1939) 17 N. C. L. REV. 360. The compulsory diphtheria immunization statute applies only to children under five and, like the smallpox vaccination statute, makes no exception in favor of individuals whose state of health might make it dangerous to immunize them with the diphtheria agent. But, in the light of the smallpox vaccination cases, it is safe to assume that the court will require such an exception to be made if medical science can show it to be warranted. Unlike the smallpox statute, the diphtheria law lays down a flat requirement of immunization and does not place the compulsion in the discretion of a Board of Health. Also, the diphtheria law contains a provision that the statute shall not apply to children whose parents "are bona fide members of a religious organization whose teachings are contrary to the practices herein required." No such concession to religious dogma is found in the smallpox statute. In the interest of public health it is possible that this provision in favor of religious objectors could be circumvented under the doctrine of the *Hutchins* case, *supra*. School Boards could exclude from the public schools all children who had not been previously immunized against diphtheria and make no

be taken by state courts. Such exceptions should be accorded by any sensible Board of Health without advice from any legislature or court, if there were reasonable grounds for confidence in the certifying physician. Doubtless in some fashion the dispensations have been granted if requests have been made, for the Supreme Court has had no subsequent controversy presenting the issue for formal adjudication. Its caution in favor of individualization must have been heeded widely. Constitutional law is permeated with similar cautions against extreme and unusual applications of statutes found not objectionable in general. The cautions have not infrequently been translated into condemnations. Particularity is of the essence of constitutional law, as it is a major theme of this effort at diagnosis.

While the Court saved itself from sanctioning compulsory vaccination except when smallpox is in the vicinage, it must be doubted whether this condition would be insisted upon. Some state courts in construing broad powers vested in School Boards and Boards of Health to take action to protect the public health have drawn the distinction between seasons of epidemic and the absence thereof. The cases are not recent ones, and they are not to be commended for good sense. A stitch in time saves nine, and the time to lock the barn is before the horse is stolen. At any rate where legislative authority to compel vaccination is explicitly conferred, it is unthinkable that at this late date a court would say that the vague due process clause forbids precaution and requires procrastination until the presence of pestilence. Common sense forbids us to believe that judicial sanction of compulsion in time of epidemic carries with it a negative pregnant that compulsion is unconstitutional otherwise.

One other observation in the opinion deserves mention. After referring to the liberty of a person to live and work where he will, it is added that "yet he may be compelled, by force if need be, against his will and without regard to his personal wishes or his pecuniary interests, or even his religious or political convictions, to take his place in the ranks of the army of his country, and risk the chance of being shot down in its defense."[7] This was not pertinent to the case at bar except for pointing out that personal liberty is not absolute. Mr. Jacobson advanced no objections on conscientious or religious grounds. Yet one wonders whether the Court did not mention religion in order to forestall any claims of conscience against health laws. Some queer sects do raise

such exception as is allowed by the statute. *A Survey of Statutory Changes in North Carolina in 1939* (1939) 17 N. C. L. Rev. 360, 361, n. 8. The diphtheria law has not yet been the subject of judicial comment but there is little doubt that it will be held constitutional.—Editor.]

[7] Jacobson v. Massachusetts, 197 U. S. 11, 29, 25 S. Ct. 358, 362, 49 L. ed. 643, 651 (1905).

such objections. Other more numerous religionists object to some other compulsions affecting bodily integrity. Such objections have sometimes prevailed with legislatures. They may have influenced some state courts even though they have not been the explicit basis of decision. Thus far, however, it cannot be said that they have carried weight with the United States Supreme Court. This brings us to another topic.

II

In 1927 in *Buck v. Bell*[8] the Supreme Court by a vote of eight to one sustained a sterilization statute. In 1942 in *Skinner v. Oklahoma*[9] it unanimously condemned another one. Our problem is to try to guess whether the later decision indicates a total or partial recantation of the earlier one or whether it indicates merely that a state must provide adequate safeguards and move within a restricted area when it commands the extinction of procreative power. On the facts there is the clearest distinction between the two cases. The Virginia statute sustained in *Buck v. Bell* applied only to mental defectives confined in institutions and it provided elaborate procedure for notice, hearing and appeals. Miss Buck was a feeble-minded daughter of a feeble-minded mother and a feeble-minded mother of a feeble-minded daughter. Mr. Justice Holmes declared that "The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes"[10] and that "Three generations of imbeciles are enough."[11] Mr. Justice Butler dissented, but since he gave no opinion we do not know whether he would think that we needed six or a dozen such generations instead of a meager three.

In *Buck v. Bell* there was no attack on the procedure required by the statute and scrupulously followed in the particular case. There was criticism that equal protection was denied because the statute applied only to those confined in institutions and not to the multitudes outside. This was easily met by the general rule of reasonable classification and by the more special retort that "Of course so far as the operations enable those who otherwise must be kept confined to be returned to the world, and thus open the asylum to others, the equality aimed at will be more nearly reached."[12] On the substantive issue, the brief on behalf of Miss Buck did not adduce any religious grounds. It asserted that the operation is unrelated to health or morals, and that the right to bodily integrity is an absolute one. In rejecting the contention Mr. Justice Holmes went

[8] 274 U. S. 200, 47 S. Ct. 584, 71 L. ed. 1000 (1927).
[9] 316 U. S. 535, 62 S. Ct. 1110, 86 L. ed. 1655 (1942).
[10] Buck v. Bell, 274 U. S. 200, 207, 47 S. Ct. 584, 585, 71 L. ed. 1000, 1002 (1927).
[11] *Ibid.*
[12] Buck v. Bell, 274 U. S. 200, 208, 47 S. Ct. 584, 585, 71 L. ed. 1000, 1002 (1927).

further than was his usual custom and indicated affirmative approval of the state's policy when he said:

"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. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind."[13]

Turning now to the condemnation visited on the other statute in *Skinner v. Oklahoma,* the main concern should be that of the psychologist or the psychiatrist rather than any expert in black letter law. The interesting thing about the decision is that seven members of the Court refrained from passing any judgment on the underlying issue of permanent significance. They condemned the statute solely for discrimination and in the particular case because it applied to triple offenders who commit larceny but not to those who commit embezzlement. This, they held to be a denial of equal protection of the laws. The defect could readily be remedied by an amendment embracing embezzlers. Then one or two more fundamental issues would have to be faced. One of them was faced by Mr. Chief Justice Stone when he concurred on the sole ground that the statute afforded to the prospective victim no opportunity to show that his criminal tendencies are not of an inheritable type.[14*] With this, Mr. Justice Jackson agreed. He also agreed that the discrimination against thieves as contrasted with embezzlers offends against the requirement of equal protection of the laws. He disagreed with each of the other two opinions "in so far as it rejects or minimizes the grounds taken by the other."[15]

There must have been some reason why eight members of the Court thought it important to lay stress on the discrimination point and why

[13] *Id.* at 207, 47 S. Ct. 585, 71 L. ed. 1002.

[14*] [The North Carolina sterilization statute, which applies to mental incompetents outside of institutions as well as to those within, was held unconstitutional by the North Carolina Supreme Court because it failed to provide for notice and hearing and thus deprived the person to be sterilized of due process of law. Brewer v. Valk, 204 N. C. 186, 167 S. E. 638 (1933). Immediately thereafter the statute was revised to remedy these defects and provide in great detail a procedure for notice, hearing, and appeal. The revision was so complete that, in effect, a new statute was enacted. Some of the procedure has since been streamlined. Though the statute in its new form, N. C. Code Ann. (Michie, 1939) §§2304(m)-2304(ff2), has never been passed on by the courts, it would almost certainly be considered constitutional. For a complete discussion of the statute and its evolution see *A Survey of Statutory Changes in North Carolina in 1929* (1929) 7 N. C. L. Rev. 392; *A Survey of Statutory Changes in North Carolina in 1933* (1933) 11 N. C. L. Rev. 253; *A Survey of Statutory Changes in North Carolina in 1935* (1935) 13 N. C. L. Rev. 401.—Editor.]

[15] Skinner v. Oklahoma, 316 U. S. 535, 546, 62 S. Ct. 1110, 1115, 86 L. ed. 1655, 1662 (1942).

seven wished to do nothing more. In general the fact that a statute doesn't go so far as it reasonably might has not in recent years been a basis for condemnation. Mr. Justice Douglas in the opinion of the Court gives general recognition of this in quoting with approval from *Buck v. Bell* the statement 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."[16] He, however, then goes on to point out that this particular legislation "involves one of the basic civil rights of man"[17] and elaborates on the possibility of its application as a weapon of discrimination against a particular race or nationality.[18*]

The cases cited for these views are ones involving members of the Chinese and colored races. Such invocation suggests that the judges were less concerned with the triviality of the distinctions between larceny and embezzlement than with the desirability of setting up a barrier against legislative race discrimination. While they emphasize the severe and irrevocable deprivation from sterilization, they say that they do so not to re-examine the scope of the police power of the state. Clearly what they most fear is that sterilization may be employed as a weapon of class hostility. It would seem that they would not trust the safeguard of a hearing on the individual's potentiality of communicating criminal traits, for they refrain from joining with the Chief Justice on this point. Even with the safeguard of a hearing, there could be discrimination in administration merely by refraining from proceeding against those of a preferred class. The case does not reveal to what race the petitioner belonged. The first of his three convictions was for stealing chickens.

[16] *Id.* at 540, 62 S. Ct. 113, 86 L. ed. 1660, quoted from Buck v. Bell, 274 U. S. 200, 208, 47 S. Ct. 584, 585, 71 L. ed. 1000, 1002 (1927).

[17] Skinner v. Oklahoma, 316 U. S. 535, 541, 62 S. Ct. 1110, 1113, 86 L. ed. 1655, 1660 (1942).

[18*] "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. 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 to his irreparable injury. He is forever deprived of a basic liberty. We mention these matters not to reëxamine the scope of the police power of the States. We advert to them merely in emphasis of our view that strict scrutiny of the classification which a State makes in a sterilization law is essential, lest unwittingly, or otherwise, invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws. The guaranty of 'equal protection of the laws is a pledge of the protection of equal laws.' *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369. When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment. *Yick Wo* v. *Hopkins*, *supra*; *Gaines* v. *Canada*, 305 U. S. 337." Skinner v. Oklahoma, 316 U. S. 535, 541, 62 S. Ct. 1110, 1113, 86 L. ed. 1655, 1660, (1942).

The case came from Oklahoma. Oklahoma has been rebuked by the Supreme Court in other matters in which racial issues were involved.[18]

In certain sections of the country the possibility of a considerable degree of racial discrimination would be present in a statute dealing with all habitual criminals as determined by three convictions for felony. One can hardly say that there was no warrant for this judicial emphasis on discrimination, though one must wonder somewhat why there was unwillingness to join in the objection to lack of a hearing on the issue of transmissibility in the individual case. Even if the Chief Justice's sole reliance on the absence of a hearing might on its face suggest a possible negative pregnant that there was no other substantive defect, Mr. Justice Douglas protected himself and his seven colleagues from any complicity in such an inference by saying explicitly of all objections other than that of discrimination that "we pass those points without intimating an opinion on them."[20] Nor does he anywhere seem to intimate any opinion except as to the fundamental nature of the civil right involved and the danger of its invasion as a weapon of discrimination. It is unthinkable that he and those for whom he wrote would not insist upon a hearing even in a non-discriminatory law. Hence in the absence of any knowledge of what went on in conference, one can only venture the notion that they thought or felt that it would emphasize the menace of class discrimination if it were made the exclusive basis of condemnation.

The Chief Justice, though technically he confines himself to the absence of a hearing, intimates a doubt whether criminality is physically transmissible. In objecting to basing the decision on discrimination he says:

"Moreover, if we must presume that the legislature knows—what science has been unable to ascertain—that the criminal tendencies of any class of habitual offenders are transmissible regardless of the varying mental characteristics of its individuals, I should suppose that we must likewise presume that the legislature, in its wisdom, knows that the criminal tendencies of some classes of offenders are more likely to be transmitted than those of others."[21]

And later, in a passage which seems to reaffirm *Buck v. Bell* and to point a difference between the statute there and the one before the court, he adds:

"Science has found and the law has recognized that there are certain types of mental deficiency associated with delinquency which are inheritable. But the State does not contend—nor can there be any pretense—that either common knowledge or experience, or scientific investi-

[19] See Guinn v. United States, 238 U. S. 347, 35 S. Ct. 926, 59 L. ed. 1340 (1915); Lane v. Wilson, 307 U. S. 268, 59 S. Ct. 872, 83 L. ed. 1281 (1939).

[20] Skinner v. Oklahoma, 316 U. S. 535, 538, 62 S. Ct. 1110, 1112, 86 L. ed. 1655, 1658 (1942).

[21] *Id.* at 544, 62 S. Ct. 1114, 86 L. ed. 1661.

gation, has given assurance that the criminal tendencies of any class of habitual offenders are universally or even generally inheritable."[22]

These two passages make it extremely likely that the Chief Justice would scrutinize severely any finding by physicians that any individual would be likely to breed criminals merely because he had been thrice convicted himself. It would seem that at most he would be satisfied only by other findings of physical and mental degeneracy comparable to those made in the case of Miss Buck.

Mr. Justice Jackson in his special concurrence clearly intimates that he thinks a fundamental constitutional issue would remain even if the defects of discrimination and absence of hearing were cured. He does not even go so far as to give clear approval to *Buck v. Bell* when he merely recites the fact that "This Court has sustained"[23] the compulsion under the particular circumstances there existing. This is quite different from the Chief Justice's statement that "Undoubtedly a state may"[24] compel what was sanctioned in *Buck v. Bell.* Quite frequently during the current judicial dispensation, mere recitals of former rulings and of the grounds which predecessors adduced for them have been indications of a disposition to qualify or reject rather than to reaffirm. While to Mr. Justice Holmes his reference to three generations of imbeciles may have been merely a superfluous rhetorical rivet, its repetition by Mr. Justice Jackson may possibly be designed to turn it into a more or less essential condition. Should any such requirement be judicially imposed, the state would find it more practical to deal with habitual offenders by stone walls and iron bars rather than by the surgeon's knife.

III

So much for what Justices of the United States Supreme Court have said and done. The recital does not throw much light on what they or their successors would do with milder eugenic measures, except to make clear that they would be zealous in insisting upon strong scientific support for the necessity and the efficacy of prophylactic prescriptions and upon adequate procedural safeguards in picking the persons subjected to them. A materialist might find it somewhat sentimental to emphasize the sacredness of procreative power when for habitual offenders there may be deprivation of all opportunity for its exercise. There are, however, other than materialistic elements in the problem, ones that in certain tightly knit fellowships would obtain even if the state did no more than to proffer sterility as the price of release from long prospective

[22] *Id.* at 545, 62 S. Ct. 1115, 86 L. ed. 1662.
[23] *Id.* at 546, 62 S. Ct. 1116, 86 L. ed. 1663.
[24] *Id.* at 544, 62 S. Ct. 1115, 86 L. ed. 1662.

incarceration. From a practical standpoint such release would mean the relinquishment of the most adequate safeguard against continued criminal enterprise by an already practiced and proficient offender.

If all this seems sadly vague and amorphous to those who extract certainties out of test tubes, it can only be answered that of such is the kingdom of jurisprudence. Even in the kingdom of the healing art one does not always find complete concord and certainty. One who listens to the nauseating promulgation of nostrums on the radio must turn in increased confidence to the more modest and tentative approach of the physician. The sin of the law is not that it is empirical and particularistic but that so often it professes to derive from the universal and the absolute. This is especially foolish when courts exercise power over legislatures in the name of unenlightening constitutional cautions. Happily the practice not only does not accord with the profession, but is far superior. Strange as it may seem that we have a system of government under which five lawyers on a bench in Washington can say "No" when a state legislature and a state court have said "Yes" and base their negative on their views of social policy, it would be hard to maintain that there was not wisdom in making a distinction between the case of Mr. Skinner and that of Miss Buck.

There is nothing in the law books which would give a lawyer any special competence to pass judgment on what the Supreme Court would say about other eugenic measures less drastic than sterilization and more far reaching and invasive than vaccination. The immediacy of danger from contagious and infectious diseases, the substantial certainty of a fair degree of efficacy from recognized curative and preventative measures, the avoidance of finality in their application—these and other considerations should keep the decision in *Skinner v. Oklahoma* from being a stumbling block in the way of any sane public health program however much it may intrude on privacy and preclude self-determination. There are, of course, sects which don't believe in medicine at all and other sects which object to the intrusion of animal substances, but the time has not yet come when their tenets are likely to carry even subconscious weight with the Supreme Court as claimants for inclusion in the protection surrounding civil or religious liberty. Whether they may in some areas have weight with state legislatures and state courts is somewhat less certain. Voters may carry weight by their numbers quite as much as by their reason.

One final point may deserve mention. If the Supreme Court is satisfied that a measure belongs in the field of public health and is not patently or covertly punitive in design, the intervention of a jury is not necessary in the determination of the facts in the individual case. This is established by *Buck v. Bell* and by *Minnesota* ex rel. *Pearson v. Pro-*

bate Court,[25] subject always to the qualification that precedents continue to be followed. The *Pearson* case involved the commitment of a so-called "psychopathic personality" to an institution. Except for the non-intervention of a jury, the proceedings before the Probate Court and on appeal were scrupulously protective against the danger of error. As to the compulsory appointment of two physicians to assist in the examination, the Court said that "The argument that these doctors may not be sufficiently expert in this type of cases merely invites conjecture. There is no reason to doubt that qualified medical men are usually available."[26] Such faith should be welcome to the medical profession. It would be an extreme legalist who could say as much for the general run of jurors. Some, of course, may question the infallibility of judges, but under our system they have the final say if duly invited to say it.

[25] 309 U. S. 270, 60 S. Ct. 523, 84 L. ed. 744 (1940).
[26] Minnesota *ex rel.* Pearson v. Probate Court, 309 U. S. 270, 276, 60 S. Ct. 523, 526, 84 L. ed. 744, 750 (1940).