Vanderbilt Law Review

Volume 26
Issue 1 *Issue 1 - January 1973*

Article 3

1-1973

The Constitutional Dilemma of a Person Predisposed to Criminal Behavior

John A. Chandler

Stanley F. Rose

Follow this and additional works at: https://scholarship.law.vanderbilt.edu/vlr

 Part of the Criminal Law Commons, Fourth Amendment Commons, and the Law and Psychology Commons

Recommended Citation

John A. Chandler and Stanley F. Rose, The Constitutional Dilemma of a Person Predisposed to Criminal Behavior, 26 *Vanderbilt Law Review* 69 (1973)
Available at: https://scholarship.law.vanderbilt.edu/vlr/vol26/iss1/3

This Article is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Law Review by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.

The Constitutional Dilemma of a Person Predisposed to Criminal Behavior

I. INTRODUCTION

The basic premise of American criminal jurisprudence is that individuals are capable of controlling their behavior.[1] The threat of incarceration is intended to be a deterrent to antisocial conduct. State and federal penal systems are called "correctional institutions"—implying that a person is incarcerated in order to modify unacceptable behavior. Criminal laws are drafted with goals of discouraging antisocial conduct, punishing and reforming the guilty, and protecting society against dangerous individuals.[2] The first two purposes are served only if a person can respond to negative reinforcement by conducting himself in socially acceptable ways. Individuals incapable of controlling antisocial behavior are not accounted for in these criminal-law concepts.

Research in physical and social sciences indicates that there may be people who cannot control antisocial conduct in themselves. Experiments, as yet inconclusive, suggest that the inability to control behavior may arise from genetic abnormality, imbalanced body chemistry, or early development. Behavioral sciences may never progress to the stage at which it will be possible with certainty to tie conduct to specific physical or social abnormalities. Recent scientific experiments,[3] however, indicate that accurate prediction of aberrant behavior is enough of a possibility to render profitable an examination of the constitutional problems that may attend society's realization of the ability to diagnose an individual as potentially violent. This Note, therefore, is based upon the hypothesis that some antisocial behavior is caused by detectable physical abnormality rather than by individuals choosing socially unacceptable behavior. The ability to predict undesirable behavior should accompany this diagnosis of causation. For example, if the presence of "tarexin," a hypothetical chemical present in the serum of schizophrenics, is found to cause some forms of mental illness, then testing for the presence of the chemical in all individuals would identify latent schizophrenics. The capacity to predict based on the presence of a chemical substance could develop prior to the ability to "cure"[4] the defect. Thus

1. *See* O.W. HOLMES, THE COMMON LAW 41-51 (1881); Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB. 401 (1958).

2. O.W. HOLMES, *supra* note 1.

3. *See* notes 6-33 *infra* and accompanying text.

4. The term "cure" is utilized throughout this Note to signify relief from the malady under

the temptation to predict and control dangerous and presently incurable behavior would be compelling.

Society might react in a number of ways to the identification of certain individuals as persons who will be likely to act in an unacceptable manner and are incapable of behaving otherwise. Assuming the predisposed conduct is violent, and, therefore a threat to society, the most obvious societal response would seem to be the imposition of restrictions designed to maximize the chance of preventing this violent behavior. Such restrictions could range from compulsory treatment to continuous surveillance[5] to incarceration. The societal sanctions would vary according to the danger involved in the violent conduct, the probability of its occurrence, the existence of treatment and cure, and the range of constitutionally permissible restrictions. This Note will examine the kinds of restrictions that seem likely to be imposed, and the constitutional problems surrounding their use.

For the purposes of this Note, persons predisposed to criminal or violent behavior because of genetic or chemical abnormalities, or early environmental factors will be referred to as "criminally predisposed," although the term is broad enough to include others, such as persons suffering from nonphysically caused mental illness and recidivists. After a brief introduction to several current theories of predisposed behavior, the constitutional protection available to the restricted person will be discussed.

A. The XYY Chromosomal Abnormality

In 1968 and 1969, it was discovered that a number of defendants convicted of mass murders and perverse sexual acts had a common chromosomal abornmality—the XYY syndrome.[6] Since the public's at-

---

discussion. Although the term often is inappropriate in discussing mental illness since, for example, a remedy parallel to the antibiotic treatment of an infection is seldom available, it is helpful in denoting relief from the particular problem discussed.

5. The possibility of an electronic device capable of controlling behavior implanted in the brain of a person suffering from an inherited, undesirable tendency is suggested in Gaylin, *We Have the Awful Knowledge To Make Exact Copies of Human Beings*, N.Y. Times, Mar. 5, 1972, § 6, pt. 1 (Magazine), at 12.

6. Although the first report of the existence of the abnormality was published in 1961, it came to the public's attention first in the Paris trial of Daniel Hugon in 1968 for strangling an elderly prostitute. The court overruled defense counsel's contention that Hugon was unfit to stand trial and rejected defendant's insanity plea based on the XYY syndrome. N.Y. Times, Apr. 21, 1968, at 1, col. 3; TIME, May 3, 1968, at 41. That same year, Richard Speck, convicted in Chicago in the 1967 rape, stabbing, and strangulation of 8 nurses was diagnosed as suffering from the XYY abnormality. N.Y. Times, Apr. 22, 1968, at 43, col. 3; *id.*, May 6, 1969, at 93, col. 5. The syndrome was not raised as an insanity defense, however, and played no part in his subsequent appeals. At the end of 1968 Lawrence E. Hannel raised the XYY syndrome as the basis of an insanity defense

tention is usually focused on the trials of criminals for bizarre offenses, the revelation that genetic compulsion may have been responsible for these crimes received an inordinate amount of attention. Thereafter, the XYY syndrome became a popular subject for research by geneticists and criminologists. Since 1965, more than 200 articles discussing the XYY chromosome have been published in medical, legal, and scientific journals.[7]

The XYY syndrome results when a male foetus receives one X and two Y chromosomes.[8] Although research is far from conclusive, and often contradictory,[9] various studies have concluded that a person with an XYY chromosomal complement is more prone to antisocial behavior than his normal XY counterpart.[10]

---

in his trial for the apparently senseless stabbing-murder of his landlady. Although the jury found Hannel insane within the M'Naghten rule, it was not allowed to consider the XYY abnormality. Bartholomew & Sutherland, *A Defence of Insanity and the Extra Y Chromosome: R v. Hannell*, 2 AUST. & N.Z.J. CRIM. 29 (1969). Finally, a New York jury rejected the XYY insanity plea of Sean Farley, and found him guilty of first-degree murder in the rape and murder of a woman in an alley near her home. N.Y. Times, Apr. 16, 1969, at 54, col. 6; *id.*, Apr. 24, 1969, at 53, col. 1; *id.*, Apr. 30, 1969, at 93, col. 4.

7. Fox, *Criminology: The XYY Offender: A Modern Myth?*, 62 J. CRIM. L.C. & P.S. 59, 71 (1971).

8. Chromosomes are threads of complex molecules containing material that transmits characteristics from one generation to the next in plants and animals. For a discussion of how the XYY syndrome develops in the process of fertilization see Burke, *The "XYY Syndrome": Genetics, Behavior and the Law*, 46 DENVER L.J. 261, 262-69 (1969); Fox, *supra* note 7, at 61-62; Money, *Impulse Aggression, and Sexuality in the XYY Syndrome*, 44 ST. JOHN'S L. REV. 220, 228-30 (1969); Montagu, *Chromosomes and Crime*, PSYCHOLOGY TODAY, Oct. 1968, at 43, 44-47; Saxe, *Psychiatry, Sociopathy and the XYY Chromosome Syndrome*, 6 TULSA L.J. 243, 245-47 (1970); Sergovitch, *Chromosome Aberrations and Criminal Behaviour: A Brief Review*, 11 CRIM. L.Q. 303, 304-07 (1969). Chromosomes provide the blueprint for the growth and development of a unique human being from the foetus. The female ovum and male sperm each contain 23 chromosomes, and upon uniting, give the fertilized ovum 46 chromosomes, arranged in 23 pairs. One of the pairs in each cell contains a gene that determines, among other features, the primary sexual characteristics of the individual. The biologist calls this pair of chromoscomes "XX" in the female, "XY" in the male. The primary biological characteristics of masculinity result from the Y chromosome. Thus, it is the sperm of the father that determines whether a child is male or female—the sex gene in the ovum will always be X, while in the sperm it may be X or Y.

Numerous chromosomal abnormalities may result if the process of matching the sperm's 23 chromosomes with the ovum's 23 chromosomes fails to operate effectively. For example, in the XXY Klinefelter Syndrome the individual is outwardly male but sterile, somewhat mentally retarded, and suffers from breast enlargement. The deviation occurs in one out of every 400-500 male births and has been linked with antisocial behavior such as homosexuality and alcoholism. Fox, *supra* note 7, at 61; Montagu, *supra* note 8, at 47. Other possibilities of chromosomal abnormalities include "XXX eggs (super-females, not always fertile) . . . XOs (outwardly female, but without ovaries and therefore without eggs), [and] XXXXYs (typically defective mentally) . . . ." Valenti, *His Right To Be Normal*, SATURDAY REVIEW, Dec. 7, 1968, at 75. Mongolism is a chromosomal abnormality that arises not from faulty union of sexual chromosomes, but from the "piggy-back" displacement of one of the pairs of chromosomes. *Id.*

9. Fox, *supra* note 7, at 69.

10. *E.g.*, Casey, Blank, Street, Segall, McDougall, McGrath & Skinner, *YY Chromosomes*

The XYY individual has been described as a man having "extremely tall stature, long limbs with strikingly long arm span, facial acne, mild mental retardation, severe mental illness (including psychosis), and aggressive, antisocial behavior involving a long history of arrests, frequently beginning at an early age."[11] Other research has shown that nearly three percent of the patients confined because of dangerous criminal propensities had XYY chromosomal makeup, while the XYY incidence in the population at large is approximately 0.13 percent.[12] Several studies have supported the thesis that the XYY syndrome is causally related to violent behavior,[13] while other experiments have questioned the syndrome's role in causing undesirable conduct.[14] Nevertheless, the controvery suggests the possibility that further research may reveal a connection between heredity and antisocial conduct.[15] The chromosomal complement, as the blueprint from which an individual develops, may prove that some undesirable conduct is not the product of free will. One authority who questioned the validity of the XYY research to date indicates that the importance of continuing research into the XYY syndrome lies in the attempt "to identify the behavioral correlates of particular genetic defects [as] one of the important first steps towards the ultimate elimination of undesirable traits in human beings by genetic manipulation. The attainment of this goal, however frightening it may appear to be, is no fanciful dream; its realization has been seriously predicted for the first decade of the new cen-

and Antisocial Behavior, 2 LANCET 859 (1966); Jacobs, Brunton, Melville, Brittain & McClemont, *Aggressive Behaviour, Mental Sub-normality and the XYY Male*, 208 NATURE 1351 (1965); Jacobs, Price, Court Brown, Brittain & Whatmore, *Chromosome Studies on Men in a Maximum Security Hospital*, 31 ANN. HUMAN GENETICS 339 (1968); Telfer, *Are Some Criminals Born That Way?*, 34 THINK 24 (1968).

11. Telfer, *supra* note 10, at 26.

12. Jacobs, Price, Court Brown, Brittain & Whatmore, *supra* note 10.

13. *See* materials cited note 10 *supra*.

14. Fox, *supra* note 7, at 69-72.

15. One author, working under a United States Public Health Service grant, after criticizing some of the research on the XYY chromosome concluded: "From the point of view of XYY babies who will grow up to be law-abiding citizens, it is immoral to spread a pseudoscientific rumor that the XYY karyotype inexorably spells crime and jail sentences. By contrast, it is equally immoral, from the point of view of XYY boys and men, already victims of behavior beyond their capacity to control, to spread a pseudoscientific rumor that they are no different from other males and should be judged accordingly. We are already far beyond the stage of having to wait out the slow and costly procedure of gathering XYY incidence statistics before being able to unstraddle the fence. With all due respect to conservative caution, it is already archaic to maintain that: 'no definite conclusions can be drawn about the relationship between the presence of the XYY chromosome and deviant criminal and/or violent behavior.' We may confidently say that the XYY karyotype is sometimes related to law-breaking behavior. The relationship is positive and definite, but not universal or inexorable." Money, *supra* note 8, at 231. *But see* National Institute of Mental Health, Press Release, July 8, 1969.

tury and, with the recently reported isolation of a single gene . . . this prediction may already require updating."[16]

B. Chemical Basis of Psychosis

Mental health professionals generally operate on the premise that antisocial conduct is the product of societal forces that can be counteracted by helping an individual to understand the basis of his behavior, and, with sufficient professional assistance and a willingness to alter his conduct, act in a socially acceptable manner.[17] Most patients are confined in mental hospitals after violent conduct has branded them dangerous to society.[18] Their disorders often are exceptionally severe and frequently recurring. Few psychiatrists would deny that if the individuals had been reached at a sufficiently early age, their subsequent conduct might have been avoided.

The idea that some violent conduct may result from physical disorders it not new. Indeed, one authority has gone so far as to quip that no twisted thought occurs in the absence of a twisted molecule.[19] It seems more likely, however, that neither physical malfunctions nor environmental influences account for all mental illnesses. Nevertheless, the discovery that some behavior disorders are caused by physiological defects could have a significant impact upon the manner in which society copes with such problems.

The discovery of physical caution could result in a cure not dependent upon an individual's ability to change his behavior. If a chemical imbalance affected the nervous system in such a way that the victim was violence-prone, simply correcting the imbalance might render the dangerous person harmless. If, however, the illness could not be cured, its victims could be identified by testing for the chemical imbalance. Thus a person who has never exhibited violent behavior could be identified as dangerous to society and controlled to minimize his opportunity for future antisocial conduct.

Several experiments have hypothesized the existence of chemical factors said to cause certain types of schizophrenia. One study indicates that fluctuations in the level of the hormone serotonin[20] in the brain may

16. Fox, *supra* note 7, at 62 (citations omitted).

17. L. BELLAK, SCHIZOPHRENIA 57-61 (1958); J. KATZ, L. GOLDSTEIN & A. DERSHOWITZ, PSYCHOANALYSIS, PSYCHIATRY, AND LAW 669-76 (1967).

18. J. KATZ, J. GOLDSTEIN & A. DERSHOWITZ, *supra* note 17, at 500.

19. Gerad, *Neurophsysiology: Brain and Behavior*, in 2 AMERICAN HANDBOOK OF PSYCHIATRY 1620-58 (S. Arieti ed. 1959).

20. Serotonin is the chemical compound 5-hydroxy-tryptamine. L. BELLAK, *supra* note 17, at 214.

cause schizophrenia.[21] Antagonistic chemical antimetabolities may cause an increase or decrease in the level of serotonin, resulting in schizophrenic conduct.[22] While the evidence is far from conclusive that a serotonin imbalance causes some form of schizophrenia, the possibility cannot be dismissed.[23]

Another hypothesis is that a substance said to be found in the serum of schizophrenics, "tarexin," causes some forms of the mental disorder.[24] According to one researcher, the introduction of tarexin into the bloodstream of volunteers with no history of schizophrenia induced symptoms associated with schizophrenia.[25] Other researchers have discounted the experiment with tarexin, and some have questioned whether the substance exists at all.[26]

These experiments nevertheless indicate the possibility that some forms of the most severe and violence-prone mental illnesses may be caused by physical factors not within the control of its victims. Indeed, the recent experience with self-induced chemical imbalances such as LSD and other hallucinogenics that result in behavior similar to that of psychotics, reinforces the idea that physical disorders may cause the behavior generally characterized as schizophrenic.[27]

C. *Techniques of Social Science As the Basis for Predicting Violent Behavior*

Social sciences are basically different from physical sciences in that prediction of a result based upon a confluence of carefully controlled elements is a characteristic of the latter but not the former. Psychologists, for example, discuss various factors that affect behavior, but are

21. Wooley, *Participation of Serotonin in Mental Process*, in CHEMICAL CONCEPTS OF PSYCHOSIS 176-79 (M. Rindel ed. 1958).

22. *Id.* at 176.

23. *Id.* at 186, 188.

24. Heath, Leach, Martens, Cohen & Feighy, *Metabolic Abnormalities in Schizophrenia*, in CHEMICAL CONCEPTS OF PSYCHOSIS 223 (M. Rinkel ed. 1958).

25. "Consistently primary or fundamental symptoms appeared. Blocking and thought deprivation developed; all subjects were autistic and complained of depersonalization. They appeared dazed, with diminished contact to the environment; had a blank look in their eyes; and showed a lessening of animation in facial expressions." *Id.* at 225.

26. L. BELLAK, *supra* note 17, at 48-49; Robins, Smith & Louv, *Attempts To Confirm the Presence of "Taraxein" in the Blood of Schizophrenic Patients*, in TRANSACTIONS OF THE FOURTH CONFERENCE, JOSIAH MACY, JR., NEUROPHARMACOLOGY FOUNDATION 123 (H. Abramsen ed. 1959).

27. In a paper presented to the American Psychiatric Association, a research team reported that they had discovered the probable biological cause of schizophrenia to be an enzyme deficiency. The researchers are conducting further tests to determine the validity of their findings. Nashville Tennessean, May 7, 1972, § B, at 9. For a discussion of other possible biochemical bases of psychosis see L. BELLAK, *supra* note 17, at 88-92.

loathe to predict that if X occurs, Y will follow. The reason is obvious—too many factors outside the control and observation of the psychologist, especially the decision-making process of humans, may interfere with predictability.

Nevertheless, sociological studies of juvenile delinquency have become sophisticated enough that criminologists are now willing to predict that given X, Y will follow.[28] In studies spanning several decades one pair of scientists, the Gluecks, has gathered and analyzed detailed data on juvenile delinquents from date of birth through early childhood.[29] Their data indicate that physical characteristics and environmental factors are the primary forces that change the normal individual into a juvenile delinquent.[30] The Gluecks construct "predictive tables," which utilize interdisciplinary findings to postulate significant characteristics influencing juvenile behavior; these characteristics are used to determine which individuals will develop into delinquents. Given sufficient information about the child's early life, he can be typed as potentially delinquent or nondelinquent. Important factors include paternal discipline, supervision by the mother, affection of the father and the mother for the child, and the cohesiveness of the family.[31] Although characteristics such as "maternal supervision" admittedly are difficult to quantify, the Gluecks indicate that measurement is sufficiently accurate to justify reliance.[32]

Society could use this ability to predict antisocial behavior in several ways. The most obvious use of the information would be to facilitate early treatment with a view to "curing" the antisocial tendencies. It is possible, however, that a juvenile "on the road" to delinquency could not be cured. Furthermore, it is likely that treatment would involve an intensive experience, probably requiring institutionalization.[33]

28. *See generally* S. GLUECK & E. GLUECK, DELINQUENTS AND NONDELINQUENTS IN PERSPECTIVE (1968).

29. "From the other data—the social background of the boys, the Rorschach Test, and the psychiatric findings—it seemed entirely feasible to construct predictive tables that would markedly differentiate between potential delinquents and potential nondelinquents . . . ." S. GLUECK & E. GLUECK, UNRAVELLING JUVENILE DELINQUENCY 259 (1950).

30. *Id.* at 258-61; S. GLUECK & E. GLUECK, *supra* note 27, at 170.

31. S. GLUECK & E. GLUECK, *supra* note 29, at 260-61.

32. S. GLUECK & E. GLUECK, VENTURES IN CRIMINOLOGY 1-71 (1964). The Gluecks have studied thousands of individual cases. One study compared a group of boys, each of whom the predictive table indicated possessed the characteristics likely to result in delinquency, to a control group. S. GLUECK & E. GLUECK, *supra* note 27. The authors concluded that a multidisciplinary analysis of data confirmed that "boys having in their make-up and early home conditioning certain identifiable traits and factors which marketedly differentiate delinquents from nondelinquents are very likely to turn out to be delinquents, and a substantial portion of them are likely to continue their criminal behavior at least into adolescence and early adulthood." *Id.* at 171.

33. In 1970 a suggestion by a former personal physician of President Richard Nixon, Dr.

It is apparent that whatever use is made of the ability to predict violent behavior, the potential juvenile delinquent probably will suffer restrictions on his freedom before ever having committed a criminal act.

D. Hypothesis

This Note will consider the constitutional protection available to criminally predisposed persons by using a hypothetical individual in a hypothetical class. The members of the class—call it class *X*—will have been identified as suffering from an abnormality, such as one of the three described in the preceding sections, that appreciably increases the probability of each member committing a violent, antisocial act. For ease of reference, an individual member of class *X* will be referred to as "*A*."

If it is assumed that the likelihood that any human being will commit a violent act is five percent, the hypothetical class could have a probability of violence at any point above that figure. There is as yet no scientifically developed means for determining which individual in the largest class—human beings—will act in an undesirable manner in the future; yet it is certain that the probability for any one person is some figure above zero. Class *X* members will have been identified as having a greater probability of violence. Although no individual in that class will be identifiable as one who will commit a crime, the physical abnormality will allow an accurate prediction that the probability that any individual class *X* member will act violently is, for example, 25 percent rather than the normal five percent. Once class *X* has been scientifically identified as existing, society's reaction[34] to the increased danger posed by members of that class will have to be measured against existing constitutional limitations.

II. CONSTITUTIONAL PROTECTIONS

A. The State's Power To Obtain Evidence of Membership in Class X

If society decided to react to protect itself against the increased

Arnold Hutschnecher, erupted into public view when it was revealed that the physician had proposed that psychological tests be administered to all 6-year old children to detect future criminal tendencies. President Nixon referred the matter, including a plan to confine "hard core" children in camps for rehabilitation, to the Department of Health, Education, and Welfare (HEW). Washington Post, Apr. 14, 1970, at 1, col. 3. In his 1600-word memorandum Dr. Hutschnecher suggested the use of techniques like the Rorschach ink-blot test "to identify children 'who have violent and homicidal tendencies.'" N.Y. Times, Apr. 11, 1970, at 15, col. 1. Although Dr. Hutschnecher complained that his "'labor of love [had been] turned into a sinister plot,'" Washington Post, *supra* at 1, HEW wasted little time rejecting his proposal. N.Y. Times, Apr. 19, 1970, § E, at 13.

34. Society reacts to a potentially dangerous long-term situation, if at all, through legislative action. Although a remedy is legislative in nature, it it still the reaction of the public at large, and therefore will be termed "society's" reaction here.

probability of danger from the members of class X, it first would be necessary to identify the individual members. In order to identify X individuals, mass testing of some kind would be required. For example, if class X were defined as those people suffering from the XYY syndrome, all children could be tested at birth for the presence of the abnormality. The constitutional considerations concerning mass testing of individuals whose freedom will be restricted in some manner following identification will be discussed in the following sections.[35]

1. *The Fifth Amendment.*—The fifth amendment provides that a person may not be compelled to give testimony against himself. It is arguable that requiring an individual to submit to an examination that will identify him as a member of class X, and therefore result in restrictions on his freedom, forces him to testify against himself. If the class were characterized by the XYY syndrome, the evidence to establish an individual's membership in the class could be acquired only from him. Would it be possible, therefore, for an individual to contend successfully that submitting to the test violates the fifth amendment?

There is no mass test in use today—that is, an examination administered to every individual in the country—that closely parallels the examination hypothesized. The fifth amendment is oriented toward the introduction of evidence at a criminal trial, however, and analogous identification processes do exist.[36] Fingerprinting and testing for blood type are examinations that may establish a defendant's guilt, and information resulting from these procedures can be obtained only by examining the defendant.

The fifth amendment has been raised unsuccessfully in objections to evidence indicating a defendant's blood grouping test in criminal proceedings. For example, in *State v. Alexander*,[37] defendant's second-degree murder conviction was upheld by the New Jersey Supreme Court despite the introduction of evidence that his blood type matched that on the murder weapon. The court rejected defendant's objection that evi-

35. One constitutional consideration can be dealt with briefly. There could be no violation of equal protection arising from the mere fact of testing since equal protection is concerned with the legislative division of the general population into classes and the determination of whether the classes constructed are unfair to some members. With mass testing, however, the entire population would be examined, not just the members of class X. If there are no subdivisions of the general populace, definitionally there can be no denial of equal protection.

36. The fifth amendment's use is not confined to a criminal proceeding against the defendant. For example, a potential defendant can assert the privilege when testifying in another proceeding. *See* Annot., 68 A.L.R. 1503 (1930) (application of privilege against self-incrimination in nonjudicial proceedings). It should be possible, therefore, for an individual to assert the fifth amendment at the time of testing or when test results are introduced in a subsequent proceeding to restrict his freedom.

37. 7 N.J. 585, 83 A.2d 441 (1951), *cert. denied*, 343 U.S. 908 (1952).

dence of his blood type was inadmissible because he consented to the test only to ascertain whether he was suffering from venereal disease. Finding that the privilege against self-incriminration protects a defendant only against the use of testimonial evidence and not against compulsory physical examinations—even if defendant were tricked into taking the examination—the court found defendant's objection without merit.[38]

The New Jersey court's conclusion that the fifth amendment is applicable only to testimonial evidence was upheld by the Supreme Court in *United States v. Wade*,[39] and *Schmerber v. California*.[40] In *Wade*, the Court found that forcing defendant to participate in a line-up did not violate the fifth amendment since it did not compel him "to give evidence having testimonial significance."[41] *Schmerber* is even more closely analogous to the mass testing hypothesized. There, defendant was hospitalized following an automobile accident. A policeman, smelling liquor on defendant's breath, arrested him and ordered doctors to perform a blood test. In upholding defendant's conviction, the Supreme Court reaffirmed that the fifth amendment protects an individual only against providing the state with "evidence of a testimonial or communicative nature, and that the withdrawal of blood . . . did not involve compulsion. . . ."[42]

Courts generally have reached similar conclusions concerning contentions that fingerprint evidence violates the fifth amendment. In the classic case in the area, the Second Circuit Court of Appeals held that the use of fingerprints for the purpose of identifying a defendant accused of crime does not compel a defendant to give testimony against himself.[43] In upholding the practice, Judge Augustus Hand stated that "[t]he slight interference with the person involved in finger printing [sic] seems to us one which must be borne in the common interest."[44] Finger-

38. *See also* Davis v. State, 189 Md. 640, 57 A.2d 289 (1948) (murder prosecution—blood grouping test taken without defendant's knowing the reason upheld); Commonwealth v. Statti, 166 Pa. Super. 577, 73 A.2d 688 (1950) (blood typing test without defendant's consent indicated his blood same as type found at scene of assault and battery).

39. 388 U.S. 218 (1967).

40. 384 U.S. 757 (1966).

41. 388 U.S. at 222. The Court reversed defendant's conviction, however, because he was not given the right to have counsel present during the line-up.

42. 384 U.S. at 761. *See also* Breithaupt v. Abram, 352 U.S. 432 (1957); Et Min Ng v. Brownell, 258 F.2d 304 (9th Cir. 1958) (blood test used to prove nonpaternity in immigration proceeding). *But see* Rochin v. California, 342 U.S. 165 (1952) (Court rejected evidence under the fourth amendment when police forced defendant to vomit evidence as shocking the conscience of the Court).

43. United States v. Kelly, 55 F.2d 67 (2d Cir. 1932).

44. *Id.* at 68. *See also* Gilbert v. United States, 366 F.2d 923, 935-37 (9th Cir. 1966); United States v. Thompson, 356 F.2d 216, 224-25 (2d Cir. 1965).

print evidence has been rejected, however, when it is found to be the product of an illegal search or arrest not based on probable cause.[45]

The individual resisting compulsory tests to determine membership in class *X* would argue that the blood sample and fingerprint analogy under the fifth amendment are not aposite since both of those tests are based on a reasonable probability that the defendant in question has some relationship to the crime under investigation. The fingerprint and blood group analogies are inappropriate, therefore, because mass testing for membership in class *X* is not based upon probable cause indicating the individual tested is a member of class *X*.

Proponents of mass testing would counter that the Supreme Court has stated clearly that the fifth amendment is applicable to testimonial evidence only. The guarantee against self-incrimination, therefore, is inapplicable to physical testing. Furthermore, public policy arguments for societal self-protection would be said to override the individual's self-interest and require that the burden of testing be borne. Given these arguments, it is unlikely that the member of class *X* could rely on the fifth amendment alone to prohibit mass examinations since the evidence garnered clearly is nontestimonial in nature.

2. *The Fourth Amendment.*—The fourth amendment prohibits unreasonable searches and seizures. Implementation of the amendment's guarantee has rested on the exclusion of unconstitutionally obtained evidence in a criminal proceeding[46] rather than on absolute prohibition of unreasonable searches and seizures. As traditionally construed, the amendment therefore would not be amenable to use as the basis of a proceeding to enjoin testing. The individual seeking to avoid identification as a member of class *X* could rely on the amendment only if the identification procedure were deemed equivalent to a criminal trial.

A person utilizing the fourth amendment in the hypothetical situation would argue that the restrictions[47] resulting from identification as a member of class *X* render the identification process tantamount to a criminal proceeding.[48] In a criminal proceeding, evidence seized without probable cause is infirm and inadmissible under the fourth amendment.[49] Evidence indicating that any particular individual suffers from

45. Bynum v. United States, 262 F.2d 465 (D.C. Cir. 1958).

46. *E.g.*, Mapp v. Ohio, 367 U.S. 643 (1961); Silverman v. United States, 365 U.S. 505 (1961); Olmstead v. United States, 277 U.S. 438 (1928).

47. The possible restrictions arising from membership in class *X* are discussed below. *See* text accompanying notes 59 & 60 *infra*.

48. *Cf. In re* Gault, 387 U.S. 1 (1967) (civil juvenile proceeding requires constitutional criminal procedural protections because of possible lengthy incarceration).

49. *E.g.*, Rios v. United States, 364 U.S. 253 (1960); Henry v. United States, 361 U.S. 98 (1959).

the characteristics common to members of class X, if acquired in mass testing, would have been obtained without probable cause because no one individual was suspected—the population in general was surveyed. If the fourth amendment argument prevailed, the only evidence establishing A as a member of class X would be inadmissible in a proceeding to identify him as such.

Public policy, however, might override A's personal interest. The fourth amendment protects the public against unreasonable search and seizure; testing for X victims also is designed to protect the public. Which public interest would prevail is debatable. The fourth amendment is embodied in the Constitution, whereas testing would have a statutory basis. The fourth amendment argument, on the other hand, has a weak flank exposed—adjudication as a member of class X would not be statutorily described as a criminal proceeding. The restrictions would be designed simply to protect society. The outcome of the fourth amendment argument likely would hinge upon the particular court's inclination to characterize the proceeding as "criminal" or "civil." With the precedent of juvenile delinquency proceedings and adjudications of an individual as mentally ill, both intended to be civil in nature, considered sufficiently severe by courts to require many of the procedural protections of a criminal trial,[50] A might be successful in his argument for the exclusion of mass-testing evidence.

3. *The Right of Privacy.*—One resisting the examination to discover the existence of characteristics common to class X would argue that mass testing violates the right of privacy. The right of privacy has long existed at common law.[51] Only recently, in *Griswold v. Connecticut*,[52] has it gained constitutional stature.

The scope of *Griswold's* protection, however, is entirely uncertain. The decision was concerned with a Connecticut birth control law, a long outdated anomaly. The constitutional right of privacy was found to emanate from the first, third, fourth, fifth, and ninth amendments to the Constitution. The majority opinion spoke of the right as absolute, although this language possibly reflected only the feebleness of the state interest offered in justification of the statute. Whether the *Griswold* right of privacy is broad enough to prohibit mass testing to gather information useful in protecting society against those identified as unusually dangerous is unclear.

In further developing the parameters of the constitutional right of privacy, courts may examine the common-law right predating *Griswold*.

50. *E.g., In re* Gault, 387 U.S. 1 (1967); Lynch v. Overholser, 369 U.S. 705 (1962).
51. 77 C.J.S. *Right of Privacy* § 1 (1952).
52. 381 U.S. 479 (1965).

As with the privilege against self-incrimination, the right of privacy has provided several cases testing the scope of the state's power to require fingerprinting.

In *State ex rel. Mavity v. Tyndall*,[53] for example, a citizen acquitted of a misdemeanor alleged that the maintenance of his arrest record, photograph, and fingerprints violated the right of privacy. Refusing to order the records destroyed, the court observed that an individual's right of privacy must be balanced against the public interest. The court found that the public's need to take fingerprints and photographs and maintain files on individuals after arrest was paramount to the personal right of privacy.

Similarly, in *Roesch v. Ferber*[54] plaintiff was arrested for a speeding violation and committed to jail pending the posting of bail. The court rejected plaintiff's request that the county be ordered to return his fingerprints and photographs. The court found that the identification procedures were purely incidental to plaintiff's arrest and, in addition to providing a positive means of identifying prisoners, served the important purpose of identifying men wanted in other jurisdictions. The individual's right of privacy, therefore, succumbed to the public good.

In addition to criminal cases, several civil actions have challenged the validity of statutes requiring that applicants for various public positions submit to police identification procedures. For example, in *Walton v. City of Atlanta*,[55] plaintiffs argued that requiring fingerprints and photographs as prerequisites to being licensed as taxi drivers violated their right of privacy. The court, however, without discussing a public need for identification, found that the city's police power to protect the public weal overrode the individual's right.

Similarly, in *Norman v. City of Las Vegas*,[56] the court upheld a city ordinance requiring that employees of retail liquor stores be fingerprinted. Plaintiffs urged that the city should be compelled to justify its restrictions on the personal right of privacy with facts or statistics indicating a need for identification of retail liquor employees. The court rejected plaintiffs' arguments and found that the city's police power conferred broad discretion in protecting safety, morals, good order, and the general welfare.[57]

53. 224 Ind. 364, 66 N.E.2d 755 (1946).

54. 48 N.J. Super. 231, 137 A.2d 61 (1957). *See also* Herschel v. Drya, 365 F.2d 17 (7th Cir.) (court refused to expunge record of plaintiff's arrest for distributing handbills), *cert. denied*, 385 U.S. 973 (1966).

55. 89 F. Supp. 309 (N.D. Ga. 1949), *modified*, 180 F.2d 143 (5th Cir. 1950).

56. 64 Nev. 38, 177 P.2d 442 (1947).

57. New Jersey has similar statutes requiring fingerprinting for the purpose of identification

Would mass testing for individuals suffering from a physical predisposition to criminality invade their right of privacy? The foregoing decisions indicate that the police power of the state would override the private right. The right of police to maintain fingerprint and photograph files is not confined to convicted criminals. Individuals acquitted of crimes cannot have their records expunged; persons whose jobs require state control and identification must submit to identification procedures or forego that employment. Since the Supreme Court has repeatedly held that the state cannot condition the grant of a privilege upon the surrender of a constitutional right,[58] these cases cannot be read as resting upon any special relationship between the persons affected and the state; the logical conclusion is that mass fingerprinting would be constitutionally permissible as within the police power of the state, notwithstanding the right of privacy. Testing for membership in class *X* would be even more important than fingerprinting to the public—protecting society against persons identified as unusually prone to violence is a higher public need than maintaining identification files on acquitted suspects.

Moreover, there is precedent for mass solutions to public problems. Smallpox innoculation of all school schildren has been upheld as a proper exercise of the police power despite the individual's right to freedom of religion and the lack of any recent evidence of smallpox. For example, *Mosier v. Barren County Board of Health*[59] held that a child had to be vaccinated in light of a statute so requiring although the parents protested on religious grounds, and although there had been no smallpox in the area in years and none was expected.[60] Thus the individual's personal right was viewed as inferior to the public good.

An individual seeking to rely on the right of privacy to prevent examination would find little favorable precedent. In similar balancing processes, his interest regularly has folded before the public need as enforced under the state's police power. While he could argue that no mass identification procedure had ever been undertaken before, he would find little favorable precedent.

4. *Conclusion.*—Of the constitutional provisions a criminally predisposed person might rely upon in attempting to thwart the state's

---

of all employees of licensed private detectives, N.J. STAT. ANN. § 45:19-16 (1963); school bus drivers, *id.* §§ 18A:39-17, -18 (1968); employees of check cashing licensees, *id.* § 17:15A-3 (1970); and allowing mental institutions to require that patients be fingerprinted, *id.* § 30:4-126.1 (1964).

58. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 262 (1970); Sherbert v. Verner, 374 U.S. 398, 404, 406 (1963); Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595, 1599-602 (1960).

59. 308 Ky. 829, 215 S.W.2d 967 (1948).

60. *See also* Jacobson v. Massachusetts, 197 U.S. 11 (1905) (upheld state smallpox vaccination statute under police power).

attempt to determine whether he is a member of class X, only the fourth amendment offers realistic hope. If the restrictions imposed are sufficiently onerous to impel a court to equate the identification process with criminal proceedings, then it might be possible to prevent the introduction of evidence indicating A's membership in class X in the adjudicatory procedure since it would not have been obtained on probable cause —rather, it would have been gathered in mass examinations. Obviously, however, the argument is dependent upon the characterization of the adjudicatory procedure. The fifth amendment argument fails because of the Supreme Court's interpretation that the amendment prohibits only testimonial self-incrimination. In analogous right-of-privacy litigation, the individual's resistance to information-gathering usually has failed before the state's interest in the testing.

A form of testing other than mass examinations could be implemented by the state. Rather than across the board checking for members of class X, the state could examine only people who are arrested or convicted of a crime. Having already shown a propensity for violence, the subjects could be examined to determine whether the X abnormality accounts for their antisocial behavior. Thus, having based the investigation on probable cause—violence is a reason to search for the existence of the X abnormality—the testing might withstand fourth amendment attack.

One factor exists favoring the individuals in their challenge to mass testing—nothing quite like it has ever been undertaken. That no analogous activity has ever been prohibited does not mean mass testing to identify individuals whose freedom will be restricted would be upheld. If such a procedure were disfavored it could be struck down as an invasion of the right of privacy. It would be simple for the Supreme Court to hold that the individual's interest in this particular area is paramount to society's—whether a court would be willing to override society's legislative decision in favor of the individual who challenges the procedure is questionable.

B. Surveillance As Society's Method of Deterring the Violent Conduct of Class X Members

Society would not seek to identify members of class X unless it intended to use the information to protect itself. Society's self-protection translates into restricting the freedom of those individuals in some manner. If a person is more violence-prone than the ordinary individual, limiting his ability to harm fellow citizens could be accomplished in various ways. Two will be considered here: constant surveillance and incarceration.

Violence-prevention through surveillance might be possible if a person inclined to violence would be restrained by the knowledge that he is being watched. Surveillance also would enhance the ability of authorities to react quickly to intervene if the individual's behavior became unacceptable. It has been suggested that the technology exists today to implant a tracking device in an individual and monitor his activities through radio or radar.[61] Although sophisticated electronic tracking devices are an extreme possibility, the activity of class *X* members could be monitored by a combination of modern surveillance techniques. For the purposes of discussion it will be assumed that a statute has been enacted implementing a program of surveillance of identified class *X* members that includes wiretaps, audio monitoring, closed circuit television, random police surveillance, and required monthly appointments with a government official for interrogation and observation.[62] What constitutional objections could *A* direct against the government intervention in his life?

1. *The Right of Privacy.*—Constant governmental surveillance undoubtedly invades the privacy of the person who is the government's object; whether the state's interest outweighs that of the individual, however, is unclear. It seems certain that the individual's right to privacy is not absolute, despite *Griswold's* language to that effect.[63]

None of the cases that have tested the limits of the right of privacy are concerned with surveillance as a means of controlling behavior. Most eavesdropping and surveillance cases allege violation of the right of privacy when an opponent in litigation attempts to gather information to prove plaintiff's claim fraudulent.[64] The surveillance hypothesized is for the purpose of preventing undesirable conduct. Despite the difference in reason for surveillance between litigation invasion-of-privacy cases and the hypothetical surveillance cases, the former shed some light on the scope of an individual's right of privacy.

In a number of cases, courts have found that eavesdropping[65] and/or surveillance[66] violates an individual's right to privacy. For exam-

61. *See* TIME, May 1, 1972, at 10; Gaylin, *supra* note 5.

62. No doubt other restrictions would be imposed, such as prohibiting class *X* members from owning weapons.

63. *See* text accompanying note 52 *supra.*

64. *See* cases cited notes 67-74 *infra.*

65. "Eavesdropping" is defined as the surreptitious overhearing, either directly by ear or by means of a mechanical device like a wiretap, microphone, or amplifier, of an individual's private conversation. Annot., 11 A.L.R.3d 1296, 1297 (1967).

66. "Surveillance" includes following and continually observing the movements and activity of an individual.

ple, in one of the most cited cases in the area, *Rhodes v. Graham*,[67] the court found that plaintiff's complaint stated a cause of action in alleging that his right to be left alone was abridged when defendant installed a tap on his telephone. Similarly, in *Fowler v. Southern Bell Tel. & Tel. Co.*,[68] the Fifth Circuit held that Georgia law established a right of privacy that would be violated when the Internal Revenue Service tapped plaintiff's telephone. Rejecting defendants' contention that the wiretap was within the scope of their official duty and that therefore they were immune from civil prosecution, the court found the right of privacy could be abridged despite the fact that there was no publication of the information overheard.[69]

In *McDaniel v. Atlanta Coca-Cola Bottling Co.*,[70] the court found that plaintiff's privacy was violated and plaintiff entitled to damages when defendant monitored conversations in plaintiff's hospital room in an attempt to prove plaintiff's claim fraudulent. The right of privacy was founded in part upon a state criminal statute prohibiting eavesdropping. In the celebrated case of *Nader v. General Motors Corp.*,[71] the New York Court of Appeals found that plaintiff's complaint stated a cause of action for invasion of privacy under the applicable District of Columbia law. The specific allegations held sufficient to state a cause of action were that defendant engaged in unauthorized wiretapping and eavesdropping by electronic means, and that defendant's agents followed plaintiff closely enough to examine the denominations of bills he withdrew from the bank.

Finally, courts have held that surveillance of an opponent in litigation to establish the invalidity of his claim violates the right of privacy if the surveillance takes on the nature of harassment or intimidation. For example, *Souder v. Pendleton Detectives, Inc.*[72] found a violation of the right of privacy when defendant's detectives constantly watched plaintiff with binoculars, trespassed on his property, and peeped in his windows. In a similar case, defendant used "rough shadowing"— following continually and openly to inform everyone plaintiff was under surveillance—as retribution for testimony plaintiff gave against defendant in another judicial proceeding.[73] The court found a violation of

67. 238 Ky. 225, 37 S.W.2d 46 (1931).

68. 343 F.2d 150 (5th Cir. 1965).

69. *See also* Hamberger v. Eastmen, 106 N.H. 107, 206 A.2d 239 (1964) (upheld judgment for plaintiff on violation of right of privacy when defendant planted microphone in bedroom, despite fact that no one listened to conversations monitored).

70. 60 Ga. App. 92, 2 S.E.2d 810 (1939).

71. 25 N.Y.2d 560, 255 N.E.2d 765, 307 N.Y.S.2d 647 (1970).

72. 88 So.2d 716 (La. App. 1956).

73. Shultz v. Frankfort Marine Accident & Plate Glass Ins. Co., 151 Wis. 537, 139 N.W.

plaintiff's right of privacy.

There are other cases, however, in which courts have found no violation of the right of privacy in defendant's surveillance or eavesdropping. For example, reasonable surveillance and investigation of a party to litigation is justified by the public interest in exposing fraudulent claims.[74] Furthermore, California courts have held that there is no right of privacy for a person held in prison before being convicted of a crime, when a party alleged an invasion of the right of privacy after the state monitored a suspect's conversation with his wife.[75]

The Court of Claims, in *Wissner v. United States*,[76] held that there was no violation of plaintiff's right of privacy when a government contractor allowed the FBI to listen to his telephone conversation with plaintiff. Furthermore, the social security administration does not violate an applicant's right of privacy in collecting information to determine his eligibility for benefits.[77] Gathering such information is within the scope of the agency's duties and therefore the administration is immune from civil litigation.[78]

From the foregoing cases it is apparent that the individual's right of privacy is not absolute. It can be protected against unwarranted harassment, especially by a party to litigation. Some conduct-inducing surveillance—that aimed at forcing a compromise, for instance—is actionable. Many invasions, however, are protected—the outcome depends upon a balancing of the interests involved.

Government-authorized surveillance to induce acceptable behavior and prevent crime appears fundamentally different from the activities that courts have thus far considered in right-of-privacy cases. One can only speculate whether an invasion of the right would be found. The invasions of privacy found actionable all involve surveillance unjustified by public need. The right of privacy described in *Griswold* was not challenged by a substantial state interest. Because of the precedent allowing surveillance when a public interest is served, it seems improbable that the right of privacy would offer protection against surveillance

386 (1913).

74. *See, e.g.*, Tucker v. American Employer's Ins. Co., 171 So. 2d 437 (Fla. App. 1965).

75. People v. Morgan, 197 Cal. App. 2d 90, 16 Cal. Rptr. 838 (Ct. App. 1961), *cert. denied*, 370 U.S. 965 (1962) (need of preventing escapes justifies monitoring conversation on intraprison telephone used by prisoner to talk with wife on other side of glass). *See also* People v. Ross, 236 Cal. App. 2d 364, 46 Cal. Rptr. 41 (Ct. App. 1965).

76. 176 Ct. Cl. 1372 (1966), *cert. denied*, 386 U.S. 981 (1967).

77. Benjamin v. Ribicoff, 205 F. Supp. 532 (D. Mass. 1962).

78. *See also* Thomas v. General Elec. Co., 207 F. Supp. 792 (W.D. Ky. 1962) (no violation of employee's right of privacy to make movie of him working for purposes of time and motion study).

authorized by legislation based on a legitimate state need.

2. *The Fourth Amendment.*—Governmental surveillance of individuals by wiretapping was challenged first in *Olmstead v. United States*,[79] which upheld the practice on the basis that, since no physical evidence was seized, the fourth amendment's prohibition of unreasonable search and seizures was inviolate. In later cases, the Supreme Court occasionally found that wiretapping violated the fourth amendment when the premises tapped were physically penetrated.[80] Thus the fourth amendment was abridged when police entered a suspect's home to plant a microphone or when the microphone penetrated the baseboard of defendant's residence.[81]

Articulation of fourth amendment standards usually occurs in the context of deciding whether to exclude evidence offered in a trial. The Supreme Court's discussions, however, often indicate a right of privacy specifically protected by the fourth amendment through broader means than the mere exclusion of evidence. Thus, in *Berger v. New York*,[82] the Supreme Court invalidated an eavesdropping statute that had been relied upon in gathering evidence necessary to defendant's conviction. The statute was constitutionally infirm for failing to require that the officer requesting judicial authorization specify the particular offense suspected, for failing to describe the "property" to be seized, and for allowing surveillance to continue for two months with subsequent renewals. The statute was overly broad, and surveillance conducted under its aegis was prohibited by the fourth amendment.

Statutory authorization for surveillance of criminally predisposed persons would suffer from the same infirmities as the New York statute. It would necessarily continue for an unlimited period, could not be designed to investigate a particular crime, and could not specify the evidence sought. Thus, although an individual's privacy may be invaded by properly authorized government action, a statute providing for continuous surveillance of members of class X apparently would violate the fourth amendment. The argument that the surveillance could be conducted if there were no physical trespass has been overcome by the Court's rejection of that doctrine in *Katz v. United States*.[83]

The contrary argument is that the fourth amendment's prohibitions

79. 277 U.S. 438 (1928). *Olmstead* was subsequently overruled in the case of Katz v. United States, 389 U.S. 347, 352 (1967).

80. *E.g.*, Mapp v. Ohio, 367 U.S. 643 (1961) (illegal search of defendant's home violates fourteenth amendment in state court criminal proceeding); Silverman v. United States, 365 U.S. 505 (1961) (spike mike penetrated base of wall of defendant's home).

81. Silverman v. United States, 365 U.S. 505 (1961).

82. 388 U.S. 41 (1967).

83. 389 U.S. 347 (1967).

generally are enforced by excluding tainted evidence from a criminal proceeding, and the purpose of class *X* surveillance would not be to gather evidence for trial, but to prevent crime. Since most fourth amendment cases do involve exclusion of evidence,[84] the argument has merit. Based upon the *Berger* rationale, however, a statute providing for such surveillance appears to be unconstitutional under the fourth amendment. Nevertheless, the hypothetical surveillance statute is distinguishable from the statute involved in *Berger* since the purpose of the two laws is fundamentally different. The *Berger*-type statute allows police to "seize" evidence when they have probable cause to suspect that a crime has been committed; the hypothetical statute, on the other hand, is designed to prevent criminal acts. One can only speculate whether this difference would validate continuous search, lack of probable cause, and failure to require specification of the evidence sought.

C. *Constitutional Considerations Affecting Incarceration of Members of Class X to Prevent Antisocial Behavior*

Rather than seeking to control undesirable behavior of the members of class *X* through surveillance, the danger to society might be deemed serious enough to warrant incarceration. This discussion will focus on whether constitutional limitations would prevent the incarceration of members of class *X* after a legislative determination that the threat to society posed by those individuals requires that they be segregated from the rest of the population. Similar statutes exist today regulating the conduct of sexual psychopaths, providing for incarceration of the mentally ill, and sterilization of the mentally deficient.[85]

1. *Sexual Psychopaths.*—The state has two primary sources of power available to regulate the conduct of sexual psychopaths: the police power and its role as *parens patriae*.[86] Police power is defined as the ability to regulate the conduct of individuals within society to promote the general welfare.[87] The *parens patriae* concept, on the other hand, encompasses the power to protect an individual against self-induced harm.[88]

---

84. *E.g.*, Lopez v. United States, 373 U.S. 427 (1963); Wong Sun v. United States, 371 U.S. 471 (1963); Goldman v. United States, 316 U.S. 129 (1942); Olmstead v. United States, 277 U.S. 438 (1928); *cf.* Camara v. Municipal Court, 387 U.S. 523 (1967); Warden v. Hayden, 387 U.S. 294 (1967).

85. *E.g.*, VA. CODE ANN. § 37.1-156 (Supp. 1972).

86. Kittrie, *Compulsory Mental Treatment and the Requirements of Due Process*, 21 OHIO ST. L.J. 28, 32-33 (1960).

87. *See* Alexander Co. v. City of Owatonna, 222 Minn. 312, 322, 24 N.W.2d 244, 250 (1946); *cf.* District of Columbia v. Brooke, 214 U.S. 138, 149 (1909) (the state police power is one of government's least limitable powers).

88. *E.g.*, Hook v. Simes, 98 N.H. 280, 98 A.2d 165 (1953).

A sexual psychopath is defined by applicable statutes in each state. A typical definition is one who is unable to control his behavior and as a consequence commits sexual crimes.[89] These statutes have only existed since about 1930. Before that time, society treated sexual psychopaths either as criminal or people suffering from mental illness.[90]

The validity of sexual psychopath statutes under the due process clause of the federal constitution has been repeatedly challenged. In one case, for instance, the person declared a sexual psychopath charged that the statute allowed the decision of two psychiatrists to send him to an institution indefinitely.[91] The court upheld the statute as a legitimate regulation of abnormal people in order to confine and treat them for their own good as well as society's. In an analysis typical of the disposition of due process arguments, the court, ignoring the substantive question of the statute's basic validity, found the commitment procedurally flawless and thus dismissed defendant's constitutional challenge. Defendant's attack on the validity of the statute as a conduct-regulating device was rejected in favor of the state's police power.

Minnesota ex rel. Pearson v. Probate Court[92] is the definitive ruling on the validity of sexual psychopath statutes. In that case a Minnesota statute allowed indefinite commitment of a "psychopathic personality" —one whose past conduct indicates that he is unable to control his sexual impulses. The Court rejected relator's charge that the statute violated the equal protection clause, saying that the "legislature is free to recognize degrees of harm, and it may confine its restrictions to those classes of cases where the need is deemed . . . clearest."[93] As is often the case in challenges to such statutes, relator's substantive due process argument was dismissed by examining and upholding the procedures provided by the statute.

2. *Incarceration of the Mentally Ill.*—Closely related to statutes confining sexual psychopaths are the state laws providing for the involuntary incarceration of those deemed mentally ill.[94] State power to regulate the mentally ill has the same sources as the capacity to incarcerate sexual psychopaths—police power and *parens patriae.*

In *State v. Sanchez*,[95] defendant was declared *non compos mentis*

89. Annot., 24 A.L.R.2d 350, 352 (1952).

90. *Id.* at 351.

91. People v. Chapman, 301 Mich. 584, 4 N.W.2d 18 (1942).

92. 309 U.S. 270 (1940).

93. *Id.* at 275.

94. *Minnesota ex rel. Pearson* is the leading case cited in upholding statutes regulating the mentally ill.

95. 80 N.M. 438, 457 P.2d 370 (1969).

under the New Mexico statute and incarcerated indefinitely. Defendant challenged the statute's constitutionality under the due process clause of the fourteenth amendment. In rejecting his claim that the state had no power to deprive him of liberty under such a procedure, the court found that state custody of the mentally ill has been recognized as a legislative responsibility from time immemorial, and thus was not open to serious attack. Once again, the due process clause's protection was construed as procedural only, and in that respect sufficient. "Persons may be deprived of their liberty for the good of society or themselves. This is not a deprivation of due process of law, but a temporary restraint on liberty, based on the extent of the illness, the need for treatment and hospitalization, as well as the protection of society."[96] Finally the court rejected defendant's assertion, based on the less intrusive alternative doctrine,[97] that total institutionalization was unnecessary—that some other method less onerous to defendant could be utilized to protect society. The court held that since the statute was constitutional the doctrine was inapplicable.

The decision in *Director of Patuxent Institution v. Daniels*[98] involved a constitutional challenge to Maryland's statute providing for incarceration of "defective delinquents." Plaintiff was confined indefinitely after being adjudged a defective delinquent. After three years in the institution, plaintiff attempted to be adjudicated "cured." A jury found him still a member of the class of people restricted by the statute. Maryland's highest court found that the statute's provisions were designed to reach persons who exhibit persistent, aggravated criminal or antisocial behavior. This definition of "defective delinquent" was found sufficiently narrow to withstand constitutional attack. Even though the class thus created included people, sane under the M'Naghten rule, who persist in antisocial behavior, the legislative intent was held to be that the subjects should be treated as suffering from mental illness rather than as criminals, since the purpose of the statute was simply to protect society from those with criminal propensities and confine them for treatment. Rejecting plaintiff's due process challenge, the court said that the state has power to restrain the liberty of persons found dangerous to the common health and safety if the restraints are based on legislative action that describes a recognized group with clarity and definiteness. Indefinite confinement was then found reasonably calculated to achieve

96. *Id.* at 441, 457 P.2d at 373.

97. The less intrusive alternative doctrine directs the court to explore alternatives in lieu of complete institutionalization. *Cf.* Lake v. Cameron, 346 F.2d 657 (1966).

98. 243 Md. 16, 221 A.2d 397 (1966).

the purpose of protecting society and curing the defective person. Since it did not use an overly vague definition, and provided numerous procedural safeguards, the statute was upheld against plaintiff's due process challenge.[99]

3. *Sterilization of Individuals Suffering from Mental Deficiency.*—Statutes exist in at least 21 states providing for the compulsory sterilization of "mentally-deficient" individuals,[100] and "with few exceptions the mentally ill are similarly identified as being within the scope of the statutes."[101] *In re Cavitt*[102] involved a constitutional challenge to Nebraska's statute requiring sterilization of patients prior to release from the state home for the feeble-minded. Plaintiff could avoid sterilization—but only by remaining incarcerated for life. Upholding the statute under the state's police power, the court rejected all of plaintiff's constitutional arguments. Due process was satisfied because of the procedural protection provided and despite proof that the offspring of feeble-minded individuals will not inevitably be similarly afflicted. The court indicated that no complete relationship between sterilization and the evil to be avoided was necessary—the only requirement under the statute was that the patient be mentally deficient and capable of having children. That a person mentally deficient because of a noninheritable accident or disease might be sterilized was insignificant in the court's eyes. In an incredible final sentence the court said that the choice was up to plaintiff—she could choose whether to remain institutionalized or regain her freedom by submitting to the saplingectomy.

4. *Incarceration of Individuals Identified As Members of Class X.*—Incarceration of individuals identified as possessing the prerequisites to membership in class X would be subject to the same constitutional attacks as confinement of sexual psychopaths and the mentally ill. Analysis of a hypothetical statute requiring involuntary institutionalization of all class X people indicates that the law would withstand these traditional constitutional challenges. Nevertheless, there are differences between the members of class X and sexual psychopaths and

99. In rejecting plaintiff's equal protection argument, the court cited Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911), which upheld a statute prohibiting bottling of gas taken from below a certain depth. Application of the rational basis test to a statute, admittedly civil in nature, that would incarcerate plaintiff for life is questionable. Even had the compelling interest test been applied, however, the court probably would have had little trouble finding a compelling state interest.

100. AMERICAN BAR FOUNDATION, THE MENTALLY DISABLED AND THE LAW 210 (rev. ed. 1971).

101. *Id.*

102. 182 Neb. 712, 157 N.W.2d 171, *aff'd on rehearing*, 183 Neb. 243, 159 N.W.2d 566 (1968), *appeal dismissed*, 396 U.S. 996 (1970).

persons suffering from mental illness. Whether those differences are sufficient to render precedent inapplicable is unclear. The basic rationale for constitutionally protecting such individuals is latent in due process-natural rights concepts; an innovative court could seize the opportunity to provide constitutional assistance to potential victims.

(a) *Traditional analysis.*—A state seeking to incarcerate *X* victims has two powers at its disposal: the police power and *parens patriae*. The police power is referred to continually as an almost unlimited weapon in protecting public health, safety, and general welfare. Concurrently, the state's power to act as *parens patriae* in protecting individuals from harming themselves or others is vast. Although strict procedural limitations have been imposed on the method of adjudging one a juvenile delinquent[103] or mentally ill,[104] no attack on the basic *right* of the state to incarcerate juvenile delinquents or the mentally ill has been successful. Thus, so long as the state provides the necessary procedural safeguards—the right to notice, to a hearing, to confront adverse witnesses, to judicial review, and possibly to trial by jury—an attack on the state's basic power to protect its citizens, through appropriate legislation, against individuals deemed a threat, would fail under existing precedent.

There are several significant conclusions to be drawn from analysis of past constitutional challenges to preventive legislation. Probably the most startling is that the state need not establish that there is any positive correlation between the individual's affiiction and the harm to be avoided. For example, the court in *Cavitt*[105] was not at all impressed by evidence that some feeble-minded patients might be sterilized whose children would not have been similarly afflicted. Analogously, that a person has once committed an act of violence is no proof at all that he will do so in the future. Nevertheless, a preventive detention statute *assumes*, despite contrary statistics,[106] that there is a great likelihood that an ex-convict suspected of a subsequent crime will commit yet another if not incarcerated awaiting trial. The same assumption is made about individuals institutionalized for mental illness. A person's past bizarre conduct is accepted as proof that he will be violent in the future.

103. *See In re* Winship, 397 U.S. 358 (1970); *In re* Gault, 387 U.S. 1 (1967); Kent v. United States, 383 U.S. 541 (1966).

104. *E.g.*, Specht v. Patterson, 386 U.S. 605 (1967) (Colorado's sexual psychopath statute violates procedural due process in denying the right to a hearing and to confront adverse witnesses).

105. 182 Neb. 712, 157 N.W.2d 171 (1970). For a discussion of *Cavitt* see text accompanying note 102 *supra*.

106. *See* Dershowitz, *On Preventive Detention*, in CRIME, LAW AND SOCIETY 307, 317, 318 (A. Goldstein & J. Goldstein ed. 1971).

Another surprising thread running through the cases examined is the failure of the courts—from the Supreme Court of the United States to state courts—to recognize substantive due process issues. Courts have invariably analyzed due process arguments in terms of procedural due process—if the statute provided the minimal requisite procedural safeguards, the due process argument was dismissed. Whether the courts' failure even to consider the validity of the state's power to enact such conduct-regulating statutes resulted from judicial misunderstanding or lack of perseverance on the part of attorneys is unclear. Nevertheless, it is unfortunate that judicial analysis of the basic validity of the statutes has been limited to considering only the correlative of substantive due process—state police power. Inevitably, analysis was limited to the permissible breadth of the police power and did not explore the substantive restrictions imposed by the due process clause.

The court in *State v. Sanchez*,[107] a 1969 decision, held the less intrusive alternative rationale inapplicable to a statute providing for incarceration of the mentally ill. None of the other cases discussed considered the doctrine. Since incarceration impinges upon the most fundamental aspects of individual liberty, one would have thought that the least restrictive method available of protecting society would have been required. Nevertheless, the court rejected defendant's argument that he could not be incarcerated for mental illness if a less onerous method of protecting society were available.

(b) *Application to X members.*—The foregoing conclusions, drawn from analysis of cases that involved challenges to statutes with restrictions on classes of people similar to class X, bodes ill for X members. Under a least intrusive alternative theory, if the state could accomplish its end by maintaining surveillance of X members rather than incarcerating them, it would be required to do so. Under the *Sanchez* rationale, however, the state is not even required to consider an alternative method of protecting its interests. In any event, logic dictates that it is probable that the state could prove surveillance is less effective in protecting society than is incarceration.

Judicial failure to question the state's *power* to incarcerate noncriminals is equally unfortunate. The technique of accepting established practice, simply noting that it is a time-honored tradition,[108] obviously begs the question. It indicates, however, both a judicial reluctance to scrutinize the essential validity of statutes that incarcerate persons con-

107. 80 N.M. 438, 457 P.2d 370 (1969). For a discussion of the case see text accompanying notes 95-96 *supra*.

108. *E.g.*, Director of Patuxent Institution v. Daniels, 243 Md. 16, 221 A.2d 397 (1966).

sidered dangerous and a tendency to redirect examination toward the procedures for implementing the process, thus granting the validity of the end—incarceration. Members of class *X* are likely, therefore, to find substantive due process a difficult argument to bring against society's restrictions.

The failure of the decided cases to demonstrate any constitutional requirement that an individual, before he can be incarcerated, be shown very likely to commit violence is troublesome. There apparently need be no positive correlation between the class restricted and the likelihood that an individual member will commit acts of violence unless incarcerated. Thus, despite statistics indicating that few individuals detained would in fact commit a crime while awaiting trial, the District of Columbia's preventive detention statute is still in force.[109]

There is one significant difference between the danger presented by members of class *X* and the danger of the classes of restricted individuals heretofore discussed. With class *X* the statistics would indicate that the likelihood of any one individual committing a violent act is 25 percent, compared to five percent for the general population. There would be no other indication, however, that any individual will ever commit a violent act. The only thing that has been identified is the individual's membership in a class of human beings with increased violent tendencies. In contrast, a person incarcerated as a sexual psychopath not only belongs to a class that possesses a high statistical probability of future antisocial behavior, but has also in the past committed an unacceptable sexual act. Whether he will do so in the future is uncertain; his membership in the class, however, is based not upon possessing certain chromosomes or a given chemical imbalance, but upon observation of past behavior. His behavior indicates that he is a sexual psychopath, rather than indicating merely a latent tendency toward psychopathic behavior.

The relevance of the difference in sources for the statistical probability is uncertain. All individuals are members of a class with some probability of violence. Whether any particular person will manifest violent behavior cannot be determined. Identifying class *X* shifts the individual to a smaller class with a higher probability of violence. Still, no one can say whether any individual member of that class will commit a violent act. Is an increase in probability from five to 25 percent

109. The outcome of a suit filed in the District of Columbia has not been reported yet. The suit challenges preventive detention as a denial of the eighth amendment right to bail; as violative of the presumption of innocence; as punishment before trial; and as a deprivation of due process by interfering with the defendant's preparation for trial, Franklin, *Stiff Crime Bill to Take Effect in Capital Tomorrow*, N.Y. Times, Jan. 31, 1971, at 22, col. 3.

sufficient to warrant incarceration? One can only guess. It is apparent, however, that there is a difference between the individual who is known to be suffering from a given malady because he has acted unacceptably in the past—although he may never do so again—and the individual who only has been identified as possessing certain characteristics that, in some people, induce violence, but who has never been violent himself and may never be in the future.

E. Natural Rights and Substantive Due Process

Having examined cases in which the constitutionality of similar statutes has been challenged, it will be helpful to turn now to the constitutional principles that restrict a legislature's power to enact conduct-regulating legislation, in order to identify potential sources of protection available to the members of class *X*.

1. *The Ninth Amendment and the Right of Privacy.*—The ninth amendment's unenumerated rights and the recently evolved constitutional right of privacy are relevant to the class *X* member's plight. Although the ninth amendment is broader than the right of privacy, considering them together is helpful, since *Griswold v. Connecticut*[110] provides the most recent explanation of both concepts.

The ninth amendment to the United States Constitution appears to provide unequivocally that citizens have specific rights unenumerated elsewhere in the Bill of Rights.[111] For many years, however, the amendment's potential was ignored.[112] The difficulty in utilizing the ninth amendment has lain in attempting to enumerate those unspecified rights, and in bringing a vague sanction to bear upon specific legislative enactments.[113] The past century's unfortunate experience with the use of the due process clause to invalidate economic legislation undoubtedly caused some judicial hesitancy in applying general prohibitions to thwart the legislative will.[114] At the same time, the Supreme Court's use of substantive due process to invalidate economic reform,[115] and in re-

110. 381 U.S. 479 (1965).

111. The ninth amendment provides that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

112. *See, e.g.*, B. PATTERSON, THE FORGOTTEN NINTH AMENDMENT (1955); Redlich, *Are There "Certain Rights . . . Retained by the People"?*, 37 N.Y.U.L. REV. 787 (1962).

113. *See* Bertelsman, *The Ninth Amendment and Due Process of Law—Toward a Viable Theory of Unenumerated Rights*, 37 U. CIN. L. REV. 777 (1968).

114. *Id.* at 780-85.

115. *Id; e.g.*, Lochner v. New York, 198 U.S. 45 (1905) (invalidated state minimum-hour legislation); Allgeyer v. Louisiana, 165 U.S. 578 (1897) (invalidated state statute regulating foreign insurers).

cent years, its use of procedural due process to expand the scope of protection available in criminal trials,[116] all through interpretation of the words "life, liberty, and property," indicate the protection latent in the scope of interpretation that may be afforded general prohibitions similar to the ninth amendment.

Legislative history of the ninth amendment indicates that it was included specifically to ensure that the rights enumerated in the Bill of Rights would not be construed to be the only rights retained by the people.[117] Indeed, Alexander Hamilton objected to the concept of a Bill of Rights because he feared that the legal maxim *expressio unius est exclusio alterius* would operate to limit individual rights, especially since it would be impossible to list comprehensively every right retained by the people. In order to prevent Hamilton's fear from becoming reality, James Madison included in the proposed amendments what ultimately became the ninth amendment.[118]

Despite the compelling legislative history, the Supreme Court seldom mentioned the ninth amendment prior to 1965.[119] Moreover, when the amendment was mentioned, it was discussed almost incidentally among other constitutional questions.[120] The Court's decision in *Griswold*, however, breathed new life into the amendment. In addition to the majority opinion's reliance on the ninth amendment as one of several from which the right of privacy was found to emanate,[121] Mr. Justice Goldberg's concurring opinion found that marital privacy was squarely protected as an unenumerated right.[122]

The difficulty in employing the ninth amendment comes in attempting to determine the unenumerated rights the Supreme Court may find within the amendment's sweep. Family rights, the right to privacy, personal fulfillment, and economic and property rights have been suggested as possible unenumerated rights.[123] An individual's rights under

116. *E.g.*, Miranda v. Arizona, 384 U.S. 436 (1966) (strict standards established for determining voluntariness of confession in criminal trial); Gideon v. Wainwright, 372 U.S. 335 (1963) (indigent's right to counsel in criminal proceeding introduced).

117. The Federalist No. 84, at 578-79 (J. Cooke ed. 1961) (A. Hamilton); Bertelsman, *supra* note 113, at 778-80.

118. 1 ANNALS OF CONG. 455-56 (1789) [1789-1824].

119. Griswold v. Connecticut, 381 U.S. 479, 490 n.6 (1965) (Goldberg, J., concurring).

120. Bertelsman, *supra* note 113, at 781; *see* United Pub. Workers v. Mitchell, 330 U.S. 75 (1947) (upholding the Hatch Act, which forbade political activity on the part of certain federal employees); Ashwander v. TVA, 297 U.S. 288 (1936) (upholding the constitutionality of legislation creating TVA).

121. 381 U.S. at 484.

122. *Id.* at 486-499 (Goldberg, J., concurring).

123. Bertelsman, *supra* note 113, at 790-93. *See also* Miller, *Personal Privacy in the Computer Age: The Challenge of a New Technology in an Information-Oriented Society*, 67 MICH. L.

the ninth amendment could be interposed to challenge the state's police power. The amendment is there for a court to use to prevent incarceration of an *X* member who has committed no crime. Nevertheless, it never has been utilized to limit the state's power to confine the mentally ill or sexual psychopaths, perhaps indicating the unlikeliness of its use in the future for *X* members. When it is understood that there is a possibility that every person will commit a violent act and that the only difference between *X* members and the general population is a few percentage points, possibly the *X* members' ninth amendment right would be articulated.

2. *Substantive Due Process.*—Substantive due process has been defined as constitutional protection against conduct-regulating policy.[124] The state may seek to prohibit or compel certain conduct of individuals or groups. If a court declared society's embodiment of that policy in legislation unconstitutional under the due process clause, the court's action would be characterized as based upon "substantive due process." The traditional example of the use of substantive due process is the Court's striking down economic legislation that abridged values the Court thought to be ensconced in the clause.[125] One must determine, therefore, the source of the values enforced today under the category "due process."

The Supreme Court has utilized the due process clause to protect values implicit in other provisions of the Constitution and values derived from sources beyond the constitutional language. Examples of values rooted in specific provisions of the Constitution include those which support the protection against retroactivity implicit in the impairment of contracts, eminent domain, and ex post facto clauses,[126] and those values which buttress the right, implicit in the first amendment, to pursue a private education and to learn a foreign language.[127] Nonconstitutional sources have generated due process rights such as freedom of contract.[128]

While the Court has abandoned the protection of economic rights against conduct-regulating legislative enactments, it has not abandoned

---

REV. 1089 (1969); Westin, *Science, Privacy, and Freedom: Issues and Proposals for the 1970's*, 66 COLUM. L. REV. 1003, 1205 (1966).

124. Ratner, *The Function of the Due Process Clause*, 116 U. PA. L. REV. 1048, 1049 (1968). Ratner provides an excellent discussion of the policy and methodology of substantive due process.

125. *See* Lochner v. New York, 198 U.S. 45 (1905); Allgeyer v. Louisiana, 165 U.S. 578 (1897).

126. *See* FHA v. Darlington, Inc., 358 U.S. 84 (1958); Perry v. United States, 294 U.S. 330 (1935); Lynch v. United States, 292 U.S. 571 (1934).

127. *Cf.* Farrington v. Tokushige, 273 U.S. 284 (1927).

128. Cases cited note 125 *supra*.

the *idea* of protecting constitutional and nonconstitutional values under the umbrella of the due process clause.[129] Modern due process restrictions have grown out of the *Rochin*-type "sense of justice" test. For example, the Court employed a nonconstitutional value in upholding Congress' deportation of an alien who had been duped into joining the Community party.[130] The Court held that such legislation did not shock its "sense of fair play—which is the essence of due process."[131]

In a similar application of unspecified constitutional principles, the Supreme Court held that the Secretary of State had violated the right-to-travel value in the due process clause by revoking the passport of a Communist.[132] The Court also relied upon the due process clause as an alternative ground for invalidating a statute forbidding miscegenation, saying the statute denied liberty without due process of law since marriage "is one of the 'basic civil rights of man,' fundamental to our very existence and survival."[133] *Griswold v. Connecticut*[134] is the classic modern use of vague values in overturning statutes disfavored by the Court. In *Griswold*, the Court specifically rejected the idea of using the due process clause to invalidate state *economic* legislation, and after declining to sit as "a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions,"[135] held Connecticut's birth control law an unconstitutional invasion of marital privacy—a right emanating from several constitutional provisions. Three justices, however, found that the due process concept of liberty as embodied in the ninth amendment proscribed the Connecticut law,[136] while Mr. Justice Harlan thought that the statute directly infringed the "basic values 'implicit in the concept of ordered liberty' " in the fourteenth amendment's due process clause.[137]

More recently, in *Boddie v. Connecticut*[138] Mr. Justice Harlan, writing for the Court, utilized due process to invalidate a fee prerequisite to the judicial dismantling of a marriage. Although the opinion did not expressly define the due process approach used, it relied heavily on procedural due process cases.[139] It is not easy, however, to characterize

129. Ratner, *supra* note 124, at 1052-53.
130. Galvan v. Press, 347 U.S. 522, 530 (1954).
131. *Id.*
132. Aptheker v. Secretary of State, 378 U.S. 500, 505-06 (1964).
133. Loving v. Virginia, 388 U.S. 1, 12 (1967).
134. 381 U.S. 479, 481-82 (1965).
135. *Id.* at 482.
136. *Id.* at 486 (Goldberg, J., Warren, C.J., & Brennan, J., concurring).
137. *Id.* at 500 (Harlan, J., concurring).
138. 401 U.S. 371 (1971).
139. *See id.* at 377-78, *citing* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306

the decision as procedural. In contrast to invalidating a particular method of conducting litigation, the Court held that using a fee to deny indigents access to courts was unacceptable. Although the statute in question regulated a formality of divorce litigation—payment of a fee—the Court found that the state had interfered impermissibly with an important personal right. In invalidating the statute the Court thus engaged in an activity that is difficult to distinguish from the use of substantive due process. Nevertheless, since the opinion did not explicitly set out the basis for the holding, the Court's current attitude toward the due process clause is uncertain.

The Supreme Court's method of analysis in *Boddie*, however, is clear. As in *Griswold*, the Court weighed the detriment to the individual against the benefit to society. Although the failure to pay a fee and the resulting inability to terminate a marriage has no res judicata effect, the Court thought the practical consequence of the state's requirement was to make divorce inaccessible to the poor.[140] The Court concluded that the harm to plaintiff far outweighed the state's justifications—deterring frivolous litigation and recouping part of the cost of operating the judicial system.[141]

From recent due process cases, as well as the methodology utilized in incorporation of the Bill of Rights through the fourteenth amendment, the Court's normal approach is clear. The governmental restriction is analyzed from the standpoint of the benefit to society and the detriment to affected individuals. The Court then decides which is to prevail.[142]

There is no question but that "[c]onstitutional phrases are construed and applied by each generation in the context of existing attitudes and needs."[143] Utilizing the due process clause to invalidate economic legislation was consistent with the economic theory prevalent when the decisions were rendered.[144] The danger inherent in nonelected officials determining which current values to enforce is reflected in the economic-theory experience of the pre-Roosevelt era, and to a lesser extent, in the Warren Court's activity in the area of criminal procedure.[145] On the

(1950); Hovey v. Elliot, 167 U.S. 409 (1897); Windsor v. McVeigh, 93 U.S. 274 (1876); Baldwin v. Hale, 68 U.S. (1 Wall.) 223 (1864).

140. 401 U.S. at 180.

141. *Id.* at 381-82.

142. This method of analysis is suggested in Ratner, *supra* note 124, at 1050.

143. *Id.* at 1048.

144. *E.g.*, H. SPENCER, THE MAN VERSUS THE STATE (T. Beale ed. 1916).

145. *See* A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS (1970); F. GRAHAM, THE SELF-INFLICTED WOUND (1970); P. KURLAND, POLITICS, THE CONSTITUTION, AND THE WARREN COURT (1970).

other hand, the Court's leadership and anticipation of widely held values is exemplified in *Brown v. Board of Education*.[146] The only alternative to the Court's enforcing societal values lies in its avoiding broad concepts such as due process, equal protection, and the ninth amendment's natural rights—and even that degree of judicial restraint ignores the necessary use of societal values in interpreting the interstices of legislative and constitutional provisions. Community value interpretation by the judiciary is unavoidable; because legislatures reflect community values more closely, however, their enactments must be given deference.[147]

The same considerations apply to substantive due process as to the ninth amendment in considering examining constitutional protection for the members of class X. Legislation restricting the freedom of X members would reflect a legislative judgment that community security outweighs the detriment to that class of people. There is ample precedent for confining individuals thought dangerous to society and even for sacrificing some lives to the community good. Provisions for incarceration of the mentally ill and sexual psychopaths, and sterilization of the mentally deficient were discussed above. Although the due process clause is held to require compensation for taking one's property, there is no such requirement if society merely takes a person's liberty.[148] Similarly, the value of society's long-range survival justifies the sacrifice of many lives during war.[149] Since society readily deprives other categories of people of liberty, a decision that one identified as a member of class X cannot be incarcerated is unlikely.

F. Equal Protection

The equal protection clause of the fourteenth amendment is not likely to provide a haven for the members of class X. During the past decade, the clause has solidified into an alternative test, the function of which is to protect individuals inappropriately lumped into a legislative classification.[150] Under the rational basis test, a legislative classification is examined and if the court concludes a rational relationship exists

146. 347 U.S. 483 (1954).

147. Ratner, *supra* note 124, at 1078.

148. *See* Frankel, *Preventive Restraints and Just Compensation: Toward a Sanction Law of the Future*, 78 YALE L.J. 339, 357 (1968).

149. Ratner, *supra* note 124, at 1076. Because of the political nature of the question, the Supreme Court has refused to examine society's justification for taking lives even in an undeclared, unpopular war such as that in Vietnam. *See* Massachusetts v. Laird, 400 U.S. 886 (1970) (state challenge of legality of war); Velvel v. Nixon, 415 F.2d 236 (10th Cir. 1969), *cert. denied*, 396 U.S. 1042 (1970) (taxpayer's challenge to war fund allocation); United States v. Mitchell, 369 F.2d 323 (2d Cir. 1966), *cert. denied*, 386 U.S. 972 (1967) (criminal prosecution for draft evasion).

150. *See Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969).

between the legislature's object and the class created, the statute is upheld. Traditionally, the test has applied to economic regulation.[151]

More recently, the fundamental interest test has developed, in which the court weighs "the benefits flowing from pursuit of the state's objective against the detriments resulting from the impairment of a basic personal interest."[152] The fundamental interest test may be triggered[153] by a suspect legislative classification, such as one based on race,[154] or by impingement of a fundamental interest, such as the right to vote[155] or the right to travel.[156] If the fundamental interest is brought to bear upon a legislative enactment, the state must show the existence of a compelling interest justifying the enactment,[157] and that the statutory bounds are drawn as precisely as possible.[158]

The Supreme Court has never held that the right to freedom or the right of privacy is a fundamental interest under the equal protection clause; even if it is assumed that a statute restricting the rights of the criminally predisposed would trigger the fundamental interest test, the clause provides no protection for those affected by a well-drafted statute. The focus of equal protection is upon state needs, not the individual's. The protection of society from a dangerous individual obviously would be considered a compelling interest. Thus, so long as the statute affects only those identified as members of class X and therefore dangerous, a court would be unlikely to find that the statute violates the equal protection clause. It follows, of course, that if the statute satisfies the stricter fundamental interest test it automatically would satisfy the rational relationship standard. Thus, the equal protection clause provides no protection in a due process sense; no conduct-regulating legislation is prohibited—although a legislative enactment impinges fundamental individual interests, it may be justified by a compelling state interest.

III. CONCLUSION

Three different aspects of governmental intrusion on individuals identified as members of class X have been examined. No absolute

151. *E.g.*, Morey v. Doud, 334 U.S. 437 (1957); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1941).

152. *Developments in the Law—Equal Protection, supra* note 150, at 1132.

153. 25 VAND. L. REV. 180, 183 (1972).

154. Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964).

155. *E.g.*, Williams v. Rhodes, 393 U.S. 23 (1968).

156. *E.g.*, Dunn v. Blumstein, 405 U.S. 330 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969).

157. *See* cases cited note 156 *supra*, in which states failed to show a compelling state interest.

158. *See Developments in the Law—Equal Protection, supra* note 150, at 1132.

prohibitions on the power of the state to restrict the liberty of *X* individuals were found; indeed, the opposite is true—the only restrictions on state power result from technical quirks. At the level of surveillance, after mass testing and identification of *X* individuals, the fourth amendment's right of privacy might prohibit continuous surveillance, since the surveillance would not be based upon probable cause, would not be limited in time, and would not be specific concerning the evidence sought. There is no certainty that statutory surveillance would violate the fourth amendment, however; since the purpose is entirely different from normal search statutes, the limiting *Berger* precedent[159] is distinguishable.

At the other two levels of governmental intrusion, the picture is even bleaker. No precedent exists that clearly invalidates mass testing to identify *X* victims or to prevent their incarceration. Identification procedures such as fingerprinting and blood testing regularly have prevailed as supporting the state's interest—an interest paramount to any individual's. Although these cases have not involved mass testing, the constitutional considerations should be similar, since people who have never been convicted of a crime—suspects later acquitted and applicants for government-regulated employment—are subject to the same identification procedures.

Incarceration is the most drastic proposed governmental control. Constitutional challenges to the validity of incarcerating the mentally ill and sexual psychopaths have been eminently unsuccessful. Incarceration statutes are even more frightening when it is realized that as long ago as 1953 it was observed that "the old, those with criminal records, juvenile delinquents, sexual deviates, alcoholics, and drug addicts" are most likely to be incarcerated wrongfully under statutes regulating the mentally ill.[160] Furthermore, statutes that shock one's conscience by such effects as forcing mentally deficient persons to choose between lifetime incarceration and sterilization have withstood constitutional attack, and evidence showing the lack of correlation between present mental deficiency and the likelihood of offspring inheriting the defect has been given no effect.

It is possible that if the figures assumed for the hypothetical class *X* were changed, a different outcome would obtain. For instance, if the likelihood that any individual in the general population will commit a violent act is five percent and the probability for class *X* members is seven rather than 25 percent, a court might be more easily convinced

159. *See* note 82 *supra* and accompanying text.

160. Curran, *Hospitalization of the Mentally Ill*, 31 N.C.L. REV. 274, 294 (1953).

that incarceration lacks a rational relationship to preventing crime—no one could argue that crime should be prevented by confining everyone. Nevertheless, arguments that incarceration is not necessary in all cases have not been successful. Indeed, even the least restrictive alternative doctrine has been ignored at times.

The principles of the ninth amendment and substantive due process do provide the necessary constitutional tools to fashion protection for the members of class *X*. The individual's due process right could be construed to require that the state prove that *he*, as an individual, and not just a member of class *X*, is likely to act in a violent manner in order to justify incarceration. If the state were unable to offer proof of such a nature, however, it seems unlikely that a court would find the individual's right paramount to society's interest. If the individual prevailed, the gates of mental institutions would be forced open, and a statute restricting the members of class *X* through surveillance or incarceration would fall.

JOHN AUBREY CHANDLER
STANLEY FRAZER ROSE