Constitutional and Practical Considerations in Mandatory Sickle Cell Anemia Testing

He who has health has hope, and
he who has hope has everything.[1]

I. INTRODUCTION

Today, Black political groups have switched their emphasis from demonstrating for equal rights[2] to developing better health care for American Blacks.[3] In particular, these groups have insisted that the federal and state governments take affirmative steps to eradicate sickle cell anemia, a hereditary disease which primarily afflicts Black people and either kills or disables fifty thousand Black people per year.[4]

As a result of intensive lobbying by Black organizations, the federal government and several states have passed legislation, including sickle cell anemia screening statutes, designed to control and eliminate the disease. Mandatory testing laws, however, have been criticized as an unconstitutional deprivation of due process and equal protection,[6] and as an ominous step leading to restrictions on the marriage and procreation of Blacks found to have sickle cell anemia.[7]

This article will demonstrate (1) that compulsory screening for sickle cell anemia is constitutional and (2) that compulsory screening will not lead to state restrictions on the rights of Blacks to marry or reproduce.

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[1] M. FORMAN, THE WORLD'S GREATEST QUOTATIONS 329 (1970) (The quotation is an Arabian saying).

[2] L. SOBEL, CIVIL RIGHTS 1960-66 6-8 (1967).

[3] *See* EBONY, Oct. 1970, at 85.

[4] *See* RAMPARTS, Oct. 1971, at 53.

[5] Reilly, *Sickle Cell Anemia Legislation,* 1 J. LEGAL MED. 42 (September-October 1973) [hereinafter cited as Reilly (September-October 1973)].

[6] Reilly, *Sickle Cell Anemia Legislation,* 1 J. LEGAL MED. 38 (November-December 1973) [hereinafter cited as Reilly (November-December 1973)]; *see also* SATURDAY REVIEW OF SCIENCE, Feb. 1973, at 42.

[7] *Id.*

II. MEDICAL BACKGROUND OF SICKLE CELL ANEMIA

Thorough analysis of the sickle cell screening laws requires initial consideration of the nature of the disorder and the purpose of the laws. Sickle cell anemia is an inherited blood disease that predominantly afflicts Blacks and, to a lesser extent, persons of Mediterranean and Middle Eastern descent.[8] The disease was first characterized by Dr. James B. Harriet, a prominent Midwestern cardiologist, in the medical literature of 1910. He offered no medical explanation, however, for either the bizarre symptoms or the cause of the malady.[9]

Today, as a result of intensive medical research, the cause and characteristics of sickle cell anemia have been discovered.[10] Sickle cell anemia is caused by a gene mutation which creates a defect in the hemoglobin of the red blood cells, the substance which supplies oxygen to all body tissues. The alteration of the hemoglobin causes the red blood cells to change from their normal doughnut shape to a crescent or sickled form. The sickled red blood cells become blocked in the capillaries. As a result the oxygen in the blood is severely reduced, and tissue damage results.

The sickling process accelerates when the victim become severely dehydrated or loses a large quantity of oxygen, causing a sickle cell crisis.[11] The crisis may last for days and is usually accompanied by extreme fatigue, severe pain, swelling of the joints, tissue damage, hemorrhaging, and infection. Most people who undergo a sickle cell crisis require hospitalization.[12]

At present, there is no known cure for sickle cell anemia; however, treatment of the disease, though expensive, has improved.[13] It usually includes the administration of blood, oxygen, anesthetics, antibiotics, and compounds which reduce the sickling of the red blood cells. Surgery is sometimes necessary to remove or repair damaged organs.[14] New drugs such as urea and cyanate offer hope for the

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[8] *See* J. SONS, PATHOLOGY OF SICKLE CELL ANEMIA 3-17 (1971) for a history of the research studies and developments regarding the cause and cure of sickle cell anemia.

[9] *Id.*

[10] Pearson, *Pregress in Early Diagnosis of Sickle Cell Disease*, 18 CHILDREN 222 (1971) [hereinafter cited as Pearson]; Interview with Dr. Charles Abildgaard, Head of the Department of Hematology at Sacramento County Medical Center, Sacramento, California, February 26, 1974.

[11] Reilly (September-October 1973), *supra* note 5, at 40.

[12] Pearson, *supra* note 10, at 223.

[13] S. LINDE, SICKLE CELL, A COMPLETE GUIDE TO PREVENTION AND TREATMENT 16, 87 (1972) [hereinafter cited as LINDE].

[14] Most surgery that is performed on patients with sickle cell anemia, is for the purpose of removing their spleen which becomes greatly enlarged or filled with blood as a result of recurring sickle cell crises. *See* J. SONG, PATHOLOGY OF SICKLE CELL DISEASE, 368-79 (1971); for more information regarding the therapeutic procedures for sickle cell anemia. *See also* S. Foster, *Sickle Cell*

discovery of a permanent method of reversing the sickling process. However, most physicians still believe that the best treatment for persons suffering from sickle cell anemia is the prevention of a sickle cell crisis.[15] This treatment consists of maintaining a well-balanced diet and avoiding physical exertion and environmental conditions which decrease the oxygen supply to the body.

Sickle cell anemia has two forms — the sickle cell disease and the sickle cell trait.[16] The disease manifests itself by general fatigue and complications which include swelling of the bones and joints, enlarged spleens, heart disease, and kidney failure.[17] The victim, often bedridden and unable to maintain employment or perform successfully in school, rarely lives beyond age thirty.[18] The individual with the trait, however, experiences no adverse physical effects and has a normal life expectancy because the presence of some normal genes prevents much of the blood from sickling.[19]

Individuals with normal hemoglobin have a pair of AA hemoglobin genes. Persons with the sickle cell disease possess two abhormal S genes.[20] Carriers of the sickle cell trait have one normal A gene and one defective S gene.[21] If two people with the disease reproduce, the child will inherit an S gene from each parent and will inevitably inherit the disease. If two people with the trait reproduce there is a twenty-five percent chance that the child will have the sickle cell disease and a fifty percent chance that the child will inherit the trait. There is no possibility that if an individual with the trait and a normal individual reproduce they will transmit the sickle cell disease to their children, but there is a fifty percent chance that their offspring will inherit the trait.[22]

Anemia: Closing the Gap Between Theory and Therapy, 71 AMER. J. OF NURSING 1955-56 (1971).

[15] LINDE, *supra* note 13, at 88-91; *see also* Sickle Cell Anemia Research and Education, Inc., What Everyone Should Know About Sickle Cell 13 (1973) [hereinafter cited as Sickle Cell Guide].

[16] Black Medical Students of Stanford University Medical School, Two Common Diseases, Facts about Sickle Cell Anemia and Glocuse — 6 — Phosphate Dehydrogenase Deficiency 5 (1971) [hereinafter cited as Black Medical Students' Report].

[17] Black Medical Students' Report, *supra* note 16, at 9; *see also* LINDE, *supra* note 13, at 18.

[18] LINDE, *supra* note 13, at 16; *see also* Pearson, *supra* note 10, at 222.

[19] Pearson, *supra* note 10, at 223; however, recently medical studies have revealed that in rare situations, under adverse physical and environmental conditions persons with the sickle cell trait may experience the same symptom as those with the sickle cell disease. Moreover, if persons with the sickle cell trait suffer a severe sickle cell crisis, they often die. *See* 4 BRIT. MED. J. 593-95 (1971).

[20] *See* Sickle Cell Guide, *supra* note 15, at 8-9; Pearson, *supra* note 10, at 223.

[21] H. ABRAMSON, J. BERTELES, D. WETHERS, SICKLE CELL DISEASE — DIAGNOSIS, MANAGEMENT, EDUCATION, AND RESEARCH 21 (1973).

[22] LINDE, *supra* note 13, at 125; *see also* Sickle Cell Guide, *supra* note 15, at 8; Interview with Dr. Charles Abildgaard, Head of the Department of Hematology

The sickle cell disease usually manifests itself in early infancy.[23] There is little need, therefore, to test persons to determine the existence of the disease. The trait, on the other hand, because of its asymptomatic nature, will remain undetected in most people absent a blood test.[24] Two and one half million American Blacks are believed to be carriers of the sickle cell trait.[25] Unless they are identified and counseled regarding the possible consequences of having children, the incidence of sickle cell anemia may increase markedly,[26] with the theoretical possibility that the Afro-American race will become extinct.[27] Hence, there is a pressing need to identify and counsel carriers of the malady.

III. STATE LEGISLATION

The state legislatures have taken the lead in responding to this need. In July, 1971, Massachusetts became the first state to enact a sickle cell testing statute.[28] This mandatory law requires every child who is susceptible to the disease to undergo a blood test before or during his first year in a public school. Several states and the District of Columbia passed similar laws.[29] Most of these statutes compel

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at Sacramento County Medical Center, Sacramento, California, February 26, 1974.

[23] Reilly (September-October 1973), *supra* note 5, at 42.

[24] H. ABRAMSON, J. BERTELES, & D. WETHERS, SICKLE CELL DISEASE — DIAGNOSIS, MANAGEMENT, EDUCATION AND RESEARCH 107 (1973) [hereinafter cited as ABRAMSON, BERTELES, & WETHERS].

[25] LINDE, *supra* note 13, at 15; *see also* Reilly (September-October 1973), *supra* note 5, at 41.

[26] Reilly (September-October 1973), *supra* note 5, at 41.

[27] *See* Black Medical Students' Report, *supra* note 16, at 15. This report suggests that the Black American race could become extinct if persons with the sickle cell trait mate and beget children with other trait carriers. *See also* SATURDAY REVIEW OF SCIENCE, February 1973, at 40.

[28] *See* Reilly (September-October 1973), *supra* note 5, at 42. *See also* MASS. GEN. LAWS ANN. ch. 76, § 15A (Supp. 1972) requiring every child determined by the Public Health Commissioner to be tested for sickle cell anemia before enrolling in public schools.

[29] The states which have mandatory sickle cell anemia testing statutes are California, Georgia, Illinois, Indiana, Massachusetts, Kentucky, New York, and Virginia. *See* CAL. HEALTH & SAFETY CODE § 325 (West Supp. 1974), requires every child who is a member of any identifiable segment of the population which is highly susceptible to sickle cell anemia to be tested; GA. CODE ANN. § 88-1201.1 (Supp. 1971) applies to couples applying for marriage licenses; ILL. S.H.A. ch. 89, § 6b (Supp. 1974) applies to applicants for marriage licenses; IND. STAT. ANN. ch. 1, tit. 31-1-1-7 (Supp. 1973) applies to marriage license applicants; IND. STAT. ANN. ch. 57, tit. 28-5708 (Supp. 1973) requires sickle cell tests to be administered to school children during periodic health checks by examining physician or school nurse. KY. ACTS ch. 122, § 2 (Supp. 1972) requires marriage applicants of the Negro race to undergo sickle cell testing; N.Y. EDUCATION LAW § 903 (McKinney Supp. 1974) requires testing of school children; N.Y. DOM. REL. LAW § 13aa (McKinney Supp. 1973) applies to applicants for marriage licenses; VA. CODE ANN. ch. 5.2, § 32-112.20 (1972) as amended (Supp. 1973). The old Virginia sickle cell testing bill was compulsory; the new statute is voluntary.

persons suspected of having the disease or carrying the trait to be tested before enrolling in a public school or obtaining a marriage license.

California is among the states which have passed mandatory sickle cell anemia screening legislation.[30] The California sickle cell detection law requires that any child enrolling in a public elementary school be tested if the state Department of Health determines that the child is a member of an identifiable segment of the population which is susceptible to the disease or trait at a disproportionately higher ratio than the balance of the population. The statute also compels children who have not been tested before entering elementary schools to submit to sickle cell screening upon entering a junior or senior high school. The law provides an exception for individuals whose religious beliefs conflict with the testing requirements. In contrast to the mandatory law concerning school children, California allows applicants for marriage licenses to be tested for sickle cell anemia on a voluntary basis.[31]

The California statute was drafted and sponsored by Assemblyman Leon Ralph.[32] He stated that the purpose of mandatory testing is to facilitate the counseling of afflicted children concerning activities and stress situations to be avoided in order to minimize the impact of the disease.[33] In addition, according to a consultant on the Assembly committee which conducted research for the bill, the committee believed that the statute would prevent young Black students with the disease from being mistakenly categorized as slow learners or as mentally retarded, as has frequently been the case, by bringing the nature of their disorder to the attention of school authorities.[34] Lastly, Assemblyman Ralph explained that sickle cell testing of marriage license applicants is on a voluntary basis because he and the committee believed that potential parents should have an opportunity to learn if they have the trait, but should not be compelled to forego marriage or having children.[35]

The public's initial reaction to both the mandatory and voluntary

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[30] CAL. HEALTH & SAFETY CODE § 325 (West Supp. 1974).

[31] CAL. CIV. CODE § 4302 (West Supp. 1974).

[32] Interview with Ms. Ruby Marshall, Secretary to the Committee on Governmental Organization and Secretary to Assemblyman Leon Ralph, in Sacramento, California, April 18, 1974. During this interview Ms. Marshall gave Gloria Dabbs a press release from the Office of Assemblyman Ralph, stating that Mr. Ralph was the sponsor of the present sickle cell statute in California.

[33] Press release from the Office of Assemblyman Leon Ralph (1971) received April 18, 1974 [hereinafter cited as Press Release].

[34] Interview with Mr. Michael Corbett, Davis, California, January 20, 1974. Mr. Corbett stated the Committee's primary concern in drafting the California compulsory sickle cell testing bill was to identify school children with sickle cell anemia in order to allow them to achieve their fullest academic potential.

[35] Press Release, *supra* note 33, at 2.

sickle cell testing legislation passed by the states was very positive.[36] Subsequently, however, some Blacks criticized the compulsory testing laws, and accused Black legislators who proposed the statutes of engaging in political opportunism to the detriment of Black people.[37] They fear that mandatory testing may lead to genocide of the Negro race by subsequent prohibition of marriage and procreation by persons found to have the disease or trait, under the guise of promoting public health.[38] Professor Phillip Reilly indicates that such legislation must be viewed in light of the history of involuntary sterilization in this country and that the possibility of involuntary sterilization of Afro-Americans cannot be lightly dismissed.[39]

Legal scholars have questioned the constitutionality of the compulsory testing laws.[40] First, they contend that the states were acting beyond the scope of their police powers by requiring persons to be tested for the non-contagious disorder before permitting them to enroll in public schools or obtain marriage licenses.[41] Second, they argue that statutes which require only Negores to be screened for sickle cell anemia, such as the Kentucky Sickle Cell Detection Act,[42] discriminate against Afro-Americans on the basis of race.[43] Third, legal scholars have argued that involuntary testing infringes fundamental rights, and that there is no compelling reason for doing so since the disease cannot be cured or successfully treated, nor is it contagious.[44]

Both the compulsory and voluntary sickle cell detection laws have also been criticized by the medical community.[45] Hematologists and other experts have attacked the legislation for failing to reflect the genetic characteristics of the disorder; there is no distinction made between persons afflicted with the disease and those who only carry the trait.[46] As a result of the overbroad classifications, misinformed employers and life insurers have excluded trait carriers from jobs and

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[36] *See* SATURDAY REVIEW OF SCIENCES, feb. 1973, at 38; *see also* Whitten, *Sickle-Cell Programming — An Imperiled Promise*, 288 NEW ENG. J. MED. 318 (1973) [hereinafter cited as Whitten].

[37] *See* SATURDAY REVIEW OF SCIENCES, Feb. 1973, at 38.

[38] *See* SATURDAY REVIEW OF SCIENCES, Feb. 1973, at 38.

[39] Reilly (November-December 1973), *supra* note 6, at 38.

[40] *See* Reilly (September-October 1973), *supra* note 5, at 47; *see also* SATURDAY REVIEW OF SCIENCES, Feb. 1973, at 47.

[41] Reilly (November-December 1973), *supra* note 6, at 39; *see also* Waltz, *Genetic Counseling and Screening: The Legal and Ethical Issues*, 68 NW. U. L. REV. 712 (1973) [hereinafter cited as Waltz].

[42] Reilly (November-December 1973), *supra* note 6, at 39; KY. ACTS ch. 122, § 2 (Supp. 1972).

[43] Reilly (November-December 1973), *supra* note 6, at 39.

[44] Waltz, *supra* note 41, at 707, 712.

[45] Reilly (September-October 1973), *supra* note 5, at 43.

[46] Reilly (September-October 1973), *supra* note 5, at 47. *See also* SATURDAY REVIEW OF SCIENCES, Feb. 1973, at 40, 45

insurance policies, though they do not share the serious health problems of the disease victims.[47]

IV. FEDERAL LEGISLATION

The controversy surrounding the constitutionality of the mandatory sickle cell testing legislation, and the vigorous opposition to the laws voiced by Black leaders, led Congress to enact the National Sickle Cell Anemia Control Act of 1972.[48] The Act provides for federal grants and contracts for research to improve the treatment of the disease, for counselling and education to supplement screening programs, but for only voluntary testing.[49] Senator John Tunney, who was primarily responsible for the drafting of the bill, stated that the policy of voluntary testing, with safeguards to protect the confidentiality of results, was designed to protect the persons tested and to avoid any misinterpretation of the basic purpose of the bill.[50] At the hearings before the Senate Subcommittee on Health, he remarked that "it would be indeed tragic if any person should gain the impression of racial prejudice or discrimination as a result of these programs."[51] Critics of the compulsory screening laws are pleased with the passage of the National Sickle Cell Anemia Control Act because they feel it will encourage more states to adopt voluntary testing statutes.[52]

V. PREFERENCE FOR MANDATORY STATUTES

Mandatory testing for the trait and disease is necessary in order to eliminate sickle cell anemia from America. All carriers of the disease, including persons who would not voluntary do so, would be compelled to submit to an examination, and would thereby be able to plan their families in an intelligent manner. Critics of the mandatory laws believe that non-compulsory legislation provides a safeguard against the fear that the federal or local governments may someday require involuntary sterilization of those individuals with the disease or the trait.[53] However, they fail to realize that the public anxiety and confusion produced by their emotionally charged condemnations deter people from being tested on even a voluntary basis. Fur-

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[47] Reilly (September-October 1973), *supra* note 5, at 43; *see also* SATURDAY REVIEW OF SCIENCES, Feb. 1973, at 45.

[48] NATIONAL SICKLE CELL ANEMIA CONTROL ACT, 42 U.S.C. § 300 a (Supp. II, 1972).

[49] NATIONAL SICKLE CELL ANEMIA CONTROL ACT, 42 U.S.C. § 300 b (Supp. II, 1972).

[50] *Hearing on S. 2676 Before the Subcomm. on Health of Committee on Labor and Public Welfare, United States Senate,* 92nd Cong., 1st Sess., at 25 (1971).

[51] *Id.*

[52] Reilly (September-October 1973), *supra* note 5, at 43; SATURDAY REVIEW OF SCIENCES, Feb. 1973, at 40.

[53] Reilly (November-December 1973), *supra* note 6, at 38; SATURDAY REVIEW OF SCIENCES, Feb. 1973, at 39-40.

thermore, many advocates of non-compulsory screening have not considered that the voluntary laws are seriously fraught with construction flaws.

Most of the states which have voluntary testing laws have neglected to define what constitutes consent or to provide for the regulation of the private screening programs funded by the federal or state governments.[54] The latter omission is serious because there is a tremendous dispute in the medical profession regarding the validity of the testing techniques employed in the mass sickle cell screening clinics.[55] In addition, the states have failed to indicate whether the private agency or the state which funds it should be liable for adverse effects of the testing.[56] Finally, the states have neglected to safeguard the results of the examinations. Most states with compulsory laws have also neglected to address this question. However, the strong disclosure penalties in mandatory syphillis testing statutes indicate that compulsory laws might logically be expected to afford more disclosure protection than their voluntary counterparts.[57]

If the controversy regarding the constitutional validity of the compulsory laws was resolved and the fears of involuntary sterilization and marriage restrictions were allayed, the efficient testing and genetic counselling that would result would be an important first step to the elimination of the disease.

VI. CONSTITUTIONAL ISSUES

A. DUE PROCESS

The Due Process Clause[58] does not prohibit the state from requiring sickle cell blood tests of its citizens. The Supreme Court originally expressed Due Process considerations in terms of the police power, and upheld similar laws designed to protect the public health as a legitimate exercise of the police power reserved to the states by the 10th Amendment.[59] In *Jacobson v. Massachusetts*,[60] for in-

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[54] Reilly (November-December 1973), *supra* note 6, at 37; *see also* Waltz, *supra* Note 41, at 744.

[55] M. MURAYAMA & R. NALBANDIAN, SICKLE CELL HEMOGLOBIN MOLECULE TO MAN 118 (1973). Some physicians feel that hemoglobin eletrophotesis should be used as an initial testing technique in mass sickle cell screening program regardless of how expensive the procedure; others feel that the less expensive Murayama dithionite solubility test is more economically feasible and suited for mass screening programs.

[56] Waltz, *supra* note 41, at 744; although Waltz does not state that the states which have voluntary sickle cell testing laws may be liable for the negligence of the attending physician, he implies that this may be the case.

[57] CAL. HEALTH & SAFETY CODE § 3227 (West 1970) the state provides that the test results of all persons examined for syphillis will be kept confidential.

[58] U.S. CONST. Amend. XIV, § 1.

[59] Jacobson v. Massachusetts, 197 U.S. 11 (1905); Prince v. Massachusetts, 321 U.S. 158 (1944).

[60] 197 U.S. 11 (1905).

stance, the Court upheld a Massachusetts statute which required individuals to be vaccinated for smallpox. In practice, however, the Court seemed to demand a rational basis for the statutes.[61] They upheld health laws after insuring that they were reasonably related to protection of the public health and that they did not interfere with a citizen's constitutional rights.[62]

Recent cases have increased the state's burden of justifying an infringement of the "liberty" protected by the Due Process Clause, and have required more than a mere rational basis for the statute.[63] In *Griswold v. Connecticut*,[64] the Supreme Court determined that a fundamental right to privacy, which emanates from penumbras of the Bill of Rights, protects the use of contraceptives by married couples. The Court held that the Due Process Clause prohibits the states from infringing that right, absent a compelling state interest. In 1973 the Supreme Court expanded the notion of the right of privacy in *Roe v. Wade*.[65] The Court held that the right to privacy protects the decision of a pregnant women to determine whether to undergo an abortion during the first trimester of pregnancy.

In *Roe* the Supreme Court expanded the fundamental right beyond the layman's conception of "privacy." The Court held, however, that the right entitled the pregnant woman to *permit* an intrusion upon her body;[66] it did not hold that the individual can *prevent* every intrusion. Such a decision would be a major extension of *Roe*. *Griswold* and *Roe*, therefore, are tenuous support for the contention that a compulsory blood test infringes on the right to privacy.

Even if the right to privacy does apply, the state can weigh substantial interests in sickle cell testing against a minor intrusion on the individual's liberty.[67] In *Schmerber v. California*[68] the Supreme Court held that a blood test for alcohol content, which "involves virtually no risk, trauma, or pain," did not violate the Search and Seizure Clause of the Fourth Amendment. The conviction of guilty persons was a sufficiently legitimate interest to justify the use of a

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[61] Jacobson v. Massachusetts, 197 U.S. 11 (1905). In upholding the compulsory smallpox vaccination statute, the Court said, "According to settled principle the police power of the state must be held to embrace, at least such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety." *Id.* at 25.

[62] Jacobson v. Massachusetts, 197 U.S. 11 (1905).

[63] Roe v. Wade, 410 U.S. 113 (1973).

[64] 381 U.S. 479 (1965).

[65] 410 U.S. 113 (1973).

[66] 410 U.S. 113, 163 (1973). The Court asserted that a pregnant woman is entitled to an abortion up until the time the fetus is viable. At this point termination of the pregnancy would endanger the life of the mother; thus the Supreme Court held that the state has a compelling interest in both the lives of the mother and the unborn child.

[67] Schmerber v. California, 384 U.S. 757 (1966).

[68] 384 U.S. 757 (1966).

blood test as a means of obtaining evidence. The sickle cell blood test is an equally minor procedure, yet it is the only way the trait can be detected. The state has an indisputable interest in protecting the health of its citizens by attempting to eliminate the disease.

B. EQUAL PROTECTION

1. CONGENITAL DISEASE DISCRIMINATION

The Equal Protection Clause of the Fourteenth Amendment provides that no person shall be denied the equal protection of the laws.[69] However, the clause does not prohibit states from establishing classifications as long as similarly situated persons are treated alike.[70] Most of the compulsory sickle cell testing laws classify individuals to be examined in terms of their susceptibility to the disease. For instance, the California statute requires any child enrolling in public elementary schools to submit to a blood test if the state department of health determines that the child is a member of an identifiable segment of the population which is susceptible to the disease or trait at a disproportionately higher ratio than the balance of the population.[71]

Many critics argue that the laws discriminate against people who are likely to have sickle cell anemia because persons who are likely to have other congenital disorders are not required to be tested for those diseases.[72] However, the statutes compel all persons who are deemed to be susceptible to sickle cell anemia to undergo an examination, and therefore all persons who are in this particular situation are treated equally. In addition, the mandatory testing laws have a rational relationship to a legitimate state interest. Genetic counselling is the only way to prevent the spread of the disease.[73] Unlike most congenital diseases, the only way to identify the carrier of the trait is through the blood test, a fairly minor procedure. The classifications are permissible because they are reasonably related to the interest of the states in protecting the health of the victims of the hereditary disorder and that of their future offspring.

2. RACIAL DISCRIMINATION

State laws which classify Negroes as the only group required to be

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[69] U.S. CONST. Amend. XIV, § 1.

[70] Jacobson v. Massachusetts, 197 U.S. 11, 30 (1905).

[71] CAL. HEALTH & SAFETY CODE § 326 (West Supp. 1973).

[72] Reily (November-December 1973), *supra* note 6, at 39.

[73] The procedure for screening a person to ascertain whether or not he has the sickle cell disease or the sickle cell trait consists of pricking the finger of the individual, drawing a miniscule quantity of blood and mixing the blood with chemical compounds. *See* LINDE, *supra* note 13, at 64; *see also* SATURDAY REVIEW OF SCIENCES, Feb. 1973, at 46.

tested for sickle cell anemia, as enacted in Kentucky and New York,[74] face greater judicial scrutiny.[75] Laws which identify the classification in terms of the individual's susceptibility to the disease, but which in operation affect only the Black race, also require greater justification.[76] To be upheld under the Equal Protection Clause, racial classifications must further a compelling state interest.[77] The Supreme Court has never upheld such a classification.[78] The classification of Negroes for the purpose of sickle cell testing, however, is likely to be upheld because it is narrowly drawn and furthers important state interests.

The protection of the health of its citizens has long been recognized by the Supreme Court as a compelling state interest.[79] In *Roe v. Wade*,[80] for instance, the Court found the protection of a viable fetus and the health of the mother to be a sufficiently compelling interest to infringe the mother's right to privacy in the latter stages of pregnancy. Similarly, the state has an interest in controlling a disease which afflicts a sizeable portion of the population. The blood test is the only means to detect the sickle cell trait, which is the key in controlling the spread of the disease. The classification is narrowly drawn; the disease affects Blacks almost exclusively. Studies have indicated that seven to nine percent of the American Black population carries the sickle cell trait, while 0.3 percent suffer from the disease.[81] The incidence of sickle cell anemia in the White population is negligible; a recent survey in New York uncovered only a 0.5 incidence of the trait.[82]

To enlarge the classification to require Whites to be tested would be a violation of their right to Due Process. The possibility that they have the trait is remote. There is no state benefit to justify even the

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[74] KY. ACTS. ch. 112, § 2 (1972) requires marriage applicants of the Negro race to submit to a test for sickle cell anemia before obtaining a marriage license. N.Y. DOM. REL. LAW § 13aa (McKinney Supp. 1973) requires sickle cell anemia testing of marriage applicants, but provides an exception for Caucasian, Indian, or Oriental races.

[75] McLaughlin v. Florida, 379 U.S. 184, 191-92 (1964); Brown v. Board of Education, 347 U.S. 483, 490 (1954); Korematsu v. United States, 323 U.S. 214, 216 (1944).

[76] Yick Wo v. Hopkins, 118 U.S. 356 (1886). The Court stated:

> Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution. *Id.* at 373-74.

[77] Loving v. Virginia, 388 U.S. 1 (1967); Korematsu v. U.S., 323 U.S. 214, 216 (1944).

[78] *But see* Korematsu v. United States, 323 U.S. 214 (1944).

[79] Jacobson v. Massachusetts, 197 U.S. 11 (1905).

[80] 410 U.S. 113, 150 (1973).

[81] Reilly (September-October 1973), *supra* note 5, at 40.

[82] Reilly (September-October 1973), *supra* note 5, at 41.

minor intrusion on their personal liberty.[83]

Furthermore, the classification does not reek of the invidious characteristics which have appalled the Supreme Court in the majority of racial classification cases.[84] The purpose of the classification is affirmative — to control a disease which affects primarily Blacks. There is no stigma attached to undergoing the blood test, and benefits may accrue to the individual.[85]

VII. MARRIAGE RESTRICTIONS AND INVOLUNTARY STERILIZATION

It is unlikely that marriage restrictions and involuntary sterilization laws will follow the mandatory sickle cell testing laws. Such laws would be politically difficult to enact, since they are anathema to a large segment of the population.[86] Furthermore, Black legislators were responsible for most of the state testing laws, and they would presumably be influential on legislatures extending those laws.

A. MARRIAGE RESTRICTIONS

Laws prohibiting the marriage of carriers of the sickle cell trait would be an unconstitutional deprivation of both Due Process and Equal Protection. The Supreme Court has determined that marriage is one of the "basic civil rights of man."[87] Under the Due Process Clause, the state must demonstrate a compelling interest to justify interference with such a right.[88] The suggested justification of preventing the spread of disease to the couple's offspring is not adequate justification, because less restrictive alternatives exist — contraception and genetic counselling, for example. Also, not all persons who marry have children, nor do all persons who have children marry.

Furthermore, marriage restrictions would probably violate the Equal Protection Clause. The restriction would apply almost exclusively to Blacks, and the state would be forced to demonstrate a compelling interest for the discrimination.[89] The burden would be impossible to carry because the classification is only loosely related to

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[83] Schmerber v. California, 384 U.S. 757 (1966).

[84] *See* Loving v. Virginia, 388 U.S. 1 (1967).

[85] *See e.g.*, Schmerber v. California, 384 U.S. 757 (1966), where the U.S. Supreme Court upheld against Due Process attack states right to withdraw blood from one suspected of drunk driving without suspect's consent.

[86] *See* SATURDAY REVIEW OF SCIENCES, Feb. 1973, at 39.

[87] Skinner v. Oklahoma, 316 U.S. 530, 541 (1942).

[88] Where fundamental rights of individuals are involved, as in the case of the right to marry, in order for the government to interfere with this right, it must demonstrate a compelling interest. *See* Shapiro v. Thompson, 394 U.S. 618 (1969); Graham v. Richardson, 403 U.S. 365 (1971).

[89] McLaughlin v. Florida, 379 U.S. 184, 191-92 (1964); Brown v. Board of Education, 347 U.S. 483, 490 (1954); Korematsu v. United States, 323 U.S. 214, 216 (1944).

public health. The classification is underinclusive because carriers of other congenital diseases are allowed to marry, and irrational because preventing marriage will not prevent procreation. The classification is overinclusive because not all persons who marry have children.[90]

B. INVOLUNTARY STERILIZATION

Although procreation has been termed a basic civil right of man — "fundamental to the very existence and survival of the race"[91] — the Supreme Court as recently as 1927 upheld a state sterilization statute enacted for eugenic purposes. In *Buck v. Bell*[92] the statute required that a person be sterilized only if it were found that he had an inheritable mental deficiency, that he would probably be the parent of socially inadequate children, and that both he and society would benefit if he were sterilized.[93] Today about one half of the states have compulsory sterilization laws,[94] although only a few sterilizations are performed each year in a few states.[95]

It is unlikely the Court would reach the same decision today that it did in 1927. First, in 1927 the Court was not as concerned with the personal liberties as it is today. Subsequent to *Buck* the Court has found seemingly less important rights — the right to travel, for example — to be fundamental. Furthermore, *Roe v. Wade*, which established the right of a mother *not* to beget a child, can be implied to protect the right of persons to *have* a child. The Court would therefore likely determine that procreation is within the liberties protected by the Due Process Clause.

Moreover, unlike the minor intrusion involved in sickle cell testing, involuntary sterilization constitutes a major infringement upon an individual's right to privacy. Therefore, the rationale supporting testing is insufficient to justify sterilization. Furthermore, it is possible that the state will not benefit from sterilizing sickle cell carriers. Some medical authorities suggest that unless trait carriers are permitted to reproduce, a new, stronger diseased gene may develop.[96]

In *Skinner v. Oklahoma*,[97] the Court overturned a compulsory sterilization statute on Equal Protection grounds and made it clear that such laws should be subjected to rigid judicial scrutiny because

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[90] Note, *Developments in Equal Protection*, 82 HARV. L. REV. 1065, 1086 (1969).

[91] Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

[92] 274 U.S. 200 (1927).

[93] Buck v. Bell, 274 U.S. 200, 207 (1927).

[94] Waltz, *supra* note 41, at 717.

[95] Vukowich, *The Dawning of the Brave New World — Legal, Ethical and Social Issues of Eugenics*, 1971 U. OF ILL. L. F. 189, 219 (1971) [hereinafter cited as Vukowich].

[96] Vukowich, *supra* note 96, at 215.

[97] 316 U.S. 535 (1942).

the very nature of such legislation creates the potential danger of genocide of minority and other non-conformist groups at the will of a dominant political group.[98] Finally, the state cannot sustain a compelling interest in the sterilization because lesser restrictive alternatives are available. Genetic counselling and artificial insemination are two methods which would reduce inheritance of sickle cell anemia.[99] It is additional evidence of the weakening of *Buck v. Bell* that neither alternative was available when that case was decided.

VIII. ALTERNATIVE SUGGESTIONS

The present mandatory sickle cell anemia laws are constitutionally valid and essential to the detection and prevention of sickle cell anemia among American Blacks. Moreover, unless the courts severely alter their application of Due Process and Equal Protection principles, there is no possibility that compulsory sickle cell testing will lead to marriage prohibitions or involuntary sterilization.

If Black persons, nonetheless remain suspicious of mandatory sickle cell testing, repeal of the laws is not a constructive solution. Rather, Blacks should strive to enact amendments providing safeguards such as requirements for the confidentiality of testing results of persons who are screened for sickle cell anemia, and economic penalties for those who disclose this information or exclude trait carriers from employment on the basis of their physical condition. These economic sanctions against the employment discrimination of persons with the trait would not apply to individuals with the sickle cell disease because as a general rule persons with the disease are often absent from work due to the numerous physical complications inherent in the nature of the disease.[100] However, if an effort to make the public aware of the difficulties the persons with sickle cell anemia encounter, particularly the problem of maintaining employment, this hardship could be greatly alleviated.

IX. CONCLUSION

The relationship between state governments and Black Americans is one of distrust. Black Americans object to mandatory sickle cell screening legislation, for instance, because of the unfounded fear that marriage restrictions and involuntary sterilization laws will soon follow. It is essential that we, the Black community, develop a working rapport with the dominant political groups, or sickle cell anemia and other problems will remain with America forever.

Gloria Jean Dabbs

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[98] 316 U.S. 535, at 541 (1942).

[99] Vukowich, *supra* note 96, at 202; *see also* LINDE, *supra* note 13, at 134.

[100] LINDE, *supra* note 13, at 16.