William & Mary Law Review

Volume 63 (2021-2022)
Issue 5

Article 4

4-2022

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Melissa Murray, *Abortion, Sterilization, and the Universe of Reproductive Rights*, 63 Wm. & Mary L. Rev. 1599 (2022), https://scholarship.law.wm.edu/wmlr/vol63/iss5/4

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ABORTION, STERILIZATION, AND THE UNIVERSE OF REPRODUCTIVE RIGHTS

MELISSA MURRAY*

ABSTRACT

In recent years, a new narrative associating reproductive rights with the eugenics movement of the 1920s has taken root. As this narrative maintains, in the 1920s, Margaret Sanger, a pioneer of the modern birth control movement, joined forces with the eugenics movement to market family planning measures to marginalized minority communities.

Although the history undergirding this narrative is incomplete and misleading, the narrative itself has flourished as the debate over the continued vitality of reproductive rights has unfolded in the United States. Indeed, in just the last three years, a member of the United States Supreme Court and a number of lower federal court judges have referenced the alleged links between abortion, contraception, and eugenics in their defense of abortion restrictions.

The effort to link abortion and contraception to the racialized logic of the eugenics movement is interesting on a number of fronts. As I have written elsewhere, this narrative is at once a potent defense of abortion restrictions and a more calculated effort to recast the social meaning of reproductive rights from a question of gender equality to one of racial inequality. But equally noteworthy is the narrative's utter neglect of the eugenics movement's investment in coercive sterilization—not abortion or contraception—as its preferred vehicle of reproductive control and social engineering.

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* Frederick I. and Grace Stokes Professor of Law, NYU School of Law. In April 2021, I delivered the annual George Wythe Lecture at William & Mary Law School. This Article builds on those remarks. I received helpful feedback from Leah Litman, Doug NeJaime, and participants at the Family Law Teachers and Scholars Conference. Chad Hughes and Nina Haug provided terrific research assistance. All errors are my own.

With all of this in mind, this Article seeks to reframe the interest in reproductive rights, racism, and eugenics to include a more robust discussion of sterilization practices. To do so, the Article supplements the historical narrative to clarify that the eugenics movement's interest in racial betterment was primarily directed at improving and purifying the white race. To the extent the eugenics movement focused on abortion and contraception, it was in limiting middle- and upper-class white women's access to these vehicles of reproductive freedom on the ground that the reproduction of these constituencies was vital to the future of the white race. Insofar as eugenicists were interested in limiting reproduction, their interest was directed toward those individuals who possessed traits deemed unsuitable for the propagation of the white race—and meaningfully, their preferred vehicle for limiting reproduction among the "unfit" was not contraception or abortion, but rather, sterilization.

And even as popular interest in eugenics waned in the 1940s, the state's interest in sterilization as a means of reproductive control did not abate. Indeed, as the Civil Rights Movement and the welfare rights movement dawned, many states repurposed sterilization to limit the reproductive capacities of those deemed sexually immoral or unduly dependent on the public fisc, usually poor women of color.

To underscore the relationship between race, class, dependence, and state-endorsed sterilization, the Article highlights Cox v. Stanton*, a challenge to North Carolina's sterilization program litigated by Ruth Bader Ginsburg, Brenda Feigen Fasteau, and the ACLU's Women's Rights Project in the 1970s. Although* Cox *did not result in the invalidation of state sterilization programs, it—and other contemporary challenges to sterilization abuse—made clear the centrality of sterilization as a technology of reproductive control, as well as sterilization abuse's racialized impact. In this regard, the nascent effort to associate abortion and contraception with eugenic racism not only equates state-sponsored reproductive abuses with an individual's decision to terminate or avoid pregnancy, but also overlooks—and indeed, further obscures—the significant history of racialized sterilization abuse in the United States.*

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INTRODUCTION

On April 13, 2021, an en banc panel of the United States Court of Appeals for the Sixth Circuit issued a ruling allowing an Ohio abortion restriction to take effect.[1] The challenged restriction bars doctors from performing abortions on women who choose to end their pregnancies because the fetus has Down syndrome.[2] Similar trait-selection laws, colloquially known as "reason bans," have been enacted around the country, including at the federal level[3]—and have been successfully challenged and invalidated under the Supreme Court's long-standing abortion precedents, *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[4] But the Sixth Circuit's 9-7 ruling departed from the logic of these other cases, concluding that "there is no absolute or *per se* right to an abortion based on the stage of the pregnancy."[5] The conflict between the Sixth Circuit's ruling and the other federal courts of appeals presents a circuit split that could bring the constitutional status of reason bans—and the abortion right more generally—to the Supreme Court's doorstep once again.[6]

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1. Preterm-Cleveland v. McCloud, 994 F.3d 512 (6th Cir. 2021).

2. OHIO REV. CODE ANN. § 2919.10(B) (LexisNexis 2018).

3. *See, e.g.*, Prenatal Nondiscrimination Act (PRENDA) of 2016, H.R. 4924, 114th Cong. (2d Sess. 2016); Jill C. Morrison, *Resuscitating the Black Body: Reproductive Justice as Resistance to the State's Property Interest in Black Women's Reproductive Capacity*, 31 YALE J.L. & FEMINISM 35, 46 n.69 (2019) (describing legislative efforts to ban abortion based on race); *Abortion Bans in Cases of Sex or Race Selection or Genetic Anomaly*, GUTTMACHER INST. (Sept. 1, 2021), https://www.guttmacher.org/state-policy/explore/abortion-bans-cases-sex-or-raceselection-or-genetic-anomaly [https://perma.cc/3P6X-CGC9] (outlining state and federal trait-selection abortion legislation in various cases).

4. *See* Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of the Ind. State Dep't of Health, 888 F.3d 300, 302 (7th Cir. 2018), *rev'd in part on other grounds sub nom.* Box v. Planned Parenthood of Ind. & Ky., Inc., 139 S. Ct. 1780 (2019) (per curiam) (invalidating challenged reason ban on grounds that it "clearly violate[d]" *Casey*, a "well-established Supreme Court precedent"); Little Rock Fam. Plan. Servs. v. Rutledge, 984 F.3d 682, 690 (8th Cir. 2021) ("[I]t is undisputed that [the challenged reason ban] is a substantial obstacle; indeed, it is a complete prohibition of abortions based on the pregnant woman's reason for exercising the right to terminate her pregnancy before viability.").

5. *Preterm-Cleveland*, 994 F.3d at 521.

6. Melissa Murray, *A New, Racialized Assault on Abortion Rights Is Headed to the Supreme Court*, WASH. POST (Apr. 18, 2021, 8:00 AM), https://www.washingtonpost.com/opinions/2021/04/18/new-racialized-assault-abortion-rights-is-headed-supreme-court/ [https://perma.cc/3YHA-Z5KD]. In October Term 2021, the Court will decide *Dobbs v. Jackson*

Although it would not be the first time the high court has confronted the charged question of abortion,[7] in this iteration, the terms of the debate would be starkly different from earlier abortion challenges. Whereas the conflict over abortion rights has long been framed in terms of women's autonomy and equality, the Sixth

Women's Health Organization, a challenge to Mississippi's HB 1510, which prohibits abortion at 15 weeks of pregnancy. Jackson Women's Health Org. v. Dobbs, 945 F.3d 265 (5th Cir. 2019), *cert. granted in part* 141 S. Ct. 2619 (May 17, 2021). That challenge also raises questions about the continued vitality of the Court's abortion jurisprudence. *See* Brief for Petitioners at 14, Dobbs v. Jackson Women's Health Org., 2021 WL 3145936 (No. 18-60868) (July 22, 2021) ("This Court should overrule *Roe* and *Casey*.").

7. In the half-century since *Roe v. Wade* recognized a constitutional right to choose an abortion, 410 U.S. 113, 153 (1973), the Supreme Court has faced a series of abortion-related legal challenges. *E.g.*, Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2370 (2018) (invalidating a California law requiring certain disclosures regarding abortion at crisis pregnancy centers); Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2300 (2016) (invalidating two Texas abortion restrictions); McCullen v. Coakley, 134 S. Ct. 2518, 2526, 2541 (2014) (invalidating a Massachusetts law prescribing "buffer zones" at abortion clinic entrances); Gonzales v. Carhart, 550 U.S. 124, 132-33 (upholding a federal law proscribing a particular abortion procedure); Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 323-24 (2006) (considering a facial challenge to New Hampshire's parental notification requirement); Stenberg v. Carhart, 530 U.S. 914, 921-22 (2000) (invalidating a Nebraska law proscribing a particular abortion procedure); Hill v. Colorado, 530 U.S. 703, 735 (2000) (upholding a Colorado law prohibiting sidewalk counseling within one hundred feet of any healthcare facility, including abortion clinics); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 844-46 (1992) (reaffirming *Roe*'s essential holding and upholding several provisions of the Pennsylvania Abortion Control Act); Rust v. Sullivan, 500 U.S. 173, 177-78 (1991) (upholding federal regulations prohibiting family planning clinics receiving Title X funding from providing counseling regarding abortion or referring clients for abortions); Webster v. Reprod. Health Servs., 492 U.S. 490, 499-501 (1989) (upholding a Missouri law denying state funding for and prohibiting state employee participation in performing or providing counseling regarding abortions); Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 772 (1986) (invalidating a Pennsylvania law requiring informed consent on fetal development, abortion alternatives, and the medical risks of abortion; reporting of abortions; and that the physician use the abortion method most likely to preserve the life of a viable child); City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 452 (1983) (invalidating a range of abortion restrictions); H.L. v. Matheson, 450 U.S. 398, 413 (1981) (upholding a Utah parental notification requirement); Harris v. McRae, 448 U.S. 297, 326 (1980) (upholding the Hyde Amendment, which strictly limits the use of federal funds for abortions); Bellotti v. Baird, 443 U.S. 622, 651 (1979) (plurality opinion) (invalidating a Massachusetts parental consent requirement); Colautti v. Franklin, 439 U.S. 379, 401 (1979) (invalidating a Pennsylvania law requiring doctors to protect the life of a fetus that "may be viable" both during and after an abortion); Maher v. Roe, 432 U.S. 464, 474 (1977) (holding that a state has "authority ... to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds"); Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 84 (1976) (invalidating a range of abortion restrictions); *see also* Melissa Murray, *The Symbiosis of Abortion and Precedent*, 134 HARV. L. REV. 308, 313-14 (2020) (discussing the history of abortion challenges at the high court).

Circuit's decision upholding the challenged reason ban frames abortion in terms of eugenics and discrimination. In its decision allowing the Ohio reason ban to take effect, a majority of the full Sixth Circuit credited the State's interest in "protect[ing] the Down syndrome community—both born and unborn—from ... discriminatory abortions."[8] A flurry of concurring opinions went even further, characterizing the challenged abortion law as "an anti-eugenics statute"[9] aimed at preventing "physicians from knowingly engaging in the practice of eugenics,"[10] and noting the associations between eugenics and the Holocaust.[11]

To be sure, in characterizing reason bans as "antidiscrimination"[12] measures, the judges of the Sixth Circuit were not writing on a blank slate.[13] Both the majority and the concurrences cited Justice Thomas's concurring opinion in *Box v. Planned Parenthood of Indiana and Kentucky*.[14] In *Box*, the high court, in a per curiam opinion, declined to take up a challenge to a similar Indiana reason ban.[15] Although Justice Thomas agreed that the Court's decision to defer review of the challenged law would allow "further percolation" of the issue, he nonetheless observed that the time was coming when the Court would be forced "to confront the constitutionality of laws like Indiana's."[16] And then, in a surprising turn, Justice Thomas continued, crafting a concurring opinion in which he associated abortion with eugenics and credited reason bans with "promot[ing] a State's compelling interest in preventing abortion from becoming a tool of modern-day eugenics."[17]

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8. *Preterm-Cleveland*, 994 F.3d at 517.

9. *Id.* at 536 (Sutton, J., concurring).

10. *Id.* at 538 (Griffin, J., concurring).

11. *Id.* ("Many think that eugenics ended with the horrors of the Holocaust. Unfortunately, it did not. The philosophy and the pure evil that motivated Hitler and Nazi Germany to murder millions of innocent lives continues today. Eugenics was the root of the Holocaust and is a motivation for many of the selective abortions that occur today.").

12. *See id.* at 541 (Bush, J., concurring) (noting that the challenged reason ban was aimed at "preventing discrimination").

13. *Id.* at 538 (Griffin, J., concurring) (quoting Box v. Planned Parenthood of Ind. & Ky., Inc., 139 S. Ct. 1780, 1783 (2019) (Thomas, J., concurring)).

14. *Id.* at 517 (majority opinion); *id.* at 538 (Griffin, J., concurring).

15. *Box*, 139 S. Ct. at 1781 (denying certiorari in part).

16. *Id.* at 1784 (Thomas, J., concurring).

17. *Id.* at 1783.

To underscore abortion's "eugenic" possibilities, Justice Thomas looked to history—and specifically, the association between Margaret Sanger, the founder of the modern birth control movement, and the eugenics movement.[18] As he explained, in the 1920s and 1930s, Sanger and the birth control movement she spearheaded joined forces with the eugenics movement to champion contraception as a means of limiting reproduction among "the unfit."[19] More importantly, because "the distinction between the fit and the unfit could be drawn along racial lines,"[20] Justice Thomas intimated that Sanger and the eugenicists were operating strategically, targeting the Black community for family planning measures, siting birth control clinics in Black neighborhoods, and enlisting Black clergy in their efforts to market birth control to Black women.[21]

Some scholars have objected to the characterization of Sanger and her work as racist, noting that Sanger's interest in "voluntary motherhood" and contraceptive access for all women was at odds with the eugenicists' interest in encouraging reproduction among the most "fit"—generally assumed to be middle- and upper-class whites.[22] Still, as Justice Thomas notes, the eugenics movement *was* undergirded by a racialized logic, and that logic had legs, informing federal immigration policy and state-level laws, including laws prohibiting miscegenation and interracial marriage.[23] Indeed, in *Buck v. Bell*, the Supreme Court "threw its prestige behind the eugenics movement ... upholding the constitutionality of Virginia's

18. *Id.* at 1787-90.

19. *Id.* at 1787.

20. *Id.* at 1785.

21. *See id.* at 1788.

22. Charles Valenza, *Was Margaret Sanger a Racist?*, 17 FAM. PLAN. PERSPS. 44, 44-45 (1985). To the extent that Sanger's involvement in "The Negro Project" reflected an interest in targeting birth control to the Black community, some scholars have noted that Sanger's pronouncements on the subject merely echo the advocacy of prominent Black intellectuals, like W.E.B. DeBois, who championed family planning measures as a means of stabilizing and uplifting the economic fortunes of the Black community. *Id.* at 45-46.

23. *Box*, 139 S. Ct. at 1785-86 ("Eugenic arguments like these helped precipitate the Immigration Act of 1924, which significantly reduced immigration from outside of Western and Northern Europe. The perceived superiority of the white race also led to calls for race consciousness in marital and reproductive decisions, including through antimiscegenation laws." (citations omitted)).

forced-sterilization law" and "g[iving] the eugenics movement added legitimacy and considerable momentum."[24]

It is not altogether surprising that in considering the contemporary prospect of eugenics, Justice Thomas would invoke the specter of *Buck v. Bell*. The 1927 decision, and its callous observation that "[t]hree generations of imbeciles are enough,"[25] stands as an unfortunate monument to the pervasive pull of eugenics in early twentieth century policy making.

What is perhaps more surprising is that, even as he cited *Buck v. Bell*, Justice Thomas's concern about the contemporary manifestation of eugenics—and its racial dynamics—remained stubbornly focused on abortion and contraception, the twin pillars of reproductive rights.[26] In his telling, abortion and contraception have the eugenic potential to deracinate minority communities—a potential genocide facilitated by the state's misguided recognition of constitutional rights to choose an abortion and to use contraception.[27]

Critically, state-endorsed sterilization programs, of the sort upheld in *Buck v. Bell*, are mentioned only in passing in Justice Thomas's narrative—a vestige of an unfortunate past when the Court and the country were in the thrall of eugenicists.[28] The reader is left to assume that state-sponsored sterilization programs, like public support for eugenics, "waned considerably by the 1940s as Americans became familiar with the eugenics of the Nazis and scientific literature undermined the assumptions on which the eugenics movement was built."[29]

But is this narrative correct? As this Article argues, Justice Thomas's effort to graft the history of the eugenics movement to the history of abortion and the history of racial injustice is problematic along multiple dimensions. As an initial matter, Justice Thomas's account is only a partial rendering of the history of eugenics in the United States. It overlooks the fact that neither the eugenics movement nor Margaret Sanger was preoccupied with endorsing abortion as a means of reproductive control. Nor was the eugenics movement

24. *Id.* at 1786 (citing Buck v. Bell, 274 U.S. 200 (1927)).
25. *Buck*, 274 U.S. at 207.
26. *Box*, 139 S. Ct. at 1782-93 (Thomas, J., concurring).
27. *Id.*
28. *Id.* at 1786 (briefly discussing sterilization in the context of *Buck v. Bell*).
29. *Id.*

unduly focused on the reproductive capacities of racial minorities. Instead, the eugenics movement was focused on improving and purifying the white race. Indeed, the eugenics movement's interest in abortion and contraception was principally focused on *limiting* middle and upper class white women's access to these vehicles of reproductive freedom on the ground that the reproduction of these constituencies was necessary for the future of the white race. To the extent that eugenicists were interested in limiting reproduction, their interest was directed toward those individuals who possessed traits deemed unsuitable for the propagation of the white race. And meaningfully, the principal vehicle of their efforts to regulate reproduction among the "unfit" was not contraception or abortion, but rather, sterilization.

This is all to say that in attempting to root abortion and contraception in a history of racial injustice, Justice Thomas neglects the eugenics movement's preoccupation with purifying the white race and its profound appetite for sterilization as the preferred vehicle of reproductive control. Moreover, his conclusion that abortion and contraception are rife with the "eugenic potential"[30] to deracinate marginalized minority groups neglects a more recent history—one that emerged in the wake of the Civil Rights Movement and the expansion of the welfare state—in which sterilization was deployed explicitly for the purpose of limiting the reproductive capacities of those deemed sexually immoral or unduly dependent on the state, usually poor women of color. In this regard, Justice Thomas's narrative not only equates state-sponsored reproductive abuses with an individual's decision to terminate or avoid pregnancy, but also overlooks—and indeed, further obscures—the significant history of racialized sterilization abuse in the United States.

This Article proceeds in four parts. Part I supplements the history undergirding Justice Thomas's *Box* concurrence. Building on Justice Thomas's invocation of *Buck v. Bell*, the 1927 case in which the United States Supreme Court upheld Virginia's eugenics-informed sterilization statute, this Part sheds light on the principal aims of the eugenics movement: improving and purifying the white race. As this Part explains, state-sponsored sterilization programs were

30. *Id.* at 1783.

rooted in the eugenics movement's interest in limiting reproduction to the "fittest" in society. Critically, during this period, the targets of eugenics-inflected reproductive policies were not non-whites, but more often poor whites, like Carrie Buck, the petitioner in *Buck v. Bell*, who were viewed as degrading and debasing the white race with their undesirable genes.

As Part II observes, the eugenics movement's allure waned in the 1940s and 1950s, as its scientific credentials were challenged and it became increasingly associated with the genocidal acts of the Third Reich. Still, as that Part explains, despite waning interest in eugenics, the state interest in sterilization did not abate. Instead, the impulse toward sterilization proceeded under a new rationale—the desire to prevent the morally lax and sexually incontinent from accessing public assistance benefits and overwhelming the state's limited resources. And critically, those targeted for sterilization were no longer the genetically unfit, but rather those whose sexual immorality and dependence on the state threatened to overwhelm the public fisc. In this regard, at the same time the Civil Rights Movement was dismantling de jure segregation and Jim Crow, and the welfare state was expanding to include minorities, southern states were quietly repurposing their state sterilization programs to limit reproduction among those who were unduly dependent—or were assumed to become dependent—on the public fisc. Unsurprisingly, these efforts assumed a decidedly racialized cast as Black women and women of color were disproportionately represented among those targeted for sterilization.

To illustrate the impact of state sterilization abuse during this period and to provide a counterpoint to *Buck v. Bell* and the eugenicist focus on racial purity, Part III considers *Cox v. Stanton*, a 1970s sterilization challenge brought by Ruth Bader Ginsburg and the ACLU's Women's Rights Project. Specifically, that Part recounts the tragic story of Nial Cox, who was involuntarily sterilized by the state of North Carolina when she was a teenager. In challenging North Carolina's sterilization program, Ginsburg and the ACLU acknowledged the program's origins in the eugenics movement, but critically, underscored the degree to which this iteration of state-sponsored sterilization had evolved to target minority women because of race, class, and welfare dependence. As Part III argues,

the tragedy of Nial Cox was no anomaly. During the 1960s and 1970s, there were numerous episodes of state-sponsored sterilization abuse.

With Part IV, the Article comes full circle, returning to Justice Thomas's concurrence in *Box v. Planned Parenthood of Indiana and Kentucky*. As that Part explains, Thomas's association of abortion with eugenics seeks to locate abortion within the landscape of racial injustices that targets communities of color, and the Black community, in particular. But to the extent this narrative undergirds the view that reproductive rights are rooted in racial injustice, the argument falls wide of the mark. As an initial matter, this narrative overlooks a broad history in which the eugenic interest in reproduction was largely directed at promoting white purity and white supremacy. And, in associating contemporary state support for reproductive rights with the racialized harms of eugenics, this narrative conveniently overlooks the more recent history of targeted sterilization abuse of minority communities.

As Part IV maintains, these oversights have significant consequences. Not only does this neglected history suggest a more complicated relationship between reproductive rights and racial injustice than Justice Thomas's narrative allows, but it also makes clear that the conventional understanding of "reproductive rights" is unduly limited to the narrow constitutional protections that exist for abortion and contraception. The broader history of state-sponsored sterilization abuse—from the eugenics movement to the present day—makes clear that access to abortion and contraception does not exhaust the full range of reproductive rights concerns. We should understand sterilization abuse—and indeed, any method of reproductive control that seeks to strip individuals of the choice to procreate—as an imposition on reproductive freedom.

Critically, centering sterilization abuse alongside abortion and contraception as part of the landscape of reproductive rights concerns highlights the strong correlation between race and socioeconomic status and vulnerability to reproductive control. In this regard, reorienting the landscape of reproductive rights to include sterilization abuse emphasizes the degree to which the extant discourse of reproductive rights may focus unduly on the rights of those who enjoy race and class privilege while overlooking

persistent impositions on the reproductive rights of marginalized communities. A brief conclusion follows.

I. RACE, STERILIZATION, AND THE EUGENICS MOVEMENT

The origins of the eugenics movement have been traced to Sir Francis Galton, an English scientist whose interest in the science of heredity was piqued by Charles Darwin's theory of natural selection, which posited that over time, the weakest species become extinct.[31] Convinced that "[w]hat Nature does blindly, slowly, and ruthlessly, man may do providently, quickly, and kindly," Galton sought to replace the natural evolution of the species with "affirmative state intervention" aimed at promoting the very best of humankind.[32] "Eugenics"—taken from the Greek root meaning "good in birth"—was "'the science of improving stock' by allowing 'the more suitable races or strains of blood a better chance of prevailing speedily over the less suitable than they otherwise would have had.'"[33] Because character and intelligence were presumed to be heritable qualities, eugenicists argued that society should encourage the procreation of those of superior lineage, while discouraging procreation among—and public support for—those of inferior lineage.[34]

Unsurprisingly, Galton's eugenic theories were underwritten by a deep-seated belief in "genetic distinctions between [the] races."[35] Eugenic theory posited that the human species was divided into different races, each with its own distinctive features and characteristics.[36] According to Galton: "The Mongolians, Jews, Negroes, Gipsies, and American Indians severally propagate their kinds; and each kind differs in character and intellect, as well as in colour and

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31. DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 59 (1997).

32. *Id.*

33. *Id.* (quoting FRANCIS GALTON, INQUIRIES INTO HUMAN FACULTY AND ITS DEVELOPMENT 24-25 (1883)).

34. *Id.* at 59-60.

35. *Id.* at 60.

36. *Id.*; *see also* Sonia M. Suter, *A Brave New World of Designer Babies?*, 22 BERKELEY TECH. L.J. 897, 904 (2007) (noting that eugenicists of the 1920s "conflated national and racial identity and believed that race determined behavior").

shape, from the other four."[37] Notably, Blacks were distinctive from other racial groups in their "strong impulsive passions," their "remarkabl[e] domestic[ity]," and were "endowed with such constitutional vigour, and [were] so prolific, that [their] race [was] irrepressible."[38] At a time when white Americans openly worried that their ranks would be overwhelmed by the fecundity of immigrants and newly freed Blacks,[39] it is unsurprising that "eugenic theories ... took root and flourished in the United States."[40]

By the early twentieth century, the American legal landscape was dotted with laws that reflected both anxiety about demographic change *and* an interest in regulating white reproduction in the name of eugenics. For example, the concern that the birth rate among immigrants and non-whites was outpacing the birth rate among native-born white women animated the campaigns to criminalize abortion and contraceptive use in the postbellum era.[41] On this account, eugenics ideology valorized white, middle-class reproduction as necessary to advance American nation building, while simultaneously "derid[ing] working class, immigrant, and other women as both hyper-fecund and unfit" for both motherhood and nation building.[42]

But "positive" eugenics's interest in controlling (and encouraging) white women's reproduction was only part of the equation. The eugenics movement was also deeply focused on ensuring that only the *fittest* of the white race reproduced.[43] To this end, the eugenics movement spearheaded the expansion of laws criminalizing miscegenation and interracial marriage in an effort to prevent the

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37. ROBERTS, *supra* note 31, at 60.

38. *Id.*

39. *See* Nicola Beisel & Tamara Kay, *Abortion, Race, and Gender in Nineteenth-Century America*, 69 AM. SOCIO. REV. 498, 509 (2004); MADISON GRANT, THE PASSING OF THE GREAT RACE OR THE RACIAL BASIS OF EUROPEAN HISTORY 66 (1916) (lamenting the demographic catastrophe of World War I and the possibility of racial degradation).

40. Melissa Murray, *Race-ing* Roe*: Reproductive Justice, Racial Justice, and the Battle for* Roe v. Wade, 134 HARV. L. REV. 2025, 2037 (2021).

41. *See* Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 285 n.87, 297-300 (1992).

42. Lisa C. Ikemoto, *Infertile by Force and Federal Complicity: The Story of* Relf v. Weinberger, *in* WOMEN AND THE LAW STORIES 179, 185 (Elizabeth M. Schneider & Stephanie M. Wildman eds., 2011).

43. Khiara M. Bridges, *White Privilege and White Disadvantage*, 105 VA. L. REV. 449, 465-67 (2019).

"mongrelization" of the white race.[44] Federal level immigration policy also became a proving ground for eugenicist logic. In the name of improving the country's gene pool, the eugenics movement championed immigration laws and policies that encouraged immigration from Northern Europe, while discouraging immigration from Southern Europe, Asia, and Africa.[45]

But closer to home, the eugenics movement also sought to safeguard the country's genetic destiny by preventing those with undesirable genetic traits from reproducing.[46] In the early twentieth century, a number of states enacted eugenics-informed laws permitting the sterilization of the "feebleminded"[47] and "habitual criminals."[48] The eugenicist interest in sterilization spoke to both the concern with limiting reproduction among those deemed "undesirable" and the broader interest in cultivating "the fittest" of the race.[49] Sterilization of the "unfit" prevented the proliferation of undesirable traits, like mental illness, disability, and criminality, that were presumed to be heritable.[50] Moreover, sterilization assisted with population control, curbing excess reproduction and fostering an environment that was believed to be more conducive to sustainable human development and growth.[51]

And critically, sterilization was a crucial means of maintaining the purity of the white race. *Buck v. Bell* is instructive on this point. For most scholars of constitutional law, *Buck* has long been associated with the triumph of eugenics at the United States Supreme Court. But, perhaps less obviously, the decision also speaks to the

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44. ROBERTS, *supra* note 31, at 268; *see also* Matthew J. Lindsay, *Reproducing a Fit Citizenry: Dependency, Eugenics, and the Law of Marriage in the United States, 1860-1920*, 23 LAW & SOC. INQUIRY 541, 546 & n.7 (1998).

45. *See* Suter, *supra* note 36, at 907 (noting that eugenic principles were "central to the passage of the Immigration Restriction Act of 1924, which set quotas limiting the immigration of 'biologically inferior' ethnic groups into the United States and favored the entrance of Northern Europeans"); Robert J. Cynkar, Buck v. Bell*: "Felt Necessities" v. Fundamental Values?*, 81 COLUM. L. REV. 1418, 1432 (1981).

46. Khiara M. Bridges, *Race, Pregnancy, and the Opioid Epidemic: White Privilege and the Criminalization of Opioid Use During Pregnancy*, 133 HARV. L. REV. 770, 830-31 (2020) (discussing the eugenics movement's interest in racial purity and improvement).

47. ROBERTS, *supra* note 31, at 69; Suter, *supra* note 36, at 906.

48. ROBERTS, *supra* note 31, at 268; Lindsay, *supra* note 44, at 570.

49. Murray, *supra* note 40, at 2038.

50. *Id.* at 2056-60.

51. *Id.* at 2046.

underlying racial politics of the eugenics movement. The Section that follows explores this aspect of *Buck v. Bell* and its relationship to the eugenics movement.

A. Buck v. Bell *and the Racial Politics of the Eugenics Movement*

Decided in 1927—the same year that Virginia enacted the eugenics-inflected Racial Integrity Act, which would proscribe miscegenation and interracial marriage[52]—*Buck* was a challenge to a Virginia state statute that authorized the compulsory sterilization of the intellectually disabled in the name of eugenics.[53]

The question before the Court was whether Virginia's eugenics-informed sterilization statute, which authorized the sterilization of eighteen-year-old Carrie Buck on the ground that she was "feeble minded," violated the Constitution.[54] Virginia argued that the statute was a permissible use of the state's police power to legislate for the general welfare of its citizens.[55] Writing for the majority, Justice Holmes echoed the logic of the eugenics movement.[56] As he explained, the legislature's conclusion that sterilization would promote the "welfare ... of society" was not unjustified.[57] After all, upon being diagnosed a "[m]oron," Carrie Buck was institutionalized at Virginia's Colony for Epileptics and Feebleminded,[58] the same institution to which her mother—also judged "feebleminded"—had been committed years earlier.[59] Noting that Buck, her mother, and

52. *See* Loving v. Virginia, 388 U.S. 1, 6, 11-12 (1967) (striking down the Racial Integrity Act of 1927 as an impermissible expression and endorsement of "White Supremacy").

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

54. *Id.* at 205.

55. *Id.* at 203.

56. *Id.* at 205-06 ("[E]xperience has shown that heredity plays an important part in the transmission of insanity, imbecility, [et cetera.]").

57. *Id.* at 207.

58. *Id.* at 205.

59. Whether Emma Buck was actually cognitively impaired is a matter of considerable debate. *See* ADAM COHEN, IMBECILES: THE SUPREME COURT, AMERICAN EUGENICS, AND THE STERILIZATION OF CARRIE BUCK 270 (2017); PAUL A. LOMBARDO, THREE GENERATIONS, NO IMBECILES: EUGENICS, THE SUPREME COURT, AND *BUCK V. BELL* x-xi (2008) (characterizing *Buck v. Bell*—and the underlying diagnoses of Carrie Buck and her relatives—as "a legal sham"). Meaningfully, her diagnosis followed the birth of two children out of wedlock and allegations that the young widow had turned to prostitution in order to support her children, strongly suggesting that the diagnosis and her institutionalization reflected an interest in sexual control, as much as mental health. *See* Paul A. Lombardo, *Three Generations, No*

her newborn daughter had all been judged intellectually disabled,[60] Holmes embraced the sterilization law—and the eugenics logic that undergirded it—as a permissible expression of the state's police power to legislate for the health and welfare of its citizens.[61] As the "potential parent of socially inadequate offspring, likewise afflicted,"[62] Buck's (alleged) disabilities could be easily transmitted to her children (and to their children) in an unending lineage of disability and deficiency.

And critically, the prospect of Buck and her progeny as dependents on the public fisc loomed large in the Court's disposition of the case. As Holmes noted, individuals like Carrie Buck "already sap[ped] the strength of the State" with their indigence and dependence.[63] Limiting the ability of such individuals to reproduce (thereby limiting their opportunities to reproduce their disability, immorality, and poverty) was a "lesser sacrifice[ ]" that would "prevent [society] being swamped with incompetence."[64] Rather than "waiting to execute degenerate offspring for crime, or to let them starve for their imbecility," Holmes reasoned, "society can prevent those who are manifestly unfit from continuing their kind."[65]

Although Holmes's opinion for the Court is infamous for its callous invocation that "[t]hree generations of imbeciles are enough,"[66] it was not laced with the explicit racism that often accompanied eugenics-informed statutes and policies. Nevertheless, the specter of race haunted *Buck v. Bell*. Recall that among the central concerns of eugenics was cultivating the "fittest" of the species and maintaining racial purity.[67] To be sure, Carrie Buck was a white woman, but

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Imbeciles: New Light on Buck v. Bell, 60 N.Y.U. L. REV. 30, 53-55 (1985) (suggesting that Carrie Buck was institutionalized in order to cover up—or punish her for—her sexual assault and the resulting illegitimate birth).

60. *Buck*, 274 U.S. at 205 ("Carrie Buck is a feeble minded white woman who was committed to the State Colony above mentioned in due form. She is the daughter of a feeble minded mother in the same institution, and the mother of an illegitimate feeble minded child.").

61. *Id.* at 207 ("The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes." (citing Jacobson v. Massachusetts, 197 U.S. 11 (1905))).

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *See supra* text accompanying notes 49-50.

her whiteness did not insulate her from the coercive forces of the state. Indeed, as Professor Khiara Bridges has noted, Buck's whiteness was likely *the reason* she was targeted for sterilization.[68] Eugenics-inflected sterilization laws were not simply aimed at preventing the transmission of undesirable traits, they aimed to cultivate the best of the race—the white race.[69]

On this account, Carrie Buck, who was poor, under-educated, and unchaste, was not performing whiteness in the manner prescribed by the eugenics logic of her time.[70] Given her circumstances, it was hardly surprising that Dr. Albert Priddy, the director of the Colony where Buck was institutionalized, categorized her as part of "the shiftless, ignorant, and worthless class of antisocial whites of the South"[71] who posed, as much as people of color, a threat to the purity of the white race.[72]

If cultivating the fittest of the race was the ultimate goal, it could not be achieved by focusing exclusively on preventing racial heterogamy and stanching demographic change. The interest in racial purity demanded the cultivation of the most desirable traits, while simultaneously limiting those traits deemed deleterious and destructive. In this regard, *Buck v. Bell* was not simply about Virginia's antipathy for the cognitively disabled, but also about its investment in racial purity and betterment.

Fifteen years after the Court concluded that "[t]hree generations of imbeciles are enough,"[73] it took up another compulsory

68. Bridges, *supra* note 46, at 831 (observing that it was "no accident" that Carrie Buck "was a white woman," as "eugenic sterilization was about *white* racial improvement. It was designed to protect and perfect *white* racial stock. As a result, white people were those who were in the crosshairs of pseudoscientists operating under the banner of eugenics."); Bridges, *supra* note 43, at 474 (speculating that if Carrie Buck had "not been white, she probably would not have been sterilized. Which is to say: *Her white privilege may be demonstrated by her being an object of eugenic interest in the first instance*.").

69. Bridges, *supra* note 43, at 465 ("[T]he eugenics movement was always about protecting the *white race* from degeneration."); Angela P. Harris, *Equality Trouble: Sameness and Difference in Twentieth-Century Race Law*, 88 CALIF. L. REV. 1923, 1975 (2000) ("The new science of eugenics seemed to place the perfection of the white race within reach if only whites could be persuaded to adopt its principles as guides for private life and public policy.").

70. Bridges, *supra* note 43, at 462-65.

71. LOMBARDO, *supra* note 59, at 134.

72. COHEN, *supra* note 59, at 58 ("Southern eugenicists were particularly concerned with the lowest economic class, people often disparagingly referred to as 'poor white trash,' who were seen as repositories of the worst of the white race's germplasm.").

73. Buck v. Bell, 274 U.S. 200, 207 (1927).

sterilization case. *Skinner v. Oklahoma* was a challenge to Oklahoma's Habitual Criminal Sterilization Act, which authorized the sterilization of those thrice convicted of crimes of moral turpitude.[74] Like the Virginia statute upheld in *Buck v. Bell*, the Oklahoma law was deeply informed by eugenics.[75] However, by the time the Supreme Court took up the challenge to the Oklahoma law, eugenics thinking had lost some of its luster.[76] As the *Skinner* Court acknowledged, "[i]n evil or reckless hands," the power to sterilize "can cause races or types which are inimical to the dominant group to wither and disappear."[77]

Yet, despite conceding that sterilization could easily lead to deracination, the *Skinner* Court did not completely disavow the state's authority to sterilize individuals in the name of social welfare. Noting that it did not wish "to reexamine the scope of the police power of the States,"[78] the Court instead focused on the equality concerns that the challenged statute raised. Noting the punitive use of sterilization, its implications for "one of the basic civil rights of man,"[79] and the fact that the Oklahoma law exempted those convicted of "offenses arising out of the violation of the prohibitory laws, revenue acts, embezzlement, or political offenses"[80] from its ambit, the Court struck down the statute as "a clear, pointed, unmistakable discrimination."[81]

By narrowly focusing on the punitive use of sterilization and the statute's impermissible distinction between "blue collar" and "white collar" crimes, the *Skinner* Court avoided the broader questions of whether the Due Process Clause imposed any limit on state police power to sterilize those with disabilities or whether *Buck v. Bell* was

74. 316 U.S. 535, 536 (1942).

75. VICTORIA F. NOURSE, IN RECKLESS HANDS: *SKINNER V. OKLAHOMA* AND THE NEAR TRIUMPH OF AMERICAN EUGENICS 75-87 (2008) (discussing the political milieu in which the Habitual Criminal Sterilization Act was enacted).

76. Mary Ziegler, *Reinventing Eugenics: Reproductive Choice and Law Reform After World War II*, 14 CARDOZO J.L. & GENDER 319, 319-21 (2008) (noting scholars attribute shift in post-war eugenics rhetoric to "widespread revulsion" to Nazi sterilization policies).

77. *Skinner*, 316 U.S. at 541.

78. *Id.*

79. *Id.*

80. *Id.* at 537.

81. *Id.* at 541.

improperly decided.[82] As a consequence, the states remained free to maintain compulsory sterilization programs.

The Court's announcement of its decision in *Skinner* roughly coincided with the decline of the eugenics movement in the United States. The *Skinner* Court's warning about the dangers of eugenic sterilization "[i]n evil or reckless hands"[83] seemed eerily prescient as the horrors of the Third Reich came to light in the late 1940s. In addition to its associations with Nazism and the extermination of religious and ethnic minority groups, the eugenics movement was also discredited and diminished in the face of considerable skepticism and challenges from the scientific community.[84] As a consequence, the rate of state-sponsored sterilizations abated in the 1950s and 1960s, and some jurisdictions repealed their sterilization statutes.[85]

Nevertheless, the threat of forced sterilization persisted under a different rationale. Rather than focusing explicitly on eugenics, proponents of involuntary sterilization touted it as a means of preventing excessive dependence on the state. Specifically, sterilization was lauded as a vehicle for preventing the births of children "whose parents could not adequately care for them."[86] On this reasoning, sterilization continued to target the disabled, though the rationale subtly shifted away from "the nature-based genetic rationale for eugenics" toward a "nurture-based explanation" that centered on the privatization of dependency.[87] But critically, the

82. *See id.* at 542 (distinguishing the Virginia statute challenged in *Buck* from the Habitual Criminal Sterilization Act challenged in *Skinner*); *see also* Paul A. Lombardo, *Medicine, Eugenics, and the Supreme Court: From Coercive Sterilization to Reproductive Freedom*, 13 J. CONTEMP. HEALTH L. & POL'Y 1, 24 (1996) ("*Skinner* qualified, but did not overrule *Buck*."); Robert L. Burgdorf, Jr. & Marcia Pearce Burgdorf, *The Wicked Witch Is Almost Dead:* Buck v. Bell *and the Sterilization of Handicapped Persons*, 50 TEMP. L.Q. 995, 1011 (1977) (noting that *Skinner* "does not ... overrule" *Buck*); Murray, *supra* note 40, at 2059 ("Although *Buck v. Bell* has been discredited, it has never been formally overruled.").

83. *Skinner*, 316 U.S. at 541.

84. PHILIP R. REILLY, THE SURGICAL SOLUTION: A HISTORY OF INVOLUNTARY STERILIZATION IN THE UNITED STATES 128 (1991); Michael G. Silver, Note, *Eugenics and Compulsory Sterilization Laws: Providing Redress for the Victims of a Shameful Era in United States History*, 72 GEO. WASH. L. REV. 862, 870 (2004) ("Around the same time, the scientific community began to debunk the theories behind eugenics.").

85. REILLY, *supra* note 84, at 148 (noting the repeal of state eugenics statutes in the postwar period).

86. Ikemoto, *supra* note 42, at 186.

87. *Id.*

interest in preventing the births of those whose families were unlikely or unable to provide adequate care also gave rise to a class-oriented rendering of sterilization. Perhaps recalling *Buck v. Bell*'s admonition about those who "sap the strength of the State,"[88] sterilization was now viewed as a means of reducing demands on the public fisc and public resources.

B. Race, Dependence, and the Changing Character of State-Sponsored Sterilization

In 1973, when *Roe v. Wade* announced a constitutional right to abortion,[89] twenty-three states still had forced sterilization statutes on the books.[90] But critically, the populations targeted for sterilization differed dramatically from those targeted in the heyday of eugenics. In the 1920s, Carrie Buck's whiteness (and her failure to comport with the norms of white middle class domesticity) made her the focus of the state's eugenic interest.[91] During this period, communities of color were not likely to be the focus of the state's efforts to defend the white race from genetic debasement.[92] After all, according to eugenics logic, non-white races were *already* debased.[93] By the same token, the realities of segregation in the early twentieth century meant that non-whites were almost always excluded from state facilities for the cognitively disabled, where so many sterilizations were performed.[94]

But the landscape changed dramatically in the 1960s and 1970s. In the 1960s, as the Civil Rights Movement brought political and

88. Buck v. Bell, 274 U.S. 200, 207 (1927).

89. 410 U.S. 113, 154 (1973).

90. Jack Slater, *Sterilization: Newest Threat to the Poor*, EBONY, Oct. 1973, at 154.

91. Bridges, *supra* note 46, at 831.

92. *Id.* ("For the most part, nonwhite people were not subjects of eugenic sterilization during this time. Nonwhite people were a concern to eugenicists only to the extent that they wanted to keep these patently inferior people, and their obviously substandard genes, away from white people. Thus, antimiscegenation laws evidenced the only site at which eugenicists were interested in nonwhite people. The other two points of eugenicists' program for racial improvement—immigration reform and coercive sterilization laws—were solely, and doggedly, about white people." (footnotes omitted)).

93. *Id.*

94. MATT WRAY, NOT QUITE WHITE: WHITE TRASH AND THE BOUNDARIES OF WHITENESS 168 n.35 (2006) ("Southern institutions had overwhelmingly white populations because blacks were generally not considered worthy of the expense of welfare.").

social gains for Blacks, welfare rights groups lobbied successfully to expand public assistance programs to include non-white women.[95] Together, these developments suggested a shifting social landscape, particularly in the South.[96] As the welfare rolls swelled to include women of color, state officials began to use welfare benefits to coerce consent to sterilization.[97] Many states, like North Carolina, used extant sterilization statutes, which sought to sterilize those with cognitive disabilities, to target women on public assistance.[98] Reasoning that an out-of-wedlock child reflected immorality, which in turn reflected cognitive disability, these states demanded that unmarried mothers consent to sterilization as a condition of continued receipt of public benefits.[99]

North Carolina was not alone in its targeting of welfare recipients for sterilization. In the early 1970s, five states considered bills that would explicitly coerce welfare recipients to submit to sterilization as a condition of benefits.[100] For example, Tennessee considered a bill to offer "voluntary" sterilization to welfare recipients who had more than one child out of wedlock.[101] If the mother refused to "volunteer" for sterilization, her benefits payments would be cut off and the State would have the right to take away any of her future children.[102] Likewise, Ohio made sterilization a prerequisite for state aid for certain mothers.[103] In other states, welfare eligibility was accompanied by "family caps," which imposed financial disincentives to having additional children.[104] In 1970, the Supreme

95. *See* Gene Demby, *The Mothers Who Fought to Radically Reimagine Welfare*, NPR (June 9, 2019, 9:49 AM), https://www.npr.org/sections/codeswitch/2019/06/09/730684320/the-mothers-who-fought-to-radically-reimagine-welfare [https://perma.cc/WK2Q-RVBU].

96. Indeed, as Professor Serena Mayeri notes, sterilization programs, in tandem with laws imposing legal impediments on illegitimacy, were widely understood as "thinly veiled attacks" on the prospects of desegregation and expanded civil rights for Blacks. Serena Mayeri, *Marital Supremacy and the Constitution of the Nonmarital Family*, 103 CALIF. L. REV. 1277, 1285 (2015).

97. Laura T. Kessler, *"A Sordid Case":* Stump v. Sparkman*, Judicial Immunity, and the Other Side of Reproductive Rights*, 74 MD. L. REV. 833, 893 (2015).

98. *See* Slater, *supra* note 90, at 150, 154.

99. Dorothy E. Roberts, *Crime, Race, and Reproduction*, 67 TUL. L. REV. 1945, 1971 (1993).

100. Evelyn Smith, *End Forced Sterilization!*, WONAAC, Summer 1973, at 2, 2-3.

101. *Sterilization—Another Part of the Plan of Black Genocide*, BLACK PANTHER, May 8, 1971, at 2.

102. *Sterilize Welfare Mothers?*, BLACK PANTHER, May 1, 1971, at 4.

103. Smith, *supra* note 100, at 3.

104. Kessler, *supra* note 97, at 876.

Court, in *Dandridge v. Williams*, concluded that states could impose family cap laws as a permissible condition of welfare eligibility.[105]

In addition to the conditioning of welfare benefits and family caps, in 1968, the United States Department of Health, Education, and Welfare (HEW) began financing "voluntary" sterilization of minors.[106] In 1974, on the heels of *Roe v. Wade*, HEW developed a funding scheme that provided states with more generous reimbursement for sterilizations than for abortions.[107] The federal program, in tandem with the conditions on welfare benefits, offered states strong incentives in favor of sterilizing poor women and their daughters.[108] Indeed, in the early 1970s, between 100,000 and 150,000 low-income people were sterilized annually under federally funded programs.[109] Mothers who received welfare benefits were frequently pressured to consent to sterilization while undergoing the stress of childbirth.[110] Another common practice was to require "consent" to subsequent sterilization as a condition for receiving an abortion.[111] Indeed, a 1968 survey of over five-hundred teaching hospitals found that more than half of the hospitals used sterilization as a condition for approving an abortion request.[112]

To be sure, race played a significant role in coercive sterilizations. According to a 1970 national fertility study, 20 percent of married Black women who practiced contraception had been sterilized compared to just 8 percent of married white women who practiced contraception.[113] North Carolina administered one of the most robust sterilization programs. During the 1960s, Black people accounted for about 25 percent of the state's population but comprised 60 percent of those subject to state sterilization.[114]

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105. 397 U.S. 471, 477-78 (1970).

106. Les Payne, *Forced Sterilization for the Poor?*, S.F. CHRON., Feb. 26, 1974, at 19.

107. Kessler, *supra* note 97, at 876.

108. *Id.* at 876-77.

109. *See* Relf v. Weinberger, 372 F. Supp. 1196, 1199 (D.D.C. 1974), *vacated as moot*, 565 F.2d 722 (D.C. Cir. 1977) (per curiam); *see also* Kessler, *supra* note 97, at 880 (discussing *Relf* and the association between welfare receipt and coercive sterilization practices).

110. Gail Kennard, *Sterilization Abuse*, ESSENCE, Oct. 1974, at 66, 66-67; Kessler, *supra* note 97, at 883.

111. *See* Kessler, *supra* note 97, at 883.

112. Smith, *supra* note 100, at 2.

113. Kennard, *supra* note 110, at 66.

114. Lutz Kaelber, Assoc. Professor Socio., Univ. Vt., Presentation at 37th Ann. Soc. Sci. Hist. Ass'n Meeting: Histories of Capitalism (Nov. 1-4, 2012), http://www.uvm.edu/~lkaelber/

The following Part concretizes the realities and harms of coercive sterilization during this period. Using a little-known sterilization case, *Cox v. Stanton*, as a point of entry, it provides a glimpse of the consequences and implications of coercive sterilizations for poor women of color.

II. *COX V. STANTON* IN CONTEXT

In 1964, Shelton Owens Howland, a welfare case worker, made a routine visit to the Cox family in Plymouth, North Carolina.[115] Charged by the state of North Carolina with ensuring that public assistance benefits were properly distributed and that recipients were conducting themselves appropriately, Howland took a particular interest in the Coxes.[116] Headed by Devora, a single mother of nine, the family was desperately poor, living in mean conditions without access to running water, a stove, or a refrigerator.[117] Howland's particular interest in the family did not center on their living conditions, but rather on Devora's eldest daughter, seventeen-year-old Nial Ruth Cox, who was then unmarried and pregnant.[118]

Howland disapproved of Nial's pregnancy. In the caseworker's view, the teenager's pregnancy reflected both loose morals and an inevitability that, eventually, Nial herself would be forced to apply for public assistance, perpetuating the family's legacy of poverty and dependence.[119] With all this in mind, Howland moved quickly to take command of the situation. Once Nial had given birth, Howland informed Devora and Nial that the family would lose their welfare benefits unless Nial underwent a procedure to prevent any future pregnancies.[120] Years later, Nial recounted the experience: "They

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eugenics/ [https://perma.cc/ED7E-HBJR]; *see also* Brenda Onyango, State Facilitated Violence Against Black Women in North Carolina Through the Lens of Eugenic Sterilization 34 (Apr. 20, 2016) (undergraduate thesis, Duke University), https://dukespace.lib.duke.edu/dspace/bitstream/handle/10161/11955/BrendaOnyangoFinalDraft2016Version2.pdf [https://perma.cc/5ST4-R6YC].

115. Complaint at 3-4, 6, Cox v. Stanton, 381 F. Supp. 349 (E.D.N.C. 1974) (Civil Action No. 800).

116. *Id.*

117. Kessler, *supra* note 97, at 878.

118. *Id.*

119. *See* Complaint, *supra* note 115, at 7.

120. *Id.* at 19.

told me that my brothers and sisters were going to be in the streets all because of [me]."[121]

The withdrawal of welfare benefits was a significant threat—one that Devora took seriously. In order to maintain the benefits for herself and her eight minor children, Devora agreed to allow Nial to undergo the proposed surgery.[122] According to Devora, she was told that the procedure was reversible and Nial later claimed that the doctor reassured her both before and after the operation that she would be able to have more children.[123] These assurances, however, were unavailing. Instead of performing a tubal ligation, which is potentially reversible, Dr. A.M. Stanton performed a bilateral partial salpingectomy, an irreversible sterilization procedure.[124] Although Stanton insisted that he explained to Nial and Devora that the procedure would result in permanent sterilization, he conceded that welfare officials often employed coercive tactics to convince women to consent to sterilization—a practice Stanton appeared to endorse.[125] As he explained to a journalist, "[w]e have a lot of mentally deficient people who should be sterilized. The people have to pay the welfare for these children."[126]

Because North Carolina's sterilization law permitted the sterilization of cognitively impaired minors with their parents' consent, in documenting Nial's procedure, Stanton described the girl as "mentally deficient."[127] Meaningfully, Nial was not evaluated for, nor was there any evidence of, a cognitive disability.[128] Relatedly, it

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121. Kim Severson, *Thousands Sterilized, a State Weighs Restitution*, N.Y. TIMES (Dec. 9, 2011), https://www.nytimes.com/2011/12/10/us/redress-weighed-for-forced-sterilizations-in-north-carolina.html [https://perma.cc/DS79-HFWA]. Howland's concerns were perhaps overstated. Because Nial was eighteen years old, Devora received no public assistance benefits for Nial and her infant daughter.

122. Complaint, *supra* note 115, at 7.

123. Ria Tabacco Mar, *The Forgotten Time Ruth Bader Ginsburg Fought Against Forced Sterilization*, WASH. POST (Sept. 19, 2020), https://www.washingtonpost.com/outlook/2020/09/19/sterilization-ruth-bader-ginsburg/ [https://perma.cc/4H34-BM8T].

124. Complaint, *supra* note 115, at 8.

125. *See* JOHN RAILEY, RAGE TO REDEMPTION IN THE STERILIZATION AGE: A CONFRONTATION WITH AMERICAN GENOCIDE 57 (2015); *Sterilization Suit Entered by Former New Bern Woman*, BURLINGTON DAILY TIMES-NEWS, July 13, 1973, at 10A, https://newscomwc.newspapers.com/image/53594450/ [https://perma.cc/8F78-F32T].

126. *Sterilization Suit Entered by Former New Bern Woman*, *supra* note 125, at 10A.

127. Complaint, *supra* note 115, at 9.

128. *Id.* at 7.

appears that the North Carolina Eugenics Board, which administered the state's sterilization program, never held a hearing to determine Nial's cognitive capacity.[129] If a hearing had been conducted, neither Cox nor her mother were given notice or any kind of opportunity to be heard or to dispute any claims of incapacity.[130] Further, at no time was Devora Cox given the opportunity to contest or dispute the prospect of Nial's sterilization as a condition of her continued receipt of welfare benefits.[131]

The situation came to a head five years later when Nial, who was then living in New York City and working as a nurse's assistant, became engaged.[132] Eager to start a family with her fiancé, she went to her gynecologist to discuss reversing the earlier sterilization procedure.[133] Only then did she learn that the operation had left her permanently infertile.[134]

In 1973, only a few months after the Supreme Court issued its decision in *Roe v. Wade* legalizing abortion, Nial Cox filed suit against Howland, Stanton, Washington County Hospital, and other officials who authorized and facilitated her sterilization.[135] The lawsuit, in which she was represented by Ruth Bader Ginsburg and Brenda Feigen Fasteau of the ACLU Women's Rights Project, sought damages and a declaratory judgment that North Carolina's forced sterilization law was unconstitutional.[136] Critically, the lawsuit sought to locate coerced and forced sterilization in the landscape of reproductive rights that *Roe* had so recently highlighted, while also going beyond *Roe*'s narrow emphasis on the unenumerated right to privacy. The complaint maintained that Nial Cox "ha[d] been deprived of substantive and procedural due process and equal protection of the laws, that her privacy ha[d] been invaded, that the statute is impermissibly vague and that she ha[d] been the victim of cruel and unusual punishment."[137] Echoing one

129. *Id.* at 7-8.
130. *Id.*
131. *See id.*
132. *Id.* at 10.
133. *Id.* at 9-10.
134. *Id.* at 10.
135. *Id.* at 3-5; Brief for Appellant at 5, Cox v. Stanton, 529 F.2d 47 (4th Cir. 1975) (No. 74-2218).
136. Complaint, *supra* note 115, at 1.
137. *Id.* at 2.

of Ginsburg's earlier lawsuits, *Struck v. Secretary of Defense*, which challenged an Air Force regulation that required pregnant servicewomen to either terminate the pregnancy or leave military service,[138] the *Cox* lawsuit pointed toward a more robust vision of reproductive rights—one that was not limited to the decision to *avoid* childbearing, but that also included the right to *bear* children free from state interference and coercion.[139]

As importantly, the complaint emphasized that reproductive freedom, or lack thereof, was deeply informed—and indeed, exacerbated—by race, class, and status. Cox's circumstances—from the birth of her daughter out of wedlock to her coerced sterilization—resulted from an interlocking system of reproductive injustices. As the complaint averred, "[a]t the time her daughter was conceived, [Cox] had neither knowledge of, access to nor money for birth control devices."[140] Upon learning that she was pregnant, Cox was obliged to continue her pregnancy, as "an abortion would have been illegal under North Carolina law," and would contradict her own "personal moral and philosophical beliefs."[141] Even if Cox had no moral qualms about terminating her pregnancy, the complaint noted the economic circumstances that constrained her choices—neither she nor her family had the "resources to travel to a jurisdiction where abortions were legal."[142]

In this desert of reproductive choices, Nial Cox had gotten pregnant out of wedlock, and in choosing to maintain her pregnancy and raise her daughter, she had attracted the state's interest, making herself a target for sterilization. Her situation was a testament to the degree to which race, class, and gender all intersected to limit the reproductive choices and freedom of poor women of color. As Ginsburg and Feigen put it in the complaint, "over the years, the Sterilization Statute has been applied discriminatorily on the basis of sex, race, age, marital status, class or welfare status, and the 'legitimacy' of children of the person to be sterilized."[143] The complaint underscored that Nial Cox was "sterilized solely or preponderantly

138. 460 F.2d 1372, 1373-74 (9th Cir. 1971), *vacated*, 409 U.S. 1071 (1972).
139. *See* Complaint, *supra* note 115, at 2.
140. *Id.* at 6.
141. *Id.*
142. *Id.*
143. *Id.* at 11.

because she is a woman, because she is black ... because she was poor and a member of a family receiving welfare payments, and because she was an unwed mother."[144]

And while race, sex, class, and status intersected to effectively target Nial Cox and others like her for coerced sterilization, these intersectionalities further exacerbated the injuries related to her sterilization. In addition to the physical ailments that Cox faced as a result of her sterilization, societal expectations and Cox's own circumstances amplified the mental anguish of her sterility. In a society where marriage and children were a norm of adult life, and womanhood was inextricably intertwined with motherhood, Cox's sterilization effectively foreclosed the prospect of traditional family life.[145] Cox's fiancé broke their engagement when he learned she was unable to bear children,[146] and as the complaint acknowledged, "[t]he reluctance of men to marry women who are unable to bear children makes it unlikely that plaintiff can anticipate marrying" in the future.[147] And indeed, in the absence of marriage, even alternative conduits to family formation were out of range. Eager to give her daughter a sibling, Cox sought to adopt a two-year-old boy, "but was discouraged from formally applying on the ground that her unmarried status would be viewed in an unfavorable light."[148]

Although the *Cox v. Stanton* complaint painted a searing portrait of North Carolina's efforts to permanently limit the reproductive freedom of poor Black women, Ginsburg and Feigen's efforts proved only partly successful. A federal district court dismissed the suit as untimely.[149] Although the Fourth Circuit reversed in part, allowing Cox to sue for damages, it also concluded that Cox lacked standing to challenge the constitutionality of the statute because the forced sterilization program had been effectively shuttered years earlier.[150] On remand and after a brief trial on the damages issue, a jury

144. *Id.* at 11-12.

145. *See* Onyango, *supra* note 114, at 24.

146. Complaint, *supra* note 115, at 10; Tabacco Mar, *supra* note 123; Onyango, *supra* note 114, at 24 (recounting that, according to Cox, her fiancé "did not want half a woman").

147. Complaint, *supra* note 115, at 10-11.

148. *Id.* at 11.

149. Cox v. Stanton, 381 F. Supp. 349, 352–53, 355 (E.D.N.C. 1974), *aff'd and rev'd in part*, 529 F.2d 47 (4th Cir. 1975).

150. *Cox*, 529 F.2d at 48-49.

eventually ruled against Cox.[151] In the end, Cox settled for $7,000 from Dr. Stanton in exchange for abandoning an appeal—a fraction of the damages sought in the initial complaint.[152]

Nial Cox's coerced sterilization was shocking, but it was not anomalous. In an unrelated case, civil rights leader Fannie Lou Hamer testified in court that, during a surgery for the removal of a uterine tumor, she had been permanently sterilized without her consent.[153] Indeed, Hamer reported that 60 percent of Black women admitted to Sunflower City Hospital in her Mississippi hometown had been sterilized—prompting Hamer to colloquially tag these sterilization procedures as "Mississippi appendectom[ies]."[154] The Student Nonviolent Coordinating Committee (SNCC) elaborated on Hamer's account in a pamphlet titled "Genocide in Mississippi," which documented the incidence of sterilization among Mississippi's Black women and analyzed a proposed Mississippi law that would make giving birth to a second or subsequent illegitimate child a felony punishable by sterilization.[155] And while SNCC focused on the sterilization laws in Mississippi, the Mississippi legislature was not alone in its endorsement of forced sterilization. Indeed, throughout the 1960s and 1970s, punitive sterilization laws were proposed throughout the country as a means of reducing the numbers of illegitimate and poor children.[156]

The state interest in forced or coercive sterilization flourished in the administration of public assistance programs. Critically, in the 1960s and 1970s, public assistance became a flashpoint of racial and economic unrest and critique. In 1965, the Moynihan Report condemned the "matriarchal structure" of the Black family as a key factor in the poverty and "deteriorat[ion]" of the Black community.[157]

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151. RAILEY, *supra* note 125, at 71.

152. *Id.*

153. JENNIFER NELSON, WOMEN OF COLOR AND THE REPRODUCTIVE RIGHTS MOVEMENT 68 (2003).

154. *Id.*

155. STUDENT NONVIOLENT COORDINATING COMM., GENOCIDE IN MISSISSIPPI 3-4 (1964); NELSON, *supra* note 153, at 68.

156. NELSON, *supra* note 153, at 68-69; Mayeri, *supra* note 96, at 1286 n.30 (documenting the rash of sterilization bills and illegitimacy restrictions introduced in various state legislatures during this period).

157. U.S. DEP'T OF LAB. OFF. POL'Y PLAN. & RSCH., THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION 29 (1965).

Others argued that family structure, in tandem with dependence on welfare and other forms of public assistance, fostered an unhealthy cycle of poverty and dependence in minority communities.[158] These discourses informed a broader claim that low-income Black women avoided marriage, while embracing motherhood, in order to maximize their eligibility for welfare benefits.[159] As these critiques took root—and coalesced around a narrative of poor Black women's hyperfecundity—sterilization again emerged as a means of controlling the unintended consequences of excessive reproduction.[160]

In this regard, *Cox v. Stanton* was one of a series of coerced sterilization cases involving welfare recipients that received significant media attention and inspired a backlash to forced and coercive sterilization practices.[161] In Montgomery, Alabama, state welfare officials, acting in conjunction with the federal Office of Equal Opportunity (OEO), sterilized Minnie Lee and Mary Alice Relf on the ground that the sisters were attracting the attention of local boys.[162] Arguing that the girls were mentally incapable of understanding the moral and economic consequences of their budding sexuality, welfare officials demanded that the Relf parents consent to interventions aimed at limiting their minor daughters' reproductive capacities.[163]

Initially, the Relf sisters received injections of Depo-Provera, an experimental, long-acting, reversible contraceptive.[164] It was, in effect, a temporary, though reversible, sterilization. Still, as Mr. and Mrs. Relf later explained, they would not have consented to an experimental treatment if they had known that Depo-Provera was

158. *See* ROBERTS, *supra* note 31, at 204–05, 207–08.

159. *See id.*

160. NELSON, *supra* note 153, at 68-69.

161. *See, e.g.*, Smith, *supra* note 100, at 2-3.

162. *Center Brings Suit to Ban Imposed Sterilization and Medical Experimentation on Poor People*, POVERTY L. REP., Sept. 1973, at 4 [hereinafter *Center Brings Suit*], https://digital.archives.alabama.gov/digital/collection/splc/id/0/rec/4 [https://perma.cc/SB4Y-ACBP]; Slater, *supra* note 90, at 150.

163. *Relf v. Weinberger*, S. POVERTY L. CTR., https://www.splcenter.org/seeking-justice/case-docket/relf-v-weinberger [https://perma.cc/H3TV-ZXF4].

164. *Center Brings Suit*, *supra* note 162, at 4.

not FDA-approved for broad distribution.[165] The drug was later discontinued after studies indicated it caused cancer in lab animals.[166]

With Depo-Provera no longer available as a contraceptive measure, local welfare authorities determined that the Relf daughters should be permanently sterilized to avoid the prospect of future pregnancies.[167] As with the administration of Depo-Provera, the Relfs maintained that they had no knowledge that their daughters were to be permanently sterilized.[168] According to their account, they were told that their daughters were going to receive contraceptive injections similar to the Depo-Provera shots that they had previously received.[169] Under these conditions, when presented with the form consenting to the sterilization, Mrs. Relf, who was illiterate, indicated her consent with an "X."[170]

Minnie Lee and Mary Alice's plight made national headlines when the Southern Poverty Law Center filed a lawsuit on behalf of their sister Katie, who managed to avoid sterilization by locking herself in her bedroom when the officials from the OEO arrived to take the Relf daughters to the hospital for the sterilization procedure.[171] Meaningfully, Katie was selected to front the lawsuit because, unlike her sisters, she was "still a member of the class of persons subject to federally funded sterilization."[172] Critically, the case, *Relf v. Weinberger*, did not challenge the underlying sterilization law, but rather, challenged the federal regulations that

165. *Id.* Critically, the use of Depo-Provera on the Relf sisters is consistent with reports of widespread, experimental use of such shots on poor women and disabled women during this time period. *See, e.g.*, *Quality of Health Care—Human Experimentation, 1973: Hearings on S. 2071, S. 2072, and H.R. 7724 Before the S. Subcomm. on Health of the S. Comm. On Lab. & Pub. Welfare*, 93d Cong. 1444 (1973) (opening remarks of Sen. Edward Kennedy) ("Our hearings demonstrated, to the alarm of the then FDA Commissioner Edwards, that Depo-Provera was used widely in the routine practice of medicine throughout the State of Tennessee.... As a result of these hearings, its manufacturer, Upjohn, voluntarily ceased shipping the drug to the Arlington [S]chool [and Hospital for the Mentally Retarded] and to the State family planning units in Tennessee. Upjohn agreed that the use of the drug in Tennessee was inappropriate.").

166. *Center Brings Suit*, *supra* note 162, at 4.

167. *Id.*

168. *Id.*

169. *Id.* at 1.

170. Kessler, *supra* note 97, at 879-80.

171. Ikemoto, *supra* note 42, at 179.

172. Relf v. Weinberger, 372 F. Supp. 1196, 1200 (D.D.C. 1974), *vacated*, 565 F.2d 722 (D.C. Cir. 1977).

funded sterilization as a family planning measure.[173] Thus, while the lawsuit succeeded in establishing that the extant federal programs had failed to implement protocols to ensure that sterilizations were indeed voluntary, it did not challenge—or disrupt—the view that sterilization could be used as a means of regulating reproduction among the poor.[174]

Relf and *Cox* made clear the pervasive use of sterilization abuse against poor women of color. In Aiken, South Carolina, twenty-year-old Marietta Williams, a young Black woman on public assistance, was sterilized after giving birth to her third child.[175] The operation was performed by Dr. Clovis H. Pierce, who routinely refused to treat welfare recipients who had three or more children unless they agreed to be sterilized.[176] Pierce also threatened expectant welfare recipients with the termination of their benefits unless they consented to sterilization.[177] "I work hard to pay my taxes," explained Pierce, "I'm tired of having people come to me to have babies that will have to be supported with tax dollars."[178]

Pierce's views on welfare dependency and the need for sterilization were broadly shared.[179] In the early 1970s, doctors and public health officials across the country turned to sterilization as an effective tool in the effort to combat a wide range of perceived social ills, from welfare dependency and poverty to overpopulation.[180] Critically, however, these efforts were not limited to women in receipt of public assistance; the scourge of coerced sterilization

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173. *Id.* at 1198.

174. *Id.* at 1200.

175. *More Forced Sterilization Cases Unveiled Nationwide*, AFRICAN WORLD, Aug. 25, 1973, at 14.

176. Nancy Hicks, *Sterilization of Black Mother of 3 Stirs Aiken, S.C.*, N.Y. TIMES (Aug. 1, 1973), https://www.nytimes.com/1973/08/01/archives/sterilization-of-black-mother-of-3-stirs-aiken-sc-residents-angered.html [https://perma.cc/SQ8Q-WG84].

177. *Right Not to Be Sterilized*, CIV. LIBERTIES, July 1974, at 8.

178. *Id.*

179. Maya Manian, *Coerced Sterilization of Mexican-American Women: The Story of* Madrigal v. Quilligan, *in* REPRODUCTIVE RIGHTS AND JUSTICE STORIES 97, 98–99 (Melissa Murray et al. eds., 2019).

180. *See* Alexandra Minna Stern, *Sterilized in the Name of Public Health: Race, Immigration, and Reproductive Control in Modern California*, 95 AM. J. PUB. HEALTH 1128, 1129-33 (2005); Marcela Valdes, *When Doctors Took 'Family Planning' into Their Own Hands*, N.Y. TIMES (Feb. 1, 2016), https://www.nytimes.com/2016/02/01/magazine/when-doctors-took-family-planning-into-their-own-hands.html [https://perma.cc/2WMC-QNSQ].

targeted a range of women whose fertility was viewed as excessive or likely to lead to public dependence.

In Los Angeles, for example, hundreds of working-class Latinas were forcibly and coercively sterilized in the late 1960s and the early 1970s.[181] In 1975, ten immigrant women filed suit against the Los Angeles County General Hospital and various physicians.[182] Their complaint, which sought injunctive and monetary relief, alleged that they had been coercively and forcibly sterilized at County General.[183] Known as the Madrigal Ten, the women were Mexican and Central American immigrants who neither read nor spoke English.[184] Although none of the women were welfare recipients when they were sterilized,[185] they maintained that they had been targeted for sterilization because of stereotypes about immigrant women's hyper-fecundity and the view that poor immigrants were inclined toward large families for which they could not provide adequate care.[186]

And while cases like *Cox v. Stanton* and *Madrigal v. Quilligan* underscored the role of state and local entities in forced or coercive sterilization, such policies were not confined to state and municipal actors. Through the administration of state-level public benefits programs, HEW, the federal agency charged with administering block grants to the states, underwrote the coercive sterilization practices challenged in cases like *Cox v. Stanton* and *Relf v. Weinberger*. But the federal government's involvement in forced and coercive sterilization went even further. Under the auspices of the Indian Health Service (IHS), the federal government oversaw the sterilizations of significant numbers of Native American women, often under circumstances in which informed consent was dubious.[187] Indeed, the U.S. Governmental Accountability Office (GAO) found that, between 1973 and 1976, at just four IHS regions, 3,406 Native women were sterilized in conjunction with childbirth or other

181. Stern, *supra* note 180, at 1134-35.
182. *See* Valdes, *supra* note 180.
183. *Id.*
184. Stern, *supra* note 180, at 1134-35.
185. *Id.* at 1134.
186. *Id.* at 1135.
187. Jane Lawrence, *The Indian Health Service and the Sterilization of Native American Women*, 24 AM. INDIAN Q. 400, 404 408 (2000).

gynecological procedures.[188] Of the 3,406 sterilizations performed, 3,001 were performed on women of reproductive age.[189] The impetus for targeting Native women for family planning measures was the high birthrate among Native women.[190]

The federal government's involvement in forced and coercive sterilizations was not limited to Indian Country. In U.S. territories like Puerto Rico, concerns about overpopulation and poverty fueled the interest in sterilization. Indeed, from 1937-1980, compulsory sterilization was legal under the Puerto Rico's territorial laws,[191] and "la operación," a government-sponsored sterilization campaign, resulted in the sterilization of one-third of Puerto Rican women of childbearing age.[192]

* * *

Cox v. Stanton was one of twenty-one challenges that the ACLU brought challenging coercive and forced sterilization statutes.[193] Although the ACLU did not succeed in invalidating sterilization statutes and overruling *Buck v. Bell*, and no court ever reached the merits of Cox's constitutional claims, the lawsuit, in tandem with suits filed on behalf of the Relf sisters and the Madrigal Ten, prompted a public backlash against, and a critical reappraisal of, coercive sterilization practices across the country.[194]

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188. U.S. GOV'T ACCOUNTABILITY OFFICE, HRD-77-3, INVESTIGATION OF ALLEGATIONS CONCERNING INDIAN HEALTH SERVICE 18 (1976).

189. *Id.*

190. According to the 1970 census, Native women bore 3.79 children, in stark contrast to the 1.79 children, which was the median for all groups in the United States. Lawrence, *supra* note 187, at 402.

191. HARRIET B. PRESSER, STERILIZATION AND FERTILITY DECLINE IN PUERTO RICO 6 & n.2 (1973).

192. Dorothy E. Roberts, *BlackCrit Theory and the Problem of Essentialism*, 53 U. MIA. L. REV. 855, 855 (1999); *see also* BETSY HARTMANN, REPRODUCTIVE RIGHTS AND WRONGS: THE GLOBAL POLITICS OF POPULATION CONTROL 247-48 (1995) (discussing sterilization in Puerto Rico).

193. Kessler, *supra* note 97, at 878.

194. *See* Smith, *supra* note 100, at 2-3; Tina Vasquez, *'State of Eugenics' Film Sheds Light on North Carolina's Sterilization Abuse Program*, REWIRE NEWS GRP. (Jan. 30, 2017, 3:23 PM), https://rewirenewsgroup.com/article/2017/01/30/state-eugenics-sheds-light-north-carolinas-sterilization-abuse/ [https://perma.cc/TV93-EJ89].

However, the legacy of these challenges in our understanding of reproductive rights—and the jurisprudence related to reproductive rights—is more muted. As I explain in the following Part, despite these earlier legal challenges, coercive and forced sterilization has not been a focus of the campaign to secure reproductive rights. Instead, reproductive rights activism and agitation has centered on broadening access to abortion and contraception. In this vein, it is not surprising that Justice Thomas's recent interest in the history of reproductive control attempts to associate eugenics with the histories of abortion and contraception, rather than with the lengthy history of eugenics-informed sterilization laws and policies. But, as the following Part maintains, the sidelining of sterilization in reproductive rights jurisprudence comes at a cost.

III. STERILIZATION AND THE UNIVERSE OF REPRODUCTIVE RIGHTS

In the *Box* concurrence, Justice Thomas conflates the history of abortion with the history of birth control to make the case that "abortion is an act rife with the potential for eugenic manipulation."[195] Although abortion and contraception have distinct histories,[196] Justice Thomas's attempt to blur these distinctions is perhaps unsurprising. After all, abortion and birth control stand as the twin pillars of reproductive rights, and ensuring and protecting access to both technologies has been the singular focus of the reproductive rights movement.[197]

But Justice Thomas's effort to blend the histories of abortion and contraception—and to paint both with the brush of racial injustice—misses the mark in two important ways. First, although the eugenics movement traded in racism, its efforts to control reproduction were aimed at optimizing the genetic composition of the

195. Box v. Planned Parenthood of Ind. & Ky., Inc., 139 S. Ct. 1780, 1787 (2019) (Thomas, J., concurring).

196. For discussion of these distinctions, see generally Murray, *supra* note 40.

197. *See* Seema Mohapatra, *Law in the Time of Zika: Disability Rights and Reproductive Justice Collide*, 84 BROOK. L. REV. 325, 339 (2019) ("The reproductive rights movement focused primarily on the need for 'increased access to contraception and abortion.'"); Angela Hooton, *A Broader Vision of the Reproductive Rights Movement: Fusing Mainstream and Latina Feminism*, 13 AM. U. J. GENDER, SOC. POL'Y & L. 59, 61 (2005).

white race.[198] Because the eugenics movement was preoccupied with ensuring white purity and supremacy, its interest in non-white communities was focused on preventing miscegenation and limiting the entry of non-whites and less desirable whites into the country.[199] To the extent the eugenics movement focused directly on controlling reproduction, its efforts were explicitly aimed at controlling *white* women's reproduction.[200] Specifically, the eugenics movement sought to encourage middle-class white women's reproduction by limiting access to abortion and contraception, while simultaneously preventing "unfit" whites—the "feeble minded," the disabled, and those with criminal proclivities—from reproducing through compulsory sterilization programs.[201]

To be sure, some might argue this clarification does not diminish contemporary concerns that abortion may be deployed in a discriminatory fashion to eliminate marginalized groups. But this too risks dangerously conflating two distinct concepts: the state-endorsed eugenics programs of the early twentieth century and contemporary women's individual exercise of reproductive rights. Justice Thomas's argument blurs the distinction between these two concepts by suggesting that constitutional recognition of reproductive rights is consistent with the state's endorsement of eugenics in the early twentieth century. As he notes in the *Box* concurrence, "[t]his Court threw its prestige behind the eugenics movement in its 1927 decision upholding the constitutionality of Virginia's forced-sterilization law."[202] The unstated inference is that, in recognizing individual rights to terminate a pregnancy and use contraception, the Court has bestowed its imprimatur on the modern iteration of eugenic sterilization. And in so doing, the Court has allowed reproductive rights to serve as a "disturbingly effective tool for implementing the discriminatory preferences that undergird eugenics."[203]

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198. *See supra* Part I.

199. *See supra* notes 45-48 and accompanying text.

200. *See supra* notes 44-48 and accompanying text.

201. *See supra* notes 50-55 and accompanying text.

202. *See* Box v. Planned Parenthood of Ind. & Ky., Inc., 139 S. Ct. 1780, 1786 (2019) (Thomas, J., concurring).

203. *Id.* at 1790.

But such a position obscures the considerable difference between the imposition of state-mandated eugenic sterilization and the individual decision to terminate or avoid a pregnancy. As Adam Cohen notes, there are "crucial differences" between eugenic sterilization of the sort credited in *Buck v. Bell* and the decision to choose an abortion, as recognized in *Roe v. Wade*—and the differences lie in "who is making the decision, and why they are making it."[204] Eugenic sterilization reflects both the state's determination about who may or may not reproduce, and the underlying "goal of 'improving' the population."[205] By contrast, in the context of abortion, "a woman decides not to reproduce, for personal reasons related to a specific pregnancy."[206]

Beyond its neglect of these crucial differences, Justice Thomas's effort to paint contraception and abortion as tools of racial injustice misses the mark in its willful blindness to the very real history of state-sponsored sterilization of marginalized groups and communities of color. Although Justice Thomas's concurrence briefly mentions *Buck v. Bell* and forced sterilization, it is only to forge a connection between the Court's embrace of eugenics in 1927 and its embrace of reproductive rights in 1973.[207] Otherwise, Justice Thomas's narrative suggests that the state's interest in eugenics (and compulsory sterilization programs) crested in the 1930s and eventually abated as the pseudo-science lost favor among the American public.[208]

But, as the foregoing discussion makes clear, the interest in state-sponsored sterilization programs did not abate in the 1940s.[209] Most states maintained their sterilization programs during this period.[210] Moreover, in the 1960s and 1970s, as the Civil Rights Movement offered communities of color widened access to the public sphere and

204. Adam Cohen, *Clarence Thomas Knows Nothing of My Work*, THE ATLANTIC (May 29, 2019), https://www.theatlantic.com/ideas/archive/2019/05/clarence-thomas-used-my-book-argue-against-abortion/590455/ [https://perma.cc/7QYK-7WK3].

205. *Id.*

206. *Id.*

207. *See Box*, 139 S. Ct. at 1786 (Thomas, J., concurring).

208. *See id.* ("Support for eugenics waned considerably by the 1940s as Americans became familiar with the eugenics of the Nazis and scientific literature undermined the assumptions on which the eugenics movement was built.").

209. *See supra* Part II.

210. *See supra* Part II.

public benefits, state-sponsored sterilization programs were repurposed as a means of reproductive control.[211]

But it is not just that Justice Thomas's narrative offers a misleading history of abortion and eugenics, while overlooking the more recent history of racialized sterilization abuse; it is that in so doing, Justice Thomas further marginalizes sterilization abuse in the universe of reproductive rights concerns. On Justice Thomas's telling, the entire universe of reproductive rights begins and ends with abortion (principally) and contraception (secondarily). Other forms of reproductive control are utterly absent and as such, escape scrutiny. To be sure, the omission is not solely Justice Thomas's doing. Indeed, the Court's extant reproductive rights jurisprudence, as it is understood by both the Court and advocates, is stubbornly oriented around abortion and contraception.[212] Even where they implicate the same privacy rights as the abortion and contraception cases, cases involving sterilization laws are viewed as distinct from these traditional reproductive rights concerns.[213] This is likely because, unlike abortion and contraception, which are presumed to be individualized and elective, sterilization is often associated with state-endorsed coercion and abuse.[214] And, unlike abortion and contraception, the abusive or coercive imposition of sterilization has, historically, been deployed against marginalized communities.[215]

To fully understand the association of sterilization with marginalized communities, one need only consider the experience of middle-class women seeking access to contraceptive sterilization. Long after the demise of eugenics, and even as they enjoyed access to abortion and contraception, privileged white women have struggled to access contraceptive sterilization.[216] Until the 1970s, private

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211. *See supra* Part III.

212. Sonia M. Suter, *The "Repugnance" Lens of* Gonzales v. Carhart *and Other Theories of Reproductive Rights: Evaluating Advanced Reproductive Technologies*, 76 GEO. WASH. L. REV. 1514, 1517 (2008) ("Although the Supreme Court has developed a substantial body of law that defines reproductive rights, this jurisprudence has focused principally on decisions regarding contraception and abortion.").

213. *See* Kessler, *supra* note 97, at 873 (noting the acoustic separation of the Court's jurisprudence on eugenics and sterilization and its reproductive rights jurisprudence).

214. *See* Cohen, *supra* note 204.

215. *See supra* Part III.

216. *See* Khiara M. Bridges, *Pregnancy and the Carceral State*, 119 MICH. L. REV. 1187, 1199 (2021).

hospitals often invoked the "120 rule" in dealing with their privileged white patients' requests for contraceptive sterilization.[217] Under the rule, sterilization was prohibited unless the woman's age multiplied by the number of children that she had equaled or exceeded 120.[218] The inaccessibility of contraceptive sterilization for affluent white women of childbearing age suggests the degree to which their maternity was favored—indeed, compelled. By contrast, the targeting of Black and Brown women for sterilization in the 1960s and 1970s reflects the devaluation—and indeed, active discouragement—of their maternity. In this way, despite his professed concern about the impact of reproductive rights on marginalized communities, Justice Thomas's understanding of reproductive rights is, perhaps ironically, focused on a subset of rights that are associated with—and likely to be exercised by—women vested with race and class privilege. By contrast, sterilization abuse, and its devastating impact on minority communities, goes largely unremarked upon in Justice Thomas's zeal to paint abortion and contraception with the brush of racism.

Taken together, these insights suggest the degree to which Justice Thomas's narrow (and misleading) focus on abortion, contraception, and eugenics exacerbates the impoverished state of reproductive rights discourse. Not only does the *Box* concurrence's focus on abortion and contraception undersell the eugenic interest in sterilization, in doing so, it also relinquishes an important opportunity to explore the race and class dynamics of reproductive control and to acknowledge the implications of these dynamics for how we value women and their reproductive capacities.

CONCLUSION

In September 2020, a consortium of advocacy groups filed a complaint with the Inspector General of the Department of Homeland Security, condemning the treatment of Immigration and Customs

217. AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS COMM. ON ETHICS, COMMITTEE OP. No. 695 3 (2017), https://www.acog.org/-/media/project/acog/acogorg/clinical/files/committee-opinion/articles/2017/04/sterilization-of-women-ethical-issues-and-considerations.pdf [https://perma.cc/2E78-HFLU] (noting that white middle-class women under the care of private physicians were particularly likely to be denied desired sterilization).

218. *Id.*

Enforcement (ICE) detainees at the Irwin County Detention Center (ICDC) in Georgia.[219] According to the complaint, one of the facility's nurses, Dawn Wooten, had raised concerns "regarding the rate at which hysterectomies are performed on immigrant women under ICE custody at ICDC."[220] According to Wooten, "a lot of women [at ICDC] go through a hysterectomy."[221] Although Wooten acknowledged that some conditions might be severe enough to warrant a hysterectomy or tubal ligation, the sheer number of women who were sterilized at ICDC was alarming—"everybody's uterus cannot be that bad."[222]

And critically, it was not simply the high rates of hysterectomies that concerned Wooten; it was also that basic protocols around informed consent were not being followed. As Wooten explained, "[t]hese immigrant women, I don't think they really, totally, all the way understand [sterilization] is what's going to happen depending on who explains it to them."[223]

The prospect of the mass sterilization of immigrant women in federal custody sparked outrage across the country—at least for a moment.[224] Barely a week after the story of the ICE sterilizations broke, Justice Ginsburg passed away,[225] and eight days later, Seventh Circuit Judge Barrett was nominated to take Justice Ginsburg's place at the high court.[226]

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219. Letter from Inst. for the Elimination of Poverty & Genocide to Joseph V. Cuffari, Inspector General, Dep't Homeland Sec. (Sept. 14, 2020), https://projectsouth.org/wp-content/uploads/2020/09/OIG-ICDC-Complaint-1.pdf [https://perma.cc/5XKP-E3H3] ("Re: Lack of Medical Care, Unsafe Work Practices, and Absence of Adequate Protection Against COVID-19 for Detained Immigrants and Employees Alike at the Irwin County Detention Center.").

220. *Id.* at 2.

221. *Id.* at 18.

222. *Id.* at 19.

223. *Id.*

224. *See, e.g.*, Steven Moore, *ICE Is Accused of Sterilizing Detainees. That Echoes the U.S.'s Long History of Forced Sterilization.*, WASH. POST (Sept. 25, 2020), https://www.washingtonpost.com/politics/2020/09/25/ice-is-accused-sterilizing-detainees-that-echoes-uss-long-history-forced-sterilization/ [https://perma.cc/E4J9-NCA6].

225. Nina Totenberg, *Justice Ruth Bader Ginsburg, Champion of Gender Equality, Dies at 87*, NPR (Sept. 18, 2020, 7:28 PM), https://www.npr.org/2020/09/18/100306972/justice-ruth-bader-ginsburg-champion-of-gender-equality-dies-at-87 [https://perma.cc/JS4M-9XCX].

226. Nina Totenberg, *Amy Coney Barrett: A Dream for the Right, Nightmare for the Left*, NPR (Sept. 28, 2020, 5:00 AM), https://www.npr.org/2020/09/28/917554001/amy-coney-barrett-a-dream-for-the-right-nightmare-for-the-left [https://perma.cc/LRU7-38SW].

Predictably, the news cycle surrounding Barrett's nomination focused on the likely impact of her appointment on the Court and its jurisprudence—particularly, its abortion jurisprudence.[227] Barrett, as a conservative Catholic, it was assumed, would be skeptical of reproductive rights and would likely cast a vote to dismantle *Roe v. Wade*.[228]

It is perhaps ironic, though not entirely unsurprising, that one of the most glaring episodes of coercive sterilization in recent history should be completely overshadowed by the changed composition of the Supreme Court and the fate of abortion rights. As this Article makes clear, even as members of the Court have injected elements of race into the reproductive rights debate, they have failed to locate sterilization abuse in the discussion, focusing narrowly on more traditional reproductive rights fare—abortion and contraception. But as the events of September 2020 make clear, sterilization abuse, as much as abortion rights, is part of the landscape of reproductive control that exists to this day in the United States. The failure to acknowledge and grapple with this reality disserves the concept of reproductive rights and the many women whose lives are irrevocably shaped by the state's efforts to regulate reproduction.

227. *See id.*
228. *See id.*