

THE DYSFUNCTIONAL PROGENY OF EUGENICS: AUTONOMY GONE AWOL

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I would feel more optimistic about a bright future for man if he spent less time proving that he can outwit Nature and more time tasting her sweetness and respecting her seniority.

—E.B. White

I. INTRODUCTION

Nearly eighty years ago, the Supreme Court in one of its most controversial decisions placed its rubber-stamp of approval on a policy of compulsory sterilization for the “feeble-minded,”¹ which unbeknownst to the Supreme Court would portend the adoption of comparable measures in much of Western Europe, including Nazi Germany.² After the atrocities committed by Nazi Germany prior to and during World War II were revealed, the laws under review and supported by *Buck v. Bell* slowly fell out of favor in the United States and Western Europe. Although the decision itself has never been overturned, and some compulsory sterilization laws remain in effect in some jurisdictions,³ there has been a growing effort in the United States to make amends for public policies based on the pseudo-science of eugenics that has since been discredited.⁴

Despite the United States and Europe having long since abandoned official policies based on eugenics, the People’s Republic of China (“PRC”) has embraced policies similar to the antiquated eugenics measures of twentieth century Western nations.⁵ In an

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¹ *Buck v. Bell*, 274 U.S. 200, 205-08 (1927).

² See Paul A. Lombardo, Commentary, “*The American Breed*”: *Nazi Eugenics and the Origins of the Pioneer Fund*, 65 ALB. L. REV. 743, 759-60 (2002).

³ See 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, 872 (2004).

⁴ *Id.* at 886-891.

⁵ See Gail Rodgers, Comment, *Yin and Yang: The Eugenic Policies of the United States and China: Is the Analysis That Black and White?*, 22 HOUS. J. INT’L L. 129, 140 (1999).

attempt to limit the growth of the population and eradicate unfavorable characteristics in that population, China continues to adhere to a population control policy contrary to fundamental human rights, drawing the ire of “progressive” Western nations.⁶

Part I of this article chronicles the history of the eugenics movement in the United States and its counterparts in Europe in the 1920s and 1930s, noting the disastrous consequences in Nazi Germany. When the horrors of the Holocaust surfaced following World War II, most of the Western nations abandoned eugenical sterilization procedures. However, in other countries, most recently the People’s Republic of China, sterilization policies became the *de facto* means of producing a limited, racially superior population. China does not always give families the same reproductive freedom as they might have in the West; in many cases the reproductive rights of families are beholden to the will of government officials. Part II will address this and other coercive measures taken by the Communist Chinese government to both limit population growth and eliminate the “abnormal” from society. At the turn of the twenty-first century, technological advances created an environment in which genetic abnormalities can be eradicated through the use of prenatal and pre-implantation genetic testing in addition to selective abortion. Part III will address this new form of eugenics made possible by such technological advances.

II. YESTERDAY

[A] page of history is worth a volume of logic.

—Justice Oliver Wendell Holmes, Jr.

A. *Eugenics*

A great many people think they are thinking when they are merely rearranging their prejudices.

—William James

“Eugenics,” from the Greek word meaning “well born,”⁷ is an “applied science . . . [w]hich seeks (1) to improve the inherited physical, mental, and temperamental qualities of the human family; (2) to apply human intelligence to man’s biological evolution; (3)

⁶ See U.S. DEP’T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: CHINA (Released by the Bureau of Democracy, Human Rights, and Labor)(2006), <http://www.state.gov/g/drl/rls/hrrpt/2005/61605.htm>.

⁷ Elyce Zenoff Ferster, *Eliminating the Unfit—Is Sterilization the Answer?*, 27 OHIO ST. L.J. 591, 591 (1966).

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to guard and improve man's inherited characteristics."⁸ Throughout much of the first half of the twentieth century, eugenicists, sociologists, and legislators, under the auspices of a "new conscience,"⁹ attempted to rid society of these "mentally deficient" and "socially unfit"¹⁰ individuals. The desire was to construct an American society devoid of persons with a propensity toward criminality or those afflicted with insanity, feeble-mindedness, epilepsy or any number of hereditary diseases.¹¹

The goal of eugenicists in the late nineteenth and early twentieth centuries, to purge society of the unfit, was not an original concept. Indeed, the hypothesis underlying eugenics, that society cannot be burdened with the disabled and effectively advance, existed in Ancient Greece and was supported by philosophers such as Plato, Aristotle, and Socrates.¹² In Ancient Greece, approximately ten days after birth a newborn would be subject to *amphidromia* ("walking around' the hearth"),¹³ at which time the family "must look at our offspring from every angle to make sure we are not taken in by a lifeless phantom not worth the rearing."¹⁴ The "exposure" of a physically defective infant was not equated with homicide,¹⁵ but was instead a generally accepted means of abrogating the burden placed on the family and on society of raising a defective child.¹⁶ "Exposure" was not merely for infants either. In ancient Sparta, young men determined to be too weak for warfare were frequently drowned in rivers or left out to die from exposure.¹⁷

⁸ ELLSWORTH HUNTINGTON, *TOMORROW'S CHILDREN: THE GOAL OF EUGENICS* 9 (1935).

⁹ Jessie Spaulding Smith, *Marriage, Sterilization and Commitment Laws Aimed at Decreasing Mental Deficiency*, 5 J. AM. INST. CRIM. L. & CRIMINOLOGY 364, 364 (1914). Smith's article is an early defense of the passage of then recent eugenical sterilization laws in various states during the "progressive era," in order to eliminate the "drain upon society" these mentally deficient individuals inflict upon the whole of society. *Id.*

¹⁰ *Id.*

¹¹ See J. H. Landman, *The History of Human Sterilization in the United States—Theory, Statute, Adjudication*, 63 U.S. L. REV. 48, 51 (1929).

¹² See Cynthia Patterson, "Not Worth the Rearing:" *The Causes of Infant Exposure in Ancient Greece*, 115 TRANSACTIONS AM. PHILOLOGICAL ASS'N 103, 105–06 (1985) (presenting the history of exposure in Ancient Greece).

¹³ *Id.* at 105.

¹⁴ *Id.*

¹⁵ *Id.* at 106.

¹⁶ *Id.* at 113.

¹⁷ See EDWIN BLACK, *WAR AGAINST THE WEAK: EUGENICS AND AMERICA'S CAMPAIGN TO CREATE A MASTER RACE* 251 (2003). As Andrew Carnegie, U.S. Steel magnate

Another key feature of eugenics is the supposition that it is acceptable, and indeed necessary, for the “intelligent”¹⁸ persons in a society to disseminate knowledge for the betterment of the general population,¹⁹ even if doing so subordinates individual autonomy for the greater good.²⁰ This idea of supplanting individual rights with societal interests determined by the elite is a concept as old as civilization itself.²¹ The Old Babylonian Code of Hammurabi, one of the earliest sets of laws of human civilization dating from 1760 BCE, cites just such a practice of “group elders” assuming responsibility of society, while concurrently maintaining the façade of a “democratic” form of government.²²

Nearly 3,800 years later, the eugenics movement swept across Western Europe and the United States, promulgating a policy of advancing the general welfare of society by sterilizing those individuals deemed “socially inadequate.”²³ Eugenics emerged in response to the growing adoption of Darwinian evolutionary theories, which displaced the Enlightenment principle of equality and the Judeo-Christian canon of the sanctity of human life,²⁴ with a theorem giving an animal ancestry to humans.²⁵ This approach enabled the presupposition that a human hierarchy exists, with morons, imbeciles, the feeble-minded, and the physically disabled at the bottom,²⁶ an elite core of intellectually and physically superior

and financial backer of the Eugenics Record Office stated, “However much we deprecate Spartan ideals and her means of advancing them, we must admire her courage in so rigorously applying so practical a system of selection” *Id.*

¹⁸ Smith, *supra* note 9, at 364.

¹⁹ See THE ENCYCLOPEDIA BRITANNICA: ELEVENTH EDITION, VOLUME IX 885 (1913).

²⁰ See Smith, *supra* note 9, at 364.

²¹ See Matthew Martin III & Daniel C. Snell, *Democracy and Freedom*, in A COMPANION TO THE ANCIENT NEAR EAST 397, 398 (Daniel C. Snell ed., 2005).

²² *Id.*

²³ See Robert J. Cynkar, *Buck v. Bell: “Felt Necessities” v. Fundamental Values?*, 81 COLUM. L. REV. 1418, 1428 (1981).

²⁴ See Richard Weikart, *Darwinism and Death: Devaluing Human Life in Germany 1859-1920*, 63 J. HIST. IDEAS 323, 327 (2002); see also Michael Dudley & Fran Gale, *Psychiatrists as a Moral Community? Psychiatry Under the Nazis and Its Contemporary Relevance*, 36 AUSTL. & N.Z. J. PSYCHIATRY 585, 590 (2002) (arguing that the Judeo-Christian value of compassion was a weakness and enabled cowardice and self-deception).

²⁵ See Weikart, *supra* note 24, at 325.

²⁶ Included in addition to those people deemed mentally deficient and mentally diseased, were: epileptics, manic-depressives, criminals, drunkards, prostitutes, syphilitics, and “chronic paupers.” See PAUL POPENOE & ROSWELL HILL JOHNSON, *APPLIED EUGENICS* 123-137 (1933).

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individuals at the top,²⁷ and everyone else falling somewhere in between.

Prior to the rise of eugenics, people in the United States with mental retardation were generally free from state interference when it came to marriage and having children.²⁸ The legal precept employed to determine whether or not these marriages would be upheld was no different than that used for the rest of society—whether the man and woman were able to understand the basic concept of marriage.²⁹ With the rise of eugenics, however, people with mental retardation became ostracized in society; they were stripped of their rights because of perceived myths about mental retardation.³⁰ These myths included the belief that people suffering from mental retardation were overly sexual. This, coupled with their lack of self-control, fomented a disastrous direction for society.³¹ To deal with this growing “problem,” states created asylums to house these individuals, where they could be segregated from society, and most importantly, from the opposite sex.³² As these asylums became overcrowded, the living conditions deteriorated. Society needed an efficient means to allow the mentally retarded with the highest potential for productivity to be released, or “normalized,”³³ without exacerbating the perceived problem of a society overrun by mental incompetents.³⁴

The eugenics movement in America was supported by the most “progressive” leaders of the early twentieth century. President Theodore Roosevelt, the man credited with ushering in the new American century wrote, “[s]ociety has no business to permit degenerates to reproduce their kind. It is really extraordinary that our people refuse to apply to human beings such elementary knowledge as every successful farmer is obliged to apply to his own stock breeding.”³⁵ During his presidency, Roosevelt signed two immigration laws, one in 1903 and one in 1907, which denied entry

²⁷ See HUNTINGTON, *supra* note 8, at 10.

²⁸ See MARTHA A. FIELD & VALERIE A. SANCHEZ, EQUAL TREATMENT FOR PEOPLE WITH MENTAL RETARDATION 9 (1999).

²⁹ *Id.*

³⁰ *Id.* at 10.

³¹ *Id.*

³² *Id.* at 11.

³³ *Id.* at 12.

³⁴ *Id.* at 10.

³⁵ HARRY BRUNIUS, BETTER FOR ALL THE WORLD: THE SECRET HISTORY OF FORCED STERILIZATION AND AMERICA'S QUEST FOR RACIAL PURITY 190 (2006).

to immigrants with any history of epilepsy or insanity,³⁶ and instituted an arbitrary exclusion of any individual “likely to become a public charge” within two years of entrance to the United States.³⁷

Margaret Sanger, the founder of Planned Parenthood of America, also argued for sterilization to lower taxes, among other reasons.³⁸ She declared that eugenics was “‘the great biological interpretation of the human race’ that provided ‘the most adequate and thorough avenue to the solution of racial, political and social problems.’”³⁹ Alexander Graham Bell, inventor of the telephone, believed that “[p]ersons . . . who are reported deaf from birth, as a class, exhibit a tendency to transmit the defect, and . . . we cannot decide with absolute certainty that anyone was born deaf.”⁴⁰

At the center of the American eugenics movement was the American Breeders Association (“ABA”), co-founded in 1903 by Charles Davenport⁴¹ at the behest of the Assistant Secretary of Agriculture, W. M. Hays.⁴² Among the various subdivisions of the ABA was the Eugenics Committee, which was directed “‘to investigate and report on heredity in the human race’ and ‘to emphasize the value of superior blood and the menace to society of inferior blood.’”⁴³ Eventually, Davenport’s obsession with human genetics

³⁶ See Peter Quinn, *Race Cleansing in America*, AM. HERITAGE, Feb.-Mar. 2003, at 34.

³⁷ See Rachel Silber, *Eugenics, Family & Immigration Law in the 1920’s*, 11 GEO. IMMIGR. L.J. 859, 866-67 (1996).

³⁸ Laura Doyle, *The Long Arm of Eugenics*, 16-3 AM. LITERARY HIST. 520, 520 (2004) (Sanger commented, “[t]he American public is taxed—and heavily taxed—to maintain an increasing race of morons which threatens the very foundations of our civilization.”); See also Donald K. Pickens, *The Sterilization Movement: The Search for Purity in Mind and State*, 28 PHYLON 78, 88 (1967).

³⁹ Quinn, *supra* note 36, at 34.

⁴⁰ Pickens, *supra* note 38, at 82.

⁴¹ Charles Davenport was racist to the core, exemplified in a fundraising letter he wrote to the Carnegie trustees:

We have in this country the grave problem of the negro . . . a race whose mental development is, on the average, far below the average of the Caucasian. Is there a prospect that we may through the education of the individual produce an improved race so that we may hope at last that the negro mind shall be as teachable, as elastic, as original, and as fruitful as the Caucasian’s? Or must future generations, indefinitely, start from the same low plane and yield the same meager results? We do not know; we have no data. Prevailing ‘opinion’ says we must face the latter alternative. If this were so, it would be best to export the black race at once.

BLACK, *supra* note 17, at 38.

⁴² See Garland E. Allen, *The Eugenics Record Office at Cold Spring Harbor, 1910-1940: An Essay in Institutional History 2* OSIRIS 225, 232 (1986).

⁴³ *Id.*

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and eugenics overshadowed the ABA's other endeavors. In 1910, he created the Eugenics Record Office at Cold Spring Harbor, Long Island, devoted entirely to eugenics.⁴⁴

As the first superintendent of the Eugenics Record Office, Harry Hamilton Laughlin⁴⁵ was devoted to both scientific research on human heredity and to educating the public about the importance of eugenics and its inevitable benefits.⁴⁶ Over the next decade Laughlin's dedicated service to the ERO propelled him to the forefront of the eugenics movement, enabling him to secure funding while advancing "eugenical truths."⁴⁷ One group that Laughlin targeted was epileptics.⁴⁸ To this end, Laughlin distorted his "scientific" findings by likening epileptics to the feeble-minded so as to play on pre-existing concerns that this "menace" was infiltrating American families.⁴⁹

In 1922, Laughlin proposed the Model Eugenical Sterilization Law that provided the foundation for many state sterilization laws enacted over the next ten years.⁵⁰ He was also an advocate of strict immigration laws to limit the number of immigrants entering the United States from undesirable nations. Much of Laughlin's most pointed criticism was directed at immigrants from Southern and

⁴⁴ See *id.* at 234. The Eugenics Record Office ("ERO") was responsible for bringing the American eugenics movement into the public consciousness. It was created to equip eugenicists with the data and analysis needed to promote eugenics as the science for the future. *Id.*

⁴⁵ *Id.* at 236.

⁴⁶ *Id.* at 238.

⁴⁷ *Id.* at 245.

⁴⁸ See BLACK, *supra* note 17, at 54.

⁴⁹ *Id.* at 55. Laughlin and the Eugenics Record Office dismissed certain causes of patients' epileptic seizures that did not align with hereditary theories. *Id.* Even if someone suffered from seizures brought on by a traumatic head injury, the ERO ignored the cause, stating in a bulletin sent out to hospitals, "[t]his defect [epilepsy] may be purely traumatic but, on the other hand, [the patient] has an epileptic brother and a feeble-minded niece so there was probably an innate weakness and the fall is invoked as a convenient 'cause.'" *Id.*

⁵⁰ See HARRY HAMILTON LAUGHLIN, EUGENICAL STERILIZATION IN THE UNITED STATES 446 (1922). Laughlin proposed a Model Eugenical Sterilization Law that provided for the sterilization of those deemed "socially inadequate." *Id.* Among the "socially inadequate" were:

- (1) Feeble-minded; (2) Insane; (3) Criminalistic (including the delinquent and wayward); (4) Epileptic; (5) Inebriate (including drug-habitues); (6) Diseased (including those with tuberculosis, syphilis, leprosy, and other chronic, infectious and legally segregable diseases); (7) Blind (including those with seriously impaired vision); (8) Deaf (including those with seriously impaired hearing); (9) Deformed (including the crippled); and (10) Dependent (including orphans, ne'er-do wells, the homeless, tramps and paupers).

Id.

Eastern Europe, especially Jews, because Laughlin believed that these groups were responsible for most of the crimes committed in the United States.⁵¹ Laughlin's claims that certain immigrants were biologically inferior had a profound impact on the immigration debate.⁵² Congress conferred upon him various honorary titles including "Expert Eugenics Agent" and "Special Immigration Agent," while he conducted a fact-finding mission in Europe.⁵³

The Immigration Restriction Act of 1924, otherwise known as the Johnson-Reed Act, severely limited entry into the United States for immigrants whose nationalities Laughlin argued were the racially and genetically inferior.⁵⁴ Representative Robert Allen, a Democrat from West Virginia lamented that, "[t]he primary reason for the restriction of the alien stream . . . is the necessity for purifying and keeping pure the blood of America."⁵⁵ President Calvin Coolidge enthusiastically signed the bill into law on May 26, 1924,⁵⁶ which was not surprising given that as early as 1921 then-Vice President Coolidge espoused his belief that,

[i]t is a self-evident truth that in a healthy community there is no place for the vicious, the weak of body, the shiftless, or the improvident It is a duty our country owes itself to require of all those aliens who come here that they have a background not inconsistent with American institutions Biological laws tell us that certain divergent people will not mix or blend. The Nordics propagate themselves successfully. With other races, the outcome shows deterioration on both sides⁵⁷

Among various provisions of the Immigration Act of 1924, one section reduced the number of aliens admitted from a certain country from three to two percent, based on the calculation mechanism of a prior Act.⁵⁸ Furthermore, the base population determining the number from which the two percent was to be calculated

⁵¹ See Allen, *supra* note 42, at 248.

⁵² *Id.* at 249.

⁵³ See BRUINIUS, *supra* note 35, at 267.

⁵⁴ See Allen, *supra* note 42, at 249.

⁵⁵ BRUINIUS, *supra* note 35, at 269; see also Marouf A. Hasian, Jr., *Conserving the Nation's "Germoplasm": Nativist Discourse and the Passage of the 1924 Immigration Restriction Act*, 24 *LEGAL STUD. F.* 157, 172 (2000).

⁵⁶ See BRUINIUS, *supra* note 35, at 268.

⁵⁷ Hasian, *supra* note 55, at 161 (quoting Calvin Coolidge, *Whose Country Is This?*, *GOOD HOUSEKEEPING*, 1921, at 13-14, 106, 107).

⁵⁸ See Silber, *supra* note 37, at 879, 881-82 (citing the Immigration Act of 1924, Pub. L. No. 139 (1924)).

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was changed from the 1910 census to the 1890 census.⁵⁹ This was done in an effort to minimize the number of immigrants from Southern and Eastern Europe by reverting to the ethnic breakdown of America thirty-four years earlier.⁶⁰ As a further impediment to the prospective resident, the burden was shifted to the immigrant to prove that he or she had the potential to be a good citizen before gaining admittance.⁶¹

B. United States Pre-Buck v. Bell

If we were to wake up some morning and find that everyone was the same race, creed and color, we would find some other cause for prejudice by noon.

—George Aiken

Throughout the first quarter of the twentieth century, various state legislatures enacted myriad laws directed at preserving America while removing the “cancer of society,” the criminal.⁶² The first state to pass a eugenical sterilization law was Indiana in 1907.⁶³ The state of Washington followed two years later.⁶⁴ In succession, California⁶⁵ and various states passed sterilization laws so that by the mid-1920s, twenty-three states had passed some form of eugenical sterilization laws.⁶⁶ However, these laws were rarely subject to judicial review. It soon became apparent to eugenicists nationwide that uniform, and more importantly, court-approved

⁵⁹ *Id.* at 883–84.

⁶⁰ See Allen, *supra* note 42, at 249.

⁶¹ See Silber, *supra* note 37, at 884.

⁶² Landman, *supra* note 11, at 48.

⁶³ See Note, *Eugenic Sterilization in Indiana*, 38 IND. L.J. 275, 276 (1962-63) (citing Ind. Acts 1907, ch. 215). Although this law was later held unconstitutional on procedural due process grounds by the Indiana Supreme Court in *Williams v. Smith*, 131 N.E. 2 (Ind. 1921), the Indiana Legislature would subsequently pass new statutes conforming to the United States Supreme Court decision of *Buck v. Bell*, 274 U.S. 200 (1927). See *Eugenic Sterilization in Indiana*, *supra* note 63, at 275–81 (citing Ind. Acts 1927, ch. 241; Ind. Acts 1931, ch. 50; Ind. Acts 1935, ch. 12). Furthermore, although Indiana was the first state to pass a sterilization law, it was not the first attempt by a state to pass such a law. See FIELD & SANCHEZ, *supra* note 28, at 67. Michigan introduced a law in 1897, but it was defeated in committee, and the Pennsylvania Legislature passed a law in 1905, but it was vetoed by the governor. *Id.*

⁶⁴ See Landman, *supra* note 11, at 60. In 1912, the Washington Supreme Court held this statute to be constitutional. See *Washington v. Feilen*, 126 P. 75 (1912).

⁶⁵ See Landman, *supra* note 11, at 61.

⁶⁶ *Id.* at 59.

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language would be needed.⁶⁷ The compulsory sterilization law in Virginia, enacted in 1924, became the perfect test case for the eugenics movement.

Paul Popenoe's and Roswell Hill Johnson's *Applied Eugenics*, originally published in 1918, with a revised edition released in 1933, served as the definitive study on eugenics for almost twenty years and was used in universities as a textbook in eugenics courses, educating an entire generation on the fundamentals of the "science."⁶⁸ Among their numerous unsubstantiated claims about the "mentally deficient" lies a thirty-page diatribe about the "negroid race,"⁶⁹ which can only be characterized as unabashedly racist. Popenoe and Johnson argued that preventing miscegenation of the races was imperative because "the Negro is in America to stay;"⁷⁰ and "mat-ing" between the races will create "offspring [who] will usually be inferior to those resulting from a better-assorted mating."⁷¹

Virginia, like the rest of the United States during the first third of the twentieth century, was enmeshed in the eugenics debate. However, the eugenical laws in Virginia were not drafted simply to prevent the feeble-minded from procreating, but were also designed to preclude any race from reproducing with the superior white bloodline.⁷² Whites greatly feared that the inter-mingling of the races would increase the number of blacks passing as whites.⁷³

⁶⁷ Sterilization laws were ruled unconstitutional in Indiana (*Williams v. Smith*, 190 Ind. 526 (1921)), New Jersey (*Smith v. Board of Examiners of Feeble-Minded*, 88 A. 963 (N.J. 1913)), Iowa (*Berry v. Davis*, 242 U.S. 468 (1917)), Nevada, (*Mickle v. Henrichs*, 262 F. 688 (D. Nev. 1918)); New York (*In re Thompson*, 169 N.Y.S. 638 (N.Y. Spec. Term 1918)), and in Michigan, (*Haynes v. Lapeer*, 166 N.W. 938 (Mich. 1918)). In Washington, the state Supreme Court upheld its sterilization law (*Washington v. Feilen*, 126 P. 75 (Wash. 1912)), and in the states of California, Wisconsin, North Dakota, Kansas, South Dakota, Montana, Delaware, Idaho, Minnesota, Utah, and Maine, sterilization laws have been enacted and enforced with no protestation from the courts. See Landman, *supra* note 11, at 60–69. Furthermore, the states of Michigan and Iowa passed amended laws after the original laws were held unconstitutional. *Id.* Oregon passed a sterilization law that was ruled unconstitutional in the district court, but while the appeal was pending the legislature passed another law which remained uncontested. *Id.*

⁶⁸ See BLACK, *supra* note 17, at 137.

⁶⁹ POPENOE & JOHNSON, *supra* note 26, at 280–303.

⁷⁰ *Id.* at 300–301.

⁷¹ *Id.* at 284.

⁷² See Richard B. Sherman, "The Last Stand": *The Fight for Racial Integrity in Virginia in the 1920s*, 54 J. S. HIST. 69, 69 (1988).

⁷³ *Id.* at 70. To support these claims, white supremacists pointed to several census reports. *Id.* According to the reports, the number of mulattoes in the state had nearly doubled in thirty years from 122,441 in 1890 to 222,910 in 1910. *Id.* However, the number of mulattoes dropped to 164,171 in 1920, prompting fear among the white community that

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To allay these fears the state of Virginia began to enact statutes designed to block this miscegenation. In 1910, the Legislature enacted a law containing a new definition for “colored person.”⁷⁴ Prior to this new statute’s passage, the law held that “every person having one-fourth or more of negro blood shall be deemed a colored person”⁷⁵ Under the new statute this threshold was lowered to one-sixteenth “negro blood.”⁷⁶ Furthermore, the law called for the creation of a Bureau of Vital Statistics to maintain a registry of the race of every Virginian.⁷⁷

By 1924, however, this new law came under fire for not being drastic enough. The Anglo-Saxon Club of America lobbied for an even more stringent standard of race definition.⁷⁸ The lobbying paid off and the Racial Integrity Act of 1924 was passed, defining a white person only as someone with “no trace whatsoever of any blood other than Caucasian.”⁷⁹ Furthermore, if upon presentment for a marriage license the clerk at the Bureau of Vital Statistics questioned the race of one of the applicants, the burden to prove racial purity shifted to the applicant.⁸⁰ In 1924, the Virginia Legislature passed another law, which entailed a more proactive method of protecting pure American stock.

C. *Carrie Buck and Buck v. Bell*

Laws are often made by fools, and even more often by men who fail in equity because they hate equality: but always by men, vain authorities who can resolve nothing.

—Michel de Montaigne

persons of “mixed” heritage were passing as “pure” white. *Id.* This fear was intensified by the drop in the population of people identifying as “Negro.” *Id.*

⁷⁴ *Id.* at 70.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 70–71.

⁷⁸ *Id.* at 77. The Anglo-Saxon Club of America was created to preserve and maintain Anglo-Saxon ideals in America through “the strengthening of Anglo-Saxon instincts, traditions and principles,” the “intelligent selection and exclusion of immigrants,” and the implementation of “fundamental and final solutions of our racial problems in general most especially of the Negro problem.” *Id.* at 74–75. Paradoxically, however, the Club also stated its goals were to be achieved without racial prejudice or hatred. *Id.* at 79.

⁷⁹ *Id.* at 77. A caveat to this definition was created for Native Americans. Known as the “Pocahontas Exception,” the law allowed a white person to have at most one sixty-fourth of the blood of an American Indian. *Id.* This exception was included to protect the descendants of John Rolfe and Pocahontas. *Id.*

⁸⁰ *Id.* at 78.

In 1927, the future of Carrie Buck was immeasurably altered when a perfect storm of scientific ignorance, faulty logic, and political expediency befell this poor, unfortunate young woman as the three branches of government undertook an undaunted effort to rid America of “slobbering idiots” and “hopeless imbeciles.”⁸¹ The Virginia Sterilization Act,⁸² which included due process safeguards fashioned to overcome the failings of previously overturned state laws,⁸³ spurred three men, Harry H. Laughlin, Aubrey Strode and Albert Priddy, to undertake a “test case”⁸⁴ to sterilize Carrie Buck, as well as countless other young women who could otherwise be productive members of society but for their “moral delinquencies.”⁸⁵

Carrie Buck was the perfect test case. Her mother Emma, a syphilitic⁸⁶ and possibly indigent⁸⁷ woman with “a lack of moral sense and responsibility,”⁸⁸ had been adjudged feeble-minded on April 1, 1920.⁸⁹ In 1923, Carrie Buck, seventeen years old and pregnant, was presented to the Colony by her guardians, the Dobbs family, as both feeble-minded and epileptic.⁹⁰ Her commit-

⁸¹ W.D. Funkhouser, *Eugenical Sterilization*, 23 Ky. L.J. 511, 511 (1934) (authored by the Dean of the Graduate School at the University of Kentucky in an effort to influence the debate in the Kentucky Legislature with regard to passing a compulsory sterilization law.).

⁸² The preamble to this Act is indicative of its intent:

Whereas, the Commonwealth has in custodial care and is supporting in various State institutions many defective persons who if now discharged or paroled would likely become by the propagation of their kind a menace to society but who if incapable of procreating might properly and safely be discharged or paroled and become self-supporting with benefit both to themselves and to society, and

Whereas, human experience has demonstrated that heredity plays an important part in the transmission of insanity, idiocy, imbecility, epilepsy and crime

Cynkar, *supra* note 23, at 1436 (quoting 1924 Va. Acts, ch. 394).

⁸³ See Cynkar, *supra* note 23, at 1436.

⁸⁴ J. DAVID SMITH & K. RAY NELSON, *THE STERILIZATION OF CARRIE BUCK* 49-50 (1989) (Aubrey Strode’s recollections of his “original participation introducing the sterilization law”).

⁸⁵ *Id.* at 57–58.

⁸⁶ *Id.* at 10.

⁸⁷ *Id.* at 15. There is some debate as to whether Emma Buck was indigent as she claimed that she had inherited some money from her father and the money was deposited in a bank, although it was never found, and the State Colony for Epileptics and Feeble-Minded made little attempt to ascertain the money’s whereabouts. *Id.* at 15-16.

⁸⁸ *Id.* at 9.

⁸⁹ *Id.* at 12.

⁹⁰ *Id.* at 17.

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ment was merely perfunctory. Within six months of her commitment, Dr. Albert Priddy, the superintendent of the Virginia Colony, testified to the Colony Board of Directors that Carrie Buck was “feeble-minded of the lowest grade Moron class,”⁹¹ and that sterilization was the only way she could become a productive member of society.⁹² Thereafter, Carrie Buck’s reproductive organs would be in the hands of the courts.

At Carrie Buck’s trial, Aubrey Strode, lawyer for the Virginia Colony, presented evidence and testimony from Dr. Albert Priddy and Harry H. Laughlin that Carrie Buck was illegitimate, feeble-minded, of questionable character, and “belong[ed] to the shiftless, ignorant, and worthless class of anti-social whites of the South . . . [about whom] it [was] impossible to get intelligent and satisfactory data”⁹³ Carrie Buck’s attorney, Irving Whitehead,⁹⁴ called no witnesses and presented no evidence to contradict the prosecution’s case regarding Carrie’s legitimacy,⁹⁵ mental proficiency⁹⁶ or the truth behind her pregnancy.⁹⁷ Whitehead’s ineffective lawyering enabled Priddy, Strode, and Laughlin to fast track the issue of the constitutionality of the Virginia Sterilization Law directly to the United States Supreme Court.⁹⁸

The County Court ruling in favor of Carrie Buck’s sterilization was affirmed on appeal by the Virginia Supreme Court of Ap-

⁹¹ *Id.* at 44.

⁹² *Id.*

⁹³ See Paul A. Lombardo, *Three Generations, No Imbeciles: New Light on Buck v. Bell*, 60 N.Y.U. L. REV. 30, 51–52 (1985) (internal citation omitted)

⁹⁴ Irving Whitehead and Aubrey Strode were lifelong friends. See SMITH & NELSON, *supra* note 84, at 84–85. In fact, upon Whitehead’s death in 1938, his widow asked Strode to pay Whitehead tribute in the Journal of the Virginia Bar Association. *Id.*

⁹⁵ Had Irving Whitehead done even a cursory amount of research he would have discovered that Carrie Buck’s mother and father were indeed married and there was no evidence they had ever divorced. See *id.* at 226; see also Lombardo, *supra* note 93, at 52.

⁹⁶ Buck’s school records indicate that she was normal and reached the sixth grade before being removed by the Dobbs family to serve as a worker in their home. See *id.*

⁹⁷ Carrie Buck reported that she was raped by a nephew of the Dobbs family, but her complaint was ignored. Instead she was quickly whisked away to the Virginia Colony for Epileptics and Feeble-minded for “having seizures” and being “morally delinquent.” See SMITH & NELSON, *supra* note 84, at 5; see also Lombardo, *supra* note 93, at 54.

⁹⁸ The real conflict of interest arose with the fact that Whitehead was paid by Dr. Albert Priddy and the Virginia Colony for Epileptics and Feeble-Minded, who were, of course, advocating for the sterilization of Carrie Buck. See SMITH & NELSON, *supra* note 84, at 86–87.

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peals.⁹⁹ Initially, Irving Whitehead contested the judgment of the County Court on three grounds. First, that the Virginia Sterilization Act did not provide due process of law; second, that the Act imposed cruel and unusual punishment; and third, that the Act denied her the equal protection of the law.¹⁰⁰ Notably, Whitehead's final brief focused primarily on the due process violation.¹⁰¹ Moreover, his final brief was only five pages long and cited only one case as precedent.¹⁰² Meanwhile, Aubrey Strode's brief, a "tour de force,"¹⁰³ was forty pages long and compellingly proclaimed that no court should stand in the way of the "path of progress in the light of scientific advancement toward a better day, both for the afflicted and for society whose wards they are."¹⁰⁴

The Supreme Court of Virginia agreed with Strode. First, the court dispensed with the procedural due process challenge and ignored any substantive due process argument.¹⁰⁵ Second, the Virginia Supreme Court easily discharged the cruel and unusual punishment challenge, finding that the Act's purpose was "not to punish but to protect the class of socially inadequate citizens . . . from themselves, and to promote the welfare of society by mitigating race degeneracy and raising the average standard of intelligence of the people"¹⁰⁶

The third argument, that the Act violated the principle of equal protection, was considered the defense's strongest argument, and the one Strode felt left the Act most vulnerable to constitutional challenge.¹⁰⁷ The Virginia Supreme Court cited United States Supreme Court precedent that "a classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality."¹⁰⁸ Additionally, the court concluded that the two classes of individuals (those already com-

⁹⁹ See *Buck v. Bell*, 130 S.E. 516, 517 (Va. 1925) (Albert Priddy passed away between the trial and the appeal and he was replaced by Dr. J.H. Bell; *Buck v. Priddy* became *Buck v. Bell*).

¹⁰⁰ *Id.* at 518.

¹⁰¹ See SMITH & NELSON, *supra* note 84, at 175.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ See *Buck v. Bell*, 130 S.E. 516, 517–19 (Va. 1925).

¹⁰⁶ *Id.* at 519.

¹⁰⁷ See Lombardo, *supra* note 93, at 48–49.

¹⁰⁸ See *Buck*, 130 S.E. at 520 (citing *Lindsley v. National Carbonic Gas Co.*, 220 U.S. 61 (1912)).

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mitted in the Colony and those persons “on the outside”) were not distinctly separate, for the simple reason that a citizen on the outside can easily be adjudged insane, committed to the Colony, and sterilized.¹⁰⁹ Upon the Virginia Supreme Court’s ruling, upholding the state’s Sterilization Law, Whitehead quickly filed a petition for certiorari to the United States Supreme Court.

On appeal to the U.S. Supreme Court, Whitehead adjusted his defense strategy, slightly, focusing on the substantive due process challenge to the Virginia Sterilization Act.¹¹⁰ Priddy, Strode, and Laughlin played their hand so effectively that the Supreme Court, in a three-page, eight-to-one decision, affirmed the legality of the Sterilization law and thereby provided a ringing endorsement for the eugenical sterilization movement.¹¹¹

By the time Chief Justice William Howard Taft tapped Oliver Wendell Holmes, Jr. to pen the decision in *Buck v. Bell*, Holmes had already long-supported eugenics and sterilization practices.¹¹² After choosing Holmes to write the opinion, Taft sent him a note asking that the opinion be written with due care because “some of the brethren . . . are troubled about the case, especially Butler.”¹¹³ Taft also suggested to Holmes how the opinion should be focused in that, “[t]he strength of the facts in three generations [of imbeciles] of course is the strongest argument for such state action.”¹¹⁴ Thus, the decision in *Buck v. Bell* was written by Holmes, a man who in 1920 wrote,

I think that the sacredness of human life is a purely municipal idea of no validity outside the jurisdiction. I believe that force, mitigated so far as it may be by good manners, is the *ultima*

¹⁰⁹ *Id.*

¹¹⁰ See Lombardo, *supra* note 93, at 56–57. Some would say that Whitehead and Strode colluded to, “orchestrate a judicial charade;” by arguing that the Act violated substantive due process, thus forcing the Court to address the substance of the Virginia Sterilization Act and not simply procedural technicalities. *Id.* .

¹¹¹ See generally *Buck v. Bell*, 274 U.S. 200, 205 (1927) (Justice Pierce Butler was the lone dissenter).

¹¹² See Oliver Wendell Holmes, *Ideals and Doubts*, 10 ILL. L. REV. 1, 3 (1915). (“I believe that the wholesale social regeneration which so many now seem to expect, if it can be helped by conscious, co-ordinated [sic] human effort, cannot be affected appreciably by tinkering with the institution of property, but only by taking in hand life and trying to build a race.”).

¹¹³ See G. EDWARD WHITE, *JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF* 404–05 (1993).

¹¹⁴ *Id.* at 405–06; See also *Buck*, 274 U.S. at 207.

ratio, and between two groups that want to make inconsistent kinds of world I see no remedy except force.¹¹⁵

Holmes wrote that the Virginia Sterilization Act not only satisfied procedural and substantive due process requirements, but also provided equal protection guarantees, which Holmes declared to be “the usual last resort of constitutional arguments.”¹¹⁶ Furthermore, he acknowledged the need for compulsory sterilization of the mentally “defective” in this now infamous epigram:

We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough.¹¹⁷

Holmes’ opinion is a model of omniscient jurisprudence.¹¹⁸ Holmes was unencumbered by facts and logic, and driven only by what *he* knew to be true. Instead of simply deferring to state legislative action, he crafted an opinion that gave “a shaky eugenics movement a strong stamp of legitimacy.”¹¹⁹

Although decried by future legal scholars as “a parody of justice,” “resting on rhetoric rather than logic or precedent,”¹²⁰ Oliver Wendell Holmes, Jr. was quite proud of his opinion.¹²¹ Indeed, Holmes wrote to a friend shortly after the decision stating, “I was getting near the first principle of reform. . . . I have no respect for

¹¹⁵ BLACK, *supra* note 17, at 120, (quoting Letter from Oliver Wendell Holmes, Jr. to Sir Frederick Pollock (Feb. 1, 1920), in HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK 1874-1932, 36 (1942).

¹¹⁶ See *Buck*, 274 U.S. at 207–08.

¹¹⁷ *Buck*, 274 U.S. at 207 (internal citation omitted). Holmes’ reference to the principle sustaining compulsory sterilization marks the only time in the decision where he cites precedent. In the case of *Jacobson v. Massachusetts*, 197 U.S. 11 (1904), the Supreme Court ruled that state-mandated vaccinations to protect public health and safety were not an illegitimate exercise of the state’s police powers.

¹¹⁸ See Mary L. Dudziak, *Oliver Wendell Holmes as a Eugenic Reformer: Rhetoric in the Writing of Constitutional Law*, 71 IOWA L. REV. 833, 865–866 (1986).

¹¹⁹ *Id.* at 836.

¹²⁰ Stephen A. Siegel, *Justice Holmes, Buck v. Bell, and the History of Equal Protection*, 90 MINN. L. REV. 106, 106 (2005).

¹²¹ See BRUNIUS, *supra* note 35, at 72.

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the passion of equality, which seems to me merely idealizing envy.”¹²²

Carrie Buck was sterilized on October 19, 1927 and released from the Virginia Colony within a month.¹²³ She married William Davis Eagle in 1932, who was thirty-seven years her senior and later married Charles Detamore.¹²⁴ Over the years, Carrie worked for many families doing odd jobs, some of which included, ironically, taking care of children and the infirmed.¹²⁵ Carrie’s daughter, Vivian, died at the age of eight; although she never met her mother nor showed any signs of “feeble-mindedness.”¹²⁶ Carrie’s sister, Doris, was also sterilized, and led to believe that the operation was an appendectomy.¹²⁷ In 1979, after thirty-nine years of marriage, Doris finally learned the true reason behind her inability to have children with her husband.¹²⁸

D. *Europe Follows*

America is a large, friendly dog in a very small room. Every time it wags its tail, it knocks over a chair.

—Arnold Toynbee

1. *Great Britain*

The United States was not alone in the drive to sterilize the mentally and physically unfit. Many European nations pushed for eugenical sterilization laws in an effort to eliminate not only the mentally and physically deficient, but also paupers and drunkards who created an internal threat to progress. In Great Britain, for example, Winston Churchill, while serving as Home Secretary, urged the passage of a sterilization bill.¹²⁹ He wrote

The unnatural and increasingly rapid growth of the feeble-minded and insane classes, coupled as it is with a steady restriction among all the thrifty, energetic and superior stocks, constitutes a national and race danger which it is impossible to exaggerate . . . I feel that the source from which all the streams

¹²² *Id.*

¹²³ See SMITH & NELSON, *supra* note 84, at 179–80.

¹²⁴ *Id.* at 215.

¹²⁵ *Id.* at 213–14.

¹²⁶ *Id.* at 171. Vivian attended public schools for the two years prior to her death, making the Honor Roll once. *Id.*

¹²⁷ *Id.* at 216.

¹²⁸ *Id.*

¹²⁹ See BRUNIUS, *supra* note 35, at 6.

of madness is fed should be cut off and sealed up. . . . [A] simple surgical operation would allow these individuals to live in the world without causing much inconvenience to others.¹³⁰

In 1912, two physicians working in British asylums, Dr. Geoffrey Clark and Dr. A.W. Daniel, released a shocking study finding that insanity in England was on the rise.¹³¹ This study reported that in 1859 there were 36,762 cases of insanity in England, equivalent to one in every 536 people.¹³² In 1909, however, the total number of cases totaled 128,787, or one in every 278 people, meaning that the proportion of the insane to the general population had doubled.¹³³ Despite widespread fear in Great Britain that the “national racial stock” was in decline as evidenced by the Clark-Daniel study, compulsory sterilization of the mentally unfit never achieved extensive public support.¹³⁴ Furthermore, by the time the Brock Committee, charged with recommending a sterilization policy, eventually released its report, the Nazi sterilization movement was already underway, thereby undermining the ethical basis for sterilization within the British government and the electorate.¹³⁵

Additionally, there had never been a drive in Great Britain to legalize any compulsory sterilization laws. By the time the Brock Committee was charged with determining “‘the causation of mental disorder and deficiency’ . . . [and] ‘the value of sterilization as a preventive measure,’”¹³⁶ the debate focused only on whether or not the government should favor *voluntary* sterilization of those included in the “social problem group,”¹³⁷ not *mandatory* sterilization upon anyone deemed unfit.

2. *Sweden*

In contrast to the debate surrounding sterilization in Great Britain, Sweden adopted a proactive movement, pushing for

¹³⁰ *Id.*

¹³¹ See J. Miller Kenyon, *Sterilization of the Unfit*, 1 VA. L. REV. 458, 462–63 (1913-1914).

¹³² *Id.*

¹³³ *Id.*

¹³⁴ See Desmond King & Randall Hansen, *Experts at Work: State Autonomy, Social Learning and Eugenic Sterilization in 1930s Britain*, 29 B. J. POL. SCI. 77, 82 (1999).

¹³⁵ *Id.* at 104.

¹³⁶ *Id.* at 89.

¹³⁷ *Id.* at 91 (included in the “social problem group” were sufferers of idiocy, imbecility, and those born to parents with such characteristics).

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eugenics by means of “coercive” sterilization.¹³⁸ From the genesis of the eugenics movement, Sweden was at the forefront of the drive to cleanse society of those perceived to be “lesser human beings, flawed by unacceptable mental, social, and socioeconomic characteristics . . . suffer[ing] from ‘genetic inferiority.’”¹³⁹

The eugenics movement in Sweden began much like it had in the United States, with laws aimed at preventing the mentally unfit from marrying and procreating.¹⁴⁰ These laws proved popular and set the stage for the sterilization drive that would come to fruition in the 1920s.¹⁴¹ Although Sweden officially required written consent from those who were to be sterilized,¹⁴² the country adopted coercive tactics as a means to persuade patients to accept sterilization.¹⁴³ When Sweden finally adopted a full-scale sterilization law in 1934, the procedural safeguards deemed indispensable in the United States, were swept aside in favor of a system much less deferential to due process controls.¹⁴⁴ Under Swedish law, not only was consent unnecessary, but no governmental agency or oversight board was ever created and no court hearing was required to determine if a person needed sterilization.¹⁴⁵ In effect, there was no system in place to supervise those authorizing sterilization procedures.¹⁴⁶

In addition to Sweden’s unabashed desire to prevent the procreation of the mentally deficient, in 1941 legislators expanded Sweden’s sterilization laws to apply to those “whose social behavior might make them an unfit parent.”¹⁴⁷ This included individuals suffering from a physical disease or exhibiting any “anti-social way

¹³⁸ See Stephanie Hyatt, Comment, *A Shared History of Shame: Sweden’s Four-Decade Policy of Forced Sterilization and the Eugenics Movement in the United States*, 8 *IND. INT’L & COMP. L. REV.* 475, 483 (1998).

¹³⁹ *Id.* at 476–77.

¹⁴⁰ *Id.* at 482.

¹⁴¹ *Id.*

¹⁴² See Torbjorn Tannsjö, *Compulsory Sterilisation in Sweden*, 12 *BIOETHICS* 236, 237 (1998).

¹⁴³ See Hyatt, *supra* note 139, at 483, 486. Generally, release from a mental institution or hospital was conditioned on the patient’s agreement to be sterilized; men and women were “persuaded” into agreeing that sterilization was in their best interest. *Id.* In 1962, a Swedish study revealed that of all the girls leaving Swedish special schools in the twenty-year period between 1937 and 1956, 36% of them were sterilized. *Id.*

¹⁴⁴ *Id.* at 483.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 484.

of life.”¹⁴⁸ Whereas in the United States the number of sterilizations dramatically decreased after Nazi Germany began implementing sterilization legislation, in Sweden there was no such decline. Throughout the 1940s the number of compulsory sterilizations increased each year.¹⁴⁹ Only recently has the Swedish government made an attempt to remedy the policies under the 1934 Sterilization Act and its amendments that resulted in some 63,000 sterilizations.¹⁵⁰

3. *Nazi Germany*

Insanity in individuals is something rare—but in groups, parties, nations and epochs, it is the rule.

—Frederich Nietzsche

Irving Whitehead’s defense of Carrie Buck in front of the United States Supreme Court included one prescient argument against Acts such as the one passed in Virginia that, unbeknownst to Whitehead and the rest of America, would foreshadow the “race cleansing” of Nazi Germany in the 1930s and 1940s. Whitehead stated to an uninspired Court:

If this Act be a valid enactment, then the limits of the power of the State (which in the end is nothing more than the faction in control of the government) to rid itself of those citizens deemed undesirable according to its standards, by means of surgical sterilization, have not been set . . . A reign of doctors will be inaugurated and in the name of science new classes will be added, even races may be brought within the scope of such regulation, and the worst forms of tyranny practiced.¹⁵¹

Within a generation, the pseudo-science of eugenics, when pushed to its ultimate breaking point by Nazi Germany, would collapse under the weight of its own “success.”

Germany entered the eugenics debate with two goals: to reverse its low birth-rate, which by 1932 had reached an international low point,¹⁵² and to promote *Fortpflanzungshygiene* (“procreation

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* Sterilizations in the five years after the implementation of the 1934 Sterilization Act averaged 481 each year. *Id.* However, by 1941, the number more than doubled to 1164, and by the end of the 1940s the figure had doubled again to 2351 in 1949. *Id.*

¹⁵⁰ The Act was finally repealed in 1976, after some 63,000 sterilizations had been conducted. *Id.* at 487.

¹⁵¹ BRUNIUS, *supra* note 35, at 70–71.

¹⁵² See Gisela Bock, *Racism and Sexism in Nazi Germany: Motherhood, Compulsory Sterilization, and the State*, 8 *SIGNS* 400, 405 (1983); see also, Henry P. David, Jochen

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hygiene”)¹⁵³ through a system designed to enable desirable births and eradicate *lebensunwertes Leben*, or “lives unworthy of life.”¹⁵⁴ In less than a decade and in the name of eugenical divinity, Nazi Germany established a “human hierarchy,”¹⁵⁵ which at first segregated, then sterilized, then euthanized, and then exterminated those “lives unworthy of life” in an effort to purify the righteous German Volk and help solidify “German blooded, Nordic raced beings: right angled in body and soul.”¹⁵⁶ The totalitarian regime of Adolf Hitler, coupled with the willful ignorance of the rest of the world, made Nazi Germany fertile ground for these eugenical ideals.

Within the first year of Adolf Hitler’s Chancellorship, Nazi Germany instituted a series of laws that on the one hand strictly limited abortion in order to reverse the low birth rate,¹⁵⁷ and on the other hand mandated sterilizations for a wide array of mentally and physically disabled Germans.¹⁵⁸ These laws also stripped the Jewish and Gypsy people of their citizenship rights in order to more easily categorize them as socially inadequate who then systematically could be stripped of their human rights.¹⁵⁹

Fleischhacker & Charlotte Hohn, *Abortion and Eugenics in Nazi Germany*, 14 POPULATION & DEV. REV. 81, 87–88 (1988). The level of births per thousand of the population dropped precipitously, from 39.2 in 1880, to 31.6 in 1906, 20.7 in 1925 and 14.7 in 1933. *Id.*

¹⁵³ Bock, *supra* note 152, at 401.

¹⁵⁴ *Id.* at 408.

¹⁵⁵ Donald J. Dietrich, *Catholic Eugenics in Germany, 1920-1945: Hermann Muckermann, S.J. and Joseph Mayer*, 34 J. CHURCH & ST. 575, 599 (1992).

¹⁵⁶ See Bock, *supra* note 152, at 405.

¹⁵⁷ See David, *supra* note 152, at 89–90. The Nazi government strictly limited sex education, information on contraception, and closed sex and marriage counseling centers in an effort to curtail the use of this information for reproductive reasons. *Id.* The government also reinstated penal codes restricting abortions and increased the penalty for having an abortion, performing an abortion, or for providing information about abortions. *Id.* Incentives were also used to promote higher birth rates. *Id.* Shortly after the reintroduction of the penal codes with regard to abortion, the government instituted regulations providing interest-free loans to newly-married, “biologically sound” couples. *Id.* One-fourth of the loan would be cancelled for each child that the couple produced. *Id.*

¹⁵⁸ *Id.* at 91. The Law for the Prevention of Hereditary Diseases in Future Generations was passed in July of 1933 for the express purpose of blunting the propagation of “lives unworthy of life.” *Id.* See also Marie E. Kopp, *Legal and Medical Aspects of Eugenic Sterilization in Germany*, 1 AM. SOC. REV. 761, 763 (1936). The law called for the sterilization of those with (1) hereditary feeble-mindedness; (2) schizophrenia; (3) manic-depressive insanity; (4) hereditary epilepsy; (5) hereditary Huntington’s chorea; (6) blindness; (7) deafness; (8) severe physical deformity; and (9) severe habitual drunkenness. *Id.*

¹⁵⁹ See LENI YAHIL, *THE HOLOCAUST: THE FATE OF EUROPEAN JEWRY* 71–72 (1991). The Reich Citizenship Law and the Law for the Protection of German Blood and German Honor, collectively known as the Nuremberg Laws, codified a second-class status for Jews.

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The German eugenics movement was not ushered in with the rise of Adolf Hitler and the Nazi Party in 1933. It was an already flourishing movement with more broad-based support than in the United States, due in large part to the popularity of Social Darwinism,¹⁶⁰ fueled by Germany's struggle with their loss in World War I and the humiliation of the Treaty of Versailles.¹⁶¹ The Jews became "the racial germ that corrupts the mixture of the blood,"¹⁶² and were therefore not only inferior to the Aryan race¹⁶³ but were *geistig Tote* ("dead souls"), "an alien growth in human society, and of a lower level than animals."¹⁶⁴ In an atmosphere rife with anti-semitism, all it took was the emergence of a charismatic leader and a party willing to confront this "germ"¹⁶⁵ to realize Nazi Germany.

After passage of the various racial hygiene laws from 1933 to 1934, Germany spent the next twelve years pushing eugenics past the brink of mere conjectural debate. Without the burden of a controlling legal or ethical authority, Nazi Germany swiftly eliminated

Id. at 71. The Reich Citizenship Law officially separated those of pure German blood from everyone else by establishing the difference between a "subject of the state" and a "citizen of the Reich," and only a citizen of the Reich had full political rights. *Id.* The Law for the Protection of German Blood and German Honor essentially relegated Jews to the status of "subjects of the state" and forbade intermarriage and sexual relations between the races. *Id.* at 71-2. Furthermore, Jews were prohibited from employing German female domestics under the age of forty-five. *Id.* at 72. These laws were purely eugenical in nature. As a Gestapo report stated, "the population regards the regulation of the relationships of the Jews as an emancipatory act, which brings clarity and simultaneously greater firmness in the protection of the racial interests of the German people." DANIEL JONAH GOLDHAGEN, *HITLER'S WILLING EXECUTIONERS: ORDINARY GERMANS AND THE HOLOCAUST* 98 (1996).

¹⁶⁰ See Weikart, *supra* note 24, at 323; see also SHEILA FAITH WEISS, *RACE HYGIENE AND NATIONAL EFFICIENCY: THE EUGENICS OF WILHELM SCHALLMAYER* 27-37 (1987). R

¹⁶¹ See YAHIL, *supra* note 159, at 18. R

¹⁶² *Id.* at 44 (quoting Adolf Hitler in, HENRY PICKER, *HITLER'S TISCHGESPRACHE IM FUHRERHAUPTQUARTIER, 1941-1942*, 321 (1951)).

¹⁶³ See YAHIL, *supra* note 159, at 307. Although used repeatedly, the word "aryan" was never precisely defined by the Third Reich which simply served as a euphemism, and a word used for exclusionary purposes, not one used to include a certain group of people. *Id.* (citing ZVI BACHRACH, *RACISM: THE TOOLS OF POLITICS, FROM MARXISM TOWARDS NAZISM* 61 (1985)). R

¹⁶⁴ YAHIL, *supra* note 159, at 307 (quoting KARL BINDING & ALFRED E. HOCHÉ, *DIE FREIGABE DER VERNICHTUNG LEBENSUNWERTEN LEBENS: IHR MASS UND IHRE FORM* 28 (1922)). R

¹⁶⁵ A mere seven years before Adolf Hitler would rise to the German Chancellorship, he expressed the following view in his racist rant, *MEIN KAMPF*, writing, "With satanic joy in his face, the black-haired Jewish youth lurks in wait for the unsuspecting girl whom he defiles with his blood, thus stealing her from her people. With every means he tries to destroy the racial foundations of the people he has set out to subjugate." ADOLF HITLER, *MEIN KAMPF* 325 (Ralph Manheim trans., Houghton Mifflin Co. 1971) (1925).

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not only the reproductive rights of the unfit, but also the unfit themselves. Nazi Germany began by creating Hereditary Health Courts or *Erbgesundheitsgericht*, which were given two tasks: to report anyone who fit into any one of the sterilization categories;¹⁶⁶ and to report any “German-blooded” woman who sought an abortion.¹⁶⁷ Between the creation of the courts in 1934 and the outbreak of World War II in 1939, 320,000 Germans (0.5% of the entire population) had been “legally” sterilized.¹⁶⁸ Unlike those sterilized in the United States, the vast majority of those sterilized in Germany were not institutionalized, but were Germans exhibiting any “deviancy from the norm.”¹⁶⁹ In 1939, Nazi Germany adopted a new policy—instead of eliminating Jews and the disabled from future generations, they were simply eliminated from the present generation.¹⁷⁰

The first stage of exterminating the *Ballastexistenzen* (or “Burdensome Life”) was carried out through the use of euthanasia or *Sterbehilfe*, meaning “aid to the dying.”¹⁷¹ This program began with the killing of children with disabilities,¹⁷² and was expanded, by “Fuhrer decree,” to include adult mental patients shortly thereafter.¹⁷³ Within two years, at least 100,000 institutionalized patients were euthanized for being “useless eaters.”¹⁷⁴ The goal was to euthanize another three million “invalids,” but the Catholic and Protestant Churches protested and Hitler abandoned the policy on August 24, 1941.¹⁷⁵ The extermination system was then transferred to concentration camps, where gas chambers and gas trucks, dis-

¹⁶⁶ See David, *supra* note 152, at 91.

¹⁶⁷ See David, *supra* note 152, at 93; Bock, *supra* note 152, at 408, 411. These courts also compiled a centralized registry, indexing the “gene value” of everyone living in Germany. *Id.* at 409.

¹⁶⁸ *Id.* at 413.

¹⁶⁹ *Id.* at 414.

¹⁷⁰ See YAHIL, *supra* note 159, at 308.

¹⁷¹ *Id.* at 307–08.

¹⁷² See Dudley & Gale, *supra* note 24, at 587.

¹⁷³ *Id.* Not only were these people murdered, but their families received false death notices, were misled to believe that pneumonia was the cause of death, and most appalling, families were charged for the killings. *Id.*

¹⁷⁴ Bock, *supra* note 152, at 415. Among those euthanized, 5,000 children were wrested from their mothers by forcing the women into the war industry so as to make home care impossible. *Id.* See YAHIL, *supra* note 158, at 309. Often, these children were simply starved to death and their families were informed that they had been transferred to an institution for special treatment. *Id.*

¹⁷⁵ See *id.*; see also Bock, *supra* note 152, at 415.

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guised as shower rooms,¹⁷⁶ more efficiently disposed of the “sick, crippled, those unfit for work, and the Jews”¹⁷⁷ In 1942, a German decree declared “[n]o more applications for sterilization of Jews need to be made;”¹⁷⁸ given that the Final Solution for the Jewish Problem was now in place, and within three years, ten million of these “corruptors of the people”¹⁷⁹ would no longer be able to “sap the strength of the State.”¹⁸⁰

E. *Backtrack—Skinner v. Oklahoma, Relf v. Weinberger (American Sterilization Movement after World War II)*

America is a country that doesn't know where it is going but is determined to set a speed record getting there.

—Laurence J. Peter

The sterilization movement in the United States did not proliferate, as eugenicists had first thought, after the Supreme Court gave the movement its ringing endorsement in *Buck v. Bell*.¹⁸¹ Various factors contributed to the failure of the eugenics movement in the United States, including changing perceptions of the handicapped,¹⁸² religious influences,¹⁸³ new scientific studies,¹⁸⁴ the

¹⁷⁶ See Dudley & Gale, *supra* note 24, at 587.

¹⁷⁷ See YAHIL, *supra* note 159, at 310. One of the physicians charged with determining the fate of the inmates was Dr. Friedrich Mennecke, who began a letter to his wife on the morning of November 28, 1941 with, “Hurray! We are going out on the merry hunt.” *Id.*

¹⁷⁸ Bock, *supra* note 152, at 408–409.

¹⁷⁹ HITLER, *supra* note 165, at 679.

¹⁸⁰ *Buck v. Bell*, 274 U.S. 200, 207 (1927). In addition to the six to ten million people murdered by the Nazi regime, the Central Association of Sterilized People in West Germany estimated in 1951 that the Nazis had also sterilized 3.5 million people. See Silver, *supra* note 3, 870.

¹⁸¹ See Cynkar, *supra* note 23, at 1454.

¹⁸² See Philip R. Reilly, *Involuntary Sterilization in the United States: A Surgical Solution*, 62 Q. REV. BIOLOGY 153, 165 (1987). In 1950, the National Association for Retarded Children (“NARC” and now “Citizens”) was founded to become a powerful lobby in Washington. In 1962 NARC pressed for a rejection of eugenic sterilization, which the President’s Commission on Mental Retardation reaffirmed. *Id.*

¹⁸³ The Catholic Church had long been an opponent of sterilizations of any kind, and in 1930 Pope Pius XI issued a *Casti Connubii*, condemning not only sterilization but the entire eugenics movement. See Pius XI, *Casti Connubii* (Dec. 31, 1930), available at http://www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_p-xi_enc_31121930_casti-connubii_en.html.

¹⁸⁴ See James B. O’Hara & T. Howland Sanks, *Eugenic Sterilization*, 45 GEO. L. J. 20, 35–36 (1956). The American Neurological Association released a report in 1936 condemning compulsory sterilization laws. *Id.* Although the report did not disapprove of voluntary or even coercive sterilization, the Association took a conservative position by stating, “We do not believe that society needs to hurry into a program based on fear and propaganda.” *Id.*; see also Cynkar, *supra* note 23, at 1459. The American Medical Association released a

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evolving legal aspects of individual rights,¹⁸⁵ and perhaps most important, the revelation of the monstrous acts the Nazis committed in the name of unburdening the State from the progeny of defectives.¹⁸⁶

Fifteen years after the decision in *Buck v. Bell*, a new Supreme Court revisited the issue of state-mandated sterilization, this time with regard to the sterilization of criminals exhibiting “moral turpitude.”¹⁸⁷ In *Skinner v. Oklahoma*,¹⁸⁸ the Supreme Court was asked to consider whether a criminal statute authorizing sterilization of habitual criminals was constitutional.¹⁸⁹ The petitioner, Jack T. Skinner was convicted and imprisoned in 1926 for stealing chickens and in 1934 for robbery with firearms.¹⁹⁰ Proceedings against Skinner were instituted in 1936 and after a trial, the jury found that sterilization could be performed on Skinner without compromising his health.¹⁹¹

On appeal, Skinner made three arguments: lack of due process, cruel and unusual punishment, and violation of the equal protection clause.¹⁹² The Supreme Court, without issuing judgment on the due process and cruel and unusual punishment claims, ruled the statute unconstitutional on equal protection grounds—what Justice Oliver Wendell Holmes, Jr. had fifteen years earlier proclaimed in *Buck v. Bell* to be “the usual last resort of constitutional arguments.”¹⁹³

report in 1937 stating, “Present knowledge regarding human heredity is so limited that there appears to be very little scientific basis to justify limitation of conception for eugenic reasons There is conflicting evidence regarding the transmissibility of epilepsy and mental disorders.” *Id.*

¹⁸⁵ See *Skinner v. Oklahoma*, 316 U.S. 535 (1942). The Supreme Court, while not overturning *Buck v. Bell*, did make reproductive freedom a “fundamental” right. *Id.* at 541.

¹⁸⁶ See BRUNIUS, *supra* note 35, at 243–86. Perhaps the greatest flaw in the American eugenics movement was the admiration notable eugenicists expressed for the Nazi regime. Harry Hamilton Laughlin, for example, received an honorary degree from Heidelberg University in 1936, which he prized for the remainder of his life. *Id.*

¹⁸⁷ See *Skinner*, 316 U.S. at 536.

¹⁸⁸ Only Harlan Fiske Stone, elevated to the position of Chief Justice of the United States, was on the Court for both the *Bell* and *Skinner* decisions. See WILLIAM COHEN & JONATHAN D. VARAT, *CONSTITUTIONAL LAW: CASES AND MATERIALS* 1684–85 (Robert C. Clark ed., Foundation Press, 11th ed. 2001).

¹⁸⁹ OKLA. STAT. tit. 57, § 171 (1935). The Oklahoma Act defined “habitual criminal” as anyone “having been convicted two or more times for crimes ‘amounting to felonies involving moral turpitude.’” *Skinner*, 316 U.S. at 536.

¹⁹⁰ See *Skinner*, 316 U.S. at 537.

¹⁹¹ *Id.*

¹⁹² *Id.* at 538.

¹⁹³ *Buck v. Bell*, 274 U.S. 200, 208 (1927).

The Oklahoma statute was ruled unconstitutional by a unanimous Court, reasoning that “[s]terilization of those who have thrice committed grand larceny with immunity for those who are embezzlers is a clear, pointed, unmistakable discrimination.”¹⁹⁴ The Supreme Court did not directly overturn the decision of *Buck v. Bell*, though Justice William O. Douglas, in his majority opinion, expressed the same concern that Irving Whitehead had presented to the Supreme Court in his defense of Carrie Buck. Douglas lamented,

In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty.¹⁹⁵

Furthermore, in both concurring opinions, Chief Justice Harlan Fiske Stone and Justice Robert H. Jackson argued that science had yet to make definitive assurances that certain conditions were in fact inheritable.¹⁹⁶ These views stood in stark contrast to the extreme deference Oliver Wendell Holmes, Jr. granted eugenical theorists in 1927. In effect, this decision rendered sterilizations for penal purposes unconstitutional. However, involuntary sterilizations for the mentally unfit would continue in the United States for the next thirty years.¹⁹⁷

Although involuntary sterilizations would continue in the United States until the mid-1970s,¹⁹⁸ over the fifty-year period of eugenical sterilization, only 65,000 people were sterilized.¹⁹⁹ By contrast, Nazi Germany sterilized more people in 1935 alone than the United States sterilized over the past century.²⁰⁰ Moreover, despite the roughly equal number of persons sterilized in the United States and Sweden during the twentieth century, Sweden’s population has never been more than one-twenty-fifth that of the United

¹⁹⁴ *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

¹⁹⁵ *Id.* Justice Douglas also created a new formula for inquiring into the constitutionality of fundamental rights—strict scrutiny analysis. *Id.*

¹⁹⁶ *Id.* at 545, 546.

¹⁹⁷ See Reilly, *supra* note 182, at 167.

¹⁹⁸ In 1978, the Department of Health, Education and Welfare instituted guidelines prohibiting the sterilizations of many, while creating prodigious consent requirements, making both involuntary *and* voluntary sterilizations rare. See Reilly, *supra* note 182, at 167.

¹⁹⁹ See BRUNIUS, *supra* note 35, at 76.

²⁰⁰ See Cynkar, *supra* note 23, at 1456.

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States population.²⁰¹ The number of sterilizations in any given year in the United States never rose above 2,500 whereas the number of women who died during childbirth each year in the United States reached the height of 14,000 in 1933.²⁰²

When eugenical sterilizations in the United States fell out of vogue after World War II, sterilizations were predominantly performed to serve therapeutic purposes. The legal debate evolved from an initial examination of whether or not the State has the right to sterilize an individual, in order to advance State interests, to whether or not parents or guardians have the right to have their child or ward sterilized for therapeutic purposes.²⁰³

As the Supreme Court began expanding fundamental rights to include the right to procreate²⁰⁴ and the right not to procreate,²⁰⁵ developing law shifted to address the degree of consent required for voluntary sterilizations. The central case dealing with involuntary sterilizations for therapeutic purposes was *Relf v. Weinberger*.²⁰⁶ Decided by the United States District Court for the District of Columbia, *Relf* would alter the sterilization movement considerably by bringing into question certain coercive measures used by State physicians to procure consent.²⁰⁷

²⁰¹ Compare SWEDEN: POPULATION AND POPULATION CHANGES: 1749-2006 (historical population of Sweden) (http://www.scb.se/templates/tableOrChart___26047.asp) with SELECTED HISTORICAL DECENNIAL CENSUS POPULATION AND HOUSING COUNTS, U.S. CENSUS BUREAU (the historical population of the United States) (<http://www.census.gov/population/www/censusdata/hiscendata.html>).

²⁰² Compare HISTORICAL ABORTION STATISTICS, UNITED STATES (compiled by Wm. Robert Johnston, last updated 20 April 20, 2007) (<http://www.johnstonsarchive.net/policy/abortion/ab-unitedstates.html>) (citing the number of births per year) with Irvine Loudon, *Maternal mortality in the past and its relevance to developing countries today*, 72 AM. J. CLINICAL NUTRITION 241, 244 (2006), available at www.ajcn.org (enter "Loudon" in "author" field)(providing maternal mortality rates).

²⁰³ See generally *Relf v. Weinberger* 372 F. Supp. 1196 (D. D.C. 1974).

²⁰⁴ See *Skinner v. Oklahoma*, 316 U.S. 535, 536 (1942). Justice Douglas wrote, "Oklahoma deprives certain individuals of a right which is basic to the perpetuation of a race—the right to have offspring." *Id.*

²⁰⁵ See *Griswold v. Connecticut*, 381 U.S. 479 (1965) (overturning a Connecticut statute criminalizing the use of contraceptives by finding a marital right to privacy in the "penumbras" of the Bill of Rights); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (overturning a Massachusetts statute criminalizing the use of contraceptives for unmarried people by finding, on the basis of a violation of equal protection, that statutes denying contraceptive use by unmarried people was irrationally discriminatory); *Roe v. Wade*, 410 U.S. 113 (1973) (holding that most laws restricting access to abortions violate a right of privacy).

²⁰⁶ See *Relf v. Weinberger*, 372 F. Supp. 1196 (D. D.C. 1974).

²⁰⁷ *Id.* at 1203.

The petitioners in *Relf v. Weinberger* were five women coerced into undergoing sterilization based on the threatened withdrawal of federal welfare benefits.²⁰⁸ The Court concluded that the procedures used were coercive and therefore not “voluntary.”²⁰⁹ The Court held that the Department of Health, Education, and Welfare (“HEW”) guidelines must be amended to “require that individuals seeking sterilization be orally informed at the very outset that no federal benefits can be withdrawn because of a failure to accept sterilization.”²¹⁰ In 1978, HEW adopted the “final rules” which not only prohibited the sterilization of those persons under the age of twenty-one and all mentally incompetent persons, but also effectuated more complex consent requirements.²¹¹

In a series of cases in the 1980s and 1990s, courts adopted a new test to determine whether sterilizations for people lacking the mental capacity for healthcare decision-making could be sterilized upon the request of a parent or guardian.²¹² In *In re Grady*,²¹³ the Supreme Court of New Jersey adopted a standard whereby the “best interests”²¹⁴ of the incompetent person provided the basis for determining whether that person should be sterilized. This standard, in conjunction with the “least-restrictive-means” approach taken in *In re Terwilliger*,²¹⁵ comprise the framework courts have used to determine whether sterilization of the mentally incompetent is necessary.²¹⁶

III. TODAY

A. *China and the One-Child Policy*

Do not remove a fly from your friend's forehead with a hatchet.

—Chinese Proverb

²⁰⁸ See Joseph D. Baker, Comment, *Sexual Sterilization—Constitutional Validity of Involuntary Sterilization and Consent Determinative of Voluntariness*, 40 MO. L. REV. 509, 523 (1975).

²⁰⁹ *Relf*, 372 F. Supp. at 1199.

²¹⁰ *Id.* at 1203.

²¹¹ See Reilly, *supra* note 182, at 167.

²¹² For example, in *In re Valerie N.*, the California Supreme Court overturned the state's statute allowing for compulsory sterilization, holding that the mentally retarded have the same procreative rights as everyone else. See FIELD & SANCHEZ, *supra* note 28, at 82.

²¹³ *In re Grady*, 426 A.2d 467 (N.J. 1981).

²¹⁴ *Id.* at 475.

²¹⁵ *In re Terwilliger*, 450 A.2d 1376, 1383 (Pa. 1982).

²¹⁶ See Robert Randal Adler, Note, *Estate of C.W.: A Pragmatic Approach to the Involuntary Sterilization of the Mentally Disabled*, 20 NOVA L. REV. 1323, 1328–30 (1996).

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In 1979, the People's Republic of China began implementing family planning policies to combat an exploding Chinese population by limiting the number of children a couple may have to just one.²¹⁷ Despite achieving its goal of significantly reducing the birth rate,²¹⁸ the policy resulted in disastrous human rights consequences and brought the nation unwanted condemnation; thwarting China's efforts to gain acceptance in the world community. Worldwide attention will be concentrated on China in the coming year due to the nation's hosting of the 2008 Summer Olympic Games in Beijing.²¹⁹

China's One-Child Policy ("OCP") was not the country's first attempt to slow the exploding birth-rate²²⁰ and was a direct about-face from a policy instituted by Mao Ze-Dong who referred to birth control and abortion as a "bourgeois plot to visit 'bloodless genocide' upon the Chinese people."²²¹ Beginning in 1979, the One-Child Policy was not a national law, but rather a policy espoused by the Communist government and implemented, often inconsistently, through various provincial and municipal laws that lacked provisions for oversight and control.²²² This lack of conformity would lead Ann Noonan, a prominent human rights advocate, to write:

This has led to the use of local informants to discover unauthorized pregnancies, monitoring women's menses at the work place, and the implementation of draconian measures which in-

²¹⁷ See Nicole M. Skalla, Note, *China's One-Child Policy: Illegal Children and the Family Planning Law*, 30 BROOK. J. INT'L L. 329, 333 (2004).

²¹⁸ *Id.* at 341.

²¹⁹ See Philip P. Pan, *China Using Rights Issue to Promote Olympic Bid*, WASH. POST, Feb. 21, 2001, at A18. The mayor of Beijing said in 2001,

By applying for the Olympics, we want to promote not just the city's development, but the development of society, including democracy and human rights If people have a target like the Olympics to strive for, it will help us establish a more just and harmonious society, a more democratic society, and help integrate China into the world.

Id.

²²⁰ See Skalla, *supra* note 217, at 332–333. The first attempt to limit the population came during the population explosion of the 1950s and 1960s when China's population grew from 540 million to 800 million in three decades, an increase of 48%. *Id.* The policy of "wan, xi, shao" or "Later, Longer, Fewer" recommended that couples wait until later in life to marry, wait longer between pregnancies, and limit their number of offspring at two. *Id.*

²²¹ *Id.* at 332.

²²² See John Bongaarts & Susan Greenhalgh, *An Alternative to the One-Child Policy in China*, 11 POPULATION & DEV. REV. 585, 587 (1985).

clude violence against women, forcible late-term abortions, forced IUD insertion, forced sterilization, the detention of pregnant women or their family members, and the destruction of “over-birth” families’ homes.²²³

Although this policy was not instituted strictly for eugenical purposes, the means used to implement and conform to this policy, along with the advent of prenatal genetic testing, created a dramatic deficit of female newborns and a high rate of abortion for fetuses deemed “abnormal.”

B. *Females in the People’s Republic of China*

*How sad it is to be a woman!
Nothing on earth is held so cheap.
Boys stand leaning at the door
Like gods fallen out of heaven.
Their hearts brave the Four Oceans,
The wind and dust of a thousand miles.
No one is glad when a girl is born:
By her the family sets no store.*

—Fu Xuan

To understand the current family planning policies of China and the potential for human rights abuses stemming from such policies, it is necessary to understand Confucian teachings and other Ancient Chinese traditions, which emphasize a patrilineal family structure with inheritance rights belonging only to the first-born son.²²⁴ Throughout Chinese history, every woman was taught to accept four basic tenets in order to fulfill her role in society.²²⁵ These four “virtues” are:

[F]irst, a woman should know her place in the universe and behave in compliance with the natural order of things; second, she should guard her words and not chatter too much or bore others; third, she must be clea[n] and adorn herself to please men; and fourth, she should not shirk from her household duties.²²⁶

²²³ Skalla, *supra* note 217, at 337–38 (quoting Ann Noonan, *One-Child Crackdown*, NATIONAL REVIEW, Aug. 16, 2001, available at <http://www.nationalreview.com/comment/comment-noonan081601.shtml>).

²²⁴ See Mary H. Hansel, Note, *China’s One-Child Policy’s Effects on Women and the Paradox of Persecution and Trafficking*, 11 S. CAL. REV. L. & WOMEN’S STUD. 369, 378 (2001).

²²⁵ See Skalla, *supra* note 217, at 343.

²²⁶ *Id.*

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In addition to being considered second-class citizens, women were bought and sold for their reproductive value. While the family of the bride was paid for their daughter, the bride was forced to submit to her husband's wishes and provide him with children and a ready supply of labor.²²⁷

Chinese tradition holds that the individual is no more than a "living link in a great chain of being."²²⁸ Because of this, it is believed that the individual has no autonomy with regard to his own body. The body was given by his parents, and held in "trust" for one's sons.²²⁹ Therefore, failing to produce a male heir was regarded as a direct affront to one's ancestors.²³⁰ Importantly, females were "secondary links," only capable of joining the "chain of being" upon death.²³¹ This tradition of placing the utmost importance on producing a male heir naturally comes into conflict with the policy limiting a couple to just one child because, in theory at least, one-half of all familial chains are cut off.²³²

The Chinese population control measures that are currently in effect are disorganized and contradictory, and oftentimes policies are implemented on an ad hoc basis, at the local level, by local Communist party officials who are conflicted between carrying out the "official" government policy²³³ and managing obligations resulting from an antiquated political structure, caught in transition. Despite the extreme measures used to enforce the One-Child Pol-

²²⁷ See *id.*

²²⁸ See Bongaarts & Greenhalgh, *supra* note 222, at 595.

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.* As one woman put it,

Mothers-in-law love their sons and grandsons, but not their daughters. If a grandson isn't back home on time, the grandmother will worry. If he is sick, she will bring him to the hospital. If it is the granddaughter, no. Our generation treats girls and boys equal. But there is a common sentence in the village: boys are treasure, girls are trouble.

Karen Hardee, Zhenming Xie & Baochang Gu, *Family Planning and Women's Lives in Rural China*, 30 INT'L FAM. PLAN. PERSP. 68, 72 (2004) (citation omitted)

²³² See Bongaarts & Greenhalgh, *supra* note 222, at 596. "A one-child limit would imply that fewer than half of all couples will have a surviving son. If this limit were reached, the policy would break over 50 percent of the descent lines, preventing the majority of men from fulfilling their duty to their ancestors . . ." *Id.*

²³³ See Philip P. Pan, *China Tense About Action on Abuses of One-Child Policy*, WASH. POST, Sept. 20, 2005, at A17. After reports of forced sterilizations by party officials responsible for implementing the One-Child Policy in Linyi province, the Chinese government detained many of these officials to investigate possible abuses of the China policy; no party leaders were detained. *Id.*

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icy, numerous exceptions to the law grant couples the right to petition for a second or third child. The most glaring exception is the “daughter-only household exemption.”²³⁴ This exemption was first tested in a small rural province of China, but quickly spread to all rural areas of China within a few years.²³⁵ The exemption came about to accommodate the centuries-old belief that failing to provide a male heir dishonors a family’s ancestors.²³⁶ However, a permit for this second child is not free, costing at least 4,000 yuan (\$500).²³⁷ This creates a substantial burden on rural farming families, who are desperate for a son who can provide both the much-needed labor supply for the farm and support for his parents in their old age.²³⁸ Females cannot provide the latter because they are required to take care of their husbands’ parents.²³⁹

This Chinese tradition of treating females as merely expendable surplus has led to drastic consequences not only for Chinese human rights, but also in terms of the ratio of Chinese males to females. China has dealt for centuries with the adverse affects of male preference, which has resulted in the abandonment or infanticide of countless female children whose only crime was not being born male.²⁴⁰ China made advances toward a more equal society under Mao Ze-Dong,²⁴¹ as evidenced by a decrease in rates of female abandonment and infanticide.²⁴² However, by the mid-1980s a deficit of one hundred million females resulted from newly acquired technology, giving parents the ability to determine the sex of their child in utero, and the widespread availability of abortion.²⁴³

²³⁴ See Rosemary Santana Cooney & Jiali Li, *Sterilization and Financial Penalties Imposed on Registered Peasant Couples, Hebei Province, China*, 32 *STUD. FAM. PLAN.* 67, 68 (2001).

²³⁵ *Id.*

²³⁶ See Skalla, *supra* note 217, at 335.

²³⁷ *Id.*

²³⁸ See Hansel, *supra* note 224, at 378. As one author put it, “having a boy child is the best pension a Chinese peasant can get.” *Id.*

²³⁹ See Skalla, *supra* note 217, at 335.

²⁴⁰ See Kay Johnson, Huang Banghan & Wang Liyao, *Infant Abandonment and Adoption in China*, 24 *POPULATION & DEV. REV.* 469, 472 (1998).

²⁴¹ When the Communists took over China in 1948, they attempted to improve the status of women. See Skalla, *supra* note 217, at 344. For example, women were included in the class struggle with the slogan, “women hold up half the sky,” signaling an attempt by the Mao Ze-Dong regime to chip away at the traditional patriarchal family. *Id.*

²⁴² See Johnson, Banghan & Liyao, *supra* note 240, at 472.

²⁴³ See Hansel, *supra* note 223, at 376, 379, 383.

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Being born is simply the first hurdle Chinese females face. Infanticide and abandonment, on the rise since the mid-1980s, led to the murder of an estimated fifteen million children from the initiation of the One-Child Policy until 1995²⁴⁴ and one million females are left in orphanages every year.²⁴⁵ Many of the young girls who are turned over to state-controlled orphanages are destined to die from neglect, starvation, and exposure.²⁴⁶ In 1991, at the Shanghai Children's Welfare Institute, China's most prestigious orphanage, the death-to-admissions ratio was 77.6%.²⁴⁷ Additionally, the likelihood that an orphan would survive more than one year was less than fifty percent in 1989, and in some provinces the mortality rate among institutionalized orphans ranged from 59.2% to 72.5%.²⁴⁸ Females comprise ninety-five percent of the children in orphanages,²⁴⁹ and unlike many of their male counterparts,²⁵⁰ these abandoned girls are completely healthy.²⁵¹ Nor are these girls always infants.²⁵² In rural China, girls as old as five have been abandoned after family-planning officials began a "mobilization campaign" to enforce the policy.²⁵³

According to the Human Rights Watch of Asia, once these girls are admitted to an orphanage they are subjected to deliberately cruel treatment, including starvation, torture, and sexual abuse.²⁵⁴ Moreover, in a fashion reminiscent of Nazi Germany, children are selected through a process known as "summary resolution" whereby unwanted children are subjected to intentional starvation and dehydration.²⁵⁵ The Human Rights Watch of Asia has stated,

²⁴⁴ *Id.* at 380.

²⁴⁵ *Id.* at 381.

²⁴⁶ See Skalla, *supra* note 217, at 347.

²⁴⁷ See Hansel, *supra* note 224, at 381.

²⁴⁸ See HUMAN RIGHTS WATCH, DEATH BY DEFAULT: A POLICY OF FATAL NEGLECT IN CHINA'S STATE ORPHANAGES (1996), <http://www.hrw.org/summaries/s.china961.html>.

²⁴⁹ See Skalla, *supra* note 224, at 347.

²⁵⁰ See Kay Johnson, *Chinese Orphanages: Saving China's Abandoned Girls*, 30 AUSTRALIAN J. CHINESE AFF. 61, 62 (1993).

²⁵¹ See Johnson, Banghan & Liyao, *supra* note 240, at 476.

²⁵² See Johnson, *supra* note 250, at 70.

²⁵³ *Id.* The Director of one of the orphanages relayed the particularly tragic story of a five-year old girl who was abandoned by her parents with only the clothes she was wearing and a poem in her pocket. *Id.* The poem, written by her parents, criticized the One-Child Policy, citing it as the reason they were giving up their child. *Id.* The parents expressed hope to one day come back and retrieve their daughter. *Id.*

²⁵⁴ See HUMAN RIGHTS WATCH, *supra* note 248.

²⁵⁵ See Hansel, *supra* note 224, at 381.

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When an orphan chosen in this manner was visibly on the point of death from starvation or medical neglect, orphanage doctors were then asked to perform medical “consultations” which served as a ritual marking the child for subsequent termination of care, nutrition, and other life-saving intervention. Deaths from acute malnutrition were then, in many cases, falsely recorded as having resulted from other causes, often entirely spurious or irrelevant conditions such as “mental deficiency” and “cleft palate.”²⁵⁶

Additionally, these children are disposed of through the crematorium. This process is run by the Bureau of Civil Affairs, with no oversight, and many times no death certificate has been filled out.²⁵⁷

The People’s Republic of China appears unwilling to fully abandon its adoption laws in order to effectuate a reversal of these human rights abuses.²⁵⁸ In order to discourage more unregistered children, China restricts the adoption of these unwanted infants.²⁵⁹ The only couples permitted to adopt are those who cannot naturally conceive a child,²⁶⁰ are “free of mental diseases,”²⁶¹ and are at least thirty years old.²⁶² Furthermore, couples who adopt a second child are penalized as if they had given birth to that second child,²⁶³ unless it can be proven that the child was “officially” abandoned and raised in a social welfare institute.²⁶⁴

Although infanticide, abandonment, and gender-selective abortion are officially illegal in China,²⁶⁵ the demographic trends of China’s population demonstrate that something besides natural selection is occurring. The accepted standard birth ratio for humans around the world is between 105 and 107 males born per 100 fe-

²⁵⁶ HUMAN RIGHTS WATCH, *supra* note 248.

²⁵⁷ *Id.*

²⁵⁸ See Hansel, *supra* note 224, at 391.

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ Rachel A. Bouman, Comments, *China’s Attempt to Promote Domestic Adoptions: How Does China’s One-Child Policy Affect Recent Revisions in China’s Adoption Law and Measure up to the Hague Convention?*, 13 *TRANSNAT’L LAW.* 91, 117 (2000).

²⁶² *Id.*

²⁶³ See Hansel, *supra* note 224, at 391.

²⁶⁴ See Bouman, *supra* note 261, at 118. Prior to this amendment, only special needs children could be adopted by couples who already had one child. *Id.*

²⁶⁵ See Skalla, *supra* note 217, at 347. Despite being illegal, prosecutions are few and far between for the practices of infanticide, abandonment, and sex-selective abortion.

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males born.²⁶⁶ This ratio drops to 100 males to 100 females for the “youth population,” which are persons between the ages of 15 and 34.²⁶⁷ China however, has a birth ratio of 116.9 males per 100 females and this number is on the rise.²⁶⁸ Moreover, one rural province’s ratio is 135.6 males per 100 females.²⁶⁹ Additionally, childhood male to female ratios in China are also very high. Male to female ratios among one- to four- year old children have increased from 107 males per 100 females in 1982, to 109.4 males per 100 females in 1989, to 118.3 males per 100 females in 1995, to the ratio of 120.8 males per 100 females in 2000.²⁷⁰ These ratios illustrate the nationwide birth-gender gap, with roughly 400,000 to 500,000 more males than females born each year.²⁷¹ Despite the widespread view that traditional Asian values lead to this male-preference,²⁷² there is now a growing preference for females in Japan. One survey found that seventy-five percent of newlyweds are hoping their first child will be a daughter.²⁷³

The dramatic increase in the gender ratio is even more apparent when birth order is taken into account. The ratio for first births is 107.1 males to 100 females, 151.9 males per 100 females for second births, 160.3 males per 100 females for third births, and 161.4 males per 100 females for fourth births.²⁷⁴ These trends show that despite the official government policy banning infanticide and gender-selective abortions, these practices continue with impunity.

Such gender imbalances have led to a growing problem in China—the trafficking of tens of thousands of females between the ages of fourteen and twenty-four who are abducted and sold as brides in areas with few females.²⁷⁵ These young women are lured in with promises of jobs and a better life, but are instead sold like chattel into China’s growing prostitution industry²⁷⁶ or to China’s

²⁶⁶ See Andrea den Boer & Valerie M. Hudson, *The Security Threat of Asia’s Sex Ratios*, 24 SAIS REV. 27, 28 (2004).

²⁶⁷ *Id.* at 28–29.

²⁶⁸ *Id.* at 33. In 1981 China’s birth-sex ratio was 108.5 males per 100 females, and in 1989 it rose to 111.3 males per 100 females. *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ See Skalla, *supra* note 217, at 349.

²⁷² See Hansel, *supra* note 224, at 387.

²⁷³ *Id.*

²⁷⁴ See den Boer & Hudson, *supra* note 266, at 33.

²⁷⁵ See Hansel, *supra* note 224, at 384.

²⁷⁶ *Id.* at 385.

guang gun-er (“bare branches”), the surplus male bachelors who will never be able to “bear fruit.”²⁷⁷

Chinese policies have given rise to the massive number of “surplus” males²⁷⁸ who are unable to marry because there are not enough females, and thus, such men are cast aside by a society that still ties manhood to marriage.²⁷⁹ This phenomenon has created an environment susceptible to crime, specifically violent crime like rape,²⁸⁰ which will inevitably lead to dramatic social instability.

C. *Eliminating the ‘Abnormal’*

Nature does nothing uselessly.

—Aristotle

Chinese tradition holds societal interests above those of the individual. People who suffer from mental disorders that might disrupt society are heavily stigmatized and isolated.²⁸¹ Suicide rates are also very high in China, according to the World Bank’s 1990 Global Burden of Disease Study.²⁸² The study found that China, while making up one-fifth of the world’s population, comprised 43.6% of all suicides in the world.²⁸³ Additionally, unlike the rest of the world, suicide in China is committed predominately by females²⁸⁴—55.8% of all female suicides in the world, in 1990,

²⁷⁷ See Skalla, *supra* note 217, at 350.

²⁷⁸ See Valerie M. Hudson & Andrea den Boer, *A Surplus of Men, A Deficit of Peace: Security and Sex Ratios in Asia’s Largest States*, 26 *INT’L SECURITY* 4, 12 (2002). Hudson and Boer explain that these “surplus males” are,

[L]iable to come from the lowest socioeconomic class, be un- or underemployed, live a fairly nomadic or transient lifestyle with few ties to the communities in which they are working, and generally live and socialize with other bachelors. In sum, these young surplus males may be considered, relatively speaking, losers in societal competition.

Id.

²⁷⁹ *Id.*

²⁸⁰ See den Boer & Hudson, *supra* note 266, at 37. It is a cross-cultural phenomenon that violent crimes are generally perpetrated by young, unmarried, poor males. *Id.*

²⁸¹ See Michael R. Phillips, *The Transformation of China’s Mental Health Services*, 39 *CHINA J.* 1, 10 (1998). In addition, in China, various myths surround the mentally ill given that they are perceived as being “frequently violent or destructive,” ill due to “bad ‘fate’” or “immoral behavior,” and mental illness is thought to be contagious. *Id.*

²⁸² *Id.* at 11.

²⁸³ *Id.*

²⁸⁴ *Id.* The total number of official female suicides in the world in 1990 was 330,000—184,000 of these were Chinese women. *Id.* And, although the number of suicides for males is disproportionately higher in China than in the rest of the world (33.9% of all male suicides in 1990 were committed by Chinese men) the rate of suicides for women was 33.5

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were carried out by Chinese women.²⁸⁵ This may be due, in part, to the byzantine administrative system imposed by the Communists, who were unable or unwilling to fully fund medical care, especially mental health care, for decades.²⁸⁶ This forced people suffering from any mental illness to remain dependent on their families to provide for their well-being.²⁸⁷ Gradually, the Chinese government is closing community therapy centers and state-funded psychiatric hospitals while promoting privatized health care.²⁸⁸ The effect of this policy has been a near-complete withdrawal of medical care from China's enormous, rural, and poor population.²⁸⁹ In addition, psychiatry is held in lower regard than other medical specialties in China,²⁹⁰ so fewer medical students enter the field, further debilitating an already deficient mental health care community.²⁹¹

China's population controls aim to reduce the number of births while ensuring that children born are only of the highest quality. Centuries of inbreeding in rural communities,²⁹² a high prevalence of congenital hypothyroidism resulting from lower than normal iodine content in the soil of many rural areas,²⁹³ and hereditary diseases have contributed to higher than normal rates of mental retardation in many rural provinces.²⁹⁴ In an effort to eliminate this problem, the Chinese government instituted a series of measures including restrictive marriage laws, compulsory (or coercive) sterilizations, and forced abortions.²⁹⁵

per 100,000, while it was 27.2 per 100,000 for males. *Id.* In the rest of the world, the average rates were 12.6 per 100,000 for women and 17.2 per 100,000 for men. *Id.*

²⁸⁵ *Id.*

²⁸⁶ *Id.* at 15.

²⁸⁷ *Id.* at 17.

²⁸⁸ *Id.* at 15–16.

²⁸⁹ *Id.* at 16.

²⁹⁰ *Id.* at 16–17.

²⁹¹ *Id.* at 16–17. The government has begun forcing students into the field of psychiatry to deal with the paucity of mental health care workers. *Id.*

²⁹² See Daniel S. Gewirtz, Note, *Toward a Quality Population: China's Eugenic Sterilization of the Mentally Retarded*, 15 N.Y.L. SCH. J. INT'L & COMP. L. 139, 146 (1994). In many rural villages, potential marriage partners live within a very limited area. *Id.* For generations there was little or no access to the outside world, which led frequently to marriages between close relatives. *Id.*

²⁹³ See *id.* at 147. Iodine is necessary for proper physical and mental development. *Id.* In some rural areas where the iodine content in the soil is very low, the rate of mental retardation is as high as 17% of the population. *Id.*

²⁹⁴ See *id.* (Approximately 380,000 children are born each year with congenital defects.)

²⁹⁵ *Id.*

China's marriage law, drafted in 1981, forbids the marriage of relatives within three generations.²⁹⁶ The law also forbids the marriage of those who are mentally retarded, unless both partners agree to sterilization.²⁹⁷ Furthermore, abortion is strongly recommended for any unborn child found to have a serious genetic defect.²⁹⁸ Because these laws broadly address a vast array of "abnormalities" and given that such policies are implemented at the local level (like most laws in China), widespread abuse and arbitrary determinations of a person's "defectiveness" have become the norm, rather than the exception.²⁹⁹

The Gansu Province in 1988 passed a law mandating the sterilization of certain "intellectually impaired"³⁰⁰ individuals. The law commanded the sterilization of any person deemed mentally retarded who had already married before the law's passage.³⁰¹ Perhaps most horrific is the fact that the law authorized the termination of any pregnancy of a mentally retarded woman, regardless of the stage of fetal development.³⁰² Anyone who allowed a mentally retarded woman to give birth would be subject to strict economic penalties.³⁰³ Other provinces followed Gansu. Within a few years, one-third of the population of China functioned under laws adopted for these eugenic purposes.³⁰⁴

Interest in eugenic principles to promote a mentally and physically fit society is not a new phenomenon in China. For centuries, the Chinese have interwoven holistic folk remedies with various theories about reproductive health in their attempt to promote the welfare of society.³⁰⁵ This has led to a mindset amongst the Chinese that the interests of society outweigh the rights of the individ-

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ *Id.* at 148.

²⁹⁹ See Linda Johnson, *Expanding Eugenics or Improving Health Care in China: Commentary on the Provisions of the Standing Committee of the Gansu People's Congress Concerning the Prohibition of Reproduction by Intellectually Impaired Persons*, 24 *J. L. & Soc'y* 199, 205 (1997).

³⁰⁰ *Id.* at 207.

³⁰¹ See FRANK DIKÖTTER, *IMPERFECT CONCEPTIONS: MEDICAL KNOWLEDGE, BIRTH DEFECTS AND EUGENICS IN CHINA* 172-73 (1998).

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ See Gewirtz, *supra* note 292, at 149.

³⁰⁵ See DIKÖTTER, *supra* note 301, at 13.

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ual.³⁰⁶ Additionally, women who are incapable of giving birth to healthy children are held responsible because it is believed they have committed some abhorrent wrong.³⁰⁷

Health manuals in China promote unsubstantiated claims about the reasons for birth defects, including one, that a child conceived by an intoxicated couple will be inferior³⁰⁸ and two, that a child conceived by anyone under the legal marriage age will be deficient.³⁰⁹ A third claim was made that there are three biological clocks responsible for intelligence, physical strength, and mood, and only when these three clocks are at their peak is conception desirable.³¹⁰ Moreover, these same health manuals transform “normality” and “abnormality” into medical terms; even the slightest “defect,” thought to be caused by a “hereditary disease,” will invoke the label of “abnormal” and termination of the pregnancy will be recommended.³¹¹

Largely as a result of the One-Child Policy and the drive for “superior” births, focus has shifted in China from preventing health defects to simultaneously promoting socially desirable children.³¹² To this end, many in China are returning to folk notions of maternal health and maternal influence on the fetus in utero. It is believed that there is a connection between the mother’s emotions during pregnancy and the health and physical fitness of the child.³¹³ To support this theory, numerous “scientific” studies have been conducted, including one that compared the average IQs of children born in a region devastated by an earthquake, to a second unaffected group of children.³¹⁴ The first group had a lower aver-

³⁰⁶ See Hansel, *supra* note 224, at 374–75. The 1982 Constitution of the People’s Republic of China mandates that families not only practice family planning but that they also use some form of birth control. *Id.* at 371, 374–75. This came on the heels of the 1980 Marriage Law that forbids marriage before the age of twenty-two for males and twenty for females. *Id.* at 371.

³⁰⁷ See DIKÖTTER, *supra* note 301, at 130.

³⁰⁸ *Id.* at 131.

³⁰⁹ *Id.* at 131–32.

³¹⁰ *Id.* at 132–33.

³¹¹ *Id.* at 135. Medical textbooks affirm these principles by classifying the following conditions under the umbrella of “defective birth”: “‘small ears,’ ‘asymmetrical size of the ears,’ ‘primitive shape of the ears,’ ‘low-set ears,’ ‘auricular tags,’ [and] ‘preauricular fistulas,’ or ‘earlobe creases’” *Id.*

³¹² *Id.* at 145.

³¹³ *Id.* at 146.

³¹⁴ *Id.* at 146–47.

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age IQ, illustrating that a trauma that causes emotional strain on women can adversely affect the intelligence of the unborn baby.³¹⁵

There is also a growing movement in China supporting euthanasia for newborn infants deemed “defective,”³¹⁶ evidenced by an increasing number of academic journal articles by respected scientists, physicians, and demographers propounding this approach. According to such scholars, these defectives have “zero worth,” given that they are a financial burden to society, and thus, society has the right to eliminate them in order to preserve the collective good.³¹⁷ Euthanasia is seen as the logical solution to defective births that have gone undetected during the pregnancy, precluding abortion as the answer.³¹⁸ Over the past twenty years there has also been an increase in the abandonment of infants with minor abnormalities, such as a cleft palate or harelip.³¹⁹

D. *Methods Used to Implement Family Planning*

Violence is the last refuge of the incompetent.

—Isaac Asimov

China's One-Child Policy has created an environment in which discrimination against women and children is allowed to go unchecked. The central feature of China's Family Planning Policy (“FPP”) is the One-Child mandate and strict adherence to that policy is obligatory. Officials are penalized severely for allowing FPP violations, including the forging of “illegal” birth certificates, allowing the live birth of a fetus that should have been aborted, and missing state-mandated birth-quotas.³²⁰ By contrast, public officials who violate human rights are subject to no such punitive measures.³²¹ Moreover, the One-Child Policy is implemented through party directives that are regarded as “superior to legislation and codified laws.”³²² This creates an atmosphere in which local party

³¹⁵ *Id.*

³¹⁶ *Id.* at 160.

³¹⁷ *Id.* at 160–61.

³¹⁸ *Id.*

³¹⁹ *Id.* at 181.

³²⁰ See Xiaorong Li, *License to Coerce: Violence Against Women, State Responsibility, and Legal Failures in China's Family-Planning Program*, 8 *YALE J.L. & FEMINISM* 145, 163–64 (1995).

³²¹ *Id.* at 164–65.

³²² *Id.* at 150.

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officials are driven to meet these “top-down,” imposed quotas, regardless of the means used.³²³

Local family planning officials, 300,000 full-time workers, and hundreds of thousands of part-time “cadres,” are responsible for enforcing these policies.³²⁴ These cadres find women with illegal pregnancies—“illegal” either because they are not registered with the government³²⁵ or because the parents are believed to have “hereditary” defects³²⁶—and report them to officials who then obtain “voluntary consent” to terminate the pregnancies.³²⁷ As a means of intimidation, and to keep the public vigilant in abstaining from potentially illegal procreation, family-planning workers are known to publish the menstrual cycles of fertile women, along with their preferred choice of birth control.³²⁸ Steven W. Mosher, President of the non-profit Population Research Institute, provides a cogent account of “voluntary compliance” in China:

There are cases in China where brute force is used to perform abortion and sterilization. But more commonly, the Chinese government abides by its own Orwellian definition of voluntary, which is to say that you can fine the woman; you can lock her up; you can subject her to morning-to-night brainwashing sessions; you can cut off her electricity to her house; you can fire her from her job; you can fire her husband from his job; and you can fire her parents from their jobs. All of this psychological mauling, sleep deprivation, arrest, and grueling mistreatment is inflicted upon these women in order to break their will to resist. But as long as the pregnant women walk the last few steps to the

³²³ See Skalla, *supra* note 217, at 337.

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³²⁴ See Elina Hemminki, Zhuochun Wu, Guiying Cao, & Kirsi Viisainen, *Illegal Births and Legal Abortions—the Case of China*, 2 REPROD. HEALTH (2005), available at <http://www.reproductive-health-journal.com/content/2/1/5>.

³²⁵ See Li, *supra* note 320, at 152. For a child to be legally approved of by the government, the mother must have permission from local authorities prior to conception and must also undergo testing to ensure that neither she, nor the child, carries a hereditary defect. *Id.*

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³²⁶ Having the following abnormalities provided grounds for prohibiting procreation: deafness, muteness, schizophrenia, manic depression, and heart disease. See Li, *supra* note 320, at 161. Shanxi province demands sterilization “if one spouse is insane (*chi*), an idiot (*dai*), or a fool (*sha*), or has any other hereditary disease likely to cause severe defects in descendants . . .” *Id.* (citation omitted).

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³²⁷ Although the Chinese government claims that its family planning policy “combines government guidance with the voluntary participation of the people,” numerous reported accounts indicate that “voluntary” is a malleable term of art. See Skalla, *supra* note 217, at 339 (citation omitted).

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³²⁸ See Hansel, *supra* note 224, at 373.

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local medical clinic under their own power, then the abortions that follow are said to be “voluntary.”³²⁹

If none of these tactics work to gain the woman’s “consent” to abort, local government officials may resort to “physical brutality, property destruction, detention, beatings and demolition of residences.”³³⁰

In addition to being subject to overt human rights abuses, women also bear a disproportionate responsibility for contraception.³³¹ Since use of contraception is mandatory, females with one child are directed to use inter-uterine devices and couples with two or more children are to be sterilized.³³² Women are five times as likely to be sterilized, despite the fact that a vasectomy is far safer than any surgical contraceptive method a woman may choose.³³³ Moreover, in accordance with Chinese tradition that the individual should submit himself or herself to the greater good of society,³³⁴ women are treated as objects of “state contraceptive control,”³³⁵ not as the liberated individuals the One-Child-Policy was supposed to beget.³³⁶

In 1995, the State Birth Planning Commission (“BPC”) began pilot projects to improve the “quality of care,” or *youzhi fuwu*,³³⁷ and place more emphasis on women’s choice.³³⁸ However, the All-China Women’s Federation, which is the preeminent promoter of women’s issues in China, refuses to cooperate with the BPC.³³⁹ The BPC purportedly “treats population targets as a blind obsession”³⁴⁰ and is incapable of reversing twenty years of practice by

³²⁹ Skalla, *supra* note 217, at 339–40 (citing Scott Weinberg, *An End to the One-Child Quota?*, Feb. 2000, available at <http://www.catholic.net/rcc/Periodicals/cwr/Feb2000/Dossier3.html>).

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³³⁰ See Skalla, *supra* note 217, at 340. There are numerous reports that when a woman refuses to submit, her home and the homes of her relatives are torn down so they will not be able to provide her with shelter. *Id.* Furthermore, anyone that does provide her with shelter or any help is subject to the same strict penalties. *Id.*

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³³¹ See Susan Greenhalgh, *Fresh Winds in Beijing: Chinese Feminists Speak Out on the One-Child Policy and Women’s Lives*, 26 SIGNS 847, 870 (2001).

³³² See Hardee, Xie & Gu, *supra* note 231, at 70–71.

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³³³ See Greenhalgh, *supra* note 331, at 870.

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³³⁴ *Id.*

³³⁵ *Id.* at 854.

³³⁶ *Id.* at 853.

³³⁷ *Id.* at 856.

³³⁸ *Id.*

³³⁹ *Id.* at 877.

³⁴⁰ *Id.*

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switching to a “bottom-up, client-focused service orientation.”³⁴¹ In 2000 and 2001, the government instituted new directives in an attempt to soften the image of the One-Child Policy.³⁴² But, notably legislators remain silent on the issue of imposing sanctions and penalties on officials guilty of violating human rights.³⁴³ Essentially, since these new directives are “neither a tightening nor a loosening” of the policy,³⁴⁴ they simply turn attention toward general reproductive health and “reaffirm the program’s historic mission”³⁴⁵ by providing incentives for couples in compliance,³⁴⁶ rather than focusing strictly on birth control.³⁴⁷ Despite this softer side of reproductive subordination to the state, violations of human rights continue relatively unimpeded and unpunished as reformers fall victim to hard-liners who maintain determined in their quest for population control.³⁴⁸

In 2001, Huaiji, a Chinese province with a population of roughly one million, became the epicenter of the drive to meet the population quota.³⁴⁹ Halfway through the year, family planning officials in the province were ordered to conduct 20,000 more abortions by year’s end, or face severe penalties.³⁵⁰ To deal with this “emergency,” local county officials withheld parts of the salaries of some 15,000 government employees, including teachers and police and fire personnel, to fund the purchase of ultrasound machines and expedite these abortions—given that more efficient technology enables “doctors to order terminations on the spot.”³⁵¹ In addition to carrying out forced abortions, physicians were also directed to sterilize every woman as soon as she gave birth.³⁵²

³⁴¹ *Id.* at 874–75.

³⁴² See Edwin A. Winckler, *Chinese Reproductive Policy at the Turn of the Millennium: Dynamic Stability*, 28 POP. DEV. REV. 379, 380 (2002).

³⁴³ See Christie N. Love, *Not in Our Country? A Critique of the United States Welfare System Through the Lens of China’s One-Child Policy*, 14 COLUM. J. GENDER & L. 142, 152 (2005).

³⁴⁴ See Winckler, *supra* note 342, at 380.

³⁴⁵ *Id.* at 390.

³⁴⁶ *Id.* at 394.

³⁴⁷ *Id.* at 399.

³⁴⁸ See Philip P. Pan, *Chinese to Prosecute Peasant Who Resisted One-Child Policy*, WASH. POST, July 8, 2006, at A12.

³⁴⁹ See Damien McElroy, *Chinese Region ‘Must Conduct 20,000 Abortions’: Hated Family Planning ‘Police’ Crack Down on Rural Area Where Families Average Five Children*, SUNDAY TELEGRAPH (LONDON), Aug. 5, 2001, at 30.

³⁵⁰ *Id.*

³⁵¹ *Id.*

³⁵² *Id.*

Huaiji has not been the only province forced to undergo such harsh measures. These implementation measures are routinely practiced throughout China's rural provinces, where violations of the One-Child Policy are most prevalent. In 2005, Chen Guangcheng, a blind activist and self-educated lawyer,³⁵³ launched an unprecedented effort to shed light on the abuses perpetrated by the Chinese government through a public campaign to end these atrocities.³⁵⁴ Guangcheng uncovered widespread abuses including forced sterilizations, forced late-term abortions,³⁵⁵ and intimidation of families.³⁵⁶ The Chinese government has repeatedly imprisoned Guangcheng for violating the most fundamental policy of the communist government—speaking to Western newspapers and United States diplomats.³⁵⁷

In July 2006, the Chinese government decided to bring criminal charges against Guangcheng for leading a protest against local Linyi officials, among other accusations.³⁵⁸ Due to the courageous protests of attorneys, scholars, and civic activists from across China and based on the support of diplomats from the United Nations and the United States the Chinese government was finally convinced to allow Guangcheng to meet with his attorney.³⁵⁹ However, Guangcheng and his attorney were prohibited from discussing his defense. When the attorney traveled to

³⁵³ Since Guangcheng is blind, he was not able to study law in any university. See *Only the 'Medically Fit,'* *infra* note 365.

³⁵⁴ See Philip P. Pan, *Who Controls the Family?—Blind Activist Leads Peasants in Legal Challenge To Abuses of China's Population-Growth Policy*, WASH. POST, Aug. 27, 2005, at A1.

³⁵⁵ See Michael Sheridan, *China Shamed by Forced Abortions*, SUNDAY TIMES, Sept. 18, 2005, at 27. Reports abound of women being forced to undergo late-term abortions. *Id.* One woman, Li Juan, in her ninth month of pregnancy, was pinned down so family planning officials could insert a poison-filled syringe in her abdomen. *Id.* "At first I could feel my child kicking a lot. Then after awhile I couldn't feel her kicking anymore," said Juan. *Id.* The next day she gave birth to a dead baby, but just to be sure, officials submerged the baby into cold water for several minutes. *Id.*

³⁵⁶ *Id.*

³⁵⁷ See Philip P. Pan, *Rural Activist Seized in Beijing—Legal Campaign Has Targeted Forced Sterilization, Abortion*, WASH. POST, Sept. 7, 2005, at A22. Guangcheng instituted a class-action lawsuit on behalf of the citizens of Linyi Province, China. *Id.* In an effort to bring attention to the suit, he spoke with *Time* magazine, the *Washington Post*, and diplomats at the U.S. Embassy. *Id.* Thereafter, he was arrested, detained, and beaten, but because Guangcheng's story had already reached the Western press, the Chinese government admitted to his being in custody and released him to house arrest. *Id.*

³⁵⁸ See Phillip P. Pan, *Trial of Blind Activist Set to Highlight China's Stance on Hard-Liners, One-Child Policy*, WASH. POST, July 7, 2006.

³⁵⁹ *Id.*

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Guangcheng's home village to gather evidence for the case, he was assaulted by local thugs, presumably at the direction of local officials.³⁶⁰

Guangcheng has been pilloried by Linyi party officials, who describe him as a tool of "foreign anti-Chinese forces."³⁶¹ These officials have created such an intense environment of fear that no one is willing to intervene on Guangcheng's behalf.³⁶² At the behest of local party officials of Linyi, the Foreign Ministry and the Propaganda Department of China have banned all discussion of Guangcheng's case in the state media and on the Internet.³⁶³ Guangcheng's wife, Yuan Weijing stated, "[e]verything that has happened runs counter to Hu Jintao's [President of the People's Republic of China] talk of democracy and governing by law. We live in a nation without law, a nation without morality."³⁶⁴

The PRC adopted yet another discriminatory measure by restricting certain individuals from entering universities.³⁶⁵ Various regulations are imposed on the admittance procedures of universities, including categorical denials of admissions to certain groups deemed inferior and not worthy of an education.³⁶⁶ For example, applicants "whose legs vary in length by more than two inches" or whose spine is excessively curved, are prohibited from taking courses in geology, law, and civil engineering.³⁶⁷ Applicants who are color-blind are not allowed in business courses.³⁶⁸ Anyone with cancer, epilepsy, high blood pressure, or any mental disorder will be prevented from attending universities altogether.³⁶⁹ These policies were adopted to alleviate the shortage of places in universities for Chinese students.³⁷⁰ Presently, there are only enough seats available every year for five percent of the student popula-

³⁶⁰ *Id.*

³⁶¹ *Id.*

³⁶² *Id.* As one Chinese scholar stated, "In the current political environment, in this political system, no official has any incentive to help him." *Id.* He continued, "The risks to your career are great, and there's little to be gained." *Id.*

³⁶³ *Id.*

³⁶⁴ *Id.*

³⁶⁵ See *Only the 'Medically Fit' Can Go to College, China Decrees*, SUNDAY TELEGRAPH (London), June 24, 2001, at 27.

³⁶⁶ *Id.*

³⁶⁷ *Id.*

³⁶⁸ *Id.*

³⁶⁹ *Id.*

³⁷⁰ *Id.*

tion.³⁷¹ As one university official stated, the disabled are excluded to prevent the “clogging up” of universities.³⁷² Allowing one disabled child “only encourages more to apply.”³⁷³

E. *United States vs. China*

There is a tendency for the world to say to America, “the big problems of the world are yours; you go and sort them out,” and then worry when America wants to sort them out.

—Tony Blair

China’s One-Child Policy and its resulting human rights violations have brought about condemnation from Western nations, particularly the United States. The conflict over human rights between the United States and China arises out of each country’s diverging concepts of such rights.³⁷⁴ Whereas, in the United States, “[w]here human rights are asserted as claims by individuals and against the power of the state”³⁷⁵ the Chinese believe that it is the duty of the state to provide for the welfare of people. Because of this, human rights in China are tied inextricably to state authority.³⁷⁶

With the United States acting as the driving force, the United Nations in 1969 created the United Nations Population Fund (“UNFPA”) to assist developing nations in enacting family planning measures.³⁷⁷ However, in the mid-1980s the United States began withholding funds from the UNFPA when Congress and the Reagan Administration adopted a new policy denying funds to any organization that “supports or participates in the management of a program of coercive abortion or involuntary sterilization.”³⁷⁸ UNFPA funding was reinstated during the Clinton Administration,

³⁷¹ *Id.*

³⁷² *Id.*

³⁷³ *Id.*

³⁷⁴ See Zhou Qi, *Conflicts over Human Rights Between China and the US*, 27 *HUM. RTS. Q.* 105, 113 (2005).

³⁷⁵ *Id.* (quoting Susan Mendus, *Human Rights in Political Theory*, in *POLITICS AND HUMAN RIGHTS* 12 (David Beetham ed., 1995)).

³⁷⁶ See Qi, *supra* note 374, at 113.

³⁷⁷ Barbara B. Crane & Jason L. Finkle, *The United States, China, and the United Nations Population Fund: Dynamics of US Policymaking*, 15 *POPULATION & DEV. REV.* 23, 23 (1989).

³⁷⁸ *Id.* at 24 (citing the Kemp-Inouye-Helms amendment to the Supplemental Appropriations Act for Fiscal Year 1985, Pub. L. No. 99-88, 99 Stat. 293).

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but American funding for the project was again withdrawn immediately after George W. Bush became President in 2001.³⁷⁹

For years, the United States has been a vocal critic of human rights violations in China. The 2005 U.S. State Department Report on Human Rights Abuses in China highlighted numerous abuses by Chinese officials.³⁸⁰ Various human rights violations are outlined in the Report such as: discrimination against women, children and the mentally disabled; trafficking in women; and forced sterilizations and abortions.³⁸¹ The U.S. State Department concluded that the central Chinese government was not only silent on the matter of punitive action for officials accused of human rights violations, but in fact, the “rewards or penalties” based on meeting population quotas have created an apparent de facto policy of willful ignorance.³⁸²

The PRC officially dismisses such claims as meritless³⁸³ by repeatedly pointing to official government policies outlawing gender-selective abortions,³⁸⁴ or sporadically prosecuting those “conducting family planning work” who have “violated the law.”³⁸⁵ However, numerous reports show that women are brutally coerced into late-term abortions and forced sterilizations.³⁸⁶ On January of 2006, in complete disregard for Western concerns about these human rights violations, Zhang Weiqing, Minister of the State Commission of Population and Family Planning, stated that the One-Child Policy would remain in effect for the foreseeable future.³⁸⁷

IV. TOMORROW

Our children's children will hear a good story.

—Richard Adams

³⁷⁹ See David Rennie, *US Cuts Off UN's Family Planning Aid*, DAILY TELEGRAPH (London), July 23, 2002, at 11.

³⁸⁰ See U.S. DEP'T OF STATE, *supra* note 6, § 1-f.

³⁸¹ *Id.*

³⁸² *Id.*

³⁸³ See *US Accusations Over Birth Policy Baseless*, CHINA DAILY (Beijing), June 24, 2005.

³⁸⁴ See *Jail for Those Who Help Sex Selection*, CHINA DAILY (Beijing), Dec. 26, 2005, at 2.

³⁸⁵ See Pan, *supra* note 233, at A17.

³⁸⁶ See Hannah Beech, *Enemies of the State?*, TIME, Sept. 19, 2005, at 58.

³⁸⁷ See *Minister Says One-Child Rule Will Remain in Coming Years*, CHINA DAILY (Beijing), Jan. 7, 2006, available at http://english.peopledaily.com.cn/200601/07/eng20060107_233576.html.

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A. *Ethical Considerations*

When we are planning for posterity, we ought to remember that virtue is not hereditary.

—Thomas Paine

Is eugenics, albeit grounded in more than speculative pseudoscience and disregard for human rights, still extant in the United States of America? When Oliver Wendell Holmes, Jr. penned his infamous witticism that “[t]hree generations of imbeciles are enough,”³⁸⁸ he no doubt envisioned a utopian dreamland, filled with intellectual heavyweights barren of mental misfits.

The line between social and medical “disability” is not only blurry, it is also an arbitrary gap, susceptible to manipulation by callous politicians and social engineers. The “characteristic of disability”³⁸⁹ lies in the eye of the beholder. People conforming to societal and medical norms serve as judge, jury, and executioner of whomever they deem sick or disabled. Ask someone with Down Syndrome, Spina Bifida, or Achondroplasia (*dwarfism*) if they believe that they are “sick” or “disabled.”³⁹⁰ Should someone with Diabetes, Sickle cell anemia, or Hemophilia be restrained from procreation? If “quality of life” is the basis for determining who should procreate, whose “quality of life” are we to use as the standard: that of Brad Pitt and Angelina Jolie?³⁹¹ Keep in mind that to a couple with achondroplasia,³⁹² bearing a child of “normal” size would be abnormal and perhaps undesirable.³⁹³

³⁸⁸ *Buck v. Bell*, 274 U.S. 200, 207 (1927).

³⁸⁹ Adrienne Asch, *Prenatal Diagnosis and Selective Abortion: A Challenge to Practice and Policy*, 89 AM. J. PUB. HEALTH 1649, 1651 (1999).

³⁹⁰ *Id.*

³⁹¹ In the summer of 2006, the world awaited the birth of the first child of Brad Pitt and Angelina Jolie. Even before birth, the child was lauded as the “perfect baby.” As one gossip columnist lamented, “[t]his week’s New York magazine wades knee-deep into the Messiah-level anticipation accompanying the impending birth of Brad Pitt and Angelina Jolie’s forthcoming biological offspring, the perfect being expected to emerge from Jolie’s womb, cut its own umbilical cord, and toddle off into the world to take care of the business of saving mankind.” *Paparazzi Await Birth of Jolie and Pitt’s Messiah*, DEFAMER, <http://www.defamer.com/hollywood/angelina-jolie/paparazzi-await-birth-of-jolie-and-pitts-messiah-166361.php> (last visited Aug. 3, 2006).

³⁹² See Ronald M. Green, *Parental Autonomy and the Obligation Not to Harm One’s Child Genetically*, 25 J.L. MED. & ETHICS 5, 6 (1997). If two people with dwarfism conceive four children, on average, at least two of them will have dwarfism, and one child will be of normal height. *Id.*

³⁹³ *Id.* In yet another example of this mentality, an American lesbian couple, both of whom were deaf, wanted to have a deaf child. See A. Holland & I.C.H. Clare, *The Human Genome Project: Considerations for People with Intellectual Disabilities*, 47 J. INTELL. DISA-

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In 1990, the United States began funding the Human Genome Project to map the 100,000 human genes so as to write the “book of life.”³⁹⁴ The project aimed to create an index of genes so that parents could “pick, add, or remove” genes to suit their desires.³⁹⁵ Such an endeavor places the practice of prenatal genetic testing at the forefront of the ethical debate surrounding reproductive rights. Some have argued that the widespread use of prenatal genetic testing in conjunction with on-demand abortion will inevitably lead to social stratification; beholding inferior people to the will of superior people, creating potential exploitation and discrimination.³⁹⁶ Others take the position that parents have a duty to their offspring “not to inflict genetic harm knowingly or negligently on their children.”³⁹⁷

These divergent positions have recently been implemented and exemplified by two nations. The Republic of Ireland enacted a policy to protect physicians who refuse to provide genetic counseling if that physician believes such counseling will increase the incidence of abortion.³⁹⁸ Conversely, in the People’s Republic of China, while prenatal genetic testing is proscribed for gender purposes, it remains mandatory for eugenical purposes.³⁹⁹

The United Kingdom regulates all assisted reproduction techniques including pre-implantation testing. An embryo may only be implanted if approved by the regulatory agency, the Human Fer-

BILITY RES. 515, 521 (2003). They used sperm donated by a man who was also deaf. *Id.* The child conceived was mostly deaf, but did have some hearing in one ear. *Id.*

³⁹⁴ Parendi Mehta, *Human Eugenics: Whose Perception of Perfection?*, 33 HIST. TCHR. 222, 226 (2000).

³⁹⁵ *Id.* Parents could choose everything from eye color to intelligence. *Id.*

³⁹⁶ See John R. Harding, Jr., *Beyond Abortion: Human Genetics and the New Eugenics*, 18 PEPP. L. REV. 471, 498, 499 (1991).

³⁹⁷ See Green, *supra* note 392, at 6. Green argues that instead of comparing a child born with a disabling condition to the child not born at all, focus should shift to a comparison of that disabled child with the “reasonably expected health status of others in the child’s birth cohort.” *Id.* at 8.

³⁹⁸ See Stacy Klein, Note, *Prenatal Genetic Testing and Its Impact on Incidence of Abortion: A Comparative Analysis of China and Ireland*, 7 CARDOZO J. INT’L & COMP. L. 73, 87 (1999). Abortion remains illegal in Ireland and the Irish Medical Organization stated in 1996 that prenatal genetic tests “discriminate against and constitute a threat to the life of the unborn patient.” *Id.*

³⁹⁹ The Chinese, unlike many Europeans and Americans, have a “sense of responsibility to society and family which supersedes any perception they may have of their own personal rights.” See *id.* at 82–83 (quoting James H. Scheuer, *China’s Family Planning and the U.S.*, N.Y. TIMES, Jan. 24, 1987, at 27).

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tilisation and Embryology Authority (HFEA).⁴⁰⁰ However, the HFEA demands that testing only be done for serious genetic conditions.⁴⁰¹ This policy was questioned in 2001, when a couple aborted a six-month old fetus because it was found to have a hare-lip.⁴⁰² This late-term abortion brought on widespread condemnation because in Great Britain it is illegal to abort a fetus over the gestational age of twenty-four weeks unless "there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped."⁴⁰³ Despite the outrage in Great Britain, the prosecutor did not file charges against the parents or the physician.⁴⁰⁴ It has been posited that this inaction "implies that *any* abnormality can qualify as a serious handicap because seriousness is determined not by its impact on the disabled person's life chances but by the parents' reluctance to be inconvenienced by it."⁴⁰⁵

In the United States, while compulsory sterilization is viewed as an antiquated and simplistic approach undertaken on a relatively infrequent basis on institutionalized, aberrant patients, prenatal genetic testing, and more recently, pre-implantation genetic testing enable couples to practice eugenics on their own accord, free of government intervention. For example, in the United States it has been reported that more than eighty percent of babies pre-natally diagnosed with Down syndrome are aborted.⁴⁰⁶ As prenatal genetic testing becomes more common and the ability to detect fetal abnormalities improves, the number of "eugenic abortions" in the United States is likely to increase.⁴⁰⁷ Others argue that parents have the right to choose their child's schooling, health-care, and extracurricular activities while generally guiding most of their child's development. It only stands to reason that as parents attempt to make their children "the best that they can be,"⁴⁰⁸ they

⁴⁰⁰ See *Pre-Implantation Genetic Testing*, 111 *BJOG: AN INT'L J. OBSTETRICS & GYNECOLOGY* 1165, 1169 (2004).

⁴⁰¹ *Id.*

⁴⁰² See Lois Rogers, *Police to Probe Late Abortion of Harelip Baby*, *SUNDAY TIMES* (London), Oct. 27, 2002, at News 13.

⁴⁰³ Editorial, George F. Will, *Eugenics Abortion: Is Perfection an Entitlement?*, *WASH. POST*, Apr. 14, 2005, at A27.

⁴⁰⁴ *Id.*

⁴⁰⁵ *Id.*

⁴⁰⁶ *Id.*

⁴⁰⁷ See Klein, *supra* note 398, at 76.

⁴⁰⁸ Dan W. Brock, *Shaping Future Children: Parental Rights and Societal Interests*, 13 *J. POL. PHIL.* 377, 381 (2005).

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should accordingly be able to choose which embryo to implant or whether to continue a pregnancy.⁴⁰⁹

V. CONCLUSION

We have come a long way since the sterilization of Carrie Buck. While the practice of sterilization in the United States has fallen out of vogue, the desire to design the perfect human, while shaping the perfect society, remain quintessential goals of the reproductive process. In the eighty years since *Buck v. Bell*, the world has become all too familiar with the disastrous consequences of attempts to create a human hierarchy by segregating, forcibly sterilizing, aborting, and mass murdering those perceived as *unworthy*. Whatever the purpose, when a society declares that a group or groups of individuals are “abnormal,” “defective,” “disabled,” “unfit,” “impaired,” “inadequate,” “retarded” or otherwise designated as *others*,⁴¹⁰ in a vain attempt at social engineering for the “best interests” of the human race by merging science, politics, and sociology, there lies the breeding ground for a society that is no longer advanced and civilized, but has instead reverted to the barbarism and savagery representative of the most primitive of species.

The true civilization is where every man gives to every other every right that he claims for himself.

—Robert Ingersoll

⁴⁰⁹ See *id.* at 380–381.

⁴¹⁰ See Lucinda Vandervort, *Reproductive Choice: Screening Policy and Access to the Means of Reproduction*, 28 HUM. RTS. Q. 438, 439 (2006). Defining *others*, Vandervort states, “[t]he existence of ‘others’ and social relationships with ‘others’ constitute essential aspects of what it is to be a person in the social sense, as opposed to what it is to be a human being in a bare biological sense.” *Id.*

