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## INTRODUCTION

The word "eugenics" invokes disturbing images of Nazi euthanasia and Chinese forced sterilization programs. Although many Americans probably assume that eugenic practices would not be allowed within the United States, eugenics has a long history in American policy, and variants of eugenic polices are a significant, ongoing feature of our political landscape. Current equal protection jurisprudence neither acknowledges nor accounts for this phenomenon, and explicitly eugenic laws are arguably constitutional under the Supreme Court's current jurisprudence. Eugenic policies are inherently subordinating, as they place lower values on the lives of those targeted. Nevertheless, the constitutional principle addressing equality, the Equal Protection Clause,[1] offers very limited protection against eugenic policies, because current jurisprudence focuses on non-differentiation by race, sex, and other protected classifications.

This Note illustrates the danger of equal protection jurisprudence that ignores subordination. Scholars have argued for an anti-subordination framework for equal protection, identifying seemingly subordinating practices that were upheld under equal protection challenges and showing how an anti-subordination norm would lead to better results in these cases.[2] This Note goes a step further, analyzing eugenic policies, which have not been challenged recently, but seem to be consistent with the current understanding of equal protection even though they are clearly subordinating. The case that the current understanding of equal protection is inadequate is reinforced by examining historical and current eugenic policies, which are largely outside the scope of equal protection despite their long and continuing history of use to subordinate unpopular groups. A reformulation of equal protection that protects against subordination of any disadvantaged group rather than merely protecting against differentiation along racial and certain other lines would rectify this problem.

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1. U.S. CONST. amend. XIV, § 1.

2. *See, e.g.*, Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Standards of Status-Enforcing State Action*, 49 STAN. L. REV. 1111 (1997).

This Note is organized in three parts. Part I reviews the interconnections between eugenics and the subordination of racial minorities and other socially disadvantaged groups in the context of the eugenics movement of the early twentieth century in the United States. Part II demonstrates that discussing eugenic laws is not merely an academic exercise, as eugenic laws attempting to discourage childbirth among certain socially unpopular groups implicitly remain a significant part of the American policy landscape. This Part examines policies such as welfare "family caps" and prosecutions of women who use cocaine while pregnant. Part III discusses the constitutionality of eugenic laws, arguing that despite eugenics dark past, many eugenic laws may be constitutional under the Court's current jurisprudence. Although some of the more coercive laws might be invalidated as violations of the substantive due process right to privacy, the Equal Protection Clause offers only minimal protection. However, these laws would be clearly unconstitutional under a more appropriate framework for equal protection, adopting a norm of anti-subordination rather than of anti-differentiation.

## I. THE EUGENICS MOVEMENT AND SUBORDINATION OF POWERLESS GROUPS

### A. *Introduction*

Eugenics arose out of burgeoning understanding of genetics in the late nineteenth century. A common definition of eugenics is the "study of human improvement by genetic means."[3] However, the "study" has often been only superficially academic, and "genetic means" have often been conflated with concepts of socio-cultural heritability.[4] Thus, I use "eugenic" policies to refer to any method of attempting to improve humanity or a specific society in the future by changing the future composition of that society. Such efforts include attempting to alter birth patterns by sterilization or other methods to discourage reproduction among those people deemed unfit to reproduce.[5] Although this paper focuses on attempts to discourage births among certain groups, attempts to encourage "fit" people to reproduce[6] or to alter survival patterns, for exam-

3. *Eugenics and Human Genetics*, *in* CONTEMPORARY ISSUES IN BIOETHICS 511, 511 (Tom L. Beauchamp & LeRoy Walters eds., 5th ed. 1999).

4. *See, e.g.*, *A Eugenics Program: American Eugenics Society Considers Measures to Correct the Adverse Differential Birthrate*, 27 J. HEREDITY 195, 195 (1936) (stating that "Eugenics must take into consideration the human environment as well as human genetics") [hereinafter *Adverse Differential Birthrate*].

5. *See, e.g.*, *Adverse Differential Birthrate*, *supra* note 4, at 196-97 (discussing various methods of encouraging the "fit" to have more children and discouraging the "unfit" from having as many children).

6. *Id.*

ple through euthanasia programs, are included in the definition above.[7]

Eugenicists believed that most social problems were caused by hereditary faults of those afflicted by the problem, and they sought to eventually eliminate these problems from society through selective breeding. The eugenics movement quickly gained popularity and was widely supported by physicians, scientific eugenicists, and lawyers.[8] At one point, basic eugenic teachings were so widely accepted that they were commonly incorporated into high school curricula.[9] Some supporters pushed eugenic teachings with religious fervor. For example, eugenicists stressed the "urgent need for a Messiah of the human germ plasm" to save civilization from otherwise inevitable decline.[10]

States began attempting to stem reproduction among the "unfit" by segregating them into asylums or prisons or enacted laws forbidding certain categories of people to marry,[11] but the policy focus quickly shifted toward sterilization, which proved less expensive and more effective.[12] In 1899, the vasectomy was developed for eugenic purposes, suggested for "inebriates, imbeciles, perverts and paupers,"[13] and later perfected on forty-two inmates of the Indiana Reformatory.[14] By the 1930s, more than thirty states had passed involuntary eugenic sterilization laws,[15] typically applied to the insane, "idiots and imbeciles," and criminals.[16] Although seven state laws were invalidated as uncon-

7. *See, e.g.*, NANCY LEYS STEPAN, THE HOUR OF EUGENICS: RACE, GENDER, AND NATION IN LATIN AMERICA 29 (1991) (quoting a eugenicist as saying "the lethal chamber, segregation and sterilization" were the only ways to "diminish the dangerous fertility of the unfit"); Jonathan Glover, *Questions about Some Uses of Genetic Engineering*, *in* CONTEMPORARY ISSUES IN BIOETHICS, *supra* note 3, at 586-87 (discussing eugenics in terms of altering breeding patterns or patterns of survival).

8. Philip R. Reilly, *Eugenic Sterilization in the United States*, *in* CONTEMPORARY ISSUES IN BIOETHICS, *supra* note 3, at 516, 518.

9. See Alan M. Dershowitz, *Trials and Cases of the 20th Century in America*, 27 LITIG. 8, 11 (discussing the Scopes trial of a teacher fired for teaching evolution in Tennessee). The book the teacher used, *Civic Biology*, contained the following passage: "If such people [the "unfit"] were lower animals, we would probably kill them off to prevent them from spreading. Humanity will not allow this, but we do have [methods of preventing reproduction]." *Id.*

10. *Adverse Differential Birthrate*, *supra* note 4, at 200-01. *See also* Julian S. Huxley, *Eugenics and Society*, 28 EUGENICS REV. 11, 30-31 (1936).

11. *See, e.g.*, DANIEL J. KEVLES, IN THE NAME OF EUGENICS: GENETICS AND THE USES OF HUMAN HEREDITY, 99-100 (1985); Matthew J. Lindsay, *Reproducing a Fit Citizenry: Dependency, Eugenics, and the Law of Marriage in the United States, 1860-1920*, 23 LAW & SOC. INQUIRY 541 (1998). Of course, "fornication" outside of marriage was already illegal.

12. KEVLES, *supra* note 11, at 92-94.

13. *Id.* at 518.

14. *Id.*

15. *See* Stephen Jay Gould, *Carrie Buck's Daughter*, *in* CONTEMPORARY ISSUES IN BIOETHICS, *supra* note 3, at 528-29.

16. *See* Reilly, *supra* note 8, at 518-19. A widely-circulated "model" sterilization law suggested sterilization of all "socially inadequate classes," which included the "feeble-minded," insane, criminalistic, drug addicts, those with chronic, infectious diseases, the blind, the deaf, the "deformed," and the "dependent," which included "orphans, ne'er-do-wells, the homeless, tramps, and paupers." Harry Laughlin, *Model Eugenical Sterilization Law*, *in* EUGENICAL STERILIZATION IN THE UNITED STATES, A REPORT OF THE PSYCHOPATHIC LABORATORY OF THE MUNICIPAL COURT OF CHICAGO 445, 447 (1922).

stitutional in state or lower federal courts,[17] the Supreme Court upheld Virginia's eugenic sterilization law in *Buck v. Bell* in 1927,[18] a decision that has never been overturned. Between 1900 and 1963, at least 60,000 Americans were sterilized pursuant to eugenic sterilization laws.[19] In response to a lawsuit, in 1974 the federal government adopted regulations banning sterilization without consent in hospitals that receive federal funds,[20] but reports of violations surface periodically.[21]

### B. *Eugenics as Subordination*

This Part examines the use of eugenic policies to subordinate unpopular groups, especially racial minorities. Examining the connections between eugenic policies and subordination is important to understanding why equal protection jurisprudence that ignores subordination inadequately protects powerless groups. Additionally, the discussion of subordination highlights some of the parallels between the historic eugenics movement and current implicitly eugenic policies.

With the goal of eliminating or reducing the population of certain groups in the future, eugenics definitionally subordinates the groups regulated. The adjective "subordinate" is defined as "1. Placed in or belonging to a lower rank, class, or position. 2. Subject to another's authority or control."[22] The central premise of eugenics corresponds to the first definition of subordination—the idea that some groups are so much less valuable than others that the world would be better off if their numbers were reduced or eliminated. The second definition, submission to authority, supplies the foundation for government eugenic policy. Eugenic policies are premised on the theory that the state may justifiably coerce or compel these "inferior" groups to limit or forgo reproduction, the most basic human instinct.[23] Thus, eugenic policy embodies both of

17. Robert J. Cynkar, Buck v. Bell: *"Felt Necessities" v. Fundamental Values?*, 81 COLUM. L. REV. 1418, 1434 (1981); Reilly, *supra* note 8, at 519.

18. Buck v. Bell, 274 U.S. 200 (1927). *See infra* text accompanying notes 160-161.

19. Reilly, *supra* note 8, at 521.

20. *See* Relf v. Weinberger, 372 F. Supp. 1196 (D.D.C. 1974). *See also* DOROTHY ROBERTS, KILLING THE BLACK BODY 93 (1997).

21. *See, e.g.*, KEVLES, *supra* note 11, at 275-76. Abuse may still be fairly widespread. *See* ROBERTS, *supra* note 20, at 89-95.

22. BLACK'S LAW DICTIONARY 1439 (7th ed. 1999).

23. Some eugenic activists argued for "positive eugenics" to encourage childbirth among the most "fit," through measures such as larger tax deductions for larger families and provision of part-day nursery schools to give harried mothers a rest. *See, e.g., Adverse Differential Birthrate*, *supra* note 4, at 196-97; Frederick Osborn & Carl Jay Bajema, *The Eugenic Hypothesis*, 19 SOC. BIOL. 337 (1972); KEVLES, *supra* note 11, at 85. Although such "positive eugenics" contains subordinating aspects of differentially valuing lives, the issue of whether "positive eugenics" is subordinating is somewhat more complex. Because "negative eugenics" is clearly subordinating and has always been a more prominent strand of American eugenic policy, I focus on negative eugenics here. It is worth noting that at the height of the eugenics movement, eugenics was used to promote a wide variety of causes, including sexual liberty, birth control, feminism, and socialism. *See, e.g.*, KEVLES, *supra* note 11, at 86-90.

the ideas central to subordination—inferiority, and submission.

Additionally, the United States's eugenic policies often have been subordinating in the sense that they have been used to harm unpopular groups and to reinforce the existing social hierarchy. The rhetoric promoting eugenics was steeped in derogatory and paranoid images of the "unfit."[24] Members of a variety of groups, including racial minorities, the poor, criminals, people with mental illnesses, or virtually any socially unpopular group, were deemed genetically defective and doomed to reproduce their circumstances in their children. A prominent eugenicist even opined that prostitutes were motivated by "innate eroticism" rather than economic or social circumstances.[25] Government action was necessary to control these "anti-social propagators of unnecessary human beings"[26] so they would not destroy society by their prolific breeding.[27] Some eugenicists completely devalued the lives of those deemed unfit: "It is the acme of stupidity . . . to talk in such cases of individual liberty. . . . Such individuals have no rights. They have no right in the first instance to be born, but having been born, they have no right to propagate their kind."[28]

Eugenics provided a convenient rationale to oppose or dismantle social protections for disadvantaged groups. Social protections such as the minimum wage, the eight-hour work day, and public medical services were said to lead to increases in "unemployables, degenerates, and physical and mental weaklings" by encouraging people to irresponsibly have children that they could not support. As a result, certain social programs, such as the traditional welfare program Aid to Dependent Children, later Aid to Families with Dependent Children, were deliberately designed to give states the flexibility to deny benefits to those deemed unworthy, in part for fear of supporting their "irresponsible" reproduction.[29] For example, many states' welfare programs excluded African Americans and some excluded women having "improper" relationships with a man.[30]

The net of eugenic programs was cast widely to encompass a great variety of socially disfavored groups and selectively applied, especially to racial minority groups and the poor.[31] For example, the tests used to detect people

24. *See generally* Francis Galton, *Hereditary Talent and Character*, 12 MACMILLAN'S MAG. 157-66, 318-27 (1865), *reprinted in* EUGENICS THEN AND NOW 14, 31 (Carl J. Bajema ed., 1976); *Adverse Differential Birthrate*, *supra* note 4.

25. KEVLES, *supra* note 11, at 53.

26. *Id.* at 34 (citing KARL PEARSON, THE ETHIC OF FREETHOUGHT 61 (1901)).

27. *See, e.g.*, *Adverse Differential Birthrate*, *supra* note 4; Reilly, *supra* note 8, at 516-18.

28. KEVLES, *supra* note 11, at 93-94.

29. *See, e.g.*, JILL QUADAGNO, THE COLOR OF WELFARE: HOW RACISM UNDERMINED THE WAR ON POVERTY (1994).

30. *See, e.g.*, King v. Smith, 392 U.S. 309 (1968) (invalidating Alabama's rule, designed to discourage immorality and illegitimacy, denying benefits for any mother who visits frequently with a man "for the purpose of cohabiting."); QUADAGNO, *supra* note 29, at 119-20.

31. KEVLES, *supra* note 11, at 168.

thought to have heritable "feeblemindedness" were highly flawed, enormously overly inclusive, and biased against those with little formal education.[32] Some states seemed to care little whether a "feebleminded" person singled out for sterilization was mentally retarded or merely poorly educated. For example, all of the famous "three generations of imbeciles" of *Buck v. Bell*[33] were of normal intelligence,[34] but they were persecuted as part of the "shiftless, ignorant, and worthless class of anti-social whites of the South"[35] who had children out of wedlock.[36] Sterilization for "sexual license" was widespread, as was an explicit ground for sterilization in many states.[37] Virginia implemented eugenic sterilization in a particularly hostile manner, raiding rural communities and sterilizing whole families, such that "everybody who was drawing welfare then was scared they were going to have it done on them."[38]

### C. *Eugenics and Racism*

From the start of the eugenics movement in the United States, eugenics and racism were intertwined and mutually reinforcing. The eugenics movement was "fed, nurtured, and sustained by racism."[39] Because the United States had used notions of biologically inherited inferiority to justify hundreds of years of slavery, racism provided a framework for the development and acceptance of eugenic thought.[40] Sir Francis Galton, widely considered the father of eugenics, was openly racist, describing all races other than "Anglo-Saxon" as "lower races," "brutes," and "savages."[41] Galton described the purpose of eugenics as giving "the more suitable races or strains of blood a better chance of prevailing speedily over the less suitable than they otherwise would have had."[42]

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32. For example, the Army administered such tests to draftees in World War I and found that 47% of the white draftees and 89% of the black draftees had a mental age of twelve or less, suggesting that many of those defending the United States were subject to sterilization under the laws of their states. *See* Cynkar, *supra* note 17, at 1424.

33. 274 U.S. 200 (1927). *See infra* text accompanying notes 160-161.

34. Gould, *supra* note 15. The youngest, Vivian Buck, was deemed feebleminded at seven months old based on a social worker's assessment that "there is a look about it that is not quite normal." (Note the de-personalizing use of the word "it.") *Id.* at 531. Despite such low expectations, Vivian Buck attended school, received normal grades, and even made the honor roll before dying at age eight. *Id.* at 531-32.

35. KEVLES, *supra* note 11, at 110 (quoting a deposition for *Buck v. Bell* of Harry Laughlin, of the Eugenics Record Office, regarding the Buck family).

36. Gould, *supra* note 15, at 531. Carrie Buck's pregnancy was probably the result of rape. She was institutionalized for newly discovered feeblemindedness to hide her shame from her community. *Id.* at 531; Nicole Huberfeld, *Recent Development: Three Generations of Welfare Mothers Are Enough: A Disturbing Return to Eugenics in the Recent "Workfare" Law*, 9 UCLA WOMEN'S L.J. 98, 119 (1998).

37. KEVLES, *supra* note 11, at 68.

38. *Id.* at 116 (quoting Howard Hale, a former member of the Montgomery County, Virginia, Board of Supervisors). *See also* ROBERTS, *supra* note 20, at 61.

39. ROBERTS, *supra* note 20, at 81.

40. *Id.* at 70.

41. Galton, *supra* note 24, at 31.

42. EUGENICS THEN AND NOW 14 (Carl J. Bajema ed., 1976) (quoting FRANCIS GALTON,

Throughout eugenic literature, notions of protecting the white race and the human race were often conflated and indistinguishable,[43] such that eugenics took on racist overtones even in writings that were not explicitly racialized.[44] In 1935, American geneticist Hermann Muller wrote that eugenics had become "hopelessly perverted" into a pseudoscientific façade for "advocates of race and class prejudice."[45] He was correct, except that eugenics had not *become* perverted; it was a pseudoscientific instrument of race and class subordination from its very inception.

Racism encouraged the progression from developing eugenic theories to implementing eugenic social programs. For example, California enacted its sterilization law in part in reaction to the influx of "racially inferior" Chinese and Mexicans.[46] Xenophobia provided the major impetus for the resurgence of the American eugenics movement after World War I.[47] Although the first eugenic literature emerged in Europe, the United States soon became the world leader in racist eugenics. An early Nazi advocate of "racial hygiene" criticized Germany for having a limited and slow-moving eugenics program compared to the United States.[48] In turn, the American Eugenics Society publicly endorsed the first Nazi sterilization law passed in 1933,[49] which was modeled after California's eugenic sterilization law.[50] As with many American eugenic laws, the first Nazi eugenic law did not explicitly target "inferior" races, but both Nazi and American eugenic policy were built upon and intertwined with racism.[51]

America's legacy of racism also influenced the contours of American eugenic policy. For example, the United States may have been willing to undertake the extreme policy of forced sterilization because it had stronger precedent for controlling the reproduction of the "biologically inferior" than European nations. It was a small step to sterilizing the unfit from the legal practice of castrating black males for committing certain crimes and from the wholesale control of black fertility under slavery.[52] An American developed the vasectomy for eugenic purposes, and Indiana adopted the first eugenic sterilization

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INQUIRIES INTO HUMAN FACULTY AND IT DEVELOPMENT (1883). Galton coined the term "eugenics" in the same book.).

43. The notion of race was even more confounded than this, as eugenicists also referred variously to the White, Anglo-Saxon, and Nordic races. *See, e.g.*, Galton, *supra* note 24, at 326; MADISON GRANT, THE PASSING OF THE GREAT RACE (1923).

44. *See, e.g.*, MARGARET SANGER, PIVOT OF CIVILIZATION 175, 189 (1922); *Adverse Differential Birthrate*, *supra* note 4.

45. *See* KEVLES, *supra* note 11, at 164.

46. Reilly, *supra* note 8, at 518.

47. KEVLES, *supra* note 11, at 72; Reilly, *supra* note 8, at 520.

48. Robert Jay Lifton, *Sterilization and the Nazi Biomedical Vision*, *in* CONTEMPORARY ISSUES IN BIOETHICS, *supra* note 3, at 533.

49. *See* KEVLES, *supra* note 11.

50. ROBERTS, *supra* note 20, at 68.

51. *See Id.* at 81.

52. *Id.* at 61, 66.

law in the world, twenty-six years before the first Nazi sterilization law.[53] In contrast, Great Britain had an active eugenics movement that was much less racialized, and Great Britain never adopted sterilization policies.[54]

Furthermore, racism may have affected the implementation of facially race-neutral eugenic laws, which were applied disproportionately to minority groups. For example, almost two-thirds of women sterilized in North Carolina in the 1930s and 1940s were black.[55] Similarly, in Virginia, the overwhelming majority of those sterilized were poor, and approximately half of them were black.[56] Eugenic laws targeted the poor, exempting those wealthy enough to obtain private treatment for mental illness or retardation and those who committed "white collar" rather the common crimes.[57] Targeting the poor, combined with the pervasive socio-economic oppression of black people, would have a racially disparate impact even absent any explicit racial targeting. Similarly, sterilizing criminals would have had a disproportionate impact on African Americans even absent racial targeting of the eugenics laws, due to the biased criminal prosecution of African Americans.[58] However, considering the prominence of racial rhetoric in the eugenics movement, it seems unlikely that there was no intentional racial targeting in addition to the disparate impact.

Finally, even after eugenics fell into general disrepute, eugenic sterilization continued in areas with a high concentration of racial minorities. For example, in 1948, over forty percent of the eugenic sterilizations performed in the United States and its territories were performed in Puerto Rico.[59] If U.S. territories are excluded, southern states were responsible for the majority of sterilizations after World War II. In 1952, Georgia, North Carolina, and Virginia sterilized fifty-three percent of the people sterilized in the United States. By 1958, these three states accounted for over three-fourths of the people sterilized nationally.[60]

## II. EUGENICS IN SHEEP'S CLOTHING: CURRENT PRACTICES

It may seem like an academic exercise to discuss the eugenics movement in the United States, as one can read from any number of sources that eugenics

53. Indiana adopted the first sterilization law in 1907. Reilly, *supra* note 8, at 518. The Nazis passed their first sterilization law in 1933. Lifton, *supra* note 48, at 534.

54. KEVLES, *supra* note 11, at 76, 94.

55. ROBERTS, *supra* note 20, at 90.

56. KEVLES, *supra* note 11, at 168.

57. *See, e.g.*, Skinner v. Oklahoma, 316 U.S. 535, 537 (1942) (noting that Oklahoma's eugenic sterilization law exempted those convicted of embezzlement, political offenses, or violating revenue laws).

58. *See* Dorothy E. Roberts, *Crime, Race, and Reproduction*, 67 TUL. L. REV. 1945, 1955 (1993).

59. Lee R. Dice, *Heredity Clinics: Their Value for Public Service and Research*, 4 AM. J. HUM. GENETICS 1, 1 (1952).

60. Reilly, *supra* note 8, at 523. Reilly's numbers do not explicitly exclude Puerto Rico, but logically they must. I have not found any data on sterilizations in Puerto Rico after 1948.

has been discredited as "bad science" and is no longer with us.[61] However, this Part explores current, implicitly eugenic policies, underscoring the importance of examining equal protection in light of eugenics and the ongoing need to adopt jurisprudence that focuses on subordination.

It is true that today no reputable scientist would openly advance eugenic theories[62] and most politicians are too savvy say the word "eugenics." American values have undergone significant change over the past century, but the transformation may be as much one of language as it is a transformation of attitudes and practices.[63] Although eugenic sterilization may have largely disappeared in the United States,[64] eugenics, like racism, remains as a prominent strand in political rhetoric and an influence in American social policy. Much as speakers use coded language to evoke racial sympathies today, eugenics is discussed with coded words. Policy makers today invoke similar imagery and use similar reasoning for efforts to discourage reproduction among certain groups, but they never call it eugenics and rarely admit that race is a factor. Instead, conservative activists refer mysteriously to "unobserved parental characteristics" rather than genetic faults contributing to poverty, and they promote concepts such as fighting a "culture of poverty"[65] through fertility control. In this Part, I argue that two specific policies, measures discouraging welfare recipients from having children and the prosecution of women who use cocaine while pregnant, are extensions of the earlier eugenics movement. Finally, I provide a very brief overview of other American social policies that may have been influenced by eugenic concerns.

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61. *See, e.g.*, JONATHAN MARKS, HUMAN BIODIVERSITY: GENES, RACE, AND HISTORY 89-95, 150-51 (1995) (discussing the failure of eugenics).

62. However, some popular social scientists continue to advance eugenic theories. *See, e.g.*, RICHARD J. HERNSTEIN & CHARLES MURRAY, THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICA (1994); CHARLES MURRAY, LOSING GROUND: AMERICAN SOCIAL POLICY 1950-1980 (1984). Interestingly, even Murray carefully avoids the word "eugenic(s)." The word does not appear in the index of *Losing Ground*, and the word does not appear at all in the text of two articles by him posted on a pro-eugenics website. *See* Charles Murray, *IQ Will Put You in Your Place*, *at* http://www.eugenics.net/papers/murray.html (May 25, 1997); Charles Murray & Daniel Seligman, *More on the Bell Curve*, *at* http://www.eugenics.net/papers/mssel.html (Dec. 8, 1997). But compare HERNSTEIN & MURRAY, *supra* at 364, using the term "dysgenic," the opposite of eugenic, to describe current birth patterns.

63. See Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2177-84 (1996), for a discussion of "preservation-through-transformation," the manner in which the language and structure practices with which the legal system enforces social stratification evolve over time as those practices are contested and become viewed as unacceptable.

64. Although they are now quite restricted by federal regulations, approximately twenty states still have involuntary eugenic sterilization laws on the books. *See* KEVLES, *supra* note 11, at 111 (stating that twenty-two states still have eugenic sterilization laws); Reilly, *supra* note 8, at 523 (putting the number at nineteen). *See also In re* Truesdell, 304 S.E.2d 793 (N.C. 1983) (upholding the denial of a petition by the state to sterilize a retarded woman, but setting forth standards by which sterilizations could be authorized).

65. *See, e.g.*, SUSAN E. MAYER, WHAT MONEY CAN'T BUY: FAMILY INCOME AND CHILDREN'S LIFE CHANCES, 149-56 (1997); MURRAY, *supra* note 62, at 202-36.

### A. *Of Welfare Queens and Family Caps*

As discussed above, eugenics encompasses efforts to improve society by discouraging reproduction among certain people deemed less fit or worthy of reproducing.[66] This Part argues that much of the welfare debate and the welfare "reforms" passed in 1996 are an extension of the dark history of the eugenics movement in the United States. Most importantly, the 1996 law, although it never mentions "eugenics," contains provisions explicitly designed to discourage childbirth among welfare recipients. These provisions fit squarely into the definition of "eugenic."[67]

#### 1. *Discouraging Reproduction*

Sterilizing or otherwise discouraging childbirth among the poor was a prominent theme of the eugenics movement, and it became a theme of the debate around welfare reform when eugenics became an unacceptable topic of political discourse. Much of the rhetoric around welfare reform centers on the idea of irresponsible "welfare queens" being paid by the government to have more children.[68] In particular, the language and imagery surrounding welfare reform debates often center on the concern that African-American women are having too many children "on the dole."[69]

States have long attempted to discourage welfare recipients from having children. Sterilization of welfare mothers has been unofficially implemented periodically by conditioning welfare benefits on sterilization or sterilizing women on welfare with coerced consent, no consent, or sometimes without their knowledge.[70] Additionally, in the 1960s, at least seven Southern and Midwestern states considered proposals to order the sterilization of single mothers.[71] Similarly, numerous states have considered mandating that women on welfare receive Norplant implants, and several states require that women on welfare receive information on Norplant or offer welfare recipients incentives to use Norplant.[72]

The idea that federal welfare policy should be crafted to discourage "irresponsible" childbirth finally came to fruition in 1996 when Congress abolished the traditional income support program for the poor, Aid to Families with De-

66. *See supra* text accompanying notes 5-6.

67. *See generally* Huberfeld, *supra* note 36, at 99; ROBERTS, *supra* note 20, at 202-45.

68. ROBERTS, *supra* note 20, at 111; WILLIAM JULIUS WILSON, WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR 162-66 (1996).

69. *See generally* QUADAGNO, *supra* note 29.

70. *See* ROBERTS, *supra* note 20, at 89-98.

71. *Id.* at 94. *See generally* David S. Coale, Note, *Norplant Bonuses and the Unconstitutional Conditions Doctrine*, 71 TEX. L. REV. 189 (1992).

72. ROBERTS, *supra* note 20, at 108-09; Melynda G. Broomfield, Note, *Controlling the Reproductive Rights of Impoverished Women: Is This the Way to "Reform" Welfare?*, 16 B.C. THIRD WORLD L.J. 217, 232-33 (1996).

pendent Children (AFDC). Congress replaced AFDC with Temporary Assistance to Needy Families (TANF), which explicitly seeks to discourage childbearing among unmarried persons and teenagers.[73] TANF provides grants to states to provide abstinence education, which is to be targeted at "those groups which are most likely to bear children out-of-wedlock."[74] States receive monetary bonuses for reducing births among certain groups. For example, the five states that reduce out-of-wedlock births the most,[75] without increasing the rate of abortion, receive $20 million each.[76] There is little oversight of how states manage to reduce these births,[77] which could provide a financial incentive for coercive actions. Additionally, states may use TANF money to provide contraception or sterilization, even though they may not use it for any other medical services including prenatal care or abortion.[78] Most importantly, states are authorized to impose "family caps" on welfare recipients under TANF.[79] Family caps are designed to discourage *all* welfare recipients from having children by not adjusting benefits for family size when an additional child is conceived while a parent is receiving income support.[80] Today approximately twenty-three states have some form of family cap.[81]

### 2. *Welfare Recipients as Unfit Mothers*

The rhetoric and logic of limiting welfare recipients' reproduction closely mirror the rhetoric and logic of the eugenics movement. Eugenicists considered children of the poor to be destined for a life of poverty and as sources of vari-

73. The Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996, Pub. L. No. 104-193, 110 Stat. 2110 (codified in scattered sections of 42 U.S.C.) [hereinafter The Welfare Act].

74. *Id.* at 2354. These programs are to teach "that bearing children out-of-wedlock is likely to have harmful consequences for the child, the child's parents, and society." *Id.*

75. Note the parallel to the enforcement of sexual mores through eugenic policy. The bonus is in no way tied to poverty, so states are, in effect, penalized for having too many single professional women who choose to have children or too many lesbian co-parents without a legally recognized relationship. *See* Huberfeld, *supra* note 36, at 101.

76. The Welfare Act § 2118.

77. Huberfeld, *supra* note 36, at 99.

78. The Welfare Act § 2137.

79. *See, e.g.*, Peter Pitegoff and Lauren Breen, *Child Care Policy and the Welfare Reform Act*, 6 J. AFFORDABLE HOUS. & CMTY. DEV. L. 113, 116 (1997); Susan L. Thomas, *"Ending Welfare As We Know It," or Farewell to the Rights of Women on Welfare? A Constitutional And Human Rights Analysis of the Personal Responsibility Act*, 78 U. DET. MERCY L. REV. 179 (2001). Even though the bonus for reducing births is conditioned on abortion rates not rising, there is some evidence that family caps contribute to an increase in abortion among welfare recipients.

80. Huberfeld, *supra* note 36, at 109. Previously, states could create family caps if they received a waiver from the federal government to do so. *See* Yvette Marie Barksdale, *And the Poor Have Children: A Harm-Based Analysis of Family Caps and the Hollow Procreative Rights of Welfare Beneficiaries*, 14 LAW & INEQ. J. 1, 4 (1995).

81. U.S Department of Health and Human Services, Other Key Provisions of State TANF Plans, *available at* http://www.acf.dhhs.gov/programs/ofa/KEY2.HTM (last visited Apr. 5, 2002). Note that the Department itself uses the term "family caps," illustrating that the policies are explicitly intended to discourage reproduction.

ous social ills. Especially after the start of the Great Depression, eugenics was promoted as a way of reducing the long-term costs of poverty by reducing the number of future "state wards."[82] The 1996 Welfare Act contained similar reasoning. For example, the law states that "[c]hildren born into families receiving welfare assistance are three times more likely to be on welfare when they reach adulthood than children not born into families receiving welfare."[83] The law goes beyond focusing solely on welfare recipients having children, stating that "[c]hildren born out-of-wedlock are more likely to experience . . . child abuse and neglect[,] . . . have lower cognitive scores, lower educational aspirations, and a greater likelihood of becoming teenage parents themselves[,] and are three times more likely to be on welfare when they grow up."[84] Similarly, "[c]hildren of teenage single parents have lower cognitive scores, lower educational aspirations, and a greater likelihood of becoming teenage parents themselves."[85] Much like earlier eugenic literature stressing differential birthrates between favored and disfavored groups, the Act highlighted the increasing birthrates among welfare recipients, unmarried people, and teenagers in contrast to the decreasing birthrates among married people.[86] The Act concluded, "[i]n light of this demonstration of the crisis in our Nation, it is the sense of the Congress that prevention of out-of-wedlock pregnancy and reduction in out-of-wedlock birth are very important Government interests."[87] This reasoning is nearly identical to eugenic reasoning of the past.[88]

3. *But It's No Longer in the Genes*

Some may object that while eugenics was based on flawed theories of biological heritability, current efforts to discourage reproduction among welfare recipients are based on theories of socio-cultural transmission of poverty, and thus represent a different phenomenon. However, the central idea of eugenics, at least as practiced, is that society can be improved by reducing the birthrates of those that society believes will contribute less fit offspring. Heritability of undesirable traits was largely assumed in the early eugenics movement, and there was little interest in the methods of heritability, whether genetic or social. Eugenic policies often focused on social problems, such as "sexual license," with, at best, tenuous biological justifications.[89] Eugenic literature often confounded ideas of biological and social heritability. One text stated, "A dispro-

82. REILLY, *supra* note 8, at 522.
83. The Welfare Act § 2112.
84. *Id.* § 2111.
85. *Id.* § 2112.
86. *Id.* § 2110.
87. *Id.* § 2112.
88. *See* LAUGHLIN, *supra* note 16; SANGER, *supra* note 44, *Adverse Differential Birthrate*, *supra* note 4.
89. *See supra* text accompanying notes 24-60.

portionately low birth rate in *socially adequate* homes and a disproportionately high birth rate in inadequate homes, is an adverse social force."[90]

Similarly, while modern welfare reform rhetoric generally does not advance arguments about genetic heritability, the use of language such as "chronic poverty" and the "underclass" suggests that poverty is a permanent feature of individuals rather than a structural or economic problem. Moreover, some widely criticized but influential researchers argue that programs that attempt to ameliorate poverty, such as welfare, are doomed to failure because poverty is largely associated with racial and other inborn factors.[91] Importantly, racism, which is founded on notions of genetic heritability, influences the popular will to cut welfare, as many researchers have demonstrated.[92] As states lost flexibility to deny welfare benefits to black families, the number of blacks receiving welfare grew.[93] Welfare has become strongly associated with black mothers, and whites substantially overestimate the extent of poverty and welfare usage among black families.[94] Racial attitudes are a strong predictor of support for welfare provisions.[95] The idea that black people should have fewer children, combined with beliefs that welfare is a black program and welfare encourages irresponsible childbearing, have fueled the movement to sharply limit welfare benefits.[96]

Some statements regarding the need for eugenic policies are strikingly similar to modern statements about the need to discourage births through welfare reform. In 1870, John Humphrey Noyes proclaimed, "Free love, easy divorce, foeticide, [and] general licentiousness . . . are symptoms of the times. Many believe that marriage is dying. Is it not remarkable that in this state of things the loud call for scientific propagation is rising?"[97] Substitute "abortion" for "foeticide" and "welfare reform" for "scientific propagation," and you have the modern welfare reform debate. For example, Robert Rector of the Heritage Foundation testified during a congressional hearing on welfare reform that

90. *Adverse Differential Birthrate*, *supra* note 4, at 195 (emphasis added). *See also* SANGER, *supra* note 44, at 173-74, 188.

91. HERNSTEIN & MURRAY, *supra* note 62; Murray, *supra* note 62.

92. *See generally* QUADAGNO, *supra* note 29; Tonya L. Brito, *From Madonna To Proletariat: Constructing a New Ideology of Motherhood in Welfare Discourse*, 44 VILL. L. REV. 415, 421-26 (1999); Risa E. Kaufman, Note, *The Cultural Meaning of the "Welfare Queen": Using State Constitutions to Challenge Child Exclusion Provisions*, 23 N.Y.U. REV. L. & SOC. CHANGE 301 (1997); Dorothy E. Roberts, *The Value of Black Mothers' Work*, 26 CONN. L. REV. 871 (1994).

93. *See* Brito, *supra* note 92, at 421-26.

94. *See, e.g.*, Martin Gilens, *"Race Coding" and White Opposition to Welfare*, 90 AM. POL. SCI. REV. 593 (1996).

95. *See, e.g.*, Sheryll D. Cashin, *Federalism, Welfare Reform, and the Minority Poor: Accounting For the Tyranny of State Majorities*, 99 COLUM. L. REV. 552, 591-94 (1999); Martin Gilens, *Race and Poverty in America: Public Misperceptions and the American News Media*, 60 PUB. OPINION Q. 515 (1996).

96. *See e.g*, QUADAGNO, *supra* note 29, at 119-21; DANIEL PATRICK MOYNIHAN, THE POLITICS OF A GUARANTEED INCOME: THE NIXON ADMINISTRATION AND THE FAMILY ASSISTANCE PLAN 87-91 (1973).

97. John Humphrey Noyes, *Scientific Propagation*, *in* THE MODERN THINKER 97-120 (D. Goodman ed., 3d ed. 1870), *reprinted in* EUGENICS THEN AND NOW 54, 77 (Carl J. Bajema ed., 1976).

"Marriage is dying in America . . . . The primary goal of welfare reform must be to save marriage: to reverse the current alarming trends and bring down the number of out-of-wedlock births."[98] Similarly, Heidi Stirrup, Director of Government Relations for the Christian Coalition, testified, "The basic family unit has been under attack from illegitimacy, promiscuity, adultery, divorce and homosexuality,"[99] and welfare reform should be used to quell the onslaught. In summary, current efforts to reduce birth among welfare recipients are nearly indistinguishable from eugenic efforts to reduce birth among the poor, except for the disappearance of the word "eugenic."

### B. *Protecting Crack Babies by Punishing Mom*

In the mid-1980s, many states responded to the "crack epidemic" by criminally punishing mothers who give birth to infants with cocaine in their systems.[100] Although higher state courts overturned most convictions that were appealed,[101] in *Whitner v. State*, the Supreme Court of South Carolina upheld a criminal child neglect conviction and its startling eight-year sentence, finding that a fetus is a child within the meaning of the child abuse and endangerment statute.[102] These punishments are justified as protecting fetuses from exposure to crack.[103] However, often little effort is made to detect cocaine use during pregnancy, and convictions do not require evidence that the infant was harmed by the drug use,[104] even though the effects of cocaine on a fetus are relatively

98. *Causes of Poverty, With a Focus on Out-of-Wedlock Births: Hearings Before the Subcomm. on Human Resources of the House Comm. on Ways and Means*, 104th Cong. 21 (1996) (statement of Robert Rector, The Heritage Foundation).

99. *Causes of Poverty, With a Focus on Out-of-Wedlock Births—Illegitimacy: Hearing Before the Subcomm. on Human Resources of the House Comm. On Ways and Means*, 104th Cong. 98 (1996) (statement of Heidi Stirrup, Director, Government Relations, The Christian Coalition).

100. Crack is cocaine that has been cooked with baking soda. Crack and cocaine are indistinguishable as detected in the bloodstream. Thus, women who use crack while pregnant would typically be prosecuted for cocaine use while pregnant if the evidence comes from blood tests. I use both terms. When I refer to the drug itself, I typically use cocaine. When discussing the political dimensions of prosecuting women who use cocaine while pregnant, I mostly use crack to emphasize the sociological understanding of crack as more threatening than cocaine and the targeting of women who use crack as a subset of cocaine users. Women are occasionally prosecuted for using other drugs as well. *See, e.g.*, Commonwealth v. Welch, 864 S.W.2d 280 (Ky. 1993) (overturning a conviction for using oxycodone during pregnancy); State v. Deborah J.Z., 596 N.W.2d 490 (Wis. Ct. App. 1999) (overturning a conviction for heavy drinking during pregnancy). However, the focus of the prosecutions has been on pregnant women who smoke crack. *See, e.g.*, ROBERTS, *supra* note 20, at 153-59.

101. *See, e.g.*, Johnson v. State 602 So. 2d 1288 (Fla. 1992); State v. Luster, 419 S.E.2d 32 (Ga. App. 1992); State v. Gray, 584 N.E.2d 710 (Ohio 1992).

102. 492 S.E.2d 777 (S.C. 1997). The Supreme Court recently held that testing women or their newborn babies for drugs without the women's consent for criminal purposes violated the Fourth Amendment; however, they declined to invalidate the program. *See* Ferguson v. City of Charleston, 532 U.S. 67 (2001).

103. *See, e.g.*, Ferguson v. City of Charleston, 186 F.3d. 469, 473 (4th Cir. 1999), *vacated*, 532 U.S. 67 (2001) ("The policy was intended to encourage pregnant women whose urine tested positive for cocaine use to obtain substance abuse counseling.").

104. The *Whitner* Court held that the criminal child neglect statute encompasses "maternal acts endangering or likely to endanger the life, comfort, or health of a *viable fetus*." 492 S.E.2d at 779.

mild compared to those of alcohol and tobacco.[105] For at least some of those instrumental in creating these policies, the penalties are a method of punishing addicts for having children rather than protecting their children.[106] This Part explores the connections between eugenics and applying criminal sanctions to women who use drugs while pregnant. I focus on South Carolina because it actively prosecutes women who use cocaine while pregnant, is the only state where challenged convictions have been upheld, and has been the focus of much of the scholarly debate about prosecution of addicted pregnant women.[107]

### 1. *Discouraging Reproduction*

What exactly are states punishing by prosecuting women who use cocaine while pregnant? States use criminal sanctions to deter unwanted behaviors. When a state punishes the combination of two behaviors, it is unlikely that the punishment will deter the behavior that usually is the antecedent condition and is more difficult to control. To illustrate, when a state outlaws driving while under the influence of drugs, the principal goal is to deter *driving* while intoxicated and not particularly to deter drug use, which is independently punished and more difficult to stop. Because crack cocaine causes severe physical addiction and it is unlikely that a woman who has control over her drug use would choose to use crack while pregnant, it is logically more apt to conceptualize such measures as criminalizing pregnancy among addicts rather than criminalizing drug use among pregnant women.

Indeed, public sentiment seems to be more oriented toward discouraging addicts from having babies than toward helping their children. For example, a private organization offers crack addicts money to undergo permanent sterilization.[108] Similarly, legislation that was proposed in Ohio illustrates the desire

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105. *See infra* text accompanying notes 119-123. *See also* Deborah A. Frank et al., *Growth, Development, and Behavior in Early Childhood Following Prenatal Cocaine Exposure: A Systematic Review*, 285 JAMA 1613 (2001) (discussing the relatively mild effects of cocaine exposure in contrast to well-established, potentially severe negative effects of alcohol and tobacco use during pregnancy).

106. I acknowledge that prosecuting women who use drugs while pregnant is different from the policies discussed above in that it is not *inherently* eugenic as proseuctions could theoretically be designed and applied without intention to discourage childbearing. Some people involved in the effort may be motivated by a desire to help babies rather than discourage certain women from having children. Thus, my contention is that these policies are eugenic as applied in at least some cases.

107. *See, e.g.*, *Whitner*, 492 S.E.2d at 777; Lynn M. Paltrow, *Pregnant Drug Users, Fetal Persons, and the Threat to* Roe v. Wade, 62 ALB. L. REV. 999, 1029-51 (1999); Kimani Paul-Emile, *The Charleston Policy: Substance or Abuse?*, 4 MICH. J. RACE & L. 325 (1999); Alma Tolliver, Case Note, *Child Abuse Statute Expanded to Protect the Viable Fetus: The Abusive Effects of South Carolina's Interpretation of the Word "Child"*, 24 S. ILL. U. L.J. 383 (2000); Carolyn Coffey, Note, Whitner v. State*: Aberrational Judicial Response Or Wave of the Future for Maternal Substance Abuse Cases?*, 14 J. CONTEMP. HEALTH L. & POL'Y 211 (1997).

108. Wendy Chavkin, *Cocaine and Pregnancy—Time to Look at the Evidence*, 285 JAMA 1626 (2001), citing L.M. PALTROW ET AL., YEAR 2000 OVERVIEW: GOVERNMENTAL RESPONSES TO PREGNANT WOMEN WHO USE ALCOHOL OR OTHER DRUGS (2000) (describing public hysteria over "crack babies").

to discourage birth among drug addicts. The legislation would have forced first-time drug offenders who did not successfully complete a drug treatment program to "undergo implantation of a hormonal contraceptive device, . . . participate in a five-year program of monitored contraceptive use approved by the court, and during the five-year period abstain from the addictive use of drugs." A repeat offender would be sentenced to have a contraceptive device implanted in her regardless of her treatment status.[109] Providing improved treatment and monitoring drug abstinence would protect fetuses from drug exposure, but the legislation focused on enforcing the contraceptive use.

The idea that punishing women who use drugs while pregnant was meant to protect their babies would be more credible if the emphasis were on treating the women and their children rather than on punishment. However, many states, including South Carolina, have focused on the arrest and prosecution of drug-abusing mothers.[110] Many important medical and public health organizations oppose punishing women who use drugs while pregnant, believing that the measures are ineffective for improving child outcomes and detrimental to the mothers' health.[111] Most pregnant addicts have few or no meaningful treatment options as many drug treatment programs do not accept pregnant women. Even fewer accept women on Medicaid or without health insurance, and cocaine addicts are disproportionately uninsured or Medicaid recipients.[112] South Carolina's actions illustrate the desire to punish childbirth among cocaine addicts. In South Carolina, the state most active in punishing pregnant addicts, there are few treatment options for pregnant women.[113] The state has waited until after some women have given birth to arrest them, even though they tested positive for cocaine use during pregnancy, when intervention possibly could have helped the fetus.[114] In some cases, women were arrested within hours of giving birth, taken to jail in handcuffs and shackles, still bleeding.[115]

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109. Nancy Kubasek, *The Case Against Prosecutions for Prenatal Drug Abuse*, 8 TEX. J. WOMEN & L. 167, 174 (1999); Deborah Ann Bailey, Comment, *Maternal Substance Abuse: Does Ohio Have An Answer?*, 17 U. DAYTON L. REV. 1019, 1033 (1992) (citing S. 82, 119th General Assembly, Reg. Sess. (Ohio 1991)).

110. *See, e.g.*, Paltrow, *supra* note 107, at 1024-26. *See also infra* text accompanying notes 113-115 (describing South Carolina's actions).

111. ROBERTS, *supra* note 20, at 190-91 (detailing the groups that oppose the punishments).

112. Louise Marlane Chan, Note, *S.O.S. From the Womb: A Call for New York Legislation Criminalizing Drug Use During Pregnancy*, 21 FORDHAM URB. L.J. 199, 208 (1993) (stating that less than half of drug treatment programs in New York City accept pregnant women (citing Wendy Chavkin, Speech Delivered to Columbia University School of Public Health (1992) (transcript at New York Supreme Court))); *id.* (stating only thirteen-percent accept pregnant crack addicts on Medicaid (citing Kary Moss, *Substance Abuse During Pregnancy*, 13 HARV. WOMEN'S L.J. 278, 287 (1990))).

113. ROBERTS, *supra* note 20, at 187-88.

114. *See, e.g.*, Ferguson v. City of Charleston, 186 F.3d. 469, 484, 488 (4th Cir. 1999) (Blake, J., dissenting), *vacated*, 532 U.S. 67 (2001).

115. ROBERTS, *supra* note 20, at 166.

### 2. *Demonizing Pregnant Addicts*

In South Carolina, a judge sentencing a woman to jail for using cocaine while pregnant showed his antipathy toward pregnant drug addicts, stating, "I'm sick and tired of these girls having these bastard babies on crack cocaine."[116] The judge's focus was not sympathy for "these bastard babies," but rather his belief that "these girls" should not have children. One of the difficulties with conceptualizing the punishment of women who use cocaine while pregnant as eugenic is that the judge's sentiment that crack addicts are unfit parents is so widespread. However, this belief, which itself is related to the eugenic idea that certain people should be discouraged from having children, is a product of racist and classist associations with crack users that have little to do with the actual dangers of the drug. Moreover, these laws as implemented, like the eugenic sterilization laws of the past, target poor and minority women, who have so long been devalued as unfit mothers.

Why target mothers who abuse crack while pregnant? Crack babies[117] make up only a small portion of infants born with prenatal exposure to illegal drugs.[118] Furthermore, the number of babies born exposed to crack is dwarfed by those exposed to alcohol and tobacco.[119] Although crack babies are a small portion of babies born exposed to potentially harmful legal and illegal drugs, the strong reaction against crack might be justifiable if it were much more damaging to fetuses than other drugs.[120] However, prenatal cocaine exposure is nowhere near as dangerous as popularly believed. A meta-analysis of thirty-six studies of the effects of prenatal cocaine exposure, controlling for alcohol and tobacco exposure, found no consistent negative associations between prenatal cocaine exposure and growth, developmental test scores, language abilities, or child behavior. Mild negative associations were found for motor skills and attentiveness in infancy.[121] Cocaine use during pregnancy is certainly not healthy, but scientific research suggests that the reports that cocaine use during pregnancy is "devastating," leaving "many crack babies . . . seriously handicapped"[122] are highly exaggerated. In contrast, tobacco and alcohol have well-established negative effects on cognitive functioning and behavior. Fetal alco-

116. Statement of Judge Frank Eppes during the hearing of Malissa Ann Crawley, *quoted in* Mikeisha T. Anderson, *Criminal Penalties for Women Engaging in Substance Abuse During Pregnancy*, 21 WOMEN'S RTS. L. REP. 181, 181 (2000).

117. I use the terms "crack babies" and "crack mothers" to emphasize the way society views them and as a convenient shorthand. I do not suggest that being born exposed to crack cocaine has any sort of definitional significance. Note that society has invented the term "crack baby," while terms such as "alcohol baby" or "marijuana baby" do not exist.

118. ROBERTS, *supra* note 20, at 156.

119. *Id.*

120. I do not contend that this would make punishing women who use crack while pregnant good public policy, merely that it would make it logically defensible.

121. Frank, *supra* note 105.

122. Chan, *supra* note 112, at 200-01.

hol syndrome is the most common cause of mental retardation in the United States.[123] Yet there are no sterilization campaigns for women who drink and very few women are charged with child abuse for using alcohol while pregnant.[124]

Prosecutors began targeting women who used crack while pregnant as part of the hysteria surrounding the "crack epidemic" in the late 1980s. After first being identified in the popular press in 1985,[125] the crack epidemic was the subject of over one thousand stories in six of the nation's largest newspapers in 1986.[126] The hysteria over crack led to the adoption of criminal penalties for crack possession that are one hundred times more severe than the penalties for the same amount of cocaine, even though they are chemically the same drug.[127] Crack is especially feared because it is associated with impoverished, inner-city African-American communities.[128] Society reacted so strongly to "protect" crack babies because of the hysteria over crack and because crack mothers fit the stereotypes of poor, black women, who have long been targeted as unfit mothers.

The targeting of prosecutions at poor, black women suggests that these penalties demonstrate antipathy toward certain women having children rather than concern for their babies. Substance abuse rates during pregnancy are roughly equal between white and African-American women.[129] Although cocaine abuse may be somewhat more prevalent in black women, the differences are far less extreme than the prosecutions would suggest.[130] Overall, approximately 70-80% of those arrested for drug abuse while pregnant have been minorities.[131] Doctors are more likely to report pregnant women who are black or poor, even where drug abuse does not differ.[132] Additionally, the tendency to prosecute only mothers who use cocaine while ignoring other illegal drugs

123. Ann Pytkowicz Streissguth et al., *Fetal Alcohol Syndrome in Adolescents and Adults*, 265 JAMA 1961 (1991).

124. *Cf.* Paltrow, *supra* note 107, at 1019-20, 1042 (discussing the application of the *Whitner* rationale to alcohol consumption by pregnant women and highlighting a case of a woman arrested in South Carolina for drinking alcohol after *Whitner*).

125. ROBERTS, *supra* note 20, at 155.

126. Paltrow, *supra* note 107, at 1017 (quoting LAURA E. GÓMEZ, MISCONCEIVING MOTHERS 14 (1997)).

127. *See* United States v. Clary, 34 F.3d 709 (8th Cir. 1994) (holding that the crack/cocaine sentencing disparity does not violate equal protection).

128. RANDALL KENNEDY, RACE, CRIME, AND THE LAW 377 (1997) (discussing a National Institute of Drug Abuse study from 1991 that found that blacks use crack at a higher rate, but there are more white crack users overall).

129. A study of 698 pregnant woman in Florida found alcohol or illegal drugs in the urine of 15.4% of white women and 14.1% of black women. Ira Chasnoff et al., *The Prevalence of Illicit Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida*, 322 New Eng. J. Med. 1204.

130. *Id.*

131. Anderson, *supra* note 116, at 183; ROBERTS, *supra* note 20, at 172.

132. Chasnoff, *supra* note 129, at 1204 (finding that doctors are more likely to report poor patients and *ten times* more likely to report black patients who use drugs).

contributes to the race bias in prosecutions. In South Carolina, a higher percentage of mothers who tested positive for cocaine were African-American, compared to those who tested positive for any drug.[133] Thus, prosecuting pregnant women only for cocaine use will have a racially disparate impact even without biased prosecution. Moreover, South Carolina only prosecutes women who give birth at the Medical University of South Carolina (MUSC). MUSC, the only hospital in the Charleston area that provides obstetric care for indigent patients and Medicaid recipients, serves predominately poor, African-American patients.[134] All of the women South Carolina has arrested were poor. Forty-one of forty-two women arrested were black, and the father of the white woman's baby was black.[135]

The situation in South Carolina raises the specter of overbroad eugenic policies selectively applied to unpopular groups, such as the past eugenic abuses in Virginia when state authorities raided rural communities to find unfit people to sterilize.[136] The *Whitner* court held that any "maternal acts endangering or likely to endanger the life, comfort, or health of a viable fetus" could be criminally punished as child abuse.[137] A wide variety of legal and illegal actions could harm fetal health or comfort. The remarkably broad and ambiguous definition would allow South Carolina to prosecute a wide variety of actions that could be found likely to endanger the comfort or health of the fetus, which the court recognizes but does not address.[138] In a later case challenging the constitutionality of South Carolina's policy, the court rejected arguments contending that selectively implementing punitive policies in hospitals that serve predominantly poor, African-American populations is racially discriminatory.[139] The broad definition, combined with racist and classist devaluation of certain mothers and wide prosecutorial discretion, creates a tremendous risk that this law will be misused to punish pregnancy among members of socially unpopular groups when they do not follow every convention of proper prenatal care.

### 3. *But Now It's Really Not in the Genes*

As with welfare recipients, few would argue that crack addicts are unfit

133. Ferguson v. City of Charleston, 186 F.3d. 469, 481 (4th Cir. 1999), *vacated*, 532 U.S. 67 (2001).

134. Paul-Emile, *supra* note 107, at 349-50; ROBERTS, *supra* note 20, at 173.

135. *Id.* at 166. A white nurse instrumental in instituting the program admitted that she believes interracial mixing is wrong. Paltrow, *supra* note 107, at 1025. Additionally, the same nurse reportedly expressed racist views to others at the hospital, including the belief that most black women should have their tubes tied. ROBERTS, *supra* note 20, at 174-75.

136. *See supra* text accompanying note 38.

137. *Whitner*, 492 S.E.2d 777, 779.

138. *Id.* at 781-82.

139. Ferguson v. City of Charleston, 186 F.3d. 469, 480-81 (4th Cir. 1999), *vacated*, 532 U.S. 67 (2001). The Supreme Court vacated the decision under the Fourth Amendment, but did not consider charges of discrimination. 532 U.S. 67 (2001).

mothers because they are genetically inferior. However, the idea that women who use crack are unfit mothers parallels the earlier uses of eugenics to justify discrimination against minority and poor women. As discussed above, punishing women who use crack during pregnancy is largely about discouraging poor, African-American women from having children. The calls to regulate pregnant women to stem the tide of "crack babies," lamenting that "millions of drug-impaired, dysfunctional children will become part of America's future generation"[140] sounds much like the eugenic rhetoric of the past. A judge sentencing a woman who used crack while pregnant used dehumanizing, racialized rhetoric to describe the woman's normal, healthy child. "[W]e've got enough trouble with normal children. Now this little baby's born with crack . . . . They just run around in class like a little rat [sic]. Not just black ones. White ones too."[141] While the claims to heritability grow more tenuous as eugenics becomes less explicit, punishing crack mothers is an extension of this country's long history of attempting to discourage racial minorities and other disfavored groups from reproducing.

### C. *Current Practices: Conclusion*

There are a number of other American policies that may have been influenced by eugenic concerns. While the eugenic sterilization laws of the past are seldom invoked, many states allow the sterilization of mentally retarded people under some circumstances without their consent, but with their parents' consent.[142] Additionally, some doctors or publicly funded health practitioners may counsel women with the sickle cell trait, which is seen only in black people and in a substantial portion of the black population, that they should undergo sterilization, although it is not medically recommended.[143] Recently, the Wisconsin Supreme Court ordered a man not to have children as a condition of probation for not paying child support, unless he could show that he would be able to support that child as well as his current children.[144]

Eugenic concerns seem particularly likely to be influential in programs supporting the poor. For example, the federal government funds sterilization for poor women through Medicaid, but does not fund abortion, giving women an

140. Chan, *supra* note 112, at 236.

141. *See* Paltrow, *supra* note 107 at 1025-26, *quoting* State v. Collins, No. 93-CP-39-859 (S.C. Ct. Gen. Sess. Pickens County Dec. 18, 1991).

142. *See, e.g., In re* Penny N., 414 A.2d 541, 542 (N.H. 1980) (finding that a probate court had jurisdiction to authorize parents, in conjunction with a guardian *ad litem*, to consent to their fourteen-year-old daughter's sterilization).

143. *See* Avery v. County of Burke, 660 F.2d 111, 115 (4th Cir. 1981) (reversing dismissal of a case in which plaintiff submitted to sterilization after a a clinic operated by the County Board of Health erroneously informed her that she carried the sickle cell trait and misrepresented the need for her to be sterilized).

144. State v. Oakley, 530 U.S. 1282 (2001).

incentive to be sterilized if they cannot afford to have a baby.[145] Many American social programs are hidden in the tax code and are regressive; American's poorest do not benefit from them.[146] Additionally, the country's largest means-tested income transfer program, the Earned Income Tax Credit (EITC), has a built in "family cap," as it does not adjust for family size for more than two children.[147] The EITC grew out of a failed guaranteed income plan, which was fought by the powerful Senator Russell Long, the Chair of the Finance Committee, who opposed "paying people not to work" but to "lay about all day . . . producing illegitimate babies."[148] Senator Long modified the plan to be a tax provision and promoted it as the EITC.[149] The enactment and expansion of the EITC was linked to efforts to cut welfare,[150] which, as discussed above, was premised on the belief that welfare encourages irresponsible childbearing.

Additionally, criminal penalties may be used to inhibit reproduction among those convicted. Most notably, several states have implemented laws mandating or permitting "chemical castration" of certain sex offenders.[151] Chemical castration inhibits the sex drive and usually eliminates the ability to procreate during use, but is reversible.[152] These laws probably are motivated in part by the desire to protect children from sexual abuse, however, the use of chemical castration evokes earlier sterilization policies,[153] especially when mandated for extended time periods or used for minor offenses. For example, Oregon's law can be applied to people convicted of engaging in sodomy or of "public inde-

145. LESLEY DOYAL, WHAT MAKES WOMEN SICK: GENDER AND THE POLITICAL ECONOMY OF HEALTH 107 (1995).

146. *See* CHRISTOPHER HOWARD, THE HIDDEN WELFARE STATE: TAX EXPENDITURES AND SOCIAL POLICY IN THE UNTIED STATES 27-32 (1997).

147. *Id.* at 22-23, 46, 139. The EITC transferred $28 billion in 1996. More than eighty percent of the cost is direct spending for the "refundable" portion of the credit rather than reduced tax liabilities.

148. *See* DANIEL PATRICK MOYNIHAN, THE POLITICS OF A GUARANTEED INCOME: THE NIXON ADMINISTRATION AND THE FAMILY ASSISTANCE PLAN 523 (1973).

149. *See, e.g.*, HOWARD, *supra* note 146, at 70-72.

150. *See, e.g.*, *Id.* at 143-50; John Myles & Paul Pierson, *Friedman's Revenge: The Reform of "Liberal" Welfare States in Canada and the United States*, 25 POL. & SOC'Y 443 (1997).

151. *See, e.g.*, Jeffrey L. Kirchmeier, *Let's Make a Deal: Waiving the Eighth Amendment by Selecting a Cruel and Unusual Punishment*, 32 CONN. L. REV. 615, 627, n. 105 (2000) (stating that California, Florida, Georgia, Iowa, Louisiana, and Montana have laws permitting chemical castration); Mark J. Neach, Comment, *California is on the "Cutting Edge": Hormonal Therapy (A.K.A. "Chemical Castration") is Mandated for Two-Time Child Molesters*, 14 T.M. COOLEY L. REV. 351, 357-59 (1997) (discussing California's chemical castration law); Caroline M. Wong, Comment, *Chemical Castration: Oregon's Innovative Approach to Sex Offender Rehabilitation, or Unconstitutional Punishment?*, 80 OR. L. REV. 267, 272-76 (2001) (describing Oregon's pilot program that subjects some sex offenders to chemical castration as a condition of parole).

152. *See* Jason O. Runckel, Comment, *Abuse It and Lose It: A Look at California's Mandatory Chemical Castration Law*, 28 PAC. L. J. 547, 558-59 (1997).

153. *See generally* Jodi Berlin, Note, *Chemical Castration of Sex Offenders: "A Shot in the Arm" Towards Rehabilitation*, 19 WHITTIER L. REV. 169, 173-77 (1997) (discussing eugenics in relation to chemical castration); Avital Stadler, Comment, *California Injects New Life into an Old Idea: Taking a Shot at Recidivism, Chemical Castration, and the Constitution*, 46 EMORY L. J. 1285, 1299-1305 (1997).

cency" for having sex in public.[154] Finally, as noted earlier, eugenics also encompasses policies related to death rates.[155] The United States is one of very few industrialized countries that still uses the death penalty,[156] which is imposed disproportionately on minorities.[157] I do not attempt to demonstrate that any of the policies mentioned in this brief Part were actually influenced by eugenic concerns. This Part is intended merely to suggest that the policies discussed above are not anomalies, but rather part of a larger strand of American social policy that has been influenced by eugenic ideas.

## III. EUGENICS AND THE CONSTITUTION

Upon declaring independence from England, the Founders proclaimed that "all men are created equal, [and] they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness."[158] They promptly and wholeheartedly ignored their own words. The equality principle was finally enshrined in American law in 1868, with the ratification of the Fourteenth Amendment, which promised all United States citizens equal protection of the law.[159] Unfortunately, this promise of equality was largely ignored for most of a century.

In 1927, the Supreme Court upheld Virginia's eugenic sterilization law against an equal protection challenge. In doing so, the Court elevated eugenic prejudices to constitutional status, proclaiming, "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. . . . Three generations of imbeciles are enough."[160] The *Buck* Court reasoned that the principles that justified the draft and compulsory vaccinations were "broad enough to cover cutting the Fallopian tubes."[161] Although *Buck v. Bell* may seem shocking to many modern Americans, it has never been overturned, and it is arguably still good law. In fact, it was cited favorably as recently as 2001.[162] The failure of our jurisprudence to squarely re-

154. *See* Wong, *supra* note 151, at 272-73, 287-88.

155. *See supra* note 7 and accompanying text.

156. For a list of nations retaining the death penalty, see DEATH PENALTY INFORMATION CENTER, THE DEATH PENALTY: AN INTERNATIONAL PERSPECTIVE (2001), *availible at* http://www.deathpenaltyinfo.org/dpicintl.html. The United States executes more people than any other country except China and the Democratic Republic of the Congo. *Id.*

157. *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279 (1987); KENNEDY, *supra* note 128, at 311-50; William J. Bowers et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. PA. J. CONST. L. 171 (2001).

158. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

159. U.S. CONST. amend. XIV, § 1.

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

161. *Id.*

162. Board of Trustees v. Garrett, 531 U.S. 356, 369 (2001) (holding that the Americans with Disabilities Act invalidly abrogated states' immunity from suit under the 11th Amendment as Congress had not identified a history and pattern of unconstitutional discrimination by the states against the disabled).

ject eugenics reinforces the perpetuation of policies with eugenic underpinnings and reflects this country's ongoing failure of to come to terms with racism, sexism, and classism. Constitutional doctrine pertaining to eugenic policies is discussed below. Although constitutional doctrine related to equal protection is most relevant to consideration of eugenics and the equality ideal, the doctrine of reproductive privacy is examined briefly, as it is the constitutional doctrine most clearly addressing the right to reproduce.

### A. *Reproductive Privacy*

*Skinner v. Oklahoma* considerably undermined *Buck v. Bell.*[163] *Skinner*, for the first time, recognized reproduction as a "basic civil right."[164] However, the Court's decision was justified in part on equality concerns: "[S]trict scrutiny of the classification which a State makes in a sterilization law is essential, lest unwittingly or otherwise invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws."[165] Yet, the Court expressly distinguished rather than overruled *Buck.*[166] The opinion assumed that eugenic policies, carefully crafted, were valid state endeavors.[167] As discussed above, eugenic sterilization laws remained in force in a number of states after *Skinner.*[168]

Later decisions affirmed and extended the right to reproductive privacy. They generally did so in the context of freedom from state interference with the right *not* to reproduce, analyzing the right in terms of substantive due process rather than a fundamental freedom under equal protection.[169] The Court has consistently maintained that reproductive privacy is limited, and cited *Buck* for that proposition in the original abortion rights decisions.[170] More recent abortion decisions, especially *Planned Parenthood of Southeastern Pennsylvania v. Casey*, have undermined the right to reproductive privacy, allowing state laws intended to discourage abortion, as long as they do not create an undue burden on the right to have an abortion.[171] However, the limitations on reproductive freedom were justified by the states' interest in protecting fetuses. The *Casey*

163. 316 U.S. 535 (1942).

164. *Id.* at 541.

165. *Id.*

166. *Id.* at 542.

167. *Id.* 539-42 (finding that states may create eugenic laws, but that Oklahoma's classification did not fit closely enough with the inheritability of criminal traits to be valid).

168. *See supra* text accompanying notes 18-21, 59-60.

169. *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833 (1992) (affirming the limited right to have an abortion); Roe v. Wade, 410 U.S. 113 (1973) (holding that women have a right to have abortions); Eisenstadt v. Baird, 405 U.S. 438 (1972) (holding that unmarried people have a right to use contraception); Griswold v. Connecticut, 381 U.S. 479 (1965) (holding that married couples have a right to use contraception).

170. *Roe*, 410 U.S. at 154; Doe v. Bolton, 410 U.S. 179, 215 (1973).

171. *Casey*, 505 U.S. at 88.

Court expressly reaffirmed numerous non-abortion reproductive privacy decisions, stating "the Constitution places limits on a State's right to interfere with a person's most basic decisions about family and parenthood."[172]

Because the undue burden framework was devised as a compromise in the abortion context, the Court would probably continue to closely scrutinize laws that clearly interfere with reproductive privacy without protecting fetuses. Thus, some of the more coercive eugenics laws, for example sterilization laws, would probably be struck down under the right to reproductive privacy. However, reproductive privacy is less likely to reach policies that do not place a large burden on reproduction. For example, the Court, upholding a welfare provision that adjusted grants for family size up to a maximum grant amount, a form of family cap, under equal protection rational basis review did not even consider the reproductive privacy claim.[173] Even the dissent dismissed the reproductive privacy claim, stating, "the effect of the maximum grant regulation upon the right of procreation is marginal and indirect at best, totally unlike the compulsory sterilization law that was at issue in *Skinner*."[174] The Court of Appeals for the Third Circuit rejected reproductive privacy challenges to the New Jersey family cap, which is based explicitly on the idea that "to have a child while receiving public support" is "irresponsible [and] not socially desirable."[175] The court stated, "[I]t would be remarkable to hold that a state's failure to subsidize a reproductive choice burdens that choice."[176] Similarly, under the undue burden framework, it is probable that punishing illegal drug use during pregnancy would be found not to cause an undue burden on reproductive privacy. Logically, such penalties could extend to include legal activities, as long the penalties did not create an undue burden on reproductive decisions. The privacy doctrine does not inquire about intent, and the courts have held that a state is not obligated to remove obstacles to the exercise of reproductive freedom that it did not create,[177] presumably even if it were acting with explicitly eugenic intentions.

In summary, privacy probably protects against some, but not all, forms of eugenic policies. In part, that may be because of inadequacies in the privacy doctrine. But, in part, it is because the concepts of privacy and reproductive autonomy do not reach the central harm of eugenic policy.[178] The central harm

172. *Id.* at 849.

173. Dandridge v. Williams, 397 U.S. 471 (1970).

174. *Id.* at 521 n.14.

175. C.K. v. New Jersey Dep't of Health & Human Servs., 92 F.3d 171, 180 (3d Cir. 1996).

176. *C.K.*, 92 F.3d at 195.

177. *See* Harris v. McRae, 448 U.S. 297 (1980) (upholding federal denial of Medicaid funding for abortions except where the life of the mother is endangered by carrying the fetus to term); Maher v. Roe, 432 U.S. 464 (1977) (upholding state's denial of Medicaid funding for abortion except where medically necessary).

178. Many feminist scholars have argued similarly that redefining abortion as a sex equality right would better address the central harm of abortion restrictions. *See, e.g.*, Reva Siegel, *Reasoning from*

in eugenics is the judgment that the lives of certain groups are less valuable than the lives of others and the world would be better off in the future if those groups did not reproduce. Interference with reproductive decision-making, which creates an additional harm, is a method of translating the devaluation of certain people's lives into public policy. To illustrate, imagine that the government instituted a eugenic program that paid people who were deemed especially "fit" to have children. It would be difficult to contend that this action "interfered" with reproduction in any material way, but there would still be a real harm in making relative valuations of people's lives. Or imagine that the government decided to place soldiers who were least "fit" to reproduce in the most dangerous positions in a war, so that casualties would not harm the country's future reproductive capacity. The link to reproductive privacy in such a situation would be tenuous, but the link to eugenics is clear and the valuing of lives is offensive to any notion of equality.

### B. *Equal Protection*

If the central harm of a eugenic program is a gross violation of the equality ideal, then perhaps constitutional protection from eugenic policies could be found in the Equal Protection Clause. Unfortunately, the Equal Protection Clause offers minimal protection, as current jurisprudence contemplates equal protection as the guarantee of non-differentiation between certain protected groups. Eugenic policies based explicitly on race or sex would almost certainly be invalidated, while other policies would likely be upheld if the Court finds that they could rationally be believed to promote some legitimate goal.

#### 1. *Strict scrutiny.*

For a period after the ratification of the Fourteenth Amendment, equal protection arguments were rarely successful. The *Buck* Court characterized equal protection as the "last resort of constitutional arguments."[179] Soon after the Fourteenth Amendment was passed, the Court established that the amendment would be read as primarily protecting African Americans from discrimination, despite its race-neutral wording.[180] However, the Court soon recognized that the Equal Protection Clause protected others from invidious discrimination.[181]

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*the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992).

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

180. Slaughter-House Cases, 83 U.S. 36, 81 (1872) ("We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision.").

181. *See, e.g.*, Skinner v. Oklahoma, 316 U.S. 535 (1942); F.S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920) (invalidating an income tax that taxed Virginia corporations for income made outside the state); Yick Wo v. Hopkins, 118 U.S. 356 (1886) (granting relief to a Chinese plaintiff under the Equal Protection Clause).

The Court devised a two-tiered system of review, whereby most classifications are subjected to minimal scrutiny, but classifications based on race or another suspect classification and classifications burdening a fundamental interest are subjected to strict scrutiny. An intermediate tier, discussed below, was later added for sex discrimination.[182] In order to survive strict scrutiny, a racial classification must be necessary to serve a compelling government interest and must be narrowly tailored to serve that interest, a test that few classifications survive.[183]

Despite the numerous interconnections between racism and eugenics and the heavily disparate impact various forms of eugenic policies have on racial minorities, unless a eugenic policy explicitly classified by race, it would be unlikely to be analyzed under strict scrutiny as racial discrimination. If a policy maker were unwise enough to create a eugenic policy that explicitly classified by race, it would be subject to strict scrutiny and almost certainly would be invalidated. Government action that does not explicitly classify by race may be subject to strict scrutiny if it can be shown that the government intended to discriminate by race.[184] However, even with a foreseeable, heavily racially-disparate impact, a policy does not receive strict scrutiny unless the plaintiff can show that the government created the classification in part *because* of the disparate impact, not merely in spite of it.[185] Discriminatory intent is difficult to prove.[186] For example, the *Ferguson* court rejected arguments that South Carolina's prosecution program is racially discriminatory although it was only implemented in a hospital primarily serving African Americans and nearly all those prosecuted were African American.[187] Classifications based on national origin or alienage are also subject to strict scrutiny,[188] but for similar reasons as above, eugenic classifications would be unlikely to draw strict scrutiny on these grounds unless they made explicit classifications by national origin or alienage. Finally, although reproduction was considered a fundamental right under equal protection in *Skinner*, subsequent reproductive privacy cases have been ana-

182. *See infra* text accompanying notes 190-198.

183. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986); Loving v. Virginia, 388 U.S. 1 (1967).

184. Washington v. Davis, 426 U.S. 229, 241 (1976); Gomillion v. Lightfoot, 364 U.S. 339, 341-42 (1960); *Yick Wo*, 118 U.S. at 373-74.

185. McCleskey v. Kemp, 481 U.S. 279, 298 (1987); *Washington*, 426 U.S. at 239.

186. *See, e.g.*, *McCleskey*, 481 U.S. at 279 (upholding the racially disparate imposition of the death penalty against a study that statistically controlled for a variety of factors and still found large racial disparities); Arlington Heights v. Metro. Housing Dev. Corp., 429 U.S. 252 (1977); United States v. Clary, 34 F.3d 709, 711 (8th Cir. 1994) (finding no intent to discriminate in prosecution for crack possession where 98.2% of those convicted were black).

187. 186 F.3d. 469, 479-82 (4th Cir. 1999), *vacated*, 532 U.S. 67 (2001). The Supreme Court vacated the decision under the Fourth Amendment, but did not consider the discrimination claim, 532 U.S. 67 (2001). *See also* ROBERTS, *supra* note 20, at 172-75 (discussing evidence of racial bias in South Carolina's program); Paltrow, *supra* note 107, at 1023-26 (same).

188. Graham v. Richardson, 403 U.S. 365, 371 (1971).

lyzed as a substantive due process right rather than an equal protection right. Constitutional protection of reproductive privacy is discussed above.[189]

In summary, eugenic policies would only be subject to strict scrutiny if they were explicitly based on race, national origin, or alienage, or intent to discriminate by these classifications could be shown. Thus, many explicitly eugenic policies could be drafted to avoid strict scrutiny under the Equal Protection Clause.

2. *Intermediate Scrutiny.*

Government actions that differentiate by sex are subject to intermediate scrutiny, and must be substantially related to an important governmental interest to survive a challenge.[190] As with race, sex discrimination must either be explicit or intention to discriminate by sex must be shown.[191] If a eugenic policy only applied to men or women as a group, it would be subjected to intermediate scrutiny and probably invalidated.[192] However, this would not include policies that only apply to pregnant women, as the Supreme Court has held that, for equal protection purposes, discrimination based on pregnancy is not sex discrimination because "non-pregnant persons" include both men and women.[193] Many scholars have attacked this reasoning, as many sex- and raced-based classifications recognized by the Court affect only a subset of the disfavored group, and regulation of pregnancy has historically been used to reinforce women's subordinate status.[194] Nevertheless, policies aimed at pregnant women probably would not be subjected to intermediate scrutiny under equal protection. Similarly, although parents receiving welfare are overwhelmingly female, eugenic policies governing welfare recipients could be worded in gender-neutral terms so as to avoid intermediate scrutiny.[195]

Additionally, classifications based on "illegitimacy" are subject to intermediate scrutiny.[196] Although the Court recognizes discouraging out-of-wedlock births as an important state interest, the Court does not recognize punishing il-

189. *See supra* text accompanying notes 164-178.

190. United States v. Virginia, 518 U.S. 515, 524 (1996); Craig v. Boren, 429 U.S. 190, 197 (1976).

191. Personnel Adm'r of Massachusetts v. Feeney, 442 U.S. 256, 276 (1979).

192. *See* United States v. Virginia, 518 U.S. at 531 (stating that there must be an "exceedingly persuasive justification" for sex-based government action (quoting Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982)(citations omitted)).

193. Geduldig v. Aiello, 417 U.S. 484, 496-97 (1974).

194. *See, e.g.*, Siegel, *supra* note 178, at 268-72; *see also* Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 983 (1984) ("Criticizing *Geduldig* has since become a cottage industry. Over two dozen law review articles have condemned both the Court's approach and the result.").

195. However, a state law regarding Norplant or other hormonal contraception might be subject to intermediate review because hormonal contraceptives for men do not exist.

196. Clark v. Jeter, 486 U.S. 456, 461 (1988).

legitimate children as a legitimate way to promote that interest.[197] Eugenic policies specifically targeting children born out of wedlock might be invalidated under intermediate scrutiny if they deprived illegitimate children of a substantial benefit. For example, the Court invalidated a state welfare program limited to married couples as unlawful discrimination based on illegitimacy.[198] In summary, only if a eugenic policy specifically categorized by sex or illegitimacy, or intention to discriminate by sex or illegitimacy could be shown, would that policy receive intermediate equal protection scrutiny. Therefore, eugenic policies could be crafted to avoid intermediate scrutiny.

3. *Rational Basis Review*

Eugenic policies crafted to avoid strict or intermediate scrutiny would receive equal protection rational basis review. The Court has explicitly decided that classifications encompassing many of the groups that have often been targeted by eugenic policies are subject to rational basis review, including the poor,[199] drug addicts,[200] the mentally retarded,[201] and disabled people generally.[202] States have wide discretion under rational basis review. A classification that has a rational relationship to any legitimate state interest will be sustained. The classification does not actually have to promote the permissible goal, as long as "any state of facts reasonably may be conceived to justify it."[203] Because the Court is generally unwilling to find that there is no way the legislature "*could rationally have decided*" that the classification *might* foster the goal, almost all policies are upheld under this standard.[204]

However, governments may not act out of a "bare desire . . . to harm," absent any rational purpose.[205] In practice, the Court occasionally seems to hold laws aimed at socially unpopular groups to a higher standard, sometimes referred to as "rational basis with bite."[206] If rational basis review were applied without "bite," one can easily imagine the Court concluding that eugenic poli-

197. *See* Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 173, 175 (1972).

198. New Jersey Welfare Rights Org. v. Cahill, 411 U.S. 619 (1973).

199. Dandridge v. Williams, 397 U.S. 471, 487 (1970).

200. New York City Transit Auth. v. Beazer, 440 U.S. 568, 593 (1979).

201. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985).

202. Bd. of Trs. of Univ. Alabama v.Garrett, 121 S. Ct. 955, 963 (2001).

203. McGowan v. Maryland, 366 U.S. 420, 426 (1961).

204. *See* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 466 (1981) (emphasis in original).

205. Romer v. Evans, 517 U.S. 620, 634 (1996) (quoting *U.S. Dept. of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

206. *See* Gerald Gunther, *A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 20-48 (1972) (discussing "rational basis with bite" review). *See also Romer*, 517 U.S. 620 (invalidating a Colorado constitutional amendment prohibiting city ordinances protecting homosexuals from discrimination); *City of Cleburne*, 473 U.S. 432 (overturning a city zoning ordinance aimed at the mentally retarded); *Moreno*, 413 U.S. at 533 (invalidating a regulation not permitting any household with unrelated members to receive food stamps, which was said to be aimed at "hippies").

cies such as sterilizing or discouraging the poor or the unmarried from having children could reasonably be believed to lead to lower rates of poverty, or that discouraging drug addicts from having children reasonably could be believed to reduce infant health problems. However, the more coercive or mean-spirited a policy is, especially if the policy-makers were to admit that they had eugenic intentions, the more likely it seems that the policy would offend enough of the Justices' sense of fairness that the Court would invalidate the policy.

### C. *Equal Protection and the Anti-Subordination Principle*

Eugenics violates the very heart of the ideal of equality, by placing into public policy the judgment that certain groups are so inferior that society may justifiably attempt to restrict their fundamental freedom to reproduce. Yet, even an explicitly eugenic law is not clearly unconstitutional under current Supreme Court equal protection jurisprudence. Although many incarnations of eugenic policies might be invalidated as violations of privacy, equal protection, or on other grounds,[207] the ambiguity in the constitutional status of eugenic policy, which seems so clearly to violate equality norms, suggests a shortcoming in current equal protection jurisprudence.

The problem arises because the Court has translated equal protection into a norm of non-differentiation rather than non-subordination. Having identified certain types of group categorization frequently involved in invidious discrimination, primarily categorization by race and sex, the Court attempted to ensure non-discrimination by barring most forms of differentiation along those lines. This strategy is both under-inclusive and over-inclusive. It is under-inclusive because it fails to address policies that disproportionately harm protected groups, such as racial minorities, without explicitly naming those groups. Additionally, it is under-inclusive because it fails to account for policies harming unprotected disadvantaged groups, such as the poor. It is over-inclusive because it disallows most government efforts to mitigate the effects of past and current discrimination by taking the status of a subordinated group into account, constitutionally equating affirmative action with Jim Crow segregation of the past.[208]

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207. I suspect that many eugenic laws would be invalidated on grounds of privacy, equal protection, or other reasons. For example, a policy might violate procedural due process if officials were given too much discretion in determining to whom the policy applied, or if the policy did not have adequate protection to ensure that decisions were accurate. Similarly, a policy applied to criminals might violate the Eigth Amendment prohibition of cruel and unusual punishment. South Carolina may no longer test pregnant women for cocaine without their consent, as the practice was found to violate the Fourth Amendment. Ferguson v. City of Charleston, 532 U.S. 67 (2001).

208. *See* Adarand Constructors v. Pena, 515 U.S. 200 (1995) (finding that federal affirmative action programs must be held to strict scrutiny); City of Richmond v. J. A. Croson Co., 488 U.S. 469 (1989) (invalidating a city affirmative action program); Regents of the Univ. of California v. Bakke, 438 U.S. 265 (1978) (invalidating the University's affirmative action program, but allowing it to create a more limited program).

The current framework is incapable of eliminating the disadvantage of racial minorities and other explicitly protected groups, as long as either explicit categorization or intent to discriminate must be shown. Dominant groups may reinforce disadvantaged groups' subordination through policies targeting unprotected categories. For example, because poverty and race are correlated, the racial caste system can be reinforced by policies that disadvantage the poor. Even a completely race-neutral eugenic policy would tend to have a racially subordinating impact, as this country's legacy of racism has left minorities disproportionately concentrated in a number of socially disadvantaged groups. Because eugenic policies reflect dominant groups' valuations of others' lives, they will always reinforce the existing social hierarchy.

Jurisprudence focusing more generally on the impact of subordinating policies and on subordination along a variety of lines could more effectively undo the racial hierarchy, and would also better account for discrimination against a number of groups that now receive little protection from antidiscrimination law, such as homosexuals, the mentally ill, drug addicts, and impoverished whites. By focusing on racial and other categories, the Court loses sight of the central harm of subordination. Several scholars have argued that refocusing equal protection review on a norm of anti-subordination rather than anti-differentiation would produce better results.[209] The Court's anti-differentiation jurisprudence contends that it is inappropriate to treat individuals differently because of their race or sex, thereby rejecting distinctions without regard to which groups are benefited and burdened. In contrast, the central concern of the anti-subordination framework is addressing inappropriate group *subordination.* Within the latter framework, facially neutral policies that perpetuate the historical subordination of groups are illicit, while facially differentiating policies that ameliorate subordination are not. Thus, the anti-subordination framework allows public policy to undo existing social hierarchies. Additionally, by accounting for policies that perpetuate historical subordination, the anti-subordination framework accounts for prejudices people are not fully aware that they have.[210] For example, many people who believe that welfare recipients should not have children are probably unaware of racist and classist underpinnings of their belief systems. Creating an anti-subordination jurisprudence would not only work to undo historical subordination, but might help create social awareness of ongoing subordination.

209. *See, e.g.*, Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986); Kimberle Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); Siegel, *supra* note 2, at 1130-48.

210. *See* Siegel, *supra* note 2, at 1136-38. *See generally* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 1987 (discussing unconscious racism and the law, and proposing a modified conception of intent in racial disparate impact cases).

Most scholars who would reinterpret equal protection as an anti-subordination doctrine treat this as a matter of asking a different question about the treatment of protected classes: "Does this policy subordinate racial minorities?" rather than "Does this policy differentiate by race?"[211] Examining eugenics, which has been used to subordinate many disfavored groups, exposes a danger in that framework. While racism is central to the maintenance of the social hierarchy in the United States, it is not the only axis of subordination. The central harm of eugenics is not racism; eugenic discrimination by race is a manifestation of placing lower values on the lives racial minorities. A true shift to an anti-subordination paradigm must not get caught in the same trap as that which ensnarled the Supreme Court, focusing on categories. An anti-subordination norm must encompass subordination of all socially disfavored groups in order to work toward undoing the central harms of racism and other forms of discrimination against disfavored groups—devaluation of members of those groups.

Implementing an anti-subordination understanding of equal protection would be relatively straightforward. It would become question of fact whether a group is socially disadvantaged and whether a policy clearly subordinates or disadvantages that group. Of course, intent to discriminate would remain relevant to showing subordination, but showing intent to discriminate would no longer be required. The system would be more complex than the current system, which understands virtually all distinctions based on race as illicit, most distinctions based on sex as illicit, and almost all distinctions made between unprotected groups as licit. However, the complexity is unlikely to be greater than many other areas of the law, which generally require individualized showings of harm. An anti-subordination framework would function for all disadvantaed groups similarly to the current version of intermediate scrutiny for sex discrimination, as framed in *United States v. Virginia*, which explicitly adopts an asymmetrical, anti-subordination-based analysis.[212] The principal danger of a shift away from categorical scrutiny is that not having explicitly heightened scrutiny would leave racial minorities and other currently protected groups less well protected than they are now. However, given the blatant, persistent, and well-documented historical subordination of protected groups such as racial minorities and women, showing disadvantaged status should be straightforward where policies harm currently protected groups.

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211. *See, e.g.*, Colker, *supra* note 209, at 1004; Owen M. Fiss, *What is Feminism?*, 26 ARIZ. ST. L.J. 413 (1994). Some scholars would expand the number of protected classes but keep the framework of protected classes. *See, e.g.*, Kenji Yoshino, *Suspect Symbols: The Literary Argument For Heightened Scrutiny For Gays*, 96 COLUM. L. REV. 1753 (1996).

212. United States v. Virginia, 518 U.S. 515, 533-34 (1996). *See also* Denise C. Morgan, *Anti-Subordination Analysis After* United States v. Virginia: *Evaluating the Constitutionality of K-12 Single-Sex Public Schools*, 1999 U. CHI. LEGAL F. 381 (1999).

D. *Conclusion*

The United States has never come to terms with its dark history of eugenics or with the racism and class oppression from which the eugenics movement sprang. Although explicitly eugenic policies largely faded away in the aftermath of the Holocaust, our failure to grapple with eugenics and the prejudices underpinning it invited variants of eugenics to resurface with time. Most Americans would probably say that eugenic policies are morally unacceptable, but variants of eugenic policy are still a prevalent part of the American social policy landscape.

We live in a nation where certain groups, particularly inner-city black youth, still face tremendous barriers to advancement. While we have made progress against certain forms of discrimination, we cannot pretend that the problems have been solved. Perhaps because Americans often turn a blind eye toward class subordination, our courts have failed to develop constitutional jurisprudence capable of undoing subordination. Because of this, instead of protecting against still widespread racial inequality, most successful claims of racial discrimination under the Equal Protection Clause function to protect white people from affirmative action.[213] The failure of our jurisprudence to firmly reject eugenics reflects this country's ongoing failure of to come to terms with its history of oppression. Both of these failures reinforce the perpetuation of eugenic thought in American social policy and political discourse.

213. *See* Siegel, *supra* note 2, at 1142 (outlining the most common beneficiaries of heightened scrutiny).