

Reproductive Control as a Carceral Tool of the State – Understanding Eugenics in a Post-Roe Society

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The government has used reproductive control as a carceral tool for centuries, especially against women of color. While scholars anticipate the overturn of Roe v. Wade will exacerbate state surveillance and control over pregnancy, the current “pro-choice” rhetoric neglects the state’s history of policing reproduction through forced sterilization programs, fetal protection laws, and criminal prosecutions against pregnant persons and caregivers dependent on narcotics. Without a complete understanding of this history and the intersectionality of race, gender, socioeconomic status, disability, and crime, reproductive liberation is not possible. Thus, this Note aims to contribute to existing reproductive justice scholarship and advocacy efforts of women and gender-nonconforming people of color by contextualizing the overturn of Roe within the history of racial eugenics and reproductive punishment. In doing so, this Note uses the history of eugenics and state-sanctioned reproductive oppression to show that abortion is not “a tool of modern-day eugenics,” as conservatives inaccurately proclaim. Adopting a reproductive justice framework is necessary to realize true reproductive freedom.

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INTRODUCTION

In June 2022, state abortion bans went into effect immediately after the Supreme Court overturned *Roe v. Wade*, which had guaranteed the constitutional right to abortion.¹ The upheaval of nearly half a century of precedent opened the door for state legislatures to criminalize abortion and those who assist others in obtaining this medical care. The decision² triggered abortion bans in at least thirteen states, many of which impose criminal liability on any person who provides or attempts to provide abortion services.³ For example, Louisiana’s and Mississippi’s statutes carry a ten-year maximum prison sentence for people who violate abortion restrictions.⁴ In response to this legislation, many White feminists staged protests evoking imagery from *The Handmaid’s Tale*, a television series in which primarily White women “are forced into slavery, repeatedly violated, impregnated, and made to give birth to children that are

1. Spencer Kimball, *Several U.S. States Immediately Ban Abortion after Supreme Court Overturns Roe v. Wade*, CNBC (June 24, 2022), <https://www.cnbc.com/2022/06/24/us-states-immediately-institute-abortion-bans-following-roe-ruling.html> [https://perma.cc/6S25-EP8H].

2. *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022).

3. Elizabeth Nash & Isabel Guarnieri, *13 States Have Abortion Trigger Bans—Here’s What Happens When Roe Is Overturned*, GUTTMACHER INST. (June 6, 2022), <https://www.guttmacher.org/article/2022/06/13-states-have-abortion-trigger-bans-heres-what-happens-when-roe-overturned> [https://perma.cc/A6TU-5W52].

4. *Id.*

immediately taken to serve the interests of others.”⁵ However, this narrative fails to acknowledge that the fictional abuse of cisgender White women in *The Handmaid’s Tale* is not just a dystopian fantasy for women of color, but a traumatic reality.⁶ “Black and Indigenous women have always been policed like this . . . which makes them ‘canaries in the coalmine.’”⁷

Indeed, the government has used reproductive control as a carceral tool for centuries, especially against people of color. While scholars anticipate the overturn of *Roe* will exacerbate state surveillance and control over pregnancy,⁸ the current “pro-choice” rhetoric neglects the state’s history of policing reproduction through forced sterilization,⁹ fetal protection laws,¹⁰ and criminal prosecutions against pregnant persons and caregivers dependent on narcotics.¹¹ Not only does the language of choice obscure the voices and lived experiences of people of color, but it also “has proved useless for claiming public resources that most women need” to exercise their right to choose.¹² Without a complete understanding of this history and the intersectionality of race, gender, socioeconomic status, disability, and crime, reproductive liberation is not

5. Sherronda J. Brown, ‘*The Handmaid’s Tale*’ and the Reproductive Rights Movement’s White Supremacy Problem, WEAR YOUR VOICE ARCHIVE (Apr. 26, 2018), <https://wyvarchive.com/handmaids-tale-reproductive-rights-movements-white-supremacy-problem/> [https://perma.cc/Y3KE-TTWA].

6. *Id.*

7. Sandhya Dirks, *Criminalization of Pregnancy Has Already Been Happening to the Poor and Women of Color*, NPR (Aug. 3, 2022), <https://www.npr.org/2022/08/03/1114181472/criminalization-of-pregnancy-has-already-been-happening-to-the-poor-and-women-of> [https://perma.cc/7NE5-73NH].

8. See Patricia Hurtado & Francesca Maglione, *In a Post-Roe World, More Miscarriage and Stillbirth Prosecutions Await Women*, BLOOMBERG (July 5, 2022), <https://www.bloomberg.com/news/articles/2022-07-05/miscarriage-stillbirth-prosecutions-await-women-post-roe?leadSource=uverify%20wall> [https://perma.cc/2LS4-GT8T].

9. See, e.g., Maya Manian, *Immigration Detention and Coerced Sterilization: History Tragically Repeats Itself*, ACLU (Sept. 29, 2020), <https://www.aclu.org/news/immigrants-rights/immigration-detention-and-coerced-sterilization-history-tragically-repeats-itself#:~:text=The%20recent%20allegation%20about%20coerced,women%20without%20proper%20informed%20consent> [https://perma.cc/H9EV-22ZT] (describing the history of forced sterilizations in the United States and its connection to abortion and reproductive justice movements).

10. See generally Michele Goodwin, *Fetal Protection Laws: Moral Panic and the New Constitutional Battlefield*, 102 CALIF. L. REV. 781 (2014) [hereinafter *Fetal Protection Laws*] (providing an overview of the history of state fetal protection laws that undermine fetal health and deny pregnant individuals of their rights afforded by the Equal Protection Clause).

11. See generally Michele Goodwin, *How the Criminalization of Pregnancy Robs Women of Reproductive Autonomy*, 47 THE HASTINGS CTR. REP. 19 (2017) (explaining the history of state prosecutions against pregnant individuals and forewarning the potential for medical jurisprudence that strips individuals of their reproductive autonomy).

12. Dorothy Roberts, *Reproductive Justice, Not Just Rights*, DISSENT (2015), <https://www.dissentmagazine.org/article/reproductive-justice-not-just-rights/> [https://perma.cc/5HWG-YLDG] [hereinafter *Reproductive Justice*].

possible. Thus, advocacy efforts that center on the constitutional right to abortion are incomplete without a broader reproductive justice framework.¹³

Reproductive justice is “the human right to maintain personal bodily autonomy, have children, not have children, and parent the children we have in safe and sustainable communities.”¹⁴ Reproductive liberation entails the realization of these core tenets as well as broader social justice policies, such as universal health care and prison abolition.¹⁵ While Indigenous women, women of color, and gender-nonconforming individuals¹⁶ have always advocated for reproductive justice, the Women of African Descent for Reproductive Justice coined the term in 1994.¹⁷ The reproductive justice movement seeks to combine reproductive rights and social justice to target advocacy on access, instead of choice.¹⁸ Reproductive justice recognizes the intersectionality of different identities in systems of oppression and “demands consideration of all the ways reproductive health can be affected by other factors, from race, religion or sexual orientation to financial, immigration or disability status to environmental conditions.”¹⁹

Reproductive justice also provides a stronger counterargument to the conservative narrative that abortion is a “tool of modern-day eugenics.”²⁰ Significantly, in footnote 41 in *Dobbs*, the majority noted that some supporters of “liberal access to abortion . . . have been motivated by a desire to suppress the size of the African-American population,” and cited Justice Thomas’s concurrence in *Box v. Planned Parenthood of Indiana and Kentucky* to support the proposition that “it is beyond dispute that *Roe* has had that demographic effect.”²¹ While Justice Thomas’s concurrence in *Box* concerned bans on reason-based abortions, which are abortions that people choose to terminate based on a

13. See *id.* (showing that pro-choice organizations ignored the prosecutions of Black women for drug use while pregnant, which “not only alienated women of color, but also failed to address the connection between criminalization of pregnant women and abortion rights”).

14. *Reproductive Justice*, SISTER SONG WOMEN OF COLOR REPROD. JUST. COLLECTIVE, <https://www.sistersong.net/reproductive-justice> [<https://perma.cc/SZE4-AH9P>] (last visited Sept. 27, 2023).

15. Roberts, *Reproductive Justice*, *supra* note 12.

16. This Note recognizes that abortion does not exclusively impact people who identify as women, but all people who have the capacity for pregnancy. Transgender, genderqueer, and nonbinary individuals must be included in discussions of abortion and reproductive justice. Moreover, it is important to recognize these groups face additional stigma and obstacles, such as being misgendered while seeking treatment. See Courtney Cooper, *Trans & Nonbinary People Get Abortions, Too*, HEYJANE (Feb. 28, 2023), <https://www.heyjane.co/articles/nonbinary-trans-abortions> [<https://perma.cc/VJ8A-XUNW>]. While this Note seeks to use gender-inclusive terms, when possible, some sections use cisgender terminology to accurately describe the historical research and data cited. As such, the “limitations of data available engender this discussion to prioritize cisgendered women.” Elizabeth Jekanowski, *Voluntarily, for the Good of Society: Norplant, Coercive Policy, and Reproductive Justice*, 2018 BERKELEY PUB. POL’Y J. 1, 74 (2018).

17. Roberts, *supra* note 12.

18. *Id.*

19. Abigail Abrams, *‘We Are Grabbing Our Own Microphones’: How Advocates of Reproductive Justice Stepped Into the Spotlight*, TIME (Nov. 21, 2019), <https://time.com/5735432/reproductive-justice-groups/> [<https://perma.cc/V33C-2N7E>].

20. *Box v. Planned Parenthood of Ind. & Ky. Inc.*, 139 S. Ct. 1780, 1783 (2019) (Thomas, J., concurring) (per curiam).

21. *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 255 n.41 (2022).

protected trait, his opinion laid the foundation for claiming abortion is eugenic.²² To support his assertions, Justice Thomas used an incomplete history of the eugenics movement and the language of choice to justify reason-based abortion bans.²³ Specifically, his focus on individual reproductive decisions failed to recognize the intersecting systems of oppression that cause discriminatory outcomes for the groups these laws allegedly protect.

When advocates simplify reproductive autonomy to the ability to choose whether to continue or terminate a pregnancy, they make a similar mistake to Justice Thomas's *Box* concurrence. They overlook the complete history of eugenics and state-sanctioned reproductive oppression inflicted on predominantly communities of color. Indeed, recognizing the lived experiences and intersectionality of different identities is essential for realizing reproductive liberation for *all*. While choice language presumes the resources to exercise reproductive freedom are already available, reproductive justice language assumes "dignified fertility management, childbirth, and parenting together constitute a fundamental *human right*" which imposes an affirmative duty on the state to provide "access to these material resources."²⁴

This Note aims to contribute to existing reproductive justice scholarship and advocacy efforts of women and gender-nonconforming people of color by contextualizing the post-*Roe* society within the history of racial eugenics and the state's criminalization of reproduction. In doing so, this Note argues that the criminalization of reproduction is an extension of eugenic ideology that must be understood within the state's use of reproductive control as a carceral tool. Part I traces the origins of state reproductive control through an intersectional lens of race and gender. Part II discusses how eugenic theory influenced the racial construction of crime in America and situates reproductive rights within the history of the eugenics movement. Part III analyzes the contemporary use of reproduction as a carceral instrument through the enforcement of fetal protection laws and coercive exercises of prosecutorial discretion. Finally, Part IV dispels conservative arguments that abortion is a tool of racial genocide, and instead, argues that the criminalization of reproduction is a byproduct of the eugenics movement. By drawing historical parallels and analyzing current trends in pregnancy-related incarceration, Part IV demonstrates that while racial eugenics dissipated from national discourse after World War II, the state's use of punishment as a reproductive policy has sustained eugenic principles and White supremacy. To that end, this Note seeks to amplify the voices of the "canaries in the coalmine" by contextualizing the post-*Roe* regulatory landscape in the broader context of the state's history of reproductive control through the carceral system.

22. Sonia M. Suter, *Why Reason-Based Abortion Bans are Not a Remedy Against Eugenics: An Empirical Study*, 10 J. L. & THE BIOSCIENCES 1, 2–3 (2023) [hereinafter *Why Reason-Based Abortion Bans are Not a Remedy*].

23. *Id.* at 2, 25.

24. LORETTA J. ROSS & RICKIE SOLINGER, *REPRODUCTIVE JUSTICE: AN INTRODUCTION* 10 (2017).

I.

RACE, GENDER, AND STATE CONTROL OF REPRODUCTION

A. *Slavery and the Exploitation of Black Fertility*

By subjugating the wombs of Black women for White economic gain, slavery laid an atrocious foundation for utilizing reproduction as an instrument of state control. Article 1, Section 9, Clause 1 of the Constitution legitimized the institution of slavery. While it does not explicitly mention the word “slavery,” the clause prohibited the federal government from placing restrictions on the “[i]mportation” of people until 1808.²⁵ Once the clause expired, slaveowners depended on the reproduction of enslaved women to supply their labor force.²⁶ Black fertility became an invaluable asset to maintain the economic prosperity of Whites, who could no longer rely on the international slave trade to increase the enslaved population.²⁷ Thus, the Constitution’s inherent approval of slavery allowed private slave owners to use the legitimacy of the state to inflict reproductive violence on enslaved women.

“Every aspect of [enslaved] women’s reproductive lives was dictated by the economic interests of their [W]hite slave masters.”²⁸ Not only did slaveowners subject Black women to repeated rape, forcible breeding with enslaved men whom they considered “prime stock,” and coercive incentives to reproduce more children, but they also “systematically denied [Black women] the rights of motherhood.”²⁹ Slaveowners threatened enslaved women with the sale of their children to induce obedience and discourage runaways.³⁰ Enslaved women had no autonomy to decide when and with whom to have children, or how to raise their children after birth. In fact, the state conferred legal ownership over Black children to slaveowners before conception by establishing *in futuro* interest in an enslaved woman’s anticipated future progeny.³¹

In 1662, the Virginia Colony enacted one of the first pronatalist laws to encourage the growth of the African American population.³² The law determined whether a child was free or enslaved based on the mother’s enslaved status, whereas English common law traditionally derived the child’s status from the father.³³ These laws “made the fertility of the enslaved woman into the essential, exploitable, colonial resource.”³⁴ About thirty years later, the Virginia Colony

25. Gordon Lloyd & Jenny S. Martinez, *The Slave Trade Clause*, NAT’L CONST. CTR. (2023), <https://constitutioncenter.org/the-constitution/articles/article-i/clauses/761> [<https://perma.cc/9WTC-XY2Y>].

26. See DOROTHY ROBERTS, *KILLING THE BLACK BODY* 24 (1997).

27. See *id.*

28. *Id.* at 25.

29. *Id.* at 25, 27, 33.

30. *Id.* at 43.

31. *Id.* at 33.

32. At the same time, states enacted laws that removed Indigenous people from their land and reduced Indigenous populations. ROSS & SOLINGER, *supra* note 24, at 18.

33. *Id.*

34. *Id.*

banned interracial marriage and prohibited multiracial or “racially indeterminate” children from receiving an inheritance or reproducing.³⁵

However, enslaved women also used their reproductive capacity as a form of resistance to undermine the economic and property interests of White slaveowners. For example, enslaved women used plants and medicinal herbs, such as cotton root, to regulate their menstrual cycles and prevent or terminate pregnancies.³⁶ While in the early 1800s, no states had laws banning abortion before quickening,³⁷ slaveowners punished enslaved women who possessed or chewed cotton root and used other means to exercise reproductive autonomy, such as abstinence, contraception, or abortion.³⁸ These early forms of resistance to state-authorized reproductive oppression informed the future reproductive justice movement.

B. *The Criminalization of Abortion in Response to Shifting Racial Demographics*

The state strictly regulated Black women’s bodies, while White women enjoyed access to abortion services and medication with little fear of punishment or state violence. Most states did not regulate abortion before quickening, and after quickening, abortion was only a common law misdemeanor.³⁹ Nineteenth-century Americans broadly supported abortion access, and many did not view it as an immoral crime.⁴⁰

In the mid to late 1800s, abortion was common, especially among upper- and middle-class married women.⁴¹ In fact, by the second half of the nineteenth century, abortion rates increased 300 percent, and married women comprised 67 percent of those seeking abortion services.⁴² This marked a significant demographic shift in those seeking abortions from low-income, single mothers

35. *Id.* at 19.

36. *Reproduction and Resistance*, LOWCOUNTRY DIGIT. HIST. INITIATIVE, <https://ldhi.library.cofc.edu/exhibits/show/hidden-voices/resisting-enslavement/reproduction-and-resistance> [<https://perma.cc/X4M8-8VVS7>] [hereinafter *Reproduction and Resistance*] (last accessed Sept. 27, 2023).

37. Quickening is the point at which fetal movement can be detected, which typically occurs in the fourth or fifth month of pregnancy. See Melissa Murray, *Race-ing Roe: Reproductive Justice, Racial Justice, and the Battle for Roe v. Wade*, 134 HARV. L. REV. 2025, 2034 (2021) [hereinafter *Race-ing Roe*].

38. *Reproduction and Resistance*, *supra* note 36; Murray, *Race-ing Roe*, *supra* note 37, at 2034 n.46.

39. *Abortion – Abortion in American Law: The Nineteenth Century*, JRANK, <https://law.jrank.org/pages/446/Abortion-Abortion-in-American-law-nineteenth-century.html> [<https://perma.cc/5XHB-8VVS>] (last accessed Sept. 27, 2023).

40. See R. Sauer, *Attitudes to Abortion in America, 1800-1973*, 28 POPULATION STUDS. 53, 56 (1974).

41. “[T]he number of newspaper advertisements for abortifacients serves as an indication of the size of the professional abortion trade in large cities towards the end of the century.” *Id.* at 55. For example, an 1891 issue of the *Boston Globe* “contained thirteen advertisements which offered ‘effective and painless remedies’ to ‘women in trouble.’” *Id.*

42. Ryan Johnson, *A Movement for Change: Horatio Robinson Storer and Physicians’ Crusade Against Abortion*, 4 JAMES MADISON UNDERGRADUATE RSCH. J. 13, 16 (2017).

to upper- and middle-class married women.⁴³ In response to declining White fertility, increases in immigration, and the apparent concentration of abortions among “married and respectable women, many of them of wealth and high social standing,”⁴⁴ Dr. Horatio Storer launched the Physicians’ Crusade Against Abortion.⁴⁵ While one of the primary motivations of the Physicians’ Crusade was professionalizing the medical field and forcing out midwives and “irregular practitioners” from obstetrics and gynecology, “in framing abortion as a vehicle of social disorder, the physicians . . . fuel[ed] concerns that the nation was on the precipice of a massive demographic reordering.”⁴⁶

Between 1860 and 1880, this fear of non-White and immigrant birthrates surpassing White birthrates prompted states to enact over forty statutes criminalizing abortion during any stage of gestation.⁴⁷ “[I]ndeed criminalizing, abortion was hand in glove with the effort to ensure that America remained a [W]hite nation.”⁴⁸

II.

THE HISTORY AND ENDURING EFFECTS OF EUGENIC IDEOLOGY IN AMERICA

A. *The Genealogy of Eugenic Policies*

Although early twentieth-century eugenic policies focused on sterilizing White women, who the state deemed unfit to meet the ideals of White supremacy, by the 1960s–70s there was a notable transition to targeting women of color, especially Black and Indigenous women.⁴⁹ This shift reflected an evolution in racist stereotypes and economic motivations behind coercive sterilization practices. In the early twentieth century, the United States employed three main eugenic tactics to sustain White supremacy: (1) immigration restrictions, (2) anti-miscegenation laws, and (3) eugenic segregation and involuntary sterilization programs.⁵⁰

43. *Id.*

44. HORATIO R. STORER, ON CRIMINAL ABORTION IN AMERICA 31 (2021), <https://www.gutenberg.org/files/65244/65244-h/65244-h.htm> [<https://perma.cc/7VSB-ESL4>].

45. Richa Venkatraman, *Horatio Robinson Storer (1830–1922)*, THE EMBRYO PROJ. ENCYCLOPEDIA (Sept. 21, 2020), <https://embryo.asu.edu/pages/horatio-robinson-storer-1830-1922> [<https://perma.cc/K59E-HQN2>]. In his essay, “On Criminal Abortion in America,” Storer argued for imposing criminal liability on those who sought and provided abortion services due to his belief that life begins at conception; Storer interwove xenophobic, patriarchal, and racist rhetoric throughout his reasoning. For example, Storer asserted that “married women had a moral obligation to reproduce” and “in women, the uterus and ovaries could either cause or amplify symptoms of insanity, and that ovariectomy, the removal of a woman’s ovaries, was a potential treatment option for insanity in women.” *Id.*

46. Murray, *Race-ing Roe*, *supra* note 37, at 2035.

47. Venkatraman, *supra* note 45.

48. Murray, *Race-ing Roe*, *supra* note 37, at 2036.

49. See Melissa Murray, *Abortion, Sterilization, and the Universe of Reproductive Rights*, 63 WM. & MARY L. REV. 1599, 1626–29 (2022).

50. Khiara M. Bridges, *White Privilege and White Disadvantage*, 105 VA. L. REV. 449, 463–64 (2019) [hereinafter *White Privilege and White Disadvantage*].

First, immigration restrictions limited the total number of immigrants, especially from Asian and Latinx communities.⁵¹ For example, in 1875, Congress passed the Page Act, which limited the number of unmarried Chinese women immigrating to the United States.⁵² Chinese immigrants were perceived as a racial and economic threat to the White labor force and were depicted as “filthy and disease-ridden.”⁵³ Americans also viewed Chinese women as promiscuous and a sexual threat, so much so that the Page Act specifically prohibited “import[ing]” Chinese women to engage in sex work.⁵⁴ Because of this eugenic and inaccurate stereotyping of Chinese women as sexually deviant, U.S. immigration officials forced them to submit to “barbarous, humiliating, and discriminatory” medical exams.⁵⁵ Moreover, since the Page Act prohibited Chinese women from immigrating with their male partners, Chinese immigrants had fewer children. In fact, after the passage of the Page Act, there were only 48 Chinese women per 1,000 Chinese men.⁵⁶ This law combined racial and gender stereotypes to control the reproduction and movement of Chinese immigrant populations. Notably, no laws restricted the number of female immigrants from European countries at this time.⁵⁷

Following “testimony on the dangers of America being flooded by ‘weakened’ Europeans,” Congress passed the Immigration Act of 1924.⁵⁸ The law set immigration quotas based on nationality and limited the number of people immigrating to the United States from each country to reflect the demographics of the United States during the 1890 census.⁵⁹ This census data predated the increases in immigration from Eastern and Southern Europe.⁶⁰ Using this thirty-four-year-old data demonstrates the racist and antisemitic sentiments underlying the passage of this legislation.⁶¹ “[T]he Page Act and the Chinese Exclusion Act paved the way for other discriminatory immigration policies that placed quotas on certain ethnic groups and prohibited the entry of individuals with mental disorders, physical disabilities, and members of the LGBTQ community.”⁶²

Second, states passed anti-miscegenation laws to deter White people from mixing genes with “the problematic, criminogenic, poverty-creating genes” of

51. *Id.* at 463, 466–67.

52. BARBARA GURR, *REPRODUCTIVE JUSTICE: THE POLITICS OF HEALTH CARE FOR NATIVE AMERICAN WOMEN* 30 (2014).

53. Jessica Pearce Rotondi, *Before the Chinese Exclusion Act, This Anti-Immigrant Law Targeted Asian Women*, HISTORY (Sept. 28, 2023), <https://www.history.com/news/chinese-immigration-page-act-women> [<https://perma.cc/W9TF-R8GY>].

54. *Id.*

55. *Id.* (internal quotations omitted).

56. *Id.*

57. *Id.*

58. Paul A. Lombardo, *Miscegenation, Eugenics, and Racism: Historical Footnotes to Loving v. Virginia*, 21 U.C. DAVIS L. REV. 421, 423 (1988).

59. Terry Gross, *Eugenics, Anti-Immigration Laws Of The Past Still Resonate Today*, *Journalist Says*, NPR (May 8, 2019), <https://www.npr.org/2019/05/08/721371176/eugenics-anti-immigration-laws-of-the-past-still-resonate-today-journalist-says> [<https://perma.cc/JNG6-4M2Y>].

60. *Id.*

61. *Id.*

62. Rotondi, *supra* note 53.

people of color.⁶³ Anti-miscegenation laws are laws that prohibit intimate relations between people of different races.⁶⁴ By 1915, twenty-eight states outlawed interracial marriage, and six states amended their constitutions to ban interracial marriage.⁶⁵ For example, the Virginia General Assembly implemented the Racial Integrity Act, which “forbade miscegenation on the grounds that racial mixing was scientifically unsound and would ‘pollute’ America with mixed-blood offspring.”⁶⁶ The law contained provisions defining Whiteness and mandated people to obtain racial registration certificates.⁶⁷ Not only did these laws control intimate partner relations, but they also controlled reproduction.

Third, states launched eugenic segregation and involuntary sterilization programs to prevent the reproduction of those with “undesirable” traits.⁶⁸ From 1907 to 1932, thirty-two states enacted eugenic statutes legalizing the involuntary sterilization of those with “defective” traits and thus “deemed incapable of making their own decisions about reproduction.”⁶⁹ While eugenicists strongly preferred sterilization over segregation, states still employed eugenic segregation to civilly or criminally commit people with undesirable traits to “sex-segregated facilities throughout their childbearing years.”⁷⁰ These policies aimed to “improve” society by eradicating biological degeneracy and preventing the propagation of “allegedly defective offspring” by unfit members of society.⁷¹ Eugenicists viewed the forced sterilization of the “mentally diseased, the feeble-minded, the idiots, the morons, and the criminals” as “the salvation of society and the race.”⁷²

States sterilized women at disproportionately higher rates than men because they viewed women as a larger threat to infecting the gene pool.⁷³ For example, under these forced sterilization programs, indicators of a woman’s feeble-mindedness included her failure to adhere to gender norms or her engagement in sexually promiscuous behavior.⁷⁴ Eugenicists believed sexual promiscuity was genetically inherited and a “peculiarly feminine trait.”⁷⁵

63. Bridges, *White Privilege and White Disadvantage*, *supra* note 50, at 463–64.

64. Lombardo, *supra* note 58, at 422 n.2.

65. Paul Lombardo, *Eugenic Laws Against Race Mixing*, DOLAN DNA LEARNING CTR., <http://www.eugenicsarchive.org/html/eugenics/essay7text.html> [https://perma.cc/EN76-SP3Z] (last accessed Feb. 21, 2024).

66. Lombardo, *supra* note 58, at 423.

67. Lombardo, *supra* note 65.

68. Bridges, *White Privilege and White Disadvantage*, *supra* note 50, at 463–64.

69. Linda Villarosa, *The Long Shadow of Eugenics in America*, N.Y. TIMES MAG. (June 8, 2022), <https://www.nytimes.com/2022/06/08/magazine/eugenics-movement-america.html> [https://perma.cc/2SBN-X7ZC].

70. Bridges, *White Privilege and White Disadvantage*, *supra* note 50, at 463–64.

71. Dorothy E. Roberts, *Crime, Race and Reproduction*, 67 TULANE L. REV. 1945, 1961 (1993).

72. *Id.* (quotations omitted).

73. Bridges, *White Privilege and White Disadvantage*, *supra* note 50, at 464.

74. *Id.* In addition to their eugenic goals, these involuntary sterilization programs sought to “attack and punish sexual ‘promiscuity’ and the sexual danger thought to emanate from the lower classes, especially lower-class women.” ROSALIND P. PETCHESKY, ABORTION AND WOMAN’S CHOICE: THE STATE, SEXUALITY, AND REPRODUCTIVE FREEDOM 88 (1990).

75. Bridges, *White Privilege and White Disadvantage*, *supra* note 50, at 465.

Because Black women and girls were and continue to be hypersexualized and viewed as less innocent compared to White girls,⁷⁶ the intersection of gender and race sharpens the eugenic blade against Black women.

Initially, early twentieth-century involuntary sterilization programs were largely “uninterested in people of color.”⁷⁷ In her article, *White Privilege & White Disadvantage*, Professor Khiara Bridges noted that “[e]ugenicists’ sole concern with people of color was in keeping their problematic genes out of [W]hite stock” and preventing the debasement of the White race.⁷⁸ With miscegenation laws already in effect, undesirable Whites served as the largest threat to White supremacy, and thus the initial target of involuntary sterilization.⁷⁹

One of the most infamous examples of involuntary sterilization from this time was the story of Carrie Buck, the plaintiff in the Supreme Court case *Buck v. Bell*.⁸⁰ Carrie Buck was the first person forcibly sterilized for being “feeble-minded” and an “imbecile” under Virginia’s involuntary sterilization statute.⁸¹ While Buck’s mother was institutionalized at the Virginia Colony for Epileptics and Feeble-minded, Buck became pregnant at 17 years old from an alleged rape.⁸² Because the state regarded imbecility and sexual promiscuity as inherited traits, state officials institutionalized Buck at the same facility as her mother and sterilized her to prevent her from reproducing other “imbeciles.”⁸³ Professor Bridges characterized Carrie Buck’s Whiteness as a “double-edged sword.”⁸⁴ While Buck’s Whiteness “allowed her inclusion into the highest quality race,” it also “rendered her vulnerable to quality control.”⁸⁵ Professor Bridges argued that White privilege can also have bad outcomes and “actively produces [W]hite disadvantage.”⁸⁶ Yet, White disadvantage does not negate the privilege afforded to White people by their Whiteness.⁸⁷

76. See Zainab Pate, *The Adulthood and Hyper-Sexualization of Black Girls*, DEAR DARK SKINNED GIRL (Sept. 8, 2020), <https://deardarkskinnedgirl.com/2020/09/08/adulthoodofblackgirls/> [<https://perma.cc/7MUS-Q3HF>].

77. Bridges, *White Privilege and White Disadvantage*, *supra* note 50, at 466.

78. *Id.*

79. *See id.*

80. 274 U.S. 200 (1927).

81. Nermeen Shaikh & Amy Goodman, *Buck v. Bell: Inside the SCOTUS Case That Led to Forced Sterilization of 70,000 & Inspired the Nazis*, DEMOCRACY NOW! (Mar. 17, 2016), https://www.democracynow.org/2016/3/17/buck_v_bell_inside_the_scotus [<https://perma.cc/92VN-WSR7>].

82. 274 U.S. at 205.

83. Margarita Tartakovsky, *Eugenics & The Story of Carrie Buck*, PSYCHCENTRAL (Jan. 24, 2011), <https://psychcentral.com/blog/eugenics-the-story-of-carrie-buck#8> [<https://perma.cc/CXW9-4YB7>].

84. Bridges, *White Privilege and White Disadvantage*, *supra* note 50, at 468.

85. *Id.*

86. Khiara M. Bridges, *Race, Pregnancy, and the Opioid Epidemic: White Privilege and the Criminalization of Opioid Use During Pregnancy*, 133 HARV. L. REV. 770, 775 (2020) [hereinafter *Race, Pregnancy, and the Opioid Epidemic*].

87. *See id.*

In an 8-1 decision written by Justice Holmes, the Supreme Court upheld Virginia's involuntary sterilization law, providing not only judicial approval but also enthusiasm for, eugenics.⁸⁸ Justice Holmes notoriously wrote:

“We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough.”⁸⁹

Under the Court's endorsement, states forcibly sterilized over 70,000 people from the early 1900s to 1970s.⁹⁰ *Buck v. Bell* was never overturned and is still good law.⁹¹

Although the Holocaust prompted public condemnation of the eugenics movement and caused the term to subside from public forums, eugenic principles continued to undergird national and state policies.⁹² In the 1960s and 70s, racial integration and the civil rights movement brought a new wave of coercive sterilization; yet this time, the target was women of color.⁹³ Between 1970 and 1976, about one-quarter of Native American women underwent sterilization procedures without their consent.⁹⁴ In the South, the number of medically unnecessary hysterectomies among Black women was so high that the procedure was referred to as a “Mississippi appendectomy.”⁹⁵ These procedures were the

88. *Buck v. Bell*, 274 U.S. at 207.

89. *Id.*

90. *The Supreme Court Ruling That Led To 70,000 Forced Sterilizations*, NPR (Mar. 7, 2016), <https://www.npr.org/sections/health-shots/2016/03/07/469478098/the-supreme-court-ruling-that-led-to-70-000-forced-sterilizations#:~:text=All%20told%2C%20as%20many%20as,were%20deaf%2C%20blind%20and%20diseased> [<https://perma.cc/3NYG-GVXZ>].

91. Julia Naftulin, *Inside the Hidden Campaign to Forcibly Sterilize Thousands of Inmates in California Women's Prisons*, BUS. INSIDER (Nov. 24, 2020), <https://www.insider.com/inside-forced-sterilizations-california-womens-prisons-documentary-2020-11> [<https://perma.cc/W8FW-93BS>].

92. See Jonathan Simon, “*The Criminal is to go Free*”: *The Legacy of Eugenic Thought in Contemporary Judicial Realism About American Criminal Justice*, 100 B.U. L. REV. 787, 791–92 (2020).

93. See Bridges, *White Privilege and White Disadvantage*, *supra* note 50, at 470; see also Alexandra Minna Stern, *Forced Sterilization Policies in the US Targeted Minorities and Those with Disabilities – and Lasted into the 21st Century*, THE CONVERSATION (Aug. 26, 2020), <https://theconversation.com/forced-sterilization-policies-in-the-us-targeted-minorities-and-those-with-disabilities-and-lived-into-the-21st-century-143144> [<https://perma.cc/6BZ8-2C8K>] (finding that “from 1950 to 1966, Black women were sterilized at more than three times the rate of [W]hite women and more than 12 times the rate of [W]hite men”).

94. PLANNED PARENTHOOD, OPPOSITION CLAIMS ABOUT MARGARET SANGER 4 (Apr. 2021), https://www.plannedparenthood.org/uploads/filer_public/cc/2e/cc2e84f2-126f-41a5-a24b-43e093c47b2c/210414-sanger-opposition-claims-p01.pdf [<https://perma.cc/Q4JT-JZUG>].

95. Rotondi, *supra* note 53.

product of eugenic principles and racist stereotypes of Black women as bad or incapable mothers.⁹⁶

Moreover, in 1974, states began using involuntary and coerced sterilization as a form of budget control.⁹⁷ In fact, the federal government incentivized this practice by offering states more funding for sterilization reimbursements than abortion reimbursements through federal welfare programs, such as Medicaid.⁹⁸ “[T]hose targeted for sterilization were no longer the genetically unfit, but rather those whose sexual immorality and dependence on the state threatened to overwhelm the public fisc.”⁹⁹

By conditioning access to welfare benefits on undergoing sterilization procedures in some states, the government enabled the coerced sterilization of predominantly Black, Latinx, and Indigenous women who relied more heavily on welfare programs due to systemic inequities. Since structural racism caused many women of color to rely on welfare programs, they were disproportionately subjected to these coerced sterilizations.¹⁰⁰

States also tied welfare benefits to traits like single motherhood or sexual promiscuity, characteristics that eugenicists often viewed as undesirable. For example, using an existing sterilization statute, North Carolina coerced unmarried mothers to undergo sterilization or risk losing their welfare benefits.¹⁰¹ The statute allowed the state to sterilize people with cognitive disabilities. The state argued that engaging in immoral activities, such as having a child out of wedlock, qualified as a cognitive disability under the statute.¹⁰² Racist tropes of Black welfare queens draining state resources further fueled states to implement these policies.¹⁰³ By linking welfare assistance to sterilization requirements, the government facilitated the nonconsensual sterilization of over 100,000 to 150,000 people, many of whom were Black, Latinx, or Indigenous women.¹⁰⁴

Some state governments perform involuntary sterilizations still, specifically on incarcerated and detained women. For example, between 1997 and 2003, the California prison system involuntarily sterilized about 1,400 incarcerated women.¹⁰⁵ Most of these women were Black.¹⁰⁶ Many prison doctors falsely told women that they needed sterilization surgery to treat cancer that they never had.¹⁰⁷ Doctors also sterilized women after other gynecological

96. Stern, *supra* note 93.

97. *Id.*

98. Murray, *Abortion, Sterilization, and the Universe of Reproductive Rights*, *supra* note 49, at 1620.

99. *Id.* at 1608.

100. *See id.* at 1608–09.

101. *Id.* at 1619.

102. *Id.*

103. *See* Melissa Murray, *What's So New About the New Illegitimacy*, 20 AM. UNIV. J. OF GENDER, SOC. POL'Y & L. 387, 414 n.148 (2012).

104. Roberts, *supra* note 71, at 1971; Stern, *supra* note 93.

105. Naftulin, *supra* note 91.

106. *Id.*

107. *Id.*

surgeries and coded these sterilizations as “medically necessary” to receive state funding for those procedures.¹⁰⁸ More recently, in September 2020, a nurse at Irwin County Detention Center filed a complaint against a doctor who was allegedly sterilizing female immigrants detained at the facility without their consent.¹⁰⁹ These current iterations of forced sterilization echo eugenic themes that depict criminality as a hereditary trait and deem immigrants and those convicted of crimes as threats to Whiteness and thus, unworthy of reproduction.

B. *Scientific Racism and the Construction of Crime*

Eugenic theory is deeply rooted in White supremacy and the idea that White people are genetically superior to people of color. In 1883, Sir Francis Galton coined the term “eugenics,” which describes the pseudoscientific use of genetics to “improve the inborn qualities of race.”¹¹⁰ The eugenics movement aimed to develop a human “stock” that was “less foolish, less frivolous, less excitable and politically more provident.”¹¹¹ Eugenicists believed that undesirable traits—such as criminality, poverty, feeble-mindedness, and mental illness—were inherited and thus, immutable.¹¹² They largely ignored environmental influences that likely contributed to such “deficienc[ies],” and even believed that social circumstances, such as poverty, were the result of poor genetic breeding.¹¹³

Describing crime as a hereditary trait created a biological justification for criminalizing Blackness. As such, “[r]ace helps to determine who the criminals are, what conduct constitutes a crime, and which crimes society treats most seriously.”¹¹⁴ According to Professor Dorothy E. Roberts, an acclaimed scholar of race, gender, and the law, race is not only used to predict an individual’s propensity for crime, but also in the construction of crime itself.¹¹⁵ For example, before the Civil War, the law distinguished between crimes committed by White and Black people using Slave Codes. The Slave Codes wielded criminal law to extinguish threats to White supremacy through criminalizing conduct for Black people that was legal for White people, such as learning to read, and enacting harsher penalties for the same offenses.¹¹⁶

After Emancipation, prominent eugenicists published reports using racial data and social science to explain America’s “Negro Problem” and measure

108. *Id.*

109. Nomaan Merchant, *More Migrant Women Say They Didn’t OK Surgery*, BUS. INSIDER (Sept. 18, 2020), <https://www.insider.com/ap-exclusive-more-migrant-women-say-they-didnt-ok-surgery-2020-9> [<https://perma.cc/G8EN-VBPQ>].

110. Henry P. David, Jochen Fleischhacker & Charlotte Hohn, *Abortion and Eugenics in Nazi Germany*, 14 POPULATION AND DEV. REV. 81, 88 (1988).

111. Francis Galton, *Eugenics: Its Definition, Scope and Aims*, 10 AM. J. OF SOCIO. 1, 3 (1904).

112. *Fact Sheet: Eugenics and Scientific Racism*, NAT’L HUM. GENOME RSCH. INST. (May 18, 2022), <https://www.genome.gov/about-genomics/fact-sheets/Eugenics-and-Scientific-Racism> [<https://perma.cc/XF89-GBWK>].

113. STEPHEN TROMBLEY, *THE RIGHT TO REPRODUCE* 2 (1988).

114. Roberts, *Crime, Race and Reproduction*, *supra* note 71, at 1945.

115. *Id.* at 1954.

116. *See id.* at 1954–55.

Black criminality, behavior, and social ills.¹¹⁷ One of the most influential publications of this time was Frederick L. Hoffman's *Race Traits and Tendencies of the American Negro*. In *Race Traits*, Hoffman used census data and crime statistics to conclude that "the innate self-destructive tendencies of [B]lack people" was the cause of their poor economic and social conditions.¹¹⁸ In later articles, Hoffman argued that Black people's disproportionately high infant and maternal mortality rates were not the result of structural racism and societal failures, but of a "diseased manhood and womanhood."¹¹⁹ However, when confronted with data on increasing rates of White crime and suicide, "Hoffman interpreted [W]hites' self-destructive behavior as a consequence of a diseased society, not of a 'diseased manhood and womanhood.' White criminality was a response to economic inequality rather than a response to a 'race proclivity.'"¹²⁰

Eugenic explanations for crime endure in the American culture and carceral system. Racial profiling by police and the "Black as criminal" stereotype are direct results of biological justifications for crime and the misinterpretation of crime statistics.¹²¹ Studies show that a majority of White Americans would characterize Black people as prone to violence and believe that Black people are more likely to use narcotics or commit crimes than White people.¹²² Professor Roberts poignantly wrote, "The police occupation of [B]lack communities and wholesale imprisonment of [B]lack citizens does not seem like oppression to the dominant society because it believes that these people are dangerous. It is the racial ideology of crime that sustains continued [W]hite domination of [B]lacks in the guise of crime control."¹²³ Although the eugenic idea that criminality is inheritable has dissipated from national discourse, "the closely associated concept of dangerousness has provided an enduring color-blind way to define 'the criminal.'"¹²⁴

Studies on biological justifications for violence and aggression, which are indicators of dangerousness, have continued to underlie penal reforms and criminological research. For example, in 1992, Dr. Frederick Goodwin revealed the inherent racism embedded in the federal program known as the "Violence Initiative." The Violence Initiative created an interagency response to reduce violence in inner cities.¹²⁵ In his announcement of the initiative, Dr. Goodwin compared inner cities to jungles and the "uncivilized behavior" of humans to that

117. KHALIL GIBRAN MUHAMMAD, *THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA* 19, 35 (2019).

118. *Id.*

119. *Id.* at 39 (internal quotations omitted).

120. *Id.* at 41.

121. See Kelly Welch, *Black Criminal Stereotypes and Racial Profiling*, 23 J. CONTEMP. CRIM. JUST. 276, 277 (2007).

122. *Id.* at 278.

123. Roberts, *supra* note 71, at 1947.

124. Simon, *supra* note 92, at 795.

125. Alfreda A. Sellers-Diamond, *Disposable Children in Black Faces: The Violence Initiative as Inner-City Containment Policy*, 62 UMKC L. REV. 423, 424 (1994).

of hyperaggressive and hypersexual monkeys.¹²⁶ In her article *Disposable Children in Black Faces: The Violence Initiative as Inner-City Containment Policy*, Alfreda Sellers-Diamond claimed that Dr. Goodwin and the Violence Initiative sent two messages. First, genetic factors may be responsible for violent behavior in inner cities.¹²⁷ Second, the biological factors that may predispose an individual to violence may be detectable in youth and thus subject to government intervention.¹²⁸ The Violence Initiative aimed to test the eugenic theory of “whether children of the inner city are likely to become violent because of an inherent vulnerability, an unalterable state of being.”¹²⁹ Since inner-city children were disproportionately Black, the Violence Initiative’s work could lead to the disturbing and inaccurate inference that “African-American children, were, as Dr. Goodwin suggested, a ‘hyperaggressive,’ ‘hypersexual’ lot.”¹³⁰ By endorsing these eugenic studies on crime, the government further entrenched racial stereotypes into public policy and social norms.

III.

CONTEMPORARY METHODS OF POLICING PREGNANCY PERPETUATE EUGENIC PRINCIPLES

Eugenic principles continue to underlie public policy, especially within the criminal legal system. Reproductive punishments do not perfectly fit within eugenic ideology because their purpose is not to deter the spread of supposedly criminal genes. However, they are founded “on the same premise underlying the eugenic sterilization laws—that certain groups in our society do not deserve to procreate.”¹³¹ Because of these shared principles, eugenic theory is instructive in understanding the state’s use of reproductive control as a carceral tool.

This Section contextualizes Part IV’s exploration of eugenic theory and the current debate on abortion by analyzing two examples: (A) the use of fetal protection laws to criminalize pregnant persons dependent on drugs and (B) the exercise of prosecutorial and judicial discretion to impose reproductive sanctions on those deemed unfit for parenthood.

A. *The War on Drugs Wages War on Pregnancy*

The convergence of the War on Drugs and the expansion of child endangerment laws to include fetal life exemplifies a model of eugenics-informed crime control.¹³² While the former “us[ed] extreme sentencing for simple drug possession-based offenses to incapacitate the great criminal,”¹³³ Fetal Protection Laws (FPLs) criminalize pregnancy to incapacitate those

126. *Id.* at 426.

127. *Id.* at 425.

128. *Id.*

129. *Id.* at 436.

130. *Id.* at 437.

131. Roberts, *Crime, Race and Reproduction*, *supra* note 71, at 1969.

132. See Simon, *supra* note 92, at 795. “A eugenics informed crime control model does not mistake the seriousness of crimes as defined by statutes for the seriousness of the criminal. One may catch the great criminal committing a minor crime.” *Id.*

133. See *id.*

deemed less worthy of reproduction. FPLs create criminal penalties for conduct that may harm or generate risks of harm to a fetus. Many FPLs penalize pregnant people for conduct that would otherwise be legal for non-pregnant persons, in effect creating “a class of people—pregnant women—who can be policed and punished in ways that other people cannot.”¹³⁴ For example, under FPLs, pregnant drug users may be charged with child abuse, chemical endangerment of a child, and delivery of drugs to a minor.¹³⁵ However, in general, failing a drug screen or test is not a crime.¹³⁶ As such, “[w]omen sent to prison after pregnancy loss are among the few Americans serving time for drug consumption; most laws criminalize drug possession and sales, not use.”¹³⁷ Since these women are charged with child endangerment or homicide instead of drug use, in effect, the state punishes them for the act of reproducing.¹³⁸

Even in cases where no fetal complication or harm was reported, prosecutors still charged pregnant women with crimes.¹³⁹ From 1973, when *Roe* was decided, to 2005, one study found over 400 cases of women who were arrested or detained after giving birth for using drugs while pregnant.¹⁴⁰ Of the 413 cases, 68 percent involved cocaine, 14 percent involved methamphetamine, 10 percent involved alcohol, and 3 percent involved cigarettes.¹⁴¹ Further, over half of these arrests were of Black women.¹⁴² This racial disparity stemmed from the fact that Black women were more likely to be drug tested during pregnancy and after delivering the baby, and “more likely to be reported, arrested, convicted, and incarcerated for drug use while pregnant.”¹⁴³

During the 1980s and 90s, prosecutors started to arrest women for using drugs while pregnant for the first time. Specifically, law enforcement targeted those using crack cocaine, which disproportionately impacted Black women.¹⁴⁴ While the stated purpose of these laws was to protect the health of the fetus, the American Medical Association found “no convincing evidence that prenatal cocaine exposure is associated with developmental toxicity effects different in

134. Bridges, *Race, Pregnancy, and the Opioid Epidemic*, supra note 86, at 808.

135. Jekanowski, supra note 16.

136. Bridges, supra note 86, at 778.

137. Cary Aspinwall, Brianna Bailey & Amy Yurkanin, *They Lost Their Pregnancies. Then Prosecutors Sent Them to Prison.*, THE MARSHALL PROJ. (Sept. 1, 2022), <https://www.themarshallproject.org/2022/09/01/they-lost-their-pregnancies-then-prosecutors-sent-them-to-prison> [https://perma.cc/PT7K-NGNA].

138. See Roberts, supra note 71, at 1967–69 (providing examples of charges brought against women who use drugs during pregnancy, including child neglect and abuse, distribution of drugs to a minor, and theft).

139. Lynn M. Paltrow & Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973-2005: Implications for Women's Legal Status and Public Health*, 38 J. OF HEALTH POL., POL'Y, & L. 299, 317–18 (2013).

140. *Id.* at 309–12.

141. *Id.* at 310.

142. *Id.* at 311.

143. Jekanowski, supra note 16.

144. Bridges, supra note 86, at 791–92.

severity, scope or kind from the sequelae of multiple other risk factors.”¹⁴⁵ Moreover, the National Institute on Drug Abuse issued a report that found that predictions on whether babies whose mothers used crack cocaine while pregnant would have lower intelligence and poor social skills “were grossly exaggerated.”¹⁴⁶

The underlying reasons for these arrests appear to be more nefarious. If pregnant mothers using cocaine were not punished for harming their fetuses, then what were they punished for? One reason, whether explicit or not, may be eugenics and/or racial biases. Significantly, the racist portrayals of “crack babies” as “uneducable, disabled, and malformed”¹⁴⁷ and members of a “bio-underclass . . . whose biological inferiority is stamped at birth”¹⁴⁸ may indicate the state used eugenics, or at the very least racist stereotypes, to justify these arrests.

Charging Black woman for using crack while pregnant established a racist precedent which “has presently led the nation to be punitive toward a population — [W]hite women — that, due to its racial privilege, might otherwise have escaped our nation’s punitive inclinations.”¹⁴⁹ Building on the stereotype of Black women as “crack mothers” giving birth to “crack babies,” White trash stereotypes encouraged the punishment of poor, pregnant White women addicted to methamphetamine or opioids.¹⁵⁰ In her article, *Race, Pregnancy, and the Opioid Epidemic: White Privilege and the Criminalization of Opioid Use During Pregnancy*, Professor Bridges characterized these White women as “exist[ing] at the limits of [W]hiteness” because they “possess a compromised, marginalized, ‘not-quite’ [W]hiteness — a corrupted [W]hiteness that has yielded to them a reduced racial privilege.”¹⁵¹ Professor Bridges argued that White privilege can yield negative outcomes in the form of White disadvantage.¹⁵² Thus, just as Carrie Buck was a threat to maintaining a superior White gene pool, the state viewed opioid-addicted, White women as a threat to White dominion as well. As such, because of their White disadvantage, White mothers were and continue to be prosecuted for opioid use.¹⁵³

Under the guise of fetal protection, legislatures passed laws criminalizing the use of opioids and crack cocaine during pregnancy, yet limited evidence

145. Goodwin, *supra* note 10, at 810 (quoting D.A. Frank, M. Augustyn, W.G. Knight, T. Pell, & B. Zuckerman, *Growth, Development, and Behavior in Early Childhood Following Prenatal Cocaine Exposure: A Systematic Review*, 285 JAMA 1613, 1622–24 (2001)).

146. NAT’L INST. ON DRUG ABUSE, *Cocaine Research Report: What are the Effects of Maternal Cocaine Use?* (2016), <https://nida.nih.gov/publications/research-reports/cocaine/what-are-effects-maternal-cocaine-use> [<https://perma.cc/ZV2E-57SV>].

147. Goodwin, *Fetal Protection Laws*, *supra* note 10, at 809.

148. *Id.* at 808–09 n.144 (internal quotations omitted).

149. Bridges, *supra* note 86, at 820–21.

150. *Id.* at 820–21.

151. *Id.* at 776.

152. *Id.* at 775.

153. *Id.* at 776–77.

supports this justification.¹⁵⁴ People who use opioids and other narcotics while pregnant may cause their infants to develop neonatal abstinence syndrome (NAS) shortly after birth.¹⁵⁵ However, not all infants exposed to narcotics in utero develop NAS.¹⁵⁶ Although some studies indicate infants with NAS are at a higher risk for other adverse health outcomes, this concern is tempered by the fact that NAS is both temporary and treatable.¹⁵⁷

Conversely, most states do not prosecute pregnant people who expose their fetuses to alcohol in utero, although such conduct may cause infants to develop Fetal Alcohol Spectrum Disorders (FASDs).¹⁵⁸ While NAS is temporary and most children exposed to crack cocaine in utero “do not show serious overt deficits,”¹⁵⁹ FASDs are permanent and may cause intellectual disabilities, facial abnormalities, vision or hearing problems, and adverse effects on the heart, kidney, and bones.¹⁶⁰ Yet, most states do not prosecute pregnant alcohol users for seemingly more dangerous behavior. Professor Roberts explained this paradox, writing that “[t]he same proliferation of prosecutions against affluent, [W]hite women who abuse alcohol or prescription medication would be unthinkable . . . [t]hus, the very conception of using drugs during pregnancy as a crime is rooted in race” and eugenics.¹⁶¹

Notably, media narratives characterizing pregnant White mothers who use opioids differ substantially from narratives characterizing pregnant Black mothers who use crack cocaine. For example, in one study, Professor Helena Hansen found that articles described White opioid users as sympathetic and included personal information about their family, their achievements, “the

154. *See id.* at 795–96. Similarly, cocaine use during pregnancy has limited to no effect on fetal health. Thus, the same eugenic principles apply to the opioid epidemic as the crack epidemic except for the racial group primarily impacted. *See, e.g.,* Goodwin, *supra* note 10, at 808–09 (describing a case in which a stillbirth, born to a fifteen-year-old mother struggling with cocaine dependency, was ruled a murder based on faulty understandings of the science of crack).

155. Bridges, *supra* note 86, at 795–96.

156. *Id.*; Seth McVey, *Did you know: drinking while pregnant is not illegal in every state*, NEXSTAR MEDIA (Mar. 1, 2023), <https://www.wvntv.com/digital-exclusives/did-you-know-drinking-while-pregnant-is-not-illegal-in-every-state/#:~:text=Some%20states%20do%20have%20laws,of%20alcohol%20by%20pregnant%20women.&text=According%20to%20data%20collected%20by,restricting%20pregnant%20women%20from%20drinking> [https://perma.cc/2CK2-FPSL].

NAS typically develops within one to three days after birth and causes infants to experience “uncontrollable shaking and seizures, constant crying, vomiting and diarrhea, and a rapid respiratory rate.” Bridges, *supra* note 86, at 795–96.

157. Bridges, *supra* note 86, at 795–96.

158. Roberts, *supra* note 71, at 1957–58.

159. NAT’L INST. ON DRUG ABUSE, *Cocaine Research Report: What are the Effects of Maternal Cocaine Use?*, <https://nida.nih.gov/publications/research-reports/cocaine/what-are-effects-maternal-cocaine-use> [https://perma.cc/ZV2E-57SV].

160. *See* CTR. FOR DISEASE CONTROL & PREVENTION, *Basics About Fetal Alcohol Spectrum Disorders (FASDs)*, [https://www.cdc.gov/ncbddd/fasd/facts.html#:~:text=Fetal%20alcohol%20spectrum%20disorders%20\(FASDs\)%20are%20a%20group%20of%20conditions,a%20mix%20of%20these%20problems](https://www.cdc.gov/ncbddd/fasd/facts.html#:~:text=Fetal%20alcohol%20spectrum%20disorders%20(FASDs)%20are%20a%20group%20of%20conditions,a%20mix%20of%20these%20problems) [https://perma.cc/KE9M-86TJ].

161. Roberts, *supra* note 71, at 1958.

tragedy of their downfall[,] and their helplessness in the face of addiction.”¹⁶² On the other hand, articles described Black and Latinx opioid users with their criminal histories and court appearances and did not include “a humanizing biography of the people in the story.”¹⁶³ As such, not only do Black women face gender-based bias in their prosecutions, but also race-based bias in how the media portrays them. Black women who use drugs while pregnant often are further demonized as bad mothers.¹⁶⁴ These compounding layers of bias and oppression exacerbate the impact of eugenic policies on Black women.

Laws criminalizing pregnancy have only continued to proliferate. As of 2018, twenty-four states defined drug use while pregnant as child abuse and thirty-eight states had fetal protection laws.¹⁶⁵ These FPLs criminalize the mere act of being pregnant. For example, in North Dakota, a pregnant Indigenous woman was charged with the reckless endangerment of her fetus because she inhaled paint fumes that were present in the surrounding environment, thereby exposing her fetus to toxic chemicals.¹⁶⁶ FPLs incarcerate pregnant mothers for crimes so minor that such conduct would not be criminal if these women were not pregnant.¹⁶⁷ In fact, for pregnant women arrested for using drugs, “factors explicitly described in arrest warrants . . . included the fact that the pregnant woman had a sexually transmitted infection, was HIV positive, or gave birth at home or in another setting outside a hospital.”¹⁶⁸ Recording these “sexually promiscuous” traits as a justification for criminal arrest is emblematic of the institutionalization of sexually promiscuous women during the nineteenth century. Thus, protecting fetal health merely serves as a screen for the state to classify these women as unfit for procreation.

B. Prosecutorial and Judicial Discretion over Reproductive Punishments

Reproductive punishments predate the eugenics era. In the eighteenth and nineteenth centuries, enslaved men were castrated for raping or “ravishing” White women.¹⁶⁹ Further, the state punished people convicted as habitual offenders with chemical castration and other sterilization procedures up until 1968.¹⁷⁰

More recently, judges and prosecutors have used sterilization as a bargaining chip in plea deal negotiations, raising issues of consent and a return

162. Austin Boggles, *Crack vs. Heroin: Drug Humor Underscores Difference in Views on Crack, Opioid Epidemics*, ASBURY PARK PRESS (Dec. 2, 2019), <https://www.app.com/in-depth/news/local/communitychange/2019/12/02/crack-vs-heroin-drug-humor-underscores-differences/4196672002/> [<https://perma.cc/VH8A-2A7U>].

163. *Id.*

164. *See Bridges*, *supra* note 86, 820–21.

165. Jekanowski, *supra* note 16.

166. Paltrow & Flavin, *supra* note 139, at 308.

167. *See, e.g., id.* (describing how the State declined to bring charges against a pregnant Indigenous woman after she obtained an abortion).

168. *Id.* at 316.

169. Roberts, *supra* note 71, at 1972.

170. *Id.* at 1963 n.85.

of involuntary sterilization as punishment.¹⁷¹ For example, in 2015, a district attorney's office in Nashville, Tennessee discharged an Assistant District Attorney (ADA) for incorporating mandatory sterilization requirements into plea deals for female defendants.¹⁷² In one case, the ADA refused to negotiate a plea agreement for a woman with a mental health disorder, who was charged with child neglect, unless she underwent surgical sterilization.¹⁷³ Similarly, in West Virginia, a young, single mother with three children had to undergo tubal ligation to comply with her probation for a marijuana-related drug offense.¹⁷⁴

With broad prosecutorial and judicial discretion over charging and sentencing decisions, the opportunity for prosecutors and judges to impose their own judgment to determine who is deemed worthy of procreation is worrisome. Moreover, this discretion allows for the injection of personal and societal biases based on race, marital status, mental health, disability, and other traits into decision-making.¹⁷⁵

One noteworthy example of contemporary reproductive punishment is the widespread use of Norplant to reduce one's prison sentence in the 1990s.¹⁷⁶ Norplant is a chemical contraceptive made of six silicone tubes of progestin, which is surgically implanted into the arm for up to five years and has a 99 percent efficacy rate.¹⁷⁷ In 1991, shortly after the FDA approved the use of the drug, some courts began requiring women convicted of child abuse and other crimes to receive Norplant insertions as a condition of their sentences.¹⁷⁸ For example, in 1991, a Superior Court judge in California ordered a woman convicted of beating her children to use Norplant for three years as a condition

171. See *Norplant: A New Contraceptive with the Potential for Abuse*, ACLU (Jan. 31, 1994) <https://www.aclu.org/other/norplant-new-contraceptive-potential-abuse> [https://perma.cc/A65F-KBUJ].

172. *Nashville Assistant DA Fired Amid Reports of Sterilization in Plea Deals*, CBS NEWS (Apr. 1, 2015), <https://www.cbsnews.com/news/nashville-prosecutor-fired-amid-reports-of-sterilization-in-plea-deals/> [https://perma.cc/RW3P-Z9PA].

173. *Id.*

174. *Id.*

175. Prosecutors have discretion to decide who will face charges, what specific charges that individual will face, who receives a plea deal, and what is in the plea deal. Because these decisions are often left to individual prosecutors, the opportunity for a prosecutor's implicit biases to influence these decisions is significant. In fact, one study found that White defendants received 10% shorter sentences than Black defendants in similar situations. "When swayed by stereotypes, such as perceived criminality, prosecutorial decisions become the crucible in which the fates of Black and Latinx defendants are sealed." Howard Henderson, Kiana Henley, & Tri Keah Henry, Commentary, *Reforming our Prosecutorial System is No Longer Just a Proposition – It is an Urgent Imperative*, BROOKINGS INST. (June 29, 2023), <https://www.brookings.edu/articles/reforming-our-prosecutorial-system-is-no-longer-just-a-proposition-it-is-an-urgent-imperative/> [https://perma.cc/FL92-E3SV].

176. See Michael T. Flannery, *Norplant: The New Scarlet Letter?*, 8 J. CONTEMP. HEALTH L. & POL'Y 201, 222 (1992).

177. Jekanowski, *supra* note 16.

178. See, e.g., William Booth, *Judge Orders Birth Control Implant in Defendant*, WASH. POST (Jan. 5, 1991), <https://www.washingtonpost.com/archive/politics/1991/01/05/judge-orders-birth-control-implant-in-defendant/01c8427e-b59a-456a-9fce-25b1e10ea87e/> [https://perma.cc/38MW-WGUV].

of her probation.¹⁷⁹ Similarly, in Ohio, legislators introduced a bill that would have forced mothers, who were convicted of child neglect for using drugs while pregnant, to choose between undergoing a drug treatment program or Norplant treatment.¹⁸⁰ The government found Norplant was useful for court-ordered, temporary sterilization programs because of its high efficacy rate, visible placement under the skin, easy maintenance, and requirement of assistance from a medical practitioner to remove the device.¹⁸¹ As such, courts could easily monitor and ensure the use of the drug.

While some proponents of Norplant probationary requirements argue that the court does not force women to use the drug because they may instead choose prison time,¹⁸² this choice is not a voluntary one.¹⁸³ Rather, the threat of detention is “a gun to [the] head”¹⁸⁴ of the convicted woman, who must choose between giving up her physical freedom or reproductive freedom.¹⁸⁵

Accordingly, reproductive punishments, such as penal sanctions under FPLs and Norplant probationary requirements, are grounded in the same premise as eugenics, that specific groups or types of people are undeserving of reproduction.¹⁸⁶ In her article *Crime, Race and Reproduction*, Professor Roberts argued that “[i]f the public grows accustomed to [B]lack women being forcibly implanted with Norplant or jailed because they gave birth to a child while addicted to drugs, the public may become less quick to question a government program that uses these same techniques because it is believed that certain children are genetically predisposed to crime.”¹⁸⁷ Here, it is clear that state control over women’s reproductive experiences employs eugenic principles that perpetuate White supremacy and disproportionately affect communities of color—just not in the way anti-abortion conservatives suggest.

179. *Id.*

180. Roberts, *supra* note 71, at 1967.

181. See Jekanowski, *supra* note 16.

182. See, e.g., Flannery, *supra* note 176, at 223. For example, in his article, “Norplant: The New Scarlet Letter?”, Michael Flannery argued that voluntary sterilization programs may be rehabilitative for people convicted of child abuse or neglect. He found that Norplant may be “rehabilitative” because “the abusive parent will not bear children within an extended period of time . . . [and] may, in the future, more fully appreciate the rights and responsibilities—and the lives—that they have abused.” *Id.* at 225.

183. See Booth, *supra* note 178.

184. *Id.*

185. Although courts no longer use Norplant as a probationary requirement today, the use of “voluntary” sterilization programs to reduce prison sentences has continued to resurface over the years. For example, in 2017, White County Tennessee started offering 30-day sentence reductions to female inmates who agreed to implant the contraceptive, Nexplanon, for four years. Kalhan Rosenblatt, *Judge Offers Inmates Reduced Sentences in Exchange for Vasectomy*, CBS NEWS (July 21, 2017), <https://www.nbcnews.com/news/us-news/judge-offers-inmates-reduced-sentences-exchange-vasectomy-n785256> [<https://perma.cc/6QFY-GDZX>]. The court offered the same sentence reduction to male inmates who agreed to undergo a vasectomy. *Id.*

186. Roberts, *supra* note 71, at 1969.

187. *Id.*

IV.

DISPELLING CONSERVATIVE NARRATIVES OF THE EUGENIC POTENTIAL OF
ABORTION THROUGH A REPRODUCTIVE JUSTICE FRAMEWORK

Conservatives' recent attempts to weaponize racial eugenics in the abortion debate¹⁸⁸ are worth discussing, not only to dispel the historical misconceptions underlying their assertions but also to illuminate the shortcomings of using pro-choice rhetoric to achieve reproductive liberation. Significantly, in footnote 41 of *Dobbs*, the majority noted that "some supporters of liberal access to abortion . . . have been motivated by a desire to suppress the size of the African-American population" and cited Justice Thomas's concurrence in *Box v. Planned Parenthood of Indiana and Kentucky* to support the proposition that "it is beyond dispute that *Roe* has had that demographic effect."¹⁸⁹ While hidden in a footnote, this assertion "hints that a majority of the Court, not just Thomas, endorses a view that abortions themselves are eugenic."¹⁹⁰

In *Box*, Planned Parenthood challenged two Indiana laws, one of which was a reason-based abortion (RBA) ban that prohibited abortion providers from administering race-, sex-, or disability-based abortions.¹⁹¹ While the Court denied the state of Indiana's petition for certiorari on this issue, Justice Thomas wrote a scathing twenty-page concurrence in which he attacked abortion as a "tool of modern-day eugenics."¹⁹² To support his argument, Justice Thomas used a "decidedly biased and incomplete" history of the eugenics movement and rhetoric that "focus[ed] only on individual reproductive decisions concerning abortion."¹⁹³ He employed examples of the disproportionate number of abortions performed on fetuses with Down Syndrome in Europe,¹⁹⁴ fetuses who are female in Asia,¹⁹⁵ and fetuses who are Black in the United States¹⁹⁶ to establish how "eugenic goals are already being realized through abortion."¹⁹⁷ Yet, here lies Justice Thomas's fatal error. By viewing the decision of whether to abort a fetus in a vacuum, he neglected the broader sociopolitical factors that influence reproductive behavior and outcomes. Moreover, he used racial stereotypes to spin inaccurate narratives around who receives abortions and why.¹⁹⁸

188. See *Box v. Planned Parenthood of Indiana & Kentucky, Inc.*, 139 S. Ct. 1780, 1787 (2019) (Thomas, J., concurring) (per curiam) (opining that "arguments about the eugenic potential for birth control apply with even greater force to abortion, which can be used to target specific children with unwanted characteristics."); see also *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 255 n.41 (2022) (noting that "some such supporters [of liberal access to abortion] have been motivated by a desire to suppress the size of the African-American population" and "[a] highly disproportionate percentage of aborted fetuses are Black").

189. *Dobbs*, 597 U.S. at 255 n.41.

190. Suter, *supra* note 22, at 14.

191. *Box*, 139 S. Ct. at 1781.

192. *Id.* at 1783–84.

193. Suter, *supra* note 22, at 25.

194. *Box*, 139 S.Ct. at 1790–91.

195. *Id.* at 1791.

196. *Id.*

197. *Box*, 139 S.Ct. at 1787.

198. See *Radical Reproductive Justice: Foundations, Theory, Practice, Critique*, 75 (Loretta J. Ross et al., eds, 2017).

The full picture becomes clear when using a more complete historical analysis and reproductive justice framework. Abortion is not eugenic, yet criminalizing and restricting access to abortion are. Part IV.A fills the gaps and corrects mischaracterizations in Justice Thomas's historical narrative of the eugenics movement. Part IV.B uses a reproductive justice framework to show why RBA bans are not effective anti-eugenic policies for allegedly disability-, sex-, and race-based abortions. In fact, research indicates that the real intention behind these bans is to increase restrictions on abortion and not prevent "eugenics or discrimination."¹⁹⁹ By extending beyond the scope of Justice Thomas's narrow discussions on individual choice, Part IV.C disproves the assertion that abortion is eugenic and illustrates how restricting abortion through RBA bans disproportionately burdens the communities he seeks to protect.

A. Justice Thomas's narrative mischaracterized the history of eugenics.

In his *Box* concurrence, Justice Thomas claimed that abortion was a eugenic tool because the justifications and advocates supporting legalized abortion were similar to those in the birth control movement.²⁰⁰ Specifically, he offered evidence that birth control advocates, especially Margaret Sanger and Alan Guttmacher from Planned Parenthood, worked in conjunction with eugenicists to market contraceptives to marginalized, or "unfit," communities in the early 1900s.²⁰¹ While Justice Thomas acknowledged that many civil rights proponents supported access to birth control and family planning services in Black communities,²⁰² he also argued other civil rights groups like the Black Panthers viewed family planning as a "euphemism for race genocide."²⁰³ Moreover, he reasoned that the eugenic effect of abortion was stronger than that of birth control because while "birth control could prevent 'unfit' people from reproducing, abortion can prevent them from being born in the first place."²⁰⁴

However, Justice Thomas misinterpreted leading eugenicists' views on birth control and abortion. While Justice Thomas claimed eugenicists supported the use of birth control and abortion for eugenic reasons, in reality, "[e]ugenicists were initially hostile to birth control because they knew that the women who would use it were the type of women they would want to encourage to reproduce, so-called 'better' women—upper-middle-class women."²⁰⁵ Indeed, one scholar who studied eugenics for over four decades told the *Washington Post* that he had

199. See e.g., Suter, *supra* note 22, at 4–5. (finding that 82.3 percent of states that passed reason-based abortion bans also sought to ban abortion completely six weeks after Dobbs and generally did not pass other anti-eugenic policies).

200. *Box*, 139 S. Ct. at 1783.

201. *Id.* at 1788.

202. *Box*, 139 S. Ct. at 1788. For example, "Black intellectuals, like W.E.B. DeBois [sic] . . . championed family planning measures as a means of stabilizing and uplifting the economic fortunes of the Black community." Murray, *supra* note 49, at 1605 n.22.

203. *Box*, 139 S. Ct. at 1790.

204. *Id.* at 1784.

205. Eli Rosenberg, *Clarence Thomas Tried to Link Abortion to Eugenics. Seven Historians Told The Post He's Wrong.*, WASH. POST (May 30, 2019), <https://www.washingtonpost.com/history/2019/05/31/clarence-thomas-tried-link-abortion-eugenics-seven-historians-told-post-hes-wrong/> [https://perma.cc/7L7N-DCGX].

never found a leader of the eugenics movement who publicly supported abortion.²⁰⁶

Additionally, Adam Cohen, an author Justice Thomas cited in his *Box* concurrence, asserted that although eugenics was not completely absent from the birth control movement, eugenics was “never involved” in abortion because it was illegal at that time.²⁰⁷ In fact, increasingly restrictive abortion laws were passed by predominantly White populations who feared immigrant populations would overwhelm theirs, as too many upper-class White women were obtaining abortions.²⁰⁸ Abortion therefore was not a tool to suppress the Black population but rather was likely viewed as causing the suppression of the White population.

While the founder of the birth control movement, Margaret Sanger, has made eugenic statements in support of birth control, “increased access to birth control was not simply thrust upon the Black community in an unwelcome attempt to reduce the Black birthrate, as Justice Thomas’s history suggests.”²⁰⁹ Many Black leaders, especially Black feminists, recognized the importance of giving women control over when and how often to conceive for the vitality and economic stability of Black communities.²¹⁰ For example, Congresswoman and former honorary president of the National Abortion Rights Action League (NARAL) Shirley Chisholm advocated for family planning clinics in Black neighborhoods. She denounced the argument that family planning was linked to Black genocide as “‘male rhetoric, for male ears’ that ‘falls flat to female listeners and to thoughtful male ones.’”²¹¹ In failing to fully consider the advocacy of Black feminists, Justice Thomas’s analysis fell short.

Moreover, Justice Thomas disregarded the use of involuntary sterilization as the state’s primary eugenic policy in the twentieth century. In doing so, he presented a “selective and incomplete” history of the eugenics and reproductive rights movements.²¹² While the state initially targeted “unfit” White women with its forced sterilization programs, from the 1930s to 1970s, people of color disproportionately bore the brunt of involuntary sterilization.²¹³ For example, “from 1950 to 1966, Black women were sterilized at more than three times the rate of [W]hite women and more than 12 times the rate of [W]hite men.”²¹⁴

206. *Id.* (internal quotations omitted).

207. Dahlia Lithwick, *Why Clarence Thomas is Trying to Bring Eugenics into the Abortion Debate*, SLATE (Jun. 17, 2019), <https://slate.com/news-and-politics/2019/06/clarence-thomas-eugenics-abortion-debate-roe-v-wade.html> [<https://perma.cc/RF4G-ZZEK>].

208. Sauer, *supra* note 40, at 55, 59.

209. Murray, *supra* note 37, at 2039–40.

210. *Id.* at 2040–41.

211. *Id.* at 2044.

212. *Id.* at 2033.

213. Sanjana Manjeshwar, *America’s Forgotten History of Forced Sterilization*, BERKELEY POL. REV. (Nov. 4, 2020), <https://bpr.berkeley.edu/2020/11/04/americas-forgotten-history-of-forced-sterilization/> [<https://perma.cc/4GUY-PYEH>].

214. Stern, *supra* note 93.

Overall, more than 70,000 people were involuntarily sterilized.²¹⁵ Thus, any analysis that fails to emphasize the significance of forced sterilization in the eugenics movement is lacking.

Lastly, Justice Thomas argued that “abortion is an act rife with the potential for eugenic manipulation” because the medical procedure “can be used to target specific children with unwanted characteristics.”²¹⁶ Specifically, he pointed to data on the number of fetuses that are aborted who have Down Syndrome, who are female, or who are Black to “suggest that eugenic goals are already being realized through abortion.”²¹⁷ While Part IV.B addresses the arguments Justice Thomas made on behalf of each of these groups in turn, first, distinguishing the difference between eugenics under state control and private reproductive decisions that have disparate effects is important.

Some scholars define eugenics based on the presence or absence of state control.²¹⁸ Significantly, Professor Sonia Suter used the term neoeugenics to distinguish private decisions that aim to increase “good births” from the term eugenics, which was founded on state coercion, White supremacy, and population control.²¹⁹ Neoeugenics is the “voluntary ‘improvement’ of the human species at the individual level” using modern reproductive technologies, such as in vitro fertilization or prenatal genetic testing.²²⁰ The key difference is eugenics inherently implies state coercion and control. By conflating neoeugenics with eugenics and reducing reproductive rights to individual choice, Justice Thomas overlooked how intersecting systems of oppression are the true drivers of eugenic goals and discrimination, not abortion.

B. Justice Thomas overlooked the eugenic principles of intersecting systems of oppression by narrowly focusing on the role of individual choice in abortion.

i. Disability Rights and Reproductive Justice

While Justice Thomas failed to distinguish between private neoeugenics and state-sponsored eugenics, his argument that prenatal screening and reproductive technologies may negatively impact the disability community is not without merit. In fact, pro-choice advocates have campaigned for abortion rights by arguing that abortions may reduce the number of babies with “fetal anomalies.”²²¹ While this reasoning is clearly harmful to the disability community, using a reproductive justice framework elucidates why reason-based abortion (RBA) bans are still harmful and unnecessary forms of state control

215. *The Supreme Court Ruling That Led To 70,000 Forced Sterilizations*, NPR (Mar. 7, 2016), <https://www.npr.org/sections/health-shots/2016/03/07/469478098/the-supreme-court-ruling-that-led-to-70-000-forced-sterilizations#:~:text=All%20told%2C%20as%20many%20as,were%20deaf%2C%20blind%20and%20diseased> [<https://perma.cc/3NYG-GVXZ>].

216. *Box*, 139 S. Ct. at 1787.

217. *Id.*

218. Suter, *supra* note 22, at 26.

219. Sonia M. Suter, *A Brave New World of Designer Babies?*, 22 BERKELEY TECH. L. J. 897, 898 (2007).

220. *Id.* at 898, 922.

221. Roberts, *supra* note 15.

over reproduction. In fact, there is “tremendous irony” in Justice Thomas proposing RBA bans as a remedy to allegedly eugenic impacts, “given that one of the horrors of the eugenics movement was state control over reproduction.”²²²

Reproductive justice requires advocates to look at the broader sociopolitical context of systemic inequities and systems of oppression. Thus, instead of imposing RBA bans, the state should remove barriers for parents and caregivers of children with disabilities, decrease the stigma around disabilities, offer resources to children with disabilities, and provide other support for parents and caregivers to “parent the children [they] have in safe and sustainable communities.”²²³ While anti-abortionists support carrying any fetus to term, their efforts focus on restricting abortion instead of increasing resources for children with disabilities and their families.²²⁴ “The need for comprehensive support services for disabled children and their caregivers is absolutely a reproductive justice claim,” but RBA bans are not.²²⁵

Moreover, by focusing on disability and reproductive rights strictly within the context of selective abortions, Justice Thomas also belied a core principle of the disability rights movement: anti-paternalism.²²⁶ A more complete assessment of the intersection between disability and reproductive rights goes beyond abortion and extends the discussion to “broader social, legal, and institutional structures in which people make reproductive decisions.”²²⁷

Under this reproductive justice framework, abortion is not “eugenic,” and the solution is no longer banning RBAs, as Justice Thomas contended.²²⁸ Instead, disability rights advocates propose expanding resources for people with disabilities; removing legal obstacles that deny people with disabilities the right to “conceive, bear, and parent children”; and correcting misinformation that pregnant people often receive about having children with disabilities.²²⁹

ii. Gender and Racial Stereotypes Underlie Reason-Based Abortion Bans

Gender and racial stereotypes underlie the justifications for both sex- and race-based abortion bans. First, Justice Thomas’s characterization of abortion as a tool of racial genocide is not only inaccurate but also a proposition that is rooted in racist stereotypes. The Endangered Species campaign illustrates this point.²³⁰

222. Suter, *supra* note 22, at 28.

223. SISTER SONG WOMEN OF COLOR REPROD. JUST.COLLECTIVE, *supra* note 14.

224. ROSS & SOLINGER, *supra* note 24, at 204.

225. *See id.* at 204–05.

226. Samuel R. Bagenstos, *Disability and Reproductive Justice*, 14 HARV. L. & POL’Y REV. 273, 285–86 (2020).

227. *Id.* at 278–79.

228. *Id.* at 276.

229. *Id.* at 276, 278, 280–81. Pregnant women often receive advice from medical professionals that “focuses on (often unduly) negative predictions about short life expectancies and extensive medical needs rather than on the ways children with disabilities ‘can participate in the life of family, school and community.’” *Id.* at 281. This negative framing of life as a person with a disability may contribute to a pregnant woman’s decision to obtain an abortion. *Id.* at 280.

230. RADICAL REPRODUCTIVE JUSTICE, *supra* note 198, at 58–84.

In 2010, anti-abortion groups launched the Endangered Species campaign to promote antiabortion legislation by linking abortion to Black genocide. The campaign posted billboards in Black communities with slogans claiming “Black Children Are an Endangered Species” because data showed Black women received disproportionately more abortions than White women.²³¹ In her book, *Radical Reproductive Justice*, Loretta J. Ross, who was a national coordinator of the reproductive justice organization, SisterSong, at the time, argued that the campaign was based on the racist and sexist stereotypes of Black women as welfare queens and promiscuous and uncaring mothers.²³² The government similarly deployed these stereotypes to justify coercing women of color to undergo sterilization procedures as a condition of welfare eligibility.²³³ Yet, now, conservatives seek to use these same stereotypes to justify abortion restrictions.

Significantly, Justice Thomas neglected to acknowledge that these intersecting stereotypes exacerbate the discrimination of Black women, as “[o]ne cannot save babies of color by discriminating against women of color.”²³⁴ The premise of identifying race-based abortion bans as a solution to racial discrimination is inherently illogical. Race-based abortion bans may lead abortion providers to racially profile people of color because their fetuses are non-White.²³⁵ Moreover, these laws may prompt health care providers to more closely interrogate people of color about their motivations for seeking abortions and ultimately refuse to offer them abortions due to fears of criminal liability for breaking the law.²³⁶ Race-based abortion bans would consequently impose a heightened level of state surveillance on people of color and limit access to legal abortion care.

Second, while Justice Thomas conceded that he was unaware of “the reasons for these disparities,” he conjectured that racial disparities justify race-based abortion bans.²³⁷ However, Justice Thomas did not provide causal support for his claim or any evidence that Black women or other people of color seek abortions based on race.²³⁸ As Ross, a Black woman, explained in *Radical Reproductive Justice*, conservative anti-abortionists “manipulate [B]lack history, our concerns about medical mistreatment, and our real collective pain around genocide and slavery to spin stories about [B]lack women as pawns of doctors, or as selfish women who do not care about our communities.”²³⁹ The *Box* concurrence similarly spun these narratives and cried racial eugenics when the true intention behind RBA bans was to lay the foundation for a complete abortion

231. *Id.* at 58–61.

232. *Id.* at 73.

233. Roberts, *supra* note 71, at 1971; Stern, *supra* note 93.

234. RADICAL REPRODUCTIVE JUSTICE, *supra* note 198, at 73–74.

235. *Id.* at 73.

236. In Arizona, anti-abortionists introduced a bill making it a felony to perform an abortion “knowing that the abortion is sought based on the sex or race of the child or the race of a parent of that child.” ARIZ. S.B. 1457 (2021).

237. *Box v. Planned Parenthood of Indiana & Kentucky, Inc.*, 139 S. Ct. 1780, 1791 (2019).

238. Suter, *supra* note 22, at 13.

239. RADICAL REPRODUCTIVE JUSTICE, *supra* note 198, at 75.

ban. In fact, 82.3 percent of states that enacted RBA bans before *Dobbs* implemented complete abortion bans about five months after the decision.²⁴⁰

Likewise, research suggests that racial and xenophobic stereotypes undergird sex-based abortion bans as well. In *Box*, Justice Thomas used China and India as examples for why sex-based abortion bans are anti-eugenic.²⁴¹ This justification is based on the inaccurate stereotype that Asian immigrants prefer to have male children over female children and thus are more likely to abort female fetuses.²⁴² While abortions of biologically female fetuses increased in China after it adopted the one-child policy, the United States does not have a similar policy that incentivizes abortions.²⁴³ In fact, the U.S. Census Data indicates that Asian Americans do not have a gender preference for their children and are not “male-biased.”²⁴⁴ Yet, some proponents of sex-based abortion bans still advocate for these laws to curb this alleged trend.²⁴⁵

In some states, proponents of sex-based abortion bans may have been motivated to pass these laws by their fears of growing Asian American populations. For the time period between 2000 and 2010, Professor Sital Kalantry found a positive correlation between states with a 70 percent or higher growth rate of Asian immigrants and states that considered or passed a sex-based abortion ban.²⁴⁶ Although the passage of other anti-abortion measures is more strongly correlated with the passage or consideration of sex-selective abortion bans, the association between these bans and growing Asian populations may imply some of these bans were racially motivated.²⁴⁷

Similar to race-based abortion bans, sex-based bans may lead health providers to racially profile pregnant Asian people based on racial stereotypes as well. Significantly, under RBA bans, racial and patriarchal systems of oppression overlap to make pregnant Black and Asian American women particularly vulnerable to state surveillance and control over their reproductive bodies.

C. *Amplifying Their Voices: Abortion Is Not Eugenic but Banning Abortion Is State-Sponsored Reproductive Oppression*

Abortion access is not a eugenic policy, but banning abortion will have discriminatory impacts on the marginalized communities Justice Thomas claimed to protect. Dating back to slavery, “regulating Black women’s reproductive decisions has been a central aspect of racial oppression in

240. Suter, *supra* note 22, at 4.

241. *Box*, 139 S. Ct. at 1790.

242. Sital Kalantry, *Sex-Selective Bans: Anti-Immigration or Anti-Abortion?*, 16 GEO. J. OF INT’L AFF. 140, 148 (2015).

243. See Joanna L. Grossman & Lawrence M. Friedman, *Junk Science, Junk Law: Eugenics and the Struggle over Abortion Rights*, JUSTIA: VERDICT (June 25, 2019), <https://verdict.justia.com/2019/06/25/junk-science-junk-law-eugenics-and-the-struggle-over-abortion-rights> [https://perma.cc/76G2-HZW9].

244. Kalantry, *supra* note 242, at 145–46.

245. *Id.* at 140.

246. *Id.* at 148.

247. See *id.* at 148.

America.²⁴⁸ Accordingly, criminalizing abortion will likely have a disproportionate impact on Black women. For example, one peer-reviewed study estimated that a total abortion ban would increase the number of pregnancy-related deaths for Black women by 33 percent, compared to 13 percent and 18 percent for White women and Latinx women, respectively.²⁴⁹ This disparity is largely due to historic and ongoing racism, which creates unequal access to health care, education, economic stability, and healthy neighborhood environments.²⁵⁰ Thus, abortion bans will likely cause more harm to Black communities.

Moreover, since Black infant mortality rates are higher than those for other races,²⁵¹ prosecutors may disproportionately target Black mothers in criminal investigations for alleged illegal abortions or violations of fetal protection laws, even if no wrongdoing occurred. Notably, in the last two years, prosecutors in Oklahoma have charged seven women under fetal protection laws for experiencing a stillbirth or miscarriage, even if the fetus was not viable.²⁵² In South Carolina, a jury convicted Regina McKnight, a Black homeless woman, of homicide because her stillborn baby tested positive for cocaine.²⁵³ Sentences for these cases varied in length from probation to up to twenty years in prison.²⁵⁴ These cases illustrate how abortion bans may lead the state to punish more people for experiencing negative pregnancy outcomes, which may exacerbate the criminalization of people with the capacity for pregnancy, especially those who are people of color.

Lastly, the criminalization of abortion and pregnancy may contribute to mass incarceration.²⁵⁵ Since *Roe* was overturned, fourteen states have effectuated total abortion bans.²⁵⁶ While most state laws reserve criminal liability for abortion providers or those who aid or abet an abortion, scholars predict the prosecution of patients who obtain abortions is not far off in the future.²⁵⁷ Prosecutors may use not only statutes criminalizing abortion but also fetal protection laws to prosecute people with the capacity for pregnancy.²⁵⁸ For

248. ROBERTS, *supra* note 26, at 6.

249. Amanda Jean Stevenson, *The Pregnancy-Related Mortality Impact of a Total Abortion Ban in the United States: A Research Note on Increased Deaths Due to Remaining Pregnant*, 58 DEMOGRAPHY 2019, 2023 (2021).

250. *Id.*

251. Latoya Hill, Samantha Artiga, and Usha Ranji, *Racial Disparities in Maternal and Infant Health: Current Status and Efforts to Address Them*, KAISER FAM. FOUND. (Nov. 1, 2022), [https://www.kff.org/racial-equity-and-health-policy/issue-brief/racial-disparities-in-maternal-and-infant-health-current-status-and-efforts-to-address-them/#:~:text=Infants%20born%20to%20Black%20women,as%20high%20\(Figure%205\) \[https://perma.cc/YKN4-LJBW\].](https://www.kff.org/racial-equity-and-health-policy/issue-brief/racial-disparities-in-maternal-and-infant-health-current-status-and-efforts-to-address-them/#:~:text=Infants%20born%20to%20Black%20women,as%20high%20(Figure%205) [https://perma.cc/YKN4-LJBW].)

252. Aspinwall et al., *supra* note 137.

253. Bridges, *supra* note 86, at 811.

254. Aspinwall et al., *supra* note 137.

255. See generally Carolyn Sufrin, *Making Mothers in Jail: Carceral Reproduction of Normative Motherhood*, 7 REPROD. BIOMEDICINE & SOC'Y ONLINE 55 (2018).

256. *After Roe Fell: Abortion Laws by State*, CTR. FOR REPROD. RTS. (2023), [https://reproductiverights.org/maps/abortion-laws-by-state/ \[https://perma.cc/GR5A-QJPX\].](https://reproductiverights.org/maps/abortion-laws-by-state/)

257. See David Dayen, *The Inevitable Prosecutions of Women Who Obtain Abortions*, AMERICAN PROSPECT (Jan. 16, 2023), [https://prospect.org/health/2023-01-16-prosecution-women-mifepristone-abortion-alabama/ \[https://perma.cc/QXU4-V2JE\].](https://prospect.org/health/2023-01-16-prosecution-women-mifepristone-abortion-alabama/)

258. See Sufrin, *supra* note 255, at 55.

example, Alabama Attorney General Steve Marshall announced that the state could prosecute women in Alabama for receiving an abortion pill under chemical endangerment laws, a common type of FPL.²⁵⁹

Criminal penalties for patients who use abortion services will likely exacerbate mass incarceration and state control and surveillance over reproduction. Although people are not explicitly incarcerated for having “criminal genes,” prison is a form of eugenic segregation because it prevents people who are at peak fertility and whom society deems unfit to parent children from procreating. For example, “[s]eventy-four percent of women in prison are between the ages of 18 and 44 years—prime childbearing years.”²⁶⁰ Indeed, Professor Carolyn Sufrin, an associate professor of gynecology and obstetrics at Johns Hopkins University, characterized mass incarceration as a reproductive technology.²⁶¹ She noted, “[i]ncarceration, by separating women from male sexual partners (at least consensual ones), precludes procreation and, by separating mothers from their children, precludes physically present parenting.”²⁶² Both of these reproductive rights—the right to choose whether to have a child and the right to raise one’s child in a stable environment—are essential to a reproductive justice framework yet are denied in the carceral system.

Significantly, in 2021, the rate of imprisonment for Black women was more than 1.5 times the rate of imprisonment for White women.²⁶³ Because of the compounding impact of structural racism on Black maternal and infant health outcomes, criminalizing pregnancy and abortion will only worsen the racial disparity among incarcerated women.²⁶⁴ Thus, Justice Thomas is wrong in viewing abortion and birth control as tools to suppress the Black population.²⁶⁵ Instead, these health services are part of a broader reproductive justice toolkit that is essential for reproductive liberation.

CONCLUSION

Accordingly, this Note endeavors to illuminate the racist and eugenic ideology underlying the state’s use of reproductive control to inform more holistic organizing. Both anti-abortion and pro-choice activists have long overlooked the complete and intersectional history of state reproductive violence and advocacy efforts of women and gender non-conforming people of color. This

259. *Id.*

260. *Id.* at 56.

261. *Id.* at 57–58. Sufrin thought about the “carceral system as not simply restricting reproduction and kinship, but as managing and crafting them in particular ways.” *Id.* at 57.

262. *Id.* at 58.

263. *Incarcerated Women and Girls*, THE SENTENCING PROJECT, <https://www.sentencingproject.org/fact-sheet/incarcerated-women-and-girls/> [<https://perma.cc/JW96-Q6QK>]. The total number of incarcerated women increased about fivefold between 1980 and 2020. *Id.*

264. See Natalie Krebs, *Abortion bans could have far-reaching impacts on the Black community in the Midwest*, NPR (Sept. 7, 2022), <https://www.kcur.org/2022-09-07/abortion-bans-could-have-far-reaching-impacts-on-the-black-community-in-the-midwest> [<https://perma.cc/XG5E-GRET>].

265. *Box v. Planned Parenthood of Indiana & Kentucky, Inc.*, 139 S. Ct. 1780, 1791 (2019).

is not only to the detriment of “canaries in the coalmine” but also the broader abortion rights movement. When advocates reduce the discussion on reproductive autonomy to individual choice, they make a similar mistake to Justice Thomas in his *Box* concurrence. They overlook both the broader structural barriers to reproductive liberation and the more necessary goal of increasing access to reproductive services and resources to support people during pregnancy and child-rearing.

Without access and resources, there can be no choice. Therefore, to create a more robust system of reproductive health care that does not use punishment to control reproductive activity, advocacy efforts must center on the experiences of women and gender non-conforming people of color and recognize the history of state reproductive abuses against them. Only through an accurate and comprehensive recognition of this history and the adoption of a reproductive justice framework can all people achieve true reproductive liberation.