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REINVENTING EUGENICS: REPRODUCTIVE CHOICE AND LAW REFORM AFTER WORLD WAR II

MARY ZIEGLER*

[M]any feel that it is inconsistent to require both that the client consent and be feeble-minded. One county specifically asks: "Could some of the 'red tape' be cut in regard to the consent of the feeble-minded adult? We are thinking of a mother of four children, born out of wedlock, who is definitely feeble-minded and who will not give consent for sterilization...." [M]any surveyed felt compulsory powers should be available.... [B]ut if compulsory powers were exercised, a great deal of hostility might be stirred up which could jeopardize the whole existence of the law.¹

When the United States Supreme Court decided *Skinner v. United States*, some observers saw the case as the beginning of the end of the movement for eugenic legal reform.² The term eugenic, coined in 1883 by the British geneticist Francis Galton, described a belief that law could be used to improve the quality of the population.³ When the Court had last considered a Due Process or Equal Protection challenge to compulsory eugenic sterilization law in 1927, only one justice dissented from the Court's decision to uphold the statute.⁴ Only fifteen years after the *Buck* Court stated that "three generations of imbeciles are enough,"⁵ the *Skinner* Court described the right to reproduce as "one of the basic civil rights of man."⁶

Many scholars have seen this apparently dramatic shift in the Court's position as evidence of the influence of World War II on American reproductive law.⁷ During the war, widespread revulsion to the Nazi political program provoked

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¹ MOYA WOODSIDE, *STERILIZATION IN NORTH CAROLINA* 71 (Univ. of North Carolina Press 1950).

² *Skinner v. Oklahoma*, 316 U.S. 535 (1942); see also James B. O'Hara and T. Howland Sanks, *Eugenic Sterilization*, 45 *GEO. L.J.* 20 (1956).

³ See generally FRANCIS GALTON, *INQUIRIES INTO HUMAN FACULTY AND ITS DEVELOPMENT* (Dent & Dutton 1907)(1883).

⁴ *Buck v. Bell*, 274 U.S. 200, 208 (1927).

⁵ *Id.* at 207..

⁶ *Skinner*, 316 U.S. at 541.

⁷ See, e.g., Michael Willrich, *The Two Percent Solution: Eugenic Jurisprudence and the Socialization of American Law, 1900-1930*, 16 *L. & HIST. REV.* 1, 67-100 (1998).

serious criticism of American sterilization laws similar to those enforced in Germany.⁸ As a result of this disapproval, the eugenic reform movement is seen to have no longer influenced American reproductive law after the War.⁹

A close examination of pro-eugenic organizations after the War tells a significantly different story. Rather than disappearing from the political scene, these organizations appear to have transformed both themselves and the very idea of eugenic law.

When originally formed, these organizations reflected ideas that had first been discussed in Europe by scholars like Galton. He proposed that law could improve the quality of the population primarily by preventing physically, mentally, and morally flawed persons from reproducing.¹⁰ When Galton was first writing in the nineteenth century, eugenic writings often reflected concern among the upper classes about the rising influence of the popular classes on politics, finance, and culture.¹¹ At the same time, those eugenic advocates like Galton rejected what German theorist Max Nordau termed pessimism, a belief that nothing could be done to prevent perceived cultural decline, and proposed instead that the law be used to help improve eugenic stock.¹²

As eugenic theory became influential in the United States in the 1890s, leading eugenic proponents increasingly adopted August Weismann's theory that all defects were, in some way, irreversible.¹³ It was possible that living in a poor environment or engaging in a moral indiscretion could deform a person's genetic matter, Weismann theorized, but a better environment could not remedy the defect.¹⁴ Once created, a defect would be passed on indefinitely from generation to generation.¹⁵

Given the perceived urgency of the threat Weismann described, many lawmakers were primarily interested in devising legal solutions to the problem presented by the multiplication of the "unfit." In the middle decades of the nineteenth century, several states experimented with homes for the mentally

⁸ See, e.g., *id.*; cf. Michael Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 54 (1996) (explaining the effects of anti-Nazi ideology on popular and legal views on religious tolerance).

⁹ See, e.g., Willrich, *supra* note 7, at 97.

¹⁰ See Francis Galton, *Types and Their Inheritance*, 32 NATURE 507, 507-09 (1885).

¹¹ See, e.g., Donald Pickens, *The Sterilization Movement: The Search for Purity in Mind and State*, 28 PHYLON 78, 79 (1967).

¹² MAX NORDAU, *DEGENERATION* 150 (Univ. of Nebraska Press 1895) Michael Willrich has offered an account of the use of eugenic theory to justify an exercise of unprecedented legal power in Chicago's Municipal Court. See Willrich, *supra* note 6, at 67-100. Other historians of Progressive-era legal reforms have emphasized the expansion of legal authority in that period. See generally MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* (Oxford Univ. Press 1992).

¹³ AUGUST WEISMANN, *THE SIGNIFICANCE OF SEXUAL REPRODUCTION IN THE THEORY OF NATURAL SELECTION, IN ESSAYS UPON HEREDITY AND KINDRED BIOLOGICAL PROBLEMS* (E.B. Poulton, S. Schöland, and A.E. Shipley Eds. Clarendon, Uk: Oxford, 1889), 277.

¹⁴ *Id.* at 65.

¹⁵ *Id.*

retarded.¹⁶ However, by the 1890s, many critics had become convinced that administrative segregation was ineffective and unnecessarily stigmatizing.¹⁷ Indeed, several states adopted so-called eugenic marriage laws, which allowed only those who could pass a battery of blood tests to obtain a marriage license.¹⁸

For a variety of reasons, eugenic marriage laws proved to be a spectacular failure. Because the laws required equipment that was often too rare and too expensive for most local physicians to acquire, the laws were unpopular as they prevented so many people from obtaining marriage licenses.¹⁹ More importantly, the laws were seen to be ineffective from a eugenic standpoint: morally unfit persons were widely believed to have sexual intercourse outside of marriage and so would be unaffected by the denial of a marriage license.²⁰ To some observers, the need for a more coercive law was apparent.²¹

Between 1915 and 1940, several states responded by introducing compulsory eugenic sterilization laws.²² Focused on people housed in state institutions, the laws authorized the sterilization of a loosely defined group that included those individuals thought to be insane, handicapped, or sexually promiscuous.²³

The rise of such laws in the 1910s can be partly explained by the emergence of Progressive politics.²⁴ Many Progressives shared with eugenic theorists a belief in the superior knowledge of experts, a suspicion of rights-based arguments made by the federal courts, and a conviction that the needs of individuals had to be subordinated to those of the community.²⁵

Eugenic compulsory sterilization laws were still frequently applied following the decline of Progressive politics.²⁶ After the Supreme Court upheld Virginia's compulsory sterilization law in *Buck v. Bell* in 1927, a significant number of states introduced sterilization laws of their own.²⁷ The decade before the beginning of World War II was, for the most part, a successful one for proponents of eugenic legal reform.

It was not until the middle of World War II, that eugenic sterilization laws

¹⁶ Pickens, *supra* note 11, at 84.

¹⁷ *Id.*

¹⁸ See, e.g., *Eugenic Law Awes Cupid*, N.Y. TIMES, July 26, 1914, at 6.

¹⁹ See, e.g., *Eugenic Law Flat Failure*, L.A. TIMES, Aug. 10, 1916, at 14.

²⁰ See Charles Davenport, *State Laws Limiting Marriage Selection Examined in Light of Eugenics*, EUGENICS RECORD OFFICE BULLETIN NO. 9 (1913).

²¹ *See id.*

²² See J. H. LANDMAN, *HUMAN STERILIZATION* 49 (The MacMillian Co. 1932).

²³ *See id.*

²⁴ See, e.g., Willrich, *supra* note 7.

²⁵ See Pickens, *supra* note 11, at 268-275.

²⁶ See *Buck v. Bell*, 274 U.S. 200, 208 (1927). The second generation of compulsory eugenic sterilization laws appeared most often in the western and southern parts of the United States. See also EDWARD LARSON, *SEX, RACE, AND SCIENCE: EUGENICS IN THE DEEP SOUTH* 123 (Johns Hopkins Univ. Press 1995); see also IAN DOWBIGGIN, *KEEPING AMERICA SANE: PSYCHIATRY AND EUGENICS IN THE UNITED STATES AND CANADA, 1880-1940* 104, 125-126 (Cornell Univ. Press 2003).

²⁷ See O'Hara, *supra* note 2, at 40-41.

came under attack. Newspapers in the 1940s increasingly mentioned sterilization laws only in the context of the Nazi regime.²⁸ Many major American newspapers provided extensive, often scathing criticism of Nazi sterilization laws.²⁹ Nazi sterilization policies were seen to be totalitarian and American eugenicists often had trouble arguing that their own sterilization laws were any different. Writing to the *Washington Post*, the Reverend F. J. Connell responded to a letter that had advocated the sterilization of the unfit:

In his letter of January 10, Dr. H. Curtiss Wood recommends the sterilization of persons regarded as unfit for parenthood, particularly the mentally defective. . . .The argument of Dr. Wood is very similar to that [argument] presented to the Reichstag in support of the sterilization policy which was put into operation in Nazi Germany on Jan. 1, 1934.... It would be interesting to know if Dr. Wood favors the entire Nazi policy or just this feature.³⁰

Many American eugenicists had trouble responding to critiques like the one framed by Reverend Connell, and popular support for eugenics declined accordingly.

Yet the association with Nazism did not spell the end of eugenic influence on reproductive law. Traditional histories of eugenics often conclude that World War II effectively marked the end of eugenic regulation of reproduction and sexual behavior.³¹ This article will argue instead that, in some cases, proponents of eugenic sterilization laws modernized eugenic legislation to reflect the changing norms of the post-war era.

Public awareness of Nazi racial policies changed but did not end laws allowing the government to control parenthood. Nazi sterilization policy had been condemned by many for being totalitarian, overbroad, racially motivated, and entirely compulsory.³² Yet, despite a potentially damning connection to Nazi practices, some social workers and legislators invoked a recent crisis in the number of out-of-wedlock births to justify an expansion of laws designed to deter those seen to be morally unfit from having children.³³

²⁸ *Sterilization of Criminals and Insane Favored*, 8-2, THE ATLANTA CONST., May 23, 1937.

²⁹ See, e.g., Harold Callenders, *Goebbels' Tactics Hint at Nazi Woes*, N.Y. TIMES, Sep. 27, 1942, at 13; see also *Nazified Medicine*, N.Y. TIMES, Dec. 6, 1942, at E1; see also Dana Adams Schmidt, *Nazi Medical Horrors Revealed At New Trials*, N.Y. TIMES, Mar. 2, 1947, at 102; B. D. Arlington, *Sterilization of Germans*, WASH. POST, Sep. 10, 1944, at B4.

³⁰ Rev. F. J. Connell, *Sterilization*, WASH. POST, Jan. 17, 1947, at 6.

³¹ See Willrich, *supra* note 7, at 98; but cf. LINDA GORDON, *THE MORAL PROPERTY OF WOMEN: A HISTORY OF BIRTH CONTROL POLITICS IN AMERICA 196-212* (Univ. of Illinois Press 2002) (arguing that the influence of eugenics in law declined but that eugenic thought influenced the evolution of Planned Parenthood and the birth control movement).

³² See WOODSIDE, *supra* note 1, at 71.

³³ See RICKIE SOLLINGER, *WAKE UP LITTLE SUSIE; SINGLE PREGNANCY AND RACE BEFORE ROE V. WADE* 13 (Routledge 1992); WINIFRED BELL, *AID TO DEPENDENT CHILDREN* 211 (Univ. of California Press 1965).

A spike in out-of-wedlock births made the compulsory sterilization of “unfit” unwed mothers appear a more attractive legislative option. Between 1950 and 1967, more than 12 states considered a measure to compulsorily sterilize unwed mothers, and yet all of these bills failed to pass.³⁴ Similarly, there is evidence that some important members of the Senate seriously considered introducing compulsory sterilization legislation but decided against such a strategy because of the perceived unpopularity of compulsory sterilization laws.³⁵ Even North Carolina, a state still widely applying its compulsory eugenic sterilization law from 1950 to 1965, was unable to expand its law.³⁶

If there was widespread support for such a eugenic law, then why did the attempts to pass a compulsory law universally fail? Moya Woodside, a British sociologist and commentator on North Carolina’s law, argued that an effective eugenic law could not be compulsory but would instead have to respect free choice.³⁷ “Laws providing for voluntary sterilization in democratic countries bear no resemblance to the German experience,” Woodside wrote. “[The] preservation of individual liberty does more in the long run to encourage sterilization as a measure of social betterment.”³⁸

The laws that developed from 1950-1967 confirmed that Woodside’s intuition was insightful. As noted, a traditional history of eugenics often concludes that World War II spelled the end of eugenic influence on the law. This article will argue instead that World War II required eugenic laws, at least in appearance, to respect some form of reproductive choice.

The new emphasis on choice forced pro-eugenic organizations to transform their strategies and rhetoric. Because eugenic legal theory had been criticized for being political rather than scientific, some pro-eugenic organizations began, in the 1950s, to renounce lobbying in order to focus on funding research that demonstrated the benefits of improving the “quality” of the population. The leaders of other organizations identified less controversial programs of legal reform that they believed would have the same effects as would an openly eugenic program. Between 1950 and 1966, pro-eugenic organizations increasingly saw population control reform as an ideal program of this sort. The platform that resulted from these changes appeared to better account for individual choice but was also more openly racist than earlier eugenic legal reform projects had been.

Perhaps most importantly, the new reform efforts offered their own definitions of reproductive choice. Many people thought to be socially inadequate were seen as unable to make the right reproductive decisions themselves, and pro-eugenic organizations advised their volunteers to omit or favorably characterize the

³⁴ See, e.g., *House Backs Senate Over Banking Bill*, N.Y. TIMES, Mar. 8, 1962, at B2.

³⁵ *Bill Urging Sterilization Hit*, WASH. POST, Feb. 20, 1960, at A9.

³⁶ WOODSIDE, *supra* note 1, at 24.

³⁷ *Id.*

³⁸ *Id.*

facts about birth control or sterilization and to take advantage of emotional or physical weakness in order to assure that the “right choice” was made.

Thus, it is not the case that eugenics was no longer a significant influence on American reproductive law after World War II. Rather, pro-eugenic organizations adapted to the new political climate that emerged after 1945. Instead of defending the merits of state coercion in reproductive matters, pro-eugenic organizations themselves now sought to define reproductive choice.

By studying the introduction and failure of expanded compulsory sterilization laws in the 1950s and 1960s, Part I examines the political rejection of governmental coercion in reproductive matters. Part II studies the alternative strategies adopted by two of the most influential post-war pro-eugenic organizations, Human Betterment and the Population Council. By evaluating the workings of a post-war compulsory sterilization statute, Part III demonstrates the effects of the new political emphasis on reproductive choice on existing laws. Part IV is a brief conclusion.

I. COMPULSORY STERILIZATION AND ITS ALTERNATIVES

A traditional account of eugenics in law often concludes that anti-Nazi ideology doomed eugenic sterilization laws that were themselves similar to laws used by the Nazis. The anti-Nazi ideology theory is in many ways a sensible one. Eugenics was a much less high profile issue in the 1950s and 1960s. Between 1950 and 1960, the term eugenic or any version of it appeared 774 times in the *New York Times*, the *Chicago Tribune*, the *Washington Post*, or the *Los Angeles Times*, compared to 1,744 times between 1930 and 1940.³⁹ The *New York Times* and the *Chicago Tribune* covered Nazi sterilization policies extensively and often negatively.⁴⁰ From the perspective of a current observer, it might seem inevitable that American sterilization policies would be condemned if Nazi sterilization policies were.

The Supreme Court opinion in *Skinner v. Oklahoma* plausibly supports an anti-Nazi ideology argument. In *Skinner*, the Court struck down an Oklahoma statute that provided for the sterilization of specified groups of repeat offenders.⁴¹ Although *Skinner* has come to stand for the existence of a substantive Due Process right to procreation,⁴² the decision was made on Equal Protection grounds. Justice Douglas, writing for the Court, concluded that the distinctions drawn by the statute

³⁹ Proquest Historical Newspapers search by the author (June 28, 2006) (receiving over 1,700 hits in search for term eugenic in above-mentioned newspapers).

⁴⁰ See text accompanying *supra* notes 26-29 (discussing problems associated with Nazi sterilization programs).

⁴¹ See *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

⁴² See, e.g., *Roe v. Wade*, 410 U.S. 113, 117 (1973).

between offenders who committed similar and equally serious crimes could not survive rational basis review.⁴³

In spite of the limited scope of the holding, there is evidence to support a contention that *Skinner* was an anti-Nazi decision. Press coverage of Nazi sterilization policy peaked in 1941,⁴⁴ a year before *Skinner* came out. The Court used rhetoric that could support an anti-Nazi reading, condemning Oklahoma's law as interfering too much with "a sensitive and important area of human rights..." and depriving "individuals of a right which is basic to the... race—the right to have offspring."⁴⁵

But those who supported eugenic sterilization laws had powerful motivations, often believing intensely in the rightness of eugenics whether or not the Nazis were associated with it. These motivations might have made it easier to see distinctions between Nazi sterilization policies and American sterilization laws.

Skinner does not preclude the drawing of such a distinction. Significantly, *Skinner* struck down a law providing for the forcible sterilization of felons who had offended more than three times.⁴⁶ The statute in question was punitive in nature. In fact, openly punitive sterilization laws had been struck down by state courts in the 1910s and condemned by eugenicists in the 1930s.⁴⁷ *Skinner* can be read as a continuation of this trend as opposed to a change in course. It is notable that the *Skinner* Court did not strike down *Buck v. Bell*.⁴⁸ Indeed, in 1942, the Court might not have been willing to strike down sterilization laws of the sort upheld in *Buck*.

Moreover, *Skinner* had a narrow holding. Oklahoma's sterilization law was struck down on Equal Protection grounds, mostly because the law targeted some felons while leaving alone felons who had committed crimes that were just as serious.⁴⁹ In fact, the Court explicitly upheld and distinguished *Buck v. Bell*, which it saw as involving a sufficiently rational law. Only Justice Jackson, writing in concurrence, raised the possibility that there might be something wrong with any compulsory sterilization law.⁵⁰ It is likely that the *Skinner* Court had considered the evils of Nazi sterilization laws, but the Court was not ready to condemn more popular eugenic policies. For the Court, some eugenic policies were acceptable and some were not. Some laws had been tainted by Nazism and some had not.

⁴³ *Id.*

⁴⁴ Proquest Historical Newspapers search by the author (September 14, 2006) (search hits for Nazi sterilization in period between 1940 and 1943)..

⁴⁵ *Skinner*, 316 U.S. at 536.

⁴⁶ *Skinner*, 316 U.S. at 536.

⁴⁷ See *Mickel v. Heinrichs*, 262 Fed. 688 (D.C. Nevada 1918); see also *Davis v. Berry*, 216 Fed. 413 (Iowa 1914); see also *WOODSIDE*, *supra* note 1, at 160 ("It is unfortunate that some states in the U.S. still sanction sterilization or castration for certain classes of criminals and sexual offenders. This creates the impression that sterilization is a punitive measure [which creates] distrust.").

⁴⁸ See especially *Skinner*, 316 U.S. at 540-541, 544-555.

⁴⁹ *Id.* at 542.

⁵⁰ *Id.* at 545 (Stone, J., Concurring).

The laws passed between 1950 and 1967 to address the illegitimacy problem help explain what was considered objectionable about Nazi reproductive policy. For various reasons, eugenic laws had long targeted unwed mothers on public assistance. Some legislators and theorists emphasized the “unnecessary” costs of paying relief to unwed mothers and their children.⁵¹ Other eugenic theorists stressed that women who repeatedly had sexual intercourse outside of wedlock were necessarily defective and would have defective children.⁵² Following the theory of August Weismann, these theorists argued that immoral sexual behavior could deform a woman’s germ plasm and, in turn, produce defects in her children.⁵³

By the 1950s, many no longer believed that unwed mothers were always hereditarily defective, but it was still often thought that the children of unwed mothers themselves had social problems, either because of bad heredity, exposure to a bad environment, or both.⁵⁴ In the 1950s, a variety of newspapers suggested that America was experiencing an illegitimacy crisis.⁵⁵ A greater proportion of unwed mothers were reported to be white,⁵⁶ and a greater proportion of those on welfare were believed to be unwed mothers.⁵⁷ Elyce Ferster wrote in 1966 that the new explanations and “arguments advanced in favor [of such compulsory sterilization] are the same as those used by proponents of eugenic sterilization. Society has the right to prevent itself from being swamped by mental illness, mental retardation, crime, poverty, etc.”⁵⁸ In Ferster’s view, only the rhetoric of lawmakers had changed. Ferster stated that “eugenicists argued that the prevention of procreation was necessary because children of parents having these defects would have the same defects by reason of heredity. Now the claim is that children will have the same defects because the parents are too socially inadequate.”⁵⁹

As Ferster predicted, between 1950 and 1967, many state legislatures were attracted to these arguments, but they ultimately rejected a compulsory sterilization

⁵¹ *Baltimore Welfare Denounced*, WASH. POST, Dec. 11, 1947 at 1 (explaining argument that welfare encouraged illegitimacy); see also William Sheridan, Jr., *Illegitimacy and ADC*, CHI. TRIB., May 9, 1955 at 20 (state legislator condemning costs imposed by unwed mothers on welfare).

⁵² See, e.g., PAUL POPENOE, *THE FEEBLEMINDED*, IN COLLECTED PAPERS ON EUGENIC STERILIZATION IN CALIFORNIA (PASADENA: THE HUMAN BETTERMENT FOUNDATION, 1928), 321.

⁵³ Scott Christianson, *Bad Seed or Bad Science*, N.Y. TIMES, Feb. 8, 2003, at B9 (describing Dugdale’s use of female “licentiousness” and “harlotry” as markers of eugenic defect); see also PHILLIP R. REILLY, *THE SURGICAL SOLUTION: A HISTORY OF INVOLUNTARY STERILIZATION IN THE UNITED STATES* 14 (Johns Hopkins Univ. Press 1991).

⁵⁴ See Elyce Zenoff Ferster, *Eliminating the Unfit -- Is Sterilization the Answer?*, 27 OHIO ST. L.J. 591, 610 (1966).

⁵⁵ See, e.g., *Sterilization Urged to Cut Costs of ADC*, CHI. TRIB., Mar. 1, 1961, at 26; See MIMI ABRAMOWITZ, *REGULATING THE LIVES OF WOMEN: SOCIAL WELFARE POLICY FROM COLONIAL TIMES TO THE PRESENT* 320-321 (South End Press 1996).

⁵⁶ See ABRAMOWITZ, *supra* note 55, at 321.

⁵⁷ See *id.*

⁵⁸ Ferster, *supra* note 54, at 610.

⁵⁹ *Id.*

law for unwed mothers. It is important to consider what led to the rejection of sterilization programs some legislators so obviously found appealing.

Part of the attraction was related to the limits placed on existing sterilization laws. Although many states still had compulsory sterilization statutes on the books in 1957, most of these laws were rarely applied.⁶⁰ Almost all of them were ultimately repealed between 1968 and 1975.⁶¹ The states that applied their compulsory sterilization laws more vigorously could often do so only after clearing several procedural hurdles.⁶² In 1950, then, it was difficult for almost all of the thirty states with compulsory sterilization laws on the books to sterilize “morally unfit” women. States that still wanted to reduce the number of unfit children had to find other legal means to discourage women perceived to be socially inadequate from having more children.

Nonetheless, these states continued to consider expanding or adopting new compulsory sterilization legislation. Many passed alternatives to compulsory sterilization shortly after the defeat of such legislation or public outcry at its introduction. The experience of these states helps to illustrate both that eugenics still influenced American reproductive law and that laws reflecting this influence had to respect reproductive choice.

A. Virginia, North Carolina, and “Voluntary” Sterilization

Both Virginia and North Carolina faced proposals to compulsorily sterilize unwed mothers irrespective of whether they qualified as feeble-minded or insane under the state’s eugenic sterilization law.

In 1956, Representative E. Ralph James of Hampton, Virginia, introduced a proposal that would have allowed the superintendent of public welfare in any county to petition a local judge to order mothers of more than one illegitimate child to be sterilized unless they could show that they should not be sterilized.⁶³ This bill was defeated, but three further sterilization proposals were introduced in 1960, including two compulsory sterilization proposals.⁶⁴ These proposals were again defeated. In 1962, another compulsory sterilization bill was introduced, but this time, the state passed a voluntary sterilization bill.⁶⁵

North Carolina followed a similar path. Representative W. M. Jolly introduced bills in 1956, 1958, and 1963 that would have expanded compulsory

⁶⁰ See O’Hara and Sanks, *supra* note 2 (Three states, North Carolina, Virginia, and California, continued applying their sterilization laws to more than 300 people per year between 1940 and 1957.).

⁶¹ See generally NANCY ORDOVER, *AMERICAN EUGENICS: RACE, QUEER ANATOMY, AND THE SCIENCE OF NATIONALISM* (Univ. of Minnesota Press 2003).

⁶² See WOODSIDE, *supra* note 1, at 30-32 (Woodside explains the frustrations of officials administering a compulsory statute in the face of various procedural requirements.).

⁶³ Julius Paul, *The Return of Punitive Sterilization Proposals: Current Attacks on Illegitimacy and the AFDC*, 3 *LAW & SOC’Y REV.* 92, 97 (1968).

⁶⁴ *Id.*

⁶⁵ *Id.* at 98.

sterilization legislation to cover “grossly sexually delinquent persons.”⁶⁶ The Jolly bill provided that mothers of unwed children be brought before the State Eugenics board and be required to demonstrate why they should not be sterilized.⁶⁷ After the birth of a third illegitimate child, there would be a rebuttable presumption in favor of sterilization.⁶⁸ North Carolina rejected these proposals not because state legislators believed that unwed mothers could produce fit children, but rather because they believed that compulsory sterilization was an ineffective means of stemming the tide of unfit parents.⁶⁹ Dr. John C. Burwell, a member of the neo-eugenic Human Betterment League of North Carolina, wrote:

Recent legislative attempts in North Carolina to ameliorate the problem of illegitimacy by some form of compulsory legislation may be... detrimental... to those of us interested in voluntary sterilization. Detrimental in that these attempts leave an implication in the public mind that any consideration of sterilization is on a compulsory basis.⁷⁰

B. Penalties and Wrong Choices

At one point, other states considered compulsory sterilization in addition to legislation that would impose a short prison term and a fine on unwed mothers. In Illinois, for example, state Senator George M. Brydia proposed a compulsory sterilization provision for unwed mothers.⁷¹ Several alternative bills were met with greater approval, including Senate Bill No. 1066, which provided for a one-year prison sentence and a fine for women who had a second illegitimate child and a three to five-year sentence for mothers of three or more illegitimate children, and House Bill No. 1561, which allowed the Family Court to remove existing children from the custody of an unwed mother.⁷²

Similar proposals passed in other states after related compulsory sterilization measures failed. In Louisiana, a 1958 commission charged with addressing the state’s illegitimacy problem considered, but ultimately rejected, a compulsory sterilization measure on the grounds that such laws were “intrinsically evil, completely immoral and violative of all concepts of Christianity.”⁷³ The commission recommended, and the state eventually adopted, Act 75, which instead provided for a one-year prison sentence and a fine designed to deter unfit parents from having children.⁷⁴

⁶⁶ *Id.* at 92; see also Ellen Key Blunt, *Sterilization Bill*, WASH. POST, Jan. 27, 1965, at C1.

⁶⁷ Paul, *supra* note 63, at 92-93.

⁶⁸ *Id.* at 93.

⁶⁹ *Id.* at 93-94.

⁷⁰ *Id.* at 94.

⁷¹ *Sterilization Urged to Cut Costs of ADC*, *supra* note 55, at 26.

⁷² Paul, *supra* note 63, at 81-82.

⁷³ *Id.* at 83 (quoting Report of the Committee (Rep. Walter Chachere, Chairman)).

⁷⁴ *Id.* at 84.

Similarly, Maryland first considered compulsory sterilization as a way to limit unfit parenthood and only later resorted to criminal penalty legislation.⁷⁵ Senator John L. Sanford, Jr. introduced a bill in 1960 which provided for a one thousand dollar fine or three-year prison sentence, a permanent loss of child custody, and a bar on receipt of welfare funds, as well as compulsory sterilization of unwed mothers who continued to have illegitimate children.⁷⁶ The bill easily passed in the Senate but was defeated in the House of Delegates.⁷⁷ Delegate Russell Hickman introduced a bill in 1963 which provided for voluntary sterilization and compulsory eugenic sterilization of the mentally deficient.⁷⁸ Ultimately, neither of these bills passed.⁷⁹ Delaware introduced legislation in the 1950s and again in the 1960s, under which an unwed mother would have to be sterilized in order to be eligible for welfare payments.⁸⁰ Similarly, in Iowa, in December of 1963, state Senator Howard Buck proposed to a legislative committee that the state sterilize all unwed mothers who received welfare payments.⁸¹

The lesson taken from the failure of these laws is that a criminal penalty divorced from a sterilization provision, would be more likely to pass. It had become clear that a compulsory sterilization law was no longer politically feasible. In Mississippi, lawmakers learned a similar lesson. Representative David Glass introduced a bill in 1958 which would require mothers of two or more illegitimate children to be sterilized if a Chancery Court determined that the “immorality of said female [was] detrimental to the state or the community.”⁸² Although this bill died on the House Calendar, a related bill was introduced in 1964 by W. B. Meek, which allowed unwed mothers to submit to compulsory sterilization or a prison term.⁸³

Apparently, this bill still did not appear to confer real choice on sterilization candidates: the bill generated considerable backlash from local civil rights organizations and voluntary sterilization advocates. Letters to the editor published in *Newsweek* magazine similarly condemned the coercive aspects of the law.⁸⁴ A student advocacy group began an influential campaign against the bill⁸⁵ that played up connections between compulsory sterilization in Mississippi and the Nazi

⁷⁵ REPORT OF THE COMMISSION TO STUDY PROBLEMS OF ILLEGITIMACY, STATE OF MARYLAND 26 (1961).

⁷⁶ Paul, *supra* note 63, at 84-86.

⁷⁷ *Id.* at 85.

⁷⁸ *Id.*

⁷⁹ *Id.* at 85-86.

⁸⁰ *See* Paul, *supra* note 63, at 80.

⁸¹ *Id.* at 82.

⁸² *Id.* at 88.

⁸³ *Id.* at 89.

⁸⁴ *Id.* at 90; *see also* *Brief for Planned Parenthood Federation of America et al. as Amicus Curiae Supporting Appellants* at 20, n.5, *Griswold v. Connecticut*, 381 U.S. 479 (1965) (No. 496).

⁸⁵ *See* Paul, *supra* note 63, at 90.

regime.⁸⁶ Were Mississippi to seek to achieve the same eugenic purpose without resorting to compulsory sterilization, it seemed likely that such legislation would not create the same resistance. This appears to have been an accurate prediction: Mississippi was able to pass a bill that provided for a fine and prison sentence for mothers of two or more illegitimate children.⁸⁷

It is worth noting that, in the same period, several states hardened their criminal penalties regarding illegitimacy, and perhaps for the same reasons. Between 1950 and 1961, Maryland, Georgia, Mississippi, Delaware, Alabama, and Massachusetts passed new laws punishing illegitimacy, expanded existing criminal laws, or made the penalties under existing law harsher.⁸⁸ Illinois also considered passing a law criminalizing unwed motherhood for AFDC recipients.⁸⁹ As noted, Maryland and Mississippi imposed fines and prison terms on any woman who had more than two illegitimate children.⁹⁰ In 1956, Georgia made abandonment of children a misdemeanor only if the children were illegitimate.⁹¹

Unlike a sterilization law, a criminal illegitimacy law was more often seen to respect choice. Nazi sterilization laws had been condemned for being compulsory. In contrast, criminal illegitimacy laws gave notice of condemned conduct and then punished wrong choices after they were made. Maryland's law punished only women who had continued to make "bad choices" by having more than a certain number of illegitimate children.⁹² Criminal neglect or abandonment laws also framed penalties in terms of reproductive choice: either a person could make the right choice, or she would choose to be punished. Lawmakers could create incentives to make the right choices without compelling anyone not to have a child. Thus, an illegimacy law could accomplish indirectly what compulsory sterilization laws had accomplished.

Moreover, the political ramifications of a compulsory sterilization law were now clear. When several states introduced compulsory sterilization laws, many observers condemned the use of governmental coercion in private reproductive matters.⁹³ Nonetheless, it is a mistake to think that the organizations and programs in place after World War II no longer reflected a eugenic influence. Julius Paul, an authority on the campaign for compulsory sterilization between 1950 and 1967,

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ See *Bill Subjecting Unwed Mothers to 2 Yrs Prison Ok'd*, CHI. DEF., May 2, 1959, at 2; BELL, *supra* note 33, at 210-215; Ga. L. 1956 §74-9901 (1956); *Bill to Curb Illegitimacy is Signed in Miss.*, N.Y. TIMES, May 28, 1964, at 28; Mass. G.L. c. 273 §15 (1963); *Ward v. State*, 170 So. 2d 500, 502 (Ala. Ct. App. 1964) (evaluating a statutory increase in the abandonment penalty regarding illegitimate children to \$100 per incident).

⁸⁹ *Sterilization Urged*, *supra* note 55, at 26.

⁹⁰ See text accompanying *supra* note 79, 87 (discussing use of criminal penalties for mothers of illegitimate children).

⁹¹ See *Williams v. State*, 98 S.E. 2d 373 (Ga. 1957).

⁹² See *Bill Subjecting*, *supra* note 88, at 2.

⁹³ See, e.g., text accompanying *supra* notes 77, 83 (discussing failure of sterilization bills for unwed mothers).

explained in 1968 that the effort to pass such laws or equivalents to them represented only a slight change in the focus of eugenic legal reformers: “[w]hereas earlier eugenic efforts were aimed at cutting off the ‘defective germ plasm’ before it ‘drowns us,’ current efforts would be aimed at cutting off the defective germ plasm and welfare payments.”⁹⁴

In the wake of the perceived illegitimacy crisis, legislators interested in improving the “quality” of the population were forced to find alternatives to the use of overt coercion. The definition of choice that emerged in alternative proposals was a narrow one, but it was the goal of pro-eugenic organizations active in the 1950s and 1960s to change this definition. Part II of this note considers the work of two of the most influential pro-eugenic organizations in order to clarify the changes in the debates that shaped American reproductive law.

II. THE REINVENTION OF EUGENIC ADVOCACY

A. The Population Council and Contraceptive Incompetence

Founded in 1952, the Population Council was formed partly by leaders of the eugenic legal reform movement who intended to create a new kind of organization in response to post-war politics: an organization that would prevent overall population growth and preserve the “quality” of the population.⁹⁵ At the organization’s founding conference in Williamsburg, Virginia, members emphasized a broad range of potential goals, including research on world food supply, alternative energy sources, and alternative methods of contraception.⁹⁶ Nonetheless, a significant number of founding members, including Frederick Osborn, Kingsley Davis, and Frank Notestein, maintained their ties with the eugenic legal reform movement.⁹⁷

Not surprisingly, these members continued to endorse eugenic goals, but they now characterized those goals as matters of population control. The Council’s evolution offers a powerful example of how pro-eugenic groups redefined themselves and their programs in order to ensure their political survival. Members of the organization worked to achieve this goal in three ways. First, the leaders of the Council deemphasized openly eugenic projects. Relying on a theory that the poorest and least eugenically fit individuals were often the most fertile, leaders of the Council believed that the quality of the population would be improved if overall population growth was checked. Second, instead of disavowing the idea that the law could be used to improve the quality of the population, leaders of the organization argued in favor of a kind of voluntary eugenics. They asserted that the

⁹⁴ See Paul, *supra* note 63, at 101.

⁹⁵ John D. Rockefeller III, *On the Origins of the Population Council*, 3 POPULATION & DEV. REV. 493, 493 (1977).

⁹⁶ *Id.* at 495-496.

⁹⁷ See *id.*

quality of the population could be improved if otherwise “incompetent” people were assisted in making the right choices. Finally, the organization’s leaders concluded that the Council could campaign for eugenic legal reform only after convincing the public that the organization focused on objective scientific research rather than on lobbying.

These ideas first emerged at a meeting sponsored by the National Academy of Science in the summer of 1952.⁹⁸ The demographers, biologists, and geneticists present agreed that a potential decline in the quality of the population was integrally related to the overall population growth.⁹⁹ The organization’s founder, John D. Rockefeller III, explained: “[t]here was a brief discussion of the problem of ‘quality.’ It was felt that this was part of the background of the questions to which the committee devoted its time. Modern civilization has reduced natural selection, saving more ‘weak’ lives and allowing them to reproduce.”¹⁰⁰ Among other goals, Council members agreed to pursue research in both the qualitative and quantitative aspects of population in the United States.¹⁰¹

Recognizing the connection between eugenic goals and issues of population control was politically significant for the Council. Although founded largely by eugenicists, the organization was openly identified only with population control. The reasons for this were straightforward. Without paying the same significant political costs, the Council could accomplish eugenic goals by promoting legal reforms designed to limit population.

Between 1952 and 1960, members of the Council realized that they would also need to change the structure and image of their pro-eugenic organization. Those in the organization who considered themselves to be scientists or social scientists, like Davis and Osborn, were particularly sensitive to frequent comments that eugenicists had no expertise and that eugenics was not a valid science.¹⁰² During and after World War II, critics of eugenic legal reforms increasingly argued that, like the Nazis in Germany, American eugenicists were politically motivated and interested only in pseudosciences that would support their own biases.¹⁰³ Following the publication of a study overseen by the American Neurological Association in 1936, a growing number of critics asserted that there was no scientific evidence that compulsory sterilization laws had a eugenic effect.¹⁰⁴ Taking up an argument from the published report, critics also questioned the

⁹⁸ See generally *Id.*

⁹⁹ *Id.* at 496, 501.

¹⁰⁰ See Rockefeller, *supra* note 95, at 496.

¹⁰¹ *Id.* at 501.

¹⁰² See, e.g., Frank Notestein, *Frederick Osborn: Demography's Statesman on His Eightieth Spring*, 35 POPULATION INDEX 367, 367-371 (1969) (Notestein and Osborn both frequently referred to themselves and to one another as scientists or demographers).

¹⁰³ See, e.g., *A Policy on Population?*, L.A. TIMES, Aug. 11, 1951, at B4.

¹⁰⁴ ABRAHAM MYERSON ET AL., *EUGENICAL STERILIZATION: A REORIENTATION OF THE PROBLEM* (Macmillan 1936).

validity of the very categories used in various sterilization statutes.¹⁰⁵ For some, the necessary conclusion appeared to be that American eugenics, like Nazi eugenics, was the product of ideology and political compromise rather than scientific research.¹⁰⁶

In response, the leaders of the Council decided that, for a period of several years, the organization would refrain from political lobbying and concentrate instead on funding research.¹⁰⁷ By selectively sponsoring and shaping research projects, the Council's leaders hoped to collect seemingly objective data that could later be shown to local administrators and lawmakers. In the early 1950s, leaders of the organization also decided to emphasize programs that appeared to have different focuses.¹⁰⁸ Arguably, some of these programs were genuinely unrelated to the Council's population quality program, especially those involving environmental preservation, world hunger, and alternative food and fuel sources.¹⁰⁹ In other cases, projects were population quality measures in everything but name, especially proposed "maternal health" initiatives that often focused on discouraging poor women from having more children.¹¹⁰ In either case, it was important to members of the Council that the organization appear to be politically neutral and involved in diverse scientific studies.

By the mid-1950s, several members of the Council also became convinced that the idea of eugenic reform needed to be reshaped.¹¹¹ Frederick Osborn, a prominent member of the Council, was especially interested in the damaged reputation of eugenic legal reform, because he served as the president of the American Eugenic Society in the same period.¹¹² In eugenic circles, Osborn had long considered himself a moderating influence, because he rejected the racist and racialist accounts of eugenic defects set forth by many eugenicists between 1910 and 1940.¹¹³ In the mid-1950s, the response that followed proposals to expand compulsory sterilization laws was instructive. Few critics of the law defended unwed mothers on welfare or rejected the idea that a deterrent was needed to

¹⁰⁵ *March of Science*, WASH. POST, Aug. 14, 1955, at E5.

¹⁰⁶ *Rap Outmoded Laws Aimed at Epileptics; Neurologists Demand Revisions*, CHI. TRIB., Dec. 10, 1954, at 12.

¹⁰⁷ For examples of the kind of research project the Council later funded, see, e.g., Victor Wilson, *Science Group Urges World Birth Control*, L.A. TIMES, Apr. 18, 1963, at 14; see also Jacques Nevard, *India Trying Loop to Reduce Births*, N.Y. TIMES, May 10, 1965, at 12; see also Peter Prugh, *Patching Up Families: Varied New Programs Aim to Curb Breakdown in Negro Home Life*, WALL ST. J., November 30, 1965, at 1.

¹⁰⁸ See Rockefeller, *supra* note 95 at 494-496 (describing early agenda of Population Council from founding conference).

¹⁰⁹ Many of these concerns were articulated by the organization's founding members as early as 1952. See Rockefeller, *supra* note 95, at 493.

¹¹⁰ For an example of a similar, but later program, see Jane Brody, *Population Group Offers Care Plan*, N.Y. TIMES, April 20, 1971, at 36.

¹¹¹ See GORDON, *supra* note 31, at 281-282 (evaluating involvement of eugenicists in nascent population control movement).

¹¹² See *id.*

¹¹³ See Notestein, *supra* note 102, at 369 (explaining Osborn's role as a moderate in eugenic circles).

prevent out-of-wedlock births.¹¹⁴ Most often, critics objected only to the fact that the sterilizations would be compulsory.¹¹⁵

In 1954, Osborn drew on this interest in voluntary sterilization in giving a new definition of eugenics. Osborn explained,

[t]he largest families should not be found as a characteristic of particular racial or social or economic groups but among all couples who give evidence of socially valuable qualities.... There can be no arbitrary decisions on who should or should not have children. The parents themselves must make that choice.¹¹⁶

Improving the quality of the population had been described as a separate but related goal. Later in the decade, several influential politicians expressed interest in measures to achieve international and domestic population control.¹¹⁷ At the same time, Council leaders became convinced that it would be difficult to rehabilitate openly eugenic programs or research studies.¹¹⁸ Efforts to study and propose ways to improve the quality of the population would have to be more closely connected than ever to the idea of population control.

The ground for doing so had been laid in the 1930s by demographers like Notestein and Osborn, who belonged to the eugenic legal reform coalition. Both Notestein and Osborn had played an important role in the study of so-called differential fertility.¹¹⁹ It had long been assumed that state governments developing compulsory sterilization laws wanted to know what measures had to be taken to ensure that more fit people than unfit people were having children. As a general matter, eugenicists believed that the unfit were more fertile than the fit.¹²⁰ As early as 1933, Osborn had posited that low intelligence was closely correlated with social class.¹²¹ He argued that the unfit tended to be poor, and the poor tended to have more children.¹²²

In the late 1950s, Osborn, Notestein, and other members of the Council revived the idea of differential fertility in order to repackage the Council's pro-

¹¹⁴ See Paul, *supra* note 63 at 90.

¹¹⁵ See *id.*

¹¹⁶ Frederick Osborn, *Population Problems and the American Eugenics Society*, SCI., May 1954, at 3A.

¹¹⁷ Ernest Gruening, a Senator from Alaska, was the most vocal supporter of population control efforts in the early 1960s. See *Letter by Eisenhower on Birth Control*, N.Y. TIMES, June 23, 1965, at 25. By the middle of the decade, however, population control politics had become less controversial and more prominent. See THE POLITICS OF ABORTION AND BIRTH CONTROL IN HISTORICAL PERSPECTIVE, 7-16 (Donald T. Critchlow ed., 2002).

¹¹⁸ Rockefeller and the other founding members carefully avoided the use of the term eugenic, or any rhetoric associated with it. See Rockefeller, *supra* note 95, at 496.

¹¹⁹ See, e.g., FRANK LORIMER AND FREDERICK OSBORN, DYNAMICS OF POPULATION: SOCIAL AND BIOLOGICAL SIGNIFICANCE OF CHANGING BIRTH RATES IN THE UNITED STATES (Macmillan 1934).

¹²⁰ See, e.g., Frederick Osborn, *Characteristics and Differential Fertility of American Population Groups*, 12 SOC. FORCES 1,4 (1933).

¹²¹ See *id.*

¹²² See *id.*

eugenic reforms.¹²³ If it was widely agreed that population control was desirable, Osborn argued, one had to check the growth of especially fertile people, and exceptionally fertile people tended to be “the socially inadequate—those families who are perennially on relief rolls, the constant problem of the social worker.”¹²⁴ Thus, if an overall reduction in world and domestic population growth inevitably improved the quality of population, those interested in eugenics could achieve the same goals by studying and campaigning for less controversial population control reforms.¹²⁵

However, the Population Council’s new focus on population control issues had a surprising consequence. As Council research emphasized ways to reduce rates of reproduction among “high fertility groups,” the Council’s research interests and policy proposals displayed a more overt racial bias. In the early 1960s, the Council began sponsoring research on ways to reduce growth rates in urban and rural African-American areas.¹²⁶ This new research focus reflected two ideas that were then becoming common among members of the Council. First, the new research suggested that it would be desirable to reduce the size of the African-American population. Second, the research focus demonstrated that a growing number of Council members believed that the “socially inadequate” were rarely white.

It may seem counterintuitive that some aspects of reproductive law and politics were more openly racist in the 1950s and 1960s than they had been before World War II. This is especially the case because a good deal of current scholarship on the eugenic legal reform movement of the earlier twentieth century justifiably emphasizes the anti-immigrant or racist character of the movement.¹²⁷ There is truth in this argument. Eugenic legal reformers sponsored successful race-based immigration quotas, anti-miscegenation laws, and sterilization programs for those in segregated hospitals.¹²⁸

However, for a variety of reasons, compulsory eugenic sterilization laws were not, for the most part, disproportionately applied to members of racial minorities before World War II. First, in southern states where racial prejudice was the strongest, non-white hospitals did not have the equipment or staff to perform a

¹²³ See, e.g., Osborn, *supra* note 115, at 3A.

¹²⁴ Frederick Osborn, *Qualitative Aspects of Population Control: Eugenics and Euthenics*, 25 L. & CONTEMP. PROBS. 406, 423 (1960).

¹²⁵ See *id.*

¹²⁶ See Research Proposal, “Problems of Bearing and Rearing Children in High-Fertility, Low-Income, Low Education American Families,” (1960) in The Rockefeller Archive, Rockefeller University, POPULATION COUNCIL PAPERS, Box 46, Folder 653.

¹²⁷ See, e.g., STEFAN KUHL, *THE NAZI CONNECTION: EUGENICS, AMERICAN RACISM, AND GERMAN NATIONAL SOCIALISM* (Oxford Univ. Press 2002); see also EDWIN BLACK, *WAR AGAINST THE WEAK: EUGENICS AND AMERICA’S CAMPAIGN TO CREATE A MASTER RACE* (Thunder’s Mouth Press 2003).

¹²⁸ See Albert Ernest Jenks, *The Legal Status of Negro-White Amalgamation in the United States*, 21 AM. J. OF SOC. 666 (1916); W. A. Plecker, *Shall We All Be Mullattoes?*, LITERARY DIG., March 27, 1925.

large number of sterilizations. For example, a study of North Carolina's compulsory eugenic sterilization law reported that such hospitals were poorly equipped and performed only a token number of sterilizations.¹²⁹ Moreover, the operations that were performed were mostly considered punitive rather than eugenic measures.¹³⁰

Second, in the North, sterilizations were still performed primarily on those in state institutions, regardless of race.¹³¹ It is true that some of the "conditions" that could justify a eugenic sterilization, including alcoholism and unwed motherhood, were likely to be associated with poverty.¹³² To the extent that race was correlated with poverty, members of racial minorities might have been exposed to compulsory sterilization more often than were Caucasians.

Nonetheless, there is evidence that members of racial minorities were not disproportionately subjected to sterilization in the North. This was the case for several reasons. First, many prominent eugenicists were concerned that sterilization laws would be considered unscientific if the laws were openly racist.¹³³ Additionally, African-Americans and Hispanics were sometimes less likely to be placed in mental institutions.¹³⁴

In the later 1950s, as evolving eugenic ideology focused on those who actually had more children, groups like the Council increasingly targeted members of racial minorities. The new eugenic agenda required the appearance of more rigorous scientific study and respect for reproductive choice, but that agenda also produced a more overtly racist set of studies and proposals.

This shift becomes apparent from a study of the work of Donald Bogue that was sponsored and shaped by the leaders of the Council. A member of the University of Chicago's Population Research and Training Center, Bogue began to receive most of his funding from the Council after 1960.¹³⁵ The definition of "high fertility" groups given by Bogue in a request for grant funding was largely based on race: Bogue listed African-Americans, Puerto-Ricans, Native Americans and white immigrants as groups with high fertility rates.¹³⁶ Bogue argued that members of these groups continued to make wrong choices with respect to family planning because they were incompetent, unmotivated, or influenced by their own or their family's culture.¹³⁷ What was needed was a program that used all measures short

¹²⁹ WOODSIDE, *supra* note 1, at 29, 33.

¹³⁰ *Id.* at 32.

¹³¹ *See Killis Wisconsin Bill to Sterilize Insane*, N.Y. TIMES, Jun. 28, 1925, at 3 (Wisconsin governor vetoing bill because sterilization applied only to those in institutions).

¹³² *See, e.g.,* POPENOE, *supra* note 52, at 268.

¹³³ *See, e.g., The Scientist Speaks to Us*, N.Y. TIMES, Feb. 11, 1912, at BR72.

¹³⁴ *See, e.g.,* WOODSIDE, *supra* note 1, at 38.

¹³⁵ *See* Research Proposal, *supra* note 126 (Bogue's 1960 proposal reflects the tone and strategies of several earlier proposals).

¹³⁶ *See id.* at 1.

¹³⁷ *Id.* at 2.

of force in order to assure that members of high fertility groups made the right choices.¹³⁸

Nonetheless, it is a mistake to think that Bogue and his sponsors were uniformly uninterested in the lives of the poor or non-white people being studied. Indeed, Bogue worked throughout the 1960s on projects designed to study and prevent poverty.¹³⁹ Nonetheless, Bogue stated that the people he studied were culturally or genetically dysfunctional and incompetent to make their own reproductive choices.¹⁴⁰

Similar beliefs colored the research and legal reforms outlined by Bogue for the Council between 1960 and 1968. Beginning with his pilot program in poor, African-American areas of Chicago, the Council sponsored research on how to get the contraceptively incompetent to make the choice to have fewer children. A number of strategies were adopted to increase the probability that the right choices would be made. Bogue's assistants sent targeted mailings to people living in housing projects and advertised in what Bogue called "ethnic newspapers," like the *Chicago Defender*.¹⁴¹ Frequently, he used volunteers who appeared to be objective or even friendly to dispense advice. African-American volunteers were instructed to befriend people in the neighborhoods studied before advising them to stop having children.¹⁴² Those with medical training were supposed to characterize their recommendations as objective medical advice rather than as propaganda put out by the Council.¹⁴³

By 1963, Bogue had better articulated his research objectives for the Council. First, his assistants developed a manual that could be used to get any person in any region to make the "right" reproductive choice.¹⁴⁴ Second, Bogue's group collected data on "Negro" fertility and on general correlations between race, class, and fertility, so that the Population Council would have more concrete findings to show potential supporters in the government.¹⁴⁵

Between 1963 and 1966, the Executive Board of the Council began to agree with Bogue that a reduction in the size of high fertility groups could be achieved only through formal legal reform and government financial support and a

¹³⁸ See *id.*

¹³⁹ See Minutes of a Meeting of the Rockefeller Council Executive Board (May 9, 1966) in The Rockefeller Archive, Rockefeller University, POPULATION COUNCIL PAPERS, Box 56, Folder 903.

¹⁴⁰ See *id.* See also, e.g., *Birth Control Facts Urged for Negroes*, CHI. TRIB., Apr. 27, 1962, at A2..

¹⁴¹ Research Proposal, *Problems of Bearing and Rearing Children in High-Fertility, Low-Income American Families*, *25 (1960) in The Rockefeller Archive, Rockefeller University, POPULATION COUNCIL PAPERS, Box 46, Folder 653. See also *Chicago Fertility Control Experiments, Preliminary Findings*, *4 (May 23, 1963) in The Rockefeller Archive, Rockefeller University, POPULATION COUNCIL PAPERS, Box 56, Folder 903.

¹⁴² See Research Proposal, *supra* note 126, at 25.

¹⁴³ See, e.g., Research Proposal, *supra* note 126, at 26-27.

¹⁴⁴ See Research Proposal, *2 (Nov. 19, 1962) in The Rockefeller Archive, Rockefeller University, POPULATION COUNCIL PAPERS, Box 56, Folder 903.

¹⁴⁵ See Research Proposal, *supra* note 126, at *1, *7-8.

redefinition of reproductive choice.¹⁴⁶ By 1966, Bogue had become deeply critical of the existing strategies of researchers financed by the Ford Foundation and the Milbank Fund.¹⁴⁷ Instead, Bogue argued, a more “large-scale effort” was needed, which would require “a great deal of technical assistance from sponsoring agencies” in government.¹⁴⁸

By 1966, many members of the Executive Board of the Council had been persuaded by Bogue’s arguments. A number of proposals were considered in that year to maximize governmental funding and involvement at both the state and federal level, including grants to welfare and health departments to start contraception programs among high fertility groups, to create federal agencies to fund research on contraceptive incompetence, and to disseminate pamphlets to the poor on the benefits of contraception.¹⁴⁹

Through working with Bogue and similar researchers, the Council developed an effective new legal strategy to achieve improvements in the quality of the population.¹⁵⁰ By the late 1960s, none of the Council’s proposals was labeled eugenic or invoked the use of governmental coercion that had been the hallmark of earlier eugenic law reforms.¹⁵¹ Indeed, the Council’s new strategy required the organization’s activists to avoid all overt political lobbying before research on a particular subject had been carried out.¹⁵²

It would be a mistake, however, to think that the leaders of the Council were no longer interested in legal reform. Instead, by collecting seemingly legitimate academic research results and using private funding, the leaders of the Council hoped to show governmental agencies and leaders the benefits of enacting the measures supported by the Council.

Many of the benefits emphasized by members of the Council were thought to be related to population control, including an improvement in the quality of the population if the overall rate of growth were reduced.¹⁵³ However, because of the organization’s new emphasis on reproductive choice, the leaders of the Council wanted to avoid any overt reference to quality population or eugenic reform. Research sponsored by the Council bolstered the theory that the quality of the population would necessarily be improved if population growth were checked. This was the case, researchers argued, because the most socially inadequate people often had the most children. In the eyes of some leaders of the Council, a population control reform would necessarily have eugenic benefits, and the Council

¹⁴⁶ See Minutes, *supra* note 139, at 1-3.

¹⁴⁷ See *id.* at 1.

¹⁴⁸ See *id.* at 2.

¹⁴⁹ See *id.* at 1.

¹⁵⁰ See Rockefeller, *supra* note 95, at 495.

¹⁵¹ See Minutes, *supra* note 139, at 1-3.

¹⁵² See *id.*

¹⁵³ See Rockefeller, *supra* note 95, at 495.

would profit from invoking reproductive choice rather than the need for quality population or eugenic reform.

After focusing on what the Council now called population control, the organization's members consistently stressed that they respected an individual's reproductive choices. However, what it meant to respect reproductive choice was itself becoming a subject of debate. Those volunteering in projects for the Council were to ensure that members of high fertility groups made the right choices. To accomplish this task, volunteers were told to approach women who had recently delivered children, because those women were then were physically weak and emotionally vulnerable.¹⁵⁴ Similarly, Council volunteers were told to assume roles that would make their advice more influential.¹⁵⁵ Increasingly, these activities reflected a belief that particular individuals were intrinsically unable to make the right choice for themselves.

In several years' worth of research sponsored by the Council, a definition of contraceptive incompetence emerged that was connected to both race and class. Thus, in the later 1960s, as the Council began openly to lobby for its preferred reforms, a new debate had emerged about the future of American reproductive law. Instead of questioning whether individual choice should be an important factor in the debate, the discussion now centered on what the meaning of choice should be.

B. Human Betterment and Selling Sterilization

In many ways, the transformation of the Council into an organization purportedly interested only in population control was easy: as early as the 1930s, Osborn and Notestein had written about the eugenic and humanitarian problems that would follow from unchecked population growth.¹⁵⁶ The Human Betterment Association for Voluntary Sterilization was a different kind of organization.¹⁵⁷ Formed in the 1920s by California eugenicists Paul Popenoe and E. S. Gosney, Human Betterment was founded primarily to promote compulsory eugenic sterilization laws.¹⁵⁸ The leaders of Human Betterment were particularly committed to the use of compulsory sterilization laws as a eugenic solution.¹⁵⁹ After World War II, members of the public were suspicious of the use of such

¹⁵⁴ Research Proposal, *supra* note 126, at 26-27.

¹⁵⁵ *See, e.g., id.*

¹⁵⁶ *See* text accompanying *supra* notes 119-120.

¹⁵⁷ *See, e.g.,* Fred Hogue, Social Eugenics, L. A. TIMES, Jan. 5, 1936, at 31 (referring to organization as Human Betterment Foundation)(The Human Betterment Association for Voluntary Sterilization, as it was later called, had a dizzying array of names in the years between 1940 and 1966); *see also* Fred Hogue, Social Eugenics, L.A. TIMES, Jul. 16, 1939, at II9 (referring to organization as Human Betterment Association). For ease of understanding, this article will refer to the organization as Human Betterment.

¹⁵⁸ *See generally,* Hogue, Social Eugenics (1939) *supra* note 157.

¹⁵⁹ *See, e.g.,* Human Sterilization, Human Betterment Foundation, Eugenics Archive, *available at* <http://www.eugenicsarchive.org/html/eugenics/static/images/1753.html>.

sterilization laws.¹⁶⁰ Human Betterment's commitment to the use of coercion and to sterilization in particular put the organization's continuing political viability in doubt.

The reception of proposals to expand compulsory sterilization laws made apparent the political obstacles Human Betterment's leaders faced in the 1950s.¹⁶¹ Human Betterment activists remained convinced that only sterilization would improve the quality of the population, because sterilization required less day-to-day attention on the part of the individual and was a more permanent contraceptive solution.¹⁶² A majority of the members of Human Betterment also believed that existing sterilization laws were too narrow: there were socially inadequate persons who they believed should be sterilized and who did not qualify as insane or feebleminded under the new, narrow interpretations of eugenic sterilization laws.¹⁶³

The fate of Human Betterment between 1945 and 1955 might seem to suggest that World War II did mark the effective end of eugenic legal reform. In that period, the organization cycled through a series of names and images, all the while struggling to find adequate funding.¹⁶⁴ By 1955, the leadership of Human Betterment had concluded that eugenic legal reform was no longer a realistic solution. Instead, members sought to fund so-called voluntary sterilizations for people who were not covered by existing sterilization laws but who were still considered inadequate.¹⁶⁵

However, the evolution of Human Betterment tells a story about the relationship between eugenics and law after World War II that differs from the traditional account. Without ever changing their goals or preferred methods, the leaders of Human Betterment effectively campaigned for the removal of state and federal bans on the use of family planning aid for voluntary sterilization. Instead of changing the substance of their agenda, members of Human Betterment changed only their rhetoric. The organization's leaders concluded that eugenic sterilization could still be realistically supported so long as the organization advocated reproductive choice.

Human Betterment's emphasis on choice grew out of a long correspondence between its leaders and Hugh Moore, the founder of the Dixie Cup Company. A

¹⁶⁰ See text accompanying *supra* notes 28-30.

¹⁶¹ See *id.*

¹⁶² See, e.g., Clinic Defended on Sterilization, N.Y. TIMES, Oct. 7, 1962, at A1. Ruth Proskauer Smith, the chairman of the organization's executive board, explained, "for the poor and uneducated, . . . surgical birth control is the only answer." *Id.*

¹⁶³ See text accompanying *supra* notes 60-61.

¹⁶⁴ See, e.g., Letter from John Cox, Treasurer of Human Betterment Association, to Hugh Moore (Jan. 3, 1955) in THE HUGH MOORE PAPERS, MC 313, Box 15, Folder 6, Seeley Mudd Manuscript Library, Princeton University; see also Letter from Hugh Moore to Ruth Proskauer Smith (Apr. 30, 1959) in THE HUGH MOORE PAPERS, MC 313, Box 15, Folder 6, Seeley Mudd Manuscript Library, Princeton University.

¹⁶⁵ See Letter from Ruth Proskauer Smith to Hugh Moore (Apr. 4, 1956) in THE HUGH MOORE PAPERS, MC 313, Box 15, Folder 6, Seeley Mudd Manuscript Library, Princeton University.

longtime donor to the organization, Moore believed that Human Betterment could not improve the quality of the population solely by funding private sterilization of the socially inadequate.¹⁶⁶ In 1961, Moore wrote to Ruth Proskauer Smith, the executive director of Human Betterment, and suggested a related change of course.¹⁶⁷ Moore recommended that less money be used for actual sterilizations, so that more could be spent to rehabilitate the image of sterilization.¹⁶⁸ If this were done, Moore asserted, it would be easier to convince people to be sterilized and to persuade state and federal agencies to support voluntary sterilization.¹⁶⁹ It was hoped that sterilization might be associated not with Nazism but with human rights and personal choice.

In 1961, the controversy surrounding a new Virginia voluntary sterilization law that Human Betterment had advocated made apparent the need to change the image of sterilization as well as its legal status.¹⁷⁰ As a primary goal, the leaders of Human Betterment had long campaigned for the introduction of statutory protections for doctors performing voluntary sterilizations.¹⁷¹ Although only three states explicitly provided for penalties for physicians and patients involved in voluntary sterilizations, physicians in a majority of states still expressed concern about potential common law or statutory liability.¹⁷² In response, a number of hospitals restricted the availability of these surgeries.¹⁷³ In order to increase the number of voluntary sterilizations, leaders of Human Betterment believed they would first have to clarify the legal status of the procedure.¹⁷⁴

The response to the Fauquier County Project, as Human Betterment activists termed the Virginia statute, made clear that no more states would adopt similar laws unless the public was first convinced that the sterilizations were truly voluntary. At first, the Fauquier County Project appeared to be a victory for Human Betterment. In March 1961, the Virginia state legislature passed a law formally authorizing a voluntary sterilization program for “medically indigent” women.¹⁷⁵ Several legislators who favored the bill professed their belief that the bill would function like a bill that had died in committee, which provided for the

¹⁶⁶ *See id.*

¹⁶⁷ Letter from Hugh Moore to Ruth Proskauer Smith (Dec. 13, 1961) in THE HUGH MOORE PAPERS, MC 313, Box 15, Folder 6, Seeley Mudd Manuscript Library, Princeton University.

¹⁶⁸ *See id.*

¹⁶⁹ *See id.*

¹⁷⁰ Charles Windle, *Factors in the Passage of Sterilization Legislation: The Case of Virginia*, 29 PUB. OP. Q. 306, 306-314 (1965) (providing a contemporary analysis of the reasoning of legislators who introduced Virginia’s voluntary sterilization law).

¹⁷¹ *See Clinic Defended*, *supra* note 162, at A1.

¹⁷² *See* Linda Champlin and Mark Winslow, *Elective Sterilization*, 113 U.P.A.L.REV. 415, 425 (1965) (A contemporary study indicated that doctors would most likely be found liable under either a common-law or statutory theory of assault and battery or mayhem).

¹⁷³ *Id.* at 419.

¹⁷⁴ *See id.*

¹⁷⁵ *See* Windle, *supra* note 170, at 306-307.

compulsory sterilization of unwed mothers: it would reduce the number of children born to women on relief.¹⁷⁶

Those trained by Human Betterment were instructed to ensure that indigent patients made the right reproductive choice. First, Human Betterment volunteers were advised to approach women immediately after they had delivered children, a time when the women were thought most likely to agree to sterilization.¹⁷⁷ In explaining the procedure, volunteers were similarly advised to emphasize the advantages of the procedure and to explain its effects in abstract, simple language.¹⁷⁸ In the short term, this strategy seemed to work.¹⁷⁹

By 1962, however, the drawbacks of the procedure were apparent. Hospital officials, like leaders of Human Betterment, were accused of being racist and of maintaining ties to the eugenic legal reform movement of the earlier twentieth century.¹⁸⁰ Defending her organization in the face of attacks by Catholic and African-American leaders, Smith argued that the program benefited “the poor and uneducated... for whom surgical birth control is the only answer.”¹⁸¹ Privately, however, other leaders of Human Betterment recognized that state governments, health departments, welfare agencies, and hospitals would not expand the availability of sterilization unless the procedure was first made less controversial.¹⁸²

In the spring of 1962, when Moore and Smith began working with a public relations agency to rehabilitate the idea of sterilization laws, both Moore and Smith were convinced that reproductive choice would have to be emphasized.¹⁸³ Their goal was straightforward: the leaders Human Betterment could use sterilization as a eugenic tool only if they changed the political meaning of sterilization. After working through several drafts with the agency, Smith crafted a statement of purpose emphasizing human rights, individual choice, and humanitarian concerns raised by the rate of world population growth.¹⁸⁴ Even Moore was surprised by the shift in tone seen in the memorandum. He wrote, “[t]he only question I have on first reading is that HBA is unalterably opposed to compulsory sterilization. I thought we favored the sterilization of imbeciles and the like in public institutions.”¹⁸⁵

¹⁷⁶ See *id.* at 313, 318.

¹⁷⁷ See Gerald Grant, *Birth Control Clinic “Amazed” at Sterilization*, WASH. POST, Sep. 9, 1962, at B1.

¹⁷⁸ See *Virginians Calm on Sterilization*, N.Y. TIMES, Sep. 14, 1962, at 20.

¹⁷⁹ See *Clinic Defended*, *supra* note 162, at A1.

¹⁸⁰ See *id.*; see also Nate Haseltine, *Only the Wealthy or Ill Are Sterilized Here*, WASH. POST, Sep. 12, 1962, at A1.

¹⁸¹ See *Clinic Defended*, *supra* note 162, at A1.

¹⁸² See, e.g., Hugh Moore to Ruth Proskauer Smith, *supra* note 167.

¹⁸³ Letter from Hugh Moore to Ruth Proskauer Smith (Mar. 14, 1962) in THE HUGH MOORE PAPERS, MC 313, Box 15, Folder 6, Seeley Mudd Manuscript Library, Princeton University.

¹⁸⁴ See Letter from Hugh Moore to Ruth Proskauer Smith (Oct. 19, 1962) in THE HUGH MOORE PAPERS, MC 313, Box 15, Folder 6, Seeley Mudd Manuscript Library, Princeton University.

¹⁸⁵ See *id.*

Moore soon came to believe that the organization could more effectively improve the quality of the population if members praised voluntary procedures and individual choice.¹⁸⁶ In accepting the position of President of Human Betterment, Moore explained, “I had become convinced... that sterilization is one of the most likely means of saving civilization and that the public should be made aware of it—and understand what it is. As a businessman, I have spent my life selling ideas, and by that means, products.”¹⁸⁷ What was needed, Moore explained, was a better effort in “selling sterilization.”¹⁸⁸

Between 1961 and 1966, the organization worked to “sell sterilization” by emphasizing that it was voluntarily chosen. Whenever the organization received a substantial grant, Human Betterment created a “plan” whereby indigent people in a particular geographic area would be encouraged to “choose” sterilization.¹⁸⁹ The rest of the organization’s funding went to publicity and “education” programs, including conferences on voluntary sterilization as a human right or as a matter of population control.¹⁹⁰

Since 1963, Moore had believed that concern about world population control would help Human Betterment to promote sterilization as much as would an emphasis on reproductive choice.¹⁹¹ Invoking the threat of world population growth, Human Betterment pamphlets produced in the mid-1960s argued that sterilization helped the poor by improving their economic position.¹⁹² Sterilization would not only reduce the number of undesirable persons, but would also help the poor by reducing overall population growth.¹⁹³ In practice, Human Betterment conducted no research and provided no funding for population control measures. Although Human Betterment pamphlets consistently mentioned an International Advisory Committee on Population Control, that committee did not meet once or

¹⁸⁶ Hugh Moore, Chairman, Human Betterment Ass’n for Voluntary Sterilization, Speech Made in Acceptance of Position as Chairman (November 20, 1964) in THE HUGH MOORE PAPERS, MC 313, Box 15, Folder 6, Seeley Mudd Manuscript Library, Princeton University.

¹⁸⁷ *See id.*

¹⁸⁸ *See id.*

¹⁸⁹ *See, e.g.*, Letter from Ruth Proskauer Smith to Jesse Hartman (July 15, 1964) in THE HUGH MOORE PAPERS, MC 313, Box 15, Folder 6, Seeley Mudd Manuscript Library, Princeton University (establishing a new Hartman Fund to provide sterilizations for the indigent in Palm Beach and Broward County and confirming donation for a similar fund for work in Kentucky); Letter from John Rague, Treasurer of Human Betterment, to Hugh Moore (June 5, 1965) in THE HUGH MOORE PAPERS, MC 313, Box 15, Folder 7, Seeley Mudd Manuscript Library, Princeton University (announcing the establishment of a fund named after donor).

¹⁹⁰ *See* Hugh Moore, Fundraising Statement (December 1965) in THE HUGH MOORE PAPERS, MC 313, Box 15, Folder 6, Seeley Mudd Manuscript Library, Princeton University.

¹⁹¹ *See, e.g.*, Letter from Hugh Moore to Admiral Lewis Strauss (Oct. 23, 1963) in THE HUGH MOORE PAPERS, MC 313, Box 15, Folder 6, Seeley Mudd Library, Princeton University (“The present rapidly growing interest in the population explosion is gaining many converts for the idea of sterilization.”).

¹⁹² *See, e.g., id.*

¹⁹³ *See id.*

receive any funding before 1967.¹⁹⁴ Human Betterment's leaders remained committed to using sterilization to improve the quality of the population.¹⁹⁵ The idea of population control, like the idea of reproductive choice, was simply an effective tool in doing so.

By 1967, the organization highlighted issues of reproductive choice in its ultimately successful campaign to remove a ban on the use of federal OEO family planning funds for voluntary sterilizations.¹⁹⁶ A variety of public health and welfare officials joined leaders of the organization in calling for the lifting of the OEO ban.¹⁹⁷

The strategy of emphasizing reproductive choice had been effective: by 1971, the OEO removed the ban on the use of federal funds for voluntary sterilizations.¹⁹⁸ Although Human Betterment had changed its message in order to accomplish this task, the organization had not fundamentally changed its goals. Consider the organization's fundraising letter of 1966: "[o]ver-crowded cities, polluted air and water, countless unwanted and suffering children, skyrocketing taxes for welfare! Half of the babies now born from some cities are from indigent families on relief. Need we say more?"¹⁹⁹

Well into the 1960s, Human Betterment remained committed to using reform to reduce the number of "babies [...] born [...] to] indigent families on relief."²⁰⁰ Leaders of the organization were happy to invoke the idea of reproductive choice in order to achieve their goals, especially when members of the organization could define choice for themselves.

III. NORTH CAROLINA AND THE TRANSFORMATION OF COMPULSORY STERILIZATION LEGISLATION

In 1933, North Carolina became one of the last states to adopt a eugenic sterilization statute.²⁰¹ Before the decision of *Buck v. Bell* in 1927, there was considerable uncertainty about the constitutionality of existing sterilization laws,²⁰²

¹⁹⁴ Letter from Hugh Moore to John Rague (Oct. 4, 1966) in THE HUGH MOORE PAPERS, MC 313, Box 15, Folder 6, Seeley Mudd Library, Princeton University ("The United States Association for Voluntary Sterilization has had a letterhead International Advisory Committee for some years, which has never met."); see also Letter from Hugh Moore to John Rague, et al. (Apr. 24, 1967) in THE HUGH MOORE PAPERS, MC 313, Box 15, Folder 6, Seeley Mudd Library, Princeton University (complaining that committee had still not met).

¹⁹⁵ See, e.g., Letter from Hugh Moore to Admiral Lewis Strauss, *supra* note 191 (Moore repeatedly wrote that population control politics would be an effective tool in promoting sterilization).

¹⁹⁶ See, e.g., text accompanying *infra* notes 198-199.

¹⁹⁷ See *id.*

¹⁹⁸ See Louis Kohlmeier, *In '72, U.S. Financed 100,000 Sterilizations*, CHI. TRIB., December 2, 1973, at A12 (The OEO itself was estimated to have funded as many as 100,000 sterilizations in 1972).

¹⁹⁹ Fundraising Letter (November 1966) in THE HUGH MOORE PAPERS, MC 313, Box 15, Folder 7, Seeley Mudd Manuscript Library, Princeton University.

²⁰⁰ See Kohlmeier, *supra* note 198.

²⁰¹ Woodside, *supra* note 1, at 20. See also Eugenics Board of North Carolina Manual (1960).

²⁰² See LANDMAN, *supra* note 22, at 49.

but the decision in *Buck* provided a template for states, including North Carolina, that wanted to enact sterilization laws of their own.²⁰³

Over the next fifteen years, however, North Carolina emerged as one of the states that most vigorously applied its sterilization policy. A 1957 study of eugenic sterilization law that was published in the *Georgetown Law Review* found that only four states consistently sterilized more than one hundred people a year: California, Georgia, Virginia, and North Carolina.²⁰⁴ According to reports published by North Carolina's own Eugenics Board, the number of sterilizations per year between 1947 and 1957 was between four hundred and seven hundred.²⁰⁵ The biennial report from 1950-1952 noted a record high of 704 sterilizations, up from the prior record of 468 in the period between 1948-1950.²⁰⁶ If an identification with Nazism spelled an end for American sterilization laws, it did not do so immediately, at least not in North Carolina.

An association with Nazism did mean that North Carolina's law had to change. After World War II, North Carolina restricted the application of its compulsory law, limiting it strictly to the mentally ill and clearly handicapped.²⁰⁷ For the first time, the state published a manual intending to ensure certain procedural protections. No longer could sterilizations occur without the consent of a family member or, in the case of mental retardation, without the patient's consent to an intelligence test.²⁰⁸

These changes reflected the influence of World War II. Nazism was associated with coercion and broad laws applied to members of the general population.²⁰⁹ Physicians and eugenics boards found to have gone beyond sterilizing the clearly mentally ill or handicapped had sometimes been subject to devastating lawsuits.²¹⁰ These lawsuits also showed that a sterilization law that appeared too broad or compulsory would draw considerable criticism.

However, World War II had not changed the motivations behind North Carolina's compulsory sterilization law. Indeed, North Carolina did not repeal its compulsory sterilization law until 1975.²¹¹ Strangely, however, it was pro-eugenic activists who opposed a broader use of compulsory sterilization. Woodside and other supporters of eugenic policies in North Carolina argued instead that choice and consent were necessary to the survival of eugenics in law.²¹² If force were

²⁰³ See WOODSIDE, *supra* note 1, at 20.

²⁰⁴ See O'Hara, *supra* note 2, at 35.

²⁰⁵ See BIENNIAL REP. OF THE EUGENICS BOARD OF NORTH CAROLINA, 1968, SUMMARY STATISTICS (1968).

²⁰⁶ BIENNIAL REPORT OF THE EUGENICS BOARD OF NORTH CAROLINA, 1950-1952 14 (1952).

²⁰⁷ EUGENICS BOARD OF NORTH CAROLINA MANUAL § 50 AT 2, 5 (1960).

²⁰⁸ *Id.* at § 80.

²⁰⁹ See WOODSIDE, *supra* note 1, at 23-24.

²¹⁰ See, e.g. *Heiress Sues Her Mother*, L.A. TIMES, Jan. 7, 1936, at 12; see also Joanna Schoen, *Between Choice and Coercion: Women and the Politics of Sterilization in North Carolina, 1929-1975*, 13 J. WOMEN'S HIST. 132, 132 (2001).

²¹¹ See Schoen, *supra* note 210, at 132.

²¹² See WOODSIDE, *supra* note 1, at 71.

used against unwed mothers, Woodside predicted that “a great deal of hostility might be stirred up which could jeopardize the whole existence of the law.”²¹³ In contrast, a law that appeared voluntary would rarely be scrutinized and could be used more broadly. Woodside argued that “persuasion and argument are legitimately used [to elicit consent for a sterilization], but compulsion never.”²¹⁴ This was because only a voluntary law could win popular support in the long term. She predicted that a voluntary law could even “eliminate the organized opposition of religious bodies.”²¹⁵ If officials could convince the public that North Carolina’s sterilization law was voluntary, Woodside suggested, they would have a freer hand in coercing unwed mothers into being sterilized.²¹⁶

It seems paradoxical for a compulsory sterilization statute to be administered as a voluntary law. Woodside suggested two interpretations of how such a statute could function.²¹⁷ Under one interpretation, the law would be compulsory only as a formal legal matter, but would in fact be used by doctors willing to help women otherwise unable to obtain birth control.²¹⁸ Under the other interpretation, the doctors and social workers administering the law would claim that they were sterilizing only those who wanted to be sterilized, because by making such a claim, the people who administered sterilization statutes could avoid the public scrutiny and procedural safeguards associated with compulsory sterilization laws. Between 1950 and 1968, the North Carolina statute was applied to women who were less severely mentally ill, and the argument was made that the women who were sterilized consented to the operations. The critical question is whether these sterilizations were voluntary in fact or only in appearance. Answering this question involves considering the ways in which doctors secured the consent of individuals who did not understand or request sterilization.

At the outset, it is important to note that many sterilization decisions were made by doctors and social workers ignoring the formal procedures required by the Eugenics Board. Between 1945 and 1950, there had already been 200 sterilizations in a single North Carolina hospital, not all of which were authorized by the Eugenics Board.²¹⁹ In one county, 23 of 59 sterilizations performed in one year were unauthorized.²²⁰ Second, by 1950, these doctors had begun to claim that the sterilizations they administered were chosen voluntarily by the nominally feebleminded women they approached.²²¹ The transfer of authority to doctors and social workers changed the administration of North Carolina’s law, especially because doctors could choose to perform sterilizations without outside attention

²¹³ *See id.*

²¹⁴ *Id.*

²¹⁵ *Id.* at 24.

²¹⁶ *See id.*

²¹⁷ *Id.* at 58, 103.

²¹⁸ *See* Schoen, *supra* note 210, at 134.

²¹⁹ WOODSIDE, *supra* note 1, at 49.

²²⁰ *Id.*

²²¹ *Id.*

and could thus afford to pay less attention to the formal rules set forth by the Eugenics Board. As doctors and social workers took greater responsibility for the administration of sterilization statutes, the enforcement of North Carolina's law became more informal and was more likely in violation of procedural protections specified in state regulations.

Two trends confirm that this was the case. First, a much larger proportion of sterilizations took place outside state institutions and involved women too healthy to be confined in those institutions.²²² Because these sterilizations were argued to be voluntary, administrators in the state could sterilize people not sick enough to be institutionalized—those often characterized as feeble-minded—at a greater rate.²²³ In 1954-56, for example, 219 of the women sterilized were already confined in state institutions, and only 175 of the women sterilized were outside of state institutions.²²⁴ By 1962-64, as many as 378 women were sterilized outside state institutions, with only 112 women in state institutions being sterilized.²²⁵ This trend signaled two things. First, it confirmed that sterilization candidates did not need to be clearly mentally ill. Second, the trend suggests that sterilizations were more often administered informally and outside the institutions in which operations were meant to take place.

A second trend makes clear that mental illness was no longer the primary reason a woman was singled out for sterilization. Of the people sterilized between 1950 and 1968, a growing proportion were women deemed to be feeble-minded. In 1954-56, 111 sterilized women had been diagnosed as mentally diseased and 392 as feeble-minded.²²⁶ By 1966-68, when as many as 250 sterilized women were still characterized as feeble-minded, only sixteen were diagnosed with a mental illness.²²⁷ Even in the 1920s, many eugenicists acknowledged that feeble-mindedness was not a biological concept but rather a catchall term applied to behaviors seen to be antisocial or immoral.²²⁸ By the 1950s, the scientific validity of “feeble-mindedness” would have been even more in doubt.²²⁹ The feeble-minded women sterilized in North Carolina between 1950 and 1968 were less and less likely to be mentally ill or handicapped.

Instead, they were increasingly likely to be single women who were sexually active or who were feared to become so in the future.²³⁰ In 1954-1956, there were

²²² *See id.* at 15.

²²³ *See id.*

²²⁴ BIENNIAL REP. OF THE EUGENICS BOARD OF NORTH CAROLINA, 1954-1956, 13-15 (1956).

²²⁵ BIENNIAL REP. OF THE EUGENICS BOARD OF NORTH CAROLINA, 1962-1964, 13-15 (1964).

²²⁶ *See* BIENNIAL REP., 1968, *supra* note 205, at 12-15.

²²⁷ *See id.*

²²⁸ *See, e.g.,* POPENOE, *supra* note 52, at 323.

²²⁹ *See* Henry Nelson, *Genetic Experts Split on Controlled Breeding*, L.A. TIMES, Sep. 11, 1966, at A2 (Advances in genetics might not have cast the same doubt on eugenic thinking that it cast on the terminology of eugenic science).

²³⁰ BIENNIAL REP., 1968, *supra* note 205, at 12-15.

139 married sterilization patients in North Carolina and 364 unmarried patients.²³¹ By 1966-68, there were only 27 female married patients, and the number of unmarried female patients remained as high as 244.²³² Doctors could sterilize a disproportionate number of unmarried women who were not obviously handicapped or ill by claiming that the women themselves wanted to be sterilized.

It is worth asking whether these sterilizations were truly voluntary. There are three reasons to be skeptical. First, many advocates of sterilization as a birth control method argued that it was married women with large families and little money who frequently demanded birth control.²³³ Similarly, the voluntary sterilization program operating in Virginia publicized the fact that it primarily served married women.²³⁴ Yet in the period between 1950 and 1968, a smaller and smaller proportion of women sterilized in North Carolina were married.²³⁵

A second reason to be suspicious of claims that North Carolina's sterilization patients chose sterilization is the hostility directed towards unwed mothers. In fact, North Carolina tried several times to pass a criminal law prescribing sterilization as a punishment for all women who had had more than a certain number of children out of wedlock.²³⁶ Legislators supporting bills designed to punish unwed mothers argued that the bills showed "compassion for the persons who [were] unable to control their sexual desires."²³⁷

In addition, one must consider the racial prejudice openly expressed by some of the legislators and doctors who discussed so-called voluntary sterilization policy in the state. Before 1965, most hospitals were segregated and many black hospitals had neither the equipment nor the staff to perform a large number of operations.²³⁸ After *Brown v. Board of Education* and the passage of the Civil Rights Act of 1964, hospitals were gradually desegregated and there was an increase in the proportion of sterilizations administered to black women.²³⁹ These sterilizations reflected eugenic as well as racial concerns. Throughout the 1950s, politicians, sociologists, and psychiatrists argued that black women did not have the same morals as did other women.²⁴⁰

But why, if North Carolina's Eugenics Board provided more procedural protections in 1950 than it had before, were doctors more able to circumvent those

²³¹ See *id.*

²³² See *id.*

²³³ See *Clinic Offers Aid by Sterilization*, N.Y. TIMES, Sep. 9, 1962, at 60; see also Haseltine, *supra* note 180, at A1.

²³⁴ See *Clinic Offers Aid*, *supra* note 232, at 60.

²³⁵ See BIENNIAL REP., 1968, *supra* note 205, at 12-15.

²³⁶ See Harry Golden, *Dealing with Illegitimacy, Letters to the Times*, N.Y. TIMES, Aug. 21, 1961, at 22.

²³⁷ *Hearing Argues Sterilization*, WASH. POST, Apr. 2, 1959, at A21

²³⁸ See WOODSIDE, *supra* note 1, at 32-33.

²³⁹ See Kohlmeier, *supra* note 197 (Most notoriously, the only women subjected to government-funded involuntary sterilizations in the 1970s were African-American).

²⁴⁰ See SOLLINGER, *supra* note 33, at 95-105.

protections between 1950 and 1968? For the most part, it was because doctors claimed that these sterilizations were voluntarily chosen.

Woodside's study reveals some of the techniques used to elicit "consent" from women who did not or would not want to be sterilized. Many social workers believed that "immoral" women could not reliably make the "right" choice. Woodside agreed that "no great success would be expected from the introduction of birth control to the unintelligent and the socially irresponsible."²⁴¹

Under the North Carolina law, Woodside explained, women did not need to be fully informed about what sterilization meant. At the State Hospital at Raleigh, patients qualified as feeble-minded were not informed about the effect of sterilization, even though the "feeble-minded" included women who had "a history or likelihood of sexual misdemeanor in the community" who were thought otherwise to be capable of intelligent choice about sterilization.²⁴² Second, North Carolina officials accepted the "consent" of a family member even if a sterilization candidate herself objected.²⁴³ At Goldsboro, as at Raleigh, "patients were not considered to be intelligent [enough] to consent, and the permission of relatives was considered to be sufficient."²⁴⁴ But if a family objected and the candidate consented, the candidate was almost certainly considered competent to consent, even if she had been diagnosed as feeble-minded.²⁴⁵

Another technique involved tricks used to secure the consent of the candidate herself. At Morgantown Hospital, social workers proposed sterilization as close as possible to admission to the hospital, when relatives would be most distressed and likely to consent.²⁴⁶ At Samarcand, an institution for white juvenile delinquents, social workers pressured minors to consent, since family members of Samarcand girls often objected to sterilization.²⁴⁷ Other social workers pressured men to be sterilized. The men proposed instead that their wives be sterilized.²⁴⁸

These techniques reflected a new idea of choice. Although "voluntary" choice proved central to the survival of North Carolina's eugenic law, "voluntary" choices included those choices made for unwed mothers by other people or by women who had not been informed about what they had chosen. One North Carolina social worker summarized this view about "immoral" women and sterilization: "[y]ou can't expect them... to be any more sensible about this than about other things..."²⁴⁹ Those applying North Carolina's sterilization law often acted on similar views. As the image of compulsory sterilization law in North

²⁴¹ WOODSIDE, *supra* note 1, at 105.

²⁴² *Id.* at 27, 29.

²⁴³ *Id.* at 37, 71.

²⁴⁴ *Id.* at 33, 29.

²⁴⁵ *Id.*

²⁴⁶ WOODSIDE, *supra* note 1, at 30-31.

²⁴⁷ *Id.* at 37-38.

²⁴⁸ BIENNIAL REP. OF THE EUGENICS BOARD OF NORTH CAROLINA, 1948-1950 11 (1950).

²⁴⁹ WOODSIDE, *supra* note 1, at 106.

Carolina changed, pro-eugenic volunteers in the state also worked to redefine reproductive choice.

IV. CONCLUSION

Eugenic legal reformers had achieved great success by the 1930s. Eugenic laws used various means to weed out the physically, mentally, or morally defective. World War II heavily influenced the fate of eugenic law but did not eliminate eugenics from law altogether. An association with Nazism meant the decline and ultimate disappearance of compulsory sterilization laws, but not of all of the eugenic motivations behind those laws.

If anything, a number of factors made the moral element of eugenics seem more pressing. Calls for integration, the influence of the Cold War, a long-term increase in national prosperity, a short-term spike in the number of illegitimate births, and the number of white unwed mothers might have made moral concerns more central than they had been in prior decades. Many legislators still held beliefs that immoral parents inevitably had immoral children. In order to prevent immorality, one had to decrease the number of children born to immoral parents. This result could be accomplished by reducing the number of children born to unfit parents or by making immoral parents reform.

If the moral element of eugenics still influenced law, World War II required eugenic laws to take a different form. Nazism was too much associated with compulsory sterilization. Legislators considering compulsory sterilization for unwed mothers instead had to adopt a range of legal alternatives that better reflected the importance of reproductive choice.

Pro-eugenic organizations similarly had to adapt to the new political climate by distancing themselves from the openly political groups that dominated the eugenic legal reform movement of the earlier twentieth century. As importantly, the organizations had to reshape the very idea of eugenic reform. To a large extent, activists working for those organizations did so by invoking and redefining the idea of reproductive choice.

It is a mistake to believe that eugenics disappeared as an important legal influence. Eugenic rhetoric might have declined, but eugenic motivations and eugenic laws did not. What made these laws successful was the ability of lawmakers and organizations to repackage eugenic laws as something more palatable. The persistence of eugenics in American law shows how an ideology may be most effective when it is the most subtle. Eugenics proved to be a subtle legal ideology indeed, capable of disguising itself in many ways, even in the language of free choice.