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RECTIFYING A WRONG: AMERICAN EUGENICS—BENEFICIAL TO THE STATE, BUT DETRIMENTAL TO THE PEOPLE

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I. INTRODUCTION

> We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching[,] and devastating effects. In evil or reckless hands[,] it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his

> irreparable injury. He is forever deprived of a basic liberty.[1]

The eugenics movement, which marked one of the most unsettling times in American history, promoted the tenet that controlled breeding of humans was beneficial to the State.[2] However, actions taken by the State in pursuit of purported benefits have subsequently proven detrimental to the people.[3] In their attempts to obtain the illusive idea of a "fit" people, the State trampled upon the constitutional rights of its citizens.[4] Under the color of authority, the State enacted legislation that subjected citizens deemed "unfit" to segregation as well as involuntary sterilization.[5] In *City of Cleburne v. Cleburne Living Center, Inc.*, Justice Marshall commented that a horrendous injustice was committed against individuals who were involuntarily sterilized under what he described as a "regime of state-mandated segregation and degradation . . . that in its virulence and bigotry rivaled, and indeed paralleled, the worst excesses of Jim Crow."[6]

This paper will analyze the history of the eugenics movement and examine how actions sanctioned by both the state legislators and the United States Supreme Court can be remedied, if they subsequently prove detrimental to the people. The traditional approach to resolving legal disputes offers little hope for granting remedies for past injustices. Therefore, the fundamental question addressed here is this: How might the living victims whose reproductive rights were severed in the name of public health and safety be made whole?

Compelled by state statute, segregation included laws that touted immigration control, anti-miscegenation ideals, and institutionalization as solutions to ridding the world of those who were, because of their "unfitness," a burden to society.[7] Also compelled by state statute,

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[1] Skinner v. Oklahoma, 316 U.S. 535, 541 (1942). Here, the Court drew a line of demarcation between involuntary sterilization of the feebleminded and involuntary sterilization of criminals. *Id.* In the concurrence, Justice Stone explained that the line was drawn because feeblemindedness, unlike criminal behavior, had been purportedly linked to heredity. *Id.* at 544.

[2] *See* John P. Radford, *Sterilization Versus Segregation: Control of the 'Feebleminded,' 1900-1938*, 33 SOC. SCI. & MED. 449, 451 (1991).

[3] *Id.*

[4] *Id.*

[5] *Id.* (describing "unfit" persons as including "criminals, paupers, prostitutes, and those regarded as mentally ill").

[6] City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 462 (1985) (Marshall, J., concurring in part and dissenting in part).

[7] HARRY H. LAUGHLIN, EUGENICAL STERILIZATION IN THE UNITED STATES 339 (1922) ("Ultimately the state must find a biologically, socially, morally, and

involuntary and coercive sterilization was performed on unsuspecting individuals, often without their consent, and sometimes without their knowledge.[8] States enacted both of these practices under the guise of promoting health and safety.[9] In distinguishing the approaches taken by the states to eliminate the growing population of those deemed "unfit," it is significant to note that involuntary sterilization, unlike segregation, is permanent and irreversible.[10] Because of the permanency of the injury and the recent unsuccessful attempts to secure a remedy in states such as North Carolina,[11] an argument for redress will be made solely for victims of involuntary sterilization.

Neither the United States Congress nor any state legislature has provided redress for individuals stripped of their reproductive capabilities as a result of eugenic ideals.[12] Only a few states have considered a remedy for individuals who were involuntarily sterilized, but these efforts have been opposed because the authority to take such action was granted pursuant to state police power.[13] State-sanctioned deprivation of procreative rights was intrusive, permanent, and egregious, and the victims have received no recompense for their suffering.[14]

II. HISTORY OF AMERICAN EUGENICS

The eugenics movement began in the nineteenth century and was largely based on ideals espoused by Francis Galton.[15] Galton and other eugenic supporters believed that the human species could be

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economically superior substitute for war, pestilence, and famine in culling the human species of its defective strains."), *available at* http://dnapatents.georgetown.edu/resources/EugenicalSterilizationInTheUS.pdf.

[8] Radford, *supra* note 2, at 454.

[9] LYNNE CURRY, THE HUMAN BODY ON TRIAL: A HANDBOOK WITH CASES, LAWS, AND DOCUMENTS 37-38 (2002).

[10] LAUGHLIN, *supra* note 7, at 407.

[11] Kim Severson, *Payments for Victims of Eugenics are Shelved*, N.Y. TIMES (June 20, 2012), http://www.nytimes.com/2012/06/21/us/north-carolina-eugenics-compensation-program-shelved.html?scp=1&sq=north+carolina+compensation+for+eugenics+victims&st=nyt.

[12] Jon Ostendorff, *N.C. May Compensate Sterilization Victims,* USA TODAY (May 23, 2012), http://usatoday30.usatoday.com/news/nation/story/2012-05-22/sterilization-compensation-north-carolina/55173250/1.

[13] Jacobson v. Massachusetts, 197 U.S. 11, 24-25 (1905); *see also* Lochner v. New York, 198 U.S. 45, 53 (1905) (noting that states can enact laws that "relate[d] to the safety, health, morals, and general welfare of the public").

[14] *Jacobson*, 197 U.S. at 24-25.

[15] Gerald V. O'Brien, *Eugenics, Genetics, and the Minority Group Model of Disabilities: Implications for Social Work Advocacy*, 56 SOC. WORK 347, 347 (2011).

improved through controlled breeding practices.[16] Writing for the United States Supreme Court in *Buck v. Bell*, Justice Holmes said:

> We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough.[17]

Justice Holmes linked laws authorizing compulsory sterilization to laws that had supported compulsory vaccination.[18] *Buck* firmly established the notions that "preventing disease was better than coping with its consequences [,] . . . the collective well-being of society could outweigh the interests of individuals who posed an alleged health menace . . . [and] state power could compel compliance with health measures when persuasion alone appeared inadequate."[19] The personal sacrifice inherent in sterilization was less burdensome than that of soldiers who were required to give up their life in war to protect the country.[20] Therefore, as a means of promoting State interest, those who were thought to possess desirable characteristics were encouraged to increase breeding, and those who were thought to possess undesirable characteristics were prohibited from breeding at all.[21]

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[16] *Id*.
[17] Buck v. Bell, 274 U.S. 200, 207 (1927) (citation omitted). In this landmark case, the United States Supreme Court upheld the Virginia statute authorizing involuntary sterilization of feeble-minded individuals. *Id.* at 207-08. Carrie Buck, the plaintiff, challenged the statute on both substantive and procedural due process grounds. *Id.* at 205-06. The decision in this case led other states to enact similar laws and gave credence to those already in existence. *See also* Skinner v. Oklahoma, 316 U.S. 535, 542 (1942) (drawing a distinction between sterilization of criminals and sterilization of the feebleminded).
[18] *Buck*, 274 U.S. at 207.
[19] Martin S. Pernick, *Eugenics and Public Health in American History*, 87 AM. J. PUB. HEALTH 1767, 1769 (1997) (discussing *Buck v. Bell*).
[20] *Id.* at 1770.
[21] O'Brien, *supra* note 15, at 347-48.

In his identification of undesirables, Galton frequently referenced a general category of those deemed "unfit."[22] In the early 1900s, a brochure promoting the institutionalization of feeble-minded persons in Alabama described those deemed mentally deficient in the following manner: "They do not work. They are immoral. They commit crimes. They multiply like rabbits, and their children are feeble-minded . . . ."[23] Additionally, an article about the need for a sterilization statute in Kentucky described the feebleminded as a "'cancer of society' . . . irresponsible, diseased, [and] defective . . . ."[24] While it is true that not everyone held these views, the passage of state legislation and Congressional acts confirm that a majority of those with decision-making authority shared these beliefs.[25] Otherwise, the enactment of legislation premised upon these assumptions would not have been so far-reaching and pervasive.[26] Eugenic supporters infiltrated almost every aspect of society with their ideas of a hierarchal human order.[27]

The practice of controlled breeding, fundamental to the eugenic ideals, was based on the belief that social problems existed because individuals inherited defective genes, which increased their propensity to commit crime, engage in promiscuous behavior, drink alcohol, or exhibit mental defects.[28] The individuals carrying the defective genes were thought to produce offspring with the same unsavory characteristics.[29] This belief in the biological transmission of mental

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[22] Radford, *supra* note 2, at 451.

[23] EDWARD J. LARSON, SEX, RACE, AND SCIENCE: EUGENICS IN THE DEEP SOUTH 81 (1995).

[24] U.S. COMM'N ON CIVIL RIGHTS, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES 20 (1983) (quoting George T. Skinner, *A Sterilization Statute for Kentucky?*, 23 KY. L.J. 168, 168 (1935)). The U.S. Commission on Civil Rights was established to study and address discrimination against disabled individuals, and this monograph was included to provide a historical overview. *Id.*

[25] *See, e.g.*, LARSON, *supra* note 23, at 81 (referencing a number of state congressional acts that passed in the 1910s and 1920s supporting eugenics).

[26] *Id.*

[27] EDWIN BLACK, WAR AGAINST THE WEAK: EUGENICS AND AMERICA'S CAMPAIGN TO CREATE A MASTER RACE xv-xvi (2003) (explaining that eugenics was supported by professors, elite universities, industrialists, government officials, psychologists, teachers, charitable associations, academicians, scientists, and wealthy corporate philanthropists, and that eugenics crossed a number of spheres from birth control to psychology to urban sanitation); *Id.* at 85 (noting that eugenics ideas could be found in science, politics, legislation, education, and social work).

[28] ALLEN BUCHANAN ET. AL., FROM CHANCE TO CHOICE GENETICS AND JUSTICE 34 (2000).

[29] CURRY, *supra* note 9, at 122; *see also* ANN GIBSON WINFIELD, EUGENICS AND EDUCATION IN AMERICA: INSTITUTIONALIZED RACISM AND THE IMPLICATIONS OF HISTORY, IDEOLOGY, AND MEMORY 64-65 (2007).

defectiveness led states to enact laws promoting segregation and involuntary sterilization,[30] thus preventing the growth of a population considered morally and intellectually lacking.[31] Therefore, the eugenics movement can be best characterized as an effort to prevent those with undesirable genes from reproducing.[32] The propagation of a defective gene pool was seen as a threat to national welfare.[33]

By controlling the quality of the populace, states believed they could decrease the pool of dependents, or those who would potentially become dependent, upon the states for support.[34] Therefore, the tax burden would be lessened, and society would reap the financial benefits.[35] This was a business model that weighed the costs and benefits to the state by assigning value to human existence.[36] "Eugenic policies are inherently subordinating, as they place lower values on the lives of those targeted."[37] With the ultimate goal of the eugenic movement being the improvement of the genetic make-up of the human race, states sought ways to achieve this goal.[38] Policies were developed that allowed states to interfere justifiably with certain groups' right to reproduce.[39] According to Victoria Nourse, Michael Guyer said:

> Let us but extend our vision from immediate suffering to the prospective suffering of the countless unborn descendants of our present unfit and ask ourselves the question, why should they be born? Havelock Ellis well says, "The superficially sympathetic man flings a coin to the beggar; the more deeply sympathetic man builds an almshouse for him so that he need no longer

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[30] CURRY, *supra* note 9, at 37.
[31] *See, e.g.*, 1924 Va. Acts 569 (outlining the rationale for a Virginia statute authorizing the sexual sterilization of certain inmates).
[32] MICHAEL J. SANDEL, THE CASE AGAINST PERFECTION: ETHICS IN THE AGE OF GENETIC ENGINEERING 63-68 (2007).
[33] Radford, *supra* note 2, at 451.
[34] Marque-Luisa Miringoff, *The Impact of Population Policy upon Social Welfare*, 54 SOC. SERV. REV. 301, 302 (1980).
[35] *Id.*
[36] Lisa Powell, *Eugenics and Equality: Does the Constitution Allow Policies Designed to Discourage Reproduction Among Disfavored Groups?*, 20 YALE L. & POL'Y REV. 481, 481 (2002).
[37] *Id.*; *id.* at 504-05 (noting that the central harm in eugenics is the valuation of lives that is evidenced in public policies restricting reproduction—"valuing of lives is offensive to any notion of equality").
[38] SANDEL, *supra* note 32, at 63.
[39] Powell, *supra* note 36, at 484.

> beg; but perhaps the most sympathetic of all is the man who arranges that the beggar shall not be born."[40]

Guyer called upon people to look beyond the obvious effects of reproductive control to the tragedy that would be inherent in the life of the countless individuals likely be born unfit, but for eugenic measures.[41] Guyer proposed that the best interest of any prospective offspring of a feebleminded individual would be served by reproductive restrictions that prevented birth.[42] If an individual was found to be feebleminded, there were only two remedies: segregation or sterilization.[43]

A. Segregation

The United States Supreme Court legitimized segregation when it rendered its decision in *Plessy v. Ferguson*.[44] In *Plessy*, the Court

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[40] VICTORIA F. NOURSE, IN RECKLESS HANDS: *SKINNER V. OKLAHOMA* AND THE NEAR TRIUMPH OF AMERICAN EUGENICS 55 (2008).
[41] *Id.*
[42] *Id.*
[43] Radford, *supra* note 2, at 452 (noting that evidence of segregation practices can also be found in immigration policy, statutes, and case law addressing miscegenation); *see also* Immigration Act of 1924, Pub. L. No. 68-139, 43 Stat. 153 (1924) (repealed 1965) (focusing on decreasing the number of immigrants, because they were considered mentally defective); Racial Integrity Act of 1924, 1924 Va. Acts 534-35 (repealed 1967) (forbidding miscegenation on the grounds that racial mixing was scientifically unsound and would pollute America with mixed-blood offspring); Lawrence B. Goodheart, *Rethinking Mental Retardation: Education and Eugenics in Connecticut, 1818-1917*, 59 J. HIS. MED. ALLIED SCI. 90, 106-07 (2004) (describing a Connecticut law banning marriage "if either partner was an 'epileptic,' 'imbecile' or 'feeble-minded,' and if the woman was under forty-five years old"; the law also penalized anyone who encouraged such a marriage, as well as any man who had sexual intercourse with a woman under forty-five, expressing one of the above-mentioned conditions); Paul A. Lombardo, *Miscegenation, Eugenics, and Racism: Historical Footnotes to Loving v. Virginia*, 21 U.C. DAVIS L. REV. 421, 421-36 (1988); Miringoff, *supra* note 34, at 307 (considering the perception that immigrants were feebleminded, that immigrants have a large number of children, that immigrants would be dependent on the state for support, and that feeblemindedness was hereditary); O'Brien, *supra* note 15, at 348 (referencing prohibitions on miscegenation for those deemed unfit as well as between certain races); Radford, *supra* note 2, at 454 (describing intelligence tests administered to immigrants to prove their unfitness); Jessie S. Smith, *Marriage, Sterilization and Commitment Laws Aimed at Decreasing Mental Deficiency*, 5 J. AM. INST. CRIM. L. & CRIMINOLOGY 364, 367 (1914).
[44] Plessy v. Ferguson, 163 U.S. 537, 549-51 (1896). The Court, relying on the customs, traditions, and the desire to maintain public peace and good order, sanctioned separate but equal facilities. *Id.* Even though the Court was quick to point out that there was no law that interfered with the political equality of blacks, it drew a clear line of demarcation so that an individual who was found to have any

ruled that segregation of people thought to be of weaker or lesser status was permissible under the Fourteenth Amendment.[45] Driven by a vision of racial purity,[46] the proponents of the eugenics movement advocated for removal of individuals deemed mentally deficient from society.[47] The mid-nineteenth century view of asylums reflects a social policy directed at the establishment of educational and training institutions for the mentally retarded.[48] Private individuals were taking altruistic measures to care for and protect the mentally retarded.[49] However, at the turn of the century, it became clear that the specialized custodial institutions were driven by eugenic policies.[50] Individuals who were considered mentally deficient, poor, promiscuous, or prone to criminal activity were generally considered a nuisance to the community,[51] and, therefore, subject to segregation in the form of institutionalization.[52] There was a definite paradigm shift from a social policy protecting those who were vulnerable to a social policy protecting society from those individuals.[53] In *City of Cleburne v. Cleburne Living Center*, Justice Marshall stated, "Massive custodial institutions were built to warehouse the retarded for life; the aim was to halt reproduction of the retarded and 'nearly extinguish their entire

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degree of blackness was denied many rights, privileges, and immunities that were available to whites. *Id.* Further, the Court said that if "the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits, and a voluntary consent of individuals." *Id.* Laws that conflicted with the general sentiment of the community could not accomplish social equality or abolish distinctions based on physical differences. *Id.* at 551-52. *Plessy* was overruled by *Brown v. Board of Education*, 347 U.S. 483, 490-94 (1954), when the Court denounced the concept of separate but equal in the educational arena by highlighting the effects of such legislation, which included a stamp of inferiority as to the individual's "status in the community that may affect their hearts and minds in a way unlikely ever to be undone." *Id.* at 494.

[45] *Plessy*, 163 U.S. at 551; *see also id.* at 549 (noting that the white race was the dominant race and "a colored man . . . is not lawfully entitled to the reputation of being a white man," and therefore not privy to all the benefits that whiteness bring).

[46] HARRIET A. WASHINGTON, MEDICAL APARTHEID: THE DARK HISTORY OF MEDICAL EXPERIMENTATION ON BLACK AMERICANS FROM COLONIAL TIMES TO THE PRESENT 193 (2006).

[47] *Id.*

[48] Radford, *supra* note 2, at 449.

[49] *Id.*

[50] *Id.* at 450.

[51] *Id.* at 451.

[52] *Id*. at 449.

[53] City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 461-62 (1985) (Marshall, J., concurring in part and dissenting in part).

race.'"[54] Indeed, "[s]tate laws deemed the retarded 'unfit for citizenship.'"[55]

In the late nineteenth century, states began enacting legislation that would allow the institutionalization of individuals considered to be a burden to society.[56] Eventually, all states enacted laws that allowed public officials, teachers and school officials, doctors, welfare boards, public health officials, charitable institutions, other commissions,[57] and/or community members to make complaints that would subsequently lead to the institutionalization of those deemed mentally defective.[58] Most states described the legislative purpose of sterilizing institutionalized individuals as an attempt to segregate "mentally defective" and "feebleminded" individuals from society, thereby protecting these individuals from themselves, while also protecting

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[54] *Id.* at 462 (quoting ANNE MOORE, THE FEEBLE MINDED IN NEW YORK, 1911: A REPORT PREPARED FOR THE PUBLIC EDUCATION ASSOCIATION OF NEW YORK 3 (1911)).

[55] *Id.* at 463 (citation omitted). In 1920, a Mississippi law was enacted to establish colonies to segregate those who were deemed feebleminded from other members of society in order to prevent reproduction and therefore decrease the number of criminals and poor in society. *Id.* The Act specifically identified those who were deemed feebleminded and having mental inferiority as unfit for citizenship. *Id.*; *see* Brief for Am. Assoc. of People with Disabilities, et al. as Amici Curiae Supporting Respondent at 2, Med. Bd. of Cal. v. Hason, 538 U.S. 835 (2003) ("When Congress enacted Title II of the ADA, there was ample evidence that States were unconstitutionally excluding people with disabilities from voting and from accessing our judicial system, prohibiting them from marrying and raising families, warehousing them in institutions with deplorable conditions, and otherwise systematically, irrationally, and intentionally depriving them of the rights guaranteed by the Fourteenth Amendment."); *see also* Americans with Disabilities Act, 42 U.S.C. § 12101(a) (1990) (outlining discrimination against individuals with disabilities existed in critical areas like education, transportation, institutionalization, health services, voting, and access to public services, and relaying that individuals with disabilities have historically been subjected to unequal treatment and political powerlessness based on stereotypes that were not a true indication of the individual's ability to participate in society).

[56] Radford, *supra* note 2, at 454.

[57] Brief for Respondent at 32, Bd. of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) (No. 99-1240) (quoting U.S. COMM'N ON CIVIL RIGHTS, *supra* note 24, at 19, 34-37).

[58] Smith, *supra* note 43, at 368 (stating that most states had institutionalization procedures for insane individuals, but not "feebleminded" individuals); *see also* BLACK, *supra* note 27, at 67-68 (noting that some states had boards, and others allowed institutional bureaucrats to recommend the procedure because it was considered beneficial to the patient).

society at large.[59] Individuals were determined to be feebleminded if they demonstrated a retarded rate of mental development.[60]

Florida is among the states that used segregation as a means to meet its eugenic goals.[61] In a state statute, the goals mirrored the eugenic ideals as follows:

> This Colony shall include the three departments of asylum, school[,] and colony co-ordinating and conducted as integral parts of a whole, to the end that these unfortunates may be *prevented from reproducing their kind*, and the various communities and the *State at Large relieved from the heavy economic and moral losses* arising by reason of their existence . . . giving preference, first, to girls and women of child-bearing age, and to those from both sexes who are most likely to profit by the *special education and training*.[62]

In 1919, the Florida legislature enacted a statute that authorized the organization and management of a State Farm Colony.[63] The legislature described the situation in Florida as "an alarming state of

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[59] *See, e.g.*, 1924 Va. Acts 569 (describing the policy behind a Virginia statute that authorized the sexual sterilization of inmates).

[60] *Fourth Biennial Rep. of the Superintendent of the Fla. Farm Colony for Epileptic & Feeble Minded 14* (1927) (noting that the process for designating a patient's mental status was consistent with the procedure outlined by the American Association for the Study of the Feeble Minded, and defining "idiot," "imbecile," and "moron" as follows: "An 'idiot' is a mentally defective person having a mental age of not more than 35 months, or, if a child, an intelligence quotient of less than 25. An 'imbecile' is a mentally defective person having a mental age between 36 months and 83 months, inclusive, or if a child, an intelligence quotient between 25 and 49. A 'moron' is a mentally defective person having a mental age between 84 months and 143 months, inclusive, or if a child, an intelligence quotient between 50 and 74."). Moreover, a patient's level of mental deficiency was determined by an intelligence test. *Id.*; *see also Fifth Biennial Rep. of the Superintendent of the Fla. Farm Colony for Epileptic & Feeble Minded* 8 (1929) ("One of the most pathetic things in life is the feeble-minded child. The subject touches every phase of public welfare. The problem has to do with law, with economics, with morality, criminality, education, and everything pertaining to the welfare of the human race.").

[61] *See, e.g.*, 1919 Fla. Laws 231 (describing an act created for the "Organization and Management of a State Farm Colony for [the] Epileptic and Feeble-Minded").

[62] *Id.* at 234 § 8-9 (emphasis added) (quoting a Florida statute emphasizing the necessity of addressing the needs of the unfit through institutionalization which would subsequently lead to a decrease in the financial burden to the state and a decrease in the moral corruption of the citizens thereby yielding a productive citizenry).

[63] *Id.* at 231.

facts."[64] The intent of the legislature was to establish an institution for the care of the epileptic and feebleminded "where they [could] be segregated and more economically cared for than through the numerous charitable institutions now burdened with these unfortunates."[65] According to the legislature, the Florida Farm Colony's purpose was to serve as an asylum for the protection, care, education, training, segregation, and employment of the epileptic and feebleminded.[66] Although the statutory language indicates that Florida legislators thought reproductive control was the way to decrease, if not eliminate, these social ills, segregation was the only means by which state officials could accomplish this goal.[67] Even though administrators believed that sterilization was a viable option, they were unable to enact legislation approving such procedures, and Florida remained one of few states that never incorporated the practice of sterilization into the care and control of the feebleminded.[68]

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[64] *Id.*
[65] *Id.* at 232.
[66] *Id.* at 234; *see Ninth Biennial Rep. of the Superintendent of the Fla. Farm Colony for Epileptic & Mentally Deficient Children* 5 (1937) [hereinafter *Ninth Biennial Report*] (quoting the superintendent, writing that the institution would "offer proper care . . . [for] those who, because of their mental retardation or epilepsy, are unable to properly adjust themselves to an outside environment and whose acts would probably prove detrimental to themselves or to the community, and to give such education, training[,] and supervised employment . . . as is possible under existing circumstances"); *see also Eleventh Biennial Rep. of the Superintendent of the Fla. Farm Colony for Epileptic & Mentally Deficient Children* 2 (1939-1941) (stating that admission was restricted to those six to twenty-one years of age, and did not offer services to "colored patients").
[67] *See* 1919 Fla. Laws 231, 232.
[68] *See Ninth Biennial Report*, *supra* note 66, at 13 ("[N]o law exists in this State at this time permitting human sterilization . . . [I]t is generally believed that fifty [percent] of all mental deficiency is due directly to hereditary factors; that the majority of such individuals do not come into State institutions but remain on the outside world; that a good proportion of poverty, delinquency[,] and criminal conduct may be traced to mental illness or deficiency, it seems that by some means of sterilization might be further applied to all those mentally ill, mentally retarded[,] and to the habitual criminal."); *see also Eighth Biennial Rep. of the Superintendent of the Fla. Farm Colony for Epileptic & Feebleminded* 7 (1935) ("When defectives marry[,] the chances are that at least some of the offspring will be defective. No fact is better established than the inexorable law of heredity. The offspring will show the traits of the ancestors. And yet we see the criminal[,] moral[,] imbecile[,] and feebleminded marrying and transmitting their traits to other millions. No wholesale remedy appears readily available, but a step towards checking this on-rushing horde now devouring civilization would be the surgical sterilization of every feebleminded person coming within the purview of the law, thus precluding them for producing their kind. The operation, done by a competent surgeon is devoid of danger and affects the individual in no way except to prevent the power of reproduction.

When states took on the responsibility of operating the asylums, state lawmakers realized that operating them was expensive and a drain on taxpayers.[69] Additionally, segregating individuals into institutions was not as effective in the goal of curtailing reproduction.[70] Therefore, many states followed their statutes, which authorized the institutionalization of those deemed feebleminded or mentally deficient, with laws that authorized involuntary sterilization of individuals committed to these facilities.[71]

B. Involuntary Sterilization

The American eugenics movement, as it specifically relates to involuntarily sterilization, is tied inextricably to legislation enacted by states to relieve them of their obligation to care for those who were deemed lazy, incompetent,[72] and a menace to themselves and society.[73] Sterilization for eugenic purposes is deeply rooted in the history of institutionalization.[74] During the twentieth-century eugenics movement, over thirty states passed laws granting state actors the authority to involuntarily sterilize individuals perceived to be mentally or morally defective.[75] Although many of the laws authorizing involuntary sterilization have been ruled unconstitutional or repealed,[76]

Drastic? Yes. And, at first would only reach comparatively few, but as the years go on thousands and hundreds of thousands would be denied the power of spreading throughout the land his or her defective progeny. Can civilization stand the strain if nothing is done to lessen or stop it?").

[69] Radford, *supra* note 2, at 454; *see also* Miringoff, *supra* note 34, at 309-10.

[70] Radford, *supra* note 2, at 453 (stating that eugenicists felt the best results could be attained by combining institutionalization with involuntary sterilization).

[71] *Id.* at 453-54; *see also* Brief for People First of Georgia et al. as Amici Curiae Supporting Respondents at 5a, 9a, Olmstead v. L.C., 527 U.S. 581 (1999) (No. 98-536), 1999 WL 143932 (explaining that Maine and New Hampshire were among the states that initially instituted segregative practices and then moved to sterilization of those deemed feebleminded).

[72] *See* Brief for Respondent, *supra* note 57, at 32.

[73] Radford, *supra* note 2, at 454.

[74] *Id.* at 453.

[75] *See* Brief for People First of Georgia, *supra* note 71, app. A, A1-A76 (citing laws that were enacted for each state); BLACK, *supra* note 27, at 67-69 (noting that the first five states to pass involuntary sterilization laws included Indiana (1907), Washington (1909), California (1909), New Jersey (1911), and New York (1912)); PAUL A. LOMBARDO, *Three Generations, No Imbeciles: Eugenics, the Court, and* Buck v. Bell 294 (2008) (listing the state laws and the repeal dates).

[76] *See* Poe v. Lynchburg Training Sch. & Hosp., 518 F. Supp. 789, 791 (W.D. Va. 1981) (stating that the 1974 Virginia Acts of Assembly, ch. 296, repealed the Virginia law that enabled involuntary sterilization); LOMBARDO, *supra* note 75, at 294.

many victims of the movement still suffer from the injustices that were legitimized and protected by state laws and sanctioned by the Supreme Court *Buck v. Bell*.[77] In *Buck,* the Court established the platform that gave physicians and hospital administrators the ability to arbitrarily and unscrupulously administer coercive and involuntary sterilization.[78] The Court established that the right to procreate is not absolute; it is subject to state regulation under certain circumstances.[79] States, however, must offer a compelling reason to restrict reproduction.[80] *Buck* reaffirmed the standard set out in *Jacobson* that the welfare of citizens takes priority over the rights of individuals in certain matters.[81] Following *Buck*, the Court in *Skinner v. Oklahoma* declared that the right to procreate was fundamental and that claims for violating that right must be evaluated under strict scrutiny.[82] As for involuntary sterilization, the Court in *Skinner* distinguished a criminal's rights from those of the feebleminded.[83] The *Skinner* Court said,

> [T]he present plan to sterilize the individual in pursuit of a eugenic plan to eliminate from the race characteristics that are only vaguely identified and which in our present state of knowledge are uncertain as to transmissibility presents other constitutional questions of gravity. This Court has sustained such an experiment with respect to the imbecile, a person with definite and observable characteristics where the condition had persisted through three generations and afforded grounds for the belief that it was transmissible and would continue to manifest in generations to come . . . There are limits to the extent to which a legislatively

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[77] *E.g.*, H.B. 36, Reg. Sess. (N.C. 2003) (repealing the North Carolina sterilization law); Motes v. Hall Cnty. Dep't of Family & Children Servs., 306 S.E.2d 260, 261-62 (Ga. 1983) (finding Georgia's involuntary sterilization law unconstitutional).

[78] Buck v. Bell, 274 U.S. 200, 207-08 (1927) (upholding a Virginia statute that allowed involuntary sterilization of those who fell within the lines of the broad category of unfit).

[79] *See, e.g.*, Roe v. Wade, 410 U.S. 113, 154 (1973) (holding that when the government has a compelling interest in "protecting potential life," the state can limit reproductive rights, then it is no longer left to the woman whether she can abort a pregnancy).

[80] George P. Smith II, *Genetics, Eugenics, and Public Policy*, 10 S. ILL. U. L. J. 435, 445 (1985) (citing Shapiro v. Thompson, 394 U.S. 618, 638 (1969)).

[81] *See Buck*, 274 U.S. at 207; *see also* Jacobson v. Massachusetts, 197 U.S. 11, 28 (1905) (holding that welfare of citizens supersedes the right to be free from compulsory vaccination).

[82] Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

[83] *Id.*

> represented majority may conduct biological experiments at the expense of the dignity and personality and natural powers of a minority—even those who have been guilty of what the majority define as crimes.[84]

It has been more than eighty-five years since the Supreme Court held in *Buck* that a Virginia statute, which authorized involuntary sterilization conducted in the name of public health, was constitutional.[85] Under laws that were legislatively enacted by the states and supported by *Buck*, many individuals, primarily women, were branded as mentally deficient, unfit to be parents, and detrimental to society before being permanently stripped of their reproductive capacity.[86] In some instances, the states alleged that they were acting in the best interest of the individual; however, in most cases, states failed to consider what was best for the individual and relied heavily on what was thought to be most beneficial to public health and economic viability.[87] One of the state's primary functions is to protect its citizens, but instead the state granted to administrative agencies the unfettered authority to decide who would be sterilized.[88] This atrocity continued for years.[89]

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[84] *Id*. at 546 (Jackson, J., concurring) (explaining that the science regarding the transmissibility of undesirable characteristics is still not exact and raises important constitutional questions). Justice Jackson further stated that the court sustained the scientific hypothesis where the presence of imbecility could be found through three generations. *Id.* However, despite an acknowledgement of the court's opinion regarding imbeciles, Justice Jackson affirmatively stated that the scope of the government's authority to conduct experiments on minorities should be limited because, at some point, an individual's dignity and personality is compromised. *Id.*

[85] Alexandra M. Stern, *Sterilized in the Name of Public Health: Race, Immigration, and Reproductive Control in Modern California*, 95 AM. J. PUB. HEALTH 1128, 1130 (2005).

[86] *See* Brief for People First of Georgia, *supra* note 71, at 8a; Allison C. Carey, *Gender and Compulsory Sterilization Programs in America: 1907-1950*, 11 J. HIST. SOC. 74, 76 (1998) (concern regarding the increase in money devoted to public welfare led to the increase in sterilization of women); Anna Stubblefield, *"Beyond the Pale": Tainted Whiteness, Cognitive Disability, and Eugenic Sterilization*, 22 HYPATIA 162, 162 (2007) (noting that sixty percent of those sterilized were women).

[87] LAUGHLIN, *supra* note 7, at 338.

[88] *See* BLACK, *supra* note 27, at xv ("Employing a hazy amalgam of guesswork, gossip, falsified information[,] and polysyllabic academic arrogance, the eugenics movement slowly constructed a national bureaucratic and jurisdictional infrastructure to cleanse America of its 'unfit.'"); LOMBARDO, *supra* note 75, at 288-89, 292 (citing a 1924 Virginia act that stated "the superintendent of . . . [a state hospital or the state colony for epileptics and feebleminded] shall be *of opinion* that it is for the best interest of the patients and of society . . . [to] be sexually sterilized");

Sterilization was an alternative to institutionalization because states could save money on the cost of caring for the mentally deficient.[90] Sterilization was cheaper than institutionalization and required the states to spend little money to carry out the procedures.[91] When individuals were sterilized, they could be released from institutions because they were no longer a threat to society.[92]

Like the Florida legislators, the Virginia General Assembly supported eugenic ideology.[93] The Assembly members enacted statutes which indicated a need to address the issues of the "weak-minded."[94] The Virginia Assembly subscribed to the notion that heredity plays an important part in the transmission of insanity, idiocy, imbecility, epilepsy, and crime.[95] In Virginia, the legislators sought to provide care for those other than the insane and epileptic by offering "a comprehensive, practical scheme for the training, segregation[,] and

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Felipe C. Robinson et al., *Eugenic Sterilization: Medico-Legal and Sociological Aspects*, 71 J. NAT'L MED. ASS'N 593, 594-95 (1979) (stating that "[i]mplementation of a sterilization law or procedure is discretionary, and thus does not adhere to minimal procedural due process standards," and noting that recommendations for sterilization were made by superintendents of state mental institutions, eugenic boards, physicians, guardians, relatives, and public agencies based on the opinion or presumption about whether an individual was fit for parenthood).

[89] *See* NANCY ORDOVER, AMERICAN EUGENICS: RACE, QUEER ANATOMY, AND THE SCIENCE OF NATIONALISM 133-34 (2003) (noting that in 1907, Indiana was the first state to pass legislation to legalize involuntary sterilization, and, between 1907 and the end of WWII, at least 70,000 people were sterilized in the United States); Nancy Ehrenreich, *The Colonization of the Womb*, 43 DUKE L.J. 492, 515 (1993) (noting that African American women, along with Latina women, were subjected to forced sterilization in appalling numbers through the 1970s).

[90] *See* DANIEL J. KEVLES, IN THE NAME OF EUGENICS: GENETICS AND THE USES OF HUMAN HEREDITY 93 (1985) (asserting that sterilization is less expensive and more effective); O'Brien, *supra* note 15, at 348.

[91] *Id.*; LOMBARDO, *supra* note 75, at 50-51 (explaining that eugenics scholars created a choice between sterilizing and paying the cost of institutionalization for the feebleminded individual's entire reproductive lives); *id*. at 35 (noting that people would have to pay higher taxes to support institutions).

[92] James Dugan, *The Conflict Between "Disabling" and "Enabling" Paradigms in Law: Sterilization, the Developmentally Disabled, and the Americans with Disabilities Act of 1990*, 78 CORNELL L. REV. 507, 516 (1993).

[93] 1914 Va. Acts 242.

[94] *Id.*; H.R.J. Res. No. 607, Reg. Sess. (Va. 2001) (stating that the eugenics laws were used to target virtually any human shortcoming or malady including alcoholism, syphilis, and criminal behavior).

[95] 1924 Va. Acts 569 (stating that there were many who were considered defective in state institutions, and if the patients were "discharged or paroled[, they] would likely become[,] by the propagation of their kind[,] a menace to society but who[,] if incapable of procreating[,] might properly and safely be discharged or paroled and become self-supporting with benefit both to themselves and to society . . .").

the prevention of the procreation of mental defectives."[96] In addition to segregation, Virginia legalized eugenically-inspired sterilization practices.[97] The Assembly noted that sterilization could support the health and welfare of the individual and society.[98] Virginia's General Assembly passed a resolution in 2001 apologizing for its role in the eugenics movement and noting that Virginia's practices were consistent with the pseudo-science of eugenics, which had a goal to improve the human race by eliminating hereditary disorders or flaws through selective breeding and social engineering.[99]

Statutorily sanctioned involuntary sterilizations were performed on United States citizens in a number of states.[100] Under the enabling legislation, individuals were forced to succumb to the coercive pressures of officials acting under the auspice of state governments.[101] As is the case with Virginia, some states apologized for their actions, but, to date, none have provided compensation to the arbitrary class of individuals deemed unfit.[102] Is there a remedy available for those who suffered injury as a result of these heinous acts?

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[96] 1914 Va. Acts 242; *see also* 1916 Va. Acts 662-63 (defining feeblemindedness and expressing an intent to provide for the examination, legal commitment, and the custody and care of feebleminded persons along with their segregation in institutions). According to the Virginia Assembly, a feebleminded person is "any person with mental defectiveness from birth or from early age, but not a congenital idiot, so pronounced that he is incapable of caring for himself or managing his affairs, or of being taught to do so, and is unsafe and dangerous to himself and to others and to the community, and who, consequently, requires care, supervision[,] and control for the protection and welfare of himself, of others and of the community, but who is not classable as an 'insane person,' as usually interpreted." *Id.*; *see also* 1924 Va. Acts 534-35 (explaining that the Virginia General Assembly passed the Racial Integrity Act, an anti-miscegenation statute, which made it "unlawful for any white person in this State to marry any save a white person, or a person with no other admixture of blood than white and American Indian"). Under this Act, "white person" was defined as a "person who has no trace whatsoever of any blood other than Caucasian." *Id.* This statute was held valid until the Supreme Court's ruling in *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

[97] 1924 Va. Acts 534-35. Virginia's sterilization statute was upheld by the United States Supreme Court in *Buck v. Bell*, 274 U.S. 200, 307 (1927), providing the precedent of constitutional protection for similar legislation in other states.

[98] 1924 Va. Acts 534-35.

[99] *See* H.R.J. Res. No. 607, Reg. Sess. (Va. 2001).

[100] *See* ORDOVER, *supra* note 89, at 134.

[101] *Id.*

[102] *See, e.g.*, H.B. 36, Reg. Sess. (N.C. 2003) (repealing and apologizing for previous eugenics policies).

III. HISTORICAL GRANTS OF REPARATION

For those who were involuntarily sterilized under obscure eugenic practices, hope of redress lies within the ambit of reparations and the backward-looking grounds of corrective justice.[103] The assertion that reparations are the most viable means for redress is supported by an examination of past atrocities where reparations were later granted to victims injured as a result of injustices committed by federal or state governmental actors.[104] Here, the analysis will begin with an overview of the Rosewood Massacre, Tuskegee Experiment, and Japanese-American Internment, all of which are instances where reparations have been paid for injustices committed against United States citizens.[105] Then, to establish a case for reparations, a parallel will be drawn between the intricacies of the eugenic-inspired practice of involuntary sterilization and those injustices committed under the auspices of the government where reparations were subsequently authorized.

A. Rosewood Massacre

Lasting for nearly a week in January 1923,[106] the Rosewood Massacre has been characterized as a "tragedy of American Democracy and the American Legal System."[107] In Rosewood, Florida, a white woman alleged that she had been assaulted by an African American male.[108] The event sparked the onset of large-scale

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[103] *See, e.g.*, Eric A. Posner & Adrian Vermeule, *Reparations for Slavery and other Historical Injustices*, 103 COLUM. L. REV. 689, 696 (noting that reparations were granted to the Tuskegee experiment victims; the maximum amount any subject received was $37,500).

[104] *Id.* at 696-97; *see also* Stanley L. Engerman, *Apologies, Regrets, and Reparations*, 17 EUR. REV. 593, 600-02 (2009) (discussing reparations granted to Japanese-Americans and Rosewood victims); Rhoda E. Howard-Hassmann, *Getting to Reparations: Japanese Americans and African Americans*, 83 SOC. FORCES 823, 827 (2004) (explaining that although the actions taken against Japanese Americans were legal at the time, the injured received reparations because they were interned during WWII); *id*. at 833-34 (noting that victims of the Tuskegee syphilis experiments received reparations and an acknowledgement of responsibility from the federal government, whereas the Florida government acknowledged responsibility for Rosewood).

[105] Posner & Vermeule, *supra* note 103, at 696.

[106] *See* MAXINE D. JONES ET AL., DOCUMENTED HISTORY OF THE INCIDENT WHICH OCCURRED AT ROSEWOOD, FLORIDA, IN JANUARY 1923 51 (1993); R. Thomas Dye, *Rosewood, Florida: The Destruction of an African American Community*, 58 HISTORIAN 605, 605 (1996); Howard-Hassmann, *supra* note 104, at 833 (noting that in the Rosewood incident, "individuals suffered grievous bodily harm, their formal right to equality was ignored, and their right to private property was violated").

[107] JONES, *supra* note 106, at 51.

[108] *Id.* at 3.

violence that resulted in devastation of the African American community.[109] African Americans were driven away from their homes and into the swamps and wooded areas in a desperate attempt to evade injury or death at the hands of a white mob.[110] Subsequently, the African Americans' homes, churches, businesses, and personal belongings were destroyed by fire.[111]

Here, it was the elected government officials' failure to act that led to the Rosewood victims' injuries.[112] State and local government officials were on notice about the conflict, but despite ample opportunity to intervene, failed to do so.[113] The sheriff failed to gain control of the event and neglected to seek assistance from the National Guard.[114] Elected officials did not attempt to protect the African Americans' safety and property.[115] The events spiraled out of control, resulting in loss of life.[116] An allegation of assault was all that was needed to justify racial violence and oppression.[117] If the force of whites was met with force by African Americans, the resistance was often enough to justify assault on the entire African American community.[118]

Following the destruction of the African American community, the sheriff convened a special grand jury to identify the guilty parties, but again neglected his duty and failed to ensure proper investigation of the incident.[119] Finding no guilty parties, the jury was disbanded.[120] Because of the sheriff's failure to control the mob and non-compliance

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[109] *Id.* at 8.
[110] Eileen Finan, *Delayed Justice: The Rosewood Story*, 22 HUM. RTS. 8, 8 (1995).
[111] JONES, *supra* note 106, at 15.
[112] *See id.*; Richard Jerome, *A Measure of Justice*, PEOPLE, Jan. 16, 1995, at 2.
[113] 1994 Fla. Sess. Law Serv. ch. 94-359 (West).
[114] JONES, *supra* note 106, at 12.
[115] 1994 Fla. Sess. Law Serv. ch. 94-359.
[116] *Id.*
[117] JONES, *supra* note 106, at 3.
[118] *Id.*
[119] 1994 Fla. Sess. Law Serv. ch. 94-359 (explaining that the legislature ordered compensation to be given to African American families from the Rosewood Florida community who suffered real or personal property loss as result of the racial riots; payment was not to exceed $150,000 for property loss, and a scholarship foundation was set up for African American students, in particular for direct descendants of Rosewood victims); Larry Rohter, *Paying for Racial Attack Divides Florida Leaders*, N.Y. TIMES (Mar. 14, 1994), http://www.nytimes.com/1994/03/14/us/paying-for-racial-attack-divides-florida-leaders.html; Brent Staples, *Unearthing a Riot*, N.Y. TIMES (Dec. 19, 1999), http://www.nytimes.com/1999/12/19/magazine/unearthing-a-riot.html.
[120] JONES, *supra* note 106, at 16.

with due process, white participants were never brought to justice.[121] In an attempt to rectify the wrongs committed against the Rosewood community, the state of Florida granted reparations to the victims for personal and property damage.[122]

B. Tuskegee Experiment

Beginning in 1932, the United States Public Health Service initiated the Tuskegee Study of Untreated Syphilis in the Negro Male.[123] Lasting forty years, the clinical study was originally designed to determine the impact of race on late-stage syphilis, but later the objective was changed to an assessment of the progression of the untreated disease.[124] Flawed scientific theory indicated that the developmental course of syphilis was different in blacks than in whites.[125] African Americans, in this case males, were considered intellectually inferior, promiscuous, and degenerate.[126] The study participants included 600 African American males, 399 of whom were infected with syphilis.[127] After voluntarily seeking medical care, the participants were targeted for the experiment.[128] However, participants did not give informed consent because they were unaware of the medical experiment; rather, they were informed that they were receiving treatment for "bad blood," a catchall diagnosis that included syphilis, anemia, and fatigue.[129] Racial segregation was considered a means to isolate African Americans who were thought to be the source

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[121] *Id.*; Dye*, supra* note 106, at 605.
[122] 1994 Fla. Sess. Law Serv. ch. 94-359; *see also* Posner & Vermeule, *supra* note 103, at 696 (noting that reparations for the Rosewood incident were given to both the victims and the descendants in amounts ranging from $375 to $150,000).
[123] *U.S. Public Health Service Syphilis Study at Tuskegee*, CTRS. FOR DISEASE CONTROL & PREVENTION (Sept. 24, 2013), http://www.cdc.gov/tuskegee/timeline.htm.
[124] Abigail Perkiss, *Public Accountability and the Tuskegee Syphilis Experiments: A Restorative Justice Approach*, 10 BERKELEY J. AFR.-AM. L. & POL'Y 70, 71 (citing SUSAN M. REVERBY, TUSKEGEE'S TRUTHS: RETHINKING THE TUSKEGEE SYPHILIS STUDY 1-3 (2000)).
[125] *Id.*
[126] WASHINGTON, *supra* note 46, at 160; *see also* Ronald L. Braithwaite, James Griffin, & Mario De La Rosa, *The Southern Male Placebo Study: The Good, the Bad, and the Ugly*, *in* THE SEARCH FOR THE LEGACY OF THE USPHS SYPHILIS STUDY AT TUSKEGEE 60 (Ralph V. Katz & Rueben C. Warren eds., 2011).
[127] *Public Health Syphilis Study*, *supra* note 123; *see also* JAMES H. JONES, BAD BLOOD: THE TUSKEGEE SYPHILIS EXPERIMENT 1 (1993) (noting that included in the Tuskegee Syphilis Experiment were 399 black men who had syphilis and 201 black men who did not have the disease).
[128] WASHINGTON, *supra* note 46, at 157-85.
[129] *Public Health Syphilis Study*, *supra* note 123.

of contamination and social danger.[130] Segregation was thought to decrease the transmission of disease.[131]

African American males with syphilis were denied access to treatment, and subsequently, the disease ravaged their bodies causing physical damage, psychological damage, and in some cases, death.[132] The African American males in the study were ill-informed about both their diagnosis and prognosis.[133] The study was supported by the United States government and private donors.[134] Medical doctors were commissioned by the federal government to conduct the study and determine its parameters.[135] Further, the highest healthcare authority in the United States, the Surgeon General, sanctioned the experiment's design to assess the manifestations of untreated syphilis as the disease ran its full course in African American males.[136] Although the theory upon which the experiment was based was later discounted by the American Heart Association, scientists continued to conduct the experiment.[137] It was years after the American Heart Association denounced the theory, and not until the experiment was exposed in the media, that the scientists discontinued it.[138]

Over sixty years after the commencement of the Tuskegee Experiment, the federal government acknowledged the wrong committed against the African American study subjects and their families.[139] For those who were still alive, the lingering effects of untreated syphilis were devastating.[140] In an attempt to remedy the

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[130] Perkiss, *supra* note 124, at 75.
[131] *Id.*
[132] *Id.* at 78.
[133] *Id.* at 77.
[134] *Id.* at 71.
[135] *Id.* at 77.
[136] SUSAN M. REVERBY, TUSKEGEE'S TRUTHS: RETHINKING THE TUSKEGEE SYPHILIS STUDY 3 (2000).
[137] WASHINGTON, *supra* note 46, at 182; Robinson, *supra* note 88, at 594.
[138] WASHINGTON, *supra* note 46, at 182; Vanessa N. Gamble, *Under the Shadow of Tuskegee: African Americans and Health Care*, 87 AM. J. PUB. HEALTH 1773, 1773 (1997) (noting that former President Clinton issued an apology for the forty-year government study twenty-five years after the news of the experiment broke to the media).
[139] Gamble, *supra* note 138, at 1773.
[140] Perkiss, *supra* note 124, at 71 (explaining that victims of untreated syphilis from the Tuskegee Experiment suffered severe damage to their hearts, brains, and nervous system; many of the victims also suffered from psychosis or blindness, and many others died).

abhorrent acts of injustice committed against the unsuspecting African American males, the federal government granted reparations.[141]

C. World War II Internment of Japanese Americans

Pursuant to an Executive Order dated February 19, 1942,[142] over 100,000 persons of Japanese ancestry were forcibly taken from their homes,[143] excluded from military zones, evacuated, and relocated to detention centers.[144] Many of those imprisoned were United States citizens.[145] Japanese Americans were unlawfully detained based on heightened paranoia about race and national origin.[146] Race alone was the sole determinant for internment, and no evidence of wrongful acts was necessary.[147] The individuals were denied due process rights as "they were given no notice of any charges, the right to a trial, or the right to an attorney."[148] After studying the incident, the Commission on Wartime Relocation and Interment noted that many individuals endured human suffering as well as intangible and material losses in education and job training.[149] The imprisonments lasted for three to

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[141] Posner & Vermeule, *supra* note 103, at 696 (showing that the maximum amount any victim from the Tuskegee Experiment received in reparations was $37,500).
[142] Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942); *see also* Commission on Wartime Relocation and Internment of Civilians Act, Pub. L. No. 100-383, 102 Stat 903 (1988) [hereinafter Civilians Act, Pub. L. No. 100-383] (stating that Congress appointed a commission to study and document the impact—material damages, intangible damages, and human suffering were found to be violations); Commission on Wartime Relocation and Internment of Civilians Act, Pub. L. No. 96-317, 94 Stat 964 (1980) [hereinafter Civilians Act, Pub. L. No. 96-317].
[143] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 697 (2006).
[144] Tuneen E. Chisolm, *Sweep Around Your Own Front Door: Examining the Argument for Legislative African American Reparations*, 147 U. PA. L. REV. 677, 714 (1999).
[145] Dale Minami, *Japanese-American Redress*, 6 AFR.-AM. L. & POL'Y REP. 27, 28 (2004).
[146] Timothy P. Maga, *Ronald Reagan and Redress for Japanese-American Internment, 1983-88*, 28 PRESIDENTIAL STUDIES QUARTERLY 606, 607 (1998) (explaining that Americans of Japanese ancestry were forced from their homes and into internment camps in 1942 after the Japanese attack on Pearl Harbor); Minami, *supra* note 145, at 29 (noting that military necessity and a threat to national security led to the internment of Japanese-Americans, which was rooted in the presumption that ethnic affiliation could determine loyalty in a time of war).
[147] CHEMERINSKY, *supra* note 143, at 697.
[148] Minami, *supra* note 145, at 28.
[149] Civilians Act, Pub. L. No. 100-383, *supra* note 142; Minami, *supra* note 145, at 29 (describing evacuation, relocation, internment of civilians during WWII, without adequate security reasons and without acts of espionage or sabotage).

four years, and the conditions were poor.[150] While imprisoned, some individuals died or suffered illness and humiliation because of poor food, bad sanitation, and lack of privacy.[151]

Officials claimed that since World War II was underway, the incarcerations were a military necessity and necessary to ensure the nation's safety and security.[152] United States officials expressed concern about whether those of Japanese ancestry would be loyal to the United States during wartime.[153] In *Korematsu v. United States*, the Supreme Court sanctioned the officials' behavior and enforcement of the order.[154] However, the case was later overturned after determining that U.S. attorneys altered, suppressed, and destroyed material evidence.[155]

Citing basic civil liberties and constitutional rights violations, reparations were paid to the Japanese Americans who were relocated to internment centers during World War II without regard for citizenship.[156] The reparations were funded with federal tax dollars.[157]

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[150] Minami, *supra* note 145, at 28.

[151] *Id.* at 31 (noting that other effects of Japanese internment included loss of hope, poor food, bad sanitation, lack of privacy, and humiliation).

[152] *Id.* at 29.

[153] *Id.*

[154] Korematsu v. United States, 323 U.S. 214, 216 (1944) ("[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.").

[155] Minami, *supra* note 145, at 31-32 (noting that documents were used to overturn the original court decisions); *see also* Maga, *supra* note 146, at 608 (explaining that the Commission on Wartime Relocation and Internment of Civilians discovered that Justice Department officials deliberately suppressed evidence, lied to investigators, and intentionally misled the Court about alleged Japanese-American security threats); Mark Sherman, *U.S. Lawyer Cites WWII-Era Mistakes on Internment*, ASSOCIATED PRESS (May 24, 2011), http://www.boston.com/news/nation/articles/2011/05/24/us_lawyer_cites_wwii_era_mistakes_on_internment/?s_campaign=8315 (reporting that United States Solicitor General failed to inform the justices of a report from the Office of Naval Intelligence that "'found that only a small percentage of Japanese-Americans posed a potential security threat, and that the most dangerous were already known or in custody' . . . [and] neglected to tell the court that information that Japanese-Americans 'were using radio transmitters to communicate with enemy submarines off the West Coast had been discredited by the FBI' and the Federal Communications Commission . . .").

[156] Civilians Act, Pub. L. No. 100-383, *supra* note 142. This Act, also known as the Civil Liberties Act, is key federal precedent for reparations. The Act provided that the Commission's recommendations be implemented to enable compensation for Japanese Americans who suffered injuries only for those living on the date of the

This reparations scheme serves as the foundation for other requests for redress made by claimants against the government.[158]

Having considered the Rosewood Massacre, Tuskegee Experiment, and Japanese-American Internment, it is evident that both the federal and state governments have committed reprehensible acts against the American people. Many of these incidences involved acts of omission or commission that were a blatant disregard for individual rights. The moral wrongs were committed against unsuspecting people and often involved the use of force or coercion. Despite arguments against reparations, the government authorized the redress and established a procedure for redress through reparations.[159]

IV. A CASE FOR REPARATIONS

Reparations, compensation given to victims of past injustices,[160] are justified on moral grounds even when there is no legal right to a remedy.[161] Generally, reparations schemes are authorized when there is a large group of claimants who have suffered injury to their persons or property.[162] In those situations where reparations were granted, the reprehensible wrongs committed by the agent were permissible under prevailing laws at the time they were committed, even though current laws bar a compulsory remedy.[163]

The remainder of this paper will highlight four key factors that are consistent in the previously mentioned historical incidents where reparations schemes were granted. Using these factors, a parallel will be drawn between past historical grants and the period of eugenic-

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enactment or their living heirs, and a public education fund to increase public awareness of the internment and prevent recurrence. *Id.*

[157] Minami, *supra* note 145, at 33.

[158] *Id.* at 28.

[159] *See, e.g.*, Engerman, *supra* note 104, at 600-02 (discussing the reparations granted to Japanese Americans and Rosewood victims); Howard-Hassmann, *supra* note 104, at 827 (noting the reparations Japanese-Americans received because they were interned during World War II); *id*. at 833-34 (discussing the reparations received by victims of the Tuskegee Syphilis Experiment).

[160] Posner & Vermeule, *supra* note 103, at 692; *see also* Engerman, *supra* note 104, at 597 ("The purpose behind reparations . . . is to force an acknowledgement of guilt about past or present actions and to provide some recognition of misdeeds on the part of the perpetrators of the crimes . . . ."); Charles J. Ogletree, Jr., *Does America Owe Us?*, ESSENCE MAG. 126, 128 (2003) (noting that, in the past, reparations have included "the recovery of property lost" and "compensation for the victims of lynching and ethnic cleansing.")

[161] Posner & Vermeule, *supra* note 103, at 698.

[162] *Id.* at 699.

[163] *Id.* at 691.

inspired involuntary sterilization, thus justifying reparations as a viable remedy. The factors to be considered here are: (1) whether an egregious act was committed by a governmental agent that resulted in injury; (2) whether traditional jurisprudence provides a remedy; (3) whether the wrong is capable of repetition; and (4) whether there is an interest convergence present. These common features of successful reparation schemes will provide the underpinnings of the parallel drawn between the Rosewood Massacre, Tuskegee Experiment, Japanese-American Internment, and eugenics-inspired involuntary sterilization.

A. Actions of a Governmental Agent Resulted in Injury

After studying the Rosewood Massacre, Tuskegee Experiment, Japanese-American Internment, and eugenics-inspired involuntary sterilization, it is reasonable to conclude that the United States government has committed some egregious acts against its citizens. Indeed, the actions taken by the government were drastic and intrusive, and injuries ensued.[164] Among the injuries were loss or destruction of personal and real property, and an assault on the health and wellbeing of the person.[165] In some instances, the governmental acts or failure to act tragically resulted in death.[166] While death was rare with the sterilization procedures, victims did experience terminal effects associated with the finality of permanently being unable to conceive.[167] Like Japanese-American Internment, involuntary sterilization was pervasive and resulted in irreparable injury to thousands of individuals.[168] A quote from former President Bill Clinton's apology for the Tuskegee Experiment is equally as applicable to the Rosewood Massacre, Japanese-American Internment,

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[164] *See* Jacobson v. Massachusetts, 197 U.S. 11, 24-25 (1905).
[165] 1994 Fla. Sess. Law Serv. ch. 94-359 (West); *see also* Posner & Vermeule, *supra* note 103, at 696 (noting reparations for the Rosewood incident were given to both the victims and the descendants).
[166] Engerman, *supra* note 104, at 600.
[167] Motes v. Hall Cnty. Dep't of Family & Children Servs., 306 S.E.2d 260, 262 (Ga. 1983) ("[I]n sterilization proceedings the government seeks, not only to suspend a fundamental liberty interest but to terminate it.").
[168] *See, e.g.*, Michael G. Silver, *Eugenics and Compulsory Sterilization Laws: Providing Redress for the Victims of a Shameful Era in United States History*, 72 GEO. WASH. L. REV. 862, 864 (stating over 60,000 United States citizens were involuntarily sterilized); CHEMERINSKY, *supra* note 143, at 697 (noting over 100,000 Japanese-Americans were interned).

and involuntary sterilization victims: "What was done cannot be undone . . . but we can end the silence."[169]

The government's horrendous acts were purportedly for the protection of people's general welfare and safety.[170] While the argument holds some weight, if the circumstances of each situation are viewed in totality, the argument becomes less plausible. The rationale for the government agents' behavior seems more like a pretext.[171] For example, in the Japanese-American Internment situation, where over 100,000 individuals of Japanese ancestry were placed in poor conditions in an internment camp, the expressed concern was national security.[172] However, there was no reported incident of threat or violence, and no acts that were suggestive of espionage.[173] Despite the absence of any legitimate claim of security breach, the government intruded upon the unsuspecting individuals, who subsequently lost their personal and real property.[174]

Likewise, in the Rosewood Massacre, only an allegation of assault was made; however, masses of men came from surrounding towns to hunt down the accused as if some heinous murder had been committed, and their rage would soon led them to kill any black person they encountered.[175] The unrest in the small town of Rosewood, Florida, grew, and African American residents attempted to find security in the local woods and swamp areas.[176] The sheriff negligently ignored the rising unrest, and the unlawful search for the accused ended in the tragic murder of innocent residents of Rosewood, Florida.[177]

Further, in the Tuskegee Experiment, public health was cited as the study's primary purpose.[178] However, the experiment studied the progression of untreated syphilis in African American men, which left many of them physically destitute.[179] While the African American males, their wives, and children suffered the ramifications of untreated

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[169] Walter T. Champion, Jr., *The Tuskegee Syphilis Study as a Paradigm for Illegal, Racist, and Unethical Human Experimentation*, 37 S.U. L. REV. 231, 234 (2010).
[170] Robinson, *supra* note 88, at 597 (explaining that states can use policing power to intervene and prevent or minimize the "harmful deterioration of a society's population").
[171] Silver, *supra* note 168, at 883.
[172] CHEMERINSKY, *supra* note 143, at 697.
[173] *Id.*
[174] *Id.*
[175] Finan, *supra* note 110, at 9.
[176] *Id.*
[177] 1994 Fla. Sess. Law Serv. ch. 94-359 (West).
[178] CURRY, *supra* note 9, at 37-38.
[179] Perkiss, *supra* note 124, at 71.

syphilis "in the name of public health," their white counterparts never experienced the suffering, nor were they called upon to participate in the study.[180] United States Public Health Service Physician, Thomas Murrell, M.D., said the following about African Americans and their battle with syphilis:

> So the scourge sweeps among them. Those that are treated are only half cured, and the effort to assimilate a complex civilization drives their diseased minds until the results are criminal records. Perhaps here, in conjunction with tuberculosis, will be the end of the negro problem. Disease will accomplish what man cannot do.[181]

Lastly, some courts have recognized that individuals were injured by eugenic-inspired involuntary sterilization.[182] For example, in *Davis v. Berry*, although the court distinguished between castration and other sterilization procedures, it noted that all victims of involuntary sterilization procedures are susceptible to feelings of shame, humiliation, degradation, and mental suffering.[183] The court said physical torture is not the only test for cruel and unusual punishment.[184] The states suggested that they were acting in the best interest of the patient.[185] However, when patients were stripped of their reproductive capabilities, the common argument was not that

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[180] WASHINGTON, *supra* note 46, at 181 ("Researchers were killing black syphilitics outright in order to test a theory of treatment.").
[181] *Id.* at 160; *see also* Andrea Patterson, *Germs and Jim Crow: The Impact of Microbiology on Public Health Policies in Progressive Era American South*, 42 J. HIS. BIOLOGY 529, 533-34 (2009). In the early part of the twentieth century, some diseases, most notably syphilis, were considered almost exclusively related to race. *Id.* Among the diseases associated with race was tuberculosis, which was considered a significant health issue in the black community. *Id.* Patterson reported that over fifty percent of urban blacks were infected with tuberculosis during some point in their life, and in 1906, one in six deaths were from tuberculosis—five in seven of which were between the ages of eighteen and twenty-eight. *Id.*
[182] Davis v. Berry, 216 F. 413 (E.D. Iowa 1914), *rev'd*, 242 U.S. 468 (1917) (stating that, as it related to the particular case at bar, there was no longer a threat to the plaintiff because the act in question had been repealed).
[183] *Id.* at 414 (requesting a "temporary injunction to restrain defendants as state officers enforcing chapter 187 of the Acts of the Thirty-Fifth General Assembly 1913, authorizing a surgical operation called vasectomy on idiots, feeble-minded, drunkards, drug fiends, epileptics, syphilitics, moral and sexual perverts, and mandatory as to criminals who have been twice convicted of a felony").
[184] *Id.* at 416.
[185] LOMBARDO, *supra* note 75, at 289.

parenthood would be to the detriment of the victim—it was that any offspring would be a burden to society.[186] The state's welfare was at least as important as any concern expressed for the individual.[187] Although the states promoted involuntary sterilization as a means to protect public health and safety, there is evidence that these notions may have been a pretext for administrative convenience or cost effectiveness.[188] The economic motivation for the eugenic movement is evidenced in a statement made by eugenics supporter and prominent Princeton biologist, Edwin Conklin.[189] In 1930, Conklin stated:

> The armies of defective and delinquent persons in every nation and race, the crowded hospitals, asylums, jails and penitentiaries in almost every country, the enormous cost caring for this human wreckage and wastage, all testify to the fact that there is urgent need for improvement. Indeed it is merely a question of how long civilization can continue to carry this ever-increasing burden of bungled and botched, of paupers, feebleminded and insane, of bums, thugs and criminals.[190]

In each circumstance where the government agent acted or failed to act, the egregious behavior turned on flawed logic supported by fear of the unknown. In the case of the Tuskegee Experiment and involuntary sterilization, where the convergence of science and health led to some of the most horrific encroachments on human rights, beliefs about the involvement of both social and biological science were erroneous.[191]

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[186] LAUGHLIN, *supra* note 7, at 338 (stating that, in addition to crime, there are "other types of social inadequacy equally destructive to the security and vigor of the nation, while not carrying blame, carry pity, shame, chagrin, ineffectiveness, and degeneracy").

[187] *Id.*

[188] Silver, *supra* note 168, at 883; LAUGHLIN, *supra* note 7, at 338.

[189] See NOURSE, *supra* note 40, at 39 (quoting Edwin Conklin, a Princeton biologist, in 1930).

[190] *Id.* According to Conklin, the number of people who had been deemed unfit for various reasons including mental deficiency and criminality created a heavy burden on society and therefore, the uncertainty of how long society would be able to sustain the weight associated with the cost of caring for and warehousing these individuals was an imminent concern. *Id.*

[191] JONES, *supra* 127, at 1-2 (explaining that there was no medical protocol, "[n]o new drugs were tested," and the "efficacy of old [treatments]" was not evaluated.); Allan M. Brandt, *Racism and Research: The Case of the Tuskegee Syphilis Experiment*, HASTINGS CTR. REP. 21 (1978) (noting that scientists thought blacks were more vulnerable than whites to disease and crime, and Social Darwinism

In both incidences, prominent scientists and physicians discredited the theory upon which the acts were premised, but leading proponents disregarded the reports and continued the detrimental practices.[192]

Involuntary sterilization, a fundamental tactic used during the eugenics movement and the Tuskegee Experiment, was linked to the early twentieth-century Social Darwinism theory.[193] The belief that some races were more prone to physical, mental, and social ills was the cornerstone of the Tuskegee Experiment and involuntary sterilization.[194] Heredity was thought to highly influence susceptibility to disease and influence the course of treatment.[195] While this premise may be true in some cases, this myth was dispelled as it relates to the Tuskegee Experiment and involuntary sterilization.[196] Both of these incidents resulted in tragic and sometimes irreversible assaults on select United States citizens' reproductive health.[197] It is even possible that the Tuskegee Experiment was driven by eugenic motives.[198] At least one state referenced syphilis as a topic of consideration under eugenic laws.[199] Syphilis, like mental deficiency, was considered a

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supporters suggested that blacks were a degenerating race driven by interests in racial differences, high rates of syphilis was thought to lead to insanity and crime; scientists discounted socioeconomic explanations for black health problems); *id.* at 27 ("The Tuskegee Study reveals the persistence of beliefs within the medical profession about the nature of blacks, sex, and disease—beliefs that had tragic repercussions long after their alleged 'scientific' bases were known to be incorrect.").

[192] Silver, *supra* note 168, at 870-71. At least as early as 1936, prominent groups had begun to oppose eugenic sterilization. *Id.* Even after the scientific community started to disregard the validity of the scientific theories behind genetics, states continued to sterilize. *Id.*; *see also id.* at 871 (quoting PHILLIP R. REILLY, THE SURGICAL SOLUTION: A HISTORY OF INVOLUNTARY STERILIZATION IN THE UNITED STATES 117 (1991)) ("[T]he idea that social inefficiency 'can be prevented on the basis of genetical theory is essentially invalid.'"). Similarly, Dr. H. M. Marvin, spokesperson for the American Heart Association, disagreed with Tuskegee Experiment proponents regarding the differing effects of syphilis on whites and blacks. *See* JONES, *supra* note 127, at 139. Marvin rejected the scientific validity of the procedures and tests used to support this notion. *Id.*

[193] Perkiss, *supra* note 124, at 74-75; *see also* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 461-62 (1985) (Marshall, J., concurring in part and dissenting in part) ("Fueled by the rising tide of Social Darwinism, the 'science' of eugenics, and the extreme xenophobia of those years, leading medical authorities and others began to portray the 'feeble-minded' as a 'menace to society . . . responsible in a large degree for many, if not all, of our social problems.'").

[194] Perkiss, *supra* note 124, at 74-75.

[195] JONES, *supra* note 127, at 21.

[196] Silver, *supra* note 168, at 871.

[197] LAUGHLIN, *supra* note 7, at 407.

[198] H.R.J. Res. No. 607, Reg. Sess. (Va. 2001)

[199] *Id.*

social contagion that required segregation to prevent the spread and the subsequent infection of other members of society.[200] Further, the decision of whether to initiate or withhold treatment was made by officials acting under the color of authority and not by the individuals themselves.[201] Coercion was just as alive in the Tuskegee Experiment as it was in involuntary sterilization.[202]

In the Rosewood Massacre, Tuskegee Experiment, and involuntary sterilization, social science influenced the presumption that African Americans were inferior and, therefore, unworthy of respect for their persons or property.[203] In the Japanese-American Internment, despite the absence of evidence, an entire race of people was considered a threat to the Nation.[204]

All of the horrific acts discussed above were sanctioned by some state or federal authority. The Japanese-American Internment was sanctioned by the President of the United States.[205] The Tuskegee Experiment was sanctioned by the Surgeon General, the highest healthcare authority in the nation.[206] While the Governor of Florida did not formally place a stamp of approval on the Rosewood Massacre, he had knowledge of the racial riots and failed to ensure that the sheriff was instituting a proper intervention.[207] The Governor's reluctance to get involved provided an avenue for the devastating events that took place. Finally, involuntary sterilization was sanctioned by the Supreme Court, the highest court in the land.[208]

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[200] Perkiss, *supra* note 124, at 75 (quoting GEORGE FREDERICKSON, THE BLACK IMAGE IN THE WHITE MIND: THE DEBATE ON AFRO-AMERICAN CHARACTER AND DESTINY 1817-1914 255 (1987)) (explaining that both syphilis and mental deficiency stemmed from acts of intimacy that led to the degeneration of society in particular when there was relations between those who were victims of either plight with those who were deemed not to be).

[201] Perkiss, *supra* note 124, at 78.

[202] WASHINGTON, *supra* note 46, at 157 (quoting Thomas Murrell, *Syphilis in the American Negro—A Medico-Sociological Study*, *in* TRANSACTIONS OF THE FORTIETH ANNUAL SESSION OF THE MEDICAL SOCIETY OF VIRGINIA 168, 171 (1909)) ("The future of the Negro lies more in the research laboratory than in the schools . . . When diseased, he should be registered and forced to take treatment before he offers his diseased mind and body on the altar of academic and professional education.").

[203] WASHINGTON, *supra* note 46, at 153.

[204] Minami, *supra* note 145, at 28.

[205] Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942) (ordering the internment of American citizens of Japanese ancestry).

[206] REVERBY, *supra* note 136, at 3.

[207] 1994 Fla. Sess. Law Serv. ch. 94-359 (West).

[208] Buck v. Bell, 274 U.S. 200, 207 (1927).

The victims of these historical atrocities have been compensated for the wrongs committed against them.[209] Similarly, victims of involuntary sterilization should be compensated. Involuntary sterilization advanced a triple controversy, including a cross section of race, gender, and reproductive rights, which were further complicated by implications of class discrimination. The pervasive pattern of discriminatory behavior should compel not only the dominant group, but all Americans to act.

B. Availability of Redress under Traditional Jurisprudence

Traditional jurisprudence does not offer an avenue of redress for individuals who, during the eugenics movement, were tragically stripped of the ability to procreate.[210] Writing for the court in *Poe v. Lynchburg Training School and Hospital*, Chief Judge Turk noted the following:

> Regardless of whatever philosophical and sociological valuation may be made regarding involuntary sterilizations in terms of current mores and social thought, the fact remains that the general practice and procedure under the old Virginia statute were upheld by the highest court in the land in *Buck v. Bell* . . . It is no answer for the plaintiff to allude to changing patterns of social and constitutional thought as a ground for reopening the inquiry.[211]

However, if state-sanctioned involuntary sterilization was conducted today and the constitutionality of the statute authorizing the procedure

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[209] *See* Posner & Vermeule, *supra* note 103, at 696 (noting the amounts of reparations awarded to victims of these horrific governmental acts).

[210] *See* Poe v. Lynchburg Training Sch. & Hosp., 518 F. Supp 789, 791 (W.D. Va. 1981).

[211] *Id.* at 791-94. A class action suit was brought by men and women claiming that the Virginia statute authorizing sterilization was unconstitutional and that officials failed to notify victims of informed consent requirement that would provide adequate notice to all members of the sterilized class. *Id.* Prayer for relief did not ask for monetary damages; claimants instead sought prospective relief, and therefore their claim was not barred by statute of limitations. *Id.* Judge Turk noted that even though societal values have changed, the beliefs of the time were reviewed and upheld by the United States Supreme Court. *Id.* Therefore, one who was injured cannot use today's standards to condemn what even the most legitimate lawmaking body has upheld in the past. *Id.*

was challenged, the claimant might have a favorable outcome.[212] In *Lawrence v. Texas*,[213] the Court viewed the Fourteenth Amendment's liberty component as a means of addressing laws like those sanctioning involuntary sterilization.[214] The Supreme Court said, "[T]imes can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact served only to oppress."[215] Since the end of the eugenics movement, the Court has taken a favorable stance in protecting an individual's right to be free from unwarranted governmental intrusion.[216] The Court has ruled in several seminal cases that the rights to procreate, marry, and privacy previously restricted in the early twentieth century are now considered fundamental rights, and therefore subject to a higher level of scrutiny.[217] However, the claims under consideration here are for actions that took place over thirty years ago and as such will encounter some insurmountable legal barriers.

Sovereign immunity, standing, and statutes of limitation are barriers that may bar any attempt to hold states accountable for the egregious acts committed against individuals in the name of public health and safety.[218] The barriers illuminate a significant flaw in the

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[212] *See, e.g.*, Roe v. Wade, 410 U.S. 113, 154 (1973) (affirming that the right to privacy in the realm of reproductive rights was fundamental); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (expanding on *Griswold* and recognizing the right to reproduction as a fundamental right); Loving v. Virginia, 388 U.S. 1, 12 (1967) (recognizing the right to marry as a fundamental right); Griswold v. Connecticut, 381 U.S. 479, 494 (1965) (finding that the right to privacy was a fundamental right). The right to privacy, marry, and procreate can all be potentially infringed upon in a case brought by a claimant seeking relief for involuntary sterilization. In addition to the Supreme Court's stance on the right to be free from governmental intrusion, Congress has recognized individual rights and the need for those rights to be considered in issues underpinning the eugenics movement. *See* Americans with Disabilities Act, 42 U.S.C. § 12101(a)(2) (2015) ("[S]ociety has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem."). Additionally, Congress noted confinement in an institution affects all areas of a person's life including everyday life activities, family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment. *Id.* at §§ 12101(a)(5)-(6).

[213] Lawrence v. Texas, 539 U.S. 558 (2003).

[214] *Id.* at 578.

[215] *Id.* at 579.

[216] *Id.* at 578; *Roe*, 410 U.S. at 154; *Eisenstadt*, 405 U.S. at 453; *Loving*, 388 U.S. at 12; *Griswold*, 381 U.S. at 494.

[217] *Lawrence*, 539 U.S. at 578; *see also supra* note 212 and accompanying text.

[218] *See* Chisolm, *supra* note 144, at 727 (standing and statute of limitations may be barriers to traditional jurisprudence); *see also* Poe v. Lynchburg Training Sch. & Hosp., 518 F. Supp 789, 793 (W.D. Va. 1981) (finding that whether an individual

legal system, which makes holding states accountable for detrimental acts committed against its people nearly impossible. By asserting the defenses of sovereign immunity, standing, and statutes of limitations against claims for redress for involuntary sterilization, states are almost certain to evade responsibility for depriving people of rights that are today deemed fundamental.[219]

Sovereign immunity protects state governments from suit in federal[220] and state court proceedings.[221] This protection is derived in part from common law tradition[222] and is rooted in the Supreme Court's interpretation of the Eleventh Amendment.[223] The Supreme Court has held that federal courts may order state officials to comply with federal standards, but may not compel the state to pay damages to

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has standing to file suit draws upon whether there is a justiciable case or controversy providing evidence that the perpetrators will commit wrongs again); *id.* at 794 (noting that a plaintiff must allege a direct and concrete injury to themselves); Cox v. Stanton (*Cox I*), 381 F. Supp. 349, 356 (E.D. N.C. 1974) (challenging the constitutionality of a state statute that authorized involuntary sterilization). In *Cox*, The court found that the plaintiff did not have standing to bring the suit because there was no present threat and the likelihood of suffering harm because of the statute was remote and speculative. *Id.*; *see also* Cox v. Stanton (*Cox II*), 529 F.2d 47, 49-50 (4th Cir. 1975) (finding that when a case falls within the jurisdiction of the federal courts, "[f]ederal law holds that the time of accrual is when [the] plaintiff knows or has reason to know of the injury which is the basis of the action"). However, the court also held that claims are time-barred if they rest on information that the plaintiff knew or should have known within the prescribed period before filing the suit. *Id.*

[219] Chisolm, *supra* note 144, at 714-27 (stating that Japanese-Americans and African-Americans had fundamental rights violated and that the barriers of sovereign immunity, statutes of limitations, causation, and standing prevent relief).

[220] CHEMERINSKY, *supra* note 143, at 180.

[221] *See* Alden v. Maine, 527 U.S. 706, 711-12 (1999). In *Alden*, a group of probation officers filed suit against their employer, the State of Maine, in the United States District Court for the District of Maine alleging that the state had violated overtime provisions. *Id.* The District Court dismissed the suit following a ruling in *Seminole Tribe of Fla. v. Florida,* 517 U.S. 44, 64-65 (1996), in which the court ruled that Congress lacks the power under Article I to abrogate the State's sovereign immunity from suits commenced or prosecuted in the federal courts. *Id.* The petitioners filed the same action in the state court and the state court also dismissed it based on sovereign immunity. *Id.* Subsequently, the Supreme Court ruled that the powers delegated under Article I of the United States Constitution do not include the power to subject non-consenting States to private suits for damages in state court, and sense Maine had not consented to suit the Court dismissed the case. *Id.* Sovereign immunity bars suit in state court without state consent. *Id.*

[222] *Id*. at 733.

[223] U.S. CONST. amend. XI ("The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced[,] or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").

compensate for past violations.[224] Further, the Eleventh Amendment prevents a federal court from awarding retroactive relief if funds will be paid from the state treasury.[225] However, the Supreme Court has recognized ways to circumvent a state's protection against suit, and lists the ability to sue for Fourteenth Amendment violations as one exception to the general rule of sovereign immunity.[226]

Thus, the cases seeking redress for involuntary sterilization have been primarily based on claims of Fourteenth Amendment violations.[227] Statutes invalidated on procedural due process grounds have generally failed because there was no express requirement for notice, hearing, opportunity to confront and cross examine witnesses, or the right to appeal.[228] In other cases claiming Fourteenth Amendment violations on substantive due process grounds, the courts were reluctant to look at the issue.[229] Perhaps the rationale for failure to consider substantive due process issues lies in states authority to ratify laws protecting public health and safety, even when those same laws abridge a fundamental right.[230] When legislators drafted laws authorizing involuntary sterilization with the express intent of protecting public health and safety, Fourteenth Amendment challenges were dismissed because the state was acting pursuant to police power.[231] In *Buck v. Bell*, for example, the Supreme Court affirmed state authority to enact such legislation under the police power by citing *Jacobson v. Massachusetts*.[232] In *Jacobson*, the Supreme Court

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[224] CHEMERINSKY, *supra* note 143, at 206-07.
[225] Edelman v. Jordan, 415 U.S. 651, 651 (1974) (providing further interpretation of the Eleventh Amendment).
[226] CHEMERINSKY, *supra* note 143, at 181. There are three primary avenues by which a party can circumvent the Eleventh Amendment's prohibition of suits against state governments: (1) bringing suits against state officers; (2) the state's waiver of the Eleventh Amendment immunity; and (3) grant of a consent to sue and substantiate a claim that the litigation is the result of a violation of a statute adopted under the Fourteenth Amendment. *Id.*
[227] Silver, *supra* note 168, at 863.
[228] Jeffrey F. Ghent, Annotation, *Validity of Statutes Authorizing Asexualization or Sterilization of Criminals or Mental Defectives*, 53 A.L.R. 3d 960, §§ 5(a)-5(b) (1973).
[229] *Id.* at §§ 5(a)-(b), 7(a)-(b).
[230] *See* Smith II, *supra* note 80, at 444.
[231] *See* Jacobson v. Massachusetts, 197 U.S. 11, 24 (1905).
[232] Buck v. Bell, 274 U.S. 200, 207 (1927) ("The principle that sustains compulsory vaccination is broad enough to cover cutting the fallopian tubes."); *see also* Jacobson v. Massachusetts, 197 U.S. 11, 24-25 (1905). In *Jacobson*, the Court referred to the authority of the state to enact a statute requiring compulsory vaccination as the state's policing power. *Id.* Within this power, the Court found that "the police power of the a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the

sanctioned compulsory vaccination by stating that the state actions were consistent with its policing powers.[233] The opinion in *In re Cavitt* provides an example of how courts viewed the scope of police power as it relates to involuntary sterilization:

> It is generally the law that the police power of the state is broad enough to permit the sexual sterilization of mentally deficient inmates . . . It can hardly be disputed that the right of a woman to bear and the right of a man to beget children is a natural and constitutional right, nor can it be successfully disputed that no citizen has any rights that are superior to the common welfare. Acting for the public good, the state, in the exercise of its police power, may impose reasonable restrictions upon the natural and constitutional rights of its citizens. Measured by its injurious effect upon society, the state may limit a class of citizens in its right to bear or beget children with an inherited tendency to mental deficiency . . . .[234]

Here, the court stated that the right to procreate is both natural and constitutional, but if the exercise of that right is detrimental to society, then the state, through its police power, may legitimately restrict reproduction to preserve the public good.[235] Therefore, given all the factors previously mentioned, sovereign immunity is a bar to claims against state governments[236] and its officials[237] for the injustices they committed during the eugenics movement.

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public safety." *Id.* at 25. However, a state law cannot contravene the Constitution of the United States nor infringe upon any rights granted or secured by that instrument. *Id.*; *see also In re* Cavitt, 157 N.W.2d 171, 175 (Neb. 1968) ("Measured by its injurious effect upon society, the state may limit a class of citizens in its right to bear or beget children with an inherited tendency to mental deficiency, including feeblemindedness, idiocy[,] or imbecility. It is the function of the legislature, and its duty as well, to enact appropriate legislation to protect the public and preserve the race from known effects of the procreation of mentally deficient children by the mentally deficient.").

[233] *Jacobson*, 197 U.S. at 24-25.

[234] *Cavitt*, 157 N.W.2d at 174-75; *see also* Plessy v. Ferguson, 163 U.S. 537, 550 (1896) ("[E]very exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class.").

[235] *Cavitt*, 157 N.W.2d at 174-75.

[236] *See* Jachetta v. United States, 653 F.3d 898, 908 (9th Cir. 2011).

[237] *See* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 102 (1984).

Similarly, standing may be a barrier to traditional jurisprudence.[238] Criteria for standing are derived from Article III of the United States Constitution.[239] Article III requires a showing that the claimant has suffered a concrete and direct injury as a result of the defendant's actions.[240] In cases regarding involuntary sterilization, the direct injury requirement will bar family members from making claims on behalf of their deceased loved ones; however, husbands or wives claiming they would have had children may be an exception.[241] Further, standing may be a barrier because most of the laws sanctioning involuntary sterilization have either been repealed or amended.[242]

Standing also requires the claimant to show causation.[243] There must be a causal link between those who experienced the harm and those who are the source of the harm.[244] "A strong tradition in the United States holds that individuals are not blameworthy for acts over which they have no control. If one person wrongfully harms another, the wrongdoer has a duty to provide a remedy, but a third party has no duty to provide a remedy."[245] Given the amount of time that has passed since the egregious acts were committed, victims are unlikely to establish standing because individual perpetrators who committed the acts are likely deceased.[246] Therefore, standing also prevents victims from obtaining justice under traditional jurisprudence.

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[238] Silver, *supra* note 168, at 885-86 (listing standing and statutes of limitations as obstacles to redress).

[239] CHEMERINSKY, *supra* note 143, at 63. In order to meet the standing requirement, the claimant must have suffered a direct injury or imminently will suffer an injury, allege that the injury is traceable to the defendant's conduct, and allege that a federal court case is likely to redress the injury. *Id.*

[240] U.S. CONST. art. III; *see* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (finding that there is no cause of action in bringing forth a claim based on a hypothetical situation; a person must have sustained an actual injury or be in immediate danger of sustaining one).

[241] Jennifer M. Klein, *Compensating Victims of Forced Sterilization: Lessons from North Carolina*, 40 J. L. MED. & ETHICS, 422, 424 (2012).

[242] *See, e.g.*, Poe v. Lynchburg Training Sch. and Hosp., 518 F. Supp 789, 792 (W.D. Va. 1981) (noting that the law has been repealed so standing may be an issue).

[243] CHEMERINSKY, *supra* note 143, at 63.

[244] Maxine Burkett, *Reconciliation and Nonrepetition: A New Paradigm for African-American Reparations*, 86 OR. L. REV. 99, 122 (2007); *see also* James T. Campbell, *Settling Accounts? An Americanist Perspective on Historical Reconciliation*, AM. HIST. REV. 963, 967 (2009) ("[T]he historical redress debate in the United States has been waged in the language of torts."); Howard-Hassmann, *supra* note 104, at 826 ("The causal chain between the harmful action and the claim for reparations is very important.").

[245] Posner & Vermeule, *supra* note 103, at 699.

[246] Burkett, *supra* note 244, at 124.

Statutes of limitation require cases to be presented within a specified time period, while evidence is available and fresh.[247] Since many of the laws which authorized involuntary sterilizations have been repealed, it is unlikely that a live case or controversy will be available for the courts to hear.[248] Further, claimants may have difficulty proving their case because they are unable to access medical records containing documentation of involuntary sterilization and the specific circumstances surrounding the procedure.[249] Since the intrusive acts date back to the early twentieth century, medical records may not be available.[250] Medical record retention policies are governed by state law, and therefore the records may have been destroyed.[251] Based on these observations, statutes of limitation will also prevent claimants from obtaining redress in court.

Since sovereign immunity, standing, and statutes of limitation bar claims under traditional jurisprudence, how can the victims of involuntary sterilization obtain redress for the injustices committed against them? Historically, many groups who suffered injuries as a result of state action have turned to reparations as a means of redress when otherwise unavailable.[252] Reparations allow claimants to sidestep obstacles encountered under traditional jurisprudence.[253]

C. Wrong Can Be Repeated

The possibility of repetition was present in each of the incidents discussed above, with the exception of involuntary sterilization, an

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[247] *Id.* at 123.
[248] LOMBARDO, *supra* note 75, at 294.
[249] Elizabeth K. Tomasovic, *Robbed of Reproductive Justice: The Necessity of a Global Initiative to Provide Redress to Roma Women Coercively Sterilized in Eastern Europe*, 41 COLUM. HUM. RTS. L. REV. 765, 769 (2010); *id.* at 793-94 (listing the inability to detect the sterilization procedure after the passage of time and public opinion as barriers; common public opinion is that compensation may invite claims for compensation for other oppressive government policies).
[250] *See* 1924 Va. Acts 569.
[251] *Medical Record Retention and Media Formats for Medical Records*, CTRS. FOR MEDICARE & MEDICAID SERVS., http://cms.gov/Outreach-and-Education/Medicare-Learning-Network-MLN/MLNMattersArticles/downloads/SE1022.pdf (last visited Oct. 18, 2015).
[252] Daniel A. Farber, *Backward-Looking Laws and Equal Protection: The Case of Black Reparations*, 74 FORDHAM L. REV. 2271, 2288-90 (2006) (noting that reparations were paid to the victims of the 1923 Rosewood Massacre, to Japanese Americans who were interned, and African Americans who were denied treatment during the Tuskegee Syphilis Experiment).
[253] Burkett, *supra* note 244, at 119-27.

unrepeatable offense.[254] In the Rosewood Massacre, where the judicial system failed Rosewood residents, the act was subject to repetition because, while the Constitution declares that all men are equal, during the week of this historical tragedy equality was nowhere to be found.[255] State officials neglected their police power.[256] The protection of safety, health, and welfare of Rosewood residents did not extend to the black community.[257] Similarly, the Tuskegee Experiment was subject to repetition because medical experiments were commonplace, and there were few guidelines regulating the process.[258] Additionally, Japanese-American Interment could have been repeated.[259] Other groups with foreign ancestry could have been targeted if the government saw fit to establish an agenda rooted in animus and fear.

Finally, the involuntary sterilization of the mentally deficient as a means of population control or selective breeding can be repeated.[260] Although the act itself cannot be repeated on the same person, the fundamental tenet supporting the procedure can be reinstated, and others may be forcefully or coercively sterilized.[261] Currently, repetition of this atrocity still remains a viable threat because "the Supreme Court has not overruled *Buck* and the lower courts refuse to declare the practice of involuntary sterilization unconstitutional."[262]

Additionally, the Court in *Planned Parenthood v. Casey*, in talking about reproductive liberties, said these matters involve intimate and personal choices, and that these choices are "central to personal dignity and autonomy, [and] are central to the liberty protected by the Fourteenth Amendment."[263] If these rights are not protected, restrictions of reproductive choices will be subject to encroachment in the name of public health. To assuage any fears that the notions of the

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[254] Carrie A. Love, *Unrepeatable Harms: Female Genital Mutilation and Involuntary Sterilization in U.S. Asylum Law*, 40 COLUM. HUM. RTS. L. REV., 173, 212 (2008) (discussing the permanency of sterilization and notes that once sterilization has taken place, the act cannot be repeated because the individual is forever deprived of their reproductive abilities); *see also* Relf v. Weinberger, 372 F. Supp 1196, 1199 (D.D.C. 1974) ("Sterilization of females or males is irreversible."); *id.* at 1203 (stating that involuntary sterilization "invades rather than compliments the right to procreate").
[255] JONES, *supra* note 106, at 19.
[256] *Id.*
[257] *Id.*
[258] *Public Health Syphilis Study*, *supra* note 123.
[259] Minami, *supra* note 145, at 33.
[260] Silver, *supra* note 168, at 864.
[261] *Id.*
[262] *Id.*
[263] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992).

eugenics past will be repeated, the United States can take a formal stance against such egregious acts.

V. INTEREST CONVERGENCE

Finally, Derrick A. Bell, Jr.'s interest-convergence theory is applicable in each circumstance, and his notion that it is an integral component of any successful reparation scheme is evident.[264] The interest-convergence theory is based on the premise that the dominant group will only recognize the "rights" of minorities when the recognition of those rights benefits the interest of the dominant group[265] and furthers some political objective.[266] Advocates for reparations have concurred with Bell's theory.[267] For example, Eric Yamamoto and other leading scholars have referred to Bell's theory as a means of explaining why some groups, such as Japanese-Americans interned in camps, have received reparations and others, such as the descendants of African American slaves, have not.[268] The scholars who draw upon and support Bell's theory advance the tenant that successful reparation strategies advance the interests of the injured individuals while also advancing the interest of mainstream society.[269]

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[264] Eric K. Yamamoto et al., *American Reparations Theory and Practice at the Crossroads*, 44 CAL. W. L. REV. 1, 15 n.66 (2007).

[265] Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523-25 (1980) ("The interests of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites. . . . [Judicial remedies,] if granted, will secure, advance, or at least not harm societal interests deemed important by middle and upper class whites."). Bell further asserts that *Brown v. Board of Education* should to be considered in light of the value that the decision would provide to whites. *Id.* According to Bell, with the abandonment of segregative practices came economic and political advances at home and abroad. *Id.* For example, U.S. prestige and leadership abroad would be improved among countries that were critical of the segregative practices. *Id.* Additionally, at home, if the segregative practices were dismantled, the South could make the transition from a rural- and plantation-based economy to a more industrialized society with all the associated financial benefits. *Id.*; *see also* Eric K. Yamamoto, *Racial Reparations: Japanese American Redress and African American Claims*, 19 B.C. THIRD WORLD L.J. 477, 514 (1998) ("[I]nterest convergence theory thesis does not mean that African Americans must subordinate their interests to those of white Americans. Rather, it means that blacks must devise a reparations strategy that primarily serves African American interests while furthering, or appearing to further in some important way, mainstream interests. Those interests, as traditionally described, include the United States' international and domestic reputation on human rights issues . . . .").

[266] Bell, *supra* note 265, at 524.

[267] Yamamoto et al., *supra* note 264, at 15 n.66.

[268] Yamamoto, *supra* note 265, at 497.

[269] *Id.* at 514.

In the Rosewood Massacre, Tuskegee Experiment, and Japanese-American Internment, governmental interests were advanced by supporting reparations for the gross injustices committed against United States citizens. Through acknowledgment of past wrongs, the government was also able to accomplish a political objective.[270] For example, Maxine Jones noted that Florida's booming tourist industry and real estate market could have suffered if officials continued to ignore the personal and economic devastation that took place in Rosewood.[271] In order to preserve Florida's economy, political officials acknowledged the wrong they had committed.[272]

In the Tuskegee Experiment, the United States was likely interested in avoiding public scrutiny for hypocrisy regarding medical experimentation. Prior to granting reparations, the United States filed suit against German Nazi medical officials for gross human rights violations in scientific testing.[273] Although the United States highlighted the unethical behavior demonstrated by the German Nazi medical officials, the government was carrying out similar experiments at home.[274] If the double standard had not been addressed, it may have been destructive to international relations; therefore, the government needed to act.[275] Similarly, when the government paid reparations for the Japanese-American Internment, the actions strengthened the United States' position with respect to human rights.[276] The United States could not advocate for human rights abroad when it inflicted harm upon its citizens and failed to protect their rights. Additionally, trade relations in Japan may have played a part as President Regan lobbied for improved relations with Japan.[277]

Similarly, the United States government might find some political motivation for supporting a grant of reparations to victims of involuntary sterilization. The United States is a staunch promoter of human rights, and it issues an annual report on global human rights practices.[278] In these reports, the United States has heavily criticized

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[270] Yamamoto et al., *supra* note 264, at 15 n.66.
[271] JONES, *supra* note 106, at 15.
[272] *Id.*
[273] Perkiss, *supra* note 124, at 71-72.
[274] *Id.* at 72.
[275] *Id.*
[276] *Id.* at 80-81.
[277] Maga, *supra* note 146, at 15 (citing a communication from former President Reagan to S. Stephen Nakashima and Jann M. Nakashima).
[278] Hillary R. Clinton, *Country Reports on Human Rights Practices for 2011: Secretary's Preface*, U.S. DEP'T OF STATE (2011), http://www.state.gov/j/drl/rls/hrrpt/2011/frontmatter/186162.htm.

China's one child policy.[279] Under the one child policy, China's government officials allowed forced abortions and involuntary sterilizations.[280] In light of the United States' position on involuntary sterilization, a domestic commitment to avoid repetition of such egregious acts would make a strong foreign policy statement.

Additionally, Congress included in its definition of a "refugee" a person who has undergone involuntary sterilization.[281] The Immigration and Nationality Act states that a person forced "to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion . . . ."[282] Further, involuntary sterilization is an international human rights violation.[283] The United States offers asylum to individuals who have been involuntarily sterilized or have experienced the threat of such acts in other countries.[284] Congress has authorized statutory relief for those individuals.[285] This action taken by Congress is especially significant because many countries with a history of eugenic-inspired involuntary sterilization practices reportedly modeled their programs after the United States.[286] American eugenics ideals and practices have transcended the United States' borders and infiltrated other countries such as China, Germany, Sweden, and Canada.[287] Congress's

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[279] *Country Reports on Human Rights Practices for 2011: China*, U.S. DEP'T OF STATE 50-51 (2011), http://www.state.gov/j/drl/rls/hrrpt/2011/eap/186268.htm (stating that China's involuntary sterilization policy is a product of strict population control measures.).

[280] *Id.* at 51.

[281] Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42)(B) (2006).

[282] *Id.* Pursuant to this act, a person who has been forced to "undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion." *Id.* This person shall also qualify as a refugee and is eligible for asylum. *Id.*

[283] Love, *supra* note 254, at 176.

[284] 8 U.S.C. § 1101(a)(42)(B).

[285] Love, *supra* note 254, at 212-13.

[286] ANNE KERR & TOM SHAKESPEARE, GENETIC POLITICS: FROM EUGENICS TO GENOME 22, 49 (2002). The countries that engaged in eugenic practices include: Germany, which had a racial hygiene program in the late nineteenth and early twentieth century, Norway, and Sweden. *Id.*; *see also* Jana Grekul, *A Well-Oiled Machine Alberta's Eugenics Program 1928-1972, ALBERTA'S HISTORY* (2011) (discussing Canada's eugenic practices).

[287] *See* Tomasovic, *supra* note 249, at 820. Sweden paid reparations for those whom the government had involuntarily sterilized. *Id.* The victims included individuals of specific races or with qualities such as mental retardation. *Id.* Also included were those who were considered racially inferior or mentally-deficient. *Id.* (citing Ariel

acknowledgement of the detrimental effects of involuntary sterilization and expressed intent of offering protection to foreign citizens who were victims of similar heinous acts in their own country establishes a strong argument in favor of interest convergence.

In light of the similarities and differences noted in the discussion about involuntary sterilization and the circumstances under which compensation has been granted, an argument for reparations is viable. While the reparations granted to the Rosewood Massacre, Tuskegee Experiment, and Japanese-American Internment victims provide a starting point for beginning reparation discussions, the amounts awarded to those victims may not be adequate here.[288] Indeed, it can be argued that the reparations paid to the Rosewood Massacre, Tuskegee Experiment and Japanese-American Internment victims were not adequate in those situations either. The United States government deprived victims of fundamental rights that can never be restored with money or in kind services.[289] Placing value on things such as homes, land, and other tangible items is relatively easy; however, attempting to place value on human factors, such as personal dignity and worth, is a different issue altogether because the devaluation of these victims was at the core of the beliefs that promulgated these historic tragedies.[290]

Thus, reparations would not assign a value to rights of bodily integrity, but rather serve as a sign of national acknowledgment and accountability, attempting to make amends and close another chapter of America's dreadful history. Throughout United States history, women, African Americans, mentally-ill, and mentally retarded individuals have endured invidious discrimination.[291] Any person involuntarily sterilized during the eugenics movement fell within at least one of these classes of persons.[292] For victims of involuntary

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Colonomos & Andrea Armstrong, *German Reparations to the Jews after World War II: A Turning Point in the History of Reparations*, *in* THE HANDBOOK OF REPARATIONS 390, 407-08 (2006)) (noting that Germany paid reparations exceeding 38.6 billion dollars).

[288] *See generally* Posner & Vermeule, *supra* note 103, at 696 (detailing the reparations awarded to victims of these incidents).

[289] Perkiss, *supra* note 124, at 73 (arguing that not only was a simple apology from President Clinton woefully inadequate, but that because of the time passed, only "a deliberate, bilateral process of reconciliation" could restore the victims).

[290] Campbell, *supra* note 244, at 967.

[291] Robert J. Cynkar, Buck v. Bell*: "Felt Necessities" v. Fundamental Values?*, 81 COLUM. L. REV. 1418, 1428 (1981) (explaining that social reformers saw eugenics as easy route to a better society).

[292] Edward J. Larson*, Supreme Mistakes: Putting* Buck v. Bell *in Scientific and Historical Context: A Response to Victoria Nourse*, 39 PEPP. L. REV. 119, 122-24

sterilization, the invasion of bodily integrity, loss of physical, emotional, and psychological health, erosion of personal dignity, and blatant denial of the opportunity to trust authority demands an even greater response. Despite the wide-ranging effect of this tragedy on the lives of its victims, there are some who will oppose any attempt to rectify these egregious government sanctioned wrongs.[293]

VI. ARGUMENTS AGAINST REPARATIONS

How to rectify injustices committed by the government or its actors is not a new issue. History has shown that building a case for reparations is not easy.[294] Opponents make several arguments against providing reparations for victims of involuntary sterilization. The most prominent argument against reparations is that taxpayers should not bear the financial burden of past wrongs committed.[295] This argument is not contemplated here because, given the dire national and state economic situation, the most viable avenue for retaining funding for a reparation program draws upon the privatization of reparations. The redress plan, however, should include compensation and an official apology, as both are important components of a reparations scheme.[296]

History suggests that political or judicial support for reparations for African Americans is unlikely; therefore, the idea of privatized reparations developed as a means to achieve redress.[297] Similarly, the privatized reparations model may be a viable alternative for those who

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(2011) (using Carrie Buck as the test case for sterilization showed the statutory allowances for sterilization of not only women, but also the mentally retarded; however, allowing states to sterilize against undesirable traits of mental retardation led quickly to sterilizing on a racial basis).

[293] *See* Campbell, *supra* note 244, at 967 (noting that the American values of self-reliance and individual responsibility underlie the argument against reparations).

[294] *See* Burkett, *supra* note 244, at 136; Lee A. Harris, *"Reparations" as a Dirty Word: The Norm Against Slavery Reparations*, 33 U. MEM. L. REV. 409, 421-22 (2003). Perhaps African Americans have not been able to obtain reparations for slavery because the cause has been closely associated with controversial figures, and, therefore, public attitudes are negative about the issue because it is associated with divisiveness. *Id.*

[295] *See* Klein, *supra* note 241, at 424-25; *see also* Campbell, *supra* note 244, at 967. Americans, particularly white Americans, often articulate their concerns about bearing "the burdens of the past," which is based on the "idea that they are somehow burdened by or accountable for offenses that occurred before they were born is not just implausible but risible." *Id.*

[296] *See also* Burkett, *supra* note 244, at 99 (including a third element: a guarantee of non-repetition).

[297] Saul Levmore, *The Jurisprudence of Slavery Reparations: Privatizing Reparations*, 84 B.U. L. REV. 1291, 1291 (2004).

were involuntarily sterilized. Under this model, individuals and businesses can voluntarily contribute private financing and receive tax credits similar to those given for charitable and campaign contributions.[298] The government may elect to give credit for private payments in the event reparations are mandated in the future.[299]

Individuals, businesses, and organizations that voluntarily contribute would receive recognition from the populace as well as other tangible and intangible benefits, thus satisfying the essential conditions under Bell's interest-convergence theory.[300] Any individual, business, or organization tied to the eugenics movement may have a greater incentive to voluntarily donate to the reparations fund due to a desire to remove the "moral taint" associated involvement.[301]

Another argument against reparations, in particular for victims of involuntary sterilization, is the impossibility of placing monetary value on the harm victims experienced.[302] While quantifying loss associated with deprivation of the ability to procreate may be difficult, compensation provided to victims of similar egregious acts may serve as a model. For example, the victims of the Tuskegee Experiment received $37,500 for the wrongs committed against them.[303]

A third argument against offering compensation to eugenics victims is that paying victims could open the door to reparations for slaves or American Indians.[304] However, one author has noted some norms that stand in the way of granting reparations for slavery, which include: deviations from individualism to a focus on a group-oriented remedy; association of support for reparations with controversial figures; and

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[298] *Id.*
[299] *Id.*
[300] Yamamato, *supra* note 265, at 497.
[301] Posner & Vermeule, *supra* note 103, at 709-10 (noting that individuals may "feel a 'moral taint' as a result of an association with wrongful behavior over which they had no control"); *see also* Larson, *supra* note 292, at 122-23 (discussing supporters of the eugenics movement, including wealthy philanthropists (Alexander Graham Bell, Margaret Sanger); foundations (Rockefeller, Russell Sage); United States Presidents (Theodore Roosevelt, William H. Taft, Woodrow Wilson, and Calvin Coolidge); university presidents (University of Michigan, Harvard University, Stanford University, and Johns Hopkins University); scientists from prestigious universities (Harvard University); and prestigious institutions (Carnegie Melon, American Museum of Natural History)). Supporters of the eugenics movement, their affiliates, or administrators of their estates may be possible sources for private contributions.
[302] Klein, *supra* note 241, at 425.
[303] WASHINGTON, *supra* note 46, at 175.
[304] *See* Severson, *supra* note 11.

the Supreme Court's obstinacy to race-based legal remedies.[305] Because these norms are impediments to granting reparations, it is important to assess whether they affect an argument for a remedy for victims of involuntarily sterilized.

Focusing on a group, as opposed to an individual, remedy is not problematic for involuntary sterilization because it can be addressed from the perspective of the individual or group affiliation. Often, victims can be specifically identified.[306] Alternatively, arguments for reparations can be based on how involuntary sterilization impacted the lives of certain groups. Moreover, support for reparations for involuntary sterilization is not linked with a controversial figure; therefore, the second norm is not an impediment. The eugenic movement itself, on the other hand, is associated with Adolf Hitler, a markedly controversial figure, and this association may be an impetus to take action and grant reparations.[307] While the movement that gave rise to increased involuntary sterilization was rooted in controversial beliefs about non-white individuals,[308] support for reparations is based on the truth that lies in the tragic history of women who have endured in a battle of race, gender, and class discrimination.[309]

Finally, the Supreme Court's obstinacy against race-based legal remedies may prove challenging, but not insurmountable. At first glance, the issue of a race-based legal remedy appears inconsequential; after all, the seminal Supreme Court case was an argument against the sterilization of Carrie Buck, a white female.[310] Further, even though non-whites were involuntarily sterilized, it is the face and story of Carrie Buck that is at the forefront of discussion.[311] However, it would be a tragic error if the impact of involuntary sterilization on women of color, particularly Black women, is marginalized.[312]

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[305] Harris, *supra* note 294, at 412, 445-47 (positing that American jurisprudence of color-blindness is problematic for race-based remedies).
[306] JONES, *supra* note 106, at 43 n.18 (noting that the Tuskegee Institute in Alabama provides much of this data as well as many Black newspapers that published data and statistics that many other mainstream media sources did not report).
[307] KERR & SHAKESPEARE, *supra* note 286, at 25.
[308] *See* Barbara L. Bernier, *Class, Race, and Poverty: Medical Technologies and Socio-political Choices*, 11 HARV. BLACKLETTER J. 115, 128 (1994).
[309] *Id.* at 143 (arguing that the United States prioritized medical advancement over the discriminatory practices of sterilization and other medical abuses).
[310] Buck v. Bell, 274 U.S. 200, 205 (1927).
[311] *See* Cynkar, *supra* note 291, at 1420.
[312] *See generally* Deleso A. Washington, *Examining the "Stick" of Accreditation for Medical Schools through Reproductive Justice Lens: A Transformative Remedy for Teaching the Tuskegee Syphilis Study*, 26 J. CIV. R. & ECON. DEV. 153, 154 (2011) (discussing the historical marginalization of black women in healthcare, research and medical education, and particularly referencing the absence of black women from the

The eugenics movement established a culture conducive to the intersection of gender, race, and class discrimination.[313] Kimberle Crenshaw stated that "the intersectional experience is greater than the sum of racism and sexism, any analysis that does not take intersectionality into account cannot sufficiently address the particular manner in which Black women are subordinated."[314] While Black women can be found at the crossroads of gender, race, and class discrimination, according to Crenshaw, their unique experiences cannot be adequately addressed if race, class, or gender issues are compartmentalized.[315] In the area of reproductive rights, Deleso Washington aptly asserted, "'Her-story,' the Black woman's story, cannot be maintained in the background of history."[316] Therefore, it is important to view the effect of eugenic-inspired involuntary sterilization through a lens that illuminates the context of economically-driven historical paradigm shifts regarding the reproductive roles of Black women.[317]

Prior to the eugenics movement and before slave labor was prohibited by the Thirteenth Amendment,[318] Black women were encouraged to have babies, as the fruit of their womb was considered valuable.[319] However, the eugenics movement, triggered by an increase in poverty, disease, and overcrowding, was an effort to relieve the government of the heavy burden of caring for the "unfits," most notably Blacks as they were deemed inferior to whites.[320] Eugenics transformed the view of the Black woman's womb from a fertile and rich breeding ground that sustained the economic viability of a nation

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Tuskegee Experiment as well as from the grant of reparations to those who suffered injury because the disease was left untreated in black males).

[313] Klein, *supra* note 241, at 423.

[314] Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Anti-Discrimination Doctrine*, *Feminist Theory and Anti-Discrimination Politics*, 1989 U. CHI. LEGAL F. 139, 140 (1989). The issues black women face must be analyzed in a multi-dimensional manner which considers the impact of the intersection of race, class, and gender on this group. *Id.*

[315] *Id.* at 149-50.

[316] Deleso A. Washington, "*Every Shut Eye, Ain't Sleep": Exploring the Impact of Crack Cocaine Sentencing and the Illusion of Reproductive Rights for Black Women from a Critical Race Feminist Perspective*, 13 J. GENDER, SOC. POL'Y & L. 123, 128 (2005).

[317] *Id.* at 128-29.

[318] *See* U.S. CONST. amend. XIII.

[319] Bernier, *supra* note 308, at 128 (discussing that the Black woman was considered a breeder of "valuable units of property").

[320] Cynkar, *supra* note 291, at 1427 (intelligence tests "confirmed" the eugenic belief that Blacks were inferior to Whites).

to "a contagion subjected to sterilization laws and abuses."[321] Undoubtedly, regulation and restraint of Black women's reproductive rights has been intricately tied to the fiscal health of the United States as well as the individual states. Failure to consider these historical truths is indeed another egregious assault upon the mind and body of the Black woman. It is impossible to achieve true justice for victims of involuntary sterilization if arguments for reparations are solely based on racial injustices, however. Race does not stand alone in an analysis of the effect of involuntary sterilization on Black women; but rather, the effect of the historical tripartite intersection of race, gender, and class must be considered. While the aforementioned arguments made against reparations may be legitimate impediments in some cases, they are not insurmountable to claims advanced by victims of involuntary sterilization who seek redress for their injuries.

VII. CONCLUSION

Those who were involuntary sterilized have endured incalculable suffering. Sanctioned by the United States Supreme Court and various state laws, involuntary sterilization shattered the hope of parenthood for many unsuspecting individuals. Congress's stance against involuntary sterilization in countries like China is no more than propaganda if it fails to consider its own eugenic history and find that the abhorrent act is equally repulsive when committed against its own citizens. While traditional jurisprudence bars remedy for victims of involuntary sterilization, there is evidence to support redress through reparations. The American people, compelled by a sense of moral obligation and a desire to maintain the nation's position as one of the most progressive countries in the world, must expressly acknowledge and rectify the wrong that may have provided some abstract benefit to the state, but was assuredly a detriment to the people.

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[321] Washington, *supra* note 316, at 129 (explaining that an understanding of critical race feminism is necessary to comprehend the effects of involuntary sterilization).