



## Future or Ruin: The Argument for Eugenics

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***DISCLAIMER:*** *My political opponents in the Libertarian Party, having no legitimate grounds to attack me, have made the following paper the centerpiece of their misguided crusade. Despite the fact that I have already addressed this paper in one of my first Fireside Chats ( <https://youtu.be/x-gMxyGlbwo> ), despite the fact that I have repudiated the policy aspect of this paper repeatedly & publicly (vide <https://www.facebook.com/notes/augustus-invictus/official-response-to-the-criticisms-of-chairman-wyllie/172864523046651>), and despite the fact that eugenics has nothing whatsoever to do with any part of my campaign platform, these disingenuous gossipmongers continue to raise this paper as their foremost evidence that I am not a “real” Libertarian. And so I must address it here, as a disclaimer to the paper itself.*

*The first objection of my critics is, of course, the very existence of the paper. To this I reply that while I still believe the legal argument to be valid, I disavow the public policy argument that States should implement eugenics programs. This change in perspective has come from my experience in law and politics. When working with theory – which is to say, when working in a vacuum – one can build the most glorious castles, draft the most ingenious battle plans, and divine the very essence of objective reality. But when one attempts to bring this theory into practice, one finds that the castle was made of air, that even the best battle plan can be ruined by what Clausewitz calls “friction,” and that reality is the Nietzschean world, not the world of Plato’s Forms. There comes a time when the*



*not utter the ruin of life; and if that time does not come for the scholar, then he shall forever remain blinded by his conceit.*

*In the world of theory, I do not find the underlying values of this paper to be objectionable. If two parents know that their child will be born with Huntington's Disease, and that the child will die a horribly painful death by six years of age, it is the most reprehensible act imaginable to bear that child anyway, simply to satisfy some selfish desire of the parents. Neither should it be controversial that we might prefer intelligent people to stupid people; healthy people to ill people; able-bodied people to crippled people; four-limbed people to dismembered people; beautiful people to ugly people; strong people to weak people. This obsession with egalitarianism – this notion that we must all be treated as equal no matter how irresponsible or reckless that notion is, no matter how divorced from reality or counter to all common sense – this obsession has wrecked every last shred of dignity our once great country did possess.*

*That being said, the problem is in the means. Again, in theory, were a State run by a beneficent philosopher-king, and were his edicts carried out by magnanimous servants of the people, then perhaps eugenic measures could work. But the fact is that the people in government are no better than the people governed. The fact is that the people heading a eugenics program would not be the selfless promoters of a revived humanity, but rather petty, short-sighted bureaucrats interested in their paychecks, their promotions, and the enforcement of their dogmas. Should the unreflective, petty-souled flies who call themselves my critics ever come to head a eugenics program (as they have come to head the Libertarian Party of Florida), they would wipe out my entire bloodline with the same zeal they have shown in trying to have me expelled from my own political party. And, like the early Christians and the Puritan witch hunters, they would do it all in the name of justice.*

*The second objection of my critics is that the paper should never have existed at all. I have heard it said that certainly we have free speech, but this is a little extreme. In other words, my critics believe in free speech and in the marketplace of ideas only so long as the topics under discussion do not make them uncomfortable. My critics know not that freedom requires strength. To circumscribe our freedom of thought because of the delicate sensibilities of suburban paper pushers is the most despicable type of totalitarian tyranny imaginable. Francis Galton would blush at the gall of the modern soccer mom.*

*Yet another objection of my critics is that a eugenics program violates the Non-Aggression Principle. Let us leave aside the fact that the "Libertarians" who engage in witch hunts are hopelessly uninformed about what the Non-Aggression Principle actually is. And let us, for the sake of argument, say that we agree on every point as to its meaning. All points being agreed upon, I DO NOT*



*is a rea nerring.*

*Another objection of my critics is that this piece was posted on LinkedIn just last year, and is, therefore, too recent a publication for me to have genuinely disavowed. As I have explained ad nauseam, I wrote this paper as a staff writer for one of the journals at my law school. It was posted to LinkedIn as being representative of my legal writing.*

*The next objection of my critics is that I have not pulled the article from LinkedIn. To this I reply that its disappearance would be even worse than its original publication, for then these same critics would accuse me of hiding something or sweeping the paper under the rug for political purposes. I have made my name on refusing to apologize for my past, and I will not start trying to bury it now.*

*It is a shame that one must write disclaimers on an academic paper in a country claiming to be the Land of the Free. It is a shame that our freedom of speech is circumscribed by the weak stomachs and low intelligence of others. It is a shame that what could be might never be for the simple fact that men of genius are required to waste so much of their time explaining themselves to the common man. We have traded our torches & pitchforks for keyboards & blogs – and we think ourselves enlightened therefore.*

*But if you truly wish to consider yourself enlightened, then steel yourself to encounter things that make you uncomfortable. If you wish to believe that you are a cut above the rest, then you must not squawk and babble like all the rest. Listen & learn. Examine & analyze. Think & discern. Consider & ponder. Then, only then, should you craft your objection. Otherwise, you are nothing more than the fat fool on the couch yelling at the TV, hoping someone can hear your impotent rage in some distant production studio.*

## INTRODUCTION

Adversity abounds in human existence. War, famine, pestilence, and death are eternal features of the struggle of humankind for justice and peace; they are the four appendages by which God forever humbles his Creation. There is absolutely no need to compound these tragedies by willfully allowing innocent children to be born with mental retardation, schizophrenia, AIDS, sickle-cell anemia, deformity or disfigurement, Tay-Sachs, Huntington's Disease, Cystic Fibrosis, Down's Syndrome, dwarfism, blindness or deafness; or without a limb or other body parts; or any other severe and irredeemable flaws that will disadvantage the child from the moment of its ill-starred birth. The total disregard for the best interest of the child in the act of procreation is a widespread moral irresponsibility with which we in American society have been complicit for far too long.



retardation, intractable diseases, severe physical handicaps, and psychological disorders. In other words, we have a duty to implement, through state legislation, an official eugenics program.[1] Should we continue on our present anarchical path, American society, and the world in general, are doomed to ruin; but should we implement a eugenics program, humankind may once more find its strength.

This thesis rests upon a utilitarian notion that sees individual rights as a means to achieving the greater good, not as ends in themselves. The state has an interest in a healthy, competent populace, as fully functional individuals benefit – or at least do not burden – society. Absent these burdens, resources are able to be directed to more beneficial ends, such as schools, the arts, and public works. Lest the reader believe that this only favors the rich and privileged, it should be noted that the more vigorous and intelligent the population, the more equality in constitution amongst fellow citizens and the less a population can be ruled by tyranny.[2]

Individuals, too, would benefit greatly from such a program, as intelligence and health further enjoyment of life. Those with low intelligence cannot fully appreciate the prose of William Shakespeare, just as the deaf cannot appreciate the works of Johann Sebastian Bach. Neither can the blind appreciate the paintings of Michelangelo, nor can those children born with Tay-Sachs disease appreciate the joys of late childhood. The decisions affecting future generations have far more intimate consequences for the innocent children than they do for society as a whole.

The aim of a modern eugenics program, then, should be to prevent social and individual ills. “No man is an island,” as John Donne once wrote, but this goes both ways. A society is a composite of individuals: the better the individuals, the better the society. An individual is largely a product of his society: the better the society, the better the individual. Society and the individual have long been at war with one another in America, and this reality must change.

This paper will begin by addressing the history of eugenics programs and commenting briefly upon our modern technological capabilities in this area. Part II will discuss ethical concerns that often arise in the eugenics debate, as law devoid of an ethical base should be abhorred by all. Part III will address one specific concern, namely the question of whether a eugenics program would be constitutional. Part IV will recommend several legislative means to implementing a eugenics program.

A disclaimer is in order. Arguments in favor of eugenics are not exactly celebrated in American society, as the reader can no doubt sense intuitively. Despite thousands of years of eugenic breeding – whether deliberate or not – a multitude of people have recently crafted a myriad of objections against the practice. Regrettably, there is not space enough in a simple essay to address every last concern of the cautious egalitarians. This paper shall, therefore, be duly condensed and perfectly incomplete. This paper is meant to be an introductory essay, a basic argument for a eugenics



analysis of every ethical and constitutional nuance, as it is not intended to be so.

## I. HISTORY & THE SCIENCE OF BREEDING

*“All beings so far have created something beyond themselves; and do you want to be the ebb of this great flood and go back to the beasts rather than overcome man?”*<sup>[3]</sup> - Friedrich Wilhelm Nietzsche

The modern history of eugenic breeding has not been a particularly lovable one. Critics have rightly remarked that past programs have targeted race, criminal activity, and so-called undesirable moral traits, such as sexual promiscuity. The American and British eugenics programs of old were based on criminality and other sociological, as opposed to biological, phenomena.<sup>[4]</sup> Steven J. Gould has boldly asserted that Carrie Buck, of Oliver Wendell Holmes’ infamous *Buck v. Bell* case, “was persecuted for supposed sexual immorality and social deviance.”<sup>[5]</sup>

Of course these errors should not be repeated, and no one would deny that previous eugenics programs have been based on some faulty science and repressive morality. However, most contemporary authors take a dishonest approach to eugenics and are even more dishonest in pandering to their audiences in their populist writings. Consider Dr. Dan Agin of the University of Chicago:

*The so-called genetic fallacy has nothing to do with genes or genetic determinism, but is the name given to any violation of the idea that the origin of a proposition should not count in weighing its truth or falsity. So, for example, if the Nazi storm trooper Pascual Jordan made a contribution to quantum mechanics (which he did), that contribution must be evaluated independently of his personal life, and to do otherwise is to commit the genetic fallacy.*

*I agree. As far as science is concerned, there is no alternative: The truth or falsity of a proposition cannot depend on whether the proposition comes to us from the sky or from under a rock.*

*But history is another game, and in history knowledge of the origins of an idea is often of*



*“human interest,” often knowledge that satisfies human curiosity. So, since I’m a human being, I have my human curiosities, and one curiosity has been the funding for Jensen’s research, and the apparent connection to William Shockley, the racist physicist . . . .*

*It seems the two men, Jensen and Shockley, were connected via the Pioneer Fund, a philanthropic organization apparently created in 1937 to promote white supremacy and racial eugenics. [6]*

Besides the total falsity of that accusation (the Pioneer Fund is not a white supremacist organization), this eminent scientist seeks to avoid scientific rigor in favor of playing the “human interest” card used in so many tabloids and other such pop culture garbage.

Indeed, the mere mention of the name “Hitler” or the phrase “white supremacist” is enough to “debunk” eugenics. Such is the utter disgrace of modern academia. It seems debate on the merits is no longer necessary; it is enough to refer to Nazi Germany, and the thing opposed automatically falls into disrepute. No reference, therefore, will be made to National Socialism or to Hitler throughout the rest of this essay. Only disgust should be inspired by the entire enterprise of academic dishonesty that would seek to discredit an idea by referencing it to the Führer, the Third Reich, and the Second World War. Such a tactic as is utilized by modern academicians is as nonsensical as it is perfidious.

Moreover, admitting that there have been mistakes in the history of eugenics movements is not to admit that eugenics movements should be dismissed altogether. To demonstrate the flaws in past methodologies should be encouraged. The admission of those flaws should not be seen as a defeat, but as a willingness to approach the question honestly. Invalidation of the noble aims of eugenics simply because past movements have lacked our modern scientific prowess could be likened to the invalidation of the literature of the Bible or the Odyssey because they did not conform to the rhythm of Shakespeare’s masterpieces; or, better stated, it could be likened to holding in disdain the physics of Isaac Newton because he lacked the sophistication of modern technological advancements. Past mistakes should be a means for growth, not for stagnation.

Furthermore, past eugenics programs have had their virtues as well as vices. The Spartans based their own program upon physical characteristics at childbirth and were



measure, it perhaps a legendary one. [7] The objection to such programs cannot be to the consequences, but rather to the means employed to achieve those consequences. Infanticide and abduction are certainly harsh means with largely unpredictable outcomes. Happily, humankind has developed far more humane and predictable methods for improving the lot of future generations.

Such a statement leads to the common criticism that the very concept of eugenics is based upon unscientific methodology. At the very least it is limited, it is argued, as the technology available in the area of genetics remains primitive. We cannot be sure of the ramifications of our intervention in human breeding, and we cannot be certain of what traits are hereditary and what traits are influenced exclusively by environmental factors. As one writer commented of the 1995 Chinese compulsory sterilization law, “[a]ny opposition to this law from Western countries is going to be very much more effective if it eschews the moral high ground and focuses on the fact that such a policy cannot produce the desired results; that in short, it is not scientific.” [8]

Franz Boas, the father of modern anthropology, was an outspoken opponent of eugenics. He was not, however, against a eugenics program *per se*. Rather, his criticism was that his contemporaries were quick to base their program upon traits not proven to be hereditary:

*It is obvious, from a purely biological point of view, that only those features that are hereditary can be affected by eugenic selection. If an individual possesses a desirable quality the development of which is wholly due to environmental causes, and that will not be repeated in the descendants, its selection will have no influence upon the following generations. It is, therefore, of fundamental importance to know what is hereditary and what is not. [9]*

His criticism is an important one, and no eugenics program can claim legitimacy if the criticism is ignored. Dogma is to be discouraged, and the hereditary nature of a trait cannot be assumed. Insofar as one is breeding for artistic genius or managerial ability, we cannot presume that modern eugenic methods can achieve the sublimation of these traits. However, we certainly know that intelligence is hereditary; we can aim to improve that. We certainly know of hereditary diseases; we can aim to eliminate those. We certainly know of hereditary deformities; we can aim to eliminate those as well. Genetic engineering is still some years away, but modern eugenic methods can



populace.

## II. ETHICS & THE MEANING OF JUSTICE

*“Nam lex mihi esse non uidetur, quae iusta non fuerit.”*<sup>[10]</sup> – Augustine

Laws must be informed by ethics, lest they be unjust. This is especially true of laws that seek to interfere with the very act of procreation. Arbitrary laws that would prevent childbirth to political dissidents or members of certain religious groups would certainly violate the very concept of justice.

Laws are tools for justice, not ends in themselves. Any eugenic law not aimed at the betterment of humankind must be considered arbitrary. Legislation that does not benefit society is illegitimate and unjust. The eminent German jurist Rudolf von Ihering once wrote that “just as the father is bound morally, though not legally, to use the power entrusted to him in accordance with the meaning of the paternal relation, so is the legislator bound to use his power in the interests of society.”<sup>[11]</sup> Justice demands that government serve and benefit the people, not the members of the government.

Law is to serve justice, but it must be realized that justice is not synonymous with unlimited freedom. The most basic premise of the legitimacy of government, at least in modern Western tradition, is that it represents the abdication of an individual’s absolute right to sovereignty in exchange for protection against a life that is “solitary, poor, nasty, brutish, and short.”<sup>[12]</sup> By definition, without the recognition that rights are limited, there could be no society. The right to procreation is included in this.<sup>[13]</sup>

The justification for a state-sponsored eugenics program springs largely from the fact that it so directly impacts the state. Not only does the absence of such a program act to the detriment of the state, but the inverse is also true, that the state and society will benefit greatly from a program intended to breed human beings capable of independence and self-sufficiency. Some will say that neither the state nor human society is so burdened as to justify a eugenics program, yet such was the very argument against mandatory vaccination in the last century.<sup>[14]</sup>

Besides the obvious concerns of welfare and healthcare costs, of taxes and infrastructure, we must consider the philosophical and personal dimensions that would be affected by a eugenics program. The discussion of whether a child should be born to live in agony for five years until a certain premature death is just as important as the abstract discussion of the balance of freedoms and responsibilities. In fact, the effect that legislation and personal decisions may have on individuals – parents and children alike – may be of greater import, for it makes the debate far less easy to avoid by way of the recitation of cliché phrases and political slogans.

The argument for eugenics cannot stop at simply stating that it is justifiable. It must be further argued that we have an ethical duty to create such a program, a duty that



Critics have argued that the very idea of a state-sponsored eugenic program is absolutely repugnant to our Western values of individualism and autonomy.[15] Such ideas are largely based upon the work of the German philosopher Immanuel Kant, who stated that persons are ends in themselves and never to be treated as a means to an end. Yet this is not to say that individual rights are to be held in esteem above all else. Kant's philosophy is very much agreeable to theories based upon the social good. As the great English ethicist, John Stuart Mill, commented:

*When Kant . . . propounds as the fundamental principle of morals, 'So act, that thy rule of conduct might be adopted as a law by all rational beings,' he virtually acknowledges that the interest of mankind collectively, or at least of mankind indiscriminately, must be in the mind of the agent when conscientiously deciding on the morality of the act . . . To give any meaning to Kant's principle, the sense put upon it must be, that we ought to shape our conduct by a rule which all rational beings might adopt with benefit to their collective interest . . . [16]*

Thus any dependence upon Kant as justification for the modern concept of American individualism is unfounded.

The writings of Mill himself are often used to champion individual liberties. While it is true that Mill advocated limited government intrusion and an expansive right to autonomy, he never argued that individual liberty was an end in itself. Utilitarianism is based upon the concept of the greater good, and individual liberties benefit the greater good. It is not desirable, however, that they be limitless, as this would impinge upon the liberty of others.

Stretching further back, we come to the ancient Greeks and Romans, who in many instances glorified the individual above the state. It is unquestionable that our ideas of liberty, personal autonomy, and individuality owe a great deal to these ancient civilizations. Yet these societies advocated greatness and great individuals, and it cannot be emphasized enough how great a gulf exists between this concept of the individual and the modern American concept of the individual as a consumer. In those days, greatness defined an individual, not his clothing or technological gadgets.[17] Furthermore, whilst Alexander and Caesar were both hailed as individuals, they were mindful also of their duties as citizens and rulers. Even despite their haughtiness and



duty was sacred in the ancient world, a fact that modern advocates of individualism tend to forget.

Thus our Western values of autonomy and individualism have always been tempered by the recognition of social obligation. Western society has always striven to maintain a balance between the society and the individual, rather than the glorification of one over the other.

The same competing ideals are present in the debate over the ability of a government to enact eugenic legislation. It is undeniable that an individual has an interest in procreating and in establishing a legacy. Parenthood is generally as beneficial for the self-development of the parent as it is for the well-being of the child. The experience and growth that come with being a parent simply cannot be replaced or replicated by being a dog owner or a babysitter to one's nephews and nieces. Moreover, considering purely biological motives, the drive to procreate is perhaps the most primal of all instincts.

Yet this interest, like all other individual interests in society, cannot be absolute. Duties exist for potential parents, as well as rights. Opponents of eugenics focus exclusively on the parents and their interest in autonomy; but children are not their parents' property. Neither are they toys for their parents' amusement, nor tools for their parents' psycho-spiritual self-fulfillment. Their rights, individualism, and autonomy must be considered as well, and even more so than the parents'. It seems quite odd that we should consider the autonomy of the individual making the decision to procreate, but not to consider whatsoever the autonomy of the individual to be born.

Bioethicist Laura Purdy asks whether it is morally permissible "to have a child because of genetic risk factors"[18] and presents the thesis that "it is morally wrong to reproduce when we have a high risk of transmitting a serious disease or defect." [19] The perceived cruelty and barbarity of compulsory sterilization pales in comparison to that of inflicting an innocent child with AIDS, sickle-cell anemia, Tay-Sachs, Huntington's Disease, mental retardation, blindness, deafness, or a host of other ills.

It has been suggested that such a normative judgment implies a larger prejudice, one that prefers nondisabled persons to disabled persons. This is a largely unfounded concern, for there is a difference between the desire to prevent disability and the devaluing of the disabled. While arguing that disabilities should be prevented, bioethicist John Harris states:

*I will assume that it is wrong to show preference for a nondisabled person over a disabled one in any way that denies that both are equally entitled to the same concern,*



*citizen. For such preference would imply that the disabled person was somehow less than an equal in moral and/or political terms. [20]*

The recognition that the prevention of disability in children and the social perception of the disabled are two different issues leads in turn to the recognition that the desire to prevent disabilities in newborn children cannot be equated to a general prejudice against disabled persons.[21] To further quote Dr. Harris, “To set badly broken legs does not constitute an attack on those confined to wheelchairs.”[22]

The debate over the child’s interest in not being disabled entirely ignores the question of whether the parent will be able to care for the child. Still to be considered are the cases in which the parent itself is so disabled, mentally or physically, that it cannot take care of the child. The question then becomes a social one: Who will take care of the baby? A child without the guardianship of its parents becomes either a ward of the state or a burden on other family members. This has the double detriment of putting the child at a disadvantage and placing a preventable burden on society.

This duty to others also extends far beyond the individual to be born. Overpopulation and the sustainability of human society are great concerns facing us presently. [23] Many have noted that the population problem may be solving itself with the birth rates of Europe and North America falling.[24] However, such an argument obviously does not address the concern that the problem of overpopulation comes from developing countries, not developed ones. It has been argued that controlling procreation in developing countries is immoral because developed actually countries consume more resources.[25] This objection confuses two separate arguments; the fact that developed countries consume too many resources is not an argument against curbing population growth. Moreover, poverty has never been an excuse for dodging moral culpability.[26] It is a basic fact of life that an increase in population leads to a decrease in resources. Yes, the developed countries consume an exorbitant amount, but that is a separate matter. The better argument would be that developed countries should curb consumption and developing countries should curb population growth.

Another concern is that placing the aforementioned problems and decisions within the purview of government is reminiscent of Orwell’s *1984* and Huxley’s *Brave New World*, both of which portray omnipotent governments in absolute control over the destinies of individuals and populations. But literature always goes both ways. Recall the works of the Marquis de Sade, all of which illustrate what effects may be expected to be born of pure individualism, egoism, and anarchy. Checks on government power are necessary, as they always have been, and an argument for eugenic legislation is not an argument for replacing maternity wards with assembly lines. Again, a balance must be struck between the individual and society. Denying legitimacy to one or the other is simply not constructive.



Who is to say who procreates and who does not? With what sort of divine arrogance must one be cursed to assume such a grand privilege? He who wishes to control the propagation of the species seeks to play God. We are arrogant, critics will say, to attempt in our ignorance to improve the lot of humankind; for we cannot know the outcome of our meddling, of our interference in the handiwork of Nature.

Such criticisms neglect the fact that human society in general is centered on the idea of playing God. All medicine is interference with nature; prolonging life is interfering with nature, as is protecting the life of a diseased child. To use medicine in an attempt to save a child's life at birth is no different from euthanasia in terms of interfering in natural processes. Education and culture are likewise attempts at circumventing the terrors of the natural world. If one argues that it is human nature to educate and to nurture our young, to pass down traditions and other such aspects of culture, then one must admit that it is human nature to try to improve one's lot, to overcome one's inadequacies, and to go above and beyond one's inherent strengths. In such a moment of honesty, we must realize that the motivation to practice eugenics falls under this aspect of human nature, and that playing God is central to being human. As Kirshna counseled Arjuna, we cannot allow fear to paralyze us and prevent us from performing our duties.

Perhaps the most serious opposition posed in the "playing God" argument is the one that questions the governing body. What will be the criteria for determining who determines the criteria for a eugenics program? Certainly we cannot have mere political appointees totally unfamiliar with ethics, medicine, or law. Nor does it seem just to subject procreation to a certified bureaucracy. Would not such measures trivialize the wonderment of childbirth?

Yet all civilizations have had laws or councils of elders to oversee their populations. Being Americans, with all that entails, it would doubtless be much more to our comfort to see eugenics, as all things, subject to the rule of law rather than a group of supposed elites. There are two main requirements for such laws that must be met so that we do not abuse our power over the fate of humanity: That they be ethical, and that they be constitutional. The details of the first requirement have just been discussed; it is time to address the second.

### III. CONSTITUTIONALITY

*"The Constitution of the United States was made not merely for the generation that then existed, but for posterity- unlimited, undefined, endless, perpetual posterity."* - Henry Clay

One thoroughly common, yet erroneous, objection to a state-sponsored eugenics program is that the very idea of it is unquestionably unconstitutional. It encroaches upon the very reproductive freedom held sacred by the Supreme Court. It also discriminates against the mentally and physically handicapped.<sup>[27]</sup> Most egregiously, if based upon intelligence quotient, it will have a disparate impact upon blacks, thereby demonstrating



There is no debate to be had. Furthermore, the violent distaste concerning eugenic measures in American society precludes their implementation.

This section will address these five objections separately, arguing that reproductive freedom is not sacred; that discrimination against the mentally and physically handicapped, whether unintentional or overt, is not unconstitutional and should not be made so; that a disparate impact upon blacks is not unconstitutional discrimination; that the constitutionality of euthanasia as a eugenic means has not been thoroughly explored; and that eugenics is still practiced on a very small scale in America while its constitutional support lies dormant but uncontested. Eugenic legislation is perfectly constitutional and, properly written, could withstand challenges to the contrary.

However offensive some may find Holmes' notorious statement that "[t]hree generations of imbeciles are enough,"<sup>[29]</sup> the reasoning behind this impolitic assertion is sound. He states:

*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 the concerned, in order to prevent our being swamped with incompetence.*

It has been argued that, contrary to Holmes' eminence as a Supreme Court Justice, the mentally and physically handicapped do indeed feel sterilization to be a sacrifice, and a quite significant one at that.<sup>[30]</sup> Yet this truth does not negate the logic of Holmes' statement. Citizenship carries burdens, sacrifices, and hardships, as well as liberties. This is something our founding fathers knew all-too-well, as did their precursors, among them Rousseau, Locke, and Cato, to name a few.

Holmes further argues that the "principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes."<sup>[31]</sup> He cites for his assertion another US Supreme Court case that has never been overruled, *Jacobson v. Massachusetts*.<sup>[32]</sup> In response to the argument that mandatory vaccination was "unreasonable, arbitrary, and oppressive,"<sup>[33]</sup> Justice Harlan asserted the following:

*[T]he liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all*



*There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy. Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others. [34]*

Holmes apparently assumes that the logic in connecting mandatory vaccination with compulsory sterilization is so evident as not to require explanation. Others may not believe it to be so obvious. Mandatory vaccination, after all, is universal, whereas compulsory sterilization could never be universal, lest we extinguish humankind. However, both rest upon the basic principle that individual rights cannot exist independent of social considerations and that pressing social considerations give justification for limiting individual rights.

It is a common misconception that the case of *Buck v. Bell* is no longer good law. It must be noted that *Buck v. Bell* has never been overruled by the U.S. Supreme Court, the only Court with the power to do so. When asked in 1981 to reopen the debate over the Virginia sterilization statute in *Buck v. Bell*, the court of the Western District of Virginia refused to do so, stating that, “[r]egardless 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*.”[35] The court further stated that, “It is no answer for the plaintiff to allude to changing patterns of social constitutional thought as a ground for reopening the inquiry,” because the statute had been repealed by Virginia several years earlier.[36]

Neither has Congress passed any legislation that would render the passage of State eugenic measures illegal. Nor could it regulate eugenic measures at all, short of an Amendment to the federal Constitution, as the police power for public safety measures falls to the States.[37] Assuming the continued silence of the Supreme Court on the matter, the States alone may determine whether to implement eugenics programs. Whether those programs are legal under State Constitutions is an entirely separate, fifty-fold debate.[38]



statute that deprive[d] certain individuals of a right which is basic to the perpetuation of a race – the right to have offspring.”[40] Though often cited as damaging to the advocacy of eugenics, and though it is often perceived that this case is the one that overturned *Buck v. Bell*,[41] this very language is testament to the fact that the Supreme Court was protecting not an unbridled right to procreation, but a right to procreation consistent with social survival. In fact, the Court was asked in *Skinner* to overrule *Buck v. Bell*, and it refused to do so.[42] *Skinner* does not recognize procreation as an end in itself, but rather as a means to perpetuate humankind. Procreation can, therefore, be limited in accordance with the necessities of protecting the social welfare.

The concurring opinion of Chief Justice Stone in *Skinner* expressly approved of State eugenics programs and also used *Buck v. Bell* as support, just as the majority did.[43] He writes: “Undoubtedly a state may, after appropriate inquiry, constitutionally interfere with the personal liberty of the individual to prevent the transmission by inheritance of his socially injurious tendencies.”[44] Stone’s reasoning for overturning the law at issue was that it subjected all persons of a certain class of criminal to compulsory sterilization without the right to defend themselves individually.[45] It follows, then, that a State eugenics program, according to Chief Justice Stone’s concurrence, would be legal so long as the individuals affected were granted an opportunity to defend themselves, and so it should be.

It is often stated that *Skinner* protects a constitutional right against compulsory sterilization, but such statements are untrue. The holding in *Skinner* was a narrow one, stating only that the statute in question did not “meet the requirements of the equal protection clause of the Fourteenth Amendment” because it targeted certain class of criminals for sterilization and not others.[46] *Skinner* was an equal protection case, not a substantive due process case; it held not on the state’s ultimate right to implement compulsory sterilization but on the discrimination inherent in a sterilization program that targets only certain classes of criminals. The case states a rule that programs for compulsory sterilization must be non-discriminatory, not that they are constitutionally prohibited.

The case of *Griswold v. Connecticut* is sometimes thought to support a general right to privacy, but what *Griswold* actually protects is the right to refrain from procreation.[47] The law at issue in *Griswold* prohibited contraception, thus seeking to restrain the prerogative of those within the state to avoid childbearing.[48] The law did not attempt to restrict anyone from procreating; rather, it did almost precisely the opposite. *Griswold*, then, is largely irrelevant in this debate.

It may be noted, however, that the Court in *Griswold* reaffirmed the principle “that a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.”[49] This is no argument against limiting the right to procreation. So long as eugenic laws are not unnecessarily broad, they will



the legislation, but it certainly does not prohibit eugenic measures altogether.

*Eisenstadt v. Baird* is another case quoted as granting a general right to privacy, as it extended *Griswold* to individuals.[50] In that case the Court stated that “[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”[51] Interestingly, the Court uses both *Skinner v. Oklahoma* and *Jacobson v. Massachusetts* in support of this statement.[52] Considering its reference to *Jacobson*, the Court must have realized that individual rights have historically been circumscribed to further the public welfare, and that this balance must be preserved in the area of procreation. The Court’s juxtaposition of *Skinner* and *Jacobson* was likely to demonstrate precisely the necessity of this balance, between restricting arbitrary government and protecting the public welfare.

Also to be considered in denying a limitless right to procreation is the controversial opinion of *Roe v. Wade*. [53] The Supreme Court actually relied upon *Buck v. Bell* “to reject the extreme position that ‘one has an unlimited right to do with one’s body as one pleases.’”[54] Irony aside, the constitutionality of eugenic measures is thus further enforced by *Roe v. Wade*. The decision was upheld in *Planned Parenthood v. Casey*, which stated quite succinctly and unequivocally that the holding of *Roe v. Wade* was “that the Constitution protects a woman’s right to terminate her pregnancy in its early stages.”[55] It further stated:

*It must be stated at the outset and with clarity that Roe’s essential holding, the holding we reaffirm, has three parts. First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State’s interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman’s effective right to elect the procedure. Second is a confirmation of the State’s power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman’s life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the women and the life of the fetus that may become a child. These principles do not*



each. [56]

None of those parts concerned the state's right to limit the procreative function, and in fact the entire summation specifically concerns arbitrary abortion of the fetus by the mother. Rather, the concept underlying *Roe v. Wade*, *Planned Parenthood v. Casey*, and, later, *Gonzalez v. Carhart*, [57] was that a woman has the right to determine whether to abort her fetus. This has no bearing on whether the woman has the right to become pregnant.

The argument for unbridled freedom of procreation is further eroded when it is realized that procreation is not private whatsoever. Carter J. Dillard has the following to say:

*[I]t is difficult to think of something less personal than creating another person. It is the antithesis of the personal, changing and creating essential legal relations perhaps more than any other act, most certainly for the person or persons created. 'The right of privacy, which encompasses the right to use contraceptives, the right to an abortion, and a variety of other activities associated with a right not to procreate, is distinct conceptually from the right to procreate . . . The right of privacy is nonrelational while the right to procreate is relational in character.' Thus procreative rights do not follow from underlying fundamental rights to personal autonomy and bodily integrity, as privacy rights do. [58]*

If procreative rights are distinct from privacy rights in that they do not follow from "fundamental rights to personal autonomy and bodily integrity," then a challenge of constitutionality concerning procreative rights cannot meet with success. The Constitution protects fundamental rights, not the desire for self-fulfillment at all costs.

Once conceded that procreation is not an unlimited right, we must discern whether eugenic measures discriminating against the mentally and physically handicapped are unconstitutional. In considering this, it must be remembered that there is no heightened scrutiny for mentally or physically handicapped persons. [59] In America, "the status of disability merits no special judicial solicitude." [60] Measures that discriminate against disabled persons are reviewed under so-called "rational basis with bite," [61] a standard



there *should* be heightened scrutiny for the mentally and physically handicapped. This entire paper can be taken as a reply to such an objection.

Perhaps the most sensitive issue concerned here is the constitutional prohibition against racial discrimination, as eugenic measures will undoubtedly affect the black population far more significantly than all other racial or ethnic groups.[62] However, as explained above, a proper eugenics program will not be based upon race or ethnicity. So long as the legislative intent is not to target a racial or ethnic group, that legislation will be upheld, even if the effect upon that group is disproportionate to the general population. As stated in *Washington v. Davis*, invidious discrimination must be evidenced by a discriminatory purpose, as opposed to a merely disproportionate effect, for the legislation to be unconstitutional.[63] Equal protection under the Constitution “guarantees equal laws, not equal results.”[64] Thus, the disparate impact of eugenic measures upon the black population does not render those measures unconstitutional.

To this point the discussion of constitutionality has been centered on compulsory sterilization and the right of the state to limit procreation; the opposite end of the spectrum has not been addressed. Euthanasia is perhaps the single-most unpopular eugenic means. However, regardless of public opinion in this specific matter, and despite the fact that the debate over whether there is a “right to die” in America is far from over, it must be recognized that the state’s right to euthanize is a totally separate issue. The euthanasia debate has so far focused on autonomy and the individual’s right to choose whether to live or die. The question of whether the state has this right is entirely different, for it asks not whether the individual has the power over life and death, but rather whether the state does, as the embodiment of the will of a society.

Presently, the will of American society seems decidedly against such a measure, the closest analogy being the permanent stay of execution for insane criminals. The person in question must know why he is being executed, and this is impossible in the case of the mentally incompetent.[65] Another concern is that the execution is to deter others, and that the execution of a mentally incompetent person cannot be a deterrent. This position is best summarized by Sir Edward Coke:

*... by intendment of law the execution of the offender is for example, ut poena ad paucos, metus ad omnes perveniat, as before is said: but so it is not when a mad man is executed, but should be a miserable spectacle, both against the law, and of extream inhumanity and cruelty, and can be no example to others.*

[66]



[67] Why it would be a more miserable spectacle to witness the execution of an incompetent criminal than to witness him continue his descent into madness has never been explained.[68] Death has historically been the highest means of retaining or recapturing dignity by those who have lost it in the course of their lives. Religious symbolism, medieval chivalry, and codes of honor have all extolled the virtue of living and dying with dignity. The preservation of life at all costs is simply not dignified.

Furthermore, it does not stand to reason that the execution of a mentally incompetent person would have no deterrent effect on the potential criminal. In fact, it seems that it would have an even greater deterrent effect if the potential criminal knew that he would be held responsible for his crimes regardless of any Djinn his lawyers may conjure out of dark legal grimoires. Still, it is simply the case that the present view of the law is that the “Eighth Amendment prohibits the State from inflicting the penalty of death upon a prisoner who is insane.”[69]

Yet the decision to euthanize incompetents is neither a question of deterrence nor of punishment. The question, rather, is one of maintaining the dignity of life, of diverting resources to more constructive ends, and of bettering the lot of humankind. If retribution and the prevention of crime are irrelevant, then it seems that the debate over state-controlled euthanasia is reopened, for the state and society have other interests than crime.

The reader should also note that eugenic measures are still practiced today, albeit to a lesser degree than this paper proposes. Eugenic laws still exist, and there is a body of constitutional that, though dormant, supports eugenic measures.[70] Judges still order compulsory sterilization and interfere in domestic matters quite regularly in the name of protecting society. Thus it is inaccurate to state that eugenics is wholly abhorred in America, or that it is no longer practiced whatsoever. So long as procedural protections are enacted along with the substantive law, eugenic measures may continue to avoid challenges to their constitutionality.

Because the right to procreation is limited by other concerns; because the inherent discrimination of a eugenics program against the mentally and physically handicapped is not prohibited by the Constitution; because the disparate impact upon the black population is does not render a eugenics program unconstitutional; and because it is evident that laws and practices in the United States concerning eugenics are still in favor of eugenic measures; the implementation of a state-sponsored eugenics program is undoubtedly constitutional. The next step, then, is to recommend legislation in furtherance of developing such a program.

#### IV. RECOMMENDED LEGISLATIVE MEANS

*“What nature does blindly, slowly and ruthlessly, man may do providently, quickly and kindly. As it lies within his power, so it becomes his duty to work in that direction.” - Sir Francis Galton*



what is needed is action. Talking about eugenics will do nothing to solve the myriad of social and individual ills that we face. As a start in that direction, this section will focus on several aspects of what might constitute a successful state-sponsored eugenics program: compulsory sterilization, screening, adoption, civic education, tax benefits, euthanasia, and genetic engineering.[71] This section will basically run roughshod over the arguments for and against, as the ethical and constitutional objections have already been discussed above.

Compulsory sterilization of individuals is the most effective, efficient, legitimate, and humane method of a eugenics program and should be its main focus. This method will prevent the birth of children who will suffer from hereditary disabilities and diseases. A vasectomy, which severs and ties the Vas Deferens, can be performed in fifteen to thirty minutes. It is also reversible, which lessens the gravity of an incorrect diagnosis of hereditary disability or disease. A tubal ligation, which blocks the Fallopian tubes, is a more involved procedure, but the recovery period is still a brief two weeks. Like the vasectomy, the tubal ligation is reversible.

Critics of compulsory sterilization argue that compulsory sterilization is barbaric, dehumanizing, and inhumane. It seems far more civilized and humane, however, than infanticide, forced abortions, segregation from the population and castration.[72] If the end goal of a eugenics program is a society constituted of healthy and intelligent individuals, then the requirement that certain persons undergo a quick, painless surgery seems small recompense. Compulsory sterilization also seems far more civilized and humane than deliberately creating a disabled child for the parents' self-fulfillment.

Restrictions on marriage may seem more favorable to some; but restrictions on marriage are not a realistic solution. Society no longer attaches such prohibitive stigmas to single parenthood or to childbirth out of wedlock as to render such restrictions effective.[73] Sterilization, then, is necessary to prevent *individuals*, as opposed to *couples*, from procreating. It is a means that reflects the reality of an American society that sees even parents as individuals rather than as a unit.

Compulsory sterilization cannot be accomplished without prior screening for the undesirable traits in the person to be sterilized. Individuals should be screened for risks of transmitting hereditary illnesses, birth defects, low intelligence, physical handicaps, *et cetera*, through genetic testing and IQ testing. This will ensure the discovery of those debilitating conditions sought to be prevented by compulsory sterilization. Additionally, the availability of pre-natal testing should be increased, paid for by the government, and mandated. This will prevent the development of illness or disability resulting from any of the myriad of adversities that can affect a pregnancy, such as malnutrition, disease, or injury.

This may be seen by some as an invasion of privacy, and it may be argued that screening should never be mandatory, only encouraged. However, anything less than mandatory would be ineffectual. The present crisis is due to our dependence upon



ensure that testing is undertaken.

Mandatory screening has already been authorized in other areas, such as “premarital testing for sexually transmitted diseases; mandatory drug testing of certain employees; mandatory HIV or other testing for those convicted of sexual offenses; and mandatory TB screening for prisoners.”<sup>[74]</sup> It is difficult to imagine that drug testing of employees, for instance, would be considered a greater public good than eugenic measures, or that the interest of the government in drug-free employees is greater than its interest in seeing that children are born free of disabilities. It has been noted that the aforementioned screening programs “have sought to enhance safety or health by identifying those who might present a risk to others.”<sup>[75]</sup> The risks inherent in reproduction are legion, and safety can be greatly enhanced by mandatory screening for hereditary defects.

For those who favor volunteerism, one voluntary measure to consider is adoption. If an individual unfit for reproduction desires a child, then adoption is perfect. Not only does it satisfy the parental instincts of the individual, but it also benefits the child, who now has a parent. Critics will argue that the individual should be able to fulfill her desire to reproduce, just as anyone else, regardless of her health or intelligence. As explained earlier, however, the rights of the individual are not absolute, and such rights are necessarily balanced by the social welfare and the greater good. Moreover, one’s selfish desire to reproduce is not a valid counterargument to adoption as a voluntary measure in a eugenics program. In fact, adoption is a wholly voluntary measure that can be undertaken presently – yet many refuse this option.

The government should provide funding for public education concerning the virtues of a state-sponsored eugenics program, including the beneficial impacts it will have on society at large. This could include parental counseling, public service announcements, secondary school tours and curriculum adjustments, college campus visits, and the dissemination of information packets. Sex education in public schools should address the necessity of a eugenics program, teach the minimum age for childbearing and sexual activity, warn of forbidden relationships as among first cousins, siblings, or the mentally and physically handicapped. Official State eugenics offices should be established which would issue specific recommendations for all of these things.

Measures such as these would go far in eliminating many of the preconceived notions about eugenics, many of which are addressed in this essay. It would also educate the young as to civic virtue, duty, and the importance of intelligence and vitality. It may be said that such a proposition is merely a call for shameless propaganda. No one seems to challenge, though, government-funded education on human rights and the virtues of democratic government. Education on eugenics is no different, except that it recognizes duties, as well as rights.

Further concerning education, our public education system should recognize inequalities in intelligence, rather than striving for equality at all costs.<sup>[76]</sup> Public



This should be exactly reversed, so that the most intelligent may reap the greatest benefits from their education. The criticism of this is that such an argument aims to keep the *status quo*; not to mention, it would disproportionately affect minorities. This is a red herring. It would certainly not maintain the *status quo*, as general intelligence is dependent upon genetics at least as much as social class.[77] Recognizing the differences between individuals would lead to a more effective educational system, as we would be able to expend the greatest amount of resources on those with the greatest potential.[78]

The restructure of tax laws should be considered to favor childbearing for the fit and discourage childbearing for the unfit. This, too, would serve to disrupt the *status quo*. Writing of the rich, educated, healthy, and intelligent, Seymour Itzkoff states:

*Is it unfair to say that these men and women, paraded before our young as role models for their future, in reality rank as national parasites? They have taken for granted the sacrifices of their forbears, the heritage of high intelligence and philanthropic wealth that made their world-class education possible. In their sterility they have transformed their own private tragedy into public irresponsibility.*

*And we should deal with them, at the very least, through the tax system. It would be doubly persuasive to match public tax policies with public disclosure of their use of wealth.*

*[T]he selfish careerist should have to bear the public's stigma. [79]*

Egalitarians will doubtless respond that this method presumes that those of higher intelligence are in the upper classes. Such is an elitist approach, worthy of suspicion. As a general rule, though, those of higher intelligence happen to be in the upper classes. Furthermore, whether or not we assume one metaphysical reality or another is no argument against the method. The recommendation that the tax system be restructured favors neither the rich nor the poor; it favors those who are fit to reproduce.

The group of those who are fit to reproduce does not include homosexuals. This is not a political statement, but a biological one. Tax benefits for and state protection of marriage have historically been implemented to promote the traditional family, in order



state in return. Tax benefits for homosexual couples, then, does not further this motive. [80] Nor can this purpose be detected in the granting of such benefits to cohabitating, non-married heterosexual couples. Nor can it be that the purpose is served in granting unlimited benefits to single mothers. The role of the state in subsidizing marriage has always been to promote the traditional family that served as the basis for perpetuating the state and its people. [81] Political affiliations aside, tax benefits for those who cannot reproduce or for those uninterested in raising their children with a stable parental unit are unjustifiable.

By restructuring the tax system we can tax those wealthy persons who use their wealth to selfish ends and refuse to perform their duties to society. We can reward through tax exemptions and refunds those who benefit society by procreating healthy, intelligent children and raising them in a stable environment. The very taxes collected would go toward funding the eugenics programs, so there is a chance that such a program could eventually be self-funded.

One other means to implementing a eugenics program is to authorize euthanasia by the state. The profoundly retarded and those suffering from incurable mental illness, *e.g.*, schizophrenia, should be euthanized to lessen the burden on the state, the family, and society. Some might object that euthanasia is barbaric in its cruelty and inhumanity. How could we kill someone simply for being a burden upon the state? Yet, if we are to presume that a person is unfit even before birth and are willing to prevent the birth of that person on those grounds, then it seems at least as reasonable to end a person's life when they have already proven themselves to be unfit and a burden to society and the state. Moreover, in many instances euthanasia by the state would be an act of mercy, relieving the lifelong sufferer of pain and humiliation, the dual burdens of having been denied a normal life by his parents.

A much more cheerful, if dreamy, means to a healthy and intelligent population is genetic engineering. Eugenics should not end with present technology and should not be eternally circumscribed by methods which merely maintain the greatest talents we now possess. We should strive ever onward. Through genetic engineering we can achieve perfect health and surpass it. We can enhance memory, sensory perception, and athletic ability. We can finally eradicate those characteristics that have kept individuals and humankind from achieving greater things.

Those critical of genetic engineering argue that we do not have the technology to ensure the certainty of our actions; nor would it be desirable to become something more than human. Many have argued that those who wished to raise humanity above its proper station have been among the worst monsters in history. I agree with the critics in that we do not presently possess the technology for this means. Yet the technology will be created someday; the only real debate is whether it should be. All of the highest hopes of humanity have concerned the overcoming of our weakness and our ignorance, our frailty and our stupidity. Now that the power is within our reach it seems folly to willfully abandon the journey simply because there are risks involved.



mental proficiency. For what is human existence without weakness and folly? The greatness of our ancestors was evident in their triumph over adversity, the absence of which will surely be our undoing. But this is not the end. There will always be adversity, regardless of our physical constitution or intellectual prowess. However arrogant we may be in attempting to rise above our station, it is far more arrogant to presume that we can understand, with all of our present limitations, all of the secret workings of the Universe. Perhaps the elimination of physical frailty and intellectual dwarfism will usher in an era of human evolution in which the human mind – as opposed to the bare intellect – will undergo ordeals and tribulations analogous to the struggles of our ancestors. What would an Achilles of the mind look like? A mental Heracles? The future holds the answers to these questions, and we cannot let it escape because of our pusillanimity.

## CONCLUSION

Mistakes have been made in past eugenics programs, such as the targeting of racial characteristics, sex, and socially unacceptable behavior. Arguing, however, that those mistakes should prevent us from trying anew is much akin to arguing that man's quest for flight should have ended when the first unfortunate fool jumped off a roof with makeshift wings. The technology will soon arise; the question is whether to embrace it.

Yet humanity cannot merely take the moderate position that we simply have the right to embrace it. Rather, we must realize that we have an ethical duty to pursue it with fervor by implementing state-sponsored eugenics programs. American society is based upon competing values of individual autonomy and social obligation. While the autonomy of the parent must be acknowledged, we must also realize that the future child is an end in itself, not an instrument in the parent's self-fulfillment or a means to implementing a political agenda. Furthermore, the decisions that parents and governments make concerning procreation affect the world at large, as the mentally and physically handicapped create preventable burdens to the state and the dual concerns of overpopulation and unsustainability force us to question what type of people we want to populate the earth.

Such ethical considerations should inform the law, especially American constitutional law. Justice Jackson once remarked in a dissenting opinion concerning the First Amendment that "if the Court [did] not temper its doctrinaire logic with a little practical wisdom, it [would] convert the constitutional *Bill of Rights* into a suicide pact."<sup>[82]</sup> What was said of the freedom of speech can rightly be said of the right to procreation. Yet the objection that a state-sponsored eugenics program would be unconstitutional is unfounded to begin with. Supreme Court cases have consistently recognized that the rights to privacy and autonomy are not boundless, and the cases supporting the doctrines that would in turn support eugenics still stand.

There are a handful of legislative means that might form the backbone of a modern eugenics program: compulsory sterilization, screening, adoption, civic education, tax



coercive measures, the voluntary exercise of virtuous conduct in this area is simply unrealistic. Furthermore, it is far crueler to demand that the child and society bear the burden of the parents' irresponsibility.

There are risks to eugenics. There is opposition to its legislative implementation. Yet these should not dishearten us, as the betterment of humankind has always been an uphill battle. The agricultural and scientific revolutions did not happen overnight, and in some places these milestones in human achievement have not been realized to this day. Without great visions of the future of humanity, without the disastrous mistakes and ill-fated trials of human history, this present would not exist. It is time we overcame our cowardice and embraced our duty to the whole of humankind.

[1] More correctly, this should read “official eugenics *programs*,” as the proper application of the doctrine of federalism demands that the several States would be in charge of such programs, not the federal Government. I use “state” and “eugenics program” as shorthand for the driving concept behind such potential State programs, so as to avoid more burdensome language.

[2] Eugenic measures were once called by the left wing in British politics “the ultimate subverter of a caste society ruled by imbred upper-class twits.” Steven Pinker, *The Blank Slate* 301 (2002) (quoting A. Woolridge, *Bell Curve Liberals*, *New Republic*, Feb. 27, 1995).

[3] Friedrich Nietzsche, *Thus Spoke Zarathustra* 12 (Walter Kaufmann trans., Penguin Books 1978) (1883).

[4] Donald MacKenzie, *Eugenics in Britain*, 6 *Social Studies of Science* 499 (1976).

[5] Stephen Jay Gould, *The Flamingo's Smile: Reflections in Natural History*, 314 (W.W. Norton & Co. 1985).

[6] Dan Agin, *Junk Science: How Politicians, Corporations, and Other Hucksters Betray Us* 269 (Thomas Dunne Books 2006).

[7] See Francis Galton, *Studies in Eugenics*, 11 *Amer. J. Soc.* 11, 14-15 (1905).

[8] Veronica Pearson, *Population Policy and Eugenics in China*, 167 *Brit. J. Psychiatry* 1, 3 (1995).

[9] Franz Boas, “Eugenics,” 3 *Scientific Monthly* 471, 471 (1916).

[10] “That which is not just does not seem to me to be law.” Augustine, *De Libero Arbitrio* I.V.XI.XXXIII. This sentence is often paraphrased as, “An unjust law is no law



[11] The Great Legal Philosophers: Selected Readings in Jurisprudence 411 (Clarence Morris ed.) (University of Pennsylvania Press 1959) (quoting Rudolf von Ihering, Law as a Means to an End, Chapter VIII: Social Mechanics, or the Levers of Social Motion). Though our modern outlook may find the language of paternalism distasteful, this is precisely the role of government.

[12] **Hobbes, Leviathan, Chapter XII: Of the Natural Condition of Mankind as Concerning Their Felicity and Misery (1651).**

[13] Carter J. Dillard, *Rethinking the Procreative Right*, 10 Yale Hum. Rts. & Dev. L.J. 1, 6-7 (2007) (“No right, procreation included, is limitless if it is capable of conflicting with other valid and perhaps hierarchically superior rights.”).

[14] *See generally Jacobson v. Massachusetts*, 197 U.S. 11 (1905), discussed *infra*, section IV.

[15] *See generally* Veronica Pearson *Population Policy and Eugenics in China*, 167 Brit. J. Psychiatry 1 (1995) (contrasting the cultures of China and the West in the context of justifications for eugenics programs).

[16] The Great Legal Philosophers, *supra* note 12, at 375 (quoting Chapter V of John Stuart Mill, Utilitarianism).

[17] In fact, Caesar was often derided for his excessive foppishness. Adrian Goldsworthy, *Caesar: Life of a Colossus* 62-63 (Yale Univ. Press 2006).

[18] Laura Purdy, *Genetics and Reproductive Risk: Can Having Children Be Immoral?*, in *Bioethics: An Anthology* 115 (Helga Kuhse & Peter Singer eds., Blackwell Publishing, Ltd. 2006).

[19] *Id.* at 116.

[20] John Harris, *Enhancing Evolution: The Ethical Case for Making Better People* 88 (Princeton Univ. Press 2007).

[21] In my own argument this applies only to disabilities such as blindness, deafness, deformity, inheritable diseases such as Huntington’s, and other such maladies – not to mental retardation and severe mental illness. The argument for euthanasia in such cases is discussed later.

[22] John Harris, *Enhancing Evolution: The Ethical Case for Making Better People* 95-96 (Princeton Univ. Press 2007).



*Population Growth and Reproductive Rights in International Human Rights Law*, 14 Conn. J. Int'l L. 83 (1999).

[24] See *Falling Fertility*, *The Economist* (2009) for a succinct statement of this argument.

[25] *Id.* (“Easier access to family planning, especially in Africa, could probably lower its expected peak from around 9 billion to perhaps 8.5 billion. Only Chinese-style coercion would bring it down much below that; and forcing poor people to have fewer children than they want because the rich consume too many of the world’s resources would be immoral.”)

[26] The reader should note well that most saints preach poverty, and many came from it themselves.

[27] See generally Jeffrey M. Shaman, *Persons Who Are Mentally Retarded: Their Right to Marry and Have Children*, 12 Fam. L.Q. 61 (1978) (discussing the discrimination inherent in denying the mentally retarded the ability to marry and procreate).

[28] Fears of gender discrimination are unfounded, as any differences between the sexes in intelligence are negligible. See Arthur R. Jensen, *The g Factor: The Science of Mental Ability* 531-543 (Prager 1998) (discussing sex differences in mental ability). It is, therefore, irrelevant to discuss the constitutionality of gender discrimination, as there would be no discriminatory effect in the area of sex.

[29] *Buck v. Bell*, 274 U.S. 200, 207 (1926).

[30] See Jeffrey M. Shaman, *Persons Who Are Mentally Retarded: Their Right to Marry and Have Children*, 12 Fam. L.Q. 61, 76-77 (1978).

[31] *Buck v. Bell*, 274 U.S. 200, 207 (1926).

[32] *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

[33] *Jacobson v. Massachusetts*, 197 U.S. 11, 26 (1905).

[34] *Id.*

[35] *Poe v. Lynchburg Training School & Hospital*, 518 F. Supp. 789, 792 (W.D. Va. 1981).

[36] *Id.*



sterilization procedures. 42 C.F.R. §§ 201-210. The justification for this legislation is that it concerns programs funded by federal money, but this bears neither on the constitutionality of State programs nor on the ability of a State to implement its own programs free of federal funds.

[38] However, granted that there are States that have not yet decided the State constitutionality of sterilization laws, I hope that the arguments stated in this paper will weigh in favor of eugenic measures.

[39] *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

[40] *Id.* at 536.

[41] David Orentlicher, Mary Ann Bobinski, & Mark A. Hall, *Bioethics and Public Health Law* 430 (2d ed. Aspen Publishers 2008).

[42] Barry R. Furrow, et al., *Health Law: Cases, Materials and Problems* 1247 (6th ed. 2008).

[43] *Id.* at 544 (Stone, J., concurring).

[44] *Id.* (Stone, J., concurring).

[45] *Id.* at 545 (Stone, J., concurring).

[46] *Skinner*, 316 U.S. at 538-39.

[47] *Griswold v. Connecticut*, 381 U.S. 479 (1965).

[48] *Griswold v. Connecticut*, 381 U.S. 479, 480 (1965). Perhaps more importantly, the law restricted physicians from counseling patients to use contraceptives. It was Planned Parenthood that brought the suit against the State of Connecticut, not any married couple.

[49] *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (quoting *NAACP v. Alabama*, 377 U.S. 288, 307 (1964)).

[50] *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

[51] *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

[52] *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

[53] *Roe v. Wade*, 410 U.S. 113 (1973).



L.J. 1, 14 (2007) (quoting *Developments in the Law: The Constitution and the Family*, 93 Harv. L. Rev. 1156, 1300 n.28 (1980), which cites in turn *Roe v. Wade*, 410 U.S. 113, 154 (1973)).

[55] *Planned Parenthood v. Casey*, 505 U.S. 833, 843 (1992).

[56] *Planned Parenthood v. Casey*, 505 U.S. 833, 846(1992).

[57] Which cited the above excerpt from *Casey*, *Gonzalez v. Carhart*, 550 U.S. 124, 145 (2007).

[58] Carter J. Dillard, *Rethinking the Procreative Right*, 10 Yale Hum. Rts. & Dev. L.J. 1, 50 (2007). His quote is of John Hill, *What Does It Mean to Be a "Parent": The Claims of Biology as the Basis for Parental Rights?*, 66 N.Y.U. L. Rev. 353, 384 (1991).

[59] See generally *Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985). The Supreme Court listed the disabled along with the mentally retarded as a group of persons who could not claim the protection of heightened scrutiny. *Id.* at 445 (“[I]f the large and amorphous class of the mentally retarded were deemed quasi-suspect . . . it would be difficult to find a principled way to distinguish a variety of other groups who have perhaps immutable disabilities setting them off from others, who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large. One need mention in this respect only the aging, the disabled, the mentally ill, and the infirm. We are reluctant to set out on that course, and we decline to do so.”).

[60] Edward J. Eberle, *Equality in Germany and the United States*, 10 San Diego Int’l L.J. 63, 87 (2008). The author notes in the next sentence that *Cleburne* is the most relevant case in the matter of heightened scrutiny for the disabled.

[61] See *id.* at 71.

[62] For those without a background in the study of intelligence, a brief (and perhaps oversimplified) tutorial may be necessary to understand why blacks would be disproportionately affected by a eugenics program. Intelligence is measured by what is called an intelligence quotient, abbreviated as IQ. An IQ scored relative to others in the population tested. When charted, the intelligence quotients of individuals in a population fall in a bell curve. Most of the population falls in the middle of the chart, that being 100. A standard deviation is 15 points, the most common referenced being 70, 85, 115, and 130. In America, the average IQ is 100. One so-called “standard deviation” above the average is 115, and those possessing this high an IQ are categorized as very bright. Two standard deviations above the average is the level of literal genius. Those whose IQs fall one standard deviation below the average are of low



retarded.

Ashkenazi Jews, taken as a population, have an average IQ of 110, which is to say that the Jewish population is of higher intelligence than the American population in general. Charles Murray, *Jewish Genius*, Comment. Mag. 29, 30 (2007). The bell curve phenomenon of IQ means that Jews are disproportionately represented in the area two standard deviations above the average. In other words, Jews have IQs above 130 (genius level) more often than the average American.

Blacks, taken as a population, have an average IQ of 85, which is to say that the black population is about one standard deviation below the average American population. J. Philippe Rushton, *Race, Evolution, and Behavior: A Life History Perspective* 22 (Charles Darwin Research Institute 2000); *see also* Arthur R. Jensen, *The g Factor: The Science of Mental Ability* 350 (Prager 1998) (putting the average black IQ at 1.2 standard deviations below the average white IQ). The bell curve phenomenon of IQ means that blacks are disproportionately represented in the area two standard deviations below the average. Neither is this simply an American phenomenon, as “[b]lacks in sub-Saharan Africa score about two standard deviations [approximately thirty IQ points] below the mean of whites on nonverbal tests.” Jensen, *The g Factor*, at 350.

Therefore, if a eugenics program focuses on rooting out mental retardation, it will disproportionately affect blacks, as more black will be negatively affected in proportion to their numbers. In response to concerns that these differences are based upon culture bias, Arthur Jensen may be quoted:

It is now well established and widely accepted by those familiar with the evidence that the [white-black] difference on cognitive tests is not attributable to test bias . . . . A now vast but rather technical body of research literature [which Jensen cites] fully supports this conclusion, and although it has been one of the most critically examined conclusions in all of contemporary psychology, no effective contradiction based on evidence has come forth.

Arthur R. Jensen, *The g Factor: The Science of Mental Ability* 360 (Prager 1998).

For a full discussion of intelligence, *see generally* Arthur R. Jensen, *The g Factor: The Science of Mental Ability* (Prager 1998). Chapter 11 in that book concerns population differences in intelligence and specifically addresses the white-black difference. For further reading concerning racial differences in intelligence, *see generally* J. Philippe Rushton, *Race, Evolution, and Behavior: A Life History Perspective* (Charles Darwin Research Institute 2000); Richard J. Herrnstein & Charles Murray, *The Bell Curve: Intelligence and Class Structure in American Life* (Free Press Paperbacks 1994).

Of course, if the reader still believes that there is no difference between the intelligence of blacks and whites, then there is no constitutional issue at all with which the reader should be concerned.



neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule . . . that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations.”).

[64] *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 273 (1979).

[65] *See generally Ford v. Wainwright*, 477 U.S. 399 (1986).

[66] Sir Edward Coke, 3 Institutes of the Law of England: Concerning High Treason, and Other Pleas of the Crown, and Criminal Causes 6 (6th ed. 1680). The Latin can be translated as “In order that punishment is to come to few, fear is to come to all.”

[67] *Ford v. Wainwright*, 477 U.S. 399, 407 (1986).

[68] One explanation, proffered by antiquity and made holy by Sir Blackwell, is the doctrine of *furiosus solo furore punitur*, which can be translated as, “The mad is punished by madness alone.” Sir William Blackstone, 2 Commentaries on the Laws of England 396 (1769). This does nothing to address the burden placed on the state and society; it is an historical argument, not a logical one, and only addresses the retributive component of justice.

[69] *Ford v. Wainwright*, 477 U.S. 399, 410 (1986).

[70] *See generally Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Buck v. Bell*, 274 U.S. 200, (1926); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

[71] There are certain eugenic measures that are so abhorrent to Western values that they will not be considered whatsoever. These include, among others, infanticide, as practiced in ancient Sparta and elsewhere, and the artificial insemination of random sperm in married women, as suggested by H.J. Muller and Julian Huxley in 1935 and 1962, respectively, *see* John Maynard Smith, *Eugenics and Utopia*, 94 *Dædalus* 487, 493 (1965). I may be criticized for not having drawn the line clearly enough between euthanasia and infanticide, or that I have not explained in greater detail why random artificial insemination of married women is more repugnant than compulsory sterilization. So be it; the infinite intricacies of this debate cannot be perfectly considered here. When making these distinctions, the reader must remember to consider the balance between individual rights and social duty. We must also remember at all



primacy over our humanity.

[72] Castration, by the way, happens to be legal as punishment for sex offenders, most notably in California.

[73] Such was precisely the reasoning behind the repeal of State laws requiring pre-marital screening for sexually transmitted diseases, as “they were considered to be inefficient: not many cases of infection were identified, and transmission would often already have been accomplished via premarital sexual activity.” David Orentlicher, Mary Ann Bobinski, & Mark A. Hall, *Bioethics and Public Health Law* 634 (2d ed. Aspen Publishers 2008).

[74] David Orentlicher, Mary Ann Bobinski, & Mark A. Hall, *Bioethics and Public Health Law* 635 (2d ed. Aspen Publishers 2008).

[75] *Id.*

[76] *See generally* Arthur R. Jensen, *Genetics and Education* (Harper & Row 1972) (arguing against the egalitarian basis of education in favor of educational pluralism).

[77] The fact that the two are positively correlated is not an argument against educational reform.

[78] Think of the French monarchical system and how it ended in the Revolution; then think of Napoleon’s system of meritocracy.

[79] Seymour W. Itzkoff, *The Decline of Intelligence in America: A Strategy for National Renewal* 141-42 (Praeger 1994).

[80] The debate over the right of homosexual couples to adopt is completely irrelevant, for they still cannot reproduce, and the children adopted have obviously already been born. Promoting adoption by homosexual couples may encourage the emptying of orphanages, but it certainly does not encourage procreation. The primary role of the state was never in alleviating the plight of orphans or of aiding the artificial self-fulfillment of homosexuals. Rather, the primary role of the state has always been the protection and perpetuation of the people. Adoption, moreover, is discussed as a separate eugenic measure on page 26. Be it further noted that I am not arguing against gay marriage or adoption by homosexuals; I am merely stating that such a debate is irrelevant to eugenic considerations, including tax benefits.

[81] *See* Seymour W. Itzkoff, *The Decline of Intelligence in America: A Strategy for National Renewal* 125-51 (Praeger 1994) (chapter titled “The American Family,” arguing in favor of the traditional family from an historical perspective).

[82] *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949).



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