

YIN AND YANG: THE EUGENIC POLICIES OF THE UNITED STATES AND CHINA: IS THE ANALYSIS THAT BLACK AND WHITE?

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*If in the First Act you hang a gun upon the wall,
by the Third Act you must use it.*
Chekhov

I. INTRODUCTION

As technological and scientific advances proliferate, innumerable questions regarding legal, cultural, ethical, and human rights issues arise begging for answers. In the ever-broadening global climate of economics and human rights, politicians and world leaders are more frequently asking about the impact of these technologies on the policies of countries around the world. More specifically, as genetic and reproductive options are enlarged, their effects elicit questions related to procreative rights, discrimination, and population policy. The purpose of this comment is to analyze the eugenic practices and policies of the United States and China, and comment on their respective human rights implications.

This Comment will outline the development of the eugenics movement and how eugenic practices have largely been abandoned in the United States. This will be contrasted with the continuing eugenic sterilization practices in China. This comment will also distinguish the social goals of sterilization policies in both countries. It will recognize as the primary distinction in policy the fundamental choice of whether to subordinate the well being of the individual to the well being of society. In addition, it will discuss the permissive genetic policies in the United States which may implicitly endorse eugenic practices.

II. EUGENICS DEFINED

For many, the term “eugenics” conjures up some image of a science fiction experiment gone amuck. The film industry has produced enough movies of aliens bred to have certain omnipotent or omniscient capabilities to somewhat justify that notion. However, the term “eugenics” comes by this connotation honestly, as it was first widely discredited in connection with atrocities of Nazi policies in Germany.¹ Surprisingly, the beginning of eugenics comes from a more palatable background. Plato was one of the earliest theorists to advocate the betterment of the human race by choosing

1. See Diane B. Paul, *Is Human Genetics Disguised Eugenics?*, in GENES AND HUMAN SELF-KNOWLEDGE 67, 72 (Robert F. Weir et al. eds., 1994).

the correct mate.² The term “eugenics” comes from the Greek word meaning “well born.”³ It was coined by Charles Darwin’s cousin, Francis Galton, who defined it as “the science of improving stock.”⁴ Bertrand Russell, a British philosopher, described it as more of a social movement than a science in that it “attempt[s] to improve the biological character of a breed by deliberate methods adopted to that end.”⁵ There is some controversy over the definition of eugenics and how broadly the term sweeps. Much of the controversy focuses on whether eugenics should be defined in terms of the intent of the policies or their consequences.⁶ However, all eugenicists share the common belief that “individual desires should be subordinated to a larger public purpose.”⁷

The definition of eugenics can be further delineated into “positive” and “negative” eugenics. Positive eugenics is similar to Plato’s view which attempts to improve the race through selection and maximization of “socially desirable” genes.⁸ In this instance, eugenicists try to manipulate genes or the mating of genes to increase the incidence of “positive” or “desirable traits.”⁹ This can be contrasted with the more controversial negative eugenics which seeks to eliminate those “bad” or “undesirable” genes or traits from the gene pool.¹⁰ The most infamous example of negative eugenics was Hitler’s attempt in the *Lebensborn* Project to produce “good babies.”¹¹ Accounts vary as to the actual numbers, but historians agree that Hitler had as many as sixty to a hundred thousand “unfit” persons sterilized in an attempt to prohibit reproduction by defectives and eliminate their bad genes from the human race.¹² Eugenicists believed that through the use of both positive and negative eugenics they

2. See Richard A. Estacio, Comment, *Sterilization of the Mentally Disabled in Pennsylvania: Three Generations Without Legislative Guidance Are Enough*, 92 DICK. L. REV. 409, 411 (1988); PLATO, *THE REPUBLIC*, 149–53 (Richard W. Sterling & William C. Scott trans., W.W. Norton & Co. 1985).

3. See Estacio, *supra* note 2, at 411.

4. FRANCIS GALTON, *INQUIRIES INTO HUMAN FACULTY AND ITS DEVELOPMENT* 17 n.1 (AMS Press 1973) (1907).

5. Paul, *supra* note 1, at 68 (quoting Bertrand Russell).

6. See *id.* (discussing the implications of using intent or effects to define eugenics).

7. *Id.* at 69.

8. See Estacio, *supra* note 2, at 411.

9. See Paul, *supra* note 1, at 70.

10. See Estacio, *supra* note 2, at 411.

11. See TROY DUSTER, *BACKDOOR TO EUGENICS* 112 (1990).

12. See Philip R. Reilly, *Eugenic Sterilization in the United States*, in *GENETICS AND THE LAW* III 227, 236 (Aubrey Milunsky & George J. Annas eds., 1985).

could eliminate many so-called hereditary defects such as mental retardation, criminality, and mental illness, and thereby eradicate many social problems.¹³ Negative eugenics such as sterilization would discourage or prevent the socially undesirable from procreating, while positive eugenics would encourage the reproduction of those with socially and culturally desirable traits.¹⁴

Modern discussions of eugenics include the discipline of genetics, and whether genetics is a new or camouflaged type of eugenics.¹⁵ Scientists acknowledge the horrific past of eugenics, and are cautious to delineate the genetic discipline from that of eugenics.¹⁶ One modern geneticist compared the definition of eugenics to the definition of the term “freedom,” in the sense that “it’s meaning ‘is so porous that there is little interpretation that it seems able to resist.’”¹⁷ A broader definition of eugenics includes almost any type of pre-natal genetic testing because this testing invariably includes the systematic selection of fetuses.¹⁸ However, many geneticists define eugenics on much narrower terms that include a social aim and coercive means.¹⁹ The various definitions used for eugenics depend on the author’s political intention and desire to associate or dissociate it from past eugenic practices.²⁰ Another thorny issue in the definition of eugenics is that the aim of the policy is often considered in deciding whether or not the policy is eugenic.²¹

13. See Eric M. Jaegers, Note, *Modern Judicial Treatment of Procreative Rights of Developmentally Disabled Persons: Equal Rights to Procreation and Sterilization*, 31 U. LOUISVILLE J. FAM. L. 947, 950 (1993) (tracing the development of sterilization laws).

14. See *id.*

15. See Paul, *supra* note 1, at 67. “Fear of a Eugenics Revival appears to be a principle anxiety aroused by the Human Genome Project.” *Id.*

16. See *id.* at 69–70 (citing the element of coercion as a major distinguishing factor between genetics and eugenics).

17. ISAIAH BERLIN, *Two Concepts of Liberty* (1958), reprinted in *FOUR ESSAYS ON LIBERTY* 118, 121 (1969); see also Paul, *supra* note 1, at 70 (quoting Berlin).

18. See Paul, *supra* note 1, at 68. “Prenatal diagnosis presupposes that certain fetal conditions are extrinsically not bearable.” *Id.*

19. See *id.*

20. See *id.*

21. See *id.* at 69 (contemplating whether it is possible to know the motives behind any policy).

III. HISTORY

A. *Eugenic Theory*

The roots of eugenics are planted in the 19th century experiments of Francis Galton's cousin, Charles Darwin.²² Darwin's work on evolution lent itself to an application to social problems.²³

Social theorists began first in Europe, and then in the United States, to compare the improvement of society to the evolution of the species.²⁴ Galton elaborated on the social aspects of Darwin's theories, and began studying traits in family trees.²⁵ Galton concluded that many physical and psychological traits were inherited, and that as a result, manipulative breeding could produce persons with desired traits.²⁶ Many eugenicists of the time believed that "feble-mindedness" or mental disability was an inherited recessive trait.²⁷ Consequently, they felt sterilization of the mentally disabled would solve the problem and improve society.²⁸ Eugenicists further linked intelligence (or lack thereof) with social adequacy and virtue, and predicted the morality of certain people based on their intelligence.²⁹

It was not difficult for proponents of eugenics to gather support for their theories, as genetic diseases and mental disabilities impacted both the affected person's family and society.³⁰ The economic realities of caring for the mentally

22. See Robert J. Cynkar, *Buck v. Bell: "Felt Necessities" v. Fundamental Values?*, 81 COLUM. L. REV. 1418, 1420 (1981).

23. See *id.*

24. See *id.* at 1420 n.4 (citing several prominent social theorists of the time).

25. See *id.* at 1420. Galton also performed statistical analysis on eighty sets of twins. See *id.*

26. See *id.* (explaining Galton's belief that society "could use his principles to produce 'men of ability' through planned breeding").

27. See *id.* at 1422.

28. See Estacio, *supra* note 2, at 412.

29. See Cynkar, *supra* note 22, at 1422. One researcher of the time came to the following conclusion:

[W]ithin one racial group, the correlations between the divergences of an individual from the average in different desirable traits are positive, that the man who is above the average of his race in intelligence is above rather than below it in decency, sanity, even in bodily health The child of good reasoning powers has better, not worse, memory than the average; the child superior in observation is superior in inference; scholarship is prophetic of success out of school; a good mind means a better than average character.

Id.

30. See Jaegers, *supra* note 13, at 951 (describing lobbying efforts of eugenicists).

disabled, combined with the misunderstanding of mental illness and fear of the degeneracy of the human race, fueled a drive in the United States for the sterilization of the mentally disabled.³¹

B. Historical Eugenics in the United States

As eugenicists analyzed American societal problems in the late 1800s, they came to rely on the assumption that nearly all social ill resulted from heredity.³² In addition, several researchers claimed a dramatic increase, in some reports as much as 200%, in the incidence of feeble-mindedness.³³ The initial encroachment of eugenics into the arena of the feeble-minded began with an 1890s Connecticut law that prohibited “epileptics, imbeciles, and feeble-minded persons from marrying or having extramarital relations before age forty-five.”³⁴ During this time period, although there were no laws expressly authorizing

31. See Cynkar, *supra* note 22, at 1423–25 (describing how the economic conditions in the United States in the late 19th century and the misunderstanding of mental illness during that time period combined to strengthen the eugenics movement in the United States). For an example of the prevailing climate, see the comments made by Dr. Walter E. Fernald before the Massachusetts Medical Society in 1912:

The past few years have witnessed a striking awakening of professional and popular consciousness of the widespread prevalence of feeble-mindedness . . . and as a causative factor in the production of crime, prostitution, pauperism, illegitimacy, intemperance and other complex social diseases The feeble-minded are a parasitic, predatory class, never capable of self-support or of managing their own affairs Feeble-minded women are almost invariably immoral and if at large usually become carriers of venereal disease or give birth to children who are as defective as themselves Every feeble-minded person, especially the high-grade imbecile, is a potential criminal

STANLEY POWELL DAVIES, SOCIAL CONTROL OF THE MENTALLY DEFICIENT 92 (Gerald N. Grob et al. eds., 1976).

32. See Cynkar, *supra* note 22, at 1423 (describing the view that an “individual’s social adequacy is solely a function of his mental endowment”).

33. See *id.* at 1423–24; see also Reilly, *supra* note 12, at 228 (discussing “the Jukes”). The report on the Jukes was written by a prison inspector who described the traits of 709 descendants of a particular Dutch settler, many of whom were prisoners, and all of whom supposedly had a penchant for taverns, brothels, and other social ills. The story of the Jukes was widely accepted by the general public, and furthered the interest in calculating the cost of these defectives to society. Another “experiment” involved a Revolutionary War soldier who impregnated a girl who was thought to be low class. He later married a “respectable” Quaker woman and bred a line of eminent citizens, while the illegitimate side of the family were feeble-minded paupers. See *id.* at 229.

34. Cynkar, *supra* note 22, at 1432 (citing Act of July 4, 1895, 1895 Conn. Pub. Acts ch. 325).

sterilization, human sterilization was practiced in many states on people in penal and mental institutions.³⁵

After Pennsylvania and Michigan unsuccessfully attempted to pass bills for sterilization of the feebleminded, Indiana became the first state to pass a statute permitting the sterilization of institutionalized criminals, rapists, imbeciles, and idiots.³⁶ Another of the initial sterilization statutes was legislated in California, partly in response to the influx of “racially inferior” Chinese and Mexicans.³⁷ In the early twentieth century, the rise of sterilization was very rapid, with twenty-three states having some form of sterilization statute by 1925.³⁸ Although many of the statutes had little or no legislative history and were passed for a variety of “defectives,” virtually all were modeled to some degree after the Indiana statute which provided that if two physicians certified that there was no chance of “improvement” in the person, they could be sterilized without consent.³⁹

Many of these laws did little to protect individual rights.⁴⁰ Accordingly, some were declared unconstitutional on grounds of equal protection, due process, or cruel and unusual punishment.⁴¹ Some courts, however, upheld the statutes on the basis of protecting the race.⁴²

35. *See id.* at 1432–33 (discussing a systematic program of sterilization implemented at the Kansas State Home for the Feebleminded).

36. *See id.* at 1433 (citing Act of March 9, 1907, 1907 Ind. Acts ch. 215) (noting that the campaign for sterilization of the feebleminded in Indiana was led by a physician who was experimenting with the newly developed vasectomy, and that prior to passage of the law, he had sterilized 176 inmates in a reformatory); *see also* Jaegers, *supra* note 13, at 950–51 (discussing the use of vasectomy, castration, and salpingectomy for eugenic purposes). Vasectomy is partial or complete removal of the vas deferens; castration is the removal of the ovaries or testicles; and a salpingectomy is the removal of the fallopian tube. *See* AMERICAN HERITAGE DICTIONARY 299, 1593, 1977 (3d ed. 1992).

37. *See* Reilly, *supra* note 12, at 231. A similar situation to that of Indiana existed in California in 1909. A physician and lobbyist named F.W. Hatch helped to draft a sterilization law, helped to convince the legislature to adopt it, and after the law was enacted, was appointed General Superintendent of State Hospitals and was thus authorized to implement the new law. The California law focused on the insane and provided for consent by the insane person’s family; however, as sterilization was a prerequisite for release from the institutions, few withheld consent. *See id.* at 231–32.

38. *See* Cynkar, *supra* note 22, at 1433.

39. *See* Reilly, *supra* note 12, at 231.

40. *See* Jaegers, *supra* note 13, at 952.

41. *See* Haynes v. Lapeer, 166 N.W. 938 (Mich. 1918) (holding a Michigan law providing for sterilization of institutionalized ‘mentally defective’ persons unconstitutional and void as class legislation). The court reasoned that the enactment selected out of a “natural class of defective and incompetent

The breakthrough for the eugenic campaign came in 1927 in the infamous *Buck v. Bell* case.⁴³ The Supreme Court upheld a Virginia statute requiring that patients in institutions who suffered from “hereditary” forms of mental illness be sterilized as a condition of their release.⁴⁴ In one of his most quoted decisions, Justice Holmes rejected the due process claim and the equal protection claim on the basis that sterilization was beneficial to both the patient and society.⁴⁵ Carrie Buck was a woman who, along with her mother before her, had been institutionalized for feeble-mindedness.⁴⁶ Carrie was an illegitimate child, and had mothered an illegitimate child who was also believed to be feeble-minded.⁴⁷ Justice Holmes upheld the statute authorizing sterilization to prevent the parenting of “socially inadequate offspring” on the grounds that “[t]hree generations of imbeciles are enough.”⁴⁸ Justice Holmes’

persons only those already under public restraint, leaving immune from its operation all others of like kind to whom the reason for the legislative remedy is normally and equally, at least, applicable, extending immunities and privileges to the latter which are denied to the former.” *Id.* at 940. *See also* *Smith v. Board of Examiners*, 88 A. 963 (N.J. Sup. Ct. 1913) (holding a New Jersey law providing for sterilization of epileptics in public institutions unconstitutional because the statutory remedy denied institutionalized epileptics equal protection); Jaegers, *supra* note 13, at 952.

42. *See* *State ex Rel. v. Schaffer*, 270 P. 604, 605 (Kan. 1928) (upholding a statute authorizing the sterilization of hospital inmates): “Procreation of defective and feeble-minded children with criminal tendencies does not advantage, but patently disadvantages, the race. The race may insure its own perpetuation and such progeny may be prevented in the interest of the higher general welfare.” *Id.*

43. 274 U.S. 200 (1927).

44. *See id.* at 200; *see also* Jaegers, *supra* note 13, at 947. The Act declared:

[T]he Commonwealth . . . is supporting . . . many defective persons who if now discharged or paroled 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 [H]uman experience has demonstrated that heredity plays an important part in the transmission of insanity, idiocy, imbecility, epilepsy and crime

Cynkar, *supra* note 22, at 1436. The Virginia law contained much of the same language as the laws Hitler used to sterilize the defective in Germany, as both were based on the Model Eugenical Sterilization Law proposed by an American eugenicist. *See* Paul A. Lombardo, *Three Generations, No Imbeciles: New Light on Buck v. Bell*, 60 N.Y.U. L. REV. 30, 31 & n.6 (1985) (citing A. CHASE, *THE LEGACY OF MALTHUS: THE SOCIAL COSTS OF THE NEW SCIENTIFIC RACISM* 135, 351 n.15 (1977)).

45. *See Buck*, 274 U.S. at 206; *see also* Jaegers, *supra* note 13, at 953.

46. *See Buck*, 274 U.S. at 205.

47. *See id.*; Cynkar, *supra* note 22, at 1437.

48. *Buck*, 274 U.S. at 207.

opinion is most notable for the fact that he accepted and endorsed the eugenic theories without reservation, gave no thought to procreation as a right, and never questioned whether feeble-mindedness was actually hereditary.⁴⁹

The era following *Buck v. Bell* consisted of nearly thirty states either enforcing previously unused sterilization statutes, or passing compulsory sterilization statutes to correct what they saw as a serious social problem.⁵⁰ Although numerous statutes were passed and sterilization of the feeble-minded occurred in most states, the prediction that *Buck* would dramatically increase the eugenic sterilization practice was largely overestimated.⁵¹ The actual peak in sterilizations occurred about the time that *Buck* was decided, but the popularity of the eugenic campaign was already losing ground.⁵² As advances were made in genetic research and other disciplines such as psychology and sociology became popular, the eugenic movement lost momentum as other explanations became available for mental disability.⁵³

49. See Jaegers, *supra* note 13, at 953; see also Estacio, *supra* note 2, at 415–16 (commenting on how Justice Holmes quickly and erroneously assumed that heredity is the primary cause of mental retardation); ALBERT DEUTSCH, *THE MENTALLY ILL IN AMERICA* 365–67 (2d ed. 1949) (discussing the post-*Buck* research and developments, and indicating that many of the so-called hereditary mental defects provided for in the sterilization statutes were in fact not inherited). It is interesting to note that several historians and commentators offer proof that *Buck* was a test case specifically designed to bolster the sterilization campaign. See Cynkar, *supra* note 22, at 1437; see also Lombardo, *supra* note 44, at 51–54 (offering evidence that none of the three *Buck* generations were actually “imbeciles,” but rather were considered social defectives because they mothered illegitimate children and that Carrie became a mother as a result of rape).

50. See Cynkar, *supra* note 22, at 1454; Jaegers, *supra* note 13, at 953–54. The initial sterilization statutes were aimed at institutionalized persons, and prior to 1930, roughly half of those sterilized were men. In 1930, the number of women sterilized began to rise dramatically. See Reilly, *supra* note 12, at 235–36.

51. See Cynkar, *supra* note 22, at 1454 (noticing that despite the *Buck* decision, and the increased number of sterilizations in Virginia, the nationwide use of sterilization was declining).

52. See *id.* (commenting that by the time of the *Buck* decision, eugenic scientists had become increasingly aware of the simplistic nature of their assumptions, and had begun to withdraw their support from the eugenics movement).

53. See *id.* at 1456. Despite strong support for eugenic sterilization in the medical community, only eighteen state medical associations officially supported the eugenic position. See Reilly, *supra* note 12, at 235. In 1937, the American Medical Association stated, “Present knowledge regarding human heredity is so limited that there appears to be very little scientific basis to justify limitation of conception for eugenic reasons There is conflicting evidence regarding the transmissibility of epilepsy and mental disorders.” Charles P. Kindregan, *Sixty Years of Compulsory Eugenic Sterilization: “Three*

Another contributor to the decline in popularity of eugenics was the discovery of the Nazi atrocities based on eugenic ideas, and American revulsion at this blatant racism.⁵⁴

The turning point in American sterilization law came in 1942 when the Supreme Court decided *Skinner v. Oklahoma*.⁵⁵ In this case, the Court held that procreation is a fundamental right; therefore, any statutes affecting this right to reproduction should be strictly scrutinized by the courts.⁵⁶ The court realized that “[t]he 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.”⁵⁷ In *Griswold v. Connecticut*,⁵⁸ the Supreme Court began expanding the rights to reproductive privacy, based on that fundamental right to procreate.⁵⁹ In contravention of the *Buck* decision which didn’t consider procreation as a right, the watershed case of *Roe v. Wade*⁶⁰ held that the right to privacy to procreate included the right to an abortion.⁶¹ As a result of scientific and social developments and the birth of the right to procreate, many states have questioned and

Generations of Imbeciles” and the Constitution of the United States, 43 CHI. KENT L. REV. 123, 136–37 (1966) (internal quotations omitted).

54. See Cynkar, *supra* note 22, at 1456. Although word of the German campaign horrified many Americans, nearly half of the involuntary sterilizations in the United States occurred after Hitler’s campaign was in full swing. See Reilly, *supra* note 12, at 235.

55. 316 U.S. 535 (1942); see Jaegers, *supra* note 13, at 958 (arguing that *Skinner* established procreation as a fundamental right, and sparked a debate regarding sterilization of mentally disabled persons).

56. See *Skinner*, 316 U.S. at 536–39 (invalidating an Oklahoma statute that provided for involuntary sterilization of individuals convicted of more than two felonies). The Supreme Court invalidated the statute in part on equal protection grounds. They reasoned that the crimes *Skinner* committed, stealing chickens and armed robbery, were essentially the same as embezzlement which was excluded from the statute. See *id.*; see also Jaegers, *supra* note 13, at 957–58 (commenting that states seeking to enforce compulsory sterilization statutes must show a compelling state interest and the unavailability of less intrusive means of accomplishing the same goal).

57. *Skinner*, 316 U.S. at 541.

58. 318 U.S. 479 (1965).

59. See *id.* at 485–86 (holding that married couples had a right to privacy that included non-interference with contraception); see also Jaegers, *supra* note 13, at 958 (commenting that the Supreme Court began formulating the modern doctrine of reproductive privacy in *Griswold*). This right was later expanded to include unmarried couples. See *Eisenstadt v. Baird*, 405 U.S. 438, 454–55 (1972) (holding that prohibiting only unmarried persons access to contraceptives violated Equal Protection).

60. 410 U.S. 113 (1973).

61. See *id.* at 154.

repealed their eugenic sterilization statutes.⁶² As the pendulum of eugenics and reproductive freedom swings the other way, some cases involve the sterilization of incompetents for non-eugenic, even habilitating reasons.⁶³

C. *Historical Eugenics in China*

Chinese eugenic policies are unlike the U.S. policies, because they are rooted in a desire for population control.⁶⁴ The Chinese began aggressive population policies after the Communist takeover in 1949.⁶⁵ In that era, the government implemented very pro-natalist policies to encourage the growth of the population and to improve socioeconomic development.⁶⁶ By the mid 1960s, that campaign was largely reversed, as Chinese officials realized the impact of famine and economic hard times on their country.⁶⁷ Communist Party leader Deng Xiaoping put a screeching halt to the population expansion with his plan of social modernization.⁶⁸ The government began urging family planning by limiting couples to two or three children and later promoting the one-child family as the norm.⁶⁹

This campaign did slow the population growth. However, Chinese officials continued to worry about the relative scarcity of arable land to support the burgeoning population.⁷⁰ “In 1979, the Chinese leadership, faced with

62. See Jaegers, *supra* note 13, at 959.

63. See *In re Valerie N.*, 707 P.2d 760 (Cal. 1985). In this case, the California Supreme Court held that it was unable to permit the sterilization of a severely retarded woman, even at the request of her parents, because the statute didn't allow sterilization of non-consenting persons. See *id.* at 761–62.

64. See Xiaorong Li, *License to Coerce: Violence Against Women, State Responsibility, and Legal Failures in China's Family-Planning Program*, 8 YALE J.L. & FEMINISM 145, 148–55 (outlining China's population policy and its ramifications).

65. See Reed Boland, *The Environment, Population, and Women's Human Rights*, 27 ENVTL. L. 1137, 1143 (1997) [hereinafter *Women's Rights*] (commenting that after 1949, the new Communist regime aggressively pursued a policy of encouraging births).

66. See *id.* (explaining that the Communist government implemented the policy to strengthen the country through increased socioeconomic development). The Communist Party Chairman, Mao Zedong, instituted a policy with the slogan “the more babies, the more glorious are their mothers.” Li, *supra* note 64, at 148.

67. See Li, *supra* note 64, at 148. The new slogan in the 1970s was “Later, farther apart, and fewer.” *Id.*

68. See *id.* His plan emphasized economic efficiency and the importance of halting the population explosion. See *id.*

69. See *id.*

70. See *Women's Rights*, *supra* note 65, at 1143. China has approximately a fifth of the world's people but less than a tenth of the world's

demographic data supporting the contention that rapid population growth would slow economic growth, revised their strategy and launched the PRC's One Child Policy.⁷¹ This policy, although not a national law, limited couples to one child per family, and was outlined in numerous Communist Party directives.⁷² In 1980, The Marriage Law was enacted and mandated family planning and restricted couples from marrying before proscribed ages.⁷³ In addition, the 1982 Chinese Constitution mandated that the entire country should practice family planning.⁷⁴

Chinese population policy, while arguably innocuous on its face, has elicited international outrage because of the methods used to implement it.⁷⁵ Although Chinese officials vigorously deny human rights abuses, numerous reports support the fact that both coercion and force are used to ensure success of the One Child Policy.⁷⁶ Although the government has acknowledged that mass sterilization campaigns occur in rural areas, they blame these excesses on local officials.⁷⁷ Directives issued in both 1982 and 1991 urged the provinces to maintain strict enforcement of the policy.⁷⁸ There are numerous reports of forced abortions and sterilizations, late term aborted babies allowed to die, infanticide, and abandonment of female infants.⁷⁹ In addition to force, coercive means such as economic and job sanctions, threats, and community pressure are used on both potential

farmable land. See Graciela Gómez, *China's Eugenics Law as Grounds for Granting Asylum*, 5 PAC. RIM L. & POL'Y J. 563, 565 (1996).

71. Gómez, *supra* note 70, at 565.

72. See *id.* (noting that the Chinese Constitution gives the individual states power to carry out family planning in order to achieve the goal of population control). "The Central Party Committee and the State Council announced that 'controlling population growth is an important strategic issue facing our country's modern socialist construction.'" Li, *supra* note 64, at 149.

73. See Li, *supra* note 65, at 149.

74. See Gómez, *supra* note 70, at 566.

75. See Li, *supra* note 65, at 152-155 (discussing in detail the 'one-birth' policy that generally requires couples to obtain birth permits prior to conception, punishes couples who have more than one child by forcing the woman to terminate the pregnancy, and forces couples to use contraceptives if they already have one child).

76. See *Women's Rights*, *supra* note 65, at 1144.

77. See *id.*

78. See Li, *supra* note 65, at 149-50.

79. See Gómez, *supra* note 70, at 568-69; Reed Boland, *Cairo Conference and Programme of Action: An Innovative Approach to Population Policy or Old Wine in a New Bottle?*, 1995 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 23, 31 (1995); *Women's Rights*, *supra* note 65, at 1144 (discussing reports of mass sterilization campaigns in the provinces).

parents.⁸⁰ Government officials view these practices as more favorable than allowing uncontrolled population growth which they fear would lead to poverty, high infant mortality rates, and malnutrition.⁸¹

In addition to sterilization for population control, China has also implemented programs to sterilize the mentally retarded for eugenic reasons.⁸² Included in the 1986 guidelines for the regulation of childbearing were provisions that prohibit people with histories of mental illness, retardation, or hereditary disease from having children.⁸³ In 1986, the Ministry of Health also released *the Guiding Criteria for Classification of Abnormal Cases* which listed four groups of people who are permitted to marry but not allowed to have children.⁸⁴ "These include couples in which both spouses are born deaf-mute due to a hereditary disease or disorder, or in which at least one spouse has hereditary schizophrenia, manic depression, or heart disease."⁸⁵ The government's apparent purpose in implementing these laws is to reallocate resources to more productive projects than spending the money on disabled individuals.⁸⁶ Many provinces passed similar laws in the late 1980s. For example, Shandong Province passed a law in 1989 stating "[t]hose who have been found to have the possibility to give birth to severely defective babies or babies with severe hereditary diseases . . . should be banned from having children; if pregnant, the pregnancy should be terminated."⁸⁷ Other provinces have similar laws

80. See *Women's Rights*, *supra* note 65, at 1145–46. At times the whole community is involved in pressuring women into sterilization, abortion, or insertion of an IUD. In some areas officials actually monitor the women's use of contraceptives and whether they become pregnant. See *id.* at 1146. The government may also withhold medical, educational or housing benefits, or impose stiff fines for non-compliance. See Reed Boland, *Civil & Political Rights and the Right to Nondiscrimination Population Policies, Human Rights, and Legal Change*, 44 AM. U. L. REV. 1257, 1261 (1995). In contrast, those couples who comply with the one child policy may be rewarded with better benefits. See *Women's Rights*, *supra* note 65, at 1145.

81. See Timothy John Fitzgibbon, *The United Nations Convention on the Rights of the Child: Are Children Really Protected? A Case Study of China's Implementation*, 20 LOY. L.A. INT'L & COMP. L. J. 325, 344 (1998).

82. See *Women's Rights*, *supra* note 65, at 1151 (noting that provinces have enacted laws requiring sterilization of individuals with hereditary diseases or mental or physical disabilities).

83. See Li, *supra* note 64, at 160.

84. See *id.* at 161.

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

86. See *Women's Rights*, *supra* note 65, at 1151.

87. Li, *supra* note 64, at 161 (citing Shandong Family Planning Regulations art. 17 (adopted by the Standing Committee of the Seventh Shandong People's Congress, July 20, 1988)).

providing that “[i]f one spouse is insane (*chi*), an idiot (*dai*), or a fool (*sha*), or has any other hereditary disease likely to cause severe defects in descendants, that spouse should be sterilized.”⁸⁸ The Gansu province in China, which has the most comprehensive eugenics measures, defines the term “idiot” as an individual whose IQ is below 49 and who has cognitive and behavioral difficulties.⁸⁹ Much of the scientific community has long rejected the assumption that individuals with mental disabilities will automatically reproduce children with the same defects.⁹⁰

Another instance of implicit eugenics in China is the widespread practice of prenatal sex selection in favor of male babies.⁹¹ Reports of this discrimination against female babies are best illustrated by a shift in the birth ratio of boys to girls.⁹² The state family planning figures from April of 1993 indicate that the ratio was 100 girls for every 111.3 boys born.⁹³ This figure is drastically different than the worldwide ratio of 100 girls for every 106 boys, which was the ratio in China prior to the One Child Policy.⁹⁴ The deputy head of the Family Planning Commission attributed this discrepancy in part to the ancient belief, especially common in rural areas, that only boys can carry on the family line.⁹⁵ Although doctors are legally barred from revealing the sex of a fetus, even small rural Chinese towns have ultrasound machines,

88. *Id.* at 161 (citing Shanxi Family Planning Regulations art. 13 (adopted by the Standing Committee of the Seventh Shanxi People’s Congress, Sept. 22, 1989)).

89. *See id.* at 161 n.87.

90. *See id.* at 162.

91. *See id.* at 169 (discussing the common practice of aborting female fetuses).

92. *See id.* at 166 & n.114 (citing Li Yongping, *Infant Sex Ratio and Its Relationship With Socio-economic Variables: Results of Population Census and The Reflected Realities*, 4 POPULATION & ECON. 3 (1993); Mu Guangzong, *A Theoretical Explanation of Recent Rise in Sex Ratio at Birth in China*, 1 POPULATION & ECON. 50 (1995) (describing China’s sex ratio).

93. *See* Uli Schmetzer, *In Controlling China’s Population, Girls ‘Disappear,’* CHI. TRIB., Apr. 27, 1993, § 1, at 1. [hereinafter *Girls Disappear*]. Some sources claim the ratio is even more skewed, and that as many as 750,000 females born in China each year are missing. *See id.* Calculations from as far back as 1986 indicate over half a million female births unaccounted for each year. *See* Terence H. Hull, *Recent Trends in Sex Ratios of Birth in China*, 16 POPULATION & DEV. REV. 63, 67 (1990).

94. *See Girls Disappear, supra* note 93 (comparing worldwide sex ratios to China’s pre-One Child Policy sex ratio).

95. *See id.* (discussing China’s preference for male offspring); *see also* Nicholas D. Kristof, *China’s Crackdown on Births: A Stunning and Harsh Success*, N.Y. TIMES, Apr. 25, 1993, at A1 (describing the emphasis Chinese peasants place on bearing male offspring).

and reports indicate that healthcare workers will accept bribes to reveal the baby's sex.⁹⁶ There are also reports of female babies that are hidden, abandoned, killed, or given away in the hopes that the couple can have a second male baby without the mandated fines and penalties.⁹⁷ Although the provinces have laws officially prohibiting violence against baby girls, the regulations prove ineffective because of their lack of specific penalties and enforcement procedures.⁹⁸ In addition, Chinese law rarely punishes crimes, unless the victim or the family presses charges which is unrealistic in the case of infanticide.⁹⁹

The Chinese government recently adopted the Maternal and Infant Health Care Law, previously known as the Eugenics Law.¹⁰⁰ This law represents an attempt by the Chinese government to not only decrease the quantity of the population, but also to increase the quality.¹⁰¹ This provision will be discussed at length in section V following.

IV. MODERN UNITED STATES EUGENICS POLICY

A. *Eugenic Theory*

Although the United States has generally rejected eugenics as a policy for social improvement, there are still some applicable uses for the old statutes permitting sterilization of the mentally disabled.¹⁰² With current political themes of reproductive privacy, and a newfound desire to protect the mentally incapable, some sterilization statutes have been upheld and found beneficial based on a rationale

96. See Li, *supra* note 64, at 169 (describing largely ineffective provincial regulations and legislation prohibiting sex identification); see also Kristof, *supra* note 95 (discussing the growing use of ultrasound technology for sex identification). Although the Chinese government denies fetal preference, in the 1980s, they created exceptions to the One Child Policy by allowing rural couples whose only child was female to have a second male child. See *Women's Rights*, *supra* note 65, at 1150.

97. See Li, *supra* note 65, at 166–67 & n.117 (explaining various techniques for concealing the birth of female babies).

98. See *id.* at 167 (discussing ineffectiveness of laws aimed at protecting female infants).

99. See *id.* at 167 & n.121.

100. See *id.* at 162 (citing Ruth Youngblood, *China Law Defers Disabled Marriages*, UPI, Oct. 27, 1994).

101. See Gómez, *supra* note 70, at 569.

102. See James C. 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, 517–20 (discussing the shift from a predominantly disabling paradigm, permitting involuntary sterilization, to the current, less severe, enabling paradigm).

of the disabled person's right to make procreative choices.¹⁰³ Three emerging themes are responsible for the transformation of sterilization law: "the discrediting of the eugenic theory, the development of the constitutional doctrine of reproductive privacy, and the changing conception of mental retardation."¹⁰⁴ Current laws reflect a societal distaste for the historical use of eugenics, and a fear of intrusion on individual liberties.¹⁰⁵

The reports of sterilization in Nazi Germany fueled the outcry against eugenic sterilization laws.¹⁰⁶ Subsequently, reproductive rights gained importance with the development of the constitutional doctrine of reproductive privacy.¹⁰⁷ In addition, theories regarding mental retardation have changed drastically from a medical model to a developmental model.¹⁰⁸ Approaches to care of the mentally disabled no longer focus on segregating them, but instead emphasize mainstreaming or integrating them to the extent possible.¹⁰⁹ Currently, mentally disabled people are seen to have the same rights to sexual privacy as other people.¹¹⁰ The apparent goal of current sterilization law is to prevent erroneous sterilizations, and to protect the right of the mentally disabled individual (or

103. See *id.* at 520–21 (comparing enabling sterilization statutes which maximize the disabled person's ability to choose, with disabling sterilization statutes which minimize the disabled person's ability to choose).

104. Elizabeth S. Scott, *Sterilization of Mentally Retarded Persons: Reproductive Rights and Family Privacy*, 1986 DUKE L.J. 806, 809 (1986).

105. See *id.* at 811–12 (describing reform law rejecting eugenics to protect individual liberties).

106. See *id.* at 811.

107. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (striking down as unconstitutional a law prohibiting married couples access to birth control on the grounds that it interfered with marital privacy). Several related decisions further broadened women's rights to contraception, abortion, and fertility. See, e.g., *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 772 (1986) (holding that women have a constitutionally protected right to an abortion); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 694 (1977) (holding a law prohibiting the sale of contraceptives to minors restricts their reproductive privacy); *Roe v. Wade*, 410 U.S. 113, 164 (1973) (holding that women have a privacy right to abortion during the first trimester); *Eisenstadt v. Baird*, 405 U.S. 438, 443 (1972) (holding that prohibiting single persons from using contraceptives violates the Equal Protection Clause of the Fourteenth Amendment). See also Robert Randal Adler, Note, *Estate of C.W.: A Pragmatic Approach to the Involuntary Sterilization of the Mentally Disabled*, 20 NOVA L. REV. 1323, 1347–48 (discussing the development of the fundamental right to sexuality and privacy).

108. See Scott, *supra* note 104, at 814 (elaborating on the changing conception of mental retardation).

109. See *id.* at 815 (discussing current trend to integrate mentally retarded persons).

110. See *id.* at 813.

a surrogate acting on her behalf) to make reproductive decisions in her best interests.¹¹¹ The argument that frequently supports statutes to sterilize the mentally handicapped is based on the best interests of the patient.¹¹²

There also exists a counter argument to incorporate into the sterilization statutes an element of the best interests of society.¹¹³ The competing values are the importance of reproductive autonomy and a paternalistic protection of the mentally disabled person's right to procreate.¹¹⁴ One of the difficult issues is defining whether the disabled person's fundamental right to privacy includes both the right to procreate and the right to be sterilized.¹¹⁵

When dealing with fundamental rights issues, courts have generally taken one of four stances.¹¹⁶ One view is to ask if the individual's privacy rights would be unfairly restricted if sterilization were denied.¹¹⁷ Another line of analysis is to only cursorily analyze the fundamental rights to privacy and procreative choice.¹¹⁸ The third viewpoint is that state interests outweigh fundamental rights and override equal protection and substantive due process challenges.¹¹⁹ A final view is that there is no state interest strong enough to outweigh the invasion of fundamental rights by involuntary sterilization.¹²⁰ This variety of approaches illustrates the controversy over fundamental privacy rights and the disabled individual.

111. *See id.* at 807.

112. *See Estacio, supra* note 2, at 420.

113. *See id.* This concern for the best interests of society is based on the presumption that some, if not all, mentally handicapped persons are unable to become fit parents. *See id.* at 421. Further arguments are put forward regarding the costs to society of supporting and raising the children, and any risks to the children from being in the custody of an incapable parent. *See id.*

114. *See Scott, supra* note 104, at 807 (contrasting a purported emphasis on reproductive autonomy with a more apparent interest in paternalism with regard to the reproductive choices of the mentally disabled).

115. *See* Roberta Cepko, *Involuntary Sterilization of Mentally Disabled Women*, 8 BERKELEY WOMEN'S L.J. 122, 131-33 (1993). *See, e.g., In re Grady*, 426 A.2d 467 at 474 (1981). "The right to be sterilized comes within the privacy rights protected from undue governmental interference." *Id.*

116. *See Cepko, supra* note 115, at 130-31.

117. *See id. See, e.g., In re Valerie N.*, 707 P.2d 760 (Cal. 1985); *In re Moe*, 432 N.E.2d 712, 717 (Mass. 1982).

118. *See Cepko, supra* note 115, at 130-31. *See, e.g., In re Hayes*, 608 P.2d 635, 639 (Wash. 1980); *C.D.M. v. State*, 627 P.2d 607, 612 (Alaska 1981).

119. *See Cepko, supra* note 115, at 130-31. *See, e.g., In re Moore*, 221 S.E.2d 307, 308-09 (N.C. 1976).

120. *See Cepko, supra* note 115, at 130-31. *See, e.g., In re Eberhardy*, 307 N.W.2d 881 (Wis. 1981).

B. Statutes

Today involuntary sterilization of the mentally disabled is supported by statute in some states, and by case law in others.¹²¹ Presently, ten states have some form of involuntary sterilization statute.¹²² The statutes vary widely in application.¹²³ For example, Idaho's sterilization law applies to persons "past his or her age of puberty,"¹²⁴ while Mississippi's law applies to both adults and minors, but only if they are institutionalized.¹²⁵ To add to the array of results, statutes use various language and definitions when referring to the mentally disabled.¹²⁶ Some states such as North Carolina require only a probability, rather than proof, that the handicapped person may be incapable of caring for their children before they can be ordered sterilized.¹²⁷ Other states such as Oregon have more substantive and procedural requirements in place to protect the rights of the mentally handicapped person.¹²⁸ The Oregon statute requires the following to establish best interest in the context of sterilization:

- a) The individual is physically capable of procreating;

121. See Cepko, *supra* note 115, at 146-58 (analyzing statutory and common law policies).

122. See ARK. CODE ANN. §§ 20-49-205 to -304 (Michie 1997); DEL. CODE ANN. tit. 16, §§ 5701-16 (1995); GA. CODE ANN. §§ 31-20-2 to -3 (1996); IDAHO CODE §§ 39-3901 to -3909 (1999); MISS. CODE ANN. §§ 41-45-1 to -19 (1998); N.C. GEN. STAT. §§ 35-39 to -43 (1997); OR. REV. STAT. §§ 436.225 to .295 (1998); UTAH CODE ANN. §§ 62A-6-101 to -116 (1998); VT. STAT. ANN. tit. 18, §§ 8705-12 (1998); VA. CODE ANN. §§ 54.1-2975 to -2977 (Michie 1998).

123. See Cepko, *supra* note 115, at 146 (stating the various state approaches to statute applicability).

124. IDAHO CODE § 39-3901(a) (1999).

125. See MISS. CODE ANN. § 41-45-5 (1998).

126. See Cepko, *supra* note 115, at 146 (examining the various ways statutes define mental disability). In addition, some statutes require certain safeguards when an individual is incapable of giving informed consent. See OR. REV. STAT. § 436.215 (1998).

127. See Estacio, *supra* note 2, at 421. The North Carolina statute leaves the determination whether the handicapped person would be able to care for children solely to the petitioner, and has no guidelines regarding the handicapped person's best interests. See N.C. GEN. STAT. § 35-39(3) (1997). It should be noted that North Carolina was one of the last and most vigorous enforcers of the previous compulsory eugenic sterilization laws, and performed these well into the 1960s after most of these laws had fallen into disfavor with the general American public. See Reilly, *supra* note 12, at 237.

128. See OR. REV. STAT. § 436.215 (1998); See also Estacio, *supra* note 2, at 422.

- b) The individual is likely to engage in sexual activity at the present time or in the near future under circumstances likely to result in pregnancy;
- c) All less drastic contraceptive measures, including supervision, education and training, have proved unworkable or inapplicable, or are medically counter-indicated;
- d) The proposed method of sterilization conforms with standard medical practice, is the least intrusive method available and appropriate, and can be carried out without reasonable risk to the health and life of the individual; and
- e) The nature and extent of the individual disability, as determined by empirical evidence and not solely on the basis of standardized tests, renders the individual permanently incapable of caring for and raising a child, even with reasonable assistance.¹²⁹

The Oregon statute exemplifies the objective “best interest” inquiry,¹³⁰ while other statutes use “substituted judgment” in an attempt to determine what the individual would want if he were able to make an informed decision.¹³¹

States place varying levels of importance on factors such as attempts at other forms of contraception and proof of fertility.¹³² The Oregon statute can be contrasted with Mississippi law which is essentially the same as the one at issue in the *Buck v. Bell* case.¹³³ The Mississippi statute has been criticized by some as having explicit eugenic purposes, and infringing on disabled persons’ liberty interests.¹³⁴ Depending on the statute, a parent, guardian, physician,

129. OR. REV. STAT. § 436.205(1) (1998).

130. See OR. REV. STAT. § 436.295 (1998).

131. See UTAH CODE ANN. § 62A-6-108(4) (1997) (setting forth the substituted judgment scheme); Cepko, *supra* note 115, at 154.

132. See Cepko, *supra* note 115, at 153. See also, e.g., UTAH CODE ANN. § 62A-6-108(1)(c) (1997) (providing for a rebuttable presumption of fertility in physically normal individuals); VA. CODE ANN. § 54.1-2977.2 (Michie 1998) (requiring proof that there is no reasonable alternative method of contraception).

133. 274 U.S. 200 (1927); See Dugan, *supra* note 102, at 527 (discussing the language and the controlling interests in the Mississippi statute). The Mississippi statute allows involuntary sterilization of persons “afflicted with hereditary forms of insanity that are recurrent, idiocy, imbecility, or feeble-mindedness.” MISS. CODE ANN. § 41-45-1 (1998).

134. See Dugan, *supra* note 102, at 527.

spouse or other interested parties may petition for sterilization of the disabled person.¹³⁵

C. Case Law

Currently most sterilization issues are raised by the parents of a mentally disabled daughter, who wish their child to be sterilized to prevent the psychological, physical and financial toll of pregnancy and parenthood on their child.¹³⁶ Judicial opinions tend to show deference to the parents of disabled children who request sterilization.¹³⁷ In the absence of statutory authorization, jurisdictions are split as to whether courts may grant petitions for sterilization.¹³⁸ Washington and Iowa courts have held that a state constitutional grant of general jurisdiction to the lower courts was adequate to authorize sterilization of mentally disabled

135. See Cepko, *supra* note 115, at 149; GA. CODE ANN. § 31-20-3(c)(1) (Supp. I 1998) (1996) (guardian or next of kin); ARK. CODE ANN. § 20-49-202(a) (Michie 1997) (parent or guardian); OHIO REV. CODE ANN. § 5123.86(c) (Anderson 1998) (natural or court appointed guardian or two doctors if neither is available); VA. CODE ANN. § 54.1-2975 (Michie 1998) (spouses); CONN. GEN. STAT. § 45a-692 (West 1993) (interested parties).

136. See *e.g.*, *In re S.C.E.*, 378 A.2d 144, 145 (Del. Ch. 1977) (denying parents' petition to sterilize severely mentally retarded girl who required nearly total physical care); *Estate of C.W.*, 640 A.2d 427, 430-31 (Pa. Super. Ct. 1994) (granting guardian's petition to sterilize moderately severely mentally retarded daughter who had multiple medical problems, and was overly affectionate); *In re Grady*, 426 A.2d 467, 470 (N.J. 1981) (denying parents' petition to sterilize daughter with Down's Syndrome because they failed to meet a clear and convincing standard of proof); *In re Valerie N.*, 219 Cal. Rptr. 387, 389-90 (Cal. 1985) (denying conservator's application to sterilize mentally retarded daughter who exhibited inappropriate sexual behavior towards men that was not corrected with behavior modification).

137. See Cepko, *supra* note 115, at 149. See *In re Grady*, 426 A.2d 467. "Parents decided not to place her in an institution but to care for her at home. Since that time they have provided her with love and emotional support, as well as the physical necessities of life." *Id.* at 469-70. See also *In re Hayes*, 608 P.2d 635. "Edith's parents are sensitive to her special needs and concerned about her physical and emotional health. During the year or so that Edith has been capable of becoming pregnant, [her parents] have become frustrated, depressed and emotionally drained by the stress of seeking an effective and safe method of contraception." *Id.* at 637. Although deferential to parents, courts have not entirely disregarded the interests of disabled children. "A court must take particular care to protect the rights of the mentally impaired when considering the prospect of sterilization." *In re Grady*, 426 A.2d at 472. See also *In re Hayes*, 608 P.2d at 640 (commenting on the "detrimental emotional effects" that mentally disabled persons may suffer as a result of sterilization, and recognizing that the interests of the retarded person are not always coterminous with the interests of the parent).

138. See Cepko, *supra* note 115, at 156.

persons.¹³⁹ Other courts have held that they lacked jurisdiction over sterilization petitions in the absence of specific statutory authorization.¹⁴⁰ However, after the landmark Supreme Court decision in *Stump v. Sparkman*¹⁴¹ (holding that sterilizations may be authorized absent express statutory permission) courts have been more likely to grant jurisdiction.¹⁴² Other courts have based their sterilization jurisdiction on the common law *parens patriae* doctrine which provides that courts have the authority to protect persons who cannot protect themselves due to a legal disability.¹⁴³

With or without statutory authorization, the courts rely on several balancing tests developed by sterilization case law.¹⁴⁴ Many courts follow the two-step process developed in *In re Hayes*¹⁴⁵ to determine the appropriateness of sterilization.¹⁴⁶ First, the court must determine whether the individual is competent to make an informed decision regarding sterilization.¹⁴⁷ If the court finds the individual incompetent, then it applies a best interests analysis to determine if sterilization is appropriate.¹⁴⁸ The *Hayes* rule is stringent; the court can order sterilization only if specific

139. See *In re Hayes*, 608 P.2d 635, 638 (Wash. 1980); *In re Matejski*, 419 N.W.2d 576, 580 (Iowa 1988).

140. See, e.g., *Frazier v. Levi*, 440 S.W.2d 393, 395 (Tex. Civ. App.—Houston [1st Dist.] 1969); *In re M.K.R.*, 515 S.W.2d 467, 470–71 (Mo. 1974); *In re D.D.*, 408 N.Y.S.2d 105 (N.Y. App. Div. 1978); *In re S.C.E.*, 378 A.2d 144, 145–46 (Del. Ch. 1977); *Hudson v. Hudson*, 373 So. 2d 310, 312 (Ala. 1979).

141. 435 U.S. 349 (1978).

142. See Susan Stefan, *Whose Egg Is It Anyway? Reproductive Rights of Incarcerated, Institutionalized and Incompetent Women*, 13 NOVA L. REV. 405, 418–19 (1989) (comparing the treatment of sterilization petitions before and after the *Stump* decision). The specific issue in *Stump* was whether a judge had judicial immunity from granting sterilization absent the statutory authorization. See *Stump*, 435 U.S. at 358. Although the Court focused on the judicial immunity issue rather than the validity of court ordered sterilizations, this decision has been cited repeatedly as support for sterilization decisions. See Cepko, *supra* note 115, at 157–58.

143. See, e.g., *In re Terwilliger*, 450 A.2d 1376, 1381–82 (Pa. Super. Ct. 1982); see also Estacio, *supra* note 2, at 425.

144. See Jaegers, *supra* note 13, at 961–63 (discussing the procedural requirements imposed by various jurisdictions).

145. 608 P.2d 635 (Wash. 1980).

146. See *id.* at 961.

147. See *In re Hayes*, 608 P.2d 635, 641 (Wash. 1980). “[T]he judge must first find by clear, cogent and convincing evidence that the individual is (1) incapable of making his or her own decision about sterilization, and (2) unlikely to develop sufficiently to make an informed judgment about sterilization in the foreseeable future.” *Id.*

148. See Scott, *supra* note 104, at 818.

criteria are met.¹⁴⁹ A more flexible rule is the “discretionary best interest” rule which uses a similar test, but allows a court more discretion in making a decision.¹⁵⁰ Yet other jurisdictions use the “medically essential” standard which authorizes sterilization when it is proven that sterilization is necessary to preserve the life or health of the incompetent.¹⁵¹ Courts relying on the “substituted judgment” standard “consider the *Hayes* criteria and any other relevant factors in order to make the decision that the disabled person would make for herself if she were competent.”¹⁵² In addition to these tests, some courts inquire further into the individual’s preference, disability prognosis, likelihood of sexual activity, and understanding of reproduction.¹⁵³

The numerous tests and factors used to consider sterilization petitions create substantial hurdles for petitioners as they tend to create a presumption against sterilization.¹⁵⁴ Although the goal of some of the standards appears to be to protect the individual’s right to procreate, others appear to protect the individual from parental or state interference in decision making.¹⁵⁵ Some commentators have criticized the current models as creating adversarial relationships between parent and child and disregarding family interests in the process.¹⁵⁶

Another criticism of sterilization law is that it purports to protect the individual’s interest in procreation when it is

149. See *Hayes*, 608 P.2d at 641:

The judge *must* find that the individual is (1) physically capable of procreation, *and* (2) likely to engage in sexual activity at the present or in the near future under circumstances likely to result in pregnancy, *and* must find in addition that (3) the nature and extent of the individual’s disability, as determined by empirical evidence and not solely on the basis of standardized tests, renders him or her permanently incapable of caring for a child, even with reasonable assistance.

Id. at 641 (emphasis added).

150. See Scott, *supra* note 104, at 822. See, e.g., *In re Penny N.*, 414 A.2d 541, 543 (N.H. 1980); *In re Terwilliger*, 450 A.2d 1376, 1382 (Pa. Super. Ct. 1982).

151. See *In re A.W.*, 637 P.2d 366, 375–76 (Colo. 1981) (holding that expert testimony must be used to prove medical necessity, and that the court must make this finding by using the clear and convincing evidentiary standard).

152. Scott, *supra* note 104, at 823.

153. See *id.* at 820–21.

154. See Jaegers, *supra* note 13, at 965; Scott, *supra* note 104, at 824.

155. See Scott, *supra* note 104, at 823–24.

156. See *id.* at 825 (acknowledging the burden a severely disabled individual can put on their family and addressing the latter’s interest in sterilization).

difficult to determine if that individual even has such an interest.¹⁵⁷ The conflict surrounding sterilization law is best illustrated by the dichotomous view of sterilization itself. “On the one hand, sterilization is authorized as a means of facilitating reproductive choice. On the other hand, sterilization is characterized as a deprivation of a fundamental right.”¹⁵⁸

V. MODERN CHINESE EUGENICS POLICY

A. *The Maternal and Infant Health Care Law*

China’s current eugenic laws stem in part from the controversial Maternal and Infant Health Care Law of 1994 [MIHCL].¹⁵⁹ This law, formerly known as the Eugenics Law, was originally intended to promote the health of women and infants, but contains controversial sterilization provisions.¹⁶⁰ Among other provisions, the law provides that people with certain hereditary disorders must agree to prevent childbirth through sterilization or long term contraception, and those with infectious diseases must delay marriage.¹⁶¹ In addition, genetic testing is compulsory during pregnancy, and fetuses with serious disorders may be aborted.¹⁶² Although according to the law sterilization or abortion requires the woman’s consent,¹⁶³ many report that consent is not required in practice.¹⁶⁴ Other concerns regarding the MIHCL are the openly admitted goals of population control and improvement by having fewer and healthier babies.¹⁶⁵ The draft of the law met with so much international criticism that the Chinese

157. *See id.*

158. *Id.* at 824 n.58.

159. Law on Maternal, Infant Health Care (Oct. 27, 1994), Beijing XINHUA Domestic Service, *available in* Foreign Broadcast Information Service-Daily Report-China-94-211, Nov. 1, 1994, at 29 [hereinafter MIHCL] (on file with the *Houston Journal of International Law*). *See Li, supra* note 64, at 160–61.

160. *See* MIHCL, *supra* note 159.

161. *See* MIHCL *supra* note 159, ch. II, arts. 9 & 10; *Li supra* note 64, at 161–62; *Gómez, supra* note 70, at 571.

162. *See* MIHCL, *supra* note 159, ch. III; *Gómez, supra* note 70, at 571.

163. *See* MIHCL, *supra* note 159, ch. III, art. 19.

164. *See Li, supra* note 64, at 162. One interpretation says women will be “advised” to terminate pregnancies. *China’s Repellent Eugenics Policy*, CHI. TRIB., Jan. 18, 1995, at 12. Doctors have the power to virtually veto the birth of a child based on genetics, and though parents may appeal, courts rarely overturn the doctor’s decision. Uli Schmetzer, *China Lays Down the Law Over Who Gives Birth, Who Doesn’t*, CHI. TRIB., Jan. 17, 1995, at 10.

165. *See* MIHCL, *supra* note 159, ch. I; *Gómez, supra* note 70, at 569. The law seeks to improve the quality of the newborn population, and prevent any relaxation of the One Child Policy. *See id.*

government revised some of the language, deleting terms such as “eugenics” and “inferior” births.¹⁶⁶ The law has been denounced by some as proposing Nazi-style eugenics, despite strong denials by Beijing.¹⁶⁷

The scientific community’s primary concern with the MIHCL is that it is based on scientifically invalid assumptions.¹⁶⁸ Scientists no longer presume that mentally disabled people will sire children with like defects.¹⁶⁹ Numerous genetic defects arise spontaneously, and there are many birth defects for which there are no known causes or methods of prevention.¹⁷⁰ Genetic testing can predict the likelihood of only certain diseases in a fetus,¹⁷¹ and the birth of one disabled child does not necessarily indicate the second child will have a disability.¹⁷² Another disturbing premise on which the Eugenics Law is arguably based is that defects or disabilities occur at a greater frequency among minorities and the poor.¹⁷³ This belief has concerned human rights activists, who fear that the law will be used to discriminate against these groups.¹⁷⁴ These critics feel that this will lead to

166. See *Chinese Minister Defends New Eugenics Law*, AGENCE FR. PRESSE, June 1, 1995, available in 1995 WL 7810735.

167. See *Retired Doctor Lands in Jail for Identifying Sex of Fetuses*, AGENCE FR. PRESSE, Sept. 19, 1995, available in 1995 WL 7858358; David Wallen, *UK Scientists See Defects in Genetics Law*, S. CHINA MORNING POST, June 6, 1995, at 8, available in 1995 WL 7528908 (discussing British geneticist’s claim that the law is an “undisguised embodiment of eugenic principles, the implementation of which has had such a disastrous history in the West”). Further support for claims that the law is eugenic may be found in the comments of Health Minister Chen Minzhang, who proposed the initial draft of the law as the “National Eugenics Programme” to combat the problem of “births of inferior quality.” Anthony O’Brien, Editorial, *China’s Genetics Law*, TIMES (London), June 13, 1995, at 17. Chen Minzhang also stated that this problem happened more frequently among “ethnic minorities, frontier peoples and economically poor areas.” *Id.*

168. See Li, *supra* note 64, at 162.

169. See *id.* “This eugenics policy is not based on agreed scientific information about the transmission of parents’ conditions to their offspring” *Caught Between Tradition and the State: Violations of the Human Rights of Chinese Women*, 17 WOMEN’S RIGHTS L. REP. 285, 298 (1996) [hereinafter *Tradition & State*].

170. See Gómez, *supra* note 70, at 572.

171. See Li, *supra* note 64, at 162.

172. See Gómez, *supra* note 70, at 572.

173. See *id.*

174. See *id.* Chinese minority groups have been described by officials as “low in population quality,” which includes characteristics such as mental retardation and short stature in addition to hereditary defects. O’Brien, *supra* note 167, at 17. O’Brien suggests that minorities such as Tibetans under Chinese control may fear this law as part of the “final solution.” *Id.*

an “abuse of private genetic information and a violation of human rights.”¹⁷⁵

The MIHCL also fails to specify what type of “serious genetic defect” warrants intervention.¹⁷⁶ The goal of the Eugenic Law is to prevent the perpetuation of diseases that may keep individuals from living and functioning independently.¹⁷⁷ Some officials have interpreted this to include such common defects as harelip and cleft palate.¹⁷⁸ Because the law will be implemented at local levels, the failure to explain what constitutes a “serious genetic condition” will most likely result in wide variations in the interpretation of restrictions.¹⁷⁹

In addition, some of the specified diseases are curable, or have been found to have no effect on pregnancy or the fetus.¹⁸⁰ In 1995, there were an estimated ten million “disabled” people cared for by the Chinese government, many of whom would never have been born had the law been enacted earlier.¹⁸¹

In contrast to its more controversial provisions, the MIHCL’s ban on pre-natal sex determination of fetuses has received widespread approval.¹⁸² The use of technology to identify the gender of a fetus is strictly prohibited unless medically necessary.¹⁸³ However, despite its official illegality, the practice of ultrasound sex determination is rampant in areas where the technology is available.¹⁸⁴ Chinese culture traditionally views baby boys as more desirable than baby girls, leading to abortion of female fetuses and girl infanticide.¹⁸⁵ With the strict enforcement of the One Child

175. Gómez, *supra* note 70, at 572. Alastair Kent of Britain’s Genetic Interest Group stated, “The problem is that the state defines who may have children. In China, ‘serious genetic disability’ could mean just being Tibetan.” *Birth Rights*, NEW SCIENTIST, Sept. 9, 1995, at 13.

176. See Gómez, *supra* note 70, at 571.

177. See Nigel Hawkes, *Scientists Attack China Over Selective Breeding*, TIMES (London), June 5, 1995, at 19.

178. See *id.*

179. See *Women’s Rights*, *supra* note 65, at 1152.

180. See Gómez, *supra* note 70, at 572; Chan Wai-Fong, *Law Bans Pregnancy by “Unfit” Mothers*, S. CHINA MORNING POST, Nov. 8, 1994, at 7, available in 1994 WL 8786467.

181. See Schmetzer, *supra* note 165.

182. See *Clarification of Maternal, Infant Health-Care Law Planned*, XINHUA ENGLISH NEWSWIRE, Aug. 13, 1998, available in 1998 WL 12177752.

183. See MIHCL, *supra* note 159, art. 32.

184. See Li, *supra* note 64, at 169.

185. See *Girls Disappear*, *supra* note 93, at 14. Part of this belief lies in the tradition that only males are able to carry on the family lineage. See *id.* Additionally, girls are viewed as providing lower productivity to the family unit,

Policy, many parents desperately wish for that one perfect child to be a son.¹⁸⁶ Numerous reports indicate that in spite of the law, pre-natal sex selection and abortion of female fetuses are common.¹⁸⁷ Despite its good intentions, given the extent of these practices, it is doubtful that the MIHCL will significantly impact pre-natal sex determination.¹⁸⁸

B. Reform of the Maternal and Infant Health Care Law

After international criticism of provisions of the MIHCL, Chinese officials announced they were going to clarify the law.¹⁸⁹ This announcement followed the Eighteenth International Congress of Genetics convention in Beijing which included discussions of eugenics and the MIHCL.¹⁹⁰ Scientists at the convention repeatedly criticized the law, and debated whether it openly condoned forced sterilization, or was just vague enough to allow that practice.¹⁹¹ Many were concerned about the ambiguity surrounding whether the doctor or the couple made the decision regarding sterilization once a defect was detected.¹⁹² Qiu Renzong, a professor of bioethics at the Chinese Academy of Social Sciences and an advisor and critic of the law, stated that this decision was to be made by the couple.¹⁹³ He stated that the principle governing sterilization was informed consent (presumably

because they leave the family when they marry, and require a sizable dowry for marriage. See *Women's Rights*, *supra* note 65, at 1149.

186. See *Women's Rights*, *supra* note 65, at 1149-50.

187. See Li, *supra* note 64, at 169. Sex-screening is so important to prospective parents that it has become a highly profitable business, and virtually anyone who can pay for the services can obtain them. See *id.* at 170. Furthermore, reports estimate that 97.5% of all fetuses aborted in China are female. See *Tradition & State*, *supra* note 169, at 298.

188. See Li, *supra* note 64, at 170. In one of the first known cases of punishment for identifying the sex of fetuses, a physician was sentenced to four years in prison after eight women who used his services aborted female fetuses. See *Retired Doctor Lands in Jail for Identifying Sex of Fetuses*, *supra* note 167.

189. See *Government to Clarify "Ambiguity" on Rules Against Pregnancy*, XINHUA NEWS AGENCY, Aug. 15, 1998, available in LEXIS, News Library, TBBCSW File.

190. See Elisabeth Rosenthal, *Chinese Law Sparks Scientific Debate Over Genetics, Sterilization*, HOUS. CHRON., Aug. 16, 1998, at A28. Geneticists from several countries boycotted the prestigious meeting because they took offense to the Eugenics Law. See *id.*; Carolyn Abraham, *Don't Shun Conference in China: Canadians Scientists Divided over Genetics Meeting*, GLOBE & MAIL, July 31, 1998, at A3.

191. See Rosenthal, *supra* note 190.

192. See *id.*

193. See Elisabeth Tacey, *Roots of a Controversy*, S. CHINA MORNING POST, Aug. 16, 1998, available in 1998 WL 22025369.

similar to the Western world's idea of consent).¹⁹⁴ Officials claimed they issued an explanation of the law in August of 1998 that clarified the ambiguous provisions.¹⁹⁵ All cities and provinces in China were said to have received a copy of this explanation.¹⁹⁶ The explanation also announced that China was seeking information to determine which diseases were severe enough to qualify for sterilization.¹⁹⁷ In essence, this suspended the provision allowing sterilization, at least until a list of diseases has been compiled.¹⁹⁸ Additionally, the explanation stated that people with HIV (which had not developed into AIDS) did not require permission to marry.¹⁹⁹ According to health officials, it may take several years to formally revise the law, but the explanation issued "had the force of law."²⁰⁰

C. *Related Laws and Policies*

Despite this clarification of the MIHCL, many specialists feel that forced sterilizations will continue in practice.²⁰¹ Provinces and local governments often have regulations that authorize such sterilization.²⁰² Provinces such as Shandong, Shanxi, Jilin, and Gansu all have some type of regulation preventing people with the potential for producing defective babies from procreating.²⁰³ Reports indicate that the Gansu law for sterilization of "Idiotic, Slow-witted, Stupid, and Deranged People" has resulted in about 5,000 people being sterilized in that region.²⁰⁴ Other reports indicate that authorities have performed compulsory sterilizations to "improve their genetic pool" and enforce the China One Child policy.²⁰⁵ One reason for the concern that sterilization will continue in spite of clarification of the law is the effect that Communist Party Directives have over codified law.²⁰⁶ "In

194. *See id.* However, a prominent Chinese geneticist explained to the press that that China has never practiced any type of informed consent. *See id.*

195. *See* John Pomfret, *China Clarifies Its Law on Sterilization*, WASH. POST, Aug. 18, 1998, at 210 [hereinafter *China Clarifies*].

196. *See id.*

197. *See China Clarifies*, *supra* note 195.

198. *See id.*

199. *See id.*

200. *Id.*

201. *See* John Pomfret, *China Suspends Sterilization of People with Genetic Ills*, INT'L HERALD TRIB., Aug. 18, 1998, at 5.

202. *See China Clarifies*, *supra* note 195.

203. *See* Li, *supra* note 64, at 184.

204. *China Clarifies*, *supra* note 195.

205. *Id.*

206. *See* Li, *supra* note 64, at 150-51.

China, Communist Party directives are equivalent or superior to legislation and codified laws."²⁰⁷ Therefore, party directives such as family planning policy can change or supersede existing law.²⁰⁸

Another concern voiced by human rights activists is the reported incidence of force or coercion to implement the One Child Policy.²⁰⁹ Although officials deny sanctioning force to implement sterilizations or abortions, reports indicate that the practice is widespread.²¹⁰ Numerous reports tell stories of women taken from their homes in the middle of the night for forced insertion of intrauterine devices or late term abortions.²¹¹ Population officials are held to rigid birth quotas and doctors and nurses may be subject to disciplinary measures for allowing babies from induced abortions to live.²¹² Reports indicate that local officials forcefully detain women for these procedures, and punish those who resist by inflicting physical injury, confiscating property, and destroying homes.²¹³ In addition, coercive measures to enforce population policy are clearly outlined in provincial family planning regulations.²¹⁴ Widespread penalties for violations of population policy include severe economic sanctions; disqualification for health care, housing, and child-care benefits; loss of employment; and public posting and monitoring of menstrual periods.²¹⁵ As a result of these policies, there is intense pressure by fellow villagers and officials who are charged with maintaining their quota of births.²¹⁶ Some commentators feel that with this troubled history of enforcement of the population policy, there is little

207. *Id.* at 150.

208. *See id.* at 151.

209. *See Tradition & State*, *supra* note 169, at 295.

210. *See id.*; Gómez, *supra* note 70, at 568; U.S. Dept. of State, *Country Reports on Human Rights Practices for 1995* § 1f (Comm. Print 1996) (discussing the prevalence of the use of force, and how punishment rarely exceeds minimal disciplining and retraining).

211. *See* Gómez, *supra* note 70, at 568–69. *Tradition & State*, *supra* note 169, at 295 (discussing incidents of women who are seven, eight, and nine months pregnant being forced to submit to abortions by local population control officials).

212. *See Tradition & State*, *supra* note 169, at 295.

213. *See id.*

214. *See id.* Central authorities deny responsibility for these measures, but this claim lacks credibility. *See id.*

215. *See* Li, *supra* note 64, at 154.

216. *See id.* at 154–55. Officials are judged on the achievement of their birth quotas, and failure to meet them may result in fines, penalties, and demotions. *See id.* at 155.

doubt that similar practices will continue to be used to enforce the sterilization provisions of the MIHCL.²¹⁷

Another concern regarding China's eugenic practices was raised after "[a] survey of 255 geneticists throughout China showed that they overwhelmingly supported the use of eugenics to improve public health."²¹⁸ Xin Mao of West China University of Medical Sciences in Chengdu conducted the survey which indicated that there exists widespread support of genetic testing for reasons unacceptable to much of the Western world.²¹⁹ Approximately eighty-six percent of those surveyed felt that the government should mandate premarital testing to identify hereditary disease,²²⁰ and ninety-one percent thought that couples who were both carriers of a particular genetic disorder should be prohibited from having children.²²¹

In addition, nearly seventy percent of the scientists favored genetic testing for susceptibility to diseases such as alcoholism.²²² Although these beliefs may seem abhorrent in the Western world, they represent "cultural common sense" in China.²²³ Chinese culture appears to support the idea of promotion of the common good, rather than individual good, even if it means endorsing eugenic practices.²²⁴ Mao states that "[t]he core issue is to clean up the gene pool [and to] reduce the number of deleterious genes."²²⁵ He admits that these policies promote discrimination among the disabled Chinese.²²⁶

VI. UNITED STATES GENETIC POLICIES

Genetic research is advancing rapidly in the United States, especially with the advent of the Human Genome Project.²²⁷ A primary goal of genetic research and testing is to

217. See *China Clarifies*, *supra* note 195.

218. Andy Coghlan, *Perfect People's Republic*, *NEW SCIENTIST*, Oct. 24, 1998, at 18.

219. See *id.*

220. See *id.*

221. See *id.*

222. See *id.*

223. *Id.* (expressing Xin Mao's view on why the Chinese accept eugenic practices).

224. See *id.*; Dinah Ashman, Editorial, *The Chinese Way*, *NEW SCIENTIST*, Nov. 14, 1998, at 58.

225. Coghlan, *supra* note 218.

226. See *id.*

227. See Maha Munayyer, Comment, *Genetic Testing and Germ-Line Manipulation: Constructing a New Language for International Human Rights*, 12 *AM. U. J. INT'L L. & POL'Y* 687, 688 (1997).

detect diseases and develop methods for prevention and treatment.²²⁸ “The potential of genetic technology to alleviate the physical, emotional, and financial pain of disease makes this technology extremely attractive.”²²⁹ However, the wide use of genetic testing and gene therapy has been seen by some to be heading down a dangerous path to social control.²³⁰ Commentators warn against the evils of widespread genetic testing which may lead to discrimination and eugenic practices.²³¹ Critics fear that genetic testing may be used to deny insurance, to enable employers to accept or reject certain workers based on their fitness, or to influence educational decisions.²³² Widespread testing and discrimination could even lead to the development of a “genetic underclass’ that society marginalizes based on factors beyond its control.”²³³

Other developing genetic technologies with human rights implications include germ line manipulation.²³⁴ This technology entails inserting genes into an undeveloped embryo that is fertilized in vitro in an effort to cure genetic diseases.²³⁵ Analysts fear that this technology may create a demand for manipulation of other characteristics such as hair color, intelligence, stature, sexual orientation, and personality.²³⁶ This type of manipulation could result in “racial” discrimination by deselecting for certain cosmetic traits such as skin and eye color and bone structure which are identifiable with a certain race.²³⁷ Currently, reports indicate that sex selection technology is available in the United States.²³⁸ The advent of such technologies has

228. *See id.*

229. *Id.* at 688–89.

230. *See id.* at 689.

231. *See id.*

232. *See id.* at 695–96.

233. *Id.* at 696 (quoting Robert N. Proctor, *Genomics and Eugenics: How Fair is the Comparison?*, in *GENE MAPPING: USING LAW AND ETHICS AS GUIDES* 60 (George J. Annas & Sherman Elias, eds., 1992)). *See* Vicki Norton, Comment, *Unnatural Selection: Nontherapeutic Preimplantation Genetic Screening and Proposed Regulation*, 41 *UCLA L. REV.*, 1581, 1587 (1994) (discussing how African Americans who were carriers for sickle cell anemia were discriminated against in job opportunities, insurance costs, and admission to the Air Force Academy).

234. *See* Munayyer, *supra* note 227, at 692–93 (discussing potential applications of germ line manipulation).

235. *See id.* at 692–93.

236. *See id.* at 693–95.

237. *See generally* Norton, *supra* note 233.

238. *See* Gina Kolata, *Researchers Report Success in Method to Pick Baby’s Sex*, *N.Y. TIMES*, Sept. 9, 1998, at A1.

prompted discussions of ethics, morality, and political responsibility.²³⁹ Some scientists express concern about the eugenic possibilities of selecting children with cosmetic or performance traits, or lack of defective traits.²⁴⁰ Others fear that techniques such as sex selection will lead to skewing of the sex ratio, and contribute to discrimination against women and girls.²⁴¹ In support of these fears are isolated reports of aborted fetuses of the “wrong” sex.²⁴²

While efforts to detect and treat genetic diseases receive critical acclaim, other aspects of genetic testing and manipulation have more dubious rewards.²⁴³ As one critic states, “being short, being of average intelligence, or being homosexual - is [not] a disease,” and therefore needs no prevention.²⁴⁴ Although none of these practices are widespread today, commentators stress the possibility that the newfound knowledge may be used to reintroduce eugenic policies rather than to benefit individuals.²⁴⁵

VII. YIN AND YANG: UNITED STATES V. CHINA

East and West, black and white, yin and yang do any of these analogies accurately describe the eugenic practices of China versus those of the United States?

On their face, the policies and goals seem vastly different, but upon closer inspection, some startling similarities appear. Current U.S. policy regarding eugenic sterilization seems geared to protect the procreative rights of disabled individuals against outside interference.²⁴⁶ There are numerous procedural and substantive protections to prevent

239. See Richard Nygaard, *Genetics and the Law: The Ethical, Legal, and Social Implications of Genetic Technology and Biomedical Ethics* (Jan. 19, 1996), in 3 U. CHI. L. SCH. ROUNDTABLE 1996 at 417, 418. See also Jodi Danis, *Sexism and “The Superfluous Female”: Arguments for Regulating Pre-Implantation Sex Selection*, 18 HARV. WOMEN’S L.J. 219, 220 (1995).

240. See Norton, *supra* note 233, at 1583.

241. See Danis, *supra* note 239, at 220.

242. See Kimberly Mills, Editorial, *Scientific Progress Again Outpaces Ethics*, SEATTLE POST INTELLIGENCER, Sept. 13, 1998, at E2. See also Norton, *supra* note 233, at 1601 (citing Geoffrey Cowley et al., *Made to Order Babies*, NEWSWEEK, Winter/Spring 1990 (Special Issue) at 94) (discussing requests for prenatal gender diagnosis which led to sex-selective abortions and noting that the highest rate of sex-selective abortion occurred among doctors’ families).

243. See Norton, *supra* note 233, at 1601–02 (explaining how genetic testing is used for more controversial goals such as sex-selective abortions).

244. Mills, *supra* note 242.

245. See WILLIAM J. CURRAN ET AL., *HEALTH CARE LAW AND ETHICS* 794 (5th ed. 1998).

246. See *supra* Part IV.A and accompanying notes 99–117, for a discussion of the goals of current sterilization law in the United States.

unwarranted sterilizations.²⁴⁷ In addition, sterilization law seems to be aimed at protecting the mentally disabled person's interests, instead of the interests of society.²⁴⁸ In the United States when mentally handicapped persons are sterilized, it is usually at the request of their parents in an effort to protect them from the travail of procreation.²⁴⁹ The statutes and case law primarily apply to incompetent persons, rather than to competent persons with genetic defects.²⁵⁰ Although some courts consider whether the person's offspring will inherit a disability, this has not been a deciding factor in most cases.²⁵¹ Several courts have explicitly rejected any eugenic rationale for sterilization of the mentally disabled.²⁵² This approach can be contrasted with Chinese policy on sterilization which seems rooted in the true eugenic goal of eliminating defective genes from the population.²⁵³

Unlike the United States policy, the Chinese policy contains no checks and balances to protect the rights of the disabled.²⁵⁴ Although the government denies it, reports indicate that practices exist that force sterilization against the will of the subject.²⁵⁵ The MIHCL purports to allow couples to make the decision about their sterilization and contraception, but most commentators believe couples have no choice.²⁵⁶ Chinese policy is also more inclusive, because it

247. See Jaegers, *supra* note 13, at 962–65.

248. See Scott, *supra*, note 104, at 812.

249. See *supra* note 136 (discussing petitions for sterilization by parents of the mentally handicapped).

250. See generally Jaegers, *supra* note 13 (explaining that many laws require incompetence to be established before nonconsensual sterilization is considered). Most jurisdictions require a preliminary finding under *Hayes* that the person is incompetent before proceeding with the sterilization petition. See *id.* at 962 n.86; *Wentzel v. Montgomery Gen. Hosp., Inc.* 447 A.2d 1244, 1253 (Md. 1982); *In re C.D.M.*, 627 P.2d 607, 612–13 (Alaska 1981); *In re Grady*, 426 A.2d 467, 482 (N.J. 1981).

251. See Cepko, *supra* note 115, at 127. Some courts emphasize that the likelihood of hereditary disability has no impact on the sterilization decision. See *id.*

252. See, e.g., *In re A.W.*, 637 P.2d 366, 368 (Colo. 1981); *In re Grady*, 426 A.2d at 473 n.3.

253. See *China Clarifies*, *supra* note 195; Li, *supra* note 64, at 151.

254. See Li, *supra* note 64, at 151. Communist Party Directives supersede existing law and there are no limits on the Party's powers. See *id.* Furthermore, there are few opportunities to challenge these policies. See *id.*

255. See Gómez, *supra* note 70, at 568–69. Reports describe sterilization by force and coercion, and at times without the woman's knowledge. See *id.* at 569.

256. See *supra* Part V.A and accompanying notes for a discussion of the involuntary nature of sterilization and abortion practices based on controversial provisions of the MIHCL. While this law stipulates that litigation or the

targets individuals for sterilization who may be mentally competent but carry genetic disorders or infectious diseases.²⁵⁷ In China, sterilization is generally requested by the physician or by government officials rather than by the potential parents.²⁵⁸

The primary distinguishing feature between Chinese and American eugenic policy appears to be that China focuses on the interests of the whole population, while the United States emphasizes the interests of the individual.²⁵⁹ While Chinese policy purports to protect the society from the ill of supporting the disabled individual,²⁶⁰ American policy attempts to protect the individual from the ill of society violating their rights.²⁶¹ The United States prides itself in securing rights for its citizens, and some of these fundamental rights include the right to privacy and bodily integrity, including decisions relating to abortion, contraception and sterilization.²⁶² As this Comment demonstrates, these rights are neither accorded the same status nor guarded as vigorously in China as in the United States. These fundamental rights in the United States result in potential parents having the freedom to make numerous reproductive decisions. Additionally, the importance we

termination of a pregnancy has to be consented to by the pregnant woman (or, if she is legally incompetent, by her guardian), serious doubt remains that this gives the woman much protection in practice. *See Li, supra* note 64, at 161–62.

257. *See Li, supra* note 64, at 161–62. In the “explanation” issued by the Chinese government, officials stated they would seek definition of which hereditary conditions are serious enough to warrant sterilization. *See China Clarifies, supra* note 195.

258. *See generally* Goméz, *supra* note 70, at 571–72.

259. *Compare* Li, *supra* note 64, at 148–55 (outlining the population policy and its results) *with* *Whalen v. Roe*, 429 U.S. 589, 599–600 (1977) (describing the individual’s “interest in independence in making certain kinds of important decisions” as central to the right of privacy) *and* Scott, *supra* note 104, at 833–40 (noting that personal autonomy and the fundamental right to individual reproductive choices are recognized in the United States).

260. *See Women’s Rights, supra* note 65, at 1151.

261. *See In re Grady*, 426 A.2d 467, 474 (1981) (holding that under some circumstances, an individual’s personal right to control her own body and life overrides the state’s general interest in preserving life); Scott, *supra* note 104, at 823–24.

262. *See Roe v. Wade*, 410 U.S. 113, 153–54 (1973) (holding that individuals have a right to privacy that includes a qualified right to an abortion); *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965) (holding that married couples have a right to privacy that includes non-interference in contraception); *Eisenstadt v. Baird*, 405 U.S. 438, 454–55 (1972) (extending the right to the use of contraception to unmarried persons); *In re Valerie N.*, 707 P.2d 760, 777 (Cal. 1985) (holding that individuals have a fundamental right to procreation that includes a right to consent to sterilization).

attach to these freedoms creates a climate where potential parents may incorporate genetic technology into their reproductive decision making and family planning.

Is there anything between Yin and Yang? From an initial analysis, it appears that Chinese eugenic policy is a much greater threat to human rights than the American policy. However, upon examining American genetic policy, one may draw the conclusion that America implicitly endorses eugenics. This conclusion may be drawn depending on how broadly eugenics is defined. Geneticists, in an attempt to disassociate their science from odious practices, may define eugenics as having “a social *aim* and often coercive *means*.”²⁶³ If this definition is used, many eugenicists who endorse voluntary or positive eugenics would be excluded from the definition.²⁶⁴ Modern commentators believe that a resurgence of eugenics is occurring without the element of coercion, but rather as a result of voluntary choices.²⁶⁵ Parents who select for certain cosmetic or performance traits in their children are practicing positive eugenics, whether knowingly or unknowingly. Similarly, those who elect not to have children with certain disabilities may be implementing a form of negative eugenics.

Although genetic testing and reproductive decisions in the United States are voluntary, the current permissive attitudes toward the use of genetics in reproductive decisions may lead toward the use of genetics for eugenic practices. Testing which discovers genetic defects and leads to negative eugenic decisions may be seen as discriminatory toward people with such defects. Similarly, the use of genetic testing to select for cosmetic traits may result in discrimination against certain races or ethnic groups. Although not intended to have a eugenic purpose, these types of voluntary decisions pose threats to the human rights that Americans value dearly. As Americans become more comfortable with the idea of determining characteristics such as sex, the implicit eugenic policy becomes more dangerous. While American policies seem safe because of their voluntary nature, they may actually pose an equal risk to human rights as genetic discrimination becomes socially acceptable.

263. Paul, *supra* note 1, at 68 (emphasis in original).

264. *See id.* at 70.

265. *See id.*

VIII. CONCLUSION

The twentieth century has witnessed the rise and fall of the eugenic movement in both the East and the West. Currently eugenic policy is in disfavor in many countries, though still strong in China. The United States has numerous safeguards to protect the disabled from eugenic elimination. However, the United States also has policies that permit eugenic decisions on a voluntary basis. With genetic and reproductive technology rapidly outpacing ethical and legal developments, our society may be facing the rise of social eugenic policies once again. In order to combat this occurrence, it is vital for scientists, human rights activists, and scholars to engage in open dialogue about eugenic policies.

Now is the time to address genetic and eugenic issues and formulate policies and laws to protect society.

“If in the First Act you hang a gun upon the wall, by the Third Act you must use it.” The gun is on the wall. Now is the time to determine when, how and against whom it will be used.

*Gail Rodgers**

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