

THEORIZING THE INJUSTICE OF THE STATE

Given a variety of institutional safeguards against the abuse of the political power, how is state-sponsored injustice possible within a liberal democracy?

The Argument

- Injustices with societal roots can be exacerbated by the state's involvement.
 - State personnel and taxpayer resources are employed to carry out the injustice.
 - Committing a wrong through law is a buffer against liability: the victim cannot claim that she has been *legally* wronged.
 - Laws shape norms, thus unjust laws can have consequences beyond what is explicitly authorized

The legality of the law and the privileged nature of political authority give rise to a capacity for state-sponsored injustice that is not anticipated in the institutional design of liberal democracy to a sufficient degree.

What's At Stake

- Part of a larger project about reparations for state-sponsored injustice.
- Many political theorists working in this area assume or argue that reparations claims refer to structural injustices for which members of society are responsible, and not the state.
 - E.g. "[T]hinking of the U.S. government as a specific agent distinct from the society it governs can tend to let the people of the United States off the hook too easily. Slavery and its aftermath were social ills, not simply matters of public policy. If there are responsibilities in relation to these historic injustices, then these belong in some sense to the people of the United States, or at least to some of them..." (Young 2011, p. 177).
- This view lets the government off the hook too easily.
- Today's racism is comparably much less harmful than the system of Jim Crow and institutionalized slavery, and this is essentially *due to the diminution of the state as a complicit agent*.

Calling it all "structural" leads to a superficial account of the privileged nature of political power when it comes to large-scale injustice.

The Approach

- An expository framework organizes a discussion of how a liberal democratic government can perpetrate injustice against individuals.
- Illustrated by the case of **eugenical sterilization laws in the United States**.
 - 65,000 Americans sterilized under compulsory sterilization laws in state hospitals, prisons, & mental institutions through mid-1970s.
- Comparing the reparations claims of eugenical sterilization victims against state governments to the reparations claims of African Americans against the federal government, the former is a simpler case. But examining the simpler case allows for a clear exposition of a framework, which is built on later on in the dissertation.

Six Categories:

Authorization

Takes place when the conditions of the practice of injustice are made possible by positive law or the backing of state authority.

- Not all state-sponsored injustices channeled through the legislature, but when they are, the presumption of lawmakers' responsiveness to the public will contribute to the appearance of broader support.
- The democratic process itself helps legitimize injustice and disguise its discordance with liberal democratic commitments.
- To become law, an injustice must be able to be cast in language consonant with liberal democratic goals.

→ "The success of democracy depends upon the quality of its individual elements. If in these elements the racial values are high, government will be equal to all the economic, educational, religious and scientific demands of the times. If, on the contrary, there is a constant and progressive racial degeneracy, it is only a question of time when popular self-government will be impossible, and will be succeeded by chaos, and finally a dictatorship" (Justice Harry Olsen, Introduction to Harry Laughlin's *Eugenical Sterilization in the United States*, 1922).

- Eugenical sterilization laws made it on the books in 30 states.

Norm- and Belief-Formation

Law shapes social norms and systems of belief.

- Laws inform belief systems → beliefs shape norms by creating standards by which behaviors are approved/disapproved of → norms regularize behavior through the mechanism of approval/disapproval
- Legal change both indicates a shift in societal norms and furthers this shift along.
- The classic example: antismoking laws → antismoking norms (McAdams 1996).
- Compulsory sterilization laws cultivated the perception of the feeble-minded as a dependent class that could be reasonably bred out of existence.
- The normative influence of sterilization laws explains why doctors performed sterilization surgeries unlawfully, forging consent forms or performing "Mississippi appendectomies."
- Due to the normative influence of law, individuals may never rationally process that a law is extreme and unjust, unthinkingly internalizing its content as part of a larger public morality.

Protection

Describes the judiciary's role in upholding the constitutionality of an injustice.

- State of Indiana was the first to enact a compulsory sterilization law in 1909, but doctors refused to carry out surgeries "for fear of personal liability in the event the law should be held invalid" (Governor of Indiana, 1921).
- The Supreme Court's ruling in *Buck v. Bell* (1927) was decisive for the practice of eugenical sterilization.
 - Justice Oliver Wendell Holmes: "We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world if, instead of waiting to execute degenerate offspring for crime or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind... Three generations of imbeciles are enough."
- Though there may be backlash, the judiciary's approval furthers the perception of an injustice's legitimacy.
- Only relevant to liberal democracies with judicial review.

Enablement

State-sponsored injustice has the ability to ingrain illiberal social goals that make their way into political practice in new and unforeseen ways.

- As difficult as it is to eradicate the injustice of the state after it has been authorized, even more difficult to eradicate the social goals whose existence precipitates the injustice; these goals are normalized by the systemization and execution of the injustice.
- Eugenical sterilization preceded by the practice of "segregating" the feeble-minded in mental institutions → sterilization seemed like a lesser evil; a feeble-minded person's licentiousness would not create offspring and did not have to be controlled (Kline 2001).
- A state-sponsored injustice may also intersect with and exacerbate other injustices.
- After hospitals were integrated, forced sterilization became increasingly racialized.
 - "Mississippi appendectomy" = 1970s idiom for the nonconsensual sterilization of a black woman during abdominal surgery (Dorr 2011).
 - 1976 audit by the Govt. Accountability Office: from 1973-1976, Indian Health Service doctors sterilized ~25% of all Native women in their childbearing years
- Curbing the number of births by "unfit" and "dependent" mothers still considered a valid public policy goal (Huberfeld 1998; King 1999).

Systemization

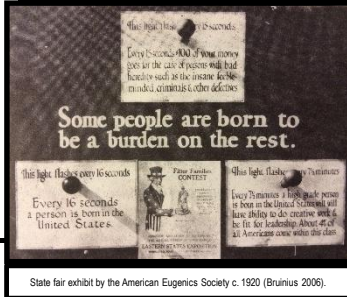
Unjust practices authorized by law broaden their impact by coordinating the activities of state institutions and personnel to carry out an injustice.

- Involves redefining the roles of existing officials, assigning new duties, and creating new roles → increases the number of persons who are actively administering the injustice.
- Taxpayer resources directed to specific steps in the procedure by which the injustice is executed.
- Lends officiality to the injustice and normalizes it.
- Adds efficiency and creates mechanisms of accountability for seeing the injustice through → "a division of moral labor" (Appelbaum 1999).
- Social workers, State Eugenics Board members, and state hospital superintendents/psychologists/doctors coordinated to identify and evaluate sterilization targets, process the required paperwork, and carry out sterilization surgeries.

Execution

Describes state personnel actually carrying out the injustice.

- State personnel sometimes go beyond the letter of the (already unjust) law.
- Many documented sterilizations took place without an individual's knowledge.
- To doctors, it seemed "inconsistent to require both that the client consent and be feeble-minded"; there are documented requests as to whether "some of the 'red tape' [could] be cut in regard to the consent of the feeble-minded adult" (Woodside 1950).



State fair exhibit by the American Eugenics Society c. 1920 (Bruinius 2006).

References: Arthur Appelbaum, *Ethics for Adversaries* (Princeton: Princeton University Press, 1999); Harry Bruinius, *Better For All the World: The Secret History of Forced Sterilization and America's Quest for Racial Purity* (New York: Random House, 2006); *Buck v. Bell*, 274 U.S. 200 (1927); Comptroller General of the United States, "Investigation of Allegations Concerning Indian Health Service," Report to Senator James G. Abourezk, B-164031(5), Government Accountability Office, 4 Nov. 1976; Gregory Michael Dorr, "Protection or Control? Women's Health, Sterilization Abuse, and *Relf v. Weinberger*," in *A Century of Eugenics in America*, ed. Paul A. Lombardo (Indianapolis: Indiana University Press, 2011); Randall Hansen and Desmond King, *Sterilized by the State* (Cambridge: Cambridge University Press, 2013); Nicole Huberfeld, "Three Generations of Welfare Mothers Are Enough: A Disrupting Return to Eugenics in the Recent 'Welfare' Law," *UCLA Women's Law Journal* 9 (1996): 97-132; King, *In the Name of Liberalism: Illiberal Social Policy in the USA and Britain* (Oxford: Oxford University Press, 1999); Wendy Kline, *Building a Better Race* (Berkeley: University of California Press, 2001); Harry Laughlin, *Eugenical Sterilization in the United States* (Chicago: Psychopathic Laboratory of the Municipal Court of Chicago, 1922); Richard McAdams, "The Origins, Development, and Regulation of Norms," Cass Sunstein, "Social Norms and Social Roles," *Columbia Law Review* 96 (1986): 903-968; "Message of Governor James P. Goodrich, Delivered at the Opening of the 72nd Biennial Session of the Indiana General Assembly," Indianapolis, Thursday, January 6, 1921; Moya Woodside, *Sterilization in North Carolina* (Chapel Hill, N.C.: University of North Carolina Press, 1950); Iris Marion Young, *Responsibility for Justice* (Oxford: Oxford University Press, 2011).