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Girl power in the Shadow of Biopower

“Power is not an institution, and not a structure; neither is it a certain strength we are endowed with; it is the name that one attributes to a complex strategical situation in a particular society.”

-Michel Foucault¹

KAYLA STRAUSS*

ABSTRACT

Spanning from the accessibility of birth control and contraceptives, the forced sterilization of minority women, and, ultimately, the availability of abortion, biopolitics has played a role in the control and limitations of women² in the United States. Though not at the forefront of the political landscape, the philosophical idea of biopower and biopolitics has continued to stifle the freedoms of women well into the twenty-first century. This Article explores how biopolitics has affected women within a legal context. First, the article lays out the definitions and history of biopolitics to describe the philosophy behind the terms. Next, the Article considers and frames biopolitics within the United States political sphere. The Article discusses specific instances in which biopolitics has regulated and influenced women’s bodies, focusing primarily on the forced sterilization of vulnerable women in Puerto Rico and U.S. Immigration and Customs Enforcement

* I would like to extend my heartfelt gratitude to Professor Anibal Rosario Lebron for his invaluable insight and unwavering encouragement, which have played a pivotal role in nurturing my passion for academia. My colleague Diala Alqadi for her sincere thoughts and feedback on this Article. And lastly, thank you to the editors of the *Journal*, for their time, effort, and valuable guidance in carrying this project through its many revisions.

¹ MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (Allen Sheridan trans., Vintage Books 1995).

² The use of the word “woman” or “girl” in this Article is not intended to be understood as exclusionary of non-binary and transgender persons.

(ICE) Detention Centers. The Article continues by explaining how rhetoric used in court cases plays a vital role in influencing and exerting biopower. Finally, the Article concludes with some brief reflections on the current state and future of women’s bodily autonomy in the United States.

I. INTRODUCTION

It has been around for decades, maybe even centuries. “Girl power” has been a phrase that many are now familiar with. Its embodiment has been observed on television shows, in movies, and in music, scattered across plot lines and lyrics. It has infiltrated arenas outside of pop culture and influenced the #MeTooMovement with slogans splattered across posters at the Women’s March on Washington.³ But what exactly does it mean? “Girl power” refers to an attitude of independence, confidence, and empowerment among young women.⁴ The term has celebrated the positive development of girls’ self-esteem, while simultaneously recognizing an upward shift in the social positioning of girlhood in the late twentieth century.⁵

Although Girl power has shifted in meaning throughout the times, the term was first recorded in its current sense in 1967 and later, amid the Riot

³ De Elizabeth, *40 Signs From the Women’s March on Washington*, TEEN VOGUE (Jan. 21, 2017), <https://www.teenvogue.com/gallery/25-signs-womens-march-washington#15> [https://perma.cc/5M62-R38F] (photo 15 out of 41); https://www.huffpost.com/entry/signs-2018-womens-march-movement_n_5a6371d9e4b0e56300701d7c [https://perma.cc/NP75-LU4U] (photo by Emma Gray).

⁴ See *Girl power*, OXFORD LEARNER’S DICTIONARIES, <https://www.oxfordlearnersdictionaries.com/us/definition/english/girl-power> [https://perma.cc/P8S5-7W3N] (last visited Apr. 13, 2021) [hereinafter “Oxford Dictionaries”].

⁵ Raisa Fernanda Alvarado, *Girl of Color-Power: Resisting the Neoliberal Girl Power Agent Girl of Color-Power: Resisting the Neoliberal Girl Power Agent*, (2018) (Ph.D. dissertation, University of Denver), <https://digitalcommons.du.edu/etd/1421/> [https://perma.cc/BHY9-7NEJ].

Grrrls⁶ punk rock feminist movement.⁷ The Riot Grrrls embraced the creative production of material goods that centered around feminine resistance to patriarchy via music, texts, clothing, and zines⁸ and they strongly believed that empowerment was attainable through the creation of counter-culture spaces.⁹ But it was not until The Spice Girls, a British music group, catapulted the term into international recognition in the mid-1990s that Girl power became a household phrase.¹⁰ The Spice Girls launched their breakthrough single in 1996, and soon after, fans from around the world were following in the footsteps of the front figures of 90's feminism by singing songs of female empowerment.¹¹ By the Spring of 1997, the Spice Girls rose to the Number 1 spot on the Billboard 200 with their debut album and, in March of that same year, the band published *Girl Power!*—a collection of photographs, lyrics, and biographical information.¹² At the end of the 1990s, the feminist figures described the Girl power movement as “being

⁶ Evelyn McDonnell, *Riot Grrrl United Feminism and Punk. Here's an Essential Listening Guide*, N.Y. TIMES (Apr. 12, 2021), <https://www.nytimes.com/interactive/2019/05/03/arts/music/riot-grrrl-playlist.html> [<https://perma.cc/8BPT-T49X>] (“Politically, riot grrrl blasted feminism into the future: Centering the needs of a new generation via direct-action strategies, witty mantras and slogans such as “girl power” and “support girl love,” it became one of the most visible branches of what was dubbed third wave feminism”).

⁷ Oxford Dictionaries, *supra* note 4.

⁸ See *zine*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/dictionary/english/zine>, (last visited Apr. 26, 2024) (defined as “a small magazine that is produced cheaply by one person or a small group of people, and is about a subject they are interested in”).

⁹ Hains, R. C., *The significance of chronology in commodity feminism: Audience interpretations of girl power music*, POPULAR MUSIC & SOC'Y (Jan. 2014).

¹⁰ Oxford Dictionaries, *supra* note 4.

¹¹ Alex Taylor, *Spice Girls: What Happened to Girl Power*, BBC NEWS, (May 24, 2021), <https://www.bbc.com/news/entertainment-arts-48381340> [<https://perma.cc/EZ8F-TMXV>].

¹² *Chart Rewind: In 1997, Spice Girls' 'Wannabe' Powered to No. 1 on the Hot 100*, BILLBOARD (Apr. 26, 2021), <https://www.billboard.com/articles/columns/chart-beat/7808628/spice-girls-album-1997-number-1-rewinding-the-charts> [<https://perma.cc/S7F9-KEA5>]; Oxford Dictionaries, *supra* note 4.

able to do things just as well as—or even better than—the boys and be what we want to be.”¹³

It follows that if Girl power is a social movement, a catchphrase, a motto, and a representative caricature of evolving conceptualizations of girlhood,¹⁴ then one might wonder where it fits within the shadow of biopower?

II. WHAT IS BIOPOLITICS AND BIOPOWER?

“The power to make ‘live and let’ die.”

-Michel Foucault¹⁵

A. *Biopolitics Definition and History*

Biopolitics is the intersectional field between human biology and politics.¹⁶ The term was originally founded on the idea of geopolitics and coined by Rudolf Kjellen, a political scientist who analyzed the geographic influences of power relationships and international relations.¹⁷ French philosopher Michel Foucault then expounded on this idea and explored, as well as focused, on the interaction between the government’s regulation of human bodies and the control it administers over the population via regulating those said individual citizens’ bodies.¹⁸ Foucault’s ideas stemmed from his concept of the Panopticon, a circular designed prison that

¹³ Allen Lemarchand, *How the Spice Girls Became Icons of the Girl Power Movement*, NUMERO (Jul. 30, 2020), <https://www.numero.com/en/musique/how-the-spice-girls-became-icons-of-the-girl-power-movement-90s-feminism-pop-music-wannabe-victoria-beckham> [<https://perma.cc/NWA2-66FT>].

¹⁴ Alvarado, *supra* note 5.

¹⁵ MICHEL FOUCAULT, *SOCIETY MUST BE DEFENDED: LECTURES AT THE COLLEGE DE FRANCE 1975–76*

241 (Mauro Bertani et al. eds., David Macey trans., 2003).

¹⁶ Michael Laurence, *Biopolitics and State Regulation of Human Life*, OXFORD BIBLIOGRAPHIES (Apr. 28, 2016), <https://www.oxfordbibliographies.com/display/document/obo-9780199756223/obo-9780199756223-0170.xml>.

¹⁷ Ragnar Björk & Thomas Lundén, *Territory, State and Nation: The Geopolitics of Rudolf Kjellén*, BERGHAHN BOOKS (1d ed. 2021).

¹⁸ *Id.*

sought to eradicate any “deviant” behavior and keep the prisoners in check.¹⁹ This “biopolitics” of the reformers, according to Foucault, contained the basic principles of the modern welfare state.²⁰

Biopolitics is thus further characterized by the production of a population with overall “characteristics of birth, death, production, illness, and so on.”²¹ Foucault once described the rise of the state power over all “living things” as the power to regulate, discipline, and take control of life and life processes.²² In contrast to the classical sovereign’s “right to take life or let live,” Foucault suggested that the modern state now regulates the “right to make live or to let die.”²³ More specifically, biopolitics is the control of the population as a whole, such as through the ratio of births to deaths, the rate of reproduction, the fertility of the population, the level of health, as well as life expectancy and longevity.²⁴ Through this regulation, Foucault suggested that “biopolitics deals with the population as a biological problem and as power’s problem.”²⁵ The concept of biopolitics does not regulate only the population itself at large, but also smaller, more individualized relations, such as the creation and disciplining of the family and relations between bodies toward reproduction.²⁶ In other words, if discipline manages the family in terms of gendered relations such as reproduction, biopolitics manages the nation in terms of phenomena such as population patterns.²⁷

¹⁹ *Id.*

²⁰ James Faubion, *Michel Foucault*, BRITANNICA, <https://www.britannica.com/biography/Michel-Foucault/Foucaults-ideas> (last visited Apr. 22, 2021).

²¹ Foucault, *supra* note 15, at 242.

²² *Id.* at 136.

²³ Joshua E. Perry, *Biopolitics at the Bedside Proxy Wars and Feeding Tubes*, 28 J. LEGAL MED. 171 (2007).

²⁴ *Id.*

²⁵ Foucault, *supra* note 15 at 245.

²⁶ Craig Willse and Dean Spade, *Freedom in a Regulatory State?: Lawrence, Marriage and Biopolitics*, 11 WIDENER L. REV. 309, 321 (2005).

²⁷ *Id.*

B. Biopolitics within the United States Politics

Emerging from the early 1900s and inextricably linked to biopolitics in the United States is the rise of eugenics programs.²⁸ Proponents of eugenics argued that the forced sterilization of the “undesirable” could cure America’s social ills.²⁹ These social ills, according to some American eugenicists at the time, include the “socially inadequate,” such as the “feeble minded;” the “inebriated or the drug addicted;” the blind, deaf, or deformed; the “dependents” (i.e., orphans); and the people experiencing homelessness.³⁰ This crusade to build a “better race” eventually focused on building a whiter race.³¹ Eugenicists concluded that “inferior races” were a drain on the economic, political, and moral health of the American people and, to prevent these “undesirables” from contaminating the mostly white “superior race,” should be quarantined.³² Further, eugenics continued to gain popularity amidst the backdrop of social and economic concerns of the time, such as “rapid industrialization, labor strife, urbanization, and vices associated with urban population growth (such as alcoholism and prostitution).”³³ Social scientists influenced state legislatures to pass sterilization laws that would uphold the ideologies of eugenicists. As a

²⁸ Jedediah Purdy, *ARTICLE: The New Biopolitics: Autonomy, Demography, and Nationhood*, 2006 B.Y.U. L. REV. 889, 925 (2006).

²⁹ Paul A. Lombardo, *Medicine, Eugenics, and the Supreme Court: From Coercive Sterilization to Reproductive Freedom*, 13 J. CONTEMP. HEALTH L. & POL’Y 1, 865 (1996).

³⁰ *Id.* at 2.

³¹ John Blake, *When American Tried to Breed a Better Race: How a Genetic Fitness ‘Crusade’ Marches On*, CNN NEWS (Oct. 18, 2018), <https://www.cnn.com/2018/10/16/us/eugenics-craze-america-pbs> [<https://perma.cc/LMS6-WQZL>].

³² Dr. Howard Markel, *Column: The False, Racist Theory of Eugenics Once Ruled Science. Let’s Never Let That Happen Again*, PBS (Feb. 16, 2018), <https://www.pbs.org/newshour/nation/column-the-false-racist-theory-of-eugenics-once-ruled-science-lets-never-let-that-happen-again> [<https://perma.cc/F6AB-8T6T>].

³³ Lombardo, *supra* note 29.

direct result, by 1907, Indiana became the first state to enact such a sterilization law.³⁴ By 1925, twenty-three states had followed suit.³⁵

At the end of the nineteenth and the beginning of the twentieth century, it was clear that “(1) individual reproductive decisions had a substantial effect on the national interest and (2) policy decisions could legitimately take account this interest in seeking to influence or dictate reproductive patterns.”³⁶ Simultaneously, the scope of biopolitics expanded to encompass anti-immigrant and white-supremacist eugenics, persisting in the shadows of contemporary society.³⁷

III. BIOPOLITICS AND THE REGULATION OF WOMEN’S BODIES

Biopolitics is far from abstractionist philosophy. Instead, it has been weaponized to regulate women’s bodies through violence and control. Violence can be seen in the act of sterilization itself, but also in the coercive and duplicitous nature in which the “consent” for sterilization was manufactured.³⁸ Whereas, control has been exercised over women’s bodies in the manipulation of said access to bodily autonomy. Biopolitics has been historically used to control women’s bodies, and it is most obvious in the examples listed of women being subjected to forced sterilization. This

³⁴ Elizabeth S. Scott, *Sterilization of Mentally Retarded Persons: Reproductive Rights and Family Privacy*, 1986 DUKE L. J. 806, 809 n. 12 (1986).

³⁵ *Id.*

³⁶ Purdy, *supra*, note 28.

³⁷ *Id.* at 926.

³⁸ *Madrigal v. Quilligan*, No. 75–2057 (C.D. Cal. 1978); Maya Manian, *Immigration Detention and Coerced Sterilization: History Tragically repeats Itself*, ACLU (Sept. 29, 2020), <https://www.aclu.org/news/immigrants-rights/immigration-detention-and-coerced-sterilization-history-tragically-repeats-itself> [https://perma.cc/86EP-GBPQ]. (A medical student who was a firsthand witness on the maternity ward testified about what she viewed as the Medical Center’s concerted effort to reduce the birth rate of racial minorities. The medical student detailed coercive practices she witnessed: “The doctor would hold a syringe in front of the mother who was in labor pain and ask her if she wanted a pain killer; while the woman was in the throes of a contraction the doctor would say, ‘Do you want the pain killer? Then sign the papers. Do you want the pain to stop? Do you want to have to go through this again? Sign the papers’”).

section considers two different instances in which the United States has engaged in the forced sterilization of women of color.

A. *Forced Sterilization of Women*

“This profoundly disturbing situation recalls some of the darkest moments of our nation’s history, from the exploitation of Henrietta Lacks, to the horror of the Tuskegee Syphilis Study, to the forced sterilizations of Black women that Fannie Lou Hamer and so many others underwent and fought.”

-Nancy Pelosi, United States House Speaker³⁹

Forced sterilization was a key component in attaining the aims of the eugenics movement. The United States has a long history of the coerced sterilization of marginalized populations, particularly of Black, Latinx, and Indigenous peoples.⁴⁰ Federally funded sterilization programs took place in thirty-two states throughout the twentieth century and targeted prejudicial concerns informed by policies of segregation and immigration.⁴¹ These laws, targeting women of color specifically, resulted in more than 60,000 coercive sterilizations performed throughout the United States under eugenics laws.⁴² California, the second state to pass sterilization laws, enacted the Asexualization Act, which provided for the involuntary sterilization of nearly 20,000 people at the decision of hospitals or institutions.⁴³ The administration of coerced sterilizations ran rampant in

³⁹ Rebecca Klar, *Pelosi Calls for Investigation of DHS After ICE Whistleblower Complaint*, THE HILL (Sept. 15, 2020, 12:08 PM), <https://thehill.com/homenews/house/516486-pelosi-calls-for-investigation-of-dhs-after-ice-whistleblower-complaint#.X2Dn2h75JLo.twitter> [<https://perma.cc/33A2-DFJ7>].

⁴⁰ Manian, *supra* note 38.

⁴¹ Lisa Ko, *Unwanted Sterilization and Eugenics Programs in the United States*, PBS (Jan. 29, 2016), <https://www.pbs.org/independentlens/blog/unwanted-sterilization-and-eugenics-programs-in-the-united-states/> [<https://perma.cc/Y6MS-VSPN>].

⁴² Manian, *supra* note 38.

⁴³ California Senate, Select Committee on Genetics, Genetic Technologies, and Public Policy, *California’s Compulsory Sterilization Policies, 1909–1979: July 16, 2003, Informational Hearing*, Senator Dede Alpert, Chairwoman (2003). (Presentation by Dr.

the American South, specifically for Black women⁴⁴, so much so that they were dubbed “Mississippi appendectomies.”⁴⁵ Acts, such as the Family Planning Services and Population Research Act of 1970, allowed physicians to sterilize between 25% and 50% of Indigenous women either under pressure and duress or without the woman’s knowledge.⁴⁶ Forced sterilization has been a way in which a Nation-State controls not just the population in general, but, more specifically, who is within the population. Throughout history, women’s bodies are often the landscape in which political agendas take place, thus stripping them of the power they have over their autonomy.

1. Forced Sterilization of Puerto Rican Women

“[T]he belief was that some people are more fit to reproduce than others and that poor brown people in a so-called underdeveloped nation were not fit to reproduce.”

- Raquel Reichard, Journalist⁴⁷

Alexandra Minna Stern, “The Darker Side of the Golden State: Eugenics Sterilization in California”).

⁴⁴ Sanjana Manjeshwar, *America’s Forgotten History of Forced Sterilization*, BERKELEY POL. REV. (Nov. 4, 2020), <https://bpr.studentorg.berkeley.edu/2020/11/04/americas-forgotten-history-of-forced-sterilization/> [<https://perma.cc/X6T8-FWA3>]. (“Black women were also disproportionately and forcibly sterilized and subjected to reproductive abuse. In North Carolina in the 1960s, Black women made up 65 percent of all sterilizations of women, although they were only 25 percent of the population”).

⁴⁵ Freedom Summer, *Fannie Lou Hamer: Women in American History*, PBS, <https://www.pbs.org/wgbh/americanexperience/features/freedomsummer-hamer/> [<https://perma.cc/9MGA-BK2L>]. (Fannie Lou Hamer was given a hysterectomy while in the hospital for minor surgery. As a Civil Rights activist, she would later say to an audience, “[In] the North Sunflower County Hospital, I would say about six out of the 10 Negro women that go to the hospital are sterilized with the tubes tied”).

⁴⁶ Brianna Theobald, *A 1970 Law Led to the Mass Sterilization of Native American Women. The History Still Matters*, TIME (Nov. 28, 2019, 11:47 AM), <https://time.com/5737080/native-american-sterilization-history/> [<https://perma.cc/V5P4-VPJ7>].

⁴⁷ Raquel Reichard, *In Puerto Rico, A History of Colonization Led to an Atrocious Lack of Reproductive Freedom*, REFINERY29 (Oct. 20, 2020, 5:00 AM), <https://www.refinery29.com/en-us/2020/10/10029088/puerto-rico-sterilization-abortion-reproductive-rights-history> [<https://perma.cc/XTQ7-JWTW>].

The forced sterilization of Puerto Rican women, initiated with Law 116 passing in 1937, represents a clear example of biopolitical control exerted over female bodies, reflecting broader patterns of colonial and racial domination. It was reasoned that Law 116 was implemented after a growing concern of overpopulation, and thus, initialized the institutionalization of the population control program.⁴⁸ But before this pivotal enactment, the island had been characterized by policymakers and journalists as “suffering from a prevailing problem of overpopulation” since the United States occupation of Puerto Rico in 1898.⁴⁹ Historians have argued that the increase in sterilization procedures was a byproduct of this characterization and sought to decrease high levels of poverty and unemployment by curbing the overpopulation concern.⁵⁰ Two main factors contributed to Puerto Rico’s overpopulation: (1) the economic policies that arose from Puerto Rico’s dependent relationship with the United States and (2) the Puerto Rican government’s restructuring of the economy and the population through emigration and sterilization.⁵¹ Overpopulation concerns, in tandem with the influence of conservative eugenicists holding powerful government positions, led to the stereotypes of Puerto Ricans being “inferior stock” and thus unfit for reproduction.⁵² The solution presented by those conservative government officials to Puerto Rico’s overpopulation problem was sterilization and emigration.⁵³ The government enacted a two-part plan for their solution;⁵⁴ from 1940 to 1960, the first part

⁴⁸ Kathryn Krase, *The History of Forced Sterilization in the United States*, OUR BODIES OURSELVES (Oct. 1, 2014), <https://ourbodiesourselves.org/> [<https://perma.cc/K26M-92LE>].

⁴⁹ IRIS LOPEZ, MATTERS OF CHOICE: PUERTO RICAN WOMEN’S STRUGGLE FOR REPRODUCTIVE FREEDOM, 5–6 (2008).

⁵⁰ Katherine Andrews, *The Dark History of Forced Sterilization of Latina Women*, UNIV. PITT. PANORAMAS (Oct. 30, 2017), <https://www.panoramas.pitt.edu/health-and-society/dark-history-forced-sterilization-latina-women> [<https://perma.cc/YSW5-LBEW>].

⁵¹ Lopez, *supra* note 49, at 7.

⁵² *Id.* at 9.

⁵³ *Id.*

⁵⁴ *Id.*

of the plan entailed the promotion of migration to the United States,⁵⁵ and the second part of the plan encouraged sterilization as the best form of birth control available for women of child-rearing age.⁵⁶

The lack of access to contraception, among other reasons,⁵⁷ set the stage for the widespread acceptance of sterilization among Puerto Ricans in the 1930s. Until the enactment of Law 116, birth control was illegal under the Comstock law in both Puerto Rico and the United States.⁵⁸ Even after the Comstock law was repealed in 1937, access to contraceptives for many poor women was minimal for several reasons, including affordability,⁵⁹ living too far away from health clinics and decreased access to public transportation,⁶⁰ or the Catholic Church frequently forcing these clinics to close.⁶¹ Collectively, this meant that the only method these women had for controlling their fertility was sterilization.⁶² Sterilization became so common that it was known as “la operación” (the operation).⁶³ In fact, not only was “la operación” common but it was also applauded. Manufacturing plants and other factories

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ DeArbea Walker, *Between 1930 and 1970, around one third of all women in Puerto Rico were sterilized to address concerns of ‘surplus population’*, BUSINESS INSIDER (Dec. 28, 2023, 9:19 AM EST), <https://www.businessinsider.com/women-puerto-rico-sterilized-birth-control-history-operation-bootstrap-2023-12> (Other reasons include: extreme poverty, few jobs and high unemployment, a class-based society, misinformation about the permanence of the procedure, and sterilization being the only form of contraception).

⁵⁸ Hannah Good, *The lesser-known history of birth control*, THE WASH. POST (Nov. 6, 2021, 12:41 PM), <https://www.washingtonpost.com/lifestyle/2021/11/06/lesser-known-history-birth-control/> [<https://perma.cc/DN9K-B2QU>].

⁵⁹ See generally Laura Briggs, *Reproducing Empire: Race, Sex, Science, And U.S. Imperialism In Puerto Rico* 107, 127, 142–61 (2002).

⁶⁰ *Id.*

⁶¹ ANNETTE RAMIREZ DE ARELLANO AND CONRAD SEIPP, *COLONIALISM, CATHOLICISM, AND CONTRACEPTION: A HISTORY OF BIRTH CONTROL IN PUERTO RICO* 139 (United States: University of North Carolina Press, 1983).

⁶² *Id.* at 38.

⁶³ Andrews, *supra* note 50.

strongly encouraged their workforces (who were majority women) to become sterilized “in order to reduce turnover.”⁶⁴

By the late 1940s (1947–48, specifically), an island-wide study revealed that about 7% of women had been sterilized.⁶⁵ Another island-wide study, conducted six years later (in 1953–54) revealed that the population of sterilized women had increased to over 16%.⁶⁶ By the late 1950s, a majority of women were sterilized, and those women who were not sterilized were still subject to experiments on their bodies when they were misled, ill-informed, and essentially tricked into participating in birth control clinical trials.⁶⁷ Further, in 1976, the United States Department of Health, Education, and Welfare reported that over 37% of women of child-bearing age in Puerto Rico were sterilized.⁶⁸

2. ICE Detention Centers

“When I met all these women who had had surgeries, I thought this was like an experimental concentration camp. It was like they’re experimenting with our bodies.”

⁶⁴ *Reproductive Genocide? A Look into Sterilization in Puerto Rico and East Los Angeles*, THE LATINX JOURNEY, DARTMOUTH (Apr. 22, 2018), <https://journeys.dartmouth.edu/apulidolats3/2018/04/22/reproductive-genocide-a-look-into-sterilization-in-puerto-rico-and-east-los-angeles/> [<https://perma.cc/HKJ5-LCKD>].

⁶⁵ Harriet B. Presser, *The Role of Sterilization in Controlling Puerto Rican Fertility*, 23 POPULATION STUD., 343, 343 (1969).

⁶⁶ Reuben Hill, J. Mayone Stycos and Kurt W. Back, *The Family And Population Control: A Puerto Rican Experiment in Social Change*, SOCIAL FORCES 167 (Chapel Hill: University of North Carolina Press, 1959).

⁶⁷ Erin Blakemore, *The First Birth Control Pill Used Puerto Rican Women as Guinea Pigs*, HISTORY (May 9, 2018), <https://www.history.com/news/birth-control-pill-history-puerto-rico-enovid> [<https://perma.cc/L3TF-PR8E>]. (Controversial biologist, Gregory Pincus, credited for contributions in creating the first birth control pills “focused on that group of women during clinical trials that recruited in the poorest areas of San Juan and other [Puerto Rican] cities beginning in 1955. Women who took the drug knew that it prevented pregnancy but had no idea it was experimental or even that they were participating in a clinical trial. They weren’t given safety information about the product [. . .] and women experienced serious side effects like blood clots and nausea”).

⁶⁸ Krase, *supra* note 48.

- Anonymous, *Detained Immigrant at ICDC Interviewed by Project South*⁶⁹

It is easy to assume that sterilization is a shameful part of American history but, in truth, it is a despicable phenomenon still occurring today. In recent years, a whistleblower complaint emerged in September 2020 alleging medical neglect and questionable hysterectomies of United States Immigration and Customs Enforcement (ICE) detainees at an ICE facility in Georgia.⁷⁰ The complaint was filed by Project South, Georgia Detention Watch, Georgia Latino Alliance for Human Rights, and South Georgia Immigrant Support Network on behalf of detained immigrants at the Irwin County Detention Center (ICDC) and Ms. Dawn Wooten, a protected whistleblower and licensed practical nurse employed by ICDC.⁷¹

The complaint documents recent accounts of jarring medical neglect at ICDC, including refusal to test detained immigrants for COVID-19.⁷² But, more concerning, the complaint also raised red flags about the rate at which hysterectomies were performed on immigrant women in ICE custody and whether those women consented to the removal of their uteruses.⁷³ The detention center's "primary gynecologist," Dr. Mahendra Amin, practiced gynecology in the nearby town of Douglas and conducted most, if not all, of the hysterectomies on the women detainees.⁷⁴ In a *New York Times* article,

⁶⁹ E-mail from Project S. to Joseph V. Cuffari, Inspector Gen. of the Dep't of Homeland Sec., Cameron Quinn, Officer for C. R. & C. L. at the Dep't of Homeland Sec., Thomas P. Giles, Acting Dir. of Atlanta U.S. Immigr. & Customs Enft Field Off., & David Paulk, Warden of the Irwin County Detention Center at 19 (Sept. 14, 2020) (hereinafter E-mail).

⁷⁰ Susanna Capelouto, *Whistleblower in Georgia Claims High Number of Hysterectomies at ICE Facility*, NPR (Sept. 16, 2020, 5:08 AM) <https://www.npr.org/2020/09/16/913448209/whistleblower-in-georgia-claims-high-number-of-hysterectomies-at-ice-facility> [<https://perma.cc/Y5SF-M6VZ>].

⁷¹ See generally E-mail, *supra* note 69.

⁷² *Id.*

⁷³ *Id.* at 2.

⁷⁴ Caitlin Dickerson, Seth Freed Wessler & Miriam Jordan, *Immigrants Say They Were Pressured Into Unneeded Surgeries*, N.Y. TIMES (Sept. 29, 2020),

sixteen women were interviewed on their concerns about the gynecological care they received while at the center.⁷⁵ In almost every woman’s chart, Dr. Amin listed symptoms such as heavy bleeding with clots and chronic pelvic pain, but some of the women said they never experienced or reported those symptoms to him at all.⁷⁶ All sixteen women interviewed were treated by Dr. Amin and all sixteen raised concerns about whether Dr. Amin had adequately explained the procedures he performed (including providing interpreters for those whose first language was not English), or whether he provided his patients with the option of less invasive alternatives.⁷⁷ Ms. Wooten, the whistleblowing nurse employed by ICDC, expressed concern regarding the high numbers of detained immigrant women at ICDC receiving hysterectomies, remarking that “everybody he sees has a hysterectomy—just about everybody.”⁷⁸

More than forty women are now part of a consolidated class action lawsuit against ICE and Dr. Amin.⁷⁹ Of the women who testified, thirty-five-year-old Canadian citizen Jenel Haug gave a grueling account of her care under

<https://www.nytimes.com/2020/09/29/us/ice-hysterectomies-surgeries-georgia.html> [<https://perma.cc/ME8K-JTZE>].

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* (A clinical Professor at George Washington University and the Washington, D.C. Chair of the American College of Obstetricians and Gynecologists, Dr. Sara Imershein, was interviewed by *The N.Y. Times* and reviewed the medical files of seven detainees Dr. Amin saw. Dr. Imershein has said that the diagnoses and procedures are “poorly supported” and “not well documented,” and that even if the patients had reported the symptoms recorded by Dr. Amin, “there would have been many avenues to pursue before rushing to surgery,” she said, “Advil for one”).

⁷⁸ E-mail, *supra* note 69, at 19.

⁷⁹ Jasmine Aguilera, *More Than 40 Women File Class Action Lawsuit Alleging Medical Misconduct by ICE Doctor at Georgia Detention Center*, TIME (Dec. 22, 2020, 2:55 PM) <https://time.com/5924021/women-lawsuit-irwin-detention-ice/> [<https://perma.cc/KA8V-LBM8>]; Filed in the U.S. District Court for the Middle District of Georgia on behalf of 14 women, some of whom are still detained and others who have been deported, alleging Amin performed unnecessary and nonconsensual medical procedures on them as far back as 2018. Including the 14 named women, more than 40 women provided sworn testimony as part of the lawsuit alleging malpractice by Dr. Amin.

Dr. Amin.⁸⁰ Ms. Haug arrived at ICDC pregnant and with a history of difficult pregnancies as well as multiple miscarriages.⁸¹ She informed ICE and ICDC about her pregnancy and her history but was denied appropriate care.⁸² Four days after her arrival, Ms. Haug started bleeding—and continued to for two weeks.⁸³ ICDC refused to acknowledge that Ms. Haug had suffered a miscarriage and continued to deny that she was even pregnant.⁸⁴ After numerous complaints about her continuous bleeding and terrible cramps following the miscarriage, Ms. Haug was finally taken to see Dr. Amin.⁸⁵ Ms. Haug describes her visit with Dr. Amin as “the most medical way of being raped you could possibly experience.”⁸⁶ Ms. Haug underscored that “he was rough; it was painful; and it was forced.”⁸⁷

Dr. Amin demonstrates a pattern of coercion and force, often pressuring detainees to agree to extreme solutions to solve “newly discovered” medical issues; for instance, Dr. Amin informed Ms. Haug that she had cysts and endometriosis, though Ms. Haug did not have the symptoms described in the information she received.⁸⁸ At first, he recommended a Depo shot⁸⁹ and Ms. Haug refused.⁹⁰ During one of her next visits, Ms. Haug was bleeding and did not want to have internal procedures done, but Dr. Amin

⁸⁰ Amended Complaint at ¶ 426, *Oldaker v. Giles*, 2020 WL 12656029 (M.D. Ga. Dec. 22, 2020) (No. 7:20-CV-00224).

⁸¹ *Id.*

⁸² *Id.* at ¶ 427.

⁸³ *Id.* at ¶ 428.

⁸⁴ *Id.*

⁸⁵ *Id.* at ¶ 428.

⁸⁶ *Id.* at ¶ 429.

⁸⁷ *Id.* at ¶ 429.

⁸⁸ *Id.* at ¶ 430.

⁸⁹ *Birth Control Shot*, PLANNED PARENTHOOD, <https://www.plannedparenthood.org/learn/birth-control/birth-control-shot> [<https://perma.cc/F6AA-PAH5>]. (The birth control shot (sometimes called Depo-Provera, the Depo shot, or DMPA) contains the hormone progestin. Progestin stops you from getting pregnant by preventing ovulation).

⁹⁰ Amended Complaint, *supra* note 80, at ¶ 431.

pushed her back on the table and performed them anyway.⁹¹ At a later point, he administered two Depo shots and told Ms. Haug that the cysts had not shrunk and that she needed to undergo surgery, despite her continuous protests and concerns.⁹² Ms. Haug was sent back to Canada before her surgery. However, she later found out from contacts that her surgery was scheduled for a date shortly after her unexpected departure.⁹³ Once safely arriving back in Canada, Ms. Haug was examined by a doctor who told her that he did not see any signs of cysts or endometriosis.⁹⁴

Ms. Haug’s experience is just one story from the various women—both named and unnamed—in the complaint. It also represents the experiences of migrant women, both visible and invisible, in the public eye of our society.⁹⁵ Despite this being only one story of many, Dr. Amin has said that he only performed one or two hysterectomies in the past three years.⁹⁶ In a statement, his attorney said that the physician strongly disputes any allegations that he treated “any patient with anything other than the utmost care and respect” and that Dr. Amin “strongly disputes that any patient was treated without fully informed consent.”⁹⁷ Furthermore, the statement included that once “all of the facts com[e] out and we are confident that once they do, Dr. Amin will be cleared of any wrongdoing.”⁹⁸

⁹¹ *Id.* at ¶ 433.

⁹² *Id.* at ¶ 434.

⁹³ *Id.* at ¶ 436.

⁹⁴ *Id.* at ¶ 436.

⁹⁵ Violence & Violation: Medical Abuse of Immigrants Detained at the Irwin County Detention Center, PROJECT SOUTH 4-16 (Sept. 2021), https://projectsouth.org/wp-content/uploads/2021/09/IrwinReport_14SEPT21.pdf [<https://perma.cc/23JB-XS7L>].

⁹⁶ Jose Olivares & John Washington, “*He Just Empties You All Out*”: Whistleblower Reports High Number of Hysterectomies at ICE Detention Facility, THE INTERCEPT (Sept. 15, 2020, 05:22 PM), <https://theintercept.com/2020/09/15/hysterectomies-ice-irwin-whistleblower/> [<https://perma.cc/SGF8-9Q8V>].

⁹⁷ Dickerson et al., *supra* note 74.

⁹⁸ *Id.*

In May 2021, the Department of Homeland Security ended its contract with ICDC.⁹⁹ In January of 2022, a report issued by the Department of Homeland Security’s Office of Inspector General (OIG) corroborated Ms. Wooten’s whistleblower disclosures; specifically, the grave shortcomings in medical healthcare around COVID-19 procedures.¹⁰⁰ However, more than two years later, at least two Department of Homeland Security OIG investigations remain open.¹⁰¹ Ms. Wooten has been fired from her position and “is back on food stamps” because she has been unable to find a new job after whistleblowing,¹⁰² and justice remains unserved. As for the other women, in the wake of the filing of the whistleblower complaint, ICE has deported or attempted to deport multiple women who detailed their experiences at ICDC.¹⁰³

As the facts continue to unfold, certain truths remain undisputed. Data from ICE inspection reports, for example, show that the facility—which is operated by a private prison company, Lasalle Corrections—refers more than 1,000 detainees a year for outside medical care, which is far more than most other immigration detention centers of the same size.¹⁰⁴ From those referrals, Project South discovered that ICE invoiced an external

⁹⁹ *ICE to Close Two Detention Centers*, DEP’T OF HOMELAND SEC. (May 20, 2021), <https://www.dhs.gov/news/2021/05/20/ice-close-two-detention-centers> [<https://perma.cc/52M8-MMP5>].

¹⁰⁰ *Medical Processes and Communication Protocols Need Improvement at Irwin County Detention Center*, DEP’T OF HOMELAND SEC. OFF. OF INSPECTOR GEN. (Jan. 3, 2022), <https://www.oig.dhs.gov/sites/default/files/assets/2022-01/OIG-22-14-Jan22.pdf> [<https://perma.cc/W7MM-6JFM>].

¹⁰¹ Miranda Bryant, ‘I’m back on food stamps’: Nurse who exposed ‘uterus collector’ still faces consequences, THE GUARDIAN (Oct. 17, 2022), <https://www.theguardian.com/us-news/2022/oct/17/whistleblower-uterus-collector-repercussions-ice-detained-immigrant-women> [<https://perma.cc/BQ2U-5QX2>].

¹⁰² *Id.*

¹⁰³ US deports migrants who accuse detention center gynecologist of abuse, THE GUARDIAN (Nov. 11, 2020), <https://www.theguardian.com/us-news/2020/nov/11/us-deportations-women-allege-detention-center-gynecologist-abuse> [<https://perma.cc/238Q-SFP8>].

¹⁰⁴ Dickerson et al., *supra* note 74.

gynecologist for at least 71 invasive procedures from 2015 to 2020.¹⁰⁵ Additionally, they gathered testimonies from 14 former ICDC detainees, who reported that their gynecological procedures were performed without their full knowledge or consent.¹⁰⁶ This further underscores the truth in the collective experience of those women who have come forward and claimed forced sterilization with muddled consent, who have woken up to a procedure they did not ask for without the interpreters they so desperately needed.

In light of these findings, biopolitics is not simply a theoretical concept—it is the real and actual objectification and alteration of women’s bodies stemming from the early 1900s to our “todays” and “tomorrows.” Indeed, as of 2022, a surprising 31 states (along with the District of Columbia) have laws in place that allow for the forced sterilization of disabled people.¹⁰⁷ For example, Arkansas’ statute allows for guardians of dependents with certain mental “incompetents” to file sterilization petitions encompassing (rather broadly) those “incapable of caring for [themselves] because of mental retardation, mental illness, imbecility, idiocy, or other mental incapacity.”¹⁰⁸ Other states, like Iowa or New Hampshire, even have legislation allowing for the forced sterilization of both adults and

¹⁰⁵ Bryant, *supra* note 101.

¹⁰⁶ *Id.*

¹⁰⁷ *Forced Sterilization Laws in Each State and Territory*, NAT’L WOMEN’S LAW CTR., https://nwlc.org/wp-content/uploads/2022/01/f.NWLC_SterilizationReport_2022_Appendix.pdf [<https://perma.cc/NS4C-ZZRS>]. (States include: Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Hampshire, New Jersey, New York, North Dakota, Oregon, Pennsylvania, South Carolina, Utah, Vermont, Virginia, Washington, Wyoming).

¹⁰⁸ ARK. CODE ANN. § 20-49-204 (2018); (*See* generally, “(a)(1) In determining the incompetence of a person for whom sterilization is sought, the court shall require that the evidence of incompetence include the testimony of at least two (2) medical witnesses who shall be found by the court to be qualified. The testimony of one (1) witness may be by written statement?”).

children.¹⁰⁹ The overwhelming number of statutes that support forced sterilization illustrate that biopolitics, as well as controlling women via forced sterilization, is still alive and well. Even in the absence of statutes, there are other methods where the government has coerced women into forced sterilization, like as engaging in plea deals.¹¹⁰ In 2015, the United States Senate voted unanimously to help surviving victims of forced sterilization by enacting the Eugenics Compensation Act.¹¹¹ However, the Senate still has not mitigated the effects of state laws that continue to enable the government to impose forced sterilization, many of which continue to be considered, for all legal purposes, good law.

IV. BIOPOLITICS RELATED TO THE LAW

“If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”

- Justice William Brennan, Associate Justice of the Supreme Court of the United States¹¹²

As illustrated, the State’s engagement in biopolitics affects women’s autonomy, whether by enacting laws that deny it, enacting laws that insist on interfering with it, or turning a blind eye when government entities

¹⁰⁹ IOWA CODE § 633.35 (2024); IOWA CODE § 232D.401 (2024); N.H. REV. STAT. ANN. §464-A:25 (2019); N.H. REV. STAT. ANN. § 463:12; In re Penny N, 120 N.H. 269, 414 A.2d 541 (198) (detailing decision process).

¹¹⁰ *Nashville assistant DA fired amid reports of sterilization in plea deals*, CBS NEWS (Apr. 1, 2015, 5:40 PM CST), <https://www.cbsnews.com/news/nashville-prosecutor-fired-amid-reports-of-sterilization-in-plea-deals/> [<https://perma.cc/4Q76-6M4U>]. (In 2015, a Nashville Assistant District Attorney was fired after reports surfaced that he made women agree to sterilization as a part of plea negotiations. The firing came after *The Associated Press* reported that sterilization was part of at least four plea bargain talks. A public defender on one of the cases commented, “Any time a woman is given a choice between prison and this surgery, that is inherently coercive, even in cases where there is no mental illness”).

¹¹¹ S. 1698, 114th Cong. § 2(a) (2015) (as passed by Senate, Nov. 30, 2015).

¹¹² *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (emphasis omitted).

engage in it. The government continues to enact laws that infringe on the autonomy of women and that further perpetuate a flawed system. The system is flawed because these governmental policies both, directly and indirectly, affect fertility, even if they do not name them as fertility policies. The second half of the eighteenth century, according to Foucault, was the first time in which the population was seen as a political, scientific, and biological problem, whereby “advances in the sciences, such as demography and medicine, allow the state to regularize and regulate.”¹¹³ This section discusses how the government engages in biopolitics through language used in caselaw, and critiques any engagement, in theory or practice, over the control of women’s bodies.

A. Reinforcement and the Law: The Paradox of Privacy

Privacy rights lie between an individual’s ability to make autonomous decisions and the State’s power to intrude on them. But personal decisions concerning life’s intimacies and intricacies—like marriage, procreation, contraception, and privacy in deciding any of the in-between¹¹⁴—sharpen the distinction on when the State can and should interfere. Oftentimes, courts impact one’s ability to make personal choices under the guise of improving life not just for society, but, theoretically, for

¹¹³ Gila Stopler, *Article: Biopolitics And Reproductive Justice: Fertility Policies Between Women’s Rights And State And Community Interests*, 171, 18 U. PA. J. L. & SOC. CHANGE 169; *See generally* Foucault, *supra* note 15, at 245.

¹¹⁴ The Supreme Court of the United States has recognized liberty rights, which protect individuals from undue interference by the State, including decisions related to marriage: *Loving v. Virginia*, 388 U.S. 1, 12 (1967); Procreation: *Skinner v. Oklahoma*, 316 U.S. 535, 541–42 (1942); Unmarried couples have the right to use contraception: *Eisenstadt v. Baird*, 405 U.S. 438, at 453–54 (1972) (stating that the right of privacy includes the right of the individual to be free from governmental intervention into the decision to have children); Privacy: *Griswold*, 381 U.S. at 484. (“[s]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees [within the Bill of Rights] create zones of privacy”).

individuals as well.¹¹⁵ But, according to Foucault, regulation, even in the interest of societal good and social mores, is simply a newer form of power still exercised over human bodies.¹¹⁶ These regulations, more often than not prescribed under the term “public health,” are defined as the actions that the government (both state and federal) takes to help ensure a healthy population.¹¹⁷ The Supreme Court’s decisions on these regulations—especially those in the realm of both public health and control over women’s bodies—have illustrated a concerning viewpoint on the control of women’s autonomy. The following cases, *Buck v. Bell*, *Stenberg v. Carhart* (*Carhart I*), and *Gonzales v. Carhart* (*Carhart II*), are examples of the “invisible hand” of biopolitics influencing American law and exerting control over women.

1. **Buck v. Bell**

In a momentous setback for women’s autonomy and freedom, the Court, in an 8–1 decision, upheld a Virginia law that authorized the involuntary sterilization of a 17-year-old mentally challenged girl.¹¹⁸ In *Buck*, the Court determined that the involuntary sterilization of “feeble minded” persons held in state institutions was authorized on the basis that such sterilizations protected society from the degenerate criminal offspring or imbeciles who would “sap the strength of the state.”¹¹⁹ Famously, Justice Holmes, writing for the Court, said that “three generations of imbeciles are enough.”¹²⁰ Justice Holmes further reasoned that it is better to prevent those who are incompetent from having children than to have to kill those children because

¹¹⁵ See generally *Buck v. Bell*, 274 U.S. 200 (1927).

¹¹⁶ Foucault, *supra* note 15, at 242–43.

¹¹⁷ *Id.*

¹¹⁸ *Buck v. Bell*, 274 U.S. 200 (1927).

¹¹⁹ *Id.* at 207.

¹²⁰ *Id.*

of crimes they will commit or to watch those children starve in the streets due to their lack of competence.¹²¹

The Court decided that infringing on Carrie Buck's bodily integrity was worth doing so for a more "redeemable population," and the Supreme Court upheld this decision. At the center of *Buck v. Bell*, was Carrie Buck, who was institutionalized after she became pregnant and accused her foster parents' relative of raping her. She was committed on the grounds of feeble-mindedness, incorrigible behavior, and promiscuity. She gave birth at the institution and was selected as the first person to be sterilized under the new Virginia law that allowed forced sterilization of those deemed feeble minded. She protested the procedure and the law's constitutionality was challenged. The Court relied on "expert" testimony, including that of well-known eugenicist Harry H. Laughlin.¹²² Laughlin did not appear at Carrie's trial and instead sent a written deposition containing sworn testimony about Carrie and her family even though he had never met any members of the Buck family.¹²³ Laughlin went on to describe Carrie and the Buck family as part of the "shiftless, ignorant, and worthless class of anti-social whites of the South," that their "feeble-mindedness is caused by the inheritance of degenerate qualities," and that she is the "potential parent of social

¹²¹ *Id.* ("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").

¹²² *Deposition of Harry H. Laughlin*, 39, DOCSTEACH, NAT'L ARCHIVES (Nov. 18, 1924), <https://www.docsteach.org/documents/document/deposition-of-harry-laughlin-eugenics-buck-v-bell> [<https://perma.cc/NN6C-Y597>].

¹²³ *Buck v. Bell: The Test Case for Virginia's Eugenic Sterilization Act*, UNIV. OF VIRGINIA HISTORICAL COLLECTIONS AT THE CLAUDE MOORE HEALTH SCIENCES LIBRARY, <https://exhibits.hsl.virginia.edu/eugenics/3-buckvbell/index.html#:~:text=Harry%20H.%20Laughlin%20did%20not%20appear%20a%20Carrie,worthless%20class%20of%20anti-social%20whites%20of%20the%20South.%E2%80%9D> [https://perma.cc/TQX9-ZJWA].

inadequate or defective offspring.”¹²⁴ The Court also considered a eugenicist’s pseudo-scientific findings on feeble-mindedness being passed down from generation to generation,¹²⁵ a nurse’s testimony that Carrie sent flirtatious notes to schoolboys to insinuate the idea that Carrie had inherited sexual precociousness from her “promiscuous” mother,¹²⁶ and the testimonies of several teachers,¹²⁷ none of whom had actually taught (and some of whom had never even met) Carrie.¹²⁸

The State exercised control over Carrie and her autonomy under the guise of protecting society.¹²⁹ Based on the Court’s findings, Carrie and her genetics posed a threat to society that was worth the intrusion, thus justifying the exertion of biopower in attempting to manage the population through surveillance and control of the health-related aspects of life. Carrie Buck was the first person involuntarily sterilized under Virginia’s law because she was considered “unfit,” but she was certainly not the last.¹³⁰

¹²⁴ *Supreme Court Opinion in Buck v. Bell*, DOCSTEACH, NAT’L ARCHIVES (May 2, 1927), <https://www.docsteach.org/documents/document/supreme-court-opinion-buck-v-bell> [<https://perma.cc/B29D-XEQG>].

¹²⁵ *Testimony of A.H. Estabrook from Hearing on Appeal of Order to sterilize Carrie Buck*, 82, DOCSTEACH, NAT’L ARCHIVES (Nov. 18, 1924), <https://www.docsteach.org/documents/document/testimony-ah-estabrook-buck-v-bell> [<https://perma.cc/D4KD-356A>].

¹²⁶ *Testimony of Anne Harris from Hearing on Appeal of Order to sterilize Carrie Buck*, 51, DOCSTEACH, NAT’L ARCHIVES (Nov. 18, 1924), <https://www.docsteach.org/documents/document/testimony-anne-harris-buck-v-bell> [<https://perma.cc/9HJJ-6ACT>].

¹²⁷ *Testimony of A.H. Estabrook from Hearing on Appeal of Order to sterilize Carrie Buck*, DOCSTEACH, NAT’L ARCHIVES (Nov. 18, 1924), <https://www.docsteach.org/documents/document/testimony-ah-estabrook-buck-v-bell> [<https://perma.cc/X8QW-U9SY>].

¹²⁸ “*Three Generations of Imbeciles are Enough*” — *The Case of Buck v. Bell*, NATIONAL ARCHIVES EDUCATION UPDATES (May 2, 2017), <https://education.blogs.archives.gov/2017/05/02/buck-v-bell/> [<https://perma.cc/2G63-SHTP>]. (It is unclear whether the testimony given was from Carrie’s actual nurse or an unrelated school nurse).

¹²⁹ *Buck*, 274 U.S. at 205 (“*The precise question therefore is whether the State, in its judgment of what is best for appellant and for society [. . .]*”).

¹³⁰ *Id.*

Until 1972, an estimated 8,300 Virginians were also sterilized under the same state law.¹³¹

2. Carhart I & Carhart II

Biopower is not only seen in the decisions reached through caselaw and the legal implications of such decisions but also in the language used within the written opinions to influence society at large. Almost 75 years after the *Buck* decision, the Court again—albeit, subtly—flexed its ability to control women’s bodies in *Stenberg v. Carhart (Carhart I)*.¹³² In a 5–4 decision, the Supreme Court held that Nebraska’s “partial-birth abortion”¹³³ law was unconstitutional due to the overbroad language of the prohibition and the lack of a health exception.¹³⁴ *Carhart I*, focused on state laws (such as Nebraska’s law) that established limitations on the types of abortion procedures conducted, despite the Supreme Court’s decision in *Roe v. Wade* safeguarding women’s right to abortion. *Carhart I* successfully established that states could not impose undue burdens on women seeking

¹³¹ *Id.*

¹³² *Stenberg v. Carhart*, 530 U.S. 914 (2000).

¹³³ *Id.* at 922 (The statute defines “partial birth abortion” as: “an abortion procedure in which the person performing the abortion partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery.” § 28-326(9). It further defines “partially delivers vaginally a living unborn child before killing the unborn child” to mean “deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the person performing such procedure knows will kill the unborn child and does kill the unborn child.” The law classifies violation of the statute as a “Class III felony” carrying a prison term of up to 20 years, and a fine of up to \$ 25,000; §§ 28-328(2), 28-105).

¹³⁴ *Id.* at 937–38; *Id.* at 948-949 (One of the reasons the Court found Nebraska’s ban unconstitutional was because “on the alternative and independent ground that it imposes an undue burden on a woman’s right to choose to terminate her pregnancy before viability. Nebraska’s ban covers not just the dilation and extraction (D&X) procedure, but also the dilation and evacuation (D&E) procedure, “the most commonly used method for performing previability second trimester abortions.” The Court further found that “the medical evidence establishes that the D&E procedure is included in this definition. Thus, it is not possible to interpret the statute’s language as applying only to the D&X procedure”).

to terminate pregnancies, and any restrictions on abortion procedures should include exemptions to protect women's health and lives.

While describing an abortion procedure, the Court used highly detailed and incredibly technical language to give a rather impersonal description that erased the woman behind the procedure.¹³⁵ The woman herself barely made an appearance in the opinion: the various methods of abortion were described as transactions that occurred almost exclusively between the “doctor” and the “fetus.”¹³⁶ This step-by-step description—which unfolded inside of the woman's body—was presented as objective but also appeared as objectifying. The complete absence of the woman in this case diminishes the human aspect of the discussion, reducing her to merely an object of discourse. By employing such language, we lose sight of the full scope of her identity and the complexities of her experience. Without insight into her thoughts, emotions, motivations, and personality, we are left with a narrow focus solely on the physical aspects of her ordeal. This omission detracts from our ability to comprehend the holistic reality of her situation, and the situation for many women. In essence, this woman is no longer a person in this case, but rather just a vessel. Further, this description is arguably also a linguistic manifestation of the law's extraordinary degree of regulation and management of this particular medical procedure.¹³⁷ This impersonal yet visual description was exactly how the Court participated in biopolitics and the regulation of women's bodies.

¹³⁵ *Carhart I*, 530 U.S. at 927 (“[I]t begins with induced dilation of the cervix. The procedure then involves removing the fetus from the uterus through the cervix ‘intact.’ . . . The intact D&E proceeds in one of two ways, depending on the presentation of the fetus. If the fetus presents head first (a vertex presentation), the doctor collapses the skull; and the doctor then extracts the entire fetus through the cervix. If the fetus presents feet first (a breech presentation), the doctor pulls the fetal body through the cervix, collapses the skull, and extracts the fetus through the cervix. The breech extraction version of the intact D&E is also known commonly as ‘dilation and extraction,’ or D&X”) (quoting *Carhart v. Stenberg*, 11 F. Supp. 2d 1099, 1105 (D. Neb. 1998) (citing testimony of the plaintiff and plaintiff's expert)).

¹³⁶ Hill, Stycos, & Back, *supra* note 66, at 660.

¹³⁷ *Id.*

How a society uses language is arguably one of the strongest forms of biopolitics. According to Foucault, biopolitics manifests through strategies of power that are pervasive in modern society. Political power in society is “not merely prohibiting, disciplining and punishing but aggressively molding, shaping and forming human behavior, personalities, and desires.”¹³⁸ More broadly, modernity is marked by biopower through an explosion of “numerous and diverse techniques for achieving the subjugation of bodies and the control of populations,”¹³⁹ which are manifested through norms, institutions, academic disciplines, and rules as well as in the language we use to convey those norms, as illustrated in this case.¹⁴⁰

Seven years later, in *Gonzales v. Carhart (Carhart II)*, Supreme Court Justice, Anthony Kennedy authored the 5–4 decision that upheld the federal Partial Birth Abortion Ban Act of 2003¹⁴¹ against constitutional challenges creating an undue burden on the right to an abortion and the Act’s lack of an exception for abortions necessary to protect the health of the mother.¹⁴² Less subtly, the Court employed descriptive language that further underscored the use of biopower as exercised by the State in regulating women’s bodies. As discussed below, the Court made strategic rhetorical choices by using vivid language to push a political agenda. The use of this language, especially when setting legal precedents, is a powerful tool not only for creating the legal standards our society relies on but also for influencing

¹³⁸ Dr. Laurette T. Liesen & Dr. Mary Walsh, *The Competing Meanings of “Biopolitics” in Political Science: Biological and Post-modern Approaches to Politics*, APSA 2011 ANNUAL MEETING PAPER 6–7 (Aug. 1, 2011).

¹³⁹ MICHEL FOUCAULT, *THE FOUCAULT READER* (Paul Rabinow, ed., New York: Pantheon, 2010).

¹⁴⁰ MICHEL FOUCAULT, *THE WILL TO KNOWLEDGE: THE HISTORY OF SEXUALITY* 140 (Robert Hurley trans., New York: Vintage Books, 1978).

¹⁴¹ 18 U.S.C. § 1531 (The Partial-Birth Abortion Ban Act of 2003 is a federal statute passed that bans partial-birth abortion, also referred to as intact dilation and extraction, to terminate a pregnancy).

¹⁴² *Gonzales v. Carhart*, 550 U.S. 124 (2007) [hereinafter *Carhart II*].

public opinion, both of which are effective ways for the government to utilize biopower.¹⁴³

First and foremost, the language used throughout the *Carhart II* decision barely featured the word “woman.”¹⁴⁴ The Court began its opinion by speaking in general terms about women’s equality, but the word “woman” rarely appears in the Court’s lengthy description of the abortion methods in that case.¹⁴⁵ One might thus “attribute the disappearance of the woman to the Court’s adoption of medical discourse rather than to conscious choice,” but, regardless of intent, the language used highlights the Court’s authority over a woman’s bodily autonomy.¹⁴⁶

Justice Kennedy’s majority opinion graphically described the details of the regulated abortion procedure in medical terms such as “dilation and extraction,” “D&X,” “intact dilation and evacuation,” or “intact D&E,” but, in more politically-charged terms, the procedure is often referred to as “partial-birth abortion.”¹⁴⁷ Starkly juxtaposing this language, Justice Kennedy used flowery language when describing the “bond of love the

¹⁴³ *Id.* at 139 (By way of example, Justice Kennedy included testimony from an abortion nurse who described the following to the Senate Judiciary Committee: “The baby’s little fingers were clasping and unclasping, and his little feet were kicking. Then the doctor stuck the scissors in the back of his head, and the baby’s arms jerked out, like a startle reaction, like a flinch, like a baby does when he thinks he is going to fall [. . .]. The doctor opened up the scissors, stuck a high-powered suction tube into the opening, and sucked the baby’s brains out. Now the baby went completely limp”) (The opinion is littered with similar descriptions).

¹⁴⁴ B. Jessie Hill, *Gender on the Frontiers—Confronting Intersectionalities: Dangers Terrain: Mapping the Female Body in Gonzales v. Carhart*, 19 COLUM. J. GENDER & L. 649, 660 (2010).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Carhart II*, 550 U.S. at 135; 18 U.S.C. § 1531(b)(1)(A)-(B) (The Act describes the procedure as: “deliberately and intentionally vaginally deliver[ing] a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus; and . . . perform[ing] the overt act, other than completion of delivery, that kills the partially delivered living fetus”).

mother has for her child” but then relied on grotesque imagery to describe the abortion procedure itself.¹⁴⁸ To compare, Justice Kennedy wrote (what he assumed) to be a woman’s experience as,

[i]t is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know: that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form.¹⁴⁹

But when describing the actual procedure, he uses macabre sentences such as the “doctor [piercing] the skull and vacuum[ing] the fast-developing brain,”¹⁵⁰ and relies on remarks from witness testimony at the Senate Judiciary Committee who describes a procedure as “[t]he baby’s little fingers . . . clapping and unclapping” and “his little feet . . . kicking,” until the doctor “stuck the scissors in the back of his head,” and then “sucked the baby’s brains out” with a suction tube, causing “the baby” to go “completely limp.”¹⁵¹

The above excerpt of the *Carhart II* opinion illustrates the impact of language and its influence on the power exercised over the population and women, in particular. Even more so, such vivid imagery is difficult to read, exceeding the degree of disturbing detail readers are likely to find even in Supreme Court cases describing actual crimes of violence.¹⁵² The repetition of gory descriptions in the opinion instills a sense of moral turpitude and, thus, a justification for exerting power over a woman’s body. The language used is intended to make readers uncomfortable, disgusted, and unsupportive. This graphic theatrical style is aimed at creating authority and

¹⁴⁸ *Carhart II*, 550 U.S. at 159–60.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Carhart II*, 550 U.S. at 137-139 (quoting H.R. Rep. No. 108-58, at 3 (2003); Hill, *supra* note 144 at 657.

¹⁵² Hill, *supra* note 144 at 663.

public support for State-controlled autonomy. This is precisely the dangerous line that Foucault invokes when discussing the State's use of language as a technique for achieving the subjugation of bodies and the control of populations.

V. CONCLUSION

“History disappears [and] [i]f we don’t capture it and keep it in the present, we have a real danger of repeating terrible things that happened in the past.”

- Linda Evans,¹⁵³ a California Coalition for Women Prisoners Member¹⁵⁴

Girl power has echoed through the decades since the rise of the Spice Girls. Behind the shadows of those women empowerment chants, though, lies the dark history of biopower on the subjugation of women's bodies. Biopower primarily focuses on two avenues of power: (1) power over the human body and (2) power over the population as a whole. In an interview from 1982, Foucault further summarized three dimensions of his work detailing biopower: (1) the axis of knowledge, (2) the axis of power, and (3) the axis of ethics.¹⁵⁵ In the final dimension of his work, the axis of ethics, he stated that he studied “the relationships between truth, power and self.”¹⁵⁶ Foucault's work reminds us that our bodies are, in a sense, a battlefield—and if that is true, then feminism needs to get a good deal more

¹⁵³ Cayla Mihalovich, *Forced Sterilization Survivors Undertake Own Healing After Feeling ‘Silenced Again’ by State*, KQED, (Apr. 15, 2024), <https://www.kqed.org/news/11982828/forced-sterilization-survivors-undertake-own-healing-after-feeling-silenced-again-by-state> [https://perma.cc/X8YG-5S7T].

¹⁵⁴ The California Coalition for Women Prisoners (CCWP) is a grassroots social justice organization that challenges the institutional violence imposed on women, transgender people, and communities of color by the prison industrial complex (PIC). CCWP members were creating a memorial quilt for prison sterilization survivors.

¹⁵⁵ Arnold I. Davidson, *Archaeology, genealogy, ethics in FOUCAULT: A CRITICAL READER* 221–333 (David Couzens Hoy, ed., Blackwell, 1986).

¹⁵⁶ *TECHNOLOGIES OF THE SELF: A SEMINAR WITH MICHEL FOUCAULT* 15 (Luther H. Martin, Gutman Huck, & Patrick H. Hutton, eds., Univ. of Mass. Press, 1988).

physical.¹⁵⁷ But what more can women, girls, and feminism do? Have the marches and movements, slogans, and chants done enough? According to the Pew Research Institute,¹⁵⁸ who surveyed 3,143 United States adults in 2020, seven in ten say that the feminist movement has done at least a fair amount to advance women's rights.¹⁵⁹ However, about six in ten say feminism has helped the lives of white women more (64%) than it has done the same for Black (61%) or Hispanic (58%) women. Notably, just 41% of women say the movement has helped them personally.¹⁶⁰

Further with recent Supreme Court decisions, what does this mean for women and their bodily autonomy and where do we go from here?¹⁶¹ Poignantly, Michele Goodwin, a Law Professor at the University of California notes, "[o]n one hand, there is a law that says that certain categories of people shall be prevented from determining their own reproductive destiny, such as to be able to have a child [and] [o]n the other hand [are] lawmakers enacting laws saying, '[w]e will force you to have

¹⁵⁷ Holly Henderson, *Recent Development: Feminism, Foucault, and Rape: A Theory and Politics of Rape Prevention*, 22 BERKELEY J. GENDER L. & JUST. 225, 251 (2007).

¹⁵⁸ Juliana Horowitz & Ruth Igielnik, *A Century After Women Gained the Right To Vote, Majority of Americans See Work To Do on Gender Equality*, PEW RSCH. CTR., (Jul. 2020), https://www.pewresearch.org/wp-content/uploads/sites/20/2020/06/PDST_07.07.20_19thamendment.FULLREPORT.pdf [<https://perma.cc/S447-A8KF>]. ("Pew Research Center is a nonpartisan fact tank that informs the public about the issues, attitudes and trends shaping America and the world. It does not take policy positions. The Center conducts public opinion polling, demographic research, content analysis and other data-driven social science research. It studies U.S. politics and policy; journalism and media; internet, science and technology; religion and public life; Hispanic trends; global attitudes and trends; and U.S. social and demographic trends").

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ Adam Liptak, *In 6-to-3 Ruling, Supreme Court Ends Nearly 50 Years of Abortion Rights*, N.Y. TIMES, (Jun. 24, 2022) <https://www.nytimes.com/2022/06/24/us/roe-wade-overturned-supreme-court.html> (last visited May 14, 2024). (On June 24, 2022, The Supreme Court overturned *Roe v. Wade*, "eliminating the constitutional right to abortion after almost 50 years in a decision that will transform American life, reshape the nation's politics and lead to all but total bans on the procedure in about half of the states").

children even when you don't want to,' and there's a lot in common in that."¹⁶²

And so, when biopower is considered, it is important to weigh whether the ethics of truth, power, and self give rise to the State controlling women's physical autonomy and the population's autonomy at large. Under these circumstances, the embodiment of Girl power may never be fulfilled against the complex barriers imposed by the government. But despite this, maybe akin to the Spice Girls, perhaps we can find a way to manufacture Girl power into real power one day.

¹⁶² Meena Venkataramanan, *She survived a forced sterilization. Activists fear more could occur post-Roe*, THE WASH. POST, (July 24, 2022, 7:00 AM EDT), <https://www.washingtonpost.com/history/2022/07/24/forced-sterilization-dobbs-roe/> [<https://perma.cc/99UV-JFBC>].

