The medical discourse and the sterilization of people with disabilities in the United States, Canada and Colombia: From eugenics to the present.

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ABSTRACT

Science and medicine are not objective or neutral fields of knowledge. Specifically, the medical discourse about people with disabilities has been historically shaped by elements like ideology, and moral, political and economic views. Proof of this, are methods for measuring intelligence, such as Craniometry and IQ testing, and the eugenic scientific theory and movement, which related "feeblemindedness" with gender, racial and social stereotypes, and the degeneration and lack of progress of societies. This work studies current judicial decisions of non-consented sterilization of people with cognitive disabilities of the United States, Canada and Colombia in a comparative perspective, and analyses the different standards and requirements judges have adopted to address this subject. This thesis argues that (1) it is necessary to challenge the way the law tends to base reproductive decisions of people with disabilities mainly on medical expert opinions, relying on these opinions as impartial and objective knowledge; and (2) it is necessary to study the current cases of non-consented sterilization of people with cognitive disabilities in the context of eugenics in each of these countries, where sterilization was used to decide what sorts of people should exist. This work claims that by allowing sterilization decisions to be based on scientific expert opinions, legal systems will forever be immersed in the medical model of disability, where diagnoses are more important than rights.

RESUME

La science et la médicine ne sont pas des champs de connaissance objective ou neutre. En particulier, le discours médical sur les personnes handicapées a été historiquement formé par des éléments tels que l'idéologie et les regards moraux, politiques et économiques. Une preuve de cela se sont les méthodes pour mesurer l'intelligence tel que la craniométrie et les tests de QI, ainsi que la théorie et le mouvement scientifique eugénique, qui met en relation la «faiblesse d'esprit» avec le genre, les stéréotypes raciaux et sociaux, et la dégénérescence et le manque de progrès des sociétés. Ce travail étudie des décisions juridiques actuelles à propos de la stérilisation sans consentement des personnes souffrant de handicaps cognitifs aux États-Unis, au Canada et en Colombie dans une perspective comparative, et analyse les différentes normes et exigences adoptées par les juges pour traiter le sujet. Cette thèse soutient que: (1) il est nécessaire de contester la façon dont la loi tend à des décisions en matière de reproduction des personnes handicapées en se basant principalement sur des expertises médicales, comme s'il s´agissait d´un avis impartial et objectif; et (2) il est nécessaire d'étudier les cas actuels de la stérilisation sans consentement des personnes ayant des déficiences cognitives dans le contexte de l'eugénisme de chacun de ces pays où la stérilisation a été utilisé pour choisir quel type de gens devrait exister. Ce travail argumente qu'en permettant que les décisions sur les stérilisations soient prises sur la base des avis d'experts scientifiques, les systèmes juridiques seront toujours plongés dans le modèle médical du handicap, où les diagnostics sont plus importants que les droits.

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[1] The opinions expressed here do not necessarily express the views of OSI.

Introduction: Thinking about eugenics in a "post eugenic" era

Medical arguments have historically determined the lives of people with disabilities, permeating all spheres, including the private, political, social, and economical spheres. In many cases, medical diagnoses still determine the state's relationship with people with disabilities, as well as their rights and legal capacity. Traditionally, the law has analyzed the sexuality and reproduction of people with disabilities under the lens of medical arguments, which have moved from "genetic/biological determinism" to the regulation of who is competent for reproduction. The Eugenic movement shows how genetic determinism theories can be translated into law, leading to the imposition of state measures such as forced institutionalization, mandatory segregation, and compulsory sterilization of millions of people with disabilities in various countries.[2] Nowadays, scientific and legal consensus understands eugenics as a dark chapter of history, as scientific progress and human rights efforts reject eugenics' principal arguments and practices**.** Thus, it is now possible to speak of a current "post eugenic" era, where human rights advocates reject coerced reproductive practices and highlight the rights of people with disabilities.

Furthermore, different countries with a history of strong eugenic practices, such as the United States, Canada, Germany, Sweden, Switzerland and Denmark, have implemented investigation commissions, historical memory mechanisms, and monetary compensation

[2] Wendy Kline, *Building a Better Race: Gender, Sexuality, and Eugenics from the Turn of the Century to the Baby Boom (*Berkeley: University of California Press*,* 2001) [Kline].

for people who were forcibly sterilized by the state.[3] Moreover, governments have offered apologies for forced sterilizations conducted during the eugenics period. For instance, in 1999, the government of the province of Alberta recognized and apologized for the forced sterilizations authorized and performed by eugenics boards. Premier Ralph Klein stated, "We extend regrets for the actions of another government, in another period of time. It's unfortunate".[4] Similarly, in 2002, the Governor of the State of Virginia, Mark R. Warmer, delivered a formal apology for Virginia's participation in eugenics, which led to the forced sterilization of about 7,450 people who were not considered suitable for reproduction.[5] The apology referred to the Eugenic movement as a "shameful effort in which state government never should have been involved".[6] On 13 May 2012, the German Medical Society released the *Nuremberg Declaration* apologizing for the human rights violations committed by the German medical community during the Holocaust,

[3] On 1980, The German government offered compensation to victims of forced sterilization during the Holocaust. This compensation was a lifetime payment of DM 5,000. In the case of Alberta, the government offered "about $82 million to one group of 246 victims: roughly $325,000 each." "Alberta apologizes for forced sterilization". In Switzerland, the Federal government has offered compensation and founded research about the sterilization practices in the country, which especially affected the gypsy population. In Sweden, the government funded a commission to research about the sterilization practices during eugenics. As a result, the government established a compensation of 75,000 Swedish crowns to the people who were forcibly sterilized. Finally, in 1997 the Denmark government conducted an official investigation about the country´s sterilization act. See: Laura Shaw, "Germany", Laura Shaw and Erna Kurbegovic," Denmark" "Sweeden", and Gerodetti, "Switzerland", University of Alberta, (2010), online: http://eugenicsarchive.ca/discover/world/51c2795697b8940a5400000f. See also: CBC News, (9 November 1999) online:<http://www.cbc.ca/news/canada/alberta-apologizes-for-forced-sterilization-1.169579>.

[4] "Alberta apologizes for forced sterilization", CBC News, (9 November 1999) online: < http://www.cbc.ca/news/canada/alberta-apologizes-for-forced-sterilization-1.169579>.

[5] ¨Virginia apologizes for eugenics policy¨, BBC News, (3 May 2003), online: < http://news.bbc.co.uk/2/hi/americas/1965811.stm >.

[6] ¨Virginia governor apologizes for eugenics law¨, USA Today, (2 May 2003), online: < http://usatoday30.usatoday.com/news/nation/2002/05/02/virginia-eugenics.htm>.

including the forced sterilization of an estimated 400,000 people with disabilities.[7] The German Medical Society recognized that, during the Eugenics movement, "(...) the most serious human rights violations did not originate from the political authorities, but rather from the physicians themselves... with the substantial involvement of leading representatives of the medical association... as well as with the considerable participation of university medicine and biomedical research facilities".[8] Hence, different governments have categorized eugenics as a discreditable movement that victimized millions of people around the world.

Responding to a history of reproductive abuses, international human rights treaties and their committees have specifically rejected practices of coerced or forced sterilization, considering such actions open violations of the right to dignity, physical and mental health, as well as reproductive freedom and the requirement of informed consent.[9] By 1992, the Committee on the Elimination of Discrimination against Women (CEDAW Committee) highlighted that compulsory sterilization "affects women's physical and mental health, and infringes on the right of women to decide on the number and spacing of their children".[10] Likewise, the United Nations Human Rights Committee recognizes forced sterilization as a "violation of the right to be free from torture, and cruel, inhuman,

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[7] Laura Shaw, "Germany", *Eugenics Archives,* University of Alberta, (2010), online: http://eugenicsarchive.ca/discover/world/51c2795697b8940a5400000f, citing Proctor, R, *Racial Hygiene: Medicine Under the Nazis* (Boston, Harvard University Press, 1988).

[8] Shmuel Reis, "Reflections on the nuremberg declaration of the German medical assembly"(2012) 14 IMAJ 532 at 532 (http://www.ima.org.il/FilesUpload/IMAJ/0/41/20536.pdf).

[9] *A.S. v. Hungary*, Committee on the Elimination of Discrimination against Women (CEDAW) Thirty-sixth session, 7-25 August 2006 , A/C/36/D/4/2004.

[10] *General Recommendation No. 19: Violence against women*, UN Committee on the Elimination of Discrimination Against Women (CEDAW), llth session, 1992, at para 22 [CEDAW General Recommendation No 19].

or degrading treatment or punishment".[11] In specific, the Committee on the Rights of the Child, warned states about the still existing practice of sterilization of children with disabilities, particularly girls, and established "(…) This practice, which still exists, seriously violates the right of the child to her or his physical integrity and results in adverse life-long physical and mental health effects. Therefore, the Committee urges States parties to prohibit by law the forced sterilization of children on grounds of disability."[12]

More recently, the United Nations Convention of the Rights of Persons with Disabilities (United Nations Convention) adopted the *social model* of disability. This model understands disability as a social phenomenon related to the existence of, and the interaction of persons with disabilities with "various barriers" that might "hinder their full and effective participation in society on an equal basis with other".[13] In doing so, the United Nations convention "buried" the *medical model* of disability, which understands persons with disabilities in terms of diseases and diagnoses, and limits their life alternatives to medical rehabilitation and normalization.[14] Particularly, the Convention proclaims the right of people with disabilities to get married, decide the number of children they want to have, have access to reproductive information, preserve their

[11] *General Comment No. 28*, Human Rights Committee, Equality of rights between men and women (CCPR), Sixty-eighth session, 29 March 2000, CCPR/C/21/Rev.1/Add.1, at para11 and 20 [CCPR General Comment No 28].
[12] *General Comment No 9,* UN Committee on the Rights of the Child (CRCCommittee), 43rd session*,* 27 February 2007*,* CRC/C/GC/9*,* at 16 para 60 [CRC General Comment No 9].
[13] *Convention on the Rights of Persons with Disabilities*, UN General Assembly, 24 January 2007, A/RES/61/106 [*CRPD*].
[14] Agustina Palacios, *El modelo social de discapacidad: orígenes, caracterización y plasmación en la Convención Internacional sobre los Derechos de las Personas con Discapacidad* (Madrid, CERMI, 2008) at 66.

integrity, and be free from forced sterilization or any other cruel and degrading treatment.[15] The United Nations Convention establishes that all "States Parties shall take effective and appropriate measures to eliminate discrimination against persons with disabilities in all matters relating to marriage, family, parenthood and relationships, on an equal basis with others (…)". Moreover, the Convention mandates that states must guarantee people with disabilities the rights to "decide freely and responsibly on the number and spacing of their children and to have access to age-appropriate information, reproductive and family planning education (….)", and the right to "retain their fertility on an equal basis with others".[16] In particular, the Committee on the Rights of Persons with Disabilities has established that women with disabilities "are subjected to high rates of forced sterilization, and are often denied control of their reproductive health and decision-making, the assumption being that they are not capable of consenting to sex."[17] Taking into account the emphatic rejection by human rights instruments of forced or coerced sterilization practices, the current social model of disability, and the recent acknowledgments of the sexual and reproductive rights of people with disabilities, it is important to question whether traditional eugenics' logics and narratives have been eliminated. In fact, non-consented sterilization of people with disabilities is still a common practice in many countries of the world, such as the United States, Spain, México, Egypt, India, and Colombia.[18] Most of the legal systems that still allow these

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[15] *Convention on the Rights of Persons with Disabilities*, UN General Assembly, 24 January 2007, A/RES/61/106 [*CRPD*], articles 15, 17, 23 [*CRPD*]
[16] *CRPD*, *supra* note 15 art 23.
[17] *General Comment No 1*, Committee on the Rights of Persons with Disabilities (CRPD), 11TH Session, 31 March–11 April 2014, CRPD/C/GC/1, at 30 [CRPD General Comment No1].
[18] Open Society Foundations, "*Against Her Will: Forced and Coerced Sterilization of Women Worldwide*" (September 2011) online: <http://www.soros.org/

practices have mechanisms of guardianship and substitute consent that permit legal guardians, family members or a judge to authorize sterilization procedures.[19] Usually, when dealing with the judicial authorization of sterilization procedures for people with disabilities, judges rely on medical expert opinions to determine the person´s "capacity to consent", "capacity to decide", "capacity to procreate", "best interests", and decide if the person should or should not be sterilized without his or her informed consent. This is done on the blanket assumption that medical arguments are neutral and objective in character, and that they bring scientific certainty to the case.

Generally speaking, the existing literature on sterilization of people with disabilities is limited to human rights violations' analysis, or to historical works about eugenics. On the one hand, human rights discussions concerning forced and coerced sterilization lack the historical context, as they limit their analyses to the evident violation of the rights of people who are forcibly sterilized. [20] Most of the times, international Committees recommendations, and human rights advocacy materials do not examine the practice of sterilization within its eugenic context, and do not question the different meanings forced sterilization procedures have had for certain populations throughout history. [21] On the other hand, despite the existence of different historical works about eugenics and

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initiatives/health/focus/law/articles_publications/publications/against-her- will-20111004/against-her-will-20111003.pdf> at 6 [Against Her Will].

[19] Against Her Will, *supra* note 15.

[20] Human Rights Watch "*Sterilization od Women and Girls with disabilities" (*November 2011), online: < https://www.hrw.org/news/2011/11/10/sterilization-women-and-girls-disabilities>. See also: Against Her Will, *supra* note 15. Ana Peláez Narváez, Beatriz Martínez Ríos, and Mercé Leonhardt Gallego, *Maternidad y Discapacidad* (Madrid: Cermi, 2009). CRPD General Comment No1, *supra* note 17. CRC General Comment No 9, *supra* note 12. CCPR General Comment No 28, *supra* note 11. CEDAW General Recommendation No 19, *supra* note 10.

[21] *Ibid.*

compulsory sterilizations, most of these analyses do not consider the relationship between past eugenic conceptions and the current situation on the topic.[22] As a consequence, most of the existent literature on forced sterilization does not challenge the current legal and medical structures that still lead to these situations, or the ways in which the medical discourse once grounding eugenics may still be present today in the specific case of sterilization of people with disabilities.

This work addresses contemporary cases of judicial authorization of sterilization of people with disabilities in the United States, Canada and Colombia, and challenges the way the law has used and valued medical expert opinions on people with disabilities by questioning the historical context in which these opinions were voiced and the inherent "objectivity" of medical theories. This thesis discusses two main arguments. It first questions the perceived objectivity of the medical discourse in the cases of sterilization of people with disabilities. It argues that it is necessary to challenge the way the law tends to base mainly on medical expert opinions to take reproductive decisions of people with disabilities, relying on these opinions as impartial and objective knowledge. Using critical literature about the medical discourse and the use of medicine in law, this work

[22] Kline, *supra* note 2. Mauricio Nieto, "Poder y conocimiento científico: nuevas tendencias en historiografía de la ciencia" (1995) 10 hist crit 3-14. Marius Turda, *Modernism and Eugenics (*New York: palgrave mcmillan, 2010). Randall Hansen & Desmond King, *Sterilized by the State. Eugenics, race and the population scare in Twentieth North America* (New York: Cambridge University Press, 2013). Philip R. Reilly, *The Surgical Solution. A History of Involuntary Sterilization in the United States* (Baltimore: The Johns University Press, 1991). Nancy Ley Stepan, *The Hour of Eugenics. Race, gender and nation in Latin America* (New York: Cornell University Press, 1991). Angus McLaren, *Our Own Master Race. Eugenics in Canada 1885-1945* (Toronto: McClelland & Stewart Inc., 1990). Jane Harris-Zsovan, *Eugenics and the Firewall. Canada´s Nasty Little Secret* (Manitoba: J. Gordon Shillingford, 2010). Carlos Ernesto Noguera, *Medicina y Política. Discurso médico y prácticas higiénicas durante la primera mitad del siglo XX en Colombia* (Medellin: Fondo Editorial Universidad EAFIT, 2003).

argues that medical opinions can be charged with ideology, moral, political and economic elements, and preconceptions about disability, and that the law should assume a critical position towards them, particularly in the context of forced sterilization. This work claims that by allowing sterilization decisions to be made by doctors and to be based on scientific expert opinions, law is forever immersed in the medical model of disability, where diagnoses are more important than rights.

Second, taking into account that during eugenics, sterilization procedures were used to prevent people with disabilities from reproducing in order to stop the "degeneration" of the race, this thesis affirms that the still-existing practice of coerced sterilization of people with disabilities must be studied in the context of the eugenics movement. By studying the context of eugenics, this work aims to provide a better understanding of the contemporary sterilizations practices of people with disabilities in Colombia, the United States and Canada. Furthermore, it aims to highlight how the medical discourse around the reproduction of people with disabilities has been transformed since the era of eugenics, but it is still present in the contemporary legal systems.[23]

Methodological considerations

[23] "While eugenic ideas and practices as traditionally conceived are largely discredited today, new concerns have emerged with advances in reproductive technology and growing knowledge about human heredity. These concerns focus on the re-emergence of strands of eugenic thinking in new practices and policies, what is sometimes called a concern with *newgenics*." Robert A. Wilson, "Eugenics", *Eugenics Archives,* University of Alberta, (2010), online: <http://eugenicsarchive.ca/discover/encyclopedia/5233ce485c2ec500000000a9. >.

In order to examine the phenomenon of sterilization of people with disabilities, this thesis integrates interdisciplinary, comparative, and doctrinal methods of analysis.[24] First of all, it uses an interdisciplinary perspective by relying on a historical analysis of eugenics and other scientific theories that were once considered reliable medical advances. The use of a historical approach responds to the need to contextualize of the practice of sterilization, understand how it has been used, and in which socio political and economic scenarios it has taken place. By using a historical perspective, this thesis does not aim to criticize past theories and conceptions in light of current social and political values. Instead, history is used to understand the fluidity of knowledge and social conceptions about people with disabilities, and to explore the processes and transformations of scientific discourse, ideals and ideas.

Additionally, the historical perspective used in this work aims at deconstructing assumptions about scientific objectivity and isolation from other fields. By using examples from the history of science, this analysis will show how medical theories that are now conceived as 'bad science', were once perceived as scientific truths, and how some of their premises and arguments are still present in today´s medical discourse. This exercise does not attempt to deny the veracity of medical opinions or the fundamental importance of medical advances and knowledge for persons with disabilities, who generally require medical support in their daily life. Contrary, it considers that it is important to recognize that science, and specifically medicine are not autonomous fields

[24] "Comparative Law and its methodology" in Geoffrey Samuel, eds, *Research Methods in Law* (New York: Routledge, 2012).

of knowledge and that they can be charged with ideology, cultural ideas, and social preconceptions about disability.

This study also use a comparative methodology in its analysis of the Eugenic movement and the current situation regarding the sterilization of people with disabilities in the United States, Canada and Colombia. This comparative perspective responds to the inherent global character of the Eugenic movement. Indeed, history has shown that scientific ideas and measures linked to this movement were globally transferred, exported and imported.[25] Likewise, the Eugenic movement generated different results, as eugenicists adopted measures "(...) with different scopes, at different times and different countries".[26] Thus, this work explores the geographical transmission of eugenic ideas and theories, studying the different dynamics of regional adaptation and transformation that they faced in each economic, political, and social context.

The selection of the United States, Canada and Colombia is motivated by the existence of the Eugenic movement in these countries, the accessibility of legal sources, and personal interest. Literature on eugenics and disability has discussed how the Eugenics movement was especially strong in the United States, Germany, Canada, and various Scandinavian and Nordic countries, where governments implemented eugenic ideals by creating programs of mandatory sterilization and institutionalized segregation.[27] However, for linguistic reasons, it was not possible to access most of the relevant primary and

[25] Hector Palma, *"Gobernar es Seleccionar". Historia y reflexiones sobre el mejoramiento genético en seres humanos* (Buenos Aires: Jorge Baudino Ediciones, 2005) at 46 [Palma].
[26] *Ibid*.
[27] *Eugenics Archives,* University of Alberta, (2010), online: < http://eugenicsarchive.ca >.

secondary sources on the topic for the non-English or non-Spanish speaking countries, leaving Canada and the United States as the objects of study. The decision to choose the United States and Canada is also motivated by the rich and prolific existing literature on the history of eugenics and forced sterilizations in these countries, and the great influence that the North American Eugenic movement had in other regions of the world.[28] Finally, the selection of Colombia as a focus of study responds to personal academic interests and to the desire to include the Latin American perspective on the subject. Contrary to the case of the United States and Canada, there are few academic studies about eugenics in Colombia, and studies of the current situation with regard to sexual and reproductive rights of people with disabilities are limited.[29] The selection of a Latin American country also contributes to construct an interesting discussion about the geographical transmission of knowledge and legal transplantations, which reflect different socio-political and economic dynamics between nations.

Lastly, this thesis includes a basic doctrinal method, reflected in the study of the current legal frameworks on the authorization of sterilization procedures on people with disabilities in each country. It examines legislation, judicial decisions, and legal literature on the topic, analyzing it from a comparative law perspective by highlighting similarities and differences between the countries, and taking into account local legal and political factors. Specifically, the thesis studies judicial decisions about sterilization of people with disabilities. These decisions have been collected and analyzed according to their

[28] It is important to highlight the work of Wendy Kline, Randall Hansen, Desmond King, Philip Reilly, Kaelber Angus MacLaren, Jane Harris-Zsovan about eugenics in the North American context.

[29] It is important to highlight the work of Carlos Ernesto Noguera about eugenics in Colombia and Nancy Leys Stepan and Hector Palma about eugenics in Latin America.

historical significance and relevance to their current judicial systems. Regarding historical relevance, the selected judicial decisions date back to the 1980s until today, as this period is considered a "post eugenic"[30] era during which many of the human rights international treaties that rejected this practice were adopted.[31] The relevance criterion takes into account whether: i) the decision includes extensive consideration of the topic; and ii) whether the decision influenced posterior cases on the topic, or changed the way the topic was considered.

The methodology used to examine these decisions, consists of: i) a basic analysis of the case and its relevant legal question and answer; ii) the analysis of the medical discourse in the decision; and iii) the decision reached by the judge. In the case of the United States, decisions from state courts from different levels were chosen, as the Supreme Court of the United States has not decided any contemporary case on this topic. For Canada, this thesis analyzes the most important Supreme Court of Canada decision on the topic, as well as some provincial courts cases. Finally, for Colombia, a decision was made to omit analyzing decisions from the Family Court, which decides cases of sterilization in the country. The reason for excluding Family Court decisions lies in the fact that these decisions are not accessible or public consultation; only the parties can consult them. Furthermore, analysis of Family judges' decisions is not within the scope

[30] Erika Dyck adopts the term "Post-Eugenic Era" to refer to the 1970´s, the period of time when sterilization acts were repealed in Canada. Therefore, this term can be adopted to make reference to the period of time (1970´s and 1980´s) when most sterilization acts and measures were overturned in different parts of the world. Erika Dyck, "Canada", *Eugenics Archives,* University of Alberta, (2010), online: < http://eugenicsarchive.ca >.

[31] An example of this is the Convention on the Elimination of All Forms of Discrimination against Women, which was adopted on 1979.

of this project, because this would have implied an extensive recollection and documentation process in Colombia. Instead, this work focuses on the Constitutional Court decisions that have studied sterilization decisions requests when there is a possible violation of basic rights of persons with disabilities. These decisions have determined the guidelines on the subject, and have analyzed the rights of people with disabilities in the context of sterilizations.

The focus of this thesis' analysis of the medical discourse in court decisions centers on: i) the relevance that judges give to a person´s diagnosis and the medical arguments that measure intelligence and capacity; ii) how the courts have constructed the sexuality and reproduction of people with cognitive disabilities; and iii) whether the judicial decision considers past eugenics legislation and measures as relevant factors when deciding if a person with cognitive disability should be sterilized. Through this methodology, this study examines and criticizes the way the law has used and valued medical expert opinions in the case of the reproduction of people with disabilities.

This paper is divided in three parts. Section 1 examines the theoretical bases of the study by introducing the concept of medical discourse, as well as the different ways in which different scholars have challenged the impartiality and objectivity of science. This chapter thereafter explores how medicine has often been used to serve different interests, and has created and reproduced stereotypes about social class, national origin, gender, and race. Lastly, this chapter analyses the role medical discourse plays in legal systems, and how the law has assumed medicine´s inherent objectivity.

Section 2 discusses the concrete case of eugenics, using examples of the movement in the United States, Canada, and Colombia. This chapter examines the general framework of eugenics and the ways in which the different legal systems adopted its premises, ideas, and anxieties. It also studies the arguments behind the eugenic measure of sterilization of people with disabilities and inquires whether there were State programs of compulsory sterilization in these three chosen countries.

Finally, Section 3 analyzes the role current medical discourse plays in contemporary legal procedures of sterilization of people with disabilities. To do so, this chapter studies the legal status of the procedure in each country and the mechanisms that legal systems have put in place to allow it, such as consent by the individuals' guardian, parent or judicial authorization. This section focuses on different judicial decisions of authorization of sterilization of people with disabilities in each aforementioned country, analysing the reasons that have led to its authorisation or denial, and the medical discourse present in them.

1. Challenging medicine´s objectivity and neutrality

Throughout history, scientific knowledge has been conceived as a neutral, rational and objective field of knowledge, and as a synonym of progress and development. Moreover, science has been traditionally understood as a field separated from ideology, culture, morality, sentiments and political discussions and tensions. This chapter shows that despite medicine's claim of objectivity for its scientific method and rhetoric, the medical discourse is often influenced by moral, political, economic and ideological elements. To do so, this chapter proceeds in three parts. First, it shows how the medical discourse is constructed, what it says, and what it leaves unsaid. This part explores diverse critical literature that has challenged the objectivity of science and, in particular, of medical theories. Second, this chapter focuses on the different medical theories for measuring human´s capacity and intelligence. This part aims to show that medical theories about disability have been traditionally influenced by political and ideological agendas about race, class, national origin and gender. Finally, this chapter explores the relationship between law and medicine and the specific role medical expert opinions play in legal systems. It argues that the law still understands medicine as providing a neutral opinion, and relegates its possible biases to cases of corruption or of lack of scientific training of professionals.

Scientific objectivity, independence and neutrality have been common claims in the past. Science as a "truth seeking" discipline, has been understood as mostly rational and independent from the influence of values, religion, ideology or politics. Some scientists, such as Karl Popper and Darwinism expositors, have reinforced the idea of science as an

independent and "value free" field of knowledge. For Karl Popper, there are three different and independent areas of knowledge, which he understands as "worlds". For him, the "Third World" is the place where all scientific theories, mathematical constructions and artistic manifestations are. This world can be understood as partially autonomous from the physical world (world one), and the mental or psychological world (world two). He also characterizes scientific theories as "an objective thought process of work".[32] Another example of how science is perceived as an autonomous and neutral field of knowledge is the scientific radical division between "social Darwinism" and Darwinism itself. During the last decade of the XIX century, scientists started emphasizing how Darwin´s premises of evolution by natural selection were socially rooted and could have social and political implications. As a reaction to this, some representatives of Darwinism created the expressions "Social Darwinism" and "Scientific Darwinism" to indicate the differences between a political, corrupted and biased Darwinism on the one hand, and a legitimate, biological and naturalist interpretation on the other.[33]

1.1. The medical discourse: What is said and left unsaid

Medicine, as a scientific field, has also been interpreted as a value and culture-free discipline. Medicine´s particular methodology and language have reinforced the idea of its inherent objectivity and neutrality, as it has been understood as a way of uncovering facts and data, which are not permeated by any ideological interference. The scientific

[32]Karl Popper, "Three Worlds" *The Tanner Lectures on Human Values* (Michigan: University of Michigan, 1978) at 156.
[33] Olga Restrepo, "El Darwinism en Colombia: Visiones de la Naturaleza y la Sociedad" (2009) 14s: Acta biol. Colomb. 23 at 25.

method emerged as a way of "explaining nature in an objective manner", and it is based on the rules of logic and evidence that prove an specific hypothesis through a systematic and non-intuitive way.[34] For Popper, the scientific method is different from others methods because it places induction at its core and studies the relationship between theory and experience, deriving objective results.[35] Consequently, the scientific method has a positivist character, as it understands the possibility of conquering results that actually reflect reality, and are rational and objective, thus, value-free.

Apart from the use of the scientific method, medicine has also constructed its neutral character by the use of its specific language. It can be argued that medical discourse uses a specific scientific language that reflects its objectives of diagnose and cure. However, the medical discourse encompasses elements that remain unsaid and out of the rhetoric dynamic. Michel Foucault defines the *medical discourse* as a "scientifically structured discourse about an individual",[36] and as a social practice composed of a specific terminology, concrete objectives, perceptions, and other elements that remain invisible and unsaid to society.[37] Foucault explains that the medical discourse has a rational character, which is explained by the use of a specific language, sign values, structured data, the specific anatomical method, and the concept of corporal spatiality.[38] Additionally, Foucault shows how the medical discourse has been constructed around the

[34] Julio Arboleda-Flórez, Christine J.Deynaka, *Forensic Psychiatric Evidence (*Toronto: Butterworths, 1999*)* at 12 and 62 [Arboleda & Deynaka].
[35] As John H Sceski, *Popper, Objectivity and the Growth of Knowledge* (London: Continuum International Publishing, 2007) at 34.
[36] Michel Foucault, *The Birth of the Clinic,* translated by M.Sheridan (London: Routledge, 2003) at xv [Birth of the Clinic].
[37] *Ibid* at xii.
[38] *Ibid* at 246.

collective experience of the clinic, the meanings of disease and death, the meaning of normality, and the idea of human finitude.[39] Similarly to Foucault, social constructionist Donna Haraway maintains that science can be explained as a rhetoric that works with language, and a set of facts and artefacts to persuade society. This process of persuasion helps construct the meaning of effective knowledge and truth.[40] Following this, it can be argued that medical discourse is a rhetoric that embodies different elements and structures of the medical experience, and gives them a rational and neutral character, distinguishing it from ideology and opinion.

The understanding of medical knowledge as autonomous and objective has already been challenged in different ways. Scientific knowledge has been linked to political and socio economical ideologies that reflect structures of power and regulate behaviours, as well as with different philosophical views, moral values, and religious beliefs. Different scholars from disciplines such as history, anthropology, sociology and philosophy, have highlighted how science is not objective but rather related to political, social and economic ideologies. For the scientist Stephen Gould, objectivity is the myth of science,[41] for Barry Barnes, science must not be understood as the embodiment of the "platonic universal".[42] As a reflection of this, Marius Turda affirms that *scientism* is conceived as a sign of modernity, but it has actually been a replacement for religious and political theories. As well, Tzvetan Todorov claims that science, or what is perceived as

[39] Birth of the Clinic, *supra* note 36 at 246.
[40] Donna Haraway, ¨Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Perspective¨ (1988) 14: 3 Feminist Studies 575 at 577 [Haraway].
[41] Stephen Jay Gould, *The Mismeasure of Men* (New York: W.W. Norton & Company, 1981) at 21 [Gould].
[42] Barry Barnes, *Scientific Knowledge and sociological theory* (London: Routledge & Kegan Paul, 1974) at 155.

such, "ceases to be a simple knowledge of the existing world and becomes a generation of values, similar to religion; it can therefore direct political and moral action".[43] Additionally, for the scientist Fausto-Sterling "there is no such thing as apolitical science",[44] as she explains that scientific knowledge has been traditionally influenced by human and political agendas that include different kinds of requests and pressures.[45] Likewise, Sandra Harding explains how the objectivity of science is useful and beneficial to groups in a position of social, political and economic power -such as men- because it gives them "flexibility and adaptability" to maintain their status quo, and to support their ideas and beliefs without losing their social reliability.[46] Harding understands that ignoring science´s intrinsic "political desires, values and interests" is prejudicial for society, and instead proposes a scientific method that starts "from the side of the oppressor".[47]

Morality and religious dogmas have also been present in medical theories, as they have been used to frame immoral behaviours, transforming immorality into specific diagnoses and diseases. An example of this is the categorization of LGBTI[48] identities as psychiatric disorders included in the Diagnostic and Statistical Manual of Mental Disorders (DSM).[49]

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[43] Peter Bowler, *The Mendelian Revolution: The Emerges of Hereditarian Concepts in Modern Science and Society* (London: The Anthones Press, 1989) at17.
[44] Anne Fausto-Sterling, *Myths of gender: biological theories about women and men* (New York: BasicBooks, 1992) at 208 [Fausto-Sterling].
[45] *Ibid.*
[46] Sandra G Harding, *Whose science? Whose knowledge? Thinking from women's lives* (New York: Cornell University Press, 1991) at 143-148 [Harding]
[47] *Ibid* at 149.
[48] This term refers to Lesbians, Gays, Bisexuals, Transgender, and Intersexual people.
[49] Vivek Datta, "When Homosexuality Came Out (of the DSM)"(1 December 2014) *Mad in America. Science, Psychiatry and Community,* online: <http://www.madinamerica.com/2014/12/homosexuality-came-dsm/. > [Datta].

While homosexuality was included in the DMS until 1987, transexualism is still included as ¨gender dysphoria¨ in the most recent DSM-5.[50] The pathologization of immoral behaviours and identities is an illustration of how moral and medical discourses can intersect and overlap each other. This intersection has been reflected in the categorization of LGBTI identities as sins, mental illnesses, and even felonies, as the law has combined medical and moral arguments to criminalize LGBTI identities in different countries.[51] Similarly, controlling women´s sexuality has been another way in which medical arguments have responded to moral concerns and have been institutionalized as legal provisions. As discussed below, compulsory, non-reversible female sterilization procedures have been used as a way to control different and "dangerous" sexualities, including "promiscuous women", "prostitutes", and "feebleminded" women.[52]

Furthermore, Foucault shows how medical rhetoric is not just a result of mathematical thought conceived during the eighteen and nineteen centuries. Instead, he explains the medical discourse as the result of human philosophical, ontological and moral anxieties and fears around the idea of finitude and death.[53] Using the example of psychiatry, Foucault claims that medicine borrowed moral perceptions and "moral therapeutics of the body" and extrapolated them to the understanding and treatment of madness.[54] The use of confinement and the birth of the asylum in the eighteen-century, as a way to treat

[50] Datta, *supra* note 48.
[51] "79 countries where homosexuality is illegal", *Erasing 76 crimes*, online: < http://76crimes.com/76-countries-where-homosexuality-is-illegal/ >.
[52] Kline, *Supra* note 2 at 30.
[53] Michel Foucault, *Madness and Civilization. A History of Insanity in the Age of Reason,* translated by Richard Howard (New York: Vintage Books, 1988) at 245 [Madness and Civilization].
[54] *Ibid* at 159.

mental disorders, is an example of the connection between moral concerns and medical treatments. Foucault explains how people who suffered from these kinds of diseases were often associated with evil and were forced to confinement in order to separate them from society and avoid the "corruption of morals" in their communities.[55] Foucault argues that the role of the doctor was not to be the "arbiter" of what was "evil" and what was "illness", but to be the "guardian" of the fears and dangers that madness produced in society.[56] In this context, the boundaries between illness and sin, morality and health, and treatment and purification were not clear. The medical discourse worked in "complicity" with morality to defend a set of social values. It is important to note that even though the understanding of confinement and psychiatry has transformed with time, it remains closely attached to concepts of danger and social safety.

In addition to ideology and morality, the medical discourse has been related with the concepts of power and control. Relying on a historical approach, Foucault shows how science has been used as an instrument of control in order to discipline and impose certain behaviors on people. Foucault analyzes how the medical, physiological and psychiatric knowledge and discourse can be understood as mechanisms of institutional power and social control.[57] For him, the relationship between power and knowledge is dialectical, so there is no power relation without the correlative constitution of a field of knowledge, and vice versa.[58] Furthermore, Foucault considers medical institutions such as clinics and asylums as places of "normative coercion", and even if they are not

[55] Madness and Civilization, *supra* note 53 at 203.
[56] *Ibid* at 203-205.
[57] Madness and Civilization, *supra* note 53. See also: The Birth of the Clinic, *supra* note 36.
[58] Michel Foucault, *Discipline and Punish: The Birth of the Prison*, translated by Alan Sheridan (London: Penguin, 1977) at 27.

necessarily coercive or violent, they usually try to discipline and control people´s bodies, aiming to normalize them.[59] Consequently, in the medical context, power is present in the scientific discourse and theories, the decisions taken by doctors and professionals, and in the medical institutions and their intrinsic normativity, which, by promoting ideas of what is healthy, normal and abnormal, regulate people´s bodies and minds.[60] An example of how power is present in science and medical arguments is the way medicine has been used to explain and perpetuate the social and economic differences between human groups. In many occasions, the medical discourse has relied on preexisting moral and social notions of a particular phenomenon and translated them into scientific truths and theories. Stephen J. Gould defines this scientific tendency as *biological determinism,* which "holds that shared behavioral norms, and the social and economic differences between human groups-primarily races, classes, as sexes-arise from inherited, inborn distinctions and that society, in this sense, is an accurate reflection of biology".[61] Biological determinism has been beneficial for certain groups in power since it has helped reproduce and legitimize the status quo of people with economic and political power. As the following chapters discuss, the eugenic theory is an example of biological determinism, where science was used to explain the existence of genetically inferior and superior people, due to their medical conditions, race, class or moral behaviors.

Not every scholar agrees with the fact that science and medicine are intrinsically influenced by the historical, social, political and economic context of their time. Some

[59] Robin Bunton & Alan R. Petersen, *Foucault, Health and Medicine (*New York: Routledge, 1997) at xiv.
[60] The Birth of the Clinic, *supra* note 36 at 40-41.
[61] Gould, *supra* note 41 at 20.

authors have opted to relate the ideological dimension of science to the existence of a "bad science", the result of erroneous postulations, or the presence of "intellectual corruption" inside the scientific field.[62] To think of non-neutral science as a corrupted and "poorly done" kind of science[63] implies that there is actually "good science" that can be impermeable to ideological influences of its context. Indeed, as Stephen Jay Gould shows, there have been examples of deliberate alterations of scientific conclusions, where scientists have lied or manipulated the results of their work to prove a conclusion.[64] However, Hector Palma explains in his work about the Eugenic movement in Latin America how it is not enough to expulse partial and biased scientific theories from the field of science. Instead he claims that we should "make a different assessment of what we must believe about science".[65] In this way, this thesis argues that it is necessary to challenge the idea of objectivity in all science, and not confine instances of lack of objectivity to cases of corruption and "bad science".

Taking into account that there can be moral, political and ideological components in scientific and medical knowledge, it is essential to question how to use medical and scientific arguments while acknowledging the varied factors at their roots. Contextualising, deconstructing and being critical about scientific arguments are fundamental steps to understand scientific theories in their own context, at a certain place, space and time. Peter J. Bowler argues that all scientific theories "have an ideological dimension that must be exposed if we are to understand why these particular

[62] Fausto-Sterling *supra* note 44 at 9.
[63] *Ibid* at 208.
[64] Gould, *supra* note 41 at 172.
[65] Palma, *supra* note 25 at 13.

ideas about nature were proposed". [66] Likewise, Mauricio Nieto proposes the deconstruction of scientific discourses in order to "demystify the universality and neutrality of scientific rationality" and as a way of creating and supporting a different and defensible view of society and nature.[67] Nieto affirms that the modern world requires us to assume an ambivalent and critical position towards science, so that we can recognize that "it carries both progressive and regressive elements".[68] While the medical discourse can increase the power of certain nations or social groups, it can also contribute to deprive others of the control they have over their lives.[69] In particular, as this thesis will show, deconstructing and adopting a critical position towards medical arguments is of particular importance in the case of surgical contraceptive sterilizations of people with disabilities in different countries. This step is necessary given that expert medical opinions have been historically used to justify and legally order coerced sterilizations of different people, as discussed in the following chapters.

Throughout history, scholars from diverse disciplines have explained the reasons why science and, specifically, medical arguments, must not be understood in a vacuum, isolated from their inherent contexts, purposes, and predispositions. Even though medical discourse has been constructed and is perceived as objective and impartial, concrete historical examples are evidence of the way in which science and social prejudices can interact with each other. The next section shows how medicine has quantified, measured, and classified human capacities. The way medicine has objectified particular economic

[66]Marius Turda, *Modernism and Eugenics (*New York: palgrave mcmillan, 2010) at 15 [Turda].
[67] Mauricio Nieto, "Poder y conocimiento científico: nuevas tendencias en historiografía de la ciencia" (1995) 10 hist. crit. 3 at 11 [Nieto].
[68] *Ibid* at 12.
[69] *Ibid* at 12-13.

and political ideas, and social preconceptions about certain social groups, is a clear example of medicine's interaction with its political, economic, and social contexts.

1.2. The medical discourse and the measurement of the human being

Medical theories have constantly tried to measure, attach a value to, and classify human capacities. Medicine has understood human capacity in different ways. Determining and ranking intelligence levels is one of those ways. Scientist Stephen Gould clarifies how science has understood that "worth can be assigned to individuals and groups by measuring intelligence as a single quality".[70] The medical discourse has been used to decide who is normal and who is not, and the construction of normality is a direct result of the definition of what is considered a disease, a pathological behaviour, or a disability. As Foucault explains, the understanding of medicine as a field of knowledge must no longer be limited to the study of ills and cures, since it also contains the definition of what is healthy "that is, a study of non-sick man and a definition of the model man".[71] This definition authorizes the medical discourse to adopt a "normative posture. It thus not only distributes advice regarding a healthy life, but also dictates physical and moral standards for the individual to live in society".[72] The notion of medical normality has been shaped around different human anxieties related to morality and progress. In other words, what is normal is what is considered moral. Normality became an organizing principle in many societies, and consequently, "those who displayed abnormal qualities,

[70] Gould, *supra* note 41 at 20.
[71] The Birth of the Clinic*, supra* note 36 at 40.
[72] *Ibid.*

suggesting an inability to improve, were socially stigmatized as potential threats to the advancement of civilization".[73]

For instance, the concept of intelligence was constructed around the definition of feeblemindedness. The term *feebleminded* was born in the 1850s. In the twentieth century, it was linked to social concerns about race, ideas of womanhood, and notions of progress and modernity.[74] The increasing number of what scientists considered feebleminded people, led them to construct theories and methods to measure intellectual and mental normality in order to identify who was mentally normal, and who was not. Craniometry and Intellectual Quotient (IQ) testing are examples of scientific methods built to measure the intelligence of humans and to understand differences among them. Scientists Robert Bennet Bean and Paul Broca developed the theory of craniometry, understood as the study of craniums, in order to calculate human intelligence and capacity. In particular, Paul Broca and his school of thought established a mathematic method to measure cranial capacity. This school of thought argued "there is a remarkable relationship between the development of intelligence and the volume of the brain".[75] Following this, craniometry developed the idea of the "intellectual advantage of bigger heads" and created an objective system for measuring intelligence and determining who was qualified to receive education and working opportunities.[76]

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[73] Kline, *supra* note 2 at 22, citing Douglas Bayton, *Forbidden Signs: American Culture and the Campaign against Sign Language* (Chicago: University of Chicago Press, 1996).
[74]Kline, *supra* note 2 at 16.
[75] Gould, *supra* note 41 at 188.
[76] *Ibid* at 105

In a similar attempt at objectively measuring intelligence, the French psychologist Alfred Binet constructed a standard system of classification of intelligence and mental deficiency. This attempt led to the standardization of mental and intellectual quotient, which by 1908 became the *Intellectual Quotient (IQ)* scale testing.[77] This method created the idea of "mental age" in contrast to the "chronological age" and assigned to each mental age a specific score based on different criteria. As Gould explains, the test's original intention was to create a guide to identify special needs in education centers.[78] However, Binet's followers ended up using the scale as a tool to standardize, classify and divide levels of intelligence under rigid labels, and segregate people with low scores.[79] Scientists Lewis M. Terman and H.H. Goddard, who implemented the IQ testing in North America, used Binet´s scale to create categories of mental age and proposed the social and physical segregation of persons who were found at a lower scale of intelligence. The scale created two levels of deficiency: the *idiots* who had a mental age below 2 years old, and the *imbecile*s with mental ages of 3 to seven years old.[80] Later, Goddard created a third category, the *morons,* for those who were of a mental age between 8 to 12 years old and posed, according to him, the greatest danger for society.[81] These classifications enhanced legal measures such as institutionalization, segregation, and sterilization of the mentally deficient. At the same time, these ideas provided the foundations for the Eugenics movement, which is analyzed in the next chapter.

[77] Gould, *supra* note 41 at 105
[78] *Ibid* at 151.
[79] *Ibid.*
[80] Kline, *supra* note 2 at 23.
[81] *Ibid* at 22-23.

These methods of scientific measurement understand human capacity as a uniform measure. Both craniometry and IQ testing conceive intelligence as a "single innate, heritable and measurable thing",[82] and not as a multifaceted number of human capacities, abilities, and skills. Yet, the understanding of intelligence as a complex phenomenon was not posterior to these theories. Unexpectedly, Binet himself argued that intelligence was not measurable in a linear way.[83] Furthermore, craniometry and IQ testing show how the quantification of human capacities is aligned with modernist premises. Modernism can be described as a generalized turn from religious explanations about the world, to a secularizing political, biological, and cultural understanding of it.[84] The modernist ideal of humanity is based on concepts of progress and rationality; hence the quantification and standardization of intelligence perfectly illustrates modernist rationality ideals. However, as this work shows, modernity´s rhetoric of rationality and secularity, in many cases, masked moral and ideological positions towards disability.

Overall, scientific measuring methods are based on the idea that science is capable of applying rational scientific methods, isolated from context, social preconceptions and ideology. In this way, based on the possibility to objectively measure someone´s abilities and capabilities, scientific methods have been used to determine people's role and status in society. The next section shows how these methods for measuring capacity and intelligence have been used in order to divide, segregate and exclude people, by creating and reproducing racial, social and gender prejudices.

[82] Gould, *supra* note 41 at 25.
[83] *Ibid* at 151.
[84] Turda, *supra* note 66 at xii xiii.

1.2.1. The medical discourse on race, class and national origin

Scientific discourses have also contributed to the deepening of differences between races and nationalities. Craniometry exponents have not hesitated in affirming that the cranial diameter of Caucasian males is bigger than indigenous, Mongol, black, and female craniums.[85] Craniometrist exponents not only measured the cranium, but also measured parts of the brain in order to determinate levels of intelligence. Broca, one of the main expositors of this school, stated that the size of the brain could distinguish intelligent people from people with mediocre talent and differentiate between superior and inferior races.[86] By 1906, craniometry scientist Robert Bennet Bean published an article comparing "the brains of American blacks and whites", in which he evidenced the "black inferiority in hard numbers".[87] For craniometry scientists, black brains were an intermediate between "man and the orang-utan", which was proof of their "paucity of intelligence".[88]

IQ testing proponents also argued that the level of intelligence could be hereditary and explain how low levels of intellect could be intrinsically related to race, national origin and social class. The theory that the average black person´s IQ is inferior to the average white person's IQ, which in turn, is inferior to an Asian person's IQ, has been common since the IQ test was first applied.[89] In 1917, Goddard performed a scientific study with people at Ellis Island that tested Jews, Hungarians, Italians and Russians. As a result of

[85] Nieto, *supra* note 67 at 11.
[86] Gould, *supra* note 41 at 87.
[87] *Ibid* at 77.
[88] *Ibid* at 82.
[89] Alexander Alland, *Race in Mind: Race, IQ, and Other Racisms* (New York : Palgrave, 2002) at 6.

this study, Goddard affirmed, "We cannot escape the general conclusion that these immigrants were of surprisingly low intelligence".[90] In another study, he analyzed a low-income family in New Jersey for a period of time. After investigating their ancestries, he concluded that their level of poverty could be related with a feebleminded ancestor in their family line.[91] Goddard named this family the "Kallikaka family", which later became the "primal myth" of the Eugenics movement.[92] Scientist Lewis Terman studied the heredity character of IQ, and attributed high IQs to factors such as race and class, while giving less importance to the influence that environmental factors and education could have on IQ scores.[93] Likewise, John Langdon Haydon linked the characteristics of Down´s syndrome with the physical appearance of Orientals, specifically Mongolians.[94] Thus, intellectual capacity measured through IQ testing generally supported the proposition that the poor, foreigners and, racial minorities were of lesser intellectual capacity and had lower IQ scores.

IQ testing conclusions transcended the scientific scenario and directly impacted the laws and public policies of different countries during the 20th century. The deportation of foreigners from the United States for reasons of mental deficiency increased "(...) 350 percent in 1913 and 570 percent in 1914 over the average of the five proceeding years".[95] During the same period of time, lack of intelligence was also generally related with

[90] Gould, *supra* note 41 at 167, citing "Mental Tests and the immigrant"(1917) 2 Journal of Delinquency 243 at 251.
[91] *Ibid* at 168.
[92] *Ibid* at 168.
[93] *Ibid* at 188.
[94] *Ibid* at 135. See also F. G Crookshank, The Mongol in our Midst. A Study of Man and his Three Faces (New York: E.P Dutton & Company, 1924.
[95] Gould, *supra* note 41 at 168.

criminality and immorality. Lewis Terman stated in 1916 "Not all criminals are feeble-minded, but all feeble-minded persons are at least potential criminals (…)".[96] Terman considered that by identifying low IQs it was possible to combat criminality, as moral judgment was the result of intelligence. [97] As a consequence, testing people soon became an important task, and IQ testing became a profitable business.[98] Traditionally, in the name of social benefit and prevention of crime, the "treatment" for feeblemindedness consisted of the institutionalization, social exclusion and segregation of these people from their communities.

The idea of genetically defined levels of intelligence has also impacted education policies throughout history. For instance, IQ tests have been used to decide who is "educable" and who is not. In 1969, after a United States Supreme Court decision banned racial segregation in public schools in the South[99], the Phycology professor Arthur Jensen published an article in the Harvard Educational Review using the hereditary character of intelligence to attack "Project Head Start", an education project. This project was a governmental effort to construct free preschools for children from poor neighborhoods in order to provide them with a better education.[100] Jensen explained that investing in the education of people from low socioeconomic status could be "a waste of money and time".[101] Similarly, the genetic basis of IQs suggested the "death sentence for the idea of

[96] Gould, *supra* note 41 at 181, citing Lewis M Terman, *The measurement of intelligence: An explanation of, and a complete guide for the use of the Stanford revision and extension of the Binet-Simon intelligence scale*. (Boston: Houghton Mifflin, 1916) at 11.
[97] *Ibid* at 181.
[98] *Ibid* at 177.
[99] *Brown v. Board of Education of Topeka* 347 US 483(1954).
[100] Alland, *supra* note 87 at 80.
[101] *Ibid*.

egalitarism"[102], since education success was linked to social class and race. Currently, IQ testing keeps being used as an instrument of classification in medical and education scenarios. For example, in Colombia, IQ scores are still requested in order to determine if a person with cognitive disability is "educable", and can be admitted in to the public education system.[103] Furthermore, as chapter 3 of this thesis will show, IQ scores are still relevant when deciding requests of sterilization of people with cognitive disabilities in the United States.

Historical evidence suggests that scientific techniques and theories have contributed to create categorical differences among races and classes. As previously mentioned, it is important to question if these scientific hypotheses were the result of an ideological agenda or if they were genuine scientific mistakes, understood as "bad science"[104]. Gould argues that the leaders of Craniometry considered themselves "servants of their numbers, apostles of objectivity", [105] separated from political ideology. Although Broca´s mathematical methods were meticulous and accurate, his social prejudices were evident

[102] Leon J Kamin, *The Science and Politics of I.Q.*, (New York; Halsted Press, 1974) at 177, citing *The New York Times*, (29 August 29 1971) at 34 [Kamin].
[103] The Decree 366 of 2009 of the Minister of Education establishes the rules that governmental secretaries and institutions must follow in order to integrate people with disabilities in the educational system. The article 3 No 1 of this Decree, states that regional secretaries must first determine and "characterize" the person´s with disabilities capabilities, by applying psycho pedagogical tests. As this article is very general, different regional Secretaries have been applying different tests, including the IQ test. This is the case of Bogota´s Education Secretary, which has established that in order to access to the system of education, children with cognitive disabilities must first present an IQ test, to determine his/her "capacities. (Our translation) Decree 366 *that organize the educational support services for the care of students with disabilities and exceptional skills or talents in the framework of inclusive education*, Minister of Education, Colombia, 2009. See also: "Students with disabilities and exceptional talents", (2015), Secretary of Education of Bogota, online: < http://www.educacionbogota.edu.co/archivos/Temas%20estrategicos/Matriculas/2016/necesidades-educativas.html >.
[104] Harding, *supra* note 46 at 9.
[105] Gould, *supra* note 41 at 74.

in the selection of his samples and his deterministic conclusions.[106] Kamin, Alland and Gould argue that IQ testing was in fact a way to scientifically explain and justify social differences.[107] Moreover, it is necessary to analyze how the improvement of scientific methods and biological and genetic discoveries has modified past scientific understandings about intelligence and capacity. To avoid undertaking an anachronistic analysis, the study of craniometry and IQ testing must not be focused on how outdated they are in comparison with current scientific progress. Indeed, historical anachronism can be understood as the analysis of a past phenomenon with current concepts and knowledge, which expresses ignorance about basic dimensions of time, space, and language of the past.[108] Still, these theories provide an example of the systematic use of medical and psychological discourses to turn subjective judgments into objective and universal truths.

The following section broadly studies and deconstructs the scientific discourse on gender in order to show how it has similarly perpetrated gender stereotypes about women´s skills, level of intelligence, and biological capabilities.

1.2.2. The medical discourse on gender

Similarly to what occurred with race, class and national original, the medical discourse has helped perpetuate gender stereotypes and power narratives that benefit men. Craniometrists also considered that women´s brains were smaller, and concluded that

[106] Gould, *supra* note 41 at 74.
[107] Kamin, *supra* note 102 at 177.
[108] Renan Silva Olarte, "Del anacronismo en Historica y en Ciencias Sociales" (2009) 39: 11 hist. crit. 278 at 287.

"within each race, women have relatively smaller genus than men".[109] Additionally, scientists acknowledged the possible nexus between feeblemindedness, prostitution and "women´s immoral behaviours".[110] Fausto-Sterling shows how during the nineteen and twentieth centuries, scientists undertook numerous studies to understand the differences between sexes and made affirmations about the political and social roles of women and men.[111] Biological "truths" such as the smaller size of female brains, women´s lack of mathematical skills, excessive emotional instability, and their predilection to be better parents, among other characteristics, were based on rigorous scientific inquiries and studies.[112] Such scientific conclusions have had different political implications for women´s role in society. They have frequently been used to support arguments against women's educational inclusion, political participation and representation, and to reduce and determine their job opportunities and employment conditions – for instance, to pay them less than men in similar employment.[113] In addition, biological determinism of sexes has been a convenient tool to control women´s sexuality and to condone different kinds of violence against them, justifying them because of women's "biological" passivity and docility.[114]

Scientific theories that have supported women´s inferiority and predisposition to occupy certain roles in society have generated different reactions and epistemological responses. Feminist scholars such as Fausto-Sterling argue that many scientists have interpreted

[109] Gould, *supra* note 41 at 79.
[110] *Ibid* 181.
[111] Fausto-Stering, *supra* note 44 at 8.
[112] *Ibid* at 12.
[113] *Ibid*.
[114] *Ibid* at 222.

biological questions, experiments and results "through the prism of every day culture", which has historically favored and privileged men.[115] In consequence, Fausto-Sterling understands that the only way to conceive a scientific analysis that is not based on the limitation of the sexes and genders is in a "culture that genuinely respects and values members of both sexes (...)".[116] In turn, Donna Haraway considers the need to use modern and postmodernist critical theories to deconstruct and challenge the discursive meanings of the bodies and the way they were built.[117]

Another feminist proposal is the construction of a "feminist standpoint epistemology" that embraces the idea of a science that starts from the side of the oppressed and not from that of the oppressor.[118] For Kamin, a feminist scientific epistemology must include a strong objectivity, consisting in recognizing that scientific theories take place in a specific historical and social context, and that they are necessarily influenced by previous relations between the object of study and the subject. Thus, the feminist approach to science proposes to incorporate a "systematic examination of such powerful background beliefs",[119] instead of perpetuating scientific notions of neutrality and universality. Consequently, the feminist proposal for treating scientific arguments is not just about challenging their objectivity and reproducing gender hierarchies, but about finding a way to use science as a mechanism of emancipation.[120]

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[115] Fausto-Stering, *supra* note 44 at 9.
[116] *Ibid* 222.
[117] Haraway, *supra* note 40 at 580.
[118] Kamin, *supra* note 102 at 142.
[119] *Ibid* at 149.
[120] Nieto, *supra* note 67 at 11.

Medical theories for measuring the human being have embodied social, economic and political biases as a reflection of the context in which they have developed and taken place. This section showed how Craniometry and IQ testing theories were a reflection of specific political agendas about race, social class, national origin, and gender. These theories shaped concepts of capacity, intelligence, normality and abnormality, and, as a result, they shaped ideas about disability. In this context, it is important to highlight that there was a direct relation between disability or "feeblemindedness", and the political and ideological values on power. "Feeblemindedness", small brains, and low IQ´s were directly linked with the "inferiority" of Afro-descendants, Mongolians, immigrants, poor people, women, alcoholics and sex workers, among other identities that were considered immoral and problematic.

Having explained the theoretical basis of the medical discourse and the different ways in which it has both shaped and reflected social conceptions and values, it is essential to underline that the law has officially adopted and used this discourse. The next section shows how, based on the presumption of objectivity, the law has used medical arguments as objective criteria, evidence, and proof of natural and biological facts.

1.3. The medical discourse and the law

The law has historically used medical theories and opinions in different policies, regulations and judicial cases around the world. The relationship between the law and medical knowledge is reflected in the existence of a field of medicine and a field of law called *legal medicine,* defined as the science that "implies the principles and practice of

the different branches of medicine to the elucidation of doubtful questions in courts of justice".[121] James B. Couch explains how legal medicine has been divided between *medical jurisprudence* and *forensic medicine*.[122] On the one hand, William Curran places *medical jurisprudence* in a broad field that covers the relationship of law and medicine, from scientific topics with legal relevance, such as abortion and euthanasia, to the concrete use of medical arguments as evidence in legal processes.[123] As for *forensic medicine,* Curran defines it as a field of science "related to the investigation, preparation, preservation, and presentation of evidence and medical opinion for the courts of law and administrative, regulatory agencies."[124] From these two fronts, legal medicine works with the objective of helping the law in "the discovery of truth",[125] and aims at educating judges on issues that are beyond their knowledge.[126] Stewart Gilbert argues that the "intimate relationship" between law and medicine is based on medicine´s utility in resolving doubtful questions around the subjects of death, insanity, personal identity, infanticide and abortion, among others.[127]

Predominantly, medical arguments and opinions are considered a type of evidence used to resolve legal disputes that are not limited to medical professional liability cases, but involve criminal, civil, family, and constitutional areas. Medical evidence is considered a

[121] Gilbert H. Stewart. *Legal medicine* (Indianapolis: Bobbs-Merrill, 1910) at 1 [Stetwart], citing Dr James S. Stringham, the first teacher of legal medicine in the united States that teached legal medicine for the first time in Columbia College in 1894.
[122] James B. Couch, " Legal medicine 1986" (1987) 8: 3 J Leg Med 501 at 501 [Couch].
[123] Couch, *supra* note 122 at 501, citing William J Curran, *Titles in the Medicolegal Field: A Proposal for Reform* (1975*)* 1 AM.J.L. & MED. 1.
[124] *Ibid* at 501.
[125] Stewart, *supra* note 121 at 2.
[126] *Act 1437 by which it is issued the Code of Administrative Procedure and Administrative Disputes*, 2012, Colombia, art 236 no l 1 [*Act 1437 of 2012*]
[127] *Ibid*.

kind of *expert evidence* that can be presented in different ways. Gilbert explains how medical evidence can consist in *ocular evidence*, where doctors are asked to testify or give a report of the medical condition of a specific patient or in a post-mortem examination. It can also consist in *expert evidence,* namely the testimony of doctors who are asked to formulate hypotheses and make formal statements about certain cases or questions based on their expertise and experience.[128] Medical evidence can also include biological and DNA studies and testing, epidemiological studies, forensic psychiatry and psychology reports, syndrome evidence, techniques to identify false confessions, and statistics.[129]

Given the widespread evidential use of science in law, it is important to consider the risks of treating it as an impartial source. The *Reference Manual on Scientific Evidence* of the United States shows the existence of malfunctioning laboratories that have hired unlicensed professionals, committed acts of fraud, or provided falsified results.[130] Similarly, when discussing psychiatric evidence used in legal cases, Arboleda-Florez and Deynaka discuss the risks of using "junk science" in legal affairs, as it can significantly affect justice.[131] In this context, junk science is defined as scientific data that has not been "adequately studied, or are no more than fancy flights of the imagination of the practitioner, plain tergiversations of the scientific method, or fabricated gobbledygook

[128] *Act 1437 of 2012, supra* note 126 at 236 no l 1.
[129] Arboleda-Florez & Deynaka, *supra* note 34 at 47-60.
[130] Committee on the Development of the Third Edition of the Reference Manual on Scientific Evidence, *Reference Manual on Scientific Evidence* (Washington: The National Academy Press, 2011) at 28 (http://www.fjc.gov/public/pdf.nsf/lookup/SciMan3D01.pdf/$file/SciMan3D01.pdf) [Reference Manual].
[131] Arboleda-Florez & Deynaka, *supra* note 34 at x- xi.

presented as science."[132] The authors explain how the existence of junk science can be attributed to the lack of research, publications, and training in the subject of forensic science. However, the critical position that legal systems take towards scientific evidence, should not be limited to recognizing what constitutes "junk science", but should expand to readiness to challenge all scientific and medical evidence.[133]

Even if Arboleda-Florez and Deynaka recognize the possibility of a neutral kind of science, they also affirm that "law as an institution needs to be proactive in discerning what may be the appropriate way of using science to administer justice because the credibility and respectability is greatly impacted by the seemingly uncritical use of scientific evidence in some cases".[134] They consider the importance of identifying the weaknesses within the scientific method in order to be critical towards medical arguments.[135] These authors argue that the legal system must be aware of aspects like the political interests behind scientific research projects, where the projects receive funding, who is benefitting from it, and what self-interests might be behind an expert´s opinion.[136] Considering the risks involved in the incorporation of medical knowledge in the law, procedural mechanisms have been put in place to allow for a critical consideration of expert opinions. Expert opinions must meet admissibility conditions in order to be considered within the legal process. In the Canadian legal system, these conditions include factors such as relevance of the opinion, the necessity in assisting the trier of fact,

[132] Arboleda-Florez & Deynaka, *supra* note 34 at x- xi.
[133] *Ibid* at 3.
[134] *Ibid* at 15.
[135] *Ibid.*
[136] *Ibid.*

the absence of any exclusionary rule, and the proper qualification of the expert.[137]. In particular, the Supreme Court of Canada has discussed the reliability of scientific advances or new science, determining that general acceptance is not a prerequisite of admission, but that credibility and perception are important to consider its admissibility.[138] In the United States, by 1993 the Supreme Court decided *Daubert v. Merrell Dow Pharmaceuticals,* and established standards of admissibility of expert testimony.[139] In this case, the US Supreme Court questioned, "what constitutes acceptable scientific evidence, and who should make that decision?"[140] Accordingly, the Supreme Court recognized judges as the "gatekeeper(s)" who must screen proffered expert testimony",[141] and established that in order to admit medical expert testimonies, judges must confirm the relevance and reliability of the witness. About the standard of reliability, the Supreme Court established it consisted in analyzing how "grounded" evidence or testimony is in "methods and procedures of science", as they argued the methodology "distinguishes science from other fields of human inquiry."[142] Furthermore, the Court stated that in order to determine what constitute "good science", judges should review whether there was a previous testing of the scientific theory or technique, if the theory has had previous publications and peer reviews, its potential rate of error, and the "general acceptance" of the theory, among other aspects.[143]

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[137] Arboleda-Florez & Deynaka, *supra* note 34 at 27.
[138] *Ibid at* 30.
[139] Reference Manual, *supra* note 130 at 12. See also: *Daubert v. Merrell Dow Pharmaceuticals* 509 US 579 (1993).
[140] Lola Romanucci- Ross & Laurence R Tancredi, *When law and medicine meet: a cultural view* (New York: Springer, 2007) at 36.
[141] *Ibid* 589, citing *Daubert v. Merrell Dow Pharmaceuticals* 509 US 579 (1993) at 589.
[142] *Ibid* at 593–94.
[143] Reference Manual, *supra* note 130 at 12.

In the Colombian system, the Civil Procedural Code and the Criminal Procedure Code regulate the rules of admissibility of expert evidence in each field. These codes establish general rules of i) admissibility of the expert evidence; ii) contradiction of the evidence; and iii) critical judicial evaluation.[144] The requirements of admissibility include the verification of the impartiality of the experts, who must be free from any cause for disqualification that include not having any nexus with any part of the process, being professionally suitable, and holding proper credentials and experience.[145] The contradictory principle gives the parties the possibility to complement, clarify, or object the expert evidence.[146] Finally, the judicial evaluation rule consists in a critical assessment of the expert evidence by the judge, including the confirmation of the expert´s seriousness and professionalism.[147]

Furthermore, in different legal systems, expert evidence is subject to the adversarial process by which parties are allowed to object or contradict expert evidence.[148] This principle opens the possibility of having more than one scientific theories exposed and to confront them in a legal sphere, showing that scientific knowledge is not absolute and can be subject to debate and inconsistencies.

Accordingly, the law interacts with the medical discourse by adopting and using its neutral and rational character to resolve doubts, construct facts and achieve standards of truth and fairness in different legal processes. Even though legal systems have adopted

[144] Ley 1437 de 2012, *supra* note 126 at art *241* .
[145] *Ibid.*
[146] *Act 1437 of 2012*, *supra* note 126 at art a 238.
[147] Corte Constitucional [Constitutional Court] 1 March of 2011, *C-124* (2011), (Colombia).
[148] *Ibid*.

legal standards to try to control the admission of partial or non-professional medical expert opinions, these mechanisms do not confront science itself. In this way, legal systems accept the premise that a medical ¨truth¨ exists**,** notwithstanding awareness within some social science circles that science in general, and medical discourse in particular, is largely socially constructed.

Overall, scientific history helps us challenge and question medical and biological theories that were once considered unobjectionable truths. The different authors cited in this chapter argue that ideology and moral views have been deeply rooted in scientific interests and medical theories about disability or "feeblemindedness". Furthermore, this chapter showed how the law has used the medical discourse, through expert evidence, in order to establish objective facts and resolve legal uncertainties. Accordingly, it is indispensable to recognize that the medical discourse is still present in the law and is still considered objective knowledge today. It is thus necessary to question the neutral character of medical arguments, and analyze the ways in which it can be loaded with its own social, cultural, political, and economic context. Particularly, this chapter highlighted why is it necessary to contextualize medical opinions on disability, as the concept of disability has been traditionally linked to political, economic, and moral agendas. By doing this, it becomes possible to use and understand medical knowledge in a most critical way, acknowledging its complexity and the diverse effects it could have in people´s lives.

Having analyzed how the medical discourse, and especially the medical discourse around disability, has been constructed, and the fact that it is far from neutral, the next chapter analyses the Eugenics movement from a comparative perspective. Eugenics, as a scientific and social movement that deeply influenced and generated public policies, legal measures, and educational reforms, shows how scientific knowledge has historically interacted with the legal field, and has been determined by the social and political context.

2. The Eugenics movement in a comparative perspective

Eugenics is understood as a polemical and disaccredited scientific movement that generated different measures to influence the reproduction of "fit" and "unfit" people, and thus contribute to the betterment of the race. This chapter studies eugenics as an international scientific, legal and social movement, and focuses on how the movement expressed itself in the United States, Canada and Colombia. The differences found can be explained by each region's scientific academic trends, particular historical settings, and political and social concerns. Through this comparative study, the chapter analyzes how eugenics was constructed around the medical discourse pertaining to the genetically inherited fitness of the human being, while still being shaped by different cultural, social, political and economic factors. This chapter claims that the political and social underpinnings of eugenics should not indicate it was a "pseudoscience" or that it was not about science. Instead, it argues that eugenics provides evidence confirming that the medical discourse is itself a political tool determined by its own political, economic, and ideological context. Furthermore, the Eugenic movement constructed and shaped the concept of feeblemindedness -later understood as disability-, by relating it to anxieties about race, gender, progress, and economic success in each national context.

Each section devoted to the case study countries is further divided in three parts that explore: i) the medical and biological theories adopted by the scientists and politicians of the country; ii) the socio political and economic context, and anxieties that influenced the eugenics movement in that country; and iii) the different eugenic measures adopted in the country. As explained in the methodological considerations of this thesis, this chapter

uses a comparative method that relies on primary sources and secondary literature related to eugenics in the three countries.

In 1883 the English scientist Sir Francis Galton introduced the term eugenics in his book "Inquires into Human Faculty and its Development", in which he defined it as "the science of improving stock—not only by judicious mating, but whatever tends to give the more suitable races or strains of blood a better chance of prevailing over the less suitable than they otherwise would have had."[149] Eugenics is a term adopted from the Greek "good in birth", and it is focused on the principles of heredity and differential fertility.[150] Subsequent scientific discoveries like Gregor Mendel's studies of heredity transmission,[151] August Weismann´s germ plasm theory of heredity,[152] Charles Darwin´s

[149] Robert A. Wilson, "Eugenics", *Eugenics Archives,* University of Alberta, (2010), online: <http://eugenicsarchive.ca >, citing Galton, F. *Inquiries into human faculty and its development (*London: MacMillan and Co., 1883).

[150] Randall Hansen & Desmond King, *Sterilized by the State. Eugenics, race and the population scare in Twentieth North America* (New York: Cambridge University Press, 2013) at 49 [Hansen & King].

[151] In 1866, Gregor Mendel published a paper called "Experiments on Plant Hybridization", which consisted in a study of the characteristics of heredity based on the observation of pea plants. Mendel´s theory of inheritance states that hereditary conditions are transmitted trough generations, and "certain traits are dominant or recessive and how the combination thereof produces observable variations to characteristics (…)". Mendelian heredity theory does not give importance to external factors, and base its understanding of human genetics in the necessary transmission of certain characteristics. Colette Leung and Erna Kurbegovic, "Gregor Mendel publishes his paper, "Versuche über Pflanzenhybriden"", *Eugenics Archives,* University of Alberta, (2010), online: <http://eugenicsarchive.ca>.

[152] In 1893, August Weismann introduced the theory of the "germ plasm", which explains how the "germ plasm" of cells "carried hereditary material". Consequently, Weismann understands hereditary material is transmitted from one generation to the other, and that external factors and influences cannot not change this. Nancy Ley Stepan, *The Hour of Eugenics. Race, gender and nation in Latin America* (New York: Cornell University Press, 1991) at 24. See also: Amy Dyrbye, "August Weisman publishes *The Germ Plasm", Eugenics Archives,* University of Alberta, (2010), online: <http://eugenicsarchive.ca>.

natural selection concept,[153] and Lamarckian and neo-Lamarckian soft inheritance theory[154], among others, influenced eugenics, and positioned it as a relevant medical theory at the beginning of the Twentieth Century.[155] The main eugenics premises are: i. human characteristics and differences are determined by heredity, and just in a small scale, by the social environment, ii. following Darwin´s theory, progress and evolution are determined by natural selection and only the fittest will survive, and iii. there is a deterioration and degeneration of the human species, due to the existence of "unfit" or "unworthy" human beings.[156]

Eugenicist Caleb Williams Saleeby first drew the distinction between "positive" and "negative" eugenics, without suggesting they were good or bad.[157] The term "positive eugenics" was understood as an effort to increase the procreation of "fit" and "healthy" human beings, by encouraging their marriage, family life, and reproduction.[158] On the other hand, "negative eugenics" consisted in an effort to prevent the reproduction of the "unfit". Negative eugenics measures included immigration restrictions, marriage

[153] Charles Darwin Natural selection theory understands "that evolutionary change comes through the production of variation in each generation and differential survival of individuals with different combinations of these variable characters". Consequently, some individuals have characteristics that make them easy to survive than others. These characteristics will transfer from generation to generation. *Stephen Montgomery* , "Charles Darwin and Evolution 1809-2009", 2009, online: < http://darwin200.christs.cam.ac.uk/pages/index.php?page_id=d3 >.

[154] Lamarckian and neo-Lamarckian Soft inheritance theory understands that environment plays an important role in genetics. As a result, this theory states that environment can transform hereditary characteristics of individuals, by acquiring new characters. This theory is explained in the following section. Colette Leung and Erna Kurbegovic, "Gregor Mendel publishes his paper, "Versuche über Pflanzenhybriden"", *Eugenics Archives,* University of Alberta, (2010), online: <http://eugenicsarchive.ca>.

[155] Nancy Ley Stepan, *The Hour of Eugenics. Race, gender and nation in Latin America* (New York: Cornell University Press, 1991) at 24-25 [Stepan].

[156] Palma, *supra* note 25 at 43.

[157] Robert A. Wilson, "Eugenics: positive vs negative", *Eugenics Archives,* University of Alberta, (2010), online: < http://eugenicsarchive.ca > [Eugenics: positive vs negative].

[158] *Ibid*.

prohibition, forced institutionalization, segregation, sterilization, and euthanasia of the "mentally deficient".[159]

Consequently, eugenicists believed in the congenital fitness of humans, and aimed to develop a better race by influencing the reproduction of the most suitable, and preventing the birth of the less suitable people.[160] Eugenics also influenced private and public spheres by creating discourses around what was "healthy", and who was "worthy" and "unworthy".[161] It is necessary to highlight that the concept of *social degeneration* behind eugenics was a response to different contextual factors from the beginning of the twentieth century, such as increasing rates of immigration, changes in the social dynamics of nations, the challenges of modernity, economical competition between countries, increasing urbanization, and new demands from marginalized groups.[162] As this chapter shows, the American, Canadian and Colombian contexts were not the same, and their definitions of social or racial degeneration, as well as their responses, varied considerably.

Eugenics had a global character and an international scope, and successfully impacted diverse countries in different ways. The movement had a strong influence in the United States, Canada, Australia, Japan, Germany, France, Brazil, Norway, Sweden, Switzerland, Finland, Denmark, Iceland, and in other countries where eugenics logics

[159] Eugenics: positive vs negative, *supra* note 157.
[160] Stepan, *supra* 155 at 25.
[161] Turda, *supra* 66 at 20.
[162] Stepan, *supra* 155 at 24.

were present in one way or the other.[163] The international outlook and nature of this scientific movement transpires from the objective of the International Eugenics Congresses that took place in 1912, 1921 and 1932.[164] These Congresses' purpose was to discuss eugenics theories, measures and politics, "in a climate of international cooperation for eugenics goals"[165]. Moreover, after the first Congress, the International Federation of Eugenics Organizations (IFEO) was created and became the organizer of the different national eugenic societies and the exchange of ideas between them.[166]

Nancy Stepan and Wendy Klein show how eugenics was not a homogenous movement, and had diverse scientific basis, interpretations, measures, and results in different parts of the world.[167] Still, some countries shared similarities in the theoretical basis of their conception of eugenics, and in the measures implemented by their eugenicists. On the one hand, as the next sections shows, North American eugenicists mainly adopted Galton's, Mendel's and Weisman's theories that defend the determinacy of heredity and rest importance to environmental factors. On the basis of these theories, they developed strong eugenic measures like compulsory sterilization, eugenic abortion and mandatory institutionalization of people considered "unfit".[168] The North American movement has been related to the German, Scandinavian and Nordic countries' movement, since they

[163] Eugenics: positive vs negative, *supra* note 157.
[164] Colette Leung, Erna Kurbegovic, and Amy Dyrbye, "First International Eugenics Congress is held at the University of London", "Second International Eugenics Congress held at the American Museum of Natural History in New York", and "Third International Eugenics Congress held at the American Museum of Natural History in New York City, *Eugenics Archives,* University of Alberta, (2010), online: < http://eugenicsarchive.ca >.
[165] *Ibid*.
[166] *Ibid*.
[167] Stepan, *supra* note 155. See also: Kline, *supra* note 2.
[168] Kline, *supra* note 2 at 26-32.

embraced the same scientific ideas, and simultaneously adopted many of their strong measures. Moreover, the German Eugenics movement adopted very extreme measures like eugenic euthanasia, compulsory sterilization, and experimentation methods on Jews and people with disabilities, before, and during the Holocaust.[169] Taking this into account, it is important to emphasize that after the World War Two and the end of Hitler's regime, eugenics remained a strong scientific movement in different parts of the world, including the United States and Canada. Eugenicists managed to condemn Hitler´s atrocities while continuing to implement eugenic measures in the United States and Canada, among other countries.[170]

On the other hand, in the *Latin areas* composed by France, Italy, Belgium, and the Latin American countries,[171] the movement has been categorized as "preventive" or "social".[172] Latin eugenicists embraced Lamarckian and Neo-Lamarckism principles, and rejected, in many cases, non-reversible measures like compulsory sterilization and abortion. As the section on Colombia explains in depth, Lamarckian and Neo-Lamarckian theories gave more importance to social and environmental factors than heredity, and believed these factors could effectively impact people's heredity. [173]

Among the chosen countries, the United States was the first to implement eugenics' ideals and measures. As next section shows, United States' eugenicists were pioneers in

[169] Philip R. Reilly, *The Surgical Solution. A History of Involuntary Sterilization in the United States* (Baltimore: The Johns University Press, 1991) at 109 [Reilly].
[170]Kline, *supra* note 2 at 105-106.
[171] "Term used by the Latin International Federation of Eugenics Societies, founded n 1935, to refer to Italy, France, and Belgium as well as Latin America" Stepan *supra* note 155 at 2.
[172] Stepan *supra* note 155 at 88.
[173] Kline, *supra* note 2 at 64-65.

North America, and effectively implemented diverse eugenic reproductive measures during the first decades of the twentieth century.

2.1. Eugenics in the United States

Eugenics was already a topic of discussion during the nineteenth century in the United States, but it was not until the beginning of the twentieth century that it became a national scientific and social movement. The United States' Eugenic movement became one of the world's most predominant, as it legally implemented diverse measures of positive eugenics education, compulsory sterilization, institutional segregation, and long-term commitment of "mental deficient" people.[174] These measures were implemented in many states and used methods for measuring intelligence and capacity as a support. Eugenics in the United States was closely linked to national anxieties about race, women´s role in the family and society, moral standards, and the understanding of mental illness and "feeblemindedness" as a dangerous condition for the progress of the country.

2.1.1. Eugenics' scientific basis and American anxieties

American eugenicists started spreading their ideas during the last decade of the nineteen-century, but only started to implement measures during the first decades of the twentieth century.[175] Eugenicists in the United States based their proposals on Mendel´s and

[174]Reilly, *supra* note 169 at ix- x.
[175] Hansen & King, *supra* note 150 at 3.

Galton´s widely discussed ideas, but also promoted research on the topic.[176] In his theory of heredity or "laws of segregation", Mendel argued "heredity material is transferred from parents to child".[177] According to Charles Davenport, eugenics in the United States was a way of "improving the population by increasing the number of those better breeding, or of improving the populations by increasing the number of those with valuable racial (heredity) traits".[178] Eugenics was based on the hypothesis that different mental disorders, illnesses and certain behaviours were hereditary, and that, in order to prevent their transmission to future generations, it was necessary to identify who was "unfit".[179] In order to determine who suffered from mental illnesses, eugenicists became very interested in mental tests, statistics, and classifications of intelligence and capacity. Consequently, identifying and studying the unfit became an important part of the Eugenic movement in the United States. Eugenicists based their actions on methods for measuring intelligence and capacity, such as Craniometry and IQ testing, which, as explained in chapter one, were pivotal to identifying who was or was not normal, and for classifying the types of "mental degeneracy". Defining who and what was normal was used to measure the progress of society, and the concept of normality became "a central organizing principle" for modern society in the United States.[180]

It is important to understand the national concerns that defined the concept of "national degeneration", and set the context for eugenics in the United States. Moral anxieties

[176] *Ibid* at 47. It is important to highlight the research of Charles Davenport, Harry H. Laughlin, and Margaret Sanger.
[177] Kline, *supra* note 2 at 21.
[178] Hansen & King, *supra* note 150 at 49, citing Charles Davenport, "Eugenics", in *Body build: Its development and inheritance* (APSA, 1924).
[179] Stepan, *supra* note 155 at 2.
[180] Kline, *supra* note 2 at 39.

played an important role for eugenicists in the country, and "moral disorder" was blamed for the degeneracy of citizens.[181] As a result, moral standards became part of the concept of "unfit", and immoral behaviours were diagnosed as "mental deficiencies".[182] Scales of "moral transgressions" and "the ability to master morality" became criteria to decide who was labeled as a "moron" or "feebleminded".[183] In particular, eugenicists focused on "reproductive morality", consisting of a set of behaviours that women should have in relation to their sexuality and reproduction.[184] Women were blamed for the decline in birthrate in the country, the high divorce rates and low marriage rates,[185] and women´s "promiscuity" was condemned for causing an increase of "moral defectives".[186] As a result, many "sexually immoral women" that were tested with low IQ´s were therefore targeted for eugenic measures such as institutionalization and forced sterilization.[187]

Moreover, eugenicists developed the concept of "social degeneracy" in a context of social, economic, and racial tensions and concerns. The theory of social degeneracy was proposed by Benedict Morel in 1857, and consisted in the idea that "certain (lower) social classes and races were predisposed to various neurological and mental illnesses due to

[181] Kline, *supra* note 2 at 11.
[182] *Ibid* at 26.
[183] *Ibid*.
[184] *Ibid*.
[185] Michael A. Rembis, "Explaining sexual life to your daughter" Gender and Eugenic Education in the United States during the 1930s" in Susan Currel and Christina Cogdell (edit), *Popular Eugenics. National Efficiency and American Mass Culture in the 1930s* (Ohio: Ohio University Press, 2006) 91 at 102 [Rembis].
[186] Susan Currel and Christina Cogdell (edit), *Popular Eugenics. National Efficiency and American Mass Culture in the 1930s* (Ohio: Ohio University Press, 2006) at 16 [Currel & Cogdell].
[187] Wendy Kline, "A New Deal for the Child: Ann Cooper Hewitt and Sterilization in the 1930´s" in Susan Currel and Christina Cogdell (edit), *Popular Eugenics. National Efficiency and American Mass Culture in the 1930s* (Ohio: Ohio University Press, 2006) 17 at 39.

bad heredity, resulting in social degradation".[188]The Great Depression impacted the economy of the country and created social anxieties against poor people, working class people and immigrants.[189] Many poor people were labeled as "mentally deficient" and were subsequently targeted for eugenic measures.[190] Economic concerns were also reflected in the promotion of eugenic methods as a way to end poverty. Eugenicists promoted methods of sterilization as a measure for cutting government costs incurred to care for criminals, "degenerates" and their descendants.[191] Racial concerns were also part of the eugenics theory of 'social degeneration'. Eugenicists frequently discussed the idea of "racial health" as an important part for American progress.[192] Afro-descendants, Asian and southern and eastern Europeans immigrants were labeled as less intelligent and were considered a threat to the country.[193] Thus, by 1924, the country restricted the entrance of central and southern Europeans and adopted medical tests and examination at Ellis Island, where physicians "had the power of rejecting thousands of unfit immigrants each year".[194] Furthermore, race was also relied on to discriminate in the implementation of eugenics measures. For instance, afro-descendants otherwise considered degenerates were often excluded from institutions housing white degenerate persons. Some eugenics institutions only focused on white, middle class and feebleminded people, and excluded African Americans from their treatments. This was the case of the Sonoma State Home in

[188] Michael Billinger, "Degeneracy", *Eugenics Archives,* University of Alberta, (2010), online: < http://eugenicsarchive.ca >.
[189]Kline, *supra* note 2 at 16. See also : Currel & Cogdell *supra* 186 at 3.
[190]Gould, *supra* note 41 at 167-168. See also about *the Jukes* and *the Kallikaks* Families studies at Hansen & King, *supra* note 148 at 49-52.
[191]Currel & Cogdell, *supra* 186 at 4.
[192] Kline, *supra* note 2 at 81.
[193] Hansen & King *supra* note 150 at 60.
[194] Angus McLaren, *Our Own Master Race. Eugenics in Canada 1885-1945* (Toronto: McClelland & Stewart Inc., 1990) at 57 [McLaren], citing MacMurchy, "The Feebleminded in Ontario": 9 report at 11.See also: Hansen & King, *supra* note 148 at 59.

California,[195] one of the country's biggest institutions for the "feeble-minded", which had "predominantly white and native-born" inmates,[196] and of the Mississippi Colony for the Feeble Minded that did not admit African Americans until 1968.[197]

With all these moral and racial concerns in mind, eugenicists proposed different measures to deal with degenerates and their descendants with the aim of ending poverty, and maintaining a wealthy and healthy nation.

2.1.2. Eugenic measures in the United States: education, segregation and sterilization

During the first decades of the twentieth century, there was a "shift in the imaginary" about the people labeled as "mentally deficient" in the United States.[198] Wendy Klein argues that these people were "(….) no longer deemed an object of curiosity or sympathy but a threat to the genetic health and stability of the race. "[199] Accordingly, eugenicists in the United States proposed and successfully implemented "positive" and "negative" eugenic measures, in order to promote the reproduction of the healthy and fit ones and to keep feebleminded people and their reproduction under control and surveillance.

Positive eugenics: education campaigns and popular culture in the United States

[195] The Somona State Home has had different names since it was created in 1891. The names included " the California Home for the Care and Training of the Feeble Minded", "the Sonoma State Home". "Sonoma State Home became Sonoma State Hospital" and "Sonoma Developmental Center". At: "History of Sonoma Developmental Center" *State of California* ,online: < http://www.dds.ca.gov/Sonoma/History.cfm>.
[196] Kline, *supra* note 2 at 58.
[197] Hansen and King, *supra* note 150 at 94.
[198] Kline, *supra* note 2 at 26.
[199] *Ibid*.

As it was explained at the beginning of this chapter, positive eugenics encouraged the reproduction of people who were considered "fit". In the United States positive eugenics stimulated "(…) the prolific procreation of white middle-class women, those who were considered to be the most mentally and physically sound and who would thus most effectively lead the advancement of civilization".[200] Positive eugenic measures were predominantly used from 1930 to 1960 in the United States and became increasingly popular after World War II, as they were an "inexpensive" and "less aggressive" way to promote eugenics principles.[201] Eugenicists promoted the concept of "good breeding" through education campaigns, literature, and popular culture. Eugenic education promoted the "rationalization of human reproduction and the reinforcement of race, class, and gender hierarchies".[202] By the 1930´s, the American Eugenic Society created a "eugenic curriculum" for schools and universities, in order to promote eugenics and reorient the youth into the selection of "fit" couples.[203] Moreover, in order to promote certain kind of breeding, eugenicists disseminated their ideas in newspapers, magazines, books, movies, and TV shows.[204]

In particular, "positive" measures targeted young women to spread their message. Eugenicists tried to reach married couples by encouraging "marital and family

[200]Kline, *supra* note 2 at 19.
[201]*Ibid* at 125-126.
[202]Rembis, *supra* note 185 at 95.
[203]The eugenic curriculum included classes of biology, family, history, religion and sexual education. Rembis *supra* note 185 at 96-99.
[204]*Ibid* at 113. See also: Angela Marie Smith "Monsters in the Bed. The Horror-Film Eugenics of Dracula and Frankenstein" in Susan Currel and Christina Cogdell (edit), *Popular Eugenics. National Efficiency and American Mass Culture in the 1930s* (Ohio: Ohio University Press, 2006) 332-359.

counseling", "marital adjustment", and enforce sexual education methods with the purpose of instructing women on the importance of "reproductive morality".[205] This kind of morality promoted eugenic procreation, and gave women the understanding that they had the duty of "improving the species".[206] Even though these positive measures became very popular during the 1930´s, negative eugenic measures were predominant in the United States during the twentieth century.

Negative eugenics: Institutionalization, segregation and compulsory sterilization of the "unfit" in the United States

In the course of the twentieth century, American eugenicists implemented negative eugenics measures, consisting in the prevention of the breeding of "feebleminded" and "unfit" people. Institutionalizing and segregating the "mentally deficient" was a very common negative eugenics measure in the United States from 1907 until the 1970s[207]. Special institutions for people with mental illness were not a eugenics invention since "asylums for the insane", "schools for idiots", "colonies", and other institutions for the "feebleminded" were constructed during the nineteen-century.[208] However, with the increasing interest in measuring mental capacities during the eugenics era, doctors started modifying old institutions and creating new institutions that distinguished between types of "deficiency" and responded to eugenic goals and needs. Accordingly, during the twentieth century, "dozens" of institutions were created in the United States, Canada and

[205] Kline, *supra* note 2 at 126.
[206] *Ibid* at 19.
[207] Alexandra Minna Stern, "United States", *Eugenics Archives,* University of Alberta, (2010), online: < http://eugenicsarchive.ca >.
[208] Hansen & King, *supra* note 150 at 64-65.

Scandinavia, including new colonies and institutions specialized on "moron girls", and the number of people who were institutionalized exponentially increased.[209]

These institutions were conceived as "homes for the feebleminded", and were primarily medical and psychiatric facilities. During the last decade of the nineteenth century and during the twentieth century, the State founded institutions for the ¨feebleminded¨ that were directed by Superintendents who had the power to decide which procedures were performed.[210]Some of the eugenic institutions that performed the highest number of sterilizations in the country were the *State Hospital* and the *State Training School for the Feeble-minded* in South Carolina, the *Sonoma State Home* in Eldridge California, the *Virginia State Colony for Epileptics and the Feebleminded*, the *State Hospital* at Raleigh, North Carolina, and O*akdale Center for Developmental Disabilities* in Michigan.[211] Randall Hansen and Desmond King argue that forced sterilisation measures cannot be understood without studying the "institutions for the feebleminded", because in most cases, institutions had autonomy over the process, and authorized and performed the procedures themselves.[212]

Non-consented surgical sterilizations were one of the most common eugenic measures in the United States. For eugenicists, surgical sterilization was a way to contribute to the "physical, moral or mental welfare" of the "unfit", by effectively preventing their

[209]Hansen & King, *supra* note 150 at 63. See also Kline *supra* note 2 at 42.
[210]Hansen & King, *supra* note 150 at 68.
[211] *Ibid* at 63. See also: Lutz Kaelber, "Eugenics: Compulsory Sterilization in 50 American States", University of Vermont (http://www.uvm.edu/~lkaelber/eugenics/).
[212]Hansen & King, *supra* note 150 at 63.

procreation.[213] Surgical sterilization was conceived as a preventive, progressive, and humanitarian measure, aimed to improve "(...) the generation of tomorrow". [214] Eugenicists believed that women had a special role in improving the future generations, so they perceived their sterilization as a protection for society.[215] Kline states that in the Somona State Home in Eldridge, California, most women were institutionalized and then sterilized for their "sexual delinquency", while men were usually sterilized for "therapeutic reasons".[216] Klein shows how during 1918 until 1944 at the Somona State Home "between 56 and 62 percent of all sterilization were performed on women". [217]

By the beginning of the twentieth century, non-consented sterilization legislation was adopted by over 30 states, and from 1907 to the 1970's an estimated of "(...) 60,000 people were sterilized while institutionalized in state hospitals or as recommended by local eugenics boards."[218] Indiana was the first state to enact sterilization legislation in 1906, allowing the compulsory sterilization of "criminals, rapists, idiots, and imbeciles".[219] In the following years, 29 states[220] enacted sterilization laws that allowed state institutions to perform these procedures on "feebleminded", "mentally defectives",

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[213] Kline, *supra* note 2 at 50.
[214] *Ibid* at 93- 94.
[215] *Ibid* at 53.
[216] *Ibid*.
[217] *Ibid.*
[218] Lutz Kaelber, "Eugenics: Compulsory Sterilization in 50 American States" (2011) University of Vermont (http://www.uvm.edu/~lkaelber/eugenics/) [Kaelber].
[219] Kaelber, *supra* note 218, citing Alexandra M. Stern, "We Cannot Make a Silk Purse Out of a Sow's Ear: Eugenics in the Hoosier Heartland" (2007) 103 Indiana Magazine of History 3 at 7.
[220] Alabama, Arizona, California, Connecticut, Delaware, Georgia, Idaho, Iowa, Kansas, Maine, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Hampshire, New York, North Carolina, North Dakota, Oklahoma, Oregon, South Carolina, South Dakota, Utah, Vermont, Virginia, Washington, West Virginia, and Wisconsin.

"the insane", criminals, among other people considered "unfit".[221] Moreover, even though the states of Colorado, Illinois, Pennsylvania and Texas did not officially enact any sterilization laws, their medical institutions still performed sterilization procedures.[222] The state of California sterilized the highest number people in the country,[223] followed by the states of Virginia,[224] North Carolina,[225] and Michigan.[226] In most of the states, sterilizations were performed after the recommendation of the superintendent, who had to consider if the procedure was in "the best interest of the patient".[227] Once the superintendent recommended the procedure, a "State Eugenic Board" or a eugenics commission had to give the final approval for the procedure.[228] In most cases, sterilization legislation require the consent of the patient, guardians or family members[229], and patients or guardians were seldom given the chance to appeal the board's or commission´s decision.[230]

By 1927, the Supreme Court of the United States reviewed its first case involving a eugenic sterilization on a declared "feebleminded". The case was about Carrie Buck, a young woman living in a "feebleminded colony in the state of Virginia who had been declared a "middle grade moron" in the Binet scale,[231] as was her mother. She had

[221] Hansen & King, *supra* note 150 at 77.
[222] Hansen & King, *supra* note 150 at 118.
[223] A total of 20,109 persons were sterilized. *Ibid* at 77
[224] A total of 7,325 persons were sterilized. *Ibid*.
[225] A total of 7,600 persons were sterilized. *Ibid*.
[226] A total of 3,786 persons were sterilized *Ibid.*
[227] *Buck v Bell,* 274 US 200 (1927) [*Buck v Bell*].
[228] Hansen & King, *supra* note 150 at 79.
[229] *Ibid*.
[230] This is the case of Indiana and Virginia. Ibid. See also *Buck v Bell supra* note 227.
[231] Hansen & King, *supra* note 150 at 104.

recently given birth to a girl, who was also considered feebleminded.[232] After her pregnancy, Virginia's Superintendent recommended her for a sterilization procedure under the "Eugenical Sterilization Act" of 1924. Virginia´s superintendent and other eugenic leaders were looking for "a case that would establish a constitutional basis supporting a general policy of sterilization in the state"[233]. Consequently, they assigned an attorney to "defend" Carrie and brought the Superintendent´s sterilization approval before the Circuit Court of Amherst County in 1924.[234] The Circuit Court decision confirming the sterilization decision was then appealed to the Virginia Supreme Court, and thereafter to the Supreme Court. In *Buck v. Bell*, the United States Supreme Court confirmed the decision to sterilize the young woman and considered Virginia's 1924 sterilization Act as constitutional, however highlighting sterilization measures should be limited to persons who would otherwise be confined in asylums.[235] Referring to Carrie´s case, the Supreme Court argued that "three generations of imbeciles are enough"[236], and established that Virginia´s procedures used to sterilize were not "cruel or unusual punishment". [237] Therefore, with *Buck v. Bell* the Supreme Court confirmed the constitutionality of compulsory sterilization measures, and gave eugenicists the "legal basis" to enact other compulsory sterilization bills in the country.[238] In fact, after this

[232] *Ibid.*
[233] Hansen & King, *supra* note 150 at 105.
[234] *Ibid.*
[235] *Ibid.*
[236] *Buck v Bell, supra* note 227 at 207.
[237] *Ibid.*
[238] Hansen & King, *supra* note 150 at 106.

decision, "seventeen states enacted or revised sterilizations", and some states allowed coerced sterilization in people who were not committed to an institution.[239]

It is important to mention that before *Buck v. Bell*, some state courts had declared sterilization acts unconstitutional.[240] For instance, in *Smith v. Board of Examiners*[241], the Supreme Court of New Jersey argued that New Jersey's 1911 sterilization act[242]violated the right to equal protection of the law.[243] Similarly, the Federal Circuit Court of Nevada declared Nevada's 1912 sterilization act[244] unconstitutional in *Mickle v. Henrichs,*[245] arguing the act violated "Nevada State Constitution's ban on "cruel and unusual" punishment".[246] These decisions show that eugenics measures also faced opposition and controversy in the country. In addition to the above constitutional objections, some doctors and politicians rejected sterilization policies, arguing sterilization would not prevent people from having sex, and would not stop the spread of venereal diseases and promiscuity.[247] Moreover, opponents of Mendelian hereditary rules and the Catholic

[239] "By 1936, Delawere, Idaho, Iowa, Michigan, North Carolina, Oregon, South Dakota, and Vermont had all expanded their statue to allow sterilizations of those mentally deficient who were not institutionalized. Nebraska instituted a law in 1935 requiring the registration of all feebleminded in the state and denying a marriage license to any such person without proof of sterilization." Kline, *supra* note 2 at 107.
[240] Hansen & King, *supra* note 150 at 118.
[241] *Smith v. Board of Examiners of the feebleminded,* 88 Atl., 963 (Sup Ct NJ 1913).
[242] US, *An act to authorize and provide for the sterilization of feebleminded*, 1911, NJ, 1911.
[243] Kaelber, *supra* note 215. See also Luke Kersten "New Jersey passed a sexual sterilization law, only to have it be deemed unconstitutional in 1913. No eugenics legislation was carried through", , *Eugenics Archives,* University of Alberta, (2010), online: < http://eugenicsarchive.ca >.
[244] US, *Prevention for Procreation Act*, 1912, Nev, 1912.
[245] *Mickle v. Henrichs,* 162 f. 687 (D. Nev. 1918).
[246] Kaelber, *supra* note 218, citing *Mickle v. Henrichs.*
[247]Kline, *supra* note 2 at 49.

Church emphatically criticized sterilization measures for being against scientific facts and the catholic morality.[248]

During the 1930s and continuing after the Second World War, American eugenicists worked to avoid any association with the Holocaust and tried to maintain their arguments in favour of sterilization. American eugenicists shifted the emphasis of sterilization, "by focusing on sterilization as means of restricting motherhood rather than of eliminating genetic defects, eugenicists escaped the limitations of hereditary arguments". [249] Furthermore, they claimed that their methods were different from those used by the Nazis and that sterilization in the United States was not related to "race, class or ethnicity", as it was in Germany.[250] As a result, eugenics kept its support after the War and institutions kept performing sterilization procedures. Between 1945 and 1946, sterilizations increased significantly and a total of 1,476 sterilizations were performed that year in the United States. [251] In the following years, concerns about genetic transmission of mental deficiencies started declining in different states, and medical research started showing how most cases of feeblemindedness "were caused by encephalitis and birth injuries".[252] Many sterilization acts remained legal until the 1960s and 1970s[253], and as eugenic programs declined "the struggle to make selective sterilization an option for controlling family size was building".[254]

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[248]Hansen & King, *supra* note at 150 at 121.
[249] Kline, *supra* note 2 at 100.
[250] *Ibid* at 105.
[251] Reilly, *supra* note 169 at 135.
[252] *Ibid* at 136.
[253] In the case of New Jersey, it remained legal until 1977, and in California until 1979. Reilly *supra* 169 at 148.
[254] *Ibid* at 144.

Finally, sterilization practices in the United States were not limited to people with disabilities, and did not stop with the Eugenics movement. Pieper Mooney and Kevin Begos show how after 1965, sterilizations undertaken by the State in the United States were racially and socially motivated. As Kevin Begos affirms, "(…) by the late 1960s more than 60 percent of those sterilized were black, and 99 percent were female".[255] Likewise, Begos exposes the case of the Cox Ramirez family in North Carolina, who in 1965 were forced by the Eugenics Board to decide whether to sterilized their daughter or lose welfare payments. Thus, sterilization measures in North Carolina specifically targeted the poor and people belonging to racial minorities.[256] Moreover, Pieper Mooney observes " (…) by 1940s, the practice of sterilizing the poor, most of them women, was commonplace. Indeed, between 1946 and 1948, the number of sterilizations in North Carolina performed on the general public exceeded the number performed on inmates and patients in state institutions."[257] This context proves that eugenic sterilizations faced shifts, depending on the socio political context of the moment. Therefore, as Mooney mentions, changes in sterilization policies that occurred between the 1930s and the 1960s in the United Stated were motivated by the "(…) degrees of attention paid to categories of race class, and gender".[258]

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[255] Kevin Begos, "Lifting the curtain on a shameful era," Against Their Will: North Carolina's Sterilization Program, Part One, *Winston-Salem Journal*, *extras.journalnow.com/againsttheirwill/parts/one/story1.html*.
[256] *Ibid.*
[257] Jadwiga E. Pieper Mooney, "Re-visiting Histories of Modernization, Progress, and (Unequal) Citizenship Rights: Coerced Sterelization in Peru and in the United States" (2010) 8/9 hist compass 1036.-1039 [Mooney].
[258] *Ibid* at 1040.

The United States was a pioneer in many eugenic measures, and was seen as an example for other Eugenic movements, such as the Canadian.[259] This chapter showed that in the United States, the eugenics movement adopted the hereditary medical discourse, and at the same time was influenced by political, economic and moral concerns and anxieties. Furthermore, eugenics was also a predominantly racial movement, and even though African Americans or immigrants were not the main targets of eugenic measures, the movement managed to relate race with feeblemindedness and mental illness. Hence, eugenicists medicalized racial, moral and gender prejudices, and labeled them as examples of "feeblemindedness". Overall, the concept of "normality" and the concept of "feeblemindedness" became a way to deal with what eugenicists believed was causing criminal and economic problems in the country. Eugenicists in the United Stated argued that the implementation of measures of institutionalization and sterilization would ideally create a nation without "morons", poor people, "lunatics", immigrants, blacks, promiscuous women, among others. As a consequence, eugenicists thought that the country would only succeed with more middle class, white, and high IQ people. As the next section shows, the Canadian Eugenic movement mirrored some concepts and measures from the United States, and also developed a strong program of negative eugenics.

2.2. Eugenics in Canada

[259] Jane Harris-Zsovan, *Eugenics and the Firewall. Canada's Nasty Little Secret* (Manitoba: J. Gordon Shillingford, 2010) at 17 [Harris-Zsovan].

Similarly to the United States, the Canadian eugenics movement was developed in the first decades of the twentieth century, and successfully established diverse eugenic organizations and saw the approval of eugenic measures in some provinces. The increased immigration during the interwar period, the low rates of fertility, the increasing numbers of feebleminded people and handicaps, and the loss of moral values in the country, pushed the eugenics agenda in some Canadian provinces and at the federal level.[260] However, it can be argued that the movement was not as strong as in the United States. At the federal level, they only enacted immigration eugenics measures. At the provincial level, only British Columbia and Alberta successfully passed reproductive eugenic measures.[261] The opposition of the Catholic Church, the influence of French-Canadian views on eugenics, and the subsequent establishment of the Canadian welfare state influenced the slow geographical spread of eugenics and was responsible for its eventual end in the country.[262]

2.2.1. Eugenics' scientific basis and Canadian anxieties

Canadian eugenicists primarily adopted English and American scientific theoretical basis and measures.[263] The Canadian eugenics movement did not have an important eugenics researcher, as England and the United States did, and based its arguments on foreign authors and reformers.[264] As in the United States, Canadian eugenicists followed Galton´s and Mendel´s theories of heredity and believed in the deterministic character of genetics,

[260] McLaren, *supra* note 194 at 93.
[261] Hansen & King, *supra* note 150 at 95.
[262] *Ibid*.
[263]Harris-Zsovan, *supra* 255 at 17.
[264] McLaren, *supra* note 194 at 10.

and the hereditary character of certain diseases and moral behaviours.[265] Various public health and women´s organizations adopted these imported eugenic ideas and organized a movement that recognized Canadian social and economic concerns. The predominant participation of women´s organizations in Canadian eugenics can be explained by their concerns over the protection of their children and the prevention of diseases.[266] As McLaren explains, Canadian women's organizations in Canada adopted the ideology of "maternal feminism", consisting in an ideology that combines the maternal classical role of women with political participation.[267] Maternal feminists understood that by gaining political participation, they would be able to influence policies that could benefit their children and maternal welfare.[268] Thus, after gaining the right to vote in 1920, women´s organizations focused on "(...) baby welfare centers, better baby contests, and the proliferation of well-baby clinics", and campaigns to prevent venereal diseases, tuberculosis and influenza.[269] Furthermore, women´s organizations became the main supporters of sterilization measures in British Columbia and Alberta. Movements such as "The National Council of Women", "The New Westminster Local Council of Women", and "The United Farm Women of Alberta", used their good relations with policy makers, and influenced the approval of sterilization legislation.[270]

As in the United States, Canadian eugenicists believed the country was facing "social" and "racial degeneration", and blamed feeblemindedness and the presence and

[265] *Ibid* at 9-10.
[266] *Ibid* at 93.
[267] The Manitoba Historical Society, "Maternal Feminism" (27 August 2009), online: < http://www.mhs.mb.ca/docs/features/timelinks/reference/db0015.shtml>.
[268] McLaren, *supra* note 194 at 93.
[269] *Ibid.*
[270] *Ibid* at 98-99.

reproduction of certain immigrants for it.[271] Canadian eugenicists considered the reproduction of the unfit especially prejudicial for the race since they argued feeblemindedness had a hereditary character.[272] Eugenicists were concerned with the national level of feeblemindedness, as scientists argued that they reproduce more than "normal families".[273] Additionally, they were worried about the increasing numbers of immigrants the country was receiving during the interwar period[274] and, more specifically, about the arrival of feebleminded, insane, alcoholics, prostitutes, criminals, and physically defective immigrants.[275] Eugenicist supporter Helen MacMurchy suggested that the country was seeing an increased level of feeblemindedness due to immigration, noting that "(...) Canada was admitting more than a 1,000 feebleminded immigrants a year".[276] Accordingly, eugenicists affirmed that the country was committing "race suicide" and was threatening its productivity by letting "moral, mental and physical defectives" enter the country.[277] Therefore, eugenicists maintained it was necessary to implement migratory reforms, as the United States had already done.

Canadian eugenicists were also anxious about the sexual and reproductive turn that the country was taking. They were concerned about the low levels of fertility among "fit" Canadians, the decline of the "traditional family", the levels of venereal diseases, and the

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[271] *Ibid*.
[272] *Ibid* at 46.
[273] McLaren, *supra* note 194 at 90.
[274] "In the single decade between 1901 and 1911 the population jumped 43 percent in what had become the world´s fastest growing country." *Ibid* at 47.
[275] These immigrants were mostly from Russia, Finland, Hungary, Italy, Belgium, Scandinavia, Britain, Ireland and ScotlandIbid. *Ibid* at 49.
[276] *Ibid* at 51, citing MacMurchy, "The Feeble-Minded in Ontario: 5th report" (1910) at 32.
[277] Harris-Zsovan, *supra* note 255 at 23.

lack of "sexual hygiene" among young people.[278] On the basis of Henry Goddard´s previous studies, Canadian eugenicists understood that feeblemindedness could be a consequence of prostitution and venereal diseases.[279] For instance, Canadian eugenicist C.K Clarke argued that immorality and prostitution were inherited and that "60 percent of prostitutes were mentally deficient".[280] He maintained that feebleminded women usually became prostitutes and "(...) spread syphilis, which in turn created another generation of the feebleminded".[281] As a result, Canadian eugenicists treated prostitution and promiscuity as medical problems, and promoted the concept of social and "sex hygiene" as the cure.[282] Furthermore, they started a war against venereal diseases, which became one of the biggest eugenics flags in the country and justified different negative eugenic measures.[283]

2.2.2. Canadian eugenic measures: immigration, institutionalization and sterilization

Eugenicists proposed and promoted different measures in order to deal with national problems about feeblemindedness, immigration, sexual education, venereal diseases, and prostitution. In a similar response to that taken by the United States, Canadian eugenicists tried to promote "positive eugenic" values among fit couples, but mostly focused on measures to prevent the reproduction of "unfit" people. Among their "positive eugenics" measures were sexual and reproductive education, educative lectures against "masturbation and venereal diseases", and "marriage manuals" that promoted the

[278] McLaren, *supra* note 194 at 68-69.
[279] *Ibid*.
[280] McLaren, *supra* note 194 at 73.
[281] *Ibid*.
[282] *Ibid* at 69 -72
[283] *Ibid* at 42-43 and 72-73.

reproduction of the "fit".[284] Still, the main focus of eugenics in the country was the reform of immigration policies and the enactment of sterilization measures.

Eugenic immigration policies in Canada: control and economic benefit

Considering the numerous concerns about the entrance of feebleminded immigrants, eugenicists pushed for immigration restrictions and health screening of all immigrants at the borders, as the nineteenth century federal government was promoting immigration into the country in order to populate some areas, particularly the West.[285] Even though this immigration generated some racial tensions, it also brought "profit for railways, lands speculators and industrialists".[286] With eugenicists' concerns about criminality and feeblemindedness, federal and provincial politicians started to debate the presence of "negative immigration" in the country, and the ways to control it.[287] The government enacted the *Immigration Act of 1910*[288], which explicitly prohibited "mental defectives", "diseased", and "physically defectives" to enter the country, and made health-screening processes mandatory at the border.[289] Within this process, Canadian eugenicists looked up to United States measures of health testing in Ellis Island, and even asked the United States border immigration officials for training.[290] Likewise, by 1923, the Canadian

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[284] *Ibid* at 71-72.
[285] Harris-Zsovan, *supra* note 255 at 23.
[286] *Ibid* at 22
[287] Negative immigration made reference to immigrants with physical and mental defects. *Ibid*.
[288] *The Immigration Act of 1910*, C, 1910 <http://www.pier21.ca/research/immigration-history/immigration-act-1910 >.
[289] McLaren, *supra* note 194 at 56-57 The mentally defective: idiots, imbeciles, feebleminded, epileptics, and insane. The diseased: loathsome diseases or a contagious or infectious disease. Physically defective: dumb, blind, handicapped.
[290] *Ibid* 64.

Parliament passed the *Chinese Immigration Act*,[291] in which the government created barriers for the arrival of Chinese immigrants- especially if they suffered from any disease or mental disability.[292] Finally, by the 1930s, immigration was highly restricted, not because of eugenic reasons, but as a result of the economic consequences of the great depression.[293] In addition to immigration efforts to restrict the entrance of the "unfit" to the country, eugenicists believed that reproductive measures could be another efficient way to prevent their procreation.

Segregation, institutionalization and sterilization of the "unfit" in Western Canada

Canadian eugenicists were also influenced by United States' reproductive measures. The segregation model of institutionalization of the feebleminded was adopted in Canada, and forced sterilizations were widely performed in some regions.[294] The United States Supreme Court's decision, *Buck v Bell*[295], was cited and used by the Eugenics Society of Canada, which was aiming for similar sterilization measures in the country.[296] It can be argued that during the first decades of the twentieth century Canada was facing a "climate of institutionalization" of the "mentally defective".[297] This measure was understood as a way to prevent "the feebleminded from harassing society, and even more importantly, it

[291] *An Act Respecting Chinese Immigration*, C, 1923 < http://www.collectionscanada.gc.ca/immigrants/021017-119.01-e.php?&document_code=021017-86&page=1&referer=021017-2412.02-e.html&section_code=pp-passage>.
[292] Luke Kersten. "Canada passes "Chinese Immigration Act", *Eugenics Archives,* University of Alberta, (2010), online: < http://eugenicsarchive.ca >.
[293] Luke Kersten. "Canada passes "Chinese Immigration Act", *Eugenics Archives,* University of Alberta, (2010), online: < http://eugenicsarchive.ca >.
[294] Erika Dyck, "Canada", *Eugenics Archives,* University of Alberta, (2010), online: < http://eugenicsarchive.ca >.
[295] *Buck v Bell, supra* note 227.
[296] Hansen & King, *supra* 150 at 95.
[297] Leslie Baker, "Corner Stone of Brookside Training School laid in Nova Scotia", *Eugenics Archives,* University of Alberta, (2010), online: < http://eugenicsarchive.ca >.

prevented them from reproducing".[298] The Brookside Training School in Nova Scotia, the Training School in Red Deer in Alberta, and the Alberta Hospital (Oliver) in Edmonton were examples of institutions "for the feebleminded" in the country.[299] However, the institutional model gained criticism and was labeled as "expensive", "inefficient", and "inhumane".[300] Some eugenicists argued that giving "free room and board for life" to a feebleminded was costing the government too much,[301] and that the method of lifetime segregation was "itself a denial of liberty".[302] In this context of criticism, eugenicists introduced the sterilization of the feebleminded and the insane as an "affordable" and "humane" solution to the problem. They reasoned that reproductive sterilization would allow the feebleminded "(...) to leave their institutions and marry without running the danger of reproducing".[303] The campaign in favour of sterilization of the "unfit" resulted in the approval of two sterilization acts in Alberta and in British Columbia.

By 1928 the Province of Alberta enacted *The Sexual Sterilization Act*, [304] which was the first legislation of this type in the country. Women's organizations such as the United Farm Women of Alberta lobbied for the approval of the Act, and argued it was going to help the racial betterment of the nation.[305] This statute created a Eugenics Board composed by two medical and two non-medical persons, who after a recommendation from the superintendent and an interview with the patient, were to make decisions about

[298] McLaren, *supra* note 194 at 40.
[299] Hansen & King, *supra* note 150 at 98.
[300] Hansen & King, *supra* note 150 at 249.
[301] Harris-Zsovan, *supra* note 255 at 49.
[302] McLaren, *supra* note 194 at 98.
[303] *Ibid*.
[304] *The Sexual Sterilization Act,* A, 1928, <http://www.ourfutureourpast.ca/law/page.aspx?id=2906151> [*Alberta Sterilization Act*].
[305] Hansen & King, *supra* note 150 at 97.

the procedure.[306] Jana Grekul reports that Eugenics' Board interviews usually lasted "an average of fifteen minutes per patient", and that, by 1940´s, the time per interview increased.[307] By the 1960s and 1970s, the Eugenics Board started applying IQ tests in their interviews, in order to determine the mental age of the patients. Furthermore, *The Sexual Sterilization Act* specified that candidates should be "inmates of a mental hospital proposed for release from that institution", who were at risk "of having children with a "disability" such that the surgery would "eliminate" the transmission of such "evil"."[308] In this case, the consent had to be given by the "inmate" or, if the person couldn't give the consent, by his or her guardian or representative.[309] By 1937, the legislative Assembly approved *An Act to amend the Sexual Sterilization Act*,[310] which added two categories of "inmates" that could be sterilized: the "mentally defective", which included any person with a mental age of 8 or less, and the "psychotic", categorized as any person with this diagnosis.[311] The 1937 reform also indicated that "psychotics" needed to have personal or substitute consent in order to be sterilized, but did not specify the same condition for "mentally defectives".[312] Therefore, from 1937, Alberta's *Sexual Sterilization Act* understood that sterilization could be performed without consent for ¨mentally

[306]Luke Kersten, "Alberta passes Sexual Sterilization Act", *Eugenics Archives,* University of Alberta, (2010), online: < http://eugenicsarchive.ca >
[307] Hansen & King, *supra* note 150 at 98, citing Grekul, Jana, Harvey Krahn and Dave Odynak. "Sterilizing the "Feeble-Minded": Eugenics in Alberta, 1929-1972" (2004) 17: 4. J Hist Soc. 358-384.
[308]*Alberta Sterilization Act, supra* note 304 at Section 4, 5.
[309] *Ibid* section 6.
[310] *An Act to amend the Sexual Sterilization Act*, A, (1937) <http://www.ourfutureourpast.ca/law/page.aspx?id=2968369> [*Alberta Sterilization Act 1937*].
[311]Luke Kersten, "Alberta passes Sexual Sterilization Act", *Eugenics Archives,* University of Alberta, (2010), online: < http://eugenicsarchive.ca >[Alberta passes first amendment to the Sexual Sterilization Act].
[312] *Alberta Sterilization Act 1937 supra* note 310 at section 6.

defectives¨.[313]Similarly, by 1942, the *Act to amend the Sexual Sterilization Act*[314] added "neurosyphillist" and "epilepsy with psychosis or mental deterioration" as new categories of persons who could be covered by the measure.[315]

British Columbia followed Alberta's legislation and, by 1933, approved the *Act respecting Sexual Sterilization*.[316] This Act was also promoted by women's organizations and gave similar guidelines to those adopted in Alberta. It also established a Eugenics Board and limited sterilization to "reasons of inheritance" of mental deficiency. The approval procedure consisted in the recommendation by a Eugenics Board, formed by a judge, a psychiatrist, and a social worker.[317] The Eugenics Board was entrusted with deciding if the person should be sterilized. British Columbia limited the application of sterilization procedures to "inmates", who had to be patients "in custody" of an institution for the feebleminded.[318] According to the 1933 *Act respecting Sexual Sterilization*, the procedure was supposed to be consented by the "inmate", the spouse, the guardian, a family member or provincial secretary.[319] However, consent was "only loosely adhered to in routinized practice".[320]

As the Colombian situation below will further demonstrate, the Catholic Church disapproved eugenics measures, specifically rejecting any "interference with

[313] *Ibid.*
[314] *An Act to amend the Sexual Sterilization Act*, A, (1942).
[315] Alberta passes first amendment to the Sexual Sterilization Act, *supra* note 311..
[316] *An Act Respecting Sexual Sterilization, BC* (1933) [*British Columbia Sterilization Act*].
[317] Hansen & King, *supra* note 150 at 99.
[318] "(…) Defined by either the "Mental Hospitals Act", "Industrial Home for the Girls" or the "Industrial School Act"". *British Columbia Sterilization Act supra* note 312 at Section 2, 4-6.
[319] Hansen & King, *supra* note 150 at 100.
[320] *Ibid.*

reproduction", and denying that "mental ability" was an inherited characteristic.[321] The Catholic Church's positions had a clear influence in some Canadian provinces. The provinces of Manitoba, Ontario and Saskatchewan tried to enact statutes similar to those of Alberta and British Columbia during the 1930´s, but they were never approved by the legislatures.[322]Angus McLaren explains that the refusal of sterilization bills in these provinces was due to the strong influence of the Catholic Church.[323]

Specifically, the province of Quebec resisted eugenics efforts and measures. The Québécois reticence has been explained by factors such as the strong influence of the Catholic Church, the nationalists' efforts, and academic and scientific posture on heredity.[324] The Catholic Church opposition led priests to criticize and "subject sterilization theories to close analysis", arguing that eugenics violated Christian ¨morality and charity¨.[325] As well, the Catholic press[326] explained that the Church did not want to see "male and female professors of eugenics corrupting the morals of Catholic Canada".[327] Moreover, McLaren explains that some Quebec Nationalists considered ¨French-Canadian cultural survival to its traditionally high fertility¨, and therefore eugenics measures could cause a fertility decline and affect their cultural identity.[328] Likewise, some Nationalists considered "Francophones would necessarily do poorly

[321] *Ibid* at 25.
[322]McLaren, *supra* note 194 at 98.
[323]*Ibid* at 104.
[324] *Ibid* at 151-152. See also: Sebastian Normandin, "Eugenics, McGill, and the Catholic Church in Montreal and Quebec: 1890-1942." (1998) 15 Cana Bull of Med Hist 59 at 61.
[325] McLaren, *supra* note 194 at 151 -152.
[326] Some examples are the *Catholic Register*, *Catholic Worlds* and *Western Catholic Ibid.*
[327] McLaren, *supra* note 194 at 151, citing G.K Chesterton, Eugenics and Other Evils (London: Casell, 1922).
[328] An example of this is Father Henri Martin in 1923. McLaren *supra* note 194 at 154.

when judged according to eugenics measurements". [329] Finally, scientific academia also opposed eugenics in the province of Quebec. While many eugenics supporters such as Dr. Alexander Peter Reid graduated from McGill and McGill Professors J. G. Adami and Came Derrick introduced and highly supported eugenics ideas in Quebec, [330] the government and academia generally rejected sterilization procedures.[331] This rejection of sterilization policies can also be explained by the strong influence of Lamarckian and Neolarmarckian theories among French Canadian scientists, who considered that environment had an influence on heredity.[332]

After the Second World War, the number of Canadian eugenics supporters declined, as eugenicists' methods were inevitably linked to Holocaust.[333] By 1945, the Canadian Government implemented assistance policies and started the policy of "family allowances", which "represented the birth of the Canadian welfare state".[334] With such improvement of Canadian economical, employment and social situation, eugenics premises and concerns lost some of their relevance. [335] Notwithstanding, legal sterilizations continued until 1972 in Alberta and until 1973 in British Columbia. In Alberta, during the time of *The Sexual Sterilization Act* was in force, "over 4,800 people were authorized for sterilization under the Act, with more than 2,800 persons sterilized

[329] *Ibid* at 25.
[330] Sebastian Normandin, "Eugenics, McGill, and the Catholic Church in Montreal and Quebec: 1890-1942." (1998) 15 Cana Bull of Med Hist 59 at 62-67.
[331] Some of the main eugenics oppositors were Antonio Barbeau expert in neuro-psychiatry, Dr Gaston Lapierre proffessro of pediatrics at te Université de Montréal. McLaren, *supra* note 194 at 151-152.
[332] *Ibid* at 26.
[333] *Ibid* at 150.
[334] *Ibid* at 157.
[335] McLaren, *supra* note 194 at 157.

under its mandate and its two amendments (1937 and 1942)."[336] Christian Timothy J. describes the "typical sterilized patient" in Alberta as a "young, unwed mother who had been diagnosed as mentally retarded".[337] Indeed, from those sterilized in Alberta 64 percent were women, 60 percent were under the age of 25, and 20 percent were under the age of 16 years.[338] Moreover, people with disabilities were not the only ones targeted by sterilization measures. In Canada, sterilizations were also racially motivated. According to Timothy, First Nations people were commonly labeled as "mentally deficient" and sterilized during the last years of eugenics sterilization. As a result, "Indians and Métis, who represented only 2.5 per cent of Alberta's population, accounted for over 25 per cent of those sterilized".[339] Likewise, Michael Billinger shows how in total, "74% of all Aboriginals presented to the Board were eventually sterilized (compared to 60% of all patients presented)".[340] As for the British Columbia's total numbers of sterilization procedures, they are unclear as the files of the Eugenics Board were "either lost or destroyed".[341] Still, McLaren claims that "no more than a few hundred (persons) were subjected to the operation".[342]

Even though Alberta´s sterilization Act clearly referred to "inheritance reasons" to authorize the procedure, the Eugenics Board of Alberta frequently justified its orders of sterilizations with reasons such as "sexual colouring", "sexual inclinations", "sex

[336] Alberta passes first amendment to the Sexual Sterilization Act, *supra* note 311.
[337] McLaren, *supra* note 194 at 159, citing Christian Timothy, "The mentally Ill and Human Rights in Alberta".
[338] *Ibid* at 160.
[339] *Ibid*. See also: Randell & King, *supra* note 150 at 98.
[340] Michael Billinger, "Aboriginal and Indigenous People", *Eugenics Archives,* University of Alberta, (2010), online: <http://eugenicsarchive.ca>.
[341] McLaren, *supra* note 194 at 159.
[342] *Ibid*.

difficulties", "too friendly", "sexual propensities are quite marked", previous abortions, and previous sexual exploitation outside the asylum.[343] Additionally, McLaren explains that British Columbia's Eugenic Board "did not include a geneticist and did not show any great interest in the subject".[344] This situation can be explained by eugenicists' constant use of the medical discourse in order to explain moral, social and racial biases, which led to people who did not conform to "normal" views on gender roles, moral standards, appropriate sexual behaviours, or that were from a nation or race different form the majority, being sometimes labeled as "mentally deficient" or "feebleminded".[345] Consequently, it is important to highlight how eugenic sterilization was justified and conceived as a medical measure but ended up reflecting moral, racial and gender stereotypes of the moment.

Overall, in spite of the resemblance between the Canadian and the American movements, the Canadian example shows diverse approaches. Even if "positive" eugenics, and immigration and sterilization policies were based in a previously established American model, the eugenics movement did not get as many followers and support in Canada. Additionally, the cases of Alberta and British Columbia show the significant cultural and social differences among Canadian provinces and its governments. Diverse processes of colonization, geographical conditions, and reception of immigrants can explain the different reactions that provincial governments had towards eugenics. It can be argued that the influx of immigrants to Alberta and British Columbia during the interwar period

[343] *Ibid* at 162, citing A.L Crease to BT. McGhie, Director of Hospital Services, and Ontario, 1 my 1933.
[344] *Ibid* at 161.
[345] McLaren, *supra* note 194 at 161-162.

encouraged racial tensions and a stronger eugenics movement.[346] Furthermore, the "weakness of the Church in the West" made things easier for eugenicists in these provinces, where they did not face much opposition to reproductive measures.[347] The Canadian eugenics movement is another example of the political character of the medical discourse, since even though eugenics was a medical movement, its methods and motives usually overlapped with specific political, moral and ideological views. As next section explores, the Colombian Eugenic movement additionally exemplifies how a scientific movement with established theories and ideas can be shaped by elements of culture, political, and economic conditions.

2.3. Eugenics in Colombia

Nancy Stepan explains that it is necessary to study eugenics in Latin America without assuming that it is a "pale reflection of eugenics elsewhere, something perhaps "misunderstood" or "misinterpreted", but as something rooted in the region's own cultural experience and history."[348] The Latin American Eugenic movement had its own particularities and was directly related to hygiene standards, racial ideologies, and the idea of "degeneracy of the race" that became common in many countries in the first half of the twentieth century. Latin America's Eugenic movement had a different scope in each country. Mexico, Argentina and Brazil were perceived as the leaders in developing

[346] *Ibid* at104.
[347] *Ibid*.
[348] Stepan, *supra* note 155 at 33.

eugenic ideas in the region. They created eugenic institutions[349] and implemented eugenic measures.[350] Similarly to other eugenic societies in the world, these associations were mainly composed of doctors and specialists, and their purpose was to promote and apply eugenic standards and theories by measures directed at the betterment of the race.[351] The eugenic measures adopted by national and local governments also varied from place to place. Only the state of Veracruz in México[352] and Puerto Rico[353] adopted sterilization measures to prevent the reproduction of the people who were considered "unfit".[354] Other countries applied eugenics principles related to hygiene, health care, and education measures.[355]

Colombian eugenicists shared some similarities with other Latin American movements, but did not create any particular institutional setting, and did not impulse any reproductive eugenic measure.[356] The Colombian Eugenic movement used the hygiene discourse, and incorporated many of the national anxieties regarding its multiracial

[349] "The Eugenics Society of Sao Pablo" the "Mexican Eugenics Society for the Improvement of Race", and "the Argentine Association of Byotypology, Eugenics and Social Medicine" (Our translation).
[350]Stepan, *supra* note 155 at 55.
[351] *Ibid.* See also: Carlos Ernesto Noguera, *Medicina y Política. Discurso médico y prácticas higiénicas durante la primera mitad del siglo XX en Colombia* (Medellin : Fondo Editorial Universidad EAFIT, 2003) at 90.
[352] In 1931 the governor of the province of Veracruz, Mexico enacted a sterilization law for reasons of "¨idiocy¨¨degenerate mad¨¨incurably ill, and ¨delinquents¨. However, the act was not in force for a long time, since the governor was replaced. Stepan, *supra* note 152 at 131.
[353] In 1937, the government enacted Law 116, which legalized eugenic sterilization and created a Eugenic Board. The act remained legal until the 1960´s. *Ibid* at 134. See also: Nancy Ordover, "Puerto Rico", *Eugenics Archives,* University of Alberta, 2010, online: < http://eugenicsarchive.ca >.
[354]Stepan *supra* note 155 at
[355]*Ibid* at 94.
[356]Carlos Ernesto Noguera, *Medicina y Política. Discurso médico y prácticas higiénicas durante la primera mitad del siglo XX en Colombia* (Medellin: Fondo Editorial Universidad EAFIT, 2003) at 98 [Noguera].

compositions, lack of development, political instability and poverty.

2.3.1. Eugenics' scientific basis and Colombian anxieties

During the nineteenth century, the French biologist Jean Baptiste de Lamarck formulated the "theory of transformation". Lamarck's theory questioned the determinacy of heredity by arguing that external environmental factors could gradually transform genetic characteristics of organisms. This transformation was explained by the existence of acquired characters, which are transferred to the next generation causing ¨transmutation¨.[357] Lamarckism drastically challenged Mendel´s and Weisman´s theories of heredity and evolution, as it opposed the idea of strong heredity and proposed an evolution "driven by slow, purposeful adaptation to changes in the environment".[358] By 1885, Lamarckism transformed into Neo-Lamarckism, which "narrowed still further to mean particular theory of how inheritance worked".[359]

It was only in the 1920s and 1930s that these ideas started getting French followers who mistrusted Mendelian genetics and Darwin´s theory of natural selection.[360] As a result of the long-term academic relationship between Latin American countries and France, in many Latin American countries academic and political elites started discussing evolutionism, Lamarckian and Neo-Lamarckian ideas during the first decades of the

[357] Stepan, *supra* note 155 at 68.
[358] *Ibid*.
[359] *Ibid* at 69.
[360] *Ibid* at 72.

twentieth century.[361] These ideas were widespread around academic circles and were discussed and taught to doctors and scientists in universities. [362] Stepan explains that Latin American scientists decided to adopt a Lamarckian approach for different political, scientific, religious, and ideological reasons.[363] Lamarckism brought "an optimistic expectation" to Latin American governments, who wanted some margin of action in order to keep working on sanitary and educational measures.[364] In addition, the Catholic Church opposed Mendel´s theory of evolution, since it denied "God´s will and choice", and gave all the importance to predetermined genetic material.[365] Accordingly, as the Catholic Church was a powerful actor in Colombia, its opposition to hereditary determinism had a big impact in the political and scientific spheres. It is important to highlight that the reception of Lamarckian and Neo-Lamarckian ideas in Colombia did not mean the complete absence of deterministic hereditary conclusions. However, Colombian scientists were critical towards strong inheritance theories and radical eugenic measures. [366]

Colombian scientists received and adopted Neo-Lamarckian ideas in a context of racial tensions and anxieties related to the challenges of modernity. Since the second half of the nineteenth century, Colombian academics and politicians questioned why the country was still facing so many social problems after the independence.[367] By the early 1920s,

[361] *Ibid* at 73-74.
[362]Olga Restrepo, "El Darwiniso en Colombia: Visiones de la Naturaleza y la Sociedad" (2009) 14S Acta biol Colomb 23 at 32. See also: Noguera *supra* note 356 at 93.
[363] Stepan, *supra* note 155 at 72.
[364] *Ibid* at 73. See also: Noguera *supra* note 356 at 88.
[365]Stepan, *supra* note 155 at 74.
[366] Noguera, *supra* note 356 at151.
[367] Ana María Muñoz, "Más allá del problema racial: el determinismo geográfico y las dolencias

doctors and politicians who were inspired by eugenic ideas started discussing the idea of "racial degeneration" as a way to explain the lack of progress, poverty, and social problems the country was facing. In 1920, the Colombian psychiatrist and conservative politician Luis López de Mesa wrote the book "The problems of the race in Colombia"[368] in which he affirmed that the country was facing a "collective degeneration; physical, intellectual and moral degeneration".[369] López de Mesa posed the question of how to deal with the new times and conquer development with a population that was "weak, decimated and in decline."[370] In this context, scientific and medical arguments became important to explain social and racial "problems", sharing the theory of racial degeneration and blaming multiple external factors for it. Medical and political elites attributed degeneration to the existence of racial mixing, factors of Colombian demography and tropical weather, the presence of alcoholism, and the lack of hygiene in low-income populations, among other factors.[371]

Unlike the United States and Canadian movements that blamed immigration for its "social problems", Colombian Eugenicists related social problems with Colombian racial composition and its typical racial mixing. Peter Wade, Ana Maria Muñoz and Nancy Stepan explain that the construction of the race category did not limit to biological characteristics, but was composed by a set of social, cultural, geographic and economic

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sociales" in *Los problemas de la Raza en Colombia* (Bogotá: Universidad del Rosario, 2011) at 13 [Muñoz].

[368](Our translation) Luis López de Mesa ed. *Los problemas de la raza en Colombia* (Bogota: Linotipos de El Espectador, 1920) [López de Mesa]

[369](Our translation) Noguera, *supra* note 356 at 75, citing López de mesa *supra* note 368.

[370] Noguera, *supra* note 356 at 75.

[371] *Ibid* at 80, 209.

factors.[372] During the twentieth century, both conservative and liberal parties agreed on the country´s "racial inferiority" and blamed it on the presence of indigenous people, afro-descendants, and the process of racial mixing, which was a result of intercourse of the indigenous, Iberian, and African populations during the process of conquest, colonization and slavery.[373] For the conservative politician Laureano Gómez, the mixing of races caused racial degeneration as "the aberrations of the races became worst in mestizos".[374] Likewise, in 1924, the liberal political leader Jorge Eliecer Gaitan argued that *mestizos*[375] were less likely to progress because of their African heritage. [376]

The country's geographical position also influenced the concept of race and was used to explain what could determine progress and affect heredity characteristics. Foreign scientists Alexander von Humboldt and Gustave Le Bon influenced local doctors like Jiménez López and Gustavo Lozano, who adopted the theory of geographical determinism in order to explain the country's social problems.[377] They argued, that "civilization decreases when it gets close to the tropics" and that racial and moral

[372] Peter Wade, Noguera and Nancy Stepan explain that the construction of the race category did not limit to biological characteristics, but was composed by a set of social, cultural, geographic and economic factors. Peter Wade, Afterword: Race and Nation in Latin America. An Anthropological View in N. Appelbaum, A. Macpherson, y K. Rosemblatt (eds.), *Race and Nation in Modern Latin America*. (Chapel Hill: The University of North Carolina Press, 2003). See also: Noguera, *supra* note 351 at 271 and Stepan, *supra* note 155 at 106.
[373] Julio Cesar Pino, "Teaching the History of Race in Latin America" (1997) Am Hist Assoc (https://www.historians.org/publications-and-directories/perspectives-on-history/october-1997/teaching-the-history-of-race-in-latin-america).
[374] (Our translation) Eduardo Restrepo, "Imágenes del "negro" y nociones de raza en Colombia a principios del Siglo XX" (2007) 27 Revista de Estudios Sociales at 46.
[375] "Mestizo" makes reference to the racial mixing process between indigenous, Iberian, and African populations in Latin America.
[376] (Our translation) Jason McGraw, "Purificar la Nación: eugenesia, higiene y renovación moral-racial de la periferia del Caribe colombiano,1900-1930" (2007) 27 Revista de Estudios Sociales 62 at 67 [McGrawr], citing Jorge Eliecer Gaitán, *Los ideas socialistas en Colombia* (Bogotá: Editorial Casa del Pueblo, 1963) at 22.
[377] Noguera, *supra* note 356 at 116.

degeneracy and high rates of criminality could be explained by hot weathers and humidity.[378] A representative of this tendency, Doctor Miguel Jimenez Lopez, adopted José Von Satchel's "theory of sunrays" to explain the lack of progress in the coastal areas in Colombia. This theory explained how short sunrays could determine crime and degeneracy of populations living in tropical places, since they "attack the protoplasm of delicate tissues, affecting nervous cells and generating a destructive action in the body".[379] Therefore, academic and governmental efforts tried to combat all the external factors that could influence the degeneration of the race, focusing on populations on the coasts, low-income workers, rural populations, and mestizos. Different eugenics measures and strategies were discussed and applied in Colombia, many of which were transplantations from other countries.

2.3.2. Eugenic measures in Colombia: hygiene, education and immigration policies

In order to combat the problems that race, poverty and geography brought to the country, Colombian political elites implemented hygiene and health-care measures invested in health infrastructures, education programs, and developed a number of immigration measures.[380] In contrast to the American and Canadian Eugenic movements, Colombian eugenicists avoided "strong measures" in the reproductive field and were not interested in initiatives like the marriage health certificate, and forced eugenic sterilizations and abortions.

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[378] *Ibid*.
[379](Our translation) *Ibid* at 119, citing Miguel Jiménez López, "Segunda conferencia. Algunos signos de degeneración colectiva en Colombia y en los países similares" in *Los problemas de la raza en* Colombia (Bogotá, Imprenta El Espectador, 1920) at 350 [Jiménez López].
[380] Noguera, *supra* note 356.

Colombian hygiene crusade

Scholars that have studied eugenics in Colombia agree that the movement mainly manifested itself in hygiene anxieties, standards and measures.[381] Hygienic processes had already taken place in Europe during the nineteen-century, but it was only at the beginning of the twentieth century that Colombian politicians started discussing and adopting these measures.[382] Colombian eugenicists argued that hygiene was the best way to deal with the racial degeneration that was preventing the country from advancing.[383] McGraw notes that hygiene became the way to address the national and racial deterioration theories, and the main goal for eugenicists in Colombia was to make hygiene standards an essential part of citizenship.[384] The Hygienic Minister Jorge Bejarano believed that the lack of progress of the country was not due to the "racial problem", but to economic factors, lack of hygiene, and the presence of diseases, malnutrition, epidemics and infections like "cancer, tuberculosis, syphilis, leprosy"[385], which weakened the Colombian society. Colombian eugenicists conceived hygiene as the solution to the backwardness of the country and believed that the path to progress was linked to medical standards, prevention, hygiene, education, and nutrition.[386] Hygiene was mainly a medical movement, as doctors proposed that by adopting prophylactic and public health measures they could control the spread of diseases and contribute to the

[381] Ibid. See also McGraw, *supra* note 376.
[382] Noguera, *supra* note 351 at 124.
[383] *Ibid*.
[384] McGraw, *supra* note 376 at 64.
[385] Muñoz, *supra* note 367 at. 24 . See also: Noguera *supra* note 356 at 112.
[386] Noguera, *supra* note 356 at 125-128.

nation´s progress[387] However, hygienic arguments constantly overlapped with moral and religious values,[388] as there were physical, biological, intellectual, and moral types of hygiene.[389]

Government representatives from both the conservative and liberal party, in the public and private spheres promoted a group of education, infrastructure, nutrition and health care measures.[390] In the early 1920´s, the Washington Sanitary Conference and the VI International Sanitary Conference influenced the Colombian national hygienic agenda. By 1930, the government created the National Department of Hygiene and Public Assistance in order to design and enforce all hygienic measures in the country.[391] By 1946 the government structured the Ministry of Hygiene, which later became the Ministry of Health and Social Protection.[392] Hygienic measures were advanced in the 1930s, and included reforms like: i) Promoting public space and building new neighbourhoods for low-income workers, ii) building new schools and green areas in education centers, and iii) battling *chicha* consumption[393], alcoholism, venereal diseases, and prostitution.[394] Hygiene measures also included the construction of hospitals,

[387] *Ibid* at 124.
[388] *Ibid* at 185.
[389] *Ibid* at 199.
[390] *Ibid* at 123.
[391] Maria Teresa Gutierrez, "Proceso de insttucionalización de la higiene: Estado, salubridad e higienismo en Colombia en la primera mitad del Siglo XX " (2010) 12 : 1 Estud Socio-Juríd 74 at 89.
[392] *Ibid*.
[393] *Chicha* is known as a typical Colombian alcoholic drink, made with fermented corn. This drink had been very typical among indigenous and rural communities in the country.
[394] Noguera, *supra* note 356 at 124.

provision of electricity, potable water, and the training in "healthy habits" of poor and middle class neighbourhoods.[395]

Colombian Hygienists impacted the education field by encouraging mental tests, medical exams and constant evaluations on kids in order to monitor and "restore" people at early ages. The state tried to enforce hygienic behaviours in the population with the use *hygienic manuals* that established appropriate conducts, and tried to modify "unhealthy" habits and social behaviours.[396] Regarding the campaign against alcoholism, prostitution and venereal diseases, the government applied measures regulating and sometimes banning the consumption of *chicha*[397], promoting beer as a better and more hygienic drink, and creating medical protocols for the practice of prostitution.[398] This battle was also related to medical standards, as some doctors considered that *chicha* was causing a "degenerative process that lead to idiocy, stupidity and foolishness".[399] Prostitution and venereal diseases were also labeled as "social diseases", along with tuberculosis, alcoholism, criminality, beggary, epilepsy, and madness.[400]

In general, Colombian political and academic elites considered that hygiene was the way to respond to eugenics theories, and anxieties about the degeneration of the race. Even though hygiene was part of a medical discussion, it was directly linked to moral, race, and class concerns and preconceptions. As next section shows, the relationship between

[395] *Ibid* at 128.
[396] *Ibid* at 195,197.
[397] (Our translation) *Act 34 Hygiene of fermented beverages*, Colombia,1948. *Act 34 in which* the conditions to fabricate alcoholic beverages are created, Colombia, 1948.
[398] Noguera, *supra* note 356 at 165- 172.
[399] *Ibid at* 159.
[400] *Ibid* at 183.

eugenics and political and moral postures was also reflected in immigration policies aiming to whiten the Colombian population and keep criminals, mentally deficient persons, and "inferior races" out of the country.

Immigration policies and the "whitening project"

Colombian politicians adopted immigration measures in order to deal with the eminent "racial problem" the country was facing. Contrary to the United States and Canada, Colombian eugenicists did not only restrict immigration to exclude people with "mental deficiency", but considered European immigration as the solution to the country's racial problems. Jimenez López stated in his book "The problems of the race in Colombia" that in order to neutralise the biological and moral deficiencies of the Colombian population, it was necessary to introduce the immigration of "healthy, strong races, who are disciplined in work habits and, as long as it is possible, free from social diseases, which are determining our regression"[401]. Immigration policies were mostly motivated by the desire to modify the racial composition of the country. Eugenic immigration policies were not unique to Colombia, they were part of a broader Latin American *whitening project* that took place during the first half of the twentieth century.[402] Tanya Hernandez defines the Latin American whitening project as a "strategy to respond to eugenics" and as a "nation-building process of both diminishing blackness and creating a new race diluted of blackness."[403] Latin American eugenicists related the white ideal to the improvement of the race and encouraged European immigration to "whiten" their

[401] (Our translation) Noguera, *supra* note 356 at 76, citing Jiménez López supra note 379 at 8.
[402] Tanya Hernandez, *Racial subordination in Latin America. The Role of the State, Customary Law and the New Civil Rights Response* (New York: Cambridge University Press, 2013) at 46.
[403] *Ibid* at 20.

population and improve their racial characteristics.[404] Immigration measures were especially strong and effective in Argentina and Brazil where government funds were used to offer subsidies and land to immigrants in order to incentivize white immigration.[405] Other countries like Venezuela, Costa Rica, Mexico, Cuba and Peru also banned "non-white immigration (indigenous, Asians and blacks)", but did not reach the same results as Brazil and Argentina, who effectively "whitened" their population.[406]

In Colombia, both conservative and liberal parties promoted immigration policies that successfully restricted certain kinds of immigration and promoted others.[407] By 1920, the government approved *Act 48 about immigration and foreigners,*[408] in which the government established that immigration was opened to "everyone" except: people who suffer from chronic or contagious diseases, or who suffer from "mental alienation, dementia, mania, general paralysis, chronic alcoholism, epilepsy, idiots, cripples and any person who is not able to work"; "professional beggars"; people who work in prostitution; communist and anarchists; and people convicted for crimes or "moral perversion".[409] By 1922, *Act 114*[410], was adopted to provide incentives for "immigrants whose personal and racial conditions" would contribute to the country by creating economic and intellectual development, improving its ethnic, physical and moral

[404] *Ibid* at 22.
[405] *Ibid* at 26.
[406] *Ibíd* at 28-29.
[407] Jaime Carrizosa Moog, "Eugenesia y discriminación en Colombia: el papel de la medicina y la psiquiatría en la política inmigratoria a principios del siglo XX" (2014) 43: 1 rev colomb psiquiatr at 58 at 62.
[408] *Act 48 about immigration and foreigners,* Colombia, 1920.
[409] *Ibid* art 7.
[410] *Act 114 about Immigration and agricultural colonies*, Colombia, 1922.

conditions, and introducing science and arts, "civilization and progress".[411] The Act specified that "those immigrants" would receive free housing for the first five days, could bring all their possessions to the country, be transported to any of the national ports, and could "get awarded up to twenty hectares of bald lands", among other benefits.[412] Moreover, by 1933, a presidential Decree established the conditions required to grant a Colombian visa. The Decree mandated a behavioral certificate, documents that proved civil status, and a medical certificate that specified that the persons did not have any "disease, mental illness, chronic alcoholism, epilepsy, or drug addiction[413].

Despite legislative efforts to entice white immigration, Colombia did not receive the same massive immigration Argentina and Brazil did.[414] The politician Luis López de Mesa argued that Colombian immigration projects "have failed", while other politicians expressed their opposition to immigration as a way to support the national labor and industry.[415] In general, immigration policies were another eugenic measure implemented to deal with the regional concerns about race, mental deficiency and immorality of the moment. Similar to immigration policies, eugenic reproductive measures were discussed. They however did not receive legislative support and were not implemented.

Colombian reproductive measures: Resistance and the Catholic Church

[411] *Ibid* art 1.
[412] *Ibid* art 12.
[413] (Our translation) Decree 1060, Colombia, 1933, art 1.
[414] Noguera, *supra* note 356 at 99.
[415] *Ibid* at 100.

Colombian eugenicists discussed reproductive eugenic measures like the prenuptial medical certificate, and eugenic contraception methods, but these were never implemented.[416] Inspired by the eugenics movement in other countries, Colombian eugenicists tried to push eugenic prenuptial certificates in the legislative agenda as a way of controlling the reproduction of people who suffered from mental or physical hereditary diseases, and were at risk of passing their "defects" to their descendants".[417] In the article "Eugenics and the prenuptial medical certificate", the Colombian Red Cruz argued that hereditary diseases were a danger for society and caused very high expenses for the country.[418] The Red Cross considered that a prenuptial medical consult could save the government expenses, and that predicting hereditary diseases could contribute to the wellbeing and progress of society. They announced that they were going to "ask the public powers to declare the prenuptial medical certificate as mandatory", and that they were looking forward to constituting "a group of experienced eugenicists to promulgate and teach the biological eugenics rules in universities and schools".[419] The Red Cross argued that "people with defects" should not get married, and that, if the defects were limited, they could only get married if "favorable circumstances allowed it".[420]

[416] *Ibid* at 98.
[417] This certificate was discussed for the first time during the nineteen century by Spanish doctors, and was later implemented by the Danish Law in 1798, and in the Mexican law by 1928. Likewise, during the twentieth century, Brazil, Ecuador, Chile and Peru adopted the pre marriage health certificate, and sometimes banned marriage of people with heritable diseasesSee: Stepan supra 152 at 114, 125. See also: Roberto Mac-Lean and Stenos, "La Eugenesia en America, Roberto Mac-Lean" (1951) 13: 3 Revista Mexicana de Sociología 359 at 361,371.
[418] (Our translation) "Eugenesia y el Certificado Médico Prenupcial" (1944) XVII :184 Revista Colombiana de la Cruz Roja, at 15.
[419] *Ibid* at 16.
[420] *Ibid* at 15.

Nevertheless, although the Colombian Congress discussed this measure, it did not receive much support and was not approved.[421]

Likewise, compulsory sterilization measures did not gain traction in Latin America, and were never legally considered in Colombia. During the eugenics era, the state of Veracruz in Mexico, and Puerto Rico were the only countries to formally legalize eugenic sterilization.[422] In the case of Peru and Veracruz, sterilization measures had a clear eugenic emphasis as they mandated sterilization "for "idiots", the "degenerate mads", the "incurably ill", "delinquents"[423], and for any person with an "incurable and inheritable disease". [424] However, Puerto Rican sterilization measures during the 1930s were conceived as a "scientific-eugenic solution to the island's "overpopulation" and poverty", and were not limited to people with "mental deficiencies".[425] Furthermore, as in the other jurisdictions studied herein, disability was not the only criteria eugenicists used to sterilize people in Latin America. Countries such as Peru and Mexico targeted indigenous and poor women with their sterilization initiatives. In Mexico, there is evidence that in 2000 the Minister of Health forcibly sterilized a number of indigenous women in the states of Guerrero and Hidalgo.[426] In the case of Peru, in 1996 and 1998, the Fujimori regime conducted coerced sterilization campaigns and performed sterilizations on almost

[421]Noguera, *supra* note 356 at 98.
[422]Stepan, *supra* note 155 at 51-55.
[423] Stepan, *supra* note155 at 131.
[424] *Ibid* at 132.
[425] *Ibid*.
[426] Patience A. Schell, "Mexico", *Eugenics Archives,* University of Alberta, (2010), online: <http://eugenicsarchive.ca>.

220 thousand poor and indigenous women living in rural communities.[427]

Colombian political leaders never proposed or passed any legislation related to eugenic sterilization or abortions, as was the case in the United States and Canada.[428] Still, there is no evidence proving that doctors did not perform surgical sterilizations on people considered "unfit" or "unworthy" despite the absence of legal regulation, or in scenarios that were not state-controlled. It is important to highlight that at the beginning of the twentieth century Colombia did not have a solid medical system, and was just starting to build its medical institutions and infrastructure in order to respond to medical emergencies and epidemics.[429] Healthcare for poor people was in the hands of religious communities and charities as the state did not have a strong presence in many regions and areas of lower socio-economic status.[430] One can thus presume that sterilization procedures could have taken place in unofficial scenarios that did not involve state institutions or control. However, it is evident that Colombia did not have the medical and financial capacity of the United States and Canada and was consequently less able to implement massive compulsory sterilization measures.

In this context, it can be argued that Latin America, and specifically Colombia, did not officially implement reproductive measures since local eugenicists considered them to be a direct result of the Mendelian hereditary theory, thus considered "too radical". In particular, eugenicists considered that the irreversible nature of eugenic sterilization was not aligned with Lamarckian and Neo-Lamarckian principles that understood the

[427] Mooney, *supra* note 257 at 1037.
[428] Noguera, *supra* note 356 at 98.
[429] *Ibid* at 49.
[430] *Ibid* at 59.

possibility of genetic transformation with the influence of environments and social measures.[431] Moreover, the absence of official reproductive eugenic measures in Latin America can be linked to the strong influence of the Roman Catholic Church. In 1920, Church representatives explicitly criticized eugenics during the Catholic National Congress held in Great Britain.[432] At this Congress, the Catholic Church made its rejection and disagreement with reproductive eugenic measures very explicit, and claimed that these processes were against the catholic doctrine of "God's will" on reproduction.[433] As a result, eugenic measures were considered anti-Catholic and were mostly promoted by secular representatives.[434]

The Colombian "progress paradigm" consisted of a mixed political and scientific reaction to "racial degeneration" and ranged from pessimism to optimism.[435] On the one hand, Colombian scientists were discussing geographical and racial deterministic theories that would lead to a negative future, as geography, weather and race conditions were not easy to transform. On the other hand, inspired by Lamarckian and Neo Lamarckian premises, Colombian politicians and medical elites were adopting hygienic legislation, creating institutions and measures that could benefit progress and development, and get certain groups of society out of their racial and moral deterioration. Consequently, it is clear that Colombian scientists and political elites did not just transplant European and North American Eugenic principles and measures. Instead, they challenged deterministic

[431] Stepan, *supra* note 155 at 111.
[432] *Ibid.*
[433] *Ibid* at 112.
[434] *Ibid* at 131.
[435] Noguera, *supra* note 356 at 120.

heredity hypotheses and measures, and adopted and proposed initiatives that responded to the country's political and economic historical context.

The history of eugenics in the United States, Canada and Colombia shows how this movement was built around scientific and medical theories while, at the same time, being shaped and influenced by the political, economic and social context of each country, region or province. In spite of differences between the three countries, it is possible to highlight some common aspects of eugenics in these cases. First, in all three countries, eugenics was based on the idea of "social" or "racial degeneracy", which was explained in different ways but remained a common phenomenon linked to social and economic crisis, criminality, poverty, and absence of expected "progress". Racial aspects, the "mental capacity" and ability of people and moral societal standards were essential in shaping the concept of "social degeneracy". Consequently, eugenicists targeted people from specific races, anyone who was not physically or mentally "normal", and people, especially women, who did not comply with moral standards on sexuality.

Second, eugenics based its premise on specific medical methods for measuring and quantifying intelligence and the mental capacity of people, such as craniometry, criminal biology, and IQ testing. More specifically, eugenicists used IQ testing methodology to identify who was "fit" for marriage and reproduction, and who was "unfit" and should be institutionalized, segregated or sterilized. It is possible to affirm that these methods allowed eugenicists to medicalize and standardize the selection of patients to whom these measures were applied, and thus, rationally justify the relationship between

feeblemindedness and afro-descendants, immigrants, indigenous people, poor people, "promiscuous" women, alcoholics, people with venereal diseases, sex workers, and people from the coasts, among other "immoral" or "problematic" groups. Eugenics experiences in United States, Canada and Colombia therefore show how the medical concept of "feeblemindedness" was created and shaped around moral values about sexuality and alcohol, economic productivity and efficiency, and social rejection of some races and social classes.

Finally, the eugenics movement faced similar opposition in the three countries, as the Catholic Church officially rejected eugenic interference with natural reproduction and "God's will". In many cases, the power of the Catholic Church influenced the lack of success of eugenics theories and measures in some states of the United States, some provinces of Canada and in Colombia. Indeed, eugenics values were usually labeled as secular and progressive, and the movement itself was considered a symbol of modernity. However, as this chapter showed, while eugenicists relied on modernity's rhetoric of scientific rationality, they subscribed to moral, political and ideological worldviews on race, gender and disability.

Taking all this into account, it can be argued that eugenics medical and scientific discourse was modeled on the social, political and economic context in which it took place. Considering the medical practice of sterilization, this chapter exposed how medical arguments were used to label and value people, and therefore justified certain actions against persons considered "worthless" or "dangerous". This finding leads to the

recognition that eugenics was a scientific movement that promoted a specific medical discourse and specific measures in order to contribute to the betterment of the race and the progress of nations. Following Hector Palma´s work, it would be historically incorrect and naïve to consider that eugenics' inherent political and ideological character make eugenics a "less" scientific movement.[436] Consequently, eugenics constitutes an example of how the medical discourse, and specifically the medical discourse around "feeblemindedness", cannot be understood in isolation from its context and has been historically charged with ideological elements.

The following chapter studies the current situation of sterilization of people with disabilities- who would have been called "feebleminded" or "mental defectives" during eugenics-, and discusses how the contemporary medical discourse continues to determine people´s with disabilities relationship with the legal system.

[436] Palma, *supra* note 25 at 40.

3. The current medical discourse and the sterilization of people with disabilities

Non-consented sterilization practices did not end with the conclusion of the "eugenics era". Even after eugenics there were opposing arguments, some governments apologized for compulsorily sterilizing people with disabilities,[437] other governments continued using this method as a means to reduce the fertility of people with disabilities, control overpopulation, and reduce poverty.[438] Kristin Savell reports how, after eugenics, different countries kept allowing involuntary sterilization of people with disabilities.[439] Countries where non-consented sterilization has taken place in recent years include Australia where, between 1992 and 1997, two hundred young women with disabilities were sterilized; France where fifteen thousand women with disabilities were compulsory sterilized between the 1970s and the 1990s; and Japan, where over sixteen thousand women with disabilities were sterilized without consent between 1949 and 1995.[440] Furthermore, current legal provisions in many countries still allow these procedures on the basis of either "judicial approval" or the substitute consent of the person´s legal guardian.[441]

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[437] This is the case of Germany and the state of Virginia in the United States.
[438] Kristin Savell, "Sex and the Sacred: Sterilization and Bodily Integrity in English and Canadian Law" 2004) 49 McGill L.J. 1093 at 1099 [Savell].
[439] *Ibid* at 1099-1100.
[440] *Ibid*, citing Barbie Dutter, "200 Impaired Girls Illegally Sterilised in Australia" *The Daily Telegraph* (25 August 1998), online: The Telegraph Group <http://www.telegraph.co.uk>. Susannah Herbert, "15,000 Forcibly Sterilised in France" *The Daily Telegraph* (11 September 1997), online: The Telegraph Group <http://www.telegraph.co.uk>. Mike Leidig, "Austria Guilty of Child Sterilisation" *The Daily Telegraph* (31 August 1997), online: The Telegraph Group <http://www.telegraph.co.uk>."16,000 Disabled Japanese Women Sterilized Since 1949" *The Seattle Times* (17 September 1997) at17.
[441] Against Her Will, *supra* note 18.

This chapter analyses the current legal situation regarding the sterilization of people with disabilities. It argues that the law in the United States, Canada, and Colombia has relied on medicine to construct and interpret the identities, sexuality, and reproduction of people with disabilities. First, the chapter describes the current legal frameworks, established by case law, governing the sterilization of people with disabilities in the three countries. Second, it analyzes the role medical discourse plays on judicial decisions concerning the sterilization of people considered incompetent to decide. This second part studies: i) the importance judges give to a person´s diagnosis, the medical arguments that measure intelligence and capacity, and the role of medical expert evidence in defining criteria such as the "best interest" of a person; ii) how the courts have constructed the sexuality and reproduction of people with cognitive disabilities; and iii) if judicial decisions consider past eugenics legislation and measures as relevant factors when deciding if a person with cognitive disability should be sterilized.

3.1. Current sterilization procedures of people with cognitive disabilities in the United States

3.1.1. Legal panorama of non-consented sterilizations in the United States

Despite the fact that eugenics arguments significantly decreased and have lacked scientific support since the 1970s, Hilary Eisenberg claims that up to 1985 in the United States, "at least nineteen states had laws that permitted the sterilization of mentally retarded persons".[442] Since *Buck v. Bell*[443] in 1926, the United States Supreme Court has

[442] These states include Arkansas, Colorado, Connecticut, Delaware, Georgia, Idaho, Kentucky, Mine, Minnesota, Mississippi, Montana, North Carolina, Oklahoma, Oregon, South Carolina, Utah, Vermont, Virginia, and West Virginia. Hilary Eisemberg, "The Impact of Dicta in Buck v.

not referred to the sterilization of people with cognitive or mental disabilities, and has only dealt with the issue in relation to inmates. In the 1942 case of *Skinner v. Oklahoma,* the Supreme Court analyzed the sterilization of inmates in the Oklahoma State correctional facility, and decided that the *Oklahoma´s Habitual Criminal Sterilization Act of 1935*[444] violated the Equal Protection Clause of the fourteenth amendment of the Constitution, since it differentiated criminals with the aim of sterilizing them. The Supreme Court stated, "Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither or disappear (...)".[445] However, the Supreme Court did not explicitly overturn *Buck v. Bell* or refer to the constitutionality of eugenic sterilization.[446] Furthermore, in the 1978 case of *Stump v. Sparkman*, the Supreme Court dealt with the situation of an Indiana woman who was labeled as "mentally retarded" and sterilized without her consent in 1971. In this case, the Supreme Court did not center its decision on the sterilization itself but focused instead focused on whether the Court that granted the authorization for sterilization had the jurisdiction to do so.[447] Accordingly, Eisenberg argues that since *Buck v. Bell* and *Skinner v. Oklahoma,* "the Supreme Court has declined to address involuntary sterilization statutes explicitly".[448]

Bell" (2013) 30 J. Contemp. Health L. & Pol'y 184 at 191 [Eisemberg]. See also: Reilly *supra* note 169 at 148**.**

[443] *Buck v. Bell, supra* note 227.

[444] US, *Habitual Criminal Sterilization Act*, Okla, 1935.

[445] *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942) at 541 [*Skinner v. Oklahoma*].

[446] Eisemberg, *supra* note 442 at 191.

[447] *Ibid* at 192-193.

[448] *Ibid* at 191.

After eugenics, legal advocacy and civil rights efforts have focused on voluntary contraception, termination of pregnancy, and other women´s reproductive rights. The United States Supreme Court has widely discussed and protected reproductive rights, and has specifically considered the right to privacy in reproductive decisions.[449] In decisions such as *Roe v. Wade*[450]*, Eisenstadt v. Baird, Roe*[451]*,* and *Griswold v. Connecticut*[452]*,* the Supreme Court constructed the "right to reproductive privacy", and applied it to contraception and the termination of pregnancy.[453] It is important to note that even though there has not been any specific Supreme Court decisions about sterilization procedures on people who are not able to consent after *Buck v. Bell*, state courts have extended the right to reproductive privacy, equal protection, liberty, and due process to cases of non-consented sterilization.[454]

Indeed, guidance on the authorization of sterilization of people with mental disabilities has been left to the determination of each state. Some states have statutes that allow parents or guardians to consent to sterilization procedures while others require judicial authorization. [455] Maura McIntyre reports that, nowadays, eighteen states have laws that

[449] Eisemberg, *supra* note 442 at 194.
[450] *Roe v Wade*, 410 US 113 (1973).
[451] *Eisenstadt v Baird*, 405 US 438 (1972).
[452] *Griswold v Connecticut*, 381 US 479 (1965).
[453] Eisemberg, *supra* note 442 at 194.
[454] *In the matter of Mary Moe* 385 Mass. 555 (Sup Jud Ct Mass 1982).*Guardianship of Mary Moe,* 960 N.E.2d 350 (Mass. App. Ct. 2012). *In re Guardianship of Hayes*, 93 Wn.2d 228 (Sup Ct Wash 1980). *In Re* Grady, 426 A.2d 467 (NJ Sup Ct 1981). *In the matter of Terwilliger*, 450 A.2d 1376 (Pa. Super. Ct. 1982). In re Estate of K.E.J. , 887 N.E.2d 704 (Ill. App. Ct. 2008). Conservatorship of Valerie N., 40 Cal.3d 143 (Cal Sup Ct 1985).
[455] In states such as Illinois it is possible for parents to request sterilization " unless challenged by a third party". In the case of the state of New York City, parents can request the sterilization of the incompetent person if she/he is older than 21 years old, unless the minor suffers "from painful

"(…) authorize court-ordered sterilization of mentally disabled individuals".[456] McIntyre identifies three categories of standards judges have used when examining cases involving the sterilization of people with mental disabilities: i) the substituted judgment standard; ii) the mandatory criteria rule; and iii) the discretionary best interest standard.[457]

The "substituted judgment standard"[458] consists in "allowing a court to render a decision consistent with the decision the patient would have made if capable".[459]This standard has been used upon guardian's petitions of sterilization, but has been based on what the courts concluded the ward would decide if competent. The Supreme Court of Massachusetts analyzed the standard of substituted judgment in *the matter of Moe.*[460] In this case, the Probate Court for Worcester County studied the mother´s petition for sterilization of Mary Moe, a mentally retarded woman. The Probate Court concluded that there was no "specific statutory authority" to decide these cases, and reported the matter to the Appeals Court. As a result, the Supreme Court accepted the application for direct appellate review in order to answer whether with no specific statutory regulation a probate and family Court can authorize a sterilization of an incompetent person, and in

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menses, and the other deemed "unlikely ever to understand...contraception, [who] could be psychologically traumatized if she became pregnant,... gave birth or had pregnancy terminated, and [could] participate in...sexual activities or have...[them]...imposed on her." Hoangmai H Pham & Barron H Lerner, "In the patient's best interest? Revisiting sexual autonomy and sterilization of the developmentally disabled" (2001) 175:4 West J Med. 280 at 281 (http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1071584/#ref4).

[456]Maura McIntyre, "Buck v. Bell and beyond: A revised standard to evaluate the best interests of the mentally disabled in the sterilization context" (2007) 4 U. Ill. L. Rev. 1303 at 1309.

[457] *Ibid* at 1311. See also: Eisemberg *supra* note 442 at 196.

[458] Hilary Eisenberg affirms that this standard originated in *In re Quinlam*, a case from 1976 where the Supreme Court of New Jersey "allowed the guardian of a patient in a permanent unconscious state to exercise the right to decline potentially lifesaving medical procedures on behalf of the patient". Eisemberg, *supra* note 442 at 197, citing *In re* Quinlan, 355 A.2d 647, 670 (N.J. 1976).

[459] *Ibid* at 197.

[460] *In the matter of Mary Moe* 385 Mass. 555 (Sup Jud Ct Mass 1982) [*In the Matter of Moe*].

the case they can, what standards should judges follow.[461] The Supreme Court of Massachusetts concluded that "under certain specified conditions the Probate Court, as a court of general equity jurisdiction, does have the authority to entertain and act upon such a petition."[462]The Court stated that when deciding cases of sterilization on incompetent persons, judges must find out what the person would choose if competent, and that "no sterilization is to be compelled on the basis of any State or parental interest."[463] Furthermore, the Court explained that the substituted judgment doctrine does not always aim to decide what is best for the person "(…) but rather what decision would be made by the incompetent person if he or she were competent."[464] Accordingly, the Court specified that to determine what the person would decide judges should consider the person´s "actual preference for sterilization, parenthood, or other means of contraception",[465] which can be obtain by considering the person´s testimony, and his/her religious beliefs.[466]

Following the same substituted judgment standard, in *re guardianship of Moe*, the Appeals Court of Massachusetts studied the appeal of a decision by a judge of the Probate and Family Court Department "appointing (Mary Moe´s) parents as guardians for the purpose of consenting to the extraordinary procedures of abortion and sterilization".[467] The Appeals Court found Mary Moe "incompetent to make a decision

[461] *Ibid* at para 557.
[462] *In the Matter of Moe, supra* note 454 at para 557.
[463] *Ibid.*
[464] *Ibid* at para 565.
[465] *Ibid* at para 570.
[466] *Ibid*.
[467] *Guardianship of Mary Moe,* 960 N.E.2d 350 (Mass. App. Ct. 2012) [*Re guardianship of Moe*].

about an abortion (or sterilization)" due to her schizophrenia and that, in cases of sterilization or abortion of people who cannot consent, judges must use the "substitute judgment standard" and determine the decision that the person would make taking into account his/her "actual preferences" and desires.[468] Guided by this standard, and taking into account that Mary Moe had "consistently expressed her opposition to abortion", the Appeal Court vacated the order to subject Mary Moe to a non-consented abortion, and remanded the case "for a proper evidentiary inquiry" to decide it with the standard of substituted judgment.[469] The Appeal Court reversed the order for sterilization, explaining that the Probate and Family Court Department had ordered the sterilization without it being requested, explaining it was to "to avoid this painful situation from recurring in the future".[470] Consequently, the Appeal Court affirmed that the order for non-consented sterilization was ¨*sua sponte* and without notice¨, and that the procedural requirements had not been met.[471]

The second standard used by judges making decisions about the sterilization of people with mental disabilities is the "mandatory criteria rule", which refers to cases where judges have established specific and rigorous conditions in order to authorize sterilization procedures.[472] In *re Guardianship of Hayes*, the Supreme Court of Washington analyzed whether the Superior Court for Grant County had the authority to grant a petition for sterilization presented by the mother of a 19-year-old with Down syndrome. The Supreme Court of Washington stated that in order to approve the sterilization of a person

[468] *Re guardianship of Moe, supra* note 467 at para 140.
[469] *Ibid* at para141.
[470] *Ibid*.
[471] *Ibid* at para139.
[472] Eisemberg, *supra* note 442 at 201.

who is not able to consent, judges must determine the person´s best interests. To do so, judges need to verify if: "(1) the incompetent individual is represented by a disinterested guardian *ad litem;* (2) the court has received independent advice based on a comprehensive psychological and social evaluation of the individual; and (3**)** to the greatest extent possible, the court has elicited and taken into account the view of the incompetent individual".[473]

Furthermore, according to the Supreme Court of Washington judges must also verify certain factors personal to the individual, such as the need for contraception, to confirm that there are no alternatives other than sterilization appropriate for that person. The judge also needs to establish whether the individual "is: (1) incapable of making his or her own decision about sterilization, and (2) unlikely to improve sufficiently to make an informed judgment about sterilization in the foreseeable future".[474] To prove the "need for contraception", the judge must take into account: (1) whether the person can biologically reproduce; (2) whether the person is likely to become pregnant as a result of present or future sexual intercourse; (3) the "nature and extent" of the person´s disability.[475] Finally, the judge needs to be sure that there are no other alternatives to sterilization, by analyzing if: (1) other, less invasive, birth control methods have been tried; (2) the method is the least invasive for the person's body; (3) there is no scientific evidence to prove that there were other "less drastic" contraceptive methods, and there is no significant improvement of the person´s disability.[476] Accordingly, the Supreme Court of Washington concluded

[473] *In re Guardianship of Hayes*, 93 Wn.2d 228 (Sup Ct Wash 1980) para 239 [*In Re Hayes*].
[474] *Ibid* para 243.
[475] *Ibid* at para 239.
[476] *Ibid.*

that the Superior Court had jurisdiction to decide cases of sterilization of incompetent people, and remanded the decision for additional evidence, so the case would be decided following the standards established in the decision.[477]

Finally, the "discretionary best interest standard" refers to decisions that provide guidance to judges when defining the best interests of the "incompetent person" for deciding sterilization requests, while granting judges flexibility to consider other elements.[478] In *Re Grady*, the Supreme Court of New Jersey established requirements in order to authorize the sterilization of Lee Ann Grady, an 18-year-old woman with Down's syndrome. The Supreme Court of New Jersey affirmed that in order to grant the request for sterilization, the Court must verify: i) that the person is incapable of understanding the implications of sterilization; ii) that all legal safeguards have been satisfied: including the presence of a guardian ad litem "to act as counsel for the incompetent during court proceedings, with full opportunity to present proofs and cross-examine witnesses" and the requirement of "independent medical and psychological evaluations by qualified professionals";[479] iii) that the person´s incompetency is permanent; and iv) that the trial court is convinced by "c*lear and convincing* proof that sterilization is in the incompetent person's best interests".[480]To do this, the Supreme Court established the following factors: (1) That the person is capable of procreation; (2) the probability that the person can suffer trauma from an eventual pregnancy; (3) the probability that the person would consent to sexual relations, or that these have the chance to be imposed upon her; (4) the

[477] *In Re Hayes, supra* 473 para 243.
[478] Eisemberg, *supra* note 442 at 205.
[479] *In Re* Grady, 426 A.2d 467 (NJ Sup Ct 1981) at 265 [In Re Grady].
[480] *Ibid* at para 267.

inability of the person to understand the concepts of reproduction and contraception, including the irreversible character of sterilization; (5) scientific evidence that support whether there could be improvement in the person´s condition, or other less drastic contraception alternatives; (6) "the advisability of sterilization at the time of the application rather than in the future"; (7) the ability of the person to eventually take care of a child and get married; (8) Medical evidence that proves the person´s condition is not likely to improve in the future; and (9) proof of the "good faith" of the petitioners of sterilization, and that they are acting in "the best interests of the incompetent person".[481] The Supreme Court clarified that these factors should not be considered "exclusive", and that "The ultimate criterion is the best interests of the incompetent person."[482] After applying these requirements to Lee Ann´s case, the Court concluded there was not enough evidence to prove the sterilization was on the child´s best interests, and therefore vacated the judgment of the Superior Court, and "remand(ed) for application of the new standards to the facts of this case".[483]

Following the same "best interests" criteria, in the case of *In Re Terwilliger*[484] the Superior Court of Pennsylvania studied the case of Mildred J. Terwilliger, a declared 25-year-old "mentally incompetent". The Superior Court stated that, when deciding cases involving the sterilization of mentally incompetents, judges need to address the following factors to facilitate their determination of what is the person's best interest: (1) the court must appoint an "independent guardian ad litem", who must be able to present evidence

[481] *In Re* Grady, *supra* note 479 at para 267-268.
[482] *Ibid* at para 268.
[483] *Ibid* at para 274.
[484] *In the matter of Terwilliger*, 450 A.2d 1376 (Pa. Super. Ct. 1982) [*In Re Terwilliger*].

and cross examine witness; (2) the trial judge must meet with the person, so the person can "(…) express his or her own views on the subject"*; (3)* the trial judge must "find that the individual lacks capacity to make a decision about sterilization and that the incapacity is not likely to change in the foreseeable future" ; (4) It must be proven that the person is capable of reproducing and there are no less drastic contraceptive methods available.[485] Furthermore, the Superior Court recommended following the standards established in *Re Grady*.[486] Similarly than in *Re Grady*, the Court explained that the requirements that it has established were not considered a mandatory or "exhaustive list" for judges, but "the minimal requirements that need to be examined to protect the constitutional rights of the incompetent".[487] As a result, the Superior Court reversed the decision of the Court of Common Pleas of Jefferson County that had authorized her guardian to consent to her sterilization, and sent the case back to the lower court for "further proceedings".[488]

Similarly, in *Re Estate of K.E.J*[489]*,* the Appellate Court of Illinois confirmed the trial court decision denying the petition of a guardian to sterilize a 29 year-old woman with "brain damage" (K.E.J.), arguing that there was no "clear and convincing evidence that a tubal ligation is in K.E.J.'s best interests when compared to other methods of contraception". The Appellate Court affirmed that in order to decide sterilization of people with disabilities, judges must first apply the "substituted judgment standard" by establishing whether the person "(1) would not have wished to be sterilized if she could have foreseen her current situation, or (2) would not have consented to the chosen

[485] *In Re Terwilliger, supra* note 484 para 565-566.
[486] *Ibid* at para 568.
[487] *Ibid*.
[488] *Ibid* at para 570.
[489] In re Estate of K.E.J., 887 N.E.2d 704 (Ill. App. Ct. 2008) [In Re K.E.J].

method of sterilization."[490] The Court stated that only if the substituted judgment standard "cannot be proven, the judge must then make a "best interests analysis", following the requirements established *In re Terwilliger"*. In the same way that in *re Grady* and in *Re Terwilliger*, the Court recognized that these standards were "not intended as rigid elements, nor are they intended to be an exhaustive list; rather, they are to guide the court as it seeks to decide whether sterilization by the petitioned-for method is truly the best way to serve the interests of the ward".[491]

Following the same standard in *Conservatorship of Valerie N*[492]*.,* the Supreme Court of California confirmed the decision of a probate court that denied the request of sterilization of Valerie, a 29 year-old with Down syndrome. The Supreme Court of California reasoned that in order to decide cases regarding sterilization of an incompetent, judges should consider the best interest standards developed in *re Guardianship of Hayes*. However, the Supreme Court stated that Courts could combine the best interest standards established in *re Guardianship of Hayes*, with other relevant factors considered by the parties and judges.[493] Consequently, the Court let the definition of the person´s with disability best interests open for judges to apply different criteria. In this case, the Supreme Court decided that there was not enough evidence to demonstrate Valerie´s necessity for contraception and that there weren't less intrusive means of contraception, and therefore sterilization was not in Valerie´s best interests.

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[490] *Ibid*.
[491] *In Re K.E.J, supra* note 489.
[492] Conservatorship of Valerie N., 40 Cal.3d 143 (Cal Sup Ct 1985) [C. Valerie].
[493] *Ibid*.

Therefore, state courts in the United States follow different standards when making decisions concerning the sterilization of people with disabilities. They have used the substituted consent standard by determining what the person would have decided if competent to do so. Other state courts, have established mandatory requirements in order to define if judges should grant requests for sterilization of a person incompetent to decide. Finally, courts have also tried to determine the best interest of the person by constructing flexible tests in order to decide whether to grant these requests.

Following the legal standards that different state courts have used in order to decide cases dealing with the sterilization of people with cognitive or mental disabilities, it is now important to analyze how these decisions have incorporated the medical discourse in their analysis.

3.1.2. The medical discourse in the United States case law

As stated in the introduction of this thesis, the medical model of disability understands disability in terms of medical diagnoses and cures, and fails to recognize disability as a way of human diversity in a framework of human rights. It can be argued that the medical model of disability is still present in the law. More specifically, the fact that the medical discourse on disability is present in judicial decision-making is reflected in: i) the way different judicial state decisions have used medical diagnoses and IQ scores to decide if a person should be sterilized; ii) the way judges have understood the sexuality and reproduction of women with disabilities; and iii) the way judges have used past eugenics events as part of their reasoning. Furthermore, this thesis argues that judges use the

medical discourse on disability as objective data and do not consider it in a critical way that acknowledges its background and how it has been constructed.

Judges have historically emphasized the individual´s specific medical diagnosis, and trial courts require medical records or rely on expert medical opinions that certify the medical history and characteristics of the individual. First, medical diagnoses and IQ scores have been considered and used as "medical facts" on cases, hence they have not been refuted, and their certainty has often been assumed. This is reflected in different judicial decisions where judges have assumed medical diagnosis, the medical and behavioral characteristics of a person, and IQ scores as given facts, and have not questioned or challenged them. In *the Conservatorship of Valerie N.* the Supreme Court of California identified Valerie as a young girl who was a "victim of Down's syndrome", and her IQ was "estimated to be 30".[494] In *Re Grady*, the Supreme Court of New Jersey highlighted that Lee Ann Grady was a 19-year-old female "seriously afflicted with Down's syndrome".[495] Likewise, in *the guardianship of Hayes,* the Supreme Court of Washington recognized Edith Hayes as a "severally mentally retarded person", and emphasized that even though she was 16 years old, her mental age "is at the level of a 4- or 5-year-old".[496] In *Re guardianship of Moe,* the Appeals Court of Massachusetts identified Mary Moe as "mentally ill, suffering from schizophrenia and/or schizoaffective disorder and bipolar mood disorder".[497] None of these descriptions or medical characteristics was challenged during the legal processes.[498]

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[494] *C. Valerie, supra* note 492..
[495] *In Re Grady, supra* note 479 para 241.
[496] *In Re Hayes, supra* note 473 para 231.
[497] *Re Guardianship of Moe, supra* note 467 para 137.
[498] *C. Valerie, supra* note 492, *In Re Grady, supra* note 479 and *Re Guardianship of Moe, supra* note 467.

Moreover, medical information has been used in deciding the person´s best interests, which as the previous cases showed, have been decided by using different criteria. For example, in *re Guardianship of Hayes,* the Court considered that knowing the "nature and extent" of the person's disability was part of the best interest test.[499] As a result, in this decision, the Court recognized that "substantial medical evidence must be adduced, and the burden on the proponent of sterilization will be to show by clear, cogent and convincing evidence that such a procedure is in the best interest of the retarded person".[500]

Considering the importance judges give to medical evidence in these cases, it is important to be critical of their use and treatment as objective information and evidence. Judges have constantly considered the diagnoses of people with disabilities on their analysis, and have focused on their biological or medical capacities and limitations. As a consequence, a person's with disability identity has been medicalized, which is sign of the persistence of the medical model of disability in the law. Accordingly, the decisions analyzed have not understood disability as a consequence of social barriers and lack of reasonable adjustments, but a medical condition affecting the bodies of people with disabilities.

In particular, the inclusion of specific diagnoses as part of the relevant facts of these decisions must be challenged, as these diagnoses and IQ scores are assumed as objective and exact ways to measure and label a person with disability. As the first chapter argued,

[499] I*n re* Hayes, *supra* note 473 para 239.
[500] *Ibid* para 238.

assuming that the medical discourse on disability is objective and factual would be incorrect. When judges do not acknowledge the context in which methods such as IQ testing have been developed, they are assuming their neutral character. Specifically, as stated in previous chapters, the IQ testing was constructed around racial and social prejudices. Eugenics boards and superintendents in the United States commonly used IQ testing in order to identify patients that may require sterilization procedures. Furthermore, this test and its theoretical basis have been challenged in recent years, as scientists Howard Gardener and Reuven Feuerstein argue that intelligence cannot be measured as a single entity, because there are "distinct intelligences" and are changeable throughout life, a fact that cannot be reflected in Binet's tests.[501]

Judicial decisions analyzing sterilization procedures of people with disabilities have also reflected the exiting stereotypes about the sexual and reproductive characteristics of women with disabilities.[502] Medical expert opinions used and adopted by courts have reproduced existing stereotypes about the sexuality of women with disabilities, which has been usually understood under the extremes of how oversexed or childlike they are.[503] Medical expert opinions and testimonies used by these judicial decisions often reflect the image of a person who cannot control sexual impulses, or that of the eternal child that should not have sex. As a result, these decisions have understood the sexuality of women with disabilities as needing to be protected from abuse. As Kristin Savell underlines after analyzing judicial cases of sterilization in England, judges usually construct the bodies of

[501] Carla Lane, The Distance Learning Technology Resource Guide*, Tecweb* online: <http://www.tecweb.org/styles/gardner.html >.
[502] The 7 decisions analyzed in the United States, all of them were about women or girls.
[503] Savell, *supra* note 438 at 1129.

women with disability as "an object of sexual gratification for a man", and do not differentiate consensual and non-consensual sexual activity.[504] The idea of women with disabilities as oversexed has been reflected in *Re State of K.E.J.,* as the medical expert brought by K.E.J.´s guardian highlighted that she had "poor impulse control" and she was likely to "engage in unprotected sex".[505] Likewise, in *the Matter of Terwilliger,* the Court considered the testimony of the chief of police, who certified he had complaints of citizens who "informed him of being propositioned by Mildred and that Mildred could be sexually abused by several men in the community".[506] In *the Conservatorship of Valerie N.,* the Court considered Valerie's mother testimony that Valerie had not been sexually active since she had been carefully supervised, and that "she was aggressive and affectionate toward boys. On the street she approached men, hugged and kissed them, climbed on them, and wanted to sit on their laps".[507] Contrary to this, in *Matter of Terwilliger* the Court considered the testimony of Mildred´s father, who argued that "because of Mildred's mental deficiency, she has been exploited; e.g., she has given birth to an illegitimate child in December of 1980 and continues to be the object of designing men". The Court in this case reasoned that "the likelihood that the individual will voluntarily engage in sexual activity or be exposed to situations where sexual intercourse is imposed upon her", was a relevant factor for deciding if the sterilization was on the person's best interest.[508]

Moreover, it is important to examine the maternal standards that judicial decisions have

[504] Savell, *supra* note 438 at 1131-1132.
[505] *In Re K.E.J., supra* note 489.
[506] *In Re Terwilliger*, *supra* note 484 para 570.
[507] *C Valerie, supra* note 492 para 483.
[508] *In Re Terwilliger*, *supra* note 484 para 567.

imposed on women with disabilities, and question if they can be linked to eugenics. As evidenced in the previous chapter, in order to avoid association with the Holocaust after the World War II, eugenicists shifted the emphasis of their concerns from genetic predispositions, to who would be a good mother.[509] Judicial decisions by state courts have also questioned the motherhood skills of women with disabilities, and have assessed these abilities with medical evidence. For example, in *re Grady* and in *the Matter of Terwilliger,* the Courts considered "the ability of the incompetent person to care for a child, or the possibility that the incompetent may at some future date be able to marry and, with a spouse, care for a child,"[510] was a relevant question for determining if the person should be sterilized. In *Re Hayes*, the Court concluded that there was insufficient evidence to decide if the 16-year-old concerned would ever be capable of being a good parent.[511]. Likewise, in *the Matter of Terwilliger* the Court considered the testimony of a visiting nurse who affirmed Mildred had a "lack of maternal instincts" with her son, which indicated she should be sterilized.[512]

Lastly, many judicial decisions about sterilization in the United States have considered past eugenic practices as part of their reasoning. In *Re Hayes*, the Supreme Court of Washington reflected on how the theoretical foundations of eugenics were scientifically disproved by evidence that showed there is little or no relationship between "genetic inheritance and such conditions as mental retardation (...)".[513] Similarly, in *Re Grady*, the Superior Court of New Jersey acknowledged the history of eugenics and of compulsory

[509] Klein, *supra* note 2 at 97.
[510] *In Re Grady, supra* note 479 para 271. *See also: In Re Terwilliger*, *supra* note 484 para 587.
[511] *In Re* Hayes, *supra* note 473 para 239.
[512] *Ibid* para 570.
[513] *Ibid* para 235.

sterilization in the country. In *the Conservatorship of Valerie N.,* the Supreme Court of California emphasized that California **"**performed the greatest number of sterilization operations".[514] Lastly, in *the matter of Moe* the Supreme Court of Massachusetts affirmed "nothing we say today condones or approves compulsory sterilization for any purpose".[515]

However in these decisions, some courts did not see any link between current sterilization arguments and the motives behind past eugenic compulsory sterilizations. Courts recognized that eugenics' theoretical foundations are all controverted, and therefore, eugenics is in a distant past. In the decision *In Re Grady,* the Supreme Court of New Jersey, considered the case of Lee Ann Grady was "either "compulsory" or "voluntary"".[516] The Court stated that the sterilization that was being analyzed could not be considered "compulsory", since there was no action of the state, it was against the person's or her guardian's will, and it was on her "best interests".[517] Furthermore, the Court reasoned that as Lee Ann was unable to understand the implications of the procedure, and therefore the sterilization could neither be considered voluntary or compulsory.[518]In *the matter of Moe* the Supreme Court stated that the decision of sterilization of an incompetent person is a decision of whether that persons should be given the same rights as other, and not a decision "based on discredited eugenic theories".[519] In fact, in the *Conservatorship of Valerie N.*, Lucas J. concurred in the

[514]*C Valerie, supra* note 492.
[515] *In the matter of Moe, supra* note 454 para 560.
[516] *In Re Grady, supra* note 479 para 447.
[517] *Ibid.*
[518] *In Re Grady, supra* note 479 para 447.
[519] *In the matter of Moe, supra* note 454 para 560.

decision to deny a sterilization procedure, but dissented on the decision to leave open the possibility of a future sterilization. Lucas J. explained that, based on current sterilization decisions in other states, he feared a possible abuse of sterilization procedures, and that this fear was "(…) neither embroidered out of whole cloth, nor alleviated by the assertion that eugenics and convenience for the caretaker and society are now historic anomalies."[520]Additionally, courts have justified the need for legal requirements and tests to decide requests for sterilization, as a way to prevent abusive medical procedures.[521] Courts have therefore reasoned that subjecting current non-consented sterilization procedures to requirements distinguish them from eugenic compulsory sterilizations.

Overall, state courts in the United States have created different standards and guidelines in order to lead judges to take objective and non-abusive decisions in relation with the sterilization of people with cognitive disabilities. Many of these guidelines include standards that need to be proven with medical evidence and medical expert opinions. As a result, judicial decisions on this topic have included medical diagnoses, IQ scores and other medical evidence, as relevant facts and neutral evidence for the case. Judges have also included medical arguments to define the sexuality and reproductive and maternal skills of people with disabilities. Furthermore, these decisions have reflected judges' acknowledgment of eugenics' past, but judges have not considered their decisions to be reflective of eugenics since they are grounded on due process and sufficient evidence. Therefore, it is possible to argue that the medical discourse has shaped the way law understands the rights of people with disabilities.

[520]*C Valerie, supra* note 492.
[521]*In Re Grady, supra* note 479.

Contrary to the United States, the Supreme Court of Canada has limited the possibility to judicially grant sterilization requests to therapeutic or "lifesaving" cases.

3.2. Current sterilization procedures of people with cognitive disabilities in Canada

3.2.1. Legal panorama of non-consented sterilizations in Canada

Differently than in the United States, the highest court of Canada has defined the Canadian legal framework on sterilization of people with disabilities. In this way, the Supreme Court of Canada stated that "neither statutes nor the *parens patriae* jurisdiction of the court may authorize non-therapeutic sterilization of a mentally incompetent person."[522]

In 1986, the Supreme Court of Canada decided *Eve, Re*[523], in which it examined the application for sterilization of the mother of a 24-year-old woman with "extreme expressive aphasia".[524] The woman´s mother considered that the hygienic duties of menstruation and the experience of motherhood would cause her daughter stress and difficulties.[525] In this decision, the Supreme Court allowed the appeal of the decision of the Prince Edward Island (P.E.I.) Court Appeal granting the sterilization request and restored the decision of the Supreme Court of P.E.I., which stated that "(….) except for clinically therapeutic reasons, parents or others similarly situated could not give a valid consent to such a surgical procedure either, at least in the absence of clear and

[522] CED (online) Mental Incapacity (Western), (II.6.(b)) at §230.
[523] *E. (Mrs.) v. Eve* (1986), 2 S.C.R. 388, 1986 CarswellPEI 22 (WL Can) [*Re Eve*].
[524] *Ibid* at 393-394.
[525] *Ibid* at 393,429.

unequivocal statutory authority".[526] The Supreme Court questioned whether courts had the competency to authorize the sterilization of persons who are not able to consent.[527]

The Supreme Court reasoned that the *parens patrie* jurisdiction must be used to protect the person´s best interest and welfare, not those of guardians or parents.[528] It considered that if the sterilization of mentally incompetents was thought of as "desirable for general social purposed"; this was an issue that Legislature should decide in light of the *Canadian Charter of Rights and Freedoms*.[529] Furthermore, the Supreme Court stated that "best interest" test used in other Canadian decisions and in American cases "is simply not a sufficiently precise or workable tool to permit the *parens patriae* power to be used" in cases of sterilization.[530] Furthermore, the Supreme Court stated that even thought judges have the duty to protect and care for those who cannot take care for themselves, this should not be confused "(...) so as to create a duty obliging the court, at the behest of a third party, to make a choice between the two alleged constitutional rights- the right to procreate or not to procreate- simply because the individual is unable to make that choice."[531]The Supreme Court concluded that sterilization procedures can only be authorized under the *parens patrie* jurisdiction where they have a therapeutic purpose.[532] Analyzing Eve´s case, the Supreme Court of Canada concluded that there was no

[526] *Re Eve, supra* note 523 at 595.
[527] *Ibid* at 426.
[528] *Ibid* at 434.
[529] *Ibid* at 432.
[530] *Ibid*.
[531] *Ibid* at 437.
[532] *Ibid* at 431.

evidence to determine that failure to perform sterilization would cause Eve a detrimental effect for her health, and therefore the sterilization authorization could not be granted.[533]

In light of *Eve. Re.,* Canadian courts have only decided cases involving therapeutic sterilizations. In *K., Re*[534]*,* the British Columbia Court of Appeal decided the case of 10-year-old girl with a diagnosis of "tuberous sclerosis", whose parents had requested a hysterectomy, maintaining that she suffered from "phobic aversion to the sight of blood"[535] and that her hysterical reactions made the hysterectomy necessary to avoid her menstruations in the future.[536] Furthermore, K´s parents mentioned their worries about the possible abuse her daughter could suffer from. The British Columbia Court of Appeal considered the medical expert opinions of different doctors and specialists in order to determine if the sterilization procedure would be in the best interest of the child, and if the hysterical reaction she presented with blood tests would replicate when she got her menstruation. On their basis, the Court disagreed with the decision of the Supreme Court, and reasoned that the sterilization procedure, in this case, was a therapeutic one. The Court stated that "(…) the test is not whether the operation is "therapeutic" or "non-therapeutic" but whether the exceed harm or risk of harm to K. This test is a subjective one: namely, a consideration of all relevant factors having regard only to the best interests of K".[537] The Court agreed with the trial judge and emphasized that the factors to determine the best interests of the incompetent person were: i) to have objective

[533] *Re Eve, supra* note 523 at 429,438.
[534] *K., Re*, [1985] 4 W.W.R. 724, 1985 CarswellBC 141 (WL Can) [*K., Re*].
[535] *Ibid at* 727-728.
[536] *Ibid* at 728.
[537] *Ibid* at 745.

criteria; ii) To have a guardian *ad litem* to represent the mentally incompetent interests, and that this guardian has access to the person; iii) evidence about the medical, and psychological effects of the surgery; iv) that the procedure will not result in harm for the person; v) that there is no scientific conditions to improve the condition of K, or "provide a less drastic solution"; vi) that the application is brought in good faith; and vii) there is no public interest in favor or against the procedure.[538] The Court concluded that the rights of children of the Constitution "include the right to be protected against unnecessary pain and suffering and the right to forego other constitutional rights in order to avoid unnecessary pain and suffering".[539] The Court decided that there was enough evidence to conclude the hysterectomy was on K´ best interests, and therefore allowed the appeal.[540]

Similarly, in *H. (E.M.)*[541]*, Re,* the Court of Queen's Bench of Saskatchewan granted a request for endometrial ablation[542] for a 12-year-old girl with mental disability.[543] In this case, her parents argued that the child´s menstrual flows were causing her negative consequences, as she did not understand the menstrual process, and got upset, lost focus on her activities, and was difficult to deal with.[544] The Court reasoned that following the *Re., K* and *Re Eve* decisions, sterilization could be granted for therapeutic reasons, which, in the court´s opinion, should not be restricted to a particular disease or "physical

[538] *K., Re*, *supra* note 527 at 745-746.
[539] *Ibid* at 756.
[540] *Ibid* at 757.
[541] *H. (E.M.), Re*, [1995] 6 W.W.R. 558, 1995 CarswellSask 71 (WL Can) [*H. (E.M.)*].

[542] This procedure consists in an ablation of the uterine lining, or endometrium. The American College of Obstetricians and Gynecologists establishes that "Pregnancy is not likely after ablation". The American College of Obstetricians and Gynecologists, "Endometrial Ablation"(2013), online: http://www.acog.org/-/media/For-Patients/faq134.pdf?dmc=1&ts=20150813T1657056289.
[543] *H. (E.M), supra* note 534 at 563 para 17.
[544] *Ibid* at 541 para 6-7.

ailment", and should rather be interpreted in a broader way. The Court concluded that due to the frequency of her menstrual cycle and the restrictions it was causing the child, the request for "endometrial ablation" fell on "the correct side of permissible", and could be granted.[545] Similarly, in *R (S.L.)*[546]*, Re,* the same court study a sterilization request for an 11-year-old girl with autism.[547] In this case, the Court stated that it had jurisdiction to authorize the sterilization under the *parens patriae* jurisdiction of the court, if the case was considered therapeutically, as this would be in benefit and best interest of the child.[548] However, in this case the Court found that it was first necessary to require S.L´s father and public trustee consent. Moreover, the Court stated that it was necessary to obtain an affidavit sworn by the doctor who would perform the sterilization, in order to determine "(…) whether this is a therapeutic procedure which is necessary and which is for the benefit of S.L.R."[549]

In general, in *Re Eve* the Supreme Court clarified that Canadian courts only have competence to grant sterilizations requests under the *parens patrie* jurisdiction and only in cases in which the person´s health, life or other rights are at risk if the procedure is not performed. Having explained the Canadian legal panorama of non-consented sterilization on people with cognitive disabilities, it is necessary to analyze how *Re Eve* and other courts decisions have relied on medical arguments.

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[545] *H. (E.M), supra* note 534 at 562 para 16.
[546] In this case the Court ordered the file to be sealed in order to protect the girl´s identity. *R (S.L.)*, Re, [1992] 5 W.W.R. 144 at 150 para 18, 1992 CarswellSask 321 (WL Can) [*R (S.L.)*, Re].
[547] *Ibid* at 144.
[548] *Ibid* at144 para 5.
[549] *Ibid* at 146 para 3.

3.2.2. The medical discourse in Canadian judicial decisions

Contrary to what occurred in United States, in *Eve Re* the Supreme Court of Canada highlighted how the lack of medical expertise among judges made it difficult to determinate which were the "best interests" of the incompetent person. For the Supreme Court, "Judges are generally ill-informed about many of the factors relevant to a wise decision in this difficult area. They generally know little of mental illness, of techniques of contraception or their efficacy. And, however well presented a case may be, it can only partially inform".[550] Accordingly, while the Supreme Court of Canada used medical facts to decide *Eve Re*, it was critical of their use in that it reasoned that sterilizing a person with mental disabilities without her consent was highly intrusive of the person´s basics rights, which required a very complex analysis that could not be limited to medical arguments. The Court affirmed that the discussion about sterilization could not be understood merely with medical arguments, since these could not be easily understood and interpreted by judges.[551]

In cases where the sterilization of people with disability is considered "therapeutic", Canadian courts have relied on medical expert opinions to decide whether not performing the sterilization procedure could harm the rights, health or life of the person. In *K. Re,* the Court took into consideration the medical opinion of a pediatric neurologist, a psychiatrist, a psychologist, and a generalist, in order to decide if K´s blood phobia could be treated, and if the hysterectomy procedure would be in favor of K´s best interests. The Court decided to give more weight to the testimony of doctors who "(…) had an intimate

[550] *Re Eve, supra note 523* at 432.
[551] *Ibid*.

relationship with Infant K since birth and as a consequence had a special insight into her needs."[552]

It is also relevant to question whether the medical discourse has been present in the Canadian Supreme Court's understanding of the sexuality and reproduction of people with disabilities. In *Eve Re,* the Supreme Court did not limit the understanding of the sexuality and reproduction of people with disabilities to medical standards or expert concepts. Instead, the Supreme Court recognized that the arguments about whether Eve was "fit" for reproduction were "value-loaded questions", and that there was no evidence to conclude "that giving birth would be more difficult for Eve than for any other woman."[553] Following this, the Supreme Court recognized that even if there could be financial difficulties associated with the reproduction of a person with cognitive disabilities, those difficulties did not involve the incompetent´s benefit, and must be addressed as a social problem which is not limited to incompetents.[554] Kristin Savell maintains that in *Eve Re,* the Supreme Court constructed the idea of a "sacred body", which is the right to bodily integrity of the person with disability.[555]

Finally, it is important to inquire as to how Canadian courts have acknowledged past eugenic practices. In *Eve Re,* the Supreme Court recognized that social history has constructed "mentally handicapped, as somewhat less than human", and this attitude had been supported by eugenics sterilization acts adopted in Alberta and British Columbia,

[552] *K., Re*, *supra* note 534 at 94.
[553] *Re Eve, supra* note 523 at 430.
[554] *Ibid*.
[555] Savell, *supra* note 438 at 1129.

and other parts of the world.[556] As a result, the Supreme Court analyzed the social and historical construction of mental disability, in order to conclude that there were reasons for "approaching an application for sterilization of a mentally incompetent person with the utmost caution".[557]

Additionally, Canadian courts have studied requests for compensation as a result of compulsory sterilizations during the eugenics era. In *Muir v. Alberta*[558], the Alberta Court of Queen's Bench studied the case of Lellani Muir who was surgically sterilized in 1959 under Alberta´s *Sexual Sterilization Act*.[559] The Court analyzed whether damages for pain and suffering, aggravated damages, and punitive damages should be awarded to her.[560] The Court concluded that evidence suggested that sterilization had a "catastrophic impact on Ms. Muir", and that she should be compensated for the pain she suffered in the last decades.[561] Furthermore, the Court recognized how under the *Sexual Sterilization Act*, "sterilization became an assault and battery", and reflected on the abused committed during this time.[562] The Court specified that the legal safeguards of the moment were ignored and that Eugenic Boards authorized sterilizations that "were not medically necessary", and undertook "unnecessary" procedures such as biopsies, castrations, and authorized hysterectomies in order to "keep (women with disabilities) clean during menstrual periods".[563] Likewise, in *E. (D.) (Guardian ad litem of) v. British Columbia*[564],

[556] *Re Eve, supra* note 523 at 427-428.
[557] *Ibid*.
[558] *Muir v. Alberta,* [1996] 4 W.W.R. 177, 1996 CarswellAlta 495 (WL Can) [*Muir v. Alberta*].
[559] *Ibid at* 183-184.
[560] *Ibid* at 200-201.
[561] *Ibid* at 178.
[562] *Ibid* at 221 para 152.
[563] *Ibid* at 221 para 152.

the Court of Appeal of British Columbia studied an action against the Crown "for abuse of public office, breach of fiduciary duty, battery and sexual assault" undertaken by seventeen people who were sterilized under British Columbia's *Sexual Sterilization Act* while they were patients at *Essondale Provincial Mental Hospital*.[565] The Court agreed with the supreme Court of British Columbia and with the plaintiffs that the eugenics sterilization Act "have gravely interfered with their personal autonomy", but it concluded that "the aspect of sexual or wrongdoing on the part of the medical personnel that would elevate the surgeries from assaults (or battery) to sexual assault is in my view, absent".[566] In this way, Canadian courts have acknowledged that eugenics measures attempted against people´s dignity and created suffering. Courts have also recognized that eugenics influenced the devaluing of people with disabilities and the violation of their rights.

The Canadian legal context shows a different approach to the sterilization of people with disabilities by limiting it to therapeutic cases. Moreover, the Supreme Court of Canada has been critical of the use of medical arguments for deciding sterilization procedures, understanding that this is a topic that implies a violation of basic rights, and cannot be limited to medical expert opinions.

Similarly to the United States and contrary to Canada, Colombia has taken the position that sterilization of people with disabilities can be performed when there is sufficient proof that the person will be unable to consent in the future.

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[564] *E. (D.) (Guardian ad litem of) v. British Columbia* 2005 BCCA 134, 2005 CarswellBC 1220 (WL Can) [*E. (D.)*].
[565] *Ibid* at 4-12.
[566] *Ibid* at 97.

3.3. Current sterilization procedures of people with cognitive disabilities in Colombia

3.3.1. Legal panorama of non-consented sterilizations in Colombia

Even though sterilization procedures on people with disabilities were not a common practice during the eugenics era in Colombia, the frequency of these procedures has increased in recent years. According to the Ministry of Health, there were 505 sterilization procedures performed in Colombia on women with disabilities between 2009 and 2012, and 127 on men with disabilities.[567] This section shows that legislation and constitutional precedent have established strict requirements to grant sterilization requests, and those legal requirements rely on medical arguments to objectively decide these cases.

Colombia is not a federation; consequently its legislation and constitutional precedents are binding on all regions. Unlike the case of the United States and of Canada, the Colombian government has enacted legislation that deals specifically with the sterilization in people who cannot consent. In the Act 1412 from 2010, the state regulated the procedure of sterilization as a way to "foment responsible maternity and paternity in the country". Article 6 of this Act establishes that in the case of sterilization procedures on "mentally disabled people", "the legal representative or guardian" must make the request and give informed consent, after judicial approval.[568] Family Court Judges, who

[567] (Our translation) "Polémica por esterilización de niños con déficit mental" , *El Tiempo* (18 March 2014), online: < http://www.eltiempo.com/archivo/documento/CMS-13675515 >.
[568](Our translation) *Act 1412 that authorizes free vasectomy and tubal ligation as a way of promoting responsible parenthood*, Colombia, 2010, art 6 [*Act 1412 of 2010*].

are also competent to decide guardianship for people with cognitive disabilities, must give the judicial approval for sterilization.[569] Furthermore, article 7 of the Act specifically prohibits[570] sterilization procedures in minors.[571]

Apart from Family Court judges, judges from other jurisdictions and the Constitutional Court of Colombia have also analyzed and decided cases of sterilization of people with cognitive disabilities, through the constitutional action of *tutela*. *Tutela* is a constitutional action that citizens can present in front of judges from any jurisdiction in the country[572] when there is an imminent violation of any of their fundamental constitutional rights, by action or omission of a private or public institution.[573]. In different occasions, guardians or parents of people with disabilities have used the *tutela* action to request health insurance companies and medical institutions to cover and perform the procedure of sterilization of their daughters or sons, arguing that not doing the procedure would put their fundamental right to health and dignity on risk.[574]

In specific, the Constitutional Court of Colombia has the competency to select and review any of the country´s *tutela* decisions.[575] As a result, the Constitutional Court has revised some of these *tutela* cases, and has widely discussed the procedure of sterilization on

[569](Our translation) *Act 1306 that establishes rules for the Protection of Persons with Mental Disabilities and dictate the Legal Regime for their Representation*, Colombia, 2009, art 48 n 8.
[570] As this work explains in the following pages, the Constitutional Court stated that sterilization can be legally performed on minors with disabilities, or when they life or health is in danger.
[571] (Our translation) *Act 1412 of 2010*, *supra* note 561 art 7.
[572] (Our translation) *Decree 2591 that regulates the Action of Tutela established in the article 86 of the Constitution*, Colombia, 1991, art 37 [*Decree 2591 of 1991*].
[573] *Ibid* art 1-2. See also: *Political Constitution*, Colombia, 1991, art 86, 241.
[574] Corte Constitucional [Constitutional Court], October 10 2002, T-*850*, (2002), (Colombia).
[575] *Decree 2591 of 1991, supra* note 572 art 33.

people with cognitive disabilities. The Constitutional Court has the competency to confirm or reverse *tutela* decisions, and taking into account that the action of *tutela* has a preferential character over other type of judicial decisions, it can grant or refuse sterilization authorizations when it considers they violate the Constitution.[576] However, in the cases it has revised, the Court has predominantly remanded them to Family Courts, as they are the competent judges to decide sterilization cases.[577] Furthermore, within its revision competence, the Constitutional Court has established the criteria that Family Judges must verify before authorizing the sterilization of a person with mental or cognitive disabilities, considering that this procedure can significantly affect their fundamental rights to dignity, equal treatment, integrity, and health.[578] Accordingly, the Constitutional Court has considered that Family Court judges must verify: i) that there is clear scientific and medical evidence to demonstrate that the person cannot consent to the procedure of sterilization and that this incapacity is not likely to improve in the future; and ii) that there has already been a judicial process of guardianship, that recognized the person as legally incapable and appointed a legal guardian. It is important to highlight that the Constitutional Court considers that the process of guardianship does not allow

[576] *Ibid*.
[577] Corte Constitucional [Constitutional Court], October 10 2002, T-*850*, (2002), (Colombia). Corte Constitucional [Constitutional Court], March 21 2003, *T-248*, (2003), (Colombia). Corte Constitucional [Constitutional Court], June 29 2006, *T-492*, (2006), (Colombia). Corte Constitucional [Constitutional Court], December 1 2006, T-1019, (2006), (Colombia). Corte Constitucional [Constitutional Court], July 27 2007, *T-560A*, (2007), (Colombia). Corte Constitucional [Constitutional Court], February 9 2012, *T-063*, (2012). Corte Constitucional [Constitutional Court], October 3 2014, *T-740*, (2012), (Colombia). Corte Constitucional [Constitutional Court], March 11 2014, C-131, (2014), (Colombia). [All decisions].
[578] *Ibid.*

guardians to authorize the procedure of sterilization, and it is required to obtain the approval of a family judge for guardians to consent these procedures.[579]

In some cases, the Constitutional Court has studied the cases of sterilization and refused to grant permission for the procedure. For example, in the decision T-850 of 2002[580], the Constitutional Court reversed the judgment of a lower court that had authorized a health insurance company to sterilize a 19-year-old woman with cognitive disability, after her mother requested the procedure in an action of *tutela*. The Court reasoned that there was not enough evidence to prove that Maria Catalina could not be able to consent and develop maternal abilities in the future, and that these abilities could develop if she has access to proper education and enough support.[581] As a result, the Court ordered the health insurance company to provide her other contraceptive alternatives "discarding those options that have a definitive character". Furthermore, the Court ordered the health insurance company and other state institutions to register her in an educational program adapted to her needs and to provide her with "training to exercise her sexuality and maternity in an autonomous and responsible way".[582]

As opposed to the previous decision, in other cases the Constitutional Court has remanded the decisions of sterilization to the competent family judges, for them to decide

[579] All decisions, *supra* note 577.
[580] Corte Constitucional [Constitutional Court], October 10 2002, T-*850*, (2002), (Colombia) [*T-850 of 2002*].
[581] *Ibid.*
[582](Our translation) *Ibid.*

the subject. In the decision T-248 of 2003[583], the Constitutional Court analyzed the case of Diana, a minor with "epilepsy and mental retardation", whose mother had requested her sterilization, arguing that by denying the procedure the health insurance company was violating her right to equality, health, and dignity.[584] The Court reasoned that in that case the minor could not consent or legally conform a family, for reasons of protecting her human dignity she cannot be forced to be biological mother, and "therefore, the tubectomy should be allowed".[585] It added that sterilization could be a way of safeguarding the self-determination of the girl´s body.[586] However, the Court confirmed the decisions of the previous judges, and refused to authorize the procedure on the ground that the guardian did not request approval from the competent judge. The Court ordered to provide the guardian of the minor with information about the competent judge and what is the legal procedure to obtain the approval for sterilization.[587] In the decision T-492 of 2006[588] the Constitutional Court also confirmed the decision of the lower court, and dismissed a request for the sterilization of Ana, a 26-year-old woman with Down´s syndrome, deciding that it was necessary to complete the process of legal guardianship, and then obtain a judicial approval of sterilization from a Family Judge. In this case, the mother of Ana had requested the procedure arguing that not performing the procedure was violating her daughter´s right to life, health, and integrity.[589] The Court urged Family judges to take into account the criteria of "usefulness" and "necessity", when authorizing

[583] Corte Constitucional [Constitutional Court], March 21 2003, *T-248*, (2003), (Colombia) [*T-248 of 2003*].
[584] *Ibid*.
[585] (Our translation) *Ibid.*
[586] *Ibid.*
[587] *Ibid*.
[588] Corte Constitucional [Constitutional Court], June 29 2006, *T-492*, (2006), (Colombia) [*T-492 of 2006*].
[589] *Ibid*.

procedures of sterilization of people with cognitive disabilities.[590]

Likewise, in the decision T-1019 of 2006[591], the Constitutional Court studied a sterilization requested by the mother of Liliana, a 16-year-old with "mental retardation", claiming that the minor not having the procedure threaten her right to dignity, health and integrity. The Court confirmed the decision of the lower court and denied the sterilization procedure, arguing that the guardian must first get the sterilization approved by a Family Judge. Furthermore, the Court reasoned that in order to decide about the necessity of the sterilization, it was first necessary to obtain a detailed expert opinion about Liliana´s "cognitive ability and level of mental development". [592] Following a similar reasoning, in the decision T-560A de 2007[593] the Constitutional Court analyzed the case of Kiara, a minor with a cognitive disability, whose mother had requested her sterilization to protect her right to health and life. The Court reasoned that in cases of sterilization of children with "mental retardation", it is required to obtain prior judicial authorization from the competent judge. Furthermore, the Court stated that the plaintiff did not provide enough elements "(…) to infer that the surgical procedure requested is imminent, necessary, urgent and urgent." [594] As a result, the Court reversed the decision of the lower court, which had authorized the procedure of sterilization.[595]

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[590] (Our translation) *T-492 of 2006, supra* note 588.
[591] Corte Constitucional [Constitutional Court], December 1 2006, T-1019, (2006), (Colombia) [*T-1019 of 2006*].
[592] (Our translation) *Ibid*.
[593] Corte Constitucional [Constitutional Court], July 27 2007, *T-560A*, (2007), (Colombia) [*T-560A of 2007*].
[594](Our translation) *Ibid.*
[595] *Ibid*.

Most recently, the Colombian Constitutional Court incorporated in its reasoning the United Nations Convention of the Rights of Persons with Disabilities, which, as an approved and ratified international treaty, has a constitutional character.[596] In the decision T-063 of 2012[597], the Constitutional Court confirmed the decision of the lower Court and denied the sterilization of Ursula, a 21-year-old with a cognitive disability requested by her father. The Court reasoned that sterilizing Ursula without her consent would violate her right to have a family, to make her own reproductive choices, and to keep her fertility recognized in the United Nations Convention of the Rights of Persons with Disabilities.[598] Finally, in the decision T-740 of 2014[599], the Court denied the request of sterilization for Maria Jose, a twelve-year-old girl with a cognitive disability, since she was not over 14 years old and there was no prior judicial order. In this case, Maria José´s father had requested the procedure, arguing her fundamental rights were being violated, as the health insurance company had refused to perform the procedure. The Court stated that the sterilization would violate her rights under the Convention, and that Family judges approving these procedures must justify their decision "based on reasonable adjustments and instruments of support in order to maximize the person´s possibility of consenting to the procedure".[600] Moreover, the Court ordered the health insurance company to prevent from authorizing the procedure of sterilization without an order from a Family Court judge, and to provide her with sexual and reproductive orientation

[596] In the decision *C -293* of 2010, the Constitutional Court confirmed the constitutionality of the Act 1346 of 2009, which adopted the "Convention on the Rights of Persons with Disabilities".
[597] Corte Constitucional [Constitutional Court], February 9 2012, *T-063*, (2012), (Colombia) [*T-063 of 2012*].
[598] Ibid.
[599] Corte Constitucional [Constitutional Court], October 3 2014, *T-740*, (2012), (Colombia) [*T-740 of 2014*].
[600] (Our translation) *T-740 of 2014, supra* note 599.

"including information and counseling on sexual and reproductive rights."[601]

In the case of the sterilization of minors, the Constitutional Court studied in 2014 a public *action of constitutionality*, which is an action that citizens can use when they consider any act or law violates the constitution.[602] In this case a group of citizens presented the *action of constitutionality* against article 7 of Act 1412 of 2010, which states that it is illegal to sterilize minors. The lawsuit argued that this prohibition violated the rights to equality, dignity, and free development of personality in relation with sexual and reproductive rights of minors under 18 years old, and minors with disabilities.[603] In decision C-131 of 2014[604], the Constitutional Court concluded that the prohibition to sterilize minors did not violate any constitutional rights, but recognized some exceptions to the prohibition.[605] The Court considered that minors could not be sterilized, except when: i) the minor´s life will be at imminent risk as a result of pregnancy, and there is no other way to prevent the pregnancy; and ii) the minor has a disability and will be incapable of consenting to the procedure in the future.[606] The Court specified that in order to grant the sterilization request for minors with disabilities: i) the application must be filed by both parents; ii) the minor must be over 14 years of age, since before this age minors do not have sufficient biological maturity to undergo such procedures; iii) there must be a medical certificate stating that there is a deep and severe degree of disability; and iv) the procedure must be authorized by the competent judge, who in each case

[601] (Our translation) *T-740 of 2014, supra* note 599.
[602] Corte Constitucional [Constitutional Court], March 11 2014, C-131, (2014), (Colombia) [*C-131 of 2014]*.
[603] *Ibid.*
[604] *Ibid*.
[605] *Ibid.*
[606] *Ibid*.

should make the decision that best protects the rights of the child.[607]

As constitutional precedent shows, in most cases discussed above, judges have denied the request due to lack of competence, and have emphasized that Family Court judges are the competent to decide these cases. Case law has established that Family judges must then verify that the person has been granted a legal guardian, and that there is sufficient medical evidence to conclude the person is and will not be capable of consenting in the future. Surprisingly, despite most requests being denied by the Constitutional Court, there are an increasing number of sterilizations of people with disabilities in Colombia. This contradiction can be explained by the small amount of cases that the Constitutional Court chooses to revise, which does not reflect the amount of sterilization requests annually granted by Family Court Judges.[608]

Following this legal landscape, it is important to question the ways in which medical discourse has been present in Constitutional Court cases.

3.3.2. The medical discourse in Constitutional Court decisions

One of the requirements to grant a request for the sterilization of a person with a disability is that judges are presented with scientific and medical evidence demonstrating that the person cannot and will not be able to consent to the procedure in the future.[609] In the case of minors over 14 years of age, the Court has emphasized the need for an

[607] *C-131 of 2014, supra* note 602.
[608] *Decree 2591 of 1991, supra* note 572 art 33.
[609] All decisions, *supra* note 577.

"interdisciplinary medical certificate stating that there is a deep and severe degree of disability".[610] As a result, Family Court Judges often rely on medical expert opinions of the National Institute of Legal Medicine to decide these cases and, most of the times, do not meet with the person with disability concerned by their decision.[611]

Likewise, the Constitutional Court has based its decisions on medical expert opinions on the person with disability, and his/her medical records. In particular, the Court has relied on the person's medical diagnosis and the opinions of psychologists, psychiatrists, and neurologists to decide if the sterilization procedure should be performed. In the decision T-859 of 2002, the Court asked the National Institute of Legal Medicine for a "neurological and psychiatric evaluation" of the child, which established that: "(...) currently there are no treatments to improve her mental faculties, given the degree of mental retardation".[612] The Court then ordered the guardian to request the authorization before a Family Judge, and the health care insurance company to provide a medical report to the competent Family judge. To complete this medical report, the Court required the insurance company to "convene a team of medical specialists in neurology, psychiatry and gynecology to evaluate the various medical options in an attempt to analyze the physical conditions necessary for Maria Catalina to make autonomous decisions regarding the management of her sexuality (...)".[613]

Similarly, in the decision T-1019 of 2006, the Court deemed it necessary to subject a

[610] *C-131 of 2014, supra* note 602.
[611] All decisions, *supra* note 577.
[612] (Our translation) *T-850 of 2002, supra* note 580.
[613] (Our translation) *Ibid*.

child to a medical expert examination in order to determine her level of cognitive ability and mental development, in order to determine if she had sufficient autonomy regarding her sexual reproduction. Following this, the Court ordered the health care insurance to provide the competent judge with a medical report, and to form a "multidisciplinary medical board which must include a neurologist, a gynecologist, a psychologist, and a doctor from the National Institute of Legal Medicine, to determine the degree of mental retardation of the child".[614]

Accordingly, the Constitutional Court has specially relied on medical opinions and records to determine if the person is capable of consenting to the procedure or will be able to consent in the future, and therefore if the person can be sterilized. As this thesis argued on its first chapter, the medical discourse encompassed in medical opinions can be deterministic, it is often based on general descriptions of diagnoses, and it has the pretention of absolute truth. Medical opinions have been specially been used to describe the "normal" or expected sexual characteristics and reproductive capacities of persons with disabilities. An example of this is the medical expert opinion used as evidence in the decision T-063 of 2012, where the National Institute of Legal Medicine examined the case of Ursula and used a typical generalized characterization of Ursula's diagnosis, and applied it to the specific situation of Ursula. The medical expert opinion reasoned that:

> "Patients with mental retardation have difficulties in certain relationships due to poor management of social conventions. Many also may have trouble coping with the demands of marriage and parenting and require

[614](Our translation) *T-1019 of 2006*, *supra* note 591.

> help in new or strange situations, especially if they are under heavy state voltage. For these reasons, it is likely to require supervision, support and special guidance from their families, even into adulthood, and these persons rarely achieve fully independent living."[615]

In the context of the decision T- 1019 of 2006, the medical expert opinion used by the Court established "pregnancy in the minor Kiara would be inconvenient not only for her mental health, but for the consequences of congenital malformation that the embryo can suffer. In addition, the child would be without a mother (...)".[616] Also, in the decision T-560A of 2007, the medical expert opinion requested and used by the Court concluded that:

> "The minor has a normal adolescent physical and sexual development, and thus, a normal sexual desire, although she does not understand the origin and reason for the desire. This makes her vulnerable to sexual relations that can trigger pregnancy and negative consequences for the child, as there can be possible risks of congenital malformation for the medications she has consumed."[617]

Likewise, in the decision T-850 of 2002, the expert medical opinion used by the Constitutional Court described the woman with disabilities desires in the following way: "She is aware of the consequences of sex but she cannot define what it (sic) is. She expresses desire on establishing an emotional relationship because she feels very lonely.

[615] (Our translation) *T-063 of 2012, supra* note 597.
[616](Our translation) *T -1019 of 2006, supra* note 591.
[617](Our translation) *T 560 A of 2007, supra* note 593.

She is ambivalent about the possibility of tubectomy, which says she knows what it (sic) is, but refers she likes children very much and would like to form a family and have children."[618]

Similarly to what happened in the United States, sterilization procedures have been especially frequent in women with disabilities. One of the main reasons to consider and request these procedures has been the fear of sexual violence against girls and women with cognitive disabilities. The University of el Rosario performed a study in 2013, during which people with disabilities, their families, judges, doctors and other members of the society were interviewed about the reasons behind requests for sterilization procedures. This study found that the fear of the person with disability becoming a victim of sexual violence, and the consequential unwanted pregnancies, are the main reasons for requesting procedures of surgical sterilization in persons with cognitive and mental disabilities.[619] In its decisions, the Constitutional Court has also understood the use of sterilization as a way to protect girls and women with disabilities from sexual violence and exploitation. In the decision T-248 of 2003, the Court asked if: "the protection of people with disabilities should be limited to avoid and prevent them from becoming a victim of abusive and criminal acts, or it extends to prevent the possible consequences of such offenses?"[620] Likewise, in the decision T-560A of 2007, the Court of First Instance examined whether the plaintiff had knowledge of acts of disrespect against his daughter

[618](Our translation) *T-850 of 2002, supra* note 580.
[619] Universidad del Rosario, *Derechos sexuales y reproductivos de las personas con discapacidad intelectual: ¿Está preparada nuestra sociedad?* (Bogotá: Universidad del Rosario, 2013) at 7-8 (http://www.urosario.edu.co/Universidad-Ciencia-y-Desarrollo/Derechos-sexuales-y-reproductivos/imagenes/fasciculo1_divulgacion.pdf).
[620](Our translation) *T-248 of 2003, supra* note 583.

at school, especially in regards to her body and sexual autonomy.[621] In this case, it was determined that the mother´s concerns that her child was "beautiful" and that "young and old guys look at her" were not enough evidence to conclude there could be potential harm against her.[622]

As a consequence, and as in the United States case law, Colombian constitutional decisions have constructed the sexual identity of women with disabilities as something that needs to be protected from potential abuse. The idea that sterilization is a protective tool can lead to the medicalization of the victim, or potential victim. The medicalization of victims can be explained by how the law has used the medical discourse to justify the need for protection of people with disabilities, and has placed the solutions in medical nonreversible contraception. The medicalization approach understands that people with disabilities should be sterilized in order to prevent them to be victims of sexual violence. Consequently, this approach places the weight of sexual violence on people with disabilities, and fails to approach the phenomenon as a social problem.[623] Given this, it is important to challenge the way in which the Colombian case law has used medical criteria to define the sexual and reproductive capacity of people with disabilities, and the situations when it is "necessary" to sterilize them in order to protect their own rights.

Finally, Colombian Constitutional Court decisions do not make any reference to eugenics as a movement during which people with disabilities were compulsory sterilized, institutionalized and segregated. As explained in the previous chapter, this may be

[621](Our translation) *T-560A of 2007, supra* note 593.
[622](Our translation) *Ibid*.
[623]*C-131 of 2014, supra* note 602. Clarifying Opinion Magister Luis Ernesto Vargas Silva.

because eugenics in Colombia had a hygienic emphasis, and the country did not implement compulsory sterilization programs. This historical context can explain the lack of judicial consciousness about eugenics, and perhaps the still existent and frequent practice in the country.

The Colombian legal system has considered that legal guardians of people with disabilities can consent to that person´s sterilization, but only after a process of guardianship and the judicial authorization of the procedure by the Family Court. The Constitutional Court has identified specific prerequisites for competent family judges to authorize this procedure, which include a medical opinion that certifies that the person´s life will be at risk in case of pregnancy or that the person is or will not be able to consent to the procedure in the future. Additionally, the Court has established that it is mandatory to obtain a prior guardianship decision that certifies the person is legally incompetent. Therefore, similarly to the case of the United States, the Colombian legal system relies on medical arguments to guarantee judges make objective, neutral, and consequently fair decisions in the case of sterilization of people with disabilities.

This chapter showed that the law in the United States, Canada, and Colombia has tried to find an objective way to decide whether a person with cognitive disability should be sterilized without giving personal informed consent. The panorama of current sterilizations procedures of people with cognitive disabilities in these countries shows three different ways of dealing with this subject. First, in the case of the United States, case law has determined that the best way to decide sterilization procedure requests is

either by using the substitute decision standard and leaving it to the person´s guardians to decide as the person herself would have, or by determining what are the person's "best interests". To determine the person´s best interests, judges have used different standards. In many of the cases, the United States courts have allowed non-consented sterilization procedures on people with disabilities. In contrast, the Canadian legal landscape shows a restrictive way of deciding this topic. In *Eve Re*, the Supreme Court of Canada affirmed that sterilization of someone who is not capable of deciding can never take place without the person's consent, unless it is motivated by therapeutic reasons. Therefore, Canadian judges can only authorize the sterilization of people with disabilities for therapeutic reasons, namely linked to disease or violation of the person´s rights. Finally, the Colombian case law has allowed sterilization procedures when the person has a legal guardian, and is not or will not be capable of consenting in the future. This standard appears very wide, as the person´s inability to consent is a sufficient reason to sterilize him/her.

Even if the legal landscape on the subject is different in all three countries, all three legal systems have incorporated medical discourse in order to define the needs and right limitations of the person with disability. Judges have used IQ scores, medical diagnoses, medical records, and medical expert opinions to define what a person's limitations are, if the person is capable or not of consenting, and if the sterilization would be in the best interest of the person. While in some decisions, medical arguments have been more important than in others, their presence is constant when discussing the subject of sterilization. Judicial decisions are often focused on understanding what causes the

person´s disability, and what his/her biological limitations are. In this way, courts have often placed the disability in the person´s body, and do not usually recognize social barriers that have historically excluded people with disabilities. As a result, courts have used and reproduced the medical model of disability, understanding people with disabilities on medical terms, and resting importance on the social context of exclusion. Moreover, the medical discourse has also been present in the way courts have understood the sexuality and reproduction of people with cognitive disabilities. As this chapter argued, courts have medicalized their sexuality and reproduction by using medical arguments in order to determine their typical sexual characteristics and their maternal or paternal skills. In this way, courts have focused on analyzing how people with disabilities must be protected from violence, how their sexual impulses should be controlled, or in the case of women and girls, if they would be "good mothers".

Finally, in the United States and Canada, judges have acknowledged and recognized past eugenics practices as an undesirable legal and scientific practice. However, in the United States, judges have not related past eugenic sterilizations with current requests and arguments to sterilize a person with cognitive disabilities. On the other hand, in Canada, the Supreme Court related past eugenics constructions with the current understanding of people with disabilities and their rights. In Colombia, judicial decisions on the topic have not made any mention of the eugenics tradition and its sterilization of people with disabilities.

4. CONCLUSIONS

This thesis argued that the medical discourse is not an objective truth, and that throughout history it has overlapped with different ideological, moral, economic, political, gender, and racial postures. In particular, it showed how the medical discourse about "feeblemindedness", now understood as mental or cognitive disability, has been both constructed, and shaped around moral, economic, social and racial anxieties. This is manifested in the medical methods to measure intelligence and capacity such as craniometry and IQ testing, which related mental defectiveness with racial, gender and social prejudices. In this way, this thesis showed how social prejudices have been medicalized, as they have been considered as a sign of "feeblemindedness". This work also discussed the current relationship of the medical discourse and the law, and claimed that the law has usually used medical discourse in order to resolve questions that scape the legal knowledge, and verify objective facts. As a result, legal systems have provided standards of admissibility of expert medical opinions, but still understand that medicine can provide an objective truth, when the right precautions are applied.

Additionally, this work claimed that it is necessary to analyze the eugenics movement in order to understand current attitudes towards disability. Eugenicists proposed a specific medical discourse on "mental deficiency" and "feeblemindedness", which believed people with disabilities could degenerate the race, as they would transfer their condition to next generations. As a result, they were considered "less humane" and their reproduction was viewed as undesirable. The analysis of this movement also showed that even though eugenics was based on Galton´s, Mendel´s and in some cases in Lamarckian

theories of genetic heredity, the movement had different scopes and approaches in the United States, Canada, and Colombia. Accordingly, the eugenics medical discourse was shaped by each country's socio-political, economic and cultural context. In the United States, moral anxieties towards women´s sexuality and venereal diseases, racial tensions of the moment, and the economic and social consequences after the Great Depression, influenced the reception and development of eugenics ideas. The United States' Eugenics movement was characterized for enforcing strong reproductive measures, and it institutionalized and sterilized a high number of people considered a threat for the nation´s progress and welfare. The Canadian case study showed some similarities with the American movement, as Canadian eugenicists adopted its theoretical scientific basis and its migratory and sterilization measures. Still, eugenics in Canada did not benefit from the same popularity as in the United States, and only the provinces of Alberta and British Columbia successfully enacted compulsory sterilization acts. Factors such as the strong presence of the Catholic Church and the reception of Lamarckian theories in the province of Quebec hindered the success of eugenics measures. Lastly, the Colombian Eugenic movement was based in Lamarckian and Neo-Lamarckian heredity theories and, as a consequence, adopted a different approach to eugenics concerns about social and racial degeneration. In Colombia, eugenicists focused on correcting the environmental conditions that could influence the inherent degeneration of the Colombian population. As a result, eugenicists focused on hygiene measures and on immigration policies that tried to "whiten" the population. Differently from the United States and Canadian eugenics measures, Colombia did not enact any sterilization act, and there is no proof of sterilization measures during eugenics.

The study of eugenics in these three countries showed how this scientific movement did not remain isolated from different moral, ideological and political postures. Accordingly, this thesis argued that it would be a mistake to deny eugenics' scientific character just because it was permeated by external factors. Instead, it stated that eugenics was an example of how the medical discourse is not isolated from its context, and is itself a political, ideological and power tool.

Following the context of the medical discourse on "feeblemindedness" and the different consequences of eugenics had in people with mental disabilities; this thesis discussed the current legal landscape of the sterilization of people with cognitive disabilities in the United States, Canada and Colombia. As a result of this analysis, it concluded that each country has developed different approaches on how to decide requests of sterilizations of people with disabilities that cannot legally consent. The United States state courts have adopted three different ways to guide this topic: the substitute judgment standards, and strict and open best interests' tests. Some United States´ courts have allowed sterilizations of people with disabilities, following what courts thought the persons would have decided if capable, stabilising strict requirements, and open standards to determining the person´s best interests. Similarly to the United States, Colombia has also allowed sterilization of people with mental disabilities that are considered "legally incompetent". Colombian legislation and case law of the Constitutional Court have left the decision of sterilization to Family Court Judges, and have established as requirements that i) there has been a previous guardianship process; and that ii) there is enough evidence to conclude the person is not or will not be able to consent the procedure in the

future. Differently than in the two previous cases, the Canadian legal system has adopted a restrictive approach to this subject. The Supreme Court Case *Eve Re* stated that the only cases where sterilization of a person with disability approval could be granted are cases where there is a therapeutic need for sterilizing. As a consequence, since this Supreme Court decision, Canadian courts have only analyzed cases where the motive of the sterilization is a possible and significant affection of the person´s health or life.

Following these different legal approaches to the topic, this thesis argued that all legal systems have relied on medical arguments in order to decide cases of sterilization of persons with mental disabilities. The analysis of different judicial decisions in each country lead to conclude that the law has usually understood people with disabilities through a medical lens, as these cases have requested and used medical expert opinions, and the medical records of the people requested to be sterilized. Courts have used the medical discourse on mental disabilities in order to establish the person´s limitations, the possibility that they will be able to consent, their sexual and reproductive characteristics, and their motherhood skills and potential.

Furthermore, this thesis analyzed if the courts have considered past eugenics sterilization practices of people with disabilities in order to decide contemporary cases. Accordingly, judges in the United States and Canada have acknowledged eugenics past practices and considered them a reproachable and disaccredited past. However, in the United States courts have not related past eugenic sterilizations with current ones, and have treated them as a different phenomenon, with different motivations. Conversely, the Canadian

Supreme Court did acknowledge the possible connection between past eugenic practices and current sterilizations requests. The Supreme Court considered that the historical and social eugenics past background required judges to be extremely careful with reproductive decisions of people with disabilities, since they were once tread as "less humans". Colombian judges have not referred to eugenics sterilization practices and do not seem to acknowledge it as a relevant historical context, in order to decide the current cases.

Overall, this thesis has stated that current non-consented practices of sterilization of people with disabilities, and the medical discourse that courts have used to decide these cases, need to be studied and challenged within a specific historical context. Then, after questioning the medical construction of mental disability, which has transformed from "feeblemindedness" to what we now know as mental or cognitive disabilities, and was once used as a tool for deciding what sorts of people should exist, one can conclude that the medical discourse on people with disability is far from being objective. This thesis has shown that the medical discourse of people with mental disabilities, and especially their sexuality and reproduction, has been shaped by prejudices and ideology. As a result when courts use this medical discourse to decide whether a person with mental disabilities should be sterilized, they are not deciding based on objective evidence.

Moreover, by using the medical discourse on mental disability as a main argument to decide the cases of sterilization, courts medicalize their identities, and understand their rights in terms of their medical diagnoses. This work claimed that by giving too much

importance to medical arguments in order to decide sterilization procedures, courts would replicate the medical model of disability, where diagnoses are more important than rights. With this in mind, it is necessary to question in which ways legal systems can approach the topic of sterilization without limiting it to the medical discourse, and without disregarding that this topic is particularly charged with a history of abuse and prejudice. One alternative that this work suggests is the approach taken by the Canadian legal system. This approach limits non-consented sterilization procedures to therapeutic cases, when the procedure is considered necessary in order to guarantee the persons rights to healthcare and life.

This thesis also highlights the need to approach disability as a social justice issue, and to not limit its legal understanding to medical arguments. The acknowledgement of the different social barriers that have systematically excluded people with disabilities from the education system, the political system, job opportunities and social life, would transform the way legal systems decide about their right to reproduction. With a social approach to disability, judges would wonder what are the barriers that a person with disabilities faces in order to access sexual and reproductive healthcare, as well as if they know their sexual and reproductive rights, if they have access or have received sexual education, and what is the state doing to guarantee this. In this way, instead of questioning what the limitations of people with disabilities are, legal systems should start by questioning what structural social changes are needed to avoid these limitations, when possible. Only in this way, would legal systems really incorporate the social model of disability where disability is not limited to an IQ score, a medical diagnosis, or medical

records, and instead, it is seen as human diversity in a context of human rights.

BIBLIOGRAPHY

LEGISLATION:

Canada

The Immigration Act of 1910, C, 1910 <http://www.pier21.ca/research/immigration-history/immigration-act-1910 >.
An Act Respecting Chinese Immigration, C, 1923 < http://www.collectionscanada.gc.ca/immigrants/021017-119.01-e.php?&document_code=021017-86&page=1&referer=021017-2412.02-e.html&section_code=pp-passage>.
The Sexual Sterilization Act, A, 1928, <http://www.ourfutureourpast.ca/law/page.aspx?id=2906151>.
An Act to amend the Sexual Sterilization Act, A, (1937) <http://www.ourfutureourpast.ca/law/page.aspx?id=2968369>.
An Act to amend the Sexual Sterilization Act, A, (1942).
An Act Respecting Sexual Sterilization, BC (1933)

Colombia

Act 48 about immigration and foreigners, Colombia, 1920.
Act 114 about Immigration and agricultural colonies, Colombia ,1922.
Act 1437 by which it is issued the Code of Administrative Procedure and Administrative Disputes, 2012, Colombia.
Act 34 hygiene of fermented beverages, Colombia,1948.
Act 34 in which the conditions to fabricate alcoholic beverages are created, Colombia, 1948.
Political Constitution, Colombia, 1991.
Act 1412 that authorizes free vasectomy and tubal ligation as a way of promoting responsible parenthood, Colombia, 2010.
Decree 2591 that regulates the Action of Tutela established in the article 86 of the Constitution, Colombia, 1991.
Decree 366 *that organize the educational support services for the care of students with disabilities and exceptional skills or talents in the framework of inclusive education*, Minister of Education, Colombia, 2009.
Act 1306 that establishes rules for the Protection of Persons with Mental Disabilities and dictate the Legal Regime for their Representation , Colombia, 2009.

The United States

US, *An act to authorize and provide for the sterilization of feebleminded*, 1911, NJ, 1911.
US, *Habitual Criminal Sterilization Act*, Okla, 1935.
US, *Prevention for Procreation Act*, 1912, Nev, 1912.

JURISPRUDENCE

Canada

E. (Mrs.) v. Eve (1986), 2 S.C.R. 388, 1986 CarswellPEI 22 (WL Can).
E. (D.) (Guardian ad litem of) v. British Columbia 2005 BCCA 134, 2005 CarswellBC 1220 (WL Can).
H. (E.M.), Re, [1995] 6 W.W.R. 558, 1995 CarswellSask 71 (WL Can).
K., Re, [1985] 4 W.W.R. 724, 1985 CarswellBC 141 (WL Can).
Muir v. Alberta, [1996] 4 W.W.R. 177, 1996 CarswellAlta 495 (WL Can).
R (S.L.), Re, [1992] 5 W.W.R. 144, 1992 CarswellSask 321 (WL Can).

Colombia

Corte Constitucional [Constitutional Court] 1 March of 2011, *C-124* (2011), (Colombia).
Corte Constitucional [Constitutional Court], October 10 2002, T-*850*, (2002), (Colombia).
Corte Constitucional [Constitutional Court], March 21 2003, *T-248*, (2003), (Colombia).
Corte Constitucional [Constitutional Court], June 29 2006, *T-492*, (2006), (Colombia).
Corte Constitucional [Constitutional Court], December 1 2006, T-1019, (2006), (Colombia). Corte Constitucional [Constitutional Court], July 27 2007, *T-560A*, (2007), (Colombia).
Corte Constitucional [Constitutional Court], February 9 2012, *T-063*, (2012), (Colombia)
Corte Constitucional [Constitutional Court], October 3 2014, *T-740*, (2012), (Colombia).
Corte Constitucional [Constitutional Court], March 11 2014, C-131, (2014), (Colombia).

The United States

Brown v. Board of Education of Topeka 347 US 483(1954).
Buck v Bell, 274 US 200 (1927).
Conservatorship of Valerie N., 40 Cal.3d 143 (Cal Sup Ct 1985).
Eisenstadt v Baird, 405 US 438 (1972).
Griswold v Connecticut, 381 US 479 (1965).
Guardianship of Mary Moe, 960 N.E. 2d 350 (Mass. App. Ct. 2012).
Mickle v. Henrichs, 162 F 687 (D. Nev. 1918).
In Re Guardianship of Hayes, 93 Wn.2d 228 (Sup Ct Wash 1980).
In Re Grady, 426 A.2d 467 (NJ Sup Ct 1981).
In Re Estate of K.E.J., 887 N.E.2d 704 (Ill. App. Ct. 2008).
In the matter of Terwilliger, 450 A.2d 1376 (Pa. Super. Ct. 1982).
In the matter of Mary Moe 385 Mass. 555 (Sup Jud Ct Mass 1982).
Roe v Wade, 410 US 113 (1973).
Smith v. Board of Examiners of the feebleminded, 88 Atl. 963 (Sup Ct NJ 1913).
Skinner v. Oklahoma ex rel. Williamson, 316 US 535 (1942)

SECONDARY MATERIAL

Books

Arboleda-Flórez, Julio & Deynaka, Christine J. *Forensic Psychiatric Evidence (*Toronto: Butterworths, 1999).

Barnes, Barry. *Scientific Knowledge and sociological theory* (London: Routledge & Kegan Paul, 1974).

Bowler, Peter. *The Mendelian Revolution: The Emerges of Hereditarian Concepts in Modern Science and Society.* (London: The Anthones Press, 1989).

Currel, Susan & Cogdell, Christina (edit), *Popular Eugenics. National Efficiency and American Mass Culture in the 1930s* (Ohio: Ohio University Press, 2006).

Crookshank, F. G. The Mongol in our Midst. A Study of Man and his Three Faces (New York: E.P Dutton & Company, 1924.

Fausto-Sterling, Anne. *Myths of gender: biological theories about women and men* (New York: BasicBooks, 1992)

Foucault, Michel. *The Birth of the Clinic,* translated by M.Sheridan (London: Routledge, 2003)

Foucault, Michel. *Madness and Civilization. A History of Insanity in the Age of Reason,* translated by Richard Howard (New York: Vintage Books, 1988)

Foucault, Michel. *Discipline and Punish: The Birth of the Prison*, translated by Alan Sheridan (London: Penguin, 1977).

Gould, Stephen Jay. *The Mismeasure of Men* (New York: W.W. Norton & Company, 1981).

Hansen, Randall & King, Desmond. *Sterilized by the State. Eugenics, race and the population scare in Twentieth North America* (New York: Cambridge University Press, 2013).

Harding, Sandra G. *Whose science? Whose knowledge? Thinking from women's lives* (New York: Cornell University Press, 1991).

Harris-Zsovan, Jane. *Eugenics and the Firewall. Canada´s Nasty Little Secret* (Manitoba: J. Gordon Shillingford, 2010).

Hernandez, Tanya. *Racial subordination in Latin America. The Role of the State, Customary Law and the New Civil Rights Response* (New York: Cambridge University Press, 2013).

Kamin, Leon J. *The Science and Politics of I.Q*., (New York; Halsted Press, 1974).

Kline, Wendy. *Building a Better Race: Gender, Sexuality, and Eugenics from the Turn of the Century to the Baby Boom (*Berkeley: University of California Press*,* 2001).

McLaren, Angus*. Our Own Master Race. Eugenics in Canada 1885-1945* (Toronto: McClelland & Stewart Inc., 1990).

Muñoz, Ana María. "Más allá del problema racial: el determinismo geográfico y las dolencias sociales" in *Los problemas de la Raza en Colombia* (Bogotá: Universidad del Rosario, 2011).

Noguera, Carlos Ernesto. *Medicina y Política. Discurso médico y prácticas higiénicas durante la primera mitad del siglo XX en Colombia* (Medellin: Fondo Editorial Universidad EAFIT, 2003).

Palacios, Agustina*. El modelo social de discapacidad: orígenes, caracterización y plasmación en la Convención Internacional sobre los Derechos de las Personas con Discapacidad* (Madrid, CERMI, 2008).

Palma, Hector. *"Gobernar es Seleccionar". Historia y reflexiones sobre el mejoramiento genético en seres humanos* (Buenos Aires: Jorge Baudino Ediciones, 2005).

Popper, Karl. "Three Worlds" *The Tanner Lectures on Human Values* (Michigan: University of Michigan, 1978).

Reilly, Philip R. *The Surgical Solution. A History of Involuntary Sterilization in the United States* (Baltimore: The Johns University Press, 1991).

Romanucci-Ross, Lola & Tancredi, Laurence R*. When law and medicine meet: a cultural view* (New York: Springer, 2007).

Samuel, Geoffrey eds. "Comparative Law and its methodology" in *Research Methods in Law* (New York: Routledge, 2012).

Stewart, Gilbert H. *Legal medicine* (Indianapolis: Bobbs-Merrill, 1910).

Stepan, Nancy Ley. *The Hour of Eugenics. Race, gender and nation in Latin America* (New York: Cornell University Press, 1991).

Wade, Peter. Afterword: Race and Nation in Latin America. An Anthropological View in N. Appelbaum, A. Macpherson, y K. Rosemblatt (eds.), *Race and Nation in Modern Latin America*. (Chapel Hill: The University of North Carolina Press, 2003).

Articles

Carrizosa Moog, Jaime. "Eugenesia y discriminación en Colombia: el papel de la medicina y la psiquiatría en la política inmigratoria a principios del siglo XX" (2014) 43: 1 rev colomb psiquiatr 59.

Couch, James B. " Legal medicine 1986" (1987) 8: 3 J Leg Med 501.

Eisemberg, Hilary. "The Impact of Dicta in Buck v. Bell" (2013) 30 J. Contemp. Health L. & Pol'y 184.

Gutierrez, Maria Teresa. "Proceso de insttucionalización de la higiene: Estado, salubridad e higienismo en Colombia en la primera mitad del Siglo XX " (2010) 12 : 1 Estud Socio-Juríd 74.

Haraway, Donna. ¨Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Perspective¨ (1988) 14: 3 Feminist Studies 575.

McGraw, Jason "Purificar la Nación: eugenesia, higiene y renovación moral-racial de la periferia del Caribe colombiano,1900-1930" (2007) 27 Revista de Estudios Sociales 62.

Mooney, Jadwiga E. Pieper "Re-visiting Histories of Modernization, Progress, and (Unequal) Citizenship Rights: Coerced Sterelization in Peru and in the United States" (2010) 8/9 hist compass 1036.

Nieto, Mauricio. "Poder y conocimiento científico: nuevas tendencias en historiografía de la ciencia" (1995) 10 hist crit 3-14.

Normandin, Sebastian. "Eugenics, McGill, and the Catholic Church in Montreal and Quebec: 1890-1942." (1998) 15 Cana Bull of Med Hist 59.

Restrepo, Olga. "El Darwinism en Colombia: Visiones de la Naturaleza y la Sociedad" (2009) 14s: Acta biol. Colomb. 23.

Restrepo, Eduardo "Imágenes del "negro" y nociones de raza en Colombia a principios del Siglo XX" (2007) 27 Revista de Estudios Sociales at 46.

Savell, Kristin. "Sex and the Sacred: Sterilization and Bodily Integrity in English and Canadian Law" 2004) 49 McGill L.J. 1093.

Silva Olarte, Renan. "Del anacronismo en Historica y en Ciencias Sociales" (2009) 39: 11 hist. crit. 278

International

A.S. v. Hungary, Committee on the Elimination of Discrimination against Women (CEDAW) Thirty-sixth session, 7-25 August 2006, A/C/36/D/4/2004.

Convention on the Rights of Persons with Disabilities, UN General Assembly, 24 January 2007, A/RES/61/106 [*CRPD*].

General comment No 9, UN Committee on the Rights of the Child (CRCCommittee), 43rd session, 27 February 2007, CRC/C/GC/9.

General Comment No. 28, Human Rights Committee, Equality of rights between men and women (CCPR) , Sixty-eighth session, 29 March 2000, CCPR/C/21/Rev.1/Add.1.

General Recommendation No. 19: Violence against women, UN Committee on the Elimination of Discrimination Against Women (CEDAW), llth session, 1992, at para 22.

Other Sources

"Alberta apologizes for forced sterilization", CBC News, (9 November 1999) online: < http://www.cbc.ca/news/canada/alberta-apologizes-for-forced-sterilization-1.169579>.

Begos, Kevin "Lifting the curtain on a shameful era," Against Their Will: North Carolina's Sterilization Program, Part One, *Winston-Salem Journal*,< *extras.journalnow.com/againsttheirwill/ parts/one/story1.html*. >.

Eugenics Archives, University of Alberta, (2010), online: < http://eugenicsarchive.ca >.

CED (online) Mental Incapacity (Western), (II.6.(b)).

"History of Sonoma Developmental Center" *State of California* ,online: < http://www.dds.ca.gov/Sonoma/History.cfm>.

Human Rights Watch "*Sterilization od Women and Girls with disabilities" (*November 2011), online: < https://www.hrw.org/news/2011/11/10/sterilization-women-and-girls-disabilities>.

Kaelber, Lutz. "Eugenics: Compulsory Sterilization in 50 American States" (2011) University of Vermont (http://www.uvm.edu/~lkaelber/eugenics/).

Lane, Carla. The Distance Learning Technology Resource Guide, *Tecweb* online: <http://www.tecweb.org/styles/gardner.html >.

Open Society Foundations, "*Against Her Will: Forced and Coerced Sterilization of Women Worldwide*" (September 2011) online: <http://www.soros.org/ initiatives/health/focus/law/articles_publications/publications/against-her- will-20111004/against-her-will-20111003.pdf>.

Pino, Julio Cesar. “Teaching the History of Race in Latin America” (1997) Am Hist Assoc (https://www.historians.org/publications-and-directories/perspectives-on-history/october-1997/teaching-the-history-of-race-in-latin-america).

“Polémica por esterilización de niños con déficit mental” , *El Tiempo* (18 March 2014), online: < http://www.eltiempo.com/archivo/documento/CMS-13675515 >.

Reis, Shmuel. “Reflections on the nuremberg declaration of the German medical assembly”(2012) 14 IMAJ 532 at 532 (http://www.ima.org.il/FilesUpload/IMAJ/0/41/20536.pdf).

“Students with disabilities and exceptional talents”, (2015), Secretary of Education of Bogota, online: < http://www.educacionbogota.edu.co/archivos/Temas%20estrategicos/Matriculas/2016/necesidades-educativas.html >.

The Manitoba Historical Society, “Maternal Feminism” (27 August 2009), online: < http://www.mhs.mb.ca/docs/features/timelinks/reference/db0015.shtml>.

Universidad del Rosario, *Derechos sexuales y reproductivos de las personas con discapacidad intelectual: ¿Está preparada nuestra sociedad?* (Bogotá: Universidad del Rosario, 2013) at 7-8 (http://www.urosario.edu.co/Universidad-Ciencia-y-Desarrollo/Derechos-sexuales-y-reproductivos/imagenes/fasciculo1_divulgacion.pdf).

Virginia apologizes for eugenics policy¨, BBC News, (3 May 2003), online: < http://news.bbc.co.uk/2/hi/americas/1965811.stm >.

Virginia governor apologizes for eugenics law¨, USA Today, (2 May 2003), online: < http://usatoday30.usatoday.com/news/nation/2002/05/02/virginia-eugenics.htm>.

Vivek Datta, “When Homosexuality Came Out (of the DSM)”(1 December 2014) *Mad in America. Science, Psychiatry and Community,* online: <http://www.madinamerica.com/2014/12/homosexuality-came-dsm/. >.

“79 countries where homosexuality is illegal”, *Erasing 76 crimes*, online: < http://76crimes.com/76-countries-where-homosexuality-is-illegal/ >.