
12-15-2011

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Recommended Citation

Victoria Nourse *Buck v. Bell: A Constitutional Tragedy from a Lost World*, 39 Pepp. L. Rev. Iss. 1 (2011)
Available at: <https://digitalcommons.pepperdine.edu/plr/vol39/iss1/6>

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Buck v. Bell: A Constitutional Tragedy from a Lost World

Victoria Nourse*

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I. INTRODUCTION

Some constitutional tragedies are well known: *Plessy v. Ferguson*¹ and *Korematsu v. United States*² are taught to every first-year law student. *Buck v. Bell*³ is not. Decided in 1927 by the Taft Court, the case is known for its shocking remedy—sterilization—and Justice Holmes's dramatic rhetoric: "Three generations of imbeciles are enough."⁴ A mere five paragraphs long, *Buck v. Bell* could represent the highest ratio of injustice per word ever signed on to by eight Supreme Court Justices, progressive and conservative alike.

Buck v. Bell is not a tragedy as some others might define tragedy: it is not a well-known opinion, nor did it yield wide popular criticism; it sits as a quiet evil, a tragedy of indifference to the Constitution and its most basic principles. To include *Buck* as a tragic opinion is to recognize what Hannah

* Burrus-Bascom Professor of Law, University of Wisconsin. This article is part of *Pepperdine Law Review*'s April 1, 2011 *Supreme Mistakes* symposium, exploring the most maligned decisions in Supreme Court history. Thanks to the members of the *Pepperdine Law Review* and to Professor Larson for inviting me to an outstanding symposium. Special thanks to Professors Amar and White for their insights on the question of constitutional tragedy. I have profited from the work of many others in my pursuit of the story of eugenics, including my great mentor in this effort, Professor Dan Kevles, as well as the extraordinary work of Professor Edward Larson and Professor Paul Lombardo. None, however, are responsible for my historical conclusions. All errors are, of course, my own.

1. 163 U.S. 537 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).
2. 323 U.S. 214 (1944).
3. 274 U.S. 200 (1927).
4. *Id.* at 207.

Arendt once dubbed the “banality of evil.”⁵ Even if grounded in eugenic assumptions widely held at the time, *Buck v. Bell* was an utterly lawless decision—and I mean that quite literally. Holmes treated Carrie Buck’s constitutional claims with contempt. The opinion cites no constitutional text or principle emanating from the text. The only “law” in the opinion must be unearthed from a lost constitutional history embedded in a factual exegesis full of disdain for the Constitution and humanity itself. Few human tragedies can be greater “than the denial of an opportunity to strive or even to hope, by a limit imposed from without, but falsely identified as lying within.”⁶ A lawless legitimization of such a principle—one of natural aristocracy—flies in the face of the very constitutional principles on which our nation was founded.

II. A CATALYTIC TRAGEDY: *BUCK* REVIVES STERILIZATION LAWS

Buck v. Bell was not an inevitable social tragedy; it was a catalytic tragedy. *Buck* could have been decided differently. Yes, the eugenics it relied upon was in some quarters banal, although by 1927 its intellectual heyday had well passed. Sterilization legislation was largely a “dead letter” by 1927 according to its proponents, interred by a variety of state court rulings and common-sense administrative fears.⁷ By the time *Buck* reached the Supreme Court, a majority of state courts that had considered the matter held sterilization laws unconstitutional on federal and state grounds.⁸

5. See HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* (Penguin Books 1977) (1963). In this sense I do not disagree with Professor Larson’s argument that *Buck* was based on the eugenic assumptions of a different day. As Professors White and Amar so eloquently explained in their remarks at the symposium, mere error cannot operate to define a constitutional tragedy. I agree. But I do not believe that all tragedies are immediately recognized as tragedies or that they later become notorious. Some tragedies may be banal reflections of a once misguided public opinion, but a *constitutional* tragedy is one that ignores the *Constitution*, and its very reason for existing: to control the powers of government. In its quiet and indifferent lawlessness, and in its disdain for the written Constitution and its most basic principles, *Buck* should count as a constitutional tragedy.

6. STEPHEN JAY GOULD, *THE MISMEASURE OF MAN* 60–61 (1981 ed.).

7. VICTORIA F. NOURSE, IN *RECKLESS HANDS: SKINNER V. OKLAHOMA AND THE NEAR TRIUMPH OF AMERICAN EUGENICS* 24 (2008).

8. *Id.* at 184–85 n.32 (“Prior to 1922, only one of seven challenges upheld a sterilization law . . .”) (citing cases decided from 1913 to 1921 in New Jersey, Iowa, Michigan, New York, Nevada, Indiana, Washington, and Oregon). See *Smith v. Bd. of Exam’rs of Feeble-Minded*, 88 A. 963 (N.J. 1913); *Davis v. Berry*, 216 F. 413 (S.D. Iowa 1914), *rev’d*, *Berry v. Davis*, 242 U.S. 468 (1917); *Haynes v. Lapeer*, 166 N.W. 938 (Mich. 1918); *Osborn v. Thomson*, 169 N.Y.S. 638 (Sup. Ct. 1918), *aff’d sub nom*, *Osborn v. Thomson*, 171 N.Y.S. 1094 (App. Div. 1918); *Mickle v. Henrichs*, 262 F. 687 (D. Nev. 1918); *Williams v. Smith*, 131 N.E. 2 (Ind. 1921); see also *Cline v. State Bd. of Eugenics, Marion Cnty.*, No. 15,442 (Or. Cir. Ct. Dec. 13, 1921), reprinted in HARRY HAMILTON LAUGHLIN, *EUGENICAL STERILIZATION IN THE UNITED STATES* 287–88 (1922) (“[T]he 1917 [law] is unconstitutional because it clearly violates the provisions of the state and federal constitution prohibiting class legislation . . .”). But see *State v. Feilen*, 126 P. 75 (Wash. 1912) (upholding a sterilization law).

To constitute a tragedy and not mere error, it must be that the constitutional decision could have been different. Long before 1927, lower courts, however uncertain about the precise basis for their views, were nevertheless bold in their rejection of eugenic sterilization. One federal court called it “mental torture,” a degradation and humiliation little different from castration.⁹ It was a “brand of infamy,” like the branding of cheeks or cutting of ears.¹⁰ As the New Jersey Supreme Court warned: “The feeble-minded . . . are not the only persons in the community whose elimination as undesirable citizens would, or might in the judgment of the Legislature, be a distinct benefit to society.”¹¹ It was “beyond the comprehension of this court,” said another judge.¹² Such “strange methods of repression”¹³ belong to “the Dark Ages.”¹⁴

The United States Supreme Court could have followed these lower courts; it could have invoked a growing consensus among the best experts about the futility of such laws.¹⁵ At the very least, the libertarians on the Court might have invoked notions of individual liberty extolled in decisions such as *Meyer v. Nebraska*¹⁶ or *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*.¹⁷ But the Court did not. Instead, it upheld Virginia’s sterilization law, and with Justice Holmes’s decision, eugenics was legislatively reborn, making America (not Germany) the eugenic legislative capital of the world in the period from 1927 until 1934.¹⁸ After *Buck*, state supreme courts pivoted abruptly, affirming the State’s power to sterilize.¹⁹ As the Utah Supreme Court put it in 1929: “[T]he rule announced

9. *Davis*, 216 F. at 416–17.

10. *Mickle*, 262 F. at 690–91.

11. *Smith*, 88 A. at 966.

12. *Osborn*, 169 N.Y.S. at 645.

13. *Mickle*, 262 F. at 691.

14. *Davis*, 216 F. at 416.

15. Holmes’s harsh rhetoric bears the mark of the early 1920s eugenic popularizers, like Madison Grant, who inveighed against the “unfit” in the grossest of terms. See *infra* text accompanying notes 34–39. The science of eugenics, by 1927, was on the decline, even though popularizing organizations would continue to extol its virtues for another decade and more. See generally DANIEL KEVLES, IN THE NAME OF EUGENICS: GENETICS AND THE USES OF HUMAN HEREDITY (1995 ed.).

16. 262 U.S. 390 (1923).

17. 268 U.S. 510 (1925).

18. See NOURSE, *supra* note 7, at 31 (“Two years after *Buck* was decided, twelve states had passed new sterilization legislation; within four years, twenty-two states had introduced new sterilization bills in their legislatures. In 1932, Jacob Landman, a student of eugenic legislation, would explain that ‘*Buck v. Bell* has now . . . committed the United States to a policy of human sterilization for good or for bad as a means of coping with the socially undesirable in our midst.’”).

19. See *id.* at 186 n.44 (“The cases arising after *Buck* deferred to Justice Holmes’s opinion . . .”); see, e.g., *State v. Schaffer*, 270 P. 604 (Kan. 1928); *Davis v. Walton*, 276 P. 921

by . . . the case of *Buck v. Bell* . . . is a complete answer” to any claim under the Fourteenth Amendment.²⁰

Today we know that the Commonwealth of Virginia sterilized Carrie Buck on false premises.²¹ Buck’s child was not imbecilic, even under the technical standards of the day (and “imbecile” along with “moron” and “idiot” were technical terms used by sociologists, psychologists, zoologists, and even geneticists of the day).²² It is often said that Carrie was sent to the asylum because she was an unwed mother or a “bad girl.” The truth is that Carrie was sent to the asylum because she was raped by a relative and the family wanted to cover up the truth.²³ But Carrie Buck’s case should not be dismissed simply because it was a sad tale, or because the Court relied upon factual errors, or because Chief Justice Taft and Justice Holmes sympathized with eugenic thought.²⁴ The decision’s effects were really far more significant than a single hour-long operation, or the Justices’ personal views. By 1933 over 150 million people in the United States lived in states with eugenic laws, or so California’s Human Betterment Foundation, one of the country’s most active eugenic organizations, declared.²⁵ “[T]wenty-seven of the forty-eight states had sterilization laws.”²⁶ California was the leader in such eugenic efforts, eventually sterilizing as many as 20,000 people.²⁷

As Alexis de Tocqueville once claimed, Americans are given to taking all socio-political controversies and turning them into legal questions.²⁸ In the nineteenth century, Darwin’s cousin, the British Francis Galton, founded modern eugenics (as well as the science of statistics, including regression to the mean).²⁹ But it was in America, not Britain, where eugenics had its great legislative victories. The eugenics movement in America inspired not only sterilization laws, but also anti-miscegenation laws and draconian immigration reforms. Harry Laughlin, the most prominent advocate for

(Utah 1929); *State v. Troutman*, 299 P. 668 (Idaho 1931); *In re Main*, 19 P.2d 153 (Okla. 1933); *In re Clayton*, 234 N.W. 630 (Neb. 1931); *Garcia v. State*, 97 P.2d 264 (Cal. Dist. Ct. App. 1939).

20. *Davis*, 276 P. at 923.

21. See NOURSE, *supra* note 7, at 24.

22. See *id.* at 25. “Idiots” signified those with “a mental age of one or two, imbeciles between three and seven, and morons between eight and twelve.” *Id.*

23. *Id.* at 24. This discovery is owed to the work of Professor Paul Lombardo. See generally PAUL A. LOMBARDO, *THREE GENERATIONS, NO IMBECILES: EUGENICS, THE SUPREME COURT, AND BUCK V. BELL* (2008).

24. LOMBARDO, *supra* note 23, at 158, 165–66 (discussing Taft and Holmes).

25. NOURSE, *supra* note 7, at 123 (quoting E.S. Gosney, *Eugenics in California*, N.Y. TIMES, Jan. 14, 1934, at E5).

26. *Id.* at 20.

27. See LOMBARDO, *supra* note 23, at 241–42.

28. See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 270 (J.P. Mayer ed., George Lawrence trans., HarperCollins Publishers 2000) (1835, 1840) (“There is hardly a political question in the United States which does not sooner or later turn into a judicial one.”).

29. See NOURSE, *supra* note 7, at 22; see also Francis Galton, *Eugenics: Its Definition, Scope and Aims*, 10 AM. J. SOC. 1 (1904); Francis Galton, *Studies in Eugenics*, 11 AM. J. SOC. 11 (1905).

sterilization legislation, was also the prime scientific advisor pushing the infamous eugenically-based 1924 immigration laws.³⁰ The impact of eugenics should not be associated only with sterilization; coupled with the false intelligence testing of the day, eugenic social thinking led to social disparagement, deportation, and even life imprisonment in asylums for a class of people that may well have been falsely branded as idiots, imbeciles, and morons.

If there is a villain here, it was more than a perverted genetics. The genetics born in a lab in the basement of Columbia University at the turn of the twentieth century was genius.³¹ But genetics was and is a statistical science, and any statistical science is one of correlation, not causation. As such, in its early stages, it was extraordinarily capable of amplifying false social assumptions; as *The New York Times* explained in 1936, a good deal of eugenics was nothing more than “statistical gossip.”³² Unfortunately, with these statistics, more was at stake than the cliché about stock markets and hem lines. Sterilization may have only been an operation, but the American eugenic movement was a set of social beliefs ranking persons as naturally fit and unfit. These social beliefs, once married with the science of eugenics, took on an aura of inevitability based less on science than on social prejudice. It is often thought that eugenics was only about the developmentally disabled, but in fact, popular intellectuals of the day, progressive and conservative alike, embraced what we would today call a eugenic theory of inherited and inevitable social caste, with the “fit” on top and the “unfit” on the bottom—what eugenicists deemed a “native American aristocracy.”³³

As Madison Grant, one of the most widely read eugenicists of the period, proclaimed: “A rigid system of selection through the elimination of those who are weak or unfit—in other words, social failures—would solve the whole question . . .”³⁴ This solution “can be applied to an ever widening circle of social discards, beginning always with the criminal, the diseased and the insane and extending gradually to types which may be called weaklings rather than defectives and perhaps ultimately to worthless race types.”³⁵ As even eugenicists were ready to admit, the term “feeble-mindedness” was a “lumber room” including everything from the inability to

30. KEVLES, *supra* note 15, at 103. See also LOMBARDO, *supra* note 23, at 78, 200.

31. See KEVLES, *supra* note 15, at 44.

32. See Editorial, *Against Sterilization*, N.Y. TIMES, Jan. 26, 1936, at E8.

33. See MADISON GRANT, *THE PASSING OF THE GREAT RACE: OR THE RACIAL BASIS OF EUROPEAN HISTORY* 5 (4th ed. 1921).

34. *Id.* at 50–51.

35. *Id.* at 51.

“appreciate moral ideals,” to the inability to control their passions, to defects such as being blind or hearing-impaired, or simply to judgments,³⁶ like the one made about the raped Carrie Buck—that it was she who was “incapable of ‘self-support and restraint.’”³⁷

Who were the “unfit”? In some cases they were unfit because of claimed mental defects, in others because of claimed immorality, and in still others because of nationality (what was often termed “race” then). When the psychologist Henry Goddard administered intelligence tests to immigrants at Ellis Island, he found “40 percent” were feebleminded.³⁸ The most famous “bad breeding” stories were constructed around poor families, like the Jukes, the Kallikaks, the Dugdales, the Mongrel Virginians, the Zeroes, the Hill Folk, and my personal favorite, the Bunglers.³⁹ These largely invented tales of licentiousness and inherited feeblemindedness wore a thin veneer of social science, securing them popular and academic respectability.⁴⁰ Poverty never perfectly tracked the category “unfit,” which could include everyone from the hillbilly to the heiress. Just take a look at one of *Life Magazine*’s most famous persons of 1936: Ann Hewitt, an heiress who was deemed “feebleminded” by her mother, and sterilized under cover of appendectomy so that the daughter, being barren, could not inherit the fortune her mother coveted.⁴¹

Lest this seem extreme, I invite you to take the test given to one million men in the Army after World War I to assess their intelligence and whose results led many to declare “that the average intelligence of American army recruits was not much more than a moron, hovering around the fourteen-year-old level.”⁴² Based on this test, respectable people, many scientists among them, came to believe the seemingly impossible claim that “nearly half of the white draft (47.3 percent)” was “feebleminded.”⁴³ In 1936, the

36. HEREDITY AND EUGENICS 280–81 (William E. Castle et al. eds., 1912).

37. LOMBARDO, *supra* note 23, at 134 (quoting material from the official *Briefs and Records of Buck v. Bell* submitted to the Virginia Supreme Court of Appeals).

38. *Id.* at 184 n.26; *see also* HENRY HERBERT GODDARD, *Feeble-Mindedness: Its Causes and Consequences* 571–72 (1914).

39. *See* NOURSE, *supra* note 7, at 81.

40. *See id.*

41. As I have explained elsewhere:

In 1936, Ann Cooper Hewitt, heiress to the multimillion-dollar Cooper Hewitt fortune, filed a civil suit charging that her mother had had her sterilized under cover of appendectomy in order to steal Ann’s inheritance (if Ann had no children, the money would go to the mother). . . . Day-by-day developments in the Hewitt case were reported from coast to coast throughout 1936. The question was whether Ann was feebleminded; to prove that, her mother emphasized Ann’s improper erotic infatuations with people below her station.

Id. at 122. One of the infatuations was with an African-American porter. *See id.* at 209 n.5.

42. *Id.* at 25.

43. *Id.* (quoting DIANE B. PAUL, *Controlling Human Heredity: 1865 to the Present* 67 (1998)).

judge presiding over the Hewitt case took a test similar to the one given to Ann and scored at the twelve-year-old level—a judicial moron.⁴⁴

Here are some of the questions on the test:

The *Knight* engine is used in the Packard, Lozier, Stearns, or Pierce Arrow? The Wyandotte is a kind of horse, fowl, cattle, or granite? *Isaac Pitman* was most famous in physics, shorthand, railroading, or electricity? *Bud Fisher* is famous as an actor, author, baseball player, or comic artist? *Salsify* is a kind of snake, fish, lizard, or vegetable? *Rosa Bonheur* is famous as a poet, painter, composer, or sculptor? *Cheviot* is the name of a fabric, drink, dance, or food?⁴⁵

III. THE LOST HISTORY OF RIGHT AND EQUALITY: *BUCK*'S CONSTITUTIONAL TRAGEDY

Buck v. Bell is not taught today in constitutional law courses in part because it is seen as a case about a false science. But it is also not taught because it cannot be understood without appreciating what I will call a “lost world” of constitutional thought. Carrie Buck’s case was not argued as one of right in any modern sense of the term, nor for that matter were any of the cases that were fought against sterilization during this period. Nor was *Buck v. Bell* argued as a matter of so-called “substantive due process”—for, as G. Edward White has written, no one really used that term at the time.⁴⁶ Rights were not the primary basis on which state courts had struck down sterilization laws. Occasionally, state courts had held that sterilization was cruel and unusual punishment,⁴⁷ that the State had violated procedural due process,⁴⁸ or even that the legislature had done something that could be analogized to a bill of attainder;⁴⁹ but mostly state courts used an argument—“class legislation”—that we have lost.⁵⁰

44. *Id.* at 122–23.

45. *Id.* at 25 (citing MEMOIRS OF THE NATIONAL ACADEMY OF SCIENCES: PSYCHOLOGICAL EXAMINING IN THE UNITED STATES ARMY (Robert M. Yerkes ed., 1921). “The answers are Knight Engine: Stearns; Wyandotte: fowl; Pitman: shorthand; Bud Fisher: comic artist; salsify: vegetable; Rosa Bonheur: painter; Cheviot: fabric.” *Id.*

46. See G. Edward White, *Revisiting Substantive Due Process and Holmes’s Lochner Dissent*, 63 BROOK. L. REV. 87, 108 (1997).

47. *E.g.*, *Mickle v. Henrichs*, 262 F. 687, 691 (D. Nev. 1918); *Davis v. Berry*, 216 F. 413, 417 (S.D. Iowa 1914), *rev’d*, *Berry v. Davis*, 242 U.S. 468 (1917).

48. *E.g.*, *Davis*, 216 F. at 419 (Smith, J., concurring); *Williams v. Smith*, 131 N.E. 2, 2 (Ind. 1921).

49. *E.g.*, *Davis*, 216 F. at 419.

50. Class legislation is known by some academics as a substitute for substantive due process, a claim made by the political scientist Howard Gillman. See HOWARD GILLMAN, *THE CONSTITUTION*

It is said that Chief Justice Taft told Holmes, when writing the *Buck* opinion, to tone down his enthusiasm for eugenics and to emphasize the facts.⁵¹ There is much more than meets the eye in Holmes's seemingly factual description. Holmes begins by telling us that Carrie Buck is a "feeble-minded white woman."⁵² Why mention her race or color? Holmes never seemed to care very much about claims of race.⁵³ The reference might have been benign: the "white race" was a term of art at the time, and appeared in various Supreme Court cases involving immigration and other matters, along with other racial terms that have long since disappeared, such as the Italian race and the Jewish race.⁵⁴ Race-as-everything-from-nationality-to-religion was deeply embedded in eugenics; eugenicists wrote the major immigration laws of the 1920s because they aimed to limit the invasion of the "unfit" races (what we would call nationalities today), such as Southern and Eastern Europeans.⁵⁵

Of course, this was a day and age in which race was a hopelessly ambiguous term conflating everything from nationality to religion. (As the University of Wisconsin's most famous sociologist and eugenicist, Professor E.A. Ross, wrote in 1914, the Jews had a penchant for "cross-racial 'perversion.'"⁵⁶) By noting that Carrie Buck was white, Holmes may have wanted to avoid any confusion with other racial categories. He may have known that other state courts had already announced the connection between eugenics and race, pronouncing it dangerous. The New Jersey Supreme Court explained that legislatures might find other groups, not simply the feeble-minded, less than desirable citizens, that such judgments might be "based on '[r]acial differences,' and that this risk was greatest in communities (presumably the South) where the racial 'question is unfortunately a permanent and paramount issue.'"⁵⁷ Even Carrie Buck's

BESIEGED: THE RISE AND DEMISE OF *LOCHNER* ERA POLICE POWERS JURISPRUDENCE (1993). However, Gillman confused due process and equal protection. Many have also confused "class legislation" with a fear for factional legislation held by some Justices; although there is some evidence of this, it cannot explain the cases in which class legislation arguments were in fact successful—ones which typically had a stronger equal protection component. In a lengthy review of the vast number of equal protection cases during this period, I show this, and I explain that "class legislation" far exceeded the notion of classification; it was aimed at preventing forms of aristocracy, petty and large. See generally V.F. Nourse & Sarah A. Maguire, *The Lost History of Governance and Equal Protection*, 58 DUKE L.J. 955 (2009).

51. LOMBARDO, *supra* note 23, at 166.

52. *Buck v. Bell*, 274 U.S. 200, 205 (1927).

53. See Brad Snyder, *The House That Built Holmes*, LAW & HIST. REV. (forthcoming 2012). See also *infra* text accompanying notes 108–13.

54. See NOURSE, *supra* note 7, at 35, 188 n.55.

55. David Bernstein & Thomas C. Leonard, *Excluding Unfit Workers: Social Control Versus Social Justice in the Age of Economic Reform*, LAW & CONTEMP. PROBS., Summer 2009, at 177, 183–84.

56. NOURSE, *supra* note 7, at 60.

57. *Id.* at 29 (quoting *Smith v. Bd. of Exam'rs of Feeble-Minded*, 88 A. 963, 966 (N.J. 1913)).

counsel had argued that “new ‘classes’ and even ‘races’ might be added to the scope” of Virginia’s law.⁵⁸

As we read on in *Buck v. Bell*, it appears that Holmes is taking Taft’s advice about the facts, and this is no doubt how the case is read today. Only one extremely well-trained in the lost constitutional doctrine of the day will see any law at all in his recitation of fact. However, an astute student will recognize that Holmes’s facts assume the single most important constitutional rule of the day—one about power, not right. As a general matter, in the period from 1890 until 1940, the vast majority of constitutional cases, even the cases we today call ones of substantive due process, were ones then called “the police power.”⁵⁹ The general, but highly counterintuitive, rule was quite simple: even if rights were at issue (property rights, contract rights, speech rights), if the State created the rule in the exercise of the police power, then the right was trumped—due process had been satisfied, substantively so.⁶⁰ Let me say this again, as it is directly contrary to the standard view of the era: the *Lochner* era was not a period of strong property rights as some conservatives have argued, and certainly was not a period of laissez-faire, as liberals have argued.⁶¹ Property rights, like contract rights or speech rights, could be trumped by the police power (hence cedar trees could be cut down to prevent tree rot, rent control could be imposed during WWI, and Mrs. Whitney could be sent to jail if her speech caused harm).⁶² In *Buck*, Holmes assumes this rule without ever stating it because he detested the police power terminology, which he derided as “apologetic phrases” for constitutional analysis.⁶³

Language which today seems to us gratuitous cruelty—“[t]hree generations of imbeciles are enough”⁶⁴—was in fact necessary to apply the governing legal doctrine, even as it hides that law from view. One of the central premises of the police power rule was that if the government believed that your rights were interfering with or harming others, it had the

58. *Id.*

59. See Victoria F. Nourse, *A Tale of Two Lochners: The Untold History of Substantive Due Process and the Idea of Fundamental Rights*, 97 CALIF. L. REV. 751, 752–53 (2009).

60. See *id.* at 753.

61. See David E. Bernstein, *Lochner’s Legacy’s Legacy*, 82 TEX. L. REV. 1, 34 (2003); see also Nourse, *supra* note 59, at 789.

62. Nourse, *supra* note 59, at 752. See *Miller v. Schoene*, 276 U.S. 272 (1928) (regarding cedar trees); *Block v. Hirsh*, 256 U.S. 135 (1921) (regarding rent control); *Whitney v. California*, 274 U.S. 357 (1927) (regarding harmful speech).

63. *Tyson & Brother—United Theatre Ticket Offices, Inc. v. Banton*, 273 U.S. 418, 445 (1927) (Holmes, J., dissenting) (describing the police power as an apology for legal analysis).

64. *Buck v. Bell*, 274 U.S. 200, 207 (1927).

police power to regulate.⁶⁵ However much we may find the notion of harm ambiguous today, at the time it tended to govern constitutional analyses ranging far and wide (think “clear and present danger”⁶⁶). And so, Holmes should not be read as simply stating the facts, but as engaging in heresthetics⁶⁷: structuring the argument so that there was only one answer. Hence, we read: defective persons, if “discharged would become a menace” transmitting insanity and other defects like any other disease.⁶⁸

Having answered the major doctrinal question (albeit neither citing nor answering any conflicting law), Holmes moves on to insist that procedural due process had not been violated.⁶⁹ Chief Justice Taft, who had cooled to his own eugenic ties at the time,⁷⁰ cautioned Holmes on this as well: Holmes is thus careful to emphasize the Virginia law’s procedural protections. He tells us that sterilization is done “under careful safeguard,” and “on complying with the very careful provisions by which the act protects the patients from possible abuse.”⁷¹ Today, of course, we know that Holmes’s claims misstate the truth. He asserts that the operations are performed “without serious pain or substantial danger to life.”⁷² In fact, we know that the operation for women was quite a bit more dangerous and that some women did in fact die from the procedure.⁷³ We also know that the procedural due process to which Carrie Buck was entitled was largely illusory. The suit that brought *Buck* to the Court was constructed precisely because sterilization laws had become a dead letter due to hostile state court

65. The bar’s professional materials reflected similar views well into the 1930s. See 11 AM. JUR. *Constitutional Law* § 267 (1937) (“[I]t is settled that the possession and enjoyment of all rights are subject to the police power Consequently, both persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, welfare, and prosperity of the people of the state.”) (footnote omitted); *id.* § 268 (“No rule in constitutional law is better settled than the principle that all property is held subject to the right of the state reasonably to regulate its use under the police power”); *id.* § 264 (“Rights and privileges arising from contracts are subject to regulations for the protection of the public health, the public morals, and the public safety, in the same sense and to the same extent as is all property”); see also HUGH EVANDER WILLIS, *CONSTITUTIONAL LAW OF THE UNITED STATES* 643 (1936) (“The great powers of government . . . are the police power, the power of eminent domain, and the power of taxation. Whenever there is a proper exercise of these powers, personal liberty is rightly delimited. . . . Property for long years made a direct appeal to due process, but its direct appeal for the most part failed.”); *id.* at 707 (“[I]f the social control is a proper exercise of the police power . . . there is no violation of due process as a matter of substance.”).

66. See *Schenck v. United States*, 249 U.S. 47, 52 (1919).

67. This is William Riker’s term. WILLIAM H. RIKER, *THE ART OF POLITICAL MANIPULATION* ix (1986).

68. *Buck*, 274 U.S. at 206.

69. *Id.* at 207.

70. LOMBARDO, *supra* note 23, at 166 (describing Taft’s cautions to Holmes).

71. *Buck*, 274 U.S. at 205–06.

72. *Id.* at 205.

73. KEVLES, *supra* note 15, at 169 (noting that the Germans estimated that, during this period, one to two percent of women undergoing the operation died).

constitutional rulings.⁷⁴ Carrie's lawyer was affiliated with the very hospital she was suing.⁷⁵ The "due process" with which she was provided involved a woman who, as Professor Paul Lombardo found, concluded that the "look" of Buck's seven month old child, Vivian, proved her imbecilic.⁷⁶ Then, too, the major evidence against Buck was constructed by Harry Laughlin, the author of sterilization laws throughout the country.⁷⁷ This hardly reflects the disinterested scrupulosity that Holmes represented.

All this simply cleared the underbrush for Holmes's major claim: "The attack is not upon the procedure *but upon the substantive law*."⁷⁸ Holmes was a great opponent of what we today call substantive due process.⁷⁹ He had no taste for substantive due process because he had no taste for rights or equality.⁸⁰ Even in cases where he embraced rights, he rejected the doctrinal parlance of the day, whether in *Pennsylvania Coal v. Mahon*⁸¹ on property rights or in his dissents in price-fixing and First Amendment cases.⁸² Justice Holmes was a balancer through and through.⁸³

In fact, Holmes was so contemptuous of rights, the term appears nowhere in his *Buck* opinion. Without a reference to counsel's argument, one would never know that Carrie Buck's lawyer had in fact gestured toward a right of "bodily integrity."⁸⁴ Holmes managed to dismiss the claim without even using the term "right," stating that "[i]t seems to be contended that in no circumstances could such an order be justified."⁸⁵ Holmes knew that absolute "right" was not the doctrine of the day, this was simply a rather disingenuous way of backhanding Carrie Buck's claim. Even in the average case of property rights, contract rights, or free speech rights, the State's interest in public health or safety (the police power) could trump a claim of

74. NOURSE, *supra* note 7, at 27–28.

75. *Id.* at 27.

76. *Id.*

77. See LOMBARDO, *supra* note 23, at 108–09, 133–35.

78. *Buck v. Bell*, 274 U.S. 200, 207 (1927) (emphasis added).

79. See Nourse, *supra* note 59, at 773 n.120.

80. See *id.*

81. 260 U.S. 393 (1922).

82. See *Tyson & Brother—United Theatre Ticket Offices, Inc. v. Banton*, 273 U.S. 418, 445 (1927) ("[W]hen Legislatures are held to be authorized to do anything considerably affecting public welfare it is covered by apologetic phrases like the police power.") (Holmes, J., dissenting). *Tyson & Brother—United Theatre Ticket Offices, Inc.*, written by Justice Sutherland, was a typical "substantive due process" case in the sense that it struck down a pricefixing or labor law.

83. See William Michael Treanor, *Jam for Justice Holmes: Reassessing the Significance of Mahon*, 86 GEO. L.J. 813, 820 (1998).

84. See NOURSE, *supra* note 7, at 27.

85. *Buck v. Bell*, 274 U.S. 200, 207 (1927).

right.⁸⁶ In short, there was no point to Holmes's contempt for Carrie's claim of right; she still would have lost under the police power (health would have trumped her rights claim under the conventional doctrine of the day). The only point of this sentence, then, was to make a pragmatist's philosophical claim: that, in life and the law, there are no absolutes, including absolute rights.⁸⁷ For philosophical pragmatists, rights are conclusions, not givens. One wonders, however, in such a case where another's liberty was at stake, whether such a philosopher's errand can only be described as deeply arrogant, particularly for a Justice who claimed that his greatest opinions emanated from the principle that he was "not God."⁸⁸

Today, moderns wonder why Holmes's opinion elicited support across the Court: progressives, moderates, and conservatives signed on to Holmes's *Buck v. Bell* opinion. The great progressive, Brandeis, was noticeably silent.⁸⁹ He would go on to cite the *Buck* opinion as an example of properly allowing the states to meet "modern conditions by regulations which 'a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive'"—in one of his most iconic dissents, *Olmstead v. United States*.⁹⁰ Chief Justice Taft and Justice Stone may well have followed the doctrine of the day: public right could trump individual right.⁹¹ There was a health reason for the law, just as there was for vaccination, the principal and only precedent upon which Holmes relied.⁹²

But what of the so-called libertarians—Justice McReynolds and others who would become known as the "four horsemen" and who are often touted as great defenders of right? McReynolds was the author of *Meyer*⁹³ and *Pierce*,⁹⁴ cases often cited for a standard list of "reserved rights" including

86. See Nourse, *supra* note 59, at 771–72.

87. LOUIS MENAND, *THE METAPHYSICAL CLUB: A STORY OF IDEAS IN AMERICA* 222 (2001) (describing the pragmatist philosopher Charles Peirce's questioning of absolutes); *id.* at 63 (describing Holmes's questioning of absolute truth).

88. David Luban, *Justice Holmes and the Metaphysics of Judicial Restraint*, 44 *DUKE L.J.* 449, 487 n.132 (1994) (quoting a letter from Justice Holmes to Lewis Einstein).

89. See MELVIN I. UROFSKY, *LOUIS D. BRANDEIS: A LIFE* 619 (2009) (describing Justice Brandeis's thoughts on the Due Process Clause of the Fourteenth Amendment).

90. 277 U.S. 438, 471 (Brandeis, J., dissenting) (quoting *Vill. of Euclid v. Amber Realty Co.*, 272 U.S. 365, 387 (1926)).

91. See *supra* text accompanying notes 62–64.

92. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (upholding the far less serious invasion of liberty accompanying vaccination).

93. *Meyer v. Nebraska*, 262 U.S. 390 (1923) (invalidating on substantive due process grounds a Nebraska law prohibiting foreign language instruction in both public and private schools, with Justices Van Devanter and Butler joining Justice McReynolds's opinion).

94. *Pierce v. Soc'y of Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925) (invalidating an Oregon statute requiring all children to attend public school, with Justices Van Devanter, Sutherland, and Butler joining Justice McReynolds's opinion).

freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.⁹⁵

Some academics have suggested that Justice McReynolds (who famously refused to say hello to Brandeis because he was a Jew) was one of the Supreme Court's true rights libertarians.⁹⁶ But, if that were the case, he, along with Justices Sutherland, Van Devanter, and Sanford, should have dissented in *Buck*, but did not. Why? Because outside the areas of labor and property rights and occasional forays such as *Meyer* and *Pierce*, the libertarians followed the standard doctrine of the day—rights were subject to the police power. In *Buck*, only Pierce Butler dissented without opinion,⁹⁷ a decision that many speculate was influenced by his Catholicism and Catholics' distaste for sterilization as bodily mutilation.

Today, of course, rights have become something else; they have taken on an absolutist aura as conventional as it is untrue (even strict scrutiny is not in fact fatal). I have spent a good deal of time arguing that rights during the first three decades of the twentieth century once had an entirely non-Dworkinian logic⁹⁸ and I will not belabor the point here; I make it simply to emphasize the foreignness of the constitutional law of 1927. For example, at the time, students of the doctrine of the era, including Professor Robert Cushman, praised Holmes's "three generation of imbeciles" as a "trenchant" explanation for why the law was a "reasonable social protection, entirely compatible with due process of law."⁹⁹ However extreme Holmes's opinion seems today, it appeared reasonable not simply for progressives, who praised it (precisely because it refused to engage in what we call "substantive due process"), but also for conservatives and libertarians. Oxymoronic as it may sound, *Buck v. Bell*'s implied police power analysis was banal as a doctrinal matter, even if today it appears lawlessly unbounded to constitutional text or structure (the "police power" after all appears

95. *Meyer*, 262 U.S. at 399.

96. See Bernstein, *supra* note 61, at 44–45 (characterizing McReynolds's opinions in *Pierce* and *Meyer* as libertarian).

97. *Buck v. Bell*, 274 U.S. 200, 208 (1926) (Butler, J., dissenting).

98. See generally Nourse, *supra* note 59.

99. Robert E. Cushman, *Constitutional Law in 1926–27*, 22 AM. POL. SCI. REV. 70, 92 (1928). Special thanks to David Bernstein for bringing this to my attention.

nowhere in the Constitution). The state courts had not rejected sterilization claims based on substantive due process or rights; rights were too weak against the State's asserted health rationale.

However banal in 1927, *Buck v. Bell* cannot be read without a shudder today in 2011 for the extraordinary breadth of state power it asserts. In its most famous passage, Holmes writes:

We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough.¹⁰⁰

Taken seriously of course, this passage justifies extraordinary state power—the power to do almost anything to citizens short of killing them (and perhaps even that, at least in case of war).¹⁰¹ Progressives, at the time, found no problem with this logic, but nor did the Justices who today are considered libertarians.¹⁰² And that is because they not only shared a notion of right as far weaker than we imagine today, one that cannot be justified in my opinion by the constitutional text or the history of the Bill of Rights or even based on the Founders' ideals, but one quite prevalent in the first three decades of the twentieth century.

So, too, the notion of “social harm” supporting the police power was completely untethered from constitutional text and ripe for misuse in the hands of a Justice such as Holmes, who believed that the Constitution could be reduced to ad hoc balancing. Eugenics was built upon the notion of harm; indeed, it thrived on a sense of imminent doom: that society was degenerating because of what were called its “weaklings” and “discards.” The idea that society was being swamped by incompetents was a common trope for eugenicists: the unfit were a “menace.”¹⁰³ Eugenicists were not afraid of talking of death: as Herbert Spencer had written, “[i]f they are not

100. *Buck*, 274 U.S. at 207 (citation omitted).

101. Holmes, famously proud of his Civil War wounds, was of course referring to his service in that war when he said that the State “may call upon the best citizens for their lives.” *Id.*

102. Ironically, given Holmes's insistence that the police power was a silly doctrine, he relied upon harm in his own “balancing” approach.

103. *See id.* at 205–06.

sufficiently complete to live, they die, and it is best that they should die.”¹⁰⁴ Even Teddy Roosevelt warned of “race death.”¹⁰⁵ Given such apocalyptic fears of widespread and imminent death, it is not surprising that lesser intrusions on an individual were considered necessary and even kind, a “practical, merciful and inevitable solution.”¹⁰⁶ Like the great popular eugenicists of the day, Holmes wrote in *Buck* that eugenics would prevent society from being “swamped” by incompetents, that fewer criminals would be executed, and that fewer imbeciles would starve.¹⁰⁷ Given such draconian results on one side of Holmes’s balance, of course the “lesser” sacrifice (a small operation on an individual) would seem fully appropriate. (Ironically, Holmes’s then entirely idiosyncratic balancing rhetoric often yielded results similar to the police power analysis.)

We come, then, to the final paragraph and real secret of *Buck v. Bell*, which dismisses Carrie Buck’s equal protection claim.¹⁰⁸ Here surfaces the ultimate constitutional tragedy of the opinion. As I explained earlier, sterilization laws were largely dead letters by 1927 when Holmes decided the case, which is why *Buck v. Bell* was so important in reviving and legitimating eugenics in the early 1930s. Equal protection was the most common rationale used by state courts to strike down sterilization laws, but Holmes backhanded this argument in a final flourish, dismissing it as the “last resort” of the constitutional lawyer.¹⁰⁹ There is a reason that state courts used a form of equal protection to strike down sterilization laws, but again, most of the history of this has been lost, as it took the form of a doctrine known as “class legislation.”¹¹⁰ For progressives, equal protection had a bad odor for its role in thwarting organized labor, when substantive due process failed (in its most infamous instantiation upholding the labor injunction in *Truax v. Corrigan*).¹¹¹ But this ignored the history of class legislation going back to the 1880s and 1890s, a history about caste and legislative due process.¹¹² After all, at a minimum, the Equal Protection Clause must mean that, in America, state legislatures have no power to

104. HERBERT SPENCER, SOCIAL STATICS 415 (New York, D. Appleton & Co. 1873) (1850).

105. See Theodore Roosevelt, U.S. President, State of the Union Address (Dec. 3, 1906), in STATE OF THE UNION ADDRESSES OF THEODORE ROOSEVELT 181 (Echo Library 2007) (declaring “race death” as the penalty for “wilful sterility”).

106. GRANT, *supra* note 33, at 51.

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

108. See *id.* at 208.

109. *Id.*

110. Nourse & Maguire, *supra* note 50, at 119.

111. 257 U.S. 312 (1921).

112. See generally Nourse & Maguire, *supra* note 50.

legislate castes, to create or establish a “born” aristocracy. Our entire constitutional history demonstrates the continuing importance of this principle, first announced in the Declaration of Independence, that “all men are created equal.”¹¹³ This is not in fact because they are equal, but because, in a democracy, they must be presumed equal citizens. Set against these basic principles, the eugenicists’ natural American aristocracy cannot stand.

Class legislation, although successful only sparingly, had an original meaning barring caste.¹¹⁴ It was supported by constitutional text: the Fourteenth Amendment, not to mention the anti-nobility clauses. It was supported by constitutional principle and history: America fought a war against Britain to replace aristocracy with a democracy in which no one was “born” to rule over others. Holmes’s view of equal protection, that it was a matter of logical classification (in which case it was a non-rule, since all legislation classifies), had no room for the idea of social caste. No doubt he believed, like many others, that class legislation had been interred with cases like *Lochner*, which shifted the claim against labor away from class legislation and toward right.¹¹⁵ Holmes would win the future on this view, and most scholars and students would never know of a different, albeit fleeting history of class legislation. In the process, we would lose a notion of equality predating the Fourteenth Amendment and reaching to the Founding: that in America, there are no blood castes. Ultimately, traces of this view would have to be resurrected to limit *Buck*, but only fifteen years later, after Holmes was gone and “the Nazis’ insistent portrayals of America . . . as unfit and full of weaker white ‘races’ transformed the public’s understanding”¹¹⁶ of eugenics. Hitler made clear how dangerous blood government could be. As the Supreme Court wrote in 1942 when America was at war: “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 and disappear.”¹¹⁷ Ironically, it was Felix Frankfurter, Holmes’s great acolyte, who insisted on the equal protection rationale in *Skinner v. Oklahoma*, striking down Oklahoma’s sterilization law. Frankfurter recognized what Holmes could not, that equality was the least aggressive and the most persuasive constitutional principle at stake in allowing legislatures the power to create an aristocracy of birth.

113. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

114. See Nourse & Maguire, *supra* note 50; see also Yick Wo v. Hopkins, 118 U.S. 356 (1886); Barbier v. Connolly, 113 U.S. 27 (1884).

115. See generally Nourse, *supra* note 59.

116. NOURSE, *supra* note 7, at 15.

117. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942). For Frankfurter’s role, see NOURSE, *supra* note 7, at 144–45.

IV. CONCLUSION

Constitutional tragedies need not be denounced on the day of their decision. Indeed, if one were to theorize tragedy, one would have to recognize that true tragedies are janus-faced, they are tragic precisely because once banal, they become over time, not merely wrong, but evil.
