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# Putting *Buck v. Bell* in Scientific and Historical Context: A Response to Victoria Nourse

Edward J. Larson\*

Responding to Professor Victoria Nourse's elegant argument condemning *Buck v. Bell*<sup>1</sup> as the worst, or at least one of the worst, U.S. Supreme Court decisions of all time puts me in an unusual position. After years of criticizing *Buck*, I now will attempt to defend it. But by defend, I do not mean *praise*. I mean *explain*. The 1924–1927 case against Carrie Buck being involuntarily sterilized under Virginia's new eugenics law was not effectively argued.<sup>2</sup> Her lawyers failed her,<sup>3</sup> which is why I cannot defend this particular decision. It was a bad decision but, given what the Justices reasonably knew, under the facts as presented to them by counsel on both sides in the context of the science of the day, I believe that the Court

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1. 274 U.S. 200 (1927).

2. Buck's court hearing is summarized in PAUL A. LOMBARDO, THREE GENERATIONS, NO IMBECILES: EUGENICS, THE SUPREME COURT, AND *BUCK V. BELL* 112–35 (2008). To represent Carrie Buck, the state institution seeking her sterilization chose and paid for an attorney who was a former member of the institution's Board of Trustees, was a friend of the institution's superintendent, had supported eugenics sterilization, called no witnesses in his client's defense at the trial-court hearing, and did not introduce any evidence in court against the sterilization statute even though state sterilization statutes had been declared unconstitutional in other states prior to the trial. *Id.* at 74–75, 135.

3. Regarding Buck's attorney, Irving Whitehead, and his handling of the Buck's case in the trial court and on appeal, legal historian Paul Lombardo concluded, "Whitehead was not merely incompetent; his failure to represent Carrie Buck's interests was nothing less than betrayal. . . . Whitehead acted as if his real client was not Carrie Buck but his now-deceased friend Albert Priddy, whose sterilization program he had supported for over a decade." *Id.* at 154–55.

made the right decision even if I cringe at some of the rhetoric in the majority opinion of Oliver Wendell Holmes.<sup>4</sup>

Before readers dismiss this article as some sort of holocaust-denial tract, let me assure them of three things at the outset. The author does believe there was a holocaust in Germany. It had at least some roots in eugenics. It was made even more horrible on account of those scientific roots.<sup>5</sup>

What the Supreme Court condoned in Virginia was not a holocaust or genocide applied to a reviled group. It was not racial or ethnic in nature.<sup>6</sup> It was supposedly an individualized public health procedure.<sup>7</sup> As applied and seen it retrospect, it was a tragic mistake made by well-meaning state legislators in an overzealous response to the re-discovery of Mendelian genetics<sup>8</sup> and upheld in laudable judicial deference to majoritarian lawmaking. No one party or ideology was to blame. At the time, eugenics laws of the type enacted in Virginia were supported by conservatives and progressives; Republicans and Democrats; scientists and lay people; Christians and Jews.<sup>9</sup> The Supreme Court merely upheld the popular will as reflected in dozens of state statutes passed by legislatures across the land.<sup>10</sup>

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4. For an example of Holmes's extreme rhetoric, see *Buck*, 274 U.S. at 207 ("Three generations of imbeciles are enough.").

5. See EDWARD J. LARSON, *EVOLUTION: THE REMARKABLE HISTORY OF A SCIENTIFIC THEORY* 193–94 (2004) [hereinafter *EVOLUTION*] (discussing the author's analysis of the scientific roots of the German eugenics program). A full analysis of the scientific roots of the holocaust appears in SHEILA FAITH WEISS, *THE NAZI SYMBIOSIS: HUMAN GENETICS AND POLITICS IN THE THIRD REICH* (2010).

6. Edward J. Larson, *Belated Progress: The Enactment of Eugenic Legislation in Georgia*, 46 *J. HIST. MED. ALLIED SCI.* 44, 63–64 (1991).

7. In its opinion, the Supreme Court described the individualized procedural protections afforded to patients under Virginia's eugenic sterilization program and equated the program to other public health programs of the day, such as compulsory vaccination. *Buck*, 274 U.S. at 206–07. Regarding these procedural protections and their application to the case, the Court stated:

There can be no doubt that so far as procedure is concerned the rights of the patient are most carefully considered, and as every step in this case was taken in scrupulous compliance with the statute and after months of observation, there is no doubt that in that respect the plaintiff in error has had due process of law.

*Id.* at 207.

8. The link between the re-discovery of Mendelian genetics and eugenics is discussed in *EVOLUTION*, *supra* note 5, at 184.

9. DANIEL J. KEVLES, *IN THE NAME OF EUGENICS: GENETICS AND THE USES OF HUMAN HEREDITY* 57–69 (1985) (discussing scientific and popular support for eugenics); EDWARD J. LARSON, *SEX, RACE, AND SCIENCE: EUGENICS IN THE DEEP SOUTH* 30–32 (1995) [hereinafter *SEX, RACE, AND SCIENCE*] (discussing support for eugenics by persons of different political parties and ideological groups); CHRISTINE ROSEN, *PREACHING EUGENICS: RELIGIOUS LEADERS AND THE AMERICAN EUGENICS MOVEMENT* 85–109 (2004) (discussing Christian and Jewish support for eugenics).

10. By the time the U.S. Supreme Court heard and ruled on Virginia's eugenic sterilization statute in 1927, twenty-five different states had enacted such laws including such major Northern, Midwestern, and Western states as California, New Jersey, New York, Wisconsin, Michigan, and Minnesota. MARK A. LARGENT, *BREEDING CONTEMPT: THE HISTORY OF COERCED STERILIZATION IN THE UNITED STATES* 72 (2008).

The underlying notion of eugenics that “like breeds like” is as old as selective breeding in agriculture and was embraced as public policy for human reproduction over two thousand years ago by no less of an authority than Plato’s *Republic*.<sup>11</sup> As a modern scientific concept, the idea of positive eugenics, which involves encouraging the supposedly best humans to mate and reproduce, was revived and given a measure of credibility by the English polymath Francis Galton in the late-nineteenth century.<sup>12</sup> He saw it as a logical consequence of Darwinian survival-of-the-fittest thinking, which he sought to assist by government policy.<sup>13</sup> Eugenics did not immediately gain wide support because most late Victorian scientists (excluding Galton) thought that living things, including people, could pass on characteristics acquired during their lifetime, which meant that all traits were malleable and no inter-generational traits were fixed at conception.<sup>14</sup> Further, most late-nineteenth century biological and social scientists (including Galton) subscribed to a blending view of heredity under which children inherited a blend of their parents’ or ancestors’ traits.<sup>15</sup> Under this view, the challenge lay not so much in pulling inferior families up to the norm (because that should happen naturally through cross-breeding) but rather in keeping superior families from falling back toward it. Thus, Galton stressed positive eugenics.<sup>16</sup>

Early in the twentieth century, mainstream scientific opinion was won over by eugenics following the re-discovery of Mendel’s genetic laws in 1900. Mendelian genetics hold that parental and other ancestral traits reappear in children and more remote descendants without blending.<sup>17</sup> Early geneticists saw this process applying in a simplistic one-to-one fashion to many severely disabling traits, including the types of serious mental illness and retardation supposedly at issue in *Buck*.<sup>18</sup> This view spurred interest in negative eugenics, which involves discouraging or preventing persons with disfavored traits from procreating.<sup>19</sup> By the 1920s, geneticists R.A. Fisher and J.B.S. Haldane in Britain and Sewell Wright in the United States demonstrated mathematically how Mendelian processes could account for

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11. DIANE B. PAUL, *CONTROLLING HUMAN HEREDITY: 1865 TO PRESENT* 5 (1995).

12. KEVLES, *supra* note 9, at 3–19. Kevles defines “positive eugenics” as measures “which aimed to foster more prolific breeding among the socially meritorious.” *Id.* at 85.

13. *Id.* at 4, 8.

14. *EVOLUTION*, *supra* note 5, at 183–84.

15. Edward J. Larson, *Biology and the Emergence of the Anglo-American Eugenics Movement*, in *BIOLOGY AND IDEOLOGY FROM DESCARTES TO DAWKINS* 165, 172–73 (Denis R. Alexander & Ronald L. Numbers eds., 2010) [hereinafter *Anglo-American Eugenics Movement*].

16. *EVOLUTION*, *supra* note 5, at 183.

17. *Id.* at 184.

18. KEVLES, *supra* note 9, at 145.

19. *See id.* at 85 (defining “negative eugenics”).

the evolution of new species through normal, seemingly continuous, inborn variations without blending or the inheritance of acquired characteristics.<sup>20</sup> For Fisher, Haldane, Wright, and many other leading geneticists, this confirmed the scientific argument for eugenics.<sup>21</sup> If there are superior and inferior hereditary traits, they reasoned, and if the impact of these traits on succeeding generations is unalterable by environmental influences or blending, then eugenics must be true—at least if the genes carrying those traits operate as simple Mendelian factors.<sup>22</sup> Under such logic, if severe mental illness and retardation were Mendelian conditions, then for the sake of society and the individuals themselves, the mentally ill and retarded should not breed.<sup>23</sup> Indeed, Fisher bent his mind to genetics to prove this very point and thereby encourage the propagation of a better breed of Britons.<sup>24</sup> He was knighted for that work.<sup>25</sup>

“More children from the fit, less from the unfit,” became the motto for early twentieth century eugenicists.<sup>26</sup> Of course, the triumph of eugenics was built on a history of increased public acceptance of a competitive struggle for existence as the driving force for social and economic progress as reflected in the writing of such influential social scientists as Herbert Spencer, Edward Ross, and William Graham Sumner.<sup>27</sup> It took only a slight twist of reasoning to transpose accepting the natural selection of the fit into encouraging the intentional elimination of the unfit.

By the 1920s, in an era when genetics was institutionalized at both state land-grant and private research universities, American geneticists enthusiastically embraced eugenics.<sup>28</sup> Leading this scientific chorus, with support from the newly created Carnegie Institute of Washington, the

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20. EVOLUTION, *supra* note 5, at 221–31.

21. *Anglo-American Eugenics Movement*, *supra* note 15, at 174.

22. *Id.*

23. This logic is reflected in Holmes’s opinion in *Buck*, which reads in pertinent part:

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.

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

24. EVOLUTION, *supra* note 5, at 224–26.

25. *Id.* at 227.

26. This particular phrase was the motto of the eugenicist and birth-control advocate Margaret Sanger, but it was broadly representative of the stated position of early twentieth century eugenicists generally. *Anglo-American Eugenics Movement*, *supra* note 15, at 174. For an example of the use of this phrase in an editorial from *American Medicine*, see Editorial, *Intelligent or Unintelligent Birth Control*, BIRTH CONTROL NEWS 10, 11, May 1919, at 12.

27. EVOLUTION, *supra* note 5, at 184–88 (Spencer and Sumner); KEVLES, *supra* note 9, at 101 (Ross).

28. CHARLES E. ROSENBERG, NO OTHER GODS: ON SCIENCE AND AMERICAN SOCIAL THOUGHT 211–24 (rev. and expanded ed. 1997).

pioneering geneticist Charles Davenport left the University of Chicago in 1904 to found a station for the experimental study of evolution at Cold Spring Harbor, New York; the station featured eugenics research and soon added a Eugenics Records Office endowed by the widow of railroad magnate E.H. Harriman.<sup>29</sup> America's two Nobel Prize winning geneticists of the era, Thomas Hunt Morgan and Hermann J. Muller, added their support to the cause, as did the American Genetics Association and various state and regional medical societies.<sup>30</sup> A larger circle of distinguished professionals, including Harvard University President Charles W. Eliot, renowned zoologist and Stanford University founding President David Starr Jordan, Harvard University biologists Edward East and William Castle, Johns Hopkins University biologists Raymond Pearl and Herbert S. Jennings, University of Michigan President Clarence C. Little, American Museum of Natural History President Henry Fairfield Osborn, birth-control advocate Margaret Sanger, inventor Alexander Graham Bell, and the legendary California plant breeder Luther Burbank, also publicly backed eugenics.<sup>31</sup> Even the era's most famous American with disabilities, Helen Keller, who became blind and deaf from a childhood illness, favored eugenic remedies for those born with severe disabilities.<sup>32</sup> A wide range of American political leaders, including Presidents Theodore Roosevelt, William Howard Taft, Woodrow Wilson, and Calvin Coolidge, endorsed eugenic measures, and it was the Justices nominated by these four presidents who decided *Buck*.<sup>33</sup> Wealthy philanthropists and foundations vied to support eugenics research and lawmaking.<sup>34</sup> Indeed, the Virginia eugenics sterilization law upheld in *Buck* was based on a model statute drafted by the Harriman and Carnegie funded Eugenics Record Office.<sup>35</sup> Advocates supported by the New York-based Rockefeller and Russell Sage Foundations lobbied for enactment of eugenics legislation throughout the

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29. KEVLES, *supra* note 9, at 44–56.

30. *Id.* at 65, 69 (Morgan and Muller); SEX, RACE, AND SCIENCE, *supra* note 9, at 30–32, 49–56 (American Genetics Association and state medical societies).

31. SEX, RACE, AND SCIENCE, *supra* note 9, at 30–35; KEVLES, *supra* note 9, at 64–69.

32. MARTIN S. PERNICK, THE BLACK STORK: EUGENICS AND THE DEATH OF “DEFECTIVE” BABIES IN AMERICAN MEDICINE AND MOTION PICTURES SINCE 1915, at 92–104 (1996).

33. SEX, RACE, AND SCIENCE, *supra* note 9, at 28–30. For more about the pro-eugenics views of Taft, who served as Chief Justice on the *Buck* Court and tapped Holmes to write the Court's opinion, see LOMBARDO, *supra* note 2, at 158–63. About the opinions written by Holmes in *Buck* and two other cases, Taft wrote to his wife: “Holmes is wonderful. I gave him three cases this week . . . and today he sends me three good opinions. His quickness and his powers of catching and stating the point succinctly are marvelous.” *Id.* at 173.

34. PAUL, *supra* note 11, at 8–9, 123.

35. LOMBARDO, *supra* note 2, at 97.

South.<sup>36</sup> The passage of Virginia’s sterilization statute was not the isolated act of a racist Southern state.

Ultimately, by 1937, thirty-two states from California to Maine had enacted compulsory eugenic sterilization statutes and five more had sterilized citizens without passing a compulsory law.<sup>37</sup> Many more states enacted measures to compel the sexual segregation of mentally ill or retarded persons.<sup>38</sup> Given the scientific and popular support for eugenics and the undisputed evidence before the Court that Carrie Buck was mentally retarded, was the daughter of a mentally retarded woman, was the mother of a mentally retarded daughter, and had received “scrupulous” due process under the law,<sup>39</sup> striking down Virginia’s sterilization statute in 1927 would have constituted a blatant act of judicial activism bordering on hubris.<sup>40</sup>

Of course, in writing for the Court, Holmes needed not fall back on the principle of judicial deference to legislative decision-making, which he long championed. By temperament and philosophy, he was a Spenserian elitist and supporter of eugenics.<sup>41</sup> Holmes declared with obvious relish in an 1895 address, “I can image a future in which science shall have passed from the combative to the dogmatic stage, and shall have gained such catholic acceptance that it shall take control of life, and condemn at once with instant execution what now is left for nature to destroy.”<sup>42</sup> Further, in a private

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36. SEX, RACE, AND SCIENCE, *supra* note 9, at 56–62.

37. LARGENT, *supra* note 10, at 72 (providing a list of states with enactment dates of state sterilization statutes).

38. E.g., responding to the pleas of eugenicists, every state in the Deep South built state institutions to segregate mentally retarded persons while only about half of them passed laws to sterilize such individuals. SEX, RACE, AND SCIENCE, *supra* note 9, at 79–84.

39. *Buck v. Bell*, 274 U.S. 200, 205–07 (1927).

40. Two years before the Supreme Court ruling in *Buck*, the Michigan Supreme Court upheld a Michigan sterilization statute that was similar to the Virginia statute at issue in *Buck*. See *Smith v. Command*, 204 N.W. 140 (Mich. 1925). Addressing the issue of judicial activism in an article about that decision that quotes from the majority opinion, a critic of the law wrote in the *Michigan Law Review*:

Simple doubt about the wisdom or policy of a statute is not decisive against its constitutionality. The sterilization statute is “expressive of a state policy apparently based on the growing belief that, due to the alarming increase in the number of degenerates, criminals, feeble-minded, and insane, our race is facing the greatest peril of all time. Whether this belief is well founded is not for this court to say. Unless for the soundest constitutional reasons, it is our duty to sustain the policy which the state has adopted.”

Burke Shartel, *Sterilization of Mental Defectives*, 24 MICH. L. REV. 1, 18 (1925) (quoting *Smith*, 204 N.W. at 145). Noting the growing scientific consensus supporting the view that mental deficiency is hereditary, the author of the article goes on to express his own view: “This attitude of solving all doubts in favor of the validity of the law seems particularly appropriate in a situation like the one surrounding the sterilization act.” *Id.* at 19; see also Recent Cases, 39 HARV. L. REV. 767, 770–71 (1926) [hereinafter Recent Cases, HARV. L. REV.] (“Some conflict of medical opinion on this question exists, but there would seem to be enough in support of sterilization to justify as not unreasonable the legislative finding of its desirability.”).

41. LOMBARDO, *supra* note 2, at 163–65.

42. OLIVER WENDELL HOLMES JR., *The Soldier’s Faith*, in THE FUNDAMENTAL HOLMES: A FREE SPEECH CHRONICLE AND READER 28, 29 (Ronald K.L. Collins ed., 2010). It was this address

letter penned shortly after the Court's decision in *Buck*, he expressed his "pleasure" in writing the majority opinion.<sup>43</sup> Yet, as a Justice, Holmes prided himself on looking past his personal views to uphold democratically enacted statutes, such as in the landmark 1905 case of *Lochner v. New York*,<sup>44</sup> where he famously wrote in dissent to a decision striking down a state maximum hour labor law, "The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics."<sup>45</sup> Justices, he stressed in *Lochner*, should not interpret the Constitution to interfere with "the right of a majority to embody their opinions in law."<sup>46</sup> In *Buck*, Holmes could invoke the principal of judicial deference and uphold a statute in line with his Spencerian social views. He gladly did so.

In doing so, Holmes was joined by seven of his eight colleagues on the bench, ranging from the progressive proponent of civil liberties Louis Brandeis to the conservative Chief Justice William Howard Taft.<sup>47</sup> The only dissent came from Pierce Butler, who regularly ruled against state health, welfare, and labor laws on due process grounds,<sup>48</sup> but in this instance did so without writing an opinion.<sup>49</sup> Holmes attributed the unexplained dissent by Butler to the dissenter's Roman Catholic beliefs. "Butler knows this is good law," Holmes told a colleague before the ruling.<sup>50</sup> "I wonder whether he will have the courage to vote with us in spite of his religion."<sup>51</sup> At the time, the Catholic Church opposed sexual sterilization as violating the Canon-law doctrine linking intercourse to reproduction.<sup>52</sup> Roman Catholics did not offer organized opposition to eugenic segregation laws; however, many

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that first attracted the attention of future President Theodore Roosevelt to Holmes. Roosevelt later appointed Holmes to the U.S. Supreme Court. *Id.* at 34.

43. *Id.* at 267.

44. 198 U.S. 45 (1905).

45. *Id.* at 75 (Holmes, J., dissenting).

46. *Id.*

47. SEX, RACE, AND SCIENCE, *supra* note 9, at 28.

48. A conservative appointee of President Warren Harding made on the recommendation of William Howard Taft, Butler became one of the so-called "Four Horsemen" who regularly ruled against the New Deal programs of President Franklin Roosevelt on due process grounds. GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE 273, 457 (1994).

49. *Buck v. Bell*, 274 U.S. 200, 208 (1927).

50. WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT 15 (1995) (quotations omitted).

51. *Id.* (quotations omitted).

52. PHILIP R. REILLY, THE SURGICAL SOLUTION: A HISTORY OF INVOLUNTARY STERILIZATION IN THE UNITED STATES 118–22 (1991). For a study of organized Roman Catholic opposition during this period to eugenic sterilization in Louisiana, the only Southern state with a significant Catholic population, see SEX, RACE, AND SCIENCE, *supra* note 9, at 107–15.



Catholics, including some American church leaders, supported eugenic measures that did not involve sexual sterilization.<sup>53</sup>

As scientists learned more about genetics and the public saw the horrors of Nazi eugenics, support for compulsory sterilization programs waned.<sup>54</sup> Indeed, we now know that in the rush to test the constitutionality of Virginia's new eugenic sterilization law, the categorization of Carrie Buck as mentally deficient was never challenged in court<sup>55</sup> and would not have met modern standards.<sup>56</sup> Further, Buck's daughter Vivian, the alleged third generation of imbecility, was not mentally retarded.<sup>57</sup> Finally, by the time of *Buck* and increasingly thereafter, geneticists recognized that many common types of mental illness and retardation covered by the Virginia statute were not inherited as unit genetic characters susceptible to simple eugenic remedies and progressively turned their attention more toward such Mendelian conditions as Tay-Sachs disease, muscular dystrophy, and Huntington's chorea.<sup>58</sup> However, given what the Supreme Court knew about the law and the facts at issue in *Buck*,<sup>59</sup> Holmes was right to declare that, as a matter of state public health law and in due deference to majoritarian decision-making, "The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes."<sup>60</sup> That principle remains true even if its application to the sterilization of Carrie Buck proved false.

Accordingly, the Supreme Court has never overruled *Buck*. *Skinner v. Oklahoma*,<sup>61</sup> the Court's 1942 ruling against a eugenic sterilization program for three-time felons, did not touch it. At the time, the consensus about the inheritability of certain types of mental illness and retardation did not extend to criminal behavior.<sup>62</sup> Without that consensus, the sterilization of criminals was always more about punishment than public health.<sup>63</sup> Indeed, before *Buck*, some state supreme courts had voided

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53. See ROSEN, *supra* note 9, at 139–64 (analyzing various currents within early twentieth century Catholic thought on eugenics to find general opposition to sterilization but a mix of views on other eugenic measures). See also SEX, RACE, AND SCIENCE, *supra* note 9, at 81 (legislation for eugenic segregation passed easily in Louisiana, which subsequently rejected eugenic sterilization legislation due to Catholic opposition).

54. EVOLUTION, *supra* note 5, at 197.

55. LARGENT, *supra* note 10, at 100.

56. STEPHEN JAY GOULD, THE MISMEASURE OF MAN 336 (1981).

57. LOMBARDO, *supra* note 2, at 110, 190.

58. KEVLES, *supra* note 9, at 145; PAUL, *supra* note 11, at 124–27.

59. *Buck v. Bell*, 274 U.S. 200, 205–07 (1927).

60. *Id.* at 207. At the time, Holmes's opinion in *Buck* was well received in law reviews and journals. *E.g.*, Editorials, *Sterilization Statute Sustained*, 13 VA. L. REG. 365, 370–72 (1927); Recent Cases, 8 B.U. L. REV. 45, 50, 54–55 (1928).

61. 316 U.S. 535 (1942).

62. See KEVLES, *supra* note 9, at 84, 105, 109–10, 144–45 (discussing various early twentieth century objections to extending eugenic sterilization to criminals).

63. *Id.* at 109. For a discussion of the legal distinction between sterilizing criminals and "mental defectives" from this era, see Recent Cases, HARV. L. REV., *supra* note 40, at 770.

sterilization statutes targeting criminals<sup>64</sup> and sterilization numbers for criminals were always much lower than the mentally ill and retarded.<sup>65</sup> Further, the odd distinctions made by the statute at issue in *Skinner*, which exempted “offenses arising out of the violation of the prohibitory laws, revenue acts, embezzlement, or political offenses” from the “felonies involving moral turpitude” covered by the law, made it particularly vulnerable on equal protection grounds.<sup>66</sup> In voiding the statute, the Court noted:

Sterilization of those who have thrice committed grand larceny, with immunity for those who are embezzlers, is a clear, pointed, unmistakable discrimination. Oklahoma makes no attempt to say that he who commits larceny by trespass or trick or fraud has biologically inheritable traits which he who commits embezzlement lacks. . . . We have not the slightest basis for inferring that that line has any significance in eugenics nor that the inheritability of criminal traits follows the neat legal distinctions which the law has marked between those two offenses.<sup>67</sup>

Notably, while the 1936 report of the American Neurological Association, which some historians credit with turning the tide of American scientific opinion against compulsory eugenics,<sup>68</sup> denounced the sterilization of criminals, it endorsed the procedure for certain mental conditions covered by Virginia’s sterilization statute, such as schizophrenia, manic-depression, epilepsy, and so-called mental hereditary retardation.<sup>69</sup> Such a conclusion fully supported the seemingly contradictory holdings in *Buck* and *Skinner*.

Accordingly, state mental-health officials from Virginia to California continued sterilizing patients in their facilities for over two decades after *Skinner* stopped the practice in prisons.<sup>70</sup> For them, as for the Supreme

64. REILLY, *supra* note 52, at 50–55.

65. For the period through 1941, the year before the *Skinner* decision, over 35,000 mentally ill or retarded persons were sterilized in the United States compared to only 704 “others,” a category that included criminals. Periodic Cumulative Grand Totals of Persons Sterilized Under State Laws According to the Categories Covered by the Laws, and by Sex, Gathered from Various Sources, in EUGENIC STERILIZATION 123 app. (Jonas Robitscher ed., 1973) [hereinafter EUGENIC STERILIZATION].

66. *Skinner*, 316 U.S. at 536–37 (quoting OKLA. STAT. tit. 57, § 171 (1935)).

67. *Id.* at 541–42.

68. *E.g.*, KEVLES, *supra* note 9, at 166.

69. ABRAHAM MYERSON ET AL., EUGENICAL STERILIZATION: A REORIENTATION OF THE PROBLEM 177–83 (1936).

70. EUGENIC STERILIZATION, *supra* note 65, at 118–19 (1973) (presenting a table of annual sterilizations performed under state eugenic sterilization laws from 1943 to 1963, showing the continued practice in California, Virginia, and other states). For California, the practice did not

Court in 1927, “Three generations of imbeciles [were] enough.”<sup>71</sup> Their error lay in their science—not in the law—but the result was just as tragic for Carrie Buck and for the over 55,000 Americans sterilized under compulsory eugenic sterilization laws after *Buck*.<sup>72</sup> Indeed, *Buck* illustrates the potential damage done by a single mistake of fact by the Supreme Court. After the Court upheld Virginia’s sterilization law, seven states enacted similar statutes and the number of sterilizations per year increased dramatically.<sup>73</sup> The individual and collective horrors of those efforts will never be fully known or redressed. The blame rests more with inept or corrupt counsel, hell-bent on upholding Virginia’s eugenic sterilization statute in a set-up case involving a patient who should not have been subject to the procedure under the science of the day, than the Court that followed their lead. Under the facts as stated in the decision, in light of then-prevailing scientific opinion, *Buck* was rightly decided.

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substantially decline until 1951. *Id.* For Virginia, the decline began in 1959. *Id.* In both states, however, the practice continued through 1963 and large annual numbers were still reported for that year in North Carolina. *Id.*

71. *Buck v. Bell*, 274 U.S. 200, 207 (1927) (alteration in original).

72. Roughly 8500 eugenic sterilizations had been performed in the United States through 1927. REILLY, *supra* note 52, at 97. Over 63,000 were performed by 1963. *Id.* The average annual number of eugenic sterilizations performed in the United States peaked at 2273 during the 1930s and decreased only slightly to 1636 during the 1940s before falling to 993 during the 1950s. *Id.* This figure for the 1950s was still higher than for any decade prior to or including *Buck*. EUGENIC STERILIZATION, *supra* note 65, at 119, 123. See generally REILLY, *supra* note 52, at 93–107 (discussing sterilizations following *Buck*).

73. LARGENT, *supra* note 10, at 72, 102 (listing the states enacting sterilization laws following *Buck* and noting the increased number of procedures).