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***Buck v. Bell*, American Eugenics, and the Bad Man Test: Putting Limits on Newgenics in the 21st Century**

Alessandra Suuberg†

“Three generations of imbeciles are enough.”
—Oliver Wendell Holmes, Jr., 1927¹

“Assume that the science relied upon in *Buck v. Bell* was right—that is, assume that Carrie Buck was mentally handicapped due to a genetic condition and that her condition was heritable. Would *Buck v. Bell*, under these circumstances, have been rightly decided? This is not an idle question.”
—Roberta M. Berry, 1998²

Abstract:

With its 1927 decision in *Buck v. Bell* (“*Buck*”), the Supreme Court embraced the American eugenics program, which was then at its peak. An association with National Socialism and a discredited genetic pseudoscience was one reason why *Buck* would later become infamous. Another was that critics saw the case as contrived: strategically designed to validate a particular Virginia law and ensure the success of the eugenics movement, rather than resolve a controversy. Because the strategists behind the constitutional challenge were a close-knit group of elites and eugenics proponents, and the test subject at the center of the case was disadvantaged, *Buck* provided a striking example of the way that a legal system intended to protect the most vulnerable members of society can instead be manipulated and used against them in the name of reform. Today, it is important to remember

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

2. Roberta M. Berry, *From Involuntary Sterilization to Genetic Enhancement: The Unsettled Legacy of Buck v. Bell*, 12 NOTRE DAME J.L. ETHICS & PUB. POL’Y 401, 427 (1998).

Buck and its legacy to avoid repeating past mistakes as we develop new genomic technologies and debate the legality and desirability of their use.

Table of Contents

| | |
|--|-----|
| Abstract | 115 |
| Introduction | 116 |
| I. State Legislation in the American Eugenics Movement | 118 |
| II. <i>Buck v. Bell</i> (1927) | 120 |
| A. Historical Background and Procedural History | 120 |
| B. In the Supreme Court | 122 |
| III. The Law Since <i>Buck</i> | 124 |
| A. Eugenic Sterilizations Post- <i>Buck</i> | 124 |
| B. Subsequent Case Law | 126 |
| IV. American Eugenics in the 21st Century | 127 |
| A. Eugenic Sterilizations in the 21st Century | 127 |
| B. Newgenics: Genetic Counseling and Genome Engineering...128 | |
| V. The Bad Man Test: Putting Limits on Newgenics in the 21st Century | 131 |
| Conclusion | 134 |

Introduction

Buck v. Bell was a constitutional challenge to a Virginia eugenic sterilization statute that came before the United States Supreme Court in 1927.³ The Court held that the statute, which allowed for compulsory reproductive sterilization of inmates in state institutions, was within the power of the State under the Fourteenth Amendment.⁴

With this decision, over one silent dissent,⁵ the Court also embraced the American eugenics program, which was then at a peak.⁶ This practice of selectively encouraging, discouraging, or

3. *Buck*, 274 U.S. at 201.

4. *Id.* at 207.

5. *Id.* at 208 (Butler, J., dissenting).

6. ADAM COHEN, *IMBECILES: THE SUPREME COURT, AMERICAN EUGENICS, AND THE STERILIZATION OF CARRIE BUCK 2–4* (2016) (describing the eugenics phenomena

preventing reproduction by certain members of society for the greater good had recently come from England and found enthusiastic support among American industrial and academic elites.⁷

The tide of public opinion turned after World War II when eugenics became associated with National Socialist sterilization practices.⁸ The association with fascism and a discredited pseudoscience was one reason *Buck* eventually became infamous. Another reason was that critics saw the case as contrived: it was strategically designed to validate a particular Virginia law and ensure the success of American eugenics, rather than resolve a true controversy.⁹

Perhaps even more unsettling to critics was that the strategists behind the constitutional challenge were a close-knit group of elites and eugenics proponents, while the guinea pig at the center of the case was unsuspecting, poor, and disadvantaged, having been taken out of school in spite of normal progress to help with housework at age 12, and then institutionalized by her foster parents after being raped and impregnated by their nephew.¹⁰

Thus, *Buck* and its legacy provide a striking illustration of the way a legal system intended to protect the most vulnerable members of society has instead been manipulated and used against them in the name of reform.¹¹

in the United States in the 1920s).

7. *Id.* See also John Warren Akin, *Inherited Realities: Eugenics, Oliver Wendell Holmes, Jr., and Buck v. Bell*, TOWER UNDERGRADUATE RES. J., Spring 2009, at 1, 1 (“Initially, the eugenics movement was driven not by widespread popular support, but rather by an almost fanatical base of professionals in the fields of law and medicine and federations of women’s clubs. . . . Supporters of the movement ranged from Margaret Sanger . . . to those closely associated with Hitler’s Nazis, who shared strikingly similar goals and means.”) (citations omitted).

8. See generally Julie M. Aultman, *Eugenomics: Eugenics and Ethics in the 21st Century*, 2 GENOMICS SOC’Y & POL’Y, no. 2, 2006, at 1, 28 (explaining the negative impact World War II and Nazi Germany had on eugenics).

9. Paul A. Lombardo, *Three Generations, No Imbeciles: New Light on Buck v. Bell*, 60 N.Y.U. L. REV. 30, 33 (1985) (describing the unsettling close relationship between Carrie Buck’s attorney and the Virginia sterilization law’s passage).

10. Berry, *supra* note 2, at 413.

11. John M. Conley, “*The First Principle of Real Reform*” *The Role of Science in Constitutional Jurisprudence*, 65 N.C. L. REV. 935, 939 (1987) (stating that after writing his opinion in *Buck*, Justice Holmes told a correspondent, “I wrote and delivered an opinion upholding the constitutionality of a state law for sterilizing imbeciles the other day—and felt that I was getting near the first principle of real reform.”).

Beyond this example, *Buck* is a landmark in the endorsement of compulsory and intrusive medical procedures by the State for the greater good.¹² As we quickly approach the point where eugenics could be more than a pseudoscience,¹³ this piece of its history is also important to remember.

I. State Legislation in the American Eugenics Movement

More than thirty states adopted compulsory sterilization laws in the early 20th century, allowing for the sterilization of more than 60,000 mentally disabled, ill, or socioeconomically disadvantaged individuals.¹⁴ California, for example, enthusiastically embraced sterilization and led the country in the number of procedures: between 1909 and 1979, California sterilized approximately 20,000 men and women, often without their full knowledge and consent.¹⁵

These laws and their associated programs informed policies on immigration and segregation in their time,¹⁶ and, beyond the United States, they also influenced National Socialist practices in Germany, where more than 350,000 compulsory sterilizations occurred.¹⁷

12. Lombardo, *supra* note 9, at 33.

13. See Aultman, *supra* note 8, at 29 (describing the 20th and 21st century technological advances in eugenics and the possible implications).

14. Lutz Kaelber, *Eugenics: Compulsory Sterilization in 50 American States*, UNIV. OF VT., <https://www.uvm.edu/~lkaelber/eugenics/> [https://perma.cc/E5YL-REND].

15. See Lisa Ko, *Unwanted Sterilization and Eugenics Programs in the United States*, PBS: INDEP. LENS (Jan. 29, 2016), <http://www.pbs.org/independentlens/blog/unwanted-sterilization-and-eugenics-programs-in-the-united-states/> [https://perma.cc/QR4P-Q9X9] (describing California's eugenic sterilization history).

16. See *id.* (“[C]alifornia’s eugenics programs were driven in part by anti-Asian and anti-Mexican prejudice, Southern states also employed sterilization as a means of controlling African American populations. . . . [F]orced sterilization of Native Americans, which persisted into the 1970s and 1980s, with examples of young women receiving tubal ligations when they were getting appendectomies. It’s estimated that as many as 25–50 percent of Native American women were sterilized between 1970 and 1976.”).

17. See Kaelber, *supra* note 14 (stating that American eugenics laws were adopted by Germany, and the United States did not stop sterilization even after Nazi sterilization became publicized). See also Mark G. Bold, *It’s Time for California to Compensate Its Forced-Sterilization Victims*, L.A. TIMES (Mar. 5, 2015, 8:40 PM), <http://www.latimes.com/opinion/op-ed/la-oe-0306-bold-forced-sterilization-compensation-20150306-story.html> [https://perma.cc/YZT2-PHDV] (quoting Adolf Hitler, writing in *Mein Kampf* in 1925: “There is today one state in which at least weak beginnings toward a better conception [of citizenship] are noticeable. Of course, it is not our model German Republic, but the United States.”).

Researcher Alex Stern explains the genesis of these laws and programs:

In the early 20th century across the country, medical superintendents, legislators, and social reformers affiliated with an emerging eugenics movement joined forces to put sterilization laws on the books. Such legislation was motivated by crude theories of human heredity that posited the wholesale inheritance of traits associated with a panoply of feared conditions such as criminality, feeble-mindedness, and sexual deviance. Many sterilization advocates viewed reproductive surgery as a necessary public health intervention that would protect society from deleterious genes and the social and economic costs of managing “degenerate stock.”¹⁸

The Virginia statute addressed by *Buck* was modeled after American biologist and educator Harry Laughlin’s¹⁹ Model Sterilization Law, which Laughlin designed as a template in 1914 to help states planning to introduce eugenics legislation.²⁰

The Model was included in Laughlin’s book, *Eugenical Sterilization in the United States*, which he distributed to academics, Supreme Court Chief Justice William Howard Taft, and hospital and asylum directors.²¹ Among the recipients was Albert S.

18. Alexandra Minna Stern, *When California Sterilized 20,000 of Its Citizens*, ZOCALO PUB. SQUARE (Jan. 6, 2016), <https://www.zocalopublicsquare.org/2016/01/06/when-california-sterilized-20000-of-its-citizens/chronicles/who-we-were/> [<https://perma.cc/2AXS-5ZQF>]. In 2007, a team of researchers at the University of Michigan completed a three-year data collection project using thousands of documents dated 1919 to 1952 from California’s Department of Mental Health (now Department of State Hospitals), seeking to understand who was being sterilized and why. *Id.* Based on 19,995 patient records, the researchers reported: “Our dataset reveals that those sterilized in state institutions often were young women pronounced promiscuous; the sons and daughters of Mexican, Italian, and Japanese immigrants, frequently with parents too destitute to care for them; and men and women who transgressed sexual norms. Preliminary statistical analysis demonstrates that during the peak decade of operations from 1935 to 1944 Spanish-surnamed patients were 3.5 times more likely to be sterilized than patients in the general institutional population.” *Id.*

19. Rachel Gur-Arie, *Harry Hamilton Laughlin (1880-1943)*, EMBRYO PROJECT ENCYC. (Dec. 19, 2014) (stating that when the Eugenics Record Office opened in Cold Spring Harbor in 1910, Laughlin became its superintendent). *See also Harry Laughlin: Workhorse of the American Eugenics Movement*, U. MO. LIBR., <https://library.missouri.edu/exhibits/eugenics/laughlin.htm> [<https://perma.cc/ACS8-FDWA>] (detailing Harry Laughlin’s life).

20. *Laughlin’s Model Law*, TRUMAN ST. UNIV., <http://historyofeugenics.truman.edu/altering-lives/sterilization/model-law/> [<https://perma.cc/YE96-U7FN>] (describing the history behind Laughlin’s model eugenic sterilization law).

21. Nathalie Antonios, *Sterilization Act of 1924*, EMBRYO PROJECT ENCYC. (Apr. 14, 2011), <https://embryo.asu.edu/pages/sterilization-act-1924> [<https://perma.cc/2AXS-5ZQF>].

Priddy, first superintendent of the Virginia Colony for the Epileptic and the Feeble-minded (the Colony).²²

Priddy, a physician, had been a proponent of eugenics before the Virginia statute was enacted and had taken it upon himself to fiercely advocate for forced sterilization in line with his personal morals.²³ On one occasion, he was sued for forcibly sterilizing colony residents and narrowly escaped liability.²⁴ Passage of a sterilization law would benefit him personally by granting protection from similar liability moving forward.²⁵

II. *Buck v. Bell* (1927)

A. *Historical Background and Procedural History*

Scholars have described *Buck v. Bell* as a friendly suit meant to clarify the constitutionality of a new Virginia law²⁶—rather than a case meant to settle a true controversy—and, in some sense, a “collusion” between three men: Albert Priddy, Aubrey Strode (counsel for the Colony), and Irving Whitehead (appointed counsel for Carrie Buck).²⁷

Priddy, Strode, and Whitehead had been friends and colleagues for years before the *Buck* litigation.²⁸ Prior to being

.cc/8RL3-CGMB] (describing who Laughlin sent his book to and why).

22. *Id.* (stating that Albert S. Priddy was the superintendent of the Virginia Colony for Epileptics and Feeble Minded and received a copy of Laughlin’s book).

23. Lombardo, *supra* note 9, at 36–37, 62. In Priddy’s early reports as superintendent of the Colony, he warned that Virginia had limited financial ability to care for its growing number of “defective” citizens. *Id.* at 35. “Priddy lobbied for the expansion of the Colony to include residential space for people suffering from the ill-defined malady of ‘feeble-mindedness.’” *Id.* at 35. Those “[w]omen whose feeble-mindedness was not so severe as to preclude their working outside the Colony were Priddy’s highest priority for sterilization.” *Id.* at 37.

24. Berry, *supra* note 2, at 415 (explaining Priddy’s narrow escape from liability for forcibly sterilizing).

25. Lombardo, *supra* note 9, at 45–47. Prior to the Virginia statute, Priddy had a similar bill of his own introduced in the General Assembly, but this effort failed. *Id.* at 46. Economic recession contributed to the success of the second effort in 1924. *See id.* at 47.

26. MINUTES OF THE SPECIAL BD. OF DIR. FOR THE VA. COLONY FOR EPILEPTICS AND THE FEEBLEMINDED (1910–1937) (stating that in August of 1924, Priddy suggested to the Colony Board that “as a matter of precautionary (sic) safety . . . a test case of the constitutionality of the Sterilization Law be made before any operation is performed . . .”).

27. Lombardo, *supra* note 9, at 33 (articulating the collusion amongst Whitehead, Strode, and Priddy).

28. *Id.* at 34–35 (describing Stroke, Whitehead, and Priddy’s personal and working relationship).

counsel for the Colony in *Buck*, Strode had been involved in establishing the Colony and drafting the Virginia legislation. Whitehead had been one of the three members comprising the first Colony Board, as well as the Colony director.²⁹

Due to a confluence of personal and historical circumstances, eighteen-year-old Colony resident Carrie Buck became the guinea pig for their constitutional challenge. Priddy petitioned the Colony Board to sterilize Carrie, testifying that she was “feeble-minded of the . . . Moron Class” and a “moral delinquent.”³⁰ The Board selected Whitehead to represent Carrie in order to comply with the legal requirement that an attorney be appointed to raise an appeal on Carrie’s behalf.³¹

In addition to having been in the wrong place at the wrong time, Carrie had the misfortune of lacking familial support. In 1906, she was born into an impoverished family in Virginia. Her mother initially raised her alone.³² Carrie’s father, at best, abandoned the family, or, at worst, disappeared soon after Carrie’s birth, either having been killed in an accident, or choosing to abandon his family.³³ At age three, Carrie was taken from her mother and placed with foster parents. They withdrew her from school to help with housework at age 12 and then petitioned to have her mother institutionalized two years later.³⁴

Moreover, Carrie’s foster parents, Mr. and Mrs. J.T. Dobbs, were eager to send Carrie away too.³⁵ In the summer of 1923, Mrs. Dobbs’s nephew raped Carrie.³⁶ Afterwards fearing that Carrie would become pregnant and therefore an “embarrassment,” Mr. Dobbs petitioned to have her committed to an institution.³⁷

29. *Id.* at 34–35, 39 (articulating that Strode, acting as a state Senator, proposed sterilization legislation that required a special board of directors and a superintendent, and Whitehead was chosen as a board member and the Colony director).

30. *Id.* at 50 (describing the process and reasoning Carrie Buck was chosen as the test individual).

31. *Id.* (explaining why Whitehead was chosen to represent Carrie Buck).

32. Berry, *supra* note 2, at 412 (describing Carrie’s personal history).

33. *Id.*

34. *Id.* at 412–13 (describing Carrie’s life with her foster parents and stating that the foster parents successfully petitioned to have Carrie’s biological mother committed to the Virginia Colony for the Epileptic and Feeble-minded).

35. Lombardo, *supra* note 9, at 54.

36. Berry, *supra* note 2, at 413 (stating that Carrie claimed her foster parents’ nephew raped her).

37. Lombardo, *supra* note 9, at 53–54.

During the *Buck* trial in 1924, Aubrey Strode presented eight witnesses to prove Carrie's "social inadequacy," as well as a deposition from a eugenics expert from New York, a eugenicist to testify at trial, and two Virginia physicians to testify in favor of the sterilization law.³⁸ Whitehead failed to call any witnesses to dispute the scientific allegations and only "weak[ly]" cross-examined the State's witnesses.³⁹

The Amherst County Court affirmed the validity of the Virginia sterilization law in 1925, and Whitehead immediately reported to the General Board of State Hospitals that the matter would eventually be taken to the United States Supreme Court.⁴⁰

That year, Strode and Whitehead prepared their respective forty-four- and eight-page briefs for the Virginia Supreme Court of Appeals, and in November, that court affirmed the lower court's ruling.⁴¹ The minutes from the December 7th Colony Board meeting state:

Colonel Aubrey E. Strode and Mr. I.P. Whitehead appeared before the Board and outlined the present status of the sterilization test case and presented conclusive argument [*sic*] for its prosecution through the Supreme Court of the United States, their advice being that this particular case was in admirable shape to go to the court of last resort, and that we could not hope to have a more favorable situation than this one.⁴²

B. In the Supreme Court

The Supreme Court ultimately upheld the Virginia law by a vote of 8-1.⁴³ The short opinion, written by Justice Oliver Wendell Holmes, Jr., comprised two holdings and one quote that would go down in history:

38. *Id.* at 50.

39. *Id.* at 50-53. Whitehead refrained from calling any witnesses and failed to challenge various assertions regarding Carrie's background, for example failing to challenge the claim that she had been an illegitimate child, failing to refer to school records that indicated normal or very good performance, and failing to mention that Carrie had attended church and church school and been a member of two church choirs in her hometown. *Id.* at 50-53.

40. *Id.* at 55 (describing *Buck v. Bell* procedural history).

41. *Id.* at 56.

42. *Id.* at 56.

43. *Id.* at 57-58; *Buck v. Bell*, 274 U.S. 200, 208 (1927). Because the decision elicited public outcry, Whitehead petitioned for a rehearing, which the Court ultimately denied. Lombardo, *supra* note 9, at 57.

Three generations of imbeciles are enough.⁴⁴

In its decision, the Court upheld the constitutionality of the Virginia statute⁴⁵ and, citing the 1905 case *Jacobson v. Massachusetts*,⁴⁶ which endorsed the state's police power to enact a compulsory vaccination law, held that "[t]he principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes."⁴⁷

Perhaps second to Justice Holmes's famous one-line proclamation in the opinion was another less pithy but equally telling justification of eugenic sterilization:

It would be strange if [the public welfare] 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.⁴⁸

After sterilization, Carrie returned to society as a domestic helper, married, became a member of a Methodist church and sang in the choir.⁴⁹ She was remembered as displaying kindness and intelligence, being an avid reader, and remaining a lucid conversationalist through the last weeks of her life at age 76.⁵⁰

Her daughter, Vivian, who had been used during the *Buck* litigation to prove her mother's hereditary defects, only lived to complete two years of schooling before dying from an infectious disease, but during that time she made the school's Honor Roll.⁵¹

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

45. *Id.* at 200.

46. *Id.* at 207.

47. *Id.* (citing *Jacobson v. Massachusetts*, 197 U.S. 11, 11 (1905)).

48. *Id.* at 207.

49. Lombardo, *supra* note 9, at 60–61.

50. *Id.* at 60–61.

51. *Id.* at 61; Akin, *supra* note 7, at 2.

III. The Law Since *Buck*

A. *Eugenic Sterilizations Post-Buck*

Some judicial decisions are so horrendously wrong that they leave us dumbstruck on first encounter. Like survivors of natural disasters first surveying the scene, we must struggle at first to comprehend what has happened. Next begins the long mourning for the victims, mourning sharpened by our feelings of anger and betrayal at injustice done by the very ones charged as our guardians against injustice.

—Roberta M. Berry, 1998⁵²

In the four years after *Buck*, seventeen states enacted or revised sterilization statutes.⁵³ Alabama and Florida had bills proposed or under discussion within days of the ruling.⁵⁴

Actual usage of the statutes increased dramatically. The annual number of sterilizations typically exceeded 2,500 after *Buck*, whereas only around 8,500 in total had been carried out between 1907, when the first eugenics laws were passed, and 1927.⁵⁵ Among the more than 4,000 sterilizations that took place at the Colony after *Buck* was the covert sterilization of Carrie's sister Doris.⁵⁶

In 2009, an examination of the previously unreleased medical records of several hundred African-American patients in the South's eugenics program between 1939 and 1953 shed light on how sterilizations were carried out and what procedural safeguards were in place.⁵⁷ According to procedural requirements in Georgia, when the State Board of Eugenics met to decide on the sterilization of a patient, the next of kin had to be notified.⁵⁸ Lack of protest or correspondence from the notified individual was considered approval of the procedure.⁵⁹

Of "several hundred files" examined in 2009, only fifty-two held letters from the next of kin commenting on the proposed

52. Berry, *supra* note 2, at 401.

53. Akin, *supra* note 7, at 2 (citing EDWARD J. LARSON, SEX, RACE, AND SCIENCE: EUGENICS IN THE DEEP SOUTH 119 (1996)).

54. *Id.* at 2.

55. *Id.* at 2 (citing LARSON, *supra* note 53, at 119). The annual number of sterilizations would begin to drop in the 1940s.

56. Berry, *supra* note 2, at 420.

57. See Akin, *supra* note 7.

58. *Id.* at 5.

59. *Id.* at 5.

sterilization.⁶⁰ Of these, “33 were either dictated because of an individual’s inability to read or write, written in confusing and incredibly poor child-like handwriting, or contained multiple serious grammatical errors that, at best, evidenced a grade school education”;⁶¹ 26 misunderstood the operation (i.e., providing consent based on the belief that the operation was in the patient’s best interest, to alleviate a medical condition);⁶² and in one instance a mother “begged in a barely legible note, ‘I don’t want you to kill my son’”⁶³

Of the fifty-two files, eleven indicated a lack of consent.⁶⁴ Ten of these eleven individuals were sterilized anyway.⁶⁵ The one remaining individual was different from the others in that they had retained a lawyer, allowing them to file an appeal in compliance with strict guidelines.⁶⁶ In another case, an appeal was filed without the aid of a lawyer, and it was rejected because it had been “filed incorrectly.”⁶⁷

As pointed out by the researcher who reviewed the Georgia files, as a practical matter, the procedural safeguards contemplated by the law in Georgia seem to have required a high level of literacy and legal competence—the antithesis of what could be expected from its targeted group of “mental defectives” and “feebleminded” individuals.⁶⁸

While education and resources could certainly help patients escape eugenic sterilization, they did not stop abuse of the practice in every instance, as illustrated by the more widely publicized *Cooper Hewitt* case.⁶⁹ In 1936, Ann Cooper Hewitt—who was a wealthy heiress, not an institutional inmate—testified that she had been sterilized without knowledge or consent.⁷⁰ Ann had undergone an emergency appendectomy in 1934 and, at her mother’s request,

60. *Id.* at 5.

61. *Id.* at 5.

62. *Id.* at 5.

63. *Id.* at 5.

64. *Id.* at 5.

65. *Id.* at 5.

66. *Id.* at 5.

67. *Id.* at 5.

68. *Id.* at 5.

69. See Wendy Kline, *A New Deal for the Child: Ann Cooper Hewitt and Sterilization in the 1930s*, in *POPULAR EUGENICS: NATIONAL EFFICIENCY AND AMERICAN MASS CULTURE IN THE 1930S* 17 (Susan Currell & Christina Cogdell eds., 2006).

70. *Id.* at 18, 26.

been given a mental test that labeled her a moron and received a salpingectomy.⁷¹ Ann claimed that, according to her late father's will, her sizeable inheritance would revert to her mother if she died childless—providing a motive for the procedure.⁷²

The San Francisco municipal court charged Ann's mother and the two surgeons who performed the salpingectomy with a "conspiracy to commit mayhem and issued arrest warrants based on invasion of personal rights."⁷³ The case was ultimately dismissed on the grounds that the sterilization was legal and the defendants had not committed mayhem.⁷⁴ The state supreme court declined to reopen the case.⁷⁵

The *Cooper Hewitt* case brought eugenic sterilization to broader public attention. Perhaps surprisingly, just one year later, a *Fortune* readers' survey showed that 66% favored compulsory sterilization of "mental defectives" and only 15% were opposed.⁷⁶ Around the same time, Fred Hogue, the author of a weekly *Social Eugenics* column in the *Los Angeles Times Sunday Magazine*, reported increased public support for sterilization, and receiving mail from women expressing concern over others' fitness to reproduce.⁷⁷ One woman wrote to him: "I am amazed in this day and age right thinking people let imbeciles have children. Why, and when will a law be passed to stop this?"⁷⁸

B. Subsequent Case Law

In terms of case law, *Buck* has never been overturned. In *Skinner v. Oklahoma*, an Oklahoma punitive sterilization law was found to violate the Equal Protection Clause of the Fourteenth Amendment of the Constitution because it selectively excluded white-collar felons from sterilization.⁷⁹ Because *Skinner* only pertained to punitive sterilizations of convicted felons, and not to

71. *Id.* at 26.

72. *Id.*

73. *Id.* (citing *Three Warrants Issued in Ann Hewitt Case*, N.Y. TIMES, Feb. 5, 1936, at 3).

74. *Id.*

75. *Id.*

76. *Id.* at 37.

77. *Id.* at 37–38.

78. *Id.* at 38 (quoting *Social Eugenics*, L.A. TIMES SUNDAY MAG., Dec. 13, 1936, at 29).

79. *See Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942).

eugenic sterilizations of “feeble-minded” individuals, the decision had limited effect.⁸⁰

In *Roe v. Wade*, the Supreme Court cited both *Jacobson* and *Buck* when concluding that the right of personal privacy includes the decision of whether to abort a pregnancy, but that right is not unqualified and must be considered against other state interests.⁸¹ In the words of the Court, it refused to recognize “an unlimited right to do with one’s body as one pleases.”⁸²

IV. American Eugenics in the 21st Century

A. Eugenic Sterilizations in the 21st Century

Sterilization programs persisted into the early 2000s, though the tide of popular opinion has turned against them since 1927. In recent years, for example, various news outlets have reported on sterilizations taking place in California prisons as late as 2010⁸³ and a Tennessee program allowing inmates to reduce jail time by 30 days by agreeing to undergo a vasectomy or receive a birth-control agent.⁸⁴

Reports like these were met with public indignation and, in a number of cases, with state legislation aimed at explicitly forbidding inmate sterilization programs⁸⁵ or obtaining justice for individuals who had been sterilized previously in California, North Carolina, and Virginia.⁸⁶

80. Akin, *supra* note 7, at 4–5.

81. *Roe v. Wade*, 410 U.S. 113, 154 (1973).

82. *Id.*

83. Corey Johnson, *California Was Sterilizing Its Female Prisoners as Late as 2010*, *GUARDIAN* (Nov. 8, 2013, 10:15 AM), <https://www.theguardian.com/commentisfree/2013/nov/08/california-female-prisoner-sterilization> [<https://perma.cc/QA64-HGPA>].

84. Wesley Ely, *Tennessee Judge’s Plan to Sterilize Inmates Was Bad Policy*, *TENNESSEAN* (Aug. 15, 2017, 6:00 AM), <https://www.tennessean.com/story/opinion/2017/08/15/tennessee-judges-plan-sterilize-inmates-bad-policy/104431844/> [<https://perma.cc/3UTD-HK5S>].

85. Adam Tamburin, *Lawmakers Pass Bill to Forbid Judges from Sterilizing Inmates in Exchange for Reduced Jail Time*, *TENNESSEAN* (Apr. 17, 2018, 12:32 PM), <https://www.tennessean.com/story/news/2018/04/17/tennessee-lawmakers-pass-bill-forbid-judges-sterilizing-inmates/524290002/> [<https://perma.cc/ZU6B-W2GQ>].

86. Nicole L. Novak & Natalie Lira, *Forced Sterilization Programs in California Once Harmed Thousands—Particularly Latinas*, *CONVERSATION* (Mar. 22, 2018, 4:00 PM), <http://theconversation.com/forced-sterilization-programs-in-california-once-harmed-thousands-particularly-latinas-92324> [<https://perma.cc/RH9A-87EW>].

B. Newgenics: Genetic Counseling and Genome Engineering

“What had thrived loudly as eugenics for decades quietly took postwar refuge under the labels human genetics and genetic counseling.”

—Edwin Black, 2003⁸⁷

While we seem to be firmly past state-endorsed eugenic sterilization and fascist eugenics in the 21st century, we are nonetheless now engaged in a eugenics of a different kind, sometimes termed “liberal eugenics,”⁸⁸ “eugenomics,”⁸⁹ or “newgenics.”⁹⁰ These terms cover genetic and reproductive technologies intended—based on individual choice, not outside coercion—to produce healthier offspring, whether by avoiding a deleterious outcome or aiming for ‘better than average.’⁹¹

With these practices in mind, should we be taking deliberate steps to avoid repeating the mistakes of the past, but with new tools, politics, or narratives?

It is important to note that in eugenics’ earlier heyday in the 1920s and 1930s, the movement was still clearly based on pseudoscience.⁹² Should large-scale coercive or systematic programs be attempted again in the future—maybe under a different name,⁹³ or under the guise of predicting, preventing, or curing disease⁹⁴—

87. EDWIN BLACK, WAR AGAINST THE WEAK: EUGENICS AND AMERICA’S CAMPAIGN TO CREATE A MASTER RACE 411 (2003) (emphasis omitted).

88. Felipe E. Vizcarrondo, *Human Enhancement: The New Eugenics*, 81 LINACRE Q. 239, 240 (2014).

89. Aultman, *supra* note 8, at 28.

90. *What Is Newgenics?*, EUGENICS NEWGENICS, <https://eugenicsnewgenics.com/2014/05/14/what-is-newgenics/> [<https://perma.cc/9SEN-3WYZ>].

91. Vizcarrondo, *supra* note 88, at 240; The N.Y. Acad. of Sci., *Enhanced Human: Risks and Opportunities*, VIMEO (May 21, 2018), <https://livestream.com/newyorkacademyofsciences/enhancedhuman/videos/175292124>.

92. Berry, *supra* note 2, at 424.

93. Nancy E. Hansen et al., *21st Century Eugenics?*, 372 LANCET S104, S105 (2008) (“In accordance with . . . efforts to repackage eugenics, the American Eugenics Society would become the Society for Study of Social Biology, *Eugenics Quarterly* would be retitled *Social Biology*, and central figures of the old eugenics movement would be transformed into pioneers of genetic counselling.”).

94. Recall that numerous case files in the Georgia Archives suggested that families believed eugenic sterilizations were being carried out for the patient’s own medical benefit. Akin, *supra* note 7, at 5. More recently, members of the autistic community have expressed concerns online about autism prevention- or cure-oriented research efforts and the opinion that these efforts are an offensive form of eugenics. See, e.g., Jon Adams (@soundcube), TWITTER (Aug. 1, 2018, 8:12 AM), <https://twitter.com/soundcube/status/1024643956657795074> [<https://perma.cc/EM3>].

they could be carried out with a level of scientific precision of which our 20th century predecessors only dreamed.

Meanwhile, a closer look at the study of genetics today reveals that although our technologies may have come a long way in 100 years, some of the things that we (or at least a proportion of researchers or healthcare professionals thinking about genetics, psychiatry, and developmental disorders) say and the topics that interest us have not. Reminiscent of the Eugenics Record Office collecting family pedigrees in the early 20th century, psychology research projects in 2018 still involve research assistants constructing family trees, tracing the inheritance of predisposition to psychiatric illnesses⁹⁵: epilepsy; intellectual, developmental, or learning disability; autism; psychotic disorders and other types of mental illness; and other idiosyncratic, ‘odd,’ or ‘eccentric’ traits.

Furthermore, scanning down one list of research collaborations between academic institutions and industry—in this example, the consumer genomics service 23andMe⁹⁶—it becomes clear that these entities are openly interested in pinning down the genetics of disability,⁹⁷ personality,⁹⁸ intelligence,⁹⁹ mental

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95. *Eugenics Record Office*, COLD SPRING HARBOR LABORATORY, <http://library.cshl.edu/special-collections/eugenics> [<https://perma.cc/PW2B-7P5B>]; *Eugenics Exhibit 2.4*, U. VA., <http://exhibits.hsl.virginia.edu/eugenics/exhibit2-4/> [<https://perma.cc/CC86-NAX4>].

96. *Research Publications*, 23ANDME [hereinafter *Publications*], <https://research.23andme.com/publications/> [<https://perma.cc/Z6AH-ATKJ>].

97. *See, id.*; *see also*, *New Research on the Genetics of Empathy, and How It Relates to Autism*, 23ANDME BLOG (Mar. 12, 2018), <https://blog.23andme.com/23andme-research/new-research-genetics-empathy-relates-autism/> [<https://perma.cc/W9DS-CAEY>] (collaborating with the University of Cambridge).

98. *See Publications, supra* note 96; 23andMe, *New Study Finds Genetic Associations for Neuroticism*, 23ANDME BLOG (June 25, 2018), <https://blog.23andme.com/23andme-research/new-study-finds-genetic-associations-for-neuroticism/> [<https://perma.cc/6MD8-AFUX>] (collaborating with Vrije Universiteit Amsterdam).

99. *See Publications, supra* note 96; J.W. Trampush et al., *GWAS Meta-Analysis Reveals Novel Loci and Genetic Correlates for General Cognitive Function: A Report from the COGENT Consortium*, 22 MOLECULAR PSYCHIATRY 336 (2017) (collaborating with Duke University).

illness,¹⁰⁰ physical or cosmetic traits,¹⁰¹ and arguably more controversial phenomena such as assortative mating in humans.¹⁰² As put by Robert Proctor in 1992, the biological determinism of the early 20th century's eugenics movement has not necessarily disappeared.¹⁰³

In this context, a number of commentators have issued their own warnings about what might eventually replace "race, religion, disease, and deformity" as bases for discrimination thanks to new technologies:

Meritocracy could give way to genetocracy, with individuals, ethnic groups, and races increasingly categorized and stereotyped by genotype, making way for the emergence of an informal biological caste system in countries around the world.¹⁰⁴

[G]enetic databases may subject people to discrimination because of defects within their genomes. Instead of a person being forcibly sterilised because his or her parent committed repeated crimes of petty theft, was "feeble-minded", or raped, for example, a person today may not receive healthcare or be able to find employment because his or her entire DNA sequence, including a family history of "defective genes", was recorded in a national database and disclosed to employers and insurance

100. See, e.g., *Publications, supra* note 96; *Massive New Study Finds Shared Genetic Basis for Psychiatric Disorders*, 23ANDME BLOG (June 21, 2018), <https://blog.23andme.com/23andme-research/massive-new-study-finds-shared-genetic-basis-for-psychiatric-disorders/> [https://perma.cc/3DPG-DHNU] (collaborating with the Broad Institute of Harvard and the Massachusetts Institute of Technology); The Brainstorm Consortium et al., *Analysis of Shared Heritability in Common Disorders of the Brain*, SCIENCE (June 22, 2018), <https://science.sciencemag.org/content/360/6395/eaap8757> [https://perma.cc/AHS5-B2PB].

101. See *Publications, supra* note 96; 23andMe, *Untangling the Genetics of Hair Color*, 23ANDME BLOG (Apr. 16, 2018), <https://blog.23andme.com/23andme-research/untangling-the-genetics-of-hair-color/> [https://perma.cc/927A-FUVC] (collaborating with King's College London).

102. See *Publications, supra* note 96; 23andMe, *Genetic Evidence of Assortative Mating in Humans*, 23ANDME BLOG (Jan. 10, 2017), <https://blog.23andme.com/23andme-research/you-complete-me/> [https://perma.cc/RF5B-3249] (collaborating with University of Queensland).

103. Robert N. Proctor, *Genomics and Eugenics: How Fair Is the Comparison?*, in GENE MAPPING: USING LAW AND ETHICS AS GUIDES 57, 83 (George J. Annas & Sherman Elias eds., 1992) ("If there is a disconcerting continuity between genomics and eugenics, it is the fact that both have taken root in a climate where many people believe that the large part of human talents and disabilities are heritable through the genes.").

104. JEREMY RIFKIN, *THE BIOTECH CENTURY* 3 (1998).

companies.¹⁰⁵

[N]ewgenics will create an uninsurable, unemployable and unfinanceable genetic underclass. The process has already started.¹⁰⁶

V. The Bad Man Test: Putting Limits on Newgenics in the 21st Century

Numerous authors have addressed the ethical issues surrounding “newgenic” practices,¹⁰⁷ and, similar to bioethicist Julie Aultman, encouraged “collective moral deliberation”¹⁰⁸ to address the challenges they present: “[t]o avoid unjust eugenic practices that discriminate, segregate, disrespect and avoid issues of confidentiality and privacy, subjecting persons to unfair and intolerable treatment, we need to understand which moral principles ought to guide our decisions and actions.”¹⁰⁹

However, as Aultman points out, typically “ethics lags behind” science, and “this division creates obstacles for serious moral deliberation and critical developments in policy-making involving the social and economic implications of genetic research and technology.”¹¹⁰

Maybe we will find that there is too much profit, speed, and power in genomics to keep everyone focused on ethics and morals once someone discovers the secrets to turning humans into non-

105. Aultman, *supra* note 8, at 39.

106. BLACK, *supra* note 87, at 429.

107. *E.g.*, STEPHEN WILKINSON & EVE GARRARD, EUGENICS AND THE ETHICS OF SELECTIVE REPRODUCTION *passim* (2013), https://eprints.lancs.ac.uk/id/eprint/65644/1/Eugenics_and_the_ethics_of_selective_reproduction_Low_Res_1.pdf [<https://perma.cc/J8FZ-TNNT>].

108. Aultman, *supra* note 8, at 47.

109. *Id.* at 41.

110. *Id.* at 40.

human species¹¹¹ or supermen,¹¹² creating alien life,¹¹³ achieving immortality,¹¹⁴ or wiping out entire populations with a single genetic tweak,¹¹⁵ for example.

Will conversations about ethics and morality be enough to protect society from its own excitement when that happens, or will a stricter approach be warranted?

For inspiration, we might turn back to Justice Holmes. In *The Path of the Law*, many years prior to his decision in *Buck*, Holmes described the study of law as a prediction of how the courts will respond to a given action, and suggested that this is how a “bad man” naturally unconcerned with ethics or morals (and only

111. David Klinghoffer, *An Apology for Harvard's George Church (of Neanderthal Baby Fame)?*, EVOLUTION NEWS (Jan. 23, 2013, 1:19 PM), https://evolutionnews.org/2013/01/an_apology_for_/ [<https://perma.cc/7MXT-BSL5>] (quoting GEORGE M. CHURCH & ED REGIS, REGENESIS: HOW SYNTHETIC BIOLOGY WILL REINVENT NATURE AND OURSELVES 11 (2012)) (“[Y]ou’d start with a stem cell genome from a human adult and gradually reverse-engineer it into the Neanderthal genome or a reasonably close equivalent. . . . If society becomes comfortable with cloning and sees value in true human diversity, then the whole Neanderthal creature itself could be cloned by a surrogate mother chimp — or by an extremely adventurous female human.”).

112. Sarah Marsh, *Essays Reveal Stephen Hawking Predicted Race of ‘Superhumans’*, GUARDIAN (Oct. 14, 2018, 8:28 AM), <https://www.theguardian.com/science/2018/oct/14/stephen-hawking-predicted-new-race-of-superhumans-essays-reveal> [<https://perma.cc/Y95T-FW82>] (quoting STEPHEN HAWKING, BRIEF ANSWERS TO BIG QUESTIONS (2018)) (“Laws will probably be passed against genetic engineering with humans. But some people won’t be able to resist the temptation to improve human characteristics, such as memory, resistance to disease and length of life. . . . Once such superhumans appear, there will be significant political problems with unimproved humans, who won’t be able to compete[.] . . . Presumably, they will die out, or become unimportant. Instead, there will be a race of self-designing beings who are improving at an ever-increasing rate.”).

113. Andrew Griffin, *Scientists Create New Life Form in a Lab, Altering the Fundamentals of DNA*, INDEP. (Jan. 24, 2017, 4:48 PM), <https://www.independent.co.uk/news/science/dna-life-form-new-a-t-c-g-x-y-scripps-research-institute-synthetic-semi-a7544056.html> [<https://perma.cc/L7TF-5JC8>] (“Two researchers created a bacterium that not only uses the four natural bases, but also uses a pair of synthetic ones known as X and Y.”).

114. Claudia Geib, *Scientists Have Found the First Ever Anti-Aging Genetic Mutation*, FUTURISM (Nov. 16, 2017), <https://futurism.com/scientists-found-first-anti-aging-genetic-mutation> [<https://perma.cc/44XU-WYPC>].

115. David Grossman, *Experiments Show ‘Gene Drive’ Technique Could Wipe Out Malaria-Carrying Mosquitoes*, POPULAR MECHANICS (Sept. 24, 2018), <https://www.popularmechanics.com/science/animals/a23424160/experiments-show-gene-drive-technique-could-wipe-out-malaria-carrying-mosquitoes/> [<https://perma.cc/T832-SQQC>] (“[S]cientists . . . were able to selectively target a region of the ‘doublesex’ gene that holds sway over female development. . . . [W]hen female mosquitos got two copies of the alternated gene, changes were definitely noticeable. . . . With the gene modification being passed down 100 percent of the time, the population began to collapse.”).

concerned with whether he will have to pay a fine or go to jail) would approach the law.¹¹⁶ With this, Holmes laid the foundation for American Legal Realism¹¹⁷ and gave birth to what would be famously known as the “Bad Man Theory”¹¹⁸ of the law.

With this “bloodless and detached view of the law,”¹¹⁹ he may also have left for posterity an important insight into how we might need to restrain those who, like Holmes, Priddy,¹²⁰ Strode, or Whitehead, while either not concerned with whether what they are doing is right, or fully believing they are doing the right thing, occasionally make widely consequential, harmful choices in the name of science and the greater good.¹²¹

How might we go about creating strict boundaries for the Bad Man in the life sciences? At least one commentator, Dr. Shobita Parthasarathy, has suggested using national patent systems as a means of regulating gene editing technology, pointing out that “organizations and individual researchers using CRISPR-Cas9 are already creating licensing agreements that reflect their own moral codes.”¹²² In addition, Dr. Parthasarathy points out that the

116. Oliver Wendell Holmes, Jr., *The Path of the Law*, 110 HARV. L. REV. 991, 992 (1997).

117. William H. Wilcox, *Taking a Good Look at the Bad Man’s Point of View*, 66 CORNELL L. REV. 1058, 1058 (1980–1981).

118. The “Bad Man” is supposedly indifferent to considerations of morality when thinking about whether to abide by the law and only looks to the actual consequence of their action. See William Twining, *The Bad Man Revisited*, 58 CORNELL L. REV. 275 (1972–1973) (revisiting the “Bad Man Theory” as applied to contemporary legal scholarship).

119. Douglas G. Baird, *The Holmesian Bad Man’s First Critic*, 44 TULSA L. REV. 739, 739 (2008).

120. Compare Lombardo, *supra* note 9, at 44 (explaining that Priddy acted in a morally questionable manner yet he recognized “the importance of complying with every technical requirement of the law”), with *Bad-Man Theory Law and Legal Definition*, USLEGAL, <https://definitions.uslegal.com/b/bad-man-theory/> [<https://perma.cc/GRK3-SEY9>] (“[A] bad person’s view of the law represents the best test of what exactly the law is because that person shall carefully and precisely calculate what the rules allow and operate up to the rules’ limits.”).

121. *Buck v. Bell*, 274 U.S. 200, 207 (1927) (“Three generations of imbeciles are enough.”); Conley, *supra* note 11, at 939 (“I wrote and delivered an opinion upholding the constitutionality of a state law for sterilizing imbeciles the other day—and felt that I was getting near the first principle of real reform.”); Lombardo, *supra* note 9, at 62 (“Doctor Priddy’s motives in proposing a sterilization program had less to do with thinning the ranks of the mentally and physically bereft than they had to do with satisfying his own strong and unique sense of morality.”).

122. Shobita Parthasarathy, *Use the Patent System to Regulate Gene Editing*, NATURE (Oct. 28, 2018), https://www.nature.com/articles/d41586-018-07108-3?fbclid=IwAR16fIHBUr9TxVYuv6u7FlSMhvjhrgZ0597j8ov_g71SrfN3rAzon4_snw [<https://perma.cc/XY89-S9PW>] (“[T]he Broad Institute of MIT and Harvard . . . holds expansive patents on CRISPR-Cas9 technology. It prohibits its

National Academies of Science, Engineering, and Medicine have urged for a “stringent oversight” system to ensure that gene editing trials are only used for treatment and prevention of serious disease or disability, though “[t]hese recommendations haven’t yet been translated into legal frameworks or formal governance structures.”¹²³

Conclusion

“Those who cannot remember the past are condemned to repeat it.”

—George Santayana, 1905¹²⁴

We are approaching an important moment in history in a few different ways. Not only are we acquiring the types of capabilities that could realize our 20th century predecessors’ vision for humankind, we are also standing on their shoulders: they made mistakes so that we could learn from them.

Thanks to them, we know how this story can end, but we also have it in our power to write a better ending.

licensees from using CRISPR-Cas9 to modify human embryos, alter ecosystems or modify tobacco plants. Similarly, Kevin Esvelt at the Massachusetts Institute of Technology . . . holds a patent on a ‘gene drive’ that could be used to spread a particular genomic alteration throughout an animal population. He requires those who wish to license this patent to disclose their proposed use, and has suggested that other scientists working on gene drives do the same.”)

123. *Id.*

124. GEORGE SANTAYANA, *THE LIFE OF REASON: OR THE PHASES OF HUMAN PROGRESS* 172 (Marianne S. Wokeck & Martin A. Coleman eds., 2011) (1905).