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"The Cruelty Is the Point": Using Buck v. Bell as a Tool for Diversifying Instruction in the Law School Classroom

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"The Cruelty Is the Point": Using *Buck v. Bell* as a Tool for Diversifying Instruction in the Law School Classroom[1]

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"Three generations of imbeciles are enough."[2]

Buck v. Bell is a notorious entry into the anti-canon of Supreme Court case law.[3] In an ideal world, the opinion would fade into the forgotten dusk, but remembering it allows readers to consider how badly—and how baldly—democratic institutions can fail. In *Buck v. Bell*, the Supreme Court upheld the 1924 Virginia Eugenical Sterilization Act, which permitted the involuntary sterilization of people who were deemed "mental defectives" as a matter of law.[4] As a result of this decision, thousands of women—mostly poor women of color—were sterilized against their will throughout the next few decades:

1. "The cruelty is the point" is taken directly from journalist and political commentator Adam Serwer's 2018 *Atlantic* article of the same name. His phrase is useful in this setting because it pithily summarizes both the disregard for the basic rights of marginalized people during the eugenics movement and the casual dismissal of their basic dignity that infuses Oliver Wendell Holmes' majority opinion in the case. *See* Adam Serwer, *The Cruelty Is the Point*, ATLANTIC (Oct. 3, 2018), https://www.theatlantic.com/ideas/archive/2018/10/the-cruelty-is-the-point/572104/ [https://perma.cc/C5KX-J9KR].

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

3. *See, e.g.*, Edward J. Larson, *Anti-Canonical Considerations*, 39 PEPP. L. REV. 1, 2, 5 (2011).

4. *Buck*, 274 U.S. at 205.

> With Supreme Court endorsement, the Virginia law provided authority for the sterilization of more than 8,300 inmates of state mental institutions between 1927 and 1972 and set the stage for the passage of laws that would sanction sterilization operations on 60,000 Americans. The law under which Hitler sterilized millions contains much of the same language found in the Virginia sterilization law.[5]

Instructors who are looking for opportunities to expose their students to the ways in which intersectional forms of bias impact policy and legal rules can use *Buck v. Bell* to explore, for instance, the impact of disability and class on the formation of doctrine. A different intersectional approach might use the discussion of the case as a gateway to a broader conversation about the ways in which race and gender bias structured the implementation of sterilization policies around the nation. Finally, those who wish to examine the global impact of American forms of bias can use this case and the sterilization policies that were enforced in its wake to identify the relationship between those biases and the propagation of the Nazi plan to implement mass genocide.[6] *Buck v. Bell* provides a unique and rich opportunity to explore the harms that flow from institutionalized racism, classism, ableism, and sexism in the domestic and international spheres.

The decision focuses on the fate of Carrie Buck, a poor teenager who was raped and impregnated by her foster parents' nephew[7] and then was used as the subject of the test case advanced by the director of the facility where she was confined.[8] After learning of her

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5. Paul A. Lombardo, *Three Generations, No Imbeciles: New Light on* Buck v. Bell, 60 N.Y.U. L. REV. 30, 31 (1985) (citations omitted).

6. Germany, both before and after the arrival of the Nazi regime, was heavily influenced by American eugenics policy. *See* PAUL A. LOMBARDO, THREE GENERATIONS, NO IMBECILES: EUGENICS, THE SUPREME COURT, AND *BUCK V. BELL* 199-207 (2008).

7. Andrea DenHoed, *The Forgotten Lessons of the American Eugenics Movement*, NEW YORKER (Apr. 27, 2016), https://www.newyorker.com/books/page-turner/the-forgotten-lessons-of-the-american-eugenics-movement [https://perma.cc/T5UY-X3JZ] (noting that Carrie Buck identified her rapist after the attack).

8. *See* Lombardo, *supra* note 5, at 30 ("[The] case tested the validity of a Virginia law allowing eugenical sterilization of the mentally ill and posed Carrie Buck against the physician who wished to use her as the law's first subject." (footnote omitted)).

pregnancy, Buck's foster parents confined her to an asylum for committing the offense of being a social liability.[9] Wrongly accused of promiscuity and deemed unintelligent, she was sent to Virginia's "State Colony for Epileptics and Feeble Minded," the same institution which housed her mother, against whom claims of feeble-mindedness and promiscuity had also been lodged.[10] Carrie Buck eventually gave birth to a daughter who, after failing to pass a questionably designed and administered test of her infant intellectual capabilities,[11] was also deemed an "imbecile," presumably hampered by her genetic ties.[12] Largely based on its assessment of the care that Virginia had taken in reviewing the so-called mental defects in three generations of Bucks—grandmother, daughter, and granddaughter—as well as accounting for the alleged immorality that affected two of them, the Supreme Court ruled against Carrie Buck.[13] The Court allowed the State of Virginia to turn her personal tragedy into an indictment of her worth to society, and her punishment for being a burden was to deprive her of the ability to ever give birth to a child again.

The Virginia Eugenical Sterilization Act was, in part, a product of the eugenics craze that began sweeping the nation toward the end of the nineteenth century.[14] "Eugenic science," as it was

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9. *See id.* at 54 ("Commitment to the Colony would hide Carrie's shame; more importantly for [her guardians], it would save the family reputation.").

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

11. *See* Buck v. Bell*: The Test Case for Virginia's Eugenical Sterilization Act*, U. VA. (2004), http://exhibits.hsl.virginia.edu/eugenics/3-buckvbell/ [] (noting that Carrie's daughter, Vivian, was deemed feeble-minded after a nurse examined her and claimed that "there [was] a look about *it* that [was] not quite normal" (emphasis added)); *see also* Paul A. Lombardo, *Facing Carrie Buck*, 33 HASTINGS CTR. REP., Mar.–Apr. 2003, at 14, 16 (describing Arthur Estabrook, one of the leading eugenics field researchers in the country, examining Vivian, potentially by using techniques for infants that were accepted at the time (including an assessment of the child's ability to turn the head while following both a sound and a light, and balancing the head while sitting), but acknowledging that no formal evidence of an intelligence test for Vivian appears either in Estabrook's papers or in the documents of the facility where Carrie was confined).

12. *Buck*, 274 U.S. at 205.

13. *Id.* at 207.

14. *See* Sexual Sterilization of Inmates of State Institutions, ch. 46B, §§ 1095h–m, VA. CODE 209, 209-10 (Michie Co. 1924) (repealed 1974). This law was passed on the same day as the Racial Integrity Act, which implemented the State's anti-miscegenation policy and was famously struck down in *Loving v. Virginia*, 388 U.S. 1 (1967). *See* Craig Timberg, *Va. House Voices Regret for*

sometimes known, was developed in Europe and the United States as part of an effort to determine "how various traits – emotional, physical, intellectual – were inherited[] so that such information could be applied in order to advance the human race and preserve imagined racial superiority."[15] Part of the eugenics project was to advocate for social interventions designed to control the passage of hereditary traits, and along those lines, in 1907, Indiana became the first state to pass a compulsory sterilization law.[16] This law was crafted in response to several lines of thought that became increasingly prominent at this time and began to influence each other: degeneracy theory, Social Darwinism as a replacement for charity, and the effort to use biology to evaluate "social worth."[17]

Degeneracy theory was based on the idea that negative environmental settings would damage individual heredity and, in turn, produce "defective offspring."[18] Social Darwinism was conceptually similar. This nineteenth-century idea took insights from

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Eugenics, WASH. POST (Feb. 3, 2001), https://www.washingtonpost.com/archive/politics/2001/02/03/va-house-voices-regret-for-eugenics/a59add86-3298-4f35-b9d0-15b09f0a4574/ [https://perma.cc/UG33-X9DX]. The dual emphases on sexual sterilization and the protection of white supremacist ideals were core aspects of the eugenics program that the State put in place when it passed both laws with an eye toward preserving the desired social order:

> Two Virginia eugenics laws, both passed in 1924, had a profound impact in the commonwealth and throughout the country. The Virginia Sterilization Act and the Racial Integrity Act not only legalized sterilization of the mentally ill and persons of low literacy, but also cemented discrimination against marginalized and vulnerable populations, including African Americans. These laws codified Jim Crow into every aspect of community life, and in doing so, denied African Americans access to medical care, jobs and fair wages, as well as higher education and professional training.

P. Preston Reynolds, *UVA and the History of Race: Eugenics, the Racial Integrity Act, Health Disparities*, UVA TODAY (Jan. 9, 2020), https://news.virginia.edu/content/uva-and-history-race-eugenics-racial-integrity-act-health-disparities [https://perma.cc/M5UC-76LF]

15. Reynolds, *supra* note 14.

16. Elof Axel Carlson, *The Hoosier Connection: Compulsory Sterilization as Moral Hygiene*, *in* A CENTURY OF EUGENICS IN AMERICA: FROM THE INDIANA EXPERIMENT TO THE HUMAN GENOME ERA 11, 11 (Paul A. Lombardo ed., 2011) ("Indiana led the world in implementing eugenic sterilization[.]").

17. *Id.*

18. Elof Carlson, *Scientific Origins of Eugenics*, EUGENICS ARCHIVE, http://www.eugenicsarchive.org/html/eugenics/essay2text.html [https://perma.cc/9GYT-FJD9] (last visited Aug. 20, 2023).

evolutionary biology and the theory of natural selection and applied those ideas to the social frameworks that governed human interactions.[19] Elof Carlson discusses the implications of Social Darwinism as applied to nineteenth century philanthropy, arguing that "many . . . who had initially viewed the less fortunate as worthy objects of assistance came to understand the poor, diseased, and physically infirm as defective in body or mind [] often undeserving of charity."[20] Carlson also suggests that the driving force behind the third factor—the use of biology as a determinant of social value—was elite opinion. Elites believed that unworthy traits were rooted in heredity and were not affected by the external environment; instead, the traits were simply passed down from generation to generation—a fairly hopeless assessment of the human potential for progress.[21]

Elite opinion was especially important, and it coalesced around the view that society should address the problems that arose from presumed genetic failure, causing policymakers to respond with multiple efforts at regulatory control. One solution was segregation; so-called "defectives" were placed in state-run institutions to prevent them from reproducing during their fertile years.[22] Policymakers, however, were also exploring a more drastic solution—compulsory sexual sterilization. The idea was met with initial resistance—the public understood the importance of curbing social

19. *See id.*

20. Carlson, *supra* note 16, at 12.

21. *See id.*

22. *See, e.g.*, ADAM COHEN, IMBECILES: THE SUPREME COURT, AMERICAN EUGENICS, AND THE STERILIZATION OF CARRIE BUCK 5 (2016). Other solutions to the problem included anti-miscegenation measures, severe restrictions on immigration, and more. One scholar notes that:

> In the first two decades of the twentieth century, eugenic ideology (and the ideologies it served) found expression in numerous areas of the law. Anti-miscegenation statutes were hardly new, but added to their rank were "eugenic marriage laws" that required premarital testing for certain conditions and prohibited marriage of the unfit. The Immigration Act of 1924 and the draconian quotas it set on immigrants from Southern and Eastern Europe likewise represented a eugenic (and racist and nativist) attempt to protect the integrity of Anglo-American stock. Even more explicit were institutionalization and sterilization statutes, which directly implemented the eugenics ideal.

Corinna Barrett Lain, *Three Supreme Court "Failures" and a Story of Supreme Court Success*, 69 VAND. L. REV. 1019, 1040 (2016) (citations omitted).

problems but was uncomfortable with the idea of using surgical means to address them.[23] The development of a safe surgical technique like the vasectomy, however, persuaded many, including policymakers, that forced sterilization was a viable option.[24] At the time, policy makers were unsure whether these laws would survive judicial scrutiny. Several state court decisions had found that the sterilization laws were unconstitutional based on multiple theories: some found that they rose to the level of cruel and unusual punishment, while others found that the laws violated procedural due process requirements,[25] the prohibition against bills of attainder,[26] or equal protection.[27] By the time *Buck v. Bell* arrived at the Supreme Court, multiple states had passed such laws, but also a number of lower courts had invalidated them as violating multiple provisions of state or federal constitutions.[28]

The decision is astonishingly brief, particularly given the nature of the harm that it permits and the complexity of the issues that were at stake. Writing for the majority, Justice Holmes opens the opinion with a pithy description of Carrie Buck that immediately reveals where the decision is headed: he draws her as "a feeble

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23. *See* LOMBARDO, *supra* note 6, at 23 ("Public sentiment seemed to support society's right to check the proliferation of criminals and others of supposedly 'defective' heredity, but many people remained squeamish about operations that mutilated these most personal human organs.").

24. *See id.* (discussing the advent of vasectomies). It is worth noting that there was less regard for the safety of tubal ligations, known as salpingectomies, for women. The risks that attended these surgeries notwithstanding, states passed laws which subjected women to this sterilization technique. *See, e.g.*, Philip R. Reilly, *Involuntary Sterilization in the United States: A Surgical Solution*, 62 Q. REV. BIOLOGY 153, 154-55, 162 (1987) (noting that salpingectomies were not very safe operations at the time that Indiana passed its compulsory sterilization law in 1907, and further, that the operations still had fairly high morbidity rates during the Depression Era, after the decision in *Buck v. Bell*).

25. *See, e.g.*, Williams v. Smith, 131 N.E.2d 2, 2 (Ind. 1921) ("[I]t is very plain that this act is in violation of the Fourteenth Amendment to the federal Constitution in that it denies appellee due process.").

26. *See, e.g.*, Davis v. Berry, 216 F. 413, 419 (S.D. Iowa 1914).

27. Skinner v. Oklahoma, 316 U.S. 535, 536, 541 (1942).

28. *See, e.g.*, Victoria Nourse, Buck v. Bell*: A Constitutional Tragedy from a Lost World*, 39 PEPP. L. REV. 101, 107, 115 (2011) (identifying the kinds of arguments on which the Court might have relied had it been so inclined and pointing out that most of the sterilization laws were dead by the time the case came to the Court, which put *Buck* in the position of reviving a trend that had nearly dissipated).

minded white woman," who is also "the daughter of a feeble-minded mother," who had recently given birth to a "feeble-minded child."[29] Holmes sets up the reader to feel not just contempt for the entire family but also a sense that there is no continued value in propagating a genetic line that is characterized by multi-generational failure. He goes on to argue that the salpingectomy procedure (i.e., a tubal ligation) is safe, relatively pain free, and would cause no danger to her life.[30] In other words, despite the fact that Carrie, her mother, and her daughter were members of the underclass, Holmes suggests that the Court was approving a procedure that would not subject her to any significant burden.[31]

As Holmes continued the opinion, he emphasized the procedural protections that the State had put in place, making it clear that Carrie had received ample opportunity to air her objections.[32] This focus on facts and procedure was an important concession—Holmes was extremely supportive of the eugenics regime, but Chief Justice Taft, who agreed with the outcome, urged him to tone down his rhetoric and focus on being objective.[33] Other members of the Court were somewhat uncomfortable with the law,[34] and an overly enthusiastic Holmes might have lost the votes that he needed:

> Holmes had embraced the most radical ideas for social improvement when the formal eugenics movement was only in its infancy. Describing the typical criminal as "a degenerate," Holmes despaired of any potential for improvement or reformation; such people, he said, simply "must be got rid of." Science, he said, could "take control of life, and condemn at once with instant execution what is now left to nature to destroy."[35]

Beyond what Holmes found to be a more than adequate procedure, however, was the substance of the law itself. Holmes reasoned imposing sterilization on this group of people was a reasonable use of the police power given the State's purpose of protecting

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29. Buck v. Bell, 274 U.S. 200, 205 (1927).
30. *Id.*
31. *See id.*
32. *Id.* at 206-07.
33. *See* LOMBARDO, *supra* note 6, at 166.
34. *See id.*
35. *Id.* at 163 (footnote omitted).

communities from the harms these individuals allegedly produced, and, therefore, the law did not violate any of Buck's constitutional rights.[36] Even though she was going to experience an irreversible loss, Holmes framed the issue through the lens of civic sacrifice:

> 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.[37]

Insofar as rhetorical flourishes were concerned, Holmes was indulging them at this point. More importantly, he was making the claim that society calls on everyone to periodically accept the burdens that come with membership. As a Civil War veteran,[38] he was perhaps highly attuned to the nature of military sacrifice and would have viewed the loss of life and limb for the sake of one's country as a far bigger ask than undergoing what he perceived as a relatively painless procedure that would make one less of a burden on society overall. The best people in the society had given their all repeatedly, so, from Holmes' perspective, those who were among the worst could be called upon to pay their way by offering a fraction of the price that others had paid.[39] He then concluded the opinion by dismissing out of hand the equal protection claim that Buck's lawyer had raised and asserted that three generations of her family were enough.[40]

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36. *Buck*, 274 U.S. at 207-08.

37. *Id.* at 207.

38. *Oliver Wendell Holmes, Jr., 1902-1932*, SUP. CT. HIST. SOC'Y, https://supremecourthistory.org/associate-justices/oliver-wendell-holmes-jr-1902-1932/ [https://perma.cc/W6W5-BVMP] (last visited Oct. 1, 2023).

39. *See Buck*, 274 U.S. at 207.

40. *Id.* at 207-08.

One member of the Court, however, dissented—Associate Justice Pierce Butler.[41] His dissent, though, was silent.[42] He declined to write an opinion that expressed his opposition or highlighted the failures of the majority position. History has been left to speculate the reasons for his disagreement with the majority; clues, however, suggest that Butler's Catholic faith might have inspired opposition as well as his deep appreciation for liberty, especially as it was protected by the Due Process Clause of the Fourteenth Amendment.[43]

The offhanded contempt that Holmes directed toward several classes of people in this case, particularly those with intellectual disabilities and those who were poor, is striking.[44] This might be confusing for modern audiences; Holmes is a towering figure in Supreme Court history, is one of its most influential jurists, and has a long-standing reputation for being a giant within the Progressive movement.[45] The discordance is due, in part, to his reputation as a defender of civil liberties, a reputation which is substantially rooted in his First Amendment jurisprudence.[46] Observers might also ground the enormous level of regard for him in his deferential stance toward reasonable exercises of legislative authority even when he disagreed with the stated policy goals, a position which fueled his opposition to the perceived *laissez-faire* leanings of his

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

42. *Id.*

43. Phillip Thompson, *Silent Protest: A Catholic Justice Dissents in* Buck v. Bell, 43 CATH. LAW. 125, 138 (2004) (discussing Justice Butler's dissent and arguing that, "[a]lthough religion may have propelled part of Butler's dissent in *Buck v. Bell*, it is also possible that his concern for individual freedom and due process expressed in other cases may have influenced his opinion").

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

45. *See, e.g.*, Noah Feldman, *The Many Contradictions of Oliver Wendell Holmes*, N.Y. TIMES (May 28, 2019) (book review), https://www.nytimes.com/2019/05/28/books/review/oliver-wendell-holmes-stephen-budiansky.html [https://perma.cc/S3XL-HDTS] ("Holmes is the second most influential justice ever to have graced the bench, after Chief Justice John Marshall, who first got the court to overturn laws and set the body on its long path to constitutional supremacy. Measured by public name recognition, Holmes may even beat Marshall."); *see also* Andrea Scoseria Katz, *The Lost Promise of Progressive Formalism*, 99 TEX. L. REV. 679, 684 (2021) (describing Holmes as an "early Progressive hero").

46. *See, e.g.*, Ronald Collins, *Prologue* to THE FUNDAMENTAL HOLMES: A FREE SPEECH CHRONICLE AND READER, at xiii (Ronald K. L. Collins ed., 2010) ("Holmes's footprint on the American law of free speech is gigantic. Like Atlas, he is a titan in that world. No one else quite casts a shadow so long.").

Lochner-era judicial colleagues. Notably, Holmes was not always deferential to legislatures,[47] but as a general matter, he preferred to give them room to implement the policies of their choice.[48]

In truth, his record is complicated. By way of example, Holmes may typically have chosen to defer to the policy goals set by legislatures in contrast to his colleagues who were more willing to question the regulatory scope of the police power by subjecting it to constitutional limits, but he was also the author of one of the most influential opinions limiting the authority of state legislators when regulating the actions of coal mining companies: *Pennsylvania Coal Co. v. Mahon*.[49] In that case, Pennsylvania tried to prohibit coal companies from exercising their rights to mine coal under the ground if doing so would substantially weaken surface stability; such a prohibition would render a significant percentage of the coal company's holdings worthless.[50] In an 8–1 ruling, and with Holmes writing for the majority, the Court decided that such a prohibition was a taking within the meaning of the Constitution.[51] To support this, Holmes had to develop new caselaw because this conclusion was not rooted in traditional eminent domain principles, which had previously been the bedrock of takings law; instead, Holmes created the new doctrine of regulatory takings that found a compensable deprivation could occur if a law passed by the State rendered property substantially diminished in value.[52] Regulatory takings doctrine recognized that the normal constitutional functioning of the police power creates the risk that legal rules will lessen property values to some degree, but in the words of Justice Holmes in *Mahon*, "while property may be regulated to a certain extent, if regulation goes too far[,] it will be recognized as a taking."[53] This case highlights an exception to Holmes' typically deferential stance toward legislatures, a principled position that had generated a great deal of admiration for him. Interestingly, one might persuasively argue that *Buck v. Bell* is the decision that most tellingly revealed

47. *Id.* at xvi.
48. *Id.*
49. 260 U.S. 393 (1922).
50. *See id.* at 413 (noting that the statute at issue destroyed the previously existing property and contract rights that Pennsylvania Coal had negotiated).
51. *Id.* at 414-16.
52. *Id.* at 415-16.
53. *Id.* at 415.

both the best of him—his deference toward democratically elected actors—and the worst of him—his casual cruelty, his elite, Boston Brahmin bigotry, and the arrogance which suggested a belief that the issues were so obvious in the case that there was no need to put pen to paper and persuasively explain himself.

What might a fuller opinion from Holmes have looked like? Or more interestingly, what might a dissent in this case have looked like? Exploring this idea could be engaging not just from a purely intellectual standpoint but also from a teaching perspective. Instructors might find it valuable to challenge students either to rewrite the majority opinion or write the dissent that was never crafted. Taking inspiration from *Feminist Judgments: Rewritten Opinions of the United States Supreme Court*,[54] the exercise might be even more worthwhile as a teaching tool if students are asked to envision—or re-envision—the opinion through a particular lens (though of course, that would not be necessary—merely reimagining the opinion in a straightforward way would be sufficient to elicit consideration of questions related to the marginalization of an individual like Carrie Buck).

There are multiple lessons that students might glean from engaging in this exercise. For one thing, this would be a sustained exercise in thinking about legal rules from the perspective of those harmed by the rules. Students sometimes struggle to move beyond the application of legal rules to the formation of a critique that offer more than simple disagreement. Forcing students to write an imagined dissent would teach them how to think systematically about the substantive problems with a legal argument and how they would address those issues in a response. An exercise like this might also inspire some students to engage deeply with critiques of moral relativism by mining the available historical information to see what kinds of challenges to eugenics theory existed in the mainstream discourse in the early twentieth century. This matters because one might imagine that someone as highly informed about the subject as Holmes would also have had a counter-narrative available had he been willing to listen.

54. *See generally* KATHRYN M. STANCHI ET AL., FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT (Kathryn M. Stanchi et al. eds., 2016).

Some argue that contemporary thinkers should not subject historical actors to modern mores. But there was a robust strand of objection that echoes the critique that more modern voices assert. In this exercise, students who examine the issue from this perspective and allow it to inform their dissents must identify the voices against eugenics that existed at the time the opinion was written. Such a review would ideally include experts who challenged the validity of the science; in light of such evidence, students would have to consider whether it is fair to judge the proponents of eugenics based on the availability of credible information that they might reasonably have possessed. The exercise would also help students develop the skill of interrogating a received narrative for the purpose of eliciting all relevant facts. The factual recitation in the opinion itself is quite barebones, and a review of the record would allow students to examine the information that Justice Holmes left out of his analysis.

The assignment also has pedagogical value because it forces students to grapple with the impact of trauma on the way litigation proceeds and a story is told. For example, one might argue that the biggest gap in the record is that no one seemed to know at the time that Carrie Buck was raped. Of course, given the time period at issue, more widespread knowledge of the assault may not have worked to her advantage—laws against forcible rape may have led to the prosecution of her guardians' nephew and the risk that she would not have been believed was high. Buck was white, but she was poor, undereducated, and the daughter of a woman who was accused of prostitution. If she had insisted on lodging the accusation, it is just as likely that she would have been viewed as a liar, thereby strengthening the case against her for moral degeneracy. But considering how this knowledge would have interplayed with the decision had it been on the record creates a useful exercise in considering the role of trauma.

Ultimately, there are many lessons that one might glean from the exercise. For the sake of providing a model of what a submission might look like, the next part of this article provides an imagined dissent and demonstrates how it might have been written. The argument here focuses on the substantive due process claim at stake—namely, the right to bodily integrity as connected to the right to procreate—because it is a straightforward argument that would likely have garnered the strongest support from case law

that existed at the time. Notably, this is a *Lochner*-era case, and, as such, the precedents supporting an expansive vision of due process that protected an imprecisely defined form of liberty was an exceptionally strong basis on which a dissent might have proceeded. Other arguments that students might wish to explore include an equal protection objection or a cruel and unusual punishment argument (which would also provide an occasion for students to explore early incorporation of the Eighth Amendment).

II.

Buck v. Bell
Graham, J., dissenting.

A.

The case that comes before us challenging the Virginia Eugenical Sterilization Act implicates one of the most important social issues that is affecting our nation today—whether it is a reasonable use of the police power of a State to sexually sterilize an individual who has broken no law, poses no specific risk of harm to herself or to anyone else, and has not consented to the operation; or whether doing so undermines the law of the land and rises to the level of a violation of the Due Process Clause of the Fourteenth Amendment and the liberties so protected under the terms of that provision. My esteemed colleague has argued on behalf of the majority that not only is there no violation, but, even more, that the plaintiff in error owes society the sacrifice of her procreative capacity in exchange for the right to walk freely within it. This is an offense before nature and God, and I cannot agree to sustain that finding.

B.

Counsel for the plaintiff in error has argued that the statute under which she would be sterilized exceeded the scope of the state police power and violated her constitutional rights.[55] As this Court has long noted, the police powers are the residuary of authority upon which state governments may base their legislative pronouncements, and they broadly ensure that States may legislate in

55. Brief for Plaintiff in Error at 9-11, Buck v. Bell, 274 U.S. 200 (1927) (No. 292).

the name of the health, safety, and welfare of the people over whom they have jurisdiction.[56] Even though the States have great authority to regulate on behalf of the people who live within their bounds, that power is not unlimited; instead, we have noted that "[d]etermination by the legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts."[57] What, then, are the kinds of legislative acts that should compel a finding by this Court that the State has acted improperly? As noted by the former United States Attorney General, George W. Wickersham,[58] "[i]n almost every case in which the constitutionality of legislation sought to be held under the police power has been considered by the Supreme Court, the court has taken pains to declare that a State cannot, under the pretense of the exercise of the police power, encroach upon the powers of the general government or rights granted or secured by the supreme law of the land."[59]

Included among those rights secured by the "supreme law of the land"—our great Constitution—is the liberty that is protected by the Due Process Clause of the Fourteenth Amendment, which we have had multiple occasions to explore and use it to protect against unreasonable intrusion by overly eager state legislators.

We have noted that due process is a principle that was "intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles

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56. *See, e.g.*, Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 204 (1824) (describing the police powers of a State and asserting that "a State, in passing laws on subjects acknowledged to be within its control, and with a view to those subjects, . . . does not derive its authority from the particular power which has been granted, but from some other, which remains with the State, and may be executed by the same means"); Gitlow v. New York, 268 U.S. 652, 668-69 (1925) ("'[T]he State is primarily the judge of regulations required in the interest of public safety and welfare;' and . . . its police 'statutes may only be declared unconstitutional where they are arbitrary or unreasonable . . . .'" (quoting Great N. Ry. Co. v. Clara City, 246 U.S. 434, 439 (1918))).

57. Meyer v. Nebraska, 262 U.S. 390, 400 (1923) (citing Lawton v. Steele, 152 U.S. 133, 137 (1894)).

58. *See Attorney General: George Woodward Wickersham*, U.S. DEP'T JUST., https://www.justice.gov/ag/bio/wickersham-george-woodward [https://perma.cc/A6G6-SUBM] (Oct. 24, 2022) (providing a brief biography of the former Attorney General).

59. George W. Wickersham, *The Police Power, a Product of the Rule of Reason*, 27 HARV. L. REV. 297, 309-10 (1914).

of private right and distributive justice."[60] Writing for the Court in *Hurtado v. California*, Justice Matthews notes that due process prohibits the government from engaging in non-neutral action, but his view of due process extended beyond that idea.[61] Indeed, he referred to a vision of due process that emphasized fair treatment of individuals, honored our juridical heritage as one that was rooted in the English common law, and embraced a willingness to be innovative in the name of protecting those rights which are crucial to our understanding of what it means to live in a civilized state:

> [Due process] . . . refers to that law of the land in each State, which derives its authority from the inherent and reserved powers of the State, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws, and alter them at their pleasure.[62]

Justice Matthews appealed to the heart of our legal system and suggested that courts have both the authority and the obligation to protect liberty as it exists in all of its forms. Without question, that liberty would extend to the ability to procreate with the partner of one's choosing and to bear the number of children one might reasonably believe one has the ability to raise.

We have consistently defended a view of liberty that is broad in its particulars and subject only to reasonable restraints by the State. As we noted in *In re Kemmler*,[63] for instance, due process respected the power of the States to regulate within the full scope of their police powers, subject only to those "fundamental principles of liberty and justice which lie at the base of all our civil and

60. Hurtado v. California, 110 U.S. 516, 527 (1884) (quoting Bank of Columbia v. Okely, 17 U.S. (4 Wheat.) 235, 235-44 (1819)).

61. *Id.* at 528-29 ("[D]ue process of law . . . [has] settled usage both in England and in this country; but it by no means follows that nothing else can be due process of law. . . . [T]o hold that [proof of long practice] is essential to due process of law, would be to deny every quality of the law but its age, and to render it incapable of progress or improvement.").

62. *Id.* at 535.

63. 136 U.S. 436 (1890).

political institutions."[64] Later, in *Chicago, Burlington and Quincy Railroad Company v. Chicago* (hereinafter *CBQ*),[65] we applied the Takings Clause of the Fifth Amendment against a state law for the first time when we observed that the statute exceeded the scope of what the police power permits and violated important property rights.[66] *CBQ* reminds us that the Constitution must intervene when legislatures commit a core violation of our basic law.[67]

Liberty sits at the core of our basic law, and we have recognized that the role the Due Process Clause plays in protecting that liberty for several decades now. We explained the meaning of that liberty in *Allgeyer v. Louisiana*[68]:

> The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways, to live and work where he will, to earn his livelihood by any lawful calling, to pursue any livelihood or

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64. *Id.* at 448; see also Holden v. Hardy, 169 U.S. 366, 389-90 (1898), which supported a broad conceptualization of due process:

> This court has never attempted to define with precision the words "due process of law," nor is it necessary to do so in this case. It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard . . . . What shall constitute due process of law was perhaps as well stated by Mr. Justice Curtis in *Murray's Lessees v. Hoboken Land Co.*, 18 How. 272, 276, . . . [where] [h]e said: ". . . . It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the Government[.] . . . To what principles, then, are we to resort to ascertain whether this process, enacted by Congress, is due process? . . . [W]e must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country."

65. 166 U.S. 226 (1897).

66. *Id.* at 241, 256.

67. *Id.* at 235-38. Even though the Court is speaking about property rights and the denial of just compensation when land has been taken, the principle extends to the current case.

68. 165 U.S. 578 (1897).

> avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.[69]

Even when we upheld against a due process challenge certain restraints on freedom that the challengers suggested were in excess of the regulatory power of the State, we still acknowledged the scope within which due process liberties operated.[70] In *Muller v. Oregon*,[71] for instance, we approved a maximum working hours law passed by the State of Oregon that limited the number of hours women could work in certain establishments.[72] Just a few years prior, we invalidated a nearly identical statute that applied to bakers in *Lochner v. New York*.[73] The two cases were ultimately distinguishable, however, because the Oregon legislature had a reasonable apprehension that female laborers required more protection than their male counterparts.[74] Nonetheless, we understood that this law operated against a default proposition that, absent a sufficient justification from the State, the basic freedom to enter into a contract of one's own free will must generally prevail.

We have had the occasion to revisit these principles in recent years. In *Meyer v. Nebraska*, for instance, we invalidated a state law that prohibited instruction in the German language because it undermined the freedom of a teacher to pursue his calling and the right of parents to hire him to teach their children.[75] While sympathetic to the aims of the state legislature—namely, the inculcation of a civic spirit and a love for country that would sustain us in times of war—we concluded that the transmission of a language other than English is not harmful in and of itself, and further, the State had not identified an emergency that would justify limiting

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69. *Id.* at 589.

70. *See, e.g.*, Barbier v. Connolly, 113 U.S. 27, 31 (1885) ("The Fourteenth Amendment . . . undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, . . . [but also] that all persons should be equally entitled to pursue their happiness . . . .").

71. 208 U.S. 412 (1908).

72. *Id.* at 422-23.

73. 198 U.S. 45, 64-65 (1905).

74. *See Muller*, 208 U.S. at 421.

75. 262 U.S. 390, 400 (1923).

the right of teachers to provide such instruction.[76] In light of that finding, liberty had to prevail. Though we have used the term "liberty" primarily with reference to the protection of rights in property and contract, we have found that it was capacious enough to hold the kind of freedom that plaintiff in error defended in this case:

> While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely 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*. The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect. Determination by the legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts.[77]

Liberty, then, is not merely a matter of protecting material goods; it also extends to the freedom to formulate one's own goals and ambitions and pursue opportunities to realize those ends. We extended this broader notion of liberty a few years later in *Pierce v. Society of Sisters*[78] where the state legislature attempted to prohibit parents from educating their children in parochial schools.[79] There, we found that such educational choices were not inherently harmful, and the law "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control."[80] The State had no right "to standardize

76. *Id.* at 402-03.

77. *Id.* at 399-400 (emphasis added) (citations omitted) (citing numerous Supreme Court cases).

78. 268 U.S. 510 (1925).

79. *Id.* at 530.

80. *Id.* at 534-35.

its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State . . . ."[81] It was certainly within the purview of the State to regulate its schools and ensure their general competency. However, it was not just unreasonable but coercive to deprive individuals of one of the most important rights that they possess—the right to make critical decisions for their children—and forcibly mold them into a Spartan ideal of totalitarian conformity.

These principles should have guided us in this case, but regrettably, they did not. My colleagues are correct in noting that as members of society who both receive enormous benefits under the law and also owe certain obligations to each other in the name of maintaining a healthy, prosperous, and just nation, we are occasionally subject to the requirement of making sacrifices for the betterment of all. The recent conflict in Europe has forcibly reminded us of that ideal as we watched our youth drafted into a brutal and debilitating war. All of this notwithstanding, we are free citizens of a nation that is bound, not just by positive enumerations of law, but by a reflective vision of the limits that a decent society must not transgress. As such, we should reject eugenic sterilization as the barbarity that it is.

That is particularly true in this case. As an initial matter, the majority opinion tells us that the process under which Ms. Buck was deemed feeble-minded and therefore subject to salpingectomy was full and fair, but the underlying justification for the law depends on a willingness to disregard the basic dignity of its victims.[82] The language of the statute contains a finding that the individuals who are targeted by this law are "likely" to become "a menace to society" if they are allowed to reproduce.[83] This argument, however, is insufficient when deciding whether to remove a person's ability to procreate. Indeed, the consequence that is imposed on people who have not even been adjudicated as criminals is so harsh that it takes on the quality of a penal sentence. A statute that operates in such harsh fashion must surely be subject to a higher standard than the mere "likelihood" that the threatened outcomes will, in fact, occur.

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81. *Id.* at 535.
82. *See* Buck v. Bell, 274 U.S. 200, 206-07 (1927).
83. Virginia Sterilization Act, ch. 394, 1924 Va. Acts 569, 569.

We recently invalidated a federal statute in the *Child Labor Tax Case*[84] when Congress attempted to use its Article I taxing power to regulate companies that use child labor.[85] We noted that the law was not a true tax, but, instead, was a penalty because it was so excessive that its application would have forced those who employed children out of business or forced them to abandon the objectionable hiring practice.[86] The tax, then, was not merely an effort to collect revenue; it was, instead, a punishment—akin to regulation under the criminal law—for companies that ran afoul of the statute.[87] I do not bring attention to this case because I believe these two cases are the same. In truth, they are meaningfully different: the police power is broader than Congress' enumerated power to tax or spend for the general welfare, and, therefore, it can encompass a wider variety of activity, including regulation under the criminal law. Nonetheless, the objection is conceptually similar: the *sub silentio* transformation of a civil statute into one that approximates a criminal law fundamentally alters the character of the rule, and courts must be wary of enforcing such penalties when they are either implemented without authority, as in the *Child Labor Tax Case*, or enforced without regard to the heightened protections that should otherwise be in place.

Beyond that objection, and in fairness, the procedural framework is adequate. The Virginia statute permits sterilization of the inmates in certain state institutions upon receipt of a verified affidavit from the superintendent of these hospitals that sets forth the factual basis for finding that the inmate is "afflicted with hereditary forms of insanity that are recurrent, idiocy, imbecility, feeble-mindedness or epilepsy."[88] Moreover, the statute sets forth a detailed set of procedural requirements to which the State must adhere when seeking approval of the sterilization request.[89] Among other things, those procedures include a right to counsel for the inmate; the right to present evidence on his or her own behalf; a right to

84. 259 U.S. 20 (1922).
85. *Id.* at 21.
86. *Id.* at 38-39.
87. *Id.*
88. Sexual Sterilization of Inmates of State Institutions, ch. 46B, §§ 1095h–i, VA. CODE 209, 209 (Michie Co. 1924).
89. *Id.* § 1095i.

appeal the decision to the circuit court; and more.[90] In addition, the fact that the inmates have a right to appeal to a court ensures that the procedural protections that apply in such a setting will be available to any person who wishes to challenge a board decision that the sterilization procedure should go forward.

But this case is not about procedural flaws. It is about the substantive failure to grant Ms. Buck the protection of a key constitutional right that she is owed—namely, the right to bodily integrity. From the standpoint of intellectual honesty, the Court should admit that our great nation has not always observed this right or honored its requirements. For over two hundred years, we permitted the enslavement of an entire race of people for no better reason than the color of their skin. Women in this country—who are making critically important strides toward full equality—are nonetheless subject to the rule of *feme covert* in some states that not only renders them legally invisible as they are subsumed by their husbands but also compels them to suffer under the injunction in some states that a husband cannot be prosecuted for committing the worst intimate invasion of his wife. There are too many examples, egregious in nature, where we have failed to honor the right of bodily integrity that Ms. Buck has persuasively asserted today.

These failures notwithstanding, there is always time to change so that a correct judgment may be rendered, but my colleagues have declined the invitation to do so. The ability to beget and bear a child is such a constitutive aspect of the human experience that the State must offer a better justification for the deprivation that we see today. It is no doubt correct that eugenical science has persuaded many of its fundamental correctness. But allowing the State to eliminate those disfavored aspects of character, which proponents of the theory believe are transmitted genetically, by removing the ability to procreate would turn men into gods. Beyond that, and aside from imprisonment, can there be a violation of liberty that is more profound than using a surgical instrument to mutilate a person's body for the sake of taking away their ability to have and raise a family? So much of our liberty of contract rhetoric revolves around the language of choice and the unreasonableness of state regulatory ends: In *Lochner v. New York*, we emphasized "the right

90. *Id.* §§ 1095i–j.

of the individual to labor for such time as he may *choose*[;]"[91] in *Adams v. Tanner*,[92] we protected the right of businesses to pay agents on commission for connecting them with potential employees they might wish to hire, on the ground that such fee structures were not immoral or otherwise injurious to the public;[93] and more cases have also made the same points.[94] Given our case law that honors individual freedom and the right to make critical choices about the direction of our lives, as well as our willingness to constrain legislatures who have legislated beyond the scope of actual authority and common sense, can we disregard a legitimate concern about the amelioration of social ills that does not perform a proper calibration between the harms at stake and the means used to address them?

Carrie Buck, in the parlance of our day, is a fallen woman. This societal offense is one that eugenicists argue contributes to the cheapening of society overall. As an unwed mother at seventeen, she has violated the social contract which preserves for the marital family the construction of a life that permissibly includes children. Looking to the record, though, it appears that there was merely an assumption that she sought the attentions of a suitor and as a result, was subsequently with child.[95] Is there any possibility that her pregnancy was simply not her fault? Is there any potential that she was the tragic victim of a heinous crime, forced into immorality against her will? We do not know. Instead, we simply know that she has been deemed promiscuous on the basis of what appears to be little more than accusation. Even worse, there is an implication that her so-called promiscuity runs in the blood; her mother, also confined to the same institution, was allegedly engaged in

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91. 198 U.S. 45, 54 (1905).

92. 244 U.S. 590 (1917).

93. *Id.* at 593.

94. *See, e.g.*, Allgeyer v. Louisiana, 165 U.S. 578, 593 (1897) (holding an act preventing companies from dealing with marine insurance companies violated liberty of contract); Adair v. United States, 208 U.S. 161, 179-80 (1908) (holding that preventing workers from joining labor unions violated liberty of contract); Coppage v. Kansas, 236 U.S. 1, 26 (1915) (holding that a law preventing an employee from joining a labor organization violates liberty of contract); Adkins v. Child.'s Hosp. of D.C., 261 U.S. 525, 561 (1923) (holding minimum wage laws for women and children interfered with freedom to contract).

95. *See* Brief for Appellee at 4-5, Buck v. Bell, 130 S.E. 516 (Va. 1925).

prostitution prior to her incarceration.[96] Perhaps the accusation against her mother is true, but the State implies that she has passed her tendency toward sexual unchasteness down to her child. Did anyone test that proposition? Did Carrie Buck have a reputation in the community for sexual improprieties? Are there any Buck siblings? Is there evidence that they also lead immoral lives? If such evidence does not exist, would that not agitate against tarring Carrie with her mother's brush absent a stronger basis for doing so, especially given the stakes involved?

Putting the question of immorality aside, there is the charge of feeble-mindedness. It is not clear what constitutes the offense of "feeble-mindedness." Does that mean less than average intelligence? Does it refer to the inability to care for oneself in the manner expected from an adult? If so, it is not even certain that Ms. Buck's commitment papers support the conclusion that she is actually feeble-minded. By way of example, we know that she was at least able to gain a sixth-grade education.[97] What marks did she receive in her courses? Did anyone ask? The commitment papers also reflect that she can count to ten and is capable of dressing herself and "keeping herself in a tidy condition."[98] The State relied on eugenical experts to make a determination about her feeble-mindedness,[99] but did these experts ever meet her and do an in-depth assessment of her intellectual capacity? Moreover, how reliable was the evidence of her mother's alleged feeble-mindedness? And how valid can an intelligence test be when carried out on an infant?

But let us take as given the conclusion that Ms. Buck was both promiscuous and feeble-minded. Does the State have a reasonable basis for imposing the penalty of sterilization on people who fall into either or both of these categories? Is eugenical theory persuasive regarding the nature of the harms that might befall society if the State does not control the reproductive capacity of such individuals? I would posit that it does not have any such basis. First, the connection that the statute draws between these characteristics and social harm is far too tenuous to justify the extraordinary punishment of sterilization. For example, even if one views feeble-minded

96. *Id.*

97. *See* Carrie Buck Commitment Papers (on file with Georgia State University College of Law).

98. *Id.*

99. *See* Brief for Appellee at 4-12, Buck v. Bell, 130 S.E. 516 (Va. 1925).

people with disdain, it is difficult to argue that such individuals are the primary authors of crime and other forms of social decay. An examination of our prisons would likely find that most criminals possessed enough intelligence to get away with their antisocial behavior before they were finally apprehended.

Second, there is no persuasive evidence that sterilization would cure the alleged problem. If feeble-mindedness and promiscuity contribute to social decay, a person who is feeble-minded would still occupy that state post-surgery, and a promiscuous person—in particular, a woman—might find that it is easier to indulge a sexual appetite when there is no longer a risk of becoming pregnant. There is a deep irony in the suggestion that sterilization carried with it the potential of making the asserted social problems worse. In fact, if there is evidence that people who were sterilized because of promiscuity lived a chaste life after the surgery, it is more likely than not the case that they were never promiscuous at all.

Sterilization might be an appropriate solution to curbing criminal instincts, for instance, when there is evidence that it would have the desired physical effect. One might ask whether it would be a viable solution when the wrongdoer in question has been found guilty of a sexual crime. If available evidence would show that sterilization diminished the wrongdoer's sexual urges, the State might have a stronger basis for using its police power to regulate such individuals in this manner. But using the power as Virginia has done in this case seems to amount to little more than bare prejudice against groups of people that legislators have deemed outside the ambit of basic respect.

To paraphrase my colleague's lament from *Lochner*,[100] the Fourteenth Amendment does not enact Mr. Laughlin's *Eugenical Sterilization*. My colleague was right when he expressed his objection then, but he is grievously wrong today.

I respectfully dissent.

100. Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).