

## ***Buck v. Bell: Understanding Its Past, Present, and Future***

Michael Conklin\*

### **Introduction**

The 1927 Supreme Court case of *Buck v. Bell* held that it would not violate Carrie Buck’s constitutional rights to forcibly sterilize her in order to provide the public good of a more intelligent populace.<sup>1</sup> As the 100-year anniversary of *Buck* approaches, there remains a great deal of misunderstanding regarding the case. Paul A. Lombardo’s book *Three Generations, No Imbeciles: Eugenics, the Supreme Court, and Buck v. Bell*<sup>2</sup> provides an excellent catalyst for examining the infamous case and its relevance in the twenty-first century. Lombardo shows that *Buck* is not just a historical peculiarity with no relevance to modern jurisprudence. This point has become even clearer in the last few years. In 2019, Justice Clarence Thomas’ concurrence included an essay on the history of eugenics and how it relates to the subject of abortion.<sup>3</sup> And in May 2022, a leaked Supreme Court draft opinion overturning *Roe v. Wade* contained references to the use of abortion for the purposes of minimizing the Black population.<sup>4</sup>

---

\* Powell Endowed Professor of Business Law, Angelo State University.

<sup>1</sup> See *Buck v. Bell*, 274 U.S. 200, 207 (1927) (holding that “the public welfare may call upon . . . citizens for their lives,” and it would be “strange” if that did not include those like Carrie Buck “in order to prevent our being swamped with incompetence.”).

<sup>2</sup> PAUL A. LOMBARDO, *THREE GENERATIONS, NO IMBECILES: EUGENICS, THE SUPREME COURT, AND BUCK V. BELL* (updated ed. 2022).

<sup>3</sup> *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1782–93 (2019) (Thomas, J., concurring).

<sup>4</sup> Josh Gerstein & Alexander Ward, *Supreme Court Has Voted to Overturn Abortion Rights, Draft Opinion Shows*, POLITICO (May 3, 2022, 2:14 PM), <https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473>.

## Biased Process

Lombardo correctly points out that *Buck* was largely the result of a biased process.<sup>5</sup> From the beginning, it was a test case engineered to enshrine a legal precedent for forced sterilization.<sup>6</sup> This alone does not infer a biased outcome, but in *Buck*, the witnesses, defense counsel, and some judges appear to have been actively working to reach a predetermined outcome.

Carrie's appointed attorney was Irving Whitehead, the former director of the organization requesting the sterilization, a eugenics advocate himself, and a confidant of Albert Priddy (the original defendant in the case).<sup>7</sup> Whitehead conducted weak cross examinations<sup>8</sup> and did not present the fact that Carrie's pregnancy was the result of rape, which would have refuted claims that she was a promiscuous "moral degenerate."<sup>9</sup> Whitehead presented very little factual evidence at trial, thus making a successful appeal difficult.<sup>10</sup> Even considering this disadvantage, the five-page appellate brief submitted by Whitehead on appeal demonstrated the continued poor representation of Carrie.<sup>11</sup>

Supreme Court Justice Oliver Wendell Holmes, who wrote the opinion in *Buck*, was a staunch eugenicist, once stating that legislation "must tend in the long run to aid the survival of the

---

<sup>5</sup> See LOMBARDO, *supra* note 2, at xv ("[T]he opinion was . . . based on deceit and betrayal.").

<sup>6</sup> *Id.* at 101–02.

<sup>7</sup> *Id.* at 107.

<sup>8</sup> See *id.* at 129–30.

<sup>9</sup> *Id.* at xii, 140.

<sup>10</sup> *Id.* at 152–53.

<sup>11</sup> LOMBARDO, *supra* note 2, at 153.

fittest.”<sup>12</sup> There was even an unsuccessful effort to bribe Supreme Court Justice William Howard Taft with an “investment opportunity” soon after the Supreme Court agreed to hear the case.<sup>13</sup>

Although not discussed by Lombardo, it is interesting to consider whether this background makes the opinion more problematic or less. One could argue that had the legal process been allowed to work in an appropriately-neutral manner, it would have reached the correct outcome and not supported the forced sterilization of Carrie. And therefore, *Buck* is less of a blemish on the U.S. legal system and more just an admonishment against the bad actors involved. Conversely, one could also argue that the biased nature of the legal process in *Buck* is even worse because such bias can result in harm regardless of constitutional protections.

### **Eugenics in the 1920s**

With twenty-first-century hindsight, it is easy to look back at the support for eugenics in the 1920s with an overly critical state of mind. Lombardo provides the background necessary to better understand public sentiment and the position of the Supreme Court Justices on eugenics. With this understanding, the twenty-first-century questions regarding 1920s eugenics are not “How could so many people be in favor of such a policy?” but rather, “How could so many people *not* support eugenics in the 1920s?” At that time, eighty-four percent of the population favored “sterilization of habitual criminals and the hopelessly insane.”<sup>14</sup> The *Scientific American* promoted the “hereditary disposition to crime” and the “pestilent brood of human vipers” that result.<sup>15</sup> The

---

<sup>12</sup> *Id.* at 163 (quoting Oliver Wendell Holmes, *The Gas-Stokers’ Strike*, 7 AM. L. REV. 582, 583 (1873)).

<sup>13</sup> *Id.* at 162–63.

<sup>14</sup> *Id.* at 227.

<sup>15</sup> *Id.* at 8 (first quoting *Hereditary Crime*, 32 SCI. AM. 18, 18 (1875); and then quoting *The Generation of the Wicked*, 32 SCI. AM. 128, 128 (1875)).

American Academy of Medicine explicitly promoted a “scientific process of selection” to combat the growing “unfortunate classes.”<sup>16</sup> The inaugural volume of the *University of Virginia Law Review* advocated for eugenics.<sup>17</sup>

Contemporary thought leaders like Thomas Edison praised eugenics.<sup>18</sup> Scientists who spoke out against eugenics were routinely relegated to obscure publications.<sup>19</sup> Even self-help books of the time, such as the popular *How to Live: Rules for Healthful Living Based on Modern Science*, contained large sections dedicated to promoting eugenics.<sup>20</sup> That book also contained an introduction from William Howard Taft, who was chairman of the board of the institute that produced the book and a Supreme Court Justice who joined the majority decision in *Buck*.<sup>21</sup> Eugenics also received widespread support from religious leaders due to its link to sexual morality.<sup>22</sup> Media accounts of the *Buck* decision were overwhelmingly positive.<sup>23</sup> The U.S. Surgeon General praised the *Buck* decision as a “step toward a super-race.”<sup>24</sup> The use of pseudo-scientific terms—such as claiming that antisocial behavior was inherited from the “germ plasm”—may appear absurd today, but were commonly used by scientific experts in the 1920s.<sup>25</sup>

---

<sup>16</sup> *Id.* at 11 (quoting *Society Proceedings: American Academy of Medicine*, 76 MED. NEWS 922, 924 (1900)).

<sup>17</sup> LOMBARDO, *supra* note 2, at 59 (quoting J. Miller Kenyon, *Sterilization of the Unfit*, 1 Va. L. Rev. 458, 469 (1914)).

<sup>18</sup> *See id.* at 26 (“Thomas Edison applauded the mandate for sexual surgery that would lessen the number of criminals.”).

<sup>19</sup> *Id.* at 56.

<sup>20</sup> *Id.* at 161 (citing IRVING FISHER & EUGENE L. FISK, *HOW TO LIVE: RULES FOR HEALTHFUL LIVING BASED ON MODERN SCIENCE* (8th rev. ed. 1916)).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 46. Eugenics was likely considered consistent with the biblical teaching that “I, the Lord your God, am a jealous God, visiting the iniquity of the fathers on the children, and on the third and the fourth generations.” *Id.* at 40 (quoting *Deuteronomy* 5:9 (New Am. Standard 1995)).

<sup>23</sup> LOMBARDO, *supra* note 2, at 174.

<sup>24</sup> *Id.* at 175 (quoting *Super Race Seen Following Court Sterilization OK*, WATERLOO EVENING COURIER (Iowa), May 3, 1927, at 17).

<sup>25</sup> *See id.* at 220–21.

## Sexism and Racism

Little is mentioned in the book about how the eugenics movement was rooted in both sexism and racism. This is unfortunate because understanding this connection helps place *Buck* in the context of the 1920s and may provide insight into twenty-first-century implications. This omission is also unfortunate because the evidence to support sexist and racist motivations behind eugenics are plentiful.

State statutes that allowed for sterilization as a punishment generally applied to blue-collar crimes but not white-collar crimes, regardless of whether such white-collar crimes imposed more harm on society.<sup>26</sup> Given the racial disparities in the white-collar workforce in the 1920s, this calls into question the motives of selectively enacting such a punishment. The focus on sterilizing women as opposed to men<sup>27</sup> was peculiar because the latter procedure is less complicated than the former.<sup>28</sup> Sterilizing men would also appear to be more effective since men remain fertile much longer in their lives than women<sup>29</sup> and can produce offspring far more frequently than women.<sup>30</sup>

The issue of gender also appears to be present when one considers an inconsistency in the claims about Carrie's allegedly diminished mental capacity and her sexual encounter. If she truly had the cognitive ability of a nine-year-old as experts testified,<sup>31</sup> then why was the known man who

---

<sup>26</sup> See *id.* at 25, 229 (citing a state law in which “stealing chickens made a convict liable for sterilization while embezzlement did not.”).

<sup>27</sup> *Id.* at 174.

<sup>28</sup> *Id.* at 26.

<sup>29</sup> *At What Age Does Fertility Begin to Decrease?*, BRITISH FERTILITY SOC`Y, <https://www.britishfertilitysociety.org.uk/fei/at-what-age-does-fertility-begin-to-decrease/> (last visited May 4, 2022).

<sup>30</sup> Given the nine-month gestational period in humans, a woman could only get pregnant and deliver a baby once in a year. But a fertile man could potentially impregnate and produce hundreds of offspring in a year.

<sup>31</sup> LOMBARDO, *supra* note 2, at 107.

impregnated her not criminally prosecuted for rape on the ground that Carrie was incapable of giving consent?<sup>32</sup>

Circumstances involving the attempted sterilization of heiress Ann Cooper Hewitt likely provide an example of how both racism and sexism were linked to the practice. Hewitt could fluently speak French and Italian, and read works such as Shakespeare and Dickens.<sup>33</sup> She was nevertheless accused of being “feeble-minded” and a “high grade moron” by experts at trial.<sup>34</sup> The real issue was likely not that of diminished cognitive ability, but instead about how she had written love notes to a chauffeur and flirted with a “negro porter.”<sup>35</sup> It seems unlikely that a male would have been at risk of being forcibly sterilized for similar conduct.

### **Modern Implications**

The fact that the *Buck* precedent is nearly 100 years old, and the incorrect belief that it was overturned by *Skinner v. Oklahoma ex rel. Williamson*,<sup>36</sup> may lead many to conclude that *Buck* is simply a historical peculiarity with no relevance to modern jurisprudence. Lombardo does a good job of deconstructing this false notion and demonstrating the relevance of *Buck* in the twenty-first century.

---

<sup>32</sup> Lombardo does mention that Carrie would have been at least sixteen at the time of the sexual encounter. Under the laws of Virginia at the time, this would make her too old for statutory rape. But, much like an adult can become too incapacitated to consent to sex, Carrie’s age of sixteen nevertheless appears to leave open the possibility that she lacked the ability to consent. *Id.* at 141.

<sup>33</sup> *Id.* at 226–27.

<sup>34</sup> *Id.* at 227.

<sup>35</sup> *See id.*

<sup>36</sup> *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942).

Contrary to what some mistakenly believe, *Skinner* did not overturn the precedent in *Buck*.<sup>37</sup> *Skinner* merely held that forcibly sterilizing criminals infringed on the fundamental right of reproduction and therefore did not pass strict scrutiny; the Court distinguished sterilizing criminals from sterilizing the “feeble-minded.”<sup>38</sup> *Buck* has been cited in over 150 judicial opinions.<sup>39</sup> As recently as 2001, *Buck* was cited as authority for the conclusion that “involuntary sterilization is not always unconstitutional if it is a narrowly tailored means to achieve a compelling government interest.”<sup>40</sup>

The appellate briefs in *Buck* cited the Supreme Court precedent of *Jacobson v. Massachusetts*<sup>41</sup> in support for direct medical intervention from the government for the purpose of public, rather than private, benefit.<sup>42</sup> *Jacobson* involved a person who was fined for refusing a vaccination and was at the forefront of recent debates regarding COVID-19 mandates.<sup>43</sup>

Although *Buck* was decided nearly a century ago, the case and the science behind it—or lack thereof—is still being debated and influencing policy decisions. For example, the successful completion of the Human Genome Project in 2001 rekindled interest in genetics and heredity.<sup>44</sup> More relevant to the case itself, two states, North Carolina and Virginia, have paid out reparations to identified survivors of forced sterilizations.<sup>45</sup>

---

<sup>37</sup> See LOMBARDO, *supra* note 2, at 270.

<sup>38</sup> *Id.* at 268-270.

<sup>39</sup> *Id.*

<sup>40</sup> Vaughn v. Ruoff, 253 F.3d 1124, 1129 (8th Cir. 2001) (citing *Buck v. Bell*, 274 U.S. 200, 207 (1927)).

<sup>41</sup> *Jacobson v. Massachusetts*, 197 U.S. 11 (1905)

<sup>42</sup> LOMBARDO, *supra* note 2, at 157 (explaining that *Jacobson* was also the only precedent cited in the Supreme Court’s decision in *Buck*.) *Id.* at 169.

<sup>43</sup> See, e.g., Wendy E. Parmet, *Rediscovering Jacobson in the Era of COVID-19*, 100 BOS. U. L. REV. ONLINE 117 (2020), <https://www.bu.edu/bulawreview/parmet/>.

<sup>44</sup> LOMBARDO, *supra* note 2, at 257.

<sup>45</sup> *Id.* at 281–82.

Furthermore, in recent years the line between voluntary sterilization and forced sterilization has become blurred in the criminal context. Some inmates and defendants are incentivized to choose sterilization through the explicit promise of a sentence reduction.<sup>46</sup> While not technically a punishment, this could be considered highly coercive depending on the length of the sentence reduction. Such sterilization incentives are not limited to the realm of criminal law. There was a private campaign in 1997 that paid out \$200 to cocaine-addicted women who provided proof of sterilization.<sup>47</sup>

In early May 2022, the precedent in *Buck* became highly relevant when a Supreme Court draft opinion overturning *Roe v. Wade* was leaked.<sup>48</sup> The draft opinion explicitly noted that “[a] highly disproportionate percentage of aborted fetuses are black”<sup>49</sup> and that some supporters of abortion “have been motivated by a desire to suppress the size of the African American population.”<sup>50</sup> This is similar to a 2019 Supreme Court case involving abortions on the grounds of race, color, national origin, ancestry, sex, or disability of the fetus in which Justice Clarence Thomas wrote on the history of eugenics in America.<sup>51</sup>

The connection between abortion and eugenics was already gaining attention amid social movements in the early 2020s. For example, the founder of Planned Parenthood, Margaret Sanger, advocated for the “exterminat[ion of] the Negro population.”<sup>52</sup> This led to some advocating for the removal of statues of Sanger.<sup>53</sup> If the current Supreme Court repeals *Roe* as the leaked draft opinion

---

<sup>46</sup> *Id.* at 275–76, 284.

<sup>47</sup> *Id.* at 276.

<sup>48</sup> See Gerstein & Ward, *supra* note 4 (explaining the leak).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Box v. Planned Parenthood of Ind. and Ky., Inc.*, 139 S. Ct. 1780, 1782–93 (2019) (Thomas, J., concurring).

<sup>52</sup> Kristan Hawkins, *Remove Statues of Margaret Sanger, Planned Parenthood Founder Tied to Eugenics and Racism*, USA TODAY (July 23, 2020, 4:00 AM), <https://www.usatoday.com/story/opinion/2020/07/23/racism-eugenics-margaret-sanger-deserves-no-honors-column/5480192002/>.

<sup>53</sup> *Id.*



suggests it will, such a decision could be interpreted to support diminishing other reproductive privacy rights, such as the right against forced sterilization.<sup>54</sup>

---

<sup>54</sup> However, the leaked draft opinion does explicitly state that, due to the unique nature of *Roe*, the opinion would not affect other reproductive rights issues. See Gerstein & Ward, *supra* note 4.