

Inherited Realities: Eugenics, Oliver Wendell Holmes, Jr., and *Buck v. Bell*

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This paper examines the Buck v. Bell Supreme Court decision that declared involuntary sterilization of state mental health patients constitutional and the judicial reasoning of Justice Oliver Wendell Holmes, Jr. that influenced the outcome. Where previous studies portray Holmes as an uncaring and insensitive aristocrat, this paper, using Supreme Court opinions, published personal works, and the previously unreleased hospital records of patients in the state of Georgia, argues that it is a misplaced faith in the efficacy of the employed procedural safeguards that led him to support the practice.

INTRODUCTION

Eugenics and the American Progressive Movement

The Progressive Era in American political history is largely heralded for contributing significant social reforms to the United States and for promoting many rights on behalf of the less fortunate in society. Unfortunately, not every endeavor advanced by the Progressives was as beneficial and even-handed as child labor laws, women's suffrage, organized labor, and the secret ballot. Few reforms, before or after, had consequences as grave as those of the American Progressive's eugenics movement.

It was the first cousin of Charles Darwin, Sir Francis Galton, who originally coined the term "eugenics" by deriving it from the Greek term meaning "well born" (Engs, 2005, p. 82). Contemporary doctrines from the fields of mental health and criminal psychology in the late 1800s dictated that problems of mental incompetence, criminal behavior, degeneracy, epilepsy, schizophrenia, and many other conditions were not only beyond treatment in many cases, but were almost always the direct result of heredity and lineage. As such, the belief arose that many individuals who were deemed "feeble minded" or otherwise mentally deficient needed to be prevented from procreating for the ultimate good of society.

These beliefs manifested themselves in both positive and negative ways. Positive eugenics encouraged the unions of those perceived to be of the best genetic stock, and often came in the form of "better baby" or "fittest family" contests at state fairs and other locales throughout the nation. Negative eugenics, however, is most closely associated with the eugenics movement and encompassed four fundamental strategies to prevent the unions of those deemed least genetically fit for society: sexual segregation, marriage prohibitions, immigration controls, and sexual sterilization (Engs, 2005, p. xv). Although they all played a role in the overall eugenics movement, the specific focus of this paper is the involuntary sterilization of American citizens at the hands of state health workers.

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 (Engs, 2005, p. xiv). In fact, the American eugenics movement can be viewed in many respects as one of the greatest successes of pre-suffrage political activity by women before the 19th Amendment. Supporters of the movement ranged from Margaret Sanger, the "mother" of modern birth control and staunch advocate of reproductive rights, to those closely associated with Hitler's Nazis, who shared strikingly similar goals and means (Larson, 1996, p. 140).

Although programs for involuntary sterilization existed as early as 1907 in Indiana and 1909 in California, they were initially relatively modest operations. The early history of these social

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programs was often marked by repeated judicial interpretation at the state level, frequent re-legislation, and relative restraint by the hands of practicing physicians to actually recommend or perform these operations. However, in 1927 the U.S. Supreme Court heard the case of a young woman named Carrie Buck who had been sentenced to involuntary sterilization by the Virginia State Board of Health. At question was the adequacy of the procedural safeguards employed by the state. After the trial, the legal landscape of the nation was never quite the same.

Buck v. Bell

Only 18 years old at the time of her original trial in 1924, Carrie Buck (1906–1983) was a white inmate of the Virginia State Colony for Epileptics and Feeble Minded and a prime example of an unfortunate person that procedural safeguards are necessary to protect. With a father that either abandoned her or died, and a mother that, by many accounts, worked as a prostitute, three-year-old Carrie Buck was placed with a foster family, the Dobbs. She progressed normally every school year until she turned 12, when she was withdrawn from school to help at home. Two years later, Mr. Dobbs petitioned a judge and had Carrie's biological mother committed on a finding she was "feeble minded" (Engs, 2005, p. 2).

When she was 17, Carrie Buck was raped by the Dobbs' nephew and bore an illegitimate child. Immediately afterwards she was institutionalized by her parents and declared "epileptic and feeble minded" by the very same judge who helped to commit her mother. Years later, both Carrie and her daughter were found to have normal mental faculties. Though her daughter only lived to be eight years old before dying of infectious disease, she even made the honor roll on one occasion (Thompson, 2004, p. 14).

What makes Carrie's case even worse is that it was deliberately devised to test the constitutionality of new sterilization laws. Dr. Albert S. Priddy, the Superintendent of the Virginia Colony and the main advocate who secured the law's passage, saw Carrie Buck as an ideal candidate for sterilization. Dr. Priddy readied the application and submitted it to the Board of the Virginia Colony for approval. Advising the Board as attorney was Mr. Aubrey Strode, a former Virginia State Senator, who had also helped draft the sterilization law.

The Board approved the application, and upon the recommendation of both Dr. Priddy and Mr. Strode, a Constitutional challenge to the law was arranged to enable them to proceed without fear of liability. Appointed as attorney for Ms. Buck in her appeal was Mr. Irving P. Whitehead, a former Virginia Colony Board member and lifelong friend of Strode, who had even participated in Dr. Priddy's selection as Superintendent (Berry, 1998, p. 9). The appeals process began, and by 1927 the case had been appealed all the way to the U.S. Supreme Court, on the contention that it was, "void under the Fourteenth Amend-

ment as denying to the plaintiff in error due process of law and the equal protection of the laws" (*Buck v. Bell*, 1927).

The judgment of the Supreme Court was handed down in May of 1927, and the results rocked the foundations of the mental health system. The opinion was authored by Justice Oliver Wendell Holmes, Jr., a highly respected jurist and Civil War veteran. Only two pages in length, the opinion not only upheld the fundamental constitutionality of these programs, but forever framed into history his relentlessly analyzed belief that "three generations of imbeciles are enough" (*Buck v. Bell*, 1927). Based on an analysis of the procedural safeguards contained within the statute, Holmes and the majority held that the statute afforded adequate protection to satisfy the requirements of the 14th Amendment. Addressing the substantive legal question at hand, Holmes deferred to the elected legislature and ruled the practice constitutional.

The effect was immediate. Now armed with what was viewed as "model legislation" in the Virginia statute, efforts to legalize compulsory sterilization for the mentally deficient gained new vigor. The opinion was wielded by eugenics advocates as a precision instrument to further the movement, and the consequences were tremendous: seventeen states enacted or revised similar sterilization statutes in the four years that followed the decision (Larson, 1996, p. 119). Two state legislatures, Alabama and Florida, had new bills proposed and under discussion within days of the ruling. Furthermore, actual usage of such statutes dramatically increased in the following years. During the first twenty years that eugenics laws were in place in the United States, from 1907 until 1927, approximately 8,500 patients had been sterilized in state institutions. In the 1930s, after the Supreme Court condones such measures, "the annual number of such sterilizations typically exceeded twenty-five hundred, and once nearly reached four thousand, before dropping to about fifteen hundred in the 1940s and then petering out during the 1950s and early 1960s" (Larson, 1996, p. 119).

RESEARCH OBJECTIVES

Research Questions and Objectives

How, and why, could the nation's highest judicial body deem legislation empowering state officials to sterilize citizens against their will legal and appropriate?

In attempting to answer this larger question, there are a number of other areas that must also be examined. How did Justice Holmes view the case and the legal issues before him? Is the decision based on sound reasoning, or did personal bias drive any part of the resolution?

More important are the actual results. Do the records indicate that the judicial intent of the decision is in accordance with the sterilizations as they were performed, or is there a more systemic

problem indicated in the case records, suggesting a consequence unintended by the Supreme Court? Present interpretations of Justice Holmes and the *Buck v. Bell* decision are largely based on an understanding of him as a judicial ogre, oppressing those beneath him with a purposeless cruelty, with no greater end in the sight than the extinction of the lower classes. This is far too simplistic of an explanation for a complicated man and a complicated event, and this study seeks to develop an alternative hypothesis for the formulation of *Buck v. Bell*. By placing the decision, the results, and Justice Holmes himself within the broader context of their contemporary social, political, and historical atmospheres, a deeper understanding of the decision and a more accurate insight into the results can be obtained.

Research Methodology

To accomplish this objective, research focused on a variety of factors surrounding the social, political, and historical context of the *Buck v. Bell* decision. Extensive review of the literature surrounding American eugenics, the Progressive Era, Justice Holmes, and *Buck v. Bell* was done to gather a greater context for analysis. Eventually, dissecting the Justice's opinions and the realities they created came to the forefront of the project.

In order to examine and better understand the procedural safeguards that were held as being so fundamental to the constitutionality of these programs, an investigation into previously unreleased medical records of involuntary sterilizations from the state of Georgia was launched. Selected for their particularly compelling need of procedural safeguards, African-Americans in the Milledgeville State Hospital served as a sample of the population for investigation. Special emphasis was paid to patient correspondences, or the lack thereof, included in the medical files of these patients. These letters were frequently the family or guardians of inmates responding to intent-to-sterilize notices sent by the state, and provide an invaluable window into the procedural workings between the state health systems, the families, and the patients themselves. Using hospital files locked away for decades in the Georgia Archives, the aim of this paper is to provide original contributions to the debate over the legacy of Justice Holmes and to shed new light on the *Buck v. Bell* decision.

BUCK V. BELL AND OLIVER WENDELL HOLMES, JR.

Oliver Wendell Holmes, Jr.

Justice Oliver Wendell Holmes, Jr. has been called many things in historical retrospectives: "inconsistent" (Swisher, 2007, p. 579), a "utilitarian" (Thompson, 2004, p. 5), "liberal," "conservative," a "political fascist," and an "aristocrat" (Duggan, 2007, p. 3). He has variously been accused of bathing "the law in 'cynical acid' to remove its moral import" (Swisher, 2007, p. 579), having "morally bankrupted the practice of the bench and bar" (Swisher, 2007, p. 2), and acting as "a bulwark against

those who would infringe upon the liberties of the people and an insensitive, detached, and uncaring rubber stamp for abuse of the weak by the powerful" (Berry, 1998, p. 16).

However, at the same time, the "Great Dissenter," as his often highly critical dissenting opinions led him to be known, was also one of the most highly respected jurists ever to sit on the bench (Simons, 2007, p. 862). His writings are widely cited, and his book *The Common Law* has been called "without a doubt the most important treatise in the American legal canon" (Duggan, 2007, p. 14). Holmes is widely regarded as a bit of an "intellectual chameleon," but his incongruence of opinion is overstated (Duggan, 2007, p. 4). Holmesian academic dissections are almost entirely void of middle ground and habitually reduce Holmes to either a fair and even-handed justice or to a cruel and callous overlord, "making him a sort of philosophical Rorschach test" (Duggan, 2007, p. 3).

Born into a time period of revolutionary ideals, Holmes was most likely influenced by the Progressive Era. It is within this context that Holmes and his decisions must be considered. Meant to better all aspects of society, Progressive politics brought broad sweeping reforms in nearly all areas of civilized life. Unfortunately, this same fervor extended to thoughts of blood and lineage, and how humankind could improve the human stock by its own hand as well.

Among the politically active, eugenics quickly became a cause on equal moral ground with other Progressive advancements. It is important to note how strong these beliefs were at the time, representing a current so strong that many celebrated minds were caught up in it. W.E.B. Du Bois, even as he argued for the advancement of the rights of African-Americans, championed his belief in eugenics just as ardently. Eugenics was endorsed by Theodore Roosevelt, a Progressive Republican, Woodrow Wilson, a liberal Democrat, and Calvin Coolidge, a conservative Republican. It would be easy to write off the decision as the result of faulty science and a mob mentality. However, in the words of Paul Lombardo, "while the case did represent the peak of public acceptance of eugenical theory, characterizing *Buck v. Bell* merely as the result of 1920's pseudoscientific thought ignores the unique confluence of events and interplay of personalities without which the case never would have occurred" (Lombardo, 1985, p. 32). In this sense, the strength of thought, character, and mind of Oliver Holmes may have played every bit as crucial a role in guiding the history of the eugenics movement as the context surrounding it.

A strongly developed sense of independence may be the very reason Chief Justice William Howard Taft chose Holmes to author what was sure to become a controversial opinion for the majority of the court. Over the silent dissent of only one jurist, Holmes carefully dissected the case of Carrie Buck as he saw fit. The case was brought to the Supreme Court primarily as an

alleged violation of Fourteenth Amendment protections, but in the eyes of Holmes it could be plainly seen that “the attack is not upon the procedure but upon the substantive law” (*Buck v. Bell*, 1927).

The Buck v. Bell Opinion

The opinion itself represents a succinct but meticulous deconstruction of the challenge presented with a three-part defense to the Virginia statute. First addressing due process, Holmes offers a detailed recollection of the procedural safeguards enacted by the Virginia statute to protect those facing sterilization. Holmes assures that “there can be no doubt that so far as procedure is concerned the rights of the patient are most carefully considered,” and later analysis will suggest that this faith in procedure is at the very heart of the problem (*Buck v. Bell*, 1927).

Next addressing the substantive question, whether or not such an operation could ever be constitutional, Holmes exhibits a striking deference to the wishes of the elected legislature. Citing the text of the Virginia statute, which requires that the patient be a probable “potential parent of socially inadequate offspring, likewise afflicted,” and thus “may be sexually sterilized without detriment to her general health and that her welfare and that of society will be promoted by her sterilization,” Holmes acknowledged that according to the facts presented, Carrie Buck did indeed fall under the order of the statute (*Buck v. Bell*, 1927). He failed to acknowledge, however, in regards to the operation being a “detriment to her general health,” that at this point in time some procedures to sterilize females killed about 2% of the patients on which they were performed (Larson, 1996, p. 28).

However disagreeable the outcome, there is no denying the presence of logic framing this opinion. Reaching back to a previous decision, Holmes recalled *Jacobsen v. Massachusetts* (1905), and the principles underlying compulsory vaccines for smallpox as justification. That opinion, as explained by Dr. Phillip Thompson, declared:

Mandatory smallpox vaccinations were permissible because the compulsory vaccination laws did not violate the due process and equal protection provisions of the Constitution. Such restraints were upheld if “reasonable” and beneficial to the “common good.” In words prescient for the Buck decision, the Supreme Court concluded that where there was “the pressure of great dangers,” the “interests of the many” should not “be subordinated to the wishes or convenience of the few” (Thompson, 2004, p. 11).

Rather succinctly, as Holmes put it, “the principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes” (*Buck v. Bell*, 1927).

Finally, Holmes addressed the third prong of the attack, the claim that the statute violated equal protection under the Constitution by applying only locally to those within a mental institution. This suggestion appears to almost irritate Holmes, who calls it the “usual last resort of constitutional arguments to point out shortcomings of this sort” (*Buck v. Bell*, 1927). His response is an unusual interpretation of equal protection, but with the final lines of the opinion he clarified that:

The answer is that the law does all that is needed when it does all that it can, indicates a policy, applies it to all within the lines, and seeks to bring within the lines all similarly situated so far and so fast as its means allow. Of course so far as the operations enable those who otherwise must be kept confined to be returned to the world, and thus open the asylum to others, the equality aimed at will be more nearly reached.

Though not equality in the traditional sense, Holmes argues for equality among all defectives the statute intended to affect. These lines only strengthen notions of these institutions operating as mills, where efficiency and speed could be employed in industrial quantities to rid the nation of those seen as unfit.

Present Legal Status

While it is true that if *Buck v. Bell* were to face a direct challenge today, it most likely would be reversed, much of the logic contained in the decision still holds. In fact, *Roe v. Wade* (1973) cites both *Jacobsen v. Massachusetts* and *Buck v. Bell* as good law in determining the scope of one’s rights over their own body. Amicus briefs in *Roe v. Wade* asserted an unlimited right to one’s own body, to which the court responded that “it is not clear to us that the claim... that one has an unlimited right to do with one’s body as one pleases bears a close relationship to the right of privacy previously articulated in the Court’s decisions” and that “the Court has refused to recognize an unlimited right of this kind in the past” (*Roe v. Wade*, 1973). In that sense, *Buck* and *Jacobsen* clarify a principle: that the right to privacy means a woman can have an abortion, but it is balanced against other interests and rights at a certain point. At that point, the rights of the child are introduced and considered. Hence, a woman’s claim to an unlimited right to her own body is false, based upon the precedential value of *Buck v. Bell* and *Jacobsen v. Massachusetts*.

In fact, the case of *Buck v. Bell* has never been overturned. The closest the Supreme Court has come to overruling the decision came in 1942 with *Skinner v. Oklahoma* (1942), in a decision that many incorrectly believe overturned compulsory sterilization. *Skinner* was a challenge to an Oklahoma law permitting involuntary punitive sterilization for criminals convicted of three felonies involving moral turpitude. Since the targeted crimes excluded white collar felons from sterilization, punitive sterilization was found to be in violation of equal protection

clause of the Constitution (*Skinner v. Oklahoma*, 1942). However, in keeping with the narrow window through which most Supreme Court decisions are judged, the decision only pertained to punitive sterilization, without touching on eugenic sterilizations of the “feeble-minded.” This had little practical effect, since punitive sterilizations made up a negligible amount of the total sterilizations performed during this period.

PROCEDURAL SAFEGUARDS

Examining the Raw Data

After Holmes deferred to the legislature on the substantive legal question of whether compulsory sterilization was ever constitutional, the two remaining fronts on which he defended his decision were the procedural safeguards and the claims of equal protection. In order to examine his assertion that “there can be no doubt that so far as procedure is concerned the rights of the patient are most carefully considered,” a small subset of the roughly 65,000 total compulsory sterilizations performed in the United States was chosen for deeper investigation (*Buck v. Bell*, 1927).

Selected for their particularly great need of procedural protections, African-Americans in the pre-Civil Rights era Deep South present ideal candidates for research. Often subject to abuse by segregated society, these citizens found themselves at the mercy of a legal process in which they had little control. Georgia has records of 4,933 patients being involuntarily sterilized, and after obtaining 1,649 cases, a sub-sample of all the African-American patients from Milledgeville’s large integrated state hospital was chosen for study. They represent a time period spanning from 1939 through 1953, and provide a glimpse into the inner-workings of the South’s eugenics programs.

Procedural safeguards required that when the State Board of Eugenics was scheduled to meet and pass on the recommended sterilization of a patient, the next of kin (or, in their absence, the County Solicitor) was to be notified. After ten days, lack of protest or correspondence from the notified kin constituted both *de facto* and *de jure* approval of the operation. If there was any such correspondence concerning the patient, copies were retained in their medical file for the record.

Of the several hundred files examined, only 52 contained any correspondence on behalf of the patient. The vast majority contained only the four requisite documents: an application to the Board by the Doctor or superintendent, the notice of the Board meeting sent to the guardian or next of kin, a report of the operation, and the original recommendation letter from the doctor or superintendent to the Board. Far too many of these patients simply lacked anyone on the outside who understood or cared for their plight. It must also be noted that national census data from 1940 indicates the illiteracy rate for blacks was over five times the rate for whites. The reality in the South

was certainly even worse than that, and in the previous century 80% of black Americans were illiterate (“National Assessment of Adult Literacy”, 2008).

Of the 52 files containing correspondences, 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. 26 exhibited a fundamental misunderstanding of the entire basis for the operation. All eugenic operations shared a common goal explicitly stated in the notices from the Board of Eugenics: the betterment of society’s gene pool. These 26 letters, however, all consented to the procedure on the basis that these operations were in the best interests of the patients and not society, and that they would somehow help alleviate the medical conditions of the individual. These people simply did not understand what they were being notified of. One mother even begged in a barely legible note, “I don’t want you to kill my son” (GA Case 1528), while another note was scratched out on the back of an index card with a return order from a retail store on the reverse (GA Case 1367). “Whatever you think is best for my...” is a sentiment commonly found throughout the letters, while anything even remotely relating to the betterment of society is conspicuously absent. In many cases, eugenic sterilization was a condition for patients’ release back to their families.

Particularly striking are the appeals. Of the 52 correspondence case files, 11 cases did not give consent. Yet of these 11, ten were sterilized anyway with no record of resolution in their files, only the objections of their family members and the dates they were ultimately sterilized. What unique characteristic allowed the one remaining patient to have their case dropped and forego sterilization? This inmate also has the distinction of being the only one who retained a lawyer, and was subsequently able to file a proper appeal in accordance with their strict guidelines. Only one other appeal, filed without the aid of legal counsel, is found in the record. This appeal was rejected without consideration because it was “filed incorrectly,” and the patient was subsequently sterilized (GA Case 1636).

Ultimately, the most conspicuous problem that arises in these case studies is that the law and the procedural safeguards it contains both presuppose a very high level of literacy and legal competence. In dealing with mental defectives and the “feeble-minded,” these attributes appear to be the very antithesis of the group that the law was drafted to target. Moreover, this entire time period occurred prior to *Gideon v. Wainwright*’s (1963) declaration that legal counsel is of fundamental importance to due process, a paradigm shift that could have clearly influenced legal thought on this matter. In the end, in the eyes of one legal scholar, “a broadening conception of personal liberty, including civil rights for the handicapped and reproductive rights for women, provided the surest protection against compulsory eu-

genic programs” (Larson, 1996, p. 168). By leaving these patients on their own to prove that they ought not to be sterilized in the face of a machine few understood and even fewer could fight, the law effectively abandoned these citizens and irrevocably altered their lives in the most fundamental of ways.

CONCLUSIONS

The literature almost universally condemns Holmes as callous and cruel for his role in the *Buck v. Bell* decision and paints him as a man disconnected and dispassionate towards the lower classes. However, after thorough investigation, new evidence appears to exonerate Holmes in many senses. Though there were a number of failures in the process, but malicious judicial intent or callous disregard for the minority do not appear to be among them.

One principal failure of Holmes in this case lies in not applying his own philosophy. A key component of the predictive legal theory advanced by Holmes in “the Path of Law” was what he referred to as the “bad man” test of a law: what would be the consequences, should someone of ill-intent attempt to subvert or use the law for malicious purposes (Holmes, 1997)? It clearly lacked application in the *Buck* case, as Carrie Buck’s own personal case history is a testament to the inadequacy of the protections provided by the law. Serious though it may be, this was not the greatest failure that occurred.

The ultimate failure of Justice Holmes in the *Buck v. Bell* decision was in deciding the case based upon the word of the law, and not the reality. For someone often credited with founding the Legal Realism school of thought, this may seem to many to be an egregious error. Though procedural safeguards were in place, and may even have theoretically offered adequate protection to the rights of the patient, the Georgia record clearly demonstrates the problems inherent to the system. In requiring far too high a level of literacy and legal competency for safeguards to ever offer any protection in practice, they deprived patients of their basic due process requirements. Further, literacy and access to legal resources led to dramatically different outcomes for patients in the Georgia record. Since the availability of these necessary skills and resources differed dramatically across socioeconomic lines, the Constitution’s equal protection clause was also violated. These were not differences that fell along lines of inmates or free citizens; these were differences that fell along lines of class, race, wealth, and power.

ACKNOWLEDGMENTS

The author would like to thank Dr. Amy D’Unger for her constant support and guidance, as well as for sharing a part of her research with an interested student.

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