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Silent Protest: A Catholic Justice Dissents in Buck v. Bell

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SILENT PROTEST: A CATHOLIC JUSTICE DISSENTS IN *BUCK V. BELL*

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I believe that the wholesale social regeneration which so many now seem to expect, if it can be helped by conscious, co-ordinated human effort, cannot be affected appreciably by tinkering with the institution of property, but only by taking in hand life and trying to build a race. That would be my starting point for an ideal for the law.[1]

The educated man . . . whose conduct is not guided by religion or morality, is a danger to the State and his fellowmen.[2]

I. OVERVIEW OF *BUCK V. BELL*[3]

In 1927, the United States Supreme Court accepted a case involving the involuntary sterilization of a young, unwed woman named Carrie Buck.[4] A tubal ligation was ordered on Ms. Buck pursuant to a Virginia statute that permitted the sterilization of imbeciles.[5] Experts for the state testified that the sterilization was necessary because the Buck family demonstrated three

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[1] Oliver Wendell Holmes, *Ideals and Doubts*, 10 ILL. L. REV. 1, 3 (1915).

[2] DAVID J. DANELSKI, A SUPREME COURT JUSTICE IS APPOINTED 18 (1964) (statement of U.S. Supreme Court Justice Pierce Butler) (quoting from a 1915 speech).

[3] 274 U.S. 200 (1927).

[4] *See id.* at 205 (examining whether the Virginia statute violated the Fourteenth Amendment).

[5] *See id.*; *see also* J. DAVID SMITH & K. RAY NELSON, THE STERILIZATION OF CARRIE BUCK xviii (1989) (documenting the sterilization of Carrie Buck after the Court upheld the Virginia statute).

generations of imbecility.[6] The case was appealed on due process and equal protection grounds.[7]

The Chief Justice, Howard Taft, stated that there was some opposition among the justices about affirming the Virginia statute when he assigned the case to the most eminent jurist on his court, Oliver Wendell Holmes, Jr.:

> Some of the brethren are troubled by the case, especially Butler. May I suggest that you make a little full the care Virginia has taken in guarding against hasty action, the proven absence of danger to the patient and other circumstances tending to lessen the shock many may feel over such a remedy? The strength of the facts in three generations of course is the strongest argument for the necessity for state action and its reasonableness.[8]

The case would pit the most renowned jurist in the history of the United States against a rather minor figure on the Court, Associate Justice Pierce Butler. Seven justices joined Holmes' majority opinion, which upheld eugenics through sterilization. Butler, the sole Catholic on the Court, would offer the single, silent dissent. In affirming the statute, Justice Holmes implicitly endorsed its eugenic assumptions. *Buck* eventually became one of the Supreme Court's most controversial acts.[9]

The case raised important questions about how the United States Supreme Court could have reached such a decision. What assumptions were behind Holmes' unequivocal support of eugenics? Did Butler's opposition stem from his Catholicism or constitutional concerns? What lessons should the case provide in terms of new forms of eugenics on the horizon?

II. THE OPINION OF JUSTICE HOLMES

It is hard to imagine two people with more opposite fortunes than the appellant, Carrie Buck, and Justice Holmes.

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[6] *See Buck*, 274 U.S. at 205; SMITH & NELSON, *supra* note 5, at 171 (reporting that state authorities determined Buck's children would be detrimental to state welfare because of feeblemindedness).

[7] *See Buck*, 274 U.S. at 205 (challenging the validity of the Virginia statute).

[8] LIVA BAKER, THE JUSTICE FROM BEACON HILL 602 (1991).

[9] *See* Robert J. Cynkar, Buck v. Bell: *'Felt Necessities' v. Fundamental Values?*, 81 COLUM. L. REV. 1418, 1451–53 (1981) (contrasting the majority opinion to Justice Butler's Catholicism-influenced dissent); Ben W. Palmer, *Hobbes, Holmes and Hitler*, 31 A.B.A. J. 569, 570–73 (1945) (discussing Justice Holmes' reasoning).

Roughly a year before the *Buck v. Bell* decision, Holmes enjoyed a remarkable eighty-fifth birthday.[10] The justice, whose opinions still displayed their trademark nuance and craft, was deluged by cards, letters, and telegrams.[11] In *The New Republic*, Felix Frankfurter declared that this "tender, wise and beautiful being [was] one of those unique gifts whose response to life was so transforming that he vivifies life for all those who come within his range."[12]

While the Boston Brahmin reveled in his fame, Carrie Buck, a young white woman in Virginia, was cleaning and cooking in the Virginia Colony for the Epileptic and Feebleminded ("the Virginia Colony").[13] Her father either left or had died when she was a baby, and her mother was reportedly a prostitute.[14] Carrie was placed with foster parents, the Dobbs', when she was three years old[15] and was removed from school at twelve to help clean their home.[16] At seventeen, she claimed to have been raped by the Dobbs' nephew and had a daughter out of wedlock, named Vivian.[17] In 1924, just one year later, she was placed in the Virginia Colony because she was allegedly epileptic, feeble minded, and morally delinquent.[18] Shortly after, Dr. Albert Priddy, the Virginia Colony Superintendent and prime sponsor of the Virginia sterilization statute, petitioned to have her sterilized pursuant to the law.[19] The sterilization order was approved, and was subsequently appealed all the way to the United States Supreme Court.[20]

Revered as a Civil War hero and for his contributions to American law, Holmes was not bothered by the potential controversy of *Buck v. Bell*. He adopted a three-pronged defense

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[10] BAKER, *supra* note 8, at 590.

[11] *Id.*

[12] *Id.*

[13] *See* SMITH & NELSON, *supra* note 5, at 40.

[14] *See id.* at 1–2 (noting Carrie Buck's difficult childhood).

[15] *Id.* (discussing Carrie Buck's life with the Dobbs).

[16] *See id.* at 3 (explaining that Carrie Buck had performed well in school prior to being withdrawn).

[17] *Id.* at 19, 40.

[18] *Id.* at 17–19 (finding that the judiciary, doctors, and foster parents all supported sterilization).

[19] *See* Roberta M. Berry, *From Involuntary Sterilization to Genetic Enhancement: The Unsettled Legacy of* Buck v. Bell, 12 N.D. J. L. ETHICS & PUB. POL'Y 401, 416–17 (1998) (noting Dr. Priddy characterized Carrie Buck's mental capacity as that of a nine-year-old).

[20] *Id.* at 410–11 (criticizing Holmes' decision).

of the Virginia statute in response to the issues on appeal.[21] First, the statute did not violate due process requirements.[22] Although several state decisions had dismissed sterilization statutes because of procedural issues, in *Buck*, "the rights of the patient are most carefully considered, . . . as every step . . . was taken in scrupulous compliance with the statute. . . ."[23] After all, a guardian was appointed, medical reports were prepared, and numerous hearings were held on the matter.[24]

As for Ms. Buck's equal protection claims, Holmes detested this "last resort of constitutional arguments."[25] While conceding that the Virginia statute did not cover similarly situated individuals outside of institutions for the feeble minded, the law stated a policy and sought to bring all appropriate persons within its limits "so far and so fast as its means allow[ed]."[26] The opinion noted that as sterilized inmates were released, additional persons could be brought within the scope of the statute.[27]

Having determined that there were adequate procedural safeguards and guarantees for equal protection, he turned to the claim that sterilization by the state was intrinsically unreasonable and inhumane.[28] The Virginia legislature and courts had two defenses. As a matter of civic duty, the decorated Civil War veteran observed that a nation's "public welfare" may call for the sacrifice of life and therefore should be able to "call upon those who already sap the strength of the State for these lesser sacrifices" in order to "prevent our being swamped with incompetence."[29] Moreover, the level of sacrifice was not much different than the court approved compulsory vaccinations.[30]

The rhetoric of civic duty and contemporary eugenics were combined to produce a public policy justification. Imbeciles threatened to create generations of incompetent people who, at a

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[21] *See* Buck v. Bell, 274 U.S. 200, 206–08 (1927) (discussing the constitutionality of the Virginia statute).

[22] *See id.* at 207 (noting procedural safeguards).

[23] *Id.*

[24] *See id.* at 206 (stating that Virginia authorities complied with the requisite procedural safeguards prior to Buck's sterilization).

[25] *Id.* at 208.

[26] *Id.*

[27] *See id.*

[28] *Id.* at 207.

[29] *Id.*

[30] *See id.*

minimum, would either starve or rely on public or private charity.[31] In a worst-case scenario, generations of "degenerate offspring" would threaten society with their predatory and criminal activity.[32] In sum, Holmes declared that sterilization would protect the public from such dependency and degeneracy because "[t]hree generations of imbeciles are enough."[33]

Holmes' decision was not an aberration from his judicial philosophy. The opinion reflects three prominent sources of his jurisprudence. First, he believes that human progress flows from the advance of the sciences.[34] New ideas in the sciences allowed human society to carefully explore and test ideas through experimentation.[35] The sciences can resolve many human questions, but they must be conjoined with a historical perspective to fully ascertain the evolutionary ends achieved by the law.[36] Quantitative determinations rely on history to provide a precise notion of the scope of legal rules and a foundation for an "enlightened scepticism."[37] "[T]he man of statistics and the master of economics" can then tame the errors of tradition and custom the historian uncovered.[38]

For theoretical ballast in his scientific jurisprudence, as applied in *Buck v. Bell*, Holmes turned to Malthusian economics, Social Darwinism, and eugenics. Like Thomas Malthus, Holmes assumed that reform measures to assist the poor and destitute were wrong because they increased the population beyond a desirable level.[39] Hence, illegitimate children are "of little value to society."[40] Social Darwinism annealed these Malthusian

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[31] *Se id.* ("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.").

[32] *Id.*

[33] *Id.*

[34] RALPH B. PERRY, THE THOUGHT AND CHARACTER OF WILLIAM JAMES 510 (1935).

[35] *Id.*

[36] *See* OLIVER WENDELL HOLMES, THE COMMON LAW 1–2 (Little, Brown & Co. 1881); Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897) (stating that "[t]he rational study of law is still to a large extent the study of history").

[37] *Id.*

[38] *Id.*

[39] *See* ALLAN CHASE, THE LEGACY OF MALTHUS 6–7 (1977) ("To Malthus, any measures that eased the lot of the greatest numbers of people . . . were not only immoral and unpatriotic but also against the laws of God and Nature.").

[40] *Id.* at 6.

claims. Herbert Spencer, one of the main proponents of this pseudo-science and who coined the phrase "survival of the fittest," concluded that Darwin's evolutionary biology and the population principles of Malthus mandated social selection as a means of limiting the inheritance of negative characteristics.[41] Not surprisingly, Holmes, like many in his generation, admired Spencer, who he believed that, next to Darwin, had done more than any other writer to "affect our whole way of thinking about the universe."[42]

The eugenics movement adopted and extended Spencer's desire to develop perfect human beings through biological manipulation.[43] The eugenicists in the first few decades of the twentieth century justified a radical manipulation of reproduction as an essential aspect of a collective evolutionary trajectory toward species refinement.[44] The rediscovery of Gregory Mendel's hereditary genetics supported eugenics, which led eugenicists to contend that psychological and cognitive characteristics are also inherited.[45] The speculations on genetic degeneracy were assisted by the use of the newly formulated Binet-Simon intelligence tests on army recruits and immigrants after 1916.[46] The tests suggested that degeneracy was on the

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[41] RICHARD HOFSTADTER, SOCIAL DARWINISM IN AMERICAN THOUGHT 38–40 (1965).

[42] *See id.* at 32; *see also* HOLMES-LASKI LETTERS 18–19 (Mark DeWolfe Howe ed., 1953) (1916) (documenting a letter from Holmes discussing his interest in a Spencer book). Holmes' reading of Spencer was verified by his daily reading lists which indicate that he read Spencer on philosophy, biology, and sociology. *See* ELEANOR N. LITTLE, THE EARLY READING OF JUSTICE OLIVER WENDELL HOLMES 170, 187, 196 (1954).

[43] *See* HOFSTADTER, *supra* note 41, at 38–40 (discussing Spencer's theory on developing perfect human beings); PHILIP R. REILLY, THE SURGICAL SOLUTION: A HISTORY OF INVOLUNTARY STERILIZATION IN THE UNITED STATES 22–25 (1991) (discussing the origin of the eugenics movement in the United States).

[44] *See* STEFAN KÜHL, THE NAZI CONNECTION: EUGENICS, AMERICAN RACISM, AND GERMAN NATIONAL SOCIALISM 40–42 (1994); REILLY, *supra* note 43, at 22–26 (considering manipulation through sterilization immigration and marriage restrictions).

[45] *See id.* at 20–22 (describing a work by Henry H. Goddard as "the work that really captured the contemporary imagination and greatly reinforced belief in the heritability of feeble-mindedness").

[46] *See* JAMES W. TRENT, JR., INVENTING THE FEEBLE MIND: A HISTORY OF MENTAL RETARDATION IN THE UNITED STATES 168, 179 (1994); *see also* REILLY, *supra* note 43, at 20–21 (documenting the first uses of the Binet-Simon test in the United States).

rise in much of the population.[47] When Holmes coined the phrase, "[t]hree generations of imbeciles are enough,"[48] he was also echoing a rather substantial literature on heredity studies. Eugenicists in their testimony favoring sterilization in *Buck v. Bell* cited one such study performed on the Kallikak family.[49]

In order to confront this looming chaos of genetic degeneracy, the half-century proceeding *Buck v. Bell* witnessed a wide array of proposals for eliminating defective population traits that included euthanasia, full time custodial care, and immigration restrictions.[50] By 1938, "more than 27,000 compulsory sterilizations had been performed in the United States."[51] The Immigration Act of 1924 excluded undesirables from diluting the Anglo-American stock.[52]

Another source of Holmes decision can be attributed to his utilitarianistic beliefs reflected by his personal association with prominent utilitarians and his extensive reading of John Austin, John Stuart Mill, and Jeremy Bentham.[53] In *Justice Oliver Wendell Holmes and Utilitarian Jurisprudence*, H. L. Pohlman concludes that the "central core of Holmes' substantive jurisprudence and philosophical methodology arose from the premises of a utilitarian legal philosophy."[54] As a jurist, Holmes demonstrated these utilitarian sympathies in his consequential reasoning. The ends are selected not because of any historical, cultural, or *a priori* rules or principles, but flow from current opinion. The aim of the law is to efficiently design public policy to implement these desires.[55] In *Buck v. Bell*, the court employed

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[47] TRENT, *supra* note 46, at 168 (discussing the results of tests given to immigrants).

[48] *See* Buck v. Bell, 274 U.S. 200, 207 (1927); *see also* DAVID H. BURTON, POLITICAL IDEAS OF JUSTICE HOLMES 64 (1992).

[49] *See* KÜHL, *supra* note 44, at 40–42; *see also* REILLY, *supra* note 43, at 20–22 (discussing the origin of the study).

[50] *See* BURTON, *supra* note 48, at 64 (considering Virginia's inmate sterilization law); REILLY, *supra* note 43, at 22–26 (discussing various immigration, miscegenation, and restrictive marriage laws).

[51] J. DAVID SMITH, MINDS MADE FEEBLE: THE MYTH AND LEGACY OF THE KALLIKAKS 139 (1985).

[52] *See* REILLY, *supra* note 43, at 23–24 (noting that "[c]oncerns for cost and for protecting 'American' racial integrity were the two cornerstones for this [exclusionary] policy.").

[53] *See* LITTLE, *supra* note 42, at 169, 171, 174, 187.

[54] H. L. POHLMAN, JUSTICE OLIVER WENDELL HOLMES AND UTILITARIAN JURISPRUDENCE (Cambridge: Harvard University Press, 1984)

[55] *See* HOLMES, THE COMMON LAW, *supra* note 36, at 1.

a utilitarian calculus of weighing costs and benefits to determine the Virginia legislation's appropriateness. If social consequences, i.e. the utility of legal actions towards a person, are a fundamental criterion for assessing a piece of legislation, individual rights are easily marginalized by the demands of a collective benefit.

Although he espoused a scientific and utilitarian jurisprudence and was cosmopolitan in his social associations, Holmes' opinion also reveals an unrepentant nationalist. A fierce nationalism was indelibly forged onto his psyche during his gallant service in the Civil War.[56] This nationalism was closely connected to Social Darwinism, which assumed that human competition was purposeful and advanced the evolution of human beings.[57] His nationalism was also connected to certain prejudices. Sterilization prevented the dilution of the national stock from inferior races.[58] The state must adapt to the "felt necessities of the time" and "the prejudices which judges share with their fellow-men."[59] These "felt necessities" and "prejudices" included contemporary theories of Social Darwinism, eugenics, and civic virtue.[60]

III. POSSIBLE SOURCES OF JUSTICE BUTLER'S DISSENT

Holmes' opinion was ultimately convincing to his brethren, with the exception of Pierce Butler. The opposing justices seemed unevenly matched. Holmes is ranked as perhaps the most influential jurist in the history of American jurisprudence, while Butler is considered one of the least important justices appointed to the highest court.[61] Holmes viewed life as solely an evolutionary process, a struggle that bears witness only to inevitable change.[62] There were no absolute or transcendent

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[56] *See generally* BURTON, *supra* note 48, at 29–34, 47 (describing Holmes' response to the war).

[57] *See* HOFSTADTER, *supra* note 41, at 38–40.

[58] *See* REILLY, *supra* note 43, at 22–26 (detailing American legislative response to "fears for the impact that these millions of [immigrants] would have on America's racial stock. . .").

[59] HOLMES, THE COMMON LAW, *supra* note 36, at 1.

[60] *See id.* at 1. *See generally* BURTON, *supra* note 48, at 25–36, 47 (detailing Holmes' intellectual development).

[61] *See* David P.Currie, *The Most Insignificant Justice: A Preliminary Inquiry*, 50 U. CHI. L. REV. 466, 479 (1983).

[62] *See* HOLMES, THE COMMON LAW, *supra* note 36, at 1 (noting that "[t]he law

rules or ends. In contrast, Butler viewed the court as bound by tradition and precedent, seeking a moral end in all its decisions.[63] Morality rested upon religious foundations and he condemned professors who taught that "religion is a hindrance to social progress."[64] Holmes remembered his colleague, after his death, as "a monolith," as frozen, as being "of one piece."[65] Butler's unswerving devotion to family, church, liberty, and country were not negotiable, causing him to oppose Holmes when others would not.

The two jurists shared many other differences. Holmes lived among America's elite in Boston, while Butler was born in a log cabin on St. Patrick's Day, in 1866, to Irish immigrants in Minnesota.[66] Butler's parents had fled the potato famine of 1848 to come to the United States.[67] The nine Butler children and their parents lived a humble life as frontier farmers, while the children attended a one-room schoolhouse.[68] Young Pierce proved an able student and applied to the United States Military Academy but lost his appointment on the entrance examination by one tenth of one percent.[69]

Although disappointed, Butler enjoyed learning about morality and laissez faire economics at Carleton College, a nondenominational Christian College not far from his home.[70] At Carleton, he was a C+ student who loved Shakespeare and

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embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics").

[63] *See* DANELSKI, *supra* note 2, at 15 (1964) (remarking that "[Justice] Butler highly valued law, order, justice, tradition, and freedom [and] morality").

[64] *See id.* at 16 (discussing Justice Butler's suggestion that professors "spread discontent among the students").

[65] *See id.* at 19 (noting Justice Holmes' remark that Butler possessed "no seams the frost can get through").

[66] *See* G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 7–8 (1993) (discussing the early years of Holmes' life); DANELSKI, *supra* note 2, at 4 (noting that Justice Butler's father was an immigrant "who left Ireland soon after the famine of 1848, [later acquired] a homestead . . . in 1862 . . . built a log cabin, and in the structure, on St. Patrick's Day, Pierce [Butler] was born").

[67] DANELSKI, *supra* note 2, at 4.

[68] *See id.* at 4–5.

[69] *See id.* at 5 (noting that although Justice Butler "did well on the examination, another candidate scored a tenth of one percent higher and received the appointment").

[70] *See id.* at 5–7 (discussing Justice Butler's course of study at the college "five miles from the Butler farm").

could recite many of the poems of Robert Burns.[71] Butler enjoyed debating both in and out of the classroom.[72] After college, as was often the custom in those days, Butler was an apprentice with lawyers in St. Paul before becoming a member of the bar.[73] He was active in local Democrat party politics and was elected county attorney at the age of twenty-six.[74] The young attorney, known for his wit, intelligence, common sense, and drive,[75] gained a reputation as a stolid defender of the rule of law.[76] He even prosecuted a powerful Democratic politician for violating tavern laws[77] and the *Minnesota Law Journal* recognized him as one of the best prosecutors in the state.[78] Butler returned to private practice, including a brief stint as a railroad attorney,[79] and specialized in litigation and railroad valuation.[80] Working hard at his craft, Butler became one of the most feared and respected court room attorneys in Minnesota.[81] His specialty was cross examination, where he applied a mix of wit, humor, and sarcasm.[82] The tough cross examiner was viewed by some as a "bully," while others described him as a "hard fighter, but a fair and just one."[83]

Butler's devotion to free enterprise and his representation of railroads did not negate his prosecutorial sensibility towards the dishonest. In 1909 the Taft administration hired him as a special Assistant Attorney General to prosecute millers selling flour allegedly bleached with nitrogen peroxide, and meat packers under the Sherman Antitrust Act.[84] In the next decade,

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[71] *Id.* at 7.

[72] *Id.* (noting that Justice Butler "said that his experience in debate and public speaking at Carleton was one of the most important aspects of his education").

[73] *See id.* at 7–8 (describing Justice Butler's admission to the bar after being quizzed "in open court, as was the custom in those days").

[74] *See id.* at 8 (noting that Justice Butler was a Democrat from his "first vote for Grover Cleveland" and describing his election as county attorney).

[75] *See id.* at 9 (discussing the positive press that Justice Butler received when he sought reelection as county attorney in 1894).

[76] *See id.* at 8–10.

[77] *See id.* at 8–9 (noting Justice Butler's prosecution of a "power in local Democratic politics").

[78] *Id.* at 9.

[79] *See id.* (discussing Justice Butler's work as a railroad attorney).

[80] *Id.* at 10.

[81] *See id.* at 10–11.

[82] *Id.*

[83] *Id.* at 11.

[84] *Id.* at 11–12.

he participated in a series of high profile railroad valuation cases, including one where he met and befriended William Taft, who was an arbitrator.[85] He was appointed to the Board of Regents at the University of Minnesota and remained active in the Democratic party.[86]

With the retirement of two Supreme Court Justices in 1922, President Warren Harding appointed Senator George Sutherland to one position[87] and asked Chief Justice Taft and Attorney General Harry M. Daugherty to recommend a replacement for the other.[88] With the retirement of the justices, the court had lost one of three Democrats and its only Catholic.[89] While former Solicitor General John Davis of West Virginia and several justices from New York had the inside track,[90] Butler eventually received the nod for the position.[91] He met the required criteria since he was Catholic, a Democrat, a man of character, and a supporter of free enterprise.[92] A recommendation from the Eighth Circuit Judge Walter Sanborn helped to carry the day for Butler:

> I cannot think of anyone better qualified for such place by character, ability, learning, judgment and temperament than he . . . . His intellect is clear, calm, analytic and unusually powerful. His mind is well stored with general information and with profound and accurate knowledge of the law; his industry is indefatigable; . . . Take him all in all, Pierce Butler is, in my opinion, one of the few great men of my acquaintance.[93]

Butler's Catholicism was a key point in his appointment to the court and a number of the members of the Church hierarchy lobbied for his appointment.[94] Butler's religion was a source of great pride and devotion, but he made clear, early in the selection process, that he did not want to be appointed solely because of his faith or for that matter "as a representative of any

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[85] *Id.* at 12–14.
[86] *Id.* at 14–15.
[87] *Id.* at 39–40, 42.
[88] *Id.* at 54–55, 87.
[89] *Id.* at 43–44.
[90] *Id.* at 43–49.
[91] *Id.* at 54–55, 88 (documenting President Harding's support for Justice Butler).
[92] *Id.* at 6–7, 49, 52, 54.
[93] *Id.* at 49.
[94] *Id.* at 60–63 (noting that several Archbishops supported Butler).

creed, class, party, or group."[95] In personal and public lives, he was noticeably tolerant of, and never critical of, other faith traditions.[96] Although Butler wanted to be known as more than the Catholic justice, his piety and sense of religious morality was in conflict with Holmes, who had no particular use for religion.[97] For Holmes, religion had little relevance to a legal philosophy that was concerned with adapting to the needs of an age and assisting in the unleashing of an evolutionary dynamism in society.[98] When Canon Patrick Sheehan provided Holmes with a book of Francis Suarez, the Catholic theologian, he never opened it because he believed that no sixteenth century writer could provide the "pragmatic thing" that must be the goal of reading.[99]

As a devout member of his Church, Butler was probably aware of the Catholic hierarchy's serious qualms about medical procedures such as involuntary sterilization. Catholic opposition to eugenics was suggested by their response to the infamous Bollinger case in 1915.[100] Dr. Harry J. Haiselden of Chicago's German American Hospital diagnosed the newly born baby of Anna Bollinger as having multiple physical abnormalities.[101] Surgery could have saved the child, but would not correct most of the abnormalities.[102] Doctor Haiselden recommended that the child not undergo surgery, and the parents complied with his suggestion.[103] The child died five days later.[104] In his defense, the doctor contended that the current form of euthanasia was supported by current eugenic theory.[105] Haiselden was the first Western physician in modern times to publicly reveal his

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[95] *Id.* at 60.

[96] United States Supreme Court, *Proceedings of the Bar and Officers of the Supreme Court of the United States in Memory of Pierce Butler, January 27, 1940* (Washington, D.C., 1940), 20.

[97] BURTON, *supra* note 48, at 73–74, 78 ("Holmes's outlook was hardly mystic and definitely matter of fact.").

[98] *See id.* at 19.

[99] *Id.* at 75–76.

[100] MARTIN S. PERNICK, THE BLACK STORK: EUGENICS AND THE DEATH OF "DEFECTIVE" BABIES IN AMERICAN MEDICINE AND MOTION PICTURES SINCE 1915, 3–8, 190–91 (1996) (discussing debate surrounding the Bollinger child).

[101] *Id.* at 3.

[102] *Id.* at 3–4.

[103] *Id.* at 4.

[104] *Id.*

[105] *See id.* at 14–17 (explaining Haiselden's view that science could provide an objective solution to the subjective and emotional disputes arising from eugenics).

practice of euthanasia.[106] Most of the country's newspapers revealed the doctor's confession and turned the Bollinger case into a cause celebre.[107] In the midst of a mounting concern about social degeneracy, there was overwhelming public support for Haiselden from prominent progressives, lawyers, doctors, socialists, and Republicans who commented on the case.[108] However, the religious organizations consistently opposed Haiselden and his infant euthanasia.[109] Catholic spokesmen disagreed with Haiselden in eighty percent of their recorded statements.[110]

The Catholic anxiety over eugenics, which may have influenced Pierce, would be formalized three years after *Buck v. Bell* in Pius XI's 1930 encyclical, *Casti Connubii* (On Christian Marriage). A part of the encyclical was aimed at the State's assuming the power to determine issues of procreation for the purposes of eugenics. Pius XI warned about those who were "over solicitous for the cause of eugenics"[111] and who would:

> [P]ut eugenics before aims of a higher order, and by public authority wish to prevent from marrying all those whom, even though naturally fit for marriage, they consider, according to the norms and conjectures of their investigations, would, through hereditary transmission, bring forth defective offspring. And more, they wish to legislate to deprive these of that natural faculty by medical action despite their unwillingness; and this they do not propose . . . for a crime committed, not to prevent future crimes by guilty persons, but against every right and good they wish the civil authority to arrogate to itself a power over a faculty which it never had and can never legitimately possess.[112]

Pius XI suggested that the State erred in denying marriage and punishing the innocent. He felt that the State simply lacked any authority to deny the reproductive capacities of its citizens, and that, although the State was owed allegiance, this allegiance was qualified by a higher obligation. Ultimately, he found the "family [to be] more sacred than the state," binding us to our

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[106] *Id.* at 19.
[107] *Id.* at 6.
[108] *Id.*
[109] *See id.* at 34–35.
[110] *Id.* at 31–35.
[111] PIUS XI, ENCYCLICAL LETTER CASTI CONNUBII 68 (1930).
[112] *Id.*

heavenly destiny more than the demands of temporal authorities.[113] Finally, the encyclical, citing Thomas Aquinas, noted that the body is a realm that can not be violated when there is no criminal guilt. [114]

Although the position of the Church on moral and religious matters was fairly explicit, it is difficult to gauge how it influenced, if at all, the jurisprudence of Justice Butler. The two cases involving religious issues before the Taft Court, each concerning public and parochial schools, were decided with unanimous opinions.[115] Nonetheless, for Butler "religion cannot be separated from morality and that without it character will not be secure as against the attacks of selfishness and passions."[116] In direct contrast to Holmes, he averred that all worthy struggles aim at establishing morality as the basis of individual and national life.[117] In *Hansen v. Haff*,[118] the court held that an alien woman who had been having an affair with a married man abroad could not be prohibited from reentering the United States on the basis of a statute that excluded aliens who came to the United States for the purpose of prostitution or for any other immoral purpose.[119] In his dissent, Butler liberally construed the facts of the case to claim she was a concubine and/or reentering the country for immoral action.[120]

Although 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.[121] Born on the frontier, Butler had a keen sense of individual liberty.[122] Hence, he felt that the Fourteenth Amendment should "forbid state action which would take from the individual the right to engage in common occupations of life [and] assure equality of opportunity to all

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[113] *Id.* at 69.

[114] *Id.* at 69–70.

[115] *See* Cochran v. Louisiana Bd. of Educ., 281 U.S. 370, 370 (1930); Pierce v. Soc'y of Sisters, 268 U.S. 510, 529 (1925).

[116] *Cochran*, 281 U.S at 371.

[117] Pierce Butler, *Educating for Citizenship*, 12 CATHOLIC EDUC. ASS'N BULL. 126–27 (Nov. 1915).

[118] 291 U.S. 559 (1934).

[119] *Id.* at 560–63.

[120] *See id.* at 564–66.

[121] United States Supreme Court, *Proceedings of the Bar and Officers of the Supreme Court of the United States* 30, 34 (1940); Cynkar, *supra* note 9, at 1452–53.

[122] DANELSKI, *supra* note 2, at 4, 7.

under like circumstances."[123] His first dissent, in which no other justice joined him, was a forfeiture of liquor case in which the offending item had been lawfully obtained prior to prohibition.[124] The dissent observed that the possession of the liquor did not injure the public at all.[125]

Due process had to be extended even to those who were the most despised and least coveted of citizens, including criminal defendants. In a circuit case, over which Butler presided, involving a refusal to grant bail to bootleggers, he declared that "[a]bhorrence, however great, of persistent and menacing crime will not excuse transgression in the courts of the legal rights of the worst offenders."[126] However, Butler also felt that legitimate governmental interests, at times, had to limit individual rights to some degree, particularly in times of war.[127] On this point, he agreed with Holmes. The difference was that his extension of a sense of national urgency did not reach other issues, such as the alleged problem of social degeneracy. Butler stood resolute in valuing individual rights over governmental power and intrusions. For example, on the power of Congress to subpoena witnesses, he concluded:

> It has always been recognized in this country, and it is well to remember, that few if any of the rights of the people guarded by fundamental law are of greater importance to their happiness and safety than the right to be exempt from all unauthorized, arbitrary or unreasonable inquiries and disclosures in respect of their personal and private affairs.[128]

This latter claim of protection against unreasonable governmental invasion of the personal domain of individual citizens could be logically extended to involuntary sterilization. As for due process arguments, the seasoned trial lawyer may have sensed some problems in the poor representation provided by her legal counsel, including the failure to be tough on cross

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[123] Senn v. Tile Layers Protective Union, 301 U.S. 468, 486–87 (1937) (Butler, J., dissenting) (including among individual rights "not merely freedom from bodily restraint but also the right of the individual to . . . establish a home and bring up children").

[124] *See* Samuels v. McCurdy, 267 U.S. 188, 191 (1925).

[125] *See id.* at 202.

[126] United States v. Motlow, 10 F.2d 657, 662 (7th Cir. 1926).

[127] *See* Hamilton v. Regents of the Univ. of California, 293 U.S. 245, 263, 265 (1934); United States v. Schwimmer, 279 U.S. 644, 652 (1929).

[128] Sinclair v. United States, 279 U.S. 263, 292 (1929).

examinations, to hire independent experts, or to press the full range of possible legal arguments.[129] Years later, this poor representation, characterized by anemic briefs, was revealed to be the product of an apparent collusion between the attorneys.[130] Albert Strode, attorney for the State, Irving Whitehead, attorney for Ms. Buck, and Dr. Albert Priddy, director of the Virginia Colony, were close friends and long time political associates.[131] Strode and Whitehead had known each other since boyhood, and they had participated in Democratic politics, even collaborating in the investigation and impeachment of a county judge.[132] Whitehead assisted Strode in an election campaign and helped him obtain an Army commission.[133] Strode had recommended Whitehead for a government position six days before Carrie Buck's trial.[134] Strode and Priddy had served together in various posts in the Democratic Party and had campaigned for many years in favor of sterilization laws.[135] These relationships are suspicious, but the web of connections is even more tightly interwoven. Strode was instrumental in obtaining a charter for the Virginia Colony, and Whitehead was on the Colony's board and regularly approved sterilizations.[136] Priddy, as the Colony's superintendent, publicly urged sterilization for inmates of such institutions in order to reduce costs. [137]

Such connections cast grave doubts on the fundamental fairness of the process.[138] Furthermore, Dr. Laughlin, a leader of the eugenics movement, was selected by the State as a witness regarding the imbecility of the Buck family, despite his having never performed a personal examination.[139] Other state "experts" likewise did not examine Ms. Buck.[140] Moreover, no

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[129] *See generally* Paul A. Lombardo, *Three Generations, No Imbeciles: New Light on* Buck v. Bell, 60 N.Y.U. L. REV. 30, 50–57 (1985).

[130] *Id.* at 33.

[131] *Id.* at 32–33.

[132] *Id.* at 34 n.17.

[133] *Id.* at 55.

[134] *Id.*

[135] *See id.* at 37–38.

[136] *Id.* at 38–39.

[137] *Id.* at 35 n.25, 36.

[138] The anemic brief written on behalf of and submitted to Carrie Buck before the United States Supreme Court can be reviewed in LANDMARK BRIEFS AND ARGUMENTS OF THE UNITED STATES SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 491–509 (Philip B. Kurland & Gerhard Casper eds., 1975).

[139] Lombardo, *supra* note 129, at 51.

[140] *Id.* at 50–52.

psychiatrist examined or found Ms. Buck's child mentally feebleminded, and the local Red Cross informed Dr. Priddy that their files on the child indicated a lack of any damning evidence.[141] Whitehead failed to present any rebuttal experts on behalf of Ms. Buck, and his appellate briefs neglected to mention many arguments against eugenics.[142] Was Butler suspicious of the lack of effort by legal counsel for Ms. Buck? Did he fear raising his suspicions in a dissent because he could not prove from the record a lack of due process?

Butler's view of judicial reasoning might have precluded him from allowing such suspicions of ineffective counsel from influencing his dissent. He decided cases based only on the facts and constitutional issues argued by counsel and included in the writ of certiorari of the court.[143] Such judicial restraint also surfaced in his application of precedent. His penchant for analyzing the facts of a case as a litigator restrained him from trying to extend his opinions to cover broad swatches of legal theory in the interstices of the law. Stare decisis governed his decisions and was vigorously defended in his opinions.[144]

Butler might have availed himself of the substantial weight of existing precedents to oppose Holmes. Before *Buck v. Bell*, state courts informally rejected the constitutionality of sterilization statutes on due process, equal protection, and cruel and unusual punishment grounds.[145] In addition, there was a significant stream of cases protecting patient autonomy.[146] The relevant federal cases, however, provided a mixed set of

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[141] *See* Cynkar, *supra* note 9, at 1438.

[142] *See id.* at 1457; Lombardo, *supra* note 129, at 50–53.

[143] *See* Erie v. Tompkins, 304 U.S. 64, 82 (1938) (Butler, J., dissenting) (restricting the Court's discussion to the issues raised by the parties); Cynkar, *supra* note 9, at 1452–53 (discussing the lack of scientific evidence and criticism of eugenics as a possible reason for Justice Butler's dissent in *Buck*).

[144] *See, e.g.*, *Erie*, 304 U.S. at 81–85.

[145] *See, e.g.*, Smith v. Wayne Probate Judge, 204 N.W. 140, 146 (Mich. 1925) (setting aside probate court's order to sterilize sixteen year old boy); Williams v. Smith, 131 N.E. 2, 2 (Ind. 1921) (enjoining prison officials from performing vasectomy on inmate); Smith v. Bd. of Examiners, 85 N.J. 46 (N.J. 1913) (holding that sterilization denied patient equal protection).

[146] Cases in which prior to *Buck v. Bell* that challenged sterilization laws and were successful include *Davis v. Berry*, 216 F. 413, 416–17 (S.D. Iowa 1914), *Williams*, 131 N.E. at 2; *Haynes v. Lapeer Circuit Judge*, 166 N.W. 938, 940–41 (Mich. 1918), *Osborn v. Thomson*, 169 N.Y.S. 638, 645 (1918), and *Smith*, 85 N.J. at 53. *See* THE LEGAL RIGHTS OF HANDICAPPED PERSONS 866–84 (Robert L. Burgdoff ed., 1980).

precedents. Initially, the courts were reluctant to expand governmental prerogatives. In *Union Pacific Railway Co. v. Botsford*,[147] the Court denied opposing counsel its right to a medical inspection in a personal injury case stemming from an injury in a railroad car.[148] In the decades following *Botsford*, the legal protections of bodily integrity became increasingly malleable, in order to permit the enforcement of public health measures. In *Jacobsen v. Massachusetts*,[149] the Court, with Holmes siding with the majority, declared that mandatory smallpox vaccinations were permissible because the compulsory vaccination laws did not violate the due process and equal protection provisions of the Constitution.[150] Such restraints were upheld if "reasonable" and beneficial to the "common good."[151] 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."[152]

The United States Supreme Court in 1922 recognized, however, that not every exercise of State police power on behalf of public health would advance the common good. In *Meyer v. Nebraska* a Nebraska statute preventing the teaching of German in public schools in order to enhance the mental health of its citizens was declared an unconstitutional due process violation.[153] There was no emergency that made this statute acceptable, and each citizen was entitled to a "freedom from bodily restraint" that included their minds.[154]

There was one final avenue for Butler. If he had researched eugenics, he might have opposed Holmes on his own justificatory grounds of science. The evolutionary jurisprudence and eugenics supported by Holmes rested on dubious and, to some extent, outdated scientific assumptions.[155] This failure to stay abreast of

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147 141 U.S. 250 (1891).

148 *Id.* at 257.

149 197 U.S. 11 (1905).

150 *Id.* at 38.

151 *Id.* at 26–27.

152 *Id.* at 29.

153 262 U.S. 390, 402–03 (1923).

154 *Id.* at 399.

155 A. Naomi Nind, *Solving an "Appalling" Problem: Social Reformers and the Campaign for the Alberta* Sexual Sterilization Act, *1928*, 38 ALTA. L. REV. 536, 558 (2000).

the latest scientific advances was somewhat ironic since Holmes prodded jurists to be aware of the latest implications of scientific advances.[156] Dr. Ada Hart Arlitt of Bryn Mawr College in 1921 produced a study claiming that social class was as important as race in determining intelligence.[157] Dr. Walter E. Fernald, the distinguished president of the American Association for the Study of the Feeble-Minded, tirelessly advocated against the "Legend of the Feeble-Minded."[158] Fernald contended that the weight of the evidence suggested that the feeble minded were by and large not prone to sexual license and criminal activities.[159] The social irresponsibility of the few could be attributed to an "array of environmental, biological, traumatic, and psychological causes—*all of them nongenetic.*"[160] However, shortly after *Buck v. Bell*, several prominent eugenicists revoked their earlier approval of sterilization.[161] Henry H. Goddard and Carl Campbell Brigham retracted their positions, given the complexity of genetic inheritance, the inadequacy of the regnant testing systems, and the intricate behavioral sources of social deviancy.[162]

IV. LESSONS FROM *BUCK V. BELL*

Although Butler had several potential justifications for opposing Holmes, his dissent would probably not have changed the impact of the decision. *Buck v. Bell* would still have provided a constitutional imprimatur for the rush of states passing involuntary sterilization laws after the decision. Involuntary sterilizations in the United States climbed from two hundred to six hundred per year in the 1920's to two thousand to four thousand per year in the 1930's.[163] Over sixty thousand involuntary sterilizations had been performed by the mid

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[156] *See* THE PATH OF THE LAW AND ITS INFLUENCE 8 (Steven J. Burton ed., 2000) (discussing Holmes' use of modern science to create legal principles).

[157] Ada Hart Arlitt, *On the Need for Caution in Establishing Race Norms*, 5 J. OF APPLIED PSYCHOL. 179, 179–83 (1921).

[158] CHASE, *supra* note 39, at 311.

[159] *Id.* at 310–12.

[160] *Id.* at 311.

[161] *See id.* at 318–22 (describing scientists' disapproval of eugenics).

[162] *See* Carl C. Brigham, *Intelligence Tests of Immigrant Groups*, 37 PSYCHOL. REV. 158, 158–65 (1930); *see also* CHASE, *supra* note 39, at 318–22.

[163] REILLY, *supra* note 43, at 97.

1960's.[164] Involuntary sterilizations were applied to the feeble minded and to the antisocial, which included unwed mothers, prostitutes, petty criminals, and children with disciplinary problems.[165]

Eventually, the courts, and public policy, challenged the hegemony of involuntary sterilization. The Court in *Skinner v. Oklahoma*[166] denied the state's authority to sterilize thrice convicted felons who were found guilty of a crime of moral turpitude.[167] The problem in *Skinner* was one of equal protection; the categories of persons covered by the law seemed arbitrary and insufficiently inclusive.[168]

Gradually, advances in medicine and social science increasingly undermined the justifications for the sterilization movement. Biologists discovered that the inheritance of social behaviors was particularly difficult to link to genetics.[169] If sterilization was to continue to eliminate defective traits, there would have to be sterilizations on those who exhibited none of the characteristics but were merely genetic carriers. To eliminate mental deficiency, for example, it was estimated in 1956 that ten percent of the population, or approximately ten million carriers, would have to be sterilized.[170]

In addition to the problems with eugenic sterilization suggested by scientific advances, social science research confirmed that mental defectives were not necessarily incompetent parents or unfeeling to suffering. Psychiatric investigations indicated that intelligence was less important

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[164] Regina Bligh, *Sterilization and Mental Retardation*, 51 A.B.A. J. 1059, 1059 (1965) ("[A] total of 63,678 persons had been sterilized prior to January 1, 1964.").

[165] *See id.* at 1059; Robert L. Burgdorf, Jr. & Marcia Pearce Burgdorf, *The Wicked Witch is Almost Dead:* Buck v. Bell *and the Sterilization of Handicapped Persons*, 50 TEMP. L.Q. 995, 1000 (1977). Starting in 1928, state courts cited *Buck* to uphold sterilization statutes. *See, e.g., In re* Main, 19 P.2d 153, 154 (Okla. 1933); State v. Troutman, 299 P. 668, 669 (Idaho 1931); State v. Schaffer, 270 P. 604, 604 (Kan. 1928).

[166] 316 U.S. 535 (1942).

[167] *Id.* at 541.

[168] *Id.*

[169] RICHARD J. PLUNKETT & JOHN E. GORDON, EPIDEMIOLOGY AND MENTAL ILLNESS 30 (1960).

[170] *See* CHASE, *supra* note 39, at 127 (explaining a report of the ABA Eugenics Section Committee that "laid down the 'scientific' foundations for the persistent eugenical myth that at least 10 percent of the American population is, by heredity, socially inadequate, and should not be permitted to breed").

than emotional involvement for parenting.[171] There was also a rising tide of evidence that the allegedly defective were able to fully understand and experience the mental pain of sterilization.[172]

The repeal of sterilization laws and judicial hostility began to seriously curtail involuntary sterilizations by the early 1960's. The Supreme Court, starting with *Griswold v. Connecticut*,[173] held that sexual activity and reproduction were fundamentally protected privacy rights.[174] Federal courts placed moratoriums on the use of federal funds for the purposes of sterilization.[175] Those favoring sterilization were further embarrassed by recent scholarship tending to establish the often overlooked connection between eugenics, American sterilization laws, and Nazi Germany.[176]

Although involuntary sterilization has been radically circumscribed since the 1940's, judicially initiated sterilizations have not been completely abolished.[177] Sometimes, judicial sterilizations are justified as being in the best interests of the person sterilized,[178] but courts will resurrect on occasion the old eugenics positions.[179] It should also be noted that the Supreme

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[171] Georges Sabagh & R.B. Edgerton, *Sterilized Mental Defectives Look at Eugenic Sterilization*, 9 EUGENICS Q., 215–221 (1962).

[172] *Id.*

[173] 381 U.S. 479 (1965).

[174] *Id.* at 485.

[175] Jennifer S. Geetter, *Coding for Change: The Power of the Human Genome to Transform the American Health Insurance System*, 28 AM. J.L. & MED. 1, 25 (2002).

[176] Ellen Brantlinger, *Sterilization of People with Mental Disabilities* 22, 32 (Westport, Connecticut: Auburn House, 1995); KÜHL, *supra* note 44, at 37–52.

[177] *See, e.g., In re* Moe, 432 N.E.2d 712, 716 (Mass. 1982) ("In this case the ward's presumed inability to give her knowing consent regarding a sterilization operation, as a competent individual could, is said to require the aid of the court."); *In re* A.W., 637 P.2d 366, 367 (Colo. 1981) ("[I]t is within the district court's inherent authority to consider a petition for sterilization of a minor and that, in the absence of legislative pronouncement, it is proper and necessary for this court to promulgate standards for determining the circumstances under which such a procedure may be performed."); *In re* Guardianship of Hayes, 608 P.2d 635, 637 (Wash. 1980) (holding that the court "has jurisdiction to entertain and act upon a request for an order authorizing sterilization of a mentally incompetent person under the broad grant of judicial power in [the] Washington Const[itution]."); *In re* Penny N., 414 A.2d 541, 543 (N.H. 1980) ("[W]e hold that a probate judge may permit a sterilization after making specific written findings from clear and convinving evidence, that it is in the best interests of the incapacitated ward, rather than in the parents' or the public's convenience, to do so.").

[178] Geetter, *supra* note 175, at 25; *see also supra* note 177.

[179] State cases recognizing a judicial right to impose sterilization include *In re*

Court, citing *Buck*, has confirmed in *Skinner* and *Roe v. Wade*[180] that the right to privacy does not allow an unlimited right over one's own body.[181] The Pierce Butler of our age who challenges any new form of eugenics will have to contend with the significant historical precedents favoring eugenics that remain in our constitutional jurisprudence.

And what forms of eugenics might be developed in the near future? The advances in genetics will not only provide wonderful new medicines but also the genetic manipulation of fundamental human traits.[182] There will inevitably be a drive to perfect children through enhancements.[183] Do we want to be able to determine in advance the height, skin color, sexual orientation and physical features of our unborn children? What about behavioral or cognitive enhancements, if it is possible? Will this lead to genetic discrimination based on the haves and have nots? The greatest danger may be that such advances put at risk what is distinctively human in our genetic heritage. The new eugenics has allies in law and science, in the heirs of Holmes. There are also the modern utilitarians in the law and economics school who advocate the weighing of costs and benefits in making rational choices in the law.[184] In addition, a new eugenics movement could find substantial theoretical support from sociobiology in crafting a new form of genetic determinism.[185]

The new technologies and their philosophical apologists raise issues about how to respond to the inevitable legal issues and public policy challenges that will arise from the new eugenics. There will, of course, be differences between these issues and those previously faced by the Court. *Buck v. Bell* involved state authorized involuntary sterilizations. The new eugenics will be more subtle and probably more like the movie "Gattaca," where those who were not genetically enhanced by

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Guardianship of Hayes, 608 P.2d at 637, *In re* Penny N., 414 A.2d at 541, *In re* A.W., 637 P.2d at 367; and *In re* Moe, 432 N.E.2d at 716; *see* SARAH F. HAAVIK & KARL A. MENNINGER II, SEXUALITY, LAW, AND THE DEVELOPMENTALLY DISABLED PERSON 123, 134 (1981) (explaining state cases that have questioned judicially-imposed sterilization); Brantlinger, *supra* note 176, at 24–26.

[180] 410 U.S. 113, 154 (1973).

[181] *See id.* at 154; Skinner v. Oklahoma, 316 U.S. 535, 542 (1942).

[182] *See* EDWARD O. WILSON, CONSILIENCE: THE UNITY OF KNOWLEDGE 275–78 (1998).

[183] *Id.* at 275–77.

[184] CASS R. SUNSTEIN, FREE MARKETS AND SOCIAL JUSTICE 3–8 (1997).

[185] *Id.* at 4–8.

voluntary modification were barred from certain types of jobs and education by their genetic inferiority. Since the new eugenicists are already advancing their case, *Buck v. Bell* should remind us to learn from the past and apply the following insights in judging future issues concerning eugenics:

1) It is essential to have a through understanding of the relevant science—its limitations and possibilities. This knowledge will prevent the judicial system from blindly or carelessly adopting any public policy that allows a dangerous determinism or reductionism not justified by science.

2) In judging the public policy implications of any science, we would do well to remember that human judgment and systems are fallible and hence prudence must be exercised in implementing genetic advances. A consensus of elites does not necessarily suggest wisdom — the majority may be wrong on such issues. We should also assess whether errors may result from legal or scientific judgments that are not completely objective and may be deformed by prejudice or entangled with institutional or personal interests.

3) Any public policy should give precedence to human dignity over individual or collective utility. Such a policy must recognize and protect the complex integrity of each human person. This foundational respect for the human dignity of each person is a better basis than collective utility for ethical analysis. A position supporting utility may too easily override the dignity of certain individuals in order to achieve desirable societal goals.

V. A POSTSCRIPT ON CARRIE BUCK

The lessons learned from *Buck v. Bell* must insure that the individual human tragedy of Carrie Buck is not repeated in a new form of eugenic perfectionism. Real persons suffer when there is an obeisance to an inadequate science that begets a distended and deterministic form of moral reasoning. Consider the life of Carrie Buck. Despite the assessments of the "experts" reviewing her case in 1926, Ms. Buck was later noted for being an "avid reader and a lucid conversationalist, even in her last days."[186] Moreover, her daughter, who lived to be only eight, was

[186] BAKER, *supra* note 8, at 603; Berry, *supra* note 19, at 419.

considered by her teachers to be "very bright" and even made the honor roll on one occasion.[187]

Suffering from malnutrition and exposure from living in a leaky, one room, cinderblock shack, Carrie Buck Detamore was placed in a state operated nursing home in Waynesboro, Virginiain the early 1980's. In 1982, the woman who had wanted children all of her life played the role of the Virgin Mary in a Christmas play. She died a few weeks later and was buried in Lynchburg only a few steps from her daughter Vivian. We would do well to remember Carrie Buck's last recorded words on her case, "They done me wrong. They done us all wrong." Nonetheless, she forgave those who had treated her so badly and declared, "I tried helping everybody all my life, and I tried to be good to everybody. It just don't do no good to hold grudges."[188] Let us hope that we will learn from the judicial decision that forever altered her life. Any dissent from future eugenic policies should be coherently and openly expressed in order to prevent new tragedies.

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[187] BAKER, *supra* note 8, at 603; Berry, *supra* note 19, at 420.

[188] *Id.*; BAKER, *supra* note 8, at 603; SMITH & NELSON, *supra* note 5, at 219; Carlos Santos, *Historic Test Case: Wrong to Carrie Buck Remembered,* Richmond Times, Feb. 17, 2002, at B2. Deception in the use of sterilizations was quite common in the 1920's and 1930's. REILLY, *supra* note 43, at xiii.