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ARTICLES

FROM INVOLUNTARY STERILIZATION TO GENETIC ENHANCEMENT: THE UNSETTLED LEGACY OF *BUCK V. BELL*

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I. INTRODUCTION

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

Eventually we turn to constructing the legacies of these decisions—our shared public understanding of their wrongfulness and our shared public commitment to preventing recurrence of the wrongdoing. By our efforts to construct these legacies we hope both to safeguard future generations and to win some measure of belated justice for past victims.

Although decisions of this sort are not common, they also are not hard to find. *Scott v. Sandford*,[1] the decision commonly known as *Dred Scott*,[2] is one of these decisions. Mr. Dred Scott

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1. 60 U. S. (19 How.) 393 (1857).

2. In 1834, Dr. John Emerson, an army surgeon, took Mr. Dred Scott to a military post in Rock Island, Illinois, where slavery was illegal. In 1836, Emerson took Scott to Fort Snelling in the Wisconsin Territory (now Minnesota), where, pursuant to the Missouri Compromise, slavery was illegal. Emerson then returned with Scott to reside again in slave states.

Scott filed suit in 1846 in the state courts of Missouri, a slave state, claiming that he was legally free due to his transport into and residence in a free state (Illinois) and a free territory (Wisconsin). Emerson had died and the action was filed against his widow, Mrs. Irene Emerson. Scott's wife and children filed

and his wife and children were African-Americans held in slavery in ante-bellum Missouri. In 1846, Scott filed suit in Missouri state court claiming that he was a free man due to his transport into and residence within a free state and a free territory while in the company of his purported owner. After losing on the merits at the Missouri Supreme Court, Scott filed a claim in Missouri federal court in 1854. Scott lost on the merits in federal court as well, and then appealed to the United States Supreme Court. In 1857, the Supreme Court rendered its decision.

Chief Justice Roger Taney, writing for the Court, refused to reach the merits of the case. Instead, he framed the central issue as a jurisdictional question:

> The question is simply this: Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guarantied by that instrument to the citizen? One of which rights is the privilege of suing in a court of the United States in the cases specified in the Constitution.
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> It will be observed, that the plea applies to that class of persons only whose ancestors were negroes of the African race, and imported into this country, and sold and held as slaves. The only matter in issue before the court, therefore, is, whether the descendants of such slaves, when they shall be emancipated, or who are born of parents who had become free before their birth, are citizens of a State, in

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parallel claims for freedom. Scott and his family won their freedom in a St. Louis court in 1850, but the decision was reversed by the Missouri Supreme Court in 1852.

Scott then filed suit in federal court in Missouri in 1854. By this time, Mrs. Emerson's brother, Mr. John F. A. Sanford, a citizen of New York, was defending the case on her behalf. The court reporter for the U.S. Supreme Court misspelled his name—Sandford, hence the title of the case. The basis for jurisdiction was Article III, Section 2, Paragraph 1 of the U.S. Constitution—so-called "diversity" jurisdiction, which generally permits "citizens" of one state to sue citizens of another state in federal court. The federal trial judge determined that Scott had the right to sue in federal court, but decided against him on the merits of the case. Scott, with the aid of lawyers committed to the antislavery cause, pursued the case to the U.S. Supreme Court. *See* PAUL FINKELMAN, DRED SCOTT V. SANDFORD: A BRIEF HISTORY WITH DOCUMENTS 2-4, 20-29, 45-50 (1997).

> the sense in which the word citizen is used in the Constitution of the United States.[3]

Taney concluded that neither Scott nor any other persons descended from Africans held as slaves—regardless of whether those persons were themselves free or enslaved—could be "citizens" within the meaning of the Constitution for purposes of bringing suit in federal court.[4] Hence, Scott was not entitled to a review on the merits[5] and had no legal recourse in pursuing his claim for freedom.

Taney's argument to this conclusion drew heavily upon evidence of the framers' intent.[6] He found evidence of their intent in various Constitutional provisions that recognized the institution of slavery, in the slaveholding practices of the framers, and in colonial statutes treating whites and non-whites differentially.[7] But the most compelling evidence, on the account of Taney, were the racial opinions that prevailed among white Americans of the founding era. He wrote:

> [African-Americans] had for more than a century before [the founding] been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to

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3. *Scott*, 60 U.S. (19 How.) at 403. As commentators have noted, despite framing the issue as purely a jurisdictional question, Taney's opinion ranged far beyond this narrow question. In the course of the opinion, he declared the federal legislation enacting the Missouri Compromise, which prohibited slavery in federal territories to the north and west of the borders of Missouri, unconstitutional—the first Court decision declaring federal legislation unconstitutional since *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). *See* FINKELMAN, *supra* note 2, at 6-10, 36-45, 72-76. For a discussion of the Taney Court prior to and after the *Dred Scott* decision, and the positions taken by the six concurring justices and two dissenters on the various questions at issue in the case, see DON E. FEHRENBACHER, SLAVERY, LAW, AND POLITICS: THE DRED SCOTT CASE IN HISTORICAL PERSPECTIVE 113-243 (1981).

4. *See Scott*, 60 U.S. (19 How.) at 403.

5. *See id.* at 404

6. Taney explained the interpretive task as follows:

> It becomes necessary . . . to determine who were citizens of the several States when the Constitution was adopted. And in order to do this, we must recur to the Governments and institutions of the thirteen colonies. . . . We must inquire who, at that time, were recognised as the people or citizens of a State . . . .

Id. at 407.

7. *See id.* at 407-27. Taney also drew upon the text of the Constitution and of other founding documents. For an analysis and a telling critique of Taney's arguments, see FEHRENBACHER, *supra* note 3, at 187-99.

> respect; and that the negro might justly and lawfully be reduced to slavery for his benefit.[8]

The racial opinions invoked by Taney had been forged during the founding era, in part in response to a problem of dissonance: while white colonials railed against British efforts to "enslave" them and professed their belief in human freedom and equality, they themselves held slaves.[9] Slaveholders concocted a variety of justifications in an effort to resolve this dissonance. Foremost among them was the claim of racial inferiority, a claim commonly supported by appeal to the incipient science of anthropology.[10]

The development of anthropological science was itself stimulated in part by the practice of slaveholding. The science developed in tandem with increasing contacts between Western Europeans and non-European peoples in the sixteenth to eighteenth centuries, contacts brought about through exploration, travel, and the slave trade.[11] Western European anthropologists sought to impose order upon the observed variety of human physical characteristics and cultures by classifying and, in some cases, ranking racial groups according to purported physical and temperamental features—with Western Europeans consistently faring best in these classifications and rankings.[12] It was to these classifications and rankings that many slaveholders appealed in support of their racial opinions and their slaveholding practices. This anthropological work, we now recognize, was distorted by the prejudices and vanities of its practitioners and mistaken in its claims about racial groups.

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8. *Scott*, 60 U.S. (19 How.) at 407.

9. For discussions of attempts to justify slavery during the founding era, see PAUL FINKELMAN, SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON 138-67 (1996); WINTHROP D. JORDAN, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550-1812, at 269-311, 483-511 (1969); DUNCAN J. MACLEOD, SLAVERY, RACE AND THE AMERICAN REVOLUTION 61-108, 169-82 (1974).

10. Justifications invoked practices in classical times, scriptural passages, and economic expediency. But, in the face of antislavery campaigns that invoked both religious principles and the political principles of the Revolution, defenders of slavery increasingly turned to the authority of science as set forth in the anthropological work of the day. *See* JORDAN, *supra* note 9, at 304-11; MACLEOD, *supra* note 9, at 169-82.

11. *See* JORDAN, *supra* note 9, at 216-65.

12. Linnaeus purported to classify various racial groups according to physiological and temperamental characteristics. Others purported to construct a hierarchical "Great Chain of Being" within which various racial groups were located according to their relatively closer proximity to the angels or the animals. Still others attempted to blend the Linnaen and hierarchical approaches. *See id.* at 217-65, 304-08; MACLEOD, *supra* note 9, at 169-82.

In fact, by the time Taney authored the opinion in *Dred Scott*, there were widespread doubts about the soundness of this anthropological work and of the racial opinions that relied upon it.[13] And Taney did not purport to endorse these racial opinions; he was careful by his locutions to distance himself from the views of his forbears:

> It is difficult at this day to realize the state of public opinion in relation to that unfortunate race, which prevailed in the civilized and enlightened portions of the world at the time of the Declaration of Independence, and when the Constitution of the United States was framed and adopted. But the public history of every European nation displays it in a manner too plain to be mistaken.
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> . . . .
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> . . . [The inferiority of African-Americans] was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open for dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as

13. Taney wrote the opinion during an era of enormous controversy within the discipline of ethnology, or race studies, an area of specialization that had developed within anthropology in the eighteenth and nineteenth centuries. Polygenist theories—claiming that racial groups were permanently distinct kinds and always had been so—competed with monogenist theories—claiming that all humans were members of a single kind. Polygenism was embraced by some proslavery forces because it lent support to claims of permanent and irreducible differences between superior and inferior races, but was resisted by others because of its potential inconsistency with religious understandings of creation. *See* THE IDEOLOGY OF SLAVERY: PROSLAVERY THOUGHT IN THE ANTE-BELLUM SOUTH, 1830-1860 (Drew Gilpin Faust ed., 1981); SLAVERY DEFENDED: THE VIEWS OF THE OLD SOUTH (Eric L. McKitrick ed., 1963).

The use of scientific claims in support of the proslavery movement had become problematic by the mid-nineteenth century:

> Most defenders of slavery sought to use the scientific prestige of ethnology to enhance their position without becoming ensnared by the difficulties it presented . . . . George Frederick Holmes, long sympathetic to the notion of race as a major determinant of human civilization, nevertheless advised fellow southerners that the truths of ethnology remained "enveloped . . . in all the mist of obscurity. I should steer a cautious middle course between the extreme views on this subject." Edmund Ruffin found that despite great potential value, ethnology offered "more amusement than reliable information," and George Fitzhugh bluntly declared that if forced to choose between the Bible and ethnology, southerners had best stick to the Holy Writ.

Drew Gilpin Faust, *Introduction* to THE IDEOLOGY OF SLAVERY, *supra*, at 16 (citations omitted).

> in matters of public concern, without doubting for a moment the correctness of this opinion.[14]

But the dubiousness of these opinions would not deprive them of their full brutal effect, on Taney's reasoning. As Taney explained:

> We think [African-Americans] . . . are not included, and were not intended to be included, under the word "citizens" in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them. It is not the province of the court to decide upon the justice or injustice, the policy or impolicy, of these laws. The decision of that question belonged to the political or lawmaking power; to those who formed the sovereignty and framed the Constitution.[15]

One of the most grievous of the many wrongs worked by the decision in *Dred Scott* was the judicial sanction of a racial basis for the imposition of constitutional disabilities upon African-Americans.[16] Slave status, of course, was purely a contingent matter—a status that could endure only as long as an aggressor group was willing and able to maintain it by legally sanctioned imposition of brute force. But racial status was another thing altogether. As a biological matter, there was no escaping one's skin, and, as a matter of constitutional interpretation—on Taney's account—there was no escaping the intent of the framers, regardless of the truth or falsity of the racial opinions that informed their intent. Thus, the racial opinions of the framers, recited not as true but as truly held, served as the linchpin in an argument that concluded in the constitutionally mandated perpetual exclusion of African-Americans, enslaved or free, from the national community.

The decision rendered by Taney, with six concurrences and two dissents, ignited a firestorm of protests in the North. News-

14. Scott v. Sandford, 60 U.S. (19 How.) 393, 407 (1857).

15. *Id.* at 404-05.

16. See discussions of Taney's imposition of legal disability due to race rather than legal status as slave in FEHRENBACHER, *supra* note 3, at 187-99; FINKELMAN, *supra* note 2, at 34-36.

paper editorials lambasted the decision. Future presidential candidates Lincoln and Douglas fiercely debated its merits.[17] A few weeks after the decision, and eleven years after Scott had begun his legal battle, the children of a former owner of Scott purchased him and his family and then freed them. Scott died nine months later.[18] Five years after the decision, President Lincoln signed the Emancipation Proclamation.[19]

The decision in *Dred Scott* compounded the failure of the founding generation by lending the imprimatur of the United States Supreme Court to one of the most vicious and harmful rationalizations of slavery and of other legal disabilities imposed upon African-Americans—a theory of racial inferiority founded in unsound science. Constructing the legacy of *Dred Scott* regarding this and other aspects of the decision has been the project—still unfinished—of several generations of Americans since.

A second example of a horrendously wrong decision is *Korematsu v. United States*.[20] In February of 1942, soon after the attack on Pearl Harbor by the Japanese Imperial Navy, President Franklin Roosevelt issued an executive order authorizing the Secretary of War to declare certain parts of the United States "military areas" from which residents could be excluded. A month later, Congress enacted a law criminalizing disobedience of military orders restricting residence in these military areas.[21]

A series of military orders ensued, including orders directing Japanese-American residents in specified areas to evacuate their homes and report to assembly centers and providing for their involuntary detention thereafter. Eventually, 110,000 men, women, and children of Japanese descent, 70,000 of whom were American citizens, were detained in "relocation centers" surrounded by barbed wire fences and guarded by armed members of the military. No individual determinations of disloyalty or misconduct were made; the sole basis for subjection to these military orders was Japanese ancestry.[22]

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17. *See* FEHRENBACHER, *supra* note 3, at 229-243; FINKELMAN, *supra* note 2, at 2-4, 20-29, 45-50.

18. *See* FINKELMAN, *supra* note 2, at 51.

19. *See id.*

20. 323 U.S. 214 (1944).

21. *See* Charles McClain, *Introduction* to THE MASS INTERNMENT OF JAPANESE AMERICANS AND THE QUEST FOR LEGAL REDRESS ix, ix (Charles McClain ed., 1994); *see generally* PETER IRONS, JUSTICE AT WAR: THE STORY OF THE JAPANESE AMERICAN INTERNMENT CASES (1983).

22. *See* Sandra Takahata, *The Case of* Korematsu v. United States*: Could It Be Justified Today?*, *in* THE MASS INTERNMENT OF JAPANESE AMERICANS AND THE QUEST FOR LEGAL REDRESS, *supra* note 21, at 235, 243-47.

Mr. Fred Korematsu was a welder and an American citizen of Japanese ancestry who disobeyed these military orders and suffered a criminal conviction in consequence. Korematsu appealed his conviction and lost in a decision authored by Justice Hugo Black over three dissents. Black justified the orders as necessary in wartime when all Americans could be called upon to sacrifice for the sake of the greater good:

> All citizens alike, both in and out of uniform, feel the impact of war in greater or lesser measure. Citizenship has its responsibilities as well as its privileges, and in time of war the burden is always heavier. Compulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.[23]

The wartime responsibilities of most American citizens included serving in the military or contributing tax dollars to the war effort or enduring rationing of scarce commodities needed by the military. These responsibilities presupposed certain commitments essential to citizenship: loyalty to the national community and dedication to its preservation in time of peril. To impose these responsibilities was to acknowledge the ties that bind us, and to discharge these responsibilities was to honor these ties.

But the wartime "responsibilities" of Korematsu and of other Japanese-American citizens were quite different, on Black's account. They were required to surrender their liberties to live in their homes, work at their jobs, and come and go as they pleased, and they were required to submit to physical detention under military guard in isolation from their fellow Americans. Only an Orwellian phrase book would include these among the "responsibilities of citizenship." The sacrifices demanded did not acknowledge the ties that bind citizens together and call upon Japanese-Americans to honor them; they presumed that Japanese-Americans lacked the commitments essential to citizenship and treated them as potential enemies in our midst.

However artful his phrasing, Black realized that depriving citizens of their liberties on the basis of ancestry posed a troublesome constitutional issue.[24] At the outset of his opinion, he declared that laws curtailing the civil rights of a group designated

23. *Korematsu*, 323 U.S. at 220-21.

24. In dissent, Justice Roberts wrote:

in this manner must be considered "immediately suspect" and subject to "the most rigid scrutiny"[25] Yet, in scrutinizing the laws as applied in this case, Black perceived only the demands of national exigency and the racially defined features of potential enemies:

> It is said that we are dealing here with the case of imprisonment of a citizen in a concentration camp solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States. Our task would be simple, our duty clear, were this a case involving the imprisonment of a loyal citizen in a concentration camp because of racial prejudice. Regardless of the true nature of the assembly and relocation centers—and we deem it unjustifiable to call them concentration camps with all the ugly connotations that term implies—we are dealing specifically with nothing but an exclusion order. To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. Korematsu was not excluded from the Military Area because of hostility to him or his race. He *was* excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decreed that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and finally, because Congress, reposing its confidence in this time of war in our military leaders—as inevitably it must—determined that they should have the power to do just this.[26]

And so, in *Korematsu*, constitutional rights that appeared inviolable before the attack on Pearl Harbor evaporated under the hot glare of wartime suspicion.[27]

> [This] is [a] case of convicting a citizen as a punishment for not submitting to imprisonment in a concentration camp, based on his ancestry, and solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States. . . . I need hardly labor the conclusion that Constitutional rights have been violated.

Id. at 226 (Roberts, J., dissenting).

25. *Id.* at 216.

26. *Id.* at 223.

27. As United States Circuit Judge Harry T. Edwards writes:

> With one stroke, the Supreme Court abandoned what had been a traditional constitutional commitment to the idea that guilt is personal, and punishment premised on individual action. Accepting

Eventually, in the 1980s, the convictions of Korematsu and two others similarly convicted were set aside and federal legislation was enacted to provide some financial compensation to the survivors among those who were interned during the war.[28] The wrongs done to Korematsu and tens of thousands of other Japanese-Americans remain as powerful testimony to how, with lightning speed, our neighbors and fellow citizens can be transformed into threatening figures, the enemy within, whose most basic liberties are readily dispensable. We continue to struggle, by our national commitment to embracing a multitude of differences within a single national community and by our jurisprudential commitment to a strong regime of constitutional rights, to construct one part of the legacy of *Korematsu.*

A third example of a horrendous decision is *Buck v. Bell,*[29] a 1927 United States Supreme Court decision authored by Justice Oliver Wendell Holmes, Jr. The case concerned a constitutional challenge to a Virginia involuntary sterilization statute as applied to a young woman named Carrie Buck. The statute authorized the involuntary sterilization of "feebleminded" individuals who had been institutionalized and who were determined to be the potential parents of "unfit" offspring.

Miss Carrie Buck had been committed to the Virginia Colony for the Epileptic and the Feebleminded ("Virginia Colony") as had her mother before her. Just before her commitment Carrie Buck had given birth to a child out of wedlock. The record on appeal contained evidence that Carrie Buck, her mother, and her child were "feebleminded" and that their condition was heritable. Holmes, writing over one dissent, concluded that the Virginia statute was constitutional as applied in this case. He wrote:

> We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our

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in its stead a presumption of "racial guilt," the Court subordinated both personal freedoms and national ideals to a dubious claim of military exigency. . . .

. . . . *Korematsu* is, without any doubt, a tragically poignant and bitter reminder of the real suffering that may follow in the wake of judicial default.

Harry T. Edwards, *The Judicial Function and the Elusive Goal of Principled Decisionmaking,* 1991 WIS. L. REV. 837, 842 (citations omitted).

28. *See* McClain, *supra* note 21, at xii (discussing the cases in which the convictions were set aside and the federal legislation authorizing payments to those who were interned).

29. 274 U.S. 200 (1927).

> being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough.[30]

On October 19, 1927, after her petition to the Supreme Court for rehearing was denied, Carrie Buck was forcibly sterilized by tubal ligation at the age of twenty-one.[31]

At the time the decision was rendered, there was good reason to doubt both the findings of "feeblemindedness" and the claims of heritability upon which the reasoning and holding relied. But there was no effort undertaken by any of those involved in the case to ensure that there was a sound scientific basis for the decision. In this disregard for the importance of the scientific truth of the matter, the case is reminiscent of the decision in *Dred Scott.*

And, as in the case of *Korematsu,* decided fifteen years later, the sacrifice demanded of Carrie Buck was different in kind from the sacrifice expected of our "best citizens." Carrie Buck, her mother, and her child were the enemy within, threatening to swamp the rest of us with their incompetence. Carrie Buck was not called upon to contribute her life, labor, or treasure to the defense and sustenance of the community. Instead, she was forced to sacrifice her capacity to bear children so that her imposition upon the community would not extend beyond her lifespan or spread beyond her only child.

But there surely was a third and distinct source of wrongdoing in *Buck v. Bell.* The Court did not simply defer to the scientific evidence in the case and did not merely sanction involuntary sterilization of the "unfit" as an appropriate sacrifice of personal liberty in service of the greater good. Beyond this, the Court wholeheartedly embraced a coercive, governmentally sanctioned program of eugenics—the assertion of control over human reproduction in service of the evolutionary improvement of the human race—of which this legislative effort in Virginia was but a part.

In constructing the legacy of *Buck v. Bell,* commentators have focused upon these three sources of wrongfulness—reliance upon unsound science, intrusion upon reproductive liberty, and

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

31. *See* J. DAVID SMITH & K. RAY NELSON, THE STERILIZATION OF CARRIE BUCK xviii (1989).

the endorsement of a coercive governmental program of eugenics—in attempting to articulate our shared public understanding of its wrongfulness. And they have recommended corresponding commitments to guard against recurrence of the wrongdoing: procedures and standards to assure careful scrutiny of "scientific" claims in governmental fora;[32] a steadfast commitment to a regime of constitutionally protected reproductive rights;[33] and rejection of any sort of governmental program of eugenics.[34] In fact, at first blush, the legacy of *Buck v. Bell* would appear to be quite settled.

But, as I hope to show in this article, the legacy of *Buck v. Bell* remains a work in progress. It remains so, first, because examination of these three sources of wrongfulness reveals questions and perplexities in our public understanding of the case—we have not yet constructed a clear and coherent account of these three sources of wrongfulness. And, second, reflection upon the legacy as we have constructed it to date leaves us with a sense of residual wrongfulness as yet unexplored. I pursue this sense in an effort to excavate an additional source of wrongfulness in the case.

I begin, in Part II, below, with a fuller examination of the case in historical context. In Part III, I assess the construction of its legacy to date, and, in Part IV, I work to extend our public understanding of the wrongfulness of the case. In Part V, I consider the implications of this extended public understanding for the potential future application of scientific knowledge and know-how to "enhance" our children by genetic engineering.

II. THE COMMITMENT AND STERILIZATION OF CARRIE BUCK

Carrie Buck was born into poverty in Albemarle County, Virginia in 1906. Shortly thereafter, her father either abandoned the family or was killed in an accident, and her mother, Mrs. Emma Buck, struggled to provide for the family, reputedly working as a prostitute. Three-year-old Carrie was taken from her mother and placed in the care of foster parents, Mr. and Mrs.

32. *See, e.g.*, Stephen Jay Gould, *Carrie Buck's Daughter*, NAT. HIST., July 1984, at 14.

33. *See, e.g.*, John A. Robertson, *Genetic Selection of Offspring Characteristics*, 76 B.U. L. REV. 421 (1996); *see also* Paul A. Lombardo, *Medicine, Eugenics, and the Supreme Court: From Coercive Sterilization to Reproductive Freedom*, 13 J. CONTEMP. HEALTH L. & POL'Y 1, 8-9 (1996) [hereinafter Lombardo, *Medicine, Eugenics, and the Supreme Court*].

34. *See, e.g.*, DANIEL J. KEVLES, IN THE NAME OF EUGENICS 300-01 (1985); *see also* Diane B. Paul, *Eugenic Anxieties, Social Realities, and Political Choices*, 59 SOC. RES. 663 (1992).

Dobbs. While living with the Dobbses, she attended school, progressing normally and receiving recommendations for promotion every year. In 1918, the Dobbses withdrew Carrie from school and kept her at home to help Mrs. Dobbs with housework.[35]

In 1920, Mr. Dobbs, a town peace officer, successfully petitioned to commit Carrie's mother to the Virginia Colony for the Epileptic and the Feebleminded ("Virginia Colony"). Mrs. Emma Buck was committed upon a finding that she was "feebleminded," and she was kept at the Virginia Colony until her death twenty-four years later.[36]

Three years after her mother's commitment, Carrie Buck, now seventeen years of age, became pregnant. She claimed that she had been raped by the Dobbses' nephew, a claim the Dobbses denied. Shortly thereafter, the Dobbses petitioned for Carrie Buck's commitment to the Virginia Colony, claiming that she was epileptic, feebleminded, and morally delinquent. The Dobbses' family doctor and a second local physician reached the medical judgments necessary for commitment, and the judge who had committed her mother a few years earlier now, in January of 1924, ordered Carrie Buck committed as well.[37]

Her commitment was delayed until after she had given birth to her daughter, Vivian. The infant Vivian was taken from her shortly after birth and placed in the custody of the Dobbses.[38]

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35. *See* SMITH & NELSON, *supra* note 31, at 1-3; Paul A. Lombardo, Eugenic Sterilization 178-79 (1982) (unpublished Ph.D. dissertation, University of Virginia) (on file with author) [hereinafter Lombardo, Eugenic Sterilization].

36. *See* SMITH & NELSON, *supra* note 31, at 7-16.

37. *See id.* at 5-6, 24, 40; Lombardo, Eugenic Sterilization, *supra* note 35, at 177-79; *see also* PHILIP REILLY, THE SURGICAL SOLUTION: A HISTORY OF INVOLUNTARY STERILIZATION IN THE UNITED STATES 86 (1991).

38. The Dobbses agreed to take custody of the infant Vivian upon one condition, as set forth in a letter from Carrie Buck's social worker to the Superintendent of the Virginia Colony:

> It has been very difficult for us to decide what disposition to make in the case of Carrie Buck as we feel that a baby whose mother and grandmother are both feeble-minded ought not be placed out in a home for adoption. However, the people who have had Carrie in their home . . . are willing to keep the baby with the understanding that it will be committed later on if it is found to be feeble-minded also.

SMITH & NELSON, *supra* note 31, at 23 (quoting a letter from Caroline Wilhelm, Carrie Buck's social worker, to Dr. Albert S. Priddy, Superintendent of the Virginia Colony).

The Superintendent, on behalf of the Virginia Colony, responded to the social worker's letter as follows:

> Replying to your letter . . . I cannot advise you what disposition to make of the baby other than to place it in the City Almshouse. Of

Then, in June of 1924, Carrie Buck was committed to the Virginia Colony and assigned to a dormitory with about 200 residents; she worked in the dormitory kitchen, cooking and cleaning from early in the morning into the evening.[39]

Dr. Albert S. Priddy was the Superintendent of the Virginia Colony at the time Carrie Buck was committed. He had also been the prime mover in the campaign to enact Virginia's involuntary sterilization statute, which took effect in March of 1924, shortly before Carrie Buck entered the Virginia Colony.[40] In the campaign for enactment of the statute, Priddy had worked closely with a number of prominent Virginians whose personal and professional lives were closely intertwined and who shared his commitment to the program of eugenics, and, in many cases, his commitment to containing social and sexual deviancy as well.[41] Among them was Mr. Aubrey Strode—an attorney and

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> course, should this child be ascertained to be feeble-minded we will receive it here. However, the law puts a limit of 8 years in feeble-minded cases and we could not take it until it is eight years of age.

Id. at 24 (quoting a letter from Dr. Albert S. Priddy, Superintendent of the Virginia Colony, to Caroline Wilhelm, Carrie Buck's social worker).

39. *See id.* at 40, 44.

40. The statute was signed into law by the Governor of Virginia on March 20, 1924. *See* REILLY, *supra* note 37, at 86.

41. *See* Lombardo, Eugenic Sterilization, *supra* note 35, at 180-81. Paul Lombardo provides a detailed history of the motivations and goals of those who worked to establish the Virginia Colony and to enact the sterilization statute. *See id.* at 67-176; *see also* Paul A. Lombardo, *Three Generations, No Imbeciles: New Light on* Buck v. Bell, 60 N.Y.U. L. REV. 30, 30 (1985) [hereinafter Lombardo, *New Light*].

Lombardo argues that "popular acceptance of eugenical theory was not the primary reason for passage of the Virginia sterilization act of 1924, nor for the litigation that tested the act." *Id.* at 59. He argues that:

> These relationships between the prime movers in *Buck* and prominent members of the eugenical movement support the view that *Buck v. Bell* is best understood not by focusing on the eugenical movement itself—the common explanation of the case's outcome—but rather by examining closely the web of personalities and events that were essential to both the genesis and outcome of the case.

Id. at 59-60.

Lombardo continues:

> Doctor Priddy's motives in proposing a sterilization program had less to do with thinning the ranks of the mentally and physically bereft than they had to do with satisfying his own strong and unique sense of morality. Priddy was obsessed with placing checks on sexuality and propagation. This obsession focused on eradication of the "moral delinquents" whose unlicensed pregnancies he identified as the cause of poverty, crime, disease, and the myriad afflictions of society. With the passage of the Virginia sterilization law, he succeeded in winning legal protection for his private surgical hobby.

Id. at 62.

former Virginia state senator—who drafted the legislative language that eventually was enacted into law.[42] Strode also served as attorney for the Board of the Virginia Colony.[43]

Priddy was motivated in this campaign by additional professional and personal concerns. Prior to enactment of the statute, Priddy had taken it upon himself to pursue his eugenic and moral commitments by forcibly sterilizing a number of individuals who found themselves within the confines of the Virginia Colony. On one such occasion, he was sued afterwards and narrowly escaped legal liability as well as professional disgrace. In the course of the proceedings, the presiding judge warned Priddy

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Nonetheless, Lombardo does not deny that eugenic thinking was an important factor in passage of the act and in the subsequent decision in *Buck v. Bell*, noting that "[w]hile 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." *Id.* at 32.

Stephen Jay Gould concludes that, however the issues in the case might have been framed, the case really was about "sexual morality and social deviance." He writes:

> . . . We know little of Emma Buck and her life, but we have no more reason to suspect her than her daughter Carrie of true mental deficiency. Their deviance was social and sexual; the charge of imbecility was a cover-up, Mr. Justice Holmes notwithstanding.

Gould, *supra* note 32, at 16.

42. Strode initially was reluctant to undertake the effort because similar proposals in other states generally had failed of enactment or, if enacted, were struck down as unconstitutional. As Daniel Kevles writes of this period:

> In many states, sterilization measures ran afoul of the courts, of legislative opposition, of executive refusal to enforce, and of gubernatorial vetoes. . . . Many of the laws were couched in punitive rather than eugenic terms. Most did not provide elementary procedural protection to those singled out for possible sterilization. Most also confined eligibility for sterilization to people in state institutions. Thus, the objections centered on violations of the constitutional safeguards against cruel and unusual punishment, due process of law, and equal protection of the laws.

KEVLES, *supra* note 34, at 109 (citation omitted); *see also* REILLY, *supra* note 37, at 50-55.

But Strode eventually changed his mind and drafted the bill that later was enacted into law. He recounted the turning point in his decision to undertake the effort—when the Governor of Virginia encouraged him to "'draft a bill . . . curing such defects as I could in the form of the Acts declared invalid by the courts, trusting that the growth of knowledge of the laws of heredity and eugenics and changing public sentiment might bring a more favorable attitude from the Legislature and the courts.'" SMITH & NELSON, *supra* note 31, at 50; *see also* Lombardo, *Medicine, Eugenics, and the Supreme Court*, *supra* note 33, at 8-9.

43. *See* SMITH & NELSON, *supra* note 31, at 44; *see also* Lombardo, Eugenic Sterilization, *supra* note 35, at 180-81.

that henceforth he should not undertake involuntary sterilizations without specific statutory authorization.[44]

With just such a statute now in force—granting authority to sterilize those institutionalized individuals who were found to be the probable potential parents of "socially inadequate" offspring, for their own welfare and the welfare of society[45]—Priddy was in a position to proceed. Shortly after Carrie Buck's commitment to the Virginia Colony, Priddy selected her for sterilization pursuant to the provisions of the statute and submitted a petition to the Board of the Virginia Colony for this purpose.[46] In support of his petition, Priddy testified before the Board that Carrie Buck was "feeble-minded of the lowest grade Moron class" with a mental age of nine, as indicated by her performance on an intelligence test.[47] He testified further that three generations displayed "feeblemindedness"—Carrie Buck, her mother, and her child—and that Carrie Buck and her descendants would bear mentally handicapped children.[48]

Advising the Virginia Colony Board in its consideration of Priddy's petition was the Board's attorney, and drafter of the stat-

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44. Priddy sterilized a mother and her daughter following a police raid for prostitution on their home that resulted in their temporary placement in the Virginia Colony. This prompted a lawsuit by the family, and Priddy was forced to defend his conduct on the basis of "therapeutic necessity." *See* Lombardo, *New Light*, *supra* note 41, at 37-45.

45. *See id.* at 48-49.

46. *See id.* at 43-48.

47. SMITH & NELSON, *supra* note 31, at 44 (quoting from the testimony of Dr. Priddy).

48. Priddy testified:

> I have had Carrie Buck under observation and care since . . . June 4, 1924, and from psychological examination and the Stanford revision of the Binet-Simon mental test, I have ascertained that she is feeble-minded of the lowest grade Moron class. Her mental age is nine years . . . . [S]he is of unknown paternity, her mother . . . is and has been for several years a feeble-minded patient in the Colony of low mental grade. According to the depositions Carrie has had one illegitimate mentally defective child. She is a moral delinquent but physically capable of earning her own living if protected against childbearing by sterilization. Otherwise she would have to remain in an institution for mentally [sic] defectives during the period of her child-bearing potentiality covering thirty years. The history of all such cases in which mental defectiveness, insanity and epilepsy develop in three generations of feeble-minded persons is that the baneful effects of heredity will be shown in descendents of all future generations. Should she be corrected against child-bearing by the simple and comparatively harmless operation of salpingectomy, she could leave the institution, enjoy her liberty and life and become self-sustaining.

Id. (quoting from the testimony of Dr. Priddy); *see also* Lombardo, Eugenic Sterilization, *supra* note 35, at 180-82.

ute, Strode.[49] The Board approved the petition,[50] and, upon the urging of Priddy[51] and Strode,[52] decided to arrange for a constitutional challenge to the Virginia statute as applied in her case, a final step intended to assure Priddy and others who might engage in eugenic sterilizations in Virginia that they could proceed without fear of legal liability. Mr. Irving P. Whitehead was appointed to serve as Carrie Buck's attorney in the appeal of the Board's order.[53] Whitehead was a Democratic Party activist in Virginia, a former Virginia Colony Board member who had participated in the selection of Priddy as Superintendent, and a lifelong friend of Strode.[54]

Strode and Priddy then prepared their case for review by the Virginia trial court.[55] They enlisted the services of several of the

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49. *See* SMITH & NELSON, *supra* note 31, at 44; *see also* Lombardo, Eugenic Sterilization, *supra* note 35, at 180-81.

50. The Board concluded that:

> Carrie Buck is a feeble-minded inmate of this institution and by the laws of heredity is the probable potential parent of socially inadequate offspring likewise afflicted, . . . she may be sexually sterilized without detriment to her general health, and . . . the welfare of the said Carrie Buck and of society will be promoted by such sterilization.

SMITH & NELSON, *supra* note 31, at 47-48 (quoting the Board's conclusion); *see also* Lombardo, *New Light, supra* note 41, at 48-50.

51. *See* Lombardo, *New Light, supra* note 41, at 48. Priddy advised that "as a matter of precautionary safety . . . a test case of the constitutionality of the Sterilization Law be made before any operation is performed." *Id.* (quoting from the minutes of the Special Board of the Virginia Colony).

52. *See id.* at 48. Strode wrote to a friend, "I had to advise that the Virginia Act had yet to stand the test of the Courts, whereupon I was instructed to take to court a test case." SMITH & NELSON, *supra* note 31, at 48. Strode noted that other sterilization statutes had been declared unconstitutional on due process grounds because of inadequate procedural safeguards. He advised the Board that he had drafted the statute in a fashion he thought adequate to repel any attack on due process grounds, but that the statute might be vulnerable on equal protection grounds. The equal protection concern was due to the statute's limited reach—it provided for the sterilization of institutionalized feebleminded persons rather than all feebleminded persons. *See* Lombardo, *New Light, supra* note 41, at 48-49.

53. Lombardo concludes on the basis of his archival research that Whitehead intentionally failed to provide appropriate legal representation for Carrie Buck. Lombardo also documents Whitehead's longtime involvement in promoting sterilization of those deemed "unfit." *See* Lombardo, *New Light, supra* note 41, at 37-40.

54. Whitehead was appointed pursuant to the Board's direction to Carrie Buck's guardian, Mr. Shelton, to hire "some competent lawyer" to represent her in her appeal to the Virginia trial court. *See* Lombardo, *New Light, supra* note 41, at 50.

55. Strode recounted:

> I was instructed to take to court a test case. With the very active and helpful cooperation of Doctors A. S. Priddy and J. S. DeJarnette this

foremost eugenicists of the day to provide support for the two claims central to their defense: that the eugenic theory underlying the statute was sound, and that the statute's application to Carrie Buck was appropriate.[56] Both Priddy and another Virginia physician active in the eugenics movement, Dr. Joseph DeJarnette, testified at trial.[57] In addition, several witnesses testified to Carrie Buck's "social inadequacy" based upon their acquaintance with her or with members of her family.[58]

The Virginia trial court approved the Board's sterilization order, and the Virginia Supreme Court of Appeals affirmed the order of the trial court.[59] The case was appealed to the United States Supreme Court, and Holmes authored the opinion of the Court allowing the sterilization,[60] over one dissent without opin-

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was done, having as the subject of the litigation Carrie Buck, a typical 19-year-old, feeble-minded patient of the Colony having an illegitimate infant already giving evidence of feeblemindedness, and Carrie's mother also being a feeble-minded patient at the Colony.

SMITH & NELSON, *supra* note 31, at 50-51 (quoting from the account of Strode).

56. *See* Lombardo, *New Light, supra* note 41, at 53. A nationally prominent eugenicist, Harry Laughlin, provided a deposition tying the evidence concerning Carrie Buck to broader eugenic theory. *See id.* at 50 n.109 and accompanying text. Based upon his review of the record, Laughlin opined that Carrie Buck and her family, "'[belonged] to the shiftless, ignorant, and worthless class of anti-social whites of the South.'" *Id.* at 51 (quoting the deposition of Laughlin).

57. *See id.* at 50 n.111 and accompanying text; *see also* SMITH & NELSON, *supra* note 31, at 48.

58. *See* Lombardo, *New Light, supra* note 41, at 50.

59. Priddy died in January of 1925, and Dr. Bell succeeded him as superintendent of the Virginia Colony, hence the change in the title of the case to *Buck v. Bell.* *See* Lombardo, *New Light, supra* note 41, at 55 n.152 and accompanying text.

Lombardo discovered minutes of the Board meeting that followed close on the heels of the decision by the Virginia Supreme Court of Appeals. The minutes stated:

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

Id. at 56 (quoting from the minutes of the Board) (emphasis added). This is one of the pieces of evidence cited by Lombardo in support of his thesis that Whitehead intentionally failed to represent Carrie Buck adequately. *See also supra* note 53 and accompanying text.

60. Justice Holmes found that the statute provided adequate procedural protections and that these protections had been observed. *See* Buck v. Bell, 274 U.S. 200, 206-07 (1927). He dispensed with the equal protection argument (the statute provided for the involuntary sterilization only of *institutionalized*

ion.[61] A motion for reconsideration was denied,[62] and on October 19, 1927, Carrie Buck was sterilized by tubal ligation at the Virginia Colony.[63]

Shortly thereafter, Carrie Buck was paroled from the Virginia Colony and placed in households to work as a domestic servant—under threat of recommitment to the Virginia Colony if her conduct was unsatisfactory. She left her last placement to marry her first husband in 1932.[64] She was later widowed and then remarried. When interviewed late in life, she reported regret at not being able to have children during her married life; she did not understand at the time the sterilization was performed that this would be its consequence. Those who knew her reported that she was a devoted wife and very close to her sister and brother. She was a lively conversationalist, a fan of drama and music, and an avid reader of newspapers, although not a sophisticated person or a person possessed of social graces. Carrie Buck died in 1983.[65]

Although little is known about Carrie Buck's mother,[66] it seems quite clear that neither Carrie Buck nor her child was mentally handicapped.[67] The assertions made in the case regard-

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feebleminded persons rather than *all* feebleminded persons), by declaring that "so far as the operations [of the statute] 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." *Id.* at 208.

61. Justice Pierce Butler dissented without opinion. *See id.* at 208. His dissent is commonly assumed to be connected to his Catholicism. *See* Lombardo, *New Light, supra* note 41, at 57 n.162. Martin Pernick, drawing upon an admittedly limited sample of public statements by persons of various political and religious affiliations in the early twentieth century regarding eugenic decisions not to treat handicapped infants, writes that "[p]ublic statements on saving impaired newborns portray the Democrats as sharply split along religious lines. Four-fifths of Catholic Democrats quoted demanded treatment for all babies. Just over one-quarter of the non-Catholic Democrats who spoke out favored that position." MARTIN S. PERNICK, THE BLACK STORK: EUGENICS AND THE DEATH OF "DEFECTIVE" BABIES IN AMERICAN MEDICINE AND MOTION PICTURES SINCE 1915, at 34 (1996).

62. *See* Lombardo, *New Light, supra* note 41, at 57-58.

63. *See id.* at 58; *see also* SMITH & NELSON, *supra* note 31, at xviii.

64. *See* SMITH & NELSON, *supra* note 31, at 185-212.

65. *See id.* at 213-22.

66. Lombardo writes, "[o]f the three generations, the least is known about Emma Buck. She died at the Colony, leaving few records of her life. She was, at worst, the 'moron' that Priddy claimed; no one but Homes charged her with imbecility." Lombardo, *New Light, supra* note 41, at 61 (citation omitted).

67. The only evidence presented at trial to support the contention that Carrie Buck's daughter suffered a mental handicap was the testimony of Carrie Buck's social worker, Miss Wilhelm, who observed the child at seven months of age and compared her to the grandchild of the Dobbses of about the same age:

ing the heritability of mental handicap are now known to have been mistaken.[68]

Carrie Buck's only child, her daughter Vivian, continued to live with the Dobbses. She progressed normally in school, and was named to the school's honor roll on one occasion. Vivian died from an infectious disease in 1932, when she was eight years old.[69]

Later examination of the records of the Virginia Colony revealed that over 4,000 sterilizations were performed there, including the covert sterilization of Carrie Buck's sister, Miss Doris Buck.[70] In the wake of *Buck v. Bell*, a number of state legislatures enacted involuntary sterilization statutes, now assured of their insulation from constitutional attack.[71] Tens of thousands of Americans were involuntarily sterilized pursuant to these statutes over the next few decades.[72] Other nations also enacted and applied involuntary sterilization statutes during the early twentieth century; hundreds of thousands of individuals around the world were sterilized pursuant to statutes of this sort.[73] Nazi offi-

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> It is difficult to judge probabilities of a child as young as that, but it seems to me not quite a normal baby. In its appearance—I should say that perhaps my knowledge of the mother may prejudice me in that regard, but I saw the child at the same time as Mrs. Dobbs' daughter's baby, which is only three days older than this one, and there is a very decided difference in the development of the babies. That was about two weeks ago. There is a look about it that is not quite normal, but just what it is, I can't tell.

Gould, *supra* note 32, at 16 (quoting from the trial testimony of Wilhelm).

68. As Gould writes, "[s]ome forms of mental deficiency are passed by inheritance in family lines, but most are not." *Id.* at 15.

69. *See* Gould, *supra* note 32, at 18.

70. Doris Buck was told that her operation was an appendectomy. She didn't learn until late in life why it was that she had never been able to conceive a child. *See id.* at 15.

71. A number of states had already enacted sterilization statutes. Indiana was the first to do so, in 1907. *See id.* at 14. By the 1930s, over thirty states had enacted such measures. *See id.*

72. For accounts of this, see ELLEN BRANTLINGER, STERILIZATION OF PEOPLE WITH DISABILITIES: ISSUES, PERSPECTIVES, AND CASES 22 (1995); MARK H. HALLER, EUGENICS: HEREDITARIAN ATTITUDES IN AMERICAN THOUGHT 139 (1963); Lombardo, Eugenic Sterilization, *supra* note 35, at 252-53; KENNETH M. LUDMERER, GENETICS AND AMERICAN SOCIETY: A HISTORICAL APPROACH 95 (1972); PERNICK, *supra* note 61, at 150; DONALD K. PICKENS, EUGENICS AND THE PROGRESSIVES 91 (1968); REILLY, *supra* note 37, at 141; SMITH & NELSON, *supra* note 31, at 2.

73. The Nazi Eugenic Sterilization Law was promulgated in 1933. The statute applied to persons whether institutionalized or not who suffered purported hereditary disabilities including "feeblemindedness, schizophrenia, epilepsy, blindness, severe drug or alcohol addiction, and physical deformities that seriously interfered with locomotion or were grossly offensive." KEVLES,

cials in the pre-war era were particularly eager to give credit to their American eugenicist counterparts for their pioneer work in crafting eugenic sterilization statutes and for their scientific work in support of the eugenic cause.[74]

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supra note 34, at 116-17. As Kevles reports, "[w]ithin three years, German authorities had sterilized some two hundred and twenty-five thousand people . . . . About half were reported to be feebleminded." *Id.*

For a study of eugenics in Nazi Germany, see ROBERT PROCTOR, RACIAL HYGIENE: MEDICINE UNDER THE NAZIS (1988). For a recent study bringing to light eugenic practices in Scandinavia, see EUGENICS AND THE WELFARE STATE: STERILIZATION POLICY IN DENMARK, SWEDEN, NORWAY, AND FINLAND (Gunnar Broberg & Nils Roll-Hansen eds., 1996).

74. *See* KEVLES, *supra* note 34, at 118. Harry Laughlin, a prominent eugenicist who provided a deposition in Carrie Buck's trial, drafted a model bill in 1922 that aimed to "'prevent the procreation of persons socially inadequate from defective inheritance, by authorizing and providing for eugenical sterilization of certain potential parents carrying degenerate hereditary qualities.'" Gould, *supra* note 32, at 14 (quoting Laughlin's model bill). The categories of persons covered by Laughlin's model bill included the "'blind, including those with seriously impaired vision; deaf, including those with seriously impaired hearing; and dependent, including orphans, ne'er-do-wells, the homeless, tramps, and paupers.'" *Id.* (quoting Laughlin's model bill). Laughlin's model bill served as the basis for the Nazi Sterilization Law. *See id.*; *see also* EUGENICS AND THE WELFARE STATE, *supra* note 73, at 170; PROCTOR, *supra* note 73, at 108-09.

The German admiration for American eugenic sterilization efforts was reciprocated by many Americans. Paul Popenoe of the Human Betterment Foundation in Pasadena, California, wrote in the *Journal of Heredity* in 1933:

> Germany's eugenic sterilization law . . . is no hasty improvisation of the Nazi regime. It has been taking shape gradually during many years, in the discussions of eugenicists. . . .
>
> But Hitler himself—though a bachelor—has long been a convinced advocate of race betterment through eugenic measures. . . . In his book, *Mein Kampf* . . . he bases his hopes of national regeneration solidly on the application of biological principles to human society. . . .
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> . . . While the German law is well drawn and, in form, may be considered better than the sterilization laws of most American states, the success of any such measure naturally depends on conservative, sympathetic, and intelligent administration. Apparently the Nazis are doing their best to prevent criticism on this score, no doubt with the realization that their actions are regarded with suspicion in many quarters.
>
> Newspaper accounts have generally said that 400,000 people are to be sterilized under the law. The statement appears to be unfounded. What German authorities have said is that about 400,000 people would be examined, to determine whether they should be sterilized. This number of course includes the inmates of all hospitals for the mentally diseased, institutions for the mentally deficient, homes and asylums for the blind, deaf, and other defectives, and the inmates of all prisons. Naturally, not all of these will be sterilized, though all will be examined with that in view. . . .

III. CONSTRUCTING THE LEGACY OF *BUCK V. BELL*

Contemplating decisions like *Dred Scott, Korematsu* and *Buck v. Bell* is not pleasant; the wrongs done never can be undone. Yet, there is room for good to follow in the wake of disaster. The legacies of these decisions continue to change the world for the better in ways that the authors of these decisions could not have imagined and would never abide.

Much hard work has been done in constructing the legacy of *Buck v. Bell.* I now turn to an assessment of this work, examining the wrongs identified—reliance upon unsound science, intrusion upon reproductive liberty, and endorsement of a coercive, governmentally sanctioned program of eugenics—and the remedies proposed to guard against recurrence of these wrongs.

With respect to the first source of wrongdoing—reliance upon unsound science—commentators have noted that the theories of mental handicap and of the heritability of mental handicap that were incorporated into the Virginia statute and applied in the case were mistaken and that the intelligence tests and other observational methods used to diagnose mental handicap in Carrie Buck and her daughter were unreliable.[75] The sterilization of Carrie Buck could not have achieved its purported purpose because Carrie Buck was not mentally handicapped and, even if she had been, she was not likely to have children who were.

In *Dred Scott,* there was no concern shown for the scientific truth of the matter; on Taney's jurisprudential take, the truth was not relevant to a just result. In *Buck v. Bell,* on the other hand, the scientific claims were treated as crucially relevant. Yet, from the inception of the process that culminated in Carrie Buck's

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> . . . [T]he Nazis seem, as this scientific [eugenic] leadership becomes more and more prominent in their councils, to be avoiding the misplaced emphasis of their earlier pronouncements on questions of race, and to be proceeding toward a policy that will accord with the best thought of eugenicists in all civilized countries.

Paul Popenoe, *The German Sterilization Law,* 24 J. HEREDITY 257, 257, 259-60 (1933).

For a recent study exploring the connection between Nazi and American eugenics, see STEFAN KUHL, THE NAZI CONNECTION: EUGENICS, AMERICAN RACISM, AND GERMAN NATIONAL SOCIALISM (1994).

75. *See, e.g.,* Gould, *supra* note 32, at 14; *see also* John M. Conley, *"The First Principle of Real Reform": The Role of Science in Constitutional Jurisprudence,* 65 N.C. L. REV. 935 (1987) (providing a summary of the scientific evidence relied upon in the case and examining the difficulties inherent in the employment of science in legal fora); Dean M. Hashimoto, *Science as Mythology in Constitutional Law,* 76 OR. L. REV. 111 (1997) (arguing that references to science in the case were rhetorical).

sterilization, none of those responsible for deciding her fate exerted any effort to investigate the soundness of the eugenic science that purportedly justified it.

Thus, *Buck v. Bell* instructs us in the awful consequences that may follow when those invested with the power of the state implement decisions with serious implications for the lives of others on the faith of unscrutinized and unsound scientific claims. In this case, as in *Dred Scott*, we can see that these "scientific claims" may constitute part of the respectable cover for social and political agendas that, when revealed to plain view, present a far less appealing appearance. So we surely should understand *Buck v. Bell* as, in part, about wrongful reliance on unsound science and we surely should pursue remedies that require careful and dispassionate scrutiny of scientific claims, especially those wielded by parties bearing weighty agendas.

While this unsound science critique is powerful and an important part of the legacy of *Buck v. Bell*, it also is in need of refinement and qualification in light of the nature of scientific practice. Scientific practice is, on the view of most, progressive, in the sense that today's science is constantly being refined, extended, revised and supplanted by tomorrow's. Scientific practice also is unruly, in the sense that it is difficult to devise and enforce norms to reduce the likelihood of abuse.

Governmental decision-makers who rely upon scientific claims run the risk of those who build on shifting sands. Science progresses relentlessly, showing no respect for reliance placed on claims that win no place in revised theory. Yet, when issues before our legislatures, administrative agencies, and courts turn upon the scientific truth of the matter, we surely do not want our decision-makers to abjure the scientific for fear of this risk. Instead, our hope is that they will base their decisions upon the best science of the day. We must accept, with regret, that even though they do, the progress of science may one day transform their decisions from sound to unsound.

But even after we settle upon the best that we might hope for, there remains the problem of implementation, of devising and enforcing norms that will help us achieve this modest goal. It is not always easy to determine the best science of the day or to ensure that decision-makers will choose to rely upon it.

At the time *Buck v. Bell* was decided, there were eugenic scientists as well as scientists working in related fields who had good reason to doubt some of the claims of eugenic science.[76]

76. *See, e.g.*, MARK HALLER, EUGENICS: HEREDITARIAN ATTITUDES IN AMERICAN THOUGHT 130-31 (1963) (describing the knowledge of Harry

But many of the early-twentieth-century eugenicists in America and abroad were accomplished and respected scientists.[77] Some of them, indeed, came to realize and to acknowledge, in the way of truth-seekers, that their earlier claims had been mistaken.[78] In any event, at the time *Buck v. Bell* was decided, eugenic science was a respectable enterprise, not an obvious exercise in pseudo-science by disreputable individuals. So we might fairly ask whether the case of *Buck v. Bell* was an instance of regrettable reliance on scientific claims that simply turned out to have been mistaken.

But perhaps we can do a better job of identifying the best science of the day. At any given time, there will be wide and deep consensus as to the soundness of some scientific claims, and there will be something well short of this with respect to many other claims. A wide and deep consensus is no guarantee of correctness, just as scientific change is no guarantee of progress toward the truth of the matter. But when governmental decision-makers rely upon scientific claims, surely they ought to take cognizance of the status of these claims within the scientific community. For it is from this community that judgments of truth and falsity emerge.

Had those involved in *Buck v. Bell* chosen to conduct a careful and dispassionate inquiry into the status of the eugenic claims in the case, they would have discovered doubts and divisions within the eugenic and wider scientific communities.[79] It surely would have been more difficult, under these circumstances—with full awareness that these eugenic claims might well be false—to authorize an intrusion of such magnitude and consequence.

But there also was a wide and deep consensus in the political community about the urgency of the social problem of the propagation of the "unfit."[80] This consensus might well have made failure to authorize a remedy appear imprudent. And governmental decision-makers, after all, are held accountable in the domain of public policy, not science.

Laughlin and other promoters of the eugenics movement that some of the scientific claims of the movement were not justified); *see also* KEVLES, *supra* note 34, at 48-49.

77. *See* KEVLES, *supra* note 34, at 3-56 (describing the contributions as well as shortcomings of eugenicists Francis Galton, Karl Pearson, Charles Davenport, Harry Laughlin and numerous others, and providing an assessment of their work with respect to the hereditary character of diseases).

78. *See id.* at 134.

79. *See id.* at 48-49; HALLER, *supra* note 72, at 130-31.

80. *See* KEVLES, *supra* note 34, at 96-118.

Perhaps, then, it is practitioners of science who should be called upon to exercise a more political role, challenging scientific claims they believe to be inadequately supported or fraudulent, and making these challenges and their resolutions a matter of public record. In this way, scientists might ensure that the scientific truth of the matter is among those considerations that count in the domain of public policy.

Thus, perhaps we should refine our understanding of the wrong done in *Buck v. Bell*, focusing more of our attention upon the failure of practitioners of science to live up to their professional and public obligations. Had they discharged these obligations, perhaps eugenic science would not have remained respectable for long and, consequently, governmental decisionmakers would not have felt justified in relying upon its claims.

So we might encourage proper discharge of these obligations by requiring systematic peer review[81] and, by supporting and protecting, as a last resort, whistleblowing on fraudulent scientific activities.[82] Peer review and whistleblowing are always tenuous enterprises, however.[83] These activities bring little promise of personal or professional reward and invite charges—sometimes warranted—of competitive or other improper motivation.

So, in addition, we might seek to establish and enforce standards for the use of scientific claims in governmental fora, standards that focus upon the methods and judgments of the scientific community.[84] But, as the controversy surrounding cur-

81. *See, e.g.*, 42 U.S.C. § 289a (1994) (establishing peer review requirements for applications for biomedical and behavioral research grants and contracts from the National Institutes of Health (NIH), and periodic peer review requirements for research at the NIH).

82. *See, e.g.*, 42 U.S.C. § 289b (1994) (establishing the Office of Research Integrity within the Department of Health and Human Services, requiring applicants for funding for biomedical or behavioral research to provide assurances that they have research misconduct procedures in place and will report any instances of such misconduct, and providing protection for whistleblowers against retaliation).

83. For a recent study of a wrenching case involving whistleblowing, see DANIEL J. KEVLES, THE BALTIMORE CASE: A TRIAL OF POLITICS, SCIENCE, AND CHARACTER (1998).

84. *See* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993) (requiring trial judges to assess proffered expert scientific testimony—applying standards that may include the testability of a scientific theory, whether there has been peer review and publication of the theory, the error rate and standards controlling its operation, and whether it is widely accepted in the scientific community). The *Daubert* standard replaced the *Frye* test, *see* Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), which held scientific evidence inadmissible unless generally accepted in the scientific community. For discussions of practical issues in connection with the *Daubert* standard, see Bert

rent judicial standards for scientific evidence reveals,[85] it is not easy for anyone, scientist, legislator, or jurist, to arrive at such standards. While the filter of history works exceedingly well in separating the sound from the unsound, implementation of con-

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Black, *Post-*Daubert *and* Joiner *Caselaw: The Good, the Bad, and the Ugly, in* PRODUCTS LIABILITY 145 (ALI-ABA Course of Study, Feb. 12, 1998); Lynn R. Johnson et al., *Expert Testimony in Federal Court:* Frye, Daubert, *and* Joiner, *in* PRODUCTS LIABILITY, *supra*, at 177. For the perspective of an expert witness on the use of scientific evidence in the courtroom, see ELIZABETH F. LOFTUS & KATHERINE KETCHAM, THE MYTH OF REPRESSED MEMORY: FALSE MEMORIES AND ALLEGATIONS OF SEXUAL ABUSE (1996) (regarding claims of repressed memories of sexual abuse); ELIZABETH F. LOFTUS & KATHERINE KETCHAM, WITNESS FOR THE DEFENSE: THE ACCUSED, THE EYEWITNESS, AND THE EXPERT WHO PUTS MEMORY ON TRIAL (1991) (regarding the fallibility of memory).

85. The *Daubert* standard has attracted considerable commentary, much of it critical. *See, e.g.*, Brian Leiter, *The Epistemology of Admissibility: Why Even Good Philosophy of Science would Not Make for Good Philosophy of Evidence*, 1997 BYU L. REV. 803; Adina Schwartz, *A "Dogma of Empiricism" Revisited:* Daubert v. Merrell Dow Pharmaceuticals, Inc. *and the Need to Resurrect the Philosophical Insight of* Frye v. United States, 10 HARV. J.L. & TECH. 149 (1997).

For critical perspectives from the bar and bench, see Michael H. Gottesman, *From* Barefoot *to* Daubert *to* Joiner*: Triple Play or Double Error?*, 40 ARIZ. L. REV. 753 (1998) (the attorney who argued the *Daubert* and *Joiner* cases for the plaintiffs at the Supreme Court argues for judicial standards that take cognizance of the public good and congressional intent); Alex Kozinski, *Brave New World*, 30 U.C. DAVIS L. REV. 997 (1997) (Ninth Circuit Court of Appeals Judge Kozinski describes the Ninth Circuit decisions in *Daubert* and assesses the merits of the *Daubert* standard); Ronald W. Tochterman, *A (California) Trial Judge Dissents*, 30 U.C. DAVIS L. REV. 1013 (1997) (arguing for the merits of the earlier *Frye* test).

Some commentary addresses other public policy issues connected to the use of scientific evidence. *See, e.g.*, Rebecca S. Dresser et al., *Breast Implants Revisited: Beyond Science on Trial*, 1997 WIS. L. REV. 705 (arguing that plaintiffs' claims in the breast implant litigation lacked scientific merit, but that the litigation was the consequence of failures by physicians, manufacturers, and the Food and Drug Administration to ensure that well-designed studies of breast implants were conducted early on); Lars Noah, *Sanctifying Scientific Peer Review: Publication as a Proxy for Regulatory Decisionmaking*, 59 U. PITT. L. REV. 677 (1998) (assessing the reliance of governmental agencies upon scientific claims that receive the sanction of peer reviewers); Dick Thornburgh, *Junk Science—The Lawyer's Ethical Responsibilities*, 25 FORDHAM URB. L.J. 449 (1998) (former U.S. Attorney General Thornburgh argues that the *Daubert* standard will not resolve the problem of "junk science" in the courtroom—the problem requires lawyers to exercise their ethical responsibilities).

Some commentary suggests practical measures for implementing the *Daubert* standard. *See, e.g.*, Laura S. Pinsky, Comment, *The Use of Scientific Peer Review and Colloquia to Assist Judges in the Admissibility Gatekeeping Mandated by* Daubert, 34 HOUS. L. REV. 527 (1997); Note, *Improving Judicial Gatekeeping: Technical Advisors and Scientific Evidence*, 110 HARV. L. REV. 941 (1997).

temporaneous filters of human devising will always be imperfect.[86]

So, although we might properly understand *Buck v. Bell* as an example of the harms that flow from reliance upon unsound science, we also must recognize the complexity of the relationship between science and governmental decision-making and the inevitability of certain sorts of errors. With awareness of these limits to any safeguards we might devise against reliance upon unsound science, we might now return to test our public understanding of the nature of the wrongdoing in *Buck v. Bell.*

Assume that, at the time of *Buck v. Bell,* these safeguards were in place—and worked. Assume that the science relied upon in *Buck v. Bell* was right—that is, assume that Carrie Buck was mentally handicapped due to a genetic condition and that her condition was heritable. Would *Buck v. Bell,* under these circumstances, have been rightly decided?

This is not an idle question. Genetic science of the twenty-first century likely will enable us to identify genes that influence, even if they do not determine, our physical and mental capabilities and, perhaps, our behaviors as well. The unsound science critique, in and of itself, tells us nothing about whether it would be wrong to undertake a governmental program of forced sterilization of those determined to be "carriers" of "defective" genes, however these might be defined.

To help us address this question, we should consider two additional critiques of *Buck v. Bell.* First, we will consider the critique of the intrusion upon Carrie Buck's reproductive liberty, then the critique of the endorsement of a coercive, governmentally sanctioned program of eugenics.

We surely should understand the case as an instance of wrongful intrusion upon reproductive liberty. Indeed, subsequent Supreme Court decisions have recognized a fundamental right to procreation, as well as a right of privacy that includes

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86. As John M. Conley writes about statistical evidence used in civil rights and employment discrimination cases:

> The courts have developed reasonable facility in qualifying statistical experts, in determining that particular methods are widely used, and in ensuring that analyses are carefully performed. Yet beneath the growing consensus on the use of some methods is an often obscure debate among statisticians about the theoretical justifications for particular methods and the propriety of transferring them from one context to another. The outcome of these debates could cause today's scientific "fact" to become tomorrow's heresy, and today's enlightened legal decision to become a latter day *Buck v. Bell.*

Conley, *supra* note 75, at 942 (citations omitted).

both rights of procreation and of abortion. And commentators commonly cite these decisions as part of the legacy of *Buck v. Bell*.[87]

These decisions have not, however, overruled *Buck v. Bell*.[88] In *Skinner v. Oklahoma ex rel. Williamson*,[89] the United States Supreme Court struck down as violative of the Equal Protection Clause an Oklahoma statute that provided for involuntary sterilization of three-time felons, but that exempted from its reach three-time embezzlers and other white-collar felons. The *Skinner* Court recognized a fundamental right of procreation, but nonetheless expressly endorsed the holding and reasoning of *Buck v. Bell*.[90] Likewise, in *Roe v. Wade*,[91] in recognizing a privacy right

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87. *See generally* sources cited *supra* note 33.

88. *See* Lombardo, *Medicine, Eugenics, and the Supreme Court*, *supra* note 33 (discussing the relationship among *Buck v. Bell* and subsequent reproductive rights cases).

89. 316 U.S. 535 (1942).

90. The opinion for the Court stated:

> But the instant legislation runs afoul of the equal protection clause . . . . We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. . . . There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty. We mention these matters not to reexamine the scope of the police power of the States. We advert to them merely in emphasis of our view that strict scrutiny of the classification which a State makes in a sterilization law is essential, lest unwittingly, or otherwise, invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws. . . . Sterilization of those who have thrice committed grand larceny, with immunity for those who are embezzlers, is a clear, pointed, unmistakable discrimination. Oklahoma makes no attempt to say that he who commits larceny by trespass or trick or fraud has biologically inheritable traits which he who commits embezzlement lacks. . . .
>
> The equal protection clause would indeed be a formula of empty words if such conspicuously artificial lines [as those between larceny by fraud and embezzlement] could be drawn. . . . In *Buck v. Bell* . . . the Virginia statute was upheld though it applied only to feeble-minded persons in institutions of the State. But it was pointed out that '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.'

Id. at 542 (quoting Buck v. Bell, 274 U.S. 200, 208 (1927) (citations omitted)).

The concurring opinion of Chief Justice Stone stated:

> Undoubtedly a state may, after appropriate inquiry, constitutionally interfere with the personal liberty of the individual to prevent the transmission by inheritance of his socially injurious tendencies.

Id. at 545 (1942) (citing *Buck*).

that included both rights of procreation and of abortion, the Court cited *Buck v. Bell* as an example of a legitimate restriction on the right of procreation.[92]

But post-*Roe v. Wade* United States Supreme Court decisions concerning reproductive liberty do not refer to *Buck v. Bell.* And on the rare occasions since the 1960s that courts have approved the involuntary sterilization of mentally handicapped individuals, they have not appealed to eugenic goals. Rather, they have justified their decisions by reference to the interests of the individuals concerned.[93]

The absence of cites to *Buck v. Bell* in the post-*Roe* reproductive rights decisions of the U.S. Supreme Court may reflect some embarrassment about the case in the light of facts about it that have been unearthed in recent years, or in light of the sensibilities about mental handicap that have evolved since the 1970s. Or perhaps the questions that *Buck v. Bell* poses so starkly about the nature of our community interest in the reproductive conduct of others are considered moot, both as a practical and a theoretical matter. In the post-*Roe* era, reproductive choice are widely considered to be fundamentally private choices.

As a matter of fact, however, we never have enjoyed, and never could enjoy, reproductive privacy or liberty in a very broad or deep sense. This is not because our reproductive choices and liberties are unimportant—just the opposite. Because reproduction is so very important, it never can be free of a dense web of biological, social, ethical, religious, and legal conditions and constraints. While much of our legal and public policy discourse is

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91. 410 U.S. 113 (1973).

92. The Court noted that the privacy right is not absolute; there is not "an unlimited right to do with one's body as one pleases." *Id.* at 154. The Court continued: "The Court has refused to recognize an unlimited right of this kind in the past." *Id.* (citing *Buck*).

93. *See, e.g., In re* Wirsing, 573 N.W.2d 51 (Mich. 1998) (authorizing sterilization of a profoundly mentally handicapped woman on the basis that it would be in her best interests). For an introduction to the critical debate regarding sterilization of the mentally handicapped, and parenting by the mentally handicapped, see ROGER B. DWORKIN, LIMITS: THE ROLE OF THE LAW IN BIOETHICAL DECISION MAKING 54-60 (1996); Norman C. Fost, *Ethical Issues in the Care of Handicapped, Chronically Ill, and Dying Children,* PEDIATRICS REV., Apr. 1985, at 291; Robert L. Hayman, Jr. , *Presumptions of Justice: Law, Politics, and the Mentally Retarded Parent,* 103 HARV. L. REV. 1201 (1990); Elizabeth S. Scott, *Sterilization of Mentally Retarded Persons: Reproductive Rights and Family Privacy,* 1986 DUKE L.J. 806; S. Sheth & A. Malpani, *Vaginal Hysterectomy for the Management of Menstruation in Mentally Retarded Women,* 35 INT'L J. GYNECOLOGY OBSTETRICS 319 (1991); Joe Zumpano-Canto, *Nonconsensual Sterilization of the Mentally Disabled in North Carolina: An Ethics Critique of the Statutory Standard and its Judicial Interpretation,* 13 J. CONTEMP. HEALTH L. & POL'Y 79 (1996).

conducted in the one-dimensional language of rights and interests, we surely do not conduct our reproductive lives in a comparably one-dimensional world.

The decision in *Buck v. Bell* derives part of its rhetorical power from Holmes's use of a richer language than that of rights and interests. With bold strokes, Holmes sketches his conception of the meaning of our reproductive lives. If we are to arrive at a clear and comprehensive public understanding of the legacy of *Buck v. Bell*, an understanding that incorporates an adequate alternative conception, we will need to employ a richer language as well. It will not suffice to say that the wrong done to Carrie Buck consisted of an intrusion upon her liberty and the remedy consists in the establishment of a regime of reproductive rights, just as it will not suffice to say that the wrong done in *Korematsu* consisted of a deprivation of liberty and the remedy consists in the establishment of a regime of civil rights. If we are to construct the legacies of *Buck v. Bell* and of *Korematsu* so that they will be secure against the pressures of exigency, we must sink stronger and deeper roots. Perhaps we can come closer to constructing such a legacy for *Buck v. Bell* if we consider the third source of wrongdoing in the case.

Holmes's conception of our reproductive lives was closely bound up with the goals of the eugenics movement. It would appear that these goals have been thoroughly discredited. Legislatures no longer enact eugenic legislation, courts no longer sanction eugenic goals, and genetic counselors agree that it is illegitimate to promote eugenic goals in the course of genetic counseling.[94] If any part of the legacy of *Buck v. Bell* is secure, it would appear to be our shared public understanding of the illegitimacy of the project of eugenics. So we might conclude, in answer to the question posed at the conclusion of our consideration of the unsound science critique, that the legacy of *Buck v. Bell* would preclude involuntary sterilization of a mentally handicapped person for eugenic purposes.

But we must consider the new possibilities that the new genetic knowledge and technology of the twenty-first century will introduce. Private individuals may well enjoy the power to engage in voluntary genetic engineering of their children, whether to relieve them of disease or disability or to "enhance" their physical, mental, or behavioral features. Eugenicists of the

94. *See generally* Arthur L. Caplan, *Neutrality is Not Morality: The Ethics of Genetic Counseling, in* PRESCRIBING OUR FUTURE: ETHICAL CHALLENGES IN GENETIC COUNSELING 149 (Dianne M. Bartels et al. eds., 1993); *see also* Paul, *supra* note 34.

early-twentieth century saw sterilization, whether voluntary or involuntary, as the best means to attain their eugenic goals; the chief impediments to realization of these goals were the resistance of those targeted for sterilization and the shortcomings of eugenic science. But in a new era, neither impediment need interfere with the realization of eugenic goals. The legacy of *Buck v. Bell*, as we have constructed it to date, appears to offer us no instruction regarding voluntary genetic engineering in this new era. I propose, however, to extend our understanding of the legacy of *Buck v. Bell*.

V. EXTENDING THE LEGACY OF *BUCK V. BELL*

To begin, we might note that Carrie Buck was used quite callously by all concerned as an instrument to their various ends. But instrumental use of others, of the innocuous as well as the offensive sort, is a commonplace in human affairs. What is distinctive about the abuse of Carrie Buck is that it consisted in targeting her as one might target livestock in a scientific breeding program; in her case, she was targeted for elimination from the breeding stock.

I suggest that this treatment of Carrie Buck was the product of a particular project pursued by those who held a particular sort of scientific worldview. From the perspective of this worldview, human beings appear as appropriate subjects for the assertion of scientific and technological mastery. This assertion of mastery is justified by the claimed improvement it brings in human welfare.

We might refer to this particular project as the project of "Baconian reflexivity." The larger project of Francis Bacon and his heirs—some might say, the chief project of modernity—was to develop and apply scientific and technological mastery of the natural world to advance human welfare.[95] In the reflexive turn

95. Cameron Wybrow summarizes the historical roots of the Baconian project:

> In the spirit of the Renaissance, Baconianism emphasized the high rational and creative potential of man, but in addition, it fostered a new, more aggressive attitude toward nature, an attitude which can be identified as the dominant modern one . . . . The Baconians pointed to the Bible, especially the Old Testament, as their inspiration for the idea of a virtually unlimited human dominion over nature, a dominion to be sustained by a penetrating inquiry into nature and an intensive manipulation of nature through human art.

CAMERON WYBROW, THE BIBLE, BACONIANISM, AND MASTERY OVER NATURE: THE OLD TESTAMENT AND ITS MODERN MISREADING 173 (1991).

Assessments of the feasibility and worth of this larger Baconian project surely differ, but these assessments are not the concern of this Article.

in this project, the Baconian sights are trained upon human beings, conceived now as constituents of the natural world. It is this exercise in Baconian reflexivity—in this case, the assertion of control over what kinds of people there should be—that is the fourth source of wrongdoing in *Buck v. Bell.*

The scientific worldview that supports this particular project is exemplified by the jurisprudence of Holmes. Holmes has been variously characterized as progressive and conservative;[96] utilitarian and poet;[97] a bulwark against those who would infringe

96. See the discussion of Holmes as dubious progressive in G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 378-411 (1993). As G. Edward White notes, Holmes's reputation as a progressive was primarily owing to his judicial deference to legislative reform measures, most of which he did not agree with. *See id.* at 390-91. As White writes:

> [Holmes believed] that majoritarian power and force were the principal determinants of social policy, that such power and force were only temporarily held, and therefore that the "progression" of various policies in the history of a nation was simply one majority temporarily shifting its burdens to its neighbors. Such views were hardly consistent with enthusiasm for legislative policies in themselves, or even with enthusiasm for legislative "solutions" to perceived social problems, except as contrasted with the outright killing of the enemies of the majority.

Id. at 391.

Evidence of Holmes's underlying conservatism appears in his correspondence:

> I think the robbery of labor by capital is a humbug. The real competitors are different kinds of labor. The capitalist by his power may turn a part into directions that you deem undesirable—but if he does he does it because he thinks a body of consumers will want the product and he is the best prophet we can get. Some kind of despotism is at the bottom of the seeking for change. I don't care to boss my neighbors and to require them to want something different from what they do—even when, as frequently, I think their wishes more or less suicidal. It is not really theory but a prophecy that the crowd having got the power will use it to smash this or that that lays the foundation for much of the fundamentally innovating talk.

Letter from Oliver Wendell Holmes to Harold J. Laski (May 12, 1927), *in* 2 HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI, 1916-1935, at 941-42 (Mark DeWolfe Howe ed., 1953).

97. On Holmes as utilitarian, H. L. Pohlman writes, "[m]y thesis is that the central core of Holmes's substantive jurisprudence and philosophical methodology arose from the premises of utilitarian legal philosophy." H.L. POHLMAN, JUSTICE OLIVER WENDELL HOLMES & UTILITARIAN JURISPRUDENCE 4 (1984). Richard Posner, who also acknowledges a utilitarian character to Holmes's jurisprudence, nonetheless locates the heart of his jurisprudence in his rhetoric. He writes:

> . . . Holmes's true greatness is not as a lawyer, judge, or legal theorist in a narrowly professional sense of these words, but as a writer, and, in a loose sense . . . as a philosopher—in fact as a "writer-philosopher"; and . . . his distinction as a lawyer, judge, and legal theorist lies

upon the liberties of the people and an insensitive, detached, and uncaring rubber stamp for abuse of the weak by the powerful;[98] America's greatest jurist and America's greatest judicial failure.[99] Perhaps the most helpful way to understand Holmes's jurisprudence, at least for purposes of my argument here, is in the way he chose to represent it—as an exemplification of law conceived as science.[100]

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precisely in the infusion of literary skill and philosophical insight into his legal work.

Richard A. Posner, *Introduction* to THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR. at xvi (Richard A. Posner ed., 1992) [hereinafter THE ESSENTIAL HOLMES].

98. White acknowledges a basis for Justice Holmes's reputation as a protector of free speech, but notes an apparent inconsistency with other aspects of his jurisprudence:

> In speech cases Holmes came to develop a framework that viewed legislative regulation of expression with suspicion and even hostility. Among the rationales he formulated to justify protection of "unpopular" speech was that of the "marketplace of ideas," in which novel opinions were given an opportunity to secure popularity and stature. The model of the "marketplace of ideas" has appeared radically inconsistent with Holmes' approach to cases involving economic regulation, where he was prepared to tolerate considerable legislative interference with existing market arrangements, whether he approved of the legislation or not.

WHITE, *supra* note 96, at 413.

Judge John T. Noonan, Jr. concludes that Holmes's decision in *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909), reveals Holmes's preference for the abstract and the general, and how he blinkered himself to facts about the real world that were essential to reaching just decisions that would protect the vulnerable against abuses of power. *See* JOHN T. NOONAN, JR., PERSONS AND MASKS OF THE LAW 65-110 (1976).

99. For examples of largely positive assessments, see LIVA BAKER, THE JUSTICE FROM BEACON HILL: THE LIFE AND TIMES OF OLIVER WENDELL HOLMES (1991); THE ESSENTIAL HOLMES, *supra* note 97; David Rosenberg, *The Path Not Taken*, 110 HARV. L. REV. 1044 (1997). For examples of largely negative assessments, see Louise Weinberg, *Holmes' Failure*, 96 MICH. L. REV. 691 (1997); Robert W. Gordon, *The Path of the Lawyer*, 110 HARV. L. REV. 1013 (1997).

100. Holmes repeatedly expressed his commitment to this conception:

> I have had in mind an ultimate dependence upon science because it is finally for science to determine, so far as it can, the relative worth of our different social ends, and, as I have tried to hint, it is our estimate of the proportion between these, now often blind and unconscious, that leads us to insist upon and to enlarge the sphere of one principle and to allow another gradually to dwindle into atrophy. Very likely it may be that with all the help that statistics and every modern appliance can bring us there never will be a commonwealth in which science is everywhere supreme. But it is an ideal, and without ideals what is life worth?

This scientific worldview infused Holmes's theory both of common law and legislative decision-making.[101] He flatly rejected the notion that the common law consists of a fixed and permanent body of precepts that must be applied without regard to social needs or the relative costs of alternative rules. He believed that legislative policy-making should be guided by norms of rational decision-making; legislative goals should be clearly identified and means to these goals should be selected on the basis of their relative efficacy and costs. Holmes has been praised for his early appreciation of the importance of economic

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Oliver Wendell Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 462 (1899); *see also* Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897) [hereinafter Holmes, *The Path of the Law*].

Philip Wiener relates the various strands in the jurisprudence of Holmes to his commitment to law as a scientific enterprise:

> It was a natural thing for Holmes to admire the positivistic ideas of [Chauncey] Wright and [Nicholas St. John] Green. Both were emancipated from theology and a priori metaphysics in their discussions of the fundamental problems and methods of the natural and social sciences, and Holmes saw in their secular naturalism and utilitarian ethics the path of enlightenment in the growth of the law. With Green and Wright, Holmes accepted the utilitarianism of Bentham and Mill alongside of the nineteenth-century evolutionary historicism of E. B. Tylor and Sir Henry Maine. Holmes took the analytic method of pre-Darwinian English positivistic thinkers and the comparative genetic method of evolution as furnishing the twin keys to law as an evolving institution and as an anthropological document for the science of jurisprudence.

PHILIP P. WIENER, EVOLUTION AND THE FOUNDERS OF PRAGMATISM 174-75 (1949). *See generally* DAVID H. BURTON, POLITICAL IDEAS OF JUSTICE HOLMES 22-40 (1992).

101. Holmes wrote:

> We must beware of the pitfall of antiquarianism, and must remember that for our purposes our only interest in the past is for the light it throws upon the present. I look forward to a time when the part played by history in the explanation of dogma shall be very small, and instead of ingenious research we shall spend our energy on a study of the ends sought to be attained and the reasons for desiring them. As a step toward that ideal it seems to me that every lawyer ought to seek an understanding of economics. The present divorce between the schools of political economy and law seems to me an evidence of how much progress in philosophical study still remains to be made. In the present state of political economy, indeed, we come again upon history on a larger scale, but there we are called on to consider and weigh the ends of legislation, the means of attaining them, and the cost. We learn that for everything we have we give up something else, and we are taught to set the advantage we gain against the other advantage we lose, and to know what we are doing when we elect.

Holmes, *The Path of the Law*, *supra* note 100, at 474; *see* Richard A. Posner, *The Path Away from the Law*, 110 HARV. L. REV. 1039 (1997); Rosenberg, *supra* note 99.

analysis to legal analysis,[102] and criticized for the ineptitude of his effort to construct a science of law from a hodgepodge of vague economic notions.[103]

Holmes also believed that science was key to constitutional jurisprudence. He was heavily influenced by evolutionary science and its naturalistic social applications; he believed that the fundamental story of biological life as well as human intellectual and social life was the struggle for survival. The "unfit" among biological creatures, ideas, and social policies would—and should—be weeded out by evolutionary processes.[104]

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102. *See* Posner, *supra* note 101; Rosenberg, *supra* note 99.

103. As Richard Parker writes of Holmes's failing:

> To reconstruct legal language in service to legal thought, he says that, first, we must 'know what we are doing.' We must recognize that we are making 'legislative' choices of policy. Next, we must 'refer' legal doctrine explicitly to those choices. Finally, we must try to make the 'best' choices. But how? On this point—a crucial point—Holmes notoriously wobbles. Initially, he just says that we have to 'state in words' (rather than Morse code?) the 'grounds' for our choices. But what counts as the best grounds, and why? At times, Holmes uses words suggesting he has in mind some sort of method to yield the answers. He describes some policies as 'rational.' He talks of 'show[ing]' whether a policy does 'more good than harm.' He even says we can aspire to 'prove' or 'discover' which policy is best on balance, if only for 'here and now.' And he supplements all this with his famous insistence that lawyers be trained in statistics and economics. They should, he says, be 'men of science.' And so on. Where is Holmes-the-'cynic' when we need him? His most 'idealistic' language—and let's face it—it is vague, obfuscatory, smug language—*begs* for a bath in the same 'acid' with which he washed the language of morality, logic and tradition.

Richard D. Parker, *The Mind Of Darkness*, 110 HARV. L. REV. 1033, 1036 (1997) (citations omitted).

Noonan writes of Holmes's obliviousness to the shortcomings of his 'method':

> In later essays, Holmes was sometimes a meliorist and a reformer, and advocated an approach to law closer to engineering than biology. The law was to be improved, and improved by measurement. Quantitative judgments should replace haphazard guessing. What was to be measured? 'The relative worth of our different social ends.' How was such worth to be measured? By determining the intensity of our social desires. Who would determine them? Opinion polls and survey research were not yet in vogue. The measurement of intensity would have to be done by 'the great judge,' who accurately appraised the requirements of the community. That social ends terminate in individual persons, that social desires exist in individual persons, was not observed. Ends or desires were taken globally as forces capable of calculation by the judicial expert.

NOONAN, *supra* note 98, at 70; *see also* Tracy E. Higgins, *Straying from the Path*, 110 HARV. L. REV. 1019 (1997) (applying a feminist critique to Holmes's method).

104. Wiener writes of the influences on Holmes's thinking:

Domination by virtue of superior power, in Holmes's positivist take on the law, provided the normative standard by which the Court in its constitutional jurisprudence should assess outcomes of the legislative process. Opinions of the justices about the merits of legislative enactments should play no role in determining their constitutionality. Hence, Holmes famously admonished his colleagues for their activism in *Lochner v. New York*,[105] writing in dissent that "[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer's *Social Statics*."[106] However persuaded Holmes might be by Spencer's claims, deference to the outcome of the evolutionary process was what constitutional jurisprudence demanded: "Every opinion tends to become a law. I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion . . . ."[107]

Holmes's scientific worldview explains the apparent contradictions in his jurisprudence. He was aligned at times with progressives, at other times with conservatives, depending upon his interpretation of his outcome of the social evolutionary struggle. He supported individual rights if they contributed to the evolutionary process that would weed out "unfit" ideas, while turning a cold shoulder to the demands of the weak for protection against the powerful—the assertion of dominance by the powerful was the way of evolution. He espoused a utilitarianism that would incorporate the science of economics and statistics in

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> Holmes shared with [Chauncey] Wright an Emersonian conception of a wisdom in nature's evolutionary processes, even when they appear to be most ruthless in eliminating the unfit. . . . Wright's view of the economic side of the class struggle for survival in society probably influenced Holmes, who lived through sixty years more of the growing industrial strife of our modern United States. . . . Holmes regularly argued against adopting a socialistic program which ignored the cost of a revolutionary overthrow of the system of private property. . . . Holmes went so far, however, as to say that if the public mind ever evolved to the point where it wanted socialism, he would vote and fight legally against it, but would accept it only if the public force prevailed in a majority show of strength. The "social Darwinism" of Holmes appeared in his Malthusian critique of socialism: 'I believe that Malthus was right in his fundamental notion, and that is as far as we have got or are likely to get in my day. Every society is founded on the death of men, . . . I shall think socialism begins to be entitled to serious treatment when and not before it takes life in hand and prevents the continuance of the unfit.'

WIENER, *supra* note 100, at 176-77 (quoting letter from Holmes to Dr. Ching-Hsiung Wu, July 21, 1925).

105. 198 U. S. 45 (1905).

106. *Id.* at 75 (Holmes, J., dissenting).

107. *Id.* at 76.

policymaking, and he wrote as a poet, seized by a vision of law as pure science.

Holmes's scientific worldview also underwrote his enthusiasm for Virginia's involuntary sterilization statute. As Holmes wrote to a correspondent concerning his decision in *Buck v. Bell*:

> I wrote and delivered a decision upholding the constitutionality of a state law for sterilizing imbeciles the other day—and felt that I was getting near to the first principle of real reform. I say merely getting near. I don't mean that the surgeon's knife is the ultimate symbol.[108]

Here was a legislative measure that was the product of the evolutionary legislative struggle, that enlisted the claims of science and the knife of the surgeon in furtherance of the evolutionary biological struggle, and that plainly satisfied any utilitarian calculus—demanding only "lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence."[109] It is no wonder that Holmes welcomed the opportunity to write the decision. As Holmes wrote to a correspondent, "[o]ne decision that I wrote gave me pleasure, establishing the constitutionality of a law permitting the sterilization of imbeciles."[110]

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108. Letter from Oliver Wendell Holmes to Harold J. Laski, (May 12, 1927), *in* 2 THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI, 1916-1935, *supra* note 96, at 942.

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

110. Letter from Oliver Wendell Holmes to Lewis Einstein (May 19, 1927), *in* THE HOLMES-EINSTEIN LETTERS: CORRESPONDENCE OF MR. JUSTICE HOLMES AND LEWIS EINSTEIN, 1903-1935, at 267 (James Bishop Peabody ed., 1964).

Holmes mentioned the decision and its aftermath in several letters. In a letter to Harold Laski, Holmes wrote "[t]hat which was given to me Saturday evening and was written yesterday concerned the constitutionality of an act for sterilizing feeble-minded people, with due precaution—as to which my lad tells me the religious are astir. I have just sent what I think to the printer." Letter from Oliver Wendell Holmes to Harold J. Laski, (Apr. 25, 1927), *in* 2 THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI, 1916-1935, *supra* note 96, at 937-38.

And in a letter to Laski a few days later, he wrote:

> I have had some rather interesting cases—the present one, as I believe I mentioned, on the Constitutionality of the Virginia act for the sterilizing of imbeciles, which I believe is a burning theme. In most cases the difficulty is rather with the writing than with the thinking. To put the case well and from time to time to hint at a vista is the job.

Letter from Oliver Wendell Holmes to Harold J. Laski (Apr. 29, 1927), *in id.* at 938-39.

Several months later, Holmes wrote to Laski:

> Cranks as usual do not fail. One letter yesterday told me that I was a monster and might expect the judgment of an outraged God for a

In Holmes's jurisprudence, law was an exercise in social scientific mastery over the conduct of human social affairs, and eugenics was an exercise in scientific and surgical mastery over the conduct of human reproductive affairs, all for the purpose of advancing human welfare along the path of evolution. Holmes never paused to question the goals of the eugenics program. It was obvious to him that the evolutionary struggle would favor the intelligent and socially adept—that is, people like him.

So it is not surprising that Holmes never paused to consider whether the scientific evidence in *Buck v. Bell* might be suspect, whether Carrie Buck should enjoy reproductive rights, or whether a legislative program of eugenics might be an illegitimate exercise of state power. His scientific worldview reduced the issues surrounding Carrie Buck and her family to a problem of human pest control and its surgical implementation, an eminently soluble problem given the partnership of modern science and modern scientific jurisprudence. His commitment to the scientific worldview was as thoroughly unscientific as any blind faith could be: incautious, unreflective, incurious and unreceptive to challenges posed from outside the faith.

The exercise in Baconian reflexivity in the case of *Buck v. Bell* happened to be an instance of forced sterilization pursuant to a coercive, governmentally sanctioned program of eugenics. But science and technology are the willing servants of any who have the capacity to employ them. And many others may well share the scientific worldview that led Holmes and the others involved in *Buck v. Bell* to conclude that they knew what kinds of people there should be and that they were justified in implementing their judgments.

IV. GENETIC ENHANCEMENT AND THE LEGACY OF *BUCK V. BELL*

I consider next a potential new exercise in scientific and technological mastery over humankind: the practice of genetic enhancement. My goal is twofold: to develop my claim that the

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decision that a law allowing the sterilization of imbeciles was constitutional and for the part that I had taken in other decisions that were dragging the country down.

Letter from Oliver Wendell Holmes to Harold J. Laski (July 23, 1927), *in id.* at 964.

Holmes mentioned the decision in his correspondence with Felix Frankfurter as well, "I think my cases this term have been of rather a high average of interest, e.g., the Virginia Sterilizing Act." Letter from Oliver Wendell Holmes to Felix Frankfurter (May 14, 1927), *in* HOLMES AND FRANKFURTER: THEIR CORRESPONDENCE, 1912-1934, at 212 (Robert M. Mennel & Christine L. Compston eds., 1996).

application of science and technology to exercise control over what kinds of people there should be is indeed wrongful; and to show that the practice of genetic enhancement is such an exercise in Baconian reflexivity and, hence, its restriction should be part of the legacy of *Buck v. Bell.*

Advances in genetic science and technology in the twenty-first century may well give us the power to alter the genetic constitutions of our children through genetic engineering, whether to cure or forestall disease or to "enhance" human features.[111] Genetic enhancements might include "cosmetic enhance-

111. Genetic engineering, as used here, refers to altering the genetic constitution of the human body. Genetic engineering may be accomplished through germ-line therapy, by alteration of the genetic constitution of the gametes or sex cells of the parents of a future human being or by alteration of all of the cells of the pre-embryo. Germ-line engineering thus assures that, absent future interventions, the genetic constitution of the human target of the genetic engineering will be altered, as will the genetic constitution of all the children of that target. This is so because every cell, including the sex cells of that individual, will incorporate the genetic alteration. Genetic engineering also may be accomplished by somatic cell therapy by which selected cells of a developing fetus, child, or adult are targeted for the insertion of new genetic material that is incorporated into the cells and affects their functioning thereafter.

Germ-line engineering, by its nature, must be performed before a child is born. Somatic cell therapy theoretically could be performed at any time from conception to death.

Genetic engineering, whether germ-line or somatic cell, may be performed for two different purposes. The first purpose is to cure or prevent disease, disfigurement, or disability. This is called "genetic therapy." The second purpose is to enhance appearance or functions that fall within the normal range for the human species. This is called "genetic enhancement."

There are ongoing efforts at somatic cell genetic therapy. The practice is relatively uncontroversial; concerns center chiefly upon its safety and efficacy. Somatic cell genetic enhancement is not now possible and the possibility of engaging in the practice in the future has not received much attention to date.

Germ-line genetic therapy and germ-line genetic enhancement are not now possible. The possibility of engaging in these practices in the future is controversial for two reasons. First, some question the ethical propriety of altering the human germ-line. Second, some question the ethical propriety of engaging in germ-line genetic therapy or germ-line genetic enhancement if these practices would be performed in conjunction with the practice of in vitro fertilization (some question the ethical propriety of in vitro fertilization under all circumstances, others under circumstances that involve the destruction of embryos or the implantation of numerous embryos in anticipation of reduction abortion).

Germ-line genetic enhancement is also controversial for additional reasons explored in this article. *See generally* LEROY WALTERS & JULIE GAGE PALMER, THE ETHICS OF HUMAN GENE THERAPY (1997); JEFF LYON & PETER CORNER, ALTERED FATES: GENE THERAPY AND THE RETOOLING OF HUMAN LIFE (1995); EVE K. NICHOLS, HUMAN GENE THERAPY (1988).

ments"—altering aspects of physical appearance such as height, eye color, facial features, and so on. Also possible might be "capabilities enhancement"—altering faculties such as intelligence, strength, agility, and so on. Third, "behavioral enhancement"—altering predispositions to display traits such as kindness, empathy, gentleness, or a particular sexual orientation—also might be possible, although this remains the most scientifically dubious.

Imagine now, a state of affairs in which we have good reason to believe that we can safely and effectively engage in genetic enhancement. Our scientific theories are well supported by observational and experimental evidence and there is a wide and deep consensus in the scientific community that these theories are true or at least approximately true. In addition, we have developed our technical expertise through repeated and successful genetic enhancements of animals. Imagine also that the regime of constitutionally protected reproductive rights in force is roughly the same as that which prevails today. And imagine, finally, that enactment of a coercive, governmentally sanctioned program of eugenics employing genetic enhancement technology is unthinkable. The political and social consensus is roughly the same as that which prevails today and it precludes any realistic possibility of enacting such a program.

I note two important points about this imagined state of affairs. First, the conditions I have specified would foreclose the possibility of recurrence of the three wrongs constitutive of our current understanding of the legacy of *Buck v. Bell.* Second, the state of affairs I have characterized constitutes my best guess as to the actual state of affairs that will prevail in the not-too-distant future.

Given this assumed state of affairs, I will consider, first, the potential benefits and harms that might result from the three potential sorts of genetic enhancement—cosmetic, capabilities, and behavioral. I will then broaden the scope of my consideration of these practices in support of my claim that they would be wrongful and that the legacy of *Buck v. Bell* should include their restriction.

Assuming that cosmetic enhancement were safe and effective, that our society continued its commitment to a strong regime of reproductive rights, and that parents were not coerced to engage in the practice—all assumptions included in our imagined state of affairs—there appears to be no obvious reason why the practice should be restricted. Achieving an improved appearance is widely considered a positive accomplishment. We encourage efforts to improve appearance, as by developing good

grooming practices, and cosmetic surgeries aimed at improving appearance are very popular among those who can afford them.

Although the scope of reproductive rights might be controversial with respect to certain parental decisions, such as those in connection with abortion, the decision to enhance one's offspring so as to improve their appearance would not appear to present similar concerns.[112] Parents now are free to engage in reproductive conduct that affects the appearance of their children—by their selection of mates or of donated gametes, in the case of assisted reproduction. Parents also are free to make grooming and clothing determinations for young children, and parental influence in these matters may well persist throughout children's lifetimes.

Concerns might arise, however, with respect to parental choices that do not appear to serve the best interests of their children. For example, some parents now arrange for their children to receive injections of human growth hormone to increase their stature. Some commentators suggest that it is ethically wrong to submit a child to a painful series of shots because of parents' unwarranted concerns about the future stature of the child.[113] Perhaps we should be similarly concerned that parents might cosmetically enhance their children due to unwarranted parental concerns about the adequacy of their children's appearance.

There is always the risk that well-intended parental interventions may do more harm than good, however. Cosmetic enhancement would not appear to introduce any novel concerns in this sense, just a novel context within which the benefits and harms of intervention would have to be sorted out. It is not obvious on its face that these interventions—which, unlike injections of human growth hormone, would involve no physical pain and which, we have assumed, would be safe and effective—would always or usually do more harm than good. In fact, it seems

112. See articles generally favoring permitting genetic enhancements and asserting that the practice should fall within the scope of protected reproductive rights: JONATHON GLOVER, WHAT SORT OF PEOPLE SHOULD THERE BE? (1984); John Harris, *Is Gene Therapy a Form of Eugenics?* 7 BIOETHICS 178 (1993); Ronald Munson & Lawrence H. Davis, *Germ-Line Gene Therapy and the Medical Imperative*, 2 KENNEDY INST. ETHICS J. 137 (1992); David Resnick, *Debunking the Slippery Slope Argument Against Human Germ-line Gene Therapy*, 19 J. MED. & PHIL. 23 (1994).

113. For a thoughtful discussion of the issues involved in the administration of human growth hormone therapy, see GLENN MCGEE, THE PERFECT BABY: A PRAGMATIC APPROACH TO GENETICS (1997).

likely, given the value we place upon appearance, that these interventions generally would accomplish more good than harm.

But what of parents whose motivations were plainly self-centered rather than well-intended, as revealed, for example, by eccentric cosmetic enhancements that made their child appear ridiculous or offensive to others? In this case, again, cosmetic enhancement would appear to introduce no novel issues. Some parents are more self-centered than others and their parenting choices of all sorts will reflect this fact. We police parental conduct of this sort at the margins by child abuse and child neglect laws. We could police the margins of cosmetic enhancement as well, enforcing restrictions through regulation of health care professionals who perform the enhancement procedures.[114]

There might be two additional concerns peculiar to the context of cosmetic enhancement, however. First, because preferences in appearance are determined at least in part by changing social fancies, and because genetic enhancement permanently alters appearance, the practice might result in self-defeating cycles that would undermine the ability of parents to make rational calculations of potential benefits and harms. For example, just as a large cohort of girls—engineered to be the unobjectionable and hence cosmetically preferred height of 5 feet 8 inches tall—came to maturity, socially preferred heights for girls might change, in part in response to the very abundance of girls of 5 feet 8 inches in height.

Second, genetic enhancement would enable parents to alter features we have identified as distinctive to racial groups. What if it were the case that future parents of children of color determined that their children's best interests, measured by life opportunities within our society for the foreseeable future, would best be served by engineering lighter skin?[115] The availability of cosmetic enhancement technology might present caring parents with choices they would prefer not to have.

Perhaps these concerns are far-fetched though. The risk of self-defeating cycles would be unlikely, and even if they occurred, the magnitude of the resulting harm likely would not be great. And parental interventions to alter racial features likely would be uncommon given the value placed upon identification with

114. See discussion favoring restrictions that assure that enhancements do not limit the range of opportunities available to a child in Nicholas Agar, *Designing Babies: Morally Permissible Ways to Modify the Human Genome*, 9 BIOETHICS 1 (1995).

115. There are anecdotal reports of such choices in gamete donor cases. *See* GINA MARANTO, QUEST FOR PERFECTION: THE DRIVE TO BREED BETTER HUMAN BEINGS 270 (1996).

racial and ethnic communities. So these particular concerns do not obviously outweigh the potential benefits of cosmetic enhancement.

Genetic enhancement directed at enhancing capabilities—faculties or abilities such as intelligence, strength, or agility—would pose a different set of questions. At the outset, it would appear that capabilities enhancement would hold the prospect of providing far more benefits than cosmetic enhancement.

Unlike preferences for enhanced appearance, preferences for enhanced capabilities presumably would not reflect passing social fancies; any child in any time or place and pursuing any life plan would benefit from enhanced capabilities. Furthermore, capabilities enhancement presumably would yield positive social consequences; enhanced individuals would be more likely to make enhanced contributions to society.

Perhaps, then, we would not only tolerate capabilities enhancement, but encourage it, just as we encourage education because every child benefits from an education and all of society benefits from the "positive externalities" that accrue from educated citizens. Perhaps parents who failed to obtain such enhancements for their children would be considered guilty of neglect, as with parents who fail to ensure that their children obtain an adequate education. In fact, it might be appropriate to fund equal access to these enhancements so that parents could satisfy their obligations.

In might also be necessary to fund equal access—both as a matter of fairness and to avoid the social tension that would result if equal access were not funded.[116] It is one thing to watch the well-to-do send their children to private schools in private cars while one's own ride the public school buses to public schools—we still believe there remains the chance to cultivate our children's talents such that they can compete well and contribute to society. But it would be quite another thing to see the well-to-do enjoy a bump-up in talent before they even crossed the thresholds of their private schools.

Thus, the importance and value of capabilities enhancement would appear to recommend government subsidization. Presumably, this governmental involvement would be viewed positively, as with the subsidization of educational opportunities, rather than as an unwelcome return to a governmentally sanctioned program of eugenics. Every child would be entitled to basic capabilities enhancement just as every child now is entitled to a

116. See the working out of the fair distribution argument in Resnick, *supra* note 112.

basic education. With this subsidization in place, one or two generations of parents might preside over the genetic redesign of our species—or our successor species—just as earlier generations presided over the universalization of education.

There might be some concerns, though, about the social consequences of this redesign. To this point, the natural distribution of various capabilities has led some to certain lines of work, and others to different lines of work, subject to the vagaries of family and social circumstance and of luck. The results of an artificially contrived distribution of capabilities might mean that all positions would have to be determined by these vagaries since everyone might be nearly equal in their capabilities. Or we might institute a lottery to determine who, among the equally well-endowed intellects and athletes, for example, would be granted the opportunity to work in academia or on the playing field. Or perhaps parents would tailor the capabilities of their children in distinctive ways reflecting their personal preferences or their sense of the job market, or in accordance with a national plan establishing what sorts of workers were needed.

Perhaps, though, we should reexamine our initial assumption that enhanced intelligence, strength, and the like would be undeniably valuable. What if there is no all-purpose set of capabilities that in fact is likely to improve everyone's experience of life and to yield benefits to society as well?

The connection between a person's ability to lead a good life—as measured by happiness, success, or any other conception—and a set of capabilities—such as intelligence, memory, strength, or agility—is anything but obvious. Only if we limit our conception of the good life to a life lived with enhanced capabilities or a life lived with an abundance of that which enhanced capabilities enables us to attain, whatever that might be, must we conclude that the connection is secure. It is true that, intuitively, we believe there must be a connection. But this is likely because we now associate high-status jobs and social position with certain capabilities or with that which these capabilities enable their bearers to attain. But, for example, athletes have not always been so well paid and widely admired. Just as with personal appearance, the value we attach to capabilities is, at least in part, a matter of passing fancy.

And the connection between capabilities enhancement and the improvement of our society is not obviously true either. The assumption that those who possess enhanced capabilities will contribute something more and better than those who do not is deeply problematic. The havoc wrought by a few bright minds—despots and criminals, as well as reformers and utopians—must

exceed, by any measure, the trivial costs imposed upon their fellows by those who cannot read or walk. Whether a society of the many bright minds would be a better society or even a good society is at least an open question. To raise these issues more concretely, as between Justice Holmes and Carrie Buck, who led the better life? Who brought a greater measure of good than harm to the world?

Although capabilities enhancement would appear at first blush to be more likely to yield net benefit than cosmetic enhancement, on closer examination it appears to introduce more nettlesome concerns—concerns not easily dismissed as farfetched. The last sort of genetic enhancement—behavioral enhancement—raises more and different concerns.

The prospect of behavioral enhancement arouses considerable controversy, first, because the nature of the link between genetic endowment and behavior is hotly contested, and, second, because the determination that there is a strong link could have important implications for our conception of ourselves as beings who make choices and deserve judgments of merit and blame.[117] If indeed we developed the ability to work significant changes in behavioral traits by genetic enhancement technology, the controversy regarding free will and culpability would expand exponentially.[118]

But these concerns are a bit abstract, more the concerns of philosophers than parents. We might conclude that, if we could develop the power to improve the behavioral traits of our children, parents surely would want to do so, and surely should be encouraged to do so. The benefits to children and the world if parents engineered their children to be kind, empathic, and gentle could be enormous.

But would caring parents in our imagined state of affairs, a state of affairs much like that which prevails at present, choose to engineer for this set of behavioral traits? Kindness might slow the combative reflexes, empathy offers no benefit in a fight, and gentleness invites overreaching by others.

It is hard to know. We are accustomed to the age-old dialectic of parental efforts to influence the behavior of their children,

117. While the scientific feasibility of engineering polygenic features, such as intelligence, involving a strong environmental influence is debatable, the feasibility of engineering dispositions, such as kindness, altruism, or generosity, is far more dubious both because of uncertainty about the nature of the genetic contribution to these dispositions and because of the undeniable importance of environment in the development of these features. *See generally* WALTERS & PALMER, *supra* note 111.

118. *See generally* sources cited *supra* note 112.

met by intractable resistance and unanticipated consequences, followed by parental efforts reconceived, met by resistance reconceived and modest movement. If parents were granted the power to realize their fantasy, to order up children predisposed to the behavioral traits their parents thought best for them, what would they choose? And what would be the consequences for them, their children, and society?

To this point, we have marshaled arguments about the benefits and harms that might accrue from the voluntary practice of genetic enhancement. These arguments are inconclusive; reasonable people could disagree about whether the practice would yield, on balance, benefit or harm for children, their parents, or society. Given that we cannot establish an excess of harm over benefit, and given our assumed commitment to reproductive rights in our imaginary state of affairs, it would appear that those favoring the liberty to engage in the practice would prevail.

But we have not yet considered all of the arguments for the wrongfulness of the practice, although our consideration of benefits and harms has raised questions and concerns that direct us toward these arguments. Our discussion to this point has centered upon considerations that typically might arise in discussions of dog breeding, for example, or the breeding of other domestic animals. What sort of coat, hunting skills, and temperament would we prefer, all things considered?

We are accustomed to addressing these sorts of questions in connection with animals—we have long considered them appropriate subjects for the exercise of mastery for human benefit—but to consider these questions in connection with our future children is unsettling. Perhaps our discomfort is due simply to our unfamiliarity with the practice. But perhaps our discomfort is connected to deeper concerns about ethical limits to the control we should assert over other human beings in pursuit of our judgments of the way they should be.

We now see children as given and nurtured, not designed and bred, whether given by nature or God or a birth mother handing over a child for adoption. If we engage in the practice of genetic enhancement, our children would join the rest of the natural world as subjects of our assertions of mastery, reflecting our determinations of what kinds of people there should be as we now determine what kinds of sheep, houses, and airplanes there should be.

We might well arrive at a view of what kinds of people there should be that is as largely standardized as are our conceptions of sheep and houses and airplanes. Or we might come to delight in

breeding exotica. It is difficult to predict given our limited experience with assimilating our children to all the other constituents of the natural world that we now survey through Baconian sights.

Engaging in genetic therapy to relieve suffering or cure or prevent disease or disability surely is consistent with our current shared conception of our children. There is in this motivation no presumption that we are entitled to assert mastery over them to work an improvement in their design. Although the line between genetic therapy and genetic enhancement may appear perilously difficult to define and enforce, it is a line that is real. It is the line between compassion and hubris, between respecting the autonomy and worth of other human beings and regarding others as suitable subjects for our evaluation and "improvement."

We see in *Buck v. Bell* the decision of a person who was utterly devoid of compassion and respect for another human being. This failing is not unique to Holmes, and exercises in Baconian reflexivity are not the only occasions for display of this failing, as contemplation of any of the judicial decisions that we recognize as horrendously wrong reveals. But in constructing the legacy of *Buck v. Bell*, we have an opportunity to learn from Holmes.

In the new genetic era, the Baconian temptation will be difficult to resist. The promise of improvement through science is very real—the twentieth century, in particular, has brought enormous advances in our capacity to relieve suffering and to cure and prevent disease and disability. Why not focus our concern, then, upon maximizing the potential benefits of genetic enhancement and minimizing the potential harms?

The importance of our liberty to procreate also is very real—the thought of coercive governmental intrusion upon this liberty, whether to accomplish eugenic goals or any other goals, is immediately and profoundly offensive. Why not extend this procreative liberty, then, to encompass the right to enhance our offspring, subject to limits aimed at minimizing potential harms?

But we have decided in other contexts—contexts in which some of us otherwise would have the power to impose our choices upon others of us—that we must impose limits upon the exercise of that power. Employers are not free to engage in sexual harassment of their employees, parents are not free to neglect their children, spouses are not free to abuse their spouses. Science cannot instruct us on what these limits should be, and the language of constitutional rights and interests captures only one dimension of our reproductive lives. We must

decide whether to impose limits upon the power we may exercise in our reproductive lives to determine the genetic constitutions of our children. We can find guidance on this question in the legacy of *Buck v. Bell.*