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ARTICLES

MEDICINE, EUGENICS, AND THE SUPREME COURT: FROM COERCIVE STERILIZATION TO REPRODUCTIVE FREEDOM*

*Paul A. Lombardo***

I. INTRODUCTION

The idea that the human race can be gradually improved and social ills simultaneously eliminated through a program of selective procreation was widely accepted through the first third of the twentieth century. The term applied to this seductive notion was eugenics, and it gave rise to a movement that found adherents throughout American society. Every president from Theodore Roosevelt to Herbert Hoover was a member of a eugenics organization, publicly endorsed eugenic laws, or signed eugenic legislation without voicing opposition.¹

The most powerful vehicle of the eugenic ideology was the law. If we evaluate the eugenicists on their legislative accomplishments, and calculate the number of people affected by "eugenical" laws, their success must be considered extraordinary.

Between 1900 and 1970, proponents of eugenic theory drafted and endorsed nearly one hundred statutes that were adopted by state legislatures.² Most of this legislation focused on limiting the reproductive rights

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1. See, e.g., ALLAN CHASE, *THE LEGACY OF MALTHUS: THE SOCIAL COSTS OF THE NEW SCIENTIFIC RACISM* 15, 19-20, 126 (1977); MARK H. HALLER, *EUGENICS: HEREDITARIAN ATTITUDES IN AMERICAN THOUGHT* 155-56 (1963); JAMES W. TRENT, JR., *INVENTING THE FEEBLE MIND: A HISTORY OF MENTAL RETARDATION IN THE UNITED STATES* 173, 292 n.3 (1994).

2. See HALLER, *supra* note 1, at 142 (stating that 30 state eugenic sterilization laws

of some individuals, and on eliminating purportedly inheritable “defects” such as crime, poverty, or mental disorder. Physicians, the most influential advocates in the eugenics movement,³ lobbied for laws that reflected eugenic theory and defended those laws in the courts. Their campaign emphasized the foundations of eugenics as a part of genetic science. They also adopted the rhetorically powerful language of public health law and characterized unchecked procreation among the “socially inadequate” as an epidemic force.⁴

Three cases that challenged laws written by self-proclaimed eugenicists between 1924 and 1935 were eventually heard by the United States Supreme Court: *Buck v. Bell*⁵ (endorsing sterilization of the mentally deficient), *Skinner v. Oklahoma*⁶ (prohibiting sterilization of habitual criminals), and *Loving v. Virginia*⁷ (overturning prohibitions on interracial marriage). Each of these cases revolved around a state law containing explicit eugenic assumptions. Furthermore, each provided a critical precedent for landmark reproductive rights decisions, particularly *Griswold v. Connecticut*⁸ and *Roe v. Wade*.⁹ This article explains how the current language of reproductive rights, including constitutional protection for procreation and limits to reproductive freedom, can be traced to the three eugenics cases.

II. SOCIAL DEVIANCE AS A EUGENIC CATEGORY

Francis Galton, Karl Pearson, and others who called themselves eugenicists believed in improving the human condition through the use of

had been enacted by 1931, while 62 state laws prohibited marriage between “insane and feeble-minded persons,” epileptics, and “confirmed drunkards”).

3. See Philip Reilly, *The Surgical Solution: The Writings of Activist Physicians in the Early Days of Eugenical Sterilization*, 26 *PERSP. BIOLOGY & MED.* 637-56 (1983) (discussing the literature generated by physicians in the eugenics movement). See also H.E. Jordan, *The Place of Eugenics in the Medical Curriculum*, in *PROBLEMS IN EUGENICS* 396 (1912) (exhorting medical educators to include instructions in eugenics as a formal part of the medical curriculum).

4. See Dr. William Allen, *The Relationship of Eugenics to Public Health*, 21 *EUGENICAL NEWS* 73-75 (July-Aug. 1936) cited in Barry Mehler, *A History of the American Eugenics Society, 1921-1940*, at 151-52 (1988) (unpublished Ph.D. dissertation, University of Illinois) (on file with the author); Reilly, *supra* note 3, at 637-56. See, e.g., Trial Transcript at 73-82, *Buck v. Bell*, 274 U.S. 200 (1927) (testimony of Dr. J.S. DeJarnette).

5. 274 U.S. 200 (1927).

6. 316 U.S. 535 (1942).

7. 388 U.S. 1 (1967).

8. 381 U.S. 479 (1965).

9. 410 U.S. 113 (1973).

science.¹⁰ They understood their field as the marriage of the biological sciences, including medical genetics, with the then new discipline of biostatistics. The most passionate of American eugenicists, such as Charles Davenport and Harry Laughlin, wished to develop a taxonomy of human traits and to categorize individuals as “healthy” or “unhealthy,” and “normal” or “abnormal,” within their classification scheme. Working under the presumption that most, if not all, human traits are transmitted genetically, the eugenicists encouraged educated, resourceful, and self-sufficient citizens to mate and produce “wellborn” eugenic children.¹¹ In contrast, the dysgenic¹² were discouraged from reproducing. Harry Laughlin called dysgenic groups “socially inadequate” and defined them to include: the feebleminded, the insane, the criminalistic, the epileptic, the inebriated or the drug addicted, the diseased—regardless of etiology, the blind, the deaf, the deformed, and dependents (an extraordinarily expansive term that embraced orphans, “ne’er-do-wells,” tramps, the homeless, and paupers).¹³

Laughlin’s list of the “socially inadequate” emphasized three major tenets of the eugenicists: 1) that social, moral, physical, and mental qualities are transmitted in predictable patterns by the mechanisms of heredity;¹⁴ 2) that the human race can be improved by selective mating;¹⁵ and

10. See C.P. BLACKER, *EUGENICS GALTON AND AFTER* 17 (1952) (“Eugenics is the science which deals with all influences that improve the inborn qualities of a race; also with those that develop them to the utmost advantage.”); SIR FRANCIS GALTON, *INQUIRIES INTO HUMAN FACULTY AND ITS DEVELOPMENT* 218-20 (London: Eugenics Soc’y 1951) (1869); DANIEL J. KEVLES, *IN THE NAME OF EUGENICS: GENETICS AND THE USES OF HUMAN HEREDITY* 1-13 (1985) (“Francis Galton, innocent of the future, confidently equated science with progress.”); ALBERT EDWARD WIGGAM, *THE NEW DECALOGUE OF SCIENCE* 15-22 (1922) (“Statesmanship, as you are fully aware, is the art-and we hope may some day be the science-of the control of life.”)

11. See CHARLES BENEDICT DAVENPORT, *HEREDITY IN RELATION TO EUGENICS* 1-25 (1911). Between 1913 and 1940, the official publication of eugenics organizations also advocated these practices. See, e.g., Harry H. Laughlin, *EUGENICS REC. OFF. BULL.* 1913-1940.

12. See Harry H. Laughlin, *Report of the Committee to Study and to Report on the Best Practical Means of Cutting Off the Defective Germ-Plasm in the American Population*, *EUGENICS REC. OFF. BULL.* No. 10A 16 (1914) (discussing the “cacogenic” in chapter entitled “Classification of the Socially Unfit from Defective Inheritance: The Cacogenic Varieties of the Human Race.” “Cacogenic” is another term for “dysgenic” and is used to label people who have fared less favorably in the competition of life).

13. *Id.* at 16-44; Harry H. Laughlin, *The Legal, Legislative and Administrative Aspects of Sterilization*, *EUGENICS REC. OFF. BULL.* No. 10B 115-20 (1914).

14. *Committee to Study and to Report on the Best Practical Means of Cutting Off the Defective Germ-Plasm in the American Population*, *EUGENICS REC. OFF. BULL.* No. 10A 10 (1914) (“Modern family history studies have amply demonstrated that heredity plays an important part in social adequacy . . .”).

3) that the ills of society (disease, crime, poverty, and other social abnormalities) can be eradicated by discouraging, or preventing if necessary, the reproduction of socially deviant individuals.¹⁶

The eugenicists were successful in incorporating these assumptions into American law, in large measure by portraying their legal program as a public health initiative. Eugenicists relied upon the image of diseased "germ plasm," their analogue for genetic material or "DNA,"¹⁷ combined with the alarming rhetoric of a spreading epidemic of crime, poverty, and feeble-mindedness to help garner support for their proposals.¹⁸ Finally, they enlisted the coercive power of public health law, a body of law that sets aside the usual restrictions that surround much of medical jurisprudence, as the solution for eliminating social problems.¹⁹

It is worth noting that Abraham Flexner's report on the shortcomings of medical education was published in 1910,²⁰ and that by the 1920's the

15. *Id.* "[I]t behooves society, in the interests of social and racial progress, to devise means for promoting fit and fertile matings among the better classes, and to prevent the reproduction of defectives." *Id.*

16. Laughlin, *supra* note 12, at 15-16 ("[I]t will always be desirable in the interests of still further advancement to cut off the lowest levels, and to encourage high fecundity among the more gifted.").

17. See DONALD K. PICKENS, *EUGENICS AND THE PROGRESSIVES* 59 (1968) ("'Germ plasm' was a general term meaning the hereditary material passed from generation to generation."); *THE CODE OF CODES: SCIENTIFIC AND SOCIAL ISSUES IN THE HUMAN GENOME PROJECT* 15 (Daniel J. Kevles & Leroy Hood eds., 1992) ("[G]enes are double-helical strands of deoxyribonucleic acid (DNA)"); *Report of the Second International Congress of Eugenics* 25-26 (1923) (citing a proposal to the Second International Congress of Eugenics from the Consultative Committee of Norway in order to "protect the nation against infection from foreign defective germ plasm"). See generally Laughlin, *supra* note 13 (this committee studied and reported on the "best practical means for eliminating the defective germ-plasm in America").

18. See HALLER, *supra* note 1, at 109; *Official Proceedings of the Second National Conference on Race Betterment* 145 (1915) (the "Race Betterment Exhibit" stated that murders increased 103%, from 2,900 per 100,000,000 in 1905 to 5,900 per 100,000,000 in 1910). See also Harvey Ernest Jordan, *Eugenics: Its Data, Scope and Promise, as seen by the Anatomist in* *EUGENICS: TWELVE UNIVERSITY LECTURES* 107-38 (1914). "But such laws [allowing eugenical sterilization] are perhaps not properly included in the Penal Code. They are peculiarly public and racial health measures, and as such should form part of the health code, administered under the state Police Powers." *Id.* at 137.

19. See Lawrence O. Gostin, *The Future of Public Health Law*, 12 *AM. J.L. & MED.* 461, 461-62 (1986); Eric S. Janus, *Aids and the Law: Setting and Evaluating Threshold Standards for Coercive Public Health Intervention*, 14 *WM. MITCHELL L. REV.* 503, 504-5 (1988) ("Public health officials have broad discretionary power to test, confine and treat persons who have, or are suspected of having communicable diseases Official coercive intervention to protect public health therefore escaped constitutional scrutiny in all but the most egregious circumstances.").

20. See KENNETH M. LUDMERER, *LEARNING TO HEAL: THE DEVELOPMENT OF AMER-*

increased professionalization of medicine was underway, with growing emphasis on scientific and laboratory based inquiry. As public health became one of the leading areas in medicine, prominent public health professionals used eugenic theories to explain social problems.²¹ Political attitudes toward the evolution of medicine were ripe for the eugenicists' message that societal ills could be cured with a scientific prescription and that the law could provide a ready antidote to the poison of defective "germ-plasm," which threatened America's future.

III. LEGAL IMPACT OF AMERICAN EUGENICISTS: 1924

The Federal Immigration Restriction Act of 1924²² was adopted in the banner year in the history of the American eugenics movement. The Act's major provisions were crafted by Harry Laughlin, and prominent eugenicists advocated its passage.²³ The law was meant to combat the "rising tide of defective germ-plasm" carried by suspect groups migrating from Southern and Eastern Europe, most notably Jews and Italians.²⁴ The eugenicists thought these immigrants would threaten public morality, poison the "American" gene pool, and were "liable to become . . . public charge[s]."²⁵ The Act was signed by President Calvin Coolidge, whose commentary in favor of such laws echoed eugenic rhetoric: "America must be kept American [because] [b]iological laws show . . . that Nordics deteriorate when mixed with other races."²⁶ The eugenic intent of the Act, and the national origins quota system it enforced, remained in place

ICAN MEDICAL EDUCATION 166-90 (1985) (analyzing ABRAHAM FLEXNER, *THE FLEXNER REPORT: ON MEDICAL EDUCATION IN THE UNITED STATES AND CANADA* (1910)).

21. See Allan, *supra* note 4, at 73-75.

22. Immigration Act, ch. 190, 43 Stat. 153 (1924).

23. See generally DANIEL J. KEVLES, *IN THE NAME OF EUGENICS: GENETICS AND THE USES OF HUMAN HEREDITY* 97 (1985) ("In April 1924, the Immigration Act was passed by overwhelming majorities in the House and Senate and quickly signed into law. . . . The new law was widely acclaimed by eugenicists for what they considered its biological wisdom."); KENNETH M. LUDMERER, *GENETICS AND AMERICAN SOCIETY: A HISTORICAL APPRAISAL* (1972) ("[Congressman] Johnson's emotional commitment to eugenic theories was shared by other members of the House Immigration Committee.").

24. See Frances Hassencahl Ph.D., Harry H. Laughlin, 'Expert Eugenics Agent' for the House Committee on Immigration and Naturalization, 1921-1931 (1970) (unpublished Ph.D. dissertation, Case Western Reserve University)(on file with author).

25. See generally ALAN M. KRAUT, *SILENT TRAVELERS: GERMS, GENES AND THE "IMMIGRANT MENACE"* (1994) (supporting the proposition that immigrants polluted the American gene pool); Patricia Russell Evans, *Likely to Become a Public Charge: Immigration in the Backwaters of Administrative Law 1882-1933* (1987) (unpublished Ph.D. dissertation, George Washington University) (on file with author).

26. Quoted in KEVLES, *supra* note 23, at 97.

until they were repealed by the Immigration and Nationality Act of 1965.²⁷

Two eugenic measures adopted by the Virginia General Assembly also became law in 1924.²⁸ These laws eventually led to two Supreme Court opinions: The Eugenic Sterilization Act²⁹ challenged in *Buck v. Bell* (1927),³⁰ and the Virginia Racial Integrity Act,³¹ considered by the Court in *Loving v. Virginia* (1967).³² A third eugenics case dealt with a 1935 Oklahoma law titled the Habitual Criminal Sterilization Act,³³ which was considered by the Court in *Skinner v. Oklahoma* (1942).³⁴ This article will examine each of these cases in chronological order.

IV. MEDICAL ELIMINATION OF THE SOCIALLY INADEQUATE: *BUCK V. BELL* (1927)

While this article has explained the connection between the eugenic message and the rhetoric promising a scientific solution to social ills, the connection between "medicine" and eugenics implied by the article's title must be clarified. The public health rationale, so often invoked as justification for coercive legislation which the eugenicists supported, provides one link. The eugenicists insisted that the "social problem classes" were a public health issue and a medical problem.³⁵ The specific methods advocated to achieve eugenic objectives, most notably segregation and sterili-

27. Immigration Act of 1924, ch. 190 § 11A, 43 Stat. 153 (1924), amended by Immigration and Nationality Act of 1952, ch. 477 § 201, 66 Stat. 175 (1952) (original version at Pub. L. No. 89-236 § 1, 79 Stat. 911 (1965)). See also Dave McCurdy, *The Future of U.S. Immigration Law*, 20 J. LEGIS. 3, 5 (1994). "The Immigration Act of 1965, passed during the civil rights movement, eased the procedures for foreign-born family members to enter the country and reduced the pro-European racial bias of the immigration law, laying the groundwork for the current upsurge of Asian and Latin American immigrants." *Id.* See also POPULATION POLICY AND ETHICS, THE AMERICAN EXPERIENCE: A PROJECT OF THE RESEARCH GROUP ON ETHICS AND POPULATION OF THE INSTITUTE OF SOCIETY, ETHICS, AND THE LIFE SCIENCES 415-17, 421 (Robert M. Veatch ed. 1977).

28. Eugenic Sterilization Act, Act of March 20, 1924 ch. 394 1924 Va. Acts 569-70; Virginia Racial Integrity Act, Act of March 20, 1924 ch. 371, 1924 Va. Acts 534.

29. Eugenic Sterilization Act, *supra* note 28.

30. 274 U.S. 200 (1927).

31. Virginia Racial Integrity Act, *supra* note 28.

32. 388 U.S. 1 (1967).

33. Sterilization of Habitual Criminals, 1935 Okla. Sess. Laws ch. 26, art. I. See also E.S. GOSNEY & PAUL POPENOE, *STERILIZATION FOR HUMAN BETTERMENT* 70-80 (1929) (description of the sterilization procedures).

34. 316 U.S. 535 (1942).

35. Laughlin, *supra* note 12, at 17 ("The classification of the socially inadequate is obviously partly legal and partly medical, but in most part biological.").

zation,³⁶ were also medical. Medical segregation, the separation of undesirable germ-plasm from the general population by institutionalizing the problem groups, relied on the infectious disease model of quarantine.³⁷ Sexual sterilization is a surgical operation entirely within the province of the medical profession.³⁸

The three eugenics cases that reached the Supreme Court are typified by the extensive involvement of physicians. Doctors often initiated litigation to validate the eugenic statutes they wrote, and were instrumental in the passage of these bills into law.³⁹ Medicine, in several forms, was linked to the eugenics cases discussed later in this article.

It should be noted that the strong support for surgical sterilization as a public health measure was far removed from mainstream thought in both law and medicine.⁴⁰ The endorsement by the United States Supreme Court of state mandated surgery on unwilling patients in *Buck v. Bell* was an extraordinarily radical departure from existing Supreme Court medical jurisprudence. *Buck* was the first and only instance in which the Court allowed a physician, acting as the agent of state government, to perform an operation that was neither desired nor needed by the "patient." A previous Supreme Court decision forbade even court ordered medical examination. As early as 1891, in *Union Pacific Railway v. Botsford*,⁴¹ the Court refused to order a plaintiff to submit to a physical examination by the defendant's doctor. Justice Gray said:

No right is held more sacred, or is more carefully guarded, by

36. See generally *Proceedings of the First National Conference on Race Betterment* (1914) (chart providing the rate of efficiency of the proposed segregation and sterilization program).

37. See *Id.* at 478-81 (calculations on the working out of a proposed program of sterilization).

38. The sterilization procedure for males is called "vasectomy." GOSNEY & POPENOE, *supra* note 33, at 77. The sterilization procedure for females is called "salpingectomy." *Buck v. Bell*, 274 U.S. 200, 205 (1928).

39. See, e.g., Phillip Reilly, *The Virginia Racial Integrity Act Revisited: The Plecker-Laughlin Correspondence: 1928-1930*, 16 AM. J. MED. GENETICS 483-92 (1983). See also Paul A. Lombardo, *Miscegenation, Eugenics, and Racism: Historical Footnotes to Loving v. Virginia*, 21 U.C. DAVIS L. REV. 421, 427-8 (1988) (Dr. Plecker "[a]s a physician within a state health agency . . . had several avenues through which to present his views on issues characterized as 'public health'" favoring the Virginia Racial Integrity Act of 1924 that was of issue in *Loving v. Virginia*, 388 U.S. 1 (1967).); Paul A. Lombardo, *Three Generations, No Imbeciles: New Light on Buck v. Bell*, 60 N.Y.U.L. REV. 30, 51 (1985) ("Laughlin's deposition relied on Priddy's 'facts' as proof not only of Carrie's alleged feeble-mindedness, but also of her generally undesirable character."); Trial Transcript at 44-46, *Oklahoma v. Skinner* (1937) (testimony of Dr. Louis Henry Ritzhaupt).

40. See HALLER, *supra* note 1, at 131.

41. 141 U.S. 250, 251-52 (1891).

the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others

. . . .

The inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow.⁴²

Except in the context of vaccination for contagious disease, coercive court ordered medical procedures had not been endorsed by the Supreme Court prior to *Buck*.

Buck also did not change the general tenor of Supreme Court commentary on coercive medicine. Twenty-five years after *Buck*, in *Rochin v. California*,⁴³ a unanimous Court overturned a conviction for illegal possession of morphine because the defendant's stomach had been forcibly pumped at a hospital to retrieve evidence of illegal drugs.⁴⁴ The personal intrusion that such a process required, said Justice Felix Frankfurter, involved "conduct that shocks the conscience."⁴⁵ The methods used by police and the doctor in *Rochin* were "too close to the rack and the screw to permit of constitutional differentiation."⁴⁶ In other words, when medical procedures start looking like torture, and are used solely to enhance police interrogation, they are forbidden by the Constitution.

A comparable result was reached thirty-three years later in the 1985 case of *Winston v. Lee*.⁴⁷ That case involved a request to surgically remove a bullet from a criminal defendant as evidence of his participation in a robbery. According to the Court, "[a] compelled surgical intrusion into an individual's body for evidence implicates expectations of privacy and security of such magnitude that the intrusion may be 'unreasonable,' [under the Fourth Amendment prohibition against unreasonable searches and seizures] even if likely to produce evidence of a crime."⁴⁸

In the light of this reluctance to allow state mandated medical intrusions even in the criminal law context, *Buck* stands out as an anomaly in Court history.

How did *Buck v. Bell*⁴⁹ get to the Supreme Court? The *Buck* case was

42. *Id.*

43. 342 U.S. 165, 172 (1952).

44. *Id.* at 174. "On the facts of this case the conviction of the petitioner has been obtained by methods that offend the Due Process Clause." *Id.*

45. *Id.* at 172.

46. *Id.*

47. 470 U.S. 753 (1985).

48. *Id.* at 759.

49. 274 U.S. 200 (1927).

necessary because of a medical malpractice lawsuit contesting a doctor's use of the "therapeutic prerogative" to sterilize women without their consent. In 1916 Dr. Albert Priddy sterilized a woman and her daughter who were brought to the Colony⁵⁰ allegedly because of their disreputable habits—they had been accused of prostitution.⁵¹ When Priddy subsequently was sued for damages, he claimed that the operation was a therapeutic necessity, and that as the Colony's physician, it was his prerogative and duty to provide whatever medical care Colony residents required.⁵² The jury accepted Priddy's explanation, but he was warned that he should not pursue further sterilizations without specific legal authority.⁵³ Subsequently, Priddy asked to have the Virginia sterilization law written to provide him with immunity for eugenical sterilization operations.⁵⁴ Thus, on at least one level, the *Buck* case was about protecting doctors from lawsuits.⁵⁵

The expert testimony Dr. Priddy and his colleague, Dr. Joseph DeJarnette, provided at the *Buck* trial focused, however, not on legal immunity, but on the eugenic values incorporated into the sterilization law. Regarding Carrie Buck's mother, Priddy stated:

[She] [h]as [a] record during life of immorality, prostitution, and untruthfulness; has never been self-sustaining; was maritally unworthy, having been divorced from her husband on account of infidelity; has had a record of prostitution and syphilis; has had one illegitimate child and probably two others These people belong to the shiftless, ignorant, and worthless class of anti-

50. See generally TRENT, *supra* note 1 (defining "colony plan" as small buildings detached from the central educational building). "The colony system put high grades and low grades, epileptics and mongoloids, moral imbeciles and spastics, trouble makers and 'household pets,' under one institutional roof." *Id.* at 80.

51. The case that resulted was titled *Mallory v. Priddy*. It is discussed in Lombardo, *Three Generations, No Imbeciles: New Light on Buck v. Bell*, *supra* note 39, at 40 n.55, 41.

52. *Id.* at 44.

53. *Id.* at 44 n.71.

54. *Id.* at 45.

55. See generally *id.* at 33 n.15 (analyzing *Mallory v. Priddy* (Va. Cir. Ct. Richmond, Feb. 16, 1918) which brought Dr. Priddy's private sterilization program to public attention). Albert Priddy was the superintendent of the Virginia Colony from its foundation in 1910 until his death in January of 1925, only weeks after he appeared as the named defendant in the November 18, 1924 case of *Buck v. Priddy*. See Lombardo, *Three Generations, No Imbeciles: New Light on Buck v. Bell*, *supra* note 39, at 35. This case is known as *Buck v. Bell* because Dr. John Bell succeeded Priddy as superintendent at the Colony and thereby assumed Priddy's role as defendant when the decision was appealed. *Id.* at 55-56 n.152.

social whites of the South.⁵⁶

Priddy's testimony was based on the assumption that such behavioral traits and social conditions were hereditary and could be eliminated by sterilization.

Dr. DeJarnette was equally clear about his enthusiasm for eugenics, and summarized his convictions in a *Virginia Medical Monthly* article that appeared soon after the trial:

I believe we should have an [sic] eugenic society in every county and city in the State.

...

Our immigration laws should be made more and more stringent, admitting only the most desirable of our predominant race. . . . Parenthood should be encouraged among those with [the] best hereditary traits, and discouraged among defectives by segregation and sterilization. Wages should be regulated according to the number of children and the mental quality of parents.⁵⁷

Regardless of the motives of the eugenicists, one might ask how the result in *Buck* could have been justified by the Court. The answer lies in the public health law connection.

In writing the *Buck* opinion, Justice Holmes borrowed language directly from the Virginia law's preamble, and repeated its conclusion that "experience has shown that heredity plays an important part in the transmission of insanity, [and] imbecility . . ." ⁵⁸ Holmes then endorsed the law's procedures and approved the reasoning and result in the Virginia courts that reviewed the law, concluding with one of the most callous and elitist statements in Supreme Court history: "[i]t 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."⁵⁹ In singling out the helplessly dependent genetic imbecile and the congenitally deficient criminal, Holmes emphasized the genetic determinism that eugenic theory had in-

56. Trial Transcript at 40-42, *Buck v. Bell*, 274 U.S. 200 (1927) (testimony of Albert Priddy).

57. J.S. DeJarnette, M.D., *Eugenics in Relation to the Insane, the Epileptic, the Feeble-minded and Race Blending*, VA. MED. MONTHLY Apr. 1925-Mar. 1926, at 290-91.

58. *Buck*, 274 U.S. at 205-06.

59. *Id.* at 207. See G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF (1993). Of the Holmes passage including the infamous "three generations" comment, White noted "This paragraph is a singular combination of familiar Holmesian arguments and non sequiturs." *Id.* at 405.

corporated. Holmes' choice of a public health law analogy wedded the imagery of a plague with the idea of cleansing the social fabric through sterilization; "[t]he principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes."⁶⁰ This statement suggests that wiping out an epidemic with a vaccine was comparable to wiping out crime and mental disease with sterilization. Justice Holmes' most dramatic statement in the opinion included a memorable comment that posed a seemingly irrefutable public policy conclusion: "three generations of imbeciles are enough."⁶¹

The "danger to society" rationale was borrowed from *Jacobson v. Massachusetts*,⁶² a public health case decided in the wake of a smallpox epidemic.⁶³ In *Jacobson*, the Court upheld a Massachusetts statute that compelled citizens to receive smallpox vaccinations and assessed fines upon those who refused.⁶⁴ *Jacobson* was the only precedent cited by Justice Holmes in *Buck*.⁶⁵ As this analysis shows, the opinion Justice Holmes wrote endorsed both an explicitly eugenic rationale and the public health underpinnings of the Virginia law.⁶⁶

The success of the *Buck* case energized Virginia's eugenicists to push for maximum use of the "surgical solution," and Dr. DeJarnette led the charge in published comments encouraging the use of sterilization.⁶⁷ In a series of official reports to Virginia's Governor and General Assembly, Dr. DeJarnette repeated his support for the Virginia sterilization program.⁶⁸ By the 1930's Dr. DeJarnette challenged the state to emulate the Nazi's success with sterilization:

No person unable to support himself on account of his inherited mental condition has a right to be born In Germany the sterilization law embraces chronic alcoholics, certain hereditary physical diseases, the hereditarily blind and deaf, the criminally insane, feebleminded and epileptic. [By] December 31, 1934

60. *Id.*

61. *Id.*

62. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

63. *Jacobson*, 197 U.S. at 28.

64. *Id.* at 24-28.

65. *Buck*, 274 U.S. at 205-06.

66. *See Buck v. Bell*, 274 U.S. 200 (1927).

67. *See, e.g.,* WESTERN STATE HOSPITAL (VA.) 1938 ANNUAL REPORTS, 110 (on file with author); WESTERN STATE HOSPITAL (VA.) 1935 ANNUAL REPORTS, 9-10 (on file with author).

68. *See* WESTERN STATE HOSPITAL (VA.) 1938 ANNUAL REPORTS, 110 (on file with author); WESTERN STATE HOSPITAL (VA.) 1935 ANNUAL REPORTS, 9-10 (on file with author).

Germany had sterilized 56,224 [persons].⁶⁹

Dr. DeJarnette continued to express admiration for Hitler's campaign in his last official comment on sterilization in 1938:

Germany in six years has sterilized about 80,000 of her unfit while the United States with approximately twice the population has only sterilized about 27,869 to January 1, 1938, in the past 20 years. The death rates in Virginia from sterilization is negligible—not over one in a thousand. . . . The fact that there are 12,000,000 defectives in the United States should arouse our best endeavors to push this procedure to the maximum.⁷⁰

Following the Court's endorsement of sterilization in *Buck*, over thirty states eventually passed sterilization laws.⁷¹ To some eugenicists, legal change only signaled the beginning. The ambition of DeJarnette and others of his ilk was to rival the efficiency of the Nazi program, which claimed between 360,000 and 3,500,000 victims (the numbers are elusive)⁷² between 1933 and 1945.

V. STERILIZATION OF HEREDITARY CRIMINALS:

SKINNER V. OKLAHOMA

Formal eugenic theory contributed to criminal law reform even before *Buck*. Harry Laughlin of the Eugenics Record Office⁷³ served as Associate of Psychopathic Laboratory of the Chicago Municipal Courts for more than ten years, conducting surveys of criminals, correlating their crimes, race, ethnicity, and I.Q.⁷⁴ Early in the century, other eugenicists proposed reforming determinate sentencing laws, arguing that it was unreasonable to ignore a criminal's hereditary propensity toward crime when a sentence was set.⁷⁵ Thus, it is not surprising that the second

69. WESTERN STATE HOSPITAL (VA.) 1935 ANNUAL REPORTS, 9 (on file with author).

70. WESTERN STATE HOSPITAL (VA.) 1938 ANNUAL REPORT, 110 (on file with author).

71. See JONAS ROBITSCHER, J.D., M.D., EUGENIC STERILIZATION 116-17 (1973) (providing the number of "annual sterilizations [from 1943-63] performed under state eugenic sterilization laws together with cumulative totals").

72. See PHILIP R. REILLY, J.D., M.D., THE SURGICAL SOLUTION: A HISTORY OF INVOLUNTARY STERILIZATION IN THE UNITED STATES 109 (1991) (discussing a group of Germans numbering more than three million who claimed legal damages for being sterilized); PAUL WEINDLING, HEALTH, RACE AND GERMAN POLITICS BETWEEN NATIONAL UNIFICATION AND NAZISM, 1870-1945 553 (1989).

73. Garland E. Allen, *The Eugenics Record Office at Cold Spring Harbor, 1910-1940: An Essay in Institutional History*, 2 OSIRIS 225-64 (2d ser. 1986).

74. See, e.g., THE MUNICIPAL COURT OF CHICAGO, 1920-1921 ANNUAL REPORT.

75. See Philip Jenkins, *Eugenics, Crime and Ideology: The Case of Progressive Penn-*

Supreme Court case spawned by the eugenics movement arose from an Oklahoma law that mandated involuntary sexual sterilization for convicted criminals.⁷⁶

Oklahoma law incorporated assumptions about the heritability of mental illness as early as 1893, when a statute was passed requiring all patients committed to the Territorial Sanitarium in Norman to respond to this question on admission: "What relatives, including grandparents and cousins, have been insane?"⁷⁷ An explicitly eugenic provision was included in the 1909 law that established the Oklahoma Institution for the Feeble-minded.⁷⁸ A stated purpose for founding that facility was to segregate "female imbeciles between the ages of sixteen and forty-five."⁷⁹ According to the 1909 law, these women would be under the "control" of the Institution for the duration of their child-bearing years, and would be released at age forty-five, regardless of their condition.⁸⁰

Oklahoma passed a sterilization law in 1931 that mirrored the Virginia measure upheld in *Buck*.⁸¹ The law was tested in the Oklahoma Supreme Court in 1933, in *In re Main*.⁸²

Following the lead of the United States Supreme Court, the Oklahoma tribunal determined the state had the power to sterilize Samuel W. Main. Main, a resident of the Central Oklahoma State Hospital at Norman, had the misfortune of having a father who had also spent some time in mental

sylvania 51 PA. HIST. 64, 72 (1984). Jenkins quoted a 1901 study by Henry M. Boies entitled *The Science of Penology* in which Boies noted:

If criminality is a defect of character, or a disease to be remedied or cured, common sense rejects the fixing of a positive time in which the cure shall be effected for every individual who commits a certain crime alike, whatever may be his actual condition or variation from the normal, as absurd.

Id. Jenkins himself noted that:

the medical or rehabilitative model [for prisons] established in 1909 was closely tied to the eugenic movement. It was the eugenicists who stressed that crime was inborn, so that sentences had to be flexible to allow for the condition of the individual; and it was the eugenicists who attempted to relieve the prisons of the hopeless cases to permit the triumph of rehabilitation of the rest.

Id.

76. Sterilization of Habitual Criminals, 1935 Okla. Sess. Laws ch. 26, art. I. *See also* *Skinner v. Oklahoma*, 316 U.S. 535, 536 (1941) ("The statute involved is Oklahoma's Habitual Criminal Sterilization Act.").

77. Questions on Application for Admission to the Hospital, 1908 Okla. Terr. Sess. Laws § 3320 (citing 1893 Okla. Terr. Sess. Laws § 3008).

78. Institution for Feeble-Minded, 1909 Okla. Sess. Laws ch. 34, art. II.

79. *Id.* at § 3.

80. *Id.* at § 3.

81. Sterilization of Insane, 1931 Okla. Sess. Laws ch. 26, art. III.

82. 19 P.2d 153 (1933).

hospitals.⁸³ Main's then-pregnant wife and four children were on public relief.⁸⁴ Main was diagnosed as manic-depressive,⁸⁵ and according to the evaluation of Dr. D.W. Griffin, superintendent of the State Hospital, Main was likely to have more children who were "socially inadequate" like himself.⁸⁶ Samuel Main became the first of 556⁸⁷ Oklahomans sterilized between 1933 and 1963.

Unlike the Virginia Eugenical Sterilization Act that served as a model for legislators, the 1931 Oklahoma law did not include the "criminalistic and other degenerate classes" as proper subjects for the surgeon's knife.⁸⁸ In order to remedy this "oversight," Dr. Griffin and other supporters of eugenics successfully lobbied the legislature to pass a second bill in 1933, naming specific penal institutions where sterilizations could take place.⁸⁹ The law was extraordinarily broad. It included all patients of childbearing age (up to age forty-seven for women, sixty-five for men) who were ready for discharge and covered "patients likely to be a public charge, or to be supported by any form of charity," anyone suffering from hereditary forms of insanity, or "habitual criminals" (three time felons).⁹⁰ Perhaps because the Oklahoma Attorney General judged the statute to be constitutionally infirm, no case was brought to test its validity.⁹¹

Supporters of the sterilization law returned to the Oklahoma legislature to remedy the remaining shortcomings in the 1933 statute and emerged with the Oklahoma Habitual Criminal Sterilization Act.⁹² This statute defined the "habitual criminal" as a person twice convicted of crimes involving "moral turpitude."⁹³ Lengthy procedures allowing a full hearing, legal representation for the alleged "habitual criminal," and a right to several appeals were included.⁹⁴ Finally, several offenses were

83. Trial Transcript at 10, *In re Main* (testimony of D.W. Griffin).

84. *Id.* at 32.

85. *Id.* at 10.

86. *Id.* at 13, 16, 21.

87. ROBITSCHER, *supra* note 71, App. I.

88. *In re Main*, 19 P.2d at 153.

89. Sterilization of Insane, 1933 Okla. Sess. Laws ch. 46, art. III.

90. *Id.*

91. The 1935 Act was drafted by the Oklahoma Attorney General, according to testimony of Dr. Louis Ritzhaupt, a surgeon and Oklahoma state senator who testified at Skinner's trial. See Trial Transcript at 45, *Oklahoma v. Skinner* (1937) (testimony of Dr. Louis Ritzhaupt). See also *Eugenics Law to be tested at M'Alister* Daily Oklahoman (Apr. 22, 1935).

92. Sterilization of Habitual Criminals, 1935 Okla. Sess. Laws ch. 26, art. I.

93. *Id.*

94. *Id.*

excepted from the Act, namely "offenses arising out of the violation of the prohibitory laws, revenue acts, embezzlement, or political offenses" ⁹⁵ These exclusions would later pose a problem for Oklahoma's eugenic aspirations.

The Oklahoma Attorney General chose Jack Skinner to test the law. Skinner's father died when Jack was "quite young," and his mother remarried when he was ten; ⁹⁶ Jack left home at the age of fifteen in search of work. ⁹⁷ He lost his foot in an accident, ⁹⁸ and at age nineteen was convicted of stealing six chickens and sentenced to eleven months of hard labor. ⁹⁹ Skinner was incarcerated in 1929 and again in 1934 for armed robbery, ¹⁰⁰ just prior to the passage of the sterilization law. ¹⁰¹ Skinner plead guilty to each crime he committed and testified that he stole because of his inability to work or support himself and his wife. ¹⁰²

Claude Briggs, a lawyer serving in the Oklahoma Legislature, defended Skinner. Dr. D.W. Griffin, who petitioned for the sterilization of Samuel Main under the earlier law, served as an expert for the Oklahoma Attorney General acting as prosecutor. Griffin was joined by Dr. Louis H. Ritzhaupt, a practicing surgeon who held a seat in the Oklahoma State Senate and was one of the authors of the 1935 law. ¹⁰³ Dr. T.H. McCarley, a surgeon at the penitentiary and past President of the Oklahoma Medical Association, also testified in favor of sterilization. ¹⁰⁴

No evidence during Skinner's trial was presented to show that he possessed a hereditary criminal disposition, as that issue was not relevant under the 1935 version of the law. ¹⁰⁵ The essential question to be decided was whether Skinner was a three time felon guilty of crimes of "moral

95. *Id.*

96. Trial Transcript at 102, *Oklahoma v. Skinner* (1937) (testimony of D.W. Griffin).

97. *Id.*

98. *Id.* at 100-02.

99. *Id.* at 101.

100. Trial Transcript at 137, *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (Plaintiff's Exhibit C).

101. Trial Transcript at 122, 124-25, *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (testimony of Jack T. Skinner).

102. *Id.* at 124-25.

103. Trial Transcript at 45, *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (testimony of Louis H. Ritzhaupt).

104. Trial Transcript at 70-73, *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (testimony of T.H. McCarley).

105. Trial Transcript at 104, 106, *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (testimony of D.W. Griffin).

turpitude.”¹⁰⁶ Nevertheless, the defense presented evidence to disprove hereditary criminality with its submission of a survey of current Oklahoma inmates showing that relatively few convicts had family members with a criminal record.¹⁰⁷ The evidence was ruled inadmissible.¹⁰⁸ The single issue the jury was allowed to consider was Skinner’s criminal record.¹⁰⁹ Because Skinner had been convicted of three felonies (any theft of twenty dollars constituted a felony at that time in Oklahoma), he met the definition of a habitual criminal under the statute and was accordingly found subject to sterilization.¹¹⁰ In a 5-4 decision, Oklahoma’s Supreme Court confirmed that judgement.¹¹¹ Skinner appealed to the United States Supreme Court.

Although the Court could have declined to review Skinner’s case, Court records indicate that none of the Justices dissented from hearing it.¹¹² So many constitutional questions were raised about the Oklahoma law, that there was little doubt among the Justices that it would be struck down.¹¹³ Justice William O. Douglas wrote the opinion for the Court.

Douglas might have used any of eight reasons presented by Skinner’s attorney to reverse Skinner’s conviction, including: 1) the question of the *ex post facto* clause (Skinner’s last conviction came a year before the law passed, making this retrospective legislation), 2) the Fifth Amendment prohibition of “double jeopardy” (even though the law was purportedly a civil enactment, prosecution testimony at trial had described the measure as a deterrent to future crime, indicating a penal motive), or 3) procedural due process (as a civil measure, the convict had no right to an attorney unless he could afford one, and he could not compel a witness to testify in his behalf).¹¹⁴ Instead, Douglas used the equal protection

106. Trial Transcript at 125, *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (testimony of Jack T. Skinner).

107. Trial Transcript at 128-130, *Skinner v. State*, 115 P.2d 123 (1941) (Mr. Briggs introduction of Exhibits 1 & 2).

108. Trial Transcript at 130, *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (Exhibits 1 & 2 were found by the Court not to be “competent”).

109. Trial Transcript at 126, *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (testimony of Jack T. Skinner).

110. See *Skinner v. Oklahoma*, 316 U.S. 535, 538 (1942).

111. *Skinner v. State*, 115 P.2d 123 (1941), *rev’d*, 316 U.S. 535 (1942).

112. Action taken on cases, Justice Douglas Papers, Library of Congress Manuscript Division, shows a 9-0 vote to review *Skinner* on petition for certiorari.

113. See Responses to Douglas’ draft opinion, Library of Congress Manuscript Division, *Skinner v. Oklahoma*.

114. *Skinner v. State*, 115 P.2d 123 (Okla. 1941), *pet. for cert. filed*, 315 U.S. 789 (Dec. 4, 1941) (No. 782); Record at 4-5, *Skinner* (No. 782).

clause of the Fourteenth Amendment to fashion an entirely new constitutional standard.¹¹⁵ He began his opinion with this statement: "This case touches a sensitive and important area of human rights. Oklahoma deprives certain individuals of a right which is basic to the perpetuation of a race—the right to have offspring."¹¹⁶ Later in the opinion Douglas reiterated: "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."¹¹⁷ This was the first time the Supreme Court described reproductive prerogatives as "fundamental rights." Douglas then analyzed the legal difference between embezzlement and larceny to point out the inequity of the Oklahoma law, using Jack Skinner's first offense as his example.

A person who enters a chicken coop and steals chickens commits a felony; and he may be sterilized if he is thrice convicted. If, however, he is the bailee of the property [that is, if he is entrusted with keeping someone else's chickens as part of his job] and fraudulently appropriates it, he is an embezzler. Hence no matter how habitual . . . his conviction, he may not be sterilized.¹¹⁸

Douglas continued, coining a second famous phrase,

[S]trict 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 . . . equal protection of the laws. . . . Sterilization of those who have thrice committed grand larceny with immunity for those who are embezzlers is a clear, pointed, unmistakable discrimination. . . . We have not the slightest basis for inferring that line [between larceny and embezzlement] has any significance in eugenics, nor that the inheritability of criminal traits follows the neat legal distinctions which the law has marked between those two offenses.¹¹⁹

Thus Douglas created the formula, known as strict scrutiny, that still guides constitutional inquiry into laws that threaten fundamental rights.¹²⁰

115. *Skinner v. Oklahoma*, 316 U.S. 535, 538 (1942).

116. *Id.* at 536.

117. *Id.* at 541.

118. *Id.* at 539 (citation omitted).

119. *Id.* at 541-42.

120. *See, e.g., Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995) (discussion of "strict scrutiny" review in relation to federal agency contracts with subcontractor compensation clauses).

Douglas' personal notes from the Court conference on the case suggest that he made a clear distinction between the *Buck* case and *Skinner*. He wrote "whether there are any scientific authorities in support [of sterilization] is not clear. Moronic minds [as in *Buck*] are different. [We have] [n]o statistics as to criminals-if criminals do not produce their kind, then we have [a] serious question."¹²¹ Thus, Douglas did not raise a general question of the validity of eugenic theories, he just could not find the eugenic sense in Oklahoma's law. The Court's decision was unanimous and two Justices wrote concurring opinions. One of the concurrences disagreed with Douglas' method,¹²² but both repeated approval of the eugenic logic in the *Buck* case.¹²³

The first concurrence was written by Chief Justice Stone. He had no problem with the Oklahoma law's eugenic foundations. He asserted "[u]ndoubtedly, a state may . . . constitutionally interfere with the personal liberty of the individual to prevent the transmission by inheritance of his socially injurious tendencies. . . . Science has found and the law had recognized that there are certain types of mental deficiency associated with delinquency which are inheritable."¹²⁴

But Stone wanted to use the due process clause, not the equal protection clause, to invalidate the Oklahoma law.¹²⁵ He felt that *Skinner* should have been allowed to show his criminal acts were not based on an inherited defect.¹²⁶ Not permitting *Skinner* that opportunity was a fatal flaw. "A law," wrote Stone, "which condemns, without hearing, all the individuals of a class to so harsh a measure as the present because some or even many merit condemnation, is lacking in the first principles of due process."¹²⁷

Justice Robert Jackson offered a second concurrence, endorsing both the equal protection and the due process attacks on the sterilization law, agreeing with both Douglas and Stone. Of the scientific basis of the law he said: "[T]he present plan to sterilize the individual in pursuit of a eu-

121. Justice William O. Douglas, Supreme Court Conference Notes (Apr. 11, 1942) (unpublished) (on file with manuscript Division, Library of Congress).

122. *Skinner v. Oklahoma*, 316 U.S. 535, 543-45 (1942). In his concurring opinion, Justice Stone stated: "I concur in the result, but I am not persuaded that we are aided in reaching it by recourse to the equal protection clause." *Id.* at 543.

123. See generally *Skinner v. Oklahoma*, 316 U.S. 535, 544, 546 (1942) (Justice Stone and Justice Jackson wrote concurring opinions).

124. *Skinner*, 316 U.S. at 544-45.

125. *Id.* at 544.

126. *Id.*

127. *Id.* at 545.

genic plan to eliminate from the race characteristics that are only vaguely identified and which in our present state of knowledge are uncertain as to transmissibility presents other constitutional questions of gravity."¹²⁸

Despite the Court's condemnation of Oklahoma's eugenic theory, Jackson pointed to the *Buck* case as a more precise use of eugenic criteria, saying: "This Court has sustained such an experiment with respect to an imbecile, a person with definite and observable characteristics, where the condition had persisted through three generations and afforded grounds for the belief that it was transmissible and would continue to manifest itself in generations to come."¹²⁹ This comment, of course, directly referenced the alleged facts in *Buck*. Jackson endorsed the general eugenic scheme outlined in *Buck*, as did Douglas.

But to Jackson's eye, *Skinner* was not *Buck*. "There are limits," he concluded:

to the extent to which a legislatively represented majority may conduct biological experiments at the expense of the dignity and personality and natural powers of a minority—even those who have been guilty of what the majority defines as crimes. But this Act falls down before reaching this problem, which I mention only to avoid the implication that such a question may not exist because not discussed.¹³⁰

The Court was unanimous in holding that the Oklahoma law was unconstitutional.¹³¹

Many commentators have suggested that *Skinner* all but overruled *Buck*, and that after *Skinner*, eugenic arguments would be rejected by the Court.¹³² It is therefore useful to explain the arguments raised against the law struck down in *Skinner*, and to compare them to the Justices' understanding of *Buck* and its eugenic rationale. As this analysis has shown, the validity of eugenically-founded, hereditary assumptions as a basis for law remained alive after *Skinner*.

VI. KEEPING THE WHITE RACE PURE; *LOVING V. VIRGINIA* (1967)

The third in the trilogy of Supreme Court eugenics cases involved the

128. *Id.* at 546.

129. *Id.*

130. *Id.* at 546, 547.

131. *Id.* at 543.

132. John A. Robertson, *Genetic Selection of Offspring Characteristics*, 76 B. U. L. REV. 421, 473-74 (1996).

1924 Virginia Racial Integrity Act.¹³³ That law owes its existence to the work of major eugenic theorists such as Harry Laughlin and to racial propagandists such as Madison Grant¹³⁴ and Lotthrop Stoddard.¹³⁵ The Act was passed following significant lobbying by John Powell and Dr. Walter A. Plecker.¹³⁶

Powell, a prominent Richmond musician and composer, was the founder and moving force behind the Anglo Saxon Clubs of America.¹³⁷ He led the third chartered branch of that organization, located at the University of Virginia, and provided money and a lobbying effort to pass the antimiscegenation law.¹³⁸

Medical input was supplied by Dr. Walter Plecker. From 1914 to 1942, Plecker served as the Registrar at the Bureau of Vital Statistics, a division of the State Board of Health.¹³⁹ He published annual Vital Statistics Reports which included data on births, deaths, and communicable diseases, and wrote editorials in state publications concerning the role of racial interbreeding as the source of public health problems.¹⁴⁰ His rhetoric fit squarely within the framework of eugenical theorists who characterized miscegenation (racial mixing) as a threat to the health of the white gene pool.¹⁴¹ Plecker used his public office to lobby for laws that would classify all citizens by race and prohibit interracial mixing of any kind.¹⁴² He also spoke to regional and national audiences as a public health expert.¹⁴³

133. The Virginia Racial Integrity Act, Act of March 20, 1924 ch. 371, 1924 Va. Acts 534.

134. In addition to founding the Galton Society, *see* CHASE, note 1, at 165, and serving as a director of the American Eugenics Society, Grant was also the author of several major works on eugenics. *See, e.g.*, MADISON GRANT, *THE PASSING OF THE GREAT RACE OR THE RACIAL BASIS OF EUROPEAN HISTORY* (1916); *THE CONQUEST OF A CONTINENT* (1933).

135. *See* LOTTHROP STODDARD, *THE RISING TIDE OF COLOR AGAINST WHITE WORLD SUPREMACY* (1920); LOTTHROP STODDARD, *THE REVOLT AGAINST CIVILIZATION: THE MENACE OF THE UNDER MAN* (1922).

136. *See generally* Lombardo, *Miscegenation, Eugenics, and Racism: Historical Footnotes to Loving v. Virginia*, *supra* note 39 (analyzing the origin of the Virginia Racial Integrity Act). *See also* Reilly, *supra* note 39, at 7.

137. VIRGINIUS DABNEY, *MR. JEFFERSON'S UNIVERSITY* 66 (1981).

138. *Id.*

139. Lombardo, *Miscegenation, Eugenics, and Racism: Historical Footnotes to Loving v. Virginia*, *supra* note 39, at 425.

140. *Id.* at 428.

141. *Id.*

142. *Id.* at 427-28.

143. For example, he gave an address to the American Public Health Association in 1924 that touted the racial integrity law as *Virginia's Attempt to Adjust the Color Problem*, reprinted in 84 *THE LITERARY DIG.* (Mar. 7, 1925) at 23.

The law¹⁴⁴ that Powell and Plecker wrote included these provisions:

Intermarriage prohibited; meaning of term "white persons."—It shall hereafter be unlawful for any white person in this State to marry any save a white person, or a person with no other admixture of blood than white and American Indian. For the purpose of this chapter, the term "white person" shall apply only to such person as has no trace whatever of any blood other than Caucasian; but persons who have one-sixteenth or less of the blood of the American Indian and have no other non-Caucasic blood shall be deemed to be white persons. . . .

Punishment for marriage.—If any white person intermarry with a colored person, or any colored person intermarry with a white person, he shall be guilty of a felony and shall be punished by confinement in the penitentiary for not less than one nor more than five years.¹⁴⁵

The law survived several challenges until the case of *Loving v. Commonwealth*¹⁴⁶ was initiated in 1958. In that year, a grand jury issued an indictment charging Mildred Jeter (a black woman) and Richard Loving (a white man) with violating the Virginia ban on interracial marriage.¹⁴⁷ They had been married in 1958 in the District of Columbia, and moved to Virginia soon thereafter.¹⁴⁸ The couple pleaded guilty to the charge of interracial marriage and were sentenced to one year in jail; however, the trial judge suspended the sentence on the condition that they leave the state and not return together.¹⁴⁹ This period of exile was to last twenty-five years.¹⁵⁰

The trial judge issued a written opinion which, in its simplicity, remains a monument to the bigotry masquerading as both religion and science:

Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with this arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.¹⁵¹

The Lovings lived in Washington, D.C. until 1963 when they returned

144. An Act to Preserve Racial Integrity, 1924 Va. Acts ch. 371.

145. Va. Code Ann. § 20-54-59 (1950); *See also* *Loving v. Virginia*, 388 U.S. 1, 4-5 (1966).

146. *Loving v. Commonwealth*, 147 S.E.2d 78 (1966).

147. *Id.* at 79.

148. *Id.*

149. *Id.*

150. *Id.*

151. Lombardo, *Miscegenation, Eugenics, and Racism: Historical Footnotes to Loving v.*

to Virginia and asked the trial court to vacate their convictions.¹⁵² They argued that the Racial Integrity law violated their Fourteenth Amendment guarantee of equal protection of the law, but the petition was denied.¹⁵³ An appeal to the federal courts referred the case back to Virginia for disposition.¹⁵⁴ The Virginia Supreme Court ruled the twenty-five year banishment void and returned the case to the trial court for resentencing.¹⁵⁵ An appeal to the United States Supreme Court followed.¹⁵⁶

The briefs from the Virginia Attorney General cited decisions that relied on racist texts written by eugenical colleagues of Powell and Plecker years earlier.¹⁵⁷ These texts had provided specious scientific arguments for supporters of the 1924 law.¹⁵⁸ The Supreme Court was unpersuaded by the eugenicists.¹⁵⁹ Noting that sixteen states continued to prohibit and punish marriages on the basis of racial classifications, the Court stated: "over the past fifteen years, fourteen states have repealed laws outlawing interracial marriages."¹⁶⁰

The Court cited *The New Family and Race Improvement*, a eugenic tract written by Dr. Plecker in 1925. This publication, however, made no mention of the eugenic nature of the law in question, commenting only that the "present statutory scheme . . . [was] passed during the period of extreme nativism which followed the end of the First World War."¹⁶¹

Justice Burger's opinion for a unanimous Court asserted that "[t]here can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause."¹⁶² Burger cited Douglas' comment in *Skinner*:

Marriage is one of the "basic civil rights of man" fundamental to our very existence and survival. . . . The Fourteenth Amendment . . .

Virginia, *supra* note 39, at 450 (quoting Judge Leon Bazile, Caroline County Circuit Court, Va. Briefs and Records, No. 6163 at 14, *Loving v. Virginia* (1958)).

152. *Loving v. Commonwealth*, 147 S.E.2d 78, 79 (1966).

153. *Id.*

154. *Id.*

155. *Id.* at 83.

156. *Loving v. Virginia*, 388 U.S. 1 (1966).

157. See, e.g., Lombardo, *Three Generations, No Imbeciles: New Light on Buck v. Bell*, *supra* note 39, at 138 (citing details related to the decisions (such as *Perez v. Lippold*) used by the Virginia Attorney General in *Loving*).

158. See *id.* at 987-93.

159. *Loving v. Virginia*, 388 U.S. 1, 11-12 n.11 (1967).

160. *Id.* at 6 n.5.

161. *Id.* at 6.

162. *Id.* at 12.

requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State.¹⁶³

The Court held that the Virginia Racial Integrity Act and related laws limiting interracial marriage were unconstitutional.¹⁶⁴

VII. THE EUGENICS CASES AND THE CONSTITUTIONALIZATION OF REPRODUCTIVE RIGHTS

The three aforementioned cases analyzed above lay a foundation for understanding the legal impact of the eugenics movement. But what significance do these cases have to current developments in law and medicine? All of these cases provide points of reference whenever reproductive rights controversies reach the courts. As this article has shown the Court in *Skinner* discussed *Buck*, distinguishing between a state's right to limit reproduction in the context of mental illness and crime.¹⁶⁵ Later cases have also built on these fundamental eugenics cases.

The 1965 decision in *Griswold v. Connecticut*,¹⁶⁶ which struck down laws prohibiting the distribution of birth control, information, and devices introduced the idea of a fundamental right to privacy that surrounded and protected the exercise of certain other constitutional rights.¹⁶⁷ In *Griswold*, the Court relied upon the finding in *Skinner* to hold that marriage and procreation were fundamental rights,¹⁶⁸ and confirmed "strict scrutiny" as the test by which such rights are measured.¹⁶⁹ *Loving* followed *Griswold*, and echoed the "fundamental rights" language of *Skinner*.¹⁷⁰ In the most important of all the reproductive rights cases, *Roe v. Wade*, the right to an abortion was explained and qualified by all three of

163. *Id.*

164. *Id.*

165. *Skinner v. Oklahoma*, 316 U.S. 535, 539-40 (1942).

166. 381 U.S. 479 (1965).

167. *Id.* at 484.

168. *Id.* at 502 (citations omitted)(White, J. concurring). "[T]he Fourteenth Amendment includes the right 'to marry, establish a home and bring up children.' . . . [T]hese are 'among the basic civil rights of man.'" *Id.* at 485. "These cases bear witness that the right of privacy which presses for recognition here is a legitimate one." *Id.*

169. *Id.* at 503-04. "The nature of the right invaded is pertinent, to be sure, for statutes regulating sensitive areas of liberty do, under the cases of this Court, require 'strict scrutiny.'" *Id.*

170. *Loving*, 388 U.S. at 12 (describing the right to marry as "fundamental to our very existence and survival").

the eugenics decisions.¹⁷¹

The *Roe* Court said that past decisions have made “it clear that only personal rights that can be deemed ‘fundamental’ or ‘implicit in the concept of ordered liberty’ are included in this guarantee of personal privacy.”¹⁷² Citing both *Loving* and *Skinner*, the Court noted that the right to privacy has been extended to activities related to marriage and procreation.¹⁷³ But it refused to declare the privacy right absolute, recalling that past decisions such as *Buck* have clarified that there is not “an unlimited right to do with one’s body as one pleases.”¹⁷⁴

The only two cases the Court in *Roe* referenced in that proposition were *Jacobson* and *Buck*.¹⁷⁵ Thus, *Buck* supported the argument that government could place limitations on a woman’s reproductive decisions—an important foundation behind the *Roe* formula that allows states to regulate abortions in later stages of fetal development.¹⁷⁶

Thus, all three eugenics cases, *Skinner* and *Loving* in repudiating eugenic statutes, and *Buck* in upholding one, have contributed concepts, arguments, and language that are critical to the understanding of reproductive rights as a constitutional issue. *Skinner* qualified, but did not overrule *Buck*.¹⁷⁷ *Skinner* generated the fundamental reproductive rights language which was a foundation for the *Griswold* decision, that struck down prohibitions on contraception. The privacy right described in *Griswold* was amplified in *Loving* and ultimately adopted in *Roe v. Wade*.¹⁷⁸ “*Buck*, by then not a particularly robust precedent, nevertheless provided a point of reference for discussing restrictions of reproductive choices in limited circumstances.”¹⁷⁹ Accordingly, the constitutional boundaries surrounding reproductive rights can be traced to language that first appeared in eugenics cases.

171. 410 U.S. 113 (1973). While *Buck* has apparently fallen out of favor as a citation in abortion decisions (e.g., no cite in any Supreme Court opinion between *Roe* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1991)), both *Loving* and *Skinner* continue to provide critical rationale for the more recent reproductive rights decisions.

172. *Roe*, 410 U.S. at 152 (citation omitted).

173. *Id.*

174. *Id.* “The Court has refused to recognize an unlimited right of this kind in the past.” *Id.* at 154.

175. *Id.* at 154. (*Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (vaccination) and *Buck v. Bell*, 274 U.S. 200 (1927) (sterilization)).

176. *Id.* at 164-65.

177. *Skinner v. Oklahoma*, 316 U.S. 535, 542 (1942).

178. *Roe v. Wade*, 410 U.S. 113, 726-27 (1973).

179. See generally *Buck v. Bell*, 274 U.S. 200 (1927) (endorsement of sterilization).

VIII. CONCLUSION

Just as the eugenics cases live on as sources of legal precedent for the ongoing controversy over abortion rights, ideas of the eugenicists continue to spark other topical controversies. For example, do the mentally ill have rights equivalent to the general population in the area of reproduction or anywhere else in civic life, or are they disqualified by their "social inadequacies?" What roles do low I.Q. or other inherited characteristics play in determining a future criminal career? And, how does racial composition of the citizenry affect the health of society?¹⁸⁰

The eugenicists attempted to answer all these questions; arguably they answered incorrectly every time. Yet they were successful in imprinting our laws with their ideas for the better part of the twentieth century, and reaction to their legacy played a major part in grounding the case law that now defines reproductive rights. Today we remain enmeshed in national debates about inherited intelligence, restrictions on immigration, and the links between race and inherited propensities to crime. The legal successes of the eugenicists should give us pause as we anticipate the seventieth anniversary of *Buck v. Bell*, once again in the midst of a frenzied search for scientific solutions to our social ills.

180. Questions such as these are addressed, much in the tradition of the eugenicists, by books such as RICHARD HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* (1994).

