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PLESSY V. FERGUSON TO NEW DEAL
LABOR LAW**

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WAGING WAR ON THE “UNFIT”?
FROM *PLESSY V. FERGUSON* TO NEW DEAL LABOR LAW

HARRY G. HUTCHISON*

ABSTRACT

Racism and group hatred have existed in most cultures throughout history but it took millennia for these hostilities to migrate into the safe harbor of scientific thought, thus rationalizing destructive actions against the despised. Since power, whether held by individuals, social groups, or institutions tends naturally toward manipulation and control, it would be unfair to claim that public intellectuals and institutions operating during the Progressive Era invented contempt as a weapon against the unwanted, such as Carrie Buck. But it would be accurate to claim that they perfected the ideology of societal advancement, which is often tainted by the human tendency to use power, unimpeded by moral restraint, for purposes of self-aggrandizing domination and abuse. The publication of Paul Lombardo’s book, *THREE GENERATIONS NO IMBECILES: EUGENICS THE SUPREME COURT AND Buck v. Bell* offers an opportunity to reexamine the enduring effects of progressive policies that were reinforced by the capitulation of modern hierarchs to pseudo-science as a vehicle to achieve human improvement. Neither the story of Carrie Buck nor the facts surrounding the sterilization imposed on her are disputed. What is far more interesting and important, is how this story is told, its moral meaning, its political and legal consequences and finally its implications for understanding both the past and future of a nation that is presumably committed to self-evident truths. It is possible that her story is part of a larger narrative that reflects an intentional, carefully considered movement that is constitutive of the pursuit of a master race, by elites espousing Nietzsche’s will to power.

A careful examination of the events that led to Carrie Buck’s sterilization shows that the intellectual currents that placed her at risk are consistent with the cultural milieu that gave rise to a determined regulatory effort to prevent marginalized groups and individuals from exercising their liberty. From the time period since the rise of Jim Crow, followed by its validation by the Supreme Court in *Plessy* to the instantiation of the New Deal extending to contemporary times, members of categories labeled as “unfit,” have struggled to obtain social legitimacy and equality. With the rise in the size and scope of government, the odds of escaping exploitive policies tied to genetic purification or subtler forms of exclusion have declined ever since Justice Holmes offered his dissent in *Lochner*. The ramifications of this development guarantee that marginalized Americans will continue to face increasing risk from the unconstrained exercise of government power that compromises their liberty interest. Hence, in praising the good that can come from government discretion, society should never forget the evils that the state has

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wrought and continues to countenance as part of its pursuit of hegemony in virtually all aspects of human life.

The Holocaust was born and executed in our modern rational society, at the high stage of our civilization and at the peak of human cultural achievement, and for this reason it is a problem of that society, civilization, and culture.¹

INTRODUCTION

The publication of Paul Lombardo’s book, *THREE GENERATIONS NO IMBECILES: EUGENICS THE SUPREME COURT AND *Buck v. Bell** offers an opportunity to reexamine the enduring effects of progressive policies, which were spawned by the belief that scientific experimentation leads inescapably to human improvement.² The book unravels many of the currents that animated the Progressive Era, an intensely ideological epoch that spanned the period between the latter part of the Nineteenth century to the New Deal. Emphasizing the Ionian Enchantment, a belief that the unity of knowledge explains everything,³ these cultural currents fostered numerous experiments directed toward the transformation of human behavior. Research, in due course, gave rise to sterilization as the solution to crime, degeneracy and the lack of hygiene. Arising out of this rich tapestry, neither the story of Carrie Buck nor the facts surrounding the removal of her reproductive capacity are disputed. What is far more interesting and important, is how this story is told, its moral meaning, its political and legal consequences and finally its implications for understanding both the past and future of a nation that is presumably committed to self-evident truths.⁴ The proper interpretation of *Buck v. Bell* is crucial. Does the case represent an isolated injustice imposed by the state of Virginia, on an unfortunate, poorly educated woman, who was exploited by bad science and victimized

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¹ DAVID ENGEL, *HISTORIANS OF THE JEWS AND THE HOLOCAUST*, 12 (2010) (citing Zygmunt Bauman).

² PAUL A. LOMBARDO, *THREE GENERATIONS, NO IMBECILES: EUGENICS, THE SUPREME COURT AND *BUCK V. BELL** ix-xiv and 7-19 (2008).

³ See e.g. EDWARD O. WILSON, *CONSILIENCE: THE UNITY OF KNOWLEDGE*, 3-7 (1998).

⁴ See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights . . .”).

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by even worse lawyering, or rather an intentional, carefully considered movement constituting the pursuit of high culture by elites embodying Nietzsche’s will to power?⁵

*Buck v. Bell*⁶ materialized during an era that stressed a cultural commitment to progress, public health and societal efficiency. At times this commitment issued forth in law reform initiatives maintaining the innate inferiority of women⁷ and favoring scientific racism.⁸ Such initiatives often exhibiting majoritarian paternalism placed the liberty interests of marginalized individuals and groups at risk. Featuring judicial deference to federal statutes grounded in a broad reading of the commerce clause and federal and state enactments originating in an expansive understanding of police power,⁹ reform efforts tied to biological identity and racial purity¹⁰ proliferated. Some perspective on such reform efforts can be provided by progressives’ reaction to the abominable treatment of the mentally ill and handicapped during this period. Asylums, for instance were mere storage bins for “human refuse,” where patients passively rotted away after spending their day restrained by camisoles and straitjackets, and their nights locked into covered cribs.¹¹ Provoked by such deprivations, hopeful progressives entered this arena premised on the need for a discretionary response to the individual case.¹² The strength of this

⁵ NIETZSCHE, BEYOND GOOD AND EVIL, 259 (trans. Walter Kaufmann, 1989) (Evidently higher cultures arise because anything which is a living and not a dying body is propelled by an incarnate will to power, and “it will strive to grow, spread, seize, become predominant . . .”) (quoted in JAMES DAVISON HUNTER, TO CHANGE THE WORLD: THE IRONY, TRAGEDY, & POSSIBILITY OF CHRISTIANITY IN THE LATE MODERN WORLD, 307 n. 5 (2010).

⁶ 274 U.S. 200 (1927).

⁷ See e.g., *Muller v. State of Oregon*, 208 U.S. 412, 420-421 (1908) (Asserting that women’s physical structure, and the functions she performs “justify special legislation restricting or qualifying the condition under which she should be permitted to toil” and the conclusion that “history discloses the fact that women has always been dependent on man.”).

⁸ Mark V Tushnet, *Progressive Era Race Relations Cases in Their “Traditional” Context*, 52 VAND. L. REV. 993, 993 (1998). See also, Harry G. Hutchison, *Employee Free Choice or Employee Forged Choice? Race in the Mirror of Exclusionary Hierarchy*, 15 MICH. J. OF RACE & LAW, 369, 380-382 (2010) [hereinafter, Hutchison, *Employee Free Choice*].

⁹ See e.g., Richard A. Epstein, *Lest We Forget: Buchanan v. Warley and Constitutional Jurisprudence of the “Progressive Era”* 51 VAND. L. REV. 787, 791 (1998) [hereinafter, Epstein, *Lest We Forget*].

¹⁰ *Id.* at 793-794 (discussing the effort to validate a “Progressive” era ordinance mandating racial segregation on grounds that it tends to promote public peace by preventing racial conflicts and maintains racial purity). This effort was occasionally hindered by courageous courts. See, DAVID E. BERNSTEIN, ONLY ONE PLACE OF REDRESS: AFRICAN AMERICANS, LABOR REGULATIONS, & THE COURTS FROM RECONSTRUCTION TO THE NEW DEAL, 3 (2001) [hereinafter, BERNSTEIN, ONLY ONE PLACE OF REDRESS] (describing the decision by some lower federal courts to overturn facially neutral labor regulations intended to harm racial minorities).

¹¹ Andrew Scull, *Progressive Dreams, Progressive Nightmares: Social Control in 20th Century America*, 35 STAN. L. REV. 575, 576-577 (1981).

¹² *Id.*

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initiative was reinforced by coupling blithe self-confidence in their own capacity to design effective treatment with a dangerous faith in the benevolence of the state and its agents.¹³ That said, it was precisely the commitment of progressives to a widening of the scope of state action¹⁴ that exacerbated their exclusion and mistreatment of individuals and groups, who were seen as a threat to the vitality of the nation. Progressives sought legal, sociological and scientific theories that justified their presuppositions about the proper treatment of a broad category of individuals labeled as the “unfit,” “undesirable” or “unemployable.” These presuppositions led to law reform initiatives backed by creative judicial interpretations that furthered their objective of controlling, if not eliminating the “unfit.” *Buck v. Bell* illustrates the corrosive effects of such initiatives. Responding to this possibility, Lombardo asserts:

In retrospect, it would be reasonable to conclude that the result in *Buck* was inevitable. In fact, the very opposite is true. Carrie Buck was the victim of an elaborate campaign to win judicial approval for eugenic sterilization laws, but the campaign need not have succeeded.¹⁵

Against such claims, this article shows that the campaign that victimized Ms. Buck was the inevitable outcome of the presumptions tied to progressive ideology. Further, I establish that Carrie Buck’s story encapsulates a larger narrative: the often successful attempt to wage war on the “unfit.” This war was sparked by the capitulation of modern hierarchs to biology, genetics and pseudo-science. Building on the platform established by *Plessy v. Ferguson*,¹⁶ the pursuit of human perfectibility and a narrow conception of human liberty, this war extended beyond the boundaries established by a state-based efforts focusing on the “feeble-minded” and other “defectives” to federal efforts that intentionally or inadvertently diminished the economic and social opportunities of “undesirables.” Subtle remnants of this war remain alive today.

Part I examines the *Buck* decision and unpacks Lombardo’s thesis wherein he contends that the appropriate lesson America should learn from the struggle to impose involuntary sterilization on human subjects is that the nation should be reluctant to

¹³ *Id.* at 577.

¹⁴ *Id.* (discussing the treatment of individuals held in asylums).

¹⁵ LOMBARDO, *supra* note ___ at xi.

¹⁶ 163 U.S. 537 (1896).

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swiftly implement the results of scientific research in human society.¹⁷ Although this observation is apt, it does not go far enough in examining the pseudo-scientific racism and progressive politics behind this issue. Part II explicates America’s remarkable commitment to biological determinism exemplified by *Plessy v. Ferguson*. Given America’s cultural commitment to progress facilitated by deference to scientific myths, and creative extensions of the police power and commerce power, *Buck v. Bell* represents a predictable outcome. It also constitutes a forecast implying efforts to rein in future power grabs by government may be difficult to resist in the face of impoverished conceptions of liberty. Part II also reconsiders Lombardo’s thesis in light of ample evidence indicating that human agents, richly endowed by government discretionary power, instantiated regimes of racial and class subjugation in the name of scientific progress, and such efforts ranged from the era of Jim Crow through the New Deal. Coincident with this trend, in both the early and late 20th century, labor organizations, the beneficiaries of New Deal Labor law, institutionalized discriminatory practices at the expense of African American workers.¹⁸ The combined effects of these developments are still being felt today.

Part III situates Lombardo’s scholarship within a broad progressive context in order to expose shortcoming in his analysis. Although Lombardo makes useful observations regarding the flaws of the pseudo-scientific movement that treated Carrie Buck and her “kind” with contempt, on closer inspection, readily available evidence shows that such categorization was inevitable in a milieu that had surrendered to the philosophy of human perfection. This move was deeply paradoxical. On one hand believers in social Darwinism foresaw the future as inevitably determined according the laws of heredity. On the other, they worried whether the inevitable outcome of history that they foresaw could come about without their intervention. Carrie Buck’s story, a story of government intervention and human invention, is part of a larger narrative evolving from fundamental ideological flaws in progressive thought, its actors and its philosophical allies. Although Lombardo disputes the deployment of state power in the domain of human reproduction,

¹⁷ LOMBARDO, *supra* note ___ at 279 (quoting L. C. Dunn).

¹⁸ See e.g., HERBERT HILL, *BLACK LABOR AND THE AMERICAN LEGAL SYSTEM: RACE WORK, AND THE LAW* 4-5 (1977, 1985). See also, Harry G. Hutchison, *Work, the Social Question, Progress and the Common Good?*, 48 J. OF CATHOLIC L. STUDIES, 59, 103-105 (2009) [hereinafter, Hutchison, *Work, the Social Question*] (linking the American labor movement to racist oppression).

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he fails to acknowledge the current deployment of eugenic tinged polices in ongoing attempts to increase abortions in racially disadvantaged communities. He also neglects to make the association between the discriminatory assumptions embedded in *Buck v. Bell* and the invention and persistence of exclusionary labor policies that reduce employment for individuals and groups classified as “unfit” or “undesirable.” Properly understood, whether within the world of reproduction or labor policy, it is not science, but an enticing ideology mandating progress, which may be the true enemy of the marginalized among us.

I. LOMBARDO’S ACCOUNT OF *BUCK V. BELL*

A. THE OPINION

Before examining Lombardo’s account of *Buck v. Bell*, it is constructive to briefly inspect the decision itself. Coincident with the events leading up to the *Buck* case, Virginia was the focal point of an effort to limit looming threats to whiteness¹⁹ featuring a campaign sparked by the Ku Klux Klan²⁰ and others intended to defend racial purity.²¹ This development exposed the widely shared view that “unwanted characteristics were transferred through blood and that non-white blood could dominate and pollute the most desirable (‘white’) human traits.”²² The *Buck v. Bell* case involved an equal protection challenge to a Virginia statute which gave state authorities the right to administer involuntary sterilization to custodial inmates. Although there was no real evidence of her mental or genetic impairment, Carrie Buck had been placed as a civil inmate in the State Colony for Epileptics and Feeble Minded (Colony). After the state decided to sterilize her, she sought judicial review of the decision to permit the operation to proceed. Asserting that the statute under which she was ordered to undergo an operation was void under the Fourteenth Amendment because it denied her due process of law and equal protection of the laws, Carrie Buck launched an appeal to the U.S. Supreme Court. She appealed the judgment of the Supreme Court of Appeals of the State of Virginia, which

¹⁹ Meghan Carr Horrigan, Note: *The State of Marriage in Virginia History: A Legislative Means of Identifying the Cultural Other*, 9 GEO. J. GENDER & L. 379, 389 (2008).

²⁰ *Id.* at 395.

²¹ *Id.* at 381.

²² *Id.* at 389-390.

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affirmed the judgment of the Circuit Court of Amherst County.²³ The Circuit Court judgment permitted the defendant, the superintendent of the Colony to perform a salpingectomy for the purpose of making her sterile.²⁴ Accepting the conjecture that Ms. Buck was the daughter of a feeble minded mother and the mother of an illegitimate feeble minded child,²⁵ maintaining that the focus of her attack was not based upon procedure but upon the substantive law,²⁶ and categorizing the concept of equal protection as “the last resort of constitutional arguments,”²⁷ the U. S. Supreme Court held that a Virginia statute premised both on the laws of heredity and the desire to make society a better place could justify the compulsory sterilization of Carrie Buck.²⁸ This is so because she was the probable potential parent of socially inadequate offspring,²⁹ and the Constitution could not prevent the State of Virginia or Justice Holmes from concluding that “[t]hree generations of imbeciles are enough.”³⁰ As such, neither the due process component nor the equal protection clause of the Fourteenth Amendment were adequate to defend Carrie Buck’s liberty.

To be sure, the *Buck* decision came prior to the use of fundamental rights/strict scrutiny analysis and accordingly, the Virginia statute at issue might now be viewed as an interference with the fundamental right of privacy (the freedom of choice regarding the individual’s ability to reproduce).³¹ If so, a statute permitting involuntary sterilization might only be justified by a compelling governmental interest.³² Hence, the *Buck v. Bell* case may now be seen as a modern-day anomaly. But a full reckoning of the Progressive Era, which produced this decision, suggests that conclusion is doubtful.

B. THE ORIGINS OF *BUCK V. BELL*: AN INTRODUCTION

²³ *Buck*, 274 U.S. at 205.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 207.

²⁷ *Id.* at 208.

²⁸ *Id.* at 205-208.

²⁹ *Id.* at 207.

³⁰ *Id.* at 207.

³¹ JOHN E. NOWAK AND RONALD D. ROTUNDA, CONSTITUTIONAL LAW 917, (2004).

³² *Id.*

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Paul Lombardo’s wide ranging book reflects decades of original research into the practice of eugenical sterilization in Virginia.³³ It is impossible in the space of this review to illustrate all the continuities, discontinuities and rhetorical abrasions that characterize the Progressive zeitgeist, which undergirded, popularized and rarely contested the movement to place involuntary sterilization at the top of America’s agenda. Whatever the continuities and discontinuities may be that confronted this movement, it is likely that the fear of difference—different races, intellectual abilities, criminal capabilities and even different understandings of science itself—combined to produce the *Buck v. Bell* opinion, an opinion, which retains its vitality because it has never been repudiated.³⁴ Given judicial commitments to precedent and *stare decisis*, Justice Holmes’ opinion is available whenever government seeks “reasonable” arguments to protect itself from the socially inadequate among us. The *Buck* case is equally important because it provides official, if unwitting, recognition of the claim that progress requires authoritarianism, which may be the inherent tendency of modern democracies.³⁵

Lombardo’s examination of *Buck* rightly places the evisceration of Carrie Buck’s reproductive capacity in a rich national and international context illuminating links between German and U.S. eugenicists³⁶ as well as an ascendant campaign favoring involuntary sterilization throughout the United States.³⁷ Lombardo inspects arguments favoring government sterilization policies, including concerns for a deteriorating standard of national heredity, growing health and welfare expenditures for higher crime rates as well as ethnic or racial bigotry.³⁸ The drive to reshape the world through eugenics culminated in the Nuremberg Trials for war crimes, which provided a forum to convincingly link policies favored by the Nazis with the policies endorsed by the

³³ See e.g., Paul A. Lombardo, *Eugenical Sterilization in Virginia: Aubrey Strode and the Case of Buck Bell*, University of Virginia (University of Virginia, Ph. D. dissertation, 1982); Paul A. Lombardo, *The American Breed: Nazi Eugenics and the Origin of the Pioneer Fund*, 65 ALBANY L. REV. 743-830 (2002).

³⁴ LOMBARDO, *supra* note ___ at 270 (The case “has been cited more than 150 times in judicial opinions since it was decided in 1927.”).

³⁵ See e.g., Richard H. Pildes, *The Inherent Authoritarianism in Democratic Regimes, in Out of and Into Authoritarianism*, 125-151 (Andras Sajó ed. 2002) available at http://ssrn.com/abstract_id=373660 at page 1 in the manuscript (showing that authoritarianism is an inherent structural tendency of democratic regimes).

³⁶ LOMBARDO, *supra* note ___ at 199-218.

³⁷ *Id.* at 219-235 & 293-294.

³⁸ *Id.* at 236.

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Supreme Court in *Buck*.³⁹ While the American government concentrated on bringing criminal charges against Nazi doctors for illegal acts taken in furtherance of the war effort, it largely ignored hundreds of thousands of involuntary sterilizations carried out on German citizens under German law.⁴⁰ American reluctance was grounded in the presumption that sterilizing the hereditarily defective could be an appropriate social policy so long as it was based on science rather than mere bigotry.⁴¹ Lombardo’s scholarship links progressive efforts in the United States to similar efforts in Germany and constitutes an important contribution to America’s understanding of the ongoing effort to reform law and perfect humanity. Lombardo’s work supplements Jonah Goldberg’s remarkable achievement in showing a broad philosophical connection between President Franklin Roosevelt’s New Deal and the accomplishments and aspirations of Mussolini, Father Coughlin and Adolf Hitler.⁴²

Returning to Virginia, it is notable that the state assumed national leadership in the propagation of a number of questionable initiatives. For example, it led the nation in imposing the first known statute designed to protect oppressive white employers from the outmigration of African American workers seeking relief from awful working conditions and low wages.⁴³ Virginia also became a leader in the movement to prevent interracial marriages on grounds that “interbreeding” posed a public health risk.⁴⁴ Lombardo confirms that as the Twentieth century approached and as concern for overcrowded mental institutions arose, physicians, clergymen and reform-minded politicians agreed that warehousing people together who suffered from a wide variety of social,

³⁹ *Id.* at 236.

⁴⁰ *Id.* at 237.

⁴¹ *Id.* at 237.

⁴² See e.g., JONAH GOLDBERG, LIBERAL FASCISM: THE SECRET HISTORY OF THE AMERICAN LEFT FROM MUSSOLINI TO THE POLITICS OF MEANING 137-149 (2007) (Showing that as the presidential election loomed Coughlin threw his considerable weight behind FDR, claiming that the New Deal was “Christ’s Deal,” illustrating that FDR and Hitler overlapped in their fawning over the “forgotten man,” and explaining that Mussolini and Hitler felt that they were doing things along similar lines to FDR so much so that Mussolini’s press office recognized that his positive statements about FDR were starting to hurt their comrade-in-arms).

⁴³ BERNSTEIN, ONLY ONE PLACE OF REDRESS, *supra* note ___ at 12 (Emigrant agents facilitated the outmigration of southern blacks from oppressive southern employers. Virginia imposed the first known statute restricting emigrant agents in 1870, thereby restricting the outmigration of black workers). Such laws were arguably a form of illicit class legislation. See *id.* at 12-13.

⁴⁴ LOMBARDO, *supra* note ___ at 243-247.

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psychological and medical maladies could no longer be tolerated.⁴⁵ Virginia became the epicenter of a campaign to provide a permanent remedy for hereditary “feeble-mindedness.”⁴⁶

This national cultural wave was animated by members of the “Purity Crusade,” as well as the social hygiene movement⁴⁷ who believed that sexually immoral individuals suffered from an inherited subnormal mentality, which could infect the populace.⁴⁸ Both the moral tone of the purity crusaders and the public health message of the social hygienists resonated with eugenicists who saw eugenic reforms like racial segregation and sterilization as positive social benefits that met the demands of both morals and medicine.⁴⁹ This line of attack was revitalized by the observation that conditions such as syphilitic insanity and congenital blindness in infants simply added to the ranks of the “defectives,” and growing sterility among married women increased concerns about falling birth rates among favored classes.⁵⁰ Scholars and scientists worried that these developments meant society was on the road to race suicide.⁵¹

The Progressive Era is marked not only by the advent of the welfare state but also an extraordinary vogue for race thinking and the social control of human breeding⁵² that evidently found expression in the racially charged language of the U.S. Supreme Court.⁵³ By insisting on racial segregation and by locking so-called unclean women and men away, society and future generations could be protected from corrupt “germ plasm” infecting the blood of the populace.⁵⁴ Such moves were augmented by scientific experts who provided a pragmatic, but often dishonest,⁵⁵ foundation for legal reform.⁵⁶ *Buck v. Bell* is a persuasive illustration of a cascading form of societal self-deception, premised

⁴⁵ *Id.* at 12.

⁴⁶ *Id.* at 15.

⁴⁷ *Id.* at 16.

⁴⁸ *Id.* at 16-17.

⁴⁹ *Id.* at 16.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² David E. Bernstein and Thomas C. Leonard, *Excluding Unfit Workers: Social Control Versus Social Justice in the Age of Economic Reform* 72 LAW & CONTEMP. PROB. 176, 177 (2009).

⁵³ See e.g. *Plessy v. Ferguson*, 163 U.S. at 549 (upholding the assignment of a black passenger to a blacks only train compartment is consistent with the fact that “he has been deprived of no property since he is not lawfully entitled to the reputation of being a white man.”).

⁵⁴ LOMBARDO, *supra* note ___ at 16-17.

⁵⁵ *Id.* at 112-156 (detailing corrupt science reinforced by a corrupt legal case wherein the deck was stacked against Carrie Buck).

⁵⁶ *Id.* at 17.

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on human perfectibility, which sheltered the pursuit of power by progressives. The following subsections sketch the historical background of the *Buck* case.

C. SCIENCE IN SERVICE OF HUMANITY

Hell is other People⁵⁷

Whether Jean-Paul Sartre’s above-referenced deduction is accurate or not, Lombardo’s best work surfaces in his research showing the persevering campaign by reformers to link surgery with the eradication of sexual deviancy and mental illness as part of a transparent effort to reduce the quantum of “other people.” From J. H. Kellogg in Battle Creek, Michigan, who believed that imbecility and idiocy result solely from masturbation, to Dr. Joseph Price of the Pennsylvania State Hospital for the Insane, who removed women’s ovaries in hopes of restoring their sanity, to Dr. F. Hoyt Picher, who castrated fifty-eight children for therapeutic reasons,⁵⁸ asexualization efforts, by “reasonable” people, were all the rage during the period between the 1890’s through the 1930s.⁵⁹ In 1897, a Michigan bill called for the “‘asexualization’ of three-time felons, rapists, and male or female inmates of the Michigan Home for the Feeble Minded and Epileptic.”⁶⁰ Reflecting widespread popular support for such initiatives among the educated class, “[t]he proposed law was sent to asylum and prison superintendents in the United States and Canada as well as three hundred physicians. Almost two hundred responded, all but eight favorably.”⁶¹ From Indiana to Washington, to California the demand by reformers for the enactment of sex surgery laws succeeded.⁶² New Jersey’s law, passed in 1911, was immediately signed by America’s leading progressive⁶³ and eugenics supporter, Governor Woodrow Wilson.⁶⁴ While this law was ultimately voided,

⁵⁷ Jean-Paul Sartre, (cited in Richard John Neuhaus, *The Hermeneutics of Love*, FIRST THINGS, 87 (June/July 2002)).

⁵⁸ LOMBARDO, *supra* note ___ at 20-21.

⁵⁹ *Id.* at 21.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 24-26.

⁶³ GOLDBERG, *supra* note ___ at 104 (explaining Wilson’s attempt to convert the Democratic Party into a Progressive party and make it the engine for the transformation of America).

⁶⁴ LOMBARDO, *supra* note ___ at 26.

“Please cite to 7 STANFORD J. C. R. & C. L. (forthcoming) (2010)”

as the next subsection shows, Virginia decided to move ahead with its own law and its own test case.

The fervor that led many states to enact involuntary sterilization laws owes a debt to Gregor Mendel who published a paper on the inherited characteristics of sweet peas that laid the foundation for studying genetics.⁶⁵ The paper went unnoticed for a number of years but later received attention because it ostensibly supplied “a biologically based scientific model, complete with ‘laws’ of heredity.”⁶⁶ “According to Mendel, people inherited certain characteristics or ‘traits’ from their parents in a predictable pattern. Those traits were passed down as independent units via some physical ‘determiner’ or ‘factor.’”⁶⁷ Putatively factors, which later became known as genes were “the essence of heredity and in the aggregate made up what came to be called ‘germ plasm’—the physical link connecting the generations.”⁶⁸ “Mendel’s theory of inheritance, Francis Galton’s family study methods, and the general passion to eradicate social problems came together in the creation of an American institution dedicated to the study of eugenics,” the Eugenics Record Office (ERO).⁶⁹ In a move that offers parallels with Chairman Mao’s campaign to sacrifice millions of peasants to the needs of civilizational progress and efficiency,⁷⁰ Charles Davenport, the head of the ERO worked to develop an enforceable remedy for people, who were considered a detriment to civilization.⁷¹ Davenport sought to pave the way for eugenic legislation that would prevent “idiots, low imbeciles, incurable and dangerous criminals” from reproducing. Shrouded by the rhetoric of social self-protection, the nation, in Davenport’s view would be equipped to “annihilate the hideous serpent of hopelessly vicious protoplasm” as a form of preventive medicine and thereby replace palliative philanthropy.⁷² Davenport’s work cohered with the efforts of progressives, who sought to remake the world through the liquidation of

⁶⁵ *Id.* at 30.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 30.

⁷⁰ See e.g., JUN CHANG AND JON HALLIDAY THE UNKNOWN STORY: MAO, 426-439 (2005) (describing China’s Great Leap forward, which was propelled by the calculation that in order to achieve progress, half of China may well have to die).

⁷¹ LOMBARDO, *supra* note ___ at 31.

⁷² *Id.*

“Please cite to 7 STANFORD J. C. R. & C. L. (forthcoming) (2010)”

America’s black and “sinister” polyglot population.⁷³ In line with such views, “former president Teddy Roosevelt stated that ‘society has no business [permitting] degenerates to reproduce their kind.’”⁷⁴ Amplifying this stance, he said, “‘I wish very much that the wrong people could be prevented entirely from breeding.’”⁷⁵ Given such enthusiasm, the “Eugenic Record Office offered a perfect setting to put Progressive theory to work. It would engage in constant studies, employing the most up-to-date statistical techniques to make sense of human behavior and the rules of heredity. . . Above all, it would enlist the forces of science to collect important data that would form a basis for policy recommendations, to advise government officials and lawmakers, to lead the way to reform of laws and regulations.”⁷⁶ Nevertheless, future reform efforts were necessary because proponents of sterilization conceded that it was not likely to provide a “final solution” to problems such as hereditary feeble-mindedness although it would provide a makeshift approach that would make conditions more tolerable.⁷⁷ An important predicate to the widespread adoption of eugenical sterilization was the development of a law that could withstand constitutional scrutiny. Essential to that effort were campaigns to garner public support.⁷⁸

D. MAKING STERILIZATION CONSTITUTIONAL

Individuals, institutions and groups proclaiming the promise of the new world order during the early part of the twentieth century recognized that public support for sterilization was still undeveloped.⁷⁹ Proponents of mandatory sterilization knew that any campaign to institute legal reform would face legal challenges in the courts and defeating such challenges would be essential before compulsory operations could be performed on a massive scale. Before law could take lessons from biology, health care professionals,

⁷³ GOLDBERG, *supra* note ___ at 135 (describing this effort and quoting H. G. Wells who saw President Franklin Roosevelt as the most effective instrument for transmitting the new world order).

⁷⁴ LOMBARDO, *supra* note ___ at 32.

⁷⁵ *Id.*

⁷⁶ *Id.* at 34.

⁷⁷ *Id.* at 40.

⁷⁸ *Id.* at 42-57.

⁷⁹ *Id.* at 43.

“Please cite to 7 STANFORD J. C. R. & C. L. (forthcoming) (2010)”

church leaders, scientists and legislators had to be mobilized⁸⁰ and opponents had to be silenced. Conferences such as the First National Conference on Race Betterment were organized to get the message out.⁸¹ Papers were presented including a plan to eliminate the great mass of defectiveness menacing America’s national efficiency and happiness.⁸² One sterilization advocate calculated that a “systematic program to purify the human ‘breeding stock’ would require fifteen million sterilizations over approximately sixty-five years.”⁸³ While some geneticists began to question eugenic policy and saw eugenic claims as unreliable and reckless, members of the vanguard were undeterred.⁸⁴ In order to implement their ideas, an examination of existing sterilization laws was completed, and these were reinforced by the creation of a Model Sterilization law with the objective of preventing “the procreation of feebleminded, insane, epileptic, inebriate, criminalistic and other degenerate persons by authorizing and providing by due process of law for the sterilization of persons with inferior hereditary potentialities, maintained wholly or in part by public expense.”⁸⁵

In Virginia, lawmakers were quick to link public health concerns to eugenics. In 1902, the Virginia General Assembly considered ruling out kissing except between those who could prove by a doctor’s testimony that they were free of disease.⁸⁶ Though Virginia proposals prescribing surgical sterilization failed initially, subsequently such efforts were advanced in order to address fears of interracial crime. One physician advocated castration for black men who assaulted white women.⁸⁷ Others supported sterilization to prevent the breeding of rapists, murderers and train wreckers.⁸⁸ The drumbeat of support for this initiative among clergy, politicians and scientists reached its apotheosis in the inaugural volume of the UNIVERSITY VIRGINIA LAW REVIEW wherein one lawyer asked “wearily how the ‘blessing of liberty, or full domestic tranquility’ could

⁸⁰ See *e.g. id.* at 43-47.

⁸¹ *Id.* at 47.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 56-57.

⁸⁵ *Id.* at 51.

⁸⁶ *Id.* at 58.

⁸⁷ *Id.*

⁸⁸ *Id.*

“Please cite to 7 STANFORD J. C. R. & C. L. (forthcoming) (2010)”

be enjoyed if persons ‘civilly unfit’ were permitted to ‘procreate their species and scatter their kind’ among normal citizens.”⁸⁹

Because sterilization efforts suffered from a mixed record of legislative progress in the United States⁹⁰ proponents of eugenical sterilization were far from optimistic about the future of legally mandated surgery.⁹¹ Aroused by the absence of momentum, three activists in Democratic Party politics, Albert Priddy, who led the Virginia Colony, lawyers, Aubrey Strode and Irving Whitehead, worked to rescue the movement.⁹² Working with E. Lee Trinkle, governor of Virginia, with whom he shared a number of progressive views,⁹³ Strode wrote draft legislation in Virginia that would provide legal authority and withstand constitutional scrutiny.⁹⁴ Cognizant of the fact that many sterilization laws in other states had been found legally deficient because they violated provisions for due process or were constitutionally suspect because they did not apply equally to residents of asylums and other genetically suspect citizens or failed to provide notice to patients or legal counsel,⁹⁵ Strode wrote a law that summarized the rationale for eugenic sterilization including the contention that the law promoted the health of the individual patient and the welfare of society.⁹⁶ Strode stated that not only would “the common good” be served by sterilization, but ironically enough, the health of the patient would be advanced.⁹⁷ “The presumption that the ills of society could be cured through selective control of the mechanism of heredity was a major tenet of eugenic dogma.”⁹⁸ Accordingly, the proposed law was directed toward reducing the menace posed by the propagation of “defective” persons.⁹⁹ Unadorned by actual scientific data, the law gave authority to initiate sterilization procedures to superintendents of state hospitals or colonies for the mentally deficient.¹⁰⁰ The law provided a number of procedural

⁸⁹ *Id.* at 59.

⁹⁰ *Id.* at 91 (discussing this mixed record that included legislative failures, vetoes and judicial invalidations of state sterilization laws during the period between 1914-1922).

⁹¹ *Id.*

⁹² *Id.* at 94.

⁹³ *Id.* at 95.

⁹⁴ *Id.* at 92-93.

⁹⁵ *Id.* at 92-93.

⁹⁶ *Id.* at 98.

⁹⁷ *Id.* at 98.

⁹⁸ *Id.* at 99.

⁹⁹ *Id.* at 98.

¹⁰⁰ *Id.* at 98-99.

“Please cite to 7 STANFORD J. C. R. & C. L. (forthcoming) (2010)”

safeguards including the right to be represented by a lawyer.”¹⁰¹ Though the linkage between mental disorders and social problems, on the one hand with genetics, on the other, was highly suspect,¹⁰² the law provided that “[s]terilization could be ordered if the board found that the patient was ‘insane, idiotic, [an] imbecile, feeble-minded, or epileptic, and by the laws of heredity is the probably potential parent of socially inadequate offspring likewise afflicted.”¹⁰³

Responding to the passage of an acceptable sterilization law, Priddy, Strode and others swiftly prepared a test case that would win approval in Virginia’s judicial system before seeking Supreme Court review. A list of patients was gathered, lawyers and guardians were hired and compliance with due process was sought.¹⁰⁴ Following a hearing, the Board approved several sterilization petitions, but one petition—Carrie Buck’s—took center stage.¹⁰⁵ As it happens, Strode who drafted the law was retained to defend it.¹⁰⁶ Priddy, the director of the Virginia Colony named R. G. Shelton as Carrie’s guardian, Shelton then retained Irving Whitehead, a confidant of Priddy and a long-term friend of Aubrey Strode as her counsel.¹⁰⁷ Absent judicial intervention, Carrie’s ability to procreate was at risk.

E. THE TRIAL

In the face of public opinion elevating eugenics as a form of biological patriotism,¹⁰⁸ the willful complicity of Irving Whitehead in the state of Virginia’s effort to sterilize her,¹⁰⁹ and the willingness of eugenics “experts” to testify without gathering evidence,¹¹⁰ Carrie Buck was simply defenseless. Among the eugenics experts who testified, Dr. Joseph DeJarnette the leader of the Western Lunatic Asylum in Staunton Virginia was

¹⁰¹ *Id.* at 99.

¹⁰² *Id.* at 99.

¹⁰³ *Id.* at 99 (The law was strengthened by adding provision stating that doctors who operated “were immune from civil or criminal liability and reaffirmed the prerogative of physicians to sterilize patients for therapeutic (rather than eugenic) motives.”).

¹⁰⁴ *Id.* at 101-102.

¹⁰⁵ *Id.* at 102.

¹⁰⁶ *Id.* at 101.

¹⁰⁷ *Id.* at 106-107.

¹⁰⁸ *Id.* at 112.

¹⁰⁹ *Id.* at 136-148.

¹¹⁰ *See e.g., id.* at 130 (One expert, Estabrook, gave no test to Carrie but nonetheless concluded that she should be sterilized for eugenic reasons).

“Please cite to 7 STANFORD J. C. R. & C. L. (forthcoming) (2010)”

remarkably ardent.¹¹¹ Reiterating rhetoric claiming that reproduction among the “unfit” was a crime against their offspring and a burden to their state,¹¹² expressing concern for sexually transmitted infections that led to “defective” offspring and his disdain for possibility that feeble-minded white women might have African American children,¹¹³ DeJarnette concluded that Carrie Buck was hereditarily predisposed to becoming the probable parent of socially inadequate offspring.¹¹⁴ Consistent with Strode’s forecast, the Circuit Court of Amherst County upheld the law.

From the beginning, Aubrey Strode crafted legislation and designed *Buck* to create a legal record that would be reviewed by appellate judges.¹¹⁵ Only the appellate courts could provide a lasting endorsement of sterilization.¹¹⁶ His most potent “argument focused on the prerogative of states to use the inherent ‘police power’ and enact legislation that protected the public health and safety.”¹¹⁷ He reasoned that the police power should be invoked to protect the state and future generations from the “multiplication of socially inadequate defectives.”¹¹⁸ “Strode dismissed the suggestion that the Virginia sterilization law violated the Constitution’s Eighth Amendment prohibition of ‘cruel and unusual punishment,’ declaring that the law was not punitive. It did not apply to prisons, and Carrie Buck had never been charged as a criminal.”¹¹⁹ Emphasizing provisions of the law protecting a patient’s procedural rights, Strode asserted that compliance with constitutionally protected due process was self-evident.¹²⁰ Strode also argued that the constitutional guarantee of equal protection was met by virtue of Virginia’s broad plan for the care of the feeble-minded.¹²¹ Virginia institutions would act as a clearing house where all people to whom the law applied would be sterilized and released ensuring room to admit others.¹²² This would guarantee that all feeble-minded

¹¹¹ *Id.* at 121.

¹¹² *Id.* at 121.

¹¹³ *Id.* at 125.

¹¹⁴ *Id.* at 124.

¹¹⁵ *Id.* at 151.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* at 152.

¹²¹ *Id.*

¹²² *Id.*

“Please cite to 7 STANFORD J. C. R. & C. L. (forthcoming) (2010)”

individuals would be treated equally.¹²³ Asserting that the law was introduced with laudable humanitarian motives, Strode argued that deficiencies in other sterilization laws should not be used as an excuse to block the path of progress in light of scientific advances providing a better day for both the afflicted and for society.¹²⁴ Whitehead’s deliberate misconduct in defending Carrie Buck at trial was exacerbated by his unwillingness to mount a defense before the Virginia Supreme Court of Appeals.¹²⁵

The Virginia Supreme Court of Appeals decision, a foregone conclusion, was met with applause. The *Virginia Law Register* celebrated asserting that since lifelong segregation of the unfit is impracticable, the race must protect itself with sterilization.¹²⁶ At the same time, public criticism of eugenics increased in the months that *Buck* was in the courts.¹²⁷ Clarence Darrow suggested that “talk about breeding for intellect, in the present state of scientific knowledge and data, is nothing short of absurd.”¹²⁸ Others asked “what is the warrant for this worship of heredity?”¹²⁹ They concluded that “[w]e are face to face with a political and social, not scientific movement.”¹³⁰

F. THE SUPREME COURT AND THE EXTIRPATION OF THE SOCIALLY “INADEQUATE”

Despite rising opposition to the procedure,¹³¹ the Supreme Court had few doubts about the value and permissibility of involuntary sterilization. Chief Justice Taft evidently made a strategic decision to assign Justice Oliver Wendell Holmes to write the opinion for the Court.¹³² Taft also warned Holmes that he could avoid controversy by focusing on the Buck family’s heredity.¹³³ Justice Holmes embraced the most radical ideas for social improvement when the eugenics movement was in its infancy.¹³⁴ During the early part of his career, “Holmes supported substituting ‘artificial selection for natural

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at 152-153.

¹²⁶ *Id.* at 154.

¹²⁷ *Id.* at 155.

¹²⁸ *Id.*

¹²⁹ *Id.* at 156.

¹³⁰ *Id.* at 156.

¹³¹ *Id.* at 158.

¹³² *Id.* at 165-66.

¹³³ *Id.* at 166.

¹³⁴ *Id.* at 163.

“Please cite to 7 STANFORD J. C. R. & C. L. (forthcoming) (2010)”

by putting to death the inadequate.’”¹³⁵ “Describing the typical criminal as ‘a degenerate,’ Holmes despaired of any potential for improvement or reformation: such people, he said, simply ‘must be got rid of.’ Science, he said, could ‘take control of life, and condemn at once with instant execution what is now left to nature to destroy.’”¹³⁶ Earlier, Holmes had demonstrated in his famous dissent in *Lochner v. New York* that he supported a constrained conception of the Fourteenth Amendment and an expansive understanding of the “common interest.” While the term “liberty,” in contemporary times appears to have endured judicial degeneracy of the first order,¹³⁷ Justice Holmes, reflecting his *Lochnerian* presuppositions, held that human liberty “did not mean freedom from government coercion and control,”¹³⁸ which meant that an appeal to this principle would not to protect Carrie Buck’s reproductive capacity from the forces of progress.

Strode submitted a brief to the Supreme Court that seemed perfectly fitted to Holmes’s personal and public beliefs suggesting that society ought to help evolution along.¹³⁹ It quickly became “clear that Holmes agreed completely with Strode’s position that the state could intrude on almost any personal liberties when the public welfare was at stake.”¹⁴⁰ In a text that ran just three full pages in the official Supreme Court Reports, Holmes accepted the claim printed in the preamble to the statute that the “health of the patient and the welfare of society may be promoted in certain cases by the sterilization of mental defectives.”¹⁴¹ He added that “surgical sterilization could be effected ‘without serious pain or substantial danger,’ and that ‘experience has shown that heredity plays an important part in the transmission of insanity, imbecility, etc.’”¹⁴² Adverting to the fact that a nation can call upon its best citizens in time of war to give up their lives,¹⁴³ Holmes declared that it would be strange, if a State could not call upon those socially inadequate defectives to make the lesser sacrifice of sterilization in order to prevent the nation from

¹³⁵ *Id.* at 165.

¹³⁶ *Id.* at 163.

¹³⁷ Nelson Lund, *Montesquieu, Judicial Degeneracy and the United States Supreme Court*, in *NATURAL MORAL LAW IN CONTEMPORARY SOCIETY* (Holger Zaborowski ed., Catholic Uni. of America Press, forthcoming), draft available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1344487 (Manuscript, at p. 1-7).

¹³⁸ LOMBARDO, *supra* note ____ at 164.

¹³⁹ *Id.* at 164.

¹⁴⁰ *Id.* at 166.

¹⁴¹ *Id.* at 167.

¹⁴² *Id.*

¹⁴³ *Id.* at 168.

“Please cite to 7 STANFORD J. C. R. & C. L. (forthcoming) (2010)”

“being swamped with incompetence.”¹⁴⁴ Swiftly overcoming the countermajoritarian problem afflicting constitutional jurisprudence,¹⁴⁵ Justice Holmes accepted the majoritarian view that Virginia was simply exercising its police power for the protection of the individual patients and society, which was analogous to compulsory vaccinations approved in *Jacobson v. Massachusetts*.¹⁴⁶ As to the claim that the Virginia law violated the equal protection clause of the Fourteenth Amendment by imposing an unfair, unequal treatment on one small group (the institutionalized) while a much larger number of similarly situated people were allowed to escape merely because they remained in the community, the Supreme Court said it was not necessary for the law to cover everyone in order comply with the Constitution.¹⁴⁷ In essence, “the law does all that is needed when it does all that it can.”¹⁴⁸ The contention that the law violated the due process clause of the Fourteenth Amendment was dispatched in a similarly dismissive manner. Justice Holmes simply recited the statute’s procedural safeguards and claimed that the patient’s rights were “most carefully considered.”¹⁴⁹ Although the ideas that propelled the eugenics movement fail both tests of good science—that is they neither predict nor explain the future pathway of inheritance,¹⁵⁰ Carrie Buck lost her case with only Justice Butler dissenting. Justice Butler offered no explanation.¹⁵¹

G. LOMBARDO’S EXPLANATION OF THE DECISION

Whether Bruce K. Ackerman is correct in his conviction “that the American people must retain their ‘constitutional creativity’ or else lose their liberties,”¹⁵² and whether the countermajoritarian difficulty exists as a fact or only in the imagination of

¹⁴⁴ *Buck* 274 U.S. 207.

¹⁴⁵ See e.g., Michael J. Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman’s Theory of Constitutional Moments*, 44 *Stan. L. Rev.* 759, 760 (1992) [hereinafter, Klarman, *Constitutional Fact/Constitutional Fiction*] (explaining Ackerman’s views denying the countermajoritarian difficulty).

¹⁴⁶ 197 U.S. 11 (1905).

¹⁴⁷ LOMBARDO, *supra* note ____ at 169-170. See also, *Buck* 274 U.S. 208.

¹⁴⁸ *Buck* 274 U.S. 208.

¹⁴⁹ *Buck* 274 U.S. 206-207.

¹⁵⁰ My debt to Joshua Ramo should be obvious. See JOSHUA COOPER RAMO, *THE AGE OF THE UNTHINKABLE: WHY THE NEW WORLD DISORDER CONSTANTLY SURPRISES US AND WHAT WE CAN DO ABOUT IT* 9 (2009).

¹⁵¹ *Buck* 274 U.S. at 208 (Butler J., dissenting).

¹⁵² Klarman, *Constitutional Fact/Constitutional Fiction*, *supra* note ____ at 760 (quoting Ackerman).

“Please cite to 7 STANFORD J. C. R. & C. L. (forthcoming) (2010)”

legal scholars,¹⁵³ neither sophisticated hermeneutics nor further analysis is necessary to understand Justice Holmes’ decision in *Buck*. Lombardo also offers commentary on the decisions making of some of the other Justices by providing the following claims: (1) Justice McReynolds retained racist, anti-Semitic sentiments reinforced by intolerance toward women;¹⁵⁴ (2) Justice Taft was a supporter of eugenics;¹⁵⁵ (3) Justice Brandeis, as he later explained, thought that limitations on governmental power contained in the Fourteenth Amendment should not stand in the way of responding to modern conditions even through a particular law might previously have been dismissed as arbitrary and oppressive.¹⁵⁶ Lombardo offers little criticism on the concurrence of Justice Brandeis, which constitutes a failure to note Louis Brandeis’ early participation in efforts to control the behavior of women. Brandeis, ever the progressive, in a Supreme Court case decided in 1908 acted as the architect of detailed sociological studies used to support differential treatment of women against a Fourteenth Amendment challenge and successfully defended a statute limiting hours of work for women on grounds of innate female inferiority.¹⁵⁷ Brandeis’ brief in *Muller*¹⁵⁸ forecast his future complicity in *Buck* as a foreseeable surrender to unconstrained Progressivism. Similar claims can be substantiated with respect to Chief Justice Taft’s participation in the *Buck* case. While he was no race bigot, Taft had previously supported some eugenic reforms and had offered his support to the most prominent leaders of the eugenics movement.¹⁵⁹ In 1913 Taft agreed to become a director and later chairman of the board of an organization created by distinguished economist, Irving Fisher.¹⁶⁰ In the 1920s, this organization, assumed responsibility for the work previously done by the Eugenics Record Office.¹⁶¹ Taken as a whole the evidence suggests that the Justices were predisposed to accept the Aubrey Strode’s claims and contentions.

¹⁵³ *Id.* at 761 (Ackerman denies the countermajoritarian difficulty).

¹⁵⁴ LOMBARDO, *supra* note ___ at 172.

¹⁵⁵ *Id.* at 173.

¹⁵⁶ *Id.*

¹⁵⁷ RICHARD EPSTEIN, *HOW PROGRESSIVES REWROTE THE CONSTITUTION*, 90 (2006).

¹⁵⁸ *See Muller v. the State of Oregon*, 208 U. S. at 419-420 and accompanying notes.

¹⁵⁹ LOMBARDO, *supra* note ___ at 158.

¹⁶⁰ *Id.* at 160 (disclosing that Fisher strongly supported the idea of protecting future generations through eugenics).

¹⁶¹ *Id.*

“Please cite to 7 STANFORD J. C. R. & C. L. (forthcoming) (2010)”

Although, Lombardo’s reconsideration of the *Buck* case¹⁶² suggests that he is highly skeptical of the case against Carrie Buck, he focuses his attention on the implications of *Buck* and *Skinner* (which later provided some restrictions on state’s power to sterilize) for the development of the right to privacy first memorialized in *Griswold v. Connecticut*.¹⁶³ More importantly, Lombardo fails to address the elephant in the room: the possibility that Virginia’s compulsory sterilization program was the inevitable outcome of the doctrinal presuppositions undergirding the Progressive movement. Clearly and correctly Lombardo signals that *Buck* was wrongly decided, but he does not delve far enough into the progressive impulse that brought that about. Nor does he scrutinize the possibility that the progressive impulse poses a threat to those who are classified as “unfit” today. In order to investigate these issues, Part II examines Justice Holmes’ dissent in *Lochner* in the context of the history of the science and ideology of human exclusion.

II. CONTROLLING THE “UNFIT”: BIOLOGY IN THE MIRROR OF THE POLICE POWER AND THE COMMERCE CLAUSE

There are, however, certain powers, existing in the sovereignty of each State in the Union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by the courts. Those powers broadly stated and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals, and general welfare of the public.¹⁶⁴

A. PLACING BIOLOGY IN SERVICE TO THE NATION: A SHORT HISTORY

“Mankind’s quest for perfection has always turned dark.”¹⁶⁵ Racism and group hatred have existed in most cultures throughout history but it took millennia for these hostilities to migrate into the safe harbor of scientific thought, thus rationalizing destructive actions against the despised.¹⁶⁶ Since power tends naturally toward

¹⁶² *Id.* at 267-279.

¹⁶³ *Id.* at 268-269.

¹⁶⁴ *Lochner v. New York*, 198 U.S. 45, 54 (1905).

¹⁶⁵ EDWIN BLACK, *WAR AGAINST THE WEAK: EUGENICS AND AMERICA’S CAMPAIGN TO CREATE A MASTER RACE*, 9 (2003).

¹⁶⁶ *Id.* See also Bernstein and Leonard, *supra* note ___ at 177 (Xenophobia, race prejudice and sexism certainly were not new to the United States in the Progressive Era but what was revolutionary was that exclusion acquired a new scientific legitimacy.).

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manipulation and control, it would be unfair to claim that public intellectuals and institutions operating during the Progressive Era invented contempt¹⁶⁷ as a weapon against the unwanted, such as Carrie Buck. But it would be accurate to claim that they perfected the ideology of societal advancement, which is tainted by the human tendency to use power, unimpeded by moral restraint, for purposes of self-aggrandizing domination and abuse.¹⁶⁸ Since “[s]cience offers the most potent weapon in man’s determination to resist the call of moral restraint,”¹⁶⁹ many progressives took the lead in forging a new science of human oppression: race science.¹⁷⁰ This move reflects the “modern spirit,” which is deeply impatient with limits and which, correspondingly, assumes the perfectibility of man and the conquerability of nature (biology).¹⁷¹ Linking socioeconomics, philosophy, biology and the law would change the world, perhaps forever.¹⁷² This linkage remade undesirables into “the hereditarily unfit and elevated exclusion to a matter of national and racial health.”¹⁷³ Progressive architecture often demanded the exclusion of “defective” groups from American labor markets with the justification that “unfit workers wrongly lowered the wages and employment of racially superior groups.”¹⁷⁴ Since shifts in tacit and explicit assumptions can produce seismic shifts in legal doctrine and since the new sciences generated new factual assumptions, new legal doctrine became inevitable.¹⁷⁵ Built on this platform, government enforced reform initiatives that encapsulated the doctrinal hypothesis that law must take lessons from biology.¹⁷⁶ The widespread acceptance of this thesis was sheltered from a critical counterattack by the view that biological conceptions possess ostensive objectivity.¹⁷⁷ Spurred on by this opinion, hierarchs began to pursue standards to identify individuals

¹⁶⁷ HUNTER, *supra* note ___ at 188.

¹⁶⁸ *Id.*

¹⁶⁹ BLACK, *supra* note ___ at 9.

¹⁷⁰ *Id.*

¹⁷¹ Paul Seaton, *Translator’s Preface*, in CHANTAL DELSOL, *UNJUST JUSTICE: AGAINST THE TYRANNY OF INTERNATIONAL LAW* vii (2008).

¹⁷² BLACK, *supra* note ___ at 9.

¹⁷³ Bernstein and Leonard, *supra* note ___ at 177.

¹⁷⁴ *Id.*

¹⁷⁵ Suzanna Sherry, *Foundational Facts and Doctrinal Change*, (forthcoming 2011 U. ILL. L. REV. (January 2011) available at <http://ssrn.com/abstract=1577247> at p. 1 in Manuscript (focusing largely on doctrinal shifts within the judiciary).

¹⁷⁶ LOMBARDO, *supra* note ___ at 44.

¹⁷⁷ DERRICK BELL, *RACE, RACISM AND AMERICAN LAW*, 3 (2000) [hereinafter, BELL, RACE, RACISM AND AMERICAN LAW].

“Please cite to 7 STANFORD J. C. R. & C. L. (forthcoming) (2010)”

and groups who were “weak” and “unfit,” as part of an accelerating international effort to transform society.¹⁷⁸

American progressives frequently advanced their campaigns against “undesirables” with great subtlety and sophistication. On the basis of the moral high ground of public interest and fairness, they claimed that correctly understood their programs and policies benefited the disadvantaged citizens they targeted. This is why some commentators continue to insist that the New Deal was a positive step toward social justice and a new world order. In order to protect their position from a successful counterattack, progressives shaped an argument, simultaneously scientific and legal, based on the biological classification of the socially superior and inferior. A good starting point was the proposal to establish classification schemes under the sponsorship of a sovereign power (the state) on grounds that it embodied the will of the majority.

In order for the nation to control the “unfit,” a category consisting of the “socially inadequate,” the “racially impure” and the “innately inferior,” two things were necessary: first an overarching theory or objective and secondly the will and methodology to achieve that objective. Progressives did not necessarily offer a unified theory of societal advancement and not all progressives favored the diminution of the economic opportunities and political rights of marginalized Americans.¹⁷⁹ But Woodrow Wilson¹⁸⁰ and backers of institutions like the Eugenics Research Organization led an impressive effort to link pseudo-science with government power in order to bring about their vision of a great society, and they were unprepared to allow documents such as the Constitution or quaint conceptions of liberty to stand in their way. “Early Progressives were social Darwinists who believed strongly in eugenics and presumed that the state could create a pure race, a society of new men.”¹⁸¹ Believing in racialized science¹⁸² and the application of the principles of efficiency to the management of government and the delegation of the control of social welfare programs to a professionally trained class of experts,¹⁸³

¹⁷⁸ BLACK, *supra* note ____ at 70.

¹⁷⁹ EPSTEIN, HOW PROGRESSIVES REWROTE THE CONSTITUTION, *supra* note ____ at 102 (showing that some progressives opposed Wilson’s attempt to subjugate Blacks).

¹⁸⁰ See e.g., Hutchison, *Employee Free Choice*, *supra* note ____ at 380-382 (examining Wilson’s effort to link racialized science with progress).

¹⁸¹ *Id.* at 380.

¹⁸² See e.g., *id.* at 380-382 (describing Wilson’s effort to link racialized science with progress).

¹⁸³ LOMBARDO, *supra* note ____ at 17.

“Please cite to 7 STANFORD J. C. R. & C. L. (forthcoming) (2010)”

progressives presumed that government was a living thing freighted by irresistible impulses requiring ever-expanding power as part of the natural evolutionary process.¹⁸⁴ And unlike classical Liberalism, which necessitated limited government in order to protect individual rights and liberties, progressives believed in an expanding role for government premised on the proposition that society was one indivisible whole that left no room for those who did not want to comply or could not evolve consistent with the terms of the prevailing vision of progress.¹⁸⁵

The preliminary acceptance of racialized science as a foundation for progress was abetted by the Supreme Court’s remarkable decision in *Plessy v. Ferguson*. While I will have more to say on this case later, and while there is a debate about whether it is a progressive decision,¹⁸⁶ there is little doubt that it is consistent with the broad outlines of Progressivism and quasi-scientific racism. By accepting the rhetoric of “separate but equal,”¹⁸⁷ *Plessy*, both substantively and procedurally, operates as a forerunner to *Buck* and the subtle and not so subtle racism that surfaced during the New Deal.¹⁸⁸

Substantively it represents the instantiation of a society dedicated to progress and the public good based on genetic purification. Consistent with *Plessy*, the state of Virginia passed a law to toughen prohibitions on interracial marriage and “preserve racial integrity,” on the same day it enacted the sterilization bill, which threatened Carrie Buck reproductive capacity.¹⁸⁹ This move illustrates the unavoidable ideological connection between efforts to reduce the number of “socially inadequate individuals” through eugenics and correlative attempts to enforce exclusion based on racial bigotry. Procedurally, *Plessy* represents a mechanism for achieving genetic purification by laying bare the tantalizing possibilities associated with the evolution of the police power. This case is significant because it constitutes Supreme Court acquiescence in formal segregation. The instigation of the regime of Jim Crow reflects a political reaction to the fact that Blacks in the South (during the period between 1877 and the late 1890s) had taken advantage of market opportunities where they were not prevented from doing so by

¹⁸⁴ GOLDBERG, *supra* note ___ at 86.

¹⁸⁵ Hutchison, *Employee Free Choice*, *supra* note ___ at 381.

¹⁸⁶ See EPSTEIN, HOW PROGRESSIVES REWROTE THE CONSTITUTION, *supra* note ___ at 102 (discussing this issue).

¹⁸⁷ See e.g., NOWAK & ROTUNDA, *supra* note ___ at 746.

¹⁸⁸ For a discussion of New Deal racism, see *infra*, Part II C.

¹⁸⁹ LOMBARDO *supra* note ___ at 100.

“Please cite to 7 STANFORD J. C. R. & C. L. (forthcoming) (2010)”

coercion.¹⁹⁰ Economic success prompted a White response, most clearly seen in formal segregation.¹⁹¹

At issue in *Plessy* was a statute requiring the formal segregation of citizens on the basis of race.¹⁹² Deciding that the Fourteenth Amendment could not have been intended to abolish distinctions based on color or to enforce social as opposed to political equality or the comingling of the races¹⁹³ and relying on the emergent science of inferiority tied to physical differences and racial instincts, the Supreme Court defended the statute by stating that: (1) the assumption that the enforced separation of the two races stamps African American with a badge of inferiority can only be correct if Blacks decide to put that construction upon it;¹⁹⁴ (2) the general sentiment of the community bars commingling of the races;¹⁹⁵ (3) legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and therefore, if one race is inferior to the other socially, the Constitution cannot put them upon the same plane;¹⁹⁶ (4) laws separating the races including those that bar intermarriage of the races, are well within the police power of the State.¹⁹⁷ Acknowledging the presence of a “dominant race” comprised of a “superior class of citizens,”¹⁹⁸ Justice Harlan’s dissenting opinion saw the statute’s denial of the “personal liberty of citizens, white and black”¹⁹⁹ as problematic. But, if one assumes for purpose of argument, the correctness of the *Plessy* majority, it follows that racial instincts confining one race to an inferior position could be freed from the stain of bigotry, at least obvious bigotry, by developments in science and genetics.

¹⁹⁰ PAUL D. MORENO, *BLACK AMERICANS AND ORGANIZED LABOR: A NEW HISTORY*, 41 (2007) (African Americans accumulated land and saw a general rise in living standards reflective of the fact that Blacks, from the low starting point of slavery, were making economic progress faster than Whites).

¹⁹¹ *Id.*

¹⁹² The case involved a dispute regarding the permissibility of a Louisiana statute placing Whites and Blacks in separate railway carriages. The law mandated that the officers of each passenger train “shall have power and are hereby required to assign each passenger to the coach or compartment used for the race to which such passenger belongs.” *Plessy*, 163 U.S. at 540-541.

¹⁹³ *Id.* at 544.

¹⁹⁴ *Id.* at 551.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 551-552.

¹⁹⁷ *Id.* at 545.

¹⁹⁸ *Id.* at 560.

¹⁹⁹ *Id.* at 563 (Harlan, J., dissenting).

“Please cite to 7 STANFORD J. C. R. & C. L. (forthcoming) (2010)”

By placing humans into categories such as the *deserving* and the *undeserving* as well as the “fit” and “unfit”²⁰⁰ progressive science, from the Jim Crow Era through the New Deal, complemented the attitudes of those who insisted on racial separation based on racial hatred. Building on a durable platform established by *Plessy v. Ferguson*, and Britain’s early sixteenth century poor laws, this concept extended to suggest that the “unfit” were an affliction upon society²⁰¹ that required a solution. Reflecting its transnational roots,²⁰² human categorization represented the transmutation of what was the biology of class in England into the biology of racial and ethnic groups.²⁰³ This emerging consensus reasoned that human action could inevitably produce human talent and quality,²⁰⁴ enabling Americans to see class, in large measure, in racial and ethnic terms.²⁰⁵ The idea of human perfection purchased by genetic purification was eagerly embraced by proponents of exclusion. Posited as an ontology of necessity, and embraced as a compelling faith, purification required collective action.

Endeavoring to delegitimize this line of reasoning, Professor Derrick Bell speculates that this scheme could rationalize the forced deportation of millions of African Americans.²⁰⁶ He also establishes that race, racialization and racism are largely modern-day concepts assigning a negative value to the traits commonly associated with a particular race leading to the subordinate ranking of that race on the social hierarchy.²⁰⁷ Under a broad banner proclaiming divine preordination²⁰⁸ or otherwise,²⁰⁹ dominant groups sought to justify and legitimate this dominance.²¹⁰ While human advancement and progress overseen by science were seen as desirable, they were not necessarily seen as inevitable. As Lombardo notes, commentators, driven to assist this process, propelled by

²⁰⁰ See generally, Bernstein and Leonard, *supra* note ____ at 177-202.

²⁰¹ BLACK, *supra* note ____ at 10-19 (explaining how 16th century currents became transformed into eugenics during the latter part of the nineteenth century).

²⁰² See *id.*

²⁰³ *Id.* at 21.

²⁰⁴ *Id.* at 15.

²⁰⁵ *Id.* at 21-41. This effort drew on the original work of Charles Darwin, Herbert Spencer and Mendel. This was followed by the efforts of a world-wide network of public intellectuals such as Francis Galton, who completed the work of their forebears. *Id.* at 14-17.

²⁰⁶ DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL* 194 (1992).

²⁰⁷ DERRICK BELL, *RACE, RACISM AND AMERICAN LAW*, *supra* note ____ at 1-2.

²⁰⁸ *Id.* at 2.

²⁰⁹ BLACK, *supra* note ____ at 12 (“the survival of the fittest”).

²¹⁰ See e.g., BELL, *RACE, RACISM AND AMERICAN LAW*, *supra* note ____ at 2.

“Please cite to 7 STANFORD J. C. R. & C. L. (forthcoming) (2010)”

fears of a country that was facing a death spiral of impending degeneration²¹¹ or economic decline, urgently committed themselves to reform America. But in order to attain this objective, and in order to take liberties away from the “undeserving,” it was imperative to find a constitutional basis for reform. And it became apparent that the police power protective of the public health and welfare as well as the commerce power formed a nimble combination to shelter necessary statutory originality.

B. CAPTURING THE POLICE POWER AND COMMERCE POWER

An impartial evaluation of *Buck v. Bell* reinforced by Epstein’s comprehensive analysis proves that progressive movement, consistent with its doubtful provenance was often corrosive of human liberty.²¹² But as a predicate to its capacity to reshape the nation by controlling the “unfit,” this movement sought to remove legal obstacles preventing its architects from crafting a link between economic reform, socialism, Prohibition and eugenics in order to bring about its objective of social improvement. Apparently, the progressive view of social progress equated active government with good government.²¹³ Unavoidably, this equation necessitated a compatible constitutional theory that eviscerated any legal doctrine standing in the way of comprehensive reform.²¹⁴ By prescinding from free labor arguments²¹⁵ and the claim that traditional notions of natural rights and opposition to class legislation ought to bind the states’ police power,²¹⁶ progressives sought secure judicial deference to social improvement initiatives emanating from the legislative branch and sought to expunge the influence of those who believed that courts should strictly enforce constitutional limitations on government power.²¹⁷ While progressives believed that the Framers offered a mechanical, natural law theory, Woodrow Wilson and other members of the progressive intelligentsia recognized

²¹¹ LOMBARDO, *supra* note ____ at xiii.

²¹² EPSTEIN, HOW PROGRESSIVES REWROTE THE CONSTITUTION, *supra* note ____ at 102.

²¹³ *Id.* at 7.

²¹⁴ *Id.*

²¹⁵ See e.g., MORENO, *supra* note ____ at 11-40 (describing the free labor philosophy).

²¹⁶ David E. Bernstein, *Philip Sober Controlling Philip Drunk: Buchanan v. Warley in Historical Perspective*, 51 VAND. L. REV. 797, 816 (1998) [hereinafter Bernstein, *Philip Sober Controlling Philip Drunk*].

²¹⁷ *Id.*

“Please cite to 7 STANFORD J. C. R. & C. L. (forthcoming) (2010)”

that society was a living organism that had to obey the law of life, not mechanics.²¹⁸ Consequently, they interpreted the Constitution according to evolving Darwinian principles and standards.²¹⁹ But in order to ensure the effectiveness of progressive policies as a vehicle to achieve America’s cultural advance, judicial and legislative compliance was mandatory. Before being deployed, this scheme—a broad conception of the police power and later, an equally broad conception of the commerce power—required a constitutional champion. This is where Justice Holmes and his audacious inclinations, typified by his *Lochner* dissent, take center stage.

Operating in contradistinction to traditional constitutional theorists, who understood the value of the Constitution as a document preventing short-lived enthusiasms from encroaching on American liberty,²²⁰ it is notable that virtually all the decisions that the progressives championed relied on a limited conception of ordinary liberty and a broad conception of the police power²²¹ in order to promote judicial quiescence. Justice Holmes’s dissent in *Lochner* fortified by his opinion in *Buck* bears witness to the deduction that progressives believe the state has virtually unlimited power to regulate activity whether it affects the hours of work for presumably healthy bakers and able-bodied women, or controls the “socially inadequate” through discretionary salpingectomies. Providing a wide berth for a progressive conception of the police power in *Lochner*, Justice Holmes took the view that the Court, consistent with emerging sociological jurisprudence ought to defer to state legislatures on issues of health.²²² Unconvinced by an alternative approach to the Fourteenth Amendment that would require courts to invalidate all manner of class legislation from labor legislation favoring trade unions to anti-miscegenation laws,²²³ Holmes’ outlook suffers from majoritarian paternalism that accepts the tyranny of the majority.²²⁴

²¹⁸ *Id.* at 816-17 n. 89 (quoting Woodrow Wilson).

²¹⁹ *Id.*

²²⁰ *Id.* at 805 (discussing traditional constitutional theorists).

²²¹ EPSTEIN, HOW PROGRESSIVE REWROTE THE CONSTITUTION, *supra* note ___ at 102.

²²² *Lochner*, 198 U.S. at 75-76 (Holmes, J., dissenting).

²²³ Bernstein, *Philip Drunk Controlling Philip Sober*, *supra* note ___ at 813 (discussing an alternative conception of sociological jurisprudence).

²²⁴ *Lochner*, 198 U.S. at 75-76 (Holmes, J., dissenting).

“Please cite to 7 STANFORD J. C. R. & C. L. (forthcoming) (2010)”

Worryingly, Holmes’ views have drawn support from commentators who assert that *Lochner* represents a sophisticated version of *Plessy*.²²⁵ Still, this attack is highly useful in understanding *Buck v. Bell* and in understanding what is missing in Lombardo’s analysis. First, it is notable that in upholding the “separate but equal” doctrine in *Plessy*, the Supreme Court did not rely on the right of citizens to freely contract with one another but on Louisiana’s police power. Thus, the effectiveness of the police power in constraining human liberty assumes justified prominence. Contrary to the *Lochner* Court’s unwillingness to vitiate human liberty under the rubric of New York’s police power, the *Plessy* Court found that Louisiana’s law was a permissible exercise of its police power within the meaning of the Equal Protection clause of the Fourteenth Amendment.²²⁶ *Plessy v. Ferguson* deploys judicial quiescence, a broad conception of the police power and a limited conception of ordinary liberty,²²⁷ in order to vindicate state power. And a broad conception of the police power is particularly useful in defending state interests as opposed to private interests.²²⁸ Second, while classical liberals fought slavery, lynching, segregation and racial distinctions in the law,²²⁹ *Plessy* rejects the integrating function of the market in order to restore bigotry to its “natural pre-market” place in society.²³⁰ *Plessy* represents the elevation of the sociological jurisprudence of race,²³¹ reflecting the fact that the literature of sociology was dominated by the idea that African Americans were inferior to the white race in every way.²³² This elevating move bore fruit in subsequent court decisions. Although, neither Holmes’ dissent in *Lochner*, nor his *Buck* opinion reference *Plessy*, the evidence clearly shows that it was *Plessy* and *not* the majority opinion in *Lochner*, that provided an effective foundation for judicial

²²⁵ Allison M. Martens, *The Black Worker As Individualist? The Effects of Resource Competition on the Constitutional Strategies of the Civil Rights Movement During the Lochner Era*, (September 15, 2009) available at <http://ssrn.com/abstract=1450901> (Manuscript at page 1-3) (referring to the critics including those who claim that *Lochner* compromised the welfare of marginalized Americans).

²²⁶ *Plessy* 163 U.S. at 550-552.

²²⁷ See e.g., EPSTEIN, HOW PROGRESSIVE REWROTE THE CONSTITUTION, *supra* note ____ at 102-103.

²²⁸ *Id.* at 102.

²²⁹ Jonathan Bean, *Introduction: Civil Rights and Classical Liberalism*, in RACE & LIBERTY IN AMERICA: THE ESSENTIAL READER 1, 1(2009, ed. Jonathan Bean).

²³⁰ Bernstein, *Philip Sober Controlling Philip Drunk*, *supra* note ____ at 828 n. 141.

²³¹ See e.g., *id.* at 821-828 “Sociological jurisprudence holds that the purpose of law is to achieve social aims, and that legal rules, including constitutional rules, cannot be deduced from first principles. Accordingly, sociological jurisprudes believe abstract notions of rights should not bind judges.” See *id.* at 81.

²³² See e.g., CLEMENT E. VOSE, CAUCASIANS ONLY 65 (1959) (as quoted in Bernstein, *Philip Sober Controlling Philip Drunk*, *supra* note ____ at 799 n. 6).

“Please cite to 7 STANFORD J. C. R. & C. L. (forthcoming) (2010)”

deference to majoritarianism, racialized science and human exclusion. That is why marginalized Americans and not progressive elites welcomed the *Lochner* decision.²³³

Holmes’ dissent in *Lochner* coupled with his pulverizing rhetoric in *Buck* follow the jurisprudential trail first blazed by the Supreme Court in *Plessy* and later revitalized by progressives committed to social and economic progress premised on biology. His dismissive performance in *Buck* represents the predictable completion of his prior surrender to the idea that the word liberty constitutes a perversion when it prevents the natural outcome of dominant opinion.²³⁴ Holmes believed that liberty could only preclude judicial deference to the legislators’ view only in cases wherein a rational and fair man was compelled to admit that the statute would infringe fundamental principles.²³⁵ Disregarding judicial precedent showing that citizens generally “enjoy those privileges long recognized at common law as essential in the orderly pursuit of happiness by free men,”²³⁶ Justice Holmes became an important legal theorist in the progressive strategy to remove barriers to the elevation of dominant opinion. A proper construal of the above-referenced opinions, establishes that Justice Holmes capitulation to the right of the majority to control human life based on evolving sociological insights was complete.

And this ongoing capitulation spread like a tsunami among progressive elites. It was no accident that the resegregation of the U.S. Civil Service was brought about under the Progressive regime of Woodrow Wilson.²³⁷ Here, Wilson made a verbal appeal to the broad police power, championed by progressives because he was primarily motivated by fear that blacks carried contagious diseases and secondarily moved by feelings that blacks had become disrespectful to their superiors.²³⁸ Although Wilson had a historical reputation as a far sighted progressive, the evidence confirms that in addition to his commitment to Darwinian jurisprudence²³⁹ and eugenics,²⁴⁰ he was a racist retrograde.²⁴¹ And just like the state of Louisiana, which enacted a statute mandating that railroads

²³³ BERNSTEIN, ONLY ONE PLACE OF REDRESS, *supra* note ____ at 7.

²³⁴ *Lochner*, 198 U.S. at 76 (Holmes, J., dissenting).

²³⁵ *Id.*

²³⁶ *Meyer v. Nebraska*, 262 U.S., 390, 399 (1923). *See also*, EPSTEIN, HOW PROGRESSIVE REWROTE THE CONSTITUTION, *supra* note ____ at 105 (noting Holmes’ dissent in *Meyer*).

²³⁷ EPSTEIN HOW PROGRESSIVE REWROTE THE CONSTITUTION, *supra* note ____ at 102.

²³⁸ *Id.*

²³⁹ Bernstein, *Philip Drunk Controlling Philip Sober*, *supra* note ____ at 816-817, n. 89.

²⁴⁰ *See supra* Part I.

²⁴¹ EPSTEIN, HOW PROGRESSIVE REWROTE THE CONSTITUTION, *supra* note ____ at 102.

“Please cite to 7 STANFORD J. C. R. & C. L. (forthcoming) (2010)”

separate African Americans train passengers from Caucasian ones in order to promote the public good, Wilson acted to protect the public good and public welfare.²⁴²

During the administration of Herbert Hoover and Franklin Roosevelt, the commerce power, representing the federalization of the police power was frequently invoked, often with the support of labor organizations. Responding to efforts such as those led by the American Federation of Labor,²⁴³ and evidently conceiving labor unions as nothing more than “White jobs trust,”²⁴⁴ many progressives, faced with difficult economic conditions, pushed for action. The National Industrial Recovery Act (NIRA), one of the centerpieces of the New Deal, referred directly to both the commerce power and the public welfare implicit in the police power in its declaration of policy.²⁴⁵ Evincing a “singularly expansive federal responsibility for the welfare of the economy,²⁴⁶ and eschewing proposals to amend the law to prevent discrimination,²⁴⁷ the final version of the law illustrated Congress’s capacity to wreak havoc on the lives of individuals that social science had classified as “undesirables.”²⁴⁸ This capability was limited by the Supreme Court in 1935.²⁴⁹ Later the Court found impermissible an attempt by Congress to graft an expansive conception of the police power onto its commerce power in determining that the federal effort to enhance the social welfare of workers was remote from any regulations of commerce.²⁵⁰ This decision was followed by a unanimous decision in *A. L.A. Schechter Poultry Corp. v. United States*.²⁵¹ The Court found that the intrastate movement of chickens, which followed an interstate movement, removed the poultry

²⁴² *Id.* at 102-103.

²⁴³ MORENO, *supra* note ___ at 164.

²⁴⁴ *Id.* 4.

²⁴⁵ National Industrial Recovery Act [NIRA] ch. 90, 48 Stat. 195 (invalidated by *Schechter v. United States*, 295 723 (1935)).

²⁴⁶ Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1243 (1986).

²⁴⁷ MORENO, *supra* note ___ at 165.

²⁴⁸ *See infra* Part II, C.

²⁴⁹ The first Supreme Court’s decision limiting Congress’ power was *Panama Refining Co. V. Ryan* 293 U.S. 388 (1935) where the Court, only overruled a portion of the statute. The Court “held that the Act was an excessive delegation of the legislative power to the executive because it did not set any standards for when the president should exercise his discretionary power.” NOWAK AND ROTUNDA, *supra* note ___ at 177-178. Then in *Railroad Retirement Board v. Alton R. Co.*, 295 U.S. 330 (1935), the Court held the Railroad Retirement Act of 1934 exceeded the commerce power. NOWAK AND ROTUNDA, *supra* note ___ at 178. The Court “found the Act to be designed only to help ‘the social welfare of the worker, and therefore remote from any regulation of commerce.’” NOWAK AND ROTUNDA, *supra* note ___ at 178.

²⁵⁰ NOWAK AND ROTUNDA, *supra* note ___ at 178.

²⁵¹ 295 U.S. 495, (1935).

“Please cite to 7 STANFORD J. C. R. & C. L. (forthcoming) (2010)”

from the reach of the commerce power.²⁵² This decision dealt a fatal blow to progressives’ efforts to use the commerce power as a weapon to reshape society. Death was short-lived and resurrection imminent taking the form of the Supreme Court’s 1937 decision in *NLRB v. Jones & Laughlin Steel Corp.*²⁵³ Accepting the contention that the National Labor Relations Act (NLRA), by its terms, regulated labor practices “affecting commerce” and rejecting the distinction between production and commerce, the Court announced that it would no longer define the commerce power in terms of Tenth Amendment reserved power concepts.²⁵⁴ Departing from the *Lochnerian* tradition of hostility to class legislation and laws interfering with free labor markets²⁵⁵ and accepting the NLRA’s objective of eliminating industrial strife through collective bargaining,²⁵⁶ the Court declared “that it considered liberty of contract a nonfundamental right.”²⁵⁷ For all practical purposes, the progressive legal revolution was absolute, meaning that the war on the “weak” could now resume.

C. CONTROLLING THE “UNFIT” THROUGH NEW DEAL LABOR LAW

Progressives, convinced that society was a living organism requiring it to obey the law of life and not the law of mechanics, were committed to the proposition that the Constitution must be interpreted pursuant to evolving Darwinian principles. This led naturally to the conclusion that government (either state or federal) was entitled to impose a form of sociological jurisprudence. At the state level, this presumptive move enabled state legislature to enact statutes confirming females’ innate inferiority and extirpating the reproductive capacity of the “feeble-minded” without so much as any scientific evidence. This prompts a question: Would federal intervention in the economy, based on quasi-scientific theories tied to sociology, economics and biology produce an outcome that differs from the enforcement of social improvement initiatives at the state level? In answering that question within the domain cabined by federal labor reform

²⁵² For an illuminating discussion of *Schechter see*, EPSTEIN, HOW PROGRESSIVES REWROTE THE CONSTITUTION, *supra* note ___ 64-66.

²⁵³ 301 U.S. 1 (1937).

²⁵⁴ NOWAK AND ROTUNDA, *supra* note ___ at 185.

²⁵⁵ BERNSTEIN, ONLY ONE PLACE OF REDRESS, *supra* note ___ at 98.

²⁵⁶ *NLRB v. Jones & Laughlin*, 301 U.S. at 33-34.

²⁵⁷ BERNSTEIN, ONLY ONE PLACE OF REDRESS, *supra* note ___ at 7.

“Please cite to 7 STANFORD J. C. R. & C. L. (forthcoming) (2010)”

initiatives, it is notable that consistent with progressive assumptions judging Carrie Buck “unfit,” progressive reformers believing biology—i.e. race—determined human worth,²⁵⁸ judged an impressive array of humans, male Anglo-Saxon heads of households excepted, to be unworthy of work, or ‘unemployable.’”²⁵⁹

And it turns out that animated by the fear that the “unworthy” and “unemployable” might destroy the living standard of racially superior groups,²⁶⁰ the implementation and enforcement of labor law became a weapon to displace biologically suspect workers.²⁶¹ “At times, such efforts were grounded in the ideology of White supremacy.”²⁶² At other times, the economic benefits of exclusion propelled union efforts.²⁶³ In either case, African Americans experienced disastrous job losses.²⁶⁴ Evidence shows that the architects of the New Deal knew that labor law innovation would create disproportionate unemployment among African Americans,²⁶⁵ and “most advocates of these laws saw the resulting unemployment, at worst, as an unfortunate necessity, and in many cases as a positive feature.”²⁶⁶ Pseudo-science assumed a prominent role in sustaining the view that labor law reform ought to protect “superior” races from competition with “inferior” ones.

²⁵⁸ Bernstein and Leonard, *supra* note ___ at 179.

²⁵⁹ *Id.* at 180.

²⁶⁰ For example, American Federation of Labor president, Samuel Gompers proclaimed “that ‘Caucasians are not going to let their standard of living be destroyed by Negroes, Chinamen, Japs or any other.’” MORENO, *supra* note ___ at 2. As the depression worsened, “undesirable jobs traditionally held by blacks became attractive to whites.” Ordinances were enacted prohibiting black labor from engaging in certain occupations and vigilante groups attempted to force employers to discharge black workers. *Id.* at 163.

²⁶¹ For example, FDR created the National Recovery Administration (NRA), an institutional outgrowth of National Industrial Recovery Act (NIRA). The NRA granted new collective bargaining powers to unions, including the power to lock Blacks out of the labor force. Trade unions took full advantage of the monopoly power granted by the NIRA and displaced disfavored biologically suspect workers. Hutchison, *Employee Free Choice*, *supra* note ___ at 396-400.

²⁶² *Id.* at 400. The force of White supremacist ideology can be seen in connection with the operation of the NIRA, which gave rise to following scenario:

Seeking to avail itself of the powers granted under Section 7A of the [NIRA], union labor strategy seems to be to form a union in a given plant, strike to obtain the right to bargain with the employer as the sole representative of labor and then the close the union to black workers, effectively cutting them off from employment.

David T. Beito, *Review of Only One Place of Redress*, 10 GEO. MASON L. REV. 293, 297 (2001).

²⁶³ Hutchison, *Employee Free Choice*, *supra* note ___ at 400.

²⁶⁴ For example, NIRA’s minimum wage provisions destroyed the jobs of half a million Blacks in a short period of time. Hutchison, *Employee Free Choice*, *supra* note ___ at 398. Enhancing this grim record, Congress passed the Fair Labor Standards Act (FLSA). The U.S. Labor Department said that enforcement of FLSA’s minimum wage provisions caused between 30,000 and 50,000 workers, mostly southern Blacks, to lose their jobs within two weeks. *Id.* at 398.

²⁶⁵ *Id.* at 398.

²⁶⁶ Bernstein and Leonard, *supra* note ___ at 178.

“Please cite to 7 STANFORD J. C. R. & C. L. (forthcoming) (2010)”

Leading sociologist, Edward A. Ross claimed that “native” (White) workers were more productive, “but because Chinese immigrants were racially disposed to work for lower wages, they displaced the ‘native’ workers, the Anglo-Saxon race disposed to ‘American’ wages.”²⁶⁷ Prominent labor economist, John R. Commons, legitimated this thesis by suggesting race, not productivity, determined living standards.²⁶⁸ A. B. Wolfe, an American progressive economist and future American Economics Association president directly linked minimum wages to “the eugenic virtues of removing from employment those who are a ‘burden on society.’ If the inefficient entrepreneurs would be eliminated [by the minimum wage,] so would the ineffective workers.”²⁶⁹ Although minimum wage regimes exhibit prima facie neutrality,²⁷⁰ on close inspection, the record shows that they frequently represented (and continue to represent) a form of “intentional discrimination that marginalizes non-whites.”²⁷¹ Indeed, “the exclusionary capacity of minimum wage regimes can equal or surpass the efficacy of a direct race-based job reservation system.”²⁷² This outcome coheres with the conclusion that some progressives were inclined to see African Americans as “indolent and fickle,” a perspective that allowed them to defend exclusion and subordination as necessary.²⁷³ Whether committed to science, ideology or some combination of the two, such sentiments, which undergirded many law reform initiatives, cannot be clearly distinguishable from those embedded in the Virginia law that threatened Carrie Buck’s reproductive capacity.

And it is clear is that New Deal labor innovation, including FDR’s insistence on raising the price of labor through labor cartelization schemes, increased the level of unemployment and human suffering experienced by African American workers.²⁷⁴ Although the entire economy suffered greatly under the weight of the New Deal,

²⁶⁷ *Id.* at 181.

²⁶⁸ Hutchison, *Employee Free Choice*, *supra* note ___ at 399.

²⁶⁹ Bernstein and Leonard, *supra* note ___ at 186-87.

²⁷⁰ On the question of prima facie neutrality, it is worth noting Hunter’s great claim that “[i]n the contemporary world, neutrality is the pretence of all secular establishments: a myth concealed by its hegemony.” See HUNTER, *supra* note ___ at 233.

²⁷¹ Harry Hutchison, *Toward A Critical Race Reformist Conception of Minimum Wage Regimes: Exploding the Power of Myth, Fantasy and Hierarchy*, 34 HARV. J. ON LEGIS. 95, 131 (1997) [hereinafter, Hutchison, *Toward A Critical Race Reformist Conception of Minimum Wage Regimes*].

²⁷² *Id.*

²⁷³ Bernstein and Leonard, *supra* note ___ at 181.

²⁷⁴ Hutchison, *Employee Free Choice*, *supra* note ___ at 371.

“Please cite to 7 STANFORD J. C. R. & C. L. (forthcoming) (2010)”

conducting to a disastrous depression within a Depression,²⁷⁵ FDR’s surrender to the “Brains Trust,” sheltered by the demands of progress and the commerce power, expanded the pre-existing pattern of human subordination tied to progressive assumptions. Although depression-era legislation was officially colorblind, it was highly discriminatory²⁷⁶ despite the fact that the progressive establishment, generally refused to defend its commitment to exclusionary labor policies on explicitly racial terms. Although minimum wage regimes were tainted by eugenics, the political class, educated in such assumptions, declined to back its legislative thrust on terms reflecting an explicit surrender to eugenic values. While such reluctance may represent rhetorical progress in comparison with the poisonous rhetoric that characterized the campaign to impose involuntary sterilization on so-called defectives, it is nonetheless clear that the federal government, largely legitimated by a pliable conception of the commerce power, deliberately or inadvertently, enforced inequality during the New Deal.²⁷⁷ This move represents the supposition that human progress embodied in the dominant will of the majority should not be thwarted. This background of Progressive Era discriminatory policy sheds light on whether Paul Lombardo’s assessment of *Buck v. Bell* goes far enough.

III. PLACING LOMBARDO’S SCHOLARSHIP IN CONTEXT

A. SUMMARIZING LOMBARDO’S CONCLUSIONS

Lombardo concludes his book by asking how Carrie Buck would fare if she were a person with diminished mental capacity related to an inherited disease living in Virginia today given that the state has modernized its law on involuntary sterilization.²⁷⁸ On a hopeful note, he infers that if we apply all the standards of the amended legislation to the facts of the *Buck* case, Carrie Buck would likely not be sterilized.²⁷⁹ Adverting to the complexity of the issues engulfing the sterilization debate, he indicates that a number of other states still permit sterilization operations involving people with mental retardation,

²⁷⁵ Hutchison, Work, *The Social Question*, *supra* note ___ 103.

²⁷⁶ Beito, *supra* note ___ at 296.

²⁷⁷ Hutchison, *Employee Free Choice*, *supra* note ___ at 401.

²⁷⁸ LOMBARDO, *supra* note __ at 267.

²⁷⁹ *Id.*

“Please cite to 7 STANFORD J. C. R. & C. L. (forthcoming) (2010)”

and such operations happen regularly, often at the request of the family.²⁸⁰ Displeased by this possibility, Lombardo contends that to the “extent to which this practice reflects the same attitudes played out in the *Buck* case—that the disabled are worthy of contempt and that the social costs such people generate justify court orders for unwanted surgery—is troubling.”²⁸¹

More questionably, Lombardo underscores the possibility that the legal evolution that issued forth from the Supreme Court in *Buck*, *Skinner*, *Griswold*, *Loving*, and *Roe v. Wade* has led to an enhanced guarantee of personal privacy.²⁸² Considered in this context, he maintains that the *Buck* opinion sparked a “revolution in reproductive rights culminating in *Roe* and the more general expansion of the ethic of autonomy in medical jurisprudence, have changed the constitutional calculus.”²⁸³ From Lombardo’s perspective, the transmutation of the *Buck* case into *Roe* represents a quandary and the outworking of beneficial developments that are highly protective of individual autonomy.²⁸⁴ Such claims form a backdrop against which Lombardo manages to partially defend the Supreme Court’s opinion in *Buck* and some elements of the eugenics movement. He states that:

Because the Supreme Court got it wrong—to use Holmes’ language, Carrie was no ‘imbecile,’ and no sound evidence of hereditary disease was demonstrated in her case—it is easy to generate scorn for the case and the movement it represented. But a moralistic backward judgment about eugenics is naively ahistorical. To impute only corrupt motives to supporters of the eugenic agenda because of our disgust at the worst of those who claimed the label is to miss the myriad ways other motives guided their efforts. It also obscures the many ways our current practices and motives find a parallel in them. . . . While much that is done in the name of eugenics has rightly earned our contempt, we should not forget that the impulse for social improvement, the wish to eradicate suffering and the problems that plague society were motives that attracted many American to eugenics.²⁸⁵

²⁸⁰ *Id.* at 268.

²⁸¹ *Id.* at 268.

²⁸² *Id.* at 267-279.

²⁸³ *Id.* at 270.

²⁸⁴ *See id.* at 273 (discussing the deployment of government power, human liberty and opposition to abortion). This discussion seems to lack nuance because opposition to abortion is often based on principles absent in Lombardo’s calculus: the life both present and future of the fetus.

²⁸⁵ *Id.* at 277-78.

“Please cite to 7 STANFORD J. C. R. & C. L. (forthcoming) (2010)”

Although Lombardo is correct in stating that much of the eugenics movement is worthy of vilification, his defense of modern science’s capability to shape social improvement is not sustainable for a number of reasons. First, he ignores the possibility that science can often be deployed for largely ideological reasons to sustain dominant prejudice. There is a substantial moral gap between the deployment of quasi-science backed by ruthless government power and an individual’s attempts to improve her life through science under an umbrella supplied by a broad conception of liberty. Second, Lombardo contends that Americans should take comfort in the fact that the flawed genetic guesswork that led to Carrie Buck’s sterilization is gradually being replaced by more precise diagnosis of genetic diseases, which allow humans to have the kinds of children they want through prenatal screening and selective abortion.²⁸⁶ This assertion is questionable on two grounds: (1) it appears to reify science by avoiding the more significant question whether science ought to be placed in service of any agenda aimed at dominance and social control in the first place and (2) it implies that the operation imposed on Carrie Buck was merely a mistake rather than the result of a calculated and intentional process. In short, the core issues implicating the Progressive movement, the capitulation of elites to social Darwinism and pseudo-science, the move to equate good government with large government, and the advent of sociological jurisprudence that places the “weak” under constant threat from the forces of human perfection are superficially examined and only lightly discussed.

D. ANALYSIS

Definitive observations emerge in response to Lombardo’s reconsideration of the *Buck* case. For quite some time progressives, evincing an asserted devotion to the public interest, were frequently captured by special-interest pleadings. Bolstered by contestable science, they pursued and sought to eradicate the “unfit.” Built upon the sciences, this movement “perfected” society by either removing “defective germ plasm” or alternatively by segregating members of impure races from “superior” ones in order to ensure racial purity. Both approaches reflected the same foundational, even mythic,

²⁸⁶ *Id.* at 278-79.

“Please cite to 7 STANFORD J. C. R. & C. L. (forthcoming) (2010)”

assumptions. As Georges Sorel wrote in 1908, the advantage of a political/ideological myth “is that it “cannot be refuted, since it is, at bottom, identical with the conviction of a group, being the expression of these convictions in the language of movement.”²⁸⁷ Reflective of a commitment to myth, it was only natural that particular programs and policies were justified to the wider world by focusing on the beneficiaries of such programs without fairly considering the adverse effects that such policies had on those harmed.²⁸⁸ While remaining estranged from its victims, the State became the locus of Progressivism’s hopes. In understanding the consequences of the triumph of progressive policies, legislative creativity and judicial originality were established on a sturdy but morally wobbly platform driven by a commitment to human perfection brought about by the “will of the majority.” Public intellectuals, academics and Justices of the Supreme Court accepted that dominance imposed by the majority requires that the majority must have uncontested power in order to enforce its will, and as such, courts must yield to this sovereign authority arising out the political process.²⁸⁹ If courts interfered with this unprincipled struggle among self-interested groups for scarce resources, they illegitimately thwarted natural societal evolution.²⁹⁰ Such sentiments elegantly expressed by Oliver Wendell Holmes more than fifty years before the Court issued his opinion in *Buck* and more than thirty years before his *Lochner* dissent, forecast Carrie Buck’s future much more surely than the complicity of Strode, Priddy, Whitehead and the Virginia legislature. Holmes’ sentiments effectively accepted by the Supreme Court in *NLRB v. Jones & Laughlin Steel Corp.*,²⁹¹ demonstrated that courts were no longer willing to interfere with the pursuit of dominance. And to the extent that current hierarchs adhere to Justice Holmes’ sentiments, this development carries a warning, suggesting that large swaths of the American populace, members of categories comprised of the “unfit,” and the “undesirable,” are at risk. It seems plain that faithfulness to Holmes’ perspective can still be found in New Deal labor law reform statutes that were built on progressive

²⁸⁷ HUNTER, *supra* note ____ at 134.

²⁸⁸ EPSTEIN, HOW PROGRESSIVE REWROTE THE CONSTITUTION, *supra* note __ at 72.

²⁸⁹ Bernstein, *Philip Drunk Controlling Philip Sober*, *supra* note ____ at 817, n. 89 (quoting Oliver Wendell Holmes and his critics).

²⁹⁰ *Id.*

²⁹¹ *NLRB v. Jones & Laughlin*, 301 U.S. at 37-38 (expressing the view that the dominant will of the majority enables Congress to regulate interstate commerce from dangers that threaten it). This move ensured the cartelization of the labor market and diminished the role of “unfit” workers in it.

“Please cite to 7 STANFORD J. C. R. & C. L. (forthcoming) (2010)”

assumptions. As we have seen, the acceptance of New Deal labor initiatives constituted a disaster for African Americans. Fortifying the exclusionary capacity of such laws, contemporary commentators, instead of repudiating Holmes or progressive assumptions, have attempted to strengthen New Deal labor programs.²⁹² And risk surfaces not simply from explicit eugenic programs, which a majority of Americans find objectionable today, but also from other programs that reward majoritarianism sheltered by the rhetoric of progress and pseudo-science. This observation is bolstered by recalling evidence showing legal innovations within the labor arena were grounded, at least in part, on eugenic predispositions.

Majoritarianism, perceptively understood, enabled either state bureaucrats or influential private parties, such as labor unions, to place other humans in exclusionary categories for purposes of social improvement. Applying Darwinian principles to constitutional interpretation assisted this process and led inevitably to judicial quiescence, a broad conception of the police or commerce power and a narrow conception of ordinary liberty. This move was made manifest by court willingness to give far too much leeway to the regulatory powers of government, allowing powerful interests groups to profit from labor legislation at the expense of African Americans.²⁹³ And this claim even applies to courts committed to *Lochnerism*.²⁹⁴ After *Lochner's* demise, and after *Buck* was decided, the “unfit” in many cases were left without redress.

Lombardo fails to notice that Virginia’s eugenics program was a tangible expression of the doctrinal presuppositions connected to social Darwinism. These presuppositions were fortified by progressives’ blithe self-confidence in their capacity to design effective programs in combination with a dangerous faith in the benevolence of the state and its agents.²⁹⁵ Taken together, this process led ineluctably to the formation of bureaucratic managerialism that issued forth as a quasi-scientific process in which the terms of life

²⁹² Far from repudiating such statutes, progressives have attempted to strengthen some New Deal initiatives such as the minimum wage regimes and the NLRA. *See e.g.*, Hutchison, *A Critical Race Reformist Conception of Minimum Wage Regimes*, *supra* note ___ at 95-106 (discussing such efforts in the minimum wage arena); Hutchison, *Employee Free Choice or Employee Forged Choice*, *supra* note ___ at 374-376 (discussing contemporary efforts to strengthen the NLRA); and Fred Feinstein, *Renewing and Maintaining Union vitality: New Approaches to Union Growth*, 50 NEW YORK L. SCH. L. REV. 337 -353 (2005-2006) (discussing state and local initiatives to strengthen labor union).

²⁹³ BERNSTEIN, ONLY ONE PLACE OF REDRESS, *supra* note ___ at 7.

²⁹⁴ *Id.*

²⁹⁵ Scull, *supra* note ___ at 577.

“Please cite to 7 STANFORD J. C. R. & C. L. (forthcoming) (2010)”

were regulated by a hierarchy that was justified by the contention that government possessed resources and an aristocracy of knowledge that rank and file citizens lacked.²⁹⁶ Such programs often initiated by states during the Progressive Era, grew at the federal level during the New Deal and have continued to grow during the current era. Responding to influential networks, officials initiated and maintained inefficient and subordinating programs enabling interest groups, such as “racially superior” individuals and workers to accrue either status enhancements or economic rents²⁹⁷ at the expense of the “unfit.” Adding gristle to this toxic stew were the predispositions of members of the Supreme Court and the precommitments of influential institutions committed to the eradication of the “unfit.”

Given this backdrop, it is clear that Carrie Buck was swept up in a vortex deploying a broad conception of the police power in order to advance the progressives’ goal of domination and control. The political, social and legislative events leading up to her sterilization were not isolated from larger ones connected to the decision to use the “objectivity” of science to advance a predetermined outcome. This deduction follows the observation that “Nietzsche was mostly right: that while the will to power has always been present, American democracy increasingly operates within a political culture—that is a framework of meaning—that sanctions a will to domination.”²⁹⁸ Carrie Buck’s story is more than simply a narrative involving the imposition of a bureaucratic atrocity on a single individual or even a group of individuals who also lost their reproductive capacity. Instead, her story is the outcome of a larger narrative, a gathering storm unleashed by elites pursuing domination and control and even the extirpation of those they held in contempt.

Lombardo’s scholarship neglects to explicate the myriad ramifications of the progressive paradigm, which would show how progressive policies, building on the pre-existing patterns of subordination and elitism, still sustain social and economic dislocation today. I list three examples verifying this possibility in the notes below.²⁹⁹

²⁹⁶ MACINTYRE, *supra* note ___ 85.

²⁹⁷ *See e.g.*, CLIFFORD WINSTON, GOVERNMENT FAILURE VERSUS MARKET FAILURE: MICROECONOMICS POLICY RESEARCH AND GOVERNMENT PERFORMANCE 4 (2006).

²⁹⁸ HUNTER, *supra* note ___ at 109.

²⁹⁹ First, contemporary African Americans continue to be excluded from work in Philadelphia and various parts of the country due to the current effects of Progressive Era labor law reform initiatives. Such

“Please cite to 7 STANFORD J. C. R. & C. L. (forthcoming) (2010)”

Consistent with the observation that elitism and status are really fundamentally about the dynamics of exclusion,³⁰⁰ the tragic missteps in American race relations including America’s commitment to eugenics did not just happen to coincide with the Progressive Era.³⁰¹ They happened in large measure because the Progressive Era and its progeny, captured by interest-groups, championed a broad conception of government power.³⁰² The advent of sociological jurisprudence, which ultimately came to be associated with legal Progressivism,³⁰³ solidified the statist bent of the emerging sociological school among legal scholars.³⁰⁴ “Progressivism emphasized collective action through government action and promoted the belief that efficient social engineering could lead to societal improvement.”³⁰⁵ Correlatively, collective action backed by sovereign authority tends to diminish the scope for individual action. Historically, innovative reform efforts

initiatives continue to honor the legacy of labor union advocates who expressed discomfort when “defective” workers (Blacks) took jobs belonging” to members of a racially superior category: White men. Hutchison, *Employee Free Choice*, *supra* note ___ at 412 (showing how Pennsylvania’s prevailing wage law, fashioned after the federal Davis-Bacon Act, (Progressive Era statute) is the root cause behind the limited number of Black workers on city funded projects).

Second, the racialized and often distinctly eugenic commitment of Planned Parenthood continues to flourish. Bearing witness to this fact, this organization, the national’s largest abortion provider, has expressed its willingness to accept financial donations targeted specifically toward the destruction of unborn “unfit” (African American) fetuses. Bob Unruh, *Planned Parenthood: Wanting fewer blacks ‘understandable,’* WORLDNETDAILY available at <http://www.wnd.com/index.php?fa=PAGE.printable&pageId=57526>. Alternatively, consider Nicholas Von Hoffman’s argument: “Free cheap abortion is a policy of social defense. To save ourselves from being murdered in our beds and raped on the streets, we should do everything possible to encourage pregnant women . . . to get rid of the thing before it turns into a monster.” See GOLDBERG, *supra* note ___ at 275 (quoting Hoffman). Both the conduct of Planned Parenthood and the attitude of writer, Von Hoffman indicate that eugenic sentiments have not yet been eviscerated. See *id.* at 273-74. Properly appreciated the Twenty-first century represents in more subtle ways, the attitudes of “middle-class whites who consistently spoke of race suicide’ at the hands of dark, subhuman savages” during the Progressive Era and through the New Deal.” *Id.* at 274.

Third, contemporary evidence shows that the FLSA enacted during the New Deal supposedly as a vehicle to advance the interest of marginalized workers currently disfavors the poor, who are disproportionately members of minority groups, while inexplicably supplying benefits (higher wages) to young people living in middle-to-upper-class families. STEVEN L. WILLBORN, STEWART J. SCHWAB, JOHN F. BURTON, JR., & GILLIAN L. LESTER, *EMPLOYMENT LAW: CASES AND MATERIALS*, 577 (2007) (showing that although the minimum wage continues to enjoy wide-spread support, only 17% of low-wage workers in the United States were living in poor households in 2003, and thus, the people who are generally favored by this type of intervention in the market are not poor). This inversion emphasizes the continuing effect of exclusionary New Deal labor policies disfavoring the “unfit.” Hutchison, *Employee Free Choice*, *supra* note ___ at 395.

³⁰⁰ HUNTER, *supra* note ___ at 258.

³⁰¹ Epstein, *Lest We Forget*, *supra* note ___ at 795.

³⁰² *Id.*

³⁰³ Bernstein, *Philip Sober Controlling Philip Drunk*, *supra* note ___ at 813.

³⁰⁴ *Id.* at 814.

³⁰⁵ *Id.*

“Please cite to 7 STANFORD J. C. R. & C. L. (forthcoming) (2010)”

led by progressives relied on eugenics, raceology, labor legislation and human ingenuity in pursuit of the “public interest” and “social justice” as part of a less than enlightened effort to transform the nation. Reform efforts, however innovative and creative, backed by government power frequently produce a paradox wherein the state ostensibly acting in the common interest and allegedly for the benefit of the disadvantaged, harms those who are defined as “weak,” feebleminded or racially impure. If past and present leaders as well as contemporary academics had acted to defend the fundamental moral belief that arbitrary racial and pseudo-scientific categorizations violate constitutional principles, instead of behaving with sophisticated pusillanimity as a way of defending their favoritism of progressive law reform initiatives,³⁰⁶ they might have saved marginalized Americans a great deal of suffering. Although inflammatory racial rhetoric has been purged from most recent progressive initiatives (as well as New Deal laws) the *contemporary effects* of Progressivism mirror some of subordinating patterns that emerged during the Jim Crow era and the New Deal. This suggests that laws grounded on exclusionary assumptions cannot be legitimized by simply insisting on the absence of racial animosity expressed in language.

Eugenic tinged science has played a prominent role in the development of exclusionary assumptions. Whether or not one believes in a complete, transcendent and immanent set of propositions about right and wrong that authoritatively and unambiguously direct us how to live righteously,³⁰⁷ it is difficult, at least in retrospect, to square advances in science with the ascendant illusion that humans through genetics and eugenic tainted economics could ascertain with certainty the worth of human lives. It is of course true that any attempt to ground normative assertions contesting the proposition that the marriage of science and the law would beget progress³⁰⁸ risks the possibility of error. The possibility of error embodies “the grand sez who?”—a universal taunt by which a skeptic may challenge the competency of the speaker to make authoritative

³⁰⁶ See e.g., BRUCE K. ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 146 (1993) (claiming that the rise of regulatory power during the New Deal was a necessary prelude to government intervention on behalf of African Americans). *But see* BERNSTEIN, *ONLY ONE PLACE OF REDRESS*, *supra* note ____ at 103-110) (explaining the deleterious effects of Progressivism and the New Deal on African Americans).

³⁰⁷ Arthur Allen Leff, *Unspeakable Ethics, Unnatural Law*, 1979 *DUKE L. J.* 1229, 1229.

³⁰⁸ LOMBARDO, *supra* note ____ at xiv.

“Please cite to 7 STANFORD J. C. R. & C. L. (forthcoming) (2010)”

moral assessments.³⁰⁹ But a focus on this possibility may obscure respect of civil rights and civil liberties common to all citizens guaranteed by the Constitution.³¹⁰ Conceptually, respect for rights might prevent public authorities from labeling groups and individuals with a badge of inferiority,³¹¹ or favoring one race or group over another because state enforced inequality is inconsistent with citizenship but also with the personal liberty enjoyed by every American.³¹² It might also prevent the removal of “feebleminded” women from the “streets by state hierarchs who sought to make the world safer for those to whom the eugenic ideal of a pure life came naturally.”³¹³ At times, building on the legacy of *Plessy*, progressives surrendered to the pseudo-scientific conclusion that government was competent to regulate the enjoyment by citizens of their civil rights solely upon the basis of biology.³¹⁴ *Buck, Muller* and, more recently, *Steele v. Louisville*³¹⁵ give evidence of this move.

One needn’t recall the Dred Scott case, to conclude that certain citizens, adjudged subordinate, inferior or unfit, “had no rights or privileges but such as those who held the power and the government might choose to grant them.”³¹⁶ This signifies that law and interpretations thereof, have emerged as potent weapons to ensure that those who deem themselves as dominant and superior in terms of biology, intellect, race or class ought to maintain their places as members of the ruling class of citizens.³¹⁷ In what is now a postmodern world wherein language is malleable, human categorizations are infinitely elastic. This enables the social construction of new categories of people as the need for self-interested dominance by the majority and its hierarchs evolve. Phrases such as the need to prevent strife, the maintenance of the public good and the need to act in accordance with established customs and traditions in order to preserve the public

³⁰⁹ Samuel A. Calhoun, *Grounding Normative Assertions: Arthur Leff’s Still Irrefutable, But Incomplete, Sez Who? Critique*, 20 J. L. & Religion, 31, 32 (2004-2005).

³¹⁰ *Plessy v. Ferguson*, 163 U.S. at 554 (Harlan, J., dissenting).

³¹¹ *Id.* at 562 (Harlan, J., dissenting) (“The arbitrary separation of citizens, on the basis of race, while they are on a public highway, is badge of servitude wholly inconsistent with the civil freedom and equality before the law established by the Constitution”).

³¹² *Id.* at 554-555 (Harlan, J., dissenting).

³¹³ LOMBARDO, *supra* note ___ at 16.

³¹⁴ *Plessy v. Ferguson*, 163 U.S. at 559 (Harlan, J., dissenting).

³¹⁵ 323 U.S. 192, (1944) (finding labor union exclusion on the basis of race permissible and holding that a union owes a duty of fair representation to Blacks who were excluded from membership).

³¹⁶ *Plessy v. Ferguson*, 163 U.S. at 560 (Harlan, J., dissenting).

³¹⁷ *Plessy v. Ferguson*, 163 U.S. at 559 (Harlan, J., dissenting).

“Please cite to 7 STANFORD J. C. R. & C. L. (forthcoming) (2010)”

peace³¹⁸ arising in judicial pronouncement in the period between *Plessy* and through the New Deal, formed a sturdy plinth on which to construct an enduring progressive edifice. Evidence of the durability of this edifice can be found in the fact that African Americans continue to be excluded from city construction jobs in Philadelphia by labor legislation built on progressive presumptions suggesting that certain kinds of people are biologically superior to others³¹⁹ or in other evidence showing minimum wage regimes and other labor laws tied exclusionary principles, still dislocate African Americans and others from the workforce. Despite evidence of dislocation, today’s progressives continue to support such legal regimes³²⁰ on grounds that such regimes are highly beneficial.³²¹ The perverse resilience of such exclusionary animus has not yet been effaced. For instance, during a June 2010 congressional hearing, a Democratic Congressman exhibiting common cause with the forces of biological purity, publicly supported legislation on grounds that it benefits “average, good American people” as opposed to irresponsible “unfit” minorities and defectives.³²² Although regulation explicitly referencing biology or race is no longer generally acceptable, these examples display a common *weltanschauung*, which proves that the nation “should be wary of any sociological or political effort to distinguish modern forms of government regulation, which are often nothing more than a systematized form of human deprivation, from their now discredited forbearers.”³²³

This raises the distinct possibility that the domain of human oppression can still be enlarged by the application of progressive assumptions, despite the dramatic turn from explicit forms of racism among the legal and intellectual elite (made up largely of

³¹⁸ See e.g., *Steele v. Louisville & N.R. Co.*, 245 Ala. 113, 121 (1944) (Sup. Ct. of Alabama.) (citing *Plessy v. Ferguson*).

³¹⁹ See Hutchison, *Employee Free Choice or Employee Forged Choice*, *supra* note ____ at 412 (quoting Christopher Dodds explaining that Pennsylvania’s prevailing wage law, fashioned after the federal Davis-Bacon Act is the root cause behind the limited number of Black workers on city funded projects).

³²⁰ Hutchison, *Toward a Critical Race Reformist Conception of Minimum Wage Regimes*, *supra* note ____ 132-134 (describing efforts to support for minimum wage regimes).

³²¹ See e.g., Karl E. Klare, *Workplace Democracy & Market Reconstruction: An Agenda for Legal Reform*, 38 *Cath. U. L. Rev.* 1, 5 (1988) (supporting minimum wage regimes).

³²² *Rep. Paul Kanjorski says his plan helps ‘good American people,’ not ‘minorities’ or ‘defective’ people*, Los Angeles Times, June 25, 2010, available at [http://latimesblogs.latimes.com/washington/2010/06/democrat-paul-kanjorski-defective-a...\(accessed 6/29/2010\)](http://latimesblogs.latimes.com/washington/2010/06/democrat-paul-kanjorski-defective-a...(accessed 6/29/2010)).

³²³ Epstein, *Lest We Forget*, *supra* note ____ at 794.

“Please cite to 7 STANFORD J. C. R. & C. L. (forthcoming) (2010)”

progressives)³²⁴ in the 1940s and 1950s.³²⁵ Expansion in the realm of oppression is frequently facilitated by the myth that progressives represent the people and the common interest while their opponents represent the discredited proponents of freedom and liberty.³²⁶ Although these myriad claims are consistent with the fact that some of the people who once called themselves progressive were racist, it does not necessarily mean those who call themselves progressive today are racist, too.³²⁷ It does mean that the edifice of contemporary liberalism/Progressivism stands on a foundation of assumptions and ideas integral to a larger exclusionary narrative.³²⁸ And, this is, in many respects, precisely what is missing from Lombardo’s gallant exposition of the *Buck* case.

Drawing a wide perimeter around the events that led to Carrie Buck’s sterilization that surrenders to the alleged benefits of modern science, Lombardo evades evidence showing that the Progressive Era and the New Deal materialized as a determined regulatory effort that prevented marginalized groups and individuals from protecting their liberty in many ways. Carrie Buck’s story surfaces as the most poignant manifestation of progressives’ thirst for power, control and dominance. A fuller appreciation of her life in the Virginia Colony and her life after the imposition of involuntary surgery, suggests that she was a pawn in an audacious attempt to achieve hegemony. From the rise of Jim Crow laws, to the instantiation of the New Deal and its ramifications in contemporary times, members of categories labeled as “unfit” have always had difficulty obtaining social and economic legitimacy. With the rise in the size and scope of government,³²⁹ which is reflective of the fact that the “State has permeated civil society to such an extent that the two are mostly indistinguishable,”³³⁰ the odds of escaping exploitive policies have declined ever since Justice Holmes offered his dissent in *Lochner*. Given this development, marginalized Americans faced and still continue to face, risk from the

³²⁴ GOLDBERG, *supra* note ___ at 260 (“[I]f the Klan was less racist than we’ve been led to believe, academia was staggeringly more so. Indeed, the modern institution of academic tenure was largely carved out by progressive academia’s solidarity with E.A. Ross, the author of the ‘race suicide’ thesis.”).

³²⁵ BERNSTEIN, ONLY ONE PLACE OF REDRESS, *supra* note ___ at 108.

³²⁶ See e.g., *id.*, *supra* note ___ at 4 (explaining Progressive myths).

³²⁷ GOLDBERG, *supra* note ___ at 261-262.

³²⁸ *Id.* at 261.

³²⁹ Brian M. Riedl, *Federal Spending by the Numbers: 2010*, HERITAGE SPECIAL REPORT, (SR-78) 1-16 (June 1, 2010) available at The Heritage Foundation, 214 Massachusetts Avenue, NE, Washington, DC 2002 (providing some perspective on the rise in government spending during the period from 1990-2010).

³³⁰ HUNTER, *supra* note ___ at 154.

“Please cite to 7 STANFORD J. C. R. & C. L. (forthcoming) (2010)”

unconstrained exercise of government power. In praising the good that can come from government discretion, society should never forget the evils that the state has wrought and continues to countenance as part of its pursuit of hegemony in virtually all aspects of human life.³³¹

Lombardo concentrates his attention on the fact that Carrie Buck’s operation was a mistake generated by poor science and the presence of incompetent counsel. He also argues that the present-day availability of more precise diagnosis of genetic diseases today coupled with other safeguards will prevent future mistakes.³³² Finally he asserts that eugenics and the eugenics movement may be a source of human hope for a better future.³³³ However reasonable his analysis may be, it is insufficient to place Carrie Buck’s story within the larger context that exposes the central role played by the progressive movement in human oppression. Human hopes for a better future can be found in the antique echoes of the Progressive movement expressed in the contemporary language and grammar of social improvement and justice. But given the record of Progressivism’s failure, such expressions of hope reflect the presumption that progressives know the right plan for controlling history and that they ought to possess the power to realize those plans in human affairs. There is a fine line between presumption and hope, as Aquinas observed, but in our society, such presumption nearly always has tragic consequences.³³⁴ Hence a number of salient implications emerge from a critical examination of Lombardo’s book including: (1) as Madison reminded us, “enlightened statesmen will not always be at the helm,”³³⁵ (2) the null hypothesis that even the enlightened among us can often be wrong (which ought to suggest scope for political, scientific and intellectual modesty), and (3) lastly as America’s political culture has gradually evolved in a progressive direction, there has been a turn toward law and politics as the primary way of understanding all aspects of collective life, and nothing catalyzed this tendency more than the New Deal.³³⁶ Although progressive ideas continue to shape

³³¹ Epstein, *Lest We Forget*, *supra* note ____ at 795.

³³² LOMBARDO, *supra* note ____ at 278.

³³³ *Id.*

³³⁴ HUNTER, *supra* note ____ at 95 (quoting Aquinas).

³³⁵ The Federalist No. 10 (James Madison).

³³⁶ HUNTER, *supra* note ____ at 108.

“Please cite to 7 STANFORD J. C. R. & C. L. (forthcoming) (2010)”

contemporary schemes to transform the nation,³³⁷ advance “social justice” and reinterpret the Constitution to favor government power, the relevant repercussions of Progressive Era ideas have regularly escaped sustained scrutiny.³³⁸ The failure to take note of such repercussions will inevitably sustain progressive plausibility structures, networks and institutions and allow a subtle war on the “unfit” to persist and thus confirm the claim that for the most part, America’s quest for perfection cannot be seen as a blessing for civil liberties.³³⁹

IV. CONCLUSION

Since we live at a high stage of American civilization, at the peak of America’s cultural achievement, and in the presence of the current consequences of a progressive ideology, one hopes that “this insight should lead us to a constitutional jurisprudence that does not ebb and flow with each change in intellectual fashion.”³⁴⁰ But a penetrating question remains, can individuals committed to human liberty successfully resist federal and state government attempts to extend their power premised on the pursuit of progress and the need to control the “unfit” either within the reproductive arena or labor markets? Or alternatively, will progressive myths, which are subject to constant reformulation and reorganization, multiply the number of individuals and groups, who can be placed in exclusionary categories, facilitated by the tendency of modern democracy to favor authoritarianism? In answering such questions, much rests on whether America can regain a shared understanding of essentials, such as truth and the meaning of the Constitution, because it is not possible for liberty to persist in a democratic society that papers over deeply antagonistic world-views, including the quest for dominance.³⁴¹

And such questions take on greater urgency because we live in an epoch in which science enjoys renewed prominence, wherein highly respected scientists still insist that “[b]rains that choose wisely possess superior Darwinian fitness, meaning that statistically

³³⁷ Harry G. Hutchison *Racial Exclusion in the Mirror of the New Deal Responses to the Great Crash*, 15 NEXUS, 5, 5-13 (2010).

³³⁸ GOLDBERG, *supra* note ___ at 268-269.

³³⁹ EPSTEIN, HOW PROGRESSIVES REWROTE THE CONSTITUTION, *supra* note ___ at 102.

³⁴⁰ Epstein, *Lest We Forget*, *supra* note ___ at 794.

³⁴¹ Harry G. Hutchison, *Liberty, Liberalism, and Neutrality: Labor Preemption and First Amendment Values*, 39 SETON HALL L. REV. 779, 842 (2009).

“Please cite to 7 STANFORD J. C. R. & C. L. (forthcoming) (2010)”

they survive longer and leave more offspring than brains that choose badly.”³⁴² Emerging from a labyrinth of knowledge tied to natural selection,³⁴³ and offered without irony or moral restraint, this iconic conception of “survival of the fittest” fails to supply a deeply satisfying rationalization for the age of social catastrophe typified by Twentieth century developments in Russia, Germany³⁴⁴ and China.³⁴⁵ While no one seriously claims that the deprivations experienced by Carrie Buck or the victims of the New Deal approached the carnage arising out of the age of social catastrophe, reasonable observers have a right to ask how such outrages, advanced by state action and lubricated by Promethean aspirations,³⁴⁶ can be explicated by a science project committed to Darwinian fitness. One melancholy retort suggests that science has either failed to account for the coercive thrust of ideology or its victims have chosen badly. Given the success of the progressive project, choosing badly in the late modern world where politics has become the “social imagery” that defines the parameters for action³⁴⁷—a world regularized by the principles of social improvement (fitness) and rarely hindered by constitutional standards—implies that the victims of America’s war on the “unfit” have simply chosen the wrong gene pool. History reveals, such “choices” depend on the foundational assumptions of majorities or influential networks, and signify the predictable outcome of our modern rational society, at the high stage of its civilization and at the peak of its cultural achievement.

³⁴² WILSON, *supra* note ___ at 165-166.

³⁴³ *Id.*

³⁴⁴ *See e.g.*, ROBERT GELLATELY, *LENIN, STALIN, AND HITLER: THE AGE OF SOCIAL CATASTROPHE* (2008) (discussing the millions purged by Stalin and Lenin, and Hitler’s ethnic cleansing program).

³⁴⁵ *See generally*, CHANG and HALLIDAY, *supra* note ___ (discussing Chairman Mao’s doubtful achievements).

³⁴⁶ *See e.g.*, Seaton, *supra* note ___ at vii-x (discussing modern man’s attempt through modern ideologies and instruments, has thus far failed to implement his Promethean aspirations).

³⁴⁷ HUNTER, *supra* note ___ at 168.