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A REVIEW OF *THREE GENERATIONS, NO IMBECILES: EUGENICS, THE SUPREME COURT, AND BUCK V. BELL*

Kevin E. Grady*

Professor Paul Lombardo has been a man on a mission since 1980, and he has culminated his quest by writing a wonderfully insightful book that should be required reading for any attorney practicing healthcare law or any attorney interested in reproductive freedom.¹ Most of us have probably not thought much about the Supreme Court case of *Buck v. Bell*² since our first year Constitutional Law class when we read Justice Oliver Wendell Holmes's famous quotation: "Three generations of imbeciles are enough."³ In that case, the Supreme Court upheld the constitutionality of Virginia's law that allowed forced sterilization of inmates or patients at mental institutions who were found to be "insane, idiotic, imbecile, feeble-minded or epileptic, and by the laws of heredity is the probably potential parent of socially inadequate offspring likewise afflicted"⁴

Paul Lombardo came across the case as a graduate student in history at the University of Virginia in 1980, and has doggedly pursued the historical facts behind the decision and the significance of the case since that time.⁵ I am probably like a lot of lawyers who considered the *Buck* case long overruled by other Supreme Court decisions or relegated to irrelevancy by the historical reality that found Nazi eugenics so repulsive. Lombardo's book is an insightful

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1. See PAUL A. LOMBARDO, *THREE GENERATIONS, NO IMBECILES: EUGENICS, THE SUPREME COURT, AND BUCK V. BELL* (2008).

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

3. *Id.* at 207.

4. 1924 Va. Acts 570; see *Buck*, 274 U.S. at 207. *Buck v. Bell* involved a challenge to the constitutionality of a Virginia statute allowing for sterilization. *Id.*

5. LOMBARDO, *supra* note 1, at ix–xiv.

wake-up call that reminds all of us that the *Buck* case has never been overruled by the Supreme Court and that it stands as a dangerous precedent to the power of the government to interfere with reproductive rights of all Americans. Lombardo also reminds us that those who would want to reverse or substantially interfere with the reproductive freedom or privacy rights in *Roe v. Wade*⁶ may look to *Buck* as precedent for the government's ability to limit citizens' personal reproductive freedom.

Lombardo's scholarship and writing ability in this book have been recently recognized by the Georgia Writers Association, which named Lombardo the 2009 Author of the Year in its history category. The book is carefully researched, but unlike many scholarly works, Lombardo's style is not dry or passive. He tells a compelling story of how Carrie Buck became a victim of the zealotry of a small group of eugenicists who wanted to make her a "test case" for the constitutionality of compulsory sterilizations for those who might produce "socially inadequate offspring."⁷

THE RELATIONSHIP BETWEEN EUGENICS AND PROGRESSIVES

Lombardo introduces us to the faux science of eugenics, which many leading individuals at the turn of the twentieth century considered to be the "science of good breeding."⁸ Indeed, the eugenics movement was the dark underside of the Progressive Movement with its desire to apply principles of efficiency to the management of government and to delegate control of social welfare programs to a professionally trained class of experts. As Lombardo explains, Gregor Mendel's 1865 work on the inherited characteristics of sweet peas formed the foundation for the study of genetics, and this work was basically rediscovered in 1900 in Europe and America to provide a scientific basis for the "laws of heredity."⁹ Many leading figures in the U.S. in the late nineteenth century and early twentieth

6. *Roe v. Wade*, 410 U.S. 113 (1973).

7. LOMBARDO, *supra* note 1, at ix-xiv.

8. *Id.* at xi.

9. *Id.* at 30.

century were strong proponents of the idea that criminality, sexual promiscuity, and mental health problems were inherited traits.¹⁰ Lombardo points out that such prominent figures as Dr. Oliver Wendell Holmes (the father of Justice Holmes) held the view that “[m]oral idiocy is the greatest calamity a man can inherit,” and vice is “more contagious than disease.”¹¹ Lombardo effectively describes the efforts of people like Woodrow Wilson, Thomas Edison, Alexander Graham Bell, Jack London, Anthony Comstock, and presidents of leading universities and governors of many states, who all were leading supporters of the eugenics movement.¹² Major philanthropists, such as the Carnegie Foundation, E.M. Harriman, and John D. Rockefeller helped fund eugenic efforts, such as the Eugenics Record Office (ERO) in Cold Spring Harbor, New York.¹³ The ERO was led by Harry Hamilton Laughlin and became a major eugenics center and training ground to collect thousands of family records and to train field workers to gather genealogical records from state asylums, hospitals and other institutions.¹⁴

STATE LEGISLATION TO ALLOW STERILIZATION

Indiana was the first state in 1907 to pass a statute allowing eugenical sterilization.¹⁵ It was quickly followed by other states, such as Washington, Pennsylvania, Iowa, California, Connecticut and New Jersey.¹⁶ Lombardo traces the similarities between legislative efforts to allow mandatory sterilizations of certain types of “feeble-minded” individuals and anti-miscegenation legislation. In fact, the very session of the Virginia Assembly that adopted the eugenics statute under which Carrie Buck was sterilized also adopted legislation to

10. *Id.* at xi, xiii–xiv

11. *Id.* at 9.

12. *See generally id.* chs. 2–4.

13. LOMBARDO, *supra* note 1, at 30–32.

14. *Id.* at 32–34.

15. *Id.* at 24.

16. *Id.* at 24–29.

strengthen prohibitions on interracial marriage and “preserve racial integrity.”¹⁷

Lombardo does an excellent job of tracing the interactions between the leading eugenicists and the lawyers and state administrators who were responsible for setting up the “test” case that became the *Buck* case. He details the efforts of people like Aubrey Strode, the author of the Virginia statute and the lead attorney who defended the statute all the way to the U.S. Supreme Court.¹⁸ He discusses Strode’s life-long friendship with A.S. Priddy, the first superintendent of Virginia’s colony in Lynchburg, Virginia, that was founded in 1906 to care for 300 epileptic patients.¹⁹ Lombardo demonstrates the familiarity between the Virginia eugenicists and other national leaders in the eugenicist campaign, such as Harry Laughlin, Arthur Estabrook, Henry Goddard, and Charles Davenport. The book emphasizes the key role played by leading faculty and administrators at the University of Virginia to advance the study and spread of eugenic teaching.²⁰ Indeed, the inaugural volume of the University of Virginia Law Review contained an article urging legislation for scientifically-based sterilization laws.²¹

DEVELOPING THE TEST CASE OF *BUCK V. BELL*

The heart and soul of the book is Lombardo’s description of how Aubrey Strode drafted the Virginia statute in 1924 with an eye on curing the deficiencies in other state laws that had been struck down for denial of due process.²² His statute was heavily influenced by a “model law” proposed by Harry Laughlin, who had prepared a legal treatise on eugenic laws, and who had worked closely with Judge Harry Olson, the first chief justice of Chicago’s innovative Municipal Court.²³ Olson was an old friend of Laughlin’s and a nationally-

17. *Id.* at 100.

18. *Id.* at 157.

19. LOMBARDO, *supra* note 1, at 12–15.

20. *Id.* at 210–11.

21. J. Miller Kenyon, *Sterilization of the Unfit*, 1 VA. L. REV. 458 (1914).

22. LOMBARDO, *supra* note 1, at 92–93.

23. *Id.* at 81–90.

respected legal Progressive, who was co-founder of the American Judicature Society.²⁴ Olson was a strong believer in the “scientific” administration of justice.²⁵ He believed studying heredity was crucial to understanding crime, and he shared Laughlin’s belief that future generations could be purged of negative hereditary traits by surgical sterilization.²⁶ Olson paid to have Laughlin’s book published as part of Olson’s annual report on the activities of the Municipal Court, and even sent favorable reviews to over 280 U.S. newspapers and personal copies of the book to friends like Secretary of State Charles Evans Hughes, and Chief Justice William Howard Taft.²⁷

In line with Laughlin’s model, Strode’s Virginia statute was based on the eugenic premise that mental disorders and social problems were linked to genetic inheritance and that the major ills of society (crime and poverty) could be cured through a selective control of heredity.²⁸ Strode’s statute had a veneer of due process in which a superintendent of a hospital or colony for the mentally deficient could petition for sterilization if the patient had been diagnosed with a hereditary defect. The patient was entitled to an attorney and a hearing before the institution’s board, and then to automatic appeals to a local court and the state’s Supreme Court. Physicians were given immunity for their sterilization activities.²⁹

Lombardo does an excellent job of describing how Strode worked with Superintendent Priddy to identify Carrie Buck as the “test case.”³⁰ Buck’s mother, Emma, was already a patient in the Colony in Lynchburg. Part of the motivation for sending Carrie to the Colony was her alleged feeble-mindedness and sexual promiscuity, evidenced by the fact that she had just had a baby.³¹ Priddy believed that Carrie’s baby, Vivian, was also feeble-minded, and this would

24. *Id.*

25. *Id.*

26. *Id.* at 81–90.

27. *Id.* at 83–89. For a marvelous analysis of Olson and his Progressive effort to streamline the justice system in Chicago through the Municipal Court, see MICHAEL WILLRICH, CITY OF COURTS: SOCIALIZING JUSTICE IN PROGRESSIVE ERA CHICAGO (2003).

28. LOMBARDO, *supra* note 1, at 97–99.

29. *Id.* at 99.

30. *Id.* at 101–02.

31. *Id.* at 103–04.

allow the tracing of three generations of feeble-mindedness.³² Strode then had the local Justice of the Peace, who served as Carrie's guardian, select Irving Whitehead to represent Carrie at the sterilization hearing, even though Whitehead was a former board member of the Colony, close friends with both Strode and Priddy, and a strong advocate of sterilization.³³

One of the most interesting parts of the book is Lombardo's analysis of the trial testimony, and his scathing criticism of the superficial testimony of experts such as Dr. Joseph "Sterilization" DeJarnette and Arthur Estabrook.³⁴ Lombardo makes a compelling argument that Whitehead basically "threw" the case, providing no defense for Carrie Buck, and offering no witnesses or evidence on her behalf. Indeed, Whitehead was regularly advising the Colony's board on the progress of the case along with Strode. Lombardo makes a persuasive case that Whitehead betrayed Carrie Buck and "violated every norm of legal ethics."³⁵ As a result, the factual record in the case offered nothing on behalf of Carrie Buck, including factual rebuttals to claims of her feeble-mindedness or sexual promiscuity.³⁶ Indeed, Lombardo points out that Carrie gave birth after she had been raped by a relative of her foster parents; those foster parents had committed her originally to Juvenile Court in Charlottesville, Virginia.³⁷

As the case was appealed, Lombardo points out the inadequate effort by Whitehead and his collusion with Strode and Priddy to uphold the decision to sterilize Carrie Buck.³⁸ When the U.S. Supreme Court accepted the case and heard oral argument, Chief Justice Taft, who had been a eugenics supporter in earlier years, assigned the drafting of the opinion to Justice Holmes.³⁹ Lombardo describes Holmes as an early supporter of the eugenics movement,

32. *Id.* at 108.

33. *Id.* at 107.

34. *See generally* LOMBARDO, *supra* note 1, at 120-35.

35. *Id.* at 154-55.

36. *Id.* at 152-53.

37. *Id.* at 140-41.

38. *Id.* at 152-55.

39. *Id.* at 163.

and he cites personal correspondence in which Holmes favored putting to death “the inadequate,” restricting propagation by undesirables and putting to death infants who didn’t pass examination.⁴⁰ In writing his short opinion, Holmes only relied on one precedent, *Jacobson v. Massachusetts*,⁴¹ which had upheld smallpox vaccinations under the theory of the police power of the state to protect public health.⁴²

Lombardo provides interesting insights into the generally favorable press reaction to the decision, and its impact on approximately thirty subsequent states adopting sterilization laws.⁴³ He notes that Georgia was the last state that adopted a sterilization law in 1937.⁴⁴ Lombardo traces the lives of the major players in the legal drama, noting that Carrie Buck was sterilized on October 19, 1927, released from the Colony at Lynchburg on November 12, 1927, and married in the spring of 1932.⁴⁵ Her husband passed away after 25 years of marriage, and she remarried before dying in 1983.⁴⁶

One of the disturbing insights in the book is its demonstration of the close connection between American eugenicists like Harry Laughlin and the promoters of “racial cleansing” in Germany in the 1930s and 1940s, such as Professor Eugen Fischer.⁴⁷ The University of Heidelberg in 1936 actually honored Laughlin with an honorary degree for his work in the “science of racial cleansing.”⁴⁸ The other expert witness at the trial, Joseph DeJarnette, had the audacity to chide Americans for falling behind the pace of sterilizations in Germany, and complained, “The Germans are beating us at our own game.”⁴⁹ Lombardo also points out that during the Nuremburg trials

40. LOMBARDO, *supra* note 1, at 163–65.

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

42. *Id.*

43. LOMBARDO, *supra* note 1, at 174–76.

44. *Id.* at 227. The Georgia statute was repealed in 1970, after 3,284 sterilization procedures had been conducted.

45. *Id.* at 185, 189.

46. *Id.* at 190.

47. *Id.* at 200.

48. *Id.* at 211–13.

49. LOMBARDO, *supra* note 1, at 209.

after World War II, some German defendants actually tried to rely on the *Buck* case for their defense.⁵⁰

Lombardo emphasizes that the next time the Supreme Court looked at the issue of forced sterilization was in *Skinner v. Oklahoma*.⁵¹ That case dealt with a statute that required involuntary sterilization for recidivist prisoners twice convicted of crimes of moral turpitude, with exceptions for prohibition laws, revenue acts, embezzlement or political offenses.⁵² By 1942 the make-up of the Court had changed, with only Chief Justice Stone remaining from the *Buck* Court.⁵³ Chief Justice Douglas's opinion recognized human reproduction as a fundamental right requiring "strict scrutiny" of laws interfering with the right, and struck down the statute under Equal Protection grounds.⁵⁴ Lombardo speculates that between *Buck* and *Skinner* some factors might have influenced a more negative view of forced sterilization, such as a Papal Encyclical by Pope Pius XI in 1930 that denounced eugenical sterilization, the growing recognition of horrors committed against the Jews in Germany, and the opposition by the American Neurological Association to eugenical sterilization as not being factually based on good science.⁵⁵ Balancing such public views, however, Lombardo notes that many Americans still supported forced sterilizations, including a representative of the Georgia Medical Association, who favored a sterilization law in Georgia and declared in 1934, "the sterilization project of Hitler in Germany is a step in the right direction," and that while the German law may look a bit drastic on the surface, "it is being used wisely."⁵⁶

After noting the changing sentiment, but recognizing that there was still some public support for involuntary sterilization, Lombardo emphasizes that even though the Supreme Court struck down the Oklahoma statute in *Skinner*, the Court did not overrule *Buck*.⁵⁷ He

50. *Id.* at 236–39.

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

52. *Id.*

53. LOMBARDO, *supra* note 1, at 228–29.

54. *Skinner*, 316 U.S. at 541.

55. LOMBARDO, *supra* note 1, at 226.

56. *Id.* at 227.

57. *Id.* at 232.

cites subsequent comments by Justice Douglas that the procedural protections in the Virginia statute in *Buck* distinguished it from the Oklahoma statute.⁵⁸

THE CONTINUING SIGNIFICANCE OF *BUCK*

Lombardo emphasizes that the Supreme Court has never overruled its opinion in *Buck*.⁵⁹ In discussing subsequent Supreme Court decisions that granted greater protection to human marriage and reproduction decisions, such as *Griswold v. Connecticut*,⁶⁰ *Loving v. Virginia*,⁶¹ and *Roe v. Wade*,⁶² he notes that the Court did not attempt to limit *Buck*. Nevertheless, efforts to strike down miscegenation laws and oppose state or federally-funded sterilizations of minority or indigent women were consistent with an underlying opposition to the principles that led to the eugenic statutes. Lombardo notes that between 1965 and 1979, at least sixteen state involuntary sterilization statutes were either declared unconstitutional or repealed.⁶³

Lombardo details his own personal commitment to trying to remedy the wrong that he believes was committed against Carrie Buck and others under the authority of the eugenic statutes, such as having an historical marker placed in Charlottesville, Virginia, to commemorate her struggle and seeking apologies from state governors and legislatures for previous sterilizations conducted under eugenic statutes.⁶⁴ In describing his efforts, Lombardo notes that there is still reluctance by some people and politicians to acknowledge the error of forcibly sterilizing members of our society. For example, he describes his unsuccessful effort in the Georgia General Assembly to obtain an official apology for the 3,300 operations that occurred in Georgia before the 1970 repeal of the

58. *Id.*

59. *Id.*

60. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

61. *Loving v. Virginia*, 388 U.S. 1 (1967).

62. *Roe v. Wade*, 410 U.S. 113 (1973).

63. LOMBARDO, *supra* note 1, at 249.

64. *Id.* at 258–66.

state statute. Instead, the Georgia Senate passed a resolution of “profound regret.”⁶⁵

Lombardo urges his readers to remember the important lesson of the *Buck* story: “[A] small number of zealous advocates can have an impact on the law that defies both science and conventional wisdom.”⁶⁶ He also cautions that the growing interest in genetic engineering should cause us to be careful not to forget the terrible damage done in earlier decades in the name of science. He also notes the “quandary” between *Roe*, which affirms reproductive autonomy, and *Buck*, which affirms the state’s power to control reproduction. He observes that many who are most opposed to the state’s power over individuals, as upheld in *Buck*, are often the same people who object to the freedom of individual decisions on reproductive choice upheld in *Roe*.⁶⁷ Lombardo properly warns all of us that “[i]f government does not protect the liberties we exercise in reproduction, then restricting childbirth for ‘the good of society’ and in the name of public health remains a possibility. If deciding for or against being a parent is a state rather than a personal decision, laws to force sterilization, or more, . . . [are] ‘as close as the next election.’”⁶⁸

Paul Lombardo has done a masterful job of shining a light on one of the most dismal chapters in the history of the Supreme Court. He has shown the *Buck* decision to have been based on the fraudulent agendas of a small group of eugenic elitists who claimed the power to decide the reproductive choices of others in society. His book is a true intellectual service to all of us who read it. I wish it were required reading for all members of the current Supreme Court.

65. *Id.* at 265.

66. *Id.* at 274.

67. *Id.* at 273.

68. *Id.* at 274 (quoting *Armstrong v. Montana*, 989 P.2d 364, 378 (Mont. 1999)).