
DISENCHANTING JUSTICE HOLMES

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Over the last several years, the United States has seen the “cancellation” of numerous public figures. While the concept of “cancel culture”¹ is of great concern to society, bringing recognition to the failures of public figures and powerful people is important. Truth should always be spoken to power. However, it is disheartening when those who have committed and encouraged some of the most heinous actions are continuously venerated by powerful institutions. The purpose of this letter is to encourage the discontinuation of such veneration for one jurist, Justice Holmes. I do not mean to “cancel” Justice Holmes in the modern sense, but to disenchant him. By this I mean to pull back the curtain, expose the wizard for the man he is; and, based on one opinion, show that such continued infatuation with Justice Holmes is improper.

Of course, Justice Holmes is not the only Justice who has failed society. The Supreme Court does not always get it right, and many of the Court’s worst decisions are deemed to have been wrong the day they were decided.² This so-called “anticanon”³ represents America at its worst. We know these cases by the names of the litigants: *Dred Scott*,⁴ *Plessy*,⁵ *Korematsu*,⁶ and *Lochner*.⁷ Conspicuously absent from that typical pantheon of error is one of the worst of all—*Buck v. Bell*.⁸ *Buck* prompts this essay.

In *Buck*, the Court—through Justice Holmes—upheld Virginia’s forced sterilization law.⁹ The law was based on the widespread eugenics movement that sought to eradicate social ills by preventing those deemed “unfit” from

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1. *Cancel Culture*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/cancel%20culture> [https://perma.cc/688W-JBVB] (last visited Oct. 25, 2021).

2. Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 404 (2011).

3. *Id.*

4. *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

5. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

6. *Korematsu v. United States*, 323 U.S. 214 (1944).

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

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

9. *Id.* at 207.

reproducing.¹⁰ Justice Holmes's five paragraph opinion was "utterly lawless,"¹¹ cited only one case,¹² and showed contempt for the litigant, Carrie Buck.¹³ Holmes held that there was no procedural due process violation because of the robust procedural requirements in the law.¹⁴ He also held that there was no substantive due process violation because forced sterilization was just like forced vaccination.¹⁵ Further, he found that it was "better for all the world" that those with disabilities be wiped out than to have their kind continue to exist.¹⁶ Finally, he held that there was no equal protection violation because such claims were "the usual last resort" of constitutional arguments; and that a law does all that it must, when it does all that it can.¹⁷

The opinion was wrong on the facts, the law, and contained outright lies. First, Holmes ignored the fact that most courts had previously held forced sterilization laws to violate the Constitution—particularly under the equal protection clause.¹⁸ Second, comparing forced sterilization to compelled vaccination cases was a severe false equivalency. In *Jacobson v. Massachusetts*¹⁹ (the one case Holmes cited), the government was not seeking to tie someone down and invade their bodily integrity. The government only imposed a fine and short prison sentence.²⁰ Third, Holmes merely assumed there was some relationship between an individual's ability to reproduce and their propensity for criminality.²¹ Finally, Holmes was wrong on virtually all the facts. Carrie Buck was not criminally promiscuous.²² She had been the victim of rape.²³

Moreover, Holmes's description of "three generations of imbeciles"²⁴—referring to Carrie, her mother, and her daughter as defectives—was completely

10. Paul A. Lombardo, *Three Generations, No Imbeciles: New Light on Buck v. Bell*, 60 N.Y.U. L. REV. 30, 32 (1985).

11. Victoria Nourse, *Buck v. Bell: A Constitutional Tragedy from a Lost World*, 39 PEPP. L. REV. 101, 102 (2011).

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

13. Nourse, *supra* note 11, at 102 (noting Carrie Buck's claims were treated with contempt).

14. *Buck*, 274 U.S. at 206–207.

15. *Id.* at 207.

16. *Id.*

17. *Id.* at 208.

18. Stephen A. Siegel, *Justice Holmes, Buck v. Bell, and the History of Equal Protection*, 90 MINN. L. REV. 106, 108 (2005). Those cases were: *Smith v. Bd. of Exam'rs of Feeble-Minded*, 85 N.J.L. 46 (1913) (finding sterilization law unconstitutional on Equal Protection grounds); *Davis v. Berry*, 216 F. 413 (S.D. Iowa 1914) (holding sterilization of inmate unconstitutional as a bill of attainder and a violation of due process) *rev'd on other grounds*, *Berry v. Davis*, 242 U.S. 468 (1917); *Haynes v. Lapeer Cir. Judge*, 201 Mich. 138 (1918) (finding state sterilization law unconstitutional under the Equal Protection Clause); *In re Thomson*, 169 N.Y.S. 638 (Sup. Ct. 1918), *aff'd sub nom*, *Osborn v. Thomson*, 171 N.Y.S. 1094 (App. Div. 1918) (finding state sterilization laws unconstitutional under the Equal Protection Clause); *Mickle v. Henrichs*, 262 F. 687 (D. Nev. 1918) (state law violated State Constitution prohibition on cruel and unusual punishments); *Williams v. Smith*, 190 Ind. 526 (1921) (state sterilization held unconstitutional under due process clause).

19. 197 U.S. 11 (1905).

20. *Id.* at 14.

21. *Buck*, 274 U.S. at 205–206.

22. Nourse, *supra* note 11, at 104.

23. *Id.*

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

mischaracterizing. Neither Carrie, her mother, nor her daughter had any disability.²⁵ And, insofar as he deemed the facts of the case as passing procedural due process, he was also wrong. The colony—the entity trying to sterilize Carrie Buck—was the one who chose her representation.²⁶ It hired a lawyer who was friendly to eugenics,²⁷ supported the law at issue,²⁸ was on the Colony’s Board²⁹ and often appeared confused about whom he was representing.³⁰

Some have defended Holmes on the basis that he merely got swept up into the eugenics theory of the day.³¹ This generosity is undeserved. Society does not give Roger Taney, the author of *Dred Scott*, a pass for getting swept up into the slavery practices of the day. What is more, the heyday of eugenics had already passed by the time the Supreme Court reviewed *Buck*.³² Further, as stated above, most courts had condemned eugenics laws as unconstitutional.³³ *Buck* allowed those laws to continue. As such, Holmes did not become swept up into eugenics. He reinvigorated it.

Buck was not simply unjustly decided; it had and continues to send aftershocks. Carrie and her sister were both sterilized against their will,³⁴ along with tens of thousands of other Americans—many not even knowing it occurred.³⁵ *Buck* and the laws it sanctioned were used as the basis for the Nazis’ eugenics laws.³⁶ Indeed, *Buck* was quoted at the Nuremberg trials by the Nazi’s defense team.³⁷ Moreover *Buck* is not dead letter. It remains “good law” to this day.³⁸ It was cited approvingly by the U.S. Supreme Court in *Skinner v. Oklahoma*³⁹ and *Roe v. Wade*.⁴⁰ Many states still have broad sterilization laws on the books, including Louisiana.⁴¹ And, to cite Justice Souter in *Tennessee v. Lane*, *Buck* and its aftermath continue to have lingering effects on society.⁴²

In light of this heinous history, it is improper for Holmes to continue to maintain his status in American jurisprudence. Holmes’s long and stellar career prior to *Buck* does not protect him. Similarly, Roger Taney, the author of *Dred*

25. Lombardo, *supra* note 10, at 61.

26. *Id.* at 50.

27. *Id.* at 55.

28. *Id.* at 55.

29. *Id.* at 55.

30. *Id.* at 51.

31. Suzanna Sherry *Wrong, Out of Step, and Pernicious: Erie as the Worst Decision of All Time*, 39 PEPP. L. REV. 129, 131 (2011).

32. Nourse, *supra* note 11, at 102.

33. *Id.* at 103.

34. Stephen Jay Gould, *Carrie Buck’s Daughter*, NAT. HISTORY, July 1984.

35. Lombardo, *supra* note 10, at 31; Derek Warden, *Ex Tenebris Lux: Buck v. Bell and the Americans with Disabilities Act*, 51 U. TOL. L. REV. 57, 62 (2019).

36. Lombardo, *supra* note 10, at 31.

37. Warden, *supra* note 35.

38. *Id.* at 57.

39. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 538–40, 542 (1942).

40. *Roe v. Wade*, 410 U.S. 113, 154 (1973).

41. LA CODE CIV. PROC. ANN. art. 4566(g) (2021).

42. *Tennessee v. Lane*, 541 U.S. 509, 535 n.2 (2004) (Souter, J. concurring) (“As the majority opinion shows, some of them persist to this day, *ante*, at 1989–1990, to say nothing of their lingering effects on society.”).

Scott, had a long career prior to that opinion, but he is no longer venerated.⁴³ Like *Dred Scott*, *Buck* was horrendous and still has impacts on society today. Continued cultural and legal celebration of Holmes only serves to prolong and exacerbate those impacts.

While some scholars have been vocal in criticizing Holmes and his terrible decision in *Buck*,⁴⁴ the legal community at large continues to be erroneously enchanted by a jurist who, in a mere five paragraph opinion, condemned tens of thousands of Americans to forced sterilization. The opinion cited only one case for support and lied about the state of the law. The opinion was unjust and unfounded, far-reaching in its consequences, and continues to impact the world today. Ending this fascination with Justice Holmes is necessary to help end these historical systemic impacts.

Concrete steps can be taken now to begin this disenchantment. Law schools should teach *Buck* more often than currently done. Law textbooks should mention *Buck* outside of a simple note. Schools should immediately end their fascination with Holmes.⁴⁵ They should no longer have his name on buildings. They should not have library wings or suites dedicated to him. And they should no longer have lectures hosted in his honor.

In short, as I have often said in my career, ten generations of enchantment with Holmes are enough.

43. See generally, Greene, *supra* note 2 (noting the harsh criticism made of Chief Taney on the basis of *Dred Scott* alone).

44. For one example, see Robert J. Cynkar, *Buck v. Bell: "Felt Necessities" v. Fundamental Values?*, COLUM. L. REV. 1418, 1458–59 (1981).

45. See, e.g., Meera S. Nair, *Harvard Medical and Dental Students Petition to Rename Holmes Society*, HARV. CRIMSON (July 12, 2020), <https://www.thecrimson.com/article/2020/7/12/holmes-society-petition/> [<https://perma.cc/W68R-UQ5K>].