

# WHITE PRIVILEGE AND WHITE DISADVANTAGE

*Khiara M. Bridges\**

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## INTRODUCTION

We hear the term “poor people and people of color” regularly. For example, the term frequently pops up in discussions of the criminal justice system. As a case in point, a recent report by The Sentencing Project describes racial disparities in sentencing and criticizes the United States for effectively operating “two distinct criminal justice systems: one for wealthy people and another for *poor people and people of color*.”<sup>1</sup> The term also appears in analyses of the ubiquitous presence that the state has in the lives of disempowered populations. In a report published by The Century Foundation, the authors assert that “[w]e do not need a unified theory of privacy to show that . . . marginal communities enjoy far less of it in practice. In some contexts, *poor people and people of color* have legal rights to privacy, but no means to exercise them.”<sup>2</sup> Variations of the term are also common. For example, a Center for American Progress article, which condemns the Hyde Amendment for making abortion inaccessible to women who cannot afford to pay for the procedure, is titled

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\* Professor of Law and Professor of Anthropology, Boston University. Thanks to participants at the Empirical Critical Race Theory Symposium that was held at the University of Virginia, as well as Issa Kohler-Hausmann, who offered helpful feedback on earlier drafts of this piece. Thanks as well to Brian Flaherty in the BU Law Library for offering amazing research support. And a special thanks to Kristina Fried and Chelsea Tejada for being the best research assistants that I have ever had.

<sup>1</sup> The Sentencing Project, Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System (Apr. 19, 2018), <https://www.sentencingproject.org/publications/un-report-on-racial-disparities/> [<https://perma.cc/TFG4-NDEX>] (emphasis added).

<sup>2</sup> Barton Gellman & Sam Adler-Bell, The Disparate Impact of Surveillance, The Century Found., (Dec. 21, 2017), <https://tcf.org/content/report/disparate-impact-surveillance/> (emphasis added and omitted).

“How the Hyde Amendment Discriminates Against Poor Women and Women of Color.”<sup>3</sup>

However, the phrase “poor people and people of color,” as well as its variants, should give us pause. These phrases appear to suggest that, in the contexts in which the term is being used, *all* poor people—including poor white people—are similarly situated to *all* people of color. They imply that poor white people are as vulnerable to the criminal justice system as are all people of color, that the state surveils and regulates poor white people as vigorously as it surveils and regulates all people of color, and that the Hyde Amendment puts abortion as far out of the reach of poor white women as all women of color.

Simply stated, “poor people and people of color,” as well as its variants, imply that being poor is like being non-white. Now, if being poor is, in fact, like being non-white, then poor white people are like people of color. Significantly, if poor white people are like people of color, then the concept of *white privilege* becomes a bit misleading, if not altogether inaccurate. As Part II explains, white privilege refers to advantages that white people are supposed to receive by virtue of the fact that they are white.<sup>4</sup> The concept presupposes that *all* white people—even the poor ones—have privileges on account of their race. However, if being poor is like being non-white, and if poor white people are like people of color, then it may not make sense to conceptualize poor white people as being *privileged* relative to people of color. If poor white people’s class disadvantage puts them in a social position that is similar to that occupied by people of color, then white privilege may not be something that they enjoy. Further, if white privilege is not enjoyed by poor white people, then it may make little sense to call it *white privilege*—inasmuch as *white privilege* implies that the privilege flows from being a member of the white race.<sup>5</sup> It may

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<sup>3</sup> Jessica Arons & Lindsay Rosenthal, *How the Hyde Amendment Discriminates Against Poor Women and Women of Color*, Ctr. for Am. Progress (May 10, 2013), <https://www.americanprogress.org/issues/women/news/2013/05/10/62875/how-the-hyde-amendment-discriminates-against-poor-women-and-women-of-color/> [<https://perma.cc/BXC6-KLN9>].

The Hyde Amendment prohibits federal funds from being used to cover the costs of abortion care except when the pregnancy is the result of rape or incest, or when the pregnancy endangers the life of the woman. Pub. L. No. 94-439, § 209, 90 Stat. 1418, 1434 (1976); Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, §§ 506–07, 132 Stat. 348, 763–64. Thus, Medicaid-reliant poor people typically cannot use their health insurance to pay for an abortion procedure—even when the abortion is medically indicated.

<sup>4</sup> See discussion *infra* Part II.

<sup>5</sup> While this Article grapples with what the lack of class privilege might mean for race privilege, similar thorny issues are raised with respect to other axes of identity—like sexuality,

make more sense to admit the error involved in the concept of white privilege and come up with a different concept altogether—something like *affluent white people's privilege* or *white class privilege*.<sup>6</sup>

For those who believe that white privilege remains a useful concept, it may be important for them to identify the benefits that even the most disenfranchised, disempowered white people possess on account of their race.<sup>7</sup> The task of defending and rehabilitating the concept of white privilege by identifying poor white people's race-based advantages is the goal of this paper. Carrie Buck—the plaintiff at the center of the Supreme Court's 1927 decision *Buck v. Bell*—provides the foundation for the inquiry.<sup>8</sup> Part I gives a history of the litigation that culminated in *Bell*, paying particular attention to the marginalization and disempowerment that Carrie Buck experienced throughout the course of her life. Part II describes various formulations of white privilege, identifying weaknesses with the most influential iterations of the concept. Part III analyzes the

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immigration status, ability, etc. Does being a sexual minority—that is, lacking privilege on account of sexuality—make a white LGBTQ person *like* a straight person of color? What about ability: is a blind white person like a sighted person of color? And so on.

<sup>6</sup> In fact, this is the conclusion that two scholars have reached after wrestling with the reality of poor white people's seeming lack of racial privilege. See Shannon Sullivan, *White Privilege*, in *The Oxford Handbook of Philosophy and Race* 331, 337 (Naomi Zack ed., 2017) (“Rather than drop the notion of white privilege, the term should be modified to white class privilege to better capture the stew of race and class that unevenly provides societal advantages to white people.”) (emphasis omitted). Of course, if only wealthy white people have what Sullivan calls “white class privilege,” we have to wonder whether the privileges to which the term refers are a function of race or class. Indeed, if only wealthy white people possess a privilege, then there is good reason to believe that the benefits they receive as a function of this privilege have little to do with their race and more to do with their class. Accordingly, “white class privilege” may actually be, simply, “class privilege.”

<sup>7</sup> The task of this paper—analyzing an instance where it appears that white privilege is not at work, but is, in fact, operating—is just one way that we might defend the concept of white privilege. Another way to defend the concept is to propose a framing of white privilege that understands it to be no more than a resource in encounters where status matters, i.e., when an individual encounters a police officer, when a person applies for a job, when an individual seeks healthcare during pregnancy or childbirth. Because white people have been created as a category of people to which positive meanings attach, a white individual might be able to draw upon those positive meanings in these encounters—even when drawing upon them does not produce a good outcome in any given instance. This defense allows for white privilege to exist and to be meaningful, while still recognizing that it does not prevent misfortune from befalling the white individual. In essence, this defense allows for the recognition that bad things can happen to white people. The defense of the concept of white privilege contained in this paper and the latter defense do not contradict one another. One can be pursued without jeopardizing the value of the other. This paper pursues the first defense. Indeed, in future writing on this issue, I will pursue the latter.

<sup>8</sup> 274 U.S. 200 (1927).

eugenics movement's relationship to whiteness, describing its overarching interest in purifying and improving the white race. Part IV engages in the task of identifying the content of Carrie Buck's white privilege, arguing that her racial privilege actually made her vulnerable to the state-sanctioned violence that she experienced. The Article concludes with some reflections on white privilege and outlines the work that those who are interested in racial justice must do in light of the complexity of the concept.

### I. THE STORY OF CARRIE BUCK AND *BUCK V. BELL*

In *Bell*, the Supreme Court upheld the constitutionality of a Virginia law that provided for the forcible sterilization of institutionalized mentally ill and intellectually disabled individuals believed to be capable of passing along their illness or disability to their children through their genes.<sup>9</sup> Celebrated jurist Oliver Wendell Holmes wrote the opinion for an eight-person majority.<sup>10</sup> Although *Bell* was decided during the height of the *Lochner* era—a period of time during which the Court found that the Due Process Clause protected an individual right to contract strong enough to invalidate minimum wage laws, maximum hour laws, and other economic regulations that could shield workers from capitalism's excesses<sup>11</sup>—Justice Holmes concluded that the Due Process Clause did not protect a right that could shield individuals from having to submit to a tubal ligation or vasectomy against their will.<sup>12</sup> Holmes also found that although the Virginia statute only provided for the sterilization of those mentally ill or intellectually disabled individuals who had been institutionalized—leaving similarly ill or disabled individuals who lived outside of institutions untouched by state power—the scheme was consistent with the Equal Protection Clause.<sup>13</sup> Brutally sanctioning the sterilization of the country's most vulnerable members, Holmes infamously stated that

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<sup>9</sup> *Id.* at 207–08.

<sup>10</sup> See *id.* at 205.

<sup>11</sup> See Michael J. Phillips, Another Look at Economic Substantive Due Process, 1987 Wis. L. Rev. 265, 269 (1987).

<sup>12</sup> 274 U.S. at 207. Justice Holmes dissented in *Lochner v. New York*, believing that the Due Process Clause did not protect a fundamental right to contract. 198 U.S. 45, 75 (1905) (Holmes, J., dissenting). In this way, *Buck v. Bell* is consistent with his substantive due process philosophy: in Holmes's view, as the Due Process Clause did not protect a fundamental right to contract, it also did not protect a fundamental right to bodily integrity or decisional autonomy that prohibited an individual's coercive sterilization.

<sup>13</sup> 274 U.S. at 208.

[i]t is better for all the world if, instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough.<sup>14</sup>

Thus, the Court put its imprimatur on eugenics, a pseudoscience and a powerful social movement at the time of the *Bell* decision. Part III will return to a discussion of the eugenics movement.

Most would agree that the story of Carrie Buck is a tragic one. Carrie's father died when she was a young girl, leaving her mother, Emma, to raise her child on her own.<sup>15</sup> Emma's status as a woman and her lack of formal education drastically limited her job prospects, however. Social workers alleged that Emma eventually turned to prostitution and other forms of extramarital sex to support her family.<sup>16</sup> Emma gave birth to two more children before she was given an intelligence test that revealed her to be a "moron" and committed to Virginia's State Colony for Epileptics and Feeble-minded ["the Colony"].<sup>17</sup>

When Emma was institutionalized, Carrie went to live with Alice and John Dobbs, a middle-class couple who offered the now orphaned toddler a home.<sup>18</sup> During her time with the Dobbses, Carrie managed to complete several years of formal schooling despite having to devote large amounts of time to domestic chores in the Dobbses' home.<sup>19</sup> When Carrie was seventeen, however, she became pregnant.<sup>20</sup> It was then that Alice petitioned to have Carrie committed to the Colony, where Emma still lived.<sup>21</sup> Alice claimed that Carrie was feeble-minded, like her mother. The best evidence of Carrie's feeble-mindedness was that, like her mother, Carrie had engaged in premarital sex and was going to be an unwed mother. Alice's petition was successful, and Carrie—whom an intelligence test also revealed to be a "moron"—was institutionalized. Carrie subsequently gave

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<sup>14</sup> *Id.* at 207 (citation omitted).

<sup>15</sup> Adam Cohen, *Imbeciles: The Supreme Court, American Eugenics, and the Sterilization of Carrie Buck* 19 (2016).

<sup>16</sup> *Id.* at 20.

<sup>17</sup> *Id.* at 19, 91.

<sup>18</sup> *Id.* at 15.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 16.

<sup>21</sup> *Id.*

birth to a daughter, Vivian, who the Dobbsses agreed to raise.<sup>22</sup> Vivian was also given an intelligence test as part of the preparation for the litigation that ultimately culminated in *Bell*. The test revealed that she, too, was feebleminded<sup>23</sup>—providing the basis for Justice Holmes’s callous declaration that “[t]hree generations of imbeciles are enough.”<sup>24</sup> That Carrie, her mother, and her daughter were intellectually disabled offered seemingly unimpeachable evidence of the claim that Carrie’s intellectual disability was heritable. Carrie was sterilized in order to prevent her from transmitting this “defect” to more children.

History has revealed the extent of the injustice to which Carrie was subjected. First, Carrie’s pregnancy, which was taken as proof of her feeblemindedness, was actually the product of rape. Carrie claimed that Clarence Garland, Alice Dobbs’s nephew, “forced himself” on her during a visit to the family’s home.<sup>25</sup> This revelation casts an even more sinister light on Alice’s petition to commit Carrie upon discovery of her pregnancy; it suggests that Alice sought to protect her nephew from charges of rape by physically getting rid of his victim. Second, the intelligence tests that “proved” Carrie’s feeblemindedness could hardly demonstrate as much. As journalist Adam Cohen notes, “Carrie was judged to be a ‘Middle grade Moron’ on the basis of such questions as ‘What is the thing to do: (a) Broken something? (b) Danger of being tardy? (c) Playmate hits you?’”<sup>26</sup> In fact, most contemporary observers have concluded that it is unlikely that Carrie had an intellectual disability. Indeed, she had received passing grades in all of her years of formal schooling, and none of her teachers had mentioned the possibility that she was of below average intelligence.<sup>27</sup> Third, even if the intelligence tests that were administered during that era could accurately measure what they claimed, Vivian was a small infant—six months old—when she was tested.<sup>28</sup> It is doubtful that the tests could establish a baby’s “feeblemindedness.” If Vivian was not feebleminded, of course, this casts doubt on the hereditary nature of any intellectual disability that Carrie was accused of having.

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<sup>22</sup> *Id.* at 28.

<sup>23</sup> *Id.* at 181.

<sup>24</sup> *Buck v. Bell*, 274 U.S. 200, 207 (1927).

<sup>25</sup> Cohen, *supra* note 15, at 24.

<sup>26</sup> *Id.* at 33.

<sup>27</sup> *Id.* at 21.

<sup>28</sup> *Id.* at 192.

Fourth and finally, Irving Whitehead, the lawyer who represented Carrie in the litigation that culminated in *Bell* was, in reality, not her ally. He was actually allied with the persons who hoped to sterilize Carrie and others like her. The Colony had hired Whitehead to represent Carrie in a suit that the authors of the legislation hoped would establish the legality of eugenic sterilization.<sup>29</sup> These powerful men selected Carrie to be the plaintiff in this test case.<sup>30</sup> They thought that she was ideal—with her alleged family history of feeble-mindedness, her unwed motherhood, and her youth, which virtually guaranteed that she would give birth to several more illegitimate, feeble-minded children.<sup>31</sup> Far from being a vigorous defender of Carrie's interests, Whitehead failed even to represent her competently. As Cohen describes it, "There was a great deal about the trial that was odd or wrong, but one thing stood out above all: only one of the two sides put on a case. Whitehead . . . did not call a single fact or expert witness, or introduce a single piece of evidence."<sup>32</sup>

Cohen observes that Whitehead might have had Carrie's former teachers testify as to her performance in their classes, noting that it would have been difficult for Carrie to have been promoted all the way to the sixth grade if she had an intellectual disability that left her with a mental age of nine.<sup>33</sup> Cohen observes that Whitehead might have also called expert witnesses who could challenge the "spurious hereditary science" that formed the foundation of the Colony's case for the constitutionality of the Virginia statue.<sup>34</sup> However, Whitehead did none of the above.

To summarize, Carrie grew up in the most extreme of indignity, only to be taken in by a family that treated her more like a maid than a child. She was the victim of sexual violence, and the people who were supposed to care for her instead institutionalized her in order to protect her rapist. She gave birth to a child that, like a shocking plot point from *The Handmaid's Tale*,<sup>35</sup> was adopted by her rapist's family; she never saw her daughter alive again.<sup>36</sup> When the state sought to inflict another form of violence on her—this time in the form of a forcible sterilization—no one

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<sup>29</sup> Id. at 98.

<sup>30</sup> See id. at 91–92.

<sup>31</sup> See id.

<sup>32</sup> Id. at 196–98.

<sup>33</sup> Id.

<sup>34</sup> Id.

<sup>35</sup> See Jennie Bricker, A Power Shift: A Conversation About Sexual Harassment and the Law Office, 78 Or. St. B. Bull. 19, 19 (2018).

<sup>36</sup> Vivian died at the age of eight from measles. See Cohen, *supra* note 15, at 291.

defended her. Indeed, powerful forces conspired against her and made her even more voiceless than she already was. She was sterilized without her consent and denied the ability to mother a child one day. And even after she was released from the Colony, things never really got better for her. In her dotage, she and her husband, Charlie, were found to be malnourished and suffering from exposure.<sup>37</sup> They lived out the last days of their lives in a home for the indigent elderly.<sup>38</sup>

Carrie was the victim of injustice after injustice after injustice. Yet, she was white. This raises the question: Where was her white privilege? What did white privilege do for her?

## II. DEFINING WHITE PRIVILEGE

Progressive race scholars have defined white privilege as the advantages that white people receive on account of their race. According to the concept, white people are the “beneficiaries of racial disadvantage” inflicted on non-white people;<sup>39</sup> white privilege is the term that refers to those benefits. In an influential and widely-cited article, Peggy McIntosh, a white scholar, offered that white privilege is “an invisible package of unearned assets which I can count on cashing in each day, but about which I was ‘meant’ to remain oblivious. White privilege is like an invisible weightless knapsack of special provisions, maps, passports, codebooks, visas, clothes, tools and blank checks.”<sup>40</sup> Building on McIntosh’s insight, Devon Carbado and Mitu Gulati explain that the concept of white privilege “is nothing more than a claim about the existence of discrimination. The notion is this: To the extent that race discrimination is a current social problem, there will be victims and beneficiaries of this discrimination. The former are disadvantaged; the latter are privileged.”<sup>41</sup>

Progressive race scholars assert that the evidence that white privilege exists is unassailable. They look to the fact that non-white people “are more likely than white Americans to be killed by police while unarmed; more likely to be stopped, searched, arrested and incarcerated; less likely

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<sup>37</sup> *Id.* at 296.

<sup>38</sup> *Id.*

<sup>39</sup> Jeremy Dunham & Holly Lawford-Smith, *Offsetting Race Privilege*, 11 *J. Ethics & Soc. Phil.*, Jan. 2017, at 1, 3.

<sup>40</sup> Peggy McIntosh, *White Privilege: Unpacking the Invisible Knapsack*, *Peace & Freedom Mag.*, July/Aug. 1989, at 10, 10.

<sup>41</sup> Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 *Yale L.J.* 1757, 1777 (2003).



to be hired by employers; less likely to be educated by prestigious institutions; and less likely to be protected by adequate healthcare.”<sup>42</sup> We might also add that women of color are more likely than white women to die during pregnancy, childbirth, or shortly thereafter;<sup>43</sup> further, the infants to which women of color give birth are less likely to survive their first year of life than their white counterparts.<sup>44</sup> All of these facts—and countless others—are the stuff of white privilege, say these progressive race scholars.<sup>45</sup>

Yet, the reality is that not all white people are doing particularly well. Unarmed white people sometimes are killed by the police,<sup>46</sup> many more

<sup>42</sup> Dunham & Lawford-Smith, *supra* note 39, at 2.

<sup>43</sup> Allison S. Bryant et al., *Racial/Ethnic Disparities in Obstetric Outcomes and Care: Prevalence and Determinants*, 202 *Am. J. Obstetrics & Gynecology* 335, 338 (2010).

<sup>44</sup> Marian F. MacDorman & T.J. Mathews, U.S. Dep’t of Health & Hum. Servs., *Understanding Racial and Ethnic Disparities in U.S. Infant Mortality Rates*, Nat’l Ctr. for Health Stat. Data Brief, Sept. 2011, at 1, <https://www.cdc.gov/nchs/data/databriefs/db74.pdf> [<https://perma.cc/K2CQ-VWT4>].

<sup>45</sup> It may be important to note that while progressive race scholars are more likely to embrace the concept of white privilege than are more conservative race scholars (or those who do not think about race at all), not all progressive race scholars find the concept entirely satisfying. For example, Zeus Leonardo argues that the concept myopically focuses on the benefits that white people receive on account of their race—an attention that obscures the oftentimes violent processes that have produced those benefits. See Zeus Leonardo, *The Color of Supremacy: Beyond the Discourse of ‘White Privilege,’* 36 *Educ. Phil. & Theory* 137, 137 (2004). He contends that the “discourse on privilege comes with the unfortunate consequence of masking history, obfuscating agents of domination, and removing the actions that make it clear who is doing what to whom. Instead of emphasizing the process of appropriation, the discourse of privilege centers the discussion on the advantages that whites receive.” *Id.* at 138. In a similar vein, Sullivan observes that the concept of white privilege may inhibit the agitation and activism that are the engines behind social change inasmuch as it may lead white people to do no more than ruminate on, and feel guilty about, their racial advantages. Sullivan, *supra* note 6, at 334. She writes:

The notion of white privilege can funnel white people’s attention and energy into mere introspection and consciousness raising. White people’s critical self-examination is not problematic in and of itself . . . . However, . . . white self-examination through the concept of white privilege can become an end in itself, rather than a means toward racial justice for people of color. Instead of leading to political and other forms of action against racism, white privilege discourse often bogs down white people in anguished personal and confessional soul searching, leaving them floundering in their guilty awareness of their privileges.

*Id.*

<sup>46</sup> 2018 Fatal Force Database, Wash. Post, [https://www.washingtonpost.com/graphics/2018/national/police-shootings-2018/?utm\\_term=.f0af5f7fa6a0](https://www.washingtonpost.com/graphics/2018/national/police-shootings-2018/?utm_term=.f0af5f7fa6a0) [<https://perma.cc/7WU6-NHY4>] (last updated Jan. 3, 2019) (noting that twenty-three of the forty-seven unarmed people shot and killed by police in 2018 were white).

are stopped, searched, arrested, and incarcerated.<sup>47</sup> Many white people are unemployed,<sup>48</sup> and most white people are not educated in prestigious institutions.<sup>49</sup> Further, millions of white people lack health insurance,<sup>50</sup> hundreds of white women die annually during pregnancy, birth, or shortly thereafter,<sup>51</sup> and thousands of white babies die during their first year of life every year.<sup>52</sup>

Race scholars have acknowledged this and proposed that different groups of white people have different access to white privilege. Provost Camille Gear Rich notes that “many whites do not benefit economically and socially from white privilege”<sup>53</sup> and are unable to avail themselves of the “material and dignitary benefits associated with whiteness.”<sup>54</sup> “[G]ender, class, ethnicity, sexual orientation, and religious background” are all characteristics that can impede an individual’s access to white privilege.<sup>55</sup>

It is because it is manifestly more difficult for some white people to enjoy racial privileges that some scholars have questioned the utility or accuracy of the concept of white privilege. Professor Shannon Sullivan criticizes the concept for implying that “all white people benefit from

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<sup>47</sup> See Inmate Statistics: Race, Fed. Bureau of Prisons, [https://www.bop.gov/about/statistics/statistics\\_inmate\\_race.jsp](https://www.bop.gov/about/statistics/statistics_inmate_race.jsp) [<https://perma.cc/44WX-6ZH4>] (last updated Sept. 29, 2018) (showing that in September 2018, 58.2% of prison inmates were white); see also Elizabeth Davis et al., U.S. Dep’t of Just., Bureau of Just. Stat., Contacts Between Police and the Public, 2015, at 2 (Oct. 2018), <https://www.bjs.gov/content/pub/pdf/cpp15.pdf> [<https://perma.cc/95UW-PX59>] (showing that roughly the same percentage of white and black individuals age sixteen and older experience police-initiated contact).

<sup>48</sup> Unemployed Persons by Marital Status, Race, Hispanic or Latino Ethnicity, Age, and Sex, U.S. Dep’t of Labor, Bureau of Lab. Stat., <https://www.bls.gov/cps/cpsaat24.htm> [<https://perma.cc/2W7M-77DX>] (last updated Jan. 19, 2018) (noting that nearly 4.7 million white people were unemployed in 2017).

<sup>49</sup> Camille L. Ryan & Kurt Bauman, U.S. Census Bureau, Educational Attainment in the United States: 2015, at 2 (2016) (noting that 32.8% of white people aged twenty-five and older have a bachelor’s degree or more).

<sup>50</sup> Uninsured Rates for the Nonelderly by Race/Ethnicity, 2016, Henry J. Kaiser Family Found., <https://www.kff.org/uninsured/state-indicator/rate-by-raceethnicity/> [<https://perma.cc/RL6U-V77C>] (last visited Oct. 12, 2018) (noting that over 12 million white Americans were uninsured in 2016).

<sup>51</sup> See Bryant et al., *supra* note 43, at 338 (noting that the 2005 maternal mortality rate for white women was 11.7 per 100,000 live births).

<sup>52</sup> See MacDorman & Mathews, *supra* note 44, at 1 (noting that white infants die at a rate of 5.63 per 1,000 live births).

<sup>53</sup> Camille Gear Rich, Marginal Whiteness, 98 Cal. L. Rev. 1497, 1504 n.28 (2010) (emphasis omitted).

<sup>54</sup> *Id.* at 1516.

<sup>55</sup> *Id.* at 1519.

racial advantages to the same degree, lumping white people together into an indistinguishable, monolithic group.”<sup>56</sup> They argue that the concept of white privilege fails to “reflect class, ethnicity, gender, and other salient differences among white people.”<sup>57</sup> Indeed, they are most disturbed by the way the concept conceals the disadvantages that are endured by white people when they are poor, writing that

the concept of white privilege glosses over class differences among white people, erasing the ways in which middle- and upper-class white people serve as the normative model of whiteness. . . . Poor white people often are seen as the “white trash” of American society, denigrated and dumped on by middle- and upper-class white people for allegedly being too stupid, dirty, and uneducated to function as proper whites.<sup>58</sup>

Most provocatively, perhaps, Sullivan suggests that the concept of white privilege disassembles that some people of color—the affluent ones—are doing much better than white people who are class unprivileged.<sup>59</sup> It may be important to underscore what is at stake in this issue: If class unprivilege negates the effects that white race privilege would otherwise produce, then white privilege may not be something that poor white people have. Further, if poor white people do not have white privilege, then it may be nonsensical to call it *white* privilege. What scholars have been calling *white privilege* may actually be nothing more than *class* privilege. Further, if *class privilege* is actually the thing that is doing the advantaging in society, then it is something that crosses racial lines; it is an entity that affluent white and non-white people can enjoy in equal measure.

Progressive race scholars have rejected this conclusion, insisting upon the continued utility and truth of the concept of white *racial* privilege. They have offered two ways that the concept of white privilege may be reconciled with the undeniable disadvantage that poor white people endure on account of their socioeconomic status. The first is to contend that white privilege does not refer to actual advantage, but rather the *statistical likelihood* of being advantaged. For example, political theorist Joel Olson

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<sup>56</sup> Sullivan, *supra* note 6, at 337.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* (observing that “some middle- and upper-class people of color receive more societal privileges than lower-class white people do”).

argues that white privilege is just “probabilities”—“not guarantees.”<sup>60</sup> If so, then white privilege is not evidenced by, for example, the fact that any particular white person is not incarcerated; instead, it is evidenced by the fact that a white person is simply less likely to be incarcerated. Again, according to Olson, white privilege is not demonstrated by a white child not dying during her first year of life; instead, it is demonstrated by a white child being simply less likely to die before her first birthday.

The problem with defining white privilege as the “statistical probability of advantage”<sup>61</sup> is that it may be unsatisfying. The incarcerated white male may feel little succor after being told that although he will be spending the next couple of decades behind bars, he is racially privileged inasmuch as he was *less likely* to be incarcerated than his non-white counterpart. Indeed, the white parents of a dead infant may feel little comfort after being informed that they are racially privileged because, although their child died, she was *more likely* to survive her first year than a non-white child.

The second solution that progressive race scholars have offered to reconcile the concept of white privilege with the obvious and undeniable fact of poor white people’s disadvantage is to propose that white privilege sometimes may be intangible. That is, it may be wholly psychic or emotional. This is what W.E.B. Du Bois was referring to when he spoke about a “public and psychological wage” that all white people had—even the disadvantaged ones.<sup>62</sup> Du Bois argued that, in the days of Jim Crow, this wage took the form of the deference that *all* white people, even the poor ones, were given on account of their race.<sup>63</sup> He continues, writing that poor white people

were admitted freely with all classes of white people to public functions, public parks . . . . The police were drawn from their ranks, and the courts, dependent on their votes, treated them with . . . leniency . . . . Their vote selected public officials, and while this had small effect upon the economic situation, it had great effect upon their personal treatment . . . . White schoolhouses were the best in the

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<sup>60</sup> Joel Olson, *The Abolition of White Democracy* 76 (2004).

<sup>61</sup> Dunham & Lawford-Smith, *supra* note 39, at 9 (emphasis omitted).

<sup>62</sup> W.E.B. Du Bois, *Black Reconstruction in America: 1860–1880*, at 700 (First Free Press ed. 1998) (1935).

<sup>63</sup> See *id.*

community, and conspicuously placed, and they cost anywhere from twice to ten times as much per capita as the colored schools.<sup>64</sup>

While the idea that all white people are paid a “public and psychological wage” is an attractive one, we have to wonder about whether that wage actually *mattered* to someone as marginalized as Carrie Buck. As a person who was confined to an institution, she was not admitted to public functions and public parks. Insofar as the Supreme Court, the highest court in the country, sanctioned her involuntary sterilization, the courts did not treat her with any significant degree of leniency. Although women secured the right to vote in 1920, it is doubtful that those who had been committed to facilities for the “feble-minded” could vote and therefore select the public officials who might have a “great effect on their personal treatment.” Finally, Carrie Buck’s foster family removed her from school in order to free her up to do more work around the house;<sup>65</sup> as a result, it did not matter that the white schoolhouses in which she would have been educated had she had kinder guardians “cost anywhere from twice to ten times as much per capita as the colored schools.” All of this is to say: If white privilege takes the form of a public and psychological wage, did Carrie Buck’s dramatic disadvantage on account of her class (and gender) render the wage illusory?

Professor Cheryl Harris has elaborated on Du Bois’s concept of the public and psychological wage, arguing that in the present-day, when Jim Crow has been abolished, the “wages of whiteness are available to all whites regardless of class position, even to those whites who are without power, money, or influence. Whiteness, the characteristic that distinguishes them from Blacks, serves as compensation even to those who lack material wealth.”<sup>66</sup> She contends that in our era of formal racial equality, white privilege

may have been reduced to a claim of relative privilege only in comparison to people of color. Nevertheless, whiteness retains its value as a ‘consolation prize’: it does not mean that all whites will win, but simply that they will not lose, if losing is defined as being on the bottom of the

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<sup>64</sup> *Id.* at 700–01.

<sup>65</sup> Cohen, *supra* note 15, at 21–22.

<sup>66</sup> Cheryl I. Harris, *Whiteness as Property*, 106 *Harv. L. Rev.* 1707, 1759 (1993).

social and economic hierarchy—the position to which Blacks have been consigned.<sup>67</sup>

When we think about Carrie Buck, though, we have to ask: In what specific ways did her whiteness compensate her? In what specific ways did she *not* lose? This was a woman who was indigent, an orphan, and a victim of rape. This was a woman who was institutionalized to protect her rapist despite her lack of intellectual disability. Carrie Buck was a woman who was subjected to a forcible sterilization after the lawyer who was supposed to advocate on her behalf colluded with her opposition and failed to meet the utter minimum of his obligations. So, again: How exactly was Carrie Buck privileged? What advantages did her race give her?

The answer may be “none.” It may be that her lack of privilege on the basis of class (and gender) nullified any privilege that she may otherwise have had on the basis of race. Of course, this is a conclusion that would call into question the universality of white privilege for white people—a circumstance that would make it inaccurate to call it a *racial* privilege. It would be misleading and, simply, wrong to call it a *racial* privilege if all of the members of a race cannot access it.

The next Part begins an argument for the continued utility of the concept of white privilege by exploring the significance of race—specifically, the white race—in the eugenics movement.

### III. WHITENESS AND THE EUGENICS MOVEMENT

The eugenics movement, which was committed to saving society through the management of the population’s gene pool, arose in the United States in the early twentieth century.<sup>68</sup> Eugenecists argued that intelligence was genetically determined and, consequently, transmittable from parent to child.<sup>69</sup> They believed that those who were successful in society had good genes, which had enabled their social success.<sup>70</sup> Further, those who were unsuccessful in society had bad genes, which had predetermined their social failure.<sup>71</sup> Eugenecists essentially proposed that the existing social hierarchy simply reflected a genetic hierarchy. As

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<sup>67</sup> *Id.* at 1758–59 (footnotes omitted).

<sup>68</sup> Linda Krákorová, *No More Imbeciles: The Eugenics Movement in the United States*, 3 *Common L. Rev.* 7, 7 (2003).

<sup>69</sup> See Clyde Chitty, *Eugenics, Race and Intelligence in Education* 27 (2009).

<sup>70</sup> See *id.* at 33.

<sup>71</sup> See *id.*

Professor Victoria Nourse explains, “[P]opular intellectuals of the day, progressive and conservative alike, embraced . . . a eugenic theory of inherited and inevitable social caste, with the ‘fit’ on top and the ‘unfit’ on the bottom—what eugenicists deemed a ‘native American aristocracy.’”<sup>72</sup>

While eugenicists encouraged the wealthy and powerful to reproduce, so as to ensure that their good genes would be propagated into the future, they were also adamant that the poor and powerless should be prevented from reproducing, so as to prevent the continuation of their undesirable genes.<sup>73</sup> Eugenicists’ goal was the creation of an American society in which the population had nothing but advantageous genes running through its veins.

Eugenicists took three primary tactics towards improving the country’s gene pool and achieving this goal. The first was anti-miscegenation laws, which they hoped would reduce the frequency with which white people had sex with non-white people—thereby reducing the number of births of children carrying the fantastic genes that white people had alongside the problematic, criminogenic, poverty-creating genes that non-white people had.<sup>74</sup> The second tactic was immigration restrictions.<sup>75</sup> The idea here was that certain immigrant groups, like those hailing from the Scandinavian countries, had desirable genes; others, like those hailing from Greece, Italy, Ireland, and Eastern Europe—not to mention Asia—had terrible ones.<sup>76</sup> Thus, eugenicists sought to improve the gene pool in the United States by allowing the right immigrants to enter the country and preventing the same from the wrong immigrants.<sup>77</sup>

The third tactic for improving the country’s gene pool was to prevent the reproduction of those with problematic genes who were already in the country.<sup>78</sup> Eugenicists believed that the reproduction of these folks could be precluded either through eugenic segregation (that is, through forcing these undesirable people to live in sex-segregated facilities throughout

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<sup>72</sup> Victoria Nourse, *Buck v. Bell: A Constitutional Tragedy from a Lost World*, 39 Pepp. L. Rev. 101, 105 (2011).

<sup>73</sup> Garland E. Allen, *Eugenics and Modern Biology: Critiques of Eugenics, 1910–1945*, 75 *Annals Hum. Genetics* 314, 314 (2011).

<sup>74</sup> Martha Menchaca, *The Anti-Miscegenation History of the American Southwest, 1837 to 1970: Transforming Racial Ideology into Law*, 20 *Cultural Dynamics* 279 (2008).

<sup>75</sup> Robert De C. Ward, *National Eugenics in Relation to Immigration*, 192 *N. Am. Rev.* 56, 65–67 (1910).

<sup>76</sup> *Id.* at 57.

<sup>77</sup> *Id.* at 66.

<sup>78</sup> See Alexandra Minna Stern, *Eugenics, Sterilization, and Historical Memory in the United States*, 23 *História, Ciências, Saúde-Manguinhos* 195, 196 (2016).

their childbearing years)<sup>79</sup> or eugenic sterilization (the compulsory tubal ligations and vasectomies that were the subject of the constitutional challenge in *Bell*).<sup>80</sup> Eugenicists much preferred the latter to the former.<sup>81</sup>

It is important to note that Carrie Buck's class unprivilege and gender unprivilege made her vulnerable to eugenic sterilization. With respect to class, as noted above, eugenicists believed that it was safe to assume that the poor carried disadvantageous genes: Their poverty served as proof that defective genes coursed through their veins.<sup>82</sup> Thus, Carrie Buck's unprivilege on the basis of class exposed her to the risk of being deemed unfit, and consequently, eugenically sterilized.<sup>83</sup>

With respect to gender, women disproportionately bore the burden of eugenic sterilization. Between 1928 and 1932, women constituted sixty-seven percent of institutionalized persons who had been sterilized.<sup>84</sup> Eugenicists tended to believe that although both men and women could possess inheritable defective genes, women posed the bigger threat of disseminating those genes to future generations.<sup>85</sup> One thinker expressed the sentiments of the day when he argued that "feebleminded girls were 'vastly more dangerous to the community' than feebleminded boys, and recommended that 'every feebleminded woman should be faithfully segregated for twenty years.'"<sup>86</sup> In fact, many of the persons identified as "feebleminded" were women who engaged in behavior that represented a departure from gender norms. As historian Paul Lombardo writes, many victims of eugenic sterilization were women who were described as "immoral."<sup>87</sup> Lombardo found that evidence of immorality included

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<sup>79</sup> *Id.* at 198.

<sup>80</sup> See *Buck v. Bell*, 274 U.S. 200, 205 (1927).

<sup>81</sup> Daniel J. Kevles, *Eugenics and Human Rights*, 319 *Brit. Med. J.* 435, 436 (1999).

<sup>82</sup> See *supra* note 71 and accompanying text.

<sup>83</sup> See Mary Ziegler, *Reinventing Eugenics: Reproductive Choice and Law Reform After World War II*, 14 *Cardozo J.L. & Gender* 319, 334 (2008) (citing Frederick Osborn, *Characteristics and Differential Fertility of American Population Groups*, 12 *Soc. Forces* 8, 15 (1933)) (noting that thinkers in the early twentieth century believed that "low intelligence was closely correlated with social class" and argued that "the unfit tended to be poor"). But see Nourse, *supra* note 72, at 106 ("Poverty never perfectly tracked the category 'unfit,' which could include everyone from the hillbilly to the heiress. Just take a look at . . . Ann Hewitt, an heiress who was deemed 'feebleminded' by her mother, and sterilized under cover of appendectomy so that the daughter, being barren, could not inherit the fortune her mother coveted").

<sup>84</sup> See Cohen, *supra* note 15, at 301.

<sup>85</sup> *Id.* at 26.

<sup>86</sup> *Id.*

<sup>87</sup> Paul A. Lombardo, *Three Generations, No Imbeciles: Eugenics, the Supreme Court, and *Buck v. Bell** 61 (2008).



“‘fondness for men,’ time spent in a ‘sporting house,’ or a reputation for ‘promiscuity.’”<sup>88</sup> Some women were accused of “a tendency to be ‘over-sexed’ or ‘man-crazy,’” and diagnoses sometimes included “‘nymphomania’ or ‘sexual degeneracy’ or positive tests for sexually transmitted diseases.”<sup>89</sup> According to eugenic philosophy, “moral degeneracy,” which led individuals to engage in promiscuous sex and to bear children out of wedlock, was a genetically determined condition—and a “peculiarly feminine trait.”<sup>90</sup> Thus, Carrie Buck’s unprivilege on the basis of gender increased her risk of being eugenically sterilized.

Ironically, and quite significantly, Carrie Buck’s racial *privilege*—her whiteness—made her vulnerable to eugenic sterilization. This is because the eugenics movement was always about protecting the *white race* from degeneration. Eugenicists were interested in eliminating the genes that they believed caused physical, mental, and behavioral deficiencies from the *white population’s* gene pool. As a result, the eugenics research that caused the most alarm—the research that acted as a call to arms, convincing powerful actors and other observers that something just had to be done lest the United States fall into disrepair—was not about miscreant people of color. It was about depraved, debased, disabled, and otherwise undesirable white people.<sup>91</sup>

At bottom, eugenics was about improving the white race. Because non-white races were thought to be inveterately inferior, eugenicists conceptualized any effort to improve these races through the elimination of

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<sup>88</sup> Id.

<sup>89</sup> Id.

<sup>90</sup> Id. at 16. See also Matt Wray, *Not Quite White: White Trash and the Boundaries of Whiteness* 94 (2006) (“While men were sterilized in large numbers, there is little evidence that their sex lives were subject to the same level of scrutiny and pathologization [as were women’s sex lives]. Controlling the sexuality and the reproductive power of lower-class women through the imposition of coercive policies of reproductive control was a major focus and a lasting consequence of eugenic reform.”).

<sup>91</sup> The study of the Jukes family, which eugenicists held up as evidence of the hereditary nature of “degeneracy,” is a case in point. The Jukes were a family whose “world was mired in crime and poverty,” and “shot through with the habit of illicit sex.” Lombardo, *supra* note 87, at 9. Their antisocial behaviors included “crime, pauperism, fornication, prostitution, bastardy, exhaustion, intemperance, disease and extinction.” Id. The idea here was that the antisocial behaviors in which the Jukes engaged were all genetically determined. Importantly, the Jukes were a white family. See Sonia M. Suter, *A Brave New World of Designer Babies?*, 22 *Berkeley Tech. L.J.* 897, 905 (2007) (noting that that in the early twentieth century, “[j]ournalists widely described the now-infamous pedigrees of ‘white trash’ families like the Jukes”).

undesirable genes as laughably futile or wholly impossible.<sup>92</sup> Thus, it is not an overstatement to say that, *on the whole, eugenicists working in the early twentieth century were uninterested in people of color.*<sup>93</sup> Non-white people were subjects of interest to eugenicists only to the extent that eugenic pseudoscience proposed that white people's intermixing with non-white people would cause the degradation of the white race. Eugenicists' sole concern with people of color was in keeping their problematic genes out of white stock, hence eugenicists' vigorous advocacy of anti-miscegenation laws alongside their campaigns for sterilization laws.<sup>94</sup>

Eugenicists' obsession with immigration was a product of their overarching concern about improving the white race. The attention that eugenicists gave to non-white populations in the reports that they authored on the immigration issue was cursory, at best. That non-white immigrants possessed undesirable traits and ought to be excluded from the nation was

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<sup>92</sup> See Lutz Kaelber, *Eugenics: Compulsory Sterilization in 50 American States*, Alabama, Univ. of Vermont, <http://www.uvm.edu/~lkaelber/eugenics/AL/AL.html> [<https://perma.cc/BZ84-2R8B>] (noting the "limitation of eugenics to the sterilization of whites" in Alabama and explaining that this practice "reflected the belief that the 'betterment' of the black 'race' could not be achieved by such measures.") (last visited Oct. 19, 2018) [hereinafter Kaelber, Alabama]. Historian Edward Larson has argued that, in the South, the idea of improving the black stock through eugenics was unpopular because racial improvement of the black race would threaten the racial hierarchy as well as undermine the availability of black labor. Edward J. Larson, *Sex, Race, and Science: Eugenics in the Deep South* 154 (1995). He writes:

[W]hen one Georgia state representative opposed legislation creating an institution for the mentally retarded on the grounds that it "would give judges authority to send hundreds of negro misdemeanants to this institution" rather than to the chain gangs, the sponsor replied, "Georgia courts would never be so foolish as to rob the roads of able-bodied negroes."

Id.

<sup>93</sup> See Cohen, *supra* note 15, at 58 ("Although eugenics was popular with many southern racists . . . eugenicists in the South generally focused their attention on whites. Their primary interest was in 'preserving' the white race from decline."); Larson, *supra* note 92, at 93 ("[Southern eugenicists] focused exclusively on 'preserving' the White race, and left the other races to fend for themselves."); Wray, *supra* note 90, at 73 ("[E]mpirical eugenic research that focused on immigrants, blacks, Indians, Asians, and ethnoracial minorities was almost nonexistent compared to the number of studies of poor rural whites").

<sup>94</sup> See Lombardo, *supra* note 87, at 245 (noting that Harry Laughlin, one of the most prolific and active eugenicists in the early twentieth century, "argued that interracial mixing was dysgenic, likely to pollute the white gene pool to the detriment of future generations of Americans," and stating that Laughlin's "efforts to reinvigorate existing anti-miscegenation laws using concepts and rhetoric borrowed from twentieth-century eugenics culminated in the revision of several state laws in the 1920s and 1930s."); see also Cohen, *supra* note 15, at 58 (observing that eugenicists in the "early twentieth century were more concerned about keeping blacks as far as possible from whites," and noting that states passed strict laws prohibiting "sexual relations between races" to advance this end).

a given. The real question concerned white immigrants.<sup>95</sup> Accordingly, eugenicists' research on immigration trained their focus on would-be immigrants from *white* nations, and they examined whether immigration from different European countries would benefit or harm the collective gene pool of the native white population in the United States. Harry Laughlin, one of the most active American eugenicists of the era, was heavily involved in this area. In his work, he argued that immigration from England, Scotland, Wales, and Scandinavia was not problematic, as the gene pools in these nations were strong.<sup>96</sup> However, he discouraged immigration from "Russia, Greece, Italy, Belgium, and Poland."<sup>97</sup> Alas, the germplasm in these countries was just too defective. Note here that the people hailing from Laughlin's favored nations, *as well as his disfavored nations*, were white. Laughlin's overriding interest—consistent with the interest of the eugenics movement overall—was with white people and safeguarding the white stock.

Because eugenics was about "protecting and purifying the Caucasian race,"<sup>98</sup> it was white people—not people of color—who largely found themselves the targets of eugenic sterilization in the early twentieth century.<sup>99</sup> It is for this reason that historian Edward Larson, reflecting on the

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<sup>95</sup> See Larson, *supra* note 92, at 9 ("[I]n the North and the West eugenic concerns typically focused on ethnically distinct immigrants who could be viewed as 'Others' by the predominantly White, middle-class supporters of eugenics."). It may be important to note that while white immigrants from countries like Ireland, Greece, and Italy during the early twentieth century were thought to embody a marginal form of whiteness, the fact that they were, indeed, white was not in dispute. See Philip Q. Yang & Kavitha Koshy, *The "Becoming White Thesis" Revisited*, 8 *J. Pub. & Prof. Soc.* 1, 14–15 (2016) (arguing that immigrants from countries like Ireland and Italy were always thought to be racially white and contending that they "became white" in the sense that they transformed their social status so as to access "wealth, status, and power" that had been unavailable to them previously). So, when a scholar like Noel Ignatiev analyzes "how the Irish became white," he should not be read as suggesting that this group was not thought to be racially white at any point. See Noel Ignatiev, *How the Irish Became White* (1995). Instead, he should be read as analyzing how the Irish came to "partake of the privileges of the white skin in this society"—that is, how they fought to "sell themselves piecemeal instead of being sold for life," to "compete for jobs in all spheres instead of being confined to certain work," and to become "citizens of a democratic republic, with the right to elect and be elected, to be tried by a jury of their peers, to live wherever they could afford, and to spend, without racially imposed restrictions, whatever money they managed to acquire." *Id.* at 1–3.

<sup>96</sup> See Cohen, *supra* note 15, at 130, 132.

<sup>97</sup> *Id.* at 132.

<sup>98</sup> Larson, *supra* note 92, at 1.

<sup>99</sup> Justin Driver, *Recognizing Race*, 112 *Colum. L. Rev.* 404, 423–24 (2012) (citing Mary L. Dudziak, *Oliver Wendell Holmes as a Eugenic Reformer: Rhetoric in the Writing of Constitutional Law*, 71 *Iowa L. Rev.* 833, 843–44 (1986)) ("[The] eugenics movement[] desire[d]

Court's decision in *Bell*, writes: "What the Supreme Court condoned in Virginia was not a holocaust or genocide applied to a reviled group. It was not racial or ethnic in nature."<sup>100</sup> What Larson means here is that the movement for eugenic sterilization that cruelly stripped Carrie Buck of her capacity to bear children largely ignored non-white people. It was classist. It was ableist. It was sexist. But, to the extent that it targeted white people for violence while disregarding non-white people, it was not racist—at least not traditionally so.<sup>101</sup>

Moreover, it was the most disadvantaged white people—the intellectually and physically disabled, the mentally ill, the incarcerated, the poor—who eugenicists believed carried undesirable genes in their blood. This explains the notation made in Carrie Buck's records by Dr. Albert Priddy, the director of the Colony where Carrie and her mother lived. In documenting Carrie's and her mother's "family history," Priddy noted that "[t]hese people belong to the shiftless, ignorant, and worthless class of antisocial whites of the South."<sup>102</sup> It was this "worthless class of antisocial whites"—not people of color—who posed the biggest threat to the white gene pool.<sup>103</sup> Accordingly, it was this maligned class of white people—not people of color—who frequently found themselves under the eugenicists' knife.

Thus, *Carrie Buck's whiteness was a double-edged sword*. It granted her admission to a race that the most powerful people of the day believed to be superior to all others. However, her membership in that race made her body an object of racial improvement. Differently stated, Carrie Buck's whiteness allowed her inclusion into the highest-quality race. At the same time, Carrie Buck's whiteness rendered her vulnerable to quality control.

This is to say that had Carrie Buck not been white, she probably would not have been sterilized. Now, this statement may strike some as untrue.

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to improve the white race scientifically by preventing whites deemed undesirable from reproducing.”).

<sup>100</sup> Edward J. Larson, *Putting Buck v. Bell in Scientific and Historical Context: A Response to Victoria Nourse*, 39 *Pepp. L. Rev.* 119, 120 (2011).

<sup>101</sup> It might be more accurate to say that because the eugenics movement was so racist—conceptualizing non-white people as wholly incapable of improvement or purification—it was safer to be non-white than white.

<sup>102</sup> Driver, *supra* note 99, at 424 (citing Lombardo, *supra* note 87, at 134).

<sup>103</sup> See also Cohen, *supra* note 15, at 58 (“Southern eugenicists were particularly concerned with the lowest economic class, people often disparagingly referred to as ‘poor white trash,’ who were seen as repositories of the worst of the white race’s germplasm.”).

This is because it is common knowledge that women of color have been frequent victims of involuntary sterilization. Many are aware that Fannie Lou Hamer, a heroine of the Civil Rights Movement, had been given a hysterectomy without her knowledge or consent after going to a hospital for a minor surgery.<sup>104</sup> They are aware of the case of *Madrigal v. Quilligan*, which involved a California hospital that, with the aid of federal funds, sterilized a large number of Latinx women without their consent.<sup>105</sup> They are aware that, at one point, a third of the women living in Puerto Rico had been sterilized.<sup>106</sup> They are aware that scores of indigenous women were sterilized without their consent after having received healthcare through the federally-funded Indian Health Services; indeed, at one point, a quarter of all indigenous women had been sterilized.<sup>107</sup> Many are aware of Minnie Lee and Mary Alice Relf, two young black girls who were involuntarily sterilized.<sup>108</sup> Their mother, who was unable to read, believed that the form that she was only able to sign with an “X” authorized healthcare providers to give the girls contraception.<sup>109</sup> The family sued when they discovered that the form had authorized the girls’ sterilizations.<sup>110</sup> Investigations that followed her suit revealed that:

[F]ederal funds had been used to sterilize between 100,000 and 150,000 low-income people in only a few years. . . . Some people had acquiesced to an operation after being threatened with the loss of welfare payments unless they consented. Many coerced sterilizations occurred at the time of childbirth, with some women reporting that delivery of their babies had been conditioned on agreeing to the surgery.<sup>111</sup>

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<sup>104</sup> Fannie Lou Hamer, PBS, <https://www.pbs.org/wgbh/americanexperience/features/freedomsummer-hamer/> [<https://perma.cc/H9V9-JMHQ>].

<sup>105</sup> Alexandra Minna Stern, *Sterilized in the Name of Public Health: Race, Immigration, and Reproductive Control in Modern California*, 95 *Am. J. Pub. Health* 1128, 1128 (2005).

<sup>106</sup> Louis de Malave, *Sterilization of Puerto Rican Women: A Selected, Partially Annotated Bibliography*, Univ. of Wisconsin-Madison Libraries (1999), <https://www.library.wisc.edu/gwslibrarian/bibliographies/sterilization/> [<https://perma.cc/SJH5-ZTNQ>].

<sup>107</sup> Erin Blakemore, *The Little-Known History of the Forced Sterilization of Native American Women*, *JSTOR Daily* (Aug. 25, 2016), <https://daily.jstor.org/the-little-known-history-of-the-forced-sterilization-of-native-american-women/> [<https://perma.cc/XR4W-VVJL>].

<sup>108</sup> B. Drummond Ayres, Jr., *Sterilizing the Poor: Exploring Motives and Methods*, *The Nation*, *N.Y. Times* (Jul. 8, 1973), <https://www.nytimes.com/1973/07/08/archives/exploring-motives-and-methods-the-nation-sterilizing-the-poor.html> [<https://perma.cc/X3QU-E4TV>].

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> Lombardo, *supra* note 87, at 248.

How do we reconcile the documented fact of the brutal coercive sterilization of tens of thousands of women of color with the claim made above that had Carrie Buck not been white—that is, had she been a woman of color—she probably would *not* have been sterilized?

The answer is to pay attention to the time period in which these sterilizations took place. Carrie Buck was sterilized in the early twentieth century. Quite significantly, the coercive sterilization of non-white people proliferated in the 1960s and afterwards. Hamer was sterilized in 1961.<sup>112</sup> The sterilization abuse that was the subject of *Madrigal* took place in the early 1970s.<sup>113</sup> In 1965, the Puerto Rican Department of Health documented that a third of the women on the island had been sterilized.<sup>114</sup> The forced sterilization of indigenous women through the Indian Health Services occurred during the 1960s and 1970s.<sup>115</sup>

That non-white women were forcibly sterilized during a different time period helps reconcile the large, disproportionate numbers of non-white women who were victims of forcible sterilization with the claim that non-white women were not the targets of *eugenic* sterilization—that is, the sterilizations that were occurring during the early twentieth century. North Carolina is a revealing case study. African Americans comprise some 39% of the more than 7,600 people who were involuntarily sterilized in the state between 1929 and 1973.<sup>116</sup> However, the proportion of black people who were sterilized varied across the decades, increasing dramatically in the 1950s and 1960s. While black people represented 23% of those sterilized in the 1930s and 1940s, they were 59% of those sterilized between 1958 and 1960.<sup>117</sup> Astonishingly, they were 64% of those sterilized between 1964 and 1966.<sup>118</sup> This is to say that the “sterilizations of blacks were concentrated in a shorter period of time”<sup>119</sup>—the post-civil rights decades, to be precise.<sup>120</sup> What this means is that during the period

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<sup>112</sup> Fannie Lou Hamer, *supra* note 104.

<sup>113</sup> Stern, *supra* note 105, at 1128.

<sup>114</sup> Harriet B. Presser, *The Role of Sterilization in Controlling Puerto Rican Fertility*, 23 *Population Stud.* 343, 344 (1969).

<sup>115</sup> Blakemore, *supra* note 107.

<sup>116</sup> Lutz Kaelber, *Eugenics: Compulsory Sterilization in 50 States*, North Carolina, Univ. of Vermont, <http://www.uvm.edu/~lkaelber/eugenics/NC/NC.html> [<https://perma.cc/URU6-8R-9R>] (last updated Oct. 30, 2014) [hereinafter Kaelber, North Carolina].

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> See Ziegler, *supra* note 83, at 348 (stating that prior to the changes brought by the Civil Rights Movement, black people were less likely to be sterilized because the segregated

in which Carrie Buck was sterilized, black women were not the targets of this form of reproductive control—certainly not disproportionately so.<sup>121</sup>

Virginia had a similar experience to North Carolina. During the sixty-year period during which most forcible sterilizations occurred—between 1920 and 1980<sup>122</sup>—“twenty-two percent of those sterilized [in Virginia] were African American. This is roughly proportionate to the twenty percent of the total population represented by African Americans.”<sup>123</sup> At the same time, “[a]fter *Brown v. Board of Education* in 1954, racist eugenics became more prominent” in Virginia.<sup>124</sup> What this means is that if black people were not disproportionately represented in the population of people who were sterilized in Virginia between 1920 and 1980, and if “racist” sterilizations of black people increased after 1954, then black people were *underrepresented* in the population of people who were sterilized prior to 1954.

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hospitals that would care for them “had neither the equipment nor the staff to perform a large number of operations,” but that “[a]fter *Brown v. Board of Education* and the passage of the Civil Rights Act of 1964, hospitals were gradually desegregated and there was an increase in the proportion of sterilizations administered to black women”).

<sup>121</sup> In fact, the rates at which North Carolina sterilized black people in the pre-Civil Rights era were higher than other states because a eugenicist, philanthropist Clarence Gamble, made sure that non-white people’s reproduction was also subject to state control. See Larson, *supra* note 92, at 156. In the 1930s, he

initiated and funded a series of studies and demonstration projects in North Carolina that resulted in a greatly expanded eugenic sterilization program implemented through both state institutions and county welfare agencies. These efforts sterilized Blacks and Whites at equivalent per capita rates . . . . During the same period, Gamble helped establish dozens of subsidized sterilization clinics serving the poor of both races in the South and the Midwest.

*Id.* Without the activities of Gamble, it is doubtful that the sterilization rates of black people in North Carolina in the pre-Civil Rights era would have been as high as they were—although they still were lower than what we would expect if the eugenics movement of the early twentieth century had actually cared about the reproduction of non-white people.

<sup>122</sup> Lutz Kaelber, *Eugenics: Compulsory Sterilization in 50 States*, Virginia, Univ. of Vermont, <http://www.uvm.edu/~lkaelber/eugenics/VA/VA.html> [<https://perma.cc/9N9D-DMJD>] (last visited Oct. 18, 2018) [hereinafter Kaelber, Virginia]. Kaelber should not be read to suggest that forcible sterilizations did not occur after 1980. Evidence that many women incarcerated in California prisons are contemporary victims of coercive sterilization clearly demonstrates that the end of an official state sterilization *policy* is no guarantee that the *practice* does not continue. Jessica Chasmar, *Female Inmates Sterilized in California Prisons Without Approval*: Report, *The Wash. Times* (July 8, 2013), <https://www.washingtontimes.com/news/2013/jul/8/female-inmates-sterilized-california-prisons-with/> [<https://perma.cc/M4KF-XY-46>].

<sup>123</sup> Kaelber, Virginia, *supra* note 122.

<sup>124</sup> *Id.*

Essentially, non-white people were less likely to be coercively sterilized in the early twentieth century and more likely to be coercively sterilized in the 1950s through 1980s—*after the Civil Rights Movement forced the installation of formal racial equality across the country*. This reality has led Mary Ziegler to conclude that though “[i]t may seem counterintuitive,” it remains that “some aspects of reproductive law and politics were more openly racist in the 1950s and 1960s than they had been before World War II.”<sup>125</sup>

The justification for the coercive sterilizations of the early twentieth century differs from the justification for the coercive sterilizations of the 1950s, 1960s, and later. The forcible sterilizations of Carrie Buck’s era were justified by the eugenic claim that some classes of people—the poor, the epileptic, the feebleminded, etc.—had defective genes that they could pass along to their children. The protection of the white race was the goal of such eugenic sterilizations. Quite distinctly, the justification for the coercive sterilization of non-white women in the post-civil rights era was that there were just too many non-white people and that far too many of them were dependent.<sup>126</sup> This deserves elaboration.

The existence of the welfare state undeniably informed the perception that developed in the post-civil rights era that non-white people had simply become too numerous and that they would inevitably give birth to unproductive, dependent children. That is, the desire to protect the welfare rolls—to limit the number of people who could make claims on the state—prompted the sterilization abuse of non-white women. As an observer notes of North Carolina, “[b]y the 1950s, some in the white majority were becoming anxious about supporting blacks through welfare . . . . It was believed [that] the control [of] the reproduction of [welfare] recipients was necessary.”<sup>127</sup> While this included white welfare recipients, “the state began to focus on sterilizing black women as they became the majority of the welfare population.”<sup>128</sup> This is key.

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<sup>125</sup> Ziegler, *supra* note 83, at 335.

<sup>126</sup> See *id.* at 335–36 (discussing the Population Council’s conviction that there were “‘high fertility groups’” in the country whose reproduction ought to be curbed and identifying these groups as “African-Americans, Puerto-Ricans, Native Americans, and white immigrants”).

<sup>127</sup> Kaelber, North Carolina, *supra* note 116.

<sup>128</sup> *Id.* See also Lutz Kaelber, Eugenics: Compulsory Sterilization in 50 States, Colorado, Univ. of Vermont, <http://www.uvm.edu/~lkaelber/eugenics/CO/CO.html> [<https://perma.cc/-TZ3Q-9EBH>] (noting that in Colorado, when eugenic attention shifted away from those with mental illnesses, “those in poverty became targets of eugenic prejudices” and that “[t]hose



Prior to the 1950s and 1960s, non-white people found it nearly impossible to make claims on the state; the safety net had been made largely inaccessible to them.<sup>129</sup> The formal equality ushered in by the Civil Rights Movement changed non-white people's relationship to the welfare state. This changed relationship altered the interest that a racially repressive society took in the fertility of non-white people. Accordingly, society began to inflict the violence of coercive sterilization on women whose race had once shielded them from the attention of the eugenics movement of the early twentieth century.<sup>130</sup> The reasoning was no longer that some genetically deficient populations would produce children whose genetic inheritance would predispose them to deviance.<sup>131</sup> Instead, the reasoning was that some *socially* deficient populations would produce children whose *environments* would predispose them to deviance.<sup>132</sup> In the wake of the Civil Rights Movement—in an era of formal racial equality—the latter populations oftentimes were identified as non-white.

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who were victimized were specifically poor mothers who relied on public assistance from the state to raise their children") (last visited Oct. 19, 2018).

Michigan presents an interesting case. Researchers have documented that "African Americans living in Michigan may have had a four times greater chance of being sterilized than whites." Lutz Kaelber, *Eugenics: Compulsory Sterilization in 50 States, Michigan, Univ. of Vermont*, <http://www.uvm.edu/~lkaelber/eugenics/MI/MI.html> [<https://perma.cc/8PPU-4Z-NY>]. However, the data also show that ninety-two percent of the total sterilizations carried out in Michigan were performed before 1955. *Id.* It is unclear whether Michigan sterilized large numbers of black people in the years preceding 1955 or, alternately, whether it concentrated the sterilization of African Americans in the years that followed 1955.

<sup>129</sup> Kenneth J. Neubeck & Noel A. Cazenave, *Welfare Racism: Playing the Race Card Against America's Poor* 45 (2001) (observing that state welfare agencies restricted financial assistance to families that were believed to be morally worthy of state aid and that because "African-American women were deemed incapable of meeting these criteria by virtue of their racial inferiority, they were customarily excluded from assistance at the local level of the racial state, no matter what their marital status, level of impoverishment, or family needs").

<sup>130</sup> See Ziegler, *supra* note 83, at 335 (noting that in the 1960s, proponents of eugenics "displayed a more overt racial bias" and that those who they identified as "'socially inadequate' were rarely white"—an identification that represented a departure from previous historical moments).

<sup>131</sup> See *id.* at 326 ("By the 1950s, many no longer believed that unwed mothers were always hereditarily defective, but it was still often thought that the children of unwed mothers themselves had social problems . . .").

<sup>132</sup> See *id.* (noting that eugenicists in the early twentieth century had "argued that the prevention of procreation was necessary because children of parents having these defects would have the same defects by reason of heredity" and observing that in the 1950s and 1960s, the argument transformed into the claim that "children will have the same defects because the parents are too socially inadequate" (quoting Elyce Zenoff Ferster, *Eliminating the Unfit—Is Sterilization the Answer?*, 27 *Ohio St. L.J.* 591, 610 (1966))).

Changed circumstances altered the techniques that a racist society used to manage and maintain the racial hierarchy. In the days of formal inequality, the preferred technique of racial domination was neglecting the reproduction of non-white races. In an era of formal equality, the technique of racial domination was more direct and violent. It was involuntary sterilization.<sup>133</sup>

#### IV. IDENTIFYING CARRIE BUCK'S RACIAL PRIVILEGE

The provocative claim made above bears repeating: Had Carrie Buck not been white, she probably would not have been sterilized. Now to some, this claim may call into question the veracity of the assertion that being white means having a privileged racial identity. They may ask: is white privilege real when Buck's whiteness made her vulnerable to the violence of an involuntary tubal ligation?

However, paradoxically, Buck's racial privilege might be evidenced by the fact that had she not been white, she probably would not have been sterilized. Which is to say: *Her white privilege may be demonstrated by her being an object of eugenic interest in the first instance.* As explained above, eugenicists concerned themselves with her fertility only because she belonged to a race they believed to be superior to all others—a race that was capable of being purified and protected from degeneration. Eugenicists did not try to defend non-white races against debasement because those races *were* debasement.

Also paradoxically, Buck's white privilege might be evidenced by the fact that she was even in a position to be sterilized. To explain, many sterilizations that occurred during the early twentieth century were performed on people who were living in homes for those with intellectual disabilities.<sup>134</sup> These institutions—like the Colony where Buck spent her

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<sup>133</sup> See Larson, *supra* note 92, at 2 (arguing that eugenicists initially “worried more about the deterioration of the Caucasian race than about any threat from the African race” and claiming that “[o]nly later, after the civil rights movement began dismantling the machinery by which southern Whites controlled local Blacks, did regional eugenic practices turn against African Americans”).

<sup>134</sup> See The Supreme Court Ruling that Led to 70,000 Forced Sterilizations, NPR (Mar. 7, 2016), <https://www.npr.org/sections/health-shots/2016/03/07/469478098/the-supreme-court-ruling-that-led-to-70-000-forced-sterilizations> [<https://perma.cc/FZ42-JLCL>] (noting that many eugenicists thought that the best model for preventing those deemed unfit to reproduce from bearing children was to institutionalize the “feble-minded,” sterilize them, and then release them, assuring that they would not be able to transmit their problematic genes to subsequent generations).

youth—were designed to care for vulnerable people who did not have family that could care for them. This was a great service to those who were actually intellectually disabled; these establishments saved extremely vulnerable people from homelessness, hunger, and the harms inflicted by extreme penury.<sup>135</sup> However, these facilities frequently refused to admit non-white people.<sup>136</sup> While this was especially true in the South, it was also true in the North.<sup>137</sup> Thus, Buck's white privilege made the Colony available to her. The irony, of course, is that she was sterilized *because* she was able to be admitted into the Colony. Had the Colony been inaccessible to Buck, as it was to non-white people, she might have been saved from a coercive sterilization.<sup>138</sup>

What was true in Virginia was true across the segregated South.<sup>139</sup> As Larson explains: “Without any compelling social-control or eugenic reason for placing mentally retarded Blacks into state institutions, and given the inadequate resources for admitting all the needy Whites, Blacks were

<sup>135</sup> The laudable aspects of these institutions were described in *Osborn v. Thomson*, in which the court struck down a compulsory sterilization law that only applied to institutionalized individuals on equal protection grounds since it left intellectually disabled persons who lived outside of institutions free from the threat of sterilization. The court poignantly writes that the plaintiff, Frank Osborn,

is not a malefactor. He is mentally deficient. He is defective without personal responsibility for such defect. It must be assumed that he is poor in the sense that there are no parents or friends to give him a home and provide for him, and so he becomes a ward of the state to be cared for and treated and strengthened and developed, if possible.

*Osborn v. Thomson*, 169 N.Y.S. 638, 643 (N.Y. Sup. Ct. 1918).

<sup>136</sup> See Larson, *supra* note 92, at 84.

<sup>137</sup> See Ziegler, *supra* note 83, at 336 (observing that in the North, “African-Americans and Hispanics were sometimes less likely to be placed in mental institutions”).

<sup>138</sup> Notably, Virginia opened an institution for feebleminded black people in 1939. See Wray, *supra* note 90, at 168 n.35. It is unclear if Virginia considered sterilizing black people worth the expense during this time. Larson notes that the racial exclusivity of institutions for the feebleminded directly relates to the fact that eugenics was, at bottom, concerned with the improvement of the white race and altogether unconcerned with the strength or vitality of non-white races. For eugenicists, the entire point of institutions for the feebleminded was to improve the white race by preventing intellectually disabled people from reproducing; in these facilities, the “feebleminded” would be separated from the opposite sex during their childbearing years. Thus, institutions for the feebleminded were reserved for white people because eugenicists were solely concerned about the health of white stock; that intellectually disabled people of color were left to reproduce out in society, disseminating their defective genes to their non-white children, was of no import. See Larson, *supra* note 92, at 84 (“[T]he White founders of these state institutions demonstrated their exclusive concern with the betterment of their own race by limiting all of these facilities either by statute or practice to Whites.”).

<sup>139</sup> See Wray, *supra* note 90, at 89 (noting that “southern institutions were overwhelmingly white”); *id.* at 168 n.35 (“Southern institutions had overwhelmingly white populations because blacks were generally not considered worthy of the expense of welfare.”).

simply excluded.”<sup>140</sup> Alabama never established an institution for black people with intellectual disabilities. Because eugenicists were focused on limiting the reproduction of the “feebleminded” in institutions, eugenic sterilization was limited to the white people who lived in the institutions that the state had established.<sup>141</sup> In Georgia, the residents at the Georgia Training School were the likely targets of eugenic sterilization.<sup>142</sup> During the Jim Crow era, all of these patients were white.<sup>143</sup> Mississippi opened its first institution for intellectually disabled black people in 1968.<sup>144</sup> Mississippi was adamant about racial segregation in the days of Jim Crow and did not permit black people to live alongside white people in the institutions that existed during that time. Intellectually disabled black people would therefore not have been institutionalized prior to 1968—a happenstance that would have saved them from being sterilized.<sup>145</sup> In North Carolina, “[b]efore 1965, most hospitals were segregated and many black hospitals had neither the equipment nor the staff to perform a large number of operations.”<sup>146</sup> Because most sterilizations were performed in hospitals, black people would have been spared this violence during this time period. In South Carolina, practically every operation that was performed prior to the end of World War II pursuant to the state’s compulsory sterilization law was performed on residents of the State Training School.<sup>147</sup> Because the facility did not admit black people, they were more likely to be spared involuntary sterilization during this time.<sup>148</sup> Similar circumstances prevailed in Florida:

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<sup>140</sup> Larson, *supra* note 92, at 93. Larson observes that Louisiana was an exception insofar as “Louisiana’s State Colony and Training School made room for African Americans prior to the civil rights movement of the 1950s, albeit in racially segregated dormitories vastly inferior to the accommodations given White residents.” *Id.*

<sup>141</sup> Kaelber, Alabama, *supra* note 92.

<sup>142</sup> See Larson, *supra* note 92, at 138.

<sup>143</sup> *Id.*

<sup>144</sup> Lutz Kaelber, *Eugenics: Compulsory Sterilization in 50 States*, Mississippi, Univ. of Vermont, <http://www.uvm.edu/~lkaelber/eugenics/MS/MS.html> [<https://perma.cc/CD6N-D-Q7M>] (last visited Oct. 16, 2018).

<sup>145</sup> See Larson, *supra* note 92, at 122–23. Those black people who found themselves the victims of a coerced sterilization in Mississippi during the pre-civil rights era were likely patients at the Mississippi State Hospital, which admitted black people (although it housed them in inferior, segregated wards). *Id.*

<sup>146</sup> Ziegler, *supra* note 83, at 348.

<sup>147</sup> Larson, *supra* note 92, at 154.

<sup>148</sup> *Id.*

Blacks were actively excluded from admittance to the Florida Farm Colony. When the facility first opened its doors to white patients in 1921, plans had been made to house black patients as well (in a separate facility on the Colony's grounds), but no [legislation] was ever passed to do so. Between 1929 and 1940, courts gave the Colony permission to commit at least 29 black patients, but the Colony never did. In fact, it actively rejected black applicants despite the court[']s [suggestion]. Superintendent Dell of the Florida Farm Colony justified this action by stating that the institution simply did not accept black patients because there was no segregated facility to house them in.<sup>149</sup>

Further, it was not unusual for black people to find themselves largely excluded from institutions in states outside of the South. As Matt Wray observes, non-white people constituted a "small but significant portion of those institutionalized" in the North.<sup>150</sup>

The Census data bear this out. In 1906, the U.S. Bureau of the Census released a report, presumably based on information that had been collected in the 1904 census, on persons who had been institutionalized in facilities for the "feeble-minded."<sup>151</sup> It reported that *no* "colored" people were living in institutions in states in the South, explaining that "institutions for the feeble-minded in the South Atlantic and South Central states do not receive colored persons."<sup>152</sup> Meanwhile, things were not much different outside of the South. Indeed, in the West, the racial geography of institutions for the feebleminded mirrored that of the South. While 657 white people lived in these homes in the Western division, 5 "colored" people resided in them.<sup>153</sup> Things were only slightly different in the North. While some 5,699 white people were living in institutions for the feebleminded in the North Atlantic division, only 90 "colored" people were

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<sup>149</sup> Lutz Kaelber, *Eugenics: Compulsory Sterilization in 50 States*, Florida, Univ. of Vermont (citations omitted), <http://www.uvm.edu/~lkaelber/eugenics/FL/FL.html> [<https://perma.cc/TFC8-SCW8>] (last visited Oct. 16, 2018).

<sup>150</sup> Wray, *supra* note 90, at 89.

<sup>151</sup> U.S. Bureau of the Census, *Special Reports: Insane and Feeble-Minded in Hospitals and Institutions 1904*, at 80–81 (1906), <https://ia601406.us.archive.org/4/items/cu3192403259-9650/cu31924032599650.pdf> [<https://perma.cc/FTL4-BCSE>].

<sup>152</sup> *Id.* at 208. In the South Atlantic and South Central divisions, 338 and 189 white people had been institutionalized, respectively. *Id.* at 209.

<sup>153</sup> *Id.*

institutionalized.<sup>154</sup> And in the North Central division, the corresponding numbers were 7,459 white people to 83 “colored.”<sup>155</sup>

The 1910 Special Census revealed that while the number of people living in institutions for the feebleminded had increased since 1900, non-white people still found these caretaking homes inaccessible: while 20,441 white people lived in these institutions across the nation, only 280 “Negro” did.<sup>156</sup> Unfortunately, it appears that 1910 was the last year in which the U.S. Bureau of the Census collected information on the people living in institutions for the “feebleminded.”

Now, the above should not be read to suggest that non-white people were completely safe from coerced sterilization from the dawn of the eugenics movement in the 1900s until the Civil Rights Movement of the 1950s and 1960s. They were not. First, because black people enjoyed more rights outside of the South, they were more likely to be admitted to institutions for the intellectually disabled in states outside of the region—and more likely to be sterilized as a consequence thereof.<sup>157</sup> Second, even prior to the fall of Jim Crow, non-white people around the country were admitted to institutions for the mentally ill<sup>158</sup>—including in the South,<sup>159</sup> and, of course, the same is true for jails and prisons. The residents of these facilities were sometimes identified as appropriate subjects of forcible sterilizations.<sup>160</sup> Accordingly, black people would have been at risk of

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<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> U.S. Bureau of the Census, *Insane and Feeble-Minded in Institutions 1910*, at 196–197 (1914), <https://ia802708.us.archive.org/3/items/insanefeeblemind00unit/insanefeeblemind00unit.pdf> [<https://perma.cc/QT3G-TMDJ>].

<sup>157</sup> See Larson, *supra* note 92, at 155–56 (noting that “eugenicists never intended to exempt African Americans from sterilization programs” and that this is “especially true for northern eugenicists, who did not have as many statutory means to control Blacks as did their southern counterparts”); see also Stern, *supra* note 105, at 1131 (noting that African Americans and Mexicans were disproportionately sterilized in California).

<sup>158</sup> For example, the 1910 Special Census reports that the “187,791 insane enumerated in hospitals on January 1, 1910 included . . . 12,910 negroes.” “Negroes” thus constituted about 6.9% of the insane enumerated on January 1. U.S. Bureau of the Census, *supra* note 156, at 25. However, after having looked at the available information, Mary Ziegler concludes that in the North, “African-Americans and Hispanics were sometimes less likely to be placed in mental institutions.” Ziegler, *supra* note 83, at 336.

<sup>159</sup> Larson explains that because of “a perceived need to control the mentally ill, southern state mental health hospitals did admit African Americans into racially segregated wards throughout the Jim Crow era.” Larson, *supra* note 92, at 93.

<sup>160</sup> We need only consider *Skinner v. Oklahoma*, in which the Court held that a law that provided for the involuntary sterilization of persons who had been multiply-convicted of certain felonies, while leaving undisturbed those convicted of other felonies, ran afoul of the

coercive sterilization if they found themselves in these institutions.<sup>161</sup> But, it remains that facilities like the one in which Buck resided—institutions for those with intellectual disabilities—more often than not were closed to non-white people. And in most states, people living in institutions for the intellectually disabled were the targets of eugenicists' sterilization campaigns. Buck's racial privilege opened the door for the state to care for her. And, of course, on the other side of that door, she found state-sanctioned violence.

#### V. SOME FINAL REFLECTIONS ON WHITE PRIVILEGE

Carrie Buck can teach us a lot about race, power, and white privilege. First, she can teach us that, when possible, it is important to identify with precision the tangible benefits that whiteness has given those in possession of it. That is, it is imperative that we demonstrate, with as much specificity as possible, the role that white privilege has played in the lives of white people—even those who appear to be the most unfortunate. If we believe that the concept of white privilege is useful—and if we believe that it is *true*—it may not be enough that we simply assert that it exists. If we can, we have to show how it has had material impacts on white people's lives—especially those who are otherwise unprivileged. We might

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Equal Protection Clause. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 536–37, 542 (1942). Because the Oklahoma law applied to convicted felons, the individuals subjected to it would have been incarcerated in the state's jails and prisons.

<sup>161</sup> South Carolina offers the most dramatic demonstration of the dangers of being a non-white person in a facility for the mentally ill. While the state's institution for the intellectually disabled did not admit non-white people, the hospital for the mentally ill did. See Larson, *supra* note 92, at 155. Many intellectually disabled black people were committed to this hospital because they had no other options. See *id.* The hospital ultimately sterilized disproportionate numbers of black people. "During the ten years between 1949 and 1960 for which the state mental health hospital published records, 102 out of 104 surgical sterilizations were performed on African Americans." *Id.* South Carolina may be an outlier in the disproportionate interest that it took in African Americans *before* the agitations of the Civil Rights Movement, though. One historian has concluded, "only in South Carolina . . . is there strong evidence of racial discrimination." *Id.* (quoting Philip R. Reilly, *The Surgical Solution: A History of Involuntary Sterilization in The United States*, 138 (1991)); see also Lutz Kaelber, *Eugenics: Compulsory Sterilization in 50 States*, California, Univ. of Vermont, <http://www.uvm.edu/~lkaelber/eugenics/CA/CA.html> [<https://perma.cc/BXW9-74HG>] (noting that in California, which forcibly sterilized 20,108 people prior to 1964—a total which constitutes a third of those coercively sterilized in the United States during this time period—people of Mexican descent comprised close to 8% of those sterilized, while "African Americans made up 1% of California's population but accounted for 4% of the sterilizations") (last visited Oct. 16, 2018).

begin by identifying how white privilege has improved the social, cultural, political, and economic landscape of the unemployed residents of the Rust Belt, the families that can no longer rely on coal mining for their income, and the communities in the throes of the opioid epidemic in Appalachia.

Second, Carrie Buck teaches us that the techniques of racial domination shift over time. They transform in light of transformed circumstances. In the era of formal inequality, when non-white people could make no claims on the state that the state was obliged to hear, the evidence that non-white people were racially dominated was found in the state being not at all concerned about their reproduction.<sup>162</sup> In this particular context, the state's orientation to non-white people was one of neglect. It did not attempt to manage their reproduction. It did not attempt to regulate it. It certainly did not attempt to improve it.<sup>163</sup> The state left non-white reproduction to its own devices while, at the same time, obsessing over white reproduction.

However, times changed. The Civil Rights Movement happened. Power conceded in the face of a demand. And non-white people became increasingly able to avail themselves of the resources that white people had at their disposal. In light of these altered circumstances—and, specifically, in light of black people's newfound ability to make claims on the welfare state—the techniques of racial domination shifted.<sup>164</sup> In the era of formal equality, racial domination was evidenced by the brutal attention that the state paid to non-white reproduction.

Which is to say: in the pre-civil rights era, non-white people's racial subordination was demonstrated by the state's failure to coercively sterilize them in significant numbers. In the post-civil rights era, non-white people's racial subordination was demonstrated by the state's commitment to coercively sterilizing them in significant numbers.

What does this mean? It means that those of us who are interested in racial justice must always be on the lookout for new mechanisms of racial subordination. It is naïve to expect that the tools that evidenced and maintained the racial hierarchy in the past will continue to be used in the future. Moreover, it means that we should not necessarily celebrate when non-white people gain access to the treatment that once had been reserved for

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<sup>162</sup> See *supra* notes 92–94 and accompanying text.

<sup>163</sup> See *supra* notes 93–94 and accompanying text.

<sup>164</sup> See *supra* and notes 127–133 and accompanying text.



white people. Because all white people are not free, being treated like white people is not, as a matter of course, proof of liberation.

Third, Carrie Buck can teach us that white privilege can be a double-edged sword. It was double-edged in the sense that Buck's whiteness made her reproduction an object of interest to eugenicists—pseudoscientists who then conceptualized it as a problem that needed to be solved.<sup>165</sup> And it was double-edged in the sense that it made institutions accessible to her—institutions that served as pathways to coercive sterilizations.<sup>166</sup>

Professor Darren Hutchinson has offered “multidimensionality” as a framework that can be used to theorize the realities of “individuals who experience intersecting privilege and subordination”<sup>167</sup>—like poor white women, who are privileged along the axis of race, but unprivileged along the axes of class and gender. He argues that an examination of the experiences of these individuals “complicates the very notions of ‘privilege’ and ‘subordination.’”<sup>168</sup> What he means is that, oftentimes, the fact of membership in a privileged group can result in one's subordination.<sup>169</sup> The fact of Carrie Buck's membership in the favored white race had a direct causal relationship to her coerced sterilization. White privilege betrayed her.

There are other examples. Consider native-born, affluent white women's inability to access contraception, abortion, and sterilization during the same period in which Carrie Buck was forcibly sterilized.<sup>170</sup> A racist, xenophobic nation was concerned that the fertility of white immigrants was outstripping the fertility of white people who were born in the country.<sup>171</sup> Accordingly, native-born white women were exhorted to reproduce. Contraception, sterilization, and abortion were restricted in an effort to ensure the abundance of their reproduction. In this way, native-born, affluent white women's *privilege* along the lines of nationality,

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<sup>165</sup> See supra notes 133, 138.

<sup>166</sup> See supra notes 135–138 and accompanying text.

<sup>167</sup> Darren Lenard Hutchinson, “Gay Rights” for “Gay Whites”?: Race, Sexual Identity, and Equal Protection Discourse, 85 Cornell L. Rev. 1358, 1364 (2000) [hereinafter Hutchinson, “Gay Rights”].

<sup>168</sup> Id. at 1366.

<sup>169</sup> See Darren Lenard Hutchinson, Identity Crisis: “Intersectionality,” “Multidimensionality,” and the Development of an Adequate Theory of Subordination, 6 Mich. J. Race & L. 285, 312 (2001) (arguing that “heterosexual status, typically a privileged category, has served as a source of racial subjugation” when heterosexuality intersects with non-whiteness).

<sup>170</sup> Zakiya Luna & Kristin Luker, Reproductive Justice, 9 Ann. Rev. L. & Soc. Sci. 327, 331–33 (2013).

<sup>171</sup> Id. at 331.

class, and race *subordinated* them by making them the targets of pro-natalist measures that virtually guaranteed that constant pregnancy would be their destiny.

That privilege may be a double-edged sword is also true of non-white groups. Consider a more contemporary example. Men are imagined to be privileged relative to women. However, black men are incarcerated at rates that dwarf those of their black female counterparts.<sup>172</sup> Moreover, scholars examining the phenomenon have argued that it is black men's masculinity—their maleness—that has rendered them vulnerable to the muscularly carceral state that the United States has erected.<sup>173</sup> In this context, the *privileged* status of being male has made scores of black men vulnerable to *subordination* in the form of incarceration. Their subordination is a product of their gender privilege.

Hutchinson writes that there is an “instability of both privilege and subordination.”<sup>174</sup> Buck's experience, insofar as her racial privilege ended up subordinating her, proves the truth of this. With respect to whiteness specifically, privilege and subordination are unstable because white privilege opens lots of doors—even the ones to unprivileged conditions. White privilege yields access to the opioid prescriptions with which doctors were unwilling to trust non-white people, setting the stage for the present opioid epidemic to decimate white communities across the nation while sparing non-white communities the brunt of the crisis.<sup>175</sup> White privilege allows affluent white parents to refuse to vaccinate their children, setting the stage for the return of diseases in affluent communities that public health scholars had considered eliminated, such as the measles that killed Carrie Buck's daughter.<sup>176</sup>

The lesson here is that white privilege is a dangerous thing—both for those who are unprivileged by virtue of it, as well as for those who possess it. This is just another reason that we *all* should work to dismantle it.

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<sup>172</sup> Phyllis Gray-Ray et al., African Americans and the Criminal Justice System, 21 *Hum-boldt J. Soc. Rel.* 105, 113 (1995).

<sup>173</sup> See, e.g., Jon Hurwitz & Mark Peffley, Public Perceptions of Race and Crime: The Role of Racial Stereotypes, 41 *Am. J. Pol. Sci.* 375, 393–95 (1997) (noting that while “the black female has come to represent the welfare queen to many whites, the black male increasingly has come to represent the criminal”).

<sup>174</sup> Hutchinson, “Gay Rights,” *supra* note 167, at 1367.

<sup>175</sup> See Helena Hansen & Julie Netherland, Is the Prescription Opioid Epidemic a White Problem?, 106 *Am. J. Pub. Health* 2127, 2127–28 (2016).

<sup>176</sup> See Michele Goodwin & Erwin Chemerinsky, No Immunity: Race, Class, and Civil Liberties in Times of Health Crisis, 129 *Harv. L. Rev.* 956, 983–84 (2016) (reviewing Eula Biss, *On Immunity: An Inoculation* (2014)); see also *supra* note 36.

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