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Hilary Eisenberg

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THE IMPACT OF DICTA IN BUCK V. BELL

Hilary Eisenberg

“Three generations of imbeciles are enough.”

These infamous words are found in Buck v. Bell, a controversial decision penned in 1927 by Justice Oliver Wendell Holmes. Buck v. Bell, which upheld a Virginia statute allowing the involuntary sterilization of Carrie Buck, is one of the Supreme Court’s most commonly reviled decisions. Despite such strong criticism, Buck v. Bell has never been expressly overturned and is today, still good law. Though legal issues surrounding reproductive rights fueled contentious debates for the remainder of the twentieth century, federal courts generally decline to address the issue of sterilization on a substantive level. Despite increased protections of personal rights as a result of the Supreme Court’s expansion of the right to privacy, a judicial trend has emerged shifting involuntary sterilization controversies into state courts. This trend is currently exemplified by the recent case of Mary Moe, where in February of 2012, a Massachusetts judge handed down a decision ordering an abortion and sterilization of a severely schizophrenic pregnant woman. Following some controversy, the Massachusetts Appeals Court quickly overturned this decision. The expansion of the right to privacy, and the varied state standards for involuntary sterilization that emerged during a mass revision over the later

2. Id. at 205-07.
4. Skinner v. Oklahoma, 316 U.S. 535, 546 (1942). Though Buck v. Bell was addressed by Skinner v. Oklahoma, it was only distinguished and not expressly overturned.
7. See infra Part II, notes 99-107 and accompanying text.
twentieth century, indicate that Justice Holmes’ endorsement of eugenic sterilization is now merely dicta.\footnote{See infra Part IV, notes 264-309 and accompanying text.}

This note seeks to explore various state standards for determining if a mentally disabled person is incompetent in terms of reproductive rights. Part I is a discussion of the evolution of federal case law covering the rights of individuals concerning reproductive freedom. It provides an overview of the attitudes courts have taken addressing reproductive rights following *Buck v. Bell*. Part II of the note reviews how involuntary sterilization cases are handled on the state level. This section discusses in further detail the three main approaches taken by state courts. Through analysis of the underlying policy motivations of these approaches, this section explores the legal evolution of sterilization standards to include an expanded interpretation of substantive due process with a focused inclusion on the fundamental right to privacy. Part III focuses on the modern state of legal reconciliation of due process rights with sterilization guidelines using the details of the recent Massachusetts involuntary sterilization case, *Guardianship of Moe* to exemplify the continued emphasis on procedural due process rights. Finally, Part IV discusses how, as a result of various state interpretations, the legal trend towards allowing standards for administering involuntary sterilization actually fits in with the general message of *Buck v. Bell* in terms of its strong emphasis on procedural due process rights. Part IV contends that the arguments expressly endorsing eugenic sterilization are purely dicta, and not binding authority. This discussion leads to the conclusion that in light of the varying state standards for sterilization of incompetent persons, the precedent in *Buck v. Bell* binds later society to enforce the protections of both procedural and substantive due process. At this point, this note explains that the *Buck v. Bell* precedent is not, in fact, binding law endorsing eugenic sterilization.

I. EVOLUTION OF CONSTITUTIONAL AUTHORITY ON STERILIZATION AND REPRODUCTIVE RIGHTS

In *Buck v. Bell*, plaintiff Carrie Buck, an eighteen-year-old woman described as “feeble minded,” challenged a 1924 Virginia statute that authorized the superintendent of the State Colony for Epileptics and Feeble Minded to order her sterilization.\footnote{Buck v. Bell, 274 U.S. 200, 205 (1927).} Carrie Buck’s mother and illegitimate child were also described as “feeble minded.”\footnote{Id.} This statute permitted superintendents of institutions for the mentally impaired to require individuals to be sterilized if they found that it is “for the best interest of the patients and of society.”\footnote{Id. at 206.} The legislative aim of this statute was to promote
the health and welfare of the mentally impaired persons and to protect society by preventing such individuals from procreating.\textsuperscript{15}

In the case of Carrie Buck, State Colony followed the procedural guidelines of the Virginia statute precisely as they were written.\textsuperscript{16} After the superintendent filed his petition and presented the written evidence in favor of her sterilization, Carrie Buck was granted her hearing and allowed to appeal, as the statute stipulated.\textsuperscript{17} However, the focus in \textit{Buck v. Bell} “is not upon the procedure but upon the substantive law.”\textsuperscript{18} In response to the contention on Carrie Buck’s behalf that there could be no justification for the sterilization order, Justice Oliver Wendell Holmes famously wrote:

\begin{quote}
We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It 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. . . . Three generations of imbeciles are enough.\textsuperscript{19}
\end{quote}

This opinion effectively allowed states to create laws allowing compulsory sterilization of mentally challenged people, and has never been overturned.

Justice Holmes’ line of reasoning clearly endorses eugenicist principles in the opinion’s justification for compulsory sterilization.\textsuperscript{20} It is important to note that at the time of the \textit{Buck v. Bell} opinion, more progressive segments of society saw eugenics-based policies such as the Virginia statute as a means of societal reform, and not oppressive intrusions into the rights of the mentally disabled.\textsuperscript{21} At that point in time, scientific misinterpretations of Gregory Mendel’s work\textsuperscript{22} understood hereditary genetic traits to include

\begin{thebibliography}{22}
\bibitem{15} \textit{Id.} at 205-06.
\bibitem{16} \textit{Id.} at 207.
\bibitem{17} \textit{Id.} at 205-06.
\bibitem{18} \textit{Id.}
\bibitem{19} \textit{Buck v. Bell}, 274 U.S. 200, 207 (1927).
\bibitem{21} Scott, supra note 20, at 810-11 n.14.
\bibitem{22} Gregory Mendel is generally regarded as the founder of modern genetics. His works were not discovered or considered credible until after his death. \textit{See Deciphering the Genetic Code: Gregor Mendel: The Father of Modern Genetics}, NAT’L INSTITUTE HEALTH, http://history.nih.gov/exhibits/nirenberg/HS1_mendel.htm (last visited Oct. 17, 2013).
\end{thebibliography}
cognitive and psychological qualities. Furthermore, the Supreme Court decided *Buck v. Bell* in 1927, almost a decade before Nazi Germany’s exercise of eugenicist policies in carrying out mass mandatory sterilizations drew the widespread condemnation with which society is now familiar.

Following *Buck v. Bell*, compulsory sterilizations increased exponentially throughout the 1930’s. These forced sterilizations no longer targeted only the mentally impaired, as the criterion expanded to include “unwed mothers, prostitutes, petty criminals, and children with disciplinary problems.” This trend of involuntary sterilizations, however, declined by the end of the twentieth century due to “advances in medicine and social science [that] increasingly undermined the justifications for the sterilization movement.”

However, while *Buck v. Bell* is technically still good law, subsequent Supreme Court rulings indicated a metamorphosis in societal attitude towards reproductive freedom.

### A. Distinguishing *Buck v. Bell*

Just over a decade after the *Buck v. Bell* decision was handed down, the Supreme Court, in *Skinner v. Oklahoma*, struck down an Oklahoma law requiring compulsory sterilization for persons with more than two convictions for felonious offenses to be sterilized. While *Skinner* is often credited as the only case to expressly distinguish *Buck v. Bell*, it did not expressly overrule it. Although both *Skinner* and *Buck v. Bell* address compulsory sterilization statutes, analysis in *Skinner* takes a narrower focus, pertaining only to punitive sterilization of criminals and avoids discussion on the ethics of forcibly sterilizing the mentally ill. *Skinner* not only sidesteps addressing *Buck v. Bell* by narrowly focusing on punitive sterilization, but it also applies a heavier focus on the Equal Protection Clause of the Fourteenth Amendment. While *Buck v. Bell* dismisses Carrie Buck’s equal protection contentions, *Skinner* focuses primarily on the

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25. Thompson, *supra* note 23, at 143-44. (noting that during the 1930’s, between two thousand to four thousand people were involuntarily sterilized each year).
29. *Id.* at 538.
32. *Id.* at 541.
equal protection issues presented, and the Court applied a more rigorous strict scrutiny test in its analysis of the Oklahoma statute.33 The Equal Protection Clause is found in the Fourteenth Amendment of the United States Constitution. The text reads:

No State shall make or enforce any law which shall abridge any privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.34

In Skinner, the Oklahoma statute exempted certain offenses, such as embezzlement and political offenses, from convictions that would count towards punitive sterilization.35 The Supreme Court reasoned that the statute’s distinction between different types of felonies allows for a law that does not apply equally to a category of people, as it appears to apply only to certain types of criminals on an arbitrary and overly subjective basis.36 Consequently, upholding this law would have essentially allowed the state of Oklahoma to deprive its citizens of their reproductive right haphazardly.37 The Court in Skinner found that by exempting embezzlement but including larceny, the law applied unequal legal standards to “those who have committed intrinsically the same quality of offense,”38 in violation of the Equal Protection Clause.39 While the Court does comment briefly on the lack of procedural protections found in the Oklahoma statute as a violation of procedural due process, it refuses the opportunity to analyze the matter, suggesting an implied indication of the Supreme Court’s refusal to expressly address Buck v. Bell.40

The Supreme Court limited its focus in Skinner v. Oklahoma to punitive sterilization.41 This, along with the decision’s emphasis on equal protection claims prove Skinner v. Oklahoma is fairly limited in distinguishing Buck v. Bell. Skinner’s focus on sterilization as punishment separates it from the issue of compulsory sterilization statutes in terms of the Court’s originative public policy aims, which allowed the Court to rule on Skinner without extensively addressing Buck v. Bell.42 The Skinner Court limits its

34. Skinner, 316 U.S. at 537.
35. Id. at 538-39.
36. Id. at 541.
37. Id.
38. Id.
39. Id.
41. Id.
42. Id. at 541.
comparisons with *Buck v. Bell* considerably, asserting that because the Virginia statute at issue in *Buck v. Bell* applied to “feeble-minded” individuals in relevant institutions of the state, the law was less arbitrary in enforcement and covered a relatively discrete class of citizens. Through an equal protection approach, *Skinner* manages to avoid addressing underlying questions of eugenic intent in legally significant detail.

A comprehensive understanding of the evolution of involuntary sterilization law following *Skinner* on a federal level requires an appreciation of the societal and legal contexts serving as the background to such decisions. Supreme Court approaches in interpreting the scope of many Constitutional protections constantly evolve, accounting for varied legal approaches that are often dependent upon trends in jurisprudence most dominant at the time of a specific decision. Such evolution in legal interpretation is particularly evident in examining the history of Supreme Court approaches to the protections of the Fourteenth Amendment. Civil rights and personal protections under the Fourteenth Amendment have grown considerably in protective scope from its addition to the Constitution in 1868, both in terms of rights covered, and protective mechanisms. Prior to the 1930’s, the Supreme Court was reluctant to employ protections under the Equal Protection Clause, and instead relied on the Due Process Clause to protect personal rights and liberties. *Buck v. Bell*, decided in 1927, is reflective of this judicial trend, evident in Justice Holmes’ condemnation of the Equal Protection Clause as the “usual last resort of constitutional arguments.” In the context of the Supreme Court’s shift towards reliance on the Equal Protection Clause, it is easier to see, contextually, why the Court in *Skinner v. Oklahoma*, decided in 1942, was more inclined to take an equal protection approach.

The effects of World War II and the policies of the German Nazi party also account for the reluctance of the Court in *Skinner v. Oklahoma* to address the eugenics issues present in compulsory sterilization statutes further than a vague reference. While in *Buck v. Bell*, Justice Holmes zealously supported involuntary sterilization as a means of reducing the

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43. *Id.*
44. See generally *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (where the Court acknowledges *Buck v. Bell* but focuses on the equal protection issue and does not mention eugenic policies).
46. *Id.*
47. *Id.* at 157, 164.
48. *Id.* at 161; *Buck v. Bell*, 274 U.S. 200, 208 (1927).
49. Hutchinson, supra note 45, at 163.
burden of disabled persons on society, it is important to note that these words were written in 1927.\textsuperscript{50} The Virginia statute under scrutiny in \textit{Buck v. Bell} was enacted in 1924.\textsuperscript{51} It was not until 1933 that Adolf Hitler came to power in Germany, and not until 1939 that he used eugenic policies.\textsuperscript{52} As these policies included mass sterilization under similarly worded law, it was not until ten years later that these policies were part of the scope of Nazi administered genocide and other horrific crimes against humanity.\textsuperscript{53} Thus, Justice Holmes wrote his opinion over a decade before the prime of the Nazi regime and the Holocaust, and therefore when eugenic policies did not carry such negative and volatile connotations.\textsuperscript{54} Further, such policy motives had many supporters in higher courts, including Justice Holmes himself.\textsuperscript{55} While eugenics was not, at the time of the \textit{Buck v. Bell} decision, at the height of popularity in the scientific community, it had yet to attain the public revulsion later acquired in connection with gruesome Nazi policies.\textsuperscript{56} Similarly, this historical context explains to a degree why later courts might be hesitant to address Holmes’ argument in favor of sterilizing the mentally disabled for the overall welfare of society. Therefore, it follows from this context, that the Court in \textit{Skinner v. Oklahoma}, faced with a decision involving compulsory sterilization in the early 1940’s in the midst of World War II, was reluctant to address such an emotionally charged and socially divisive issue.\textsuperscript{57} 

\textsuperscript{50} Buck v. Bell, 274 U.S. 200 (1927).
\textsuperscript{51} Id. at 205.
\textsuperscript{53} Paul A. Lombardo, \textit{Three Generations, No Imbeciles: A New Light on Buck v. Bell}, 60 N.Y.U. L. REV. 30 (1985); see M. Cranach, \textit{The Killing of Psychiatric Patients in Nazi Germany Between 1939-1945}, ISR. J. OF PSYCHIATRY RELATED SCI. 1, 8-18 (2003). See also Nazi Persecution of the Disabled: Murder of the Unfit, U.S. HOLOCAUST MEMORIAL MUSEUM, http://www.ushmm.org/museum/exhibit/ focus/disabilities/ (last visited Sept. 9, 2013). During his regime in World War II, Adolf Hitler created mass policies ordering the sterilization of classes in his population considering undesirable. Included in these policies were the mentally ill as well as the physically and mentally disabled. Under these policies, mass sterilization was administered by direction of the state, resulting in the sterilization of a large number of disabled persons.
\textsuperscript{54} Thompson, \textit{supra} note 21, at 142.
\textsuperscript{55} Id.
\textsuperscript{57} Id. at 1308.
The reluctance of *Skinner* and other later courts to address Justice Holmes’ eugenics-based argument was not entirely the result of the increasingly critical view of eugenics in light of Nazi abuse of sterilization law. Advancements in genetics, medicine, and science further contributed to the decline of the eugenics movement, which had already been becoming more limited in its application even around the time of the *Buck v. Bell* decision. It follows naturally, then, in light of such advancements, that American society would become less likely to support the sterilization of the mentally disabled or ill.

**B. Supreme Court Silence on Compulsory Sterilization**

Since *Buck v. Bell* and *Skinner v. Oklahoma*, the Supreme Court has declined to address involuntary sterilization statutes explicitly. In conjunction with substantial scientific advances in medicine and a general decline of the eugenics movement, most eugenic sterilization statutes aimed at the mentally ill or mentally disabled have since been repealed. While, as recently as 1988, fourteen states still had eugenic sterilization statutes, four have since been repealed, and none are currently in active use.

Additionally, relevant federal case law over the twentieth century indicated a trend towards legal protection of reproductive privacy as a fundamental right. Modern jurisprudence has indicated a legal trend towards analyzing cases where involuntary sterilization is sought within the


59. Thompson, *supra* note 23, at 125, 142. In 1923, the Supreme Court declined to endorse an attempt to use state power designed to “enhance the mental health of [state citizens]” in declaring a Nebraska statute preventing public schools from teaching German unconstitutional on grounds that this violated due process by limiting educational endeavors. *Meyer v. Nebraska*, 262 U.S. 390, 402-03 (1923).

60. Scott, *supra* note 20, at 812 n.18. There were twenty-eight eugenic sterilization statutes reported to be law on the state books in 1956, which the states began to repeal in the 1960s. By the mid-1980’s most of eugenic sterilization statutes were repealed.


63. Scott, *supra* note 20, at 813 n. 25.
legal framework of the fundamental right to privacy and protection of individual reproductive rights.\textsuperscript{64}

Since statutes concerning sterilization of the mentally incompetent are found in state law, the Supreme Court generally declines to address cases of involuntary sterilization.\textsuperscript{65} However, following a mass repeal of eugenics era sterilization statutes by many states in the 1960’s and 1970’s, legal authority on the issue was unclear in many jurisdictions.\textsuperscript{66} In many cases, states did not provide alternative guidelines after their outdated compulsory sterilization laws were repealed, resulting in an absence of statutory authority on the matter.\textsuperscript{67} Though this created a legal grey area following the mass repeal of sterilization statutes, as evidenced by 1978’s decision, \textit{Stump v. Sparkman}, the Supreme Court declined the opportunity to address the substantive legal issues regarding reproductive rights of incompetent persons, choosing to leave the decisions to the individual states and focus on the limits of judicial immunity in their authority.\textsuperscript{68} In \textit{Stump v. Sparkman}, a mother had her “somewhat retarded” minor daughter sterilized in 1971 without the daughter’s knowledge or consent, after obtaining legal approval through a petition presented to an Indiana Circuit Court.\textsuperscript{69} After the daughter later married and could not conceive, she discovered the

\begin{thebibliography}{99}
\bibitem{64} Scott, \textit{supra} note 20, at 810. Cases involving medical permanent sterilization procedures have focused mainly on the right of mentally ill or mentally disabled people to privacy and their required consent where parents, guardians, or other legal caregivers seek to obtain permanent medical treatments, often sterilization, on their behalf. The right of adults who have no such disabilities or illnesses to obtain sterilization has been addressed infrequently in the circuits and at the state level, but not by the Supreme Court. Presently, sterilization procedures in an involuntary context are generally largely issues of guardianship and ability to consent. \textit{See generally In re Grady}, 426 A.2d 467, 474 (N.J. 1981); \textit{In re Guardianship of Hayes}, 608 P.2d 635, 641-642 (Wash. 1980) (en banc); \textit{In re Terwilliger}, 450 A.2d 1376, 1378 (Pa. Super. Ct. 1982).
\bibitem{65} The last case the Supreme Court addressed involving involuntary sterilization was \textit{Stump v. Sparkman}, 435 U.S. 349 (1978), where the Court focused solely on the issue of judicial immunity and did not discuss the involuntary sterilization as a legal issue. \textit{See} Beverly Horsburgh, \textit{Schrdegreeodinger’s Cat, Eugenics, and the Compulsory Sterilization of Welfare Mothers: Deconstructing an Old/New Rhetoric and Constructing the Reproductive Right to Natality for Low-Income Women of Color}, 17 \textit{CARDozo L. REV.} 531, 569-70 (1996).
\bibitem{66} Scott, \textit{supra} note 20, at 814. See also Christine Ryan, \textit{Revisiting Legal Standards that Govern Requests to Sterilize Profoundly Incompetent Children: In Light of the “Ashley Treatment,” is a New Standard Appropriate?}, 77 \textit{FORDham L. REV} 287, 308-09 (2008).
\bibitem{67} Scott, \textit{supra} note 20, at 810, 814 n.31.
\bibitem{69} \textit{Id.}
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sterilization and sued the Indiana judge who approved the petition. 70 When the petition was approved in 1971, there was no statutory authority governing sterilization of incompetent persons or minors, and no case law existed prohibiting submission and judicial approval of such a petition. 71 Because there was no statute to challenge, the issue to be decided concerned the scope of the judge’s judicial immunity in granting the petition, which required a judge to have acted within his jurisdiction when claiming immunity. 72 The Supreme Court found that because there was no statute or prohibitive case law on the matter, the jurisdiction was broad enough to include the circuit court judge. 73 Though the Supreme Court indicated that the judge did err as a matter of law, it declined commentary on sterilization laws for incompetent persons. 74 Instead, the Supreme Court focused on the issue of proper jurisdiction, and ruled that legal error notwithstanding the judge had judicial immunity because he was within his jurisdiction to rule on the matter. 75

The absence of commentary by the Court on the substance of statutes governing the sterilization of minors or incompetent persons indicates the Court’s growing unwillingness as the century progressed to address cases involving involuntary sterilization on a federal level. 76 Comparing this case to Buck v. Bell, it is of substantial impact that Justice White did not take the opportunity to comment on acceptable societal or individual needs for sterilization, as Justice Holmes did in great detail. 77 While in Stump v. Sparkman there was no actual statute to evaluate, the Court did insinuate that it was likely that the judge did not extend procedural due process to the woman in question whereas Buck v. Bell discussed an existing Virginia statute. 78 The Supreme Court declined an opportunity to comment on the issues a violation of procedural due process might present and the interests a judge should consider in evaluating a petition. This, along with the strict

70. Id.
71. Id. at 358.
72. Id. at 354-55.
73. Id. at 359-60.
74. See Horsburgh, supra note 65 at 569-70.
76. Horsburgh, supra note 65, at 570.
77. Compare Sparkman, 435 U.S. at 356-60 (where Justice White focuses on judicial immunity), with Buck v. Bell, 274 U.S. at 207-08 (where Justice Holmes engages in a lengthy discussion about the ethical implications of compulsory sterilization as a societal good).
78. Id. They insinuated potential violation of the sterilized woman’s right to due process in making their point that such a violation does not, if made in the appropriate jurisdiction, violate judicial immunity.
focus on judicial immunity, indicates that the Supreme Court’s approach shifted to decline federal interpretation in regard to sterilization policies.

**C. Shift Towards Expansion of the Right to Privacy**

Simultaneously, with its silence on compulsory sterilization law as state legislatures repealed their eugenic sterilization statutes en masse, the Supreme Court released a series of decisions that confirmed both the existence and protection of a fundamental right to privacy in a number of areas. 79 Over the past century, the Supreme Court has expanded fundamental rights through an interpretation of the Constitution to include rights not explicitly stated in the text, but found in the penumbra of specific protections stated in the Bill of Rights. 80 Through this interpretative approach, the Supreme Court found privacy to be a fundamental right subject to Constitutional protection, even though privacy is not directly mentioned in the text. 81 This fundamental right to privacy was expanded to protect many reproductive rights, including marriage, contraception, termination of pregnancy, and procreation. 82 Over the latter half of the twentieth century, this expansion of the right to privacy led to the development of the constitutional right to reproductive privacy and now requires a revision of the analytical approach used in assessing the constitutionality of laws governing sterilization of the incompetent. 83

Continuing the legal trend expanding protections under the right to privacy, the Supreme Court declared a statute prohibiting use by or distribution of contraceptives to married couples unconstitutional because it violated the fundamental right to privacy in the 1965 decision *Griswold v. Connecticut*. 84 Holding that the guarantees in the Bill of Rights have penumbra inclusive of the right to privacy, the Court found that the

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82. *Roe*, 410 U.S. at 152-53 (where the court recognized the right to privacy extends to a woman’s right to terminate a pregnancy, though this right is not unlimited); *Griswold*, 381 U.S. at 485 (where the court extended the right to privacy to reproductive decisions within marriage, striking down a Connecticut law withholding contraceptives from marriage); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (where the court extends the ruling from *Griswold* to apply also to unmarried couples, including the right to contraceptives as within the right to privacy); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (where the court extended the right to privacy to include the right to marriage, striking down a state law prohibiting interracial marriage).
83. Scott, *supra* note 20, at 811 n.17.
84. *Griswold*, 381 U.S. at 485.
Connecticut statute improperly regulated marriage, a “relationship within the zone of privacy created by several fundamental constitutional guarantees.”\(^{85}\) In 1972, the Court in \textit{Eisenstadt v. Baird} expanded that holding to encompass unmarried persons, reasoning that such an expansion was necessary on equal protection grounds.\(^{86}\)

In perhaps the most recognizable right to privacy case, the controversial 1972 decision in \textit{Roe v. Wade} determined that the fundamental right to privacy extends to protect a woman’s decision to end a pregnancy.\(^{87}\) According to the Court’s reasoning, the right to this specific privacy extends from the Fourteenth Amendment’s protection of liberty, which reads, “nor shall any State deprive any person of life, liberty, or property.”\(^{88}\) The Court, however, acknowledged some acceptable limitations on the right to end a pregnancy, including when a state’s interests in “safeguarding health, in maintaining medical standards, and in protecting potential life . . . become sufficiently compelling to sustain regulation of the factors that govern the . . . decision.”\(^{89}\) The decision in \textit{Roe v. Wade} invalidated the Texas state law prohibiting all abortions outright.\(^{90}\) Following \textit{Roe}, numerous state and federal courts struck down abortion statutes as unconstitutional violations of a woman’s right to privacy.\(^{91}\)

Since the Court in \textit{Roe}, \textit{Griswold}, and \textit{Eisenstadt} determined the freedom to terminate a pregnancy and to access contraception are fundamental rights, state laws imposing limitations on such rights are subject to strict scrutiny under judicial review.\(^{92}\) Under the strict scrutiny analysis, any law limiting a fundamental right is unconstitutional unless it serves a compelling state interest to which the legislation is narrowly tailored to address.\(^{93}\) Legal classifications of reproductive rights as fundamental under the right to privacy casts \textit{Buck v. Bell} in a new light.\(^{94}\) When \textit{Buck v. Bell} was decided in 1927, reproductive autonomy was not yet afforded its more recent

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85. \textit{Id.} at 484-85.
88. \textit{U.S. Const. amend. XIV}.
90. \textit{Id.} at 166.
92. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n. 4 (1938) (demonstrating where the various standards of review were introduced, outlining a higher level of scrutiny for laws infringing on a fundamental right in violation of a Constitutional provision).
94. Scott, \textit{supra} note 20, at 811 n.17.
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protections as a fundamental right. Furthermore, case law developing standards of heightened scrutiny under judicial review was not introduced until 1938, or fully articulated by the court until 1944. As a legal framework for considering violations of equal protection or due process, strict scrutiny as a standard was not applied in case law until 1967. Therefore, in understanding Buck v. Bell, it is important to note that because case law had yet to develop higher standards of scrutiny, any equal protection analysis by Justice Holmes was limited to the only standard of review available, the rational basis test.

II. STATE STANDARDS FOR STERILIZATION

“Currently, courts adopt one of three rules to determine whether to grant a petition for sterilization of any individual deemed incompetent for the purpose of giving informed consent to the procedure: (i) the substituted judgment standard, (ii) the minority criteria rule, or (iii) the discretionary best interest standard.” These standards are based on rulings found in case law, and evolved from “selectively adopting case law of other similarly situated states.” Therefore, outcomes in such cases have become unpredictable. The variability of these outcomes is not restricted to the discrepancies between varied state statutes, as outcomes can differ on similar cases within one jurisdiction alone.

Despite the varied objectives evident in the approaches taken by the three rules, all require extensive procedural legwork creating strict standards.

97. Loving, 388 U.S. at 12.
98. Since Buck v. Bell was decided in 1927, there was no form of heightened scrutiny for the courts to apply in analyzing the constitutionality of this statute, since strict scrutiny was not developed until Korematsu over a decade later, nor applied until 1967 in Loving v. Virginia. Korematsu v. United States, 323 U.S. 214 (1944); Loving v. Virginia, 388 U.S. 1, 7-8 (1967).
99. McIntyre, supra note 56, at 1311-12.
100. Id. at 1312.
101. Id.
102. Id. at 1311-12. The substituted judgment standard, for example, has been applied in cases involving once competent and never competent individuals. Compare In re Grady, 426 A.2d 467, 474 (N.J. 1981) (which involves a woman who has had Down Syndrome since birth), with In re Guardianship of Moe, 960 N.E.2d 350, 352-53 (Mass. App. Ct. 2012) (concerning a once-competent woman who became mentally ill upon adulthood).
103. Most state procedures for ordering an involuntary sterilization require multiple steps, including medical and psychiatric evaluations, court hearings, and several levels of
and placing the odds strongly against sterilization. These state-level cases requiring extensive procedural legwork are decided similarly to that in *Buck v. Bell*, as the focus is not on the existence of procedural protections for the rights of the mentally impaired person, but instead on the adequacy of such procedures and their enforcement. Challenges to sterilization provisions addressing substantive issues arising from the content or intent of the statutes, as addressed to some extent in *Buck v. Bell*, have not since been addressed on a federal level. This, perhaps, is illustrative of why varied standards have evolved to produce fairly unpredictable results. While the justifications of modern state standards are generally tailored to reflect the best interests of the incompetent person, this presents a broad arena for interpretation, leading to such variable outcomes.

**A. Substituted Judgment Standard**

The substituted judgment standard seeks to preserve fundamental liberties by assigning a surrogate to an incompetent person and “[allowing] a court to render a decision consistent with the decision the patient would have made if capable.” This standard originated in case law in 1976, when the New Jersey Supreme Court in *In re Quinlan* allowed the guardian of a patient in a permanent unconscious state to exercise the right to decline potentially lifesaving medical procedures on behalf of the patient. In order to protect the constitutional right to decline lifesaving medical procedures, the father of a permanently incompetent woman was permitted to decide whether or not to sustain life support. While many states subsequently adopted this court ordered investigation by various professionals. See DEL. CODE ANN. Tit. 16, § 5712 (2013); N.C. GEN. STAT. § 35A-1245 (2012).


106. *Id.*. While Justice Holmes’ opinion begins with a focus on the procedural protections afforded by the Virginia statute, he also addresses the justifications for such a mandatory sterilization statute in his discussion of the burden of the disabled on society.

107. *See infra* Part II, Sections A-C.


110. *In re Quinlan*, 355 A.2d at 670-71.
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approach, the New Jersey court in *In re Grady* declined to extend application of the doctrine to involuntary sterilization of the mentally incompetent.

In *Grady*, the parents of Lee Ann Grady, a 19-year-old girl born with Down Syndrome, brought the case after Morristown Memorial Hospital refused an operation sterilizing their daughter. Lee Ann’s inability to significantly comprehend the consequences of sexual relationships or pregnancy or care for a child was undisputed. Additionally, it was uncontroverted that Lee Ann was likely to require “lifetime supervision to care for her own needs.” Recognizing her limitations, Lee Ann’s parents’ long-term plan was to place her in a group home for mentally retarded adults, but only if they could ensure Lee Ann would not accidentally conceive.

After the hospital in *Grady* refused to perform the sterilization without court authorization, Lee Ann’s parents filed a complaint and subsequently, the trial judge assigned a guardian *ad litem* to represent Lee Ann in judicial proceedings. During this time, Lee Ann also underwent medical and psychological expert evaluations. After considering testimony from involved persons and experts, analyzing evaluative reports, and meeting with Lee Ann herself, the trial judge created a five-part standard for determining whether or not the court should authorize sterilization. The trial court’s standard addressed the extent of the individual’s incompetency, the best interests of the incompetent with respect to reproductive choices, and the application of procedural safeguards as stipulated by the statute. Concluding that Lee Ann met the conditions imposed by this standard, the trial judge authorized the sterilization. However, the Supreme Court of New Jersey later rejected the lower court’s five-part standard stating that it allowed for potential judicial abuse; and therefore imposed a modified

113. *Id.* at 469-70.
114. *Id.* at 470.
115. *Id.* at 469-70.
116. *Id.*
117. *Id.* at 470-71.
119. *Id.*
120. *Id.* (In order to address the extent of the incompetency, the Court takes into account the incompetent person’s understanding the consequences of sexual functions, permanence of their incompetency, and their capability to procreate).
121. *Id.* at 470.
version of the trial court’s standard that included a stricter set of requirements.\footnote{122}

In \textit{Grady}, the higher court modified and supplemented the trial court’s standard, first, by determining that it is the duty of the court, not the parents, to decide whether or not sterilization is necessary.\footnote{123} After endorsing the trial court’s procedures in reaching the previous standard,\footnote{124} it ruled that “the trial judge must find that the individual lacks capacity to make a decision about sterilization and that the incapacity is not likely to change in the foreseeable future.”\footnote{125} Finally, considering a non-exhaustive list of factors which include the possibility of pregnancy, likelihood of sexual activity, feasibility of less permanent contraceptive methods, the person’s understanding of the reproductive process, and overall ability to provide adequate childcare,\footnote{126} the standard required a finding that there is “clear and convincing proof that sterilization is in the incompetent person’s best interests.”\footnote{127} Applying these standards, the New Jersey Supreme Court was unable to conclude that sterilization was within Lee Ann’s best interest.\footnote{128} Instead, the court held that sterilization was premature because there was no reasonable likelihood of Lee Ann becoming sexually active in the near future.\footnote{129}

Though the New Jersey Supreme Court rejected the substituted judgment standard, other states do employ this approach. Through \textit{In re Moe}, a case concerning a severely mentally retarded adult woman, the Massachusetts Supreme Court implemented the substituted judgment standard rejected in \textit{Grady}.\footnote{130} The court in \textit{Moe} first set down procedural safeguards uniform to all sterilization standards, which required appointing a guardian \textit{ad litem}, evaluations by medical and psychological experts, and a declaration that the person was legally incompetent to make reproductive decisions.\footnote{131} In accordance with the substituted judgment approach, the judge must, based on the evidence from the expert reports and guardian \textit{ad litem}, “attempt to ascertain the ward’s actual preference for sterilization, parenthood, or other means of contraception . . . [to arrive at] the same decision that would be

\begin{itemize}
\item \footnote{122}{\textit{Id.} at 481-82.}
\item \footnote{123}{\textit{Id.} at 482.}
\item \footnote{124}{\textit{In re Grady}, 426 A.2d 467, 482 (N.J. 1981).}
\item \footnote{125}{\textit{Id.}}
\item \footnote{126}{\textit{Id.} at 483.}
\item \footnote{127}{\textit{Id.}}
\item \footnote{128}{\textit{Id.} at 486.}
\item \footnote{129}{\textit{Id.}}
\item \footnote{130}{\textit{In re Moe}, 432 N.E.2d 712, 715-722 (Mass. 1982).}
\item \footnote{131}{\textit{Id.} at 721.}
\end{itemize}
made by the incompetent person.”

Essentially, the substituted judgment standard attempts to work within the procedural framework to ascertain the wishes of an incompetent person.

Supporters of substituted judgment standard contend that this standard best incorporates the wishes of the incompetent individual into the ultimate determination. While they do concede that the standard may allow for unwise decisions, they argue that this equalizes the incompetent with the competent, since competent people are generally held to imprudent decisions without judgment. Conversely, critics find the standard to be logically flawed because it asks the decision maker to ascertain what the incompetent person would choose if competent. This logical fallacy is therefore thought to be dangerous in that it essentially asks the decision maker to decide from the viewpoint of someone who was never competent originally. No matter how the decision maker decides, it is impossible to ensure that they reached the same decision that the mentally impaired person would have reached were they able to choose for themselves, implying a strong possibility that the decision rendered is not in the impaired individual’s best interest. Finally, since there is no way to fully remove the personal beliefs or preferences of the surrogate decision maker from the equation, accuracy cannot be ensured.

The substituted judgment standard presents practical complications with reference to differentiating between those who became incompetent after living competently for some time, and those who have never experienced competency. While most cases dealing with the sterilization of incompetent persons concern those who are born with profound mental disabilities, cases do arise concerning sterilization of persons who later became incompetent by means of brain damage or severe mental illness. The difficulty in reconciling substituted judgment standards for persons who

132. Id. at 722-23
133. McIntyre, supra note 56, at 1313.
134. Id. at 1313-14.
135. Id. at 1313. See also Scott, supra note 20, at 823-24.
136. McIntyre, supra note 56, at 1313.
137. Scott, supra note 20, at 824 n. 56.
138. McIntyre, supra note 56, at 1313.
140. See generally In re Grady, 426 A.2d 467, 474 (N.J. 1980) (involving the reproductive decisions of a daughter born with Down’s Syndrome); In re Guardianship of Hayes, 608 P.2d 635, 641-42 (Wash. 1980); In re Terwilliger, 450 A.2d 1376, 1378 (Pa. Super. Ct. 1982).
have never been competent with the formerly competent contributes to the reluctance of many courts to adopt such standards.\textsuperscript{142}

\subsection*{B. Mandatory Criteria Rule}

In 1980, Washington State created the mandatory criteria approach in their landmark decision \textit{In re Guardianship of Hayes}.\textsuperscript{143} The facts in \textit{Hayes} are similar to those in \textit{Grady}, where the parents of a 19-year-old woman with Down Syndrome sought to obtain a sterilization for their daughter.\textsuperscript{144} The mother of Edith Hayes, a severely mentally retarded sixteen-year-old, petitioned the Superior Court of Washington to authorize Edith’s sterilization\textsuperscript{145} Edith, though physically developed normally and capable of conception, “function[ed] at the level of a 4- or 5-year-old.”\textsuperscript{146} Though Edith was alleged to be sexually active, she did not have the mental capacity to logically connect sexual activity with her reproductive capacity.\textsuperscript{147}

The Washington Supreme Court first discusses relevant factors in sterilization decisions before setting down its own procedural guidelines for authorizing sterilizations.\textsuperscript{148} After emphasizing the seriousness and permanence of sterilization procedures,\textsuperscript{149} the court finds that sterilization can occasionally be in the best interest of an incompetent person.\textsuperscript{150} However, the procedural framework is rigid:

The decision can only be made in a superior court proceeding in which (1) the incompetent individual is represented by a disinterested guardian \textit{ad litem}, (2) the court has received independent advice based on a comprehensive medical, psychological, and social evaluation of the individual, and (3) to the greatest extent possible, the court has elicited and taken into account the view of the incompetent individual.\textsuperscript{151}

Following this framework, “the judge must first find by clear, cogent and convincing evidence that the individual is (1) incapable of making his or her own decision about sterilization, and (2) unlikely to develop sufficiently to

\begin{thebibliography}{99}
\bibitem{142} Krais, \textit{supra} note 104, at 343-44.
\bibitem{143} \textit{In re Guardianship of Hayes}, 608 P.2d at 641-42; McIntyre, \textit{supra} note 56, at 1314.
\bibitem{144} \textit{In re Grady}, 426 A.2d at 467.
\bibitem{145} \textit{In re Guardianship of Hayes}, 608 P.2d at 636-37.
\bibitem{146} \textit{Id.} at 637.
\bibitem{147} \textit{Id.}
\bibitem{148} \textit{Id.} at 641-42.
\bibitem{149} \textit{Id.} at 639.
\bibitem{150} \textit{Id.} at 640. The court here makes a point to stress that it is rare that compulsory sterilization cases are necessary.
\bibitem{151} \textit{In re Guardianship of Hayes}, 608 P.2d 635, 641 (Wash. 1980).
\end{thebibliography}
make an informed judgment about sterilization in the foreseeable future.”152 Additionally, the petitioner for sterilization must prove a demonstrated need for contraception exists.153 Sterilization is granted only if sterilization is the only contraceptive option.154 While the court in Hayes recognized the stringency of their required burden of proof,155 they found Edith did not meet their requirements for sterilization. Specifically, no sufficient evidence proved conclusively that sterilization was the only feasible form of contraception, or that Edith would categorically be incapable of good parenting.156

Advocates of the mandatory criteria approach argue the standard’s stringency is a protective advantage because it allows minimal exercise of judicial discretion.157 Advocates also contend its inflexibility protects an incompetent person’s privacy interests from arbitrary and unfair outcomes that might result under broader judicial discretion.158 Furthermore, because the guidelines do not require balancing an indeterminate list of factors, their rigidity and clarity make them easier in application and setting precedents.159

Conversely, opponents find that inflexibility of the standard essentially provides courts a mechanism to deny sterilization petitions without deeper

152. Id.
153. Id.

The judge must find that the individual is (1) physically capable of procreation, and (2) likely to engage in sexual activity at the present or in the near future under circumstances likely to result in pregnancy, and must find in addition that, (3) the nature and extent of the individual’s disability, as determined by empirical evidence and not solely on the basis of standardized tests, renders him or her permanently incapable of caring for a child, even with reasonable assistance.

154. Id.

The judge must find that by clear, cogent and convincing evidence (1) all less drastic contraceptive methods, including supervision, education and training, have been proved unworkable or inapplicable, and (2) the proposed method of sterilization entails the least invasion of the body of the individual. In addition, it must be shown by clear, cogent and convincing evidence that (3) the current state of scientific and medical knowledge does not suggest either (a) that a reversible sterilization procedure or other less drastic contraceptive method will shortly be available, or (b) that science is on the threshold of an advance in the treatment of the individual’s disability.

155. In re Guardianship of Hayes, 608 P.2d at 641.
156. Id. at 641-42.
157. McIntyre, supra note 56, at 1315.
158. Id.
159. Scott, supra note 20, at 822 n. 53.
Critics also contend that this standard may not be in the best interest of the incompetent. If a judge finds that a case may not satisfy a requirement less relevant to the persons’ best interest, they may be forced to disregard other factors potentially more impactful on an individual’s well-being. Additionally, from a right to privacy standpoint, the standard’s strong presumption against sterilization places such importance on the right to procreate that it ignores the importance of the companion’s right not to procreate.

C. Discretionary Best Interest Standard

The case of In re Terwilliger involved a legal guardian’s petition to declare their ward incompetent and to have her involuntary sterilized. Mildred Terwilliger, described as mentally deficient, was illiterate at age 25, and gave birth to an illegitimate child shortly before trial proceedings began. Mildred did not take responsibility for her child, who was under the care of her parents. The court ruled that there was no applicable statute at the time in Pennsylvania, and therefore it created a standard beginning with procedural safeguards similar to those of Hayes and Grady. Procedurally, the judge must first appoint a guardian ad litem to advocate on behalf of the individual subject to the competency hearing. The court also requires the individual to undergo a “comprehensive medical, psychological, and social evaluation.” The trial judge must meet with the incompetent person to determine if their presence is required at the hearing, where they must formulate an impression regarding their competency, and then decide accordingly.

160. McIntyre, supra note 56, at 1316.
161. Id.
162. Id.
163. Id.
164. In re Terwilliger, 450 A.2d at 1378.
165. Id. at 1385.
166. Id. at 1384-85
167. Id.
169. McIntyre, supra note 56, at 1317.
170. In re Terwilliger, 450 A.2d at 1383. This guardian “must have full opportunity to meet with the ward, present evidence and cross examine witnesses at the hearing.” Id.
171. Id. (citing In re Moe, 432 N.E.2d 712 (Mass. 1982)).
172. Id. at 1383.
Following the competency hearing, the judge must make a number of procedural findings. First, the judge must find “that the individual lacks capacity to make a decision about sterilization and that the incapacity is not likely to change in the foreseeable future.” Furthermore, the judge must also find that the incompetent individual has the ability to reproduce and that sterilization is the only reasonable method of contraception. Once the above findings are made, the court will then determine if sterilization is in the best interest of the incompetent individual. To make this determination, the Terwilliger court adopts the factors employed by the Grady court. With regard to Mildred Terwilliger, the Terwilliger Court

173. Id. at 1383-84.
174. Id. (citing In re C. D. M., 627 P.2d 607 (Ala. 1981)) (requiring a court to find that other contraceptives are not feasible or will otherwise not be useful).
175. In re Terwilliger, 450 A.2d at 1383.
177. In re Terwilliger, 450 A.2d at 1383-84; The following quote reveals to factor adopted by the court to determine those interests:

To determine those interests, the court should consider at least the following factors: (1) The possibility that the incompetent person can, become pregnant. There need be no showing that pregnancy is likely. The court can presume fertility if the medical evidence indicates normal development of sexual organs and the evidence does not otherwise raise doubts about fertility. (2) The possibility that the incompetent person will experience trauma or psychological damage if she becomes pregnant or gives birth, and, conversely, the possibility of trauma or psychological damage from the sterilization operation. (3) The likelihood that the individual will voluntarily engage in sexual activity or be exposed to situations where sexual intercourse is imposed upon her. (4) The inability of the incompetent person to understand reproduction or contraception and the likely permanence of that inability. (5) The feasibility and medical advisability of less drastic means of contraception, both at the present time and under foreseeable future circumstances. (6) The advisability of sterilization at the time of the application rather than in the future. While sterilization should not be postponed until unwanted pregnancy occurs, the court should be cautious not to authorize sterilization before it clearly has become an advisable procedure. (7) The ability of the incompetent person to care for a child, or the possibility that the incompetent may at some future date be able to marry and, with a spouse, care for a child. (8) Evidence that scientific or medical advances may occur within the foreseeable future which will make possible either improvement of the individual’s condition or alternative and less drastic sterilization procedures. (9) A demonstration that the proponents of sterilization are seeking it in good faith and that their primary concern is for the best interests of the incompetent person rather than their own or the public’s convenience. These factors should each be given appropriate weight as the
concurred with testimony given by Mildred’s father, family physician, and Mildred herself indicated that Mildred lacked capacity to make her own reproductive decisions.\textsuperscript{178} Furthermore, it is implied the Terwilliger court recognized that Mildred’s inability to care for her illegitimate child without aid from professionals and family proved that she did not understand the consequences of sexual activity.\textsuperscript{179} However, upon review of testimony given by Mildred’s family physician, which indicated that birth control mechanisms less drastic than sterilization may have sufficed,\textsuperscript{180} the court found that the standard requiring sterilization to be the only feasible option was not met and vacated the decision of the lower court, ordering a remand.\textsuperscript{181}

Advocates of the discretionary best interest analysis find the standard’s flexibility advantageous, as the judges are granted wide discretion with their decisions.\textsuperscript{182} This flexibility and broad discretion essentially forces judges to consider the specific facts of each case so that their decision is individually tailored to each unique situation. However, opponents of the discretionary best interest standard find the flexibility as potentially misleading in terms of precedent, as broad judicial discretion in such context will “inevitably lead to inconsistent results.”\textsuperscript{183}

D. Policy Considerations in State Law

Recent case law indicates that state standards providing for sterilization of incompetent persons have developed uniformly to attend to the best interest of the profoundly mentally disabled, and no longer established under eugenic justifications.\textsuperscript{184} The differing approaches of varied state standards, however, do reflect a legal uncertainty in light of the Supreme Court’s silence on matters involving involuntary sterilization since Buck v. Bell and Skinner v. Oklahoma.\textsuperscript{185} However, from a policy perspective, the state laws regarding sterilization of incompetent or mentally disabled persons are unvarying in their condemnation of eugenic sterilization and their assertion

\begin{itemize}
\item particular circumstances dictate. The list is not meant to be exclusive. The ultimate criterion is the best interests of the incompetent person. \textit{In re Grady}, 426 A.2d 467 at 483 (internal citations omitted).
\item \textsuperscript{178} \textit{In re Terwilliger}, 450 A.2d at 1384-85.
\item \textsuperscript{179} \textit{Id.} at 1385.
\item \textsuperscript{180} \textit{Id.} (indicating that an intrauterine device would have worked to prevent pregnancy and sterilization was not necessary).
\item \textsuperscript{181} \textit{Id.} at 1384-85.
\item \textsuperscript{182} McIntyre, supra note 56, at 1317.
\item \textsuperscript{183} \textit{Id.} at 1319.
\item \textsuperscript{184} Jaegers, supra note 58, at 954-55.
\item \textsuperscript{185} Ryan, supra note 66, at 298.
\end{itemize}
of the intent to act in the best interest of the individual at issue.\(^\text{186}\) Additionally, since the rulings in most cases were decided following the expansion of reproductive privacy as a fundamental right under the right to privacy, most state decisions reflect reluctance to infringe on this right through their standards.

The Court in *Hayes* acknowledges the influence of the eugenic movement in early sterilization laws, and while it addresses the possibility that eugenic sterilization may be constitutional, it also emphasizes the scientific advancements subsequent to *Buck v. Bell* that disprove such theories.\(^\text{187}\) The Court’s contention is that this removes any legitimate basis for arguments supportive of improving society with eugenic sterilization laws.\(^\text{188}\) Its policy concern is, instead, in regards to the best interest of the incompetent person, and not the needs of society overall.\(^\text{189}\) In that respect, the Court recognizes the unique complications the sterilization decision presents, in that unlike with most other medical procedures, there is no guarantee that the child and parent would share the same interest.\(^\text{190}\) In light of this recognition, the *Hayes* court sees this as an example of an instance where it may be necessary to distinguish the interests of mentally disabled persons from those of a minor child in terms of sterilization law.\(^\text{191}\) For this reason, it confines authorization of these procedures to the courts, declining to allow guardians to consent to the sterilization in the same way they would for many other procedures.\(^\text{192}\) The standard is a stringent reflection of the Court’s reluctance to infringe on the right to privacy, granting the procedure in the rare cases where it finds the most conclusive proof sterilization is in the best interest of a particular incompetent person.\(^\text{193}\)

Similarly, the court in *Grady* recognizes the history of abuse manifested in the sterilization of incompetent persons prior to the decline of the eugenics movement.\(^\text{194}\) Consequently, the *Grady* court expresses its intent to decide instead in favor of the best interests of the incompetent.\(^\text{195}\) In light of this recognition, *Grady* distinguishes the guidelines for sterilization from the compulsory sterilization law of the past by redefining the classification of

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188. *Id.* at 640.
189. *Id.* at 640-41.
190. *Id.* at 640.
191. *Id.*
192. *Id.*
195. *Id.* at 475.
incompetent persons in accordance with the law. Refusing to classify sterilization of incompetent persons as either voluntary or involuntary, the Grady court creates a new category tailored to those who cannot consent for the purposes of developing their legal standards. Additionally, it recognizes the constitutional right to privacy inherent in such issues, and extends this right to privacy to expressly include the right to obtain sterilization. This provides citizens of their state extended protection under the fundamental right to privacy, which does not specifically include sterilization under Supreme Court precedent.

In development of the discretionary best interest approach, the court in Terwilliger also appreciates the gravity of sterilization as a procedure in respect to permanence and intrusion on their right to privacy. Its analysis differs slightly from Hayes and Grady in creating its respective approaches through its focus on proper jurisdiction and employment of the doctrine of parens patriae to decide on matters of sterilization. The doctrine of parens patriae, which authorizes the state to made decisions in the place of guardians in certain situations, is here extended to include sterilization of incompetent persons. In reservation of its rights of parens patriae on such matters, the decision emphatically accentuates the obligations of the courts to act with solely the best interest of the incompetent person in mind.

E. State Level Implications on Buck v. Bell

Following Buck v. Bell, the Supreme Court’s expansion of right to privacy protections and societal shifts in public policy presented interesting analytical implications for modern developments of state sterilization standards. In some respects, recent case law reflects an adherence to the rationale of Buck v. Bell, though it is fairly limited to maintaining strong enforcement of procedural due process rights. The Virginia statute at issue in Buck v. Bell remained in force because it provided procedural mechanisms safeguarding due process rights. With respect to judicial emphasis on ensuring the protections of procedural due process, standards developed in state case law included similarly strong procedural requirements, intended to

196. Id. at 473.
197. Id.
198. Id. at 474.
199. Id.
201. Id. at 1380-81.
202. Id.
203. Id.
204. Lombardo, supra note 53, at 49 n. 100.
afford parallel protections.\textsuperscript{205} The mandatory criteria standard developed in the \textit{Hayes} opinion limits decisions concerning involuntary sterilization to remain within the scope of court supervision.\textsuperscript{206} Additionally, the procedural requirements in \textit{Hayes} also include appointment of a guardian \textit{ad litem}, evaluations of the person by medical, social, and psychological experts, reports on such evaluations, and efforts to obtain the viewpoint of the incompetent as best possible.\textsuperscript{207}

Similarly, \textit{Grady} also requires appointing a guardian \textit{ad litem} and various expert evaluations of the incompetent person, in addition to a court hearing and requirement that the judge meet with the allegedly incompetent person.\textsuperscript{208} The standard developed in \textit{Terwilliger} echoes this procedural approach, including an express requirement of due notice along with appointment of a guardian, evaluations, and court hearing.\textsuperscript{209} Similar requirements for court hearings, guardian, and expert evaluations are also found in the substituted judgment standard as adapted by the court in \textit{Moe}.\textsuperscript{210}

Though state courts follow \textit{Buck v. Bell} closely in terms of ensuring procedural safeguards, a clear deviation emerges in terms of the policy driving court rationale, and the standards of scrutiny employed for purposes of judicial review. The 1924 Virginia statute was drafted for the purpose of improving society through eugenic methods,\textsuperscript{211} and relevant substantive discussion in \textit{Buck v. Bell} accepted, to an extent, such motivations.\textsuperscript{212} Since many states started to repeal their eugenic sterilization laws enacted around or following the \textit{Buck v. Bell} decision beginning in the 1960’s and continuing through the 1980’s,\textsuperscript{213} more recent state law indicated a divergent trend in the underlying policy for authorizing compulsory sterilization. Court opinions specified a shift in their chief concerns away from general societal welfare, and towards acting in the best interest of the incompetent person.\textsuperscript{214} This shift from an emphasis on overall societal welfare to protection of individual privacy is further evident through the identity of the petitioners

\begin{footnotes}
\item[205] In re Guardianship of Hayes, 608 P.2d 635, 641-42 (Wash. 1980) (en banc) (where the court required proof of specific factual findings according to a stringent standard before granting sterilization); In re Grady, 426 A.2d 467, 486 (N.J. 1981) (where the court outlines rigid standards that must be met before applying the substituted judgment standard).
\item[206] In re Guardianship of Hayes, 608 P.2d at 641.
\item[207] Id. at 482.
\item[208] In re Grady, 426 A.2d at 474.
\item[209] In re Terwilliger, 450 A.2d at 1383.
\item[210] In re Moe, 432 N.E.d at 720-21.
\item[211] Thompson, supra note 21, at 129.
\item[212] Id.
\item[213] Scott, supra note 20, at 806 n.17.
\item[214] See infra Part IV, Section A for a detailed discussion of the rational basis test.
\end{footnotes}
seeking the sterilization. In *Buck v. Bell* and *Skinner v. Oklahoma*, state actors sought the sterilization of incompetent persons, respectively the Virginia mental institutions and the Oklahoma legislature. In more recent state cases like *Hayes* and *Grady*, the facts concerned involve the family members or guardians of the incompetent person seeking sterilization. This indicates that the policies are better applicable to individual liberties and allow for a stronger focus onto sterilization as in the best interest.

In conjunction with the expansion of the right to privacy, developments post *Buck v. Bell* with the Supreme Court’s interpretation of substantive due process allowed the states less leniency in laws that could potentially abridge newly protected personal rights. Judge Holmes evaluated the substantive due process claim in *Buck v. Bell* under the rational basis test, which required only proof that the law could rationally relate to a legitimate government interest. The Supreme Court has since required heightened scrutiny in cases where a law would infringe on what is deemed to be a fundamental right. By the time many state courts developed the current standards for sterilization of incompetent persons, the Supreme Court had extended the right to privacy to include procreation as a fundamental right. Since any law infringing on a fundamental right may only be upheld if they are “narrowly drawn” to serve a “compelling state interest,” more recent sterilization laws were held to a higher standard of scrutiny than the Virginia statute at issue in *Buck v. Bell*. It was therefore a combination of the heightened scrutiny and expansion of fundamental rights that accounted for the deviation of modern case law from the *Buck v. Bell* approach to an analysis of substantive due process claims.

216. *In re Guardianship of Hayes*, 608 P.2d at 636-37 (involving facts where a mother of a severely mentally retarded seeking a petition for sterilization); *In re Grady*, 426, A.2d at 240-242 (detailing where the parents of a 19-year-old woman with Down Syndrome sought the sterilization of their daughter).
218. See infra Part IV, Section A for a discussion in detail of the rational basis test.
220. *United States v. Carolene Prods. Co*, 304 U.S. 144, 152 n. 4 (1938) (where the various standards of review were introduced, outlining a higher level of scrutiny for laws infringing on a fundamental right in violation of a Constitutional provision).
222. *Id.* at 155.
223. See the standards set out in *In re Guardianship of Hayes*, *In re Terwilliger*, and *In re Grady*, infra Part II.
III. MARY MOE AND THE MODERN BACKLASH

The most recent court decision regarding involuntary sterilization concerned the pregnancy of a severely mentally ill thirty-two-year-old woman, referred to in court documents as “Mary Moe” for the purposes of confidentiality.224 As previously indicated, since the 1982 In re Moe decision, Massachusetts has followed the substituted judgment approach when authorizing sterilization.225 In applying the substituted judgment approach, “[t]he court ‘dons the mental mantle of the incompetent’ and substitutes itself as nearly as possible for the individual in the decision making process.”226

A. The Trial Court Decision and Sterilization Order

The facts of the case indicate that Mary Moe, a schizophrenic, suffers from bipolar mood disorder.227 Prior to the events outlined, Mary Moe “has been pregnant twice before.”228 The first pregnancy was terminated, and the second resulted in the birth of a boy who is in the custody of Mary Moe’s parents.229 Mary Moe made a number of erroneous and erratic statements at a competency hearing on December 9, 2011.230 She denied being pregnant and claimed to have previously met the judge, who stated that she and Moe have never met.231 Moe also claimed to be a devout Catholic and opposed to abortion, asserting that she would never have one.232 The parents of Moe, conversely, “have stated that [Moe] is not an ‘active’ Catholic.”233 Following this hearing, Judge Christina L. Harms, then of the Massachusetts Probate and Family Court found Moe to be severely delusional and thus “incompetent to make a decision about an abortion.”234

Judge Harms appointed a guardian to prepare an investigative report on Moe’s condition, focusing on the issue of substituted judgment as set out in Massachusetts law under ALM GL ch. 190B § 5-306A.235 This statute

226. In re Moe, 432 A.2d at 720.
228. Id.
229. Id.
230. Id.
231. Id. (including claiming that she had previously given birth to a baby girl name Nancy, though this never happened).
232. Id. at 353.
234. Id.
235. Id. at 352-53; MASS. GEN. LAWS. ch. 190B, § 5-306A.
prevents guardians of minor children or incompetent persons from consenting on their behalf to treatment plans unless the court both finds in applying the substituted judgment standard that the person would consent if competent, and expressly approves that specific treatment or procedure.\footnote{236} Furthermore, under the substituted judgment standard the statute requires the court to hold a hearing before authorizing any treatment.\footnote{237}

In the course of this investigation, the guardian consulted a doctor about possible risks posed to the fetus presented by Mary Moe’s schizophrenia medication.\footnote{238} According to the report, Mary Moe was recommended to discontinue use of her medication as it would harm unborn children.\footnote{239} While Judge Harms weighed all relevant factors to determine how Mary Moe would choose to proceed with the pregnancy if competent, in applying the substituted judgment standard, she found the discontinuation of some of Mary Moe’s antipsychotic medication to prevent harming the fetus to be the most compelling factor.\footnote{240} In an open letter later published in a Boston area legal journal,\footnote{241} Judge Harms explained:

As Probate and Family Court judges, we deal regularly with mental health issues, and know that people with untreated or poorly controlled schizophrenia commit suicide at far greater rates than the rest of the population. That Mary Moe’s pregnancy and resultant medication reduction puts her at substantial risk of killing or harming herself in the coming months seemed important to me. I formed the judgment that religion would be a lesser consideration for Mary Moe than her own safety and well-being. I viewed the interruption of Mary’s full medicinal regimen as potentially life-threatening. If Mary understood this, which my observation of her behavior, demeanor, and responses indicated that she did not, I believed then, as I do now, that she would elect to abort the pregnancy in order to protect her own well-being.\footnote{242}

\footnote{236}{Mass. Gen. Laws, ch. 190B, § 5-306A(a).}
\footnote{237}{Mass. Gen. Laws, ch. 190B, § 5-306A(a).}
\footnote{238}{In re Guardianship of Moe, 960 N.E.2d at 352-53.}
\footnote{239}{Judge Christina L. Harms, Open Letter to the Judges of the Probate and Family Court (Feb. 20, 2012); In re Guardianship of Moe, 960 N.E.2d at 352-53.}
\footnote{240}{Open letter from Judge Christina L. Harms, supra note 239.}
\footnote{241}{Judge Harms’ original opinion is not available because it contains information that could reveal the true identity of the women referred to here as Mary Moe, and has been sealed by the court for confidentiality reasons. See also Mass. Gen. Laws ch. 123, § 36A (1986) (concerning confidentiality of court records involving inquiries into persons’ private mental health records).}
\footnote{242}{Open letter from Judge Christina L. Harms, supra note 239.}
Thus, because removing Mary Moe from her medication could have grim consequences to her health, Judge Harms ruled that had Mary Moe been able to understand such consequences, she would have elected to terminate the pregnancy and agree to sterilization. Under this application, Judge Harms employed the Massachusetts substituted judgment standard requiring Mary Moe to obtain an abortion and undergo compulsory sterilization.

B. Appellate Response and Media Firestorm

Following the decision of the Massachusetts Probate and Family Court, the case of Mary Moe went before the Massachusetts Appeals Court. Here, the appellate court agreed with the Probate and Family Court that the substituted judgment approach was the correct standard, but disagreed with Judge Harms’ application. According to the Appeals Court, the substituted judgment standard requires a determination of how the person would decide if competent, and does not consider what decision would actually be in the best interest of that individual. On these grounds, the Appeals Court stressed the importance of the “actual preference” of Mary Moe on the matter, and in finding that Mary Moe was consistent in her refusal to undergo an abortion, concluded that she would refuse an abortion if not incompetent. In light of that determination, the Appeals Court remanded in part with regards to the abortion order and reversed in part in terms of the sterilization order. In reversing the sterilization order, the Appeals Court contended that because the order was authorized in conjunction with the abortion directive, Mary Moe was denied due process as required by the Fourteenth Amendment.

Shortly after the appellate ruling, the case of Mary Moe attracted the attention of various advocacy groups and politicians, inciting a media firestorm. The story ran in local news outlets like the Boston Globe as

243. Id.
244. Id.; In re Guardianship of Moe, 960 N.E.2d at 353.
246. In re Guardianship of Moe, 960 N.E.2d at 354.
247. Id.
248. Id. at 354-55
249. Id. at 355
250. Id. at 354. Note that in her open letter, Judge Harms explains that a hearing had, in fact been held and due process had been afforded. Open letter from Judge Christina L. Harms, supra note 239.
251. Eng, supra note 245.
well as national news services like NBC and Associated Press.\textsuperscript{252} The press coverage caught the attention of the legal community on the internet when the case was featured on a well-known legal blog, Above The Law.\textsuperscript{253} As the story gained popularity on the internet, entertainment blogs published dramatized accounts of the case online. For example, written specifically for its largely female audience, the blog Jezebel, owned by Gawker Media, published a particularly dramatic and inflammatory piece on the Mary Moe incident entitled, “Horrible Judge Tries to Force Schizophrenic Woman to Get Abortion, Be Sterilized.”\textsuperscript{254}

In an open letter published following the media backlash, Judge Harms defended her decision to order the abortion and sterilization.\textsuperscript{255} Along with addressing her focus on Mary Moe’s safety and well-being, Judge Harms contended that, aside from ruling with regard to Mary Moe’s best interest, her reasoning did follow the standard of substituted judgment.\textsuperscript{256} In defense of her substituted judgment analysis, Judge Harms wrote:

\begin{quote}
Apart from being life-threatening, schizophrenia is probably the most devastating among all the mental illnesses, in terms of human suffering. As we know, people with untreated or poorly controlled schizophrenia often stop bathing, shaving, washing their hair, wearing shoes, and using toilets to urinate or defecate. The right combination of medications ameliorates these common symptoms, often to a remarkable degree, sometimes to at least a satisfactory degree. If Mary Moe’s schizophrenia may worsen to the point that she suffers from some or all of these common symptoms, what would be her substituted judgment?\textsuperscript{257}
\end{quote}

Following her defense of her application of the substituted judgment standard in the Mary Moe case, Judge Harms continued her letter to address...
the contention that she had failed to provide due process, explaining that there had in fact been a hearing where Mary Moe was present.258

In light of the decision of the Massachusetts Appeals Court and the statements of Judge Harms, the issues here are illustrative of the long-standing emphasis on ensuring enforcement of procedural protections as afforded by due process rights. The focal point of the appellate ruling focused on the affordability of the procedural protections of the Massachusetts standard, which included the requirement of considering the actual preference of the incompetent and either a evidentiary hearing or judicial findings based on documented evidence, 259 as actually applied to Mary Moe.260 This is evident in their focus on Judge Harm’s assessment of Mary Moe’s opposition to terminating her pregnancy or undergoing sterilization on religious grounds in adherence of Catholic dogma.261 Contending that the Judge did not hold a hearing and disregarded Mary Moe’s opposition to abortion by way of Catholic belief, 262 the appellate court found that inadequate efforts to ascertain actual preference indicated that Mary Moe was not afforded full procedural protection.263 This scrutiny of procedural safeguards indicates a continuation of the emphasis on safeguarding protections of procedural due process.

IV. LEGACY OF PRECEDENT IN BUCK V. BELL

The following analysis addresses the separate focus on personal rights under procedural and substantive due process. This analysis shows a steadfast adherence towards the enforcement of procedural safeguards on due process. Additionally, this discussion examines the impact of later standards for evaluation of substantive due process rights, affording sterilization laws higher levels of scrutiny not yet available under Buck v. Bell.

A. Inclusion of Due Process Rights as Binding Authority

In large part, the Buck v. Bell decision focused on the compliance of the Virginia statute with procedural due process requirements as set out by the Fourteenth Amendment.264 To refresh, the Due Process Clause of the Fourteenth Amendment states that: “No State shall . . . deprive any person of

258. Id.
260. In re Guardianship of Moe, 960 N.E. 2d at 141.
261. Id. at 138.
262. Id. at 141.
263. Id. at 140-41.
life, liberty, or property, without due process of law.\textsuperscript{265} Satisfaction of procedural due process generally requires legal safeguards such as mandatory hearings and notification to be included in statutes governing the deprivation of life, liberty, or property.\textsuperscript{266} Therefore it is important to note that in drafting the Virginia statute at issue in \textit{Buck v. Bell}, lawmakers crafted the legislation with an active effort to include procedural safeguards that would comport with the requirements imposed by due process.\textsuperscript{267} The statute itself required that in order to impose compulsory sterilization on an inmate of a qualifying state institution, a petition must be filed with a board specially created to review such cases, and the incompetent person to be sterilized must be notified, appointed a guardian, and afforded a hearing and opportunity to appeal.\textsuperscript{268}

Justice Holmes found the requirement of procedural due process satisfactory in \textit{Buck v. Bell} in light of such safeguards designed to address the rights of Carrie Buck and other patients at such institutions before depriving her of her reproductive liberty through administering the involuntary sterilization.\textsuperscript{269} Since Carrie Buck had been actually afforded every procedural protection as required by the statute, the court found that her legal right to due process had not been violated.\textsuperscript{270} This part of the opinion is expressly binding, in light of later interpretation of sterilization law at the state level. In the more recent January 2012 decision in \textit{Guardianship of Moe}, the opinion of the Massachusetts Court of Appeals was entirely concerned with ensuring that Mary Moe was afforded her full procedural rights under state statute in ordering her sterilization, and did not address in detail the substantive elements of the Massachusetts substituted judgment standard from an analytical perspective of the standard itself.\textsuperscript{271} Since the court found that because the judge did not hold the mandatory hearing or provide the necessary alternative evidence, and ordered the sterilization without adequate notice, Mary Moe did not receive the procedural protections afforded to her by law.\textsuperscript{272} On these grounds, they found that the due process required under the Fourteenth Amendment was not provided, and overruled the sterilization order.\textsuperscript{273}

\begin{footnotes}
\item [265] U.S. CONST. amend. XIV §1.
\item [267] Lombardo, \textit{supra} note 53, at 48-50.
\item [268] Va. Acts 569, 569-571, ch. 394 (March 20, 1924) (repealed); \textit{See also} Lombardo, \textit{supra} note 53, at 49 n. 100.
\item [269] \textit{Buck v. Bell}, 274 U.S. at 206.
\item [270] \textit{Id.} at 207.
\item [272] \textit{Id.} at 354, 355.
\item [273] \textit{Id.} at 354.
\end{footnotes}
receipt of the full protections as required under the due process clause in Guardianship of Moe indicates that the stipulation in Buck v. Bell that requires involuntary sterilization statutes to include and exercise such procedural protections is binding law.

Conversely, it is much harder to argue that the Buck v. Bell approach to substantive due process is binding authority, in light of subsequent evolution of the standards of judicial review and protections under the right to privacy. As discussed in greater detail in Part II, Buck v. Bell was decided in 1927, decades before the courts classified reproductive autonomy as a fundamental right, and before the development and adaptation of heightened standards of judicial review. At the time, the only standard for judicial review of law with regard to substantive due process issues was the rational basis test, which requires that the statute or regulation be somehow related to a legitimate government interest. It is important to note that rational basis only requires that the law be potentially supportive of any legitimate government interest. Note that the rational test basis does not mandate that the interest cited be an actual interest of the government, nor does it require proof that the legislation was created with that interest in mind. In applying this standard, Justice Holmes’ contention indicates the view that there is a legitimate state interest in reducing the burden of incompetent persons on government resources. Though the legislative intent of lawmakers indicates that the sterilization statute could reflect such an interest, this does not mean that Justice Holmes’ support for eugenicist policies as a legitimate government interest is immortalized as binding authority. In fact, one recent scholar acknowledged the difficulty that modern courts would face if they would attempt to use Buck v. Bell to establish eugenic sterilization as a legitimate state interest, specifically in cases involving hereditary genetic defects.

Rather, the strong presumption against such drastic measures seems to indicate that Justice Holmes’ recognition of eugenic sterilization as a

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274. See generally Roe v. Wade, 410 U.S. 113 (1973) (where the courts found the right to choose an abortion to be the exercise of the fundamental right to control one’s own reproduction); see also Eisenstadt v. Baird, 405 U.S. 438 (1972) (where the court extends fundamental privacy rights to include reproductive decisions pertaining to contraceptives).
275. Scott, supra note 20, at 810.
280. Lombrado, supra note 205, at 47.
281. Smith, supra note 61, at 77-78.
legitimate government interest is dicta. A close reading of his argument reveals that his application of the Virginia law to the potential interest of societal improvement through eugenic sterilization is vague. Holmes wrote, in regards to that interest, “we cannot say as a matter of law that the grounds do not exist, and if they exist they justify the result.”\textsuperscript{282}

\textbf{B. Impact of Dicta in Buck v. Bell Analysis of Substantive Due Process}

\textbf{1. Dicta Generally}

While there is no conclusive authority or standard for guiding distinction between dicta and holding,\textsuperscript{283} dicta is traditionally defined to characterize judicial statements “not necessary to the decision of the case.”\textsuperscript{284} The traditional definition is frustratingly impractical to apply in distinguishing dicta from holding as it provides no specific guidance for statements made in case rationale.\textsuperscript{285} Case law offers little clarification on the matter,\textsuperscript{286} but dicta has been determined to include deliberate asides, discussion broadening a legal principle beyond the scope of the case, and components of the case rationale that are not determinative of the outcome.\textsuperscript{287} The doctrine of stare decisis, a central to the United States common law system, binds lower courts to adhere to the holdings of higher courts.\textsuperscript{288} Though stare decisis does not compel the lower courts to follow the dictum of the higher courts, courts can and do regard the dicta with varying levels of persuasiveness.\textsuperscript{289}

The ambiguous distinction between dicta and binding opinion requires a further analysis, assessing succeeding legal attitudes following the dicta.\textsuperscript{290} In some cases, more persuasive dicta may evolve into law through subsequent judicial opinions or uniform adherence by lower courts.\textsuperscript{291} Conversely, dicta may also be dismissed entirely, either expressly through

\begin{itemize}
\item \textsuperscript{282} \textit{Buck v. Bell}, 274 U.S. at 207.
\item \textsuperscript{284} Marc McAllister, \textit{Dicta Redefined}, 47 WILLAMETTE L. REV. 161, 166 (2011) (citing Humphrey’s Executor v. United States, 295 U.S. 602, 627 (1935)).
\item \textsuperscript{285} McAllister, \textit{supra} note 284, at 168.
\item \textsuperscript{287} \textit{Id.} at 2007.
\item \textsuperscript{288} McAllister, \textit{supra} note 284, at 161.
\item \textsuperscript{290} McAllister, \textit{supra} note 284, at 165.
\item \textit{Id.} at 163.
\end{itemize}
later statements of the original court, or implicitly, through a succession of court rulings rejecting the dicta. The persuasiveness of some dicta remains ambiguous, as it is neither adapted into law nor clearly rejected, as lower court interpretations reach assorted decisions, often choosing to disregard dicta altogether. Therefore, in analyzing the binding effect of a statement, subsequent legal treatment can be telling in the determination between holding and dicta.

2. Dicta With Regard to Buck v. Bell

In addressing Carrie Buck’s contentions that her substantive due process rights were violated, Justice Holmes applies the rational basis standard of review to the Virginia statute mandating her sterilization. Note that the Supreme Court’s various phrasings of the rational basis standard require the law to be somewhat relevant to any legitimate state interest, regardless of the specific legislative intent in drafting the law. The Virginia institution in Buck v. Bell recognized that while compulsory sterilization would deprive Carrie Buck of her liberty, it was in the interest of benefiting society, contending that mental disability or feeble-mindedness is hereditary. In analyzing such a claim as a legitimate government interest, Justice Holmes stated, “we cannot say as a matter of law that the grounds do not exist, and if they exist they justify the result.” Close reading of this statement indicates that while Justice Holmes was not rejecting outright a government interest in promoting eugenics, he was not expressly confirming such an interest either. Instead, this statement confirms that a legitimate state interest for such a law is potentially in existence. The holding here, is that because the statute could relate to a legitimate state objective, Carrie Buck’s right to substantive due process was not violated.

In defining what is dicta and what is holding, incorporating the doctrine of issue preclusion is essential towards determining what is essential to the facts of the case, and what is not. This requires identifying what is actually at issue, as either a matter of fact or law. It is important to note that the attack was not on the legitimacy of the state objective, as the contention at issue was that “in no circumstances could such an order be

292.  Id. at 164.
293.  Klein & Devins, supra note 289, at 2030.
297.  Id. at 207.
298.  Abromowitz & Stearns, supra note 283, at 1061.
299.  Id.
The holding, then, was not concerned with the legitimacy of that state interest, but instead whether or not a state interest was possible at all. Therefore, the holding is limited to the assertion that there was a conceivable legitimate purpose, and as a result, Carrie Buck’s due process rights were not violated.

The holding does not include more abstract discussion of the overall worldwide benefits of mandatory sterilization policies. Justice Holmes’ subsequent discussion broadens beyond the focus on the potential existence or non-existence of a legitimate government interest. Transitioning into a moralistic digression, the discussion widened the scope considerably, as evident through the statement, “[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.”

While this is a blatant endorsement of eugenicist policies, it is also dicta. These statements broaden in scope, in contrast with their discussion specific to the Virginia law, where the language is vague and does not take the clear opportunity to confirm eugenic sterilization as a legitimate state interest. Instead, this endorsement is confined to an aside, which broadens the scope to a more general perspective, engaging in a theoretical and idealistic testimonial no longer tailored to the Virginia statute. Thus, since dicta includes statements found in the rationale but not essential to the outcome of the case, it is material that the decision reached could be made without this fierce defense of eugenic policy as a legitimate government interest.

3. Dicta as Reflective of Societal Attitude

Failure to separate dicta from binding authority is dangerous because it allows courts, if mistaking dicta for the binding authority of the holding, to bind later courts to judicial attitudes no longer reflective of modern society. While dicta is not law binding later courts to adherence, it is still persuasive authority that, as history indicates, is not easily overlooked or questioned, as lower courts are not inclined to examine it with much diligence. Appellate judges often successfully utilize this tendency towards reliance as a way to plant their broader ideological views into the law in order to attempt to ensure some later adherence. It logically follows then that dicta is a reflection of judicial attitude pertaining to the

301. *Id.*
303. *Id.* at 2004.
305. *Id.* at 178-79.
time period in which the case was decided, which, in turn, provides insight into the overall societal views present in that specific era. Holmes himself has written that judicial interpretation of the law is not entirely reached through pure logical analysis, but instead has more to do with the “felt necessities of the time, the prevalent moral and political theories [and] even the prejudices which judges share with their fellow men.”306 Here, Justice Holmes recognized that legal concepts shift over time as attitudes change in society.

Using Holmes’ own logic, it is best to adhere to what is predictable and constant in terms of later interpretations. History has shown, an emphasis on the procedural due process element rather than Holmes’ focus on protecting society’s right to weed out genetic inferiority. This flexibility present in the growth and adjustment of legal concepts, is, according to Holmes, “both inevitable and desirable, enabling the law to adapt to new knowledge, to technological developments, and to changing social mores and values.”307

Legal and societal views on sterilization and contraceptive issues as they relate to the mentally disabled have evolved, as later interpretations of the law explicitly disregard eugenic justifications for administering sterilization in favor of providing for the general welfare of the mentally disabled or incompetent.308 In light of the current legal trends, as reflected through the various state standards, it can hardly be argued that Holmes’ endorsement of a moral and ethical obligation to regulate reproduction to avoid overtaxing the welfare system is anything more than marginally persuasive dicta.

Instead, because the opposite trend prevails, there is a heavy presumption against involuntary sterilization and it is not widely granted. In light of the recent events of the Mary Moe case in Massachusetts, we see that the emphasis on procedural due process rights is intact, indicating that this part of Buck v. Bell was, in fact, binding authority. The policy rationale behind such sterilization procedures clearly favors the interest and general well being of the disabled person, and not the strength of the gene pool. This attitude is reflected clearly in the events of the recent Guardianship of Moe, where the trial judge’s motivations for originally granting the sterilization were explicitly to protect Mary Moe’s best interest.309 This indicates that, since such a focus on fair procedure has held steadfast, and the eugenicist principles have, in fact, not. Holmes’ inflammatory view, therefore, was

308. See infra Part II, Section E.
309. Open letter from Judge Christina L. Harms, supra note 239.
never actually regarded as binding authority. Rather, it is an ideological remnant of long-abandoned perspectives that remains dicta, and dicta alone.

CONCLUSION

*Buck v. Bell* has long been a subject of legal criticism and public stigma, despite no subsequent efforts to overturn the law. Instead, the United States Supreme Court has largely declined to address *Buck v. Bell* and most involuntary sterilization statues, shifting its focus towards the inclusion of reproductive rights under the right to privacy. Following a mass repeal of state statutes authorizing eugenic sterilization in furtherance of societal benefits, states’ current sterilization statutes reflect an interest in individual protections, defending compliance with the protections afforded by the Fourteenth Amendment.

The inflammatory legacy of *Buck v. Bell* is largely unfounded. Instead, public revulsion towards *Buck v. Bell* is a product of societal sensitivity towards eugenicist-based policies and an expansion of the protections under the right to privacy. A closer reading of the decision indicates an emphasis on procedural due process, requiring states to afford procedural safeguards in such statutes. Since Holmes’ broad theoretical endorsement of eugenics is tangential to the substantive due process analysis, it is dicta, and merely indicative of societal attitudes of the time. Most telling is the subsequent focus of case law on creating strong procedural safeguards, which, in conjunction with a shift in societal rejection of eugenic sterilization policies. This indicates largely, that the inflammatory defense of eugenics is in fact, dicta, and not binding authorization of eugenics as a constant legitimate state interest. The impact of this is already evident in modern state sterilization, which present standards so strict they act as an effective safeguard by creating hurdles for granting sterilization. Recognition of Holmes’ inflammatory statements as dicta will only further these efforts, no longer allowing stringent state laws to hide behind a strict reading of *Buck v. Bell*. 