

Intro:

Mr. Chief justice, and may it please the Court. There's an old joke that when a man argues against two beautiful ladies like this, that they're going to have the last word.

Intro:

She spoke not elegantly, but with unmistakable clarity. She said, "I ask no favor for my sex. All I ask of our brethren is that they take their feet off our necks."

Melissa Murray:

Welcome back to Strict Scrutiny, a podcast so fierce, it's fatal in fact. I'm one of your hosts, Melissa Murray. As you've noticed I'm solo hosting today. I'm really excited to be joined by a special guest, Adam Cohen. Adam is a graduate of Harvard law school and he's had a really varied and interesting career in the law. He's worked as a public interest lawyer with the Southern poverty law center in the ACLU. He's worked as a speech writer for New York city mayor, Bill de Blasio. And he's perhaps best known for his popular writing. He's been a member of the New York Times editorial board and a senior writer for Time Magazine. He's also the author of five books. The most recent of which is Supreme Inequality, the Supreme Court's 50 year battle for a more unjust America.

Melissa Murray:

Adam and I took the time to discuss Supreme inequality at an event at NYU Law School hosted by the Brennan Center for Justice. That conversation has been released as a special collaboration episode between Strict Scrutiny and the Brennan Center. We're grateful again to the Brennan Center for that. And we encourage you to check it out. Adam and I had such a good time discussing Supreme Inequality that we thought we should get together again to discuss another one of Adam's books, and he has many of them.

Melissa Murray:

But the one that came to mind for me was a book titled Imbeciles, the Supreme Court, American eugenics and the sterilization of Carrie Buck. The book discusses Buck versus Bell, which of course is one of those anti canonical Supreme Court cases, which is to say one of those cases that the Supreme Court, perhaps later wishes it had never issued. Again, this is the famous episode in the court's history where Justice Oliver Wendell Holmes famously intoned that three generations of imbeciles was enough, as he upheld a Virginia sterilization law.

Melissa Murray:

The case got another airing more recently. Last summer in the case Planned Parenthood versus Planned Parenthood, Clarence Thomas filed a concurring opinion in which he mentioned Buck versus Bell and also cited Adam's book imbeciles liberally throughout his opinion. So we're delighted to have Adam here today to talk about Buck versus Bell. His research concerning Carrie Bell and what was the sterilization trial of the century, and how it to be part of the Supreme Court's abortion jurisprudence. So welcome, Adam.

Adam Cohen:

It's great to be here, Melissa.

Melissa Murray:

Thanks so much for being here. We're glad to have you. Where to start with Imbeciles. So first of all, how did you get the idea to even do a long, interesting, deep dive methodological study of the Buck case, which again is not really that frequently referenced in American law schools at this point in time. It's only sort of referenced in passing, but you really brought it to light again.

Adam Cohen:

Well, thank you. As you mentioned, I've lived in the general vicinity of the Supreme Court for much of my professional life, both as a lawyer and as a journalist and have been writing a lot about it. And I always wanted to write a book about the Supreme Court. And when I thought about what that book could be, I really wanted to find a terrible case. There've been a lot of books about the great cases like *Brown V Board of Ed*, and *Gideon's Trumpet* and books like that.

Adam Cohen:

But I thought it would be interesting to see where they had gone wrong. And I also wanted to write a book about a case that wasn't that well known, and that would shine a light on a part of the court's history that a lot of people didn't know much about. And when I looked into *Buck versus Bell* as a possibility, the resonances were so strong. Because we think of eugenics as being well in the past and as being a fixture of decades like the 1920s when *Buck V Bell* was decided.

Adam Cohen:

But in fact, as I learned working on it and then certainly going out and talking about it later, it had a lot of resonances with modern America. So it just seemed like a really great topic. And the more I read about it, the more I got into it, the more excited I got about it.

Melissa Murray:

Let's give the listeners a little bit of a preview of the case itself. So *Buck V Bell* is a case from the 1920s. So can you give us a little bit of just the case itself and why it's become known and notorious in Supreme Court lore as one of the worst decisions the court has ever issued?

Adam Cohen:

Sure. So the case was decided at the height of American eugenics, which American eugenics really started in the beginning of the 1900s when Indiana passed a eugenic sterilization law. The movement itself had begun earlier in England, and it was a product of the Darwinian age. And in fact, it was Darwin's cousin, Francis Gallton, who was the leader of the eugenics movement in England. It really put the movement on the map. Comes to America, and after Indiana, actually a bunch of states passed laws, eugenic sterilization laws, which allow them to sterilize people if they think that their genes will essentially bring down the gene pool.

Adam Cohen:

And these laws, they varied from state to state in which categories they included. But it tended to be groups like the feebleminded, which was a word that was very hot back then, but also the indolent, as they said, the unemployed, alcoholics, there were many, many categories that were brought in under the statutes. And the statutes of course, reflected an intellectual commitment in really a large part of the country to the idea that eugenics would make America better.

Adam Cohen:

That if you took Darwin at his word, that our species was always evolving, why not use the law to help that evolution along and make better people? So that was the backdrop. Those were the laws. And Virginia is the place where Buck V Bell emerged. Virginia passed one of these sterilization laws. And what was different then in other states is the lawyer for the Virginia colony for epileptics and feebleminded where these eugenic sterilizations were to occur did not want Virginia to start sterilizing people until the law was tested to make sure that it was constitutional.

Adam Cohen:

So, they wanted to find a test case to bring the statute before a court, and maybe before the Supreme Court, just to determine that it's constitutional to begin sterilizing people because their genes are "bad".

Melissa Murray:

So, Adam, can I jump in for a minute before you talk about Carrie?

Adam Cohen:

Sure, yeah.

Melissa Murray:

So this part is actually really interesting to me, just as part of the larger historiography of the court. So we have this moment in what is essentially the Lochner era, where the court is absolutely hostile to the prospect of government intervention in the markets. And again, this is all spurred by the interest in social Darwinism, and laissez faire economics. This idea that the cream will rise to the top, and the government should allow it to do so naturally without actually intervening to allow those at the bottom to bubble up.

Melissa Murray:

Really, if you want the best of the species, everyone economically should just be on their own steam without any kind of governmental regulations. So at this point, during the court's history, they are striking down all of these laws that Congress is passing under the commerce clause to eliminate monopolies and trust busting laws. And the substantive due process side, they're also striking down state level laws that are actually meant to aid the plight of workers, like the average working man, so progressive legislation. And they don't believe there should be any kind of government regulation and markets, but they do believe that there should be government regulation of these intimate affairs.

Melissa Murray:

Even going so far as to allow the states to sterilize those who they believe to be unfit in some ways. So there's a weird cognitive dissonance to the court's understanding of what's appropriate governmental regulation and what isn't.

Adam Cohen:

It's a great point. And yes, as you're saying, this is the same court that is striking down child labor laws, because that's not the business of the government. But somehow sterilizing people because their genes are bad, that's perfectly okay. Excellent point. So that is the backdrop. Carrie Buck comes along, and she's a very, very sad case. She was being raised on the streets of Charlottesville, Virginia, by a very poor

single mother. She gets taken in by a foster family who don't treat her very well, and really don't treat her one of their own children. Really treat her like the maid.

Adam Cohen:

She gets raped by the nephew of one of her foster parents. And suddenly they have a pregnant foster child that they don't know what to do with, and who also is a witness to a crime committed by one of their relatives. So what they do is, they decide to have her declared feebleminded, which was not hard to do in this eugenic age. That was a word that was being bandied around a lot to cover a lot of different categories of, you're not good enough. And when the family took her to a hearing, it was very easy to have her declared feebleminded and epileptic, even though really her grades were perfectly fine in school and she had never had a seizure.

Adam Cohen:

She gets shipped off to the colony for epileptics and feebleminded that I mentioned. And her timing is very unfortunate because she gets there just after this law was passed. And the superintendent of the colony decides, "Here's the woman, Carrie Buck, that we're going to put at the center of this attempt to test the law." So they decide they're going to sterilize Carrie Buck. They give her a lawyer, but it's not really a lawyer who wants to represent her. It's a lawyer who had been a member of the board of the colony, and he seemed to be really in favor of sterilization laws.

Adam Cohen:

They give her this lawyer and they proceed to have her test the law to see if it's constitutional, so they can go about their big project of sterilizing all the unfit members of the state of Virginia.

Melissa Murray:

So Albert Priddy is the doctor, who's the director of this colony for the feebleminded that Carrie Buck is consigned to. And interestingly, she's not the only member of her family who was sent to this colony. Her mother is also a resident when she gets there. And that's part of the reason, as you explain, that Carrie is luckless enough to be identified as the perfect litigant. Because they can actually trace that she is not just feebleminded herself, but she has this family history of feeblemindedness because her mother and a number of collateral relatives are also inmates at this asylum. And she's very carefully chosen by Dr. Priddy for that purpose. Is that right?

Adam Cohen:

That's absolutely right. And there actually are other things about her that make her very appealing to the eugenic story. So another thing about her is that, she's a young woman who's pregnant at a young age. And the great fear is that the so-called feebleminded are going to engulf the country in a wave of feebleminded children. And there's a lot of literature at the time that says the feebleminded are more fertile and more likely to have children.

Adam Cohen:

So here they bring a young woman who is pregnant, no one mentions the fact that she was raped, who is going to have the first of what they presume will be many of these feebleminded children, fits the pattern that you mentioned, that her mother is also in the colony. She's in many ways, a perfect poster child for their ideology of eugenics.

Melissa Murray:

She has, I guess, eugenics issues on both sides. She comes from a family that is poor, unable to support themselves, find themselves in the throws of the state, and then consigned to this penal colony. She happens to be young. She is pregnant out of wedlock. She's ticking lots of different boxes here. Can we back up though, to just maybe think about the social context that she and her family found themselves in. So to me, at least as someone who thinks about marriage and how marriage has really shaped women's lives, both socially, culturally, and legally, for so many years, it was really striking that her mother, Emma, had been married to her father, but the father abandons them. And Emma is really left without many economic prospects after she has been abandoned by her husband.

Melissa Murray:

And she actually turns to the streets, and it suggested a life of prostitution. That doesn't really end well for her. She has a number of other children and then is confined to the colony for epileptics and the feeblemindedness. Carrie is in a similar circumstance. And the Dobbs, the foster family that take her in and then allow her to become pregnant by the sexual assault by their nephew, they are deeply worried that she is going to be in their household forever with their other children, whom they worry she will contaminate with whatever traits that she has, and that they will be responsible for her because no man is going to marry her because she's already been sexually compromised.

Melissa Murray:

So the role that marriage plays as the economic leveler in women's lives is huge in this particular case, and certainly shapes the outcomes for Emma Buck and her daughter, Carrie. But as you suggest, actually shapes the lives of other people. Because the eugenics movement is deeply, deeply concerned about the question of marriage and reproduction.

Adam Cohen:

I think that's all absolutely right. And one other thing I would add to that biographical story of hers is, a lot of this case is an indictment of progressivism or self-proclaimed progressivism. And I'm sure we'll get to that when we talk about how the court ends up voting. But it's true even at this early stage. I mean, she's taken in by this middle class family as part of... The zeitgeists back then was what they call child saving, the idea that middle class families could save poor children by taking them in and giving them a good middle class home. It was a sort of ideology.

Adam Cohen:

And of course we see the complete emptiness of that promise. Because first of all, even before the sexual assault, they didn't really want to save Carrie. They bring her in and they make her not only do housework in their home, making her more like the maid than like one of the children. They actually rent her out to some of the neighbors to do housekeeping. And when she gets to fifth grade, they just decide she's had enough schooling. So the idea that even before the sexual assault, they really wanted to save her, they didn't. It was very opportunistic and they were exploiting her even before the ultimate much larger exploitations occurred.

Melissa Murray:

So she's definitely luckless, truly a creature of ill fortune here. The eugenics movement though really picks up steam. And as you say, it is alive and well in Virginia at the time that Carrie Buck is in this

situation. She lives in Charlottesville, Virginia. For those of you who don't know, Charlottesville is dominated by the University of Virginia, which is the flagship state university in the state of Virginia. And it is a hotbed of eugenics and eugenics thought, and it's not alone. There are other universities throughout the country.

Melissa Murray:

So how does eugenics take root and become understood as an actual science or field of study when it would actually seem rather thin in terms of our understanding of what science is?

Adam Cohen:

No, it's a great point. I think a large part of the answer to that is the fact that Darwin came along and really changed our view of biology and of the human race. Darwinism was such a major shock to the way people thought about science and humanity that it led to offshoots. And this was one of those offshoots. And you're right that the actual science when we look back on is terrible. And in many ways, resembles things like measuring the size of skulls, which is actually... If you look at the manuals at the eugenics record office, which was the center of eugenic thinking and propaganda, which was on Long Island actually. They did things like measured skulls with forceps and tried to figure out how smart someone was based on that.

Adam Cohen:

So there's a lot of what we would now regard as junk science. But at the time so it was considered quite cutting edge. And the other thing which you're alluding to by mentioning that Charlottesville was such a center, is it really is one of the great ironies. And one of the, I think, troubling aspects of this case that eugenics really took hold in the most progressive and the most educated parts of our country. So, it was places like Charlottesville, but places like that in every state. It was the university towns. It was the doctors who led the movement, it was the lawyers, it was the professors.

Adam Cohen:

And the media embraced it quite a lot. You could read during this period in the New York Times articles about the importance of people thinking eugenically before they married. So this was very much a movement of elites, of the educated, and of progressives, and not of the people we think of as being the most anti-science and the most wrong-headed.

Melissa Murray:

Well, so it is the movement of elites. And that certainly seems, I think different from the way we understand junk science today, but it's a movement of elites and it is one that really gets visited upon by those who are not elite. So Carrie Buck is totally outside of the generation of eugenic thought, but she's the one who ultimately bears the burden of it. So she is sent to this colony. They immediately identify her as a proper candidate to test the law, to ensure that they can actually do this on a wider scale.

Melissa Murray:

And they want to make sure they've checked off all of the Planned Parenthood and done this, and it's all been above board. And so they assigned her a lawyer. But he's, as you say, is part of the group. I mean, one of the things that marks this case is that every single person who is involved here, whether as a witness, or as a lawyer, or as opposing counsel, they all know each other, they're all connected because

they're all part of this network of eugenesists, who really believe in this science. And the fix is in for Carrie Buck before she even steps into a courtroom. So how is it that the law actually fails her?

Adam Cohen:

Well, I think the law in this case is so fascinating. And I spend a lot of time in the book on one of the characters, Aubrey Strode, who was the lawyer for the Virginia colony for epileptics and feebleminded. And to me he's the most complicated character in the whole story, because he is really just a practicing lawyer, who the colony is one of his many clients. And I think in many ways we would regard him as a good guy. He campaigned for women's education and to get women into the University of Virginia, he was quite progressive on-

Melissa Murray:

He fails at that, but he does get Mary Washington College.

Adam Cohen:

... there you go. Right. I didn't say he was successful. But it seemed like on many issues, his heart was in the right place. And on some of the other issues, he favored more education and better funded education. So he's a complicated guy. And I really spent a lot of time thinking about what were his motives, how good was he, how ethical was he as a professional. And in some ways, I think he's a hero, in that, as I mentioned, most states, every other state, they just started sterilizing people.

Adam Cohen:

Aubrey Strode was the one who said to the Virginia colony, "I don't want you to start sterilizing anyone until this has been before a judge," and gone up as far as it goes. So that is actually, I think, a very positive instinct. The feeling that the law should be involved. But on the other hand, you look at some of the things he did and it's quite terrible. Because he did know that the lawyer that they gave to Carrie was actually not representing her interests. He was writing really bad inadequate briefs. A lot of this was all going on with her not understanding what was going on.

Adam Cohen:

So I think the answer to why the law failed is that this was the state of the law at the time. Remember this was, of course, a time when the courts were upholding Jim Crow and doing lots of other bad things. They didn't really care about people like Carrie Buck. And what I think gives the book a lot of force and the story a lot of force is, I don't think we'd be surprised to know that in the 1920s, the judge in Amherst County, Virginia, did not really care a lot about people like Carrie Buck even if the state was trying to sterilize them. What's shocking is that when it gets up to the US Supreme Court, which is populated by justices that we know well, some of whom have very fine progressive reputations, those law folks didn't care either.

Melissa Murray:

Well, so that's a great segue for the court. So this decision is issued by the court. It's an eight to one decision. So only one person dissents and that's justice, Pierce Butler. We can talk a little bit about why he dissented in a minute. But some real legal lions are on record with agreeing that the state of Virginia has the authority and its police power to sterilize Carrie Buck because she's feebleminded, and chief among them is Justice Oliver Wendell Holmes, who is the scion of a very wealthy Boston family.

Melissa Murray:

His father is the former Dean of Harvard Medical School. He comes from a really illustrious background. He should know better. But in fact it is his illustrious background that makes him so susceptible to eugenics thought. So can you say a little bit about how this lion of the court actually comes to be the standard bearer for eugenic thought?

Adam Cohen:

Sure. And it's one of the things that really drew me to the whole story, was Oliver Wendell Holmes, his role in it. And I went to Harvard law school where he is a revered figure. And you can barely turn a corner without seeing a portrait of him. And I'd really never heard anything bad about him. Not only were his legal opinions and his legal writings supposed to have been so exemplary, but the heroic story of him actually leaving Harvard undergrad to go fight in the civil war, where he was seriously wounded three times, but kept going back.

Adam Cohen:

So he was really held up as one of the real icons of Harvard. And as I looked into it, it's just what you said. It's not just that all of his good learning at Harvard and growing up in Boston didn't train him better, it's that it actually trained him in all these terrible values. So, as we know, there's a concept of the Boston Brahmin. And not only is there that concept, but it was actually Oliver Wendell Holmes' father, Oliver Wendell Holmes Sr, who coined that phrase, Boston Brahmin.

Adam Cohen:

And it's such a resonant term, because it really does convey the idea that this Boston elite from the old families really felt that their place in the hierarchy was endowed almost by God that they were better. And this was something drilled into Holmes that the Oliver family, the Wendell family, and the homeless family, were all old Boston families. And honestly that he was better than the Irish and other working class people who worked in the mills that were owned by the Boston Brahmin. So this was the view that Oliver Wendell Holmes was raised with.

Adam Cohen:

And when Carrie Buck gets to the Supreme Court, he's just the worst possible person to consider her case. Because her case is really someone saying, making a very democratic argument, essentially we're all equal. None of us has better genes than anyone else. No one should be stopped from reproducing. But everything he had learned in his upper echelon Boston upbringing was, "No. Some of us really do have better genes." The Olivers, the Wendells, and the Holmes, aren't just better because they went to better schools, it's in their blood.

Adam Cohen:

And that's very much reflected in the decision he wrote, which was, not only not the outcome we'd want, but to the modern ear just reads horrifically. He says horrific things in it.

Melissa Murray:

The opinion really stands out. So one thing he says in this opinion is famously or infamously that, three generations of imbeciles are enough. So he's referring to Emma Buck, Carrie Buck, and her daughter, Vivian, who is the product of that rape by the Dobbs' nephew. So three generations of imbeciles are

enough. And he's joined in writing that opinion by some stalwarts of the progressive movement. So justice Louis Brandeis, who is the famed author of the Brandeis brief, who argued for better working conditions for American workers, and particularly women workers in Mueller versus Oregon signs onto this opinion. So how do these people who understand what progressivism is and should be, how are they signing onto this so unquestioningly?

Adam Cohen:

First of all, I want to say just a word about that very famous phrase as you say, from the opinion, three generations of imbeciles are enough. It's offensive on so many levels. And I think what first hits the ear is just the idea that being an imbecile is something that is in our blood and is going to be passed down from generation to generation. But also it's just so careless about the facts. I say somewhat jokingly, but quite seriously actually, at the time there actually the word imbecile meant something, and it meant something different than the word moron and the word idiot.

Adam Cohen:

These were actually scientific. And I put that word in quotation marks, in terms at the time. And it's the morons were in the middle and imbeciles were at the top... I'm sorry. Morons were at the top. I'm sorry. So, when Carrie Buck was tested at the Virginia colony, she actually tested as a moron, which was the highest level. So-

Melissa Murray:

Well, to be clear, the testing is a little shoddy too. So they're using the Simon Benet test, which has since been discredited.

Adam Cohen:

... absolutely. And also it's being administered by Mr. Priddy, who's looking for someone to sterilize. I don't believe one thing about the test. And actually some of the tests are in the records of the colony. And the questions as you might imagine are just crazy. I had trouble answering some of them because they seem to make no sense. But also just even by their own crazy metrics, she did measure as the highest level of moron. So she wasn't an imbecile. Her mother actually had also been registered as a moron not an imbecile.

Adam Cohen:

And then Vivian, the third one, died actually at age six at an age at which it was not possible to really test her intelligence. Although those who knew her as an infant said she was perfectly bright. So that is all completely wrong, that idea that they were in any way imbeciles. The larger point of how did all these people sign on? Again, I think it comes back to this point about the role that progressive's played in the movement, which... I personally enjoyed being uncomfortable about it, because I've written enough stories in which the progressives are the good guys and the conservatives are the bad guys.

Adam Cohen:

And I think sometimes we have to question whether we're always on the right side of everything. And here, eugenics was a movement that was led by people who were more forward looking. So Louis Brandeis was one of the justices on the court who voted with Oliver Wendell Holmes. But when you

looked around, Roger Baldwin, the founder of the American civil liberties union, quite sympathetic to eugenics. Margaret Sanger famously the founder of Planned Parenthood, very sympathetic to eugenics.

Adam Cohen:

And I would explain it in part by saying, there's a strand of progressivism that says, we believe in science and we believe in the perfectability of society. We're the ones who believe that if you build the roads the right way, it will make things better. If you build people better housing, they'll lead better lives. We think that policy can make for a better country and ultimately for happier people. And this was something that in that day, progressives extend it to biology. They said, "Look, if we've learned anything from Darwin, we're all evolving. Why not take that evolution by the hand, help it along and build better people just the way we want to build better cities and build better factories and everything else."

Adam Cohen:

So I think that was the impulse. But of course, it's very frightening when you apply it to this idea of building "better people."

Melissa Murray:

The eight justices all signed on for this. And again, maybe it is completely consistent with their understanding of progressivism, that with just sort of careful cultivation, we actually can become better as a people. Not just the conditions around us, but just actively weeding out the quote unquote on fit among us. But Pierce Butler, who isn't normally regarded as being a progressive on this court during the new deal era, he is one of the four horsemen that consistently votes to strike down Franklin Roosevelt's new deal legislation. But he's the lone dissenter in *Buck V Bell*. And why is that? It seems an odd place for him to depart from his colleagues.

Adam Cohen:

It's a great question. And we'll never truly know the answer because he didn't write a dissent and he never really said why he voted the way he did. But he was in fact, the only Catholic on the court. And as you mentioned, I've written a few books. This is the only book I've ever been invited by the archdiocese of New York city to come talk to one of their groups about. And I knew exactly why, but I was also very glad to go because I wanted to give them props.

Adam Cohen:

It's absolutely true that when folks like Margaret Sanger and Roger Baldwin and Louis Brandeis were on the wrong side of this, American Catholics, largely were on the right side. And so, before we get to Samuel Butler, we get to the earlier stage when legislatures around the country are debating some of these eugenic sterilization laws. And the people who wanted them were the educated and progressive. So in Virginia, it was pushed by men like superintendent Priddy, who you mentioned, who's a doctor who believes that eugenic sterilization will make his job easier of trying to root out mental illness.

Adam Cohen:

In New Jersey when the legislature is debating it, the league of women voters shows up. And would you know that they were on the side of passing eugenic sterilization law. Who shows up on the other side? Catholics. Catholic lay leaders, nuns. And when you look at the states where eugenic sterilization laws

didn't pass some of them like Louisiana, it was absolutely the case that it was Catholics priests, nuns who showed up and made the difference in the legislature, voting them down.

Adam Cohen:

And the Catholics said that at the time that they believed that the value of a human being resides in their soul, the perfect soul that God has created. Not in things like, are you really intelligent? Or are you an alcoholic? Are you lazy? They regarded all of these people as equal before God. And this is one where I think it really did translate into them being on the right side. And a little bit after the Buck V Bell decision, the Pope actually issues a formal and cyclical saying that eugenics sterilization is wrong.

Adam Cohen:

But I think that Butler was tapping into that, that he was, as you say, very conservative about things like new deal legislation. But I don't think he really liked this new fangled, eugenics movement.

Melissa Murray:

So the court upholds this Virginia law eight to one. And the not only uphold the law, they actually uphold the logic underlying it, which is to say they give credit to the entire eugenics movement. And at that point in time, it is not just the sterilization laws that are inflicted with eugenesis thought. So in the same year that Virginia passes the law that authorizes the sterilization of the feebleminded, Congress passes the immigration act of 1924, that sets limits on the entry to the United States of individuals from certain parts of the world.

Melissa Murray:

And the idea here is that, there are some immigrants who are more highly valued than others. So specifically those from Northern Europe are more highly valued than those from Southern Europe, and more Northern European migrants are permitted. And in fact, during the period of the Nazi takeover of Europe, a number of Jews try to gain entry to the United States and are prohibited from doing so because of the quotas that are in place under the immigration act of 1924. The same year in Virginia, the state passes the racial integrity act of 1924, which prohibits intermarriage.

Melissa Murray:

And that law of course famously would be struck down in 1967, Loving versus Virginia. But it too was the product of eugenicists thought, this idea that I'm marrying the wrong person. And in this case, the wrong person was someone of a different race, or namely someone who was not white, if you were white, that could lead to a corrosive impact on the gene pool. And that would be prohibited as well. So when the court upholds the sterilization law, they're also upholding the logic of these other public policies, which really are far reaching and actually endure even longer than these sterilization laws do.

Adam Cohen:

That's exactly right. And the 1924 immigration act was a sea change. Because up until then, we had pretty much unimpeded immigration into the United States. And so the first time that we as a country decide, we're going to clamp down and put some limits on who gets to come into the country. It's striking that because it occurred during this eugenic era, we decided to do it in absolutely racist eugenic ways.

Melissa Murray:

We'd been racist and immigration before, because we had the Chinese exclusion act.

Adam Cohen:

Absolutely. But just the idea that this is a national one that covers really all immigration. We had done it in more targeted and equally offensive ways, but suddenly we're creating an immigration policy for the entire nation, and it's one rooted in eugenics. And the great fear was at that time that there was large immigration of Jews from Eastern Europe and Italians. And the head of the eugenics record office actually is hired by Congress to be a special eugenics advisor to them when they pass this law. And he explains to them how Jews and Southern Europeans are intellectually and in other ways inferior and more likely to be criminals and all that.

Adam Cohen:

That absolutely goes into the setting of the quotas. And the quotas were intentionally set based on the population that that nationality represented in the United States in the 1800s before the large recent waves of immigration, to make sure that many immigrants could come from places like England and Germany, and many fewer from Eastern Europe and Italy. And while I was writing the book, I thought about this a lot. And I had read, there was an article in the New York times, a few years earlier, that found some letter that Otto Frank and Frank's father wrote to the state department repeatedly trying to get a visa to bring his family to the United States. And he was turned out. He never got a visa, of course.

Adam Cohen:

And they get shipped to concentration camps, and Frank dies there in one of them. And it occurred to me for the first time that when I read Anne Frank's diary in grade school, I was taught that Anne Frank died in a concentration camp because the Germans thought the Jews were racially inferior. And I realized in working on the book that she also died in a concentration camp because the US Congress thought that Jews were racially inferior, otherwise she would have been allowed to immigrate.

Adam Cohen:

So absolutely. And the thing about the Virginia law also fascinating. And one thing that struck me about that is, when I told people that I was working on the book, a lot of people at first thought, "Carrie Buck must have been African-American, because that's who they would want to sterilize." And what was so interesting about the way Virginia went about it is, in enacting the genetic sterilization law, the same day that they enacted the so-called one drop rule, the legislature was so racist that their idea of eugenics was really just about lifting up the white race.

Adam Cohen:

Those folks thought that lifting up the black race wasn't even worth it. So they saw these two laws is operating in conjunction. The one drop law made sure that the white race wouldn't be "polluted" by the black race. And then the eugenics law was designed to make the white race better by getting rid of people like Carrie Buck, the so-called poor white trash and making the white race more elite. So you're right. There was a lot of this stuff going on and the Supreme Court was really giving a green light to all of it.

Melissa Murray:

And in the sense, the United States is almost again exceptional. They really pioneered eugenics and exported it to the world. And it's so interesting that you mentioned, Ann Frank and her family's trying to gain refuge in the United States and being turned down. Hitler actually praises the immigration act of 1924. So we actually teach the Germans all about eugenics and they actually deploy it to great effect during the Holocaust.

Adam Cohen:

That's right. And actually, they modeled their racial laws, the Nuremberg law and laws like that on the American eugenic laws, which were a few years ahead of them. They were actually corresponding with the eugenics record office and giving the head of it. The University of Heidelberg gave him a special award in 1937, which was after they had already purged all the Jews from their faculty. So they were definitely looking to America as a model and all these things and striking the degree to which at least some of the eugenics were happy to help the Nazis out.

Melissa Murray:

So let's update the story and bring it into the future. So, Carrie Buck, as you explained, dies in a home in 1983. She's eventually released from the colony for the feebleminded. She goes on to marry twice, but she has been sterilized. She's never able to have children, her daughter, Vivian, who she bore before she was actually sterilized dies at the age of six. So she dies without children. And this is something that really weighs heavily on her for the rest of her life, until she dies in 1983.

Melissa Murray:

The legacy of Buck V Bell, I think, continues to be felt in lots of different ways. Although we don't teach this case. As you note in constitutional law that frequently, I think it usually comes up as a preface to talking about Skinner versus Oklahoma, which is the case where the court strikes down under equal protection a similar sterilization law that Oklahoma has passed that requires the sterilization of criminals who have been thrice convicted of crimes of moral turpitude.

Melissa Murray:

That case invalidates the Oklahoma law on equal protection, but never actually overrules Buck versus Bell. So in fact, there's actually a quite lengthy history in the United States and particularly in the South of continued sterilization. So in 1973, three sisters, the Ralph sisters, are taken from their home. One of them manages to hide in a closet and she escapes this fate, but the two other sisters are taken by officers of the public welfare office, and the girls are sterilized because their welfare caseworker worries that because they are getting older and developing, that they will become right for sexual activity. And they will have children at an early age and further be a drain on the fiscal resources of the state.

Melissa Murray:

So it recalls Holmes' point that those who sap the strength of the state are burden, and the least they can do is sterilize themselves to avoid creating a bigger burden for the public more generally. We had the lieutenant governor of Texas suggesting in the midst of Coronavirus that, maybe the older among us should sacrifice themselves to Coronavirus so that the rest of us might continue and survive. And that the market itself might survive. So I think we're seeing odd strains of eugenicists thought pop up in some places that are perhaps unsurprising. But in other places like the Coronavirus for example, where we're getting a sense that there are those among us who might be more highly valued and the rest of us should be sacrificed for them.

Adam Cohen:

Absolutely true. And to make it even a little bit tougher, you're right that when someone like the lieutenant governor of Texas says something like that, we can all just wag our finger. But right now hospitals around the country have ethicists that are going through the very difficult issue of trying to decide if there are not enough ventilators for all the patients they see with Coronavirus, how do they decide? And in Europe we're hearing stories where absolutely, reportedly doctors are saying we're giving it to the younger ones or the healthier ones are the ones we think have more reason to live, even if it's already attached to someone else. So these are issues that are very much of the moment.

Melissa Murray:

Well, about a year ago though, you got some special attention from the Supreme Court, because the court decided a case Planned Parenthood versus Planned Parenthood, which challenged an Indiana abortion law. And we've talked about this case endlessly on strict scrutiny, but the court actually upheld one provision that was challenged, but denied certiorari on the other provision, which was a law that prohibited abortion if abortion was being used for sex or race selection, or to deal with the possibility of a disability or a birth defect.

Melissa Murray:

And Justice Clarence Thomas wrote a concurrence, where he very much objected to the court's denial of cert on what he called the sort of eugenic abortion provision. And he consciously invoked this history of eugenics, connected it to the history of birth control and Margaret Sanger. And then in turn connected that history to abortion and called for the court to think about abortion in terms of eugenics. And he says, this history is obviously not the same, but if contraception and birth control could be right for eugenic purposes, so could abortion. And he specifically quoted your book, Imbeciles, for the proposition that the eugenics movement had been alive and well in the United States that it had been invoked by the court and credited by the court in Buck V Bell. And that this eugenic thought could be resurrected through the use of abortion and other reproductive technology.

Adam Cohen:

He did. And it was a surreal day. I hadn't really been paying attention to the court that morning. And to be contacted by a bunch of reporters and some editors, "Do you want to respond to what Clarence Thomas said about you?" I'm like, "What did he say about me?" But yeah, he did. He relied a lot on Imbeciles and actually also on an article I wrote for a Harvard magazine about Harvard University's very uncomfortable history of involvement with eugenics. There are a couple of things I think to say about his use of the history.

Adam Cohen:

First of all, the use of it is wrong. Eugenics means something very specific. Eugenic movement was the idea, as we've discussed, that science can be used to uplift the human race by carefully selecting which genes we want to reproduce. That's not what abortion is. And in a statute like the Indiana law, it applies to a woman who's trying to decide whether she wants to bring a pregnancy to term. I don't need to tell you, there are many factors that, of course, go into that decision. I don't think anyone really believes that the women of America, as they're deciding whether or not they want to bring their own pregnancy to term, are motivated by some abstract idea about how we can uplift the human race by choosing the right genes.

Adam Cohen:

So it's just not at all a right fit. These individual abortion decisions are not eugenics. The larger point though, I think is something very cynical going on. I think that the right to life movement, I would say, it's a bit stalled nationally, even if it maybe getting more success on the court. I just don't think that the American people are buying the right to life line as much as they used to. And to me, this seemed like a very cynical case of Clarence Thomas trying to rebrand anti-abortion laws.

Adam Cohen:

Okay. If you don't believe the story we've been telling you for so long that it stops a beating heart, that this is a human being and all that, what if we give it this progressive gloss and say, "Hey, you know what abortion is really about? It's really about eugenics. And therefore it's really about sort of racism and discrimination." I'm not sure they even believe it, but I think they see it as maybe a new front to open on this war.

Melissa Murray:

So I think that's exactly right. I mean, the right to life movement has really tried to articulate a number of different lanes through which to oppose reproductive rights. One of them is this idea of protecting women's health. And I think in just the last month, at least some members of the court have seemed quite skeptical about whether regulations on abortion really do serve an interest in promoting women's health. We've seen this discussion of the right to life, the promotion of fetal life. And that has been, I think, perhaps more successful.

Melissa Murray:

But still, also, I think a lot of skepticism about whether one should prioritize the woman over the fetus. But this opens up an entirely new lane. That again makes common cause, I think, with other progressive constituencies. So in his concurrence in Planned Parenthood, Justice Thomas not only speaks of eugenics, but talks about this idea of abortion being used for sex selection in certain Asian countries.

Melissa Murray:

He also talks about the use of abortion in places like Iceland, for example, where it seems to have completely eliminated the prospect of certain disabilities, including down syndrome. And this is obviously something that the disability rights community here in the United States has been very attentive to and very vocal about. And then finally, he notes the broad racial disparity in abortion rates in the United States. And specifically speaks of the fact that black women are more likely or more likely to have abortion. Um, they're just proportionately overrepresented in the pool of women seeking abortions than they are in the general population entirely.

Melissa Murray:

And so part of this I think is a rebranding, but also an attempt to make common cause and perhaps drive a wedge in the right to choose constituency. I mean, all of these groups might be in the right to choose. But as you say, this seems wildly out of step with the eugenics movement that you detail in Imbeciles. I mean, it seems striking to me that this whole court case is launched because Carrie Buck does not have enough control over her body that she can prevent the Dobbs' nephew from raping her. That she does not have enough control over her body, that she can stop the state of Virginia from sterilizing her because they think it is cheaper than simply keeping her confined in the colony for the rest of her life.

Melissa Murray:

I mean, that's the whole cost benefit analysis that they engage in. The state could keep her for the rest of her life on this colony and pay for her and her care, or they can sterilize her and allow her to go back into society, perhaps marry and have someone else take care of her, absorb the cost of her dependency. But the state doesn't have to. And so part of, again, the whole history of eugenics really seems to be about muting, the state muting control over a woman's body at a point where she might want to exert some control herself.

Adam Cohen:

I think that's right. I mean, I think of eugenics as being a top down movement, not a bottom up. So if a lot of the things that Justice Thomas is worried about, if the state were doing it, if the state said, anytime there's a fetus that might have a disability or something, we're going to require you to have an abortion, that to me sounds a lot like eugenics, and some of the other categories as well. But again, if it's a woman making her own decision about the life she wants to lead and the pregnancy she wants to bring to term or not, that bottom up decision, to me, that's not eugenics at all. That's freedom of choice and trying to not be regulated by the state.

Melissa Murray:

So where do we go now with this conversation? So eugenics is back in the ether. This opinion that in June of 2019 seemed off the wall, and no one signed on to it, but Justice Thomas. Now it seems increasingly on the wall. It's been referenced by a number of lower courts. Judge James Ho from the Fifth Circuit has mentioned it specifically in an abortion case, Judge Alice Batchelder of the Sixth Circuit also mentioned it in a dissent from a Sixth Circuit case on abortion. Other lower courts have referenced it. It seems like it's becoming increasingly on the wall.

Melissa Murray:

And here you are, perhaps one of the foremost experts on the history of eugenics in the United States. What do you say as this theory gets more and more credence? I mean, almost like the junk science that's at the heart of the eugenics movement.

Adam Cohen:

That's exactly right. And I think we need to speak out about it. Point out that it's a misuse of history. And clearly what Clarence Thomas was trying to do was to use the prestige of history and of people having thought about the mistakes of the past, and try to marshal them for his own purposes today. And I think we just need to speak out and say that it's a misuse and it's a misrepresentation and it's an attempt to sell confusion for political reasons. But I would also just... To maybe make the whole issue more complicated, I would say that even if we succeed in beating back Clarence Thomas, this is going to be a big issue in many complicated ways going forward that are actually not so easy to resolve.

Adam Cohen:

And when the book came out, I wrote an op ed piece about it, asking the question whether there could be such a thing as good eugenics. And that was about the CRISPR technology that is coming out. And the idea that, increasingly we're going to be able to edit genes. And I would say even if we end up pushing aside the Clarence Thomas's of the world, just right thinking people are going to have a lot of hard

choices to make. So, I don't believe that eugenics is necessarily a simple question, and that it's always the answer that we don't want any eugenics.

Adam Cohen:

And in that piece, I actually talked about how suppose we have the technology with CRISPR to edit out one gene, that is a gene that does exist for like Huntington's disease, that that one gene can mean that if your child gets it 50, 50 chance, they're going to die early, but also completely horrible death. What if we could just pluck out that one gene? And I think that I would say that's not strictly eugenics if we leave the choice at the individual. But these are really going to be difficult decisions for all of us. And I think we need to start wrestling with them now, because the CRISPR technology is being used now and China is ahead of us.

Adam Cohen:

I mean, I think that between that and immigration and some of the crazy comments that have come up in the political sphere in recent years, there's going to be a lot of talk about eugenics in all different directions. And I think some of the answers are easy, but probably some of them are not also.

Melissa Murray:

Right. I mean, the whole political campaign in 2016, the presidential campaign, seemed to be a eugenics like. Thinking about Mexico sending us their rapists and their criminals, not their scientists. I mean, that strikes at eugenesis thought. The whole conversation around "anchor babies" also, I think sort of speaks to that as well.

Adam Cohen:

And of course, that horrible comment made by the Iowa Republican Congressman, Stephen King, that the immigrant babies shouldn't replace the white babies, or however exactly he phrased it that people rightly understood that was absolutely eugenics. So yeah, it's going to be with us, I think, quite a lot. I think that we need to think about what exactly is wrong with it and make sure that people aren't using the idea of it being wrong for their own purposes as Clarence Thomas is, but also maybe thinking about are there ever any ways in which we believe science can be used in this fear, or are we in danger of making the same mistakes that our progressive predecessors did a century ago. There's a lot more of it coming, I think.

Melissa Murray:

You mentioned Steve King's remarks about replacement theory. This idea that foreign born babies are replacing native born American babies. This actually goes back to some of the history, I think that you say that Justice Thomas gets wrong when he attempts to link the birth control movement and Margaret Sanger and eugenics to abortion. So as you note in this book, Margaret Sanger was a very complicated figure. She is the leader of the birth control movement in the United States in the early 20th century. She is the founder of what is now known as Planned Parenthood Federation of America.

Melissa Murray:

And as you say, she favored eugenics for a wide variety of reasons, and it informed her understanding about the need to have broader access to contraception. But that is a very different history from the history of criminalizing and making prohibitions on access to abortion in the United States. So access to

abortion in the United States is relatively open until after the civil war when there is a push to criminalize it, that's led largely by doctors, by the medical elite, trying to run out midwives and faith healing women out of their practice and make it more professionalized, essentially.

Melissa Murray:

And one of the things that the doctors talk about is the whole idea that there has been an influx of immigrant women, and now these newly freed African American women, and they are incredibly fecund, and they're having children at "alarming rates," and indeed are outstripping native, born American women who are contracepting and are using abortion to limit the sizes of their family so that their workload is actually more manageable. And the effort to criminalize abortion is in part a kind of eugenicist idea, but works the other way. It's the idea that we shouldn't allow abortion because we want white supremacy, we want white women to outstrip these other women in terms of the children that they're having.

Melissa Murray:

So Justice Thomas's right, there's eugenics there, but not in the way that he suggests in *Box versus Planned Parenthood*. I mean, it's actually completely inverted and that history is completely obscured.

Adam Cohen:

Right. I think that's a great point. I think it's all true and obviously doesn't fit his purposes. So yes, he's not going to present it that way.

Melissa Murray:

Well, so you are here and you've seen your book manipulated, perhaps repackaged for a particular purpose. You're exactly right. The one thing that the opinion does is make clear that these questions of eugenics are not simply consigned to the dustbin of history. They're going to be relevant and in a lot of different ways, going further, certainly, in this abortion debate, where it's gained new life, but also in this question about genetic theory, about designer genes, about whether or not we can actually use eugenics for social good, this idea of good versus bad eugenics.

Melissa Murray:

And here you are on the forefront of all of it. And I think one of the things that *Imbecile* speaks of, or at least gestures toward is, any kind of technology will often be pioneered by the elites. And it's really the people on the bottom who pay the price as the kinks get worked out. And that is certainly an idea that gets ventilated in your most recent book, *Supreme Inequality*. This idea that the elites here are the elites of the Supreme Court often work out some of their theories in ways that are really burdensome to those on the bottom of society. So I just wanted to give you an opportunity to say something about *Supreme Inequality*, since it's now out there in hardcover alongside *Imbeciles*, and maybe give us a sense of what the takeaway from that book was as well.

Adam Cohen:

Yeah. I think that your connection of the two books is exactly right. Because I spent a lot of time writing *Imbeciles*, thinking about just what you're talking about, the power dynamics that were used against *Carrie Buck* at every stage in the legal process, and then certainly by the Supreme Court. And it did occur to me that this was not a dynamic that was relegated to the 1920s. When I thought about the modern

court, that's what they've been doing for the last 50 years. And the idea of Supreme Inequality is... I grew up in the shadow of the Warren court, as I think many of us did. And the war in court gave us our idea of what the Supreme Court and the law could be as a force for fighting for the underdog and making a fairer society.

Adam Cohen:

But that really ended very abruptly in the late 1960s and early 1970s. And I wanted to talk about what it was replaced by. And what we've had since then is, since Nixon very consciously took over the Warren court and made it a conservative court, we've had 50 years of a conservative court, 50 years of conservative chief justices from Burger to Rehnquist to Roberts with a conservative majority behind them. And that's so much unlike the other branches of government.

Adam Cohen:

In that time, we've had conservative presidents and liberal presidents. We've had Democrats and Republicans in charge of each branch of Congress. During that entire 50 years, we've had a conservative court with a conservative agenda. And I think that the through line running through it, as you suggest really is, that in every area they've consistently sided with the rich and powerful against the poor and the weak. And I actually tried to show that it had a more systemic effect, which is, when we think about the inequality in our society today, particularly the economic inequality, which has become such a big issue, big issue in the presidential election. We think about it as being something created by either larger forces like globalization and jobs moving overseas, and automation replacing jobs.

Adam Cohen:

Or by decisions made by the president and by Congress. We don't really associate with the Supreme Court. And I tried to show very systematically in the book how if you look at the last 50 years of what this conservative court has been able to do because of its monopoly on power, it has been a driving force in inequality. And when we look at how much richer the rich become and how much the middle class has hollowed out and how badly the poor are doing, so much of it is a direct result of decisions of the court.

Melissa Murray:

I think that's all we have time for today. I want to thank Adam Cohen for being a guest. We are so glad to have you to have you talk about this really terrific book. We hope that listeners will take this time where we all have a little more time on our hands, just because of these circumstances, to check out imbeciles the Supreme Court, American eugenics and the sterilization of Carrie Buck. As always at Strict Scrutiny, we are so grateful to the team that helps us to get this podcast into your ear holes, especially Melody Rowell, who's doing this producing for us and Eddie Cooper who has pioneered our haunting intro music.

Melissa Murray:

Thank you to them for all of their work. And thanks to all of you for taking the time to listen, even while everything is so uncertain. We hope you all are staying well and safe. And we look forward to hearing you, seeing you, being with you in the future.