

July 2015

The Soldier and the Imbecile: How Holmes's Manliness Fated Carrie Buck

John Kang

Please take a moment to share how this work helps you [through this survey](#). Your feedback will be important as we plan further development of our repository.

Follow this and additional works at: <http://ideaexchange.uakron.edu/akronlawreview>

 Part of the [Law and Gender Commons](#)

Recommended Citation

Kang, John (2014) "The Soldier and the Imbecile: How Holmes's Manliness Fated Carrie Buck," *Akron Law Review*: Vol. 47 : Iss. 4 , Article 6.

Available at: <http://ideaexchange.uakron.edu/akronlawreview/vol47/iss4/6>

This Article is brought to you for free and open access by Akron Law Journals at IdeaExchange@UAkron, the institutional repository of The University of Akron in Akron, Ohio, USA. It has been accepted for inclusion in Akron Law Review by an authorized administrator of IdeaExchange@UAkron. For more information, please contact mjon@uakron.edu, uapress@uakron.edu.

**THE SOLDIER AND THE IMBECILE: HOW HOLMES’S
MANLINESS FATED CARRIE BUCK**

*John Kang**

I. The Facts of *Buck v. Bell* 1056
 II. Manliness and the Right to Decide..... 1058
 III. The Soldier’s Faith 1062
 IV. *Buck v. Bell*, Redux..... 1067

“[I]n the midst of doubt, in the collapse of creeds, there is one thing I do not doubt [and that is the] faith . . . which leads a soldier to throw away his life in obedience to a blindly accepted duty,”

—Oliver Wendell Holmes, “The Soldier’s Faith,” Memorial Day Speech, Harvard University (1895)¹

“Three generations of imbeciles are enough.”

—Oliver Wendell Holmes, *Buck v. Bell* (1927)²

The Supreme Court case of *Buck v. Bell*, while never overturned, endures in infamy among those who know it. For in that case the Court had tacitly sanctioned what Adolph Hitler made unequivocally evil a few years after the Court’s adjudication: eugenics.³ However, the case was only partly about that. Indeed, I will argue in this essay that the Court’s opinion, written by Justice Oliver Wendell Holmes, turned perhaps more significantly on the trope of manliness as an organizing theme. In a

* Professor of Law, St. Thomas University. J.D., UCLA; Ph.D., University of Michigan. Many thanks to Professor Tracy Thomas for inviting me to participate in the *Akron Law Review* symposium. I am grateful to Marquette Law School, which had invited me in 2013 to present some of the ideas in this essay.

1. 3 OLIVER WENDELL HOLMES, *The Soldier’s Faith*, in THE COLLECTED WORKS OF OLIVER WENDELL HOLMES: COMPLETE PUBLIC WRITINGS AND SELECTED JUDICIAL OPINIONS OF OLIVER WENDELL HOLMES 486, 487 (Sheldon M. Novick ed., 1995) [hereinafter HOLMES, *The Soldier’s Faith*].

2. *Buck v. Bell*, 274 U.S. 200, 207 (1927).

3. See generally STEFAN KÜHL, THE NAZI CONNECTION: EUGENICS, AMERICAN RACISM, AND GERMAN NATIONAL SOCIALISM (1994).

sense Holmes was filtering the facts of *Buck* through his own ordeals and triumphs with manliness, particularly as they were experienced through his service as a combat soldier in the Civil War.

I. THE FACTS OF *BUCK V. BELL*

Pick any random Supreme Court case. If you dig deeply enough, you will find that the case is pregnant with a rich story whose details were occluded or bluntly ignored by the Court in its formal recounting of the facts. Perhaps more so than most such cases, the back story of Carrie Buck is especially disconcerting. Carrie appeared to have been raped by a nephew of her foster parents when she was only sixteen.⁴ Ashamed of her circumstances, her foster parents marched her to a mental institution where they could hide her.⁵ The story of the eighteen-year-old Carrie Buck is one that deserves telling, and while ignored during most of her life, it has been told ably, many decades later, by Paul Lombardo.⁶ I see little value, therefore, in rehearsing what those scholars have done already. I want to focus instead on the other central figure in *Buck*, Justice Oliver Wendell Holmes, who had authored the Supreme Court opinion upholding Virginia's decision to forcibly sterilize Carrie Buck.⁷

Let me begin first with the facts, not as they existed in some ideally objective state, but as Holmes folded and fashioned them in his legal opinion. For it is his rendering of them, however misinformed and jaundiced, that worked tendentiously to justify his decision to compel Carrie to undergo sterilization.⁸ Carrie's story takes place in Virginia's state-run mental care facility—or, as it called itself, the State Colony for Epileptics and Feeble Minded.⁹ Holmes briskly introduced Carrie Buck as an eighteen-year-old “feeble-minded white woman” who had been committed by her adoptive parents to said Colony.¹⁰ By describing Carrie as “feeble-minded,” Holmes immediately deprived her of some measure of autonomy over her fate; for one who was feeble-minded required a guardian to act in her best interest.¹¹ In Holmes's opinion, such guardianship properly belonged to the Virginia state legislature.¹²

4. PAUL A. LOMBARDO, THREE GENERATIONS, NO IMBECILES: EUGENICS, THE SUPREME COURT, AND *BUCK V. BELL* 139-40 (2008).

5. *Id.* at 120.

6. *See* LOMBARDO, *supra* note 4.

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

8. *Id.*

9. *Id.* at 205.

10. *Id.*

11. *Id.* at 205-06.

12. *Id.* at 207.

It had passed a law in 1924 that permitted the state to sterilize “mental defectives” who suffered from “insanity” or “imbecility.”¹³ The law applied to both genders, and its rationale hinged on the assumption that such defectiveness was hereditary.¹⁴ Carrie, according to the State Colony, was “the probable potential parent of socially inadequate offspring, likewise afflicted. . . .”¹⁵

Carrie challenged the law as violating her due process and equal protection clause rights.¹⁶ Holmes rejected her challenge on both grounds. There were plenty of safeguards for Carrie’s rights under due process, he reassured.¹⁷ Most obviously, the superintendent of the State Colony that housed Carrie could not unilaterally subject her to the sterilization.¹⁸ He had to present a detailed petition for sterilization to the Colony’s board of directors.¹⁹ The board would then invite the inmate to attend the proceedings and to contest the superintendent.²⁰ If the board granted the superintendent’s request, the inmate had available several levels of appeal, including judicial appeal.²¹

As for the substance of the law, this, too, was constitutional according to Holmes.²² It was here that Holmes issued his most memorable pronouncements. Holmes was quite sure that Carrie would not suffer serious detriment due to the sterilization.²³ If anything, Holmes agreed with the Virginia superintendent that Carrie’s own welfare “will be promoted by her sterilization.”²⁴ “It is better for all the world,” Holmes announced, “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.”²⁵ He did not marshal any evidence for these provocative claims, nor did he attempt to elaborate. Instead, Holmes’s opinion concluded with an unforgettable indictment coursing with moral disgust: “Three generations of imbeciles are enough.”²⁶

13. Buck v. Bell, 274 U.S. 200, 207 (1927).

14. *Id.*

15. *Id.* at 205, 207.

16. *Id.* at 205.

17. *Id.* at 206.

18. *Id.*

19. Buck v. Bell, 274 U.S. 200, 206 (1927)

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* at 206-07.

24. *Id.* at 206.

25. Buck v. Bell, 274 U.S. 200, 206 (1927).

26. *Id.*

Three generations of imbeciles are . . . *enough*. Holmes read as though it were *his* patience, not poor Carrie's, which was being tried by the circumstances that brought the two parties together—what prompted his spike of indignation? We can never know for certain why a judge would say something strange (or, for that matter, I suppose, something mundane). Still, we can try to answer this question by parsing Holmes's prior statements in *Buck*. Recall how he contrasted the respective obligations owed by the mentally feeble and by combat soldiers. "We have seen more than once that the public welfare may call upon the best citizens for their lives," he stated.²⁷ "It would be strange," he said, "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."²⁸ In Holmes's depiction, the soldier was the "best citizen" and, unbidden, the soldier sacrificed himself for the public.²⁹ On the other hand, mental defectives like Carrie did the opposite—they shamelessly sapped the public's resources.³⁰ For Holmes, the former were society's heroes; the latter, its parasites. The least that the imbecile could do for her country, Holmes insisted, was to stop having babies, a far lesser burden than having to risk one's life in war.

A case that was ostensibly about the medical issues of sterilization and mental disability thus pivoted, rather jarringly, on the trope of the combat soldier. In so introducing the soldier as a symbol, Holmes brought to the fore a figure who was both a metaphor and, for him, a lived-identity. I want to explore next why Holmes might have chosen this symbol to order the rhetorical regime in his judicial opinion.

II. MANLINESS AND THE RIGHT TO DECIDE

In his mid-twenties Holmes quit Harvard College without permission and without much regret.³¹ He had something far more important to do, something that would powerfully shape his basic worldview: fight for the North in the Civil War.³² During the war, he would be wounded thrice as a member of the Massachusetts Militia, and

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER OCEAN 26, 45-46 (1993).

32. *Id.* at 26.

on one occasion, he would be nearly killed.³³ Yet the brave young man returned, each time, to join the battle, and he commendably served out his term while many others simply fled or feigned injury to avoid combat.

Like many other Northern soldiers, Holmes joined the Union to end slavery, but for him the chief draw was the opportunity to obtain the mythic manliness of the warrior.³⁴ Consult in this regard the rambunctious letter that Holmes wrote to his mother after he was first wounded in 1861.³⁵ The Oliver Wendell Holmes, formerly of Harvard College, was lying supine in a field hospital after being shot by a Confederate soldier at Ball's Bluff on the Virginia shore.³⁶ Wendell, as his parents called him, was twenty-years-old, the same age as Carrie Buck when Justice Holmes had adjudicated her case.³⁷ Only his first battle, Holmes already felt, or claimed to feel, that he had proved his manliness, and he wished for his mother to know it.

My Dear Mother

Here I am flat on my back after our first engagement—wounded. . .but
I felt and acted very cool and did my duty I am sure. . .³⁸

The brief passage contains a jolting contrast. First, Holmes gives his mother the devastating news: I was “flat on my back.”³⁹ Then, right after, he tries to succor his mother with what he styles as consolation: “. . . I felt and acted very cool and did my duty I am sure. . .”⁴⁰

It was quite the cocksure opening for the young man. Holmes, in his fashion, heartened his mother with news that his manliness had not faltered. That he was lying flat on his back was not a condition of emasculated immobility. It was a posture which indicated that he had endured battle, the grandest baptism of manliness. Self-acclamation was inadequate in Holmes's view, however. More needed to be said, and Holmes sketched for his mother the salient details.

I was out in front of our men encouraging 'em [sic] on when a spent

33. *Id.* at 52, 57, 60-61.

34. *Id.* at 46.

35. OLIVER WENDELL HOLMES, TOUCHED WITH FIRE: CIVIL WAR LETTERS AND DIARY OF OLIVER WENDELL HOLMES, JR., 1860-1864, 13 (Mark de Wolfe Howe ed., 2000) [hereinafter HOLMES, TOUCHED WITH FIRE].

36. *Id.*

37. *Buck v. Bell*, 274 U.S. 200, 207 (1927).

38. HOLMES, TOUCHED WITH FIRE, *supra* note 35, at 13.

39. *Id.*

40. *Id.*

shot knocked the wind out of me & [sic] I fell—then I crawled to the rear a few paces & [sic] rose by help of the 1st Ser^{gt}; & [sic] the Colonel who was passing said “That’s right Mr [sic] Holmes—Go to the Rear” but I felt that I couldn’t without more excuse so up I got and rushed to the front where hearing the Col. cheering the men on I waved my sword and asked if none would follow me when down I went again by the Colonel’s side-⁴¹

His gallantry was the real thing, Holmes suggested. The sergeant and colonel, concerned for the wounded Holmes, had directed him to the rear, but in a cinematically plucky gallop, the greenhorn officer, beholden to his more vaunted standard of manliness, charged again: “. . . I felt that I couldn’t without more excuse so up I got and rushed to the front.”⁴² Here was that exceptional young man who had risked his life and, while wounded, returned lustily to fight, hungry for more; so prodigious was his manliness it seemed.

Fastforward to 1862. Holmes had been shot again and was immobile in a hospital bed.⁴³ At the hospital, he had penned a letter to his mother.⁴⁴ The letter, dated Dec. 12, 1862, described how he had welled up at the terrible sight of his companions trudging back to fight while he lay safely in bed: “I see for the first time the Reg^t [sic] going to battle while I remain behind—a feeling worse than the anxiety of danger, I assure you—Weak as I was I couldn’t restrain my tears—I went into the Hosp. . . listless and miserable.”⁴⁵

Only a miserly cynic would begrudge the genuineness of Holmes’s frustrated lament. For unit cohesion is more than a slogan. Soldiers, unlike civilians, find themselves besieged by a lethal enemy and they are reflexively willing to sacrifice themselves for each other; it is common and inevitable that a powerful mutual affection would bind them over time.⁴⁶ During the war, for example, Holmes had confided in his diary and to his parents how much he loved his fellow-soldiers. But war depletes every soldier and most want to go home, eventually.⁴⁷ Holmes was no different; when he had the chance to reenlist in 1864, he wanted out.⁴⁸ Yet that decision risked his manly honor. Holmes had laurelled

41. *Id.*

42. *Id.*

43. WHITE, *supra* note 31, at 57.

44. HOLMES, TOUCHED WITH FIRE, *supra* note 35 at 74.

45. *Id.*

46. See John M. Kang, *Does Manly Courage Exist?*, 13 NEV. L.J. 467, 476-77 (2013).

47. JOSHUA S. GOLDSTEIN, WAR AND GENDER: HOW GENDER SHAPES THE WAR SYSTEM AND VICE VERSA 258-59 (2006).

48. WHITE, *supra* note 31, at 68-70.

his manliness with ostentation. Now, desiring exit, he risked appearing a coward, or one whose manliness was much less than it seemed, a despoiled status that was barely better than being the former.

How did Holmes attempt to extract himself from this dilemma? By doing what any hypermasculine, self-congratulatory male braggart like he would do: by reasserting his manliness, of course. In a letter dated June 7, 1864, he explained to his mother:

The campaign has been most terrible yet believe me I was not demoralized when I announced my intention to leave the service next winter if I lived so long—I started in this thing a boy I am now a man and I have been coming to the conclusion for the last six months that my duty has changed. . . .⁴⁹

In the letter Holmes insisted that he had earned the right—as a man—to leave the military: “I started in this thing a boy I am now a man and I have been coming to the conclusion for the last six months that my duty has changed.”⁵⁰

A fuller announcement followed in the same letter:

I can do a disagreeable thing or face a great danger coolly enough when I *know* it is a duty—but a doubt demoralizes me as it does any nervous man—and now I honestly think the duty of fighting has ceased for me—ceased because I have laboriously and with much suffering of mind and body *earned* the right which I denied Willy Everett to decide for myself how I can best do my duty to myself to the country and, if you choose, to God. . . .⁵¹

Parse his explanation for withdraw from the militia. Holmes reassured his parents that he could face anything including “great danger,” but “a doubt demoralizes me as it does any nervous man.”⁵² This was a rare concession of humility for Holmes, and he did make a confession of sorts: “and now I honestly think the duty of fighting has ceased for me. . . .”⁵³ But his was no admission of emasculation; it was an explanatory preamble to Holmes’s insistence that he, as a veteran combat soldier, had now obtained the right to think for himself as a man.

Reread the relevant passage: “I honestly think the duty of fighting has ceased for me—ceased because I have laboriously and with much suffering of mind and body *earned* the right which I denied Willy

49. HOLMES, TOUCHED WITH FIRE, *supra* note35, at 142-43.

50. *Id.*

51. *Id.* at 143 (emphasis in original).

52. *Id.*

53. *Id.*

Everett to decide for myself how I can best do my duty to myself to the country and, if you choose, to God—.”⁵⁴ Holmes had *earned* the right to judge for himself because he had *proved* his guts in battle; he was entitled to judge as a man because he had shown in combat that he was one.

Holmes thereby implied that the right of self-direction was not something to which a man was entitled as a matter of course but that it must be purchased through some demonstration of courage. Holmes could hence properly deny the right of self-direction to Willy Everett, a Harvard classmate who had dodged military service for study in England.⁵⁵ As a presumptive coward who had shrugged his civic duties, Everett, Holmes suggested, lacked manly standing to decide what was in his best interests.

This conclusion, brimming with self-assurance, started ironically with Holmes’s admission that he was overcome by *doubt*. Doubt, he had told his mother, “demoralizes me as it does any nervous man.”⁵⁶ And from this premise, Holmes had made his case for abdicating his duties as a soldier. He no longer wanted to be a soldier because he was filled with doubt.

In the next section we look at an older Holmes, thirty-five years after he had written his aforementioned letter to his mother. He would give a famous speech at Harvard College.⁵⁷ The topic of the speech was the combat soldier, but Holmes had no interest in revisiting with his audience the terrible doubt that gripped him as a young officer.⁵⁸ Instead, he had in mind a subject that was the opposite of doubt, as suggested by the title of his speech: “The Soldier’s Faith.”⁵⁹

III. THE SOLDIER’S FAITH

The first letter from Holmes to his mother—the one where he bragged about having dispatched his duty magnificently—was written in 1861.⁶⁰

Thirty-five years pass, and we find an Oliver Wendell Holmes who had lived a full life by then. After his military service, Holmes had

54. *Id.*

55. *Id.*

56. HOLMES, TOUCHED WITH FIRE, *supra* note 35, at 142-43.

57. HOLMES, *The Soldier’s Faith*, *supra* note 1, at 486.

58. *Id.* at 486-91.

59. *Id.*

60. *Id.* at 486.

enrolled in and graduated from Harvard Law School.⁶¹ He had married Fanny Dixwell, the daughter of his high school teacher, in a relationship that would endure for their lifetime.⁶² He had become a law professor at Harvard and a distinguished scholar.⁶³ He then had accepted a judicial appointment on the Massachusetts Supreme Court.⁶⁴

It is at this point in his life as a judge and seven months after his father's death that Oliver Wendell Holmes gave the 1895 Memorial Day Speech to Harvard's graduating class.⁶⁵ One might imagine that Holmes, now fifty-four years old—about a decade removed from retirement for most men—had outgrown whatever affection he had had for the boyish charms of manliness, perhaps even remembering such affection with amused embarrassment. If anything, Holmes's regard for manliness had, over the years, organized itself into an overwrought celebration that was spiked with cranky contempt for effeminacy. And let us be clear: it was *effeminacy*, not femininity that was the object of Holmes's scorn. Femininity, the traditional province of women, is imputed with the virtues of tenderness, love, maternalism, meekness. For Holmes to have condemned femininity would have been for him to condemn these as well. True, effeminacy's etymon—*femi*—derives from femininity, but effeminacy is not graced with femininity's redemptive appeal. Effeminacy is not the condition of being womanly, but being unmanly, with none of the virtues of man *or* a woman. As we will see, effeminacy for Holmes was a vice stuffed with narcissism, materialism, and sloth.

Titled "The Soldier's Faith," Holmes's speech started by taking measure of how the world had changed since he was an undergraduate.⁶⁶ In the 1890s, success in business, not sacrifice in war, had become the emblematic fulfillment of manliness, he bemoaned.

For although the generation born about 1840, and now governing the world, has fought two at least of the greatest wars in history, and has witnessed others, war is out of fashion, and the man who commands the attention of his fellows is the man of wealth.⁶⁷

Holmes did not mean to condemn the pursuit of wealth. What disgusted him was that it seemed to be the only worthy ideal in American society.

61. WHITE, *supra* note 31, at 87-88, 91.

62. *Id.* at 23, 89, 103, 104.

63. *Id.* at 108, 112-13.

64. *Id.* at 255-56.

65. HOLMES, *The Soldier's Faith*, *supra* note 1, at 486.

66. *Id.* at 486-91.

67. *Id.* at 486.

The new generation desired above all, Holmes disdainfully commented, an easy placidity that comes from material comfort: “The society for which many philanthropists, labor reformers, and men of fashion unite in longing is one in which they may be comfortable and may shine without much trouble or any danger.”⁶⁸ The sentiment, Holmes complained, was everywhere. Animal rights activists, socialists, labor unions, and the idle rich—they all condemned suffering, whatever the suffering, as inherently wrong.⁶⁹ In suffering’s place, Americans welcomed hedonism, as they drowned in “literature of French and American humor” while “revolting at discipline, loving flesh-pots, and denying that anything is worthy of reverence. . . .”⁷⁰

He commended war as a needful remedy. More than a political necessity for Holmes, war was an opportunity for moral regeneration. Through war, men found or rekindled that most worthy ideal to govern their lives: manliness. “The ideals of the past for men,” Holmes explained, “have been drawn from war, as those for women have been drawn from motherhood.”⁷¹ According to Holmes, then, today’s gentleman was not the antithesis of the soldier, but the latter’s heir. “Who is there who would not like to be thought a gentleman?” Holmes asked.⁷² “Yet what has that name been built on but the soldier’s choice of honor rather than life?”⁷³ Holmes silently truncated the *gentle* in “gentlemanliness,” leaving only the warrior’s manliness; used thusly, *gentlemanliness* was divorced from its connection to civility and restraint, and hearkened back to its older, pre-liberal meaning in a culture of honor that prized chivalry and duels.⁷⁴

This is not to imply that Holmes relished any form of manly violence. He would have hardly condoned the thuggish misrule of oligarchs or the random sadism of the schoolyard bully. Holmes most valued violence when it was done as an existential enterprise, a test of one’s faith in one’s self—hence the title of his speech, “The Soldier’s Faith.”⁷⁵

In the speech, he confessed his own uncertainty about life and the meaning of death. “I do not know what is true,” Holmes confided, “I do

68. *Id.*

69. *Id.*

70. *Id.* at 489.

71. HOLMES, *The Soldier’s Faith*, *supra* note 1, at 487.

72. *Id.*

73. *Id.*

74. John M. Kang, *Manliness and the Constitution*, 32 HARV. J. L. & PUB. POL’Y. 261, 268-76, 293-97 (2009).

75. HOLMES, *The Soldier’s Faith*, *supra* note 1, at 486.

not know the meaning of the universe.”⁷⁶ Yet there was one thing that he always believed:

. . . in the midst of doubt, in the collapse of creeds, there is one thing I do not doubt, that no man who lives in the same world with most of us can doubt and that is that the faith is true, and adorable which leads a soldier to throw away his life in obedience to a blindly accepted duty, in a cause which he little understands, in a plan of campaign of which he has no notion, under tactics of which he does not see the use.⁷⁷

Purportedly a meditation about faith, the passage is oddly paradoxical. On the one hand, Holmes “in the midst of doubt” held fast a faith in something—the soldier’s manliness.⁷⁸ But this manliness itself seemed to be in the dark: the soldier was marshaled “in a cause which he little understands, in a plan of campaign of which he has no notion, under tactics, of which he does not see the use.”⁷⁹ How could Holmes then turn to the soldier for inspiration?

He could do so, he claimed, because a true soldier never relinquished his faith in *himself*. “Most men who know battle know the cynic force with which the thoughts of common-sense will assail them in times of stress; but they know that in their greatest moments faith has trampled those thoughts under foot.”⁸⁰ These men “who know battle” were probably a minority among the well-heeled, mixed-gender audience listening attentively to Holmes on the Harvard campus.⁸¹ So Holmes had them imagine what combat might be like in order to gain a depth of feeling about the incredible faith required of a soldier.

Picture yourself, he said,

. . . in line, suppose on Tremont Street Mall [not far from Harvard], ordered simply to wait and to do nothing, and have watched the enemy bring their guns to bear upon you down a gentle slope like that from Beacon Street, have seen the puff of the firing, have felt the burst of the spherical case-shot as it came toward you, have heard and seen the shrieking fragments go tearing through your company, and have known that the next or the next shot carries your fate. . . .⁸²

Or, suppose:

76. *Id.* at 487.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. HOLMES, *The Soldier’s Faith*, *supra* note 1, at 487.

82. *Id.* at 487-88.

[Y]ou have ridden by night at a walk toward the blue line of fire at the dead angle of Spottsylvania, where for twenty-four hours the soldiers were fighting on the two sides of an earthwork, and in the morning the dead and the dying lay piled in a row six deep, and as you rode have heard the bullets splashing in the mud and earth about you, . . .⁸³

Against these grotesque scenarios,

[i]f you have had a blind fierce gallop against the enemy, with your blood up and a pace that left no time for fear, if, in short, as some, I hope many, who hear me, have known, you have known the vicissitudes of terror and of triumph in war, *you know that there is such a thing as the faith I spoke of.*⁸⁴

Holmes continued, “You know your own weakness and are modest; but you know that man has in him that unspeakable somewhat which makes him capable of miracle, able to lift himself by the might of his own soul, unaided, able to face annihilation for a blind belief.”⁸⁵

It was in combat that said belief would be tested as a manly virtue. And Holmes unequivocally promised that against staggering odds the soldier was “capable of miracle.”⁸⁶ By this, Holmes did not mean to suggest man was capable of surviving the impossible. For manliness was not measured by whether the man himself survived. Manliness was measured by its willingness to exert everything that it had to the fullest such that the “might of [the soldier’s] own soul, unaided, [is] able to face annihilation for a blind belief.”⁸⁷

The point of combat, for Holmes, was not necessarily to win, but to test his mettle, his manliness. Holmes summarized this mindset in a passage worth quoting in full:

That the joy of life is living, is to put out all one’s powers as far as they will go; that the measure of power is obstacles overcome; to ride boldly at what is in front of you, be it fence or enemy; to pray, not for comfort, but for combat; to keep the soldier’s faith against the doubts of civil life, more besetting and harder to overcome than all the misgivings of the battle-field, and to remember that duty is not to be proved in the evil day, but then to be obeyed unquestioning; to love glory more than the temptations of wallowing ease, but to know that one’s final judge and only rival is oneself; with all our failures in act and

83. *Id.* at 488.

84. *Id.* (emphasis added).

85. *Id.*

86. *Id.*

87. HOLMES, *The Soldier’s Faith*, *supra* note 1, at 488.

thought, these things we learned from noble enemies in Virginia or Georgia or on the Mississippi, thirty years ago; these things we believe to be true.⁸⁸

The point of manliness lay not necessarily or chiefly in political victory but in cultivating a *faith* in one's manliness, a faith whose value was only measured by its ability to endure terror and hardship. Thus, Holmes implored men "to pray, not for comfort, but for combat" and "to love glory more than the temptations of wallowing ease."⁸⁹ So conceived, Holmes was grateful for "noble enemies in Virginia or Georgia or on the Mississippi" for having taught him about manliness by trying to kill him.⁹⁰

From this scene of battle, we return to where we started, the enclosed universe of words that was Justice Holmes's opinion in *Buck v. Bell*.

IV. BUCK V. BELL, REDUX

In this essay, we have seen the soldier as symbol perform three functions in the thought of Oliver Wendell Holmes.

First: The symbol of the soldier organized a coming-of-age story about how a Harvard undergraduate found manhood in battle. In his 1861 letter, Holmes had eagerly informed his mother that, although he was wounded by shrapnel and lying flat on his back, he had distinguished himself as a soldier ("I felt and acted very cool and did my duty I am sure").⁹¹ Even as his colonel told him to rest behind the lines, young Holmes rushed to the front with saber in hand.⁹²

Second: The soldier as trope underwrote a philosophical statement about when a person was entitled to make life-altering decisions. Having fought and nearly died in battle, Holmes had insisted to his mother in 1864 that he had earned the right to withdraw from service when his formal commitment had expired.⁹³

Third: The soldier was an object of unparalleled veneration. In his late middle age, Holmes had presented to the public an image of the soldier as existential figure.⁹⁴ For Holmes, the soldier had inhabited a world devoid of religious and moral meaning. The only thing that

88. *Id.* at 490.

89. *Id.*

90. *Id.*

91. HOLMES, TOUCHED WITH FIRE, *supra* note 35, at 13.

92. *Id.*

93. *Id.* at 142-43.

94. See HOLMES, *The Soldier's Faith*, *supra* note 1, at 486-91.

Holmes could believe in was the soldier and his faith in himself. Yet this was no mere exercise in narcissism, for the soldier was sacrificing himself for his nation and all those who could not, or would not fight to defend it.

The three images do not form a cohesive triptych. The first is a vindication of Holmes's manhood. But the second is an attempt, a somewhat ungainly attempt, to opt out of the very war into which he had ostensibly relished. The third appears to be a partial indulgence of fantasy, or a bid to construct a sort of mythologized conceit. Here was a fifty-four-year-old Holmes—he who had been so overwhelmed by doubt as a young man that he had insisted on leaving the very military that he had venerated—paying lavish homage to the inviolable faith of the soldier.

All three accounts of the soldier, however, worked against Carrie Buck. Return to the lines from *Buck* authored by Holmes in 1927 that had impelled our brief excursus into the eminent jurist's life.

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.⁹⁵

The juxtaposition may have appeared peculiar at first, the combat soldier and the feckless “imbecile.”⁹⁶

In light of the material I have presented, we can begin, albeit with a dollop of skepticism and caution given that mine is a first pass only, to speculate about why Holmes had said what he did. Holmes had penned his *Buck* opinion in 1927 when he was 86 years old.⁹⁷ Several decades had drifted since he had given his Memorial Day Speech at Harvard in 1893; even more time had passed since he had written his mother, initially lauding his own achievements in battle, and then later, defending his decision to quit.⁹⁸ Yet these events can help us to make some preliminary sense of why Holmes wrote what he did in *Buck*.⁹⁹

Start with his letter, the first one, where he extolled his feats. Holmes had informed his mother:

Here I am flat on my back after our first engagement—wounded but I

95. *Buck v. Bell*, 274 U.S. 200, 207 (1927).

96. *Id.*

97. *Id.* at 205.

98. HOLMES, *The Soldier's Faith*, *supra* note 1, at 486.

99. *Buck*, 274 U.S. at 205.

felt and acted very cool and did my duty I am sure.¹⁰⁰

Holmes wrote these words when he was twenty. When he adjudicated *Buck v. Bell*, Carrie Buck was two months shy of her twentieth birthday.¹⁰¹ Holmes's coming of age as a man had been forged in combat; Carrie, nearing twenty, was living in a mental hospital and required care from the state. Young Holmes had done "his duty," while Carrie belonged to that group "who . . . sap the strength of the State" and who threaten to "swamp" society "with incompetence."¹⁰²

Then there was the second letter in which Holmes had justified to his mother his decision to exit the military. He had written:

I have laboriously and with much suffering of mind and body *earned* the right which I denied Willy Everett to decide for myself how I can best do my duty to myself to the country and, if you choose, to God—
¹⁰³

For Holmes, the right to make the most basic decisions about one's life had to be earned, preferably through heroic service to country; and according to Holmes, he had indeed earned it. Unlike those cowards like Willy Everett. And certainly not those mental defectives like Carrie Buck. In fact, the latter was perhaps more contemptible in Holmes's eyes. For while Everett had bided his time in England during the war, Carrie, according to Holmes's account, had parasitized off of society back home. So even as her purported deficiency precluded her from deciding for herself, one cannot help but think that Holmes was also influenced by his assumption that a person's right to think for herself was measured in large part by whether she had contributed to society.

Perhaps considerations of sympathy should have moved Holmes, but one must remember that Holmes's moral universe was permeated by doubt, a point that brings us to the last item under review, Holmes's Memorial Day speech. His words, excerpted once more:

. . . in the midst of doubt, in the collapse of creeds, there is one thing I do not doubt, that no man who lives in the same world with most of us can doubt and that is that the faith is true and adorable which leads a soldier to throw away his life in obedience to a blindly accepted duty, . . .
¹⁰⁴

100. HOLMES, TOUCHED WITH FIRE, *supra* note 35, at 13.

101. *Buck*, 274 U.S. at 205.

102. HOLMES, TOUCHED WITH FIRE, *supra* note 35, at 207.

103. *Id.* at 143.

104. HOLMES, *The Soldier's Faith*, *supra* note 1, at 487.

Note the arched contrast. Holmes lives, he says, in a world absent legitimate objects of veneration; for him, we are condemned to live in a universe of existential doubt, a universe probably devoid an inviolable moral principle. The only thing that inspires Holmes's moral belief is the soldier. And the only reason it does so is because the soldier, in all of his symbolic ideal, devotes himself to fulfilling the dangerous commands of his superior, commands whose purpose he does not understand and never will.

If the universe was bereft moral meaning, and the soldier's heroic sacrifice was the only thing (or main thing) that bore such meaning, Holmes surely would have no qualms about ordering Carrie Buck to undergo the sterilization. Enduring such compulsion will not imbue her with the soldier's heroism, of course. Quite the opposite, actually: By comparing Carrie's abject need for care with the soldier's courageous sacrifice, Holmes could treat her with moral contempt, something that was not forbidden in a universe where, Holmes said, creeds, including creeds founded on empathy, could "collapse."¹⁰⁵

105. *Id.*