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## Disabling Lawyering: *Buck v. Bell* and the Road to a More Inclusive Legal Practice

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## BOOK NOTICE

### DISABLING LAWYERING: *BUCK V. BELL* AND THE ROAD TO A MORE INCLUSIVE LEGAL PRACTICE

*Jacob Izak Abudaram\**

DEMYSTIFYING DISABILITY: WHAT TO KNOW, WHAT TO SAY, AND HOW TO BE AN ALLY. By *Emily Ladau*. New York: Ten Speed Press. 2021. Pp. 167. \$16.

THREE GENERATIONS, NO IMBECILES: EUGENICS, THE SUPREME COURT, AND *BUCK V. BELL*. By *Paul A. Lombardo*. Baltimore: Johns Hopkins University Press. 2022. Pp. xvi, 404. \$34.95.

#### INTRODUCTION

Make no mistake: eugenics never left us.<sup>1</sup> While the early twentieth-century version of it centered on the elimination of “feble-mindedness” and lowering taxes for nondisabled people,<sup>2</sup> today it shows up in conversations around who to save during crises,<sup>3</sup> immigration policy,<sup>4</sup> population control,<sup>5</sup> and

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\* J.D. Candidate, May 2023, University of Michigan Law School. I am grateful to Elena Meth and Gabe Chess for challenging me to make this piece stronger and clearer. Thank you to all *MLR* Executive Editors past and present: EEs are the backbone of the *Michigan Law Review*. Thank you also to Professor Mike Steinberg for empowering me to think through these critical lawyering issues, and to Professor Robert Dinerstein, Professor Eve Brensike Primus, and Lili Siegel for their important contributions to this piece. Finally, thank you to Michele and my family, especially Rachel. I hope this piece serves the movement toward a more just and accessible world. All errors are my own.

1. *E.g.*, Linda Villarosa, *The Long Shadow of Eugenics in America*, N.Y. TIMES MAG. (June 8, 2022), <https://www.nytimes.com/2022/06/08/magazine/eugenics-movement-america.html> [perma.cc/2KPA-YP9J]; Caitlin Fendley, *Eugenics Is Trending. That's a Problem.*, WASH. POST (Feb. 17, 2020, 6:00 AM), <https://www.washingtonpost.com/outlook/2020/02/17/eugenics-is-trending-thats-problem> [perma.cc/BH59-JYYQ].

2. *See infra* Part I.

3. *See* Samuel R. Bagenstos, *Who Gets the Ventilator? Disability Discrimination in COVID-19 Medical-Rationing Protocols*, 130 YALE L.J.F. 1 (2020).

4. *See* Samuel R. Bagenstos, *The New Eugenics*, 71 SYRACUSE L. REV. 751, 752 (2021).

5. *E.g.*, Fendley, *supra* note 1.

many other areas touching the law. The legal profession itself has a long history of discrimination against disabled people.<sup>6</sup> While critical progress has been made toward an inclusive legal profession and justice system,<sup>7</sup> much like broader systemic ableism, there is far more work to be done. As clients and navigators of the legal system, disabled people experience a wide range of unique disparities, including a lack of physical accessibility, a lack of appropriate accommodations from courts and their lawyers, obscure processes, and other forms of direct discrimination.<sup>8</sup> The harm caused by the severe underfunding of indigent defense is well-documented,<sup>9</sup> and with the poverty rate for

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6. See Lilith Siegel & Karen M. Tani, *Disabled Perspectives on Legal Education: Reckoning and Reform*, 69 J. LEGAL EDUC. (forthcoming 2022). This piece uses the terms “disabled” and “disability” to inclusively and generally describe functional limitations that affect one or more of the major life activities, including (but not limited to) walking, lifting, learning, and breathing. Recent years have seen shifts in terminology here, and the term “disabled people” is commonly used by leaders in the community. For more on this linguistic dynamic, see *Disability Language Style Guide*, NAT’L CTR. ON DISABILITY & JOURNALISM (Aug. 2021), <https://ncdj.org/style-guide> [perma.cc/PWL4-G73S].

7. On the legal front, the Americans with Disabilities Act (ADA) and several other pieces of legislation preceding it, including Section 504 of the Rehabilitation Act and the Individuals with Disabilities Education Act, represent meaningful yet unfinished steps forward. See Stephanie Pappas, *Despite the ADA, Equity Is Still Out of Reach*, MONITOR ON PSYCH., Nov./Dec. 2020, at 38, <https://www.apa.org/monitor/2020/11/feature-ada> [perma.cc/DF6R-AGR9]; Bagenstos, *supra* note 3, at 5; Leslie Salzman, *Rethinking Guardianship (Again): Substituted Decision Making as a Violation of the Integration Mandate of Title II of the Americans with Disabilities Act*, 81 U. COLO. L. REV. 157, 165 n.20 (2010). Yet there are still myriad problems left to solve. See, e.g., Siegel & Tani, *supra* note 6 (discussing ableism in the legal academy); Zainub Dhanani et al., *Deconstructing Ableism in Health Care Settings Through Case-Based Learning*, ASS’N AM. MED. COLLS. J. TEACHING & LEARNING RES. (May 6, 2022), [https://doi.org/10.15766/mep\\_2374-8265.11253](https://doi.org/10.15766/mep_2374-8265.11253) (discussing ableism in healthcare settings); Catarina Rivera, *Addressing Ableism in the Workplace*, INCLUSIVELY (Feb. 1, 2023), <https://www.inclusively.com/news-and-resources/catarina-rivera-addressing-ableism-in-the-workplace> [perma.cc/CG79-357P] (discussing ableism in the workplace).

8. See A.B.A. COMM’N ON DISABILITY RTS., *Implicit Biases & People with Disabilities*, ABA, [https://www.americanbar.org/groups/diversity/disabilityrights/resources/implicit\\_bias](https://www.americanbar.org/groups/diversity/disabilityrights/resources/implicit_bias) [perma.cc/NTJ4-RR9S].

9. See BRYAN FURST, BRENNAN CTR. FOR JUST., *A FAIR FIGHT: ACHIEVING INDIGENT DEFENSE RESOURCE PARITY* (2019), [https://www.brennancenter.org/sites/default/files/2019-09/Report\\_A%20Fair%20Fight.pdf](https://www.brennancenter.org/sites/default/files/2019-09/Report_A%20Fair%20Fight.pdf) [perma.cc/AQT4-JAY3].

adults with disabilities more than double that for nondisabled adults,<sup>10</sup> disabled people disproportionately bear the burden of that harm.<sup>11</sup> It is then unsurprising that nearly 40% of people incarcerated in prisons are disabled<sup>12</sup> despite making up 12.8% of the United States at large.<sup>13</sup> Finally, with disabled lawyers making up only 0.5% of all attorneys at American law firms,<sup>14</sup> “[i]t is unsurprising that most legal providers do not know how to make their services, offices, and products accessible to [disabled] persons.”<sup>15</sup>

Systemic ableism in the legal system is nothing new. Paul Lombardo’s *Three Generations, No Imbeciles: Eugenics, the Supreme Court, and Buck v. Bell*<sup>16</sup> captures a critical and relevant part of that history, documenting the American eugenics movement that led up to *Buck v. Bell*, the infamous Supreme Court case in which the highest court held that a Virginia statute permitting the compulsory sterilization of disabled people was constitutional.<sup>17</sup> Lombardo’s thorough research captures both the systemic factors at play in

10. NANETTE GOODMAN, MICHAEL MORRIS & KELVIN BOSTON, NAT’L DISABILITY INST., FINANCIAL INEQUALITY: DISABILITY, RACE AND POVERTY IN AMERICA 12 (2019), <https://www.nationaldisabilityinstitute.org/wp-content/uploads/2019/02/disability-race-poverty-in-america.pdf> [perma.cc/9RXM-L8NW].

11. See Mark Stephenson, *Public Defenders and People with Disabilities*, CHRISTIAN REFORMED CHURCH: THE NETWORK (Apr. 10, 2018), <https://network.crcna.org/disability-concerns/public-defenders-and-people-disabilities> [perma.cc/TE5S-6GEJ] (“Inadequate defense is one reason why people with disabilities find themselves incarcerated more often than the general population.”).

12. LAURA M. MARUSCHAK, JENNIFER BRONSON & MARIEL ALPER, BUREAU OF JUST. STAT., U.S. DEP’T OF JUST., DISABILITIES REPORTED BY PRISONERS 1 (2021), <https://bjs.ojp.gov/content/pub/pdf/drpspi16st.pdf> [perma.cc/L37A-8EGH]. For a deep analysis of imprisonment and disability in the United States, see generally DISABILITY INCARCERATED (Liat Ben-Moshe, Chris Chapman & Allison C. Carey eds., 2014).

13. REHAB. RSCH. & TRAINING CTR. ON DISABILITY STAT. & DEMOGRAPHICS, 2017 DISABILITY STATISTICS ANNUAL REPORT 2 (2018), [https://disabilitycompendium.org/sites/default/files/user-uploads/2017\\_AnnualReport\\_2017\\_FINAL.pdf](https://disabilitycompendium.org/sites/default/files/user-uploads/2017_AnnualReport_2017_FINAL.pdf) [perma.cc/QM83-C2GG].

14. Katie Stancombe, *Web Exclusive: Lawyers with Disabilities Speak Out Against Small Numbers, Stigma*, THE IND. LAW. (Sept. 4, 2019), <https://www.theindianalawyer.com/articles/web-exclusive-lawyers-with-disabilities-speak-out-against-small-numbers-stigma> [perma.cc/LL44-PVBZ].

15. Derek J. Dittmar, *Disability Access in the Practice of Law – Begin Making Your Law Firms More Accessible for Disabled Employees and Clients with This Simple Checklist*, NC BAR BLOG (May 16, 2022), <https://ncbarblog.com/disability-access-in-the-practice-of-law-begin-making-your-law-firms-more-accessible-for-disabled-employees-and-clients-with-this-simple-checklist> [perma.cc/36CS-8YFW]. The underrepresentation of disability among attorneys also reflects a pipeline issue, as disabled people have shared myriad concerns about ableism before and during law school on the path to becoming legal professionals. See, e.g., Siegel & Tani, *supra* note 6; Christine Charnosky, *I Felt Afraid to Ask: Law Students with Disabilities Are Often Torn Between Trying to Fit In and Seeking Accommodations*, LAW.COM (Apr. 26, 2022, 4:44 PM), <https://www.law.com/2022/04/26/i-felt-afraid-to-ask-law-students-with-disabilities-are-often-torn-between-trying-fit-in-and-seeking-accommodations> [perma.cc/XK9P-BWTQ].

16. Paul Lombardo is a Regents’ Professor and the Bobby Lee Cook Professor of Law, Georgia State University.

17. 274 U.S. 200 (1927).

*Buck* and its aftermath. It also captures the personal story of Carrie Buck, whom Virginia officials selected to serve as the plaintiff in the case and who was ultimately sterilized by the state (Lombardo, ch. 8). *Three Generations, No Imbeciles* also reveals critical failures in lawyering at both the trial and appellate levels, underscoring the consequences of ineffective counsel on both personal and systemic levels (Lombardo, chs. 9–12). Understanding the significance, relevance, and failings of *Buck v. Bell* is critical for any legal professional working with disabled clients. But that understanding cannot be a solely retrospective one: rather, legal professionals ought to consider how ableism persists today and actively work to eliminate it from their practices.<sup>18</sup> Enter *Demystifying Disability*.

Emily Ladau's<sup>19</sup> work provides an accessible blueprint for understanding disabled experiences across history, interacting with and elevating diverse disabled voices today, and ultimately being an ally to the disabled community. She starts with the baseline question —“What is [d]isability, [a]nyway?”—and proceeds to highlight definitions that span far beyond what, say, the ADA-informed lawyer might be familiar with.<sup>20</sup> She then provides readers with a number of different models through which to think about disability, the many dos and don'ts of interacting with disabled people, the current state of disability advocacy, and the places where nondisabled people can fit in as allies or “accomplices” (Ladau, pp. 141–49). Given the often-enormous consequences that interactions with the legal system can have for disabled individuals and the damage that the legal system has wrought on the disability community, legal advocates would do well to heed *Demystifying Disability*'s key themes of unlearning paternalism and being an “accomplice” to the disability community. At a moment when eugenics is again rearing its ugly head,<sup>21</sup> when disability discrimination is rampant,<sup>22</sup> and when the legal rights of disabled people

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18. The sterilization of disabled people continues today too. Lombardo, pp. 283–87 (describing ongoing sterilization abuse in Tennessee, Virginia, Oklahoma, and California, and sterilization abuse toward immigrants in ICE custody). In many situations, incarcerated people were offered time off of their sentences if they agreed to be sterilized—in others, as in California and immigrants in ICE custody, formal processes were not followed and victims were sterilized without their knowledge. Lombardo, pp. 283–87.

19. Digital Content & Community Manager, Disability & Philanthropy Forum.

20. Ladau, pp. 7–10. The ADA covers individuals who have “a physical or mental impairment that substantially limits one or more major life activity,” those who have previously had a disability, and those who are “regarded as having a disability.” *What Is the Definition of Disability Under the ADA?*, ADA NAT'L NETWORK (Apr. 2023), <https://adata.org/faq/what-definition-disability-under-ada> [perma.cc/2FM5-6QAF]. Ladau, on the other hand, gives her own definition and asks a number of others for theirs. Ladau, p. 9. “Disability isn't static. It evolves, both physically and emotionally.” Ladau, p. 9. “Disability is a holistic experience, so it must have a holistic definition. Disability is not just a physical diagnosis, but a lived experience in which parameters and barriers are placed upon our lives because of that diagnosis.” Ladau, p. 9.

21. See *supra* notes 1–5 and accompanying text.

22. See, e.g., sources cited *supra* note 7.

and other marginalized communities are at stake,<sup>23</sup> it is crucial that lawyers have the skills and tools to inclusively work with disabled clients.

This Notice seeks to provide legal professionals with a contextualized set of tools and frameworks for working with disabled clients. Part I draws out important concepts from Lombardo's accounting of the eugenics movement and *Buck v. Bell*. Part II discusses the failures in lawyering that pervaded *Buck* at every stage of litigation. Part III utilizes *Demystifying Disability's* lessons on being an ally to the disability community and applies them to the practice of law and legal education.

#### I. AMERICAN EUGENICS, ALBERT PRIDDY, AND LAYING THE GROUNDWORK FOR STERILIZATION

Lombardo expands the frame through which we view *Buck v. Bell*, outlining the history underpinning forced sterilization and the individual actors involved in the case. In so doing, he brings to light many of the pseudoscientific, cultural, and legal issues that disabled people still confront today. Eugenics is “the scientifically erroneous and immoral theory of ‘racial improvement’ and ‘planned breeding.’”<sup>24</sup> Support for sterilizing disabled people grew out of the American eugenics movement. Early twentieth-century advocates believed that “the use of methods such as involuntary sterilization, segregation and social exclusion would rid society of individuals deemed by them to be unfit.”<sup>25</sup> “Mendel’s theory of inheritance, Francis Galton’s family study methods, and the general passion to eradicate social problems came together in an American institution dedicated to the study of eugenics. In 1910, biologist Charles Benedict Davenport established the Eugenics Record Office (ERO) . . .” (Lombardo, p. 30). Davenport and other well-credentialed scientists raised funds from prominent philanthropic sources like the Carnegie Foundation and the Rockefellers on the idea that eugenics was the way to identify and eliminate socially undesirable traits like “insanity” and “feeble-mindedness” (Lombardo, pp. 30–31). A second common rationale was an economic one: “Should we merely stand by to watch philanthropists shower their beneficence on ‘the delinquent, defective and dependent classes’ or even raise the taxes of ordinary

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23. See, e.g., Eric Garcia, *How This Supreme Court Is Setting Back Disability Rights – Without Even Trying*, MSNBC (July 5, 2022, 6:00 AM), <https://www.msnbc.com/opinion/msnbc-opinion/supreme-court-s-hostility-disability-rights-discouraging-n1296795> [perma.cc/BX6Y-QYBB]; Michelle Baik, *Losing Legal Abortion Options May Hurt Marginalized Groups, Some Worry*, NBC15 (May 4, 2022, 12:03 AM), <https://www.nbc15.com/2022/05/04/losing-legal-abortion-options-may-hurt-marginalized-groups-some-worry> [perma.cc/U77U-Z48G]; Press Release, Office of the High Commissioner for Human Rights, United States: UN Expert Warns LGBT Rights Being Eroded, Urges Stronger Safeguards, (Aug. 30, 2022), <https://www.ohchr.org/en/press-releases/2022/08/united-states-un-expert-warns-lgbt-rights-being-eroded-urges-stronger> [perma.cc/Z6U5-9CQR].

24. *Eugenics and Scientific Racism*, NAT'L HUM. GENOME RSCH. INST. (May 18, 2022), <https://www.genome.gov/about-genomics/fact-sheets/Eugenics-and-Scientific-Racism> [perma.cc/AT7K-7KC9].

25. *Id.*

Americans to that end?” (Lombardo, p. 31). In other words, supporters argued that eugenics would lessen the tax burden on everyone else by reducing the number of people requiring government support. From this bedrock, wherein wealthy elites funded privileged scientists, it is not hard to see how eugenics would ultimately embed itself into the legal community, where similarly well-credentialed and mostly white men were making most of the decisions.

Eugenics became popular among scientific, academic, and political elites.<sup>26</sup> Before sterilization measures became law, some doctors were sterilizing prisoners extralegally (Lombardo, p. 58). Advocacy for sterilization measures grew in the 1910s with doctors loudly claiming that sterilization of women who had succumbed to “diseases” such as alcoholism, syphilis, feeble-mindedness, and immorality would “prevent state bankruptcy” (Lombardo, p. 59). The first volume of the *Virginia Law Review* published *Sterilization of the Unfit*, which asked “how the ‘blessings of liberty, or full domestic tranquility’ could be enjoyed if persons ‘civilly unfit’ were permitted to ‘procreate their species and scatter their kind’ among normal citizens.”<sup>27</sup> State legislatures passed laws permitting sterilization surgeries purportedly designed to benefit the physical, mental, or moral condition of inmates (Lombardo, p. 60). In Virginia, as in other states, physicians at institutions had wide latitude to perform whatever surgeries they thought were “safe and effective” (Lombardo, p. 60). Surgeons like Dr. Albert Priddy, superintendent of the Virginia Colony for Epileptics and Feeble-minded, found any and every excuse to sterilize women, describing them as “immoral” and having identified “symptoms” such as “fondness for men,” a reputation for “promiscuity,” being “oversexed,” “wayward,” “incorrigible,” and many other trumped-up observations.<sup>28</sup> Priddy’s work set a clear double standard in which the sexual activities of women were a cause for commitment to an institution and sterilization while similar behavior in men did not warrant the same (Lombardo, p. 63). It seems that for the elites who were often dictating norms and standards of “fitness,” the only people fit to procreate were those who looked, acted, and grew up like them.

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26. Alexander Graham Bell was the first chairman of the board of scientific directors of the ERO. Lombardo, p. 32. The first dean of Johns Hopkins’s medical school was the vice chairman. Lombardo, p. 32. Former President Teddy Roosevelt supported the movement too, writing “I wish very much that the wrong people could be prevented entirely from breeding.” Lombardo, p. 32 (quoting Theodore Roosevelt, *Twisted Eugenics*, *OUTLOOK*, Jan. 3, 1914, at 30).

27. Lombardo, p. 59 (quoting J. Miller Kenyon, *Sterilization of the Unfit*, 1 *VA. L. REV.* 458, 461–62 (1914)).

28. Lombardo, pp. 60–61. Many of the women whom Priddy saw were homeless, having fled their families following physical or sexual abuse. Lombardo, p. 61. Priddy described them as “insane,” “defective,” “weak minded,” “illegitimate,” “untruthful,” or “criminal,” all of which were characteristics believed to be hereditary. Lombardo, p. 61. Many women also arrived at the colony pregnant—some babies were taken from them by Priddy who gave them to his friends, and others were given to their mothers’ relatives. Lombardo, p. 61.

After Priddy's sterilization work came under scrutiny in *Mallory v. Priddy*,<sup>29</sup> he sought to avoid future controversy by advocating in the state legislature for leniency for doctors performing sterilizations (Lombardo, pp. 91–92). He used a model law written by Harry Laughlin, a leader in the eugenics movement, and published by Judge Harry Olson of Chicago's Municipal Court as part of a comprehensive book on eugenical sterilization (Lombardo, ch. 6). Priddy, along with lawyer and state legislator Aubrey Strode, drafted a law containing careful, politically calculated language that would neither raise alarms for people concerned about sterilization nor be too confusing (Lombardo, pp. 96–100). Rather than rely on any data in advocating for passage of the law, they wrote: “[H]uman experience has demonstrated that heredity plays an important part in the transmission of insanity, idiocy, imbecility, epilepsy, and crime” (Lombardo, p. 98). This sort of language effectively moved the question of whether any of those “conditions” were hereditary to an assumption. Sterilization could then be ordered if it was determined that (1) the institutionalized person was “insane, idiotic, imbecile, feeble-minded, or epileptic, and by the laws of heredity is the probably potential parent of socially inadequate offspring likewise afflicted,” (2) that the person could be sterilized “without detriment to his or her general health,” and (3) that both the welfare of the patient and society would be promoted by the operation (Lombardo, p. 99). The bill became Virginia law in 1924 on the same day as the statute that would eventually be overturned in *Loving v. Virginia* (Lombardo, p. 245).

Immediately following its passage, Priddy sought to manufacture a test case for the law, enlisting Strode to defend the law on behalf of the state.<sup>30</sup> Carrie Buck, a resident at the Virginia Colony, was chosen by the state to serve as plaintiff because her mother, Emma, was also a resident at the Colony, making the case for the heredity of feeble-mindedness easier for the state to prove (Lombardo, ch. 8). Though the courts would never find out about it, Carrie only ended up at the colony because she was sent there by her foster family after a member of that family raped her (Lombardo, p. 140). There is very little evidence that she had any sort of mental or cognitive disability (Lombardo, p. 103). Despite this, the Virginia board approved Carrie's sterilization soon after the passage of the law (Lombardo, p. 107).

The case would ultimately make its way to the Supreme Court as *Buck v. Bell*. There, Justice Oliver Wendell Holmes Jr. would write for an 8–1 majority allowing the state to sterilize Carrie, infamously stating, “*Three generations of imbeciles are enough.*”<sup>31</sup> As Part II discusses, the choices of the lawyers involved in the case played no small role in bringing about its outcome.

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29. A.S. Priddy Grounds of Defence, *Mallory v. Priddy* (Va. Cir. Ct. Richmond Feb. 16, 1918).

30. Lombardo, p. 101. There does seem to be an inherent problem in having a state fully orchestrate a test case for a law, allowing the state to select and pay the attorney it will argue against. Adversarial litigation is necessarily underpinned by the contents of its name: two opposing sides. That discussion, however, is outside the scope of this Notice.

31. *Buck v. Bell*, 274 U.S. 200, 207 (1927) (emphasis added).



## II. LAWYERING AGAINST DISABLED PEOPLE

Under the new sterilization law, Carrie needed an appointed attorney to appeal her sterilization (Lombardo, p. 107). The board hired Irving Whitehead. Lombardo's account of Mr. Whitehead's representation reveals a lawyer unequipped for, and perhaps actively opposed to, working with his client. Throughout his representation he made choices that actively harmed Carrie's case and failed to collaborate effectively with her in his representation. As this Part discusses, his actions and inactions, both at the trial and on appeal, played a critical role in the outcome of the case. Mr. Whitehead's representation should be a clarion call for lawyers intending to serve as a co-conspirator/accomplice to disabled people. That path is outlined in Part III, after the sad alternative is discussed in this Part.

A. *Irving Whitehead's Inadequate Counsel*

Irving Whitehead was a "confidant of Priddy, boyhood friend to Aubrey Strode, former Colony director, and sterilization advocate" (Lombardo, p. 107). Clear conflict of interest notwithstanding, the case proceeded. At trial, Strode called a number of witnesses: teachers that had observed the Buck family in school, social workers that had monitored similar "problem families" in the community, neighbors of the Buck family, and four expert witnesses—two doctors and two eugenic scientists (Lombardo, p. 112). In stark contrast, Whitehead called no witnesses and produced no evidence against the Commonwealth's case (Lombardo, p. xi). Despite the fact that Strode's evidence was transparently weak, Whitehead made no rebuttal to the Commonwealth's argument for surgery. He failed to challenge the allegations made about Carrie and her family specifically, and failed to challenge broader assertions regarding the utility of sterilization and the heredity of "feeble-mindedness" (Lombardo, p. 130). And while widely popular, eugenics did not have consensus among prominent scientists, with many having serious doubts about the usage of sterilization and eugenics at large.<sup>32</sup> But rather than poking and widening holes in the stories of witnesses on cross-examination to attack Strode's case for sterilization, Whitehead seemed to actually fill in the gaps in Strode's case, building the best possible record for both Carrie's condition and the heredity of feeble-mindedness (Lombardo, pp. 117–18, 120).

Strode's expert witnesses gave weak testimony too. Dr. Joseph DeJarnette, for example, admitted that he had "no accurate knowledge of [how Mendel's rules apply to humans] because inheritance is such a complicated thing" (Lombardo, p. 123). This statement went unquestioned by Whitehead (Lombardo, p. 126). Whitehead also knew that Carrie did not have a venereal disease, yet failed to challenge any of DeJarnette's statements that she did (Lombardo, p. 127). DeJarnette had not even examined Carrie. Another expert witness from Strode was Arthur Estabrook, a field worker from the ERO whose

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32. See *infra* note 36.

goal was to demonstrate how Carrie was “exactly the type of person eugenic laws could eradicate” (Lombardo, p. 128). Whitehead failed here again. First, he failed to dive deeper into Estabrook’s genetic analysis, which claimed that “the taint” in a family line’s “germ plasm” could lie hidden as a recessive trait for generations (Lombardo, pp. 129–30). Whitehead could have pursued a line of questioning here focused on the actual effectiveness of sterilization: if eugenicists believe that many “defects” could lie dormant for generations, what is the point of sterilization? Second, Whitehead should have challenged Estabrook’s contentions regarding what a “socially inadequate” person was—that is, those who were prime targets for sterilization. Estabrook claimed that a socially inadequate person was “anybody who by reason of any sort of defect or condition is unable to maintain themselves according to the accepted rules of society” (Lombardo, p. 129). Who decides what the rules are? A lawyer with an understanding of the intersectional model of disability discussed in Part III would recognize the fallacy of such a normative judgment as to social adequacy and attack it as such. Estabrook had also done a “brief study” of both Carrie’s mother Emma and Carrie’s eight-month-old daughter, Vivian, determining that both were feebleminded.<sup>33</sup> Based on this cursory investigation, he somehow determined that Carrie deserved to be sterilized (Lombardo, p. 130). Unsurprisingly, his conclusion about Vivian ended up being wrong: when she died from measles at age eight (Lombardo, p. 190), she was an average student who had once made the honor roll.<sup>34</sup>

To succeed, the Commonwealth’s case required that first, Carrie was feebleminded; second, that feeblemindedness is hereditary; and third, that sterilization was an appropriate measure for the Commonwealth of Virginia to take. Whitehead failed in rebutting each of these claims (Lombardo, ch. 10). First, he allowed witnesses to assume her feeblemindedness (Lombardo, p. 138). Many of the witnesses, particularly teachers and neighbors, had never met Carrie and were speaking about her supposed disabilities from second-hand knowledge (Lombardo, p. 138). Legal professionals reading this history of the *Buck* trial will have “HEARSAY” alarm bells going off.<sup>35</sup> Second, even at the time, expert scientists had serious doubts about both the usage of sterilization and eugenics theory more broadly.<sup>36</sup> Yet none of these scientists were

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33. Lombardo, p. 130. Estabrook’s one-day study was based primarily on Emma and Carrie’s medical records. See Lombardo, p. 130. He gave no test to Carrie and gave only a truncated version of an IQ test to Emma. Lombardo, p. 130. He gave the “regular mental test” to Vivian, somehow concluding that she was below average. Lombardo, p. 130.

34. VIRGINIA DAILY ATTENDANCE REGISTER AND RECORD OF CLASS GRADES (1931), <https://readingroom.law.gsu.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1086&context=buckvbell> [perma.cc/5KXY-S82W] (noting that Vivian Buck, going by the name Vivian Dobbs via her adoptive family, made the honor roll in promoting to grade 2a).

35. See FED. R. EVID. 801 (requiring nonexpert witnesses to generally have first-hand knowledge of their testimony).

36. Geneticist R.C. Punnett calculated that it would take eight thousand years to eliminate the supposed genetic character for feeblemindedness through segregation or sterilization, while Geneticist Raymond Pearl argued that sterilization laws could not account for “normal” people

brought in at trial and Whitehead failed to challenge any of the shaky intellectual or scientific underpinnings of eugenics and sterilization (Lombardo, p. 147). This is despite having had more than nine weeks to prepare for trial with a similar schedule and the same budget as Aubrey Strode, who assembled a dozen witnesses (Lombardo, p. 147). Third, he should have made stronger constitutional arguments under the Eighth and Fourteenth Amendments. “A bystander might reasonably have reached the conclusion that there were two lawyers working for Dr. Priddy and none for Carrie Buck” (Lombardo, p. 127). Unsurprisingly, the state won.<sup>37</sup>

### B. *The Appeal and the Aftermath*

The legal record that Strode and Whitehead put together at trial left little room for the appellate courts to reverse the decision. Given how few objections Whitehead made at trial to Strode’s evidence, Whitehead could effectively only attack the law itself. The debates over whether Carrie was disabled, whether feeble-mindedness is hereditary, and whether the use of sterilization as a tool was appropriate to help rid Virginia of disease and lower taxes could no longer be argued. By the time the case got to the United States Supreme Court, Justice Oliver Wendell Holmes Jr. and Chief Justice William Howard Taft were already longtime eugenics supporters (Lombardo, pp. 161, 163). Strode’s brief to the Court on behalf of Virginia “seemed perfectly fitted to Holmes’s beliefs” (Lombardo, p. 165). It and his oral argument focused on the use of eugenics as a scientific tool and on state police power (Lombardo, p. 165).

Whitehead, on the other hand, focused on the law’s requirement that sterilization accrue some benefit to patients who were sterilized.<sup>38</sup> His brief should have instead focused on the judiciary’s deep reluctance to interfere with “the right of every individual to the possession and control of his own person.”<sup>39</sup>

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who carried hidden defects that would appear in later generations. Lombardo, p. 146. H.S. Jennings attacked key parts of the eugenics movement more broadly, including the “unit character” theory that asserted that feeble-mindedness was contained in particular unit genes. Lombardo, p. 146.

37. Lest it seem the inadequacy of Whitehead’s representation is clear only with the benefit of hindsight, Lombardo remarked,

It’s easy to look back at this case and this time with what we know now about both the horrors of eugenics and the facts of the case. So I tried to put myself in his position at that time. And the state’s case would have been even easier to beat back then [than it would be today].

Zoom Interview with Paul A. Lombardo, Regents’ Professor and Bobby Lee Cook Professor of Law, Ga. State Univ. Coll. of L. (Aug. 19, 2022).

38. Brief for Plaintiff in Error at 17, *Buck v. Bell*, 274 U.S. 200 (1927) (No. 292), <https://readingroom.law.gsu.edu/cgi/viewcontent.cgi?article=1095&context=buckvbell> [perma.cc/2M5H-82RF].

39. *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891).

Whitehead should have distinguished this case from *Jacobson v. Massachusetts*,<sup>40</sup> arguing both that the abridgment of personal freedoms is warranted when public health is endangered but not in this situation, and that the permanent harm done to sterilized individuals is far worse than any potential harm a vaccine might have. But by focusing on the facts in the case and the question of the “benefit” that might accrue to patients or to society, Whitehead allowed Strode’s carefully constructed factual record to shine through. This enabled Holmes’s eventual opinion to characterize the sterilization of disabled people as a sacrifice we allow the state to impose:

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.<sup>41</sup>

The depravity and inaccuracy of Holmes’s opinion in *Buck* has been well-documented, from his selective use of facts to his overbroad rhetorical flourishes and incoherent logical jumps.<sup>42</sup> And while having two sitting justices on the Supreme Court openly support the eugenics movement (Lombardo, pp. 161–63) made a Virginia and Strode victory likely in this case, the role of bad lawyering cannot be ignored. The consequences of that bad lawyering have been catastrophic.<sup>43</sup> Carrie was sterilized on October 19, 1927 (Lombardo, p. 185). By 1961, over 60,000 people had been sterilized under these statutes across the country, with Virginia sterilizing between 7,200 and 8,300 people between 1927 and 1979, when all Virginia sterilization laws were finally repealed.<sup>44</sup> The deep ties between American and German eugenicists were well

40. 197 U.S. 11 (1905) (upholding the authority of states to enforce compulsory vaccination laws).

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

42. See, e.g., Victoria Nourse, *Buck v. Bell: A Constitutional Tragedy from a Lost World*, 39 PEPP. L. REV. 101 (2011); Stephen A. Siegel, *Justice Holmes, Buck v. Bell, and the History of Equal Protection*, 90 MINN. L. REV. 106 (2005); ADAM COHEN, *IMBECILES: THE SUPREME COURT, AMERICAN EUGENICS, AND THE STERILIZATION OF CARRIE BUCK* (2016); Robyn M. Powell, *Confronting Eugenics Means Finally Confronting Its Ableist Roots*, 27 WM. & MARY J. RACE, GENDER, & SOC. JUST. 607 (2021).

43. See Jasmine E. Harris, *Why Buck v. Bell Still Matters*, HARV. L. PETRIE-FLOM CTR. (Oct. 14, 2020), <https://blog.petrieflom.law.harvard.edu/2020/10/14/why-buck-v-bell-still-matters> [perma.cc/Z958-BTMP].

44. Meagan Day, *How the Supreme Court Allowed Forced Sterilization of Women for 50 Years*, TIMELINE (Oct. 18, 2016), <https://timeline.com/supreme-court-forced-sterilization-763f8bfefe48> [perma.cc/6GWG-Q6LQ]; Elizabeth Wong, *A Shameful History: Eugenics in Virginia*, ACLU OF VA. (Jan. 11, 2013, 10:59 AM), <https://www.acluva.org/en/news/shameful-history-eugenics-virginia> [perma.cc/LU6X-UHW3]; Virginia, UNIV. OF VT., <https://www.uvm.edu/~lkaelber/eugenics/VA/VAold.html> [perma.cc/3SC9-3GNQ]. *Skinner v. Oklahoma*, a case in which the Supreme Court held that laws permitting the compulsory sterilization of criminals was unconstitutional under the Fourteenth Amendment, came in 1942. 316 U.S. 535 (1942). Unsurprisingly, part of the reason the incarcerated plaintiffs won their case was far better lawyering than that in *Buck*. Lombardo, ch. 16.

established by the 1930s (Lombardo, p. 199), and the eventual impact that had on the brutality of the Nazi regime has been well-documented.<sup>45</sup> Most American academics writing about German eugenics supported it: “[T]hey wrote, ‘we don’t like Hitler, but we like this idea.’ And that sort of sentiment was felt among the public at large, as documented in newspapers of the time.”<sup>46</sup> Dr. DeJarnette, an expert witness in Carrie’s case, was disappointed after tallying the numbers sterilized in Germany and the United States between 1935 and 1939, writing that “[t]he Germans are beating us at our own game” (Lombardo, p. 209). The Nazi regime would go on to carry out a program of approximately 400,000 forced sterilizations, 275,000 euthanasia deaths, and the murder of millions of “racial” enemies including Jews, disabled people, LGBT individuals, and others.<sup>47</sup>

Today, issues around eugenics and involuntary sterilization of disabled people abound. Some states like Virginia have some version of an involuntary sterilization statute, but with extensive due process steps in place before a court may order surgery for someone unable to give informed consent (Lombardo, p. 267). Others, like Arkansas, permit sterilization by court order of people who are unable to care for themselves “by reason of intellectual and developmental disability, mental illness, imbecility, idiocy, or other mental incapacity.”<sup>48</sup> Those individuals can also be sterilized via petition of parents or guardians.<sup>49</sup> Elsewhere, immigrant women have been forcibly sterilized by ICE in a number of cases.<sup>50</sup> The Human Genome Project and related endeavors to understand the genetic roots of various diseases also have implications for eugenics.<sup>51</sup> During the COVID-19 pandemic, eugenics cropped up when

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

46. Zoom Interview with Paul A. Lombardo, *supra* note 37; see also Robert J. Miller, *Nazi Germany’s Race Laws, the United States, and American Indians*, 94 ST. JOHN’S L. REV. 751, 792 (2020) (“The Nazi regime studied and emulated American laws and policies on [eugenics], avidly and openly interacted with American academics, and applied aspects of American strategies.”); Lily Rothman, *More Americans Supported Hitler than You May Think. Here’s Why One Expert Thinks That History Isn’t Better Known*, TIME (Oct. 4, 2018, 12:00 PM), <https://time.com/5414055/american-nazi-sympathy-book> [perma.cc/K7AE-FTRE] (noting relatively widespread support for Hitler in America).

47. *Nazi Racial Science*, U.S. HOLOCAUST MEM’L MUSEUM, <https://www.ushmm.org/collections/bibliography/nazi-racial-science> [perma.cc/X9DQ-B9B8]; *Gays and Lesbians*, U.S. HOLOCAUST MEM’L MUSEUM, <https://www.ushmm.org/collections/bibliography/gays-and-lesbians> [perma.cc/5LKG-PFPW].

48. ARK. CODE ANN. § 20-49-101 (Supp. 2021). The language in this statute was updated in 2019, taking out the term “mental retardation” in an effort to use more respectful language. Lombardo, p. 287. Of course, one might argue that the respectful action would have been to eliminate the law altogether.

49. ARK. CODE ANN. §§ 20-49-102 to 20-49-207 (2018).

50. Caitlin Dickerson, Seth Freed Wessler & Miriam Jordan, *Immigrants Say They Were Pressured Into Unneeded Surgeries*, N.Y. TIMES (Sept. 29, 2020), <https://www.nytimes.com/2020/09/29/us/ice-hysterectomies-surgeries-georgia.html> [perma.cc/5CAN-QUDJ].

51. Zoom Interview with Paul A. Lombardo, *supra* note 37; see also Alessandra Suuberg, *Buck v. Bell, American Eugenics, and the Bad Man Test: Putting Limits on Newgenics in the 21st*

hospitals were overwhelmed with cases and attention turned to crisis standards of care—many states and hospital systems disqualified disabled people from receiving life-saving treatment during crises.<sup>52</sup> The Trump administration also repeatedly endorsed “herd immunity” approaches to the pandemic, “subordinat[ing] the interests of older people, those with disabilities, and members of racial minority groups to others.”<sup>53</sup>

### III. BUILDING OUT A NEW SET OF LAWYERING TOOLS

“Think of allyship as a journey, not a destination” (Ladau, p. 143; cleaned up). The process of building a more inclusive legal profession for disabled clients and lawyers has been and will continue to be long. With the consequences of lawyering against disabled people in clear view, this Part calls for a different approach rooted in lawyers being accomplices and co-conspirators with disabled clients. There is inherent tension between what we conventionally understand lawyers to do and what the disability rights and disability justice movements advocate for. Media would have us think that good lawyers are omniscient debaters that always know the best way to win for their clients, regardless of what those clients might actually think or want.<sup>54</sup> In law school, students devote more time to understanding the theoretical underpinnings of obscure doctrine than figuring out how to manage a relationship with a client. So, new attorneys often lack the lawyering skills they need to succeed.<sup>55</sup> On the other hand, the disability justice movement stresses solidarity, elevating the most marginalized voices, and the principal of “[n]othing about [u]s without [u]s.”<sup>56</sup> The lawyer looking to succeed quickly by jumping to craft esoteric legal arguments to convince a judge might leave her client in the dust, without a full understanding of what that client wants or needs.

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*Century*, 38 MINN. J.L. & INEQ. 115, 129–130 (2020) (discussing the importance of remembering *Buck*’s legacy to avoid repeating past eugenics mistakes as researchers develop new genomic technologies that can “pin[] down the genetics of disability, personality, intelligence, mental illness, physical or cosmetic traits, and arguably more controversial phenomena such as assertive mating in humans.” (footnotes omitted)).

52. See Bagenstos, *supra* note 3.

53. Bagenstos, *supra* note 4, at 752–53. For a deeper dive into what eugenics looks like today, particularly around COVID and policies under the Trump administration, see generally Bagenstos, *supra* note 4.

54. See, e.g., *Suits* (Universal Content Productions 2011–19) (well-dressed geniuses who know better than everyone else); *Perry Mason* (Paisano Productions 1957–66) (a criminal defense lawyer always saves the day, even if a bit unconventionally, because he knows best).

55. See R. Michael Cassidy, *Reforming the Law School Curriculum from the Top Down*, 64 J. LEGAL EDUC. 428, 430 (2015) (“Both insiders and outsiders to legal education now seem to agree that we need to do a better job of equipping our graduates with the lawyering skills, professional judgment, and ethical values essential to the effective practice of law . . .”).

56. Ladau, pp. 63, 143–44. “Nothing about us without us” has been a bold reminder to disabled and nondisabled communities that autonomy is critical to a more just and accessible world. It was popularized in America by James Charlton, a disability rights activist who wrote a book by that name in 2000. See JAMES I. CHARLTON, *NOTHING ABOUT US WITHOUT US: DISABILITY OPPRESSION AND EMPOWERMENT* (1998).

Drawing from Ladau's work, this Part provides useful skills and tips for lawyers and legal professionals to build meaningful, co-conspiratorial relationships with disabled clients. Together, you and your clients can solve problems and make the world a bit more accessible and inclusive. Section III.A focuses on tips for currently practicing legal professionals, while Section III.B asks what curricular and cultural shifts ought to happen in law school to produce attorneys that are ready to inclusively serve clients. The positive potential of client-centered lawyering is well documented,<sup>57</sup> and client-centered lawyering for disabled clients requires a thoughtful approach that Ladau sheds much light on.

#### A. Accessible Legal Practice

"It starts with accessibility," says Ladau.<sup>58</sup> "In an industry where there are few disabled lawyers, where ableism is written into laws like [the Fair Labor Standards Act], and where the ADA has no teeth, lawyers need to be all the more intentional about accessibility when it comes to working with disabled clients."<sup>59</sup> This Section provides a list of helpful questions and considerations for lawyers working with disabled clients to ask themselves and work through, while the footnotes provide additional depth to each item.

1. When first setting out to meet with a client, am I using the method of communication that works best for them?<sup>60</sup>

2. Have I asked my client how to make our interactions more accessible to them? A great starting point that will signal that you care about their needs

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57. See, e.g., Katherine R. Kruse, *Fortress in the Sand: The Plural Values of Client-Centered Representation*, 12 CLINICAL L. REV. 369 (2006); Monroe H. Freedman, *Client-Centered Lawyering—What It Isn't*, 40 HOFSTRA L. REV. 349 (2011); Julie D. Lawton, *Who Is My Client? Client-Centered Lawyering with Multiple Clients*, 22 CLINICAL L. REV. 145 (2015); Robert A. Baruch Bush, *Mediation Skills and Client-Centered Lawyering: A New View of the Partnership*, 19 CLINICAL L. REV. 429 (2013); Heather Heavin & Michaela Keet, *Client-Centered Communication: How Effective Lawyering Requires Emotional Intelligence, Active Listening, and Client Choice*, 22 CARDOZO J. CONFLICT RESOL. 199 (2021); Jonah A. Siegel, Jeanette M. Hussemann & Dawn Van Hoek, *Client-Centered Lawyering and the Redefining of Professional Roles Among Appellate Public Defenders*, 14 OHIO ST. J. CRIM. L. 579 (2017).

58. Zoom Interview with Emily Ladau, Author of *Demystifying Disability: What to Know, What to Say, and How to Be an Ally* (July 8, 2022).

59. *Id.* Disabled lawyers make up less than 1 percent of practicing attorneys in the United States. Stancombe, *supra* note 14. The Fair Labor Standards Act (FLSA) allows employers to pay workers with disabilities subminimum wages. 29 C.F.R. § 525 (1989). Some have argued that the ADA does not provide for enough enforcement mechanisms for disabled people to effectuate their rights. See, e.g., Roy Spiegel, Opinion, *A Toothless Law*, N.Y. TIMES (Apr. 24, 1995), <https://www.nytimes.com/1995/04/24/opinion/a-toothless-law.html> [perma.cc/N5VU-Y83T]; *Cummings v. Premier Rehab Keller, P.L.L.C.*, 142 S. Ct. 1562 (2022) (ruling that emotional distress damages are not recoverable in a private action to enforce either the Rehabilitation Act or the Affordable Care Act).

60. See Ladau, p. 78. Different clients will prefer to communicate via telephone, email, Zoom, text message, in-person meetings, or other methods.

is, “I want to make sure [our meeting] works well for you. Is there anything I can do or any accommodations you might need to make [that happen]?”<sup>61</sup>

3. Am I being mindful of what questions I am asking and whether those questions are appropriate given why my client is here?<sup>62</sup>

4. Am I mirroring the language my client uses to describe their disability status? (Ladau, p. 24). Lawyers should start with “disabled person” or “person with a disability” as a baseline, then adjust language based on how the client talks about their disabilities.<sup>63</sup> And *never* use the R-word (Ladau, p. 22).

5. Have I taken my client to “law school” while encouraging them to take me to “fact school”?<sup>64</sup> “A good client-centered lawyer will craft their [argument] theory with their client.”<sup>65</sup> This must necessarily include the adoption of a co-conspiratorial partnership between attorneys and their clients, working to solve that client’s problem while also confronting the legal system we work in that continues to disproportionately harm disabled people.<sup>66</sup>

6. Have I taken extra care to eliminate legal jargon while also making myself clear?<sup>67</sup> To be sure, there will be times and circumstances in which legalese is appropriate. But “the sign of a very good lawyer is someone who can

61. See Ladau, p. 92. As you get to know your client better, you will both develop a better understanding of how to communicate with each other.

62. Suppose your client wears a back brace and walks slowly. If the client is arriving at your office to see you about a worker’s compensation case related to an injury he had to his back, then it can be appropriate to ask direct questions about the client’s disability. If, however, that same client was coming to see you for tax advice, it is far less likely that asking about his disability is appropriate.

63. Ladau, p. 24. If the client tends to refer to themselves as “special needs,” “differently abled,” or some other term, you can use the same language. It’s important to know, however, that these terms have generally fallen out of favor among many in the disability community who argue that these sorts of euphemisms avoid the term “disabled” and only lead to more stigmatization. See David Oliver, *I Am Not Ashamed: Disability Advocates, Experts Implore You to Stop Saying ‘Special Needs,’* USA TODAY, (June 11, 2021, 12:48 PM), <https://www.usatoday.com/story/life/health-wellness/2021/06/11/disabled-not-special-needs-experts-explain-why-never-use-term/7591024002> [perma.cc/4DB9-52JF].

64. Jonah Perlin, #076: *Kobie Flowers – Civil Rights & Criminal Defense Lawyer*, HOW I LAWYER PODCAST WITH JONAH PERLIN, at 27:35–28:05 (Aug. 10, 2022), <https://www.howilawyer.com/076-kobie-flowers-civil-rights-criminal-defense-lawyer> [perma.cc/FJB2-2QTQ].

65. Interview with Eve Brensike Primus, Yale Kamisar Collegiate Professor of L., Univ. of Mich. L. Sch., in Ann Arbor, Mich. (Aug. 24, 2022).

66. See *infra* notes 78–80 and accompanying text; see also Jamelia N. Morgan, *Reflections on Representing Incarcerated People with Disabilities: Ableism in Prison Reform Litigation*, 96 DENV. L. REV. 973 (2019).

67. Do you really need to say, “we got an adjournment,” or can you just say, “we were able to move the trial to a later day”? “Aforementioned” can just be “stated earlier.” “Inter alia” can just be “among other things.” “Instant case” can just be “this case.” See Lucas Hardgrave, *What Is ‘Legalese’ and Why Is It Bad?*, LEGAL INSITES (Sept. 8, 2016, 10:00 AM), <https://www.legalinsites.com/2016/09/08/what-is-legalese-and-why-is-it-bad> [perma.cc/39LZ-U8E7]. When Ladau was once working with a lawyer, she found that the lawyer’s language was “inaccessible to me, and I’m someone who communicates verbally, I’m college-educated, and I’m a writer! What does that mean for others?” Zoom Interview with Emily Ladau, *supra* note 58.



say [to their client], 'here's what's happening, I'm going to make it clear to you in accessible and plain language.'<sup>68</sup>

7. Have I put my client in the driver's seat for major decisions? Many lawyers think they know what's best for their client, or worse, like Irving Whitehead, see their client as a means to an end. Decisions like whether and who to sue, whether to take a plea deal, and even what major factual/legal arguments to advance should be made *with* clients and not *for* clients. Nondisabled advocates act paternalistically when they think they know what is best for a disabled person and they make decisions to help the person without asking if that help was wanted and what the nature of that help ought to be.<sup>69</sup> Legal professionals should avoid this.

8. Have I taken the time to ensure that my client understands the implications of major decisions? "Everyone processes information differently. Just because you have years of law school and a law degree under your belt doesn't mean that everybody's going to process information the same way you do."<sup>70</sup>

9. Am I actually lawyering for my client and not someone accompanying them? Some disabled clients may be accompanied by a friend, an interpreter, a guardian, or someone else. When communicating with a deaf client who uses an interpreter, look at the client you're talking to rather than the interpreter (Ladau, p. 97). Legal professionals should be just as clear on who *is* their client as who *isn't* their client. "You're a lawyer for the client, not the client's family."<sup>71</sup> "We are quick to rob disabled people of their autonomy through systems like guardianship. As much as possible, disabled people themselves should be driving the bus and making decisions."<sup>72</sup>

10. Have I sought to understand my client's unique experience within larger disability frameworks? Today's disability justice movement under-

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68. Zoom Interview with Emily Ladau, *supra* note 58.

69. Paternalism shows up across the legal profession. See, e.g., Mark Baer, *Lawyer Paternalism Is a Very Serious Problem*, HUFFPOST (Mar. 20, 2015), [https://www.huffpost.com/entry/lawyer-paternalism-is-a-v\\_b\\_6498348](https://www.huffpost.com/entry/lawyer-paternalism-is-a-v_b_6498348) [perma.cc/UNL4-TGS3]; see also Stanley S. Herr, *Representation of Clients with Disabilities: Issues of Ethics and Control*, 17 N.Y.U. REV. L. & SOC. CHANGE 609, 621 (1989) ("Further, the codes permit the paternalistic domineering lawyer to exert unwarranted control over clients who have only mild degrees of disability or only suspected forms of impairment. Since the American Bar Association . . . defines disability in terms of functional limitations—an impaired ability to make adequately considered decisions in connection with representation—lawyers may broadly classify many of their clients as 'disabled.'). In a disabled client's day-to-day life, paternalism might show up in situations like when a nondisabled person grabs the arm of a blind person and forcibly "helps" them get somewhere, without asking. Ladau, p. 103. In the courtroom, it might look like a lawyer pushing his disabled client toward a plea bargain without laying out all of the options and consequences of those options because the lawyer thinks that it is the best outcome for them.

70. Zoom Interview with Emily Ladau, *supra* note 58.

71. Interview with Eve Brensike Primus, *supra* note 65.

72. Zoom Interview with Emily Ladau, *supra* note 58. Newer models for how decisions are made regarding the lives of disabled individuals are focused on supported decisionmaking rather than the full transplantation to a guardian. See Salzman, *supra* note 7.

stands that disability intersects with all other identities, adopts an intersectional lens that centers the experiences of disabled people who hold other marginalized identities, and elevates their voices.<sup>73</sup> It pushes back against a mainstream movement that was historically singularly focused on a version of disability that centered whiteness and physical disabilities.<sup>74</sup> Lawyers working with disabled clients, particularly disabled clients of color, should take an expansive view of disability and its intersections with other forms of oppression.<sup>75</sup>

11. Are there ways for me to advance the disability justice movement while advocating for my client's needs? This is where a co-conspiratorial or accomplice approach to lawyering for disabled clients enters. An accomplice is someone who works "side by side with people who are marginalized[] to confront the system and contribute to shifting it accordingly" (Ladau, p. 142). A co-conspirator "leverag[es their] privilege in a way that empowers people who don't have th[at] privilege."<sup>76</sup> In the legal context, lawyers have the privilege of being highly educated and comfortable navigating complex systems—traits that their disabled clients may not share. Lawyers should wield that privilege to fight for their disabled clients, leveraging their knowledge, experience, and relationships to create a more accessible and inclusive legal profession. "It's not about being saviors for our clients."<sup>77</sup> Rather, it is about forming a team with your client and not just solving the problem they have in front of

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73. This includes "disabled people of color, immigrants with disabilities, queers with disabilities, trans and gender non-conforming people with disabilities, people with disabilities who are houseless, people with disabilities who are incarcerated, people with disabilities who have had their ancestral lands stolen, amongst others." Patty Berne, *Disability Justice – A Working Draft by Patty Berne*, SINS INVALID (June 10, 2015), <https://www.sinsinvalid.org/blog/disability-justice-a-working-draft-by-patty-berne> [perma.cc/XP42-3N2P]; Ladau, p. 32. Lawyers should understand that disabled experiences are incredibly diverse and that a disabled person who occupies more than one marginalized identity will have a different experience than someone who holds just one of those identities. See Natalie M. Chin, *Centering Disability Justice*, 71 SYRACUSE L. REV. 683 (2021).

74. See PATTY BERNE ET AL., *SKIN, TOOTH, AND BONE: THE BASIS OF MOVEMENT IS OUR PEOPLE* (2d ed. 2019); Jennifer L. Erkulwater, *How the Nation's Largest Minority Became White: Race Politics and the Disability Rights Movement, 1970–1980*, 30 J. POL'Y HIST. 367 (2018).

75. Professor Natalie Chin's racism/ableism consciousness framework, which frames racism and ableism not as mutually exclusive but as systems that work together to reconstitute the subjugation and discrimination experienced by disabled people, is a critical lens through which to push back against this historical focus. Chin, *supra* note 73.

76. Erica Courdae & India Jackson, 88. *Disability Allyship with Jennifer Sarrett*, PAUSE ON THE PLAY, at 31:34–31:50 (Jan. 5, 2021), <https://www.pauseontheplay.com/potp/ep88> [perma.cc/K8FT-DZSP]. For more on co-conspiracy, see Pmsedgwick, *User Clip: Dr. Bettina Love Explains What She Means by a Co-Conspirator*, C-SPAN (June 8, 2020), <https://www.c-span.org/video/?c4880307/user-clip-dr-bettina-love-explains-means-conspirator> [perma.cc/3RX5-3PGZ] (clip from *We Want to Do More Than Survive* (C-SPAN television broadcast Mar. 19, 2019)).

77. Interview with Eve Brensike Primus, *supra* note 67.

them, but confronting the legal system we work in that continues to disproportionately harm disabled people.<sup>78</sup> Take the time to work through problems *with* your client, listening closely for what their goals are and how you might be able to work together to achieve them.

12. Have I pushed the court or jurisdiction I work in to be more accessible to disabled litigants? There are many steps that courts can take to increase access to justice for disabled people.<sup>79</sup>

Take a hypothetical case involving an incarcerated client of yours who has been unable to get the prison he is in to fix his broken prosthetic leg. Solving his problem individually might look like meeting with him, understanding exactly what repairs the prosthetic needs, and then meeting with the warden who can send it out for repair. But what happens when the prosthetic breaks again a few months down the line? A co-conspiratorial or accomplice approach could involve bringing a class action suit against the prison system that your client is in, working with him to find other incarcerated people with disabilities in the system who have had prosthetic issues while incarcerated. It might also look like helping him get connected to appellate lawyers in your network to fight the case that has him incarcerated in the first place.

### B. *Training Future Lawyers More Inclusively*

While her law school did offer some accommodations for disabled students, now-Professor Britney R. Wilson “felt afraid to ask for other accommodations that probably would have been helpful.”<sup>80</sup> Disabled law students and professors have pushed for law schools to reckon with the legal profession’s unwelcoming attitude toward lawyers with disabilities.<sup>81</sup> This reckoning must extend to how law students are taught to treat disabled clients. We must “train lawyers to respect disability and know how to engage with it.”<sup>82</sup> This work is certainly happening at some law schools. Professor Robert Dinerstein started the Disability Rights Law Clinic at American University Washington College

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78. *Id.*; see also, e.g., Morgan, *supra* note 66 (describing the disproportionate harm).

79. The National Center for Access to Justice (NCAJ) maintains the Justice Index, which provides a snapshot of the degree to which each U.S. state has adopted best practices in the access to justice space. See *Disability Access*, NAT’L CTR. FOR ACCESS TO JUST. (2020), <https://ncaj.org/state-rankings/2020/disability-access> [perma.cc/GWM9-UPYY]. Connecticut and Hawai’i rank at the top of Disability Access, measured against NCAJ’s identified best practices. *Id.* In the 2020 study, NCAJ included twenty-nine best practices for state court systems, including maintaining an accessibility task force of community stakeholders, providing sign language interpreters and a process to monitor and promote the quality of those interpreters, consistently evaluating the accessibility of physical infrastructure, holding accessibility trainings for judges, allowing service animals at all times, and many other important practices. *Id.* (Benchmarks: Weights and Trends).

80. Charnosky, *supra* note 15.

81. See, e.g., Siegel & Tani, *supra* note 6.

82. Zoom Interview with Lilith [Lili] A. Siegel, Former Bd. Member, Nat’l Disabled L. Students Ass’n, Jud. L. Clerk, U.S. Dist. Ct., N. Dist. of Cal. (Aug. 22, 2022). Her opinions expressed in this interview do not represent the views of the court.

of Law in part because he saw too much bad lawyering for disabled clients.<sup>83</sup> “Lawyers would make themselves judges instead of advocates for their clients,” making decisions for those clients based on what the lawyers thought was best for them, rather than understanding the client’s needs and acting on those terms.<sup>84</sup> Professor Dinerstein also wanted to build out a legal culture around disability that focused on an empowerment model of disability, rather than a deficit model.<sup>85</sup> He had noticed that so many court proceedings involved lawyers talking about all of the things their clients cannot do, but there was not enough lawyering focused on breaking down barriers to support disabled people and focusing on what they *could* do.<sup>86</sup> Today, the clinic at AUWCL prioritizes client-centered, antipaternalistic lawyering that understands that clients know their own lives best and should be the primary decisionmakers.<sup>87</sup>

“Students should be given opportunities to try out making hard decisions with disabled clients.”<sup>88</sup> While law schools emphasize “thinking like a lawyer,” not enough emphasis is placed on the actual skill building necessary to work successfully with clients. While clinical and experiential courses are not the only places to build client skills, they are important ones—and they deserve more of our focus.<sup>89</sup> Consider a simulation in which a law student is working with a hypothetical disabled client with cognitive disabilities that does not seem to understand the implications of the three legal options he has. The student must decide what steps to take with this client, working with her professor to craft a plan in which she will try several different ways to communicate with her client and her client’s family/support system, and consult with local disability organizations that can provide advice on how to treat this “client.” If students can practice making tough decisions like this under pressure, but in spaces that do not affect real world clients (or if they do, with supervision), they will be far more prepared to serve actual disabled clients than they would have been otherwise.

As a student at Berkeley Law, Lili Siegel had a real experience with this when working with a clinical client.<sup>90</sup> Her client was facing a difficult hearing and was offered a settlement. The client initially wanted to go to the hearing and fight their battle. In taking the time to discuss the matter with the client, Lili was concerned that the client did not actually understand that if they went

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83. Zoom Interview with Robert D. Dinerstein, Professor of L. and Dir. of the Disability Rts. L. Clinic at Am. U. Washington Coll. of L. (Aug. 22, 2022).

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. Zoom Interview with Lili Siegel, *supra* note 82.

89. See Robert Kuehn, *The Disparate Treatment of Clinical Law Faculty*, BEST PRACTICES FOR LEGAL EDUC. BLOG (Jan. 4, 2021), <https://bestpracticeslegaled.com/2021/01/04/the-disparate-treatment-of-clinical-law-faculty> [perma.cc/WJ69-JJZV].

90. Zoom Interview with Lili Siegel, *supra* note 82. Details have been obscured to protect the client’s identity.

to the hearing, there was a high chance that they could incriminate themselves, with significant consequences for the client's future.<sup>91</sup> After taking the time to lay out the options and potential ramifications of each one, the client ultimately chose to take the settlement deal.<sup>92</sup> Currently, the ABA requires that law students enroll in at least six credits of "experiential" education.<sup>93</sup> It should consider expanding this requirement to help ensure that future lawyers are prepared to engage thoughtfully with their clients after law school. And professors teaching doctrinal courses should look for opportunities to incorporate the nuts and bolts of communicating and working with clients as they move through core legal doctrine.

Professor Eve Brensike Primus runs the Public Defender Training Institute at Michigan Law, a relatively new immersion program that prepares students to be successful indigent defenders.<sup>94</sup> When training students to work with disabled clients, she stresses that a lawyer's job is *not* to be a "voice for the voiceless."<sup>95</sup> Rather, it is instead to be an advisor to and advocate with their client.<sup>96</sup> Building trust with clients takes time, but entering your client's framework for how they view the world and getting to know them there can be an effective way to building a better relationship.<sup>97</sup> When clients and attorneys have better relationships, outcomes for the clients are better.<sup>98</sup> To Professor Primus, "part of being a good, client-centered lawyer is giving your clients agency in how the legal action proceeds."<sup>99</sup> Two dynamics to consider when working with disabled clients are time and resources. This is particularly true for public defenders, who are often stretched thin working dozens of cases (if not more) at any given time.<sup>100</sup> When working with a large caseload, a lawyer

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91. *Id.*

92. *Id.*

93. AM. BAR ASS'N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS: 2022–2023 31 (2022), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/standards/2022-2023/2022-2023-standards-and-rules-of-procedure.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2022-2023/2022-2023-standards-and-rules-of-procedure.pdf) [perma.cc/3NFJ-M782] ("A law school shall offer a curriculum that requires each student to satisfactorily complete at least . . . one or more experiential course(s) totaling at least six credit hours. An experiential course must be a simulation course, a law clinic, or a field placement.").

94. Interview with Eve Brensike Primus, *supra* note 65.

95. *Id.*

96. *Id.*

97. *Id.*

98. See Phoebe Bower & Pervin R. Taleyarkhan, *Building Effective Client Relationships: Practice Tips from In-House*, LANDSLIDE, Jan.–Feb. 2019, at 38.

99. Interview with Eve Brensike Primus, *supra* note 65.

100. See Richard A. Opper, Jr. & Jugal K. Patel, *One Lawyer, 194 Felony Cases, and No Time*, N.Y. TIMES (Jan. 31, 2019), <https://www.nytimes.com/interactive/2019/01/31/us/public-defender-case-loads.html> [perma.cc/YDS5-KNCC] ("Of the public defenders in Louisiana handling felony caseloads at that time, there were two dozen with even more [than 194] clients. One had 413."). Public defense offices (and indigent defense more broadly) are also chronically underfunded. See Teresa Wiltz, *Public Defenders Fight Back Against Budget Cuts, Growing Caseloads*, PEW CHARITABLE TRS. (Nov. 21, 2017), <https://www.pewtrusts.org/en/research-and->

may only have small time blocks allocated to each client. The important client-centered activities that are critical to connecting with disabled clients, which are sometimes time intensive, might feel out of reach. Professor Primus teaches her students that while the “gold standard” in all aspects of lawyering may not be achievable, lawyers should know what that “gold standard” is and use a scrappy approach to implement client-centered tactics.<sup>101</sup> For some lawyers, that might look like figuring out if there are funds to hire a social worker in your office—a social worker who could provide a vital support function in serving disabled clients. Many cities have social work schools with students looking for internships, too. So, while getting to the “gold standard” of inclusive practice for disabled clients might take some time, it is crucial to understand and strive toward a model of lawyering as an accomplice and co-conspirator.

#### CONCLUSION

Today, the fight against ableism and the movement toward a more inclusive legal world continues. As Ladau put it, “ableism is written into the law.”<sup>102</sup> The Fair Labor Standards Act still allows businesses to pay disabled employees pennies on the dollar.<sup>103</sup> The ADA, while serving as a landmark civil rights law, is difficult to enforce, with costly litigation often being the only remedy disabled people can pursue.<sup>104</sup> Its gaps have been well documented.<sup>105</sup> And today’s Supreme Court seems hostile to disability rights, which deters plaintiffs from filing lawsuits for fear of the ADA being gutted even further.<sup>106</sup> *Buck* has never been formally overturned. And with the Supreme Court’s recent overruling of *Roe*, the line of cases that most obviously undermines *Buck* is severely weakened.<sup>107</sup> With advancements in technology and science allowing us to know

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analysis/blogs/stateline/2017/11/21/public-defenders-fight-back-against-budget-cuts-growing-caseloads [perma.cc/6J23-D9PH].

101. Interview with Eve Brensike Primus, *supra* note 65.

102. Zoom Interview with Emily Ladau, *supra* note 58.

103. See Sara Luterman, *Why Businesses Can Still Get Away with Paying Pennies to Employees with Disabilities*, VOX (Mar. 16, 2020, 8:30 AM), <https://www.vox.com/identities/2020/3/16/21178197/people-with-disabilities-minimum-wage> [perma.cc/JG73-9K7E].

104. See Adam Flores-Boffa, *The Americans with Disabilities Act: Why It’s Not Enough*, SAN ANTONIO REP. (July 16, 2018), <https://sanantonioreport.org/the-americans-with-disabilities-act-why-its-not-enough> [perma.cc/8M7G-RMRW]. In 2022, the Supreme Court also ruled that emotional distress damages are not recoverable in private actions to enforce either the Rehabilitation Act or the Affordable Care Act. *Cummings v. Premier Rehab Keller, P.L.L.C.*, 142 S. Ct. 1562 (2022).

105. See Chin, *supra* note 73, at 690–92.

106. See Eric Garcia, Opinion, *How This Supreme Court Is Setting Back Disability Rights – Without Even Trying*, MSNBC (July 5, 2022, 6:00 AM), <https://www.msnbc.com/opinion/msnbc-opinion/supreme-court-s-hostility-disability-rights-discouraging-n1296795> [perma.cc/BX6Y-QYBB].

107. *Skinner v. Oklahoma*, 316 U.S. 535 (1942), saw the Supreme Court find an Oklahoma law permitting the compulsory sterilization of habitual criminals unconstitutional. But after

more and more about future generations,<sup>108</sup> conversations and, potentially, legislation related to eugenics will come to the forefront. *Buck's* powerful expressive message, that some lives matter more than others, continues to shape public norms and legal interpretations about the humanity of Black, Indigenous, and disabled bodies.<sup>109</sup> Disabled people remain under critical threat in our legal system, and we need lawyers prepared to be accomplices and co-conspirators to navigate the turbulent waters ahead.

As discussed in this Notice, there are critical steps that lawyers and lawmakers can take to make both the practice of law and our legal systems more equitable and accessible. However, legal professionals—particularly nondisabled legal professionals—should understand that we only play a support role in the broader movement for disability justice. “[I]t’s absolutely crucial to make sure that people with disabilities are leading the charge in any and all efforts in everything from individual circumstances to major policy decisions.”<sup>110</sup> As legal professionals, we can contribute to a more just and equitable world by advocating alongside disabled people and utilizing the privileges we have to navigate complex laws and systems. We can be co-conspirators in the journey toward collective liberation.<sup>111</sup>

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*Dobbs v. Jackson Women’s Health Organization*, 142 S. Ct. 2228 (2022), other privacy and Fourteenth Amendment cases like *Griswold v. Connecticut*, 381 U.S. 479 (1965), may be in jeopardy. See AUTISTIC SELF ADVOC. NETWORK, *DOBBS V. JACKSON WOMEN’S HEALTH ORGANIZATION AND ITS IMPLICATIONS FOR REPRODUCTIVE, CIVIL, AND DISABILITY RIGHTS* 7 (2022), <https://autisticadvocacy.org/wp-content/uploads/2022/06/Dobbs-memo.pdf> [perma.cc/9RSJ-Q8R7]. If *Griswold* is at stake, *Skinner* will be weakened. *Id.* And if *Skinner* doesn’t survive, it is hard to imagine the current Supreme Court overruling *Buck v. Bell*.

108. See, e.g., Carey Goldberg, *The Pandora’s Box of Embryo Testing Is Officially Open*, BLOOMBERG, (May 26, 2022, 5:00 AM), <https://www.bloomberg.com/news/features/2022-05-26/dna-testing-for-embryos-promises-to-predict-genetic-diseases> [perma.cc/8VVB-JWP3].

109. Harris, *supra* note 43.

110. Zoom Interview with Emily Ladau, *supra* note 58; see also Ladau, pp. 143–44.

111. See Chin, *supra* note 73, at 717.