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THREE GENERATIONS, NO IMBECILES: NEW LIGHT ON *BUCK v. BELL*

PAUL A. LOMBARDO*

With the proclamation that "Three generations of imbeciles are enough" Justice Oliver Wendell Holmes concluded his Supreme Court opinion in the 1927 case of Buck v. Bell, which upheld the constitutionality of a Virginia law permitting eugenical sterilization of the mentally ill. Most commentators have explained Holmes's harsh opinion as a reflection of the popularity of the eugenics movement. In an original interpretation of the Buck case, Dr. Lombardo demonstrates that the lawsuit was a carefully designed test of the Virginia law, brought by the statute's proponents as the final step to ensure the success of a eugenical sterilization program. Charting the genesis of the law, Lombardo reveals that it originated as a means of vindicating the moralism and private prejudices of three professional and political colleagues. One was the state legislator who drafted the statute and eventually defended it in court. Another was the doctor whose fervent belief that sterilization could rid society of undesirables spurred the law's enactment. The third was the attorney who represented Carrie Buck. That attorney, Dr. Lombardo contends, colluded with his purported adversaries in the Buck lawsuit by deliberately neglecting to develop the factual record in the case, and consequently failing to mount a proper challenge to the statute. Dr. Lombardo concludes that Carrie, her mother and her daughter were not imbeciles, but rather, the unfortunate victims of an elaborate legislative and judicial campaign that resulted in the legally sanctioned sterilization of Carrie and thousands of other Americans.

INTRODUCTION

During his long and highly acclaimed career, Justice Oliver Wendell Holmes wrote few lines more memorable than the rhetorical coda to *Buck v. Bell*.¹ That case tested the validity of a Virginia law allowing eugenical sterilization of the mentally ill² and posed Carrie Buck against the physician who wished to use her as the law's first subject. Speaking for the Taft Court, Justice Holmes delivered the now infamous epigram describing Carrie Buck, her mother, and her daughter: "Three generations of imbeciles are enough."³ With histrionic flair, Justice Holmes

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¹ 274 U.S. 200 (1927).

² Act of Mar. 20, 1924, ch. 394, 1924 Va. Acts 569, repealed by Act of Apr. 2, 1974, ch. 296, 1974 Va. Acts 445. The 1924 Act provided for sexual sterilization of any state hospital inmate who was "insane, idiotic, imbecile, feeble-minded or epileptic, and by the laws of heredity . . . the probable potential parent of socially inadequate offspring likewise afflicted . . ." Act of Mar. 20, 1924, ch. 394, 1924 Va. Acts 569, 570.

Eugenical theory holds generally that many of society's ills, including crime, poverty, and mental deficiency, are largely caused by hereditary defects rather than environmental factors.

³ 274 U.S. at 207.

upheld the constitutional validity of the law, sealed the fate of Carrie Buck, and established the reputation of Carrie, her mother, and her daughter as the "three generations" whose surname is invoked in constitutional law texts even today.

With Supreme Court endorsement, the Virginia law provided authority for the sterilization of more than 8,300 inmates of state mental institutions between 1927 and 1972⁴ and set the stage for the passage of laws that would sanction sterilization operations on 60,000 Americans.⁵ The law under which Hitler sterilized millions contains much of the same language found in the Virginia sterilization law.⁶

In the almost sixty years since *Buck v. Bell* was decided, commentators have repeatedly attempted to understand its more problematic aspects. Some have suggested that the litigation was a "friendly suit," structured to clarify the legality of novel legislation rather than to settle a true controversy;⁷ that Carrie's lawyer offered a suspiciously weak defense;⁸ and that both the logic and the tone of Holmes's opinion were indefensible.⁹ Additionally, some discussions of *Buck v. Bell* have pointed out the inaccuracy of Holmes's description of the Buck family as

⁴ See "Woman Told of Her Sterilization," *Daily Progress* (Charlottesville, Va.), Feb. 24, 1980, at B1, col. 1; Booker & McKelway, "Sterilizations Were Thought Beneficial, Nurse Recalls," *Richmond Times Dispatch*, Mar. 2, 1980, at D1, col. 1. The sterilization practice reportedly ended in 1972, two years before the statutory authority was repealed by the Act of Apr. 2, 1974, ch. 296, 1974 Va. Acts 445. The 1974 Act, however, provided for sterilization of those with "hereditary forms of mental illness," and that language remained in the Virginia Code until it was repealed by the Act of Mar. 21, 1981, ch. 454, 1981 Va. Acts 656.

⁵ Eugenic Sterilization, apps. 1-2a (J. Robitscher ed. 1973) and (nearly 60,000 eugenic sterilizations were performed between 1927-1964 alone). In the wake of the Supreme Court's decision, 20 states passed eugenical sterilization statutes in the ensuing 10 years, most of them closely patterned after the Virginia law. At least 32 states have had sterilization statutes at one time or another. Note, Human Sterilization, 35 *Iowa L. Rev.* 251, 253 nn.12-13 (1950).

⁶ See, e.g., A. Chase, *The Legacy of Malthus: The Social Costs of the New Scientific Racism* 135, 351 n.15 (1977). Both Hitler's sterilization law and the Virginia law were based on the Model Eugenic Sterilization Law proposed by the American eugenicist, Harry Laughlin. See note 108 *infra*.

⁷ E.g., C. Vose, *Constitutional Change: Amendment Politics and Supreme Court Litigation Since 1900*, at 16 (1972); Berns, *Buck v. Bell: Due Process of Law?*, 6 *W. Pol. Q.* 762, 766 (1953).

⁸ See C. Vose, *supra* note 7, at 17 ("Carrie Buck's lawyer had neither the resources nor *desire* to search for experts [to contradict eugenical theory].") (emphasis added); Berns, *supra* note 7, at 765 ("at no time . . . did [Carrie's counsel] offer any evidence or produce any witness to question the validity of the eugenical basis of the statute").

⁹ E.g., S. Gould, *The Mismeasure of Man* 335 (1981) ("one of the most . . . chilling statements of our century"); Berns, *supra* note 7, at 762 ("surely one of the most 'totalitarian' statements in the history of the Court"); Burgdorf & Burgdorf, *The Wicked Witch is Almost Dead: Buck v. Bell and the Sterilization of Handicapped Persons*, 50 *Temp. L.Q.* 995, 1009 (1977) ("brutally derisive"); Gest, *Eugenic Sterilization: Justice Holmes vs. Natural Law*, 23 *Temp. L.Q.* 306, 306 (1950) ("Holmes dispenses with rules of logic"); Kindregan, *Sixty Years of Compulsory Eugenic Sterilization: "Three Generations of Imbeciles" and the Constitution of the United States*, 43 *Chi.[-]Kent L. Rev.* 123, 143 (1966) ("fallacious absurdity of

“imbeciles” and have made special note of the subsequent intellectual development of Carrie’s child.¹⁰

Many of the commentaries on *Buck* describe the case as an aberration traceable to the “eugenics craze”¹¹ of the Progressive Era. Fervent eugenical theorists are credited with passage of sterilization laws¹² and, as one writer has concluded, “with the eugenics movement at its height in 1927 the Court was its prisoner.”¹³ These commentators focus on the enthusiasm of this special interest group which engendered public support for eugenics too strong for the Court to resist.¹⁴ Although this analysis elucidates the social forces behind the *Buck* story, it inadequately explains the origins of the Virginia sterilization statute and its test in the courts. While the case did represent the peak of public acceptance of eugenical theory, characterizing *Buck v. Bell* merely as the result of 1920’s pseudoscientific thought ignores the unique confluence of events and interplay of personalities without which the case never would have occurred.

The primary purpose of this Article is to highlight the roles of three men who have figured only marginally in earlier accounts of the case. Aubrey Strode, Irving Whitehead, and Albert Priddy were political asso-

[Holmes’s] reasoning”); Rogat, Mr. Justice Holmes: A Dissenting Opinion, 15 Stan. L. Rev. 254, 288 (1963) (“gratuitously callous”).

¹⁰ See C. Vose, *supra* note 7, at 15; Coogan, Eugenic Sterilization Holds Jubilee, 177 Cath. World 45, 46-47 (1953).

Neither Carrie nor her mother Emma were described as “imbeciles” even by the physicians and eugenicists who advocated Carrie’s sterilization. The trial court record available to the Supreme Court in *Buck v. Bell* made it clear that Emma Buck was alleged to be of a mental age of nearly eight years and that Carrie was alleged to be of a mental age of nine years. Record at 90-91, *Buck v. Bell*, 274 U.S. 200 (1927) (trial transcript, testimony of Dr. Albert Priddy) [hereinafter Record, *Buck*]. On the Stanford Revision of the Binet-Simon intelligence scale, Emma Buck would have been classified as a low-grade moron and Carrie Buck would have been labeled a middle-grade moron. Carrie was so categorized specifically. *Id.* at 91. Imbeciles are ranked below morons on this intelligence scale. See Special Report of the State Board of Charities and Corrections to the General Assembly of 1916, Mental Defectives in Virginia 8-9 (1915) (delineating the different levels of feeble-mindedness on the Binet-Simon scale) [hereinafter Mental Defectives]. See also note 182 *infra* concerning the use of the Binet-Simon scale.

For a discussion of Carrie Buck’s daughter’s mental development, see notes 187-89 and accompanying text *infra*.

¹¹ The phrase was coined by Richard Hofstadter in *Social Darwinism in American Thought* 167 (rev. ed. 1959).

¹² See A. Chase, *supra* note 6, at 134-35; Bligh, Sterilization and Mental Retardation, 51 A.B.A. J. 1059, 1059-60 (1965); Burgdorf & Burgdorf, *supra* note 9, at 997-1001; Cynkar, *Buck v. Bell: ‘Felt Necessities’ v. Fundamental Values*, 81 Colum. L. Rev. 1418, 1431-35 (1981).

¹³ C. Vose, *supra* note 7, at 17.

¹⁴ See, e.g., Berns, *supra* note 7, at 764; Cynkar, *supra* note 12, at 1440-46, 1450-53. Other commentators have noted, however, that prior to *Buck*, state courts reviewing similar laws had questioned seriously the scientific underpinnings of eugenical sterilization theory. See, e.g., Burgdorf & Burgdorf, *supra* note 9, at 1000-01, 1007.

ciates, professional colleagues, and close friends for many years prior to the *Buck* litigation. An examination of private correspondence and institutional records, documents not previously reported in the literature,¹⁵ reveals that the involvement of this group of friends was critical to the passage of the Virginia sterilization law and the conduct of the *Buck* lawsuit. This Article demonstrates not only that *Buck* was a “friendly suit,” but that Aubrey Strode wrote the sterilization law with such a test in mind and that the involvement of Irving Whitehead as counsel to Carrie Buck amounted to no less than collusion among Whitehead, Strode, and Priddy to insure that the sterilization law would be upheld.

Underlying these conclusions is a new interpretation of *Buck v. Bell*. By any measure, *Buck* represents a milestone in the affirmation of governmental power over individual rights, but more specifically, *Buck* is a landmark in the endorsement of intrusive medical procedures as tools to be used for state ends. *Buck* does not merely represent the popular triumph of eugenical theory, but also the success of a small group of professionals who were able to use the specious “scientific” tenets of eugenics to legitimate their private prejudices.

The Article is divided into four parts. Part I displays the record of legislation written by Aubrey Strode, often at Doctor Priddy’s behest, to advance the fortunes of mental health institutions in Virginia. Part I also traces Priddy’s early propaganda in favor of sterilization laws as a means for eradicating “moral degeneracy” and explores the case of *Mallory v. Priddy*, which brought Doctor Priddy’s private sterilization program into public light. Part II details the efforts of Strode and Priddy to develop preemptive legislation which would preclude further challenges to sterilization practices. It explains the genesis of the 1924 sterilization act and the plans for testing it in the courts. Part III analyzes the trial and appeals of *Buck v. Bell*, with particular attention to Whitehead’s role as

¹⁵ One of the major sources of documents used in this Article is a collection of the personal papers of Aubrey Strode, compiled as the Aubrey Ellis Strode Papers, #3014, #3014A Manuscripts Department, University of Virginia Library [hereinafter Strode Papers]. A second important document source is the Record, *Mallory v. Priddy* (Va. Cir. Ct. Richmond, Feb. 16, 1918) [hereinafter Record, *Priddy*], and the records in the related cases, Record, *Ex Parte Mallory*, 122 Va. 298, 94 S.E. 782 (1918) [hereinafter Record, *Ex Parte Mallory*], and Record, *Mallory v. Va. Colony for the Feeble-Minded*, 123 Va. 205, 96 S.E. 172 (1918) [hereinafter Record, *Mallory v. Colony*] (Virginia State Archives File Drawer #383, Item 2711). The third major set of documents are the Minutes of the General Board of State Hospitals (1906-1937) [hereinafter General Board], and Minutes of the Special Board of Directors for the Virginia Colony for Epileptics and Feebleminded (1910-1937) [hereinafter Colony Board]. Records of the General Board include legislative initiatives introduced on behalf of all the mental hospitals in Virginia; Virginia Colony records track private lobbying for the sterilization law and detail the institution’s sterilization practices. Cited portions of the Strode Papers, Records in the Mallory cases, and Minutes of the General Board and Colony Board are on file at New York University Law Review.

attorney for Carrie Buck and the deficiencies in his advocacy. Part IV describes Carrie Buck's life after the sterilization suit. All four parts include references to private documents which clearly place Whitehead in the midst of lobbying, planning, and participating in cooperative efforts with Strode and Priddy to insure the success of their eugenical sterilization program.

I

SETTING THE STAGE FOR A STERILIZATION LAW: THE VIRGINIA COLONY FOR EPILEPTICS AND FEEBLEMINDED 1906-1918

A. Lobbying and Early Legislation

When Carrie Buck was chosen to test the sterilization act, she was a resident of the Virginia Colony for Epileptics and Feeble-minded.¹⁶ A close look at the legislative initiatives passed for the benefit of the Colony, from the original commitment of funds in 1906 to the 1916 grant of discretion given the Colony's superintendent to choose appropriate medical treatment for patients, provides valuable insight into the genesis of the sterilization act. The personal and professional relationships of Aubrey Strode, Albert Priddy, and Irving Whitehead were intertwined,¹⁷ and each played a key role in the drafting, passage, and implementation of those enactments.

Long before his appearance as defendant's attorney in *Buck v. Bell* Strode was intimately involved in the fortunes of the Virginia Colony. During the first of his three terms as a Senator in the Virginia General Assembly, Strode led the movement to build a farmlike institution in his

¹⁶ The Colony's name changed from Virginia State Epileptic Colony to Colony for Epileptics and Feeble-minded, sometimes referred to simply as "the Colony." Today it is known as the Central Virginia Training Center.

¹⁷ Strode and Whitehead were boyhood friends who had grown up on adjacent farms near the village of Amherst, Virginia. Their friendship was lifelong. See, e.g., Letter from Irving Whitehead to Aubrey Strode (Nov. 19, 1917), Strode Papers, *supra* note 15, at Box 135; Letter from Irving Whitehead to Aubrey Strode (May 21, 1918), Strode Papers, *supra* note 15, at Box 79. They were both regular participants in local and state Democratic Party politics, and in 1903 collaborated in the investigation and impeachment of a county judge. See Investigation by the Committee for the Courts of Justice of the House of Delegates of Charges Preferred Against C.J. Campbell, Judge of the County Court of Amherst, printed in 1902-1904 House Journal (Va.). See generally P. Lombardo, *Eugenical Sterilization in Virginia: Aubrey Strode and the Case of Buck v. Bell* 234-36 (May 1982) (unpublished Ph.D. dissertation, University of Virginia).

Priddy had served in the Virginia House of Delegates for two terms, see 1893-1894 House Journal (Va.) and 1899-1900 House Journal (Va.), and had remained active in the Democratic Party, see, e.g., note 83 *infra*. When Strode married his second wife, a student of eugenical theory, Priddy was a valuable confidant and advised the couple as to whether she could safely have children. See P. Lombardo, *supra*, at 149-53.

district for the care of the state's epileptics.¹⁸ His initial efforts to establish and fund the institution were successful,¹⁹ but delays in site acquisition²⁰ impeded Strode's efforts to push through a law granting a formal charter of the Colony until 1910.²¹ That law provided for the appointment of a special board of directors to govern the Colony. Irving P. Whitehead was appointed along with two others to comprise the first Colony Board, which in turn selected Albert Priddy to be the Colony's first superintendent.²²

Strode's legislation suggested economic as well as humanitarian motives for chartering the Colony. The Colony would provide not only for the unique needs of the epileptic patient, but would be a working farm where self-supporting inmates could relieve the state of a portion of the financial burden occasioned by their care.²³ Priddy not only embraced the concept of economical care as applied to epileptics,²⁴ but also carried it over to his broader interest, the treatment of the "feeble-minded" and "mental defectives." Doctor Priddy warned, starting with his earliest official reports, that the state's fiscal ability to continue providing care for its growing number of "defective" citizens was limited.²⁵ To address in-

¹⁸ See "To Provide for the Epileptics," *Richmond Times Dispatch*, Jan. 16, 1906, at 2, col. 2.

¹⁹ See Act of Feb. 20, 1906, ch. 48, 1906 Va. Acts 36; Act of Mar. 10, 1906, ch. 129, 1906 Va. Acts 211.

²⁰ See Act of Mar. 12, 1908, ch. 195, 1908 Va. Acts 295 (authorization for purchase of alternate site).

²¹ See Act of Feb. 16, 1910, ch. 31, 1910 Va. Acts 39. See also P. Lombardo, *supra* note 17, at 74-81.

²² See Report of the Virginia State Epileptic Colony 11-12 (1910). For general history of the Colony's founding, see A. Priddy, *Virginia State Epileptic Colony*, in *Institutional Care of the Insane in the U.S. and Canada 777-81* (H. Hurd & W. Drewry eds. 1916); Prichard, *Lynchburg Training School and Hospital, Mental Health in Virginia*, Summer 1960, at 40.

²³ First to be admitted were "those patients who would be of the greatest service to the colony." Act of Feb. 16, 1910, ch. 31, 1910 Va. Acts 39, 40.

²⁴ Priddy was keenly aware of the costs of institutional care. His early reports contained long discussions of the high costs of such care and proudly noted that patient employment partially defrayed those costs. See Report of the Virginia State Epileptic Colony 9 (1911) ("over one-half of our patients are employed in some capacity . . . much to their own benefit and to the profit of the institution").

²⁵ Priddy's first official report as superintendent of the Colony explicitly linked heredity to the growth of the dependent population.

[O]f the known causes which contribute to the development and growth of epilepsy . . . bad heredity is the most potent, and with the unrestricted marriage and intermarriage of the insane, mentally defective and epileptic, its increase is but natural and is thus to be reasonably accounted for . . .

Report of the Virginia State Epileptic Colony 7 (1910). A year later, Priddy declared,

[I]t is reasonable to anticipate a rapid increase in epileptics and mental defectives, out of proportion to the normal increment of population, and to infer that the State of Virginia is rapidly accumulating a greater population of these defectives and dependents than her resources will permit the comfortable care and support of.

Report of the Virginia State Epileptic Colony 10 (1911).

creased numbers of "defectives" in the population and reduce social welfare costs, Priddy took a bold stand and urged the legislature "to give thought to the practicability of a law permitting the sterilization of inmates of our eleemosynary and penal institutions"²⁶

Meanwhile, in order to control the reproduction (through segregation) of as many of the "defective" population as possible, Priddy lobbied for the expansion of the Colony to include residential space for people suffering from the ill-defined malady of "feeble-mindedness."²⁷ In 1912, the General Assembly appropriated funds to expand the Colony as Priddy wished.²⁸ The authorizing legislation specifically directed the admission of "women of child-bearing age, from twelve to forty-five years of age" as the first patients. As such, the 1912 law was Virginia's first legislative expression of the theory that feeble-mindedness is hereditary and that those afflicted should be segregated to avoid propagation of their own kind.²⁹

As the Virginia Colony population grew, so did the frequency with which Priddy proposed legislation to prevent patient reproduction in a manner more economical than long-term segregation. In 1914 he participated in a study with the Virginia Board of Charities and Corrections, which culminated in a report to the General Assembly entitled *Mental Defectives in Virginia*.³⁰ That report proposed large-scale institutional sterilization for Virginia's feeble-minded.³¹ In his own reports to the Governor, Priddy warned of the "blight on mankind" that feeble-mindedness threatened and urged that unless "radical measures" were taken to curb its growth, feeble-mindedness would constitute a "burden too heavy" for the people to bear.³² Priddy's remarks drew connections be-

²⁶ Report of the Virginia State Epileptic Colony 10 (1911).

²⁷ The State Board of Charities and Corrections, with which Priddy was in regular contact, argued from its inception in 1908 for an institution for the segregation and treatment of the feeble-minded. See, e.g., Report of the State Board of Charities and Corrections 28 (1911).

²⁸ Act of Mar. 13, 1912, ch. 196, 1912 Va. Acts 464.

During the same legislative session the State Board of Charities and Corrections was directed "to ascertain the facts concerning the weak-minded," Act of Mar. 12, 1912, ch. 143, 1912 Va. Acts 291. That mandate was repeated in 1914, along with a directive that the Board "report . . . a comprehensive, practical scheme for the training, segregation and the prevention of procreation of mental defectives," Act of Mar. 20, 1914, ch. 147, 1914 Va. Acts 242. The language of the 1914 law echoed a recommendation by Dr. Priddy in his annual update on the Epileptic Colony. See Report of the State Board of Charities and Corrections 57 (1913).

²⁹ The law was a direct product of efforts by the State Board of Charities and Corrections and the Virginia Medical Society, both of which were concerned about inheritable feeble-mindedness, and both of which advocated segregation. See Report of the State Board of Charities and Corrections 21-25, 27-28 (1911); Proceedings of Virginia Medical Society (Oct. 24, 1911).

³⁰ *Mental Defectives*, supra note 10, at 5.

³¹ *Mental Defectives*, supra note 10, at 11 (comprehensive sterilization is necessary to eradicate feeble-mindedness within two generations).

³² Report of the Virginia State Epileptic Colony 15-16 (1915).

tween hereditary mental defects and crime, prostitution, drunkenness, and other problems of "non-producing and shiftless persons, living on public and private charity."³³ Women whose feeble-mindedness was not so severe as to preclude their working outside the Colony were Priddy's highest priority for sterilization.³⁴

In tandem with Priddy's campaign, Strode continued as the Colony's chief advocate within the state legislature.³⁵ During the 1916 legislative session, Strode, often in response to requests from Doctor Priddy, introduced five separate bills relating to treatment of the feeble-minded.³⁶ The most important of the five enactments amended the charter of the Colony to allow the superintendent and the Board to "see that such moral, medical and surgical treatment as they may deem proper" be given to Colony patients "in order to promote the objects for which the institution is provided."³⁷ While on its face that provision appeared innocuous enough, an earlier line in the amendment provided a clue to its true intent. Among the objects for which the Colony had been established was "the protection of society."³⁸

Thus, although the 1916 Colony charter revision never mentioned "sterilization," Priddy's writings confirm that his interpretation of the

³³ *Id.*

³⁴ *Id.* at 17. Priddy's first selection of patients for sterilization was based on this criterion. See notes 39-41 and accompanying text *infra*.

³⁵ Strode was rewarded for his work by construction of a building at the Colony bearing his name. Report of the Virginia State Epileptic Colony 14 (1912).

³⁶ Strode and several other senators shared sponsorship for the five bills, each of which eventually became law. See S.B. No. 146, 1916 Senate Journal (Va.) 93, Act of Mar. 4, 1916, ch. 104, 1916 Va. Acts 166 (giving additional administrative power to the State Board of Charities and Corrections to identify and register the feeble-minded); S.B. No. 169, 1916 Senate Journal (Va.) 100, Act of Mar. 4, 1916, ch. 106, 1916 Va. Acts 168 (expanding the charter of the Virginia Colony); S.B. No. 63, 1916 Senate Journal (Va.) 42, Act of Mar. 16, 1916, ch. 207, 1916 Va. Acts 406 (establishing a colony for feeble-minded Negroes); S.B. No. 230, 1916 Senate Journal (Va.) 191, Act of Mar. 20, 1916, ch. 312, 1916 Va. Acts 540 (specifying procedures for commitment of feeble-minded criminals); S.B. No. 147, 1916 Senate Journal (Va.) 93, Act of Mar. 20, 1916, ch. 388, 1916 Va. Acts 662 (establishing a new legal definition of feeble-mindedness based on the Binet-Simon intelligence scale).

Correspondence and copies of draft bills make it clear that Strode was the original author of all five laws and that he introduced some of them on Priddy's behalf. See, e.g., Letter from Albert Priddy to Aubrey Strode (Feb. 2, 1916), Strode Papers, *supra* note 15, at Box 39 ("I thank you for sending me copies of the Bill in regard to the Department for the Feeble-minded which I find to be . . . just what we wish. . . . I also gave Mr. Gatewood of Amherst a copy of the bill which he introduced in the House."). See also *id.* at Box 101, for a copy of Strode's Senate bill amending the Colony charter.

³⁷ Act of Mar. 4, 1916, ch. 106, 1916 Va. Acts 168, 170.

³⁸ Feeble-mindedness was frequently characterized as a "menace to society" or as the "rising tide of degeneracy." See, e.g., M. Haller, *Eugenics* 95-110 (1963); Reilly, *The Surgical Solution: The Writings of Activist Physicians in the Early Days of Eugenic Sterilizations*, 26 *Persp. Biol. & Med.* 637, 642-44 (1983) (discussion of alarmist eugenical propaganda related to the social costs of "degeneracy").

law provided a justification of the "therapeutic" prerogative.³⁹ Within days of the effective date of the new law, Priddy petitioned the Colony Board for specific approval to sterilize eight patients.⁴⁰ At a meeting of the Colony Board, it was Irving Whitehead who mimicked Priddy's argument that the treatment prerogative provided in the statute was sufficiently broad to cover involuntary sterilization of feeble-minded patients and who recommended that his fellow Board members approve salpingectomy (the surgical procedure to sterilize women, analogous to tubal ligation) for the patients chosen by Priddy.⁴¹

The minutes of the Colony Board meeting inaugurating sterilization as a new therapy contained so little discussion that it appears to have been considered only a casual development.⁴² Subsequent sterilizations were approved in an entirely perfunctory manner.⁴³ There are no explanations why particular patients were selected, nor any evidence of careful review of the superintendent's choices.⁴⁴ Until his resignation in

³⁹ Report of the Virginia State Epileptic Colony 15 (1916) ("[T]hat mental defectives should not be permitted to assume the risk of reproducing their kind [has] . . . found recognition in this law, in that a logical and plain construction of one of its provisions authorizes . . . sterilization . . . as a means of permitting those who are capable of self-support . . . to leave the institution . . .").

⁴⁰ Priddy presented his report proposing the sterilization at the June 9, 1916 Colony Board meeting. The law had gone into effect on June 4, 1916. See Colony Board, *supra* note 15, at June 9, 1916.

⁴¹ The minutes recorded Whitehead's recommendation as follows:

The law amending the Act of incorporation of the [Virginia] Colony for the Feeble-minded became operative and effective June 4, 1916. Under this Act the performance of such surgical operations on patients as would promote their health, safety and usefulness as well as to hasten their discharge from the institution is authorized in such cases as the Board may direct upon the recommendation of the superintendent. Acting on the provision of this law, I respectfully recommend that official authority be granted the superintendent to perform Salpingectomy for the purpose of sterilization on the following young women of such high mental grades as might warrant their release from the institution to earn their own living under the control of proper persons if thus protected: to wit: [names of the eight women selected].

A report of the date of performance of these operations and the result to be made to the Board in due time after such operations.

Colony Board, *supra* note 15, at June 9, 1916. As to Whitehead's two fellow directors, one was not present at the meeting and the other offered no comment. *Id.*

⁴² See *id.*

⁴³ See, e.g., Colony Board, *supra* note 15, at Aug. 11, 1916, Sept. 8, 1916, Mar. 14, 1917, Apr. 6, 1917.

⁴⁴ The first victims of the Priddy policy were almost uniformly women. However, in one dramatic case, Priddy was authorized to operate on "two feeble-minded young men . . . liable to escape and especially dangerous to the safety of women if allowed to go at large . . . by complete method of removing the organs of both of them." Presumably because of the radical nature of castration, the Board suggested that the father of one of the patients be asked for his consent. Colony Board, *supra* note 15, at Sept. 8, 1916.

This failure to notify the patients of the nature and consequences of the surgery was the gravamen of a recent class action suit against the Colony (now called the Central Virginia Training Center and formerly also known as Lynchburg Training School and Hospital). Poe

1917,⁴⁵ Whitehead invariably was the director who moved to have the Colony Board authorize patients to be sterilized. At several meetings of the Colony Board, Priddy recommended and Whitehead approved the sterilization of more than two dozen women.⁴⁶

Whitehead's personal contributions to public service and treatment of the feebleminded were not limited to his tenure as a director of the Colony. He also sat on the General Board of State Hospitals as a representative of the Epileptic Colony. While sitting on the General Board, he was appointed to a special committee along with Priddy to lobby the General Assembly to enact measures quite similar to those proposed in *Mental Defectives in Virginia*.⁴⁷ Whitehead was commended for his efforts when he reported back to the General Board on the success of the committee's work.⁴⁸

In one of his last official acts as a Colony Board member, Whitehead recommended approval of the sterilizations of two Richmond women from the same family, Miss Jessie and Mrs. Willie Mallory.⁴⁹ Several months after their operations were performed, Priddy reported to the Colony Board that a damage suit had been filed against him by Mrs. Mallory. The Board, agreeing that Priddy had acted legally in his official capacity as superintendent, approved the retention of an attorney to defend him.⁵⁰

The records of the case of *Mallory v. Priddy*⁵¹ contain perhaps the

v. Lynchburg Training School & Hosp., 518 F. Supp. 789 (W.D. Va. 1981). The suit was settled on March 5, 1985. The settlement included a state-financed media campaign to alert former patients of their possible sterility and a confidential "sterilization hotline" to respond to patient inquiries. The settlement included no provision to notify known patients individually nor funding for surgical reversal of operations.

⁴⁵ Whitehead left the Colony Board in 1917 when he moved from Virginia to accept a post at the Federal Land Bank in Baltimore. Colony Board, *supra* note 15, at May 6, 1917; Letter from Aubrey Strode to Peyton Cochran, Chairman, Va. State Bar Ass'n (June 13, 1938) (memorial to Irving Whitehead), Strode Papers, *supra* note 15, at Box 92.

⁴⁶ See note 43 *supra*.

⁴⁷ General Board, *supra* note 15, at Nov. 14, 1916. It is likely that this appointment was a tardy formality and that the committee was actually formed at the Jan. 7, 1916 meeting of the General Board, when it reviewed the recommendations in the State Board of Charities and Corrections report, *Mental Defectives*, *supra* note 10, and adopted several similarly worded recommendations of its own.

⁴⁸ General Board, *supra* note 15, at Oct. 10, 1917.

The spate of laws passed in 1916, see note 36 *supra*, reflected the recommendations of the General Board and the State Board of Charities and Corrections. Compare, e.g., Act of Mar. 4, 1916, ch. 104, 1916 Va. Acts 166 with General Board, *supra* note 15, at Jan. 7, 1916 (2d recommendation) and *Mental Defectives*, *supra* note 10, at 14-15; Act of Mar. 20, 1916, ch. 388, 1916 Va. Acts 662 with General Board, *supra* note 15, at Jan. 7, 1916 (1st recommendation).

⁴⁹ See Colony Board, *supra* note 15, at Mar. 14, 1917, Apr. 6, 1917.

⁵⁰ Colony Board, *supra* note 15, at Nov. 8, 1917.

⁵¹ See note 15 *supra*.

most revealing portrait of the Colony's first superintendent. In depositions and letters introduced as evidence during the Mallory suit, Priddy appears more as an obsessed moralist who used his position to threaten and manipulate his patients than a zealot of eugenics. A close look at Priddy's behavior explains much of his motive for seeking specific legislative and judicial endorsement of eugenical sterilization and foreshadows some of the more inflammatory rhetoric found both in the records of Carrie Buck and in the Supreme Court opinion.

B. "Therapeutic Sterilization": Mallory v. Priddy

In September 1916 George Mallory was working away from home at a sawmill in Hanover County, Virginia. His wife Willie and eight of their twelve children lived in nearby Richmond. Mrs. Mallory and her two oldest daughters worked from time to time to supplement the money George brought them every week to cover the family expenses. They were, in the words of their attorney, "respected citizens . . . but . . . poor, and not overplussly [sic] blessed with worldly riches."⁵² Two Richmond policemen appeared at the Mallory home one night; George was away at work and two family friends were visiting. The police arrested Mrs. Mallory, the two male visitors, and the eight children. Most of the children were taken to the Juvenile Court where, on the testimony of the two policemen, it was concluded that they were "exposed to vicious and immoral influences."⁵³ Without notifying their father, the court determined that the children should be removed from their home and turned over to the Children's Home Society.⁵⁴

The police court fined Irene, the eldest daughter, and the two family friends five dollars each on disorderly conduct charges. Mrs. Mallory was charged with conducting a disorderly house⁵⁵ and her two next old-

⁵² Petition for Writ of Habeas Corpus at 1, Record, *Mallory v. Colony*, supra note 15.

⁵³ See *Ex Parte Mallory*, 122 Va. 298, 299, 94 S.E. 782, 783 (1918). The testimony of the two policemen was called into question by the charge that "one of the police officers made an indecent proposal to Irene Mallory, a comely young daughter about nineteen years of age," allegedly offering to drop the charges if she would comply with his demands. Petition at 2, Record, *Ex Parte Mallory*, supra note 15.

⁵⁴ *Ex Parte Mallory*, 122 Va. 298, 299, 94 S.E. 782, 783 (1918).

Of the eight children taken from the Mallory home that night, all the young ones were sent to the Children's Home Society. The Society specialized in placing orphaned, neglected, or abandoned children in foster homes. According to depositions taken in *Ex Parte Mallory*, these placements often amounted to little more than an indenture, the children performing as servants to the "foster" parents. Deposition at 91-97, Record, *Ex Parte Mallory*, supra note 15 (testimony of Charlie Walls describing his work duties for his foster parents and the attempts of the director of the Society to confiscate his meager wages). The Children's Home Society was an administrative arm of the State Board of Charities and Corrections, the agency that issued *Mental Defectives in Virginia*.

⁵⁵ In the parlance of the era, keeping a disorderly house amounted to conducting a brothel.

est daughters, Nannie and Jessie, were held at the City Detention Home for three weeks, though no charges appear to have been made against them.⁵⁶ A "Commission of Feeble-Mindedness" was held, and Mrs. Mallory, along with Nannie and Jessie, were declared feeble-minded and taken to the Colony.⁵⁷ There, Jessie and her mother were sterilized and discharged.⁵⁸ Fourteen-year-old Nannie Mallory remained in Priddy's custody for more than a year, and it was in an effort to obtain her release that George Mallory eventually retained an attorney to sue Priddy.

Three suits were filed. The first two were petitions for writs of habeas corpus to release the younger children from the Children's Home Society and Nannie from the Colony. Both were successful; each court found that the procedural requirements of the relevant law had been violated.⁵⁹

⁵⁶ See Petition at 2, 3, Record, *Mallory v. Colony*, supra note 15.

⁵⁷ All three were committed on Oct. 14, 1916. See Petition at 3, Record, *Mallory v. Colony*, supra note 15.

⁵⁸ Petition at Exhibit B, Record, *Mallory v. Colony*, supra note 15 (letter from Priddy to Mr. Mallory admitting sterilization of both Willie and Jessie); Deposition at 33, 36, 44, 45, Record, *Ex Parte Mallory*, supra note 15 (testimony of Willie and Jessie Mallory, each stating she was sterilized; Willie was released nine months after her commitment and Jessie seven to eight months after commitment).

⁵⁹ *Ex Parte Mallory*, 122 Va. 298, 94 S.E. 782 (1918) (writ of habeas corpus for release of Mallory children); *Mallory v. Va. Colony for the Feeble-Minded*, 123 Va. 205, 96 S.E. 172 (1918) (writ of habeas corpus for release of Nannie Mallory).

The court in *Ex Parte Mallory* found that, because the statutory rights to notice and a hearing had not been available to Mr. Mallory, the commitment procedure had not been in compliance with the law. 122 Va. at 300, 94 S.E. at 783. Mrs. Roller, a probation officer of the Juvenile Court and a regular consultant to Priddy, see Report of the Virginia State Epileptic Colony 18 (1916), seemed to have anticipated the commitment of the children and reportedly remarked, "Now I have got the little Mallory children at last." Deposition at 77, Record, *Ex Parte Mallory*, supra note 15 (testimony of Jessie Mallory Bowles).

Administrative procedures for commissions of feeble-mindedness were described in the law drafted by Aubrey Strode defining the affliction. See Act of Mar. 20, 1916, ch. 388, 1916 Va. Acts 662, 663-64. Those procedures had not been followed. See *Mallory v. Va. Colony for the Feeble-Minded*, supra (finding that Nannie Mallory's commitment did not follow the statutorily prescribed procedures and granting habeas relief).

Mrs. Mallory, who was committed in the same "proceeding" as Nannie, described the irregularity of her commitment in her deposition. First she explained how she was brought by Mrs. Roller from the jail to the Home, where her younger children were kept. She was asked to explain the events that occurred there.

A. [A] doctor examined my mind and asked if I could tell whether salt was in the bread or not, and did I know how to tie my shoes. There was a picture hanging on the wall of a dog. He asked me if it was a dog or a lady. He asked me all sorts of foolish questions which would take too long for me to tell you.

Q. What happened?

A. Then, the doctor took his pencil and scratched his head and said "I can't get that woman in," and Mrs. Roller said to them, "put on there, 'unable to control her nerves', and we can get her in for that." That is about all.

Deposition at 32, Record, *Ex Parte Mallory*, supra note 15 (testimony of Willie Mallory). The suggestion that Willie Mallory could be committed to a mental institution for being

The third suit was a damage action against Doctor Priddy for \$5,000, alleging that Mrs. Willie Mallory had been illegally deprived of her liberty, sterilized against her will, deprived of her family, and forced to work for no compensation.⁶⁰ Priddy's defense to the damage action relied on the recommendation of the Commission of Feeble-Mindedness, which had been convened under the 1916 law, as the basis of his right to admit the Mallory women to Colony care.⁶¹ He denied that the sterilization was involuntary, claiming that Willie Mallory had requested the operation and that it was medically necessary.⁶² Without it, he said, she "would most probably have died."⁶³ He denied any ill treatment of Mrs. Mallory and ended his own defense with a charge against her. She was, Priddy asserted, "for a long time . . . well-known to the police of the City of Richmond, and the social and charity workers of the State of Virginia, as a deficient, and as a most troublesome and undesirable citizen . . . incapable of leading a clean and proper life."⁶⁴

Although the suit against Priddy focused on the damages suffered by Mrs. Mallory, George Mallory was equally upset by the fact that his daughter, Nannie, remained in Priddy's custody. Both Willie Mallory and her daughter Jessie had been sterilized by Priddy; George feared that as long as Nannie remained at the Colony, the same fate might befall her.⁶⁵ After George had entrusted the damage case to an attorney, he wrote a long and impassioned letter to Priddy seeking Nannie's release:

Dear sir one more time I am go write to you to ask you about my child I cannot here from her bye no means. I have wrote three or four times cant yet hereing from her at all we have sent her a box and I dont no wheather she received them or not. I want to know when can I get my child home again my family have been broked up on false pertents same as white slavery, Dr what busneiss did you have opeating on my wife and daughtr with out my consent. I am a hard working man

"unable to control her nerves" reflected Mrs. Roller's experience in committing people to state hospitals under the previous Lunacy Act which allowed such "medical" judgments to be used as the basis of a commitment order. See Act of Apr. 7, 1903, ch. 139, 1903 Va. Acts 121, 125-26, for the typical commitment procedure prior to 1916. In fact, the 1903 insanity commitment statute does not even define insanity. The 1916 law for the feeble-minded was somewhat more explicit in regard to mental exams, requiring a minimum of two months of special observation and an administration of the Binet-Simon test. Act of Mar. 20, 1916, ch. 388, 1916 Va. Acts 662, 665.

⁶⁰ Complaint of Trespass on the Case, Record, *Priddy*, supra note 15.

⁶¹ Grounds of Defence at 2, Record, *Priddy*, supra note 15.

⁶² *Id.* at 2-3.

⁶³ *Id.* at 3.

⁶⁴ *Id.* at 4.

⁶⁵ Before the habeas petition was filed, Mr. Mallory's attorney wrote to attorneys for the Colony explaining that they were "reliably informed" that Nannie was detained at the Colony "for the purpose of an illegal operation which will be performed on her in the near future." Petition at Exhibit D, Record, *Mallory v. Colony*, supra note 15.

can take care of my family and can prove it and before I am finish you will find out that I am. I heard that some one told you lots of bad new but I have been living with her for twenty three years and cant no body prove nothing againts my wife they cant talk anything but cant prove nothing. My laywers said that you treated them very [?] just to think my wife is 43 years old and to be treated in that way, you ought to be a shamed of your selft of opeating on her at that age Just stop and think of how she have been treated What cause did you have to operateding her please let me no for there is no law for such treatment I have found that out I am a poor man but was smart anuf to find that out—I had a good home as eny man wanted nine sweet little children—now to think it is all broke up for nothing I want to no what you are go do I earn 75\$ a mounth I dont want my child on the state I did not put her on them. if you dont let me have her bye easy terms I will get her by bad she is not feeble minded over there working for the state for nothing now let me no at once I am a humanbeen as well as you are I am tired of bein treated this way for nothing I want my child that is good understood let me know before farther notice. Now I want to know on return mail what are you go do wheather are go let my child come home let me here from her.

Verly Truly

Mr. George Mallory

My last letter to you for my child with out trouble dont keep my child there I have told you not to opeated on my child if you do it will be more trouble then you [?]⁶⁶

Priddy's response threatened Mallory with arrest and showed the extent to which Priddy kept in touch with state agencies that could recommend patients for "therapy" at the Virginia Colony:

I have your letter of the 5th of Nov. which is insulting and threatening in its tone and I want to say to you that if you dare write me another communication I will have you arrested and brought here too. I have the full record of you and your family from the State Board of Charities and Corrections and the Juvenile Court of Richmond. Your wife and Jessie were both operated on because they asked me to do so and it was done for diseases they had. Now, don't you dare write me another such letter or I will have you arrested in a few hours.

Very Respectfully,

A.S. Priddy

Superintendent⁶⁷

This and other letters suggest the strong moralistic tone with which Priddy's peculiar brand of eugenics was infused.⁶⁸ Fortunately for Nan-

⁶⁶ Letter from George Mallory to Albert Priddy (Nov. 5, 1917) (reproduced unedited).

⁶⁷ Petition at Exhibit B, Record, *Mallory v. Colony*, supra note 15 (letter from Albert Priddy to George Mallory (Nov. 13, 1917)).

⁶⁸ See also Letter from Albert Priddy to Willie Mallory (Nov. 26, 1917) ("I am gratified to

nie the habeas relief was granted promptly enough that she was released from the Colony unsterilized.⁶⁹

When the suit against Priddy came to trial, the defense of therapeutic prerogative was apparently effective; the jury returned a verdict in favor of Priddy.⁷⁰ Later accounts, however, indicated that the trial judge had reservations about Priddy's reliance on therapeutic discretion as the justification for sterilizing patients. He warned Priddy to discontinue the practice until the existing law was changed.⁷¹

There can be little doubt of the effect of the *Mallory v. Priddy* lawsuit on Priddy's sterilization policy. Colony records following the lawsuit show that although he felt the verdict had "vindicated the management of the institution," it also highlighted "the importance of complying with every technical requirement of law."⁷² While Priddy continued to recommend patients for sterilization, in each future instance "pelvic disease" of undisclosed origin was indicated as the basis for the operation.⁷³ In a notable change of tone from his early boasts of sterilizing "twenty young women of the moron type,"⁷⁴ Priddy's later reports cautiously noted that sterilizations were carried out when necessary "for the relief of physical suffering."⁷⁵

Both public and private accounts thus support the conclusion that

know that the operation performed on you did so much good that you are now able to earn an honest living . . . and not live such a life of shame as you did before coming to this institution . . . because I have had the police on the lookout for you and Jessie for some time, trying to locate and arrest you to bring you back.").

⁶⁹ This conclusion is based on the absence of Nannie's name on the lists of people sterilized at the Colony.

⁷⁰ Verdict, Record, *Priddy*, supra note 15.

⁷¹ See Prichard, supra note 22, at 46 (Director on Colony Board reported that the "Judge warned Dr. Priddy not to sterilize any other patients until the existing law was changed.'). See also Letter from Aubrey Strode to Don Preston Peters (July 19, 1939), Strode Papers, supra note 15, at Box 30 (Priddy "could successfully defend only on the ground that the operation was indicated for therapeutic purposes rather than eugentially . . ."). Perhaps the most telling commentary on the importance of the damage suit to Priddy's need for a sterilization law was made by his friend Dr. Joseph DeJarnette some years later on the occasion of a memorial to Priddy:

About ten years ago Dr. Priddy did more for the people of Virginia . . . than all the superintendents . . . for the last forty years. What did he do? He sterilized sixty women, potentially mothers of feeble-minded children. When you remember that one couple in a few years will bring six or seven feeble-minded, criminals, paupers or misfits into the world you can see what he did for the State then. A patient upon whom he had operated sued him for \$5,000.00 for operating upon her and sterilizing her. This frightened all the superintendents in the State and all sterilization was stopped promptly. I had sterilized a few, but since then we have all been afraid to operate.

General Board, supra note 15, at Oct. 12, 1926.

⁷² Colony Board, supra note 15, at Apr. 9, 1918.

⁷³ See, e.g., Colony Board, supra note 15, at Sept. 9, 1918.

⁷⁴ Report of the Virginia State Epileptic Colony 15 (1916).

⁷⁵ Report of the Virginia State Epileptic Colony 13 (1917).

the Mallory cases gave Priddy a substantial motive for pursuing specific statutory authority for eugenical sterilization. In fact, Priddy's sensitivity about the scope of his therapeutic prerogative surfaced explicitly during Carrie Buck's trial.⁷⁶

II

LEGISLATIVE STRATEGIES 1919-1924

A. *In Pursuit of Specific Sterilization Authority*

In the wake of the Mallory suits, Priddy had a bill introduced in the General Assembly specifically authorizing eugenical sterilization.⁷⁷ Priddy was so anxious to receive legislative approval that he did not wait for the help of Strode, who was serving an Army commission in Washington, D.C.⁷⁸ Because of his absence, Strode witnessed neither Priddy's embarrassment in the Mallory lawsuits nor the undignified defeat of Priddy's hasty legislative initiative.⁷⁹

In 1919, Strode returned to resume his duties in the Virginia General Assembly.⁸⁰ Priddy asked Strode to draft two bills that would provide protection to physicians in future suits: one providing for the legal expenses of superintendents in habeas corpus proceedings and the other declaring all present inmates to be lawfully committed.⁸¹ Although both of these bills were enacted in 1920, they were piecemeal measures and did

⁷⁶ See, e.g., Record at 89, *Buck* (trial testimony of Albert Priddy proclaiming that he could medically treat his patients however he chose).

⁷⁷ Priddy argued for the need of explicit statutory authorization before the General Board of State Hospitals and was charged with preparing the bill. At least one member of the General Board, however, opposed the move, warning that time was not politically ripe for such radical measures. DeJarnette, *Sterilization Law in Virginia*, DeJarnette Papers, Western State Hospital, Staunton, Va. [hereinafter DeJarnette Papers]. (Cited portions on file at New York University Law Review.)

⁷⁸ Strode received his commission with the Judge Advocate General's Corps in April 1918. This commission had been arranged by Congressman Henry Flood of Virginia at the prompting of Irving Whitehead. An account of the correspondence between Whitehead and Strode concerning the Army commission may be found in P. Lombardo, *supra* note 17, at 137-41.

⁷⁹ See Letter from Joseph DeJarnette to John Dickson (Oct. 24, 1947), Strode Papers, *supra* note 15, at Folder 3014A. DeJarnette shared credit for the legislative failure: "We prepared the bill, and it was presented before the legislative committee of the House by Dr. Peter Winston We were rewarded for our trouble by one vote (Dr. Winston's) and were laughed at by the law-makers" An earlier account of the bill's failure demonstrated DeJarnette's vindictiveness toward the legislators. "The Legislators were so excited about it; they said: 'They might get all of us.' When they voted against it, I really felt they ought to have been sterilized as unfit." Transcript of the Celebration of Dr. J.S. DeJarnette's Fiftieth Anniversary (July 21, 1939), DeJarnette Papers, *supra* note 77, at 30.

⁸⁰ See P. Lombardo, *supra* note 17, at 141-42.

⁸¹ See Act of Mar. 10, 1920, ch. 164, 1920 Va. Acts 240; Act of Mar. 16, 1920, ch. 262, 1920 Va. Acts 376. See also Letter from Albert Priddy to Aubrey Strode (Jan. 25, 1920), Strode Papers, *supra* note 15, at Box 148 (approving draft copies of Strode's bills). Provisions of both laws were written to avoid particular problems raised by the Mallory litigation.

not address Priddy's major objective: specific legislative authorization for sterilizations. Still desirous of such a law, Priddy asked Strode to report on the feasibility of a statute allowing eugenical sterilization. Strode's report indicated that sterilization laws had been struck down as unconstitutional in several state courts and that, in fact, similar legislation allowing eugenical sterilization of prisoners had been proposed in Virginia in 1910, but had failed.⁸² These comments apparently put the matter to rest for a time, and Strode turned his attention to other matters.⁸³

Priddy continued his public campaign for sterilization legislation by alternately extolling the scientific accuracy of eugenical theory and recommending restrained and careful application of the theory in practice. In a chapter in one of his annual reports, "Observations on Mental Defectives," Priddy took the opportunity to advance both strategies. He had learned through professional experience, he said, that the "sexual immorality" of "anti-social" "morons" rendered them "wholly unfit for exercising the right of motherhood."⁸⁴ One of Priddy's important targets was prostitutes. He claimed that "[t]hese women are never reformed in heart and mind because they are defectives"⁸⁵

After making his case for sterilization, Priddy was quick to assert that "[n]o one could be more opposed to a drastic and far-reaching law

⁸² Letter from Aubrey Strode to Don Preston Peters (July 19, 1939), Strode Papers, *supra* note 15, at Box 30 (recounting Strode's involvement). See also Lombardo, *Involuntary Sterilization in Virginia: From Buck v. Bell to Poe v. Lynchburg*, *Dev. Mental Health L.*, July-Sept. 1983, at 13 (1983) (detailing the 1910 proposal to sterilize convicts).

⁸³ In 1922, Strode was involved in a heated political contest, campaigning for the Democratic nomination to the congressional seat left vacant by Henry Flood's death. Several letters link Strode, Priddy, and Whitehead during the campaign. One letter, from Strode to Priddy, outlined his campaign strategy. The letter indicated that Priddy had been keeping Strode apprised of his political strength in various counties. Letter from Aubrey Strode to Albert Priddy (Jan. 5, 1922), Strode Papers, *supra* note 15, at Box 84. Another note of interest was written by Irving Whitehead, offering aid for a campaign rally:

Dear Aubrey,

Dr. Priddy has written me asking me down to the Amherst mass meeting. If I can come I will do so but I fear I won't be able to get there. He says he can load up two autos with Colony 'mates and send them over to the meeting for you.

I think you should call him up and ask him to be sure to do so and tell him who his crowd should report to when they get there so that no confusion will arise.

I am coming if possible.

Good luck,

Yours,

I.P. Whitehead

Letter from Irving Whitehead to Aubrey Strode (Jan. 31, 1922), Strode Papers, *supra* note 15, at Box 84. Unfortunately, the Strode Papers do not reveal whether any Colony patients attended the rally.

⁸⁴ Report of the Virginia State Epileptic Colony 27 (1922-1923).

⁸⁵ *Id.* at 27-28.

. . . .”⁸⁶ His “opposition” was not, however, without qualification, for “in such cases of females who have been committed to state institutions as incorrigible and delinquent mental defectives . . . [he viewed sterilization] as the only solution”⁸⁷

From the cautious manner in which Priddy chose to present his sterilization policy, it is apparent that he understood it might be viewed as radical by the public at large. The theory of eugenics—that mental, moral, and physical defects were transmitted in a predictable pattern through heredity—was simply not a generally accepted proposition. Priddy’s final success in passage of the sterilization law did not depend on the unproven intricacies of eugenical theory, however, but upon economic recession in Virginia.

In 1922 and 1923 Governor E. Lee Trinkle made several unprecedented visits to meetings of the General Board of State Hospitals. He was accompanied by his chief budget officer, and at each meeting he delivered an analysis of the state’s fiscal predicament.⁸⁸ At the September 1923 meeting of the General Board, Trinkle gave a report on the “critical financial condition of the State” and urged that it was “absolutely necessary . . . to use the most rigid economy” in institutional administration.⁸⁹ Discussion followed on the means by which increased demand for admission to state institutions could be prevented. One of the measures proposed and approved by the Board and the Governor was a legislative initiative “to legalize under proper safeguards, the sterilization of insane, epileptic and feeble-minded persons . . . to relieve the institutions of their crowded conditions [and in order that patients] could leave the institutions, become producers and not propagate their kind.”⁹⁰

Priddy was apparently appointed to request that Strode draft a bill in time for the next session of the General Assembly.⁹¹ Strode, the three-

⁸⁶ *Id.* at 28.

⁸⁷ *Id.* Not surprisingly, Priddy later reported to the General Hospital Board that the Virginia Colony contained a population confined strictly to epileptics and “incorrigible moral delinquents of the feeble-minded class.” General Board, *supra* note 15, at Aug. 13, 1924.

⁸⁸ See General Board, *supra* note 15, at May 12 and Aug. 9, 1922; May 10, Aug. 10, and Sept. 17, 1923. The need for economic austerity was hardly news to the institutions’ representatives, who had faced budget deficits for several years. See, e.g., Act of Sept. 5, 1919, ch. 33, 1919 Va. Acts 60 (authorizing a special budget appropriation to meet deficits at hospitals for the insane).

⁸⁹ General Board, *supra* note 15, at Sept. 17, 1923.

⁹⁰ *Id.*

⁹¹ Although Priddy was not the person who ultimately offered the proposal at the General Board meeting, it was he who made the overture to Strode. Letter from Aubrey Strode to Don Preston Peters (July 19, 1939), Strode Papers, *supra* note 15, at Box 30. Strode’s recollections focused upon the eugenical, rather than economic, basis of the new law. He noted that the Board, through Priddy, had directed him to

draft a bill for presentation to the Legislature curing such defects as [he] could in the form of the Acts declared invalid by the courts, trusting that the growth of knowledge of

term ex-Senator and expert draftsman, prepared the bill. In addition to having access to the necessary legal arguments, he had an intimate understanding of the Democrat-controlled legislature. Strode's draft was ushered through both houses of the Assembly, ultimately passing with only two dissenting votes.⁹² It was signed into law as "An act to provide for sexual sterilization of inmates of state institutions in certain cases."⁹³ Thus in March, 1924 Priddy finally gained direct legislative approval for the practice he had initiated at least eight years earlier.

B. *Planning the "Test Case"*

When the Colony Board met in August, 1924, Priddy was ready with eighteen sterilization petitions for patients he had found to be fit subjects for the operation under the new law.⁹⁴ An en masse hearing was held at which the Board approved the petitions and ordered surgery. Because the indignities Priddy had suffered in the Mallory lawsuits were still fresh in his mind, he suggested to the Board that "as a matter of precautionary safety . . . a test case of the constitutionality of the Sterilization Law be made before any operation is performed . . ."⁹⁵ The Board agreed and directed Priddy to take up the matter with Aubrey Strode and to employ him to prepare the test case.⁹⁶ The Board also voted to report this decision to the General Board of State Hospitals at its next meeting in order to receive authorization and financial support for the test case.⁹⁷

Strode appeared before the Colony Board the following month to explain his litigation strategy. He reviewed court decisions on the constitutionality of other states' sterilization laws and compared them to the Virginia law, pointing out that the law he crafted might be vulnerable to constitutional challenge for two reasons.⁹⁸ First, there was an issue of due process. Sterilization laws had been declared to impair life and property unlawfully when they failed to include specific procedural safe-

the laws of heredity and eugenics and changing public sentiment might bring a more favorable attitude from the Legislature and the courts.

See also Letter from Joseph DeJarnette to Gov. Trinkle (Jan. 12, 1924), Executive Papers of Governor Trinkle, Virginia State Archives (stating that DeJarnette and Priddy consulted about the sterilization bill).

⁹² 1924 House Journal (Va.) 772.

⁹³ Act of Mar. 20, 1924, ch. 394, 1924 Va. Acts 569.

⁹⁴ Colony Board, *supra* note 15, at Aug. 6, 1924.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* The General Board approved the test of the law and agreed to an arrangement of prorating the costs of the litigation among all five state institutions. General Board, *supra* note 15, at Aug. 13, 1924.

⁹⁸ Colony Board, *supra* note 15, at Sept. 9-10, 1924.

guards.⁹⁹ Strode noted, however, that he “had so carefully prepared the Virginia Act to meet this objection that he considered the question of its [un]constitutionality on this ground negligible.”¹⁰⁰ The second and principal issue, according to Strode, was equal protection. Because the Virginia law applied only to institutionalized patients (and not to all feeble-minded people irrespective of who cared for them), the equal protection objection might pose a serious constitutional problem.¹⁰¹ Strode concluded his presentation by noting that because an unconstitutional law had no legal force, any sterilization performed before the constitutional issues were settled might expose Doctor Priddy and the institution to liability. Strode recommended that all sterilizations be postponed until the Virginia law’s validity “had been passed on by the Court of Appeals of Virginia, and possibly the Supreme Court of the United States.”¹⁰²

Accepting Strode’s advice, the Colony Board reviewed Priddy’s petition for the sterilization of Carrie Buck, an eighteen-year-old girl from Charlottesville, Virginia. Robert G. Shelton was appointed as Carrie’s guardian for the sterilization hearing.¹⁰³ After testimony from Priddy that Carrie was “feeble-minded of the . . . Moron Class,” and a “moral delinquent,”¹⁰⁴ the Board summarized its findings and framed its conclusion within the language of Strode’s law:

⁹⁹ Id. See, e.g., *Davis v. Berry*, 216 F. 413, 418-19 (S.D. Iowa 1914), rev’d on other grounds, 242 U.S. 468 (1917); *Williams v. Smith*, 190 Ind. 526, 527-28, 131 N.E. 2, 2 (1921).

¹⁰⁰ Colony Board, supra note 15, at Sept. 9-10, 1924. The procedural protections in the Virginia statute included petitioning the special board, notifying the patient, appointing a guardian, holding a hearing in the presence of the patient, and providing for judicial review. Act of Mar. 20, 1924, ch. 394, 1924 Va. Acts 569, 569-71.

¹⁰¹ Colony Board, supra note 15, at Sept. 9-10, 1924. See, e.g., *Haynes v. Lapeer* Cir. Judge, 201 Mich. 138, 144-45, 166 N.W. 938, 940-41 (1918); *Osborne v. Thomson*, 103 Misc. 23, 33-36, 169 N.Y.S. 638, 643-45, aff’d, 185 App. Div. 902, 171 N.Y.S. 1094 (1918); *Smith v. Board of Examiners of Feeble-Minded*, 85 N.J. 46, 53-55, 88 A. 963, 966-67 (1913).

¹⁰² Colony Board, supra note 15, at Sept. 9-10, 1924.

¹⁰³ By statute, Shelton was paid for representing the interests of patients scheduled for sterilization. Act of Mar. 20, 1924, ch. 394, 1924 Va. Acts 569, 570. This provision of the Virginia law eventually provided a comfortable side income for Shelton. For at least ten years, he was the only person designated as guardian of Colony inmates, and often appeared at sterilization hearings to represent as many as twenty-five patients simultaneously. See, e.g., Colony Board, supra note 15, at June 9, 1927, Jan. 10, 1928, and Mar. 14, 1928. So little work was involved that Shelton agreed to accept less than the statutory amount regardless of the number of patients he represented. See Letter from H. Minor Davis to Aubrey Strode (Jan. 10, 1936), Strode Papers, supra note 15, at Box 30. While still serving as a guardian, Shelton later became a judge of the Juvenile and Domestic Relations Court of Amherst County. See Colony Board, supra note 15, at Apr. 14, 1928.

¹⁰⁴ Record at 25, *Buck*, supra note 10 (Special Board hearing, testimony of Albert Priddy). Actually Priddy characterized Carrie as of the “lowest grade” moron class. That characterization was erroneous, however, because he also found her to be a mental age of nine, see note 10 supra. Priddy corrected the categorization before the trial court, testifying that Carrie was a middle-grade moron, Record at 91, *Buck*, supra note 10.

Carrie Buck is a feeble-minded inmate of this institution and by the laws of heredity is the probable potential parent of socially inadequate offspring, likewise afflicted, that she may be sexually sterilized without detriment to her general health, and that the welfare of the said Carrie Buck and of society will be promoted by such sterilization¹⁰⁵

To complete the procedures required by law before Carrie could be brought within the Colony's sterilization authority, the Board had only to appoint an attorney to raise an appeal on Carrie's behalf. Strode had already been designated to defend Doctor Priddy and the Colony at the trial and any subsequent appeals. Shelton was directed to hire "some competent lawyer" to oppose Strode in the litigation. The attorney he chose was Irving Whitehead, a former Colony director and Strode's long-time friend.¹⁰⁶

III

"SOME COMPETENT LAWYER": IRVING WHITEHEAD'S DEFENSE OF CARRIE BUCK

A. *The Trial and Undiscovered Evidence*

The trial of *Buck v. Bell* took place November 18, 1924.¹⁰⁷ Strode presented eight witnesses from the area near Carrie's home in an attempt to prove her "social inadequacy."¹⁰⁸ Additionally, Strode introduced a lengthy deposition from a eugenical expert from New York¹⁰⁹ and had another eugenical expert testify at the trial,¹¹⁰ both of whom informed the court about Carrie's feeble-mindedness in light of eugenical theory. He also put two Virginia physicians on the stand to bolster the case in favor of the sterilization law.¹¹¹

¹⁰⁵ Record at 28, *Buck*, supra note 10 (order of Special Board to sterilize Carrie Buck).

¹⁰⁶ Strode negotiated payment of \$250 for the trial and \$250 for each appeal of the case, plus expenses. Colony Board, supra note 15, at Sept. 9-10, 1924. It has been suggested that Whitehead defended Carrie without pay, and thus had inadequate funding to pursue the case vigorously. See C. Vose, supra note 7, at 17; Coogan, supra note 10, at 47. In fact, records of the Colony Board show that Whitehead eventually collected fees totaling over \$1000. See Colony Board, supra note 15, at July 11, 1925 (\$298.80), Oct. 12, 1925 (\$276.47), Apr. 12, 1926 (\$295), Nov. 9, 1926 (\$299).

¹⁰⁷ Record at 42, *Buck*, supra note 10 (transcript of trial court).

¹⁰⁸ Id. at 42-62. Many of these witnesses did not know Carrie, but testified about other members of her family. Id. Strode borrowed "social inadequacy" as terminology for the sterilization law from the Model Eugenical Sterilization Law proposed in H. Laughlin, *Eugenical Sterilization in the United States* 446-51 (1922).

¹⁰⁹ Harry Laughlin, author of the Model Eugenical Sterilization Law, see note 108 supra, and Assistant Director of the Eugenics Record Office in New York of the Carnegie Institute of Washington, supplied a deposition for the trial. Record at 29-41, *Buck*, supra note 10 (transcript of deposition); id. at 97 (deposition introduced at trial by Aubrey Strode).

¹¹⁰ Record at 75-87, *Buck*, supra note 10. Arthur Estabrook, also of the Carnegie Institute of Washington, provided a "field study" of Carrie Buck's family in his testimony. Id. at 81-83.

¹¹¹ Id. at 63-75 (trial testimony of Joseph DeJarnette); id. at 88-98 (trial testimony of Albert

In contrast, Whitehead called no witnesses to dispute the specific allegations against Carrie or to cast doubt on the "scientific" theories about which Strode's four "experts" had testified. Moreover, Whitehead's cross-examination of the witnesses for the State was so weak that it was often unclear which side he was representing. Past analyses of *Buck v. Bell* have emphasized the differing performances of Strode and Whitehead at trial to support the conclusion that Whitehead's representation was inadequate. One commentator described Whitehead as "an ineffective and unenthusiastic defender of his client's interests."¹¹² A cursory review of the trial transcript readily supports this view; a more thorough analysis of the case Whitehead could have presented suggests a deliberate decision not to defend Carrie.

Among the allegations Whitehead chose not to dispute were several assertions about Carrie's background. For example, famed eugenicist Harry Laughlin never examined Carrie, but drew firm "scientific conclusions" from very sketchy information supplied by Priddy, compelling one commentator to label Laughlin's analysis as "near-psychic."¹¹³ Laughlin's deposition relied on Priddy's "facts" as proof not only of Carrie's alleged feeble-mindedness, but also of her generally undesirable character. She had, said Priddy, a "record during life of immorality, prostitution, and untruthfulness; [had] never been self-sustaining; [and] has had one illegitimate child . . . supposed to be mental defective."¹¹⁴ Her mother, Emma Buck, "was maritally unworthy; having been divorced from her husband on account of infidelity . . . [and] has had one illegitimate child and probably two others inclusive of Carrie Buck . . ."¹¹⁵ With regard to the Buck family generally, he concluded, "[t]hese people belong to the shiftless, ignorant, and worthless class of anti-social whites of the South

Priddy). Both Dr. Priddy and his friend Dr. DeJarnette offered anecdotes summarizing their experiences sterilizing the feeble-minded.

¹¹² Brown, *Case Histories, Interest Group Litigation, and Mr. Justice Holmes: Some Unexplained Questions on Psycho-Political Behavior* (Book Review), 24 *Emory L.J.* 1037, 1049-50 (1975) (reviewing C. Vose, *Constitutional Change: Amendment Politics and Supreme Court Litigation Since 1900* (1972)).

¹¹³ Cynkar, *supra* note 12, at 1438-39. The Laughlin deposition began with a recitation of facts. Record at 32-33, *Buck*, *supra* note 10. The description of Carrie Buck in this deposition displays some of the harshest language contained in the court records, and is thus usually regarded as another example of Laughlin's almost rabid zeal in broadcasting eugenical propaganda. See, e.g., A. Chase, *supra* note 6, at 313-14; Coogan, *supra* note 10, at 46. It is clear from the trial record, however, that these "facts" were direct quotations from Priddy, supplied to Laughlin by mail to inform his eugenical analysis of the Buck family. Record at 32, *Buck*, *supra* note 10 (deposition of Harry Laughlin); *id.* at 97-98 (testimony of Albert Priddy).

¹¹⁴ Record at 32, *Buck*, *supra* note 10 (deposition of Harry Laughlin, quoting Albert Priddy).

¹¹⁵ *Id.*

. . . [about whom] it is impossible to get intelligent and satisfactory data"¹¹⁶

Most of these comments, left unchallenged by Whitehead, were not only of questionable relevance, but untrue. Had Whitehead chosen to investigate Carrie's background he easily could have collected evidence to refute most of Priddy's charges. For example, on the question of her illegitimacy, he could have found that her parents, Frank and Emma Buck, were married in 1896.¹¹⁷ The available records indicate that when Carrie was born in 1906,¹¹⁸ her parents were still married.¹¹⁹ A common law presumption effective in Virginia at that time would have established Carrie's legitimacy.¹²⁰ Was Carrie feeble-minded? This was the purported justification for her commitment to the Colony, yet the majority of witnesses called by Strode had no firsthand knowledge of Carrie. Seven of the eleven witnesses either had never met Carrie or refused to offer any conclusion about her mental condition.¹²¹ Several of Carrie's own teachers could have attested, with supporting documentation, that Carrie was not mentally deficient. School records indicate that Carrie was a normal child: In the five years that she attended school, she was promoted to the sixth grade.¹²² In fact, the year before she left school, her teacher entered the comment "very good—deportment and lessons" and recommended her for promotion.¹²³ That teacher and her records would have contradicted the testimony of the single witness who claimed that Carrie was "anti-social" because she had written notes to boys in school.¹²⁴

Was Carrie immoral? Apart from how ridiculous this charge

¹¹⁶ *Id.* at 32-33.

¹¹⁷ See Marriage Register, City of Charlottesville, Va. ("Frank W. Buck to Emma Adeline Harlow, September 23, 1896.")

¹¹⁸ Record at 18, *Buck*, supra note 10 (petition to Special Board for sterilization approval for Carrie Buck, by Albert Priddy).

¹¹⁹ There is no record of divorce of Emma Harlow and Frank Buck in Charlottesville or Albemarle County from 1897 to 1920, the year Emma was committed to the Colony.

¹²⁰ See, e.g., *Scott v. Hillenberg*, 85 Va. 245, 246-47, 7 S.E. 377, 378-80 (1888) (law presumes that child born in wedlock is legitimate, even though father was absent for an extended period); *Reynolds v. Adams*, 125 Va. 295, 307, 99 S.E. 695, 699 (1919) (law presumes legitimacy not bastardy).

¹²¹ See Record at 42-98, *Buck*, supra note 10.

¹²² *Id.* at 15 (inquisition of commission of feeble-mindedness held to commit Carrie Buck).

¹²³ Register of Students, McGuffey School, Charlottesville, Va., 1916-1917. See also Records of the Midway School, 1913-1915, and McGuffey School, 1915-1918. During her school years, Carrie was registered under the name of her foster parents, Dobbs.

¹²⁴ Record at 46-47, *Buck*, supra note 10 (trial testimony of Anne Harris). Harris had little specific recollection of Carrie except for a single incident which occurred during Carrie's grammar school years:

[Harris] A. The Superintendent called me and said she was having trouble with Carrie. She told me that Carrie was writing notes, and that sort of thing, and asked what she should do about it.

sounds today, broadly defined character traits such as immorality were at issue in the trial. Priddy linked Carrie's supposed predisposition to "anti-social" behavior to the same characteristics he had observed in her mother and the "generally accepted theory of the laws of heredity."¹²⁵ Whitehead easily could have questioned the charge of "immorality" by calling witnesses of his own. Carrie had attended church and church school and had been a member of two church choirs in her hometown.¹²⁶ Such testimony would have, at the least, posed doubts about the accuracy of the investigation into her character.

The eugenical basis of the Virginia sterilization law required that Carrie's inadequacies be hereditary—that she be the "probable potential parent of socially inadequate offspring."¹²⁷ To show this hereditary link, Strode elicited testimony that Carrie's mother, Emma, was a feeble-minded patient at the Colony,¹²⁸ that Carrie had exhibited "peculiarities" since childhood,¹²⁹ that supposed members of Carrie's family were "peculiar,"¹³⁰ and that Carrie's child was slow.¹³¹ Strode's evidence was weak, yet Whitehead's cross-examination, when it took place at all, failed to attack the evidence.

Why, given the weakness of Strode's evidence, was Carrie chosen as the perfect candidate for sterilization? The answer to this question clarifies the unstated purpose of the sterilization policy: she had delivered a child, but was unmarried. Poor, and born of a disgraced mother herself, Carrie was likely to be the parent of more of the "shiftless, ignorant and worthless class of anti-social whites" from which she came. The single fact of her unwed motherhood was Priddy's proof of her deficiency.

However, strong evidence existed to mitigate Carrie's responsibility for her bastard child. The circumstances of her commitment and the contradictions in the testimony of her foster parents would have alerted any conscientious attorney to probe further. As Carrie's commitment

[Whitehead] Q. Writing notes to boys, I suppose.

A. Yes, sir.

Q. Is writing notes to boys in school . . . considered anti-social?

A. It depends upon the character of the note.

Q. . . . [I]f the child had been sixteen years old would it still have been anti-social?

A. Well, if a girl of sixteen had written that kind of note, she ought to have been sent to Parnell-Isle of Hope.

¹²⁵ Id. at 91 (trial testimony of Albert Priddy).

¹²⁶ Interview with Carrie Buck (Dec. 27, 1982) (church choir); Record at 62, *Buck*, supra note 10 (trial testimony of Mary Duke, stating that Carrie attended church and Sunday school).

¹²⁷ Act of Mar. 20, 1924, ch. 394, 1924 Va. Acts 569, 570.

¹²⁸ See, e.g., Record at 90, *Buck*, supra note 10 (trial testimony of Albert Priddy).

¹²⁹ See, e.g., id. at 44 (trial testimony of Anne Harris); id. at 62 (trial testimony of Mary Duke).

¹³⁰ See, e.g., id. at 48-57.

¹³¹ See id. at 58 (trial testimony of Caroline Wilhelm).

papers show, the foster parents with whom she lived for fourteen years were very anxious to have her put away. The petition filed by Mr. and Mrs. J.T. Dobbs was a desperate attempt to remove the embarrassment of a pregnant but unwed girl from their home.¹³² The Dobbses' petition and testimony at the commitment hearing were often inconsistent. At one point they denied that she was epileptic but later asserted the contrary.¹³³ In their petition, the Dobbses claimed that Carrie's symptoms of feeble-mindedness did not emerge until she was ten or eleven;¹³⁴ at the hearing, however, they described "mental peculiarity" they had noticed since her birth,¹³⁵ even though they did not have custody of Carrie until she was three or four years old.¹³⁶ The Dobbses claimed to be unable to afford Carrie financially,¹³⁷ but later told Priddy they would be happy to have her back, if she were sterilized.¹³⁸

Why did the Dobbses seem willing to lie to have Carrie committed? The trial record contains clear evidence of their motivation. A Red Cross social worker testified: "Mr. Dobbs . . . reported . . . that the girl was pregnant and that he wanted to have her committed somewhere—to have her sent to some institution . . ." ¹³⁹ What the trial did not reveal was that, despite all the discussion of her immoral behavior, Carrie was pregnant because she had been raped.

Mrs. Dobbs was away "on account of some illness,"¹⁴⁰ in the summer of 1923. During her absence Carrie was raped by Mrs. Dobbs's nephew.¹⁴¹ Commitment to the Colony would hide Carrie's shame; more importantly for Mr. and Mrs. Dobbs, it would save the family reputation. Had Whitehead called the Dobbses to testify to the circumstances of Carrie's commitment, he could have revealed both their contradictory statements and personal interest in having Carrie committed.

Whitehead neither called the Dobbses as witnesses nor challenged

¹³² At the time of Carrie's commitment hearing (January 23, 1924), she was seven months pregnant. Her baby, Vivian, was born March 28, 1924. Death Certificate, Vivian Dobbs, Va. Bureau of Vital Statistics. Carrie arrived at the Colony on June 4, 1924. Record at 9, *Buck*, supra note 10 (Petition to Special Board to authorize sterilization of Carrie Buck). Her admission was delayed because there was a long waiting list for vacancies at the Colony, see id. at 94 (trial testimony of Albert Priddy), and because the commitment papers were improperly completed at the January hearing, see id. at 62 (trial testimony of Mary Duke).

¹³³ Compare Record at 12, *Buck*, supra note 10 with id. at 17 (inquisition of Commission of Feeble-mindedness).

¹³⁴ Id. at 22 (petition of Dobbses to commit Carrie Buck).

¹³⁵ Id. at 13 (inquisition of Commission of Feeble-mindedness).

¹³⁶ Id. at 22 (petition of Dobbses to commit Carrie Buck).

¹³⁷ Id.

¹³⁸ Id. at 97 (trial testimony of Albert Priddy).

¹³⁹ Id. at 57 (trial testimony of Caroline Wilhelm).

¹⁴⁰ Id. at 62 (trial testimony of Mary Duke).

¹⁴¹ Interview with Carrie Buck (Dec. 27, 1982). See also Giametta, 'They Told Me I Had to Have An Operation,' *Daily Progress* (Charlottesville, Va.), Feb. 26, 1980, at A1, col. 1.

Priddy by introducing readily available data on Carrie's parents, her church attendance, or her school record—data Priddy (and presumably Whitehead) had considered "impossible to get."¹⁴² Whitehead failed as Carrie's attorney not because he was incompetent, underpaid, or merely ineffectual. He failed because he intended to fail.

Whitehead had long been associated with Strode and Priddy. He helped Strode with his election campaign¹⁴³ and helped him obtain an Army commission.¹⁴⁴ As a member of the Colony Board,¹⁴⁵ Whitehead authorized Priddy's sterilization requests.¹⁴⁶ A building named in Whitehead's honor was opened at the Colony just two months before Carrie's arrival.¹⁴⁷ Strode, in turn, recommended Whitehead for a government position only six days before Carrie Buck's trial.¹⁴⁸ Proof that Whitehead intended to lose Carrie Buck's case does not, however, rely primarily on the evidence of these close, personal associations. Whitehead's role and intent are amply documented in the minutes of the Colony Board.

B. *Whitehead Behind the Scenes*

In February of 1925, immediately following the decision of the Amherst County Court affirming the validity of the sterilization act,¹⁴⁹ Irving Whitehead appeared before Carrie's adversaries, the General Board of State Hospitals, to report on the progress of the litigation.¹⁵⁰ The county court had upheld the constitutionality of the act, Whitehead reported, but the matter would eventually be taken to the United States Supreme Court for a final decision.¹⁵¹ Doctor Priddy died before the trial court issued its decision,¹⁵² but the litigation he launched had devel-

¹⁴² Record at 33, *Buck*, supra note 10 (deposition of Harry Laughlin, quoting Albert Priddy).

¹⁴³ See note 83 supra.

¹⁴⁴ See note 78 supra.

¹⁴⁵ See notes 22, 45 and accompanying text supra.

¹⁴⁶ See notes 41, 45-46 and accompanying text supra.

¹⁴⁷ Report of Virginia State Epileptic Colony 8 (1924-1925) ("The opening of the Dew-Whitehead building . . . in April, 1924, temporarily relieved [overcrowding]. This building was speedily filled up, however, by new admissions . . ."). Ironically, Carrie may well have been housed in a building named after her defense attorney. See note 132 supra.

¹⁴⁸ Letter from Aubrey Strode to Sen. Carter Glass (Nov. 12, 1924), Strode Papers, supra note 15, at Box 56.

¹⁴⁹ The Circuit Court of Amherst County did not formally issue its decision until April 13, 1925. Record at 3-4, *Buck*, supra note 10 (judgment of trial court).

¹⁵⁰ General Board, supra note 15, at Feb. 11, 1925. The minutes record that "On motion of Mr. Ferguson, a vote of thanks was extended to Mr. Whitehead for his appearance before the Board." *Id.* Ferguson and Whitehead had served together on the Colony Board.

¹⁵¹ *Id.*

¹⁵² Priddy died on January 13, 1925. Report of Virginia State Epileptic Colony 9 (1924-1925) (memorial to Priddy). Several memorials survive, each noting Priddy's contributions to

oped its own momentum and continued unimpeded. By September, Strode and Whitehead had prepared their briefs for the Virginia Supreme Court of Appeals. Strode's characteristically thorough effort was forty-four pages long,¹⁵³ Whitehead's brief filled barely eight pages.¹⁵⁴ In November 1925, Virginia's highest court affirmed the lower court's ruling.¹⁵⁵ On the heels of this decision Whitehead and Strode presented the good news to the Colony Board. The minutes of the December 7 Board meeting include this description of their report:

Colonel Aubrey E. Strode and Mr. I.P. Whitehead appeared before the Board and outlined the present status of the sterilization test case and presented conclusive argument for its prosecution through the Supreme Court of the United States, their advice being that this particular case was in admirable shape to go to the court of last resort, and that we could not hope to have a more favorable situation than this one.¹⁵⁶

The minutes of this Board meeting vividly demonstrate what the record of Carrie Buck's trial can only suggest. Whitehead and Strode were certain that the sterilization law would be upheld. Together they had orchestrated a judicial charade. They were careful to fulfill every procedural provision of the law, while simultaneously creating a trial record so one-sided, that little, if any, evidence appeared to support a reversal. Carrie Buck was deceived into believing that her rights would be protected.¹⁵⁷ In fact, her attorney had undermined her case at every stage and was arrogant enough to appear before his long-time colleagues to boast of his confidence that Carrie Buck's challenge of the law would fail. It is easy in hindsight to criticize a failed litigation strategy: nonetheless, it is clear that breach of client confidences, including reports to the client's adversary, is one of the most serious violations of professional ethics and a clear demonstration of Whitehead's true allegiances.¹⁵⁸

the advance of eugenical policy. See, e.g., Letter from Aubrey Strode to S.L. Ferguson (May 5, 1925), Strode Papers, *supra* note 15, at box 91; General Board, *supra* note 15, at Oct. 12, 1926. Dr. Bell, then assistant physician at the Colony, took Priddy's place as the superintendent and defendant in the sterilization suit. Record at 3, *Buck*, *supra* note 10 (decision of trial court).

¹⁵³ Appellee's Brief, *Buck v. Bell*, 143 Va. 310, 130 S.E. 516 (1925).

¹⁵⁴ Appellant's Petition for Appeal, *Buck v. Bell*, 143 Va. 310, 130 S.E. 516 (1925). In his Reply Brief answering Strode's brief, Whitehead managed to complete only five more pages. Appellant's Reply Brief, *Buck v. Bell*, 143 Va. 310, 130 S.E. 516 (1925). The arguments of the attorneys are discussed by Berns, *supra* note 7, at 764-65; Cynkar, *supra* note 12, at 1439-40.

¹⁵⁵ *Buck v. Bell*, 143 Va. 310, 130 S.E. 516 (1925).

¹⁵⁶ Colony Board, *supra* note 15, at Dec. 7, 1925.

¹⁵⁷ When she was asked by Strode at her sterilization hearing if she had anything to say in her behalf, Carrie commented simply, "No sir, I have not, it is up to my people." Record at 27, *Buck*, *supra* note 10.

¹⁵⁸ See Canons of Professional Ethics (1908), reprinted in F.C. Hicks, *Organization and Ethics of the Bench and Bar* 562-63 (1932) (Canon 6 obliges an attorney to represent the client with undivided fidelity and not to divulge his secrets or confidences).

Continuing the charade, Strode and Whitehead prepared for the Supreme Court appearance. A petition for certiorari was filed, and briefs followed. Strode's brief repeated the form of his earlier work.¹⁵⁹ Whitehead's brief showed improvement over his arguments at the state level,¹⁶⁰ but predictably focused on the substantive due process and equal protection issues.¹⁶¹ Whitehead's argument was to no avail: the Supreme Court upheld the sterilization act by a vote of 8-1.¹⁶²

The lawsuit was not over. Holmes's caustic opinion and the surgical violence it threatened to set loose apparently mobilized the forces of those who opposed the Court's conclusion.¹⁶³ The storm of protest must have reached Whitehead, who petitioned the Court for a rehearing,¹⁶⁴ perhaps in an attempt to mollify the opponents of sterilization. The petition demonstrated that Whitehead was aware of the strongest arguments against the sterilization law, but that he simply was not motivated to use them in Carrie Buck's defense prior to public outcry.

Whitehead's petition questioned for the first time the eugenical theories and "scientific" propositions about the hereditary nature of mental illness, crime, and disease that had been the basis for the Virginia sterilization law. The petition noted that it was "common knowledge that the beneficent effects of sterilization . . . [were] denied by competent medical and sociological authority all over the country."¹⁶⁵ Whitehead also attacked the Court's reliance on an earlier case upholding a law requiring the vaccination of school children¹⁶⁶ as inapposite to the question of "permanent bodily mutilation" authorized by the Virginia statute.¹⁶⁷

The petition won Carrie a short reprieve. Colony Board minutes

¹⁵⁹ Brief for Defendant in Error, *Buck v. Bell*, 274 U.S. 200 (1927).

¹⁶⁰ See Brief for Plaintiff in Error, *Buck v. Bell*, 274 U.S. 200 (1927).

¹⁶¹ *Id.* at 9-17.

¹⁶² 274 U.S. 200 (1927). The single dissenting vote came from Justice Pierce Butler, whose opposition to sterilization is usually attributed to his Roman Catholic beliefs, see C. Vose, *supra* note 7, at 17. In contrast to Justice Butler, Chief Justice Taft concurred in the decision and applauded the opinion of the octogenarian Holmes: "His quickness and his powers of catching and stating the point succinctly are marvelous. His brilliance does not seem to abate at all." Letter from Chief Justice Taft to Helen Heron (May 6, 1927), William Howard Taft Collection, Library of Congress, ser. 2, reel 28.

¹⁶³ Even before the decision was made public, Holmes noted the brewing controversy in a letter to his friend Harold Laski, "my lad tells me the religious are astir." 2 Holmes-Laski Letters 938 (M. Howe ed. 1953) (letter of Apr. 25, 1927).

¹⁶⁴ Petition for Rehearing and Argument, *Buck v. Bell*, 274 U.S. 200 (1927).

¹⁶⁵ *Id.* at 10. Sterilization and the eugenical argument in its favor had been condemned in a publication of the State Board of Public Welfare in Virginia the same month Whitehead filed his Supreme Court brief in *Buck*. See *The X-Ray*, Sept. 1926, at 1.

¹⁶⁶ *Jacobson v. Massachusetts*, 197 U.S. 11 (1904) (upholding the constitutionality of a Massachusetts statute requiring smallpox vaccinations of children attending public schools and prescribing a five-dollar fine for parents who defied the law).

¹⁶⁷ Petition for Rehearing at 3-5, *Buck*, 274 U.S. 200 (1927).

include a report by Strode that "an appeal had been made to the Supreme Court by some anti-eugenic society for a rehearing of the case" and his advice that "it might be unwise to do any operations" until this last appeal was settled.¹⁶⁸ Unfortunately for Carrie, Whitehead's arguments were new to the Court. As he and Strode no doubt knew, it was unlikely that the Court's near unanimity would be reversed. When the Justices reconvened in October 1927, the rehearing was denied.¹⁶⁹

After nearly three years of litigation, Carrie Buck was sterilized in the Colony infirmary on October 19, 1927.¹⁷⁰ Doctor Bell, assuming Doctor Priddy's leadership of the Colony, performed the operation and began traveling the lecture circuit, repeating the conclusion of the Holmes opinion and advocating expanded use of eugenical sterilization.¹⁷¹ Within a year of the Supreme Court decision, Bell requested a special appropriation to pay a surgeon, so busy had the Colony become with performing sterilization operations.¹⁷² By 1933, the sterilization program was described as "the most important function which the institution carries on."¹⁷³

After *Buck v. Bell*, Whitehead continued his career as a banking lawyer. When he died in 1938, Strode wrote his eulogy.¹⁷⁴ Although *Buck* was Whitehead's only appearance before the United States Supreme Court, Strode's memorial included not a word about Whitehead's role in the case. Strode's career culminated in a judgeship, and at times he was called upon to approve the appointment of guardians for sterilization proceedings at the Colony.¹⁷⁵

¹⁶⁸ Colony Board, *supra* note 15, at June 9, 1927. The minutes incorrectly stated who had actually petitioned for a rehearing; Whitehead had filed the petition the day of this Colony Board meeting.

¹⁶⁹ Memorandum denying reh'g to *Buck v. Bell*, 274 U.S. 200 (1927) (Oct. 10, 1927) (on file at New York University Law Review).

¹⁷⁰ Report of Virginia State Epileptic Colony 10 (1930). Carrie's sister, Doris, was brought to the Colony while the litigation was still pending. A petition for her sterilization was presented to the Special Board only a month after Carrie was sterilized. Colony Board, *supra* note 15, at Nov. 10, 1927.

¹⁷¹ See, e.g., Address by J.H. Bell, *Eugenics of the Development of the Human Race*, Medical Society of Virginia, Annual Meeting (Oct. 1930) (reprinted in 1931 Va. Med. Monthly 727); Address by J.H. Bell, *The Protoplasmic Blight*, Medical Society of Virginia (Oct. 22, 1929); Address by J.H. Bell, *Eugenical Sterilizations*, American Psychiatric Association (May 13, 1929).

¹⁷² Colony Board, *supra* note 15, at Mar. 14, 1928.

¹⁷³ Colony Board, *supra* note 15, at July 11, 1933.

¹⁷⁴ See Letter and accompanying eulogy from Aubrey Strode to Peyton Cochran (June 13, 1938), Strode Papers, *supra* note 15, at Box 92.

¹⁷⁵ Letter from G.B. Arnold, Colony Superintendent, to Aubrey Strode (Mar. 15, 1934), Strode Papers, *supra* note 15, at Box 136 (requesting Strode's approval of Shelton as guardian and noting Strode's approval of previous appointments of Shelton).

C. Buck v. Bell and the Eugenics Movement

As the foregoing discussion demonstrates, the popular acceptance of eugenical theory was not the primary reason for passage of the Virginia sterilization act of 1924, nor for the litigation that tested the act. It would be incorrect, however, to suggest that eugenical theorists did not play a significant role in *Buck v. Bell*. Strode borrowed critical language from Harry Laughlin's Model Eugenical Sterilization Law¹⁷⁶ and incorporated it into the Virginia statute. Strode also followed Laughlin's lead in relying on the vaccination case, *Jacobson v. Massachusetts*, as precedent to justify the Virginia law.¹⁷⁷ Correspondence among Strode's personal papers shows that he referred to Laughlin's writings in preparing his own contribution to eugenical literature, *Sterilization of Defectives*,¹⁷⁸ immediately following Carrie Buck's trial.¹⁷⁹

Strode no doubt learned of Laughlin through Doctor Priddy.¹⁸⁰ Priddy also kept in touch with H.H. Goddard,¹⁸¹ a nationally prominent eugenicist, to whom he sent Colony staff members for training in the use of mental measurement tests.¹⁸² As a regular participant in regional and national professional meetings, Priddy probably met many noteworthy advocates of eugenical theory.

Strode's connection with eugenics was also personal. Strode's second wife studied under Laughlin's colleague, Arthur Estabrook, in preparation for a career in social work. During her courtship with Strode, she wrote to him regularly about Estabrook's research, and eventually introduced the two men during an Estabrook field trip to Virginia. She probably provided the catalyst for Estabrook to travel to Virginia again to testify at the *Buck* trial.¹⁸³

These relationships between the prime movers in *Buck* and promi-

¹⁷⁶ See note 108 supra. The model act was widely available in H. Laughlin, supra note 108.

¹⁷⁷ Laughlin proposed the vaccination analogy in Eugenical Sterilization in the United States, supra note 108, at 339-40. Laughlin also was the first to report in detail on the history (from the eugenicists' perspective) of the *Buck* litigation. See H. Laughlin, *The Legal Status of Eugenical Sterilization* (1929).

¹⁷⁸ 11 Va. L. Rev. 296 (1925).

¹⁷⁹ See, e.g., Letter from Aubrey Strode to Charles Nash, Editor in Chief, *Virginia Law Review* (Jan. 23, 1925), Strode Papers, supra note 15, at Box 56.

¹⁸⁰ Priddy probably met Laughlin through Judge Olson of the Chicago Municipal Court. Although he lived in New York, Laughlin held a part-time consultant's post as Eugenics Associate at the Psychopathic Laboratory of Olson's court. See Record at 31, *Buck*, supra note 10 (deposition of Harry Laughlin). Priddy visited that court in 1920. Colony Board, supra note 15, at Oct. 12, 1920.

¹⁸¹ Goddard's major works, *The Kallikak Family: A Study in the Heredity of Feeble-mindedness* (1912), and *Feeble-mindedness, Its Causes and Consequences* (1914), were often quoted in Priddy's annual reports. See, e.g., Report of Virginia State Epileptic Colony 15 (1915).

¹⁸² See, e.g., Colony Board, supra note 15, at Feb. 9, 1914. Goddard's role in popularizing the Binet-Simon intelligence test is described in A. Chase, supra note 6, at 232-36.

¹⁸³ Interview with Mrs. Louisa Hubbard Strode Williams (Aug. 15, 1981). Details of the

nent members of the eugenical movement support the view that *Buck v. Bell* is best understood not by focusing on the eugenical movement itself—the common explanation of the case's outcome—but rather by examining closely the web of personalities and events that were essential to both the genesis and outcome of the case.

IV

CARRIE BUCK AFTER *BUCK V. BELL*

In 1930 Doctor Bell reported that after her sterilization, Carrie Buck “was immediately returned to society and made good.”¹⁸⁴ That evaluation was only partially true. Although she was paroled as a domestic helper to a family in Bland, Virginia, she remained under the control of the Colony.¹⁸⁵ Her discharge, like that of all sterilized Colony women, was conditioned on an annual visit to Doctor Bell for a physical examination. Had there been any complaints of ill behavior, she could have been returned to the Colony at once.

After Carrie left the Colony, she married and became a member of the Methodist Church in Bland where she sang in the choir as she had as a teenager in Charlottesville. After twenty-four years of marriage, her husband died and she traveled to Front Royal, Virginia, where she met and later married Charles Detamore. He took work in farms and orchards and Carrie assisted a local family in caring for an elderly relative.

In 1970, with Carrie suffering from ill health, the couple returned to Carrie's hometown. They moved into a single-room cinder block shed with no plumbing, which the owner allowed them to inhabit rent-free. They lived there ten years in abject poverty, until in 1980 Carrie was hospitalized for exposure and malnutrition. After she recovered partially, she and her husband were taken to a state-operated nursing home

Strode-Estabrook connection and Louisa Hubbard's influence on Strode are available in P. Lombardo, *supra* note 17, at 148-54, 195-99.

¹⁸⁴ Report of the Virginia State Epileptic Colony 10 (1930).

¹⁸⁵ Women like Carrie, linked to the Colony indefinitely, provided a ready source of low-cost domestic labor. Out-placement of Colony patients in Virginia homes was part of Priddy's program at least as early as 1911, see notes 23-24 *supra*, and was clearly outlined in his testimony at Carrie's trial:

[Priddy] A. Now the demand for domestics in housework is so great that probably we could get rid of half of our young women of average intelligence, but I have had to abolish [the placement program]. They go out, and it is so common for them to come back pregnant that I have quit taking the risk. People don't care to take them when there is the constant chance of them becoming mothers.

[Strode] Q. Except for their liability to become pregnant, is there any insurmountable obstacle to their being put out in homes that way?

A. No sir, none whatever.

Record at 92, *Buck*.

outside Waynesboro, Virginia. She died there on January 28, 1983, at the age of seventy-six.¹⁸⁶ Her body was returned to Charlottesville, where she was buried only a few steps from the graves of her daughter, Vivian, and her foster parents, Mr. and Mrs. Dobbs.¹⁸⁷

Throughout Carrie's adult life she regularly displayed intelligence and kindness that belied the "feble-mindedness" and "immorality" that were used as an excuse to sterilize her. She was an avid reader, and even in her last weeks was able to converse lucidly, recalling events from her childhood. Branded by Holmes as a second generation imbecile, Carrie provided no support for his glib epithet throughout her life.

Carrie's daughter Vivian, like her mother, was wrongly accused. On the basis of a nurse's comment that she was "not quite normal,"¹⁸⁸ Vivian Buck was used to prove her mother's hereditary "defects." Although she lived barely eight years, she too disproved Holmes's epigram. In her two years of schooling, she performed quite well, at one point earning a spot on the school "Honor Roll."¹⁸⁹

Of the three generations, the least is known about Emma Buck. She died at the Colony, leaving few records of her life. She was, at worst, the "moron" that Priddy claimed; no one but Holmes charged her with imbecility.¹⁹⁰ Her true shortcomings probably stemmed from poverty and perhaps promiscuity. It was Emma's misfortune to provide a target for Doctor Priddy's moralisms and Justice Holmes's misguided rhetoric.

CONCLUSION

Conventional legal wisdom directs a good attorney to argue first the facts in his client's favor, turning later to confront the validity of the law under which the client stands accused. In the case of *Buck v. Bell*, Irving Whitehead turned that axiom on its head. Not only was his challenge of the Virginia sterilization law wholly inadequate, but as this Article has demonstrated, Whitehead virtually ignored his duty to alert the court to specific facts that favored his client, Carrie Buck.

Had Whitehead been the kind of advocate demanded by the law and expected by Carrie, he might have succeeded not only in preventing her

¹⁸⁶ Carrie was survived by Charles Detamore, her husband. Details of Carrie's later life were collected from an interview with her (Dec. 27, 1982) and from an interview with Mrs. E. Pumphrey, her friend and fellow resident at the home. (June 12, 1983).

¹⁸⁷ Carrie's daughter, Vivian, remained with the Dobbs family after Carrie's commitment to the Colony. She died of an infectious disease on July 3, 1932, at the age of eight. Death Certificate, Vivan Dobbs, Va. Bureau of Vital Statistics.

¹⁸⁸ Record at 58, *Buck*, supra note 10 (trial testimony of Caroline Wilhelm). Vivian was seven months old at the time of the comment.

¹⁸⁹ See 1930-1931 Register, Venable School, Charlottesville, Va. See also S. Gould, *Carrie Buck's Daughter*, 93 Nat. Hist. 14 (July 1984).

¹⁹⁰ See note 10 supra for an explanation of the distinction between moron and imbecile.

sterilization, but also in overturning the sterilization law itself. One disgraceful chapter of American legal history would never have been written.

But vindication of Carrie's rights was not Whitehead's intent. The private records explored in this Article fully illustrate that Whitehead's true goal was to help secure legislative and judicial endorsement for a practice he had long supported. These records clearly show as well that Doctor Priddy's motives in proposing a sterilization program had less to do with thinning the ranks of the mentally and physically bereft than they had to do with satisfying his own strong and unique sense of morality. Priddy was obsessed with placing checks on sexuality and propagation. This obsession focused on eradication of the "moral delinquents" whose unlicensed pregnancies he identified as the cause of poverty, crime, disease, and the myriad afflictions of society. With the passage of the Virginia sterilization law, he succeeded in winning legal protection for his private surgical hobby.

The argument that Carrie Buck did not fit the provisions of the sterilization law should not be read as implicit approval of surgery on those the law might accurately have described. However, had Carrie's case succeeded and the law been properly challenged, the thousands the law eventually punished for their illnesses would also have escaped.¹⁹¹ Nor, finally, would the occasion have arisen for Holmes's degrading comment and the lifetime of embarrassment it portended for an undefended girl.

¹⁹¹ In *Poe v. Lynchburg Training School & Hospital*, 518 F. Supp. 789, 792 & n.1 (W.D. Va. 1981), the court expressly chose not to reconsider the constitutionality of the Virginia sterilization law, noting that the Supreme Court had upheld the general practice and procedure of the statute. The class action was recently settled. See note 44 *supra* for the terms of the settlement.

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