with the young lawyers he trained and inspired.

Judge Marrero also gave thanks to members of his family – his wife and two sons – who always have supported him. He then thanked his Chambers family, including his assistant and many law clerks, his judicial colleagues, the chief judges under whom he has served and Second Circuit Chief Judge Robert Katzmann. Judge Marrero described Judge Katzmann as a Buckner-type mentor to him, giving him the privilege of serving as Chair of the Second Circuit Judicial Conference and as co-chair, with Judge Katzmann, of "Justice for All: Courts and the Community."

Judge Marrero encouraged lawyers in private practice to seek opportunities for the professional pleasure found in public service and suggested several ways to do so. First, mentor and nurture the careers of promising young lawyers. Second, work to improve fairness and eliminate excess and inefficiency in court proceedings. There is definitely public interest in making the practice of law more amicable, less costly and more equitable and efficient. Third, provide pro bono and public interest service. Try to meet the minimum aspirational standard for provision of pro bono services in the Code of Professional Responsibilities. There is a vast unmet need for legal services for unrepresented litigants.

Judge Marrero concluded by giving thanks to the Federal Bar Council for the honor of the Emory Buckner award.

Legal History

Yet Another Terrible Decision by the Supreme Court: This Time, Endorsing *Eugenics*!

By C. Evan Stewart

Oliver Wendell Holmes wrote and said many famous things during his long and illustrious judicial career. One of my personal favorites is: "The life of the law has not been logic, it has been experience." As I tell my law students, that gem can be trotted out whenever one is in a jam for something to say; and its elasticity (and opaque meaning) will usually suffice to end whatever tough spot in which one finds herself.

Unfortunately, when Holmes penned his most infamous opinion in *Buck v. Bell*, 274 U.S. 200 (1927), neither "logic" nor "experience" carried the day.

Eugenics

Although eugenics got its start in England in the 1880s, it quickly took hold in America. Proponents believed there were "genetically inferior" groups threatening the well-being and future of the country. By the 1920s, eugenics was being taught at 376 leading colleges and universities – Professor Earnest Hooton, Chairman of Harvard's Anthropology Department, opined that well-educated Americans were throwing away their "biological birthright for a mess of morons." Supporters of the eugenics movement included John D. Rockefeller, Jr., Alexander Graham Bell, W.E.B. DuBois, Theodore Roosevelt, and Margaret Sanger.

In 1896, Connecticut became the first state to enact a law prohibiting marriage to anyone who was "epileptic, imbecile or feeble-minded." In 1907, Indiana became the first state to pass sterilization legislation for "defective" people.

The legislative efforts that followed in various states fed upon public enthusiasm for ensuring that America would continue to be a nation of and for "high grade" people. By the 1920s, Congress was holding hearings at which the biological and genetic differences between various national groups were openly vetted. Eugenics "expert" Harry H. Laughlin (a Princeton Ph.D. in biology and head of the Eugenics Record Office), who testified in support of the Immigration Act of 1924 (which barred immigration to southern and eastern Europeans, "inferior stock," while allowing immigration for northern Europeans, "old stock"), was strident in his advocacy that the "lowest one-tenth" of Americans (15 million people) should be sterilized.

Also in 1924, based in large part upon a "model" eugenics law devised by Laughlin (in consultation with legal experts), Virginia adopted a statute that authorized the compulsory sterilization of "mental defectives." Aubrey E.

Strode – a prominent Virginia lawyer – was the principal drafter of the legislation; and he would also be its defender/advocate in the lower courts and before the U.S. Supreme Court. Dr. Albert S. Priddy, the superintendent of Virginia's Colony for Epileptics and Feebleminded, did not want to proceed under the new law (for which he had lobbied the state legislature) until the courts had blessed it. Accordingly, it was decided there should be a test case. And Carrie Buck was chosen to be the "testee."

Who Was Carrie Buck?

Carrie Buck had been at the Colony for only two months in 1924, but in many ways she was the perfect candidate for Priddy's purposes. For one thing, her mother had been in the Colony for several years, having been declared a "moron" and being someone who exhibited "a lack of moral sense and responsibility" (she had had two additional children out of wedlock, was "without means of support," and may have resorted to prostitution to help support herself and her children). Carrie had been taken away from her mother at an early age and had been living with a local family since she was four. For a time, Carrie's life with a new family seemed for the better: she attended school, had friends, and in her free time went fishing and hiking. After the sixth grade, however (her last teacher's comments were "very good – deportment and lessons"), her foster "parents" pulled her out of school and relegated her to domestic chores, both at home and for hire. When she was seventeen, Carrie was raped by her foster "mother's" nephew and became pregnant. Faced with this most unfortunate situation, Carrie's foster "parents" made the decision not only to get her out of their home, but also to institutionalize her.

Petitioning the Virginia Commission of Feeblemindedness, Carrie's foster "parents" falsely represented that she was both feebleminded and epileptic. And at the time of the Commission's hearing, Carrie was seven months pregnant. This latter fact – an unmarried and pregnant minor, who was also purportedly feebleminded – was a defining third strike, because it reinforced many public fears driving the eugenics movement: immoral young woman carrying venereal diseases, and giving "birth to children who are as defective as themselves." (Dr. Walker E. Fernald). The Commission dutifully found Carrie to be "feebleminded or epileptic" – without setting forth any criteria or evidence of either; and after Carrie gave birth to a daughter (Vivian), she was delivered to the Colony and Dr. Priddy's care, where she was promptly designated a "Middle grade Moron."

A Test Case

Dr. Priddy's decision to pick Carrie for his test case was easy: he already had the determination by the Commission; he had the Colony's own "medical" assessment of her; he had her mother's track record at the Colony; Carrie was an unwed, teenage mother (stoking the aforementioned fears); and she was young – once sterilized, Carrie could be released back into society (free from years of tax-payer care, but not able to engage in immoral activity leading to more feebleminded children). Following the procedures set forth in the new law, Priddy initiated legal proceedings to sterilize Carrie, and hired Strode as his counsel. A local court then appointed a lawyer (Robert G. Shelton) as Carrie's guardian to protect her interests; his compensation: $5 a day (with a cap of $15).

Next came a hearing of the Colony's Special Board of Directors to obtain permission to proceed. At the hearing, Priddy was the principal witness, and much of his testimony was false; the very worst part was his statement that Carrie's two month old daughter Vivian was also feebleminded – something he could not possibly have known. Unfortunately, Shelton's cross-examination was pathetic and Priddy was actually able to bolster his case for sterilization. At the end of the hearing, Carrie was asked one question: "Do you care to say anything about having this operation performed on you?" Not surprisingly, no one had ever explained to her what "this operation" was. Her answer was "No Sir, I have not, it is up to my people." There was no follow-up, not even who she believed to be her "people" (or why she thought they were

looking out for her). Not surprisingly, the Special Board in short order granted Priddy's petition.

Virginia's statute allowed Carrie a right to appeal to a court; Priddy wanted a test case, and Shelton willingly agreed to appeal the matter. Shelton then hired another lawyer, Irving P. Whitehead, to handle the appeal. Unfortunately for Carrie, Whitehead – an enthusiastic proponent of eugenics – had close ties to Strode, the Colony, and Priddy (and Priddy agreed to pay Whitehead's legal fees).

Six weeks after the Special Board's decision, a local Virginia court held a trial on Carrie's appeal. It was a disaster. Strode presented six fact witnesses, virtually all of whom gave testimony based upon supposition, hearsay, or opinion(s). Whitehead stood silent to such objectionable garbage, and his cross-examination of each only made things worse. Then came three "experts" whose testimony would most certainly never even get to serious *Daubert* scrutiny. Their expertise on Carrie, her mother, and her daughter makes for shocking reading; it is uninformed and untethered to any actual medical or scientific work. Nevertheless, it all came in without objection, and (again) Whitehead's cross-examination of these experts only made matters worse. Although there are a multitude of examples of egregious "expert" testimony, the worst (in my view) came from Arthur Estabrook, who worked for Harry Laughlin. Estabrook not only misrepresented that he had given Carrie an accredited medical test to determine her mental capacity, he also gave the *only* testimony about Vivian's mental capacity – and that testimony (about an eight month old baby) was on its face absurd and went unchallenged by Whitehead on cross-examination. [This testimony would constitute the *sole* "evidence" with respect to *three* generations of mental impairment in Carrie's family.]

At the conclusion of the "expert" testimony, Strode rested his case. Whitehead – who was the one challenging the sterilization order – called no witnesses, fact or expert. The entire trial took one day. The complete evidentiary record for any appeal going forward had thus been established.

Three months later, the court duly issued its decision, upholding the Colony Special Board's order and finding that the statute was constitutional. The court, however, stayed its ruling to allow Shelton to appeal further. Shelton, as ever, followed the playbook and authorized an appeal to the Virginia Supreme Court of Appeals. A new party had to be added to the caption, however, because Priddy had died. His successor at the Colony, Dr. John Bell, readily agreed to be substituted as the name opposite Carrie Buck. And Bell was no reluctant participant. Not only was it Bell who first "examined" Carrie when she arrived at the Colony, in a presentation he made to the Medical Society of Virginia, Bell had ominously predicted "a world peopled by a race of degenerates and defectives, a world gone topsy-turvy, and sunk into the slough of despond."

Appeal of the Test Case

Notwithstanding the appalling evidentiary record below, Carrie Buck's legal chances on appeal did not look so bad. Between 1913 and 1921, there had been eight challenges to state sterilization laws (Indiana, Iowa, Michigan, Nevada, New Jersey, New York, Oregon, Washington), and all eight had been successful. The state statutes were voided on various constitutional grounds: cruel and unusual punishment, due process, and equal protection. Would Virginia's statute suffer a similar fate?

Whitehead raised the enumerated constitutional grounds that had worked to void the other states' statutes. But he did so in a very half-hearted way: his brief to Virginia's highest court was five pages long, and it focused primarily on the weakest point: due process - - that the statute did not provide enough procedural protections before sterilization could be effected. Bizarrely (and without any seeming irony), he contended that due process was especially violated because his client had insufficient means or opportunity to refute the testimony presented against her, especially that of the expert witnesses.

Strode (who as drafter of Virginia's statute had been fully aware of the other states' determinations of the flaws in their laws) put together a formidable, forty-five page response. First and fore-

most was the overwhelming evidence that went in unchallenged and uncontradicted at trial. Invoking the state's police power to protect its citizens, Strode then cited *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), in which the U.S. Supreme Court upheld Massachusetts' mandatory vaccination laws. (Laughlin's treatise on eugenics sterilization had also prominently cited *Jacobson*.) As for the constitutional issues, Strode quickly dealt with cruel and unusual punishment (Carrie was not being "punished" for any crime) and due process (the Virginia statute was replete with all the procedural niceties for which the other states' laws had been found lacking). As far as equal protection, Strode knew this was the weak-link (and had known it when he drafted the statute), because the law applied only to those in state hospitals, not to the population generally. That bifurcation had already doomed the laws of New Jersey, New York, and Michigan. In addressing this point, Strode did some rope-a-dope, arguing that there were not in fact two classes of Virginians, because at some point *anyone* in Virginia could be committed to a state hospital and be a candidate for sterilization!

On November 12, 1925, Virginia's Supreme Court of Appeals unanimously affirmed the trial court in all respects; and it adopted Strode's arguments and legal authority *in toto*. One month later, Strode and Whitehead met with the Colony's Special Board, jointly telling that group that the case "is in admirable shape" to go up to the U.S. Supreme Court. Thereafter, Shelton again followed his marching orders and authorized the case to be reviewed by the nation's highest court. What kind of justice would Carrie Buck receive from the Yankee from Olympus and his colleagues?

Justice Holmes and the Supremes

Unfortunately, the make-up of the Court was not a good one for Carrie. Chief Justice William Howard Taft had chaired the Life Extension Institute, a health organization with ties to Harry Laughlin's Eugenics Record Office. Holmes's father, a prominent doctor, had coined the phrase "Boston Brahmin," and of that elite bloodline, he was deemed the "greatest Brahmin." His son had written in 1923 that he wanted laws to "keep certain strains out of our blood." Many of the other Justices were racists, bigots, or anti-Semites.

Oral argument was held on April 22, 1927, and the decision was handed down less than two weeks later, on May 2, 1927. Clearly, the Justices did not spend a great deal of time agonizing over the merits of the case. When Taft assigned the majority opinion to Holmes, he sent along the following advice:

> Some of the brethren are troubled about the case, especially Butler. May I suggest that you [explicate] the care Virginia has taken in guarding against undue or hasty action, the proven absence of danger to the patient, and other circumstances tending to lessen the shock that many feel over such a remedy? The strength of the facts in three generations of course is the strongest argument for the necessity for such state action and its reasonableness.

Holmes quickly completed his opinion and sent it to be printed on April 25, 1927. It would be his worst.

Holmes' hastily-prepared opinion was short (less than three pages), not artfully done, and reflected his own prejudices on the subject at hand. Based upon Strode's recitation of the evidence adduced below, Holmes started off by declaring as a fact that Carrie, her mother, and her daughter were all feebleminded; and he also accepted the trial experts' representations that "insanity, imbecility, etc." were transmitted by heredity. He then turned to the "very careful provisions" of the Virginia statute, detailing all the procedural steps put in the law by Strode, and concluding that "[t]here can be no doubt that . . . the rights of the patient [were] most carefully considered, and . . . every step in this case was taken in scrupulous compliance with the statute." He thus declared that Carrie had certainly received due process.

Holmes next turned to the dangers the Virginia statute was designed to address: it was there "to prevent our being swamped with incompetence." Taking *Jacobson* straight from Strode's brief,

he wrote that '[t]he principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes." Then came the infamous words: "Three generations of imbeciles are enough."

In his last paragraph, Holmes briefly addressed the equal protection issue. Obviously convinced by Strode's argument, Holmes rejected this as no big deal, deeming it "the usual last resort of constitutional arguments to point out shortcomings of this sort." He reasoned that, once hospitals sterilized inmates and returned them to the world, the hospitals would be "open . . . to others, [and] the equality aimed at will be more nearly reached."

Eight Justices signed on to Holmes's decision (including Louis Brandeis and Harlan Fiske Stone). The lone dissenting Justice was Pierce Butler, the Court's only Catholic. Butler's dissent, however, came without an opinion.

The Aftermath of *Buck v. Bell*

Media reaction to the Holmes opinion was generally favorable. The first female presidential candidate (Victoria Woodhull Martin) hailed the decision (the "first principle of the breeder's art is to weed out the inferior animals"). Cornell law professor, Robert E. Cushman, lauded Holmes and called the statute "reasonable social protection." Not everyone was pleased, however. A group of Catholic lawyers sought rehearing of the matter in the Supreme Court; their petition was denied. And Dr. Bell received a postcard from New York, with this message: "May God protect Miss Carrie Buck from [feebleminded justice] injustice." (The "feebleminded justice" had been crossed-out.)

On October 19, 1927, Carrie was operated on by Dr. Bell. She recovered well and was released on "furlough" by the Colony on November 12, 1927. After Christmas, she came back to the Colony. At that point, Dr. Bell picked up on Priddy's sworn representations that Carrie was wanted back at the home of her foster "parents" (who had custody of Vivian); he contacted them, but they replied they did not want Carrie under their roof and asked that she be kept at the Colony (permanently). Ultimately, Carrie was placed with a different family in far-away Bland, Virginia, where she did well and corresponded with Bell on an on-going basis; the basic goal of her correspondence was to be formally discharged, which was ultimately granted on January 1, 1929.

In 1932, Carrie married a sixty-three-year old widower, with whom she had been "going" for three years. Seven weeks after the wedding, Vivian – who was eight and whom Carrie had seen only a few times – died of a stomach infection (following a bout with the measles). Before she died, Vivian had made the honor roll at school. (Years later, Harvard biologist Stephen Jay Gould examined Vivian's school records and concluded that she was a "quite average student and perfectly normal.")

After her husband died in the 1940s, Carrie moved to Front Royal, Virginia. On her own, she took on several jobs, including taking care of elderly people. In 1965, Carrie married again. In 1980, the director of the Colony (now renamed the Lynchburg Training Center) convinced Carrie to return to the facility. She came mainly to see her mother's grave site; when confronted with the building where Dr. Bell had sterilized her, Carrie could not bring herself to revisit the operating room.

After that trip, Carrie was interviewed by a local paper. For the first time, it was publicly revealed that her pregnancy had resulted from being raped by her foster "parent's" nephew. And Carrie also revealed that – far from being a willing participant to sterilization (as repeatedly testified to by Dr. Priddy) – she was never told (*by anyone*) that the operation would cause her to become sterile.

In 1983, Carrie died. She was buried near the graves of her daughter and her foster "parents."

Postscripts

- Was Carrie feebleminded? Contemporary evidence strongly suggests not. Not only did she do well at school – through the sixth grade, but those who interacted with her (outside of those who wanted to institutionalize and sterilize her) all seemed of the view that she was not mentally impaired. Most telling is the voluminous cache of her

articulate letters to Dr. Bell after the operation, which survive; they belie that she was feebleminded, or, as she was labeled by Dr. Bell in 1924: a "Middle grade Moron." At the end of her life, Carrie was an avid newspaper reader and a devotee of crossword puzzles. Professor Gould, who met her at that time, concluded that "she was neither mentally ill nor retarded."

- The starting places for those who want to know more about this sad and grotesque story are: Adam Cohen's "Imbeciles: The Supreme Court, American Eugenics, and the Sterilization of Carrie Buck" (Penguin 2016); Paul Lombardo's "Three Generations, No Imbeciles: Eugenics, the Supreme Court, and *Buck v. Bell*" (Johns Hopkins 2008).
- After his testimony, Estabrook's career took a nosedive. First, he got caught trying to double bill for his trial expenses. And Estabrook (who had called Carrie a "moral degenerate") was also unmasked as a sexual predator of college interns who worked for him. As a result, he was dismissed from the Eugenics Record Office.
- Laughlin's career trajectory was a bit different. Other states now enacted the model law he had drafted, as did European countries. In 1933, the Nazi regime adopted its Law for the Prevention of Hereditarily Diseased Offspring (ultimately at least 375,000 sterilization orders were issued under that law). In 1936, Laughlin, an admirer of the Nazi's racial policies, was awarded an honorary doctorate by the University of Heidelberg.
- At the Nuremberg trials, Otto Hoffman, who led the SS Race and Settlement Office, defended his role in sterilizing hundreds of thousands by citing America's sterilization laws and Holmes's opinion in *Buck v. Bell*. This *Buck v. Bell* defense was explicitly referenced in the movie "Judgment at Nuremberg" (United Artists 1961).
- Irving Whitehead's atrocious/conflicted representation of Carrie Buck's interests was never publicly revealed during his lifetime, and, as such, it went unpunished.
- Incredibly, *Buck v. Bell* is still good law. It has never been overturned by the Supreme Court. *See Skinner v. Oklahoma*, 316 U.S. 525 (1942). Indeed, it was cited by Justice Blackmun in *Roe v. Wade*, 410 U.S. 113, 154 (1973). For a more recent citation to this odious opinion, see *Vaughan v. Ruoff*, 253 F.3d 1124, 1129 (8th Cir. 2001).
- Under the various state sterilization laws, it is estimated that approximately 70,000 Americans were sterilized in the 20th Century, the great majority of whom were women.

Essay

Pragmatism and the Judicial Philosophy of Richard Posner

By Steven M. Edwards

When Richard Posner retired as a federal judge in September, he had a number of interesting things to say. One of them related to his philosophy of judging:

> I am proud to have promoted a pragmatic approach to judging during my time on the Court, and to have had the opportunity to apply my view that judicial opinions should be easy to understand and that judges should focus on the right and wrong in every case.

In a later interview with a reporter, he elaborated: "I pay very little attention to legal rules, statutes, constitutional provisions. A case is just a dispute. The first thing you do is ask yourself – forget about the law – what is a sensible resolution of this dispute?"

Judge Posner's devotion to pragmatism is not new. He first articulated his theory in 1993, in a book entitled *The Problems of Jurisprudence* (The Harvard University Press, 1993). There, he declared that "judges are not *bound* by the rules to do anything," and he added: "The common law is a vast collection of judge-made rules . . . loosely tethered to debatable interpreta-