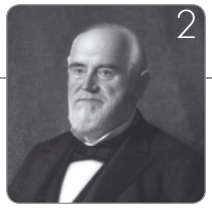
THE VERDICT OF HISTORY

The History of Michigan Jurisprudence Through Its Significant Supreme Court Cases

MICHIGAN SUPREME COURT HISTORICAL SOCIETY

Welcome to the second issue exploring the following cases:



Sherwood v Walker: Cows and Contracts

People v Beardsley: Law and Morals in the Industrial Age

Haynes v Lapeer Circuit Judge: Eugenics in Michigan

Bolden v Grand Rapids Operating Company: Civil Rights and the Great Migration

The Forgotten Years: 1870–1940

While the early years of the Michigan Supreme Court attracted a great deal of attention, it largely fell out of prominence toward the turn of the century, lacking the giant personalities or compelling issues of the "Big Four" era. Nevertheless, the Court played a significant role in the state's advance into the urban and industrial age, a process transforming the entire country. Most notable in the period was a decoupling of law and morals. The influence of the greatest legal thinker of the age, Oliver Wendell Holmes, Jr., can easily be seen in the cases on criminally negligent homicide and eugenics. Presaging the rise of new legal theories, Holmes had written, "I often doubt whether it would not be a gain if every word of moral significance could be banished from the law altogether and other words adopted which should convey legal ideas uncolored by anything outside the law." And behind Holmes' legal thinking was the most important intellectual development of the period, the evolutionary natural science of Charles Darwin.

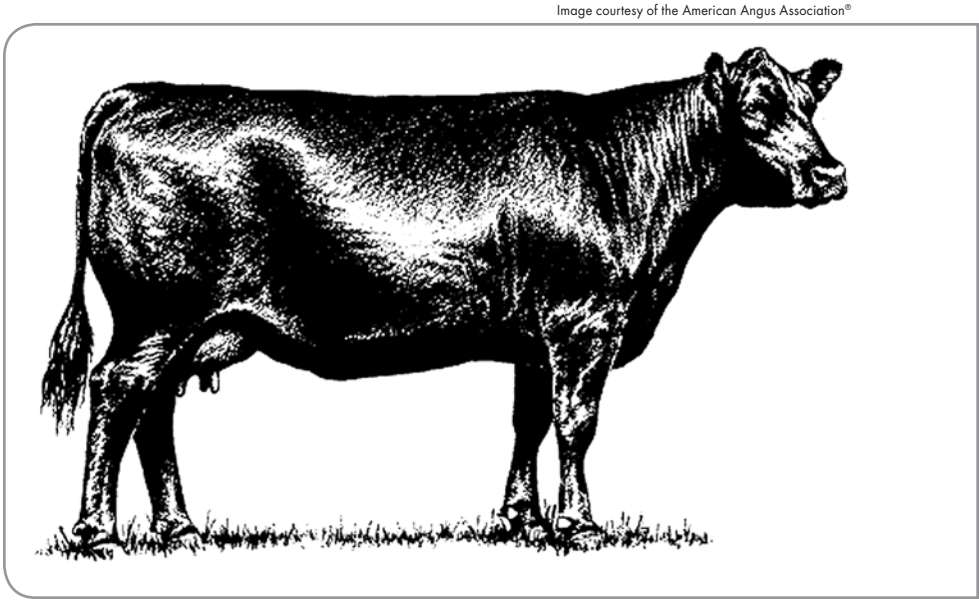
The Court also vindicated its nineteenth-century civil rights laws, reflecting the growing population and political impact of the "great migration" of African Americans into the state. Finally, the end of this period saw the Court respond to the economic and political upheaval of the Great Depression and the New Deal. The Court, no longer a part of the overwhelming Republican establishment that had controlled the state almost exclusively since the Civil War, rewrote the state's law of industrial relations and brought it in line with national developments. ■

Sherwood v Walker

Cows and Contracts

66 Mich 568 (1887)

Image courtesy of the American Angus Association®



Drawing of an Angus cow by renowned Angus artist Frank C. Murphy.

In 1887 the Michigan Supreme Court rendered what has come to be considered a seminal decision in the common law of contracts. Generations of American law students have studied *Sherwood v Walker,* more popularly known as the "cow case." Here, Walker and Sherwood agreed to a price of about $80 for an Angus cow ("Rose 2d of Aberlone" was her name) that both understood to be sterile. When the seller discovered that Rose was pregnant, and therefore worth about 10 times more than the agreed-upon price, he was allowed to cancel the contract. The decision defined the principle of "mutual mistake," whereby a contract is voidable if both parties share a misunderstanding regarding a significant fact in the agreement. But there is more: *Sherwood* also revealed great changes in American society and law in the late nineteenth century.

On the centenary of the writing of the U.S. Constitution, Michigan and much of America was rapidly changing from a rural and small-town country to an urban and industrial one. The second half of the nineteenth century transformed the world. As Henry Adams noted, the world of an American born in 1850 was closer to the world of the year 1 than it was to the world that he would see in 1900.[1] This process of urbanization was well underway in the early nineteenth century; the triumph of the free-labor, commercial, and industrial North in the Civil War accelerated the movement. The nation enjoyed unprecedented material benefits, but also endured great social and cultural anguish over the swift and profound changes. Eighty-five percent of Michigan's population earned its living on the farm when the Civil War began in 1861; by 1910, only about half did; by 1930, only a third. Detroit grew from 45,000 to 286,000 between the time of the war and the end of the century.[2]

The decision defined the principle of "mutual mistake," whereby a contract is voidable if both parties share a misunderstanding regarding a significant fact in the agreement.

The law grew and changed with the country.

The parties in *Sherwood* provide a good example of the transformation from rural to industrial worlds. Part of the appeal of the story of the "cow case" lies in its simple, bucolic setting—what could provide a clearer example of contract than two farmers bargaining over the price of a cow?[3] But the Walker of the case, whom the Supreme Court described simply as "in business at Walkerville, Ontario, and hav[ing] a farm at Greenfield," was Hiram Walker, one of the giants of nineteenth-century enterprise—known as "captains of industry" to their admirers or "robber barons" to their detractors. Hiram Walker was a classic rags-to-riches story, born in poverty and building a fortune in distilling. His great innovation was in marketing, selling, and advertising his whiskey under a brand name, to distinguish it from rivals in a widening consumer market. He established himself in Canada, a safer manufacturing location due to potential American temperance or prohibition laws. (His American competitors forced him to call his product "Walker's *Canadian* Club Whiskey.") Like other industrialists, such as George Pullman, Walker built a model company town, Walkerville, which later became the site of another Michigan industrial giant, the Ford Automotive Plant. Walker purchased a farm in Wayne County

and took up the avocation of gentleman farmer and breeder of fine cattle. Still, one of the great commentators on American contract law referred to Walker as "a small farmer."[4] Theodore Sherwood was a successful banker who also took the part of a gentleman farmer and Angus cow breeder. Notably, some of their contract negotiations were made by telephone, a cutting-edge technological breakthrough in 1887.

The legal instrument of the contract was fundamental to the industrial-urban revolution in the American economy and society. The law of contract was virtually nonexistent in 1800. William Blackstone's monumental, four-volume *Commentaries on the Law of England* (1765–69) devoted about four pages to contracts, a subset of real estate. But the economic explosion of the nineteenth century produced tremendous growth in this area of law, and thousands of cases were on the books by the time of the Civil War. In England, and even more so in the United States, lawmakers encouraged individuals to engage in economic enterprise, and the contract facilitated free-market, entrepreneurial freedom. The nineteenth century became "the golden age of contract law." Indeed, the great English legal historian Sir Henry Maine described the whole transformation of modern society as a movement "from status to contract." Individuals were no longer defined by birth, class, or race, but were equal persons before the law.[5] And they were free to make mutually and socially beneficial exchanges by contract.

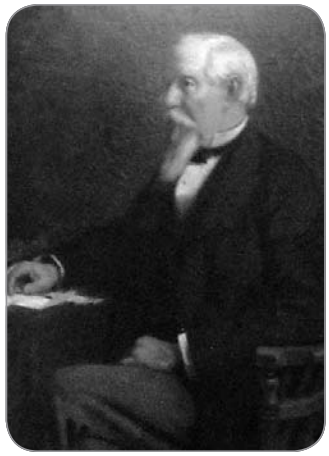
The nature of contract also changed. In the eighteenth century, judges would scrutinize contracts to make sure that they were "fair." Still influenced by medieval ideas of "just prices," courts would refuse to enforce "hard bargains" or contracts that gave one party more than an even exchange. As a result, few contracts were taken to court to enforce. Yet in the nineteenth century, legislators and courts began to leave the parties to contracts completely to their own devices. Provided they were adult males, in their right minds, and not using fraud or coercion, the contract depended completely on the subjective intent and will of the contractors. The government got out of the "paternal" position of supervising citizens. This was a change well suited to a liberal, egalitarian, democratic society such as the United States. People were assumed to be competent and trusted to take care of themselves, to succeed or fail on their own merits. The material benefits of this system—what the great legal historian J. Willard Hurst called the "release of energy" from encouraging individual enterprise—were tremendous. But the system gave more room to the shrewd and the sharp; the freedom to win also required a freedom to fail. In an 1844 South Carolina contract case, a judge referred to bargaining as a "contest of puffing and cheating" by both buyer and seller. But, once sealed, the bargain would be enforced.[6] The new rules produced opportunity, economic growth, and higher living standards overall, but also vast inequality and startling, almost chaotic change. But on the whole, the American people believed that the benefits outweighed the disadvantages.[7]

In May 1886, Sherwood inspected some of Walker's Angus cows, which Walker told him were infertile, at his Greenfield farm.[8] Sherwood picked out Rose, and Walker confirmed the sale by letter, at a price of five-and-a-half cents per pound—what she was worth as beef. When Sherwood sent a man to collect Rose, Walker, having found her pregnant, refused to deliver her. Sherwood secured a writ of replevin (a common-law writ, an order by a judge allowing a person to recover property wrongly taken), took possession of Rose, and won his claim to her in the Wayne County Circuit Court. Walker appealed to the Michigan Supreme Court.

Perhaps the entire case depended on the understanding that both Walker and Sherwood believed that Rose was infertile—as opposed to the possibility, elaborated in the Supreme Court's dissenting opinion, that Sherwood was taking a chance that Rose might be fertile after all. (Courts seldom allow parties to void contracts based on unilateral, rather than mutual, mistake.) However, the original record of the case is incomplete and contradictory, and this record was all that the Supreme Court had to consider.[9]

The Court that heard the *Sherwood* appeal was full of new faces, Democrats who had recently taken over the bench. Only Justice Campbell, on the Court since 1858, remained of the renowned Republican "Big Four." Three new judges joined the Court in the three years from 1883 to 1885. Thomas R. Sherwood (no relation to Rose's putative owner) served as chief justice. Like most early Michigan justices, he was a New York native, moving to Kalamazoo in 1852. Sherwood was a Greenback-Democrat, elected to the Court when the Republicans were being turned out in 1882. John W. Champlin was also a New Yorker, moving to Kalamazoo two years after Sherwood and joining his brother's law firm. He studied medicine and became an able surgeon, so that "a good doctor was spoiled to make a…justice." Champlin, also a Democrat, was elected to the Court one year after Sherwood. Allen B. Morse was a Michigan native—the first to be chosen for the Court. He served in the Union Army, losing an arm in Sherman's victory at Missionary Ridge, near Chattanooga, in November 1863. Morse took his place on the Court after defeating Thomas M. Cooley in the 1885 election. This Court "may almost be called a military tribunal," one observer noted in 1890, "for the puisne judges have all smelled powder."[10]

Justice Morse's majority opinion reversed the circuit court's decision in July 1887. Morse assumed that Sherwood and Walker were both mistaken about Rose's barrenness. "It appears from the record that both parties supposed this cow was barren and would not breed, and she was sold by the pound for an insignificant sum as compared with her real value if a breeder," Morse wrote. "She was evidently sold and purchased on the relation of her value for



Hiram Walker, from a painting that hangs in Willistead Manor, Windsor, Ontario.
Wikipedia contributors, "Hiram Walker," *Wikipedia, The Free Encyclopedia*, http://en.wikipedia.org/w/index.php?title=Hiram_Walker&oldid=232161637 (accessed August 27, 2008)

beef, unless [Sherwood] had learned of her true condition, and concealed such knowledge from [Walker]."[11] Thus, Morse indicated, it was a case of mutual mistake or fraud on Sherwood's part, a void contract in either case.

While there were some common-law precedents for the decision, Morse ultimately relied on logic and natural law. In some sense, there was no contract because Walker and Sherwood had made an agreement to purchase something that did not exist—a *barren* cow named Rose. Morse used the terminology of Plato and Aristotle, distinguishing the nature or essence of a thing from its accidental features. "If there is a difference or misapprehension as to the substance of the thing bargained for, if the thing actually delivered or received is different in substance from the thing being bargained for and intended to be sold, then there is no contract; but if it be only a difference in some quantity or accident, even though the mistake may have been the actuating motive to the purchaser or seller, or both of them, yet the contract remains binding." In simple terms, a breeding cow was fundamentally different from a beef cow.[12]

The Court thus took a position in an emerging battle over legal philosophy. The appeal to philosophic standards—to God, Nature, or Reason—was as old as Western civilization itself. It came under attack in the nineteenth century, challenged by legal philosophies derived from "positivism." Positivists argued that judges did not simply "discover" the eternal and immutable principles of law. Rather, law was a human product, the command of the sovereign. Oliver Wendell Holmes, Jr., who wrote his classic *Common Law* a few years before *Sherwood,* gave expression to this idea. Holmes wanted the language of morals and metaphysics completely excised from the law. He, and more radical critics of natural law jurisprudence, believed that judges used natural law as a pretext to make law on the basis of their own class interests. In contrast to Justice Morse's discussion of the essential or real nature of Rose, the positivists believed that these were just names, non-existent abstractions. Though often called "legal realists," they were really "legal nominalists," denying the reality of legal concepts.

Such law-school nostalgia was another sign of the modernizing forces at work in 1887: formal legal education was just getting underway. Rather than simply serving as an apprentice in a law office, "reading law" for a while and then hanging up a shingle, as lawyers like Abraham Lincoln did, the late nineteenth-century bar began to organize and professionalize. The American Bar Association, for example, was formed in 1878. Formal study, credentials, and organization took hold among lawyers, doctors, and even historians in the late nineteenth century. Only 11 out of 30 jurisdictions required any qualifications to practice law in 1840. After the Civil War, many more did. Teaching *Sherwood* became part of the progressive "search for order," as middle-class professionals tried to control the often unruly effects of the unbridling of contract.[1]

1. Wiebe, *The Search for Order, 1877–1920* (New York: Hill & Wang, 1967); Hockett, *New Deal Justice: The Constitutional Jurisprudence of Hugo L. Black, Felix Frankfurter, and Robert H. Jackson* (Lanham: Rowman & Littlefield, 1996), p 32.

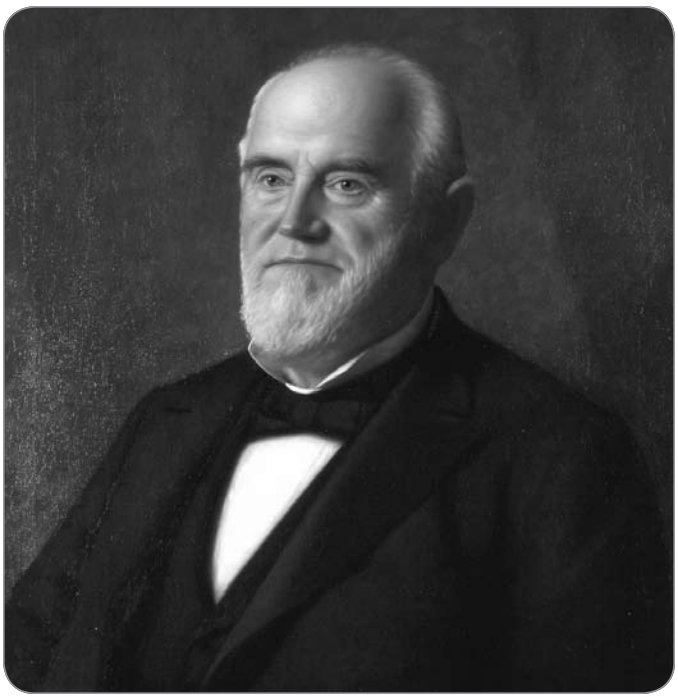


Image courtesy of the Michigan Supreme Court Historical Society

Official Court portrait of Justice Thomas R. Sherwood.

Thus, *Sherwood* is a profoundly ambivalent decision. On the one hand, it seemed to be stepping away from the anything-goes, devil-take-the-hindmost character of nineteenth-century contract doctrine, back toward a paternalistic judicial scrutiny of bargains, preventing Sherwood from reaping a windfall by pulling a fast one. Yet it did so by using natural law reasoning, which was revived in the late nineteenth century in defense of the doctrine of "liberty of contract." Most critics of nineteenth-century contract law claim that it empowered the already powerful and better informed, usually sellers and employers, at the expense of the weak and ignorant, usually employees and buyers—hardly characteristic of this case between two men of wealth.[13]

Chief Justice Sherwood dissented. Quite simply, he disagreed that there had been a mutual mistake. "He believed she would breed," Justice Sherwood said of plaintiff Sherwood. The purchaser turned out to be more correct about a quality of the cow "which could not by any possibility be positively known at the time by either party to exist." Articulating the dominant theory of contract, he said, "It is not the duty of courts to destroy contracts when called upon to enforce them, after they have been legally made." The law should leave individuals to their own devices. "As to the quality of the animal, subsequently developed, both parties were equally ignorant, and as to this each party took his chances."[14] But Justice Sherwood had to assume, apart from the record of the case on appeal, that Theodore Sherwood had been banking on Rose's possible fertility.[15]

What did *Sherwood* actually settle? Hiram Walker got Rose back, but the doctrine of "mutual mistake" was far from settled.[16] Mistake cases are rare enough, and mutual mistake cases even rarer.[17] Courts and casebooks continue to be "puzzled" about the principle, and

"courts use [mistake] for *ex post* rationalizations of their holdings," one recent study notes.[18] *Sherwood* was seldom cited in its first century. Indeed, the Michigan Supreme Court seemed to overrule it in 1888, reaffirmed it three years later, and repudiated it in 1982.[19] Nevertheless, *Sherwood* became a staple in the American legal education system. When a federal judge cited the decision in 1969, he called it "an ancient case revered by teachers of contract law," one that brought on "a flood of nostalgia" for him.[20]

Finally, perhaps *Sherwood*'s greatest claim to fame is that it inspired two humorous poems, one by Brainerd Currie in 1954, and another by Alan Garfield in 2004, which can be read on our website at www.micourthistory.org. ■

FOOTNOTES

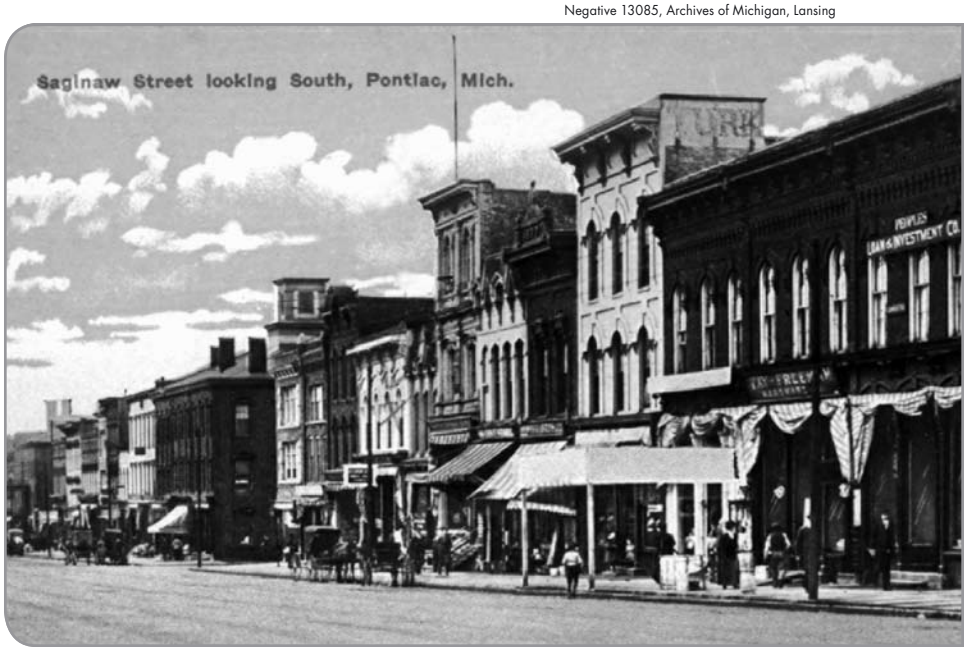
1. Adams, *The Education of Henry Adams* (Boston, 1927), p 53.
2. Dunbar, *Michigan: A History of the Wolverine State,* 2d ed (Grand Rapids: Wm B Eerdmans Pub Co, 1970), pp 582–584, 619.
3. Roscoe Pound, one of the founders of twentieth century "sociological jurisprudence," believed that judges were unable to deal with modern, urban, industrial problems because they analyzed them in light of outdated, premodern legal ideology. Courts should not treat complex, modern industrial labor relations "as if [corporation and worker] were farmers haggling over the sale of a horse." Pound, *Liberty of contract,* 18 Yale L J 454 (1909).
4. Atiyah, *Promises, Morals, and Law* (New York: Oxford Univ Press, 1981), quoted in Birmingham, *A rose by any other word: Mutual mistake in* Sherwood v Walker, 21 U Cal–Davis L R 198 (1987–1988).
5. Friedman, *A History of American Law* (New York: Simon & Schuster, 1973), p 275; Maine, *Ancient Law* (New York: Dent, 1931 [1861]), ch 5.
6. Scheiber, *Economic Liberty and the Modern State,* in Scheiber, ed, *The State and Freedom of Contract* (Stanford Univ Press, 1998), p 151.
7. Hall, et al., eds, *American Legal History: Cases and Materials* (New York: Oxford Univ Press, 1991), p 171; Teevan, *A History of the Anglo-American Common Law of Contract* (Westport: Greenwood, 1990), pp 175–183; Hurst, *Law and the Conditions of Freedom in the Nineteenth Century United States* (Madison: Univ of Wis Press, 1956). For a contrary view, emphasizing the continuity of pre- and post-industrial contract doctrine, see Simpson, *The Horwitz thesis and the history of contracts,* U Chi L R 46 (1979), pp 533–601, and Karsten, *Heart versus Head: Judge-Made Law in Nineteenth Century America* (Chapel Hill: Univ of NC Press, 1997), pp 47–53.
8. It is possible that Rose had calved in 1884, according to research undertaken by Terrence Ayala into the records of the American Aberdeen Angus association.
9. Birmingham, *supra* at 200–201.
10. Chaney, *The Michigan Supreme Court,* Green Bag 2 (1980), p 394; *Michigan Supreme Court Historical Reference Guide* (Lansing: Mich Supreme Court Hist Society, 1998), pp 76–81; Baxter, *History of the City of Grand Rapids, Michigan* (New York: Munsell, 1891), pp 730–760.
11. *Sherwood v Walker,* 66 Mich 568, 576; 33 NW 919 (1887).
12. *Id.* at 576–577; Birmingham, *supra.* Discusses the philosophical and linguistic issues in considerable depth, as does Golanski, *Nascent modernity in the case of* Sherwood v Walker: *An intertextual proposition,* 35 Willamette L R 315 (1999).
13. Pound, *supra.* See especially Horwitz, *The Transformation of American Law, 1780–1860* (Cambridge: Harvard Univ Press, 1977).
14. *Sherwood, supra* at 580–582.
15. Birmingham, *supra* at 199; Fuller, *Mistake and Error in the Law of Contracts,* 33 Emory L J 61 (1984).
16. Terrence Ayala reports that Sherwood won possession of Rose in a second trial after the Supreme Court remanded the case. Moreover, Rose gave birth to five more calves.
17. This is not to deny that the doctrine often has significant results. When a deep-sea treasure-hunting company found out that its treasure was discovered in waters *mistakenly* believed to be Florida's, it saved millions of dollars that it would have had to share with the state. Birmingham, *supra* at 204.
18. Rasmusen & Ayres, *Mutual and unilateral mistake in contract law,* 22 J of Legal Studies 312 (1993).
19. *Nester v Michigan Land & Iron Co,* 69 Mich 290, 296; 37 NW 278 (1888); *McCay v Coleman,* 85 Mich 60, 61; 48 NW 203 (1891); *Lenawee County Bd of Health v Messerly,* 417 Mich 17, 29; 331 NW2d 203 (1982).
20. Birmingham, *supra* at 203.

People v Beardsley

Law and Morals in the Industrial Age

150 Mich 206 (1907)

Negative 13085, Archives of Michigan, Lansing



Pontiac City Scene Postcard, Saginaw Street looking south.

As the Michigan Supreme Court entered the twentieth century, it began to deal with the problems of the urban and industrial transformation of America that were hinted at in *Sherwood*. The great cases of the first half of the new century concerned crime, compulsory sterilization, labor unrest, and civil rights.

The Supreme Court grew along with the state. Michigan's population doubled between the time of the Civil War and 1880 to 1.3 million people; it rose from the 16th to the 8th most populous state in the Union. In 1905, the legislature increased the size of the Court from five to eight justices, and lengthened their terms from seven to eight years. As an indication of the esteem in which the Court was held, a new state constitution in 1908 made almost no alterations to the Court. Indeed, the constitution's language regarding the common law seemed to strengthen the Court's power. While the 1850 constitution declared that the common law was to remain in force until "altered or repealed *by the Legislature,*" the 1908 constitution said that it was to remain in force until "altered or abolished."[1]

The first leading case of the twentieth century established a new standard in a difficult area of the law—crimes of omission. Carroll Beardsley spent a long weekend of intoxication with his paramour, Blanche Burns. When Burns took too much morphine, subsequently overdosing, Beardsley did not seek medical attention for her and was convicted of manslaughter when she died. The Supreme Court overturned the conviction and released Beardsley, holding that, whatever his *moral* obligation to Burns might have been, he had no *legal* duty to help her.

The case came out of Pontiac, a burgeoning Michigan industrial city, in 1905. The city, named after the Native American chief who led a great rebellion of northwestern tribes against the English in 1763, bestrode the Clinton River and was the site of grist mills and woolen factories in the early nineteenth century. The railroad arrived in 1844, and new manufacturers located there, particularly wagon and carriage makers, which turned into automobile makers around the turn of the century. By 1870, Pontiac was the fifth most populous city in the state. In 1909, only a few years after the events in *Beardsley,* General Motors would purchase several early automobile factories in Pontiac, and the city became a G.M. town. Michigan was taking the next step in its economic development, from timber and mineral extraction and processing to heavy manufacturing—especially autos—which would dominate the state economy for the century.

Carroll Beardsley lived in Pontiac and worked as a clerk and bartender at the Columbia Hotel. When his wife was out of town, he spent a weekend with Blanche Burns, who worked at another Pontiac hotel. They had been having an affair for some time. The couple drank steadily throughout the weekend, Beardsley using his fireplace-attendant boy to deliver beer and whiskey. As Beardsley began to prepare the house for his wife's return, Burns sent the boy to a drugstore for morphine and camphor.

Though Beardsley was as intoxicated as Burns, he perhaps suspected that she was attempting suicide, and knocked the morphine tablets out of her hand, crushing several of them. She managed to take three or four grains and lost consciousness. Beardsley had the fireplace boy take her into a downstairs room occupied by a Mr. Skoba, and put her to bed. Skoba helped the boy carry Burns, but eventually became alarmed at her condition. On Monday evening he called the city marshal and a doctor, who confirmed that she was dead. Beardsley was prosecuted for manslaughter in Oakland County Circuit Court; he was convicted and sentenced to one to five years in Jackson state prison.[2] Beardsley appealed his conviction to the Supreme Court, which heard the case in April 1907.

The great names of the mid-nineteenth century Court had passed away—Benjamin Graves, the last of the "Big Four," having died the previous year. The legislature had enlarged the Supreme Court, from four to five justices in 1888 and then to eight justices in 1905. The Court had returned to the completely Republican cast that it had in the 1860s. Of the five justices who heard Beardsley's appeal, all but one had been born in Michigan, and all but one had experience on the circuit court level before election or appointment to the high court. Chief Justice Aaron V. McAlvay rendered the decision in December 1907.

The prosecution's argument was that Beardsley had a legal duty to care for Burns, and that he had so grossly neglected that duty as to be responsible for her death. Of course, Beardsley was not guilty of murder, for the common-law definition of murder was a killing that included premeditation and malicious intent. This was not even "voluntary" manslaughter, a homicide resulting from a fit of passion (as in *Maher*) or the by-product of another crime such as robbery. It was "involuntary" manslaughter, or criminally negligent homicide, of a peculiar kind. Anglo-American law has had particular difficulty defining such crimes of "omission."[3] The expression "criminally negligent" shows that jurists find it difficult to distinguish private wrongs (torts) from public wrongs (crimes). Anglo-American criminal law depended on intent—the *mens rea*. But negligent actions assume a lack of intent. Certainly Beardsley's negligence could be the subject of a civil suit for damages brought by Burns' heirs. In such a suit, they would have to meet easier standards of proof (preponderance of evidence) than in a criminal case (guilt beyond a reasonable doubt); but Beardsley would only have to pay monetary damages, not face prison or execution.

Wikipedia contributors, "Opiate," *Wikipedia, The Free Encyclopedia,* http://en.wikipedia.org/w/index.php?title=Opiate$oldid=225852248 (accessed August 27, 2008)

Morphine advertisement from the January 1900 edition of the *Overland Monthly.*

Morphine was a readily available, over-the-counter opiate in nineteenth-century America. Perhaps tens of thousands of soldiers had become morphine addicts during the Civil War; the drug was even more popular among middle-class women. Cocaine was also legally available and becoming popular around the turn of the century—often to treat morphine addiction; just as morphine was used to treat alcohol addiction. One historian observes: "A 1903 report of the American Pharmaceutical Association conceded that in many drugstores customers could obtain cocaine and morphine as easily as Epsom salts." Addicts could also readily purchase syringes and needles. Few states acted against drug use until well into the twentieth century.[1]

1. Courtwright, *Drug Laws and Drug Use in Nineteenth-Century America,* in Nieman, ed, *The Constitution, Law, and American Life: Critical Aspects of the Nineteenth-Century Experience* (Athens: Univ of Georgia Press, 1992), p 124.

The Court acknowledged that there were several situations that did impose a positive duty to care, in which people would be held liable for failure to act. Parents had such obligations to their children, as did husbands to wives and ship masters to seamen. People who voluntarily took on responsibility for dependents also placed themselves in such a position. Contracts could also create these duties. Finally, the state, by statute, could impose such obligations.

McAlvay found no such relationship in Beardsley's case. "We must," he said, "eliminate from the case all consideration of mere moral obligation." Beardsley and Burns knew what they were doing, McAlvay pointed out. Burns "was a woman past 30 years of age. She had been twice married. She was accustomed to visiting saloons and to the use of intoxicants." She had had previous "assignations" with Beardsley, the Pontiac bartender. These drinkers and adulterers "knew each other's character." The Court noted that Beardsley imposed no force or fraud on his partner. "On the contrary, it appears that she went upon this carouse with [him] voluntarily…. Her entire conduct indicates that she had ample experience in such affairs."

In short, their relationship was not the kind that imposed legal obligations. "Had this been a case where two men under like circumstances had voluntarily gone on a debauch together, and one had attempted suicide, no one would claim that this doctrine of legal duty could be involved to hold the other criminally responsible for omitting to make effort to rescue his companion." McAlvay asked, "How can the fact that in this case one of the parties was a woman change the principle of law applicable to it?" Quoting a similar federal case,[4] McAlvay concluded that Beardsley deserved "the just censure and reproach of good men; but this is the only punishment" that society imposed.[5]

Beardsley's principle sustained Michigan's tradition of liberal standards in criminal law. Stricter rules applied in other states. In Massachusetts, for example, an *au pair* was charged with second-degree murder in 1997 for causing the death of an infant by shaking. The trial judge told the jury that neither intent to kill nor even harm was needed for a murder charge. The judge eventually relented and entered an involuntary manslaughter verdict.[6] In Michigan, the Court of Appeals affirmed a second-degree murder conviction in a similar case, since the prosecution had proved malicious intent by "circumstantial evidence and reasonable inferences drawn therefrom."[7]

The *Beardsley* decision was strikingly modern and conservative at the same time. Its reduction of legal obligation to contractual relation sounded very much like the "will theory" at work in *Sherwood.* Even more remarkable was the premise of sexual equality—that the sex of the victim was of no significance in determining a man's guilt. This indicated the great strides toward legal equality that women had made in the nineteenth century. American courts had extended legal standing to married women to own property, for example, overriding the old common-law principle that "in law, husband and wife are one person, and that person is the husband"—i.e., that married women had no legal existence.[8] Michigan's 1908 constitution gave female property owners the right to vote on tax questions; women had gained complete

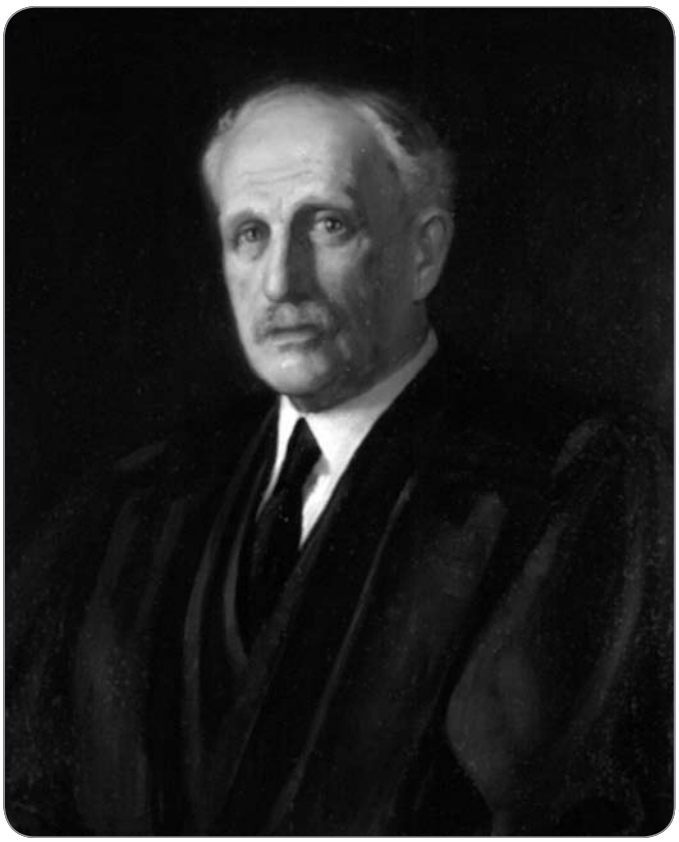


Image courtesy of the Michigan Supreme Court Historical Society

Official Court portrait of Justice Aaron V. McAlvay.

suffrage in several other states. At the same time, the decision seemed to be colored by traditional Victorian sexual moralism. Burns was little more than a prostitute; Beardsley did not have the same duty toward such a woman that he would have had toward a wife. In the opinion there was a hint, as one commentator later noted, of a "proclamation that the wages of sin is death."[9] This was in keeping with nineteenth-century state legislation and law that liberated contractual relations in the economic sphere but kept a tight rein on drinking, gambling, sexual vice, prostitution, and brutal sports. Even Congress intervened in this moral-cultural sphere, prohibiting the use of the mails to send "obscene" materials—including contraceptive information—in the 1873 Comstock Act.[10]

But the most remarkable legal aspect of the case, and one that marks it as profoundly modern, was the Court's rigid separation of law and morality—McAlvay's assertion that "We must eliminate from the case all consideration of mere moral obligation." Nineteenth-century American law, especially after the Civil War, saw the rise of "legal positivism." Positivists defined law as the will of the sovereign, a positive enactment, made by men. They rejected the traditional, natural-law view of law as a body of eternal, transcendent principles that legislators and judges "discovered." Oliver Wendell Holmes, Jr., the Massachusetts jurist who wrote *The Common Law* in 1880, was the leading exponent of this view. "I often doubt whether it would not be a gain if every word of moral significance could be banished from the law altogether," he wrote, "and other words adopted which should convey legal ideas uncolored by anything outside the law." He continued, "Manifestly… nothing but confusion of thought can result from assuming that the rights of man in a moral sense are equally rights in the sense of the Constitution and the law."[11] A New Hampshire decision about a decade before *Beardsley* made a similar point. "Suppose A, standing close by a railroad, sees a two-year-old babe on the track and a car approaching. He can easily rescue the child with entire safety to himself, and the instincts of humanity require him to do so. If he does not, he may, perhaps, justly be styled a ruthless savage and a moral monster; but he is not liable in damages for the child's injury, or indictable…for its death."[12] Whereas *Sherwood* gave expression to the classical natural-law view, *Beardsley* sounded the twentieth-century tocsin. The decision has been condemned, in the words of one commentator, for ignoring "any impulse of charity or compassion. It proclaims a morality which is smug, ignorant, and vindictive."[13]

But almost simultaneous with *Beardsley* was the emergence of a host of laws, state and federal, to protect people from the situation that Blanche Burns found herself in. The Pure Food and Drug Act of 1906, for example, required accurate labeling for drugs like morphine. The Mann "White Slave" Act of 1910 made it a federal offense to transport women across state lines for immoral purposes. The Harrison Narcotics Act of 1916 prohibited the use of cocaine and morphine without a physician's prescription. Many states had anticipated these federal acts, as governments began to restrict the often chaotic liberty unleashed in the nineteenth century. The United States Supreme Court accepted these acts of Congress over the objection that they usurped the police powers reserved to the states.[14] The "progressive" era began to eclipse the old, classical liberalism of the earlier period. ■

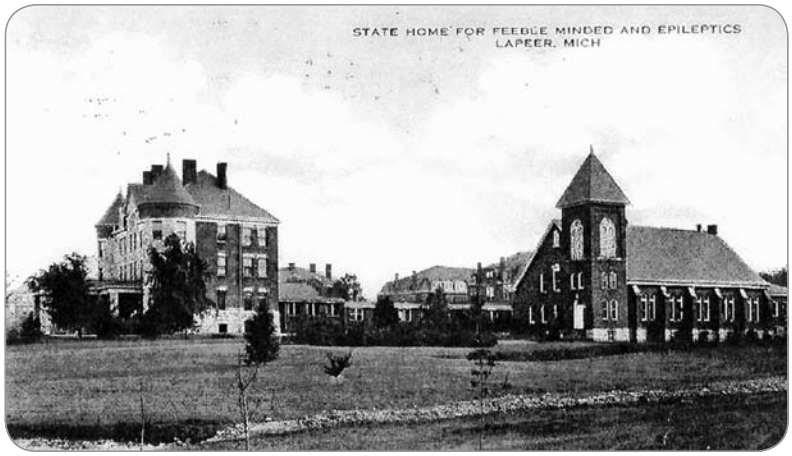
FOOTNOTES

1. *Sherwood v Walker,* 66 Mich 568; 33 NW 919 (1887).
2. Const 1850, sched 1 (emphasis added); Const 1908, sched 1. The 1963 Constitution used the phrase "changed, amended, or repealed."
3. *People v Beardsley,* 150 Mich 206, 206–209; 113 NW 1128 (1907).
4. Hughes, *Criminal omissions,* 67 Yale L J 590 (1958); Garner, *Unintentional homicide,* 36 Loyola of Los Angeles L R 1425 (2003).
5. *United States v Knowles,* 26 F Cas 800 (ND Cal, 1864).
6. *People v Beardsley, supra* at 206, 213–215.
7. *Massachusetts v Woodward,* 694 NE2d 1277 (Mass, 1997).
8. *People v Bulmer,* 256 Mich App 33; 662 NW2d 117 (2003).
9. "By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage"—Ehrlich, ed, *Ehrlich's Blackstone* (New York: Capricorn, 1959), vol I, p 83.
10. Hughes, *supra* at 624.
11. Benedict, *Victorian Moralism and Civil Liberty in the Nineteenth Century United States,* in Niemen, ed, *The Constitution, Law, and American Life: Critical Aspects of the Nineteenth Century Experience* (Athens, GA, 1992).
12. Holmes, Jr., *The Path of the Law, in Collected Legal Papers* (New York: Harcourt, 1920), pp 179, 172.
13. *Buch v Amory Mfg Co,* 44 A 809, 810 (NH, 1897).
14. Hughes, *supra* at 624.
15. See, e.g., *Hoke v United States,* 227 US 308; 33 S Ct 281 (1913), upholding the Mann Act.

Haynes v Lapeer Circuit Judge

Eugenics in Michigan

201 Mich 138 (1918)



Courtesy of the Lapeer District Library

Postcard image of Lapeer State Home for the Feeble Minded.

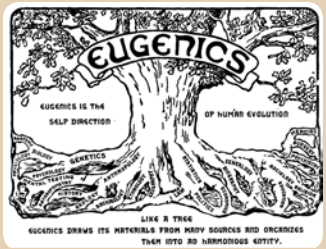
In 1918, the Michigan Supreme Court, in *Haynes v Lapeer Circuit Judge,* struck down a state law providing for the compulsory sterilization of "mental defectives" in state institutions. But it did so on a narrow basis that presaged a decision, in *Smith v Wayne Probate Judge,* seven years later allowing such laws. These decisions were similar to other state court responses to the first wave of American eugenic laws from the late nineteenth century to the First World War. In the 1920s, almost every state court and the United States Supreme Court acquiesced in a second wave of eugenic laws. Although Michigan's Supreme Court came within one vote of resisting the tide, ultimately it acquiesced in the judgment of the legislature. As a result, over 3,000 involuntary sterilizations took place in Michigan, and over 60,000 occurred in the United States. It was not until a change in attitudes developed during World War II, ultimately culminating in a wave of legal reform in the 1970s, that involuntary sterilizations were dramatically reduced. However, the impulse behind eugenics persisted. Cases dealing with assisted suicide, euthanasia, and allowing the death of the handicapped or the comatose arose, and the legislature responded to them. The Michigan courts still had to weigh the constitutional rights of individuals against legislative policy.

The great scientific and technological changes that transformed the United States into an urban and industrial nation had a deep impact on American thought, and on American law. During the period from 1870 to 1930, many influential teachers of law, judges, and lawyers wanted to turn law into a science with the same power and prestige as the natural sciences. And in the social sciences, the most impressive influence was that of Darwin's theory of evolution. Charles Darwin published *The Origin of Species* in 1859. Its subtitle was particularly important: *The Preservation of Favored Races in the Struggle for Life.* Darwin's theories provided the basis for a completely naturalistic and materialistic explanation for the origin and development of life. He hypothesized that random mutations gave some species, and some members of a species, superior advantages in coping with their environments. In this way, "natural selection" ensured the "survival of the fittest."

After the publication of *The Origin of Species,* various academics and others sought to apply Darwinian concepts to a broad range of disciplines. Some of these "Social Darwinists" argued that civilization should aid nature's effort to weed out the weak and dependent and breed the fittest. The American progressive movement of the early twentieth century displayed a particular confidence that science could provide answers to social problems. The social problems that stood out in the early twentieth century were associated with urban and industrial development—crime, poverty, and vice. Progressives in particular believed that modern scientific ideas, including eugenics, might hold the key to resolving these problems. For example, a belief that the population could be improved by eugenics was one of the motivations behind the establishment of Planned Parenthood.[1]

Progressives argued that "natural selection" should be applied by man, not simply by nature. Darwin's cousin, Francis Galton, proposed what came to be called "eugenics" in the 1860s. The

Wikipedia contributors, "Eugenics," *Wikipedia, The Free Encyclopedia,* http://en.wikipedia.org/w/index.php?title=Eugenics&oldid=233122937 (accessed August 20, 2008)



Logo from the Second International Eugenics Conference, 1921, depicting eugenics as a tree that unites a variety of different fields.

Eugenics is a philosophy that supports human intervention to improve human genetic and hereditary traits. Today, eugenics is often associated with Nazi experiments, now considered war crimes, which occurred during World War II. However, eugenics was previously considered a good cause by many. Due to the negative connotation that eugenics has taken on as a result of forced sterilization and other abuses, the rhetoric of the philosophy is not often heard. Yet the scientific advances in genetics of late have brought to question the moral ramifications as well as the very definition of eugenics.

rationale for eugenics was summarized in *Civic Biology,* a popular high-school textbook. It noted of the mentally ill, the retarded, habitual criminals, and others that "if such people were lower animals, we would probably kill them off to prevent them from spreading. Humanity will not allow this, but we do have the remedy of separating the sexes in asylums or other places and in various ways preventing intermarriages and the possibility of perpetuating such a low and degenerate race."[2] This echoed what Darwin himself had written in *The Descent of Man,* that "The weak members of civilized societies propagate their kind. No one who has attended to the breeding of domestic animals will doubt that this must be highly injurious to the race of man. It is surprising how soon a want of care, or care wrongly directed, leads to the degeneration of a domestic race; but excepting in the case of man himself, hardly anyone is so ignorant as to allow his worst animals to breed." Among the "various ways of preventing…the possibility of perpetuating such a low and degenerate race" was enforced sterilization. By 1935, 35 states had enacted laws to compel the sexual segregation and sterilization of those deemed unfit to reproduce.

Midwestern states were particularly enthusiastic about the eugenics program. Indiana enacted the first sterilization law in 1907.[3] In 1897, Michigan State Representative W. R. Edgar, a physician, introduced a bill to castrate criminals and degenerates. The bill failed, according to its proponents, due to old-fashioned ideas of individual rights and nineteenth-century sentimentalism.[4] Six years later, State Representative Lincoln Rodgers introduced a bill to electrocute mentally defective infants in the Michigan Home for the Feebleminded and Epileptic (later the Michigan Home and Training Center) at Lapeer.[5] This bill also failed. Interest in eugenics in Michigan was given impetus by Dr. J. Harvey Kellogg, brother of the cereal manufacturer, who organized the first "Race Betterment Conference" in Battle Creek in 1914, together with a special school for eugenic education. In 1913, the legislature enacted a law permitting the state to sterilize "mentally defective persons maintained wholly or in part by public expense."[6] [The act also made it a felony to perform sterilization operations outside of state institutions except in cases of medical necessity.[7]]

Coincident with these cases was the celebrated story of Dr. Harry Haiselden, who urged physicians to allow handicapped newborns to die. In 1915, Haiselden refused to perform an operation on Anna Bollinger's baby, Allan, who was born without a neck and ear and with other abnormalities, to repair an imperforate anus, which caused the baby to die after five days. He then said that he had allowed other "defective" infants to die and continued to do so. Haiselden wrote and starred in a motion picture, *The Black Stork,* advocating infant euthanasia. Public opinion was divided over Haiselden's actions, but his only punishment was expulsion from the Chicago Medical Society—not for his actions, but for his mass-media publicity about them. A few months after the Allan Bollinger case, Madison Grant published *The Passing of the Great Race,* which warned against the effect of non-Anglo-Saxon immigration on the nation's racial stock, and called for the "elimination of defective infants" and of "worthless race types."[1]

1. Pernick, *The Black Stork,* 3–17, 56.

Doubts as to the constitutionality of the act inhibited its implementation. While there was no shortage of opinion that forced sterilization was a violation of rights and inconsistent with the freedoms guaranteed by the United States and Michigan Constitutions, the breadth of the relevant constitutional provisions was unclear. The courts had not articulated a general "right to privacy" in the constitution.[8] An alternative, and less confrontational, approach was to question whether legislation of this kind was unconstitutional because it was aimed at a narrow "class" within a similarly situated group.

Only one operation was carried out under the new law, at the Psychopathic State Hospital in Ann Arbor, before it was challenged.[9] In 1915, H. A. Haynes, the medical superintendent of the Michigan Home and Training Center in Lapeer, proposed to remove the fallopian tubes of Nora Reynolds, an inmate. Reynolds was 27 years old and had been admitted to the institution eight years earlier. She was diagnosed as having the mental capacity of a 10-year-old, had repeatedly escaped, and had already given birth to two illegitimate children.[10] Her guardian, John Roach, objected to the sterilization, and the case of *Haynes v Lapeer Circuit Judge* began. The Lapeer County probate court refused to grant Haynes' request for permission to sterilize. Probate Judge Daniel F. Zuhlke pronounced the act unconstitutional.[11] Haynes appealed to the Lapeer County Circuit Court, which also refused to permit the procedure. Circuit Judge William B. Williams ruled that the act violated the Fourteenth Amendment of the United States Constitution and was "class legislation," because it was limited to inmates in state institutions. In Judge Williams' view, these constitutional objections were not related to the substance of the legislation, however. "The object of the statute is clear and the result sought to be reached is much to be desired," he noted; but the act excluded mental defectives in private institutions or at large. Williams cited a New Jersey Supreme Court decision of 1913, which had struck down that state's sterilization law on similar grounds.[12] Haynes then appealed the case to the Michigan Supreme Court.

The Michigan Supreme Court unanimously struck down the act. But the opinion of the Court left the door open to another legislative effort. On the one hand, the state attorney general submitted a brief that essentially conceded the unconstitutionality of the law as class legislation, making no effort to defend it.[13] On the other hand, the Court saw no constitutional basis for objecting to this type of legislation if it were properly written from the standpoint of the affected class. Justice Steere concluded that the state could use its police power—the general power to legislate for the safety, health, welfare, and morals of the citizens—for eugenic purposes. "Plainly stated," he said, "the manifest purpose and only justification for this legislation is to promote…the general welfare of the human race by a step in the line of selective breeding to be effected through sterilization of those found and adjudicated by a designated tribunal to be hopelessly insane and mentally defective to such an extent that, in connection with their personal record and family history, procreation by such persons

is inadvisable and inimical to public welfare."[14] The Court also pointed out that the state might single out a class of persons, such as the mentally defective, as objects of such legislation, despite the Fourteenth Amendment's guarantee that no state could deny to any person the equal protection of the laws. The law failed, however, because it "carves a class out of a class" in that it was limited to defectives in state institutions.

Haynes was one of several state high court decisions voiding compulsory sterilization laws. During the same period, the forces of public opinion that prevented the castration and infant electrocution bills that had been proposed in the Michigan legislature may have helped doom these first eugenics laws. In addition to the technical analysis of the Michigan Supreme Court, there was also considerable public sentiment against such laws in principle. Five governors vetoed sterilization bills; one was repealed by referendum. Judges struck down at least seven of nine that were challenged in state courts.[15] While sometimes the reasoning of these cases was similar to that of the Michigan Supreme Court, there was also a substantive objection to what many argued was both cruel and humiliating punishment, and a violation of due process.[16]

The eugenics movement gained strength after the First World War, bolstered by the racism and nativism of the period. Harry Hamilton Laughlin led the effort to enact new state euthanasia laws. Laughlin supervised the Eugenics Record Office at the Carnegie Institute in Washington, D.C., from its origin in 1910 and was its director until 1940. He was considered an expert on both eugenics and immigration; he was the sole scientific expert that Congress consulted when it revised American immigration laws in the 1920s.

In Michigan, the intellectual elite of Michigan's medical, educational, and legal communities took the lead in this second wave of the eugenics movement. Among the leaders of the movement were Victor C. Vaughn, dean of the University of Michigan medical school; Clarence C. Mitchell, University of Michigan president; and John H. Kellogg, director of the Battle Creek Sanitarium and founder of the Race Betterment Foundation.[17] Eugenic advocates drafted legislation more carefully, to avoid the "class legislation" pitfall that had condemned their acts before the war. In 1923, the state enacted a new compulsory sterilization law, drafted by Burke Shartel, University of Michigan law professor and later dean of the law school. The revised act applied to anyone adjudged feebleminded by a probate court, not just to inmates of state institutions.[18] If the defective person was deemed likely to beget children, and his or her family was unable to support those children, he or she could be sterilized. Willie Smith was adjudged to be feeble-minded by the Wayne County probate court, and his parents asked that he be sterilized. As Shartel noted, the law as drafted allowed "almost anyone…to make application for [a sterilization order]—whether he acts in the interest of the defective or of the public."[19] When his parents obtained the order, Smith sought its reversal in the Supreme Court in the case of *Smith v Wayne Probate Judge.*

The Court upheld the act in a 5-3 decision, though it struck down that part of the act that limited its application to defectives of indigent families and noted that the statutory procedures had not been followed in Smith's case. Chief Justice John S. McDonald wrote that "biological science has definitely demonstrated that feeble-mindedness is hereditary." The claim Willie Smith made, McDonald wrote, was the right of "any citizen or class of citizens to beget children with an inherited tendency to crime, feeble-mindedness, idiocy, or imbecility."[20] Dismissing individual-rights concerns, McDonald concluded that "It is an historic fact that every forward step in the progress of the race is marked by an interference with individual liberties."[21] McDonald's opinion was an excellent illustration of the influence of progressive-era faith in natural science, and progressive judicial embrace of scientific positivism in the law, which led the Court majority to conclude that the legislature's judgment was not an unreasonable assault on individual liberty. Justices Steere and Moore, who had voted in *Haynes* to strike down the 1913 law on equal-protection grounds, concurred with McDonald in upholding the new act. Justice George M. Clark entered a separate concurring opinion, noting that he joined the majority "with reluctance." He had doubts about the constitutionality of the act, but believed that the legislature should get the benefit in doubtful cases.

Justice Howard Wiest entered an impassioned dissent for himself and Justices John E. Bird and Grant Fellows. (Bird had voted to strike down the 1913 act; Fellows had not participated in the *Haynes* case.) Closely divided decisions like this had been very rare in the history of the Michigan Supreme Court. "I cannot agree that [the police power] extends to the mutilation of the organs of generation of citizens or any class thereof," Wiest wrote. He believed that the act violated the constitution's provision that "institutions for the benefit of those inhabitants who are deaf, dumb, blind, feeble-minded, or insane shall always be fostered and supported." He regarded the act as "cruel and unusual punishment," a denial of equal protection, and of due process of law. Wiest wrote, in classic natural-law language, "The inherent right of mankind to pass through life without mutilation of organs or

Image courtesy of the Lapeer District Library

Girls at the Michigan Home and Training Center in Lapeer participate in a party.

glands of generation needs no declaration in constitutions, for the right existed long before constitutions of government." Wiest was simply aghast at what he saw as the act's perversion of modern science and technology. "We have found no case in the books holding that in a Christian civilization it is neither cruel nor unusual to emasculate the feeble-minded. It has remained for the civilization of the twentieth century to write such a law upon the statute book." In a resounding conclusion he wrote, "This law violates the Constitution and inherent rights, transcends legislative power, imposes cruel and unusual mutilations upon some citizens, while constituting the like treatment of all others a crime, thereby depriving some of the equal protection of the law, and is void."[22]

A biographer noted that Wiest "was personally slow to accept changing times. The paradox lies in the fact that his personal preferences found no reflection in his holdings."[23] This dissent, however, reflected very well the traditional jurisprudence and morality of the pre-modern period. Professor Shartel, the sterilization statute's author, noted that Wiest's opinion was unsupportable "on any modern theory of rights or constitutional limitations."[24] At the same time, Justice Wiest's willingness to find fundamental rights that were safe from state abridgement, regardless of the popular will as expressed in legislatures, presaged the future of jurisprudence. While progressives often complained that conservative judges used outdated natural-law reasoning to impose their own policy preferences, progressive jurists of the late twentieth century would do so to an even greater degree.[25]

Professor Shartel and Justice Wiest reflected the intellectual divide of that time. The modern, progressive elite that invoked science and genetic engineering opposed the "old-fashioned" populists and the religiously orthodox. Interestingly, the debates taking place at the time over eugenics and human evolution were repeatedly linked in ways that may seem surprising today. For example, William Jennings Bryan, the populist and three-time presidential candidate who was also a devout Christian fundamentalist, was deeply concerned about the eugenics movement and the implications that were being drawn from evolutionary theories.[26] Such views led to the celebrated "monkey trial" over the teaching of evolution, subsequently made more famous by the play, *Inherit the Wind*.[27]

The decision in *Smith v Wayne Probate Judge* did not end the legal challenges to compulsory sterilization laws, either in Michigan or nationally. Two years later, in the 1927 case *In re Salloum, Smith* was nearly overruled in another, similar appeal to the Supreme Court. Justice Joseph B. Moore of the *Smith* majority had resigned, and was replaced by Justice Ernest A. Snow, who voted to overturn the sterilization law. This left the Court tied at 4-4, which meant the circuit court order to sterilize Agnes Salloum stood.[28]

Later that year, a Virginia eugenic statute similar to Michigan's was challenged in the United States Supreme Court. This produced the best-known American eugenic case, *Buck v Bell*.[29] The United States Supreme Court, with only one dissenter, upheld Virginia's decision to sterilize Carrie Buck, who was described as "a feeble-minded white woman…the daughter of a feeble-minded mother in the same institution, and the mother of an illegitimate feeble-minded child." Subsequent scholarship has shown that it is unlikely that any of the Bucks were truly "feeble-minded"; but Laughlin summarized a report sent to him and told the Court that the Bucks were among "the shiftless, ignorant, and worthless class of anti-social whites of the South." He described Carrie as "a typical picture of the low-grade moron." The case was astoundingly collusive, with lawyers and officers on both sides of the case conspiring to get the Virginia law upheld.[30] Carrie Buck's counsel, I. M. Whitehead, hardly defended his client at all. But he did use Justice Wiest's dissenting argument in *Smith* that "the inherent right of mankind to go through life without mutilation of organs of generation needs no constitutional declaration."[31]

In the generation after *Buck v Bell,* the states sterilized over 60,000 Americans. California sterilized about 20,000, and Virginia 7,000. Michigan extended its eugenics law to include the insane in 1929, and sterilized nearly 3,800 inmates, over 2,000 in the Lapeer facility alone, mostly in the 1930s and 1940s. Local enthusiasm for the program varied. Kalamazoo State Hospital for the Insane sterilized patients in a "promiscuous" manner, and a Kent County probate judge "active in the eugenics movement almost singlehandedly instigated a program of sterilizing the county's dysgenic elements." On the other hand, a probate judge in Genesee County "was unsure of the law's use and even its legality."[32]

The United States Supreme Court began to find objections to eugenic laws more compelling, striking down an Oklahoma law that required sterilization for three-time criminal offenders. It did so on equal protection grounds but, perhaps more tellingly, imposed a "strict scrutiny" standard of review that would help to strengthen individual rights in the future.[33] After World War II, the disclosure of the dimensions of Nazi eugenics discredited the American eugenics movement. Harry H. Laughlin, who had supported Michigan's sterilization law and the Virginia statute upheld in *Buck v Bell,* provided the model for the Third Reich's "Law for Protection Against Genetically Defective Offspring," under which 400,000 involuntary sterilizations and 200,000 murders were performed. Laughlin received an honorary degree from the University of Heidelberg in 1936 for his work to promote "racial purity." Dr. J. H. Bell, who severed Carrie Buck's fallopian tubes, praised the Nazis' "elimination of the unfit."[34]

While American eugenic laws remained on the books for another generation, the enthusiasm for eugenics as a progressive force changed. The number of American sterilizations dropped off, and most states had repealed their eugenic laws by the 1970s. Henry Foster, nominated to be surgeon general in 1995, was defeated in part because he had sterilized retarded women in the 1970s.[35] Early in the twenty-first century, governors of five states made formal apologies for their past policies, and many called on Governor Jennifer Granholm of Michigan to do so as well.[36]


Bentley Historical Library, University of Michigan
Dr. H. A. Haynes

However, the Michigan courts blocked at least one effort to obtain

relief for the decisions of the past. Fred Aslin, Michigan's version of Carrie Buck, brought suit against the state in 1994. Although his case was dismissed, Aslin "received a formal letter of apology from James K. Haveman, Jr., the director of the Michigan Department of Community Health," for his sterilization 50 years earlier. Aslin and several of his siblings were diagnosed as "feebleminded" and sterilized before being released from Lapeer; he believed that, as poor, Upper Peninsula Indians, they were the victims of social prejudice. Aslin's suit was dismissed because the statute of limitations had expired.[37]

Michigan repealed its sterilization laws in 1974, but this did not settle the matter of sterilization and individual rights. The parents of Donna Wirsing, who was diagnosed as having the mental capacity of a four-year-old, sought to have her sterilized. The Michigan Protection and Advocacy Service, a disability-rights group, intervened to prevent the operation, claiming that Wirsing was extremely unlikely to ovulate and conceive and that the Michigan law no longer permitted courts to authorize sterilizations, even at the request of parents. The probate and county circuit courts of Genesee County approved of the parents' petition, but the Michigan Court of Appeals overturned them, insisting that the legislature must explicitly empower probate courts to authorize such procedures. The Wirsing parents appealed to the Supreme Court, which overruled the Court of Appeals and allowed the sterilization to proceed. The long shadow of twentieth-century eugenics hung over the litigation; the majority noted that "Nothing in this decision should be interpreted as an endorsement of a return to the routine sterilization system of the past."[38]

Nor was the eugenic and euthanasia debate settled. Several "Baby Doe" cases in the 1970s revived the discussion of allowing handicapped infants to die. The issue of "assisted suicide" for adults also became a major issue, with the Michigan prosecutions of Dr. Jack Kevorkian and the celebrated case of Terry Schiavo in Florida. In 1999, Princeton University appointed the Australian philosopher Peter Singer to a chair in bioethics, perhaps signaling a movement in elite attitude back toward the progressive-era view of eugenics. Singer was known for his advocacy of infanticide and euthanasia. "We think that some infants with severe disabilities should be killed," he wrote.[39] Genetic screening and legal abortion had nearly eliminated the birth of children with Down Syndrome. Judge Richard A. Posner of the Seventh Circuit Court of Appeals opined that, while the ardor of Oliver Wendell Holmes and other eugenics advocates is still unfashionable, "with the revived interest… in euthanasia, and with rise of genetic engineering, we may yet find those enthusiasms prescient rather than depraved."[40] Whether or not that is so, courts will continue to wrestle with the question of the extent to which constitutional rights limit majorities' power in these matters. ■

FOOTNOTES

1. *Smith v Wayne Probate Judge,* 231 Mich 409; 204 NW 104 (1925).
2. Black, *War Against the Weak: Eugenics and America's Campaign to Create a Master Race* (New York: Four Walls, 2003), p 127; Quinn, *Race Cleansing in America,* American Heritage 54 (2003), chronicles at length the breadth of support for eugenics in the United States, including backing from leading intellectuals (including W. E. B. Du Bois), foundations, and others.
3. Hunter, *Civic Biology: Presented in Problems* (New York: American, 1914), p 263.
4. Laughlin, *Eugenical Sterilization in the United States* (Chicago: Psychopathic Laboratory of the Municipal Court, 1922), pp 1–4.
5. Lightner, *Asexualization of criminals and degenerates,* Mich L J (1897), pp 289–316.
6. Pernick, *The Black Stork: Eugenics and the Death of "Defective" Babies in American Medicine and Motion Pictures Since 1915* (New York, 1996), p 24. "Feebleminded-ness" was an inexact designation, today usually called "mental retardation." It comprised morons, imbeciles, and idiots.
7. 1913 PA 34, in Laughlin, *supra* at 28.
8. *Id.*
9. Future United States Supreme Court Justice Louis D. Brandeis did argue that a general "right to privacy" could be derived from common law reasoning—Brandeis & Warren, *The right to privacy,* Harv L R 4 (1890), p 193. But the "privacy" he was principally concerned about was protection against exposure by newspapers. See Kersch, *Constructing Civil Liberties: Discontinuities in the Development of American Constitutional Law* (Cambridge: Cambridge Univ Press, 2004), pp 56–62.
10. Laughlin, *supra* at 73.
11. *Id.* at 305.
12. Order of the Probate Court, in Laughlin, *supra* at 205.
13. In re *Nora Reynolds,* in Laughlin, *supra* at 206.
14. Brief of Attorney-General, in Laughlin, *supra* at 209–213.
15. *Haynes v Lapeer Circuit Judge,* 201 Mich 138, 142; 166 NW 938 (1918).
16. Siegel, *Justice Holmes,* Buck v Bell, *and the history of equal protection,* Minn L R 90 (2005), p 111; Laughlin, *supra* at 1–4.
17. Friedman, *American Law in the Twentieth Century* (New Haven: Yale Univ Press, 2002), p 110.
18. Hodges, *Dealing with Degeneracy: Michigan Eugenics in Context* (Ph.D. diss., Mich State Univ, 2001).
19. 1923 PA 285 "to authorize the sterilization of mentally defective persons."
20. Shartel, *Sterilization of mental defectives,* 24 Mich L R 1, 6 (1925).
21. *Smith v Wayne Probate Judge, supra* at 414–415.
22. *Id.* at 425.
23. *Id.* at 428–448. Wiest referred to the fact that it was a crime to perform sterilization operations beyond cases of medical necessity.
24. *Michigan Supreme Court Historical Reference Guide* (Lansing: Mich Supreme Court Hist Society, 1998), p 125.
25. Shartel, *supra* at 18.
26. Ross, *A Muted Fury: Populists, Progressives, and Labor Unions Confront the Courts, 1890–1937* (Princeton: Princeton Univ Press, 1994), p 321.
27. Larson, *Summer for the Gods: The Scopes Trial and America's Continuing Debate over Science and Religion* (New York: Basic, 1997), p 28.
28. *Scopes v State,* 289 SW 363 (Tenn, 1927).
29. *In re Salloum,* 236 Mich 478; 210 NW 498 (1927).
30. *Buck v Bell,* 274 US 200; 47 S Ct 584; 71 L Ed 1000 (1927).
31. Lombardo, *Three generations, no imbeciles: New light on* Buck v Bell, NY U L R 30, 30–62 (1985); Quinn, *supra.*
32. *Buck, supra.*
33. Hodges, *supra* at 314.
34. *Skinner v Oklahoma,* 316 US 535; 62 S Ct 1110; 86 L Ed 1655 (1942). Justice Harlan's dissent in *Shapiro v Thompson,* 394 US 618; 89 S Ct 1322; 22 L Ed 2d 600 (1965), elaborates the significance of *Skinner* as foreshadowing the Court's greater concern for personal liberty.
35. Quinn, *supra.*
36. Lush, *Decision for Sterilization Becomes 12-Year Fight,* USA Today, April 24, 1998, p 10.
37. Hodges, *supra* at 314.
38. Lessenberry, *Scarred by Sterilization, Michigan Man Sues State over Legacy of 'Race Betterment,'* Washington Post, March 9, 2000, p A3; Stern, *Michigan Should Apologize for Forced Sterilizations,* Detroit News, August 3, 2003.
39. *In re Wirsing,* 456 Mich 467; 573 NW2d 51 (1998); *In re Wirsing,* 214 Mich App 131; 542 NW2d 594 (1995).
40. Kuhse & Singer, *Should the Baby Live? The Problem of Handicapped Infants* (New York, 1985), p v.
41. Posner, ed, *The Essential Holmes: Selections from the Letters, Speeches, Judicial Opinions and Other Writings of Oliver Wendell Holmes, Jr.* (Chicago: Univ of Chicago Press, 1992), p xxix.

Bolden v Grand Rapids Operating Company

Civil Rights and the Great Migration

239 Mich 318 (1927)

Grand Rapids History & Special Collections, Archives, Grand Rapids Public Library, Grand Rapids, MI. Robinson Studio Collection (#125) Neg#E2047.20.

Interior of the Keith Theater.

The industrial revolution brought millions of immigrants to American cities. During and after World War I, it brought millions of black migrants from the South to northern cities. Michigan's civil rights laws were as egalitarian as those of any other state, but questions as to their interpretation and enforcement developed as black migration increased. In the late 1920s, the legislature and Supreme Court extended and modified Michigan law to keep pace with its growing African-American population, which was increasingly assertive of its rights.

By the end of the nineteenth century, the federal government had largely abandoned the effort to guarantee equal rights to former slaves and their children. In 1883, the United States Supreme Court held that Congress could not prohibit segregation or discrimination by restaurants, theaters, railroads, or in other places of "public accommodation."[1] However, many northern states enacted their own civil rights laws to prohibit discrimination after 1883. For example, Michigan enacted a civil rights law in 1885. The Michigan Supreme Court, in *Ferguson v Gies* (1890), interpreted it as prohibiting "separate but equal" accommodations. In rather paternalistic terms, the Court held that "The law is tender, rather than harsh, towards all infirmity; and, if to be born black is a misfortune, then the law should lessen, rather than increase, the burden of the black man's life."[2] Nonetheless, in 1896, in the infamous case of *Plessy v Ferguson,* the United States Supreme Court allowed states to impose segregation in such places if the results were "separate but equal," the formulation the Michigan Court had previously rejected. Similarly, the United States Supreme Court acquiesced to practices that resulted in the virtual disfranchisement of blacks in most southern states.

The United States Supreme Court's decision in *Plessy v Ferguson* may have caused the Michigan courts to retreat from their prior view and interpret the state's laws in a more restrictive fashion. Thus, in 1908 the Michigan Supreme Court decided that a company operating a ferry and amusement park at Belle Isle could refuse admission to blacks. "Theaters, race tracks, private parks, and the like, are private enterprises," the Court held. They were not "common carriers," and thus were outside the scope of the state's civil rights laws, "unless there be some statute regulating their business."[3]

The next year, the Grand Rapids Medical College expelled two black students after several white students threatened to leave the college if the blacks were allowed to return.[4] The Kent County circuit court ordered the college, as a "quasi-public institution," to admit them, but the Michigan Supreme Court overruled it. In a strained decision, the Court held that "private institutions of learning…may discriminate by sex, age, proficiency in learning, and otherwise," yet, once admitted, the black students had a right not to be expelled for arbitrary reasons like race. Nevertheless, the Court maintained that it lacked the power to issue writs of mandamus to enforce private contracts, thus providing no remedy for the wrong.[5]

In 1919, the legislature revised the 1885 civil rights act. The act guaranteed to everyone in the state "full and equal accommodations, advantages, facilities and privilege of inns, restaurants, eating houses, barbershops, public conveyances on land and water, theaters, motion picture houses, and all other places of public accommodation and amusement and recreation and all public educational institutions." The act also provided for fines and imprisonment for those who violated the statute.

Great demographic changes in Michigan would soon provide an opportunity to see how far the new civil rights act extended. Black Americans had been leaving the Deep South for border states for several decades; in the early 1900s, they began to be attracted to northern cities. Crop failures augmented segregation,

discrimination, and lynchings as incentives to leave the South, while growing industrial employment made the North attractive. This was especially the case after the First World War and the immigration restriction acts of 1921 and 1924 cut off the European immigrant labor supply.

In what has come to be known as the Great Migration, as many as half a million blacks left the South between 1915 and 1920; 300,000 in the summers of 1916 and 1917 alone. Northern cities like New York and Chicago acquired hundreds of thousands of black residents.

Because of the potential for employment in the auto industry, Detroit was the principal Michigan destination for black migrants. Henry Ford was a pioneer in black industrial employment, hiring 10,000 blacks to work in all job categories in his massive, state-of-the-art River Rouge plant. Though blacks were often restricted to hot, heavy, and unpleasant jobs, these auto jobs paid well and laid the foundation for an educated black professional middle class.

Even smaller cities like Grand Rapids felt the effects of the Great Migration. Grand Rapids established itself as the finest furniture-making city in the United States and attracted many different immigrant groups to that industry.[6] Its black population remained in the hundreds in the late nineteenth century, reached a thousand in 1920, and had nearly tripled by 1930. Their increasing numbers in northern cities, where they could vote and were supposed to enjoy equality before the law, led the new generation of black migrants to begin to assert their rights, especially after some of them returned from fighting for democracy in World War I. Even the small African-American community of Grand Rapids established two hallmarks of northern black consciousness shortly after World War I: a local branch of the National Association for the Advancement of Colored People, and a black-owned newspaper, the *Michigan State News*.[7]

Grand Rapids History & Special Collections, Archives, Grand Rapids Public Library, Grand Rapids, MI. Robinson Studio Collection (#125) Neg#E2047.35.

Exterior of the Keith Theater.

Keith Theater playbill published in the December 12, 1924, edition of the *Grand Rapids Press*.

The local NAACP began to promote several cases to test the state's civil rights law.[8] The principal case involved Grand Rapids dentist Emmett Bolden, a Grand Rapids native who had attended the College of Dentistry at Howard University in Washington, D.C., who was denied a first-floor ticket at the Keith Theater and was told he could only purchase a balcony ticket. Bolden's attorney was New York City native and World War I veteran Oliver M. Green. Green had apparently negotiated a settlement from the Grand Rapids Operating Company, a motion-picture theater, for two of his other clients. The opposing law firm, representing the theater, offered Green a job in an attempt to buy him off. Green persisted, though, bringing Bolden's case in the superior court of Grand Rapids.

Bolden, like other blacks, had been restricted to the balcony section in the Keith Theater. Though the civil rights act was a criminal statute, Bolden sued the Grand Rapids Operating Company, owners of the Keith Theater, for $1,000 in civil damages. The company denied that restricting blacks to the balcony violated the act or, in the alternative, that the act provided for civil damages. The company tried to wear Bolden out with repeated costly procedural motions. Bolden faced a hostile judge, Leonard Verdier, who had recently sentenced a black man to life in prison for armed robbery. "If you were in some other states, you would have been lynched," he said in court.[9] Verdier had also sponsored a bill to prohibit racial intermarriage when he was a state senator. In July 1926, Judge Verdier decided that the theater was a private enterprise, and thus the civil rights act requirement that the theater treat blacks equally might in fact deprive the theater owner of his property without due process of law.[10]

The local NAACP was divided over whether to make an appeal to the Michigan Supreme Court. While older residents and professionals like Bolden and Green were concerned about segregation and what was often referred to as "social equality," new migrants had more pressing interest in employment opportunities. The Grand Rapids black community was similarly conflicted over a proposal for a National Urban League branch in the city, for the Urban League was associated with the quasi-separatist and

economic self-help philosophy of Booker T. Washington, whereas the NAACP was committed to political and social agitation for integration. Much-needed assistance came from the NAACP national office and the Detroit branch.[11] On appeal, the theater owners argued that the civil rights act was an invalid exercise of the police power—the general power of the state to legislate for the safety, health, welfare, and morals of the people—and that it allowed only criminal prosecution, not civil suits. They pointed to several United States Supreme Court decisions that had struck down state regulations as violations of the due process clause of the Fourteenth Amendment.

The Michigan Supreme Court unanimously overturned Judge Verdier's decision and allowed Bolden's suit. The Court returned to the broad, egalitarian interpretation that it had adopted in *Ferguson v Gies*. It noted that the civil rights law was intended to benefit blacks who had suffered discrimination and therefore were permitted to vindicate their rights under the law. Thus, a suit to sustain the right to equal accommodations was permissible. Justice Sharpe quoted the earlier case of *Lepard v Michigan Central Railroad Co.* for the proposition that "It is a well-established principle that the violation of a statutory duty is the foundation for an action in favor of such persons only as belong to the class intended by the legislature to be protected by such statute."[12] He concluded, "It therefore seems clear to us that a person denied admission, in violation of its provisions, has a right of action for such damages as he sustained thereby."[13] After a new trial in Grand Rapids Superior Court, the Operating Company agreed to settle the case with Bolden for $200.[14]

While the legislature had adopted a criminally enforceable civil rights act, such an act would be worth little if local prosecutors did not enforce the laws vigorously—and most did not. *Bolden,* in giving blacks who suffered discriminatory treatment a civil remedy, allowed them to vindicate their own rights when local authorities could or would not. Later, federal civil rights laws also adopted this tactic, turning civil plaintiffs into "private attorneys general" to vindicate egalitarian social policy. But this tactic did not ensure full compliance with civil rights laws for, as Bolden and Green experienced it, private litigation was costly and time-consuming. The next step in the enforcement of civil rights laws, the establishment of independent administrative agencies to bring suits, came after the next world war.

It might be said that *Bolden* did no more than vindicate the obvious intent of the Michigan legislature, whose revised civil rights statute was necessitated by vacillating court decisions of 1908–1909. But the *Bolden* decision was broad and liberal, one of many judicial decisions, state and federal, that began to chip away at state-enforced racial inequality. In the early 1900s, the United States Supreme Court struck down debt-peonage laws that attempted to keep blacks tied to the land and prevented their northward migration.[15] It overturned the "grandfather clause" by which southern states exempted whites from literacy tests that prevented blacks from voting.[16] It also prevented border-state cities from adopting zoning laws that imposed residential apartheid.[17] In Michigan, just before the *Bolden* decision, the Detroit Recorder's Court exonerated the family of Ossian Sweet. Dr. Sweet had moved his family into a home in a "white" neighborhood. In an attempt to drive the Sweet family from the neighborhood, a mob of whites surrounded the house. A shot fired by Dr. Sweet's brother, Henry, killed a member of the mob. All of the occupants of the home at the time of the shooting were charged with murder. The first trial ended in a mistrial because of a hung jury. Following a second trial in which Henry Sweet was acquitted, the charges against all the other occupants of the house were dropped.[18] These were all signs that, accompanied by the social and political growth of the northern black population, the law was taking a turn back from its late-nineteenth century abandonment of the principle of equality before the law. ■

FOOTNOTES

1. *Civil Rights Cases,* 109 US 3; 3 S Ct 18; 27 L Ed 835 (1883).
2. *Ferguson v Gies,* 82 Mich 358, 367; 46 NW 718 (1890); Mitchell, *From slavery to Shelley—Michigan's ambivalent response to civil rights,* 26 Wayne L R 1, 19–20 (1979); Norris, *A perspective on the history of civil rights law in Michigan,* Detroit C L R 578 (1996).
3. *Meisner v Detroit, BI & W Ferry Co,* 154 Mich 545; 118 NW 14 (1908).
4. Jelks, *Making opportunity: The struggle against Jim Crow in Grand Rapids, Michigan, 1890–1927,* Michigan Historical Review 19:2, 27–29 (1993); *Won't Study with Negroes,* New York Times, November 21, 1908, p 1.
5. *Booker v Grand Rapids Medical College,* 156 Mich 95; 120 NW 589 (1909).
6. Buffum & Whaples, *Fear and loathing in the Michigan furniture industry: Employee-based discrimination a century ago,* Economic Inquiry 33, 234–252 (1995).
7. Jelks, *Making opportunity, supra* at 30.
8. The Grand Rapids branch began the litigation; it later ran out of money and lost interest. The Detroit branch and the national office then supported the suit.
9. Jelks, *Making opportunity, supra* at 42–43.
10. *Id.* at 43.
11. Jelks, *Race, Respectability, and the Struggle for Civil Rights: A Study of the African American Community of Grand Rapids, Michigan, 1870–1954* (Ph.D. diss, Michigan State University, 2001), pp 192–193.
12. *Lepard v Michigan Cent R Co,* 166 Mich 373, 383; 130 NW 668 (1911).
13. *Bolden v Grand Rapids Operating Corp,* 239 Mich 318, 328; 214 NW 241 (1927).
14. Jelks, *Making opportunity, supra* at 47.
15. *Bailey v Alabama,* 219 US 219; 31 S Ct 145; 55 L Ed 191 (1911).
16. *Guinn v United States,* 238 US 347; 35 S Ct 926; 59 L Ed 1340 (1915).
17. *Buchanan v Warley,* 245 US 60; 38 S Ct 16; 62 L Ed 149 (1917).
18. It is worth noting that Clarence Darrow served as the defense attorney in both trials and that the trials were heard by Judge Frank Murphy, who was later appointed to the United States Supreme Court.