THE VERDICT OF HISTORY

The History of Michigan Jurisprudence Through Its Significant Supreme Court Cases

MICHIGAN SUPREME COURT HISTORICAL SOCIETY

Michigan and the Culture Wars: 1970–1994

Welcome to the final issue exploring the following cases:


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2 Young Women Struck By Auto Reported 'Fair'
Two young women hit by a caroming car as they walked along Olive Road late Tuesday morning were listed in fair con-

O'Neill v Morse: Unborn Persons in Michigan


Accident 6
liability broader
By PAT SHELLENBARGER
News Staff Writer
LANSING — If you are injured in an accident — even though you are partly to blame — you may collect damages from another person, the Michigan Supreme Court has ruled.

Placek v Sterling Heights: Civil Wrongs and the Rights Revolution


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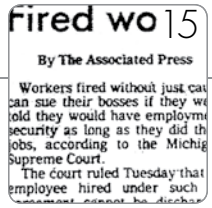
People v Aaron: Exorcising the Ghost of Felony Murder


fired wo 15
By The Associated Press
Workers fired without just cau
can sue their bosses if they w
told they would have employm
security as long as they did th
jobs, according to the Michig
Supreme Court.
The court ruled Tuesday that
employee hired under such

Toussaint v Blue Cross: Employee Rights and Wrongful Discharge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Poletown Neighborhood Council v Detroit: Private Property and Public Use


Burned Man 24
Reported 'Fair'
A young man who received severe electrical burns Tuesday in a construction site accident is in fair condition in St. Joseph Mercy Hospital, Ann Arbor.
Michael S. Ross, 19, of 304 Harwood, received the burns at a sewer installation site on Cunningham Road in Blackman Township.
Ross was burned extensively on the face, arms, legs and abdomen when a crane-borne metal support he was guiding into place, touched a high tension wire.

Ross v Consumers Power Co: Suing the State


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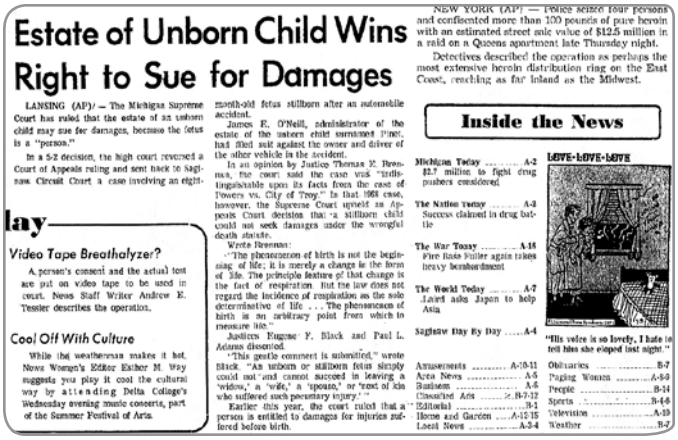
People v Kevorkian: The Right to Die

In its most recent decades, the Michigan Supreme Court has reflected the deep cultural and political divisions that have marked American society since the 1960s. Americans experienced what has been called a "rights revolution," in which the judicial branch of government played a prominent role. The Michigan Supreme Court made important decisions regarding the rights of unborn children, of plaintiffs in negligence suits, of employee job rights, of criminal defendants, of citizens who were suing or being dispossessed by the government, and the relative claims of natural and adoptive parents. In its most recent and celebrated opinion, the Court considered the question of whether there was a right to die under the U.S. or Michigan constitutions, and whether the state legislature could punish people for assisting in suicides. Some of these cases showed the degree to which states had lost their ability to make policy to the national government. The Michigan Supreme Court decision to recognize unborn children as persons, for example, was quickly followed by a United States Supreme Court decision declaring the right to abortion under the U.S. Constitution. Though the Michigan Supreme Court gave a strong opinion that the state could not be sued without its consent, the state could still be sued under federal civil rights laws. Also notable in these years was the question of the degree to which the Court made the law, or simply applied the law of the legislature and the Constitution. These cases raised issues that continue to cause controversy today.

O'Neill v Morse

Unborn Persons in Michigan

385 Mich 130 (1971)



Estate of Unborn Child Wins Right to Sue for Damages

LANSING (AP)— The Michigan Supreme Court has ruled that the estate of an unborn child may sue for damages, because the fetus is a "person."

In a 5-2 decision, the high court reversed a Court of Appeals ruling and sent back to Saginaw Circuit Court a case involving an eight-month-old fetus stillborn after an automobile accident.

James E. O'Neill, administrator of the estate of the unborn child surnamed Pinet, had filed suit against the owner and driver of the other vehicle in the accident.

In an opinion by Justice Thomas M. Brennan, the court said the case was "indistinguishable upon its facts from the case of Powers vs. City of Troy." In that 1961 case, however, the Supreme Court upheld an Appeals Court decision that a stillborn child could not seek damages under the wrongful death statute.

Wrote Brennan:

"The phenomenon of birth is not the beginning of life; it is merely a change in the form of life. The principle feature of that change is the fact of respiration. But the law does not regard the incidence of respiration as the sole determinative of life . . . The phenomenon of birth is an arbitrary point from which to measure life."

Justices Eugene F. Black and Paul L. Adams dissented.

"This gentle comment is submitted," wrote Black. "An unborn or stillborn fetus simply could not and cannot succeed in leaving a 'widow,' a 'wife,' a 'spouse,' or 'next of kin who suffered such pecuniary injury.' "

Earlier this year, the court ruled that a person is entitled to damages for injuries suffered before birth.

lay—

Video Tape Breathalyzer?

A person's consent and the actual test are put on video tape to be used in court. News Staff Writer Andrew E. Tessler describes the operation.

Cool Off With Culture

While the weatherman makes it hot, News Women's Editor Esther M. Way suggests you play it cool the cultural way by attending Delta College's Wednesday evening music concerts, part of the Summer Festival of Arts.

NEW YORK (AP) — Police seized four persons and confiscated more than 100 pounds of pure heroin with an estimated street sale value of $12.5 million in a raid on a Queens apartment late Thursday night.

Detectives described the operation as perhaps the most extensive heroin distribution ring on the East Coast, reaching as far inland as the Midwest.

Inside the News

LOVE-LOVE-LOVE

"His voice is so lovely, I hate to tell him she eloped last night."

©July 9, 1971, edition of the *Saginaw News.*

The social ferment of 1960s liberalism intensified into a full-blown cultural revolution. Protests originating in the civil rights movement escalated into Black Power and urban riots. Opposition to the Vietnam War, and other student unrest, set American college campuses ablaze. American Indians and other ethnic minorities, the elderly and disabled, and prisoners and homosexuals all organized and protested. The most significant changes were in sex roles and the status of women. Among the most controversial issues of the 60s—and the one that most concerned the courts—was that of abortion. Across the nation in the late 1960s there were dogged political contests over the liberalization of abortion laws. The outcome varied, with some states amending and some retaining restrictive abortion statutes before the United States Supreme Court struck down all state abortion laws in the *Roe v Wade* decision of 1973. On the eve of *Roe,* Michigan voters rejected a referendum to decriminalize abortion and, in *O'Neill v Morse,* the Michigan Supreme Court dramatically reversed its precedents and held that unborn children were "persons" under the state's wrongful death laws. As the opening paragraph of the decision put it, the case was indistinguishable upon its facts from the case of *Powers v Troy.*[1] At the same time that the United States Supreme Court in *Roe* swept away the state's ample protection of the right to life in criminal law, Michigan's unborn children went from having almost no recognition in the state's civil law system to being recognized as persons.

The history of Michigan abortion law was fairly straightforward and typical. In 1848, the legislature declared that to kill an unborn child at any stage of gestation, unless necessary to save the life of the mother, was manslaughter.[2] But few criminal prosecutions concerned abortion: one scholar estimates that there were about 40 convictions between 1893 and 1932.[3] The state's private-law or civil status of unborn children was more unsettled and began as quite unsympathetic to the unborn. In 1937, a woman brought suit for injuries that she sustained on a streetcar, injuries she claimed caused her then unborn child to die three months after his birth.[4] The Court held that no person could sue for injuries sustained *in utero.* But Michigan was an outlier among states; most jurisdictions did allow actions for prenatal torts. Between 1960 and 1968, the Court began to revise its position, and fully abandoned it in 1971 in *Womack v Buckhorn.*[5] The Court now held that "a child has a legal right to begin life with a sound mind and body."[6] It was a democratic majority that was more willing to follow developments in other states.[7] Although the two major political parties developed sharply defined and opposing positions on abortion in the 1980s, with Democrats generally supporting abortion rights and Republicans opposing them, this was not the case in the 1960s–1970s.

Shortly before *Womack* altered Michigan Supreme Court jurisprudence, while walking with a friend on a cold December day, Carol Pinet, eight months pregnant, was struck by a car as a result of an automobile accident that occurred at the intersection where she was standing. Mrs. Bernice May Morse, driving a Ford Falcon, skidded through a stop sign and struck a Nash Rambler driven by Gary Root. Root's car was pushed off the road onto the sidewalk where Pinet and her friend stood, injuring both women. Pinet sustained minor injuries, but the baby boy she carried was stillborn. James O'Neill, the administrator of her son's estate, sued Mrs. Morse, the driver of the car that ran the stop sign and caused the accident. Acting under the assumption that an unborn child was not a person, the circuit court summarily dismissed the action.

The new Michigan Constitution had established a Court of Appeals, to which O'Neill brought his case. The Court of Appeals rejected his appeal by a 2-1 vote. Judge S. Jerome Bronson dissented, noting that "the constantly evolving legal history of our Bill of Rights" should now include the unborn, just as Indians, aliens, convicted felons, corporations, and labor unions had come to be treated as "persons."[8] O'Neill appealed to the Michigan Supreme Court.

In a 6-1 decision, the Court overturned the Court of Appeals decision in *O'Neill* and held that O'Neill could sue for damages caused by the death of the unborn child, because the child was a "person" under the state's wrongful-death statute. Justice Brennan, in the majority opinion, noted that barely a month earlier the Court in *Womack* had overturned the precedents that denied

recovery for prenatal torts. Brennan observed that courts in other states had recognized prenatal personhood. "The phenomenon of birth is not the beginning of life," Brennan wrote, "it is merely a change in the form of life." The Court swept aside old ideas that regarded the unborn child as indistinguishable from its mother, because dependent on her. "A baby fully born and conceded by all to be 'alive' is no more able to survive unaided than the infant *en ventre sa mere.* In fact, the babe in arms is less self-sufficient—more dependent—than his unborn counterpart." In short, Brennan concluded, "The phenomenon of birth is an arbitrary point from which to measure life."[9] The Court also pointed out that the legislature had recently amended its laws of inheritance to recognize the interests of unborn children, instructing probate courts to appoint guardians for unborn persons. "If property interests of unborn persons are protected by the law," Brennan asked, "how much more solicitous should the law be of the first, unalienable right of man—the right to life itself?"[10]

Justice Black entered a characteristically lively dissent. Fundamentally, he objected to what he saw as judicial activism by the majority, imputing its own desires into legislative intent, gratifying what he called their "insatiable demands for unconstitutional legislation."[11] In rather opaque dudgeon, Black announced, "This writer, slated now to contribute an offering prior to scriven by or on behalf of a majority of the justices, proposes to lance our feverish disagreement with aim toward ascertainment as now due of the specific issue of legislative intent and purpose."[12] Simply put, he argued that statutes regarding inheritance and property rights were inapplicable to unborn children. "An unborn or stillborn fetus simply could not and cannot succeed in leaving a 'widow,' a 'wife,' a 'spouse,' or 'next of kin who suffered such pecuniary injury.' Nor could any legislator of 1848, or of 1939, or of 1965, reasonably have conceived otherwise." The majority "have concentrated too much on that one word 'person,' and too little on the purposeful rest of these unitary statutes."[13]

Black's perception was that there were profound problems in the majority decision. One commentator noted that in *Womack* and *O'Neill,* Michigan suddenly propelled itself from a laggard state to "the forefront of the movement for allowing prenatal injury recovery." The cases amounted to "a grand-slam approach of changing almost thirty-five years of precedent in less than two months." However, the state legislature seemed to ratify the decision when it very quickly expanded the range of damages that could be recovered in prenatal wrongful-death suits.[14] The *O'Neill* decision explicitly held that birth was not a crucial factor in determining personhood; it implied that viability might be equally irrelevant, making conception the moment of personal identity.[15] And it did appear that the majority was using right-to-life language (associated with the criminal law protecting the unborn against abortion) in the civil law realm that was concerned, not with fetal life per se, but with the harm done to the unborn child's relatives.[16]

O'Neill was decided at a critical point in the national abortion-reform movement, and coincided with Michigan's clear reaffirmation of the right to life. The political movement to liberalize Victorian-era laws, in which states used their police power to regulate public morals in favor of sexual or reproductive freedom, had been remarkably unsuccessful. Legislatures refused to amend their laws that restricted access to contraceptives, even by married couples, until the 1965 United States Supreme Court's decision in *Griswold v Connecticut* struck down such laws on the basis of a constitutional "right to privacy."[17] The effort to liberalize abortion law was moving slowly and in contradictory ways before the United States Supreme Court again intervened. Most proposals provided for incremental reform, along the lines of the American Law Institute's model abortion law, which would permit "therapeutic" abortions in cases of rape or incest, severe fetal abnormality, or when pregnancy posed a grave threat to the physical or mental health of the mother. Thus, Mississippi amended its anti-abortion law to allow abortion in cases of rape in 1966. The next year, Colorado made the first significant revision, along the lines of the A.L.I. model, and North Carolina and California soon followed. Five other states amended their laws in 1970, with New York and Hawaii allowing abortion "on demand" up to the point of viability or 24 weeks. The New York statute passed by one vote in the State Senate.[18]

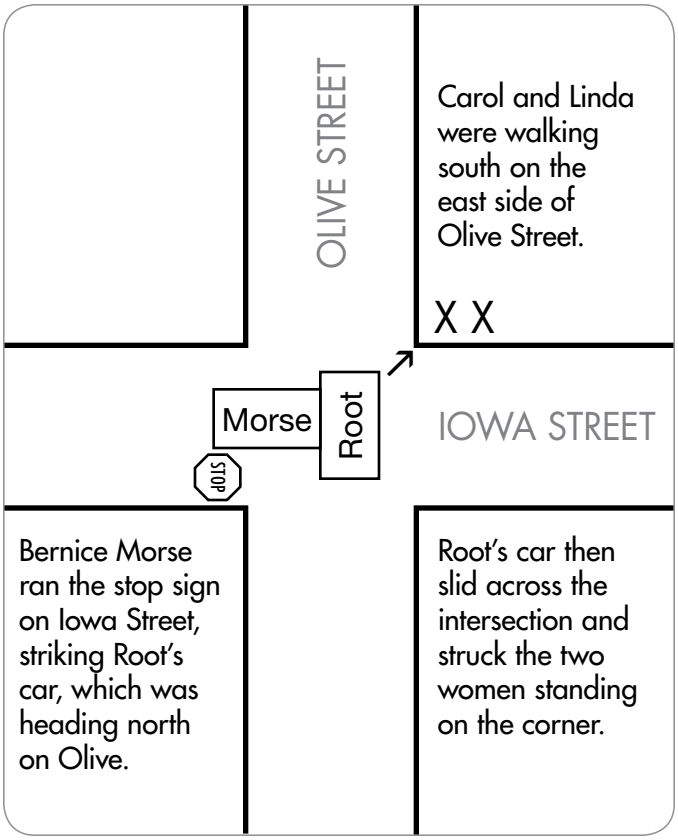
However, these reforms provoked a right-to-life reaction, and after 1970, "the abortion reform effort seemed to evaporate."[19] Twenty state legislatures rejected abortion reform bills in the first half of 1971, and six state supreme courts upheld their states' abortion laws in 1971–1972. In New York, the legislature voted to repeal the new law, but Governor Nelson Rockefeller vetoed the bill.[20] In Michigan, abortion proponents presented "Proposition B," a petition to enact a New York-style abortion law, to the voters in November. Polls indicated support for the proposal early on, and abortion reform leaders were guardedly optimistic about its chances. "The eyes of the world are on Michigan," feminist leader Gloria Steinem said. "A defeat here will slow our efforts elsewhere." But abortion opponents mobilized and mounted an

The 1963 constitution had added an intermediate Court of Appeals to reduce the workload of the Supreme Court and allow it to concentrate on only the most important cases. The new constitution also reduced the size of the Supreme Court from eight to seven justices, which made tie votes less likely. Justice Theodore Souris had been elected to an eight-year term in 1960, but resigned in 1967 to establish the new seven-member body.[1] The sharp partisan division among Court members that characterized the early 1960s was gone. Thomas E. Brennan was the only Republican on the Court. The youngest man ever to serve as chief justice, he left the Court in 1973 to found the Thomas M. Cooley Law School, and wrote a novel (*The Bench,* published in 2000) based on his experience as a justice. Paul L. Adams, who had been defeated in the aftermath of the Court's controversial 1962 reapportionment decision, returned to the bench in 1964. Thomas M. "the Mighty" Kavanagh served as chief justice, and was joined by his unrelated namesake Thomas G. "the Good" Kavanagh in 1969. The newest members of the Court were former governors John B. Swainson and G. Mennen Williams. The senior member was Eugene F. Black, who had been on the Court since 1956.

1. Cohn, *A Footnote to a Footnote,* 75 Mich B J 494 (1996).

extensive campaign against Proposition B, and it lost by 61 percent to 39 percent, a margin of almost 800,000 votes, in "one of the most remarkable political reversals in Michigan's history." One of the architects of the proposition's defeat was Wayne County District Judge James L. Ryan, who later joined the Michigan Supreme Court and was appointed to the U.S. Court of Appeals. Observers concluded that most voters were not ready for a law as liberal as New York's and might have ratified a more incremental and moderate one. But "Having failed with the voters," Michigan pro-abortion leaders "believed that the 'emphasis will be placed in the courts.'"[21]

Michigan's referendum turned out to be the last democratic expression on the abortion issue. Indeed, a Wayne County Circuit Court judge and the Michigan Court of Appeals declared Michigan's abortion law unconstitutional in the weeks before the referendum, but the Michigan Supreme Court did not have time to consider these decisions.[22] While Michiganders were voting, United States Supreme Court Justice Harry Blackmun was drafting his opinion in *Roe v Wade,* which struck down every abortion law in the country—even New York's law was too restrictive. Under *Roe,* states could not regulate abortion at all in the first trimester, and could regulate it only to preserve maternal health in the second. In the third trimester, up to the point of birth, "the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." Since "health" was understood to include psychological well-being, the decision amounted to abortion-on-demand up to the point of birth.[23]



2 Young Women Struck By Auto Reported 'Fair'

Two young women hit by a caroming car as they walked along Olive Road late Tuesday morning were listed in fair condition today at St. Mary's Hospital.

Carol Diane Pinet, 18, of 124 Walnut was admitted to the hospital for observation. Linda K. Pollard, 17, of Findlay, Ohio was treated for facial bruises and scrapes.

State police said the two women were walking south on Olive when a car driven by Gary Russel Root, 22, of 3692 Olive was hit by a car driven by Mrs. Bernice May Morse, 47, of 2517 Iowa, The impact knocked the Root car into the pedestrians.

The Morse car, police said, approached the intersection of Iowa and Olive, skidded when it tried to stop, and hit the Root car northbound on Olive. Mrs. Morse was ticketed for failure to stop.

The decision in *Roe v Wade* denied that unborn children were "persons" under the U.S. Constitution. Blackmun claimed that there was no agreement as to when life begins; birth seemed to be the only point at which personhood began. When Michigan and many other states attempted to prohibit "partial-birth abortion," the Supreme Court held that this imposed an "undue burden" on the constitutional right to abortion and struck such laws down.[24] At the same time, Justice Brennan's observation that birth was an arbitrary dividing line was used by proponents of neonatal euthanasia or infanticide.[25]

Roe was altogether at odds with the capacious expression of unborn life that the Michigan Supreme Court stated in *O'Neill,* and caused great distress to the pro-life justices, who nevertheless abided by the U.S. decision.[26] Yet despite *Roe,* there was little change in prenatal wrongful-death jurisprudence. In 1975, the Michigan Court of Appeals held that suits could only be brought for injuries sustained by viable fetuses. Here it noted the anomaly of extensive regard for unborn children in civil law after *Roe* ended their criminal-law protection. "If the mother can intentionally terminate the pregnancy at three months, without regard to the rights of the fetus, it becomes increasingly difficult to justify holding a third person liable to the fetus for unknowingly and unintentionally, but negligently, causing the pregnancy to end at that same stage."[27] Yet in 1996, the Court held that prematurely born, non-viable twins were included under the law. The following year, the legislature amended the wrongful death statute in a way that seemed to confirm that pre-viable fetuses were included, but the law remained ambiguous.[28]

Similarly contradictory was the case of Jaclyn Kurr, who was convicted of voluntary manslaughter after she killed the father of her unborn quadruplets when he repeatedly punched her in the stomach while she was 17 weeks pregnant. Michigan law (ever since *Pond*) allowed defendants to use lethal force to defend themselves and others against violent attacks. A Kalamazoo circuit judge held that pre-viable children were not "persons" who could be protected against attack. The Court of Appeals reversed, based on Michigan's 1998 Fetal Protection Act, which provided criminal penalties for assaults on pregnant women. The Court of Appeals also noted the amended wrongful-death act's "civil protections for fetuses and embryos." Thus, the criminal law's

protection of unborn children depended on a woman's choice to continue the pregnancy. Kurr could have chosen to abort the quadruplets in the aftermath of the assault, and no abortion opponent could raise the "defense of others" that she had used in her manslaughter case as a justification for trying to stop her. The Court of Appeals declared that it would not take up the question of the status of "embryos existing outside a woman's body," a further complication presented by modern science. The Michigan Supreme Court declined (on the 30th anniversary of the *Roe* decision) to review the decision, despite one justice's plea that "it is incumbent on us…to provide guidance for the bench and bar on this important question."[29] Indeed, the Court of Appeals seemed to be pleading for such clarification when it stated, "We emphasize that our decision today is a narrow one. We are obviously aware of the raging debate occurring in this country regarding the point at which a fetus becomes a person entitled to *all* the protections of the state and federal constitutions."[30]

The status of the unborn presented another complication in the emergence of "wrongful birth" suits. Parents of handicapped children sued physicians and hospitals for failing to diagnose prenatal defects, knowledge of which would have permitted the parents to abort the child. The New Jersey Supreme Court rejected the first wrongful birth suit in 1966. That Court noted, "Examples of famous persons who have had great achievement despite physical defects come readily to mind…. The sanctity of the single human life is the decisive factor in this suit in tort," it continued. "Eugenic considerations are not controlling. We are not talking here about the breeding of prize cattle." After *Roe,* however, many states permitted wrongful-life actions. Michigan was one of the few states to bar them.[31]

No question better illustrated the nationalization of American social policy, and the primacy of judicial social policy-making, than abortion and other life or sexual freedom issues that came to the fore in the 1960s. The United States Supreme Court gave voice to the radical individualism of the cultural revolution when it reaffirmed *Roe* in a 1992 case, although it now held that the constitutional right to abortion derived not from a right to "privacy," but from the Fourteenth Amendment's guarantee of liberty. And the United States Supreme Court defined liberty in an open-ended way: "At the heart of liberty is the right to define one's own concept of existence, of the universe, and of the mystery of human life."[32] The Court extended this principle to the liberty of homosexual sodomy in 2003. Dissenting bitterly from these decisions, Justice Antonin Scalia remarked that the Court had "taken sides in the culture war."[33] These issues made every United States Supreme Court appointment, and eventually appointments to lower federal courts and elections to state courts, the subject of fierce political struggles.

FOOTNOTES

1. *Powers' Estate v City of Troy,* 380 Mich 160, 156 NW2d 530 (1968).
2. Michigan Legislative Service Bureau, Legislative Research Division, *Abortion: A History of Abortion Laws in Michigan,* Research Report 18 (1998); Linton, *Enforcement of state abortion statutes after* Roe*: A state-by-state analysis,* 67 U Det L R 195 (1990); Linton, Roe v Wade *and the history of abortion regulation,* 15 Am J L & Med 227 (1989).
3. Shartsis, Casey *and abortion rights in Michigan,* 10 TM Cooley L R 316 (1993). Justice John D. Voelker had the protagonist of one of his novels note that his first law office had for its "last tenant, an old and recently deceased doctor, [who] had for many years practiced the stealthy arts of the abortioner," and that his initial legal practice was so unlucrative that "I dallied with the heady notion of taking a swift cram course in illicit surgery." *Hornstein's Boy* (New York: St. Martin's Press, 1962), pp 13–14.
4. *Newman v City of Detroit,* 281 Mich 60, 274 NW 710 (1937). See *Recent developments,* 70 Mich L R 729 (1972); Paonessa, *Recovery for prenatal injuries: Michigan exorcises its "Ghosts of the Past,"* 47 Notre Dame Lawyer 976 (1972).
5. *Womack v Buchhorn,* 384 Mich 718, 187 NW2d 218 (1971).
6. *La Blue v Specker,* 358 Mich 558, 100 NW2d 445 (1960); *Powers' Estate, supra; Womack, supra.*
7. Roger F. Lane interview with Justice John W. Swainson, October 18, 1990; Paonessa, *Recovery for prenatal injuries, supra* at 982.
8. *O'Neill v Morse,* 20 Mich App 679; 174 NW2d 575 (1969).
9. *O'Neill v Morse,* 385 Mich 130, 136; 188 NW2d 785 (1971).
10. *Id.* at 137.
11. *Powers, supra* at 180.
12. *O'Neill, supra* at 141.
13. *Id.* at 146–147.
14. Paonessa, *Recovery for prenatal injuries, supra* at 988, 991–992.
15. *Recent developments, supra* at 751.
16. *Id.* at 746, 755.
17. *Griswold v Connecticut,* 381 US 479; 85 S Ct 1678; 14 L Ed 2d 510 (1965); Hittinger, *Abortion before* Roe, 46 First Things 14 (October 1994).
18. Linton, *Enforcement of state abortion statutes, supra* at 258; Karrer, *The formation of Michigan's anti-abortion movement, 1967–74,* 22 Mich Hist R 69 (1996).
19. Karrer, *The formation of Michigan's anti-abortion movement, supra* at 82.
20. *Id.* at 92; Linton, *Enforcement of state abortion statutes, supra* at 231.
21. Karrer, *The formation of Michigan's anti-abortion movement, supra* at 89, 95–97, 100; Mossberg, *A Key Battle,* Wall Street Journal, November 3, 1972, p 30; *Some Referenda Voters Go Against the Polls and Big Advertisers,* Wall Street Journal, November 9, 1972, p 4.
22. Karrer, *The formation of Michigan's anti-abortion movement, supra* at 88; *People v Nixon,* 42 Mich App 332; 201 NW2d 635 (1972); *People v Bricker,* 42 Mich App 352; 201 NW2d 647 (1972); *Abortion Declared Legal in Michigan,* New York Times, October 12, 1972, p 36; Mossberg, *A Key Battle, supra.*
23. *Roe v Wade,* 410 US 113, 165; 93 S Ct 705 (1973). The Michigan Court of Appeals upheld the indictment of a physician for performing a third-trimester abortion without any medical reason. The abortionist pled guilty to a lesser charge and surrendered his license to practice medicine. *People v Higuera,* 244 Mich App 429; 625 NW2d 444 (2001).
24. *Stenberg v Carhart,* 530 US 914; 120 S Ct 2597; 147 L Ed 2d 743 (2000). The Court later upheld a similar prohibition by Congress if the procedure was "in or affecting interstate commerce," in *Gonzales v Carhart,* 550 US 124; 127 S Ct 1610; 167 L Ed 2d 480 (2007).
25. Duckworth, *Living and Dying with Peter Singer,* Psychology Today, January/February 1999.
26. Lane, interview with Justice John W. Swainson, *supra.*
27. *Toth v Goree,* 65 Mich App 296; 237 S Ct 297 (1975). The Michigan Supreme Court declined to hear an appeal.
28. Marks, *Person v potential: Judicial struggles to decide claims arising from the death of an embryo or fetus and Michigan's struggle to settle the question,* 37 Akron L R 76 (2004); Marks, *Prenatal torts in Michigan: Lingering questions about the wrongful death of a previable fetus,* 83 Mich B J 28 (2004). The legislature tried to clarify the law in Public Act 270 of 2005.
29. *People v Kurr,* 253 Mich App 317; 654 NW2d 651 (2002); George, *Woman's Fetus Defense Was Right, Judges Say,* Detroit Free Press, October 9, 2002; Will, *Life, and Death, in an Abortion Culture,* Washington Post, October 27, 2002, p B7. The quadruplets miscarried while Kurr was in prison.
30. *Kurr, supra* at 328.
31. Weil, *A Wrongful Birth?* New York Times Magazine, March 12, 2006; *Gleitman v Cosgrove,* 227 A2d 689 (NJ, 1966).
32. *Planned Parenthood v Casey,* 505 US 833, 851; 112 S Ct 2791; 120 L Ed 2d 674 (1992).
33. *Lawrence v Texas,* 539 US 558; 123 S Ct 2472; 156 L Ed 2d 508 (2003).

Placek v Sterling Heights

Civil Wrongs and the Rights Revolution

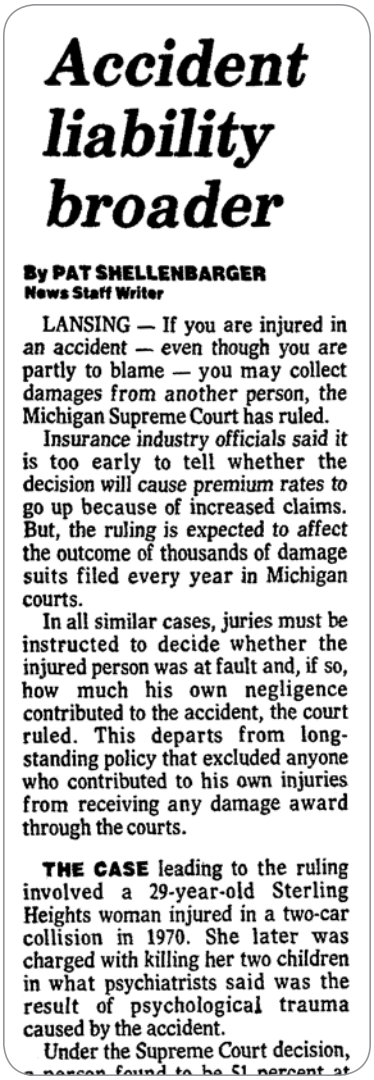
405 Mich 638 (1979)

The Michigan Supreme Court led the state into a nationwide movement to liberalize tort law. In the twentieth century, and particularly after World War II, states and the federal government altered the common law to make it easier for plaintiffs to bring and win injury suits against manufacturers, physicians, insurance companies, and public utilities. Though these changes in private law were incremental and less visible than changes in constitutional or criminal law, they had enormous public consequences. Michigan took a major step down this road in 1979 when it adopted a more plaintiff-friendly standard of "comparative negligence" in place of the older "contributory negligence" standard. By the end of the century, many argued that the system had become abused, and tort reform became a significant political and legal issue.

The law of torts developed alongside the law of contracts in the nineteenth-century civil law. The word "tort" simply means "wrong"—but a wrong remedied by an individual lawsuit rather than a criminal prosecution. Many torts—intentional ones like assault and battery—doubled as crimes, and there never was a perfect distinction between them. Judges and legal scholars also tried to distinguish between tort and contracts. Michigan Supreme Court Justice Thomas McIntyre Cooley indicated this in the subtitle to his 1878 treatise on the law of torts, "the wrongs which arise independent of contract."[1] The general trend of the nineteenth century was to maximize contract and minimize tort; the principal feature of the twentieth century was the growth of tort and the decline of contract.[2]

Within the realm of torts, judges developed the central principle of "negligence." For a tort suit to succeed, the plaintiff had to show that he was injured by another person, either intentionally or through the carelessness of the defendant. Activities that were inherently dangerous bound actors to a standard of "strict liability"; they had to pay damages even if not negligent. But the vast majority of tort suits alleged negligence. Some negligent parties were exempted from liability—such as charitable and governmental institutions and members of the victim's family. Defendants possessed several defenses in negligence suits—what plaintiffs' lawyers referred to as the "unholy trinity" of contributory negligence, assumption of risk, and the fellow-servant rule. These defenses grew out of contract law and showed that fault, while the central principle in tort law was not the only one.[3] Illustrative of these rules was *Smith v Smith,* in which the Supreme Judicial Court of Massachusetts said:

> It would seem, at first, that he who does an unlawful act, such as encumbering the highway, would be answerable for any direct damages which happen to anyone who is thereby injured, whether the party suffering was careful or not in his manner of driving or in guiding his vehicle, for it could not be rendered certain whether, if the road were left free and unencumbered, even a careless traveler or team driver would meet with any injury. But on deliberation we have come to the conclusion that this action cannot be maintained, unless the plaintiff can show that he used ordinary care; for without that, it is by no means certain that he himself was not the cause of his own injury. The party who obstructs a highway is amenable to the public in indictment, whether any person be injured or not, but not to an individual, unless it be shown that he suffered in his person or property by means of obstruction; and where he has been careless it cannot be known whether the injury is wholly imputable to the obstruction, or to the negligence of the party complaining.[4]



Accident liability broader

By PAT SHELLENBARGER
News Staff Writer

LANSING — If you are injured in an accident — even though you are partly to blame — you may collect damages from another person, the Michigan Supreme Court has ruled.

Insurance industry officials said it is too early to tell whether the decision will cause premium rates to go up because of increased claims. But, the ruling is expected to affect the outcome of thousands of damage suits filed every year in Michigan courts.

In all similar cases, juries must be instructed to decide whether the injured person was at fault and, if so, how much his own negligence contributed to the accident, the court ruled. This departs from long-standing policy that excluded anyone who contributed to his own injuries from receiving any damage award through the courts.

THE CASE leading to the ruling involved a 29-year-old Sterling Heights woman injured in a two-car collision in 1970. She later was charged with killing her two children in what psychiatrists said was the result of psychological trauma caused by the accident.

Under the Supreme Court decision,

Headline from the February 9, 1979, issue of the *Detroit News.* Reprinted with permission.

Contributory negligence meant that the plaintiff could not recover damages if the defendant showed that the plaintiff's own negligence contributed to the injury. As Cooley put it, "When it appears that but for his own fault the injury would not have occurred, it also appears that the duty to protect him did not rest upon others; for no one is under an obligation to protect another

against the consequences of his own misconduct or neglect." He continued, "No man shall base a right of recovery upon his own fault. Between two wrong-doers, the law will leave the consequences where they have chanced to fall."[5] This principle illustrated the dual nature of tort law. It tried to compensate injured victims—to restore them to their condition before the injury. But it also sought to deter bad and irresponsible behavior, and thus those who were themselves negligent ought not be rewarded. Very much like the simultaneously developing law of contract, tort law tried to recognize the independence and self-responsibility of the individual. Oliver Wendell Holmes, Jr. reiterated this principle in his 1881 classic, *The Common Law*. "The general principle of our law is that loss from accident must lie where it falls."[6]

Critics denounced the contributory principle as inhumane and unfair to injured plaintiffs. "The attack upon contributory negligence has been founded upon the obvious injustice of a rule which visits the entire loss caused by the fault of two parties on one of them alone, and that one the injured plaintiff, least able to bear it, and quite possibly much less at fault than the defendant who goes scot free," wrote William Prosser, the twentieth-century dean of modern tort law. "No one ever has succeeded in justifying that as a policy, and no one ever will."[7] It seemed to be especially unjust to employees who were injured on the job. Injured workmen faced the hurdles of "assumption of risk"—the idea that the worker understands the ordinary hazards of a job and calculates the dangers into the employment contract (higher wages for more dangerous jobs).[8] They also could not recover for injuries that were due to the negligence of their "fellow servants." A railroad, for example, paid for the injuries to passengers that resulted from the negligence of railroad employees, but they were not responsible for injuries that employees inflicted upon one another. Such a principle "strikes the twentieth-century observer as the archetypical doctrine of an age entranced with the idea that each man was equally capable of protecting himself against injury," one historian observes. "In its most extreme applications the doctrine seems almost a parody of itself."[9] As a result, judges did not apply the principle in a doctrinaire way, but fashioned numerous exceptions to mitigate it.[10]

Many historians concluded that the whole nineteenth-century common-law legal system worked to shift the burden of industrialization from entrepreneurs and capitalists onto workers, farmers, and consumers. The law of torts and contracts permitted the sharp and the shrewd, the wealthy and the powerful, to profit without worrying about the injuries that their railroads and mills caused to the public. It allowed businesses to "externalize" the costs of accident and injury onto society through a legal system that permitted "civil wrongs." In effect, the law provided a "subsidy" for industrial developers. Virginia law professor Charles O. Gregory inferred that Chief Justice Lemuel Shaw adopted the assumption-of-risk principle in 1850 out of "a desire to make risk-creating enterprise less hazardous to investors and entrepreneurs than it had been previously at common law.... Judicial subsidies of this sort to youthful enterprise removed pressure from the pocket-books of investors and gave incipient industry a chance to experiment on low-cost operations without the risk of losing its reserve in actions by injured employees. Such a policy no doubt seems ruthless; but in a small way it probably helped to establish industry, which in turn was essential to the good society as Shaw envisaged it."[11] Gregory noted that this explanation was "pure speculation"; later historians developed the "subsidy" thesis in more detail, arguing that courts—and federal courts especially—were biased in favor of big business interests and against the people.[12] But other scholars have concluded that "the nineteenth century negligence system was applied with impressive sternness to major industries and that tort law exhibited a keen concern for victim welfare."[13] Another concludes that, however rigorous and harsh the rationalistic legal rules might have been, individual judges tempered them with a "jurisprudence of the heart" in particular cases.[14] Scholars in the "law-and-economics movement" have defended the negligence-based tort system as both just and efficient.[15]

It is clear that judges fashioned exceptions to the contributory negligence doctrine all along. Juries often decided not just facts, but whether the facts showed negligence, and they tended to favor injured plaintiffs over corporate defendants. Contributory negligence did not prevent recovery in cases of intentional torts in which defendants were willful, wanton, or reckless or violated a statute. Judges also devised the "last clear chance" doctrine: if the plaintiff could show that the defendant had a clear opportunity to escape the consequences of the plaintiff's negligence and did not take it, the defendant would be liable. This qualification to contributory negligence arose in an English case in which plaintiff Davies left his ass fettered in the highway and the defendant drove into it.[16] Americans rapidly embraced the "jackass doctrine." As one commentator noted, "The groans, ineffably and mournfully sad, of Davies' dying donkey, have resounded around the earth. The last lingering gaze from the soft, mild eyes of this docile animal...has appealed to and touched the hearts of men. There has girdled the globe a band of sympathy for Davies' immortal critter."[17] Commentators disparately described last clear chance as "an arbitrary modification of a harsh rule" or "an exception based on sound policy and judgment."[18]

However harsh and biased nineteenth-century tort law may have been, it was turned in a pro-plaintiff direction in the twentieth century. The federal government led the way, in regulating the interstate railroad system. It imposed safety standards on the railroads, and made the railroads liable for the injury or death of employees, abrogating the contributory-negligence and fellow-servant doctrines, in the federal Employers Liability Act of 1906. The law established what was known as "comparative negligence," in which the court calculated how much of the plaintiff's injuries were due to his own negligence, and deducted that from the amount of the award. Many states enacted workmen's compensation acts, and work-related injuries were gradually eased out of the tort system.[19] States then applied comparative negligence to other suits; Mississippi in 1910 was the first to do so.[20]

At the same time, plaintiff attorneys began to employ new, more aggressive tactics in personal-injury cases. Traditionally, the American legal profession discouraged litigation. Attorney self-restraint was a matter of professional ethics, and often limited by

law. Lawyers were not allowed to advertise, for example, and could be disbarred or prosecuted for practices like "champerty" and "barratry," or the stirring up of disputes and litigation. By the turn of the century, a new breed of lawyers began to challenge these standards. They were often immigrants in the new industrial cities, educated in night law schools. They worked on contingency fees, taking a percentage of a successful plaintiff's award, and getting nothing if the suit failed. The older legal establishment derided them as "ambulance-chasers" and a threat to professional standards. The elite bar also vented its prejudice against the social and ethnic (often Jewish) origins of the new plaintiff bar.[21] For their part, the plaintiff attorneys were not just making a living for themselves, but providing legal services to a clearly underserved community.

A reorientation among legal academics also helped to shift the nature of tort law. Nineteenth-century civil law strove to keep liability connected to negligence or fault, and to minimize litigation. As one critic put it, "ideally, nobody should be liable to anyone for anything."[22] Law professors increasingly looked upon the litigation system as a source of redistributing risk and resources to redress the socioeconomic inequality that the industrial revolution had produced. "Quickly after the turn of the century the idea grew that industrial injuries should be considered an unavoidable part of the productive process and that compensation should be awarded automatically as a normal cost of doing business," one historian notes.[23] Manufacturers and employers were wealthy enough to absorb the costs, through liability insurance, safety measures, or by charging higher prices for their products. If contract could be absorbed into tort law, and the role of fault or negligence could be reduced or eliminated, then litigation could act as a kind of social insurance system.

A group of reform-minded scholars, often among the group loosely referred to as "legal realists," undertook this transformation, constructing what has been called the theory of "enterprise liability." The two most important theorists were Fleming James and Friedrich Kessler. James' scholarship focused on the goal of legal reform to make it easier for plaintiffs to win their suits. He argued, for example, that the injured are inherently at risk for accidents, and not responsible for their injuries. Thus tort law could not effectively fulfill its function of deterring irresponsible behavior. Without any role for fostering personal responsibility, tort law could concentrate on its compensatory function. Kessler was more radical, arguing that the burdens of litigation should be shifted from individual plaintiff to corporate defendant because corporations had monopoly power. Not only did nineteenth-century tort law oppress injured individuals, it threatened to bring fascism to America, as it had in his native Germany. Nineteenth-century principles of liberty of contract and individual fault had been instruments of liberation in their day, but now they served to maintain giant concentrations of capital. For these theorists, as nineteenth-century negligence doctrine "externalized," imposing the social costs of industrialization on the individual, so twentieth-century law should "internalize," and impose the cost of the harm done by individuals on society at large. William Prosser enlisted the ideas of James and Kessler in his campaign to reform tort law.[24]

A more general and important point that the realists made was that the law was an instrument of social policy, and that judges did not merely "discover" principles of law, or interpret statutes or the constitution in a neutral way, but, at least to some degree, made it. Law and judging were inescapably political; lawyers and judges should embrace their role as policymakers and "social engineers." Many judges began to move in the direction of expressly taking consideration of public policy into account, and gradually altered the principles of old contract and tort law. One limitation on product-liability litigation, for example, was the principle of "privity of contract." Manufacturers were only liable for product defects to those with whom they had a contractual relation. In 1916, New York Court of Appeals Justice Benjamin Cardozo, among the most prominent of the realist judges, allowed a suit by an automobile driver against the Buick Motor Company, rather than against the dealer who sold the car.[25] Justice Roger Traynor of the California Supreme Court took a similar approach, using the arguments of the realist academics to extend the principle of strict liability in tort suits.[26] Holding that manufacturers were liable not just to their contractual partners, but to the public generally, was typical of the decline of contract and the rise of tort, as American social thought moved from nineteenth-century individualism to twentieth-century collectivism.[27]

The Michigan Supreme Court was not as active as these courts, but did curtail the doctrines of negligence and privity in the 1940s–1950s.[28] Indeed, after the New Deal and Democratic Party ascendancy had placed many liberal reformers on the federal and state courts, many observers claimed that the courts were biased in favor of plaintiffs and against business.[29] Political scientists wrote that Democratic members of the Michigan Supreme Court were statistically biased toward plaintiffs in workmen's compensation cases, for example.[30] Michigan abandoned the privity requirement after many other states, in 1958, when a Democratic majority sat on the Court.[31] After that, the Michigan Supreme Court eagerly adopted liberal liability standards. The Democratic majority on the Court showed a "penchant…for 'rough justice' over 'ancient rules,'" a scholar noted.[32] Liberal activism fed upon the frisson of liberal reform in the 1960s–1970s, especially the consumer and environmental movements marked by Ralph Nader's 1965 book, *Unsafe at Any Speed,* which exposed the hazards produced by the auto industry.[33]

Plaintiffs frequently asked Michigan courts to abandon the contributory negligence standard and adopt comparative negligence. Thirteen states did so by statute between 1971 and 1973. In some of these states, the comparative standard was a compromise, which staved off calls for a complete no-fault system like that in automobile accidents. The Florida and California supreme courts ended contributory negligence in the next two years.[34]

In 1970, Patricia and Joseph Placek were driving through an intersection in Sterling Heights, to the left of a car making a right turn in front of them. Police officer Richard Ernst was driving through the intersection, on an emergency run, with siren and lights on. The Placeks said that they did not hear or see the police car before it collided into them; the police admitted that only cars directly in

front of them would have. Patricia Placek became wracked by pain that required heavy medication, and her condition introduced great strain in her marriage. When Joseph Placek threatened to divorce her and take custody of their children, Patricia shot them. She was charged with murder but found not guilty by reason of insanity.[35] The Placeks then sued the City of Sterling Heights. A first trial in 1972 found for the City, but the Placeks appealed to the Court of Appeals, which overturned the decision and ordered a new trial, because the trial judge had allowed the jury to consider that the Placeks had not been wearing seat belts.[36] A new trial also denied recovery to the Placeks on contributory negligence grounds; the Court of Appeals sustained this judgment without opinion. The Placeks appealed to the Michigan Supreme Court, which heard the case in 1978, over eight years after the accident.

The Supreme Court of the late 1970s was recovering from some internal agony. Dissatisfaction with Thomas "the Mighty" Kavanagh's leadership led the associate justices to oust him and install Thomas "the Good" Kavanagh as chief justice in 1974. Thomas the Mighty then died suddenly of cancer. Shortly after that, Justice John B. Swainson was indicted in federal court on bribery charges related to an effort to overturn the conviction of John J. Whalen, an organized crime figure. Swainson was a rising star in Michigan politics, a popular former governor and World War II veteran who had lost both legs below the knees in France. Three Supreme Court justices testified that Swainson had not tried to influence their decisions in the Whalen case. Swainson was acquitted of the more serious charges, but convicted of perjury, and resigned from the Court in 1975; he served 60 days in a halfway house in Detroit.[37]

But the Court began a period of recovery and stability in 1977. The members of the Court remained the same for six years—after the 1946–1952 period, a twentieth-century record for continuity. In partisan terms, the Court was evenly divided. Democrats T. G. Kavanagh and "Soapy" Williams had been joined by Blair Moody, Jr., in 1977. The senior Republican and chief justice was Mary S. Coleman, the first woman to serve on the Michigan Supreme Court, beginning service in 1973. John W. Fitzgerald and James L. Ryan joined the Court in the next two years. The swing vote was held by Justice Charles Levin. Scion of a family of prominent Michigan Democratic politicians, Levin ran as an Independent. He formed his own political party in 1972, nominated himself for an open seat on the Supreme Court, and was elected.[38] Justices Williams, Kavanagh, and Levin had already voted to replace contributory negligence and adopt comparative negligence in a 1977 case, but the three Republicans opposed them and left the Court tied.[39]

Justice Williams wrote the opinion that granted the Placeks a third trial based on the comparative negligence standard. "There is little dispute among legal commentators that the doctrine of contributory negligence has caused substantial injustice," he wrote. He noted that most other state courts and legislatures had done away with it, so that "the question before remaining courts and legislatures is not whether but when, how and in what form to follow this lead."[40] Quoting a leading negligence reformer, Williams noted that "pure" comparative negligence did not allow a plaintiff to benefit from his own fault, since the damages awarded were reduced in proportion to his share of responsibility for the injury. "That is justice," he noted.[41]

But even if comparative negligence was a superior principle, was it appropriate for the Court, rather than the legislature, to adopt it? Former Governor Williams addressed this question of judicial lawmaking forthrightly. "There is no question that both this Court and the legislature have the constitutional power to change the common law." He noted that, "although the courts have not been the primary agencies for adoption of comparative negligence, they are certainly in as good, if not better, a position to evaluate the need for change, and to fashion that change." Such a policy "is consistent with this Court's responsibility to the jurisprudence of this state."[42] Chief Justice Coleman's concurring opinion was even more explicit in its expression of legal realism. She recognized that the Court's decision "may be seen by some as usurping the legislative prerogative." "Historically, traditional notions of the role of appellate courts were that they merely discover and then declare the meaning of the common law. The reality that this body of law, as opposed to statutory law, was judge-made was ignored," she noted. "Modern jurisprudence has abandoned this ostrich-like approach, recognized the obvious and acknowledged that whenever a court overrules prior precedent it is functioning in a lawmaking capacity."[43]

While the Court unanimously adopted the comparative negligence standard, it split on the problem of the limits and application of judicial lawmaking. The majority held that the new standard would be applied not just to future cases, but retroactively to some cases, including pending retrials and appeals. The Republican justices did not want the new standard to be applied retroactively, but only prospectively. In the traditional distinction between legislating and judging, legislation applied only to future cases (thus the Constitution prohibits "ex post facto laws"), while Court decisions applied only to past cases. But decisions that work a clear and abrupt change in seemingly settled law raise profound problems if applied retroactively. When the United States Supreme Court imposed the "exclusionary rule" on the states, overturning criminal convictions based on illegally seized evidence, it did not require that all prisoners convicted on such evidence be released and retried, due to the obvious chaos that such an order would cause.[44] Chief Justice Coleman, pointing out that "it is difficult to imagine a more legislative-like decision" than this, urged the Court to apply it only prospectively for similar reasons of equity and policy.[45]

Though the *Placek* decision raised many detailed and technical questions of application, it provoked no immediate legislative reaction.[46] The Placeks themselves settled out of court with the City of Sterling Heights.[47] The decision reinforced the movement of change in the law, sometimes described (often pejoratively) as "liberal judicial activism," that marked the 1960s–1970s in Michigan and the nation. It confirmed the legal realists' aspiration that, since judges were necessarily policymakers, they ought to use that power to foster progressive social policy. Since the New Deal, state legislatures and especially Congress had extended commercial regulation, and transferred supervision of the economy from judges to

administrators; labor, for example, had been largely removed from the realm of the common law and taken over by the National Labor Relations Board, workmen's compensation commissions, and anti-discrimination agencies. Decisions like *Placek* augmented judicial power. As one scholar observes, the new tort theories "appointed the judge as an agent of the modern state." They "charged the judge to internalize costs and distribute risks. Enterprise liability theory also allowed judges to join the effort to aid the poor. Indeed, the theory conceived of courts as possessing unique powers to achieve these ends in comparison to alternative branches of government."[48] As in the apportionment and desegregation cases, the majority of the judiciary prided itself on having done the right thing when the political branches would not.

To some degree, the legal realists' hope that tort law would become part of a social engineering project had been realized. Plaintiff lawyers depicted themselves as crusaders for social justice, using the lawsuit to vindicate the rights of the poor, women, minorities, and consumers against irresponsible corporations. Indeed, tort plaintiffs acted as "private attorneys general," achieving public good in their private suits. "Private tort litigants serve the public interest by uncovering dangerous products and practices," two legal scholars recently claimed.[49] The legal and ethical limitations on plaintiff attorney activity were relaxed in these decades as well. "In 1975 one of the most widely quoted of the new legal ethicists [Monroe Freedman] could write of a 'professional responsibility to chase ambulances,'" one critic of the new mood observes. The United States Supreme Court permitted lawyers to advertise two years later.[50] Even more significant were the "mass tort" class-action suits, against manufacturers of asbestos and silicon breast implants, and ultimately the tobacco industry. Critics decried the "litigation explosion" in America, and a movement for tort law reform got underway in the 1980s. If the nineteenth-century ideal had been that "nobody should be liable to anyone for anything," the new principle was that "everybody was liable to everyone for everything." In this view, the legal system reinforced a social and cultural movement that devalued individual responsibility, blamed "society" for all problems, and focused on victimhood.[51]

In 1986, the American Tort Reform Association was established. It fed the widespread public sense that the litigation system had gotten out of control, influenced by many stories of outrageous lawsuits. The most famous (the "tort-reform poster-child") was the woman who sued McDonald's when she spilled scalding coffee on herself.[52] Others included a woman who won a $1.6 million judgment against a phonebook company that had led her to a physician who botched her liposuction surgery, a student who sued his school for stress caused by summer homework, and a city employee who backed his dump truck into his own car and sued the city.[53] Such suits provided material for innumerable lawyer jokes among late-night TV comics and talk-radio hosts. They also spawned many "urban legends," such as the pregnant woman who sued the manufacturer for the failure of its contraceptive jelly, which she ate (on toast). Warning labels showed the extent of product-liability awards, such as the brass fishing lure with a three-pronged hook that cautioned "harmful if swallowed," and the cocktail napkin-map from a Hilton Head restaurant that warned, "not to be used for navigation."[54]

The advent of the "litigious society" fit the dour national mood of the 1970s. In the aftermath of the Vietnam War, the Watergate scandal, and the general social upheaval of the cultural revolution, American society appeared to be coming apart. The sense that the government and legal system were causes rather than solutions to the problems fueled a conservative political reaction, which, by 1980 ended the decades-long dominance of New Deal Democratic liberalism. The economic effects of the litigation system were significant. Litigation costs had grown at four times the rate of the economy since 1930, amounting to 2 percent of the national income. Average tort awards in Cook County (Chicago) rose in inflation-adjusted terms from $52,000 to $1.2 million between 1960 and 1984. By 1990, it was estimated that the tort-law system cost the country $300 billion a year. The plaintiff bar took in $40 billion in 2002; plaintiffs themselves netted only about half of the amount of judgments, after paying lawyers' fees and other costs. The indirect costs of increased liability were said to raise prices for everyone, and inhibit innovation. One West Virginia Supreme Court justice opined, "Much of my time is devoted to ways to make business pay for everyone else's bad luck."[55] Michigan and other states of the industrial midwestern "Rustbelt" were especially hard-hit by the economic downturn of the 1970s, part of which, the conservative critics contended, resulted from government policies that grew out of the liberal rights revolution—union privileges and labor costs, environmental requirements, affirmative action, and the new tort regime. Detroit, a city of nearly two million in the 1950s, lost half its population by the end of the century.

Inevitably, it is difficult to balance the rights of criminal defendants and society's need for safety and order; so it is inevitably difficult to balance the conflicting rights and interests of plaintiffs and defendants in tort law. While it may be arguable that the abuses of the late twentieth century tort regime, however exaggerated by conservatives, exceeded those of a century earlier, similarly exaggerated by progressives, they seem to have provoked a greater political reaction.[56] Almost every state adopted some kind of tort reform in the 1980s–1990s, capping punitive damage awards, restricting comparative negligence, and doing away with doctrines like "joint and several liability," in which a plaintiff could recover the full amount of damages from any one of multiple defendants, regardless of the relative contribution of that defendant to the total injury. The Michigan legislature was especially active in tort reform. It punished frivolous lawsuits, limited joint and several liability, and headed off the possibility of mass-tort lawsuits to make the food industry liable for obesity. Since tort law remained a state issue, it became a factor in judicial appointments and elections. This was especially the case in 2000, when three Republicans who had established the first Republican majority on the Court in decades were up for re-election, and the Michigan Trial Lawyers Association raised hundreds of thousands of dollars to defeat them.[57] If nothing else, the tort revolution made state Supreme Court elections around the country increasingly bitter, partisan, and expensive.

FOOTNOTES

1. Cooley, *A Treatise on the Law of Torts, or the Wrongs Which Arise Independent of Contract,* 2d ed (Chicago: Callaghan, 1888).
2. *Id.* at 95–97; Gilmore, *The Death of Contract* (Columbus: Ohio State Univ Press, 1974).
3. Rabin, *Some reflections on the process of tort reform,* 25 San Diego L R 24 (1988); Rabin, *The historical development of the fault principle: A reinterpretation,* 15 Georgia L R 925 (1981).
4. *Smith v Smith,* 19 Mass 621, 664 (1824).
5. Cooley, *Treatise on the Law of Torts, supra* at 793, 807.
6. Holmes, Jr, *The Common Law* (Boston: Little, Brown, 1881), pp 94–95.
7. Prosser, *Comparative negligence,* 51 Mich L R 469 (1953).
8. See, e.g., *Michigan Cent R Co v Smithson,* 45 Mich 212; 7 NW 791 (1881).
9. White, *Tort Law in America: An Intellectual History* (New York: Oxford Univ Press, 1980), p 41.
10. Rabin, *Historical Development of the Fault Principle, supra* at 942; Karsten, *Heart versus Head: Judge-Made Law in Nineteenth Century America* (Chapel Hill: Univ of NC Press, 1997), pp 113–128.
11. Gregory, *Trespass to negligence to absolute liability,* 37 Virginia L R 368 (1951); Prosser, *Comparative negligence, supra* at 469.
12. Horwitz, *The Transformation of American Law, 1780–1860* (Cambridge: Harvard Univ Press, 1977) was the pathbreaking work. Friedman, *Civil Wrongs: Personal Injury Law in the Late Nineteenth Century,* 12 Am B Found Res J 351 (1987) and *More civil wrongs: Personal injury litigation, 1901–10,* 34 Am J Legal Hist 295 (1990). For other references, see Purcell, Jr, *Litigation and Inequality: Federal Diversity Jurisdiction in Industrial America, 1870–1958* (New York: Oxford Univ Press, 1992), pp 401–402.
13. Schwartz, *Tort law and the economy in nineteenth-century America: A reinterpretation,* 90 Yale L J 1720 (1981).
14. Karsten, *Heart versus Head, supra.* See also Friedman's critique in *Losing one's head: Judges and the law in nineteenth-century American legal history,* 24 Law & Soc Inquiry 253 (1999), and Karsten's defense, *Using one's head: Were jurists "unconscious" socio-economic ciphers or conscious agents? A response to Friedman,* 24 Law & Soc Inquiry 281 (1999).
15. Posner, *A theory of negligence,* 1 J Legal Stud 29 (1972). For a critique, see Purcell, *Litigation and Inequality* (Oxford Univ Press, 1992), pp 257–262.
16. *Davies v Mann,* 152 Eng Rep 588 (1842).
17. Cooley, *Treatise on the Law of Torts, supra* at 801, 811; Prosser, *Comparative negligence, supra* at 469–472.
18. White, *Tort law in America, supra* at 49.
19. Kelly, Harbison, & Belz, *The American Constitution: Its Origins and Development,* 7th ed (New York: Norton, 1991), pp 418–419; Schwartz, *Tort Law and the Economy, 1770–1771.*
20. Prosser, *Comparative negligence, supra* at 482.
21. Olson, *The Rule of Lawyers: How the New Litigation Elite Threatens America's Rule of Law* (New York: St. Martin's, 2003), pp 6–7; Purcell, *Litigation and Inequality, supra* at 35, 150, 187. Plaintiff advocates pointed out that the original "ambulance-chasers" were corporate defense attorneys who conspired with physicians and cajoled injured and incoherent plaintiffs to sign inadequate settlement agreements in their hospital beds.
22. Gilmore, *Death of Contract, supra* at 14.
23. Purcell, *Litigation and Inequality, supra* at 162.
24. Priest, *The invention of enterprise liability: A critical history of the intellectual foundations of modern tort law,* 14 J Legal Stud 461 (1985).
25. *MacPherson v Buick Motor Co,* 111 NE 1050 (NY, 1916).
26. *Escola v Coca-Cola Bottling Co of Fresno,* 150 P2d 436 (Cal, 1944).
27. Gilmore, *Death of Contract, supra* at 95.
28. *Bricker v Green,* 313 Mich 218; 21 NW2d 105 (1946); *Spence v Three Rivers Building & Masonry Supply, Inc,* 353 Mich 120; 90 NW2d 873 (1958); Porter & Tarr, eds, *State Supreme Courts: Policymakers in the Federal System* (Westport: Greenwood, 1982), p 87.
29. Purcell, *Litigation and Inequality, supra* at 230.
30. Ulmer, *The political party variable in the Michigan Supreme Court,* 11 J Pub L 352 (1962); Smith & Stolberg, *Looking Beyond Race: The Life of Otis Milton Smith* (Detroit: Wayne State Univ Press, 2000), p 150, 161.
31. *Spence v Three Rivers Builders & Masonry Supply, Inc, supra.*
32. *State Supreme Courts, supra* at 98–99; Ulmer, *Politics and procedure in the Michigan Supreme Court,* 46 SW Soc Sci Q 382 (1966). See also Baum, *State Supreme Courts: Activism and Accountability,* in *The State of the States,* Van Horn, ed (Washington, DC: Congressional Quarterly Press, 1989).
33. Rabin, *Some Reflections, supra* at 21.
34. White, *Tort Law in America, supra* at 165.
35. Interview with Sheldon Miller, attorney for the Placeks. The Placeks' attorneys decided not to bring up the stress-induced killings at trial, uncertain as to whether it would make a jury more or less sympathetic to their client.
36. *Placek v Sterling Heights,* 52 Mich App 619; 217 NW2d 900 (1974).
37. Pace, *John Swainson, 68, Michigan Governor and Perjured Judge,* New York Times, May 16, 1994, p B8; Roger F. Lane interview with John W. Fitzgerald, October 8, 1990. Justice Thomas G. Kavanagh was convinced that the national Republican party had framed Swainson to eliminate an attractive Democratic candidate—Roger F. Lane interview, November 19–20, 1990. See Pizzigati, *The Perverted Grand Juries,* Nation, June 19, 1976, p 743, claiming that the federal grand jury is "a little-understood institution which the Nixon administration distorted to be a legal loophole in the Bill of Rights."
38. *Michigan Supreme Court Historical Society Reference Guide* (Lansing: Michigan Supreme Court Historical Society, 1998); Fink, *Michigan lawyers in history—Justice Charles Levin: A scholarly independent,* 83 Mich B J 50 (2004).
39. *Kirby v Larson,* 400 Mich 585; 256 NW2d 400 (1977).
40. *Placek v Sterling Heights,* 405 Mich 638, 652–653; 275 NW2d 511 (1979).
41. *Id.* at 661. "Pure" comparative negligence allowed a plaintiff to recover regardless of the proportion of his own negligence. Thus, even if he was 99 percent at fault, he could recover 1 percent from the defendant. "Modified" comparative negligence places some limit, usually 50 percent, beyond which the plaintiff cannot recover at all. In "pure" contributory negligence, a plaintiff could recover nothing, even if he was only 1 percent at fault.
42. *Id.* at 656, 659–660.
43. *Id.* at 686.
44. Kelly, Harbison, & Belz, *The American Constitution, supra* at 634.
45. *Placek v Sterling Heights, supra* at 693. Coleman also believed that the trial court had properly instructed the jury on the standard of negligence to consider.
46. Silver & Toth, *Torts,* 26 Wayne L R 833 (1980); Platzer, *Michigan adopts comparative negligence: Will comparative contribution follow?* 4 Det C L R 1157 (1980).
47. Interview with Sheldon Miller, *supra.*
48. Priest, *The Invention of Enterprise Liability, supra* at 519.
49. Koenig & Rustad, *In Defense of Tort Law* (New York: New York Univ Press, 2001), p 2.
50. Olson, *The Litigation Explosion: What Happened when America Unleashed the Lawsuit* (New York: Dutton, 1991), p 8.
51. *Id.;* Sykes, *A Nation of Victims: The Decay of the American Character* (New York: St. Martin's, 1992).
52. Koenig & Rustad, *In Defense of Tort Law, supra* at 6.
53. Sickinger, *Directory Liable for Ad Fraud,* The Oregonian, February 25, 2005, p C1; Abdul-Alim, *Homework During Summer Vacation Prompts Lawsuit,* Milwaukee Journal-Sentinel, January 20, 2005, p 1 (the student dropped the suit); *Man Hits His Own Car then Sues Himself,* Associated Press, March 16, 2006. The American Tort Reform Association maintains a file on such "looney lawsuits."
54. Compiled by the Michigan Lawsuit Abuse Watch.
55. Levy, *Shakedown: How Corporations, Government, and Trial Lawyers Abuse the Judicial Process* (Washington: CATO, 2004), p 119; Dunning, et al., *Pernicious Ideas and Costly Consequences: The Intellectual Roots of the Tort Crisis* (Washington: National Legal Center for the Public Interest, 1990), p 83, 119–120.
56. Cf. Rabin, *Some Reflections, supra* at 13.
57. Thernstrom, *Trial Lawyers Target Three Michigan Judges Up for Election,* Wall Street Journal, May 8, 2000; Young, *Reflections of a Survivor of State Judicial Election Warfare* (Manhattan Institute for Policy Research, 2001).

People v Aaron

Exorcising the Ghost of Felony Murder

409 Mich 672 (1980)

In 1980, the Michigan Supreme Court abolished a confused and tangled crime known as "felony murder." At its most expansive, felony murder meant that if a death occurred while somebody was committing a felony, the felon was guilty of murder, regardless of his motive or role in causing the death. Scholars dispute the origins of the felony murder doctrine, and each state had its own version of the crime. By the end of the twentieth century, many jurists regarded it as a harsh, unfair, out-of-date vestige of the common law, which many states reformed or abolished.

Ironically, felony murder arose as part of the effort to liberalize criminal law in the United States.[1] Old English law punished all felonies with death. The American colonies and states tried to mitigate this system. Pennsylvania's 1776 constitution, the most liberal and democratic of the new fundamental laws, stated, "The penal laws as heretofore used shall be reformed by the Legislature of this state, as soon as may be, and punishments made in some cases less sanguinary, and in general more proportionate to the crimes."[2] The Pennsylvania legislature adopted a statute in the 1790s to define degrees of murder, and the Michigan legislature copied this statute verbatim in 1837. It read, "All murder which shall be perpetrated by means of poison, or lying in wait, or other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration, or attempt to perpetrate any arson, rape, robbery, or burglary, shall be murder of the first degree." Michigan having abolished capital punishment (except for treason), the statute imposed life imprisonment for first-degree murders. The legislature later added larceny, extortion, and kidnapping to the list of "enumerated" felonies. The statute defined all other murders as second-degree, and empowered judges to sentence the murderer to any term of years in prison.[3]

However, the legislature never defined "murder." The term evolved over centuries in the common law of England and the American states. The most serious crime in American law, murder exceeded mere killing. Indeed, the biblical commandment often translated as "thou shalt not kill" should really read "thou shalt not murder." Murder involved more than the mere killing of a human being, or "homicide," for some homicide is excusable or even praiseworthy. Societies award medals and erect monuments to soldiers who take many lives in war. They also permit killing in self-defense or the defense of others (see *Pond*). Nor does all *criminal* homicide rise to the level of murder. Killing done negligently or in the heat of passion became known as "manslaughter" (see the *Maher* and *Beardsley* cases). The common law defined murder as

3 Convicted of Murder Will Have New Trials

By JOYCE WALKER-TYSON
Free Press Staff Writer

The Michigan Supreme Court ordered new trials Monday for three men convicted of first-degree murder under a state statute that allows the maximum (life imprisonment) penalty for those who kill someone while committing certain other felonies.

In a 5-2 decision, the court called the felony provision "injudicious and unprincipled."

Malice, or the intent to kill, is one of the elements that must be proven in all murder cases. Additional elements, such as poisoning, lying in wait or premeditation raise the charge to first-degree murder. As the law currently reads, the commission of another felony also raises the charge.

The additional felony (such as armed robbery, arson or rape) allows a court to assume malice without other proof.

THE SUPREME court ruled that malice cannot be assumed even if it is proven that the defendant intended to commit the felony that accompanied the killing.

Recorder's Court Chief Judge Samuel C. Gardner said the ruling is in line with the requirements for first-degree murder.

"The law we got from the English common law included malice as an element of all murder. Then the state laws provided extra elements to raise that to first-degree murder, but I don't believe that was intended to mean that malice did not have to be shown when you add those other elements," he said.

One of the three men who will get a new trial is Stephen Aaron Jr., 30, who was convicted in 1974 for the murder of George (Texas Slim) Dudley.

Testimony at Aaron's trial indicated that Dudley was shot to death when he unexpectedly returned to his west side Detroit home as it was being robbed by Aaron and a second man. Occupants of the house had been bound and gagged, but had not been harmed by the two men.

The court's ruling Monday means that Aaron would not necessarily have been guilty of first-degree murder despite his conviction for armed robbery.

IN THE OTHER two cases, Robert G. Thompson was convicted in Saginaw of first-degree murder in a slaying that occurred during an armed robbery, and Jesse Wright was convicted in Washtenaw Circuit Court for deaths that occurred during an arson.

The high court noted that although "the jury may not find malice from the intent to commit the underlying felony alone," it can seek a first-degree murder conviction if it can be proven that malicious intent accompanied the death itself.

The decision will apply to all similar cases now in progress as well as in future trials.

Free Press Photo by WILLIAM ARCHIE

Detroit's Welterweight boxing champion Thomas Hearns (with "BOXING" on his T-shirt) stands in the middle of a group of Keep Detroit Beautiful Teens, who honored him at the Kronk Gym Monday for his contributions to the City of Detroit. Holding the plaque in front of the group is Emanuel Steward, Hearns' manager and manager of the gym.

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criminal homicide plus "malice." As the Michigan Supreme Court put it in an 1858 case, "Murder is where a person of sound memory and discretion unlawfully kills any reasonable creature in being, in the peace of the state, with malice prepense or aforethought, either express or implied."[4] It defined malice as "the intention to kill, the intention to do great bodily harm, or the wanton and willful disregard of the likelihood that the natural tendency of one's behavior is to cause death or serious bodily harm."[5]

Historians long sought the origins of the felony murder rule among the murky bogs of legal history. Most often, commentators claimed that it was an English common-law rule that colonial and early state jurisdictions adopted. But the most thorough inquiry into it reveals not a single felony murder case in pre-Revolutionary England, nor in any American colony. The doctrine seems to have originated in nineteenth-century America, and was a legislative

(statutory), not a judicial (common-law), creation. Caselaw discloses no common-law felony murder convictions until very late in the nineteenth century, and very few even then. Thomas Jefferson proposed to preclude felony murder in his 1779 "bill for proportioning crimes and punishments." "Where persons meaning to commit a trespass only, or larceny, or other unlawful deed, and doing an act from which involuntary homicide hath ensued, have heretofore been adjudged guilty of manslaughter or of murder, *by transferring such their unlawful intention to an act, much more penal than they could have in probable contemplation;* no such case shall hereafter be deemed manslaughter unless manslaughter was intended, nor murder, unless murder was intended." This defined the essential idea of felony-murder: transferring the intent to commit any felony into the intent to commit murder. However, far from following Jefferson's late eighteenth-century advice to prevent felony murder, American states extended the principle in the early nineteenth century. Illinois enacted the first felony murder statute in 1827. Half of the states had enacted one by the time of the Civil War.[6]

Felony murder also acquired the reputation of being a particularly harsh rule. Commentators claimed that it led to the execution of defendants who inadvertently and indirectly caused the death of someone during the commission of a felony. For example, if, during a bank robbery, a bank customer accidentally killed another customer or a police officer while trying to prevent the robbery, the bank robber was held responsible for the killing. He would be punished, not for robbery, but for first-degree murder. In another example, robbers tied up a house owner while ransacking his house, and intended to publicize the fact and have the man untied after they got away. Nobody untied the man, who then died. The burglars were tried for first-degree murder. Many commentators argued that killings like these, not involving malice or premeditation, were not murder.

But among such hard cases, few states adopted the felony murder principle to its full extent—calling it murder if *any* death occurred while somebody was committing a felony, regardless of his motive or role in causing the death. Most convictions resulted from the shooting of robbery victims. In the nineteenth century, courts "almost always conditioned murder liability on causing death with fault," and almost never in cases of accidental death. Far from being an oppressive and arbitrary rule, most felony murder rules were "limited in scope and applied fairly." Judges interpreted felony murder statutes and rules narrowly and limited their application, most often to felonies that were inherently dangerous—arson, for example, but not larceny.[7]

Michigan did not really have a felony murder statute. The 1837 statute, which elevated murders committed in the commission of enumerated felonies to first-degree murder, was more accurately a "felony aggravator statute." Michigan judges began to elaborate a common-law doctrine of felony murder, beyond the 1837 statute's requirements, in the late nineteenth century. Some courts limited its application to inherently dangerous felonies; Michigan was among the first states to try to contain common-law felony murder this way. But some Michigan courts did not require prosecutors to prove malice. Rather, they allowed prosecutors to argue that the commission of the felony provided the malicious requirement for murder.[8] The twentieth-century trial court record displayed no clear rule. The Michigan Supreme Court never made any definite statement that the state actually had a common-law felony murder doctrine.[9]

By the 1970s, the legal academic world attacked the felony murder rule, and the Michigan Court of Appeals was at loggerheads over it. New Hampshire abolished felony murder by statute in 1974; the Kentucky and Hawaii legislatures followed by the end of the decade. The Iowa Supreme Court abolished it in 1979.[10] The Michigan Court of Appeals decided in 1976 that the state had neither a statutory nor a common-law felony murder rule. In a killing during a robbery, the prosecution must prove malice to the jury as a matter of fact; the judge could not instruct the jury that intent to commit robbery was a sufficient substitute for proof of malice in the killing. But the following year, a different panel of the Court of Appeals held that Michigan *did* have a felony murder rule to the extent that commission of an enumerated felony would turn manslaughter into murder.[11] The Supreme Court had to step in and settle the matter.

The Court consolidated three cases from the Court of Appeals (*People v Aaron, People v Thompson,* and *People v Wright*). Robert G. Thompson was convicted of felony murder for a killing that took place during an armed robbery. The judge instructed the jury that "the evil intent to commit the robbery carries over to make that crime murder in the first degree." The Court of Appeals reversed the conviction, ruling that the prosecution had to prove to the jury malicious intent to kill. Similarly, the Court of Appeals reversed the conviction of Daniel J. Wright, who was found guilty of first-degree murder for two deaths that occurred as a result of the arson he committed. The State brought these appeals. Stephen Aaron was also convicted of first-degree murder for a homicide that arose out of an armed robbery. In his case, the Court of Appeals upheld the conviction, but the Supreme Court overturned the decision and instructed the trial court to resentence Aaron for a second-degree murder conviction. The trial court imposed the same sentence (life imprisonment), and Aaron appealed again.[12] The Supreme Court took up the issue of the status of felony murder in Michigan.

The Court unanimously ended felony murder. With considerable understatement, Justice Fitzgerald observed in his majority opinion, "Felony murder has never been a static, well-defined rule at common law." He noted its obscure origins, which he located in England, which had abolished it in 1957 by statute. He also described the ways in which American jurisdictions had limited, and some recently abolished, the rule. These "modifications and restrictions…reflect dissatisfaction with the harshness and injustice of the rule…. To the extent that these modifications reduce the scope and significance of the common-law doctrine, they also call into question the continued existence of the doctrine itself." Above all, felony murder "completely ignores the concept of determination of guilt on the basis of individual misconduct." It was possible that "an accidental killing occurring during the perpetration of a

felony would be punished more severely than a second-degree murder requiring intent to kill."[13]

Indeed, the Court doubted that Michigan ever had a common-law felony murder rule. No cases "expressly considered whether Michigan has or should continue to have a common law felony murder doctrine." Some cases contained language that suggested a common-law rule, but never in a way that established a clear precedent. Due to the confusion among appellate courts on the issue, the Supreme Court exercised its power under Article III, section 7 of the State Constitution to abrogate the common law. Ironically, the first definite recognition of the felony murder rule came during its abolition. "We believe that it is no longer acceptable to equate the intent to commit a felony with the intent to kill," Fitzgerald wrote. Prosecutors would have to prove malicious intent to kill, beyond a reasonable doubt, to the jury. The new rule would apply to all current and future prosecutions.[14]

Fitzgerald and other commentators earnestly asserted that the abolition of felony murder should have little practical effect. While courts could not translate intent to commit a felony into malicious intent to commit murder, they could consider the felonious intent as a factor in establishing intent to kill. This would be particularly likely in cases of the dangerous felonies enumerated in the Michigan murder statute. But the new rule would prevent courts from treating accidental killings, committed without malice, as murders. As one review noted, "*Aaron* barely aids defendants at all."[15] Justice Ryan's concurring opinion reinforced the point that the Court was simply clarifying the confusion that had arisen in lower courts. "It is sufficient to state only that *if* felony murder existed in Michigan, by virtue of today's decision it no longer does." He noted that, "Today we simply declare that the offense popularly known as felony murder, which, properly understood, has nothing to do with malice and is not a species of common law murder, shall no longer exist in Michigan, if indeed it ever did."[16]

In retrospect, there was a lot less to *Aaron* than met the eyes of both supporters and critics. Justice Levin later commended Justice Fitzgerald's opinion for "eliminat[ing] a harsh and outdated view of criminal responsibility."[17] The decision did eliminate opportunities for illogical applications, if not outright miscarriages of justice. As one commentator noted, "To consider a killing without malice to be more blameworthy than a killing with malice merely because the former was committed during the course of a felony is irrational."[18] But such cases were rare, and reformers reinforced this point by repeated claims that the abolition of the rule would make no serious difference. But critics saw the decision as another irresponsible exercise of liberal judicial activism, coddling felons in a period of rising crime rates. The murder rate in the United States doubled between 1963 and 1970, years in which the United States Supreme Court imposed significant liberalization of criminal procedure in the states.

Observers also debated the Court's exercise of its power to alter the common law. As Justice Levin said, "the Court acted in the exercise of its constitutional authority to declare the common law, and thereby make clear that the common law does not become mortified when embodied in the statute."[19] Others noted that it was unusual for the Court to use its constitutional common-law power to alter the *criminal* law, which was mostly codified by statute. Decisions like *Placek,* which altered civil common law, were more acceptable.[20] Some complained that the Court was usurping legislative authority.[21] But *Aaron* really restored Michigan law to the legislature's original 1837 statute. That act was not a felony murder act at all—there is no way to read the statute as doing anything but elevating *murders* committed during certain felonies to first-degree murder; never did it turn *homicides* committed during felonies into murders. Insofar as felony murder had insinuated its way into Michigan law, it did so through incoherent lower-court opinions. If anything, *Aaron* deferred to the original intent of the Michigan legislature, and put an end to the Victorian-era judicial activism that had fabricated a common law of felony murder.

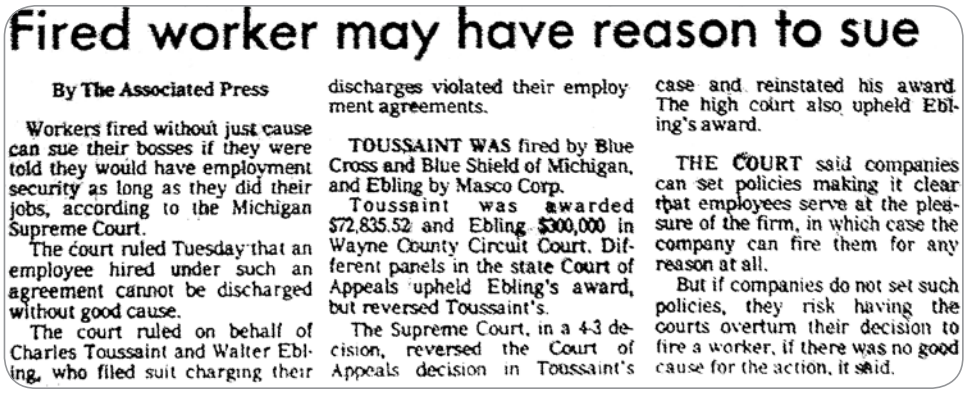
FOOTNOTES

1. Binder, *The origins of American felony murder rules,* 57 Stan L R 59 (2004).
2. Pa Const 1776, XXXVIII.
3. Sidney, *The felony murder doctrine in Michigan,* 25 Wayne L R 70 (1978).
4. *People v Potter,* 5 Mich 1, 8 (1858).
5. *People v Aaron,* 409 Mich 672, 733; 299 NW2d 304 (1980).
6. Binder, *Origins of American felony murder rules, supra* at 63–65, 71, 120, 161; Ford, ed, *The Works of Thomas Jefferson* (New York: Putnam, 1904–05), vol II, p 400.
7. Binder, *Origins of American felony murder rules, supra* at 66–68, 72.
8. *Id.* at 120, 141, 150, 160.
9. Sidney, *The felony murder doctrine, supra* at 71.
10. Conley, *Criminal law,* 15 Suffolk U L R 1312 (1981).
11. Martin, *The Michigan Supreme Court uproots the felony murder rule,* 50 UMKC L R 122 (1981) [*People v Fountain,* 71 Mich App 491; 248 NW2d 589 (1976) and *People v Till,* 80 Mich App 16; 263 NW2d 586 (1977)].
12. *People v Aaron, supra* at 687–689.
13. *Id.* at 689, 698, 707–09.
14. *Id.* at 722, 727, 734; Cutlip, Jr, *Criminal law,* 59 U Det J Urb L 433 (1982).
15. *People v Aaron, supra* at 729–731; Cohn, *The demise of the felony murder doctrine in Michigan,* 28 Wayne L R 237 (1981).
16. *People v Aaron, supra* at 744, 746.
17. Presentation of the Portrait of the Honorable John W. Fitzgerald, 447 Mich ccviii (1994).
18. Cohn, *The demise of the felony murder doctrine, supra* at 234.
19. Presentation of the Portrait of the Honorable John W. Fitzgerald, *supra.*
20. *People v Aaron, supra* at 722; Cutlip, *Criminal law, supra* at 438.
21. Baughman, *Justice Moody's lament unanswered: Michigan's unprincipled retroactivity jurisprudence,* 79 Mich B J 664 (2000).

Toussaint v Blue Cross

Employee Rights and Wrongful Discharge

408 Mich 579 (1980)



Fired worker may have reason to sue

By The Associated Press

Workers fired without just cause can sue their bosses if they were told they would have employment security as long as they did their jobs, according to the Michigan Supreme Court.

The court ruled Tuesday that an employee hired under such an agreement cannot be discharged without good cause.

The court ruled on behalf of Charles Toussaint and Walter Ebling, who filed suit charging their discharges violated their employment agreements.

TOUSSAINT WAS fired by Blue Cross and Blue Shield of Michigan, and Ebling by Masco Corp.

Toussaint was awarded $72,835.52 and Ebling $300,000 in Wayne County Circuit Court. Different panels in the state Court of Appeals upheld Ebling's award, but reversed Toussaint's.

The Supreme Court, in a 4-3 decision, reversed the Court of Appeals decision in Toussaint's case and reinstated his award. The high court also upheld Ebling's award.

THE COURT said companies can set policies making it clear that employees serve at the pleasure of the firm, in which case the company can fire them for any reason at all.

But if companies do not set such policies, they risk having the courts overturn their decision to fire a worker, if there was no good cause for the action, it said.

Headline from the June 11, 1980, issue of the *Lansing State Journal*.

For most of American history, the theoretical framework of the law was that employers and workers had an "at-will" relationship. Workers were free to work or quit, and employers to hire or fire, whenever they wanted, for whatever reasons they wanted. In the late twentieth century, legislatures and courts began to make exceptions to this rule, and to give employees rights against "wrongful discharge." In 1980, the Michigan Supreme Court became the first state to adopt the "implied contract" principle, holding that certain employer policies automatically gave employees a right to be fired only for "good cause."

American employment law grew out of the medieval English common law of "master and servant." Unless otherwise stipulated, employment contracts were assumed to extend for one year, probably so that landowners could be sure that agricultural workers would work through harvest-time and to assure that the workers would enjoy a year of what would later be called "job security."[1] The law could be quite harsh in compelling employees to serve out the terms of their contracts. They were not free, for example, to accept an offer of higher wages from another employer during the term of their contract. And if employers had a good cause to fire them (which might include, for example, failing to show proper respect and deference to the employer), he could do so 11 months into the term of the contract and pay nothing. Many American courts began to relax these rules after independence, allowing employees to be paid for that part of the time which they had worked if they quit during the year.[2]

The industrial revolution widened the labor market, created new kinds of non-agricultural jobs, and made most employment relations distant and impersonal. No longer was the landlord-tenant or master-apprentice system an intimate, local, face-to-face relationship. Employment law thus became more abstract and formal, taking on the characteristics of contract law in general (see *Sherwood*). The law came to view all employment relations as completely individualistic and voluntary. Indentured servitude and slavery, most notably, were abolished in the nineteenth century. Employer and employee were said to be equally free to bargain for whatever wages and terms they found satisfactory. Employers were free to hire or fire any worker, and employees to accept or quit any job they liked. The principle came to be called "employment-at-will."

State and federal courts struck down many laws that attempted to abridge this "liberty of contract" in employment. States could not, for example, prohibit employers from paying workers in scrip redeemable at the company store. If workers were happy to accept such scrip, that was their business. States could, on the other hand, prohibit children or women from working, since they were not, like adult males, equal before the law. And they could prohibit miners from working more than 10 hours in one day, mining being an obviously hazardous occupation. But when New York enacted a law prohibiting bakers from working more than 10 hours in a day, the United States Supreme Court struck it down, since there was nothing inherently dangerous about baking.[3]

The general rule was liberty; restrictions had to be justified. Thus, in 1908, the United States Supreme Court struck down a federal act that outlawed "yellow-dog contracts" in interstate railroad employment. In "yellow-dog contracts," an employee agreed, as a condition of employment, never to join a labor union. "The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it," Justice John Marshall Harlan wrote. "So the right of the employee to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employee…. In all such particulars the employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land."[4]

"Employment-at-will" is sometimes referred to as "Wood's rule," after it was mentioned in Horace Wood's 1877 treatise, *Master and Servant.* "Men must be left, without interference to buy and sell where they please, and to discharge or retain employees at will for good cause or no cause, or even for bad cause without thereby being guilty of an unlawful act per se," Woods wrote. "It is a right which an employee may exercise in the same way, to the same extent, for the same cause or want of cause as the employer."[1] Wood added that, unless an employment contract explicitly said otherwise, the contract was terminable by either party at any time.

1. Quoted in Skoppek, *Employment-at-Will in Michigan: A Case for Retaining the Doctrine,* Mackinac Center for Public Policy (1991), available at <http://www.mackinac.org/article.aspx?ID=266> (accessed March 1, 2009).

In the late nineteenth and early twentieth centuries, many observers began to criticize the employment-at-will principle. The formal equality of the employer and employee, they argued, was a legal fiction that masked the obviously greater power of the employer. How could a penniless immigrant bargain on equal terms with a billion-dollar corporation like U.S. Steel? Far from guaranteeing employee liberty, employment-at-will forced workers to accept employer dictation or starve, producing "wage slavery."[5] Legislatures and courts began to respond to the "unequal bargaining power" argument to bolster employee rights, making exceptions to the employment-at-will principle. The most important of these exceptions empowered labor unions. The National Labor Relations (Wagner) Act of 1935 compelled employers to bargain with unions chosen by a majority of their workers. The Act also prohibited employers from firing workers for union activity, and most collective bargaining agreements provided some procedure whereby employers had to show "good cause" to fire workers. By 1955, almost one in three American non-farm workers was a union member.

After World War II, the state and federal governments added protections for the remaining two-thirds of workers who could be terminated for no reason or bad reasons. Many states in the northeast, upper Midwest, and West adopted "fair employment practice" laws, which made it illegal to fire someone because of race, creed, color, or national origin. Michigan adopted such an act in 1955. Congress adopted this non-discrimination rule, and added sex as a protected class, in the Civil Rights Act of 1964. The California Supreme Court held in 1959 that it was unlawful to fire someone for reasons that were contrary to "public policy."[6] In this case, the Teamsters Union made a trucking company fire a worker who had agreed to testify about union corruption to the state legislature. Similarly, a worker could not be fired for agreeing to serve on jury duty or for filing a workers' compensation claim. Few states followed California's example right away, but by the end of the century all but a handful of states had adopted a public-policy exception to the employment-at-will rule.[7]

The Michigan Supreme Court led the way in the judicial creation of further protections against wrongful discharge. In 1967, Charles Toussaint interviewed for a job as a financial officer with Blue Cross/Blue Shield of Michigan. During the interview process, he was told that he would be employed until retirement, "as long as I did my job," and that "if I came to Blue Cross, I wouldn't have to look for another job because [the interviewer] knew of no one ever being discharged." While there was no written contract of employment, he was given a 260-page employee manual, in which the company declared that its policy was to fire for "just cause" only. Toussaint later had problems managing Blue Cross' company-car accounts and was fired. He sued, claiming that he had been fired without just cause, and a Wayne County jury awarded him $73,000. Blue Cross appealed, and the Michigan Court of Appeals reversed the decision. Toussaint then appealed to the Supreme Court.[8]

Toussaint v Blue Cross was consolidated for argument with a factually similar case, *Ebling v Masco Corporation*. The Supreme Court unanimously agreed that a jury could consider testimony in the record on whether the employee and employer made an oral contract that included distinguishing features or provisions that made Mr. Ebling's employment terminable at will but only for cause. The Court upheld a judgment that he was entitled to recover the value of stock options that he forfeited when fired without just cause. As to Mr. Toussaint's contract, however, the Court split 4-3 as to whether Mr. Toussaint's evidence that such a contract existed was sufficient to make a prima facie case.

In a 4-3 decision, the Court restored the trial court verdict for Toussaint. Justice Charles Levin wrote the majority opinion; the three Republicans dissented. Levin held that the interview statements and employee manual amounted to an "implied contract" that included just-cause termination. Employment-at-will could not be assumed in the face of such expressions of just-cause tenure. Employers were entitled to maintain an at-will policy, he noted, but Blue Cross and other employers had created misunderstandings by not stating such a policy clearly. Levin denied the company's contention that they received no consideration from the employee in exchange for greater job security—and without such consideration there could be no contract. "The employer secures an orderly, cooperative and loyal work force" in exchange for job security, he claimed. "Having announced the policy, presumably with a view to obtaining the benefit of improved employee attitudes and behavior and improved quality of the work force, the employer may not treat its promise as illusory."[9] In addition to the "implied contract" that Toussaint made when he was hired, subsequent company policies created, without contract requirements, a "legitimate expectation" of tenure. "We hold that employer statements of policy, such as the [guidelines], can give rise to contractual rights in employees without evidence that the parties mutually agreed that the policy statements would create contractual rights."[10] Thus the two pillars of wrongful-discharge law in Michigan were "implied contract" and "legitimate expectations."

Justice James Ryan wrote the dissenting opinion. He noted that the guidelines did not constitute a contract between Toussaint and Blue Cross. There was no evidence of any offer, acceptance, consideration, or meeting of the minds—the classical elements necessary to make a binding contract—in its promulgation by the company and reception by the employee. Toussaint may have "felt" that these documents were part of his employment contract, but "we are unable to conclude that there was produced any evidence

whatever from which a jury was free to conclude that the parties agreed, either expressly or by implication, that the defendant's manual or guidelines, or any part of either, would constitute [Toussaint's] contract of employment."[11]

Toussaint opened the door to a flood of wrongful-discharge litigation. It "caused a certain amount of chaos in the Michigan judicial system," one commentator noted, and for many years employers were uncertain as to the limits of the implied-contract and especially the legitimate-expectations doctrines.[12] Noting that wrongful-discharge was "very much in the mainstream of the contemporary litigation explosion," another critic observed, "Michigan courts are clogged with employment litigation, employers have turned defensive hiring and firing measures into a fine art, and the cost[s] of doing business in Michigan, which was already high, has become prohibitive."[13]

Two economists who studied wrongful-discharge laws have concluded that the Michigan doctrines increase unemployment between 0.8 and 1.6 percent. While they might benefit workers with seniority and skills, they reduce employment for young, female, and low-skilled workers. When Charles Toussaint was hired, the United States was in the middle of a booming economic decade with almost full employment. When his case was decided, the country was in the midst of a depression in which the unemployment rate would reach nearly 10 percent. In Michigan, the unemployment rate approached 17 percent in 1982. These economists conclude: "legal protections do not come costlessly."[14]

The legal and economic fallout of the *Toussaint* case led many courts within the state to try to contain its effects, and the federal courts (particularly the Sixth Circuit Court of Appeals, which Justice Ryan joined in 1985) "engaged in a guerilla war" against it.[15] In the more conservative atmosphere of the 1980s and 1990s, the movement to expand employee tenure abated. Only two states (Arizona and Montana) adopted comprehensive wrongful-discharge laws by statute. Public-policy exceptions to at-will employment remained widespread, and extended in federal civil rights acts, but most states did not go as far as Michigan in the implied-contract and legitimate-expectations doctrines, the latter of which the Michigan Supreme Court tightened up in 1993.[16] And Michigan did not follow the few state courts that adopted an even more pro-employee "covenant of good faith" rule, which essentially read a just-cause provision into every employment contract. But it remained true that "nowadays employers must be wary when they seek to end an employment relationship for good cause, bad cause, or, most importantly, no cause at all."[17]

FOOTNOTES

1. Blackstone, *Commentaries on the Law of England,* Book I, ch 14.
2. Karsten, *Heart versus Head: Judge-Made Law in the Nineteenth Century* (Chapel Hill: Univ of NC Press, 1997), p 184. See, e.g., *Allen v McKibbin,* 5 Mich 449 (1858).
3. *Lochner v New York,* 198 US 45; 25 S Ct 539; 49 L Ed 937 (1905).
4. *Adair v United States,* 208 US 161, 174–175; 28 S Ct 277; 52 L Ed 436 (1908). Of course, even without a yellow-dog contract, an employer was free to fire a worker who joined a union. Such contracts were useful to stop unions from trying to organize workers, for trying to persuade yellow-dog workers to join was inducing them to breach their contracts, and such activity could be enjoined by courts.
5. Forbath, *The ambiguities of free labor: Labor and the law in the gilded age,* Wis L R 767 (1985); Steinfeld, *The Invention of Free Labor: The Employment Relation in English and American Law and Culture, 1350–1870* (Chapel Hill: Univ of NC Press, 1991); Pound, *Liberty of contract,* 18 Yale L J 454 (1909). For a contrary view, see Reynolds, *The myth of labor's inequality of bargaining power,* 12 J Lab Res 167 (1991).
6. *Petermann v International Brotherhood of Teamsters,* 344 P2d 25 (Cal App, 1959).
7. Muhl, *The employment-at-will doctrine: Three major exceptions,* Monthly Lab Rev 5 (January 2001).
8. *Toussaint v Blue Cross & Blue Shield of Michigan,* 408 Mich 579; 292 NW2d 880 (1980).
9. *Id.* at 613, 619.
10. *Id.* at 614–615.
11. *Id.* at 646.
12. Przybylo, *Call off the funeral: Toussaint…Is alive under* Rood v General Dynamics, 11TM Cooley L R 966 (1994).
13. Skoppek, *Employment-at-will, supra.*
14. Autor & Donohue III, *The Costs of Wrongful-Discharge Laws,* National Bureau of Economic Research Working Paper, May 2005.
15. Skoppek, *Employment-at-will, supra.*
16. Przybylo, *Call off the funeral, supra.*
17. Muhl, *The employment-at-will doctrine, supra* at 11.

Poletown Neighborhood Council v Detroit

Private Property and Public Use

410 Mich 616 (1981)

Photo by John Dominis/Time Life Pictures/Getty Images

Hamtramck section of Detroit heavily populated by Poles. From photo essay re Polish American community.

In a monumental effort to bolster its crumbling economic base, in 1980 the City of Detroit condemned an entire neighborhood to make room for a new General Motors plant. Some of the residents of the gritty, integrated, working-class neighborhood known as "Poletown" challenged the scheme, claiming that it violated the Michigan Constitution's provision that government could not use its "eminent domain" power to transfer property from individuals to private corporations. In a controversial decision, the Michigan Supreme Court rebuffed the challenge, marking what some argued was a new standard in the law of "takings," allowing the exercise of eminent domain power for economic development.

Poles had settled in large numbers in the neighborhood south of Hamtramck, taking jobs in the manufacture of cigars, stoves, radiators, and steam engines. By 1900, 48,000 had come, the best-known being Leon Czolgosz, the anarchist who assassinated President William McKinley in 1901. Other ethnic groups followed, especially African Americans. Detroit became a majority-black city in the 1970s, and elected its first African-American mayor, Coleman Young, in 1974. By 1980, about half of Poletown was black.[1] By this time, Poletown, Detroit, and Michigan were all suffering intensely from the economic decline of industrial, "rust-belt" America.

The industrial economy that sustained Detroit was in crisis. Consistent economic growth had run from World War II until the late 1960s. American manufacturers faced little global competition until then, when they found themselves with outdated plants and expensive labor forces. This was particularly true in the automotive sector where the wages and benefits were disproportionately high as strong unions pressed for wages and benefits that the unbroken success of the Big 3 automotive manufacturers seemed to be in a position to afford indefinitely. In fact, however, higher labor costs (as well as high costs for annual styling changes and other expenses) had been passed on to consumers in the price of cars, creating a vulnerability to lower-cost foreign imports.[2] Steel and auto workers earned almost twice as much as the average manufacturing employee by 1980. Old antitrust and banking policies, and new health, safety, welfare, and environmental policies, aggravated the situation. Many manufacturers relocated to states in the South and West (and eventually abroad) where there were lower labor costs and taxes. At the same time, a new immigration act added 35 million immigrants to the domestic work force in the last third of the century. Six hundred and seventy thousand auto and steel jobs were lost between the summer of 1979 and the summer of 1980 alone; 1.2 million were gone by 1982. In all, one in seven manufacturing jobs disappeared in the recession of the period.[3]

The pressures facing the auto industry were most intense in Detroit, and they actually began in the mid-1950s. The auto industry in the city of Detroit had peaked by 1955 when imports began to make a meaningful dent in the market. Chrysler alone lost 23,000 jobs in Detroit from 1955–1958. The Packard Motor Co. closed its doors and its jobs disappeared. Hudson merged with Nash and moved to Wisconsin. This cost Detroit 35,000 jobs. While the combined firm later became American Motors, with its headquarters in the Detroit area, it had no factories there.[4] And growing foreign competition was only one side of the labor coin. Technology allowed fewer workers to do more, and jobs were shed as technical innovation increased. Detroit was losing its population, industry, and tax base, declining in population by 10 percent in the 1950s, and another 9 percent in

the 1960s. Then Detroit was shaken by the race riots of 1967 and extreme "white flight." Fully one-fifth of the city's residents left in the 1970s (and another 15 percent were to depart in the 1980s). By 1980, unemployment reached 18 percent in Detroit, and was nearly double that rate among African Americans.

It was no surprise then, that in 1980, like many other Detroit neighborhoods, Poletown was declining. The nearby Dodge Main plant, which had been built in 1910 by the Dodge brothers in Hamtramck, closed that year. The area was "undermined by a lack of employment, an aging population, crime, the increasing poverty of people on fixed incomes, a decline in private and public services, and deteriorating housing stock."[5] But it was not considered blighted by the standards of the time; it remained a community with many homes, small businesses, and churches. Indeed, it was later asserted that Poletown "was considered a rare and desirable urban community by many sociologists, since it seemed to be the embodiment of a stable, integrated community."[6] Poletown was, for example, untouched by the great Detroit riot of 1967, which inflamed many black neighborhoods, killed 43, injured thousands, and caused millions of dollars of property losses. But the fact that many residents hoped that the area could be revitalized necessarily meant that its vitality was, at a minimum, in jeopardy.

Detroit Mayor Coleman Young concluded that Poletown would need to be sacrificed to serve his larger goal of keeping business in the city. Young began his career as a fiery, civil rights militant, involved as an officer of the Tuskegee Airmen fighting Jim Crow regulations in the army, in the UAW-CIO until ousted by Walter Reuther as too left wing, and becoming in 1951 the executive director of the National Negro Labor Council, the most radical black labor organization at the time.[7] He endeared himself to some in the black community by standing up to the House Un-American Activities Committee. When Michigan Republican Charles Potter asked him, "Do you consider the Communist Party un-American?" he replied, "I consider the activities of this committee un-American." But after his time in the left-wing Progressive Party, he became a Democrat in 1959. He was elected a Michigan state senator in 1960 and four years later was Democratic leader of the State Senate and in 1968 the first black Democratic National Committeeman. Elected mayor in 1974, Young ran on a platform promising economic development for the city, and he had substantial business support. In 1976 he helped Jimmy Carter become president. At this point, Mayor Young was now part of the political establishment, but he remained blunt, aggressive, and determined to change the racial climate. Under the Carter administration, Detroit received significant new support from Washington. But by the end of the 1970s, Chrysler, a major Detroit employer, was in desperate straits. The City indicated its willingness to spend huge sums to bolster it, but in January 1980, Chrysler closed Dodge Main and, yet again, thousands of highly paid jobs vanished. Mayor Young zealously endeavored to keep the City financially solvent and to retain jobs. When he asked General Motors what it would take for it to expand employment in Detroit, GM indicated its willingness to build a new Cadillac assembly plant if the City could provide a 500-acre site, with adequate road and rail transportation, other improvements, and tax abatements, in a short time frame. The only site in the city that fit the bill was Poletown, and GM insisted that the City condemn the area and turn it over to the company by May 1981. The area included over 6,000 residents, 1,400 houses, 144 businesses, 16 churches, two schools, and a hospital. It was expected to cost the city $200 million to compensate, raze, and improve the area, in hopes that the new factory would create 6,000 jobs directly (although this would only partly offset the employment lost by the anticipated closing of two other GM plants), and thousands more related to the plant.

While such wholesale displacement dismayed many later observers, so desperate were the city and state to keep GM in Detroit that few voices opposed the plan. Most of the political establishment believed that the plan was necessary to stave off economic calamity. The major Detroit media agreed; organized labor endorsed it. Despite the intense attachment of local parishioners and priests to their churches, the Roman Catholic hierarchy accepted the plan and deconsecrated and sold its Poletown buildings and moved the stained glass and statuary. Despite the image of powerful interests trampling the rights of the working class and the poor, most left-wing activists acquiesced, probably due to Mayor Young's radical bona fides and their support of his larger goals. When Governor William Milliken, who supported the project on the whole, simply gave audience to Poletowners who did not, Young was furious. As for the few, like Ralph Nader, who objected to the plan, Young replied, "Ralph Nader is psychotic in his hatred of GM," and warned that any delay in condemnation proceedings would jeopardize the effort.[8] The displacement proceeded rapidly, aided by the recently enacted Uniform Condemnation Procedures (or the "quick-take") Act. This allowed the City to take condemned property and demolish it quickly, while dispossessed owners could later litigate if not satisfied with the compensation rendered. Generous relocation benefits were provided and many, but not all,

Poletown and other "urban renewal" projects, combined with a lack of decent housing and an atmosphere of racism, created a great tension in Detroit. In 1967, that tension erupted. The Detroit Riot of 1967 began when police raided an after-hours drinking club in a predominantly black neighborhood. They were expecting to make a few simple arrests, but instead walked in on a party of more than 80 people being held for two returning Vietnam veterans. The officers attempted to arrest everyone who was on the scene. A crowd quickly gathered to watch the transport of the arrestees. After the last of the police cars had left the scene, a small group lifted the bars on a nearby store window, broke the window, and unwittingly began the series of events that have become known as the Detroit Riot of 1967. Further incidents of vandalism were reported, looting and fires spread through the northwest side of Detroit, then crossed over to the East Side. Within 48 hours, the National Guard was mobilized, followed by the 82nd airborne, which was called in on the fourth day of the riot. As police and military troops sought to regain control of the city, violence escalated. When the 5-day riot was over, over 40 people were dead, over 1,000 were injured, and over 7,000 had been arrested.

residents were willing to take them and go. As increasing numbers of Poletowners moved out, those who remained faced dangerous demolition, arson, and crime, and further diminished public services.[9] Local activists, joined by Nader, scrambled to challenge the proceedings as an illegal eminent-domain taking.

In England and the United States, government had the power to take private property for public use if it compensated the property owners. This power was known as "eminent domain." The principle that such government power must be limited extended at least as far back as the Magna Carta. Colonial and early American judges treated the principle as rooted in natural justice, and it found expression in both the federal and state bills of rights. Michigan's Constitution (article X, section 2 of the 1963 Constitution) copied the U.S. Constitution, declaring that "private property shall not be taken for public use without just compensation." In the strictest interpretation, private property could never be taken for private use. As United States Supreme Court Justice Samuel Chase put it in 1798, "a law that takes property from A and gives it to B" must be invalidated as "contrary to the great first principles of the social compact."[10] "Public use" could also be strictly interpreted as public ownership and operation, such as a fort, a public school, or a highway. In the nineteenth century, states made exceptions for privately owned businesses that provided important services and were regulated by the State—grist mills and railroads most especially. In Michigan, the Supreme Court allowed the extension of eminent domain power to railroads while it denied that municipalities could use the taxing power to support railroad bonds (see *Salem*). But Justice Cooley, to whom both sides would appeal in twentieth-century eminent-domain litigation, interpreted "public use" quite strictly. Only "necessity of the extreme sort" could justify the eminent domain power.[11] As he put it in his 1878 *Treatise,* "vague grounds of public benefit from the more profitable use" that a new private business might provide did not justify a taking.[12] Privately owned entities could almost never take private property

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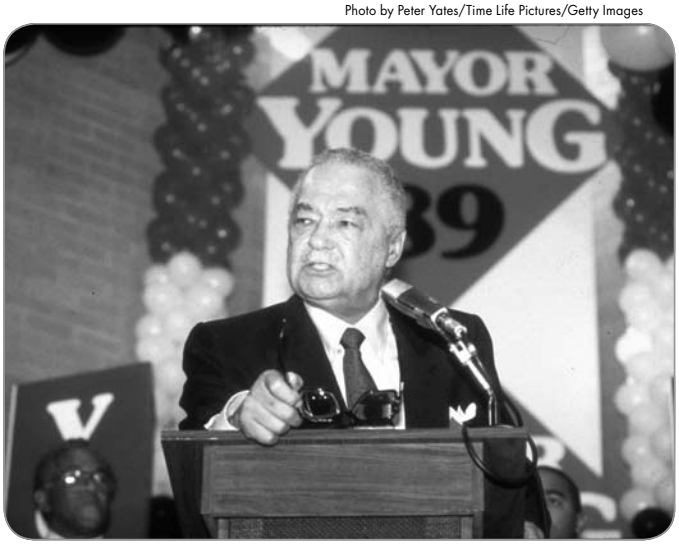


Detroit Mayor Coleman Young campaigning with his name on wall behind and balloons.

under the claim that the new owners would produce more employment, higher real estate value, or taxes.

Takings became more common as constitutional protection of property rights weakened in the twentieth century. State and federal courts approved condemnation for "slum clearance," or the elimination of "blighted" urban areas. Michigan accepted this rationale in 1939.[13] Urban highway construction also displaced thousands of poor and working-class residents who had little political power to resist.[14] Interstate 94 had cut through the Poletown-Hamtramck neighborhood and displaced 1,400 families. I-75 had cut through the "Black Bottom" area of Detroit, which pushed many African Americans into Poletown.[15] These takings followed from the New Deal's great increase of government power over the economy. Believing that the Great Depression showed the failure of free-market capitalism, the New Dealers embarked on a program of public investment, or "state capitalism."[16] After the great clash between President Roosevelt and the United States Supreme Court, most judges accepted greater state power over private property. As Justice Harlan F. Stone put it, the Court would accept legislative power in cases of "ordinary commercial transactions," while it reserved scrutiny for legislative infringements of non-property rights. This became known as the "double standard" or "preferred freedoms" doctrine, which reduced judicial protection for economic rights.[17] By 1980, it was more likely that the courts would accept takings that would increase employment or tax revenue.

The Poletown Neighborhood Council tried to stop the project in the Wayne County Circuit Court. In a 10-day trial shortly after Thanksgiving, 1980, the court ruled that the City had not abused its discretion in using its power of eminent domain; the only grounds (other than "fraud, or error of law") on which it could be challenged were under the Uniform Condemnation Procedures Act. The council appealed the case to the Michigan Court of Appeals, and to the Michigan Supreme Court for permission to bypass the Court of Appeals. On February 21, 1981, the Supreme Court granted the request and issued an injunction halting the condemnation proceedings. This put great pressure on the parties and justices, since General Motors insisted that the City transfer title to the property in less than 10 weeks.

The Supreme Court's acceptance of the appeal buoyed the hopes of the Poletowners, being "the first institutional response to the neighborhood's crisis that seemed to indicate a community victory."[18] The optimism was short-lived, however, as the Court quickly upheld the original decision. The case was argued on March 3, and decided just 10 days later. In a 5-2 decision, with Justice Coleman joining the three Democrats and Independent Justice Levin, the Court upheld the City's actions. Its per curiam opinion (that is, no individual justice was identified as the author) held that the terms "public use" and "public purposes" "have been used interchangeably in Michigan statutes and decisions in an effort to describe the protean concept of public benefit." It quoted the United States Supreme Court on judicial deference to legislative determinations of public benefit, that "when a legislature speaks, the public interest had been declared in terms 'well-nigh conclusive.'" It concluded that the project's public benefits were "clear and

significant," and that the private benefits to General Motors were "merely incidental." But this was not a blank check for such projects, it noted. "If the public benefit was not so clear and significant, we would hesitate to sanction approval of such a project."[19]

Republican Justices Fitzgerald and Ryan dissented. Fitzgerald entered his opinion along with the majority decision; he denied that the judiciary needed to defer to the legislature in eminent domain cases; "Determination whether a taking is for a public or a private use is ultimately a judicial question," he said. He dismissed the majority's putative authorities for the decision, claiming that "there is simply no precedent for this decision in previous Michigan cases." Indeed, Michigan had a more stringent takings standard than most states, one closer to "public use" than "public purpose," "benefit," or "interest." "Certainly," he wrote, "we have never sustained the use of eminent domain power solely because of the economic benefits of development."[20]

Justice Ryan worked on his fuller dissenting opinion for another month. "I could not understand this rush to judgment by our colleagues except that they were caught up in this frenzy of civic enthusiasm on which this whole cause had been riding for a year," Ryan recalled.[21] He called *Poletown* "an extraordinary case," one that would be remembered to have "seriously jeopardized the security of all private property ownership" and "judicial approval of municipal condemnation of private property for private use." He said that it showed "how easily government, in all of its branches, caught up in the frenzy of perceived economic crisis, can disregard the rights of the few in allegiance to the always disastrous philosophy that the end justifies the means." In his view, the project was clearly for the primary benefit of General Motors, which he described as the "guiding and sustaining, indeed controlling, hand" behind the proceedings. "The evidence then is that what General Motors wanted, General Motors got." He did not mean to demonize GM. The company in fact had displayed an admirable "social conscience" in a highly competitive economic environment. Nevertheless, in this case the private benefit of GM was primary, and the public benefits incidental. Ryan agreed with Fitzgerald's dissent regarding the Michigan precedents and judicial deference to legislative determination of public benefit, but went further and explicitly held the Condemnation Act to violate the Constitution's eminent-domain provision. The statute placed "the state taking clause…on a spectrum that admits of no principles and therefore no limits."[22]

Poletown facilitated "the largest relocation of people under the auspices of eminent domain—in the shortest period of time—in the history of the United States."[23] At the time, most observers hailed the majority and the GM plan. Coleman Young regarded the Poletown project as the greatest accomplishment of his administration, and repeated the process with Chrysler and other corporations. Legally, the United States Supreme Court appeared to follow the logic of *Poletown,* and in 1984 gave a similarly broad berth to legislative takings (*Hawaii Housing Authority v Midkiff,* 467 U.S. 229) though other state court decisions were mixed. Few voices objected to the process. These tended to be on the extreme right and extreme left of the political spectrum; what Ralph Nader called the "corporate socialism" of *Poletown* made strange bedfellows. A free-market group called the Council for a Competitive Economy scored the decision, and "the Detroit media were perplexed that an advocate of business could criticize GM." Justice Ryan, regarded as the right-winger on the Court, later recalled being congratulated by Detroit city councilman Kenneth Cockerell, an avowed Marxist, for standing up for the powerless.[24]

The General Motors Detroit/Hamtramck assembly plant, July 13, 2006, in Detroit, Michigan.
Photo by Jeff Haynes/AFP/Getty Images

After about a decade, though, second thoughts began to sink in, and there was a growing view that *Poletown* "acquired a kind of infamy in legal and social science circles, forever equated with the idea of government folly, gross waste, and a what-were-they-thinking sort of horror."[25] However, it should be noted that those views came from two very different directions: one which saw *Poletown* as a violation of property rights that were receiving insufficient protection, the other which interpreted *Poletown* as a triumph of corporate greed over the powerless, with the legal analysis functioning merely as camouflage. The plant's opening was delayed, and it ended up providing only about half of the hoped-for jobs. Owner suits raised the price paid by Detroit for the project from $200 million to closer to $300 million. An oil company that the city estimated to be worth $350,000 won a $5 million award at trial. Most of this money came from state and federal aid, since GM paid only $8 million for the property. A revival of interest in property rights, associated especially with the University of Chicago's "law and economics" movement, gave intellectual ammunition to the cause of limiting eminent domain.[26] Social and cultural critics bemoaned the ill effects of bureaucratic planning on American cityscapes.[27] Justice T. G. Kavanagh later confessed, "I think if I had it to do over again, I wouldn't vote the way I voted in that case…. I overstepped the bounds there. I think I was probably wrong on *Poletown*."[28] In the late 1980s and early 1990s, the United States Supreme Court seemed to take a turn back toward restricted takings law.[29]

Some of the main arguments against the *Poletown* decision are that the takings were bad for the area and that the building of the Poletown plant was not as good for the city as originally anticipated. Of course, not everyone would agree that *Poletown* was decided incorrectly, or that it should have been overturned. In a June 2008 letter to the editor in *Crain's Detroit Business,* Wayne State University Law Professor John Mogk vehemently defended the *Poletown* decision. Mogk wrote:

> *What happened [as a result of the building of the plant] was that 4,200 residents were paid 200 percent of the value of their homes in a declining neighborhood, along with thousands of dollars more in relocation assistance, to make way for a 3.6 million-square-foot plant in an attempt to preserve thousands of high-paying jobs on the factory floor and five times as many jobs in local suppliers when GM's World War I plants on the city's southwest side were to be closed.*

Mogk concluded his letter with an admonition: "Those who are giving thanks that *Poletown* will never happen again should think again."

The Michigan Supreme Court revisited the case in 2004 and vehemently overruled *Poletown,* striking down an attempt by Wayne County to take private land to build the "Pinnacle Project," a business and technology park.[30] Justice Robert Young's unanimous decision in *County of Wayne v Hathcock* noted the "clash of two bedrock principles of our legal tradition: the sacrosanct right of individuals to dominion over their private property…and the state's authority to condemn private property for the commonweal."[31] Young made a strong statement of constitutional "originalism," the theory that the Constitution ought to be interpreted according to the understanding of those who wrote and ratified it, a theory associated with the conservative jurisprudential movement of the late twentieth century.[32] Albeit, when the Constitution used "technical or legal terms of art," such as the eminent-domain provision, it needed to be construed according to the day's legal understanding of such terms. In 1963, there were few instances in which private property might be transferred to private parties—in cases of "public necessity of the extreme sort otherwise impracticable," in cases "when the private entity remains accountable to the public in its use of that property," and "when the selection of the land to be condemned is itself based on public concern." As Young noted, the Pinnacle Project "implicates none of [these] saving elements." *Poletown* was the county's only justification, and that case "is most notable for its radical and unabashed departure from the entirety of this Court's pre-1963 eminent domain jurisprudence." Indeed, the decision was such a radical departure that even advocates of judicial restraint "must overrule *Poletown* in order to vindicate our Constitution, protect the people's property rights, and preserve the legitimacy of the judicial branch as the expositor—not creator—of fundamental law."[33] Poletown was gone, but the principle that the Poletown Neighborhood Council fought for had been vindicated. Some, like PNC attorney Ronald Reosti, who appeared before the Court in both *Poletown* and *Hathcock,* were still alive to savor the victory.

Justice Elizabeth Weaver entered a concurring opinion, but only because she believed that the majority had not repudiated *Poletown* thoroughly enough. She believed that the Court's appeal to the technical, legal understanding of "public use" in 1963 was "elitist," and left significant loopholes for abuse of eminent-domain power. The Court's willingness to let governments condemn property on the basis of blight was one example. "A municipality could declare the lack of a two-car garage to be evidence of blight," she noted, as an Ohio municipality had.[34] Some property-rights advocates shared Justice Weaver's concern that the decision still allowed government too much power to take private property.[35] While the Michigan Supreme Court was now unanimous in thinking *Poletown* to have been decided in error, the decision retained strong defenders. The problems of the inner cities had not ended, and the potential loss of a tool for assembling large parcels for redevelopment was considered a significant problem by those that believed that distressed urban communities were at a serious disadvantage without it. A major GM plant, employing thousands of highly paid union workers, remains in operation 25 years later; one can only wonder what condition Poletown would be in today had the plant not been built and the neighborhood remained. Indeed, property-rights enthusiasts seemed to have the rug pulled out from under them shortly after *Hathcock,* when the United States Supreme Court upheld a Connecticut economic-development taking very much like *Poletown*.[36] The city of New London justified the taking of individual homes because new businesses would provide greater tax revenues for the city. Opponents asked the Court to reject such economic-benefit takings and follow the Michigan Supreme Court's *Hathcock* doctrine. The Court was split 5-4, and there was a much greater public outcry against it than there had been to *Poletown.* But the United States Supreme Court explicitly noted that states were free to establish more stringent takings standards than the federal courts. Indeed, it explicitly cited *Hathcock* as an example of a state that had done so.[37]

The Michigan Supreme Court, by overturning *Poletown,* appeared to have obviated the necessity of legislative strengthening of property rights, but the legislature enacted a law in the spring of 2006 that reinforced its holding that private property could not be taken for economic development. It also overwhelmingly (106-0 in the House of Representatives and 31-6 in the Senate) sent a constitutional amendment (Proposition 4) to the voters for ratification. Proposition 4 prohibited "taking private property…for purposes of economic development or increasing tax revenue." If the property taken was an individual's primary residence, the owner was entitled to 125 percent of the property's fair market value. It also required the State to demonstrate that the taking was for a public use, and imposed stricter standards of proof in cases of condemnation for "blight."

Michigan voters approved Proposition 4 in November 2006. Thirty-four other states had also altered their laws or constitutions to make takings more difficult. Donald J. Borut, the executive

director of the National League of Cities, while admitting that eminent domain was sometimes abused, "said that property-rights groups have played to public fears in a way that discourages thoughtful discussion about how individual rights should be balanced against projects that benefit the community as a whole. He described anti-*Kelo* sentiment as a 'huge emotional tsunami that's been rushing through the country.'"[38] Wayne Law School Professor John E. Mogk agreed, saying that the amendment would have a "chilling effect on the willingness of investors to undertake development."[39] Mogk called *Hathcock* "unprecedented in Michigan takings jurisprudence." It "rewrote the state's constitution and removed the power of the legislature to meet the economic necessities of the people of Michigan." The Court "wrongfully overturned *Poletown*" and "imposed an economic ideology on the state legislature and the people of Michigan" in a way that "will potentially have a crippling effect on the city of Detroit to rebuild."[40]

The early twenty-first century saw a surprising reassertion of the Lockean, founding-era view of property rights being anterior to government, which is instituted primarily to protect property rights.[41] In some cases, this principle could be taken to violent extremes. In 2003, for example, Steven Bixby, a New Hampshire native, asserting the state motto of "live free or die," and claiming to exercise the "right to revolution," killed two police officers who attempted to take his South Carolina property for a highway-widening project. He was ultimately condemned to death.[42]

FOOTNOTES

1. Wylie, *Poletown: Community Betrayed* (Urbana: Univ of Ill Press, 1989).
2. Conot, *American Odyssey, A History of a Great City* (Wayne State Univ Press,1986).
3. Moreno, *Black Americans and Organized Labor: A New History* (Baton Rouge: Louisiana State Univ Press, 2006), pp 276–278.
4. Conot, *American Odyssey, supra.*
5. Wylie, *Poletown, supra* at 23.
6. Lewis, *Corporate prerogative, "public use" and a people's plight:* Poletown Neighborhood Council v City of Detroit, Det C L R 909 (1982).
7. Darden, Hill, Thomas and Thomas, *Detroit: Race and Uneven Development* (Temple Univ Press, 1987).
8. Nolan, *Auto Plant vs. Neighborhood: The Poletown Battle,* Detroit News, January 27, 2000. He also called Nader a "carpetbagger."
9. Wylie, *Poletown, supra* at 84–109, 125–30; *Poletown Neighborhood Council v City of Detroit,* 410 Mich 616, 658–659; 304 NW2d 455 (1981).
10. *Calder v Bull,* 3 US 386, 388; 1 L Ed 648 (1798).
11. *Ryerson v Brown,* 35 Mich 332 (1877); Main, *How Eminent Domain Ran Amok: Kelo and the Debate over Economic Development Takings,* Policy Review 133 (October/November 2005).
12. Ely, Jr, *Thomas Cooley, "public use," and new direction in takings jurisprudence,* Mich St L R 847 (2004).
13. Lewis, *Corporate Prerogative, supra* at 916.
14. See, e.g., Caro, *The Power Broker: Robert Moses and the Fall of New York* (New York: Knopf, 1974).
15. Wylie, *Poletown, supra* at 19–20.
16. Schwartz, *The New Dealers: Power Politics in the Age of Roosevelt* (New York: Knopf, 1993).
17. Ely, *Thomas Cooley, supra* at 852; *US v Carolene Products,* 304 US 144, 152; 58 S Ct 778; 82 L Ed 1234 (1938).
18. Wylie, *Poletown, supra* at 117.
19. *Poletown Neighborhood Council v City of Detroit, supra* at 630, 633–634.
20. *Id.* at 639, 642–43.
21. Roger F. Lane, interview with James J. Ryan, November 13–15, 1990.
22. *Poletown, supra* at 646, 653, 657, 681.
23. Lewis, *Corporate Prerogative, supra* at 909.
24. Main, *How Eminent Domain Ran Amok;* Ely, *Thomas Cooley, supra* at 851–53; Wylie, *Poletown, supra* at 132, 137, 215; Roger F. Lane, interview, *supra.*
25. Main, *How Eminent Domain Ran Amok, supra.*
26. See especially, Epstein, *Takings: Private Property and the Power of Eminent Domain* (Cambridge: Harvard Univ Press, 1985).
27. Jacobs, *The Death and Life of Great American Cities* (New York: Modern Library, 1993 [1961]).
28. Roger F. Lane, interview with Thomas G. Kavanagh, November 19–20, 1990.
29. Kelly, Harbison, & Belz, *The American Constitution: Its Origins and Development,* 7th ed (New York: W. W. Norton, 1991), pp 747–748; *Lucas v South Carolina Coastal Council,* 505 US 1003; 112 S Ct 2886; 120 L Ed 2d 798 (1992); Ely, *Thomas Cooley, supra* at 853.
30. *County of Wayne v Hathcock et al.,* 471 Mich 445; 684 NW2d 765 (2004).
31. *Id.* at 450.
32. Kelly, Harbison, & Belz, *The American Constitution, supra* at 754–767.
33. *County of Wayne v Hathcock, supra* at 473–477, 479, 483.
34. *Id.* at 486, 501. Justice Cavanagh dissented from the retroactive application of the Court's decision. The county had proceeded on the basis of the *Poletown* precedent, and should not be punished for following the Court's misreading of the Constitution.
35. Somin, *Overcoming* Poletown, Mich St L R 1005 (2004); Mossoff, *The death of Poletown,* Mich St L R 837 (2004).
36. *Kelo v New London,* 545 US 469; 125 S Ct 2655; 162 L Ed 2d 439 (2005).
37. *Id.* at n 22. "We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose 'public use' requirements that are stricter than the federal baseline. Some of these requirements have been established as a matter of state constitutional law."
38. Pristin, *Voters Back Limits on Eminent Domain,* New York Times, November 15, 2006, p 6.
39. *Id.*
40. Mogk, *Eminent domain and the "public use": Michigan Supreme Court legislates an unprecedented overruling of* Poletown *in* County of Wayne v Hathcock, 51 Wayne L R 1332 (2005).
41. Epstein, *How Progressives Rewrote the Constitution* (Chicago: Univ of Chicago Press, 2005), p 126. Locke defined "property" as more than just "real and personal estate." "Property" was anything that a person had a right to—one's opinions, religious beliefs, talents, and abilities, for example, as well as one's material possessions. See also Madison, *"Property," in The Founders' Constitution,* ed Kurland & Lerner (Indianapolis: Liberty Fund, 1987), p 598.
42. Nossiter, *An Outsider's Murder Trial Shakes a Southern Town,* New York Times, February 15, 2007, p 20; *Death Penalty in Slayings of Two Law Officers,* Los Angeles Times, February 22, 2007, p 10.

Visit http://www.micourthistory.org/verdict_history_cases.php for additional materials and information on all of the Verdict of History cases.

Ross v Consumers Power Co

Suing the State

420 Mich 567 (1984)

Burned Man Reported 'Fair'

A young man who received severe electrical burns Tuesday in a construction site accident is in fair condition in St. Joseph Mercy Hospital, Ann Arbor.

Michael S. Ross, 19, of 304 Harwood, received the burns at a sewer installation site on Cunningham Road in Blackman Township.

Ross was burned extensively on the face, arms, legs and abdomen when a crane-borne metal support he was guiding into place, touched a high tension wire.

He was given emergency treatment at Mercy Hospital and transferred to St. Joseph Mercy.

Headline from the August 25, 1971, edition of the *Jackson Citizen Patriot.*

In a series of cases in the late 1970s and early 1980s, the Michigan Supreme Court rewrote the complicated law of governmental immunity. For most of American history, federal, state, and local governments could not be sued in their own courts without their consent. In the twentieth century, legislatures began to extend the right to sue more generally, the Michigan legislature doing so in the Governmental Tort Liability Act (GTLA) of 1964. What followed, however, were two decades of legal confusion. The Supreme Court then stepped in with a sweeping reassertion of governmental immunity, which the legislature subsequently accepted and codified by amendments to the GTLA. Few cases better illustrate the confident and effective lawmaking power of the state's high court.

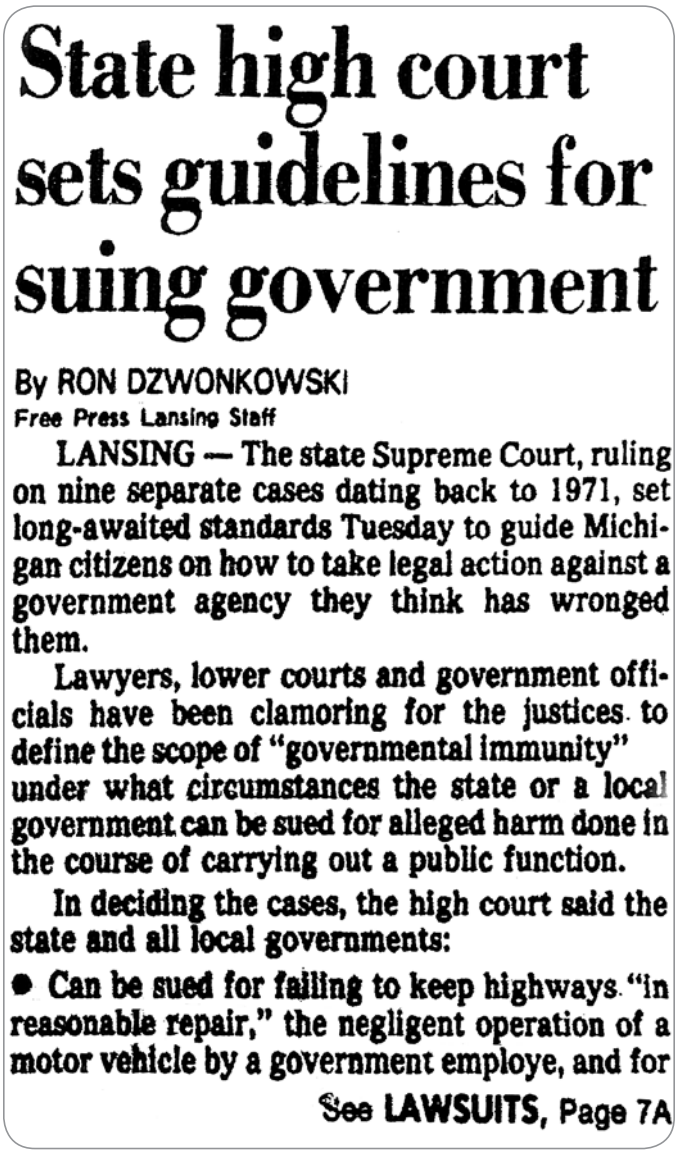
Sovereign or governmental immunity has always been a problem in political and legal theory. How could the power that had established the courts, itself be sued in them? On the other hand, if the government was immune from suit, what was to prevent it from abusing its powers and harming the people it was established to protect? The issue raised the theoretical problems of ultimate political power (sovereignty) that had been at the heart of the American Revolution and Civil War. For the most part, American governments had adopted a policy of nearly complete governmental immunity from suit. The principle was often said to derive from the English rule that "The King can do no wrong" and its corollary, "The King can authorize no wrong." It is more likely that these maxims expressed the ancient and medieval idea that the King and his agents *ought* to do no wrong—that they were not above the law. In the early modern period in which the Tudors and Stuarts bid for unlimited power, it came to be rendered as the King and his agents were *incapable* of doing wrong, and it was this idea that came to be adopted by the American states and federal government.[1]

Indeed, the jealousy with which early American colonial and revolutionary era governments guarded their sovereign immunity led to the First Amendment to the U.S. Constitution after the Bill of Rights. Article III of the Constitution allowed federal courts to hear suits "between a state and citizens of another state…and between a state, or the citizens thereof, and foreign states, citizens or subjects." When this provision led to states being sued in federal courts, the Eleventh Amendment, which states that "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state," was adopted in 1795. States could still be sued in federal court on *appeal* (i.e., so long as the suit was not initially "commenced or prosecuted" against them, but was begun by the State against a citizen), and state *officers* could be sued. In 1884, in *Poindexter v Greenhow*,[2] the United States Supreme Court held that state officers were immune from suit in cases in which the real party in interest was the State; it had earlier held in *Gibbons v United States*[3] that the federal government could not be sued without its consent.[4] Though Congress established a Court of Claims where citizens could sue for breach of contract, American governments did not eagerly invite suits. As Justice Oliver Wendell Holmes, Jr. put it in 1907, near the height of the doctrine of sovereign immunity, "A sovereign is exempt from suit…on the logical

and practical ground that there can be no legal right as against the authority that makes the law on which the right depends."[5]

The states were equally unwilling to extend liability in their own courts. Some western states adopted broader liability for municipal corporations than eastern states, but state courts proved to be even more attached to governmental immunity than state legislatures. Thus, the Michigan Supreme Court, in an 1861 opinion by Justice Cooley, relaxed the common-law standard of governmental immunity, but in 1870 the Court reversed this decision and held that immunity could not be reduced without a statutory change.[6] Michigan courts also held that state officers could not be sued if the real party being sued was the State.[7]

In the twentieth century, as government began to undertake ever more activities, the need for some sort of protection against government harm of private citizens became pressing. It seemed rather ironic that the less democratic governments of continental Europe admitted more government liability than England and America. In the 1920s, California and Wisconsin began to waive sovereign immunity and allow suits in some cases. In 1939, Michigan enacted a court of claims act for similar cases. During World War II, the legislature completely waived its immunity, but repealed the act two years later.[8] The federal government enacted the Federal Tort Claims Act in 1946. The major movement allowing state liability began in the 1960s, as state courts began to qualify the principle of sovereign immunity. The Michigan Supreme Court abolished the common-law doctrine in 1961 (*Williams v City of Detroit,* 36 Mich 231 (1961)), and the legislature responded with a Governmental Tort Liability Act in 1964, which allowed the government to be sued in cases in which it was not carrying out a "governmental function."[9] The Act also provided for government liability in cases involving motor vehicles, the maintenance of public highways and buildings, and when the government was involved in "proprietary" or for-profit activity. However, the legislature did not define many of these common-law terms, and so it remained for courts to determine, for example, what a "governmental function" was. The courts experimented with several definitions, such as analyzing whether the activity was for the "common good of all," or part of "the essence of governing." This produced two decades of, as the Supreme Court put it, "confused, often irreconcilable" lower-court decisions that were "of little practical guidance to the bench and bar."[10] The Michigan Supreme Court, which had been evenly divided on the extent of governmental immunity in the early 1980s, was moving toward a standard of narrower government immunity, and finally stepped in and reviewed eight lower-court cases in an effort to clarify the law.[11]



State high court sets guidelines for suing government

By RON DZWONKOWSKI
Free Press Lansing Staff

LANSING — The state Supreme Court, ruling on nine separate cases dating back to 1971, set long-awaited standards Tuesday to guide Michigan citizens on how to take legal action against a government agency they think has wronged them.

Lawyers, lower courts and government officials have been clamoring for the justices to define the scope of "governmental immunity" under what circumstances the state or a local government can be sued for alleged harm done in the course of carrying out a public function.

In deciding the cases, the high court said the state and all local governments:

- Can be sued for failing to keep highways "in reasonable repair," the negligent operation of a motor vehicle by a government employe, and for

See LAWSUITS, Page 7A

Headline from the January 23, 1985, issue of the *Detroit Free Press.*

In partisan terms, the evenly divided Court of the 1970s, with the Independent Justice Levin in the middle, now had a Democratic majority. Republicans Coleman and Fitzgerald, as well as Democratic Justice Moody, had been replaced by two Democrats, Patricia J. Boyle and Michael F. Cavanagh, and Republican James F. Brickley. The Court consolidated the appeals in eight different cases and announced a broad standard of governmental immunity. Five justices issued a per curiam opinion. Justice Levin dissented in part, and Justice T. G. Kavanagh did not participate.

Ross v Consumers Power Co was the leading case, the details of which show the complications of sovereign-immunity litigation. Michael Ross had sued the Consumers Power Company for injuries he sustained while working on a drain-construction project. He had suffered electrical burns when some of his equipment ran into the power company's lines. The power company then sued the drainage district, claiming that it had been negligent in failing to notify the company of the work being done near its power lines. So the real issue in *Ross* was whether Consumers Power could sue the drainage district, or whether the drainage district, as a public entity, was immune from suit. The circuit court held that the district was immune; the Michigan Court of Appeals held that it was liable; the Michigan Supreme Court reversed and held that the district was immune. Having led the movement to limit government immunity in the 1960s, the Court now

reversed course and "essentially reiterated absolute governmental immunity," based on its interpretation of legislative intent.[12]

After reviewing the history of sovereign immunity, and the tangle of case law that followed the Governmental Tort Liability Act, the Court observed that its earlier attempts to define "governmental function" all "require the judiciary to make value judgments" and were unavoidably "subjective." "The legislature's refusal to abolish completely sovereign and governmental immunity, despite this Court's recent attempts to do so," the Court declared, "evidences a clear legislative judgment that public and private tortfeasors should be treated differently." The Court now defined "governmental function" broadly, as "an activity which is expressly or impliedly mandated or authorized by constitution, statute, or other law. When a governmental agency engages in mandated or authorized activities, it is immune from tort liability, unless the activity is proprietary in nature or falls within one of the other statutory exceptions to the governmental immunity act." Defining immunity broadly, the Court subsequently defined these exceptions narrowly. It did note that government officials could still be liable, for "the immunity extended to individuals is far less than that afforded governmental agencies."[13]

The companion cases involved a variety of government agencies and officials: a delinquent-care facility, a mental hospital, a high school, police officers, and the Department of Natural Resources. In every case, the Court held the government immune. In doing so, it upheld the Court of Appeals in six cases, and the circuit courts in seven.[14] Justice Levin dissented in part; he and Justice Kavanagh had been the members of the Court moving toward narrower standards of governmental immunity in the preceding years, and he noted that in this case "the Court casts the net of governmental immunity too far."[15]

The Court's return to a broad standard of governmental immunity, whether more just or not, at least had the benefit of clarity. The Court, a contemporary observer noted, "has drawn a bright line rule. It has given the lower courts a black and white distinction in deciding issues of governmental immunity."[16] As a recent commentator notes, "No one is well served when a case, good or bad, must be evaluated in a cloud of total uncertainty. Plaintiffs' counsel are spared the expense of fruitless case preparation when there is a clear immunity defense. Defense counsel can advise clients with more confidence regarding their risks when the challenged conduct is known to be actionable."[17] Indeed, the Court had the ancient principle that law ought to be stable, orderly, and predictable on its side. John Locke had stated that a legitimate, constitutional government could only rule by "established standing laws, promulgated and known to the people, and not by extemporary decrees."[18] James Madison, too, warned in the *Federalist Papers* that overly mutable laws—the "repealing, explaining, and amending laws, which fill and disgrace our voluminous codes," as he put it—posed a threat to republican government.[19] The Michigan legislature agreed, and adopted the *Ross* standard by statute shortly after the decision by amendments to the GTLA. But another commentator called the case an "amazing display of judicial *chutzpah,*" an activist piece of judicial legislation that turned a government-liability statute into a government-immunity one. "However," he admitted, "because the pro-government definition created by the Court coincided with the pro-government bias of those who controlled the legislature at the time, the act was amended to incorporate *Ross'* definition of governmental function."[20]

The State was hardly scot-free, though. However difficult it might be to sue Michigan *in its own courts,* the State remained liable to suit in federal courts. In the aftermath of the civil rights movement, federal courts extended a wide right to sue states under the Civil Rights Act of 1866 (section 1983 of the United States Code). The Act provided that "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State… subjects…any citizen…to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." In the 1970s the act "became an all-purpose instrument for pursuing grievances against state and local governments that went far beyond the sphere of civil rights as traditionally understood." Suits under section 1983 rose from several hundred in the 1960s to several thousand in the 1980s. Combined with other procedural changes that widened access to the courts, states still faced a degree of civil liability that was high by historical standards.[21]

FOOTNOTES

1. Weller, *Sovereign immunity in Michigan: Sources and outline,* 6 TM Cooley L R 218 (1989); Borchard, *Governmental liability in tort,* 34 Yale L J 2 (1924).
2. *Poindexter v Greenhow,* 114 US 270; 5 S Ct 903; 29 L Ed 185 (1884).
3. *Gibbons v United States,* 75 US 269; 19 L Ed 453 (1968).
4. Borchard, *Governmental liability, supra* at 17; Hirsch, *Law and Economics: An Introductory Analysis,* 2d ed (Boston: Harcourt, 1988), p 239.
5. *Kawananakoa v Polyblank,* 205 US 349; 353; 27 S Ct 526; 51 L Ed 834 (1907).
6. Borchard, *Governmental liability, supra* at 9; *Detroit v Corey,* 9 Mich 165 (1861); *Detroit v Blackeby,* 21 Mich 84 (1870); JES, *Note,* 8 How L J 62 (1962).
7. Weller, *Sovereign immunity, supra* at 231.
8. 1943 PA 237, § 24; repealed by 1945 PA 87, § 2.
9. Borchard, *Governmental liability, supra* at 1–9; JES, *Note, supra* at 62; Weller, *Sovereign Immunity, supra* at 234; Hirsch, *Law and Economics, supra* at 239; Baylor, *Governmental Immunity in Michigan,* 2d ed (Ann Arbor: Institute of Continuing Legal Education, 2006), p 2.1.
10. *Ross v Consumers Power Co,* 420 Mich 567, 596; 363 NW2d 641 (1984).
11. Collins, *Governmental immunity from tort liability in Michigan,* 28 Wayne L R 1764 (1982).
12. Russ, *Governmental immunity after* Ross v Consumers Power Co, 32 Wayne L R 1475 (1986); *Ross v Consumers Power Co, supra* at 598.
13. *Ross v Consumers Power Co, supra* at 617–618, 620, 636.
14. *Id.* at 636–661; Baylor, *Governmental immunity, supra* at 2.11.
15. *Ross v Consumers Power, supra* at 684; Collins, *Governmental immunity, supra* at 1764.
16. Russ, *Governmental immunity, supra* at 1496.
17. Baylor, *Governmental immunity, supra* at 2.2. As the report of an 1806 conspiracy trial put it, "It is better that the law be known and certain, than that it be right." Commons, et al., ed, *A Documentary History of American Industrial Society* (New York: Russell & Russell, 1958), vol III: 59.
18. Locke, *Second Treatise of Government,* Peardon, ed (Indianapolis: Bobbs-Merrill, 1952), p 73.
19. No. 62, *The Federalist Papers,* Rossiter, ed (New York: Mentor, 1961), p 379.
20. Braden, *(Mis) Construing the Governmental Immunity Act: Using* Ross v Consumers Power, 84 Mich B J 45 (2005).
21. Kelly, Harbison, & Belz, *The American Constitution: Its Origin and Development,* 7th ed (New York: Norton, 1991), p 703.

In Re Clausen

Natural v Adoptive Parents

442 Mich 648 (1993)

Photo by John Zich/Time Life Pictures/Getty Images

Dan Schmidt comforting his tearful wife, Cara, as they sit at a press conference table covered with mikes, after the court ruling in their favor in the battle for custody of their 28-month-old biological daughter, Jessica, with her would-be adoptive parents, Jan and Roberta DeBoer.

In 1993, the Michigan Supreme Court brought to an end a bitter child-custody fight that garnered nationwide attention. After an Iowa woman gave up her daughter for adoption and then decided she wanted her back, the Michigan adopters of "Baby Jessica" fought to keep her. After nearly two years of litigation, the Michigan Supreme Court, in a decision that struck a major blow to the rights of adoptive parents, ordered that the baby be returned to her natural parents.

Jan and Roberta DeBoer, unable to conceive a child of their own, sought to adopt one in the early 1990s. Michigan, unlike most states, did not allow private adoption. The process of adopting a child through the state system was long and difficult, so the DeBoers sought a child in another state. In a small town in Iowa, Cara Clausen found herself pregnant and unmarried. Her mother and their family physician began the process of finding parents to adopt Cara's baby; they located the DeBoers. Shortly after giving birth on February 8, 1991, Cara signed the legal documents to give the baby to the DeBoers, including a waiver of her right to a 72-hour period in which to change her mind. Though the child's father was in fact Daniel Schmidt, Cara named Scott Seefeldt as the baby's father, and he signed away his paternal rights. The DeBoers filed an adoption petition in an Iowa court, which granted them custody of the child during its consideration of the petition. The DeBoers named the baby Jessica and took her back to their home in Ann Arbor, Michigan.[1]

In the meantime, Cara Clausen had come to regret her decision to give up her baby, apparently influenced by Concerned United Birthparents (CUB), a "secretive radical organization" founded in 1976 by birth parents who wanted to end the closed-adoption system in which natural parents could not recover their children. CUB viewed the adoption system in class terms, in which wealthy and educated couples were able to use "fast-talking attorneys" to take the children of poor and working-class people like Cara Clausen. (Though the DeBoers were in fact not much wealthier than the Clausens, their residence in the university town of Ann Arbor added to the class-conflict cast of the controversy.) CUB stalked and harassed adoptive parents, some of whom formed a counter-organization, the Pro-Adoption Coalition of Iowa, for protection against CUB's "terror tactics." The national media eventually depicted this adoption contest as a cultural clash.

Cara claimed to have been coerced by the DeBoers' lawyer and to have waived her parental rights while under the influence of postpartum drugs. She also confessed to having lied about the child's father, whom she now identified as Dan Schmidt. Dan asserted his paternity rights. Cara and Dan soon married. Schmidt had had a short and unhappy previous marriage and had abandoned the son he had begotten. He later refused to have any contact with a daughter by another woman, refused to pay court-ordered child-support, and had his wages garnisheed for it. Nevertheless, like most states, Iowa law privileged the rights of natural parents over those of adoptive parents, and in order to keep the baby, the DeBoers had to prove that the Schmidts would be unfit parents. The DeBoers were unable to do so in Iowa courts, and were ordered to return the baby to the Schmidts. They refused to appear before the Iowa court in December 1992, and an arrest warrant was issued. On the same day, the DeBoers won an order from the Washtenaw County Circuit Court to prevent the Schmidts from taking custody. Two state courts were now locked in a conflict of laws.

Article IV of the U.S. Constitution provides that "Full faith and credit shall be given in each state to the public acts, records, and

judicial proceedings of every other state; and the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof." Toward the end of establishing uniformity in state child-custody proceedings, Congress enacted the Parental Kidnapping Prevention Act (PKPA) in 1980. Along the same lines, the National Conference of Commissioners on Uniform State Laws induced all 50 states to adopt the Uniform Child Custody Jurisdiction Act (UCCJA). The question in the DeBoers' case was whether Michigan courts could use these acts to affirm their adoption or whether the acts compelled Michigan courts to enforce the Iowa courts' rulings. The Washtenaw County Circuit Court denied a motion for summary judgment by the Schmidts in December 1992, and allowed the DeBoers to retain custody of Jessica during the litigation. In March 1993, the Michigan Court of Appeals reversed, ruling that Michigan had no jurisdiction under the PKPA and UCCJA. The DeBoers then appealed to the Michigan Supreme Court.

In 1993, the Michigan Supreme Court had returned to the partisan balance of the 1970s, with Independent Justice Charles Levin as the swing vote. "Soapy" Williams had died in 1988, Justice Ryan had been appointed to the Sixth Circuit Court of Appeals, and Thomas "the Good" Kavanagh had been defeated in his 1984 reelection bid. Kavanagh was defeated by Republican Dorothy Comstock Riley, the second woman to serve on the Court. After Riley's election in 1984, she was joined by Republican Robert Griffin and Democrat Conrad Mallett.[2]

All the justices but Levin voted to sustain the Court of Appeals order to return Jessica to the Schmidts.[3] The Court observed that the DeBoers, to whom it icily referred as "the third-party custodians with whom the child now lives," had no claim to the child that was not contractual or conventional. The couple knew that their rights were contingent on Iowa legal proceedings, and the adoption had begun to be challenged only days after it took place. The adoption had never taken place under Iowa law, the majority concluded, and the Michigan courts were bound to observe Iowa's determination under the PKPA and UCCJA. Michigan courts could make no independent determination as to the best interests of the child. Congress' only goal in writing PKPA and UCCJA was


THE ANN ARBOR NEWS

'Cara met me at the door, and we hugged and we cried together, and we were both at a loss for words, we were both so overwhelmed.' – Daniel Schmidt, birth father

'This court is not very sympathetic toward the best interests of the child.' Attorney Peter Darrow, who filed a suit on Jessica's behalf

Return Jessica, court says

Now only a ruling by the U.S. Supreme Court stands between the Schmidts and permanent custody of their biological daughter.

By STEPHEN CAIN and SUSAN CIPPAT news staff writers

The Michigan Supreme Court, in what may be the next-to-last decision in the turbulent legal tug-of-war over a 3½-year-old named Jessica, ruled Friday afternoon that she must be returned to her biological parents Dan and Cara Schmidt of Blairstown, Iowa.

Barring a decision by the U.S. Supreme Court to block the transfer – a development that an attorney for Jessica's special guardian considers unlikely – Ashley and Jan DeBoer will be given a maximum of 31 days to hand over the child they've raised since she was a few days old.

The Schmidts were ecstatic. The DeBoers were devastated.

JESSICA ...at center of battle

WHAT'S NEXT

■ DeBoer attorney Sushil Scarrecchia next week will ask the U.S. Supreme Court to block the Michigan

Headline from July 3, 1993, edition of *The Ann Arbor News*.


Image courtesy of the Michigan Supreme Court Historical Society

Official Court portrait of Dorothy Comstock Riley

Riley had lost her 1982 election bid for a seat on the Michigan Supreme Court. Shortly after her defeat, Governor William Milliken, who was leaving the governor's office, appointed her to the Court to fill the vacancy created by Justice Blair Moody's death. Many observers believed that Governor-elect James Blanchard should have made the appointment. He filed a *quo warranto* petition, asking the Supreme Court to nullify Milliken's appointment. Riley sat on the Court for 69 days; she recused herself from the proceedings regarding her tenure. After an initial 3-3 tie, one justice switched and the Court ousted Riley by a 4-2 vote. Blanchard then appointed Patricia Boyle to the seat.

predictability and uniformity, regardless of substantive differences as to adoption policy. Iowa law may have given more preference to the rights of biological parents than to the "best interests of the child," but this did not give Michigan the power to refuse to enforce Iowa policy. Iowa's law was not "so contrary to Michigan public policy as to require us to refuse to enforce the Iowa judgments." The majority noted that their decision was a difficult one. "To a perhaps unprecedented degree among the matters that reach this Court, these cases have been litigated through fervent emotional appeals, with counsel and the adult parties pleading that their only interests are to do what is best for the child, who is herself blameless for this protracted litigation and the grief that it has caused." But a decision had to made, and an end put to the struggle. The Court's decision would accomplish this "with minimum disruption of the life of the child." "Custody litigation is full of injustice," the Court conceded, "let there be no doubt about that. No system of law is perfect. Consistency in the application of the laws, however, goes a long way toward curing much of the injustice."[4]

Justice Levin entered a lengthy and impassioned dissent. He held that Michigan, not Iowa, was the home state, and Michigan's policy was that the best interests of the child should prevail over the rights of natural parents. The DeBoers had not "purchased a carload of hay" in Iowa, he noted; the child whom they adopted had developed significant psychological ties to her adoptive parents. He pointed out that "every expert [in the circuit court] testified that there would be serious traumatic injury to the child at this time." He concluded that "The superior claim of the child to be heard in this case is grounded not just in law, but in basic human morality."[5]

Levin denied that Congress was interested only in procedural uniformity in the PKPA; rather, it had adopted a best-interests-of-the-child standard that was closer to Michigan policy than it was to Iowa's preference for the rights of natural parents. "This Court, by ignoring obvious issues concerning the welfare of the child and by focusing exclusively on the concerns of competing adults, as if this were a dispute about the vesting of contingent remainder, reduces the PKPA to a robot of legal formality with results that

Congress did not intend."[6] He noted that New Jersey and West Virginia courts had held up their own adoption standards against those of other states.

Levin also called attention to the fact that the DeBoers had taken Jessica on the good-faith assumption that Cara Clausen had told the truth about her paternity. "The sympathetic portrayal of the Schmidts in the majority's opinion ignores that it was Cara Schmidt's fraud on the Iowa court and on Daniel Schmidt that is at the root of this controversy." After the fraud had been exposed, the DeBoers "discovered that Schmidt had a dismal record as a father," which record was substantiated in the Washtenaw County Circuit Court. But the majority decision was driven by a "philosophical preference for the rights of biological parents."[7]

Finally, Levin condemned the majority for ordering the instant execution of its order, requiring the immediate return of Jessica to the Schmidts. He found it "extraordinary" that the Court denied the DeBoers the possibility of any stay, rehearing, or appeal of their decision. Levin suspected that the majority was in a rush because it feared that the state legislature might amend the Child Custody Act in reaction to its decision.[8] The DeBoers did make a last-minute appeal to United States Supreme Court Justice John Paul Stevens, but he denied their application to stay the enforcement. Stevens said that he was "convinced that there is neither a reasonable probability that the [full U.S. Supreme] Court will grant certiorari nor a fair prospect that, if it did so, it would conclude that the [Michigan Supreme Court] decision below is erroneous.[9] Indeed, four days later, the United States Supreme Court denied the DeBoer's application to delay the enforcement order. Justices Blackmun and O'Connor dissented, however. "This is a case that touches the raw nerves of life's relationships," Justice Blackmun wrote. "While I am not sure where the ultimate legalities or equities lie, I am sure that I am not willing to wash my hands of the case at this stage, with the personal vulnerability of the child so much at risk."[10] This determination was in keeping with the United States Supreme Court's preference, like that of most states, for the rights of natural over adoptive parents.[11]

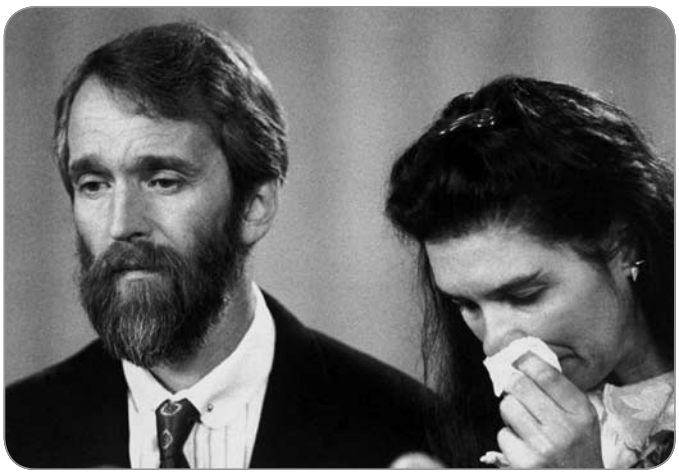


Photo by John Zich/Time Life Pictures/Getty Images

Jan DeBoer looking distraught as he sits by his tearful wife, Roberta, after the court ruling giving custody of Jessica, the 28-month-old girl they hoped to adopt, to her biological parents, Dan and Cara Schmidt.

The Michigan Supreme Court decision attracted a good deal of criticism. One legal scholar noted, "The failure of both the Iowa and Michigan courts to consider what would be in Jessica's best interests was repugnant to both public policy and a long line of case law." The emphasis on biological parental rights "comes dangerously close to treating the child in some sense as the property of his parent," said another.[12] But the decision was in line with the law and policy of the United States. The Schmidts renamed Jessica Anna and, while they divorced in 1999 and Dan Schmidt again fell on hard times, no evidence of the predicted psychological trauma had surfaced in the child.[13] The DeBoers also divorced in 1999, but remarried each other two years later.[14]

Photo by Michael L. Abramson/Time Life Pictures/Getty Images

The case made national headlines. Here, Jessica appears on the cover of the July 19, 1993, issue of *Time* Magazine with the DeBoers.

FOOTNOTES

1. Background of the case can be found in Franks, *The War for Baby Clausen,* New Yorker, March 22, 1993, p 56.
2. *Michigan Supreme Court Historical Reference Guide* (Lansing: Michigan Supreme Court Historical Society, 1998); Winter, *Appointee agony: Michigan lame-duck muddle,* 69 ABA J 267 (1983); Boyle, *New Michigan justice,* 69 ABA J 580 (1983).
3. *In re Clausen,* 442 Mich 648; 502 NW2d 649 (1993).
4. *Id.* at 674.
5. *Id.* at 693–697.
6. *Id.* at 698.
7. *Id.* at 731.
8. *Id.* at 736.
9. *DeBoer v DeBoer,* 509 US 1301; 114 S Ct 1; 125 L Ed 2d 755 (1993).
10. *DeBoer v DeBoer,* 509 US 938; 114 S Ct 11; 125 L Ed 2d 763 (1993).
11. Weinberg, *DeBoer v Schmidt: Disregarding the child's best interests in adoption proceedings,* 23 Cap U L R 1106 (1994).
12. *Id.* at 1134; quoting Homer H. Clark, *The Law of Domestic Relations in the United States.*
13. Smith, *"Baby Jessica's" Parents Divorcing,* Chicago Sun-Times, October 7, 1999, p 4; *Baby Jessica's Dad in Trouble,* Detroit Free Press, March 6, 2001; Dickerson, *A Child's Life Shows Folly of Adults, Media,* Detroit Free Press, February 24, 2003.
14. *Couple Who Lost Baby Jessica Also Divorce,* St. Petersburg Times, October 24, 1999, p 64; *Baby Jessica Couple to Remarry,* Detroit Free Press, February 4, 2001. The DeBoers tell their story in *Losing Jessica* (New York: Doubleday, 1994).

People v Kevorkian

The Right to Die

447 Mich 436 (1994)

Associated Press/Richard Sheinwald

Dr. Kevorkian poses with his "suicide machine" in February 1991.

In 1994, the Michigan Supreme Court made a significant contribution to the late-twentieth-century debate over the "right to die" and the right to physician assistance in exercising it. That year, the Court upheld a Michigan statute that outlawed assisted suicide, denying that either Michigan or the United States guaranteed a right to end one's life. The principal leader of the physician-assisted-suicide movement, Jack Kevorkian, defeated in his effort to assert death as a constitutional right, was ultimately convicted of murder and imprisoned.

No other case in the Michigan Supreme Court's history was so much the result of one man's devotion to a social cause. Jack Kevorkian was born in Pontiac, Michigan, in 1928. His parents were Armenians who had escaped the Ottoman Turks' attempt to annihilate that people during World War I. He attended the University of Michigan Medical School, where he specialized in pathology—the study of corpses to determine the cause of death.

As a medical resident in 1956, he published a detailed study of the eyes of patients as they neared death, which earned him the nickname "Dr. Death" among his fellow residents.[1] He became interested in the use of condemned criminals for medical experiments, having discovered that the ancient Greeks and thirteenth-century Armenians had undertaken such operations. He hoped that the organs of condemned criminals could be harvested for transplanting. Some observers drew parallels between Kevorkian's approach and that of the Nazi physicians of the Holocaust, but Kevorkian maintained that his efforts were to relieve suffering rather than to cause it. He contended that what he saw as this misunderstanding, combined with old-fashioned sentimentality or religious scruples, would deprive humanity of the benefits of his experiments. Besides, he said, Holocaust victims "didn't suffer as much" as his Armenian ancestors. University of Michigan officials were embarrassed by Kevorkian's activities and persuaded him to quit his residency there in 1958.

He moved to Pontiac General Hospital, where he began experimenting with transferring blood from cadavers to live patients. In 1970, he became the chief pathologist at Saratoga General Hospital in Detroit. His extracurricular activities also indicated a fascination with death; in an adult-education art class, he produced "striking, gruesome surrealistic visions full of skulls and body parts and cannibalism and harsh religious parody," and he used human blood in his paint mixtures.[2]

In the 1970s, he gave up his pathology career and invested all his savings in a motion picture based on Handel's *Messiah*. He produced the film, but could find no distributor for it; this bankrupted him. He then embarked on a new career as a "death counselor." "His new crusade for assisted suicide would be an outgrowth of his lifelong campaign for medical experiments on the dying," a biographer notes. He praised those Nazi doctors who tried to "get some good out of concentration camp deaths by conducting medical experiments." He envisioned a system of institutions where people could go to obtain "death on demand," and called these centers "obitoria." With this agenda, he was unable to secure any medical position. In 1988, he went so far as to ask the Oakland County prosecutor if such institutions would be legal; he got no response. Kevorkian then assembled a machine by which a patient could inject himself with a series of anesthetic and lethal drugs, and called the device the "Thanatron" (death-machine). In June 1990, he made the Thanatron available to Janet Adkins, a 54-year-old woman suffering from Alzheimer's disease, who sought to end her life.[3]

Was Kevorkian's act illegal? Michigan had no statute regarding assisting a suicide. Under common law generally, a person could be tried for aiding and abetting murder if he counseled someone to commit suicide,[4] but the Michigan common-law precedents were

not clear. In 1920, the state Supreme Court upheld the conviction of Frank Roberts, who had helped his wife to commit suicide[5] (*People v Roberts,* 211 Mich 187 (1920)). But the Court also denied review of a Court of Appeals decision in 1983 that held that incitement to suicide was not murder (*People v Campbell,* 124 Mich App 333 (1983), app den, 418 Mich 905 (1984)). Shortly after Janet Adkins' death, an Oakland Circuit Court judge issued an injunction ordering Kevorkian to stop assisting suicides. At the same time, the county prosecutor charged him with murder. Kevorkian retained the flamboyant and iconoclastic plaintiff's attorney, Geoffrey Fieger, to defend him. The criminal charges were dismissed, with the judge ruling that assisting suicide was not a crime in Michigan. The following year, Kevorkian used the death-machine (which Fieger had persuaded him to rename the "mercitron") in another suicide, and also provided a carbon monoxide mask for another patient. The state medical board then revoked his license.[6]

The controversy over assisted suicide was one element in the late twentieth-century "culture war" between one strand of thought claiming the mantle of progressivism and orthodoxy.[7] Kevorkian and Fieger believed that they were advancing science and enlightenment, rationalism against the backward and benighted forces of religious obscurantism, bigotry, and superstition. Kevorkian claimed that his prosecution was "a perfect manifestation of the existence of the Inquisition in this state, no different from the medieval one." He told a court that he regarded assisted suicide as "the first concrete step in a long-range plan that I have envisioned long ago…toward true enlightenment, in which we can develop a rational policy of planned death for the entire civilized world," and complained that he was being thwarted by a "Dark Age mentality born of a taboo." Fieger frequently denounced his opponents as religious fanatics, and claimed that Kevorkian's prosecution was "a civil rights matter on the scale of the Scopes trial," in which he faced judges who were attempting to "enforce morality."[8] Kevorkian's opponents saw his campaign, like abortion and euthanasia, as a further step toward what Pope John Paul II called an atheistic "culture of death."

The Oakland County prosecutor again failed to win a murder case against Kevorkian in 1992, and he began to assist more suicides and acquire a national reputation. Near the end of the year, the state legislature acted. It passed a Janus-faced law that established a Commission on Death and Dying to study the issue of assisted suicide, and at the same time made assisted suicide a felony beginning at the end of March 1993, not until six months after the commission issued its report. In the weeks before the law took effect, Kevorkian assisted in seven more suicides, as many as he had conducted in the previous two and a half years. The legislature then enacted an assisted-suicide ban that would take effect immediately, on February 25. Kevorkian nevertheless continued to assist suicides, but was acquitted at every trial. Several circuit court judges held that assisted suicide was a constitutional right. In 1994, the Court of Appeals overturned the statute outlawing assisted suicide—not because there was a constitutional right to assisted suicide, but on the grounds that it violated the provision in the State Constitution (article IV, section 24) that "no law shall embrace more than one object." The statute at once established a commission to study assisted suicide, and, at the same time, held that Kevorkian could be charged with common-law murder in these assisted suicide cases.

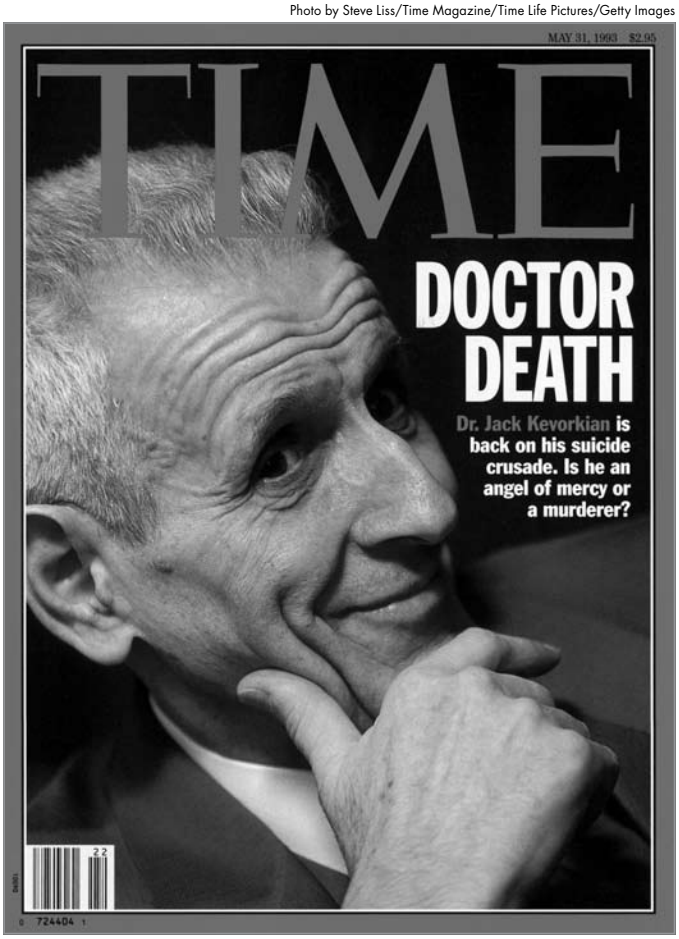
A majority of the Michigan Supreme Court upheld the legislature's assisted-suicide act. It held that the act was not constitutionally defective for having more than one object, and denied that the Fourteenth Amendment included a constitutional right to die. But the Court updated the common-law definition of murder and held that assisting suicide was not the same as murder. At least four justices agreed to these basic holdings, though several entered separate concurring and dissenting opinions.

None of the justices accepted the claim that the assisted-suicide statute violated the one-object provision of the Michigan Constitution. Outlawing assisted suicide while establishing a commission to study the issue "reflected permissible joining of statutory provisions." "There is virtually no statute that could not be subdivided and enacted as several bills," the Court noted.[9] More serious was the charge that the act limited a Fourteenth Amendment right to suicide, which several of the circuit courts had recognized. Kevorkian's advocates emphasized that a constitutional right to die could be inferred from the United States Supreme Court's abortion decisions. Most recently, the Court had reaffirmed the right to abortion in the 1992 case, *Planned Parenthood v Casey.* In that decision, the Court claimed that, "At the heart of liberty is the right to define one's own concept of existence, of the universe, and of the mystery of human life."[10] Read broadly, this definition of Fourteenth Amendment liberty would trump nearly any governmental restriction on individual choice. In addition, Kevorkian claimed that the United States Supreme Court had ruled that patients or their representatives could refuse or discontinue life-sustaining medical measures.[11] But the Michigan Supreme Court majority rejected these arguments. It maintained that there was a distinction between the right to refuse life-continuing treatment and the right to insist on life-ending treatment. Here it drew upon the law's distinction between misfeasance and nonfeasance. It also held that there was no history or tradition supporting a right to die. Most states prohibited suicide by statute or common law, provided for involuntary commitment for the suicidal, and permitted the use of non-deadly force to prevent suicide. "The right to commit suicide is neither implicit in the concept of ordered liberty nor deeply rooted in this nation's history and tradition," it concluded. "It would be an impermissibly radical departure from existing tradition, and from the principles that underlie that tradition, to declare that there is such a fundamental right protected by" the Fourteenth Amendment.[12]

At the same time, the Court held that Kevorkian's actions in assisting suicides could no longer be treated as murder under the 1920 *Roberts* precedent. "Few jurisdictions, if any, have retained the early common-law view that assisting in a suicide is murder,"

After serving eight years, Jack Kevorkian was released from the Lakeland Correctional Facility on June 1, 2007. On March 12, 2008, he announced his plans to run for congress in Michigan's 9th Congressional District. He ran as an Independent against incumbent Joe Knollenberg and Gary Peters, a professor at Central Michigan University.

Photo by Steve Liss/Time Magazine/Time Life Pictures/Getty Images



Time cover May 31, 1993, "Doctor Death" Dr. Jack Kevorkian.

they noted. Most states—now including Michigan—had enacted statutes that made assisted suicide a lesser crime. Since 1920, "interpretation of causation in criminal cases has evolved in Michigan to require a closer nexus between an act and a death." They concluded, "Only where there is probable cause to believe that death was the direct and natural result of a defendant's act can the defendant be properly bound over on a charge of murder."[13] On this point Justice Boyle dissented, believing that the majority had excessively weakened the moral culpability in assisted suicide. The Court's alteration of the common law of murder "effectively converts every criminal homicide accomplished by participation into assisted suicide." She claimed that the majority "sends the message that it assess the quality of particular life and judges as a matter of law that it is less culpable to destroy some lives than others."[14] On the other side, Justices Levin and Mallett believed that there was a Fourteenth Amendment liberty interest in suicide, at least for a "competent, terminally ill person facing imminent, agonizing death."[15] Levin and Mallett opined that Michigan could not legally prohibit assisted suicide for such individuals.

Dr. Jack Kevorkian, shown here in a 2005 mug shot, was released from prison on June 1, 2007.

In the following years, the legal debate over assisted suicide continued. Some federal courts struck down state laws against assisted suicide on constitutional grounds; others upheld them. The United States Supreme Court finally declared in 1997 that there was no constitutional right to die and affirmed that states could outlaw assisting suicide. Kevorkian continued to assist in suicides, participating in a hundred of them by 1998. In 1995, Kevorkian opened a "suicide clinic" in Springfield, Michigan. He was prosecuted for several assisted suicides, but acquitted in three trials in 1996. The following year, prosecutors dropped a case after a mistrial. Michigan juries continued to acquit him, until finally, in 1998, when he videotaped himself administering a lethal injection to Thomas Youk. The tape was broadcast on the television news program *60 Minutes*. With this evidence, Kevorkian, who had fired Fieger and now conducted his own defense, was convicted of murder and sentenced to prison for 10 to 25 years. Though Michigan voters had rejected a referendum to permit assisted suicide by a 70-30 percent margin a few months before Kevorkian's trial,[16] the conviction was perhaps more of a reaction to Kevorkian's defiance of the law than a judgment about assisted suicide. "This trial was not about the political or moral correctness of euthanasia," the judge told Kevorkian at sentencing. "It was about you, sir. It was about lawlessness. It was about disrespect for a society that exists because of the strength of the legal system. No one, sir, is above the law."[17]

In 1998, Oregon enacted the Death with Dignity Act, allowing patients to have physicians prescribe lethal medication, and nearly 300 people have died under the terms of the act. However, no other state followed suit. After serving eight years in prison, Kevorkian was paroled in 2007, promising to assist in no more suicides.[18]

FOOTNOTES

1. Betzold, *Appointment with Doctor Death* (Troy, MI: Momentum Books, 1993). Ironically, Kevorkian's birthplace was also the site of the Michigan Supreme Court decision that there was no legal obligation to prevent another person from killing himself *(People v Beardsley)*, and he ended up in a state prison in Lapeer, site of the eugenic sterilizations upheld by the court *(Haynes v Lapeer)*.
2. *Id.* at 7–18.
3. *Id.* at 24–35.
4. Urofsky, *Lethal Judgments: Assisted Suicide and American Law* (Lawrence: Univ Press of Kan, 2000), p 68.
5. *People v Roberts*, 211 Mich 187; 178 NW 690 (1920).
6. Betzold, *Appointment with Doctor Death, supra* at 56–102.
7. Hunter, *Culture Wars: The Struggle to Define America* (New York: Basic Books, 1991).
8. *Kevorkian Vows to Keep Fighting Laws Barring Assisted Suicide*, New York Times, December 18, 1994, p 43; Betzold, *Appointment with Doctor Death, supra* at 51, 80–81.
9. *People v Kevorkian*, 447 Mich 436, 457–459; 527 NW2d 714 (1994).
10. *Planned Parenthood v Casey*, 505 US 833, 851; 112 S Ct 2791; 120 L Ed 2d 674 (1992).
11. *Vacco v Quill*, 521 US 793; 117 S Ct 2293; 138 L Ed 2d 834 (1997).
12. *People v Kevorkian, supra* at 464, 471, 477, 481.
13. *Id.* at 488, 493.
14. *Id.* at 498, 503.
15. *Id.* at 513.
16. Proposal B, defeated November 3, 1998.
17. Urofsky, *Lethal Judgments, supra* at 85.
18. Davey, *Kevorkian Freed After Years in Prison for Assisting Suicide*, New York Times, June 2, 2007, p 8.