

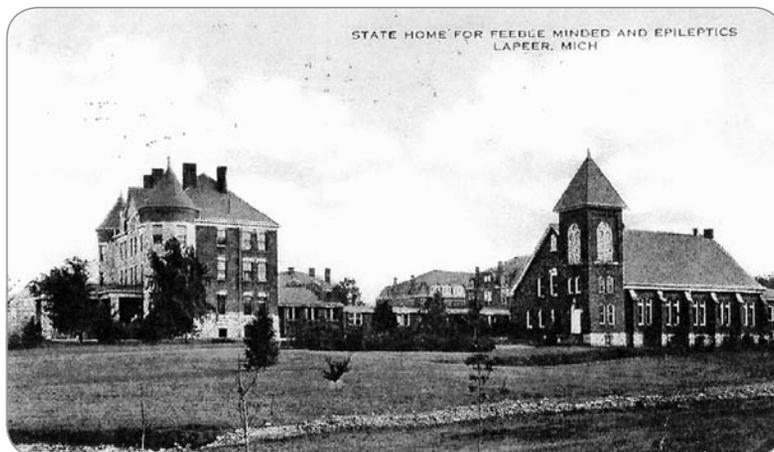
# Haynes v Lapeer Circuit Judge

## Eugenics in Michigan

201 Mich 138 (1918)

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

The great scientific and technological changes that transformed the United States into an urban and industrial nation had a deep impact on American thought, and on American law. During the



Postcard image of Lapeer State Home for the Feeble Minded.

period from 1870 to 1930, many influential teachers of law, judges, and lawyers wanted to turn law into a science with the same power and prestige as the natural sciences. And in the social sciences, the most impressive influence was that of Darwin’s theory of evolution. Charles Darwin published *The Origin of Species* in 1859. Its subtitle was particularly important: *The Preservation of Favored Races in the Struggle for Life*. Darwin’s theories provided the basis for a completely naturalistic and materialistic explanation for the origin and development of life. He hypothesized that random mutations gave some species, and some members of a species, superior advantages in coping with their environments. In this way, “natural selection” ensured the “survival of the fittest.”

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

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

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



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

scientific advances in genetics of late have brought to question the moral ramifications as well as the very definition of eugenics.

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

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

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

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

Only one operation was carried out under the new law, at the Psychopathic State Hospital in Ann Arbor, before it was challenged.<sup>9</sup> In 1915, H. A. Haynes, the medical superintendent of the Michigan Home and Training Center in Lapeer, proposed to remove the fallopian tubes of Nora Reynolds, an inmate. Reynolds was 27 years old and had been admitted to the institution eight years earlier. She was diagnosed as having the mental capacity of a 10-year-old, had repeatedly escaped, and had already given birth to two illegitimate children.<sup>10</sup> Her guardian, John Roach, objected to the sterilization, and the case of *Haynes v Lapeer Circuit Judge* began. The Lapeer County probate court refused to grant Haynes’ request for permission to sterilize. Probate Judge Daniel F. Zuhlke pronounced the act unconstitutional.<sup>11</sup> Haynes appealed to the Lapeer County Circuit Court, which also refused to permit the procedure. Circuit Judge William B. Williams ruled that the act violated the Fourteenth Amendment of the United States Constitution and was “class legislation,” because it was limited to inmates in state institutions. In Judge Williams’ view, these constitutional

*During the period from 1870 to 1930, many influential teachers of law, judges and lawyers wanted to turn law into a science with the same power and prestige as the natural sciences.*

objections were not related to the substance of the legislation, however. “The object of the statute is clear and the result sought to be reached is much to be desired,” he noted; but the act excluded mental defectives in private institutions or at large. Williams cited a New Jersey Supreme Court decision of

1913, which had struck down that state’s sterilization law on similar grounds.<sup>12</sup> Haynes then appealed the case to the Michigan Supreme Court.

The Michigan Supreme Court unanimously struck down the act. But the opinion of the Court left the door open to another legislative effort. On the one hand, the state attorney general submitted a brief that essentially conceded the unconstitutionality of the law as class legislation, making no effort to defend it.<sup>13</sup> On the other hand, the Court saw no constitutional basis for objecting to this type of legislation if it were properly written from the standpoint of the affected class. Justice Steere concluded that the state could use its police power—the general power to legislate for the safety, health, welfare, and morals of the citizens—for eugenic purposes. “Plainly stated,” he said, “the manifest purpose and only justification for this legislation is to promote...the general welfare of the human race by a step in the line of selective breeding to be effected through sterilization of those found and adjudicated by a designated tribunal to be hopelessly insane and mentally defective to such an extent that, in connection with their personal record and family history, procreation by such persons is inadvisable and inimical to public welfare.”<sup>14</sup> The Court also pointed out that the state might single out a class of persons, such as the mentally defective, as objects of such legislation, despite the Fourteenth Amendment’s guarantee that no state could deny to any person the equal protection of the laws. The law failed,

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

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

however, because it "carves a class out of a class" in that it was limited to defectives in state institutions.

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

The eugenics movement gained strength after the First World War, bolstered by the racism and nativism of the period. Harry Hamilton Laughlin led the effort to enact new state euthanasia laws. Laughlin supervised the Eugenics Record Office at the Carnegie Institute in Washington, D.C., from its origin in 1910 and was its director until 1940. He was considered an expert on both eugenics and immigration; he was the sole scientific expert that Congress consulted when it revised American immigration laws in the 1920s. His findings on the supposed social inadequacy of southern and eastern European immigrants led the United States to adopt immigration restriction in 1921 and 1924 (Asians had been excluded in earlier decades).<sup>17</sup>

In Michigan, the intellectual elite of Michigan's medical, educational, and legal communities took the lead in this second wave of the eugenics movement. Among the leaders of the movement were Victor C. Vaughn, dean of the University of Michigan medical school; Clarence C. Mitchell, University of Michigan president; and John H. Kellogg, director of the Battle Creek Sanitarium and founder of the Race Betterment Foundation.<sup>18</sup> Eugenic advocates drafted legislation more carefully, to avoid the "class legislation" pitfall that had condemned their acts before the war. In 1923, the state enacted a new compulsory sterilization law, drafted by Burke

Shartel, University of Michigan law professor and later dean of the law school. The revised act applied to anyone adjudged feeble-minded by a probate court, not just to inmates of state institutions.<sup>19</sup> If the defective person was deemed likely to beget children, and his or her family was unable to support those children, he or she could be sterilized. Willie Smith was adjudged to be feeble-minded by the Wayne County probate court, and his parents asked that he be sterilized. As Shartel noted, the law as drafted allowed "almost anyone...to make application for [a sterilization order]—whether he acts in the interest of the defective or of the public."<sup>20</sup> When his parents obtained the order, Smith sought its reversal in the Supreme Court in the case of *Smith v Wayne Probate Judge*.

The Court upheld the act in a 5–3 decision, though it struck down that part of the act that limited its application to defectives of indigent families and noted that the statutory procedures had not been followed in Smith's case. Chief Justice John S. McDonald wrote that "biological science has definitely demonstrated that feeble-mindedness is hereditary." The claim Willie Smith made, McDonald wrote, was the right of "any citizen or class of citizens to beget children with an inherited tendency to crime, feeble-mindedness, idiocy, or imbecility."<sup>21</sup> Dismissing individual-rights concerns, McDonald concluded that "It is an historic fact that every forward step in the progress of the race is marked by an interference with individual liberties."<sup>22</sup> McDonald's opinion was an excellent illustration of the influence of progressive-era faith in natural science, and progressive judicial embrace of scientific positivism in the law, which led the Court majority to conclude that the legislature's judgment was not an unreasonable assault on individual liberty. Justices Steere and Moore, who had voted in *Haynes* to strike down the 1913 law on equal-protection grounds, concurred with McDonald in upholding the new act.



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

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Oliver Wendell Holmes, Jr., circa 1930.

In *Holmes* they found the perfect judge, for he was a eugenic enthusiast with little concern for individual rights claims against state power. “Holmes had a brutal worldview and was indifferent to the welfare of others,” a recent biographer observes. He called for “substituting artificial selection for natural by putting to death the inadequate” and “killing everyone below standard.” A hero to progressives for his criticism of the Supreme Court’s striking down of social and economic welfare legislation, and for his support for the First Amendment, many earlier biographers were shocked to discover Holmes’ personal views. “The real Holmes was savage, harsh, and cruel.”<sup>1</sup> In his jurisprudence, he seldom found any constitutional limitations to majority power. “It is no sufficient condemnation of legislation that it favors one class at the expense of another,” he wrote in 1873, “for much or all legislation does that.... Legislation is necessarily a means by which a body, having the power, puts burdens which are disagreeable to them on the shoulders of somebody else.”<sup>2</sup>

The thrice-wounded Civil War veteran wrote, “We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the state for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind.” Sterilization was no more burdensome than compulsory vaccination, he wrote. Famous for his pithy aphorisms, Holmes concluded, “Three generations of imbeciles are enough.” He curtly dismissed *Buck’s* equal-protection claim as “the usual last resort of constitutional arguments.” At present compulsory sterilization applied only to inmates in state institutions, but the law “seeks to bring within the lines all similarly situated so far and so fast as its means allow.” In other words, we could look forward to the day when all the feeble-minded could be sterilized.<sup>3</sup> As harsh as this opinion sounds, Holmes’ original draft was even more fierce; Chief Justice William Howard Taft and his colleagues prevailed on Holmes to tone it down.<sup>4</sup> Only Justice Pierce Butler dissented, perhaps on religious grounds.<sup>5</sup>

1. Albert W. Alschuler, *Law without Values: The Life, Work, and Legacy of Justice Holmes* (Chicago: University of Chicago Press, 2000), 28
2. Holmes, “The Gas-Stokers Strike” (1897), in “The Early Writings of O. W. Holmes, Jr.,” ed. Felix Frankfurter, *Harvard Law Review* 44 (1931), 796.
3. *Buck v Bell*.
4. Saul Touster, “Holmes a Hundred Years Ago: *The Common Law and Legal Theory*,” *Hofstra Law Review* 10 (1982), 678.
5. Phillip Thompson, “Silent Protest: A Catholic Justice Dissents in *Buck v Bell*,” *Catholic Lawyer* 43 (2004), 125–48.

Justice George M. Clark entered a separate concurring opinion, noting that he joined the majority “with reluctance.” He had doubts about the constitutionality of the act, but believed that the legislature should get the benefit in doubtful cases.

Justice Howard Wiest entered an impassioned dissent for himself and Justices John E. Bird and Grant Fellows. (Bird had voted to strike down the 1913 act; Fellows had not participated in the *Haynes* case.) Closely divided decisions like this had been very rare in the history of the Michigan Supreme Court; this case marked the beginning of a steady erosion in curial unanimity. Ninety-five percent of Michigan Supreme Court opinions in the 1870s had been unanimous; this dropped to 56% by the 1960s.<sup>23</sup> “I cannot agree that [the police power] extends to the mutilation of the organs of generation of citizens or any class thereof,” Wiest wrote. He believed that the act violated the constitution’s provision that “institutions for the benefit of those inhabitants who are deaf, dumb, blind, feeble-minded, or insane shall always be fostered and supported.” He regarded the act as “cruel and unusual punishment,” a denial of equal protection, and of due process of law. Wiest wrote, in classic natural-law language, “The inherent right of mankind to pass through life without mutilation of organs or glands of generation needs no declaration in constitutions, for the right existed long before constitutions of government.” Wiest was simply aghast at what he saw as the act’s perversion of modern science and technology. “We have found no case in the books holding that in a Christian civilization it is neither cruel nor unusual to

emasculate the feeble-minded. It has remained for the civilization of the twentieth century to write such a law upon the statute book.” In a resounding conclusion he wrote, “This law violates the Constitution and inherent rights, transcends legislative power, imposes cruel and unusual mutilations upon some citizens, while constituting the like treatment of all others a crime, thereby depriving some of the equal protection of the law, and is void.”<sup>24</sup>

A biographer noted that Wiest “was personally slow to accept changing times. The paradox lies in the fact that his personal preferences found no reflection in his holdings.”<sup>25</sup> This dissent, however, reflected very well the traditional jurisprudence and morality of the pre-modern period. Professor Shartel, the sterilization statute’s author, noted that Wiest’s opinion was unsupportable “on any modern theory of rights or constitutional limitations.”<sup>26</sup> At the same time, Justice Wiest’s willingness to find fundamental rights that were safe from state abridgement, regardless of the popular will as expressed in legislatures, presaged the future of jurisprudence. While progressives often complained that conservative judges used outdated natural-law reasoning to impose their own policy preferences, progressive jurists of the late twentieth century would do so to an even greater degree.<sup>27</sup>

Professor Shartel and Justice Wiest reflected the intellectual divide of that time. The modern, progressive elite that invoked science and genetic engineering opposed the “old-fashioned” populists and the religiously orthodox. Interestingly, the debates taking place at the time over eugenics and human evolution were repeatedly linked in

ways that may seem surprising today. For example, William Jennings Bryan, the populist and three-time presidential candidate who was also a devout Christian fundamentalist, was deeply concerned about the eugenics movement and the implications that were being drawn from evolutionary theories.<sup>28</sup> Such views led to the celebrated “monkey trial” over the teaching of evolution, subsequently made more famous by the play, *Inherit the Wind*.<sup>29</sup> This play caricatured a barely fictionalized Bryan and lionized his opponent, a sanitized version of Clarence Darrow, while playing fast and loose with the facts of the case. What is little remembered is that, while Bryan’s views on evolution did not ultimately predominate, his skepticism about eugenics did.

The decision in *Smith v Wayne Probate Judge* did not end the legal challenges to compulsory sterilization laws, either in Michigan or nationally. Two years later, in the 1927 case *In re Salloum*, *Smith* was nearly overruled in another, similar appeal to the Supreme Court. Justice Joseph B. Moore of the *Smith* majority had resigned, and was replaced by Justice Ernest A. Snow, who voted to overturn the sterilization law. This left the Court tied at 4-4, which meant the circuit court order to sterilize Agnes Salloum stood.<sup>30</sup>

Later that year, a Virginia eugenic statute similar to Michigan’s was challenged in the United States Supreme Court. This produced the best-known American eugenic case, *Buck v Bell*.<sup>31</sup> The United States Supreme Court, with only one dissenter, upheld Virginia’s decision to sterilize Carrie Buck, who was described as “a feeble-minded white woman...the daughter of a feeble-minded mother in the same institution, and the mother of an illegitimate feeble-minded child.” Subsequent scholarship has shown that it is unlikely that any of the Bucks were truly “feeble-minded”; but Laughlin summarized a report sent to him and told the Court that the Bucks were among “the shiftless, ignorant, and worthless class of anti-social whites of the South.” He described Carrie as “a typical picture of the low-grade moron.” The case was astoundingly collusive, with lawyers and officers on both sides of the case conspiring to get the Virginia law upheld.<sup>32</sup> Carrie Buck’s counsel, I. M. Whitehead, hardly defended his client at all. But he did use Justice Wiest’s dissenting argument in *Smith* that “the inherent right of mankind to go through life without mutilation of organs of generation needs no constitutional declaration.”<sup>33</sup>

In the generation after *Buck v Bell*, the states sterilized over 60,000 Americans. California sterilized about 20,000, and Virginia 7,000. Michigan extended its eugenics law to include the insane in 1929, and sterilized nearly 3,800 inmates, over 2,000 in the Lapeer facility alone, mostly in the 1930s and 1940s. Local enthusiasm for the program varied. Kalamazoo State Hospital for the Insane sterilized patients in a “promiscuous” manner, and a Kent County probate judge “active in the eugenics movement almost single-handedly instigated a program of sterilizing the county’s dysgenic elements.” On the other hand, a probate judge in Genesee County “was unsure of the law’s use and even its legality.”<sup>34</sup>

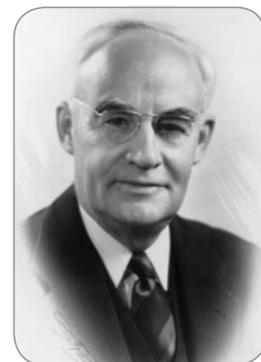
The United States Supreme Court began to find objections to eugenic laws more compelling, striking down an Oklahoma law that required sterilization for three-time criminal offenders. It did so on equal protection grounds but, perhaps more tellingly,

imposed a “strict scrutiny” standard of review that would help to strengthen individual rights in the future.<sup>35</sup> After World War II, the disclosure of the dimensions of Nazi eugenics discredited the American eugenics movement. Harry H. Laughlin, who had supported Michigan’s sterilization law and the Virginia statute upheld in *Buck v Bell*, provided the model for the Third Reich’s “Law for Protection Against Genetically Defective Offspring,” under which 400,000 involuntary sterilizations and 200,000 murders were performed. Laughlin received an honorary degree from the University of Heidelberg in 1936 for his work to promote “racial purity.” Dr. J. H. Bell, who severed Carrie Buck’s fallopian tubes, praised the Nazis’ “elimination of the unfit.”<sup>36</sup>

While American eugenic laws remained on the books for another generation, the enthusiasm for eugenics as a progressive force changed. The number of American sterilizations dropped off, and most states had repealed their eugenic laws by the 1970s. Henry Foster, nominated to be surgeon general in 1995, was defeated in part because he had sterilized retarded women in the 1970s.<sup>37</sup> Early in the twenty-first century, governors of five states made formal apologies for their past policies, and many called on Governor Jennifer Granholm of Michigan to do so as well.<sup>38</sup>

However, the Michigan courts blocked at least one effort to obtain relief for the decisions of the past. Fred Aslin, Michigan’s version of Carrie Buck, brought suit against the state in 1994. Although his case was dismissed, Aslin “received a formal letter of apology from James K. Haveman, Jr., the director of the Michigan Department of Community Health,” for his sterilization 50 years earlier. Aslin and several of his siblings were diagnosed as “feeble-minded” and sterilized before being released from Lapeer; he believed that, as poor, Upper Peninsula Indians, they were the victims of social prejudice. Aslin’s suit was dismissed because the statute of limitations had expired.<sup>39</sup>

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



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as an endorsement of a return to the routine sterilization system of the past.”<sup>40</sup>

Nor was the eugenic and euthanasia debate settled. Several “Baby Doe” cases in the 1970s revived the discussion of allowing handicapped infants to die. The issue of “assisted suicide” for adults also became a major issue, with the Michigan prosecutions of Dr. Jack Kevorkian and the celebrated case of Terry Schiavo in Florida. In 1999, Princeton University appointed the Australian philosopher Peter Singer to a chair in bioethics, perhaps signaling a movement in elite attitude back toward the progressive-era view of eugenics. Singer was known for his advocacy of infanticide and euthanasia. “We think that some infants with severe disabilities should be killed,” he wrote.<sup>41</sup> Genetic screening and legal abortion had nearly eliminated the birth of children with Down Syndrome. Judge Richard A. Posner of the Seventh Circuit Court of Appeals opined that, while the ardor of Oliver Wendell Holmes and other eugenics advocates is still unfashionable, “with the revived interest... in euthanasia, and with rise of genetic engineering, we may yet find those enthusiasms prescient rather than depraved.”<sup>42</sup> Whether or not that is so, courts will continue to wrestle with the question of the extent to which constitutional rights limit majorities’ power in these matters. ■

## FOOTNOTES

1. *Smith v Wayne Probate Judge*, 231 Mich 409; 204 NW 104 (1925).
2. Black, *War Against the Weak: Eugenics and America’s Campaign to Create a Master Race* (New York: Four Walls, 2003), p 127; Quinn, *Race Cleansing in America*, *American Heritage* 54 (2003), chronicles at length the breadth of support for eugenics in the United States, including backing from leading intellectuals (including W. E. B. Du Bois), foundations, and others.
3. Hunter, *Civic Biology: Presented in Problems* (New York: American, 1914), p 263.
4. Laughlin, *Eugenical Sterilization in the United States* (Chicago: Psychopathic Laboratory of the Municipal Court, 1922), pp 1–4.
5. Lightner, *Asexualization of criminals and degenerates*, *Mich L J* (1897), pp 289–316.
6. Pernick, *The Black Stork: Eugenics and the Death of “Defective” Babies in American Medicine and Motion Pictures Since 1915* (New York, 1996), p 24. “Feeble-mindedness” was an inexact designation, today usually called “mental retardation.” It comprised morons, imbeciles, and idiots.
7. 1913 PA 34, in Laughlin, *supra* at 28.
8. *Id.*
9. Future United States Supreme Court Justice Louis D. Brandeis did argue that a general “right to privacy” could be derived from common law reasoning—Brandeis & Warren, *The right to privacy*, *Harv L R* 4 (1890), p 193. But the “privacy” he was principally concerned about was protection against exposure by newspapers. See Kersch, *Constructing Civil Liberties: Discontinuities in the Development of American Constitutional Law* (Cambridge Univ Press, 2004), pp 56–62.
10. Laughlin, *supra* at 73.
11. *Id.* at 305.
12. Order of the Probate Court, in Laughlin, *supra* at 205.
13. *In re Nora Reynolds*, in Laughlin, *supra* at 206.
14. Brief of Attorney-General, in Laughlin, *supra* at 209–213.
15. *Haynes v Lapeer Circuit Judge*, 201 Mich 138, 142; 166 NW 938 (1918).
16. Siegel, *Justice Holmes, Buck v Bell, and the history of equal protection*, *Minn L R* 90 (2005), p 111; Laughlin, *supra* at 1–4.
17. Philip R. Reilly, *The Surgical Solution: A History of Involuntary Sterilization in the United States* (Baltimore: Johns Hopkins University Press), 84; Harry H. Laughlin, *The Legal Status of Eugenical Sterilization* (Chicago: Ringley, 1930).
18. Friedman, *American Law in the Twentieth Century* (New Haven: Yale Univ Press, 2002), p 110.
19. Hodges, *Dealing with Degeneracy: Michigan Eugenics in Context* (Ph.D. diss., Mich State Univ, 2001).
20. 1923 PA 285 “to authorize the sterilization of mentally defective persons.”
21. Shartel, *Sterilization of mental defectives*, 24 *Mich L R* 1, 6 (1925).
22. *Smith v Wayne Probate Judge*, *supra* at 414–415.
23. Lawrence M. Friedman, *A History of American Law* (New York: Simon & Schuster, 1973), 689.
24. *Id.* at 425.
25. *Id.* at 428–448. Wiest referred to the fact that it was a crime to perform sterilization operations beyond cases of medical necessity.
26. *Michigan Supreme Court Historical Reference Guide* (Lansing: Mich Supreme Court Hist Society, 1998), p 125.
27. Shartel, *supra* at 18.
28. Ross, *A Muted Fury: Populists, Progressives, and Labor Unions Confront the Courts, 1890–1937* (Princeton: Princeton Univ Press, 1994), p 321.
29. Larson, *Summer for the Gods: The Scopes Trial and America’s Continuing Debate over Science and Religion* (New York: Basic, 1997), p 28.
30. *Scopes v State*, 289 SW 363 (Tenn, 1927).
31. *In re Salloum*, 236 Mich 478; 210 NW 498 (1927).
32. *Buck v Bell*, 274 US 200; 47 S Ct 584; 71 L Ed 1000 (1927).
33. Lombardo, *Three generations, no imbeciles: New light on Buck v Bell*, *NY U L R* 30, 30–62 (1985); Quinn, *supra*.
34. *Buck*, *supra*.
35. Hodges, *supra* at 314.
36. *Skinner v Oklahoma*, 316 US 535; 62 S Ct 1110; 86 L Ed 1655 (1942). Justice Harlan’s dissent in *Shapiro v Thompson*, 394 US 618; 89 S Ct 1322; 22 L Ed 2d 600 (1965), elaborates the significance of *Skinner* as foreshadowing the Court’s greater concern for personal liberty.
37. Quinn, *supra*.
38. Lush, *Decision for Sterilization Becomes 12-Year Fight*, *USA Today*, April 24, 1998, p 10.
39. Hodges, *supra* at 314.
40. Lessenberry, *Scarred by Sterilization, Michigan Man Sues State over Legacy of ‘Race Betterment’*, *Washington Post*, March 9, 2000, p A3; Stern, *Michigan Should Apologize for Forced Sterilizations*, *Detroit News*, August 3, 2003.
41. *In re Wirsing*, 456 Mich 467; 573 NW2d 51 (1998); *In re Wirsing*, 214 Mich App 131; 542 NW2d 594 (1995).
42. Kuhse & Singer, *Should the Baby Live? The Problem of Handicapped Infants* (New York, 1985), p v.
43. Posner, ed, *The Essential Holmes: Selections from the Letters, Speeches, Judicial Opinions and Other Writings of Oliver Wendell Holmes, Jr.* (Chicago: Univ of Chicago Press, 1992), p xxix.