The People v. Ossian Sweet, Gladys Sweet, et. al. (1925)
The People v. Henry Sweet (1926)

Michael Hannon (2010)

Detroit

The Sweet trials were the direct result of the racial tensions prevalent in Detroit and other northern cities during the 1920s. During WWI and up until the 1920s, all the major cities in the northern part of the United States experienced a very large demographic shift. Large numbers of blacks moved from the South seeking work and escape from institutionalized Jim Crow discrimination. Many whites also moved to northern cities in search of work. Many blacks as well as whites looking for work went to Detroit, simply because that is where the automobile industry began in the United States. Detroit's black population stood at just 7,000 in 1915 and by 1925 the number had risen to 80,000.[1] By 1920, "90 percent of the city's blacks had not been born in Michigan."[2] Although blacks moved to many northern cities, "No major city … took in more blacks (as a percentage of its total population) faster than did Detroit."[3]

Such rapid increases in population created a housing shortage in many cities, including Detroit. This rapid population growth heightened racial tensions as blacks sought housing outside of the run down and over-crowded areas they were forced to live in. During this period there was also a large influx of immigrants from other countries to Detroit and other cities. Detroit's total population grew from about 285,704 in 1900 to 1,568,662 by 1930.[4] It was the fastest growing metropolitan area in the United States by the mid-1920s.[5] While other cities faced similar housing problems, it was worse in Detroit because of "the magnitude of the shortage and the potential for violence, especially given the racial dimension."[6]

The vast increase in the black population and the resulting housing shortages pushed some blacks who could afford to move to look for better housing in white communities, which exacerbated racial tensions. Before the 1925 incident involving the Sweet family,

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[1] DAVID ALLAN LEVINE, INTERNAL COMBUSTION: THE RACES IN DETROIT 1915-1926, 3 (1976) [INTERNAL COMBUSTION].
[2] *Id.* at 12.
[3] *Id.* at 5.
[4] *Id.* at 12.
[5] *Id.*
[6] *Id.*

several blacks tried to move into white communities in Detroit but faced vehement opposition from whites. For example, in 1917, fifty blacks were forced out of a rooming house by a mob of 200 whites.[7]

Ku Klux Klan Influence in Detroit

Several other factors contributed to the problems in Detroit which were to engulf the Sweets and their friends. Racial hostility became much worse in the 1920s as the Ku Klux Klan rapidly gained considerable influence. Klan membership grew from about 3,000 in 1921 to about 22,000 by 1923. Walter White, at the time an assistant secretary of the NAACP, stated that "in the two years prior to 1925, 90 percent of the new recruits to the Detroit police force were southern whites, susceptible to Klan propaganda."[8]

Detroit held a special election for mayor in November 1924 because the current mayor was too ill to serve his term. During the 1924 mayoral race the Klan backed Charles Bowles. Bowles and his Klan backers were not very adept at politics and failed to get his name on the ballot in time, so Bowles had to run in a write-in candidate. Bowles lost the race to Johnny Smith, a Catholic, but it was a fairly close contest. Significantly, Bowles would have won if Smith did not manage to get about seventeen thousand ballots rejected because of mistakes made in spelling Bowles' name. Smith's political connections enabled his campaign to get some ballots rejected with very minor misspellings.

White Neighborhoods

Whites in Detroit as in other cities were determined to keep their neighborhoods white, even if they had to use violence to do so. A mob of 5,000 whites threatened to burn down the house of a black man who moved into a white neighborhood in April 1925. In June 1925, Alexander Turner, a black doctor who had moved into a white neighborhood, came under siege by angry whites and Turner was forced under threat of violence to sell his house to a white group called the "Tireman Avenue Improvement Association." In July 1925, Vollington Bristol, a black undertaker, moved to a house he had built on what was considered the boundary line of a black area. When a group of whites formed a mob around it, blacks began to congregate and the police had to intervene.

Also in July 1925, a white mob of about 1,000 tried to drive John Fletcher from his home. During the encounter, someone, likely Fletcher himself, fired shots out of the house and a white teenage boy was hit in the leg. Everyone in Fletcher's house was arrested but Fletcher had some connections with the police commissioner so the case was dropped, although Fletcher did end up moving out the day after the shooting.

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[7] STEPHEN GRANT MEYER, AS LONG AS THEY DON'T MOVE NEXT DOOR: SEGREGATION AND RACIAL CONFLICT IN AMERICAN NEIGHBORHOODS 36 (2000) [hereinafter AS LONG AS THEY DON'T MOVE NEXT DOOR].

[8] HERBERT SHAPIRO, WHITE VIOLENCE AND BLACK RESPONSE: FROM RECONSTRUCTION TO MONTGOMERY 187 (1988) [hereinafter WHITE VIOLENCE AND BLACK RESPONSE].

Clarence Darrow explained the mass migration of blacks along with the search for work by whites in the north was the source of considerable "friction, which has been cultivated by the Klan and augmented by the large increase of southern whites, who have brought with them their views of the Negro's 'proper place.'"[9]

This was the state of race relations in Detroit during the summer of 1925 when a black doctor named Ossian Sweet purchased a home for sale in a white neighborhood.

Dr. Ossian Sweet

Before he was thrust into tremendous legal uncertainty, an uncertainty which most likely would end with life imprisonment, Dr. Ossian Sweet (Ossian is pronounced as "ocean,"[10]) had accomplished a great deal in his life. His accomplishments were all the more impressive because he achieved them at a time when many blacks could not even dream of becoming a doctor.

Ossian was born on October 30, 1895 in Orlando, Florida. He was named after a Reconstruction-era governor, Ossian B. Hart, who had appointed an uncle of Ossian's mother to the position of Justice of the Peace in 1873.[11] Ossian Hart opposed secession during the Civil War and served as a justice of the Florida Supreme Court from 1868-1873. In 1873, he was elected the tenth governor of Florida and the state's first Republican governor, and served until his death one year later.

Ossian Sweet became the oldest of what would be a family of ten children because his older brother, Oscar, died eight days after Ossian was born. Oscar Sweet had been named in honor of Ossian Hart's brother. The Sweets later moved to Bartow, Florida after Ossian's father purchase a plot of land there.[12] The town of Bartow, located about halfway between Orlando and Tampa, was very small and initially was less segregated than some other towns until a railroad increased the population and prosperity of the area.[13] The increased prosperity resulted in increased segregation, which was fairly well established by the time the Sweets moved there in 1898.[14]

The Sweets instilled in their children the virtue of hard work and the importance of education. The children's ability to attend school was severely limited by the Jim Crow segregation they lived under. While they may have been able to get a rudimentary education beyond what their parents could have in their woefully underfunded school,

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[9] ARGUMENT OF CLARENCE DARROW IN THE CASE OF HENRY SWEET 2 (National Association for the Advancement of Colored People) (1927) (Apr.-May 1926) [hereinafter ARGUMENT OF CLARENCE DARROW] (These facts were given by Clarence Darrow to the NAACP).
[10] INTERNAL COMBUSTION, *supra* note 1, at 159.
[11] Kevin Boyle, ARC OF JUSTICE: A SAGA OF RACE, CIVIL RIGHTS, AND MURDER IN THE JAZZ AGE 54, 59 (2004) [hereinafter ARC OF JUSTICE].
[12] *Id.* at 59.
[13] *Id.* at 60.
[14] *Id.* at 61.

education ended in eighth grade with "nowhere to go but the fields and the phosphate mines."[15]

Bartow town officials did not extend utilities to the black part of town, so the Sweet home, built by Mr. Sweet, did not have electricity, running water or plumbing.[16] Racial violence against blacks increased during Ossian's youth because economic changes disrupted the security of many whites; moreover, the rise of the Populist movement threatened Democratic politicians, who then resorted to stirring up white fear of blacks.[17]

A particularly explosive situation involved the rape and murder of the town baker's wife in May 1901. The crime took place less than a mile from the Sweet home. The white community became convinced the perpetrator was Fred Rochelle, age sixteen. Rochelle had fled but he was eventually found by three local blacks who turned him over to a group of passing whites. Rochelle was burned to death in a lynching that night.[18] There were other lynchings in later years, but "Ossian would always remember Fred Rochelle's death as the most terrifying moment of his young life."[19] When he was an adult he would tell others he had witnessed the entire lynching. Ossian was only five years old at the time and it is unlikely that he would have been allowed outside that day; however, he was convinced he had witnessed the murder of Rochelle and it affected him deeply.[20]

It was in this atmosphere of terror that Ossian's parents made the decision to send him north so that he might have a chance for a better life. He was thirteen now and had finished the eighth grade. Of course it was a heart-wrenching decision, and more pragmatically, Ossian was very important as a worker on the family farm. Even so, the thought of Ossian staying was worse because there was no opportunity for an education and the very real threat of violence.

Wilberforce University

The decision was made to send Ossian to Wilberforce University in Xenia, Ohio where he arrived in September 1909 to complete his education. Founded in 1856, Wilberforce was the nation's oldest private African-American university. The president of Wilberforce from 1908 to 1920 was William Sanders Scarborough, who had been born into slavery, and later became the first prominent African American classical scholar.

The plans Ossian's parents had for their son were very ambitious given that in 1900 half the blacks in Florida could not read or write. Furthermore, there were an estimated 8.8 million blacks in the United States in 1900 and only about 1,613 graduated from college during the period 1900-1909.[21] The Sweets could not possibly afford the yearly tuition of

[15] *Id.* at 64.
[16] *Id.* at 61.
[17] *Id.* at 65.
[18] *Id.* at 68.
[19] *Id.* at 68-69.
[20] *Id.* at 69.
[21] MONROE N. WORK, ED., NEGRO YEAR BOOK: AN ANNUAL ENCYCLOPEDIA OF THE NEGRO 1921-1922, 243 (1922).

$118, but Wilberforce was owned and operated by the African Methodist Episcopal (AME) church and Ossian received a full scholarship from the AME's Florida Conference to attend.[22] Sadly, after the young Ossian arrived at Wilberforce he was informed that there was no money for the scholarship.[23] This was a consequence of Wilberforce's chronic underfunding.

Ossian made a courageous decision for a thirteen year old many hundreds of miles from his home. He decided to stay at Wilberforce and worked many hard jobs on campus to cover his expenses, such as shoveling snow and stoking the campus furnaces.[24] Instead of going back to Florida during the summers, Ossian went to Detroit and worked in various jobs – he was a hotel bellhop and waiter on excursion boats during the summer; he also washed dishes and sold soda.[25]

Talented Tenth

Ossian's struggles to achieve an education put him on the path to becoming part of the celebrated "Talented Tenth," a term made famous by W.E.B. Du Bois. Du Bois believed that black equality would be achieved by a vanguard of elite, highly educated, black men who would provide the leadership blacks needed. Du Bois first formally proposed this idea in a 1903 essay titled *The Talented-Tenth* in which he expressed the belief that "[t]he Negro race, like all races, is going to be saved by its exceptional men." Ossian Sweet was deeply influenced by Du Bois's call for a cadre of elite blacks and Ossian wanted to achieve an education and become one of these exceptional men.

But Ossian was to find that racism and racial violence also occurred in the North. The migration of both blacks and whites from the South to the North also brought with it the more virulent forms of racism from the South. While the North would claim the moral high ground when it came to race relations, they were not so tolerant when thousands of blacks migrated north to escape the worst forms of racism in the South. Eventually tensions in the North between blacks and whites led to violent race riots.

NAACP

One of the most shocking acts of racist violence in the North occurred in August 14, 1908 when a rumor of rape instigated a white mob in Springfield, Illinois to go on a rampage in which eight blacks were killed (six were shot and two were lynched).[26] This and other acts of violence in the North prompted a group of progressives in New York to form an organization dedicated to equality for blacks. This group, which eventually created the NAACP, was overwhelmingly white but it did include William Scarborough and W.E.B. Du Boise, among others.

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[22] ARC OF JUSTICE, *supra* note 11, at 73.
[23] *Id.* at 74.
[24] *Id.* at 74.
[25] *Id.* at 84.
[26] *Id.* at 80.

There appears to be some discrepancy concerning when the NAACP was actually formed, even among authoritative sources. According to Mary White Ovington, co-founder of the NAACP, it was formed at a small meeting in early 1909: "So I wrote to Mr. Walling, and after some time, for he was in the West, we met in New York in the first week of the year of 1909. With us was Dr. Henry Moskowitz, now prominent in the administration of John Purroy Mitchell, Mayor of New York. It was then that the National Association for the Advancement of Colored People was born."[27] Another source states that a call for a meeting went out on February 12, 1909, the centennial birth of Abraham Lincoln, and the first National Negro Conference was held in New York City, May 31 to June 1, 1909.[28] According to this account, this 1909 conference led to the development of the NAACP.[29] Still another source states that the NAACP was formed at the second Annual National Negro Conference held in New York May 31-June 1, 1910: "In May 1910, we held our second conference in New York, . . . It was then that we organized a permanent body to be known as the National Association for the Advancement of Colored People."[30] However, the discrepancy may simply involve when exactly the formal name of the organization was adopted. Regardless, 1909 was the beginning of the NAACP. Ossian Sweet entered Wilberforce University in September 1909.

Ossian Sweet Reaches Higher

Ossian had already achieved more education than the vast majority of blacks, especially those from the South. But he set an even higher goal. At some point during his time at Wilberforce, Ossian decided to become a doctor, a decision that was not only ambitious but "wildly unrealistic."[31] There were less than 2,500 black doctors in the United States, new professional standards made it harder for blacks to become doctors, most of the nation's medical schools had stopped admitting any black candidates and only a few schools would even admit but one or two black students per year, and very few blacks could even afford the "luxury of devoting four years" to medical school.[32] The only two black medical schools in the country were Howard University in Washington, D.C. and Meharry Medical College in Nashville, and most of their available slots went to black students from more prestigious schools such as Lincoln, Howard or Fisk.[33]

But an unexpected set of events during World War I intervened in Ossian's life. Two months before Ossian was scheduled to graduate, President Woodrow Wilson asked Congress to declare war against Germany. Black leaders from the NAACP, including W.E.B. Du Bois, pleaded for blacks to join the war effort, thinking that if blacks fought for democracy, this sacrifice would force white Americans to recognize the rights of black people. Joel Spingarn, the white president of the NAACP, got approval from the

[27] Mary White Ovington, HOW NAACP BEGAN (Originally Written in 1914) http://www.naacp.org/about/history/howbegan/index.htm
[28] *Birth of the NAACP*, The Crisis 79 (Feb. 1969).
[29] *Id.*
[30] NAACP: CELEBRATING 100 YEARS IN PICTURES 16 (2008).
[31] ARC OF JUSTICE, *supra* note 11, at 86.
[32] *Id.*
[33] *Id.*

Army to establish a training camp for black officers in Des Moines, Iowa. Ossian's poor eyesight prevented him from qualifying for this military training but this turned into a lucky break because the involvement of black college men in the war effort opened up more slots for medical school.[34] Later that year Ossian learned he had been accepted to Howard University's College of Medicine. Ossian graduated from Howard with a medical degree in 1921 and then moved to Detroit as a new doctor. Without any connections or family in the city he would have to make it on his own. He used his meager savings to prepare for the state medical exam and was awarded his medical license in November 1921. Ossian was the only black to pass the exam that year.[35]

Ossian eventually set up practice in the back office of a small pharmacy in Detroit's Black Bottom area and established a practice serving the poor blacks in this area.[36] His patients were very poor and normally could only pay a dollar or two - and some could not even afford that - but he was still able to make a better living than the best-paid factory workers from the black community.[37] Ossian was very frugal and was able to save money for the future. Moreover, he also secured work as the medical examiner for Liberty Life Insurance.[38]

Ossian met Gladys Mitchell in 1922 and they were married later that year. They initially lived with Gladys' parents, which allowed them to save more money. During this time, Ossian decided he was going to study medicine in Europe for a year. Ossian and Gladys set sail for Europe in 1923 and traveled to Vienna, the Mediterranean and Paris. Ossian attended lectures by Baron von Eiselsberg on neurosurgery at the University of Vienna and lectures by Marie Curie on radium therapy at the Sorbonne.[39] Ossian did not earn any degree or certificate during his year abroad, but attending the lectures of these eminent Europeans gave him impressive credentials that many other American doctors lacked.[40] The Sweets returned to the United States in June 1924.

2905 Garland Avenue

Upon returning from Europe, Ossian and Gladys continued to live with Gladys' parents. Eventually they began looking for a place to establish their own home. They did not want to live in the already overcrowded black section with its poor housing. But their choices were severely restricted by racial covenants that kept blacks, even if they could afford it, from buying homes in white neighborhoods. A realtor eventually showed them a house at 2905 Garland Avenue at the corner of Charlevoix Avenue that was for sale. The home was owned by a mixed race couple; the husband was black and his wife was white, but the husband was very light-skinned and most whites were unaware that he was black. The Sweets were wary of racial problems that could arise from moving into a white neighborhood but they eventually decided to buy the house. In June 1925 they signed a

[34] *Id.* at 87.
[35] *Id.* at 113.
[36] *Id.*
[37] *Id.* at 114.
[38] *Id.* at 115.
[39] *Id.* at 128.
[40] *Id.* at 131.

purchase agreement to buy the house for $18,500 and gave the sellers a $3,500 down payment.

Dr. Sweet was very aware that he and his family risked a real threat of violence by moving into a white neighborhood. This was made clear to him by the other incidents that occurred in the summer of 1925 when blacks tried to move into white areas. In fact, he did not move in immediately. He decided to keep his family at his wife's parents' home for the rest of the summer because of the danger and so he could contemplate what he was getting into. However, he had used all of his savings for the $3,500 deposit on the house and he would lose this money if he did not go through with the purchase.

Interestingly, although the Sweets were the first black family to move into the white neighborhood on Garland Avenue, on just the next street over there lived at least six back families.[41] According to the NAACP, "When Dr. Sweet purchased the house there were no Negroes residing nearer than two or three blocks away."[42]

Neighborhood Improvement Association

When word reached the whites in the neighborhood that a black family had purchased the home, a meeting was held in July at the school located diagonally across the street from the Sweets' new home. The main speaker at this meeting was the head of the "Tireman Avenue Improvement Association" which was the same group that had engineered the eviction of Dr. Turner.[43] He gave advice to the white crowd about techniques for driving out blacks and from this meeting the "Waterworks Park Improvement Association" was formed. Clarence Darrow described this association:

> As soon as the neighbors heard of the purchase of the house by Dr. Sweet, they organized what they called a "Waterworks Park Improvement Association." The dues were fixed at one dollar a year, and nearly every person in the community joined. It was admittedly organized to prevent colored people from coming into the district. Similar organizations existed in other parts of the city, and the assaults on the houses of the Negroes were generally instigated by these associations.[44]

Neighborhood "improvement associations" were a common means of preventing blacks from moving into white neighborhoods. Superficially they were created to promote neighborhood security and protect property values, but their main goal was to keep neighborhoods white. One of the most effective methods used by these improvement associations to prevent blacks from moving in was the use of racially restrictive covenants. These were contractual agreements in which property owners agreed not to sell, rent or lease property to blacks.

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[41] AS LONG AS THEY DON'T MOVE NEXT DOOR, *supra* note 7, at 36.
[42] ARGUMENT OF CLARENCE DARROW, *supra* note 9, at 2.
[43] INTERNAL COMBUSTION, *supra* note 1, at 158.
[44] ARGUMENT OF CLARENCE DARROW, *supra* note 9, at 2.

The purchase of the house on Garland Avenue by the Sweet family generated considerable interest in the neighborhood. The Waterworks Park Improvement Association meeting began in the main room of the school but eventually the "crowd was so large that they moved out on the lawn. Some seven or eight hundred people attended this meeting."[45]

Sweets Move In

Having made his decision, Dr. Sweet informed the police that he was planning to move into the house. Dr. Sweet, Gladys and several friends began to move the Sweet family into the house on the morning of Tuesday, September 8, 1925. They left their baby Eva with Gladys' mother. Along with Ossian and Gladys there were Ossian's brothers, Henry Sweet, a student at Wilberforce University, and Dr. Otis Sweet, a dentist in Detroit; Ossian Sweet's chauffeur Joseph Mack; William Davis, a pharmacist and federal narcotics agent; and John Latting, a friend of Henry and Norris Murray who was a handyman and chauffeur. Later in the day, two women, Edna Butler and Serena Rochelle, came to help Gladys with interior decorating decisions.

Prior to moving, Dr. Sweet had consulted with Cecil Rowlette, an attorney, who advised Ossian against taking along this entourage during the move because if "casual acquaintances" were in the house "by design, the protection the law gives a man defending his property is overstepped."[46] Dr. Sweet also asked his personal attorney Julian Perry, who was black, if he would accompany the Sweets during the move. Perry initially agreed but he did not show up on the morning of the move.

Guns and Ammunition

Along with their household goods, the Sweets brought along a significant quantity of firearms and ammunition. Later during the trial the prosecution would list these items as "one shotgun, two rifles, and seven revolvers, ten weapons . . . revolvers consisting of two automatics, one 32-20 revolver, one 38 caliber revolver, and three 39 specials, together with a large quantity of ammunition." They did not move in with much furniture because they had been living with Gladys' parents and they planned on buying furniture after moving in. This would have legal ramifications later because the prosecution would argue that they moved in armed for a fight, as demonstrated by the amount of firearms and ammunition and the absence of household furniture.

The move itself was uneventful and things appeared to be going well until nightfall when occupants in the house noticed large numbers of whites repeatedly passing back and forth in front of the house. The two women who were helping Gladys were afraid to leave and so they decided to stay overnight. A crowed formed that was eventually estimated to be from 500 to 800 in number and stayed until 3:00 a.m. However, the next day was peaceful enough that Dr. Sweet and Gladys went furniture shopping, and Dr. Sweet's brother Otis went to work, as did several other members of the group. Later in the day,

[45] *Id.* at 3.
[46] INTERNAL COMBUSTION, *supra* note 1, at 161.

some casual acquaintances of Dr. Sweet named Leonard Morse, Charles Washington and Hewitt Watson came by and Dr. Sweet asked them to stay for dinner.

Violence Begins

At eight o'clock in the evening of September 9, things began to turn ugly. Someone in the house noticed a mob of whites gathering outside. The crowd grew until it seemingly filled the neighborhood around the house. Nearly twenty policemen were present but they did not respond when the mob began to throw rocks at the house and yell racial epithets. When Otis Sweet and William Davis returned to the house in a taxi, the mob continued its verbal abuse and threw bricks and stones at the men before they managed to get inside the house. The house was now under attack by the mob which threw bricks and stones against the sides and roof and broke windows.

Shots Fired

The entire social and legal situation changed suddenly when shots rang out from the house as some of the occupants fired their weapons. A white man named Leon Breiner was killed and a white teenager named Erick Houghberg was seriously wounded. It was at this point that the police reacted. They entered the Sweets' home and arrested everyone inside.

A police search of the house recovered the assortment of guns and ammunition. All of the suspects were interrogated and for the most part they all stuck to the same story, except for Henry Sweet. Henry Sweet admitted firing a weapon and he claimed that he fired twice: once a warning shot into the air and once just over the top of the heads of the crowd. Henry Sweet would be the only defendant who admitted firing at the crowd outside the Sweets' house.

The eleven people in the house at the time of the shooting were charged with conspiracy to commit murder for the death of Leon Breiner and conspiracy to commit assault with the intent to kill for the wounding of Erick Houghberg. If convicted, they could be sentenced to life in prison.

In an interview given in 1927, Dr. Sweet recounted the decision to move into the house: "[I]f I had known how bitter that neighborhood was going to be, I wouldn't have taken that house as a gift. But after I had bought it, I felt that I could never again respect myself if I allowed a gang of hoodlums to keep me out of it."[47]

Difficulty Securing Legal Counsel

The coming trial and the precedent it would set were enormously important to the NAACP to blacks in general. It was imperative that they secure the best legal talent

[47] MARCET HALDEMAN-JULIUIS, CLARENCE DARROW'S TWO GREAT TRIALS: REPORTS OF THE SCOPES ANTI-EVOLUTION CASE AND THE DR. SWEET NEGRO TRIAL 31-32 (1927).

possible to defend the Sweet family and the other defendants. Walter White knew the stakes were high:

> The importance of the case to the Negro cause was obvious. If the Sweets were not given adequate legal defense, if the ancient Anglo-Saxon principle that 'a man's home is his castle' were not made applicable to the Negroes as well as others, we knew that other and even more determined attacks would be made upon the homes of Negroes throughout the country. We were equally convinced that legal affirmation that a Negro had the right to defend his home against mob assault would serve to deter other mobs in Detroit and elsewhere.[48]

But hiring the best lawyers for the defense was not easy. White describes the difficulties they faced in securing defense counsel who would be able to defend black defendants charged with murdering a white victim:

> It soon became apparent that the task would be terribly difficult. We sought to employ the ablest lawyers in Detroit for the defense. We wanted attorneys who were not only capable but whose standing in the community would demonstrate to decent people in Detroit and elsewhere that the highly biased stories which had appeared in the newspapers were not correct. In brief, we did not want attorneys who were professionally notorious for their ability to free persons accused of crime no matter how guilty. We wanted instead men whose reputations were established for taking only cases where they were certain that the case of the defendant was just.[49]

NAACP Calls on Clarence Darrow

Clarence Darrow was very sensitive and empathetic to the cause of blacks. According to one of Darrow's biographers: "He spoke before colored audiences, he defended them in court, he wrote for their press, he was a member of the National Association for the Advancement of Colored People, he fought for their rights, he was always their friend."[50]

The NAACP would turn to Darrow not just because of his nationwide fame in the Scopes and Leopold and Loeb trials. The NAACP leadership was well aware of Darrow's attitudes and beliefs about race. Darrow was a member of the NAACP's general committee as early as 1910.

In either event, because of his advocacy of equal rights for blacks, Darrow was invited to speak at the second Annual National Negro Conference in 1910. Darrow liked to say things to surprise and even shock people. At the conference, Darrow caused a controversy when he called for the repeal of laws banning interracial marriage.

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[48] WALTER WHITE, A MAN CALLED WHITE: THE AUTOBIOGRAPHY OF WALTER WHITE 74-75 (1948) [hereinafter A MAN CALLED WHITE].
[49] *Id.* at 75.
[50] ATTORNEY FOR THE DAMNED 532 (Weingberg ed. 1957).

Darrow also caused a sensation at this second annual conference when he spoke at a meeting whose goal was to give blacks advice about how to better their condition in the South and the rest of the country. Darrow told the crowd "'What the South wants by its acts of disenfranchisement is not to make the negro leave the South, but to make the negro keep his place.'"[51] Darrow continued "'If I were going to advise the negroes of this country what to do. I would advise them to follow the example of the whites and get along without working. Why do you go to the industrial schools? Do you want more work? . . . You won't get more wages for it. The whites won't give you any more wages. They don't give more wages to horses.'"[52] The news article reports that younger blacks in the audience were laughing and applauding while elder statesmen were shocked. One of the clergy who had spoken earlier went up to Darrow and whispered in Darrow's ear and Darrow quickly ended his speech and sat down.

Darrow was among a group of whites that were crucial to the success of the NAACP in the early years after its founding: "The pivotal role of white founders and white sustaining members—the Spingarn brothers, Clarence Darrow, Arthur Garfield Hays, Oswald Garrison Villard, Mary White Ovington, Kivie Kaplan, and countless others—was critical to the development and growth of the NAACP."[53]

Given Clarence Darrow's well-known sympathy for and work on behalf of blacks, it is obvious why his name would come up when the NAACP was looking for attorneys to represent the defendants in Detroit. But Darrow was not initially contacted and it was Walter White who was instrumental in getting Darrow to defend the Sweets.

White worked with others to draw up a list of lawyers and then went about contacting them. White soon found out how difficult it would be to secure adequate representation for the defendants. As he met with the lawyers on his list, "[o]ne after the other made some excuse for not taking the case or else frankly told me that the public feeling against Dr. Sweet and his fellow defendants was so bitter that they could not afford to accept the case because it would cause them to lose valuable clients."[54] White believed that other lawyers demanded impossibly high fees, knowing the defense could never afford them. White recounts, "I returned to New York to make a very depressing report. It was decided then to telegraph Clarence Darrow in Chicago to ask him if he would head the defense counsel."[55]

Clarence Darrow at the Peak of His Fame

In 1925 Clarence Darrow was the most famous lawyer in America. Just about three months earlier he had ensured his lasting fame by participating in the famous Scopes anti-evolution trial in Dayton, Tennessee. In 1924 he defended the youthful killers Nathan

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[51] SOCIALIST ADVISES NEGROES TO STRIKE; Speech by Clarence Darrow Stirs Sociologists in Cooper Union to Warm Protest, New York Times, May 13, 1910, p. 2.
[52] *Id*.
[53] SONDRA KATHRYN WILSON, ED., IN SEARCH OF DEMOCRACY: THE NAACP WRITINGS OF JAMES WELDON JOHNSON, WALTER WHITE, AND ROY WILKINS (1920-1977) 3-4 (1999).
[54] A MAN CALLED WHITE, *supra* note 48, at 75.
[55] *Id.*

Leopold, Jr. and Richard Loeb who confessed to the kidnapping and thrill killing of fourteen-year-old Bobby Franks in Chicago. Although he participated in numerous high profile cases, the Leopold and Loeb case and the Scopes trial ensured Darrow's place in history.

When the NAACP tried to contact Darrow in Chicago they found he was visiting Arthur Garfield Hays in New York. Hays and Darrow had become good friends as they worked together on the Scopes defense during the summer. A committee consisting of James Weldon Johnson, the first black secretary of the NAACP, Walter White, assistant secretary of the NAACP, Arthur Spingarn, head of the NAACP's National Legal Committee, and Charles Studin went to meet with Darrow. Studin worked on libel reviews for NAACP's flagship publication *The Crisis* and substituted for Spingarn during his absences.

An amusing incident involving racial appearances is recounted about this meeting, although there are various versions of what exactly was said. After hearing about the predicament of the Sweets and their co-defendants in Detroit, Darrow turned to Spingarn who was Jewish and had curly hair and a dark complexion and said, "I know full well the difficulties faced by your race." Spingarn replied that he was not a Negro. Darrow then turned to Studin who like Spingarn had a dark complexion and curly hair and said, "Well, you understand what I mean." Studin then informed Darrow that he too was white. Darrow then looked at Walter White, who was seven-eights white but considered himself black despite his white appearance and said, "Well with your blue eyes and blond hair, I could never make the mistake of thinking you colored." To Darrow's astonishment, White said he was a Negro. Then Darrow smiled and said, "That settles it, I'll take the case."

Walter White tells essentially the same story about Darrow mistaking Spingarn and Studin as black and Walter White as Caucasian, but White does not claim that Darrow agreed to take the case after that incident. Later White met with Darrow in the latter's Chicago office to discuss the case. Darrow indicated to White that he would consider becoming chief counsel of the case, but only if the defendants and the black lawyers that some of the defendants had already hired agreed. Three local black attorneys had already been retained for the defense: Julian Perry, Cecil Rowlette, and Charles Mahoney. White was impressed by this display of modesty: "Although Mr. Darrow was at that time at the very peak of his considerable fame as a lawyer and a champion of human liberty, it was characteristically modest of him to believe that there might be some objection to his appearing as chief counsel for the defense."[56]

Darrow asked White many questions, including, "Did the defendants shoot into that mob?" White was very hesitant to answer for fear that Darrow might not take the case if the defendants had actually fired into the crowd. Darrow told White, "Don't try to hedge. I know you were not there. But do you *believe* the defendants fired?" White replied that he thought they did fire and was going to explain that he thought they were justified in defending themselves when Darrow interrupted him by saying, "Then I'll take the case. If

[56] A MAN CALLED WHITE, *supra* note 48, at 76.

they had not had the courage to shoot back in defense of their own lives, I wouldn't think they were worth defending."[57]

Walter White thought very highly of Darrow. Before White and his wife Gladys had a son in 1927, White claims that Clarence and Ruby Darrow told the Whites that they wanted the baby to be their namesake; White stated, "'Gladys and I were most happy to honor our son in this fashion.'"[58] When the baby was born in June he was given the name Walter Carl Darrow White - a combination of names from his father, Clarence Darrow and likely Carl Van Vechten, a white literary critic and novelist. However, some accounts say that White told people the name Carl was from Carl Roberts, a Chicago doctor and family friend. Years later, after a falling out with his father the son changed his name to just Carl Darrow.

Other prominent blacks also contacted Darrow. W.E.B. Du Boise implored Darrow to "come to the rescue of our fellow sufferers in Detroit."[59] James Weldon Johnson had wired Darrow asking him to come to the Sweets' defense, stating that the case was the "dramatic high point of the nationwide issue of segregation."[60]

Despite his sympathy for the defendants and the importance of the case, Darrow was tired of fighting in court for unpopular causes. He recounts in his 1932 autobiography his thoughts after the Scopes trial:

> I had determined not to get into any more cases that required hard work and brought me into conflict with the crowd. I had fought for the minority long enough. I wanted to rest, but to rest would be something new. But I could not rest. I get tired of resting. And something always comes along to disturb my restful contemplations, anyhow, so—I was in New York, and a committee of negroes came to see me. I knew they were negroes because they told me so. In color and intelligence they were like many of the most intelligent white men that I know. The committee came in behalf of the National Association for the Advancement of Colored People, an organization of negroes with headquarters in New York City. Doctor J. E. Spingarn is its president; and Mr. James Weldon Johnson, at that time, was its secretary; and Walter White, the present secretary, was then assistant secretary. Each member of the committee was a man of attainments in the realm of arts and letters. Their great individual intelligence cannot be due to their white blood, because so many of my Southern friends assure me that persons of mixed blood take on the worst characteristics of both strains. Personally, I do not know, because I have never known any one who was not of mixed blood. . . .
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> This committee wanted to engage my services to defend eleven negroes in Detroit, on the charge of murder. I made the usual excuses that I was tired, and growing old, and was not physically or mentally fit. I knew that I would go when

[57] *Id.* at 76-77.
[58] KENNETH ROBERT JANKEN, WALTER WHITE: MR. NAACP 116-17 (2006) [hereinafter MR. NAACP].
[59] WHITE VIOLENCE AND BLACK RESPONSE, *supra* note 8, at 189-90.
[60] *Id.* at 189.

> I was making the excuses. I had always been interested in the colored people. I had lived in America because I wanted to. Many others came here from choice to better their conditions. The ancestors of the negroes came here because they were captured in Africa and brought to America in slave ships, and had been obliged to toil for three hundred years without reward. When they were finally freed from slavery they were lynched in court and out of court, burned at the stake, and driven into mean squalid outskirts and shanties because they were black, or had a drop of negro blood in their bodies somewhere. I realized that defending negroes, even in the North, was no boy's job, although boys usually were given that responsibility. I was the more easily persuaded because my good friend, Arthur Garfield Hays, was willing to go with me.[61]

There is a discrepancy about the amount of the fee that Darrow requested to defend the Sweets and the other defendants. According to one account, Darrow initially asked for $50,000 but when he was informed that the NAACP could not afford that amount, he later dropped this to $5,000.[62]

That Darrow's presence would raise awareness of the case was not lost on the NAACP. W.E.B. Du Bois, one of the founders of the NAACP, wrote that the "Sweet case never would have been heard of by most of the country if we had not hired Clarence Darrow and flooded the land with propaganda."[63]

White and Black Lawyers

White lawyers were critical to the NAACP in its first two decades. Before 1930, "prominent white lawyers carried the principle burden of the national offices' legal activity."[64] Cases undertaken by NAACP branches in southern states were usually handled by white lawyers; in contrast, in the North and in border states, the "usual practice of local branches was to employ black lawyers who on frequent occasions associated themselves with white counsel."[65] But in important cases such as those involving the NAACP's campaign against residential segregation, when the case was in the north or border states "where black lawyers were more numerous, they were more likely to be retained in such cases but nearly always as associates of prominent white counsel."[66] Darrow and Hays were hired because of the enormous stakes involved. There was a good chance the defendants would be convicted and this would set a very bad precedent for the rights of blacks to self-defense, as well as for housing de-segregation.

While having white lawyers in prominent positions could be considered paternalistic: "[B]lack leaders in the NAACP themselves emphatically favored using prominent white attorneys. This policy was rooted in two very practical considerations—the problems

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[61] CLARENCE DARROW, THE STORY OF MY LIFE 301 (1932) [hereinafter STORY OF MY LIFE].
[62] SIDNEY FINE, FRANK MURPHY: THE DETROIT YEARS 153 (1975) [hereinafter DETROIT YEARS].
[63] HENRY LEE MOON, THE EMERGING THOUGHT OF W.E.B. DU BOIS 89 (1972).
[64] August Meier & Elliott Rudwick, *Attorneys Black and White: A Case Study of Race Relations within the NAACP*, 62 The Journal of American History 913, 915 (1976) [hereinafter *Attorneys Black and White*].
[65] *Id.* at 915.
[66] *Id.* at 923-24.

besetting the black legal profession, and NAACP's ability to secure the services of certain highly distinguished white attorneys."[67]

Statistics illustrate the obstacles facing black lawyers. In 1930, blacks "formed only about .8 percent" of the attorneys in the United States with the number in the South even lower.[68] Despite the dearth of black attorneys, animosity towards the idea of white lawyers taking the lead role in the Sweet defense did arise. According to a study of the issue "[u]nhappiness over the NAACP's reliance on white lawyers, which had been latent in the early years, surfaced during 1925-1926" because of the Sweet trials in Detroit.[69] By the time Walter White arrived in Detroit, the defendants had already hired three black attorneys. White informed the black attorneys that it was the position of the NAACP's national office that a white attorney "of the very highest standing should be retained at once" because even the "fairest-minded white citizens" of Detroit believed that the defendants had fired and killed a man without provocation.[70]

The black lawyers told Walter White that white lawyers would not be able to "understand Negro psychology" to which White responded that "the judge, the jury, and the 'larger court of public opinion which influences the court' would all be white."[71] The need to get prominent white lawyers involved was reiterated by Oscar Baker, one of the most successful black lawyers in Michigan, and by Mose L. Walter, the black vice president of the NAACP's Detroit branch who stated that the black '"public demands that we take action at once to get a white attorney."'[72] Although it took some pressure and they did threaten to quit, the black attorneys were persuaded to accept the national office's decision not only to hire white attorneys but to give them complete control of the case.[73] This decision culminated in the NAACP's selection of Darrow because he was the "ablest attorney of national prestige that we can possibly secure."[74]

The NAACP also recognized that it needed a black attorney on the case to assure the black community. And Darrow "with an eye on local white opinion" insisted that a local white attorney also be included.[75] The defense did retain a local white attorney named Walter Nelson. Although local white and black attorneys were present "[i]n actuality Darrow and his associate, Arthur Garfield Hays, completely handled the defense, using the local counsel, both white and black, only for symbolic purposes."[76] Although the local black attorneys played a symbolic role, they demanded full pay which rankled Walter White. White complained that the black attorneys demanded the full $4,300 fee previously agreed to although they "'were of practically no use'" during the trials and

[67] *Id.* at 915.
[68] *Id.*
[69] *Id.* at 930.
[70] *Id.*
[71] *Id.* at 930-31.
[72] *Id.* at 931.
[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] *Id.*

were essentially "'nothing except ornaments'" on the defense team.[77] In the end, the black attorneys were paid in full so as not to damage the NAACP's reputation with the black population.[78]

Clarence Darrow and Race

There are numerous instances of Darrow working with blacks as equals and standing up for the rights of blacks during his career. Prior to the Sweet trials, Darrow had defended several blacks in court and in other ways.

Oscar Stanton DePriest (1871 - 1951)

In 1917, Oscar DePriest,[79] a black alderman from Chicago's Second Ward, was indicted on conspiracy charges for allegedly protecting illegal gambling and prostitution operations.[80] DePriest, born in Alabama in 1871 to former slaves, became Chicago's first black alderman and the first black elected to Congress since Reconstruction.

The charges against DePriest, who the *Chicago Tribune* referred to as "King Oscar," grew out of his organization of a "colored voters club" in 1916 that demanded contributions from local gamblers in order to support upcoming elections.[81] DePriest ran what was described as his own "Tammany Club" from a real estate office.[82] Since vice and corruption was common in the city of Chicago, the black population resented De-Priest's indictment and believed he was targeted because of his race.[83] Darrow worked with Edward H. Morris, a prominent black attorney in Chicago, to defend DePriest.

During his final summation to the jury, Darrow warned them to be on guard against racial prejudice when rendering their verdict.[84] Darrow who loved to play poker told the jury:

> Gambling is a horrible crime,' . . . Why doesn't our industrious state's attorney attack it in the women's clubs, where they play bridge whist for money and prizes? That is gambling. Why doesn't he pull down my house and yours when we play cards? If this defendant has gambled he would be liable to a $200 fine. But if he conspired to permit gambling by others he may be sent to the penitentiary for five years. It is not fair.[85]

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[77] *Id.* at 931-32 (citing Box D-86, NAACP Papers).
[78] *Id.* at 932.
[79] DePriest's last name is often spelled De Priest. He used the spelling DePriest in a letter he wrote to Clarence Darrow in 1931.
[80] ARTHUR AND LILA WEINBERG, CLARENCE DARROW: A SENTIMENTAL REBEL 272-73 (1980) [hereinafter SENTIMENTAL REBEL].
[81] Robert M. Lombardo, *The Black Mafia: African-American organized crime in Chicago 1890–1960*, 38 Crime, Law & Social Change 33, 39 (No. 1) (July 2002).
[82] *Id.*
[83] *Id.*
[84] SENTIMENTAL REBEL, *supra* note 80, at 273.
[85] *Id.*

Darrow was able to persuade the all-white jury to find DePriest not guilty. In 1928, DePriest was elected to Congress as a member of the Republican Party.

Jessie Binga (1865 – 1950)

Darrow also came to the aid of Jessie Binga who rose to prominence as a banker in Chicago only to lose everything due to the Great Depression and a conviction for embezzlement. Binga was born in Detroit but moved to Chicago. He became a realtor, banker and major developer of Chicago's South Side in the 1920s.[86] Binga founded the prosperous Binga State Bank but "a combination of real estate depression, unwise loans and investments, and inept leadership" as well as illegal activities which seemed to have been rife led to its sudden collapse in 1930.[87] During his years of success, Binga also faced racial violence because he helped blacks purchase property in white areas. His home and businesses were bombed six times.[88]

In 1933, Binga was convicted of embezzling $22,000 and sentenced to 10 years in prison.[89] Binga went to prison and "[n]ot until 1938 did the combined efforts of religious leaders, Clarence Darrow, attorney George Griffing, and many others bring his release."[90] Darrow had appeared before a subcommittee of the Illinois State Parole Board to plead for Binga's release.[91] Binga lived twelve more years, eking out an existence as a janitor.

In his autobiography, Darrow mentions DePriest and a colored banker in Chicago, both of whom suffered through racial violence. Although he does not name the banker, he is almost certainly referring to Jessie Binga:

> It is always hard for a colored man to find a decent living-place in America, North or South. We have a colored banker in Chicago whose home has been bombed nine times, obviously by good people who want to drive him away. The home of Oscar DePriest, a colored congressman of Chicago, has been bombed a number of times. In none of these cases is any one ever arrested, much less sweated and beaten and maltreated, as is growing to be the usual treatment for any one suspected of crime.[92]

Reverdy Cassius Ransom (1861 – 1959)

Darrow formed a friendship with Reverdy C. Ransom, a black Christian socialist, civil rights activist, and Methodist Bishop. Ransom was a leading figure in what has been termed the "Social Gospel Movement." While working in Chicago, Ransom came in

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[86] Carl R. Osthaus, *The Rise and Fall of Jesse Binga, Black Financier*, 58 The Journal of Negro History, 39 (1973) [hereinafter *Rise and Fall of Jesse Binga*].
[87] *Id.* at 56.
[88] Accounts vary about how many times Binga'a property was bombed. Darrow claims it was nine times.
[89] *Rise and Fall of Jesse Binga*, *supra* note 86, at 58-59.
[90] *Id.* at 60.
[91] SENTIMENTAL REBEL, *supra* note 80, at 376.
[92] STORY OF MY LIFE, *supra* note 61, at 304-05.

contact with whites who were involved in settlement house and charity organizations, and this is how he came to know Darrow.[93] Ransom got involved in labor disputes such as the Chicago stockyard strike in the summer of 1902, in which white union workers went on strike and blacks were brought in to work as strikebreakers.[94] This inevitably led to violence and "Ransom saw the need for outside mediation, and with Clarence Darrow, offered himself" to the Swift Packing Company and to Armour Packing Company to try to resolve the impasse.[95] The strike was eventually resolved.

Ransom's friendship with Darrow was based on the "clear cut ideals and concepts that Darrow espoused on the issue of race."[96] Darrow had established his views on race through his actions:

> He began his law practice in Chicago in the 1890's, and his clientele included a large number of Blacks at a time when few white lawyers would take their cases. A long-time member[s] of the NAACP, he frequently offered legal expertise to the organization, gave time, talent and financial resources to many institutions, including clubs, lodges, and colleges. He lectured at Howard University Law School, wrote numerous articles for the black press, and frequently spoke at Bethel A.M.E. Church and the Institutional Church Social Settlement in Chicago during the years Reverdy Ransom pastured those institutions."[97]

Thus because of Darrow's actions "[i]t is clear why Ransom found Darrow such a sympathetic and warm friend during his Chicago Ministry, since Ransom judged people, particularly Whites, on their freedom from prejudice."[98] That Darrow was an outspoken agnostic and Ransom a deeply religious man did not matter because "if they were able to meet Blacks as equals, Ransom was not concerned about their denominational or religious proclivity."[99] Because he was "a proponent of racial and social equality, Darrow became a major contributor to Ransom's Social Gospel perspective."[100]

Edward H. Morris (1858 or 1859 – 1943)

Darrow worked with Edward H. Morris, a leading black lawyer in Chicago, while defending Oscar DePriest. According to once source, Morris was only the fifth black to pass the Illinois bar.[101] The 1899 *The Bench and the Bar of Illinois: Historical and Reminiscent* describes Morris's remarkable rise in the legal profession:

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[93] Terrell Dale Goddard, *The Black Social Gospel in Chicago, 1896-1906: The Ministries of Reverdy C. Ransom and Richard R. Wright, Jr.*, 84 (No. 3) The Journal of Negro History, 227, 236 (1999).
[94] *Id.* at 237.
[95] *Id.*
[96] CALVIN S. MORRIS, REVERDY C. RANSOM: BLACK ADVOCATE OF THE SOCIAL GOSPEL 80 (1990).
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] CHRISTOPHER ROBERT REED, BLACK CHICAGO'S FIRST CENTURY: VOLUME 1, 1833-1900, 264 (2005).

> The life record of this member of the Chicago bar is another proof of the statement that merit is the only indispensable qualification at the bar. Mr. Morris was born a slave upon one of the plantations of Kentucky, in 1859. To-day he stands among the successful legal practitioners of the western metropolis, enjoying a very handsome income which results from a large and important law practice. . . . For twenty-eight years he has been a resident of Chicago. Under great pecuniary difficulties he acquired his professional education, and on the 12th of June, 1879, he was admitted to the Illinois bar, having passed an examination before the appellate court. His exchequer was then in such a state of depletion and his wardrobe so in need of repair that when taking the examination he wore a long overcoat, closely buttoned, in order to hide the ravages of time and wear upon his trousers. In the years which have since passed, however, he has won financial success. With strong determination and invincible courage he entered upon his professional career and has steadily gained a large clientage, largely among the white race. His practice brings him in a number of thousands every year, and his surplus earnings he has invested in real estate until his property interests are now quite large. In September, 1881, he was admitted to the bar of Wisconsin, and has had considerable practice in that state. On the 15th of October, 1885, he was admitted to the bar of the supreme court of the United States.[102]

In 1891, Morris was elected to the Illinois General Assembly for the third senatorial district as a Republican. Morris also served as the attorney for the town of South Chicago in 1892 and 1896, and in 1895 he served as an assistant attorney for Cook County.

Morris helped several young black lawyers and law students including Fredrick L. McGhee, who in 1885 at the age of twenty-four went into practice with Morris, who by that time was referred to as Chicago's "'dean of colored lawyers.'"[103] McGee later moved to St. Paul, Minnesota and became the first black lawyer admitted to the bar in Minnesota. McGee went on to become an important civil rights advocate.

Darrow publicly spoke out in support of Morris when he believed Morris was unfairly treated because of his race by a committee of the Chicago Bar Association. The committee issued a report on candidates for judges in which it said Morris was not fit for the bench and also mentioned that he was colored. Darrow wrote a letter to the editor published on November 23, 1923 in *The BROAD AX*, a Chicago black newspaper, in which he protested the "unfair treatment received by Edward H. Morris at the hands of the Chicago Bar Association and its committee."[104] Darrow accused the committee of being prompted "solely" by Morris's color and he praised Morris' ability:

> I know of no man on either ticket who is better qualified or whom I believe would make a better judge, and I trust that the colored voters of this City will give him

[102] JOHN MCCAULEY PALMER, THE BENCH AND THE BAR OF ILLINOIS: HISTORICAL AND REMINISCENT 117 (1899).
[103] PAUL D. NELSON, FREDRICK L. MCGHEE: A LIFE ON THE COLOR LINE, 1861-1912, 7 (2002).
[104] Letter to the editor from Clarence Darrow to *The BROAD AX* (Nov. 23, 1923).

such a vote as emphatically to show their disapproval of the report and the action of the bar.

Isaac Bond

Darrow also helped poor blacks. In 1913, Darrow returned to Chicago from Los Angeles in the aftermath of his last bribery trial, which nearly ended his legal career. Even though he was not convicted, his legal career was in disarray. According to Darrow after returning to Chicago, "The first case of any importance that came to me was an indictment of a negro named Isaac Bond."[105] Bond was charged with murdering Ida J. Leegson, a white woman, who was described as an artist, art student, or teacher, and was also a practical nurse. She was found murdered on October 5, 1913. According to an appellate opinion about the case, Leegson "had been ravished, and murdered by being choked."[106] The same day Leegson's body was discovered a colored man pawned her watch, which was engraved with her name, at a pawnshop in a black neighborhood. The pawnbroker turned it over to police upon hearing about the murder.

In 1910, Bond had killed a man in a dispute over a poker game in Missouri. He was later captured, tried and convicted of manslaughter, and sentenced to the penitentiary. He was released in August 1913. Numerous witnesses claimed to have seen a tall negro with Leegson the day before she was murdered. Eventually suspicions fell on Bond. When he found out he was a suspect he turned himself into the police. He was soon charged with the murder.

Because of his well-known sympathy for black people, a group of Bond's friends approached Darrow to see if he would defend Bond. According to a biography of Darrow he asked his law partner, Victor Yarros, if they should take the case; stating that he thought they should, Darrow added. "'We may even have to pay court costs ourselves.'"[107] Darrow's firm decided to defend Bond, who was facing the death penalty, because it was a very brutal murder. At the conclusion of the trial, the jury deliberated through the night and returned a verdict of guilty. However, the jury rejected the prosecution's demand for the death penalty and Bond was sentenced to life in prison. Darrow, Victor M. Yarros, and J. Gray Lucas appealed the case on the grounds that judgment should be reversed because the proof did not show Bond was guilty beyond a reasonable doubt, and also because the court erred in admitting improper testimony. However, the Supreme Court of Illinois affirmed Bond's conviction. Darrow recounted the Bond case in his autobiography:

> Most identifications are of little value unless a witness has been acquainted with the subject. It takes a close acquaintance when the meeting is casual, unless there is something specially noticeable about the person; if a man is black that is identification in itself, in most minds. But poor Ike was also tall. What more could one ask? Had the defendant been a white man under the same circumstances, the

[105] STORY OF MY LIFE, *supra* note 61, at 205.
[106] People v. Bond, 281 Ill. 490, 118 N.E. 14 (Ill. 1917).
[107] SENTIMENTAL REBEL, *supra* note 80, at 270.

> prosecutor would not have asked for a conviction on the evidence. The weirdness, the condition of the dead girl, the former conviction of Bond, served to give it considerable public attention. I made the best fight I could. The jury argued all night, and in the early morning brought in a verdict giving Isaac Bond a life sentence. The killing of the nurse was so ghastly that nothing but the doubt saved his life.
>
> Several years later I took his case to the pardon board, and am convinced that they thought I was right. One said that he was satisfied that I was, but they did not dare touch it unless the proof was complete as to who committed the act, because the killing was so brutal and revolting. Ike came to be fully trusted around the penitentiary, and few, if any, who knew him believed him guilty. I felt sure that he had nothing to do with the killing of the unfortunate girl. Poor Ike lived in prison for almost ten years, always protesting his innocence to me and every one else he knew. Meantime, he contracted tuberculosis, and so he died of it.[108]

Darrow and Hays Meet Their Clients

The defendants knew their future was precarious. Walter White recounted the moment when he brought Darrow to the jail to meet the defendants: "I have seldom seen such joy in the faces of any persons as appeared on those of the defendants when I introduced Mr. Darrow to them."[109] Arthur Garfield Hays described the meeting and also what the defense was facing:

> They seemed cheered by our visit but not hopeful. They had spent sixty summer days in a dingy city jail; and negroes in Detroit involved in a killing have reason to be pessimistic. On the face of it, our case was not strong. It seemed clear that Breiner had been shot from by the fusillade from that house. Ten men had gathered there with provisions to withstand a possible siege, with guns and ammunition. Shooting from various windows indicated a concerted plan. And there had been police protection. Besides this, the authorities had taken statements, so-called confessions, from all the defendants.[110]

Darrow said of the meeting: "On my way home from New York I stopped in Detroit to find out what I could about the case. I found my clients all in jail, excepting one, the wife of one of the defendants, who had been admitted to bail; the rest were men and boys."[111] Darrow was impressed by Ossian Sweet. He mistakenly wrote that Dr. Sweet went to medical school in Ann Arbor:

> Doctor Ossian Sweet, the main defendant in the case I was undertaking, was a man of strong character. He began his career in Detroit as a bell-hop on the lake boats plying between that city and Cleveland, after which he took all sorts of odd

[108] STORY OF MY LIFE, *supra* note 61, at 206-07.
[109] ARC OF JUSTICE, *supra* note 11, at 244.
[110] ARTHUR GARFIELD HAYS, LET FREEDOM RING 198 (1928) [LET FREEDOM RING].
[111] STORY OF MY LIFE, *supra* note 61, at 303.

> jobs such as fall to the man whose face is black. By a hard struggle he worked his way through college, and then through the medical school at Ann Arbor. After that he managed to get the money for taking a post-graduate course in Europe. When he had completed his years of study, he opened an office in Detroit. In the meantime he had married, and had a child about two years old at the time that he was arrested for murder.[112]

Did the Defendants Fire Too Soon?

Early on Darrow and Hays began formulating defense strategies and they knew it would involve arguments of self defense. Hays explains:

> The defense depended upon the attitude of mind of the defendants at the time of the shooting. Did they think they were in danger? Were they actually scared? They had become heroes in the eyes of their race—eleven million negroes scattered all over the country. Darrow was there to defend them. Not all of them cared to admit they had been scared.[113]

Racism was the most difficult issue facing the defendants and their lawyers: the defendants were black, and one of them shot and killed a white man. But another factor was important—many observers, even those who were sympathetic to the defendants, believed that they had fired too soon. Although it was clear that the white mob wanted to scare the Sweets into moving out of the neighborhood, their verbal abuse and rock-throwing was relatively mild when compared to violent crimes in which blacks had been murdered. According to Walter White, the defendants' use of firearms "served to alienate [the] sympathy of the decent white people to a degree;" moreover, the "sentiment even among blacks was that the accused had fired too soon."[114] This would place additional pressure on a defense team trying to convince a white jury that the defendants acted in self defense.

Significance of Sweet Trials to the NAACP

The Sweet trials were especially important to the NAACP. Although founded in 1909, the NAACP was still a fledgling organization in 1925. It was dominated by influential white leaders and W.E. B. Du Bois was the "only Negro in its inner circle"; furthermore, it was not until after 1921 that "the top administrative post of secretary was held by a Negro—first James Weldon Johnson, then Walter White . . . ."[115] Johnson served as the executive secretary of the NAACP until 1930.

Significantly, the Sweet case led to the establishment of the NAACP's Legal Defense Fund.[116] According to James Weldon Johnson:

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[112] *Id.* at 304.
[113] LET FREEDOM RING, *supra* note 110, at 199.
[114] DETROIT YEARS, *supra* note 62, at 152.
[115] *Attorneys Black and White*, *supra* note 64, at 914.
[116] MR. NAACP, *supra* note 58, at 76.

> I undertook to raise money for the defense of the case. The issue was segregation by mob violence and the simple question was: Does the common axiom of Anglo-Saxon law, that a man's house is his castle, apply to a Negro American citizen? We set our organization machinery in motion, and I issued an appeal to the country in which we called for the raising of a Defense Fund, a fund for the Detroit cases and any other cases that would involve the Negro's constitutional rights. The response was spontaneous; within four months a sum in excess of $75,000 was raised. (A third of this amount was contributed by the American Fund for Public Service.)[117]

W.E.B. Du Bois stated that the fundraising effort initiated for the Sweet trials was "the definite beginning" for blacks "of the habit of giving and of giving systematically for definite objects." Another source identifies the Sweet trials as "the most celebrated NAACP case of the 1920s . . . ."[118]

The Sweet trials and other high profile cases involving race were important beyond the immediate facts and legal aspects of the cases themselves:

> Many NAACP leaders believed that a litigation campaign was as important for its role in organizing local black communities as for the victories it produced in court. Lawsuits taught blacks the importance of banding together in defense of their rights. What happened to Ossian Sweet in Detroit in 1925 or to the Scottsboro Boys in Alabama in 1931 could happen to almost any black American at almost any time.[119]

Langston Hughes, an African-American writer and playwright associated with the Harlem Renaissance stated, "Thousands of dollars to help clear the Sweets poured into the national offices of the NAACP, mostly from Negro donors. The Fund for Public Service (the Garland Fund) . . . voted to match every two NAACP dollars with one of its own."[120]

Walter White believed the NAACP might not even want a directed verdict in favor of the defendants; completing the trial would allow them to finish using the trial for its educational value '"which gives the trial its greatest ultimate value."'[121]

Judge Murphy

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[117] JAMES WELDON JOHNSON, SONDRA K. WILSON, ALONG THIS WAY: THE AUTOBIOGRAPHY OF JAMES WELDON JOHNSON 384 (2000) [hereinafter ALONG THIS WAY].
[118] Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 Mich. L. Rev. 48, 76 (2000) [hereinafter *Racial Origins*].
[119] *Id.* at 90.
[120] LANGSTON HUGHES, FIGHT FOR FREEDOM: THE STORY OF THE NAACP 43 (1962) [hereinafter FIGHT FOR FREEDOM].
[121] *Racial Origins*, *supra* note 118, at 92.

Judge Frank Murphy, a judge in the Recorder's Court of the City of Detroit,[122] from 1923 to 1930, signed the criminal warrants for the shooting death of Breiner and the wounding of Houghberg based on the prosecutor's recommendation. He also denied bail to all of the defendants except Gladys Sweet who posted $5,000 bail and was released on October 5. But Judge Murphy's subsequent involvement in the case clearly indicates his sympathy for the Sweets and the other defendants and his determination to give them a fair trial. He would play a key role in the trials through his rulings.

Soon after the Sweets and their friends were arrested, Murphy became the presiding judge of the court and in this position he had the responsibility to assign cases to the judges. He assigned the Sweet case to himself because it represented the "opportunity of a lifetime to demonstrate sincere liberalism and judicial integrity."[123] Judge Murphy also stated that the other judges on the court wanted no part of the case due to its notoriety. Judge Murphy also had a political motive because he planned to run for mayor and would use the Sweet case to win the black vote in Detroit.[124] His position as the trial judge would prove to be very fortunate for the defendants in the Sweet trials.

Throughout the trial, Judge Murphy displayed sympathy for the black defendants and black residents of Detroit. The trial proceedings were of great interest and the courtroom was packed throughout the trial. Darrow complained at some point to Judge Murphy that whites were being given preferential treatment by court attendants over black spectators, and it is believed that Murphy ordered that blacks be given a certain proportion of seats.[125]

Judge Murphy expressed his concerns in a letter to his sister:

> [T]he question of how to secure a fair trial for the eleven colored defendants is constantly on my mind. Above all things I want them to know that they are in a court where the true ideal of justice is constantly sought. A white judge, white lawyers and 12 white jurymen are sitting in judgment on 11 who are colored black. This alone is enough to make us fervent in our effort to do justice. I want the defendants to know that true justice does not recognize color.[126]

Darrow later wrote about Judge Murphy:

> When I went to court to arrange for the trial, I found a judge who not only seemed human, but who proved to be the kindliest and most understanding man I have ever happened to meet on the bench, Judge Frank Murphy; since then he has become the mayor of Detroit.

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[122] In 1997 legislation was passed to dissolve Detroit Recorders Court and consolidate its operation under the Third Circuit Court.
[123] DETROIT YEARS, *supra* note 62, at 151.
[124] *Id.* at 151-52.
[125] *Id.* at 156.
[126] *Id.* (quoting Frank Murphy to Marguerite Murphy (Nov. 6, 7 1925), Marguerite Murphy Papers).

> Somehow, it is supposed that a judge must be stern and devoid of human feelings. This is the right attitude for one who is to judge his fellow man and try to tell with absolute accuracy what sort of sentence a culprit must receive. It takes a mighty intelligent mind to determine with absolute justice whether another man shall live or die, or how long he should be kept behind prison bars. To do this with fairness and wisdom, a judge must be endowed with omniscient discernment, and must be self-righteous as well.
>
> A man who practices law in the criminal courts should be able to tell something about a man by looking at his face. A large part of his work is sizing up judges, jurors, and witnesses at the first glance. At any rate, I did not take a change of venue from Judge Frank Murphy, and an extended and rather close association with him convinced me that I was not mistaken in him.[127]

Mayor Smith

Detroit's Mayor John W. Smith was caught in a political storm. He had to react to racial violence but he also did not want blacks to antagonize whites by moving into white neighborhoods. On September 12, three days after the shooting, Smith issued a letter that was printed in the papers. It included this admonition:

> I believe that any colored person who endangers life and property, simply to gratify his personal pride, is an enemy of his race as well as an incitant of riot and murder. These men who have permitted themselves to be the tools of the Ku Klux Klan in its effort to fan the flames of racial hatred into murderous fire have hurt the cause of their race in a degree that cannot be measured. I feel that it lies with the real leaders of the colored race in Detroit to dissipate this murderous pride.[128]

Picking a Jury

Jury selection began on October 30, 1925. For Darrow, with the exception of the Scopes trial earlier in the summer, this was always one of the most important parts of any trial. In the Scopes trial, Darrow was not concerned about the jurors because the defense in that case wanted Scopes to be convicted so they could challenge the constitutionality of the Tennessee statute that prohibited teaching the theory of evolution in public schools. But in Detroit, the defense would take jury selection very seriously.

Darrow and the defense team were convinced that this was not and should not be a simple murder case to be decided solely on facts, on whose witnesses were more believable, on what actually happened on the evening of September 9, 1925. They knew the case was about racial prejudice. They needed to find jurors, who would all likely be white males, who could put aside their prejudices enough to see that the defendants were truly afraid for their lives that night even if in hindsight they may have fired too soon.

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[127] STORY OF MY LIFE, *supra* note 61, at 306-307.
[128] Riot Curb Demanded by Mayor, Detroit Times, Sept. 13, 1925.

Judge Murphy had called over one hundred prospective jurors but only sixty-five showed up at court. Prosecutor Robert Toms questioned the jurors on the first day until he found twelve acceptable to the prosecution. Clarence Darrow then began to question these twelve. The defense chose to try all the defendants in the same trial in part because of the number of peremptory challenges it would give them. Under Michigan law, the defense in a murder trial got thirty peremptory challenges and since there were eleven defendants this gave the defense three hundred and thirty challenges.

Interestingly, Darrow himself became a focal point of this process:

"The prosecutors quickly realized they needed to ask jurors if they were 'likely to be affected by Darrow's record as a criminal lawyer.' Did candidates react strongly to his most recent cases, including the trial of Leopold and Loeb in nearby Chicago? Did a prospective juror's religion influence his view of Darrow's performance in the Scopes evolution case in Dayton, Tennessee?"[129]

Darrow's fans were not allowed on the jury: "If a juror admitted he was intrigued by Darrow, his interest qualified as bias and the prosecution did not want that person. Prospective juror Mary Young was excused after she told the court she '"knew nothing about the case but was anxious to hear Darrow plead."'[130]

Walter White described the process of picking the jury: "Day after day dragged by in the effort to obtain a jury. Sometimes gently, sometimes savagely, Mr. Darrow and his associates pounded away at the prejudices of the prospective jurors until panel after panel of talesmen was exhausted."[131]

Hays said of the jury selection process:

> Finally, however, after interrogating about a hundred men and women, we were satisfied, or rather not dissatisfied, with the jury. It seemed about as good as we could get and there was always the danger that if we challenged one, the next might be worse. It afterwards transpired that some of those of whom we had been most fearful were our best friends.[132]

Darrow later wrote about trying to find suitable jurors:

> It was not easy to get a jury. As expected, almost every one had an opinion, and it was obvious that these opinions were not favorable to my clients. Eleven colored men were on trial, and although nearly a tenth of the population of Detroit were negroes, it was certain that none of them would be jurors in this case. I kept wondering what a white man would think of his chances for getting a fair trial in

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[129] PHYLLIS VINE, ONE MAN'S CASTLE: CLARENCE DARROW IN DEFENSE OF THE AMERICAN DREAM 152 (2004) [hereinafter ONE MAN'S CASTLE].
[130] *Id.*
[131] A MAN CALLED WHITE, *supra* note 48, at 77.
[132] LET FREEDOM RING, *supra* note 110, at 201.

> Africa if he had killed a negro and was placed on trial before twelve men with black faces. After considerable time we managed to get twelve men who said they could be fair, but of course they knew nothing about that. No one knows so little about a man's ability to be fair as the man himself.[133]

Darrow excused the only black jury candidate because he believed the state would dismiss him anyway.

1925 Election

Since the mayoral election in November 1924 was a special election, the regular mayoral election was to be held in November 1925. Jury selection went on during the tense election. The election was held on November 3, 1925, with Johnny Smith again facing Charles Bowles, who the Klan supported. Smith won again by a vote of 140,000 to 110,000. Jury selection ended on November 4 after one hundred and eight potential jurors had been questioned. When a jury was finally picked, Darrow reportedly remarked, "The case is won or lost now. The rest is window dressing."

The actual trial began on November 5, 1925. As listed in the trial transcripts, the defendants were Ossian Sweet, Gladys Sweet, Joe Mack, Henry W. Sweet, Morris Murray, Otis O. Sweet, Charles B. Washington, Leonard C. Morris, William E. Davis, John Latting, and Hewitt Watson.

The defense team consisted of Clarence S. Darrow, Walter Nelson, Herbert J. Friedman, Cecil Rowlette, Charles Mahoney, and Julian Perry. Arthur Garfield Hays was listed as "of counsel." The prosecution team was made up of Robert M. Toms, Prosecuting Attorney, Lester S. Moll, Chief Assistant Prosecuting Attorney, and Edward J. Kennedy, Assistant Prosecuting Attorney.

Prosecution Opens – Argues Defendants Fired Too Soon

During the state's opening, Prosecutor Toms focused on what the defense had worried about since taking the case—that the defendants had fired too soon to be acting in self-defense. After laying out the facts as he saw them Toms stated:

> [T]he theory of the State is that no one of these defendants, at the time of the shooting, was in danger of his life or of seriously bodily harm; that he had no right to believe . . . that his life or safety was in jeopardy, that the property was not being trespassed upon, that it was – that there was no justification for shooting – that no damage to the property or to the persons of any of the defendants was imminent, or was threatened, and it if was, it was not sufficiently serious to justify taking a life. . . . we contend, that these eleven defendants, banded themselves together, and armed themselves with ten deadly weapons, in pursuance of an agreement and understanding between them that in the event of a threatened trespass on this property, or in the event of threatened damage to the house, or to

[133] STORY OF MY LIFE, *supra* note 61, at 307.

> any one of the people in it, one or more of the defendants would shoot to kill; that they actually did that; they did shoot to kill, not even waiting for a trespass of the property or damage to their persons or to the house . . . Now, that is the theory on which we claim that this killing was felonious; that it was premeditated; premeditated because they went there with it in mind . . . . The State's contention is that a man has no right to kill another simply to prevent a threatened trespass, or that a man has no right to kill another to prevent slight damage or slight bodily harm; that if a man threatens to slap my face, I have no right to kill him. That is the basis of the state's case; that this killing was unwarranted, unjustifiable, unnecessary, and done premeditatedly with malice aforethought.

Darrow and his co-counsel had a difficult set of facts to work with in addition to the overt racism present throughout the trial: ten men and one woman had gone to the house, heavily armed with rifles and handguns and ammunition; nine out of the ten guns in the house had been fired; while the crowd was verbally abusive and many rocks had been thrown at the house, no one had tried to enter the house; the occupants had police protection (according to the prosecution); Leon Breiner, the victim, was not an active member of the mob, but was simply standing across the street smoking a pipe when he was shot; and the defendants had given statements after being arrested.

The prosecution made these facts known to the jury from the beginning of the state's case. Prosecutor Toms supported the state's charge of conspiracy to commit murder by telling the jurors:

> The defendants had brought a substantial amount of food into the house…. There was little furniture. The house was not ready to be lived in. There were ten weapons found in the house, one for each of the men, and only one of the weapons had not been fired. Prior to the shooting the house had been made dark. In front of a number of windows on the second floor there were found chairs, cigar butts, tobacco ashes, burned matches, and comforters or quilts for kneeling. Not one of the defendants at the time of the shooting was in danger of life or serious bodily harm . . . .

The defense decided to reserve their opening statement until the presentation of their case.

Detroit Police Inspector

An important witness for the prosecution was Norton Schuknecht, inspector of police for the Detroit Police Department. He was also the commanding officer for the precinct that included the area around the Sweet home on the night of the shooting. Schuknecht was a witness that the defense wanted to discredit.

On direct examination, Schuknecht claimed that he told the men under his command that they "would have to act impartially; that we were there to preserve peace and order, and that man, Dr. Sweet could live there, if we had to take every man in the department to

protect his home; that we wanted no recurrent of the happening on the west side." Schuknecht testified that there was no white mob surrounding the Sweet home; there was just a few people occasionally walking by as in any neighborhood. According to Schuknecht, nothing was out of the ordinary—certainly nothing to justify the occupants of the house shooting at anyone. The prosecution led Schuknecht through what he did immediately after the shooting. Schuknecht said the Sweet home was pitch black when he entered it. The police found the assortment of guns and ammunition but very little furniture. The testimony was aimed at showing the defendants had come for an armed battle instead of simply moving into a new house.

Darrow cross-examined Schuknecht for almost four hours, going over every detail of Schuknecht's involvement before the Sweets moved in, the time just before the shooting, during the shooting and Schuknecht's actions just afterwards. In his probing, Darrow got Schuknecht to admit that when he was in the Sweet home he saw a stone or rock on the floor and broken glass. Schuknecht had to admit that someone must have thrown the rock through the window from the outside.

Prosecution witnesses continually denied that a large crowd had formed in front of the Sweet home and that rocks were being thrown at the house. One of the witnesses only conceded that it sounded like pebbles hitting the house. Darrow had one of the large rocks that had been thrown that night and at one point in the trial, he "dropped one of the pebbles as he was about to hand it to the witness. It resounded loudly as it bumped along the floor."[134]

Darrow cross-examined many of the prosecution's witnesses. He asked them if they were members of the Waterworks Park Improvement Association and he got many to admit they did not want blacks in their neighborhoods. But all denied there was any large crowd throwing rocks at the Sweet home. One witness, seventeen-year-old Dwight Hubbard, accidentally forgot the prosecution's line during direct examination when he blurted out that there was a great crowd gathered outside the Sweet home. Then he immediately stammered that there was just a large crowd but he quickly changed this to just a few people. Darrow of course took notice of this and on cross-examination got Hubbard to admit that he had been coached by a police detective. Darrow got a few of the other witnesses to admit to seeing a large crowd throwing rocks.

At one point, a prosecution witness, Otto H. Everhardt, was testifying that he heard the shots come from the corner of Garland and Charlevoix. Darrow broke in to tell the witness, "Call it Dr. Sweet's. That is Dr. Sweet's house. Refer to it as the Sweet house."

Darrow Speaks at YMCA

On November 8, 1925, Darrow took time to speak to a black audience of about 1,500 at the Detroit YMCA. At the beginning he told the audience he could not discuss the Sweet trial. He then launched into a pessimistic speech about race relations. He also said things that would be very controversial if said decades, later such as, "It may be, that without

[134] LET FREEDOM RING, *supra* note 110, at 211.

slavery, your race would never have had its chance for civilization. You might still be savages in Africa—and you might be better off there. But still I think that civilization is worth the price we have to pay for it."

On Monday, November 9, after a temporary adjournment Darrow complained to the Judge that Mrs. Leon Breiner, the victim's widow, "was sitting in the courtroom, on the first seat outside the railing; and she fainted, or had every appearance of it, anyhow, and fell over, in the presence of the jury." Darrow claimed that the court had excluded her from the courtroom but the judge said he had only excluded her from the inside railing. But Darrow wanted to question the officers in charge of the courtroom about the incident. Toms strongly objected, arguing that neither he, Darrow nor the jury was aware that the person in question was Mrs. Breiner, so her presence would not affect the trial. The two sides argued back and forth until Darrow asked that the jury be dismissed. Then he immediately asked Judge Murphy to "enter an order of mistrial on account of the incident of the wife of the deceased having fainted and been carried out partly in the presence of the jury." Judge Murphy immediately denied the motion.

Defense Moves for Directed Verdict

When the prosecution was finished presenting its case, the defense made a motion for a directed verdict instead of an opening statement. Surprisingly, Walter White and some others did not want the trial to end on a directed verdict for the defense. Although this would have been the best possible outcome for the defense because the trial would have ended right there and the defendants could not be retried, there was a downside for White and others if the case ended that way. They would lose their rallying cry to raise money for the NAACP legal defense fund, and they would not be able to use the trial to educate the public about the race prejudice involved in these types of cases.

During Hays' argument for a directed verdict he argued that the prosecution had failed to support their allegations of a conspiracy to commit murder. At one point, a baby in the courtroom began to cry and Judge Murphy asked a bailiff to have the baby removed. Hays objected, explaining that it was the Sweets' child, Iva, and they had brought the child in to show that if Iva would have been in the house on the night of the shooting, she could have been arrested and tried for conspiracy to commit murder.

Darrow argued that only one bullet had killed Breiner, that bullet was never found, and the prosecution could not show which of the defendants had fired that bullet. Darrow also denounced the testimony of the witnesses who denied what everyone knew to be true about the events leading up to the night of the shooting and what happened that night.

The arguments for a directed verdict took the rest of Saturday. When the trial resumed on Monday, Prosecutor Toms decided to give the defense a little of what they asked for. The prosecution offered to drop all charges against Gladys Sweet. Gladys was adamant that she would not accept the offer. Despite his obvious sympathy for the defendants, Judge Murphy, without explanation, denied the defense's motion for a directed verdict. Although this "was a bitter disappointment for the defense" it is understandable because

even though he was dubious of the conspiracy charge "a man had been killed, since the need for self-defense had not yet been established, and since the right of self-defense did not necessarily mean that firearms had to be used . . . he could hardly have been expected to do otherwise than to let the case go to the jury."[135]

Self Defense

The defense strategy to delay their opening statements allowed the defense more time to research the law they needed. They found an important part of their legal defense in the 1860 case of *Pond v. People*[136] decided by the Supreme Court of Michigan. The Sweet's attorney, Cecil Rowlette had included the case in his motion to dismiss but he had "buried the ruling among a dozen citations; Hays and Nelson turned it into the centerpiece of the defense team's new brief; incontrovertible proof that the law was on their side."[137] There were several rulings in the *Pond* case that were relevant to the Sweet defense, including:

> The intent constitutes the essence of every crime; and therefore if a man kill another, really and honestly believing himself to be in great danger of death or serious bodily harm, it is neither murder nor manslaughter, but self-defense; and he will be held excusable, although it should afterwards turn out that he was mistaken, and there was really no necessity for the extreme measure.

In addition, the Michigan Supreme Court clarified in *Pond* that:

> The danger to be resisted must be to life, or of serious bodily harm of a permanent character; and it must be unavoidable by other means. Of course, we refer to means within the power of the slayer, so far as he is able to judge from the circumstances as they appear to him at the time. A man is not, however, obliged to retreat if assaulted in his dwelling, but may use such means as are absolutely necessary to repel the assailant from his house, or to prevent his forcible entry, even to the taking of life.

The defense argument was based on self defense; someone in the Sweet house shot into the crowd because they feared for their lives, or in legal terms the defendants were in "reasonable apprehension of danger from a mob." At the time, Michigan had a statute on the books that prohibited twelve or more armed men or thirty unarmed men to be "unlawfully, riotously, or tumultuously assembled."[138]

The core of the self defense argument was that the members holed up in the Sweet house reasonably feared for their lives given the racism of the times, the recorded instances of blacks being forced from white neighborhoods and the worst possibility—lynching. Walter White recounted:

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[135] DETROIT YEARS, *supra* note 62, at 159.
[136] Pond v. People, 8 Mich. 150 (Mich. 1860).
[137] ARC OF JUSTICE, *supra* note 11, at 255.
[138] MICH. COMP. LAWS § 15001 (1915).

> As Mr. Darrow pointed out convincingly to the court, the theory of a reasonable man as propounded by the State could not possibly mean in this case the attitude of a white man but must necessarily be that of a negro with a white mob outside and in the Negro's brain a picture of what similar mobs have done to Negroes during the last sixty years in America.[139]

For a while, Darrow and Hays seriously considered arguing that the shot that killed Breiner did not come from the Sweet house at all but was instead fired by a rookie policeman who fired wildly when he tried to shoot at one of the defendants on the back porch of the house. However, this line of argument was dropped as they concentrated on the self defense arguments.

Dr. Ossian Sweet Takes the Stand

Darrow and the defense team knew that the police and other witnesses were lying on the stand. One of the greatest obstacles the prosecution witnesses posed for the defense was that their testimony covered up the presence of a mob of angry whites gathered around the Sweet home. It was vital to their self-defense arguments that the jury believe the truth – that there were several hundred whites near the Sweet home intent on driving them out of the neighborhood. The defense had to show that the defendants fired their guns, including the fatal bullet that hit Breiner, because they justifiably feared for their lives.

It was crucial to the defense that they be allowed to describe the impact of racism on the defendants in order to show their state of mind during the siege in the house. This included racism in general and specifically racism directed to other blacks who had moved into white neighborhoods in Detroit. To do this, the defense planned to call Dr. Ossian Sweet to the stand. And so on the afternoon of Wednesday, November 18, 1925, Ossian Sweet heard Arthur Garfield Hays call his name to testify.[140]

Prosecution Objects

The prosecution objected to Ossian Sweet testifying about specific acts of racism he had seen and experienced as a child or had heard about from his grandfather who told him about slavery, and how these experiences created fear in Ossian. The prosecution wanted this to be a simple murder case and this other evidence the defense was trying to introduce was not relevant. Prosecutor Toms asked, "Is everything this man saw as a child justification for a crime twenty-five years later?" Darrow countered:

> This is the question of the psychology of a race, of how everything known to a race affects its actions. What we learn as children we remember—it gets fastened in the mind. I would not claim that the people outside the Sweet home were bad. But they would do to Negroes something they would not do to whites. It's their

[139] Walter White, *The Sweet Trial*, 31 The Crisis 125, 128 (Jan. 1926) [hereinafter White, *The Sweet Trial]*.
[140] Some accounts state that Darrow conducted the direct examination of Ossian Sweet.

> race psychology. Because this defendant's actions were predicated on the psychology of his past, I ask that this testimony be admitted.

Judge Murphy Rules

In the most important ruling of the trial, Judge Murphy allowed Ossian's testimony because it went to the defendants' state of mind. Without this testimony, the defense could not show that the defendants were in fear of their life when they started shooting. The prosecution would be able to show that the defendants shot far too soon. Without Ossian Sweet's testimony, Breiner's death was murder instead of justifiable homicide.

And so Ossian Sweet testified with Hays asking the questions. Ossian testified about his life, his academic achievements and various incidents of racism that he had witnessed or heard about. It was powerful testimony, recalling race riots with blacks being attacked by whites, blacks being run out of white neighborhoods and lynchings.

"A Peculiar Fear"

Hays had Ossian describe the mob scene in front of his house on September 9 and then asked what his state of mind was at the time of the shooting. Ossian answered:

> When I opened the door and saw the mob, I realized I was facing the same mob that had hounded my people through its entire history. In my mind I was pretty confident of what I was up against. I had my back against the wall. I was filled with a peculiar fear, the fear of one who knows the history of my race. I knew what mobs had done to my people before.

One commentator described Hays' examination of Ossian Sweet as "one of the most remarkable direct examinations to be found in all the records of criminal cases: a vivid picture of the fear-ridden mind of a black man, terrified by a hostile crowd of whites outside his home."[141]

The defense bolstered Ossian's testimony with other witnesses. Vollington Bristol and John Fletcher, two black Detroit residents who had been run out of their homes by whites, testified about their ordeals. A white reporter for the *Detroit News* was near the Sweet home shortly before the shooting. He testified that there were somewhere between four and five hundred people near the house. Other witnesses confirmed the size of the large crowd.

Walter White spent much of his adult life fighting for black equality. Because he could pass as a white person, White traveled to the South and gathered evidence of lynchings, a task that would not have been possible for a person who appeared to be black. The

[141] David E. Lilienthal, *Has the Negro the Right of Self-Defense?*, 121 The Nation 724, 725 (Dec. 23, 1925).

defense called White to testify about "his extensive research into mob violence, a threat so pervasive, he explained, every Negro lived in terror of it."[142]

The defense had mounted an impressive case for self defense. The most important part of the defense was convincing Judge Murphy to let Ossian Sweet testify, and then Ossian Sweet's testimony itself: "The moment Ossian opened the bungalow door for the jurors and let them see the Garland Avenue crowd through his eyes, Clarence Darrow had everything he needed to bring the trial to its conclusion."[143] Prosecutor Moll later commented that "Dr. Sweet's testimony was the turning point in the trial."[144]

Prosecutor Robert Toms conducted an "uncharacteristically aggressive cross-examination" but Ossian fended it off with "answers delivered with a dignity so fierce it was inspiring."[145]

At one point, Toms asked Ossian Sweet during cross-examination why his answers differed from what he said to detectives on the night of the shooting:

> Sweet: I am under oath now. I was very excited then and afraid that what I said might be misinterpreted . . . .
> Toms: You admit, of course, that Leon Breiner was killed by a bullet fired from your home?
> Sweet: No, I don't.

Clarence Darrow's Closing Argument

Clarence Darrow began his closing argument on November 24, 1925 at 3:00 p.m. As with many of his closing arguments in high profile cases, there was great excitement and a large crowd tried to get a spot in the courtroom to witness Darrow plead to save his clients. Knowing that emotions ran deep in the case Judge Murphy told those in attendance, before Darrow began:

> Now, we have tried to permit as many people as possible to come into the courtroom and hear the argument, and I want to say again that which I said before, in order that fair play may be insured as much as possible, please do not demonstrate your feeling about anything that is said in argument, because if that is done a disturbance will take place that will interfere with these proceedings and it would be necessary for me to exclude you from the courtroom. I do not want to do that and I do not think it will be necessary if you will all try to be careful.

"Back of It"

[142] ARC OF JUSTICE, *supra* note 11, at 290.
[143] *Id.* at 290-91.
[144] DETROIT YEARS, *supra* note 62, at 160.
[145] ARC OF JUSTICE, *supra* note 111, at 290.

Clarence Darrow began as he often did with an apology to the jury that the case was taking up their time. Then he got directly to the issue of racism, which he repeatedly said was "back of it" - meaning it formed the background for the whole murder case and the case could not be removed from the racism that pervaded it:

> If the court please and gentlemen of the jury: I wish it was not my turn, that I did not feel it was my duty to talk to you in this case. It is not an easy matter to talk about a case of this sort, and I am afraid it won't be an easy matter to listen but you can't help it any more than I can. This case has taken a good deal of your time but we are pretty near the end, and I am certain that everyone of you knows how important it is. There are many reasons why it is important. In the first place, eleven people are on trial charged with a crime which might involve imprisonment for life, which is something. In the next place, back of it all, hanging over all of it and overshadowing it is the everlasting problem of race and color and creed that have always worked their evil in human institutions.
>
> If I thought any of you had an opinion against my clients, I would not worry about it because I might convince you; it is not so hard to show men that their opinions are wrong, but it is the next thing to impossible to take away their prejudices. Prejudices do not rest upon facts; they rest upon the ideas that have been taught to us and that began coming to us almost with our mothers' milk, and they stick almost as the color of the skin sticks. It is not the opinion of anyone of these twelve men that I am worrying about; much else is it the evidence in this case, for I know just as well as I know that you twelve men are here at this minute that if this had been a white crowd defending their homes, who killed a member of a colored mob, you would not leave your box. I don't need to say that no one would have been arrested, no one would have been on trial, and I would not have worried, and you know it, too. My clients are charged with murder, but they are really here because they are black.

Black Defense Witnesses Superior to White Prosecution Witnesses

One of the most interesting and perhaps surprising defense strategies was that Darrow did not merely claim that the black defendants and witnesses were equal to the whites in the neighborhood; instead, he directly argued that they were intellectually and morally superior to many of the whites who testified. It is surprising because it is seems that in 1925, given the state of race relations, this strategy could backfire because it might have upset the white jurors.

Darrow told the jury: "We have presented witnesses . . . that are as intelligent, as attractive, as good looking as any white man or woman, and who are as far above the bunch which testified against these men as the heavens are above the earth and you know it and they know it."

In describing Gladys Sweet's two friends who went to her home to help decorate Darrow said, "There were two, attractive, pretty, intelligent, cultured, colored girls who were

working in a decorating place downtown . . . . Aren't they so far superior . . . that there isn't any human being who would look at them that would not call them a superior race if they are to be judged by these witnesses in this case? Bright, intelligent, cultured, truthful, modest . . . ."

Darrow later commented on this in his autobiography:

> The trial revealed a marked contrast between the Klansmen and other witnesses for the State, and the colored defendants and their friends, who testified for our side. Practically all the negroes who came upon the stand were men and women of culture and refinement, many college graduates, and in every way the superiors of the witnesses for the prosecution.[146]

Noble, Nordic Race

Darrow directly accused the prosecution witnesses of lying on the stand:

> Now, I am going to say some things about these witnesses who come here to testify in this case, called by the state. I think everyone of them lied, perjured themselves over and over and over again to send twelve black people to prison for life; there is not an honest person in the whole bunch.

But Darrow believed that the witnesses, outside of this case, were likely honest and decent but that racial prejudice caused them to do as they did. Darrow spoke about how deep racial prejudice was the reason the prosecution witnesses lied on the stand: "[I]t means that the almost instinctive hatred of the white for anything that approaches social equality is so deep and so abiding in the hearts of most white people that they are willing to perjure themselves in behalf of what they think is their noble, Nordic race."

Waterworks Improvement Association

Darrow brought up the Waterworks Improvement Association and exposed it for what it was. He read from the association's own paperwork, which stated its purpose as "'[c]onstructive, civic and social service, assisting to maintain a clean, healthy condition in our streets and alleys." Darrow would read a specific section of the association's manual and then expose and ridicule it: "They were maintaining a healthy condition in their streets and alleys with a mob surrounding a home where a man had a legal—men and women had a legal right to live, by driving them into the streets, and that is what they were doing." As to "observing and supporting the traffic ordinances" and "particularly speed laws, that greater safety and protection may be created around our families, especially children," Darrow commented, "They loved the children if they were not black." Another association goal was "[h]elping out on traffic." Darrow pointed out "the first effort . . . was crowding the streets with a felonious mob, . . . a gang of law-breakers who had no rights under the law, not one of them, because they were a mob committing a crime."

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[146] STORY OF MY LIFE, *supra* note 61, 309.

Not to Blame

Darrow went back and forth between accusing the whites in the neighborhood of being racists but also saying they were not to blame. Darrow was an ardent determinist and he fully believed people were not free-will actors but were instead driven by forces beyond their control such as passions, emotions, environment, heredity, and what they were taught. Numerous times he said he would not blame the whites who wanted to drive the Sweets from their neighborhood. While accusing the members of the improvement association of being racists and not wanting Dr. Sweet in their neighborhood, he also told the jury, "I don't blame them for not wanting him, I don't think there is any reason why they should not, but there is a prejudice and they are not to blame for that . . . ."

Darrow was clearly aware of how important the case was to other blacks besides the defendants. In his autobiography, he wrote:

> The courtroom during the closing arguments presented a pitiful and tragic picture. The whole of the space beyond the railing was packed with negroes. With strained and anxious faces they made a powerful mute appeal to the white men who seemed to be holding in their keeping the fate of an outraged and downtrodden race.[147]

Darrow spoke until 6:30 p.m. on the first day of his closing and resumed the next morning.

As he spoke about racism Darrow was blunt. Talking about Dr. Sweet's state of mind that night he told the jury:

> [H]e knew the history of his race, he knew that looking back to the terrible years that have marked their history he could see his answer, loaded like sardines in a box in the mid-decks of steamers and brought forcibly from their African homes, half of them dying in the voyage; he knew they were sold like chattels as slaves and were compelled to work without pay; he knew that families were separated when it paid the master to sell them; he knew that even after he had got liberty under the Constitution and the law he knew that the bodies of dead negroes were hanging from the limbs of trees of every state in the Union where they had been killed by the mob; he knew that in every state of the Union telegraph poles had been decorated by the bodies of negroes dangling to ropes on account of race hatred and nothing else; he knew they had been tied to stakes in free America and a fire built around living human beings until roasted to death; he knew they had been driven from their home in the north and in great cities and here in Detroit, and he was there not only to defend himself and his home and his friends, but to stand for the integrity and the independence of the abused race to which he belonged, and I say, gentlemen, you may send him to prison if you like, but you will only crown him as a hero who fought a brave fight against fearful odds, a

[147] *Id.* at 309-10.

> fight for the right, for justice, for freedom, and his name will live and be honored when most of us are forgotten.

I am sick of this talk about an innocent man being killed

Perhaps surprisingly, Darrow did not refrain from talking about Breiner, who was shot and killed. Instead of portraying Breiner as an innocent victim and expressing remorse for his death, Darrow went so far as to accuse Breiner as being part of the mob:

> Ah, let me tell you, gentlemen, Breiner was not an innocent man, but if he had been innocent his blood is on the head of the police department that was around there, that part of it, who should have dispersed Breiner and sent him on his way. I am sick of this talk about an innocent man being killed. There were no innocent men in that bunch, not one. The evidence in this case shows that he was several doors from his home, that he trice went up and down that street, that he had been lingering around there for some time.
>
> Why was he there? Only an inference. He was there just the same as everybody else in this mob was there. He was there to uphold law and order as meted out by the Water Works Improvement Association. That is the evidence in this case. It makes me sick. A man standing there in a mob bent on crime; the court will tell you that, in a mob, which was a criminal organization, waiting to see the sacrifice of some helpless blacks. And then they say he was innocent. Nobody was innocent; nobody could be innocent. They came there for that purpose with malice in their hearts, with enmity to their fellows, determined to drive them out.

Would you Choose to be Black?

Darrow constantly reminded the jury that as whites, they had prejudicial feelings they had to be aware of and guard against. He tried different examples to get the jury to confront the issue of race:

> None of you people would like to go to a penitentiary. Suppose you had the option of going to a penitentiary for ten years, or being black, which would you take? Suppose you had the option of going to a penitentiary for15 or 20 years, or being made black over night, what would you do? And yet there is no reason in logic or science or broad humanity or under any religion in the world why a difference should be made on account of color, no matter what it is. Nobody knows that as well as the black man knows that.

Women Cannot Throw Stones and Shoot Very Well

Despite his progressive credentials, Darrow was a product of his time and he occasionally expressed views about the ability of women that would be controversial today. In a 1936 article published in *Esquire Magazine* titled “Attorney for the Defense” Darrow made

many remarks that would be deemed politically incorrect years later. Speaking about women now serving on juries, he wrote:

> Then, too, there are the women. These are now in the jury box. A new broom sweeps clean. It leaves no speck on the floor or under the bed, or in the darkest comers of life. To these new jurors, the welfare of the state depends on the verdict. It will be so for many years to come. . . . Women still take their new privilege seriously. They are all puffed up with the importance of the part they feel they play, and are sure they represent a great step forward in the world. They believe that the sex is co-operating in a great cause. Like the rest of us, they do not know which way is forward and which is backward, or whether either one is any way at all. Luckily, as I feel, my services were almost over when women invaded the jury box.

In the article he related a story about a case in which he defended a man charged with illegally selling "some brand of intoxicant":

> When I arrived on the scene, the courtroom looked ominous with women jurors. I managed to get rid of all but two, while the dismissed women lingered around in the big room waiting for the victory, wearing solemn faces and white ribbons. The jury disagreed. In the second trial there were four women who would not budge from their seats or their verdict. Once more I went back to the case with distrust and apprehension. The number of women in the jury box had grown to six. All of them were unprejudiced. They said so. But everyone connected with the case was growing tired and skeptical, so we concluded to call it a draw. This was my last experience with women jurors. I formed a fixed opinion that they were absolutely dependable, but I did not want them.

At one point in his closing argument in the Sweet trial, Darrow was referring to the fact that the police had stationed four officers near the Sweet home on September 9 during the day, even though all the prosecution witnesses claimed there was not a mob or any problems in the neighborhood. Darrow asked: "Why four in the day time while the men were at work; and women, while they might be vicious, they cannot throw stones and shoot very well. They can swing the language all right, but shooting and marksmanship with guns or stones is a little out of their line."

Conclusion

Darrow ended his argument with an appeal to the jury:

> Gentlemen, I ask you to use all of your judgment, all of your understanding, all of your sympathy in the decision of this case. I speak not only for these eleven people, but for a race that in spite of what you may do will go on and on and on to heights that it has never known before. I speak to you not only in behalf of them, but in behalf of the millions of blacks who look to these twelve white faces for confidence and trust and hope in the institutions of our land, and in the guarantees

> that the laws have made to them, those blacks who all up and down the length and breadth of our land, and whose ancestors we brought here in chains . . . . I speak to you in behalf of those faces that have haunted this court room from the beginning of this case, and whose lives and whose hearts and whose hopes and whose fears are centered upon these 13 men before you. I ask you gentlemen in behalf of my clients, I ask you more than anything else, I ask you in behalf of justice, often maligned and down-trodden, hard to protect and hard to maintain, I ask you in behalf of yourselves, in behalf of our race, to see that no harm comes to them. I ask you gentlemen in the name of the future, the future which will one day solve these sore problems, and the future which is theirs as well as ours, I ask you in the name of the future to do justice in this case.
>
> Gentlemen, you twelve whites, with such intellects as have been given you, with such prejudices as have been forced upon you, with such sympathies as you have, and with such judgment as I can urge upon you, I ask you to understand my clients, and I ask in the name of the race, in the name of the past and the hope of the future, in justice to black and white alike, that you shall render a verdict of not guilty in this case.

Jury Instructions

The defense made another motion for a directed verdict, which Judge Murphy refused to grant. Then Judge Murphy took an hour to give the all-important jury instructions. He clearly explained to the jury that the Sweet home enjoyed the same protections as white homes:

> Dr. Sweet has the same right under the law to purchase and occupy the dwelling house on Garland Avenue as any other man. Under the law, a man's house is his castle. It is his castle, whether he is white or black, and no man has the right to assail or invade it. The Negro is now by the Constitution of the Untied States given full citizenship with the white man and all the rights and privileges of citizenship attend him wherever he goes.

He told the jury that if any of the defendants shot Breiner, their state of mind at the time of the shooting mattered:

> [If they were] under an honest and reasonable belief, based on the circumstances as they appeared to him or to them at the time, that he or they were in danger of losing their lives, or suffering great bodily harm, or were resisting a forcible and violent felony in the only effective manner that it could be resisted, the shooting would be justifiable and the defendants would not be guilty.

Vitally for the defense, Judge Murphy's instructions incorporated the racial fears that Darrow, Hays and Ossian Sweet emphasized:

> Their situation, race and color, the actions and attitude of those who were outside the Sweet home, all have a bearing on whether or not the sum total of the surrounding circumstances as they appeared to them at the time were such as to induce in a reasonable man the honest belief of danger.

Judge Murphy's instructions gave the jury a reasonable black person test to use during deliberations. In an article written shortly after the trial Walter White stated: "Seldom in any court has a more impartial, learned or complete charge to a jury been heard. As was evidenced throughout the case, Judge Murphy was exerting every effort at his command to assure to the eleven defendants a completely fair trial."[148] Darrow believed that Judge Murphy's "instructions to the jury were clear and forcible, and scarcely left a chance for them to do anything but acquit."[149]

Waiting for a Verdict

Prior to the trial, many whites and even some blacks believed that whatever the facts of the case, the defendants had fired too soon on the night of September 9, 1925. By firing before members of the mob actually entered the house or committed other acts of violence beyond yelling and throwing rocks, the defendants had committed homicide instead of the justifiable homicide of self-defense. But according to Walter White:

> By the time the case was ready to go to the jury, it was freely predicted throughout Detroit that the case could not possibly end in anything other than acquittal for all eleven defendants. The newspapers of Detroit gave full and impartial reports of the trial, for thirty days featuring the story on the front page. As a result of this impartial reporting, the decent and fair minded element in Detroit had been informed to such an extent that sympathy had swung definitely toward the defendants—a very marked contrast to felling in the city prior to the entry of the N.A.A.C.P. and Mr. Darrow into the case.[150]

The jury deliberated for forty-six hours but became hopelessly deadlocked. The jurors were unanimous that they should acquit eight of the defendants. But they could not agree on the fate of Ossian Sweet, Henry Sweet and Leonard Morse. Five jurors wanted to acquit all of the defendants but seven jurors voted to convict the Sweet brothers and Morse of second degree murder, for which they could be sentenced to fifteen years in prison. Judge Murphy then declared a mistrial. Hays believed that "[i]t was clear that they were ready to acquit most of the defendants but some of them felt that there should be a penalty paid by some one. A white man had been killed."[151]

Walter White put the cost of the three week trial at $21,897.

Pre-Trial Changes

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[148] White, *The Sweet Trial*, *supra* note 139, at 125.
[149] STORY OF MY LIFE, *supra* note 61, at 310.
[150] White, *The Sweet Trial*, *supra* note 139, at 128.
[151] LET FREEDOM RING, supra note 110, at 232.

After the mistrial, the defense counsel tried to get the charges dismissed but the prosecution was determined to retry the defendants. The defense then changed tactics and asked that the defendants be tried separately. It was believed by some observers that Darrow's decision to try the defendants separately was an attempt to pressure the prosecutor into dropping the charges against some of the defendants.

The prosecution decided to try Henry Sweet first. This was clearly the prosecution's strongest case because Henry was the only defendant who admitted firing a weapon towards the crowd on the night of the murder. Some believed that Darrow's decision to try the defendants separately was a terrible mistake because when all the defendants were tried at once the prosecution had to deal with the conspiracy charge that upset them in the first trial. As one source explains:

> Since the prosecution did not know who had fired the shot that killed Breiner and could not identify the gun from which the fatal bullet had been fired—the bullet was not found after the shooting—it really had no alternative but to rely on a conspiracy theory as the basis of its case. It would have to prove that the shooting was unprovoked and had occurred with malice aforethought.[152]

Arthur Garfield Hays Replaced

Darrow lost his co-counsel, Arthur Garfield Hays, who declined to return for the new trial because he was involved in another case. Darrow picked Thomas Chawke who was considered the best criminal defense attorney in Detroit to replace Hays. But this decision shocked Walter White because Chawke had a notorious reputation and it was rumored that he defended mobsters. Although Chawke was immensely talented, his notoriety and questionable clientele made him just the sort of attorney that the NAACP did not want when they first began the search for a legal defense team for the accused. But Darrow wanted him, so Chawke joined the defense. Of the three black attorneys, only Julian Perry was retained because he was a good friend of Ossian Sweet.

While Walter White participated in some of the pre-trial strategy, he did not attend the trial. Instead, James Weldon Johnson represented the NAACP at the trial.

Henry Sweet Trial

The trial of Henry Sweet began on April 19, 1926. Judge Murphy would again preside over the trial. Along with Clarence Darrow leading his defense, Henry Sweet was extremely fortunate that Judge Murphy would be in the courtroom. Jury selection was again a difficult process as both sides went through nearly two hundred potential jurors before eventually agreeing on twelve jurors who were again all white males. To ensure fairness, Judge Murphy had the jurors sequestered.

[152] DETROIT YEARS, *supra* note 62, at 157.

One day during jury selection, Darrow invited Ossian and Gladys Sweet to lunch at the Wolverine Hotel "which had never before served blacks and whites at the same table or blacks at any table."[153]

Defense More Aggressive

The second trial was similar to the first in several ways. The prosecution used many of the same witnesses who told the same story. Basically they denied seeing a large crowd around the Sweet home. But Darrow and Chawke were even more aggressive on cross-examination than in the first trial. Having learned from the first trial and perhaps because the state likely had a stronger case against Henry Sweet, the defense went after prosecution witnesses more directly and aggressively than in the first trial.

The prosecution was also aggressive. In preparation for the first day of trial, the prosecution had stacked all the weapons confiscated from the Sweet home on a table prominently displayed for the jurors to see.

Darrow Ridicules White Prosecution Witnesses

Darrow again not only challenged the white witnesses for the prosecution, but also ridiculed them. He was even more direct in his comments that the Sweets, their friends and witnesses, all black, were culturally superior to many of the white witnesses. One way Darrow did this was to point out that several of the witnesses did not know how to properly pronounce the name of Goethe Street that was near the crime scene.

Darrow cross-examined a high school teacher named Marjorie Stowell who did not testify in the first trial because she was out of the city.[154] The *Detroit Times* stated that the "drawing sarcasm of Darrow produced an equally sarcastic reaction when Miss Marjorie Stowell" was cross-examined.[155] Prosecutor Toms had started the examination by asking her to speak louder, which she did, and then gave her street address a second time. Darrow began his cross-examination by again inquiring her place of residence.

> "You heard it the first time," snapped the witness.
> "Thank you." said Darrow.
> "What do you do?"
> "I am a teacher."
> "I guessed that much." said Darrow
> "Where?"
> "Southeastern High School"
> "You live near what street?"
> "Goethe"—she pronounced it with a long "o."
> "You mean to tell me anybody is fit to teach school in this city
> Who pronounces "Goethe" that way?"

[153] ONE MAN'S CASTLE, *supra* note 129, at 249.
[154] Detroit Times, May 4, 1926, at 5.
[155] *Id.*

> "Well, I suppose the Germans pronounce it 'Goethe'—giving the 'o' something the sound of a long 'a.'"[156]

An important strategy of Darrow and Chawke was to get the witnesses to admit the true nature and intentions of the Waterworks Park Improvement Association and why each had joined. In particular, they tried to elicit testimony about the meeting that took place at the school. A *Detroit Times* headline stated "DARROW WINS RIOT SKIRMISH" on May 3, 1926 and explained in the front page article entitled "Skirmish to Darrow":

> The counsel for Henry Sweet, negro, on trial for the slaying of Leon Breiner, a white man, during a race riot, scored heavily today when Judge Frank Murphy of Recorder's Court refused the motion of the prosecution to exclude from the record all references to speeches made at the meeting of the Waterworks Improvement Association, July 14.[157]

The news article also reported:

> Testimony has revealed that the improvement association was an organization of white people for protecting the welfare of the community which centered around Dr. Sweet's home and that speakers urging discrimination against negroes appeared before the association. . . . one speaker urged violence to keep negroes from living in the community.[158]

At one point, Moll argued that it was ridiculous for the defense to attempt to show that the speeches given during the Waterworks Improvement meeting two months before the shooting angered the crowd to the extent that they carried this anger with them two months later. Darrow replied, "There is a serious conflict of the facts as seen by the defense and the State." Furthermore, he said, "I don't believe the State has put on one witness who was present at the shooting who told the truth. Their own statements show they are hedging, quibbling and lying."

Darrow recounted that "[o]f all the people on the street through that event, we were able to get not over five white men and women to testify for us, and it was difficult to keep some of these in line."[159]

With so much at stake, many blacks attended the trial. James Weldon Johnson described their mood:

> The crowd was sensitive, like a barometer, to the ups and downs of the testimony. Whenever Darrow or Chawke scored in their cross-examination a ray of light lit

[156] *Id.*
[157] Detroit Times, May 3, 1926.
[158] *Id.*
[159] STORY OF MY LIFE, *supra* note 61, at 309.

> the sear of dark faces, and when prosecutors won a point somber tragedy would again settle down.[160]

Darrow wrote in his autobiography about the second trial: "The same eager crowds haunted the courthouse. The same tense faces watched every move in what to them represented a part of the tragedy of the whole race. I am sure that their silent, appealing looks were more eloquent than any words that I could offer."[161]

Ossian Sweet testified as a witness. He again told about his experiences and deep-seated fears of racism. Most accounts state that the defendant Henry Sweet did not take the stand. However, in his autobiography Darrow later recalled:

> Henry was about twenty years old, and had just completed his junior year in the Wilberforce College, in Ohio. The evidence was plain that he had shot out of the front window in the direction of the deceased. Henry was very fond of his elder brother, the doctor, who had helped him while attending school. He was really a member of the family, and what he had done was naturally in defense of his brother and kinsfolk, and his race. Even though he might have been hasty in shooting, he was justified in doing so if he believed that the home and the inmates were in danger. Henry made an excellent appearance in the witness chair. He was frank and open-mannered and made no attempt to conceal his part in the tragedy.[162]

Darrow's Closing Argument

Although he was slowing down because of age, Darrow was probably at the height of his fame during the Sweet trials. The Henry Sweet trial, coming less than a year after the Scopes trial and just two years after the Leopold and Loeb case, guaranteed that Darrow's courtroom performance, especially his final summation to the jury, was highly anticipated. According to James Weldon Johnson:

> [E]very available space in the courtroom was taken up. Even within the railing spectators were closely packed together. There were hundreds of colored people and a large number of interested whites. There were prominent lawyers and jurists of Detroit. When the court opened not another person could be squeezed into the courtroom. Clarence Darrow was to speak.[163]

Darrow gave his closing argument on May 11, 1926 and he spoke for more than eight hours. It was a performance that added to legend of his storied legal career. As one commentator described it, "Darrow tore apart the testimony of the prosecution witnesses

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[160] James Weldon Johnson, *Detroit*, 32 The Crisis 117, 118 (1926) [hereinafter *Detroit*].
[161] STORY OF MY LIFE, *supra* note 61, at 311.
[162] *Id.* at 310.
[163] *Detroit*, *supra* note 160, at 118.

and then, watched by hundreds of spectators, at least two thirds of them black, he told a tale that had never before been heard in an American court."[164]

As in the first trial, Darrow did not dodge the race issue. After some introductory pleasantries he exposed the racial tensions underlying the case and he did not mince words. He told the jurors that they themselves were prejudiced and the whole case was based on racism, but he appealed to them to lay their prejudices aside and put themselves in the place of the Sweets.

Gracious Towards Prosecution

Despite the heated battle, Darrow was gracious towards the prosecution at the beginning of his final argument to the jury. He extended compliments to the prosecution by saying:

> I want to say, however, that while I have tried a good many cases in the forty-seven or forty-eight years that I have lived in court houses, that in one way this has been one of the pleasantest trials I have ever been in. The kindness and the consideration of the Court is such as to make it easy for everybody, and I have seldom found as courteous, gentlemanly and kindly opponents as I have had in this case. I appreciate their friendship.[165]

Nothing but Prejudice

Darrow began with a review of the prosecution's denial that race was involved:

> I shall begin about where my friend Mr. Moll began yesterday. He says lightly, gentlemen, that this isn't a race question. This is a murder case. We don't want any prejudice; we don't want the other side to have any. Race and color have nothing to do with this case. This is a case of murder.[166]

Darrow sharply rejected Moll's argument:

> I insist that there is nothing but prejudice in this case; that if it was reversed and eleven white men had shot and killed a black while protecting their home and their lives against a mob of blacks, nobody would have dreamed of having them indicted. I know what I am talking about, and so do you. They would have been given medals instead.[167]

Darrow told the jury directly:

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[164] SADAKAT KADRI, THE TRIAL: A HISTORY, FROM SOCRATES TO O.J. SIMPSON 290 (2005) [hereinafter KADRI, THE TRIAL].
[165] ARGUMENT OF CLARENCE DARROW, *supra* note 9, at 5.
[166] *Id.*
[167] *Id.*

> You twelve white men are trying a colored man on race prejudice. Now, let me ask you whether you are not prejudiced. I want to put this square to you, gentlemen. I haven't any doubt but that everyone of you are prejudiced against colored people. I want you to guard against it. I want you to do all you can to be fair in this case, and I believe you will.[168]

These are Colored People Who are Intellectually the Equal of All of You

Darrow strongly emphasized that the defendants and defense witnesses were intellectually and morally superior to the prosecution's white witnesses:

> You have seen some of the colored people in this case. They have been so far above the white people that live at the corner of Garland and Charlevoix that they can't be compared, intellectually, morally and physically, and you know it. . . . There isn't one of you men but what know just from the witnesses you have seen in this case that these are colored people who are intellectually the equal of all of you. Am I right? Colored people living right here in the City of Detroit are intellectually the equals and some of them superior to most of us. Is that true? Some of them are people of more character and learning than most of us.[169]

Darrow frequently came back to prejudices of the jurors:

> Now, gentlemen, I say you are prejudiced. I fancy everyone of you are, otherwise you would have some companions amongst these colored people. You will overcome it, I believe, in the trial of this case. . . . All I hope for, gentlemen of the jury, is this: That you are strong enough and honest enough, and decent enough to lay it aside in this case and decide it as you ought to. And I say, there is no man in Detroit that doesn't know that these defendants, everyone of them, did right. There isn't a man in Detroit who doesn't know that the defendant did his duty, and that this case is an attempt to send him and his companions to prison because they defended their constitutional rights. It is a wicked attempt, and you are asked to be a party to it.[170]

Not Going to 'Slobber' over Breiner

During the trial, the prosecution accused Darrow of not wanting talk about the victim Leon Breiner. As Darrow described it, Moll "says that I wiggled and squirmed every time they mentioned Breiner."[171] Darrow conceded that he did not like the state to focus on the victim during a criminal trial because of the prejudicial affects it may cause. He told the jury:

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[168] *Id.*
[169] *Id.* at 5-6.
[170] *Id*. at 6-7.
[171] *Id.* at 8.

> [H]e said that I don't like to hear them talk about Breiner. I don't, gentlemen, and I might have shown it. This isn't the first case I was ever in. I don't like to hear the State's Attorney talk about the blood of a victim. It has such a mussy sound. I wish they would leave it out. I will be frank with you about it. I don't think it has any place in a case. I think it tends to create prejudice and feeling and it has no place, and it is always dangerous.[172]

But Darrow did not avoid talking about Breiner. As he did in the first trial, he not only talked about Breiner, he implicated Breiner as a member of the white mob that tried to drive the Sweets from their home. Darrow told the jury, "I am going to talk about him, and it isn't easy, either. It isn't easy to talk abut the dead, unless you 'slobber' over them and I am not going to 'slobber' over Breiner."[173] According to Darrow, Leon Breiner was "a conspirator in as foul a conspiracy as was ever hatched in a community; in a conspiracy to drive from their homes a little family of black people and not only that, but to destroy these blacks and their home."[174]

Breiner Was Waiting for the Circus

Darrow went on to recite the evidence that Breiner was part of the mob that night:

> What do we know of Breiner? He lived two blocks from the Sweet home. On the 14th of July, seven hundred people met at the school-house and the school-house was too small, and they went out into the yard. This school-house was across the street from the Sweet house.
>
> Every man in that community knew all about it. Every man in that community understood it. And in that school-house a man rose and told what they had done in his community; that by main force they had driven Negro families from their homes, and that when a Negro moved to Garland Street, their people would be present to help. That is why Mr. Breiner came early to the circus on the 9th. He went past that house, back and forth, two or three times that night. Any question about that? "Smoking his pipe." What were the rest of them doing? They were a part of a mob and they had no rights, and the Court will tell you so, I think. And, if he does, gentlemen, it is your duty to accept it.
>
> Was Breiner innocent? If he was, every other man there was innocent. He left his home. He had gone two or three times down the corner and back. He had come to Dove's steps where a crowd had collected and peacefully pulled out his pipe and begun to smoke until the curtain should be raised. You know it. Why was he there? He was there just the same as the Roman populace were wont to gather at the coliseum where they brought out the slaves and the gladiators and waited for the lions to be unloosed. That is why he was there. He was there waiting to see these black men driven from their homes, and you know it; peacefully smoking

[172] *Id.*
[173] *Id.*
[174] *Id.*

> his pipe, and as innocent a man as ever scuttled a ship. No innocent people were there. What else did Breiner do? He sat their while boys came and stood in front of him not five feet away, and stoned these black people's homes, didn't he? Did he raise his hand? Did he try to protect any of them? No, no. He was not there for that. He was there waiting for the circus to begin.[175]

Darrow also put the Waterworks neighborhood improvement association on trial. He told the jury that this was about more than the prosecution trying to get a conviction:

> It was bad enough for a mob, by force and violation of law, to attempt to drive these people from their house, but, gentlemen, it is worse to send them to prison for life for defending their home. Think of it. That is the case. Are we human? Hardly. . . . the mob met there to drive them out. That is exactly what they did, and they have lied, and lied and lied to send these defendants to the penitentiary for life, so that they will not go back to their home.[176]

Darrow told the jury that this terrible injustice had happened before and would happen again "but, gentlemen, they ought not to ask you to do it for them. That is a pretty dirty job to turn over to a jury, and they ought not to expect you to do it."[177]

Ridicules Witnesses for the State

Darrow used his closing argument to again ridicule the uneducated witnesses that testified for the state. He reminded the jury about Miss Stowell, the school teacher, who faced Darrow's rath while on the witness stand:

> Miss Stowell,—Miss Stowell—do you see her? I do. S-t-o-w-e-l-l. You remember, gentlemen, that she spelled it for us. I can spell that in my sleep, too. I can spell it backwards. Well, let me recall her to you. She teaches school at the corner of Garland and 'Gother' Street; fifteen years a high school teacher, and, in common with all the other people in the community, she called it 'Gother' Street.[178]

In describing the policemen who were present on the night of the shooting, Darrow said, "Some of them seemed to come from some institution, judging by the way they talked."[179] Referring to another witness who testified that there might have been four people present in the schoolhouse yard, Darrow told the jury, "Four, gentlemen. I wouldn't say this man lied. It takes some mentality to lie. An idiot can't lie."[180] Darrow continually hammered at the fact that all of the state's witnesses lied about how many

[175] *Id.* at 8-9.
[176] *Id.* at 10.
[177] *Id.* at 10-11.
[178] *Id.* at 11.
[179] *Id.* at 12.
[180] *Id.* at 12.

people were present near the Sweet home that night, calling them "wonderful mathematical geniuses who testified in this case."[181]

"Eye-talians"

Darrow recalled another witness named Miller who admitted under cross-examination that the Improvement Association was created for the purpose of keeping out "undesirables" which Miller admitted included "Negroes," and upon further prodding from Darrow admitted also included "Eye-talians."[182] Darrow pointed out that the whites in that neighborhood wanted to keep it "American" and yet they did not know that the Sweets' descendants had been in America for three hundred years and that it was an "Eye-talian that discovered this land of ours. Christopher Columbus was an 'Eye-talian,' but he isn't good enough to associate with Miller."[183]

Darrow stated that the police were deployed to the area "to see that a family were permitted to move into a home that they owned without getting their throats cut by the noble Nordics who inhabit that jungle."[184]

Make Yourselves Colored for a Little While

Darrow stressed to the jury that they needed to put themselves in the place of the defendants to truly judge whether Breiner's death was a justifiable homicide. He told the jury of 12 whites, "Imagine yourselves colored, gentlemen. Imagine yourselves back in the Sweet house on that fatal night. That is the only right way to treat this case, and the court will tell you so."[185] Darrow stressed this point to the jury—they had to see the shooting through the eyes of the defendants:

> Now, let us look at these fellows. Here were eleven colored men, penned up in the house. Put yourselves in their place. Make yourselves colored for a little while. It won't hurt, you can wash it off. They can't, but you can; just make yourself black for a little while; long enough, gentlemen, to judge them, and before any of you would want to be judged, you would want your juror to put himself in your place. That is all I ask in this case, gentlemen.[186]

If the defendants thought their lives were in danger, then they could act to protect themselves with deadly force:

> Every man may act upon appearances as they seem to him. Every man may protect his own life. Every man has the right to protect his own property. . . . he has the human right to go to the extent of killing to defend his life. He has a right

[181] *Id.* at 13.
[182] *Id.* at 14.
[183] *Id.* at 14.
[184] I*d.* at 17.
[185] *Id.* at 18.
[186] *Id.* at 27.

> to defend the life of his kinsmen, servant, his friends, or those about him, and he has a right to defend, gentlemen, not from real danger, but from what seems to him real danger at the time.[187]

Darrow did not dodge the fact that the defendants had brought ten guns and ammunition with them to the house. He told the jury that the defendants were justified in having guns: "They had a bedstead, a stove and some bedding, ten guns and some ammunition, and they had food to last them through a siege. I feel that they should have taken less furniture and more food and guns."[188]

Darrow talked at great length about the long history of discrimination against blacks, from slavery up to the time of the trial.

Jim Crow Heaven

Darrow made several references to religion in his summation. For example, when referring to segregation based on race, he said:

> Of course, colored people belong to a church, and they have a Y.M.C.A. That is, a Jim Crow Y.M.C.A. The black Christians cannot mix with the white Christians. They will probably have a Jim Crow heaven where the white angels will not be obliged to meet the black angels, except as servants.[189]

Darrow did not totally concede that Henry Sweet killed Breiner, and reiterated that it was not clear whose gun the fatal shot came from. But he also told the jury that it did not matter who fired the fatal shot:

> Gentlemen, these black men shot. Whether any bullets from their guns hit Breiner, I do not care. I will not discuss it. It is passing strange that the bullet that went through him, went directly through, not as if it was shot from some higher place. It was not the bullet that came from Henry Sweet's rifle; that is plain. It might have come from the house; I do not know, gentlemen, and I do not care. There are bigger issues in this case than that. The right to defend your home, the right to defend your person, is as sacred a right as any human being could fight for, and as sacred a cause as any jury could sustain.[190]

The Story Would Melt Hearts of Stone

Darrow made repeated efforts to get the jury to sympathize with the defendants as much as possible. To get them to think about the prejudice that blacks felt at that time, he said: "Gentlemen, I feel deeply on this subject; I cannot help it. Let us take a little glance at the history of the Negro race. It needs only a minute. It seems to me that the story would melt

[187] *Id.* at 25.
[188] *Id.* at 18.
[189] *Id.* at 19.
[190] *Id.* at 33.

hearts of stone."[191] Darrow stated that while he was born in America and others came freely to America from other countries, the black story was different:

> These men, the defendants, are here because they could not help it. Their ancestors were captured in the jungles and on the plains of Africa, captured as you capture wild beasts, torn from their homes and their kindred; loaded into slave ships, packed like sardines in a box, half of them dying on the ocean passage; some jumping into the sea in a frenzy, when they had a chance to choose death in place of slavery. They were captured and brought here. They could not help it. They were bought and sold as slaves, to work without pay, because they were black. They were subjected to all of this for generations, until finally they were given their liberty, so far as the law goes—and that is only a little way, because, after all, every human being's life in this world is inevitably mixed with every other life and, no matter what laws we pass, no matter what precautions we take, unless the people we meet are kindly and decent and human and liberty-loving, then there is no liberty. Freedom comes from human beings, rather than from laws and institutions.[192]

Darrow impressed upon the jury the importance of their task:

> Your verdict means something in this case. It means something more than the fate of this boy. It is not often that a case is submitted to twelve men where the decision may mean a milestone in the progress of the human race. But this case does. And, I hope and I trust that you have a feeling of responsibility that will make you take it and do your duty as citizens of a great nation, and, as members of the human family, which is better still.[193]

Law of Love

Darrow concluded:

> I am the last one to come here to stir up race hatred, or any other hatred. I do not believe in the law of hate. I may not be true to my ideals always, but I believe in the law of love, and I believe you can do nothing with hatred. I would like to see a time when man loves his fellow man, and forgets his color or his creed. We will never be civilized until that time comes. I know the Negro race has a long road to go. I believe the life of the Negro race has been a life of tragedy, of injustice, of oppression. The law has made him equal, but man has not. And, after all, the last analysis is, what has man done?—and not what has the law done? I know there is a long road ahead of him, before he can take the place which I believe he should take. I know that before him there is suffering, sorrow, tribulation and death among the blacks, and perhaps the whites. I am sorry. I would do what I could to avert it. I would advise patience; I would advise toleration; I would advise

[191] *Id.* at 34.
[192] *Id.*
[193] *Id.* at 35.

> understanding; I would advise all of those things which are necessary for men who live together.
>
> Gentlemen, what do you think is your duty in this case? I have watched day after day, these black, tense faces that have crowded this court. These black faces that now are looking to you twelve whites, feeling that the hopes and fears of a race are in your keeping.
>
> This case is about to end, gentlemen. To them, it is life. Not one of their color sits on this jury. Their fate is in the hands of twelve whites. Their eyes are fixed on you, their hearts go out to you, and their hopes hang on your verdict.
>
> This is all. I ask you, on behalf of this defendant, on behalf of these helpless ones who turn to you, and more than that,—on behalf of this great state, and this great city which must face this problem, and face it fairly,—I ask you, in the name of progress and of the human race, to return a verdict of not guilty in this case![194]

Darrow's closing argument in the trial of Henry Sweet was one of the most powerful of his career. Executive Secretary of the NAACP James Weldon Johnson observed the trial and described Darrow's summation:

> For nearly seven hours he talked to the jury. I sat where I could catch every word and every expression of his face. It was the most wonderful flow of words I ever heard from a man's lips. Clarence Darrow, the veteran criminal lawyer, the psychologist, the philosopher, the great humanist, the great apostle of liberty, was bringing into play every bit of skill, drawing upon all the knowledge, and using every power that he possessed.[195]

In a lifetime of dramatic and important courtroom performances, this was one of Darrow's most powerful. Johnson states that Darrow ended his argument with an appeal that "did not leave a dry eye in the courtroom."[196] Judge Murphy reportedly said, "This is the greatest experience of my life. That was Clarence Darrow at his best. I will never hear anything like it again. He is the most Christ-like man I have ever known."

Darrow later wrote that during the Henry Sweet trial, "My long sympathy for the colored people conspired to help me make one of the strongest and most satisfactory arguments that I ever delivered."[197]

One commentator stated that Darrow's summation in the Henry Sweet case "has strong claim to be the finest forensic address of the twentieth century."[198] Langston Hughes wrote that Darrow's speech to the jury "has been called one of the greatest in the history

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[194] *Id.* at 36.
[195] Detroit, *supra* note 160, at 118.
[196] *Id.* at 119.
[197] STORY OF MY LIFE, *supra* note 61, at 311.
[198] KADRI, THE TRIAL, *supra* note 164, at 287.

of American jurisprudence."[199] So influential was Darrow's final plea to the jury in the Henry Sweet trial that an excerpt was published in the compilation *A Treasury of the World's Great Speeches* published in 1954.

Robert Toms Closing Argument

Prosecutor Robert Toms gave the closing argument for the state of Michigan the day after Darrow's closing argument. Toms focused considerable attention on the statement Henry Sweet gave to the police on the night of the shooting. From the prosecution's standpoint, Henry Sweet was the best defendant because he was the only one who admitted to shooting a gun the night of the murder and he gave several incriminating statements after being arrested. Toms tried to use these statements to paint an entirely different picture of the scene in and about the Sweet's new home on the night of the shooting.

Toms would focus on what the NAACP leadership and the defense considered the most dangerous part of their case and what they worried about from the beginning: that a jury of whites would think the defendants fired too soon. Toms tried to counter the defense description that there was an angry mob of whites outside the Sweet house. Instead, the whites were more curious than anything else, they were not aggressively threatening the defendants and certainly did not represent a threat sufficient to justify shooting an unarmed man and killing him. Toms also wanted the jury to focus on the fact that whatever happened that night, Breiner was dead, shot in the back and that was far worse than whether someone could or could not live in a particular neighborhood.

Toms began:

> May it please the court, and gentlemen of the jury, I want to first express my personal appreciation of the patience and continued interest with which you have listened to this case during the wearisome weeks we have been here trying to do a public duty. I realize that it has been an occasion of some discomfort and inconvenience for you and that your service here has been or should be labeled as a patriotic one. It is not pleasant. It is not convenient, but you have faced it, and faced it cheerfully and patiently, and I for one want to commend you for it and state that I appreciate it.
>
> I dread to impose on you a further avalanche of language after what you have been subject to for the last two or three days. Unfortunately, it falls to me to pile on the straw which will probably break the camel's back, but I cannot feel but I must say something, at least, as it is my duty to on behalf of the State at the conclusion of this trial.

Toms expressed his confusion over race:

> Now, I have learned a lot about the Negro problem in sitting through this case twice. I mean, I have to learn a lot. The more I hear, the more I am convinced

[199] FIGHT FOR FREEDOM, *supra* note 120, at 44 .

that I don't know much about it. I don't know whether it is a Negro problem, or whether it is a white problem, or whether it is both, but the more I study it and the more I hear about it, the more I am convinced nobody knows much about it; that it is a problem which has arisen recently and which is changing so rapidly that no one can claim to be an authority on it. I do not know what a Negro is. What do you mean by a 'negro'? Do you mean a person who has any trace of African blood in his veins? I can't say that in the ordinary acceptance of the term we mean a black person, because so many negroes are not black. Some of them are very white, so what do we mean by a 'negro'? What it means in the ordinary acceptance of the word is a person who has the slightest trace of African blood in his veins. In other words, he may be 99.9 per cent white man, but we feel the other tenth makes him a negro. So our problem isn't altogether with the black man unless we are going to modify our definition of the word 'negro.'

Mr. Darrow Prejudiced

In his own clumsy way, Toms tried to show that he was not prejudiced against negroes although he was prejudiced against some things:

> Now, let me talk about prejudices a minute. I have got a lot of them. I am prejudiced against some Negroes. I am prejudiced against some white men to such an extent that I don't think I could be argued out of it. My grandfather was prejudiced against Democrats. It happens that he was one of the founders of the Republican party out at Jackson [Michigan] in 1846, and he used to say that he didn't think that all Democrats were horse thieves, but it was funny that all horse thieves were Democrats. Now, that is just prejudice, of course. It is pure, unadulterated, unreasoning, blind prejudice. Mr. Darrow has got a lot of pet prejudices too. He is prejudiced against policemen and he is prejudiced against state's attorneys as a rule, and he is prejudiced against state's witnesses; all you need to arouse his prejudice is to put a witness on the stand for the state, and he wouldn't believe him if they told him that his name was Clarence Darrow. He would doubt it. Oh, I have got a lot other pet prejudices. I am prejudiced against bright blue window-shades, and I detest bathing girl stickers on Ford cars, and I have a prejudice against gossips, male or female, and I have a prejudice against slackers, lazy people, and I have a prejudice against women that use lip-sticks in street cars . . . .
>
> And you, each of you, have such prejudices. Do not deceive yourselves. You have. And you can't put them out of your mind. But I want to tell you this, that among my pet prejudices, I do not hold one against the negro. I have known some fine negroes. I once ate dinner with Bert Williams, and spent the evening with him; as delightful an evening as I ever spent. I broke bread with Walter White when he was here at the last trial. I wish that he was here now. And I have a negro in my office, a competent, trustworthy fellow. My two children this morning are in the keeping of a colored woman, and in spite of that fact that I am prosecuting this case, I am not a bit afraid, not a bit. So, I haven't any prejudice

> against a man on account of his color. I think if you were to ask Mr. Darrow, he would say that my attitude throughout these two trials is some evidence of that."

Darrow responded "It is." Toms resumed "So I will join with him in asking you to exclude all the prejudice that you have, all of it, from your deliberation in this case, and I include in that, the prejudices which Mr. Darrow has tried to instill into you."

Facts

Toms was well aware of Darrow's power to get a jury to focus on issues outside the courtroom and the particular facts of case. He wanted the jury to remember the state's version of some of the facts:

> It is undisputed that the only damage to the Sweet house were the two holes in one pane of glass, in the front window, and a sort of half-hearted claim, based on an impression, that the window on the south side of the house on the second floor might have been broken, and that constitutes the sum total of the damage to the Sweet house. It isn't disputed that not one finger was laid on any of the ten people in that house. It is not disputed that not one hair of their heads was harmed. It isn't disputed that there were no people on the sidewalks immediately around the house, that is, on the west side of Garland in front of the house, and the north side of Charlevoix at the side of the house. It isn't claimed that there was any mob or crowd over there. It isn't disputed that 391 rounds of ammunition were found in the house, and that 14 shells of five different calibers were found discharged in that house. It isn't disputed that no threats of any kind were directed at the members of that household that night. Well, I guess that is all. There may be some other things that are not disputed. That is a lot better than we thought, when you get it all together. It is quite a bit, and quite significant. The undisputed facts of this case are very important. They go a long way towards proving what happened there that night, the undisputed facts.

Fear

Toms wanted to disrupt the heart of the self-defense argument Darrow and Chawke made on behalf of Henry Sweet:

> Now, let's talk about fear for a minute. Here is the whole defense in this case. It is a defense which is founded on fear. Well, now, fear isn't a thing that you can put your finger on either, or put in a box. There are so many degrees of fear. . . . Now, in connection with honesty in this case, how frightened was Henry Sweet and what was the basis of his fright, because if he wasn't frightened there wouldn't be any defense here, that Henry Sweet was frightened, and they go clear back to the time his brother, the Doctor, was seven years old, to lay the foundation for that fright, and by inference, they say, if Doctor Sweet was frightened, Henry was frightened just as much, and every other defendant in that house, every other occupant was frightened just as much as the spokesman, Doctor Sweet, was

> frightened. They sort of standardized their fear. They said, 'We will plot a fear here, about that size (Indicating), yes, that is big enough to cover this case. That is our fear; David and Washington and Latting and Henry and Otis and Ossian, all of them, we all have the same fear.

Defense Makes up Fear

The prosecutor sarcastically denied that Henry Sweet feared for his life:

> And then Henry Sweet, how terrified he was. He must have been down in the basement hiding in the part behind the furnace, trembling, shaking in terror of his life, at the white mob. Well, not so you could notice it. Henry goes out on the porch, and sits down and reads for three quarters of an hour in a swing on the front porch. Then he says, 'Well, this is pretty tough. I guess I will go and get a cigar,' and comes over to the white man's grocery store and buys a cigar and comes back, and walks up and down in front of the house, and finally from sheer ennui, he says, 'I guess I will go in the house.' Frightened to death. That was the day that – that was the 9th, that was the day when they were all terror stricken, when their house was to be demolished. And that is what they call being frightened. So overcome with fear that they felt it was necessary to shoot 104 feet to kill a man by putting a bullet through his back to protect themselves. Oh, that fear theory is just a smoke screen, gentlemen. It is just a smoke screen. It is plain subterfuge. Well, they got to have some defense, and the fact that this man is a negro, immediately offers the defense of fear, of race persecution, and of hereditary terror. Why talk about being afraid? Why were these people inside running about? According to Dr. Sweet, frightened, terrorized, and someone rings the doorbell, and they go and say, 'Come in.' And it is his brother, and his friend Davis. Do you think you could have dragged him to that door, that front door? If they had been frightened, really frightened? Two friends come up in an automobile and they say, 'Hello, come in.' Frightened? Oh, there are a few things, little things -- which show that they never were frightened until they found out that it was necessary to be frightened, in order to justify their actions.

Henry Sweet Own Words

Toms constantly reiterated that the defense justification of overwhelming fear was belied by the facts:

> Why, how frightened they were. They spent the evening playing cards. Here are men who are in terror of their lives, frightened -- who feared immediate, pressing, and impending death, lynching, their house torn down, about their heads, playing cards. And Henry Sweet says, 'Oh, I thought I would shoot so they would go away and let us finish our supper.' Oh, is that the price of interfering with a meal? Death? Do you disturb the tranquility of the evening meal at the risk of your life? Let us see what Henry Sweet does say, I mean let us see what he said before he had to have a lawyer to tell him to tell the truth. Now, here is the

> statement of a man which was taken the night that this thing happened, with his recollection fresh, without his having the time to conjure up, and manipulate, and manufacture fears and defenses. . . .
>
> Now, here is a chance for Henry Sweet to give his own justification for the thing -- here is a chance for him to say that he was in mortal terror of his life, if he was afraid, if he didn't fire, he would lose his life or his brother's property would be destroyed? Now, this is right after he did it, that he makes this statement.
>
> Q. Why did you fire as close as that?
> A. To frighten them so they would leave us alone so we could go and finish our supper.

At this point Darrow interrupted to say that Henry said there were other defendants in the same room. Toms continued:

"To frighten them so they would leave us alone so we could go and finish our supper. Well, if that is a good reason for killing a man, all right. If a man must be shot because not he, but some other people were there moving around, are disturbing the quiet of my supper hour, I will quit. We are all done if that is the reason for killing a man.

Police Did not Shoot Breiner

Toms ridiculed the defense argument that Breiner may have been shot accidently by a Detroit police officer. "Now, I think the most ridiculous, conjecture, speculation, suspicion that has been put into this case is the one about Gill, of his having shot Breiner. How desperate you must be for a defense, gentlemen! Clutching at straws."

After being interrupted by Darrow, Toms continued about Gill the police officer: "He wasn't shown to have the reputation of a liar. The worst that you can say about him is that he was from Tennessee, and for the reason he was shooting at white people in preference to negroes. How things have changed in Tennessee since the Scopes trial?"

Darrow Wants to Ignore "Mussy" Facts

Toms accused Darrow of avoiding the case of Henry Sweet and the fact that Breiner was shot dead. He said Darrow wanted to try:

> any case that he could think of except the People of the State of Michigan versus Henry Sweet. He doesn't like that, and he doesn't like to have us talk about Breiner's death, and about Breiner being shot, and about Breiner being buried, I don't blame him. He says it is mussy. And when he used the word, I couldn't help but think of Dr. Sweet's vivid and wonderful description of the burning of the colored boy in Florida, when Dr. Sweet was seven years old; mussy -- that is kind of mussy to talk about pouring kerosene on him, and that sort of thing. That is my idea of mussy. Oh, you see, that doesn't hurt Dr. Sweet any. The mussy things

> that Darrow doesn't like to hear are the ones that don't do Dr. Sweet and his brother credit. So he hates to see Breiner brought in here. Breiner, poor Breiner, just a figurehead here. What an innocent figure he has turned out to be. Just some man who was killed, that is all. Just the man who is dead. Well, that is mussy. Who made it that way? Who created the muss? What is the only violence and bloodshed in this whole case? Well, it is the violence and bloodshed that was caused by a bullet fired from this house. That is the only bloodshed. That is the only mussy feature. I am not surprised he doesn't like to hear about it. It isn't pleasant. We don't any of us like to hear about the dead, but we ought, none of us, to forget them.

Conclusion

Toms concluded his argument by focusing on the murder victim:

> Let us not be misled as to what we are to determine here, what the real issue of this case is. We are not trying a group of hoodlums in Chicago, nor a mob in Tulsa, Oklahoma, in 1910, or in Chicago, or East St. Louis, or Orlando, Florida. We are not fundamentally concerned with the prominence or distinction of the defendants or their witnesses, or any organization which sponsors them. It is not so important to us that Doctor Sweet was once a good waiter or worked as a bell-boy, or that he studied medicine in Europe, or graduated from Wilberforce University. That is not of much importance here. This is all a smoke screen, gentlemen, thrown out to hide the real question to be decided here, and that is who was responsible for the death of Leon Breiner? On whom should the hand of guilt be placed? Back of all your sophistry, gentlemen of the defense, back of all your transparent philosophy, back of your prating of the civil rights, and your psychology, and your theory of race hatred, and fear, and slavery, back of all that rise the dead body of Leon Breiner with a bullet hole in his back. You can bury it if you will, or if you can, beneath all the copies of 'The Crisis' and 'The Defender' and 'The Independent' and the other committees' reports in the world; bury it if you can, and still out from under that avalanche appears the mute face of Leon Breiner and the lips are forever mute. All your specious arguments and all your beautiful ingenuity born of many years of experience, and all your sociological theories and all your cleverly conceived and manipulated race psychology, can never dethrone justice in this case. Leon Breiner, just a poor insignificant American citizen, just one man in thousands, but a living human being with a right to live, without aspirations and with hopes and with ambitions, and with the God-given right to work them out, Leon Breiner, chatting with his neighbor at his doorstep, is shot through the back, from ambush, and you can't make anything out of those facts, gentlemen of the defense, or gentlemen of the jury, but cold-blooded murder.

Judge Murphy's Charge to the Jury

Judge Murphy's charge to the jury was a fundamentally important part of the case.

As he did in the first trial, Judge Murphy incorporated the defense's emphasis on the fear that blacks had when confronted with white mobs. This effectively took the case well beyond the simple murder case the prosecution wanted the jury to decide:

> It is your province, gentlemen of the jury, to consider what were the circumstances which confronted the accused at the time, his situation, their situation, his race and color. The actions and attitude of those who were outside the Sweet home all has a bearing on whether or not the sum total of the surrounding circumstances, as they appeared to him at the time, was such as to induce in a reasonable man the honest belief of danger.

Judge Murphy again gave the instructions that a man's house is his castle:

> Under the law, a man's house is his castle. It is his castle, whether he is white or black, and no man has the right to assault or invade it. The negro is, now by the Constitution of the United States, given full citizenship with the white man, and all the rights and privileges of citizenship attend him wherever he goes. Our Supreme Court has said, all citizens, whether white or black, are equal before the law. The white man can have no rights or privileges that are denied to the black. Socially, people may do as they please, if they do it within the law. The whites may associate together and exclude the blacks, or the blacks may associate together and exclude the whites, from their dwelling houses and private grounds, and from their own private activities.

Judge Murphy warned the jury to be hyper-cautious about prejudice:

> You have no right to draw upon any prejudice that you may have, or upon any passion, upon any sympathy, either for the respondent in this case, or for the deceased, or for anybody else. It is your duty to weigh, and analyze and consider what the testimony is in this case, considering carefully the testimony of each witness, and determining from all of the testimony what the true facts are. Now, gentlemen of the jury, because of the particular facts surrounding this case, and because of all that has been said and argued here, I consider it my duty to especially caution and warn you against prejudice or intolerance in your deliberations. I urge you, gentlemen, to summon the best judgment you have, and your finest sense of conscientious duty.
>
> You must strive to be equally fair with the prosecution and with the defense. Anything less than this will be less than your duty under the law. If you permit passion or prejudice, or hate or the like, to enter into your deliberations, reason will depart, and that calm, judicial and fair judgment necessary in doing justice, will not prevail. You will remember, gentlemen, that under the Constitution of the country, as well as the Anglo-Saxon conception of justice, all men are equal before the law. Real justice does not draw any line of color, race, or creed or class. All charged with crime, rich or poor, humble or great, white or black, are entitled to the same rights and the same full measure of justice. It may be

> possible, human as we are, we cannot create perfect justice; but the ideal is plain, and it is our duty to strive and reach for it as sincerely as it is in our power to do so.

James Weldon Johnson wrote of the jury instructions:

> For two and a half hours Judge Murphy charged the jury. The charge contemplated the law involved from every point and yet it was not the dry dust of the law books. It was eloquent and moving. In his charge, as in presiding over the case, Judge Murphy showed himself absolutely fair and impartial. Indeed, he was in the highest degree the just judge.[200]

Waiting

The jury began deliberations after Judge Murphy's instructions on May 13, 1926. Many expected a long deliberation. After the jury was sent to deliberate, Darrow, his co-counsel and several others went to a bar to drink and wait. They were at the bar three hours later when they were summoned back because the jury was asking for clarification and Judge Murphy needed to discuss the matter with the prosecution and defense. However, while both sides were discussing the issues, word came that the jury had reached a verdict. After about three and a half hours the jury had decided Henry Sweet's fate and to a large degree the fate of the other defendants. The jury foreman was asked for the verdict which, he gave: "Not guilty."

Nolle Prosequi

On July 12, 1927, prosecutor Robert Toms filed a motion asking the court to enter an order of nolle prosequi[201] in the case. The one-page motion briefly mentioned that the first trial involving all the defendants ended in a mistrial after about thirty-six hours and the second trial in which Henry Sweet was the defendant ended in a not guilty verdict. Toms stated that the state's "proofs" were greater against Henry Sweet than the other defendants, listing as an example that only Henry Sweet had admitted he fired in the direction of the victim. Toms also stated:

> It is significant that since the trial of this case there has not been a single so-called inter-racial clash in the City of Detroit and a noticeably improved spirit of tolerance and forbearance has arisen between the colored and white groups in this city. The defendant Ossian Sweet has not attempted to occupy the residence at the corner of Garland and Charlevoix Streets and has offered the same for sale.

Toms concluded that if a jury could not find Henry Sweet guilty it was even more likely that a jury would not convict the other defendants because the evidence against the others "would be far less conclusive." He conceded that the state did not have additional proof

[200] *Detroit*, *supra* note 160, at 119.
[201] Black's Law Dictionary defines nolle prosequi as Latin for "not to wish to prosecute" and as "[a] legal notice that a lawsuit or prosecution has been abandoned."

beyond what was offered in the two trials. Another factor was the "enormous expense . . . in retrying a case in which there [we]re approximately seventy-five witnesses and which would take the time of one court for nearly a month." Toms concluded the motion by stating that while cost was not a controlling factor if the state believed they could establish guilt, "[I]n view of the proceedings already had in this cause such a result seems improbable to the last degree."

The widow of Leon Breiner sued for $150,000 in 1927 but the suit was dismissed.

Aftermath

The Sweet trials came near the last decade of Clarence Darrow's long career and after numerous famous trials. Yet Darrow himself considered it the most important case he was ever involved with. Darrow stated, "The defense of this case gave me about as much gratification as any that I have undertaken."[202] Darrow summed up the Henry Sweet trial this way: "The verdict meant simply that the doctrine that a man's house is his castle applied to the black man as well as to the white man. If not the first time that a white jury had vindicated this principle, it was the first that ever came to my notice."[203]

One book about the trial notes "Darrow had been attracted to the case because, so far as he knew, no black man in this country charged with killing a white man had ever successfully pleaded self-defense."[204] One of Darrow's biographers believed "[i]n the Sweet case Darrow exposed for the first time in a courtroom the virulence of racial segregation."[205] Langston Hughes wrote that the "Sweet case set a precedent for the law in relation to Negroes. For every citizen it reaffirmed that '"a man's home is his castle."'[206]

Darrow Stays True to His Deterministic Beliefs

Darrow truly believed that human behavior was ruled by determinism and not free will. His strongly held views about determinism influenced how he viewed the white community that had shown such prejudice against his clients in the Sweet trials. In his autobiography written in 1932 he stated:

> While I was certain that my clients were right and that they were grievously wronged, I never had any sense of resentment against the community. The people who sought to drive that colored family from their home were only a part of the product of the bitterness bred through race prejudice, for which they were not responsible. So long as this feeling lives, tragedies will result.[207]

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[202] STORY OF MY LIFE, *supra* note 61, at 311.
[203] *Id.* at 311.
[204] KENNETH G. WEINBERG, A MAN'S HOME, A MAN'S CASTLE xiii (1971) [hereinafter WEINBERG, A MAN'S HOME].
[205] SENTIMENTAL REBEL, *supra* note 80, at 332.
[206] FIGHT FOR FREEDOM, *supra* note 120, at 45.
[207] STORY OF MY LIFE, *supra* note 61, at 311.

Darrow also harbored no ill feelings toward the whites who testified in the Sweet trials despite their untruthfulness:

> [They] were lying about the whole affair. And yet, these people were almost all members of churches, and in the ordinary matters of life were truthful and kind. Their fear that their property would be injured, together with their racial feeling, justified them in their testimony. Invariably one meets these experiences in court, where prejudices show up very marked and deep. I could realize how seriously some of them must have feared the loss of their property, and neither then nor since have I judged them."[208]

Darrow Meets Prosecution Team

About a year after the trials, Darrow met both prosecutor Robert Toms and his assistant Lester Moll and claimed that both men "told me that they had come to think that the verdict was just and did a great deal of good in Detroit."[209] Both Toms and Moll eventually became judges. Darrow supported Toms when he was elected a circuit court judge.[210] In his autobiography Darrow wrote, "It is only fair to state that the Honorable Robert Toms, who prosecuted the case, was one of the fairest and most human prosecutors that I ever met."[211]

Surprisingly, Toms later joined the local NAACP and even sat on its executive committee. Later, Toms "devoted all of 1947 to confronting the greatest of racial evils, presiding over the prosecution of Nazi war criminals as a trial judge for the United States Military Tribunal at Nuremberg."[212] Toms was a presiding judge of Military Tribunal II along with two other judges in the case of Oswald Pohl. During that trial, the chief prosecutor took the deposition of Hermann Goering, Field Marshall, Commander-in-Chief German Air Force just days before Goering was sentenced to death. Pohl and three other defendants were sentenced to death by hanging. One of the judges that served with Toms in the Pohl trial was Michael Angelo Musmanno, a Naval officer and Justice of the Pennsylvania Supreme Court. In 1932 Musmanno and Darrow debated each other on the topic of immortality. The debate was titled *Does Man Live Again?*

Ossian Sweet

Dr. Ossian Sweet had numerous accomplishments in his life in addition to earning an undergraduate education and a medical degree and studying abroad in Europe. In 1929, he co-founded Good Samaritan Hospital with Mrs. Bertha McKenzie in Detroit "as a general and maternity hospital, increasing the medical resources for African American physicians and patients in Detroit."[213] He also founded St. Aubin General Hospital in

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[208] *Id.* at 309.
[209] *Id.* at 311.
[210] ARC OF JUSTICE, *supra* note 11, at 341.
[211] STORY OF MY LIFE, *supra* note 61, at 311.
[212] ARC OF JUSTICE, *supra* note 11, at 341.
[213] Black–owned and -operated Hospitals in the Detroit Metropolitan Area During the 20th Century http://www.med.umich.edu/haahc/Hospitals/hospital1.htm

Detroit in 1931, which served the African American community until after World War II. It was converted to care for black patients with tuberculosis in the 1930s.[214]

Although Ossian Sweet won a legal victory for which he is long remembered, his life was filled with tragedy. Understandably, the Sweets did not want to live in the house after the trial and rented it out for time while they lived with Gladys' mother. Within a year of the second trial, his baby daughter Iva died at age two from tuberculosis and his wife Gladys died of the same disease a short time afterwards. It is believed that Gladys contracted tuberculosis while incarcerated in jail before the trial and passed it on to her child. Henry Sweet went back to school, then passed the Michigan bar and worked during the 1930s as an administrator of the Michigan State Conference of NAACP Branches and even served as its president in 1937. Henry Sweet also contracted tuberculosis and died in 1940.

Housing Segregation Remained

The Sweet trials did not appear to have any effect on housing discrimination. Racially restrictive covenants continued to be upheld in Detroit and in other parts of the country.[215] In Wayne County where the Sweet's house was located, white homeowners filed five hundred racially restrictive covenants barring the sale of their houses to blacks between 1937 and 1940.[216] Racially restrictive covenants were finally ended in 1948 by the United States Supreme Court in *Shelley v. Kraemer*.[217] In *Shelley v. Kraemer*, the Court held that enforcement of a private racially restrictive covenant violated the Equal Protection Clause under the Fourteenth Amendment because judicial enforcement of the covenant constituted state action.

Ossian Sweet Back in Court

Ossian Sweet was involved in at least one more trial. In 1953 he was charged with and found guilty of fathering a child out of wedlock. According to a 1953 magazine article:

> Wealthy Detroit physician Dr. Ossian H. Sweet was charged with fathering a child born to 29-year old Constance Nelson. A warrant accusing the 57-year old physician of bastardy was issued by the Wayne County prosecutor's office, but Dr. Sweet denied the charge. Miss Nelson said she met Dr. Sweet in 1951, when he was a candidate for political office.[218]

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[214] The African American Health Care Experience in Detroit: Sources of Manuscript and Archival Information http://www.si.umich.edu/HCHS/Afroam/Afroam_manuscripts.html#aubin.
[215] *See* Schulte v. Starks, 238 Mich. 102, 213 N.W. 102 (1927) (holding that a restraint upon occupancy of lots of subdivision by colored persons is valid).
[216] DOMINIC J. CAPECI, JR. RACE RELATIONS IN WARTIME DETROIT: THE SOJOURNER TRUTH HOUSING CONTROVERSY OF 1942, 34 (1984).
[217] Shelley v. Kraemer, 334 U.S. 1 (1948) (The case was a consolidation of two state cases. One case was from the Missouri Supreme court—Kraemer v. Shelley, 198 S.W.2d 679 (Mo. 1946) (property located in St. Louis, Missouri); another case was from the Michigan Supreme Court—McGhee v. Sipes, 25 N.W.2d 639 (Mich. 1947) (property located in Detroit, Michigan)).
[218] *Detroit Medic Named Father in Paternity Suite*, JET, July 2, 1953, at 19.

Sweet appealed the verdict to Supreme Court of Michigan in 1956.[219] The court described the case as follows:

"The defendant, a physician, was tried before a jury in the circuit court for Wayne county, charged with being the father of a male child born out of wedlock, on the complaint of the child's mother-commonly referred to as a bastardy proceeding."[220] The court reversed and remanded the case, holding that it was reversible error to give instructions that if the jury determined the defendant was the father of the child, the court would enter an order requiring him to contribute to the extent of 50% of the child's support, and that the mother was required by law to support the child to the extent of 50%. The court ruled "[a] mere reading of the statute readily discloses that this is not a correct statement of the law. There is no such provision in the statute for a 50-50 liability of the father and the mother of a child born out of wedlock, for the child's support."[221]

Ossian Sweet remarried after Gladys died. But that marriage ended in divorce. He married a third time but that marriage also ended in divorce. Ossian moved back to the house on Garland Avenue in the 1930s and continued to live in it for another twenty years until he sold it in 1951.[222] On March 19, 1960 Ossian Sweet committed suicide at age sixty-four.

Importance and Influence of the Sweet Trials

According to Walter White, the Sweet trials were very significant: "[T]he nation-wide publicity given the case and the acquittal broke the wave of attacks on the homes of Negroes, and there have fortunately been only a few isolated instances of this type of mob violence in the years since the Sweet case." [223]

Executive Secretary of the NAACP James Weldon Johnson stated after the Henry Sweet trial: "The verdict was recorded upon the oath of the jury and thus was reached what we believe to be the end of the most dramatic court trial involving the fundamental rights of the Negro in his whole history in this country."[224]

The NAACP stated: "The acquittal of Henry Sweet marks one of the most important steps ever taken in the struggle for justice to the Negro in the United States. It likewise marks the dramatic high point of one of the three aspects of attempted residential segregation of Negroes—segregation by mob violence."[225] The other two aspects were: (1) municipal ordinances and state laws "designed to herd Negroes into ghettos" and (2) racially restrictive covenants.[226] The NAACP reprinted the full text of Clarence Darrow's

[219] People v. Sweet, 346 Mich. 684, 78 N.W.2d 598 (Mich. 1956).
[220] *Id.* at 685.
[221] *Id.* at 686.
[222] The Sweet's home on 2905 Garland Avenue was honored with a Michigan Historical Marker on July 22, 2004.
[223] A MAN CALLED WHITE, *supra* note 48, at 79.
[224] *Detroit*, *supra* note 160, at 120.
[225] ARGUMENT OF CLARENCE DARROW, *supra* note 9, at 4.
[226] *Id.*

closing argument to the jury in the Henry Sweet trial because of its "historical, legal, and humanitarian value."[227]

Perhaps there is no stronger indication of how Darrow was viewed by many blacks during this time than the fact that he was asked by leaders of the NAACP to lead the defense in a case of such monumental importance to their cause. W.E.B. Du Bois stated of the Henry Sweet trial:

> We are not sure that even in their rejoicing most colored Americans appreciate the significance of the acquittal of Henry Sweet. The eleven defendants in Detroit were doomed. The police deliberately lied. Many of the witnesses for the prosecution lied. . . . Under such circumstances the natural thing would have been to convict some, if not all of these defendants of first degree murder.[228]

According to Du Bois, there were two factors that distinguished the Sweet trials from other black trials during this time period:

> *First*, the American Negro went down in his pocket and for the first time in his history put into the treasury of the N.A.A.C.P. an amount of money that meant that these defendants would have a chance for a fair trial. Justice in the United States costs money. No pauper need apply at the barred gates of our criminal courts. *Secondly*, we found in Clarence Darrow a man who dared; whose whole life has been daring; who has had the rare moral courage to stand and defend, with his singular sincerity, unpopular causes.[229]

The Sweet case was important as a rallying point for blacks in general and the NAACP in particular, and it demonstrated the importance of collective action. The NAACP was able to raise over $70,000 for the Sweet case, which was "a small fortune for the NAACP at the time."[230] The NAACP put the total cost for both trials at $37,849.[231]

Writing in 1938 just a month after Darrow's death, an editor for *Opportunity: Journal of Negro Life*, praised Darrow for his work in the Sweet trials. Interestingly, the long shadow of the Scopes trial and Darrow's self-identification as an agnostic and his sharp criticism of religion tempered the praise:

> By Negroes he will be remembered most for his moving eloquence in behalf of the defendants in the Sweet case—one of the milestones in the historic struggle of the Negro for status. He brought into play in this trial, which finally resulted in a verdict of acquittal, all of his extraordinary powers of persuasion, his profound knowledge of crowd psychology, his penetrating insight into the mental and social attitudes of contemporary America. He had brilliant associates, but all will

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[227] *Id.*
[228] *Opinion of W.E.B. Du Bois*, 32 The Crisis 114 (July, 1926).
[229] *Id.* (emphasis in original).
[230] *Racial Origins*, *supra* note 118, at 90.
[231] ARGUMENT OF CLARENCE DARROW, *supra* note 9, at 4.

> concede that his own consummate skill was the principle element in the freeing of the accused.
>
> The rank and file of the Negro race, deeply appreciating his unselfish service, his utter lack of race prejudice, had for Clarence Darrow a profound respect. If this respect did not carry with it unqualified admiration it was because they could not understand the agnosticism he professed.[232]

The importance of the Sweet trials was recognized by their inclusion in the compilation *Great American Trials* which covers "the most significant and celebrated trials in U.S. history, from 1637 to the present."[233] This compilation includes 378 trials that were selected as the "most significant and celebrated trial in U.S. history" based on their historic significance, legal significance, political controversy, public attention, legal ingenuity, and literary fame.[234] The Sweet trials were included because they "revealed the growing racial tension in northern and Midwestern cities following World War 1[235] and furthermore "[t]he issues brought forth in these trials presaged the growing racial tensions throughout the country that would eventually give rise to the Civil Rights movement."[236]

In 1986, the Sweet trials were memorialized by the Michigan Legal Milestone Program which recognizes significant legal cases in Michigan's history by placing bronze plaques at featured sites to document historical significance. The trials were dedicated and the plaque placed inside the Frank Murphy Hall of Justice in Detroit, Michigan on May 2, 1986.[237] The Sweet house on 2905 Garland Avenue is listed in the National Register of Historic Places.

How Did Clarence Darrow and the Defense Succeed in Detroit?

How did Darrow succeed in this case? It may be that the first mistrial, although not a perfect victory like an acquittal, was necessary in order for Darrow to succeed in the Henry Sweet trial. Perhaps the first mistrial gave the second jury some support in finding Henry Sweet not guilty. It may have been too much to ask an all white jury in this racially charged atmosphere to find a black defendant or defendants not guilty of killing a white man during the first trial.

Could Darrow Have Prevailed in the South?

Darrow's stunning success in the Sweet trials raises an interesting question. Could Darrow have gotten his client acquitted in a Southern courtroom? In 1925, this would have been almost impossible, even for Darrow. One commentator states that the Sweet

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[232] *The Editor Says*, 16 Opportunity: Journal of Negro Life, 101 (Apr. 1938).
[233] EDWARD W. KNAPPMAN, ED., GREAT AMERICAN TRIALS (Vol. 1: 1637-1949) (2002).
[234] *Id.* at xlix-I (Preface).
[235] *Id.* at 560.
[236] *Id.* at 562.
[237] Naseem Stecker, *A Stop on the Long Road to Freedom*, 84 MICH. BAR J. 18 (July, 2005).

trial exemplifies the sharp differences that existed between how the northern and southern parts of the country treated blacks who were charged with serious crimes against whites.[238] The trial itself "was strikingly fair, according to contemporary testimonials by NAACP leaders, especially in light of the extent of Klan influence in Detroit in the mid-1920s."[239] These end results, in which the first trial ended with a deadlocked jury and the second ended with an acquittal for Dr. Sweet's brother, likely would not have been achieved in the South: "It is difficult to imagine a similar result in a southern courtroom during this time period."[240]

Two Against 5,000

To show how unusual the Sweet case is, in both its factual and legal aspects—the fact that the defendants used guns in self defense and that Darrow was successful in his legal defense—consider that as late as 1936, at least in the South, blacks who stood up to whites were not just acting out of line but were actually thought to be crazy. Roy Wilkins, a prominent civil rights activist and leader in the NAACP, wrote about an episode in 1936 involving 60-year-old William Wales and his 62-year-old sister Cora Wales. Whites tried to evict the Wales from their property over the course of many years and finally the city condemned part of their land to expand a cemetery.[241] But the Wales refused to leave and it was reported that they patrolled their yard with firearms to protect their land.

William Wales was eventually accused of threatening a white woman and the local sheriff "swore out a warrant charging Wales with lunacy."[242] But the Wales brother and sister fought back and the sheriff was shot and killed when he tried to serve the warrant. Wilkins writes, "That set the stage. Here was a Negro who would not 'act right.' Furthermore he had killed a sheriff—a white man. The lid was off. It was a free-for-all. Anybody could do anything."[243] Eventually a mob estimated at 5,000 including various law enforcement agencies and local citizens surrounded the Wales' home. The Wales still refused to surrender and fought on until their house was set on fire and started to collapse on them and they were finally shot and killed.[244] Wilkins describes how such resistance was characterized in the South: "Southern white people, almost unanimously, characterize such Negroes as 'crazy.' A colored man who refuses to be shoved into the pattern they have set for the race, who protests and who fights when fighting is called for is labeled a lunatic."[245]

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[238] *Racial Origins*, *supra* note 118, at 76.
[239] *Id.*
[240] *Id.*
[241] Roy Wilkins, *Two Against 5,000*, 43 The Crisis 169 (June 1936).
[242] *Id.* at 169-70.
[243] *Id.* at 170.
[244] *Id.* at 169.
[245] *Id.*

In discussing the Sweet trials, Roy Wilkins wrote "Darrow was an agnostic who didn't acknowledge the divinity of Christ but who honored the Golden Rule far better that [sic] most white Christians, and he won the case."[246]

Judge Murphy

The success of Clarence Darrow, his co-counsel and the defendants was likely not possible without Judge Murphy. His key rulings allowing testimony about the fear blacks felt when confronted with a white mob and his jury instructions were fundamental to the self defense claims. The defendants were in great danger of being convicted without these rulings. Walter White was very enthusiastic in his praise of Judge Murphy's conduct of the trial, stating that "[n]ever had a trial been conducted with more scrupulous fairness than it was by Judge Frank Murphy…"[247]

In 1950, Thurgood Marshall, who at the time was Special Counsel to the NAACP, wrote this in an article about Justice Murphy: "[I]n the field of civil rights, Mr. Justice Murphy was a zealot. To him, the primacy of civil rights and human equality in our law and their entitlement to every possible protection in each case, regardless of competing considerations, was a fighting faith."[248]

Thurgood Marshall, who would later become a justice on the United States Supreme Court, praised Justice Murphy and specifically pointed out his work in the Sweet trials:

> Mr. Justice Murphy's contributions to the law of the land as to the validity of distinctions based on race or ancestry are unique. In this field his experience as Governor-General of the Philippine Islands and his part as judge in the famous *Sweet* trial in Detroit gave to him the necessary first-hand knowledge of the extent to which racial hostility could defeat the ends of justice. This background along with Murphy's deep-rooted sense of justice gave to the Supreme Court a man determined to oppose every governmental act which was tainted in whole or in part by racial considerations.[249]

Marshall believed that the Sweet trials "will always be remembered for the brilliant defense conducted by Clarence Darrow and the complete fairness of Judge Frank Murphy."[250]

Another commentator stated: "Mr. Justice Murphy was a great judge because of three qualities. The first was simplicity; the second was courage; the third was insight into the substance of the problems of the changing times in which he lived."[251]

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[246] ROY WILKINS, TOM MATHEWS, STANDING FAST: THE AUTOBIOGRAPHY OF ROY WILKINS, 64 (1994).
[247] A MAN CALLED WHITE, *supra* note 48, at 77.
[248] Thurgood Marshall, *Mr. Justice Murphy and Civil Rights*, 48 MICH. L. REV. 745 (1950).
[249] *Id.* at 764.
[250] *Id.* at 746.
[251] Thurman W. Arnold, *Mr. Justice Murphy*, 63 HARV. L. REV. 289, 293 (1949).

A writer for the *Detroit Free Press* who witnessed the Sweet trials, wrote of Darrow and Judge Murphy:

> The two men were much alike in their attitudes and thinking on the social level. They swung verbal hatchets at prejudice, fought against injustice, championed the oppressed. Classes, castes, races and colors had no place in the free worlds of their minds. The big difference between them was in the field of formalized religion. Murphy was a Catholic; Darrow, an agnostic. But their fundamental understanding of the forces that motivate the actions of mankind were noticeably similar.[252]

A writer on racial issues saw the combination of Clarence Darrow, Arthur Garfield Hays and Frank Murphy as a unique event that made the Sweet trials different: "The case was tried by a white judge, white prosecutors, and an all-white jury. . . . In its white composition the court was routine; the departure from the ordinary was the participation of Murphy and the defense lawyers of the caliber of Darrow and Hays."[253]

After the Sweet trials, Frank Murphy went on to serve as Mayor of Detroit, Governor of Michigan, the last Governor-General of the Philippines and the first High Commissioner of the Philippines, United States Attorney General, and finally as a United States Supreme Court Justice.

Commentary on the Sweet Trials

The Sweet case and Darrow's defense still generate commentary and study from legal scholars. This scholarship serves not only to show Darrow's current relevance but also to illustrate just how far Darrow was ahead of his time, and indicates the lasting legacy and importance of the Sweet trials. By successfully defending his clients in seemingly impossible circumstances, Darrow ensured his place as one of the greatest trial lawyers in the history of the United States.

In a 1995 article, Professor Jody Armour discusses the Sweet trials and Darrow's approach in which he "directly challenged jurors to confront their own prejudices".[254] The author explains just how significant Darrow's accomplishment was:

> Dr. Sweet's case provides a compelling narrative of hope and redemption that stands in marked contrast to the pessimism of many current discussions of prejudice in the courtroom. Clarence Darrow, in the heyday of Jim Crow, successfully urged a jury of all white males to resist succumbing to their discriminatory impulses in judging the reasonableness of a black man's use of lethal force against a white man. Darrow's feat was especially remarkable because

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[252] Cash Asher, *Waiting for a Verdict with Clarence Darrow*, The Crisis 325, 327 (1957) hereinafter *Waiting for a Verdict*].
[253] WHITE VIOLENCE AND BLACK RESPONSE, *supra* note 8, at 190.
[254] Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 CAL. L. REV. 733, 762 (1995).

> it required Darrow to combat the influence of both stereotypes and prejudice on the factfinders. In the 1920s, just as today, American culture was replete with derogatory images of blacks. Thus, negative black stereotypes that could be triggered automatically by the presence of a black person were well established in the factfinders' memories. Moreover, the percentage of whites who accepted or endorsed the prevailing black stereotypes was much greater in the past than it is today.[255]

Professor Armour writes that because the jury was comprised of members:

> whose personal beliefs and stereotypes about blacks overlapped, Darrow's strategy was based on the assumption that even high-prejudiced persons personally endorse general egalitarian beliefs. Dr. Sweet's life hinged on whether the jurors -- prompted by Darrow's race-conscious appeals -- could resist their discriminatory impulses and respond to Dr. Sweet on the basis of their egalitarian ideals. Fortunately for Dr. Sweet and those of us who find relief from despair in what his case says about the capacity of jurors to resist even their most entrenched biases, the jury responded to Darrow's plea by activating their egalitarian responses and checking their prejudiced and stereotype-congruent ones.[256]

A reporter for the *Detroit Free Press* who witnessed Darrow's final summation in the Henry Sweet trial wrote that Darrow:

> was trying the human race, more than the defendants. He had excellent subjects to exhibit. . . . . But the qualities and virtues of the defendants would have gone unnoticed and unsung had not Darrow humanized the attitude of people toward them, and brought into focus in graphic language the equality of races, peoples, and creeds, under the laws of man and the edicts of Creation.[257]

In a 1993 article about racial attitudes and juries, the author refers to the Sweet trials in which "Clarence Darrow discovered that talking to jurors about their biases can be a successful technique of disarming conscious and unconscious racism."[258] The author goes on to suggest that judges use Darrow's strategy of facing the racial bias involved in a trial: "Why not provide a formal occasion for the judge, as well as counsel, to speak to the jurors about the problem of bias?"[259]

Black Rage Defense

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[255] *Id.* at 763.
[256] *Id.* at 764.
[257] *Waiting for a Verdict*, *supra* note 252, at 326.
[258] Susan N. Herman, *Why the Court Loves Batson: Representation Reinforcement, Colorblindness, and the Jury*, 67 Tul. L. Rev. 1807, 1850 (1993).
[259] *Id.* at 1851.

Another commentator identifies the Sweet trials as the second "historically recorded and clear use of the black rage defense" with the first being an 1846 case.[260] In order to defend the Sweets and the other defendants, Darrow and his co-counsel helped:

> an all-white jury understand that black and white people share the same feelings of love of family and longing for a better life. They integrated the reality of race relations with the rules of law. That is the essence of the black rage defense. Their efforts resulted in a legal victory for the Sweets and the education of thousands of people in Detroit and throughout our country.[261]

The Sweet Trials and the Right of Self Defense

According to one commentator, "The single most important issue which was crystallized in the Sweet case was the right of black self-defense in America."[262] There is significant writing and commentary about the need for self-defense in the black community during the post Civil war period. For example, A. Philip Randolph, editor of the socialist black magazine *The Messenger* wrote in an editorial in 1919:

> Lynching is our chiefest problem in America today. All Negroes are agreed, and some white people also, that it is the arch crime of America and that it ought to be stopped. The only difference is that of method. The question is How? . . . The Messenger proposed an immediate program for Negroes.[263]

Randolph's advice, coming six years before the shooting at the Sweet's home, was clear:

> Anglo Saxon jurisprudence recognizes the law of self-defense. Our information also records that the right of self-defense is recognized in the laws of all countries. . . . We are consequently urging Negroes and other oppressed groups confronted with lynching or mob violence to act upon the recognized and accepted law of self-defense. Always regard your own life as more important than the life of the person about to take yours, and if a choice has to be made between the sacrifice of your life and the loss of the lyncher's life, choose to preserve your own and to destroy that of the lynching mob.[264]

The Sweet Trials and the Second Amendment

The Sweet trials have been embraced by those who support the right to keep and bear arms for self defense because it was a clear case of self defense, which is one of the fundamental arguments made by Second Amendment proponents. They also point out that the Sweet trials were used to enact gun control legislation in Michigan. In 1927, just a year after the Henry Sweet trial, the Michigan legislature enacted a gun control law

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[260] Paul Harris, *The Black Rage Defense*, 1 Conn. Pub. Int. L.J. 34, 36 (Fall 2001).
[261] PAUL HARRIS, BLACK RAGE CONFRONTS THE LAW 182 (1997).
[262] WEINBERG, A MAN'S HOME, *supra* note 204, at xix .
[263] A. Philip Randolph, *How to Stop Lynching*, 3 The Messenger 8 (Aug. 1919).
[264] *Id.*

which while neutral on its face, was aimed at preventing blacks from owning handguns. There was precedent for this in other states. For example, the Sullivan Law was enacted by New York in 1911 which made it illegal to own a handgun without a police permit; this allowed the New York City police to withhold permits from the Italian population in that city.[265] Noted scholar Donald B. Kates states, "The Michigan version of the Sullivan Law was hurriedly enacted in the aftermath" of the Sweet trial.[266]

Dr. Ossian Sweet Self-Defense Act

Interestingly, the saga of Dr. Ossian Sweet and the other defendants was referred to in the Michigan Legislature in 2005-2006 when a bill about self-defense in the home was proposed. According to Representative Rick Jones, "I was inspired to write this law after reading a biography of Dr. Ossian Sweet's 1925 trial for defending his home against the Ku Klux Klan in Michigan." The House bill, No. 5143 was titled the "Dr. Ossian Sweet self-defense act." The bill was proposed to:

> Specify that a person could use deadly force against another individual, without a duty to retreat, if he or she actually and reasonably believed that force was necessary to prevent imminent death, bodily harm, or sexual assault.
>
> Specify that a person could use less-than-lethal force against another individual, without a duty to retreat, if he or she actually and reasonably believed that force was necessary in defense against the other individual's imminent unlawful use of force.
>
> Establish a rebuttable presumption that a person had an actual and reasonable fear of imminent death, sexual assault, or great bodily harm if certain conditions existed.
>
> Specify circumstances under which the presumption would not apply.

Later, it was decided to amend the bill and not name it after Ossian Sweet. The bill became law when it was signed by Gov. Jennifer Granholm on July 18, 2006.

Darrow and Influential Black Leaders

Darrow was friends with many influential black leaders both before and after the Sweet trials. One such friend, W.E. B. Du Bois, was one of the most influential black leaders of his generation. Darrow was a member of the "Du Bois Testimonial Committee" which provided Du Bois with the deed to the land of his boyhood home as a gift on his sixtieth birthday.[267]

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[265] Donald B. Kates, A History of Handgun Prohibition, *in* RESTRICTING HANDGUNS: THE LIBERAL SKEPTICS SPEAK OUT 19 (1979).
[266] *Id.*
[267] Du Boise and the House, http://www.library.umass.edu/spcoll/duboishome/duboishouse.htm.

Darrow was friends with and greatly admired by James Weldon Johnson. In his autobiography, James Weldon Johnson recalled:

> [T]he most lasting impression I have of any of the gatherings at my home is of Clarence Darrow, sitting under a lighted lamp, the only one in the room left lighted, reading in measured tones from his book, Farmington. I retain a memory of the Lincoln-like beauty of the man, the beauty of sheer simplicity of his prose, the rising and falling melody of his voice, and the group seated about him drinking in the three elements combined—Ruby Darrow, no doubt, musing, "This wonderful man is my husband" . . . the whole group silent, as the words falling, falling, slip through their minds and lodge in their hearts with strange stirrings.[268]

On June 26, 1938, Johnson was driving his car near his summer home in Wiscasset, Maine, when the car was struck by a train and he was killed. His funeral in Harlem was attended by more than 2,000 people. Johnson died just three months after Clarence Darrow.

Darrow also knew Charles Hamilton Houston, the "creative architect of the legal strategy that produced" the *Brown v. Board of Education* case.[269] Houston was also the dean of Howard Law School during the 1920s and 1930s "which he built from virtually a one-room operation to a first-rate program that trained a generation of black civil rights lawyers," including Thurgood Marshall.[270] To increase the value of a Howard Law education, "Houston added the front-line experience of great lawyers and scholars whom he imported as guest lecturers—men such as Dean Roscoe Pound of Harvard Law School and Clarence Darrow."[271]

The Scottsboro Case

One of the most infamous cases involving racial prejudice in the history of the United States was the legal travesty inflicted on the "Scottsboro boys," the name given to nine young blacks accused of raping two white women on a freight train in Alabama on March 25, 1931. Soon after the alleged attack, they were arrested and taken to jail in Scottsboro, Alabama.

The day after being taken to Scottsboro's jail, the defendants were nearly lynched by a crowd of over 100 whites. The defendants were indicted for rape and went on trial just twelve days after being arrested. All but one defendant was convicted, and sentenced to death. The trial of one defendant who was only age twelve or thirteen when arrested ended in a mistrial because some jurors held out for the death sentence despite the prosecution's request for life imprisonment due to the defendant's age.

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[268] ALONG THIS WAY, *supra* note 11717, at 379-380.
[269] Richard Kluger, *The Legal Scholar Who Plotted the Road to Integrated Education*, 4 The Journal of Blacks in Higher Education 66 (1994) [hereinafter *Legal Scholar*].
[270] David W. Blight, *Charles Hamilton Houston: The Legal Scholar Who Laid the Foundation for Integrated Higher Education in the United States*, 24 The Journal of Blacks in Higher Education 107 (Winter 2001-2002).
[271] *Legal Scholar*, supra note 269, at 68.

It soon became apparent to many observers that the victims were lying and the prosecution was based on the defendants' race. The convictions would be appealed and the legal odyssey would drag on for years.

Although it would seem like a case that the NAACP would get involved in from the beginning, the group was reluctant to do so because the charge of raping white women was so explosive that if the charges were true, it would damage the NAACP's standing among whites. Eventually, the NAACP decided to help the defendants but this created a battle between the NAACP and the International Labor Defense (ILD) for the right to represent the Scottsboro defendants. The ILD was the legal arm of the Communist Party of the United States of America.

Clarence Darrow and the Scottsboro Boys

Given Clarence Darrow's well-known feelings for blacks, why wasn't he part of the infamous Scottsboro case? Actually, Darrow and Arthur Garfield Hays did become involved for a time but politics would drive them out of the case. Hays stated that the NAACP hired him, Roderick Beddow, a Birmingham lawyer, and Clarence Darrow to appeal the defendants' convictions before the Alabama Supreme Court.

Walter White described the entrance of the Communists into the Scottsboro case after Darrow had agreed to help defend the accused, and after the motion to deny a new trial was appealed to the Alabama Supreme Court:

> [A] new element entered the cases which simultaneously complicated them to an unbelievable degree and, at the same time, made them the most notable test of strength to date between those who seek justice for the Negro through American forms of government and those who seek to spread Communist propaganda among American Negroes.
>
> With a blare of trumpets the Communists seized upon the Scottsboro convictions. It was, they realized, a golden opportunity to put into effect the plan decided upon by the Third Internationale and upon which they had been assiduously working but with only a modicum of success—to capitalize Negro unrest in the United States against lynching, jim crowism, proscription, and insult.[272]

White also wrote: "Clarence Darrow's entrance into the cases at Scottsboro effectively silences in the minds of all but the most intransigent the argument that 'capitalists' are trying to murder the nine Negro boys of the Scottsboro cases."[273]

The Communist party through the ILD desperately wanted to represent the Scottsboro defendants because the case fit with their ideological struggle against capitalism and the United States:

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[272] Walter White, *The Negro and the Communist*, 164 Harper's Monthly Magazine 62, 66 (Dec. 1931).
[273] *Id.* at 72.

> Stepping aside from the heat of the ILD-NAACP quarrel, we can have no doubt but that the Communists waged an unprecedented publicity campaign in connection with the Scottsboro case. No single instance of racial injustice in American history had ever been the subject of a comparable worldwide campaign, one that reached millions in this country and abroad.[274]

Hays recounts his involvement with Darrow in the case:

> I went with Mr. Darrow to Birmingham. We were there greeted with a telegram signed with the names of all the defendants to the effect that they wished to be represented only by the International Labor Defense; that if we would work through that organization, they would be glad to have us in the case.[275]

Darrow and Hays met with several lawyers representing the ILD about the case. Later the ILD told Hays and Darrow that they would be glad to have them work on the case "but on certain conditions." Hays recalls, "Darrow peered at the youngster over the rims of his eye-glasses" and said, "Young man, it is a long time since anyone has invited me into a criminal case on conditions, but what are they."[276] The conditions were that Darrow and Hays had to repudiate the NAACP and leave the trial tactics up to the ILD. Darrow responded, "[I]f you people choose to send insulting telegrams and letters to all the judges and even to the Governor to whom we may have to appeal for a pardon, you'll do it and I shall have noting to say about it."[277] This was indeed what the ILD meant.

Darrow and Hays proposed that all lawyers sign a memorandum which in effect stated that they represented the defendants and not any organization because eight lives were at stake. The IDL lawyers refused to sign the statement.[278]

Darrow and Hays could not remain in the case with the ILD's conditions. They knew the ILD wanted to turn the case into a political trial and they could not forsake the NAACP. Darrow said that "you can't mix politics with law" and the case had to be won in Alabama and "not in Russia or New York."[279] Hays wrote about their withdrawal from the case:

> We felt it impossible to join in the case under the circumstances. The Communists did not hesitate to charge us with having retired because of the Communist connection, and this regardless of the many Communists and labor cases in which both Mr. Darrow and I have served.[280]

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[274] WHITE VIOLENCE AND BLACK RESPONSE, *supra* note 8, at 211.
[275] ARTHUR GARFIELD HAYS, TRIAL BY PREJUDICE 87 (1933).
[276] *Id.* at 88.
[277] *Id.* at 88-89.
[278] *Id.* at 89.
[279] SENTIMENTAL REBEL, *supra* note 80, at 367.
[280] *Id.*

According to one of his biographers, the Scottsboro defense was the only case Darrow withdrew from in his career.[281] The NAACP withdrew from the case in January 1932. The Scottsboro case would result in numerous reversals, convictions, and retrials and the case would eventually be argued before the United States Supreme Court several times. Although none of the defendants were executed, they spent many years in prison and it was not until 1950 that the last defendant was paroled.

Cases Referring to the Sweet Trials

U. S. *ex rel.* Haynes v. McKendrick, 481 F.2d 152 (2nd Cir. 1973)

The court held that a prosecutor's use of racially prejudicial remarks in summation violated the defendant's right to a fair trial. The court made reference to Darrow's summation in the Sweet trial:

> The defense attorney made quite a perceptive argument attacking each prosecution witness's opportunity for observation, memory, suggestibility, and the like, emphasizing the lineup's suggestibility, the conflicts between witnesses, and pointing out that $60, the customer's wallet and the robber's gun were not found. Just what the State means by a "blatant racial appeal" is unclear. If it means that a defense attorney cannot attack a juror's potential racial prejudice by direct reference to it and an appeal to cast it aside, or that by doing so, the defense invites a counter attack by way of an appeal to race prejudice, this suggestion falls on deaf ears in this court. What may have been Clarence Darrow's finest summation was just such an argument, made when he was defending the Sweet case in Detroit in 1926.

Lind v. City of Battle Creek, 681 N.W.2d 334 (Mich. 2004)

This case involved a lawsuit by a white police officer against a city to recover for reverse discrimination that violated the Michigan Civil Rights Act. The court held that a reverse discrimination claim does not require a showing of background circumstances supporting the suspicion that the defendant is an unusual employer who discriminates against the majority.

A dissenting judge wrote:

> I must dissent, not only from the majority's holding, but also from Justice Young's assertion that we should turn a blind eye to racism. How I wish we all could live in Justice Young's utopian society where all races are treated equally, but I cannot ignore reality. I urge the reader to look beyond the surface appeal of Justice Young's simplistic argument and examine not only the text, but also the context of the Civil Rights Act. It is with regret that I acknowledge the relevance today of Clarence Darrow's closing argument at the 1926 trial of Detroiter Henry Sweet. In discussing the tragedy, injustice, and oppression faced by African-Americans, he

[281] *Id.* at 366.

stated: "'The law has made him equal, but man has not. And, after all, the last analysis is what has man done?-and not what has the law done?'" . . . This still rings true today.