

Chapter Seven

Conclusion

Five celebrated criminal cases:

- In the Leopold and Loeb case the defendants, both under twenty, for no apparent reason killed a fourteen-year-old boy they casually knew. They offered highly intellectualized explanations for their behavior. The crime was gratuitous, despite the melodramatic attempt to secure a ransom.
- At Scottsboro, nine illiterate black hoboes, two under the age of sixteen, all called "boys," were pulled out of a railroad car and dragged into custody by hastily deputized lawmen. They were sentenced to be executed in several successive trials. None was killed by the state but they served sentences upwards of nineteen years for an offense they did not commit. The Scottsboro men became symbols of Jim Crow racism in the southern states, a byword for how the criminal justice system could be used by whites to maintain political, economic, and social control. The blatant triumph of racial prejudice over legal norms brought the case to the attention of the world.
- Without Charles Lindbergh's sensational solo flight to Paris there would not have been the kind of trial that ended in the execution of Bruno Richard Hauptmann. The public idolization of Lindbergh allowed him to control the criminal investigation in the Hauptmann case until the baby's body was found. Despite evidence that appeared much more suspect after the FBI files were obtained years later by a Freedom of Information action, Hauptmann, an illegal immigrant from a despised country, went to the electric chair in large measure to appease the public's thirst for someone's blood to atone for the murder of the child of a celebrated couple.

- The trials of Alger Hiss offered a volatile combination of Richard Nixon's political ambition and strategic acumen (mixed with a good dosage of pure luck) and the ill-kempt and melodramatic Whittaker Chambers. Arrogant and obdurate denials by Alger Hiss of the most self-evident of Chambers's allegations created a fascinating drama. Chambers told all. Hiss denied everything. To the day of his death, Hiss insisted that sooner or later he would be vindicated.
- In the O. J. Simpson case, the defendant was a very wealthy and very famous black man accused of murdering his glamorous blonde ex-wife. The interracial marriage, the searing episodes of domestic violence, and the Mark Fuhrman tapes showing blatant perjury by a law enforcement officer elevated a family slaying into an absorbing television drama.

The five famous cases produced five different outcomes. Leopold and Loeb were sentenced to life imprisonment, but spared the death penalty. The Scottsboro defendants, excepting the two juveniles, were sentenced to death several times, but none was executed. In a ceremony dripping with irony, the last of the Scottsboro defendants would be pardoned in 1954 for the offense he had not committed. The pardon was granted in person by Alabama Governor George Wallace, one of the staunchest opponents of racial integration during the early days of the civil rights movement. Wallace wanted to make a run for the presidency and he needed to clean up his image if he was to have any prospect of making a decent showing.

Bruno Richard Hauptmann went to his death proclaiming his innocence, Alger Hiss served a forty-four-month sentence when he was convicted of perjury in his second trial, and O. J. Simpson walked out of the Los Angeles courtroom a free man.

What lessons might be drawn from these epic moments in the annals of the administration of criminal justice in the United States during the twentieth century?

We know that the outcomes bore no relationship to the sensational nature of the cases: all episodes were famous before their outcomes were known. But was justice served? Did the trials have an impact on the criminal law and its administration that was equivalent to the impact they had on the public consciousness? Would the same results have come about had the earlier cases been tried in more recent times?

The answers to such questions are as varied as the details of the cases themselves. The simplest overall response will come as a surprise to very few, if any: It pays to have a great deal of money when you are up against it in a

criminal court because money buys good attorneys and diligent, clever investigators. The criminal justice system is sufficiently malleable to provide openings for skilled lawyers if the evidence is—or can be made to appear to be—somewhat ambivalent and ambiguous. But it takes a very large defense fund to overcome the enormous initial advantage in resources enjoyed by the prosecution. As in war, imagination, intelligence, and courage can be very important, but materiel advantages—the airplanes and the ammunition—are what in the end pretty much dictate how things will go.

For us, probably the most unexpected aspect of the cases was the importance of the man (for it always was a man) who sat on the bench. Judges in American jurisprudence tend to be regarded as umpires in a few-holds-barred fray between combative opposing lawyers. They are stereotyped as wise, sober, and above the battle. But in the trials that we have looked at, the judges very often played a crucial role. It was Judge James Edwin Horton, Jr., in the *Scottsboro* case who almost brought the charade to an end with his courageous refusal to endorse the verdict after the first Decatur trial, and it was Judge William Washington Callahan in the subsequent Decatur trials who peremptorily shut down any attempt at an effective defense by his rulings and his insistence that he could not contemplate any white woman, however degraded, having a sexual relationship with a black man.

Both Callahan and Judge Thomas W. Trenchard in the Lindbergh case demonstrated the way in which an adroit judge can convey his personal views forcefully to jury members by his tone of voice and facial expression, matters that never find their way into the official trial transcript. The decision to spare Nathan Leopold and Richard Loeb from death was made by Judge John R. Caverly. The striking difference in the manner in which the two Hiss trials played out was in considerable measure a function of the rulings of the judges. In the first Hiss trial, Judge Samuel Kaufman was pilloried by Nixon for what he said were Kaufman's leanings toward the defense. Kaufman refused to allow Hede Massing, attempting to corroborate Chambers's story, and Carl Binger, the psychoanalyst trying to document what he saw as Chambers's mentally ill personality, to testify in the first trial. Judge Henry W. Goddard, in the second trial, was much less stringent about testimony than Kaufman and he permitted both Massing and Binger to offer evidence, perhaps significantly affecting the outcome of the trial.

In the Simpson trial, the presiding officer again figured prominently. Judge Lance Ito invariably is chastised as having run the case poorly, unwilling to take a firm stand against showboating and to cut off long-winded speeches and irrelevant examination of witnesses by both sides. He also uniformly is

regarded as having been submissive to the enticements of the defense attorneys and blinded from doing his job in a professional manner by his own fascination with being in the media limelight. Another judge might well have meant a different verdict in the Simpson criminal case.

The qualities of the attorneys also were of overwhelming importance in virtually all of the cases. Second-guessing the manner in which the Alger Hiss case was tried, a law professor, Richard Morris, in *Fair Trial* illustrates the small but significant ways in which an attorney's talent can score points or fall short:

Stryker had shown Chambers to have been a liar in the past, but that was not the issue. The question was whether he was a liar now. Stryker's questioning betrayed a failure on his part to come to grips with the crucial issue. Confronting Chambers with his denial before the grand jury that he had any "direct knowledge" of espionage, Stryker asked the witness: "Was that answer true or false?" "That answer was false." "Then you admit that you testified falsely and committed perjury before the grand jury in this building, is that right?" "That is right." Stryker's phrasing was psychologically inept. The implication of Chambers's answer seemed obvious: he was lying then, but he is telling the truth now. Profiting by this lapse, Claude B. Cross, at the second trial, phrased the question differently: "You lied either then before the grand jury or before this jury?" he asked Chambers. "That is right," the witness was compelled to answer. Again: "And you lied then or you are lying now?" "That is right."

Leopold and Loeb might well have been hanged without the superb pleading of Clarence Darrow. The Scottsboro defendants were on the verge of being executed after they were so ineptly defended in their first trial, but the strikingly competent work of Samuel Leibowitz kept them alive until local public outrage abated with the passage of time. The newspaper that hired Hauptmann's attorney (this would not be allowed today) expected exclusives because of the money it laid out. The ill-prepared attorney took the case to publicize himself, not to work for his client's cause—and Hauptmann went to the chair. Lloyd Paul Stryker thought he could easily obtain at least a hung jury in the Hiss perjury trials, but Hiss wanted a more dignified defense and so obtained a much less dramatic (however more erudite) attorney—and lost. And whatever one might think of his tactics and his choice of themes, Johnnie Cochran did for his client exactly what was needed for an acquittal—and did it extremely well.

The prosecutors proved to be in general a less colorful lot; they often played partisan roles designed not to separate the guilty from the innocent but to gain

glory. John Mason Brown in *Through These Men* has offered what remains one of the best delineations of the kind of abilities that it takes to be a successful prosecutor—and, for that matter, a good defense attorney:

The prosecutor's by obligation a special mind, mongoose quick, bullying, devious, unrelenting, forever baited to ensnare. It is almost duty bound to mislead, and by instinct dotes on confusing and flourishes on weakness. Its search is for blemishes it can present as scars, its obligation to raise doubts or sour with suspicion. It asks questions not to learn but to convict, and can read guilt into the most innocent answers. To natural lapses of memory it gives the appearance either of stratagems for hiding misdeeds or, worse still, of lies, dark and deliberate. Feigned and wheedling politeness, sarcasm that scalds, intimidation, surprise and besmirchment by innuendo, association, or suggestion—all these methods and devices are such staples in the prosecutor's repertoire that his mind turns to them by rote.

Note, in the same vein, the advice supplied attorneys in a book called *How to Win Lawsuits before Juries*:

When you have forced the witness into giving you a direct answer to your question you really have him under control: he is off balance, usually scared. This advantage should be followed up with a few simple questions such as, "You did not want to answer that question, did you?" If the witness says that he wanted to answer it, ask him in a resounding voice, "Well, why did you not answer it when I first asked you?" Whatever his answer is you then ask him, "Did you think you were smart enough to evade answering the question?" This battering and legal-style "kicking the witness around" not only humiliates but subdues him.

In the annals of criminal trials, a classic illustration of the quickness of mind that can make a courtroom gladiator successful is the story about Edward Carson, a distinguished Irish barrister, who asked a witness, "Are you a drinking man?"

"That's my business" was the man's response.

"And have you any other?" Carson shot back.

There were numerous illustrations in the five celebrated cases of the kind of tactics scathingly inventoried by Brown. One of the worst was a minor early moment in the Simpson trial when Carl Douglas, a junior member of the defense team, excoriated Ron Shipp, a policeman testifying against the defendant. The tactic seemed to backfire, with the jury and the audience viewing it as overkill, and Douglas was restricted to a lesser role throughout the remainder of the trial. Perhaps—though perhaps not—this indicates that people

today are more alert to and less taken in by bullying tactics that have served criminal court attorneys so well in the past.

Overall, the performances of the prosecutors seemed a mixed bag compared to those of the attorneys who faced them for the defense. Robert Crowe was no match for Darrow in the Leopold-Loeb case; neither was Edward Reilly in the same league as David Wilentz. Thomas Murphy, on the other hand, did a yeoman's job in both Hiss trials, aided by some very sophisticated work by his investigators. The Simpson prosecutors were never really in contention with the defense. They badly underestimated what they had to do, in part because they had never come up against so strong a defense team, and they made very poor tactical decisions. Probably most important, putting aside the issue of legal acumen, the jurors did not like the prosecutors, particularly Marcia Clark, and that made her job extraordinarily more difficult, perhaps almost hopeless.

That winning was of considerable importance in advancing the careers of the attorneys involved is well illustrated by our cases. Knight went on to become lieutenant governor of Alabama, Wilentz to become the most powerful personage in the New Jersey Democratic Party for many decades. Murphy became New York's police commissioner before being appointed to a judgeship. Leibowitz became a judge known for his tough stance toward criminal offenders, but he got that job in New York, not in Alabama. Others who lost their cases fared less well. Most faded into obscurity, at least in terms of public renown, but at least there was solace for the Simpson district attorneys in the stunning book advances—\$4.2 million for Marcia Clark—that they received for spinning stories about how they lost the case but shouldn't have, and besides, it was someone else's fault.

All the world's a stage," William Shakespeare has one of the characters in *As You Like It* proclaim. "And all the men and women merely players/They have their exits and their entrances/And one man in his time plays many parts." Social psychologists agree. We all acts in ways that we presume—and hope—will bring about those things we desire. Of course, we have to anticipate how others will respond to the roles we play, a complex task that often fails to work out the way we believed it would. One of the reasons adolescents can be difficult for their elders to deal with is that they are trying on various behavioral costumes, seeking to locate the one that is comfortable, comforting, and rewarding.

The criminal trials that we have scrutinized provide in encapsulated form

the drama of life, and they are structured by formal rules. Much is omitted in the trials, leaving room for our imagination; we see in the courtroom only a suggestive slice of the relevant reality. Witnesses being cross-examined cannot explain in a complicated way a complicated issue or choose the questions they will answer. The struggle for control of the discourse is ongoing. A criminal trial often is very good theater, especially since the stakes are real, not simulated.

The space-bound and time-bound aspect of criminal trials also provides an excellent setting for the expression and reflection of attitudes toward matters such as authority and political power. Trials have a beginning, a middle, and (usually) a dramatic end. Then the audience can go home and the listeners and viewers can turn off their radios or television sets.

Trials also often demand consummate acting skills from those who desperately try to persuade jury members of the truth of their version of what went on. If they were guilty as charged, imagine the talent demonstrated by Richard Hauptmann, Alger Hiss, and O. J. Simpson to blatantly lie throughout a grueling process, never certain when they might be entrapped by an irreconcilable contradiction. In the Hiss case, the dramaturgy of the event was specifically entered into the record. "Whichever of you is lying is the greatest actor that America has ever produced," said F. Edward Hébert, the Congressman from Louisiana and member of the House Un-American Activities Committee. Similarly, psychoanalyst Meyer Zelig noted that Hiss paid such extraordinary attention to the state of Chambers's teeth that "it was thought that he was play-acting." Certainly Chambers seemed to think so and he makes an explicit reference to the theatricality of the trial in *Witness*, his autobiography:

Not its least horrifying aspect was that it was great theater, too; not only because of the inherent drama, but in part because, I am convinced, Alger Hiss was acting from start to finish, never more so than when he pretended to be about to attack me physically. His performance was all but flawless, but what made it shocking, even in its moments of unintended comedy, was the fact that the terrible spur of Hiss's acting was fear.

Criminal trials reduce complex external events to words and exhibits. The alleged rapes featured in the Scottsboro case are not seen but described by words that never can recreate with total adequacy what went on or was supposed to have gone on. Alger Hiss was tied to incriminating documents by circumstantial evidence, but there was no videotaped evidence of his opening his house door, receiving documents from Chambers, and giving them to Priscilla Hiss to type on the Woodstock. It takes imagination—and imagina-

tion can be faulty and can be manipulated—to make the leap from its verbal reproduction to an actual event.

At the same time, it becomes exceedingly difficult to recreate the highly significant moods of the times that played so prominent a part in the way the cases went: the racism in Alabama, the public worship of the Lindberghs, the ravages of the Great Depression, the fear of Communism and the terrors of atomic bombing at the time of the Hiss trial, and the impact of the Rodney King case on the verdict of the Simpson jurors. In the King case white police officers had been videotaped savagely beating a black motorist who had committed no crime. They had been found not guilty by a white jury; the memory of that episode and its aftermath permeated the Simpson courtroom.

How much has changed from the time of the earlier trials to today? Is Scottsboro so far out of tune with present conditions that its ingredients are difficult to believe? Any answer has to be qualified: certain matters would never be tolerated, but other kinds of mischief, sometimes equally reprehensible, now prevail. The vituperation of Wilentz's summation, lacerating Hauptmann as an alien fiend, would not be permissible today; though it obviously was accepted without a flutter six decades ago.

Trials as theater also provide tableaux that remain vivid. The rotund chameleon Whittaker Chambers staring at the straight-backed Alger Hiss as Hiss is taunted from the dais by Richard Nixon. In the Leopold and Loeb hearing the exhausted but soft-spoken Clarence Darrow making an overmatched and ambitious prosecutor appear flat-footed. The Scottsboro trials might never have taken place without the vivid persona of Victoria Price, shrewd and earthy, or the dogged determination of the prosecutor to make the capital charges stick. In the Hauptmann case there is the memorable moment in which Wilentz shakes his fist at the defendant on the witness stand, calling him a liar, a liar, before a transfixed audience.

In the Simpson trial a boomerang came back to figuratively decapitate Marcia Clark after she had treated police officer Mark Fuhrman as a choirboy, only to discover that he had been flatly lying. Then there were the defense attorneys at the Simpson trial, each pushing his way into the spotlight: the smooth and confident Johnnie Cochran; F. Lee Bailey, an old bull putting his head down and shaking it when his territory was threatened; Alan Dershowitz, the academic gadfly with credibility problems of his own; and Robert Shapiro, the member of the team being nudged nearer to the sidelines each day.

Trials, like theater, can enthrall a prurient audience as they reveal details of

the intimate lives of real people, lives that can vary dramatically from those of the ordinary citizen. The very wealthy Leopold and Loeb families with their strange nursemaids corrupting the young children turned over to their care; the wretched condition of unemployed black hoboes in the South and the brutality of the white-controlled legal system; the dreamlike lives of Charles and Anne Lindbergh at a time when most people just scraped by without social security, welfare benefits, or unemployment insurance. Then there was the bizarre and mesmerizing life of Whittaker Chambers, with multiple identities and strange underground espionage activities; and the sudden transformation of the same man to a God-fearing, intensely patriotic martyr, intent on saving his country from the Communist scourge. The Hisses for their part testified about life in the Washington and New York legal and social communities and that of left-wing intellectuals, in addition to the internal activities and bickering in the upper and lower echelons of the federal government. In the Simpson case the defendant had been a spectacular football player. By then a multimillionaire, he and the murdered woman to whom he had been married were living their lives amid rumors of drug use, hot-tub parties, promiscuity, and stories of domestic violence. And in the background hovered a cast of colorful characters, each absorbing in terms of the way they had chosen to live their lives, often in a manner so strikingly different from the humdrum existence of most of the rest of us.

Subtler matters that may (or may not) have been of utmost significance in the cases never surfaced in the courtrooms. We never heard what happened to the casts made of the footprints left at the Lindbergh estate and in the cemetery by the alleged kidnapper. Many witnesses were not called, certain evidence was mothballed. Neither the dramatic chase of Simpson's Bronco along the southern California freeways, the apparent suicide note, nor the police interrogation was brought before the jury.

Both Bruno Richard Hauptmann and Alger Hiss, some observers believe, protested their innocence in the face of strong contrary evidence because of their close attachment to their wives. Hauptmann, it was claimed, could not tolerate shattering the trust and love that Anna Hauptmann so thoroughly gave him by implicating himself in the kidnapping-murder. Life, it seemed to him, would have been meaningless if her support was withdrawn and her good opinion of him destroyed. Alger Hiss, some said, was protecting his wife, a woman who had been involved in the espionage as deeply as or more deeply than he had. Priscilla Hiss, of course, despite the evidence accepted by the jury that she had typed the incriminating documents, was never indicted.

Nixon later said that his excitement at Alger Hiss's revelations had so stimulated him that he got no sleep the night before he was to interrogate Priscilla Hiss. He was unprepared and failed to follow up on the inconsistencies and gaps in her testimony or to take advantage of her extreme nervousness. For all practical purposes that chapter of the story concluded then, Nixon believes, and only because of his fatigue.

More generally, the five cases exposed sharp divisions in American society along race, class, and ethnic lines. Yet there was surprisingly little gender tension. No case directly involved women challenging the control of men over the social and legal order, although the role of Marcia Clark as the Simpson prosecutor sometimes was seen in terms of gender politics. Nor did any of the cases involve women as defendants, a likely reflection of the considerably lower rate of serious offenses committed by women in contrast to men.

How did these trials affect crime and criminal justice? Some changes that owe their origin to them are easily chronicled; others are far too subtle to pin down with any confidence. In the Simpson trial, for instance, millions of Americans who had never before heard the terms "voir dire" or "sequestration" developed firm views about how juries should be selected and treated. Judges in cases that followed the Simpson trial showed that they had absorbed some lessons from it, at least for a while: television cameras found it much more difficult to gain entrance to proceedings and lawyers came under stringent bans to refrain from trying their cases in the press.

Justice Oliver Wendell Holmes, Jr., the eminent jurist for whom Alger Hiss and his brother both served as law clerks, contributed what is probably the best-known aphorism that can be applied to the cases that we have looked at. In his 1904 dissenting opinion in *Northern Securities Company v. United States* (193 U.S. 1977), Holmes noted first that "although I think it is useless and undesirable, as a rule, to express dissent," he nonetheless felt bound in this instance to do so, presumably because of the importance of the case. He then declared:

Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgments.

"These immediate interests," Holmes went on to say, "exercise a kind of hydraulic pressure which makes what previously was clear doubtful, and before which even well settled principles of law will bend."

At issue in *Northern Securities* was a caper in which James J. Hill, the controlling force in the Great Northern Railroad, and J. P. Morgan, who dominated the Northern Pacific Railroad, had established the Northern Securities Company, into which they placed most of the shares of the two railroads, which were direct competitors along many of their routes. The action was alleged by the government to violate antitrust law. The 8-4 majority decision found that the Morgan-Hill tactic had the tendency to reduce competition and the almost certain outcome of operating against the public interest. Holmes, in a carefully crafted dissent, took issue with the majority view that what had been done, whether beneficent or malevolent, was prohibited by the antitrust law. The law, he claimed, did not say anything about competition. Would the Justice Department have punished two grocers who decided to combine their businesses? Holmes believed that the financial magnitude of the case and the power of its protagonists had unacceptably swayed the court into issuing an unsatisfactory ruling.

Can the same be said of the celebrated criminal cases that we have reviewed? Are they "hard" cases that produced "bad" law?

Holmes's terms—"great," "hard," and "bad"—have a considerable element of subjectivity. The cases that we have considered were "great" but not necessarily "hard" ones. They were sensational and celebrated episodes that became complicated only because of the positions adopted by the participants and, at times, the skills of the attorneys.

What, then, can be said about the law they produced?

Only the Scottsboro case impelled Supreme Court rulings, but it produced landmark decisions that basically realigned the power of the states and that of the federal courts when in *Powell v. Alabama* it extended constitutional protections to state proceedings based on Justice Sutherland's declaration that the Scottsboro defendants had not received adequate legal representation. The case also saw the U.S. Supreme Court push strongly for fair representation of blacks on grand and petit juries. But if we desire to look only at cases that had a stunning impact on the administration of criminal justice, we would be well advised to examine not the ones that we have chosen but those of Ernesto Miranda and Clarence Gideon, and the appeals of a little black girl named Brown who sought admission to a white public school then off limits to her, and a pregnant woman given the name of Roe who wanted a legal abortion. Sensational cases apparently rarely make path-breaking law. That they may occasionally produce "bad" law is reflected in the Hiss Act, which disallowed federal pensions for persons convicted of certain crimes, but they also can

impel "good" law, such as the Supreme Court decisions following the Scottsboro trials, and the Lindbergh kidnaping statute, bringing the crime under federal jurisdiction.

There are, however, subtle eddies that run from our celebrated trials, though these are not readily pinned down. To take the Simpson case as the most recent example, whites have had to face the reality of deep racial divisions in our society from which they previously were more likely to be shielded. Jury selection and sequestration, television cameras in courtrooms, defense and prosecution tactics, and proper performance of the judicial and attorney roles all came in for criticism and produced suggestions for change. Most of these changes, it needs noting, seemed more spur-of-the-moment products of annoyance rather than the result of careful thought. Such suggestions for change seem to flow more often from the freeing of those deemed guilty than from the conviction of those found responsible for the offense with which they are charged. When such changes occur they often reflect the temper of the time as much as the details of the cases. In the United States today public opinion leans heavily toward uneasiness about crime, and people seek to redress what they perceive as a procedural tilt toward those charged with criminal behavior.

The so-called crimes of the century with which we have dealt represent fascinating commentaries about human and criminal justice activity at moments of high tension and great stress. There is no single or simple way to tie together the lessons that they might convey, though we have sought to indicate ingredients that they share as well as their individual characteristics. Their drama and their mystery, the details of the crimes themselves, and the nature of the people involved are what elevated these cases into the category of crimes of the century. They are cases with the power to tell us about their times and about our history. In some ways too—most particularly in how we react to each of them—they also tell us something about ourselves.