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Crime and Punishment: Cautionary Lessons from the Past

IN MODERN SOCIETIES the legal system is vast and complicated; most of it is completely unknown to the public, and indeed to most lawyers. A few parts of the system, on the other hand, are highly visible. Any big proposal or plan from the government will break the surface and become "news." But the major exception to the rule of invisibility is criminal justice. Crime news, day in and day out, bombards the public: in the newspapers, radio, movies, and TV. The public is inundated with cops, crooks, trials and executions, fact and fiction. Somebody wrote a great novel called *Crime and Punishment*; and someone else wrote another called *The Trial*; we have yet to see a masterpiece called *Long-Term Shopping-Centre Lease* or *Adventures in Corporate Reorganization*. The fascination with criminal justice is unending.

Consider, too, the enormous popularity of mysteries and detective stories; or the constant flow of TV programs about police, and with courtroom scenes; or plays and movies with trials and verdicts. Many bookstores now have whole sections devoted to "true crime." I hardly need tell you that much of the American material oozes over the border into Canada.

In common law systems, the criminal trial is itself theatrical. It is enough to mention the magic name, O.J. Simpson, to underline this point; but there have been plenty of other examples of trials, south of the border, that were consumed by a hungry public as theatre: the two trials of the Menendez brothers, or the travails of Lorena Bobbitt, and countless others. There are moral lessons in all of these rather depressing affairs, but they are, in the first instance, grand entertainment on a world-wide scale. Like it or not, CNN and satellites carry American courtroom drama around the globe.

All this is, in a way, nothing new. There were sensational, theatrical trials long before anyone even dreamed of television. In the 1890s an eager public followed the Lizzie Borden case (from Fall River, Massachusetts) in their daily newspapers. The literature on this case alone would fill a small library; and it has produced at least one opera and ballet.[1]

Certainly nobody could or should argue that this makes the big criminal trial the most important part of the legal system. The jury trial is, or has become, a rather rare event in the United States. According to the Bureau of Justice Statistics, 92 per cent of all felony convictions in 1992 in the state courts resulted from guilty pleas; another 4 per cent from bench trials; and only 4 per cent from jury trials.[2] The type of case, to be sure, makes a big difference. In murder cases, guilty pleas drop to 59 per cent; bench trials account for 8 per cent, jury trials a third of the convictions. The more dramatic the crime, the more drastic the possible penalty; and the more likely the case is to get to the jury. In general, only jury trials are dramatic enough to make the front page.[3] Plea bargains are quiet and subterranean.

To be sure, the study of those things that are quiet and subterranean is also very important. Scholars have a special duty to explore obscure, typical aspects of the legal system. We know the least about these parts of the system; and, because of this obscurity, the public is grossly misinformed about how criminal justice actually works. Criminologists and criminal justice scholars have a duty to expose this system to the light of day. Still, I come back to my starting point: the flamboyant fireworks at the visible tip of the system. They have significance in their own right; and they are the subject I propose to take up here.

Most people think of criminal justice as a system of crime control, and of course it is that. It accomplishes much of its purposes

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[1] For a recent treatment of this case, see Cara W. Robertson, "Representing 'Miss Lizzie': Cultural Convictions in the Trial of Lizzie Borden," *Yale Journal of Law and the Humanities* 8 (1996): 351.

[2] Bureau of Justice Statistics, US Department of Justice, *Sourcebook of Criminal Justice Statistics* (1994) 486.

[3] One exception was the famous Loeb-Leopold case; the defendants had confessed to the murder, and the "trial" turned on whether the judge would sentence them to die or not. Hal Higdon, *The Crime of the Century: The Leopold and Loeb Case* (New York: Putnam, 1975).

through weapons of compulsion—the police, the jails, the gallows and the rest. But it is also a teacher and a preacher: a source of lessons, a marker of normative boundaries, as Emile Durkheim long ago pointed out.[4] The criminal justice system announces, through word and deed, a code of behaviour. The penal code itself, in the most literal sense, is the embodiment of this code: it is a catalogue of outlawed behaviours—conduct which has been criminalized, and put in some kind of order of gravity and severity; the levels of punishment fix the relative weights and prices of bad deeds.

This is the system on paper. I use the word "announce," but I do not mean it literally. It hardly needs to be said that John and Jane Public do not carry about with them a copy of the penal code of their province or state. It is the living, operating system which does the teaching and the preaching; and much more effectively than the codes themselves. The living system provides moral lessons in a vivid, expressive way. It dramatizes and makes concrete the norms of the community, or at least the norms of some significant part of the community. It is, in short, didactic theatre.[5]

This is, today, a prime characteristic of the criminal trial. But in the United States, at one time, it was true of the whole system of criminal justice. In the colonial period, that is, in the seventeenth and eighteenth centuries, criminal justice was public and theatrical, in every sense of the word.[6] If you were to be whipped for your misdeeds—and whipping was the most common form of punishment—this was carried out before the eyes of the whole community. Whatever the punishment, from reprimands to swinging on the gallows, it was done in public.

Statutes of the colonies in what is now the United States vividly illustrate this point. In Rhode Island, for example, under a law of 1749, a person convicted of adultery was to be set "publickly on the Gallows in the Day-Time, with a rope about his or her

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[4] Durkheim made the argument in his book, *The Division of Labor in Society*. See, for a discussion, Kai T. Erikson, *Wayward Puritans: A Study in the Sociology of Deviance* (New York: Wiley, 1966) ch. 1.

[5] See, in general, Stewart Macaulay, "Images of Law in Everyday Life: The Lessons of School, Entertainment, and Spectator Sports," *Law & Society Review* 21 (1987): 185–218.

[6] See Lawrence M. Friedman, *Crime and Punishment in American History* (New York: Basic Books, 1993) 25–26.

Neck, for the Space of one Hour,"[7] and then whipped. Everyone has heard of Hawthorne's novel, *The Scarlet Letter.* A New Hampshire statute (1701) indeed prescribed that adulterers were to wear a capital letter A, two inches long, "and of proportionable ... Bignesse, cutt out in Cloath of a contrary Colour to their Cloaths and Sewed upon their Upper Garments."[8] One Hannah Gray, in Massachusetts, in 1674, was ordered to stand at the meeting house at Salem upon a lecture day, with a paper on her head on which was written in capital letters, I STAND HEERE FOR MY LACIVIOUS & WANTON CARRIAGES; this was her alternative to a public whipping.[9] For many crimes in New England, the punishment was branding—in 1674, two burglars in Massachusetts, after paying a fine, were ordered to be "Branded in their Forheades ... with the letter B"; and in 1670, Nicolas Vauden, a servant, and a persistent runaway, was to be "branded on the forehead with the letter R and to be severely whipped."[10] For certain crimes, the laws ordered mutilation—for example, cutting off an ear. This was a lot more painful than a scarlet letter, and more permanent, but it had a similar effect: as in the case of branding, the criminal was publicly marked for his crime.

The ultimate punishment, of course, was death by hanging, and this too was an outdoor activity: it was a show, an event; perhaps not quite an entertainment, but definitely a didactic exercise. It was an especially valuable show if the wretched criminal confessed, and announced to the public how evil he had been, how deeply he repented, and if, standing in the very shadow of the gallows, he begged his audience to learn a lesson and exhorted his onlookers to live lives of Godliness and truth. James Morgan, executed in Boston in 1686, for "an horrible Murder," made a last speech on the "Ladder, which was then taken down in Short-Hand." The speech began: "I Pray God that I may be a warning to you all ... have a care of that Sin of Drunkenness, for that Sin leads to all manner of ... Wickedness ... O let all mind what I am a saying

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[7] *Laws of Rhode Island and Providence Plantation* (1749) 53.

[8] *Laws of New Hampshire*, Vol. 1: Province Period, 1679–1702 (1904) 676.

[9] *Records and Files of the Quarterly Courts of Essex County, Massachusetts* 5: 291.

[10] Joseph H. Smith, ed., *Colonial Justice in Western Massachusetts (1639–1702): The Pynchon Court Record* (Cambridge, MA: Harvard UP, 1961) 281; *Records and Files of the Quarterly Courts of Essex County, Massachusetts* 4: 234.

now ... O take warning by me, and beg of God to keep you from this sin which has been my ruine."[11]

The show did not necessarily end with execution: in 1710, in Virginia, after an Indian and a slave were hanged, their heads were cut off, and their bodies were quartered; the court ordered the heads and body parts to be displayed "in the most publick places" of Virginia, as a vivid lesson on the fate of those who committed treason.[12]

Well into the nineteenth century, executions were exceedingly public in the United States. At one hanging, in Cooperstown, New York in 1827, the crowd was so dense that a viewing stand gave way; two people were killed.[13] As late as 1880, in Tennessee, a landowner made more than $500 selling reserved seats and barbecue at a hanging. In the southern states, hangings were "powerful theatre"; and crowds, including schoolchildren, were seized with "religious mania" as the "doomed man" was "launched into eternity."[14]

But the appetite for such spectacles among the leaders of society, particularly in the midwestern and northern states, cooled decidedly by the middle of the nineteenth century. One of the long-term secular trends in criminal justice was toward privacy and concealment in corrections. Hangings retreated from the public square to the courtyard of the prison or jail. Pennsylvania began executing in private in 1834; New Jersey, New York, and Massachusetts followed with laws passed in 1835. Under an Illinois law (1859), hangings were to take place "within the walls of the prison of the county" where the defendant was convicted, "or within the yard or inclosure adjoining such prison." The invited guests were the judges, prosecuting attorney, and the clerks of court of the county, along with "two physicians and twelve reputable citizens," to be selected by the sheriff or deputy sheriff; the condemned man could name up to three ministers of the gospel, and any of his "immediate relatives" he might want to see the

[11] Daniel E. Williams, ed., *Pillars of Salt: An Anthology of Early American Crime Narratives* (Madison, WI: Madison House, 1993) 78.

[12] Hugh F. Rankin, *Criminal Trial Proceedings in the General Court of Colonial Virginia* (Williamsburg, VA: UP of Virginia, 1965) 119–20.

[13] Friedman, *Crime and Punishment in American History* 76.

[14] Edward L. Ayers, *Vengeance and Justice: Crime and Punishment in the Nineteenth Century American South* (New York: Oxford UP, 1984) 247–48.

show. No one under twenty-one, except relatives of the condemned man, was permitted to witness the hanging.[15]

But even within the closed precincts of jails or prisons executions continued to be all too visible; when Lloyd Majors was executed in Oakland, California, in the jail yard in 1894, crowds of people gathered in the streets, hoping for a glimpse of the fun. Some of them clambered onto roofs; and "several boys … climbed into a tall poplar tree in front of the jail, in full view of the scaffold."[16] On the other hand, this spectacle was already a shade anachronistic. A movement was underway to confine executions deeper inside the bowels of the prison. In 1888 the legislature of New York passed an act providing that anybody convicted of a capital crime would, from 1889 on, be "electrocuted" rather than hanged. This began the career of the infamous "electric chair."[17] Among other things, the electric chair made it possible for executions to go extremely private—they could take place in a small, intimate chamber of the prison, in front of a few carefully selected eyewitnesses, and nobody else. The first person who had the honour to die this way was William Kemmler, whose "launching" took place in 1890.[18]

Punishment in general had gone private: the states had, generally speaking, gotten rid of the whipping post; branding dropped out of the statute books after Independence (in the northern states; it lingered longer in the south). In the nineteenth century, imprisonment (in the newfangled "penitentiaries") became the standard way of punishing criminals. Convicts were locked up, out of sight, in grim fortresses. To be sure, Massachusetts, after it built its penitentiary, allowed visitors to tour the prison, charging a 25

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[15] *Laws of Illinois* (1859) 17. In addition, the sheriff could invite "such officers of the prison, deputies and constables as shall by him be deemed expedient to have present." Nobody but the people in the categories mentioned were allowed to be at the execution.

[16] Lawrence M. Friedman and Robert V. Percival, *The Roots of Justice: Crime and Punishment in Alameda County, California, 1870–1910* (Chapel Hill: U of North Carolina P, 1981) 305–6.

[17] For the background, see Deborah W. Denno, "Is Electrocution an Unconstitutional Method of Execution? The Engineering of Death over the Century," *William and Mary Law Review* 35 (1994): 554, 556–77.

[18] See Friedman, *Crime and Punishment* 170–71. The Supreme Court held, in *In re Kemmler*, 137 US 436 (1890), that electrocution was not cruel and unusual punishment. The actual execution did not go as smoothly as those who hustled this new way of killing claimed or hoped.

cent fee; this practice was abolished by about the middle of the century.[19] The classic penitentiaries, built in the first half of the nineteenth century, or shortly afterwards, were austere and exclusive; the prisoners lived in solitary cells, within big, gloomy buildings, surrounded by high brick walls; they lived and worked in utter silence, and their lives were totally regimented. They ate only prison food, wore uniforms, and marched, if at all, in lock-step. Books were censored, mail excluded or monitored, visitors were few and carefully screened. The outside world, in short, was rigorously excluded. Punishment in prison, then, was the exact opposite of the open, theatrical punishments of colonial times.[20]

What brought about this retreat from public punishment? Some scholars have pointed to structural and social changes in society. Colonial punishment assumed an audience, and a small-town audience at that—an audience of people who knew each other, knew the rules, knew the leaders of the community. In the nineteenth century, in the big, anonymous cities, or in smaller communities with lots of strangers coming and going, under conditions of extreme geographic mobility, shame and humiliation lost some of their small-town bite.

There was also a shift in elite attitudes toward public hangings, and toward corporal punishment in general. Punishing the body was now generally denounced as primitive, barbaric. This was why the whipping post was abolished—whipping no longer seemed civilized. But of course this was a social judgement; what is barbaric is in the eye of the beholder, and definitions vary from place to place and time to time. The learned divines of colonial Massachusetts, who considered themselves extremely civilized no doubt, saw nothing barbaric about whipping. And, when one thinks about it, it is more than a little odd to consider whipping more barbaric than, say, ten years behind bars in a maximum security prison.

Social judgements, of course, are not random or accidental; context and culture shape them. Public hanging became barbaric

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[19] Michael Hindus, *Prison and Plantation: Crime, Justice, and Authority in Massachusetts and South Carolina, 1767–1878* (Chapel Hill: U of North Carolina P, 1980) 101.

[20] On the history of the penitentiary system, see David J. Rothman, *The Discovery of the Asylum: Social Order and Disorder in the New Republic* (Boston: Little, Brown, 1971); Adam J. Hirsch, *The Rise of the Penitentiary: Prisons and Punishment in Early America* (New Haven: Yale UP, 1992).

because of a shift in legal culture. Unruly crowds, riots, urban disorders were all too common features of nineteenth-century city life. The tumult in the city was one of the reasons why city after city, toward the middle of the century, began to organize police forces. The trend, as is well known, began in England; within ten years, it had leaped the Atlantic to New York, then Boston, and Philadelphia. The root cause was urban disorder. In this kind of atmosphere, public hangings no longer looked like open-air lessons in morality and piety—spectacles of civil and religious order. A public hanging, in the minds of respectable folks of the nineteenth century, was almost the opposite: an open display of cruelty and violence, an invitation to the blood lust of the mob. It evoked debasing passions and appetites. It brought out the beast inside the public breast.

In this regard, incidentally, elite opinion in Canada followed a similar course. Public hangings were denounced by one journal, in 1849, as "disgusting"; another, in 1845, recording a hanging in front of five or six thousand people, reported that the crowd cheered and clapped for the prisoner "as though he had been a favourite actor making his debut!" And a Montreal newspaper, in the same year, claimed that such "exhibitions" merely served "to brutalize the mind of the populace."[21]

Like the penitentiary, the abolition of public hanging represented a withdrawal from the community—a turning away from the idea that the people themselves, the *community*, dealt out punishment, through shaming and stigma. Now the community was feared and distrusted; the urban mobs were seen as the *source* of criminality, not by any means the cure.

It should be added, too, that although executions literally went private, the public continued to be there, on the scene, if only vicariously. The gentlemen and ladies of the press saw to that. Executions, like trials, were favourite topics for the newspapers in the United States, and for rags like the *National Police Gazette*, the supermarket tabloid of its day. This was especially true in the late nineteenth century, the age of the so-called "yellow press." The press was never more shriekingly yellow than in reporting on crime,

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[21] *The Pilot*, 1 May 1845, in J.M. Beattie, ed., *Attitudes Towards Crime and Punishment in Upper Canada, 1830–1850* (Toronto: Centre of Criminology, University of Toronto, 1977) 58–59.

trials, and executions. The public seemed to love every prurient detail: what the doomed man wore, how he acted, what he ate. The *National Police Gazette* hungrily recounted the execution of Mrs. Martha Place, in 1899, in the electric chair: she was "dressed in a black gown with big sleeves and a few fancy frills at the bosom .... She wore russet slippers"; her hair was braided, though a spot had been clipped on the crown of her head, to accommodate the electrode; she was dispatched by a current of 1,760 volts.[22] In Alameda County, California, the *Oakland Tribune* delighted in loathsome descriptions of executions, including a blow-by-blow description of how the rope nearly severed one man's head, how the blood spurted from the neck of this man with a gurgling noise, and so on.[23] Cameras, of course, were not allowed at executions, although in 1928, a glorious day in the annals of capital punishment, a reporter for the *New York Daily News* smuggled a camera into the execution chamber, strapped to his ankle, and shot a picture of Ruth Snyder as she died in the electric chair.[24] The camera issue (or rather, the television issue) is still a burning concern in the United States in the 1990s, though so far we have been spared the first live execution on TV.

All of the great trials were conducted before packed courtrooms, and the media brought the word to the outside world. Some of the larger trials were almost literally media circuses—dozens of reporters crowded every available inch of space, cameramen and artists provided graphic detail. Thousands of words and pictures poured out, recounting every lurid detail, every scandal, every twist and turn. Some newspapers were not above inventing juicy details on their own. In any event, trials and punishments, and criminal justice in general, were for most people filtered and mediated, yes, even *experienced* by means of the daily press.

These great trials, covered in the newspapers and magazines, or (today) broadcast on TV, are thus the survivors of a more general system of public criminal justice—criminal justice in which the general public participates. There are, however, great differences between the modern system and what went on in the past.

Trials during the colonial period in the United States were definitely theatrical and didactic, but they were very much under

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[22] *National Police Gazette* 8 April 1899: 6.
[23] Friedman and Percival, *Roots of Justice* 305–6.
[24] Friedman, *Crime and Punishment in American History* 445.

the control of the judges and the elites of the community. These were deeply religious men; they had a strong sense that leaders of society had the right and the duty to direct and instruct the ordinary woman and man. Judges were very much members of this class of elites. Trials were not so much a search for truth, as dramas that expounded truths already known. Hence the great emphasis on confessions, and on inducing repentance and reform.

Today the power of the judge has receded greatly. The instructions she gives to the jury tend to be bare, abstract, cut-and-dried. Lawyers have taken over the main job of building up the drama of the trial: they develop the narrative flow, and they point the morals, when there are morals to point.

The Jury

The members of the jury are, of course, also key figures in the drama. If the role of the lawyers is to present rival stories and dramas, the role of the jury is to choose among these discordant accounts. The jury is made up of lay people—members of the community. The lawyers present their stories and their evidence in ways that often differ drastically from the way these would be presented to a judge—less legalistic, more tilted toward emotion, drama, morality. There is a kind of paradox at the trial: the lawyers talk a lot, the witnesses talk a lot; the judge instructs the jury; but in the end, the jury comes down with a verdict that consists of one or two words, no more. Whatever there is of a moral, or a lesson, or an admonition, flowing out of the actual *result*, is concealed and contained in those few pregnant words.

Members of the jury, on the whole, try to do an honest job. But often they fail to rise above the prejudices of their communities; (White) juries in the southern part of the United States were, in the past, scandalously unfair to Black defendants.[25] Everywhere, of course, jurors are simply human beings. This is why the lawyers work so hard to build up a sympathetic story; this is why they create stereotypes, why they try to put the victim on trial, why they whitewash the defendant or blacken his reputation, depending. They want to convince the jury, first, to see the facts of the case in the proper light; more especially they want to advance the plot, the drama. The lawyers are like two rival script-writers, fighting for

[25] For a discussion of one notorious instance, see Dan T. Carter, *Scottsboro: A Tragedy of the American South* (Baton Rouge: Louisiana State UP, 1969).

the attention of a Hollywood mogul, who will decide which version of the story he will turn into film.

Every great trial has an audience; indeed, it has two audiences. One audience is the wider public. This audience, no question, sometimes influences how the case turns out, though this is very hard to document. Judge and jury are the inside audience. The two audiences are, of course, connected; and the message of a case is carried to the outer world by the behaviour inside the courtroom. The lawyers, in their story-telling; the judge, in his rulings; the jury, with their verdicts—all combine to create the message. In some cases, the verdict is the most significant of all. If there was anything more widely discussed than the lawyers in the Simpson case, it was the behaviour of the jury.

The jury system, as a whole, allows the legal system to be much more supple and subtle, normatively more complex, than the official law would permit. Official rules are relatively tight, clear, brittle; jury decisions are or can be lithe and flexible—cut to the individual case.

·Of course, much of this subtlety has to be inferred from what juries do. Despite a great deal of research on jury deliberation, we rarely know exactly what a jury had in mind, in any particular case. Jurors deliberate in a locked room, and they issue a bald, naked verdict; unlike a judge, they never give reasons. Lately, in some especially newsworthy cases, jurors have granted interviews to the press when the case is over, but that is quite exceptional. If we go back further in time, of course, jury behaviour becomes even more shrouded in obscurity.

The ideology of the jury is (by now) fairly clear. The jury is supposed to find facts, and apply these facts to the law. At one time, it was usual to say that the jury was judge of law as well as fact; but that rule (or whatever it was) did not survive the nineteenth century.[26] It is clear, too, that the jury is supposed to make its decision on the basis of the evidence and the evidence alone. A jury is not supposed to reach a verdict by tossing a coin; and jurors are definitely supposed to ignore sympathy, prejudice, and other raw emotions. That is what judges say to juries, that is how their

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[26] See, for example, the discussion in William Nelson, *Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760–1830* (Cambridge, MA: Harvard UP, 1975) 165–71.

function is described in the books about criminal procedure and criminal justice.

But the very structure of the system belies these pious platitudes. If the system really meant what it said, the jury would not be locked up in a room and left to discuss the case in total secret. The jury would not be allowed to pronounce its verdict like the Delphic oracle, as a bare *fiat*, without any explanation or supporting reasoning whatsoever. A system that took seriously its commitment to rational, "legal" decision-making would not use a jury at all, or at least not a jury of twelve nobodies picked at random. Or it might ask the jury to explain itself—to give reasons for its verdicts, so that we could see for ourselves whether their decision made sense. We do none of these things. Most legal systems in fact avoid juries; these systems put their faith in professionals—in judges, in other words.

In short, the jury's power to bend and sway, to chip away at the official rules, is built right into the system. The United States Supreme Court itself has alluded to the "unreviewable power of a jury to return a verdict of not guilty for impermissible reasons."[27] Juries are not supposed to be "lawless"; but the system is set up in such a way that lawlessness, of a sort, cannot be prevented—cannot even be detected. This can hardly be some sort of historical accident. So central a feature of an important legal institution might get its start through some accident of history, but it could not survive all these centuries unless it met some deep-seated want or need.

This does not mean, of course, that the jury is truly "lawless" and that most cases are decided on the basis of naked prejudice or sympathy. There is, in fact, evidence that most juries try hard to do their duty, as they see it, and as they are told to do. Moreover, the jury does not reign totally supreme. There are very complicated rules of evidence, almost all of them devised with the jury in mind. The rules of evidence are a kind of control over juries. Nobody presents raw, unadulterated "fact" to the jury; "facts" are, rather, carefully predigested, purified, and made into a kind of sauce before the jury is allowed to consume them. It is impossible to tell how much of an effect this practice has, but surely it has some. If we were allowed to tell a jury that the defendant had an arrest record as long as your arm, does anybody doubt a higher inclination to convict?

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[27] Harris v. Rivera, 454 US 339, 346 (1981).

Still, within the limits imposed by rules of evidence and the formal structure of the trial, the power of the jury is awesome and supreme. There is no appeal from the verdict of a jury. When the jury acquits, its decision is utterly final; and even a guilty verdict is untouchable on the facts. A losing defendant has to scrape around for some "errors" of law—a judge's misstep in admitting evidence, or in instructing the jury, for example—on which to base his appeal. These "errors" are not that easy to find. Most appeals end badly for defendants.

In short, the law permits and enhances, structurally, exactly those aspects of a jury trial which stress *dramatic*, non-legal, non-logical, emotional, didactic appeals. Rules of evidence are supposed to hobble the jury; they are meant to keep out the most prejudicial bits of news. But it is not malpractice or grounds for a mistrial to make a jury laugh and cry; quite the contrary. In many ways, emotion and intuition are what jury trials are all about. For logic and legal reasoning we have judges.

Unwritten Laws

Trials in common law systems are particularly prone to theatre because of the jury—that unique, empowered audience. Its decisions have an awesome finality. The judge can talk and talk and instruct; it is the jury that decides. Thus jury verdicts in the United States provide us with many examples of what are called "unwritten laws." These are social norms to which the law turns a blind eye, officially, but which the practiced observer (or even the unpracticed one, from time to time) can detect in patterns of jury verdicts. The lawyers often make powerful appeals to the force of such "unwritten laws." There are no doubt many examples. One of the most famous, in the nineteenth century, was the "law" that a man was entitled to avenge the sexual dishonour of a wife, sister, daughter, or mother. This was in fact *the* "unwritten law": the one that gave the whole genre its name.

In the case of some "unwritten laws," juries tended to acquit—or convict on skimpy evidence—and as usual we do not know what went on in the privacy of the jury room. It is a plausible guess, however, that juries usually paid *some* attention to what the judges told them, which means that they were at least sometimes reluctant to acquit defendants who were clearly guilty, legally speaking. What an honest jury needed (and needs) is a legal hook,

an excuse, to justify and legitimate what the jury wants to do. Thus the history of jury behaviour is not only a history of unwritten laws; it is also a history of these figleaves.

One of the most interesting of these, which has figured in any number of sensational trials, is the idea of "temporary insanity." It is hard to know exactly when this magnificent concept got its start. "Temporary insanity" obviously plays off the well-established rule that an insane person is not criminally responsible. Now some insane people can have (it is said) lucid moments; similarly, otherwise sane people might have an episode or two of insanity, if some unusual passion or stress unhinged their minds.

Credit (if that is the word) for the first use of the defence of "temporary insanity" in the United States is often assigned to the trial of Congressman Dan Sickles, in Washington, DC, in 1859.[28] Whether this is true or not, the Sickles trial certainly gave the concept a big push forward. Sickles had a young wife, Teresa; and Teresa, alas, took herself a lover, Philip Barton Key, the son of Francis Scott Key, author of America's national anthem. Sickles himself was no paragon of fidelity, but the double standard was in full flower in those days. An anonymous tipster sent Sickles a note, ratting on Teresa and young Philip. Sickles confronted Teresa, who tearfully confessed her sins. The next day Sickles took his gun and shot Key dead on the streets of Washington, a few blocks from the White House.

The trial, as one can well imagine, was big box office for its times. Hundreds lined up in the streets trying to get in to the show, including gentlemen of the press. Sickles' lawyers made essentially two arguments: the first, hardly a legal argument at all, was that adulterers deserved to die. The bond of marriage was "sanctified by the law of God," they said; the penalty for adultery "did not originate in human statutes; it was written in the heart of man in the Garden of Eden." In Biblical times, after all, adulterers were stoned to death.[29]

This was, of course, an argument based purely and entirely on the unwritten law; there was nothing in the text of the penal

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[28] On the Sickles case, see Nat Brandt, *The Congressman Who Got Away with Murder* (Syracuse, NY: Syracuse UP, 1991).

[29] The Sickles trial is reported in John D. Lawson, ed., A*merican State Trials* 12 (1919): 494.

code in the District of Columbia which authorized outraged husbands to kill. The lawyers also mentioned the concept of temporary insanity—it was a kind of bait held out to the jurors, in hopes that they might bite. Adultery, so went the argument, could produce in a man like Sickles a rage or "frenzy" in which "he is wholly irresponsible for what he may do." Popular opinion was strongly on Sickles' side. The jury, as it turns out, shared the public view. Sickles went free.

In the course of the nineteenth century, and into the twentieth, there were many examples of jury verdicts based on the "unwritten law"; and "temporary insanity" figured in any number of these cases. In the 1870 trial of Daniel McFarland, who shot his ex-wife's lover to death, a Dr. Hammond testified to "cerebral congestion"; the defendant's face and head were "abnormally hot"; shown photographs of his wife, his pulse rose and he started twitching. Tests on thc "Dynamograph machine" proved the defendant "could not control his will." The good doctor swore that "the act itself was done during an attack of temporary insanity." The jury acquitted.[30] Paul Wright, in Glendale, California, shot his wife Evelyn and his best friend, John Kimmel, to death. Wright had been roused from sleep "by a single note, repeated over and over on the piano." He went down to the living-room, where he found Evelyn and John sitting on the piano-bench, in what used to be called, delicately, a compromising position. A "white flame" "exploded" in Paul Wright's brain, according to him. The jury acquitted here too.[31]

The trial of Harry K. Thaw, in 1907, was one of the most sensational in US history. Thaw shot and killed Stanford White, one of the most famous architects of the time, in Madison Square Garden, New York. Thaw was married to young Evelyn Nisbet, a woman of rare beauty. White had (allegedly) taken advantage of her sexually—though long before she even met Harry Thaw. The whole story came out at the trial in lurid detail. Thaw's defence was temporary insanity; but the jury (at a second trial) found insanity

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[30] George Cooper, *Lost Love: A True Story of Passion, Murder, and Justice in Old New York* (New York: Pantheon Books, 1994) 192–94. The defense argued that "the compromise of a husband's honor" creates such passions that "the Deity did not make man strong enough to stand a provocation like that" (216–17).
[31] Marvin J. Wolf and Katherine Mader, *Fallen Angels: Chronicles of L.A. Crime and Mystery* (New York: Facts on File, 1986) 143–47.

of a more permanent type. Thaw was shipped off to the State Asylum for the Criminally Insane, in Matteawan, New York.[32]

Women who killed husbands and lovers were less successful than men in invoking the "unwritten law," but there are a fair number of examples. In 1894 a young girl named Clara Fallmer went on trial for murder in Alameda County, California. Clara was fifteen or sixteen; she had shot and killed her lover, Charlie La Due, on the streets of Oakland, California.

Her story was an old, familiar one: seduced and abandoned. Like Dan Sickles and Harry Thaw, Clara committed her crime in the open, in plain view of the public. "I didn't do it" was hardly a credible defence. Hence, it was better to argue that Clara shot Charlie during a "state of emotional insanity"; as she brooded over her fate, she had become "unhinged." More significantly, the defense painted a picture of Clara as a tender young plant, innocent as fresh-fallen snow; Charlie as a villain who deserved to die. Clara appeared every day in court, dressed in blue, with a veil covering her face, clutching a bouquet of violets. This was, naturally, a piece of stage-management, concocted by her lawyers. For its part, the prosecution sneered at this image of Clara, and tried to paint her instead as an abandoned young trollop.[33]

In the gender dramas of the 1890s, these were the two stock roles available. Clara could be a whore or a delicate flower; there was nothing in between—no room in conventional thought for the most likely description of Clara, that is, as an ordinary, but sexually-active teenager. The two conflicting pictures of reality, championed by opposing lawyers, tell us a great deal about what was thinkable (or at least sayable) and what was not, in the 1890s, as far as sex and young girls were concerned. There was not, however, much doubt about the outcome. For a young girl of this type—weak, pale, sympathetic, especially a girl who clutched violets—the jury verdict was almost a foregone conclusion. They had their sympathetic image, and they had their legal hook. Clara was acquitted in short order.

Examples could be multiplied. But the central point is this: the history of criminal trials is also the history of unwritten laws; it is the history of many of society's important but underground norms;

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[32] On the Thaw trial, see Richard O'Connor, *Courtroom Warrior: The Combative Career of William Travers Jerome* (Boston: Little, Brown, 1963) chs. 7 and 8.

[33] On this trial, see Friedman and Percival, *Roots of Justice* 239–44.

and it is also a history of the legal doctrines that permitted these norms to work themselves out in the course of criminal trials. The most significant doctrines were nothing more or less than the rules instituting and regulating the jury. The criminal trial itself, and the behaviour of juries, are therefore important social indicators—though rather tricky ones to use; they shed important light on ideas, attitudes, and stereotypes of the past, they provide subtle data that would be hard to generate in any other way. They teach us about stock narratives, gender roles, and conventional wisdom. Where else could we learn so much about such elusive things?

One question worth asking about "unwritten law" is the obvious one: why is it unwritten? Truly general rules tend to be written; society is not bashful about putting its norms and prejudices into the penal code. Norms that stay unwritten are by and large contested norms. They might, for example, be popular ideas which some moral or political elite is dead set against. The historical study of jury behaviour uncovers a hidden realm of such norms and patterns, many half-formed or inchoate, some exceedingly local, some widely diffused, some ephemeral, some longer-lasting. A good deal of this terrain is familiar to social historians, but there may be new and unexplored country yet to be discovered.

The Contemporary Trial

As I pointed out before, jury trials (and trials altogether) are relatively rare in criminal process. Rare does not mean trivial. The jury trial acts as a kind of (subtle or crude) brake on the operating law. And it still acts as a teacher and preacher, though perhaps in not quite the same way as before. Today, in the age of TV, focus groups, public opinion polls, and mass media, the big trials make more noise, and generate more publicity than ever before. They also reach a vastly wider audience, and in a more direct way. Tens of millions of people watched the O.J. Simpson case, added to the millions who devoured the trial of the Menendez brothers and other notorious trials. There is still drama, and still didactic lessons; but the trial is now, also, a major source of public entertainment.

We live in a celebrity society. This means a society in which public life is dominated, not by charismatic or traditional leaders, not by experts, but by celebrities.[34] A celebrity is not just a famous

[34] See Lawrence M. Friedman, *The Republic of Choice: Law, Authority, and Culture* (Cambridge, MA: Harvard UP, 1990) ch. 7.

person; she or he is a famous and *familiar* person; a person who is like ourselves, only more so; who belongs to us, the public; whom we know or think we know intimately; whose private life is part of public life. A charismatic leader is awesome and distant; a celebrity is neither. On the contrary. She is, in fact, an everyday image on the television screen.

In some ways, the sensational trials of history helped pave the way, or at least foreshadowed, the celebrity society. In any event, the defendant in a sensational case automatically becomes some kind of celebrity. The public idolizes celebrities, even (it seems) when they are murderers or criminals. The touch of a famous person is as valuable as the king's touch, which used to cure scrofula. Amy Fisher is a celebrity because she shot her lover's wife in the face; so are the Menendez brothers, who killed their parents; and Lorena and John Wayne Bobbitt; and so too is John Gotti, a prominent New York mobster who was put on trial. Famous murderers on death row often get proposals of marriage. In October 1996 the *San Jose Mercury* reported the marriage of a gushing, blushing bride, dressed in "antique lace," to Richard Ramirez, a notorious Los Angeles mass killer.[35] Hordes of fans gathered outside O.J. Simpson's house, after he was arrested. What were they looking for? Probably nothing more than the fallout from a celebrity's magical presence. T-shirts were big sellers outside the Los Angeles courthouse. When Bruno Hauptmann went on trial for kidnapping and murdering the baby of Charles Lindbergh—perhaps the most sensational trial of this century, in the United States, at least before O.J.—"certified locks of Baby Lindbergh's hair" (fake, of course) were sold on the streets of Flemington, New Jersey, where the trial took place, along with book-ends in the shape of the courthouse, photographs of Lindbergh, and toy replicas of the ladder used by the kidnappers in snatching the baby from its home.[36]

A celebrity society is also a public opinion society. Political leaders, in such a society, are themselves celebrities, and they rise and fall like celebrities. Under these circumstances, the general public is both sovereign and manipulated; it has extraordinary power, through public opinion polls, focus groups, and the like, to influence policy. But at the same time, the government uses all its wiles, and

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[35] *San Jose Mercury* 4 Oct. 1996: 3B.

[36] Ludovic Kennedy, *The Airman and the Carpenter* (London: Collins, 1985) 259.

all the tricks of the media trade, to bend, mould, and distort public opinion; it shows only what it wants to show, it lies, it conceals, it stereotypes, it blusters. The public, then, is a bit like a puppet emperor, who thinks he rules, when all the time someone else is pulling the strings.

Of course, the government does not have everything its own way. There is, after all, an opposition; it too manipulates the public. It may make use of the same bag of tricks that the government does. Hence public life, in a celebrity society, is in a way a great deal like a criminal trial writ large; there are two opposing "sides," government and opposition, and two sets of arguments on major issues—counsel for defence and counsel for prosecution, as it were. The voting public is like the jury—powerful within its domain, but controlled by rules of evidence and shamelessly manipulated by lawyers.

We can carry the analogy a bit further. The public in a celebrity government is systematically misled in much the same way that the jury is misled in a criminal trial. The information it gets is twisted and filtered; and the rival plots dished up are always distorted, rich in stock characterizations, empty rhetoric, and pandering to the most common social prejudices. The public judges, not on the basis of "facts," but on the basis of personality, image, perceived sincerity.

The media also mislead the public, sometimes deliberately, sometimes for reasons that are market-driven. The importance of the media cannot be overestimated. The public gets most of its information, such as it is, from TV and newspapers; and their information, as far as criminal justice is concerned, is tilted badly in the direction of celebrity trials.

Of course, there has been a certain amount of backlash from the excesses of celebrity trials—the O.J. Simpson trial very notably. Probably, at least in the short run, some judges in the United States will be quicker to say, no thank you, on the question of TV in the courtroom.[37] But "Court TV" is a popular cable channel; it is certainly not going out of business; and despite a century of complaints and whining, neither are the scandal sheets and the tabloids.

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[37] In the second Menendez trial, the judge refused to allow television coverage of the proceedings. *New York Times* 4 Oct 1995: 9. Similarly, no cameras were allowed in the civil trial against O.J. Simpson, brought by the families of the victims.

Criminal justice, then, will continue to be "on stage." And it will continue to perform, through the big trials, its theatrical and didactic functions. At the most general level, though, it will continue to give off two powerful, intense messages—which are in a way both wrong, and somewhat contradictory. The O.J. Simpson case illustrated both of these.

In the first place, there is a message that we are serious and in deadly earnest about due process. Incredible pains are taken to select an impartial jury. The public also watches, in fascination and in some disgust, how the lawyers battle and manoeuvre; the public sees an obsessive attention to form, to points of evidence and procedure, the incessant arguments in front of the judge, the squabbling over expert testimony, the constant refrain of "I object."

On the other hand, this posturing and manoeuvring sends another message: the trial is not about truth or justice at all. It is theatre and only theatre; it is a lawyer's game, a charade, a bag of tricks. Justice is a riverboat gambler, a con-man. Money and publicity buy justice, such as it is. Enough money and enough sneaky lawyering, and the most ironclad case turns to jello.

There is, of course, another system of criminal justice, the real system, the working system. This is a grubby world of plea bargaining—a world of copping pleas and cutting deals; a world of slapdash, routine process. But this world is largely hidden from view; hardly anybody seems to know much about it, outside of the professionals in criminal justice; and hardly anybody seems to care.[38] Survey evidence suggests that members of the public are wildly wrong about many of the facts of criminal justice. They imagine, for example, that the insanity defence is very common; in fact, it is rare. A 1979 study in Wyoming found that citizens estimated that 37% of felony defendants used the defence; and "that more than 16% succeeded." In fact, fewer than one-half of one per cent raised the defense, and almost nobody was acquitted on those grounds.[39]

People also imagine that courts coddle criminals, that the criminal justice system in the United States is flabby and soft, that hardened criminals escape through cracks in the system—all of

[38] There is, to be sure, a large literature on plea bargaining in the United States; see, for example, Milton Heumann, *Plea Bargaining: The Experiences of Prosecutors, Judges, and Defense Attorneys* (Chicago: U of Chicago P, 1978).

[39] This study is cited in Thomas Maeder, *Crime and Madness: The Origins and Evolution of the Insanity Defense* (New York: Harper & Row, 1985) xv.

which is at least misleading if not downright wrong. This is one of the reasons that the public shows such bloodlust over crime, demanding more and more harshness, and why politicians fall all over themselves in a competition to act and sound tougher and meaner than anybody else. In this regard the United States is an extreme case, but is by no means alone. The same phenomenon can be observed in England, for example.

I have stressed the public, didactic, moralizing, norm-bending aspects of the criminal trial. In our times, all these functions take place in the blare of media publicity. And they give out, as I have said, false signals and messages to the public. The falsity of these messages contributes, I think, to bad policy decisions. It contributes to legislation that is harsh, ineffective, expensive, and misconceived. Of course it would help if there were some way to enlighten the public. Sometimes, I fear, the public does not want to be enlightened.

It is pretty conventional to end a paper such as this by asking for more research, and in this case I feel the urge to be conventional. In one sense, the literature on criminal trials is enormous. The stuff on Lizzie Borden alone would fill a room. The newspapers and magazines are saturated with criminal trials. The supply of books seems endless. But in another sense, the literature is terribly thin. Very little of it is both rigorous and historical; there is not even as much as one might think about the contemporary role of the big criminal trial, even though the works on the O.J. Simpson trial, as they pile up, will end up dwarfing poor Lizzie Borden. The literature is so small, in part, because one key institution, the jury, is exceedingly difficult to study; there are simulation studies and the like, but real-life juries remain elusive. In addition, the very flamboyance of the big cases discourages serious research. They are huge, vulgar, and gaudy, like the casinos and hotels of Las Vegas. The public flocks to them hungrily, but the intellectuals, the elites, the serious researchers, the rigour-mongers, all tend to stay away. Perhaps we need more scholars willing to take the gamble.