

**FRONT PAGE: NOTES ON THE NATURE AND SIGNIFICANCE OF  
HEADLINE TRIALS**

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INTRODUCTION

This is a brief exploration of the world of the sensational trial.<sup>1</sup> Mostly, it is an exploration of the sensational *common law* trial, and mostly as it was and is in the United States, with a few examples from England and other societies thrown in as well.

The common law trial can be quite a dramatic event. It can be dramatic in a quite literal sense: trials are, or can be, a kind of stage-play, with a definite story or plot—usually, in fact, *two* stories or plots, which are in sharp contrast to each other—and a suspenseful and exciting ending, when the jury files into the room and announces its verdict. The principle of orality is one of the keys to the drama of the common law trial. Unlike the classic civil law trial, in which judges and other officials shuffle documents and papers, the common law trial has traditionally been an open and public event; moreover, its procedures put enormous stress on the spoken word. We all have a vivid mental picture of these trials: the witnesses, sitting to the side of the judge; the two lawyers, cross-examining witnesses sharply, then arguing in front of judge and jury; the oral instructions to the jury; and the final, climactic scene, when the jury announces to the world a judgment of guilty or innocent.

This basic shape of a big criminal trial is familiar to everybody in our society. It is familiar because the trial is ubiquitous in popular culture. Criminal justice, in the broadest sense, is the staple of thousands of books,

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1. There is surprisingly little *general* literature on these trials, exceptions include ROBERT A. FERGUSON, *THE TRIAL IN AMERICAN LIFE* (2007) and RICHARD L. FOX & ROBERT W. VAN SICKEL, *TABLOID JUSTICE: CRIMINAL JUSTICE IN AN AGE OF MEDIA FRENZY* (2001). I should mention, too, MARY S. HARTMAN, *VICTORIAN MURDERESSES* (1976). The subtitle of this book is worth citing: “A True History of Thirteen Respectable French and English Women Accused of Unspeakable Crimes.” *Id.* Treatments of media coverage of trials are also valuable, examples include the Fox and Van Sichel book mentioned above and RAY SURETTE, *MEDIA, CRIME, AND CRIMINAL JUSTICE: IMAGES, REALITIES, AND POLICIES* (3d ed. 2007).

Of course, if you added together all the books and articles about *particular* headline trials, such as Lizzie Borden, Sacco and Vanzetti, and the rest, you would end up with a truly enormous list.

magazine articles, plays, movies, and television shows. It would be impossible to count how often, on television, for example, the focus of a show is a criminal trial (or how often shows have a criminal trial as part of the story line).

Of course, trials in real life come in many shapes and forms. There are civil trials and criminal trials. Some civil trials are extremely significant, for all sorts of reasons; massive tort cases, for example, arising out of huge class actions and asking for damages in the billions of dollars; or, once in a while, a sensational divorce case, or a will contest that piques the public interest. On the whole, however, civil trials do not usually catch the eye and ear of the public. I will confine myself, in this paper, to criminal trials.

Criminal law—criminal justice—performs a number of functions. The criminal justice system is a complex social system. It includes the criminal law itself—the codex of rules that label certain actions and behaviors as wrong and harmful—anything from overtime parking to serial murder. The rest of the system, from the police to the gas chamber, is more or less geared to catch and deal with those who violate the criminal code. Most of the work of the criminal justice system is quite unobtrusive. Actual trials are only a small part of the system, and big trials an even smaller part. Probably more than ninety percent of all criminal trials are cut and dried, and nobody outside of the defendant, the victim, and their families much care. Most trials are, in a way, nasty and short; they last only a day or two from start to finish. Only a handful take days or weeks or months, and play themselves out in the blare and glare of publicity, in courtrooms crowded with visitors. Only a handful get noticed in the newspapers and perhaps on TV news; a tiny fraction of these are actually televised. But it is these big trials, these headline trials, which form the subject of this paper.

As we said, most criminal cases never get to the stage of a trial. This is even true of felonies—of serious crimes. Plea-bargaining disposes of them. Prosecution and defense strike a deal. The defendant pleads guilty in exchange for a lighter sentence, or no sentence, or some other benefit. No trial takes place. This accounts for more than ninety percent of the felonies in some jurisdictions.<sup>2</sup> Generally speaking, we live in the age of the “vanishing trial.”<sup>3</sup> In fact, trials have been doing their vanishing act for more than a century. Not that big, full-scale trials have ever been common—trials with complex voir dire, impassioned arguments before the jury, vigorous cross-examination.

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2. There is a large literature on plea bargaining. On its origins, see LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 390–93 (1993); GEORGE FISHER, *PLEA BARGAINING’S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA* 223 (2003).

3. See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004). See also ROBERT P. BURNS, *THE DEATH OF THE AMERICAN TRIAL* (2009).

Before the age of the plea bargain, most criminal cases did indeed go to trial; but the “trials” were short, routine, even slapdash.<sup>4</sup> Juries were selected in a hurry.<sup>5</sup> The same panel sat in on a whole series of cases.<sup>6</sup> The typical “trial” perhaps lasted an hour or two. And in most of these trials, no lawyer appeared for the defendant.<sup>7</sup>

In the aggregate, these routine trials may be of the highest social importance. They are the heart and guts of the criminal justice system. The big trials are few in number, but this does not mean that they are not significant. They are the only ones which break into the daily press. They make the front page, or the evening news on television. They attract the attention of the mass media, and through the media, the attention of the general public. There have been trials of this sort for a long time, in our country and in other common law countries. It is impossible to get an accurate count of “big” trials, or indeed to mount any count at all, or even to define them. Their notoriety varies. Some trials make headlines in Wichita, Kansas, but are unknown outside of this community. Others, like the trial of O. J. Simpson, set the whole country ablaze; and resonate even beyond the borders.<sup>8</sup> For want of a better term, and a better definition, I will simply refer to these trials as headline trials and define them crudely as trials that attract major public attention. “Major public attention” means, basically, newspaper and other media coverage—including books, movies, TV shows, and the like.

Today, many of these high-profile trials fall into a category which Fox and Van Sickel call “tabloid justice.”<sup>9</sup> They have a certain sensational character: they fascinate the public, they launch a thousand conversations, they produce acres of film, print, and comment. Other aspects of the law, no matter how important, can hardly compete. It is fair to ask, why do these trials cast such a spell? And, furthermore, what is their significance in society? Or, to put it another way—or to ask a somewhat different question—exactly what is their message?

They do, of course, have a message. Or rather messages. But those messages are complex, various, and change greatly over time. Originally, big, showy trials tended to serve political or didactic purposes—the message justified the medium. Now, more and more, trials rise to the surface for no other reason than that they captivate the public. Their value, basically, is as

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4. Lawrence M. Friedman, *The Day Before Trials Vanished*, 1 J. EMPIRICAL LEGAL STUD. 689, 692 (2004).

5. *Id.*

6. *Id.*

7. *Id.*

8. A great deal has been written about the Simpson case. See, e.g., THE O.J. SIMPSON TRIALS: RHETORIC, MEDIA, AND THE LAW (Janice Schuetz & Lin S. Lilley eds., 1999).

9. FOX & VAN SICKEL, *supra* note 1.

public entertainment. And, more and more, the study of these trials is a study not so much of the law, as of the mass media and their role in society. The media propagate these trials. In some sense, today, they create them.

The modern headline trial is, in a way, one of the few survivors of a phenomenon that was once much more widespread. Criminal justice and the punishment of criminals were at one time *public* in the most literal sense. In colonial America, punishment of crime—law enforcement—was *always* open to the eyes of the community.<sup>10</sup> Whipping was one of the most common ways to punish the guilty, and men and women were always whipped in public. Colonial law also possessed a rich stock of punishments that made use of public shame and scorn—sitting in the stocks, for example. Often, too, punishment was public in another sense: offenders carried with them, for the rest of their lives, visible signs of their crimes and punishments. Everyone has heard of the scarlet letter. This was not something Nathaniel Hawthorne dreamed up: for example, under a New Hampshire law of 1701, adulterers were to wear “for ever after . . . a Capitall Letter: A: . . . Sewed upon their Upper Garments.”<sup>11</sup> Punishment for a burglar, under the Laws and Liberties of Massachusetts in 1648, was branding “on the forehead with the letter (B).”<sup>12</sup> If the burglar committed the crime on a Sunday, “he shal for the first offence have one of his ears cut off;” for a second offense, “he shal loose his other ear.”<sup>13</sup>

Actual trials were significant as ritual and drama; punishment even more so. Hanging a condemned man was a mighty public event. Thousands could and would gather to see the criminal launched into eternity. Clergymen delivered relevant sermons on the Sunday before an execution. Some of these were printed and distributed. The last speech of the condemned man was another popular form of literature in the eighteenth century. More than thirty-five of these survive.<sup>14</sup> Supposedly, these speeches were delivered at the gallows itself, in the very shadow of death, though in all probability they were mostly written beforehand, by ministers, jail officials, or the doomed man himself.<sup>15</sup> The texts were meant to be enlightening, moralistic. So, for example, “poor Julian,” executed for murder in 1733, confessed to drunkenness and Sabbath-breaking, the start of a slippery slope which led

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10. See FRIEDMAN, *supra* note 2, at 36–41.

11. LAWS OF NEW HAMPSHIRE: PROVINCE PERIOD, 1679–1702, at 676 (Albert Stillman Batchellor ed., 1904).

12. THE BOOK OF THE GENERAL LAWES AND LIBERTYES CONCERNING THE INHABITANTS OF THE MASSACHUSETS (1648), *reprinted in* THE LAWS AND LIBERTIES OF MASSACHUSETTS 4 (1929).

13. *Id.* at 4–5.

14. DANIEL A. COHEN, PILLARS OF SALT, MONUMENTS OF GRACE: NEW ENGLAND CRIME LITERATURE AND THE ORIGINS OF AMERICAN POPULAR CULTURE, 1674–1860, at 20 (1993).

15. *Id.*

downward “to this great Sin for which I now die. . . . O take Warning by me all of you, I intreat you . . . . turn from your evil Ways.”<sup>16</sup> Esther Rodgers delivered an “emotional statement of warning” just before she was hanged for infanticide in 1701: “Let me beg of all Young Ones, be not Disobedient, go not with bad Company, O my dear Friends—Take Warning by me.”<sup>17</sup> All this before a crowd of some four or five thousand spectators.<sup>18</sup>

The situation changed in the nineteenth century; men and women were still hanged, but hanging was no longer effective as moral theater. In big, raucous cities, with a floating population, with slums, crude waterfront saloons, and an atmosphere prone to rioting and disorders, elite opinion came to reject public punishment decisively. To hang somebody in front of a crowd of people no longer seemed to convey moral lessons; on the contrary, it looked like something that would appeal to the worst instincts of the mob, something that might incite their appetite for violence, their bloodlust. Punishment went private. The states began to build “penitentiaries,” huge, guarded buildings, surrounded by massive walls.<sup>19</sup> Condemned men and women were no longer to be hanged in the public square. Executions retreated into prison yards, beyond the sight of most people—though people sometimes watched from the treetops, or from the roofs of houses.<sup>20</sup> When the electric chair was invented, in the late nineteenth century, executions became truly private. Men and women died deep in the bowels of the prison, away from the masses, and their deaths were observed only by a handful of witnesses.<sup>21</sup>

Thus, public executions were gone—officially at least. The reality was more complex. In the West, the vigilante movement claimed its share of victims; the vigilantes continued the tradition of death in the open and before the whole community.<sup>22</sup> In the South, there was the dreadful custom of lynching—violent, often sadistic, but quite open, and carried out in front of

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16. *Id.* at 21.

17. *Id.* at 63.

18. *Id.*

19. On the rise of the penitentiary, see generally FRIEDMAN, *supra* note 2, at 77–82; ADAM JAY HIRSCH, *THE RISE OF THE PENITENTIARY: PRISONS AND PUNISHMENT IN EARLY AMERICA* (1992).

20. See, e.g., LAWRENCE M. FRIEDMAN & ROBERT V. PERCIVAL, *THE ROOTS OF JUSTICE: CRIME AND PUNISHMENT IN ALAMEDA COUNTY, CALIFORNIA 1870–1910*, at 305 (Morris S. Arnold ed., *Studies in Legal History Ser.*, 1981).

21. STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY 150–51*, 154–61 (2d prt. 2002). William Kemmler was the first person to die in the electric chair. See *id.* at 151; see also *In re Kemmler*, 136 U.S. 436, 449 (1890) (upholding electrocution as constitutional).

22. There is considerable literature on the vigilante movement. For a comprehensive account, see RICHARD MAXWELL BROWN, *STRAIN OF VIOLENCE: HISTORICAL STUDIES OF AMERICAN VIOLENCE AND VIGILANTISM* (1975).

mass audiences.<sup>23</sup> In both cases, these public executions were meant to teach a lesson. Lynching in the South carried the message of white supremacy, in its cruelest, most barbaric, most naked form. Southern justice was itself an instrument of white supremacy. But the trial of a black man for rape was not violent enough, not severe enough, not sufficiently horrible, to serve as an effective instrument of terror. A black accused of certain crimes could expect only a short, slapdash trial, and was certain to be convicted. But these trials, in front of all white juries, apparently did not deliver the right amount of warning, and did not carry the right symbolic message, the right dose of terror. Only lynching had that power.

These were important exceptions. The headline trial was another. It continued to be a bold public event. At times, it served up moral messages and carried out the didactic function which the whole system had once provided. These were messages and lessons about crime and its consequences, and about the norms and values of society. Not that this was, in most cases, what these trials seemed to be about, on the surface. More and more, these big trials did nothing more than attract the attention of masses of people—and, of course, the attention of the popular press.

### I. TYPOLOGY

In this essay, I begin by offering a rough typology of these trials, a catalogue of types. There is, however, no sharp division between the various types. In fact, not only do the types often overlap, but many famous trials can and do fall into several of the categories. After setting out this typology, I will focus more specifically on one or two of the categories, asking some basic questions: why did these trials capture the fancy and the attention of the public?

But I begin with the typology:<sup>24</sup>

#### A. *Political Trials*

The first category is political trials. This has always been an important type of headline trial. Cases fraught with political significance go back quite far in legal and social history. Exact definition of a political trial is elusive—and somewhat arbitrary. Peter Hoffer lists three criteria: the trial must be politically motivated; the outcome of the trial must be affected by political considerations; and the trial must have a significant impact on politics.<sup>25</sup> This is a rather severe definition. Its problem is that it leaves out too many trials—trials that, to the naked eye, do seem quite political, at least if we try some kind

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23. See, e.g., LEON F. LITWACK, *TROUBLE IN MIND: BLACK SOUTHERNERS IN THE AGE OF JIM CROW* 13 (1998). For a vivid description of a lynching, see SHARON DAVIES, *RISE ROAD: A TRUE TALE OF LOVE, RACE, AND RELIGION IN AMERICA* 153–54 (2010).

of broader definition.<sup>26</sup> Hoffer does not consider a trial political, for example, if it was conducted with due process, that is, if it was scrupulously fair.<sup>27</sup> He has to admit, of course, that the “outcome” even of a fair trial can be “affected” by politics.

I prefer a vaguer definition (or non-definition): a political trial is a trial that has political overtones, or appears to have such overtones. It is a trial that has political *meaning*. This meaning, and the political significance of a “political” trial, can and does vary from trial to trial. But generally we know it when we see it. Most of us, for example, would consider treason trials to be clearly political. A famous example from the first part of the nineteenth century was the treason trial of Aaron Burr. Burr was a former Vice-President of the United States, a notorious political figure, and the charges against him were sensational. He was accused, no less, of a plot to detach the western parts of the United States and set up these regions as a separate country, under his leadership.<sup>28</sup> I would also classify the trials of the conspirators who killed Abraham Lincoln, the trials of Nazi spies, and others guilty or accused of espionage, and the trials of terrorists and other “enemies of the people” as political, since beyond a doubt, all of these have political overtones and meanings.

Political trials are often staged, managed, and closely watched by the regime, government, or administration. During the Cold War, the United States government put the leaders of the Communist Party on trial.<sup>29</sup> The trial of Julius and Ethel Rosenberg was an especially notorious political trial. The Rosenbergs were arrested in 1950, accused of betraying atomic secrets to the Soviet Union. They were convicted, sentenced to death, and executed in 1953.<sup>30</sup> The perjury trials of Alger Hiss were also important political trials, drenched with the politics of the cold war.<sup>31</sup> The Soviet Union itself staged a

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24. One of the few earlier attempts to classify headline trials is Ray Surette, *Media Trials*, 17 J. CRIM. JUST. 293 (1989). He divides “media trials” into three categories, based on the theme of the trial: “abuse of power and trust,” “sinful rich,” and “evil strangers.” *Id.* at 296. These seem useful, as far as they go, but I think it would pay to expand the list of categories, and I have tried to do so here.

25. PETER CHARLES HOFFER, *THE TREASON TRIALS OF AARON BURR 1* (Peter Charles Hoffer & N.E.H. Hull eds., Landmark Law Cases & Am. Society Ser., 2008).

26. Indeed, Hoffer is thus able to conclude that “in the end, the Burr trials were not political . . .” *Id.* at 2.

27. *See id.* at 1–3, 5–6.

28. *Id.* at 77, 147–48.

29. Eleven leaders of the Communist party were convicted of violating a federal law, the Smith Act, and the convictions were affirmed in *Dennis v. United States*, 341 U.S. 494, 495, 517 (1951).

30. See the account in William R. Conklin, *Pair Silent to End*, N.Y. TIMES, Jun. 20, 1953, at 1.

31. *See* ALLEN WEINSTEIN, *PERJURY: THE HISS-CHAMBERS CASE*, at xv–xvi (1978).

series of notorious show trials in the 1930s to expose real or imagined counter-revolutionaries, and to strengthen the grip of a government that ruled on the basis of terror.<sup>32</sup>

Sometimes, defendants try to turn the tables on the government and make the trial into *their* political show. This was true of the trial of the Chicago Seven in 1969–1970. The defendants were radicals, accused of trying to disrupt the Democratic Convention in 1968.<sup>33</sup> They worked to transform their trial into political theater. They refused, for example, to stand up when the judge came in and took other actions to show their disrespect toward the system that had arrested them and was trying to send them to prison.<sup>34</sup> They wanted the trial to become a radical circus. At one point the judge ordered one defendant, Bobby Seale, bound and gagged.<sup>35</sup> The judge cited the defendants' lawyers for contempt.<sup>36</sup> All in all, the trial was an unruly affair; the judge was sorely provoked, but he did seem, to say the least, prejudiced against the defendants. All of the convictions and the contempt judgments were reversed on appeal.<sup>37</sup>

Sometimes, too, what starts out as an ordinary trial, or which takes the form of an ordinary trial, develops political significance in the course of the proceedings. In many ways this was true of the famous case of Sacco and Vanzetti. Nicola Sacco and Bartolomeo Vanzetti, “two young Italian immigrants and revolutionary anarchists,” one a “heel trimmer,” and one a “fish peddler,” were arrested in 1920 for robbing and murdering a “factory paymaster and security guard” in a suburb of Boston.<sup>38</sup> They were convicted and sentenced to death.<sup>39</sup> The case became an international cause celebre, in a way comparable to the Dreyfus case in France. It polarized opinion in the United States and abroad. The critics claimed the trial was unfair, and that the defendants were on trial less for these actual crimes, than for their unpopular political views. In the end, however, all attempts to save the men ended in failure, and they were both put to death.<sup>40</sup>

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32. See, e.g., VADIM Z. ROGOVIN, *STALIN'S TERROR OF 1937–1938: POLITICAL GENOCIDE IN THE USSR* 83 (Frederick S. Choate trans., 2009).

33. JASON EPSTEIN, *THE GREAT CONSPIRACY TRIAL: AN ESSAY ON LAW, LIBERTY, AND THE CONSTITUTION* 52 (Vintage Books 1971) (1970).

34. *Id.* at 248.

35. *Id.* at 254.

36. *Id.* at 413–17.

37. *Id.* at 430.

38. See, e.g., MOSHIK TEMKIN, *THE SACCO-VANZETTI AFFAIR: AMERICA ON TRIAL* 1 (2009). This is the latest of the many books on this famous affair and one that deals explicitly with the political aftermath of the trial.

39. *Id.*

40. *Id.*



We might also label a trial as political, in the broadest sense, when the trial, for whatever reason, raises some important issue of policy or principle; perhaps one on which public opinion is sharply divided. An excellent example would be the Scopes trial, the famous “monkey” trial, which took place in Dayton, Tennessee in 1925.<sup>41</sup> Scopes, the defendant, was a high-school science teacher.<sup>42</sup> His “crime” was teaching Darwinian evolution, which was a violation of the laws of Tennessee.<sup>43</sup> Scopes, if found guilty, would simply have to pay some small fine. But the case exploded into a dramatic confrontation between science and religion. Huge numbers of reporters and sight-seers invaded Dayton. The trial itself was an utter sensation. Two famous lawyers, William Jennings Bryan and Clarence Darrow, battled it out in the courtroom: Bryan for the strict, fundamentalist account of creation; Darrow for science and skepticism.<sup>44</sup> In some ways, Scopes, who had no role in these goings-on, was nothing more than some kind of bystander, even though he was the one on trial. The trial itself has been (rather inaccurately) immortalized in a play (1955) and a classic film (1960) called *Inherit the Wind*.<sup>45</sup>

Clearly, a significant number of headline trials can be labeled political. Political trials have their own quite extensive literature. Consider, for example, the Nuremberg trials after the end of the Second World War, in which prominent Nazi leaders were brought to judgment.<sup>46</sup> There was a parallel trial in Tokyo, in which Japanese leaders were tried for war crimes.<sup>47</sup> Many countries ran their own versions of such trials. Trials of Nazi leaders, some of them sensational, continued for many years (including, very notably, the trial in Israel of Adolph Eichmann).<sup>48</sup> Consider also the growing field of international criminal law. Various international tribunals, in recent years, have been set up to bring to trial and punish various tyrants, despots, and mass murderers—a group, alas, which seems not to be in small supply. There is now also an International Criminal Court, which sits in The Hague, which has

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41. EDWARD J. LARSON, *SUMMER FOR THE GODS: THE SCOPES TRIAL AND AMERICA'S CONTINUING DEBATE OVER SCIENCE AND RELIGION* 93, 256 (1997).

42. *Id.* at 89.

43. *Id.* at 89–92.

44. *Id.* at 103–06.

45. *Id.* at 239–46.

46. There is a huge literature on these trials. *See, e.g.*, *PERSPECTIVES ON THE NUREMBERG TRIAL* (Guénaël Mettraux ed., 2008).

47. *See generally* PHILIP R. PICCIGALLO, *THE JAPANESE ON TRIAL: ALLIED WAR CRIMES OPERATIONS IN THE EAST, 1945–1951* (1979).

48. Eichmann was captured and taken to Israel, where he was put on trial for his crimes. Homer Bigart, *Trial of Eichmann Opens Before Israeli Tribunal*, N.Y. TIMES, Apr. 11, 1961, at 1. Eichmann was convicted and executed. Lawrence Fellows, *Israeli Public Coldly Silent on Eichmann Hanging*, N.Y. TIMES, June 2, 1962, at 3.

the mandate of dealing with crimes against humanity.<sup>49</sup> Or consider the legal battles of General Pinochet, the former dictator of Chile,<sup>50</sup> and the many “transitional justice” trials in countries that have moved from dictatorship to democracy.<sup>51</sup> Political trials, then, in the broadest sense, continue to be an extremely important type of headline trial.

### B. *Corruption and Fraud*

A second category has as its subject corruption and fraud. This is closely related to the first category, and might even be viewed at times as a sub-class of political trials. Impeachment trials, trials of congressmen accused of taking bribes, and other instances of corruption in high places, are all examples that fall under this heading.<sup>52</sup> The administration of President Warren Harding in the 1920s was notably corrupt, and the famous Teapot Dome scandal gave rise to a sensational trial.<sup>53</sup> Fraud and corruption, alas, are hardly uncommon in American history or, for that matter, the history of other countries. Such trials certainly attract attention, though probably somewhat less than a good lurid murder might attract. Very few murder trials, to be sure, generated as much heat and publicity as the attempted impeachment of President Clinton which, in the end, failed in the United States Senate.<sup>54</sup>

Corruption and fraud are governmental problems. But there is also private corruption and fraud—the work of notorious conmen, the crimes and misdemeanors of officials of the Enron corporation, other big corporate malefactors, insider trading defendants, people who run Ponzi schemes and the like. The recent trial of Bernard Madoff, who cheated people out of billions, certainly made the front page.<sup>55</sup> There can be corruption, too, in the world of sports and entertainment. Here one might mention the scandal of the “Black Sox”—members of the Chicago baseball team, the White Sox, who took bribes and threw away victory in the World Series in 1919.<sup>56</sup>

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49. On the tribunals and the ICC, see HELEN M. STACY, *HUMAN RIGHTS FOR THE 21ST CENTURY: SOVEREIGNTY, CIVIL SOCIETY, CULTURE* 58–75 (2009).

50. See Rebecca Evans, *Pinochet in London—Pinochet in Chile: International and Domestic Politics in Human Rights Policy*, 28 *HUM. RTS. Q.* 207, 209–11 (2006).

51. See generally TRANSITIONAL JUSTICE: GLOBAL MECHANISMS AND LOCAL REALITIES AFTER GENOCIDE AND MASS VIOLENCE (Alexander Laban Hinton ed., Genocide, Political Violence, Human Rights Ser., 2010).

52. This category closely resembles what Ray Surette calls “abuse of power and trust” and identifies as a major theme of media trials. See Surette, *supra* note 24, at 293–94.

53. See LATON MCCARTNEY, *THE TEAPOT DOME SCANDAL* (2008).

54. See James Bennet & John M. Broder, *President Says He Is Sorry And Seeks Reconciliation*, *N.Y. TIMES*, Feb. 13, 1999, at A1.

55. For a front page article discussing the Madoff case, see Diana B. Henriques & Jack Healy, *Madoff Jailed After Pleading Guilty to Fraud*, *N.Y. TIMES*, Mar. 13, 2009, at A1.

56. *Eight White Sox Players are Indicted on Charge of Fixing 1919 World Series; Cicotte Got \$10,000 and Jackson \$5,000*, *N.Y. TIMES*, Sept. 29, 1920, at 1. The players were acquitted,

C. *Was Justice Done?*

Another category, which also often overlaps political trials, we can call: Was Justice Done? These are cases which become famous, or notorious, because of the way they were conducted. Here we can put cases in which the defendants were (or may have been) falsely or unjustly accused or were subjected to the ordeal of trial for base or political reasons. The Sacco-Vanzetti case can be included here again. Scholars are still arguing over whether they were guilty or innocent. But most scholars feel the trial itself was biased and unfair (and so did many contemporaries). Indeed, this was the reason why many people denounced the verdicts and the sentence. The critics felt that the real point of the trial was to suppress political dissent and radical thought. In France, of course, the Dreyfus case is the supreme example of this category. The Dreyfus case almost tore the country apart and divided the nation between Dreyfusards and anti-Dreyfusards.

The Scottsboro case was another instance of this genre.<sup>57</sup> Nine young black men were arrested in Scottsboro, Alabama, in 1931.<sup>58</sup> They were accused of raping two white women on a freight train, as it traveled between Chattanooga, Tennessee, and Huntsville, Alabama.<sup>59</sup> The first trial was short and quite typical of southern justice at the time—at least when defendants were black. The defense was shockingly brief and inept. Eight of the defendants were quickly convicted and sentenced to death.<sup>60</sup> The defendants were, in fact, completely innocent. Indeed, one of the “victims” later recanted and admitted she had lied.<sup>61</sup> This seemed to make little difference to judges and juries. The blatant injustice of the case made it notorious. The United States Supreme Court reversed the trial court, holding that the trial was so unfair that it violated the federal constitution.<sup>62</sup> Another trial before an all-white jury predictably produced another flock of death sentences.<sup>63</sup> Ultimately, after years in jail, and tremendous political agitation, the “Scottsboro boys” went free.<sup>64</sup>

The Leo Frank affair was another notorious instance of southern (in)justice. Frank was Jewish and ran a pencil factory in Georgia.<sup>65</sup> In 1913, he was accused of the brutal murder of young Mary Phagan, a thirteen-year-old

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but barred from baseball. *Baseball Leaders Won't Let White Sox Return to the Game*, N.Y. TIMES, Aug. 4, 1921, at 1.

57. See DAN T. CARTER, *SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH* (1969).

58. *Id.* at 3, 5.

59. *Id.* at 3, 6.

60. *Id.* at 48.

61. *Id.* at 186–87, 232.

62. *Powell v. Alabama*, 287 U.S. 45, 71 (1932).

63. CARTER, *supra* note 57, at 239, 370.

64. *Id.* at 412–13.

65. LEONARD DINNERSTEIN, *THE LEO FRANK CASE* 5–6 (1968).

girl who worked in the factory.<sup>66</sup> The evidence against Frank was shaky, to say the least, but he was convicted and sentenced to death, in an atmosphere poisoned by general hysteria and rabid anti-Semitism.<sup>67</sup> When the Governor commuted his sentence to life imprisonment, a mob took Frank from the prison and lynched him.<sup>68</sup>

For cases in this category, very often what happens *after* the trial is more significant than the trial itself. The proceedings, or the particular verdict or judgment, create the controversy (and generate the headlines). Sometimes, the punishment seems so severe as to strike some as grossly disproportionate to the crime. In California, Caryl Chessman was tried in 1948 for robbery, sexual assault, and kidnapping.<sup>69</sup> He was sentenced to death.<sup>70</sup> Chessman spent twelve years on death row, wrote four books, and became an international celebrity.<sup>71</sup> There was a strong campaign to save his life, but the campaign failed in the end. Chessman was executed in 1960.<sup>72</sup>

The trial of the Rosenbergs, husband and wife, was of course a political trial, and a sensational one. But the *sentence* produced even more controversy than the trial or the verdict. The judge sentenced the Rosenbergs to death.<sup>73</sup> This harsh sentence touched off a national and international campaign to save the two from the electric chair. But, like the campaigns for Caryl Chessman and Sacco and Vanzetti, it ended in failure, and the Rosenbergs were executed.<sup>74</sup>

Occasionally, the sentence is thought to be too *mild*, or simply wrong, and this is what touches off the controversy. This was certainly true of the sentencing of Dan White, who assassinated the mayor of San Francisco, George Moscone, and Harvey Milk, the first openly gay city supervisor.<sup>75</sup> White was convicted of manslaughter, not murder, and riots broke out in San Francisco in protest against the punishment, which was arguably far more lenient than White deserved.<sup>76</sup> One might also mention here the trial of John W. Hinckley, Jr., who tried to kill President Ronald Reagan on March 30,

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66. *Id.* at 1–2, 5.

67. *Id.* at 55, 57, 59–60.

68. *Id.* at 126, 139, 141. Most scholars feel Frank was innocent and that a janitor was the true killer. Ironically, the janitor was black.

69. THEODORE HAMM, *REBEL AND A CAUSE: CARYL CHESSMAN AND THE POLITICS OF THE DEATH PENALTY IN POSTWAR CALIFORNIA, 1948–1974*, at 4 (2001).

70. *Id.*

71. *Id.* at 67, 135.

72. *Id.* at 135.

73. *1,500 Clergy Back Rosenbergs' Plea*, N.Y. TIMES, Jan. 14, 1953, at 19.

74. Conklin, *supra* note 30.

75. *S.F. Braces for Gay March: 70 Injured in Violence After "Lenient" White Verdict*, L.A. TIMES, May 22, 1979, at 1.

76. *Id.*

1981.<sup>77</sup> At the trial, in 1982, Hinckley was found not guilty by reason of insanity.<sup>78</sup> This verdict made a great deal of sense (Hinckley certainly seemed mentally unbalanced); nonetheless, the jury's decision set off a storm of protest. It also led to changes in the (formal) rules about the insanity plea in a number of states and in the federal government.<sup>79</sup>

The notorious Massie-Fortescue trials in Hawaii, in the 1930s, provide us with another example. Thalia Massie, the white wife of a naval officer, accused five Hawaiian men of rape.<sup>80</sup> None of the men were white. The charge was almost certainly fabricated. The trial was big news in Hawaii. The evidence against the men was extremely weak. The local jury failed to reach a verdict, and the five men were discharged.<sup>81</sup> Massie and his mother-in-law, Grace Fortescue, outraged at this turn of events, connived to kidnap one of the defendants, Joe Kahahawai, probably to try to force him to confess.<sup>82</sup> The plan went tragically awry, and Kahahawai was shot to death.<sup>83</sup> A new trial followed—this time, it was Massie and Grace Fortescue and their confederates who were accused of crime.<sup>84</sup> At this trial, the defendants were convicted.<sup>85</sup> But the politics of race deeply colored the whole atmosphere of the trial. Elite white opinion was outraged by the conviction of Massie and Fortescue, and there was enormous pressure on the authorities to do something on their behalf.<sup>86</sup> The court had sentenced them to ten years in prison, but the Governor reduced their sentences to one hour, and they simply went free (and left the islands).<sup>87</sup>

Political trials, and trials closely allied to political trials, are arguably the most significant headline trials, the most important to society. The categories that follow are quite different. These cases are political only in the sense that anything that creates a stir, anything that makes headlines, anything that captures the eyes and ears of the public, can be labeled politically significant, in the broadest sense. If we imagine a continuum of great trials, we might

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77. William F. Lewis, *Power, Knowledge, and Insanity: The Trial of John W. Hinckley, Jr.*, in *POPULAR TRIALS: RHETORIC, MASS MEDIA, AND THE LAW* 114, 116 (Robert Hariman ed., *Studies in Rhetoric & Comm'n Ser.*, 1990).

78. *Id.* at 117.

79. *Id.* The resulting federal statute was the Insanity Defense Reform Act of 1984, Pub L. No. 98-473, § 401, 98 Stat. 2057 (codified at 18 U.S.C. § 1984 (Supp. II 1985)); the heart of the law is currently codified as 18 U.S.C. § 17 (2006).

80. See DAVID E. STANNARD, *HONOR KILLING: HOW THE INFAMOUS "MASSIE AFFAIR" TRANSFORMED HAWAI'I* 54-55 (2005).

81. *Id.* at 217.

82. *Id.* at 240.

83. *Id.* at 247.

84. *Id.* at 288-89.

85. STANNARD, *supra* note 80, at 380.

86. *Id.* at 383-87.

87. *Id.* at 389-90.

place the overtly political at one end, and at the other end would be trials which are basically pure entertainment, without any (obvious or clear) social meaning. These are trials that create a stir, that fascinate the public, and command the attention of the media, even though they seem to have no impact other than on the immediate parties.

#### D. *Tabloid Trials*

Our fourth category, and the first in this group, consists of what we might call tabloid trials. These trials titillate the public and cause an enormous ruckus because of the nature of the crime itself—the defendant is accused of acts which are sensational, lurid, sometimes disgusting. Millions of readers and viewers find these tawdry affairs strangely exciting. Some of these seem to plumb the lowest depths of human pathology. Indeed, the trial itself may come as an anticlimax: the crimes themselves, as they come to light, make for the biggest headlines. (And if the crimes remain unsolved—think of Jack the Ripper, the famous serial killer of late nineteenth century London—there is of course never any trial at all.)<sup>88</sup>

Often, however, we know (or think we know) who committed the crimes; and the trials serve as a kind of public horror movie. One prominent example was the case of Jeffrey Dahmer, who killed and mutilated more than a dozen young men; he was convicted in 1991, and murdered in prison a few years later.<sup>89</sup> Another example was William Heirens, the “lipstick killer,” convicted of three bloody and horrifying murders in Chicago in 1946.<sup>90</sup> Heirens confessed, but later recanted, and to this day there are serious doubts whether Heirens, who has been in prison for more than fifty years, was actually guilty.<sup>91</sup>

Even more lurid was the case of Armin Meiwes, the German cannibal. Meiwes made use of that new-fangled device, the internet, to search for a victim, someone even more pathological than he was—a man willing to be killed and eaten.<sup>92</sup> He actually found such a person—an engineer from

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88. Book after book has presented a “solution” to the mystery of Jack the Ripper and apparently dozens of names have been suggested. For example, the mystery writer, Patricia Cornwell, claimed to have solved the crime in *PORTRAIT OF A KILLER: JACK THE RIPPER CASE CLOSED* (2002). Her candidate is an artist, Walter Sickert. *Id.* at 2. But this is apparently unlikely. No theory has won general acceptance, and the trail by now is of course extremely cold.

89. Don Terry, *Jeffrey Dahmer, Multiple Killer, Is Bludgeoned to Death in Prison*, N.Y. TIMES, Nov. 29, 1994, at A1.

90. Adam Higginbotham, *The Long, Long Life of the Lipstick Killer*, GQ, June 2008, at 176, 200.

91. *Id.* at 200–01.

92. Mark Candler, *German Court Convicts Internet Cannibal of Manslaughter*, N.Y. TIMES, Jan. 31, 2004, at A3.

Berlin.<sup>93</sup> The whole lurid ritual was captured on video for Meiwes' private entertainment.<sup>94</sup> When Meiwes began the search for a second victim, somebody talked, and the secret was out.<sup>95</sup> Meiwes was then arrested, tried, and eventually sent to prison for his crimes.<sup>96</sup> As one can imagine, the tabloids of Germany (and elsewhere) had a field day with Armin Meiwes.<sup>97</sup>

Crimes which have a sexual flavor, or which seem the product of pathology bordering on insanity (or crossing the border), have for a long time fascinated the public. Crime literature feeds on these crimes and the trials that follow them. These crimes were staples of cheap broadsides and brochures in the nineteenth century, and were a key ingredient in the *National Police Gazette*, which flourished in that period.<sup>98</sup> In the twentieth century, there was a fascination with serial killers—men (almost never women) who commit crime after crime, sometimes without motive, preying on random victims.

### E. *Celebrity Trials*

What we might call celebrity trials are another important group of headline trial. These trials are notorious less because of the crime itself, than because either the victim or the defendant is or was a famous or public figure. In the 1850s, Congressman Daniel Sickles went on trial for murder.<sup>99</sup> An anonymous note warned Sickles that his young wife, Teresa, was unfaithful; she was having an affair with Philip Barton Key (son of the man who wrote the Star-Spangled Banner).<sup>100</sup> Sickles confronted his wife, who admitted everything.<sup>101</sup> Sickles went out the next day and shot Key to death on the streets of Washington, D.C.<sup>102</sup> His trial, for murder, was a sensation, as one can imagine. But in the end, with much fuss or delay, the jury set him free, on the flimsiest of legal theories; clearly, the men on the panel thought that Key deserved his fate.<sup>103</sup>

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93. *Id.*

94. *Id.*

95. *Germany: Cannibal Defendant Sought Other Victims*, N.Y. TIMES, Dec. 9, 2003, at A6.

96. Candler, *supra* note 92.

97. *See, e.g., Der Kannibale von Rotenburg—Jetzt Rede Ich!*, BILD-ZEITUNG, June 18, 2009 (Ger.).

98. KAREN HALTTUNEN, MURDER MOST FOUL: THE KILLER AND THE AMERICAN GOTHIC IMAGINATION 70 (1998).

99. NAT BRANDT, THE CONGRESSMAN WHO GOT AWAY WITH MURDER 162–90 (1991).

100. *Id.* at 101–02.

101. *Id.* at 110–11.

102. *Id.* at 121–22.

103. *See id.* at 184. Sickles, of course, was obviously guilty; his (legal) defense was temporary insanity—one of the earliest examples of this particular defense. What really swayed the jury, no doubt, was the notion that Key got what was coming to him.

O.J. Simpson—a football hero among other things—is the most famous of recent celebrity defendants.<sup>104</sup> His trial was an incredible media event, beamed into millions of homes on television and, indeed, watched all over the world. Here one might mention, too, the trials of Roscoe Arbuckle, generally known as “Fatty” Arbuckle, in Los Angeles. Arbuckle was an actor, comedian, and director of silent films—indeed, one of the most famous and successful.<sup>105</sup> In 1921, at a party which Arbuckle arranged, an aspiring actress, Virginia Rappe, became desperately ill; she died a few days later.<sup>106</sup> A friend of hers accused the actor of raping Rappe, and Rappe herself, before she died, had said something to the effect that Arbuckle had hurt her (though very likely this was misconstrued).<sup>107</sup> Arbuckle was arrested and put on trial for manslaughter.<sup>108</sup> There were three sensational trials. The first two ended in hung juries.<sup>109</sup> These were both celebrity trials and tabloid trials, with their scandalous overtones of sex and depravity in Hollywood. The third jury acquitted Arbuckle, who was almost certainly innocent of the charges.<sup>110</sup> But the trials had ruined his career, and probably shortened his life. Even though a jury had (finally) exonerated him, his ordeal had left behind a feeling, shared by many people, that he was actually guilty of the crime or, if innocent of *that* crime, that the charges of vice and debauchery must have had some substance behind them.<sup>111</sup>

Indeed, the overlap between celebrity and tabloid crimes is quite common. Celebrity trials may overlap with other categories as well—the impeachment trial of President Clinton was in some ways a political trial, in some ways a trial about misconduct in office (perjury), in every regard a celebrity trial, and in other ways nothing more than a sordid tale about lust and sex in office—a tabloid trial par excellence.

Celebrity trials make headlines because they are often lurid, and because of the sheer power of the celebrity name. They are headline trials, too, for a much more mundane reason. The rich and famous can afford to hire the best, the most flamboyant, the most newsworthy lawyers. This was certainly true of O.J. Simpson. Thus, the rich and famous have the means and the will to turn their trials into media events—something that some poor wretch, accused of killing another poor wretch in a barroom brawl, can never aspire to.

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104. For celebrity trials, see generally GINI GRAHAM SCOTT, *HOMICIDE BY THE RICH AND FAMOUS: A CENTURY OF PROMINENT KILLERS* (2005).

105. See DAVID A. YALLOP, *THE DAY THE LAUGHTER STOPPED: THE TRUE STORY OF FATTY ARBUCKLE* 83–85 (1976).

106. *Id.* at 7–9.

107. *Id.* at 131–32.

108. *Id.* at 137, 253.

109. *Id.* at 241, 248.

110. YALLOP, *supra* note 105, at 253.

111. See *id.* at 259–62.



Charles Guiteau shot President Garfield in broad daylight, in the Baltimore and Potomac Station, in Washington, D.C., in 1881.<sup>112</sup> Garfield died of his injuries.<sup>113</sup> Guiteau's trial was a perfect example of a trial that made headlines because of the identity of the *victim*. Guiteau readily confessed to shooting the President, and in any event, it was perfectly obvious that he had done so.<sup>114</sup> The trial turned then, on his only defense, insanity.<sup>115</sup> Guiteau's behavior was certainly bizarre enough, and he made the trial into a weird kind of circus.<sup>116</sup> More basically, the trial became a battle between warring schools of psychiatry. To us, today, it seems obvious that Guiteau was insane, under any psychiatric theory one might muster.<sup>117</sup> But the jury was not inclined to be lenient or understanding in light of what Guiteau had done; he was convicted, sentenced to death, and hanged in 1882.<sup>118</sup>

In the early twentieth century, Harry K. Thaw, member of a rich and prominent family, went on trial for killing Stanford White, the leading American architect of his day.<sup>119</sup> The Thaw trial was both a celebrity trial and a prime example of a tabloid trial. Thaw murdered White because (according to Thaw) White had "ruined" Thaw's wife when she was sixteen.<sup>120</sup> The two men had been rivals for her affection; but she chose Thaw, and he became her husband. Evelyn Nesbit Thaw was "exquisitely lovely," and the trial was "the most spectacular . . . that ever sucked dry the descriptive reservoirs of the American press."<sup>121</sup> The jury could not reach agreement. In a second trial, Thaw was found not guilty by reason of insanity.<sup>122</sup>

Bruno Hauptmann went on trial in 1935, for kidnapping and murdering the infant child of Charles Lindbergh, a tremendous national hero.<sup>123</sup> Thirty-five years later, Charles Manson went on trial in 1970, for murdering (among others) the actress Sharon Tate.<sup>124</sup> Manson did not commit the crimes himself;

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112. CHARLES E. ROSENBERG, *THE TRIAL OF THE ASSASSIN GUILTEAU: PSYCHIATRY AND LAW IN THE GILDED AGE* 3–6 (Midway repr. ed. 1989) (1968).

113. *Id.* at 10.

114. *See id.* at 5.

115. *See id.* at 155–57.

116. *See, e.g., id.* at 162–63.

117. Clinicians in the twentieth century who studied the case, tended to agree that Guiteau was a paranoid schizophrenic. ROSENBERG, *supra* note 112, at xiii.

118. *Id.* at 223, 232, 238.

119. *See* IRVIN S. COBB, *EXIT LAUGHING* 198 (1941).

120. *See* GERALD LANGFORD, *THE MURDER OF STANFORD WHITE* 101–02 (1962); *Emotional Insanity: The Thaw Defense*, N.Y. TIMES, June 29, 1906, at 1.

121. COBB, *supra* note 119, at 198–99.

122. *Id.* at 242.

123. JIM FISHER, *THE LINDBERGH CASE* 3, 267 (1987).

124. Douglas Robinson, *Manson Called a Megalomaniac By Prosecutor as Trial Begins*, N.Y. TIMES, July 25, 1970, at 22. For background on the Manson trial generally, see VINCENT BUGLIOSI, *HELTER SKELTER: THE TRUE STORY OF THE MANSON MURDERS* (1974).

he was the leader of a strange and cult-like group, which carried out this murder, and others.<sup>125</sup> The Manson case had both celebrity and tabloid aspects and generated enormous heat and noise. Lee Harvey Oswald assassinated President Kennedy in 1963.<sup>126</sup> Oswald was quickly captured; but in the event, he never went on trial; Jack Ruby murdered him.<sup>127</sup> Ruby's trial, which followed, was in a sense a celebrity trial at one remove.<sup>128</sup>

#### F. *Whodunit Trials*

Another category can be called whodunit trials. These trials gain their special tingle of excitement from uncertainty—from an air of mystery and doubt. Was the defendant guilty or innocent? The fictional criminal lawyer, Perry Mason, appeared in about eighty novels written by Erle Stanley Gardner, starting in the 1930s. In each of the books, Mason represents a client accused of murder. These clients, unlike real-life clients, are invariably innocent (though they always *seem* guilty, which is why they are put on trial). At the trial, Mason, through masterful deduction or cross-examination, succeeds in unmasking the real killer and saving his client. Real life can be much more ambiguous—and tantalizing. Mystery and uncertainty were clearly aspects of the Lizzie Borden trial (of which more later). Lizzie was accused of the brutal axe-murder of her father and step-mother.<sup>129</sup> Book after book has been written, presenting new and different “solutions” to the mystery of who killed the senior Bordens.<sup>130</sup>

There were elements of mystery and uncertainty, too, in the notorious case of Dr. Sam Sheppard, in the 1950s. Dr. Sheppard was convicted of murdering his pregnant wife, Marilyn, in 1954.<sup>131</sup> Sheppard was an osteopath; the Sheppards were well-to-do suburbanites in the Cleveland area.<sup>132</sup> Dr. Sheppard hardly fit the conventional image of a killer. He insisted all along that he was innocent of the crime.<sup>133</sup> He claimed that an intruder—a bushy-haired stranger—was the real killer, that Sheppard had fought with the man, and was injured himself.<sup>134</sup> Sheppard argued that he could not have inflicted

125. Robinson, *supra* note 124.

126. JOHN KAPLAN & JON R. WALTZ, *THE TRIAL OF JACK RUBY* 1 (1965).

127. *See id.* at 3.

128. *See id.* at 12.

129. EDWARD D. RADIN, *LIZZIE BORDEN: THE UNTOLD STORY* 2–3 (2d prtng. 1961).

130. The most likely “solution” is the most obvious one—Lizzie was guilty.

131. *Sheppard v. Maxwell*, 384 U.S. 333, 335–38 (1966).

132. *Sheppard v. Maxwell*, 231 F. Supp. 37, 39 (S.D. Ohio 1964).

133. *Sheppard*, 384 U.S. at 340.

134. *Id.* at 336; *see also* CYNTHIA L. COOPER & SAM REESE SHEPPARD, *MOCKERY OF JUSTICE: THE TRUE STORY OF THE SHEPPARD MURDER CASE* 153–54, 290 (1995). The co-author of the book, Sam Reese Sheppard, is the son of Doctor Sheppard.

his injuries on himself,<sup>135</sup> also, that there was no blood on him, as there should have been, had he been the actual killer.<sup>136</sup> The jury convicted him, however, and he was sentenced to life in prison.<sup>137</sup> Ten years later, the United States Supreme Court ordered a new trial.<sup>138</sup> Eight justices felt that the proceedings had been so tainted with hysteria and publicity that Dr. Sheppard had not had a fair trial.<sup>139</sup> The opinion referred to the “bedlam” that “reigned at the courthouse” and the “carnival atmosphere” of the proceedings.<sup>140</sup> At the second trial, Sheppard was acquitted.<sup>141</sup> There are strong suggestions that Dr. Sheppard had been telling the truth, that he was innocent of the crime, and that there really was a murderous intruder,<sup>142</sup> but an element of mystery still hangs about the case.

Mystery also surrounds the case of Claus von Bulow. Von Bulow, a handsome European, married an American heiress (she had once been married to an Austrian prince).<sup>143</sup> Von Bulow’s wife, nicknamed Sunny, went into a coma in 1980.<sup>144</sup> Was this attempted murder? Had Claus injected her with insulin? She was still alive at the time of the trial but “curled in the fetal position . . . a tube implanted in her throat and a feeding tube in her mouth.”<sup>145</sup> Tons of newsprint and enormous amounts of television time were spent on this rather baffling case. The jury deliberated for six days, and then found Von Bulow guilty. The conviction was reversed on appeal, and a second trial resulted in acquittal. Nobody knows for sure whether Claus von Bulow was guilty or not. This case had, of course, strong elements of a tabloid trial as well.

In 1902, Albert T. Patrick went on trial, accused of murdering William Marsh Rice, a very wealthy man (and the founder of Rice University).<sup>146</sup> Charles Jones, Rice’s valet, had actually done the evil deed, with chloroform.<sup>147</sup> The prosecution felt that Patrick, a lawyer, was the mastermind

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135. JACK P. DESARIO & WILLIAM D. MASON, DR. SAM SHEPPARD ON TRIAL: THE PROSECUTORS AND THE MARILYN SHEPPARD MURDER 89 (2003).

136. COOPER & SHEPPARD, *supra* note 134, at 109.

137. *Sheppard*, 231 F. Supp. at 40.

138. *Sheppard*, 384 U.S. at 363.

139. *Id.*

140. *Id.* at 355, 358.

141. COOPER & SHEPPARD, *supra* note 134, at 329 n.4.

142. *Id.* at 117, 153–54.

143. Susan J. Drucker & Janice Platt Hunold, *The Claus von Bulow Retrial: Lights, Camera, Genre?*, in POPULAR TRIALS: RHETORIC, MASS MEDIA, AND THE LAW, *supra* note 77, at 133, 133.

144. *Id.*

145. *Id.*

146. For an account of this case, see MARTIN L. FRIEDLAND, THE DEATH OF OLD MAN RICE: A TRUE STORY OF CRIMINAL JUSTICE IN AMERICA, at ix, 6 (1994).

147. *Id.* at 111–13, 278.

behind the affair.<sup>148</sup> Patrick was tried, found guilty, and sentenced to death.<sup>149</sup> Patrick was certainly up to no good, and he probably forged Rice's will; but whether Patrick was actually guilty of planning the murder is another question. Ultimately, the sentence was commuted to life imprisonment, and in 1912, the governor of New York pardoned Patrick.<sup>150</sup> "There has always been," he said, "an air of mystery in this important case."<sup>151</sup>

In my own town, Stanford, California, the celebrated case of David Lamson falls into the category of "whodunit."<sup>152</sup> Lamson, who worked for the Stanford University Press, was accused of murdering his wife in 1933.<sup>153</sup> She was found dead in her bathroom, with a wound on the back of her neck; there was blood everywhere in the room.<sup>154</sup> The police insisted that her death was foul play; Lamson insisted that it must have been an accident.<sup>155</sup> In any event, there was no obvious motive—the couple seemed to be happily married—and Lamson never wavered in his claim of total innocence. The case was "front-page news throughout" the summer of 1933; newspapers "hired motorcycle couriers to speed the copy and photos back from the courthouse and police headquarters."<sup>156</sup> At the trial, Lamson was convicted and sentenced to death.<sup>157</sup> His conviction was reversed on appeal.<sup>158</sup> A second trial resulted in a hung jury.<sup>159</sup> A third trial was "aborted due to jury list irregularities."<sup>160</sup> The fourth trial resulted in another hung jury; and the prosecution basically gave up at this point.<sup>161</sup> To this day, the case remains a mystery: did he or did he not murder his wife?

David Lamson's life was saved, because the California Supreme Court thought the evidence against him was too weak to bear the burden of the verdict. Two subsequent juries simply could not agree on guilt or innocence. This of course is relatively rare. Trials normally end in a blunt and definitive way: guilty or not guilty. And usually, these trials put all doubt to rest (for the public, at any rate). But not always. O.J. Simpson is an outstanding example;

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148. *Id.* at xi.

149. *Id.* at 236–37.

150. *Patrick Freed by Dix After 12-Year Fight*, N.Y. TIMES, Nov. 28, 1912, at 1.

151. *Id.*

152. Bernard Butcher, *Was it Murder?*, STAN. MAG., Jan./Feb. 2000, available at <http://www.stanfordalumni.org/news/magazine/2000/janfeb/articles/lamson.html>.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. Butcher, *supra* note 152. On death row, Lamson wrote a book. See DAVID LAMSON, *WE WHO ARE ABOUT TO DIE: PRISON AS SEEN BY A CONDEMNED MAN* (1936).

158. Butcher, *supra* note 152.

159. *Id.*

160. *Id.*

161. *Id.*

millions of people are convinced he murdered his wife, and never mind what the jury decided. There are those who insist that Bruno Hauptman did not kill the Lindbergh baby. There are some who think that William Heirens was the victim of a frame-up. The police, so the theory goes, desperately needed to come up with a solution to the vicious crimes that horrified Chicago; they simply had to pin the crime on someone. In some cases, the doubts come long after the trial itself has ended, and in some of these cases, the doubts can never be removed.

### G. *Soap Opera Trials*

A seventh category I call soap opera trials—trials arising out of love-triangles, trials that originate in romantic entanglements, in disappointments in love, in lovers who are abandoned or scorned, and similar situations. In Oakland, California, the trial of Clara Fallmer, in the 1890s, was headline news. Clara was a young girl, seduced and abandoned—or so she said—by young Charlie La Due.<sup>162</sup> Clara, fifteen years old and pregnant, shot Charlie on the streets of Oakland in 1897.<sup>163</sup> He died of his wounds.<sup>164</sup> Clara was on trial for murder, and the newspapers breathlessly covered every aspect of the trial.<sup>165</sup> The Sickles trial, too, had something of this flavor, and in many indeed of the more sensational trials, indeed, love or at least sex plays a major role. Claus von Bulow had a mistress, and so did Scott Peterson, who was accused of killing his wife and unborn baby.<sup>166</sup>

Soap opera trials are often celebrity trials, or tabloid trials, or both. Most of the defendants in these trials have been men, but occasionally a woman sits in the dock. Here, one might mention the trial of Laura D. Fair, who shot her lover, Alexander D. Crittenden, a San Francisco lawyer, in 1870, on board a ferry boat in San Francisco Bay.<sup>167</sup> A sensational trial followed. Her defense was (temporary) insanity, brought on by delayed menstruation.<sup>168</sup> The jury, however, after less than an hour of discussion, found Laura Fair guilty of the crime.<sup>169</sup> The Supreme Court of California reversed and remanded the case for a second trial.<sup>170</sup> This jury found Laura not guilty “by reason of insanity.”<sup>171</sup>

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162. FRIEDMAN & PERCIVAL, *supra* note 20, at 239–40.

163. *Id.* at 239.

164. *Id.*

165. *Id.*

166. Carolyn Marshall, *Jury Finds Scott Peterson Guilty of Wife's Murder*, N.Y. TIMES, Nov. 13, 2004, at A10. Peterson was convicted. *Id.*

167. GORDON MORRIS BAKKEN & BRENDA FARRINGTON, *WOMEN WHO KILL MEN: CALIFORNIA COURTS, GENDER, AND THE PRESS* 19 (John R. Wunder ed., Law in the Am. West Ser., 2009).

168. *Id.*

169. *Id.* at 34.

170. *Id.* at 37.

### H. *Worm in the Bud Trials*

An eighth and particularly interesting category is one I call worm in the bud trials.<sup>172</sup> These are trials that catch the public fancy because they expose the sleazy underside of prominent or respectable society. The Thaw-White case was sensational, at least in part, because it seemed to expose the raw reality behind the life-styles of the rich and famous, the seamy habits and sex lives of members of Broadway and high society. The Fatty Arbuckle case did the same for Hollywood. In a more muted but perhaps more significant form, this was probably an aspect of the Lizzie Borden trial. The case ripped aside a curtain that covered and concealed a kind of dry-rot, a concealed pathology, and one which (arguably) was eating away at the pillars of respectable society.

The notion of the “worm in the bud” was a prominent feature of the Loeb-Leopold case, another (of many) that has been called the “crime of the century.”<sup>173</sup> The two young, rich, and intelligent defendants, Nathan Leopold and Richard Loeb, had murdered a fourteen-year-old boy, Bobby Franks, apparently just for the thrill of it and to show that they could commit the perfect crime.<sup>174</sup> But their crime turned out to be very far from perfect. Loeb and Leopold were soon caught.<sup>175</sup> They both confessed that they had killed Bobby Franks.<sup>176</sup> What followed, then, was not strictly speaking a trial at all; the issue was punishment and sentencing. The Loeb and Leopold families hired Clarence Darrow, paying him an enormous fee to try to persuade the judge not to impose the death penalty (in the event, the judge did spare their lives).<sup>177</sup> Many people saw something sinister and disturbing in this whole affair: a collapse of traditional values, a kind of moral decay that affected rich, spoiled kids. This was perhaps also the case with the so-called preppy murder, the murder of Jennifer Levin, strangled in Central Park, New York City, by Robert E. Chambers, Jr., in 1986. Chambers hardly fit the image of a “preppy,” but the case did give off a troublesome aura: an aura of dissolute, hedonistic, sex-mad youth. Much of this, to be sure, was nothing more than media hype.

#### I. *Who Would Have Thought?*

A sub-category of worm in the bud trials might be called: who would have thought? Jack the Ripper and other serial killers seem like monsters—

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171. *Id.*

172. I take the phrase from RONALD PEARSALL, *THE WORM IN THE BUD: THE WORLD OF VICTORIAN SEXUALITY*, at xi, xii (1969).

173. See HAL HIGDON, *THE CRIME OF THE CENTURY: THE LEOPOLD AND LOEB CASE* (1975).

174. *Id.* at 95, 134–35, 319.

175. *Id.* at 86.

176. *Id.* at 95.

177. *Id.* at 135, 266.

deranged, abnormal, almost creatures from another planet. A different kind of shock and titillation comes when the horror resides closer to home, in places, or with people, that are supposed to be innocuous or even beneficial. Who, for example, would have imagined that a mild-mannered, bespectacled English doctor, Harvey A. Crippin, could have murdered his wife and stashed her body in his cellar?<sup>178</sup> Who, for that matter, would have thought that a church-going spinster, like Lizzie Borden, could have dispatched her father and stepmother with an axe? Or, more recently, that Scott Peterson, a fertilizer salesman with no criminal record, could have murdered his pregnant wife?<sup>179</sup> Or that people who ran a day-care center in Los Angeles might have been guilty of all sorts of Satanic practices and gross abuse of children?<sup>180</sup> This was the charge in the notorious McMartin case in Los Angeles, on which more below.

The Parkman-Webster case produced one of the most famous nineteenth century trials. A professor in the Harvard Medical School, John Webster, was accused of murdering another professor, George Parkman, and chopping his body in pieces.<sup>181</sup> Medical school professors are not exactly celebrities, but they are prominent people in their community, and to accuse one professor of murdering another is a surprising and shocking event. Parkman, moreover, was a member of an old, rich, and very prominent Boston family.<sup>182</sup> There was a good deal of circumstantial evidence, and Webster, who was heavily in debt to Parkman, had an obvious motive for killing his colleague.<sup>183</sup> The jury found Webster guilty of the murder, after a long and memorable trial, presided over by Lemuel Shaw.<sup>184</sup> Attempts to get clemency for Webster were unsuccessful, and he was hanged.<sup>185</sup> He was, in all likelihood, guilty of killing Dr. Parkman, but there are still some questions about the how and the why.<sup>186</sup>

#### J. Moral Panic Trials

A ninth category we can call moral panic. This is not a common type, but it can be exceedingly important. “Moral panic” refers to a kind of mass hysteria, an irrational fear that grips the community and spreads like some sort of infectious disease. The (American) granddaddy of these trials is, of course, the Salem witchcraft trials. These trials, of course, came long before the age of

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178. TOM CULLEN, *THE MILD MURDERER: THE TRUE STORY OF THE DR. CRIPPEN CASE* 15, 23–24 (1977).

179. Marshall, *supra* note 166.

180. *See generally* PAUL EBERLE & SHIRLEY EBERLE, *THE ABUSE OF INNOCENCE: THE McMARTIN PRESCHOOL TRIAL* (1993).

181. HELEN THOMSON, *MURDER AT HARVARD* 39, 151 (1971).

182. *Id.* at ix, 131.

183. *Id.* at 138, 140–41.

184. *Id.* at 229–30, 238.

185. *Id.* at 260–62, 272.

186. *See* THOMSON, *supra* note 181, at 151–53.

headlines, but in the small, ingrown New England communities, these trials created an enormous stir.<sup>187</sup> These trials fed on popular beliefs about a vast, satanic conspiracy.<sup>188</sup> Some of the trials during the McCarthy period, resting on fears of a huge, secret Communist underground, had something of the same flavor. There are, to be sure, many differences. Almost nobody today takes witchcraft seriously, and the whole episode in Salem is viewed as a kind of mass delusion. The emotional fervor that led to and fed on McCarthyism was arguably a kind of moral panic, but there *was* an actual Soviet Union and actual spies and a real conspiracy.<sup>189</sup> The reaction, of course, was often misguided, overdone, aimed at the wrong targets, and the motives behind McCarthyism were, to say the least, politically suspect.

The infamous McMartin daycare trial in southern California, in the 1980s, was a more recent example.<sup>190</sup> This was the longest and most expensive trial in American history.<sup>191</sup> It began with accusation of sexual abuse, directed against the employees of a daycare center.<sup>192</sup> The woman who made these accusations, Judy Johnson, was mentally ill, a paranoid schizophrenic, and a chronic alcoholic who died of liver disease a few years later.<sup>193</sup> But the accusations snowballed. Dozens of parents came to believe that the employees of the daycare center were sexually abusing the children and indulging in horrendous satanic rituals.<sup>194</sup> The charges were almost certainly completely unjustified, but they led to a series of sensational trials and spawned satellite trials in many other cities.<sup>195</sup> In the end, none of the McMartin defendants were convicted, but not all of the defendants in the satellite trials were so fortunate.<sup>196</sup>

The trials during the McCarthy period were also, of course, political trials, and the McMartin trials had definite tabloid elements. But these trials also had

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187. See CAROL F. KARLSEN, *THE DEVIL IN THE SHAPE OF A WOMAN: WITCHCRAFT IN COLONIAL NEW ENGLAND* 35 (1987).

188. There is a large literature on these trials. See, e.g., PAUL BOYER & STEPHEN NISSENBAUM, *SALEM POSSESSED: THE SOCIAL ORIGINS OF WITCHCRAFT* (1974); KARLSEN, *supra* note 187.

189. There is a huge literature on McCarthy and McCarthyism. See, e.g., ARTHUR J. SABIN, *IN CALMER TIMES: THE SUPREME COURT AND RED MONDAY* (1999); ARTHUR J. SABIN, *RED SCARE IN COURT: NEW YORK VERSUS THE INTERNATIONAL WORKERS ORDER* (1993); ELLEN SCHRECKER, *MANY ARE THE CRIMES: MCCARTHYISM IN AMERICA* (1998).

190. On these trials, see EBERLE & EBERLE, *supra* note 180; DEBBIE NATHAN & MICHAEL SNEDEKER, *SATAN'S SILENCE: RITUAL ABUSE AND THE MAKING OF A MODERN AMERICAN WITCH HUNT* (1995).

191. *2d Trial Opens in Preschool Molestation Case*, N.Y. TIMES, May 8, 1990, at A13.

192. NATHAN & SNEDEKER, *supra* note 190, at 70, 88–89.

193. *Id.* at 92.

194. *Id.* at 84–85.

195. *Id.* at 92, 107–09.

196. See *id.* at 92, 108.



their own distinctive features. Moral panics do not come from nowhere, and in each case, some aspects of the social context touches off the panic. This explains why these episodes spread so rapidly and with such dangerous side effects.

## II. THE ROLE OF THE MEDIA

But indeed, each category has meaning and interest for the study of social history. Each of them tells us something about our society and, more and more, about the role of the media in that society. Indeed, the media have become a critical factor in explaining the why and the wherefore of headline trials.

In the discussion so far, I have stressed characteristics of the crime itself and of the protagonists and classified cases accordingly. Now we ask: what makes these cases notorious? When a President is assassinated, the answer is obvious. The type of crime also plays an important part—the bizarre and the lurid attract attention or the sheer scale, as in Timothy McVeigh's attack on the federal building in Oklahoma.<sup>197</sup> Sometimes, the case is part of a larger American drama. Race relations, for example, have been a salient aspect of American political and social life for centuries. In some of the great trials, race has been the elephant in the room. The Massie-Fortescue trials in Hawaii were a drama about white supremacy on the multi-racial island of Hawaii. The Scottsboro case arose out of the tortured history of race relations in the American south.

But in some cases it is, on first blush, hard to see exactly why a particular case became *so* notorious. It is tempting, sometimes, to say that the explanation lies outside the case itself: in the media, or rather, in the coverage of the case, and the way the media stirred up the pot. The Sam Sheppard case is the classic example. No doubt the case would have attracted some attention under any circumstances. But the Cleveland newspapers had a field day with it.<sup>198</sup> They decided, early on, that Sheppard had killed his wife, and they demanded action from the authorities.<sup>199</sup> They were partly responsible, too, for the atmosphere in the courtroom—the excitement, the turmoil, the crowds of reporters—an atmosphere so exaggerated, that it led the Supreme Court to hold, as we have seen, that the trial had been grossly unfair.<sup>200</sup>

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197. McVeigh was tried, sentenced to death, and executed in June 2001. See Jim Yardley, *Execution on TV Brings Little Solace*, N.Y. TIMES, June 12, 2001, at A26.

198. See COOPER & SHEPPARD, *supra* note 134, at 16.

199. *Id.* at 76–77; Sheppard v. Maxwell, 384 U.S. 333, 340 (1966).

200. See *supra* note 140 and accompanying text.

A. *Juries and the Unwritten Law*

It is hard, then, to divorce the impact of the trials, and the nature of the trials, from the role of the media. The history of headline trials is, in many ways, a history of media coverage of crime and punishment. This becomes more and more the case as we reach contemporary times. Nonetheless, the trials themselves are very often striking social documents. They sometimes shed a blinding light on social norms that are otherwise shrouded in darkness and would otherwise be almost impossible to document. Take, for example, the so-called “unwritten law” that protects a husband who kills his wife’s lover.<sup>201</sup> In the trial of Congressman Sickles, the defense hammered away at this point—Philip Barton Key was an evil man; he deserved to die.<sup>202</sup> He was an adulterer. The Bible itself prescribed death by stoning for adulterers. Of course, the Bible was not part of the penal code of the District of Columbia, and the formal law of the District contained no such defense. That Sickles was (factually) guilty was perfectly obvious. His only *legal* defense was temporary insanity. The news about Teresa’s betrayal, the argument went, was so devastating that it unhinged Sickles, at least temporarily.<sup>203</sup> This defense was flimsy, to say the least. Yet the jury in short order acquitted Sickles and set him free.<sup>204</sup> They followed the “unwritten law.”

The “unwritten law” is an example of one important but implicit role of the jury in our system. As we know, a jury never gives reasons for its decisions. It simply decides. As far as the great German sociologist, Max Weber, was concerned, jury decisions in the common law system were examples of “irrational” decision-making.<sup>205</sup> He put the jury in the same category as trial by ordeal, the consulting of oracles, or reading the entrails of birds.<sup>206</sup> But precisely *because* the jury never gives reasons, it can bend the law without owning up to what it is doing. This has surely occurred time and again. The unwritten law condemned Key, not Sickles, to death.<sup>207</sup> The unwritten law was invoked in the trial of Harry K. Thaw, who, after all, was on trial for killing the

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201. Robert M. Ireland, *The Libertine Must Die: Sexual Dishonor and the Unwritten Law in the Nineteenth-Century United States*, 23 J. SOC. HIST. 27, 27 (1989).

202. BRANDT, *supra* note 99, at 179.

203. *Id.* at 172–73.

204. *Id.* at 184.

205. 6 MAX WEBER ON LAW IN ECONOMY AND SOCIETY 63, 79 (Max Rheinstein ed., Edward Shils trans., 20th Century Legal Philosophy Ser., 3d prtg. 1969). Lawmaking and law finding are “formally irrational” when they use “means which cannot be controlled by the intellect, for instance when recourse is had to oracles.” *Id.* at 63. The jury, according to Weber, resembles the oracle, “inasmuch as it does not indicate rational grounds for its decision.” *Id.* at 79.

206. *Id.* at 78–79.

207. *See* BRANDT, *supra* note 99, at 186.

man who (he said) had “ruined” his wife.<sup>208</sup> It is found in quite a number of other instances.

We rarely know, of course, what actually goes on in the jury room—in a case like the trial of Congressman Sickles, for example. But there are enough examples of the “unwritten law” to suggest, very strongly, that it reflected a genuine social norm and influenced the behavior of juries. There were and are no doubt many other “unwritten laws.” No penal code ever suggested that a man could not be convicted of raping a woman if she was flirtatious or promiscuous or hung out at bars or wore tight or revealing clothing. But (male) juries in the past simply would not convict a man for raping such a woman.<sup>209</sup> Patient analysis of actual jury behavior might uncover many other “unwritten laws.”

### B. *Tales From the Courtroom*

In a major trial, the lawyers on either side have to construct a coherent, sympathetic, story to tell to the jury. The stories may be, of course, in total conflict with each other. Often it is hard to know which one is more accurate. A good deal of the time, neither story makes complete sense, and many times neither attorney is playing from a full deck. Nonetheless, the stories themselves are revealing. They expose, in an open and dramatic way, common stereotypes, attitudes, and norms of the period. The lawyers have to appeal to ideas, images, and concepts that (they hope) will sway the jury. They try to construct the story of their client so as to make it convincing or sympathetic for the jury, hoping the jury will carry that story, and not the opposing story, into the room when they deliberate.

In the case of Clara Fallmer, for example, the defense stage-managed the defendant with exquisite care. They dressed her in blue, her face was veiled, and she clutched a bouquet of violets in her hand.<sup>210</sup> The defense painted a picture of an innocent victim, pure as the driven snow; the man she killed, in turn, was branded a heartless cad who seduced and abandoned a young girl.<sup>211</sup> The prosecution tried to suggest quite a different version of Clara—hinting strongly that she was far from the innocent dove the defense described.<sup>212</sup> Today, we would probably describe Clara as a sexually active teenager—neither an angel nor a whore. But the world of the 1890s could not accept such

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208. *Emotional Insanity: The Thaw Defense*, *supra* note 120.

209. For the classic study, see HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY*, 249–54 (3d prtg. 1966).

210. FRIEDMAN & PERCIVAL, *supra* note 20, at 239.

211. *Id.* at 242.

212. *Id.* at 239–44. This was another case in which the real defense was simply that the victim deserved what he got; the legal hook, as in the Sickles trial, was temporary insanity. *Id.* at 242.

a picture of a young woman's behavior. In the standard imagery of the times, a girl like Clara had to be one or the other: a blameless victim, or a fallen woman.

### C. *A Dash of History*

Political trials have a long and distinguished pedigree. There have been innumerable examples—one thinks immediately of Joan of Arc or Anne Boleyn, Henry VIII's unfortunate wife who forfeited her position and her head. Of course, the outcomes of these trials were generally not in doubt. A King never loses his case. Some of these trials rested on pure malice or revenge or were ways to get rid of a political rival. But they were, no doubt, also designed to teach the relevant public a lesson. You defy or anger the King at your peril. Or the Queen. Elizabeth I disposed of her rival, Mary Queen of Scots, after holding her a prisoner for years.<sup>213</sup> Political trials continue to be important in contemporary times as well. We have mentioned some examples. Indeed, there may be more trials with political overtones than ever before—if one includes corruption trials and scandals of various sorts involving political figures.

Of course, headline trials, in our sense, could hardly exist before there were headlines. The true headline trial only came into its own in the nineteenth century; it depended for its very existence on mass-market newspapers and magazines. "Worm in the bud" trials can probably be dated to the same period. These trials all involve or suggest a kind of critique of society, or at least some aspect of society. This critique is implicit in the prosecution, for the most part. The defense tells quite a different story. So, as we said, in the trial of Lizzie Borden, her defense was, in a way, a defense of traditional bourgeois society, and the prosecution, by implication at least, mounted a critique of that society.

The "worm in the bud" trial is specifically nineteenth century. The concept itself is one that lies at the base of the mystery novel. The mystery, as a literary form, can be traced to the beginning of the nineteenth century.<sup>214</sup> Whether it was Edgar Allan Poe or someone else who first invented the form is not particularly important. The chronology is reasonably clear. One of Poe's stories, "The Mystery of Marie Roget," which has a place of honor in the history of the genre, was based on a real incident.<sup>215</sup> This was the sensational case of a young woman, Mary Rogers, who was murdered in 1841 in Hoboken,

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213. 2 EUROPE 1450 TO 1789: ENCYCLOPEDIA OF THE EARLY MODERN WORLD 249 (Jonathan Dewald ed., 2004).

214. Lawrence M. Friedman, *True Detective*, 14 *STUD. L. POL. & SOC'Y* 9, 9–10 (1994); Lawrence M. Friedman & Issachar Rosen-Zvi, *Illegal Fictions: Mystery Novels and the Popular Image of Crime*, 48 *UCLA L. REV.* 1411, 1415 (2001).

215. RAYMOND PAUL, WHO MURDERED MARY ROGERS? 83 (1971).

New Jersey.<sup>216</sup> The investigation into Mary Rogers' death was "passionately conducted by a circulation-crazed press," and (in the opinion of Raymond Paul, who wrote a book about the case) "firmly established the gentle practices of the yellow press" long before William Randolph Hearst.<sup>217</sup>

In the classic mystery, a crime is committed—usually but not always murder—and nobody (especially the reader) has any idea who did it. At the end of the story, the true killer is unmasked. In the best, and most famous, of the mystery novels, the author withholds the identity of the killer until the very last chapter, and in a good or successful mystery, the unmasking comes as a big surprise. It is no accident that this literary form appears at one particular moment in history. In the nineteenth century, social relationships had become much more fluid than in the past. Society was more mobile in every sense—geographically mobile and also mobile in the sense of movement up and down the social ladder. In a small town and in a traditional society, everybody knows everybody else. But in big cities, and in periods of great mobility, every day one meets with and interacts with total strangers. For the first time, then, *identity* becomes problematic. We think we know who people are and what they are like by reading their outward signs: the way they talk, dress, or behave. But all this can be simulated—a person can invent, and pass off, a counterfeit self. At least among gullible strangers.

This was the period, then, of the "confidence man," a scam artist, a person who makes money by pretending to be something he is not. A writer in the 1870s claimed that "no city in the Union" was as full of "impostors of all kinds" as New York.<sup>218</sup> "The immense size of the city, the heterogeneous character of the population, and the great variety . . . of the people, are all so many advantages to the cheat and swindler."<sup>219</sup> New York could perhaps justly claim a special place in the world of the con man, but in fact there were con men everywhere.<sup>220</sup> The mortal enemy of the confidence man was the detective. This role—the role of the detective—was also invented in this period, to serve as a kind of antidote to the rise of the con man.<sup>221</sup> The "con man" preyed on society, through tricks, artifices, disguises, and outright lies. The detective was the expert with the skill to unmask this sneaky kind of criminal. The ordinary police force had the job of keeping order in public places; the police handled those who committed open and notorious crimes on the streets, in bars, and among urban mobs. The police officer wears a uniform

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216. *Id.* at 1.

217. *Id.*

218. JAMES D. MCCABE, LIGHTS AND SHADOWS OF NEW YORK LIFE; OR, THE SIGHTS AND SENSATIONS OF THE GREAT CITY 316 (1872).

219. *Id.*

220. See Friedman, *True Detective*, *supra* note 214, at 10.

221. See Friedman & Rosen-Zvi, *Illegal Fictions*, *supra* note 214, at 1416.

to advertise who he is and what he does. The detective operates quietly, in plain clothes, and secretly; only in this way could he do battle with the con man and others in the clandestine army of malefactors.

In many trials—and particularly in those we called the whodunit trials—identity (that is, true identity) is also very much at issue. Who *was* this person, really, who is on trial? A respectable citizen, falsely accused, or a heartless killer? A loving husband or a faithless murderer? The classic mystery novel raised questions of identity but, in the end, gave us definitive answers. In the last chapter, knots were unraveled, mysteries resolved, and the criminal finally revealed. The trial also usually provides a kind of answer: the jury brings in a verdict, and this is, in its own way, definitive. But unlike the trials and mysteries of fiction, we cannot always be sure if the jury got it right. In many headline trials, doubts remain.

In those cases I called “worm in the bud,” what is sometimes on trial is nothing less than a way of life or, perhaps more accurately, the trial raises questions about common assumptions—assumptions about the nature of society or the nature of life in society. Cara Robertson made this point in her perceptive article about the Lizzie Borden case: “trials make explicit prevailing ideologies by providing opposing narratives.”<sup>222</sup> The Borden trial made vivid use of those stories that the “culture wanted and expected to hear.”<sup>223</sup> This is, perhaps, what made the Lizzie Borden case seem so important to people living at that time. It is what attracted hordes of reporters. In the end, the jury acquitted Lizzie, even though she had behaved very suspiciously and there was considerable evidence pointing in her direction.<sup>224</sup> The prosecution’s case was, in a way, like turning over a big, smooth stone, and watching the vermin crawl out. This was the fatal flaw in the prosecution’s case. As Cara Robertson put it, to convict Lizzie Borden was to convict the world in which she lived and to question its most basic assumptions.<sup>225</sup> Convicting Lizzie would cast doubt on “the entire basis for social order and hierarchy . . . .”<sup>226</sup> This was “the subversion buried at the heart of the case.”<sup>227</sup> It would be better, then, “to let one woman get away with murder than to suggest that a dutiful middle-class daughter like Miss Lizzie might be capable of it.”<sup>228</sup> The very idea that a church-going spinster—a woman from the upper middle class—could commit

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222. Cara W. Robertson, *Representing “Miss Lizzie”: Cultural Convictions in the Trial of Lizzie Borden*, 8 *YALE J.L. & HUMAN.* 351, 356 (1996).

223. *Id.*

224. *Id.* at 361–62.

225. *Id.* at 415.

226. *Id.* at 416.

227. Robertson, *supra* note 222, at 416.

228. *Id.*

such a brutal, savage, pathological, crime cast the shadow of doubt over the traditions and values of bourgeois society.

Thus, by this account, the jury perhaps simply could not bring itself to convict. To these men, a woman of her type, her class, her place in society, was simply incapable of committing such a fiendish crime: killing her own father with an axe, an act of senseless brutality. To find her guilty would have been, in a sense, an indictment of bourgeois society. This is, of course, something of an exaggeration, but it has a core of truth. Thus, the outcome of the trial rested on assumptions about gender and class. These assumptions have weakened, but they are still with us, which may be one reason why the case seems endlessly and timelessly fascinating.

To be sure, everybody knows that there are hidden lives and hidden aspects of lives, secrets in families, skeletons in countless closets. But it was important—certainly in the nineteenth century—to keep these matters private, to hide them behind a curtain of secrecy.<sup>229</sup> It was particularly important to protect the elite from scandal. How else could a democratic society justify privilege and position for the rich and the mighty? Headline trials threw open doors into secret rooms, rooms the public was not meant to see. This was one source of the drama of these trials. Bourgeois society was on trial or Hollywood or the halls of government or conventional suburban life. The trial itself was bad enough—the trial possibly threatened the harmony of society, but at least some of the damage could be repaired, if the jury reached the right decision.

I have argued elsewhere that certain quirks of nineteenth century law suggest a tendency, which might have been unconscious or implicit, to protect the reputations of elite men and women, even when these men and women did not deserve this protection.<sup>230</sup> This was perhaps based on an implicit assumption: that the masses must have faith in the honesty and integrity of elites. Impairing this faith meant impairing the social order. Blackmail, for example, can be explained in these terms. Blackmail is a curious crime, which has puzzled many commentators. In blackmail, the “perpetrator” coerces the “victim” into paying money for silence—even though it is the “victim,” not the perpetrator, who has committed some terrible and secret offense. The blackmailer, in fact, almost always comes from a lower stratum of society; the “victim” is almost always a member of the elite. Blackmail, then, is a crime because it is an attack on the elite; it threatens their reputations. Repression of these secrets is better for society—or so it can be argued.<sup>231</sup>

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229. See LAWRENCE M. FRIEDMAN, *GUARDING LIFE'S DARK SECRETS: LEGAL AND SOCIAL CONTROLS OVER REPUTATION, PROPRIETY, AND PRIVACY* 4 (2007).

230. *Id.*

231. On this point, see *id.* at 81–100; see also ANGUS MCLAREN, *SEXUAL BLACKMAIL: A MODERN HISTORY* 37 (2002).

The same idea—protecting the upper classes—may (consciously or unconsciously) lie behind the tremendous amount of self-censorship that the media practiced until quite recent times. Dozens of reporters must have known about President Kennedy's sexual adventures, but they never reported what they knew.<sup>232</sup> The British press was careful not to publish anything that would show the royal family in an unfavorable light.<sup>233</sup> While the whole world was buzzing with gossip about King Edward VIII and Wallis Warfield, the British newspapers kept a discreet silence.<sup>234</sup> They broke the news when only the King himself went public.

It would be only a slight extension of this general idea to cover cases like Lizzie Borden's. Putting a woman like Lizzie Borden on trial violated an unspoken norm: nice people, leaders of society, moral and respectable people, do not do nasty and criminal things. Acquitting Lizzie, thus affirmed this norm. It might be a myth that a Lizzie Borden is incapable of crime, but society lives on myths. Headline trials in the nineteenth century, then, were at times a danger point for social order. They had vast public appeal, but were also deeply problematic.

Crime, of course, *is* a serious issue and a serious social problem; crime, particularly violent crime, is a threat to personal security. In a number of periods—notably the 1950s and later—crime rates were a burning issue in American society. But (in rich, developed societies, at any rate) even a high rate of violent crime does not really threaten the established order. Putting Lizzie Borden in the dock does not *seem* to have the political overtones of a treason trial, a terrorism trial, or a trial of political dissenters. Yet the case was unsettling, in a way that a barroom brawl or a stabbing in a gang fight could never be—and perhaps not even a political trial like that of Sacco and Vanzetti or the Rosenbergs, for the reasons already mentioned.

Perhaps people have always been drawn to crime, like moths to the flame. Perhaps violent, extraordinary crimes have always exuded a kind of fatal attraction. Certainly, even traditional people have their rituals, mysteries, and trials. There is an esthetic and sociological connection between the lure of headline trials in modern society, and the tales about ghosts, spirits, and supernatural wonders in traditional society: glimpses into secret worlds, worlds beyond normal experience. Ghost stories still have a certain appeal but only as fiction; most people today no longer believe in ghosts. Mystery and mysteries, and crime and punishment, occupy some of the same social space as tales of wonder and magic. Jack Katz has speculated as to why crime and violence are

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232. See ARI ADUT, ON SCANDAL: MORAL DISTURBANCES IN SOCIETY, POLITICS, AND ART 1 (2008).

233. Walter F. Leysmith, *Restraint of Press Poses British Issue*, N.Y. TIMES, Oct. 18, 1936, at E4.

234. *Id.*



so fascinating and so problematic. One reason that he gives fits into our analysis: some headline trials expose matters that tend to undermine public faith in institutions. Katz mentions “reports of torture or sexual abuse occurring at child care centres” as an example.<sup>235</sup> This trial, then, was very much a worm-in-the-bud affair, as well as the result of a moral panic. In such cases, the public is troubled and even horrified—but at the same time, fascinated. The trial adds another layer of interest to troubling and horrific stories about crime. It dramatizes them. Personalities come alive on the witness stand during cross-examination, in ways that would otherwise be hard to achieve. Perhaps contemporary headline trials do not so often raise basic questions about society and social institutions. But sometimes they do. The O.J. Simpson trial certainly invoked issues about the role of racism in modern America.<sup>236</sup>

#### D. *Celebrity Trials*

Celebrity trials are one of our categories—trials with celebrity victims or celebrity defendants. In the true celebrity trial, the victim, defendant, or both come from the ranks of elite society. The rich and the famous are vastly overrepresented in headline trials. In part, this is only natural. The rich and the famous are the ones who can afford expensive, flamboyant lawyers, and they are among the few who can decide, on balance, to run the risk and the expense of a full trial. But arguably, all front-page trials are, or become, celebrity trials. Probably not one person out of a million had ever heard of Lizzie Borden or Sam Sheppard or Claus von Bulow or Scott Peterson before they were accused of committing an awful crime, and then became the central figure in a sensational trial. By the time the trial began, however, they had become household names.

We live in a celebrity society, and the affairs of celebrities, their habits, their daily lives are matters of profound public interest, for better or for worse. A celebrity is not just a famous person; a celebrity is famous, to be sure, but is also a *familiar* person, somebody we know and recognize from the media.<sup>237</sup> We know—or think we know—everything about celebrities, because we see and hear them every day. The President, for example, is a celebrity of celebrities. We know his walk, his talk, his gestures, how he looks; we know his family, his history, his background; we know what his voice sounds like and what kind of clothes he wears. This engenders a feeling that we have a

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235. Jack Katz, *What Makes Crime 'News'?*, 9 MEDIA, CULTURE & SOC'Y 47, 52 (1987). His example was, of course, inspired by the tremendous uproar over the McMartin case. See *supra* notes 190–96 and accompanying text.

236. ADUT, *supra* note 232, at 18.

237. LAWRENCE M. FRIEDMAN, *THE HORIZONTAL SOCIETY* 27–41 (1999); RICHARD SCHICKEL, *INTIMATE STRANGERS: THE CULTURE OF CELEBRITY* 4 (1985).

*right* to know everything about them. Hence, nobody and nothing is sacred today—not the President, not the British royal family, and certainly not movie stars and basketball players. If every headline trial is, in a way, a celebrity trial, today’s public will quite naturally be mesmerized by these trials. Thus, in a sense, the headline trial is a natural outgrowth of a celebrity society. And because celebrity trials have great audience appeal, they are very valuable, economically, to newspapers and other media.

The media feed on scandals of the rich and famous and powerful to an extraordinary degree. The celebrity society—and the public feeling about a right to know—bring about changes in the law. In a reflection of current social norms, “public figures” have been stripped of almost all of their privacy rights. And, indeed, the definition of a “public figure” has been vastly expanded. Once a person falls into this category, there are almost no limits to what newspapers may print about him or her.<sup>238</sup>

Defendants in headline trials are, as said, public figures almost by definition. There is a kind of circular process here. The media help *create* the sensational trial. Once the public shows an interest in the crime and in the trial, then covering the trial in all its gory detail is (according to the courts) a matter of public interest. The defendants, thus, tend to lose whatever rights of privacy they might once have had. In some countries in Europe, the law has not gone quite so far. Just because the public is interested in a matter does not mean that the public has a right to know everything about it. Hence, in a well-known German case from the 1970s, a defendant in a sensational trial, who had served a time in prison and been released, had the right to prevent a television program from rehashing the details of the trial.<sup>239</sup> Would this case come out the same way in the United States? In *Briscoe v. Reader’s Digest Association*, the plaintiff had hijacked a truck eleven years earlier.<sup>240</sup> A California court felt the magazine should not have revealed his name; he had a right to sink back into obscurity.<sup>241</sup> Recent trends in European law suggest a great sensitivity to privacy, even for public figures. Princess Caroline of Monaco, for example, was able to suppress photographs that showed her going about her daily life, doing her chores in public spaces, even though she was a public figure.<sup>242</sup>

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238. See *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 147, 154–55 (1967).

239. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 5, 1973, 35 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 202 (Ger.).

240. *Briscoe v. Reader’s Digest Ass’n*, 483 P.2d 34, 36 (Cal. 1971), *overruled by* *Gates v. Discovery Commc’ns, Inc.*, 101 P.3d 552 (Cal. 2004).

241. *Briscoe*, 483 P.2d at 40, 44.

242. *Von Hannover v. Germany*, 40 Eur. H.R. Rep. 1, 24, 28–29 (2005).

### E. Headlines

In our times, one must understand headlines to understand headline trials. The role of the media is crucial. In the nineteenth century, periodicals like the *National Police Gazette*, along with cheap pamphlets and broadsides, fed the public appetite for tales of crime and punishment with great zest, if not accuracy.<sup>243</sup> After 1820, the “popular literature of murder” grew “at an increasing pace,” with the growth of “an era of information abundance.”<sup>244</sup> The period of “yellow journalism” batted on this hunger for sensation. The newspapers saturated the public with news of the biggest and juiciest trials; they hired “sob sisters” to emphasize “human interest”;<sup>245</sup> they sent reporters to the trials in great numbers. The “yellow press” specialized in sensational coverage, but even such dignified newspapers as the *New York Times* participated in this “news frenzy,” competing with the more down-market newspapers in this regard.<sup>246</sup> Trials like the trial of Lizzie Borden or Harry K. Thaw were the bread and butter of mass circulation newspapers.

One strand of elite opinion was always horrified at the epidemic of news about violence and crime. Many people felt that an obsession with violence and crime—like public hangings in an earlier period—could corrupt the masses. This was, of course, not true of political trials; the argument went to trials where the crimes were lurid and disgusting, especially if there was a sexual element. Some states had laws which tried to limit newspaper coverage of sensitive aspects of criminal justice—for example, details of executions.<sup>247</sup> The press usually found ways to get around any such limitations. One motive behind censorship laws was the fear that unsavory reporting could lead to public corruption. State laws not only banned pornography, in some cases they tried to limit the reporting of crime news. Thus, a Kentucky statute, still in effect in the 1940s, made it a crime to print or publish any book or newspaper “whose principal characteristic is criminal news, police reports, or accounts of criminal deeds, or pictures or stories of deeds of bloodshed, lust, or crime . . . .”<sup>248</sup>

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243. HALTTUNEN, *supra* note 98, at 70.

244. *Id.* at 69.

245. For an example of “sob sister” at work, see GILES FOWLER, DEATHS ON PLEASANT STREET: THE GHASTLY ENIGMA OF COLONEL SWOPE AND DOCTOR HYDE 162, 163–66 (2009), on the work of Winifred Black.

246. See Trevor D. Dryer, “All the News that’s Fit to Print”: The New York Times, “Yellow” Journalism, and the Criminal Trial 1898–1902, 8 NEV. L.J. 541, 568 (2008).

247. A 1889 Minnesota law required executions to take place at night and prohibited newspapers from printing any details—no reporters were to be present, and the newspaper could only tell its readers that an execution had taken place, nothing more. 1889 Minn. Laws 66–67 (repealed 1923); JOHN D. BESSLER, DEATH IN THE DARK: MIDNIGHT EXECUTIONS IN AMERICA 98 (1997).

248. KY. REV. STAT. ANN. § 436.110 (West 1942).

In some sensational trials, if testimony unfit for the tender ears of women was expected, judges excluded or tried to exclude women from the courtroom. This happened, for example, in the trial of Harry K. Thaw for murdering Stanford White (1907).<sup>249</sup> This trial was so sensational that it caught the beady eye of the President (Theodore Roosevelt). Roosevelt reportedly asked the Postmaster General to look into “the use of the mails by newspapers which have printed the full details” of this trial; federal law, after all, forbade sending “obscene matter” through the mails.<sup>250</sup> When they burst on the scene in the twentieth century, movies were a particular target of the censors. They were cheap and popular with ordinary people, and dark theaters were deemed a danger to the morals of the young. Movie censorship—or attempted censorship—has a long and complex history.<sup>251</sup> All of these phenomena reflected the same impulse that lay behind blackmail laws—and obscenity laws in general. Society was brittle, fragile; it hung in the balance at all times. To throw mud on its natural leaders was a dangerous act of rebellion. And to allow the lower orders access to tales of crime and depravity was similarly dangerous.

Movie censorship had a definite impact on the production and the content of films. But the various laws against lurid press coverage probably had little or no effect. From the age of “yellow journalism” and its “sob sisters” on, the media succeeded in providing a vicarious experience of the sensational trials—an experience perhaps even more thrilling than actually sitting in the courtroom. And despite rigid codes, crime and punishment were staples of the movies; criminals, however, had to come to a bad end, which presumably made the depiction of crime more palatable. Then came television and, at the end of the twentieth century, the internet; trials, crimes, murders were constant fodder for all of these.

Fascination with headline trials, then, has probably never been so great as it is now; never has the public seemed so hungry for the lurid and bizarre. Every night, on television, before audiences of millions, real and fictional crime shows enact, parse, and (usually) solve a devastating multitude of murders, rapes, and other violent crimes. We live in the age of what Fox and Van Sichel have called “tabloid justice.” The mass media focus on “the sensationalistic, personal, lurid, and tawdry details of unusual and high-profile

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249. *Jerome Checks Thaw Defense*, N.Y. TIMES, Feb. 12, 1907, at 1. The judge ordered all women “excluded, unless they could show that they were newspaper women, definitely assigned to cover the trial by their city editors.” *Id.*

250. *Id.* I am indebted to Mark Hernandez for this reference.

251. On censorship of the movies, see FRIEDMAN, *supra* note 229, at 156–65; LEE GRIEVESON, POLICING CINEMA: MOVIES AND CENSORSHIP IN EARLY-TWENTIETH-CENTURY AMERICA 4 (2004); RICHARD S. RANDALL, CENSORSHIP OF THE MOVIES: THE SOCIAL AND POLITICAL CONTROL OF A MASS MEDIUM (1968).

trials.”<sup>252</sup> Fox and Van Sickle claim that attention to such trials reached some sort of peak in the 1990s.<sup>253</sup> In that decade, such trials as O.J. Simpson’s so dominated the media as to amount to “almost total cultural immersion”; this degree of “immersion” constituted, in their view, “a new phenomenon.”<sup>254</sup>

At the same time, censorship has ended, self-censorship has collapsed, and, in the press and in the media in general, just about anything goes. The reasons for this change—in law and society—are no doubt many and complex. But clearly the transition to a celebrity society, with all that this entails, is one of the factors in this development. The celebrity society demands total (vicarious) access to the lives of the rich and the famous. Censorship—and even reticence and privacy—must yield to an insatiable public demand.

Society in the developed world is largely middle-class society. Middle-class life is orderly and comfortable, compared to most societies in the past and in the third world. Millions of members of the middle class, it seems, are enthralled with what goes on above them, in the gilded world of the celebrities, and below them, in the seedy, sinful, and vice-ridden domain of the underworld. They seem also fascinated with the secretive world within their own ranks, the scandals that occasionally erupt in suburbia and in their own levels of society—scandals which reflect things that mostly happen privately, behind bolted shutters and closed doors, and only rarely come to light. Many of the famous trials combine aspects from all three of these social levels, and in some of the trials, it is the very mixture of two or more that attracts the attention of the public.

Perhaps, to a degree, the stories behind headline trials also evoke envy or desire—hidden longings or, on the contrary, a grateful sense that our lives are not like the unfortunate, tragic, or sordid lives that are on display. Or perhaps what is attractive are the stories, events, and situations which are so radically different from everyday life; they have the capacity, in short, to divert people from their own humdrum lives. Headline trials in this sense act as a kind of emotional and psychological tourism. These trials, after all, are not fiction. They claim to be a slice of life. They are both alien and familiar at once. Crimes that lead to headline trials—certainly tabloid trials—stem from jealousy, lust, greed, anger, and hate. These are emotions most people have, but for most people, they are not only intensely private but also intensely contained. Murder may stem from everyday motives, but murders are not

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252. FOX & VAN SICKEL, *supra* note 1, at 3. They define “tabloid justice” to include three elements. First, the “educational function of the press is undermined by its entertainment role” (hardly new, however); second, a “frenzy of media activity . . . envelops . . . legal proceeding”; and third, an “attentive public . . . witnesses these legal travails and uses them as a means by which to understand and assess the criminal justice process.” *Id.* at 4–5.

253. *Id.* at 54.

254. *Id.*

everyday events. The trials today complement the countless movies and television shows that focus on crime and punishment. The trials are, in a way, cousins of reality television. In these dramas, actual men and women play exciting and mysterious roles—roles played in movies and on television, but in this case, by real people, not actors and actresses.

The trials are, as I said, a form of entertainment. And entertainment plays a greater and greater role in people's lives. In the rich, developed societies, ordinary people do not need to work themselves to death. For many people, to be sure, life is a scramble, a constant challenge, a treadmill. Nonetheless, there *is* time off: days off, weekends, national holidays, vacations, and evenings at home without the pressure of work. There is money jingling in the pockets of average families which can be spent in discretionary ways. The entertainment industry might well be the largest industry of all in developed countries, if you add together sports, movies and television, video games, and the innumerable hobbies of one sort or another.

Entertainment, then, broadly conceived, is pervasive in modern society. It spills over and infects many other areas of life. Entertainment criteria, for example, shape political life. More and more, the public judges politicians in terms of image and in terms of something vaguely called "charisma." For many voters, ideology and programs seem to matter less than whether the candidate can charm, soothe, inspire confidence and, in a sense, entertain. A wooden, boring speaker is doomed at the polls. Moreover, television is a key factor in modern political campaigns. Television ads have to catch the attention of the public—to entertain, in short. Indeed, the worlds of entertainment and politics are so intertwined that one author has called the President the "entertainer-in-chief."<sup>255</sup>

#### F. *The Vexed Question of Influence*

The media cater to public taste, but they also help form it. Headline trials in our day, then, are simply one small part of a giant system, a system which feeds on and derives from mass culture, and whose basic aim is to divert, to amuse, to entertain.

But even though these big trials do not seem to do anything else but feed the appetite of the public and the media, they still have a wider significance. They reflect social norms and they also, in a way, still do instruct. Whether they mean to or not, they teach lessons about the nature of criminal justice, and perhaps even about the nature of society. How important are these messages? Do these trials make a difference in society? Do they change public attitudes and behavior? These are of course difficult questions to answer—perhaps impossible.

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255. Kurt Andersen, *Entertainer-in-Chief*, NEW YORKER, Feb. 16, 1998, at 34.

Headline trials certainly spread information (and misinformation) about the criminal justice system. Almost anybody in this society can mouth the standard of guilt in criminal trials; they know that the prosecution needs to prove its case “beyond a reasonable doubt” (although exactly what that means in practice is elusive, to say the least). Most people also know about the *Miranda* warning, the right to remain silent, and so on. They know at least something about juries, defense lawyers, witnesses, cross-examination, instructions to the jury, and the like. But movies and the media coverage of trials give the public a very incomplete and misleading picture of the way the system works. There are two basic misconceptions which are, paradoxically, quite contradictory. For one thing, media coverage gives the impression of a meticulous system, a system of almost pathological due process. Everything is done to a “T”—potential members of the jury are screened, probed, questioned, needled, all to the end of keeping out anybody prejudiced or unsuitable. The lawyers, during the trial, are eagle-eyed to detect and object to mishandled evidence, incorrect cross-examination, and anything contrary to justice and law. There is, in short, scrupulous attention to detail, all in the interests of fairness to the defendant. Yet the audience can get, in addition—or instead of this—the very opposite lesson: the lesson that tricks, smart lawyering, and quirks of procedure can bend and twist the administration of justice. That money can buy acquittal. For better or for worse, the media focus on these high-profile but misleading cases and ignore, on the whole, the humdrum, everyday administration of justice, with all its faults and virtues.

In an open society, and a mass media society, lawmaking is incredibly sensitive to some forms of public opinion and, hence, to the imprint of notoriety, scandal, sensational incidents, and outrageous events.<sup>256</sup> Scandals led to the creation of the first Food and Drug Administration, and another led to amendments in 1938, which greatly strengthened the law.<sup>257</sup> Laws on clean air and water owe a lot to the Donora death fog, and similar public catastrophes. The great oil spill of 2010 led to a moratorium on ocean drilling. Business scandals have often led to changes in the regulatory structure.<sup>258</sup> But perhaps nowhere is the influence of scandal greater than in the criminal justice system. The impact comes, on the whole, from sensational crimes rather than from sensational trials. One could mention here “Megan’s Law,”<sup>259</sup> which

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256. On the meaning and social importance of scandal, see ADUT, *supra* note 232, at 5–22.

257. On this, see DANIEL CARPENTER, REPUTATION AND POWER: ORGANIZATIONAL IMAGE AND PHARMACEUTICAL REGULATION AT THE FDA 73–76 (2010).

258. CARY COGLIANESE ET AL., THE ROLE OF GOVERNMENT IN CORPORATE GOVERNANCE 2 (Harvard Univ., Regulatory Policy Program Report No. RPP-08, 2004).

259. This law, passed originally in 1994, was a response to the murder of young Megan Kanka. 2001 N.J. Laws 1187. People convicted of a “sex offense” are required to register; and there are provisions for making the information available to members of the community in which the offender lives. *Id.* There are now versions of this law apparently in all the states. There are

followed a dreadful crime in New Jersey, and the three-strikes law in California, which had a similar background. The same is true of so-called trials that arise out of moral panics. Here we can mention the various “red scares,” the reaction to 9/11, and so on. Some moral panics work directly to produce sensational trials—this goes all the way back to the Salem witchcraft trials, as we noted, and in our day, to the McMartin child-care case. Sensational trials themselves no doubt play at least some role in generating movements to change the law. And new laws produced by scandal and moral panic in turn produce their share of sensational trials. After the kidnapping of Charles Lindbergh’s baby, Congress passed a law federalizing kidnap cases whenever the kidnapper crossed state lines, and after a certain amount of time, the law presumed that this had taken place.<sup>260</sup> Many states passed “Little Lindbergh” laws of their own, and this law was at the core of the Caryl Chessman case; it accounts for the fact that the death penalty was imposed on him.<sup>261</sup> The trial of the Chicago Seven owes a great deal to the climate of political hysteria associated with McCarthyism and the Cold War moral panic over Communism. The McMartin case arose out of—and led to—a flurry of legal activity, designed to end real (and imagined) child abuse.<sup>262</sup>

Probably today, the headline trial serves mostly to sell newspapers and television time and to provide public diversion. To be sure, the usefulness of the headline trial as a *political* instrument has of course not ended. Its influence on the criminal justice system can certainly be labeled “political” in the broadest sense. And the rise of international criminal tribunals suggests that political trials, in a more literal sense, might be entering a golden age. Huge publicity has surrounded the trials of men who committed atrocities—crimes against humanity—in Liberia, Cambodia, in the former Yugoslavia.<sup>263</sup> International criminal law shows signs of vigorous growth. Some of these trials were carried out by ad hoc tribunals, but there is now an International Criminal Court; most countries (though not the United States) have signed on, and the court has made a promising beginning.<sup>264</sup>

And what of the other forms of headline trial? In an age of instant communication, blogs, twitters, websites by the zillions, in which images and ideas spread around the world in nanoseconds, the headline trial as a form of

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other laws, too, which are commonly referred to by the name of the victim, for example, “Jessica’s Law” in Florida. 2005 Fla. Laws 204–05.

260. 18 U.S.C. § 1201 (2006).

261. HAMM, *supra* note 69, at 56.

262. *See supra* notes 190–96 and accompanying text.

263. Lisa J. Laplante & Kelly Phenicie, *Mediating Post-Conflict Dialogue: The Media’s Role in Transitional Justice Processes*, 93 MARQ. L. REV. 251, 277 (2009). *See generally* Jessica Feinstein, *The Hybrid’s Handmaiden: Media Coverage of the Special Court for Sierra Leone*, 7 LOY. U. CHI. INT’L L. REV. 131 (2009–2010).

264. STACY, *supra* note 49, at 62–65.



communication may seem like a kind of dinosaur—a lumbering, awkward device left over from an earlier period. Yet there are no signs that the headline trial is headed for the dustbin of history. Indeed, these trials help feed the insatiable appetite of the public for diversion, information, and in a way, instruction. Their place in the entertainment society—the celebrity society—has never been greater, and is, if anything, likely to grow in the years to come.

