

Introduction

TEN GREAT AMERICAN TRIALS PROVIDES chapter-length accounts of some of the most highly publicized—and fascinating—court cases of the twentieth century. Embedded in each of our narratives is an analysis of the use by prosecutors and defense attorneys of trial advocacy techniques (involving discovery, pretrial motions, jury selection, direct testimony, cross-examination, the introduction of forensic exhibits, and summations) to craft compelling stories about what happened. We also assess the impact of cultural, social, and political values on the proceedings and the outcomes.

We selected the cases, several of which have been dubbed “the crime of the century,” because they are dramatic, suspenseful, emotional, intellectually powerful, and have become part of American culture. Uncertainty about motives, guilt or innocence, it is worth noting, still haunt several of our trials. And every one of our cases has inspired a full-length movie, a television series, and/or a documentary.

All ten of our trials—*Sacco and Vanzetti*; *Leopold and Loeb*; *Scottsboro Boys*; *Alger Hiss*; *Sam Sheppard*; *Skokie, Illinois, Neo-Nazis*; *Dan White* (the killer of Harvey Milk and George Moscone, the mayor of San Francisco); *Claus von Bülow*; *McMartin Preschool*; and *O. J. Simpson*—shed light on one or more “hot button” issues: xenophobia, the death penalty, race, anticommunism, free speech rights, homosexuality, and child abuse.

We recognize that our selection criteria were idiosyncratic and our cases are not “representative.” After all, the overwhelming majority of indictments are settled and do not come to trial. And “great,” “hard,” and sensational cases rarely make good law. That said, one of our trials (Scottsboro) resulted in a landmark decision by the United

States Supreme Court that extended defendants' due process rights (previously reserved for federal government proceedings) to actions taken by the states—and added momentum to initiatives to guarantee fair representation of blacks on juries. Other cases in this book (Sheppard, McMartin, and O. J.) stimulated a public discussion of jury selection and sequestration, the value of the testimony of experts in psychology, prejudicial pretrial media coverage of crimes, and the circus atmosphere created by the presence of television cameras in the courtroom.

Our trials also serve as opportunities to examine the strengths and weaknesses of our adversarial system of justice. In contrast to the unfortunately named “inquisitorial” system of adjudication that prevails in most of the rest of the world (outside of the United Kingdom and former British colonies), where judges take an active role in investigating facts, appointing experts, and interrogating witnesses, the American system assigns evidence gathering and fact presentation to prosecutors and defense attorneys. The system treats the judge, in essence, as an umpire, intervening only when necessary to maintain a level playing field that is necessary to decide a case “correctly.”

At its best, the system works well in the United States. In our “winner take all society,” lawyers have incentives to find evidence that supports their clients—and to present clear and convincing narratives designed to persuade juries and judges to see things their way. As we will see, defense lawyers Clarence Darrow (*Leopold and Loeb*), Samuel Leibowitz (*Scottsboro Boys*), Alan Dershowitz (*von Bülow*), and Johnnie Cochran (*O. J. Simpson*) performed brilliantly as advocates under extraordinarily difficult circumstances. Prosecutor Thomas Murphy did a first-rate job of using the “pumpkin papers” of Whittaker Chambers and the Woodstock typewriter on which State Department documents had been copied to secure the conviction of Alger Hiss for perjury.

The adversarial system, however, does not always produce just outcomes. District attorneys, prosecutors, and defense lawyers often use trials to advance their own agendas, reputations, and career interests, including reelection, a race for higher office, a cause they sup-

port, or an opportunity to attract lucrative cases. And so, as John Mason Brown reminds us in *Through These Men*, lawyers “are almost always duty bound” to present blemishes as wounds; ask questions not only to learn but to lead and unsettle witnesses; read guilt into innocent, inconsistent, or incomplete answers; present lapses of memory as attempts to hide misdeeds; and deploy “feigned and wheedling politeness, sarcasm that scalds, intimidation, surprise, and besmirchment by innuendo, association or suggestion.”

There is conclusive evidence, moreover, that clients who retain the best lawyers money can buy are far more likely than less affluent folks with court appointed or less accomplished attorneys to get the outcome they desire. Claus von Bülow’s money, for example, made it possible for Alan Dershowitz to recruit a team of superb students from Harvard Law School, hire experts to reexamine the apparently incriminating forensic evidence, and draft an extraordinarily sophisticated appeal of a murder conviction. The wealthy parents of Leopold and Loeb hired Clarence Darrow who, against all odds, avoided a death penalty verdict against the young men. And, of course, Prosecutors Marcia Clark and Christopher Darden were no match for O. J. Simpson’s expensive “dream team” of lawyers, including Robert Shapiro, DNA expert Barry Scheck, F. Lee Bailey, Johnnie Cochran, and Alan Dershowitz. On the other hand, the ACLU, through their representative David Goldberger, provided free legal services for the Neo-Nazis in the Skokie litigation in order to preserve “free speech for those we hate.”

Our cases also reveal that judges often play an active role in trials, belying the view that they are neutral, largely passive umpires. Webster Thayer, judge of the Superior Court of Massachusetts, did not hide his contempt for Sacco and Vanzetti. In private conversations, he allegedly called the defendants “Bolsheviki,” vowing to “get them good and proper.” And he denied virtually every motion made by Fred Moore, their lawyer, telling reporters “No long-haired anarchist from California can run this court.”

At the other end of the ideological spectrum, James Edwin Horton, a judge on the Eighth Circuit Court in Alabama, who presided over the retrials of the *Scottsboro* Boys (only two of whom were under

age sixteen), made the highly controversial decision to set aside the conviction and death penalty handed down against one of the defendants. He proclaimed that the accusations of rape were uncorroborated, improbable, contradicted by other evidence, and made by two women so “that their selfish ends may be gained.” After ordering a new trial, Horton was taken off the case; he subsequently lost his bid for reelection as a judge and retired to his farm.

As we will indicate in the final chapter of this book, Lance Ito, judge of the Superior Court of Los Angeles County, California, had a substantial impact on the trial of O. J. Simpson. Perhaps because he relished his own appearances in the media limelight, Ito permitted live television coverage of the trial. In deference, to the role prescribed for judges in the adversarial system, he allowed the two sides to try the case as they wished, permitting numbingly long and at times irrelevant speeches and interrogations of witnesses. He agreed to so many requests from lawyers to approach the bench that the word “sidebar” entered the English language as a synonym for unnecessary delays.

Judge Ito also made several important, perhaps pivotal, and certainly contested decisions on the admissibility of evidence. He ruled on a defense motion to prove its claim that Los Angeles Police Department detective Mark Fuhrman committed perjury by entering into evidence tape recordings in which he used racial epithets forty-one times, and on motions by prosecutors to exclude or limit the testimony on this issue, to reduce the possibility of producing “undue prejudice” in members of the jury. Ito also had to decide whether to allow prosecutors to use O. J.’s 1989 no contest plea to wife-beating charges and the 911 tapes in which she pleaded for help while Simpson was raging inside the house, in the face of objections by the defense that knowledge of prior convictions would unduly influence the jury.

As we focus on lawyers and judges, we examine as well the influence of politics and ideology on the content and context of trials, all of which have become touchstones of American culture, consciousness, and conscience. The behavior of Judges Thayer and Horton indicates one way in which prevailing beliefs and behaviors entered

the courtroom. Three additional examples, elaborated on in detail in *Ten Great American Trials*, should suffice for this introduction.

Accusations by Whittaker Chambers, a senior editor at *Time* magazine, that in the 1930s Alger Hiss had delivered classified State Department documents to the Soviet Union (which Chambers had made before) may not have gotten traction in 1948; nor might Hiss have felt compelled to deny that he had ever met Chambers if millions of Americans had not been deeply fearful that vast networks of spies were operating inside the government of the United States. That the Un-American Activities Committee of the House of Representatives was conducting investigations, and politicians, including Richard Nixon, were exploiting the “Red Scare” to make their reputations as zealous Cold War anticommunists, made a difference as well.

Less obviously, allegations in 1983 that about 400 young children had been subjected to sexual abuse, sexual encounters with animals, Satanic rituals, and travel in hot air balloons by Virginia McMartin, Raymond Buckley, and several teachers at the McMartin Preschool in Manhattan Beach, California, probably would not have resulted in arrests and the longest and most expensive trial in American history had there not been widespread hysteria about an epidemic of child abuse in the United States. Fueling the panic, moreover, was a mass media that tended to accept uncritically reports of predatory behavior, despite the absence of physical evidence—the only “confirmation” emanating from the suggestive questioning of children and unlikely claims about repressed and recovered memory. Before the panic subsided and the charges against the defendants were dismissed, several states passed laws allowing children to testify on closed-circuit television to avoid the trauma associated with facing the individuals they had accused.

And it now seems obvious that what might have been an “ordinary” murder trial of O. J. Simpson was transformed by the persistent and potent realities of racism, racial polarization, and celebrity culture in America into a spectacle digested and debated by tens of millions of people throughout the world.

Successful courtroom lawyers are skilled storytellers. They recognize that stories are essential to all of us as we learn, interact with

others, and try to understand the world around us. They realize that facts do not speak for themselves; they must be interpreted. Operating within the formal rules, regulations, and norms of the adversary system (and willing, at times, to test its boundaries), lawyers weave the evidence that has been gathered into a clear, concise, and convincing narrative; frame the issue; and punch holes in the competing narrative offered by the other side. Using ordinary English, they demonstrate mastery of facts but do not get lost in details, never forgetting the observation of actor and director Kenneth Albers that “a great story is like a well-crafted joke—deliciously brief, immediately memorable, eminently repeatable, and virtually impossible to dismiss.”

Successful trial lawyers generate sympathy for and trust in their clients, their witnesses, and themselves. They highlight weakness in the character, contentions, and credibility of their opponents. Aware of the backgrounds, beliefs, and biases of each juror and the judge, they use anecdotes, verbal expressions, body language, and, if appropriate, simple outlines on blackboards or flip charts to connect with and convince their listeners. They appeal to reason and emotion. They do not dispute facts that are (or should be) beyond dispute. They never ask a question unless they know the answer the witness will give and what to do in the event of a surprise. They understand that members of the jury form opinions quickly and often discount or reject evidence that contradicts their first impressions. They have learned that getting the last word—and making it count—can have an enormous impact on jury deliberations. Most important, they tell the story of the case in such a way that it arouses in the judge and jury a sense that justice will and must be served by a decision that favors the person or people they represent.

In *Ten Great American Trials*, we tell the stories of courtroom storytellers, evaluate the stories they told, and the axes and axioms they grinded. Our cast of characters is large and varied. Our lawyers sometimes do—and sometimes do not—exhibit mastery of the techniques of trial advocacy. Our judges sometimes do—and sometimes do not—act impartially and in accordance with the precepts of

our adversarial system. And our plaintiffs and defendants sometimes do—and sometimes do not—get what they deserve.

We have tried to make our narratives at least as accessible, dramatic, and thought-provoking as the fictionalized and documentary renditions of them; capture and assess what really went on inside the courtroom; recreate the mood of the times; and convey the ways in which our cases illuminate continuities and changes in the law and in the beliefs and behavior of Americans. We hope—and we think—that *Ten Great American Trials* has something to say about our legal structures and institutions, our history, and ourselves.