COMMENTARY

AN AMERICAN TRAGEDY: THE TRIAL OF JACK RUBY†

LAWRENCE M. FRIEDMAN*

President Kennedy was assassinated on November 22, 1963. Two days later, his body lay in state in the rotunda of the Capitol. The world was given over to black pomp and measured grief. It was a "day of drums." Far off, in Dallas, near the site of the bullets and blood, the police held Lee Harvey Oswald in custody. No one doubted that Oswald, ("a twenty-four-year-old drifter and self-proclaimed Marxist with a checkered history of protest against society"[1]) had killed the President. On the morning of November 24th, the Dallas police prepared to move Oswald from one jail to another. The room in the basement of the Dallas city hall was humid and crowded. Oswald was led in, handcuffed to a detective. Suddenly, a man emerged from a boiling mass of onlookers, police officers, television cameramen, and reporters—Jack Ruby, born Rubinstein, the owner of a Dallas strip joint. "You son of a bitch!" he shouted, and fired a gun at Oswald; hours later Oswald was dead. This turn of events robbed Dallas of one great state trial, but gave it another; when judgment day came it was Ruby who sat in the dock instead of Oswald. The story of his trial, beautifully understated, has now been told in a masterful book by John Kaplan and Jon R. Waltz.

The trial was bound to excite public interest. No sequence of events in modern times had been followed so eagerly by the public as the tragedy at Dallas and its consequences: the death of a young hero-President, so swift, so tragic, so meaningless. The murder of Oswald was horror piled upon horror. Millions of people had seen it on their television screens; they would never forget. The country had settled down to normalcy when Jack Ruby came to trial, but the trauma had not been expunged. Public curiosity was exploited to the hilt by mass media. The trial was conducted in the honky-tonk air of publicity, polluted by the press and by the buzzing of countless photographers. Ruby's team of lawyers was dominated by Melvin Belli, the "King of Torts,"—flamboyant, high-priced, and notorious. Judge Joe Brown presided, a man known to the Dallas bar as "affable and witty"; "the sort that other men liked to join on a fishing trip or at a poker party."[2] No one thought of Brown as a legal scholar or a subtle umpire of fact. His lust for the limelight

† This Commentary is based on THE TRIAL OF JACK RUBY, by John Kaplan and Jon R. Waltz. New York, New York: The Macmillan Company. 1965. Pp. i, 392. $7.95 [hereinafter cited as KAPLAN & WALTZ].

* Professor of Law, University of Wisconsin. B.A., 1948, J.D., 1951, LL.M., 1953, University of Chicago.

1 KAPLAN & WALTZ 1.

2 *Id.* at 17.

("But, Sam, couldn't you give me just one camera?"[3])—along with simple lack of skill in running a courtroom—may have impeded the conduct of the trial.

The trial itself was arduous. Selection of the jury took a great deal of time; a long parade of witnesses marched on and off the stand. Belli's problem in defending Jack Ruby was simple to state, but difficult to solve. Ruby's state of mind was the essential (and only) question at the trial. Millions, after all, had seen him pull the trigger. The act was undeniable; insanity would have to be the defense. Belli never proved it to the jury's satisfaction. He dabbled with this theory and that. An elusive brand of epilepsy captured his fancy, but no one else seemed convinced. Belli, it seems, had overextended his powers; by the end of the trial he was exhausted. In addition, he made serious tactical mistakes.[4] Ruby himself never took the stand. He sat and listened. At the end of the trial the jury, with almost unseemly speed, found Jack Ruby guilty as charged. He was sentenced to death.

The sentence of death has not yet been carried out; perhaps it never will. Yet the trial and the shadow of death have destroyed what was left of Jack Ruby. By all accounts, he is a broken man. Perhaps he was (legally) sane at the time of his act; after the trial, his mind seemed clearly out of joint. On April 26, 1964, he had to be taken to the hospital for an abrasion caused when he struck his head against the wall of his cell. A professor of psychiatry found him "obviously psychotic."[5] There were signs of gross paranoia in his behavior. He believed that "all the Jews in America were being slaughtered," that "the President's assassination [was] . . . now being blamed on him," and that he was the cause of a national massacre.[6] He thought he heard the screams of his brother, who had been castrated and murdered on account of Ruby's deed.[7] His detachment from reality was by then so gross that even the prosecution could see it. Whatever the game Ruby played, whatever the

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[3] *Id.* at 35. The statement was made by Brown to Sam Bloom, his "press aide." Brown finally gave way to pressure and barred television from the courtroom.

[4] For example, in regard to the testimony of Patricia Ann Burge Kohs:

> who could have been one of [the defense's] . . . most important witnesses. . . . Belli, however, in the preliminary questioning . . . brought out the fact that she was presently being held for trial on a narcotics charge. . . . Belli . . . had for some unaccountable reason destroyed the credibility of what might have been one of his most helpful witnesses.

Id. at 183.

In his closing argument, Belli insisted that "there was only one proper disposition of Jack Ruby's case: he must be acquitted outright, on grounds of insanity. Over and again Belli informed the jurors that there was no middle ground, no room for compromise." *Id.* at 329.

[5] *Id.* at 344.

[6] *Ibid.*

[7] *Id.* at 344-45.

secrets of his mind, his essential gamble had ended in defeat. That much was clear.

He was not the only loser. With the possible exception of the prosecuting team, everybody who touched the Ruby trial or who was touched by it came away tainted with its filth. The judge, Melvin Belli, his colleagues on the defense, the expert witnesses on the stand—all stood indicted of incompetence or worse. The American system of trial by jury was itself on trial, and the verdict was adverse. There were no heroes of the Ruby trial, tragic or otherwise—only pathetic, limited men. There was a Faulkner quality to every episode, an air of grotesque Texas rot. It was a trial of the decadent, by the decadent, and the decadent sat solemnly in judgment.

This is in essence the tale. The subject calls for—and gets—a narrative of the highest skill. *The Trial of Jack Ruby* is a model of accuracy and irony, of subtle indirection. It does not describe; it evokes. That is one of its greatest virtues. Another is the clarity with which institutions of the criminal law are presented and explained. Perhaps no other book of American law teaches so well in narrative form. Moreover, few books bring so tellingly to judgment the American system of trial by jury. Trial by jury is elsewhere romanticized or denigrated: very occasionally it is studied. Here, quite exceptionally, a mirror is held up to its face.

Not that *The Trial of Jack Ruby* is a book of preachments and conclusions. Works of *verismo* depict our purulence and blood, but prescribe no cure; nor do they willingly go to the end of their implications. In *Jack Ruby* too, there is a deliberate holding back. Partly, this is a matter of technique; the authors prefer to make their points by delicate juxtapositions. Partly, one suspects, the authors mean also to arouse in their reader a critical mood, a mood that will allow the reader to find his own corollaries and deductions. Some questions are raised, some data given in the form of a cautionary tale; but no answers are explicitly provided. Let us pursue one or two of the problems more fully. Was the trial of Jack Ruby unique? Does it reflect some larger whole? Is the system it represents basically sound, or is it far too corrupt for redemption?

I

The trial of Jack Ruby, as described by Kaplan and Waltz, leaves the reader with a feeling that our system of criminal justice is sick. In this case it is clear where the sickness lies. In large measure, it was made manifest in a passion for celebrity. If the trial was a circus, it was because the major characters had chosen for themselves a role of greasepaint and drums. The judge's fondness for the limelight has already been mentioned. Before the Ruby

trial, he was best known to the world for his conduct during the trial of Candy Barr. Candy Barr was a stripper, on trial for possession of marijuana. The judge called her into chambers and took photographs of her. She was fully clothed, but, understandably, some citizens of Dallas found the judge's behavior unprofessional. Ruby himself may have pulled the trigger for reasons of notoriety—he was a lonely and alienated man gambling (perhaps subconsciously) for a place in the sun. And Lee Oswald no doubt knew that only his rifle could make him famous—a hero in a world which does not always discriminate between noble and ignoble fame. Our society has (relatively speaking) many gradations of rank but little fixity of birth. Some are willing to kill and be killed, to earn a counterfeit nobility; murder may be preferable to an obscure and pointless life. The lust for fame crosses the boundaries of class and occupation. There are doctors who prefer the courtroom to the operating room, heliotropic professors who thrive on flashbulbs. Expert witnesses are sometimes recruited from these men. Oswald's mother is another instance. Her grief at the death of her son has been eased by her delight at "going down in history." Every major Dallas participant had memories for sale. And most avid and eager of all to feed on the mass media was Melvin Belli, chief counsel for the defense. "Get me that case," he said, "I want it so badly I can taste it."[8] He tasted publicity. His name and his money had been acquired, bit by bit, through clever manipulation of the art of being known, through press agentry, through courtroom stunts and strident appeals to the visual senses of juries. This is the man who once carried an artificial leg, wrapped in brown butchershop paper, into the courtroom; who celebrates verdicts by firing a cannon and running a skull-and-crossbones up the flagstaff of his office.[9] His reputation is known to millions of Americans who could not name two Wall Street lawyers to save their souls.

Belli represents, in his profession, the extreme case of the seeker of headlines. But it is important to remember that he is not unique. There are others of his stamp. Every big city has at least one—bizarre, eccentric lawyers, who specialize in personal injury work and garish criminal trials, "attorneys for the damned"; lawyers of lurid divorces, people whose names are always in the paper, men who strike extravagant poses, ladies with incredible hats—"good copy," all of them, despised by the "respectable" bar but rich, successful, and notorious.

These lawyers are, in one sense, the degenerate descendants of the lions of another day—of lawyers like Daniel Webster and Horace Binney, the great courtroom orators of the nineteenth century. In his day, Webster was also "good copy." Audiences gathered breath-

[8] *Id.* at 31.
[9] *Id.* at 28, 31.

lessly to hear him speak. When the cause was right, and the occasion propitious, he could harangue a court for hours or days in oral argument. His eloquence made the crowds laugh and cry on his behalf. When a Webster spoke, the Supreme Court drew sizable crowds; important civil servants, diplomats, and high-born ladies crowded the galleries.[10] Of less prestige, the circuit-riding lawyers of the open West were also public performers. In dull, unpolished county seats, they entertained the masses with tricks, legal charades, outrageous technicalities, homespun addresses. All this skill displayed at trial brought them an audience—and customers as well. Indeed, whatever its psychological and social roots, exhibitionism at the bar has only flourished where it meant cold cash. Lawyers are human beings as hungry for psychic and material goods as anyone else, whatever pious platitudes the leaders of the bar put forth. If a craving for attention may lead a man to murder, a craving for money and success may create a Webster, a Lincoln—or Melvin Belli.

Success does not come easily to a lawyer. This is true of all professions and hence also of the law. There is room at the top, but the ladder is crowded. There are a number of ways to succeed, but none of them are simple. One highly selective way leads to the genteel anonymity of Wall Street.[11] Here success means money, pride, and a kind of muted fame. The masses will never hear your name or ask your autograph, but an audience of peers and servants understands your place. To win on Wall Street means admission to a tiny club of the elite. Moreover, once a young lawyer gets a start on Wall Street, he has a certain measure of security within reach. Not everybody who is hired by a Wall Street firm winds up as a senior partner; but we are speaking here of men with skill and brains. In the firm, the young lawyer finds a ready-made clientele—big businessmen, their companies, their private affairs. When he achieves partnership, the young lawyer will inherit these clients; and when he in turn dies or retires, he will leave them to his successors. New clients are not easily acquired, to be sure; yet by moving in economic and social circles inhabited by the rich and powerful, he is at least exposed to potential business. He may have been born into those circles in the first place. If not, he can learn how to behave—most likely he has already learned this at college.

But Wall Street (and its equivalent in other cities) is only for the few. Many lawyers, by reason of their background, inclination, training, and temperament cannot aspire to its heights. The big firms are rigid in their insistence that prospective recruits must have been trained in the proper schools and have credentials of academic success. A certain temperament, a certain culture, and

[10] See 1 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 471-73 (1937).

[11] For a recent study of the Wall Street lawyer, his recruitment, career patterns, and characteristics, see SMIGEL, THE WALL STREET LAWYER (1964).

a certain style of life are also essential. Yet those who have Wall Street traits do not exhaust the ranks of the able and ambitious. The others must take different roads to the top. The small firm lawyer in a big city[12] has to scramble for his clients. Word of mouth, hard and patient work, friends and relations, classmates in school, clubs and social groups—all of these can provide him with business, if he is lucky or adroit. For those who specialize (through desire or otherwise) in criminal work, personal injury, or divorce, the job of finding customers may be the hardest of all. Their business in those fields is nonrecurring; few clients come back. Advertising in its less polite forms is forbidden to them[13] by the "ethics" invented by their betters at the bar. For them, word of mouth must be a shout, not a whisper. A front-page story is a golden brief.

Headlines and mass media are modern phenomena. The silver tongue of Daniel Webster and the antics of the frontier lawyer were the functional equivalents, in their day, of Belli's headlines. All these tactics were employed to bring a lawyer to the attention of potential clients. One hundred years ago, the "retainer" was virtually unknown; courtroom work loomed larger in the average lawyer's practice than it now does. Attention-getting was even more important than today. But for lawyers who work with a shifting clientele, the situation has hardly altered in a century. In one way or another, their name *must* get known to an audience of potential business. Thus, though temperament predisposes a man to exhibitionism, economic facts of the profession help write the script.

In Belli's case, economic need has turned into an addiction; his own ego has been victimized. He "had become a prisoner of his own image. . . . [O]ver the years Belli had gradually come to believe more and more of the things he said about himself."[14] So the glitter and stench from Dallas were stimuli he was powerless to resist. Jack Ruby, whom he was so badly to serve, had set a trap for him; and the King of Torts, grown unwary from success, fell into it. It hardly needs to be added that Jack Ruby, too, paid dearly for his mistake. Yet in a sense, neither was responsible. It was not Ruby's fault but that of the system that he called for Melvin Belli; not Belli's fault that he ran to take the bait. The virtue of the system is that it brings together the two partners in a mutual relation, as the color of a flower attracts a suitable species of bee. The system is tolerable, however, only if and so long as it serves its function—matching lawyers to people in need. Kaplan and Waltz have shown, by dispassionate but damning analysis, how Belli failed to serve his client. They raise, in acute form, the question

12 Graphically described in CARLIN, LAWYERS ON THEIR OWN (1962).
13 ABA, CANONS OF PROFESSIONAL ETHICS, Canon 27.
14 KAPLAN & WALTZ 31.

whether the system *is* tolerable in criminal cases. Ruby, it is suggested, would have been better off with a lesser-known lawyer, one who knew the local temper and the local scene. But the difficulties of the case seemed to call for the very best lawyer, and Ruby's family could not tell the best from the loudest voice. In this sense, the system misfired. It has misfired in other cases, too. Representation of the criminal poor is obviously defective. The distribution system for legal talent has broken down. It not only creates a Melvin Belli, it also tends to drive out of the field of criminal law the sedate, shy, but perhaps efficient lawyers. The cost to society may be great.

II

In a brief, trenchant epilogue, Kaplan and Waltz address themselves to some basic questions posed by Jack Ruby's trial. One of these "important . . . for lawyers and others who care about American justice is whether . . . Jack Ruby was accorded a fair trial."[15] The concept of "fair trial," the authors explain, implies "two notions—that of equality (has the accused been given the same protection and chance of acquittal as others similarly situated?) and that of rational procedure (has there been an adherence to procedures rationally adapted to determine the guilt or innocence of the accused?)."[16] Kaplan and Waltz do not go so far as to say that in either regard the trial of Jack Ruby was defective, yet the trial "leaves one with an uneasy feeling." The pathic publicity; the lurid nature of the crime and its attendant circumstances; the destructive impact of the trial on Ruby's personality; the severe and shocking penalty imposed;—these are some of the things, perhaps, which give rise to an "uneasy feeling." But an even more general uneasiness has not been laid to rest. Was the trial of Jack Ruby truly an instrument for the discovery of truth? For that matter, is any trial?

> Many people were disappointed that his trial shed so little light on the motive underlying Jack Ruby's crime. In all probability their expectation was unrealistic from the outset. The rules of evidence, for a variety of reasons, sometimes reject testimony which is relevant and probative; and the adversary system, which insures that the only evidence produced is that tendered by the parties, often leaves large areas of the case unexplored because neither side has felt it tactically prudent to expose them.[17]

In short, the actual criminal trial is unlike the trial of fiction and drama, in which truth, the whole truth, and nothing but the truth emerges into daylight at drama's end. The actual criminal trial is so structured that truth hides its face. Judge and jury may hear

[15] *Id.* at 370.
[16] *Id.* at 371.
[17] *Id.* at 367.

only what law and lawyers let them hear. They may not hear, or absorb, or seek out, the total context of a crime or its actors; they are confined to the rules of the courtroom.

Not all panels of adjudication have this feature, by any means. Consider, for example, the Warren Commission, appointed to investigate the President's death. The Commission acted, in a sense, as the trial of Lee Oswald. One of the jobs of the Commission was to investigate the facts and circumstances surrounding the President's death, and Oswald had been charged with this crime. The sessions of the Commission were duly reported by news media, and evoked a good deal of public interest; nonetheless, the tone of the proceedings was much more restrained than was the case in Dallas. The Commission seemed patient, and cost was irrelevant. The Commission sifted mounds of evidence, called witness after witness, dug through layers of relevancy and irrelevancy, and gave at least the appearance of a solemn tribunal, doggedly searching for facts. The Commission, in its own words,

> functioned neither as a court presiding over an adversary proceeding nor as a prosecutor determined to prove a case, but as a factfinding agency committed to the ascertainment of the truth.[18]

The Commission's procedures were "necessarily" different from "those of a court conducting a criminal trial,"[19] since, after all, Oswald was dead. The Commission was anxious, however, to act in "fairness to the alleged assassin and his family."[20] The President of the American Bar Association, Walter E. Craig, at the request of the Commission, was asked to represent Lee Harvey Oswald; he and his associates "were given the opportunity to cross-examine witnesses, to recall any witness . . . and to suggest witnesses whose testimony they would like to have the Commission hear."[21]

But the shadow of the gallows did not hang over Lee Oswald's head. Actually, Craig made little use of his role. An "adversary" atmosphere is hard to counterfeit. The function of the tribunal in Dallas was to decide a man's fate; the function of the tribunal in Washington was to learn, to explain, and to soothe the fears of a nation. The contrast between the Warren Commission and the Ruby trial emerges most sharply if we compare their "verdicts." At the Ruby trial the verdict was brief, oracular—a bald assertion of guilt and a sentence of death. No reasons were—or had to be—given. The Warren Commission's "verdict" was book-length, discursive, ponderous; it nagged and worried at this or that aspect of the facts. The style was deliberately calculated to give the impres-

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18 THE PRESIDENT'S COMMISSION ON THE ASSASSINATION OF PRESIDENT JOHN F. KENNEDY, THE WARREN REPORT x (Associated Press 1964).

19 *Ibid.*

20 *Ibid.*

21 *Ibid.*

sion that no stone had been left unturned. Formal, oracular brevity would have been distinctly out of place.

The cautiousness of the Warren report was purposeful. The report had the job of laying suspicions to rest. In this country, almost everyone believed in the Commission's integrity. Almost everyone believed that it looked for and found the whole truth of the case. A few commentators, most of them European, rather hysterically disagreed. They labeled the Report a gigantic whitewash, part of a mammoth secret plot to hide the truth. This is absurd, though we must not forget that the charge has a core of plausibility. After all, the government was not disinterested in the findings of its Commission. What the Commission reported was what everyone wanted to hear. A state paper, reporting the results of an inquiry of state, can be a whitewash just as easily as it can be an exploration into truth—perhaps more easily.[22] A trial like Jack Ruby's, on the other hand, is radically different; it cannot be an impartial, objective search for the whole of the truth, but neither can it (at least not easily) serve as an instrument of state.

In this lies the paradox, the strength, and the weakness—all at once—of the American system of trial. Jack Ruby's trial displays this paradox in heightened form, but it is visible in every trial to a greater or a lesser degree. American civil and criminal procedures are, in the main, not rationalized, not bureaucratic, not dispassionate. But at the same time, when conducted in the open, they are not subservient to state interests, and they are not the instruments of tyranny. Unfair trials are certainly no rarity in this country. A Negro very likely cannot be fairly tried for certain crimes in much of the South, and there have been plenty of northern examples of harsh, vindictive uses of criminal law.[23] A tyrannical trial, however, presupposes a conjunction of state power and deep-seated popular opinion. Where the public mind is open, the American system prevents the government from overwhelming the defense either with brute facts or brute power. The trial of the "discoverer" of Krebiozen provides a recent, and striking, example. Some scholars have wondered how the most democratic nation in the world tolerates modes of procedure more irrational and archaic than those of the dictatorial power states. The answer is that the American mind sees no alternative; the search for objective truth (which is the essence of inquisitorial procedure) seems far too dangerous to be tolerated. Hence it has been sacrificed for the vulgarity and

[22] Very recently, additional charges have been made that the Commission failed to examine the facts independently, and that it glossed over some troublesome questions. See, for example, EPSTEIN, INQUEST (1966).

[23] See, for example, the trials of the "anti-renters" as described in CHRISTMAN, TIN HORNS AND CALICO: AN EPISODE IN THE EMERGENCE OF AMERICAN DEMOCRACY 215-52 (1961). Similarly, the notorious political trials, from the days of the Sedition Act to the Smith Act, were all jury trials.

inefficiency of the criminal trial. The Ruby case and others make one wonder; is the price too high? Yet history and national instinct are not totally unsound; inquisition and Star Chamber deserve at least some of their black reputations. A Melvin Belli was unthinkable in Moscow during the purge trials, and the Moscow purge trials would be unthinkable in Dallas.[24]

The flaws of the adversary system of criminal trial are glaring. Its virtues, on the other hand, are familiar and quite ingrained in the American legal mind. American lawyers tend to believe that there is no other way to reach honest results. One point, often overlooked, is that the essence of the adversary system is not the power of the two opposing lawyers, but the powerlessness of the judge. At first sight, this seems a paradoxical statement to make about a system of law in which the judge makes or at least declares the law, and which exalts the personality of the judge to a degree unthinkable on the Continent. But it is equally important to note in what role the American judge is *not* exalted: in his role as civil servant. The "independence" of the judge is a two-edged sword. He is free from the power of the other branches of the government, but he also does not partake of their power. The judge cannot investigate, he does not consult other departments of government, he does not have at his fingertips the full apparatus of the state. It is well known (and often deplored) that the rules of evidence operate to keep the jury in the dark. The judge is almost equally in the dark.

The evolution of some aspects of American procedural law—and, what is just as important, some aspects of its stagnation—can be viewed as the outcome of a constant struggle to keep the judge under control, and more specifically, to prevent the legal system (especially the criminal law) from being useful as an instrument of tyranny. In some countries, as in England, the independence of the judiciary from the state apparatus is ensured by tradition; English judges are traditionally fair, aloof, and objective, at least in modern times. The Englishman's wig is a symbol that he lives in another era, removed from the temptations of the modern nation-state with all its powers and its evils. It is an English archaism, just as American procedure is an American archaism, symbolizing much the same thing.

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[24] Everyone knows that a defendant is not necessarily innocent or guilty merely because a jury says so. The same uncertainty is inherent in the "verdict" of a state trial or state investigation. No matter how hard the state tries, it cannot readily dispel all doubts. This has been true of the Warren Report. Most Americans believe in it because they believe in their government. The foreign observer, having no reason of faith or experience to trust our institutions, sees no reason why the Warren Commission, which so clearly had an axe to grind, should not be charged with grinding it. This loss of confidence may now be spreading to the United States. See EPSTEIN, INQUEST (1966).

The English sort of tradition has never developed in this country. Probably it could not have flourished in a relatively classless society with great ethnic diversity. Americans have not had faith in an elite, at least since the early nineteenth century. Economic and social circumstances destroyed the possibility of a judicial elite.[25] History, too, took an unfortunate turn. The Federalist judiciary behaved in a partisan manner; in office, it appeared willing to act as the instrument of state power. The trial judge became an object of democratic suspicion. The Jeffersonian party attacked the judges as elitists, and demanded that they be made more responsive to the popular will. Logically then, the judge's power had to be curbed; and in such a way as to bend him toward the people, rather than toward the government. From the days of Jefferson on, legal institutions developed to accomplish these purposes. The Jacksonian concept of democracy reinforced these developing trends. For example, most judgships became elective. Election tied the fortune of the judge to current political movements, but did not make him an instrument of the state. This might have happened had life tenure been replaced by a system of short-term appointments to office at the will of the governor or assembly. The judge was responsive to the people—and directly so. Significant changes took place in the way trials were carried on—changes that fundamentally altered the position of the judge.[26] Judges at one time used to comment on the evidence; they instructed the jury in their own language; in general, they took an active role in managing the trial. Now they were reduced to a more passive role. They were umpires, reciting stock instructions (drafted by attorneys) and refraining, in most states, from any comment on the evidence. The judge was not only to be powerless, he was also to be divorced from the state apparatus. American courts were not bureaucratically organized. For example, in many places the clerks of court are elected—they are nominated by political parties, organize campaigns, and run for office. That a judge's clerk should be, not a civil servant, but a politician responsive to a lay constituency, and independent of the judge, would no doubt strike a continental lawyer or judge as preposterous. But even the office of judge is not highly professionalized or highly bureaucratic. Until very recent times, the states did not provide for central administration of court systems; each judge ran his own little fiefdom. Today, to be sure, a certain amount of administrative reform has been achieved in some states and in the federal system. Moreover, the rules of evidence are becoming more "rational" (that is, free and discretionary with the judge). But neither of these tendencies even today has gone to its logical limit. And judgeship is not, as in France, a separate, specialized career.

[25] On the relationship between egalitarian ideologies and the "loss of professional standards for training and admission to the bar," see HURST, LAW AND SOCIAL PROCESS IN UNITED STATES HISTORY 124-26 (1960).

[26] See Friedman, Book Review, 78 HARV. L. REV. 1705, 1709 (1965).

A judgeship (particularly on the lower levels) sometimes may even be a stepping stone for lawyers as much as a career in itself. In Lincoln's day, lawyers sometimes sat in for a judge who was busy or indisposed. Bench and bar had professional solidarity; the bench was not (and is not) a separate, civil service career, but rather an offshoot of the bar; and the bar is in practice, if not in theory, quite independent of the state.

Such a system does not readily produce a Star Chamber or a hanging judge; but it abounds in the likes of Joe B. Brown. The persistence of a crude, rule-bound system of procedure is therefore not unrelated to the existence of crude and vulgar judges. The system persists as a control over such judges, and the quality of the judges helps the system to persist, because it makes a virtue of continued control. How much more power would we be willing to grant to Judge Brown? But while we can explain the American way through its historical and social roots, this does not mean that the present system is indispensable or that it cannot be reformed. It has survival value—but only barely—and the costs to society are great. Reform is not easy, however. The people directly affected by the system (for example; lawyers, and judges) have a vested interest in it; others with a vital stake (the criminal population) have no effective say. The wider public is ignorant or uninterested. The use of trial courts for matters of major economic concern is quite limited; as a result, much intolerable procedure *is* tolerable since it is not generally used. A social problem does not begin to find a "solution" until some important segment of the public is aroused. A problem is real when it is felt to be real. Prior to that time, it is not a problem, but a sleeping matter of fact. Recently, a heightened awareness of the costs of our system seems to have come over some leaders of opinion. Reexamination of institutions is in the air. A wider audience may draw wide insights from the present work.

III

One further point. The authors of this book bear the title of Professor of Law; they are both academics. This fact is particularly welcome. American legal scholarship, in the main, has exhausted its energies in sterile dogmatics, neglecting its vital opportunities. The academic study of law can be pursued as an art or as a science. It can be looked at as a practical study of the techniques of social control, or as the dispassionate investigation and dissection of those techniques. The art and the science presuppose each other. Without science, the art of law is a simple trade; without art, the science of law is dead abstract bones. Both the art and the science, in American legal education, have been in a mumified state for generations, despite sporadic attempts at revival. In recent years, some signs have indicated the possible (and permanent) rebirth of the science of law. But the use of scientific techniques (such

as statistical measurement) will not bring full understanding of the legal system, without what we might call an artistic grasp of reality. The *Trial of Jack Ruby* is one of those very few, very rare works, about law and of law, which can be called (in the sense used here) a work of art; it conveys, with economy and force, a heightened image of the real.