LAW AND LITERATURE
Dreiser and the Courts

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THESIS

This is to certify that the

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ABSTRACT

LAW AND LITERATURE
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By

Ida Blacksin

This dissertation presents an analysis of the legal case study as found in Theodore Dreiser's An American Tragedy. The author demonstrates how Dreiser gave meaning to the dry facts gathered from the "Gillette case" by showing all of the social forces leading up to the tragedy that are special to the American scene in such a way as to make it a plea for Clyde Griffiths and an indictment of American society.

The author indicates how Dreiser took the dry facts and translated them into living experiences and revealed his conclusions by showing us:

1. A joy ride in a stolen car that ends in a tragedy starts Clyde on the way to crime. Here Dreiser shows us the "criminal negligence" factors connected with automobile accidents.

2. The American culture patterns contributed to Clyde's crime; An American Tragedy is an example of a socioeconomic crime. Here crime is symptomatic of our complex economic life.

3. The influence of the press on crime--how newspaper methods of playing up crime news have a morbid effect on many constitutionally weak persons.

4. There is no such entity as a criminal will. Crime is not due to intent "deliberate and premeditated design," as legally defined, but the motive underlying the crime. The criminal act is due to the experience of some kind of inner conflict connected with some development in childhood.

5. The whole legal system is tied up with politics --prosecutors, lawyers, judges, and jury.

6. Shady methods are used in order to obtain a victory. Various loopholes are open to lawyers for the defense. Lawyers use flattering, emotional, and prejudcial methods to sway the jury.

7. The trial is a public show that arouses the spirit of mob psychology in the spectators.

8. Legal language and numerous technicalities of the law have many disadvantages in retarding justice.

9. There are many weaknesses in the jury system, such as the poor mental caliber of the average jury, the time-consuming methods of selecting a jury, and the local pressures and political aspects involved in a jury deliberation.

10. Appeals interfere with a proper administration of justice because of the many technical errors, delays,

exorbitant expenses, disadvantages suffered by the family of the convicted man, and the psychological effects on the convicted man himself.

11. Capital punishment is not a deterrent to murder.

Finally, this dissertation presents a fifteen-page bibliography for readers of varied taste, consisting of: (1) Dreiser's Books and Articles, (2) Studies and Reviews about Dreiser, (3) Comparative Books Cited, (4) Criminology and Law, (5) Capital Punishment and Penology, and (6) a Table of Cases of all the cases cited in the study.

LAW AND LITERATURE

Dreiser and the Courts

By

Ida Blacksin

A THESIS

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My thanks go to Professor Lore Metzger of Emory University, and to the following of Michigan State University: Professors Herbert Josephs, John Murray, Russel Nye, and John Yunck. My final thanks go to my typist, Janet R. James.

For many centuries, people considered as criminals have been executed--but have they become extinct? No; far from diminishing, their numbers have been increased by the additions of those who have been demoralized by punishments, and also of those other criminals--judges, prosecutors, magistrates, and jailers, who judge and punish men.

--Leo Tolstoy, Resurrection, Chapter 28

TABLE OF CONTENTS

INTRODUCTION

Theodore Dreiser is an author of "sprawling strength" whose writings can not fit into a rigidly controlled point of view as outlined by many professors of literature. I therefore have avoided the strictly controlled point of view--especially in the first two chapters, where I have tried to synthesize some of the ideas of Volume I of An American Tragedy which takes on form and meaning only after one reads Volume II.

My aim is to treat the reader as though he were about to go to the criminal court to observe Dreiser's An American Tragedy in three acts and an epilogue. It is understood that the observer has read the book--especially Volume II.

This study consists of six chapters. Before the reader enters the court room, the author as guide devotes the first chapter in explaining the culture patterns of the society under observation, i.e., car, money, newspapers and sex with their impact on crime, as well as the definitions, distinctions and motive of crime.

The second chapter describes the people who live in that society, i.e., lawyers, judges, the public, and

the peculiarities of a foreign language--legal jargon and technicalities.

The reader is now prepared to observe the tragedy in three acts (Chapters III, IV, and V). Here the process of the law and its functions is described from the selection of the jury to the sentencing. The sixth chapter contains the epilogue--the scene in prison and the execution.

Along the way, the author explains what Dreiser as an artist does with the material he is accused of purloining, i.e, the "Gillette case." Comparative views in law and literature are brought in.

If we read between the lines, we may find a suggestion for a human relations court; the law has refused so far to unite with other bodies of knowledge like psychology, sociology, penology, administration of justice, and science.

Dreiser also implies that the psychiatric approach is the scientific answer for the treatment of criminals. He presents this approach by means of the spiritual Reverend Mr. McMillan who tries to suggest the idea that it was not, perhaps, a mere matter of chance that the great Teacher to whom we owe our ideals of Christian citizenship was Himself crucified between two criminals; and to one of them who repented of his sins, He made the promise:

"Today shalt thou be with me in Paradise."

CHAPTER I

DREISER AND THE AMERICAN SCENE

> It [An American Tragedy] is not only a minutely detailed picture of one man's life; it is a commentary upon human life in general.[1]
>
> --H. L. Mencken

> A flawless piece of circumstantial evidence as the lawyers call it.[2]
>
> --Jakob Wassermann, Der Fall Maurizius

More than any other modern writer, Dreiser came into constant conflict with the law in his struggle for freedom of expression. In the history of civil liberties, he well deserves a chapter, if for nothing else than because he carved a way for future writers. He stood a lone figure, fighting extra legal controls over the publication of opinion--controls that were a natural outcome of a press organized on the same basis as giant industry. Financial and political pressures not only colored industry, but closed the avenue of expression to undesired ideas. To overcome this complicated pressure, Dreiser was continually involved with the law.

However, it is not Dreiser's personal legal struggles that are portrayed here, but rather an analysis of the law and crime as it appears in An American Tragedy. Dreiser touched the law and crime in almost all his writings. Hurstwood commits a theft in Sister Carrie. The law interferes in the crime of embezzlement and grand larceny in The Financier. In The Hand of the Potter, we have rape and murder. Up to the very end, law and crime had a fascination for Dreiser. In The Bulwark, he raises a very nice point of law. Stewart and Bruge take turns in having relations with the latter's girl, whose resistance is overcome by giving her a sleeping medicine that causes her death. From the facts, it would be difficult to prove whether Stewart had relations with the girl while she was alive or after she was dead. If the intercourse took place while she was alive and if the girl, Psyche, is overage (eighteen in New York), then he would be guilty of rape in the first degree. If she was dead, then the case comes under some special and unusual section that deals with intercourse with a dead body--sodomy. It is doubtful as to what the crime is. It seems to be a case of felony and murder. Both men were equally involved since they both gave her the sleeping medicine to weaken her and with intent to rape; therefore, legally we have homicide with intent of felony. However, Stewart's crime involves difficulty of proof and one wonders how the case would be handled legally

if Stewart had not committed suicide.[3] And, in An American Tragedy, we get a glimpse of "criminal negligence" in the automobile accident for which Clyde Griffiths is legally culpable, and finally the crime for which he is condemned to death.

Dreiser's documentation of law and crime cannot be overlooked, and since the law plays such a significant part in his works, it is the purpose of this study to analyze the legal case study as found in An American Tragedy.

Law is divided into civil law and criminal law. The civil law is occupied with the exposition and enforcement of civil rights. In theory, preserving man's liberty and life is more important than preserving a corporation. Criminal law may be defined as the body of precepts and practices that a community employs to protect itself by the use of force against acts which impair or endanger its internal peace and security.[4]

Lawyers and law students usually regard the criminal law as being narrower in scope than do people generally. This is due to a rather arbitrary limitation of the subject that is common in law school courses and textbooks. These are more concerned with what is known as the substantive criminal law, or the problems of burglary, rape,

homicide, murder, and so on. Substantive criminal law then relates to the definition and classification of crimes generally, the criminal act, the criminal intent, the capacity to commit crime and exemptions from criminal liability, the parts to crime, and, finally, a consideration of important elements or characteristics of particular offenses.

It is well to understand that in its broader phases criminal law includes a much wider range of subjects. This discussion treats some of these subjects, such as administration of the courts, criminal procedure, evidence, sentencing the convicted, appeal, pardon, reformation, and crime prevention generally.

To use Harry Elmer Barnes' words, Dreiser's concepts of law and crime were more in harmony with the modern development of the science of

> criminology which deals particularly with the criminal himself, giving special emphasis to the problem of the causation of crime. Scientific interest of the study of the criminal came late because the criminal was classed with the sinner as a theological problem. Both were considered perverse free moral agents who had deliberately violated the will of God. The criminal had also defied the law of the land, and savage punishment was therefore believed to be thoroughly deserved. The full responsibility of the criminal for his own conduct was assumed, and the persons who prescribed and executed punishment were believed to be serving God as well as man. Hence there was little basis for restraint in punishment or little incentive to look into the problem from a naturalistic or human point of view. The rise of scientific criminology had to wait upon the development of a new intellectual perspective and the accumulation of scientific knowledge which would undermine the ancient theological approach to the criminal and his treatment.[5]

The latest tendency is for the law schools to emphasize the social aspects of crime; that is, the causes that work into the cases considered from the legal viewpoint. The trend is to get away from the idea of the rule of the case and to see the picture or pattern of the law.

Dreiser drew the material for An American Tragedy from the unusual circumstances surrounding the death of Grace Brown at Moose Lake, New York. Chester Gillette, a real-life prototype of Dreiser's Clyde Griffiths (the initials are alike), was tried and convicted for murder in the first degree.

From the legal point of view, the interest lies in the discussion of "circumstancial evidence" used to convict the murderer in the trial proceedings. It also gives us an idea of the mosaic of proof that may be composed from pieces of evidence. From the literary point of view, an opinion of the Court of Appeals[6] written by Mr. Justice Hiscock is striking in that it demonstrates how closely Dreiser adhered to the tragic circumstances of the actual case. Clyde Griffiths was taken out of the court records of a murder trial, but Dreiser takes the skeleton of the story and clothes it with flesh and blood. He shows us that all the social forces leading up to the tragedy are special to the contemporary American scene.

Officially, the case is known as People v. Gillette (1908). What does this mean? It means that a public prosecution is a proceeding conducted by the people of a state against persons charged with criminal acts. It thus implies the existence of a public criminal law that has superseded private vengeance. In its operation, it is an interacting system of rules of criminal procedure, the substantive criminal law, and various administrative factors.

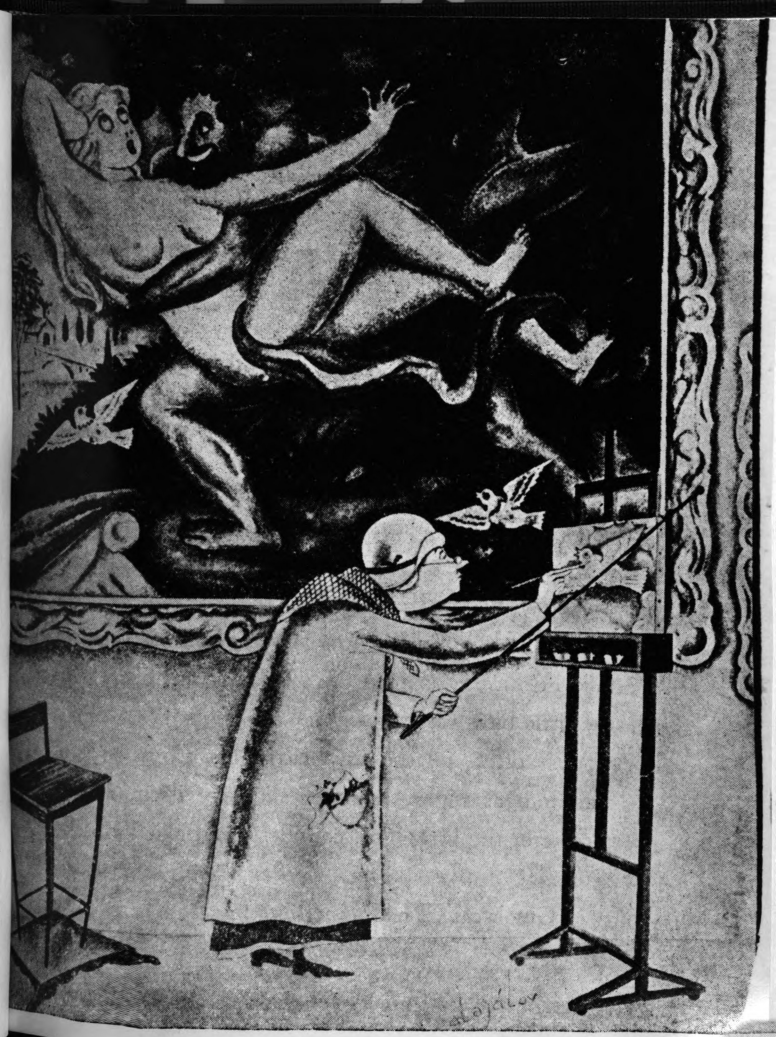
According to Dreiser's interpretation of the case, it should be cited officially as In re the People or In re the State of New York or In re Society. In re means in the affair, in the matter of, concerning; re is the usual method of entitling a judicial proceeding in which there are not adversary parties. The term in re is prevalent in what is known as the socialized or juvenile courts, where the object is not punishment but definite social investigation and reformation as the ideal of treatment. In the specialized or juvenile courts, the usual rules of procedure, pleading, and evidence are dispensed with and instead an informal administrative procedure is used. In such courts, Dreiser might get some of his answers for Clyde's crime because the considerations there are: What is he?

How has he become what he is? Why has he particular difficulties? What can we do to help him?

The famous Gillette murder case not only engaged the interest of Dreiser and set his mind upon the problem of unravelling all the trivial events in a boy's life that might lead up to the boy's death in the electric chair, but also gave him the opportunity to show us what it is like to be a middle-class boy in America who hungers for success and power and is caught in a trap between sexual hunger and economic status.

Frederic Wertham, psychiatrist and author of Dark Legend, says that in the treatment of a criminal, "The trivial may represent the essential, the detail may symbolize the whole, the background may elucidate the figure." In his book, Dr. Wertham illustrates this statement with a cartoon by the artist Alájalov, which first appeared as a cover for The New Yorker magazine, showing an intent, rather unattractive middle-aged woman copying a picture in a museum. As Dr. Wertham puts it:

> The picture she is copying is a gigantic portrayal probably entitled The Rape of the Sabines. It shows a ferocious gentleman with a leer on his face carrying off a lush and very naked lady, who is pretending, not too successfully, to be terrified out of her wits. The picture is somber, perhaps in part darkened by age, but surely intending to convey by the rich blue and red of its tones the violence of emotion of its characters.
>
> But all this is not what our painter is copying. She is transferring to her own small canvas only a little bird which appears in a corner of the original picture.



> However, by making the bird very white, the sky very blue, the clouds very pink, she is making a sentimental, innocuous, and vapid picture.
>
> There is no title given this cartoon. But I doubt if anyone mistook the artist's intention. The copyist is obviously that stock character known as the old maid. Her clothes betray the fact that she has no interest in making herself attractive as a woman; that in fact, she is anxious to look as neutral as possible.
>
> Her posture, the way in which her head thrusts forward and her eyes stare, shows that she is passionately absorbed in what she is doing. Yet none of that passion has been transferred to her own small canvas which is as tepid as cold tea.[7]

In relation to Dreiser's An American Tragedy, the Gillette case was only a murder, the "white bird with the pink clouds and the blue sky." The fact remains that Dreiser's deliberate tenacity in rendering the whole scene honestly, concretely, and comprehensively is the main source of his strength. Dreiser reconstructed and went beyond the limited canvas of the copyist from which the little bird or the dry facts of People v. Gillette were taken so as to convey the violence of emotions that the original meant to portray. He showed us the various complex and sensitive shades lurking in that dark and somber background that gave meaning to the small and limited canvas so as to make it a plea for Clyde Griffiths and an indictment of all of society. But what does Dreiser see that the Gillette case did not report?

Dreiser has been accused of piecing his novel together from exerpts of the Court records of the Gillette case. He has also been charged with extreme particularization as a fault. An answer to Dreiser's accusers and fault-finders is contained in his novel in the episode of the joy ride in a stolen car that terminates in a tragedy. The Gillette case does not record the "criminal negligence" factors, whereas Dreiser describing the wreck of a speeding automobile relates just how the car strikes an unpaved section of the street, how it caroms off a lumber pile, how it is thrown over on its left side, in just what direction each of the eight occupants is thrown, what positions they occupy in the wrecked car, how six of them get out, why the other two cannot get out, and how each one reacts to the accident.[8] Let these fault-finders investigate the cases of "criminal negligence," where years are spent in the courts on a single accident in order to find out whether it was a left turn or a right turn; study all the complicated diagrams that are submitted; and attend while various tests of "reasonableness" are argued. A man is minus a foot, an arm, an eye. The interest of the court should be to make some kind of economic adjustment. When those concerned in the case leave, they should be better members of society. Human values are entirely lost. And the irony of it:

> They sent that fellow Sparser up for a year--did you hear that? Tough, eh? But not so much for the killing of the little girl, but for <u>taking the car</u> [italics mine], and running it without a license and not stopping when signaled. That's what they got him for.[9]

Dreiser was fully aware of the holy regard the law has for property. The car was more important than the life of the child.

Dreiser called his story An American Tragedy. Why American? Perhaps an interesting answer might be supplied by a story that is told of a case in the Russian courts where two girls had once occupied for a home a certain number of cubic feet of space, the allotted quantity. One of the girls moved out. The city housing committee moved in a young man. After a child was born, the man was haled before the court to determine how much he should pay toward the support of the child. His answer was that he felt no responsibility, that he had not chosen the girl, that he had not even chosen his abode, that the housing committee which had moved him into the lodgings might well have known what the result would be. The so-called judges, encumbered by neither precedent nor training, concluded--and it seems quite properly--that the cost of supporting the child should be imposed upon the housing committee of the city of Moscow. In the individual case, this was no doubt a just decision; in fact, it was poetically just. One is inclined to believe, however, that the principle underlying the decision would not be a sound guide for social action. And so in Russia what might have been "an American tragedy" was

judicially settled by the court. Thus, we find the Russians looking realistically upon the sexual needs of the young. It seems that the Russians were:

> Mastering the lawless science of our law,
> That codeless myriad of precedent,
> That wilderness of single instances.
>
> --Alfred Tennyson, Alymer's Field.

An American Tragedy is an example of the socio-economic crime. Here crime is symptomatic of our complex economic and social life. Much of it is due to economic causes. Need and greed lie at the foundation of the greater portion of contemporary crime. And greed is responsible for the vast majority of the dangerous crimes committed today. These dangerous crimes of greed represent the socially disapproved methods of obtaining something for nothing.

Most penologists and penal administrators know that the average murderer is an ordinary citizen without any previous notion of committing a crime until confronted with a situation that seems too much for him to solve in any rational manner. It is this fact that is admirably brought out by Theodore Dreiser in his penetrating novel.

We do not know whether the youths of today are better or worse than those in any other generation. But surely we are convinced that the wide gamut of temptation is much more attractive and dynamic than it was in the days of our

ancestors. The automobile and the nightclub, the tavern and the dine-and-dance, scattered as they are all over the landscape, inviting the boys and girls to frolic and fun, present a situation almost unknown to average parents. James V. Bennett, who was director of the Federal Bureau of Prisons, put it this way:

> Incidentally and off the record so to speak since I am a parent, it would be a good idea for us old folks to make more of an effort to understand and appraise the difficulties and temptations which our children must meet and face. It has been said that there are two kinds of homes in this country--the good home and the bewildered home.[10]

Clyde Griffiths comes from such a bewildered home. The one moral discipline he knows, the evangelicism of his religious parents, is linked in his mind with social defeat, and slips easily from his essentially pagan nature. Society at large teaches him only the specious ambition to "rise," which to him means only to gain entrance to the luxurious circles of the wealthy. In one sense, Clyde's misfortune consists simply in the failure of a weakling to survive, but in a larger sense it consists in the sacrifice of impressionable youth to the pursuit of unworthy standards. Dreiser indicates Clyde's standards thus:

> Oh, why, why couldn't he have waited and then this other world would have opened up to him just the same? If only he could have waited!
>
> And now unquestionably, unless he could speedily and easily disengage himself from her, all this other splendid recognition would be destined to be withdrawn from him, and this other world from which he sprang might extend its gloomy, poverty-stricken

> arms to him and envelop him once more, just as the poverty of his family had enveloped and almost strangled him from the first.[11]

Then Dreiser explains that the "genii of Clyde's darkest and weakest side was speaking" in the following manner:

> And do not forget that afterwards there is Sondra--the beautiful--a home with her in Lycurgus--wealth, a high position such as elsewhere you may never obtain again --never--never. Love and happiness--the equal of any one here--superior even to your cousin Gilbert.[12]

And finally

> . . . The promise of a restricted and difficult life as contrasted with that offered by Sondra . . . The difference between the attitudes of these two girls--Sondra with everything offering all--asking nothing of him; Roberta, with nothing, asking all.[13]

As one reads the various cases presented by Lewis E. Lawes, former warden of Sing Sing, who wrote a revealing book, Meet the Murderer,[14] one asks: Why were these persons' lives snuffed out, when so many other more dangerous criminals are permitted to walk the streets free? The answer is that the treatment of the murderer should be in terms of psychiatry. If we read between the lines, we find the psychiatric approach at the end of An American Tragedy in the scenes between Clyde and the Reverend Mr. McMillan, his confessor--one of the most dramatic scenes in American literature.

A joy ride in a stolen car terminates in a tragedy, and Clyde, already a moral coward, takes to his heels. He then makes his way to Lycurgus, New York, where he is given a place in his rich uncle's factory. Thus, with his first flight, the soil is already fertile for crime.

In due time, Clyde becomes a foreman in the collar factory. It is strictly against the rules of the management for any of the foremen to have anything to do outside of hours with the girls who work under them. It was an unnatural rule and was meant to be broken. Clyde is lonely. His loneliness is somewhat eased when a new and lovely little country girl, Roberta Alden, has come into the stamping department of the factory where he is now foreman. They have, in fact, become lovers. Roberta tells him that he must help her find a way to prevent their child from being born. Clyde plans the murder of a sweetheart of his own social and economic station in life when he realizes that her pregnancy means the shouldering of irksome responsibility, and death to his hopes for financial and social advancement just at the moment when his hopes, after a hard struggle, seem about to be realized.

In his desire to free himself from Roberta, the newspaper account of a boating accident in another state

leads to dark thoughts in the young man's harassed mind. How simple things would be if Roberta should drown on some such excursion and he could escape to happiness with Sondra!

Dreiser was aware of the influence of the press on the increase of crime. He was a former newspaperman and was therefore well acquainted with the modern machinery of news distribution--gigantic presses, leased wires, specialist reporters. He certainly knew that the amount of space devoted to crime news had greatly increased in the last quarter-century. Clyde reads the headlines upon the first page of the Times-Union of Albany:

> ACCIDENTAL DOUBLE KILLING AT PASS LAKE--UPTURNED CANOE AND FLOATING HAT REVEAL PROBABLE LOSS OF TWO LIVES AT RESORT NEAR PITTSFIELD--UNIDENTIFIED BODY OF GIRL RECOVERED--THAT OF COMPANION STILL MISSING[15]

Although this was only the report of an accident, Dreiser knew that this item had, through the power of suggestion, served to stimulate Clyde's crime. He writes concerning the young man:

> In a tremulous state of dissatisfaction with himself --that any such grisly thought should have dared to obtrude itself upon him in this way--he got up and lit the lamp--re-read this disconcerting item in as cold and reprobative way as he could achieve, feeling that in so doing he was putting anything at which it hinted far from him once and for all. Then, having done so, he dressed and went out of the house for a walk . . . feeling that he was walking away from the insinuating thought of suggestion that had so troubled him up to now.[16]

On another occasion, "Clyde, for some reason, had thought of the accident at Pass Lake. He did not realize it, but at the moment his own subconscious need was

contemplating the loneliness and usefulness at times of such a lone spot as this."[17] He continues: "And in spite of himself, his eye once more followed nervously and yet unwaveringly to the last word of all the suggestive and provocative details."[18] Dreiser indicates further: "And yet at moments the solution suggested by the item in The Times-Union again thrusting itself forward, psychologenetically, born of his own turbulent, eager and disappointed seeking. And hence persisting."[19] And, finally:

> A feeling of dark and bitter resentment swept over him and he could not help but feel sympathetic toward that unknown man at Pass Lake and secretly wish that he had been successful. Perhaps he, too, had been confronted by a situation just like this. And perhaps he had done right, too, after all, and that was why it had not been found out. His nerves twitched. His eyes were somber, resentful and yet nervous. Could it not happen again successfully in this case?[20]

Commentators on crime and the news designate crime news as the literature of the nation. In one notorious and sordid trial, the number of words telegraphed from the scene of the trial at the end of twenty-four days was twelve million.

> . . . Words enough if put into one newspaper . . . to fill 960 pages of solid reading matter. Words enough, if put into book form, to make a shelf of novels twenty-two feet long. This is the literature of the nation . . . because it does not wait for its patrons on bookstore shelves or gather dust in libraries, but is sold out, read and realistically debated within two hours after it comes smoking from the press. It needs no pushing, no advertising, needs no criticism.[21]

Criminologists claim that newspaper methods of playing up crime news do have a morbid effect on many constitutionally weak persons. So long as the public wants to read

banal and racy news, we can expect little constructive reform from the news fraternity.

There is no statistical method of arriving at the number of persons who enter criminal activity through what they read in the newspapers or magazines. No doubt, there are many. The constant repetition of crime stories in the press can affect readers in two different and dangerous ways. It may affect some highly suggestible persons, among whom are many young people, to commit similar crimes; or it may create an indifference to law and order through the constant reiteration and exaggeration of the details of the crimes. Stable people, juvenile and adults alike, will be little affected by what they read. The unstable and many of the socially maladjusted may be somewhat affected, and it is from this suggestible and abnormal group that most of our delinquents come.[22]

A prominent police consultant stated the case of newspaper responsibility, in so far as crime news is concerned:

> So far [this great instrument] the press has scarcely done its part. The most carefully formulated editorial policies, through which might be secured able discussions of law enforcement problems, are often offset by a new policy deliberately designed to appeal to the prejudices of the unschooled and ignorant.[23]

The motion picture and the radio also have been attacked for their contribution to delinquency and crime. Much as one may deplore the cinema's shortcomings as a medium of art and education, nevertheless the motion picture

has been made too much of a scapegoat by the clergy and other puritanical forces in our society. Thanks to Eric Johnston and his associates of the Motion Picture Association of America, action was taken to amend their regulations and codes and to halt the production of those pictures glorifying the criminal. Criticism of comic books as contributors to delinquency and crime has waned since the arrival of television, which now is faced with almost the same charges once hurled at comic books and before that at movies and radio.

Dreiser tells us that at intervals diabolic voices seem to whisper the details of the murder in Clyde's shrinking ears. Roberta becomes importunate in her anguish. He takes her on an excursion to Big Bittern and Grass Lake in the Adirondacks. In the solitude of the south shore of lonely Big Bittern, his fiendish plans materialize. Then, when the moment arrives, he shrinks from it and hates the girl the more because he knows himself too weak to find his freedom this way. A discussion arises and she creeps toward him in the boat, which tips dangerously. With his camera in hand, he instinctively strikes to ward her off and she falls back. His sudden movement to save her throws them both into the water, as he had previously planned. Although he is a good swimmer and she is not twenty feet

away and unable to swim, his former resolution revives and he swims for the shore, leaving her to drown. There he picks up his suitcase he has hidden, changes into a dry suit, and makes his escape to Sondra and their friends, who are soon off on a gay camping trip to Bear Lake.

A crime was committed--a murder. What are the elements of this crime, first from the legal point of view, and then in Dreiser's conception of crime?

The first element of any crime is the act. Since this is a necessary element, it excludes those persons who do not act. The criminal act has three distinct parts: first, the act; second, the act with its prohibitory element. That is, the act must be prohibited by law. This prohibitory element by the law distinguishes a legal crime from a sociological crime. For example, a drunkard commits a sociological crime, the act being prohibited by sociological law. The act may be prohibited by society but not by law, as many immoral acts are--such as lying. An act may be considered sinful or heretical and still not be a crime. The third part of the act is criminal intent.

Criminal law rests on the basis of a premise of responsibility. This premise of responsibility rests upon the doctrine of free will. As a result, a person is to be

punished on the basis of his intention to commit an act. The criminal intent then rests with the offender's free will. That is, he must be free from blemishes of pathological and physiological restrictions. Legally, this is ideal. The decisions as to whether free will is present and the basis upon which such decisions are made are sometimes vague, uncertain and undecided. The legal crime, then, must present a mental element accompanied by a physical act that is prohibited by law.

Motive is not an essential element of crime. A bad motive will not make an act a crime, nor will a good motive prevent an act from becoming a crime. Motive and intent are sometimes difficult to distinguish, especially in situations where two or more motives, or two or more intents, coincide. Motive is the desire or inducement that incites or stimulates a person to do an act; intent is the purpose or resolve to do the act. In one sense, motive may be said to precede and in another sense to accompany intent. The motive may be a desire either to injure or to benefit. However, motive is never an essential element in a crime. Therefore, a person may be convicted of a crime whether his motives appear to be good or bad, or even though no motive at all is proved. A good motive does not prevent an act from being a crime. If a father drowns his child to save it from starving, he is guilty of criminal homicide, though he was actuated by a good motive--love for the child. So a

parent in disobedience of a statute neglects to provide medical aid for a dependent child cannot excuse himself on the ground that he was actuated in such refusal by religious motives. On the other hand, the law does not punish a bad motive. The motive that prompts an act, however bad it may be, does not make the act a crime if the act in itself is not a crime.[24] However, the motive of an act plays a part in determining the amount of punishment. A good motive tends to lessen the punishment.

If it can be established pathologically or psychologically that the offender did not have freedom of the will, then he is set free. Today the question is whether this theory should be changed. The theory of free will is really a myth. Many criminologists claim that the danger to society is due to motives, and motives should be the principles in establishing crime, but these men are still pioneers in the field.

One of the greatest obligations of organized governments is the preservation of human life. Consequently, killing by individuals is prohibited. The word "homicide" is used to describe all taking of human life by human act or agency. Since a New York case is being considered, the New York criminal law alone is in question. In New York,

homicide is defined as "the killing of one human being by the act, procurement or omission of another."[25] There are different kinds of homicide. Homicide is murder or manslaughter.[26] To distinguish between necessary and unnecessary taking of human life, the law classifies some homicides as excusable and justifiable.[27] New York distinguishes between first- and second-degree murder.

Clyde was convicted for murder in the first degree, which is defined: "The killing of a human being, unless it is excusable or justifiable, is murder in the first degree when committed from a deliberate and premeditated design to effect the death of the person killed."[28]

Murder is the most serious type of homicide. It is the malicious and intentional killing of one person by another. "Blackness of heart," "criminal intent," "design," "malice aforethought," "malicious," "the guilty mind," "willful," are the terms employed to denote an element of this type of homicide.

In the New York statute, the word "deliberate" and "premeditated" are the important words, because these words distinguish first-degree murder from any other killing. "Deliberate and premeditated" implies the capacity to think and reflect--a sufficient volition to make a choice.[29] Premeditation means to think of an act beforehand; to contrive and design; to plot and lay plans for the execution of a purpose. This may be done in a cool state of blood

or in passion. Deliberation is of the same character as premeditation. It is prolonged premeditation, and the perpetrator weighs the motive for the act and its consequences. The time required to deliberate may be a moment or a much longer period. A deliberate murder is a cold-blooded, planned, and revengeful murder.[30]

Clyde was convicted of a first-degree murder because of premeditation with intent to kill a human being. Legally, the minor motive was to avoid the disgrace of being known as the father of the child, and the major motive was to marry into wealth and society. In Clyde's case, we must distinguish between legal intent, which resides in the mind and consists of knowingly and willfully doing an act forbidden by law, and motive which is the purpose for which the act is done. Clyde's purpose was to gain social position, and the intent was that he knew it was against the law and yet willfully did it.

In passing, it is of interest to note that authors in other countries were concerned with the various components of the definition of crime as outlined. In France, Emile Zola who is recognized as having begun the naturalistic novel and codified its theory (and after him the greatest naturalist was Theodore Dreiser whose <u>An American Tragedy</u>

is considered an archetypical American example), had something pertinent to say about crime which implied the existence of the myth of free will. In Nana's salon, we find "the gentlemen were condemning the new theories of criminology with that wonderful invention of irresponsibility in certain pathological cases, there were no more criminals there were only sick men."[31] And Nana, the third-rate actress and courtesan whose lethal sexuality attracts these gentlemen, is in agreement.

Francois Mauriac, the Catholic author and Nobel prize winner, was concerned with sinners. One such sinner and unbeliever is the heroine Thérèse Desqueyroux. She is hidden in the corridors of the law courts and is too small to be anything except a provincial murderess who muffs the job. She never knows what actuates her to poison her husband. In her diary, Thérèse writes, "It is not intention that makes the crime, but the absence of intention."[32] Thérèse's husband who was poisoned unsuccessfully by his wife, tells his daughter towards the end of the novel: "The world recognizes as crime only what the law can take hold of, violence that is tangible and capable of proof."[33]

Anatole France, another Nobel prize winner, whose first novel, The Crime of Sylvestre Bonnard, in which Bonnard, a kindhearted old archeologist, commits the "crime" of kidnapping the orphaned daughter of his old sweetheart. He takes her away from a school where she has been mistreated. When her legal guardian is discovered to be an

embezzler, Bonnard is forgiven for the abduction, and the child is made his ward.

This crime gives the urban author--whose irony appears as a piquant condiment with which this book is discriminately sprinkled--a chance to say something in his diary about motive. "I reached the conviction at last that I should not be judged in regard to my motives, which were innocent, but only according to my actions, which were punishable."[34] And then Bonnard offers a prayer:

> My God, Thou who didst make the sky and the dew, as it is said in Tristan, judge me in Thine equity, not indeed according unto my acts, but according to my motives, which Thou knowest have been upright and pure; and I will say: Glory to Thee in heaven, and peace on earth to men of good-will.[35]

Albert Camus, an author very popular with the American reader, the Nobel prize winner who became famous with his twentieth century minor masterpiece The Stranger, treats all his novels as cases. In The Stranger, the revolver shot jolts Meursault out of his purely negative state. He is a study in confusion when he thinks about the murder he has committed.

> What he [the prosecutor] was aiming at, I gathered was to show that my crime was premeditated. I remember his saying at one moment, I can prove this, gentlemen of the jury, to the hilt. First, you have the facts of the crime; which are as clear as daylight; and then you have what I may call the night side of this case, the dark workings of a criminal mentality.[36]

Camus raises the same question raised by Jakob Wassermann and Theodore Dreiser in The Maurizius Case and An American

Tragedy, respectively. Do courts mete out justice in judging the offense rather than the offender or vice versa?

One of Camus' masters was the German author Franz Kafka.[37] Both authors were interested in capital punishment[38] and in the case, and both are often compared.[39] Kafka, a lawyer in his own right, treats in a symbolic way in his masterpiece The Trial subjects like administration of justice, law books, legal language, politics, lawyers and their charges. Kafka's work is such that it offers us all interpretations and yet it confirms none. Despite Kafka's symbolism, it is not difficult for the student of literature to understand the concept of justice as in K's discussion with Titorelli, a painter who is in some way attached to the court. "'It is Justice,' said the painter at last. 'Now, I can recognize it,' said K. 'There's the bandage over the eyes, and here are the scales. But aren't there wings on the figure's heels, and isn't it flying?' 'Yes,' said the painter, 'my instructions were to paint it like that; actually it is Justice and the goddess of Victory in one.' 'Not a very good combination, surely,' said K., smiling. 'Justice must stand still, or else the scales will waver and a just verdict will become impossible.'"[40] And the complexities of modern man in an alien world are best brought out through the difficult ingredients that enter into the concept of guilt when K. says, "My innocence doesn't make the matter any simpler, . . . I have to fight

against countless subtleties in which the court indulges. And in the end, out of nothing at all, an enormous fabric of guilt will be conjured up."[41]

Alfred Döblin, the German author whose Alexanderplatz, Berlin, is generally thought to be his masterpiece, practiced medicine with a professional interest in psychoanalysis. This aspect was probably instrumental in his following the technique of free association and the stream-of-consciousness style of James Joyce.[42] Franz Biberkopf struggled to make his way after his release from prison. It is a depressing story which conveys the collective forces which crush the distressed and lonely protaganist who observes: "There is the good old father State, he rags and irks you soon and late. He pricks and pesters you--you're bled--with laws and codes: 'Prohibited.'"[43]

Finally, there are certain motifs incorporated in Jakob Wassermann's The Maurizius Case. Most important of these are the problems of justice, the treatment of criminals in penal institutions and man's indifference of his fellows. Wassermann, like Dreiser, was not the finished artist, yet Wassermann comes nearest to Dreiser in that numerous personages reflect Wassermann's belief in the mysterious incalculability of human nature.

The Maurizius Case is more like a detective story in which a youth, Etzel Andergast, fights against a blatant miscarriage of justice by making his youthful ardor and

idealism the instrument for breaking open the hardened souls of those who hold the key to the truth.

The question of justice which bulks so large in Wassermann's writings is approached in the Maurizius case from a variety of angles. What is justice? What is the relation of law to justice? What justice is there in punishment? Do courts mete out justice in judging the offense rather than the offender? Like Kafka, Wassermann was interested in the scales of justice when Etzel, who investigates the crime, hears "a whisper to the effect that the State has a right and a left hand, and a twofold measure, one for one hand, one for the other, and several scales and for each scale various weights."[44]

Then the youthful idealist asks himself: "What about justice? Is there really such a thing as justice? Don't we really imagine it, as pious persons imagine a paradise?"[45]

Etzel, who is only sixteen, calls upon the poet Ghisels for advice and he informs him: "Justice and love were originally sisters. In our civilization, they are no longer relatives."[46]

If, with the combined efforts of the various departments of literature, a course in the college curriculum were given in Humanitarian Literature for pre-legal students, then it surely should include Wassermann's The Maurizius Case, as well as Dreiser's An American Tragedy.

Dreiser considered the subject of crime and tried to ascertain the motivation of this murder. He found that the force which compels a person to commit murder is frustration in sexual, economic, or social strivings, the murder being instigated by rational and irrational motives. He showed Clyde as completely dominated by his inner drives to such an extent that apparently no means were too foul for achieving his goal. He stressed that certain inner conflicts, frustrations, and repeated disappointments were among the inner forces that called forth an abnormal attitude or elicited an abnormal drive that tends to steer Clyde in an antisocial direction. He writes concerning Clyde's will:

> There are moments when in connection with the sensitively imaginative or morbidly anachronistic--the mentality assailed and the same not of any great strength, and the problem confronting it of sufficient force and complexity--the reason not actually toppling from its throne, still totters or is warped or shaken --the mind befuddled to the extent that for the time being, at least, unreason or disorder and mistaken or erroneous counsel would appear to hold against all else. In such instances the will and the courage confronted by some great difficulty which it can neither master nor endure, appears in some to recede in precipitate flight, leaving only panic and temporary unreason in its wake . . . [47]

> Indeed the center or mentating section of his brain at this time might well have been compared to a sealed and

> silent hall in which alone and undisturbed, and that in spite of himself, he now sat thinking on the mystic or evil and terrifying desires or advice of some darker or primordial and unregenerate nature of his own, and without the power to drive the same forth or himself to decamp, and yet also without the courage to act upon anything.[48]
>
> At this cataclysmic moment, and in the face of the utmost, the most urgent need of action, a sudden palsy of the will--of courage--of hate or rage sufficient; and with Roberta from her seat in the stern of the boat gazing at his troubled and then suddenly distorted and fulgurous, yet weak and even unbalanced face--a face of a sudden, instead of angry, ferocious, demoniac--confused and all but meaningless in its registration of a balanced combat between fear (a chemic revulsion against death or murderous brutality that would bring death) and a harried--and restless and yet self-repressed desire to do--to do--to do--yet temporarily unbreakable here and now--a static between a powerful compulsion to do and yet not to do.[49]

Readers with a discernment of the protagonist in Feodor Dostoevski's Crime and Punishment will understand that the legal terms "intent," "murder in the first degree --deliberate and premeditated" do not apply to the planning of Clyde's murder. Dreiser has Clyde move to and fro like a stormy wave--a human being in agony and pain, whose mind swerves and veers. Concerning Clyde's deliberate and premeditated crime, Dreiser writes:

> And in this instance, the mind of Clyde might well have been compared to a small and routed army in full flight before a major one, yet at various times in its precipitate departure, pausing for a moment to meditate on some way of escaping complete destruction and in the coincident panic of such a state, resorting to the weirdest and most haphazard of schemes of escaping from an impending and yet wholly unescapable fate. The strained and bedeviled look in his eyes at moments--the manner in which, from moment to moment and hour to hour, he went over and over his hitherto poorly balanced actions and thoughts but with no smallest door of escape anywhere.[50]

Dreiser sees "intent" as one who hesitates and oscillates and then turns and twists into some abnormal form. As indicated by Dreiser, intent is:

> . . . The very substance of some leering and diabolic wish or wisdom concealed in his own nature, and that now abhorrent and yet compelling, leering and yet intriguing, friendly and yet cruel, offered him a choice between an evil which threatened to destroy him (and against his deepest opposition) and a second evil which, however it might disgust or sear or terrify, still provided for freedom and success and love.[51]

As to Clyde's motives, Dreiser never can make Clyde into an ancient demi-god. Clyde does not have heroic proportions. His desire is a very human one--the disease of our civilization--money. What were Clyde's motives? Dreiser writes:

> And Clyde, contemplating, all that had been said, was still unconvinced. Darker fears or better impulses supplanted the counsel of the voice in the great hall. But presently thinking of Sondra and all that she represented, and then of Roberta, the dark personality would as suddenly and swiftly return and with amplified suavity and subtlety.[52]

It should be mentioned that the French are the unchallenged masters of psychological analysis. Their vocation in fiction has been to probe searchingly into the workings of mind and soul so as to bring to light the complex feelings and hidden motives that enter into a crime like Clyde's.

It is, therefore, befitting that Régis Michaud, the French critic, summed up Dreiser's crime as follows:

> <u>An American Tragedy</u> is the most original attempt to detect the instillation of a criminal thought in a man's brain. Did anybody give a more exact,

> penetrating and dramatic account of how the idea of crime can invade a mind and gradually anesthetize the whole moral system or the criminal? Dreiser shows himself an expert and an explorer of the field of abnormal psychology by the way he marshalls what may be called instinctive logics, the logic of our blood and flesh, against rational logic, and by the way he detects the obscure sophistications of the inhibited and repressed to find motives which come to their selfish ends . . . The scenes of the book which show us the plan of the crime brewing in Clyde Griffiths' mind are tantamount to magic divination. Those pages on the function of the will must be recommended to professional psychologists. If Dreiser's views on the subject were accepted, our whole system of criminal legislation ought to be amended. . . .[53]

> His unflinching analysis leaves very little room for fully deliberate intention on the part of the criminal mind, a criminal thought operates like a microbe and it follows a homopathic process. It never becomes obvious, clear or exclusive enough to allow the use of the word "responsibility" in its current acceptance. Responsibility for a crime supposes a conception of the human mind and will which bio-chemistry contradicts. Such is Theodore Dreiser's attitude in regard to the problem of crime.[54]

Dreiser, like Dostoevski in Crime and Punishment, lays bare a man's soul. His attitude may perhaps be expressed in the wise epigram by the Chinese writer Lusin (Chou Shujen) as quoted by Lin Yutang, which states:

> The great judge of man's soul is at the same time its defendant. The judge on his bench enumerates the crimes the soul has committed while the defendant tries his best to paint a picture of its good points. The judge exposes the dirt in his soul, while the defendant reveals the beauty among its dirt. In this way, the depths of the human soul can be revealed.[55]

According to Dreiser, Clyde's crime is an explanation rather than a justification. Dreiser's concept of the crime is something that cannot be indicted because as yet we do not have the legal machinery for such a crime as Clyde's. There is a suggestion for a human relations court.

CHAPTER II

LAWYERS, JUDGES, LEGAL LANGUAGE, AND THE PUBLIC

> The legal apprentice he sweats and
> he strains
> To memorize every principle;
> He'd learn a lot more in the end for
> his pains
> By studying something sinciple.
>
> --Anonymous

> There are no such things as principles, there are only events; there are no laws, there are only circumstances; the man who is wiser than his fellows accepts events and circumstances in order to turn them to his own ends.[1]
>
> --Honoré DeBalzac, Le Pére Goriot

Not long after the murder, in spite of the various aliases he had used, Clyde is traced through letters found in Roberta's suitcase, left at Big Bittern, and he is arrested. The dramatic and romantic interest of the case arouses widespread interest. His uncle, Samuel Griffiths, more for the sake of his own good name than out of regard for Clyde, furnishes him with excellent counsel.

Much has been written about lawyers. In his Henry the Sixth, Shakespeare has Dick the butcher say: "The first thing we do, let's kill all the lawyers,"[2] and in his Utopia, Sir Thomas More conceived a country in which "they have no lawyers among them for they consider them as a sort of people whose profession it is to disguise matters," The Chinese are said to have a repugnance to lawyers as men who prove that right is wrong and wrong is right.

Percival E. Jackson, former counsel for the United States Senate for the Investigation of the Administration of Justice in the United States Courts, writes in Look at the Law:

> In Edward III's reign, the House of Lords voted the lawyers should be excluded from Parliament because of the prevailing feeling that lawyers were knaves and promoters of legislative mischief.
>
> Complaints were universal in the seventeenth century regarding the avarice and extortions of lawyers. They were charged with "picking the public pocket," engaging in "knavish tricks," talking unnecessarily in order to protract legislation, injuring their clients by vexatious and bootless delays and unnecessarily increasing work so as to increase fees.
>
> The American colonists also were notoriously suspicious of lawyers. According to James Truslow Adams, in Connecticut, in the seventeenth century, lawyers were legislated against in company with drunkards, keepers of disorderly houses and other people of ill-fame. John Adams wrote that "the mere title of lawyer is sufficient to deprive a man of public confidence."
>
> The early miners of the Pike's Peak region in Colorado exhibited their aversion in more practical form. They resolved that "no lawyer shall be permitted to practice law in any court in this district, under penalty of not more than fifty, nor less than twenty lashes, and be banished from the district."[3]

In The Growth of American Thought, Merle Curti, in discussing the intellectual life of the American people during the Revolutionary period, says:

> . . . It was the lawyers, the country's chief literary spokesmen, who were especially disliked by the plain people. Subservient to the creditor class, they could and did foreclose mortgages on the farmers and imprison urban debtors who were unable to meet their obligations. So great was the hostility to the law that its practitioners were sometimes asked by irate citizens of humble status to leave town. In 1786 the citizens of Braintree, a town near Boston, requested in town meeting that "there may be such laws compiled as may crush or at least put a proper check or restraint on that order of Gentlemen denominated Lawyers, the completion of whose modern conduct appears to us to tend rather to the destruction than to the preservation of the town." The conviction was widespread that, as one man writing in 1783 put it, the courts might be purged and "voluminous laws curtailed into a plain command, which the common people of plain sense, may understand." In view of such prejudice it is probable that many of the plain folk paid little or no attention to the demands for universal participation in the higher intellectual interests of the favored classes.[4]

Jackson, in the book already cited, talking of lawyers in recent times, says:

> The execration of lawyers continues, unabated, in modern tempo: the President of the United States charges lawyers with encouraging and abetting law evasions; a prominent inventor charges patent lawyers with practices "close to fraud;" a governor of Pennsylvania brands lawyers as "hairsplitters" guilty of toryism; an assistant United States Attorney taxes lawyers with "frustrating democracy;" while the annual Congress of the American Prison Association holds lawyers to be accessories to criminals.[5]

Professor Fred Rodell discusses the institution of law and lawyers in his admirable book, Woe Unto You, Lawyers![6] where he sets out to demonstrate that the law as an institution is of the utmost importance to every one of us. He tells us that in tribal times we had medicine men, in

the Middle Ages priests, but today it is the law that dominates us. He claims that it is the law which runs our civilization, our government, our business, and our private lives. He says that "most presidents, governors, commissioners, along with their brain-trusters are lawyers; they administer our laws. All judges are lawyers; they interpret and enforce our laws . . . As the school boy put it, ours is a 'government of lawyers, not of men.'"[7]

Vincent Keogh, a justice of the third highest court of New York State, was convicted of taking a bribe in an effort to go easy on several men convicted in a bankruptcy swindle. Max Lerner, newspaperman and professor of American Civilization at Brandeis University, in commenting on the tragic aspects of the Keogh case, suspects that there is some relation between the climate which produced this situation "and what is happening on college campuses--even in the Ivy League--where books are being stolen from the libraries and supplies are disappearing from the co-op stores. Not that the boys need the stuff badly, but they are exploring what they can get away with. When you have a climate of cheating, you must expect the tender plants will get little nourishment."[8]

The most tragic case was the resignation of Associate Justice Fortas from the Supreme Court of the United States because of his extrajudiciary relations with jailed financier Louis E. Wolfson and his acceptance of $20,000

from the Wolfson Foundation after he went on the bench and after Wolfson got in trouble with the law. It was tragic for Fortas, tragic for the Supreme Court, and tragic for the country. An apt statement is the compassionate one made by the New York Post: "To deride his [Fortas'] ordeal or exult in the outcome would be pitiless and primitive. But in the serious circumstances, his action was inevitable; the evidence is clear and overwhelming."[9]

It is interesting to note the various concepts of lawyers that appear in the literature of other countries. In French literature, Baron De Montesquieu, the first of the great philosophers of the eighteenth century (who recommends a separation of powers in his The Spirit of the Laws[10] that was later to be embodied in the American Constitution) also wrote an epistolary novel, The Persian Letters, in which one of the Persian characters discusses the lawyers on the continent, and asks: "'And aren't they [the lawyers] sometimes also responsible for deceiving you?' . . . 'You would do well to protect yourself against their snares. They have arms with which they attack your justice. It would be a good thing for you to have some defend it, a good thing not to go lightly dressed to battle people armed to the teeth.'"[11]

Gustave Flaubert, whose Madame Bovary remains his most widely read work, also wrote Sentimental Education which has never enjoyed the general esteem of Madame Bovary, yet there are many who consider this work the author's supreme accomplishment. It is in this book that Flaubert describes the political and social implications of the Revolution of 1848 in the last years of Louis-Phillippe. As for the concept of lawyers during the revolution, Flaubert states: "To obtain a reputation for common sense, it was necessary to criticize the lawyers all the time, and to use the following expressions as often as possible: 'contribute one's stone to the building . . . social problem . . . workshop.'"[12]

Guy De Maupassant, the incomparable master of the short story, was also a novelist who learned from Flaubert, who taught him the value of "le mot juste" and of accurate detail. His first novel, A Woman's Life, is the sad story of a suffering mother who seeks consolation from the fanatic priest Tolbiac. Jeanne, like Emma Bovary, "would loose herself in cloudy poetic arguments, while he [Abbé Tolbiac], being more exact, would reason like a lawyer possessed with the mania for proving the possibility of squaring the circle."[13]

Émile Zola, the head of the Naturalistic School, but a romantic by temperament whose best novel probably is Germinal, a study of miners and the mine. Etienne Lantier

is the awakened proletariat who advocates the strike. At one point, he doubts his mission and thinks, "Perhaps that man ought to be a lawyer, a learned man able to speak and act without compromising his fellow workers? But then a reaction soon restored his self-esteem. No, no, they didn't want lawyers! All lawyers were rogues using their knowledge to enrich themselves at the people's expense. Come what may, the workers must manage their own affairs."[14]

Louis-Ferdinand Céline, the author of Journey to the End of the Night, the book which narrowly missed the Goncourt prize, writes a sort of picaresque novel of adventure in which there are incidents similar to those in Cervantes' Don Quixote. In this book, we find the crimes of criminal conspiracy, attempted murder, and murder. Throughout the voyage, Bardamu has been accompanied by a mysterious fellow wanderer, Robinson. When Bardamu arrives in his solitary outpost in the jungles of Africa, Robinson is already there and preparing to absconed with the company's funds. Bardamu has to take inventory. In a state of hallucination, he ponders about the law.

> As soon as I felt the least bit better, slightly less bewildered and battered, the damnable fear took hold of all of me again--the fear of having to account to the Porduriere Company. What should I say to these hard-hearted creatures? How should they believe me? They'd certainly have me arrested. Then who should I be judged by? A special group of men armed with frightful laws deriving their authority from Heaven knows where, like a court-martial, laws whose real intentions are always kept from you, judges whose sport it is to urge you bleeding along a narrow

> track skirting the pit of hell, a road which leads the poor to their destruction. The law is misery's great Luna Park--when an underdog gets caught in it, you can hear him screaming forever after.[15]

In Céline's second novel Death on the Installment Plan, which some critics consider his best, the hero Ferdinand is apprenticed to a lovable character, the cheerful fraud and mythomaniac Courtial des Perieres. Living by his wits, Cortial is a jack-of-all trades. Editor, writer of manuals, hawker and inventor, he has surrounded his ego with evident achievements. With all his accomplishments, "He was damn sick of lawsuits and claims . . . in connection with the 'multiple' and 'reversible' patents . . . He was fed up . . . He didn't go for lawyers and headaches . . ."[16] This is the novel of the three dots--the punctuated stutter of progressive rage and hysteria.

Albert Camus' last novel, The Fall, a rather ambiguous work in which a seedy lawyer Jean-Batiste Clamence confesses in monologue form the symbolism of self-flagellation--a defeated generation, repenting of its morals and politics, wishes to have a new start. Clamence discovers his former good deeds have been done only for popular approval--always where there were witnesses to applaud his actions and his language. Thus: "The reference, purely verbal, that I often made to God in my speeches before the court awakened mistrust in my clients. They probably feared that heaven could not represent their interests as well as a lawyer invincible when it came to the code of

law."[17] And on the last page, Clamence tells his silent interlocutor: " . . . You practice the noble profession of lawyer! I sensed that we were of the same species. Are we not all alike, constantly talking and to no one, forever up against the same question although we know the answers in advance?"[18]

In Russian literature, there are numerous examples. In Leo Tolstoy's final novel, Resurrection, Nekhludov is serving on the jury of Katusha, a prostitute charged with murder. He is her first lover who now must judge her. He tries to understand his fellow jurors.

> He [Nekhludov] walked away and approached a group gathered around a tall, handsome, cleanshaven man who was talking with great animation about a trial now going on in the civil court, where he seemed to be familiar with the judges and fashionable lawyers whom he referred to by their Christian names. He was describing the remarkable way in which a famous lawyer had handled his case: he had succeeded in compelling an old lady who had the right on her side to pay his client, her adversary, a large sum of money.
>
> "That man is a genius!" he exclaimed.[19]

Dostoevsky in Memoirs from the House of the Dead, in which the author describes his four years in prison at Omsk in Siberia where he reflects: "These advocates of the application of the law definitely do not understand, and are incapable of understanding, that the mere fulfillment of the law, without reason or comprehension of its spirit, leads straight to disorder and has never led to anything else. 'The law says so; what more do you want?' they say, and are sincerely astonished that anybody should demand of

them, in addition to the letter of the law, sound judgement and sober heads."[20]

Dostoevsky's story, thinly disguised as a novel, is remarkable for its detachment and freedom from bitterness and its sympathetic understanding for his unfortunate fellow prisoners.

The same thought, but in a more humorous light (since the author was never imprisoned for a political crime), is expressed by Harper Lee, winner of the Pulitzer Prize novel, To Kill a Mockingbird. The lawyer, Atticus, hears the complaints of his daughter concerning the advanced Dewey method of education, one which crippled the educational system of New York City and many other cities and towns for twenty years, and may well be the reason for the present student discontent and frustration. She already knows how to read and write, but does not want to go to school because of the new way they are teaching in the first grade--a method not to read but to learn through experience. Her father wisely instructs her: "Sometimes it's better to bend the law a little in special cases. In your case the law remains rigid. So to school you must go."[21]

In contrast to the lawyer Atticus, the German author Jakob Wassermann describes Andergast in The Maurizius Case as a lawyer who typifies ossified belief in the letter of the law, faith in abstract legal codes, rigid systems, soulless machinery and punishment. His divorced wife reproaches

her husband and is quite justified: "In your eyes, right and the law are institutions which are proof against human criticism. I dreamed once that a tremendous crowd of people grovelled on their knees before you, begging you to revoke a decree, but you stood like a pillar of stone . . . Not to have been able to make mistakes, what a curse!"[22]

His son Etzel describes his background to one of the characters: "Perhaps you will understand better if I tell you that I grew up in a house in which a verdict is what a sacrament is in a church."[23]

Finally, in the Japanese novel No Longer Human, the hero Yozo is taken to a mental hospital where once a record is established, then "Even if released I would be forever branded on the forehead with the word 'madman,' or 'reject.'"[24] He describes himself as "Disqualified as a human being."[25]

Yozo is a sensitive, lonely, loving individual whose situation is not of his own making. This young man who thought himself "disqualified from being human" is a literal translation of the Japanese title of the novel.

Earlier in the book he describes his experience with the law. Here is his story:

> But among my otherwise nostalgic memories there is one harrowing disaster which I shall never be able to forget and which even now causes me to break out into a cold sweat. I was given a brief examination by the district attorney in his dimly lit office. He was a man about forty, with an intelligent calm about him which I am tempted to call "honest good looks" (in contrast to my own alleged good looks which, even if true, certainly are tainted with lewdness). He seemed so simple and straightforward that I let down my guard

> completely. I was listlessly recounting my story when suddenly I was seized with another fit of coughing. I took out my handkerchief. The blood stains caught my eye, and with ignoble opportunism I thought that this cough might also prove useful. I added a couple of extra, exaggerated for good measure and, my mouth still covered by the handkerchief, I glanced at the district attorney's face.
>
> The next instant he asked with his quiet smile, "Was that real?"
>
> Even now the recollection makes me feel so embarrassed I can't sit still . . . Sometimes I have even thought that I should have preferred to be sentenced to ten years imprisonment rather than meet with such gentle contempt from the district attorney.[26]

It is the prosecutor, even more than the judge, whose task it is to rid society of the individuals who violate the law. The prosecution in a criminal case is handled by a public prosecutor, who in New York is called a district attorney. He is a public servant representing the sovereign power of the state.

The political nature of the district attorney's office has led generally to an overemphasis on convictions, a fact that often enables the defendant to plead guilty to a lesser crime; furthermore, it often leads the district attorney to seek publicity value of cases. In theory, the district attorney is required to protect the rights of an accused person. It is his duty to establish innocence as well as to prevent guilt, but the truth is that the chief object of the district attorney is to prosecute crime. Mr.

Mayer C. Goldman, who has done much to bring before the people the idea of a state-paid attorney or other public defender to represent the indigent defender, states in The Public Defender:

> If they [public prosecutors] were so perfectly constituted that they could properly safeguard the rights of the accused, there would be no need for private counsel to undertake defense--or for judge and jury to decide the law and the evidence. It is important to note that the law makes no provision for the district attorney to defend--his function is to prosecute--and the people demand a vigorous prosecution.[27]

Dreiser emphasizes the element of guilt in the prosecution of Clyde when the district attorney, Mason, in his opening speech to the jury is described:

> . . . Turning dramatically toward Clyde, and with his right index finger toward him at times, [he] continued: "The people of the State of New York charge" [italics Dreiser's] (and he hung upon this one word as though he desired to give it the value of rolling thunder), "that the crime of murder in the first degree has been committed by the prisoner at bar--Clyde Griffiths. They charge [italics Dreiser's] that he willfully, and with malice and cruelty and deception, murdered and then sought to conceal forever from the knowledge and the justice of the world, the body of Roberta Alden. . . . They charge [italics Dreiser's] . . . that this same Clyde Griffiths plotted for weeks the plan and commission of it, and then with malice, aforethought and in cold blood, executed it."[28]

Dreiser was well acquainted with the whole system of political favoritism. He knew that the prosecutor was a practical politician who looked upon his office as a stepping stone to a more lucrative position. Thus, we find the district attorney thinking:

> A quadrennial county election was impending, the voting to take place the following November, at which were to be chosen for three years more the entire roster of

> county offices, his own included, and in addition this year a county judge whose term was for six years [italics mine]. In August, some six weeks further on, were to be held the county Republican and Democratic conventions at which were to be chosen the regular party nominees for these respective offices. Yet for no one of these places, thus far, other than that of the county judgeship, could the present incumbent of the office of district attorney possibly look forward with any hope, since already he had held the position of district attorney for two consecutive terms, a length of office due to the fact that not only was he a good orator of the inland political stripe but also, as the chief legal official of the county, he was in a position to do one and another of his friends a favor [italics mine]. But now, unless he was as fortunate as to be nominated and subsequently elected to this county judgeship, defeat and political doldrums loomed ahead. For during all his term of office thus far, there had been no really important case in court in connection with which he had been able to distinguish himself and so rightfully and hopefully demand further recognition from the people. But this . . .[29]

And Mason exclaims:

"This may turn out better than we think. It looks to be the biggest and most important case in all of my term of office, and if we can only clean it up satisfactorily and quickly, before things break here this fall, it may do us all some good, eh?"[30]

The prosecutor's position is such that he usually professes to be nonpartisan, and he asserts that no innocent person will be convicted through his activities, yet the Coroner Heit tells Mason:

> You know what the political situation here is just now, and how the proper handling of a case like this is likely to affect public opinion this fall. And while I certainly don't think we ought to mix politics in with crime there certainly is no reason why we shouldn't handle this in such a way as to make it count in our favor [italics mine].[31]

Mr. Goldman, in the book already quoted, points out an advantage the district attorney may enjoy over the defendant's counsel:

> He can, and frequently does make application for the appointment of a particular judge to try a specific case, of importance to the community--in other words, he selects his own judge. Would it not be considered most unusual and improper for an accused person to ask for the assignment of a particular judge to try his case? Would such a request be granted?
>
> But without asking for a special judge, the district attorney may, in large communities, indirectly select his own judge by moving cases on for trial at such time, as he may desire, and thereby bring them up at a term of court presided over by a judge of his own choice.[32]

Thus, we find that Mason, the district attorney:

> . . . Decided to communicate with the governor of the state for the purpose of obtaining a special term of the Supreme Court for this district, with its accompanying special session of the local grand jury, which would then be subject to his call at any time. For with this granted, he would be able to impanel a grand jury and in the event of a true bill being returned against Clyde, then within a month or six weeks, proceed to trial. Strictly to himself, however, he kept that fact in view of his own approaching nomination in the ensuing November election this should all prove most opportune, since in the absence of any such special term the case could not possibly be tried before the succeeding regular January term of the Supreme Court, by which time he would be out of office and although possibly elected to the local judgeship still not able to try the case in person. And in view of the state of public opinion, which was most bitterly and vigorously anti-Clyde, a quick trial would seem fair and logical to every one in this local world. For why delay? Why permit such a criminal to sit about and speculate on some plan of escape? And especially when his trial by him, Mason, was certain to rebound to his legal and political and social fame the country over.[33]

In the Gillette case, the defense attorneys raised this very issue in the appeal. They claimed the court which

held the trial was not organized according to the Constitution[34] of the state, and therefore had no jurisdiction of power to try Gillette or to pronounce the judgment of death against him. However, the Court of Appeals declared that the power of the Governor to call an extraordinary term of the court and the jurisdiction of the court was not questionable.[35]

Dreiser shows us the political aspects of the situation. The Governor who calls an extraordinary term of the court is a Republican who works hand in hand for a speedy victory with the Republican prosecutor. This information we get indirectly when Dreiser tells us that Judge Oberwaltze is a "Democrat, who owed his appointment to a previous governor."[36] And then we get Clyde's attorney "intimating that the undue haste of the district attorney in seeking a special term of the Supreme Court might possibly have a political rather than a purely legal meaning. Else why hurry, especially in the face of an approaching county election? Could there be any plan to use the results of such a trial as this to further any particular person's or group of persons', political ambitions?"[37]

As the mainspring of law enforcement, the district attorney takes the initiative in crime detection and investigation. Surveys have demonstrated the prosecutor's

dictatorial control over criminal proceedings. His broad investigatory and discretionary powers have minimized the importance of the preliminary examination, in which small effort is made to conduct an adequate judicial inquiry into the circumstances of the crime.

In Criminal Justice in America, Roscoe Pound states that the duties of the district attorney in this respect are not clearly defined and "responsibility as between sheriff or police and prosecutor is, as usual, divided or diffused. When a sensational crime has been committed, coroner, police and district attorney may each go out for glory or publicity in their own way. Politics require taking advantage of possibilities of publicity. Thus, these possibilities become a determining factor in criminal investigation."[38]

In this connection, it is interesting to note the zeal displayed by young Swenk, one of the deputies appointed to arrest Clyde.[39] As Dreiser sees it, he was "blazing with a desire to arrest and handcuff someone. . . . And with great dreams of being the one to capture the murderer"[40]. . . and use those magic words--"I arrest you, Clyde Griffiths in the name of the law."[41]

We also find that Burton Burleigh, the assistant to the district attorney, resorts to unscrupulous practices. Dreiser describes him thus:

> In Burton Burleigh there existed as sly a person as might have been found in a score of such backwoods countries as this, and soon he found himself meditating on how easy it would be supposing irrefragable

> evidence was necessary, for him or any one to cut a finger and let it bleed on the rug or the side of the boat or the edge of the camera. Also, how easy to take from the head of Roberta two or three hairs and thread them between the sides of the camera, or about the rowlock to which her veil had been attached. And after due and secret meditation, he actually deciding to visit the Lutz Brothers morgue and secure a few threads of Roberta's hair. For he himself was convinced that Clyde had murdered the girl in cold blood. As for want of a bit of incriminating proof, was such a young, silent, vain crook as this to be allowed to escape? Not if he himself had to twine the hairs about the rowlock or inside the lid of the camera, and then call Mason's attention to them as something overlooked![42]

It is important to note here that in the Gillette case the defense attorney declared that it was error to submit the two specimens of hair to the jury and let them speculate as to their identity.[43] The district attorney in that case claimed that no error was committed in exhibiting to the jury the entangled hair collected from the braces of the boat, together with some hair cut from the dead woman's head.[44] However, Dreiser uses this information to show us what goes on behind the scenes so that we may understand methods used by the district attorney's office in order to obtain evidence for a conviction.

Harry Elmer Barnes and Negley K. Teeters declare:

> We know that ambitious district attorneys want to be successful in their profession and often resort to questionable practices. The real go-getting prosecutor is adept in all the tricks of the trade. . . . If he cannot get his evidence through normal channels, he may feel obliged to resort to high-handed methods. It is the confiction that measures his success; the methods he employs are overlooked by the general public.[45]

Thus, we find Mason taking a hand in the criminal investigation in a manner not recognized by the law. He gets an inspiration:

> He would take Clyde and, although the law specifically guaranteed accused persons against compulsions, compel him to retrace the scenes of his crime. And although he might not be able to make him commit himself in any way, still, once on the ground and facing the exact scene of his crime, his actions might reveal something of the whereabout of the suit, perhaps, or possibly some instrument with which he had struck her.[46]

Roscoe Pound says that "under our legal system the way of the prosecutor is hard, and the need of 'getting results' puts pressure upon prosecutors to use the 'third degree,' to suppress evidence, to bull-doze witnesses, and generally to indulge in that lawless enforcement of law which produces a vicious circle of disrespect for law."[47] The same author discusses the much-condemned power of the district attorney to compromise his cases: "Ninety per cent of the 'convictions' are upon pleas of guilty, made on 'bargain days,' in the assured expectations of nominal punishment, as the cheapest way out."[48] And so we find Mason with the same bag of tricks and bargaining methods. He tries to compromise Clyde.

> "Why not come clean here and now as to those facts, anyhow, before it's too late to take advantage of any mitigating circumstances in connection with all this --if there are any? And if you do <u>now</u> [italics Dreiser's], and I can help you in any way, I promise you here and now that I'll be only too glad to do so. For, after all, I'm not out here just to hound a man to death or make him confess to something that he hasn't done, but merely to get the truth in the case. But if you're going to deny that you ever knew the girl when I tell you that I have all the evidence and can prove it, why then--" and here the district attorney lifted his hands aloft most wearily and disgustedly.[49]

Three days after the arrest, the murder trip is retraced with Clyde by the district attorney with his

assistant Burton Burleigh, the coroner Heit and his assistant Earl Newcomb, Sheriff Slack, and First Deputy Kraut. Kraut is to follow the instructions of Mason to play up to Clyde

> in order to ingratiate himself into his good graces, and probably cause him to make a clean breast of it. For Kraut was to argue that the evidence, so far, was so convincing that you "never would get a jury to believe that you didn't do it," but that, "if you would talk right out to Mason, he could do more for you with the judge and the governor than any one could--get you off, maybe, with life or twenty years, while this way you're likely to get the chair, sure."[50]

The third-degree methods used by the arresting officers to obtain a confession from Clyde are more of a psychological than of a physical nature. Some policemen contend that it is impossible to get along without some mild form of third-degree methods, yet many students of criminal procedure maintain that any questioning of a suspect to be legal must be in the presence of responsible persons who will safeguard the interests of the accused. One of these persons should be the accused's own attorney or some other person who can see that his legal rights are not placed in jeopardy.

Third-degree tactics are without doubt a violation of the law. The Constitution of the United States makes elaborate provision for the protection of the individual against any invasion of his person and property in securing evidence of his wrongdoing. The Fifth Amendment says: "No person . . . shall be compelled to be a witness against

himself." There is a similar provision in the New York Constitution.[51] Thus, the rights of the accused are protected by both constitutions.

In an article in the Atlantic Monthly, Zachariah Chafee declares: ". . . the third degree is unnecessary for putting down crime. It ought to be abolished, not merely because it is illegal, but because of the serious evils it causes. It involves the danger of wholly or partially false confessions. It impairs the efficiency of the police by accustoming them to trying to prove most cases by extorted confessions instead of looking for witnesses and facts."[52]

The methods used by the district attorney have frequently come before the New York courts. Thus, in one New York Court of Appeals case[53] reversing a conviction of the defendant on a charge of attempted murder, the Court declared:

> We close our review with the remark made as a deliberate remonstrance against the necessity for frequent reversals in criminal cases, that too many prosecuting officers run dangerous, foolish and unprofessional risks in order to secure a conviction. . . . Judgment of conviction should be reversed and a new trial ordered.[54]

And Chief Justice Cullen (who dissented from the opinion on other grounds) wrote:

> I join my brother [Judge Vann] in reprehending the manner in which important criminal prosecutions are so frequently conducted at this time, often evincing ignorance of the ordinary rules of evidence or disregard for the interest of both the People and the

> defendant, which alike require that a trial should be had according to law.[55]

The murder by Clyde took place in Cataraqui County,[56] a rural area of New York state. The traditional organization of the law enforcement agencies found in rural areas is quite different from that in the cities. The sheriff is the legally constituted law enforcement agent in those subdivisions of the state called counties. The sheriff's assistants, the deputy sheriffs, assist him in his duty, whether it be the care and custody of the inmates of the county jail or the investigation of the crime. In many places, the sheriff has divested himself of his statutory duties to apprehend criminals, except in the rural West and South, where the county continues to be the focal point of local government. Occasionally, for the purpose of a publicity stunt as portrayed in An American Tragedy, or in case of disturbance of the public peace, the sheriff will exercise his powers by appointing deputies and engaging in a manhunt or police duty.

There is one other county officer of some importance in law enforcement--the coroner. He is required by law to determine the cause of death and fix responsibility in suspicious cases or where no physician's certificate is available. His responsibility is great, since he must

differentiate between natural causes of death and death at the hands of some person, which constitutes homicide. Usually, he is poorly qualified for his office. In some states, he must be a physician or have some medical information or even be "learned in the law."[57]

As to lawyers for the defense--a significant story is told about a criminal lawyer of the West. One day a well-dressed high-bred old Chinese entered his office. He wanted to know how much the lawyer would charge to defend him for murder. He was informed. He sat down, began pulling little bags out of his voluminous garments, and finally counted out the money in gold. Then he rose and with a deep bow, started out. "Hey," said the lawyer, "come back here. What's all this? Where are you going?" "I go kill the man now," said the Chinese, "then I be back." The attitude of this Chinese serves as an illustration of the layman's concept of a criminal lawyer--one who will defend any crime at a price.

The criminal lawyer sometimes fabricates defenses he knows to be manufactured and false. The layman does not realize that the criminal lawyer who gets his guilty client acquitted by a defense that is fabricated, with or without the aid or suggestion of the client, is to be considered dishonest, although he may plead that "every lawyer is

entitled to present the best defense his client has."

Dreiser knew that there were many unscrupulous criminal lawyers who could be bought by the rich at a price. He tells us about the firm of Canavan & Canavan, "most able if dubious individuals." Clyde's uncle and his cousin Gilbert knew there

> . . . were criminal lawyers deeply versed in the abstrusities and tricks of the criminal law. And many of them--no doubt--for a sufficient retainer, and irrespective of the primary look of a situation of this kind, might be induced to undertake such a defense. And, no doubt, via change of venue, motions, appeals, etc., they might and no doubt would be able to delay and eventually effect an ultimate verdict of something less than death, if such were the wish of the head of this very important family.[58]

We must remember that in a complicated society there must be men trained in the legal profession--men who devote their lives to studying the constitutional guarantees that are necessary in order to protect the individual. No matter how depraved, the prisoner is entitled to all the privileges guaranteed to any citizen by the Constitution. Whatever the public thinks, there are many criminal lawyers who are known for their honesty and humanity. The late Clarence Darrow was such a lawyer. He defended many notorious criminals who, although they were doubtless guilty of serious crimes, escaped severe penalties merely because Darrow saw to it that their legal rights were not encroached upon by the prosecution. Darrow was once charged with trying to prejudice the jury.[59] "Surely I am," he said. "That's what I'm here for." In theory,

if both sides of an issue are fully presented, an impartial tribunal is likely to reach a just decision.

Clyde's uncle employed the law firm of Belknap & Jephson to defend Clyde. Belknap is Dreiser's humanitarian Darrow, who considers the criminal an ordinary human being confronted with a problem he finds it difficult to solve. Through this attorney, Dreiser presents the idea that the nature of the crime is not important, but that the nature of the criminal is important because he is the victim of a peculiar set of circumstances. When Belknap is asked by his law partner whether he thinks Clyde is guilty, he replies:

> "Well, now as astonishing as it may seem to you, no. At least, I'm not positive that I do. To tell you the truth, this is one of the most puzzling cases I have ever run against. This fellow is by no means as hard as you think, or as cold--quite a simple, affectionate chap, in a way, as you'll see for yourself--his manner, I mean. He's only twenty-one or two. And for all his connections with the Griffiths, he's very poor--just a clerk, really. And he tells me that his parents are poor, too. . . ."[60]

> "That's just the point, I'm trying to make. He could plot to kill one girl and maybe even did kill her, for all I know, after seducing her, but because he was being so sculled around by his grand ideas of this other girl, he didn't quite know what he was doing, really. Don't you see? You know how it is with some of these young fellows of his age, and especially when they've never had anything much to do with girls or money, and want to be something grand.[61]

The other lawyer is Jephson, who is described as a criminal lawyer "with a mental and legal equipment which

for shrewdness and self-interest was not unlike that of a lynx or ferrett."[62] Through his picture of Jephson, Dreiser indicates all the loopholes and fabricated defenses that are open to the lawyer for the defense.

Jephson turned to Belknap "and began to inquire as to what he thought of suicide as a theory, since Roberta's letters themselves showed a melancholy trend which might easily have led to thoughts of suicide. And could they not say that once out on the lake with Clyde and pleading with him to marry her, and he refusing to do so, she had jumped overboard. And he was too astounded and mentally upset to save her."[63] But that defense was out because of the false registrations at the hotel, the two hats, Clyde's suit and bag.

The blackening of Roberta's character is also suggested by Jephson, so that the jury may be more sympathetic with Clyde. This type of argument is used to affect her credibility--perhaps another man was guilty who blamed Clyde. Thus, Jephson asks: "'In all of that time that you were with her, or before, was she ever friendly, or maybe intimate, with any other young man anywhere--that is, that you know of?'"[64] Clyde was shocked and thought: "What a shameful thing in connection with Roberta and her character it would be to introduce any such lie as this. He could not and would not hint any such falsehood."[65]

The defense of insanity is one of the most common and troublesome defenses appearing in the courts. There is probably nothing more confusing in the whole realm of criminal jurisprudence than the moral responsibility of an offender, especially when the crime is murder. The "right-and-wrong" test is the law in New York and in the majority of the states. In order to punish the defendant legally, he must have freedom of will, and if pathologically he does not have freedom of the will and cannot distinguish between right and wrong, he should not be punished for the crime.

The contention of "irresistible impulse" is not a defense in New York. It never was a defense in New York, and as of the date of this study (1969) still is not a defense. In some states, a person is not criminally responsible even though he knows the act is wrong, if it is proved to have been the result of an "irresistible impulse." While the terms "irrestible impulse" and "insane delusion" have a meaning in the law, they are not recognized by psychiatrists as having any definite medical connotation. The law refuses to recognize moral insanity, while the mind is sound. And, whatever they may mean psychologically, "ungovernable passion" and "emotional insanity" may not be used in justification of a criminal act.

The plea of insanity is used for the purpose of mitigating the punishment. If legal insanity cannot be established, very often the jury takes a more practical view of the case and acquits the defendant, and in many cases the jury is right in the social function it performs.

In discussing the plea of insanity, Belknap says:

> "I'm not so sure that we want to mention that cataleptic business yet--at least not unless we want to enter a plea of insanity or emotional insanity, or something like that--about like that Harry Thaw case, for instance."[66]

And then Jephson asks Clyde: "No uncle or cousin or grandfather who had fits or strange ideas or anything like that?"[67]

And Jephson declares:

> "Well, whatever theory we advance, those things will have to be accounted for in some way. . . . We can't admit the true story of his plotting without an insanity plea, not as I see it--at any rate. And unless we use that, we've got that evidence to deal with whatever we do."[68]

But Belknap persisted that the insanity plea would have to be omitted because of Clyde's refusal to marry Roberta "after his promises referred to in her letters--why it would only react against him so that public opinion would be more prejudiced against him than ever. No, that won't do . . . We'll have to think of something which will create some sort of sympathy for him."[69]

Finally, Jephson concocted a defense that might work in view of all the evidence gathered by the district attorney. The last minute, Clyde experiences a change of

heart. He wants to marry Roberta; the drowning was an accident. And so Jephson instructs Clyde:

> "You're not guilty! You're not guilty, Clyde, see? You understand that fully by now, and you must always believe and remember that, because it's true. You didn't intend to strike her, do you hear? You swear to that. You have sworn it to me and Belknap here, and we believe you. Now, it doesn't make the least bit of difference that because of the circumstances surrounding all this we are not going to be able to make the average jury see this or believe it just as you tell it. That's neither here nor there. I've told you that before, you know what the truth is--and so do we. But [italics Dreiser's], in order to get justice for you, we've had to get up something else--a dummy or substitute for the real fact, which is that you didn't strike her intentionally, but which we cannot hope to make them see without disguising it in some way. You get that, don't you?"
>
> "Yes, sir," replied Clyde, always over-awed and intrigued by this man.
>
> "And for that reason, as I've so often told you, we've invented the other story about a change of heart. It's not quite true as to time, but it is true that you did experience a change of heart there in the boat. And that's our justification. But they'd never believe that under all of the peculiar circumstances, so we're merely going to move that change of heart up a little, see? Make it before you ever went into that boat at all. And while we know it isn't true that way, still neither is the charge that you intentionally struck her true, and they're not going to electrocute you for something that isn't true--not with my consent, at least." He looked into Clyde's eyes for a moment more, and then added: "It's this way, Clyde. It's like having to pay for potatoes, or for suits of clothes, with corn or beans instead of money, when you have money to pay with but when, because of the crazy notions on the part of some one, they won't believe that the money you have is genuine. So you've got to use the potatoes or beans. And beans is what we're going to give 'em. But the justification is that you're not guilty. You've sworn to me that you didn't intend to strike her there at the last, whatever you might have been provoked to do at first. And that's enough for me. You're not guilty."[70]

In the Gillette case, suicide was used as a defense, but in An American Tragedy other defenses are shown to be opened to the accused. The reader attends all the conferences in jail and listens to all the discussions concerning the merits and demerits of the various defenses proposed.

And the clowns in Shakespeare's Hamlet, likewise, have their say when they discuss the moral elements involved in Ophelia's drowning and suicide:

> 1st Clown: Is she to be buried in Christian Burial that wilfully seek her own salvation?
>
> 2nd Clown: I tell thee she is, and therefore make her grave straight. The crowner hath sat on her, and finds it Christian burial.
>
> 1st Clown: How can that be, unless she drown'd herself in her own defence?
>
> 2nd Clown: It must be "se offendendo," it cannot be else. For here lies the point: if I drown myself wittingly, it argues an act, and an act hath three branches; it is [to] act, to do, and to perform; argal, she drown'd herself wittingly.
>
> 2nd Clown: Nay, but hear you, goodman delver,--
>
> 1st Clown: Give me leave. Here lies the water; good. Here stands the man; good. If the man go to this water and drown himself, it is, will he, nill he, he goes,--mark you that? But if the water come to him and drown him, he drowns not himself; argal, he that is not guilty of his own death shortens not his own life.
>
> 2nd Clown: But is this law?
>
> 1st Clown: Ay, marry, is 't; crowner's quest law.
>
> --Shakespeare, Hamlet, Act V, Scene 1.

Belknap, like the district attorney, is also involved in politics. He had twice been state senator, three times Democratic assemblyman,

> and more recently looked upon by various Democratic politicians as one who would be favored with higher honors . . . . In fact only three years before, in a contest with Mason for the district attorneyship, this same Belknap had run closer to victory than any other candidate on the Democratic ticket. Indeed, so rounded a man was he politically that this year he had been slated for the very county judgeship nomination which Mason had in view. And but for this sudden and most amazing development in connection with Clyde, it had been quite generally assumed that Belknap, once nominated, would be elected . . . [71]

> [He] had even been thinking that . . . the local situation being what it was might advantageously to himself --and perhaps most disruptingly to the dream of Mr. Mason be able to construct a defense--or at least a series of legal contentions and delays which might make it not so easy for Mr. Mason to walk away with the county judgeship as he imagined. Might it not, by brisk, legal moves now--and even in the face of this rising public sentiment, or because of it,--be possible to ask for a <u>change of venue</u> [italics mine]--or time to develop new evidence in which case a trial might not occur before Mr. Mason was out of office.[72]

The venue is the neighborhood, place, or county in which an injury is declared to have happened. It is also defined as the county (or geographical division) in which an action or prosecution is brought for trial, and which is to furnish the panel of jurors. To "change the venue" is to transfer the cause for trial to another county or district.[73]

The prosecutor and the defense attorneys take advantage of every political influence. Thus, Mason persuades

the Republican governor to grant an extraordinary term of court for a speedy victory, and the defense attorneys try to use their political connections with the Democratic judge to delay the action and thus obstruct Mason. They "argue for a change of venue, on the ground that by no possible stretch of the imagination could any twelve men residing in Cataraqui County be found who, owing to the public and private statements of Mason, were not already vitally opposed to Clyde and so convinced of his guilt that before ever such a jury could be addressed by a defense, he would be convicted."[74]

When one considers the infinity of political considerations possible in a case, one realizes they cannot be arranged by resorting to simple formulas. Another element enters into the legal process--the personality of the judge.

When Belknap tries to convince the Democratic judge concerning a change of venue because "the district attorney has been so busy in magnifying" this crime and "you can't get twelve men now who will try this man fairly," the judge replies "that this same material has been published everywhere."[75] So, after five days the judge decides to deny the motion for a change of venue because of "Justice Oberwaltzer, who was of a sober and moral turn, a slow

and meticulous man inclined to favor conservative procedure in all things. . . . If he were wrong, there was the Appellate Division to which the defense could report."[76]

Professor John Barker Waite points out in Criminal Law in Action that the authority of the trial judge is reviewable by the higher courts, which do not hesitate to reprimand a judge if he has erred in his conduct of a trial. But, if the judge has been technically correct with respect to the law, the higher courts take little cognizance of any obvious bids on his part.[77]

Other factors that enter the process are technicalities and legal jargon. Charles Macklin, an eighteenth century dramatist, said in Love a la Mode that "the law is a sort of hocus-pocus science."[78] The mother in The Winslow Boy (a play by the English author Terrence Rattigan) attends the proceedings instituted to clear her son of a charge of petty thievery. She explains to the members of her family that for four days she has gone to court without understanding a word and she wonders what "petitions" and "demurrers" have to do with her poor little boy.

James Joyce, the most misunderstood writer of our day, whose works are so esoteric that most readers can take him only in small doses, nevertheless is more successful in realizing a near-infinitude of experiences in an

instantaneous flash of language than the law is with its legal jargon and technicalities. Thus, in Ulysses, Joyce describes the manner in which Mr. Bloom appeases his sense of sin as to the problem of sex relationship by comparing the act with other little sins like the law:

> As natural as any and every natural act of a nature expressed or understood executed in natured nature by natural creatures in accordance with his, her, and their natured natures, of dissimilar similarity . . . As less reprehensible than theft, highway robbery, cruelty to children and animals, obtaining money under false pretences, forgery, embezzlements, misappropriation of public money, betrayal of public trust, malingering, mayhem, corruption of minors, criminal libel, blackmail, contempt of court, arson, treason, felony, mutiny on the high seas, trespass, burglary, jailbreaking, practice of unnatural vice, desertion from armed forces in the field, perjury, poaching, usury, intelligence with the king's enemies, impersonation, criminal assault, manslaughter, wilful and premeditated murder. As not more abnormal than all other altered processes of adaptation to altered condition of existence, resulting in a reciprocal equilibrium between the bodily organism and its attendant circumstances, foods, beverages, acquired habits, indulged inclinations, significant disease. As more than inevitable, irreparable.[79]

Professor Rodell, in his attack on legal jargon, says:

> . . . No matter which way you slice it, the result remains the same. Legal language, wherever it happens to be used, is a hodgepodge of outlandish words and phrases because those words and phrases are what the principles of The Law are made of. The principles of The Law are made of those outlandish words and phrases because they are not really reasons for decisions but obscure and thoroughly unconvincing rationalizations of decisions--and if they were written in ordinary English, everybody would see how silly, how irrelevant and inconclusive, they are. If everybody could see how silly legal principles are, The Law would lose its dignity and then its power--and so would the lawyers. So legal language, by obstructing instead of assisting the communication of ideas, is very useful--to the

> lawyers. It enables them to keep on saying nothing with an air of great importance--and getting away with it . . .[80]

> Every once in a while, however, a lawyer comes along who has the stubborn skepticism necessary to see through the whole solemn sleight-of-mind that is The Law and who has the temerity to say so. The greatest of these was the late Justice Holmes, especially where Constitutional Law was concerned. Time and again he would demolish a fifty-page Court opinion--written in sonorous legal sentences that piled abstract principle upon abstract principle--with a few words of dissent, spoken in plain English. "The Law as you lay it down," he would say in effect, "sounds impressive and impeccable. But of course it really has nothing to do with the facts of the case." And the lawyers, though they had come to regard Holmes as the grand old man of their profession and though they respected the legal writing he had done in his youth, were always bothered and bewildered when he dismissed a finespun skein of legal logic with a snap of his fingers.[81]

Percival Jackson remarks: "The ubiquity of technicalities in the administration of our criminal law has held it up to public scorn. Applications for mistrials in criminal cases, motions in arrest of judgment, reversals of convictions of notorious criminals because of technical errors in the conduct of the prosecution, are of common occurrence . . ."[82]

> With all the wealth of material and precedent, appellate courts are daily reversing civil and criminal verdicts and judgments because the trial court erred in admitting or excluding evidence. The rules are fine, and the refinements and exceptions numerous. Evidence may be "incompetent" or "irrelevant" or "immaterial." It may not be the "best" evidence. It may be hearsay. No proper formation may have been "laid" for it.
>
> The distinctions are often unknown to the lawyer who makes the objections to the testimony that he usually rattles off all the objections he can think of, so as to cover every contingency.[83]

The attorneys in An American Tragedy resort to the usual "irrelevant,"[84] incompetent,[85] and "immaterial"[86] questions and answers, and in addition take about twenty objections and exceptions. During one objection by Belknap, "Mason promises to 'connect it up,' which however, he was unable to do and the evidence was accordingly ordered 'struck out.' But its pathetic significance by that time was deeply impressed on the minds and hearts of the jurymen."[87]

Professor Rodell says that "a bit of evidence at a trial does not fall into the famous 'irrelevant, incompetent, and immaterial' classification any more automatically than a killing falls into 'second degree murder'"[88] and thus "a killing may be, without so much as a legal doubt, a punishable murder, and still the murderer may go free, for a time or even for good, just because a bit of evidence used in the trial is labeled 'irrelevant, incompetent, and immaterial.'"[89]

Charles T. McCormick on "Evidence" declares:

> The American trial lawyer might well imitate the English barrister, who rarely makes an objection except where evidence vital to the merits is seriously questionable. It is not unusual for contested murder trials in England to be completed without a single objection from the defense to the evidence. A corresponding change in the attitude of trial and appellate judges toward evidential technicalities is equally essential in the United States.[90]

Mr. Justice Frank asks in Law and the Modern Mind:

> But why are lawyers peculiarly infected with what has been called "verbomania"? . . . Legal thinking, it

> is said, is affected by "belated scholasticism," by "a blighting medieval prepossession." . . . In no other field of human thought is that prepossession to be found in a more exaggerated and persistent form.[91]

The public too has a share in the legal process. As Roscoe Pound sees it, the criminal trial has become a public spectacle.

> In its origin this tendency was in part a response to the exigencies of rural life. In the "Mill on the Floss" we have a picture of how litigation could be a relief from the monotony of rural existence. Before the days of the automobile, the movie and the radio, before urban amusements were available to every farmer every day along with politics, the criminal trials at the court house were the staple diversions. During "court week" the wagons of the farmers were tied up about the court house square and an appreciative audience watches the fine points of the trial--game as an urban audience might watch the fine points of a professional baseball game. Later this feature of criminal trials was developed further by the press. American newspaper accounts of trials gave a bad impression of criminal justice in action beyond the actual situation. They emphasize the wranglings, the abuse of witnesses, the spectacular features at the expense of the evidence and the merits of the case, and this exaggeration of the spectacular features has tended to aggravate them because of the value of publicity to the actors in the spectacle.[92]

Thus, Dreiser describes the public:

> And with cries outside of "Peanuts!" "Popcorn!" "Hot dogs!" "Get the story of Clyde Griffiths, with all the letters of Roberta Alden. Only twenty-five cents!" (This being a set of duplicate copies of Roberta's letters which had been stolen from Mason's office by an intimate of Burton Burleigh's and by him sold to a penny-dreadful publisher of Binghamton who immediately issued them in pamphlet form together with an outline of "the great plot" and Roberta's and Clyde's pictures.)[93]

> [Clyde] noting at once that several reporters and artists were studying and then sketching or writing of him . . . for he could feel their eager eyes and their eager words as clearly as he could hear their scratching pens . . . [94]

> Because of the enormous interest aroused by the pitiable death of Roberta, as well as the evidence of her rich and beautiful rival, Clyde was being visited by every type of shallow crime-or-sex-curious country bumpkin lawyer, doctor, merchant, yokel, evangelist or minister, all friends or acquaintances of one or another of the officials of the city, and who, standing before his cell door betimes, and at the most unexpected moments, and after surveying him with curious or resentful, or horrified eyes, asked such questions as: "Do you pray, brother? Do you get right down on your knees and pray?"[95]

We get the mob psychology when "Clyde himself felt the strong public contempt and rage that the majority of those present had for him from the start--now surging and shaking all. It filled the room."[96] Then came a "vengeful voice of an irate woodsman: 'Why don't they kill the Goddamned bastard and be done with him.'"[97] And after the judge's instruction to the jury, Clyde was immediately "removed to his cell before the audience proper was allowed to leave the building. There was a constant fear on the part of the sheriff that he might be attacked."[98]

CHAPTER III

TRIAL BY JURY

"What do you know about this business?" the King said to Alice.

"Nothing," said Alice.

"Nothing _whatever_?" persisted the King.

"Nothing whatever," said Alice.

"That's very important," the King said, turning to the jury.[1]

--Lewis Carrol, _Alice's Adventures in Wonderland_

The attempts of the judge and the leading counsel to bring this succession of events home to the jury in the terms of an ordinary crime, seemed to him [Garine] so completely a parody that he could hardly help laughing.[2]

--André Malraux, _Les Conquérants_

Under the Constitution of the United States, everyone accused of crime has a right to trial by jury.[3] Some states permit a trial by judge for all crimes except those carrying the death penalty, provided the state and the defendant are both willing. An accused person cannot be compelled to waive his right to jury. The merits and demerits of the jury trial are constantly subject to debate. The

value of the jury trial lies in the fact that a group of twelve men or women of similar status to the accused must be unanimously convinced that the facts presented warrant a verdict of guilty or not guilty. The trial is considered a safeguard against unwarranted convictions.

Harry Elmer Barnes and Negley K. Teeters declare:

> . . . The jury is far from the admirable bulwark of human liberty that it has been fashionable to consider it. It originated in a nonjuridical field and was clumsily adapted to its present purpose simply because nothing better was at hand. Far from being a rampart of human freedom or safeguard of democracy, it was in its origins one of the most potent and highly prized instruments of royal absolutism and monarchical oppression. Compared to other instruments of the time, trial by jury probably made a fairly respectable showing in the sixteenth century, when there were relatively few highly trained lawyers, and the men summoned for jury service represented the intelligent and cultured upper classes. But the progress of medical knowledge, sociology, jurisprudence, and democracy since that time has made it preposterous and out of date as the sun-dial of James II or the coach of Charles II. Moreover, the average jury is today chosen from an altogether less intelligent class than that which furnished the jurymen in the sixteenth century.[4]

The selection of the panel is determined by lot, the names of citizens being drawn from a collection of slips or cards bearing the names of all the qualified voters of the county, except those excused from jury duty. It is charged that in New York the long list of classes exempt from jury service results in a selection of the relatively

unintelligent and uneducated from this important service. In Our Criminal Courts, Raymond Moley contends that selection from among the educated and privileged classes would weaken the value of the jury as an indication of the popular will.[5] However, Harry Elmer Barnes and Negley K. Teeters state that at best "any such panel can only in rare instances include a better than average group of citizens. It cannot be limited to those possessing unusual intelligence or special knowledge of legal matters. In the usual case, the panel is made up of an average collection of farmers, shoemakers, barbers, plumbers, salesmen, hod-carriers, and day laborers, with a few professional or businessmen sprinkled among them."[6]

As Dreiser sees the jury, they were

> odd and grizzled, or tanned and wrinkled, farmers and country storekeepers, with here and there a Ford agent, a keeper of an inn at Tom Dixon's Lake, a salesman in Hamburger's dry goods store at Bridgeburg, and a peripatetic insurance agent residing in Purday just north of Grass Lake. And with but one exception, all married. And with but one exception, all religious, if not moral and all convinced of Clyde's guilt before ever they sat down, but still because of their almost unanimous conception of themselves as fair and open-minded men, and because they were so interested to sit as jurors in that exciting case, convinced that they could pass fairly and impartially on the facts presented to them.[7]

Thus, Dreiser shows us that the public is often biased in types of cases where popular sympathies or fears are aroused. At any rate, the typical jury is just such a collection of average citizens as the trained spellbinder can manipulate through knowledge of local prejudices.

The process of selection is described by Clarence Darrow as follows:

> I try to get a jury with little education but with much human emotion. The Irish are always the best jurymen for the defense. I don't want a Scotchman, for he has too little human feeling; I don't want a Scandinavian, for he has too strong a respect for law as law. In general I don't want a religious person, for he believes in sin and punishment. The defendant should avoid rich men who have a regard for the law, as they make and use it. The smug and ultra respectable think they are the guardians of society, and they believe the law is for them.
>
> The man who is down on his luck, who has trouble, who is more or less a failure, is much kinder to the poor and unfortunate than are the rich and selfish.[8]

Professor Sutherland states in his Principles of Criminology:

> According to legal theory the business of the jury is to determine, on the basis of evidence, a question of fact: Did the accused person commit the crime? It is supposed to be a problem in logic similar to the problem which confronts a scientist in a laboratory. In practice, however, the prosecutor tries to select jurymen who will be antagonistic to the accused, and the attorney for the defense tries to select jurymen who will be sympathetic. One tries to exclude all persons not of same race, religion, politics or occupation as the accused, and the other tries to exclude all persons who are of the same race, religion, politics, or occupation.[9]

That these methods are used is conveyed by Dreiser when he says that the clerk of the court

> reached into a square box that was before him, and drawing forth a piece of paper, called "Simeon Dinsmore," whereupon a little, hunched and brown-suited man, with claw-like hands, and a ferret-like face, immediately scuttled to the jury box and was seated. And once there he was approached by Mason, who in a brisk manner--his flat-nosed face looking most aggressive and his strong voice reaching to the uttermost corners of the court, began to inquire as to his age, his business, whether he was single or married, how many children he had, whether he

> believed or did not believe in capital punishment . . . for at once and with emphasis, he answered, "I most certainly do--for some people--" a reply which caused Mason to smile slightly and Jephson to turn and look toward Belknap who mumbled sarcastically: "And they talk about the possibility of a fair trial here."[10]

Whenever Mason approved of a juror he would announce it by exclaiming:

> "Acceptable to the People!" But, invariably, whenever he had done so, Jephson had merely turned slightly, but without looking, and had said: "Nothing in him for us, Alvin. As set as a bone." And then Belknap, courteous and bland, had challenged for cause and usually succeeded in having his challenge sustained.[11]

The selection of the jury often involves a long delay. Morris Ernst, as quoted by Harry Elmer Barnes and Negley K. Teeters, states: "If every person called for duty were put onto a case immediately, without the dreary coming in at ten, leaving at eleven-thirty, reporting back at two, and being excused at two-thirty with no accomplishment to his credit, many of the shirkers would relieve the district leaders of their present burden of procuring excuses."[12]

Although only five days were "consumed by Mason and Belknap in selecting the jury,"[13] the situation was similar to that described by Ernst, "the clerk of the court announcing . . . a recess until two P.M. And Jephson . . . turning to Clyde with 'Well, Clyde, that's the first round. . . . Better go over there and get a good meal, though. It'll be just as long and dull this afternoon.'"[14]

Severe criticisms have been leveled against the jury because they are influenced by the emotional and biased appeals made by attorneys, and they lack understanding of law and evidence because of the restrictions against judges in instructing jurors and the practice of juries in reaching a verdict in the light of possible penalties inflicted.

Harry Elmer Barnes and Negley K. Teeters point out that the "most amazing feature of the modern jury trial is that neither the district attorney nor the counsel for the defense is vitally concerned with the hard facts. The explanation is that the jury is not trained to weigh facts and is susceptible to emotional appeals."[15]

Examples of emotional appeal to the jury used by Mason are numerous: Roberta was "'so cruelly blotted out beneath the waters of Big Bittern,'"[16] and

> "Roberta Alden loved this defendant with all the strength of her soul. She loved him with that love which is the crowning mystery of the human brain and the human heart, that transcends in its strength and it weakens all fear of shame or punishment from even the immortal throne above. She was a true and human and decent and kindly girl--a passionate and loving girl. And she loved as only a generous and trusting and self-sacrificing soul can love. And loving so, in the end she gave to him all that any woman can give the man she loves."[17]

Then Clyde "'was seeking not to marry but to find a wilderness to snuff out the life of this girl of whom he

had tired,[18] [and] that you deliberately and with cold-hearted cunning allowed that poor, tortured girl to die when you might have rescued her.'"[19]

And, in connection with Roberta's letters, Dreiser writes:

> At this psychological moment, as the afternoon sun was already beginning to wane in the tall, narrow court room, and as carefully planned by him beforehand, Mason's reading all of Roberta's letters, one by one, in a most simple and nondeclamatory fashion, yet with all the sympathy and emotion which their first perusal had stirred in him. They had made him cry. . . .[20]
>
> "Remember her writing you this? . . . 'Clyde,--I shall certainly die, if you don't come. I am so much alone. I am nearly crazy now. I wish I could go away and never return or trouble you any more. But if you would only telephone me, even so much as once every other day, since you won't write. And when I need you and a word of encouragement so.'" Mason's voice was mellow. It was sad. One could feel, as he spoke, the wave of passing pity that was moving as sound and color not only through him but through every spectator in the high narrow courtroom.[21]

In the Gillette case, the most important issue raised in the briefs submitted to the Court of Appeals was that it was error to receive in evidence and to read the letters Grace Brown had written to Gillette.[22] The prosecutor declared that it was not error to receive in evidence the complete correspondence between the dead woman and her lover during their relationship.[23] It is important to note that in the Gillette case the issue concerning the letters was raised on a technicality connected with the law of evidence, whereas Dreiser only shows the use made of these letters by the district attorney in his emotional appeal in order to sway the jury.

In Dreiser and the Land of the Free, Dorothy Dudley says that Dreiser had copied nothing verbatim from either newspapers or courts in An American Tragedy because "to have done so would only have impeded the progress of the drama."[24] However, from the point of view of the administration of justice, it is unimportant whether Dreiser copied them or not, because Dreiser's purpose was not to use the letters as letters but to show how carefully Mason planned the reading of them at just the right psychological moment for emotional effect.

Here are some examples of the flattery used by the district attorney:

> ". . . by the exceeding care with which the lawyers in this case have passed upon the panels from which you twelve men have been chosen. It has been no light matter to find twelve men to whom all the marshalled facts in this astonishing case could be submitted and by them weighed with all the fairness and understanding which the law commands. For my part, the care which I have exercised, gentlemen, has been directed by but one motive--that the state shall have justice done. No malice, no pre-conceived notions of any kind."[25]

And: "'you expect any fair-minded, decent, intelligent person to believe that explanation, do you?'"[26]

Examples of prejudice used by Mason: "'He has been called by his counsel and others in the newspapers a boy, over and over again. He is not a boy. He is a bearded man.'"[27] And again: "'You talked about that change of heart that you experienced after you encountered Roberta Alden once more at Fonda and Utica back there in July--just as you were starting on this death trip.'"[28]

In the Gillette case, the defense attorneys raised the issue in the Court of Appeals concerning the way the trial was conducted by the prosecutor. They claimed that it was oppressive and unfair to Gillette. In the briefs submitted to the Court of Appeals, a case was cited to uphold their contention. It is interesting to note that in this case the court reversed a conviction of the defendant for the crime of abduction, and granted a new trial. The court severely arraigned the prosecuting attorney, saying:

> "An unfair trial, especially in a criminal case, is a reproach to the administration of justice and casts grave responsibility not only upon the prosecuting officer but upon the trial judge. However strong the evidence may be, if she did not have a fair trial, as shown, by the rulings of the court subject to proper objections and exceptions, the judgment of conviction should be reversed and a new trial ordered. We have repeatedly laid down the rule governing prosecuting officers in addressing the jury and to govern trial judges also in their duty relating to the subject. We have repeatedly admonished both, the former at times with severity and the latter more mildly, not to depart from that rule, but our admonitions have not always been regarded, although they were followed by a reversal of the judgment involved, founded solely on the improper remarks of the prosecuting officer and the failure of the trial judge to do his duty in reference thereto."[29]

Similarly, in <u>An American Tragedy</u>, Jephson informed Clyde that the

> trial from start to finish had been unfair. Prejudice and bias had governed its every step. Such bullying and browbeating and inuendo as Mason had indulged in before the jury would never pass as fair or adequate in any higher court. And a new trial--on appeal--would certainly be granted.[30]

However, in the Gillette case, it was held that the fact in summing up the case after a long and bitterly

contested trial, the district attorney made some statements not fully justified by the evidence as not to be a sufficient ground for reversal.[31]

In addition, the acceptance of and adherence to the existing mores of society play an important part in Mason's appeal to the jury. Here we have a rural area where the standards and objectives of church, home, and family are for the most part in harmony with one another, and the group is bound together by common economic circumstances and by similar moral traditions into a consistent culture pattern. Thus, Mason appeals to the jury by declaring:

> ". . . the name of Griffiths in Lycurgus was one that would open the doors of Lycurgus exclusive circles . . . and . . . would bring him in contact with girls of education and means, girls who moved far from the sphere to which Roberta Alden belonged. Not only that, but he had found one girl to whom, because of her beauty, wealth, position, he had become enormously attached and beside her the little farm and factory girl in the pathetically shabby and secret room to which he had assigned her, looked poor indeed--good enough to betray but not good enough to marry. And he would not . . . and after she was cold and dead . . . dances, lawn fetes, automobile parties, dinners, gay trips to Twelfth Lake and Bear Lake, and without a thought seemingly, that his great moral and social need should modify his conduct in any way. . . . [32]

> "There he sits! Is he the son of wastrel parents--a product of the slums--one who had been denied every opportunity for a proper or honorable conception of the values and duties of a decent and respectable life? Is he? On the contrary. His father is of the same strain that has given Lycurgus one of its largest and most constructive industries--the Griffiths Collar & Shirt Company. He was poor--yes--no doubt of that. But not more so than Roberta Alden--and her character appears not to have affected by her poverty. His parents . . . appear to have been unordained ministers of the proselytizing and mission-conducting type--people who . . . are really, sincerely religious and

> right-principles in every sense. But this, their oldest son, and the one who might have been expected to be deeply influenced by them, early turned from their world and took to a more garish life. . . .[33]

> ". . . He allowed her to brood in that little lonely farmhouse on the outskirts of Blitz . . . With the neighbors coming to watch and help her make some clothes which even then she did not dare announce as her bridal trousseau."[34]

Adherence to the mores of morality are illustrated in the following manner:

> "There was a rule of the Griffiths Company . . . and that was that no superior officer or head of any department was permitted to have anything to do with any girls working under him, or for the factory, in or out of the factory. It was not conducive to either the morals or the honor of those working for this great company, and they would not allow it. And shortly after coming there, this man had been instructed as to that rule. But did that deter him? Did the so recent and favorable consideration of his uncle in any way deter him? Not in the least. Secrecy! Secrecy! From the very beginning! Seduction! Seduction! The secret and intended and immoral and illegal and socially unwarranted and condemned use of her body outside the regenerative and enobling pale of matrimony! . . .[35]

> "The poor little thing imagined that she was going for a brief outing before that marriage of which he talked and which was to seal and sanctify it. To seal and sanctify it! To seal and sanctify, as closing waters seal and sanctify, but in no other way--no other way. And with him walking, whole and sly--as a wolf from its kill--to freedom, to marriage, to social and material and affectionate bliss and superiority and ease, while she slept still and nameless in her watery grave."[36]

We also find an appeal to religion when Mason declares:

> ". . . It was not more than two months after that before he had induced her to move from the respectable and religious [italics mine] home which she had chosen in Lycurgus, to one concerning which she knew nothing and the principal advantage of which . . . was that it

> offered secrecy and freedom from observation for the vile purpose which already he entertained in regard to her."[37]

In connection with the oath, Mason says to Clyde: "'And under oath, too. Don't forget that! That sacred oath that you respect so much. Isn't that true?'"[38]

Then Dreiser tries to demonstrate through Clyde's attorneys the conflict between the accepted mores of morality and a changing world. They try to present to the jury the hypocrisy of the puritanical forces existing in rural areas. Thus, Belknap describes the relationship between Clyde and Roberta:

> ". . . Some of the testimony that has been offered here, that perhaps the sly and lecherous overtures with which this defendant is supposed to have lured the lovely soul now so sadly and yet so purely accidently blotted out . . . from the straight and narrow path of morality, were perhaps no more sly nor lecherous than the proceedings of any youth who finds the girl of his choice surrounded by those who see life only in the terms of the strictest and narrowest moral régime . . .[39]
>
> "I know that as you gentlemen view such things, such conduct has no excuse for being. One may be the victim of an internal conflict between two illicit moods, yet nevertheless, as the law and the church see it, guilty of sin and crime. But the truth, none-the-less, is that they do exist in the human heart, law or no law, religion or no religion, and in scores of cases they motivate the notions of the victims. And we admit that they motivated the actions of Clyde Griffiths."[40]

And then Jephson says to Clyde:

> "Well, then, just roughly now, without going into detail, do you suppose you could explain to yourself and this jury how and why and where and when those changes came about which led to that relationship which we all of us" (and here he looked boldly and wisely out over the audience and then afterwards upon the jurors) "deplore. How was it, if you thought so highly of her at first that you could so soon afterwards descend to

this evil relationship? Didn't you know that all men, and all women also, view it as wrong, and outside of marriage unforgivable--a statutory crime?"

The boldness and ironic sting of this was sufficient to cause at first a hush, later a slight nervous tremor on the part of the audience which, Mason as well as Justice Oberwaltzer noting, caused both to frown apprehensively. Why this brazen young cynic! How dared he, via innuendo and in the guise of a serious questioning, intrude such a thought as this, which by implication at least picked at the very foundation of society--religious and moral.[41]

And Clyde recalled Jephson's coaching:

"Educational effect. The quicker and harder we can shock 'em with some of the real facts of life around here, the easier it is going to be for you to get a little more sane consideration of what your problem was."[42]

Then Clyde's reaction to Mason's cross-examination:

"Yet continuing relations with Miss Alden when your other interests left you any time."

"Well . . . yes, sir," once more hesitated Clyde, enormously troubled by the shady picture of his character which these disclosures seemed to conjure, yet somehow feeling that he was not as bad, or at least had not intended to be, as all this made him appear. Other people did things like that too, didn't they--those young men in Lycurgus society--or they talked as though they did.[43]

In connection with the religious mores, Belknap says to the jury:

"You may think, perhaps, that we ourselves must be believing in his guilt. But you are wrong. The peculiarity, the strangeness of life, is such that oftimes a man may be accused of something that he did not do and yet every circumstance surrounding him at the time seems to indicate that he did it. There may have been many very pathetic and very terrible instances of miscarriages of justice through circumstantial evidence alone. Be sure! Oh, be very sure that no such mistaken judgment based on any local or religious or moral theory of conduct or bias [italics mine], because of presumed irrefutable evidence, is permitted to prejudice you, so that without meaning to, and with the best and highest-minded intentions, you yourselves see a crime, or the intention to commit a crime, when

> no such crime or any such intention ever truly or legally existed or lodged in the mind or acts of this defendant.[44]
>
> ". . . In the eyes and words of the district attorney, an engagement, and not only that but a sacred engagement [italics mine], which no one but a scoundrel and a thief and a murderer would attempt to sever . . . many engagements, more open and sacred in the eyes of the law and of religion, have been broken. Thousands of men and thousands of women have seen their hearts change, their vows and faith and trust flouted, and have even carried their wounds into the secret places of their souls, or gone forth, and gladly, to death at their own hands because of them. As the district attorney said in his address, it is not new and it will never be old!"[45]

And then Jephson: "'Well now, Clyde, from there on, just what happened? Tell us now, as near as you can recall. Don't shade it or try to make yourself look any better or any worse. She is dead, and you may be, eventually, if these twelve gentlemen here finally so decide. . . . But the truth for the peace of your own soul [italics mine] is the best' -- and here Jephson thought of Mason--let him counteract that if he can."[46]

In the final summation by Mason, we get a combination of every conceivable method known to the legal profession.

> And then Mason, blazing with the conviction that Clyde was a murderer of the coldest and blackest type, and spending an entire day in riddling the "spider's tissue of lies and unsupported statements" with which the defense was hoping to divert the minds of the jury from the unbroken and unbreakable chain of amply substantiated evidence wherewith the prosecution had proved this "bearded man" to be the "red-handed murderer" that he was. And with hours spent in retracing the statements of the various witnesses. And other hours in denouncing Clyde, or re-telling the bitter miseries of Roberta--so much so that the jury, as well as the

> audience, was once more on the verge of tears. And with Clyde deciding in his own mind . . . that no jury such as this was likely to acquit him in the face of evidence so artfully and movingly recapitulated.[47]

In connection with methods used by lawyers, Mr. Jackson has this to say:

> The favorite channel for lawyer seduction of the jury is through the summation. Here the lawyer plays upon the jurors' passions and prejudices.
>
> From the ancient Grecian orators to our modern Choates and Darrows, juries have been victimized by gifted orators and jury-swayers. Some advocates swear by the ancient forensic school. Ignoring facts, they orate in the grand manner about "desolate homes, lovely children, weeping widows and heartbroken mothers." Others affect a quiet, confidential attitude and, flattering the jury, appear to reason with them. One school indulges in false sentiments; another in false reasoning. Some lawyers affect kindness; others abuse their opponents, following the Saconian injunction to "slander boldly; something always sticks." None of this is new but every age has its successful proponents of a system, who come to be known as great Jury lawyers.[48]

Since it is the obligation of the state to prove the defendants' guilt or innocence, it is incumbent on the prosecutor to submit his evidence to the judge and the jury. He calls his witnesses in one by one and asks them to tell the jury what they know about the crime and the accused's participation in it. Since the burden of proof rests with the prosecutor, it is his responsibility to open the trial. This he does by stating to the jury the charges against the accused as they are contained in the bill of indictment, and outlining the evidence he expects to introduce during

the trial. At the completion of his opening statement, he calls his witnesses one by one. After he examines each directly, the defense attorney has the privilege of cross-examination, his purpose being to discredit the prosecutor's witnesses or to minimize their testimony. Defense witnesses are then introduced, and they are cross-examined by the prosecutor. After this, both sides may produce additional witnesses. Upon the completion of the state's testimony against the accused, the prosecutor advises the court that he rests his case.

In a very dramatic opening speech, using every form of oratorical appeal, Mason charged Clyde with the murder of Roberta Alden. However, Mason had no eyewitnesses, so in his concluding statement he informed the court that as Roberta's "'last death cry rang out over the water of Big Bittern, there was a <u>witness</u> [italics mine], and before the prosecution has closed its case, that <u>witness</u> [italics mine] will be here to tell you the story.'"[49]

Dreiser explains that Mason

> could not resist this opportunity to throw so disrupting a thought into the opposition camp.
>
> And decidedly, the result was all that he expected, and more. For Clyde, who up to this time and particularly since the thunderbolt of the letter, had been seeking to face it all with an imperturbable look of patient innocence, now stiffened and then wilted. A witness! And here to testify! God! Then he, whoever

he was, lurking on the lone shore of the lake, had seen the unintended blow, and heard her cries--had seen that he had not sought to aid her! Had seen him swim to shore and steal away--maybe had watched him in the woods as he changed his clothes. God! His hands now gripped the sides of the chair, and his head went back with a jerk as if from a powerful blow, for that meant death--his sure execution. God! No hope now! His head drooped and he looked as though he might lapse into a state of coma.

As to Belknap, Mason's revelation at first caused him to drop the pencil with which he was making notes, then next to share in a puzzled and dumb-founded way, since they had no evidence wherewith to forefend against such a smash as this -- But as instantly recalling how completely off his guard he must look, recovering. Could it be that Clyde might have been lying to them, after all--that he had killed her intentionally, and before this unseen witness? If so, it might be necessary for them to withdraw from such a hopeless and unpopular case, after all.

As for Jephson, he was for the moment stunned. And through his stern and not easily shakable brain raced such thoughts as--was there really a witness?--has Clyde lied?--then the die was cast, for had he not already admitted to them that he had struck Roberta, and the witness must have seen that. And so the end of any plea of a change of heart. Who would believe that, after such testimony as this?

But because of the sheer contentiousness and determination of his nature, he would not permit himself to be completely baffled by this smashing announcement. Instead he turned, and after surveying the flustered and yet self-chastizing Belknap and Clyde, commented: "I don't believe it. He's lying, I think, or bluffing. At any rate, we'll wait and see. It's a long time between now and our side of the story. Look at all those witnesses there. And we can cross-question them by the week, if we want to--until he's out of office. Plenty of time to do a lot of things--find out about this witness in the meantime. And besides there's suicide, or there's the actual thing that happened. We can let Clyde swear to what did happen--a cataleptic trance--no courage to do it. It's not likely anybody can see that at five hundred feet." And he smiled grimly. At almost the same time he added, but not for Clyde's ears: "We might be able to get him off with twenty years at the worst, don't you think so?"[50]

In connection with surprise witnesses, Professor Sutherland says that "each side tries to win the case and take advantage of every possible trick, surprise and technical device. It is not at all unusual for as many as fifteen formal motions to be introduced in a case, each of which involves debate, possible continuances and decisions by the court."[51]

Robert W. Millar has suggested that each side should be required to submit a list of witnesses who are to be called, with an abstract of the evidence to be presented. This would make it possible to reach a decision without the surprises, which are not a part of real justice.[52]

And Belknap, as defense attorney, uses similar tactics:

> "But, gentlemen," and here [he] suddenly paused as though a new or overlooked thought had just come to him, perhaps you would be better satisfied with my argument and the final judgment you are to render if you were to have the testimony of <u>one eyewitness</u> [italics mine] at least of Roberta Alden's death--one who, instead of just hearing a voice, was actually present, and who saw and hence knows how she met her death."[53]

Professor Sutherland declares that the "essential business of a trial should be to determine a question of fact: Did the accused commit the crime? In the performance of that duty, tricks and surprises are no more justifiable than in determining a fact in the laboratory. In practice, however, the criminal trial is regarded as a game between the two lawyers. Large audiences were attracted in the

past and in some sections of the country the criminal trials still are the principal amusement."[54]

Thus, we have the audience in An American Tragedy

> hearing that an actual eyewitness was to be produced, and not by the prosecution but the defense, was at once upon its feet, craning and stirring. And Justice Oberwaltzer, irritated to an exceptional degree by the informality characteristic of the trial, was now rapping with his gavel while his clerk cried loudly: "Order, order! Unless everybody is seated, all spectators will be dismissed! The deputies will please see that all are seated." And then a strained silence falling as Belknap called: "Clyde Griffiths, take the witness chair."[55]

Mr. Jackson says that

> a trial is a contest akin to the old "trial by battel" except that it is played under rules which substitute for physical force the intellectual skill and agility of lawyers and witnesses. As in days of old, such contestant is still permitted to select his champion, but now instead of a burly butcher, he picks a wily lawyer. These champions still use the methods of "battel," they advance and retreat, they use force and bluster, they employ concealment and surprise. Fundamentally the purpose is the same--to win, by hook or by crook, by stealth or by wealth.[56]

That the literary artist discerns the problems of his time--even if in symbolic form--is evidenced by Roger Vailland, French author of the Goncourt prize-winning cynical novel The Law. Oddly enough, the novel is not about France, but about Monacore, a small port in southern Italy --the Italy of Lolabrigida, Sophia Loren, and racing cars, and, of course, love and sex--the Italian way. It was during the author's sojourn in Italy, in a small village where

they played the game of la legge, that the idea for The Law came to him--which he zestfully portrays in his book La Loi.

In Monacore, as throughout the region, the male citizens amuse themselves by playing a traditional game called The Law, and it is this game that gives the book its title and its deeper meaning. The Law is played thus: A "Chief" is chosen by lot, and he picks a "Deputy." The other players pay for the wine. The two winners, but especially the Chief, are privileged to insult, abuse, and subject to emotional torture one or more of the losers. When this exercise in sadism has reached a culminating point--that is, when the wine is exhausted or the victim has betrayed himself by some sign of emotion, whether fear, rage, or frustration--the game stops.

As the author puts it:

> The winner, the Chief, who dictates the law, has the right to speak, to interrogate and to reply in place of the interrogated, to praise and to blame, to insult, to insinuate, to revile, to slander, and to cast a slur on people's honor; the losers who have to bow to the law, are bound to submit without sound or movement such is the fundamental rule of the game of The Law.[57]

In the novel Resurrection, Tolstoy relates the game motif of a French Renaissance writer in the following episode: "Rabelais tells of a judge who was trying a case and who, after quoting all sorts of laws and reading some twenty pages of unintelligent Latin proposed that the contending parties should throw dice, odds or even; if the number turned up even the plaintiff would be right; if odd--the defendant."[58]

Another angle of the game is brought in when Jakob Wassermann has the honest lawyer Laudin describe another lawyer in the novel Wedlock (Laudin und die Seinen), in the following manner:

> . . . And it was of this colleague that he wanted to speak now. He had met him before. He was one of those talented men without conscience, who had brought their calling and its service down to the level of a dicer's game. Their stakes are the varying interpretations of doubtful or equivocal legal enactments which are possible under their astute scrutiny. They are past masters of all the arts of delay and procrastination and they are capable of defending obvious injustice and trickery with more emphasis and passion than their opponents can bring to the support of the purest cause.[59]

CHAPTER IV

IN RE CLYDE GRIFFITHS

Lawyers, I suppose, were children once.
--Charles Lamb

There was a child went forth every day,
And the first object he look'd upon,
that object he became,
And that object became part of him for
the day or a certain part of the day,
Or for many years or stretching cycles
of years.[1]
--Walt Whitman, "There Was a Child Went Forth"

Dreiser, through the lawyers for the defense, tries to use Darrow's tactics--"jurymen seldom convict a person they like, or acquit one they dislike. The main work of a trial lawyer is to make a jury like his client, or, at least to feel sympathy for him, facts regarding the crime are relatively unimportant."[2]

The defense attorneys set about doing this by showing what the basic facts were, as distinguished from the legal facts. Clyde was the victim of circumstances in committing a crime for the first time. It was necessary to

destroy the illusion that criminals are not like other men. It must be recognized that the average criminal is a human being who has been impelled to a crime by personal handicaps and unfortunate surroundings. They tried to show the motive underlying Clyde's crime. A man may be a gross "moral coward" but still may be driven into crime by an unconscious urge. Although he may have a conscious motive in mind, unconscious motivation may also be present, and it was this that in Clyde's case was the driving force.

The reason Clyde fails to convince the jury is that the legal machinery was an artificial means of showing his whole background and the extent of the influences of an inadequate home on his delinquency. The painful cross-examination by Mason in order to reconstruct the event was hardly the answer. It is necessary to get a flashback to the first volume of An American Tragedy for the explanation of all the fears, emotional instabilities, and insecurities that led up to the fatal killing. The fact that murder seemed the only solution to his trouble indicated a basic inadequacy in his personality. Emotional insecurity, frustration, and inadequacy played an important part in his delinquency. Clyde was

> dragged out of normal life, to be made a show and jest of. The handsome automobiles that sped by, the loitering pedestrians moving off to what interests and comforts he could only surmise . . . and the "kids" staring, all troubled him with a sense of something different, better, more beautiful than his, or rather than their life.[3]

> . . . He never had any real friends, and could not have any, as he saw it, because of the work and connection of his parents, was now tending more and more to induce a kind of mental depression or melancholia which promised not so well for his future. It served to make him rebellious and hence lethargic at times . . . [4]

> . . . If only he had a better collar, a nicer shirt, finer shoes, a good suit, a swell overcoat like some boys had. Oh, the fine clothes, the handsome homes, the watches, rings, pins that some boys sported; the dandies many youths of his years already were. Some parents of boys of his years actually gave them cars of their own to ride in . . .
>
> And yet the world was so full of so many things to do--so many people were so happy and so successful. What was he to do? Which way to turn? What one thing to take up and master--something that would get him somewhere. He could not say. He did not know exactly. And these peculiar parents were in no way sufficiently equipped to advise him.[5]

When the Wickersham Commission reported on the cause of crime in 1931, one of its members, Mr. Henry W. Anderson of Virginia, made a minority report. He says:

> They [the American people] have created the widest spread between the extremes of wealth and poverty existing in the western world. They have developed degrading slums in the cities, and ignorant underprivileged areas in the rural districts which stand as menaces to social health and dangers to social order . . . [6]
>
> They have created the largest body of laws and the most complex system of government now in existence as restraints and controls upon individual and social conduct, and every stage in their development has been characterized by a large and increasing degree of lawlessness and crime. . . . No candid investigation can ignore these facts, or the conclusions which they naturally suggest.[7] [Italics Mr. Anderson's]

In Crime and the Human Mind, Dr. David Abrahamsen declares "since a tendency toward crime is present in all humans, criminals are not very different from many law-

abiding citizens. If this is true, we may say they are more like normal individuals than different from them. In one sense, therefore, crime is an artificial thing created by law."[8]

It is interesting to note that as to the crime of murder in the article on "Homicide" in the Encyclopaedia of the Social Sciences, William Seagle makes the following statements:

> The most complete break with the western civilization is represented by the penal code of Soviet Russia, in which homicide has ceased to be the major crime. The normal penalty for intentional homicide is eight years of solitary confinement. The aggravating circumstances which will increase the period of incarceration to ten years are the presence of dishonorable motives, such as greed and jealousy; recidivism; and the existence of a special duty to care for the victim. Patricide is not specially mentioned. Among extenuating circumstances are mentioned provocation and the overstepping of the bounds of necessary self-defense.[9]

The law of evidence is a large and important division of law in itself, which usually is treated as a separate course in law schools and as a separate subject in textbooks, digests, and encyclopedias. Much of it is of particular importance in criminal cases, and some is important only in criminal cases.

Crimes are rarely committed in front of a person who can see and hear--which would be direct evidence. Therefore, circumstantial evidence must be proved by making

certain inferences. Thus, when the existence of any fact is attested by witnesses as having come under the cognizance of their senses, or is stated in documents the genuineness and veracity of which there seems no reason to question, the evidence of the fact is said to be direct or positive. When on the contrary the existence of the principal fact is only inferred from one or more circumstances that have been directly established, the evidence is said to be circumstantial. In homicide cases, circumstantial evidence must be very strong, and is a question of fact for the jury to decide. Nothing must be done to influence the jury, and it is within the discretion of the court to rule out anything that would inflame its members.

In You Be the Judge, Ernest Mortenson says that circumstantial evidence is synonymous with weak evidence:

> A set of inferential circumstances is superior, as a type of proof, to a weak case resting upon questionable testimony. There have been convictions of innocent persons by direct evidence as well as by circumstantial evidence. The senses are indeed fallible and cases of mistaken identity are possible, as well as wrong inferences from indirect evidence. Where conclusions must be drawn from evidence which is not positive, there should be independent lines of fact pointing clearly toward guilt.[10]

The piling up of circumstantial evidence in An American Tragedy is almost identical with that of the Gillette case. In both cases, we have concealed companionship, registration under assumed names, social engagements with ladies at pleasure resorts, a hired boat, wearing apparel of the dead woman left at the hotel, letters, and so on.[11]

Percival Jackson says:

> In matters of giving evidence upon a trial an apotheosis of technique is reached. What is to be admitted in evidence upon a trial and what is to be rejected, is a subject of such abstruseness that volumes of law books are constantly being written on the subject. Greenleaf on Evidence, a standard work written in 1899, consists of three volumes of 2,167 pages citing perhaps almost 16,000 precedents. Wigmore, a more recent expert on the subject, has a text consisting of five volumes aggregating 5,500 pages with 42,000 precedents.[12]

Charles T. McCormick on "Evidence" in the Encyclopaedia of the Social Sciences, thinks that

> the responsibilities of the trial judges for the enforcement of evidential rules and standards are heavy and unremitting. The law offers no all embracing formula for determining whether a given item of proof is relevant to the issue, and logic and experience must be the only guides. Even when evidence is logically probative, the trial judge must still exclude it if he finds that its probative value is slight and is overborne by the danger that it may arouse undue prejudice in the jury, may confuse the issue or lead to undue consumption of time.[13]

Ernest Mortenson declares that "matters which deal with trial practice and the rules of evidence have reference to those devices which experience has developed for bringing into review events which are causally connected with a party to the action. Here must be applied a process of inclusion and exclusion. The proof must be adopted to the purpose, and events which are relevant to the issues to be tried must be re-enacted as far as practicable."[14]

In this connection, the identical boat in which Clyde and Roberta had sat is put before the jury in order to re-enact the entire scene with Miss Newcomb. But the conditions are not the same. Belknap's objection culminates

in "a long and wearisome legal argument, finally terminating in the judge allowing this type of evidence to be continued for a while at least."[15] And there followed

> a long wrangle between Belknap and Mason as to the competency of such testimony since Clyde declared that he could not remember clearly--but Oberwaltzer finally allowing the testimony on the ground that it would show, relatively, whether a light or heavy push or blow was required in order to upset any one who might be "lightly" or "loosely" poised.[16]

> . . . The jury, in spite of Belknap's thought that his contentions would have counteracted all this, gathering the impression that Clyde, on account of his guilt and fear of death, was probably attempting to conjure something that had been much more viciously executed, to be sure. For had not the doctors sworn to the probable force of this and another blow on the top of the head? And had not Burton Burleigh testified to having discovered a hair in the camera? And how about the cry that woman had heard? How about that?[17]

As Harry Elmer Barnes and Negley K. Teeters see it:

> The technical rulings on law are often as ineffective upon the jury as the testimony. The average jury is objectly ignorant of even the most elementary law, and almost invariably misses the significance of the judge's interpretation of it. Even in those cases where the rules are simple, explicit and direct, the jury on occasions goes counter to them. If a juryman has really been impressed by testimony, in not one case out of ten will he be influenced by a subsequent ruling that is irrelevant and must be excluded from consideration.[18]

The judge rules on the admission of evidence; but the jury alone decides on its weight in the case. On the subject of circumstantial evidence, Edwin M. Borchard, Professor of Law at Yale University, states in Convicting the Innocent: "No one will suggest that circumstantial evidence should be excluded as a form of evidence. On the contrary, it is often convincing and conclusive."[19] However,

it is often misleading and unreliable, and tends itself to exploitation by a clever prosecutor or lawyer. Professor Borchard quotes Chief Justice Shaw of the Massachusetts Supreme Court in connection with circumstantial evidence:

> The advantages [of circumstantial evidence] are that as the evidence comes from several witnesses and different sources, a chain of circumstances is less likely to be falsely prepared and arranged, and falsehood and perjury are more likely to be detected and fail of their purpose. The disadvantages are, that a jury has not only to weigh the evidence of facts, but to draw just conclusions from them; in doing which, they may be led by prejudice, or by want of due deliberation and sobriety of judgment, to make hasty and false deductions; a source of error not existing in the consideration of positive evidence.[20]

Professor Borchard gives some interesting statistics concerning convictions of innocent people due to misleading circumstantial evidence:

> Cases of circumstantial evidence in which entered a mistaken identification are fifteen in number. Cases of circumstantial evidence in which perjury was an ingredient are eleven in number. Cases in which the perjury of prosecuting or other witnesses, taking advantage of circumstantial evidence, natural or manufactured, was the main factor in the conviction are not inconsiderable--fifteen. Among them are four for murder in which the alleged "murdered" person later turned up alive and well. In fourteen cases the victim was "framed" by hostile witnesses. . . .[21]

Witnesses play a very important role in a criminal case. It is the nature of the long array of witnesses in a trial and what they say on the stand that mainly influence the jury in its final verdict.

In An American Tragedy, Dreiser shows us:

> . . . Witnesses, witnesses, witnesses--to the number of one hundred and twenty-seven. And their testimony, particularly that of the doctors, three guides, the woman who heard Roberta's last cry, all repeatedly objected to by Jephson and Belknap, for upon such weakness and demonstrable error as they could point out depended the plausibility of Clyde's defense.[22]

Arthur Garfield Hays declares in the introduction to Percival E. Jackson's book Look at the Law:

> . . . In most cases witnesses color their stories. . . . This is a human failing which is difficult to avoid. No two persons see anything alike; no one can tell the effect of the power of suggestion. It is easy to distinguish red from green, but the colors merge, the distinction becomes increasingly difficult. The best one can do is to reconstruct what has happened in the past, . . . An interested party, however honest he may be, is bound to reconstruct the story in the color of his own predispositions, he is bound to be influenced by his predilections. My own experience in law suits arise through honest differences of opinion where people see things from a different point of view.[23]

"Heresay evidence" is a term applied to that species of testimony given by a witness who relates not what he knows personally, but what others have told him, or what he has heard said by others. In the law of evidence, opinion is an inference or conclusion drawn by a witness from facts some of which are known to him and others are assumed, or drawn from the facts which, though lending probability to the inference, do not evolve it by a process of absolutely necessary reasoning.

Not only in murders, but in most criminal cases there are few eyewitnesses. Hearsay evidence is not permitted in court; neither can an ordinary witness express an opinion. This is necessary to protect the accused from

hearsay and the kind of evidence that affects men's emotions instead of their judgment.

An American Tragedy has an example of this, where Mason calls in a Mrs. Rutger Donahue

> who proceeded, in the calmest and most placid fashion to tell how on the evening of July eighth last, between five-thirty and six, she and her husband immediately after setting up a tent above Moon Cove, had started out to row and fish, when being about a half-mile off shore and perhaps a quarter of a mile above the woods or northern fringe of land which enclosed Moon Cove, she had heard a cry.
>
> "Between half past five and six in the afternoon, you say?"
>
> "Yes, sir."
>
> "And on what date again?"
>
> "July eighth."
>
> "And where were you exactly at that time?"
>
> "We were --"
>
> "Not 'we.' Where were you personally?"
>
> "I was crossing what I have since learned was South Bay in a row boat with my husband."
>
> "Yes. Now tell what happened next."
>
> "When we reached the middle of the bay I heard a cry."
>
> "What was it like?"
>
> "It was penetrating--like the cry of some one in pain--or in danger. It was sharp--a haunting cry." [Opinion]
>
> (Here a motion to "strike out" with the result that the last phrase was so ordered stricken out.)
>
> "Where did it come from?"
>
> "From a distance. From within or beyond the woods."
>
> "Did you know at the time there was another bay or cove there--below that strip of wood?"

"No, sir."

"Well, what did you think then--that it might have come from within the woods where you were?" [Leading question]

(Objected to--and objection sustained.)

"And now tell us, was it a man's or a woman's cry? What kind of a cry was it?"

"It was a woman's cry and something like 'Oh, Oh! or 'Oh, my!'--very piercing and clear, but distant, of course. A double scream such as one might make when in pain."

"You are sure you could not be mistaken as to the kind of cry it was--male or female."

"No, sir. I am positive. It was a woman's. It was pitched too high for a man's voice or a boy's. It could not have been anything but a woman's."

"I see. And now tell us, Mrs. Donahue--You see this dot on the map showing where the body of Roberta Alden was found?"

"Yes, sir."

"Do you think that voice came from where this dot in Moon Cove is?" [Leading question]

(Objected to. Sustained.)

"And was the cry repeated?"

"No, sir, I waited and I called my husband's attention to it, too, and we waited, but didn't hear it again."

Then Belknap, eager to prove that it might have been a terrified [italics mine] and yet not a pained or injured cry, taking her and going all over the ground again, and finding that neither she nor her husband, who was also put on the stand, could be shaken in any way. Neither, they insisted, could the deep and sad effect of this woman's voice be eradicated from their minds. It had haunted both, and once in their camp again they had talked about it.[24]

Here we get an illustration of the difficulties connected with the testimony of witnesses. Generally,

witnesses cannot give opinions unless they are experts in particular fields. Nevertheless, by means of leading questions, Mason tried to induce Mrs. Donahue to make statements as to whether the voice she heard was that of a male or a female and where the voice came from; and the defense lawyers tried to show the difference between a terrified voice and a pained or injured one.

As to the testimony of the witnesses, there is an apt summation by Mr. Jackson, in which he declares that

> a trial proceeds as though it were a mere game. The object of the game is to ascertain who has most successfully complied with the rules. He is thereupon declared the winner. Each contestant is allowed a lawyer and witnesses. The umpires are the judges and the jury. The judge announces the rules, the jury (or sometimes the judge) decides the identity of the winner, presumably according to the rules. . . . None of the witnesses may tell all he knows, nor may he tell it in his own way to the best advantage. The lawyer on his side tries to suggest by his questions what the witness should say; the lawyer on the other side tries to make him say something else. Each lawyer tries to induce the jury to disregard everything the other lawyer or his witnesses say.[25]

In the Gillette case, the lawyers for the defense raised this issue on the appeal. They claimed it was error to permit the witness Marjorie Carey to express an opinion that a certain sound she heard was uttered by a woman.[26] The prosecutor stated that the description by the witness of the cry heard by her about six o'clock P.M. of July 11 was competent.[27]

Each side in the Gillette case upheld its contentions with a long list of citations concerning the competency of Marjorie Carey's testimony. Competent evidence is

the kind of evidence that renders it proper to be given on the trial of a cause. In evidence, an opinion is an inference or conclusion drawn by a witness as distinguished from facts known to him as facts. It is the province of the jury to draw inferences and conclusions; and if the witnesses were in general allowed to testify what they believed as well as what they know, the verdict would sometimes prove to be not the decision of the jury, but that of the witnesses. Hence, the rule that, in general, the witness cannot be asked his opinion upon a practical question.

On the subject of witnesses, Mr. Jackson makes this observation:

> An otherwise honest witness is often mistaken in his testimony for a variety of psychological reasons. For one thing, human sensory organs have physical limitations and the nerves are often inadequate to transmit even simple concrete facts to the mind. It is a practical impossibility to absorb a complicated set of occurrences in a moment. When an accident happens, it is usually over before one knows it has occurred. Afterthought reconstructs it. This has been demonstrated time and again by tests made by psychologists and psychiatrists, as well as in the courtroom.[28]

Professor Sutherland declares that a problem in regard to evidence

> is the honest mistakes which witnesses make. Memory is a fickle thing. One remembers what he wants to remember in many cases. Also his memory is a combination of what was actually witnessed and of other things that have been heard or imagined subsequent to the occurrence. Delusions of perception occur, also. Tests given to students regarding accuracy in reporting occurrences show very decided differences on many points, with a very high error under the best conditions. The only checks on mistakes in testimony in court are the testimony of other witnesses. The

> psychologists have been working for some time, however, on tests of comparative accuracy of different groups of persons, of replies to leading questions and of narrative accounts.[29]

In Crime, Criminals and Criminal Justice, Nathaniel Cantor states that as to memory: "Psychologists have shown that there is a curve of forgetting which starts with a sharp rise and flattens out at the end of several days. The testimony in a courtroom, given months . . . after the events, oftimes tells more about the 'coaching' of witnesses than the clarity of their memory. The minute details reported months after their happening are psychologically impossible."[30]

Thus, in the case of Clyde, the killing of Roberta occurred on July 8. Dreiser informs us that the case was carried "well into November."[31] Hence, after a lapse of about five months, Mason in cross-examination asks Clyde:

> "When you left Lycurgus to start on the trip, how much did you have?"
>
> "About fifty dollars."
>
> "About fifty? Don't you know exactly how much you had?"
>
> "I had fifty dollars--yes, sir."
>
> "And while you were in Utica and Grass Lake and getting down to Sharon afterwards, how much did you spend?"
>
> "I spent about twenty dollars on the trip, I think."
>
> "Don't you know?"
>
> "Not exactly--no, sir--somewhere around twenty dollars, though."
>
> "Well, let's see about that exactly if we can," went on Mason, and here, once more, Clyde began to sense a trap

and grew nervous--for there was all that money given him by Sondra and some of which he had spent, too. "How much was your fare from Fonda to Utica for yourself?"

"A dollar and a quarter."

"And what did you have to pay for your room at the hotel at Utica for you and Roberta?"

"That was four dollars."

"And of course you had dinner that night and breakfast the next morning, which cost you how much?"

"It was three dollars for both meals."

"Was that all you spent in Utica?"

Mason was taking side glances occasionally at a slip of paper on which he had figures and notes, but which Clyde had not noticed.

"Yes, sir."

"How about the straw hat that it has been proved you purchased while there?"

"Oh, yes sir, I forgot about that," said Clyde, nervously. "That was two dollars--yes, sir." He realized that he must be more careful.

"And your fares to Grass Lake were, of course, five dollars. Is that right?"

"Yes, sir."

"Then you hired a boat at Grass Lake. How much was that?"

"That was thirty-five cents an hour."

"And you had it how long?"

"Three hours."

"Making one dollar and five cents."

"Yes, sir."

"And then that night at the hotel, they charged you how much? Five dollars, wasn't it?"

"Yes, sir."

"And then didn't you buy that lunch that you carried out in that lake with you up there?"

"Yes, sir. I think it was about sixty cents."

"And how much did it cost you to get to Big Bittern?"

"It was a dollar on the train to Gun Lodge and a dollar on the bus for the two of us to Big Bittern."

"You know these figures pretty well, I see. Naturally, you would. You didn't have much money and it was important. And how much was your fare from Three Mile Bay to Sharon afterwards?"

"My fare was seventy-five cents."

"Did you ever stop to figure this all up exactly?"

"No, sir."

"Well, will you?"

"Well, you know how much it is, don't you?"

"Yes, sir, I do. It is twenty-four dollars and sixty-five cents. You said you spent twenty dollars. But here is a discrepancy of four dollars and sixty-five cents. How do you account for it?"

"Well, I suppose I didn't figure just exactly right," said Clyde, irritated by the accuracy of figures such as these.[32]

As has been noted, it is a rule of evidence that the ordinary witness cannot express an opinion. An exception is the expert witness who testifies in regard to some professional or technical matter arising in the case, and who is permitted to give his opinion as to such matters on account

of his special training, skill, or familiarity with it. In An American Tragedy:

> the guest page of the Renfrew House of Utica, for July sixth last, identified by Jerry K. Kernocian, general manager of said hotel, which showed an entry--"Clifford Golden and wife." And the same then and there compared by handwriting experts with two other registration pages from the Grass Lake and Big Bittern Inns and sworn to as being identically the same handwriting. And these compared with the card in Roberta's suit-case, and all received in evidence and carefully examined by each juror in turn and by Belknap and Jephson, who, however, had seen all but the card before. And once more a protest on the part of Belknap as to the unwarranted and illegal and shameful withholding of evidence on the part of the district attorney. And a long and bitter wrangle as to that, serving, in fact to bring to a close the tenth day of the trial.[33]

It is not unusual to find both the defense and the prosecution calling in experts in the same field who present conflicting views. Thus, in An American Tragedy:

> The testimony of the five doctors whom Mason had called in at the time Roberta's body was first brought to Bridgeburg, and who in turn swore that the wounds, both on the face and head, were sufficient, considering Roberta's physical condition, to stun her. And because of the condition of the dead girl's lungs, which had been tested by attempting to float them in water, she must have been still alive, although not necessarily conscious. But as to the nature of the instrument used to make these wounds, they would not venture to guess, other than to say it must have been blunt. And no grilling on the part of either Belknap or Jephson could bring them to admit that the blows could have been of such a light character as not to stun or render unconscious. The chief injury appeared to be on the top of the skull, deep enough to have caused a blood clot, photographs of all of which were put in evidence.[34]

The expert for the defense was

> a Dr. A. K. Sword, of Rehobeth--chancing to be at Big Bittern on the day that Roberta's body was returned to the boat-house, now declared that he had seen and examined it there and that the wounds, as they appeared

> then, did not seem to him as other than such as might have been delivered by such a blow as Clyde admitted to have struck accidentally, and that unquestionably Miss Alden had been drowned while conscious--and not unconscious, as the state would have the jury believe --a result which led Mason into an inquiry concerning the gentleman's medical history, which, alas, was not as impressive as it might have been. He had been graduated from a second-rate medical school in Oklahoma and had practised in a small town ever since.[35]

Ernest Mortenson declares:

> Doctors probably appear more frequently in the trial court than any other type of witness. While the evidence of most doctors may be invaluable in helping a jury in arriving at a correct verdict, there are unfortunately some "semi-professionals" testifying in the courts. Some time ago, in a damage suit against a city, the plaintiff, said to be suffering from serious head injury, called a doctor to testify as to the extent of her injuries. The doctor, being a loquacious gentleman with considerable presence, greatly impressed the jury, and even the judge. In an oracular and sensational manner he lectured them on "vaso-motor nerves" and "reflexes" and expressed himself almost entirely in medical terms impressively unfamiliar to both judge and jury. Finally, he terminated his testimony glibly with the statement that the plaintiff could never recover and, if she lived at all, it would have to be in an insane asylum.
>
> When the counsel for the defendant city got up to cross-examine, he saw that he had a difficult task ahead. The doctor was undoubtedly a sham and yet astute enough to slip through the examination with alert answers wrapped in a veil of medical terminology.[36]

On the subject of the alienist as an expert, Dr. William A. White states in his article "Alienist" in the Encyclopaedia of the Social Sciences:

> The function of the alienist, which is essentially that of the expert witness, is in theory to give the results of his scientific experience with mental disease in general, and in particular with reference to the case in hand, for the assistance of the court and the instruction of the jury. As an expert he is not confined to testimony as to facts. His testimony is essentially opinion evidence, and on the witness stand he is called

> upon to give his opinion of the bearing of certain symptoms upon legal issues involved, such as responsibility in criminal actions. . . .
>
> The testimony of alienists has in recent years fallen somewhat into disrepute because they have been pitted against one another in equal numbers; and because of the technical character of their evidence and the fact that they contradict each other, juries have tended to disregard it. Many efforts have been made to correct this state of affairs. The most outstanding suggestion is to employ state alienists who occupy a neutral position in the cause at issue and who may therefore be cross-examined by both defense and the prosecution. Such a course does not limit either the defense or the prosecution from employing additional alienists, but it is felt that the neutral position of the state alienists would materially increase the weight of their testimony. In practice, however, the problem of the expert testimony of alienists remain in a very unsatisfactory state.[37]

Each side claims to be telling the truth and wants the jury to find that what its witnesses say is the truth. Each witness tells what he claims is the truth, though his story is usually directly at variance with what a witness on the other side says is the truth. Thus, in addition to the experts

> there was Samuel Yearsley, one of the farmers from around Green Lodge, who, driving over the road which Roberta's body had traveled in being removed from Big Bittern to Gun Lodge, now earnestly swore that the road as he had noticed in driving over it that same morning, was quite rough--making it possible for Belknap, who was examining him, to indicate that this was at least an approximate cause of the extra-severity of the wounds upon Roberta's head and face. This bit of evidence was later contradicted, however, by a rival witness for Mason--the driver for Lutz Brothers, no less, who as earnestly swore that he found no ruts or rough places whatever in the road.[38]

On the subject of experts, Percival Jackson says: "It has become the custom to call expert witnesses to give

'expert' testimony on almost every conceivable subject, and many such 'experts' make it a practice to sell any believe-it-or-not opinion for which a litigant will pay. Often, even an honest expert indulges in wishful thinking and stretches the probabilities to favor the side that calls him. In consequence, it is never very difficult to get an expert to testify 'con' to combat the testimony of an expert who has testified 'pro.'"[39]

Ernest Mortenson quotes one legal authority as saying: "'The methods of an advocate should not shock the conscious, they should merely deceive the head of the enemy.' But in his eagerness to quash his victim, the cross-examiner sometimes employs methods that do not seem quite above-board. Of course, the attorney for the other side may object and the judge may order that part of the examination be stricken from the record but it is not always possible to strike from the mind of a juror the impression he has received."[40]

Cross-examination is the examination of a witness by the party opposed to the party who called him, and who examined or was entitled to examine him in chief. The purpose of the cross-examination is to test the truthfulness, intelligence, memory, bias, or interest of the witness, and any question to that end within reason is usually

allowed. Mr. Mortenson says 'of all the courtroom procedure and the lawyer technique, cross-examination has most thoroughly captivated the public fancy. The annihilation of another human being on the witness stand is as thrilling a spectacle to many people as a tenth-round knockout in a boxing ring. It is not alone the dramatic flourishes of a cross-examination which touch the imagination. Man is socially righteous and he delights almost mercilessly in the detection of another's untruths."[41]

An example of a leading question found in An American Tragedy is provided when Stella, the daughter of Mrs. Gilpin, testifies that

> shortly after Roberta had taken the room, she had passed her and a man, whom she was not able to identify as Clyde, standing less than a hundred feet from the house and noticing that they were evidently quarreling, she had paused to listen. She was not able to distinguish every word of the conversation, but upon leading [italics added] questions from Mason was able to recall that Roberta had protested that she could not let him come into her room--"it would not look right." . . . And decidedly this confirmed much of what Mason had charged in his opening address--that he had willfully and with full knowledge of the nature of the offense, persuaded Roberta to do what plainly she had not wanted to do--a form of testimony that was likely to prejudice the judge as well as the jury and all these conventional people of this rural county.[42]

Another example already illustrated is found in the leading questions used by Mason with Mrs. Donahue.

In scientific methods, the "lie detector" at present has the best standing of all the methods to get at the truth. This instrument measures the respiration, the heartbeat, and the blood pressure as the subject answers questions, on the theory that when a person lies, internal changes will occur.

The courts will not accept evidence obtained by this method at the present time. In one case,[43] the defendant was convicted of murder in the second degree. He appealed to a higher court because he had not been allowed to use the lie detector as evidence in his trial. The court stated:

> . . . While courts will go a long way in admitting expert testimony deduced from a well-recognized principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.
>
> We think the systolic blood pressure deception has not gained such standing and scientific recognition among physiological and psychological authorities as would justify the courts in admitting expert testimony deduced from the discovery, development and experiments thus far made.[44]

Another "lie detector" is a drug known as scopolamin. It is reported that this drug induces a state of semi-subconsciousness in which a person will answer every question asked of him. This method is still in its experimental stage, and there is evidence that it is not wholly reliable.[45]

On the subject of scientific methods in the courts, Charles T. McCormick states in his article "Evidence" in

the Encyclopaedia of the Social Sciences:

> A fertile possibility for the future improvement of the law of evidence lies in the contribution which psychologists may offer to the science of proof. The psychologists have already by controlled experimentation accumulated much statistical data about the accuracy of witnesses in perceiving, remembering and reporting. Thus errors in observing colors in different lights, in identifying sounds and in fixing the direction from which they come, in estimating time periods and in determining the number of persons in a group have all been measured. Again, the degree of improvement of perception where the attention of the witness is especially directed to the object and degree of distortion resulting from shock have both been shown to be of controlling significance in evaluating testimony. Experiments with group reporting upon short moving picture scenes show clearly the fallibility of memory. Apparently, the curve of forgetting starts with a sharp rise but flattens out after two or three days and errors double after an interval of forty-five days. Here again, whether the observation was attentive or casual plays a great part in the accuracy and completeness of the recall the extent of which has been measured. Likewise memory of word heard has been especially measured with results that . . . confirm the lawyer's hostility to hearsay . . . . Among the interesting findings as to reliability of reporting are those which indicate that the taking of an oath reduces the completeness of the report but substantially increases the accuracy. Comparisons of results as between free narration, giving greater accuracy, and answers to questions, giving greater completeness, and as between leading and non-leading questions bears directly upon the soundness of methods of examining witnesses in the court. . . .[46]

> . . . Eventually, perhaps, Anglo American procedures may find itself gradually but increasingly free from emphasis on jury trial with its contentious theory of proof. With responsibility for the ascertainment of facts vested in professional judges, the stress will be shifted free from the crude technique of admitting or rejecting evidence to the more realistic problems of appraising its credibility. Psychologists meantime will have built upon their knowledge of the statistical reliability of witnesses in groups a technique of testing the veracity of individual witnesses and assessing the reliability of particular items of testimony. Judges and advocates will then become students and practitioners of an applied science of judicial proof.[47]

Percival Jackson advises that "less formality and greater flexibility, less technicality and more liberality in the courtroom would help make the truth plausible and lies ineffectual. A trial would then seem less like a game, and truth more its end."[48]

"It couldn't be worse, . . . The evidence boils down to you-did---I-didn't. . . ."[49]
--Harper Lee, To Kill a Mockingbird

CHAPTER V

THE END OF A TRIAL

> For twelve honest men have decided the cause,
> Who are judges alike of the facts and the laws.
>
> --Sir William Pulteney

> Warfare in the courts is as expensive as it is on the battlefield.[1]
>
> --Honoré de Balzac, Illusions Perdues III, "Les Soufrances de L'inventeur"

After the evidence has been submitted to the jury and the opposing attorneys have examined and cross-examined the various witnesses on both sides and have presented the final arguments, the judge makes the charge to the jury. The purpose of the charge is to give the jury the legal aspects of the case and to instruct them how to analyze the evidence in arriving at their verdict.

> And then Judge Oberwaltzer from his high seat finally instructing the jury: "Gentlemen--all evidence is, in a strict sense, more or less circumstantial, whether consisting of facts which permit the inference of guilt or whether given by an eyewitness. The testimony of an eyewitness is, of course, based upon circumstances.

"If any of the material facts of the case are at variance with the probability of guilt [italics mine], it will be the duty of you gentlemen to give the defendant the benefit of the doubt raised.

"And it must be remembered that evidence is not discredited or decried, because it is circumstantial. It may often be more reliable evidence than direct evidence. Much has been said here concerning motive and its importance in this case, but you are to remember that proof of motive is by no means indispensable or essential to conviction. While a motive may be shown as a circumstance [italics Dreiser's] to aid it in fixing a crime, yet the people are not required to prove a motive.

"If the jury finds that Roberta Alden accidentally or involuntarily fell out of the boat and that the defendant made no attempt to rescue her, that does not make the defendant guilty and the jury must find the defendant 'not guilty.' On the other hand, if the jury finds that the defendant in any way, intentionally, there and then brought about or contributed to that fatal accident, either by blow or otherwise, it must find the defendant guilty.

"While I do not say that you must agree upon your verdict, I would suggest that you ought not, any of you, place your minds in a position which will not yield if after careful deliberation you find you are wrong."[2]

The judge must be most cautious in making the charge because he knows that the attorneys are hanging on his words, so that if he goes beyond his privilege, reversible error may be charged against him.

The phrase "probability of guilt" in the quotation above is emphasized because in regard to this Clarence N. Callendar gives a criticism of the judge's charge in his American Courts. He substitutes the phrase "reasonable doubt" for the "probability of guilt" used by Judge Oberwaltzer and declares that in

> criminal cases a verdict of guilty should not be based on a mere preponderance of proof. The jury should be convinced that, upon all the evidence, there can be no reasonable doubt that the accused is guilty . . . . What constitutes reasonable doubt is difficult to define, and the probabilities are that few jurors understand the definition which the judge gives them. . . . Assuming that the jury understands what he means, it is not unlikely that they will have some difficulty in applying the doctrine.[3]

It is important to note the fourth paragraph of Judge Oberwaltzer's charge to the jury.

> "Much has been said here concerning motive and its importance in this case, but you are to remember that proof of motive is by no means indispensable or essential to conviction. While a motive may be shown as a circumstance [italics Dreiser's] to aid it in fixing [italics Dreiser's] a crime, yet the people are not required to prove a motive."

Clyde's lawyers tried to show that motive or the impelling power that causes a person to commit an act, but as has been stated, legally it is never essential to show motive in order to get a conviction. For example, mercy killing is a crime of murder that might be cloaked with a good motive, but motive is not necessary for the conviction. Evidence of motive is generally admissible on behalf of the state and of the defendant, especially where the evidence bearing upon intent with which the crime was committed is circumstantial, and also by way of extenuation or aggravation, to establish the degree of the offense or the proper punishment. Thus the law is more interested in the nature of the crime for purposes of punishment and less in the criminal, who may have been a victim of circumstances and who commits a crime for the first time.

After the judge completes the charge, the jury is excused and ordered into a room especially set aside for them to weigh the facts in the case. Very often, the jury ignores the evidence presented and the instructions of the judge and bases its decision upon the prejudices of the members. Thus, in An American Tragedy we have

> Out of the whole twelve but one man--Samuel Upham, a druggist--(politically opposed to Mason and taken with the personality of Jephson)--sympathizing with Belknap and Jephson. And so pretending that he had doubts as to the completeness of Mason's proof until at last after five ballots were taken he was threatened with exposure and the public rage and obloquy which was sure to follow in case the jury was hung. "We'll fix you. You won't get by with this without the public knowing exactly where you stand." Whereupon, having a satisfactory drug business in North Mansfield, he at once decided that it was best to pocket this opposition to Mason and agree.[4]

Harry Elmer Barnes and Negley K. Teeters declare:

> Eventually when a jury is reasonably alert in following the testimony, the desirable results that might come are likely to be offset by the presence upon the panel of a powerful and impressive personality or an unusually stubborn moron. There have been innumerable miscarriages of justice because the jury was converted to the point of view of a prejudiced but convincing orator, or because a juror was present who, through bias, bribery or stupidity, held out against the judgment of his seven colleagues. And even the most elementary psychology makes it clear that though we had twelve able men on the jury they could rarely come to a concise, definite and well-reasoned agreement upon the basis of a study of the same body of facts.[5]

And in connection with Clyde's jury, we hear

> four hollow knocks on the door leading from the jury room to the court room. It was the foreman of the jury, Foster Lund, a dealer in cement, lime and stone. His great fist was knocking . . . the jury room being opened and the twelve men filing solemnly in. . . . And as they did so, seating themselves in the jury box, only to rise again, at the command of the clerk, who began: "Gentlemen of the jury, have you agreed on a verdict?"
>
> And then Lund announcing: "We have. We find the defendant guilty of murder in the first degree."[6]

Harry Elmer Barnes and Negley K. Teeters say that often "any criticism of the jury system is not by the allegation that most verdicts are sound. But how does one know even that one particular verdict is correct? The majority of our convicted murderers go to the chair vehemently protesting their innocence, and many who seem obviously guilty are freed."[7] These authors present the thesis "that the modern jury trial is one of the many anachronisms that clutter up our system of criminal jurisprudence and penal philosophy."[8] They contend that "there are many advantages and practically no disadvantages in waiving jury trials. It saves the state much expense. It reduces the number of appeals and retrials, and it relieves the work of the prosecutor's office, for more time can be placed on careful preparation of cases. The trend away from jury trials is healthy and is being encouraged by many whose professions are closely linked with criminal justice."[9]

The same authors agree with Raymond Moley, who claims such a "positive drift toward the decline of the use of the jury that there is little point in either wasting our efforts arguing about the abolition of a thing which is actually abolishing itself, or in proposing substitutes or remedies for an agency which is stricken with a fatal illness. The criminal jury may already lie in the twilight of doomed institutions."[10]

However, Roscoe Pound thinks there are

> compelling reasons for believing that the jury in criminal cases will endure . . . the jury of the vicinage is a truly representative institution, and a representative local judgment upon conduct has a value which atones for many shortcomings. . . . On the other hand, the jury system in criminal cases stands in need of much improvement. The rapid growth of enforcement of laws against vice by injunction rather than prosecution is due largely to the ineffectiveness of the jury trial for such cases. Indeed with the rise of the problem of enforcing law in the urban, industrial society of today a more efficient criminal trial system is imperative.[11]

In the opinion of the author of this discussion, the abolition of the jury would be a loss to society. A judge, unless he is considered a radical, will make every effort to tell others how to behave. In political crimes, the judge is influenced by politics; the members of a jury of anonymous persons do not as a rule have political aspirations, and therefore it is better for the purpose of administration of justice to relieve the judge and put some pressure on the jury. There is less danger where there are twelve men and one strong man may hold out--which

helps. Juries serve the administration of justice by serving as a buffer for the courts.

Harry Elmer Barnes and Negley K. Teeters point out that in "some cases where jury trial is waived there are many other abuses, notably trial by huddle, a situation in which prosecutor, defense attorney, and judge work out a compromise disposition of the case, which is just as reprehensible as a verdict of a corrupt jury."[12] They say that the "jury is a man-made device full of flaws but with a kernel worth preserving. If it is kept, we must continue to watch it, checking from time to time until we have some chance of creating an efficient, honest and intelligent body of citizens who take their responsibility as no light task in citizenship."[13]

In criminal practice, the arraignment of a defendant consists of calling upon him by name, reading the indictment to him, and demanding of him whether he is guilty or not guilty. Where the offense carries the death penalty, it is customary for the defense attorney to bring into the court room members of the family. This is usually done in an attempt to sway the judge toward an attitude of leniency.

"'Better wire her [Clyde's mother] to come on,' suggested Jephson practically. 'We can get Oberwaltzer to set

the sentence over until the tenth if we say she is trying to come on here.'"[14]

And then Clyde "was arraigned for sentence, with Mrs. Griffiths given a seat near him."[15] And

> in his darkest hour, standing up before Justice Oberwaltzer and listening first to a brief recital of his charge and trial (which was pronounced by Oberwaltzer to have been fair and impartial), then to the customary: "Have you any cause which shows why the judgment of death should not now be pronounced against you according to law?"--to which and to the astonishment of his mother and the auditors (if not Jephson, who had advised and urged him to do so), Clyde now in a clear and firm voice replied:
>
> "I am innocent of the crime as charged in the indictment. I never killed Roberta Alden and therefore I think this sentence should not be passed."
>
> However, Oberwaltzer, without the faintest sign of surprise or perturbation, now continued: "Is there anything else you care to say?"
>
> "No," replied Clyde after a moment's hesitation.
>
> "Clyde Griffiths," then concluded Oberwaltzer, "the judgment of the court is that you, Clyde Griffiths, for the murder in the first degree of one, Roberta Alden, whereof you are convicted, be, and you are hereby sentenced to the punishment of death; and it is ordered that after this day's session of court, the Sheriff of this county of Cataraqui deliver you, together with the warrant of this court, to the Agent and Warden of the State Prison of the State of New York at Auburn, where you shall be kept in solitary confinement until the week beginning the 20th day of January, 19--, and, upon some day within the week so appointed, the said Agent and Warden of the State Prison of the State of New York is commended to do execution upon you, Clyde Griffiths, in the mode and manner prescribed by the laws of the State of New York."[16]

Even after they are sentenced to death, most of the condemned continue to fight for life and liberty. To afford the convicted person every opportunity of avoiding the stigma of guilt, provision is made by the state statutes for taking appeals in criminal cases from the courts of original jurisdiction to a higher court for review. Appeals are very common, but many are not granted. In New York, an appeal stays the execution even if eventually the appeal is denied. The New York statute reads:

> When the judgment is of death, an appeal to the Court of Appeals stays the execution, of course, until the determination of the appeal. When the judgment is death the Court of Appeals may order a new trial, if it be satisfied that the verdict was against the weight of evidence or against law, or that justice requires a new trial, whether any exception should have been taken or not in the court below.[17]

Within a short time after conviction, the defense must file the application for appeal, with reasons. In preparing for an appeal, the attorneys do not need to find witnesses or other evidence. The rules of most of the appellate courts require the filing of briefs for the use of the court and opposing counsel at a time designated for each side before the hearing. These briefs are backed by the citations of former cases that support the particular contentions of the litigating parties.

The appellate court differs from the trial court in that there is no jury but several judges, usually from three to nine in number. The New York Court of Appeals consists of the chief judge and six associate judges.

These judges hear only the necessary facts of the case that were found in the trial court and then decide what law should be applied to those facts.

After Clyde was convicted and the proper commitment papers were prepared, he was moved to the Auburn State Prison, where "he was to be restrained until ordered retried or executed."[18] There he becomes acquainted with another convict, "Miller Nicholson, a lawyer . . . a refined intellectual type,"[19] who discusses the appeal and advises him concerning

> one important point in connection with his own case--an appeal--or in the event of any second trial, i.e., --that the admission of Roberta's letters as evidence as they stood, at least be desperately fought on the ground that the emotional force of them was detrimental in the case of any jury anywhere, to a calm unbiased consideration of the material facts presented by them--and that instead of the letters being admitted as they stood they should be digested--and that only offered to the jury. "If your lawyers can get the Court of Appeals to agree to the soundness of that you will win your case sure."[20]

This is the only point stressed by Dreiser in the actual appeal, and it is similar to the one raised in the briefs to the Court of Appeals by the defense attorneys in the Gillette case; but Dreiser uses this contention to illustrate the technicalities involved in the admission of written evidence. The separation of the emotional contents from the factual contents of Roberta's letters

called for the wisdom of a Solomon. Even Clyde's lawyers did not think of it, and so Dreiser supplies the intellectual lawyer to discern these fine points. We learn that after the advice received by Clyde from the intellectual lawyer, he "at once, after inducing a personal visit on the part of Jephson, laying this suggestion before him and hearing him say that it was sound and that he and Belknap would assuredly incorporate it in their appeal."[21]

In this connection, Mr. Jackson says:

> How the judges can magnify or minimize the inevitable difficulties of technical procedure is readily illustrated.
>
> After a long and arduous trial, a notorious criminal had been convicted of murder. The case was a cause célèbre. There was no doubt of the defendant's guilt. But as is invariably done in capital cases, the defendant appealed to the highest court of the State. The appeal was argued and the appellate judges retired in consternation. They would have to reverse the judgment of conviction, though they were convinced of the defendant's guilt, because the judge who had tried the case had committed undeniable error in refusing to admit in evidence a letter which had been offered by counsel for the convicted defendant. The law was clear; the judge should have received the letter and should have permitted it to be read to the jury; his failure to do so, under a long line of established precedents, was error that required the conviction to be set aside and a new trial was ordered.
>
> The appellate judges were about to order a reversal of the judgment of conviction when an appellate judge with common-sense tendencies asked to see the letter. To the amazement of the judges, it was not available. Due to an oversight, it had not been marked for identification and included in the record, as is customary in such cases. The skeptical judge insisted on seeing the letter before he would vote for reversal. Others of the judges remonstrated; it was highly irregular; the appeal judges, under the law, were bound by what was

> in the record; they had no legal right to consider anything else; the cases and precedents were clear on the subject. The dissenter stood his ground. Finally, the chief justice sent for the district attorney who had prosecuted the case. He came to the state capital from the distant city where the case had been tried and brought with him the letter that was causing all the difficulty. The letter was opened and read. It was utterly innocuous; there was nothing in it which, by any stretch of the imagination, could have caused the jury to have changed its conclusion respecting the defendant's guilt. The lawless judge then insisted that the judgment of conviction be affirmed; he argued that there was no point in reversing the judgment on a useless technicality and thereby hold up the law to public reproach.[22]

Professor Harry Best writes in Crime and Criminal Law about the technicalities connected with evidence in an appeal case. He says:

> A case is carried to a higher court on appeal. . . . by means of a bill of exceptions (or objections) taken to the rulings of the trial court . . . as to the character of the evidence admitted. Objections may be offered on the ground that the judgment in a given case is contrary to the weight of evidence, or is against the law or justice; that new evidence has been discovered; that certain improper evidence was introduced in the trial; that certain proper evidence was denied; that the evidence failed to show some important detail; that the indictment was incorrect or defective in some particular; that there was misdirection of faulty charges to the jury on the part of the court; that the jury was improperly drawn; that there was some misconduct or impropriety on part of the judge or jury at the trial; or some similar ground. An appeal may be taken from final judgment of conviction; from an order denying a motion for a new trial; from an order made after judgment affecting substantial rights; or some like reason.[23]

But Dreiser was not concerned with any useless technicality involved in an appeal, but was essentially interested in all the circumstances surrounding an appeal that are recognized by authorities in the field of administration

of justice. He is more concerned with the enormous expense of the appeal, the sufferings of Clyde's family, the delay, and its psychological effects on Clyde.

As to the expense of the appeal, Harry Elmer Barnes and Negley K. Teeters declare that the "item of stenographic help is large. The record of a long trial will often cost thousands of dollars. To appeal a case to a higher court, the defense must submit from ten to twenty copies of the transcript of the trial. This expense is often more than a defendant can afford."[24]

Before Clyde's trial was over, his uncle decided to move the business to South Boston

> where they might decently submerge themselves until the misery and shame of this had in part at least been forgotten.
>
> And because of this further aid to Clyde absolutely refused. And Belknap and Jephson then sitting down together to consider . . . they were by no means persuaded that either their practical self-interest or their charity permitted or demanded their assisting Clyde without further recompense. In fact, the expense of appealing this case was going to be considerable as they saw it. The record was enormous. The briefs would be large and expensive. . . . At the same time, as Jephson pointed out, it was folly to assume that the western Griffiths might not be able to do anything at all. Had they not been identified with religious and charitable work this long while? And was it not possible, the tragedy of Clyde's present predicament pointed out to them, that they might through appeals of various kinds raise at least sufficient money to defray the actual costs of such an appeal.[25]

As to the cost of appeals, Mr. Jackson states:

> Judicial errors that result in appeals are costly. Appeals are unjustifiably complicated and expensive, because the stenographer's record of what occurred at a trial must be ordered and its cost paid. The record of a long trial will frequently cost many thousands of dollars; for a short trial its cost is invariably in the hundreds. Moreover, the stenographer produces only one or two typewritten copies and the appeal court, for its judges, its clerks and its records requires twelve, fifteen or twenty copies. The result is that the litigant who would appeal must have the stenographer's record printed (unless he gets special permission from the court for good cause shown), and these printing bills are sometimes staggering in amount. For not only must the stenographer's record of the trial testimony be printed, but every document offered in evidence that bears on the question before the court must be included in "record on appeal"--contracts, photographs, maps, diagrams, the thousand and one papers that lawyers, necessarily or needlessly, submit to court and jury.[26]

He tells of one case that "involved a record of about 7,000 pages, and cost $10,000 to print. Another case had a record of about 4,000 pages which cost about $6,000. And such records are by no means unusual."[27] He gives us the statistics of Thaw's legal fights in the Stanford White killing, which were said to have cost him about $900,000. Items listed are:[28]

Expenses of first trial, 1907	$200,000
Expenses of second trial, 1908	150,000
Expenses of first insanity hearing, 1908	65,000
Expenses of second insanity hearing, 1908	50,000
Expenses of third insanity hearing, 1912	75,000
Incidentals	100,000
C. W. Hartridge, attorney of record, who called in many others of counsel (disbursements)	103,000
Paid detectives	50,000

Mr. Jackson declares that the "inordinate cost of

appeal frequently means that the losing side is denied the opportunity to appeal since the cost of such proceedings, if taken, may readily consume all of its substance."[29]

So, Clyde's mother was

> troubled as to the source of any further funds, . . . And an appeal sure to cost not less than two thousand. And Mrs. Griffiths, after an hour in their [Belknap's and Jephson's] presence, in which they made clear to her the basic cost of an appeal--covering briefs to be prepared, arguments, trips to be made--asserting repeatedly that she did not quite see how she was to do.[30]

She endeavors by addressing public meetings in her son's behalf to raise the money for an appeal. In Clyde's family, most hard hit were his parents. His mother

> soon discovered there were other factors to be considered--carfare, her own personal expenses in Utica and elsewhere, to say nothing of certain very necessary sums to be sent to Denver to her husband, who had little or nothing to go on at present, and who, because of this very great tragedy in the family, had been made ill--so ill indeed that the letters from Frank and Julia were becoming very disturbing. It was possible that he might not get well at all. Some help was necessary there.
>
> And in consequence, in addition to paying her own expenses here, Mrs. Griffiths was literally compelled to deduct other reducing sums from this, her present and only source of income. It was terrible--considering Clyde's predicament--but nevertheless must she not sustain herself in every way in order to win to victory? She could not reasonably abandon her husband in order to aid Clyde alone.
>
> Yet in the face of this--as time went on, the audience growing smaller and smaller until at last they constituted little more than a handful--and barely paying her expenses--although through this process none-the-less she finally managed to put aside--over and above all her expenses--eleven hundred dollars.
>
> Yet, also, just at this time, and in a moment of extreme anxiety, Frank and Julia wiring her that if she decided to see Asa again she had better come home at once. He was exceedingly low and not expected to live.

> Whereupon, played upon by these several difficulties . . . she now hastily conferred with Belknap and Jephson, setting forth her extreme difficulties.
>
> And these, seeing that eleven hundred dollars of all she had thus far collected was to be turned over to them, now in a burst of humanity, advised her to return to her husband.[31]

Harry Elmer Barnes and Negley K. Teeters say that the "practice of safeguarding even the convicted man against shoddy or inefficient 'justice' is admirable, but the cumbersome machinery by which he is protected is expensive, inefficient, absurd, and time consuming."[32]

Dreiser shows us the time element when Belknap and Jephson advise Mrs. Griffiths to return to her sick husband because

> Clyde would do well enough for the present seeing there was an entire year--or at least ten months before it was necessary to file the record and the briefs in the case. In addition another year assuredly must elapse before a decision should be reached. And no doubt before that time the additional part of the appeal fee could be raised. Or, if not--well, then--anyhow (seeing how worn and distrait she was at this time) she need not worry. Messrs. Belknap and Jephson would see to it that her son's interests were properly protected. They would file an appeal and make an argument--and do whatever else was necessary to insure her son a fair hearing at the proper time.[33]

Then there are the psychological effects of the appeal which Dreiser describes in the following manner:

> No thought in either the planning or the practice of all this of the unnecessary and unfair torture for those who were brought here, not to be promptly executed, by any means, but rather to be held until the higher courts should have passed upon the merits of their cases--an appeal. . . .[34]

> What followed then was what invariably followed in the wake of every tortured consciousness. From what it dreads or hates, yet knows or feels to be unescapable, it takes refuge in that which may be hoped for--or at least imagined. But what was to be hoped for or imagined? Because of this new suggestion offered by Nicholson, a new trial was all that he had to look forward to, in which case, and assuming himself to be acquited thereafter, he could go far, far away--to Australia--or Africa--or Mexico--or some such place as that, where, under a different name--his old connections and ambitions relating to that superior social life that had so recently intrigued him, laid aside, he might recover himself in some small way. But directly in the path of that hopeful imagining, of course, stood the death's head figure of a refusal on the part of the Court of Appeals to grant him a new trial. Why not--after that grand jury at Bridgeburg?[35]

Throughout this discussion there have been noted the issues raised in the briefs submitted to the Court of Appeals in the Gillette case in their relation to points made by Dreiser in his novel. To summarize these issues and give the citations to uphold the contentions:

1. The defense attorneys in the Gillette case held that the trial was not organized according to the constitution of the state, and that the court had no

jurisdiction or power to try the defendant or pronounce the judgment of death against him.[36] The prosecutor's briefs stated that the power of the Governor to call an extraordinary term of the court is not questionable.[37]

2. It was error to submit the two specimen of hair to the jury in order to let them speculate as to their identity.[38] The prosecutor declared that no error was committed in exhibiting to the jury the tangled hair collected from the braces of the boat, together with some hair cut from the dead woman's head.[39]

3. The defense attorneys claimed that the methods by which this trial was conducted by the prosecution were oppressive and unfiar to the defendant.[40] There was no statement made in the briefs concerning this point, but the court explained that the fact that the district attorney, in summing up the case after a long and bitterly contested trial, made some statements not fully justified by the evidence was held not to be sufficient ground for reversal. The court declared that where the district attorney, upon objection, immediately withdrew, and the trial judge explicitly and clearly instructed the jury to disregard any unwarranted statements, and where it did not appear that such statements produced any substantial or lasting effect upon the jury outside of and in addition to that caused by the evidence itself, there was no ground for reversing the decision of the trial court.[41]

4. The defense attorneys claimed it was error to permit the witness Marjorie Carey to express an opinion that a certain sound she had heard was uttered by a woman.[42] The prosecutor stated that the description by the witness of the cry heard by her about six o'clock P.M. of July 11 was competent.[43]

The only point the court went into at great length in the Gillette case was the one connected with the letters. The defense attorneys stated:

5. It was error to receive in evidence and to read to the jury letters Grace Brown had written to the defendant.[44] The prosecutor cited cases to show that it was not error to receive in evidence the complete correspondence between the dead woman and the defendant during the relationship.[45]

The Court of Appeals in the Gillette case explained that the letters written by the dead woman to her lover and by the defendant to the dead woman were admitted by the trial court not only under the ruling that the dead woman's letters should not be received as evidence of the facts therein stated, but were received as evidence under the further and too narrow ruling, and that they were admitted "only for the purpose of showing how the decedent regarded her relations with the defendant."

The court declared that aside from the admitted purpose of showing the relations and the thoughts of the

dead woman as to Gillette, the only effect the letters would have been apt to have with the jury, so far as the letters could be controlled by any ruling of the court, would have been to tend to establish a motive for the commission by Gillette of the crime charged against him; and therefore the letters might have been admitted with entire propriety for that very purpose. If the jury considered the letters as affecting that feature of the People's case, it did no more than the court should have directed and authorized them to do. Therefore, the court held that the judgment should not be reversed on the ground that the letters might have more significance in the minds of the jury than that which was authorized by the trial judge.[46]

The following issue was the only one not raised in An American Tragedy:

6. It was error to produce the uterus of the deceased and the foetus of the unborn child and receive them in evidence.[47] No statement was made by the prosecutor concerning this point. The court declared that the foetus taken from the dead woman's body at the time of the autopsy was produced in court at the trial in order to establish that the dead woman was pregnant. The court explained that this did not constitute error where such exhibit was carefully covered up and kept from the jury so that it could not by any possibility have served to inflame their feelings to the prejudice of Gillette; and especially where no

fact was established by such exhibition that was not, in the end, fully admitted by him.[48]

The Court of Appeals in the Gillette case stated that their opinion was not based on any one particular point raised by the attorneys in their briefs, but it found on examination the evidence that, although circumstantial, yet all taken together and considered as a connected whole, constituted such convincing proof of Gillette's guilt that the court was not able to escape from its force by any justifiable process of reasoning. The court declared that not only was the verdict of the jury convicting the defendant of the crime of murder in the first degree not opposed to the weight of evidence and to the proper inferences to be drawn from it, but that such verdict was abundantly justified by the evidence.[49]

The holding of the Court of Appeals in Clyde's case reads:

> "We are mindful that this is a case of circumstantial evidence and that the only eyewitness denies that death was the result of crime. But in obedience to the most exacting requirements of that manner of proof, the Counsel for the people, with very unusual thoroughness and ability has investigated and presented evidence of a great number of circumstances for the purpose of truly solving the question of the defendant's guilt or innocence.
>
> "We might think that the proof of some of these facts standing by themselves was subject to doubt by reason of unsatisfactory or contradictory evidence, and that other occurrences might be so explained or interpreted to be reconcilable with innocence. The defense--and very ably--sought to enforce this view.

> "But taken all together and considered as a connected whole they make such convincing proof of guilt that we are not able to escape from its force by any justifiable process of reasoning and we are compelled to say that not only is the verdict not opposed to the weight of the evidence, and to the proper inference to be drawn from it, but that it is abundantly justified thereby. Decision of the lower court unanimously confirmed."[50]

The conclusion reached by the Court of Appeals in Clyde's case is very similar to one paragraph in the opinion of the Gillette case,[51] but Dreiser uses this conclusion as illustrative material. He insists that the decision of the Court of Appeals rested not on the proof of one particular issue, but upon some vague concept of a "connected whole." For Dreiser, this "connected whole" must be broken up into separate issues and translated into living experiences. These issues have no meaning as dry and lifeless contentions with a string of citations to uphold them. They require a "bath of realism."

In connection with the issues raised in the briefs of the Gillette case, Dreiser shows us (1) the political favoritism connected with the Governor's calling an extraordinary term of the court for Clyde's trial; (2) the shady practices carried on by the district attorney in order to obtain a victory; (3) all the flattering, emotional, and prejudicial appeals to the jury known to the legal profession; (4) that the truth of a witness's story depends upon the questions suggested by the lawyers; (5) that letters are used to sway the jury by appealing to their passions

for the purpose of raising fine technical points of evidence in the appeal.

Dreiser does not discuss the issue raised by the defense attorneys in the Gillette case that it was error to produce the uterus of the deceased and the foetus of the unborn child and receive them in evidence.

The term "uterus" and "foetus" could be used in medical books and legal records, but the moral and legal censorship[52] at that time prohibited their use in literature. After the "Comstockian" attack upon The "Genius,"[53] Dreiser was probably not too anxious for a criminal prosecution based on the obscenity statute or the so-called Comstock Law[54] passed by Congress on March 3, 1873.

In view of all the obscenity then found in The "Genius," it was hardly worthwhile for Dreiser to arouse the animosity of the Society for Suppression of Vice because of the two little words like "uterus" and "foetus" especially since he had so many vital issues to present to his readers.

Various suggestions have been made for the improvement of methods used by the Court of Appeals.[55] Short records would save time and expense. Very little has been done about this. Only the necessary parts of the record

should be used. More time should be allowed for oral argument. All the judges should decide independently. The one-man method makes the other judges lazy.

It was not for nothing that Dreiser wrote the "Court of Appeals finding (Fulham, J., reviewing the evidence as offered by Belknap and Jephson)--with Kincaid, Briggs, Truman and Dobshuter concurring."[56]

It should be noted that when a case is decided in a higher court, one of the judges generally gives the reasoning by which the court has arrived at its decision, expounding the law as applied to the case and detailing the reasons on which the judgment is based. This is known as "opinion."

A "concurring opinion" is an opinion separate from that which embodies the views and decision of the majority of the court, prepared and filed by the judge who agrees in the general result of the decision, and which either reinforces the majority opinion by the expression of the particular judge's own view or reasoning, or (more commonly) voice his disapproval of the grounds of the decision or the arguments on which it was based, though approving the final decision.

A "dissenting opinion" is a separate opinion in which a particular judge announces his dissent from the conclusion held by the majority of the court, and expounds his own views.

In the Gillette case, Mr. Justice Hiscock wrote the opinion of the Court of Appeals. All of the judges concurred without writing concurring opinions.[57] Similarly, in An American Tragedy only Judge Fulham reviewed the evidence submitted by Belknap and Jephson, and none of the other judges wrote separate concurring or dissenting opinions and "in January, 19--, the Court of Appeals finding . . . that Clyde was guilty as decided by Cataraqui County jury and sentencing him to die at some time beginning February 28th or six weeks later."[58]

And Shakespeare, too, has something to say about sentencing.

Angelo: The law hath not been dead, though it hath slept.
Those many had not dar'd to do that evil,
If [but] the first that did th' edict in fringe
Had answer'd for his deed. Now 'tis awake,
Takes note of what is done, and, like a prophet,
Looks in a glass that shows what future evils,
Either [new], or by remissness new conceived,
And so in progress to be hatch'd and born,
Are now to have no successive degrees,
But, [ere] they live, to end.

Isabella: Yet show some pity.

Angelo: I show it most of all when I show justice,
For then I pity those I do not know,
Which a dismiss'd offence would after gall;
And do him right that, answering one foul wrong,
Lives not to act another. Be satisfied
Your brother dies tomorrow. Be content.

Isabella: So you must be the first that gives this sentence,
And he that suffers O, it is excellent
To have a giant's strength; but it is tyrannous
To use it like a giant.
--Shakespeare, Measure for Measure, Act II, Scene 2

The power to punish has always carried with it the power to pardon. Under the common law, the king had power to pardon a person who had been convicted of crime. His act of pardoning was one of grace, for which he was accountable to no one. In the American colonies, the pardoning powers were generally vested in the executive, but in some cases in the Assembly or Council. After the Revolution, because of the fear of executives, the pardoning power was generally retained by the legislative assembly. A tendency soon appeared to increase the power of the governor in this field, generally as an expression of the doctrine of separation of powers. Thus, in New York, the statute reads:

> The governor has power to grant reprieves, commutations and pardons, after conviction of all offenses, except treason and cases of impeachment, upon such conditions, and with such restrictions and limitations, as he may think proper, subject to the regulations provided in this Chapter.[59]

And in another section:

> He must annually communicate to the legislature each case of reprieve, communication or pardon; stating the name of the convict, the crime of which he was convicted, the sentence and its date, and the date of the commutation, pardon or reprieve.[60]

When an appeal fails, a new date is set for the execution. Lewis E. Lawes, former warden of Sing Sing,

says in Life and Death in Sing Sing:

> . . . But there is still hope of life by commutation to "natural life" by the governor, the chances being one out of three. . . . In some instances, commutations have been granted only an hour or two before the execution was to take place. Hence, most of the condemned continue to hope for life in face of the denial of their appeal. In the event of a commutation to natural life, the chances of being eventually released from prison are only about five out of a hundred.[61]

In his Criminology, Donald R. Taft declares that "the possibility of pardon is indispensable because authorities, being human, make mistakes and sometimes misuse power. Moreover, when mores and laws change, pardon can bring treatment in line with such changes. It is easy to exaggerate the frequency of unjust imprisonment. Men are sometimes innocent of particular offenses, but rarely are guiltless of any crime. Yet prisoners found to be innocent need to be pardoned."[62]

The law in New York provides for the time of execution. It reads: "The week so appointed must begin not less than four weeks and not more than eight weeks after the sentence."[63]

When Clyde is informed that his conviction has been affirmed, and "that--even though McMillan talked of an appeal to the Governor which he--and some others whom he was sure to be able to influence would make--unless the Governor chose to act within six weeks, as Clyde knew, he would be compelled to die."[64]

Professor Sutherland says that the "pardoning system has been assailed by many people and many have demanded

that it be completely abolished. The arguments most frequently advanced for abolishing it are as follows: "It is a device by which criminals who have political influence or other influence escape a penalty. It produces an unfavorable effect on prisoners in that they try to secure a pardon rather than reform. It makes the court careless in imposing sentences to enable judges to impose very heavy penalties at a time of public frenzy and later recommend clemency."[65]

McMillan consoles Clyde by informing him:

> "But you see we haven't reached the end of this yet. There is a new Governor coming into office in January. He is a very sensible and kindly man, I hear. In fact I know several people who know him--and it is my plan to see him personally--as well as to have some other people whom I know write him on the strength of what I will tell them."[66]

Professor Sutherland says that because "the Governor does not have reliable information on which to base a decision, he is susceptible to pressure or clamor. Consequently, many pardons are granted for reasons that are entirely inadequate. One governor gave as his reason for pardoning criminals that 'he could deny Carrie [his wife] nothing and she could refuse nothing to anyone else.' Another governor, when a friend sought the pardon of two criminals, offered him his choice of the two but refused to pardon both 'because that county's quota is exhausted.'"[67]

Mrs. Griffiths and the minister appeal to the new governor--

> a tall, sober and somewhat somber man who, never in all his life had even so much as sensed the fevers or fires that Clyde had known, yet who, being a decidedly affectionate father and husband, . . . yet greatly exercised by the compulsion which the facts, as he understood them, as well as the deep-seated and unchangeable submission to law and order, thrust upon him. Like the pardon clerk before him, he had read all the evidence submitted to the Court of Appeals, as well as the latest briefs submitted by Belknap and Jephson. But on what grounds could he--David Waltham, and without any new or varying date of any kind--just a re-interpretation of the evidence as already passed upon--venture to change Clyde's death sentence to life imprisonment? Had not a jury, as well as the Court of Appeals, already said he should die?[68]

In one of the "Attorney General's Survey of Release Procedure" in connection with the pardon, we find that "beyond assembling . . . records of the criminal proceedings and the statements and recommendations of judges, prosecutors, prison officials, and others interested, most states make no effort to obtain information as to the defendant's character, family history, or other factors relevant to the propriety of returning him to society."[69]

Mrs. Griffiths is so shaken by emotions that she cannot talk, so McMillan, seeing his opportunity, now entered his plea. "Clyde had changed. He could not speak as to his life before--but since his incarceration . . . he had come into a new understanding of life, duty, his obligation to man and God. If but the death sentence could be commuted to life imprisonment . . ."[70] But

> the Governor at last found voice to say "because of your long contact with him in the prison there--do you know of any material fact not introduced at the trial which would in any way tend to invalidate or weaken any phase of the testimony offered at the trial?

> As you must know this is a legal proceeding. I cannot act upon sentiment alone--and especially in the face of the unanimous decision of two separate courts."[71]

How could McMillan tell the Governor that Clyde was tortured to the breaking point and that murder seemed the only solution to his troubles? How explain that through a period of time he had acquired an insight into the complexities of the formation of Clyde's character and was therefore better qualified than the law to evaluate and interpret the play of the psychological and sociological factors in the life of this man? And forthwith he declared:

> "As his spiritual advisor I have entered only upon the spiritual, not the legal aspect of life." And thereupon Waltham at once deciding, from something in McMillan's manner that he, like all others, apparently, was satisfied as to Clyde's guilt. And so, finally finding courage to say to Mrs. Griffiths: "Unless some definite evidence such as I have not yet seen and which will affect the legality of these two findings can be brought me, I have no alternative, Mrs. Griffiths, but to allow the verdict as written to stand. I am sorry--oh, more than I can tell you. But if the law is to be respected its decisions can never be altered except for reasons that in themselves are full of legal merit."[72]

And Clyde, now for the first time fit to live rightly, is forced instead to pay the last penalty to the state for a crime committed out of weakness and undisciplined greed for happiness, one of the many who have become derelict through inadequate character training and the lack of the normal joys of youth.

> The Court wants nothing from you.
> It receives you when you come
> And it dismisses you when you go.[73]
>
> --Franz Kafka, The Trial

CHAPTER VI

PRISON AND THE DEATH PENALTY

I know not whether the Laws be right
    Or whether the Laws be wrong;
All that we know who lie in jail
    Is that the wall is strong;
And that each day is like a year,
    A year whose days are long.

But this I know, that every Law
    That Men have made for Man,
Since first Man took his brother's life,
    And the sad world began,
But straws the wheat and saves the chaff
    With a most evil fan.

This too I know -- and wise it were
    If each could know the same --
That every prison that men build
    Is built with bricks of shame,
And bound with bars lest Christ should see
    How men their brothers maim.[1]

--Oscar Wilde, The Ballad of Reading Gaol

That Dreiser had a keen interest in prison administration was evident in The Financier, where he shows the politics and favoritism that exists within the prison walls. Thus, after two weeks in prison, the warden tells the wealthy Cowperwood he will be transferred to a better cell with a back yard.

"'They'll give you a yard . . . we only allow a half-hour a day in it. . . . I've told the overseer about

your business arrangements. He'll treat you right in the matter.'"[2]

Then the "warden and some allied politicians made a good thing out of this prison industry, which was enforced. It was really not hard labor--the tasks were simple and not oppressive, but all that were made were promptly sold and the profits pocketed."[3] And

> seeing that the prison was a public institution apt to be visited at any time by lawyers, detectives, doctors, preachers, propagandists, and the public generally, and that certain rules and regulations had to be enforced, if for no other reason than to keep a moral and administrative control over his own help, it was necessary to see that such discipline, system and order were maintained, and it was not possible to be too liberal with any one. There were, however, exceptional cases--men of wealth and refinement, victims of those occasional uprisings which so shocked the political leaders generally--who had to be looked after in a friendly way.[4]

> . . . It was strictly against the rules, in theory at least, to bring in anything which was not sold in the store-room--tobacco, writing paper, pens, ink, whiskey, cigars, or delicacies of any kind. . . . Whiskey was not allowed at all, and delicacies were abhorred as indicating rank favoritism; nevertheless, they were brought in. If a prisoner had the price and was willing to see that Bonhag secured something for his trouble, almost anything would be forthcoming.[5]

Professor Sutherland states:

> The prisons, like the police department and the courts, have frequently been extremely corrupt. Positions in many institutions are filled on the principle of political patronage. . . . When a prisoner is admitted on a definite sentence, he may, if he can make a sufficient payment to an officer and his case has not been too prominent, be released immediately, although his name is carried on the books until the end of his sentence. Prisoners who have been convicted of false entries on the books of a bank may be assigned to bookkeeping work in the prison and be required to falsify the prison records in order to cover the supplies which the prison

> officers have appropriated for their own use. . . . When MacCormick became commissioner of correction in New York City in 1934 he made a raid on the house of correction, where he found narcotic drugs, hypodermic needles, knives, male prostitutes, a "politician's row" in which politically important prisoners secured unusual privileges, and many other abuses which had been permitted by the thoroughly corrupt administration. Similar conditions could undoubtedly be discovered by similar raids on dozens of other prisons. In view of these conditions it is not surprising that imprisonment frequently fails to reform prisoners.[6]

In An American Tragedy, Dreiser describes the favoritism shown to Clyde in the county jail:

> And in the interim, Clyde in his cell, walking to an fro . . . or reading and re-reading the newspapers, or nervously turning the pages of magazines or books furnished by his counsel, or playing chess or checkers, or eating his meals, which, by special arrangement made on the part of Belknap and Jephson (made at the request of his uncle), consisted of better dishes than were usually furnished to the ordinary prisoner.[7]

Clyde committed a capital crime. Capital crime is one punishable with death. The subject of capital punishment has occupied the attention of enlightened men for a long time, particularly since the middle of the last century. Authorities list more than thirty methods of putting to death legally that were relatively common at some stage of human history. Contemporary methods are hanging, asphyxiation, shooting, beheading, and electrocution.

Electrocution was first introduced in New York state in Auburn Prison in 1890.[8] During the first fifty years, over five hundred persons have been electrocuted

in the state. In 1900, or immediately thereafter, fifteen states and twenty-five foreign countries have abolished the death penalty, but in 1944 only six states in the United States have done so. As of 1965, thirteen states wiped out the death penalty, Four states, among them New York, abolished the death penalty except for special crimes.[9]

Death by electrocution has been advocated as a humanitarian move because it was considered entirely painless. However, former Warden Lawes informs us that its original introduction was apparently the result of an effort of an electrical company to market its products. He says: "Back of the enactment is an interesting story of a business fight between two great electrical concerns which illustrate how far flung may be the influence of seemingly unrelated and indirect factors of which one may be entirely unaware."[10]

Harry Elmer Barnes and Negley K. Teeters state that they "are unable to offer any conclusive opinion as to the accuracy of those who contend that electrocution is painless and those who maintain that it is a brief severe form of torture. That there is much room for doubt is indicated by the subsequent introduction of a lethal gas in some states as a method of executing the death sentence."[11]

The New York statute reads:

> The punishment of death must, in every case, be indicated by causing to pass through the body of the convicted person a current of electricity of sufficient intensity to cause death, and the application of such current must be continued until such convict is dead.[12]

Far worse than the physical pain is the mental torture endured by the convicted man, which may last for weeks, months, and even years, since a condemned man need not give up hope of reprieve until the last moment.

Says Dreiser:

> The "death house" in this particular prison was one of those crass erections and maintenances of human insensitiveness and stupidity principally for which no one primarily was really responsible . . . And to the end that a man, once condemned by a jury, would be compelled to suffer not alone the death for which his sentence called, but a thousand others before that. For the very room by its arrangement, as well as the rules governing the lives and actions of the inmates, was sufficient to bring about this torture, willy-nilly.[13]

A convict is about to be executed in the cell next to Clyde's. Dreiser describes the effect upon Clyde:

> Once more the voice from the lowest: "Oh, my God! Oh, my God! Oh, my God!"
>
> Clyde was up, his fingers clinched, his nerves were as taut as cords about to snap. A murderer! And about to die, perhaps. Or grieving over some terrible thing like his own fate. Moaning--as he in spirit at least had so often moaned there in Bridgeburg. Crying like that! God! And there must be others!
>
> And day after day and night after night more of this, no doubt, until, maybe--who could tell--unless. But oh, no! Oh, no! Not himself--not that--not his day. Oh, no . . .
>
> The other room! It was in here somewhere, too. This room was connected with it. He knew that. There was a door. It led to that chair. <u>That chair</u>. [Italics Dreiser's]
>
> And then the voice again, as before, "Oh, my God! Oh, my God!"
>
> He sank to his couch and covered his ears with his hands.[14]
>
> Then the voice of the priest accompanying the doomed man reciting a litany. . . . And now the other door

> would be opened. He would be looking through it--this condemned man--so soon to be dead--at it--seeing it--that cap--those straps. Oh, he knew all about those by now. . . .
>
> The procession has passed. That door was shut. He was in there now. They were strapping him in, no doubt. Asking him what more he had to say. . . . Now the straps must be fastened on, surely. The cap pulled down. In a moment, a moment, surely--[15]

Dreiser goes on to describe

> a sudden dimming of the lights in this room--as well as over the prison--an idiotic or thoughtless result of having one electric system to supply the death voltage and the incandescence of this and all other rooms. . . .
>
> And then after the lapse of a minute perhaps, a second dimming lasting for thirty seconds--and finally a third dimming.[16]

According to Mr. Lawes, there is no dimming of lights, as is popularly supposed, when the death switch is thrown into place, because a separate dynamo, run by power produced in the prison plant, furnishes the electricity.[17]

Mr. Lawes says that the "'cheating of the chair' by escape or suicide is rendered practically impossible by the form and construction of the new death house, the ceaseless vigilance which is kept, and the extraordinary precautions which are taken against these possible contingencies."[18]

As to suicide, Dreiser writes about one of the convicts sentenced for the murder of a bank watchman who "became hysterical, screamed, hashed the chair and table of his cell against the bars of his door, tore the sheets of his bed to shreds and even sought to strangle himself

before eventually he was overpowered and removed to a cell in a different part of the building to be observed as to his sanity."[19]

In connection with insanity, Mr. Lawes says:

> Each condemned prisoner is examined at various intervals by three lunacy commissioners appointed by and reporting directly to the governor. A very few become insane, and these are transferred by order of the governor to Dannemore State Hospital for Insane Prisoners. Some have been medically, but not legally, insane; others have been of low mentality, but nevertheless responsible for their actions under the law. Occasionally, a condemned prisoner shams insanity, but these are, of course, easily detected by the alienists. Those who are commuted to natural life show, in after years, an unusually high rate of insanity as compared with other prisoners--most men begin to break down mentally after about fifteen years of imprisonment.[20]

After witnessing the first electrocution, Clyde

> shook and shook, lying on his couch, face down. The keepers came and ran up the curtains--as sure and secure in their lives apparently as though there was no death in the world. And afterwards he could hear them talking--not to him so much--he had proved to be too reticent thus far--but to some of the others.
>
> Poor Pasquale. This whole business of the death penalty was all wrong. The warden thought so. So did they. He was working to have it abolished.[21]

Dreiser was probably referring to Warden Lawes, who tells about one convict who said: "'Warden, I hope you don't succeed in your effort to abolish capital punishment. It is better to burn in the chair and have it over than to rot in prison with a life sentence.'"[22]

On the subject of life imprisonment, Professor Sutherland says that "it is generally suggested that life imprisonment should be the alternative to the death penalty.

No good reason exists for insisting on life imprisonment as the sole substitute. Those convicted of capital offenses should be treated on the same principle as other criminals, namely, careful study of personality and social situation. This may mean life imprisonment but certainly does not mean this in all cases."[23]

That Dreiser did not approve of life imprisonment or of conditions within the prison, was evident by his description of

> Auburn, the western penitentiary of the State of New York, wherein the "death house" or "Murderers' Row" as it was called--as gloomy and torturesome an inferno as one could imagine any human compelled to endure--a combination of some twenty-two cells on two separate levels . . .[24]

> . . . , the gray and restraining walls of Auburn itself --with, once he [Clyde] was presented to a clerk in the warden's office and his name and crime entered in the books--himself assigned to two assistants, who saw to it that he was given a prison bath and hair cut--a prison-striped uniform and hideous cap of the same material, prison underwear and heavy gray felt shoes to quiet the restless prison tread in which he might indulge, together with the number, 77221.[25]

> . . . That cutting of his hair downstairs in that prison barber shop--and by a convict; that suit and underwear that was now his and that he now had on. There was no mirror here--or anywhere--but no matter--he could feel how he looked. This baggy coat and trousers and this striped cap. He threw it hopelessly to the floor. For but an hour before he had been clothed in a decent suit and shirt, and tie and shoes, and his appearance had been neat and pleasing as he himself had thought as he left Bridgeburg. But now--how must he look? And tomorrow his mother would be coming . . . God![26]

Mr. Lawes makes this observation:

> The condemned is "dressed in" upon arrival in clothing which is of such a quality that it cannot easily be used to make a rope to be used in an attempt at suicide by hanging, although one such suicide had been accomplished this way. . . .
>
> Felt slippers are substituted for shoes, which might conceivably be used as a weapon either against a keeper or in an attempt at suicide. Special shoes made in the prison, are supplied for the exercise period, as all other shoes have a small piece of steel under the instep which might be taken out and used as a weapon. Knives, forks, and pepper are not permitted and the meals are served through a small opening in the barred door, in vessels of soft aluminum which are taken up immediately after the meal is finished.
>
> Pencils are not allowed, and only one kind of a pen, which is returned to the keeper. Mail is censored, but the condemned may write all the letters they wish and receive any proper mail. Magazines and newspapers are permitted when received from the publishers, but the small pieces of wire used in binding magazines are extracted. Both the magazines and the newspapers are collected after being read, as one prisoner made a very formidable club out of loose sheets of a magazine by using chewing gum and bits of string as a binder.
>
> Condemned prisoners are shaved with a safety razor by a prison trusty under a watchful eye of a keeper. Once or twice a week, the prisoner puts his hands out between the bars to have his fingernails pared by the attending guard, as long nails could be used to cut the arteries of the wrist. Matches are not allowed, although prisoners are permitted to smoke cigarettes and cigars, which are lighted upon request by the guards. There is no movable object in the cell, and the lights are located outside to prevent their being broken and used with suicidal intentions. In fact, the condemned prisoner is in the same position as a rat caught in a wire-caged trap.[27]

As to the activities in prison, Mr. Lawes says that "the law stipulates solitary confinement for the

condemned, and they are so confined except for a fifteen-minute exercise period, during which they walk or play handball in one of the three small enclosures, which are floored with concrete and admit of no view except the sky above. While locked in the cell, no condemned prisoner can see another although it is possible to converse with the prisoners in the cell on either side."[28]

Dreiser comments:

> In an exercise court, beyond the farthermost end of the long corridor, twice daily, for a few minutes each time, between the hours of ten and five--the various inmates in groups of five or six were led forth--to breathe, to walk, to practise calisthenics--or run and leap as they chose. But always under the watchful eyes of sufficient guards to master them in case they attempted rebellion in any form. And to this it was, beginning with the second day, that Clyde himself was led, now with one set of men and now with another. But with the feeling at first strong in him that he could not share in any of these public activities, which nevertheless, these others--and in spite of their impending doom--seemed willing enough to indulge in.[29]

It was during such an exercise period that Clyde met the lawyer Nicholson who advised him about the appeal and gave him books to read. Mr. Lawes declares:

> . . . The majority of the condemned are practically illiterate when they enter the death house, but nearly all of them learn to read and write fairly well before they are executed. Some of them develop a taste for good reading, the books being furnished from the prison library, and a few have written some creditable amateur prose and poetry. Most of them show considerable ingenuity by making picture frames out of coloured paper and thread, ash trays out of orange peel, and statuary out of left over pieces of bread. One prisoner learned to draw very well and drew with chalk an excellent likeness of the governor.[30]

Dreiser says that there were "no games other than cards and checkers--the only ones playable without releasing the prisoners from their cells. Books, newspapers, to be sure, for all who could read or enjoy them under the circumstances."[31] He describes a checker game as follows:

> For the most part, as soon as breakfast was over--among those who were not called upon to join the first group for exercise, there were checkers or cards, two games that were played--not with a single set of checkers or a deck of cards between groups released from their cells, but by one of the ever present keepers providing two challenging prisoners (if it were checkers) with one checker-board but no other checkers. They were not needed. Thereafter the opening move was called by one. "I move from F2 to E1"--each square being numbered--each side lettered. The move checked with a pencil.
>
> Thereafter the second party--having recorded this move on his own board and having studied the effect of it on his own general position, would call: "I move from E7 to F5." If more of those present decided to join in this--either on one side or the other, additional boards and pencils were passed to each signifying his desire. Then Shorty Bristol, desiring to aid "Dutch" Swighort, three calls down, might call: "I wouldn't do that, Dutch. Wait a minute, there's a better move than that." And so on with taunts, oaths, laughter, arguments, according to the varying fortunes and difficulties of the game. And so, too, with cards. These were played with each man locked in his cell, yet quite as successfully.[32]

Mr. Lawes tells of a condemned prisoner who played checkers with a prisoner in another cell by calling out his moves up to the very minute he was summoned to the chair.[33]

As to religious activities in the prison, Dreiser says there were visits "mornings and afternoons, as a rule, from a priest, and less regularly from a rabbi and a Protestant minister, each offering his sympathies or services to such as would accept them."[34] Mr. Lawes indicates that some of the prisoners are stoical and refuse any religious

consolation. One such said to him: "Oh, hell, what's the difference? We all have to die, and I might as well die sitting up in a chair as lying in a bed."[35]

As to other visitors, Mr. Lawes says: "Visits from relatives and attorneys (unless a court order is obtained to admit others), which have heretofore been allowed twice a week, are permitted each day of the final week. Visitors are separated from the prisoner by a screen and the meetings are supervised by a keeper. Newspaper reporters and magazine writers resort to various subterfuges to make such visits, but these are never permitted and all interviews purporting to have been made in the death house are untrue."[36]

Clyde "had heard from his mother that scarcely any [visitors] were allowed--that only she and Belknap and Jephson and any minister he chose might come once a week."[37]

And Dreiser describes visits in the following manner:

> Also at any time in going to visit a lawyer or relative brought into the old death house for this purpose, it was necessary to pass along the middle passage to this smaller one and so into the old death house, there to be housed in a cell, fronted by a wire screen two feet distant, between which and the cell proper a guard must sit while a prisoner and his guest (wife, son, mother, daughter, brother, lawyer) should converse--the guard hearing all. No handclasps, no kisses, no friendly touches of any kind--not even an intimate word that a listening guard might not hear.[38]

As for the death penalty being a deterrent, there is no evidence to show that serious crimes are more prevalent in states that have abolished the death penalty. In fact, both individual and social psychology have found that it is not the severity of the penalty but the swiftness and certainty with which the punishment is inflicted that makes it effective. It is obvious, therefore, that the delay in prosecuting cases, characteristic in our legal system, offsets the effectiveness of the penalty inflicted, no matter how severe. Generally speaking, the arguments pro and con on the subject of capital punishment are unconvincing; the figures available, however, do not show that capital punishment is a deterrent, nor does it appear a just form of punishment in relation to the offender; it may serve the purpose of vengeance, and is probably cheaper in the long run.[39]

As to the deterring effect of capital punishment in an article in the Prison Journal, Dr. Thorsten Sellin says that, "Murder, however, is the very crime where the fear of penalty, under any circumstances, is least likely to be present. The murderer is frequently incapacitated to such a degree that he does not understand the consequences of his actions. Even though mentally competent, he may be so blinded by the passions of the moment that all thoughts of the future have been expelled or dominated by his unreasoning fury."[40]

Harry Elmer Barnes and Negley K. Teeters declare that "the final answer of the scientific criminologist to the exponent of capital punishment is that if we desire to get rid of crime we must adopt the same scientific attitude that society has taken about the elimination of physical disease. So it is likewise absurd to punish those who are socially ill to the degree that they commit acts of which society disapproves. We must reduce so far as possible the unhealthy social environments which generate bad habits that emerge in criminal conduct."[41]

Dreiser was convinced that capital punishment was not an effective deterrent; he shows us the social apathy and the irony of life in the final scene laid in a Western city at night, where the opening is repeated. Another young boy, this one Clyde's nephew, forms a part of an identical street mission under the leadership of the aged grandmother and grandfather--another American tragedy in the making.

Thus, writes Dreiser:

> "Praise the Lord," commented the man [Clyde's father].
>
> And then at last the mission itself--"The Star of Hope Bethel Independent Mission, Meetings every Wednesday and Saturday night, 8 to 10. Sundays at 11, 3, 8. Everybody weldome." And under this legend in each window--"God is love." And below that in smaller type: "How long since you wrote to mother."
>
> "Kin I have a dime, grandma? I wanna go up to the corner and git an ice-cream cone." It was the boy asking.
>
> "Yes, I guess so, Russell. But listen to me. You are to come right back."
>
> "Yes, I will, grandma, sure you know me."

> He took the dime that his Grandmother had extracted from a deep pocket in her dress and ran with it to the ice-cream vendor.
>
> Her darling boy. The light and color of her declining years. She must be kind to him, more liberal with him, not restrain him too much, as maybe, maybe, she had-- She looked affectionately and yet a little vacantly after him as he ran. "For his [italics Dreiser's] sake."
>
> The small company, minus Russell, entered the yellow, unprepossessing door and disappeared.[42]

There was an aftermath to this great drama. About eighteen years after Gillette murdered Grace Brown, the mother of Grace Brown brought an action[43] for libel against the Paramount Publex Corporation for the exhibition of a talking picture entitled An American Tragedy, based on the indictment, trial, conviction and execution of a character for the murder of her daughter. The picture implied that the mother had neglected her daughter, both educationally and morally, that she had permitted her to carry on clandestine relations with the murderer, or others, and that the mother was made to appear as poor white trash and a disreputable, untidy product of the hills.

The court held in Mrs. Brown's favor and explained that since the sound film was a new medium of expression at that time, she need not plead the actual words, scenes, and incidents claimed to be libelous. It was sufficient to set

forth a description of the objects portrayed on the screen in the form of facts and conclusions. Two of the judges dissented.

And as to the misrepresentation[44] of Dreiser's An American Tragedy, Dorothy Dudley tells us:

> . . . In the fall of 1931 a talking film was finally made from An American Tragedy, produced by Paramount under the direction of the imported Von Sternberg, through the scenario of a friend of Dreiser's, Samuel Hoffenstein. The picture lied so patently as to the meaning of the novel, was certainly no more profound than any other "murder film," that Dreiser after futile protests in Hollywood appealed to the courts to prevent its release. What was the answer of the lawyer for Paramount, and of a judge of the Supreme Court of New York State? The lawyer smirkingly argued that the book was just a lot of crap, taken from court records; the novelist had written it to get himself on the front page. The judge in his final decision seemed to accept this opinion and further ruled against the author, since Paramount pitifully had spent so many thousands of dollars on its production. Arthur Garfield Hays, attorney for Dreiser, pointedly wondered in court why Paramount had not gone direct to the records of "The State vs. Gillette," rather than pay a large sum for the rights of the novel.[45]

Mr. Hays might have added that Denis Diderot, the eighteenth century author who was famous as the editor of the Encyclopédia, also wrote a realistic novel, Jacques the Fatalist and His Master. Whether consciously or not, Diderot borrowed many pages from Lawrence Sterne's Tristram Shandy,[46] yet neither of these men regarded it as a theft because each author made his works something of his own.

Stendhal, who was delighted with Diderot's Jacques the Fatalist and His Master, like Diderot, had no scruples about taking the sources for The Red and the Black from two different reports of the Gazette des Tribunaux.[47] The newspaper accounts were useful only as the spark which set fire to the forest. He would have written The Red and the Black at any event, for the qualities which make it great are Stendhal's and not the newspaper accounts.

André Gide's strictures against society follow in the wake of French tradition as illustrated by Stendhal's The Red and the Black. He too used two newspaper clippings which have no relationship one with the other but furnish him with a certain amount of connective tissue which form in a documentary sense the sources of his novel The Counterfeiters,[48] a novel which grew into a unique book and which represents most fully his art and thought.

Leo Tolstoy derived the idea of the plot of Resurrection from a newspaper report as well as from an actual case reported by his friend Anatoly Fedorovich Koni,[49] who at the time was Prosecutor of the District Court at St. Petersburg. Koni firmly believed that any violation of the moral code establishes severe moral punishment in the form of guilt conscious. His credo is expressed in the following manner: "Where justice and due process of law do not form an entity, the moral foundation of social life is threatened."[50]

Koni was determined that Tolstoy use the facts of a case in which a nobleman called to serve on a jury at the trial of a prostitute for murder, recognizes her as a girl whom a long time since he had seduced. Koni insisted that Tolstoy himself use the topic for a work of deep moral significance. As to the moral significance, Tolstoy told his biographer P. I. Biryukov to mention an episode in his biography of a crime he committed with Masha, a maid in his aunt's house. She was innocent and Tolstoy seduced her and thereafter she was dismissed and disappeared. On the basis of this conscious-striking incident, a tremendously powerful story is built up.

Jakob Wassermann, like Dreiser, was repeatedly charged with gross purloining[51] from other writers when he wrote The Maurizius Case. Even if certain data are borrowed from the Hau case,[52] Wassermann has invested them with new life in an entirely different background, with characters of his own creation, in a vivid story of his invention.

Thomas Mann, who wrote about the intellectual Adrian Leverkühn, the piano-tuner[53] (Tonsetzer)[54] in Doctor Faustus which concerns the creative individual in our time who cannot "breakthrough from formal construction to expression."[55] One of Leverkühn's compositions is an opera based on Shakespeare's Love's Labour's Lost.[56] Mann discusses his indebtedness to Shakespeare in his autobiographical The Story of A Novel: The Genesis of Doctor Faustus[57] (Die Entstehung

Des Doktor Faustus), yet Mann's description of music never actually composed is one of the most daring innovations of modern fiction which has nothing to do with his "theft" from Shakespeare. Then there is always the inimitable Shakespeare whose plays consist primarily of adaptations transferred by the magic of his genius for all times.

Finally, as to Dreiser purloining the material in the Gillette case, the reader is referred to the cartoon and its explanation at the very start of this study. "Whether or not An American Tragedy will survive in the Dreiser cannon is a question that can be answered only by time."[58] Dreiser may not have been like Shakespeare for all times, but in his "sprawling strength" of An American Tragedy, he is for the all-important time of compassion, pity and understanding of human weaknesses.

Isabella: Well, believe this,
No ceremony, that to one longs,
Not the king's crown, nor the disputed sword,
The marshal's truncheon, nor the judge's robe,
Become them with one half so good a grace
As mercy does.

--Shakespeare, Measure for Measure
Act II, Scene 2

APPENDIX

APPENDIX

THE JUDGE'S CHARGE IN PEOPLE V. GILLETTE*

Hiscock, J. No controversy throws the shadow of any doubt or speculation around the primary fact that about six o'clock in the afternoon of July 11, 1906, while she was alone with the defendant, Grace Brown met an unnatural death and her body sank to the bottom of Big Moose Lake. But the question which is bitterly disputed, and which is of some extreme importance to this defendant, is whether this tragedy was the result of suicidal drowning or of violence inflicted by his hand under such circumstances as constituted deliberate murder. The jury, after a long and arduous trial, have adopted the latter theory, and, therefore, the serious responsibility comes to us of determining whether their conclusion is infected with any such error, either of fact or of law, as requires the judgment based thereon to be reversed and the defendant to be relieved from that sentence to the extreme penalty of the law which now hangs over him.

In pursuing the first branch of our investigation and in the discussion of the evidence for the purpose of

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*191 N.Y. 107, 83 N.E. 680 (1908).

making clear and stating our conclusions with reference to its weight and effect, it will not be possible to refer to all the details which have been developed with such care by counsel on either side in support of the theory of guilt or innocence. All of them have received our painstaking consideration and the omission or reference to many of them is due to these limitations of reasonable length which should be imposed upon this opinion.

At the date of her death, Grace Brown was about twenty years of age, and the defendant was three years her senior. The former had been brought up in a country home of apparently simple and wholesome atmosphere, and, subject only to her relations with the defendant, seems to have been a girl of pure character and of unusual intelligence and attractiveness. The defendant was possessed of education, of previous good character, and had had considerable experience in the world. They came together as employees in the factory of the defendant's uncle in the city of Cortland, New York, and this common employment led to acquaintance and intimacy, and finally to the seduction, and three or four months before her death to the pregnancy of the deceased by the defendant. The defendant largely screened this association from observation, and in public sought the society of young ladies belonging to what would be regarded as a more pretentious social grade than that to which the decedent belonged.

In the latter part of June, evidently by prearrangement and with the expectation that the defendant soon would join her, the deceased left the factory and went to her father's home not far from Cortland. While there, several letters passed from her to him and two or three from him to her. The great body of the former is filled with expressions of affection for defendant and with pathetic references to her physical and still greater mental distress caused by her condition; with reference to their coming trip and what manifestly were preparations for marriage; with complaints at defendant's lack of affection and consideration and his pursuit of pleasure elsewhere and his failure to write to her more frequently; with entreaties that he should come to her, and doubts whether he would come as he had promised, followed by expressions of contrite sorrow for her distrust of him; and finally with very significant statements that if he did not come to her she would return to him at Cortland.

Finally, on the evening of July 8th the defendant went to a neighboring railroad station where the next morning he was joined by the deceased; thence they journeyed up to Utica where they stayed that night; thence the next morning to Tupper Lake in the Adirondacks where they stayed that night, the next morning retracing their course to Big Moose Lake, and thus reaching the spot where was to be enacted the closing scene of their unhappy association. This journey

must have been planned with the theory, genuine of course on the part of the woman, that it would lead to marriage. It could have presented no other reasonable or lawful purpose. The time had passed when desire would prompt such a trip as the cover or opportunity for mere illicit enjoyment. A condition existed which only could be relieved in a legitimate way by marriage and the defendant has testified that at that time he loved the deceased and intended to marry her.

Yet every significant step taken by him seems to have led away from this consummation. At all times when he was in the neighborhood or presence of those who knew him he concealed his companionship with the deceased, and at Utica and Tupper lake where he stayed with her as his wife he registered both under an assumed name and from fictitious residences, and the final registry made at Big Moose lake which gave correctly the name and residence of deceased, still utilized a false name and residence for himself. And while he was thus carefully suppressing the facts of identity and companionship he was arranging through social engagements with young lady acquaintances and otherwise to be present a few days later at certain pleasure resorts, publicly and undisguised.

From these circumstances, the People argue with much force that at the time the defendant started out on the journey he did not intend to marry the deceased; that

he did not purpose during the latter days of the week openly to acknowledge a relationship which he was so carefully concealing during the first days, and that, therefore, already he must have planned to rid himself of its embarrassments. At least it is manifest that during those days when they journeyed back and forth he was unready and unwilling to solve their difficulties by the lawful remedy of marriage.

Shortly after arrival at Big Moose the defendant engaged a row boat and alone with the decedent started out on the lake. Some of the incidents which attended the setting out on this trip are treated as of great importance by the district attorney and we think properly so. While an article of decedent's wearing apparel was left in a conspicuous place in the hotel from which they started, defendant gathered up and took with him all of his property, including an umbrella, an overcoat and a heavy suitcase upon which he carried a tennis racket which became an article of much importance on the trial. We do not think that the evidence fairly established any legitimate explanation of this latter conduct, and we are forced to the conclusion urged by the People that the defendant was then planning such a termination of the boat ride that he would not desire to return to the hotel and, therefore, was taking with him all of his possessions.

The two people were seen on the lake at various times during the afternoon and finally towards its close

were observed going toward a secluded portion of the lake where subsequently the tragedy occurred, the defendant rowing and the decedent sitting in the stern of the boat, and soon after and at about the time when death was happening and from the direction where it was happening a sound was heard which was described as a woman's scream.

After the death the defendant went on shore and taking his possessions with him struck through the woods to a road with which it is claimed he had become familiar and journeyed on foot and by steamboat to another resort of the Adirondacks near that at which as before stated he had planned to be the last of the week. As he went, he carefully hid his tennis racket in the woods. He became a guest of the hotel under his own name and there and in that neighborhood spent the following two days after the manner of an ordinary summer tourist, showing no outward signs of distress and giving no information of what had happened. Upon the following morning he was taken into custody. The next day after the tragedy the boat was found floating bottom side up and the body of decedent was recovered from the lake.

Of the facts thus far stated most are undisputed and all are established in our judgment beyond any reasonable doubt whatever. And now with the light which they shed upon it we will revert to the crucial question: What was the cause of Grace Brown's death? That leads to an examination of her body as it was disclosed by the autopsy

performed July 14th by five physicians who were sworn as witnesses.

According to their testimony there were found on her head and face many marks of violence, especially there being evidence of a blow near the left eye sufficient to cause blindness and of a blow on the side of the head three inches above the ear of sufficient severity to cause unconsciousness even if not more serious consequences, and it is the theory of the prosecution that these wounds were inflicted by the defendant in the boat with the tennis racket and thereafter the body was thrown into the water.

The accuracy and completeness of the autopsy and the candor and truthfulness of these doctors were assailed with unflinching vigor and with much ability on the trial by the learned counsel for the defendant. He sought to minimize the evidence of violence and to make the witnesses admit that there were present all of the prominent signs of drowning, thus combating the People's theory and sustaining the defendant's theory of suicide. We think that he failed of success. It may be admitted that at times on cross-examination the answers of witnesses were unsatisfactory and that in the form in which questions were put they were compelled to admit the presence of signs incident to drowning, the latter evidence many times when occasion offered being modified to the effect that such signs as were actually found in this body might result from death in other ways or from the embalming which had been performed.

But aside from this, through the examination of these witnesses as an entirety, there runs constant, consistent and convincing evidence that the decedent bore upon her head the marks of violent blows. In the statement compiled from the notes of the autopsy within sixteen days after the death and before witnesses, even if they were willing, could intelligently prepare for this trial, we find this concluding statement: "From the findings of the autopsy the cause of death was primarily concussion, followed by syncope and asphyxiation."

This testimony to the presence of marks of violence is no expression of opinion or theory. It deals with actual, visible conditions. The witnesses either saw what they describe or else with wholesale and wicked perjury they are attempting to sacrifice a human life by pretending to describe that which they did not see. We cannot adopt the latter view, and when we reject it and reach the conclusion that the body bore proof of external wounds, we are led directly and irresistibly to the next conclusion as to the authorship of these wounds. No reasonable theory sustains the possibility of their infliction after death, and no reasonable theory accounts for their infliction before death save by the hand of the defendant.

And again, when we reach the second conclusion, we are necessarily driven to the third and last one. If in those final moments whose events were seen by no living eye save that of the defendant himself, he was beating the head

of Grace Brown, there is no room for conjecture about the quality and intent of his acts, and it becomes a matter of small consequence whether he thus wounded her to insensibility or worse, or whether he flung her still partly conscious into the water, there for a brief period to maintain a feeble struggle for life and thus produce those signs of drowning whose presence is so earnestly asserted by counsel.

Thus far we have tested the People's case almost entirely by the weight of their own evidence. But limited as we are to a choice between two theories of the decedent's death, the one advanced by the People is strengthened in our minds, if that were necessary, by the improbability and apparent untruthfullness of the one offered by the defendant, and to a consideration of which we now turn.

He testifies that shortly before her death he and the decedent commenced a discussion of their situation, and after a while he said in substance that he would communicate it to her parents; that they could not keep on as they were, and that thereupon she stated, "Well, I will end it here," and jumped into the lake; that after some ineffectual efforts to rescue her, and without any cry for help he went on shore and gathering up his property and without informing any of the cottagers or hotel guests on the lake of the accident, he proceeded to Eagle Bay and Arrowhead, as already stated, where he spent two days in various amusements, still giving no information of what happened. So that by this evidence, offered by the defendant himself as

the only innocent explanation of what transpired, we see him emerging from this catastrophe where he made no outcry for help, and with apparent composure turning in other directions and to other pursuits while he left the body of the woman, whom he says he loved better than anyone else and intended to marry, lying unrecovered and unsought at the bottom of the lake.

And while we have passed beyond the impressive unnaturalness of some of the principal features of this account, we encounter much evidence which still further impeaches its truthfulness. According to the People's witnesses there were several, and, by the admission of the defendant himself, some statements with reference to the tragedy made by him after his apprehension widely at variance with his present testimony. There was no satisfactory explanation of the dry condition of the suitcase which he had taken in the boat, or of the condition of his clothes, or of the completely overturned boat with the decedent's cape lying on the top of it. And in addition to these inherent deficiencies and improbabilities of his evidence there are repeated contradictions by a large number of witnesses who apparently had no interest in telling anything but the truth.

While incomplete in respect to minor details this summary of the evidence is sufficient for the purposes of this opinion, and as a basis for the statement of our convictions with respect to the merits of the prosecution.

We are mindful at every step that this is a case of circumstantial evidence and that the only eye-witness denies that death was the result of crime. But in obedience to the most exacting requirements of that manner of proof, the counsel for the People, with very unusual thoroughness and ability, has investigated and presented evidence of a great number of circumstances for the purpose of truly solving the question of the defendant's guilt or innocence. We might think that the proof of some of these facts standing by themselves was subject to doubt by reason of unsatisfactory or contradictory evidence and that other occurrences might be so explained or interpreted as to be reconcilable with innocence. But taken together and considered as a connected whole, they make such convincing proof of guilt that we are not able to escape from its force by any justifiable process of reasoning, and we are compelled to say that not only is the verdict not opposed to the weight of evidence and the proper inferences to be drawn from it, but that it is abundantly justified thereby.

But it is earnestly urged that material errors were committed in respect to, and upon, the trial whereby substantial rights of the accused were so prejudiced that for this reason he should be granted another opportunity to establish his innocence, and we take up the consideration of these arguments.

At the very threshhold of the trial the defendant challenged the legality of the term at which he was being

tried, and which was an extraordinary term convened by the governor for the purposes of this particular trial. It is insisted that under the provisions of section 2, article VI of the Constitution the exclusive power was conferred upon the Appelate Division of appointing terms of the Supreme Court and that the power conferred by Section 234 of the code of Civil Procedure upon the governor to convene extraordinary terms has been impliedly repealed. We think that the question indirectly and directly has been decided adversely to appellant's contention, and we have no disposition to disagree with the conclusion sustained and reached in People v. Shea (147 N.Y. 78), that the constitutional provisions cited relate to ordinary and usual terms at court, and do not in any manner conflict with the power reposed in the governor to call extraordinary terms.

Some of the exceptions, such as those relating to the photograph of the deceased used upon the trial, the identity of the hair found at the bottom of the boat, and the evidence of the hearing of that which sounded like a woman's scream at about the time of and from the direction of the locality where the decedent's death occurred, do not require detailed consideration, for in our opinion the evidence received was competent and simply presented the ordinary questions of weight and credibility.

No error was committed by the production in court of the foetus taken from the decedent's body at the time of the autopsy. We are not prepared to say that it would

have been error if this had been produced and put in evidence in the ordinary way. It was a very material part of the People's case to establish that the deceased was pregnant, and up to the time the evidence in question was produced there had been no act or admission upon the part of the defendant which relieved them from establishing the fact by any competent evidence, and it very well might be said that the foetus itself would be perfectly proper testimony upon this point. But it is not necessary to go to this extent in order to meet the criticisms of the appellant, for this exhibit was carefully covered up and fully kept from the view of the jury. It, therefore, not only established no fact which was not in the end fully admitted in behalf of defendant, but it could not by any possibility have served to inflame the feelings of the jury to his prejudice.

The only question of evidence which in our judgment is at all debatable is that which arises in connection with the admission in evidence of decedent's letters to the defendant.

In addition to those written in June, and to which already reference has been made, two others written by the defendant and one written by defendant to her during the month of April preceding the homicide were admitted in evidence and are criticized. So far as these earlier letters are concerned, they constitute a well-proportioned correspondence between the parties, those of the decedent largely

being taken up with girlish gossip, and with expressions of endearment and affection for the defendant, which were not harmful to him. The only material passages are those in her first letter calling for his companionship and somewhat reproaching him for his willingness to have her absent, and the significant reply in his that it would be better to discontinue his attentions.

The only possible complication in connection with the admission of these letters arises from the restriction placed by the learned trial justice upon the purpose for which they might be admitted. Of course it was entirely correct to rule that they should not be received as evidence of the facts therein stated, but the further ruling that they should be admitted "only for the purpose of showing how the decedent regarded her relations with the defendant," made in a spirit of commendable caution, placed a limitation on their use which was too narrow and somewhat difficult to interpret. Independent of the competency secured for decedent's letters by reason of the fact that they were part of a correspondence which included letters from defendant also introduced in evidence, her letters were perfectly proper evidence upon the subject of motive. They forced upon his mind, after he had proposed a termination of their intimacy, a vivid realization of the fact that the decedent, distressed in body and agonized in mind as the result of his acts, was clinging to him and was looking to marriage as the only solution of her difficulties, and that

while pleading that he should come to her, she was intimating at the same time in no uncertain terms that if he did not keep faith and come to her she would come to him to accomplish this. They must have suggested with irrestible force that he had arrived at a point where unless he was willing to publicly acknowledge his relations with the decedent as he never had done and permanently cement them by marriage he must escape by another way leading in a different direction and, as the People say, to the tragedy at Big Moose lake.

Both counsel by their reference to and use of these letters, without available objection made at the time, perhaps placed a practical construction on the ruling of the court which broadened the natural meaning of the language used and materially enlarged the purposes for which the letters might be considered by the jury under the ruling. In addition to this, the district attorney by his cross-examination of the defendant with reference to these same letters legitimately brought into the record a large part of the contents thereof free from the restrictions originally imposed by the trial judge.

But not withstanding all this, it possibly may be true that these letters obtained a wider significance in the minds of the jury than that which was authorized by the trial judge, and the question is whether for this reason we should reverse the judgment.

Aside from the permitted purpose of showing the relations and thoughts of the decedent towards the defendant, we can think of no effect which they would have been apt to have with the jury, so far as the letter could be controlled by any ruling of the court, except to tend to establish a motive for the commission by defendant of the crime which is charged against him. But, as we have seen, they might have been admitted with entire propriety for this very purpose, and, therefore, if the jury considered them upon that branch of the People's case, it did no more than the Court should have authorized and directed them to do. Should we, therefore, reverse this judgment because the jury may have considered evidence for a purpose not permitted by the Court on the trial, but which should have been permitted and for which purpose under our opinion the Court would permit it to be used on a new trial, if we should grant one? We think not. We are commanded by the statute to give judgment "without regard to technical errors or defects or to exceptions which do not affect the substantial rights of the parties," and we should depart from the letter and spirit of these controlling instructions if we did so reverse.

It is true that scattered here and there through the letters are expressions which are not very pertinent. But in the main these relate to the decedent's life and we think could not have been a source of material harm to the defendant. Furthermore we are inclined to think that when

counsel had made objection to the letters as a whole as incompetent and inadmissible the obligation fairly rested upon him to specify any scattered sentences which he deemed inadmissible for special reasons.

In the submission of the case to the jury we do not find that any errors were committed in the very careful charge and impartial charge of the Court, and so far as the later stages of the trial are concerned we shall limit our discussion to a review of the complaints made against the methods of the district attorney in summing up, it being claimed that he made statements and comments which were not justified by the record and which tended greatly to excite the minds of the jury and prejudice the defendant.

It doubtless is true that the district attorney as well as his adversary did say some things which rested upon no sufficient basis of evidence. Many of the statements, however, which are now criticized come within the fair limits of inferences from and arguments on the testimony. We think that at least one statement in regard to the alleged comments of defendant's counsel upon the decedent must have been the result of a mistake and inadvertence, or else, as now claimed by the district attorney, based on something not appearing in the record. While, of course, it is objectionable that counsel in summing up should travel beyond correct limits, we realize that human nature has limitations and that it is difficult for counsel, who for

weeks have been engaged in such a struggle as was this case, tending to arouse to the uttermost degree their zeal and anxiety, at all times to avoid transgression. Neither aids was entirely free from it here. But, upon objection, the district attorney immediately withdrew, and the trial judge explicitly and clearly instructed to disregard any unwarranted statements, and we do not believe that they produced any substantial or lasting effect upon the jury outside of and in addition to that caused by the evidence itself.

In conclusion, we think that no error was committed which substantially impaired defendant's rights. We believe that the adverse verdict was not the result of any of those occurrences which are criticized by his counsel and which possibly we could say might better be modified or omitted at another trial. But rather we think that it was based on the substantial features and essential character of the case which was fairly established against him, and that so long as the conduct of an accused is to be tested in such an investigation as this, by the intentions and purposes which ordinarily prompt human acts, and by the consequences which ordinarily prompt human acts, and by the consequences which ordinarily follow them, no other result reasonably could have been expected in this case than that which has overtaken the defendant.

The judgment of conviction should be affirmed.

Cullen, Ch. J., Gray, Vann, Werner, Willard Bartlett and Chase, J. J., concur.
Judgment of conviction affirmed.

NOTES

NOTES: CHAPTER I - DREISER AND THE AMERICAN SCENE

1. H. L. Mencken, Introduction to Memorial Edition of An American Tragedy (1946), p. xvi.

2. Jakob Wassermann, The Maurizius Case (New York: Pyramid Books, 1964), Part One, Ch. 6, p. 39.

3. Theodore Dreiser, The Bulwark (New York: World Publishing Co., 1946), pp. 284-294.

4. George W. Kirchwey, "Criminal Law," Encyclopaedia of the Social Sciences, IV, 569.

5. Harry E. Barnes, "Criminology," Encyclopaedia of the Social Sciences, IV, 584.

6. People v. Gillette, 191 N.Y. 107, 83 N.E. 680 (1908). See Appendix for opinion.

7. Frederick Wertham, Dark Legend (New York: Duell, Sloan and Pearce, 1941), pp. 35-36.

8. Theodore Dreiser, An American Tragedy, Volume I and Volume II (New York: Boni & Liveright, Inc., 1925), Vol. I, pp. 139-147. All further references will be taken from this edition.

9. An American Tragedy, I, 171.

10. Quoted from Harry Elmer Barnes and Negley K. Teeters, New Horizons in Criminology (New York: Harper & Bros., 1944).

11. An American Tragedy, II, 12-13.

12. Ibid., II, 51.

13. Ibid., II, 57.

14. Lewis E. Lawes, Meet the Murderer (New York: Harper, 1940).

15. An American Tragedy, II, 23.

NOTES: CHAPTER I - DREISER AND THE AMERICAN SCENE

16. Ibid., II, 26.

17. Ibid., II, 42.

18. Ibid., II, 45.

19. Ibid., II, 48.

20. Ibid., II, 57.

21. Charles Merz, The Great American Band Wagon (New York: Harper & Bros.), p. 81

22. Barnes and Teeters, op. cit., pp. 230-231.

23. Bruce Smith, "Enforcement of the Criminal Law," The Annals of the American Academy of Political and Social Sciences (September, 1941), 13.

24. Justin Miller, Handbook of Criminal Law (St. Paul, Minn.: West Publishing Co., 1934), pp. 52-56.

25. Penal Law, sec. 1042.

26. Ibid., sec. 1043.

27. Ibid., secs. 622-663.

28. Ibid., sec. 1044.

29. See People v. Governale, 193 N.Y. at p. 590 (1908).

30. See People v. Caruso, 243, N.Y. 437 (1927).

31. Emile Zola, Nana (New York: Bantam Books Inc., 1964), Chapter 10, p. 291.

32. Francois Mauriac, Thérèse, trans. Gerard Hopkins (New York: Farrar Straus and Girous, The Noonday Press, 1967), "Thérèse at the Hotel," p. 183.

33. Ibid., "The End of the Night," p. 365.

34. Anatole France, The Crime of Sylvester Bonnard (The Definitive Edition, New York: Dodd-Mead & Co., 1918), p. 273.

35. Ibid., p. 275.

NOTES: CHAPTER I - DREISER AND THE AMERICAN SCENE

36. Albert Camus, The Stranger, trans. Stuart Gilbert (New York: A Vintage Book, 1946), Part Two, Ch. IV, pp. 124-125.

37. See Albert Camus, "Hope and the Absurd in the Work of Franz Kafka," in The Myth of Sisphus and Other Essays (New York: Vintage, 1955), pp. 92-102.

38. For Camus' interest in capital punishment, see Arthur Koestler and Albert Camus, Reflexions sur la peine capitale: Introduction et étude de Jean Block-Michel (Paris: Calman-Levy, 1947); also Albert Camus, The Plague, trans. Stuart Gilbert (New York: Library College Edition, 1948). For Kafka's interest in capital punishment, see Franz Kafka, The Penal Colony, trans. Willa and Edwin Muir (New York: Schocken Books, 1967), pp. 191-227.

39. Philip H. Rhein, The Urge to Live: A Comparative Study of Franz Kafka's Der Prozess and Albert Camus' L'Etranger (Chapel Hill: University of North Carolina Press, 1966). See also Heinz Politzer, "The True Physician: Franz Kafka and Albert Camus," in Franz Kafka, Parable and Paradox (Ithaca, N.Y.: Cornell University Press, 1966), Ch. IX, pp. 334-357.

40. Franz Kafka, The Trial, trans. Willa and Edwin Muir (Definitive Edition, New York: The Modern Library, 1946), Ch. VII, pp. 182-183.

41. Ibid., p. 186.

42. For an example of Joyce's use of legal language, see Chapter II, note 79 of this study.

43. Alfred Döblin, Alexanderplatz, Berlin, trans. Eugene Jolas (New York: Frederick Ungar Publishing Co., 1968), Second Book, p. 109.

44. Jakob Wassermann, The Maurizius Case, op. cit., Part One, Ch. 3, p. 29.

45. Ibid., Part Two, Ch. 5, p. 282.

46. Ibid., Part Two, Ch. 7, p. 291.

47. An American Tragedy, II, 48.

48. Ibid., II, 49.

NOTES: CHAPTER I - DREISER AND THE AMERICAN SCENE

49. Ibid., II, 76-77.

50. Ibid., II, 48.

51. Ibid., II, 48-49.

52. Ibid., II, 51.

53. Regis Michaud, The American Novel Today, A Social and Psychological Study (Boston: Little, Brown & Co., 1928), pp. 117-118.

54. Ibid., p. 118.

55. Lin Yutang, ed., The Wisdom of India and China (New York: Random House, 1942), "The Epigrams of Lusin," trans. Lin Yutang. Epigram No. 34, p. 1090. Lusin is his pen name. His real name is Chou Shujen.

NOTES: CHAPTER II - LAWYERS, JUDGES, LEGAL LANGUAGE, AND THE PUBLIC

1. Honoré de Balzac, Old Goriot, trans. Marion Syton Crawford (Baltimore, Md.: Penguin Classics, 1959), p. 134.

2. William Shakespeare, Henry the Sixth, Part Two, Act IV, Sc. 2.

3. Percival E. Jackson, Look at the Law (New York: E. P. Dutton & Co., 1940), p. 257.

4. Merle Curti, The Growth of American Thought (New York: Harper & Bros., 1943), pp. 142-143.

5. Jackson, op. cit., pp. 257-258.

6. Based on the quotation from the New Testament, "Woe unto you, lawyers! for you have taken away the key of knowledge; ye entered not in yourselves, and them that were entering in ye hindered." St. Luke, 11:52.

7. Fred Rodell, Woe unto You, Lawyers! (New York: Reynal & Hitchcock, 1939), p. 3.

8. Max Lerner, "The Cheaters," New York Post, June 18, 1962.

9. "Justice Fortas Steps Down," New York Post, editorial, p. 56 (Magazine p. 4), May 16, 1969.

10. Baron De Montesquieu, The Spirit of the Laws, trans. Thomas Nugent (New York and London: Hafner Publishing Co., 1966).

11. Baron De Montesquieu, The Persian Letters, ed. and trans. and introduced by J. Robert Loy (Cleveland and New York: The World Publishing Co., 1961), Letter LXVIII, pp. 147-148.

12. Gustave Flaubert, Sentimental Education (Baltimore, Md.: Penguin Books, 1964), Part Three, Ch. I, p. 300.

13. Lewis Galantière, The Portable Maupassant (New York: The Viking Press, 1947), "A Woman's Life," Ch. X, p. 553.

14. Emile Zola, Germinal (Baltimore, Md.: Penguin Classics, 1954), Part Four, Ch. 3,p. 222.

NOTES: CHAPTER II - LAWYERS, JUDGES, LEGAL LANGUAGE, AND THE PUBLIC

15. Louis-Ferdinand Céline, Journey to the End of the Night (New York: A New Directions Book, 1934), p. 173.

16. Louis-Ferdinand Céline, Death on the Installment Plan (New York: Signet Books, 1966), pp. 573-574.

17. Albert Camus, The Fall (New York: Vintage Books, 1956), p. 107.

18. Ibid., p. 147.

19. Leo Tolstoy, Resurrection (New York: A Signet Classic, 1961), pp. 25-26.

20. F. M. Dostoevsky, Memoirs from the House of the Dead (London, New York and Toronto: Oxford University Press), p. 176.

21. Harper Lee, To Kill a Mockingbird (New York: Popular Library, 1962), p. 35.

22. Jakob Wassermann, The Maurizius Case (New York: A Pyramid Book, 1964), p. 339.

23. Ibid., p. 384.

24. Osamu Dazai, No Longer Human (New York: A New Directions Book, 1958), p. 167.

25. Ibid., p. 167.

26. Ibid., pp. 92-93.

27. Mayer C. Goldman, The Public Defender (New York: Putnam's Sons, Knickerbocker Press, 1919), p. 25.

28. An American Tragedy, II, 232.

29. Ibid., II, 88.

30. Ibid., II, 96.

31. Ibid., II, 93-94.

32. Goldman, op. cit., p. 33.

33. An American Tragedy, II, 166.

34. New York Constitution, Art. 6, Sec. 2.

NOTES: CHAPTER II - LAWYERS, JUDGES, LEGAL LANGUAGE, AND THE PUBLIC

35. Code of Civil Procedure, sec. 234; People v. Shea, 147 N.Y. 85 (1895); People v. Young, 18 App. Div. 162 (1891).

36. An American Tragedy, II, 208.

37. Ibid., II, 206.

38. Roscoe Pound, Criminal Justice in America (New York: Henry Holt & Co., 1930), pp. 185-186.

39. In these very difficult times when the arresting policeman has to take a lot of guff--what with the drunk and disorderly arrest, it is well to remember the story Norman Thomas tells:

> "In New Jersey, during a long drawn out labor conflict in 1926, I tested the right of the sheriff to enforce indefinitely what he said was his 'right' to forbid a meeting of strikers. I was arrested. The policeman who took me for arraignment before a somewhat befuddled Justice of the Peace, said while we waited: 'Mr. Thomas, what you was doing was moral all right, but I don't think 'twas legal. Some things is legal that ain't moral, and some things is moral that ain't legal, and what's a poor cop to do about it?"
>
> From "The Choices," by Norman Thomas, as quoted in the New York Post, p. 41, March 17, 1969.

40. An American Tragedy, II, 139.

41. Ibid., II, 139.

42. Ibid,, II, 165.

43. Petree v. Howe 4 T. of C. 85 (1874); People v. Carney 29 Hun 49 (1883).

44. People v. Buddensieck, 103 N.Y. 487 (1886).

45. Barnes and Teeters, op. cit., p. 302.

46. An American Tragedy, II, 163.

47. Pound, op. cit., p. 186.

48. Ibid., p. 184.

NOTES: CHAPTER II - LAWYERS, JUDGES, LEGAL LANGUAGE, AND THE PUBLIC

49. An American Tragedy, II, 151-152.

50. Ibid., II, 164.

51. New York State Constitution, Art. 1, sec. 6.

52. Zachariah Chaffee, "Remedies for the Third Degree," Atlantic Monthly, November, 1931, pp. 621-630.

53. People v. Cascone, 185 N.Y. 317 (1906).

54. Ibid., p. 334.

55. Ibid., p. 335.

56. An American Tragedy, II, 83.

57. Bruce Smith, Rural Crime Control (New York: Institute of Public Administration, 1933), p. 191.

58. An American Tragedy, II, 179.

59. See Irving Stone, Clarence Darrow for the Defense (New York: Doubleday, Doran & Co., 1941).

60. An American Tragedy, II, 191.

61. Ibid., II, 192.

62. Ibid., II, 190.

63. Ibid., II, 196.

64. Ibid., II, 193-194.

65. Ibid., II, 194.

66. Ibid., II, 191.

67. Ibid., II, 195.

68. Ibid., II, 196.

69. Ibid., II, 196.

70. Ibid., II, 223-224.

71. Ibid., 182-183.

72. Ibid., II, 184.

73. Black's Law Dictionary, p. 1805.

NOTES: CHAPTER II - LAWYERS, JUDGES, LEGAL LANGUAGE, AND THE PUBLIC

74. An American Tragedy, II, 208.

75. Ibid., II, 208.

76. Ibid., II, 208.

77. John Barker Waite, Criminal Law in Action (New York: Harcourt, Brace & Co., 1934), pp. 200-201.

78. Charles Macklin, Love a la Mode, Act II, sc. 1.

79. James Joyce, Ulysses (New York: The Modern Library, 1942), pp. 717-718.

80. Rodell, op. cit., pp. 192-193.

81. Ibid., pp. 194-195.

82. Jackson, op. cit., p. 113.

83. Ibid., p. 121.

84. An American Tragedy, II, 269.

85. Ibid., II, 299.

86. Ibid., II, 241.

87. Ibid., II, 242-243.

88. Rodell, op. cit., p. 210.

89. Ibid., p. 211.

90. Charles T. McCormick, "Evidence," Encyclopaedia of the Social Sciences, V, 645.

91. Jerome Frank, Law and the Modern Mind (New York: Coward-McMann, 1930), p. 63.

92. Pound, op. cit., pp. 163-164.

93. An American Tragedy, II, 222.

94. Ibid., II, 229.

95. Ibid., II, 219.

96. Ibid., II, 311.

97. Ibid., II, 313.

98. Ibid., II, 329.

NOTES: CHAPTER III - TRIAL BY JURY

1. Lewis Carroll, Alice's Adventures in Wonderland (New York: Macmillan, 1963), "Alice's Evidence," ch. 12, p. 117.

2. André Malraux, The Conquerors (Boston: The Beacon Press, 1956), p. 55.

3. There is an exception. If one is accused of criminal "contempt," there is no right to trial by jury. According to the decision in Green v. United States, 356 U.S. 165 (1958), the Supreme Court "has never deviated from the view that the Constitutional guarantee of trial by jury for 'crimes' and 'criminal prosecutions' was not intended to reach to criminal contempts." Justice Douglas disagreed with this view.

4. Barnes and Teeters, op. cit., p. 349.

5. Raymond Moley, Our Criminal Courts (New York: Menton, Balch, 1930), p. 110.

6. Barnes and Teeters, op. cit., p. 349-350.

7. An American Tragedy, II, 231.

8. Quoted from Edwin H. Sutherland, Principles of Criminology (Philadelphia: J. L. Lippincott, 1939), p. 290. (From a statement made by Darrow at an anniversary dinner at the Quadrangle Club, Chicago, 1933).

9. Ibid., pp. 289-290.

10. An American Tragedy, II, 226-227.

11. Ibid., II, 230.

12. Quoted in Barnes and Teeters, op. cit., p. 353.

13. An American Tragedy, II, 231.

14. Ibid., II, 230.

15. Barnes and Teeters, op. cit., p. 354.

16. An American Tragedy, II, 233.

17. Ibid., II, 235.

18. Ibid., II, 237.

NOTES: CHAPTER III - TRIAL BY JURY

19. Ibid., II, 304.

20. Ibid., II, 253.

21. Ibid., II, 297.

22. Willett v. People, 27 Hun 477, 92 N.Y. 29 (1883); People v. Green, 1 Park Cr. Rep. 11 (1845); Wigmore on Evidence, Sec. 1073; People v. Smith, 172 N.Y. 210 (1902); People v. Sutherland, 154 N.Y. 345, 347 (1897); People v. Webster, 139 N.Y. 73 (1893).

23. People v. Sutherland, 154 N.Y. 345 (1897); People v. Tice, 13 N.Y. 651 (1892).

24. Dorothy Dudley, Dreiser and the Land of the Free (New York: Harrison Smith and Robert Haas, 1932), p. 463.

25. An American Tragedy, II, 231.

26. Ibid., II, 301.

27. Ibid., II, 234.

28. Ibid., II, 312.

29. People v. Wolf, 163 N.Y. 464 (1906). The other two cases cited to uphold this contention were People v. Fielding, 158 N.Y. 542 (1899) and People v. Smith, 162 N.Y. 520 (1900).

30. An American Tragedy, II, 330.

31. See Appendix.

32. An American Tragedy, II, pp. 235-236.

33. Ibid., II, 233-234.

34. Ibid., II, 237.

35. Ibid., II, 235.

36. Ibid., II, 238.

37. Ibid., II, 234-235.

38. Ibid., II, 318.

NOTES: CHAPTER III - TRIAL BY JURY

39. Ibid., II, 259.

40. Ibid., II, 263.

41. Ibid., II, 270.

42. Ibid., II, 276.

43. Ibid., II, 313.

44. Ibid., II, 260.

45. Ibid., II, 261.

46. Ibid., II, 279.

47. Ibid., II, 328.

48. Jackson, op. cit., pp. 319-320.

49. An American Tragedy, II, 239.

50. Ibid., II, 239-240.

51. Sutherland, op. cit., p. 295.

52. Robert W. Millar, "The Modernization of Criminal Procedure," Journal of Criminal Law and Criminology, II (November, 1931), pp. 344-367. See also Robert W. Millar, "Procedure, Legal," Encyclopaedia of the Social Sciences, XII, pp. 439-54.

53. An American Tragedy, II, 263-264.

54. Sutherland, op. cit., p. 295.

55. An American Tragedy, II, 264.

56. Jackson, op. cit., p. 316.

57. Roger Vailland, The Law, trans. from the French by Peter Wiles (New York: Alfred A. Knopf, 1958), p. 43.

58. Resurrection, op. cit., p. 85.

59. Jakob Wassermann, Wedlock, trans. from the German by Ludwig Lewisohn (New York: Grosset & Dunlap, 1926), p. 97.

NOTES: CHAPTER IV - IN RE CLYDE GRIFFITHS

1. Walt Whitman, Complete Poetry and Selected Prose, ed. James E. Miller, Sr. (Boston: Houghton Mifflin Company), p. 258.

2. Quoted in Sutherland, op. cit., p. 290.

3. An American Tragedy, I, 6.

4. Ibid., I, 15.

5. Ibid., I, 15.

6. "Report of Henry W. Anderson," National Commission on Law Observance and Enforcement, Vol. I, "Report on the Causes of Crime," p. xii, 1931.

7. Ibid.

8. David Abrahamsen, Crime and the Human Mind (New York: Columbia University Press, 1944), p. 24.

9. William Seagle, "Homicide," Encyclopaedia of the Social Sciences, VII, pp. 454-455.

10. Ernest Mortenson, You Be the Judge (Washington, D.C.: Washington Law Book Co., 1940), pp. 353-354.

11. See Appendix.

12. Jackson, op. cit., pp. 120-121.

13. Charles T. McCormick, "Evidence," Encyclopaedia of the Social Sciences, V, p. 643.

14. Mortenson, op. cit., p. 364.

15. An American Tragedy, II, 298.

16. Ibid., II, 299.

17. Ibid., II, 299-300.

18. Barnes and Teeters, op. cit., pp. 354-355.

19. Edwin M. Borchard, Convicting the Innocent, Errors of Criminal Justice (New Haven: Yale University Press, 1932), p. xiv.

20. Ibid.

NOTES: CHAPTER IV - IN RE CLYDE GRIFFITHS

21. Ibid., p. xv.

22. An American Tragedy, II, 241.

23. Quoted in Jackson, op. cit., p. 7.

24. An American Tragedy, II, 251-252.

25. Jackson, op. cit., pp. 316-317.

26. Ferguson v. Hubbell, 97 N.Y. 507 (1884); Schultz v. U. Ry. Co., 181 N.Y. 33 (1905); Littlejohn v. Shaw, 159 N.Y. 188 (1899); Roberts v. N. Y. & E. R. R. Co. 128 N. Y. 455 (1891); Messner v. People 45 N.Y. 1 (1871).

27. Cornell v. Green, 10 Sergeant and Rowles (Pa.) 16 (1823); Major, etc. v. Pence, 24 Wend. 668 (1840); Syddleman v. Beckwith, 48 Conn. 9 (1875); Hardy v. Merrill, 56 N.H. 424 (1890); Schwander v. Birge 46 Hun 66 (1887). Ferguson v. Hubbell, 97 N. Y. 507 (1884). People v. Ward, 3 N.Y. Cr. Rep. 483 (1885). People v. Adam, 63 N.Y. 621 (1875).

28. Jackson, op. cit., p. 307.

29. Sutherland, op. cit., p. 291.

30. Nathaniel Cantor, Crime, Criminals and Criminal Justice (New York: Holt, 1932), p. 285.

31. An American Tragedy, II, 241.

32. Ibid., II, 314-316.

33. Ibid., II, 247.

34. Ibid., II, 250-251.

35. Ibid., II, 326.

36. Mortenson, op. cit., pp. 389-390.

37. William A. White, "Alienist," Encyclopaedia of the Social Sciences, I, p. 641.

38. An American Tragedy, II, 326.

39. Jackson, op. cit., pp. 305-306.

NOTES: CHAPTER IV - IN RE CLYDE GRIFFITHS

40. Mortenson, op. cit., p. 393.

41. Ibid., p. 378.

42. An American Tragedy, II, 244-245.

43. Frye v. United States, 293 F. 1013 (1923).

44. Ibid., p. 1014.

45. John A. Larson, Lying and Its Detection (Chicago: University of Chicago Press, 1932); Paul Travillo, "A History of Lie Detection," Journal of Criminal Law and Criminology (March-April, 1939), 848-881; for limitations on the use of "truth serums," see John MacDonald, "Truth Serum," Journal of Criminal Law and Criminology (July-August, 1955), pp. 259-263.

46. Charles T. McCormick, "Evidence," Encyclopaedia of the Social Sciences, V, p. 645.

47. Ibid., p. 646.

48. Jackson, op. cit., p. 334.

49. Harper Lee, To Kill a Mockingbird (New York: Popular Library, 1960), p. 92.

NOTES: CHAPTER V - THE END OF A TRIAL

1. Honoré de Balzac, Lost Illusions, The Complete Trilogy trans. from the French by Kathleen Raine (New York: The Modern Library, 1967), "The Sufferings of an Inventor," Part Three, p. 614.

2. An American Tragedy, II, 328.

3. Clarence N. Callendar, American Courts, Their Organization and Procedure (New York: McGraw-Hill, 1927), pp. 193-194.

4. An American Tragedy, II, 329.

5. Barnes and Teeters, op. cit., p. 363.

6. An American Tragedy, II, 329-330.

7. Barnes and Teeters, op. cit., p. 363.

8. Ibid., p. 363.

9. Ibid., p. 364.

10. Raymond Moley, Our Criminal Courts (New York: Menton, Balch, 1930), p. 112.

11. Roscoe Pound, "Jury," Encyclopaedia of the Social Sciences, VIII, pp. 497-498. See also William Seagle, "Jury," Encyclopaedia of the Social Sciences, VIII, pp. 498-502.

12. Barnes and Teeters, op. cit., pp. 364-365.

13. Ibid., p. 365.

14. An American Tragedy, II, 339.

15. Ibid., II, 345.

16. Ibid., II, 345-346.

17. Code of Criminal Procedure, Sec. 528.

18. An American Tragedy, II, 347.

19. Ibid., II, 362.

20. Ibid., II, 368-369.

21. Ibid., II, 369.

NOTES: CHAPTER V - THE END OF A TRIAL

22. Jackson, op. cit., pp. 147-148.

23. Harry Best, Crime and the Criminal Law in the United States (New York: Macmillan, 1930), pp. 88-89.

24. Barnes and Teeters, op. cit., p. 329.

25. An American Tragedy, II, 338-339.

26. Jackson, op. cit., pp. 237-238.

27. Ibid., p. 238.

28. Ibid., p. 240.

29. Ibid., p. 238.

30. An American Tragedy, II, 344.

31. Ibid., II, 359-360.

32. Barnes and Teeters, op. cit., p. 329.

33. An American Tragedy, II, 360.

34. Ibid., II, 354.

35. Ibid., II, 377.

36. New York Constitution, Art. 6, Sec. 2.

37. Code of Civil Procedure, Sec. 234; People v. Shea, 147 N.Y. 85 (1895); People v. Young, 18 App. Div. 162 (1897).

38. Petree v. Howe, 4 T and C 85 (1874); People v. Carney, 29 Hun 49 (1883).

39. People v. Buddensiech, 103 N.Y. 487 (1886).

40. People v. Fielding, 158 N.Y. 542 (1889); People v. Smith, 162 N.Y. 520 (1900); People v. Wolf, 183 N.Y. 464 (1906).

41. See Appendix.

42. Ferguson v. Hubbell, 97 N.Y. 507 (1884); Schultz v. U. Ry. Co., 181 N.Y. 33 (1905); Littlejohn v. Shaw, 195 N.Y. 182 (1889); Roberts v. N. Y. & E. R. R. Co. 128 N.Y. 455 (1891); Messner v. People, 46 N.Y. 1 (1871).

NOTES: CHAPTER V - THE END OF A TRIAL

43. Cornell v. Green, 10 Sergeant and Rowles (Pa.) 16 (1823); Mayer, etc. v. Pence, 24 Wend 668 (1840); Syddleman v. Beckwith, 48 Conn. 9 (1875); Hard v. Merrill, 56 N.H. 227 (1875); Van Wycklen v. City of Brooklyn, 118 N.Y. 424 (1890); Schwander v. Birge, 46 Hun 66 (1887); Ferguson v. Hubbell, 97 N.Y. 507 (1884); Commonwealth v. Hayes, 138 Mass. 185 (1884); People v. Adams, 63 N.Y. (1875).

44. People v. Green, 1 Park Cr. Rep. 11 (1845); Wigmore on Evidence, sec. 1073; People v. Smith, 172 N.Y. 210 (1902); People v. Sutherland, 154 N.Y. 345, 347 (1897); People v. Webster, 139 N.Y. 73 (1893).

45. People v. Sutherland, 1544 N.Y. 345 (1897); People v. Tice, 131. N.Y. 651 (1892).

46. See Appendix.

47. Perry v. M. R. R. Co., 68 App. Div. 352 (1910); People v. Altman, 147 N.Y. 473 (1895); People v. Strait, 154 N.Y. 165 (1897).

48. See Appendix.

49. See Appendix.

50. An American Tragedy, II, 393-394.

51. See Appendix.

52. See Harold D. Lasswell, "Censorship," Encyclopaedia of the Social Sciences, III, pp. 290-294.

53. See Dreiser v. John Lane & Co., 183 App. Div. 773, 171 N.Y.S. 605 (1918). See also H. L. Mencken, A Book of Prefaces (New York: Garden City Publishing Co., 1927), "Dreiser," ch. II, pp. 140-141, and "Puritanism as a Literary Force," ch. IV, pp. 193-283.

54. See Leon Whipple, The Story of Civil Liberties in the United States (New York: D. Appleton & Co., 1927), pp. 284-294.

55. See E. M. Morgan, "Appeals," Encyclopaedia of the Social Sciences, II, pp. 131-136.

56. An American Tragedy, II, 393.

NOTES: CHAPTER V - THE END OF A TRIAL

57. See Appendix.

58. An American Tragedy, II, 393.

59. Code of Criminal Procedure, Sec. 692.

60. Ibid., Sec. 694.

61. Lewis E. Lawes, Life and Death in Sing Sing (New York: Doubleday, Doran, 1929), pp. 178-179.

62. Donald R. Taft, Criminology (New York: Macmillan, 1942), p. 534.

63. Code of Criminal Procedure, Sec. 492.

64. An American Tragedy, II, 394.

65. Sutherland, op. cit., p. 511.

66. An American Tragedy, II, 395.

67. Sutherland, op. cit., p. 511.

68. An American Tragedy, II, 397.

69. Attorney General's Survey of Release Procedure, "Pardon," (Washington, D. C.: U. S. Department of Justice, 1939), III, pp. 167-168.

70. An American Tragedy, II, 397.

71. Ibid., II, 398.

72. Ibid.

73. Franz Kafka, The Trial, Definitive Edition (New York: The Modern Library, 1964), p. 278.

NOTES: CHAPTER VI - PRISON AND THE DEATH PENALTY

1. Oscar Wilde, The Ballad of Reading Gaol; Conceptions by John Vassos (New York: Dutton & Co., 1930).
2. Theodore Dreiser, The Financier (New York: Harper & Bros., 1912), p. 717.
3. Ibid., p. 717.
4. Ibid., p. 702.
5. Ibid., p. 720.
6. Sutherland, op. cit., p. 431.
7. An American Tragedy, II, 221.
8. Barnes and Teeters, op. cit., p. 419.
9. New York Times, "U. S. Executions Down to 7 in '65, Death Penalty Gone in 13 States," p. 14, cols. 1 and 2, Feb. 18, 1966.
10. Lawes, op. cit., p. 200 ff.
11. Barnes and Teeters, op. cit., p. 420.
12. Code of Criminal Procedure, Sec. 505.
13. An American Tragedy, II, 352.
14. Ibid., II, 351.
15. Ibid., II, 366.
16. Ibid.
17. Lawes, op. cit., p. 204.
18. Ibid., p. 179.
19. An American Tragedy, II, 364-365.
20. Lawes, op. cit., p. 184. See also New York Code of Criminal Procedure, Secs. 495-a, 498, 499.
21. An American Tragedy, II, 366-367.
22. Lawes, op. cit., pp. 197-198.

NOTES: CHAPTER VI - PRISON AND THE DEATH PENALTY

23. Sutherland, op. cit., pp. 571-572.

24. An American Tragedy, II, 347.

25. Ibid., II, 348.

26. Ibid.

27. Lawes, op. cit., pp. 181-182.

28. Ibid., pp. 180-181.

29. An American Tragedy, II, 361.

30. Lawes, op. cit., p. 183.

31. An American Tragedy, II, 353.

32. Ibid., II, 363.

33. Lawes, op. cit., p. 192.

34. An American Tragedy, II, 353.

35. Lawes, op. cit., pp. 183-184.

36. Ibid., p. 185.

37. An American Tragedy, II, 348-349.

38. Ibid., II, 354.

39. See George W. Kirchwey, "Capital Punishment," Encyclopaedia of the Social Sciences, III, pp. 192-195.

40. Thorsten Sellin, "Common Sense and the Death Penalty," Prison Journal (October, 1932), p. 12.

41. Barnes and Teeters, op. cit., p. 434.

42. An American Tragedy, II, 408-409.

43. Brown v. Paramount Publex Corporation, 240 App. Div. 520, 270 N.Y.S. 544 (1934).

44. I could find no official report of this case. See W. A. Swanberg, Dreiser (New York: Bantam Books, 1965), p. 454; also note 45, p. 678.

NOTES: CHAPTER VI - PRISON AND THE DEATH PENALTY

45. Dorothy Dudley, op. cit., p. 474.

46. Denis Diderot, Jacques the Fatalist and His Master, edited by S. Robert Loy (New York: Collier Books, 1962). See notes 3, 62, 64, 95, 98. See also Alice Green Fredman, Diderot and Sterne (New York: Columbia University Press, 1955).

47. F. W. J. Hemmings, Stendhal: A Study of His Novels (London: Oxford University Press, 1964), pp. 100-104. See also Stendhal, A Roman Journal, translation of Promenades dans Rome, ed. and trans. by Haakon Chevalier (New York: Orion Press, distributed by Crown Publishers, 1957), "The Story and Trial of Leffargue," pp. 294-307.

48. André Gide, The Counterfeiters (New York: The Modern Library, 1955), See newspaper clipping in the appendix of the Journal of "The Counterfeiters," pp. 421-423.

49. For the sources of Tolstoy's Resurrection, see Michael Ginsburg, "Koni and His Contemporaries," Ch. V, pp. 68-78 in Slavic Studies, edited by Michael Ginsburg and Thomas Shaw (Bloomington, Ind.: Research Center in Anthropology, Folklore and Linguistics, 1956).

50. Ibid., note 2, pp. 84-85.

51. Marianne Thalman, "Der Fall Maurizium," Deutsches Volkstum, XII, 44-48 (1930).

52. Carl Hau, Das Todesurteil: Die Geschichte mines Prozesses (Berlin: Ullstein, 1925); Carl Hau, Lebenslänglich Erlabtes und Erlittens (Berlin: Ullstein, 1925).

53. Mann uses the archaic word "tonsetzer" in the German subtitle of Doktor Faustus, which has been translated as "composer." I do not think that "composer" conveys the meaning of Mann's cold parody. I therefore preferred to use my own translation, i.e., "piano-tuner."

54. The subtitle of Mann's Doktor Faustus is: Das Leben Des Deutchen Tonsetzers Adrian Leverkühn, Erzählt von Einem Freunde (Stockholm: Bermann-Fischer Verlag, 1947).

NOTES: CHAPTER VI - PRISON AND THE DEATH PENALTY

55. Thomas Mann, The Story of a Novel: The Genesis of Doctor Faustus (New York: Alfred A. Knopf, 1961), p. 221.

56. Ibid., p. 29.

57. Ibid., pp. 33-35.

58. H. L. Mencken, op. cit., p. xv.

BIBLIOGRAPHY

BIBLIOGRAPHY

Dreiser's Books and Articles

An American Tragedy. Volume I and Volume II. New York: Boni and Liveright, 1925.

Hand of the Potter. A Tragedy in Four Acts. New York: Boni and Liveright, 1918.

Hey, Rub-a-Dub-Dub. New York: Boni and Liveright, 1920.

The Bulwark. New York: Doubleday and Co., 1946.

The Financier. New York: Harper and Bros., 1912.

The "Genius." New York: Horace Liveright, 1923.

Jennie Gerhardt. New York: World Publishing Co., 1946.

"The Mercy of God," American Mercury, II (August, 1924), 457-464.

Sister Carrie. New York: Modern Library, 1932.

The Stoic. New York: Doubleday Doran, 1947.

The Titan. New York: John Lane Co., 1914.

Studies and Reviews

Bourne, Randolph. History of a Literary Radical and Other Essays. New York: The Viking Press, Inc., 1920. "The Art of Theodore Dreiser."

Boynton, Percy H. Some Contemporary Americans. Chicago: University of Chicago Press, 1924. "Theodore Dreiser," Ch. VIII.

Cargill, Oscar. Intellectual America. New York: The Macmillan Co., 1941. "Naturalists," Ch. II.

Curti, Merle. The Growth of American Thought. New York: E. P. Dutton & Co., 1940.

Dreiser, Helen. My Life with Dreiser. Cleveland: World Publishing Co., 1951.

Dudley, Dorothy. Dreiser and the Land of the Free. New York: Harrison Smith and Robert Haas, 1932.

Edgar, Pelham. "American Realism, Sex and Theodore Dreiser," The Art of the Novel. New York: Macmillan, 1933. Ch. XXIII, pp. 244-254.

Elias, Robert H. Theodore Dreiser: Apostle of Nature. New York: Alfred A. Knopf, Inc., 1949.

Gerber, Philip L. Theodore Dreiser. New York: Twayne Publishers, Inc., 1964.

Kazin, Alfred. On Native Grounds. New York: Reynal and Hitchcock, 1942.

Kazin, Alfred, and Shapiro, Charles, eds. The Stature of Theodore Dreiser. Bloomington: Indiana University Press, 1955.

Lehan, Richard. "Dreiser's An American Tragedy: A Critical Study," pp. 18-32 in The American Novel: Essays in Criticism, by Max Westbrook, ed. New York: Random House, 1967.

Matthiessen, F. O. Theodore Dreiser. New York: William Sloane Associates, Inc., 1951.

McAleer, John J. Theodore Dreiser: An Introduction and Interpretation. New York: Holt, Rinehart, and Winston, Inc., 1968.

Mencken, Henry Louis. A Book of Prefaces. New York: Garden City Publishing Co., 1927. "Theodore Dreiser," Ch. II, and "Puritanism as a Literary Force," Ch. IV.

Michaud, Regis. The American Novel Today: A Social and Psychological Study. Boston: Little Brown and Co., 1928.

Roscoe, Burton. Prometheas, Ancient and Modern. New York: C. P. Putnam's, 1933. "Theodore Dreiser," pp. 241-269.

Roscoe, Burton. Theodore Dreiser. New York: Robert McBride and Co., 1925.

Smith, Lewis Washington. Current Reviews. New York: Henry Holt and Co., 1926. "An American Tragedy," review by Llewellyn Jones, pp. 203-212 (Chicago Evening Post, January 22, 1926).

Swanberg, William A. Dreiser. New York: Charles Scribner's and Sons, 1965.

Walcutt, Charles Child. "The Three Stages of Theodore Dreiser's Naturalism," PMLA, LV (March, 1940), 266-289.

Weimer, David R. The City as a Metaphor. New York: Random House, 1966. Especially, "Heather Catacomb: Theodore Dreiser," Ch. IV, pp. 65-77.

Whipple, T. K. Spokesmen, Modern Writers and American Life. New York: D. Appleton and Co., 1928. "Theodore Dreiser," Ch. IV.

Comparative Books Cited

Balzac, Honoré de. Lost Illusions. The Complete Trilogy, trans. from the French by Kathleen Raine. New York: The Modern Library, 1967.

Balzac, Honoré de. Old Goriot, trans. from the French by Marion Ayton Crawford. Baltimore, Md.: The Penguin Classics, 1959.

Camus, Albert. The Fall, trans. from the French by Justin O'Brien. New York: Vintage Books, 1965.

Camus, Albert. The Myth of Sisyphus and Other Essays, trans. from the French by Justin O'Brien. New York: Vintage Books, 1955.

Camus, Albert. The Plague, trans. from the French by Stuart Gilbert. New York: Vintage Books, 1946.

Camus, Albert. The Stranger, trans. from the French by Stuart Gilbert. New York: Vintage Books, 1946.

Carroll, Lewis (Charles Lutwidge Dodgson). Alice's Adventures in Wonderland and Through the Looking Glass, with illustrations by John Tenniel. New York: Macmillan, 1963.

Celine, Louis-Ferdinand. Death on the Installment Plan, trans. from the French by Ralph Manheim. A Signet Book, 1966.

Celine, Louis-Ferdinand. Journey to the End of the Night, trans. from the French by John H. P. Marks. New York: New Directions, 1960.

Dazai, Osamu. No Longer Human, trans. from the Japanese by Donald Keene. New York: Vintage Books, 1958.

Diderot, Denis. Jacques the Fatalist and His Master, trans. from the French by J. Robert Loy. New York: Collier Books, 1962.

Döblin, Alfred. Alexanderplatz, Berlin, trans. from the German by Eugene Jolas. New York: Frederick Ungar Publishing Co., 1968.

Dostoevski, Feodor. Crime and Punishment, trans. from the Russian by Jessie Coulson, A Norton Critical Edition, edited by George Gibian. New York: W. W. Norton & Co., 1964.

Dostoevski, Feodor. Memoirs from the House of the Dead, trans. from the Russian by Jessie Coulson. London: Oxford University Press, 1965.

Flaubert, Gustave. Madame Bovary, ed. and trans. by Paul de Man in the Norton Critical Edition. New York: W. W. Norton & Co., 1965.

Flaubert, Gustave. Sentimental Education, trans. from the French by Robert Baldick. Baltimore, Md.: Penguin Books, 1964.

France, Anatole. The Crime of Sylvester Bonnard. The Definitive Edition. New York: Dodd-Mead & Co., 1918.

Fredman, Alice Green. Diderot and Sterne. New York: Columbia University Press, 1955.

Gide, André. The Counterfeiters, with the Journal of "The Counterfeiter." The novel trans. from the French by Dorothy Bussy; the Journal trans. by Justin O'Brien. New York: The Modern Library, 1927.

Ginsburg, Michael, and Shaw, Joseph Thomas, eds. Indiana Slavic Studies. Bloomington, Ind.: Research Center in Anthropology, Folklore and Linguistics, 1956.

Hau, Carl. Das Todesurteil. Die Geschichte meines Prozesses. Berlin: Ullstein, 1925.

Hau, Carl. Lebenslanglich. Erlebtes und Erlittens. Berlin: Ullstein, 1925.

Hemmings, F. W. J. Stendhal: A Study of His Novels. London: Oxford at the Clarendon Press, 1964.

Joyce, James. Ulysses. New York: The Modern Library, 1942.

Kafka, Franz. The Penal Colony, trans. from the German by Willa and Edwin Muir. New York: Schocken Books, 1967.

Kafka, Franz. The Trial, trans. from the German by Willa and Edwin Muir. New York: The Modern Library, 1946.

Koestler, Arthur, and Camus, Albert. Reflexions sur la peine capitale: Introduction et etude de Jean Bloch-Michel. Paris: Calman-Levy, 1947.

Lee, Harper. To Kill A Mockingbird. New York: Popular Library, 1962.

Malrau, André. The Conquerors, trans. from the French by Winifred Whale. Boston: The Beacon Press, 1956.

Mann, Thomas. Doctor Faustus: The Life of the German Composer Adrian Leverkühn as told by a Friend, trans. from the German by H. T. Lowe-Porter. New York: Modern Library, 1966.

Mann, Thomas. Doktor Faustus: Das Leben des Deutschen Tonsetzers Adrian Leverkühn, Erzählt von einem Freund. Stockholm: Berman-Fisher Verlag, 1949.

Mann, Thomas. Die Entstehung Des Doktor Faustus. Amsterdam: Berman-Fischer Verlag, 1949.

Mann, Thomas. The Story of a Novel: The Genesis of Doctor Faustus, trans. from the German by Richard and Clara Winston. New York: Alfred A. Knopf, 1961.

Maupassant, Guy de. "A Woman's Life," in The Portable Maupassant, edited by Lewis Galantière. New York: The Viking Press, 1947.

Mauria, Francois. Thérèse, trans. from the French by Gerard Hopkins. New York: Farrar Straus and Girous, The Noonday Press, 1967.

Montesquieu, Baron de. The Persian Letters, ed. and trans. from the French by J. Robert Loy. Cleveland and New York: The World Publishing Co., 1961.

Montesquieu, Baron de. The Spirit of the Laws, trans. from the French by Thomas Nugent. New York and London: Hafner Publishing Co., 1966.

Politzer, Heinz. Franz Kafka: Parable and Paradox. New York: Cornell University Press, 1966.

Rattigan, Terrence. The Winslow Boy. New York: Dramatists' Play Service, Inc., 1946.

Rhein, Philip H. The Urge to Live: A Comparative Study of Franz Kafka's Der Prozess and Albert Camus' L'Etranger. Chapel Hill: University of North Carolina Press, 1966.

Shakespeare, William. Hamlet, Henry the Sixth: Part Two, Love's Labour's Lost, Measure for Measure. In a new text edited with introduction and notes by William Allan Neilson and Charles Jarvis Hill. Cambridge, Mass.: Houghton Mifflin Co., 1942.

Stendhal (Marie Henry Beyle). The Red and the Black, trans. from the French by Lowell Bair. New York: Bantam Books, 1959.

Stendhal (Marie Henri Beyle). A Roman Journal. Trans. of Promenades dans Rome, ed. and trans. by Haakon Chevalier. New York: Orion Press, distributed by Crown Publishers, 1957.

Sterne, Lawrence. The Life and Opinions of Tristram Shandy. New York: Modern Library.

Thalman, Marianne. "Der Fall Maurizius," Deutsches Volkstum, XII, 44-48 (1930).

Tolstoy, Leo. Resurrection, trans. from the Russian by Vera Traill. New York: A Signet Classic, 1961.

Vailland, Roger. The Law, trans. from the French by Peter Wiles. New York: Alfred A. Knopf, 1958.

Wassermann, Jakob. The Maurizius Case. New York: Pyramid Books, 1964.

Wassermann, Jakob. Wedlock, trans. from the German of Laudin und die Seinen, by Ludwig Lewisohn. New York: Grosset & Dunlap, 1926.

Wilde, Oscar. The Ballad of Reading Gaol; Conceptions by John Vassos. New York: Dutton & Co., 1930.

Yutang, Lin, ed. The Wisdom of India and China. New York: Random House, 1942.

Zola, Emile. Germinal, trans. from the French by L. W. Tancock. Baltimore, Md.: Penguin Books, 1966.

Zola, Emile. Nana, trans. from the French by Lowell Blair. New York: Bantam Books, Inc., 1964.

Criminology and Law

Abrahamsen, David. Crime and the Human Mind. New York: Columbia University Press, 1944.

Attorney General's Survey of Release Procedures, "Pardon." Washington, D. C.: U. S. Department of Justice, 1939. Vol. III, pp. 167-168.

Barnes, Harry E. "Criminology," Encyclopaedia of the Social Sciences, IV, pp. 584-592.

Barnes, Harry Elmer, and Teeters, Negley K. New Horizons in Criminology. New York: Prentice Hall, Inc., 1944.

Beyle, Herman D., and Parratt, Spencer D. "Approval and Disapproval of Specific Third-Degree Practices," Journal of Criminal Law and Criminology, 28:526-550 (November-December, 1938).

Best, Harry. Crime and the Criminal Law in the United States. New York: Macmillan, 1930.

Black's Law Dictionary. Third Edition. St. Paul, Minn.: West Publishing Co., 1944.

Bok, Curtis, "The Jury System in America," Annals of the American Academy of Political and Social Science, 287: 92-96, 1955.

Borchard, Edwin M. Convicting the Innocent, Errors of Criminal Justice. New Haven: Yale University Press, 1932.

Callender, Clarence N. American Courts, Their Organization and Procedure. New York: McGraw Hill, 1927.

Cantor, Nathaniel. Crime, Criminology and Justice. New York: Holt, 1932.

Chaffee, Zachariah. "Remedies for the Third Degree," Atlantic Monthly, Vol. 148 (November, 1931), 621-630.

Davidson, Henry A. "Psychiatrists in Administration of Justice," Journal of Criminal Law, Vol. 45, 1 (May-June, 1954), pp. 12-20.

Davies, Audrey M. "Police, the Law, and the Individual," Annals of the American Academy of Political and Social Science, 291:143-151 (January, 1954).

Deutch, Albert, ed. Sex Habits of American Men, A Symposium on the Kinsey Report. New York: Prentice Hall, Inc., 1951.

Deutch, Albert. The Trouble with Cops. New York: Crown, 1945.

Ellis, Havelock. Studies in the Psychology of Sex. Third edition. Philadelphia: F. A. Davis Co., 1930.

Frank, Jerome. Courts on Trial. Princeton: Princeton University Press, 1949.

Frank, Jerome. Law and the Modern Mind. New York: Coward-McMann, 1930.

Frank, Jerome, and Frank, Barbara. Not Guilty. New York: Doubleday, 1957.

Goldman, Mayer C. The Public Defender. New York: G. P. Putnams Sons, 1919.

Green, Edward. Judicial Attitudes in Sentencing. New York: St. Martins Press, 1961.

Guttmacher, Manfred S., and Weihofen, Henry. Psychiatry and the Law. New York: Norton, 1952.

Haire, N.; Costler, A.; and Willy, A. Encyclopedia of Sexual Knowledge. London: F. Aldor, 1934.

Hopkins, Ernest, Our Lawless Police. New York: Viking Press, 1931.

Jackson, Percival E. Look at the Law. New York: Dutton, 1940.

James, Rita M. "Status and Competence of Jurors," American Journal of Sociology, 64:563-570 (May, 1959).

James, Rita M. "Jurors' Assessment of Criminal Responsibility," Social Problems, 7:58-69 (Summer, 1959).

Johnston, Norman; Savitz, Leonard; and Wolfgang, Marvin E. The Sociology of Crime and Delinquency. New York: John Wiley & Sons, Inc., 1962.

Keedy, E. R. "Irresistible Impulse as a Defense in Criminal Law," University of Pennsylvania Law Review, 100:956-993 (May, 1952).

Kinsey, A. C., and Pomeroy, W. B., and Martin, C. E. Sexual Behavior in the Human Male. Philadelphia: W. B. Saunders Co., 1948.

Kirchwey, George W. "Criminal Law," Encyclopaedia of the Social Sciences, IV, 569-579.

Larson, John A. Lying and Its Detection. Chicago: University of Chicago Press, 1932.

Lasswell, Harold D. "Censorship," Encyclopaedia of the Social Sciences, III, 290-294.

Lavine, Emanuel. The Third Degree. New York: Vanguard, 1930.

Lawes, Lewis E. Meet the Murderer. New York: Harper, 1940.

Lerner, Max. "The Cheaters," New York Post, June 18, 1962.

Levin, Meyer. Compulsions. New York: Simon and Schuster, 1956.

Maguire, John Macarthur. "Expert Evidence," Encyclopaedia of the Social Sciences, VI, pp. 13-16.

Mayers, Lewis. The American Legal System. Revised Edition. New York: Harper and Row, 1964.

McCormick, Charles T. "Evidence," Encyclopaedia of the Social Sciences, V, 637-646.

McKinney's Consolidated Laws of New York. Annotated. Brooklyn, N.Y.: Edward Thompson Co., 1945. Especially Book 2 for Constitution; Book 66, Part II for Criminal Procedure; Book 39, Parts I and II for Penal Law.

Merz, Charles. Great American Band Wagon, "Bigger and Better Murders." New York: Harper, 1928.

Millar, Robert W. "The Modernization of Criminal Procedure," Journal of Criminal Law and Criminology, II (November, 1931), 344-367.

Millar, Robert W. "Procedure, Legal," Encyclopaedia of the Social Sciences, XII, 439-454.

Miller, Justin. Handbook of Criminal Law. St. Paul, Minn.: West Publishing Co., 1934.

Moley, Raymond. Our Criminal Courts. New York: Menton, Balch, 1930.

Morgan, E. M. "Appeals," Encyclopaedia of the Social Sciences, II, 131-136.

Morteson, Ernest. You Be the Judge. Washington, D. C.: Washington Law Book Co., 1943.

National Commission of Law Observation and Law Enforcement. Henry W. Anderson, "Report on the Causes of Crime," Vol. I, 1931.

New York Post. Editorial, "Justice Fortas Steps Down," p. 56 (Magazine p. 4), May 16, 1969.

Ploscowe, Morris. "Crime in a Competitive Society," The Annals of the American and Social Science (September, 1941), pp. 105-111.

Ploscowe, Morris. Sex and the Law. New York: Prentice Hall, Inc., 1951.

Pound, Roscoe. Criminal Justice in America. New York: Holt, 1929.

Pound, Roscoe. "Jury," Encyclopaedia of the Social Sciences, VIII, 492-498.

Richardson, William Payson. The Law of Evidence. Sixth edition. Brooklyn Law School, 1944.

Rodell, Fred. Woe unto You, Lawyers! New York: Reynal and Hitchcock, 1939.

Seagle, William. "Homicide," Encyclopaedia of the Social Sciences, VII, 450-456.

Seagle, William. "Jury," Encyclopaedia of the Social Sciences, VIII, 498-502.

Seagle, William. Law; The Science of Inefficiency. New York: Macmillan, 1952.

Smith, Bruce. "Enforcement of the Criminal Law," The Annals of the American Political and Social Science (September, 1941), pp. 12-18.

Smith, Bruce. Rural Crime Control. New York: Institute of Public Administration, 1933.

Special Committee of the Association of the Bar of the City of New York and the National Legal Aid and Defender Association. Equal Justice for the Accused. New York: Doubleday, 1959.

Stone, Irving. Clarence Darrow for the Defense. New York: Doubleday, Doran, 1941.

Sutherland, Edwin H. Principles of Criminology. Philadelphia: J. B. Lippincott, 1939.

Sutherland, Edwin H., and Cressey, Donald R. Principles of Criminology. Philadelphia and New York: J. B. Lippincott, 1939.

Sutherland, Edwin, and Cressey, Donald R. Principles of Criminology. Philadelphia and New York: J. B. Lippincott, Seventh edition, 1966.

Taft, Donald R. Criminology. New York: Macmillan, 1942.

"Third Degree," Encyclopaedia Britannica, 14th edition. Chicago: Encyclopaedia Britannica, 1929, Vol. 22, p. 135.

Thomas, Norman. "The Choices," as quoted in the New York Post, p. 41, March 17, 1969.

Travillo, Paul. "A History of Lie Detection," Journal of Criminal Law and Criminology, Vol. 29 (March-April, 1939), 848-881.

Vollmer, August, and others. "Report on Police," National Commission on Law Observance and Enforcement. Report No. 14. Washington, D. C.: Government Printing Office, 1931, p. 45.

Waite, John Barker. Criminal Law in Action. New York: Harcourt, Brace, 1934.

Walker, Nigel. Crime and Punishment in Britain. Edinburgh: University Press, 1965.

Weinberg, Arthur, ed. Attorney for the Damned. New York: Simon & Schuster, 1957.

Wertham, Frederick. Dark Legend. New York: Duell, Sloan and Pearce, 1941.

Westley, William A. "Violence and the Police," American Journal of Sociology, 56:34-41 (July, 1953).

White, William A. "Alienist," Encyclopaedia of the Social Sciences, I, 641.

Whipple, Leon. Story of Civil Liberty in the United States. New York: Vanguard Press, 1927.

Wigmore, John Henry. A Student's Textbook of the Law of Evidence. Chicago: The Foundation Press, Inc., 1935.

Wigmore, John Henry. A Treatise of the Anglo American System of Evidence in Trials at Common Law. 10 vols. Boston: Little Brown & Co., 1940. Especially sections 25, 1073, 2497.

Willemse, Cornelius W. Behind the Green Lights. New York: Alfred A. Knopf, 1931.

Wood, Arthur Lewis. "Informal Relations in the Practice of Criminal Law," American Journal of Sociology, 62:48-55, (July, 1956).

Wright, Clifford A. "The Sex Offender's Endocrines," Medical Record, 149:399-402 (June, 1939).

Capital Punishment and Penology

Ball, John C. "The Deterrent Concept in Criminology and the Law," Journal of Criminal Law, Criminology and Police Science, 46:347-354 (September-October, 1955).

Bates, Sanford. Prisons and Beyond. New York: Macmillan, 1938.

Bedau, Hugo A. "A Survey of the Debate on Capital Punishment in Canada, England, and the United States, 1948-1958," Prison Journal, 38:35-45 (October, 1958).

Hazard, J. N. "Trends in the Soviet Treatment of Crime," American Sociological Review, 5:566-576 (August, 1940).

Howard, John. The State of Prisons. New York: E. P. Dutton & Co., Everyman's Edition, 1929.

Johnson, Elmer H. "Selective Factors in Capital Punishment," Social Forces, 36:165-169 (December, 1957).

Johnston, Norman; Savitz, Leonard; and Wolfgang, Marvin E. The Sociology of Punishment and Correction. New York: John Wiley & Sons, Inc., 1962.

Kirchwey, George W. "Capital Punishment," Encyclopaedia of the Social Sciences, III, 192-195.

Kirchwey, George W. "Crime and Punishment," Journal of Criminal Law and Criminology, 1:718-734 (January-February, 1911).

Koestler, Arthur. Reflections on Hanging. New York: Macmillan, 1957.

Lawes, Lewis E. Life and Death in Sing Sing. New York: Doubleday Doran, 1928.

New York Times. "U. S. Executions Down to 7 in '65, Death Penalty Gone in 13 States," p. 14, cols. 1 and 2, February 18, 1966.

Schuessler, Karl F. "The Deterrent Influence of the Death Penalty," Annals of the American Academy of Political and Social Science, 284:54-62 (November, 1952).

Sellin, Thorsten. "Common Sense and the Death Penalty," Prison Journal (October, 1932).

Thomas, Paul A. "Murder and the Death Penalty," American Journal of Correction, 19:16-17ff. (July, 1957).

Wines, Frederick Howard. Punishment and Reformation, A Historical Sketch of the Rise of the Penitentiary System. London: Swan Sonnenchein & Co., 1895.

Wolfgang, Marvin E. Patterns of Criminal Homicide. Philadelphia: University of Pennsylvania Press, 1958.

Wood, Arthur Lewis. "The Alternatives to the Death Penalty," Annals of the American Academy of Political and Social Science, 284:63-72 (November, 1952).

TABLE OF CASES

People v. Green, 1 Park Cr. Rep. 11 (1845).

People v. Shea, 147 N.Y. 85 (1895).

People v. Smith, 162 N.Y. 520 (1900).

People v. Smith, 172 N.Y. 210 (1902).

People v. Strait, 154 N.Y. 165 (1897).

People v. Sutherland, 154 N.Y. 345 (1897).

People v. Tice, 131 N.Y. 651 (1892).

People v. Ward, 3 N.Y. Cr. Rep. 483 (1885).

People v. Webster, 139 N.Y. 73 (1893).

People v. Wolf, 183 N.Y. 464 (1906).

People v. Young, 18 App. Div. 162 (1897).

Perry v. M. R. R. Co., 68 App. Div. 352 (1910).

Petree v. Howe, 4 T. and C. 85 (1874).

Roberts v. N. Y. and E. R. R. Co., 128 N.Y. 455 (1891).

Schutz v. Union Ry. Co., 181 N.Y. 33 (1905).

Schwander v. Berge, 46 Hun 6 (1887).

Syddleman v. Beckwith, 43 Conn. 9 (1875).

Van Wycklen v. City of Brooklyn, 118 N.Y. 424 (1890).

Willette v. People, 92 N.Y. 29, 27 Hun 477 (1883).