Leopold and Loeb Case (1924)

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Introduction

This is Clarence Darrow's second most famous case. Only the Scopes antievolution trial the following year exceeded the Leopold and Loeb case in terms of public interest and lasting historical significance. Darrow saved two confessed thrill killers from execution in a case that generated nationwide interest and was even followed overseas. It generated national and international interest because of numerous factors, including the wealthy background of the defendants, absence of any reason to commit murder, arbitrary selection of the victim, and cruel and callous method used. There were allegations the two killers were homosexuals and many believed the victim had been sexually assaulted before and maybe after he was murdered. Anti-Semitism permeated the atmosphere because both defendants and the victim were Jewish. The perpetrators continued to torture the victim's family with a ransom demand even after the victim's death. Especially troubling was the killers' confession that it was done for the thrill of it.

Clarence Darrow, the most famous lawyer in the country, was hired to save the two defendants from the gallows. Darrow's involvement raised the public interest to new heights. The public wondered how he could save them despite what appeared to be overwhelming evidence of guilt. But hiring Darrow also angered many people who thought the two murderers were using their families' wealth to avoid justice. Darrow would be defending two young elites whose families could seemingly afford whatever was needed for the best defense possible. Darrow appeared to be a hypocrite because he had made his reputation defending the society's poor and downtrodden.

Darrow, knowing that the case against his clients was overwhelming, shocked the court and the country when he had his clients withdraw their not guilty pleas and plead guilty. Darrow realized that the only way to save his clients lives was to rely on the mercy of the court. Darrow believed their only chance was to persuade the judge to sentence his clients to life in prison instead of death. They simply could not take a chance with a jury because the state's case was airtight. If Darrow's strategy failed, his clients would be executed. Under Illinois law, when a defendant pled guilty to a crime and the judge had discretion in sentencing, the judge was required to receive and review aggravating and mitigating circumstances. Darrow used this law to introduce extensive psychiatric evidence and testimony. Several accounts identify this as the first time such evidence was introduced in an American courtroom. The psychiatric testimony and cross-examination

specific action of ductless glands, that now universally are believed to have so much of importance to do with human conduct."[61]

Bowman-Hulbert report

Dr. Bowman and Dr. Hulbert conducted extensive examinations of Leopold and Loeb over the course of about eighteen days from June 13 to June 30, 1924. They reported the results of their examinations in what has come to be referred to as the Bowman-Hulbert report. The doctors were afforded considerable freedom at the Cook County Jail in which to interview and examine the suspects. Hulbert would later testify in court that he saw the defendants thirteen times starting on June 16. They documented the family history of both defendants and examined all aspects of their lives, literally from when their mothers were pregnant until they murdered Bobby Franks. They were also given extensive physical examinations and their physical health throughout their lives was documented. Thorough examinations of their endocrine and glandular systems were conducted. Considerable attention was paid and conclusions drawn about how each man's upbringing affected him. This report was given to the main alienists for the defense. The combined report, which was several thousands pages in length, was admitted into evidence. Using this report and their own examinations, White, Healy, Glueck and Hulbert prepared a joint report for the defense.

"A,B,C, and D" Crimes

A strange and mysterious part of the Bowman-Hulbert report was Loeb's brief admission of several crimes to the doctors. The crimes were only identified by the letters "A, B, C, and D." After Loeb was arrested, the prosecution and detectives tried to link Loeb to several unsolved crimes in Chicago. Chicago was a very violent city with enough organized crime murders and other isolated murders and assaults to make many people wary of walking around at night in certain areas. After the murder of Bobby Franks, the police took a new look at several unsolved vicious crimes in the Chicago area, thinking Leopold and Loeb may have been involved.

One of these crimes occurred in November 1923. A cab driver named Charles Ream was walking home around 2:00 a.m. when he was accosted by two men with revolvers. He was robbed, kidnapped and knocked unconscious with an ether-soaked rag. Ream later woke up covered with his own blood because he had been castrated. Ream would later identify Leopold and Loeb as his attackers and claimed he recognized them as soon as he saw their pictures in the newspaper.

Five days after Ream was attacked, a twenty-three year old student at the University of Chicago named Freeman Tracy was murdered in the early morning hours by a gunshot to the head. Detectives would later conclude that the bullet that killed Tracy matched the revolver taken from Nathan Leopold's bedroom. In April 1924, a young man named Melvin T. Wolf left his uncle's house at 4553 Ellis Avenue in the Kenwood community to walk less than a block to mail a letter. He was never seen alive again. A month later his

[61] *Id*. at 236.

body was found in Lake Michigan. Wolf was last seen less than three blocks from where Bobby Franks would be kidnapped about six weeks later. Finally, about two years earlier, a victim called the "Ragged Stranger" or "Handless Stranger" was found murdered with his hands cut off and face mutilated.

"Forensically Inadvisable"

The Bowman-Hulbert report basically exposed as untrue the defense's contention that the intensive psychiatric and medical examinations were meant to get at the truth. The report downplayed and did not investigate the "A, B, C, D" crimes that Loeb admitted to. The report concluded, "It was found forensically inadvisable to question him about these." Robert Crowe would later seize on this omission during his closing arguments.

Chicago newspapers would later try unsuccessfully to link the cryptic A, B, C, and D crimes to the unsolved crimes involving Ream, Tracy, Wolf and the Handless Stranger. Hal Higdon who wrote a book about Leopold and Loeb's murder of Bobby Franks believes that it is unlikely that Leopold and Loeb committed these other serious crimes.[62]

Bowman-Hulbert Report Stolen

The Bowman-Hulbert report was a secret report that was only intended to be seen by the defense. But just before the defense put on its first witness, the report was leaked to the newspapers and became public knowledge. According to one account, it was believed that the report was stolen by a *Chicago Tribune* reporter from a secretary's desk in Clarence Darrow's office.[63] When this came to light, Darrow expressed outrage but then gave copies to other reporters so they would not miss the hot news item.[64] Hal Higdon believes that the theft story is not true. He thinks that because the report was made public on the Monday before the defense was to present their case "it seems probable that Darrow permitted the report to be stolen. If he did not, he should have."[65] According to Higdon, Darrow also gave the prosecution a copy of the report.[66] If true, it could only have been done to try and show that Leopold and Loeb were mentally ill.

Predictably, Crowe denounced the report. He saw it as an end run around the proceedings, in which the defense tried to show that Leopold and Loeb were insane. Crowe strongly argued that only a jury trial could determine insanity. The defense denied any attempt to show the defendants were insane, but instead wanted to bring to light the defendants' mental deficiencies. And these mental deficiencies were mitigating factors that the judge had to consider. The prosecution argued there were no degrees of mental deficiency in the legal sense: a defendant was either insane and thus could not be criminally responsible or the defendant was not insane and thus was criminally responsible. Crowe also believed the report was part of a defense scheme to fool the court

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[62] CRIME OF THE CENTURY, *supra* note 2, at 249-260.
[63] *Id*. at 188-89.
[64] *Id.* at 189.
[65] *Id.*
[66] *Id.*

and the public into believing that Leopold and Loeb were mentally ill, even though there were not.

Joint Medical Report

The main alienists for the defense, Dr. William A. White, Dr. William Healy, Dr. Bernard Glueck and Dr. Harold Hulbert also conducted extensive examinations of Leopold and Loeb from July 1 to July 27. They were given extraordinary access to the youthful killers and were accompanied by Walter Bachrach of the defense's legal team. Their joint report incorporated some of the information from the Bowman-Hulbert report. However, this joint medical report went much further in trying to interpret and come to conclusions about the mental state of the defendants. The doctors were clearly influenced by Freud in their analysis.

Nathan Leopold's "Early Peculiar Tendencies"

The alienists' examination and analysis of Leopold led them to conclude that his mental abnormalities stemmed from his experiences in early childhood: "[F]rom five to seven years of age peculiar tendencies were shown quite at variance with the trends of normal childhood." The doctors believed Leopold's intense mental interests in certain areas were abnormal. For example, beginning around age five he displayed an intense interest in religious issues. He was particularly fascinated with the Catholic concept of the crucifixion.

"Delusionally Disordered Personality"

The doctors found their patient to have a "delusionally disordered personality" which accounted for his very strong beliefs about his superiority. The doctors believed that Leopold saw himself as a "superman" who "definitely conceive[d] himself as a superior being, quite set apart and not called on to be amendable to the social regulations or legal restrictions which govern the ordinary human being." Leopold told them that "anything that gives him satisfaction [wa]s justified . . . ." and even murder was "perfectly tolerable" under his beliefs. He sometimes argued in law school classes that legal regulations should not apply to a superman.

Leopold's excessive focus on his own superiority resulted in placing himself above the rules of society. From early childhood he gradually developed "a personal philosophy which admits of only one motive, his own advantage."

Early childhood influences included a fixation on religious ideas, particularly related to the Catholic church, and a reverence for his mother and an aunt after his mother died, both of whom he placed on the same level as the Madonna. Later in life he held women in contempt because they were intellectually inferior, but maintained exceptions for his mother and favorite aunt.

Leopold early on displayed a conceit in his own intellectual ability and superiority. The doctors found as a child he had a "well-defined tendency to whip himself into superior accomplishment, and to do those things which would set him apart from others on the basis of his superiority." He believed that going without sleep increased his intellectual capacity by twenty percent.

Suppression of Emotions

The doctors found one "outstanding abnormality" to be Leopold's conscious efforts since childhood to suppress his emotions, such as sentiment and sympathy. As an intellectually superior human being he thought he should have control over his emotions and should only follow logically what appealed to him. But this suppression of emotions began because of feelings of inferiority, especially in school. He sought to destroy his emotions and pursue intellectual achievement instead. Leopold's emotional life was marked by his long-held belief that his emotions should be suppressed and his actions should only be governed by cold logic.

The doctors found that Leopold displayed the "utmost indifference and lack of emotional display" about the murder and freely revealed that he "had not the slightest remorse" for killing Bobby Franks. It appears that Leopold's emotional indifference helped him adjust to his stay in jail, which was such a different environment than the comfortable life he was accustomed to.

Leopold Looks Forward to Trial

Leopold told the doctors that he looked forward to the trial because it would be the "keenest intellectual enjoyment of his life." He even believed he would enjoy his own execution. The doctors found that the "essence of his abnormality" was the clear lack of emotional life.

Phantasy Life

The doctors believed that Leopold's intense "phantasy life"[67] was another indication of his abnormality. One of his peculiar religious interests was to visualize the crucifixion and the idea of somebody suffering. They doctors thought it "most important to note" that in his later years Leopold very frequently played the role of one who suffered.

King-Slave

Leopold's most influential phantasies were those he developed the earliest - his King-Slave phantasies. In his imagination, Leopold was a slave who was intensely devoted to a king or master. This slave was very good-looking and very strong, and in different scenarios always saved the King's life. This would lead to the King offering the slave his freedom, but the slave always refused to be set free.

[67] This is the spelling used in the Joint Medical Report.

Leopold would eventually try to apply his phantasies to real life by imagining real people in various phantasy roles. By far the most important of these was Loeb's role "very definitely woven into [the] phantasy" as the King in the King-Slave scenarios. Leopold also engaged in hero worship of Loeb, believing him to be nearly perfect and a superman; all the while Leopold knew he himself was intellectually superior.

Possible Causes of Leopold's Mental Abnormality

The doctors found several factors they believed contributed to Leopold's abnormal mind. Until he was nine years old Leopold was poorly developed and had an "inferior physical status." This along with his attendance at a girls' school for two years (for which he was teased), and the fact that a nurse took him to and from school, all combined to make him feel different and very sensitive to how others viewed him. The doctors placed the most blame on his "nurse, a woman who was dishonest, suspicious, irritable, jealous, and who showed marked indiscretions in her physical contact with this boy." But they also found Leopold to have "very considerably super-normal general intelligence" based on tests involving the use and comprehension of language and vocabulary.

The doctors found physical factors they thought significant. Leopold showed indications of Bright's disease and certainly had cardio-renal disease. He had a "very definite disorder of the control of his heart and blood-vessels" indicated by a low pulse, low respiration, low temperature and very low blood pressure. A skull x-ray showed a marked calcification of his pineal gland which was unusual in a young man. The doctors believed that the "whole endocrine chain of glands via their chemistry and via the sympathetic nervous system profoundly affect[s] the intellect and emotion; in his case the endocrine disease contributes greatly to his mental disease."

The doctors stated, "[W]e can draw no other conclusion . . . Leopold is and was on the twenty-first of May, 1924, a thoroughly unbalanced individual in his mental life. He represents a picture of a special abnormal type, the paranoid psychopathic personality."

Richard Loeb

The report determined the circumstances leading to Loeb's ultimate crime stemmed from his "early boyhood days" and posited the "challenging fact in the personality of this boy as we see him today, lies in his most remarkable unscrupulousness, untruthfulness, unfairness, ingratitude, disloyalty, and in his total lack of human feelings and sympathy with respect to the deed" for which he and his companion pled guilty.

The doctors believed that Loeb's characteristics "assume[d] a particularly abnormal nature" when viewed against the "kind home and social setting" he grew up in; "The Loeb home has been noted for its high standards of virtue and culture and [as] a place where the task of bringing up children was viewed with unusual seriousness."

The doctors were astounded at the stories Loeb told them about his phantasies of being a criminal and staying in prison. Loeb told the doctors he was abused in his prison

phantasies but that he actually enjoyed it because it gave him notoriety. Loeb spent countless hours phantasizing about being a master criminal. A constant feature of his criminal phantasies was a need to have someone view the crime; this recognition allowed Loeb to derive satisfaction from the crime.

Loeb first stole something at age nine and got a great deal of pleasure from it. At age ten, Loeb began to shadow people, following them as if he were a detective. Loeb also drank alcohol regularly. The doctors were surprised at how well Loeb appeared to have adapted to jail life. His experience seemed to fit in with his phantasies of suffering in prison.

The report described Loeb's use of his Teddy bear when he was young. He would say, "As you know, Teddy" when engaged in his criminal phantasies. Loeb found himself saying this while in jail after Bobby Franks was murdered. To the doctors this showed his dual nature: part innocent boy and part hardened and vicious criminal.

The doctors found an "outstanding fact in explanation of Loeb's abnormal career [wa]s the extraordinary moral callousness which ha[d] been growing upon him. He ha[d] become incapable of viewing his criminal acts with any natural feeling." The doctors believed the best example of Loeb's detachment from feeling was his contemplated kidnapping a member of his own family, even his younger brother, while planning the crime. Loeb told the doctors, "I would have supposed I would have cried at the testimony of Mrs. Frank, but I did not feel anything much. I was not sorry about any of the things I did that were wrong."

Prosecutor Crowe would harshly criticize the examinations, reports and testimony of the defense doctors. One of the most preposterous parts of the defense alienists' examination involved analyzing a picture of Richard Loeb when he was about four years old. In the photo, Loeb was dressed as a cowboy, complete with a revolver and holster. Loeb displayed a "fierce look" which the alienists believed indicated future aggression and dangerousness.

The report concluded that several important factors formed Loeb's pathological inner mental and emotional life: the dominance of a repressive and jealous governess from age four and a half to age fourteen; the pressure she put on Loeb to pursue his studies; Loeb's attendance of college at age fourteen, where he was thrust into a group of boys four to seven years older than him; and Loeb's intense interest in reading detective stories beginning around age ten.

The report concluded:

> The opinion is inescapable that in Loeb we have an individual with a pathological mental life, who is driven in his actions by the compulsive force of his abnormally twisted life of phantasy or imagination, and at this time expresses himself in his thinking and feeling and acting as a split personality, a type of condition not uncommonly met with among the insane.

> We therefore conclude that Richard Loeb is now mentally abnormal and was so abnormal on May 21st, 1924, and in so far as anyone can predict at this time, will continue, perhaps with increasing gravity as time goes on.

Their study of the defendants as individuals led the team of doctors to conclusions about the defendants as a team:

> [The] criminal activities were the outgrowth of a unique coming-together of two peculiarly maladjusted adolescents, each of whom brought into the relationship a long-standing background of abnormal mental life. This has made a situation so unique that it probably will never repeat itself. There is justification for stressing the uniqueness of this case if, for no other reason, than that it has created wide-spread panic among parents of young people.

According to a 2007 account:

> In exposing Leopold and Loeb to prying scientific instruments and the prying public, the endless testing and psychiatric evidence both democratized them and made them more controllable. The new psychology transformed them from arrogant Nietzschean criminals (the early representation of Leopold) into vulnerable boys (Loeb and his teddy bear) and linked them to ordinary boys of America.[68]

Sigmund Freud

Extensive efforts were made to entice the famous psychoanalyst Sigmund Freud to travel to the United States to observe the trial and write daily articles with analysis. The *Chicago Tribune* offered Freud "$25,000 or anything he would name" to come to Chicago and "psycho-analyse" Leopold and Loeb.[69] But Freud declined the invitation, stating, "I cannot be supposed to be prepared to provide an expert opinion about persons and a deed when I have only newspaper reports to go on and have no opportunity to make a personal examination."[70] Freud was also suffering from cancer at this time.

William Randolph Hearst also offered Freud "any sum he cared to name" to come and analyze the defendants; he even offered to charter a special liner for Freud since he knew he was ill, but Freud declined.[71] Bernard L. Diamond, a prominent forensic psychiatrist, believed "Freud was always most cautious about the 'half-baked' application of psychoanalytic concepts in legal proceedings, and most psychoanalysts seem to have

[68] PAULA S. FASS, CHILDREN OF A NEW WORLD: SOCIETY, CULTURE, AND GLOBALIZATION 120 (2007).
[69] ERNEST JONES, SIGMUND FREUD: LIFE AND WORK, THE LAST PHASE 1919-1939, Vol. 3, 109 (1957).
[70] *Id.*
[71] *Id.*

followed his example in staying clear of the courtroom after the Leopold-Loeb hearing."[72]

As would be expected, the crime and upcoming trial were the biggest news in Chicago and in much of the country. The case generated so much interest that the *Chicago Daily Tribune* contemplated broadcasting the trial over the radio by WGN, its new radio station. Radio was a very new medium in 1924. The paper decided to have its readers vote on whether the trial should be broadcast, so it printed a short ballot and asked readers to mail it back with their votes. Sixty-five percent of the ten thousand votes cast were against broadcasting the trial, so WGN did not broadcast it.

People of the State of Illinois v. Nathan F. Leopold Jr. and Richard Loeb

Darrow and the defense team knew that Crowe had Leopold and Loeb right where he wanted them. With their confessions, their extensive corroboration of nearly every detail of the crime, and identification by numerous eyewitnesses so soon after the crime, Leopold and Loeb had sealed their own fate. Darrow and his team had very little if anything to work with to mount a credible defense against the charges. Besides the solid evidence, the crime was so notorious it would be impossible to find unbiased jurors.

Defense Impossible

The defense had few options and had to make a very difficult decision. Darrow recalled:

> We spent considerable time deliberating as to what we should do. The feeling was so tense and the trial was so near that we felt we could not save the boys' lives with a jury. It seemed out of the question to find a single man who had not read all about the case and formed a definite opinion. Judge Caverly had formerly been a judge of the Municipal Court and helped form the Juvenile Court, and we believed that he was kindly and discerning in his views of life. After thorough consideration we concluded that the best chance was on a plea of guilty. Only a few knew what was to be done—the boys and their parents, two or three relatives, and the attorneys in the case.[73]

Darrow and the defense team were especially worried that the prosecution would learn of their decision to plead guilty before they did so in open court. If the prosecution got word of the defense strategy, Crowe could try the defendants on one of the charges, murder or kidnapping, and then try them in a separate trial on the other charge. The prosecution would get two chances to send them to the gallows because both crimes were eligible for the death penalty and the defense would have to try to save its clients' lives in front of two juries:

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[72] THE PSYCHIATRIST IN THE COURTROOM: SELECTED PAPERS OF BERNARD L. DIAMOND, M.D. 244 (Jacques M. Quen, M.D. ed., 1994) [hereinafter PSYCHIATRIST IN THE COURTROOM].
[73] STORY OF MY LIFE, *supra* note 23, at 237.

> What we most feared was that if the State had any conception of our plan they would bring up only one case at a time, saving a chance, if given a life-sentence, to bring up the second case and, and as it were, catch us on the rebound. We were conscious of the risk we were taking and determined to take one chance instead of facing two.[74]

The most important factor that led Darrow and the other members of the defense to conclude their best choice was a guilty plea was the weight of evidence against them; this included the confessions of the defendants and the great deal of evidence that corroborated the confessions. But two other factors were important. First was the overwhelming publicity the crime generated. The defense believed it simply could not take a chance on a jury trial given the notoriety of the crime. The second factor was time: the defense was not granted the delay it asked for. Even if they wanted to the try the case, they did not think they had enough time to prepare.

So worried was Darrow and the defense about the prosecution getting word of their plan that it was a closely guarded secret. Even Leopold and Loeb were not informed until just before the trial was to start. In his autobiography, Leopold recounted that Darrow told them he was worried that if they knew ahead of time, they might be overheard discussing the plea or might even talk in their sleep.

Before the defense came to the conclusion that the case was hopeless, it did conduct some investigations. A 2003 article includes this reference to the case: "My late uncle Jacob Alschuler (University of Chicago Law School Class of 1927) recalled Darrow's visit to the Jewish fraternity Zeta Beta Tau in search of character witnesses for his clients. Upon ascertaining my uncle's opinion of Nathan Leopold, Darrow told him, 'Obviously we can't use you.'" [75]

Shocking Pleas

The two sides were in Judge Caverly's courtroom on Monday, July 21, 1924 for the beginning of the trial. There was some speculation that the defense would change the defendants' pleas to guilty by reason of insanity. But at the beginning of what would have been the trial of the century, Clarence Darrow addressed Judge Caverly:

> Your Honor, we have determined to withdraw our pleas of not guilty and enter pleas of guilty. We dislike to throw this burden upon this court or any court. We know its seriousness and its gravity. And while we wish it could be otherwise we feel that it must be as we have chosen. The statute provides, your Honor, that evidence may be offered in mitigation of the punishment, and we shall ask as such time as the court may direct that we be permitted to offer evidence as to the mental condition of these young men, to show the degree of responsibility they had, and also to offer

[74] *Id.*
[75] Albert W. Alschuler, *Centennial Tribute Essay: The Changing Purpose of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts About the Next*, 70 U. CHI. L. REV. 1, 5 n. 22 (2003).

> evidence as to the youth of these defendants, and the fact of a plea of guilty as a further mitigation of the penalty in this case. With that we throw ourselves upon the mercy of this court and this court alone.

The guilty pleas were a complete shock to the judge, prosecution, spectators, reporters, city of Chicago and entire country. Except for the small group of defense attorneys, a few members of the defendants' families and the defendants themselves, no one anticipated a guilty plea. It was another jolt from an already shocking crime story.

Judge Caverly was very surprised. The judge asked the defendants: "[T]he Court desires to know whether, with the consequences of entering such a plea of guilty before you, you now here persist in pleading guilty to the murder of the said Robert Franks in manner and form as charged in the indictment herein." Each defendant was read the same information and each responded by saying, "I do, your honor." The judge then set the date of July 23 to begin the sentencing hearing.

Defense Asks for Joint Examination

Before court adjourned, Benjamin Bachrach proposed that the defense alienists and the state alienists participate in a joint conference to study the defendants and issue a joint report of findings. Bachrach believed by working together the alienists could avoid the spectacle of dueling experts. But Crowe, obviously angry about being surprised by the pleas, refused any joint examination or report by the two sets of experts. Crowe saw it as an attempt to raise issues of insanity, and since the defendants had pled guilty they had admitted they were sane. There was a testy exchange between Bachrach and Crowe, but Crow was adamant. Judge Caverly said he did not have the power to order a joint examination.

Illinois Statute

The statute Darrow referenced that allowed evidence in mitigation of the punishment was Illinois Criminal Code § 723, which states in part: "In all cases where the court possesses any discretion as to the extent of the punishment, it shall be the duty of the court to examine witnesses as to the aggravation and mitigation of the offense." The statute applied in this case because the under Illinois law, the murder and kidnapping charges gave the judge discretion to impose punishment ranging from fourteen years to life in prison to the death penalty.

It was this Illinois statute, or more specifically, the judge's interpretation of this statute and the ability of the defense attorneys to persuade that opened up an entire field of psychological findings, theories and testimony for Clarence Darrow. Financing from the Leopold and Loeb families enabled Darrow to engage his lifelong fascination and study of psychology in a real case. Although the stakes for his clients were high and the work exhausting, coming just two years after he wrote *Crime: Its Causes and Treatment*, Darrow must have found the defense investigation very interesting.

Judge Caverly

Clarence Darrow would be placing the lives of his clients at the mercy of Judge Caverly. There are varying descriptions of Judge Caverly's judicial philosophy in regard to crime and the death penalty. At least one source portrays him as not a "soft on crime" judge by any means. According to this source, during a judicial campaign when he was running for office, Judge Caverly supported "sending every criminal to the penitentiary and hanging every murderer."[76] Another source describes Judge Caverly as a "liberal judge" and in his three years on the bench, although he had sentenced five defendants to death, in each of those cases it was a jury that set the punishment.[77]

Sentencing Hearing of the Century

After the guilty plea, the phrase "trial of the century" was inaccurate because there would be no trial. The proceedings would instead be a hearing held by the judge to determine the sentence, often referred to as a "hearing on sentence." However, the hearing would still generate a tremendous amount of interest because everyone wanted to see whether Leopold and Loeb would be sentenced to death. Crowe was pushing ahead, doing all he could to see that they were hanged for their crime and Darrow and his co-counsel would do all they could to save the defendants. The public also followed the hearing closely because of the psychiatric evidence introduced by the defense that revealed the strange personalities of Leopold and Loeb.

The hearing began on July 23. So surprising were the guilty pleas on July 21 to the court that Judge Caverly felt compelled "to fully explain" to each of them the consequences of their plea and repeat their options if they decided to withdraw their guilty pleas. The judge wanted to be sure they understood that they could be sentenced to death even with a plea of guilty. He also repeated his warning and explanation in regard to the kidnapping charge. Leopold and Loeb confirmed that they were pleading guilty.

The state presented its case first, and by the time the state rested on July 30, it had produced over 80 witnesses who testified to every detail of the kidnapping and murder of Bobby Franks. The prosecution was solely focused on presenting evidence of aggravating circumstances to justify the death penalty. Darrow protested against the evidence because the defendants had already pled guilty. Darrow accused the prosecution of trying to inflame public opinion and whip the public into demanding the death penalty. At first it seems like a waste of time for the state to present evidence of the crime, since the defendants had pled guilty. However, Crowe wanted to show that the evidence against the defendants was overwhelming, causing them to plead guilty. In addition, the statute under which Darrow and the defense could bring in mitigating factors also provided for aggravating factors. Crowe wanted to detail the intricate planning that went into the crime and emphasize the cold-blooded nature of the plan and its execution. The kidnapping and murder plan and the execution of the plan were aggravating factors, and they also served

[76] CRIME OF THE CENTURY, *supra* note 2, at 171.
[77] FOR THE THRILL OF IT, *supra* note 3, at 240.

to show that Leopold and Loeb were cunning killers and not mentally defective young men.

The prosecution put on emotionally wrenching testimony from witnesses such as Bobby Franks' parents who recalled the kidnapping, the ransom demand and other aspects of the crime. There was a parade of witnesses on factual matters that identified Leopold or Loeb during various parts of the planning and execution of the kidnapping and murder. One witness, a chauffeur, provided surprising testimony that he saw Loeb driving on Ellis Avenue around 4:30 p.m. on the day of the murder. Leopold told his attorneys that the man was lying or mistaken. Leopold was concerned because this would implicate him as the person who physically attacked Bobby Franks. Bachrach cross-examined the witness with some questions supplied by Leopold.

Defense Case - Battle over Defense Alienist Evidence

The first medical expert the defense put on the stand was Dr. Walter A. White. After the preliminaries about Dr. White himself, the state vigorously objected to all testimony regarding the defendants' mental states during the crime, arguing these issues were off the table after the guilty plea. The defense argued just as strongly that the testimony should be allowed. For nearly three days the prosecution and defense argued back and forth about whether or not under the law there were "'degrees of mental responsibility short of insanity.'" To the prosecution there was no such thing, a defendant was either responsible or not, sane or insane. The prosecution viewed the proposed psychiatric evidence as delving into the legal aspects of sanity and insanity, which was the type of evidence that a jury would hear during a trial. They argued both that the guilty plea precluded the jury's involvement and that the court could not hear this type of factual evidence during a sentencing hearing.

Crowe was adamant "Our interpretation of this is, you honor, that they are attempting to show degrees of responsibility. There is nothing in law known as degrees of responsibility. You are either entirely responsible for all the consequences of your act, or you are not responsible at all."

The defense argued that the judge was required to hear mitigating evidence for the sentencing phase, which was what they intended to introduce through their experts. The defense conceded that by pleading guilty the defendants were legally sane at the time of the murders. The defense, Walter Bachrach argued, was going to present evidence in support of the following:

> [A] mental condition, a mental disease, functional in character, not an organic brain disorder . . . that would affect the capacity of the defendants to choose between right and wrong, but that there was a functional mental disease which would have been insufficient for the defense to have asserted here on an issue before the jury on the question of guilty, that these defendants were insane. But we still say that evidence falling short of a competent legal defense is a circumstance which this court may take

> into consideration and should, in determining the punishment to be meted out to these defendants in the exercise of the discretion conferred upon the court by the statute.[78]

Judge Caverly's Decision on Defense Expert Testimony

For nearly three full days both sides argued back and forth then Judge Caverly finally issued a ruling:

> Under that section of the statute which gives the court the right, and says it is his duty to hear evidence in mitigation, as well as evidence in aggravation, the court is of the opinion that it is his duty to hear any evidence that the defense may present and it is not for the court to determine in advance what it may be. The court will hear it and give it such weight as he thinks it is entitled to.

Judge Caverly overruled an objection by Crowe and the defense was allowed to bring its first alienist to the stand. Darrow and the defense had won this battle. Even so, they surely knew that the best they could hope for would be to persuade the judge to sentence their clients to the state penitentiary for rest of their lives.

Judges Helped to Build Darrow Legend

Judge Caverly would play a crucial role, along with several other judges, in helping to build Clarence Darrow's legend. The outcomes of several of the most important cases that earned Clarence Darrow fame depended greatly on decisions made by the judges. Besides the Leopold and Loeb case, Darrow's most notable cases include: the Bill Haywood trial, Darrow's own bribery trials, the 1925 Scopes trial and the 1925 and 1926 Sweet trials in Detroit. Darrow and his co-counsel could have lost each of these important cases had it not been for key rulings by the presiding judge. Although Clarence Darrow's role was critical in the 1907 Haywood trial, if the judge involved had made adverse rulings in key areas, Big Bill Haywood could easily have been convicted and hung. Darrow could have been convicted of bribery in one or both of his bribery trials during 1912 - 1913. A bribery conviction would almost certainly have ended his legal career, leaving Darrow to be a much more minor figure in history. Instead, Darrow went on to his two most famous cases, Leopold and Loeb in1924 and the Scopes trial in 1926, making him the most famous lawyer in American history.

In the Scopes trial, even though the judge's rulings for the most part favored the prosecution, he did allow William Jennings Bryan to go on the stand at least for part of a day and face Darrow's examination, which elevated the case to mythic status. In the 1925 and 1926 Sweet cases in Detroit, Darrow and his co-counsel successfully defended several black defendants charged with killing a white man after a mob of whites tried to drive Dr. Ossian Sweet and his family out of a white neighborhood where they had purchased a home. Although not as well known as the Leopold and Loeb case or the

[78] AMAZING CRIME AND TRIAL OF LEOPOLD AND LOEB, *supra* note 1, at 80.

Scopes trial, the NAACP considered the Sweet trials to be some of the most important trials in the history of desegregation.

Key rulings by Judge Frank Murphy in the Sweet trials, included a ruling that allowed Darrow and his co-counsel to argue self defense by introducing evidence of past discrimination that demonstrated the Sweet defendants feared for their lives. This led an all white jury to deadlock in the first trial and a verdict of acquittal in the second trial. Given the racial tension at the time, it was much more likely that an all white jury would have convicted the black defendants. Murphy, later a United States Supreme Court Justice, was instrumental in Darrow's success in Detroit.

Judge Caverly played a similar role in the Leopold and Loeb case with two key decisions. First, he allowed the defense to present expert psychiatric and medical testimony and reports. This evidence would generate tremendous controversy and interest and would add to the notoriety of the case. Second and of greater importance was Judge Caverly's sentencing decision.

Dr. White

Dr. White took the stand as the first witness for the defense. White was of the same opinion as the other defense alienists—he believed both Leopold and Loeb suffered from mental and emotional defects. Dr. White described how the defendant's friendship led to murder:

> We can only understand this homicide by understanding the back and forth play of these two personalities as they are related to each other. Now, Dickie Loeb, with his feeling of inferiority, developed certain anti-social tendencies which are characterized to a certain extent to compensate him personally, but which are disintegrating and socially de-structive, namely, his criminalistic tendencies. He develops these tendencies as being the head of a gang because, obviously, it is not half as satisfying to an individual to be a great man in secret. Dickie needed an audience. In his fantasies, the criminalistic gang was his audience. In reality, Babe Leopold was his audience. Babe is generally the slave in the situation. But he is a powerful slave, who makes Dickie king, so that in either position he occupies, as the king or slave, he gets the expression of both components of his make-up. All of Dickie's life has been in the direction of self-destruction. He has often considered suicide. He told me he had lived his life out, come to its logical conclusion.
>
> Babe, on the other hand, has the definitely constructive capacities of an intellectual character. I do not believe that the Franks homicide can be explained without an understanding of this relation. Babe would not have entered it alone, because he had no criminalistic tendencies, as Dickie did. Dickie would never have gone as far as he did without Babe to give that final push."

Throughout the testimony of the defense witnesses, Crowe objected any time he thought the testimony involved issues of insanity. On cross-examination, Crowe began by asking Dr. White how much he was being paid. Dr. White said he was receiving $250 per day. Crowe asked Dr. White who he thought actually killed Bobby Franks. Dr. White responded, "I think it was Dickie." Dr. White believed Loeb did not admit this to the authorities in an attempt to lessen his responsibility. But Dr. White never asked Loeb directly if he committed the actual murder. The Loeb family was understandably distressed by this revelation because it was the first time someone other than Leopold pointed to Loeb as the actual killer.

Crowe raised an issue with Dr. White that would later anger the judge when Crowe brought it up in his closing arguments. There had been rumors that Leopold said his father could arrange for a friendly judge to take a guilty plea and thus avoid the death penalty. Crowe asked Dr. White about these rumors and if Leopold had ever discussed bribing jurors. White said Leopold never mentioned any of this.

Dr. White's Conclusions Could Be Based on Defendants' Lies

Crowe then sought to discredit White's entire examination and conclusions about Leopold and Loeb. He got White to admit that everything he knew about the defendants came from the defendants themselves or their defense attorneys. Crowe asked: "So basing your opinion as to the mental condition of Nathan Leopold Jr., you are depending entirely on information you got from the defendants' attorneys?" White, feeling defensive, responded: "I beg pardon, I want to supplement that. I had read—there is one other thing I did have. I had read the so-called Bowman and Hulbert report . . . ." But the Bowman-Hulbert report was based mostly on what Leopold and Loeb told those doctors.

Crowe got White to admit that his opinion on Leopold was based entirely on what Leopold and his attorney Mr. Bachrach had told him. Crowe kept pushing to get White to admit that Leopold could have lied to him. He asked White to assume that "he has fooled you and that the things that he has told you about himself which led you to the conclusion that you now have were all lies, then you would not have the same conclusion, would you?" White conceded that "[i]f things are all different from what they are, my conclusion in regard to them would be different from what it is."

Crowe indicated Nathan was smart enough and mentally competent enough to tell the doctors stories in order to escape the gallows. He implied Leopold and Loeb had been coached to act a certain way in front of the doctors. Crowe continued to raise the obvious issue that Leopold could have lied to the doctor:

> Crowe: "And he has not lied to you at all?"
> White: "I don't remember any particular instance at this moment where I believe Nathan lied to me. I think he was frank, as frank as he could be."
> Crowe: "You are satisfied that he has been absolutely truthful, that is, Nathan has, with you all the way through?"

White: “Well, I think he has made an effort to be frank with me and I think in all essential details he has been.”
Crowe: “Don’t you think it is strange that he lies to Loeb and he lies to everybody else except you?”
Witness: “No. You know when a person is in a situation in which these boys find themselves, naturally even very badly diseased people are capable of defending themselves and doing things that are calculated to be to their advantage.”
Crowe: “The fact that Nathan Leopold has lied to every other person that he has talked to except you, don’t make any impression on your mind at all? Does it?”
White: “Well, I just answered that question.”

White had to admit that he had to rely on his judgment that Leopold did not lie to him.

Prior Crimes Could Be Lies or Not Proof of Mental Defects

Crowe then tried to undermine the evidence of prior crimes, which the alienists believed indicated the defendants suffered from various mental defects. He did this by showing these crimes were either based entirely on the word of the defendants and so could not be verified or were fairly common incidents. White found it significant that the defendants got drunk and caused property damage. But Crowe asked, “That is rather common for people who are drunk to break things, isn’t it, especially among young fellows. . . . And it does not follow because a drunken man throws a brick through a window that he will plan a murder for six months, does it, doctor?” White had to admit it did not.

Crowe asked White about some fires the defendants claimed they started. White could not remember which defendant told him about the fires. Crowe demanded details of the alleged crimes, such as what buildings were set on fire and their locations so the stories could be verified. He wanted to know the year, the day, and the time each fire was set, but White could not provide any details. Crowe repeatedly asked Dr. White if he had asked for such details. Crowe left the distinct impression that White had simply believed whatever the defendants told him.

Crowe repeatedly stated that the defendants could have been lying to the doctors, and then he asked bluntly, “Well, if they have fooled you and consistently lied to you then your conclusion isn’t worth anything, is it?” Walter Bachrach objected, “He has been asked that question ten times.” Judge Caverly wanted to let the witness answer, and an apparently exasperated White said, “Things are all different; things are all different, that is all.”

Crowe would try throughout the hearing to show that the intricate planning that took place in the months preceding the crime along with its implementation evidenced mental cunning, as opposed to any mental defect. He asked Dr. White to assume that the defendants were aware that a typewritten letter could be traced to the typewriter used. Then, Crowe asked, their act of stealing a typewriter instead of purchasing one that could

be traced back to them "[wa]s an indication not of mental disease but of extreme caution, [wa]s it not?" White would only admit it could be an indication of both.

Crowe was a tenacious adversary, as Darrow and the defense must have realized. Crowe effectively cast doubt upon the utility of Dr. White's testimony:

> Crowe continued to batter the witness all day, but he had already won his point. White's testimony was a fake defense with little or no relationship to the facts—a defense manufactured solely to defeat justice. Perhaps the attorneys had instructed Nathan and Richard to deceive the psychiatrists; or perhaps the psychiatrists had willingly colluded in the scheme, Crowe suggested. But such speculation, he stated, was irrelevant. The defense testimony relied on the truthfulness of the defendants and, as such, it was rotten to the core.[79]

"Compact" - Too Shocking for the Public

One of the most sensational parts of the hearing, too shocking to be heard by the public, came when Dr. Healy testified for the defense about the "for Robert's sake" agreement between Leopold and Loeb:

> In the matter of the association I have the boys' story, told separately, about an incredibly absurd childish compact that bound them, which bears out in Leopold's case particularly the thread and idea of his fantasy life. Loeb says the association gave him the opportunity of getting some one to carry out his criminalistic imaginings and conscious ideas. In the case of Leopold, the direct cause of his entering into criminalistic acts was this particularly childish compact.

Crowe Insists on Details

Crowe did not want this aspect of Leopold and Loeb's relationship to be glossed over. He wanted details, especially details about Leopold and Loeb's sexual relations: "You are talking about a compact that you characterize as childish. Kindly tell us what that compact was."

> Witness: "I am perfectly willing to tell it in chambers, but it is not a matter that I think should be told here."
> Mr. Crowe: "I insist that we know what the compact is, so that we can form some opinion about it."
> Mr. Darrow: "I suggest it be in Chambers."
> Mr. Crowe: "Tell it in court. The trial must be public, your Honor. I am not insisting that he talk loud enough for everybody to hear, but it ought to be told in the same way that we put the other evidence in."

[79] FOR THE THRILL OF IT, *supra* note 3, at 314.

Court: “It would be public, if there was only one outsider in here. If it is something that is unfit for publication—”
Mr. Crowe: “There is no desire on my part to bring out something unfit for publication –”
Mr. Bachrach: “It ought not to be given to the newspapers by this reporter, your Honor.”
The Court: “Oh no. This is not for the papers at all. This will not be given to the newspapers, Mr. Reporter.”

The hearing transcript reads:

> The witness then made the following statement to court, counsel, and court reporters:
>
> Witness: “This compact, as was told to me separately by each of the boys on different occasions and verified over and over, consisted of an agreement between them that Leopold, who has very definite homosexual tendencies, which have been a part of his makeup for many years, was to have the privilege of – do you want me to be very specific?”
> Mr. Crowe: “Absolutely, because this is important.”
> Witness: “—was to have the privilege of inserting his penis between Loeb’s legs at special rates; at one time it was to be three times in two months, if they continued their criminalistic activities together, and then they had some of their quarrels, and then it was once for each criminalistic deed. Now, their other so-called perverse tendencies seemed to amount to very little. They only engaged in anything else, so far as I can ascertain, very seldom, but this particular thing was very definite and explicit.”
> Mr. Bachrach: “So that it need not be repeated, make it clear what the compact was.”
> Mr. Darrow: “I do not suppose this should be taken in the presence of newspapermen, your Honor.”
> Court: “Gentlemen, will you go and sit down, you newspapermen. Take your seats. This should not be published.”
> Mr. Crowe: “What other acts, if any, did they tell you about? You say that there are other acts that they did rarely or seldom?”
> Witness: “Oh, they were just experimenting once or twice with each other.”
> Mr. Crowe: “Tell what it was.”
> Witness: “They experimented with mouth perversions, but they did not keep it up at all. They did not get anything out of it.”
> Mr. Crowe: “And Leopold was—”
> Witness: “Leopold has had many years—shall I go into this whole subject while we are here now?”
> Court: “Yes.”
> Witness: “Leopold has had for many years a great deal of phantasy life surrounding sex activity. That is part of the whole story and has been for

many years. He has phantasies of being with a man, and usually with Loeb himself, even when he has connection with girls and the whole thing is an absurd situation because there is nothing but just putting his penis between this fellow's legs and getting that sort of a thrill. He says he gets a thrill out of anticipating it. Loeb would pretend to be drunk, then this fellow would undress him and then he would almost rape him and would be furiously passionate at the time, whereas with women he does not get the same thrill and passion."
Mr. Crowe: "That is what he tells you?"
Witness: "Surely."
Mr. Darrow: "That is all I believe of that."
Witness: "That is what he tells me. And of the other part, of course, Loeb tells himself. That is exactly what they did, and how he feigns sometimes to be drunk, in order that he should have his aid in carrying out his criminalistic ideas. That is what Leopold gets out of it, and that is what Loeb gets out of it."
Mr. Bachrach: "When in connection with the compact in point of time did they start, with reference to the compact?"
Witness: "Their criminalistic ideas began on the same day when they began their cheating at bridge. It was on the day when they first made it out. It was the first in a berth, and it was when Leopold had this first experience with his penis between Loeb's legs, and then he found it gave him more pleasure than anything else he had ever done. To go on further with this, even in jail here, a look at Loeb's body or his touch upon his shoulder thrills him so, he says, immeasurably. Is that enough?"
Mr. Crowe: "I think that is all."
Court: "The press has all of this. They have a copy of it and they know what it contains. There is no necessity of taking it down."

Dr. Healy's remaining testimony was less sensational, delving into intelligence tests he administered and his findings and conclusions as to the mental health of the defendants. As with some other alienists, Healy seemed to have a higher opinion of Leopold than of Loeb, which tended to be the opposite of the opinion held by many in the public and by the people who knew both defendants. The defense alienist found Leopold was engaged during their sessions and demonstrated an interest in their work, in sharp contrast to Loeb who was disinterested and even fell asleep sometimes.

Dr. Bernard Glueck

Dr. Bernard Glueck followed Healy. Dr. Glueck, along with the other defense alienists, was struck by the defendants' coldness and lack of emotional response to the crime. Glueck recalled his examination of Loeb:

> I took up the Franks crime with Loeb, and asked him to tell me about it. He recited to me in a most matter of fact way all of the gruesome details. I was amazed at the absolute absence of any signs of normal feeling. He

> showed no remorse, no regret, no compassion, and it became very evident to me that there was a profound disparity between the things that he was talking and thinking about, and the things that he claimed he had carried out. The whole thing became incomprehensible to me, except on the basis of a disordered personality. He told me how his little brother passed in review before him as a possible victim, yet he showed the same lack of adequate emotional response. His lack of emotion struck him as unusual when he sat listening to the testimony of Mrs. Franks. He came to explain it to himself as having nothing within him that might call forth a response to the situation.

Benjamin Bachrach asked Dr. Glueck, "Did Loeb say who it was that struck the blow on the head of Robert Franks with the chisel?" Dr. Glueck answered: "He told me all the details of the crime, including the fact that he struck the blow."

Endocrinology

Dr. Hulbert was next. His testimony would focus on the physical aspects of the two defendants and the impact of these physical attributes on the mind. Dr. Hulbert and Dr. Bowmen poked, prodded and ran the defendants through numerous tests resulting in a large record of information. Dr. Hulbert brought a large notebook with him to the stand. His testimony would include the endocrinology findings that Darrow valued so much. Dr. Hulbert and Dr. Bowmen found a lot more physically wrong with Leopold in comparison to Loeb. Dr. Hulbert recited an astonishing amount of diagnostic information from the endocrine examinations and other tests:

> There is to be found in Nathan Leopold, Jr., considerable pathology. The hair development is pronounced. The blood pressure was low. His eyes are somewhat prominent. One eyelid is lower than the other. His face is not the same on the two sides, there being asymmetry. His heart sounds were clear; no disease of the lungs; some curvature of the spine. He is rather round shouldered. The abdomen protrudes. He is flat-footed. The thyroid gland may be felt. He has dermographia, or a disorder of the nervous control of the blood vessels. From all of which it was concluded, bearing the history in mind, that he has neuro-circulatory- asthenia or vasomotor instability.
>
> Q. Give us in full the endocrine findings as to Leopold.
>
> From my examination and study of this and similar cases I believe that the thymus gland involuted unusually early, for the following reasons: his sexual maturity came on early, he had a very low resistance to infections, and there is a tendency to acidosis, confirmed by low carbon dioxide, by his early permanent teeth, by his early secondary hair, his short body, stocky frame. The pineal gland has involuted early, because of the X-ray showing that it has already calcified at the age of 19; by the muscular

fatigue, his mental precocity, the disorder in his blood, the sugar disturbance; the thyroid gland has been definitely diseased; that it has been an over-active thyroid; that the over-activity has now subsided, because of the definite history of a rapid pulse; by the condition of the skin, which is thick and dry, with coarse hair; by his large teeth and their poor condition; by his slow pulse now; by his low temperature, low blood pressure, low metabolism rate; by his mild anemia, his early sex development; by his skin reactions, dermographia, by his sugar in- tolerance. He has a disorder of the adrenal glands, medullary insufficiency. I have come to the conclusion that his sex glands are over functioning, because of his short, stocky build, his early and complete sexual development in both primary and secondary characteristics, and the strong sex urge.

Q. What relation is there between the abnormal functioning of his endocrine glands and his mental condition?

The effect of the endocrine glands on the mental condition is definitely established in the minds of medical men in certain points and is still a matter of dispute in others. But I would say that his endocrine disorder is responsible for the following mental findings: his precocious mental development, his rapid advance through school, his ease of learning, are of endocrine origin. The fact that the cruel instincts show but little inhibition, is of endocrine origin. The fact that his mental habits are fixed early in life, is of endocrine origin. That his mind and body are everlastingly busy is of endocrine origin. That he fatigues if he overexerts himself and is nonaggressive, the prey of hidden fears, neurotic
and unmoral, and at the same time keen and witty, is of endocrine origin. The early development and strength of his sex urge is obviously of endocrine origin. His shallow mood and his good bearing are of endocrine origin.

On cross-examination, Crowe asked Hulbert many questions about the details of the examinations such as what kind of X-ray machine was used, and specific questions about a fluoroscope. Crowe wanted to trip Hulbert up on technical details.

Prosecution Alienists

During the sentencing hearing, the state's alienists gave their opinions on direct and cross examination as to the mental health of Leopold and Loeb. The state's alienists were all of the opinion that both Leopold and Loeb "showed no evidence of mental disease." Hugh Patrick, a Chicago neurologist, examined Leopold and Loeb just a few hours after they had confessed. Dr. Patrick did not think the defendants were without emotional reactions and gave a number of examples from his own observations and from consideration of the Bowman-Hulbert report. Finding no evidence of mental disease, he explained:

> [U]nless we assume that every man who commits a deliberate cold-blooded, planned murder must be mentally diseased, there was no evidence of any mental disease in any of the communication or in any of the statements the boys made regarding it, or their earlier experiences. There were no mental obliquities or peculiarities of the enormity of the deed which they committed.

Dr. Patrick also dismissed some factors the defense alienists raised as evidence of mental defects, such as Loeb's immature sexual development, habit of shaving only two or three times a week, history of fainting, hand tremors, low basal metabolism, and enlarged inguinal glands. According to Dr. Patrick, none of these factors would create a mental disorder. Dr. Patrick also criticized the Bowmen-Hulbert report. He found many of the findings either well within the range of normal, trivial or too vague to be significant.

Crowe asked Dr. Church to assume that every conclusion on Leopold and Loeb's mental states made by the defense alienists in testimony was true. Dr. Church testified that even assuming everything the defense said was true, it would not change his mind that neither of the defendants had a mental disease when he examined them or on the day of the murder. Dr. Church also stated that the Bowman-Hulbert report "which is very carefully and thoroughly prepared, and based upon painstaking examinations, fails to present anything which is significant of mental disease."

Dr. Singer testified that Clarence Darrow had come in during an examination of the defendants in Crowe's office on June 2. After this, the defendants would answer each question put to them by saying, "I respectfully decline to answer on the advice of counsel."

Darrow's Cross-Examination

Darrow cross-examined several of the prosecution's doctors, including Dr. Church. Darrow had a copy of Dr. Church's book *Nervous and Mental Disorders* and he read passages during his cross-examination. Dr. Church based his findings on an examination that was very short, especially in comparison with the length of the examinations by the defense doctors. Darrow was trying to get access to his clients while Dr. Church and many others were in the room with Leopold and Loeb, so he knew there were dozens of people moving in and out of the room during the examination. Darrow got Dr. Church to admit that this was not an ideal atmosphere for an examination. Darrow wanted to show that the chaotic scene of Dr. Church's examination was a far cry from what Church recommended in his own book on the subject. Darrow showed that the examinations conducted by Dr. Church and the prosecution's alienists were superficial in comparison with the extensive examinations conducted by the defense. The defense would raise this issue again during its closing arguments.

The Defense Alienists

When searching for alienists to examine their clients, Darrow and his co-counsel had to go outside the Chicago area because "[b]efore any lawyer was employed the State had called into their counsel the best-known alienists in Chicago."[80] Darrow recalls, "From the beginning we never tried to do anything but save the lives of the two defendants; we did not even claim or try to prove that they were insane. We did believe and sought to show that their minds were not normal and never had been normal."[81] The findings and testimony of the defense alienists provided some of the most controversial and interesting moments in the trial. The Leopold and Loeb defense strategy has been described as the "first intensive effort . . . to apply Freudian psychoanalytical concepts directly to a criminal trial in a court of law."[82]

The psychiatric examinations, reports and testimony were much more extensive than in most other cases. As a commentator in 1938 explained, "The Loeb-Leopold hearing on sentence, much publicized years ago, was far more elaborate and covered much more territory than the ordinary hearing. In that sense it was and remains definitely exceptional."[83] Darrow later stated that the judge placed no limitations upon the evidence that could be introduced during the mitigation phase, thus "making possible for the first time in the history of medical jurisprudence a completely scientific investigation in a court of law of the mental condition of persons accused of crime."[84] Noted psychoanalyst Bernard Diamond states, "Darrow hoped to win sympathy and understanding for their inexplicable crime by a parade of psychiatric and psychoanalytic experts who, for the first time, would reveal the unconscious psychodynamics of a bizarre murder."[85]

Agenda

It appears that at least some of the defense alienists viewed the murder of Bobby Franks as an opportunity to advance their own agenda. They wanted to reform the criminal justice system by replacing aspects of it with psychiatric knowledge and examination or at least mitigate what they viewed as the harsher aspects of criminal law and punishment. According to one source: "The defense . . . employed a dream-team of the leading experts on criminal psychology and psychiatry including William Healy, William Alan White, and Bernard Glueck. These men were not only eminent clinicians; they were national advocates making the argument for the priority of psy-expertise in administering criminal justice."[86]

One of the doctors Darrow hired, William Alanson White, later wrote in his autobiography:

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[80] STORY OF MY LIFE, *supra* note 23, at 235 (1932).
[81] *Id.* at 234.
[82] PSYCHIATRIST IN THE COURTROOM, *supra* note 72, at 2.
[83] George H. Dession, *Psychiatry and the Conditioning of Criminal Justice*, 47 YALE L.J. 319, 324 (1938).
[84] AMAZING CRIME AND TRIAL OF LEOPOLD AND LOEB, *supra* note 1, at 6.
[85] PSYCHIATRIST IN THE COURTROOM, *supra* note 72, at 244.
[86] JONATHAN SIMON, "A SITUATION SO UNIQUE THAT IT WILL PROBABLY NEVER REPEAT ITSELF": MADNESS, YOUTH, AND HOMICIDE IN TWENTIETH-CENTURY CRIMINAL JURISPRUDENCE, 86 (IN LAW'S MADNESS, AUSTIN SARAT, LAWRENCE DOUGLAS, AND MARTHA MERRILL UMPHREY EDTS.) (2003). [hereinafter A SITUATION SO UNIQUE].

> I was pretty well disgusted with my experience in the Thaw case, but in later years when the Loeb and Leopold case broke in Chicago and I was importuned to testify there I acquiesced, thinking that possibly something might be done here to retrieve what for years had been a bad situation.[87]

Henry Thaw was a mentally disturbed but very wealthy heir to a multi-million dollar mine and railroad fortune. In one of the most notorious murders of its time, Thaw shot and killed the famous architect, Standford White, in a jealous rage on June 25, 1906. Among his many accomplishments, White had designed the original Madison Square Garden. Shaw killed White while White was eating dinner at a restaurant in Madison Square Garden. In what was called the "trial of the century" Thaw was found not guilty by reason of insanity. A prior trial had ended in a hung jury. Thaw was sent to a mental institution but after a few years was released. Many viewed the Thaw case as a travesty because Thaw had basically gotten away with murder. Newspapers compared the Thaw case with the upcoming Leopold and Loeb trial. Darrow and the defense had to counter suggestions that the two cases were similar.

Bernard Diamond was a well-known professor of law and psychiatry at the University of California at Berkeley. An expert in forensic psychiatry, he was an expert witness for the defense in many well known trials, including the trial of Sirhan Sirhan for the murder of Robert Kennedy.

Diamond was twelve years old and living in California during the Leopold and Loeb case. He was fascinated by the news coverage of the case and it was the first time he had heard of Sigmund Freud. Diamond was inspired to become a psychoanalyst by the Leopold and Loeb case: "My image of the psychoanalyst was not of Freud, but of William Alanson White, the psychoanalyst in the courtroom.[88]

Diamond writes about White's involvement in the case:

> William Alanson White, in particular, took this occasion to introduce into the courtroom the dynamic concepts that he had learned well from his studies of Freud's writings and that he accepted as the new psychology, which he believed would eventually replace the stereotypic, static, diagnostic psychiatry that had been prevalent in courtrooms.[89]

Behavior of Leopold and Loeb During the Hearing

Numerous accounts describe Leopold and Loeb during the hearing acting amused, snickering, laughing, constantly whispering back and forth and appearing to be having a good time. One of the oddities of the sentencing hearing was that Clarence Darrow and

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[87] WILLIAM ALANSON WHITE, THE AUTOBIOGRAPHY OF A PURPOSE 186 (1938) [hereinafter AUTOBIOGRAPHY OF A PURPOSE].
[88] PSYCHIATRIST IN THE COURTROOM, *supra* note 72, at 5-6.
[89] *Id.* at 3.

his co-counsel did not keep Leopold and Loeb from acting as they did while in court. With the stakes so high and the life or death decision resting solely on Judge Caverly, one would think that the defendants would have been instructed to be on their best behavior and that they would do so if they wanted to escape the gallows. They certainly did not act as if they were facing at the least life in prison and a very real chance of hanging for their crimes. Instead, both of them acted as if they were going to walk right out of the court as free citizens as soon as the hearing was finished.

One account argues it may have been false bravado, a courtroom version of whistling passed the graveyard:

> The attitude of the boys throughout the trial amazed everyone who watched them. Every day newspapers carried pictures of them smiling in the courtroom. When the crowd laughed, they laughed. Sometimes they laughed alone. Everyone commented on their cheerfulness and even levity, through the whole proceeding, but those who watched them closely came to see that often it was the nervous giggling of two frightened, foolish boys who found themselves in a terrific mess with the eyes of the world upon them.[90]

Jacob Franks, the father of the murder victim, was perplexed at the demeanor of the defendants. He had watched them during the proceedings, trying to analyze them and come to some understanding of what happened. But Jacob Franks could not fathom that it was these two defendants who murdered his son and shattered his family forever:

> I thought I was a pretty good judge of human nature during my long experience, but I find I have encountered an unsolvable problem. It's impossible for me to sit there and believe, as I watch those boys, that they are the ones who killed my child. They seem so gentle; they're so refined looking.[91]

Why they did not try to act repentant, remorseful and respectful of the court proceedings is a mystery. Perhaps this was part of the defense strategy. To be fearful, remorseful, anxious and worried about the upcoming sentence would be normal human behavior. Or perhaps Leopold and Loeb were so arrogant and self-centered that they stayed true to form.

Interestingly, Leopold and Loeb's behavior in the courtroom in 1924 was cited in a 2008 capital murder case. The defendant was sentenced to death under the Federal Death Penalty Act.[92] One of the statutory requirements was that the defendant failed to demonstrate remorse for his crimes. The defendant challenged the lack-of-remorse consideration on two fronts. He argued that the prosecutor's statements about his remorse-free demeanor in court amounted to a penalty for his failure to testify. He also

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[90] AMAZING CRIME AND TRIAL OF LEOPOLD AND LOEB, *supra* note 1, at 57.
[91] CRIME OF THE CENTURY, *supra* note 2, at 186-87.
[92] United States v. Mikos, 539 F.3d 706 (7th Cir. 2008).

argued that "only gloating or boastfulness, after the fashion of Leopold and Loeb, show a meaningful 'lack of remorse.'"[93]

Closing Arguments

After the prosecution and defense finished presenting evidence, each side gave closing arguments. The arguments were given in the following order: Assistant District Attorneys Thomas Marshall and Joseph P. Savage for the State; Walter Bachrach, Clarence Darrow and Benjamin C. Bachrach for the defense. The final argument was given by District Attorney Robert E. Crowe for the state. The following excerpts from the closing arguments are taken from the hearing transcripts, a pamphlet titled *Attorney Clarence Darrow's Plea for Mercy and Prosecutor Robert E. Crowe's Demand for the Death Penalty in the Loeb-Leopold Case, the Crime of the Century* published in 1924 and *The Loeb-Leopold Case: With Excerpts from the Evidence of the Alienists and Including the Arguments to the Court by Counsel for the People and the Defense* by Alvin Victor Sellers published in 1926.

State of Illinois - Thomas Marshall

On August 19, Assistant State Attorney Thomas Marshall began the state's closing arguments. Marshall told the court, "There is in this case but one question before the court, and one question only. That is, what punishment is proportionate to the turpitude of the offense, or in other words, what punishment under the law fits the crime committed." Marshall believed this crime warranted the death penalty:

> If this is not a murder of the extreme type on the facts, then, of course, a lesser penalty than death can be invoked; but when months of planning, careful execution of every detail, a money motive, a kidnapping for ransom, the cruel blows of a sharp steel chisel, the gagging, the death, and the hiding of the body all appear, as they do here, the malice and deliberation take the crime out of the scale of lesser penalties and prescribe death.

Perhaps sensing that Judge Caverly might be receptive to defense arguments that executing youthful defendants was becoming out of date, he compared the defendants' position to that of other youthful defendants who were facing execution or had already been executed. He recounted the case of Bernard Grant and Walter Krauser who had gone to a store to commit a robbery but ended up in a struggle with a police officer who was shot and killed. Grant was eighteen years old and Krauser was nineteen years old when they committed the crime. They were both convicted and sentenced to death even though they only intended to commit a robbery. Marshall asked:

> Should Grant go to the gallows, under the law, when men of the same age, of greater education, of better opportunity, can deliberately plan and

[93] *Id.* at 718 (relying on United States v. Roman, 371 F.Supp.2d 36 (D.P.R. 2005)).

> scheme a murder and kidnapping for ransom for months and months, carry it into execution and by any possibility escape that penalty?

Marshall read off a list of youthful offenders executed in Cook County in the past years and said none of their crimes "compares in premeditation, in malice or in execution with the terrible crime" committed by Leopold and Loeb. Marshall went into brief details about numerous murders committed by youthful offenders who were executed, and concluded: "Your Honor, the books are full of such cases. But nowhere will you find a case more terrible, more cunningly planned, more carefully executed, more dastardly than this case at the bar."

Marshall described all the planning that Leopold and Loeb went through which culminated in the murder of Bobby Franks. He argued that it was the state's position that because this was a "premeditated, carefully planned and deliberate murder of a helpless fourteen-year-old school boy, Robert Franks" the only penalty proportionate to the turpitude of the crime was "the extreme penalty—death."

Joseph Savage

Assistant Attorney Savage followed Marshall. As Crowe would later, he spent considerable time going over the details of the kidnapping and murder plan and the actions and attitudes of Leopold and Loeb both before and after the murder in order to show the premeditation and cold-blooded nature of the crime. He said, "Why Judge, you wouldn't strike a dog four times on the head with a chisel and not give him a chance."

Eyeglasses Traced to Leopold

Savage went into more detail about how the eyeglasses were traced to Nathan Leopold. The detectives discovered the manufacturer's unique frames and learned that in Chicago that type of eyeglass frame was only sold by Almer Coe & Co. Personnel at Almer Coe recognized the frames and were able to identify the lenses as those made by Almer Coe because of a special mark. Savage recounted, "'That stalwart business man, Almer Coe, himself, with his manager, Jacob Weinstein, said, 'We will place our entire force at work and check back the records and see if we can find a prescription to tally with the glasses.'" Almer Coe did just that and gave the investigators the names of three people on record for buying that type of glasses: a prominent lawyer, a young lady and Nathan Leopold, Jr. When Leopold was taken to his home to search for his pair of eyeglasses he could only locate the Almer Coe case.

My God!

Savage related that when Loeb was asked about the eyeglasses he said, "Why every one says that if you find the owner of the glasses you have found the man who murdered Bobby Franks." Then Mr. Crowe asked him, "Richard what would you say if I told you that your pal, Nathan Leopold, is the owner of the glasses?" Savage recounted Loeb's response, "Why, your Honor, he almost jumped out of his seat, and gasped: 'My God!'"

Savage described the scene when the two suspects and investigators were in the yard of the jail looking over the rental car. Loeb refused to get in the car with Leopold in the driver's seat because then it would appear that Leopold was driving when Bobby Franks was picked up and it was Loeb who committed the actual murder.

There were reports that Bobby Franks' mother was so devastated by the news of his murder that she actually believed that he would return sometime. Savage irked Clarence Darrow when he mentioned this to the judge, "[Y]ou feel sorry for the Franks family, and you feel sorry for the mother who still believes that her little boy will yet return." Darrow intervened:

> Mr. Darrow: "Where is the evidence on that, Mr. Savage?"
> Mr. Savage: "It is a fair inference."
> Mr. Darrow: "Oh!"
> Mr. Savage: "That is fair to infer, your Honor; that that mother who cherished the boy is still waiting for his return from school; and then they ask your Honor for mercy!"

Savage also raised an issue that had permeated the whole case but was not directly addressed until Crowe's closing argument—that Bobby Franks had been raped: "And when your Honor metes out that justice we will have no more supermen; we will have no more men with phantasies, whose desires are to ravish young children and then murder them."

Walter Bachrach

Walter Bachrach began by trying to clear up the defense's position, which had been "much distorted" by the state's attorneys and the press. He explained that there was no issue as to the legal insanity of the defendants. They pled guilty and assumed full responsibility for the crime. This proceeding was simply about the judge hearing aggravating and mitigating evidence so as to assess the proper punishment, which for this crime ranged from not less than fourteen years to life in prison or the death penalty. He explained, "It is as though there were before your Honor a sort of sliding scale with imprisonment in the penitentiary for fourteen years at one end and punishment by death at the other, and as though it were your Honor's duty to set the indicator at some point upon this scale."

Bachrach cited the 1895 Nebraska case of *Tracy v. State*[94] to support the defense's contention that the defendant's age, mental condition and other factors should be taken into consideration by a court during sentencing. Bachrach described *Tracy v. State* as "the only case squarely passing upon the question" of the defense's right to present such mitigating evidence. In that case the Nebraska Supreme Court ruled:

[94] Tracy v. State, 46 Neb. 361, 64 N.W. 1069 (Neb. 1895).

> The obvious intent of the statute in fixing the punishment for the crime of robbery at imprisonment from three to fifteen years was to invest the trial court with discretion to grade the punishment within the limits of the statute according to the enormity of the offense to take into consideration, in fixing the punishment, all the circumstances in evidence under which the crime was committed; perhaps to consider the age, the mental condition, and the previous good character of the person convicted.
>
> True the district court may determine what penalty shall be imposed solely from the evidence produced before the jury on the trial, but we do not think that the court is confined to that evidence alone in fixing the punishment. When the prisoner is inquired of by the court whether he has anything to say why judgment should not be pronounced against him, he may make such statements of his previous good behavior, of his previous good character, of his age, of his condition at the time he committed the offense, and the influences which were brought to bear upon him, and led to his commission of the crime, as may induce the court "to temper justice with mercy," and to give the prisoner the least punishment provided for by the statute; and we cannot say that such action on his part would be an abuse of his discretion.

Legal Father

Bachrach told Judge Caverly:

> Your Honor stands in the relationship of a father to these defendants. Every judge does. Every man in his heart knows that the judge on the bench is his father; his punisher, when he is wrong; that he must come before him and receive his chastisement. But when he comes before his legal father on a plea of guilty, that father is faced with the duty which every father has of desiring understanding of the wrongdoer, and what it was that brought about the situation, before the punishment is inflicted. It is so easy to hang; the important problem is put out of sight. It requires more intelligence to investigate.

Bachrach and the other defense lawyers tried to put the evidence in a different light. Whereas the prosecution used the intricate planning of the crime as evidence that the defendants were cold, calculating fiends, the defense tried to use the same evidence to show Leopold and Loeb suffered from an abnormal mental condition.

Crowe Sent for Alienists

Bachrach tried to use Prosecutor Crowe's own actions to support the defense's contention that its clients were mentally defective. Right after Leopold and Loeb's confessions had been fully corroborated "the first thing the State's Attorney did . . . was to have what Mr.

Darrow designated as a 'roundup.' He sent out his call for his alienists. Why should the idea of insanity ever have entered Mr. Crowe's mind?"

Bachrach used an example to show Leopold and Loeb's crime was so shocking that anyone who knew them would think they had mental problems:

> Supposed that someone were to come to your Honor, or to anyone who knows my associate, Mr. Darrow, who has known him for years, and knows the kindly individual that he is, and say that Mr. Darrow had kidnapped and murdered a boy of fourteen years old, and brought you proof that he had done it. Would your Honor say that Mr. Darrow was a hardened murder, or would you not rather suggest that his mind had become affected?

Bachrach argued Prosecutor Crowe faced the same situation:

> These were respected boys, intelligent, without the earmarks of criminals, the sons of respected parents of wealth and stability. When they had confessed the crime, what happened was the very natural thing . . . that Mr. Crowe would doubt their sanity; and doubting their sanity, he sent for Dr. Patrick, Dr. Church and Dr. Kohn, who came on Sunday.

Bachrach severely criticized the prosecution's alienists for only observing Leopold and Loeb for about forty minutes and basing their conclusions on this brief examination. In comparison, defense alienists Bowan and Hulbert spent fourteen days gathering evidence.

Clarence Darrow's Closing Argument

On Friday, August 22, 1924 as the time approached for Clarence Darrow to give his final plea for mercy, the excitement surrounding the case intensified and the crowds in and around the courthouse grew enormously. There was a crush of people vying for a place in the courtroom to hear the famous attorney. Estimates put the crowd in front of the Criminal Courts building at 2,000 to 3,000. Bailiffs struggled to gain control of the crowd. Extra police were called in. Judge Caverly ordered the police to clear the building of anyone not in the courtroom.

Darrow began his closing argument at about 2:20 p.m.:

"It has been almost three months since I first assumed the great responsibility that has devolved upon me and my associates in this case; and I am willing to confess that it has been three months of perplexity and anxiety. A trouble which I would gladly have been spared excepting for my feelings of affection toward some of the members of one of these families. It is a responsibility that is almost too great for anyone to assume that has devolved upon us. But we lawyers can no more choose than the court can choose."

Darrow Denies Large Fee

Very early in his argument Darrow denied that the defense was receiving a large amount of money, noting that the defense attorneys agreed to receive a fee set by the Chicago Bar Association and the alienists agreed to work for per diem the same as the state's alienists. Darrow told the court:

> It was announced that millions of dollars were to be spent on this case. Wild and extravagant stories were freely published as if they were facts. Here was to be an effort to save the lives of two boys, that should not have required an effort even, but to save their lives by the use of money, in fabulous amounts, such as these families never had nor could have.

With regard to the public perception that the wealth of the defendants' families was a great advantage, Darrow insisted it was in fact a detriment. He argued that the state's attorney was only seeking the death penalty because the defendants came from wealthy families and the case had generated such intense public interest. To support this assertion, Darrow reminded the court that there had never been a case in Chicago where a youth under age twenty-one had pled guilty to murder and been executed. Darrow believed that no one under twenty-three had been executed in the state of Illinois, though he had not researched it.

As he did in many trials, Darrow attacked at least one member of the prosecution. He did this to try and anger the other side. Referring to Assistant Attorney Savage, Darrow asked, "[M]y friend Mr. Savage—did you pick him for his name or his ability or his learning? . . . ."

Referring to Crowe and the pictures taken of the defendants soon after they confessed, Darrow continued:

> I know my friend, Judge Crowe, had a friendly attitude because I saw divers, various and sundry pictures of Prosecutor Crowe taken with these boys. When I saw them I believed it showed friendship for the boys, but now I am inclined to think he had them taken just as a lawyer who goes up in the country fishing and has his picture taken with a string of fish, or the man who goes shooting has his picture taken with a dead animal. Here was his prey.

Burden on Judge Caverly

Darrow apologized to Judge Caverly for placing such an important decision on him. But just as he did with the jury in all of his criminal trials, Darrow emphasized the responsibility for the defendants' lives was squarely on Judge Caverly. But Judge Caverly had even more responsibility than the members of a jury: "[Y]our Honor, if these boys hang, you must do it. There can be no division of responsibility here. You can never explain that the rest overpowered you. It must be your deliberate, cool, premeditated act, without a chance to shift responsibility."

Bobby Franks' Murder not Cruel

Darrow made some surprising statements in attempting to dispute the cruelty of the crime. The state called it a cold-blooded murder and the most terrible crime in the history of Illinois. Darrow tried to rebut this:

> I insist, your honor, that under all the rules and measurements, this was one of the least dastardly and cruel of any that I have known anything about. . . . They say that this was a cruel murder, the worst that ever happened. I say that very few murders ever occurred that were as free from cruelty as this. . . . But I would say the first thing to consider was the degree of pain, to the victim. Poor little Bobby Franks suffered very little. This is no excuse for his killing. . . . Robert Franks is dead, and we cannot change that. It was all over in fifteen minutes after he got into the car, and he probably never knew it or thought of it. That does not justify it. It is the last thing I would do. I am sorry for the poor boy. I am sorry for his parents. But, it is done. . . . So far as the cruelty to the victim is concerned, you can scarce imagine one less cruel.

Although it likely would not help his clients, Darrow also disputed the prosecution's argument that Bobby Franks would have grown up to be a great man: "At fourteen years of age I don't know whether he would or not."

At one point, Darrow echoed Leopold's comment to reporters about "impaling a beetle on a pin." He asked, "Why did they kill little Bobby Franks? Not for money, not for spite, not for hate. They killed him as they might kill a spider or a fly, for the experience."

Darrow Denounces Cry for Blood

Darrow was outraged and offended that the prosecution cited English cases from Blackstone in which defendants much younger than Leopold and Loeb had been executed:

> I have heard in the last six weeks nothing but the cry for blood. I have heard raised from the office of the state's attorney nothing but the breath of hate. I have heard precedents quoted which would be a disgrace to a savage race. I have seen a court urged almost to the point of threats to hang two boys, in the face of science, in the face of philosophy, in the face of humanity, in the face of experience, in the face of all the better and more humane thought of the age.

Darrow described the arguments of the State's Attorneys: "Cruel; dastardly; premeditated; fiendish; abandoned and malignant heart;—sounds like a cancer—cowardly,—cold-blooded!"

Wrath Directed at Dr. Krohn

Darrow heaped a great deal of scorn on Dr. Krohn, one of the state's alienists. He accused Dr. Krohn of testifying in court cases for sixteen years simply for money - "the cold, deliberate act of a man getting his living by dealing in blood." He did not consider Dr. Krohn to be a real doctor: "I can never imagine a real physician who cared for life or who thought of anything excepting cash, gloating over his testimony as Dr. Krohn did in this case."

Referring to the cases the prosecution cited from Blackstone, he said, "Thus a girl 13 has been burned for killing her mistress. Lord, how that would delight Dr. Krohn! He would lick his chops over that more than over his dastardly homicidal attempt to kill these boys. A girl of 13 was burned, because she probably didn't say 'Please' to her mistress-out of my beloved Blackstone."

Speaking of Dr. Krohn's testimony, Darrow told the court:

> When he testified my mind carried me back to the time when I was a kid, which was some time ago, and we used to eat watermelons. And I have seen little boys take a rind of watermelon and cover their whole face with water, eat it, munch it and have the best time of their lives, up to their ears in watermelon. And when I heard Dr. Krohn testify in this case, to take the blood or the lives of these two boys, I could see his mouth water with the joy it gave him, and he evinced all the delight and pleasure of myself and my young companions when we ate watermelon.

Darrow was angry at Assistant Attorney Savage's remark that the defense only pled guilty because they were afraid to do anything else. Darrow insisted they would not have tried the case to a jury, even if they thought they could win:

> We have said to the public and to this court that neither the parents nor the friends, nor the attorneys would want these boys released. That they are as they are, unfortunate though it be, it is true, and those the closest to them know perfectly well that they should be permanently isolated from society. We have said that; and we mean it. We are asking this court to save their lives, which is the least and the most that a judge can do.

Civilization Moving Away from Hanging Youthful Offenders

Darrow spent considerable time on one of his main arguments—that the age of the defendants was a mitigating factor and that civilization had been progressing and moving away from executing youthful offenders:

> We have raised the age of hanging. We have raised it by the humanity of the courts, by the understanding of the courts, by the progress in science which at last is reaching the law; and of ninety men hanged in Illinois

> from its beginning, not one single person under twenty-three was ever hanged upon a plea of guilty—not one.

Past and Future

Darrow told the judge:

> I know your Honor stands between the future and the past. I know the future is with me, and what I stand for here . . . . I am pleading for life, understanding, charity, kindness, and the infinite mercy that considers all. I am pleading that we overcome cruelty with kindness and hatred with love. I know the future is on my side. You may hang these boys; you may hang them by the neck until they are dead. But in doing it you will turn your face toward the past.

Guilty Pleas Very Rarely Earn the Death Sentence

Darrow and his co-counsel also argued that the vast majority of defendants who plead guilty and throw themselves on the mercy of the court are not sentenced to death. Darrow pointed out that Prosecutor Crowe was a rare exception during the time he was a judge:

> It was twenty-two years, your Honor, before anybody else was hanged in Cook County on a plea of guilty, old or young, twenty-two years before a judge had either the old or young walk into his court and throw himself on the mercy of the court and get the rope for it. But twenty-two years later, in 1919, Thomas Fitzgerald, a man about forty years old, was sentenced for killing a little girl, pled guilty before my friend Judge Crowe, and he was put to death. And that is all. In the history of Cook County that is all that have been put to death on a plea of guilty. That is all.

Darrow conceded that they would rather take their chances with a judge than a jury because of the notoriety of the crime. Darrow also pointed out, "Some ninety human beings have been hanged in the history of Chicago, and of those only four have been hanged on the plea of guilty—one out of twenty-two."

Darrow displayed a cynical, gallows-type sarcasm that he used in other cases:

> [N]inety unfortunate human beings had been hanged by the neck until dead in the city of Chicago in our history. We would not have civilization except for those ninety that were hanged, and if we can not make it ninety-two we will have to shut up shop.

Darrow reiterated that of those ninety executions, only four were based on pleas of guilty. In the last ten years three hundred and forty people had pled guilty to murder charges, and only one of these had been hanged. Referring to Prosecutor Crowe, Darrow said,

"[M]y friend who is prosecuting this case deserves the honor of that hanging while he was on the bench. But his victim was forty years old."

"Friendly Judge"

Darrow brought up a controversial issue that would later make Judge Caverly very angry when Crowe discussed it. This was the allegation by a policeman that Leopold had told him he might escape the death penalty if he had a friendly judge. Darrow claimed that Leopold never said this and the policeman committed perjury.

World War I

Darrow supported the United States' entry into World War I. But he also believed that the mass slaughter of that war which ended in November 1918 had led to an increase in violent crimes because it conditioned society to be more accepting of violence:

> For four long years the civilized world was engaged in killing men. Christian against Christian, barbarians uniting with Christians to kill Christians; anything to kill. It was taught in every school, aye in the Sunday school. The little children played at war. The toddling children on the street.

Franks Family to be Envied

In another surprising statement, Darrow said, "I have been sorry, and I am sorry for the bereavement of Mr. and Mrs. Franks, for those broken ties that cannot be healed. . . . But as compared with the families of Leopold and Loeb, the Franks are to be envied—and everyone knows it."

"these boys are not fit to be at large"

Darrow knew the best he could hope for would be that Leopold and Loeb spend the rest of their lives in prison. He also said they should be in prison:

> I do not know how much salvage there is in these two boys. I hate to say it in their presence, but what is there to look forward to? I do not know but what your Honor would be merciful if you tied a rope around their necks and let them die; merciful to them, but not merciful to civilization, and not merciful to those who would be left behind. To spend the balance of their days in prison is might little to look forward to, if anything.
>
> They may have the hope as the years roll around they might be released. I do not know. I will be honest with this court as I have tried to be from the beginning. I know that these boys are not fit to be at large. I believe they will not be until they pass through the next stage of life, at forty-five or fifty.

Endocrinology

Darrow was convinced that science had made a breakthrough in understanding human behavior through the study of the endocrinology:

> I know what causes the emotional life. I know it comes from the nerves, the muscles, the endocrine glands, the vegetative system. I know it is the most important part of life. I know it is left out of some. I know that without it men cannot live. I know that without it they cannot go with the rest. I know they cannot feel what you feel and what I feel, that they cannot feel the moral shocks which come to men who are educated and who have not been deprived of an emotional system or emotional feelings.

Darrow emphasized the defense alienists' conclusion that Loeb lacked proper emotions, which could have been caused by defective glands:

> Is Dickie Loeb to blame because out of the infinite forces that conspired to form him, the infinite forces that were at work producing him ages before he was born, that because out of these infinite combinations he was born-without it? If he is, then there should be a new definition for justice. Is he to be blamed for what he did not have and never had? Is he to blame that his machine is imperfect? Who is to blame? I don't know. I have never been interested so much in my life in fixing blame as I have in relieving people from blame. I am not wise enough to fix it. I know that somewhere in the past that entered into him something missed. It may be defective nerves. It may be a defective heart, liver. It may be defective endocrine glands. I know it is something. I know that nothing happens in this world without a cause.

Omar Khayyam

Darrow was very fond of reading and quoting the Persian poet Omar Khayyam. He quoted Khayyam in several trials. For this case he told the court,

> In the words of old Omar Khayyam, we are only:
>
> "Impotent Pieces of the Game He plays
> Upon this checkerboard of nights and days,
> Hither and thither moves, and checks, and slays,
> And one by one back in the closet lays."

Bad Seed

Darrow's deterministic beliefs extended to the point that he believed people were victims of their heredity. According to Darrow, Loeb was a victim of his ancestors:

> I do not know what remote ancestor may have sent down the seed that corrupted him, and I do not know through how many ancestors it may have passed until it reached Dickie Loeb. All I know is, it is true, and there is not a biologist in the world who will not say I am right.

Darrow recalled a remark the prosecution made about mothers:

> But I am thinking of the mothers, too. I know that any mother might be the mother of a little Bobby Franks, who left his home and went to his school, and whose life was taken, and who never came back. I know that any mother might be the mother of Richard Loeb and Nathan Leopold, just the same.
>
> The trouble is this, that if she is the mother of a Nathan Leopold or of a Richard Loeb, she has to ask herself this question: "How came my children to be what they are? From what ancestry did they get this strain? How far removed was the poison that destroyed their lives? Was I the bearer of the seed that brings them to death?"

Leopold and Loeb should not be blamed because of an ancestor:

> I do not know what it was [that] made these boys do this mad act, but I do know there is a reason for it. I know they did not beget themselves. I know that any one of an infinite number of causes reaching back to the beginning might be working out in these boys' minds, whom you are asked to hang in malice and in hatred and injustice, because some one in the past has sinned against them.

Loeb's Parents More Responsible than Dickie Loeb

Darrow never conceded that Leopold and Loeb were to blame for the murder:

> Now, there is not any mystery about this case, your honor. There isn't any mystery. I seem to be criticizing their parents. They had parents who were kind and good and wise in their way. But I say to you seriously that the parents of Dickie Loeb are more responsible than he. And yet few boys had better parents.

Hanging Leopold and Loeb Much Worse than Bobby Franks Murder

Darrow believed that capital punishment was premeditated murder. And he thought this type of murder far worse than the murder of Bobby Franks:

> The law can be vindicated without killing any one else. It might shock the fine sensibilities of the state's counsel that this boy was put into a culvert

> and left after he was dead, but, your honor, I can think of a scene that makes this pale into insignificance. I can think, and only think, your honor, of taking two boys, one 18 and the other 19, irresponsible, weak, diseased, penning them in a cell, checking off the days and the hours and the minutes until they will be taken out and hanged.
>
> Wouldn't it be a glorious day for Chicago? Wouldn't it be a glorious triumph for the state's attorney? Wouldn't it be a glorious triumph for justice in this land? Wouldn't it be a glorious illustration of Christianity and kindness and charity?

“Babe” and “Dickie”

Darrow and the defense alienists often referred to Leopold as “Babe” and Loeb as “Dickie.” They were criticized by Crowe and later by critics for using “Babe” and “Dickie” as a thinly veiled attempt to win sympathy from the judge with the names’ youth. Darrow played up this contention about nicknames:

> Let me tell you something that I think is cowardly, whether their acts were or not. Here is Dickie Loeb, and they object to anybody's calling him Dickie although everybody did, but they think they can hang him easier if his name is Richard, so we will call him Richard.

Speaking of Leopold, he said,

> ‘Babe’ took to philosophy: I call him ‘Babe’ not because I want it to affect your honor, but because everybody else does. Being the youngest of the family, I suppose that is where he got his nickname. We will call him a man. Mr. Crowe thinks it is easier to hang a man than a boy, and so I will call him a man if I can think of it.

At another point in his argument he said, “I want to call your attention then to an extract from another letter by Babe, if I may be permitted to call him Babe up to the time of his death.”

Leopold Influenced by Nietzsche

One of the sensational aspects of the case was the revelation that Leopold was heavily influenced by the philosophy of Nietzsche. Referring to Leopold, Darrow said:

> He grew up in this way. He became enamored of the philosophy of Nietzsche. Your honor, I have read almost everything that Nietzsche ever wrote. A man of wonderful intellect; the most original philosophy of the last century. A man who had made a deeper imprint on philosophy than any other man within a hundred years, whether right or wrong.

Leopold believed in the concept of the “Superman” who was above society’s rules:

> Here is a boy of 16 or 17 becoming obsessed with these doctrines. There isn't any question about the facts. Their own witnesses tell it and every one of our witnesses tell it. It was not a casual bit of philosophy with him; it was his life. He believed in a superman. He and Dickie Loeb were the supermen. There might have been others, but they were two, and two chums. The ordinary commands of society were not for him. Many of us read it, but know that it has no actual application to life, but not he. It became a part of his being. It was his philosophy. He lived it and practiced it; he thought it applied to him, and he could not have believed it excepting that it either caused a diseased mind or was the result of a diseased mind.

University More to Blame than Leopold

Believing Leopold was unduly influenced by Nietzsche’s philosophy, Darrow tried to assign blame:

> There is not a university in the world of any high standing where the professors do not tell you about Nietzsche and discuss it, or where the books are not there. I will guarantee that you can go down to the University of Chicago today, in its big library, and find over a thousand volumes on Nietzsche, and I am sure I speak moderately. If this boy is to blame for this, where did he get it? Is there any blame attached because somebody took Nietzsche's philosophy seriously and fashioned his life on it? And there is no question in this case but what that is true. Then who is to blame?
>
> The university would be more to blame than he is. The scholars of the world would be more to blame than he is. The publishers of the world-and Nietzsche's books are published by Macmillan, one of the biggest publishers in the world-are more to blame than he is. Your honor, it is hardly fair to hang a 19-year-old boy for the philosophy that was taught him at the university. It does not meet my ideas of justice and fairness to visit upon his head the philosophy that has been taught by university men for twenty-five years.
>
> Now, I do not want to be misunderstood about this. Even for the sake of saving the lives of my clients, I do not want to be dishonest, and tell the court something that I do not honestly think in this case. I do not think that the universities are to blame. I do not think they should be held responsible. I do think, however, that they are too large, and that they should keep a closer watch, if possible, upon the individual.

> But you cannot destroy thought because, forsooth, some brain may be deranged by thought. It is the duty of the university, as I conceive it, to be the great storehouse of the wisdom of the ages, and to have its students come there and learn and choose. I have no doubt that it has meant the death of many; that we cannot help.

Offenders Too Young to Hang

Perhaps Darrow's most forceful arguments and those he believed in most strongly were that Leopold and Loeb should not be hanged because of their age. Darrow did all he could to convince the court that society was progressing away from using capital punishment against young offenders:

> I want to discuss now another thing which this court must consider and which to my mind is absolutely conclusive in this case. That is, the age of these boys, independent of everything else. I want to discuss it more in detail than I discussed it before, and I submit, your honor, that it is not possible for any court to hang these two boys if he pays any attention whatever to the modern attitude toward children; if he pays any attention what- ever to the precedents in this county; if he pays any attention whatever to the humane instincts which move ordinary men.

Perhaps sensing that Judge Caverly was receptive to arguments about the defendant's youth, Darrow emphasized what it would mean if the judge did sentence them to death:

> Your honor, what excuse could you possibly have for putting these boys to death? You would have to turn your back on every precedent of the past. You would have to turn your back on the progress of the world. You would have to ignore all human sentiment and feeling, of which I know the court is full. You would have to do all this if you would hang boys of eighteen and nineteen years- of age who have come into this court and thrown themselves upon your mercy.
>
> Your honor, if in this court a boy of eighteen and a boy of nineteen should be hanged on a plea of guilty, in violation of every precedent of the past, in violation of the policy of the law to take care of the young, in violation of all the progress that has been made and of the humanity that has been used in the care of the young; in violation of the policy of placing boys in reformatories instead of prisons-if your honor in violation of all that and in the face of all the past should stand out here in Chicago alone to hang a boy, then we are turning our faces backward toward the barbarism which once possessed the world.
>
> If your honor can hang a boy of eighteen, some other judge can hang him at seventeen, or sixteen, or fourteen. Some day, some day, if there is any such thing as progress in the world, if there is any spirit of humanity that is

> working in the hearts of men, some day they will look back upon this as a barbarous age which deliberately turned the hands of the clock backward, which deliberately set itself in the way of all progress toward humanity and sympathy, and committed an unforgivable act.

Nothing to Look forward to in Prison

Darrow knew that even if Leopold and Loeb escaped the gallows, they faced a dreadful life in prison. He looked to another poet he liked, A.E. Housman, to express his feelings:

> But what have they to look forward to? Nothing. And I here think of the stanzas of Housman:
>
> "Now, hollow fires burn out to black
> And lights are fluttering low;
> Square your shoulders and lift your pack
> And leave your friends and go.
> Don't ever fear, lads, naught's to dread;
> Look not to left nor right.
> In all the endless road you tread
> There is nothing but the night."

Ends Plea with Omar Khayyam

It is typical of Darrow that the night before one of the most important pleas of his life he read poetry instead of just law books. He ended his plea for mercy with another poem:

> I was reading last night of the aspiration of the old Persian poet, Omar Khayyam. It appealed to me as the highest that I can envision. I wish it was in my heart and I wish it was in the heart of all, and I can end no better than to quote what he said:
>
> "So I be written in the Book of Love,
> I do not care about that Book above.
> Erase my name or write it as you will,
> So I be written in the Book of Love."

Darrow recalled in his autobiography published eight years later:

> I endeavored in my address to make a plain, straightforward statement of the facts in the case, and I meant to apply such knowledge as we now have of the motives that move men. The argument took the largest part of two court days and was printed almost word for word in some of the Chicago papers, and very extensively by the press outside that city, so that people at the time were fairly familiar with the facts in the case, and certainly the outcome. When I closed I had exhausted all the strength I could summon.

> From that day I have never gone through so protracted a strain, and could never do it again, even if I should try.[95]

Prosecutor Crowe's Closing Argument

Prosecutor Crowe began his closing statement on August 26 and he argued for nearly three full days on behalf of the State of Illinois. Crowe did not merely defend the prosecution's position. He was angry at the defense and denounced it sarcastically. Crowe went after Clarence Darrow numerous times during his argument, ridiculing Darrow's call for leniency. He was angry and disgusted with Leopold and Loeb. Crowe was as passionate in arguing for the death penalty as Darrow was in arguing against it.

Crowe's Sarcasm

Crowe wasted no time in taking sharp jabs at Clarence Darrow:

> Before going into a discussion of the merits of the case, there is a matter that I would like to refer to. The distinguished gentleman whose profession it is to protect murder in Cook county, and concerning whose health thieves inquire before they go out to commit crime, has seen fit to abuse the state's attorney's office, and particularly my assistants, Mr. Marshall and Mr. Savage, for their conduct in this case. He has even objected to the state's attorney referring to two self-confessed murderers, who have pleaded guilty to two capital offenses, as criminals. And he says that Marshall has no heart or if he has a heart that it must be a heart of stone; and that Savage was probably selected on account of his name and not on account of his attainments. That they have dared to tell your honor that this is a cold-blooded murder they have violated all the finer sensibilities of this distinguished attorney whose profession it is to protect murder in this community, by representing this crime as a dastardly, cruel, premeditated crime.

Crowe's closing argument was filled with sarcasm and scorn at the defense's arguments for leniency and its psychiatric excuses:

> We ought not to refer to these two young men, the poor sons of multimillionaires, with any coarse language. Savage and Marshall should have come up here and tried them with kindness and with consideration. I can imagine, your honor, when this case was called for trial and your honor began to warn these two defendants of the consequences of their plea, and when you said we may impose the death penalty, Savage and Marshall both rushing up and saying, 'Now, Judge, now, Judge, not so fast. We don't intend to be cruel in this case. We don't intend to be harsh. We want to try these boys, these kiddies, with kindness and consideration.'

[95] STORY OF MY LIFE, *supra* note 23, at 242.

> Your honor ought not to shock their ears by such a cruel reference to the laws of this state, to the penalty of death. Why, don't you know that one of them has to shave every day of the week, and that is a bad sign? The other one only has to shave twice a week, and that is a bad sign. One is short and one is tall, and it is equally a bad sign in both of them. When they were children they played with Teddy bears. One of them has three moles on his back. One is over-developed sexually and the other not quite so good. My God, if one of them had a hare lip I suppose Darrow would want me to apologize for having had them indicted.

Dismisses Defense Alienists

Crowe heaped scorn on and dismissed the reports and testimony of the defense alienists. Crowe wanted to convince the court that it was not a thrill killing but was a "strictly commercial proposition" as the ransom letter had stated. The thrill killing explanation fit in with the defense's contention that the defendants were mentally disturbed. Crowe wanted to show that the defendants intricately planned the crime to obtain the ransom money, and that Bobby Franks had to be murdered because he knew Loeb. An additional motive was to sexually assault Bobby Franks—most likely by Nathan Leopold.

Crowe and the prosecution believed that the defense was reaching for fashionable Freudian explanations to show the judge and the public that Leopold and Loeb were as mentally defective as any two youths could be, just short of the legal definition of insanity. Crowe believed the defense's emphasis on the "thrill killing" aspect of the crime was a deliberate plan to bewilder the judge and the public into accepting the defense alienists' conclusions. In effect the defense was asking — what else could explain such a crime at the hands of two seemingly normal, privileged young men from exemplary families with no history of conduct even approaching such a deed? They had to be mentally defective to plan and carry out such a crime.

Crowe wanted to undercut all of the defense psychiatric and medical testimony and show the judge and the public that these were just two amoral teenagers who knew what they were doing. Besides, they were perverts who probably sexually abused Bobby Franks before and maybe even after he was murdered. Crowe simply could not believe anyone would think they did not deserve to be hung from the neck until dead.

Crowe Believes in God

In discussing his own religious views, Crowe showed that Clarence Darrow's agnostic views were common knowledge, even before the Scopes trial:

> I have never been vicious nor cruel. I believe in God—which may be considered a fault in this case not only by the two defendants but by the master pleader who represents them—and I believe in the laws of this State. I believe the State's Attorney is as kindly a man as the paid

> ‘humanitarian,’ who believes in doing his fellow citizens good—after he has done them good and plenty.

At another point, Crowe said, “I believe in God and that is a fault in this case, a fault not only to the two murderers, but a fault to the master pleader whose profession it is to protect murder in this county. I believe in the laws of this state.”

Nursery

Crowe continually scoffed at the defense alienists’ theories:

> I have taken quite a trip during the last four or five weeks. I thought I was going to be kept in Chicago all summer trying this case, and that most of my time would be spent in the Criminal court building. And I find that I have been mistaken. I did come up to your honor's courtroom five weeks ago, and after I was there a little while Old Doc Yak-is that his name, the man from Washington? Oh, Dr. White-Dr. White took me by the hand and led me into the nursery of two poor, rich young boys, and he introduced me to a teddy bear. Then he told me some bedtime stories, and after I got through listening to them he took me into the kindergarten and he presented to me little Dickie and Babe, and he wanted to know if I had any objection to calling them that, and I said no, if he had no purpose. . . .
>
> And after he had wandered between the nursery and the kindergarten for quite a while, I was taken in hand by the Bachrach brothers and taken to a psychopathic laboratory, and there I received quite a liberal education in mental diseases, and particularly what certain doctors did not know about them.

Defends Prosecution Alienists

Crowe refuted Darrow’s allegations that the examination by the state’s alienists was substandard. Crowe believed it was much better than the defense’s examinations because it occurred before Leopold and Loeb had been coached:

> What better opportunity, in God's world, has the state ever had in an examination than they had in this? From 2:30 until 6:30, when these two young smart alecks were telling their story and boasting of their depravity; before they had been advised to invent fantasies; before they had been advised to answer certain questions in certain ways and before they had been advised to withhold even from the wise men from the east certain information that might be detrimental to the defense in this case.

Divine Act of God Catches Atheist Leopold

Referring to the dropped eyeglasses that led investigators to Leopold, Crowe stated:

> He has proclaimed since he was eleven years of age that there is no God. 'The fool in his heart hath said there is no God.' I wonder now, Nathan, whether you think there is a God or not. I wonder whether you think it was pure accident that this disciple of Nietzschian philosophy dropped his glasses or whether it was an act of Divine Providence to visit upon your miserable carcasses the wrath of God in the enforcement of the laws of the State of Illinois.

Sarcasm Directed at Darrow

Darrow was repeatedly the target of Crowe's sarcasm:

> [M]y good friend Clarence Darrow took me on a Chautauqua trip . . . . We would go to social settlements, such as the Hull House, and Clarence would expound his peculiar philosophy of life; and we would meet with communists and anarchists, and Clarence would regale them with his philosophy of the law, which means there ought not to be any law and there ought not to be any enforcement of the law. And he even took me to Springfield, where he argued before the legislature that you ought to abolish capital punishment in the State of Illinois. I don't know whether the fact that he had a couple of rich clients who were dangerously close to the gallows prompted that trip or not. I know when he was a member of the legislature he did not abolish capital punishment nor introduce a bill for that purpose.

Crowe argued to Judge Caverly that a judge was supposed to uphold the law even if he disagreed with it. "I have no right to be a judicial anarchist, even if Clarence Darrow is an anarchist advocate."

Referring to Darrow's verbal attacks on the prosecution, Crowe continued:

> May it please your Honor, we have heard considerable about split personalities in this case. I was somewhat surprised to find that my old friend, who has acted as counsel and as nurse in this case for the two babes who were wandering in dreamland, also was possessed of a split personality. I had heard so much of the milk of human kindness that ran out in streams from his large heart, that I was surprised to know he had so much poison in his system.

Darrow Only Defending Leopold and Loeb because of Money

Crowe sharply denied Darrow's claim that the only reason the prosecution was seeking the death penalty was because the defendants came from wealthy families. He countered by arguing the only reason Darrow was defending Leopold and Loeb was because they were rich:

> Take away the millions of the Loebs and the Leopolds, and Clarence Darrow's tongue is as silent as the tomb of Julius Caesar. Take away their millions, and the 'wise men from the east' would not be here, to tell you about fantasies, and Teddy bears and bold, bad boys, who have their pictures taken in cowboy uniforms. Take away their money, and what happens? The same thing that has happened to all the other men who have been tried in this building, who had no money. A plea of guilty, a police officer sworn, a coroner's physician sworn, the parents of the murdered boy sworn and a sentence.

As he would several times, Crowe turned Darrow's previous statements against him:

> Clarence Darrow once said that the poor man on trial was usually disposed of in fifteen minutes, but if he was rich and committed some crime, and he got a good lawyer, his trial would last twenty-one days. Well, they have three good lawyers, and it has lasted just a little bit longer; and in addition they had three wise men from the East.

Not Entitled to Mercy

Crowe was astounded that the defense tried to portray eighteen and nineteen year-old murders as children in need of sympathy:

> Treat them with kindness and consideration? Call them babes, call them children? Why, from the evidence in this case they are as much entitled to the sympathy and mercy of this court as a couple of rattle snakes, flushed with venom, coiled and ready to strike. They are entitled to as much mercy at the hands of your honor as two mad dogs are entitled to, from the evidence in this case.

Defense Confused about Mitigating and Aggravating Evidence

Crowe simply could not believe that the defense referred to certain evidence as mitigating:

> It is a mitigating circumstance . . . that when they were outlining the plan of this conspiracy and murder, they wanted to take a little girl, the daughter of the rich, and first rape her and then murder her, and then collect the ransom. If that evidence had been put in by the State, I would have thought it was an aggravation. These three wise men, with their distorted theories, hired by the defense, put that evidence in. Clarence Darrow calls it a mitigating circumstance. Why, when they murder a boy, they ought to be treated with kindness and consideration. If they had taken a little girl, and debauched her, I suppose each would have been entitled to a medal.

“Childish Compact”

Crowe more than any other lawyer for the prosecution pushed the allegations of sexual assault and perversion. Bringing up some of the most sensational testimony of the defense, Crowe exclaimed:

> These two defendants were perverts, Loeb the victim and Leopold the aggressor, and they quarreled. Then they entered into a ‘childish compact,’ Dr. Healy says, so that these unnatural crimes might continue. Dr. Healy says this is a ‘childish compact’; and I say if Dr. Healy is not ashamed of himself, he ought to be. My God! I was a grown man before I knew of such depravity. Mr. Bachrach says that is an evidence of insanity. The statute of Illinois says that crimes against nature are crimes punishable by imprisonment in the penitentiary.

“how do you undress a child?” Crowe Alleges Bobby Franks Sexually Assaulted

Crowe saved his closing argument for his most sensational allegations. Several times Crowe raised the allegation that Bobby Franks had been sexually assaulted:

> [O]ne of the motives here was a desire to satisfy unnatural lust. They first wanted a little girl, so Leopold could rape her; then they decided on a little boy. What happened? Immediately upon killing him, they took his trousers off. And how do you undress a child? First, the little coat, the collar, the tie, the shirt, and the last thing, the trousers. And yet immediately after killing this poor little boy, his trousers alone came off, and for three hours that little dead boy, with all his other clothes on him, remained in that car; and they did not take the balance of the clothes off until they pulled the body into the culvert.

Crowe would soon make more direct allegations.

“Ladies” May Want to Retire from the Courtroom - Crowe Claims Perverts Raped Bobby Franks

At one point, Crowe warned the court that the “ladies” present may want to retire because of what he was going to say. The court did go into recess for a few minutes so ladies could leave. Then Crowe dropped a bombshell:

> The Coroner’s report says that he had a distended rectum, and from that fact, and the fact that the pants were taken off, and the fact that they are perverts, I have a right to argue that they committed an act of perversion. . . . I do not contend that the coroner’s report states that an act of perversion was committed. It merely says that the rectum was distended. There was no evidence of semen, but it was washed away, I contend.

Judge Forces "Ladies" to Leave the Courtroom

At this point Judge Caverly stated:

> I have asked the ladies to leave the room. Now, I want you to leave. If you do not, I will have the bailiffs escort you into the hallway. There is nothing left here now but a lot of stuff that is not fit for you to hear. There will be nothing else but that to read. Why do you persist to listening to such rot. Step out into the hallway.

Unfair to Raise New Allegations in Closing Argument

Walter Bachrach then read the coroner's statement into the record, which included the finding that "the rectum was dilated, would easily admit one finger. There was no evidence of a recent forcible dilation." Darrow argued the report said there was no evidence of assault. Crowe countered that the evidence was washed away while the body was in the culvert, and that was his theory. Benjamin Bachrach argued it was unfair for the prosecution to raise this allegation in their closing argument: "There was no hint at all that such a claim would be made, and now all our opportunity to reply is gone."

Bachrach argued that the prosecution had to have some evidence before they could make such a charge. Crowe responded, "The evidence is that these two defendants are perverts, and when they took the body of the boy in, the first thing they took off was his trousers."

Kidnapping Ransom Was the Motive – Not Thrill Killing

Nearly all accounts of the Bobby Franks murder explain it as a thrill killing with Leopold and Loeb motivated by the thrill of getting away with a kidnapping and murder. However, Robert Crowe saw a different motive. He was as familiar with all of the evidence as anyone and he believed that the two teenagers were actually motivated to commit the kidnapping to secure the ransom money and fuel their gambling habit. Although very wealthy, Crowe believed they gambled enormous amounts of money which exhausted their allowances. Crowe believed Franks was murdered because he knew Loeb and thus he could not be released after the ransom was paid. An additional motive was to sexually assault a young boy and this provided another reason the boy had to die.

Pursuing this line of reasoning, Crowe said: "Mr. Darrow says that there is no motive; that this is a senseless crime; that the $10,000 had nothing to do with it. I will undertake to prove, not by argument, but by sworn testimony, that the $10,000 had much to do with it."

Four-Year Old Loeb Dressed as Cowboy

Crowe believed one of the silliest conclusions made by the defense alienists came from Dr. White. White had examined a photograph taken of Loeb dressed as a cowboy at age four, complete with a toy pistol. In the photo, Loeb is scowling in an attempt to look mean and dangerous. Dr. White concluded that this indicated Loeb had a diseased mind and homicidal tendencies. Crowe said of this diagnosis:

> One of the very significant things the eminent doctor says was that little Dickie had his picture taken in a cowboy's uniform when he was four years of age; and that is a distinguishing thing and stamped him as one of diseased mind, with homicidal tendencies; and I saw a shudder go through every woman in the court room that has a 'kid' four or five years of age, and I began to think of my four 'kids.' I suppose Marshall Field's sale of cowboy suits must have fallen off at least one hundred thousand since that doctor testified.

Perverts

Crowe repeatedly referred to Leopold and Loeb as "perverts." Crowe was outraged that the defense argued Leopold was overly influenced in his early years by religion. Referring to the defense alienists' examinations, Crowe exclaimed:

> Three wise men from the East came to tell your Honor about these babes . . . . One of them was sacrilegious enough to say that Leopold, this pervert, this murderer, this kidnapper, thought that he was the Christ child and his mother the Madonna—and without a syllable of evidence to support the blasphemous statement. Who said that this young pervert ever thought he was the Christ child?

Crowe despised Leopold and Loeb and he would alternate referring to them sarcastically as "Dickie" and "Babe" with "cold-blooded killers" or "perverts." He frequently alleged that the psychiatric defense was a sham and the defendants were faking their mental defects:

> In all probability the present mental disease of these two defendants would disappear very rapidly if the causes for its existence were removed. If the glasses had never been found, if the State's Attorney had not fastened the crime upon these two defendants, Nathan Leopold would be over in Paris or some other of the gay capitals of Europe, indulging his unnatural lust with the $5,000 he had wrung from Jacob Franks.

Crowe accused the defense of blaming Loeb's nurse for Loeb's mental problems. Referring to a letter she wrote to Loeb, Crowe said, "It was a kindly, loving letter, sent by a woman to a boy she loved, filled with motherly advice, advice that it develops is so sadly needed in this case by these two young perverts."

Refuting the defense's contention that the defendants lacked normal emotions he said,

> And if it is the fate of these two perverts that they must pay the penalty of this crime upon the gallows, when they realize it, you will find that they have got emotion and you will find they have got fear, and you will find these cowardly perverts will have to be carried to the gallows.

Crowe defended his harsh words:

> It is wrong, if your honor please, for the state's attorney and his two assistants to refer to these two perverts, these two atheists, these two murderers in language that they can understand. But it is all right for Mr. Darrow to take an honorable physician, and to characterize him, without a shred of evidence, without the slightest foundation, as a peddler of perjury, and hurl that cruel charge broadcast over this land. Where is there anything in this case that warrants Clarence Darrow to make such an infamous charge against Dr. Krohn?

Leopold and Loeb were Coached

Crowe did not merely imply that Leopold and Loeb had been told what to say and how to act in front of the defense's alienists, he flat-out accused them of faking it:

> After some guileless attorney, studied in medicine and grounded in it probably more than he is in the practice of criminal law, some doctor or some member of the family had gotten these two Smart Alecs and had trained and prepared them and told them what to tell the doctors and what not to tell them . . . .

Perjury

Crowe made numerous accusations of perjury. He could not have been more direct in his condemnation of the defense's psychiatric evidence: "All this other stuff that we have been regaled with is perjury, pure and simple; perjury for a purpose. . . . from the lying alienist on the stand to a report made by the alienist that they did not think would come to light."

Crowe alleged the whole psychiatric defense was a sham:

> There has been some talk here, in order to make him appear to be mad, that he even contemplated killing his little brother, Tommy, or killing his father. The evidence in this case shows that that is just thrown in for good measure, that it has no foundation in fact at all. It is another piece of perjury, manufactured in order to build a foundation for a perjured insanity defense.

A,B,C,D Crimes

Crowe accused the defense alienists of intentionally avoiding the truth of prior crimes committed by the defendants. Referring to the examination of Loeb:

> He referred to four episodes. Four crimes . . . merely designated as A,B,C, D. And the two doctors, whose only interest is to tell the truth as they find it, add in their own language: "It was found forensically"—now, what does 'forensically' mean? That it was found from a legal standpoint, so the doctor said, "forensically inadvisable to question him about these." And the case closes and we are just as much in the dark as ever as to what these four crimes were, because the doctors concluded that legally, forensically, it was inadvisable to question him about it. And then I ask you, when Darrow talks about tricks, who are the tricksters in this case?

"strange hold"

Crowe then alleged another motive for the defendants' joint crime which also explained why Loeb submitted to the "pervert" Leopold:

"What strange hold did this man Leopold have upon Loeb? Why did he submit himself to the unnatural practices of Leopold? I will tell you, your Honor, and I think I will demonstrate it beyond a peradventure of a doubt, that these four episodes, that these four crimes were known to Leopold, and he blackmailed Loeb, he threatened Loeb with exposure if he did not submit to him, and Loeb had to go along with Leopold. And Leopold was willing to go along with Loeb because he could use his body for vile and unnatural practices."

Crowe then added another theory about the murder plan:

> And I might tell you at this point, your honor, and will develop later, that the original plan of Loeb was not to kill him with the chisel, but they were to strangle him to death with the ropes that they procured. He was to pull one end and Leopold the other; and the reason he wanted that done was, as I will demonstrate as we go on, Leopold had something on him. Leopold knew about the crimes A, B, C and D, and in this murder he was going to make Leopold pull the rope so he would have something equal on Leopold.

Crowe read from his copy of the Bowmen-Hulbert report where Loeb told the doctor "In a way, I have always been sort of afraid of him. He intimidated me by threatening to expose me and I could not stand it." Another part of the report stated "Of late the patient, Loeb, had often thought of the possibility of shooting his associate." Crowe was convinced that Loeb was afraid Leopold might tell what he knew of the A, B, C and D crimes.

Gambling Evidence

Darrow had ridiculed Crowe's arguments that the defendants' motive for kidnapping Bobby Franks was to secure the $10,000 to finance their high stakes gambling. Crowe accused Darrow of not knowing all the facts of the case. Crowe read a letter written by Allan Loeb to his brother Richard just before the crime:

"I wanted to send this letter to you so there would be no possible chance of Dad seeing it. Glad to hear about Sammy Schmaltz, but could that amount have been possibly reversed? If so, you are all wrong in your gambling; and even so, you must be shooting a little too high. Did you get the cash, or did he pay on an I.O.U., I suppose?"

He read another letter written by a friend to Loeb "I am damn sorry that we couldn't see each other while I was home, but you are always so ——— busy. I guess I am, too while home. But I always feel as though I am intruding when you guys are gambling because I don't gamble that high."

Crowe stated that Loeb received a $250 monthly allowance but Crowe was able to show numerous deposits into Loeb's bank accounts that far exceeded this monthly amount. Loeb's $250 monthly allowance is equal to about $3,100 in 2009.

Crowe pointed out that the defendants spent considerable amount of time practicing throwing a simulated packet of money from the train. He asked, if they did not intend to use the ransom money why did they ask for old, unmarked bills.

It was Crowe's belief that "the motive in this case was, first, money; that the original crime planned was the crime of kidnapping; that murder was later decided upon in order to protect them from arrests and punishment"

Not Thrill Killing

Crowe countered the defense assertion that the kidnapping and murder was a "thrill killing" by two mentally unstable youths. Crowe pointed out:

"A crime by mad boys without a purpose, without any thought of revenge, without any thought of money? Let's see. The first boy they contemplated killing was a boy he did not like. Hatred, revenge, was motive in his mind at that time, but a desire for money overcame that."

Crowe used the defense alienists findings to refute the thrill killing theory "Was this killing done, as we have been asked to believe, by the defense, merely for the thrill, your Honor, or the excitement? What does the doctor further say on that? 'The patient (Loeb) did not anticipate the actual killing with any pleasure.'"

Clarence Darrow's Dangerous Philosophy

Crowe truly believed that Clarence Darrow's views about crime and punishment were dangerous. At one point Crowe referred to Darrow's views as the "weird and uncanny

philosophy of the paid advocate of the defense, whose business it is to make murder safe in Cook County." Crowe read extensive excerpts from a speech Clarence Darrow gave in 1902 to prisoners in Chicago which was published as an *Address To The Prisoners In The Cook County Jail*. Crowe said:

"Mr. Darrow quoted considerable poetry to you, and I would like again to be indulged while I read a little prose. This is from an address delivered by Clarence Darrow to the prisoners in the county jail . . . ." Crowe then read significant portions of the address:

> The reason I talk to you on the question of crime, its cause and cure, is because I really do not believe the least in crime. There is no such thing as a crime, as the word is generally understood. I do not believe that there is any sort of distinction between the real moral condition in and out of jail. One is just as good as the other. The people here can no more help being here than the people outside can avoid being outside. I do not believe that people are in jail because they deserve to be. They are in jail simply because they cannot avoid it, on, account of circumstances which are entirely beyond their control and for which they are in no way responsible.

Darrow took exception to Crowe's quoting his 1902 speech:

> MR. DARROW-I want to take exception to the reading of this. It is not in evidence. It was an address delivered twenty-five years ago.
> MR. CROWE- Is it any less evidence than Omar Khayyam is evidence?
> MR. DARROW-That is another thing.
> MR. CROWE-Oh, certainly.
> MR. DARROW-It has not any relation to my views. I have expressed my views freely in a book which Judge Crowe is fairly familiar with and has quoted here. This is simply a talk twenty-five years ago. It hasn't anything to do with this case.
> THE COURT-Oh, yes. What Mr. Darrow has said or does has no bearing on this case particularly, except what he has said or done during this trial. The court will not give great consideration to any readings or lectures in any way in determining what should be done with these two young men, who have pleaded guilty of this murder.
> MR. CROWE-Well, if Clarence Darrow is really ashamed of his philosophy of life, something has been accomplished in this trial.

Crowe read another line from Darrow's speech then exclaimed "That is the doctrine of Leopold. That is the doctrine expounded last Sunday in the press of Chicago by Clarence Darrow."

Crowe was clearly shocked by Clarence Darrow's philosophy about crime and society:

> I want to tell you the real defense in this case, your honor. It is Clarence Darrow's dangerous philosophy of life. He said to your Honor that he was not pleading

alone for these two young men. He said he was looking to the future; that he was thinking of the ten thousand young boys who in the future would fill the chairs his clients filled, and he wants to soften the law. He wants them treated not with the severity that the law of this state prescribes, but he wants them treated with kindness and consideration.

I want to tell your Honor that it would be much better if God had not caused this crime to be disclosed; it would be much better if it had gone unsolved, and these men went unwhipped of justice; it would not have done near the harm to this community that will be done if your Honor, as Chief Justice of this great court, puts your official seal of approval upon the doctrines of anarchy preached by Clarence Darrow as a defense in this case.

Society can endure, the law can endure, if criminals escape but if a court such as this courts should say that he believes in the doctrines of Clarence Darrow, that you ought not to hang when the law says you should, a greater blow has been struck to our institutions than by a hundred, aye, a thousand murders.

“Friendly Judge” Comment Angers Judge Caverly

At the end of his argument, Crow brought up an issue he would soon regret:

I don't know whether your Honor believes that officer or not; but I want to tell you, if you have observed these two defendants during the trial, if you have observed the conduct of their attorneys and their families — with one honorable exception, and that is the old man who sits in sackcloth and ashes, and who is entitled to the sympathy of everybody, old Mr. Leopold — with that one honorable exception, everybody connected with the case has laughed and sneered and jeered; and if the defendant Leopold did not say that he would plead guilty before a friendly judge, his actions demonstrate that he thinks he has got one.

Judge Caverly admonished Crowe for the “friendly judge” comment “as being a cowardly and dastardly assault upon the integrity of this court.”

Mr. Crowe: It was not so intended, your Honor.”
The Court: “And it could not have been used for any other purpose except to incite the mob and to try and intimidate this court. It will be stricken from the record.”
Mr. Crowe: If your Honor please, the State's Attorney had no such intention.
The Court: We will go on.
Mr. Crowe: I merely want to put my personal feelings plainly before the court. It was not the intention of the State's Attorney.
The Court: The State's Attorney knew that would be heralded all through this country and all over this world; and he knows the court hadn't an opportunity except to do what he did. It was not the proper thing to say. This court will not be intimidated by anybody at any time or place so long as he occupies this position.

On this angry note the sentencing hearing ended.

Crowe's Theories of Motive Lost to History

Crowe's theory, that the crime was a kidnapping for ransom because the perpetrators wanted the money for high stakes gambling and Bobby Franks was murdered because he knew Loeb would not gain favor and is largely lost to history. So is his theory that Leopold knew of other crimes Loeb committed and initially Loeb wanted Leopold to assist in the strangling of their young victim. This would make Leopold equally guilty of murder and deprive him any power he previously held over Loeb. Nearly all subsequent accounts of the trial focus on it as a thrill killing and that is a large part of the reason why it fascinated observers of the case in 1924 and why it continues to fascinate people today. Even though some accounts of the case discuss Crowe's theories, none appear to focus on them or try to determine whether Crowe was right. Crowe and his assistants grilled Leopold and Loeb for many hours, heard their confessions, and reviewed all of the evidence. The prosecutors had questioned Leopold and Loeb for several days before defense attorneys put an end to the questioning. Crowe and the other prosecutors were more familiar with all of the evidence than anyone in 1924 and anyone later. But the thrill killing motive greatly overshadows Crowe and the prosecution theories.

Judge Caverly's Sentence

On August 28th, after a month of testimony, Judge Caverly adjourned the court to study the enormous amount of material. Mindful of the intense anticipation that would build while he deliberated, Judge Caverly threatened to have anyone trying to get information from him about the verdict "arrested and sent to jail instantly."[96] During the sentencing hearing, Judge Caverly received numerous letters in which the sender threatened the judge if he did not sentence the defendants a certain way. Security was tightened during this time.

On September 10th, Judge Caverly reconvened the court to deliver the sentence. Darrow wrote in his autobiography that "Every one connected with the defense went to the court under police protection."[97]

Defense Alienist Evidence – Not Deserving of Judicial Consideration

Judge Caverly did the legal equivalent of ignoring the great deal of psychiatric reports and testimony. Despite the efforts of the defense to get into evidence a mountain of information about Leopold and Loeb's mental defects, lack of emotions, glandular problems, and defective nannies, none of it influenced the judge's decision:

> By pleading guilty the defendants have admitted legal responsibility for their acts; the testimony has satisfied the Court that the case is not one in which it would

[96] CRIME OF THE CENTURY, *supra* note 2, at 261 (quoting the Chicago Tribune, August 29, 1924).
[97] STORY OF MY LIFE, *supra* note 23, at 242.

> have been possible to set up successfully the defense of insanity, as insanity is defined and understood by the established law of this state for the purpose of the administration of justice.
>
> The court, however, feels impelled to dwell briefly on the mass of data produced as to the physical, mental and moral condition of the two defendants. They have been shown in essential respects to be abnormal; had they been normal they would not have committed the crime. It is beyond the province of this court, as it is beyond the capacity of human science in its present state of development, to predict ultimate responsibility for human acts.
>
> At the same time, the court is willing to recognize that the careful analysis made of the life history of the defendants and of their present mental, emotional, and ethical condition has been of extreme interest and is a valuable contribution to criminology. And yet the court feels strongly that similar analyses made of other persons accused of crime would probably reveal similar or different abnormalities. The value of such tests seems to lie in their applicability to crime and criminals in general. Since they concern the broad questions of human responsibility and legal punishment, and are in no wise peculiar to these individual defendants, they may be deserving of legislative but not of judicial consideration. For this reason the court is satisfied that his judgment in the present case cannot be affected thereby.

“a crime of singular atrocity”

Judge Caverly found no mitigating circumstances for the crime and he was concerned enough about rumors that the defendants had abused Bobby Franks’ body to directly address this issue:

> The testimony in this case reveals a crime of singular atrocity. It is, in a sense, inexplicable; but is not thereby rendered less inhuman or repulsive. It was deliberately planned and prepared for during a considerable period of time. It was executed with every feature of callousness and cruelty.
>
> And here, the court will say, not for the purpose of extenuating guilt, but merely with the object of dispelling a misapprehension that appears to have found lodgment in the public mind, that he is convinced by conclusive evidence that there was no abuse offered to the body of the victim. But it did not need that element to make the crime abhorrent to every instinct of humanity, and the court is satisfied that neither in the act itself, nor in its motive or lack of motive nor in the antecedents of the offenders, can he find any mitigating circumstances.

Judge Caverly of course was only referring to sexual abuse. Because Bobby Franks’ body was abused after he was murdered when the defendants poured hydrochloric acid on his face and genitals in order to destroy means of identification.

Saved from the Gallows Because of Their Age

Judge Caverly then announced the decision that millions of people were waiting to hear:

> It would have been the path of least resistance to impose the extreme penalty of the law. In choosing imprisonment instead of death, the Court is moved chiefly by the consideration of the age of the defendants, boys of eighteen and nineteen years. It is not for the court to say that he will not in any case enforce capital punishment as an alternative, but the court believes that it is within his province to decline to impose the sentence of death on persons who are not of full age.

Judge Caverly justified a sentence of life instead of death because it:

"appears to be in accordance with the progress of criminal law all over the world and with the dictates of enlightened humanity. More than that, it seems to be in accordance with the precedents hitherto observed in this State. The records of Illinois show only two cases of minors who were put to death by legal process—to which the court does not feel inclined to make an addition."

Long Suspense Over

Darrow recalls "For us, the long suspense was over. The lives of Loeb and Leopold were saved. But there was nothing before them, to the end, but stark, blank stone walls."[98] Despite all the psychiatric evidence, it was Darrow's and his co-counsel's arguments about the age of the defendants that saved them from the gallows. It is possible that Crowe persuaded Judge Caverly that the defense's psychological evidence of mitigating circumstances was concocted just to save them from the gallows. This would leave only Leopold and Loeb's relative youthfulness as the only sufficiently mitigating factor. Dr. White concedes that the defense alienists did not convince Judge Caverly "Unfortunately my associates and I failed completely, I am afraid, although we did make a very decided effort."[99] White was very disappointed that several of their aims were not fulfilled during the Leopold and Loeb case:

> [W]e finally tried to get the three families, each of which had in reality lost a son, to come together in friendly conference and try to reach some constructive conclusion for what otherwise seemed to be a total loss in any direction we could look. The suggestion was made that they found an institution for the special study and understanding of problem children and that over the entrance to this institution the profiles of these three boys be carved.[100]

The Franks family declined this suggestion from the defense experts. It is true that each family had lost a son, but it seems very disingenuous and even callous to equate the three

[98] STORY OF MY LIFE, *supra* note 23, at 243.
[99] AUTOBIOGRAPHY OF A PURPOSE, *supra* note 87, at 186.
[100] *Id.* at 186-87.

losses since the Franks' loss was so different than the losses experienced by the other parents. Regardless of what they faced in the future, Leopold and Loeb were still alive. Furthermore, to suggest to the parents of a murdered child that their child's profile be placed on a building along with the profiles of his murderers would strike most people as a terribly insensitive suggestion at best. It is rather remarkable that someone with White's experience and knowledge about human behavior would not be able to see why the Franks family would not agree to such an arrangement.

Life Plus 99 Years

Judge Caverly continued "Life imprisonment may not, at the moment, strike the public imagination as forcibly as would death by hanging; but to the offenders, particularly of the type they are, the prolonged suffering of years of confinement may well be the severer form of retribution and expiation."

After giving his explanation, Judge Caverly proceeded to the formal sentencing. He sentenced each defendant for the murder of Bobby Franks to "be confined in the penitentiary at Joliet for the term of your natural life" and for the kidnapping he sentenced each defendant to "be confined in the penitentiary at Joliet for the term of ninety-nine years."

Legal Loophole

At first it appears Judge Caverly believed the defendants should and would serve their whole lives in prison. Just before announcing the sentences he stated:

"The Court feels it proper to add a final word concerning the effect of a parole law upon the punishment for these defendants. In the case of such atrocious crimes it is entirely within the discretion of the Department of Public Welfare never to admit these defendants to parole. To such a policy the Court urges them strictly to adhere. If this course is persevered in, the punishment of these defendants will both satisfy the ends of justice and safeguard the interests of society."

Later however, evidence appeared that Judge Caverly left a legal loophole that would eventually allow Leopold and Loeb a chance at freedom many years in the future. Either intentionally or negligently, he had failed to say whether the life sentences and the 99 year sentences were to be served concurrently or consecutively. Under Illinois law, if the judge failed to specify this, then the sentences were to run concurrently with the person under sentence to serve the longer term.

Did Judge Caverly Write His Own Decision?

According to Hal Higdon, Ernst W. Puttkammer, a criminal law professor at Northwestern University who had taught Nathan Leopold, was skeptical that Judge Caverly had written his own decision because it was so articulate.[101] Judge Caverly did

[101] CRIME OF THE CENTURY, *supra* note 2, at 268.

not have a reputation as a learned or articulate jurist. According to this account, Puttkammer's skepticism proved accurate as he later learned that the decision was actually written by Ernst Freund, a Northwestern University law professor. Professor Freund wrote the decision in consultation with Judge Caverly the weekend before it was delivered.[102]

Convicts Number 9305 and 9306

Just a few hours after they were sentenced, Leopold and Loeb were driven under heavy police security to Joliet prison located about forty miles from Chicago. Still the center of attention, they were interviewed by reporters for the last time upon arrival. Then prison reality quickly set in. They were issued prison numbers, had their heads shaved, and were placed in solitary confinement for the first twenty-four hours. This was standard procedure that gave new inmates a chance to "think it over." Leopold became Convict No. 9305 and Loeb 9306. They were separated and the warden told reporters that they would not see each other until July 4, 1925. They were also put to work. Leopold was assigned to the prison chair factory in the rattan section and Loeb was assigned to the cabinet making department in the same factory.

Prison Life

Despite their wealthy upbringing it appears that Leopold and Loeb adjusted better to their initial lockup in jail awaiting sentencing and to their incarceration in the Illinois state prison system much better than many had predicted. Undoubtedly they must have been shocked at many aspects of being locked up but it apparently did not devastate them to the extent some thought it would. Perhaps one of the worst aspects of prison life for Leopold was that he was under the control of others who he thought were intellectually very inferior. For someone as arrogant as Leopold this must have been very frustrating.

Leopold did a great deal of clerical work in prison. He was much more suited to this work than many of the other prisoners who were far less educated. At some point during their prison sentence, Leopold suffered from appendicitis and Loeb came down with a case of measles which came close to killing him.

In 1924, Joliet prison was about seventy years old and in a state of disrepair. In May 1925, Leopold was transferred to Stateville Prison, a modern penitentiary about five miles from Joliet prison. Loeb remained at Joliet until he was transferred to Stateville in March 1931. One of Leopold's tasks at his new home was to organize the prison library. Late in 1932, Leopold and Loeb obtained permission from the warden to create a correspondence school for prisoners.

Loeb

Lurid allegations of homosexuality surrounded the case but were suppressed to some degree during the summer of 1924. However, they were never far from the surface and

[102] *Id.*

they never went away. This aspect of the case came back to the fore very dramatically in 1936. By this time, Leopold and Loeb were at the upper levels of the prison hierarchy at least in terms of perks and privileges. Loeb was supplied with money from his family and he used this money to obtain influence with the guards and was accorded privileges few other inmates could afford. According to one account, Loeb also used his money and influence to engage in sexual relations with other inmates.[103] Inmates who complied with Loeb's desires would be rewarded with cigarettes or other benefits Loeb could arrange with the guards. Loeb was given keys and could also access parts of the prison others could not without supervision. Leopold was also accorded more privileges than many prisoners.

James Day

In 1935, a prisoner named James E. Day was transferred to Stateville prison. Day, originally from Virginia, had racked up a fairly extensive record as a juvenile. In 1932, Day had been arrested for robbing a gas station in Chicago with an accomplice. Eighteen years old at the time of the robbery, Day pleaded guilty and was sentenced to an indeterminate sentence of one to ten years and he served three years of this sentence in the Illinois State Reformatory. When he turned twenty one, he was transferred to Stateville. This would prove to be a critical event in the lives of Leopold and Loeb.

There are various versions of Loeb and Day's relationship. According to one account, Loeb was attracted to Day and was able to get Day transferred to a cell near Loeb's and arranged for Day to receive various benefits.[104] Loeb repeatedly sought sexual relations with Day in return but Day resisted Loeb's advances.[105] Another source states that Loeb and Day were cellmates and Loeb supplied Day with cigarettes, food and other benefits that Loeb could afford but this account does not allege that there were demands by Loeb for sexual relations. However, when a new warden took over, he cut the prison commissary allowance to just $3.00 per week. This was a reduction of over seventy-five percent from what Loeb enjoyed previously. Loeb stopped supplying Day with benefits because Loeb barely had enough for himself. This caused a great deal of friction between Loeb and Day and because of this Day was moved to another cell. Whatever the truth was about Loeb and Day's relationship, it would end violently on January 28, 1936.

Loeb's Last Minutes

On January 28,th Loeb went to take a shower close to noon. One account states that Loeb wanted Day to meet him in the shower for a sexual encounter. According to this account Loeb had been after Day for weeks and Loeb was threatening to stop all the privileges he gave to Day.[106] Since Loeb had keys to the shower room he could lock the door for privacy. Day did go to the shower room and he took a straight razor with him. Later Day would claim that a naked Loeb advanced towards him and he defended himself. Although

[103] FOR THE THRILL OF IT, *supra* note 3, at 430.
[104] *Id.*
[105] *Id.* at 431.
[106] FOR THE THRILL OF IT, *supra* note 3, at 432.

it is not clear exactly what happened, Loeb was viciously attacked by Day who inflicted fifty-six to fifty-eight slashing wounds on Loeb.

Loeb did not die immediately. He walked or staggered under his own power through the doors before collapsing in the hallway. He told Warden Ragen "'I'm alright, Warden' and "I'll pull through.'"[107] Prison doctors tried to treat Loeb. Leopold, alerted to the attack, went to where Loeb lay on a stretcher as the doctors tried to stop the severe bleeding. In his autobiography, Leopold describes Loeb's condition:

> Dick was already on the operating table, with an ether mask over his face. Four doctors were working on Dick—two on his throat and two on his body. Dick's throat was cut—a series of four deep gashes had almost severed his head from his body. His trunk, his arms, his legs were one mass of knife cuts. Nowhere on his entire body could you go six inches without encountering a cut. He was breathing through a rubber tube inserted into his windpipe though the gaping hole in his throat.[108]

According to Leopold, one of Loeb's brothers and two more doctors came into the room at about 2:45 p.m. One of the doctors, a friend of the Loeb family, was the obstetrician who had delivered both Leopold and Loeb. Despite the efforts of the doctors, Loeb's wounds were too severe and he died of blood loss around 2:50 p.m. The doctor who brought him into this world was holding his hand. Richard Loeb, prisoner 9306, was about five months short of his thirty-first birthday.

What thoughts may have flashed through Loeb's mind during the attack and before the loss of blood left him unconscious? Did he see images of his family whom he had hurt so much? Did he see an image of Bobby Franks who was murdered by Loeb and his partner and very possibly directly by the hands of Loeb himself? Maybe he envisioned Robert Crowe who did all he could to end Loeb's life in 1924. Or perhaps he saw images of Clarence Darrow and the defense team trying to save Loeb from the gallows. Or were his last thoughts about Nathan Leopold?

Day's Homosexual Panic Defense

Day was charged and tried for Loeb's murder. Day's defense amounted to a classic use of what has come to be known as "homosexual panic defense" or "gay panic defense." Using this defense, a defendant who has killed or injured another person, claims that he reacted out of fear of a homosexual advance and thus was temporarily insane at the time of the attack. Day claimed that he stabbed Loeb because Loeb had tried to have sex with him. Despite slashing Loeb to death with more than fifty wounds, a clear attack rather than mere self-defense, Day was much more successful than some later defendants who have used this defense. A jury acquitted him of all charges.

Loeb Ends Sentence with a Proposition

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[107] CRIME OF THE CENTURY, *supra* note 2, at 294.
[108] NATHAN FREUDENTHAL LEOPOLD, LIFE PLUS 99 YEARS, 267 (1958).

Ed Lahey at the *Chicago Daily News*, reported on Loeb's death by beginning his story "with what many newspapermen consider the classic lead paragraph of all time: 'Richard Loeb, a brilliant college student and master of the English language, today ended a sentence with a proposition.'"[109] Another account says Lahey's report begins with: "Richard Loeb, despite his erudition, today ended his sentence with a proposition." Reportedly, Lahey's lead was pulled after one edition.[110]

There had been rumors of homosexuality and that Bobby Franks had been sexually assaulted soon after his naked body was identified and his killers were arrested. Loeb's death and Day's acquittal only added to this aspect of the case. *Time* magazine in an article entitled "*Last of Loeb*" showed that the allegations of homosexuality, sexual assault and even anti-Semitism surrounding the case were still present in 1936. Time began its story about Loeb's death by informing its readers that:

"On May 21, 1924, two perverted Chicago youths named Nathan Leopold and Richard Loeb kidnapped 14-year-old Bobby Franks, knocked him unconscious, violated him, killed him, poured acid over his face, buried his body in a culvert on a forest reserve. Wealthy South Side Jews, the Leopold, Loeb and Franks families were friends and neighbors."[111]

Nathan Leopold

In 1941 Leopold began working in the prison hospital as an X-ray technician. He also worked for a time as a nurse in a psychiatric ward. Over the years, Leopold had engaged in service activities with an eye towards one day seeking parole. In 1945, Dr. Alf S. Alving, a scientist at the University of Chicago and other researchers began research into a cure for malaria. Part of the research would include prison volunteers who would allow infected mosquitoes to bite them so various drugs could be tested against the disease. Leopold volunteered for the program, caught malaria and received experimental drugs that successfully treated the disease. This experiment led to the discovery of the first drug to treat malaria. The experiment was featured in *Life* magazine in 1945. Although the prisoners were not promised pardon or parole for volunteering, Leopold now had an important accomplishment he could later raise before a parole board.

Under Illinois law, prisoners could get a reduction in their sentence for good behavior. Life sentences became eligible for parole after twenty years. Due to Judge Caverly's sentence, Leopold would first become eligible for parole in 1944 which was twenty years into his sentence. But that was only in regard to the life sentence. For sentences of a specific number of years, prisoners became eligible for parole after serving one-third of their sentence. Leopold would not become eligible for parole under the ninety-nine year kidnapping sentence until 1957.

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[109] CRIME OF THE CENTURY, *supra* note 2, at 298.
[110] Andie Tucher, *Framing the Criminal: Trade Secrets of the Crime Reporter*, 43 New York Law School Law Review 905 (1999).
[111] Monday, February 10, 1936 http://www.time.com/time/magazine/article/0,9171,755781,00.html

Leopold's work with the malaria program paid off although he suffered fairly significant health problems. In 1949, the Governor of Illinois, Adlai Stevenson, cut Leopold's 99 year sentence to 85 years thus making him eligible for parole at the beginning of 1953. Leopold undertook a campaign over many years to try and win his release. Ralph Newman, a close friend, worked on the outside to help Leopold. Newman suggested that Leopold write an autobiography.

Leopold's volunteering for the malaria experiment is often held up as a significant justification for his eventual parole and a shining example of rehabilitation. But at least one account claims that Leopold had an ulterior motive that did not include helping mankind defeat the scourge of malaria. In 1961 a writer investigated Leopold's contribution to the malaria and found that Dr. Alving and an assistant believed that Leopold:

"'interfered with the smooth running of the research program by engaging the prisoner guinea pigs in homosexual acts. He capitalized on his access to the prison hospital that the malaria work gave him for that purpose. Alving gave the distinct impression that Leopold was more interested in what he could get out of the experiment homosexually than in any 'contribution to mankind' as Leopold's press agent suggested.'"[112]

Parole Board

Leopold appeared before a parole board at Stateville prison on January 8, 1953 but the board turned down his parole request. The chairman of the parole board, Victor I. Knowles, believed Leopold was a con man who got special treatment in prison and greatly exaggerated his accomplishments in particular his contributions to the malaria experiment and claiming to have learned to read twenty-seven languages. Of course the most important factor was the brutal murder of Bobby Franks. Crowe did not appear at the hearing but told reporters he was against parole "I thought at the time they ought to hang. I still think the same way. There were no extenuating circumstances; it was a brutal murder."

Leopold was turned downed for parole petitions in 1955 and 1956. He tried again in 1957, this time being represented by Elmer Gertz a well-known Chicago civil rights attorney and law professor. He would later defend Henry Miller the author of *Tropic of Cancer* against obscenity charges. He would also argue successfully on behalf of Jack Ruby to get Ruby's death sentence overturned. Gertz, who obtained his law degree from the University of Chicago, had been inspired by Clarence Darrow to become a lawyer.

Ralph Newman was friends with the poet Carl Sandburg and he got Sandburg to write a letter to the parole board urging them to grant parole. Leopold applied unsuccessfully for parole in 1955 and 1956. He applied for executive clemency in 1957. Although the governor denied clemency, he asked the parole board to reconsider Leopold's parole request. Gertz had gotten Hans Mattick, a criminologist at the University of Chicago and

[112] CRIME OF THE CENTURY, *supra* note 2, at 308.

former Cook County Jail assistant warden, to testify. Carl Sandburg also testified. According to one account, Gertz was unable to persuade Dr. Alving, who conducted the malaria experiments, to testify. Instead Dr. Alving "deprecated Leopold's contribution to the malaria project and said others had contributed more."[113]

Although it was not unanimous, the board agreed to grant Leopold parole with some conditions attached for five years. One of the conditions was that he must avoid publicity. Nathan Leopold Jr. was released from Stateville prison on March 13, 1958. He walked out the prison with Elmer Gertz. It was more than 33 years since Leopold had entered Joliet prison with his friend Richard Loeb. It was also twenty years to the day since Clarence Darrow died.

Leopold found that even after nearly 34 years since the murder the press was still fascinated by him and the crime. There was a crowd of reporters at the prison when he was released. The press chased his car on the drive to Chicago. Leopold planned to stay in Chicago for a few days but the onslaught of the press made this impossible. So the next day he flew to Puerto Rico.

Leopold went to live in Castaner, a small village close to San Juan. As part of his parole, he worked at a hospital sponsored by the Church of the Bretheren, a Protestant organization based in Elgin, Illinois. His parole board granted him permission in 1961 to marry Gertrude Feldman Garcia de Quevada.

Leopold earned an M.S. degree from the University of Puerto Rico. He also taught mathematics at the university and worked in urban renewal, and conducted research on leprosy for the university's medical school. Still interested in birds, he wrote a book titled *A Checklist of the Birds of Puerto Rico* published by the University of Puerto Rico in 1963. In 1963, Leopold's parole restrictions ended and he was then totally free. Leopold and his wife then traveled extensively including going back to Chicago to visit friends.

Life Plus 99 Years According to Nathan Leopold

Leopold wrote an autobiography entitled *Life Plus 99 Years* published in 1958 by Doubleday. In the first few pages of his autobiography, Leopold lets the reader know he does not write about the actual crime. He claims that it is "far too painful" and besides the facts were gone over completely in 1924. Therefore, his "story starts on the evening of May 21, 1924" a little past 9:00 p.m. as "Dick and I were driving away from the swampland hear Hegewisch, just south of Chicago, where we had left Bobby Franks' body in a conduit pipe under a railroad embankment." Leopold describes his thoughts, his conversations with Loeb and what they did starting at this point after the crime.

Right from the beginning, he places most of the blame on Loeb. Leopold had a strong motive to implicate Loeb as the mastermind and the actual killer because he began writing his autobiography before he was paroled. He clearly would know that his chances for parole would be improved if he could convince others that Loeb was more to blame

[113] *Id*. at 308-09.

for the crime—especially implicating Loeb as the mastermind and the one who physically attacked and murdered Bobby Franks. Because Loeb was murdered in 1936, Leopold got the last word in about the crime. In his autobiography Leopold writes that Loeb was his "best pal" but:

"In one sense, he was also the greatest enemy I ever had. For my friendship with him had cost me—my life. It was he who had originated the idea of committing the crime, he who had planned it, he who had largely carried it out. It was he who had insisted on doing what we eventually did."[114]

According to Simon Baatz:

> Leopold wrote his autobiography as part of his campaign to win parole, and it should be read in that light. It is an immensely clever book, written in a clear and engaging style that portrays the author as a lovable rogue who constantly struggles, despite adverse circumstances, to improve the lives of his fellow prisoners. The establishment of the prison school, his work as an X-ray technician, his stint as a nurse in the psychiatric ward, his participation in the malaria experiments—everything, in Leopold's account, is undertaken selflessly for the betterment of mankind. The publication of his autobiography came too late to be considered by the parole board, but it succeeded in creating a picture of Nathan Leopold that persists to the present. There is no evidence, for example, that Leopold could speak several languages or that he had an exceptional IQ, yet such myths have been repeated so often that they have now come to be accepted as true.[115]

Compulsion

Nathan F. Leopold, Jr. would go before a court of law one more time but this time he initiated the legal action. Meyer Levin, a fellow student of Leopold and Loeb in 1924, had written a novel titled *Compulsion* in 1956 that was based on the murder of Bobby Franks. Even though fictitious names were used, Leopold was not pleased with how his character was portrayed. When the book was going to be turned into a movie, Leopold had his attorney, Elmer Gertz, file a lawsuit in 1959. Gertz brought an action for violation of the right of privacy against the author, publishers and several local distributors of a novel and a play, entitled *Compulsion* and the producer, distributor and Chicago area exhibitors of a related motion picture of the same name. Accounts vary in regard to how much in damages Leopold was seeking. One source puts the amount at $2,970,000 while others put it at $1.4 or $1.5 million.

Leopold won in the trial court which granted his motion for a summary judgment on the question of liability and reserved the issue as to the amount of damages. The defendants appealed and the case was remanded back to the trial court where a succeeding judge vacated the summary judgment in favor of the plaintiff and granted the defendants'

[114] LIFE PLUS 99 YEARS, *supra* note 108, at 269.
[115] FOR THE THRILL OF IT, *supra* note 3, at 465.

motion for summary judgment and judgment on the pleadings. Leopold appealed this ruling to the Supreme Court of Illinois. The legal battle took ten years to reach this point. The Supreme Court of Illinois described Leopold's claim as:

"the constitutional assurances of free speech and press do not permit an invasion of his privacy through the exploitation of his name, likeness and personality for commercial gain in 'knowingly fictionalized accounts' of his private life and through the appropriation of his name and likeness in the advertising materials. Denying him redress would deprive him, he argues, of his right to pursue and obtain happiness guaranteed by section 1 of article II of the constitution of Illinois . . . ."[116]

The court noted "It is of importance here, too, that the plaintiff became and remained a public figure because of his criminal conduct in 1924. No right of privacy attached to matters associated with his participation in that completely publicized crime."

The court ruled against Leopold because:

"the core of the novel and film and their dominating subjects were a part of the plaintiff's life which he had caused to be placed in public view. The novel and film were derived from the notorious crime, a matter of public record and interest, in which the plaintiff had been a central figure."

The court found that the reference to Leopold in the advertising material "concerned the notorious crime to which he had pleaded guilty. His participation was a matter of public and, even, of historical record. That conduct was without benefit of privacy."

Furthermore, "The plaintiff became and remained a public figure because of his criminal conduct in 1924. No right of privacy attached to matters associated with his participation in that completely publicized crime."

Other Fiction

The Leopold and Loeb case inspired other works of fiction. In 1929, Patrick Hamilton, an English playwright and novelist, wrote a play called *Rope* based loosely on the case. Alfred Hitchcock made a film based on *Rope* in 1948 which starred James Stewart. Levin's *Compulsion* was made into a movie in 1959 with Orson Wells cast as the fictionalized Clarence Darrow. This was the first movie produced by Richard D. Zanuck. A 1992 British movie tilted *Swoon* about the crime explicitly delves into the homosexuality that permeated the case. A play titled *Never the Sinner* opened in Chicago in 1985. A 2003 musical titled *Thrill Me: The Leopold and Loeb Story* opened in New York. There have been other fictionalized accounts of the case.

Darrow's Plea for Mercy

[116] Leopold v. Levin, 45 Ill.2d 434, 439 259 N.E.2d 250 (Ill. 1970)

Clarence Darrow's plea for mercy along with the work of his co-counsel saved Leopold and Loeb from the gallows. This was the most their clients and their families could have hoped for. It has also become one of the most important cases in building Clarence Darrow's reputation as the greatest lawyer in American history.

Darrow's plea, often considered one of his most dramatic and powerful, has been ranked number 23 out of the top 100 political speeches of the 20th Century in a 1999 survey of 137 leading scholars of "American public address" as compiled by the University of Wisconsin-Madison and Texas A & M University.[117]

Darrow's closing argument has received praise from numerous commentators:

"Darrow's closing argument is one of the most oft-cited pieces of lawyer's prose from the twentieth century. Indeed the fame of Darrow and his clients outlasted many other seemingly more notorious crimes to be among the best remembered of recent times. The outcome, which spared Leopold and Loeb from the scaffold, was long celebrated as a landmark on the road to a fully modern and progressive criminal justice system."[118]

Alan Dershowitz, a well known attorney and law professor, believes that Darrow's closing argument is "one of the most remarkable legal arguments in the history of advocacy" and "No lawyer, indeed no civilized person, should go through life without reading – if only there a tape recording! – Darrow's eloquent defense of young human life."[119]

Paul Harris, who in 1971 pioneered the modern version of the black rage defense, writes:

"Darrow's argument was a masterful discussion of two subjects: human psychology and the illegitimacy of capital punishment. He had looked into the souls of these two sick, selfish, spoiled young men and had found some humanity. He then translated their humanity to the judge."[120]

Irving Younger, a leading scholar on trial technique, found Darrow's:

"now classic closing statement, in one of the most celebrated trials of our time, also shows a true master of the courtroom dealing with a cynical media and the largely hysterical public-at-large as part of his master strategy in the case."[121]

Darrow Edited His Plea for Mercy

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[117] Top 100 American speeches of the 20th century http://www.news.wisc.edu/misc/speeches/
[118] A SITUATION SO UNIQUE, *supra* note 86, at 81.
[119] ALAN M. DERSHOWITZ, AMERICA ON TRIAL: INSIDE THE LEGAL BATTLES THAT TRANSFORMED OUR NATION 256 (2004).
[120] PAUL HARRIS, BLACK RAGE CONFRONTS THE LAW 167 (1999).
[121] Clarence Darrow's Sentencing Speech in State of Illinois v. Leopold and Loeb. with foreword by Irving Younger [Classics of the Courtroom Volume VIII] (1988).

It appears that most analysis of Darrow's plea for mercy, is based on a version of the plea that was heavily edited and rearranged by Darrow himself. When the sentencing hearing was over Darrow borrowed the section of the transcript that contained his closing arguments and then he:

"rewrote the speech, cutting out long passages, correcting his syntax, and streamlining his argument, and then published the amended version as a pamphlet. Darrow's speech in the courtroom was ponderous, disorganized, prolix, and often tedious; but subsequent commentators, unaware that the published version is not the speech that Darrow gave in court, have praised Darrow's summation as a masterpiece."[122]

The section of the transcript that Darrow borrowed is lost because Darrow did not return it.[123] Simon Baatz was able to piece together the entire closing arguments by Darrow from contemporary Chicago newspapers which had published it. The transcripts themselves contain a notation that pages 3937 to 4115 from Volume VII were taken and "Del to Mr. Darrow Personally." No library or archive appears to have these missing pages.

Criticism of Darrow's Defense in Leopold-Loeb Trial

As the most prominent member of the Leopold and Loeb defense team, Clarence Darrow was the target of criticism in 1924 and later. Perhaps one of the most vocal critics as well as one of the most reputable was John Henry Wigmore, Dean of the Northwestern University School of Law from 1901 to 1929. A leading expert on the law of evidence,[124] Dean Wigmore, sounding a bit like Robert Crowe, was outraged at the psychiatric testimony and the judge's sentence in the Leopold and Loeb case: "I maintain that the reports of the psychiatrists called for the defense, if given the influence which the defense asked, *would tend to undermine the whole penal law*."[125] Wigmore found the phrases the defense alienists used in their diagnosis of Leopold and Loeb "is not the language of modern penal law. It is the language of biology."[126] The psychiatrists' description of the "cruel, ruthless deeds" of the killers was "just such a description as a botanist might give a certain weed, as distinguished from a certain useful plant."[127]

According to Wigmore, the defense psychiatrists believed that if "a party's life-history shows that his development as a human fiend was perfectly natural and inevitable—that he was 'driven' . . . by his character" then he should not suffer ordinary penalties.[128] Wigmore called this "sheer Determinism" and "These new-school psychiatrists" believe

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[122] FOR THE THRILL OF IT, *supra* note 3, at 458.
[123] *Id.*
[124] He wrote the leading evidence treaty: A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW, INCLUDING THE STATUTES AND JUDICIAL DECISIONS OF ALL JURISDICTIONS OF THE UNITED STATES (1904-1905).
[125] *The Loeb-Leopold Murder of Franks in Chicago, May 21, 1924*, 15 J. Am. Inst. Crim. L. & Criminology 347, 403 (1924-25).
[126] *Id.*
[127] *Id.*
[128] *Id.*

determinism eliminates "moral blame" and thus eliminates punishment.[129] Wigmore was astonished that the doctors' theory of eliminating blame and punishment applies equally to "the cruel murder as to the petty window-breaker." No only are these psychiatrists wrong "but their implications are dangerous, because their logic seems to eliminate penalties, and would, if applied practically, undermine the entire penal system."

Wigmore stated that this case was the first in which these new-school psychiatrists theories were publicly advanced in an actual trial outside of the juvenile courts. He thought it was fortunate that their theories were publicly exposed because:

"It is time that the issue be squarely faced in the open, before the whole administration of the penal law is undermined. Let public opinion look into the literature on this subject, and learn to discard that false sympathy and dangerous weakening that is apt to arise on first acceptance of the biopsychologic doctrine of Determinism."[130]

Expert Witnesses

Wigmore was very critical of the use of partisan witnesses in trials and he used the Leopold and Loeb trial to illustrate the problem. He took issue with the testimony of defense psychiatrists who tried to influence the judge by referring to defendants as "Babe" for Leopold and "Dickie" for Loeb. According to Wigmore, "This voluntary adoption of the endearing, attenuating epithets 'Dickie' and 'Babe' to designate the defendants reflects seriously on the medical profession. The whole evil of expert partisanship is exemplified in this action of these eminent gentlemen." [131]

Wigmore pointed out that most of the criticism of biased expert testimony was based on "the money taint" that resulted from the experts being paid a fee for their testimony. But in this case the fee paid to both sides was the same and the experts on both sides had impeccable reputations and "all the world knows that in the case of all six no question could possibly arise of the taint of money. There standing, their whole career, has placed them beyond any such suggestion."[132]

Wigmore criticized the defense experts, who despite their reputations, engaged in the:

"sad spectacle" of adopting epithets "calculated subtly to emphasize the childlike ingenuousness and infantile naivity of the cruel, unscrupulous wretches in the dock. It was the cue of the defense to impress this character on the judge, and the experts' well-chosen language lent itself shrewdly to that partisan end."[133]

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[129] *Id*. at 404.
[130] *Id.* at 405.
[131] John Wigmore, *To Abolish Partisanship of Expert Witnesses, As Illustrated in the Loeb-Leopold Case,* 15 Journ. Amer. Inst. Crim. Law and Crim. 341 (1924).
[132] *Id.*
[133] *Id.*

Wigmore then identified the cause of this partisanship by experts: "It is this; *the vicious method of the Law*, which permits and requires each of the opposing parties to *summon the witnesses on the party's own account*." [134] This method naturally makes the witness a partisan and "inherently bad." As Wigmore points out this was known long before the Loeb and Leopold trial which merely demonstrated it clearly to the world. Wigmore's solution was simple: "Let the expert witness be summoned by the court himself."[135]

Other commentators have expressed similar criticisms:

"Since Clarence Darrow's management of the Loeb and Leopold case in the United States, Western criminal courts have become notorious for the parading forth of psychiatrists by both prosecution and defense, who proceed to present acrimonious, partial and disparate versions of the sanity of the accused. This surrendering of the psychiatrist's non-aligned status in order to become a concerned litigant serving one side in the adversary process has been particularly destructive to the credibility of the insanity defense as a workable judicial tool."[136]

Darrow's Views on Crime Criticized

Clarence Darrow's views about the causes of crime drew plenty of criticism both before and after the Leopold and Loeb case. Sheldon Glueck, whose older brother was Bernard Glueck, one of the alienists Darrow hired to examine Leopold and Loeb, was critical of Darrow's deterministic philosophy. Sheldon Glueck was a prominent law professor at Harvard Law School and is considered a pioneer in the study of criminal law. Glueck wrote in 1927:

> even practical, keen minded, but sentimentally altruistic lawyers, such as Clarence Darrow, arrive at absurd conclusions by treading the via dolorosa of "necessity', or "determinism." This capable advocate and humanitarian, steeped in the dogma of mechanistic psychology, informs us at the outset of a recent work on "Crime, Its Causes and Treatment that his main effort is to show that the laws that control human behavior are as fixed and certain as those that control the physical world. In fact, that the manifestations of the mind and the actions of men are a part of the physical world." With commendable consistency, but absurd results, he therefore concludes that "the criminal" is morally blameless. He tells us that "crime" and "criminal" are "associated with the idea of uncaused and voluntary actions. The whole field is part of human behavior and should not be separated from the other manifestations of life." Now the use of the expression "the criminal" together with this supermechanistic and materialistic psychology, indicates that this author proceeds upon the wrong premise elsewhere criticized, that, because there are many evidences of mechanistic causation in the physical world, it necessarily follows that the human mind has not even an iota of power of creative adaption to

[134] *Id.* at 342
[135] *Id.*
[136] Robert J. Menzies, Christopher D. Webster, Margaret A. Jackson, *Legal and Medical Issues in Forensic Psychiatric Assessments*, 7 Queens Law Journal, 3, 25 (1981-82).

> environmental demands and that, consequently, all human conduct is accidental; further, his view implies that we can speak of "the criminal," the homo delinquente of Lombroso, disregarding the very obvious evidence of the multiplicity and complexity of causation of criminal, as of noncriminal behavior, in the individual case. What does Mr. Darrow propose to do with all these criminals?[137]

A less charitable criticism was aimed at Darrow by a medical doctor: "I doubt if anywhere else can one see so much nonsense and half-knowledge on the subject of crime as he can in the writings of Darrow, a Chicago attorney. It will not be necessary to try to refute most of his theories; they refute themselves."[138]

Criticism of Judge Caverly's Sentence

Dean Wigmore was also critical of the sentences given to Leopold and Loeb. He believed the "cardinal error" in Judge Caverly's sentence was that it "ignores entirely" the deterrence theory of punishment which is the "kingpin of the criminal law."[139] Wigmore compared the ratio of crimes contemplated but not committed (6 to 1) to an iceberg with most of its mass below the surface. He believed the fear of being caught is one of the primary reasons some crimes are not committed. Wigmore asked and answered the question "Would the remission of the extreme penalty for murder in Loeb-Leopold case lessen the restraint on *the outside class of potential homiciders?* The answer is *yes*, emphatically."[140]

Wigmore then related a Chicago crime story to illustrate his point. On September 1, 1924 after the defense arguments in the Leopold and Loeb case were published, two 18-year old girls were arrested for helping two boys, ages 16 and 19, murder an elderly woman during a burglary. When they were arrested, the girls told the police "'A cop told me they would hang Tony. But they can't. *There's never been a minor hanged* in Cook County [Note that the judge later cited this point in his opinion]. *Loeb and Leopold probably won't hang. They are our age. Why should we?*'"[141]

Writing in 1924, Wigmore believed deterrence was especially important for young people ages 18 – 25, who are susceptible to "reckless immorality and lawlessness."[142] Life in prison did not alarm them because it required imagining what that sentence means while "hanging is a penalty that needs no imagination and no experience. Everybody has

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[137] S. SHELDON GLUECK, MENTAL DISORDER AND THE CRIMINAL LAW: A STUDY IN MEDICO-SOCIOLOGICAL JURISPRUDENCE, 443-44 (1927).
[138] John F. W. Meacher, *Crime and Insanity: A Discussion of Some Modern Radical Theories*, 16 Journal of the American Institute of Criminal Law and Criminology 360 (1925-26)
[139] *A Symposium of Comments from the Legal Profession, in The Loeb-Leopold Murder of Franks in Chicago, May 21, 1924*, 15 J.C.L.C. 395, 401 (1924 -25) [hereinafter Symposium of Comments].
[140] *Id.* at 402
[141] *Id.*
[142] *Id.*

sufficient horror of that—everybody except the crazy and the mere child."[143] Judge Caverly's sentence was wrong because this all important deterrence was removed:

> And that is where we see the special, dangerous error of the court's opinion in the Loeb-Leopold case, in basing the mitigation on the offenders being 'under age'—that is, under twenty-one. What has the twenty-one year line to do with the criminal law? Nothing at all, nor ever did have. The twenty-one years is merely an arbitrary date for purposes of property rights, family rights, and contract rights. For purposes of criminal law the only question is: *Are persons in general of the age at bar susceptible to the threat of the law's extreme penalty? Would it help deter them?*
>
> It certainly would. Those two clever female miscreants of eighteen that helped choke the old woman to death were smart enough to perceive the difference between hanging and imprisonment. Loeb and Leopold were clever enough to understand it; else why did they take such ingenious pains to avoid detection and to leave the country? As a matter of fact, the *only* thing that they did fear was the criminal law. Neither personal morality nor social opinion imposed any limit on their plans. The only repressing influence on them was the criminal law. To mitigate its penalty for them was therefore to "take the lid off" for all unscrupulous persons of their type. And that is what the sentence of the judge in this case has done for Cook County![144]

Alienists from Different Schools of Psychiatry

According to an editorial written soon after the trial, it was not surprising that the defense and prosecution alienists came to such different conclusions since they represented two very different schools of psychiatry.[145] The prosecution experts with possibly one exception were composed of members of the "formal orthodox school" which looks to "traditional inquiries into mental processes, such as "orientation in time and space," "memory," "stream of thought," "judgment," "attention," and "knowledge of right and wrong, conduct, superficial motives, etc."[146] The prosecution experts "naturally concluded" that the defendants were mentally normal even though they had read the report of the defense experts.[147]

In contrast, the defense experts were from the "dynamic psychology" school of psychiatry.[148] Thus they focused "intensively into the inner mental life of the criminals, into a genetic study of their mental processes, thus taking into consideration and laying

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[143] *Id.*
[144] *Id.* at 402-03.
[145] *The Crime and Trial of Loeb and Leopold, (Editorial)*, XIX (No. 3) The Journal of Abnormal Psychology and Social Psychology, 223, 224 (1924) [hereinafter Crime and Trial of Loeb and Leopold (Editorial)]
[146] *Id.*
[147] *Id.*
[148] *Id.*

emphasis upon an entirely different and additional class of alleged facts."[149] This led them to the "absolutely opposite conclusion" that the defendants were mentally abnormal.[150] The two groups of experts "did not and were not allowed" to make joint examinations, observe the other group's examination nor consult or discuss the examinations with each other which is commonly done in private and public hospitals.[151]

Defense and Prosecution Alienists Made Mistakes

The editorial faulted the prosecution experts because even though their methods were adequate for determining whether the defendants were "legally insane" and thus not legally responsible under Illinois law, their methods were "entirely inadequate to determine whether in other respects they were mentally abnormal."[152] The defense experts were criticized because of "too rigid acceptation and adherence to certain debatable doctrines and theories" and confusing facts, interpretations and theories and stating them as fact when "clear thinking" could only regard them as theory.[153] The defense experts engaged in begging the issue by sprinkling their reports with the terms "abnormal" and "pathological" when describing finding of facts "when the question of abnormality was the very question at issue."[154] Furthermore, "It is a pity that experts do not distinguish more rigidly between fact and theory."[155]

The editorial when on to state that it would have been far better if the two groups of experts were allowed to jointly conduct examinations and consult with each other as this would have "had a modifying and educational influence upon the other" and they could have agreed upon facts, recognize different possible theories and thus it could be decided how much weight to accord each divergent opinion.[156]

Legal System to Blame

Despite its criticism of the alienists, the editorial placed the blame squarely on the legal system because the adversarial process inevitably leads to "the old, old story of experts lined up on opposing sides giving diverse and contradictory opinions as to the mental condition of the defendants and bringing themselves into undeserved discredit as usual with the public."[157] One of the fundamental defects of this system is that the experts are only responsible to the counsel on their side and they become protagonists for the side that employs them. A much better approach would be to have additional experts "appointed by the Court, paid by the Court, responsible to the Court, and make a written report of their findings to the Court (subject, of course, to cross-examination on the

[149] *Id.*
[150] *Id.*
[151] *Id.*
[152] *Id.*
[153] *Id.* at 225.
[154] *Id.*
[155] *Id.*
[156] *Id.*
[157] *Id.*

stand)."[158] Another significant defect of the legal system is that each side of experts makes their examinations independently; they are not allowed to share observations, nor consult with each other or discuss their findings. This inevitably leads to different conclusions.[159] The legal profession is at fault for these problems because it is "obdurate to any reform" and "lawyers have shown themselves unwilling to give up any possible advantage" of the current system.[160]

Joint Examination Preferable

Both the defense and prosecution experts wanted to conduct "joint examinations and to confer together over the facts found and make a joint report" but it was the State's attorney who refused this request.[161] The prosecution was afraid of what new facts joint examinations might produce; however, such joint efforts might have actually helped the state because the defense experts based their opinions "to a serious extent upon certain psychological doctrines which another modern school of psychology would feel called upon to traverse."[162] It was a "pity" that the experts were not allowed to work together because some experts testified about "debatable theories . . .as if established and accepted facts, and not as theories."[163] Because of the different lines of examination, the prosecution experts only examined half of the case and the defense experts failed to prove their case.

No Mitigating Psychological Circumstances

To the editorial writer it appeared that Judge Caverly "plainly and quite rightly . . . was not impressed by the testimony."[164] The editorial concluded that "if we were forced to express an opinion based solely on the testimony we have read, that probably Loeb and possibly Leopold were theoretically abnormal though fully responsible for their crime, and we can see no mitigating psychological circumstances."[165]

S. Sheldon Glueck

S. Sheldon Glueck reviewed the editorial excerpted above and wrote that no discussion of the mitigation portion of the trial provided "so acute an analysis of some phases of that case" as this editorial.[166] Despite this compliment, Glueck was very critical of the editorial in other respects. He took strong exception to the criticism of the defense report especially the editorial's charge that the use of "abnormal" and "pathological" were used throughout the report and were presented as facts. He responded that this "grave charge is

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[158] *Id*. at 226 (as is done in Germany).
[159] *Id.*
[160] *Id.*
[161] *Id.*
[162] *Id.* at 227.
[163] *Id.*
[164] *Id*. at 228.
[165] *Id*. at 229.
[166] S. Sheldon Glueck, Some *Implications of the Leopold-Loeb Hearing in Mitigatio*n, IX Mental Hygiene 449 (July, 1925).

of the utmost significance for the testimony of alienists in future cases, and it therefore requires careful examination."[167] Glueck defended the defense alienist and he concluded that the "only real ground for criticism" of the joint report of the defense alienists is "their too frequent use of superlatives." [168] Also, their report could have been "couched in more temperate language."[169]

Glueck also regretted that the both sides of experts were not allowed to consult on joint examinations and discuss their observations because the prosecutor was "unwilling to accede to such a novel proposal" and this left the experts on both sides to state their opinions based on their examinations of these particular defendants and upon their experience and training in dealing with other defendants.[170]

Noted forensic psychiatrist Bernard Diamond states:

"I think White and Glueck, and perhaps less so Healy, were hopelessly idealistic in what they hoped to achieve. For one thing, they wanted a nonadversarial process in which the psychiatrists for the defense would get together in a sort of friendly consultation with psychiatrists for the prosecution and they would all read a common ground of understanding. Thus a battle between the experts would be avoided. The prosecuting attorney objected very strenuously to this idea and forbade any such meeting between prosecution and defense psychiatrists."[171]

Bernard Diamond corresponded with Nathan Leopold for over thirty years and Diamond and his wife had dinner with Leopold and his wife a little over a year after Leopold was released from prison.[172]

Homosexuality and the Leopold and Loeb Case

Open discussion about the homosexual relationship between Leopold and Loeb was taboo during the 1924 crime of the century. Yet it added to the sensationalism that surrounded the crime and the legal aftermath. According to a 2001 article:

> the homosexual sex criminal remained a shadowy figure as late as 1925, when unsubstantiated charges that Leopold and Loeb had sexually assaulted Bobby Franks, the boy they murdered, remained hidden in public discussion by the row of asterisks which newspapers put in place of "unprintable matter." The asterisks had fallen away by 1936. In that year, Time magazine claimed the "two perverted Chicago youths" had "violated" Bobby Franks before they killed him. Time's retelling of the Leopold and Loeb case reflected a new willingness to publicly

[167] *Id* at 450-51.
[168] *Id.* at 467
[169] *Id.*
[170] *Id.* at 452-53.
[171] PSYCHIATRIST IN THE COURTROOM, *supra* note 72, at 6-7.
[172] *Id*. at xxiii.

> discuss sex crimes against boys, as well as the appearance of a new, sinister portrait of the homosexual in culture and politics.[173]

A 2005 article criticized Darrow for not addressing this in 1924:

"Notwithstanding my own admiration for Darrow, I argue that there is no value-neutral rhetorical choice regarding sexuality, most certainly not in a closet culture. Darrow's career was marked by other courageous engagements with America's skeletons; in this case, despite his noble ends and skillful performance, Darrow resembled his many neighbors: cowards guarding the closet door."[174]

Some see this issue as being tied to the anti-Semitism of the time. And these issues are still being untangled 80 years later:

> while references to homosexuality and Jewishness in the press and the courtroom often were whispered or shrouded in innuendo, homophobia and antisemitism nevertheless were writ large in the public reception of the crime and trial. What went unsaid in the course of the investigation and prosecution of Leopold and Loeb did so precisely because it went without saying. These youths were construed to be two Jewish teens whose Jewishness "naturally" predisposed them to homosexuality, a "crime against nature" that incited them to commit further crimes against humanity. . . . the intimately entangled rhetorics of antisemitism and homophobia voiced in the wake of Bobby Frank's disappearance embodied widespread debates regarding the increasing visibility of Jews, homosexuals, and homosexual Jews in American culture of the 1920s.[175]

A contemporary commentator in 1924 criticized the defense for not directly addressing homosexuality during the case. Chief Justice Harry Olson of the Municipal Court of Chicago strongly believed that heredity was the cause of the crime and not environmental factors. Olson criticized the Bowman-Hulbert report for stressing the uniqueness of the murder because he believed that "This case is not so unique from a psychological standpoint that it will not frequently repeat itself. On the contrary, it is very common in criminology where one of the parties is homosexual."[176] Olson took the defense to task for failing to address this. In commenting on the report submitted by the defense psychiatrists, Olson stated "The part of the report referring to their contempt for women is interesting because it suggests homosexuality, to which no direct allusion is made."[177]

Nathan Leopold Jr. Dies

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[173] Stephen Robertson, *Separating the Men from the Boys: Masculinity, Psychosexual Development, and Sex Crime in the United States, 1930s – 1960s*, 56 Journal of the History of Medicine and Allied Sciences, 3, 21 (2001).
[174] Charles E. Morris III, *Passing by Proxy: Collusive and Convulsive Silence in the Trial of Leopold and Loeb*, 91 Quarterly Journal of Speech 264, 265 (2005).
[175] Jew Boys, Queer Boys, *supra* note 22, at 122-23.
[176] Symposium of Comments, *supra* note 139, at 395.
[177] *Id.*

Nathan Leopold died at age 66 of diabetes-related heart attack on August 29, 1971. In his final years, Leopold only displayed two mementos from 1924, one a framed photo of his best friend Dickie Loeb and the other a photo of Clarence Darrow.

Leopold and Loeb Case Cited in Court Cases and Briefs

The Leopold and Loeb case is cited in numerous cases and court briefs. Many of these are criminal cases but not all involved the death penalty. Several cases refer specifically to Clarence Darrow's defense in the Leopold and Loeb case. Below are excerpts from some of these cases and briefs.

Florida v. Nixon, 543 U.S. 175, 125 S.Ct. 551 (2004)

Nixon was convicted of first-degree murder, kidnapping, robbery, arson and sentenced to death. He had tricked the victim into giving him a ride, kidnapped her and tied her to a tree with jumper cables and set her on fire. The United States Supreme Court held that the defense counsel's failure to obtain the defendant's express consent to a strategy of conceding guilt in a capital trial did not automatically render counsel's performance deficient. To support its reasoning, the Court stated:

> Renowned advocate Clarence Darrow, we note, famously employed a similar strategy as counsel for the youthful, cold-blooded killers Richard Loeb and Nathan Leopold. Imploring the judge to spare the boys' lives, Darrow declared: "I do not know how much salvage there is in these two boys. ... I will be honest with this court as I have tried to be from the beginning. I know that these boys are not fit to be at large." . . . (Darrow's clients "'did not expressly consent to what he did. But he saved their lives.'").

Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869 (1982)

The defendant was 16 years old when he killed a police officer. He entered plea of nolo contendere to the charge of murder and was sentenced to death. In an opinion by Justice Powell, the Court vacated the death sentence and remanded case for further proceedings because the state courts refused to consider as a mitigating circumstance the petitioner's unhappy upbringing and emotional disturbance, including evidence of turbulent family history and beatings by a harsh father.

In an amicus brief submitted to the United States Supreme Court in support of Eddings, the attorneys concluded:

> In his closing remarks in the Leopold and Loeb case, Clarence Darrow stated:
>
> "You may hang these boys. You may hang them by the neck until they are dead. But in doing it you will turn your face toward the past. In doing it you are making it harder for every other boy who in ignorance and darkness must grope his way

> through the mazes which only childhood knows." H. Higdon, The Crime of the Century: The Leopold and Loeb Case 241 (1975)
>
> Darrow's remarks have proved prophetic. Recognizing the important developmental differences which distinguish adolescent children from adults, most of the civilized world has rejected the death penalty for children. In modern America public revulsion at executions of children has rendered the imposition and execution of such sentences to be 'wanton' and 'freakish' in their rarity. See, Furman v. Georgia, 408 U.S. 238, 310 (1972) (Stewart, J. conc.). Amici join in asking this Court to condemn capital punishment of children as barbaric, inhumane, and unworthy of our "'. . . evolving standards of decency that mark the progress of a maturing society.'" Trop v. Dulles, 356 U.S. 86, 101 (1958).[178]

On remand, Eddings was again sentenced to death but an appeals court modified the sentence to life imprisonment.

Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726 (1972)

Justice Douglas wrote an concurring opinion in this famous death penalty case, and cited a congressional hearing on capital punishment in which a witness stated "But the Leopolds and Loebs, the Harry Thaws, the Dr. Sheppards and the Dr. Finchs of our society are never executed, only those in the lower strata, only those who are members of an unpopular minority or the poor and despised."[179] Justice Douglas agreed: "One searches our chronicles in vain for the execution of any member of the affluent strata of this society. The Leopolds and Loebs are given prison terms, not sentenced to death."

Furman was paroled in April 1984. Later he would be sentenced to 20 years in prison after pleading guilty to a 2004 burglary.

Lynch v. Overholser, 369 U.S. 705, 82 S.Ct. 1063 (1962)

This case involved a defendant who had received treatment in a mental hospital, after which a psychiatrist advised the court that he was able to stand trial. But the psychiatrist also concluded that the defendant was suffering from a mental disease and that further treatment would be advisable. The defendant was tried in Washington, D.C. on two charges of passing worthless checks. On advice of counsel, he sought to withdraw an earlier plea of not guilty and to plead guilty to both charges; but the judge refused to permit him to do so. Although petitioner maintained that he was mentally responsible when the offenses were committed and presented no evidence to support an acquittal by reason of insanity, the trial judge concluded that he was not guilty on the ground that he was insane at the time of the commission of the offense, and ordered him committed to a

[178] Brief for the Petitioner, Eddings v. Oklahoma, 455 U.S. 104 (1982), 1981 WL 389851 (brief on behalf of National Council on Crime and Delinquency, Juvenile Law Section of the National Legal Aid and Defender Association, and American Orthopsychiatric Association).

[179] Hearings before Subcomm. No. 3 of the H. Comm. on the Judiciary, 92d Cong., 2d Sess. (Ernest van den Haag, testifying on H.R. 8414 et al).

mental hospital under the D.C. Code. The defendant appealed the judge's decision to not allow him to plead guilty. In the petitioner's brief submitted to the United States Supreme Court, the attorneys refer to Darrow's defense:

"Perhaps the most celebrated case highlighting the nature of such a benefit to a client is the Loeb-Leopold case of 1924. This Court will recall that as a matter of calculated strategy Clarence Darrow advised his clients to enter guilty pleas to charges of murder in the first degree. It seems plain that to have rejected the guilty pleas in that case would have deprived defendants of the benefit of the best legal judgment of the time, and in all likelihood, of their lives as well."[180]

Baldonado v. California, 366 U.S. 417 (1961)

Elizabeth Duncan hired Augustine Baldonado and Louis Estrada Moya to kill her 29-year-old daughter-in-law. All three were convicted of first degree murder and sentenced to death.[181] On appeal before the United States Supreme Court, Moya's attorney argued against the death sentence for his client. He asked the court to look at the sociological and psychological makeup of the defendant and to not just focus on the circumstances of the crime. The judge countered that the circumstances of this "crime stands out in bold relief." The defense attorney responded:

"Does that mean that we are going to shut our eyes to the circumstances of the underlying causes of the thing? Look at the Loeb and Leopold case. That was far more terrible than this, and there the judge looked at the sociological and psychological backgrounds of the defendants. I don't care how terrible the crime is. I don't think that is any basis for imposing punishment alone. It is certainly one factor but we can't be blind to the underlying causes of it."[182]

The judge responded:

> With respect to reducing the punishment from death, fixed by the verdict, to life imprisonment, I would point out that while a judge in Chicago many, many years ago did fix the life imprisonment sentence for two men by the name of Loeb and Leopold in a slaying, the situation in that case was quite different on the facts and certainly the situation was completely different on the law, inasmuch as in that instance the trial of the penalty was before the judge himself, not before a jury. This defendant chose to have a jury fix his penalty. . . . really the thing for the Court to determine is whether the Court disagrees entirely with the conclusion of the jury and thinks that the Court should substitute its own views, if those are different views, from that of the jury, and I would say that in this instance I don't see anything that would compel a judge, in light of the history of the case, to set

[180] Brief of Petitioner at 42 n.24, Lynch v. Overholser, 369 U.S. 705 (1962), 1961 WL 101652.
[181] People v. Duncan, 53 Cal.2d 803, 350 P.2d 103 (1960).
[182] Transcript of Record at 182, Baldonado v. California, 366 U.S. 417 (1961).

> aside completely the opinions of 12 impartial citizens, who decided in their absolute discretion that the death penalty would be appropriate.[183]

Later the judge referred again to the Leopold and Loeb case:

"I remember the Loeb-Leopold case very well. I followed Clarence Darrow's argument very closely at the time when he made it. He was talking then to a judge, one person. But I would have to practically ignore the opinions of 12 jurors, if I should set aside their verdict and render one of my own.[184]

Baldonado, Moya and Elizabeth Duncan, who was age 74, were each executed in the gas chamber at San Quentin prison gas on August 8, 1962.

Fukunaga v. Territory of Hawaii, 280 U.S. 593 (1929)

In 1928, Myles Fukunaga, a mentally disturbed 19-year-old hotel worker kidnapped Gill Jamieson, a 10-year-old student from the Punahou School in Honolulu. Jamieson, who was white, was the son of a Hawaiian Trust Co. executive. Fukunaga kidnapped the young boy by tricking the school administrators into believing that the boy's mother had been hurt in an automobile accident. Fukunaga was angered because the Hawaiian Trust was going to evict his family, which include seven children, from a home they rented in Honolulu. Within about an hour of the kidnapping, Fukunaga struck the boy with a steel chisel and strangled him. He sent a ransom note to the victim's family demanding $10,000. The boy's father raised the ransom money and met with Fukunaga and gave him $4,000 and demanded to see his son before giving the rest. Fukunaga took the money and ran off. He was quickly arrested after passing bills which were marked and he later confessed. The case was notorious in Hawaii and greatly stirred up racial tensions between whites and the Japanese community.

The kidnapping and murder were directly influenced by the Leopold and Loeb trial four years earlier. Fukunaga appealed his death sentence all the way to the United States Supreme Court. In a brief filed with the Court, he describes the kidnapping and murder plan:

"I planned to get money. I didn't think about the kidnapping case until I went to the Library of Hawaii, I saw about the Leopold and Loeb case back in Chicago in 1924. That case I studied. The ransom letter was taken from that same letter as the boys."[185]

Myles Fukunaga was hanged on November 19, 1929, in O'ahu Prison.

United States v. Hawkins, 380 F.Supp.2d 143 (E.D.N.Y. 2005)

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[183] *Id.* at 185.
[184] *Id*. at 185-86.
[185] Brief for the Respondent at 4, Fukunaga v. Territory of Hawaii, 280 U.S. 593 (1929); see also Fukunaga v. Territory of Hawaii, 33 F.2d 396 (9th Cir. 1929).

The defendant, involved in a scheme to make fraudulent medical and legal claims on the basis of staged automobile accidents, pleaded guilty to conspiracy to defraud the United States. The judge held that clear and convincing evidence established that the defendant exhibited extraordinary rehabilitation, warranting a downward departure to a sentence of probation, despite her commission of a serious crime against state unemployment compensation funds during the course of her presentencing supervision. The judge stated:

> A child forced into crime by a criminal father surely emerges from a different starting point than the child of a legitimately employed parent. The father of defendant Chastity Hawkins was not only a criminal, but an alcoholic who impressed his wife and children into crime. Defendant's background reflected social as well as socioeconomic deprivation-a scarred personality as well as an acid-etched visage. That she has progressed from an irresponsible white collar criminal to a law-abiding hard working citizen is quite extraordinary, given this starting point. (The problem of dealing with an advantaged youngster who commits crimes not induced by economics or other need-the Leopold and Loeb syndrome among others-is left for another day.)

United States v. Quick, 59 M.J. 383, 388 (C.A.A.F. 2004)

In a court martial case, the defendant appealed, claiming ineffective assistance of counsel. A judge wrote in a concurring opinion that confessing a client's shortcomings is a:

> legitimate tactical decision to which this Court should afford great deference. . . . The same tactic was famously employed by Clarence Darrow in the Leopold and Loeb case:
>
> "I do not know how much salvage there is in these two boys.... [Y]our Honor would be merciful if you tied a rope around their necks and let them die; merciful to them, but not merciful to civilization, and not merciful to those who would be left behind."
>
> In this vein, counsel's concession that Appellant's conduct "deserves to be labeled as dishonorable" and "that any period of confinement in excess of forty years is excessive" was a calculated attempt to build credibility with the judge."

Pursell v. Horn, 187 F.Supp.2d 260 (W.D.Pa. 2002)

In a case reminiscent of the murder of Bobby Franks, on July 23, 1981 at approximately 6:30 p.m., thirteen year-old Christopher Brine left his home in Wesleyville, Pennsylvania, riding his bicycle. Less than twenty-four hours later, he was found dead, naked, his face was drenched with blood, and a twenty-five foot long tree-limb lay across his throat. An autopsy revealed that Brine had sustained fifteen blows to the head with a rock, and had suffered a broken nose, internal hemorrhaging in the neck, and swollen eyes with the ultimate cause of death identified as asphyxiation because Brine's windpipe was crushed

when he was strangled with the tree-limb. Alan Pursell was later arrested and eventually convicted for the murder.

Pursell's undoing began just as it did for Nathan Leopold:

> First, a pair of glasses was found at the murder scene. An optometrist, Dr. Moody Perry, examined these glasses and determined that they were the same prescription and frame that he sold to Pursell a few months before the murder. According to Dr. Perry, the prescription was so rare that his office records revealed that he had written it only once in six years. On the afternoon of July 24, 1981, hours after the murder took place, Pursell returned to Dr. Perry's office and ordered a new pair of glasses, explaining that his pair had been stolen.

A number of witnesses confirmed that Pursell lost his glasses on the very night that Brine was killed. On July 27, 1981, Pursell and a friend were watching the television news when, out of the blue, Pursell asked if a person could be traced through his glasses. At the time, only the police and the murderer himself could have known that a pair of glasses was found at the scene of the crime because the local news media had made no such report.

Blood evidence also tied Pursell to the murder and he was arrested, tried, convicted and sentenced to death. Pursell appealed his murder conviction and death sentence. The court found:

> The evidence against Pursell was strong. Like a modern-day Nathan Leopold, Pursell accidentally left his calling card at the crime scene for all the world to read. His glasses provided the jury with ample evidence from which it could infer his presence at the murder scene and his complicity in Brine's death. The blood found on his shoe further reinforced his connection to the crime. And his statements to Lynch, Jagta, and Walters seemed to seal his fate, particularly since the testimony regarding these statements came from those who were most likely to support Pursell, his next door neighbors and the wife of his friend. These four pillars established a solid foundation for Pursell's guilt.

The court granted Pursell's petition for writ of habeas corpus on several grounds including: defense counsel was ineffective in failing to investigate and present extensive mitigating evidence; the sentencing court's instruction on torture aggravating circumstance was unconstitutionally vague and broad, and failed to limit jury's discretion; and the state Supreme Court's decision on review of jury instruction on torture aggravating circumstance was an unreasonable application of clearly established federal law.

Prosecutors' appealed the ruling and Pursell struck a plea deal. He agreed to forgo all future appeals of his 1981 conviction for murdering Christopher Brine and in exchange prosecutors agreed not to seek reinstatement of the death penalty.

Gentry v. Roe, 320 F.3d 891 (9th Cir. 2002)

After being sentenced to 39 years to life for assault with a deadly weapon, Gentry sought federal habeas corpus relief. The court held that the state court determination that the petitioner was not denied effective assistance of counsel was an objectively unreasonable application of federal law and warranted habeas relief. The court reversed and remanded the case. Judge Kleinfeld dissented:

> I am especially concerned about this case, not only because it flies in the face of what the Supreme Court has told us to do, but also because it has the potential to damage the quality of criminal defense in our circuit. We're de-fanging defense counsel, by limiting flexibility in closing argument, particularly by limiting the techniques counsel can use to establish personal credibility and argue reasonable doubt. The panel majority would treat Clarence Darrow's successful closing argument in the Leopold and Loeb case as deficient under Strickland, had he lost, because he conceded that his clients were bad people for whom the death penalty would be merciful: "I do not know how much salvage there is in these two boys. I hate to say it in their presence, but what is there to look forward to? I do not know but what your Honor would be merciful if you tied a rope around their necks and let them die; merciful to them, but not merciful to civilization, and not merciful to those who would be left behind ... I will be honest with this court as I have tried to be from the beginning. I know that these boys are not fit to be at large."[186]

Lockett v. Anderson, 230 F.3d 695 (5th Cir. 2000)

Lockett was convicted of murdering a husband and wife and sentenced to death. Lockett's lawyer did not explore mitigating circumstances such as whether he had a troubled upbringing, repeated head injuries, an organic brain abnormality, a history of referring to himself as an entirely different person, schizophrenia, or other mental problems. The court found this failure to explore these potentially mitigating circumstances amounted to ineffectiveness of counsel. The court stated:

> At trial, counsel essentially pled only for mercy for Lockett, without mentioning any of the possible mitigating evidence noted above. He failed even to question Lockett's mother-the only witness presented in the Mrs. Calhoun trial-about possible mitigating evidence. As pointed out, counsel "compared Carl to Leopold and Loeb, arguing that Carl could be spared because Leopold had gone on to become a noted scientist while at the same time admitting that Carl lacked the intellectual ability to do so." Given that the jury knew that Lockett had a low IQ, that analogy was sure to convince no one.

Ex parte Burgess, 811 So.2d 617 (Ala. 2000)

[186] Citing Clarence S. Darrow, Closing Argument for the Defense in the Leopold-Loeb Murder Trial, in Famous American Jury Speeches 1086 (Frederick C. Hicks ed., Legal Classics Library 1989) (1925)).

The defendant was convicted of a murder he committed when he was16 years old. The jury recommended life imprisonment without parole but the trial court overrode that recommendation and sentenced him to death. In a concurring opinion a judge stated:

> Before I voted in this case, knowing that the State of Alabama is going to be named in a list with such countries as Iran, Iraq, Bangladesh, Nigeria, and Pakistan, as jurisdictions approving death sentences for persons under age 18, I reread Clarence Darrow's summation in the Leopold and Loeb case. . . . Like Darrow, I wonder if
>
> "[w]e are turning our faces backward toward the barbarism which once possessed the world. If Your Honor can hang a boy of eighteen, some other judge can hang him at seventeen, or sixteen, or fourteen. Someday, if there is any such thing as progress in the world, if there is any spirit of humanity that is working in the hearts of men, someday men would look back upon this as a barbarous age which deliberately set itself in the way of progress, humanity and sympathy, and committed an unforgivable act."

Roy Burgess Jr. was later sentenced to life imprisonment without the possibility of parole.

Wade v. Calderon, 29 F.3d 1312 (9th Cir. 1994)

Wade was convicted of murder and sentenced to death. On appeal the sentence was reversed and remanded in part because he received ineffective assistance of counsel at the penalty phase of his trial. Judge Reinhardt wrote an opinion concurring in part and dissenting in part:

> Although I join in the portion of Judge Canby's opinion which concludes that Ames rendered ineffective assistance at the penalty phase, I believe it necessary to respond to Judge Trott's assertion-which I assume he makes with tongue at least partly in cheek-that our decision rewards a 'skilled professional ... with a slap in the face because he wasn't Clarence Darrow.'" Opinion of Judge Trott at 5053.
>
> Carried away by the excesses of his own rhetoric, Judge Trott actually likens Ames's wholly inadequate penalty phase closing argument in this case to Darrow's well-known and masterful closing argument in the case of Leopold and Loeb. It is simply ludicrous even to mention Darrow's brilliant twelve-hour plea, which raised every possible argument and touched on every possible emotion, in the same volume of the Federal Reports as Ames's disastrous summation of less than ten minutes. Ames's argument, in total contrast to Darrow's, offered the jurors one and only one justification for keeping Wade alive: so that he could be a "human guinea pig." Few capital defendants can engage the services of a Clarence Darrow. But surely they are entitled to more than the wholly ineffective representation Wade received from S. Donald Ames.[187]

[187] Wade v. Calderon, 29 F.3d 1312, 1330-31 (9th Cir. 1994).

Judge Trott also dissented and took exception with other parts of the opinion:

> I suppose Judge Canby would also find fault with Clarence Darrow's defense in the Leopold and Loeb case. Nathan Leopold, Jr. and Richard Loeb were wealthy, young men who, "for the sake of a thrill," sought to commit the "perfect crime." See Attorney for the Damned 16-19 (Arthur Weinberg ed., 1957). They kidnapped and later murdered a fourteen-year-old boy. In the face of enormous public outcry against the defendants, Clarence Darrow took their case. Leopold and Loeb pled guilty to the murder, but the prosecutor still demanded the death penalty. During the course of his eloquent and impassioned plea before the judge, Darrow said:
>
> "I do not know how much salvage there is in these two boys. I hate to say it in their presence, but what is there to look forward to? I do not know but that Your Honor would be merciful if you tied a rope around their necks and let them die; merciful to them, but not merciful to civilization, and not merciful to those who would be left behind."
>
> When Darrow finished his argument, tears streamed down the judge's face, and Leopold and Loeb received life imprisonment, not death.
>
> No one would claim Clarence Darrow argued that the execution of Leopold and Loeb would be a favorable outcome. Darrow was obviously pleading for sympathy, and his statement must be understood in the context of his more-than-twelve-hour plea. But Judge Canby does not give Wade's counsel any such license. Judge Canby isolates a passage out of context, then obscures its clear meaning. While Wade's counsel may not have been Clarence Darrow, his performance was not constitutionally infirm.

Resnover v. Pearson, 754 F.Supp. 1374 (N.D.Ind. 1991)

Resnover and a co-defendant were convicted for killing Indianapolis Police Sergeant Jack Ohrberg on December 11, 1980. The defendant appealed on several grounds including ineffective assistance of counsel. The court ruled against the defendant:

> The blunt and obvious fact was that Gregory D. Resnover was not personally present before that jury considering the death penalty at that time. He was not present because he voluntarily chose not to be present. Certainly, Clarence Darrow, Edward Bennett Williams or F. Lee Bailey might have each thought of something creative to say at that time and under those circumstances, but the blunt and obvious fact was that Resnover wasn't there. He now retroactively expects his appointed defense counsel to have performed some kind of a miracle of advocacy on his behalf. Given the almost totally no-win situation created by Resnover's own conduct, it is very difficult with the omniscience of hindsight to fault defense counsel Alsip for his efforts during that presentation.

> In some very sensational cases in which the death penalty has been sought, defense counsel will concentrate on avoiding the application of the death penalty and in the process will often basically concede the commission of the crime itself. Certainly, Clarence Darrow used that precise tactic with great success in defending Nathan Leopold and Richard Loeb in 1924. This petitioner strongly resisted the understandable tactics of defense counsel Alsip to attempt to distance Resnover from Tommie Smith. It was Resnover and not Alsip who chose to walk in lock step with Tommie Smith. After all, in the final analysis, a defense counsel, even a very good and experienced one, is required to follow the expressed decisions of his client, even when these decisions after the fact lead to disaster. Given this tactic of cooperation rather than distancing, it is hard to conceive what brilliant tactical moves could have been made by counsel Alsip that would have brought about a different result. Nathan Leopold and Richard Loeb cooperated with Clarence Darrow and did not leave him in the lurch at the critical moment of the trial. Resnover did otherwise and now complains that his counsel should have been a latter-day Clarence Darrow.

Gregory Resnover was electrocuted on December 8, 1994. His co-defendant Tommie Smith was executed by lethal injection in July 1996.

McDougall v. Dixon, 921 F.2d 518 (4th Cir. 1990)

In a death penalty case, the court held that the closing argument presented by one member of defense team which amounted to a "head-on" attack on the death penalty, was not deficient and defendant was not denied effective assistance of counsel even though the closing argument was unsuccessful. The court described the closing argument:

> In his final comments to the jury, Paul attacked the death penalty head-on as a cold blooded, premeditated killing by the state. He argued that when society executes people it breeds violence, that the death penalty was a tool of totalitarians and fascists, and that believers in capital punishment love killing. He quoted Clarence Darrow in his defense of Loeb and Leopold. He talked about love and nonviolence and his admiration of Martin Luther King, Jr., who had preached nonviolence. He invoked the memory of his young son, who had died of leukemia, and reminded the jury that while there was life there was love. He then quoted extensively from the Sermon on the Mount including a complete recitation of the Beatitudes. He spoke of the brotherhood of man and advised the jury that only persons who oppose capital punishment are honored by history.

Michael Van McDougall was executed by lethal injection on October 18, 1991.

In re Rupe, 115 Wash.2d 379, 798 P.2d 780 (Wash. 1990)

In a death penalty case, the court held that an instruction directing the jury not to permit sympathy to influence it during sentencing deliberations was not erroneous on the theory

that it conflicted with instructions defining mitigating evidence. A dissenting judge wrote:

> The majority's conclusion that the United States Supreme Court decisions in California v. Brown, 479 U.S. 538, 107 S.Ct. 837, 93 L.Ed.2d 934 (1987) and Saffle v. Parks, 494 U.S. 484, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990) compel the holding that sympathy for the defendant is an impermissible consideration for the jury in the penalty phase of a capital case is simply wrong. Under United States Supreme Court doctrine and our statutes, the purpose of presenting mitigating evidence is to elicit feelings of sympathy based on some aspect of the defendant's character or background that prompts the jury to exercise mercy and not impose the death penalty.
>
> It is generally acknowledged that the most effective strategy for defense counsel at the penalty phase is to play on the jurors' sympathy and compassion. Welsh S. White, in his book, The Death Penalty in the Eighties: An Examination of the Modern System of Capital Punishment, characterizes the best defense attorneys as the ones who have successfully appealed to the emotions of the jury. He points to Clarence Darrow's moving plea for the lives of Leopold and Loeb as a famous example of a superb argument that effectively aroused the sentencer's sympathy. W. White, The Death Penalty in the Eighties: An Examination of the Modern System of Capital Punishment 82-83 (1987). White argues that defense argument which pertains to the evidence presented should not be excluded because it is emotional. He explains that the Supreme Court's decision in Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) which requires the sentencer to make an individualized sentencing determination based on the defendant's personal characteristics as well as the circumstances of the crime, mandates the kind of eloquence that will arouse the sentencer's feelings.

Juries twice sentenced Rupe to death, but higher courts overturned the sentences for various reasons. In 1994, a federal judge upheld his conviction but agreed with Rupe's contention that at more than 400 pounds, he was too heavy to hang because of the risk of decapitation. Prosecutors tried for the death penalty a third time in 2000, but the jury deadlocked 11-1 in favor of the death penalty. Because a unanimous vote was required for capital punishment, Rupe got a life sentence by default. He died in February 2006 after a long illness in Washington State Penitentiary. As a result of outrage over the Rupe case, the Washington legislature changed the state's primary method of execution from hanging to lethal injection in 1996. Prior to this, Washington executed prisoners by either hanging or lethal injection. If an inmate didn’t choose a method, the preferred way was hanging.

Jordan v. State, 464 So.2d 475 (Miss. 1985)

The defendant was convicted of murder and sentenced to death on July 21, 1976. After several decisions and appeals, the death penalty was re-imposed for the third time. A dissenting judge stated:

> What is most disturbing about the majority decision is that it would, if carried to its logical extreme in the future, operate as a matter of law to deprive society of the benefits it could well derive from the continued life of one convicted of capital murder. History has recorded the names of numbers of persons who have in their youth committed heinous and atrocious crimes and, escaping the hangman, gone on to lead productive and useful lives, albeit behind bars. Nathan Leopold participated in the thrill killing of little Bobby Franks in Chicago in the early 1920s and, after he escaped the gallows largely through the eloquence of Clarence Darrow, went on to make important humanitarian contributions in the fields of science and medicine. N. Leopold, Life plus 99 Years 305-38 (1958). Several decades ago there was popularized the life of Robert Stroud, the birdman of Alcatraz, a convicted murderer, who following reprieve made important contributions to avarian science. There have no doubt been others. While most capital murderers do not have such creative capacities in their character and personality, there is no reason why we should arbitrarily deprive society of the benefits of the continued life of those who do.

As of 2009 Jordan has been on death row for over 30 years. His case has been reviewed a total of six times by various courts, including the Supreme Court of Mississippi, the United States Court of Appeals for the Fifth Circuit and the United States Supreme Court.

State v. Battle, 661 S.W.2d 487 (Mo. 1983)

The defendant was 18 years and 4 months old when he brutally raped and murdered an 80 year old neighbor. He was sentenced to death. In this appeal, a dissenting judge thought his age should be mitigating factor against imposing the death penalty:

> The history of capital punishment in Missouri shows that persons who were under the age of 20 at the time of commission of the offense have seldom been sentenced to death, or executed. . . . History shows that 35 persons were executed in the Missouri gas chamber following state convictions, prior to the invalidation of the previous death penalty statutes pursuant to Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). Only two of the 35 were under the age of 18 at the time of the offense. See State v. Lyles, 353 Mo. 930, 185 S.W.2d 642 (1945); and State v. Anderson, 386 S.W.2d 225 (Mo. banc 1963). Without lengthening this opinion by details it is sufficient to say that both cases involved willful killings incident to robbery, in which the defendants abused their victims prior to killing and also severely wounded other persons who might well have died.
>
> One of the most aggravated murders in our history is that of Bobby Franks by Richard Loeb and Nathan Leopold. The victim was abducted and brutally murdered by use of a chisel, while a ransom note was in circulation and the kidnappers continued their efforts to collect the ransom knowing that he was dead. The defendants retained Clarence Darrow and entered pleas of guilty.

Sentencing fell to Judge John R. Caverly, Chief Justice of the Criminal Court of Cook County, Illinois. The Judge paid little attention to Darrow's psychological arguments but nevertheless decided not to impose the death penalty, explaining his reasoning as follows:

"It would have been the path of least resistance to impose the extreme penalty of the law. In choosing imprisonment instead of death, the Court is moved chiefly by the consideration of the age of the defendants, boys of 18 and 19 years. It is not for the Court to say that he will not in any case enforce capital punishment as an alternative, but the Court believes that it is within his province to decline to impose the sentence of death on persons who are not of full age.

This determination appears to be in accordance with the progress of criminal law all over the world and with the dictates of enlightened humanity. More than that, it seems to be in accordance with the precedents hitherto observed in this state. The records of Illinois show only two cases of minors who were put to death by legal process-to which number the Court does not feel inclined to make an addition."

Perhaps this view from a time when the death penalty was much more often imposed than it is now will furnish perspective. History tells us that Loeb was killed in a prison incident in the 1930's, while Leopold served many years. After he was released on parole, he led a useful life.

Based on the above comparisons I do not believe that the law requires the life of this young man. In so stating I do not minimize the enormity of his guilt or the horrible details of the offense, but do urge youth as a proper factor for consideration.

Thomas Battle was executed on August 7, 1996.

Leach v. U.S., 334 F.2d 945 (C.A.D.C. 1964)

The defendant was convicted of robbery. During sentencing he asked the judge to refer him for a mental examination claiming he had twice been under psychiatric care. His lawyer told the court that in the last 31 years, basically Leach's entire adult life, he had been out of prison only 63 days. The pre-sentence report characterized Leach as "'the classical picture of the psychopathic offender.'" The trial judge ignored his request for an examination.

On appeal, Chief Judge Bazelon, held that the refusal to refer the prisoner for a mental examination was an abuse of discretion where there was extreme recidivism, a request from the prisoner, a pre-sentence report characterizing prisoner as a "'psychopathic offender'" and other information regarding mental disturbance and where facilities for a mental examination were available to aid in sentencing. Judge Bazelon stated:

> A judge sentencing for a D.C.Code violation has two sources other than D.C.CODE § 24-301(a), supra p. 948, from which to obtain a psychiatric evaluation: The Legal Psychiatric Services, D.C.CODE § 24-106, and the two-month study made possible by Rule 35, Fed.R. CRIM.P. But the first has fallen into desuetude and the judges have ignored the second even after its endorsement by Congress in 18 U.S.C. § 4208(b). Against this background of neglect, Leach's case is a dramatic example of the need for such services. If Leach, his family or friends had had the intellectual and financial ability, he would have been able to present psychiatric and other information directed to the separate issue of sentencing. Compare the extensive psychiatric evidence and argument offered to mitigate the sentence by the wealthy defendants in the Loeb-Leopold case. Sellers, THE LOEB-LEOPOLD CASE. A wide difference between the opportunities for justice available to the rich and poor has often been held "invidious discrimination."[188]

A dissenting judge disagreed:

> Further than this, it is particularly unfortunate, in my opinion, to indicate by the language used that Leach suffered because of his "financial ability." Such is not the case. He had the benefit, in his trial and on his two appeals here, of able counsel, who diligently protected his interests; and certainly Clarence Darrow (who kept the defendants in the Loeb-Leopold case from the electric chair) could have done no more than did counsel in this case for Leach- all without compensation, and in the best traditions of our bar. In this connection, let me add that the bar of this court and of the District Court has always responded, at great sacrifice on their part and with great ability, to the many thousands of requests by the courts to represent indigent defendants.

Clark v. United States., 259 F.2d 184 (C.A.D.C. 1958)

During a murder trial, the defendant testified that he was not guilty and claimed he must have been insane. However, his trial counsel stated that it was a case of manslaughter and not a case of first degree murder and that he knew that defendant must pay a penalty and he was not asking for an acquittal. The defendant appealed his conviction. The court held that the defense counsel's attempt to take the insanity defense out of case may have tended effectually to persuade the jury to disregard the court's subsequent instruction that they should find defendant not guilty by reason of insanity unless they found, beyond a reasonable doubt, that he was sane. This amounted to prejudicial error.

In a dissenting opinion, Judge Burger wrote:

> Appellant's own counsel appointed to conduct this appeal acknowledged in open court that, had the tactic worked in this particular case, it would have been a sound and good trial tactic. I do not suggest that a basis for reversal could not be

[188] Citing Griffin v. Illinois, 351 U.S. 12 (1956); Greenwell v. United States, 317 F.2d 108 (1963); Brown v. United States, 331 F.2d 822 (1964).

> grounded on ineffective assistance of counsel for failing to press an essential or central element of defense. But here, as I pointed out, there was not the slightest evidence of insanity apart from appellant's testimony that he "must have been insane," and the "ineffectiveness" of counsel rests entirely on failure to argue insanity and on the calculated decision to concede guilt of a lesser degree. On this record trial counsel had a right to believe that it would be in appellant's best interest to use the tactic of admitting appellant's obvious guilt and seeking a lesser punishment. Clarence Darrow did this in the Loeb-Leopold case in the form of a guilty plea on which he then successfully urged the court to impose the lesser punishment of life imprisonment.

People v. White, 365 Ill. 499, 6 N.E.2d 1015 (Ill. 1937)

In a forgery prosecution, during his argument to the jury, the prosecuting attorney told the jury that a handwriting expert for the defense:

"Mr. Rounds testified that . . . he testified for the defense as a handwriting expert in the Loeb-Leopold case, but I say to you gentlemen of the jury, what price glory when a man will sell his services in that kind of a case, with little Bobby Franks mutilated and lying in his grave.'"

The court sustained an objection to this statement and held that the statement and other errors made at trial:

> were severally grossly prejudicial to the rights of the defendant to a fair and impartial trial. Nor were any of the errors cured by the court telling the jury, in some instances, to disregard such improper matters. The human mind does not lose its power of memory nor its function of thinking merely because it is in the jury box. The individual's emotions are not destroyed when he becomes a juror. The juror may be ever so honest, but it is not easy for him to forget matters which appeal to his passions and emotions. It is likewise difficult to prevent such circumstances, either consciously or unconsciously, from affecting the ordinary juror in the consideration of the case on trial.

People v. Parisi, 270 Mich. 429, 259 N.W. 127 (Mich. 1935)

Parisi was convicted of bank robbery. On appeal, the court ruled that the following issue did not amount to reversible error:

> On the final arguments, the attorney for respondent declared it to be unlikely that a robber would return to a car he had used in a holdup on the same day. This remark prompted a reply by the prosecutor to the effect that frequently something is overlooked by a criminal in the perpetration of a crime, and he referred to the "Bobbie Franks" case as an example. The argument was not taken down by the stenographer, and, upon objection being made to the remark, the court immediately halted the prosecutor and ordered him not to continue along that line.

> The remark was improper, and had the prosecutor not followed the instructions of the trial judge, it might have led to serious consequences. However, the "Bobbie Franks" case referred to by the prosecutor, better known as the "Loeb-Leopold" case, did not involve a bank robbery, took place in a different jurisdiction, and in no way resembled the case at bar. The reference, under the circumstances, did not come under the rule laid down in People v. Kolowich, 262 Mich. 137, 150, 247 N. W. 133.

Burrows v. State, 38 Ariz. 99, 297 P. 1029 (Ariz. 1931)

The Supreme Court of Arizona reversed and remanded a murder conviction in part because of a reference to the Leopold and Loeb case:

> The second remark was far more serious. It was that: "You will do the same as another state did when two young murderers came in and pleaded guilty of first-degree murder, and they were given life imprisonment. And that was in the same state that this defendant comes from." This was undoubtedly a reference to the famous Leopold-Loeb case, which occurred some years since in the state of Illinois. The case is of such widespread notoriety that we should assume some, at least, of the jury had it recalled to their minds by the remark of the county attorney.
>
> That the language used by the county attorney was in the highest degree improper, utterly indefensible, and deserving of the severest censure, is obvious to every man who recalls the case referred to, and its circumstances. While it is true the evidence in this case is of such a nature that no reasonable jury, whether the objectionable remark had been made or not, could have returned any other verdict than murder in the first degree, yet in our opinion it was not only objectionable, but in the highest degree prejudicial so far as the penalty was concerned. Under our law the Legislature, believing that two murders legally of the same degree may differ greatly in the moral atrocity of the crime, has provided that the jury may in its discretion direct that the defendant suffer the extreme penalty of death, or, if there appear extenuating circumstances, may provide for life imprisonment. In our opinion the present case is peculiarly one where reasonable jurors might differ as to the proper penalty, though there could be no difference on the general verdict.
>
> On the one hand is the natural feeling of indignation at the ingratitude shown where the murderer has gained his opportunity for the killing through the kindness of his victim. On the other hand we have a boy, barely over the age of eighteen, of good previous character, and brought up in a sheltered home, suddenly, as he believed, abandoned by his parents, penniless, friendless, and hungry; a stranger in a strange land, and perhaps with his moral resistance weakened by the unwonted use of liquor urged on him by his victim. While this is, of course, no legal justification or excuse for his acts, a jury might well, in view of the situation, have deemed life imprisonment a sufficient penalty. Under such circumstances

> the county attorney calls to their attention a case, similar only in the fact that the defendants therein were youths, and lacking in every other mitigating circumstance found in the case at bar. In that case, as every juror at all familiar with it knew, a storm of indignation beat upon the head of the judge who had failed to assess the death penalty. The only inference which the jury could possible have drawn from the remarks of the county attorney was a threat that, if they failed to return a verdict carrying the graver penalty, they would be criticized as was the judge in the Leopold-Loeb case.

State v. Genna, 163 La. 701, 112 So. 655 (La. 1927)

Genna was convicted of murder and sentenced to death. He raised several issues on appeal including the following remark made during the trial by the assistant district attorney:

"'You, gentlemen of the jury, are now confronted with the most serious problem ever presented to the people of Beauregard parish. It is for you to say whether or not henceforth there shall be law enforcement or not. You are confronted with the same situation [synonymous with, state of facts] as was presented to the people of Illinois in the famous Leopold and Loeb Case.'"

The defendant's attorney requested the trial judge to instruct the assistant district attorney to desist from referring to any case in Illinois or any other state in his argument to the jury but the judge denied the request. On appeal, the Supreme Court of Louisiana ruled:

> The remark was made "in a general argument against the plea of insanity in this case. There was nothing improper or prejudicial in the remark". . . . District attorneys are entitled to argue their cases to the jury with the same latitude as counsel for the defense. It is a mistake to suppose otherwise. It is true they may not go outside of the record to bring to the attention of the jury any facts connected with the case which have not been given in evidence; nor should they appeal to the prejudices of the jury (supposed or real); and if they do so they should be stopped by the trial judge and the jury properly instructed and directed to disregard such remarks.
>
> But aside from this, their right to argue their case with all the eloquence at their command is quite as extensive as that of counsel for the accused. And we have always found that trial judges, sitting as moderators in these warm debates, are quite competent to keep the arguments of counsel for the state toned down to the proper key.
>
> In the case before us the remarks of the district attorney could be no more prejudicial to the accused than if he had referred to the story of Cain and Abel, or the assassination of Julius Caesar, or the French Revolution; just as the attorney for the defendant would have been quite free, if he chose to do so, to refer to Magna Charta, the Bill of Rights, and the Declaration of Independence, without

> overstepping the bounds of propriety in any manner whatever. Literature and history are open to all men; and the Leopold and Loeb Case is an event in current history which is not undeserving of deep thought.

Joe Genna's sentence was affirmed. On March 9, 1928, Genna and his accomplice Molton Brasseaux were both executed in a double hanging (Genna first followed by Brasseaux).

Bertig Mercantile Co. v. Williams, 286 S.W. 150 (Mo. App. 1926)

In a suit over a promissory note, the defendant asked the plaintiff's ex-book-keeper during cross-examination whether he was from Chicago because his last name was Loeb:

> Appellant also contends this witness David Loeb was asked if he was from Chicago. The abstract of the record shows there was no question of that kind asked except as above shown, which referred only to the brother Rudolph Loeb. The question is claimed to have been prejudicial, for the reason that at the time this case was tried the young Jews, Loeb and Leopold, were on trial in Chicago for the murder of the Franks boy; that the Chicago case attracted much publicity; that, since the manager of the store and his brother, Rudolph, bore the same surname as one of the defendants in the murder case, the question had prejudicial effect upon the minds of the jury and diverted their attention from the real facts in the case.
>
> The question was no doubt immaterial to the issues. We do not believe, however, the conduct of defendant's counsel in asking the question referred to is sufficient grounds for a reversal. The trial court is given much discretion in deciding how far counsel shall be permitted to go in cross-examination of witnesses. We cannot believe counsel for defendant deliberately attempted to inject the thought of the Franks murder into this case, and thus prejudice the jury. If such were the purpose of the question, the conduct of counsel was reprehensible in the extreme, and he should have been severely reprimanded by the court.
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> The learned trial judge had the benefit of hearing the question asked, and could better judge of its effect upon the jury. It is almost inconceivable that a jury of citizens, who no doubt had known Mr. Loeb throughout the many years he had lived in their midst, could be so prejudiced and unfair as to let the mere fact that he bore the same name as a man charged with murder in a distant city, influence their decision.

Tyree v. Commonwealth, 212 Ky. 596, 279 S.W. 990 (Ky.App. 1926)

During a prosecution for manslaughter, the prosecution told the jury:

"'Gentlemen of the jury, all a man has to do at this day and time is to hire the best lawyers to be had, and you will remember the miscarriage of justice that we read about a

few months ago in Chicago in the case of Loeb and Leopold, two of the foulest murders in recent history, and justice is defeated.'"

The defendant argued that his conviction should be reversed in part because of this statement by the prosecution. The court ruled:

> It has always been allowable for counsel in argument to refer to matters of history and to facts within the knowledge of the general public to illustrate a point or to warrant a conclusion, and such argument is not ground for a reversal of the judgment in a criminal case. . . .
>
> The reference to the miscarriage of justice in the case of Loeb and Leopold was but to call a matter of history fresh in the minds of the reading public to the attention of the jury to illustrate the fact that sometimes the foulest murders go unwhipped of justice because they have resorted to questionable defenses or have engaged adroit counsel, who, by powers of argument or skill and tact in the trial of criminal cases, are able to influence a jury to return a verdict in their favor. It is not infrequent for lawyers in argument of cases to juries to call to their aid incidents arising in famous trials of the long ago, and to base their argument upon facts and results thus well known to the jury.
>
> Certainly members of a jury are authorized in considering their verdict in a criminal case to call to their aid all their past experience and teaching--the sum total of their knowledge. Why, then, should counsel be prohibited from calling to the attention of the jury historical facts and general matters of information which are calculated to throw light upon the conduct of the parties litigant and to aid the jury in determining the issues involved? None of the statements attributed to counsel for the prosecution are out of the ordinary. Scarcely a criminal case is tried before a jury where argument is had that counsel do not make similar statements both for and against the accused.
>
> Good ethics may require the choice of different words to express the same thought, but frankness, direct statement, or bluntness has never been regarded as anything more than want of diplomacy and skill to delicately and elegantly express thoughts, and, so far as we are advised, has never been held to be ground for reversal of a judgment, where the words expressed are not unnecessarily insulting or humiliating.
>
> We find no error in the record warranting a reversal of the judgment. It is therefore affirmed.