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The Big Trial
I

Law and Its Audience

On October 3, 1995, the whole United States, it seemed, was holding its breath. O. J. Simpson—sports hero, movie star—had been on trial for murder. Now a verdict was about to be announced. Millions of people put their lives on hold, as they waited for the news. At my school, faculty and students crowded into lounges where the TV sets were on, so as not to miss this event. This scene was repeated in homes, bars, and institutions all over the country, and elsewhere as well. The Los Angeles County courthouse was ringed with police. Fear of riots hung in the air like a dark, fetid cloud. Volume dropped on the stock exchange. The president of the United States stopped work to listen to the news.

At 10 a.m. the jury’s verdict came, and it was a sensation: not guilty.¹ Sixteen months had gone by since Nicole Brown Simpson, the defendant’s ex-wife, and a friend of hers, Ronald L. Goldman, had been found, slashed to death, in the front yard of Nicole Simpson’s condominium. From that moment on, the case was a total sensation. A great deal of evidence pointed to Simpson. The trial was televised, to an audience of millions, here and abroad. Everyone involved in the case—the judge, the witnesses, the lawyers—became celebrity figures. The courtroom battle went on, month after month. In the end, the jury reached
its verdict quickly. But the case did not end with its verdict. True, Simpson went free. But a burning question remained: Was justice done?

The Simpson case was a prime example of what we might call “headline trials,” the subject of this book. By this I mean criminal trials that make the headlines, and often the front page, in the daily newspaper, that claim a share of attention in the evening news, and that, in any event, evoke intense public interest. Like many people, I find these trials quite fascinating. Many of these big trials have kept their fascination over the years. The Lizzie Borden trial, in the 1890s, has in a real sense never died. Among other things, this book tries to answer the question: Why? What was it about this trial that gave it such powers of survival?

Big, notorious trials like the Simpson trial are, of course, in no way typical of criminal trials in the United States. Yet that trial had a number of traits that are hardly unique; these traits are, in fact, to be found in quite a few of these headline trials. It was, to begin with, a celebrity trial: Simpson was a celebrity defendant. There have also been celebrity victims: Stanford White, the country’s leading architect, shot down by Harry K. Thaw; President Garfield, assassinated by Charles Guiteau. And, like many other big trials, by the time the Simpson trial had ended, the judge, the witnesses, and everybody involved in the case had themselves become celebrities. Also, like many headline trials, the Simpson trial was left enveloped in a fog of mystery and uncertainty: Did he or did he not do it? Also, one can ask (as we mentioned) whether justice had in fact been done. Simpson was black; his ex-wife was white; and the trial developed strong political overtones, polarizing white and black opinion about what happened and why. The undertone of sexuality and sexual jealousy made it also what we might call a “tabloid trial”—that is, a trial that flowed out of a sensational and lurid crime.

As these last paragraphs make clear, headline trials come in various sizes, shapes, and types. The types overlap, of course.
What they all have in common is their sheer notoriety. They are public theater: The events take place in public and before a public audience (real and virtual) in a dramatic, theatrical way. All dramas have messages, of course; hence, headline trials can be labeled, if you wish, as didactic theater.

But what makes them so dramatic? What is it about society that gives them their fascination? And how has the social meaning and importance of these trials changed over time? These, too, are themes of this book. Why do these cases capture the imagination of the public? Are the headline trials of our period different from those of a century or two ago? And what do we learn from these trials about the nature of our society, past and present?

To tame this rather unruly subject, I have classified headline trials—divided them into distinctive types. The types, to be sure, tend to overlap. Some trials (like O. J. Simpson’s) can fall into several categories. One obvious type of headline trial is the political trial: trials for treason, spy trials, trials of dissenters and radicals, among others. Trials for corruption and fraud are an important subcategory of the political trial.

Perhaps all trials have at least a certain amount of political relevance. This is particularly true of trials that leave people asking, was justice done? Some of these trials call the whole legal process into question. The O. J. Simpson trial began as a straightforward murder trial and morphed into something rather different. It also had elements of two other categories, which we mentioned in connection with the case: tabloid trials and celebrity trials. When we come to discuss celebrity trials, we will need to explore exactly what we mean by “celebrity.” Headline trials also, as we said, create celebrities. Whodunit trials, another category, are trials whose fascination consists, at least in part, of the sheer element of mystery surrounding the events in question. We know who killed President Garfield, but are we sure about O. J. Simpson? Claus von Bulow, defendant in a sensational trial, was accused of
acts that sent his wife, Sunny, into an irreversible coma. But did he actually do it?

I group an especially interesting type of trial under the phrase “worm in the bud.” These cases seem, somehow, to put society itself on trial, to raise fundamental social questions that probe beneath the surface, suggesting hidden and secret pathologies. These are among the most unsettling cases. The classic example is Lizzie Borden, which we will deal with later. Did Lizzie really commit the brutal axe-murders she was charged with? What made the case so notorious, then and later, was the notion of a worm in the bud, the idea that an unmarried, straitlaced, church-going woman from polite, bourgeois society was capable of such an awful crime. Finally, a small but important group of cases flows out of moral panic. The classic example is the Salem witch trials, but there are some significant recent examples as well.

Not much ties all of these trials together; indeed, one point of this book is to establish how many different types there are. They all do have, however, a few gross commonalities. One we have already mentioned: all are examples of didactic theater. Also, increasingly, they reflect and depend on the mass media. In a sense, the mass media gave birth to the headline trial, and the role of the media has been vital to the progress (if that is the word) of headline trials. Lastly, headline trials, for the most part, raise a question about identity: Who is this person on trial? Is he or she a villainous killer or an innocent, caught unfairly in a web? As we will argue, modern society, with its intense mobility and where there are always strangers among us, is also a world in which identity has become problematic in ways that were not so pronounced before. Big trials reflect this aspect of modern society.

You might think that headline trials must have produced a huge literature. And in a way they have. Oceans of ink were spilled over the case of Lizzie Borden in its day, and the case continues
to resonate to this day. The trial of O. J. Simpson was in the news constantly; it was perhaps the greatest television drama of them all. No doubt every year or so some trial catches the public’s fancy and makes big news. In the 1950s, it was the trial of Dr. Sam Sheppard for killing his wife. In the summer of 2013, it was the trial in Florida of George Zimmerman, who was accused of killing a young black man, Trayvon Martin. Zimmerman’s trial generated enormous heat, and controversy. It absorbed huge amounts of space in the press and on TV.

There are many books, articles, and television programs about some of these trials, and sometimes about groups of trials. But, oddly enough, very little has been written about big trials in general—about their nature, how it has changed, and what it all means. This short book is a modest attempt to fill in a few of the gaps and to add something to our general understanding of these trials. The period in question is roughly that of American independence. There were fascinating trials in ancient history—the trial of Socrates, for example, and in the Middle Ages, the trial of Joan of Arc—and probably in every society. But, for the most part, I will stick to the modern period, and to the United States.

In Public

What all of these trials have in common is that they were public events. Secret trials are not supposed to exist in our system. Trials have always been open to the public. Of course, a public event today is not the same as a public event of the nineteenth century, or even of the first half of the twentieth century. At one time, “the public” was the small group of people who actually attended the trials and those who heard about it from neighbors. This was no doubt true for the Salem witch trials, in the seventeenth century. These trials made a great stir in their day, to be sure, and in their community; but news about these trials spread very slowly.
The modern world is entirely different. Telling the story of headline trials is also telling the story of the rise of the mass media. In the nineteenth century, cheap, popular newspapers broke through to a mass audience. The whole country could and did read about Lizzie Borden. Next came radio, then television, and now, in the twenty-first century, the Internet: all have vastly increased the number of people who watch, listen, or care about headline trials. More recent trials—O. J. Simpson being a prime example—reached audiences that would have been unthinkable in the past. The O. J. Simpson trial was, for a while, the most popular and prominent television show in America.

Nobody was forced to watch the O. J. Simpson trial on TV. People watched because they wanted to, because it was fascinating—it was, in other words, prime entertainment. They might have watched a baseball game or a quiz program or a reality show or tended to their rose garden. Instead, they became, as it were, spectators at a criminal trial.

Clearly, people enjoyed the trial. It fascinated them. Did they also learn something? Even pure entertainment gives off messages, overt and covert. Criminal trials carry messages as well. They can tell us about society’s norms and values. As Emile Durkheim long ago pointed out, criminal justice defines the normative boundaries of society. It expresses what is and what is not allowed, in an overt, dramatic way. Political trials are often meant to send an explicit message. A lurid murder trial sends a less obvious message, but in every case, some sort of message, some lesson, some idea, is there, hidden perhaps in the dense legal shrubbery or disguised by the overt drama.

The big criminal trial is historically important precisely because of the mixture of what fascinates people and what instructs them. This is one of the theses of this book: Headline trials have, and have always had, two distinct social tasks. One is to instruct, to teach, to send a message. The other is to entertain. But the exact mixture of the two varies from type to type and has varied
over time. In the age of mass media, the mixture is not the way it was in the age of the Salem witch trials. But big trials are always a kind of social drama—didactic theater, as we called it. And these trials have always been, in a sense, public debates. They tell a story (or, more often, two conflicting stories). And they carry messages. To be sure, the stories and messages come out in complicated ways, because procedural rules tie trials up in legal knots. And the messages can be false or misleading, or misreported.

In a big trial, lawyers on both sides appeal to popular justice, in the broadest sense of that phrase. The stories they tell have to be plausible, sympathetic, and persuasive. In a jury trial, they have to give the jury something reasonable, something familiar, something they can carry with them into the jury room. This makes these trials important social documents. The media, too, must be able to tap into and exploit norms and attitudes that are already out there in the ocean of society. For this reason, trials can shed light on social norms that might otherwise be obscure. Arguments and strategies in jury trials are windows into social stereotypes and norms, into what people think and believe. They can help show us which norms, ideas, and attitudes pack the most social punch, at various points in history. The evidence is rough; it is hardly rigorous and systematic, but sometimes this is the best we can do.

Patterns of jury decisions also tell a story. Jurors do not normally talk about their decisions. They come out of their locked room and utter a few gnomic words. Their reasoning can only be inferred. The jury room is the blackest of black boxes.

Besides, as we know, both sides are at work, trying to concoct a coherent story. The stories are usually in conflict. It is often hard to tell, for jurors or outsiders, what is true (whatever “truth” might mean). Sometimes neither story makes total sense; sometimes neither side is playing with a full deck. But the stories themselves are revealing. And the patterns of decisions can make clear what individual trials do not.
As we said, headline trials are above all public. They are open, on display. Big trials are, and always have been, public in a quite literal sense. For the big trials, people line up eagerly for a chance to watch the show. At the trial in 1879 of the Reverend Herbert Hayden, a married Methodist minister with children, who was accused of killing a young woman he had impregnated, people lined up early in the morning, waiting for the doors to open. People “pushed, shoved, and trampled each other to get in and the deputies had quite a time of it to close the doors on the hundreds who were unsuccessful.” These “unsuccessful” people, of course, could read the newspapers: Since the dawn of the mass-circulation press, big trials have also been public in this wider sense. They were broadcast, as it were, to a vast audience outside of the courtroom. When Harry K. Thaw was on trial for murdering Stanford White in 1907—we shall have more to say about this trial later on—the general public had to be satisfied with this kind of vicarious attendance. The courtroom was jammed with lawyers, family, and friends of the defendant; more than one hundred reporters with press passes filled seats in the courtroom. But, though the public had no chance to get into the room, thanks to newspaper coverage, the trial was “reported to the ends of the civilized globe.”

That the process is and should be open is a rule for democratic societies. These societies are committed to the rule of law—the idea that legal institutions are or ought to be impartial, transparent, and independent and that legal process should be orderly, regular, and fair. Policy in democratic societies is supposed to be made in the open, in the sunshine. Secrecy is disfavored. Statutes like the Freedom of Information Act are supposed to make government an open book. The Administrative Procedure Act tells government agencies that they must, generally speaking, give the public notice, and a chance to be heard, before they issue rules and regulations. If the Food and Drug Administration (FDA) wants to specify what dyes can be used to turn cucumbers green
and tomatoes red, it must (in theory at least) let the public know what it plans to do, publish its proposals in the Federal Register, and throw the process open to comments and suggestions. Very likely chemical companies will demand to be heard, if the FDA intends to ban some sort of chemical additive. Various consumer groups might have a thing or two to say as well.

So much for theory. Transparency and participation are ideals, not realities. The very text of the Administrative Procedure Act opens the door to exceptions: for “good cause,” an agency can bypass requirements of notice. Some agencies are very good at discovering these “good causes.” The Freedom of Information Act is peppered with exceptions. Government in the modern world is staggeringly complex. So is the legal system. There are rooms within rooms within rooms, locked doors and secret panels. What goes on, every day, in thousands of offices and bureaus, is for the most part totally opaque. Laws are made the way some sort of giant sausage might be made. Mysterious ingredients are ground up and stirred in the pot, and a gaggle of cooks and sub-cooks mix and stir, add and subtract, boil and steam and fry. Courts, legislatures, regulatory bodies, members of the Executive staff, and even the president himself are part of the law-making process. And on other levels, governors, mayors, city officials, police officers, wardens of prisons, commissioners of agencies, members of zoning boards and boards of education, people who license doctors and plumbers, and so on and so forth: All are busily engaged in making and enforcing rules. In addition, members of the public, by voting, making campaign contributions, writing letters, and nagging and demonstrating and protesting, leave their mark on the system as well. Some—for example, big donors—leave more of a mark than others.

In practice, there are more closed doors than open doors. Many aspects of the process are totally and officially closed to the public. There is no right to know, for example, how to put together a hydrogen bomb, or what dirty secrets the Central
Intelligence Agency (CIA) keeps in its breast. You cannot use the Freedom of Information Act to ferret out contingency plans for dealing with a crisis in China or Pakistan, or to learn the names of our spies in other countries. A modern, complex government has to keep secrets, and it has to do a lot of its work in secret. In the summer of 2013, the government was outraged when a whistle-blower, Edward Snowden, revealed dirty secrets about actions of his government. To avoid arrest and trial, he felt forced to flee the country.8

That the dirty tricks of the CIA are secret goes without saying. But in fact, law-making and rule-making go on mostly behind closed doors; the process is informal and, in the main, below the radar screen. A citizen can hardly expect to see the wheels actually turning. She cannot expect to eavesdrop on people in the State Department arguing about policy or debates in the Department of Agriculture about crop subsidies.

And, for most of us, whatever the theory, most of what government does might as well be labeled “top secret.” Of the work of the millions of civil servants, from the president on down to the local postal clerk, only the tiniest fragment gets broadcast to a wider audience. Most government action is visible, if at all, only to a small, select group. Of course, as we mentioned, regulations, executive orders, and drafts of regulations have to be published in the Federal Register. This is Leviathan’s diary. It is hardly bedside reading; it runs to tens of thousands of pages each year. It is, however, meat and drink for lobbyists and interest groups. They make it their business to know what the Register says—at least those parts that affect their clients. But even the thousands of pages of the Federal Register are only part of the story. Not everything that is supposed to be there is actually printed; and in any event, for most of us nonlobbyists, and for all of us in many ways, government operates quietly and without publicity. Leviathan hides in the murky depths of an ocean of law.

What is public, then, is in fact exceptional. The president’s
press conferences, debates in the halls of Congress: These are prominent examples. And trials—our subject—are another. Trial personnel are government employees; and, in criminal cases, the government (state or federal) is nominally the plaintiff. Trials, as we said, are open to the public. Most trials and proceedings, to be sure, run their course without an audience, except for family and friends. But when the case makes headlines, people—and reporters—crowd the courtroom. Headline trials are thus extremely visible. They are actually, legitimately, and blatantly public.

Another point: Today especially, headline trials are creatures of the media. So much so that we can ask whether it is the media that makes them what they are. The media mediate; they sit squarely in the middle, between legal agencies and institutions, on the one hand, and the general public, on the other. The government brings the cases, but then in a sense the media take over. They report the news about trials and other events, but they also make the news. They turn a whisper into a roar. To say that the media simply report “facts” is naïve; in a real sense, they make the facts (within limits, of course). Often enough, the noise from the media is far from rational. It is more like a street scene in the metropolis: a welter of screams, screeches, and sirens.

Increasingly, “public” means what the newspapers report, what is shown on TV, or what is blogged and tweeted about. The media expose headline trials to the public. Before the radio, there were no “broadcasts,” but the newspapers did their share. Now, with radio, television, and the Internet, ours has become a broadcast society. The “broadcasting” of trials, literally and figuratively, is essential to any understanding of the trials and their place in society. The story of headline trials is also the story of headlines.

In the next chapter, we will explore in more detail what it means for a trial to be public and look at how the public nature of trials has changed over the years. We will also look briefly at two forms of nonofficial trials: lynchings and vigilante action.
In chapters 3 through 9, we will take up the various types of headline trials and discuss them in order. We will also discuss what makes these trials significant, or notorious, or both; these issues will be discussed in chapters 10 through 14. Headline trials emerge from a specific social milieu. They are rooted in modern society—a society of mobility, in which, more than ever before, a person’s very identity can be at issue. And in more recent times, these trials have reflected the development of what we have called a celebrity society. Many of these trials, as we said, have celebrity defendants or celebrity victims (think of the trial of Charles Guiteau, for example, who shot President Garfield). And, as we said, big trials also create celebrities; if the trial makes enough of a splash, the participants all become celebrities themselves.

These then are the main themes of this book; they will be explored and expanded in the coming chapters.