Round Two

RUSH TO JUDGMENT: A Critique of the Warren Commission's Inquiry. By Mark Lane. Introduction by Hugh Trevor-Roper. 478 pp. New York: Holt, Rinehart & Winston. $5.95.

THE OSWALD AFFAIR: An Examination of the Contradictions and Omissions of the Warren Report. By Léo Sauvage. Translated by Charles Gaulkin from the French, "L'Affaire Oswald." Illustrated. 418 pp. Cleveland and New York: The World Publishing Company. $6.95.

By FRED GRAHAM

SOME law professors stage a "murder" each year to teach the first-year students the facts of life about eyewitness testimony. Without warning but in full view of the class, there is a volley of shots, screams, a stricken victim and a fleeing gunman. Detailed descriptions of the incident are immediately taken from a half-dozen students—and always their stories are astonishingly different.

The teachers' point is that eyewitness testimony is far less reliable than it seems to be. Since forensic fact-finding must necessarily rely heavily upon eyewitness testimony, the future lawyers are taught early that the "airtight case" is a fiction and that inexplicable inconsistencies will appear in almost every trial.

Those who saw the films taken immediately after the assassination of President Kennedy, films taken by television cameramen in the bus that followed the Presidential limousine, had an opportunity to see this phenomenon in action. There was a blur of cars racing, people scattering, and suddenly a brief focus on a woman and her child, stretched out in the open lot across from the Dallas School Book Depository building, fully exposed but not knowing which way to run for protection. If she was so confused at that moment, it was easy to predict that the scene would be difficult to reconstruct later.

This inability of people to tell what has happened in their presence explains the did-they-convict-the-wrong-man books that inevitably follow famous trials. In any court transcript will be found inconsistencies, omissions and mistakes to support the proposition that the person who paid for the crime—be he Bruno Hauptmann, Julius and Ethel Rosenberg, Sacco and Vanzetti or Dr. Sam Sheppard—was the victim of a terrible injustice.

This was particularly true of the eyewitness reports of the Kennedy assassination and its aftermath. The confusion and contradictions in witnesses' statements to the press and the Warren Commission provided the grist for the first round of books and articles (by Thomas Buchanan, Sylvan Fox, Hugh Trevor-Roper, Bertrand Russell and others) that appeared soon after the assassination.

But these tended to be inaccurate and improbable in their conclusions

MR. GRAHAM is a lawyer and the Supreme Court correspondent for The New York Times.

NYT - BOOKS - Sun 6/28/66

and were largely discredited. This summer, however, a second round of books has come out, based upon more research and reflection, and concentrating primarily upon alleged shortcomings in the performance of the Commission itself. They are "Inquest," by Edward Jay Epstein, "Whitewash," by Harold Weisberg, and these books by Mark Lane and Léo Sauvage.

Next year, the commission will apparently win a round when a former Yale instructor named Jacob Cohen is scheduled to publish a favorable book. Yet another round will be in order when the National Archives declassifies the Commission's papers.

The most interesting and definitive assassination study of all may be the one commissioned by the Kennedy family only four months after the Warren Commission was created. It is being written by William Manchester of Wesleyan University, and is expected to be published next year.

Why the Kennedy family, before seeing the Warren Report, decided to produce a Manchester report, is an intriguing question, but it may well happen that the Kennedy connections will enable Mr. Manchester to produce evidence that will answer some of the questions now being raised about the Warren Commission's conclusions. For instance, Robert F. Kennedy is reliably reported to have suppressed the color pictures and X-rays taken during the autopsy (probably for reasons of taste). If these are made available to Mr. Manchester, he could probably settle the doubts over whether the shot that hit President Kennedy in the back passed through and out the neck, as the Commission decided.

But at this point, it is clear that the second round of books has seriously damaged the Warren Commission's prestige. Much of this criticism is undeserved, but it is probably inevitable, because the Warren Report has highlighted some limitations of the forensic method of truth-finding that the secrecy of the jury room has tended to obscure. Unlike a jury, the Warren Commission had to publish a detailed account of the crime (primarily from eyewitness testimony), and then explain why certain evidence was accepted and other evidence rejected.

It has been assailed for concluding that Oswald was guilty, and then rejecting testimony inconsistent with that conclusion. All juries must do this, of course, when the over-all evidence convinces them of a person's guilt, despite the fact that on certain points the defendant's evidence is stronger.

But the jury confounds its critics with an inscrutable "guilty, as charged" verdict, while the Commission had to justify its conclusions in print. This gave Mr. Lane and Mr. Sauvage the opportunity to hammer away at such weak points as the experts' difficulty in matching the assassin's shooting speed with Oswald's sluggish bolt-action rifle, Oswald's poor marksmanship record, this rifle's faulty sight, and the doubts as to whether the recovered slug could have inflicted the wounds on both President Kennedy and Governor John B. Connally Jr.

Yet against the broad proof of

The assassination site immediately after the shooting, as the Kennedy motorcade raced to Parkland Memorial Hospital.

Oswald's ownership of the rifle, his palmprint on the rifle, the three used shells from his rifle found near the window, the recovered slug traced ballistically to his rifle, his presence in the Depository building, his flight after the shooting, his murder of Officer J. D. Tippit, his resistance when finally caught, his personality, and the lack of evidence pointing to any other possible assassin, the Warren Commission had no choice but to smooth over the inconsistencies to the extent possible and brand Oswald the lone killer.

However, the Commission has been justifiably criticized for some defects that could have been avoided. Mr. Lane and Mr. Sauvage make a strong case that the Commission should have admitted an adversary counsel, that it should have employed independent, non-Governmental investigators, that it should have taken more time, and that it might have functioned better under the direction of a full-time expert, rather than a panel of part-time dignitaries. These flaws in the Commission are unfortunate, because the recent criticism of the Commission itself may confuse the public and create the mistaken impression that the Commission's conclusions have been disproved.

It is ironic that Mr. Lane is able to score so heavily against the Commission, because he was a key figure in the Commission's decision to forego any effective adversary voice in the proceedings. In retrospect, this was the false turn that led to much of the Commission's present embarrassment. It was left free to gloss over the hard *(Continued on Page 28)*

questions, and now that the gloss is wearing thin it is too late to get satisfactory answers.

Mr. Lane, a New York attorney, was retained by Mrs. Marguerite Oswald to represent her dead son's interests before the Commission. It turned her down, and Mr. Lane's conduct created the impression that this was probably a wise move. Mr. Lane noisily demanded a public hearing (the others were secret), at which he made wild charges, based upon information from sources he would not disclose. But he had raised a sensitive point, and the Commission appointed as Oswald's representative the President of the American Bar Association, Walter E. Craig, who did almost nothing.

Mr. Lane's book is thus a brief for the defense—the case he would have made, had he been permitted to represent Os-

wald. Unlike his testimony, it is well-documented, persuasive and restrained. As a professional advocate, he does not have to believe or claim that Oswald was actually innocent, but instead presents a powerful case for the proposition that the Commission committed numerous errors in admitting, evaluating and excluding evidence. He concludes that Oswald's guilt has therefore not been proved beyond a reasonable doubt.

Mr. Sauvage, American correspondent of Le Figaro, was one of the foreign journalists who observed the early days of the investigation in Dallas. He found the casual mien of the Dallas police so unsettling that he developed a deep suspicion of the authorities' version of the events, so that his

MR. SAUVAGE does give an insight into the prejudices about America that made it so difficult for Europeans to believe that no conspiracy existed. With only his deep prejudice against white Southerners to support him, he suggests that there were two conspiracies: one by white supremacists to kill the President and another by the Dallas police to eliminate Oswald and avoid an embarrassing trial.

It is significant that the critics cannot get together on an alternative to the Warren Commission's conclusions. Those who have postulated a conspiracy (Sauvage, Buchanan and Richard H. Popkin) disagree as to its nature. None of them faces up to the two facts that the Commission found so persuasive: that Oswald got his

less one is prepared to believe that Oswald became involved in an assassination plot (either as a conspirator or a fall-guy) and subsequently had the luck to have a Presidential motorcade pass beneath his window.

All four books cite statements by witnesses suggesting a possible second rifleman: that the shots appeared to some to come from a knoll opposite the Book Depository, that a rifleman was seen in a window other than the one used by Oswald, that a man resembling Oswald was whisked away from the scene by people in an automobile, etc.

book tends to waste its impact by being too quick to reject official explanations. He damns the police, the District Attorney, the Commission, J. Edgar Hoover and his F.B.I., and most other critics of the Warren Report — in each case, probably more than they deserve.

Both authors use material dug up in Dallas by themselves and others. Dallas residents must have been amused at these self-appointed sleuths poking about the city: Mr. Lane mentions 13 who journeyed to Dallas, including one lady who made a family vacation of it. These investigations produced some colorful sidelights (such as Mr. Lane's report of the high incidence of murder, suicide and other misfortunes among witnesses and reporters involved in the Jack Ruby case) but nothing to contradict the Commission's findings.

job at the School Book Depository on Oct. 15, a month before anybody in Dallas knew there would be a Presidential motorcade; and that no physical evidence was found on the scene to suggest that any other person was involved.

The conspiracy theories have been based largely on four eyewitness reports: that a man introduced as "Oswald" and resembling him told an anti-Castro Cuban leader that President Kennedy should have been assassinated (Sept. 1965); that a skilled rifleman with a telescopic sight who resembled Oswald shot at others' targets at a Dallas rifle range (Sept. 28, Nov. 10); that a man named Oswald told a car salesman he would soon be coming into some money (Nov. 9); and that a man who gave the name "Oswald" had a scope mounted on a rifle that was not the Italian type found at the assassination.

The accuracy of these reports is challenged in each case, but they are also contradicted by logic. Dallas citizens were told of the motorcade on Nov. 15, and the exact route was not released until Nov. 19. So these incidents are meaningless un-

But no physical evidence of another assassin was found—another rifle, used shells, spent bullets, fingerprints—in a situation in which Oswald left many traces and another assassin could hardly have escaped without doing the same.

It is clear that any jury, faced with the material before the Warren Commission and in these books, would easily convict Oswald of murder.

Unfortunately, many people may confuse the doubts about the commission with doubts about its conclusion. One of the earliest and most perceptive critics of the Warren Commission, Paul L. Freese of the California Bar, remarked in the Columbia Law Review that the commission was vulnerable because its real task "was not to find the truth but to appear to have found the truth."

The pity is that it may have done the opposite. end