Excerpted from THE TRIAL OF JACK RUBY (A Classic Study of Courtroom Strategies), by John Kaplan and Jon R. Waltz©66The Macmillan Company, NY, 1965.

Background of authors:

Kaplan: Prof. of Law at Stanford U., specializing in criminal law and evidence. Graduated Harvard College and Law School, where he was editor of Law Review; served as law clerk to Sup. Ct. Justice Tom C. Clark. Prior to teaching, most of professional career spent in Criminal Div. of Dept. of Justice and as asst. US Atty. in San Francisco. In 1962 became Prof. of Law at Northwestern U. School of Law in Chicago. Three years later, after year as visiting Prof. of Law at U. of Calif. at Berkeley, joined faculty at Stanford. 35 years old.

Walts: Graduate College of Wooster and Yale Law School; editor of Yale Law Journal. As member of trial dept. of law firm of Squire, Sanders & Dempsey in Cleveland, Ohio, for 10 years was actively engaged at both trial and appellate levels in civil and criminal matters, usually as counsel for defendant. Now Prof. of Law at Northwestern U. School of Law and litigation consultant to large Chicago law firm. 35 years old.

p.103 ..... Although the prosecution made no retort when referred to by Joe Tonahill as "persecutors," they did retaliate against Belli's and Tonahill's mispronouncing of Jim Bowie's name as "Boy" by referring to Melvin Belli as "Mr. Belly."

In one way the disorder of the jury selection was somewhat less pronounced than that ofothe venue hearing. Although it had been augmented by reporters sent in to cover the trial and the picking of the jury, the press corps seemed somewhat better behaved. Their interviews with the defendant had been stopped on the orders of Judge Brown, over the protest of Joe Tonahill, who complained that Ruby "had his constitutional right to free speech," and the number of reporters who charged down the aisle to interview the participants in the trial seemed smaller. Only one subtle effect of the press coverage appeared undiminished from the venue hearing: Just before the deadline of each morning and afternoon newspaper some disturbance even greater than usual would erupt.

p.112 ..... While it cannot be definitely established, it seems likely that Melford's conduct had not come as a complete surprise to Judge Brown. The Dallas public-relations firm which had been hired to assist in the distribution of Melford's material had requested an okay from Sheriff Bill Decker before commencing the undertaking. The desired clearance had been granted.

Maurice Melford exerted a far more significant influence on the course of the Ruby case than either Belli or the general public realized. Educated at the University of Illinois School of Journalism, he had become a public-relations counsel and later national director of the Epilepsy League, Inc. Not an epileptic himself, he was nonetheless powerfully committed to the cause of public education concerning the much-misunderstood disease. When the outlines of Melvin Belli's defensive strategy were publicly revealed during the second bail hearing, Melford had lost no time in offering his assistance to the prosecution team. Fearful that Belli would distort the role of Ruby's possi

epileptic condition, Melford had provided Henry Wade with the names of a number of respected neurological experts who could be expected to dispute not only the Towler-Gibbs diagnosis but also its very foundation, the Gibbs theory of the psychomotor epilepsy variant. Three of the experts suggested to Wade by Medford were called as prosecution witnesses at the Jack Ruby trial. They were Dr. A. Earl Walker of Johns Hopkins University, Dr. Francis M. Forster of the University of Wisconsin and Dr. Roland Mackay of Northwestern University.

Although Maurice Medford had returned to Chicago after his organization's abortive effort to educate the news media concerning epilepsy, he did not remain away long. He flew back to Dallas in the company of Dr. Roland Mackay and stayed there inconspicuously until the jury's verdict had been announced. Much of Assistant District Attorney William Alexander's subsequent effectiveness with the medical witnesses who testified for and against Jack Ruby was directly attributable to the counseling of Melford and the three doctors recommended by him.

pp.114/5 Henry Wade and his assistants looked ahead with equanimity to the trial which was to begin the next day. Not only did the prosecution have a jury which suited it perfectly, but it was fully prepared to cope with any surprise witnesses the defense might attempt to produce. The crime itself had been the most public in history and the investigation that had followed had been perhaps more thorough than any before in our nation, with efforts of the Dallas police being supplemented by the vast investigatory resources of the FBI as well as several other federal investigative agencies. FBI agents had interviewed every person to whom Ruby had talked between the assassination of the President and the shooting of Oswald, and they not only questioned friends from Ruby's youth but had followed his entire life history. They had audited Ruby's books, bank accounts and tax returns; they had investigated his employees and business associates, and examined the telephone-company records of not only Ruby's and his family's calls but of all those who had received a call from Ruby or his family. And they had checked out an enormous number of reports and rumors that came to them from a wide variety of sources.

Moreover, although local law enforcement officers generally complain that cooperation with the FBI is a one-way street - that they give great amounts of information to the FBI and receive little in return - in this case the FBI made a great deal of information available to the prosecution. (Though not, the prosecutors contended, as much as they were entitled to, considering the cooperation shown the FBI by the Dallas authorities.) In the officers of the United States Attorney, Barefoot Saunders, Assistant District Attorney Frank Watts was permitted to inspect some four thousand pages of FBI interviews, and while he was not permitted to take these reports from the U.S. Attorney's office, he did digest them into a 350-page book. This book, which lay on the prosecution counsel table during the entire trial, contained statements by almost all of those called as witnesses - for the defense as well as the prosecution. It had been invaluable for locating prosecution witnesses and, even more important, would be used again and again to contradict defense witnesses with statements that they had made to the FBI in the days shortly after the shooting of Oswald.

The prosecution felt itself well armed in the medical phases of the case, as well as the purely factual ones. At first they had complained that although Dr. Towler's report was completed, the district

attorney's office had not been able to obtain the copies of the actual electroencephalographic tracings. During this period they had been concerned, though not too worried. If it turned out that the tracings conclusively supported Dr. Towler's view that Ruby was afflicted with psychomotor epilepsy, they would be forced to fight on the sole ground that Ruby had not in fact suffered an epileptic attack at the time of the shooting. Although they were prepared to do this, they could hardly feel comfortable with only one string in their bow. Eventually their insistent demands that the judge make the actual tracings available to them produced results. Judge Brown agreed to have a Texas state trooper pick them up from Dr. Towler in Galveston. Immediately after receiving the two shoeboxes which contained the results of Ruby's electroencephalographic examination, the prosecutors made copies of the wavy tracings and sent them for examination to several of the nation's most prominent specialists in epilepsy. Jim Zimmermann, a thirty-one-year-old former Office of Strategic Intelligence agent and an assistant district attorney for two and a half years, took one set of copies to Houston, New York and Baltimore, while Bill Alexander departed for Chicago and Madison, Wisconsin, with another. Just to make sure that the defense staff would not find out what was going on, Henry Wade allowed rumors to be spread that he had been dissatisfied with Alexander's work at the change-of-venue hearing and was keeping him out of the way of the jury during part of the voir dire. When Alexander and Zimmermann returned to Dallas, they found that every one of the medical experts they had contacted had agreed, after examining the EEG tracings, to testify for the prosecution.

Except for a nagging feeling that the psychomotor-epilepsy defense was so simple and so wrong that it must be a cover-up for some brilliant stroke by Belli - a feeling which lasted until the very end of the case - the prosecutors sat back confidently awaiting the beginning of the trial.

p.117 ..... On the obvious ground that it came too late, Judge Brown denied the motion for the separate trial on the issue of Ruby's present insanity and instead at the end of the trialinstructed the jury that it might find Ruby presently so insane as to have been unable to cooperate in his defense.

..... Here again, though the defense would have been entitled to a separate jury trial on the issue of Ruby's insantiy at the time of the crime, their motion was clearly too late. The jury had already been picked after a lengthy voir dire on issues, including opposition to capital punishment and the presence of a fixed belief as to whether Ruby had shot Oswald, which were completely irrelevant to the question of Ruby's insantiy. If the demand for a separate trial on insanity were granted, a new qury would have bo be picked, while the jury already selected would have to be sent home to be called back only if the insanity trial resulted in rejection of the defendant's claim. The court was not obligated to allow this disruption when the motion could as easily have been filed before any jury was impaneled.

pp.128/Bill Alexander's next witness, T. B. Leonard, a lieutenant in
9 the Burglary and Theft Bureau of the Dallas Police Department, continued the procession of preliminary evidence. At about 11:30 that Friday night, he testified, District Attorney Wade was having a press conference in the police assembly room in the city hall. The place wa crowded and the scene was one of great confusion as reporters milled about seeking stories. Jack Ruby was there with a notebook in one han and a pencil in the other. Someone called to him, asking him what he was doing there, and he had first said, "I brought the sandwiches."

pad and pencil, he said, "I'm a reporter tonight." A short while later Oswald had been brought in and Leonard had not noticed Ruby after this time.

(Note: Lt. Leonard was not a witness before the Commission. While my recollection may be in error, I have no recollection of an exhibit of Jack Ruby's notebook in which there were any notations applicable to this testimony.)

p.134/5 ..... Then while Bill Alexander scrupulously avoided any questions which might be thought leading, Leavelle told his story:

A: Well, there was a man came from the crowd of reporters and photographers and police officers too, I assume, and up to in front of myself, Mr. Oswald and Mr. Graves.

Q: Now what, if anything, first attracted your attention to this man?

A: When he first dashed from the crowd, I saw that he had a pistol in his right hand, and he was raising it up in preparation to shoot.

Q: Will you stand up and demonstrate to the jury the manner in which he raised his hand?

A: It came up from his side when I first saw it, like this.

Q: All, right. And after that pistol came up into your view, what, if anything, did you do?

A: I reached to try to catch the man by the shoulder, and did succeed in catching him by his left shoulder.

Q: All right. Now, would you estimate for us how many steps the man took after you first saw the gun in his hand?

A: To me it appeared that he took two quick steps.

Q: And at the end of these two quick steps, what are the facts as to whether or not he fired the gun?

A: Yes, sir; that is correct. He did.

Q: And what, if anything, did Lee Harvey Oswald do or say when the gun was fired?

A: He grunted and hollered and said "Oh" and slumped to the floor.

(Note: This testimony is either wrong or false. Compare it with famous Jack Beers' picture on back cover and in Report.

And why should Leavelle have taken Oswald back into the jail office to work on him since he is not a doctor? There was a police car waiting and they could have had Oswald at the hospital by the time the ambulance got there.

If the shooting happened at 11:21, there was a full 10-minute delay (p.188) before the call for the ambulance was made at 11:31. The trip to the hospital took less than 4 minutes (p.188).)

p.143 After a short while on the jail floor, Ruby had been hustled into the elevator and up to the fifth floor to the upstairs jail office. Henry Wade asked, "What, if anything, did Ruby say at that time?" and again the defense attorneys objected, but on the district attorney's assurance that "this is a matter of a few minutes," Judge Brown overruled the objections and held the testimony admissible.

Archer then related that he had said to Ruby, "Jack, I think you killed him," and that Ruby had replied, "I intended to shoot him three times." The district attorney quickly finished the direct examination and passed the witness to Melvin Belli.

p.166 ..... Henry Wade had wanted very much to introduce two pieces of evidence seized by the police - one a copy of a radio talk

on "heroism" found in Ruby's car and the other the Western Union receipt for a twenty-five-dollar money order found in his pocket - but somehow these bits of evidence were misplaced by the Dallas police and Wade was unable to find either one.

p.267 ..... it was Hubert Winston Smith - chancellor of the Law-Science Academy of America and himself both a lawyer and a physician - who initiated the New York psychiatrist's entry into the Ruby case by recommending him to Belli.

p.314 Alexander then reached the prosecution's main hurdle in the Ruby case.

I have seen enough to know that any time a jury is considering a murder case, the first question they are going to ask is, "Should the deceased have departed?" I know that.

I am not going to defend Oswald to you. But I tell you this, American justice is on trial.

American justice had Oswald in its possession.

The Dallas Police Department had Oswald in its possession.

Oswald was entitled to the protection of the law, until the law chose no longer to protect him and to punish him.

Oswald was a living, breathing, American citizen, whatever he may have done. He was entitled to be tried in a court of justice.

p.332 This was the time to convince the jury that any feelings of outrage against the defendant could just as effectively be expressed by a long prison term as by the death penalty, especially since - regardless of their views on Ruby's legal insanity/- the jurors could have no doubt that the defendant was not a wholly normal person. With but a few words Belli could have started the jury thinking about an entirely different consideration which did not in fact occur to them. He might have used a version of the argument with which the New York attorney James B. Donovan, defending the Russian spy known as Rudolf Ivanovich Abel, saved his client from the death penalty. Donovan argued not that his client deserved anything less than death, but that it was important to keep him alive so that he might be of use to us. Similarly Belli might have pointed out that if the jurors caused the execution of Jack Ruby, they would be sealing his lips just as effectively as he had sealed Oswald's. Belli, while maintaining that, in fact, there were no sinister reasons for Ruby's violent act, could at the same time have pointed out that history takes many strange turns and that there might come a time in the future when a living Jack Ruby - able, perhaps, to refute rumor and gossip - might be of value to the nation.

This is not to say that this argument would inevitably have won the jury over, although interestingly enough Donovan's argument - save the man's life because he may be useful to us later - was not only successfull but correct. Abel, sentenedd to thirty years in prison instead of death, was subsequently exchanged for an American prisoner held o by the Russians, U-2 pilot Gary Powers.

p.340 ..... A crowd of reporters surrounded Melvin Belli, who, as he himself later recounted the scene, "said that Ruby had been railroaded, . . . that the jurors had made Dallas a city of shame forevermore. My words were bitter, contemptuous of court and city, yet I stand by every one of them. American justice had been raped - outraged - and, shouting and in tears, I was its spokesman there." Belli also insisted that he had not spoken out of pure anger but in great part because there

was a large collection of foreign newsmen there and he considered it his patriotic duty to make sure they understood that American justice was not always what they had seen in Dallas.

pp.343/4 Shortly after the departure of Percy Foreman, Dr. Hubert Winston Smith, the attorneyiand physicisn who had acted as Melvin Belli's medical adviser from the beginning of the Ruby case, took over as chief counsel. Instead of the usual short retainer agreement, Ruby and Dr. Smith aigned a most unusual, if not unprecedented, six-page contract. After pointing out that the Ruby case posed "a supreme challenge in the field of 'The Proofs of Science and the Science of Proof' to which Dr. Hubert Winston Smith has devoted his life, individually . . . and through the Law-Science Academy of America, a nonprofit, charitable organization made up of more than 800 leading trial lawyers, judges, physicians and scientific specialists which Dr. Smith leads as Chancellor," the agreement set forth its signatories' undertaking to discover and make known "the complete and additional true facts," Dr. Smith agreed to conduct "an exhaustive drag-net medico-legal and scientific analysis of the Ruby case from cellar to garret" - all without fee.

Dr. Smith also agreed that "there shall be no disparagement of Dallas, which is the home of Dr. Smith's mother and sister," and no "public criticism of courts or juries, nor of prior counsel." Jack Ruby agreed that, upon any retrial, if Dr. Smith "deem it wise," he would "take the stand and waive his privilege against self-incrimination and his rights of secrecy under the Attorney-Client Privilege." In addition to Dr. Smith, the agreement was signed by Joe H. Tonahill, Phil Burleson, Jack Ruby and Jack's sister, Mrs. Eva Grant.

On April 27, 1964, Dr. Smith filed in Judge Brown's court a motion requesting that the defendant be hospitalized immediately and that an inquiry into his present sanity be conducted. In this motion Dr. Smith also requested that Ruby ~~ERxREEM~~ be permitted to undergo hypnosis and the administration of sodium pentothal, the so-called "truth serum," in the hope that significant information buried deep in his subconscious might be uncovered. This sort of testing had been "neglected" prior to Ruby's trial, said Dr. Smith, "through no fault of Defendant's counsel."

pp.345/6 In view of his "unexpected discovery" that the defendant was presently psychotic, Dr. West had abandoned any effort o by means of "special examination" to probe Ruby's mental status at the time of Lee Harvey Oswald's slaying. The psychiatrist's report concluded with an urgent recommendation that Ruby be hospitalized immediately. He termed him "actively suicidal" and urged that appropriate precautions, including ~~them~~ close observation, be undertaken. His prognosis was "fair, if proper treatment is promptly instituted." Although it suggested the possibility of organic brain damage, Dr. West's report included no reference to psychomotor variant epilepsy or, for that matter, episodic dyscontrol.

Dr. West was not the only psychiatrist to comment on Ruby's mental condition. Within a few days of West's examination two other psychiatrists, both appointedoby Judge Brown, had turned in their re-ports. Dr. Robert L. Stubblefield, who had testified for the prosecu-tion at the trial, interviewed Ruby twice and described the "depressive and paranoiac trends of Mr. Ruby's behavior." He diagnosed Ruby as being "severely emotionally disturbed." "If this behavior pattern per-sists," he said, "it will be necessary, in my opinion, for me to recom-mend to you the possibility of a hearing to consider a trial by jury o the question of Mr. Ruby's sanity."

The report of the other psychiatrist, Dr. W. R. Beavers, was similar to Dr. Stubblefield's. Dr. Beavers reported that Ruby was actively hallucinating and that he was a suicidal risk. "If this patient were without criminal charges," Dr. Beavers stated, "it is my opinion that he should have immediate ppsychiatric hospitalization and close observation because of the possibility of a suicidal attempt." Ruby was, he said, "acutely mentally ill." Again no mention of psychomotor variant epilepsy was made.

On Monday, April 28, Judge Brown denied the request that Ruby be hospitalized but announced that he would convene a full-saale sanity trial "at the first suitable date." Under Texas law the sole function of the sanity trial would be to determine Ruby's sanity subsewuent to his trial. Texas law provides a jury trial for this purpose and specifies furthar that if a defendant is found insane, his appeal will remain in abeyance until either he recovers his sanity or his attorneys elect to have the appeal heard regardless of his mental condition. The basic purpose of such a sanity hearing is tied up with the fact that in both England and the United States an insane person may not be executed. This rule was originally justified on the theory that the condemned man's insanity precludes his making his peace with God and preparing his soul for the hereafter. Now, in our secular age, the same rule is defended on the ground that his insanity might prevent him from presenting a meritorious ground for setting aside his conviction. Since the courts are open to him until the last moment, it is argued that the state must allow him every possible opportunity to avoid execution of the death sentence even when it means postponing the execution until he has recovered p his sanity.

On the day following his granting of the defense's motion for a sanity hearing, Judge Brown denied the motions for a new trial - by now there had been three of them: the original and two amended motions. Once the new-trial motions were denied, the appeal could proceed, and on that same day the defense formally noted its intention to appeal to the Texas Court of Criminal Appeals at Austin. One week later Dr. Hubert Winston Smith informed o Judge Brown that "economic necessities" compelled him to withdraw from the Ruby case. Dr. Smith asserted that he had been advised that he would not be included in the budget of the University of Texas Law School for the coming year unless he halted his activities on behalf of Jack Ruby.

While the Ruby family and its attorney searched for yet another chief counsel, Jack Ruby was being treated for mental illness in his maximum-security cell in the Dallas County Jail. Dr. Stubblefield had advised the judge that Ruby's mental condition "should yield to treatment," and the judge told newsmen, "I believe i they're giving him happy pills or something. Things so far indicate a sanity hearing." The district Attorney's office did not dispute the belief that Ruby needed medical treatment. "It's my understanding," District Attorney Wade remarked, "that Ruby needs some kind of treatment. He's been under a strain, sitting up there knowing he's been sentenced to the electric chair." This "death-house psychosis," Wade added, was "not uncommon" in persons awaiting execution.

On Sunday, June 7, while the search for a chief counsel continue Earl Warren, the Chief Justice of the United States and the chairman of the President's Commission on the Assassination of President Kennedy, took Jack Ruby's testimony in the Dallas County Jail. Ruby's testimon rambling and at times almost unintelligible, lasted three hours and fi minutes. It was all a very odd specyacle. Ruby dominated the hearing occasionally inquiring of the nonplussed Chief Mustice, "Am I boring

p.350 On July 18, 1964, it fell to his (Clayton Fowler, then president of Dallas County Criminal Bar Association) lot to attend the polygraph - lie detector - test that was given to Ruby in the Dallas County Jail by two FBI agents. Earl Ruby, Sol Dann and Fowler had several times agreed that Jack Ruby should not take a lie detector test and Fowler on a number of occasions had advised his client against submitting to such an examination. Fowler, however, had received no advance notice of the arrival of the FBI agents, who were accompanied by an assistant counsel to the Warren Commission. Sheriff Bill Decker telephoned him that the polygraph team had arrived at the jail, and since it was a Saturday afternoon, Fowler felt it was too late to try to find a judge who might enjoin the test. Moreover, Jack Ruby was determined to proceed. He told Fowler, who had rushed to the jail, "By God, I'm going to take the test!" And he did. During a break in the questioning, Fowler telephoned Eva Grant and told her what was happening. She in turn telephoned attorney Sol Dann in Detroit. Dann then telephoned Fowler, advised him that he was fired for not stopping the lie detector test, and stated that he would file assault and battery charges against virtually everyone associated with the test. Fowler countered by informing Sol Dann that he was fired.

p.353 Bellows was fully familiar with the Escobedo case; he had successfully represented a co-defendant of Escobedo whose confession was held inadmissible before Escobedo's own case reached the United States Supreme Court. Bellows realized that although some of the language in the Escobedo opinion was helpful to Ruby since he clearly had not been warned of his right to remain silent before he made his statements, it was still an open question whether the remarks made by Ruby after his arrest would be held inadmissible on appeal. First of all a majority of the Supreme Court might refuse to apply the broad language of the Escobedo opinion to a case in which the questioning had taken place over such a short time and in which the accused had neither asked for a lawyer nor been denied one.

In addition, although the trial evidence did not in any way reflect this, there might be a serious problem in convincing an appellate court that Ruby's statements had been made during a "process" whose "purpose" (was) to elicit a confession." The alleged statements testified to by Sergeant Dean were made to a Secret Service agent who was interested not in getting a confession to the murder of Oswald but only in finding out whether Ruby had had anything to do with the assassination of President Kennedy. ....

p.354 Bellows and the team he headed were not the only lawyers seeking the reversal of Jack Ruby's conviction. Melvin Belli was also trying to do his bit for his former client. He traveled throughout the country lecturing, giving press conferences and appearing on television, denouncing the "Oligarchy" of Dallas, the trial of Jack Ruby and the "rape" of the common law. Again and again he referred to the "kangaroo court" which had convicted Ruby and asserted that "Joe Brown didn't walk to the bench each day, he hopped." (The Australian Law Journal, in an article entitled "Due Process and the American Criminal Trial," felt it necessary to point out that "Mr. Belli's reference (to a 'kangaroo court') was in no way intended to disparage Australian criminal proceedings. . . .")

p.358 The judge was particularly aggrieved by the first of the motions - asking him to disqualify himself. Phil Burleson had learned, to his amazement, that Judge Brown was writing a book about his partici-

pation in Jack Ruby's trial and that it was scheduled for publication in a few months. As the defense attorney put it,

(T)he preparation, publication and sale of the aforesaid book will be directly affected by the outcome of and this Court's decision during . . . the sanity hearing ..... in that Defendant is the subject matter of such unfinished book and such matters presently before the Court could serve as an additional chapter in said book.

This book, Burleson argued in his written motion, gave Judge Brown a personal and pecuniary interest in the impending proceedings. "The decisions of this Court," he said, "could be influenced by the anticipated effect such decisions would make on the sale and profits of said book." Burleson had a point: whether or not he would in fact be influenced in his decision by its effect on the sales of his book, it is hardly appropriate for a judge to have a financial interest in the decision of a case before him. It is strange enough for a judge to make public announcements about a case he has tried, but to do so in book form while the case is still on appeal is unprecedented. Here, where the case might still be before Judge Brown at the time his book was published, the situation was grotesque.

p.362 ..... The exact reason for Judge Brown's change of heart will never be known. One can, however, hazard a guess that the judge's decision had something to do with a document which had fallen into the hands of Ruby's lawyers. It was a letter from Joe B. Brown on his official court stationery, dated March 12, 1965, to an editor of Holt, Rinehart & Winston, Incorporated, the New York publisher of the judge's projected book. In this most unusual letter, Judge Brown said:

About the book - It perhaps is a good thing that it is not finished, because they have filed a Motion to disqualify me on the grounds of having a pecuniary interest in the case. I can refute that by stating that there has been no book published or that I have not begun to write a book.

We are coming along nicely. We have approximately 190 pages complete. . . .

Perhaps equally embarrassing to the judge was his comment that:

As o you probably read in the papers, the Court of Criminal Appeals tossed the case back to me to determine Jack Ruby's sanity. . . . I . . . don't know the outcome o but it is my opinion that they will never prove Ruby insane. . . .

p.363 ..... (In fact, although layman Ruby could not be expected to know this, it is almost impossible to think of any issue on which the President's widow could have testified at the trial of Oswald. There could be no doubt that her husband had been killed, and she apparently had no information on any other isaue in the case.)

p.364 The litigation over Jack Ruby will not end with a determination of his present mental condition or, for that matter, with a decision of the Texas Court of Criminal Appeals. If Ruby's conviction is reversed, the state will quickly bring him to trial again unless his mental condition requires a postponement until he can cooperate intelligently with his counsel and aid in his defense. On the other hand, if the conviction is affirmed, Ruby's attorneys, having had their appeal the highest state court with criminal jurisdiction (the Supreme Court of Texas has jurisdiction over civil cases only), can then attempt to

secure review by the Supreme Court of the United States, claiming that the Texas trial court denied their client some right granted him by the United States Constitution. If this effort fails and the Supreme Court either declines to hear the case or, having heard it, rules that the points presented do not merit a reversal, one might think that the process of review would be at an end. It will, in fact, have baregly begun.

After this procedure, known as the direct review, is complete, Ruby will have the right to embark upon what is called "collateral attack" on his conviction. First, he can petition the Texas court of the district where he is imprisoned to order his release on a writ of habeas Corpus. Ruby can allege that his conviction was defective because of some violation of his constitutional rights, such as the admission into evidence of a coerced confession, inadequate assistance of counsel, knowing use of perjured testimony by the prosecution, or his own insanity at the time of trial. To none of these issues is the transcript of the trial conclusive, and additional testimony can be taken to resolve them. If the state trial court denies the petition for habeas corpus, Ruby can appeal to the Texas Court of Criminal Appeals again, and if this is unsuccessful, ask a second time for review of the United States Supreme Court.

p.367 Many people were disappointed that his trial shed so little light on the motive underlying Jack Ruby's crime. In all probability their expectation was unrealistic from the outset. The rules of evidence, for a variety of reasons, sometimes reject testimony which is relevant and probative; and the adversary system, which insures that the only evidence produced is that tendered by the parties, often leaves large areas of the case unexplored because neither side has felt it tactically prudent to expose them. Moreover, aside from the question of sentence, the main issues at Jack Ruby's trial were whether he was insane and, if not, whether he committed the murder of Oswald with malice. The definition of insanity is so narrow and that of malice so broad that Ruby could have had a wide variety of motivations while being sane and acting with malice within the meaning of Texas law.

p.368 Other conspiracy theories have been advanced and it isprobably only a matter of time before some imaginative historian stumbles on the conclusion that Ruby did not kill Lee Harvey Oswald after all. Presumably he will contend that the fatal shot o was fired by someone else in the crowd while all attention was riveted on Ruby's diversion. To support this view he may point out, quite correctly, that no evidence at the trial connected the bullet which killed Oswald with Ruby's gun, and that although there was testimony that Oswald's side showed a circular powder burn and a bullet hole, there was no testimony that the bullet hole was <u>within</u> the circle.

p.370 A more important question by far for lawyers and for others who care about American justice is whether, aside from any technical errors of law, Jack Ruby was accorded a fair trial.

Some of the news reporters at the trial, by their very unfamiliarity with legal procedures, were able to see something which the lawyers in attendance might have completely overlooked - that the process of the trial in itself was a punishment for Jack Ruby far beyond what the jury decreed orwhat he deserved. Although Oswald may have died, undisturbed, with whatever illusions led him to his deed, Jack Ruby, before a crowded courtroom and the press of the world, was stripped of

both his self-respect and his illusions. He heard himself analyzed by his psychiatrists as a latent homosexual with a compulsive desire to be liked and respected, described by his own lawyer as the village clown, damningly quoted - untruthfully, he felt - by members of the police department in whose reflected prestige he had been happy to bask, and forced to sit as a passive witness while the attorneys, the judge and the jury fought over and decided his fate. As one of the newsmen, Edward Linn, put it, "It would have been kinder to stone him to death." And most of this was unnecessary; Ruby himself was only an exhibit at his own trial and not a very important one at that. There is no reason in law or humanity that he could not have been excused from the courtroom during the more painful episodes. The apparent deterioriation in Ruby's mental condition after the trial may be due not so much to the impending death sentence as to the trial itself. The sorry consequence might have been avoided had anyone thought of it - and cared enough to act.

But by a fair trial we do not mean a humane trial, nor do we mean merely a trial which reaches what one considered the "correct" conclusion. When we say that even the obviously guilty are entitled to a fair trial we are saying that the trial must do more than reach the right answer. Fair trial is a complicated concept which involves, at least to some, a sporting theory that even where the defendant's guilt can
p.371 easily be demonstrated, he is entitled to a chance for acquittal.

At minimum, however, fair trial implies two notions - that of equality (has the accused been given the same protection and chance of acquittal as others similarly situated) and that of rational procedure (gas there been an adherence to procedures rationally adapted to determine the guilt or innocence of the accused?). In this sense of the term it is difficult to isolate blatant sources of unfairness in the trial of Jack Ruby. Admittedly, had Ruby been an Anglo-Saxon Protestant without, as he put it at one of the post-trial hearings, "the wrong background," his chances for acquittal might have been enhanced, yet exactly how - and whether in any significant measure - is impossible to determine. Although one might be more confident of the fairness of the trial had the defense's change-of-venue motion been granted, it may well be that this feeling is merely the result ofconstant repetition of the charge that Dallas could not give Ruby a fair trial. Conceding that as a practical matter local prejudice may be most difficult to prove, the evidence presented at the change-of-venue hearing - as distinguished from naked surmises concerning the subconscious motivations of the city - fell short of demonstrating the unfitness of Dallas as a place of trial.

The great disparity in the resources available to the prosecution and the defense might also be relevant to the fairness of the trial. Still, this was not a case where the defendant, too poor to afford an attorney, was assigned an incompetent or uninterested one by the court. Ruby's chief attorney had, to say the least, an excellent reputation. Similarly, though the conduct of the prosecuting attorney staff was not in all respects in accord with the highest standards of the legal profession, criminal prosecution has always been a rough-and-tumble business, and the number of prosecution attempts to bring inadmissible matte before the jury was far exceeded by those of the defense.

On the other hand, there is no doubt that the result of the tria leaves one with an uneasy feeling. At least part of this is due to the fact that most of us would feel that, considering the nature of the crime and of the accused, the penalty imposed was too severe. And whil attainment of the right result does not guarantee that the antecedent trial has been fair, it may be true that a trial reaching the wrong re sult cannot have been fair.

The prosecutors have asserted since the trial that the jury voted the death penalty because of faulty defense tactics. No one denies that where defense counsel can properly be labeled incompetent the trial is not fair; but if we go further and hold a trial unfair because an attorney made what we feel are tactical errors, we are opening wide Pandora's box. In all cases, criminal and civil, a decision by an attorney can mean the difference between victory and defeat for his client, and it is often not at all obvious that the tactical
p.372 choice which resulted in defeat was a bad choice. We cannot be sure that a different tactic would have altered the result and even if with hindsight this appears to be true, it may well be that at the time it was made, based on the information then available, the unfortunate decision was a prudent one. In litigation, as in many other areas of life, a "correct" decision may lead to disaster, while an "incorrect" one might have carried the day. The hard fact is that our adversary system must rely to a great extent not only on both sides being represented with equal skill but also upon their having approximately equal amounts of luck.

The operation of the adversary system is not the only factor in the Ruby case that inspires uneasiness. The Ruby trial was a state case and our legal procedures are not designed for cases where all the participants - the lawyers, the judge, the witnesses and the jury - know that the eyes of the nation are on them. The processes of American justice are designdd for administration in relative o quiet and tranquillity. If in no other way, the trial of Jack Ruby was different because this atmosphere was absent. Whatever else one can say of the case, it was not a quiet one. The crowded corridors thronging with newsmen,microphones and television cameras, the countless interviews, and the realization that all concerned were enacting history influenced the participants in many obvious ways. It is not extreme to assume that there were also more subtle effects. The difficult and fundamental problem which these facts raise is that it may be impossible for the United States ever to afford in a state case a fair trial if by this we mean a trial not basically different from the usual unpublicized one.

We cannot, of course, be completely certain that the pressures of publicity in a state case affect the result. As it happened, a clue can be derived from the operation of the law in an unpublicized case which was not so very much different from that of Jack Leon Ruby. . . .

Shortly after Jack Ruby shot and killed Lee Oswald in the basement of the Dallas Police and Courts Building, another act of violence occurred in Sioux City, Iowa. There, on the afternoon of Sunday, November 24, 1963, Vaschia Michael Bohan, a forty-seven-year-old dental technician, and his mother were seated in the living room of their home watching a television program about the funeral arrangements for President Kennedy. Suddenly Bohan's sixty-eight-year-old stepfather entered the room and loudly cursed the assassinated President.

Bohan rose, picked up a pair of sewing scissors, and stabbed his stepfather six times, once in the mouth and five times in the chest. The older man fell to the floor dead and at 2:52 p.m. - one hour and thirty-two minutes after the shooting of Oswald, Bohan telephoned the Sioux City Police Department to report his crime. Two police officers arrived shortly thereafter and he surrendered without resistance.
p.373 On Monday, November 25, 1963, Bohan, like Ruby, was arraigned on a charge of murder. He pleaded not guilty and demanded a preliminary hearing. Bail was set at $10,000; it was promptly posted and Bohan was released from custody.

In December Bohan changed his plea to guilty. On the day before

Christmas he appeared in the courtroom of District Judge George M. Paradise for sentencing. The judge had pondered the accused's crime and the atmosphere in which it had taken place. Referring to the assassination of President Kennedy, Judge Paradise stated that "the entire nation was under stress and strain from the tragedy." He continued: "But that is not a reason for a citizen of the nation to release his emotions to the extent of causing another tragedy." The defendant's deed, he concluded, would weigh forever on his conscience. Then he sentenced Bohan to eight years in prison and a $1,000 fine. The judge suspended the prison sentence and ended the hearing by wishing the defendant a merry Christmas and a happy new year.

Bohan paid his fine and went home.