Trial by Fury

The Hauptmann Affirmance

by **RICHARD A. KNIGHT**

ON THE NINTH DAY of October last, the New Jersey Court of Errors and Appeals unanimously affirmed the conviction of Bruno Richard Hauptmann for the murder of the Lindbergh baby. This affirmation was met with expressions of unqualified approval from virtually the entire press of the country. The populace was likewise edified. Nevertheless, it is the object of this article to advance the proposition that the decision presents, as did the conviction before it, a monstrous miscarriage of justice bearing social implications of the gravest and most alarming character.

I have no more admiration for Hauptmann than you have and I am quite as certain as you are that, as you have repeatedly said to your friends and they to you, he *must* have had *something* to do with the kidnaping and the extortion which followed it and even with the child's death. But, in a society in which anybody is to be safe, criminal convictions may not be based upon hunches or personal opinions — not even on yours or mine. They must be based upon legal evidence and legal evidence alone. Otherwise, everybody becomes at once a potential victim of the incalculable intuitions of the mob, and there is no law or safety anywhere. So that, no matter how passionately we may thirst for the infliction of the punishment which, in our bones, we may feel Hauptmann merits, we are manifestly fools if we permit its infliction unless our feeling has been justified by competent proof. There is elemental wisdom in the legal aphorism that "courts must not let hard cases make bad law."

II

LAST SPRING, in the midst of a mob of peanut eaters in an atmosphere suggestive of a cockfight rather than of a court, Hauptmann was tried and found guilty, allegedly on circumstantial evidence, not of kidnaping nor of extortion but of murder. Now kidnaping is one thing, and extortion is another, and murder, quite distinctly, is yet a third. And in the record compiled at that trial there is no more evidence that the man is guilty of murder than there is that you are or I am.

The fundamental requirement for the sufficiency of circumstantial evidence to sustain a conviction for murder or indeed any other crime is that it must be *so strong as to exclude all other hypotheses than that of the accused's guilt of the crime as charged.* Any lawyer will confirm to you that in the whole of the criminal law there is no more elementary or perfectly settled rule than this. And there is nothing esoteric, nothing complicated about it; it is precisely as simple as it sounds. With it clearly in our minds, each of us at once becomes as well qualified to pass upon the propriety of the affirmance of the conviction by the Appellate Court as the Supreme Court of the United States is.

Now, specifically Hauptmann was charged

with murder by virtue of having, while perpetrating a burglary, *accidentally* killed the baby *on the Lindbergh premises* — a technical kind of murder, obviously, since no murderous intent is required by it to be established. In accordance, then, with the rule which I have just recited, for his conviction to have been properly sustained, circumstantial evidence not merely of the child's death but of its *accidental* death *on the premises* must not only have been introduced into the record but must have been so strong as to *exclude the possibility of any other hypothesis*. This is the exact and inarguable essence of the whole case. Unless in that gross ton of evidence which was sent up from the trial court these two facts were overwhelmingly established, not a pound of it could properly avail to sustain the conviction, and all the ingenious deductions from the wood of the ladder and from the handwriting of the ransom notes and all the testimony respecting the passage of the ransom money and all the admissions wrung from Hauptmann himself respecting the viciousness of his own past and indeed anything and everything else in the whole record was and is wholly immaterial. All those things may conclusively prove the crime of *kidnaping or that of extortion*. But it is with the crime of murder and murder *only* that the Appellate Court was concerned — that accidental killing in the course of the commission of that burglary on those premises — it *had* to find overwhelming evidence of that.

III

Well, every gum chewer in the subway knows that there is no such evidence in the record. That it is not there cannot be better illustrated than by reference to the startling fact that the prosecution itself in the actual course of the trial advanced two perfectly contradictory hypotheses of the killing without offering an iota of evidence in support of either and without even suggesting that there *was* any such evidence.

At the start of the trial it explicitly charged that the child's brain was bashed accidentally against the outer wall of the house as it and Hauptmann fell with the breaking ladder. At the close of the trial it changed its theory and without apology or explanation blandly charged that Hauptmann deliberately beat the child's head in with a chisel before ever he removed it from its cradle. As neither the wall nor the nightshirt in which the child was concededly clothed nor the bedding nor yet the chisel bore — any one of them — the slightest trace of the inevitable bloody debris of a bludgeoning, it doesn't take a Max Steuer to point out the not very bright fancifulness of each of these hypotheses or the fact that circumstantial evidence supporting either one of them is wholly nonexistent in the record.

Several of my friends who read a preliminary draft of this article expressed to me their incredulity that the law and the facts of the case could be as I say they are, since, they argued, the presentation to an appellate court of such a combination must necessarily have *forced* a reversal from it. "How *could* the Court have got around it?" they insisted.

Fortunately I was able to say in reply to this insistence that I had carefully checked both with Mr. Edward J. Reilly of Brooklyn, who was the chief trial counsel, and Mr. Egbert Rosecrans of Blairstown, New Jersey, who prepared and presented the appeal, and that both these lawyers had fully confirmed both my interpretation of the law and my reading of the evidence; thanks to the generosity of Mr. Rosecrans, moreover, I had and still have copies of the brief submitted by him to the Appellate Court, from which it incontrovertibly appears that the point I offer here was fully developed and emphasized by him for the Court's guidance in the course of the argument before it. And so, in final answer to my friends' incredulity, I was able to point out to them what they did not know but what we lawyers know all too well, which is simply that, if a court deliberately chooses to anesthetize its conscience and ignore the law in the making of its decisions, there really is nothing to stop it.

And that, with all due respect, is exactly what the Court did in this case. I venture to suggest, indeed, that in the whole literature of appellate decisions there cannot be found one of any jurisdiction more completely divorced from any honest consideration of the evidence contained in the record on appeal or one from which can be more clearly deduced the hell-bent determination of the court, regardless of its duty, to sustain a popular conviction.

In the rambling and only relatively literate opinion written for the whole Court by Mr.

Justice Charles W. Parker, this paramount point in the case was cavalierly dismissed as follows:

> We think that the jury was clearly entitled to find that the child was killed while the "burglar" was still on the Lindbergh premises, and, if so, the homicide would be [sic] murder in the first degree.

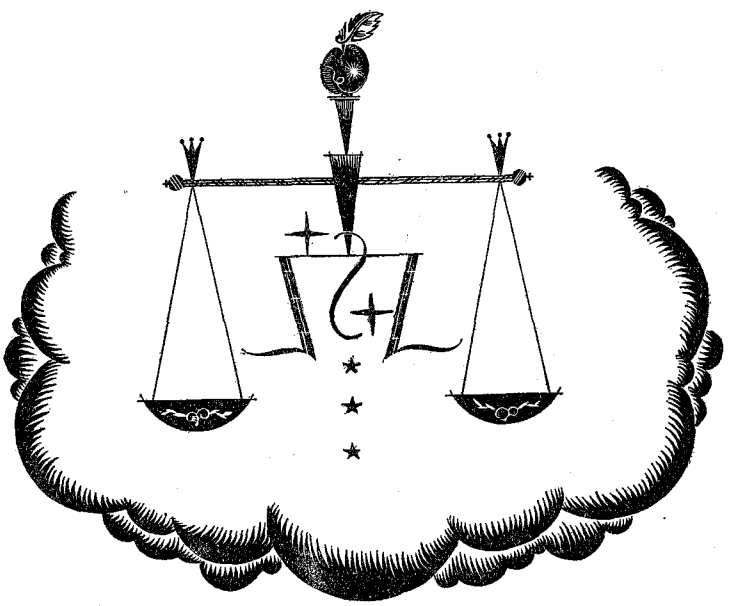
In God's name *why* was the jury entitled to make such a finding in the total absence of any evidence justifying it? Wouldn't it, for example, have been quite as reasonable for it to have found that Hauptmann stumbled and fell with the child in the road *after* he had left the premises and that, the child thus having met its death after the completion of the burglary, there was no murder? And if it had so found could it be argued that that finding was any more the fruit of pure inference than its actual verdict was? Can a shred of evidence be cited in the record which *necessarily* excludes, as, to be effective, it must, either of these hypotheses in favor of the other?

IV

Of course the truth about the Hauptmann case is that it is not only, as Mr. Reilly called it, the crime of the century but it is likewise the mystery of the century. Indeed it is one of the profoundest and most tantalizing mysteries in the whole history of crime. It *couldn't* have happened and yet it did happen. But merely to say that it happened is not to be able to say *how* it happened, and for the maintenance of the general social security crime obviously must be proved and proved up to the hilt before it can safely be punished.

Certainly no reasonable man can believe that this crime has been proved. No reasonable man can believe that an adult and a baby can fall off a ladder into soft mud without making a depression in the mud. No reasonable man can believe that the baby in falling can have its skull crushed in three places by the wall of a house or the rungs of a ladder without its brains and blood staining either the wall, the ladder, or the sleeping suit in which it is clad. In the alternative, no reasonable man can believe that a baby can be done to death in its cradle with a chisel without either the bedclothes or the chisel retaining any evidence of the deed. A jury of mob-menaced zanies, awed for weeks by the implacable presence of a World Hero on vengeance bent, their oafish passions inflamed by the frantic yowling of an ambitious small-town prosecutor can believe such grisly nonsense, but a reasonable man can't.

And so, no matter how strong his hunch or yours or mine is that this Hauptmann committed murder, since none of us can believe these unbelievable things and believe, as well, that they were proved when they weren't, we have clearly no choice but to recognize that the affirmation of his conviction by that exalted court of callous, worldly minded old men is a crime far more sinister in its social significance than could possibly have been the murder, if it was murder, of that poor little child. For a child's murder can set no legal precedent; but a judicial lynching can.



Progress and Profits

A Debate

I—Three Roads before Us

***by* HERBERT AGAR**

CAPITALISM IS the system of the private ownership of the means of production and the use of those means of production for profit. But the "private ownership of the means of production" can mean two very different things. It can mean a system under which the ownership of productive property is widespread or it can mean a system under which ownership is so very private that scarcely anyone has any. The former system is the economic basis for democracy; the latter system is monopoly capitalism, the economic basis for Fascism.

Defenders of the institution of private property use two types of argument — one moral, one politico-economic. It is my thesis that all these arguments are valid if they refer to the institution of widely distributed private property, that none of them is valid if they refer to monopoly capitalism. It is my thesis that civilization can survive and flourish under a genuine property system but that it must die away into Fascism under a system of monopolies.

The moral argument for property is that it makes for responsibility, freedom, independence and for the stability of the family. If we think of property in terms of families owning their own farms, their own stores, their own machine shops — or, in co-operation with not more than a few score others, their own small factories — it is self-evident that the argument is valid. People who own productive property are their own masters to an extent which can never be true of people who live on a salary or a dole. The man who owns productive property will flourish or decline according to his industry, his intelligence, his reputation among his neighbors. The man on a salary may be ruined forever when some superbandit like Kreuger kills himself in Paris.

But private property, in the sense of monopoly capitalism, has no right to use any of these arguments. It is not true that the millions are made stable, made industrious, made free by watching a few hundred other people own the productive resources of society. It is not even true, to judge by the family histories of most of our robber barons, that the few hundred other men gain moral value from their property. It may be true (though I do not think so) that monopoly capitalism is efficient. But there is no moral argument that can be brought to its aid.

In the field of economics and politics there are two main arguments in favor of private property. The first is that under a real system of private property, combined with a real system of free competition, the production and distribution of goods takes place semiautomatically, without benefit of "planning." But it is not possible to have free competition in a world of giant monopolies. There is no point in forming monopolies except to rig the market, to get rebates and subsidies and all sorts of special favors both from your competitors and from the government. Once that is done, the economic argument in favor of free competition and a free market has been destroyed. Once monopolies have come into being, the first step has been taken toward a planned economy. And if a planned economy is contemplated I think any disinterested man would rather live in an economy planned by communists for the good of the whole than in an economy planned by robber barons for the good of one another.

In a world of widespread property and truly free competition, it is possible to allow free thought and the free expression of opinion. For the economic life of the community will go forward irrespective of how many people have queer ideas or how many followers they may