

# The Mock Trial of Oswald .

by JEFF GREENFIELD

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*"Prosecutor" Kevin McNerny, holding a replica of the alleged assassination weapon, stands in front of defense counsel and the accused Lee Harvey Oswald (center), played by first-year law student John Strait.*

The Dallas District Attorney paused for a moment, and then asked deliberately:

"Do you see that man, the assassin, in the courtroom?"

"Yes I do," replied the witness.

"Please point him out."

Leaving his witness chair, the soft-spoken Southerner walked across the courtroom and stopped in front of a gaunt, dark-haired young man at the defense table. The crowded courtroom was quiet.

"That," he said, pointing at Lee Harvey Oswald," is the one."

The bizarre scene was a dramatic high point of a mock trial of Lee Harvey Oswald, staged this March by the Thomas Swan Barrister's Union of the Yale Law School. Lasting more than seven hours—until after 3 A.M.—the "trial" of President Kennedy's accused assassin was often dramatic, often stultifying, and occasionally humorous both by design and accident. Yet it is stark testimony to

the lingering horror of that November Friday that at most of the critical moments—the identification of Oswald, the examination of assassination photos, and the testimony of the accused killer—a deep, almost breathless silence fell over the Law School auditorium.

### *Bristling with Legal Controversy*

The trial attracted considerable attention both inside and outside the Law School and the Yale community—so much attention, in fact, that the most controversial part of the mock trial was the unsuccessful attempt of television cameramen to film the actual testimony, and the ruling of the “judge” that cameras would be barred from the courtroom.

The interest was expected, particularly within the Law School, for the murder of President Kennedy bristled with legal controversy. Was the evidence in the Warren Commission Report convincing? Could Oswald have received a fair trial, given the greatest amount of adverse pre-trial publicity in history? What kind of defense strategy was wisest: the frame-up theory or the multiple-assassin theory?

Moreover, the participants in the trial, in contrast to many mock trials where courtroom skills are stressed at the expense of preparation, had combed the immense piles of evidence in the 26 volumes of the Warren Report and testimony, as well as the spate of works critical of the Commission and its conclusions. The witnesses, principally law students, testified on the basis of what the actual witnesses said before the Warren Commission and in subsequent interviews. Reproductions of photographs, bullet fragments, blood-stained clothing worn by the late President, and the alleged murder weapon were all part of the attempt to lend credence to the model trial.

By 7:30 P.M. Friday night, when the trial was supposed to begin, more than 600 people had filled the Law School auditorium, waiting for the excitement to start. In fact, the excitement was already beginning, in another part of the Law School. The members of the press had crowded into the Faculty Dining Room where a hastily-called press conference was being held by Terry Segal, a Barrister’s Union director and a skilled press agent. He introduced the judge for the trial, New York attorney Jacob D. Fuchsberg, a past president of the American Trial Lawyers’ Association.

Fuchsberg was determined to make the proceeding as authentic as possible, and so were the attorneys. Defense-men Charles Blaisdell and Walt Rockenstein, both second-year students, objected to the television cameras and the blinding lights that had been set up in the courtroom. To the horror of the Fourth Estate, Fuchsberg granted the objection and ordered the cameras removed.

Judiciously explaining the basis of his decision to the incredulous reporters, Fuchsberg noted that the Supreme Court had reversed important convictions because the presence of television cameras might have prevented a fair trial. Television cameras, he said, “will make a show out of it . . . they militate against a realistic atmosphere.” At that point, CBS cameraman Robert Still exploded. A deeply-tanned Englishman with flowing silver hair and a silver

handlebar moustache, Still indignantly explained that CBS had gotten permission from a Law School associate dean to film the proceedings. “This is costing us more than \$1,000,” he said.

Still good-humored, Fuchsberg apologized for the inconvenience, but said he had not been consulted. At this point Segal, a bit upset by the sudden emergence of a free-press fair-trial conflict, suggested that the cameras could shoot before the trial and during the recess. Fuchsberg agreed, but the newsmen were not mollified.

“There’s going to be a stink about this,” Still muttered.

“Maybe he’d like us to use mock cameras for the mock trial,” another said contemptuously. The cameramen moved into the courtroom to snap their pictures and shoot their film before the trial began.

### *A Curious, and Restless, Audience*

A few moments later the bailiff intoned, “Rise for the court,” and Fuchsberg moved down the long aisle to the bench. The crowd, a mixture of law students and dates, undergraduates, and the curious from New Haven giggled a bit as the formal opening of the court was intoned (“oyez, oyez oyez, all who have business before this honorable court. . .”). Fuchsberg took his seat and began a sincere, long explanation of why he barred the cameras and of the need for an orderly trial. Two photographers hustled up the aisle, still angry at being shut out of the trial.

“We better get out of here before we get thrown in jail,” one said to his companion.

After the jury was brought in and sworn (“a true verdict give, according to the evidence . . . you will suffer no one to speak to you . . . your own conscience keep . . .”), Fuchsberg addressed a few words to the jury, made up of volunteers from a North Haven Presbyterian Church. He attempted to underscore the serious nature of the offense (“ . . . the killing of our late President, the shooting of the governor of the state of Texas . . . you are to divorce yourselves from the national importance of this trial . . .”) and added a brief lecture on the nature of the jury.

Though obviously making a sincere effort to force the jury into taking its role in this mock trial seriously, he began to lose his audience, who had waited more than an hour for the trial to start. Groans and laughter were audible, and some of the remarks reflected a less than passionate commitment to the discipline of the law.

“This’ll go on for two days unless he shuts up,” whispered one of the throng.

With the preliminary skirmishes out of the way, the prosecution began to spin out its theory of the murder, and its proof. John Bush, a law senior and one of the prosecutors, offered a crisp, unemotional opening statement to the jury, cautioning them that he was not offering evidence, but rather detailing what the prosecution intended to prove. He spent much of his time reading the indictment; and, for the first time, that silence was heard as he intoned “. . . Lee Harvey Oswald did kill one John Fitzgerald Kennedy, then President of these United States.” After acknowledging the state’s belief in the controversial

theory that one bullet hit both President Kennedy and John Connally, Bush concluded:

"You will be able to reach one conclusion only—that Lee Harvey Oswald murdered John F. Kennedy."

The witnesses for the prosecution established the time of the assassination, and then Howard Brennan gave his dramatic, positive identification of Oswald as the man who stood in the sixth-floor window of the Texas School Book Depository and fired a rifle in the direction of the Presidential motorcade.

On cross-examination, the defense demanded to know why Brennan had not identified Oswald at earlier police lineups.

"Because I was scared," Brennan replied. "I'm not proud, but I have a wife and kids. I thought there might be a plot."

The defense attempted to ridicule the fear explanation.

"Look," said defense attorney Blaisdell. "You're in police headquarters. . . ."

At that point, the events of the weekend in Dallas intruded on the audience, and they laughed; the murder of Oswald in the basement of the Dallas jail, of course not a part of the mock trial, made the defense attempt at ridicule less than successful.

#### *The Single Bullet Theory*

The longest part of the prosecution's case was the testimony of Dr. James J. Humes, who was in charge of preparing the autopsy report. More than one-and-a-half hours of direct and cross-examination was devoted to a minute examination of the reported wounds of President Kennedy and Governor Connally, and the relation between these wounds and the "single bullet theory." This was vital to both sides; for, if the defense could rebut the single bullet notion, then the wounds of Connally and Kennedy would almost surely have had to have been caused by more than one gunman—and that would have made the guilt of Oswald far more doubtful.

The testimony of Dr. Humes was in support of the prosecution; he maintained repeatedly that a single bullet could have inflicted all the wounds, from the throat wound of the President to the chest, wrist, and thigh injuries of Connally. He pointed to tests showing that this could well have happened. The defense's most successful cross-examination probe revealed that Dr. Humes had neither achieved, nor even tried, any tests with one bullet that did everything the alleged first shot by Oswald did.

If the cross-examination was legally significant, it did not make that good an impression on the audience, dulled by more than three hours of testimony and an auditorium which was resembling a sweatbox. By the time the recess was mercifully called after 11 P.M., more than half of the original audience had fled.

The break, welcome to the spectators who got fresh air, brought the heat back on Judge Fuchsberg. The press had neither forgotten nor forgiven his ban on cameras, and they grilled him with surgical skill on his reasons.

"Mr. Fuchsberg, why did you bar cameras?"

He explained, this time for tape-recorders and cameras,

that he wanted to preserve as realistic an air as possible for the sake of the law students trying the case.

"Then why did you allow smoking and drinking in the courtroom?"

Fuchsberg glared at the questioner. The press glared at Fuchsberg.

This dialogue over, the trial resumed. Walt Rockenstein, in a staccato opening address, promised to prove reasonable doubt about the number of shots, the place from which they were fired, the number of possible assassins, and the guilt of Oswald. Already it was becoming apparent that most of the audience was waiting for the testimony of Oswald; as the single biggest unknown factor, the one item not found in the Warren Report or the attacks on it, the reconstruction of a possibly innocent Oswald's movements on November 22 had the gripping attraction of a last, missing piece in a jigsaw puzzle.

Defense witnesses featured a railway switchman, who claimed to see a "puff of smoke" from behind the grassy knoll over Dealey Plaza, the assassination site. He also claimed to see "strangers" milling about. The prosecution jumped on Bowers during cross-examination.

"What do you mean, they were strangers," demanded Kevin McInerny, a stocky, lantern-jawed, third-year student.

The witness shrugged. "I'd never seen 'em before," he said, and the courtroom broke up.

A similar light moment came during the testimony of Bonnie Ray Williams, who was watching the parade from a fifth-floor window of the School Book Depository. He claimed to have seen nothing suspicious during a trip to the sixth floor shortly before the assassination.

"Didn't you say earlier that plaster had fallen on your head?" demanded the prosecution.

"Well," drawled the witness, "there was white stuff, but I don't know what it was. Could'a been pigeons."

Other defense witnesses included Governor Connally, who stoutly maintained he had been hit by a shot well after President Kennedy had sustained the first wound; Malcolm Perry, who had vainly treated Kennedy at Parkland Hospital, and who was uncertain about whether the throat wound had come from the front or back; and Ronald Simmons, ballistics expert, who described the alleged assassination weapon as a poor rifle, which could not have been operated by an average marksman quickly enough to get off three shots in the brief seconds between the first Kennedy wound and the fatal head shot.

#### *Skillful Blending of Fact and Fiction*

By now it was 12:45 A.M.; about 100 people were left, in various stages of alertness, when the bailiff called Oswald to the stand.

As played by John Strait, first-year student, the Oswald testimony was the most skillful blending of fact and fiction the trial saw. Nervous, speaking scarcely above a mumble, eyes darting nervously down to the floor and around the courtroom, Oswald told a story of a frightened, neurotic man who had gone to buy lunch and had watched the motorcade from the street. He went back to the Depository,



and only when a policeman asked the Depository supervisor about him did Oswald realize what happened.

Then, pausing frequently, Oswald explained his fear about being framed as the possible assassin. "I wanted to get out of there," he said. As a defector and as an admitted pro-Communist he had almost immediately feared that the police would use him as a scapegoat.

He then traced his movements, describing his growing fear, to his apartment and then down the street. When he heard a police siren, he snapped, and ran into a movie theatre, where he was captured.

Throughout the direct examination came a picture of Oswald familiar to the world: nervous, frightened, worried, a loner, always in suspicion. Using these character traits to explain rather than to hide Oswald's actions made for a chillingly plausible presentation of what Oswald might well have said had he lived to stand trial. Whether because of the lateness of the hour or the impossibility of getting Oswald to change his story, the prosecution did not cross.

The summations were a study in contrast. Charles Blaisdell, for the defense, spoke quietly and with few gestures to the jury. (He spoke so softly that a voice from the rear of the hall cried "Louder!" Replied Blaisdell calmly, "I'm addressing myself to the jury.")

He reviewed the doubts about the shots, the wounds, and Oswald, and then said of the Dallas police that they had compiled "the most shameful record in the history of police . . . The Dallas Police Force was out to save its neck."

Blaisdell ended his review of the testimony with a frank acknowledgement that Oswald fled the assassination scene.

"He's the only one who ran," said Blaisdell, "but he's also the only known Communist. Did he have a reason to run? Oh, yes."

Then, concluding deliberately, Blaisdell said: "It is a heinous crime to gun down the President of the United States. It is a heinous crime to find an innocent man guilty."

#### *The Prosecution's Summation*

Then Kevin McNerny summed up the state's case against Oswald. He unbuttoned his coat and stretched his arms along the bench, then rested his elbows on the bench while folding his hands over his vest.

He quoted the undelivered Dallas speech of President Kennedy about "not listening to nonsense," and urged the jury to ignore the nonsense of the defense theory. "The state," he said, "built a pen, stone by stone. And in the middle of it stood Lee Harvey Oswald." He ridiculed the defense witnesses as "thrown up like confetti in the . . . face of the state's case."

Then, McNerny began to force the "hard" evidence on the jury. He passed shells, bullet fragments, the bag in which Oswald allegedly carried the murder weapon, to the jury. Speaking quickly, he talked of the clear, hard pieces of evidence while he began to take the murder weapon apart, illustrating dramatically that it could have been carried in the short paper bag. As the last screws came apart, he jerked the rifle apart and held it aloft for a moment;



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then, he passed the scope, stock, and barrel to the jury.

With a flourish, McNerny described the late President. "He trusted us, the American people . . . you can answer the crime. You'd better answer the crime."

It was after 2 A.M. when the judge finished his charge to the jury, which was told to bring back its decision as soon as possible. And it was 3:15 A.M. when they returned, unable to agree on a verdict.

Six felt Oswald was guilty; three believed that, while he had taken part, there was reasonable doubt he had fired the fatal shot. Three thought there was reasonable doubt as to his guilt at all.

The verdict was, in a sense, symbolically appropriate. It reflected the lingering doubts of many Americans that the full story of the assassination is known, fused with a reluctance to believe lurid tales of conspiracy in place of the stature of the Warren Commission. But whatever damage done to the valuable sense of trust in our institutions and leadership, the assassination debate and all of its morbid props and diagrams and photographs will go on; if the Oswald trial showed anything, it was a clear portrait of confusion and uncertainty.

Perhaps more important, the trial—and the strange mixture of date-night frolic and numbed silence in its audience—mirrored the scar on the nation that has not yet healed. The people came in large measure looking for a fun evening; they stayed to listen in stillness to the litany: ". . . the car turned on Elm St. . . . I heard shots . . . the President clutched his throat . . . the Governor's wounds . . . the sixth floor window . . . a Mannlicher-Carcano. . ."

If the trial reflected tragedy, however, there was no catharsis, no resolution. That will await the finding—or the revelation—of the missing pieces in the Oswald puzzle.

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*Jeff Greenfield is a third-year law student and an officer of the Yale Law Journal; his article on the Buckley-Coffin debate appeared in the January issue of the Yale Alumni Magazine.*