University of Minnesota
Law Library

Bribery Trials of Clarence Darrow (1912 & 1913)

Michael Hannon

Bombing of the Los Angeles Times

In the early morning hours of October 1, 1910, a bomb made of numerous sticks of dynamite exploded in an alley next to the *Los Angeles Times* building. The dynamite ignited barrels of nearby printing ink and the resulting fire killed twenty *Times* employees who were working to get the next edition of the paper ready for delivery. General Harrison Gray Otis, owner of the *Times*, was staunchly against labor unions, as was the paper itself. Otis and other business owners immediately accused labor supporters of the crime. At the time, labor was struggling to gain an influence in Los Angeles similar to what it enjoyed in San Francisco. Labor adamantly denied the allegations, blaming the explosion on an accident that Otis was exploiting or alternatively accusing him of intentionally causing the explosion in order to blame it on labor. An intense investigation was launched to identify and arrest the perpetrators. In April 1911, two members of the International Association of Bridge and Structural Iron Workers (IABSIW) were in arrested in Detroit for the bombing. One of those arrested, Ortie McManigal, confessed and implicated James B. McNamara in setting the bomb and his brother John J. McNamara, secretary of the IABSIW, in directing and supporting the bombing. The McNamara brothers and McManigal were taken to Los Angeles to stand trial under a questionable extradition process. To labor, their extradition to California appeared to be a kidnapping instead of a legal extradition.

In July, the American Federation of Labor (AFL) started a national campaign to raise money for a defense fund for the accused. Labor insisted that the defendants were framed and illegally taken to California. Labor wanted Clarence Darrow to defend the accused, but Darrow was reluctant to get involved. After much persuasion Darrow agreed to defend the McNamara brothers. He was given a $200,000 defense fund and was to receive $50,000 out of this amount for his fee.

In July 1911, Darrow and the defense team entered not guilty pleas for the McNamara brothers, but over time they came to the conclusion that their clients were guilty. Darrow eventually concluded that their only hope was a plea deal in which the defendants would agree to plead guilty and confess to everything; in exchange, James B. McNamara, who actually planted the bomb, would not be executed but be sentenced to life in prison and his brother would be sentenced to a prison term. A series of negotiations with the prosecution led to a tentative agreement, but there was a firm deadline of December 1, 1911 as the last day the McNamara brothers had to accept the deal and plead guilty. The

plea negotiations were closely guarded and the McNamara brothers were first informed about the plea deal on Thanksgiving Day, November 24. The defense and prosecution were still gearing up for a trial in case a plea deal could not be reached.

Prior to this, on September 1, 1911, Darrow and his wife Ruby traveled to San Francisco. The next morning, a Saturday, Darrow met with San Francisco labor leader Olaf Tveitmoe and allegedly gave him a $10,000 check from the McNamara defense fund. Tveitmoe cashed the check that day. This was a very unusual transaction because the AFL, which was funding the defense, had insisted on strict accounting and all other checks were cashed at Los Angeles banks and put into the defense accounts. LeCompte Davis, Darrow's co-counsel, would later testify that he knew nothing of the $10,000 check, although he knew of all the other checks cashed in the defense accounts. The prosecution would allege that Tveitmoe later gave the cash to Darrow to be used for bribing jurors.

First Bribery Attempt

Clarence Darrow always placed great weight on the importance of jury selection. Bert Franklin, a former detective for the L.A. county sheriff and the U.S. Marshal, had approached Darrow for work and Darrow hired him as his chief jury investigator to find out information about potential jurors for the trial. Writing about twenty years later, Darrow recalled "The investigation of possible jurors was placed in the hands of Bert Franklin, a Los Angeles detective, who had at one time been connected with the city or county administration, and had done a good deal of work of this kind."[1]

Darrow gave Franklin a list of the initial juror pool of 125 men to begin his investigation. Franklin was supposed to engage in the legal activity of gathering information about the potential jurors. It was common practice to find out information about potential jurors, such as their political and religious beliefs and views towards organized labor.

But Franklin went well beyond legal information gathering and engaged in attempts to bribe potential jury members. One name on the jury pool list was Robert Bain, a Civil War veteran and carpenter, who Franklin knew. Bain, seventy years old, was married and having serious financial trouble. On Friday, October 6, 1911, Franklin went to the Bain's home and spoke with Mrs. Bain. During the conversation he learned they had recently purchased their house and owed a $1,800 mortgage on it. Franklin offered to pay them money if her husband Robert became a jury member and agreed to vote to acquit the McNamara brothers. When her husband returned, Mrs. Bain told her husband about the meeting with Franklin. Later that night Franklin returned and gave Bain $500 and promised to pay another $3,500 after Bain voted to acquit during the upcoming trial. Bain did not report the bribery attempt.[2] Bain would later testify that Franklin told him he had gotten $20,000 from Clarence Darrow to use for this type of activity. The alleged bribery of Bain for $4000 in 1911 is equal to about $87,000 in 2009.

---

[1] CLARENCE DARROW, THE STORY OF MY LIFE, 176 (1932) [hereinafter STORY OF MY LIFE].

[2] Some accounts say the figures were $400 and $3,600. *See Now Names Darrow in Bribery Tale*, NEW YORK TIMES, Dec. 12, 1911.

Second Bribery Attempt

During jury selection, Bain was the first juror accepted by both sides. Jury selection continued and after five jurors were seated, Franklin attempted to bribe another potential juror named George Lockwood. Lockwood did not accept but said he wanted time to think it over. But unlike Bain, Lockwood was greatly angered and reported the attempt to his friend, District Attorney Fredericks. Lockwood also informed Fredericks that Bain had been bribed. Fredericks directed Lockwood to keep this information secret and to go along with Franklin. Fredericks wanted Lockwood to remain silent because if Lockwood was selected for the jury, he thought the defense would approach Lockwood again.

When Lockwood was selected for the jury, Franklin, unaware that several members of the McNamara defense were secretly trying to secure a plea deal, tried again to bribe Lockwood. This time Lockwood, working under the direction of the prosecution, went along with the bribery scheme. A meeting was set up at Lockwood's ranch but it had to be cancelled. Later they planned to meet in downtown Los Angeles on the morning of November 28, which was the day before Lockwood was due in court. But the transfer of money, which was to occur at the corner of Third and Main (some accounts say it was Third and Los Angeles) was a sting and the prosecution had agents ready to arrest Franklin.

Third and Main

On Tuesday, November 28, 1911, Lockwood went downtown to meet with Franklin and a friend of Franklin's named C.E. White to receive the initial payment. White was supposed to give Lockwood $500 and hold $3,500 until Lockwood voted to acquit the McNamara brothers. Franklin was in a nearby saloon and came out when the deal was going through. But Franklin recognized Los Angeles detectives watching them and hurried the group down the street. Then another individual came hurriedly towards them, but it was not a detective:

"It was Clarence Darrow. What was Darrow doing there? Why had be come to the scene of the bribe? It was a question that would linger for eighty years."[3]

Darrow approached the group but before they could say anything a detective reached between them and arrested Franklin; everyone but Darrow was taken to the prosecutor's office. Both Lockwood and White were released on the agreement that they would testify against Franklin.[4] Darrow paid $10,000 to bail Franklin out with money from the McNamara defense fund. Darrow also hired Henry Gage, one of the area's best defense lawyers and a former governor of California, with a $10,000 retainer to defend Franklin using McNamara defense funds.[5]

---

[3] GEOFFREY COWAN, THE PEOPLE V. CLARENCE DARROW: THE BRIBERY TRIAL OF AMERICA'S GREATEST LAWYER 237 (1993) [hereinafter PEOPLE V. CLARENCE DARROW].
[4] *Id.* at 237.
[5] *Id.* at 238.

News about the attempted bribe quickly broke and spread around the country. However, Darrow's presence was kept secret for the time being. The attempted bribery significantly raised the stakes in plea negotiations for the McNamara defendants. The deadline set by the prosecution was Friday, December 1, 1911 after which the deal was off if the defendants did not agree to plead guilty. The case against the McNamara brothers was already very strong, especially against Jim McNamara for allegedly planting the dynamite bomb that killed twenty employees at the *Los Angeles Times*. News of the bribery would make it even more likely that the defendants would be found guilty by a jury if they went to trial. Another complication was that the Los Angeles mayoral election was the following Tuesday. The prosecution wanted the plea done before the election because it would hurt Job Harriman's Socialist party ticket.

McNamaras Plead Guilty

After the bribery attempt and arrests, the defense decided to have the McNamara brothers plead guilty. On Friday, December 1, 1911, both brothers were brought to the Los Angeles Superior Court and me their attorneys. Jim and J.J. McNamara withdrew their not guilty pleas and pled guilty. The same day he sentenced the McNamara brothers to prison, Judge Bordwell took the unusual step of releasing a statement about the pleas in which he explained the effect the bribery allegations had on plea negotiations:

> As to the defense, the public can rely on it that the developments last week as to bribery and attempted bribery of jurors were the efficient causes of the change of pleas which suddenly brought these cases to an end. The District Attorney could have had J.B. McNamara's plea of guilty long ago if he had been willing to dismiss the case against his brother, but he refused, insisting that the latter was guilty and should suffer punishment.
>
> The first proposition from those interested in the defense was that J.B. McNamara should change his plea from not guilty to guilty on condition that he should not be sentenced to death, and that his brother should go free. The District Attorney would not agree. Afterwards emissaries from the defense brought the District Attorney the proposition that J.B. McNamara would plead guilty and be sentenced to death, if the court so ordered, provided that his brother should be saved. But the District Attorney still would not agree. Those interested in the defense continued to urge his acceptance of this last proposition for ten days or more, and until the bribery development revealed the desperation of the defense and paralyzed the effort to save J.J. McNamara by sacrificing his brother. Then it was that the change of pleas of these men was forthcoming.[6]

[6] WILLIAM WILCOX ROBINSON, BOMBS AND BRIBERY: THE STORY OF THE MCNAMARA AND DARROW TRIALS FOLLOWING THE DYNAMITING IN 1910 OF THE LOS ANGELES TIMES BUILDING 26-27(1969) [hereinafter, BOMBS AND BRIBERY].

Darrow wrote in his autobiography that the plea deal was agreed to prior to the Lockwood bribe:

> We purposely drew out the examination of jurors several days after the negotiations were complete. The procedure was, however, fully agreed upon two or three days before another complication set in. When all the parties of the two sides felt certain that the case was to be disposed of immediately, the man who had been placed in charge of the examination of jurors, Bert Franklin, was arrested on the charge that he had handed a prospective juror four thousand dollars on one of the main streets of Los Angeles, as the juror was on his way to the courthouse. Franklin was arrested on the spot and taken to jail. He then protested his innocence and asked us to furnish bail, and so we put up a cash bond, whereupon he was released. In spite of what had happened, the State carried out the agreement to accept a plea of guilty for J. B. McNamara with a life-sentence, and a plea in a separate case by J. J. McNamara with a ten-year sentence. But the judge insisted upon giving Joseph J. McNamara a fifteen-year sentence instead of the one that had been agreed to by the State.

George Bissett

In 1910 a poor woman came to Darrow and begged him to help her son George Bissett who had been convicted for murder and sentenced to life in prison. At first Darrow told her he could not help, but he eventually took the case for free because they had no money to pay for legal help. Upon examining the trial record, Darrow concluded that Bissett should not have been convicted and thought he might be able to get the conviction reversed on appeal.

Bissett had been convicted for murdering a plain clothes police officer and wounding another in a bar shootout in Chicago on June 12, 1909 in which Bissett himself was nearly killed. Bissett had denied shooting the officer during his murder trial because he was afraid that an admission, even if he was acting in self defense, would lead to conviction because he had a prior conviction for attempted burglary. The evidence suggested that the police had started the altercation and that Bissett had in fact acted in self defense.[7] Darrow insisted that Bissett's only valid argument was that he was acting in self defense. Darrow got the conviction reversed by the Supreme Court of Illinois and the case was remanded for a new trial.[8] Darrow defended Bissett in the new trial and he was found not guilty.

After Franklin was arrested, Darrow knew he was likely to be indicted by the Los Angeles District Attorney, John D. Fredericks. One day in 1912, Darrow was in his office in Los Angeles when he was informed that he had a visitor. Darrow was surprised to find it was George Bissett, who had rode freight-cars all the way from Illinois to Los Angeles

[7] The police version of the shooting is available at the Officer Down Memorial Page, Inc. http://www.odmp.org/officer.php?oid=11650.
[8] People v. Bissett, 246 Ill. 516, 92 N.E. 949 (Ill. 1910).

because he heard that Darrow was in trouble.[9] Bissett had come to help and explained: "I have been here about a week and have been getting a line on Franklin."[10] When Darrow asked what he had found out about Franklin, Bissett said he "had found where he lived, had watched what time he went away in the mornings, had some dynamite, and was going to kill Franklin the next day when leaving his home."[11]

Darrow of course could not allow Bissett to carry out his plan, although he was deeply moved by Bissett's crude attempt to help him:

> All along through my life I have had many warm demonstrations of friendship, but this was the first time any man had offered to kill some one for me. I looked at George, and thought of this rough, unlettered man riding two thousand miles on car tops and bumpers and in seriousness offering to risk his life out of gratitude for what I had done for him. I did my best to show my appreciation of this most astounding proffer.[12]

Darrow eventually talked Bissett out of killing Franklin. Darrow was to hear from Bissett again about five years later when Bissett was arrested and tried for stealing "some five hundred thousand dollars" from a government building in Minneapolis.[13] Darrow defended Bissett again and was able to get Bissett sentenced to just two and a half years in prison instead of a much longer sentence that he would likely have received had Darrow not discussed the matter with the prosecuting attorney and the judge.[14]

Earl Rogers

As a bribery indictment loomed, Darrow chose Earl Rogers, a Los Angeles attorney, to defend him. Rogers was at the peak of his career as a nationally known criminal defense attorney. Significantly, Rogers had been on the business side of the Los Angeles labor troubles until this time and he had even authored the Los Angeles anti-picketing ordinance that had greatly angered labor. After the *Times* bombing, the Merchants and Manufacturers Association hired Rogers to initially oversee the investigation. After the McNamaras were arrested and brought to Los Angeles, Rogers was appointed as the special prosecutor who took the case to the grand jury.

Darrow had once referred to Rogers as the "greatest jury lawyer of his time."[15] When Darrow first went to Los Angeles to defend the McNamara brothers he asked Rogers to assist him, but Rogers could not do so because he had played such a prominent role in the investigation of the bombing. He believed that he would be disqualified from assisting the defense, even if he wanted to.

---

[9] STORY OF MY LIFE, *supra* note 1, at 196.
[10] *Id.*
[11] *Id.*
[12] *Id.* at 196-97.
[13] *Id.* at 198-99.
[14] *Id.* at 199-200.
[15] ALFRED COHN & JOE CHISHOLM, TAKE THE WITNESS 2 (1934) [hereinafter TAKE THE WITNESS].

Rogers was a legendary figure in the California legal profession even before Darrow called on him. He was one of the most successful and innovative criminal defense attorneys of his day. In some ways, his legacy still effects trial practice:

> Earl Rogers invented many of the tactics that have become common criminal law stratagem. He was a true pioneer, and his "frontier" was the legal system. Rogers was the first American lawyer to make use of the science of ballistics, and was at the cutting edge of medical forensic science as used in criminal defense. Indeed, he was more knowledgeable in the field of anatomy than many of the coroners he cross-examined, and was at one time a professor of medical jurisprudence and insanity in the old college of physicians and surgeons and he had a degree from the College of Osteopathic Physicians and Surgeons. . . . He became a Professor of Advocacy at the University of California Law School. He amassed a truly extraordinary winning percentage, a statistic that will make or break a criminal attorney, handling seventy-seven important murder cases and losing only three![16]

Rogers' daughter wrote that Darrow was one of her father's heroes and that if Rogers had an idol, it was Darrow.[17] She recounted:

> When Darrow defended Eugene Debs in a strike dispute, Papa had followed every word of the trial. He'd spent long nights talking to Debs on his last visit to California. The testimony in the case of Big Bill Haywood he had read aloud to us there in our office, he'd been tickled as a kid, chortling in a way he had, when Darrow defeated Borah, a foe, my father said, worthy of any man's steel.[18]

Rogers had a well-earned reputation for drinking too much, but it was frequently said by those who knew of his trial skills, "I'd sooner have Earl Rogers drunk defending me that any other lawyer, sober."[19] Rogers' daughter Adela recalled that as a child she attended baseball games with her father, and if a player got mad enough to go after an umpire with a bat, the fans would shout, "Go ahead and kill him, we'll get Earl Rogers to defend you."[20] A reporter for the *Examiner* wrote that "Rogers can ask a man his name in a tone that calls him a liar, perjurer and crawling reptile all at once."[21]

Even if ethically he could have helped the McNamara brothers, Rogers probably would not have done so when asked by Darrow because Rogers was directly affected by the *Los Angeles Times* bombing. Adela wrote in her biography of her father that Earl Rogers' law office was just across the street from the *Los Angeles Times* building and he was in his office when the bomb went off.[22] As one of the first people to arrive on the scene, Rogers witnessed victims trapped in the fire and heard their screams. He recounted to his

---

[16] MICHAEL LANCE TROPE, ONCE UPON A TIME IN LOS ANGELES: THE TRIALS OF EARL ROGERS 19 (2001) [hereinafter ONCE UPON A TIME IN LOS ANGELES].
[17] ADELA ROGERS ST. JOHNS, FINAL VERDICT 382 (1962).
[18] *Id.*
[19] TAKE THE WITNESS, *supra* note 15, at 238.
[20] *Id*. at v.
[21] *Id*. at 219 (citing Joe Timmons of the *Examiner*).
[22] FINAL VERDICT, *supra* note 17, at 370.

daughter that the worst part of it was seeing the victims' "faces appearing in the windows of the editorial and city rooms like distraught fugitives from a graveyard . . . ."[23] Adela also believed that her father had agreed to help the prosecution investigate the bombing because their good friend, Harvey Elder, an editor at the *Times*, had died in the fire. Not only did Rogers see the immediate aftermath of the bombing, he actually participated in the rescue attempts. Adela described what she saw later in the morning when she made it to the scene:

> My first look at Papa made me cry aloud. Black with soot, his clothes in ribbons, his face raw and swollen with burns, he was holding his right arm away from his body and his hand looked like a piece of raw steak on the end of it. . . . Papa was talking to himself through clenched teeth. The murdering fiends, he kept saying. The paranoiac assassins. They defeat their own ends, which are righteous. This butchery of workingmen and women—as brutal and useless as the St. Bartholomew massacre, it will turn all decent people who sympathize with their cause from them. . . . These men who must turn loose the red-handed slayer—do they expect us to believe they can govern? That they have a right to freedom? They have to be chained like dogs that bite![24]

Hearing that Harvey Elders had jumped from the building, Rogers and Adela walked to the hospital where they found out that he had died an hour before. Adela wrote:

> Perhaps this makes it possible to see why my father and I had trouble adjusting to Clarence Darrow's point of view about the McNamaras, which was to figure so vitally later on. I always saw Harvey Elder on one side of the screen and J.B. McNamara on the other. . . . Darrow was looking at it from the broad humanitarian standpoint. People who got in the way of humanity's progress must be dynamited out of it.[25]

Rogers was still wearing bandages on his hands when he and others met with city leaders about how to proceed with the investigation into the bombing. A 1934 biography of Rogers credits him with being instrumental in gathering evidence about the *Los Angeles Times* bombing. According to this source, when the Merchants & Manufacturers Association met the day after the explosion, they had raised $100,000 for the investigation and the entire amount was given to Rogers when he was appointed special deputy district attorney.[26] Rogers with his assistants used the dynamite from the unexploded "infernal machine" which had been planted at the home of the MMA's secretary, Felix Zeehandelaar, to trace the origin of the dynamite to an explosive factory close to San Francisco. It was this link that eventually led to the McNamara brothers' arrest. While Burns and others received credit for solving the bombings, the businessmen who hired Rogers credited him with discovering the first evidence that directly linked the

[23] *Id.* at 371.
[24] *Id.* at 372.
[25] *Id.* at 374.
[26] TAKE THE WITNESS, *supra* note 15, at 196.

Iron Workers union to the bombing.[27] It was Rogers who presented the evidence to the grand jury that indicted the McNamara brothers.

Clarence Darrow Suicidal

The definitive source on the investigation of the Los Angeles Times bombing, the McNamara trial and Clarence Darrow's bribery trials is Geoffrey Cowan's 1993 book *The People v. Clarence Darrow: The Bribery Trial of America's Greatest Lawyer*. Cowan opens his book with the description of an event one night in Los Angeles in late December 1911 when Clarence Darrow was certain he would be indicted for jury bribery. On that night Darrow went to visit Mary Field who Darrow had an ongoing affair with for nearly four years. Cowan relates that Darrow told Mary Field that he was going to kill himself. To prove he was serious he displayed a revolver he had in his coat. Although it took several hours, Field eventually convinced Darrow not to take this course.

Clarence Darrow Indicted

In late January 1912, Bert Franklin pled guilty to trying to bribe Lockwood and he was fined $4,000. Franklin cut a deal with the prosecution and on January 29 he testified before a grand jury. Franklin's testimony implicated Clarence Darrow in the bribery attempts. About 4:00 p.m. that same day Clarence Darrow, accompanied by Earl Rogers, surrendered to an indictment for bribery involving Robert Bain and George Lockwood. Darrow would be tried in two bribery trials. He faced a maximum of thirty years in prison and a twenty thousand dollar fine. He posted $20,000 bail. Although he knew he was very likely to be indicted, the reality hit Darrow hard:

> In short time Franklin was taken before the grand jury, whereupon I was indicted for conspiracy to corrupt a juror, in two separate cases. The intense pain on my mind and feelings was undermining my health, and I did not feel the strength and enthusiasm necessary for the fight.[28]

Darrow found the transition from defense counsel to criminal defendant very difficult:

> At the first I was dazed. I had sat beside the accused for many, many years, giving them all my comfort and aid in their dire misfortunes. I had made their cause my own. I had worked with them and suffered with them, and rejoiced in their triumphs, and despaired with them in their defeats. Now I was no longer a lawyer pleading another's cause. I was a defendant, fighting against fearful odds.[29]

Pre-Trial Strategy

Darrow and Rogers prepared for Darrow's first trial. Adela Rogers was present during some of the pre-trial strategy sessions between Darrow, Rogers and others, such as

---

[27] *Id.*
[28] STORY OF MY LIFE, *supra* note 1, at 187.
[29] *Id.* at 188.

Rogers' assistant Jerry Geisler. During one meeting, Rogers asked Geisler for the prosecution's strongest point, and Geisler responded it was "'Darrow on the scene'" of the bribery by Franklin.[30] Rogers declared, "'We must make it work for us'" and he asked Darrow what he was doing at the scene.[31] Darrow said he went there because he received an anonymous call that the prosecution was probably trying to frame Franklin. Rogers then asked why, if Darrow was the man they were after, it didn't occur to him that his presence at the scene would implicate him in the frame-up. Darrow responded that he did not think of it at the time and felt that if he hurried he might prevent the framing, but he never thought of himself in a crisis.[32] Rogers then worked out an explanation for Darrow's presence at the scene:

> Now—we can't deny you were there. Half the police department seems to have seen you. Any intelligent mouse would have sniffed the cheese but you are not a mouse, you are man of great emotional heat, dedicated, idealistic, selfless. You conceive it to be your duty to rush to the rescue of your co-worker. To prevent injustice you run, panting, race perspiring, take your life in your hands crossing the street, wave your hat so you may warn Franklin of the trap in time. Yes, yes—a rash and reckless and foolish thing, but *innocent* and only believable under that interpretation. On the other hand, you have been a lawyer thirty-five years. If you planned this bribery you would take pains to be twenty miles away from the pay-off. It is beyond the bounds of reason, probability, possibility that *if you were guilty*, you would arrive on the scene at the moment the crime was committed.[33]

Rogers and Darrow Disagree on Trial Strategy

While strategizing, Rogers laughed at Detective Sam Browne's testimony that Darrow was waving his hat as he neared the scene of the alleged bribe. But Darrow took offense at the suggestion that his actions that day were foolish. Rogers then had the others leave and he and Darrow remained for several hours. Adela Rogers and Jerry Geisler tried to listen to what was said from another office. She recounted that they heard Rogers explaining:

> "We have got to prove that only your complete *innocence* is compatible with your appearance at Third and Los Angeles at that time. We have got to emphasize your brilliance as a lawyer and then show the bungling stupidity of this even if you are innocent. Then we have to say, Can you believe that Clarence Darrow would rush in where angels fear to tread *waving his hat*—"[34]

Rogers also planned to argue that the whole thing was a trap, because it was preposterous for Darrow to actually go to the scene of the bribery that he himself had planned. Rogers

[30] FINAL VERDICT, *supra* note 17, at 406.
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.* at 410.

would argue that the prosecution had staged the bribery attempt to implicate Clarence Darrow and also Samuel Gompers the president of the American Federation of Labor.

A huge problem for Darrow arose when John Harrington, a detective Darrow had personally brought with him from Chicago for the McNamara trial, began to cooperate with the prosecution. Darrow recounted in his autobiography, "I had brought with me from Chicago, John Harrington, long an investigator for the Chicago City Railway; he had spent years in arranging, sifting and marshalling facts in the damage suits of the surface lines of that city . . . ."[35]

Harrington had worked as the chief investigator for the McNamara defense team from April 1911, when Darrow had agreed to take the case, until December 1911 when the McNamara brothers were sentenced to prison. Harrington had been providing information to the National Erectors' Association "either because, as Darrow charged, he had refused Harrington a substantial pay increase for his services or, . . . because Harrington feared that he would be linked to Darrow in the bribery case."[36]

Dictograph Trap

Harrington's involvement with the prosecution also involved elaborate undercover work. The prosecution promised to drop charges against Harrington if he agreed to cooperate, and Harrington was then used to spy on Darrow in a very devious way. The prosecution had a New York detective named Foster rent three adjacent rooms at the Hayward Hotel, the hotel of choice for organized labor in downtown Los Angeles. Foster took one room in his name and held the other room under an alias, explaining that the person would arrive later. He then saved the third room located between the other two rooms for two stenographers who could eavesdrop on the other two rooms with a dictograph machine. Harrington was then called to Los Angeles by federal subpoena and he took the room in the Hayward Hotel under the alias that Foster had used to book the room. After he arrived, Harrington called Darrow to come to a meeting in the hotel room. The prosecution had placed a microphone behind a bureau in Harrington's room which would pick up conversations that could be listened to by the two stenographers wearing earphones. Darrow met with Harrington in the hotel room on four different days for about a total of ten to twelve hours. The bugging operation would later be called the "Dictograph Trap."

Harrington had the potential to be an extremely important witness for the prosecution and an extremely damaging one for Darrow. Because Franklin was a co-conspirator, the prosecution had to be able to corroborate Franklin's testimony. The prosecution had other damaging evidence but it "needed at least one other live witness to confirm" Franklin's story and "it was possible that, without Harrington's testimony, the

[35] STORY OF MY LIFE, *supra* note 1, at 176.
[36] SIDNEY FINE, "WITHOUT BLARE OF TRUMPETS": WALTER DREW, THE NATIONAL ERECTORS' ASSOCIATION, AND THE OPEN SHOP MOVEMENT, 1903-57, 127 (1995) [hereinafter "WITHOUT BLARE OF TRUMPETS"].

prosecution['s] case could totally collapse."[37] Astonishingly, Geoffrey Cowan wrote that based on a letter written by one of Darrow's close friends Charles Erskine Scott Wood, it seems Darrow enlisted San Francisco labor leader Anton Johannsen to have Harrington kidnapped, "thus eliminating the strongest corroborating witness in the forthcoming trial."[38] Whatever the truth of this, Harrington was not kidnapped.

The People of the State of California v. Clarence Darrow

First Bribery Trial

Clarence Darrow's first bribery trial began on May 15, 1912. The trial, which would last thirteen weeks, was presided over by Los Angeles Superior Court Judge George H. Hutton. Judge Hutton did not have much criminal trial experience. The defense counsel consisted of Earl Rogers, Horace Appel, Jerry Geisler and Harry Dehme. On the prosecution side was John D. "Captain" Fredericks, W. Joseph Ford, Arthur Keetch, and Asa Keyes.

Jury selection was not completed until Friday, May 24. California law permitted a thirteenth juror to be selected who would only participate in rendering a verdict if one of the other jurors became incapacitated. When the last juror was selected, Darrow commented, "'Today is Friday; this juror is the thirteenth; it's good. We're not superstitious.'"[39] However, some accounts indicate that the jury appeared to be friendlier to the prosecution than to Darrow. The jury consisted of a business executive, two contractors and seven ranchers; nearly all were Republicans and none had voted for Harriman in the mayoral election.[40]

The prosecution began to attack Darrow right from the start of their opening statement. They laid out their allegations that all the evidence led straight back to Darrow, and that his actions were part of a concerted effort to undermine justice in Los Angeles: "'We will next show you, that that act on the part of Mr. Darrow was one of a series of efforts to pervert justice in that case by paying money to other jurors and to witnesses who were scheduled to testify for the People against the defendant McNamara.'"[41]

Rogers and other defense attorneys vigorously objected to going beyond the specific bribery charges and telling the jury about a wider and systematic attempt to undermine justice. However, the judge overruled their objections and allowed the prosecution to continue.

George Lockwood, the juror at the scene of the bribe in downtown Los Angeles, was one of the prosecution's most important witnesses. He proved to be a good witness on the stand. But on cross-examination, Rogers went after Lockwood by trying to show that he

[37] PEOPLE V. CLARENCE DARROW, *supra* note 3, at 347.
[38] *Id.* at 300.
[39] ATTORNEY FOR THE DAMNED, 492 (WEINBERG ED. 1957).
[40] PEOPLE V. CLARENCE DARROW, *supra* note 3, at 307.
[41] *Id.* at 309.

had actually derived his living from law enforcement even though he was described as a farmer. More importantly, Rogers used Lockwood's cross-examination to get under the skin of Fredericks, the prosecutor. He repeatedly accused Lockwood of being part of a scheme concocted by the prosecutors to entrap Darrow. As Lockwood described the scene of the alleged bribe, Rogers called it a frame-up by the prosecution. This greatly angered Fredericks who strongly objected and even asked the court to hold Rogers in contempt. While it was believed that Lockwood held up well under Rogers' attack, Rogers had accomplished his goal of getting the prosecutor angry and upset.

The defense introduced a voluminous set of deposition statements from numerous prominent citizens attesting to Darrow's good character. The evidence consisted of fifty-five statements given by former mayors, former United States senators, and numerous judges and other prominent people. Darrow's former law partner, Edger Lee Masters, had spent hundreds of hours collecting the statements by calling on the various citizens and recording their statements in his office.

William J. Burns on the Stand

Detective William J. Burns was a very important witness for the prosecution and Rogers and Darrow argued about the strategy to use to undermine his testimony. Rogers believed it was nearly impossible to undercut Burns' testimony. Darrow wanted to cross-examine Burns himself. Darrow did in fact begin the cross-examination of Burns but at one point Darrow became frustrated, threw up his hands and asked, "'What are we trying to prove here at this time by this wonderful man?'"[42] Burns himself objected, which the court sustained. Rogers then took over cross-examination.

Rogers went after Burns with such vehemence that "[i]t is doubtful if any witness of the prominence of Burns ever underwent the manhandling that Rogers subjected him to. Sparks flew almost continuously and both men were frequently on the verge of physical encounter."[43] At one point Rogers remained seated with his back to the judge and quietly remarked (although loudly enough for the jury to hear) that Burns was known to carry a sword cane and also that Burns was a "'suborner of perjury.'"[44] Burns informed the judge what Rogers had said about the sword cane, which Rogers denied. Burns then told the judge what Rogers had said about perjury. At this point, Rogers leapt up and walked towards Burns and said, "'I make it again, sir; and do not take it back.'"[45] Both men were enraged at this point and the judge called for order and fined each twenty-five dollars. This would equal over $500 in 2009. Burns' cross-examination went on for days with numerous heated moments. At one point, Rogers had so infuriated Burns that the detective was "purple-faced" with rage and looked ready to attack Rogers, whereupon Rogers calmly asked the judge for protection from the witness who he had heard carried a gun in addition to a sword.[46]

---

[42] TAKE THE WITNESS, *supra* note 15, at 218.
[43] *Id.* 217.
[44] *Id.* at 218.
[45] *Id.*
[46] *Id.* at 219.

Rogers goaded Burns by implying the private detective profession was the lowest form of employment and Rogers' "play of facial expression, the scorn, loathing and taunting triumph with which he regarded the noted sleuth brought from the latter appeals to the court to protect him against further irrelevant questioning."[47]

It was at this early stage of the trial that Rogers' well-known alcoholism came into play. Rogers did not show up for a trial strategy meeting during a recess day. Darrow and Ruby went to find him and got into an exchange of words with Rogers' daughter, Adela, who later went searching for Rogers and found him drunk. But Rogers was known for his ability to recuperate from drinking binges and he appeared in court the next day ready to fight for Darrow.

Bert Franklin

Bert Franklin testified for one day for the prosecution and then, Franklin faced Rogers' cross-examination that lasted more than a week. Franklin was one of the most important witnesses the prosecution had and Rogers planned to grill him mercilessly. But Franklin held up well and Rogers did not damage him as he had expected to. Rogers needed more information to undermine Franklin's testimony and he asked for a continuance before finishing his cross-examination. When Rogers continued the cross-examination two days later he had information that Franklin had attended a meeting at the Merchants and Manufacturers Association after he had testified to the grand jury. Rogers showed that Franklin went there for help getting business to make a living, since he would have trouble finding work due to the legal mess he was in. But despite Rogers' working him over, at the end it appeared that Franklin's testimony held up.

California Labor Support

Darrow began to lose confidence in Rogers. There was too much damaging testimony getting through to the jury. It was also at this time that important labor leaders in California, Anton Johannsen and Olaf Tveitmoe, began a campaign to support Darrow. Although they were very angry at Darrow over the McNamara case, as were many labor supporters, they realized that if he was convicted, this along with the McNamara guilty pleas would be devastating for the labor movement in California.[48] In addition, they may have been motivated to help because the McNamara guilty pleas were engineered to a significant extent to keep them and other labor leaders from being prosecuted for the *Los Angeles Times* bombing.[49] This local support was in sharp contrast to the complete disregard most national labor leaders such as Gompers and the AFL felt about Darrow's predicament.

The defense was able, after much effort, to get the judge to move the trial to a larger courtroom. This allowed labor to pack the court with Darrow's supporters. Even more

[47] *Id.*
[48] PEOPLE V. CLARENCE DARROW, *supra* note 3, at 327.
[49] *Id.*

significantly, the San Francisco labor leaders prompted Darrow to take charge of his own defense.[50] This suggestion took on added importance for Darrow when Rogers cross-examined Detective Sam Browne, who had arrested Franklin in downtown Los Angeles during the alleged bribery. Browne testified that not only was Darrow there, but shortly afterwards Darrow approached Browne in the Hall of Records and told Browne, "'[D]o the best you can and I will take care of you.'"[51] Clearly the implication was that Darrow was going to pay Browne to help get him out of the bribery mess. To counter this on cross-examination, Rogers portrayed Darrow as a fool since it was the only way Rogers thought he could defend against the evidence. Rogers wanted to show the jury that if Darrow had really engaged in such criminal activities, he would have been far smarter and shrewder than what was described to the jury. But Darrow was angry at being made to look like a fool and a rift developed between him and Rogers that night.[52] Not only was Rogers trying to portray Darrow as a fool; Darrow also felt that Rogers was using the trial to advance his own agenda, which was to make a name for himself instead of just defending Darrow.

Roger Makes Mistake

Rogers then made a grave legal error. The prosecution wanted to put on the witness stand a taxi driver to testify that he had been paid by Tveitmoe and Johannsen to take a witness out of state so she could not testify for the prosecution. The judge sided with the defense that the testimony should be excluded because there was no connection to Darrow. But Rogers kept talking and inadvertently said enough to show some connection to Darrow, thus prompting the judge to reverse his decision and allow the witness to testify. The testimony proved to be very damaging. This prompted Tveitmoe and Johannsen to help take over Darrow's defense.

The day after the taxi driver's testimony, the defense made a request to put on witnesses to rebut the testimony. This was an astonishing request because the defense was not allowed to introduce any witnesses until the prosecution had presented its case.[53] In addition, Rogers would have to withdraw from the case because Johannsen was going to testify that it was Rogers, as the special prosecutor in the *Times* bombing investigation, that had caused the witness to leave California.[54] Remarkably they got the judge to agree to allow the rebuttal witnesses in, a ruling that "attorneys for both sides agreed was wholly unprecedented in English and American jurisprudence . . . ."[55] Equally important, the judge allowed Rogers to temporarily withdraw from the case, with the result that Darrow became his own lead attorney.[56] This legal maneuvering was so unexpected that some thought the prosecution would move to dismiss the case. But instead, Fredericks turned the situation to his advantage. During cross-examination of Johannsen, Fredericks introduced a telegraph from Johannsen to Harrington written in a secret code telling the

[50] *Id*. at 328.
[51] *Id.* at 329.
[52] *Id.* at 330.
[53] *Id*. at 336.
[54] *Id.*
[55] *Id*. at 337.
[56] *Id.*

defense that the witness had been taken out of state. It was damaging evidence against the defendant.

John Harrington

Another important prosecution witness was John Harrington, who worked as the chief detective for Darrow during the McNamara case. In this position, Harrington would know the inner workings of the defense and what was discussed. It was Harrington who met several times with Darrow in the Dictograph Trap hotel room. In addition, the prosecution needed Harrington's testimony to corroborate Franklin's testimony because Franklin was a co-conspirator, and corroboration was required under California law.

Harrington proved a very good witness for the prosecution by convincingly tying Darrow to numerous incriminating actions. Although Darrow had taken charge of his defense and had cross-examined Behm, it was Rogers who would take on the critical task of cross-examining Harrington. During the cross-examination, Harrington refused to look at Rogers or Darrow but insisted on only looking at the jury. Rogers tried moving in front of the jury along with other tricks to try to get Harrington to look at him or Darrow, but to no avail.

Darrow Accused of Using Hypnotism

On the second day of Harrington's cross-examination, Darrow walked up to Rogers to tell him that Harrington had been a guest in Darrow's home during a certain time period. As he was going to sit down, Rogers whispered to Darrow to make Harrington look Darrow in the eyes. Fredericks heard Rogers' comment and he asked the court to make Darrow sit down. Rogers then described how the witness refused to look at him or Darrow. Fredericks, upset and flustered, then shocked the courtroom by accusing Darrow of attempting to use hypnotism on the witness. The hypnotism allegation caused the entire courtroom to burst into laughter. So hilarious was the comment that the judge ordered a five minute recess for everyone to regain their composure. Fredericks was humiliated.

Dictograph Transcripts

During the cross-examination of Harrington, Rogers repeatedly asked for transcripts of the Dictograph recordings from Harrington's hotel room. The prosecution kept objecting. This may have been a ploy by Rogers because he had likely learned from his government connections that there were no transcripts, as the dictograph trap had not worked. The technology was too primitive and the conversations between Darrow and Harrington were almost impossible for the stenographers to hear.[57]

However, another source indicates that the dictograph evidence was useful. In a 1995 book, the author wrote that the prosecution repeatedly tried without success to introduce the dictograph evidence, but supposedly used the evidence to ask impeaching questions

[57] *Id.* at 358.

of Darrow instead.[58] According to this source, dictograph evidence had never been used in a Los Angeles courtroom before Darrow's first bribery trial.[59]

Prosecution Introduces Check from Darrow to Tveitmoe

The prosecution damaged the defense considerably when it persuaded the court to allow into evidence some checks purporting to be the financial source of the bribery money paid by Darrow to Franklin. Most damaging was a check for $10,000 upon which was written the names of Darrow, Frank Morrison and Olaf Tveitmoe. Morrison, the secretary of the American Federation of Labor, had exclusive control over the McNamara Defense Fund. Morrison wrote the check on August 21 to Darrow, and Tveitmoe endorsed and cashed it at a bank in San Francisco on September 2. Darrow had deposited all other large checks into the defense's regular Los Angeles bank account. In addition, LeCompte Davis, Darrow's associate counsel, stated that he was aware of all other large checks given to the defense, but Darrow never told him about this particular check.

Patrick H. Ford, the son of assistant prosecutor W. Joseph Ford, later claimed that Tveitmoe, who was not called as a defense witness, had admitted in grand jury testimony that a $1,000 bill he got in exchange for cashing the $10,000 check from Darrow was used as part of the $4,000 bribe to Lockwood.[60]

Judge Hutton

Judge Hutton appeared very sympathetic to Darrow and ruled numerous times in the defense's favor. Judge Hutton barred much of the evidence against Darrow and told the jury that the defendant did not have to "'prove who, if anyone, furnished the money to Franklin for the purpose of bribing the juror.'"[61]

Rogers and Darrow were not the only defense attorneys able to provoke the prosecution. Horace Appel antagonized Fredericks to the point that he picked up an ink well and attempted to throw it at Appel. Rogers stepped in to block the assault and received a cut on his hand.

Hugh Baillie, who covered the case for the United Press and later became its president, described the contrast between Darrow and Rogers in the courtroom on those occasions when Darrow would take over cross-examination from Rogers:

> He would drop soft questions on the witness like water on a stone, wearing his antagonist away until a contradiction emerged—at which point he would raise his voice slightly, only slightly to call attention to his victory. Rogers pranced all over the courtroom during a cross-examination (if the seat next to me was vacant, I

[58] "WITHOUT BLARE OF TRUMPETS", *supra* note 36, at 127.
[59] *Id.*
[60] THE DARROW BRIBERY TRIAL: WITH BACKGROUND FACTS OF MCNAMARA CASE AND INCLUDING DARROW'S ADDRESS TO THE JURY 4 (Patrick H. Ford ed.) (1956).
[61] BOMBS AND BRIBERY, *supra* note 6, at 41.

> might find Rogers in it, asking questions of a witness while he read my dispatches and attempted to edit them). But Darrow stayed in one place, bent over the table, looking alternately at his notes and at the witness, his haggard, gloomy expression doubly effective because of the very real peril he was in.[62]

Darrow Looks Guilty

The charges weighed heavily on Darrow and his worry and anguish were apparent. A source of considerable strain between Darrow and Rogers was that Darrow, by several accounts, looked very down, morose, and even depressed, and Rogers thought he looked guilty to the jury. According to a biography about Rogers:

> Time after time during the trial, Rogers railed at Darrow under his breath because of the drooping chin, the fear-stricken eyes that so clearly told his trepidation. At times Darrow was absolutely without hope and only the rough prodding of the Los Angeles lawyer could make him realize that he was providing for the jury 'a portrait of guilty,' as Earl once put it, within hearing of the row of newspapermen.[63]

According to Hugh Baillie, Rogers constantly badgered Darrow to pull himself out of his gloom and look cheerful if only for the jury: "His appearance obviously disturbed Rogers, who began to argue with him—often within the hearing of others in the courtroom—about the way he looked. It was Rogers' theory that Darrow should seem jaunty and confident, though the gates of San Quentin yawned before him."[64]

In Baillie's view, the stress of the trial wore Darrow down:

> As the weeks passed, Darrow looked worse and worse. The courtroom was close and stuffy in those summer months, and he felt it. His hair hung down the back of his neck. He lost weight, accentuating the bagginess of his clothes, and he became more and more round shouldered. Both his head and his lower lip thrust forward more despondently than ever, his face grew longer and the rest of him seemed to shrink. In fact, he looked guilty.[65]

Baille claimed that he had spoken often with Darrow during the trial, and Darrow told him about his disagreements with Rogers over his demeanor. Darrow told Baille that "he certainly didn't think that he should put on an act of buoyancy to impress the jury. Instead, he thought he should look as he felt—bitter, and gravely concerned."[66] Baille believed that Darrow and not Rogers had the correct view of how the defendant should

---

[62] HUGH BAILLIE, HIGH TENSION: THE RECOLLECTIONS OF HUGH BAILLIE 20 (1959) [hereinafter HIGH TENSION].
[63] TAKE THE WITNESS, *supra* note 15, at 211.
[64] HIGH TENSION, *supra* note 62, at 20.
[65] *Id.*
[66] *Id*. at 21.

appear to the jury. He thought Darrow's gloomy appearance garnered the jury's sympathy.

Darrow Takes the Stand

On July 29, 1912 Rogers' announcement that Clarence Darrow would be called to testify generated considerable excitement. On the stand Darrow adamantly denied the accusations by Franklin. Darrow stated: "I did not know Lockwood at all. Franklin did not receive any money from me to bribe Lockwood—besides, I never had $4,000 in cash among any of my accounts here. I believe $4,000 was the sum taken by Franklin at the time he was arrested."[67]

Under direct examination by Rogers, Darrow explained what the $10,000 check was for. He claimed that when he came to California he met Tveitmoe, who told him that the union labor officials had financial problems from dealing with the *Los Angeles Times* bombing grand jury and the Burns detectives, and he asked Darrow for $10,000 to reimburse the union men.[68]

According to one account, on the stand Darrow "came across as intelligent, honest, straightforward and sympathetic" and while the defense and prosecution got into heated objections, "Darrow maintained a composed and respected demeanor."[69] Darrow was on the stand almost two days for direct examination. Then he had to face cross-examination.

Darrow Cross-Examined

Darrow was cross examined by W. Joseph Ford. Darrow knew he would be cross-examined about the $10,000 check he gave to Tveitmoe. He had a ready answer. Tveitmoe had told Darrow that San Francisco labor had incurred about twenty-five to thirty thousand dollars in expenses related to the grand jury investigation. Tveitmoe had repeatedly asked Darrow for reimbursement and that is why Darrow gave him the $10,000 check.

Darrow wrote this in his autobiography about his four days of cross-examination: "I had no more trouble . . . answering every question put to me than I would have had in reciting the multiplication table."[70]

Did Darrow have a Motive to Bribe?

After raising serious doubts about Franklin and Harrington's testimony, the defense sought to demonstrate a crucial point to the jury—that Darrow did not have a motive to bribe Lockwood because Darrow had already decided to have the McNamaras plead guilty, and their pleas were imminent. The most important fact at issue for the rest of the

[67] ONCE UPON A TIME IN LOS ANGELES, *supra* note 16, at 199.
[68] *Id.* at 202.
[69] *Id.* at 205.
[70] STORY OF MY LIFE, *supra* note 1, at 189.

trial was whether Darrow had decided to have the McNamara brothers plead guilty before Franklin tried to bribe Lockwood in downtown Los Angeles on November 28, 1911. If the defense could show that Darrow had decided the McNamaras should plead guilty before the Lockwood bribe, then the defense could argue convincingly that Darrow had no reason to bribe a jury. This illustrates the risk the prosecution took when they decided to first try Darrow for bribing Lockwood instead of Bain, whose alleged bribe took place on October 6, well before the plea deal negotiations.

The defense began to gain momentum by presenting evidence that the alleged bribery of Lockwood occurred after Darrow had already decided to have both McNamara brothers plead guilty. However, Joseph Ford, the deputy district attorney, surprised the defense by introducing evidence indicating that Darrow was still gearing up for a trial after the alleged bribe took place. Ford introduced copies of telegrams between Darrow and his agent in Indianapolis showing that Darrow was still trying to keep the prosecution from obtaining evidence confiscated at the union's headquarters in Indianapolis. Ford also got Darrow to admit that he never asked the detectives who arrested Franklin at the scene of the bribery why Franklin was being arrested. Finally, Ford got Darrow to admit he had never asked Franklin where he got the money to pay the bribe.

Rogers' Closing Arguments

A source of friction between Darrow and Rogers during and after the trial revolved around Darrow's lack of payment to Rogers. Interestingly, Rogers appears to have woven this into his closing argument. While arguing that Darrow would not pay money to bribe a juror, Rogers told the jury:

> The McNamara case was virtually settled. Do you believe that Darrow, a man who has financial peculiarities, would let go of $4,000? It is a physical, mental and moral impossibility. Witnesses testified that Darrow is the stingiest man in the world. And I believe it fully. I know whereof I speak. Mr. Darrow is exceedingly careful in money matters. Darrow would not pay $4,000 for a juror whom he would never have use for.[71]

Rogers Convinces Darrow not to Justify Los Angeles Times Bombing

Although Darrow and Rogers clashed often outside the courtroom about trial strategy, Rogers succeeded in convincing Darrow on one very important point. Darrow had planned to discuss the bombing of the *Los Angeles Times* building and other union violence in order to justify or at least explain that this violence was the act of desperate men driven to such extremes by capitalist oppressors. As Darrow practiced his speech the night before he was to deliver his closing argument, Rogers repeatedly argued he should not condone or justify the *Los Angeles Times* bombing. At one point Rogers shook his finger at Darrow and nearly hollered at him:

[71] ONCE UPON A TIME IN LOS ANGELES, *supra* note 16, at 206.

> "*You have forgotten a boy named Harvey Elder, Mr. Darrow*. . . .And the little old scrub lady and the copy boss and the men working in the pressrooms, ... You cast a spell, Darrow, a deep spell. I listen to you and I am lost. But let me tell you man's inhumanity to man isn't the way to get what you want and never had been. . . . I listen to you, Darrow, when you give tongue, and I forget that night of *shame*, that massacre of the poor and the weak and helpless whom I heard crying out in agony while the man you say was never morally guilty skulked and scramble in back alleys. I care as much for my fellow man as you do, though I don't talk about it as much."[72]

Rogers argued strongly against such an approach and finally convinced Darrow that the jury would not accept any justification for the bombing and murder.

Rogers also played an important role in the closing phase of the trial. Rogers had a huge chart created which listed all the prosecution's witnesses and the nature of their testimony. Rogers referred to each witness as he tried to undercut the prosecution's testimony, labeling them all as part of a conspiracy against Darrow. Rogers recapped the three basic defense themes for the jury:

> 1. The conspiracy to get Darrow.
> 2. That the agreement to plead the McNamaras Guilty had probably been made and therefore Darrow had no reason to bribe anybody.
> 3. Above all, he came back to the inanity, insanity, stupidity of Darrow's presence on the scene if he was guilty and knew what was to take place there. "Not very intelligent," Rogers said with a smile, "even when he was innocent, but Darrow is a crusader, he will always follow a white plume."[73]

Rogers then closed with his own powerful speech to the jury:

> Will you tell me how any sane, sensible man who knows anything about the law business—and this defendant has been at it for thirty-five years—could make himself go to a detective and say to him: 'Just buy all the jurors you want. I put my whole life, my whole reputation, I put everything I have into your hands. I trust you absolutely. I never knew you until two or three months ago, and I don't know very much about you now; but there you are, go to it![74]

Rogers' chart remained up while Darrow gave his closing argument.

Darrow's Closing Argument

Clarence Darrow began his closing argument in his own defense on August 14 and finished on August 15, 1912. After some introductory comments, Darrow began by attacking assistant district attorney Ford who Darrow felt had lied and slandered him:

---

[72] FINAL VERDICT, *supra* note 17, at 447.
[73] *Id.* at 436-37.
[74] TAKE THE WITNESS, *supra* note 15, at 223.

> I think I can say that no one in my native town would have made to any jury any such statement as was made of me by the district attorney in opening this case. I will venture to say he could not afterward have found a companion except among detectives and crooks and sneaks in the city where I live if he had dared to open his mouth in the infamous way that he did in this case.
>
> But here I am in his hands. Think of it! In a position where he can call me a coward—and in all my life I never saw or hear so cowardly, sneaky, and brutal an act as Ford committed in this courtroom before this jury. Was any courage displayed by him? It was only brutal and low, and every man knows it.
>
> I don't object to a lawyer arguing the facts in his case and the evidence in his case, and drawing such conclusions as he will; but every man with a sense of justice in his soul knows that this attack of Ford's was cowardly and malicious in the extreme. It was not worth of a man and did not come from a man.[75]

Then Darrow brought forth a theme he would come back to repeatedly:

> What am I on trial for, gentlemen of the jury? You have been listening here for three months. What is it all about? If you don't know, then you are not as intelligent as I believe. I am not on trial for having sought to bribe a man named Lockwood. There may be and doubtless are many people who think I did seek to bribe him, but I am not on trial for that, and I will prove it to you. I am on trial because I have been a lover of the poor, a friend of the oppressed, because I have stood by labor for all these years, and have brought down upon my head the wrath of the criminal interests in this country. Whether guilty or innocent of the crime charged in the indictment, that is the reason I am here, and that is the reason that I have been pursued by as cruel a gang as ever followed a man.[76]

Accuses National Erectors' Association of Bribery

Darrow accused the other side of the very crime he was on trial for—bribery:

> Will you tell me, gentlemen of the jury, why the Erectors' Association and the Steel Trust are interested in this case way out here in Los Angeles? Will you tell me why the Erectors' Association of Indianapolis should have put up as vicious and as cruel a plot to catch me as was ever used against any American citizen? Gentlemen, if you don't know, you are not fit to be jurors. Are these people interested in bribery? Why, almost every dollar of their ill-gotten gains has come from bribery.[77]

---

[75] PLEA OF CLARENCE DARROW IN HIS OWN DEFENSE TO THE JURY AT LOS ANGELES AUGUST, 1912, 3-4 (GOLDEN PRESS) [hereinafter DARROW IN HIS OWN DEFENSE].
[76] *Id.* at 4.
[77] *Id.* at 5.

Darrow told the jury:

> I have committed one crime, one crime which is like that against the Holy Ghost, which cannot be forgiven. I have stood for the weak and the poor. I have stood for the men who toil. And therefore I have stood against them, and now this is their chance. All right, gentlemen, I am in your hand, not in theirs, just yet.[78]

Darrow essentially argued for jury nullification, urging the jury to acquit him even if they believed he was guilty: "Suppose you thought that I was guilty, suppose you thought so—would you dare as honest men, protecting society, would you dare to say by your verdict that scoundrels like this should be saved from their own sins by charging those sins to someone else?"[79]

Darrow also sought to minimize the crime of bribery in these circumstances:

> Let me say this, gentlemen, there are other things in the world besides bribery, there are other crimes that are worse. It is a fouler crime to bear false witness against your fellow-man, whether you do it in a cowardly way in an address to a jury, or from a witness chair—infinitely fouler.[80]

Darrow did speak to some extent about the things Rogers urged him not to bring up. When Darrow tried to justify or explain the bombing, Rogers got up and left the courtroom. His daughter followed him out and she was about to mention that maybe he ought not to be gone during the speech, but as she later wrote, "I got a look at the maddest man I had ever seen, his eyes were that hot blue of an acetylene torch, so I shut up."[81] Rogers said to her, "'Where does he think he is, in Indianapolis? I warned him. That jury was ready to acquit him. If he doesn't stop this wailing-wall weeping-willow blubber and snivel—That's not a speech, it's a lament. They might change their minds and lock the melancholy Dane up somewhere.'"[82]

Darrow Explains His Presence at the Scene of the Bribery Attempt

One of the strongest pieces of evidence against Darrow was his presence at the scene of the bribery. Surely the jury would wonder why he was there. Darrow told the jury:

> If you twelve men think that I, with 35 years of experience, general attorney of a railroad company of the city of Chicago . . . with all kinds of clients and important cases—if you think that I would pick out a place half a block from my office and send a man with money in his hand in broad daylight to go down on the street corner to pass $4,000, and then skip over to another street corner and pass $500—

[78] *Id.* at 6.
[79] *Id.* at 10.
[80] *Id.*
[81] FINAL VERDICT, *supra* note 17, at 451.
[82] *Id.* at 452.

> two of the most prominent streets in the city of Los Angeles; if you think that, gentlemen, why, find me guilty. I certainly belong in some state institution.[83]

Darrow denied committing any bribery and told the jury, "Now I am as fitted for jury bribing as a Methodist preacher for tending bar. By all my training, inclination, and habit, I am about the last person in all this world who could possibly have undertaken such a thing."[84]

Bert Franklin

Darrow lashed out at his one-time agent Franklin, asking of his testimony: "[I]s it worth anything? Is there a single one of you gentlemen who would condemn your dog upon his word? Is there one of you who would condemn the meanest reptile that crawls upon the word of Franklin as shown by the testimony in this case[?]"[85]

But then Darrow stayed true to his belief that human beings are not responsible for their actions but are instead driven by forces beyond their control:

> I have said about all I care to about Franklin. I have said enough. I have said too much. I have no feeling against him. He is the way God made him. He can't help it any more than you can help being you, or I can help being I. It was a hard choice he had to make. It is a hard choice for a weak man . . . . I don't want anybody to think that I would judge him with hardness or bitterness. I have never judged any human being that way in my life, I never shall.[86]

As to why he furnished the $10,000 bail for Franklin after his arrest, he said, "[LeCompte] Davis came to me and told me that he thought Franklin was innocent, and he advised me to give him the money, and said he would make good if Franklin ran away."[87]

Darrow asserted that with so many detectives spying on him he would never commit bribery in the open as alleged: "[W]ould I take that chance with these gumshoes everywhere . . . detectives over the town as thick as lice in Egypt, detectives everywhere?"[88] He continued:

> Detectives to the right of me,
> Detectives to the left of me,
> Detectives behind me,
> Sleuthing and spying.
> Theirs not to question why—

[83] DARROW IN HIS OWN DEFENSE, *supra* note 75, at 14.
[84] *Id*. at 20.
[85] *Id.* at 43.
[86] *Id.*
[87] *Id.* at 42.
[88] *Id.* at 43.

> Theirs but to sleuth and lie—Noble detectives![89]

Condemns Harrington

Darrow was even harsher in his condemnation of Harrington:

> [A] man who came here to work for me, a man who lived in my house, who ate with me and my wife, who slept under my roof . . . and all the while he was going before Lawler and the Grand Jury and testifying against me? . . . Is there any crime more heinous than that? . . . [T]he man who sat in this courtroom day after day and would not look me in the eye—afraid of being hypnotized? If I started out to hypnotize Harrington I would want a hunk of corned beef. You have to get him through his stomach. Did he look at you? Did he look one juror in the eye? Will he ever look a human being in the eye again until he goes down to his unhallowed grave?

He compared Harrington to a steer that is trained in a stock yard to lead the other steers to slaughter but is able to escape out a side door, leaving the other steers to their fate.

Dictograph Trap

Darrow denounced the prosecution's use of the dictograph trap. The bribery trap was "a sacrament compared with the hidden dictograph used to trap a man into the penitentiary." Darrow was outraged by the dictograph trap and Harrington's role in it:

> Harrington, posing as my friend, came here to lure me into a room where he could secretly record and distort my conversation, in order to land me in the penitentiary! Gentlemen, where is there a parallel for that in the annals of criminal trial? . . . Wouldn't it be better that every rogue and rascal in the world should go unpunished, than to say that detectives could put a dictograph into your parlor, in your dining room, in your bedroom, and destroy that privacy which alone makes life worth living?[90]

Darrow told the jury that the prosecution did not introduce any evidence from the dictograph recordings because nothing incriminating was recorded.

Tveitmoe Check

One of the most damaging pieces of evidence against Darrow was the $10,000 check he gave to Olaf Tveitmoe. Darrow told the jury, "A check was given to Mr. Tveitmoe for a perfectly lawful purpose—it was just as necessary to have money in San Francisco as it was to have money here—and they seized upon that check early in the game."[91]

---

[89] *Id.*
[90] *Id.* at 44-45.
[91] *Id.* at 46.

No Reason to Bribe

Darrow told the jurors, "There is another fact in this case that stands out so clear that every human being who has heard it must know it and understand it, and that is that the McNamara case was disposed of so far as I was concerned prior to the 28th day of November."[92] Darrow asserted that neither the prosecutor nor any member of the group negotiating the deal had "denied a single word of Steffens' testimony that the case was practically settled prior to the 28th."[93] Darrow knew that many jurors would likely not agree with Steffens' social and political philosophy, but he reminded them that this did not make him a liar.

An important witness to the plea negotiations and the timing of the plea deal would have been Judge Cyrus McNutt, who worked on the McNamara defense, but he died before the bribery trial. Ford had mentioned during the trial that McNutt was dead. Referring to this Darrow said, "I couldn't help it. If the Angel of Death hovering around the court room had come and asked my advice, I would probably have told him, 'Take Ford and spare McNutt,' but he didn't. I cannot help it because the Angel of Death made a mistake."

Conclusion

Darrow concluded:

> If you should convict me, there will be people to applaud the act. But if in your judgment and your wisdom and your humanity, you believe me innocent, and return a verdict of Not Guilty in this case, I know that from thousands and tens of thousands, and yea, perhaps millions of the weak and the poor and the helpless throughout the world, will come thanks to this jury for saving my liberty and my name."[94]

When he finished, "Darrow himself was almost at the point of exhaustion as he took his chair. He was trembling as though with ague."[95]

Reflecting twenty years later on one of the most important speeches of his life, Darrow wrote:

> I made the closing argument in the case. I felt as much at ease and as indifferent over my fate as I would have been standing comfortably at a harmless fireside surrounded by loving friends. My argument occupied a day and a half. It was a good argument. I have listened to great arguments and have made many arguments myself, and consider that my judgment on this subject is sound.[96]

---

[92] *Id.* at 48-49.
[93] *Id.* at 49.
[94] *Id.* at 59.
[95] TAKE THE WITNESS, *supra* note 15, at 223.
[96] STORY OF MY LIFE, *supra* note 1, at 189.

Fredericks had the unenviable task of following Darrow. But despite having to talk to the same jurors that had just heard one of Clarence Darrow's best speeches, Fredericks by most accounts did a superb job.

Judge Hutton's Instructions to the Jury

As with many of Darrow's cases, one of the most important aspects was yet to come—the judge's instructions to the jury. Judge Hutton's instructions favored the defense. He emphasized to the jury that they could not convict Darrow based only on the uncorroborated testimony of Franklin who was an accomplice; furthermore, the testimony of one accomplice could not be corroborated by the testimony of another accomplice. If the jury had any doubt as to whether Harrington was an accomplice, this had to be resolved in Darrow's favor. As a result, the uncorroborated testimony of Franklin and Harrington was not enough to convict Darrow. Significantly, Judge Hutton instructed the jury that the fact that Darrow was at the scene of the attempted Lockwood bribery was circumstantial evidence, and the jury could only rely on it if it was "'absolutely incompatible' with any other 'reasonable hypothesis.'"[97] Judge Hutton required almost an hour to instruct the jury, and then at about 9:20 a.m. they were taken to a room to deliberate. It was August 17, 1912.

Verdict

The consensus was that the deliberation would take many hours, so many observers started to leave the court house. The prosecutors went to their offices on another floor of the building and Earl Rogers took a smoke break out in the hall. Darrow stayed in the courtroom and paced back and forth. To the surprise of everyone, after only about thirty-four minutes of deliberation, word came that the jury had reached a verdict. Ford came back for the verdict, but Fredericks did not.

The jury foreman read the verdict: not guilty. Numerous Darrow supporters rushed forward to congratulate him. One of the first to congratulate Darrow was Judge Hutton who said, "'Hundreds of thousands of hallelujahs will go up from as many throats when they hear this.'"[98] Darrow then told the judge he would like to visit him at his home, to which the judge gladly assented.

The jury had taken three ballots with the following results: 8-4, 10-2, and finally 12-0 for a not guilty verdict. During the trial it appeared that jurors number seven and number eleven were against Darrow, but when he concluded his plea these "two men were openly weeping, as was everybody else in the courtroom including the judge."[99]

The celebration at the courthouse went on for two hours, after which Darrow and some of his friends went to a reception at a restaurant to celebrate some more.

---

[97] *Id.*
[98] ATTORNEY FOR THE DAMNED, *supra* note 39, at 531.
[99] *Id.*

According to one source, one of the jurors said the jury believed there had been a bribe and that someone other than Clarence Darrow furnished the money.[100]

Hugh Baille was sure that the jury had decided to acquit Darrow even before all of the evidence was in. According to Baille, the jurors walked by the press benches every day when they went out to lunch, and during the last week of the trial a juror named F.E. Golding signaled an acquittal by shaking his head in the negative to Baille. After the verdict was in, Golding confirmed this to Baille and said that the verdict had been generally agreed upon a week earlier, and that the jury did not even debate the testimony.[101]

The People of the State of California vs. Clarence Darrow

Second Bribery Trial

After his first bribery trial, Darrow went back to Chicago. He knew that Fredericks might pursue the allegations that he bribed Bain, but he also believed the charges might be dropped. Darrow asked Jerry Geisler, who worked in Rogers' law firm, to check with the district attorney about the matter. Geisler wrote to Darrow that Fredericks would not commit himself to a definite answer, but indicated that the matter would probably be dropped.[102]

But the District Attorney did not drop the charges and Darrow was tried for bribing jury member Robert Bain. The trial began on January 20, 1913. The trial judge was Judge William M. Conley of Madera County. The trial was held in the Superior Court of Los Angeles County.

Darrow's defense attorney Earl Rogers, became ill during the first day of the trial and was unable to continue defending Darrow. It was well known that Rogers was an alcoholic and his drinking was ruining his health. Rogers stayed on long enough to cross-examine Lockwood, who testified against Darrow. Rogers was then ordered to bed by his doctor, although later he did return to court for a short time. As a result, Darrow defended himself with the aid of Jerry Geisler, who worked in Roger's law firm, and Orlando "O.W." Powers, a former judge from Salt Lake City, Utah who had recently moved to Los Angeles. Powers had replaced Horace Appel.

Wheaton Gray prosecuted the case as a special prosecutor and he was assisted by Joseph Ford who helped prosecute Darrow in the first trial.

Darrow claimed to be much more relaxed about the second trial. As he recounted:

---

[100] BOMBS AND BRIBERY, *supra* note 6, at 41.
[101] HIGH TENSION, *supra* note 62, at 21, 23.
[102] ARTHUR AND LILA WEINBERG, CLARENCE DARROW: A SENTIMENTAL REBEL 253(1980) [hereinafter SENTIMENTAL REBEL].

> The State had of course tried its strongest case first. No one supposed that they would ever try the other. But they waited three months and then put the second one on call. I did not consider it seriously, for everything possible had been brought out in the first trial. No one regarded the second as serious, so far as I could learn.[103]

Although the prosecution would use much of the same evidence and arguments, there were some major differences in the two trials. The first trial involved an alleged bribe of a potential juror, while the second trial involved a seated juror. But the most important difference was that Bain was allegedly bribed in October 1911, well before the McNamara brothers' plea negotiations had begun. Thus, Darrow could not use the lack of motive defense that was one of his strongest arguments in the first trial.

Darrow found it difficult to act as his own defense lawyer:

> It is all very well to object to evidence and so-called evidence where some one else is concerned, but it looks bad if one is the defendant and has to rise up and protest against letting something in. It is not easy to know what to do in a situation so sensitive as that. And from the beginning I felt certain that some of the jurors were hostile.[104]

Trial

Less is known about this trial because the trial transcripts are not available. Judge Conley took much greater control over the proceedings than did Judge Hutton in the first trial. He took an active role in jury selection by limiting repetitive questions and speeding up the process. He was obviously aware of the acrimony that permeated the first trial and warned both sides to control the personal animosity.[105]

Jury selection took seven days, with Darrow doing most of the questioning for the defense. In the end twelve jurors were seated with one alternate. Judge Conley explained to the jury that they were to remain unbiased despite what they may have read in the papers prior to the trial, but he did allow them to read the daily papers as long as they avoided news about the trial.[106]

The state's case took seven days. Ford opened for the prosecution and while doing so he mentioned the Lockwood bribery trial. This prompted Rogers to object but Judge Conley overruled the objection, stating that the jury would understand that it was not evidence.

As in the first trial, one of the prosecution's most important witnesses was Bert Franklin, Darrow's former chief jury investigator. Franklin was on the stand less than two days which was much less than in the first trial. Rogers was supposed to cross-examine

---

[103] STORY OF MY LIFE, *supra* note 1, at 189.
[104] *Id.* at 190.
[105] SENTIMENTAL REBEL, *supra* note 102, at 254.
[106] *Id.*

Franklin but he was missing from court and the work fell to Darrow. Darrow went after Franklin but Franklin was defiant; he called Darrow a "'briber'" and flatly stated that he had bribed Bain at Darrow's direction.[107] When Darrow asked why he had gone to the Bain home, Franklin replied directly, "'To bribe Robert F. Bain, at your request.'"[108] Darrow asserted that he had tried to get Bain stricken from the jury because he believed Bain was biased against labor unions, but that Franklin had kept him on the jury. Franklin denied this assertion.

Rogers Too Sick to Continue

Rogers appeared in court the following Friday determined to cross-examine Lockwood, the next witness. Rogers was obviously very sick and doctors advised him to step down from the case, but he refused. Rogers proceeded to cover much of the same testimony as in the first trial, but Rogers also implied that Lockwood and Franklin had worked together to "'get'" Darrow.[109] Rogers' efforts were too much for his health, which prompted Judge Conley to speak with Rogers' doctor. After the noon recess Judge Conley met with the defense and Rogers' doctor, and then told Rogers what his doctor had said: "'[Y]ou have to quit this case, and if you don't you're liable to die as a result.'"[110] Rogers replied, "'I can't, Judge. I have to stay with the case, and I'm going to do it if it kills me. What the doctors say is true, and I know it, but I'm not going to retire from the case.'"[111]

But Judge Conley was adamant: "'Well, if you won't of your own free will, I'll have to figure out some way to make you,' . . . 'Give me a chance and I will put you in jail for contempt, and I am going to figure out some way whereby I can commit you to the hospital in this case.'"[112] Rogers reluctantly withdrew, leaving Darrow to finish cross-examining Lockwood and to shoulder much of the burden of acting as his own counsel for the rest of the trial.

Ortie McManigal

Ortie McManigal, whose confession brought down the McNamara brothers, was called as a witness. He was not called as a witness in Darrow's first bribery trial. McManigal testified that Darrow and the defense had put pressure on him and his family to get McManigal to recant his confession implicating the McNamara brothers. He said his wife threatened to stop coming to the jail to see him if he did not talk to Darrow.

Defense Case

[107] *Id.* at 254-55.
[108] *Id.* at 255.
[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] *Id.*

Darrow's opening for the defense took three hours. He believed he was being subjected to double jeopardy since the prosecution had lost the first trial with much of the same evidence:

> All the evidence the State has produced against me, as we will show, was submitted to a jury of twelve men of this country, and after three long months of testimony that jury immediately pronounced me not guilty. If a tribe of savages had compelled a man to run the gauntlet once, they would have been satisfied and would not have compelled him to run it the second time.[113]

Powers offered the same depositions of witnesses attesting to Darrow's reputation that were used at the first trial. Judge Conley did not want to use up time reading them and Ford stipulated that Darrow's previous reputation was good. However, Darrow insisted, so the Judge allowed five to be read.

Ruby Darrow Called as Witness

Most of the defense witnesses were the same as during the first trial, except that Ruby Darrow was called as a surprise witness. Darrow put his wife on the stand to impeach the testimony of John Harrington, who had said in both trials that Darrow had flashed a large roll of money and bragged that it was to be used to reach McNamara jurors.

Rogers Returns

Two weeks after he was forced to leave the case, Rogers returned long enough to examine Clarence Darrow. Rogers looked much better but he was not well enough to resume his role as defense counsel for the rest of the trial.

Closing Arguments

After the state had given its rebuttal to the defense's case, Judge Conley gave each side eight hours for closing arguments.

The special prosecutor Wheaton Gray spoke first for the prosecution. Gray vilified Darrow, calling him a "'[m]oral idiot'" and "'the greatest power for evil in the United States today.'"[114] Gray told the jury that Darrow had received at least $200,000 from the McNamara defense fund "'for purposes of corruption'" and with the defense fund expected to rise to $800,000, that much money could not be spent for legitimate purposes.[115] Gray said Franklin had no motive to bribe a juror and would only have done so because Darrow directed him. Darrow also had the motive to win the McNamara case. Gray did not mince his words:

---

[113] *Id.* at 256 ("Darrow's opening statement was reported in the Los Angeles Record, February 13, 1913; Los Angeles Times, February 14; Los Angeles Examiner, February 14").
[114] *Id.* at 257.
[115] *Id.*

> "If you want to please dynamiters, murderers and the criminals of the world, acquit this man. But if you want to do your duty to society, then convict him. It should be made impossible for jury bribery to exist in this city, but if Darrow is acquitted, then you can never find a lawyer guilty who passes a bribe by an agent."[116]

Judge Powers' Closing Argument

Judge O.W. Powers began his closing argument at 9:00 a.m. on Wednesday, March 5, 1913. Other participants, including Judge Conley, referred to him as "Judge" because he had served as a judge in Utah. Judge Powers began his talk by informing the jury and the court that he was not exactly an outsider as many may have viewed him:

> If your Honor Please and Gentlemen of the Jury: May I make a personal reference at the outset of my argument? I want to state that I shall not speak to you exactly as a stranger from a sister state; for before I received the request from my distinguished client to assist in his defense, I had made preparations to come among you and open an office, and help to pay the taxes of your county. Therefore I am here as a resident, as well as a lawyer whose home is in another city; and I, therefore can speak to you with less hesitation. I mention this because sometimes that which is said by one who has no interest connected with our own, has not as much weight.[117]

Judge Powers soon launched into an argument as to why this trial amounted to double jeopardy. He said he had listened to the prosecution the day before and "not until one hour and fifty minutes had elapsed was the name of Bain mentioned."[118] The prosecution was being "manifestly unfair" in deliberately trying to "becloud the issue" by introducing testimony from the Lockwood case to prejudice "my client."[119]

Prosecution Attacks Darrow Because of Weak Case

Powers conceded that technically the Lockwood and Bain charges were different, "yet the thing stares us in the face that Darrow has been acquitted upon this very testimony now before us."[120] He accused the prosecution of resorting to verbal abuse because their case was so weak, calling Darrow a "'jury-briber,'" "'witness briber,'" "'a man who has the burglar's tools with him,'" "'moral idiot,'" "'thick skull,'" "'an unintelligent person,'" "'a criminal by nature,'" and "'a criminal by practice.'"[121]

Powers stated that nearly all of the time Gray devoted to discussing the testimony was focused on Diekelman, McManigal, and Biddinger. Gray tried to glorify Biddinger,

---

[116] *Id.* at 257-58.
[117] THE DARROW CASE ARGUMENT FOR DEFENDANT BY JUDGE O. W. POWERS OF SALT LAKE CITY 4 (F. W. GARDINER CO.) [hereinafter JUDGE O. W. POWERS].
[118] *Id.* at 6.
[119] *Id.*
[120] *Id.*
[121] *Id.* at 7.

Burns's detective: "He stood here and plucked feathers from the air and he stuck them on Biddinger's shoulder blades and made him an angel, so that William J. Burns himself never would have recognized him. Burns is not in the habit of employing angels to do his work."[122]

Powers emphasized the sentiment that Darrow claimed all along was behind his prosecution: "[H]e must be punished; he must be followed; he must be crushed. He has dared to defend labor; he has stood for the weak and oppressed."[123]

Harrington is a Traitor

Powers lashed out at Harrington, knowing how important he was as a witness for the prosecution. He asked why it was Darrow who should be crushed:

> Harrington, the scarecrow lawyer from Chicago, comes here and is rewarded, and expects to be rewarded for his treachery? Treachery as perfidious as that of Judas when he betrayed the Master. It seemed to me when that man testified on the stand, and there was developed his conduct towards this defendant and his family that if it be true, as some men believe, that at one time all men were animals, the man Harrington must have crawled upon his belly, lapped the dust of the earth and hissed at the passerby, as he hid under a bush.[124]

Darrow's Closing Argument

Darrow began his closing argument on March 5, 1913 and finished the next morning. Darrow wasted no time in going after Wheaton Gray. Darrow's invective was extraordinary during this trial. He lashed out at Wheaton Gray perhaps as much as he did against anyone he faced in a courtroom, although Gray was not present to hear it. Darrow began:

> If the Court please, and gentlemen of the jury:
>
> I wish the attorneys on the other side to be kind enough to send for Gray. I have got some things to say about him, and I had rather he would be here, if he is not too big a coward.
>
> I don't think that Gray is much of a lawyer. I was wondering what he would be good for. If he had lived sixty years ago, I could have found a job that I think he would have been fitted for; but he is a misfit in this age. He would have been all right in the days of slavery for hard and cruel masters to hire to beat negroes. He is built for it, and he has got courage to beat a man when his hands are tied—Gray has. He might want his feet tied too; but he would have courage enough to beat them if they were securely fastened.

[122] *Id.*
[123] *Id.* at 8-9.
[124] *Id*. at 9.

Every individual Darrow thought was out to get him received a verbal lashing: "And I guess Gray is right. I think I am a coward. . . . I think if I was not a coward I would just kill Harrington—just plain kill him. I can hardly give myself credit for not killing him."

In referring to Harry Chandler, the son-in-law of *Los Angeles Times* owner Harrison Gray Otis, Darrow said, "I will guarantee that Chandler has visited Gray's pen a good many times and poured many a pail of swill down his trough."

Darrow Goes Against Rogers' Advice

Darrow made a significant mistake that nearly got him convicted. Despite a warning from Rogers not to try and explain or justify the *Los Angles Times* bombing or other acts of labor violence, Darrow was determined to place his bribery trial and the McNamara case in the historical context of a great struggle between labor and capital. He wanted the jury to see the actions of the McNamara brothers as he did, as the actions of desperate men forced by the oppression of a wealthier and stronger opponent, to lash out in violence because they had no other choice. Darrow recounted in his autobiography: "I made the closing argument, and consciously took the chance of saying something in defense of the McNamaras and their real motives, which I felt that I should say."[125]

Darrow knew he was inviting danger:

> I am sorry for the McNamaras; I am sorry for them to-day. I would give a great portion of my life to have those two boys understood as they will one day be understood; and I want to say to this jury, even if it costs me my liberty, that the placing of dynamite in the Times alley was not the crime of the century; it was not even a crime, as crimes are understood. I want to make myself plain upon that, if it costs me the vote of every man in this jury box.

Darrow also said that the McNamara brothers "never morally committed murder" because when J.B. McNamara placed the sixteen sticks of dynamite in the alley next to the building, he never had any intent to commit murder. The explosion caused ink barrels to ignite and the fire was what killed the twenty victims. Darrow called it "an accident."

A biography of Earl Rogers states: "Without Rogers to restrain him, Darrow did what he had wanted to do in the first trial. He attempted to condone the wholesale destruction of the *Times* employees as a social crime rather than a horrible murder."[126] His approach caused several jurors to vote for conviction. This would appear to vindicate Rogers' approach to the defense instead of Darrow's social justice defense.

Why did Darrow venture into this dangerous territory? Perhaps he was so convinced that he was on the right side of history he thought he could convince others to see events as he did. Being a student of history, Darrow saw the present events as part of a long journey of

[125] STORY OF MY LIFE, *supra* note 1, at 190.
[126] TAKE THE WITNESS, *supra* note 15, at 225.

social justice and he was convinced that until the root causes were solved, labor violence would continue no matter how many perpetrators were hanged.

Quotes Poem

Near the end of his argument, Darrow quoted poetry as he did in many of his closing arguments. For this moment, he chose to quote parts of the poem *The Garden of Proserpine* by Algernon Charles Swinburne:

> I am tired of tears and laughter,
> And men that laugh and weep
> Of what may come hereafter
> For men that sow to reap:
> I am weary of days and hours,
> Blown buds of barren flowers,
> Desires and dreams and powers
> And everything but sleep
>
> From too much love of living,
> From hope and fear set free,
> We thank with brief thanksgiving
> Whatever gods may be
> That no life lives for ever;
> That dead men rise up never;
> That even the weariest river
> Winds somewhere straight to sea.
>
> There sun or star shall waken,
> Nor any change of light:
> Nor sound of waters shaken,
> Nor any sound or sight:
> Nor wintry leaves nor vernal,
> Nor days nor things diurnal;
> Only the sleep eternal
> In an eternal night.

Then Darrow told the jury: “I am ready for that sleep. I have loved peace. I have loved my fellow men. I believe in peace. I believe in the law of love. I believe it is the greatest and most potent force in all this great universe.”

Darrow recounted:

> Not long ago—not long ago I was sitting in the depot down here at Sixth street, and near me sat an old woman with a shawl over her head; and suddenly she turned and looked at me and asked if this was Mr. Darrow, and I told her it was; and she took my hand and kissed it, because she said she knew that I had been the

> friend of the poor. I had rather go to the penitentiary, gentlemen, with the kiss of that poor woman on my hand than to live in a palace purchased at the price of my dishonor and my shame.

Claiming his support among the working poor, he told the jury, "I know there are sewing girls in great cities who, bending over their task, will drop a briny tear upon their needle which will be stitched into the garment that the rich shall wear."

Darrow closed with this:

> Gentlemen, it is with you—in the hands of these twelve men, strangers—strangers in a strange land; after my long career, after my hard fight, after all the bitterness and hatred of the past, I come to you worn and weary, and tired, and submit my fate, the fate of my family, and the hopes and fears and the prayers of my friends, to you.

One account states that Darrow was crying and appeared on the verge of collapse after his argument.

Ford Closes for the Prosecution

Ford followed Darrow and gave a very strong closing argument for the prosecution. Ford emphasized the dangers that jury bribery posed: "'I will tell you gentlemen, that organized society must be protected against such crimes as jury bribery. We can have no justice and no law if jurors can be corrupted with immunity.'"[127]

Ford said he pitied Darrow:

> I appreciate the tremendous self-control he has shown during this and the former trial and the suffering, guilty or innocent, he has undergone. I appreciate all that, and, further, what a verdict will mean to his faithful wife who has stood by him in all his trouble. I also appreciate his feeling of contempt for Franklin and Harrington, who have come here to testify against him. But most of all, I pity him that a man with such an intellect, a man of such endowments, would stoop to such a crime.[128]

Despite his feelings of pity, Ford pointed his finger at Darrow and shouted that the jury should convict him - "'just as you would an ordinary sneak-thief who had been proven guilty. If we cannot get a verdict of guilty on the evidence submitted here, then this community is against law and order, and I will never prosecute this case again.'"[129]

After Ford concluded, Judge Conley took forty minutes to give his jury instructions. It was now after 9:00 p.m. and the jury was too tired to deliberate that night.

---

[127] SENTIMENTAL REBEL, *supra* note 102, at 261.
[128] *Id.*
[129] *Id.*

Verdict

After about thirty-eight hours of deliberation, the jury reported that it was unable to reach a verdict. Judge Conley thereupon discharged the jury. The trial ended on March 8, 1913 with a hung jury voting 8 to 4 for conviction. The jury had taken twelve ballots and Darrow never had more than six jurors voting not guilty.[130] Significantly, that was early in the balloting and soon two more jurors voted guilty. According to one of the jurors, Darrow's own arguments were to blame for the lack of acquittal. Darrow alienated several jurors when he said the McNamara brothers were not murderers but instead were workers in a great cause.[131] Even though Darrow thought this was the prosecution's weaker case, he came closer to being convicted in the second trial than the first.

Will There be a Retrial?

Darrow's counsel immediately asked for a retrial.[132] Darrow, speaking on his own behalf, asked that the time for setting a new trial be set a week from the following Monday. The judge reminded Deputy District Attorney Ford that during his closing argument he said he would not try the case again. The judge asked if this meant that the indictment against Darrow would be dismissed. Ford replied that he had only expressed his personal belief and that he could not speak for District Attorney Fredericks. Judge Conley then set the date of March 31 for a new trial. Darrow's $10,000 bail was continued. Darrow thanked the court and said, "'I'll fight it out; I should have been acquitted on the evidence, and I shall surely fare better next time.'"[133]

District Attorney Fredericks said he believed the Los Angeles Bar Association should take action against Darrow because of his testimony that he had paid money to Guy Biddinger, a detective working for the prosecution.

Fredericks eventually decided not to recharge Darrow. Several accounts state that Fredericks made a deal with Darrow that if Darrow left and never practiced law in California again, Fredericks would drop the charges.

In his autobiography Darrow was very dismissive of the second bribery trial:

> The State had of course tried its strongest case first. No one supposed that they would ever try the other. But they waited three months and then put the second one on call. I did not consider it seriously, for everything possible had been brought out in the first trial. No one regarded the second as serious, so far as I could learn.[134]

---

[130] *Darrow Jury Fails to Agree; 6 for Him*, N.Y. TIMES, Mar. 9, 1913.
[131] *Id.*
[132] *Id.*
[133] *Id.*
[134] STORY OF MY LIFE, *supra* note 1, at 189.

Darrow believed that the second bribery trial was influenced by the prosecution of members of the International Association of Bridge and Structural Iron Workers in dynamite trials in Indianapolis. He wrote of the trials in Indianapolis:"This case was fully played up in Los Angeles, and my second case followed soon after. . . . There was no reason why the Indianapolis situation should affect my case, but I knew that it would, and it did."[135]

The bribery trials were so traumatic to Darrow that years later in his autobiography he wrote:

> I feel confident that no reader will blame me if I do not dwell on this part of my story. As I write, the old ghosts creep out of the dimming past and dance around me as if in glee, and I am anxious to drive them back and lock them up where I cannot see their haunting faces or hear their mocking jeers.[136]

Earl Rogers

Earl Rogers' excessive drinking eventually ended his life. He died broke at age fifty-two in a Los Angeles rooming house on February 22, 1922. Earl Rogers' daughter wrote that in 1924 she went to the court in Chicago to cover the Leopold-Loeb case for the Hearst papers. But she could not effectively cover the case and told Hearst as much because she still hated Darrow. She claimed that when her father died in poverty, Darrow still owed him $27,000 for defending him in Los Angeles.[137]

Did Clarence Darrow Engage in Bribery during the McNamara Defense?

Although he was not convicted, the question still remains: Did Clarence Darrow engage in jury bribery during the defense of the McNamara brothers?

Evidence of Darrow's Guilt

Geoffrey Cowan, Dean of the Annenberg School for Communication and a law professor, spent five years researching the McNamara case and Darrow's first bribery trial for his book *The People v. Clarence Darrow: The Bribery Trial of America's Greatest Lawyer*, the most comprehensive book to date on the cases. Cowan believes "it is fair to conclude that Darrow bribed both Lockwood and Bain. Over the course of this century, the power of Darrow's myth has obscured the fact that this was a widely held opinion at the time."[138]

Cowan researched personal memoirs, private papers and government documents and found that many of Darrow's friends at the time believed he was capable of bribery and

---

[135] *Id.* at 190.
[136] *Id.* at 188.
[137] FINAL VERDICT, *supra* note 17, at 384.
[138] PEOPLE V. CLARENCE DARROW, *supra* note 3, at 434.

probably did it on other occasions.[139] And many of Darrow's friends and associates believed Darrow had committed jury bribery in the McNamara case.[140] He also thinks most of the reporters who covered the trial believed Darrow was guilty.[141] Cowan also thinks that Darrow was not the victim of a government setup.[142] And Judge Bordwell "was almost certainly correct" in his belief that the arrest of Franklin on bribery charges forced Darrow to plead both McNamaras guilty.[143]

During the trial, Darrow's strongest argument against the attempted bribery of Lockwood was lack of motive—he knew his clients were going to plead guilty. Darrow's defenders at the time and later make the same claim. Cowan refuted this:

> As of Tuesday, November 28, 1911, at nine a.m., when Franklin met Lockwood on the streetcorner, Darrow still wanted the jurors bribed because, notwithstanding Steffen's efforts, he expected the case to go to trial. Fredericks had made it clear that he would not accept any arrangement that did not include confessions from both brothers—and Darrow was unwilling to let J.J. go to jail. No agreement was possible, or so it seemed until Franklin was arrested at Third and Main.[144]

W.W. Robinson, who lived near the *Times* building during the bombing, followed the events and later studied the case, wrote in 1969: "I can say today that I have been unable to find a lawyer or anyone else directly connected with, or an observer of, the McNamara and Darrow trials who believed in Darrow's innocence."[145]

Robinson recounted an interview with Paul Jordan Smith, an admirer of Darrow, who took part in a welcoming reception for Darrow when he arrived back in Chicago. Smith said he told Darrow, "'[W]e all knew you could not be guilty of bribery'" to which Darrow reportedly replied, "'When you're up against a bunch of crooks you will have to play their game. Why shouldn't I?'"[146]

Adela Rogers recounted an argument she overheard between Rogers and Darrow during which Rogers angrily denounced Darrow's attempts to justify or explain the *Los Angeles Times* bombing. Rogers was pacing back and forth in front of Darrow and Rogers said, "'I don't ask my clients whether they are innocent or guilty either . . . but—I know. You knew about the McNamaras. I didn't ask you, but you told me you were innocent.'"[147] To which Darrow replied, "'You never believed me, did you?'"[148] One of the two, likely

---

[139] *Id.* at 434.
[140] *Id.* at 500-501.
[141] *Id.*
[142] Id. at 435.
[143] *Id.* at 435-36.
[144] *Id.* at 438.
[145] BOMBS AND BRIBERY, *supra* note 6, at 46.
[146] *Id.* at 47.
[147] FINAL VERDICT, supra note 17, at 448.
[148] *Id.* at 448.

Rogers, slammed the door shut. By this point, dawn was breaking and the door opened, and Darrow left. Then Rogers came out:

> The moment when my father came out is etched in my brain . . . . I'd never seen him look quite like that before. . . . My father had gone into that room with Darrow believing in his innocence, his honesty. . . . He came out knowing Darrow was guilty, though we agreed we would never tell anyone and I never have. . . . I have to tell it here, or it is not just to the story about Earl Rogers.[149]

Evidence in Favor of Clarence Darrow

Besides the defense evidence and arguments offered during both bribery trials, there is another possibility that the bribery attempts were made by someone other than Clarence Darrow. The prosecution believed that the San Francisco labor leaders, Olaf Tveitmoe and Anton Johannsen, were behind the bombing of the Los Angeles Times. They would have benefited if the McNamara brothers were found not guilty. There were also nearly fifty union men of the International Association of Bridge and Structural Iron Workers who were indicted in Indiana as part of the dynamite conspiracy cases. These charges were a direct result of the McNamara investigation. All of those indicted were facing serious charges and prison sentences if convicted and any one of them would benefit tremendously if the McNamara brothers were found not guilty.

Motives

If Darrow did engage in jury bribery, why did he do it? To help win the case obviously, but there must be more to it. One possible motive was Darrow's morbid fear and hatred of the death penalty. He would do nearly anything to save a client from the gallows. Jim McNamara faced a near certain conviction if he went to trial; furthermore, he faced a very good chance of being executed if convicted. At some point after Darrow took the case but before the trial, he had time to look at the evidence and concluded that James McNamara was guilty. He also learned that the prosecution had a rock solid case. When Darrow realized this, his primary focus was on saving his client from the gallows. Darrow also appeared to feel the pain and fear of his clients. He identified with his clients so strongly that he could envision himself on death row and this horrified him. In addition, Darrow's social and political beliefs led him to believe that the McNamara brothers and other union members who engaged in violence were driven to it by oppression. Also, because the prosecution had such a strong case there was no guarantee that the prosecution would accept a plea deal.

Fighting Fire with Fire

Professor Gerald Uelmen believes that Darrow, in fighting a superior foe, was simply using similar tactics and thus fighting fire with fire:

[149] *Id.* at 448-49.

> The jury acquitted him in the face of overwhelming evidence of guilt, strongly suggesting that they agreed with his argument that his underhanded techniques were no worse than the underhanded techniques of his opponents. Ninety years later, what do we think of a legal system that permits the prosecution to bribe witnesses, back-door judges, kidnap defendants, and engage in spying and eavesdropping on defense lawyers, but severely punishes defense lawyers who engage in the same conduct? When is it appropriate to fight fire with fire?[150]

Professor Uelmen believes that except for the charges for jury bribery, "every offense in this litany could be matched with equally offensive conduct by the prosecution."[151] Darrow faced a strong case by the prosecution: "Darrow denied most of the activity, but the denials wore thin as the evidence accumulated. Darrow's defense placed increasing reliance on a theory of justification: he was fighting fire with fire."[152]

Clarence Darrow Returns to Chicago

Clarence Darrow returned to Chicago and tried to resurrect his legal career. Over the years he would do this in spectacular fashion, with several of his most famous trials taking place in the 1920s. Darrow summed up the aftermath of the McNamara case and his bribery trials in his autobiography:

> There was only one view that I was sure practically every one would agree on--that, whatever the facts might be, there had been no sordid or selfish motive connected with the affair. They would know that if the charge was true it was because of my devotion to a cause and my anxiety and concern over the fate of some one else. Most people did not remember or understand about the twenty-one indictments against each defendant, that to get a disagreement in each case, or even in ten, would be of no avail. People did not know the weakness of the State's testimony against me or the overwhelming contradictions of most of the important points in Franklin's statement. They did not know that Franklin was indicted; that they did not want any one but me. They did not realize that the effort to dispose of the McNamara case by a plea of guilty was admitted by the prosecution to have begun many days before the arrest of Franklin and that the agreement for the plan had been completed before that time.
>
> Whatever my feelings, and whatever the attitude of the public, there was but one thing to do. I must go back to work. So I went to my office without delay. I made no statement, gave no explanations, I offered no excuse or extenuation. I said nothing about the matter unless some one asked me, and then I avoided their queries as much as I could. I went straight ahead as though nothing had interrupted my course, but I was conscious that something had taken place. I offered no occasion for snubbing me, if perchance any one might have been so

[150] Gerald F. Uelmen, *Fighting Fire With Fire: A Reflection on the Ethics of Clarence Darrow*, 71 FORDHAM L. REV. 1543, 1544 (2002-2003).
[151] *Id.*
[152] *Id.*

inclined. If people wanted to see me, my door was open; if they did not care to come I never knew it. Every house has skeletons in its closets grinning and struggling to come out. It is doubtless better that they should be free and roaming in full light of day.

My prolonged absence from Chicago was enough in itself to destroy my business. I had to begin anew. But then, I was already known and had a wide acquaintance. I did not sit in my office only to wait for some one to bring me a good fee; any one who came inside my door was welcome; whether he had money or not was of small concern. Neither then nor at any other time in my life did I go after business. I simply took it as it came, and the criminal courts and the jails are always crowded with the poor.[153]

[153] STORY OF MY LIFE, *supra* note 1, at 203-05.