malaria experiments, to testify. Instead Dr. Alving "deprecated Leopold's contribution to the malaria project and said others had contributed more."[113]

Although it was not unanimous, the board agreed to grant Leopold parole with some conditions attached for five years. One of the conditions was that he must avoid publicity. Nathan Leopold Jr. was released from Stateville prison on March 13, 1958. He walked out the prison with Elmer Gertz. It was more than 33 years since Leopold had entered Joliet prison with his friend Richard Loeb. It was also twenty years to the day since Clarence Darrow died.

Leopold found that even after nearly 34 years since the murder the press was still fascinated by him and the crime. There was a crowd of reporters at the prison when he was released. The press chased his car on the drive to Chicago. Leopold planned to stay in Chicago for a few days but the onslaught of the press made this impossible. So the next day he flew to Puerto Rico.

Leopold went to live in Castaner, a small village close to San Juan. As part of his parole, he worked at a hospital sponsored by the Church of the Bretheren, a Protestant organization based in Elgin, Illinois. His parole board granted him permission in 1961 to marry Gertrude Feldman Garcia de Quevada.

Leopold earned an M.S. degree from the University of Puerto Rico. He also taught mathematics at the university and worked in urban renewal, and conducted research on leprosy for the university's medical school. Still interested in birds, he wrote a book titled *A Checklist of the Birds of Puerto Rico* published by the University of Puerto Rico in 1963. In 1963, Leopold's parole restrictions ended and he was then totally free. Leopold and his wife then traveled extensively including going back to Chicago to visit friends.

Life Plus 99 Years According to Nathan Leopold

Leopold wrote an autobiography entitled *Life Plus 99 Years* published in 1958 by Doubleday. In the first few pages of his autobiography, Leopold lets the reader know he does not write about the actual crime. He claims that it is "far too painful" and besides the facts were gone over completely in 1924. Therefore, his "story starts on the evening of May 21, 1924" a little past 9:00 p.m. as "Dick and I were driving away from the swampland hear Hegewisch, just south of Chicago, where we had left Bobby Franks' body in a conduit pipe under a railroad embankment." Leopold describes his thoughts, his conversations with Loeb and what they did starting at this point after the crime.

Right from the beginning, he places most of the blame on Loeb. Leopold had a strong motive to implicate Loeb as the mastermind and the actual killer because he began writing his autobiography before he was paroled. He clearly would know that his chances for parole would be improved if he could convince others that Loeb was more to blame for the crime—especially implicating Loeb as the mastermind and the one who physically attacked and murdered Bobby Franks. Because Loeb was murdered in 1936, Leopold got

[113] *Id*. at 308-09.

the last word in about the crime. In his autobiography Leopold writes that Loeb was his "best pal" but:

> In one sense, he was also the greatest enemy I ever had. For my friendship with him had cost me—my life. It was he who had originated the idea of committing the crime, he who had planned it, he who had largely carried it out. It was he who had insisted on doing what we eventually did.[114]

According to Simon Baatz:

> Leopold wrote his autobiography as part of his campaign to win parole, and it should be read in that light. It is an immensely clever book, written in a clear and engaging style that portrays the author as a lovable rogue who constantly struggles, despite adverse circumstances, to improve the lives of his fellow prisoners. The establishment of the prison school, his work as an X-ray technician, his stint as a nurse in the psychiatric ward, his participation in the malaria experiments—everything, in Leopold's account, is undertaken selflessly for the betterment of mankind. The publication of his autobiography came too late to be considered by the parole board, but it succeeded in creating a picture of Nathan Leopold that persists to the present. There is no evidence, for example, that Leopold could speak several languages or that he had an exceptional IQ, yet such myths have been repeated so often that they have now come to be accepted as true.[115]

Compulsion

Nathan F. Leopold, Jr. would go before a court of law one more time but this time he initiated the legal action. Meyer Levin, a fellow student of Leopold and Loeb in 1924, had written a novel titled *Compulsion* in 1956 that was based on the murder of Bobby Franks. Even though fictitious names were used, Leopold was not pleased with how his character was portrayed. When the book was going to be turned into a movie, Leopold had his attorney, Elmer Gertz, file a lawsuit in 1959. Gertz brought an action for violation of the right of privacy against the author, publishers and several local distributors of a novel and a play, entitled *Compulsion* and the producer, distributor and Chicago area exhibitors of a related motion picture of the same name. Accounts vary in regard to how much in damages Leopold was seeking. One source puts the amount at $2,970,000 while others put it at $1.4 or $1.5 million.

Leopold won in the trial court, which granted his motion for a summary judgment on the question of liability and reserved the issue as to the amount of damages. The defendants appealed and the case was remanded back to the trial court where a succeeding judge vacated the summary judgment in favor of the plaintiff and granted the defendants' motion for summary judgment and judgment on the pleadings. Leopold appealed this

[114] LIFE PLUS 99 YEARS, *supra* note 108, at 269.
[115] FOR THE THRILL OF IT, *supra* note 3, at 465.

ruling to the Supreme Court of Illinois. The legal battle took ten years to reach this point. The Supreme Court of Illinois described Leopold's claim as:

> the constitutional assurances of free speech and press do not permit an invasion of his privacy through the exploitation of his name, likeness and personality for commercial gain in 'knowingly fictionalized accounts' of his private life and through the appropriation of his name and likeness in the advertising materials. Denying him redress would deprive him, he argues, of his right to pursue and obtain happiness guaranteed by section 1 of article II of the constitution of Illinois . . . .[116]

The court noted, "It is of importance here, too, that the plaintiff became and remained a public figure because of his criminal conduct in 1924. No right of privacy attached to matters associated with his participation in that completely publicized crime."

The court ruled against Leopold because:

> the core of the novel and film and their dominating subjects were a part of the plaintiff's life which he had caused to be placed in public view. The novel and film were derived from the notorious crime, a matter of public record and interest, in which the plaintiff had been a central figure.

The court found that the reference to Leopold in the advertising material "concerned the notorious crime to which he had pleaded guilty. His participation was a matter of public and, even, of historical record. That conduct was without benefit of privacy."

Furthermore, "The plaintiff became and remained a public figure because of his criminal conduct in 1924. No right of privacy attached to matters associated with his participation in that completely publicized crime."

Other Fiction

The Leopold and Loeb case inspired other works of fiction. In 1929, Patrick Hamilton, an English playwright and novelist, wrote a play called *Rope* based loosely on the case. Alfred Hitchcock made a film based on *Rope* in 1948 which starred James Stewart. Levin's *Compulsion* was made into a movie in 1959 with Orson Welles cast as the fictionalized Clarence Darrow. This was the first movie produced by Richard D. Zanuck. A 1992 British movie titled *Swoon* explicitly delves into the homosexuality that permeated the case. A play titled *Never the Sinner* opened in Chicago in 1985. A 2003 musical titled *Thrill Me: The Leopold and Loeb Story* opened in New York. There have been other fictionalized accounts of the case.

Darrow's Plea for Mercy

[116] Leopold v. Levin, 45 Ill.2d 434, 439 259 N.E.2d 250 (Ill. 1970)

Clarence Darrow's plea for mercy along with the work of his co-counsel saved Leopold and Loeb from the gallows. This was the most their clients and their families could have hoped for. It has also become one of the most important cases in building Clarence Darrow's reputation as the greatest lawyer in American history.

Darrow's plea, often considered one of his most dramatic and powerful, has been ranked number 23 out of the top 100 political speeches of the 20th Century in a 1999 survey of 137 leading scholars of "American public address" as compiled by the University of Wisconsin-Madison and Texas A & M University.[117]

Darrow's closing argument has received praise from numerous commentators:

"Darrow's closing argument is one of the most oft-cited pieces of lawyer's prose from the twentieth century. Indeed the fame of Darrow and his clients outlasted many other seemingly more notorious crimes to be among the best remembered of recent times. The outcome, which spared Leopold and Loeb from the scaffold, was long celebrated as a landmark on the road to a fully modern and progressive criminal justice system."[118]

Alan Dershowitz, a well known attorney and law professor, believes that Darrow's closing argument is "one of the most remarkable legal arguments in the history of advocacy" and "No lawyer, indeed no civilized person, should go through life without reading – if only there were a tape recording! – Darrow's eloquent defense of young human life."[119]

Paul Harris, who in 1971 pioneered the modern version of the black rage defense, writes:

"Darrow's argument was a masterful discussion of two subjects: human psychology and the illegitimacy of capital punishment. He had looked into the souls of these two sick, selfish, spoiled young men and had found some humanity. He then translated their humanity to the judge."[120]

Irving Younger, a leading scholar on trial technique, found Darrow's:

"now classic closing statement, in one of the most celebrated trials of our time, also shows a true master of the courtroom dealing with a cynical media and the largely hysterical public-at-large as part of his master strategy in the case."[121]

Darrow Edited His Plea for Mercy

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[117] Top 100 American speeches of the 20th century http://www.news.wisc.edu/misc/speeches/
[118] A SITUATION SO UNIQUE, *supra* note 86, at 81.
[119] ALAN M. DERSHOWITZ, AMERICA ON TRIAL: INSIDE THE LEGAL BATTLES THAT TRANSFORMED OUR NATION 256 (2004).
[120] PAUL HARRIS, BLACK RAGE CONFRONTS THE LAW 167 (1999).
[121] Clarence Darrow's Sentencing Speech in State of Illinois v. Leopold and Loeb. with foreword by Irving Younger [Classics of the Courtroom Volume VIII] (1988).

It appears that most analysis of Darrow's plea for mercy, is based on a version of the plea that was heavily edited and rearranged by Darrow himself. When the sentencing hearing was over Darrow borrowed the section of the transcript that contained his closing arguments and then he:

> rewrote the speech, cutting out long passages, correcting his syntax, and streamlining his argument, and then published the amended version as a pamphlet. Darrow's speech in the courtroom was ponderous, disorganized, prolix, and often tedious; but subsequent commentators, unaware that the published version is not the speech that Darrow gave in court, have praised Darrow's summation as a masterpiece.[122]

The section of the transcript that Darrow borrowed is lost because Darrow did not return it.[123] Simon Baatz was able to piece together the entire closing arguments by Darrow from contemporary Chicago newspapers which had published it. The transcripts themselves contain a notation that pages 3937 to 4115 from Volume VII were taken and "Del to Mr. Darrow Personally." No library or archive appears to have these missing pages.

Criticism of Darrow's Defense in Leopold-Loeb Trial

As the most prominent member of the Leopold and Loeb defense team, Clarence Darrow was the target of criticism in 1924 and later. Perhaps one of the most vocal critics as well as one of the most reputable was John Henry Wigmore, Dean of the Northwestern University School of Law from 1901 to 1929. A leading expert on the law of evidence,[124] Dean Wigmore, sounding a bit like Robert Crowe, was outraged at the psychiatric testimony and the judge's sentence in the Leopold and Loeb case: "I maintain that the reports of the psychiatrists called for the defense, if given the influence which the defense asked, *would tend to undermine the whole penal law*."[125] Wigmore found the phrases the defense alienists used in their diagnosis of Leopold and Loeb "is not the language of modern penal law. It is the language of biology."[126] The psychiatrists' description of the "cruel, ruthless deeds" of the killers was "just such a description as a botanist might give a certain weed, as distinguished from a certain useful plant."[127]

According to Wigmore, the defense psychiatrists believed that if "a party's life-history shows that his development as a human fiend was perfectly natural and inevitable—that he was 'driven' . . . by his character" then he should not suffer ordinary penalties.[128]

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[122] FOR THE THRILL OF IT, *supra* note 3, at 458.
[123] *Id.*
[124] He wrote the leading evidence treaty: A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW, INCLUDING THE STATUTES AND JUDICIAL DECISIONS OF ALL JURISDICTIONS OF THE UNITED STATES (1904-1905).
[125] *The Loeb-Leopold Murder of Franks in Chicago, May 21, 1924*, 15 J. Am. Inst. Crim. L. & Criminology 347, 403 (1924-25).
[126] *Id.*
[127] *Id.*
[128] *Id.*

Wigmore called this "sheer Determinism" and that "These new-school psychiatrists" believe determinism eliminates "moral blame" and thus eliminates punishment.[129] Wigmore was astonished that the doctors' theory of eliminating blame and punishment applies equally to "the cruel murderer as to the petty window-breaker." Not only are these psychiatrists wrong "but their implications are dangerous, because their logic seems to eliminate penalties, and would, if applied practically, undermine the entire penal system."

Wigmore stated that this case was the first in which these new-school psychiatrists theories were publicly advanced in an actual trial outside of the juvenile courts. He thought it was fortunate that their theories were publicly exposed because:

> It is time that the issue be squarely faced in the open, before the whole administration of the penal law is undermined. Let public opinion look into the literature on this subject, and learn to discard that false sympathy and dangerous weakening that is apt to arise on first acceptance of the biopsychologic doctrine of Determinism.[130]

Expert Witnesses

Wigmore was very critical of the use of partisan witnesses in trials and he used the Leopold and Loeb trial to illustrate the problem. He took issue with the testimony of defense psychiatrists who tried to influence the judge by referring to defendants as "Babe" for Leopold and "Dickie" for Loeb. According to Wigmore, "This voluntary adoption of the endearing, attenuating epithets 'Dickie' and 'Babe' to designate the defendants reflects seriously on the medical profession. The whole evil of expert partisanship is exemplified in this action of these eminent gentlemen." [131]

Wigmore pointed out that most of the criticism of biased expert testimony was based on "the money taint" that resulted from the experts being paid a fee for their testimony. But in this case the fee paid to both sides was the same and the experts on both sides had impeccable reputations and "all the world knows that in the case of all six no question could possibly arise of the taint of money. Their standing, their whole career, has placed them beyond any such suggestion."[132]

Wigmore criticized the defense experts, who despite their reputations, engaged in a "sad spectacle," that was "calculated subtly to emphasize the childlike ingenuousness and infantile naivity of the cruel, unscrupulous wretches in the dock. It was the cue of the defense to impress this character on the judge, and the experts' well-chosen language lent itself shrewdly to that partisan end."[133]

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[129] *Id*. at 404.
[130] *Id.* at 405.
[131] John Wigmore, *To Abolish Partisanship of Expert Witnesses, As Illustrated in the Loeb-Leopold Case*, 15 Journ. Amer. Inst. Crim. Law and Crim. 341 (1924).
[132] *Id.*
[133] *Id.*

Wigmore then identified the cause of this partisanship by experts: "It is this; *the vicious method of the Law*, which permits and requires each of the opposing parties to *summon the witnesses on the party's own account*." [134] This method naturally makes the witness a partisan and "inherently bad." As Wigmore points out, this was known long before the Loeb and Leopold trial which merely demonstrated it clearly to the world. Wigmore's solution was simple: "Let the expert witness be summoned by the court himself."[135]

Other commentators have expressed similar criticisms:

> Since Clarence Darrow's management of the Loeb and Leopold case in the United States, Western criminal courts have become notorious for the parading forth of psychiatrists by both prosecution and defense, who proceed to present acrimonious, partial and disparate versions of the sanity of the accused. This surrendering of the psychiatrist's non-aligned status in order to become a concerned litigant serving one side in the adversary process has been particularly destructive to the credibility of the insanity defense as a workable judicial tool.[136]

Darrow's Views on Crime Criticized

Clarence Darrow's views about the causes of crime drew plenty of criticism both before and after the Leopold and Loeb case. Sheldon Glueck, whose older brother was Bernard Glueck, one of the alienists Darrow hired to examine Leopold and Loeb, was critical of Darrow's deterministic philosophy. Sheldon Glueck was a prominent law professor at Harvard Law School and is considered a pioneer in the study of criminal law. Glueck wrote in 1927:

> even practical, keen minded, but sentimentally altruistic lawyers, such as Clarence Darrow, arrive at absurd conclusions by treading the *via dolorosa* of "necessity," or "determinism." This capable advocate and humanitarian, steeped in the dogma of mechanistic psychology, informs us at the outset of a recent work on "Crime, Its Causes and Treatment," that his "main effort is to show that the laws that control human behavior are as fixed and certain as those that control the physical world. In fact, that the manifestations of the mind and the actions of men are a part of the physical world." With commendable consistency, but absurd results, he therefore concludes that "the criminal" is morally blameless. He tells us that "crime" and "criminal" are "associated with the idea of uncaused and voluntary actions. The whole field is part of human behavior and should not be separated from the other manifestations of life." Now the use of the expression "*the* criminal" together with this supermechanistic and materialistic psychology, indicates that this author proceeds upon the wrong premise elsewhere criticized, that, because there are many evidences of mechanistic causation in the physical

[134] *Id.* at 342
[135] *Id.*
[136] Robert J. Menzies, Christopher D. Webster, Margaret A. Jackson, *Legal and Medical Issues in Forensic Psychiatric Assessments*, 7 Queens Law Journal, 3, 25 (1981-82).

> world, it necessarily follows that the human mind has not even an iota of power of creative adaption to environmental demands and that, consequently, all human conduct is accidental; further, his view implies that we can speak of "*the* criminal," the *homo delinquente* of Lombroso, disregarding the very obvious evidence of the multiplicity and complexity of causation of criminal, as of noncriminal behavior, in the individual case. What does Mr. Darrow propose to do with all these *criminals?*[137]

A less charitable criticism was aimed at Darrow by a medical doctor: "I doubt if anywhere else can one see so much nonsense and half-knowledge on the subject of crime as he can in the writings of Darrow, a Chicago attorney. It will not be necessary to try to refute most of his theories; they refute themselves."[138]

Criticism of Judge Caverly's Sentence

Dean Wigmore was also critical of the sentences given to Leopold and Loeb. He believed the "cardinal error" in Judge Caverly's sentence was that it "ignores entirely" the deterrence theory of punishment which is the "kingpin of the criminal law."[139] Wigmore compared the ratio of crimes contemplated but not committed (6 to 1) to an iceberg with most of its mass below the surface. He believed the fear of being caught is one of the primary reasons some crimes are not committed. Wigmore asked and answered the question "Would the remission of the extreme penalty for murder in Loeb-Leopold case lessen the restraint on *the outside class of potential homiciders?* The answer is *yes*, emphatically."[140]

Wigmore then related a Chicago crime story to illustrate his point. On September 1, 1924 after the defense arguments in the Leopold and Loeb case were published, two 18-year-old girls were arrested for helping two boys, ages 16 and 19, murder an elderly woman during a burglary. When they were arrested, the girls told the police, "'A cop told me they would hang Tony. But they can't. *There's never been a minor hanged* in Cook County [Note that the judge later cited this point in his opinion]. *Loeb and Leopold probably won't hang. They are our age. Why should we?*'"[141]

Writing in 1924, Wigmore believed deterrence was especially important for young people ages 18 – 25, who are susceptible to "reckless immorality and lawlessness."[142] Life in prison did not alarm them because it required imagining what that sentence means while "hanging is a penalty that needs no imagination and no experience. Everybody has

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[137] S. SHELDON GLUECK, MENTAL DISORDER AND THE CRIMINAL LAW: A STUDY IN MEDICO-SOCIOLOGICAL JURISPRUDENCE, 443-44 (1927).
[138] John F. W. Meacher, *Crime and Insanity: A Discussion of Some Modern Radical Theories*, 16 Journal of the American Institute of Criminal Law and Criminology 360 (1925-26)
[139] *A Symposium of Comments from the Legal Profession, in The Loeb-Leopold Murder of Franks in Chicago, May 21, 1924*, 15 J.C.L.C. 395, 401 (1924 -25) [hereinafter Symposium of Comments].
[140] *Id.* at 402
[141] *Id.*
[142] *Id.*

sufficient horror of that—everybody except the crazy and the mere child."[143] Judge Caverly's sentence was wrong because this all-important deterrence was removed:

> And that is where we see the special, dangerous error of the court's opinion in the Loeb-Leopold case, in basing the mitigation on the offenders being 'under age'—that is, under twenty-one. What has the twenty-one year line to do with the criminal law? Nothing at all, nor ever did have. The twenty-one years is merely an arbitrary date for purposes of property rights, family rights, and contract rights. For purposes of criminal law the only question is: *Are persons in general of the age at bar susceptible to the threat of the law's extreme penalty? Would it help deter them?*
>
> It certainly would. Those two clever female miscreants of eighteen that helped choke the old woman to death were smart enough to perceive the difference between hanging and imprisonment. Loeb and Leopold were clever enough to understand it; else why did they take such ingenious pains to avoid detection and to leave the country? As a matter of fact, the *only* thing that they did fear was the criminal law. Neither personal morality nor social opinion imposed any limit on their plans. The only repressing influence on them was the criminal law. To mitigate its penalty for them was therefore to "take the lid off" for all unscrupulous persons of their type. And that is what the sentence of the judge in this case has done for Cook County![144]

Alienists from Different Schools of Psychiatry

According to an editorial written soon after the trial, it was not surprising that the defense and prosecution alienists came to such different conclusions since they represented two very different schools of psychiatry.[145] The prosecution experts with possibly one exception were composed of members of the "formal orthodox school" which looks to "traditional inquiries into mental processes, such as "orientation in time and space," "memory," "stream of thought," "judgment," "attention," and "knowledge of right and wrong, conduct, superficial motives, etc."[146] The prosecution experts "naturally concluded" that the defendants were mentally normal even though they had read the report of the defense experts.[147]

In contrast, the defense experts were from the "dynamic psychology" school of psychiatry.[148] Thus they focused "intensively into the inner mental life of the criminals, into a genetic study of their mental processes, thus taking into consideration and laying

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[143] *Id.*
[144] *Id.* at 402-03.
[145] *The Crime and Trial of Loeb and Leopold, (Editorial)*, XIX (No. 3) The Journal of Abnormal Psychology and Social Psychology, 223, 224 (1924) [hereinafter Crime and Trial of Loeb and Leopold (Editorial)]
[146] *Id.*
[147] *Id.*
[148] *Id*.

emphasis upon an entirely different and additional class of alleged facts."[149] This led them to the "absolutely opposite conclusion" that the defendants were mentally abnormal.[150] The two groups of experts "did not and were not allowed" to make joint examinations, observe the other group's examination, nor consult or discuss the examinations with each other, which is commonly done in private and public hospitals.[151]

Defense and Prosecution Alienists Made Mistakes

The editorial faulted the prosecution experts because even though their methods were adequate for determining whether the defendants were "legally insane" and thus not legally responsible under Illinois law, their methods were "entirely inadequate to determine whether in other respects they were mentally abnormal."[152] The defense experts were criticized because of "too rigid acceptation and adherence to certain debatable doctrines and theories" and confusing facts, interpretations and theories and stating them as fact when "clear thinking" could only regard them as theory.[153] The defense experts engaged in begging the issue by sprinkling their reports with the terms "abnormal" and "pathological" when describing finding of facts "when the question of abnormality was the very question at issue."[154] Furthermore, "It is a pity that experts do not distinguish more rigidly between fact and theory."[155]

The editorial went on to state that it would have been far better if the two groups of experts were allowed to jointly conduct examinations and consult with each other as this would have "had a modifying and educational influence upon the other" and they could have agreed upon facts, recognize different possible theories and thus it could be decided how much weight to accord each divergent opinion.[156]

Legal System to Blame

Despite its criticism of the alienists, the editorial placed the blame squarely on the legal system because the adversarial process inevitably leads to "the old, old story of experts lined up on opposing sides giving diverse and contradictory opinions as to the mental condition of the defendants and bringing themselves into undeserved discredit as usual with the public."[157] One of the fundamental defects of this system is that the experts are only responsible to the counsel on their side and they become protagonists for the side that employs them. A much better approach would be to have additional experts "appointed by the Court, paid by the Court, responsible to the Court, and make a written report of their findings to the Court (subject, of course, to cross-examination on the

[149] *Id.*
[150] *Id.*
[151] *Id.*
[152] *Id.*
[153] *Id.* at 225.
[154] *Id.*
[155] *Id.*
[156] *Id.*
[157] *Id.*

stand)."[158] Another significant defect of the legal system is that each side of experts makes their examinations independently; they are not allowed to share observations, nor consult with each other or discuss their findings. This inevitably leads to different conclusions.[159] The legal profession is at fault for these problems because it is "obdurate to any reform" and "lawyers have shown themselves unwilling to give up any possible advantage" of the current system.[160]

Joint Examination Preferable

Both the defense and prosecution experts wanted to conduct "joint examinations and to confer together over the facts found and make a joint report," but it was the State's attorney who refused this request.[161] The prosecution was afraid of what new facts joint examinations might produce; however, such joint efforts might have actually helped the state because the defense experts based their opinions "to a serious extent upon certain psychological doctrines which another modern school of psychology would feel called upon to traverse."[162] It was a "pity" that the experts were not allowed to work together because some experts testified about "debatable theories . . .as if established and accepted facts, and not as theories."[163] Because of the different lines of examination, the prosecution experts only examined half of the case and the defense experts failed to prove their case.

No Mitigating Psychological Circumstances

To the editorial writer it appeared that Judge Caverly "plainly and quite rightly . . . was not impressed by the testimony."[164] The editorial concluded that "if we were forced to express an opinion based solely on the testimony we have read, that probably Loeb and possibly Leopold were theoretically abnormal though fully responsible for their crime, and we can see no mitigating psychological circumstances."[165]

S. Sheldon Glueck

S. Sheldon Glueck reviewed the editorial excerpted above and wrote that no discussion of the mitigation portion of the trial provided "so acute an analysis of some phases of that case" as this editorial.[166] Despite this compliment, Glueck was very critical of the editorial in other respects. He took strong exception to the criticism of the defense report, especially the editorial's charge that the use of "abnormal" and "pathological" were used throughout the report and were presented as facts. He responded that this "grave charge is

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[158] *Id*. at 226 (as is done in Germany).
[159] *Id.*
[160] *Id.*
[161] *Id.*
[162] *Id.* at 227.
[163] *Id.*
[164] *Id*. at 228.
[165] *Id*. at 229.
[166] S. Sheldon Glueck, Some *Implications of the Leopold-Loeb Hearing in Mitigatio*n, IX Mental Hygiene 449 (July, 1925).

of the utmost significance for the testimony of alienists in future cases, and it therefore requires careful examination."[167] Glueck defended the defense alienist and he concluded that the "only real ground for criticism" of the joint report of the defense alienists is "their too frequent use of superlatives." [168] Also, their report could have been "couched in more temperate language."[169]

Glueck also regretted that the both sides of experts were not allowed to consult on joint examinations and discuss their observations because the prosecutor was "unwilling to accede to such a novel proposal" and this left the experts on both sides to state their opinions based on their examinations of these particular defendants and upon their experience and training in dealing with other defendants.[170]

Noted forensic psychiatrist Bernard Diamond states:

> I think White and Glueck, and perhaps less so Healy, were hopelessly idealistic in what they hoped to achieve. For one thing, they wanted a nonadversarial process in which the psychiatrists for the defense would get together in a sort of friendly consultation with psychiatrists for the prosecution and they would all read a common ground of understanding. Thus a battle between the experts would be avoided. The prosecuting attorney objected very strenuously to this idea and forbade any such meeting between prosecution and defense psychiatrists.[171]

Bernard Diamond corresponded with Nathan Leopold for over thirty years and Diamond and his wife had dinner with Leopold and his wife a little over a year after Leopold was released from prison.[172]

Homosexuality and the Leopold and Loeb Case

Open discussion about the homosexual relationship between Leopold and Loeb was taboo in 1924. Yet it added to the sensationalism that surrounded the crime and the legal aftermath. According to a 2001 article:

> the homosexual sex criminal remained a shadowy figure as late as 1925, when unsubstantiated charges that Leopold and Loeb had sexually assaulted Bobby Franks, the boy they murdered, remained hidden in public discussion by the row of asterisks which newspapers put in place of "unprintable matter." The asterisks had fallen away by 1936. In that year, Time magazine claimed the "two perverted Chicago youths" had "violated" Bobby Franks before they killed him. Time's retelling of the Leopold and Loeb case reflected a new willingness to publicly

[167] *Id* at 450-51.
[168] *Id.* at 467
[169] *Id.*
[170] *Id.* at 452-53.
[171] PSYCHIATRIST IN THE COURTROOM, *supra* note 72, at 6-7.
[172] *Id*. at xxiii.

> discuss sex crimes against boys, as well as the appearance of a new, sinister portrait of the homosexual in culture and politics.[173]

A 2005 article criticized Darrow for not addressing this in 1924:

> Notwithstanding my own admiration for Darrow, I argue that there is no value-neutral rhetorical choice regarding sexuality, most certainly not in a closet culture. Darrow's career was marked by other courageous engagements with America's skeletons; in this case, despite his noble ends and skillful performance, Darrow resembled his many neighbors: cowards guarding the closet door.[174]

Some see this issue as being tied to the antisemitism of the time. And these issues are still being untangled 80 years later:

> while references to homosexuality and Jewishness in the press and the courtroom often were whispered or shrouded in innuendo, homophobia and antisemitism nevertheless were writ large in the public reception of the crime and trial. What went unsaid in the course of the investigation and prosecution of Leopold and Loeb did so precisely because it went without saying. These youths were construed to be two Jewish teens whose Jewishness "naturally" predisposed them to homosexuality, a "crime against nature" that incited them to commit further crimes against humanity. . . . the intimately entangled rhetorics of antisemitism and homophobia voiced in the wake of Bobby Frank's disappearance embodied widespread debates regarding the increasing visibility of Jews, homosexuals, and homosexual Jews in American culture of the 1920s.[175]

A contemporary commentator in 1924 criticized the defense for not directly addressing homosexuality during the case. Chief Justice Harry Olson of the Municipal Court of Chicago strongly believed that heredity was the cause of the crime and not environmental factors. Olson criticized the Bowman-Hulbert report for stressing the uniqueness of the murder because he believed that "This case is not so unique from a psychological standpoint that it will not frequently repeat itself. On the contrary, it is very common in criminology where one of the parties is homosexual."[176] Olson took the defense to task for failing to address this. In commenting on the report submitted by the defense psychiatrists, Olson stated "The part of the report referring to their contempt for women is interesting because it suggests homosexuality, to which no direct allusion is made."[177]

Nathan Leopold Jr. Dies

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[173] Stephen Robertson*, Separating the Men from the Boys: Masculinity, Psychosexual Development, and Sex Crime in the United States, 1930s – 1960s*, 56 Journal of the History of Medicine and Allied Sciences, 3, 21 (2001).
[174] Charles E. Morris III, *Passing by Proxy: Collusive and Convulsive Silence in the Trial of Leopold and Loeb,* 91 Quarterly Journal of Speech 264, 265 (2005).
[175] Jew Boys, Queer Boys, *supra* note 22, at 122-23.
[176] Symposium of Comments, *supra* note 139, at 395.
[177] *Id.*

Nathan Leopold died at age 66 of a diabetes-related heart attack on August 29, 1971. In his final years, Leopold only displayed two mementos from 1924, one a framed photo of his best friend Dickie Loeb and the other a photo of Clarence Darrow.

Leopold and Loeb Case Cited in Court Cases and Briefs

The Leopold and Loeb case is cited in numerous cases and court briefs. Many of these are criminal cases but not all involved the death penalty. Several cases refer specifically to Clarence Darrow's defense in the Leopold and Loeb case. Below are excerpts from some of these cases and briefs.

Florida v. Nixon, 543 U.S. 175, 125 S.Ct. 551 (2004)

Nixon was convicted of first-degree murder, kidnapping, robbery, arson and sentenced to death. He had tricked the victim into giving him a ride, kidnapped her and tied her to a tree with jumper cables and set her on fire. The United States Supreme Court held that the defense counsel's failure to obtain the defendant's express consent to a strategy of conceding guilt in a capital trial did not automatically render counsel's performance deficient. To support its reasoning, the Court stated:

> Renowned advocate Clarence Darrow, we note, famously employed a similar strategy as counsel for the youthful, cold-blooded killers Richard Loeb and Nathan Leopold. Imploring the judge to spare the boys' lives, Darrow declared: "I do not know how much salvage there is in these two boys. ... I will be honest with this court as I have tried to be from the beginning. I know that these boys are not fit to be at large." . . . (Darrow's clients "'did not expressly consent to what he did. But he saved their lives.'").

Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869 (1982)

The defendant was 16 years old when he killed a police officer. He entered plea of nolo contendere to the charge of murder and was sentenced to death. In an opinion by Justice Powell, the Court vacated the death sentence and remanded the case for further proceedings because the state courts refused to consider as a mitigating circumstance the petitioner's unhappy upbringing and emotional disturbance, including evidence of turbulent family history and beatings by a harsh father.

In an amicus brief submitted to the United States Supreme Court in support of Eddings, the attorneys concluded:

> In his closing remarks in the Leopold and Loeb case, Clarence Darrow stated:
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> "You may hang these boys. You may hang them by the neck until they are dead. But in doing it you will turn your face toward the past. In doing it you are making it harder for every other boy who in ignorance and darkness must grope his way

> through the mazes which only childhood knows." H. Higdon, The Crime of the Century: The Leopold and Loeb Case 241 (1975)
>
> Darrow's remarks have proved prophetic. Recognizing the important developmental differences which distinguish adolescent children from adults, most of the civilized world has rejected the death penalty for children. In modern America public revulsion at executions of children has rendered the imposition and execution of such sentences to be 'wanton' and 'freakish' in their rarity. See, Furman v. Georgia, 408 U.S. 238, 310 (1972) (Stewart, J. conc.). Amici join in asking this Court to condemn capital punishment of children as barbaric, inhumane, and unworthy of our "'. . . evolving standards of decency that mark the progress of a maturing society.'" Trop v. Dulles, 356 U.S. 86, 101 (1958).[178]

On remand, Eddings was again sentenced to death but an appeals court modified the sentence to life imprisonment.

Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726 (1972)

Justice Douglas wrote a concurring opinion in this famous death penalty case, and cited a congressional hearing on capital punishment in which a witness stated "But the Leopolds and Loebs, the Harry Thaws, the Dr. Sheppards and the Dr. Finchs of our society are never executed, only those in the lower strata, only those who are members of an unpopular minority or the poor and despised."[179] Justice Douglas agreed: "One searches our chronicles in vain for the execution of any member of the affluent strata of this society. The Leopolds and Loebs are given prison terms, not sentenced to death."

Furman was paroled in April 1984. Later he would be sentenced to 20 years in prison after pleading guilty to a 2004 burglary.

Lynch v. Overholser, 369 U.S. 705, 82 S.Ct. 1063 (1962)

This case involved a defendant who had received treatment in a mental hospital, after which a psychiatrist advised the court that he was able to stand trial. But the psychiatrist also concluded that the defendant was suffering from a mental disease and that further treatment would be advisable. The defendant was tried in Washington, D.C. on two charges of passing worthless checks. On advice of counsel, he sought to withdraw an earlier plea of not guilty and to plead guilty to both charges; but the judge refused to permit him to do so. Although petitioner maintained that he was mentally responsible when the offenses were committed and presented no evidence to support an acquittal by reason of insanity, the trial judge concluded that he was not guilty on the ground that he was insane at the time of the commission of the offense, and ordered him committed to a

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[178] Brief for the Petitioner, Eddings v. Oklahoma, 455 U.S. 104 (1982), 1981 WL 389851 (brief on behalf of National Council on Crime and Delinquency, Juvenile Law Section of the National Legal Aid and Defender Association, and American Orthopsychiatric Association).

[179] Hearings before Subcomm. No. 3 of the H. Comm. on the Judiciary, 92d Cong., 2d Sess. (Ernest van den Haag, testifying on H.R. 8414 et al).

mental hospital under the D.C. Code. The defendant appealed the judge's decision to not allow him to plead guilty. In the petitioner's brief submitted to the United States Supreme Court, the attorneys refer to Darrow's defense:

> Perhaps the most celebrated case highlighting the nature of such a benefit to a client is the Loeb-Leopold case of 1924. This Court will recall that as a matter of calculated strategy Clarence Darrow advised his clients to enter guilty pleas to charges of murder in the first degree. It seems plain that to have rejected the guilty pleas in that case would have deprived defendants of the benefit of the best legal judgment of the time, and in all likelihood, of their lives as well.[180]

Baldonado v. California, 366 U.S. 417 (1961)

Elizabeth Duncan hired Augustine Baldonado and Louis Estrada Moya to kill her 29-year-old daughter-in-law. All three were convicted of first degree murder and sentenced to death.[181] On appeal before the United States Supreme Court, Moya's attorney argued against the death sentence for his client. He asked the court to look at the sociological and psychological makeup of the defendant and to not just focus on the circumstances of the crime. The judge countered that the circumstances of this "crime stands out in bold relief." The defense attorney responded:

> Does that mean that we are going to shut our eyes to the circumstances of the underlying causes of the thing? Look at the Loeb and Leopold case. That was far more terrible than this, and there the judge looked at the sociological and psychological backgrounds of the defendants. I don't care how terrible the crime is. I don't think that is any basis for imposing punishment alone. It is certainly one factor but we can't be blind to the underlying causes of it.[182]

The judge responded:

> With respect to reducing the punishment from death, fixed by the verdict, to life imprisonment, I would point out that while a judge in Chicago many, many years ago did fix the life imprisonment sentence for two men by the name of Loeb and Leopold in a slaying, the situation in that case was quite different on the facts and certainly the situation was completely different on the law, inasmuch as in that instance the trial of the penalty was before the judge himself, not before a jury. This defendant chose to have a jury fix his penalty. . . . really the thing for the Court to determine is whether the Court disagrees entirely with the conclusion of the jury and thinks that the Court should substitute its own views, if those are different views, from that of the jury, and I would say that in this instance I don't see anything that would compel a judge, in light of the history of the case, to set

[180] Brief of Petitioner at 42 n.24, Lynch v. Overholser, 369 U.S. 705 (1962), 1961 WL 101652.
[181] People v. Duncan, 53 Cal.2d 803, 350 P.2d 103 (1960).
[182] Transcript of Record at 182, Baldonado v. California, 366 U.S. 417 (1961).

> aside completely the opinions of 12 impartial citizens, who decided in their absolute discretion that the death penalty would be appropriate.[183]

Later the judge referred again to the Leopold and Loeb case: "I remember the Loeb-Leopold case very well. I followed Clarence Darrow's argument very closely at the time when he made it. He was talking then to a judge, one person. But I would have to practically ignore the opinions of 12 jurors, if I should set aside their verdict and render one of my own.[184]

Baldonado, Moya and Elizabeth Duncan, who was age 74, were each executed in the gas chamber at San Quentin prison on August 8, 1962.

Fukunaga v. Territory of Hawaii, 280 U.S. 593 (1929)

In 1928, Myles Fukunaga, a mentally disturbed 19-year-old hotel worker kidnapped Gill Jamieson, a 10-year-old student from the Punahou School in Honolulu. Jamieson, who was white, was the son of a Hawaiian Trust Co. executive. Fukunaga kidnapped the young boy by tricking the school administrators into believing that the boy's mother had been hurt in an automobile accident. Fukunaga was angered because the Hawaiian Trust was going to evict his family, which include seven children, from a home they rented in Honolulu. Within about an hour of the kidnapping, Fukunaga struck the boy with a steel chisel and strangled him. He sent a ransom note to the victim's family demanding $10,000. The boy's father raised the ransom money and met with Fukunaga and gave him $4,000 and demanded to see his son before giving the rest. Fukunaga took the money and ran off. He was quickly arrested after passing bills which were marked and he later confessed. The case was notorious in Hawaii and greatly stirred up racial tensions between whites and the Japanese community.

The kidnapping and murder were directly influenced by the Leopold and Loeb trial four years earlier. Fukunaga appealed his death sentence all the way to the United States Supreme Court. In a brief filed with the Court, he describes the kidnapping and murder plan: "I planned to get money. I didn't think about the kidnapping case until I went to the Library of Hawaii, I saw about the Leopold and Loeb case back in Chicago in 1924. That case I studied. The ransom letter was taken from that same letter as the boys."[185]

Myles Fukunaga was hanged on November 19, 1929, in O'ahu Prison.

United States v. Hawkins, 380 F.Supp.2d 143 (E.D.N.Y. 2005)

The defendant, involved in a scheme to make fraudulent medical and legal claims on the basis of staged automobile accidents, pleaded guilty to conspiracy to defraud the United States. The judge held that clear and convincing evidence established that the defendant

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[183] *Id.* at 185.
[184] *Id*. at 185-86.
[185] Brief for the Respondent at 4, Fukunaga v. Territory of Hawaii, 280 U.S. 593 (1929); see also Fukunaga v. Territory of Hawaii, 33 F.2d 396 (9th Cir. 1929).

exhibited extraordinary rehabilitation, warranting a downward departure to a sentence of probation, despite her commission of a serious crime against state unemployment compensation funds during the course of her presentencing supervision. The judge stated:

> A child forced into crime by a criminal father surely emerges from a different starting point than the child of a legitimately employed parent. The father of defendant Chastity Hawkins was not only a criminal, but an alcoholic who impressed his wife and children into crime. Defendant's background reflected social as well as socioeconomic deprivation-a scarred personality as well as an acid-etched visage. That she has progressed from an irresponsible white collar criminal to a law-abiding hard working citizen is quite extraordinary, given this starting point. (The problem of dealing with an advantaged youngster who commits crimes not induced by economics or other need-the Leopold and Loeb syndrome among others-is left for another day.)

United States v. Quick, 59 M.J. 383, 388 (C.A.A.F. 2004)

In a court martial case, the defendant appealed, claiming ineffective assistance of counsel. A judge wrote in a concurring opinion that confessing a client's shortcomings is a:

> legitimate tactical decision to which this Court should afford great deference. . . . The same tactic was famously employed by Clarence Darrow in the Leopold and Loeb case:
>
> "I do not know how much salvage there is in these two boys.... [Y]our Honor would be merciful if you tied a rope around their necks and let them die; merciful to them, but not merciful to civilization, and not merciful to those who would be left behind."
>
> In this vein, counsel's concession that Appellant's conduct "deserves to be labeled as dishonorable" and "that any period of confinement in excess of forty years is excessive" was a calculated attempt to build credibility with the judge."

Pursell v. Horn, 187 F.Supp.2d 260 (W.D.Pa. 2002)

In a case reminiscent of the murder of Bobby Franks, on July 23, 1981 at approximately 6:30 p.m., thirteen-year-old Christopher Brine left his home in Wesleyville, Pennsylvania, riding his bicycle. Less than twenty-four hours later, he was found dead, naked, his face was drenched with blood, and a twenty-five foot long tree-limb lay across his throat. An autopsy revealed that Brine had sustained fifteen blows to the head with a rock, and had suffered a broken nose, internal hemorrhaging in the neck, and swollen eyes with the ultimate cause of death identified as asphyxiation because Brine's windpipe was crushed when he was strangled with the tree-limb. Alan Pursell was later arrested and eventually convicted for the murder.

Pursell's undoing began just as it did for Nathan Leopold:

> First, a pair of glasses was found at the murder scene. An optometrist, Dr. Moody Perry, examined these glasses and determined that they were the same prescription and frame that he sold to Pursell a few months before the murder. According to Dr. Perry, the prescription was so rare that his office records revealed that he had written it only once in six years. On the afternoon of July 24, 1981, hours after the murder took place, Pursell returned to Dr. Perry's office and ordered a new pair of glasses, explaining that his pair had been stolen.

A number of witnesses confirmed that Pursell lost his glasses on the very night that Brine was killed. On July 27, 1981, Pursell and a friend were watching the television news when, out of the blue, Pursell asked if a person could be traced through his glasses. At the time, only the police and the murderer himself could have known that a pair of glasses was found at the scene of the crime because the local news media had made no such report.

Blood evidence also tied Pursell to the murder and he was arrested, tried, convicted and sentenced to death. Pursell appealed his murder conviction and death sentence. The court found:

> The evidence against Pursell was strong. Like a modern-day Nathan Leopold, Pursell accidentally left his calling card at the crime scene for all the world to read. His glasses provided the jury with ample evidence from which it could infer his presence at the murder scene and his complicity in Brine's death. The blood found on his shoe further reinforced his connection to the crime. And his statements to Lynch, Jagta, and Walters seemed to seal his fate, particularly since the testimony regarding these statements came from those who were most likely to support Pursell, his next door neighbors and the wife of his friend. These four pillars established a solid foundation for Pursell's guilt.

The court granted Pursell's petition for writ of habeas corpus on several grounds including: defense counsel was ineffective in failing to investigate and present extensive mitigating evidence; the sentencing court's instruction on torture aggravating circumstance was unconstitutionally vague and broad, and failed to limit jury's discretion; and the state Supreme Court's decision on review of jury instruction on torture aggravating circumstance was an unreasonable application of clearly established federal law.

Prosecutors' appealed the ruling and Pursell struck a plea deal. He agreed to forgo all future appeals of his 1981 conviction for murdering Christopher Brine and in exchange prosecutors agreed not to seek reinstatement of the death penalty.

Gentry v. Roe, 320 F.3d 891 (9th Cir. 2002)

After being sentenced to 39 years to life for assault with a deadly weapon, Gentry sought federal habeas corpus relief. The court held that the state court determination that the petitioner was not denied effective assistance of counsel was an objectively unreasonable application of federal law and warranted habeas relief. The court reversed and remanded the case. Judge Kleinfeld dissented:

> I am especially concerned about this case, not only because it flies in the face of what the Supreme Court has told us to do, but also because it has the potential to damage the quality of criminal defense in our circuit. We're de-fanging defense counsel, by limiting flexibility in closing argument, particularly by limiting the techniques counsel can use to establish personal credibility and argue reasonable doubt. The panel majority would treat Clarence Darrow's successful closing argument in the Leopold and Loeb case as deficient under Strickland, had he lost, because he conceded that his clients were bad people for whom the death penalty would be merciful: "I do not know how much salvage there is in these two boys. I hate to say it in their presence, but what is there to look forward to? I do not know but what your Honor would be merciful if you tied a rope around their necks and let them die; merciful to them, but not merciful to civilization, and not merciful to those who would be left behind ... I will be honest with this court as I have tried to be from the beginning. I know that these boys are not fit to be at large."[186]

Lockett v. Anderson, 230 F.3d 695 (5th Cir. 2000)

Lockett was convicted of murdering a husband and wife and sentenced to death. Lockett's lawyer did not explore mitigating circumstances such as whether he had a troubled upbringing, repeated head injuries, an organic brain abnormality, a history of referring to himself as an entirely different person, schizophrenia, or other mental problems. The court found this failure to explore these potentially mitigating circumstances amounted to ineffectiveness of counsel. The court stated:

> At trial, counsel essentially pled only for mercy for Lockett, without mentioning any of the possible mitigating evidence noted above. He failed even to question Lockett's mother-the only witness presented in the Mrs. Calhoun trial-about possible mitigating evidence. As pointed out, counsel "compared Carl to Leopold and Loeb, arguing that Carl could be spared because Leopold had gone on to become a noted scientist while at the same time admitting that Carl lacked the intellectual ability to do so." Given that the jury knew that Lockett had a low IQ, that analogy was sure to convince no one.

Ex parte Burgess, 811 So.2d 617 (Ala. 2000)

The defendant was convicted of a murder he committed when he was16 years old. The jury recommended life imprisonment without parole but the trial court overrode that recommendation and sentenced him to death. In a concurring opinion a judge stated:

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[186] Citing Clarence S. Darrow, Closing Argument for the Defense in the Leopold-Loeb Murder Trial, in Famous American Jury Speeches 1086 (Frederick C. Hicks ed., Legal Classics Library 1989) (1925)).

> Before I voted in this case, knowing that the State of Alabama is going to be named in a list with such countries as Iran, Iraq, Bangladesh, Nigeria, and Pakistan, as jurisdictions approving death sentences for persons under age 18, I reread Clarence Darrow's summation in the Leopold and Loeb case. . . . Like Darrow, I wonder if
>
> "[w]e are turning our faces backward toward the barbarism which once possessed the world. If Your Honor can hang a boy of eighteen, some other judge can hang him at seventeen, or sixteen, or fourteen. Someday, if there is any such thing as progress in the world, if there is any spirit of humanity that is working in the hearts of men, someday men would look back upon this as a barbarous age which deliberately set itself in the way of progress, humanity and sympathy, and committed an unforgivable act."

Roy Burgess Jr. was later sentenced to life imprisonment without the possibility of parole.

Wade v. Calderon, 29 F.3d 1312 (9th Cir. 1994)

Wade was convicted of murder and sentenced to death. On appeal the sentence was reversed and remanded in part because he received ineffective assistance of counsel at the penalty phase of his trial. Judge Reinhardt wrote an opinion concurring in part and dissenting in part:

> Although I join in the portion of Judge Canby's opinion which concludes that Ames rendered ineffective assistance at the penalty phase, I believe it necessary to respond to Judge Trott's assertion-which I assume he makes with tongue at least partly in cheek-that our decision rewards a 'skilled professional ... with a slap in the face because he wasn't Clarence Darrow.'" Opinion of Judge Trott at 5053.
>
> Carried away by the excesses of his own rhetoric, Judge Trott actually likens Ames's wholly inadequate penalty phase closing argument in this case to Darrow's well-known and masterful closing argument in the case of Leopold and Loeb. It is simply ludicrous even to mention Darrow's brilliant twelve-hour plea, which raised every possible argument and touched on every possible emotion, in the same volume of the Federal Reports as Ames's disastrous summation of less than ten minutes. Ames's argument, in total contrast to Darrow's, offered the jurors one and only one justification for keeping Wade alive: so that he could be a "human guinea pig." Few capital defendants can engage the services of a Clarence Darrow. But surely they are entitled to more than the wholly ineffective representation Wade received from S. Donald Ames.[187]

Judge Trott also dissented and took exception with other parts of the opinion:

[187] Wade v. Calderon, 29 F.3d 1312, 1330-31 (9th Cir. 1994).

I suppose Judge Canby would also find fault with Clarence Darrow's defense in the Leopold and Loeb case. Nathan Leopold, Jr. and Richard Loeb were wealthy, young men who, "for the sake of a thrill," sought to commit the "perfect crime." See Attorney for the Damned 16-19 (Arthur Weinberg ed., 1957). They kidnapped and later murdered a fourteen-year-old boy. In the face of enormous public outcry against the defendants, Clarence Darrow took their case. Leopold and Loeb pled guilty to the murder, but the prosecutor still demanded the death penalty. During the course of his eloquent and impassioned plea before the judge, Darrow said:

"I do not know how much salvage there is in these two boys. I hate to say it in their presence, but what is there to look forward to? I do not know but that Your Honor would be merciful if you tied a rope around their necks and let them die; merciful to them, but not merciful to civilization, and not merciful to those who would be left behind."

When Darrow finished his argument, tears streamed down the judge's face, and Leopold and Loeb received life imprisonment, not death.

No one would claim Clarence Darrow argued that the execution of Leopold and Loeb would be a favorable outcome. Darrow was obviously pleading for sympathy, and his statement must be understood in the context of his more-than-twelve-hour plea. But Judge Canby does not give Wade's counsel any such license. Judge Canby isolates a passage out of context, then obscures its clear meaning. While Wade's counsel may not have been Clarence Darrow, his performance was not constitutionally infirm.

Resnover v. Pearson, 754 F.Supp. 1374 (N.D.Ind. 1991)

Resnover and a co-defendant were convicted for killing Indianapolis Police Sergeant Jack Ohrberg on December 11, 1980. The defendant appealed on several grounds including ineffective assistance of counsel. The court ruled against the defendant:

The blunt and obvious fact was that Gregory D. Resnover was not personally present before that jury considering the death penalty at that time. He was not present because he voluntarily chose not to be present. Certainly, Clarence Darrow, Edward Bennett Williams or F. Lee Bailey might have each thought of something creative to say at that time and under those circumstances, but the blunt and obvious fact was that Resnover wasn't there. He now retroactively expects his appointed defense counsel to have performed some kind of a miracle of advocacy on his behalf. Given the almost totally no-win situation created by Resnover's own conduct, it is very difficult with the omniscience of hindsight to fault defense counsel Alsip for his efforts during that presentation.

In some very sensational cases in which the death penalty has been sought, defense counsel will concentrate on avoiding the application of the death penalty

> and in the process will often basically concede the commission of the crime itself. Certainly, Clarence Darrow used that precise tactic with great success in defending Nathan Leopold and Richard Loeb in 1924. This petitioner strongly resisted the understandable tactics of defense counsel Alsip to attempt to distance Resnover from Tommie Smith. It was Resnover and not Alsip who chose to walk in lock step with Tommie Smith. After all, in the final analysis, a defense counsel, even a very good and experienced one, is required to follow the expressed decisions of his client, even when these decisions after the fact lead to disaster. Given this tactic of cooperation rather than distancing, it is hard to conceive what brilliant tactical moves could have been made by counsel Alsip that would have brought about a different result. Nathan Leopold and Richard Loeb cooperated with Clarence Darrow and did not leave him in the lurch at the critical moment of the trial. Resnover did otherwise and now complains that his counsel should have been a latter-day Clarence Darrow.

Gregory Resnover was electrocuted on December 8, 1994. His co-defendant Tommie Smith was executed by lethal injection in July 1996.

McDougall v. Dixon, 921 F.2d 518 (4th Cir. 1990)

In a death penalty case, the court held that the closing argument presented by one member of defense team which amounted to a "head-on" attack on the death penalty, was not deficient and defendant was not denied effective assistance of counsel even though the closing argument was unsuccessful. The court described the closing argument:

> In his final comments to the jury, Paul attacked the death penalty head-on as a cold blooded, premeditated killing by the state. He argued that when society executes people it breeds violence, that the death penalty was a tool of totalitarians and fascists, and that believers in capital punishment love killing. He quoted Clarence Darrow in his defense of Loeb and Leopold. He talked about love and nonviolence and his admiration of Martin Luther King, Jr., who had preached nonviolence. He invoked the memory of his young son, who had died of leukemia, and reminded the jury that while there was life there was love. He then quoted extensively from the Sermon on the Mount including a complete recitation of the Beatitudes. He spoke of the brotherhood of man and advised the jury that only persons who oppose capital punishment are honored by history.

Michael Van McDougall was executed by lethal injection on October 18, 1991.

In re Rupe, 115 Wash.2d 379, 798 P.2d 780 (Wash. 1990)

In a death penalty case, the court held that an instruction directing the jury not to permit sympathy to influence it during sentencing deliberations was not erroneous on the theory that it conflicted with instructions defining mitigating evidence. A dissenting judge wrote:

> The majority's conclusion that the United States Supreme Court decisions in California v. Brown, 479 U.S. 538, 107 S.Ct. 837, 93 L.Ed.2d 934 (1987) and Saffle v. Parks, 494 U.S. 484, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990) compel the holding that sympathy for the defendant is an impermissible consideration for the jury in the penalty phase of a capital case is simply wrong. Under United States Supreme Court doctrine and our statutes, the purpose of presenting mitigating evidence is to elicit feelings of sympathy based on some aspect of the defendant's character or background that prompts the jury to exercise mercy and not impose the death penalty.
>
> It is generally acknowledged that the most effective strategy for defense counsel at the penalty phase is to play on the jurors' sympathy and compassion. Welsh S. White, in his book, The Death Penalty in the Eighties: An Examination of the Modern System of Capital Punishment, characterizes the best defense attorneys as the ones who have successfully appealed to the emotions of the jury. He points to Clarence Darrow's moving plea for the lives of Leopold and Loeb as a famous example of a superb argument that effectively aroused the sentencer's sympathy. W. White, The Death Penalty in the Eighties: An Examination of the Modern System of Capital Punishment 82-83 (1987). White argues that defense argument which pertains to the evidence presented should not be excluded because it is emotional. He explains that the Supreme Court's decision in Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) which requires the sentencer to make an individualized sentencing determination based on the defendant's personal characteristics as well as the circumstances of the crime, mandates the kind of eloquence that will arouse the sentencer's feelings.

Juries twice sentenced Rupe to death, but higher courts overturned the sentences for various reasons. In 1994, a federal judge upheld his conviction but agreed with Rupe's contention that at more than 400 pounds, he was too heavy to hang because of the risk of decapitation. Prosecutors tried for the death penalty a third time in 2000, but the jury deadlocked 11-1 in favor of the death penalty. Because a unanimous vote was required for capital punishment, Rupe got a life sentence by default. He died in February 2006 after a long illness in Washington State Penitentiary. As a result of outrage over the Rupe case, the Washington legislature changed the state's primary method of execution from hanging to lethal injection in 1996. Prior to this, Washington executed prisoners by either hanging or lethal injection. If an inmate didn’t choose a method, the preferred way was hanging.

Jordan v. State, 464 So.2d 475 (Miss. 1985)

The defendant was convicted of murder and sentenced to death on July 21, 1976. After several decisions and appeals, the death penalty was re-imposed for the third time. A dissenting judge stated:

> What is most disturbing about the majority decision is that it would, if carried to its logical extreme in the future, operate as a matter of law to deprive society of

> the benefits it could well derive from the continued life of one convicted of capital murder. History has recorded the names of numbers of persons who have in their youth committed heinous and atrocious crimes and, escaping the hangman, gone on to lead productive and useful lives, albeit behind bars. Nathan Leopold participated in the thrill killing of little Bobby Franks in Chicago in the early 1920s and, after he escaped the gallows largely through the eloquence of Clarence Darrow, went on to make important humanitarian contributions in the fields of science and medicine. N. Leopold, Life plus 99 Years 305-38 (1958). Several decades ago there was popularized the life of Robert Stroud, the birdman of Alcatraz, a convicted murderer, who following reprieve made important contributions to avarian science. There have no doubt been others. While most capital murderers do not have such creative capacities in their character and personality, there is no reason why we should arbitrarily deprive society of the benefits of the continued life of those who do.

As of 2009, Jordan has been on death row for over 30 years. His case has been reviewed a total of six times by various courts, including the Supreme Court of Mississippi, the United States Court of Appeals for the Fifth Circuit and the United States Supreme Court.

State v. Battle, 661 S.W.2d 487 (Mo. 1983)

The defendant was 18 years and 4 months old when he brutally raped and murdered an 80-year-old neighbor. He was sentenced to death. In this appeal, a dissenting judge thought his age should be mitigating factor against imposing the death penalty:

> The history of capital punishment in Missouri shows that persons who were under the age of 20 at the time of commission of the offense have seldom been sentenced to death, or executed. . . . History shows that 35 persons were executed in the Missouri gas chamber following state convictions, prior to the invalidation of the previous death penalty statutes pursuant to Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). Only two of the 35 were under the age of 18 at the time of the offense. See State v. Lyles, 353 Mo. 930, 185 S.W.2d 642 (1945); and State v. Anderson, 386 S.W.2d 225 (Mo. banc 1963). Without lengthening this opinion by details it is sufficient to say that both cases involved willful killings incident to robbery, in which the defendants abused their victims prior to killing and also severely wounded other persons who might well have died.
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> One of the most aggravated murders in our history is that of Bobby Franks by Richard Loeb and Nathan Leopold. The victim was abducted and brutally murdered by use of a chisel, while a ransom note was in circulation and the kidnappers continued their efforts to collect the ransom knowing that he was dead. The defendants retained Clarence Darrow and entered pleas of guilty. Sentencing fell to Judge John R. Caverly, Chief Justice of the Criminal Court of Cook County, Illinois. The Judge paid little attention to Darrow's psychological

> evaluation: The Legal Psychiatric Services, D.C.CODE § 24-106, and the two-month study made possible by Rule 35, Fed.R. CRIM.P. But the first has fallen into desuetude and the judges have ignored the second even after its endorsement by Congress in 18 U.S.C. § 4208(b). Against this background of neglect, Leach's case is a dramatic example of the need for such services. If Leach, his family or friends had had the intellectual and financial ability, he would have been able to present psychiatric and other information directed to the separate issue of sentencing. Compare the extensive psychiatric evidence and argument offered to mitigate the sentence by the wealthy defendants in the Loeb-Leopold case. Sellers, THE LOEB-LEOPOLD CASE. A wide difference between the opportunities for justice available to the rich and poor has often been held "invidious discrimination."[188]

A dissenting judge disagreed:

> Further than this, it is particularly unfortunate, in my opinion, to indicate by the language used that Leach suffered because of his "financial ability." Such is not the case. He had the benefit, in his trial and on his two appeals here, of able counsel, who diligently protected his interests; and certainly Clarence Darrow (who kept the defendants in the Loeb-Leopold case from the electric chair) could have done no more than did counsel in this case for Leach- all without compensation, and in the best traditions of our bar. In this connection, let me add that the bar of this court and of the District Court has always responded, at great sacrifice on their part and with great ability, to the many thousands of requests by the courts to represent indigent defendants.

Clark v. United States., 259 F.2d 184 (C.A.D.C. 1958)

During a murder trial, the defendant testified that he was not guilty and claimed he must have been insane. However, his trial counsel stated that it was a case of manslaughter and not a case of first degree murder and that he knew that defendant must pay a penalty and he was not asking for an acquittal. The defendant appealed his conviction. The court held that the defense counsel's attempt to take the insanity defense out of the case may have tended effectually to persuade the jury to disregard the court's subsequent instruction that they should find defendant not guilty by reason of insanity unless they found, beyond a reasonable doubt, that he was sane. This amounted to prejudicial error.

In a dissenting opinion, Judge Burger wrote:

> Appellant's own counsel appointed to conduct this appeal acknowledged in open court that, had the tactic worked in this particular case, it would have been a sound and good trial tactic. I do not suggest that a basis for reversal could not be grounded on ineffective assistance of counsel for failing to press an essential or central element of defense. But here, as I pointed out, there was not the slightest

[188] Citing Griffin v. Illinois, 351 U.S. 12 (1956); Greenwell v. United States, 317 F.2d 108 (1963); Brown v. United States, 331 F.2d 822 (1964).

> failed to assess the death penalty. The only inference which the jury could possible have drawn from the remarks of the county attorney was a threat that, if they failed to return a verdict carrying the graver penalty, they would be criticized as was the judge in the Leopold-Loeb case.

State v. Genna, 163 La. 701, 112 So. 655 (La. 1927)

Genna was convicted of murder and sentenced to death. He raised several issues on appeal including the following remark made during the trial by the assistant district attorney:

> You, gentlemen of the jury, are now confronted with the most serious problem ever presented to the people of Beauregard parish. It is for you to say whether or not henceforth there shall be law enforcement or not. You are confronted with the same situation [synonymous with, state of facts] as was presented to the people of Illinois in the famous Leopold and Loeb Case.

The defendant's attorney requested the trial judge to instruct the assistant district attorney to desist from referring to any case in Illinois or any other state in his argument to the jury, but the judge denied the request. On appeal, the Supreme Court of Louisiana ruled:

> The remark was made "in a general argument against the plea of insanity in this case. There was nothing improper or prejudicial in the remark". . . . District attorneys are entitled to argue their cases to the jury with the same latitude as counsel for the defense. It is a mistake to suppose otherwise. It is true they may not go outside of the record to bring to the attention of the jury any facts connected with the case which have not been given in evidence; nor should they appeal to the prejudices of the jury (supposed or real); and if they do so they should be stopped by the trial judge and the jury properly instructed and directed to disregard such remarks.
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> But aside from this, their right to argue their case with all the eloquence at their command is quite as extensive as that of counsel for the accused. And we have always found that trial judges, sitting as moderators in these warm debates, are quite competent to keep the arguments of counsel for the state toned down to the proper key.
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> In the case before us the remarks of the district attorney could be no more prejudicial to the accused than if he had referred to the story of Cain and Abel, or the assassination of Julius Caesar, or the French Revolution; just as the attorney for the defendant would have been quite free, if he chose to do so, to refer to Magna Charta, the Bill of Rights, and the Declaration of Independence, without overstepping the bounds of propriety in any manner whatever. Literature and history are open to all men; and the Leopold and Loeb Case is an event in current history which is not undeserving of deep thought.

Joe Genna's sentence was affirmed. On March 9, 1928, Genna and his accomplice Molton Brasseaux were both executed in a double hanging (Genna first, followed by Brasseaux).

Bertig Mercantile Co. v. Williams, 286 S.W. 150 (Mo. App. 1926)

In a suit over a promissory note, the defendant asked the plaintiff's ex-book-keeper during cross-examination whether he was from Chicago because his last name was Loeb:

> Appellant also contends this witness David Loeb was asked if he was from Chicago. The abstract of the record shows there was no question of that kind asked except as above shown, which referred only to the brother Rudolph Loeb. The question is claimed to have been prejudicial, for the reason that at the time this case was tried the young Jews, Loeb and Leopold, were on trial in Chicago for the murder of the Franks boy; that the Chicago case attracted much publicity; that, since the manager of the store and his brother, Rudolph, bore the same surname as one of the defendants in the murder case, the question had prejudicial effect upon the minds of the jury and diverted their attention from the real facts in the case.
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> The question was no doubt immaterial to the issues. We do not believe, however, the conduct of defendant's counsel in asking the question referred to is sufficient grounds for a reversal. The trial court is given much discretion in deciding how far counsel shall be permitted to go in cross-examination of witnesses. We cannot believe counsel for defendant deliberately attempted to inject the thought of the Franks murder into this case, and thus prejudice the jury. If such were the purpose of the question, the conduct of counsel was reprehensible in the extreme, and he should have been severely reprimanded by the court.
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> The learned trial judge had the benefit of hearing the question asked, and could better judge of its effect upon the jury. It is almost inconceivable that a jury of citizens, who no doubt had known Mr. Loeb throughout the many years he had lived in their midst, could be so prejudiced and unfair as to let the mere fact that he bore the same name as a man charged with murder in a distant city, influence their decision.

Tyree v. Commonwealth, 212 Ky. 596, 279 S.W. 990 (Ky.App. 1926)

During a prosecution for manslaughter, the prosecution told the jury: "'Gentlemen of the jury, all a man has to do at this day and time is to hire the best lawyers to be had, and you will remember the miscarriage of justice that we read about a few months ago in Chicago in the case of Loeb and Leopold, two of the foulest murders in recent history, and justice is defeated.'"

The defendant argued that his conviction should be reversed in part because of this statement by the prosecution. The court ruled:

It has always been allowable for counsel in argument to refer to matters of history and to facts within the knowledge of the general public to illustrate a point or to warrant a conclusion, and such argument is not ground for a reversal of the judgment in a criminal case. . . .

The reference to the miscarriage of justice in the case of Loeb and Leopold was but to call a matter of history fresh in the minds of the reading public to the attention of the jury to illustrate the fact that sometimes the foulest murders go unwhipped of justice because they have resorted to questionable defenses or have engaged adroit counsel, who, by powers of argument or skill and tact in the trial of criminal cases, are able to influence a jury to return a verdict in their favor. It is not infrequent for lawyers in argument of cases to juries to call to their aid incidents arising in famous trials of the long ago, and to base their argument upon facts and results thus well known to the jury.

Certainly members of a jury are authorized in considering their verdict in a criminal case to call to their aid all their past experience and teaching--the sum total of their knowledge. Why, then, should counsel be prohibited from calling to the attention of the jury historical facts and general matters of information which are calculated to throw light upon the conduct of the parties litigant and to aid the jury in determining the issues involved? None of the statements attributed to counsel for the prosecution are out of the ordinary. Scarcely a criminal case is tried before a jury where argument is had that counsel do not make similar statements both for and against the accused.

Good ethics may require the choice of different words to express the same thought, but frankness, direct statement, or bluntness has never been regarded as anything more than want of diplomacy and skill to delicately and elegantly express thoughts, and, so far as we are advised, has never been held to be ground for reversal of a judgment, where the words expressed are not unnecessarily insulting or humiliating.

We find no error in the record warranting a reversal of the judgment. It is therefore affirmed.