The State of New Jersey v. Bruno Richard Hauptmann: Fairness on Trial

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Last time, we discussed the prosecution's improbable theory of the Lindbergh Kidnaping case. One should remember that this was the kidnaping of the most famous baby of the most famous man on the face of the earth. It was an audacious crime. In 1932, Charles Lindbergh was known and revered by more people and by a greater percentage of the world's population than any human who had ever lived. Your gut tells you that this crime must have been planned down to the last detail by at least a handful of people. In this case the prosecution suppressed or disregarded any evidence that showed a conspiracy and, except for the construction of a ladder, no evidence was ever discovered of pre or post kidnaping plans. For example, where was the baby to be held and who was going to care for it?

In summary, the prosecution theory went like this: A "lone wolf" kidnaper drove three hours from his home in the Bronx to the Lindbergh weekend estate in very rural New Jersey. He discovered the family in residence on the only weekday they had ever stayed overnight at that location. Around 9:00 P.M., with Colonel Lindbergh, his wife, the butler, the maid, the child's nurse and Wagoosh the family terrier, all awake, the kidnapper went to work. He placed a ladder up to the window of the nursery, the only window in the house for which the shutters would not lock, crawled in, placed the twenty month old child in a burlap bag and exited through the window. Although this kidnapper was a master carpenter, the ladder he built was too short and only reached to thirty inches below the window. However, the kidnaper was able to exit the window with the baby in one hand, reach back up, leave a ransom note on the window sill and still close the window. (Oh, by the way, the note was placed on the left side of the window sill and the ladder was offset about a foot to the right of the window.) Unfortunately, this master carpenter/kidnaper had built the ladder with 1" x 3" shelving pine and the ladder broke during his descent. He dropped the baby, killing it. Undaunted, he discarded the baby's body a short distance away, off a road three miles south of the Lindbergh Estate and returned home to continue his extortion plot.

Over the next thirty days, working alone, he was able to communicate in writing fifteen times with the Lindberghs. During this time, he also met with their representatives in two Bronx cemeteries, successfully extracting the $50,000 ransom money—even though he produced no conclusive evidence that he was the real kidnaper, that he had the child or that the child was alive.

After obtaining the ransom money, in April of 1932, he was able to live in the Bronx for the next two and one-half years, openly and notoriously (to borrow a phrase from property law) with his wife and child, while eluding the most intense police manhunt in the history of the world. During this time, the prosecutor contended that the kidnapper passed upwards of $5,000 in ransom money to various banks and commercial establishments, mostly in New York City and mostly in the Bronx. In September, 1934, this master kidnaper walked into a gas station a few miles from his home and paid with a ten dollar gold note that was part of the ransom money. Walter Lyle, the station attendant, said, "You don't see many of these anymore." Bruno Richard Hauptmann replied, "Yeah, I only have a couple of hundred left." The attendant wrote Hauptmann's license plate number on the note and a couple of days later Hauptmann was arrested.

The police discovered $14,000 of ransom money hidden in Hauptmann's garage. He had a plausible explanation for how he got the money but for reasons to be discussed later he could not corroborate his story. The police found that their suspect was an illegal immigrant who had been a law abiding resident of this country for ten years. He was always employed, even during the deepest part of the depression. He was married for eight years and had a young child. He was a regular communicant at a local Lutheran church and had a close circle of friends. Except for the construction of the ladder (which Hauptmann denied ever seeing) the police never uncovered any evidence that Hauptmann had made any other preparations for the kidnaping or his getaway. The police never suspected that Hauptmann's wife, Anna, knew anything of the kidnaping or the money found in the garage.

Now, just because this theory of the case may sound improbable, that doesn't make Hauptmann innocent. After all, it is improbable that you will win the lottery but every week someone does win the lottery, against humongous odds. However, criminal juries are charged that an improbable theory of a case can create reasonable doubt—even if all of the facts of that theory are proven beyond a reasonable doubt. More fundamental, however, is that Hauptmann's trial was infected with monumental prosecutorial misconduct and judicial error. His lead attorney also fatally compromised his defense. These errors and misconduct violated basic standards of due process of that day or any other day. The standards violated were designed to produce a reliable verdict. With the mountain of unfairness that buried Hauptmann's trial, no one can be confidant in the verdict or be sure, to a moral certainty, that an innocent man did not go to his death in the electric chair.

REVERSIBLE ERROR IN THE HAUPTMANN CASE[1]

1. LEGAL IMPOSSIBILITY. Hauptmann had to die for kidnaping the most famous baby in the world. However, kidnaping was not a capital offense in New Jersey in 1932 (nor in New York). But felony murder was a capital offense. So far so good. But, causing a death in the course of committing a kidnaping was not a felony murder offense in New Jersey. So far so bad. But, causing a death in the course of committing a burglary was a felony murder offense. So far so good. But, unlawful entry with the intent to commit a kidnaping was not a burglary in New Jersey. So far so bad. But, unlawful entry with the intent to commit a larceny was a burglary and, if someone died in the course of the burglary–that would be felony murder, a capital offense. So far so good. But what was the larceny in the Lindbergh case? Why stealing the baby's night suit! Well true, the baby happened to be in the night suit at the time, but that was legally irrelevant to the charge. Hauptmann would die based on the legal theory that he broke into the Lindbergh Estate to steal a pair of pajamas. That was the legal theory that supported the capital murder charge in the indictment. Of course, that small technicality got buried in the heat of the trial, as

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did the fact that the sleep suit was mailed back two weeks after the kidnapping. It is inconceivable that the New Jersey Legislature, in not making kidnaping a capital offense or making kidnaping a predicate crime for burglary, intended to leave open a backdoor theory that stealing the clothes that a kidnap victim was wearing would support a capital charge if the victim accidentally died. Was it the Legislature's intent that the death penalty could be imposed on such pleading legerdemain? To paraphrase Lincoln, this legal theory was, "....as thin as a broth made from the shadow of a pigeon that had starved to death."[2]

2. SUPPRESSION AND SPOILATION OF EVIDENCE. A hotly contested issue at trial was whether Hauptmann worked at the Majestic Apartments at 72ND Street and Central Park West the day of the kidnaping. In the beginning of the case both Sam Foley, the Bronx D.A. and David Wilentz, the New Jersey Attorney General, conceded that Hauptmann worked there until at least noon. Hauptmann claimed he worked there until 5:00 P.M. If so, he would not have had enough time to drive to New Jersey to commit the crime. The time sheets of the contractor would answer this question. There exists a signed receipt for these records that were in the possession of the District Attorney. At Hauptmann's extradition hearing the records disappeared, never to be seen again. After that, the prosecution changed its argument to claim that Hauptmann didn't start work at the Majestic until the middle of March. Other records, those of the employment agency that supplied the carpenters to the contractor, which do show that Hauptmann was hired to work on March 1st, have mysterious ink blobs covering some of the entries-but only those entries regarding Hauptmann's employment.

3. SUGGESTIVE VOICE SHOW UP. The exchange of the ransom money took place in April, 1932 at St. Raymonds cemetery in the Bronx. Lindbergh was siting in a car, with the window rolled up, about 200 feet away from where "Cemetery John" called out "Hey Doc." to Dr. John F. Condon (Jafsie) who was Lindbergh's intermediary. Two and one-half years later, Lindbergh was asked at the Grand Jury proceedings in the Bronx whether he could identify that voice. Lindbergh replied, **"It would be very difficult for me to sit here and say that I could pick a man by that voice."**

The next day, D.A. Foley arranged for Hauptmann to be brought to his office while Lindbergh sat there in disguise. Upon Hauptmann repeating the words, "Hey Doc," Lindbergh's auditory memory was refreshed and he had no doubt that the voice belonged to "Cemetery John." When he made this identification at trial, virtually every trial observer noted that, from the reaction of the jury, this identification alone sealed Hauptmann's fate. After all, this was the most honored man in the entire world telling his neighbors that Bruno Richard Hauptmann was the man who kidnaped and killed his baby right there in their own county. Who could possibly question that father's opinion.

In reality, it is hard to believe that Lindbergh did not perjure himself. It defies our human experience to think that any person could identify a voice heard only once, two and one-half years ago, in the form of two words. Oh, by the way, by 1932, Lindbergh has spent over ten years in open cockpit airplanes with large, un-muffled rotary engines roaring in his ears. Lindbergh's daughter, Reeve, tells the story of how, when she was a child and went flying with her father, he would not let her wear earplugs. "Our father frowned upon cotton balls. If he saw them, he would make us remove them. He claimed that they diminished the experience of flying, and were in any case unnecessary: the engine noise was not so terribly loud that one couldn't get use to it. He certainly had done so." (**Under a Wing, A Memoir,** p.96)

4. INEFFECTIVE ASSISTANCE OF COUNSEL. Edward Reilly was once known as the "Bull of Brooklyn." In his prime, which was a decade earlier, he was very good. More recently, he became known as "Death House Reilly." A the start of the trial on January 2, 1935, he was still hung over from New Year's eve celebrations. At trial, dressed in spats and a cut-a-way coat, his pompous demeanor broadcast a disdain for the plain folk of Hunterdon County. Every juror later commented on Reilly's condescending attitude. He drank through most of his lunches and his trial preparation at night consisted mostly of entertaining prostitutes, thinly disguised as secretaries, supposedly taking his dictation. Before the trial he had spent a total of just forty minutes with his client.

His trial strategy was disastrous, his cross-examination was usually harmful to his case. On direct, he called as witnesses persons that hurt more than helped. However, most importantly, his loyalty was compromised. The Hearst Papers paid Reilly his $10,000 retainer in exchange for exclusive access to the defense strategies and daily commentary by Reilly. The New York Journal, which was rabidly anti-Hauptmann and convinced to a certainty of his guilt, would spare no ink in declaring so. This paper would get Reilly's exclusive reports.

Tied into this was America's most famous journalist, Walter Winchell. Winchell would daily broadcast to "Mr and Mrs. America and all ships at sea" his profound belief, backed up by inside information, that Hauptmann was as guilty as sin. Reilly, after going through three wives and casks of alcohol, would eventually lose his license to practice law and spend two years in a mental institution suffering from the effects of tertiary syphilis.

5. TAINTED EYEWITNESS IDENTIFICATIONS. The eye witness testimony against Hauptmann crossed over into the Twilight Zone. Amandus Hochmuth was an 87 year old man who said he saw Hauptmann drive off the road near his house the day of the kidnaping and saw a ladder in the car. He had cataracts in both eyes and was legally blind. He was receiving public assistance for this condition. At trial he testified that until the day of his testimony, almost three years after the kidnaping, he had never told anyone about what he saw. The day before his testimony he was taken to the jail for a show up after being shown a picture of Hauptmann. Just before he testified, he was shown where Hauptmann was seated in the coutroom. Not surprisingly, he identified Hauptmann in court. However, he needed no help in becoming aware of the reward money, part of which he collected.

Joseph Perone was a cab driver who said he was stopped one night on Gun Hill Road in the Bronx and asked to deliver a letter, which turned out to be a ransom note. In the intervening years up to Hauptmann's arrest, he had made a dozen or more misidentifications of the person who gave him the letter. After being told that the real kidnaper had been arrested, Perone picked Hauptmann out of a suggestive line-up.

Cecil Barr, a cashier at the Lowe's Sheridan in Greenwich Village, testified that on November 26, 1933 she sold Hauptmann a ticket to the movies. Though selling 1,500 tickets that night, she still had a clear memory of Hauptmann a year later when she I.D. him in a suggestive line-up. The Lowes-Sheridan was fifteen miles and probably forty-five minutes to an hour from Hauptmann's residence. November 26th was Hauptmann's birthday and he was at a party at his home with several friends. Barr identified the man she sold the ticket to as

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"American" and said he was alone and without a coat.

Millard Whited was a 35 year old illiterate farmer who lived a mile from the Lindbergh estate. Shortly after the kidnaping, Whited told police that he had seen nothing suspicious prior to the kidnaping. Two and a half years later, he was shown a photograph of Hauptmann and identified him as a person he had seen wandering about the Lindbergh Estate in February 1932. He too, as with the other eye witnesses, received reward money.

When Hauptmann was finally put into a line up he had been sleep deprived for almost thirty-six hours and had been severely beaten. "Leon Turrou, one of the FBI agents in the room, noted that Hauptmann stood out like a sore thumb. The police officers were all over six feet tall, neatly pressed and freshly shaved. 'Hauptmann looks like a midget who has wandered through a Turkish bath for two sleepless days and nights,' Turrou noted to a companion." (Jim Fisher, **The Lindbergh Case**, p. 209). John F. Condon (Jafsie), the man who had spent an hour talking with "Cemetery John" at the Woodlawn Cemetery, was the only eyewitness who refused to identify Hauptmann in the line-up. After immense police pressure and threats of prosecution, he did identify Hauptmann at the trial.[3]

6. BRADY, AND ROSARIO MATERIAL. Brady and Rosario are the two leading cases for discovery in a criminal case, where discovery is severely limited to begin with. **Brady** holds that the prosecution must turn over to the defense any exculpatory information. **Rosario** holds that the defense is entitled to review any pre-trial statements made by a witness. The Lindbergh investigation material ran to more than 100,000 pages. Virtually none of it was available to the defense. Anything that could have been helpful to the defense never saw the light of day. Hauptmann's financial journals that were seized at his house the day of his arrest. Those records could have shown the sources and uses of his money but they were never made available to his defense team. Almost every witness who testified for the prosecution had given conflicting statements prior to the trial, including Lindbergh and the leading handwriting witness. The Defense had no access to these statements. (One handwriting expert, Albert D. Osborne, would testify in our time that there was only one chance in a million that the Howard Hughes diary was not authentic. We know now that Clifford Irving perpetrated that hoax. Oops! Well, Clifford Irving was not facing the electric chair but tell me again how much improvement was made in "questioned document" expert testimony in those forty years.) For most of the witnesses, the defense was crippled in its cross-examination and some witnesses could commit perjury with impunity. For example, the medical examiner who testified about conducting the autopsy never mentioned that he did not actually do the autopsy. Because of severe arthritis, he talked the coroner through the procedures.

7. THE TRIAL CIRCUS. The Hunterdon County Court House was about 100 years old when the trial took place in 1935. It was designed to hold less than 200 people. Every day up to 500 persons jammed the courtroom. A "hidden" camera was set up in the balcony and a "secret" microphone was placed near the witness chair. After the trial was well under way the Judge was shocked to discover this breach of his rules even though all of the light bulbs in the courtroom had been changed to ones with higher wattage. The jury was housed across the street in the Union Hotel. The other rooms in the hotel were occupied by the press. The jury dining area was screened off only by a curtain that did nothing to isolate the jury from the commentary of the boisterous press corps and the public. Four times a day the jury had to parade through the 50,000 or more people who had flooded into this town of 2,500 to be part of history. The crowd would shout out things like "Hang Hauptmann" of "Hauptmann must die," as peddlers sold souvenir models of the kidnap ladder. Lindbergh attended the trial everyday, sitting at the prosecution's table, armed, on occasion, with a shoulder pistol. The word circus is probably not a good word to describe the trial. After all, a circus has seats for everyone, organized acts and a ring master.[4] Periodic pandemonium surrounded by a lynch mob atmosphere better describes this trial.

8. CHANGE OF VENUE. Hauptmann's lawyers tried to get a change of venue and the motion was denied. In reality, Hauptmann would have needed a change of venue to Baghdad to get a fair trial. Don't forget that Hauptmann was German and a veteran of the Kaiser's Army that America had expended thousands of soldiers lives to defeat in WW I. Hauptmann was always called Richard–until he was arrested and the press resurrected his official first name, "Bruno." Well, everyone knows that Richards don't kidnap babies but Brunos do. Virtually every person in America believed in Hauptmann's guilt. When the baby was first kidnaped, 5,000,000 persons had volunteered in the massive manhunt. Hunterdon County in 1932, was about the size and composition of Schoharie County now. It is about the same distance from Trenton, the New Jersey Capital, as Schoharie is from Albany. The phenomenon that permeated the Lindbergh case was that an entire nation stood ready to do whatever was necessary so that justice was done for the "Eaglet" and the "Lone Eagle", this Nation's foremost hero. This crime would not go unpunished. It is inconceivable that twelve citizens of Hunterdon County could ever look their world famous neighbor in the eye and say "not guilty."

9. JUNK SCIENCE. With the Supreme Court's rulings in the **Daubert** and **Kumho Tire** cases, the world of expert testimony has been broadsided. In most state courts, the old tried and true **Frye** test is gradually withering away. The big battle ground, at least for scientific testimony, is taking place on the "rate of error" issue. There have been strong challenges in Federal trial courts to fingerprint and handwriting evidence. In the Hauptmann case there was powerful expert handwriting testimony and expert "wood" evidence. None of it should have been admitted into evidence under **Frye**. None of it could be admitted under **Daubert**. However, more fundamentally, the evidence lacked the basic standards of foundation to even get to the opinion admissibility question.

The wood evidence was pure junk science. The expert testified that he could trace the wood used in the ladder to trees grown in the Carolinas, milled there and then shipped to a lumber yard in the South Bronx. There is not enough space to set forth why this "evidence" was ludicrous. Suffice it to say, there was no foundation laid as to when the ladder as made or the age of the ladder wood. For all the expert knew, the wood could have been forested in 1830 as opposed to his assumption of about 1930.

The expert's testimony that one of the rails of the ladder was made from a board taken from Hauptmann's attic is more complicated. It has as much to do with possible police misconduct and chain of

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evidence problems as it does with opinion evidence. This issue is also too complicated for a short article but I will point out two facts. First, to believe that the ladder rail and the board remaining in the attic were once joined, one must imagine a grain pattern in a 1.5 inch piece of the board that is missing. Second, the attic board was "discovered" by Lt. Lewis J. Bornmann of the New Jersey State Police. Bornmann had moved into the Hauptmann apartment after the arrest. In the week following Hauptmann's arrest, the attic was searched nine times by thirty-seven police officers, including Bornmann—and nothing was found. Two weeks later Bornmann again searched the attic and this time discovers that one of the attic boards had been sawed and a length removed. Bornmann returns to the attic with the famous "rail 16" of the kidnap ladder and, viola, we have the Lindbergh equivalent of the magic bullet. When rail 16, is placed on the rafters its nail holes line up with holes in the rafters. Oddly, Hauptmann was never interrogated by police about the attic board and the Defense was never allowed access to the attic. The house was decades old in 1932, but rail 16 showed no signs that it had laid across joists for all that time nor did it have any hammer or pry bar marks that would indicate how it was removed.

The main problem with the handwriting evidence was also foundational. Hauptmann was interrogated for over twenty-four hours without sleep. During this time he was asked to write over and over various passages of the kidnap notes. This dictation lasted for over four hours and included directions to misspell certain words the way the kidnapper had misspelled them. The initial opinion of Albert S. Osborne, the leading handwriting expert of the day, was that Hauptmann was not the author of the ransom notes. He changed his mind when he was told that ransom money had been found in Hauptmann's garage. At trial the handwriting experts were allowed to give their opinions in ways such as this: "Hauptmann might just as well have signed his name to the notes." or "The chances that anyone other than Hauptmann writing this note are one in a hundred, hundred million." (That would be 100 trillion or more people who ever walked the face of the earth by a factor of at least 100.)

10. THE DIRECTED VERDICT. The most shocking trial error in the Hauptmann case was the judge's charge to the jury. Here are just three of more than a half dozen examples of charges by which the judge directed a verdict of guilty:

It is argued that the kidnaping and murder was done by a gang...with the help of one or more servants. **Now, do you believe that? Is there any evidence in this case whatsoever to support this conclusion?**

It is argued that Dr. Condon's testimony is inherently improbable and should be in part rejected by you. But **you will observe** that this testimony is c**orroborated in large part** by several witnesses whose credibility has not been impeached in any manner whatsoever. **Upon the whole, is there any doubt in your minds as to the reliability of Doctor Condon's testimony?**

The Defendant says that these ransom bills, moneys, were left with him by one Fisch, a man now dead. **Now do you believe that?**

People who attended the trial reported that the portions of the charge that are highlighted above were similarly highlighted by the judge by the added emphasis and inflection in his voice.

Why does it seem that every time the government tells us that a "lone wolf" commits a famous crime it seals the evidence and wants us to take it on faith that it has told us the truth. Much of the controversy in the Kennedy assassination was created by hiding the facts from the public for decades. This allowed conspiracy theorists to make mole hills of discrepancy into mountains of doubt. The Lindbergh case took a similar path. The investigative records were sealed and not open to the public for almost fifty years. For what possible reason could that be? It would now be possible to DNA test the wood in rail 16 with the remaining board from Hauptmann's attic. It would also be possible to DNA test the saliva preserved in the glue of the ransom envelopes and the glue on the envelopes in which Hauptmann sent letters to the Governor. Requests that these tests be done have been made to New Jersey officials and they have ~~refused. Now why is that?~~ ----------

1. I have only listed ten reversible errors, there were several others. For example: **1.** Hauptmann's attorney should have insisted on a translator. English was a second language for Hautpmann. When asked a question he would have to translate it into German in his mind before he could give an answer. He could not think in English. This made him appear indecisive at best or duplicitous at worst. **2.** Another issue, unknown to the defense at the time of the appeal, was that all of Hauptmann's jail conversations with his wife were recorded by he State Police. That fact that nothing incriminatory was ever revealed in those conversations between husband and wife lends some credibility to Hauptmann's claims of innocence. Anna Hauptmann spent the next sixty years of her life trying to clear her husband's name. **3.** To get the jury in a hanging mood, here are a couple of comments made on summation by the prosecutor. **"He is the filthiest, vilest snake that ever crept through the grass.....And let me tell you, the State of New Jersey and the State of New York and the federal authorities have found that animal—an animal lower than the lowest form in the animal kingdom, Public Enemy Number 1 of this world—Bruno Richard Hauptmann: we have found him and he is here for your judgment."** (David Wilentz)
2. When, where and how the baby died was hotly contested. The autopsy was grossly inadequate. It is one page long and no tissue slides or photographs were made or preserved. A hole in the baby's head was found by Dr. Michael Badin, in reviewing the records for a symposium several years ago, to be consistent with a small bore bullet hole. Had the baby not been killed "in the course of " the unlawful entry, even this capital charge theory of the prosecutions case would have gone by the boards.
3. Hauptmann never confessed to any involvement in the kidnaping. But after being sleep deprived and beaten he did give conflicting accounts for his alibi and he initially lied about how he got the ransom money. This hurt his credibility, perhaps fatally, at trial. In a private conversation with the grandson of a police officer who was at the police station during the six days that Hautpmann was interrogated, the grandson related to me that his grandfather once told him this: "The Gestapo may have known how to get people to talk, but the New York City Police were not far behind. If Hauptmann had known anything about that kidnaping, we would have got it out of him."
4. The trial judge was Thomas W. Trenchard. He was seventy-one and a twenty-eight year veteran of the bench. He had a reputation for fairness, even temperedness and compassion. That his trial rulings were upheld on appeal, shows that he was applying the law of the times.