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Chapter 28

The summer flew by on golden wings, and one bitter morning I awoke almost blubbing ~~to realize~~ <sup>when I realized</sup> that another fishing season had fled, that the leaves were already <sup>fading</sup> ~~turning~~, and that the September term of circuit court was almost upon us. My summer idyll was over...Meanwhile Parnell and I had not been idle. Among other things we had prepared little dossiers on each of the prospective jurors, an elaborate trial brief to buttress our defense of unconsciousness, <sup>besides</sup> a raft of requested instructions. In addition we had endlessly debated our trial strategy: should we try to bar Kirk's police statement? should we make an issue of our earlier demanding a lie-detector test on his claimed lack of memory? Should we, ought we, might we...

There remained one bothersome fly in the ointment: Doc still had not succeeded in stimulating memory recall in Randall Kirk; in fact I had stopped going to the jail with him on his rare visits (on our last <sup>one</sup> together Doc had not even attempted hypnosis but just sat and talked trout fishing with our client), and as court <sup>term</sup> approached I more and more adopted an attitude of resigned fatalism toward the

case--or was it a fatalistic resignation? ~~In any case~~ I had done  
*bloody well*  
my part and what would happen would happen; after all it was not  
my fault if I'd drawn a client who either could not or would not  
remember what ~~had happened~~. *he had done.*

After the initial edict of no visitors none had attempted to  
see or phone Randall Kirk, ~~so far as we could discover~~, and in  
fact we'd learned that Jason Spurrier had left town. Then one day  
it was the first day of circuit court, a Monday, mostly devoted  
to the call of the criminal and civil calendars, the setting of  
jury cases for trial, the culling of cases that had been settled  
*which* or for lack of progress or other reasons were to be ~~dismissed~~, *thrown out*, the  
hearing of various motions, and, in the afternoon, the routine  
emanicipation of those more impatient spouses in their pending un-  
contested divorce cases. During the *first-day* call of the criminal calendar  
I had pleaded Kirk not guilty and his case had been set for trial  
to commence that *coming* Thursday, the first jury case.

Thursday morning the courtroom was crowded even before court  
convened, mostly with women, mostly in turn of the type who seem  
to unfailingly attend every sensational jury trial in the land.

Parnell naturally had a theory about them. "I swear," he de-

claimed, "that they recruit these ~~faceless~~ <sup>faceless</sup> dames from under

every hair dryer in the county and haul 'em to court in trucks, <sup>Or</sup>

~~or~~ maybe it's ~~in~~ <sup>in</sup> school busses."

"But what do they do between <sup>court</sup> terms?" I made the mistake of asking, ~~him~~

~~They~~ <sup>They</sup> race back to their beauty parlors and crouch under

their hair dryers in a state of suspended animation until the

next juicy trial rolls around--then back <sup>to the courthouse</sup> ~~over~~ again--oink, oink--

avidly snouting and sniffing the air for scandal and <sup>dirt</sup> ~~smut~~."

"But meanwhile what do they live on?"

"Soap operas," he said, "that are endless accounts of authentic romance."

What with the presence of the entire jury panel, whose benches

had <sup>earlier</sup> been roped off and posted against the anticipated invasion of <sup>curious</sup>

women, every <sup>a</sup> available seat in the courtroom had been taken when, <sup>already</sup>

promptly at nine, Judge Maitland emerged from chambers and, his

black robe swishing, mounted the short steps to his mahogany

island and stood <sup>motionless</sup> behind his high-backed chair until quiet had  
fallen. A flash-bulb blinked like a wink of summer heat light-  
ning and the Judge frowned and nodded to the Sheriff on his  
right and that worthy gaveled the room <sup>raggedly</sup> to its feet.

"Hear ye, hear ye, hear ye!" Sheriff Wallenstein bawled  
like a cow-poke calling <sup>to</sup> his li'l lost dogies. "The Circuit  
Court for the County of Iron Cliffs is now in session. Please  
be seated."

Judge Maitland looked out at the crowded courtroom and cleared  
his throat. "During this trial no photographs will be taken in  
this courtroom upon peril of contempt of court," he said quietly.  
"I am both morbid and rabid on the subject." Smiling faintly he  
looked down at the special table that had been provided for the  
local and out-of-town reporters. "And I want the film of any  
photographs already taken to be delivered to the Sheriff before  
we continue. Mister Sheriff."

While the Sheriff importantly bustled around collecting rolls  
of contraband film from red-faced newsmen I glanced around the room.  
Parnell, who shunned the spotlight during trials and preferred to

rove, sat over in <sup>an isolated</sup> ~~the~~ row of lawyer's chairs nearest the Judge's chambers; the DA Eugene Canda sat alone at his counsel table to my right surrounded by a barricade of briefcases, manila files and assorted law books; while Randall Kirk and I sat alone at our table which, in a corny show of underdog psychology, was free of all clutter save a solitary <sup>ruled</sup> legal pad and a brand-new ball-point pen recently presented me with the compliments of the engaging proprietor of <sup>the Roosevelt Bar.</sup> ~~Wister G's Restaurant.~~ I turned around and found and nodded at Maida and Hugh Salter sitting in the front row of the spectator's benches behind me.

"No need to come to court, doll, till the jury's chosen," I had earlier told her.

"No need to tell me I'm going to miss a moment of this trial," she had responded. "I'll get a sitter—and you'll pay the bill."

Office discipline, I saw, was <sup>still</sup> ~~really~~ reaching a lower ebb...I craned beyond them looking for Jason Spurrier—back among the hair-dryer set—but could not locate him.

"All film is collected, Your Honor," the Sheriff ~~loudly~~ announced.

"Burn it," the Judge said tersely, turning to the court clerk.

"Mr. Clerk, call the case."

Clovis Trepannier arose in his mahogany cubicle in front of the Judge's bench and cleared his throat and took a dramatic stance, like an eager tenor about to launch into <sup>his first</sup> an aria. "People versus Randall Kirk," he sang out loud and clear. "The charge: murder in the first degree."

"Please swear the jurors on the voir dire," the Judge said.

Clovis faced all the roped-off jurors sitting in the back court and raised his right hand to deliver his first encore. "Please arise and raise your right hands," he sang, pausing until the forty-<sup>mystified and</sup> odd unrehearsed jurors got raggedly to their feet. "You do solemnly swear," he intoned, "that you will true answers make to such questions as may be put to you touching upon your competency to sit as jurors in this cause, so help you God." ~~stat~~

The jurors murmured their embarrassed "I do's" and then sat down.

"Please call a jury," Judge Maitland said.

Clovis sat down and reached for a paneled wooden box containing the individual slips bearing the name of each member of the large jury panel, shaking the box as though he were <sup>x</sup>mixing a massive cocktail. Then he reached into the box with the flourish of a magician about to produce a rabbit and pulled out a slip *and squinted at it.*

"Henry L. Scarffe," he intoned, whereupon a fellow trout fisherman I knew strode to the empty jury box and sat in the far seat of the back row as I scribbled his name on my pad, adding "OK".

"Millicent Olson," Clovis next called, and a motherly-looking housewife of pleasant mien (Parnell and I had cased the entire <sup>prospective</sup> panel earlier) arose and came forward and quietly took her seat beside the first juror as I put a question mark after her name.

This I did not because we knew anything bad about the poor woman but <sup>simply</sup> because we didn't know anything at all. Parnell had a theory that it was precisely the people who lead conventional and uneventful lives who made the most unpredictable jurors--and the common housewife headed his list.

"Who knows what dark fantasies lurk in the secret recesses of her heart?" he had declaimed, pointing in the air. "Take a notorious gambler or lush or whore, even take a Sunday-school teacher or rabid reformer--there's something ~~fairly~~ predictable about their responses to a given trial situation. But an anonymous enigmatic housewife?" He shook his head. "Who can tell what wild notions and <sup>pent</sup> rebellions churn in her ample bosom?"

At the same time we were agreed, housewives or no, that on this jury we wanted all the women jurors we could get. Again Parnell had put it pungently. "Kirk's shy handsomeness will arouse the latent motherhood lurking in every dame," he declared, "while at the same time none will forget that the glamorous Connie was not only two-timing her husband, mind, but had attracted and seduced a younger man to boot. They'll hate and envy her for it."

"Seduced?" I'd asked, puzzled.

"Of course seduced. The women'll know that for one man who ever seduces a woman there are hundred cases where the seducing is done by the dame."

"Hm," I'd said, thinking of Maida.



"So cling to any and all <sup>jury</sup> dames who possess even a pulse.

Remember, Paul, women are always harder on their own kind."

"John Overturf," Clovis called, and again the prospective juror won our private OK. When Clovis came to juror number seven <sup>the drawing for</sup> I looked over at Parnell and smiled. Before court the old boy had bet me five dollars that juror number seven--who would occupy the <sup>predictably</sup> first seat on the very front row--would be a handsome young woman of a kind "that would make a dog break his chain, as Hugh says."

"But how can you be so sure?" I had scoffed. "The whole thing is pure chance--it'd be like taking candy from a baby."

"Except you're <sup>ll be</sup> the baby," he had smugly said. "Is it a bet or are you going chicken?"

"Of course," I had said.

"Doris Flanders," Clovis called out, and a lissome young divorcee in a startling mini-skirt, <sup>later</sup> uncoiled herself from a back bench, <sup>she</sup> in <sup>the</sup> a suddenly hushed courtroom, <sup>she</sup> glided forward with <sup>the</sup> <sup>provocative</sup> that sort of undulant pelvic thrust that fashion models once affected--before, slaves of fashion to the end, they had turned into starved and flat-assed boys--and demurely took her seat and

crossed her legs, all under the avid beady eye of paternal old Clovis.

Even Judge Maitland <sup>started and</sup> blinked a little as I sighed and wrote after her name "Wowie!" If the divorced Mr. Flanders had lost himself an exotic dish, his former wife had just lost me five bucks. I looked over at a grinning Parnell and shrugged; the old boy and his theories were sending me to the poorhouse...

"L. P. Barrett," Clovis called, then "Grace Taylor" and "Donald Anderson" and Mary Clancey", and this went on until twelve prospective jurors--seven men and five women--filled the jury box and sat looking up expectantly at the Judge.

Judge Maitland picked a paper off the bench. "The People charged in their information that the defendant Randall Kirk, on the 16th day of June, last, and I quote, 'at the Township of Chipewa in the County of Iron Cliffs and State of Michigan, feloniously, wilfully and of his malice aforethought, did kill and murder one Constance Farrow Spurrier.' "

The Judge dropped the information <sup>like a falling leaf and</sup> faced the jury. "That, ladies and gentlemen, charges first degree

murder and to that charge the defendant has pleaded not guilty.

Now before we proceed further I want to inquire briefly about your general qualifications to sit here as jurors. Please raise your hand should any of you not qualify. Do you understand? ))

*murmured*  
There was a rumble of <sup>^</sup> assent from the jury.

The Judge then briefly explained the doctrine of presumption of innocence and reasonable doubt and asked the jurors if they understood and would apply these doctrines <sup>on behalf of</sup> ~~to~~ the defendant throughout the trial. All professed to understand and assented and he next passed to statutory qualifications.

"First of all, are all of you citizens? Raise your hands if you are not." Again the muttered rumble, like the ragged responses of a sleepy church congregation, and no hands were raised. <sup>court</sup> The <sup>^</sup> reporter, his back to the jury, glanced questioningly up at the Judge, who nodded an all clear.

The Judge then went on with the other routine questions: were any of them deaf, ill or over seventy; did they all speak and understand English; had any served on a circuit court jury within the year; were any of them public employees or law-enforcement officers;

did any...All passed with flying colors.

"I shall now examine for cause," the Judge said. "The prosecuting attorney, Eugene Canda, sits alone at the counsel table nearer you. Now I suppose some of you know him, do you not?" About half the jurors raised their hands. "And do any of you know him intimately?" None responded. "Or have any pending business with him?" Again none. "Or know of any reason or circumstance in your acquaintance that would in any manner embarrass or hamper you in deciding this case freely on the law and evidence presented here?" Again a stolid silence.

It was now my turn <sup>for the spotlight and only</sup> and ~~but~~ two prospective jurors allowed <sup>when</sup> they knew me, <sup>alas!</sup> which gave me a pang ~~over~~ over the passage of time and the fickleness of the public toward its devoted former servants.

"Do either of you know him intimately?" the Judge continued, and the prospective jurymen Scarffe allowed he had encountered me occasionally <sup>one of</sup> on his favorite trout streams.

"Would your acquaintance with him affect your verdict?" the Judge persisted.

"I'd try not to hold it against him" the fisherman juror said,

and the courtroom tittered and His Honor frowned, and I hung my head, reprieved.

"Now take the defendant, Randall Kirk, sitting on Mr. Biegler's left," the Judge continued, and I could feel my client stiffen and <sup>even more</sup> sit erect. "Do any of you know him?"  
^

The jurors sat staring impassively at Randall Kirk--who stared ahead--stolid as an array of native Buddhas, and I could all but hear them asking themselves, So this is that handsome summer visitor who choked that glamorous Connie Spurrier? None appeared to know him.

"Were any of you acquainted with the deceased?" the Judge continued. None ~~were~~. <sup>was</sup>.

"Now I'll ask all of you jurors if any of you have talked or read about this case?"

All raised their hands; any who hadn't would have confessed <sup>either</sup> perjury, deafness, illiteracy, or failure to pay their newspaper boys.  
^

"Have any of you formed any impression or opinion as to the guilt or innocence of the accused? Simply answer yes or no or raise your hands."

This was the one prickly question that so often got prospective jurors <sup>hustled off</sup> ~~banished~~ to the showers, but these prospective jurors <sup>warily</sup> glanced <sup>at</sup> each other like visitors uncertain of the ritual in a strange church; since their neighbors had not said yes or raised their hands none did, and so all survived the <sup>crucial</sup> test in a mumbled chorus of noes.

The Judge then asked <sup>some</sup> ~~them~~ a final clean-up question <sup>about</sup> the presumption of innocence and reasonable doubt and <sup>the</sup> ~~their~~ ability <sup>of the jurors</sup> to stick to the law and evidence, which all ~~jurors~~ passed, whereupon the Judge sighed and looked down at Eugene Canda, "For cause, gentlemen," he said. "You first, Mr. Prosecutor."

"One moment, Your Honor," the DA said, consulting his notes, and I touched the sleeve of my client and whispered. "How do they look?" and he shrugged fatalistically, and then I <sup>peered sightlessly</sup> ~~looked~~ at my <sup>own</sup> notes. Both sides had a certain number of peremptory challenges, that is, they could <sup>banish</sup> ~~dismiss~~ a juror without any cause, and while I had some reservations about some of those sitting, I had even <sup>several others</sup> more about ~~some~~ not yet called. (Tweedledum, tweedledee...)

"The People pass," Eugene Canda <sup>finally</sup> said. "No questions for cause."

"Up to you, Mr. Biegler," the Judge said.  
*I took a deep breath and arose.*

"The defense passes," I ~~arose~~ and said.

"Peremptory challenges," the Judge said, <sup>wisely.</sup> "Back to you Mr.


Prosecutor."

*This was a crucial decision and*  
Gene Canda sat looking up at the skylight for a spell and  
*sighed and got to his feet.*  
then glanced at me and arose. "Your Honor," he said, "the People are satisfied."

"Up to you, Mr. Biegler," the Judge said, and it was my turn to study the skylight to invoke divine inspiration and to reflect on how chancy this whole <sup>crisis</sup> jury-selection business was. I glanced at the mini-skirted juror and it seemed she smiled, and if the <sup>I reflected that</sup> length of Cleopatra's nose could once have swayed empires, why not the <sup>chance</sup> Mona Lisa smile of a comely divorcee?...

"Your Honor," I said, "the defense is satisfied with the jury. X

A miracle had happened; Gene Canda and I had selected a murder jury in slightly over an hour; we had frequently wrangled far longer in <sup>routine</sup> ~~padding~~ minor cases. "Swear the jury," the Judge said to



Clovis.

Clovis arose and administered the final oath to the standing jurors, although it seemed from my angle of vision that he was mainly addressing the mini-skirted one.

"You do solemnly swear," he sang with evangelical fervor, *his raised hand shaking*  
"that you shall well and truly try, and true deliverance make, *oath*  
between the People of this state and the prisoner at the bar, whom you shall have in charge, according to the evidence and laws of this state, so help you God."

Few coronations, I reflected, could have more tightly glued a monarch to his throne. The Judge addressed the balance of the waiting jurors sitting in the back court. "You will be excused from further attendance until next *Tuesday* ~~Wednesday~~ at nine. If we need you sooner or should there be further delay you will *timely* be notified."

He looked out at the clock. "We'll take a fifteen-minute recess."

*"Darling"*  
"Levely *^* crowd of fugitives from the county's hair dryers,"

I said to Parnell when we were alone together back in the defense lawyer's conference room.



"Yes, I'd love to <sup>have</sup> ~~own~~ the popcorn ~~and beer~~ concessions,"

Parnell said. "How does our jury look?"

"Who knows?" I said, shrugging. "Or have you forgotten your recent oration on the enigma of the housewife? Tell me,"

I went on, absently paying him the jury bet I had just lost, "how does Clovis <sup>always</sup> manage to draw these dream babes <sup>juror</sup> as number seven ~~juror~~? <sup>anyway</sup> And how could you tell?"

"Hell, Paul, I've observed the phenomenon for years. My theory is that he cases all the comely babes <sup>on the panel</sup> beforehand and simply never puts their <sup>goddam</sup> slips in the box. When he reaches number seven juror he merely palms the slip of his queen for the day and already has it in his hand when he reaches in the box."

"But that's outrageous and unbelievable. <sup>illegal and faintly</sup> ~~And also~~ <sup>lecherous.</sup>"

"Oh, I don't know, Polly. I remember back in my drinkin' days," he ran on, his ~~littled~~ faded eyes growing misty with recollection, "when I had an ogress of a landlady who was always buggin' me for back rent. One morning the old dragon waylaid me in the hall and demanded either her money or my key. So I shook my finger under her nose and I says"--whereupon he shook his finger under my

nose—" 'Madam', says I, 'on the first of each month I piles all  
me bills in me hat and shakes it and picks out one lucky bill an'  
pays a little on it. Now if you don't quit houndin' me next  
month I won't even put your <sup>goddamn</sup> bill in the hat. Now scat!' "

"Pardner," I said, "you're pulling my leg. The first time I  
heard that old joke I fell out of my crib laughing."

"But it actually happened, Paul," he protested. "I swear I  
didn't make it up, it--it's as true as I'm settin' here."

"But you're standing up."

The old boy looked down at himself with eyes full of wonder.  
"So I am, lad, 'tis a true fact--I am standin' up...But that's  
still got nothin' to do with Clovis and his beauty queens on the  
jury. See, I've just won five bucks to prove it," and he waved  
the money in my face.

"But supposing Gene or I had booted her off the jury? In  
fact I almost did so in order to keep my mind on my work. It's  
~~difficult~~ <sup>hard</sup> enough to defend a murder case without doing it to a  
pair of dimpled knees. Suppose we had excused her?"

"Clovis'd have a runner-up all waitin' an' ready. Many's the time I've seen it. By the way, Jason Spurrier's back. I saw him wearin' smoked glasses sitting back amongst the hair-dryer gals."

The Sheriff put his head in our door. "Time, boys, back to the salt mines, anchors <sup>awright</sup> ~~away~~ and all that crapola."

Old

Chapter 29

Eugene Canda's opening statement to the jury was a model of relevance <sup>and</sup> concision. "The People will show," he briskly declared, "that sometime during the early morning hours of Saturday, June 16th, last, Constance Spurrier met her death by strangulation; that at the time she was alone in her bedroom with the defendant, Randall Kirk; and that the defendant killed her. We further expect to prove and show, beyond a reasonable doubt, that the killing was premeditated and the result of malice aforethought, as the Judge will ~~in due time~~ define those terms. In other words, ladies and gentlemen of the jury, we expect to prove and will prove that the defendant, Randall Kirk, was guilty of the crime of first-degree murder. I thank you," he concluded, retiring to his table.

Judge Maitland looked down at me. "Mr. Biegler," he said, "do you wish to make your statement at this time?"

"If it please Your Honor," I said, half-rising, "the defense would like to reserve its statement until later."

"Very well," he said, looking at Gene Canda. "Call your first witness."

"The People will call Dr. Homer Pomper," the DA announced, and the bespectacled Dr. Pomper, a pathologist at one of the local hospitals, arose from the body of the court and came forward and was sworn within an inch of his life by Clovis the Oath-giver.

"Your name please?" Eugene Canda asked.

"Homer Pomper," the witness replied.

"What is your business or profession?"

"Medical doctor."

"Do you have any medical speciality, Doctor?"

"Pathology."

"And what does that mean?"

"Hm...Volumes are written on that subject, young man, but in a nutshell the ~~hardy~~<sup>bold</sup> might define pathology as the study and science of the causes and nature of human disease and disability and of abnormal or morbid bodily conditions."

"Are you associated with any hospital?"

"St. Francis Hospital, this city."

"How long have you practiced medicine, Doctor?"

"Ah...Well now--thirty-one years."

"Where did you obtain your medical education?"

I arose swiftly. "The eminent qualifications of Doctor Pomper are admitted," I said, and Gene nodded gratefully--reciprocity had been observed, I thought, remembering our recent hearing involving Hugh Salter--and Doctor Pomper beamed as though I had ~~just~~ <sup>on him</sup> conferred an honorary degree. I was not trying to butter him up but <sup>merely</sup> ~~simply~~ trying to get on with the trial and keep boredom to a minimum; there was quite enough of that in every trial without manufacturing it...Moreover everybody knew that Doc Pomper knew his stuff--I had used him often in my own past homicide prosecutions--as they further knew he wouldn't lie to save his own grandmother. On with the butchery...

After that Gene brought out that the doctor had performed an autopsy on Connie Spurrier's body at his hospital within hours of her death and that it was done at the ~~concomitant~~ <sup>of the county medical examiner</sup> request and in the presence of two state police officers, who identified the body.

"Will you please tell us your findings, Doctor?" Gene asked.

The doctor reached in a manila folder he was carrying and produced a sheaf of typewritten papers. "I have here my <sup>formal</sup> autopsy report," he said. "It is quite long and I will summarize it in lay terms if <sup>that is</sup> agreeable."

Gene Canda looked <sup>inquiringly</sup> at me and I arose and said: "The defense is agreeable to such a summary if the People are." I had already seen ~~and gone over~~ a copy of the ~~formal~~ report, <sup>which</sup> with Hugh Salter, ~~who had approved it,~~

"The People agree," Gene Canda said. "Proceed with your summary, Doctor."

"She was strangled," he said bluntly.

"Go on, Doctor."

The doctor then told of finding discolored bruises and contusions on the outer neck which could only have been made by the hands of another person; that an interior examination of the bruised cartilage and tissue of the throat only served to confirm this visual diagnosis; and that in his opinion the strangulation could only have been caused by the hands of a strong and vigorous male...

"State whether or not you could see the marks of the assail-

ant's fingers on her throat?" Gene pressed on.

"Plainly."

"From your examination could you tell whether the deceased appeared to have put up any resistance?"

"Well, it was rather hard to tell, but two of the nails on the right hand of her otherwise ~~impeccably~~<sup>well-</sup> groomed fingers were broken and—"

"Go on, Doctor?"

"And, while I did not see them in her hands, the state police told me they found her right hand clutching several human hairs."

The disclosure was clearly objectionable, coming in this way from this ~~source~~<sup>s</sup> at least, and I half rose to make my objection but instead gradually settled back in my chair. While this revelation was news to me, the fat was already in the fire, the jury wouldn't forget it, the state police could tell it later, anyway, and plainly the good doctor had ~~clearly~~ not meant to toss anyone a low blow...

Gene Canda looked back ruefully at me and I shrugged and nodded and he turned back to the witness. "Just what you saw and



observed yourself, Doctor, please," he said. "Were you able to determine the cause of death?"

"Sorry," the doctor said. "Yes, I was."

"Could death have been caused by the things you <sup>yourself</sup> saw and have testified to?"

"It could."

"In your opinion, Doctor, was death so caused?"

"It was. In my opinion death was clearly caused by strangulation at the hands of a strong and determined male."

After that the doctor's <sup>formal</sup> autopsy report—which had not mentioned the human hairs—was identified, offered and with my assent swiftly received in evidence as People's Exhibit 1.

"You may examine," Gene Canda said to me, retiring to his table.

I arose and moved forward. As part of our strategy of exhibiting total candor over the cause of death but questioning only Randall Kirk's legal responsibility for causing it I had not intended to ask Doctor Pomper any questions. But the inadvertent mention of the human hairs had changed all that. For one thing the jury would be dying to learn whose hairs they were, and for the defense to

appear, however righteously, to be blocking that information would only Crockerishly becloud our basic strategy. If candor was the order of the day perhaps now was the time to be candid...

But first, while I was about it, I felt I had to clear up one other thing. In his direct examination Gene Canda had not touched on the possibility that Connie Spurrier might have recently engaged in sexual intercourse nor had the Doctor's report mentioned it.

While it was now obvious to everyone in the room that Randall Kirk and she must have been intimate, I felt I had to clarify the subject <sup>nevertheless</sup> so that there might not linger any residual inference that our client might forcibly have attacked her sexually, as the initial newspaper report had implied.

"Doctor, did you make any examination to determine whether the deceased had recently engaged in sexual intercourse?" I bluntly began.

"I did," he answered. "That's routine procedure in cases of this nature, as you know."

"Yes, that's why I'm inquiring," <sup>I said.</sup>

"And the results?"

"Negative."

"Meaning what, Doctor?"

*- ah - would,*  
*Wm*

"There was no evidence of male sperm in ~~the~~ <sup>Wm</sup>—where one might expect to find it."

"This would of course not preclude the possibility that there had been recent intercourse, would it?"

"It would not."

"In any case you found no evidence that if there had been that the act was forcible or involuntary?"

"None whatever."

"And so she might recently have had intercourse?"

"Yes, Paul--I mean Mr. Biegler--short of the presence of the physical evidence I've mentioned there is no way to tell whether a mature married woman has recently engaged in intercourse." He smiled faintly. "With proper precautions such a woman might *have* engage <sup>d</sup> a whole regiment without leaving a trace."

This conjured up a startling picture, but I scarcely needed a regiment to make my point. "But you found no evidence, Doctor, that if there had been recent intercourse it had for her part been involuntary or accomplished by force?"

"None whatever."

"And you looked for that, too, of course."

"I did, *yes.*"

So now I at least knew that the more athletic aspects of Randy's and Connie's romance had been conducted with appropriate precautions and accessories, as it were, and I pondered my next question.

"Doctor," I went on, "you do not personally know who strangled Mrs. Spurrier, do you?"

"Well, no," he answered, glancing swiftly beyond me at Randall Kirk. So far no good.

"Or the state of mind he or she was in?"

"Well, no--except that it was apparent that he clearly meant business."

Get to the point, Biegler, I thought; this plain-spoken old boy will kill you with kindness. "Doctor," I went on, "in your direct testimony you mentioned some hairs recovered from the right hand of Mrs. Spurrier, did you not?"

"Yes, I'm sorry--it just slipped out."

"Now, Doctor," I pushed on, glancing at the jury which to a man was tensely leaning forward, "to your knowledge were these human hairs?"

"They were."

"And have you learned and do you know," I said, going whole hog, "whose hairs they were?"

"I do, sir."

"Will you please tell the court and jury?"

Pointing: "They belonged to the defendant <sup>sitting</sup> there, Randall Kirk."

My "That's all," was lost in the series of hissing gasps from the crowded courtroom--like a string of railway cars suddenly being uncoupled--and Judge Maitland frowned and fondled his gavel and looked down at Eugene Canda and said curtly: "Call your next."

"The People will call Ingrid Berquist," he said.

Chapter 32

Maida was by way of becoming habit forming, and without the lure of fishing to console and distract me, it seemed I had lately been seeing her day and night. The next day, Sunday, I slept till past noon, a rare indulgence for the constant angler, and that afternoon, in a spirit of small rebellion, I got out my stored fishing gear and again raced for Lake Superior, this time to have a try at surf-casting for the relatively new--new to Michigan, that is--coho salmon.

All afternoon I prowled the lonely stretch of rocky shore, this one so remote that ~~even~~ the resourceful beer-can flingers hadn't yet found and deflowered it, brooding over my case and ducking rollers and hurling an alarming assortment of eminently resistible flies at a riseless and unresponsive sea. As for my case, revelation eluded me as successfully as the salmon did; all I caught for my efforts was ~~a case of sniffles~~ <sup>and no fish;</sup> a wet ass, as the saying goes, and hell from Maida for being late.

"We'll be holding up Amanda's dinner," she pouted when finally I had changed and stopped by to pick her up. "You know how it kills her when we're not on time."

"Women!" I said scornfully. "You're all alike. It must be great to live in a snug little world that revolves only around your slightest whim."

"Men!" Maida mocked me. "You're all alike. It must be great to live in a snug little world where one gallantly thinks of women only when he's tired, hungry or ~~blindly~~ *amorous as a goat.*"

"Get your things on," I said. "Gotta save my arguments for *tomorrow in* court."

Driving over to Doc's Maida revealed that Jason Spurrier had phoned her twice that afternoon.

"What for, in heaven's name?" I asked.

"For a dinner date tonight. He was quite insistent."

"Dinner where?"

"At his cabin beautiful. I was half tempted to go."

"Why didn't you?" I inquired. "But of course, you couldn't resist the prospect of my charming company."

"Your charming company had nothing to do with it," Maida swiftly disabused me. "On several occasions lately old Doc has warned me never to go out alone with that man under any circumstances."

"He did? But why?"

"He wouldn't explain. Merely said that with luck all would be revealed soon. Maybe Jason regularly grinds up his girl friends and feeds 'em to the fish."

"Hm," I said, feeling aggrieved. "Even that's more than Doc's told me. I'm beginning to feel like an under-paid briefcase bearer in this goddam case. Why'd Jason Spurrier call the second time?"

"Trying to get me to change my mind. Even hinted in his oblique way he had a lavish gift for me. Ah me, all the boys covet Maida when she can't go out and play. I finally told him I not only had a dinner engagement but a date later--and that was that."

"Date later? With whom?"

"My charming boss--though naturally I didn't tell Jason."

"I'm afraid that's out tonight, Maida," I said. "Doc phoned me just before I came for you and wants me to join him in making a final try at memory recall on Randall Kirk late tonight."

"Why late?"



"I dunno, Maida," I said glumly. "Nobody tells me nothin' no more. Anyway, Doc wants to give it the final college try. You can stay home and wash out your nylons and maybe pray."

"Not on your life, Buster. I'll wait at Doc's with Parnell till you two get through. You certainly don't think I could possibly sleep till I know the result?"

"Maida," I said, shaking my head, "there ought to be a federal law against dames like you. Well, here we are, and Doc's waiting at the door. Hope it's to deliver our drinks."

No drinks awaited us, alas; instead Doc reported an urgent phone call for me from the county jail. "You're to go see Randall Kirk as soon as possible," he said. "They've called three times since I last talked with you an hour ago," he added.

"Was it Kirk himself who called?"

"No, Paul, some young jailer by the name of Kallio. Says he knows you. Asks that you phone him quick so he can maybe calm Kirk down."

"Will do, Doc. Can I use the phone in your den?"

"Of course, of course."

start  
X

The young night jailer Gary Kallio answered the phone. "Paul Biegler, Gary," I said. "What's up with Kirk?"

"I don't know, Mr. Biegler, but he's sure been in an awful sweat to see you ever since Jason Spurrier talked with him late this afternoon."

"Jason Spurrier!" I demanded. "But Gary, don't you know we left strict orders that nobody was to visit Randall Kirk?"

"Talked with him on the phone, I mean. Nobody left <sup>no</sup> any orders <sup>A</sup> ~~against~~ <sup>about</sup> that that I know of."

The young man had a point there, I remembered. "Where did Spurrier phone from?" I countered.

"I dunno, somewhere from outside. Said it was <sup>a bad</sup> an emergency, so I called Kirk down to the phone—he took it in the conference room—and after that Kirk came out and insistently asked me to phone

you to come right down. In fact I can hear him hollering for me <sup>right</sup> now <sup>from</sup> behind the <sup>first-floor</sup> jail door here. May have to lock him <sup>up</sup> in his cell like we do our owl-drunks. What'll I tell him, Mr. Biegler?"

"Tell him I'll be down right after I have dinner here at Doc Salter's."

"Right-o, Mr. B."

"Thank you, Gary."

During a drinkless and restrained dinner I told Doc and the others of this latest development and then Maida again related Jason Spurrier's insistent efforts to date her that night. "Looks like things are really cooking, Doc," I said. "Maybe Kirk's recovered his memory."

"Quite the contrary, I'd guess," Doc said grimly. "But I agree that things are cooking and maybe coming to a ~~rapid~~ boil. Anyway I'll ride along with you when you go see Kirk just in case I'm needed. And I'll venture to predict, Paul, that old Doc will be needed."

"Is that a bet, Doc?" I inquired.

"No, Paul--Parnell tells me you're too easy a pigeon to make any bets with."

"Squealer," I said to Parnell. "So you went and told him about my sucker bet about Whistler's delinquent great-granddaughter being chosen as juror Number Seven?"

"Thought it was an interesting example of the value of

observing little things, Paul," the old boy smugly said. "You've watched old Clovis do it far oftener than I--yet you've never noticed a thing. Wanna make a bet <sup>why</sup> Kirk wants to see you?"

"No thanks. I'll send the money to the Salvation Army, <sup>instead.</sup> That way I can feel charitable and virtuous as ~~all~~ hell <sup>without having</sup> ~~and won't have~~ to listen to you crow."

Proud Amanda kept relentlessly plying us with food and it was past nine and already dark before we staggered away from the table and Doc and I hurried out to my car to drive <sup>down</sup> to the jail.

"Can I be temporarily reprieved and allowed one question, Doc?" I said as we sped along, scattering the early fallen maple leaves.

"Just one question, Paul," Doc said.

"It is Jason Spurrier, isn't it?" I asked ambiguously because for the life of me I didn't quite know how else to put it.

"I think so, Paul," he answered soberly, "but we'll know a lot more before the night's over—with luck, that is."

And so we drove along silently through the autumn night, churning and whirling the fleeing leaves, each lost in his <sup>own</sup> troubled thoughts.

"Doc," I said, as I parked between the jail and the court-  
house, "I suppose I'd better go see him first, don't you think?"

"By all means, Paul. After all it's you he <sup>specifically</sup> asked to see  
and we'd better not risk upsetting him by me tagging along. <sup>meanwhile</sup> I'll  
wait out here where I can breathe instead of in the Rose Room."

"'Evening, Gary," I said to the young jailer. "Everything  
under control?"

"All OK. He finally quit hollering about an hour ago, Mr.  
Biegler, so maybe he's fallen asleep. Never saw a guy that could  
sleep like him. Just like he's drugged. Do you want to go right  
up?"

"Please, Gary."

The lights in the jail proper had already been dimmed and I  
had to grope my way up the darkened jail steps among all the caged  
and snoring men. There was but one light burning on Kirk's level,  
away from his cell, and for a moment I thought his cell was empty  
until I made out his huddled form lying on his cot.

"Kirk," I whispered so as not to startle him. "It's me, Paul  
Biegler." There was no answer; the man was fast asleep. I started

shaking him and calling his name and it seemed all of five minutes before he rolled over and sleepily sat up, rubbing his eyes like the little boy in the old tire ads. I waited a few moments for him to get his bearings before I spoke. "You sent for me, Kirk?" I finally said. "What's the good word?"

"Oh, it's you," he said, slowly standing up and rubbing his chin. "What I phoned you about," he bluntly began, "is I think I need another lawyer."

"But you've already got two," I said, not immediately getting the drift. "Parnell and I are nicely on top of the case and I really don't think we need any help. Might ~~we~~ confuse things."

"I don't mean that," he said, speaking in a sort of listless monotone. "I think I ought to have a different lawyer to handle my case."

"You mean, Kirk," I said slowly, "you're telling me I'm fired?"

"That's right," he said, nodding brightly. "That's ~~exactly~~ what I mean."

My first reaction was one of dismay and immense fatigue, and I groped and sat on the edge of his cot, my mind in a whirl. "Let

me get this straight, Kirk," I said wearily. "It's all a little swift, you know. You mean you've got yourself a new lawyer to take over your case tomorrow?"

"I don't have one yet, but I'll get one and if I can't I'll handle my own case," he said, ~~airily~~. "One thing is plain--I no longer want you."

"Why?" I said, beginning to develop a slow burn. "I think I'm entitled to know that."

"In the first place I haven't liked your flirting with this stupid hypnotism stuff."

"Go on."

"Moreover I greatly resent your bringing out in court this *past* week my apparent intimate relations with Mrs. Spurrier."

"Anything else, Kirk? Let's have the whole lump."

"Well, I've lost confidence in you, is all. But at least you've been well paid."

"Anything else?" I said, standing up.

"No, that's all." He yawned and stretched and took a step toward the seatless toilet. "Now if you'll excuse me I'll--"

I was at him before he could finish, pinning him savagely against the stone cell wall with a fury that scared even me.

"Kirk," I shouted, almost sobbing with pent frustration and anger, "you're mad--utterly stark, raving mad! Do you know what you're saying, man? Do you have any slight idea what all of us have been doing for you? Do you realize there are probably no lawyers in Michigan--hell, the whole goddam country--who could possibly step into your case now, cold, and know it as we do?"

"You've been well paid," he repeated dully, passive in my grasp.

"You say that again and I'll punch your goddam patrician nose," I ranted on, shaking him so that his head banged the wall. "Why you petulant idle son-of-a-bitch, you have no faint idea how we've slaved over your lousy case. I eat it, I sleep it, I dream it I tell you--it haunts me when I shave, when I'm on the can, even when I'm laying a dame--are you listening? <sup>man?--</sup> ~~laying~~ laying a dame, and you dare talk to me about money. Money! Why you couldn't buy what we are trying to do for you for all the goddam dough on Wall Street.



Money! Kirk, during your <sup>idle</sup> sheltered life did you ever hear of  
^  
anything called loyalty to one's profession, of simple pride  
of craftsmanship, of the old-fashioned corny notion of a job  
well done? You---you can shove your goddam money up your ungrate-  
ful ass!"

I paused, out of breath as much as anything, and for the  
first time noticed he was sobbing, with deep, rhythmic, swift-  
intaking sobs. The sound unaccountably cut me like a knife.

"I'll go now," I said quietly, releasing him, and he lurched away  
from the wall and subsided <sup>in</sup> a ~~crumpled~~ heap, still sobbing, on  
^  
his cot. "Just on the off chance you're drunk or crazy I'll be  
on hand tomorrow to see this weird thing through," I said.

"Goodnight, <sup>my</sup> goddamit."  
^

Chapter 36

"Proceed with your objection, Mr. Prosecutor," Judge Maitland said when <sup>the jury had retired,</sup> ~~recess was over~~, and Gene Canda, lugging a massive briefcase that seemed as heavy as a plumber's kit, moved quickly up past the now empty jury box and stood just below the Judge's bench like a boxer awaiting the bell. Judge Maitland nodded.

"Your Honor," Gene Canda began crisply, having evidently used <sup>the brief delay</sup> ~~our recent recess~~ to gather his thoughts and reload his legal cannon, "the People urge that this whole line of testimony by the defendant Kirk is objectionable, inadmissible, and should be stricken. We do so for several reasons, one, because <sup>all</sup> that testimony appears plainly to have been elicited under hypnosis--<sup>in itself</sup> thus making it inadmissible--and, two, because it now further appears, so far as I can follow the defendant's weird story, that he is now seeking to defend this murder charge on the grounds of his alleged insane delusion."

He stepped back and then went on, tersely ticking off his points like a <sup>cup-winning</sup> ~~prize-winning~~ college debater. "This latter he may not do for at least two reasons: one, he failed to file and serve

the advance notice of the defense of insanity as required by law,  
and two, even if he had done so, and actually were deluded, as a  
matter of law he had no right to kill this mysterious madman he  
speaks of even if his delusions were true. This fantastic goblin  
of his imagination had done nothing, according to Kirk's own story,  
to warrant being killed by Kirk. In the first place the defendant  
could not justifiably kill this person to protect Mrs. Spurrier  
because, one, it does not appear she was being threatened and,  
two, even if she were being threatened she did not stand in the  
requisite relationship to Kirk, either by blood or marriage, to  
warrant his intervention on her behalf. Moreover, one may not  
yet kill another <sup>person</sup> in this country <sup>simply</sup> because he walks with a crouch  
and looks fierce."

Gene Canda, I saw, was pouring it on, and he next cited the  
same <sup>venerable LRA</sup> ~~legal~~ source for this primitive rule that Parnell had un-  
veiled at Doc's house that distant Saturday night, namely, that  
an insantly deluded defendant must at his peril remain suffi-  
ciently canny to pick out a delusion that, if the delusion were  
true, constituted <sup>§</sup> a legal defense for his behavior. Next he cited

a number of cases showing that this was the rule followed in Michigan, besides citing and quoting a series of irrefutable Michigan authorities requiring advance notice of the defense of insanity, including that of insane delusion.

"As for my first point," he pressed on, "namely, the inadmissibility of testimony induced under hypnosis, I should like to read the court a few excerpts from volume 40 of Lawyers' Reports Annotated," whereupon he dove into his voluminous briefcase with the zeal of a door-to-door salesman diving for an alluring sample and produced the same leather-bound volume Parnell had unearthed the day he'd found our decisive California Cornell case.

He then proceeded to read a series of damning quotations from it to the effect that no testimony resulting from the use of hypnosis was ever admissible in a court of law, while back at my table I scribbled away furiously, suddenly aware that our present clash might <sup>prove</sup> be more crucial to our case than even our final jury argument. S,

"Moreover," he relentlessly pushed on, "neither the recent ruling of the California court in the Cornell case nor Your Honor's

even more recent ruling here permitting hypnotic recall on Kirk passed on the admissibility of any evidence that might be obtained by such recall. In fact the California court explicitly disavowed that it was passing on that question and plainly hinted that any results might be limited to establishing defenses not requiring the giving of recalled testimony by the defendant <sup>himself</sup>, such as alibi."

✓ Again he reached in his magic briefcase. "We have a third ground of objection," he continued <sup>as</sup> I listened with growing concern, "namely, that some of the most eminent students of modern hypnosis flatly declare that hypnosis may never be successfully used to induce another to commit crime," and he then read some impressive statements to that effect from Orne and Erickson and other modern researchers in hypnosis.

Gene Canda briefly consulted his notes and again bored in. "Lastly, and perhaps our most serious and basic objection, is that even conceding for the sake of argument that the defendant Kirk was hypnotized and while under hypnosis was persuaded by another to do what he did, this still is not a defense to this charge and such testimony must still remain irrelevant and inadmissible in this case."

NO  
=

*for the reason*  
I mean that his defense boils down to one of unconsciousness and *//*  
that defense has never been recognized in Michigan." He then  
renewed his objection, snapped shut his briefcase, and briskly  
retired to his table, where he sat ~~delicately~~ mopping his brow.

I drew in my breath sharply. It had been an impressive performance and also a puzzling one. For one thing, how could Gene Canda have possibly known about and been so obviously prepared to argue whether hypnosis could ever be used to induce crime when that possibility had ~~only~~ become known to me only the night before? Judge Maitland sat blinking thoughtfully as he nodded down at me and quietly said "Mr. Biegler."

I arose and moved forward, grimly reflecting that our whole case might now be riding on the Judge's ruling and that Gene Canda's apparently routine objection had in effect squarely challenged the validity of our entire concept of unconsciousness as a possible defense in our case. ~~Mr.~~ *baby* Beeglah, I thought, this time you *^*  
really better be good, ~~or~~...

"Your Honor," I began, my voice grown nasal and strident with

my mounting tension and concern, "while I found my brother Canda's argument mighty impressive, perhaps predictably for one in my position I did not find it without a flaw. Take his argument against the admissibility of testimony received under hypnosis. We concede that if you are prepared to plant your present ruling on the state of the law back in 1898--the date of the venerable LRA annotation from which he has just so eloquently read--then his objection should probably be sustained. For we freely concede that hypnosis was firmly in the legal doghouse back in those days and that no decided case or rule of those days of which we are aware would then have likely admitted the testimony we now seek to get in."

I paused, fighting to modulate my voice, and then pointed out that this old annotation consisted largely of quotations from medical and other non-legal sources, a smattering of dicta from judges and lawyers, and referred to ~~but~~ only two actual decisions from courts of last resort. "Both were from California," I pushed on, "and neither goes quite as far as my brother would have them go. In fact, one of them, the Ebanks case, simply decided that a hypnotist could not get on the stand and blandly express an opinion on the

defendant's innocence merely from <sup>having talked</sup> ~~talking~~ with the hypnotized  
accused. That would be the same as though I'd dared call Dr.  
Salter here today to so testify following his conversation last  
night with Kirk. I do not quarrel with that decision, and act-  
ually it does not so much involve hypnosis as the application of  
sound <sup>and familiar</sup> rules against the admission of <sup>any</sup> hearsay testimony, as the  
dissent there plainly shows. So much for Ebanks and old LRA."

I glanced over at a tense and white-faced Parnell, who  
nodded grimly. "But whatever the state of the law regarding  
hypnosis may have been in California back in 1898," I continued,  
"we now know from the recent California Cornell case, followed  
even more recently by this court here, that the legal attitude  
toward hypnosis has vastly changed. For this court now to lean  
on two old cases not really in point and on an old annotation full  
of medical fulminations against hypnosis and assorted windy rhet-  
oric would be like a farmer depending on the weather report in an  
1898 almanac to tell him <sup>when</sup> ~~whether~~ he should mow this summer's hay."  
I paused, thinking this was pretty nifty going; at least two of



our absent jurors were <sup>dairy</sup> farmers who might <sup>just</sup> possibly get the word...

I looked up at the skylight. "As if all this were not enough, we additionally now have the prestigious Model Penal Code which today explicitly makes those crimes committed under hypnosis a specific defense under the general defense of unconsciousness, or lack of voluntariness, as some prefer to put it. Nothing is there said about limiting that defense to alibi." I held out both hands. "Why, why, why? Why should the earnest and careful framers of that Code do such a vain and idle thing as to provide the defense of hypnosis if they further intended to seal the lips of the <sup>unlocked</sup> hypnotized victim so that he could not tell the court and jury what had happened to him? Who else could possibly show the hypnosis if he can't? The implicated crime-inducing hypnotist? To ask such a question is to answer it."

Again I glanced at my notes. "Counsel also contends that we are now claiming insane delusion, which we may not ~~not~~ show because we failed timely to file an advance notice of insanity. Not so. We made and are making no claim of insanity or insane delusion <sup>here</sup> for two reasons, first, because Kirk manifestly was not and is not <sup>now</sup>

insane, and second, because any horrifying illusions or hallucinations or delusions or subtle mixtures of these he may have suffered came not as the result of his insanity but from the dark schemes and machinations of a so-far unidentified third person." I resisted an impulse to turn around and search out Jason Spurrier. "I suggest," I concluded with purposeful ambiguity, "that if there is any insanity in this case it might possibly reside elsewhere than in <sup>Randall</sup> Kirk."

I returned to hammer away at admissibility, pointing out that while it was true that neither the California court in Cornell nor Judge Maitland more recently in our case had expressly ruled on the admissibility of hypnotically recalled testimony-- since in neither case was that issue before it--implicit in both decisions was the inescapable assumption that if the hypnotist was successful the defendant could tell what it was he recalled. "If this were not so," I pushed on, "why should either court permit the mockery of attempting such recall in the first place? Simply to torment the <sup>unlocked and</sup> recollecting defendant? If so, wouldn't it be better to leave the poor devil as he was in the first place?"

I glanced around at Gene Canda. "My brother implies that the results of hypnotic recall must be limited to establishing alibi. Why? Why is such recall to be trusted to establish one defense and not all others? And since Kirk has been planted at the scene here with everything but photographs <sup>and tent stakes,</sup> including now his own admission, doesn't this sort of argument smack of glib expediency?" I then pointed out that Kirk's very silence to the police lent a sort of mute but eloquent truth to his claim of forgetfulness. "Why, if he had actually remembered would he not have told the police and his lawyer from the <sup>very</sup> start that he had killed this imaginary madman to defend himself or Connie?"

I next pointed out that the People themselves had first injected the issue of forgetfulness and recall in this case. "This they did by putting into evidence Kirk's police statement in which he clearly claims he remembered nothing. They started it; we didn't. All we now ask is a chance to amplify and explain his <sup>earlier</sup> police statement."

I moved closer to the Judge and lowered my voice. "As for counsel's contention the many eminent students of hypnosis do not

agree that it can ever be used to induce crime, I do not dispute that disagreement any more than I dispute that there are many earnest and distinguished students of fornication who insist that no woman may ever truly be raped. Yet we <sup>all</sup> know there is rape. In fact I <sup>could</sup> ~~would~~ augment my brother's list of agnostics and dissenters in the realm of hypnosis to include our own Dr. Hugh Salter--who also, ~~I suspect,~~ once listed himself among these distinguished skeptics until this <sup>very</sup> case came along."

I doggedly pushed on. "My resourceful brother Canda seeks to have it both ways. While he apparently will not say or believe anything good about hypnosis, either in or out of court, he will gingerly go slumming <sup>with it</sup> far enough to approve and cite those students of the art who might help his case--namely, those who claim hypnosis may never be used to induce crime. I could cite an equal or larger number of equally earnest students who believe it can be so used, and it is tempting to do so but I shall not. I shall not because, for one thing, all of these experiments, pro and con, were performed in the laboratory or clinic by dedicated scientific experimenters who were by <sup>training and tradition</sup> ~~hypothesis~~ men of ethics and impeccable

rectitude, men who wouldn't deliberately <sup>harm</sup> ~~hurt~~ a fly."

I walked back to my table and gulped a glass of tepid water and again faced the Judge. "Today we are not in a cloistered laboratory counting noses among genteel experimenters but in a court of law confronting a charge of murder. Today the gut issue before us is not whether a violent antisocial act of homicide might have been committed--that one was <sup>committed</sup> is all too tragically apparent--but whether that accomplished act was a voluntary and conscious one, and therefore murder, or <sup>was</sup> an involuntary and unconscious <sup>act,</sup> ~~one,~~ and therefore excusable."

I then pointed out that unconsciousness or lack of voluntary capacity had long been a respected defense in many of our sister states, both by statute and court decision, and moreover had lately been incorporated into the <sup>prestigious</sup> Model Penal Code, expressly adding hypnosis. "But all this has been covered in our brief and I shall not again belabor it here. Nor shall I repeat my argument there that it is not true that Michigan has never entertained the defense of unconsciousness because, as I there maintain, every insanity defense itself is in the last analysis but another

example of the larger basic <sup>criminal</sup> defense of unconsciousness."

I again glanced back at Gene Canda. "Yet despite all this my brother still asks this court to view hypnosis in the light of primitive legal concepts current in the last century and also to reject the defense of unconsciousness in Michigan because it never

~~before~~ happened here." I paused and plunged the needle. "In fact

I am surprised he hasn't dredged up those old Colonial authorities

which ~~one~~ <sup>once</sup> countenanced the torture and drowning of nonconforming

females as witches." I paused and all but wrapped the courtroom

flag around me. "The glory of our law is that it is not static

but responds to the needs and insights of our time. Yet my brother <sup>boldly</sup>

~~asks~~ <sup>back</sup> Your Honor to retreat with him <sup>back</sup> to the era of McKinley."

The courtroom tittered and His Honor frowned as I pushed on.

"I further believe that in his zeal my brother has confused the

admissibility of evidence with what I might call the law of our

case, that is, what the jurors are entitled to hear with what the

judge ~~may~~ <sup>might</sup> later tell them they may or may not ultimately consider.

I speak now of the inherent right of every criminal defendant to

be sworn and take the stand and tell his story. That his story

ultimately  
may be preposterous and unlikely, rejected by the judge, scorned  
by the jury, doubted by his own lawyer, perhaps even privately  
by the defendant himself, does not lessen his right to tell it."

Again I glanced at my notes as the Judge fidgeted restlessly  
and stared pointedly out at the clock. "Let me give some crude  
examples. Suppose Kirk <sup>had</sup> this morning ~~testified~~ testified that a little  
bird told him to go kill Connie Spurrier? Or that a mysterious  
stranger got him drunk or drugged him and told him to do so?  
*However unlikely, <sup>his story,</sup> would this <sup>alone</sup> make it inadmissible?*  
That his actual story happened to involve hypnosis cannot change  
<sup>basic</sup> that right. Had he told the identical story he has told here <sup>today</sup> and  
omitted only any mention of hypnosis would anyone doubt his right  
to tell it? Put another way, had he recovered his memory by  
*surgery or simply by*  
psychiatry or the natural passage of time, would Mr. Canda have  
objected here and thus ~~stimulated~~ <sup>goaded</sup> me to this interminable tirade?  
No, I am afraid my brother in his zeal has confused admissibility  
of the results of recalled memories with the means used to recall  
them."

I mopped my face. "Please bear with me, Your Honor, just a  
little longer," I murmured as I sighed and reached in my inner

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breast pocket for a paper. "Let me conclude by reading a significant excerpt from the drafters' explanatory comments on that part of the Model Penal Code making hypnosis a defense to crime. 'The view that the hypnotized subject will not follow suggestions that are repugnant to him'--and here it cites eminent authority--'does not suffice, in our view, to warrant treating his conduct as voluntary; his dependency and helplessness are too pronounced'--and here again it cites <sup>still</sup> further eminent authority."

I lowered the paper and held out both hands toward the Judge, "Here there is no talk of alibi, of inadmissibility, or of cautious rules of evidence, but instead plain talk about a man who may have been used by another." I dropped my hands. "The crux of our situation then, Your Honor, is not how many or for what reasons sheltered students of psychology and related disciplines may disagree among themselves on the subject of the possible misuse of hypnosis, but that gifted and dedicated students of the law have now made their choice, ~~namely, that hypnosis can be used to induce crime~~ My client and I ~~devoutly~~ hope you will follow that choice."

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Neenah Bond  
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As I turned away and sat down I saw that an alert and attentive Jason Spurrier was back <sup>again</sup> sitting in the front row. The large room had grown hushed as a tomb. Judge Maitland seemed to have turned gray with the gravity of the decision we had piled on him. He took a sip of water and my heart went out to him as I saw his hand tremble as he put the glass down. Wasn't this almost too much to load on the shoulders of this brave arthritic old man? He looked out at the clock as though to time his ruling and raggedly cleared his throat.

"The People's objection is overruled and the testimony will stand," he said in a firm resonant voice. "Prepare to proceed with your examination of the defendant, Mr. Biegler, after the bailiff brings back the jury." I closed my eyes <sup>with relief</sup> and then opened them and wigwagged the Sheriff to bring me some more of his apparently inexhaustible supply of two-day-old water.