

Stories of My Great-Grandfather's Murder

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I am not sure how old I was, but I vividly remember my father telling me the story when I was fairly young of how his grandfather, sleeping in bed one night with his son, was viciously murdered in his sleep by an intruder bludgeoning his head with a piece of scrap iron. That story of the murder of my great-grandfather, Yomtov (Jacob) Schoenberg in Batavia, New York in 1915 always haunted me. I sometimes tried to envision the horror of that scene but have no memory of exploring that event in depth with my father. Nor do I recall any mention of this murder by any relative—including my great-grandfather's son, my Great Uncle Max, whom I knew.

But then, when I began teaching Evidence over a decade ago, I started to investigate what happened to my great-grandfather, Zayde Schoenberg, that night. My father had told me that the alleged intruder was arrested and tried. So I read the New York Court of Appeals decision in the case.¹ I found that my Great Uncle Max was the key witness in the case and began to explore with my students the credibility of his testimony.² And I discovered that the murder took place in the context of two different newly arrived immigrant communities in a small upstate New York city—the Jewish community of my great-grandfather and the Polish community

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¹ *People v. Trybus*, 113 N.E. 538 (N.Y. 1916).

² See Record on Appeal at 52–124, 707–17, 876–77; *Trybus*, 113 N.E. 538.

of the alleged perpetrator, Jan Trybus—living among an already established community. So began my research into the archives—both legal and nonlegal—about the case. And so began my understanding that this case involved a number of stories besides the one told to me by my Dad.

This article describes the different stories I have encountered in this research: those of the victim, the alleged perpetrator, the prosecutor, the defense attorney, the private detective, the diverse immigrant groups, and the residents of the established community. These stories, I believe, provide a good example of how over a century ago, the different players in this murder case—from their own divergent cultural perspectives—used storytelling to try to explain this horrible tragedy. And not surprisingly, I discovered that some of the same ugly narratives about immigrants used today were prevalent a century ago. But just as importantly, through this inquiry, I learned that there were attorneys at that time who fought back against those narratives. And I gained some insights about myself. As an experienced civil rights lawyer, I discovered that the retelling of these stories shifted my narrative from the focus of what happened to my family that tragic night in 1915 to the legal rights of the perpetrator. The stories I uncovered changed my own story of that event.

In this article, I take a deep dive into archival material to discover the cultural milieu of Batavia in the early twentieth century; the backstory to the litigation of a case that reached the state's highest court; and the schemata of the attorneys who litigated the case. I first briefly describe the Batavia community in 1915 and introduce the key characters in this tale: the victim and his family and the defendant in the case. I then detail the conflicting stories about the murder presented at the trial of Trybus. Then, I present the different narratives of the Jewish, Polish, and established Batavia community about the case reported in the local media and the differing characterizations of those communities by the attorneys in the case.

With this background I explore how the attorneys' portrayal of immigrants and their rights infused the stories they told about the case. Then, examining the attorneys' schemata about themselves and the legal system, as reflected in their writings, I analyze how those views were reflected in their stories at trial. Finally, I will conclude by describing how my retelling of the different characters' stories—through my own schemata—affected my own story of events over a century ago.

I. The background of the case

A. Batavia, New York—1915

Batavia is a small city in upstate New York, approximately halfway between Buffalo and Rochester. In the early decades of the twentieth century, with a large influx of immigrants, the population of Batavia grew substantially. In 1900, the population of Batavia was 9,180; in 1910, it had grown to 11,613; and by 1920, it had increased to 13,541, a growth of approximately 47% in two decades.³ By 1920, 16% of Batavia's population was foreign-born;⁴ 38.76% of the white immigrant population was from Italy and 14.29% was from Poland and Russia.⁵ With this increase in population, Batavia was incorporated as a city in 1915.⁶

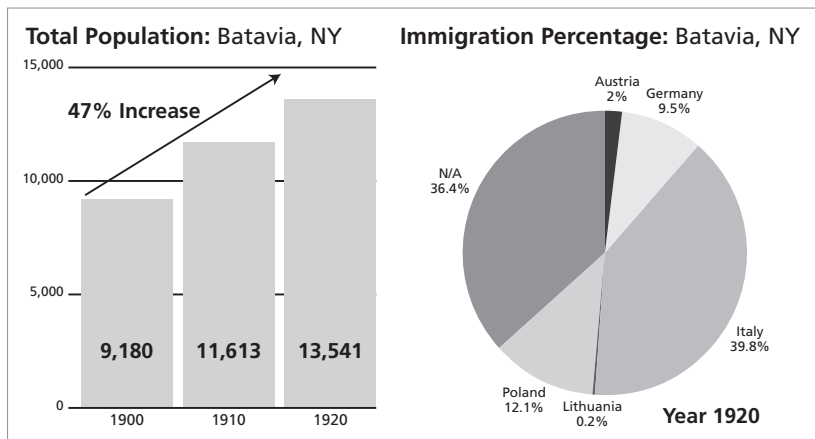


Figure 17

This growth in population reflected an expansion of industry in the city. Batavia was located in an area with many dairy and vegetable farms. While the Erie Canal bypassed Batavia, the city was located on major rail lines, and starting in the mid-nineteenth century, it became a small industrial town in the heart of an agricultural area.⁸ In the 1880s, for

³ U.S. CENSUS BUREAU POPULATION: 1920, at 533 tbl.53.

⁴ *Id.* at 18 tbl.10.

⁵ *Id.* at 29 tbl.12. According to the 1920 census, the “Native White” population of Batavia was 11,339, 7,022 (62%) of which had “Native Parentage”; 2,974 (26%) of which had “Foreign Parentage”; and 1,343 (12%) of which had “Mixed Parentage.” *Id.* at 18 tbl.10. Accordingly, besides the 16% of Batavia’s population who were foreign born white, 38% of the “Native White” population had foreign or mixed parentage. Batavia’s black population in 1920 was .2%.

⁶ LARRY DANA BARNES, HISTORY OF BATAVIA 1801 TO 2015, *The Twelfth Decade, 1911–1920*, at 10–11 (2015) (e-book), <https://www.batavialibrary.org/sites/default/files/documents/HistoryOfBatavia-LarryBarnes.pdf>.

⁷ Stefan Krieger, Richard J. Cardali Distinguished Professor of Trial Advocacy, Murder in the Family, Eighth Biennial Applied Legal Storytelling Conference slide 3 (July 16, 2021) (slide created using U.S. CENSUS BUREAU POPULATION: 1920, at 533, tbl.53 and *id.* at 29 tbl.12) (on file with author).

⁸ BARNES, *supra* note 6, *The Fourth Decade, 1831–1840*, at 2.

example, the Johnston Harvester Co., a manufacturer of farm implements, relocated to Batavia,⁹ and in 1910, the company was acquired by Massey-Harris Co., a subsidiary of a large Canadian manufacturer of agricultural equipment.¹⁰ And, in the late nineteenth century, the E.N. Rowell Box Co. began operations manufacturing medicine and cosmetic boxes.¹¹

As the county seat, Batavia was the home to the Genesee County Supreme Court where Jan Trybus was tried.¹²

B. The victim and alleged perpetrator

1. The victim: Jacob Schoenberg

The victim, Yomtov (Jacob) Schoenberg was born in Kuz'myn, Russia (now Ukraine) in 1869.¹³ He emigrated to the United States on August 1, 1893, apparently for economic opportunity.¹⁴ Jacob lived in New York City, then Rochester, and moved to Batavia before 1897, where he applied to be a United States citizen in 1899.¹⁵ While it's unclear why he came to Batavia in particular, it appears that he was part of a chain migration of relatives and acquaintances from his region of the Ukraine to Western New York.¹⁶

As the district attorney noted in his opening statement at the criminal trial, "Jacob Schoenberg has been a resident of the city for upward of 18 years. With one exception, he was here as long as any



Figure 2¹⁷

⁹ *Id.*, *The Ninth Decade, 1881–1890*, at 11.

¹⁰ Farm Collector, Sam Moore, THE JOHNSTON HARVESTER CO., <https://www.farmcollector.com/company-history/the-johnston-harvester-company/>.

¹¹ BARNES, *supra* note 6, at 157.

¹² *Genesee County - History*, NEW YORK STATE UNIFIED COURT SYSTEM, <https://ww2.nycourts.gov/courts/8jd/Genesee/history.shtml> (last visited Feb. 27, 2023).

¹³ *Immigration Application of Jacob Schoenberg to Become a Citizen of the United States*, Genesee County, NY County Clerk, Naturalization Records 1849–1929 v. 5, at 270, Oct. 21, 1899. I have been unable to find a photograph of Jacob. Figure 2 shows his gravestone.

¹⁴ *Id.*

¹⁵ *See id.* Ironically, Yomtov's immigration application was notarized by Fredd Dunham, who seventeen years later was the defense lawyer for Jan Trybus, Yomtov's alleged killer. *Id.*

¹⁶ Yomtov's brothers, Hyman and Jacob, for example, immigrated to Rochester, New York and resided there in 1910. *See 1910 United States Federal Census*, https://www.ancestry.com/imageviewer/collections/7884/images/4449350_00688?pld=110043895 (last visited May 2, 2023) (census record for Hyman); *1910 United States Federal Census*, https://www.ancestry.com/imageviewer/collections/7884/images/4449350_00685?pld=18241804 (last visited May 3, 2023) (census record for Jacob).

Hebrew. He was of the Hebrew nationality. He had a wife, five daughters and one son, all of whom lived in his home . . . on the west side of Liberty Street.”¹⁸ He further observed that Jacob was “one of the best and most favorably known men of that nationality residing in Batavia.”¹⁹ Jacob Schoenberg was a junk dealer who peddled junk on his wagon to the farmers in the area and, as his son Max testified at trial, peddled bread in Batavia to “Hebrews and Poles.”²⁰ He was married to Rebecca. My grandmother Fanny was Jacob’s and Rebecca’s daughter.



Figure 3²¹



Figure 4²²

As Lee Shai Weissbach observes in his study of Jewish life in early twentieth century small-town America, “A remarkable number of Jewish men in small-town America, especially among the East Europeans, got their start as junk collectors, buying up cast-off scrap metal, household goods, paper, rags, animal fur, and other waste, and then preparing it

¹⁷ Photograph on file with author; see Yom Tov Schoenberg, U.S., FIND A GRAVE INDEX, 1600–Current, https://www.findagrave.com/memorial/118499950/yom_tov-schoenberg (last visited May 3, 2023). The Hebrew inscription on the gravestone reads, “Our beloved father Yomtov, son of Mordechai, died on the ninth day of the [Jewish month of] Cheshvan, [in the Hebrew] year 5676.” The last five Hebrew letters in the inscription are an acronym for “May his soul be bound up in the bond of life.”

¹⁸ Record on Appeal, *supra* note 2, at 35.

¹⁹ *Id.*

²⁰ *Id.* at 36. A little more than two years before his murder, Jacob was arrested for selling junk without a peddler’s license. See *Accused of Buying Junk Without Village License*, THE DAILY NEWS (Batavia, N.Y.), Sept. 24, 1914, at 7. Two years prior, ten Jewish peddlers were tried in Batavia police court for selling junk after their licenses expired. *Dealers in Junk Before the Cadi*, THE DAILY NEWS (Batavia, N.Y.), Nov. 18, 1913, at 7 (observing that police headquarters had been “transferred . . . into a metropolitan Ghetto . . . with Police Justice Wolcott as chief rabbi”).

²¹ Photograph of Rebecca Schoenberg in an email from Sidney Gottlieb to Stefan Krieger (May 14, 2021) (on file with the author).

²² Photograph of the home of Rebecca and Jacob Schoenberg, in William H. Coon, *Whom the Murder Cap Fits*, 79 TRUE 58, 61 (Dec. 1943). Pictured is my great-grandparents’ home at 138 Liberty Street, Batavia, New York, where the murder took place.

either for sale as used merchandise or as cleaned and sorted raw material to be marketed to large reprocessors in commercially viable lots. Junk dealing was a business that took almost no start-up capital and yet allowed for a certain level of independence.²³ Junk-dealing was a way for the new immigrants to integrate into the community at large.

This integration is reflected in a big event that occurred in the Schoenberg family two years before the murder: the wedding of Jacob and Rebecca's first-born daughter Fanny to my grandfather, Harry Krieger.²⁴ Apparently, from a review of the local newspaper at the time, this was not only a momentous occasion for my family but also for the wider Jewish and non-Jewish community. As Batavia's *THE DAILY NEWS* reported, over 500 Jews and Gentiles attended the event in Brown's Hall. The non-Jewish attendees included a county supervisor, the town clerk, a prominent lawyer in the city, James L. Kelly, the police justice, and the police matron.²⁵

The aspiring local newspaper journalist viewed the celebration as an anthropologist observing a tribal ritual, describing the celebration in grandiloquent language:

Reaching far back into the days of Ruth, to the time when the fair Moabitish damsel gleaned in the fields of Boaz, were the Jewish songs, signs and ceremonies witnessed by more than 500 Jews and Gentiles in Brown's hall last evening. It was the famed wedding of Harry Krieger, son of Mr. and Mrs. Wolf Krieger, and Miss Fanny Schoenberg, daughter of Mr. and Mrs. Jacob Schoenberg, and Solomon Sadoufski, chief rabbi of the orthodox Hebrews of Western New York, saw that the ancient rites prevailed.²⁶

But as the journalist goes on to say, the festivities were not limited by the strictures of the ancient rituals:

The merrymaking proper started about 5 p.m. with dancing in Brown's hall, when a Rochester orchestra struck up the joyous strains of the popular rag, "In My Harem." There were gowns on Yiddish maidens which were a far cry from the pictured modes of the days of Ruth, Naomi, Esther and the other ladies of Talmudic times. Some of these most modern maidens, too, danced the Tango-Tangle, the Ivy Cling, the

²³ LEE SHAI WEISSBACH, *JEWISH LIFE IN SMALL-TOWN AMERICA: A HISTORY* 109 (2005).

²⁴ Wolf Krieger, the father of Harry, was the brother of Fanny's mother, Rebecca Schoenberg. This, then, was a wedding of first cousins.

²⁵ *Krieger-Schoenberg Wedding Event Witnessed by Five Hundred Guests*, *THE DAILY NEWS* (Batavia, N.Y.), July 7, 1913, at 8.

²⁶ *Id.*

“Come to Me, Kid,” and the like, which are even said to antedate Old Testament days.²⁷



Figure 5²⁸

In this context, it is clear that Jacob Schoenberg was what historian Anton Hieke terms an “Integrated Outsider” in Batavia.²⁹ On the one hand, the district attorney’s reference to Jacob as “one of the best and most favorably known men of th[e Hebrew] nationality residing in Batavia” and the reporter’s description of the ancient Hebrew rituals at the Schoenberg wedding reflect his outsider status. On the other hand, the attendance at the wedding of some of the prominent Batavia non-Jewish citizens and the description of the performance of the American top hits of 1913 at the wedding show a Jewish community that is assimilating.

So, it appears that at least in the eyes of some of the established community in Batavia—and perhaps Jacob himself—Jacob was inside the community but still the other.

2. The alleged perpetrator: Jan Trybus

The purported killer of Jacob Schoenberg, Jan Trybus, was also an immigrant. He emigrated to America in 1902 at the age of twenty, about a decade after Jacob.³⁰ He came from a village, Libiaz, near Chrzanow in Galicia, which at the time was in the Austro-Hungarian Empire and is presently in Poland.³¹ Chrzanow had a substantial Jewish population in

²⁷ *Id.*

²⁸ *Id.*

²⁹ ANTON HIEKE, *JEWISH IDENTITY IN THE RECONSTRUCTION SOUTH: AMBIVALENCE AND ADAPTATION* 164 (2006).

³⁰ Year: 1902; Arrival: *New York, New York, USA*; Microfilm Serial: *T715, 1897–1957*; Line: 16; Page Number: 112 (*entry for Johann Trybus*).

³¹ *Id.*; *Where was Galicia?*, Drohobycz Administrative District, <https://kehilalinks.jewishgen.org/drohobycz/history-of-galicia/where-was-galicia.html> (last visited Mar. 14, 2023).

1900: 5504 persons, 54% of the population.³² Jan was a Roman Catholic.³³ On the ship's manifest, his occupation is identified as a day laborer.³⁴ I have searched the relevant archives for naturalization papers for Jan, but apparently he never applied to become a citizen.³⁵

In 1898, when Jan was sixteen, anti-Jewish riots broke out throughout Galicia, including Chrzanow.³⁷ As Daniel Unowsky, a historian of the riots, argues, the riots were, in large part, economically motivated with peasants attacking Jewish property, especially taverns. No Jews were killed but the property damage was significant.³⁸

Unowsky relates one story: In one village, after breaking into a Jew's farmhouse, a peasant beat the owner bloody with a stick and yelled, "Beat this dragon, because he has money."³⁹

In 1915, Jan was thirty-three years old and single. His folks were still in Galicia in the midst of World War I.⁴⁰ He lived in Batavia, hanging out at the home of another Polish family, the Dzierzawskis, a/k/a Miller, with his friend Mike Miller.⁴¹ A little more than a year prior to the murder, with the headline, "Officer Found a Pole Drunk and He was Locked Up and Fined," the local newspaper reported that police officers arrested Miller on charges of public intoxication.⁴² Among his friends, Jan was known as "John Galicia."⁴³

Between his arrival to America in 1902 and the murder in 1915, Jan had acquired a fairly substantial rap sheet. In 1904, he was convicted in



Figure 6³⁶

³² *Chryzanow*, ENCYCLOPEDIA.COM, <https://www.encyclopedia.com/religion/encyclopedias-almanacs-transcripts-and-maps/chryzanow> (last visited Mar. 12, 2023).

³³ Record on Appeal, *supra* note 2, at 20.

³⁴ *Manifest of Pretoria*, Hamburg State Archives, entry for Johann Trybus (Nov. 1902), <https://www.ancestry.com/discoveryui-content/view/940451:1068> (last visited Feb. 26, 2023). On this manifest, Jan is identified as Johann Trybus, and his occupation is listed as a "tagelöhner" (a day laborer) and "landmann" (person who works on the land).

³⁵ See *NY Records of Aliens and Naturalization of Aliens 1849–1929*, Genesee County, New York, [https://www.co.genesee.ny.us/departments/history/naturalization_records_1849-1929_\(indexed\).php](https://www.co.genesee.ny.us/departments/history/naturalization_records_1849-1929_(indexed).php) (last visited Mar. 27, 2023).

³⁶ *Jan Trybus, Batavia, Paid Extreme Penalty, Dying Unflinchingly*, THE DAILY NEWS (Batavia, N.Y.), Sept. 1, 1916, at 1.

³⁷ DANIEL UNOWSKY, THE PLUNDER: THE 1898 ANTI-JEWISH RIOTS IN HABSBURG GALICIA 104, 215 (2018).

³⁸ *Id.* at 94–95.

³⁹ *Id.* at 77.

⁴⁰ Application of Fredd Dunham on behalf of Jan Trybus for Commutation of Sentence to Life Imprisonment (Aug. 9, 1916) (on file with author).

⁴¹ Coon, *supra* note 22, at 95–96.

⁴² *Shots Attracted Police*, THE DAILY NEWS (Batavia, N.Y.), Aug. 31, 1914, at 5.

⁴³ Record on Appeal, *supra* note 2, at 568.

Figure 7⁴⁴

Buffalo for vagrancy and sentenced to five months in Erie County Penitentiary. In 1905, he was convicted in Blaisdell, New York for petit larceny for stealing box car wheels and sentenced to six months imprisonment in Erie County Penitentiary. In 1905, he was convicted for burglary in Batavia and sentenced to six months imprisonment. In 1909, he was convicted in Buffalo for carrying a gun and fined \$50.00 or fifty days in jail. Finally, in 1911, he was convicted in Batavia for burglary in the third degree (second offense), sentenced to serve six years and one month in state prison. He was released in May 1915. All of these convictions were for offenses involving theft or were against the public order; none were for offenses against persons.⁴⁵

Finally, Jan had a reputation for being, as the trial transcript puts it, “intemperate.”⁴⁶ He was known to have gone with his friend Mike Miller to the notorious “Bowl of Blood” in Batavia, a saloon with an unsavory reputation as a venue for gambling and violent clashes between customers.⁴⁷ The Bowl of Blood was a few blocks from Jacob Schoenberg’s house.⁴⁸

In sum, in contrast to Jacob Schoenberg, who was an integrated outsider in Batavia, Jan was a foreign outsider in the Batavia community. While he mingled in the world of the Bowl of Blood, he does not appear to have integrated elsewhere into Batavia’s established community.

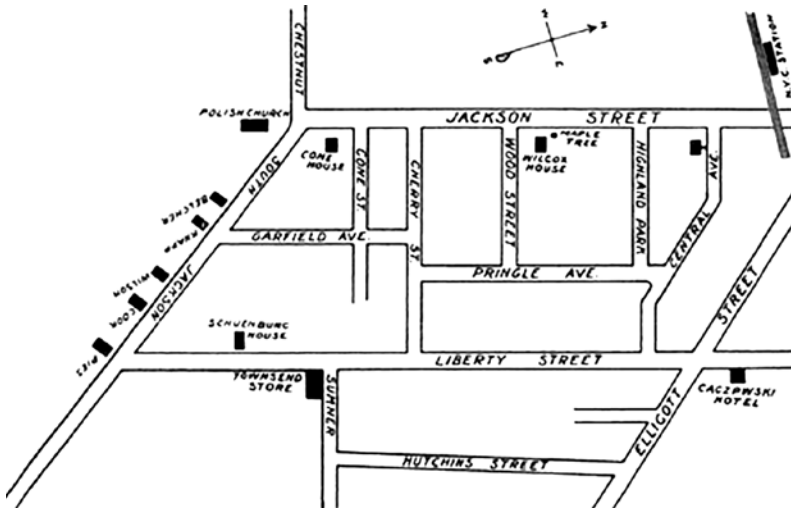
⁴⁴ Coon, *supra* note 22, at 96.

⁴⁵ Record on Appeal, *supra* note 2, at 20–21, 329–32.

⁴⁶ *Id.* at 20.

⁴⁷ See *id.* at 700–04; see also *Two Under Arrest*, THE DAILY NEWS (Batavia, N.Y.), Mar. 22, 1917, at 1.

⁴⁸ Record on Appeal, *supra* note 2, at 196½.

Figure 8⁴⁹

In fact, after the trial, he wrote his attorney: “I sold my life for whiskey, beer and promises . . . I am not an American. I’m an Austrian—that’s why I’m punished to death.”⁵⁰

II. The stories of the murder told in court

Having described the scene and the different principal characters, this article will now present the different stories told at the trial of Jan Trybus for the murder of Jacob Schoenberg from the perspective of the prosecution, the defense, and the Court of Appeals.

A. The district attorney’s story of the murder

On December 1, 1915, Trybus’s capital murder trial began in Genesee County Supreme Court.⁵¹ District Attorney William H. Coon presented the prosecution’s case.⁵²

According to the evidence presented by District Attorney Coon, late at night on October 16, 1915, Jan Trybus and Mike Miller were out drinking whiskey at the Bowl of Blood. They got very drunk. Mike told Trybus to hit another patron, “Mike Jew.” As Trybus said, “He is Polish but everybody called him Jew.” Around midnight, Trybus and Miller left

⁴⁹ *Id.*

⁵⁰ Jan Trybus Traded Life for Liquor, THE DAILY NEWS (Batavia, N.Y.), Dec. 22, 1915, at 1.

⁵¹ Trial of Jan Trybus, Charged with Murder, Begun in Court Today, THE DAILY NEWS (Batavia, N.Y.), Dec. 1, 1915, at 1.

⁵² Record on Appeal, *supra* note 2, at 30.

the Bowl of Blood and staggered down the street and fell on the sidewalk. Mike lost his cap. And sprawled out on the sidewalk, passersby told them to go home.⁵³

Then, Mike pointed to the Schoenberg house and said, “[W]e will go into the Jew’s house and get the money. Mike says the Jews have always got money.”⁵⁴

At this time—about 4:00 a.m.—Jacob Schoenberg was asleep in the first-floor bedroom of his home with his sixteen-year-old son Max. The bedroom was off the living room. His wife, Rebecca, and daughters were asleep upstairs.⁵⁵



Figure 9⁵⁶

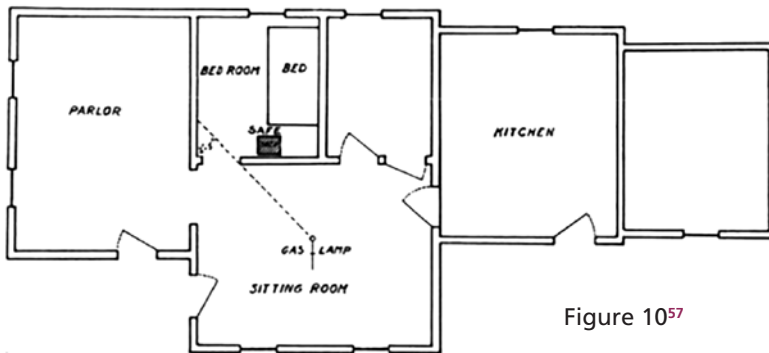


Figure 10⁵⁷

⁵³ *Id.* at 371, 383, 701.

⁵⁴ *Id.* at 384.

⁵⁵ *Id.* at 54, 61, 130, 142–43.

⁵⁶ *Id.* Ex. 6.

⁵⁷ *Id.* at 880½.

While there was no light in the bedroom, a chandelier with a dim gas light shown in the living room.⁵⁸

The prosecution argued that stone-drunk Trybus—with the help of Miller—entered the house through the bedroom window. Mike handed him an iron bar weighing eighteen pounds.⁵⁹

Jacob turned around in bed, and Trybus thought he saw him, so Trybus bludgeoned him over the head.⁶¹

Then, Max—sleeping in the bed against the wall—woke up and pretended not to see the intruder. When Trybus went into the living room, Max yelled out, “Help! Murder! Mother!” Trybus came back into the room, holding a revolver, and said, “Shut up. Give me money or I will shoot you.” Max told him he could ask his mother or father, but he did not know where the money was. Max asked him what right he had to come into my house, and Trybus said, “Shut up.”⁶²

At this point, according to the prosecution’s evidence, Trybus heard a sound of someone walking upstairs to the bathroom. So Trybus jumped out of the window. Max then went into the living room and yelled, “Mother, come down; something has happened to father.” Rebecca came downstairs and dragged Jacob’s body into the living room. One of the daughters called the doctor who came over to the house. They also called the police.⁶³ When the police arrived, an officer found the iron bar against the frame of the bed. He also found a spot of blood three inches long covering the width of the bar.⁶⁴

The doctor then arrived and found Jacob unconscious with the bones on the right side of the head crushed in. Two hours later, the ambulance arrived, and at 10:40 in the morning Jacob died in the hospital.⁶⁵



Figure 11⁶⁰

⁵⁸ *Id.* at 65–66.

⁵⁹ *Id.* at 160.

⁶⁰ *Id.* Ex. 4.

⁶¹ *Id.* at 490.

⁶² *Id.* at 71–72.

⁶³ *Id.* at 72.

⁶⁴ *Id.* at 148–49.

⁶⁵ *Id.* at 166–68, 175.

In Coon's words in his brief in the Court of Appeals, the crime "shocked the people of the community, and the Batavia police officers being handicapped because of lack of sufficient officers to investigate this important case, engaged the services of Thomas O'Grady, a private detective in Buffalo, to assist him in the apprehension of the murderer of Jacob Schoenberg."⁶⁶

O'Grady formed a group of former police officers and informers to investigate the case. The Batavia police had found Mike Miller's cap on the street. One of O'Grady's men went to the Bowl of Blood—the natural hang-out for thugs—where the bartender identified the cap as belonging to a factory worker in Buffalo. The factory worker said he left the cap at Mike Miller's so it could have been worn by Mike or his partner, John Galicia (a/k/a, Jan Trybus). So O'Grady's men picked up Trybus and brought him to O'Grady's office in Buffalo on Friday evening, October 29.⁶⁷

Detained in Grady's office, Trybus initially denied he murdered Jacob but finally, on Saturday, October 30, he confessed to the murder and described the events in detail.⁶⁸ That afternoon, Grady brought Trybus into the Buffalo police station for a show-up with Max Schoenberg. Max identified him as the culprit by his features and voice.⁶⁹ Over the course of three days, he confessed four additional times.⁷⁰ Then, O'Grady, the Batavia Police Chief, and Coon himself, took Trybus on a perp walk down Liberty Street to the Schoenberg house so he could describe his movements that night. The visit was capped off with confessions to two of Jacob's daughters.⁷¹

On Monday, November 2, 2015, four days after O'Grady's men had picked up and detained Trybus, he was arraigned.⁷²

B. The defense's story of the murder

At the trial, Fredd Dunham and his co-counsel, appointed attorneys, represented Jan Trybus.⁷³

⁶⁶ Brief for Respondent at 67; *Trybus*, 113 N.E. 538.

⁶⁷ Coon, *supra* note 22, at 96; Record on Appeal, *supra* note 2, at 334.

⁶⁸ *Id.* at 369–72.

⁶⁹ Brief for Respondent, *supra* note 66, at 25.

⁷⁰ *Id.* at 74–79; Brief for Appellant at 21–25, 54; *Trybus*, 113 N.E. 538.

⁷¹ Brief for Appellant, *supra* note 70, at 25–26; see also *No Charge Yet Against Miller*, THE DAILY NEWS (Batavia, N.Y.), Nov. 4, 1915, at 6. (Trybus said, "I'm sorry I killed your father. If I was not drunk and had not met Mike Miller I would not have done it" to Jacob's daughters.)

⁷² Record on Appeal, *supra* note 2, at 891.

⁷³ *Id.* at 12.

Dunham presented a counter-narrative to Coon's story on behalf of Trybus. First, he challenged Max Schoenberg's identification of Trybus. Dunham pointed out that Max, a mere sixteen-year-old, admitted that the only light in the bedroom where Trybus encountered him was a dim light in the ceiling of the living room, seven feet from the doorway to the bedroom. Max could not visually identify the assailant.⁷⁴ Moreover, Dunham challenged Max's voice identification of Trybus at O'Grady's show-up at the Buffalo police station. On the witness stand, Batavia Police Chief Anthony Horsch testified that Max originally said the assailant had "a foreign voice, he didn't know whether it was an Italian voice or [a] Polock's."⁷⁵ In fact, Max told a newspaper reporter two days after the murder that he was so excited he could not identify the man in the room, that the man had a mask, and that he could not identify the man's voice.⁷⁶

Second, Dunham called into question the validity of Trybus's confessions. He elicited testimony that after O'Grady's man abducted Trybus and brought him to O'Grady's office, O'Grady grabbed Trybus around the neck and threw him against a radiator.⁷⁷ With four other men in the room, O'Grady accused Jan of the murder of Jacob Schoenberg and kept badgering him even though he adamantly denied the charges.⁷⁸ Trybus testified that when he went to the bathroom, one of O'Grady's crew named Mennecci—an informer—joined him and told him that O'Grady knew that Trybus had recently shot a railroad detective. With his prior convictions, he would be sentenced to life imprisonment as a habitual offender. But, Mennecci suggested, if Trybus admitted to the murder of Jacob Schoenberg, O'Grady could persuade the judge to sentence him to twenty years in prison.⁷⁹

Then, after the initial roughing up and Mennecci's maneuvering, O'Grady plied Trybus with whiskey, even taking him to the Napoleon Hotel in Buffalo for drinks. Without an indictment or even an arrest, O'Grady, with Coon's support, kept Trybus in his custody from Friday afternoon until his arraignment on Monday. During that time, with the

⁷⁴ Record on Appeal, *supra* note 2, at 106–08, 960–61; see also *Arrest of Man May Give Clue*, THE DAILY NEWS (Batavia, N.Y.), Oct. 23, 1915, at 1 (Max, upon visiting in Buffalo the penitentiary, county jail, and police headquarters, was unable to positively identify a suspect. Max did indicate that two men possibly looked and talked like the murderer.).

⁷⁵ Record on Appeal, *supra* note 2, at 749.

⁷⁶ *Id.* at 878–79 (Newspaper reporter John Maney testified for the defense that he interviewed Max, who stated he was excited and could not identify the man.). *But see id.* at 876–77 (On recall, Max stated that the reporter never interviewed him, nor did Max provide him with any information.).

⁷⁷ *Id.* at 206 (testimony of Thomas O'Grady).

⁷⁸ O'Grady testified that he had four other men in the room during questioning, even though he did not have any bodily fear of Trybus. *Id.* at 244.

⁷⁹ Trybus testified that "the Italian detective [Mennecci]" told him, "if you tell us that you killed the jew O'Grady will get you out in 20 years." *Id.* at 338–39.

initial roughing up, Mennecci's promise, and plenty of whiskey, Trybus confessed.⁸⁰

Quite simply, as Dunham argued in his summation, Trybus's confessions were coerced:

I wouldn't wish to slander Thomas O'Grady, but I want to tell you this, between Judas Iscariot and Thomas O'Grady, I would rather have Judas Iscariot for a roommate, because Judas repented but Tom O'Grady sat here in ghoulish glee all through this case thinking of the time when he was going to be down there at Auburn prison and when he was going to be in the room there and watch this boy electrocuted.⁸¹

Regarding the substance of the confessions, Dunham's narrative focused on the testimony of all the witnesses that Trybus and Mike Miller were smashed after their drinks at the Bowl of Blood. They were so drunk that passersby saw them sprawled out in the middle of the sidewalk not far from the saloon.⁸² As Dunham argued in his closing, "It strains credulity that Jan could have easily even entered the Schoenberg home: The blinds have got to be taken off; second, the window has got to be taken out, with a bedstead there seven inches away from it; third, the curtains hanging down between the window and the bedstead."⁸³

Finally, Dunham suggested an alternative narrative for the events of October 17, 1915. A police officer saw two suspicious men getting off the late train from Buffalo the night of the murder. Later, at 12:15 a.m., a witness saw two men sitting on a bench in the Schoenberg neighborhood. The witness testified that the two were not drunk, and Trybus was not one of them. That same night, there was evidence of five other attempted burglaries in the area, including severed telephone lines. The police never found the two suspicious men or solved the burglaries.⁸⁴

⁸⁰ In Dunham's closing, he highlighted that Trybus was given liquor, taken for meals in a hotel, and held by O'Grady for an extended period of time before being charged. *Id.* at 843–44; *see also id.* at 257–64 (O'Grady testified to having meals and drinks with Trybus at the Napoleon Hotel and holding him without charge for several days.).

⁸¹ *Id.* at 940.

⁸² *Id.* at 946–47.

⁸³ *Id.* at 946; *see supra* Figure 9 (Jacob's bedroom, showing proximity of the window to the bed); Figure 11 (exterior view of the window through which Trybus allegedly entered).

⁸⁴ Officer Henry Stickney explained that DA Coon called his attention to two "suspicious" individuals who alighted from a train arriving from Buffalo the evening prior to the murder. Record on Appeal, *supra* note 2, at 150–51. A defense witness, arriving home early in the morning of October 17, 1915, saw two men, unknown to him, sitting outside. *Id.* at 861–62. At the trial, Dunham explored the theory of the two unknown men and a spate of burglaries the night of the murder as an alternative explanation as to who might have committed the crime. *Id.* at 953–54.

C. The aftermath of the trial

After a six-day trial during which Coon and Dunham told their respective stories, the jury retired for deliberations at 11:00 a.m. on December 9, 1915. After lunch, a little more than three hours later, at 2:15 p.m., they rendered a guilty verdict. The judge immediately sentenced Trybus to death.⁸⁵ That same day, the district attorney announced that Mike Miller would plead guilty to second-degree murder and was sentenced to twenty years to life.⁸⁶

Dunham and his co-counsel appealed the judgment to the New York Court of Appeals. Seven months after the verdict, the court rendered its decision.⁸⁷

While acknowledging that Max Schoenberg's identification was based largely on Trybus's manner of speech, the court found that his identification was not incredible as a matter of law.⁸⁸ As to the confessions, the court censured O'Grady's conduct in eliciting the confessions:

The conduct of a detective in needlessly laying hands on a helpless man detained by him without legal warrant deserves the severest censure. The practice of detectives to take in custody and hold in durance persons merely suspected of crime, in order to obtain statements from them before formal complaint and arraignment, and before they can see friends and counsel, is without legal sanction.⁸⁹

But the court held that the jury could reasonably have found that the confessions were made voluntarily.⁹⁰ The court, therefore, affirmed the guilty verdict and death sentence.⁹¹

Dunham then filed a petition for commutation of the sentence to the New York Governor.⁹² He included in the petition statements from eight of the jurors requesting that the death sentence be commuted to life imprisonment.⁹³ One of the jurors argued that Trybus was so intoxicated

.....

⁸⁵ *Verdict of Guilty Reported by Jurors Against Jan Trybus*, THE DAILY NEWS (Batavia, N.Y.), Dec. 9, 1915, at 1, 8; Record on Appeal, *supra* note 2, at 1032.

⁸⁶ Miller, whose trial was set to begin the following week, pled guilty on the day of Trybus's verdict and sentencing. *Verdict of Guilty Reported by Jurors Against Jan Trybus*, *supra* note 85, at 1.

⁸⁷ *Trybus*, 113 N.E. 538.

⁸⁸ *Id.* at 539.

⁸⁹ *Id.* at 539–40.

⁹⁰ *Id.* at 540.

⁹¹ *Id.* at 541.

⁹² *Intoxicated at the Time, Trybus Plea*, THE DAILY NEWS (Batavia, N.Y.), Aug. 11, 1916, at 1; Dunham Application, *supra* note 40.

⁹³ Letter from George Hunt et al., to Hon. Charles S. Whitman, Governor of the State of N.Y. (undated) (on file with author).

when he murdered Schoenberg, he should have only been found guilty of second-degree murder.⁹⁴ Dunham also included a letter from the Counsel-General of Austria-Hungary, on behalf of his “unfortunate countryman,” arguing that Trybus had nothing to do with the murder or, if he did, that he was so intoxicated, he should have only been convicted of second-degree murder.⁹⁵ The Governor denied this petition.⁹⁶ And on September 1, 1916, Jan Trybus was executed.⁹⁷

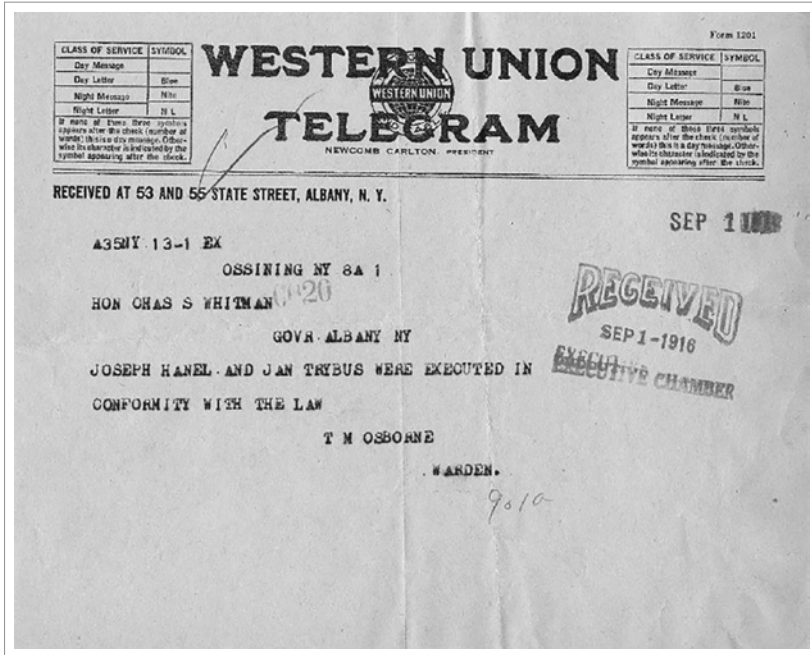


Figure 12⁹⁸

III. The stories told in different communities

The criminal trial against Jan Trybus took place in a small upstate city in which separate communities told their own stories about what happened in the Schoenberg home late at night on October 16, 1915, and what was occurring in the Genesee County Supreme Court. This section

⁹⁴ Dunham Application, *supra* note 40.

⁹⁵ Letter from Alexander von Nuber, Consul-General of Austria-Hungary, to Hon. Charles S. Whitman, Governor of the State of N.Y. (Aug. 10, 1916) (on file with author).

⁹⁶ Letter from T.M. Osborne, Agent and Warden Sing Sing Prison, to Hon. Charles S. Whitman, Governor of the State of N.Y. (Sept. 1, 1916) (on file with author).

⁹⁷ Telegram from T.M. Osborne, Agent and Warden Sing Sing Prison, to Hon. Charles S. Whitman, Governor of the State of N.Y. (Sept. 1, 1916) (on file with author); see *infra* Figure 12; see also *Jan Trybus, Batavia, Paid Extreme Penalty, Dying Unflinchingly*, THE DAILY NEWS (Batavia, N.Y.), Sept. 1, 1916, at 1.

⁹⁸ Osborne Telegram, *supra* note 97.

of the article will address how the case played out in three different communities in Batavia: the Jewish community, the Polish community, and the established community. As will be seen in section IV of this article, this cultural landscape affected the stories District Attorney Coon and Fredd Dunham told at trial.

A. The Jewish community's story

In the early twentieth century, Jewish newspapers were quite popular and loved to cover sensationalist criminal cases.⁹⁹ A search in the Jewish Historical Press archives for articles on the case from that period, both in English and Yiddish, however, turned up no articles on the case.¹⁰⁰ This lack of attention to the case could be because Batavia was an obscure little town in Upstate New York far from New York City. But around the same time, the Jewish press was quite absorbed by a blockbuster murder at a farm in New Brunswick, New Jersey, as far off the beaten path from urban Jewish communities as Batavia.¹⁰¹ So the absence of any reportage in Jewish newspapers about the case is quite surprising.

Without any reports of the case in the Jewish press, the only archival source for reaction to the murder and the case is the coverage in the general local Batavia newspapers of the Jewish community's response to the murder. In those press reports, the major event that stands out is the community's reaction to District Attorney Coon's and O'Grady's parading of Trybus through the Schoenberg neighborhood when Trybus described Miller's and his purported movements the early morning of October 17, 1915. This was a perp walk worthy of today's media-crazed prosecutors. One article, headlined "Revenge Demanded by Jews," read in part,

Ringing with cries which suggested the sentiment "an eye for an eye and a tooth for a tooth," the Jewish quarter of Batavia presented a fearful spectacle yesterday afternoon when the family, friends and countrymen of the murdered Jacob Schoenberg saw for the first time Jan Trybus, the self-confessed slayer of that reputable Jew.

"Murderer!" "Kill him." "Don't let him live!" and sundry other expletives, mingled with Yiddish maledictions, imprecations and

⁹⁹ See generally EDDY PORTNOY, *BAD RABBI AND OTHER STRANGE BUT TRUE STORIES FROM THE YIDDISH PRESS* (2017).

¹⁰⁰ I personally searched the website for English-language articles. And my Yiddish-language researcher, Roberta Newman, found no articles in the Yiddish press on the murder or the case. Dr. Newman researched the biggest New York Yiddish newspapers—THE FORWARD, THE JEWISH MORNING JOURNAL, DER TOG, and DIE VAHRHEIT—for the period October to December 1915 and June to September 1916, and even entire issues near the important dates in the case and turned up no articles. Email correspondence from Roberta Newman to Stefan Krieger (May 7, 2021) (on file with author).

¹⁰¹ *Id.* Even though the Leo Franck trial and lynching had occurred in 1913, the Yiddish press was still absorbed with the case in 1915 and 1916. *Id.*

exhortations for revenge, echoed the length and breadth of South Liberty Street. . . .

In the street Jews—men, women, and children—mingled with Italians. A Jew set up the cry, “Murderer!” and there was a rush for Trybus which frightened the officials and made them think for a moment that there was an organized plan to take the prisoner from them.

Mrs. Schoenberg’s grief and rage were startling. She set the example for the Jewish women to tear out handfuls of hair from their heads and to utter piercing screams.¹⁰²

While this article highlights the deep emotions expressed by Jacob Schoenberg’s family and the crowd, it also suggests the empowerment felt by the Batavia Jewish community. They did not see themselves as cowering victims. The community felt it had a right to protest—even a right to revenge—under American law. As described earlier in reference to Jacob Schoenberg, this was a community, while still outsiders, that viewed itself as integrated into the established community. In fact, according to the reporter, Italian neighbors of the Jews participated in the protest. And it appears, at least in the reportage by Batavia’s *The Daily News*, that there were no shouts by the crowd about anti-semitism or Trybus’s targeting of Jewish homes.¹⁰⁴ This lack of focus on anti-Jewish hatred was especially striking given the purported motive for the crime: Trybus’s confession that as Miller and he walked toward the Schoenberg home, Miller exclaimed, “All Jews have money.” And even Trybus’s connection with Galicia—the site of fairly-recent anti-Jewish riots targeting wealthy Jews—did not seem to influence the message of the residents of Batavia’s “Jewish Quarter.” All in all, apparently these Jews felt part of the community at large in Batavia. Perhaps the absence of reportage on the case in the Jewish press reflects the sentiment of the local Jewish community that the murder, while horrific, was not primarily an antisemitic incident.

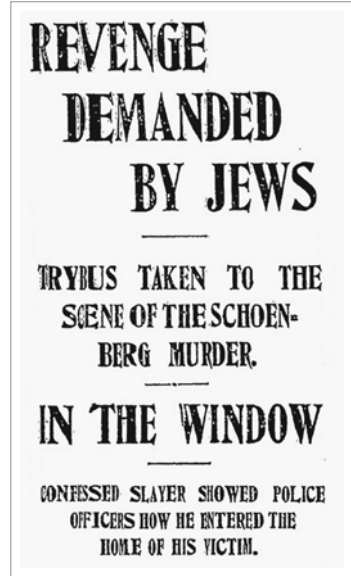


Figure 13¹⁰³

¹⁰² *Revenge Demanded by Jews*, THE DAILY NEWS (Batavia, N.Y.), Nov. 3, 1915, at 1, 5.

¹⁰³ *Id.* at 1.

¹⁰⁴ There is no record, however, of the Yiddish “imprecations” that day.

B. The Polish community's story

Unlike the Jewish press, Polish newspapers in Buffalo—a little more than forty miles west of Batavia—covered the case widely.¹⁰⁵ A number of stories—especially at the beginning of the case and early in the trial—objectively reported on the status of the investigation of the case and the testimony at trial. Some pieces actually were very unsympathetic to Trybus. For example, one item read, “According to reports from Batavia, Jan Trybus, who was proven guilty of the murder in the first degree, will die by the electric chair on August 28th. You’ve made your bed, now lie in it. . . .”¹⁰⁶

But the day after the execution, one columnist was quite critical about the American system of justice and drew sobering lessons from the case for the entire Polish community:

Jan Trybus, a Pole from Galicia, sentenced to death for murdering a Jewish dealer in Batavia, NY, was executed by the electric chair yesterday in Sing-Sing.

Trybus committed the crime when completely intoxicated and he did not confess to the murder.

As he was sitting down on this horrible chair, used for administering justice, he said to the gathered, “Pray for me and I will pray for you.”

A few years ago, Gośliński of Buffalo who killed a police officer while intoxicated was executed in the same way.

Also, several years ago, a Buffalo boy named Maruszewski was executed by the electric chair for the same murder committed under influence.

At present, two or three young Poles are in prison, awaiting justice for crimes committed while . . . intoxicated.

We are therefore faced with a terrible fact.

An intoxicated, that is a completely unconscious man kills another man. Sobering up, he denies the deed. During the trial, however, the prosecutor charges the poor man with a murder in the first degree. The defense, in most cases a public attorney, quickly handles the case. The jury delivers the verdict: “guilty.” The judge sentences the accused to death. And since usually there is no one to stand up for a Pole, when the day of the execution comes, he sits down on the electric chair and a few minutes later the prison doctor announces that . . . justice has been done.

¹⁰⁵ A researcher hired for this project, Agnieszka Legutko, Lecturer in Yiddish & Director of the Yiddish Language Program at Columbia University, translated these articles.

¹⁰⁶ *DZIENNIK DLA WSZYSTKICH* (Buffalo, N.Y.), July 30, 1916, at 4.

* * * * *

We, Poles, who according to the statistics commit 90 percent of crimes when intoxicated, should draw the attention of our future representative to this matter during this year's elections.

We have to fight against drunkenness as hard as possible, but before the results of this fight are visible, we should employ our best efforts to make sure that such Maruszewskis, Goślińskis and Trybuses are not sentenced to death for committing a murder when drunk unconscious.¹⁰⁷

Thus, while the Batavia Jewish community publicly sought revenge—either within or without the justice system—for the murder, at least some sectors of the local Polish community, as reflected in this opinion column, had serious concerns about their treatment in that system. Again, while the Jewish community saw itself as integrated outsiders, this columnist seemed quite ambivalent about the status of Poles in the established community.

C. The established Batavia community

A final aspect of the cultural context of the case is the established Batavia community: folks who were well-settled in the community, Americans for more than a few decades.

From both the news coverage of the case and the trial record, it is clear that the established community in Batavia viewed the case primarily through the prism of ethnicity. For example, not only the ethnicities of Schoenberg and Trybus were mentioned in articles about the case, but also the ethnicity of Mike Miller, an Italian suspect in the case, and other residents of South Liberty Street.¹⁰⁸ Apparently, this focus on ethnicity arose from the large influx of immigrants into the community.¹⁰⁹ In fact, at the trial, District Attorney Coon asked a lengthy series of questions to private investigator, Thomas O'Grady, laced with references to the ethnicity of his agents. For nearly three pages of the transcript, O'Grady

107 Maruszewski—Gośliński—Trybus, *DZIENNIK DLA WSZYSTKICH* (Buffalo, N.Y.), Sept. 2, 1916, at 2.

108 See, e.g., *Schoenberg Murder Case Not Solved*, *THE DAILY NEWS* (Batavia, N.Y.), Oct. 19, 1915, at 1 (referring to Jacob Schoenberg as the “South Liberty Street Jew”) (emphasis added); *Officers Arrested Suspects*, *THE DAILY NEWS* (Batavia, N.Y.), Oct. 28, 1915 at 7 (reporting on the arrest of “both Poles” Trybus and Miller) (emphasis added); *No Charge Yet Against Miller*, *THE DAILY NEWS* (Batavia, N.Y.), Nov. 4, 1915, at 6 (reporting on “Mike Miller, the Pole who is being held at police headquarters”) (emphasis added); *Jacob Schoenberg Brutally Killed*, *THE DAILY NEWS* (Batavia, N.Y.), Oct. 18, 1915, at 1 (reporting that, after the neighbors heard the news of the murder “the Schoenberg yard was thronged with a wildly excited crowd of Jews, Italians, and Poles”) (emphasis added); *Jacob Schoenberg Brutally Killed*, *THE DAILY NEWS* (Batavia, N.Y.), Oct. 18, 1915, at 5 (reporting that when the police brought Frank Filita to Max Schoenberg, Max said “he thought the Italian looked and talked like the man who had leveled the revolver at him”) (emphasis added).

109 See *supra* notes 3–4 and accompanying text.

identified each of the members of his posse as Irish, German, Italian, Polish.¹¹⁰ The final crony O’Grady identified was “William Ross, an American or Yankee.”¹¹¹

While the local newspaper’s coverage of the Schoenberg family could at times be sympathetic, it sometimes played into ethnic stereotypes. In one article, the reporter played the anthropologist, describing in some detail the rituals of shiva.¹¹² But the headline for the article noted that Jacob Schoenberg was a “well-to-do junk dealer,” and the reporter described the reaction of one of Schoenberg’s daughters to the murder: “‘Revenge is sweet,’ vehemently exclaimed one of [Max’s] sisters, as her luminous dark eyes, typical of the ancient race, glowed like fiery coals. ‘The police must catch that murderer.’”¹¹³ And the coverage of the Jewish community’s reaction to Trybus’s perp walk is replete with classic Jewish stereotypes:

Ringing with cries which suggested the sentiment “an eye for an eye and a tooth for a tooth,” the Jewish quarter of Batavia presented a fearful spectacle yesterday afternoon, when the family, friends, and countrymen of the murdered Jacob Schoenberg saw for the first time Jan Trybus, the self-confessed slayer of that reputable Jew.¹¹⁴

The reporter continued, “The officials who took Trybus to the scene of his fearful crime had difficulty in preserving him from the wrath of that ancient race that first taught the doctrine of retributive justice and laid the foundation for our law of capital punishment.”¹¹⁵ This article—highlighting the character of descendants of an ancient, vengeful race but with a recognition of the Hebrew Bible’s underpinnings of modern law—perhaps reflects the ambivalent attitude of the established community to the Jewish community in Batavia.

110 Record on Appeal, *supra* note 2, at 198–200.

111 *Id.* at 200.

112 *Schoenberg Murder Case Not Solved*, THE DAILY NEWS (Batavia, N.Y.), Oct. 19, 1915, at 1.

113 *Id.*

114 *Revenge Demanded by Jews*, THE DAILY NEWS (Batavia, N.Y.), Nov. 3, 1915, at 1. Similar to generalizations drawn by many journalists today, this reporter’s stereotypic description of the Jewish sentiment toward capital punishment ignores the divergent views of rabbinic authorities on the subject. BASIL F. HERRING, JEWISH ETHICS AND HALAKHAH FOR OUR TIME: SOURCES AND COMMENTARY 208–32 (1984). Jewish legal tradition contains conflicting views that reflect a variety of policies for and against the death penalty—from imposition of the punishment for the wellbeing of society to opposition to the penalty in favor of rehabilitation of the offender. *Id.* at 229.

115 *Revenge Demanded by Jews*, THE DAILY NEWS (Batavia, N.Y.), Nov. 3, 1915, at 1.

IV. The portrayal of immigrants at the trial

A close analysis of the storytelling of District Attorney Coon and defense attorney Fredd Dunham in their litigation of the case demonstrates how this cultural landscape infused the portrayal of the different parties at trial.

A. Coon's portrayal of immigrants

Throughout his litigation of the case, District Attorney Coon played on the ethnic stereotypes of the established Batavia community to differentiate the acceptable immigrants from the bad ones. As described previously, in his direct examination of the private investigator, Thomas O'Grady, Coon focused on the ethnic identity of each of O'Grady's cronies.¹¹⁶ And then in his summation, Coon played on the trope of the drunken Pole in his characterization of the defendant:

[Trybus] is a man 33 years old, thoroughly steeped in crime, by his own confession a fifth offender under the law of this State. He is a drunken brute according to the testimony in the case. He is a gun man. He is a man, according to his own confession, who has shot people, a man who has carried a gun, a car burglar by two confessions, and you know what character of man that is.¹¹⁷

And, fully aware of the legally improper tactics of O'Grady, Coon defensively justified those tactics in terms of protecting Batavians from the likes of this drunken brute:

If this crime had gone unpunished we certainly ought to be removed from office, every one of us. Gentlemen, I do not stand here and approve of everything that has been done in this case. Neither do I disapprove of it. We are not dealing here with a Sunday School boy. . . . If you find this man guilty of murder in the first degree, [the court] is going to impose the judgment of death upon him. It is a horrible thing to contemplate, and I fully realize it as I stand here . . . and I believe that God means that it is right and proper that when one man deliberately, with premeditation, or while in the act of committing a felony, takes the life of one of our human beings, . . . I believe that the man should be sent to his God to receive the judgments of his Master. I believe it is proper for the protection of society that he be removed from this earth. Hard as it is for you and me to do our duty, let us be manly men, let us be strong men,

116 See *supra* note 110 and accompanying text.

117 Record on Appeal, *supra* note 2, at 964–65.

let us not be weak. Let us stand up and do our duty to the People, to the State, and to our Master.¹¹⁸

This specter of the feared outsider—the drunken Pole who endangers the community—is precisely the sentiment that is critiqued by the columnist in the Polish press. To protect society, Coon urges the jurors, they must obey their duty to God and the State and sentence Trybus to death.

In contrast to this portrayal of Trybus, in bolstering the credibility of Max Schoenberg’s sketchy eyewitness identification, Coon subtly contrasts the drunken Polish immigrant with the stereotype of the Jewish immigrant, semi-integrated into the community:

This Max is one boy out of a thousand; probably you have seen that before this. He is a brighter boy than the average, a good deal. He is a 16-year old Jewish boy, born of a poor junk dealer. He is having the advantages which you and I would give him when he came from Russia to this country. We afford the advantages of a high school education to our adopted Americans, and he is in our high school, and he is taking Third Year German, Second and Third Year Latin and Geometry, and studying the higher subjects. I wondered what you gentlemen thought of that when you heard that testimony. He is away above the average young man in intelligence and observation, he is a boy who is going to make a mark for himself in this world some time.¹¹⁹

So unlike Trybus, Coon argues, Max was integrating into Batavia society—“an adopted American”—who, despite emigrating from Russia and being the son of a Jewish junk dealer, was excelling in his studies at Batavia High. The not-so-unsubtle message was that the jury could believe Max’s identification of Trybus because he was becoming “one of us.” This trope was consistent with the established community’s views of Jews as “integrated outsiders.”

B. Dunham’s portrayal of immigrants

In his storytelling in the case, Dunham, like Coon, played on ethnic stereotypes in his own portrayal of the different immigrant communities. On the issue of divine justice for Trybus, for example, Dunham lapsed into the stereotype of the legalistic Hebrew Bible:

¹¹⁸ *Id.* at 964, 996.

¹¹⁹ *Id.* at 981–82.

On the night following the 16th of October last, Jacob Schoenberg was killed. His widow and four daughters and son sat here in this courtroom throughout this case, missing him, oh yes, but even if the old Jewish law of an eye for an eye, a tooth for a tooth, and a life for a life, calls for the life of Jan Trybus, it won't give Jacob Schoenberg back to his family. No one feels sorrier for that family than I do, and if I could give him back I would.¹²⁰

While certainly this argument is a response to Coon's calls for the jury to follow their duty to God and send Trybus to the electric chair, in an indirect way, it may be a subtle message to the jury to reject the calls by the Jewish community for revenge during Trybus's perp walk. Indeed, the local coverage of that event was laced with a reference to the Jewish quarter's "cries which suggested the sentiment 'an eye for an eye and a tooth for a tooth.'"¹²¹

Most of Dunham's story, however, focused on the abuse of power by District Attorney Coon and O'Grady against a helpless outsider. For example, referring to O'Grady's methods, in his summation, Dunham asks each juror:

If [you] are ever accused of a crime, [would you] want some fellow to take [you] by the throat and slam [you] against the wall; [Would you say] I want him to keep me for five days, three-quarters drunk, coaxing, wheedling, threatening every other way, to get me to confess to something that I didn't do, to let the authorities out of a hole.¹²²

But Dunham goes even further. Not only does he urge the jurors to view Jan Trybus as a person in the community abused by the legal system, just like themselves, but he asks them to consider the difficulties posed by his immigrant status:

I do not believe you are going to convict poor Jan Trybus, that boy that stands here, homeless, friendless, with just your hand and mine between ushering him into the great eternity; I do not believe, Gentlemen, that because his father and mother are living in that far off land of Galicia, which has been ravaged by this awful war of Europe, and he is unable to get any word from them, you are going to treat him any less thoughtfully and conscientiously than you would if it was the life of one of your boys or your brothers that was at stake.¹²³

120 *Id.* at 933.

121 *Id.*; see *supra* note 114 and accompanying text.

122 Record on Appeal, *supra* note 2, at 955.

123 *Id.* at 932.

Dunham drives home this point even more directly in his storytelling in the Court of Appeals: “[O’Grady’s] methods are peculiarly vicious and dastardly when employed in a capital case, and against a defendant whose foreign birth, appearance, manner of speech, habits, and previous criminal record, are against him already.”¹²⁴

Finally, in his story of abuse of power against an immigrant, he unsparingly chastises District Attorney Coon:

The District Attorney had no more right to contemptuously disregard the provisions of the Statute in the case of this man than he would in the case of any other accused person, entirely irrespective of previous good character, reputation or social standing, and the District Attorney of nine years experience was necessarily well aware of this, but carried away by his zeal and by his desire to succeed in obtaining a conviction and deliberately relying upon the defendant’s helplessness, on account of his foreign birth, intemperate habits, previous convictions and the confessions which the District Attorney himself had so cunningly and laboriously obtained, deemed it a safe case for him to ride rough shod over the Statute, and strip from the defendant the last vestige of protection which the law afforded him.¹²⁵

In this storytelling, then, Dunham—with his references to Trybus’s foreign birth and parents in war-torn Galicia—explicitly addresses Trybus’s immigrant status and asks the jury to respond with compassion. Echoing the critique in the Polish newspaper of the legal system, Dunham berates Coon’s and O’Grady’s deliberate attempts to use their power to take advantage of this helpless immigrant.¹²⁶ In short, Dunham portrays Trybus as one of their own and asks the jury to reject Coon’s attempts to consider Trybus an outsider.

V. The lawyers’ schemata about themselves and the justice system

In the field of Applied Legal Storytelling, scholars talk a lot about the schemata of the parties, witnesses, and decisionmakers in analyzing the different narratives of the characters regarding the events in the case and the decisionmakers in constructing their versions of “what really

¹²⁴ Brief for Appellant, *supra* note 70, at 36.

¹²⁵ *Id.* at 93–94.

¹²⁶ But contrary to the critique of the justice system in the Polish newspaper, Dunham, an appointed lawyer, did not “quickly” handle Trybus’s case—even submitting a plea to the Governor for commutation of the death sentence. *See supra* notes 85–87 and accompanying text.

happened.”¹²⁷ Schemata are semi-conscious mental frameworks that witnesses use to filter and organize the facts they perceive about the case, and that triers-of-fact apply to make sense of the legal evidence that is presented.¹²⁸ These schemata underlie the stories told by witnesses at the trial and by the judges and jurors deciding the case. This literature, however, rarely addresses the stories that lawyers tell about themselves as attorneys or as members of the justice system.

The historical record developed in this article provides a unique opportunity to consider the schemata of the two opposing attorneys in the Trybus case—District Attorney William H. Coon and defense attorney Fredd Dunham—about themselves and the justice system and to take a deep dive into the impact of those schemata on their portrayal of immigrants in the litigation. Both attorneys left written records reflecting their schemata of the role of the legal system in society that infused their storytelling. Nearly three decades after the Trybus trial, Coon published an article on the case.¹²⁹ And Dunham left behind unpublished reminiscences for his family about his professional development, which shed light on the story he crafted for his client.¹³⁰

¹²⁷ See, e.g., Ruth Anne Robbins, *Fiction 102: Create a Story for Story Immersion*, 18 *LEGAL COMM. & RHETORIC* 27, 38–39 (2021) (observing that “narrative transportation”—the process by which audiences and triers of fact enter the storyworld—is a schema lawyers can use in developing stories in their cases); Sherril Lee Keene, *Stories That Stream Upstream: Uncovering the Influence of Stereotypes and Stock Stories in Fourth Amendment Reasonable Suspicion Analysis*, 76 *MD. L. REV.* 747, 758 (2017) (describing how police officers’ schemata operate in their evaluation of suspects); J. Christopher Rideout, *A Twice-Told Tale: Narrativity, Plausibility and Narrative Coherence in Judicial Storytelling*, 10 *LEGAL COMM. & RHETORIC* 67, 78–86 (2013) (discussing how the schemata of different Supreme Court justices in the majority and dissenting opinions in a case challenging a police officer’s use of deadly force impacted their storytelling about a high-speed chase to apprehend a suspect); Jennifer Sheppard, *What If the Big Bad Wolf in All Those Fairy Tales Was Just Misunderstood: Techniques for Maintaining Narrative Rationality While Altering Stock Stories That are Harmful to Your Client’s Case*, 34 *HASTINGS COMM. & ENT. L.J.* 187, 190–94 (2012) (describing how schema theory can be used to develop persuasive narratives to the trier-of-fact); Kenneth D. Chestek, *The Plot Thickens: The Appellate Brief as Story*, 14 *LEGAL WRITING* 127, 162 (2008) (noting how “narrative theory provides the [legal] writer with a useful large-scale organizational schema” for drafting an appellate brief); Andrew E. Taslitz, *Wrongly Accused Redux: How Race Contributes to Convicting the Innocent: The Informants Example*, 37 *SW. U. L. REV.* 101, 143–45 (2008) (examining the role of stereotypes in witness perception of events); Ruth Anne Robbins, *Harry Potter, Ruby Slippers and Merlin: Telling the Client’s Story Using the Characters and Paradigm of the Archetypal Hero’s Journey*, 29 *SEATTLE U. L. REV.* 767 (2006) (describing how lawyers can use the trier-of-fact’s schemata reflected in stock stories to persuade); Steven Cammiss, *He Goes Off and I Think He Took the Child: Narrative (Re)Production in the Courtroom*, 17 *KINGS L.J.* 71, 78–79 (2006) (describing the role of schemata in the telling of stories at trials and the understanding of the stories by the audience).

¹²⁸ See generally STEFAN H. KRIEGER, RICHARD K. NEUMANN JR. & RENEE M. HUTCHINS, *ESSENTIAL LAWYERING SKILLS* 176–77 (6th ed. 2020) (noting that “[t]he findings of fact in a case can, therefore, hinge to a certain degree on the schemas of the different witnesses and those of the trier-of fact”).

¹²⁹ Coon, *supra* note 22.

¹³⁰ Letter from Fredd Dunham to Mary et al., at 1 (unpublished) (Oct. 20, 1931) (on file with author); Fredd Dunham, *Reminiscences*, at 5–7 (unpublished manuscript) (May 15, 1926) (on file with author).

A. William H. Coon

District Attorney William H. Coon was born in 1875, went to high school in Batavia, and later went on to Rochester Business University. His father was a lawyer and, following in his father's footsteps, he became a member of the bar in 1899 by reading the law at a Batavia law firm.¹³¹ Eight years later, Coon was elected as Genesee County District Attorney on the Republican ticket.¹³² As district attorney, even before the murder trial, he handled the Batavia criminal cases against Trybus.¹³³ Coon served two terms as district attorney, but in 1916—right after the Trybus case—he was not renominated by the party.¹³⁴

In a biographical sketch for the 1925 History of Genesee Country, apparently written by Coon himself, he (immodestly) wrote,



Figure 14¹³⁵

Through the intervening period of twenty-six years he has been actively engaged in law practice in Batavia, where his clientage has assumed extensive proportions and has connected him with considerable important litigation. His fidelity to the interests of his clients is proverbial; yet he never forgets that he owes a higher allegiance to the majesty of the law.¹³⁶

Then, nearly three decades after the Trybus trial, he published his article in *True*, a periodical devoted to sensationalist stories, sports, and high adventure, touting his prowess in the case.¹³⁷ In that article, he portrayed himself as the hero of the story, playing a front-and-center role at every stage of the case. As he told it, he was awakened before dawn by a call from the assistant police chief about the attack on Jacob Schoenberg and immediately rushed to the Schoenberg home.¹³⁸ There, he coordinated the work of the police and one of the county coroners, and took charge of interviewing Rebecca and Max Schoenberg and nearby

¹³¹ IV HISTORY OF THE GENESEE COUNTRY 736 (S. J. Clark Publ'g Co., 1925).

¹³² *Majorities in Genesee*, THE DAILY NEWS (Batavia, N.Y.), Nov. 7, 1907, at 6.

¹³³ Record on Appeal, *supra* note 2, at 2, 8, 13–14.

¹³⁴ *Kelly Defeated Coon for The District Attorneyship*, THE DAILY NEWS (Batavia, N.Y.), Sept. 20, 1916, at 1.

¹³⁵ Photograph of Coon in Coon, *supra* note 22, at 58.

¹³⁶ IV HISTORY OF THE GENESEE COUNTRY, *supra* note 131, at 736.

¹³⁷ See Coon, *supra* note 22.

¹³⁸ *Id.* at 58.

neighbors.¹³⁹ He then played detective and reconnoitered the scene of the attack and the exterior of the house and started to hypothesize theories of how the perpetrators entered the house.¹⁴⁰ Then, when an officer found a gray cloth cap near the Schoenberg home, Coon recounts, the police chief and he visited all the haberdashers in Batavia to find out who bought the cap, but found no leads. So, Coon confesses, he was stumped.¹⁴¹

At this point, Coon remembers, he came up with the idea of engaging the services of Thomas O'Grady, "one of the ablest detective sergeants in [] Buffalo, N.Y."¹⁴² In his telling, Coon and O'Grady brainstormed possible motives and theories about the case.¹⁴³ Then, Coon relates, O'Grady got some of "his boys" to assist on the case. As Coon puts it, "There was Tom Fogarty, an Irishman; Jake Mennecci, Italian; Frank Jawczynski, called Polish Frank, and William Ross, American—a combination competent to take care of any situation involving almost any given nationality."¹⁴⁴ When some of the boys found witnesses who saw two drunks in the vicinity of the Schoenberg house the night of the murder, O'Grady surmised those men were the perpetrators.¹⁴⁵ And Coon recounts,

I, too, subscribed wholeheartedly to this theory . . . and in so doing came to an inescapable conclusion: if the murderers were drunk, they must have obtained the liquor probably near by. And when I considered from what source in that neighborhood after-closing-hours liquor might have come, I turned to experience for counsel. . . . [In the vicinity of the Schoenberg home] stood a combination saloon and poolroom which was known in those days in local police circles as the "Bowl of Blood." It was frequented principally by the town's rougher element.¹⁴⁶

To which, according to Coon, O'Grady responded, "I have just the man for such a dive as that—Polish Frank Jawczynski."¹⁴⁷

O'Grady gave "Polish Frank" the cap, and in the words of Coon, "it didn't take very long before Polish Frank developed his first bit of essential information" by ingratiating himself with the customers at the Bowl of Blood.¹⁴⁸ Eventually, Coon reports, "Polish Frank" found out from

¹³⁹ *Id.* at 59.

¹⁴⁰ *Id.* at 60.

¹⁴¹ *Id.* at 62.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 62, 94.

¹⁴⁵ *Id.* at 94.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

the Bowl of Blood bartender that the cap belonged to a relative of Mike Miller.¹⁴⁹ After interviewing the relative, O’Grady and Coon interrogated Miller and, Coon recounts, Miller admitted he had been at the Bowl of Blood with Jan Trybus. And Coon reports that was his breakthrough moment:

From that point on as far as I was concerned, the Schoenberg case increased in interest. We had Jan Trybus identified, yes, but he wasn’t caught yet. He was loose. He had a gun. He was dangerous and clever. What I already knew of him [from the previous prosecutions], and what I subsequently learned, proved it.¹⁵⁰

“We caught him on Friday, October 29,” Coon continues, and ignoring any mention of the mistreatment in O’Grady’s office, he recounts, Trybus “confessed finally, after much malingering.”¹⁵¹

Coon, then, in three short paragraphs, tells of the confessions, reports that Trybus was “ably defended” but was convicted and sentenced to death at Sing Sing because of the “overwhelming” evidence.¹⁵²

Obviously, it is difficult to draw firm conclusions about Coon’s schemata about the justice system at the time of the trial from his recollection three decades later or from an article written for readers of a sensationalist magazine. But the consistency between Coon’s arguments in the litigation and the views he expressed in the article make it possible to fairly assess those schemata. Contrary to Coon’s professed allegiance in his 1925 biographical sketch to the “majesty of the law,” his article portrays a prosecutor who saw his role as crime-solver-in-chief rather than as a public servant weighing whether there was probable cause to charge a crime. In the article, Coon touts his role as leader and coordinator of the investigation from the interviews in the Schoenberg home in the early morning of the attack to the brainstorming with O’Grady to visits to the haberdashers to the interrogation of Miller. But he ignores any reference to O’Grady’s tactics in coercing Trybus’s confessions, Max Schoenberg’s inconsistent versions of the events and his sketchy identification, and the failure of his office to fully investigate the two suspicious men who got off the late train from Buffalo just before the murder.¹⁵³ While it is understandable that Coon wanted to frame his article as true crime, nowhere in

149 *Id.* at 95.

150 *Id.* at 96.

151 *Id.*

152 *Id.*

153 See *supra* note 84 and accompanying text.

it did he once step back and question the reliability of the evidence Grady, the police, and he gathered. Instead, as Coon admits in the article, as soon as he heard Jan Trybus's name, he jumped to the conclusion that he was the culprit.

And the *True* article also reveals how Trybus's ethnicity played a key role in Coon's certainty that Trybus committed the murder. Like the established Batavia community, Coon viewed people through the prism of their ethnicity. As at the trial, the article identifies members of O'Grady's gang in terms of their nationalities except for one individual—"William Ross, American."¹⁵⁴ In his recounting of the investigation of the cap, he consistently referred to O'Grady's investigator as "Polish Frank," not by his surname. And he clearly suggested in the article that the Bowl of Blood was the hang-out for disreputable drunken Poles.¹⁵⁵ So, for Coon, in his single-minded pursuit of the killer without an evaluation of the evidence, who better to assume was the murderer than the "dangerous and clever" Pole who hung out at the Bowl of Blood?

Coon's closing argument's references to immigrants, then, clearly reflect his own schemata about the justice system. For him, the people who lived in Batavia were divided between Americans like William Ross and other individuals who were identified by their nationalities. Some of those Batavians whom he labeled by their ethnicity—the ethnic members of O'Grady's cohorts and Max Schoenberg—were the good immigrants who were becoming integrated into the community. But others, like the disreputable Poles at the Bowl of Blood were a danger to the community. They were the bad immigrants. And, for that reason, he, as the official leader of an investigation of the "horrible murder," was required to engage the services of O'Grady to protect the established community from the "drunken brute."¹⁵⁶ This portrayal of these "disreputable immigrants" from whom Batavia must be protected at all costs belies his purported allegiance to the "majesty of the law."

B. Fredd Dunham

Defense attorney Fredd Hall Dunham was born in 1861 on a farm twenty-two miles south of Batavia.¹⁵⁷ Dunham traced his ancestry back

154 Coon, *supra* note 22, at 94.

155 In his reporting, after learning that two drunken men were seen in the neighborhood of the Schoenberg home the morning of the murder, Coon tells O'Grady that the likely source of the liquor was a saloon for the town's "rougher element," to which O'Grady responds, "I have just the man for such a dive as that *Polish Frank Jawczynski*." *Id.* (emphasis added).

156 Record on Appeal, *supra* note 2, at 963–65 (In his closing argument, Coon defended O'Grady's tactics explaining to the jury that they were necessary to protect the community from Trybus.).

157 Dunham Letter, *supra* note 130, at 1.

to the beginning of English colonization of America. Sometime between 1628 and 1632, his ancestors, Deacon John Dunham, Sr., and Abigail Barlow arrived in Plymouth Colony.¹⁵⁸ They were Separatists fleeing England.¹⁵⁹ Dunham's great-grandfather, Simeon Dunham, was an ensign in the Revolutionary War.¹⁶⁰

After high school in Attica, NY and a stint teaching third grade at a country school, Dunham graduated from Cornell.¹⁶² During that time, Dunham reports in his unpublished autobiographical papers that he basically lived hand-to-mouth.¹⁶³ He then studied law in firms in Batavia and became a member of the bar in 1889, ten years before Coon.¹⁶⁴ Besides practicing law, he served as one of the Justices of the Peace in Batavia for twelve years.¹⁶⁵ As Justice of the Peace, he notarized the application for citizenship of Jacob Schoenberg.¹⁶⁶ Dunham died in 1936 at the age of 75.¹⁶⁷

His unpublished autobiographical papers reflect an intelligent and creative thinker with a deep commitment to civic responsibility.¹⁶⁸ Those papers demonstrate how his ideas about America were influenced to a great degree by the Civil War. He vividly recalled as one of his first memories that—at three-and-a-half years old—all of his family were in tears when they heard of Lincoln's death and recounted the tale of his father returning to the farm from Batavia after viewing Lincoln's funeral train.¹⁶⁹ He related,



Figure 15¹⁶¹

¹⁵⁸ See Fredd Hall Dunham, Family Tree of Fredd Hall Dunham, <https://www.ancestry.com/family-tree/person/tree/52652446/person/222000469933/facts> ("Family Tree") (last visited May 3, 2023); see also *Dunham Family Connections*, http://chazzcreations.com/robert_brewer__dunham_family_history_conections/dunham_family (last visited Mar. 27, 2023).

¹⁵⁹ John Dunham Society, *About John Dunham*, <https://johndunhamsociety.com/about-john-dunham> (last visited Mar. 22, 2023).

¹⁶⁰ *Dunham Family Connections*, *supra* note 158, at 53.

¹⁶¹ See Fredd Hall Dunham, Gallery, <https://www.ancestry.com/family-tree/person/tree/52652446/person/222000469933/gallery?galleryPage=1&tab=0> (last visited May 9, 2024).

¹⁶² Dunham, *Reminiscences*, *supra* note 130, at 1–2; Dunham Letter, *supra* note 130, at 7–8.

¹⁶³ Dunham, *Reminiscences*, *supra* note 130, at 2–4.

¹⁶⁴ *Id.* at 8.

¹⁶⁵ *Id.*

¹⁶⁶ *Immigration Application of Jacob Schoenberg*, *supra* note 13.

¹⁶⁷ *New York, Death Index*, entry for 1852-1956 (2017); see Fredd Hall Dunham, Family Tree of Fredd Hall Dunham, <https://www.ancestry.com/family-tree/person/tree/52652446/person/222000469933/facts> (last visited Mar. 27, 2023).

¹⁶⁸ Dunham Letter, *supra* note 130, at 1.

¹⁶⁹ *Id.*

I have . . . thought that perhaps the fact that my prenatal days, were the early days leading up to our Civil War and the bloody early days of that great war may have made its prenatal impress upon me for my father tells me that Patriotism burned at white heat in those days in our home and that President Lincoln might be preserved along with an undivided Union was the daily and both public prayer of both my father and mother, as well as the subject of all their private devotions.

In fact, mother herself has told me that she spent far more time sewing for the soldiers and “picking lint”, for the wounded in the hospitals, [than] she did in making me baby clothes.”¹⁷⁰

Then, after describing the turbulent years of the Andrew Johnson administration, he continued,

[A]s a child, [I] was impressed by the gravity of the situation and the factional bitterness which developed between sections of the Republican party and which was fostered by the Democratic party and I have later learned how excellent was the counsel of such plain citizens as my Father who sought to still the angry clamor of rabid counselors whose leadership was most dangerous in arousing the passions of our citizens.

* * * * *

Thank God that my excellent father and mother permitted me to get some of this early training which helped me to think and to get some light on the great problems which confronted this nation and which have continued to interest me and which helped greatly later in my education as a citizen's preparation for the work of being an American.¹⁷¹

In Dunham's schema, therefore, the America he sought should be led by cool-headed leaders, like Lincoln, who would refrain from playing on the passions of the public and who would try to unite the country. Even from an early age, he believed that patriotism meant working hard to address the problems of the nation. As an example of those values, in 1904, Dunham received a handwritten letter from Booker T. Washington thanking him for a donation to the Tuskegee Institute.¹⁷²

Dunham's heroes were “plain” people like his father “who sought to still the angry clamor of rabid counselors.” This same modest sense pervaded his schema about his practice of law. In a piece for his sixty-fifth birthday, he reflected on his legal career, “I doubt if many offices have settled more matters than mine has. I know of some lawyers who have

170 *Id.*

171 *Id.* at 2.

172 Telephone conversation with David States, the grandson of Fredd Dunham (July 1, 2021) (notes on file with author).

lost more suits, and some that have won more suits.”¹⁷³ Dunham took real pride in his service as Justice of the Peace, Acting City Judge, and United States Commissioner, but even in his recounting of this work, he was self-effacing:

During the many many cases in which I have presided as a Magistrate, Acting City Judge or Commissioner, I frankly admit I have made errors. Some of them serious, many of them trifling: Some disclosed to the public view. Some never discovered: Thank heaven for that. . . .¹⁷⁴

In contrast, then, to Coon’s self-laudatory description of his career as an unsurpassed lawyer, in his papers, Dunham describes his career in the legal profession with great humility. Unlike Coon, he did not revert to high-blown platitudes about the “majesty of the law,” boast of his accomplishments in practice, or ignore the errors he made in his career. Instead, he seemed to take satisfaction in the fact that he settled more cases than other lawyers in the community and that he provided service to the community. And, in fact, he appeared quite pleased in retrospect that his career was not the same as Coon’s when he wrote,

One of the best things that ever happened to me was when I failed to be nominated for District Attorney and it was probably also a good thing for Genesee County as well. At least I never knew of anyone having any large measure of grief, and I guess I was about the only fellow in the County who was disappointed.¹⁷⁵

This review of Dunham’s schemata about the citizen’s role in American society and the practice of law reveals some of the underpinning of his closing argument in the Trybus case. Perhaps because of his family’s heritage, but certainly because of the impact of the Civil War on his early life, Dunham strongly believed in an America where the community was united and not susceptible to the whims of popular rancor. For that reason, he asked the jurors to consider Trybus as a human being, not a “drunken brute,” as a “boy” who was homeless and friendless and whose family was caught up in that far away, awful war in Europe. Indeed, he entreated the jury, in Lincoln-esque language, that they should treat the case “as [if] the life of one of your boys or your brothers . . . was at stake.”¹⁷⁶ Consistent with Dunham’s schemata about the justice system,

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¹⁷³ Dunham, *Reminiscences*, *supra* note 130, at 6.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ See *supra* note 123 and accompanying text.

while Trybus was a new immigrant in the community, the jury should treat him with dignity.

Moreover, Dunham's excoriation of Coon in his brief to the Court of Appeals clearly reflects his view of the dangers of "rabid counselors" who dangerously arouse the passions of the citizenry. In that brief, Dunham portrayed Coon as someone so "carried away by his zeal and by his desire to succeed in obtaining a conviction" that he deliberately took advantage of Trybus's helplessness, "on account of his foreign birth" to ride rough shod of law.¹⁷⁷ Dunham's disdain for Coon's "contemptuous" disregard of the rule of law to win a conviction reflects his own schema of shying away from grandstanding in the practice of law.

While it can be argued that Dunham was merely employing this rhetoric before the jury and the Court of Appeals as good advocacy for his client, his work on the case after the Court of Appeals affirmed the conviction belies that notion. These efforts demonstrate that his arguments reflected values deeper than effective litigation strategy. After the Court of Appeals affirmed Trybus's conviction, Dunham, without any compensation, tried without success to locate Trybus's relatives in Europe to provide support for him. Similarly, he tried unsuccessfully to recruit a humanitarian organization to help in averting the execution. He obtained a petition of eight of the twelve jurors to support his commutation petition and solicited a supporting letter from the Counsel-General of Austria-Hungary.¹⁷⁸ Clearly, these efforts were beyond the call of duty for Dunham. For him, apparently, he was following the lessons he learned from his parents.

Perhaps, though, Dunham did eventually have some vindication against Coon for his tactics in the Trybus case. While no direct evidence appears in the archives, it appears that Dunham and James Kelly, Mike Miller's lawyer, might have played a role in ousting Coon as a candidate of the Republican Party for district attorney in 1916. It appears from news reports at the time that both Dunham and Kelly were leaders in the Republican Party in Genesee County.¹⁷⁹ Less than a month after the execution of Jan Trybus, in the September 1916, Republican primary, Kelly defeated Coon for the Republican nomination for district attorney and went on to succeed him.¹⁸⁰

¹⁷⁷ See *supra* note 124 and accompanying text.

¹⁷⁸ *Intoxicated at the Time, Trybus Plea*, THE DAILY NEWS (Batavia, N.Y.), Aug. 11, 1916, at 1; see *supra* notes 93–95 and accompanying text.

¹⁷⁹ See *College League Men Organized*, THE DAILY NEWS (Batavia, N.Y.), Oct. 24, 1916, at 6 (announcing Dunham's efforts as President of an organization to elect Charles Evans Hughes, the Republican candidate for President); *Mr. Coon Lauds Candidate Kelly*, THE DAILY NEWS (Batavia, N.Y.), Sept. 21, 1916, at 7 (Coon's concession letter describing Kelly's support from the Genesee County Republican Committee).

¹⁸⁰ *Kelly Defeated Coon for the District Attorneyship*, THE DAILY NEWS (Batavia, N.Y.), Sept. 20, 1916, at 1.

Conclusion

This article has provided a model for scholars in the field of Applied Legal Storytelling to unpack the backstory of cases. By researching archival materials regarding the surrounding community, the parties to the case, the cultural milieu, and the schemata of the opposing attorneys about themselves and the justice system, I was able to gain deeper insights into the anatomy of the Trybus case than a mere review of the case record or Court of Appeals decision. These historical insights provided me with added perspectives on how I need to reflect on issues such as cultural context, opponent's schemata, and the character of parties in developing stories in my current cases. Hopefully, other scholars and practitioners will follow this model of mining the historical record to gain deeper insights into the development of case narratives.

* * * * *

On a personal note, through the research of the trial record and other archival material, my story of the murder of Jacob Schoenberg—my Zayde—has been transformed.

When I was a child, in my imagination, I saw this forbidding, faceless tall man enter my Zayde's bedroom and bludgeon him to death. My father told me the motive was money and that a national publication had visited the Schoenberg home immediately after the murder and described my great-grandmother—my Bubbe—laying on the floor hysterical in tears. I still have those images in my mind. They comport with the story told to the jurors by Coon at the trial.

But, when I began teaching Evidence as a law professor, I sought to dig deeper into the case, and my story changed. I read the Court of Appeals decision affirming Trybus's conviction and then sat down with the record in the case. The first issue that caught my eye was the purported identification of Trybus by Max Schoenberg—my Uncle Max—primarily by the sound of his voice. At that point, I had found a wonderful hypothetical that I could use in teaching the personal knowledge rules of Federal Rule of Evidence 602. Every semester since then, I capture the attention of my students in telling the tale of the murder and each term, students have different assessments of the reliability of Uncle Max's identification. In this teaching moment, my story was quite abstracted from my family history and became an academic exercise.

Then, when I started work on this project, I sought to answer the question whether the evidence at trial supported the conviction, and my story again was transformed. Like any trial attorney, I read the trial transcript closely and assessed the evidence. I discovered that Trybus's

multiple confessions were superficially strong evidence of guilt. Since it was undisputed that Mike Miller and he were at the Bowl of Blood that night and became quite intoxicated, the story told by Coon, at first blush, seemed solid. But then I turned to the photographic evidence and started to identify holes in that story.¹⁸¹ How could a stone drunk man, even with the help of an accomplice, wriggle his way holding an iron bar and gun through the window when part of the bed's headboard blocked it? Why did he kill Schoenberg when he moved around in bed instead of simply asking for the money? After Max had previously told the police that the voice could have been from an Italian or a Pole, how could he be so certain that Trybus was the perpetrator? And then, of course, there were O'Grady's tactics to coerce the confessions and the publicity-stunt perp walk that calls into question any of Trybus's statements to the family. Additionally, the language of the confessions seemed to reflect a degree of literacy that would not be possible for an immigrant like Trybus.¹⁸²

By the end of this assessment of the evidence, in my schema as a lawyer, I was simply unsure whether Trybus had committed the murder.

But my deep dive into the case had a surprising outcome. I no longer was convinced one way or the other that Trybus committed the murder, nor was I focused on the technical evidentiary issues that I have used in my teaching. Rather, I became very interested in the stories told by the attorneys, especially Fredd Dunham. Perhaps because of the civil rights litigation which I have practiced on behalf of immigrant communities, I was deeply impressed that a lawyer over a century ago could expend the time and effort to defend a friendless and deeply flawed man who had no friend in the community or relative to call upon. But something in Dunham's values as an American compelled him to zealously give Jan Trybus the representation he deserved.

Perhaps because, unlike my Bubbe and Zayde, I am no longer an integrated outsider, but am an integrated insider in America, my schemata in writing this article have focused not on my Jewish immigrant ancestors but on a lawyer with a Yankee heritage who tried to live by the values of Lincoln.

Fredd Dunham concluded his *Reminiscences* writing,

¹⁸¹ See *supra* Figures 9 and 11.

¹⁸² An expert in Forensic Linguistics, Robert Leonard, has reviewed the transcript of Max Schoenberg's testimony about the voice identification of Trybus. In his opinion, while a century later it is hard to gauge whether Max Schoenberg knew the difference between a Pole and an Italian, certainly he would have known the person did not sound like a Yiddish speaker. But, especially given the stressful circumstances and limited conversation with Trybus, he likely would not have recognized the person as anyone but someone outside of his Yiddish-speaking community unless he recognized that the voice belonged to someone he knew. Leonard notes that research shows that voice identification is difficult except with voices a witness knows well. Email from Robert Leonard to Stefan Krieger (Apr. 28, 2023) (on file with author).

I do not believe that [the] world has much regard for a lawyer unless he succeeds, and the price of that success is sometimes pretty high. It is my honest conviction that none of my fellow lawyers can ever conscientiously call me a great lawyer. It is my hope that some of them would be willing to concede that I have tried with varying success to give honest advice to clients who sought my services.¹⁸³

At least to me, Dunham is the hero of this story. After reading the case record, I had doubts about the guilt or innocence of Jan Trybus; I still do. But I have no doubt Fredd Dunham's lawyering in the Trybus case was a model for me to follow.

¹⁸³ Dunham, *Reminiscences*, *supra* note 130, at 5–6.