BRIEF CASES

Affording innocence

BY HARVEY SILVERGLATE

Question: what do film director John Landis, former secretary of Labor Raymond J. Donovan, former Boston tax assessor and Kevin White fundraiser Theodore V. Anzalone, onetime automobile magnate John Z. DeLorean, and the late Roy Cohn have in common?

Answer: all endured lengthy and expensive criminal investigations and prosecutions, and all were eventually declared not guilty by their respective juries. In each case, commentators — jurors, lawyers, reporters — questioned the reasons the accused were indicted in the first place. The 12 jurors in the recently completed Donovan fraud trial, in New York, deliberated a mere 10 hours over two days before returning unanimous not-guilty verdicts on the total of 100 charges brought against Ronald Reagan's former secretary of Labor and his seven codefendants. This quick and clean conclusion belied, however, the defendants' ordeal. A brief review of the case demonstrates that only the hardiest — and richest — individuals could have weathered such a storm.

The trial itself lasted eight months and was described by even the staid *New York Times* (which, as the nation's newspaper of record, is accustomed to reporting on slow-moving and dry legal contests in excruciating detail) as a "trial of often unbearable tedium." The trial was preceded by a couple of years of legal wrangling, during which time Donovan's lawyer tried to get the Bronx County trial judge to dismiss the charges on the grounds that there simply was no evidence of criminal fraud. Perhaps reluctant to take so bold a step in so high-profile a case — Donovan was, after all, the first sitting Cabinet officer to be indicted in United States history — the judge refused, and he ordered the case to go to trial. Donovan and his codefendants, it was reported, spent some $13 million defending themselves against charges many believe should never have been brought. Donovan also had to resign from his Labor post; he claims, too, that the trial cost him his business and his reputation.

The Donovan case raises, of course, all the old questions about what should be done when a prosecutor who is ambitious, or who holds political views and allegiances contrary to the defendant's (as Bronx District

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Donovan: what if he hadn't been wealthy?

millions for his defense?

The question is more than just theoretical. Here in Boston, where my law firm was deeply involved in defending a number of people caught up in the US Attorney's probe of the Kevin White political machine and those who dealt with it, I heard on many occasions that one or another defendant had decided to throw in the towel and plead guilty because he simply could not afford the costs of an adequate defense. I therefore naturally took with more than a grain of salt the boasts by the Public Corruption Unit of the US Attorney's office, made throughout the course of the probe, that there were only two acquittals out of dozens of people charged in the Boston City Hall probe (the acquittals being my client Theodore Anzalone and former state senator Vincent Piro). Nearly all of the others pleaded guilty.

The really interesting question is whether any of those who pleaded guilty were arguably not guilty but could not afford the hundreds of thousands of dollars needed to mount a defense. Local scuttlebutt had Piro paying his lawyers (talented defense lawyer R. Robert Popeo and his team at the large downtown firm where he is a named partner) some $600,000. Anzalone has revealed in interviews — which is why I can say it here — that his defense cost some quarter of a million dollars, leaving him deeply in debt, but that he would have been in even more trouble had he paid "full freight" (he was given a discount toward the end) and had his lawyers not allowed him to spread out payment over a period of

the wealthy have a fighting chance, is new. The answer is, yes and no.

No, it's not exactly new; since the early days of our legal system, it's been true that those with money have generally been able to attract the best legal talent and support staff, such as investigators and expert witnesses. The legal system, in this respect, has always been kinder to the rich, or even the moderately well-to-do, than to the poor. (Notable exceptions have been the kinds of "political" trials wherein needy defendants have had the good fortune to get the best legal talent on their side because of the lawyers' sympathy for the client's cause or the civil-liberties implications of the case.)

What is unprecedented is the "megatrial" of today — the lengthy, expensive trials, occurring with more and more frequency of late, that tax the resources of even the well-heeled. Today's prosecutors have more resources than ever before; at this point in our history, it is fair to say that only a person of substantial wealth can pay for and mount a topnotch legal defense against a well-financed, politically ambitious, and highly motivated prosecutor.

Even if a defendant is acquitted the first time, a truly vindictive prosecutor can almost always squeeze a second charge out of the voluminous evidence collected by the small army of federal investigators at his beck and call. Was anyone really surprised when, in the aftermath of DeLorean's startling acquittal on cocaine-trafficking charges, the Justice Department brought another set of indictments, this time alleging financial fraud? DeLorean, a wealthy and persistent man who was well represented by scrappy California defense lawyer Howard Weitzman, was acquitted on both occasions. Anzalone had two trials and was vindicated both times. Perhaps the record in modern history was set by the late and not terribly lamented Roy Cohn, who was thrice indicted on fraud charges by then US attorney Robert Morgenthau in what was widely perceived as a political vendetta. Cohn was acquitted at each trial.

All of these defendants, under enormous financial and emotional pressures, chose to fight rather than to plead guilty and switch. (Becoming an informant is part of the normal price one pays these days for making a deal with the prosecutor.) What has brought about this increasingly high price for seeking vindication — a price so high that seeking a deal is the more viable alternative for many?

One factor has surely been the enormous resources that prosecutors are currently able to throw into a single investigation and prosecution. Under Attorney General Edwin Meese and his predecessor, William French Smith, the number of lawyers in US Attorney's offices around the country has increased severalfold. The number of supporting investigatory agents from the FBI, the IRS, and the Bureau of Alcohol, Tobacco, and Firearms has seen a substantial increase as well. Although state prosecutors here and elsewhere have not been able to muster resources quite this massive, and

what lawyers call a "stretch indictment" in order to destroy a political enemy. The Republicans in the Department of Justice have over the past six years brought scores of indictments against Democratic big-city machine politicians — many of them warranted, but some of them clearly stretches. It surely came as no surprise, then, when the Democratic machine attempted to strike back.

Yet another disturbing question arises: how can criminal defendants, the innocent and the guilty alike, in high-profile cases where the prosecution has spent millions of dollars investigating and preparing possibly be expected to finance an adequate, much less an equally meticulous, defense?

Donovan, as it happened, had the financial resources to defend himself. But what if he had not spent a good deal of his life accumulating capital? What if he were just an ordinary wretch, or even an important public figure who worked in a less lucrative field and so did not have

More recently than either the Anzalone or Donovan case, John Landis, director of one segment of the *Twilight Zone* movie, and four of his associates in making the movie were acquitted of involuntary-manslaughter charges by a jury in Los Angeles Superior Court. That prosecution grew out of the movie-set deaths, nearly five years ago, of actor Victor Morrow and two children, killed when a helicopter in a battle scene crashed. The jury, after hearing evidence for 10 months, deliberated for nine days before returning the acquittal. The forewoman of the jury said after announcing the verdict, "This was all an unforeseeable accident, and you don't prosecute people for unforeseeable accidents." Yet the district attorney did bring such a prosecution, and the case droned on for five years after the disaster.

In terms of time and money, these three cases surely would have broken people with lesser reserves of endurance and cash. One has to ask whether this phenomenon of lengthy and complex trials, where only

criminality rather than stretch prosecutions, even they have managed to emulate their federal counterparts in high-profile cases. (How many real criminals might Mario Merola have pursued with the manpower thrown into the case against Donovan?)

In addition to added prosecutorial resources, new laws are responsible for some of the megaprosecutions of recent years. A rash of new statutes that complicate criminal prosecutions has been passed in the past two decades; in addition, a host of court decisions have stretched, distorted, and made vague other laws that have long been on the books. The federal racketeering or RICO law (an acronym for Racketeer-Influenced and Corrupt Organizations) and the Continuing Criminal Enterprise statute are examples of new laws that have enormously complicated both the prosecution and the defense of criminal cases. Because these laws, to a large extent, charge defendants not with having committed a

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particular criminal act but with having attained a certain criminal status, they result in investigations and prosecutions that are inherently complex. A large amount of evidence is needed to make the case. The indictments themselves are long and complex, often running more than a hundred pages and containing dozens or even scores of charges, or counts. Trials running to several months are no longer considered unusual.

The recently completed racketeering trial here of Gennaro Angiulo and other members of the Boston Mafia is a case in point. The evidence was gathered through a substantial expenditure of law-enforcement resources over a period of years. The trial itself dragged on for the better part of a year, after more than a year of pretrial legal skirmishing. US District Judge David S. Nelson had to be relieved of most of his other judicial obligations so that he could pay attention to the Angiulo case, depriving the overworked bench of the badly needed services of one of its members.

Yet those familiar with the evidence in the Angiulo case point out that the government had, in its wiretap evidence alone, proof of dozens of individual crimes, some of them easily serious enough to have put the defendants away for life — for even longer than the racketeering sentences ultimately imposed by Nelson. Had these defendants been tried simply for the crimes they'd committed, instead of for being "racketeers," the case likely would have taken less than a month. Indeed, some of the individual crimes (such as loansharking or murder) that formed a mere backdrop in the Angiulo case probably could have been tried in a week or two

Force has sought to justify its complex and time-consuming strategy for going after the Angiulo defendants by claiming that such trials serve an important symbolic and public-education role. After all, it is true that for more than a year the Boston dailies ran something about the Mafia nearly every day, frequently on their front pages.

Yet you've got to ask wonder what happens when an ordinary citizen, rather than someone with Angiulo's wealth, becomes the object of a Justice Department passion play. Who is to foot the bill for the lead actors and actresses, involuntarily drafted as they are into their starring roles? And what about those who turn out to be innocent, or who should never have been charged in the first place? Indeed, is it still possible, as a practical matter, for an innocent citizen thrust into such a nightmare to prove his or her innocence?

Congress should get back to passing criminal statutes that ordinary citizens, including defendants and jurors, can understand. Judges should insist that indictments be brief and to the point; those that run on for scores of pages should be thrown out. (The late Federal District Court judge Charles E. Wyzanski Jr. made a practice of forcing a prosecutor to choose one or two "representative charges" in a long and complex indictment. The other, "surplus" charges were routinely dismissed.) If a prosecutor cannot state in just a few pages what crime the defendant is alleged to have committed, and if he or she cannot prove the case in a month-long trial, then it is likely that either the defendant did not do anything really criminal or the prosecutor is out to harass and bankrupt the defendant rather than to do justice. □