

—CHAPTER SEVEN—

## THE TRIAL OF THE CENTURY

WEDNESDAY WAS the hottest day of the trial, or so it seemed to many inside the courthouse. One observer called it “the worst day of all,” and complained of “the crowd filling the court rooms so that a breath of air through the windows was almost impossible.”<sup>1</sup> Only the renewed cordiality among participants made it tolerable. When prosecutor Ben McKenzie appeared on the verge of collapsing from the heat again, Malone rushed over to fan him. During the noon recess, two young prosecutors, Wallace Haggard and William Bryan, Jr., went swimming with the defendant in a mountain pond. “The water was cool and clear,” Scopes later recalled. “We temporarily forgot the trial and everything; as a result we were late returning to the courtroom.” When they finally showed up, Scopes could barely squeeze through the packed aisles to the defense table. “Where the hell have you been?” thundered Hays, but no one else appeared to notice the defendant’s absence.<sup>2</sup>

Prosecutors had too much trouble locating their own witnesses—schoolboys lost in a sea of adults—to worry about Scopes, and by the time they found them they had lost their chairs to spectators. Ben

McKenzie called on the unknown culprits to return the chairs: "We are a necessary evil in the courtroom," he protested.

When the prosecutors and their witnesses were finally in place, the court recalled the jurors and directed each side to make its opening statement. Stewart earlier predicted that his case would take "about an hour," and kept to that pace by delivering a two-sentence opening statement.<sup>3</sup> Scopes violated the antievolution law by teaching that "mankind is descended from a lower order of animals," the prosecutor simply declared. "Therefore, he has taught a theory which denies the story of divine creation of man as taught in the Bible."<sup>4</sup>

Defense counsel estimated that their experts, if permitted to testify, would talk for weeks, and accordingly countered with an extended, carefully crafted opening statement. "We will prove that whether this statute be constitutional or unconstitutional the Defendant Scopes did not and could not violate it," Malone read from a typed script. "We will show by the testimony of men learned in science and theology that there are millions of people who believe in evolution and in the story of creation as set forth in the Bible and who find no conflict between the two. The defense maintains that this is a matter of faith and interpretation, which each individual must determine for himself." "[S]o that there shall be no mistake," he noted, "the defense believes that there is a direct conflict between the theory of evolution and the theories of creation as set forth in the Book of Genesis," but this simply represented the *opinion* of counsel. "While the defense thinks there is a conflict between evolution and the Old Testament, we believe there is no conflict between evolution and Christianity." Among the defense lawyers, only Malone could have read this line with conviction; it did reflect the beliefs of their modernist Christian expert witnesses, however. Malone suggested succinctly three different views on the relationship between the Bible and evolution: complete accord, direct conflict, and progressive compatibility. Accepting any one viewpoint constituted a matter of personal religious opinion, he asserted. The prosecution simply could not assume, nor could it prove, that teaching the theory of human evolution denied the biblical account of creation.<sup>5</sup>

Malone directly assailed Bryan. "There might be a conflict between evolution and the peculiar ideas of Christianity which are held by Mr. Bryan as the evangelical leader of the prosecution, but we deny that the evangelical leader of the prosecution is an authorized spokesman for the

Christians of the United States," Malone explained. To emphasize the transitory nature of religious opinion, he quoted from a twenty-year-old article in which Bryan endorsed Thomas Jefferson's Statute of Religious Freedom in language that seemingly repudiated laws—such as the antievolution statute—that coerced or promoted religious belief. "The defense appeals from the fundamentalist Bryan of today to the modernist Bryan of yesterday," Malone declared. The repeated references to Bryan finally drew an objection from Stewart, but the Commoner waved him off. "I ask no protection from the court," Bryan asserted, "and when the proper time comes I shall be able to show the gentlemen that I stand today just as I did, but that this has nothing to do with the case at bar."<sup>6</sup> After waiting days for their Peerless Leader to speak in court, the local spectators erupted. "They stamped. They whistled, they cheered with their lungs. They applauded with their hands," one reporter observed. "Bryan had won. His simple eloquence had confounded the sophistry of his enemies."<sup>7</sup> Watching this demonstration, Mencken observed, "Bryan is no longer thought of as a politician and jobseeker in these Godly regions, but has become converted into a great sacerdotal figure, half man and half archangel—in brief, a sort of fundamentalist pope."<sup>8</sup>

After order was restored and Malone finished reading his opening statement, the prosecution expeditiously presented its case. Stewart called four witnesses. Superintendent White led off by testifying that Scopes had admitted teaching about the theory of human evolution from Hunter's *Civic Biology* when conducting a review session for a high school biology class. Stewart identified offending paragraphs from the textbook, which sounded harmless enough when Darrow read them into the record during cross-examination. Darrow also had White confirm that the state textbook commission had officially adopted the text for use in Tennessee public schools. The only clash occurred when Stewart asked White to identify the King James version of the Bible, and offered it as evidence "of what the act relates to when it says 'Bible.'" Seizing an opportunity to emphasize differences in biblical interpretation, Hays immediately objected on the grounds that dozens of differing versions of the Bible existed. "This is a criminal statute and should be strictly construed. There is nothing in the statute that shows [teachers] should be controlled in their teaching by the King James version," he declared. In Protestant East Tennessee, how-

ever, this version was the Bible—or so Judge Raulston stated in overruling the objection.<sup>9</sup>

Two high school students followed White to the witness stand. The first, Howard Morgan, a wide-eyed freshman from Scopes's general science course, testified that the defendant once discussed human evolution in class. "Well, did he tell you anything else that was wicked?" Darrow asked on cross-examination. Even Bryan cracked a smile as Morgan answered, "No, not that I remember."<sup>10</sup> Everyone laughed when the boy, who had twisted his tie under his ear and popped the top button of his shirt, assured Darrow he was not hurt by what he learned from Scopes. A sullen senior named Harry Shelton next confirmed that Scopes conducted a biology review session using Hunter's textbook. In his cross-examination, Darrow drew out that Shelton had remained a church member despite attending the class. Instruction in human evolution hardly seemed harmful to these students.

Finally, Frank Robinson took the stand. He testified that Scopes himself admitted that "any teacher in the state who was teaching Hunter's Biology was violating the law." On cross-examination, Darrow asked him about this textbook. "You were selling them, were you not?" and "You were a member of the school board?" Spectators began to laugh as they caught Darrow's drift, and broke out again when he cautioned the witness, as if advising a bootlegger, "You are not bound to answer these questions." Stewart could only joke back, "The law says teach, not sell."<sup>11</sup> Darrow was having too much fun at the prosecution's expense. Stewart decided against calling further witnesses. He simply stated that others were prepared to offer similar testimony and rested the state's case less than an hour after it began.

With the afternoon drawing to a close, Darrow called the defense's first witness, the zoologist Maynard M. Metcalf. Stewart interrupted to remind Darrow, "We have a rule in this state that precludes the defendant from taking the stand if he does not take the stand first." Darrow turned to the judge, "Your honor, every single word that was said against this defendant, everything was true." Scopes would not testify, Darrow declared.<sup>12</sup> Rather than deny what Scopes had done, the defense would seek to show that his actions did not violate the law—and this required expert testimony about the theory of evolution and the Bible. "So I sat speechless, a ringside observer at my own trial, until the end of the circus," Scopes later commented. "Darrow realized that I

was not a [biology] teacher and he was afraid that if I were put on the stand I would be asked if I actually taught biology," he added. "Although I knew something of science in general, it would be quite another matter to deal exhaustively with scientific questions on the witness stand."<sup>3</sup>

A 57-year-old senior scientist, Metcalf represented the logical choice as the first, and perhaps only, witness for the defense. He had graduated from Oberlin College when it still had strong evangelical Protestant ties, and returned to that college after earning a doctorate in zoology from one of the nation's leading research institutions, Johns Hopkins University. Gaining a solid reputation as a researcher and teacher, Metcalf served as an officer in several professional associations. He moved on to Washington during the First World War as chief of the biology and agriculture division of the National Research Council, and afterward became a senior researcher at Johns Hopkins. Metcalf remained active in the church throughout his career and taught the college-age Sunday school class at modernist Congregational churches in Oberlin and Baltimore; now he would try to teach the court and the country about the theory of evolution and its compatibility with Christianity.

After establishing Metcalf's credentials, Darrow asked him, "Will you state what evolution is, in regard to the origin of man?" Stewart jumped up on this cue. "We except to that," he interjected. "We are excepting to everything here that pertains to evolution or to anything that tends to show that there might be or might not be a conflict between the story of divine creation and evolution."<sup>4</sup> The prosecution maintained that the statute outlawed any teaching about human evolution regardless of what evolution meant or whether it conflicted with the Bible. This position rendered evidence on those questions irrelevant. The defense countered that the law only barred instruction in evolution that denied the biblical account of creation, and therefore such evidence was relevant. Indeed, it constituted the defense's entire case. The judge decides questions regarding the admissibility of evidence, so the jurors again left the room, less than two hours after they entered it, and remained out for the rest of the week. The judge would hear Metcalf's testimony that afternoon. The two sides then would argue the question of its admissibility on Thursday. Even if the court excluded expert testimony, the defense still could submit evidence into the record for appeal.

"Then began one of the clearest, most succinct and withal most eloquent presentations of the case for the evolutionists that I have ever heard," Mencken wrote of Metcalf's testimony. "Darrow steered [Metcalf] magnificently. A word or two and he was howling down the wind. Another and he hauled up to discharge a broadside."<sup>15</sup> Darrow asked Metcalf to explain the theory of evolution, assess its status among scientists, and discuss its relationship to the biblical account of creation. "Evolution and the theory of evolution are fundamentally different. The fact of evolution is a thing that is perfectly and absolutely clear," the professor began. "But there are many points—theoretical points as to the methods by which evolution has been brought about—that we are not yet in possession of scientific knowledge to answer. We are in possession of scientific knowledge to answer directly and fully the question: 'Has evolution occurred?'"<sup>16</sup> Metcalf proceeded to relate technical evidence for evolution and affirm its universal acceptance among biologists, but never got around to the Bible before time for adjournment. The prosecutors silently listened to the detailed testimony. Raulston appeared sincerely interested. The audience thinned noticeably, however, with one departed spectator muttering, "He is about as authoritative as the evening breeze." After court adjourned for the day, Bryan affably handed Darrow a tiny wooden monkey as a memento of the case.<sup>17</sup> One day of cordial relations had netted substantial progress.

Thursday thrust the participants back into conflict, as nearly every lawyer in the case interjected his views on the thorny question of expert testimony. Speakers stayed pretty much on point during the morning. So weakened by the heat that he could barely speak above a whisper, William Bryan, Jr., opened for the state and, drawing on his experience as a federal prosecutor, precisely laid out the strict, nationally accepted rules that then governed the admissibility of expert evidence. "This young lawyer is not the orator his father is," one observer noted. "But he seems to have a liking for matters of fact which distinguishes him from his father. He read citation after citation of dry cases with apparent pleasure."<sup>18</sup> As young Bryan correctly concluded to the court from these cases, if the statute simply barred teaching evolution, then "to permit an expert to testify upon this issue would be to substitute trial by experts for trial by jury, and to announce to the world your honor's belief that this jury is too stupid to determine a simple question of fact."<sup>19</sup>

Hays responded by stressing the defense's interpretation of the statute. "Oh, no, the law says that [a guilty teacher] must teach a theory that denies the story as stated in the Bible. Are we able to say what is stated in the Bible? Or is it a matter of words literally interpreted?" The same evidence rules cited by the younger Bryan, under Hays's view of the statute, became arguments for admitting expert testimony from scientists and theologians. Hays concluded by reminding Raulston of the broad issues at stake. "The eyes of the country, in fact of the world, are upon you here," he pleaded. "This is not a case where the sole fact at issue is whether or not Mr. Scopes taught evolution."<sup>20</sup>

Daytonians originally welcomed a broad test of the antievolution statute; now they shunned it. "This is a court of law, it is not a court of instruction for the mass of humanity at large," Herbert Hicks told the judge. Ben McKenzie seconded this remark in his own colorful fashion. "We have done crossed the Rubicon. Your honor has held that the act was reasonable," he proclaimed. "That never left anything on the face of the earth to determine, except as to the guilt or innocence of the defendant." Displaying a fundamentalist suspicion of academic theologians, both prosecutors also questioned the need for expert testimony to interpret scripture even under Hays's view of the statute. "Why should these experts know anything more about the Bible than some of the jurors?" Hicks asked. Amid shouts of "amen" from local spectators, McKenzie maintained that the Genesis account "is a much more reasonable story to me than that God threw a substance into the sea and said, 'In sixty thousand years, I'll make something out of you.'" When Hays challenged this, McKenzie asked him, "Do you believe the story of divine creation?" Hays retreated with the words, "That is none of your business."<sup>21</sup> Yet primary responsibility for answering Hays fell to the elder Bryan; Malone and Stewart would close. The hour approached noon however, and rather than risk interrupting the Commoner's oratory, Raulston adjourned early for lunch. During the extended recess, workers finally installed ceiling fans in the courtroom.

"Word that the great Bryan was to speak made the courthouse a magnet, and long before the time set for the afternoon session of the Scopes trial the crowds filled the courtroom," Philip Kinsley reported for the *Chicago Tribune*. "Out under the cottonwoods, in a much cooler situation, the greater crowds gathered to hear the story from the brazen mouths of the loud speakers. The whole town was one great

sounding board of oratory."<sup>22</sup> No one left disappointed. Bryan was brilliant; Malone more so. Stewart stopped the show. The judge tried to avert outbursts by warning spectators at the outset, "The floor on which we are now assembled is burdened under great weight . . . so I suggest to you to be as quiet in the courthouse as you can; have no more emotion than you can avoid; especially have no applause."<sup>23</sup> No mere threat of physical catastrophe, however, could still the emotions unleashed that afternoon. As Darrow inserted at this point in his autobiographical account of the trial, "All in all, that was a summer for the gods!"<sup>24</sup>

Bryan began and ended talking about expert witnesses but in between soared into an hour-long assault against teaching evolution. "Your honor, it isn't proper to bring experts in here to try to defeat the purpose of the people of this state by trying to show that this thing that they denounce and outlaw is a beautiful thing," he began. And the people denounce it because it undermines morality, Bryan asserted. "This is that book!" he exclaimed, holding aloft Hunter's *Civic Biology*. "There is the book they were teaching your children that man was a mammal and so indistinguishable among the mammals that they leave him there with 3,499 other mammals. Including elephants!" the old Democrat charged in a joking reference to Republicans. "Talk about putting Daniel in the lion's den!" The audience hung on every word, and laughed on cue. "The Christian believes man came from above, but the evolutionist believes he must have come from below," Bryan thundered. He then quoted liberally from Darrow's statements at the Leopold-Loeb trial to argue that Darwinian teaching encouraged selfish, animalistic behavior. "Now, my friends, Mr. Darrow asked Howard Morgan, 'Did it hurt you?'" Bryan observed regarding Scopes's teaching. "Why did he not ask the boy's mother?"<sup>25</sup>

This rhetorical question brought Bryan back to the issue of expert witnesses. "When it comes to Bible experts, do they think that they can bring them in here to instruct members of the jury?" he asked. "The one beauty about the Word of God is, it does not take an expert to understand it." Bryan concluded to great applause, "The facts are simple, the case is plain, and if these gentlemen want to enter upon the field of education work, . . . then convene a mock court for it will deserve the title of mock court if its purpose is to banish from the hearts of people the Word of God as revealed."<sup>26</sup>