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1958

Book Review. Was Justice Done? The Rosenberg-Sobell Case by Malcolm P. Sharp

W. Howard Mann

Indiana University School of Law

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Recommended Citation

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international comity or is influenced by domestic constitutional problems, such as the proper function of courts in matters affecting foreign affairs. This appears from one of the basic distinctions, that between so-called "territorial" and "extraterritorial" confiscations: a "territorial" confiscation acts upon property located within the territory of the confiscating state at the time of the confiscation; an "extraterritorial" confiscation is one of property located outside. As usually stated, the rule is that territorial confiscations will be supported but extraterritorial confiscations will not, on the theory that every state is the sole sovereign over its own territory and is entitled to respect for its acts there. Certainly, this rule is not a necessary legal consequence of the principle of sovereignty, from which it is derived. If the aid of the state of the forum is required to give effect to a territorial confiscation, the sovereignty of that state is as relevant as the sovereignty of the confiscating state. Why should the state of the forum subordinate its sovereignty to the law of the confiscating state? Or, in the case of extraterritorial confiscations, why should the fact of extraterritoriality automatically result in denying effect to the confiscation? Conceivably, the policy of the state of the forum might be otherwise. Territorial confiscations are, in fact, subject to the public policy of the state of the forum, including recognition or nonrecognition by that state of the confiscating state; and extraterritorial confiscations may sometimes be approved by the public policy of the state of the forum, as in the case of the Litvinov Assignment. In short, the answers to the questions in this field are more likely to be found from an analysis of the policies behind the legal rules than from the rules themselves.

The book contains a useful bibliography and table of cases. Unfortunate awkwardness of English usage distracts the reader's attention and occasionally obscures the author's meaning.

ARTHUR R. ALBRECHT†

WAS JUSTICE DONE? THE ROSENBERG-SOBELL CASE. By Malcolm P. Sharp. New York: Monthly Review Press, 1956. Pp. xxxvi, 216. \$3.50.

Was Justice Done was written because the author sensed a grave injustice in the conviction and sentence of Julius and Ethel Rosenberg and Morton Sobell for conspiracy to commit espionage in time of war. When a sensitive legal scholar of Professor Sharp's standing makes serious charges against the workings of the judicial process, the legal profession and those engaged in the critical study of law should be deeply concerned. Sharp expresses his charges against the fairness of the conviction and sentence somewhat obliquely in the "Author's Preface":

"I think that the average intelligent citizen, after considering the facts in this case, will come to doubt the justice of the conviction or at

†Member of the California Bar.

any rate will agree with me that a new trial should have been granted on the evidence disclosed in the last defense motion. If he is at all familiar with legal procedure, he will almost certainly feel that the speed with which the final problems of this serious case were disposed of created a dangerous and unacceptable precedent."¹

He adds: "Further knowledge and reflection might increase one's doubt about the sentence."²

Initially, Sharp was "The Uneasy Spectator."³ The conviction came on April 5, 1951, and was subject to review by one of the strongest courts in the country, the United States Court of Appeals for the Second Circuit.⁴ Study of the record did not seriously shake Professor Sharp's confidence in the verdict, nor did the careful, extensive opinion of the court of appeals.⁵ The report of newly discovered evidence that appeared to attack the credibility of witnesses for the government, which came to his attention in May 1953, caused him to change his position on the fairness of the trial and the validity of the conviction.⁶ Thus, on May 16, 1953, "at the request of the Rosenberg Committee," he made the following public comment:

"The statement in favor of mercy made on behalf of the Church has reinforced the criticisms made by many Americans, of the severity of the Rosenberg sentence.

"Moreover, the report of new evidence must shake the confidence of many who, like me, have been willing to assume that the verdict of 'guilty' was fairly reached. The evidence relates to what may be regarded as details of the prosecution's case. Nevertheless, if defense witnesses establish the identity of the newly discovered table, it will cast serious doubt on the credibility of key witnesses for the prosecution and the fairness of the trial as a whole. If the defense is not given a chance to establish the identity of the table, it will be a denial of justice."⁷

In June 1953, Sharp joined the staff of defense counsel for the Rosenbergs in the last stages of the case.⁸ In working on the various defense motions to secure further review just prior to the defendants' execution, Sharp "had gradually come to believe the Rosenbergs innocent."⁹ He accepted "the origi-

1. Pp. xxxiii-xxxiv.

2. P. 1.

3. C. 1.

4. *United States v. Rosenberg*, 195 F.2d 583 (2d Cir.), *cert. denied*, 344 U.S. 838, 850, 889 (1952).

5. Pp. 9, 11.

6. P. 11.

7. P. 14. The Apostolic Delegate had informed the Department of Justice and the White House of appeals received by the Vatican for intervention in behalf of the Rosenbergs. House Committee on Un-American Activities, *Trial by Treason*, H.R. Doc. No. 206, 85th Cong., 1st Sess. 103-04 (1956).

8. P. 15.

9. Pp. 16, 147.

nal defense theory that there was a conspiracy to commit espionage, but that it did not include the Rosenbergs."¹⁰ To support this thesis, he attempts to discredit the testimony of accomplice witnesses upon which the government based its case.

The testimony and other presentations on behalf of the government supported fully the jury's verdict of "guilty as charged." They show the extensive communist underground activities in transferring atomic and other military secrets to the agent Yakovlev, who held diplomatic immunity.¹¹ The most critical conspiracy was the transmittal during World War II of military secrets concerning the atomic bomb to the Russian agent, Julius Rosenberg—the trial record reveals—somehow secured knowledge of the atomic bomb project and prevailed upon his brother-in-law David Greenglass, who was assigned to the Los Alamos bomb project as a technical sergeant in the United States Army, to secure secret information concerning the experiments.¹² Of four episodes of espionage, the first occurred in November 1944, when Julius secured from David a diagram of the layout of the Los Alamos project, the real names of the leading scientists working there on the atomic bomb experiments and other information.¹³ The second occurred in January 1945, when David provided Julius, at his request, with sketches and a written description of a lens mold experiment, a list of nuclear scientists and a special list of persons at Los Alamos who, as "progressives," might be recruits for espionage work in the communist underground.¹⁴ The third episode occurred in June 1945, when Harry Gold, on courier trip to Santa Fe to obtain secret information from Klaus Fuchs, was directed by Yakovlev to stop by the Greenglass apartment in Albuquerque to obtain information about the high explosive lens mold and the usual list of possible recruits for espionage work. Gold left an envelope with the Greenglasses containing five hundred dollars in bills.¹⁵ The last episode in the atomic bomb conspiracy occurred in September 1945. On this occasion, David, at Julius's request, made sketches and prepared extensive descriptions of a cross section of the post-Hiroshima bomb, which he delivered to Julius for transmittal to Yakovlev.¹⁶ After the news of Klaus Fuchs's confession, Julius directed David to leave the United States with his family; and, upon Harry Gold's arrest in June 1950, Julius paid David five thousand dollars and offered him six thousand more to leave the country immediately.

10. P. 214.

11. Government's Exhibit 15, Transcript of Record, pp. 846-47, United States v. Rosenberg, 195 F.2d 583 (2d Cir. 1952) (citations are to the unofficial printed record of the trial).

12. *Id.* pp. 679-80.

13. Government's Exhibit 1, *id.* pp. 425-27, 680-85.

14. *Id.* pp. 427-29, 440-43, 470-73. This information was so significant that Julius arranged for David to meet with a Russian agent who questioned him at length about the high explosive lens experiments at the Los Alamos project. *Id.* pp. 451-55.

15. *Id.* pp. 444-66, 687-701, 821-29.

16. Pp. 36-38; Government's Exhibit 8, Record, pp. 489-513, 624-28, 910-11.

The Greenglasses were to go to Mexico City and Julius was to arrange transportation to Czechoslovakia.¹⁷

In the second conspiracy, the government's indictment charged Julius Rosenberg with instigation and direction of espionage activities to secure information about classified experiments in warmaking technology.¹⁸ Morton Sobell was one of the coconspirators. On this charge, the government's case rested solely upon the testimony of Max Elitcher, who had been associated with Rosenberg and Sobell in the Young Communist League at City College from 1934 to 1938, and later in Washington.¹⁹ According to Elitcher, Rosenberg solicited secret information from him and confided to him that Sobell and others were aiding Russia by supplying Rosenberg with various military secrets.²⁰ Apart from evidence of his flight to Mexico at the time of David Greenglass's arrest,²¹ Sobell's espionage was constructed from Elitcher's testimony of conversations with him about secret data and of his delivery of classified information to Rosenberg.²²

A criminal trial constitutes one of the most delicate and complex processes of government. As a principal organ of the day by day functioning of the free society, the criminal trial is democracy in action and must function subject to the forces that provide collective animation through the society. The Rosenberg-Sobell trial was subject to several powerful influences: the understandably strong reaction of the American people to revelations of espionage and subversion through the communist party and the communist underground, the intensity of the world-wide struggle with Russia and the war in Korea. Preservation of the essential integrity of the legal processes of the trial was made more difficult by the loose and unco-ordinated form of the conspiracy indictment. Sobell's participation in espionage was virtually unconnected with the other conspiracy to transmit military secrets on the atomic bomb project at Los Alamos. The connection between the two rested on the generalizations that Rosenberg had administered both conspiracies and both were in furtherance of the goals of the same foreign government.²³

17. *Id.* pp. 522-37, 792-98, 1420-24.

18. C. 4.

19. Record, pp. 215-33.

20. *Id.* pp. 232-39.

21. Sobell and his wife were seized and returned to the United States by Mexican security agents. *Id.* pp. 263, 857-67, 927-30, 932-38. The government's case against Sobell was based heavily on flight; Sobell had used bogus names in travelling in Mexico and in communications with persons in the United States, and had planned to continue to South America or Europe as had been outlined by Rosenberg to Greenglass. See also Brief for the Government, pp. 9-11, *United States v. Sobell*, 244 F.2d 520 (2d Cir. 1957), *affirming* 142 F. Supp. 515 (S.D.N.Y. 1956); House Committee on Un-American Activities, *Trial by Treason*, H.R. Doc. No. 206, 85th Cong., 1st Sess. 121 (1956); Davidson, *The First Real Story of the Big Atomic-Bomb Plot*, Look, Oct. 29, 1957, p. 96.

22. Record, pp. 210-63, 350-79.

23. Judge Kaufman instructed the jury that the question for their ultimate determination was whether Sobell was a member of the broad generalized conspiracy "to obtain

Sharp's attack on the Rosenberg-Sobell convictions centers on the accomplice testimony of David and Ruth Greenglass.²⁴ One chapter, titled "The Critics," exemplifies the book's tone; Sharp details with approval the criticisms of Stephen Love of the Chicago Bar and of Harold C. Urey, internationally famous nuclear physicist.²⁵ Mr. Love states that "the story of David Greenglass is so obviously false in so many material respects that he is entitled to no credence."²⁶ He asserts as a generally accepted fact that Greenglass lacked the technical qualifications to prepare sketches and descriptions of the lens mold and the post-Hiroshima bomb and that, even if qualified in 1944 and 1945, he could not possibly have reproduced these in 1950 for use at the trial.²⁷ That Greenglass's work placed him in a position to secure knowledge of the lens mold for detonating the atomic bomb was amply corroborated by the nuclear scientist in charge, who testified that at various times he had given information and sketches to the machinists for guides in construction.²⁸ Whether Greenglass actually made the reproductions offered as government exhibits without the aid of scientists assisting the government in the prosecution of the case—a question of evidence—was challenged neither by defense counsel nor by Judge Kaufman.

Mr. Urey details his criticisms at length.²⁹ While not doubting Greenglass's competence as a machinist to have made the sketches and descriptions, he believes that the Rosenbergs were not necessary parties to the Fuchs-Yakovlev-Gold-Greenglass conspiracy to transmit atomic secrets to the Russians. He concludes that when the Greenglasses were trapped after the confessions of Fuchs and Gold, they implicated the Rosenbergs, with whom they were having financial and personal differences, in order to escape the maximum penalty for the atomic espionage in which they were involved. No direct evidence connected Yakovlev with Rosenberg, and Gold had no contact with Rosenberg. The testimony of the Greenglasses, Urey writes, "contains un-

secret information pertaining to the national defense and then to transmit it to the Union of Soviet Socialist Republics. It is not a conspiracy to obtain information only about the atom bomb. I point that out because the Government contends that Sobell was in the general conspiracy to obtain information of a secret nature . . ." *Id.* pp. 1542, 1560. See Judge Frank's dissent on this point, *United States v. Rosenberg*, 195 F.2d 583, 600-02 (2d Cir. 1952), and the high-level treatment of the conspiracy question in Note, *The Rosenberg Case: Some Reflections on Federal Criminal Law*, 54 COLUM. L. REV. 219, 228-33 (1954).

24. Another basis for attack was the speed with which the district court, the court of appeals, and the Supreme Court denied the Rosenbergs' final motions for a new trial. Pp. xxxiv, 16, 156-67. See also *Rosenberg v. United States*, 346 U.S. 273, 277-83 (1953) (listing of the large number of petitions for collateral attack), and the opinion of Mr. Justice Frankfurter asserting that the issues had been disposed of without adequate deliberation, *id.* at 301-10.

25. C. 7.

26. P. 94.

27. P. 93.

28. Record, pp. 472-75, 479-82. See also Davidson, *supra* note 21, pp. 100-01.

29. Pp. xiii-xxix.

believable statements, that the plausibilities of certain details of their testimony can be explained, that they had powerful motives for involving the Rosenbergs unjustly, and, finally, that all the facts of the atomic espionage can be accounted for without the involvement of the Rosenbergs at all."³⁰ Although Mr. Urey's disbelief in the Greenglasses' testimony is undoubtedly sincere, credibility of witnesses in our judicial system is a matter for determination by the jury and for appellate courts upon review when credibility is entwined with the question of the legal sufficiency of evidence.³¹ Little in Urey's unsupported conjectures causes uneasiness about the jury's verdict.

The principal factor contributing to Professor Sharp's disbelief in the testimony of accomplice witnesses was the later discovery of a console table.³² Greenglass testified about gifts, the table among them, to the Rosenbergs for spy activities.³³ The Rosenbergs testified that the furniture in their apartment was secondhand, with the exception of a small console table which they had purchased at Macy's in 1944 or 1945.³⁴ Ruth Greenglass connected the table with Julius's underground activities:

"I admired the table and I asked Ethel when she bought a new piece of furniture; she said she had not bought it, she had gotten it as a gift . . . and Julius said it was from his friend and it was a special kind of table, and he turned the table on its side to show us why it was so special There was a portion of the table that was hollowed out for a lamp to fit underneath it so that the table could be used for photograph purposes, and he said when he used the table he darkened the room so that there would be no other light and he wouldn't be obvious to anyone looking in."³⁵

Because the table loomed large in the testimony, introduction into evidence of either the large console table described by Mrs. Greenglass or the Macy table described by the Rosenbergs would have been significant. Two years after the conviction and sentence, the defense claimed to have found the Macy table in the apartment of Julius Rosenberg's mother.³⁶ The very report of the discovery in the *National Guardian* during an inspired campaign against the Rosenberg trial and sentence was almost enough to make the honesty of the claim suspect.³⁷ Judge Kaufman considered the question an aspect of

30. P. xvii.

31. Frank, J., in *United States v. Rosenberg*, 195 F.2d 583, 592 (2d Cir. 1952).

32. C. 10.

33. Record, pp. 521-22.

34. *Id.* pp. 1054-55, 1297-98.

35. *Id.* pp. 706-07, 1409-10; p. 119.

36. Pp. 12, 112. The FBI was unable to locate the console table. See Davidson, *supra* note 21, p. 103.

37. See House Committee on Un-American Activities, *Trial by Treason*, H.R. Doc. No. 206, 85th Cong., 1st Sess. 12, 24, 39, 114, 120 (1956); Fiedler, *A Postscript to the Rosenberg Case*, 1 ENCOUNTER 12-13 (1953), reprinted in FIEDLER, AN END TO INNOCENCE 25-26 (1955).

due diligence: defense counsel "had not satisfied the requirement of diligence," since the table had remained in the Rosenberg family for the period of the trial and the two years following.³⁸ In short, the proof required for the objective reader to assess the charges of unreliability against the Greenglasses and their testimony has not been presented. Thus, the Sharp book is an effort to impute to the trial and conviction of the Rosenbergs reflections of legal persecution in the trial and punishment of innocent men as shown by documented studies to have been the consequence of socially-pressured defalcations in the Dreyfuss and Sacco-Vanzetti trials.

The significant factor of the Rosenberg-Sobell trial, for critical study of the workings of the judicial process, is Judge Kaufman's decree of the death penalty.³⁹ The case illustrates the confusion presently surrounding capital punishment as an institution. In *Rosenberg*, each official responsible for making and abiding by the death decree fulfilled his oath of office upon as high a professional and ethical standard as he was capable. The security of the United States was seriously involved in these espionage conspiracies. While the atomic bomb secrets were transmitted during the years 1944 and 1945, the Rosenberg-Sobell-Elitcher conspiracy to commit espionage continued actively into the summer of 1950 and the beginning of the Korean War. In these circumstances, the prosecutor, Mr. Saypol, thought it his "absolute duty" to recommend the maximum penalty allowable by statute, in order to deter those who would aid in the nation's destruction.⁴⁰ Judge Kaufman did not consider the prosecutor's recommendation a basis for the court's decree of the death penalty: "The responsibility is so great that I believe that the court alone should assume this responsibility."⁴¹ Accordingly, he addressed the Rosenbergs:

"What I have to say is not easy for me. I have deliberated for hours, days and nights. I have carefully weighed the evidence. Every nerve, every fibre of my body has been taxed. I am just as human as are the people who have given me the power to impose sentence. I am convinced beyond any doubt of your guilt. I have searched the records—I have searched my conscience—to find some reason for mercy—for it is only human to be merciful and it is natural to try to spare lives. I am convinced, however, that I would violate the solemn and sacred trust that the people of this land have placed in my hands were I to show leniency to the defendants Rosenberg."⁴²

Nevertheless, the death penalty was not appropriate in the circumstances of the case, and the process of sentencing lacked any semblance of a judicial

38. Pp. 152, 156. A practical study would probably show that newly discovered evidence is not of much value to the defense for attacking a conviction based on substantial evidence. See also HISS, *IN THE COURT OF PUBLIC OPINION* 263-86 (1957).

39. See Frank, J., in *United States v. Rosenberg*, 195 F.2d 583, 603-09, 611 (2d Cir. 1952); Black, J., dissenting in *Rosenberg v. United States*, 346 U.S. 273, 300-01 (1953).

40. Record, pp. 1600-03.

41. *Id.* p. 1612.

42. *Id.* p. 1616.

process. The government's case against Ethel Rosenberg was limited to accomplice evidence of her aid to Julius in procuring atomic secrets. This alone did not support the death penalty. Still, the fact that she had not discouraged Julius in his activities in espionage made her, in Judge Kaufman's words, "a full-fledged partner in this crime."⁴³ Capital punishment of Julius Rosenberg also cannot be supported, even though the government's case against him was substantial on the espionage conspiracy relating to communication of the secret technology of the atomic bomb. Legislative delegation of sentencing authority assumes the application of present standards of criminology and presupposes relation of the statutory penalty—euphemistically called "punishment"—to the *mens rea* of the offender. The general policy of the statute was effectively satisfied by breaking up the Rosenbergs' activities and by trial and conviction.⁴⁴ But prosecutor and judge apparently related the death penalty to the policy of the statute as an official act necessary to eradicate communist underground espionage. As a result, the penalty bore no relationship to the individual's responsibility in light of the legislative proscription. A lesser sentence—for example, the alternative maximum penalty of thirty years—might have made the government's case more acceptable to the American and world community.

The shifting sands of international order and the emotions stirred by later events imparted into the trial extraneous considerations, through which the essential fairness and integrity of the sentencing process may be attacked. In recommending the death sentence, Mr. Saypol reminded the court that Judge Learned Hand had moved outside the record to international events to uphold the Smith Act in *United States v. Dennis*.⁴⁵ The government's arguments in support of the death penalty relied on the facts that the Rosenbergs had given their allegiance to the "real enemy" in the war in Korea, had "used methods of espionage which traditionally called for severe punishment" and had "affected the lives, and perhaps the freedom, of whole generations of mankind."⁴⁶ In light of these considerations, there was no room for compassion or mercy. Judge Kaufman described espionage as "a sordid, dirty work . . . with but one paramount theme, the betrayal of one's own country."⁴⁷ In addition to the atomic bomb conspiracy, the Rosenbergs were involved in a second plot continuing until the beginning of the war in Korea. When the

43. *Ibid.*

44. The Espionage Act of June 15, 1917, c. 30, 40 STAT. 217. The prosecutor and Judge Kaufman were disturbed because the statute did not allow the alternative sentence of imprisonment for life instead of "not more than thirty years" or twenty years when espionage was committed not in time of war. Record, pp. 1603, 1613.

45. 183 F.2d 201, 213 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951).

46. Record, pp. 1602-03. Defense counsel thought that Mr. Saypol had "introduced political considerations of a very weighty character" and that the Rosenbergs should be judged by what "they may have intended in 1944 and 1945." *Id.* pp. 1603, 1605-06.

47. *Id.* p. 1613.

conspiracies are lumped together, as they were at trial, the seriousness of the crime is magnified. This was in essence the position of Judge Kaufman. But the atomic bomb conspiracy dominated his thinking when he said to the Rosenbergs:

"I consider your crime worse than murder. Plain deliberate contemplated murder is dwarfed in magnitude by comparison with the crime you have committed. . . . I believe your conduct in putting into the hands of the Russians the A-bomb years before our best scientists predicted Russia would perfect the bomb has already caused, in my opinion, the Communist aggression in Korea, with the resultant casualties exceeding 50,000 and who knows but that millions more of innocent people may pay the price of your treason. Indeed, by your betrayal you undoubtedly have altered the course of history to the disadvantage of our country."⁴⁸

To justify the death penalty, Judge Kaufman greatly overstates the relationship of the international problems of the 1945-50 period to the Rosenbergs' motive and intent. He makes the crime greater in 1951 than at the time of commission. The case illustrates the difficulties of excluding society's demand for revenge from the process of conviction and even more from the process of sentencing. The emotional basis of revenge and retaliation in fact entered the sentencing process, although the stated basis was deterrence. The prosecutor expressed the view that "leniency would be merely an invitation to increased activity by those dedicated to the concept that compassion is decadent and mercy an indication of weakness."⁴⁹ Deterrence for Judge Kaufman was extirpation: "In light of the circumstances, I feel that I must pass such sentence upon the principles [*sic*] in this diabolical conspiracy . . . which will demonstrate with finality that this nation's security must remain inviolate"⁵⁰

These considerations strongly suggest the need for judicial review of sentences on appeal. Precedent effectively isolated the court of appeals from the

48. *Id.* pp. 1614-15.

49. *Id.* p. 1603.

50. *Id.* p. 1615. The British Royal Commission has noted that the principle of retribution has been used in two senses: vengeance and reprobation, the latter being "that of the State's marking its disapproval of the offence." According to Lord Justice Denning, appearing before the Royal Commission, "the ultimate justification of any punishment is not that it is a deterrent, but that it is the emphatic denunciation by the community of a crime" ROYAL COMMISSION ON CAPITAL PUNISHMENT, 1949-1953 REPORT 18 (1953). Deterrence is actually based upon the continued vigor of individual and collective belief in the justification of societal vengeance. See Schuessler, *The Deterrent Influence of the Death Penalty*, 284 THE ANNALS 54, 55, 62 (1952). The logic of Diodotus which was given in his reply to Cleon's proposal that the Mitylenians be put to death is unassailable against the supposed deterrent factor in capital punishment: "Mankind has run the whole gamut of penalties, making them more and more severe in the hope that transgressions of evil-doers might be abated. . . . Either, then, some terror more dreadful than death must be discovered, or we must own that death, at least, is no prevention." THUCYDIDES bk. III, 45 (C. Forster Smith transl. 1919).

fairness, substance and legal validity of the sentencing proceedings.⁵¹ Appellate review of criminal trials is a recent development in Anglo-American law,⁵² but the dividends have been significant in the century of its existence in America. Criminal trials have been formalized, institutionalized and fashioned into the general over-all legal structure of lawmaking.⁵³ Judicial review has also furnished a measure of insulation from the community pressures involved in the criminal trial. Similarly, the sentencing process should be brought within the ambit of the general legal structure.⁵⁴ The sentence contains dashes of community pressures—vengeance, dashes of the individual or group propensity to repeat certain crimes—recidivism, and dashes of the policy of stamping out certain offenses against society—deterrence.⁵⁵ Needed is the institutionalizing process of appellate review of sentences so that the whole of the criminal trial may be analyzed with relation to the legal principles created in the process of insulated decision-making.

Was Justice Done proselytizes one view of the *Rosenberg* case. As such, it is an aspect of the Rosenberg-Sobell trial as a phenomenon in the social history of America in the 1940's and 1950's. Legal historians may study the case in another day when they can examine more critically the degree to which the judicial process had become saturated with the social pressures and attitudes of the period. Certainly, the case provides a starting point for considering appellate review of the sentencing process and restriction, or even abolition, of the

51. *United States v. Rosenberg*, 195 F.2d 583, 603-09 (2d Cir. 1952); Memorandum of Mr. Justice Frankfurter, *Rosenberg v. United States*, 344 U.S. 889 (1952); Hall, *Reduction of Criminal Sentences on Appeal: I*, 37 COLUM. L. REV. 521, 523 n.4 (1937); ORFIELD, *CRIMINAL APPEALS IN AMERICA* 103-04 (1939).

52. See Frankfurter, J., concurring in *Griffin v. Illinois*, 351 U.S. 12, 20-21 (1956). Appellate review has had varying breadth during our legal development. When it was extremely technical and literal, William Howard Taft and Mr. Justice Brewer thought appellate review of criminal trials of small import and, indeed, harmful. See Taft, *The Administration of Criminal Law*, 15 YALE L.J. 1, 14-16 (1905); Brewer, *A Better Education the Great Need of the Profession*, 18 A.B.A. REP. 441, 448 (1895).

53. See, e.g., J. HALL, *PRINCIPLES OF CRIMINAL LAW* (1947); DESSON, *CRIMINAL LAW ADMINISTRATION AND PUBLIC ORDER* (1948); WILLIAMS, *CRIMINAL LAW, THE GENERAL PART* (1953).

54. See L. Hall, *Reduction of Criminal Sentences on Appeal*, 37 COLUM. L. REV. 521, 762 (1937); Sobeloff, *A Recommendation for Appellate Review of Criminal Sentences*, 21 BROOKLYN L. REV. 2 (1954). See also ORFIELD, *CRIMINAL APPEALS IN AMERICA* c. 5 (1939); Whalen, *Punishment for Crime: The Supreme Court and the Constitution*, 35 MINN. L. REV. 109 (1951); Note, *Appeals Against Sentence*, 69 SCOT. L. REV. 97 (1953); Note, *Due Process and Legislative Standards in Sentencing*, 101 U. PA. L. REV. 257 (1952). Appellate review of the criminal trial came late in England, with the Criminal Appeal Act, 1907, 7 Edw. 7, c. 23; but, because it came late, review of the sentence is made easily available. O'Halloran, *Development of the Right of Appeal in England in Criminal Cases*, 27 CAN. B. REV. 153 (1949).

55. See L. Hall, *supra* note 54, at 762; J. HALL, *PRINCIPLES OF CRIMINAL LAW* 50-60, 539-70 (1947); Morris, *Sentencing Convicted Criminals*, 27 AUSTR. L.J. 186 (1953). See also Knowlton, *Problems of Jury Discretion in Capital Cases*, 101 U. PA. L. REV. 1099 (1953).

death penalty. For, "this case is an incident in the long and unending effort to develop and enforce justice according to law. . . . Only by sturdy self-examination and self-criticism can the necessary habits for detached and wise judgment be established and fortified so as to become effective when the judicial process is again subjected to stress and strain. . . . [A]ll systems of law, however wise, are administered through men and therefore may occasionally disclose the frailties of men. Perfection may not be demanded of law, but the capacity to counteract inevitable, though rare, frailties is the mark of a civilized legal mechanism."⁵⁶

W. HOWARD MANN†

56. Frankfurter, J., dissenting in *Rosenberg v. United States*, 346 U.S. 273, 310 (1953).

†Associate Professor of Law, Indiana University.