shock. The hurt is broader than mere injury to the personality. But, by the same token, the defendant’s countervailing claim to communicate freely must be taken into strict account. This is why the cases are so hard, and this is one reason why the doctrines are involved almost to the point of being nonsensical. This is too big a bite to be digested during the last few hectic weeks of the first-year torts course.

The same observations are even more appropriate to Gregory and Kalven’s last grand division, “Tort Law in the Market Place.” This ingenious grouping includes fraud, trade libel and a bewildering variety of unfair practices in competition, including the appropriation of advertising values and other intangibles. The common denominator binding this topic to defamation is obvious. We need only substitute the trade community for the social community. Again the injuries are to relationships, rather than to person, personality or property. The fact that both litigating parties are usually members of the trade group and that the group interest itself is at stake increases the complexity. It is here that the demand for protection strains the judicial process to its uttermost limits and frequently exceeds the capacity of the common law for growth. The editors make this clear, and they anticipate the course in trade regulation by pointing out the highlights of legislative intervention and the operative area for the Federal Trade Commission and other administrative bodies. Certainly this is not stuff that can be packed effectively into the last gasping moments of a first-year torts course. Since, however, by tradition the trade cases must be left there, I hasten to add that Gregory and Kalven have made the most of the assignment within the available limits of time and space. I regret that their fine handiwork in this area will probably pass without fair appreciation in the classroom.

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The tradition of each of the two principal teachers of the Western world—Jesus and Socrates—includes an account of an unjust trial, controlled by religious and patriotic influences. Jesus was apparently a pacifist opponent of those favoring a rebellion against Rome, like that in which Josephus fought a generation later. Socrates, an artisan, expressed the aristocratic opposition to the democratic and expansive imperialism of Pericles and his successors. Western history includes the execution of Arnold of Brescia by Pope Hadrian
IV, after some help from the Emperor Frederick Barbarossa; and the execution of Servetus at the hands of Calvin and the authorities of Geneva. It includes witchcraft trials in both Catholic and Protestant communities. The Catholic victims of Titus Oates¹ and the Jewish victim of the Dreyfus case are now undebatably instances of the misuse of government power under the influence of social and political passions.²

Incidents of the McCarthy period—the Anastaplo and Schware bar admission cases,³ and the first Communist conspiracy case in the light of more recent cases⁴—are interesting in comparison. The effects of the principal charges of Senator McCarthy himself, against officials and employees at Fort Monmouth, Mrs. Moss of the Defense Department, and General Zwicker are now regarded by most thoughtful observers as simple examples of the pathological factors which may affect public judgments. Instances from Nazi and Communist history, particularly the Slansky purge in Czechoslovakia in 1952, recall the scope of pathological influences on public prosecutions.

They recall also the undebated historical instances of criminal acts influenced by social and political ideas. In our own history we have for example the Molly Maguires⁵ and the McNamaras,⁶ and the assassinations of Lincoln and McKinley, the latter by an anarchist. Recollection of these instances will guard against sweeping generalizations about prosecutions for offenses having political features, while recollection of the unmistakable instances of mistake may contribute to caution in judging supposed political offenders.

¹ See generally LANE, TITUS OATES (1949) which in spite of what seems a slight bias tells the familiar facts of the story vividly.

² This is true whether one accepts the familiar view that the Dreyfus case began in deliberate official misconduct or whether one is persuaded by the view that it began in mistake and was conducted under the influence of public passion and with the aid of some official misconduct. Compare HALasz, CAPTAIN DREYFUS (1955), with CHAPMAN, THE DREYFUS CASE (1955).


⁴ The record in Dennis v. United States, 341 U.S. 494 (1951) corresponds to the Court's summary of the record in the cases which it ordered dismissed in Yates v. United States, 354 U.S. 298 (1957). The instructions were of course different, as the Court observed.

⁵ For this violent predecessor of the relatively peaceful United Mine Workers, see 2 COMMONS, HISTORY OF LABOUR IN THE UNITED STATES 181–85 (2d rev. ed. 1936).

⁶ Id. at 528. The lives of the journalist Fremont Older and the lawyer Clarence Darrow in the Dictionary of American Biography (1st Supp. 1944, 2nd Supp. 1958) indicate how this case affected them. It was a case of confessed dynamiting, probably meant only to frighten but leading to the burning of a newspaper building and resultant deaths, committed by two labor leaders in 1911, in Los Angeles. See DARROW, THE STORY OF MY LIFE, 172–91 (1932).
The factors in the cases of mistake are various and numerous. They include conscious disregard of evidence on one side or both, doctrinaire or venal or simply eccentric. One can detect on one or both sides obscure influences which have been studied by psychologists: identification and projection, for example, and attitudes toward authority, property, and freedom. There are the factors which appear in the conviction of the innocent in ordinary cases, unaffected by social and political controversy. There is also, in the great cases, at least, on both sides, an effort to treat evidence rationally, as a good physician treats evidence, always impeded to some extent by the feelings aroused by the drama of human conflict.

The great controversial cases of the early days of our generation were the Mooney-Billings and the Sacco-Vanzetti cases. The Hiss case and the Rosenberg-Sobell cases were the striking cases of our later days. The similarities and contrasts between the course and influence of the Sacco-Vanzetti and the Rosenberg cases are worth reflection in a period when, for a time at least, we are relatively free from some of the influences which have affected their discussion. Reflection on these cases may be some safeguard against passion in the treatment of others which may arise. The emotions which appear in these cases include, moreover, the emotions aroused by a serious threat or supposed threat to the security of the community, emotions which affect critical public and

The case against Mooney and Billings for participation in the bombing of a Preparedness Day parade in 1916 in San Francisco, killing nine people and injuring some forty, depended on identification by witnesses, "consciousness of guilt" evidence, and circumstantial evidence. Mooney's death sentence was commuted to life imprisonment, and his and Billings's life sentences were terminated in 1939 by executive clemency based on the view that the men were improperly convicted. The identification witnesses had been shown to be unreliable, and the consciousness of guilt evidence was even less persuasive than such evidence is likely, at best, to be. There remained evidence that twenty-two and thirty-two caliber cartridges were used in the bomb; and the discovery of twenty-two cartridges and rifle—apparently recently used in a hunting trip—and thirty-two cartridges and revolver in Billings's room and thirty-two cartridges in Mooney's room. One and a half ball bearings were apparently picked up near the scene of the bombing, and two ball bearings of a different size were found in the room of Billings, a garage mechanic at the time, according to a police witness for the prosecution. People v. Billings, 34 Cal. App. 549, 552, 168 Pac. 396, 398 (1917); People v. Mooney, 177 Cal. 642, 646–47, 171 Pac. 690, 692 (1918). For reasons that will occur to the reader, the ball bearing evidence was apparently not taken seriously on either side during efforts for clemency; and ball bearings were apparently not introduced in evidence in Mooney's trial, though other evidence against Billings used in his separate trial, was used again against Mooney in his later trial. If the ball bearing evidence had been stronger, it might have been very strong indeed. On the evidence of this general character in the case, see the Brief of the People, In the Matter of the Investigation in the case of People v. Mooney by the U.S. Comm'n on Mediation (1917–18), at pp. 26–33; Hunt, The Case of Thomas J. Mooney and Warren K. Billings, pp. 12, 25, 37, 148, 215, 215–16, 332–34 (1929). Mooney and Billings were militant and fairly well known union organizers, and their case is of all the four well-known cases the one in which there appeared, increasingly over the years, the strongest evidence of official misconduct in prosecution. See Chafee, Pollak and Stern's draft report for the Wickersham Commission, published as The Suppressed Mooney-Billings Report (Gotham House 1932).
official judgments about peace and war. A recollection of the special problems which arise in evaluating evidence on issues arousing such emotions may be a useful safeguard for us all.

Mr. Montgomery's book is a defense of the Commonwealth of Massachusetts and its representatives in the Sacco-Vanzetti case. For those of us who have been trying to detach ourselves from feelings and commitments arising from the circumstances of the years of 1950 to 1954, or 1948 to 1957 in order to re-examine our positions coolly, it is a useful stimulus from another period. It seems an honest statement, indicating how an honest lawyer or citizen could reach Mr. Montgomery's conclusions. At the same time if it is read carefully, it will disclose most of the difficulties felt by those with an opposite view. Reading it with Professor Morgan's careful study of the evidence will disclose further objections to Mr. Montgomery's position, for example on the Berardelli gun and the Goddard photographs. In the rare instances where something new is reported, as in the item about Sacco's hair on a cap, or where something receives new emphasis, as with Sacco's "obsolete" bullets, a reference to standard works on criminal investigation in the one case or to the carefully indexed Henry Holt & Co. Record in the other, will serve to correct the author's not unnatural overstatement of his point.

On May 5, 1920, about a year after bombings and attempted bombings in which anarchists apparently had some responsibility, Sacco and Vanzetti were arrested near Boston. Vanzetti was subsequently convicted of participation in an attempted holdup committed the preceding December 24, and given a twelve to fifteen year sentence. Later Sacco and Vanzetti were convicted of participation, with unknown associates, in a double murder which had been committed on April 15, 1920, as a planned part of a successful robbery of a factory payroll custodian and his guard. After an appeal, motions for new trials and subsequent appeals, and hearings by the Governor and a distinguished committee appointed by him, the two men were executed on August 23, 1927.

At the trial for the attempted holdup, Vanzetti relied on the testimony of others and did not take the stand. Consequently, the lies he told on his arrest were not explained. Neither were his radical views told to the jury, except perhaps by innuendo in questions. At the murder trial, Sacco and Vanzetti explained their lies on arrest by their fear, as anarchists, of proceedings connected with public vigilance against anarchists, growing out of the earlier bombings. They were then cross-examined on their views. At the time there was still general and somewhat undiscriminating public hostility, though Mr. Montgomery minimizes it, not only against anarchists on account of the

8 See generally this reviewer's discussion in: The Limits of Law, 61 Ethics 270, 279–81 (1951); Biology and Law, 16 U. Chi. L. Rev. 403 (1949); Agreement and Disarmament, 16 Bulletin of the Atomic Scientists 179 (1960).

9 See Joughin & Morgan, The Legacy of Sacco and Vanzetti (1948).
bomb episodes, but also against communists and radicals of various types. Much of the hostility came from the days of the First World War and the Russian Revolution.

The murder case became a great state case. The evidence was puzzling and interesting. The claim that unpopular "foreigners" and radicals had not received the careful treatment supposed to be characteristic of our criminal procedure was vigorously and widely made and as vigorously and even more widely attacked. It is impossible here to reconstruct the case, but for those who lived at the time the events may be recalled, and for younger readers the interest in them may be suggested by Mr. Montgomery's book.

On the main outlines of the case organized by the prosecution at the trial and after, there is a remarkable degree of agreement between Mr. Montgomery and Professor Morgan, whose conclusions are opposed to Mr. Montgomery's. Mr. Montgomery does not indicate how vulnerable on other grounds is the testimony of the only two "eyewitness" identification witnesses whose testimony is not objectionable on account of their emotional make-up, their expressed final uncertainty, or the circumstances of identification after the arrests. The two witnesses in question said they saw Sacco at such a distance and angle and for such a time during the murder that Mr. Morgan and other students have thought accurate identification impossible. Mr. Montgomery does however agree\(^\text{10}\) that the identification evidence "cannot be called strong." He recognizes that there was eyewitness evidence contradicting eyewitness evidence against Sacco and concededly destroying the effort to identify Vanzetti as driver of the car, and that there was evidence of alibis, which will be considered later.

Mr. Montgomery agrees with what seems to be a general opinion among specialists that the expert ballistics evidence given at the trial and available to public agencies considering the matter later was worthless by the standards of the later times as well as by our standards today. He seems to recognize—though he minimizes them—the considerations that precluded any reference, in opinions expressed in the final disposition of the case by the committee and the Governor, to Mr. Goddard's off the record ballistics pictures, taken not long before the execution. Mr. Montgomery thus comes close to agreeing that two of the three principal lines of proof developed by the prosecution for the record, the identification evidence and the expert ballistics evidence, were worthless.

It is with respect to the third principal line of evidence that Mr. Montgomery takes issue with critics of the Massachusetts authorities. This line is a form of consciousness of guilt evidence. The reader in considering the argument should be careful about accepting Mr. Montgomery's effort to distinguish between the various kinds of lies told by Sacco and Vanzetti on their arrest. He should firmly remember the reasons for any fear felt on arrest by Italian

\(^{10}\) P. 95.
anarchists in May of 1920. He should then consider the kind of syllogism on which the value of consciousness of guilt evidence—except in very unusual cases—depends: "Murderers usually lie when caught. These men lied when caught. Therefore these men are probably murderers." Mr. Montgomery seems to me to struggle vainly with the objections to this syllogism.

Mr. Montgomery is at his most persuasive in arguing a fourth line of evidence, on which the prosecution might have depended more if it had been able to strengthen its case. This line is the circumstantial evidence of coincidences thought to go beyond the toleration warranted by everyday experience. The case against Vanzetti would be strengthened if the evidence were stronger for the possession by Vanzetti of the murdered guard's gun, though over two weeks after the murder. The case against Sacco would be stronger if the evidence established at all adequately any considerable rarity of the "obsolete" kind of bullets one of which may have been found in the guard's body and others of which were found on Sacco. In view of Sacco's and Vanzetti's association, stronger evidence on each point might considerably strengthen the case against both.

Vanzetti was convicted of participation in the attempted holdup on evidence with characteristics closely corresponding to those of the evidence on which Sacco and Vanzetti were soon after convicted on the murder charge. Though not strictly evidence for the jury on the murder issue, Vanzetti's possession on his arrest of "common Winchester 12-gauge" shotgun shells like one found some four months before near the scene of the attempted holdup may be of some interest to an historian. Mr. Montgomery, however, observes: "The shotgun shells suggested a connection with the Bridgewater crime [the attempted holdup] but surely, without other evidence, only a tenuous one." Moreover, the record of the murder case contains a plausible account by Sacco, his wife, and Vanzetti of the occasion on which, according to them, Vanzetti was casually given the shells while visiting Sacco.

The Goddard ballistics photographs may interest the historian apart from questions about the conduct of the trial and later proceedings. They appear to show rather persuasively that a shell supposedly found at the place of the

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11 By way of contrast with the evidence in the Sacco-Vanzetti case, consider variations of the case of the man who after a murder but before it has been discovered and in the course of interrogation on other matters and places, nervously disclaims presence at what turns out to be the scene of the murder.

12 An alternative syllogism which may be useful to consider has for a major premise the proposition: People who lie when caught are probably murderers; or probably guilty of any recent nearby murder. For a thoughtful and cautious treatment of consciousness of guilt evidence, see People v. Leyra, 1 N.Y.2d 199, 208-11, 134 N.E.2d 475, 480-81 (1956).

13 For a discussion of the special difficulties with the identifications of Vanzetti in this case, see Osmond Fraenkel's thorough and careful THE SACCO-VANZETTI CASE, at 159, 184-86 (1931).

murder and a bullet, "the fatal bullet," the only one of its kind found among the seven in the two dead bodies, came from Sacco's gun.

The pictures were taken in 1927, while the case was before the Governor and his committee. Mr. Goddard's visit to Boston was so timed that Mr. Thompson, the principal defense counsel, could not be present at the taking of the photographs, though a junior defense lawyer was present. It was understood between Mr. Thompson, the prosecution and Mr. Goddard that Mr. Goddard's results were not to be used for any purpose in proceedings before the Governor or the committee.

As a result of this understanding Mr. Thompson did not press in argument—though he presented it—his own view that the identity of both the shell and the fatal bullet could not be counted on in view of the circumstances of their custody and the markings on the bullet. For historical purposes it would be interesting if someone with a standing like that of Professor Morgan would try to discover what evidence still exists about the custody of shell and bullet and marking of the bullet. Neither Mr. Montgomery's attack on Mr. Thompson's doubts nor the reference to them in Mr. Morgan's book is altogether satisfactory. My own recollections of the feeling in Boston in 1921 and the much stronger feeling in 1927 lead me to appreciate Mr. Thompson's position. What turned out to be concededly a mistake about a supposed fatal bullet in 1926 in an ordinary Cleveland murder case had invalidated the supposed effect of Mr. Goddard's evidence there. Mr. Thompson seems justified in his insistence that an adequate and reliable account should be given of the custody of both shell and bullet between the arrests in 1920 and the final proceedings in 1927 before either should be taken finally to be what it was thought to be. I should suppose further that these considerations would be as serious for the historian interested in the facts of the crime as for the historian or lawyer interested in the fairness of the proceedings.

Mr. Goddard in fact communicated his views to the press and the Governor, but neither the Governor nor the committee referred to them in finally approving execution of the sentences. Mr. Thompson was assured by the Governor that the pictures were not considered by him.

Enough has been said to encourage the reader in a critical attitude toward Mr. Montgomery's criticism of alibi evidence in both holdup and murder cases. There is for example much less in the record than the reader may suppose to support Mr. Montgomery's view that Italian customs about salting eels made implausible the testimony that Vanzetti was delivering eels on the day when they were to be eaten, December 24, the day of the attempted holdup. Memorized testimony is by no means of itself subject to total discount; and it is the prosecution that must prove its case, perhaps even to the satisfac-

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16 See Fraenkel, op. cit. supra note 13, at 160.
tion of historians. Care is required again in considering Mr. Montgomery's treatment of the position, which was the foundation for a persuasive motion for a new trial, that the case against Sacco and Vanzetti for murder was weakened by evidence, coming after the trial, that a particular group of professional criminals committed the murders in question.

If carefully read, Mr. Montgomery's defense of Judge Thayer is not fully persuasive. His attack on Professor, now Mr. Justice, Frankfurter and on Mr. William G. Thompson, chief defense counsel in the later stages of the case, leaves untouched my own impression of the wisdom, care, humanity, and courage which these two men employed in the case.

II

Mr. Herbert Ehrmann became associated with Mr. Thompson in the last stages of the Sacco-Vanzetti case. His particular assignment was an investigation of clues to an alternative explanation of the crime of which Sacco and Vanzetti had been convicted. The evidence he gathered was the basis for the last in a series of motions for a new trial, all of which were denied by Judge Thayer. In 1933, Mr. Ehrmann published an account of his investigation in a lively and readable little book, which is now republished. The new edition includes some new material, of some interest, in an author's preface and in three appendices dealing with events since the book was first published. The new edition has an admirable summary of the case by Professor Edmund Morgan speaking cordially again of Mr. Ehrmann's book. It has also an eloquent and very persuasive foreword by the late Joseph N. Welch, Esq., who knew Mr. Ehrmann and Judge Thayer, and who expresses strong support for Mr. Ehrmann and a respectful but unmistakably adverse observation on Judge Thayer's conduct of the case.

Mr. Ehrmann's book has some of the interest of a detective story along with its serious concern for the treatment of the case. Mr. Ehrmann begins with the confession of Celestino Madeiros. Madeiros, sentenced to death and occupying a cell near Sacco, made a brief and ambiguous confession of his participation in the murder and robbery of which Sacco and Vanzetti had been convicted. It is doubtful whether anything like rational self-interest could have prompted the confession, and it may have been the result of seeing Sacco's wife and children and being touched by them. The confession of itself did not have great significance, as pathological confessions are familiar enough in criminal matters. It did, however, lead to questioning of Madeiros by Mr. Thompson, and so to information about a fluid group of professional thieves in Providence. Some of them had been engaged in taking shoes manufactured at the factory whose payroll was the object of the murder and robbery and at another nearby shoe factory whose payroll was perhaps expected to be taken at the same time. The men had been convicted of taking shoes from freight cars in Providence. Mr. Ehrmann produces strong evidence that in order to
be sure they got something of which they knew how to dispose through fences, they had representatives spotting freight cars at the factories. They would thus have had men who had become familiar with the timing and movement of payrolls.

The leader of this group, Joe Morelli, was so strikingly similar in appearance to Sacco that two witnesses who had identified the murderer as Sacco and others who knew Sacco thought a photograph of Joe Morelli was of the same man or one resembling him. Antonio Mancini, who had associated with Morelli and his brothers, had been convicted of a homicide in which he used a gun, a foreign Star or Steyr, like that which one of the experts at the trial had said must have been used by the man who fired the six bullets other than Sacco's supposedly fatal one into the bodies of the two victims. This expert was supported in different ways by two others during Mr. Ehrmann's investigation. Joe Morelli had a gun which could have fired the fatal bullet.

There was thus some evidence early in the investigation to connect Madeiros, Joe Morelli and Mancini, who were all in prisons then, with the crime. A Polish friend of Madeiros, Steve Benkoski, who had been shot and killed in the meantime, fitted the common description of the driver as a man of light complexion. Joe's brother, Frank Morelli, was a possible fifth occupant of the murder car. His other brother, Mike, a more retiring criminal, could have made the change of cars which was part of the story of the commission of the crime that was now being developed.

Mr. Ehrmann has assembled an interesting group of suspects. Madeiros was psychopathic, epileptic, and somewhat pathetic. There is evidence that he had had money of about the right amount for his split from the robbery, on which he had taken a long trip south with a circus girl.\(^7\) Joe Morelli was a simple ruffian who spent large parts of his life in prison and had a reputation for betraying his fellow prisoners and getting on well with wardens. Mr Ehrmann records his impression of Mancini as an intelligent, iron-nerved, quiet and almost perfect criminal. The dead Benkoski was idolized by his family as a good provider and a man of character, but he was in fact involved in criminal activities. Frank Morelli was another ruffian. Mike, on the other hand, was capable only of lesser jobs, and could well have been the man to handle the changing of cars.

It does not appear that they had ever committed a crime so well organized or so serious as the double murder and robbery of which Sacco and Vanzetti

\(^7\) This review is of course no substitute for the books, and it will have been seen that it does not of course attempt to deal with all the problems of evidence in the case. For example, Mr. Montgomery's suggestion that participation in the robbery furnishes a needed explanation for Sacco's possession of the means for a planned trip to Italy is met by Mr. Ehrmann's observation about Sacco's regular and long-sustained saving from his wages. On the other hand, Madeiros' incorrect statement that the money stolen in the murder-robbery was in "a black bag" receives what seems an over-argued and partly implausible explanation from Mr. Ehrmann (21, 40, 151, 170), and may perhaps best be explained by confusion and Madeiros' statements indicating that he was not in good shape at the climax of the crime.
had been convicted. They were, however, much better qualified for such criminal acts than were Sacco and Vanzetti. In his foreword Mr. Welch says, "I would like to think that Mr. Ehrmann and I are resourceful. But I would think it quite beyond his power and mine to find three people to join us in a payroll robbery and a double murder. There is nothing in the record or elsewhere to indicate that Sacco and Vanzetti knew their way around in this very special field of crime, or how to find the accomplices they needed."

Mr. Ehrmann found other evidence, including evidence of Morelli automobiles in the neighborhood of the crime, but of course he has not convicted any of those named. He writes as though his problem were convicting them, and as though he had solved it; and Mr. Montgomery in turn writes at times as though he thought this was Mr. Ehrmann's problem and he had failed. Mr. Montgomery at one point, however, unobtrusively notices that this cannot be the problem.

For one thing, a motion for a new trial is made on affidavits. Affidavits may be enough for an attachment of property but they are not enough for a verdict in a civil, let alone a criminal, let alone a capital case. For another thing Mr. Ehrmann properly criticizes the district attorney, a successor to the prosecutor at the trial, for not cooperating with him in using the power of the state to make a thorough investigation of the significant leads which Mr. Ehrmann had found.

On a motion for a new trial because of newly discovered evidence, there is hardly anything for a judge to do with moving affidavits, not effectively controverted, recording statements made by persons whom he has not seen testifying, except for purposes of the motion to believe them. If he is in a position to do so, he may himself conduct a hearing; but otherwise he has only the affidavits before him. The question is whether evidence produced at a new trial corresponding to the information in the affidavits could be expected to lead to a verdict of acquittal instead of conviction. Even on the new trial the evidence of an alternative responsibility for a crime need not be enough to convict the persons newly charged. It need be only enough to raise, with other evidence, a reasonable doubt of the guilt of those convicted. Perhaps those newly charged could not be indicted and tried until the indictment against those convicted was disposed of, though an argument to the contrary can be made. In the ordinary case, even on the new trial, and certainly on the motion for a new trial, evidence sufficient to convict those newly charged beyond a reasonable doubt is not to be expected.

If one projects Mr. Ehrmann's summary of his motion papers into evidence presented at a new trial and supposes that every evidentiary fact which he aduces is supported in turn by substantial evidence at the new trial, he probably still has not enough to convict the people he names. Madeiros' confession is

18 P. v.
probably not by itself, even with his possession of the appropriate amount of money, sufficient to convict him. The identification of Joe Morelli is certainly no better than the identification of Sacco at the actual trial. Mancini's gun is inconclusive. There is little or no evidence against the other three, and their role is primarily to indicate how a full party could easily have been assembled among the friends of Joe Morelli. On two occasions Frank Morelli, questioned about a Morelli automobile, his presence near the scene and other matters, told lies and in other ways showed consciousness of guilt of something. Mr. Ehrmann thinks that a judge who takes stock in the consciousness of guilt argument should be impressed with this evidence, but his argument seems to be *ad hominem*. We have seen the weaknesses of consciousness of guilt evidence, and those weaknesses are present here. If association among the suspects is recognized and the items against them are put together, it could not be inferred, beyond a reasonable doubt, that any one of them was a participant in the double-murder robbery.

There does not seem to be enough to convict, but there seems indeed to be enough to destroy all possibility that a new jury could have been permitted to find Sacco and Vanzetti guilty beyond a reasonable doubt on the evidence in the entire proceedings, including the evidence projected in the final motion for a new trial.

Of Judge Thayer, who presided at the trial and decided on the motions for a new trial, Mr. Welch says: "Herbert B. Ehrmann and I once worked in the same office. He has been and is my friend. I also knew Judge Webster Thayer. I have tried cases before him. I have sat in his lobby and heard him discuss the Sacco and Vanzetti case. It is clear that he believed Sacco and Vanzetti to be guilty. It is also clear that this was not merely an intellectual conclusion on his part, but a passionate dedication to the proposition that the two of them were to die. It was unfortunate that under Massachusetts law one man and only one man could grant Sacco and Vanzetti a new trial. That man was Judge Thayer. After the jury verdict, Judge Thayer's rulings on the various motions for a new trial satisfy me."

20 But see Professor Morgan's review of *The Untried Case*, 47 Harv. L. Rev. 538, 545 (1934). The probative value of the confession by itself might have been tested by an untrustworthy repudiation which left the reliability of the confession to be considered independently. A comparable question would have been presented by Madeiros' testimony as a witness for the prosecution in a trial of the new suspects for the robbery-murders. After his first move to confess, Madeiros may have learned of the financial resources of the Sacco-Vanzetti committee, and he apparently had what he considered a possible independent occasion for feud with the Morelli family. He may have been influenced by a hope of reprieve or even clemency in return for the incrimination of the Morellis, however irrational his calculations may seem. Subconsciously influenced sometimes found in cases of false confessions may have influenced him. He was an unbalanced individual under great emotional stress. His story as a whole contained omissions and other defects. Madeiros' confession, even if supplemented by his pretrial statements, repeated for example as his testimony, and by other testimony which can fairly be projected from them, seems likely to have been insufficient to establish guilt beyond a reasonable doubt on his part or on the part of any of the other new suspects. Here however an historian may conclude that the guilt of Madeiros, Joe Morelli, and perhaps Mancini is more nearly probable than the guilt of Sacco or Vanzetti.
trial were as fatal and as conclusive as was the throwing of the switch at their execution. But Judge Thayer was beyond persuasion. He was not to be moved by reason. He was, in this case, incapable of showing mercy. This is not to say he was wrong. It is only to describe him.

"I have always thought that the great tragedy of the Sacco-Vanzetti case was that it happened to be assigned to Judge Thayer. I think almost any other judge would have granted a new trial. Assuming that Sacco and Vanzetti were as guilty as Judge Thayer believed them to be, a second jury would quite surely have found them guilty. If the evidence discovered after their conviction had been presented to a new jury with a unanimous verdict of not guilty, no one would have been dismayed. And in either event, with a second trial, no matter what the result, the conscience of Massachusetts would have been at rest."21

Madeiros, the Morellis, Mancini, and Benkoski are not only figures in a drama, not only a not improbable explanation of the crime, and not only a gallery of criminal characters. They are also a reminder of the usual problems of the police and the prosecuting officials and a challenge to the benevolent though doubtless somewhat ambivalent anarchism expressed by Sacco and Vanzetti and those philosophers whose teaching had influenced them. The violence in the world, including murder, robbery, racial clashes, and wars, seems to be a part of the human condition. Human combativeness may well be linked to the toughness which has combined with our ingenuity to make us the most powerful of the animals. There is a charm about philosophical anarchism, particularly for anyone who has felt the poetical fascination of the Sermon on the Mount. The Christian anarchism expressed there and its variants make their contribution to human life. Nevertheless it is ironical that the Morellis and their friends present so sharp a challenge to the often attractive expressions of anarchist philosophy which we find in the letters of Sacco and Vanzetti.

III

The Sacco-Vanzetti case, like the Rosenberg case, raises questions of the probative value of the admissible evidence presented at the trial and later. Each case raises also a question about capital punishment, and indeed about our views of punishment in general.

The fairly high risk of factual error in criminal as in other cases has properly been made a point in the arguments of those opposed to capital punishment. In principle, however, this objection would be largely met by cool treatment of evidence and the development of strong insistence on the satisfaction of requirements of a heavy "burden" of proof in capital cases. On the artificial assumption that such a development has occurred, and that the case before us is one where a verdict of guilt must be accepted, other objections to capital punishment appear.

Suppose that to test these objections in our case, we assume that Sacco and Vanzetti participated in the payroll robbery double murder. In the case of Vanzetti particularly this will be a difficult, perhaps an almost impossible, assumption for a reader of his letters who respects the opinions of persons who have recorded, on the basis of acquaintance, their favorable impressions of his character. Similar though less circumstantial considerations apply to the case of the less articulate Sacco. But let us make the assumption as best we can. On this assumption what is to be said of their execution?

Comparison with the more recent case may be useful. The Rosenbergs were convicted on the testimony of accomplice witnesses who, somewhat as Sir Matthew Hale put it in the 17th century, were "bribed" by a practical assurance that their lives would be spared for their testimony. The only corroborative evidence showed at most "consciousness of guilt" of something, perhaps radicalism.

Let us assume however for purposes of discussion, that these two people, who were moved by simple but enthusiastic beliefs, and who showed marked courage in facing their conviction, imprisonment, and death, were guilty of conspiracy to give atomic secrets in 1944–45, and other unspecified secrets later, to Russia. What is to be said of their execution?

Somewhat similar observations can in my judgment be made about the


23 Further knowledge, observation, and reflection have served only to strengthen this reviewer's doubts about both the Hiss and the Rosenberg-Sobell convictions expressed in WAS JUSTICE DONE? THE ROSENBERG-SOBELL CASE (1956).

On the feasibility of forgery by typewriter, see a review of Hiss, IN THE COURT OF PUBLIC OPINION (1957) by W. K. Boulton, product analyst of the Royal Typewriter Company, in 40 Saturday Review of Literature 25 (May 18, 1957). For what seems a turning point in the development of informed professional opinion see Packer, A Tale of Two Typewriters, 10 Stan. L. Rev. 409 (1958). One may not be convinced by Professor Packer's theory of the timing of events, and yet still be persuaded that a number of alternative almost probable or probable accounts of the typewriter and its use, make proof of guilt beyond a reasonable doubt, in the "court of public opinion" or elsewhere, lacking. Neither does one have to accept the views of Mr. Hiss or Mr. Lane about every difficulty, for example the one considered on page 372 n. 1 of the book by Mr. Hiss. Compare the review by C. D. Williams, Esq., 40 Saturday Review of Literature 28 (May 18, 1957), with an indication of the ready availability, to a late date, of a specimen from the typewriter in question. An unfavorable review here suggests an explanation of a problem about which Mr. Hiss and his lawyer seem to be, rather disarmingly, baffled.

executions in both cases. For simplicity, let us however return to Sacco and Vanzetti, and—by way of further simplification—simply to Vanzetti.

He expressed, for the most part, in his conversation and correspondence, his belief in a philosophical anarchism somewhat like that which some find in the Sermon on the Mount and the tradition of Saint Francis. A modern philosophical and relatively pacific anarchist of note was the Russian scientist Kropotkin. It seems to be true that some modern anarchists have oscillated between the relative pacifism of Kropotkin and the violence of a different kind of anarchism, associated with the name of Bakunin. They may consider violence necessary to destroy the obstacles to a society where there is no more occasion for conflict or force. At times Vanzetti expressed admiration for both Kropotkin and Bakunin. On our assumption of guilt, he must be supposed to have tried to conceal or minimize the elements of violence in his thought as well as his practice.

The assumption of guilt is, in any event, a peculiar one, and must include a murder and robbery whose proceeds may have been intended and conceivably used—though there is no evidence of it—for a secret revolutionary cause. Vanzetti may have been capable of joining violence in a strike, or even of random protest violence, in spite of his controlling pacifism. But neither Sacco nor he seems qualified by either temperament or experience for a planned double murder robbery and escape, leaving no trace in their affairs of the proceeds of the crime. Our assumption requires us only to consider this as their single venture of the sort. They were surely not hardened by experience with similar crimes. Whatever else he was, Vanzetti was still a man of strong and sensitive intelligence, talent and courage.

A murder should probably not in any case go without emphatic disapproval and some sentence for what may best be described as purposes of education for the community. A person subject to deterrent influences may, as far as is known, be as effectively deterred by the prospect of ten years confinement24 in prison or hospital, as by more damaging possibilities. For some, longer confinement may be needed for purposes of protection or rehabilitation. On our present assumptions, Vanzetti would need to be restrained as a protection to the community and himself, for a period of re-education. For one with his qualities, the period would probably have been less than ten years.25

There is little more to be said; and comparable, though in some ways different, observations apply to the Rosenbergs. Indeed similar observations ap-


25 On the treatment of political offenders see TAPPAN, op. cit. supra note 23, at 385–86; and PLAYFAIR & SINGTON, op. cit. supra note 23, at 167–211. Allan Nunn May and Klaus Fuchs, confessed atomic physicist spies, received respectively ten and fourteen year sentences in England, and Fuchs was confined for less than ten years.
ply, as experienced wardens know, to cases of life imprisonment, which may be as useless, and as cruel and retributive, as capital punishment.

IV

The Rosenbergs' co-defendant, Morton Sobell, who has not been accused of any connection with atomic matters, was, like them, convicted on accomplice testimony. He is shown at worst to have participated in 1946 in what might possibly have led to a violation of security provisions. A physicist working on computers at the General Electric Company plant in Schenectady, he apparently talked with a friend and fellow scientist working on fire control for the Navy about matters of common interest in their work, and expressed interest in seeing a possible future Navy report. There was much vaguer testimony, some of it unlikely as well as vague, about association with Julius Rosenberg and about other episodes. The admitted accomplice who gave all this testimony was corroborated only by Sobell's trip to Mexico in 1950, under circumstances which may appear to show consciousness of guilt of something, perhaps radical affiliations. Sobell was convicted, in 1951, of conspiracy—but not atomic conspiracy—with the Rosenbergs, in the trial of all three for participation in supposedly related efforts to get information to Russia. At the age of thirty-four, Sobell was given a sentence of thirty years.

Judge Jerome Frank, disagreeing with his two associates on the United States Court of Appeals for the Second Circuit, thought that error in not separating the issues of atomic conspiracy from those of non-atomic conspiracy required a new trial for Sobell. The Supreme Court declined to review his case. Since his conviction, Sobell's lawyers have secured considerable evidence that it was a kidnapping, inspired and planned by United States officials, that—in the guise of a summary deportation—brought him back from Mexico for trial, and anticipated his voluntary return. The United States has not tried to test this evidence publicly, and has successfully opposed a

26 See PLAYFAIR & SINGTON, op. cit. supra note 23, at 103-43.

27 Judge Frank voted to affirm the judgment against the Rosenbergs, and he wrote the opinion of the court in the case. After criticism of the treatment of the conspiracy charged as a unit, and speaking of his associates' decision to affirm the judgment against Sobell, Judge Frank said: "The writer of this opinion disagrees. He thinks that there was error, in this respect, which requires that Sobell be given a new trial." United States v. Rosenberg, 195 F.2d 583, 601 (2nd Cir. 1952).

legal contest about it, on procedural grounds. The Supreme Court has de-
clined to review a decision on this matter. 29 After ten years Sobell is confined in the United States prison in Atlanta.

His case presents not only a problem about the severe sentence. It returns us also to a recollection of the circumstances of 1950–54 when Senator Mc-
Carthy was conducting his rebellion against State Department, Senate, Execu-
tive, and Army. The Rosenberg-Sobell case, beginning with arrests in June and July of 1950 and ending for the Rosenbergs with their execution in June of 1953, was contemporary with the period of Senator McCarthy's greatest influence, from February, 1950, to the middle of 1954. For most of that period and during practically all the time of the Rosenberg proceedings we were en-
gaged in the Korean war and risking a larger war. The relationships between the Rosenberg case and the period as a whole are worth reflection. Sobell's continued imprisonment reminds us that for some purposes the time is not yet over.

Mr. Montgomery concludes his book with expressions of distress that truth about the Sacco-Vanzetti case is not likely to prevail, with its lessons for those who support defendants in similar cases. This review must conclude in turn that the lessons of the Sacco-Vanzetti case for the much larger number who tend to support the prosecution in comparable cases, have not influenced pub-
lic discussion of a case as interesting and striking as that of Morton Sobell. Apart from considerations of domestic sanity and justice, discussion could help prepare us for avoiding the kind of unnecessary fear and hatred which if they occur in some new period of tension may add to factors which threaten us with increased expenditures for arms and an increased chance of a large mod-
ern war. The great political cases of our generation have been sources of the kind of fear and hatred which may make a critical addition to the hostilities of international tension. They are characteristic of periods of general tension, which contributes to the cases, and to which they in turn contribute.

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