Malcolm Sharp and the *Rosenberg* Case: Remembrance of Things Past

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The Rosenberg case is significant as a human occurrence, as a social phenomenon, and as a puzzle in proof.

*Sharp, Was Justice Done?* 18 (1956)

I.

There have been few moments in the Supreme Court in recent years which surpassed in tension and drama the final oral argument on Thursday, June 18, 1953, in the *Rosenberg* case.¹ The trial and sentence of the Rosenbergs in 1951 had provoked a worldwide furore which had mounted in intensity as the execution date approached. Pickets and counterpickets were parading in front of the White House that Thursday afternoon, and a crowd of several thousand persons packed the Supreme Court building and stood outside on the steps. The procedural status of the matter was likewise extraordinary. Three days previously, on Monday, June 15, the Court had recessed until October after denying, by a vote of 5 to 4, a petition by the Rosenbergs for a stay of execution. On Tuesday, a new motion for a stay had been presented to Mr. Justice Douglas. Lawyers appearing for an amicus argued that the penalty provisions of the Atomic Energy Act²—specifically the requirement that no death sentence be imposed in a case involving atomic espionage without a jury recommendation—superseded the Espionage Act of 1917³ under which the Rosenbergs had been indicted and convicted. Throughout the day on Tuesday, Mr. Justice Douglas had pondered the motion. Then, on Wednesday morning, June 17, he granted the stay; he felt that the point raised was a "substantial one which should be decided [only] after full argument and deliberation."⁴ A few hours after the stay was granted, Attorney

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General Brownell filed an application with Mr. Chief Justice Vinson asking that a special term of the Court be convened to review and vacate the stay granted by Mr. Justice Douglas. This application was granted, and for the third time in its entire history the Supreme Court was reconvened during its vacation recess for a special term.

I was present in the courtroom as a spectator that Thursday afternoon thirteen years ago. It was my practice, and that of other young lawyers in Washington, to attend argument in noteworthy cases. I recall my sense of surprise at seeing Malcolm Sharp sitting at the table reserved for counsel for petitioners. What was this diffident, soft-spoken professor of contract and commercial law doing in the Supreme Court at the climactic moment of a great spy case? Sharp taught contract to first year law students at Chicago; I had been one of his students in 1947. I had anticipated that a course in contract would be as dull as dishwater. I had not reckoned with Malcolm Sharp. Who among those who studied under him will ever forget the exquisite subtlety with which he probed the old problems of offer and acceptance, consideration, and mutual mistake? Sharp did not view the law of contract as a sterile set of black letter propositions. The life of the law to him is not logic; it is psychology, economics, semantics, history, and philosophy; the life of the law is the bustle of the marketplace and the need for fair, commonsense accommodations. Sharp's students were exposed to the workings of a highly cultivated mind, sensitive, precise, and provocative.

If “the Sacco-Vanzetti case united the liberals,” David Riesman and Nathan Glazer were later to write, “the Rosenberg case divided them.”\(^5\) The explosion of an atomic weapon by the Russians in 1949; the Hiss case; the war in Korea; the Truman loyalty program for government employees; Senator McCarthy's claims that the State Department was overrun by Communists—these had left the liberal community in the United States in 1950 in disarray. The Rosenberg indictments and trial followed hard on the heels of those events. While there were many thoughtful persons who were uneasy and even shocked by a death sentence imposed in peacetime on both husband and wife—no civil court had ever imposed this penalty in an espionage case—there were very few who believed the Rosenbergs to be innocent.

Sharp is one of those few. Like many others, Sharp, as he revealed in his book *Was Justice Done?*, had at first been an “uneasy spectator” of the Rosenbergs' trial.\(^6\) Like many others, he was disquieted by the

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severity of the punishment. He had been impressed, however, by the “careful and convincing” opinion of the Court of Appeals for the Second Circuit, which had affirmed the conviction. A study of the record in the case, he was later to write, did not shake his confidence in the correctness of the verdict. Then, in May 1953, when it appeared that all avenues of appeal had been exhausted, there was a report of newly discovered evidence. At the trial, Ruth Greenglass—the Rosenbergs’ sister-in-law—testified for the prosecution that about 1946 she had noticed and admired a mahogany console table in the Rosenbergs’ apartment. Ethel Rosenberg told her it was a gift, and Julius Rosenberg, Ruth testified, said “it was a special kind of table.” Mrs. Greenglass said that Julius had turned the table on its side to show her that “there was a portion of the table that was hollowed out for a lamp to fit underneath it so the table could be used for photograph purposes . . . .” The inference was plain: the Russians had given Julius Rosenberg a “special” table, suitable for photographing documents. Julius Rosenberg testified that he had purchased a console table at Macy’s for about $20 and that there was nothing “special” about the table. The table was not produced at the trial. Two years after the trial, in May 1953, counsel for the Rosenbergs claimed to have found the table which fitted the description given of it at the trial by the Rosenbergs: an inexpensive piece of furniture purchased by the Rosenbergs at Macy’s and in no way adapted for photography. Sharp was impressed by this claim. In his view, the discovery of the table, if proved by reliable witnesses, would have had a devastating effect on the credibility of the Greenglasses, who were key witnesses against the Rosenbergs. In mid-May 1953 Sharp, who still had no official connection with the case, was moved to make a public statement in which he deplored the severity of the sentences and urged careful consideration of the “new evidence.” A few weeks later, Sharp was invited by counsel for the Rosenbergs to assist them, and during the final month before the Rosenbergs were executed he was fully and deeply engaged as counsel in their defense. It was in this capacity that he sat in the Supreme Court that Thursday afternoon thirteen years ago.

What led Malcolm Sharp to become involved—without compensation, it should be noted—in a great cause célèbre for two of the most despised defendants in our history? Several years after the case was

7 Id. at 9.
8 Ibid. See United States v. Rosenberg, 195 F.2d 583 (2d Cir. 1952).
9 The testimony is quoted in SHARP, op. cit. supra note 6, at 51-53.
10 Id. at 14.
11 Ibid.
over, Sharp offered an explanation in his book *Was Justice Done?*. "What moved me," he wrote, "apart from a growing fear of serious injustice in a capital case of peculiar public concern, was a sense of the relationship of the case to public policy, both domestic and foreign. A calm estimate of spy scares seems to me a part of a calm estimate of foreign quarrels, the resolution of which might help us to preserve our liberties, promote prosperity, save taxes, and keep the peace."12 To this somewhat impersonal account, I would add that, in my view, Sharp was moved by a sense of compassion for individuals confronting great odds and the overwhelming power of the state. This same compassion—the same largeness of spirit and the same respect for the underdog—had led Malcolm Sharp to fight in the 1940's for the admission of Negro students into the law school at the University of Oklahoma and later to champion the right of one of his students, George Anastaplo, to refuse to state whether he was a member of the Communist Party as a precondition to admission to the bar.13 The Populist tradition of respect for dissenters and mavericks is rooted deep in Sharp.

Sharp's book discusses many of the key issues of the case. He examines the credibility of the prosecution's four principal witnesses—the Greensglasses, Harry Gold, and Elizabeth Bentley, each a self-confessed spy. He is especially critical of the casual attention accorded by the courts to the discovery and importance of the console table. Sharp writes thoughtfully of the dangers inherent in the use of testimony by accomplices who are witnesses for the prosecution and of the passions aroused by a trial like that of the Rosenbergs. The book also relates Sharp's personal involvement in the case and the desperate efforts made by the defense in the final month before execution.

While Sharp has since 1953 steadfastly adhered to a belief in the innocence of the Rosenbergs, I am among those who are not convinced that the Rosenbergs were innocent but who feel the death sentence was wrong. Although Sharp's book did not induce me to change my opinion, it raised many troublesome questions concerning the case to which I know no satisfactory answers.

II.

The *Rosenberg case*, Sharp wrote, is significant in part as a "puzzle in proof."14 In the decade since the case ended, there have been no disclosures or developments which would definitively solve the puzzle.

12 *Id.* at xxxiv.
14 *SHARP*, op. cit. *supra* note 6, at 18.
Some of the puzzling questions presented by the case are posed by Dr. Harold Urey, the distinguished scientist, in a brief but thoughtful introduction he wrote to Sharp's book. Is it probable, for example, that Rosenberg used his own name "Julius" as a codeword in telephoning Elizabeth Bentley and that his name was the password Harry Gold was instructed to use in identifying himself to Greenglass—if Julius Rosenberg was in fact the head of a spy ring and anxious to avoid detection? Is it probable, as the Greenglasses testified, that the Russians gave the Rosenbergs a console table to photograph documents—certainly a clumsy, easily exposed device? And is it likely that Greenglass—who had only a high school education and no advance training in mathematics or physics—could have assimilated, memorized, and transmitted vital technical information? Presumably, these questions were resolved by the jury adversely to the Rosenbergs, but a jury verdict is not equivalent to scientific proof and does not silence all doubt and discussion.

Emmett Hughes wrote in his memoirs of the Eisenhower administration that the Rosenberg case was discussed by the Cabinet while it was pending before the Supreme Court. Hughes states that Attorney General Brownell told President Eisenhower: "I've always wanted you to look at evidence that wasn't usable in court showing the Rosenbergs were the head and center of an espionage ring here in direct contact with the Russians—the prime espionage ring in the country."\(^{15}\) Hughes, however, reports nothing further concerning this discussion.

We know little more about another official attempt to allay doubts concerning the Rosenbergs' guilt. In 1956, Attorney General Brownell ordered a full report on the case to be prepared by the Department of Justice, apparently with a view toward publication of a "white paper."\(^{16}\) A department attorney was reportedly given complete access to the FBI files and to all of the evidence in the department's possession, and he interviewed various witnesses, members of the prosecutor's staff, and Sobell and Greenglass. Unfortunately, the report was never made public.

Recently, a fresh reappraisal of the case has been made by two journalists in private life, Walter and Miriam Schneir, in an interesting book entitled *Invitation to an Inquest*. Hitherto, critics of the case, including Sharp, have acknowledged that Gold and Greenglass were engaged in a conspiracy to commit espionage, but these critics have maintained that Rosenberg and Sobell had nothing to do with this conspiracy.

\(^{15}\) Hughes, *The Ordeal of Power* 79-80 (1965).

and were wrongfully implicated by perjury. In essence this was the theory of the defense. The Schneirs, on the other hand, advance the startling thesis that the Rosenbergs and Sobell "were punished for a crime that never occurred." Gold and Greenglass, they claim, never met each other prior to their arrests, and no secret information was ever transmitted.

As the Schneirs point out, the critical episode in the case was an alleged meeting between Gold and Greenglass in Albuquerque, New Mexico, on June 3, 1945. It was at this meeting that Greenglass allegedly turned over to Gold secret information concerning the atomic bomb. This was also the meeting at which Gold allegedly identified himself to Greenglass as the courier by matching one-half of a jello box which he held with one-half held by Greenglass, and by using the now famous password, "I came from Julius." At the trial, Gold testified that he arrived in Albuquerque on Saturday night, June 2, 1945; that he found a room for the night in a rooming house; that on Sunday morning, June 3, he registered at the Hilton Hotel; and that late that morning he met the Greenglasses, received the information, and turned over $500 in payment.

The Schneirs examined a photocopy of Gold's hotel registration card which was placed in evidence at the trial. The face of the card, filled in by hand by the Hilton Hotel clerk, bears the date "6-3-45," but the time stamp on the back of the card is the following day, June 4, 1945. Starting from this curious discrepancy, the Schneirs build an argument that the hotel card was a forgery, that Gold in fact never was in Albuquerque on June 3 or 4, and that he never met Greenglass at that time. Another basis for the Schneirs' conclusion is a series of recorded interviews between Gold and his attorney which took place in June, 1950, before Greenglass was arrested. There are noteworthy differences between Gold's statements to his counsel at that time and his subsequent testimony at the trial with respect to the meeting with Greenglass. In his statement to his lawyer, for example, Gold made no mention of the jello box or of the "Julius" password—items of evidence so striking that it is hard to believe he would have neglected to mention them.

The Schneirs argue that Gold was a thoroughly unreliable person, given to wild fantasies and a desire for self-glorification. They argue

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17 Id. at 403.
18 Id. at 136.
19 Gold's testimony is quoted id. at 378.
20 Id. ch. 29.
21 Id. at 401.
also that Greenglass was emotionally unstable, untruthful, and fearful of being prosecuted for stealing property from the Government. They quote the government attorney who studied the matter in behalf of the Attorney General in 1956 as saying that Greenglass was a man "with no conscience at all," and, "If I were a judge, I wouldn't take his testimony too seriously."

Gold and Greenglass were together in the same prison for a number of months, and the Schneirs maintain that they collaborated while in custody in fabricating the account which they gave at the trial. The Schneirs' argument, however, assumes that representatives of the FBI and Justice Department attorneys suborned perjury by Gold and Greenglass and fabricated evidence. A charge of this extreme nature demands very strong, clearcut proof and, in my view, the book falls far short of substantiating this grave accusation.

III.

The fate of the Rosenbergs is a subject of interest only to historians, but the fate of Morton Sobell—who was tried and convicted as a co-conspirator with them—remains as an insistently practical problem, for Sobell is still confined in a federal penitentiary. He has served 14 years of a 30-year sentence. Convinced of Sobell's innocence, Sharp for many years has worked with others to secure a new trial, a pardon, or parole for Sobell.

The case against Sobell rested essentially on the testimony of a single witness, Max Elitcher. Sobell and Elitcher had been classmates together in high school and college, and afterwards, in 1940-1941, they shared an apartment together in Washington, D.C., where they were both employed by the Navy Bureau of Ordnance. Elitcher testified that on several occasions he was urged by Julius Rosenberg to provide classified military information for transmittal to the Russians. He

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22 Id. at 349.

23 In the thirteen years since the execution, there have been two legal developments worthy of note which would have altered the procedure—although probably not the outcome—of the trial. First, there has been a change in the permissible scope of cross-examination in federal criminal trials. Ethel Rosenberg had invoked the privilege against self-incrimination while appearing before the grand jury, but at the trial she testified as to matters she had previously refused to discuss. On cross-examination the prosecution elicited the fact that she had previously pleaded the fifth amendment. In 1957, the Supreme Court, invoking its supervisory powers over the administration of criminal justice in the federal courts, ruled such cross-examination is impermissible; the use of constitutional privilege cannot be used to discredit a person who asserts it. Grunewald v. United States, 353 U.S. 391 (1957).

Second, in a post-conviction proceeding, Judge Friendly, speaking for the Second Circuit, held that Sobell could properly have asked the jury to decide whether, if he had joined the conspiracy, he had done so when the United States was no longer at war within the meaning of the Espionage Act. United States v. Sobell, 314 F.2d 314, 329 (2d Cir. 1963). A favorable finding would have led to a lower sentence.
further testified that he had been asked by Sobell for the names of young engineers who might furnish military data. Elitcher said that Sobell (who was then employed by General Electric) had expressed interest in a gunnery control report on which Elitcher was working. Finally, Elitcher testified that in 1948 he drove from Washington to New York and on arrival told Sobell he thought he had been followed by FBI agents. He described a dramatic midnight ride with Sobell from Sobell’s home in Flushing, New York, to Knickerbocker Village in Manhattan (where Julius Rosenberg lived) for the purpose of delivering a can of film containing allegedly valuable information.

Evidence was introduced that in June 1950, after Greenglass was arrested, Sobell took his wife and children to Mexico. He wrote letters to a friend in the United States using an alias and traveled about Mexico employing various aliases. Sobell was “kidnapped” by agents of the Mexican government and turned over to United States authorities. At the trial Sobell, on the advice of counsel, did not take the stand, and no evidence was offered in his behalf.

Elitcher’s credibility has been challenged by various critics of the case who point out that Elitcher had lied in filling out a government employment form by denying former Communist party membership. How reliable, they ask, is the testimony of a confessed Communist and a confessed perjurer who admitted on the stand that he was frightened and hoped for clemency? There was no corroborative testimony or extrinsic objective evidence to confirm what Elitcher said. One is thus forced to believe either Elitcher or Julius Rosenberg’s denials. In post-trial affidavits, Sobell contradicted Elitcher’s charges, but because Sobell’s statements were never subjected to cross-examination their value is diminished.

Those who think Sobell innocent also have difficulty in accounting for his strange behavior in Mexico. It is true that evidence of flight is treacherous proof; Sobell may have fled to Mexico, as the prosecuting authorities claimed, because he was guilty, but he may have gone for innocent reasons. In post-conviction proceedings, Sobell stated that he was “apprehensive over signs of political intimidation and repression in [the United States];” that he and his wife had been engaged in leftwing political activities and had seen scientists “harassed and persecuted for no more than their opinions and associations;” and that he felt that because of his views and acquaintance with Rosenberg he “would be slapped into jail on one pretext or another.”24 But what can one say about the clumsy attempts he made to conceal his identity?

Even persons sympathetic to Sobell have written that "whether one assumes Sobell to have been a fugitive spy or a would-be political refugee, the fact is that many aspects of his behavior while in Mexico seem to preclude any rational motive." He behaved, they note, "as a fearful and confused individual who acted out of complex and at least partially obscure motives."\footnote{Id. at 336, 338.}

Assuming, however, that Sobell was properly convicted, the issue at present is whether there are solid grounds for parole. A good case can be made in support of executive dispensation.

In the first place, there has always been a serious question whether Sobell was prejudiced by being tried with the Rosenbergs. There was never any evidence offered that Sobell had anything to do with purloining atomic secrets from Los Alamos. There may well have been one conspiracy involving Rosenberg, Greenglass, and Harry Gold, and a separate, different conspiracy involving Rosenberg and Sobell. The Court of Appeals rejected this separate conspiracy argument, but Judge Jerome Frank—an exceedingly able and astute judge, who wrote the opinion for the court affirming the Rosenbergs' conviction—dissented from the ruling as to Sobell.\footnote{See United States v. Rosenberg, 195 F.2d 583, 601 (2d Cir. 1952).} He felt that the jury should have been instructed to consider whether Sobell was part of a general conspiracy to transmit any kind of military information, or whether he was a member of a "different" conspiracy to transmit only certain types of military information. The point that Sobell was prejudiced by being tried with the Rosenbergs is certainly not frivolous, and it could properly be weighed in considering a parole application.

Of greater immediate relevance perhaps is the fact that Sobell has served nearly half of a very long sentence and that, according to various accounts, he has been a model prisoner. His wife has remained loyal to him and has carried on a remarkable campaign in his behalf. The passions which surrounded the case have long since died down, and it is unlikely that his parole would precipitate widespread political controversy. His release would be a humane ending to a grim and tragic chapter in this country's history.