CIVIL LIBERTIES ASPECTS OF THE ROSENBERG - SOBELL CASE

The case of the United States vs Rosenberg and Sobell presents several issues of importance in the civil liberties field, which transcend the question of guilt or innocence of the particular defendants. These issues have been obscured, until now, by the dramatic and explosive quality of the alleged "atomic espionage" plot which was the subject of the trial of these defendants.

The issues in the case were prejudged by many, on the basis of the questionable type of "press release" condemnation before trial, employed at the direction and in the name of J. Howard McGrath, Attorney General at the time the prosecution was commenced. The affirmance of the convictions by the Court of Appeals for the Second Circuit, however, emphasizes the dubious quality of the prosecutions actual proof of the charges; if the testimony of the "government's chief witnesses who are all self-confessed spies "were disregarded" says the court, "the convictions could not stand."

Despite the unstable foundation of the convictions on accomplice testimony, the Court of Appeals affirmed in the face of serious procedural challenges by the appellants. Some of these -- such as the propriety of allegedly prejudicial interventions of the trial judge in the questioning of witnesses, and an ambiguous indictment calculated to conceal rather than reveal the nature of the charge, depend on facts peculiar to the Rosenberg-Sobell record, requiring elucidation at such lengths that the nature of the civil liberties issue is not evident without familiarity with the entire record. Others, however, are of such ominous character, and so evident on the face of the record, that organizations interested in defending civil liberties cannot remain inactive in the face of the Court of Appeal's affirmance.

I

THE COMMUNIST ISSUE

The charge against the defendants was conspiracy to transmit national defense information to the Soviet Union, with intent or reason to believe that the information would be used to that country's advantage.

It has always been a fundamental facet of American due process -- most significant and meaningful in a period of popular passion and prejudice - that:

> "it is inconsistant with our traditional conception of a fair trial to permit any information to go to a jury which might influence a jury to convict a defendant for any reason other than he is guilty of the specific offense with which he is charged."**

The most familiar example of the application of this rule is the exclusion of evidence of crimes other than the particular one the defendant is charged with committing; it extends, however, to any derogatory fact concerning a defendant's life or background which might prejudice a jury against him.

Nevertheless, in the opening statement of the prosecutor -- and throughout the trial -- he was permitted by the trial judge to bring to the attention of the jury in the Rosenberg-Sobell trial, evidence purporting to show:

(a) either that the defendants had been members of, or acquainted with members of the Communist Party

(b) or that they had expressed approval of the economic system, or of particular policies of, the Soviet Union.

The Court of Appeals, in affirming, conceded that "such evidence can be highly inflammatory in a jury trial" and "that the Communist label yields marked ill-will for its American wearer." Yet it ruled that its admission was within the trial judge's discretion; it suggests that although the trial court's cautionary instructions "not to determine the guilt or innocence of a defendant on whether or not he is a Communist" may have been no more than "an empty ritual," defendants' only recourse was to have foreseen the danger and waived trial by jury.

The result is not only of consequence to those who should feel that convictions on such grave charges - with the death sentence for two defendants, and thirty years imprisonment for a third - can rest only on impeccable procedure, by a tribunal divested to the utmost of passion and prejudice. It is also of consequence as involving, and most probably calculated to involve, a sanction of a most terrifying

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** Sang Soon Sur vs United States 167 F. 2 431, 432-3

kind against left wing, radical, or progressive thought and action; namely the implanting of a fear in persons of humble station, and ordinary walks of life th utterances or actions within the protection of the First Amendment, when conjoine with baseless accusations by criminals seeking leniency (1), may subject them to death or long prison sentences.

This last consequence was foreseen, and warned against by the Supreme Court of the United States in a not disimilar context. The prosecution's pretext for injecting political evidence in the Rosenberg-Sobell trial was, at one point, that it had some bearing on "intent", although concededly irrelevant to guilt or innocence. Obviously, the evidence was most inflammatory at a time when there was a "heated public feeling against Communists." 2

In the treason trial of Haupt, evidence had been admitted (apart from the proof of the substantive charge of Haupt's aid to his son and confederate saboteurs during the war,) of conversations and occurences before the war said to show sympathy with Hitler and hostility to the United States. But the evidence in the Haupt case consisted of testimony that the defendant approved his son's wish to go back to Germany and fight for the Nazis, that he bragged that German organizations would take over the United States if we went to war with Germany, that he stated that if, on the outbreak of war he were drafted, "he would crawl over to the enemy lines and tell them our position."

The Supreme Court took care in permitting such "explicit" evidence of "intent and adherence to the enemy" to draw a line which it felt was required to reserve freedom of speech:

> "Such testimony is to be scrutinized with care to be certain the statements are not expressions of mere lawful and permissible difference of opinion with our government or quite proper appreciation of the land of birth." 3

The line so carefully drawn was trangressed by far in the Rosenberg-Sobell case. The government's own summary of the evidence, in its brief in the United States Court of Appeals showed at most, as to the Rosenbergs, an expression of preference for "Russian socialism" over capitalism, and a statement that Russia had an ideal form of government, with which that of the United States did not compare. Sobell was alleged to have been a member of the Communist Party - until 1941-enactment of the Smith Act-- and as such to have defended the German-Soviet non-Agression pact. 4

BEFORE THE ?

It can hardly be denied that each and every statement or act attributed to defendants --ostensibly to show "intent," actually to influence the jury-- was within the scope of "lawful and permissible difference of opinion with our government" or "quite proper appreciation" of a country where socialism was believed to be practiced and of a character and quality quite different from the flagrantly disloyal acts and utterances of Haupt.

The United States Court of Appeals cited, without attempting to explain, the Haupt case; apart from its declining to apply to the Rosenberg-Sobell utterances the "scrutiny" dictated by the Supreme Court's opinion in the Haupt case, it rested their admission on a premise itself unsound and incompatible with prior standards of fair trial procedure.

Describing the evidence as showing merely "a preference for the Russian social and economic organization over ours," the Court somehow, unaccountably, translated this at a later point in its opinion to read "devotion to another country's welfare." This it conceded "cannot, of course, constitute proof" of espionage; but, it said "one may reasonably infer that he is more likely to spy for it than other Americans not similarly devoted."

This last premise --supplied by the unsupportable equation made between "preference" and "devotion" -- is one that all Anglo-American used of evidence have hitherto rejected. A typical, and somewhat poignant reminder of this is found in a case stating: "It is certainly more probable that a crooked official did steal

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1. Two of the three alleged Co-conspirators of the Rosenberg and Sobell were not even indicted: the third, David Greenglass, received a fifteen year sentence on which he may be released in less than six years from now.
2. So described by Chief Judge Learned Hand in Dennis vs United States 183F (2d) 201,226. The situation at the time of the Rosenberg-Sobell trial had become much worse, for the Korean War had begun, and American troops were suffering grave reverses from the Chinese Communist intervention.
3. Haupt vs. United States 330 U.S.631,642
4. A portion taken, among others by David Lloyd George, and Joseph P. Davies (See Mission to Moscow pp 453-6).

than if he were an upright one. Yet our law forbids these very premises." 1

The premise that one's disposition or tendency to commit crime must be excluded is based, as Justice Jackson once said in a bribery case (2) on the proposition that it proves "too much"; it has a tendency to "overpersuade" the jury. Ignoring this, Judge Frank said that since disposition "bears on a possible motion" or "possible intent" to commit espionage, it was admissible. But this is only the opening of a back door which would destroy entirely the "fundamental demand for justice and fairness" which requires exclusion of evidence of "criminal tendency." 3

Almost twenty years ago, Justice Cardozo stated, with characteristic eloquence, in reversing a murder conviction, why it is that evidence possibly admissible on a subsidiary issue, must be excluded when it has prejudicial bearing on irrelevant issues: "It will not do to say" he said, that the evidence should go in on the assumption that this jury will consider it for the permissible purpose, and ignore its forbidden implications:

> "Discrimination so subtle is a feat beyond the compass of ordinary minds . . . It is for ordinary minds, and not for psychoanalysts that our rules of evidence are based . . . When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out." 4

The Bentley Testimony

Even Judge Kaufman, who presided at the trial, was not able to perceive, at first, the relevance of mere membership in the Communist Party, to the subsidiary question of "intent". The intention required to be proved was intention to commit espionage, that is to say, to confer a military advantage on a foreign country. However, he admitted the evidence, over the defendants' objection, on the prosecutor's promise to "show the connection."

To show the connection, the prosecution placed Elizabeth Bentley, the notorious "blonde spy queen" on the stand. Bentley had not participated in any of the acts with which the defendant had been charged, nor did she know any of them. Her testimoney consisted of a capsule of her now - familiar and widely peddled autobiography.

> "She testified" said the Circuit Court, "that the American Communist Party was part of, and subject to the Communist International: that the Party received orders from Russia to propagandize, spy and sabotage; and that Party members were bound to go along with these orders under threat of expulsion."

The defendants contended, unsuccessfully, that the admission of this "testimony" composed of a melange of hearsay, gossip and rumor, was itself prejudicial under the old legal rule of "res alios interacts"-- forbidding the conviction of one defendant by having the accusations against him confused with the misdeeds of another person. They also contended that her testimony should in no event have gone to the jury, but at most been considered by the court, in the jury's absence, on the question of admissibility of evidence-- a question of law, for the judge, rather than of fact for the jury. They contended finally, and with considerable justice, that the use of the Bentley testimony was a form of guilt by association, flatly in contradiction of the rule of the Schneiderman case that "beliefs are personal and not a matter of mere association." 5

In this instance, "guilty intent" rather than "guilt," was attributed by association; the reasoning of Court, jury and appellate court must have been: the witness testifies that some members of an association have such-and-such an intent; the defendants are members of such an association, and hence have such an intent.

It seems clear that the use of the Communist issue, at the Rosenberg-Sobell trial, was not only in conflict with ordinary rules of evidence laid down to issue a fair and dispassionate trial; it was also a violation of the limitation on the use of such evidence especially laid down in the Haupt case to protect an area of thought and speech under First Amendment protection.

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1. Railton vs United States 127 F(2D)591
2. Mudielson vs United States 335 U.S. 469
3. Lovely vs United States 169 F(2nd) 386,389
4. Shepard vs United States 290 U.S. 96,104
5. Schniederman vs United States 320 U.S. 118,136

The Death Sentence

The statute under which the defendants were accused and convicted provides for a sentence of, up to twenty years imprisonment for violation in time of peace; or up to twenty years, or death, in time of war. The defendants were accused of espionage, not in behalf of an enemy in time of war, or even a dubious neutral, but in behalf of an ally in the war. The overt acts of which the defendants Rosenberg were accused (unlike Sobell) included participation in the theft by David Greenglass of certain information from Los Alamos, where he was stationed as a sergeant in the Army, pertaining to the atomic bomb project. Upon the return of the verdict of guilty, the trial judge sentenced the Rosenbergs to death.

The sentence was sensational at the time, to many shocking. The plainly anti-Soviet Jewish Daily Forward called the sentence "too horrible" and "too cruel." The Chicago Sentinel, an American-Jewish magazine of national circulation, said that the sentencing judge "was carried away to an extent by the hysteria which has overtaken our country."

The contention was made in the appeal of the Rosenbergs from the conviction, that the sentence was in conflict with the Eighth Amendment to the Constitution of the United States, which for bids the infliction of "cruel and inhuman punishment." The history of the Eighth Amendment, and the context of the trial and conviction of the Rosenbergs, shows sound support of this claim.

The roots of the Eighth Amendment lie not in a squeamish distaste for the infliction of pain, but in the historic judgment that cruel and vindictive punishment are a characteristic weapon of political tyranny: the Eighth Amendment is but part of a Bill of Rights intended to protect the people against dictatorial government. It was not the savagery of sadists that the draftsmen of the Bill of Rights intended to protect the people against, but the employment of cruel or severe punishment as an instrument of political tyranny. This is established not only by the views of learned commentators, (1) but also by the attitude of the Supreme Court of the United States:

> "...surely they (authors of the Amendment) intended more than to register fear of the forms of abuse that went out with the Stuarts. Surely their jealousy of power had a saner justification than that. They were men of action, practical and sagacious, not beset by vain imagining and it must have come to them that there could be exercises of cruelty by laws other than those which inflicted bodily pain or mutilation. With power in a legislature great, if not unlimited to give criminal character to the acts of man, with power unlimited to fix terms of imprisonment with what accompaniments they might, what more potent instruments of cruelty could be put into the hands of power? And it was believed that power might be tempted to cruelty. This was the motive of the clause and if we are to attribute an intelligent providence to its advocates we cannot think that it was intended to prohibit only practices like Stuarts, or to prevent only an exact repetition of history. We cannot think that the possibilty of coercive cruelty being exercised through other forms of punishment was overlooked. We say "coercive cruelty," because there was more to be considered than ordinary criminal laws. Cruelty might become an instrument of tyranny: of zeal for a purpose either honest or dishonest." (2)

It is surely consistent with this approach to the Eighth Amendment to contend, as the Rosenbergs did, that a sentence of death may be permitted by statute, and yet imposed by a Court in circumstances which bring it within the sort forbidden by the Constitution. Corresponding to the emphasis on the political belief during the trial, was an emphasis on political implications of the sentence, in the remarks of the Court in imposing sentence, which speaks for itself.

The sentencing judge made his courtroom a forum for remarks about "delusions about the benefits of Soviet power;" he accused the defendants of "making the choice of devoting themselves to the Russian ideology...instead of serving the course of liberty and freedom;" he expressed on his consummate motivation the proposition:

> "It is so difficult to make people realize that this country is engaged in a life and death struggle with a completely different system."

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1. 2 Story, Commentories on the Constitution Sec. 1903; Whalen, Punishment for Crime, The Supreme Court and the Constitution, 35 Minn. L Rev. 109,111

2. Weams vs United States 217 U.S. 349,372-3

When it is considered that never before in the history of the United States has a civil court-- in time of peace or war-- decreed a death sentence for espionage; that none of the eight Americans convicted of treason on behalf of the Axis were sentenced to death; that the Rosenbergs were not charged with intent to injure the United States, and that the Atomic Energy Act of 1946 permits a death sentence only when such specific intent is found -- it becomes clear that the Rosenbergs are correct in arguing that their sentences is in violation of this principal.

> "In the most exact sense, therefore, a punishment whose imposition is designed to, or which tends to enforce, or which has the effect of enforcing, political conformity to the concepts of the sovereign, is a punishment which is violation of the Eighth Amendment." (1)

Their contention is reinforced by the failure of the Government in its argument to the Court of Appeals to deny the overt political manifestation of the sentence. Their position was not met by the opinion of the Court of Appeals which rejected their argument solely on the ground that an appellate court has no power to modify a sentence permitted by a valid statute. One judge went further in a "concurring" opinion apended to the opinon he wrote for the Court, and invited the Supreme Court to re-examine the principle of law which was sufficient for his colleagues. He did not, however, meet, or attempt to discuss, or even deny, that the sentence below imposed to bring about political conformity, "to make people realize that we are engaged in a life and death struggle with a completely different system:" he incorrectly understood the appellants to have offered a "community attitude" test of the severity of the sentence, which they disclaim to have been their purpose.

III

THE JOINT TRIAL OF SEPARATE CONSPIRACIES

The "growing habit" of prosecutors, "to indict for conspiracy" when a substantive offense has been committed, has been denounced by Justice Jackson as a "serious threat to fairness in our administration of justice." (2)

One limit that has been imposed, however, on "dragnet" conspiracy trials, has been the refusal of courts to allow participants in two separate conspiracies to be tried together, when the only pretext for this is that one of the defendants may have participated in each of the two conspiracies.

An important aspect of fair procedure is protected by this rule which is intended to prevent confusion of the jury and "transference of guilt from one to another across the line separating conspiracies." (3)

How serious the danger is when this rule is avoided was stated as follows by the Supreme Court:

> "Criminal they may be, but it is not the criminality of mass conspiracy. They do not invite mass trial by their conduct. That way lies the drift to totalitarian institutions." (4)

In the Rosenberg-Sobell case, conspiracy was the charge. The Government's case against the Rosenbergs and Greenglass and Gold (the latter of whom pleaded guilty) related solely to the atomic information offense-- a conspiracy which, if the government's witnesses were believed was consummated and should have been presented substantively. The government's case against Sobell related solely to a conspiracy in which he was supposed to have participated with Julius Rosenberg, relating to his specialty of electronic engineering, and directed almost exclusively to persuasions supposed to have been unsuccessfully addressed to another scientist, one Max Elitcher.

It was never claimed that Sobell knew, had heard of, or assisted Greenglass or Gold. It was indeed conceded by the trial judge in imposing sentence on Sobell:

> "the evidence in the case did not point to any activity on your part in connection with the atom bomb project."

In fact, Sobell had not been named in the original indictment against the Rosenbergs; the original charge against Sobell, on the other hand, did not name the Greenglasses or Gold. It was only by a subsequent, superseding indictment that the two charges of conspiracy were brought together and attempted to be merged.

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1. Brief in Court of Appeals, P. 137

2. Krulowitch vs United States 336 U.S. 440, 446
3. Kotteakos vs United States 328 U.S. 750, 754
4. Id., P773.

To have dragged Sobell thus into the "atomic espionage" trial, with the knowledge that the prosecutor must have had that Sobell had nothing to do with the atomic bomb, was diabolical. It was not merely the type of careless expedient which sometimes lends to two defrauders being tried together: an expedient which the Supreme Court has characterized as "totalitarian." It was a deliberate effort to confuse the jury, to prejudice it against Sobell on the one hand, and against Ethel Rosenberg on the other hand, by bringing against each evidence that had only to do with the other. Particularly Sobell suffered, for he was stained and impugned by evidence calculated to inspire horror in any juror, terror-stricken by years of propaganda concerning atomic warfare.

Judge Frank of the Court of Appeals dissented from the affirmance of Sobell's conviction, on the ground of separate conspiracy that Sobell had urged. His colleagues, however, in upholding the sentence resorted to an expedient that would have the effect, if widely applied, of destroying entirely the protection that is supposed to be offered against transference of guilt from one conspiracy to another. Their reasoning was that there were not two, but only one conspiracy; that each of the defendants had a purpose to transmit "any and All" information to Russia that could be obtained. But the label of "any and all" if applied to any two separate but similar conspiracies, would readily serve to merge them, and thus obliterate the protection against "totalitarian" multiple conspiracy trials.

Judge Frank pointed out, moreover, that the majority of the court had even countenanced the refusal of the trial judge to submit to the jury the question of whether there were one or two conspiracies. Thus the right to a jury determination on all questions of fact was actually abrogated as to this vital issue.