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WHEN JUSTICE FAILS

*Stephan Landsman**

THE HAYMARKET TRAGEDY. By *Paul Avrich*. Princeton, New Jersey: Princeton University Press. 1984. Pp. xv, 535. \$29.50.

I. WHAT WAS THE HAYMARKET TRAGEDY?

On November 11, 1887, four anarchists were executed for allegedly participating in a bombing attack in Chicago's Haymarket Square that resulted in the deaths of more than half a dozen policemen. In the narrowest sense this execution and the chain of events that led to it constitute the Haymarket tragedy. Paul Avrich suggests that the road to Haymarket began in 1877 when a virtually spontaneous strike of railroad and other workers swept across the United States to protest oppressive management policies and the dismally depressed state of the American economy. The great railroad strike shocked the nation.

Never before had America witnessed a nationwide uprising of workers, an uprising so obstinate and bitter that it was crushed only after much bloodshed. Local police and state militias alone could not restore order. For the first time federal troops had to be called out during peacetime to suppress a domestic disturbance. In the process, more than a hundred workmen were killed and several hundred wounded. [p. 26]

The violence of 1877 led the most militant members of the nascent American labor movement to adopt a policy of armed self-defense. This policy, along with a series of political rebuffs in the late 1870s and early 1880s, moved a significant segment of organized labor's left wing towards the enunciation of anarchist principles, a step formally taken at a congress held in Pittsburgh in 1883. When the United States was plunged into yet another depression in that same year, the radicals began a period of sustained agitation and organization. The economic and political events of the era convinced some of them that the time for revolution had arrived and that working people ought to be armed and prepared for the final battle against capitalism.

From 1883 to 1886 the struggle between labor and capital intensified. Bitter strikes and political violence became ever more common. In response, the rhetoric of the radicals became ever hotter. At a public meeting in Chicago in 1885, for example, an anarchist speaker presented "a scientific treatise on nitro-glycerine as a civilizing agent" and praised "the value of dynamite as a great moral factor in solving

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the problem of capital and labor" (p. 110). These sentiments were echoed by a great many others, and amongst anarchists a "cult of dynamite" seemed to be growing (pp. 160-77).

Conflict between employers and employees came to a head in the early months of 1886 when a broad coalition of labor organizations undertook a campaign for the eight-hour workday. Those leading the movement for shorter hours chose May 1, 1886, as the day for the commencement of a general strike. The strike had a significant impact in Chicago. There all proceeded peacefully until the afternoon of May 3, when fighting broke out at the McCormick Reaper Works and at least two workers were killed (pp. 188-89).

Chicago's anarchist community was outraged by these killings. A protest meeting was called for the evening of May 4 in Haymarket Square. At the same time, a number of armed militant anarchist groups began to make plans in the belief that revolution was imminent. Despite the intensity of emotion among radicals, the Haymarket meeting was a rather sedate affair. Chicago Mayor Carter Harrison was present until around ten p.m. and at that time instructed the police to dismiss the reserves that had been held in readiness in case of trouble (p. 204). After the mayor's departure, Inspector John Bonfield, the commander of the police, decided on his own authority to disperse the remnants of the crowd. As the several hundred police under Bonfield's command advanced on the dwindling crowd, a bomb was thrown into their ranks. The bomb triggered a fusillade of police gunfire. As a result of the bombing and gunfire, seven police officers died and sixty more were wounded (p. 208). A like number of citizens were killed or wounded (p. 210).

The bombing provoked what Paul Avrich describes as the first major "Red Scare" in American history (p. 215). The press shrilly attacked all anarchists and called for their blood.¹ The Chicago police launched a campaign of roundups, searches, and seizures that resulted in the arrests of hundreds of men and women (p. 221). The two leading anarchist newspapers, the German-language daily, *Arbeiter-Zeitung*, and the English-language bimonthly, *The Alarm*, were put out of business and their staffs incarcerated. Chicago was under virtual "martial law" for nearly eight weeks as meetings were banned, speech suppressed, and even the color red "banished from public advertising" (p. 222).

It was in this atmosphere that eight of the Chicago area's leading anarchists were indicted for the murder of one of the slain policemen. Among the eight were several anarchists of national reknown, includ-

1. Avrich quotes the *New York Times*, which on May 6, 1886, gave the following prescription: "In the early stages of an acute outbreak of anarchy a Gatling gun, or if the case be severe, two, is the sovereign remedy. Later on hemp, in judicious doses, has an admirable effect in preventing the spread of the disease." P. 217.

ing Albert Parsons, Oscar Neebe, and August Spies, as well as several revolutionaries of the most militant stripe, including Adolph Fischer, George Engel, and Louis Lingg. The other two defendants were Samuel Fielden and Michael Schwab. The process leading to their indictment was marked by extraordinary prosecutorial excesses. The State's Attorney for Cook County Julius Grinnell instructed investigating police to "[m]ake the raids first and look up the law afterward" (p. 221). His assistant Edmund Furthmann conducted a "sweating shop" to wring statements from witnesses and potential defendants (p. 221). Chicago area businessmen "subscribed more than \$100,000" to the prosecution for expenditures "to help stamp out anarchy and sedition" (p. 223). This vast sum was used for a variety of purposes, including prosecutorial offers of monetary support to various witnesses in the case.²

Despite the defendants' requests for additional time and for separate trials, the cases of all eight of the accused were brought on for hearing before Judge Joseph Easton Gary on June 21, 1886. The trial was a mockery of justice. Seven years after the event, Illinois Governor John Altgeld reviewed the case and concluded that the proceedings had been deficient in the following ways:

FIRST — That the jury which tried the case was a packed jury selected to convict.

SECOND — That according to the law as laid down by the supreme court, both prior to and again since the trial of this case, the jurors, according to their own answers, were not competent jurors and the trial was therefore not a legal trial.

THIRD — That the defendants were not proven to be guilty of the crime charged in the indictment.

FOURTH — That as to the defendant Neebe, the state's attorney had declared at the close of the evidence that there was no case against him

FIFTH — That the trial judge was either so prejudiced against the defendants, or else so determined to win the applause of a certain class in the community that he could not and did not grant a fair trial.³

The jurors were selected from a panel chosen by Henry Ryce, a special bailiff who, according to subsequent disclosures, had declared his intention to pack the jury to convict.⁴ When this charge was aired after trial, the prosecution attempted to persuade a witness with knowledge of the jury-packing efforts to refuse to make an affidavit about them.⁵ At least four of the jurors stated on voir dire that "they

2. See, e.g., Affidavit of Jacob Mikolanda dated Apr. 14, 1893, reprinted in J. ALTGELD, REASONS FOR PARDONING FIELDEN, NEEBE AND SCHWAB 53 (1893).

3. J. ALTGELD, *supra* note 2, at 5.

4. See Affidavit of Otis S. Favor dated Nov. 7, 1887, reprinted in J. ALTGELD, *supra* note 2, at 8-9.

5. *Id.*

were so prejudiced that they could not try the case fairly."⁶ They, along with a great number of others, were cajoled or pressured by the trial judge into conceding that they might be able to change their minds and, therefore, serve as jurors.

The evidence against the defendants was exceptionally weak. The actual bomber was never produced in court. Only four of the defendants were tied to the bombing in any way,⁷ and this by dubious and conflicting testimony drawn, for the most part, from two witnesses of suspect reputation.⁸ As to the other defendants, little was proven except that they, at one time or another, had made inflammatory utterances. Their convictions, if justifiable at all, could only be based on a novel conspiracy theory that held the defendants liable if they "publicly by print or speech advised or encouraged the commission of murder without designating time, place or occasion at which it should be done."⁹ This theory invited the introduction of all sorts of prejudicial material into the case, and led many observers to conclude that the defendants were tried and convicted for their beliefs rather than for having had any part in the murder of a police officer. In the case of defendant Neebe, even this sort of evidence was lacking. The prosecution also injected prejudice into the case by referring to the defendants as "cowards,"¹⁰ "assassins," and "godless foreigners" (p. 268), as well as by introducing provocative exhibits, including the blood-stained uniform of a dead policeman and various demonstrative exhibits relating to bomb manufacture (p. 276).

Judge Gary was openly and consistently hostile to the defendants. He denied their motions for a delay of trial and for separate trials. His courtroom demeanor was marked by the strongest evidence of animosity towards the anarchists. He allowed the prosecution extensive latitude in opening, closing, and examining, while rigidly confining the defendants, especially in cross-examination (p. 262). Judge Gary

6. J. ALTGELD, *supra* note 2, at 25-29.

7. The three directly implicated were August Spies, Michael Schwab, and Adolph Fischer. Pp. 268-70. The prosecution argued that Louis Lingg might have manufactured the bomb that was thrown. P. 273.

8. The two witnesses were M.M. Thompson and Harry L. Gilmer. Among other things, Thompson claimed to have overheard Spies and Schwab confer in English a moment before they allegedly handed the deadly bomb to a confederate. This testimony flew in the face of the fact that both were German-born and both virtually always spoke German to each other, as well as the fact that Schwab had an excellent alibi. Pp. 268-69. Gilmer's testimony was equally questionable. He claimed Fischer was on the scene when the strongest evidence demonstrated otherwise. Additionally, ten witnesses swore that Gilmer "was an inveterate liar whom they would not believe even under oath." P. 270.

9. Judge Gary's Charge to the Jury, 1 Abstract of Record at 8, *Spies v. People*, 122 Ill. 1, 12 N.E. 865 (1887), *reprinted in* THE CHICAGO HAYMARKET RIOT: ANARCHY ON TRIAL 57 (B. Kogan ed. 1959).

10. Opening Address of State's Attorney Julius Grinnell, *Spies v. People*, 122 Ill. 1, 12 N.E. 865 (1887), *reprinted in* M. SCHAAK, ANARCHY AND ANARCHISTS 392 (1889), *and in* THE CHICAGO HAYMARKET RIOT: ANARCHY ON TRIAL, *supra* note 9, at 22.

played a key part in the tainted jury selection process, and he framed the legal theory in a way that encouraged convictions. In an article published in 1893, the judge wrote of the verdict that it "was received by the friends of social order, wherever lightning could carry it, with a roar of almost universal approval"¹¹ and that it should be said of the condemned anarchists that

"the people whom they loved" they deceived, deluded, and endeavored to convert into murderers; the "cause they died in" was rebellion, to prosecute which they taught and instigated murder; their "heroic deeds" were causeless, wanton murders done; and the "sublime self-sacrifice" of the only one to whom the words can apply was suicide, to escape the impending penalty of the law incurred by murder.¹²

It is not at all remarkable that the jury convicted the eight anarchists and fixed death sentences for all but Neebe. The case was appealed to the Illinois Supreme Court under the caption *Spies v. People*.¹³ In a lengthy opinion, the court affirmed the convictions with virtual unanimity. The court's decision is noteworthy for its endorsement of almost every ruling of the trial judge. Perhaps a more candid evaluation came from Justice Mulkey, who in his brief concurrence stated:

In view of the number of defendants on trial, the great length of time it was in progress, the vast amount of testimony offered and passed upon by the court, and the almost numberless rulings the court was required to make, the wonder with me is, that the errors were not more numerous and more serious than they are.¹⁴

The cavalier nature of this conclusion is especially troublesome in light of the facts that seven of the defendants were condemned to die, and that the difficulties of the case were attributable to court rulings and prosecutorial choices rather than the actions of the defendants.

The decision in the Haymarket case is even more troublesome because it was flatly contradicted by the Illinois Supreme Court seven years later in *Coughlin v. People*.¹⁵ There a majority of the court overturned a conviction in a case in which jurors were impanelled despite their initial avowals of prejudice. The court sought to distinguish *Spies*, where such avowals had not led to reversal, on the theory that prejudice in the case of the anarchists was "justified."¹⁶ Two judges dissented from this extraordinary analysis. One was Justice Magruder, who had written the *Spies* decision. He specifically found that

11. Gary, *The Chicago Anarchists of 1886: The Crime, The Trial, and The Punishment*, 65 THE CENTURY MAGAZINE 803, 807 (1893).

12. *Id.* at 837.

13. 122 Ill. 1, 12 N.E. 865 (1887).

14. 122 Ill. at 266-67 (Mulkey, J., concurring).

15. 144 Ill. 140, 33 N.E. 1 (1893).

16. 144 Ill. at 188, 33 N.E. at 16.

there was no difference between *Coughlin* and *Spies*.¹⁷ Governor Altgeld, in his review of the Haymarket case, stated that “[t]he very things which the supreme court held to be fatal errors in the [Coughlin] case constituted the entire fabric of [the *Spies*] case.”¹⁸

The supreme court fixed the date of execution as November 11, 1887. Before that time a substantial clemency campaign was undertaken with the objective of persuading Illinois Governor Richard Oglesby to pardon the defendants. An amnesty association was formed, and its efforts led to the gathering of more than 40,000 petition signatures in a week (p. 338) as well as appeals for mercy from some of the leading activists and thinkers of the day, including Samuel Gompers and William Dean Howells. Under intense political pressure from all sides, Governor Oglesby fashioned what can only be interpreted as a compromise solution.¹⁹ He granted clemency to two of the condemned defendants while sustaining the death sentences of five others. Shortly before the date of execution one of the defendants, Louis Lingg, took his own life with a small dynamite bomb smuggled to him by a friend (p. 376). The remaining four defendants — Albert Parsons, August Spies, Adolph Fischer, and George Engel — were executed.

In January 1893, John Altgeld was inaugurated governor of Illinois. The three remaining Haymarket defendants — Samuel Fielden, Michael Schwab, and Oscar Neebe — immediately petitioned him for pardons. He personally undertook a painstaking examination of the entire record. In June of 1893, Governor Altgeld issued a sixty-three-page report analyzing the legal proceedings and pardoning the defendants.²⁰ Altgeld’s report was a stinging indictment of the trial on the five grounds enumerated above. The decision ignited a firestorm of controversy in which Altgeld was excoriated as a champion of anarchy. Apparently what was most provocative was not the governor’s decision to pardon the men, but the fact that “he had called the sanctity of the judicial process into question, and with a body of evidence so overwhelming that it could not be easily refuted” (p. 425). Altgeld was not reelected to a second term as governor.

The tragedy of the Haymarket affair is to be found not only in these events, but in the broader consequences of the bombing. The explosion in Haymarket Square and the attendant publicity fixed in the American mind the idea that leftists in general and anarchists in particular were bloodthirsty madmen with explosive devices spilling out of their pockets. The anarchists thus became “arch counselors of

17. See *Coughlin*, 144 Ill. at 189-96, 33 N.E. at 16-19.

18. J. ALTGELD, *supra* note 2, at 34.

19. It has been so described in H. DAVID, *THE HISTORY OF THE HAYMARKET AFFAIR* 457 (1936).

20. See J. ALTGELD, *supra* note 2.

riot, pillage, incendiarism, and murder."²¹ Their social program was ignored and their humanity denied. They were grotesquely caricatured. Witness, for example, the description of the defendant Samuel Fielden given by the *Chicago Times* on the occasion of his arrest:

He is a villainous-looking fellow at best, of heavy, stocky build, shoulders broad and slightly stooped, large hands, and muscular arms. His head is covered with a thick growth of frowsy rat-colored hair, and his face is almost hidden in a mass of whiskers resembling moss-hair. The expression of his countenance as a prisoner was in great contrast to that as a murder-preaching devil. He it was who made the last speech to the socialist crowd on Tuesday night. Then, mounted on a platform, his face contorted in a most fiendish shape, he harangued and urged his listeners to pillage and kill. He was in his element and felt safe in his backing. Yesterday, however, his visage was one of extreme despair and fear. The brutal look had given place to one of fearful anxiety, and as he was led into the secret room of the police he cast his little ratty eyes about from face to face looking in vain for a friendly countenance. A few moments' search of his sweaty, sticky clothes disclosed nothing but a dirty handkerchief and numerous circulars appealing to the workingman to take up arms, etc.²²

All but one of the Haymarket defendants (Albert Parsons) were foreign born. The hatred and anger engendered by the bombing were focused not only on radicals but on immigrants as well. The background of the defendants was constantly emphasized in the press. Even Governor Altgeld, who had spent all but the first three months of his life in the United States, was branded a foreigner and as such untrustworthy (p. 424). The bombing and attendant commentary gave new credibility to an old American stereotype — the outside agitator. They fueled American xenophobia, and lent credence to the notion that the ills of the nation could be traced to strangers, minorities, and newcomers. The Haymarket case reinforced an American inclination in certain circumstances to treat aliens as scapegoats and helped establish a pattern that has been repeated in a number of famous cases, including those of Nicola Sacco and Bartolomeo Vanzetti, Bruno

21. *Chicago Times*, May 6, 1886, reprinted in *THE CHICAGO HAYMARKET RIOT: ANARCHY ON TRIAL*, *supra* note 9, at 14.

22. *Id.* at 16. Compare Joseph Conrad's description of the terrorist, Mr. Verloc, in *THE SECRET AGENT*:

[A]t that signal, through the dusty glass doors behind the painted deal counter, Mr. Verloc would issue hastily from the parlour at the back. His eyes were naturally heavy; he had an air of having wallowed, fully dressed, all day on an unmade bed. Another man would have felt such an appearance a distinct disadvantage. In a commercial transaction of the retail order much depends on the seller's engaging and amiable aspect. But Mr. Verloc knew his business, and remained undisturbed by any sort of aesthetic doubt about his appearance. With a firm, steady-eyed impudence, which seemed to hold back the threat of some abominable menace, he would proceed to sell over the counter some object looking obviously and scandalously not worth the money which passed in the transaction: a small cardboard box with apparently nothing inside, for instance, or one of those carefully closed yellow flimsy envelopes, or a soiled volume in paper covers with a promising title.

J. CONRAD, *THE SECRET AGENT* 4-5 (1907).

Richard Hauptmann, Leo Frank, the Scottsboro boys, Angelo Herndon, and perhaps even Julius and Ethel Rosenberg.

II. AVRICH'S ACHIEVEMENTS

Paul Avrich set himself the task of reconstructing "the story around the lives of the anarchists themselves, their hopes and dreams and passions" (p. xiii). At its core *The Haymarket Tragedy* is a group biography intended to restore an appreciation of the human qualities of a group of men and women whose history has been grossly distorted because of misleading reportage and long-lived political stereotypes. Avrich succeeds admirably in this endeavor. His portraits of the anarchists, their principles, and their passions, are both rich and vivid. His work allows the reader to rediscover a number of truly extraordinary figures.

Perhaps foremost among them is Albert Parsons, the one native born American among the defendants. Avrich follows the Parsons family from its American beginnings in Puritan New England to Albert Parsons' youth in Alabama and Texas. Avrich painstakingly documents the development of a homegrown radical from his days as a boy soldier in the Confederate Army, to advocate of racial equality in Reconstruction Texas, to labor organizer in Chicago, and finally to militant anarchist. He shows us the nobility of spirit and boundless energy of a man who advocated a different path for America. Avrich succeeds in giving Parsons a human face and heart. He prepares us for the heroism that led Parsons to surrender himself for trial though he had escaped the law's net and could have remained safely out of harm's way.

Avrich also provides a fine portrait of one of the most militant and radical anarchists of his day, the defendant Louis Lingg. At the time of the Haymarket bombing, Lingg was a twenty-two-year-old recent immigrant from Germany who was caught up in the millennial expectation of revolution (pp. 157-59). He was a bomb manufacturer for the most radical German-American anarchist groups in Chicago and an outspoken advocate of retaliatory violence (pp. 159, 175). He was the only defendant to resist arrest, and throughout the legal proceedings he consistently rejected the proposition that a capitalist court could make any claim upon him. His path was one of "unflinching courage" (p. 359) and led him to take his life with a miniature explosive device smuggled to him by a supporter rather than be hung in a capitalist prison. For anarchists of the next generation like Emma Goldman and Alexander Berkman, Lingg was "the sublime hero" (p. 377).

Although many of Avrich's biographical sketches introduce characters of great interest, one other actor in the Haymarket drama stands out: the defense team's lead counsel, William Black. Black was

a highly successful forty-four year old corporate lawyer when approached by the anarchists' defense committee. He had been a hero in the Civil War and had been awarded the Congressional Medal of Honor (p. 250). He initially suggested that the defendants seek counsel with greater criminal experience. His ire was provoked, however, when almost the entire criminal defense bar of Chicago shrank from the task of representing the Haymarket defendants (p. 251). Despite a clear appreciation of the risk to his career, Black undertook the case. He pressed it with the greatest zeal, adhering throughout to his belief in the integrity of the judicial system. His decision to represent the anarchists led to the dissolution of his law firm and the loss of the vast majority of his business clients (p. 448). Despite these hardships, he never wavered in his support for the anarchists. He provides an outstanding example of the finest qualities of the American lawyer.

Avrich succeeds in portraying the Chicago anarchists as "men and women who have the courage to defy conventional standards of behavior and to withstand hardship and abuse for the sake of principles that they believe to be right" (p. xiv). Yet there is something troubling about this picture. The rhetoric of the anarchists is so violent as to give one pause. Lucy Parsons, Albert's wife, said of the rich in 1885, "Let us kill them without mercy, and let it be a war of extermination and without pity" (p. 91). August Spies in that same year said "what does it matter if some thousands, or even tens of thousands of drones are removed during the coming struggle?" (p. 125). And Parsons himself, shortly before going into hiding in 1886, wrote, "[i]t must be LIBERTY for the people or DEATH for the CAPITALISTS" (p. 244) (emphasis in original). Avrich does not succeed in fully reconciling this espousal of violence and the attendant cult of dynamite with the noble picture he paints of the anarchists. The difficulty in explaining these contradictory pieces of the puzzle is glossed over. Indeed, one is tempted to say that there is a touch of hagiography in Avrich's approach to the Chicago defendants.

The tendency to canonize the anarchists can be seen in a number of sections of *The Haymarket Tragedy*. Almost as much space is devoted to their postconviction speeches as to the proceedings at trial. Every arguably generous act of the anarchists is dwelt upon, especially Parsons' refusal to seek clemency for himself alone and the group's refusal to encourage a last-minute rescue attempt by fellow radicals. The final hours of the defendants are presented in the greatest detail and seem intended to call to mind either Socrates' death or the events in the garden at Gethsemane. We are informed of the sheriff's rejection of a suggestion by influential citizens that he "secrete the bodies of the doomed men lest their burial place become a revolutionary shrine," (p. 388) and of the ghastly sufferings of the four executed anarchists, all of whom "died from slow strangulation" (p. 393). The Haymarket defendants were men of high principles, but they were

political zealots, not saints. A fuller picture of them would have addressed the problem inherent in their choice of rhetoric and tactics.

Avrich deserves credit not only for restoring the humanity of the defendants, but also for allowing us to hear their voices. He quotes extensively from the socialist and anarchist literature of the era. He gives us the anarchists' own words. This is especially valuable with respect to the German-speaking radicals who dominated left-wing politics in America during the late 1800s. Avrich manages to give us a sense of the principles and views of this important segment of the great wave of Northern European immigrants who came to America before 1900. The one criticism to be made about his approach is that he makes too little use of the traditional sources of information about the case, such as the trial record and appellate opinions.²³ A further annoyance for the serious reader is Avrich's use of a citation form that makes it exceedingly difficult to identify sources cited in footnotes.

III. THE LEGAL PROBLEM

One question Paul Avrich does not adequately address in *The Haymarket Tragedy* is why the judicial system failed so grievously in the case. He seems to suggest that a miscarriage of justice was inevitable given the nature of American society and the espoused opinions of the defendants. In this view, the Chicago anarchists were tragic heroes, men of honor and worth caught in the toils of a system they could not survive. The idea that the courts were ineluctably fated to condemn anarchist defendants is an inadequate explanation for Haymarket. Avrich fails to consider the nature of the judicial mechanism and ignores substantial evidence that both the courts and society were capable of dealing reasonably with radicals in a range of contexts. Judges showed an ability to dispense justice in other cases involving radicals,²⁴ and politicians such as Mayor Harrison²⁵ and Governor Altgeld displayed both open-mindedness and tolerance. If judicial debacles like Haymarket and similar cases are to be understood, their special characteristics must be identified and analyzed.

The American legal system utilizes a variety of mechanisms to prevent adjudications based on prejudice rather than evidence. Chief among these are jury trial, restrictions on judicial activism, party re-

23. For example, the Illinois Supreme Court opinion in the case is never cited and its contents are discussed in only the most cursory fashion.

24. Avrich himself provides a series of examples, including the decision of Judge William McAllister upholding a group of workmen's right of assembly, p. 33 (also discussed in J. ALTGELD, *supra* note 2, at 39-42), the judicial victory of socialist candidate Frank Stauber over electoral officials who sought to deny him his Chicago aldermanic seat in 1880, p. 48, and the leniency shown Lucy Parsons when she was arrested while campaigning for the release of her husband. Pp. 337-38.

25. The mayor appointed socialists to important positions, p. 80, sought to restrain the police, pp. 98, 197, and supported the movement for an eight-hour workday. P. 183.

sponsibility for the adduction of evidence, rules protecting the integrity of the forensic process, and appellate review.²⁶ These methods generally insure that decisions will be rendered by the most disinterested factfinders available and that the principles of neutrality and fairness will be honored.²⁷ In the criminal setting these rules are augmented by the imposition of a set of ethical prescriptions designed to deter excessive prosecutorial efforts to convict.

Despite the precautions built into the judicial system, grossly biased and unjust adjudications do occur. On such occasions the procedural protections afforded defendants are ignored and verdicts of dubious validity are obtained. Haymarket is but one of a number of famous American criminal cases in which it is generally conceded that improper procedures and questionable results have marred the system's integrity. Others that have been so described include the trial and execution of Sacco and Vanzetti,²⁸ the trial and incarceration of the Scottsboro boys,²⁹ and the prosecution and condemnation of the Rosenbergs.³⁰

While each of these cases is unique, they all share certain features that may assist us in identifying the particular stresses that cause the American judicial system to fail. One crucial factor seems to be the social conditions that precede trial. When conditions are especially turbulent and the general populace perceives a threat to its way of life, the chances of a miscarriage of justice are substantially increased. The Haymarket case arose in 1886, a time of intense social unrest both because of a severe economic slump and because of extensive labor agitation. Sacco and Vanzetti were tried in 1921, a time of economic depression, turmoil induced by the recent demobilization of large numbers of American soldiers, and a widespread "red scare." The Scottsboro boys' first trial took place in 1931 during yet another period of economic hardship and attendant social unrest. Finally, the

26. For a detailed discussion of these mechanisms and their interrelationships, see Landsman, *The Decline of the Adversary System: How the Rhetoric of Swift and Certain Justice has Affected Adjudication in American Courts*, 29 BUFFALO L. REV. 487, 490-99 (1980).

27. *Id.*

28. See *Commonwealth v. Sacco*, 255 Mass. 369, 151 N.E. 839 (1926); F. FRANKFURTER, *THE CASE OF SACCO AND VANZETTI* (1927); L. JOUGHIN & E. MORGAN, *THE LEGACY OF SACCO AND VANZETTI* (1948); F. RUSSELL, *TRAGEDY IN DEDHAM* (1962).

29. See *Powell v. State*, 224 Ala. 540, 141 So. 201, *revd. sub nom. Powell v. Alabama*, 287 U.S. 45 (1932); *Norris v. State*, 229 Ala. 226, 156 So. 556 (1934), *revd. sub nom. Norris v. Alabama*, 294 U.S. 587 (1935); D. CARTER, *SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH* (1969).

30. See *United States v. Rosenberg*, 195 F.2d 583 (2d Cir.), *cert. denied*, 344 U.S. 838 (1952); *Rosenberg v. United States*, 346 U.S. 273 (1953); L. NIZER, *THE IMPLOSION CONSPIRACY* (1973); R. RADOSH & J. MILTON, *THE ROSENBERG FILE* (1983); W. SCHNEIR & M. SCHNEIR, *INVITATION TO AN INQUEST* (1965); J. WEXLEY, *THE JUDGMENT OF JULIUS AND ETHEL ROSENBERG* (1955); Cohen, *Justice Douglas and the Rosenberg Case: Setting the Record Straight*, 70 CORNELL L. REV. 211 (1985); Parrish, *Cold War Justice: The Supreme Court and the Rosenbergs*, 82 AM. HIST. REV. 805 (1977).

Rosenbergs' 1951 espionage trial opened amidst the most intense "red scare" in American history and at a time of exceptional international tension. In all these cases the public was confronted with social conditions of the most threatening sort.

But it is not simply the character of the times that produces the *cause célèbre*. Another essential ingredient seems to be the status of the defendants as outsiders who threaten the established order of the community. The Haymarket defendants and Sacco and Vanzetti were most obviously similar in this regard. They were all, save Albert Parsons, European immigrants. In addition, they all shared a belief in a political philosophy, anarchism, that was generally perceived as antithetical to American values. It is only slightly more difficult to discern the same pattern in the Scottsboro proceedings. There nine young black hoboos were accused of raping two young white women on a train moving through northern Alabama. Such an act by racial outcasts was perhaps as provocative a challenge to the Southern system of segregation as could be imagined at the time. The difficulty of the case was compounded by the fact that the Scottsboro defendants were represented by a number of Jewish lawyers from New York and supported by a communist-controlled defense committee.³¹ The pattern was repeated in the Rosenberg case, where a young Jewish couple from New York were charged with providing atomic secrets to the Soviet Union. One of the keys to the case was their membership in the Communist Party, an organization generally perceived in the 1950s as the greatest of menaces. All of these cases suggest that at times of intense social upheaval defendants perceived as outsiders of a particularly threatening sort will be at special risk in American courts.³²

The presence of these factors is not a guarantee that justice will miscarry. In each of the highlighted proceedings, problems particular to the case or its participants transformed the potential for injustice into the actuality of an unfair proceeding. A key safeguard in most cases is the neutrality and passivity of the decisionmaker. Judge and/or jury failed to meet systemic expectations in this regard in each of the enumerated prosecutions. Perhaps the most remarkable were the juries in the Scottsboro case. In almost a dozen trials, only one juror held out for anything less than the prosecution demanded³³ despite the

31. See D. CARTER, *supra* note 29, at 51-103.

32. In Britain, by contrast, the most troublesome modern cases have involved men or women from within the society who have offended strongly held *social* mores. See, e.g., A. NOYES, *THE ACCUSING GHOST OF ROGER CASEMENT* (1957) (detailing dubious nature of legal proceedings and propaganda campaign — including charges of homosexuality — against Sir Roger Casement, an advocate of Irish independence executed as a traitor in 1916); *THE TRIAL OF ROGER CASEMENT* (G. Knott ed. 1926) (same); *TRIAL OF FREDERICK BYWATERS AND EDITH THOMPSON* (F. Young ed. 1923) (presenting trial record and analysis of criminal prosecution that appears to have led to execution of adulterous wife more for her sexual behavior than for her participation in murder).

33. See D. CARTER, *supra* note 29, at 375.

denial of one of the alleged victims that there had been a rape,³⁴ the testimony of physicians that the medical evidence was not consistent with violent assault,³⁵ and the existence of physical infirmities that made it virtually impossible for several of the defendants to have participated in a sexual attack.³⁶ The intense bias of the juries made it virtually impossible for the Scottsboro boys to obtain a fair trial.

Juror bias was also a serious problem in the Haymarket case. In twenty-one days of jury selection virtually all of the 981 venire members questioned stated that they had fixed prejudices against the defendants (p. 264). The jury that actually tried the anarchists shared the same feelings. Only the importunings of the trial judge led venire members to concede that they might be able to put aside their prejudices. On the weakest sort of evidence, seven of the Haymarket defendants were condemned. While less is known about the prejudices of the jurors in the Sacco-Vanzetti and Rosenberg cases, substantial evidence suggests that jurors in those cases also harbored strong feelings against the defendants.³⁷

Judges as well as juries were particularly antagonistic to the defendants in the cases under consideration. The hostility of Judge Gary to the Haymarket defendants has already been considered.³⁸ Judge Webster Thayer displayed similar animosity in the Sacco-Vanzetti case. In his in-court rulings and remarks, Thayer consistently sided with or assisted the prosecution;³⁹ and in out-of-court comments, he displayed a vicious antagonism towards the Italian anarchists.⁴⁰ The performance of Judge William Callahan in the last series of Scottsboro trials was virtually identical to that of Thayer. Again and again Callahan intervened in the proceedings to assist the prosecution or hinder the defense.⁴¹ Judge Irving Kaufman was far less overtly hostile to the defendants in the Rosenberg prosecution. Recent scholarship, however, suggests that Kaufman's role was quite troubling. It has been

34. *Id.* at 232-34.

35. *Id.* at 213-14, 227-28.

36. *Id.* at 221-22.

37. *See, e.g.,* L. JOUGHIN & E. MORGAN, *supra* note 28, at 116 (jury foreman Harry H. Ripley quoted shortly before trial of Sacco and Vanzetti as stating "Damn them, they ought to hang them anyway").

38. *See* text at notes 11-12 *supra*.

39. *See* F. RUSSELL, *supra* note 28, at 185.

40. *See* F. FRANKFURTER, *supra* note 28, at 103-07; L. JOUGHIN & E. MORGAN, *supra* note 28, at 142-48. Thayer was quoted by an acquaintance as having remarked after ruling on one of several post-trial motions, "Did you see what I did with those anarchistic bastards the other day. I guess that will hold them for a while . . . Let them go to the Supreme Court now and see what they can get out of them." *Id.* at 148; *see also* F. RUSSELL, *supra* note 28, at 194-95.

41. *See* D. CARTER, *supra* note 29, at 279-305. Judge Callahan's charge to the jury was described in the following terms by a reporter for the *New York Herald Tribune*: "[It] was not alone the content of the judge's charges . . . which made it a more effective bludgeon against the defense than even the oratory of the prosecuting attorneys . . . [but also the] significant glares from the bench toward Mr. Leibowitz [defense counsel]." *Id.* at 299.

suggested that he was involved in a series of improper *ex parte* communications with the prosecution before and during the trial,⁴² that he interfered in the process used by the government to fix its sentence recommendation,⁴³ and that after the case left his court he continued to press for the swiftest punishment of the defendants.⁴⁴ In these actions can be glimpsed an unacceptable lack of evenhandedness.

It should come as no surprise that biases may influence decisions in any system that relies on human beings. It should never be assumed that any set of procedures will eliminate all prejudice or that all cases will be dealt with fairly. Given the intense social pressures at work during the trials I have considered, and the provocative affiliations of the defendants, it might be anticipated that an unfair adjudication could result. Unfortunately, we generally ignore these propositions and cloak all arguably regular proceedings in a mantle of legitimacy. Investing all the acts of judges or juries with such credit is dangerous because it makes it difficult to admit error without raising doubt about the legitimacy of the mechanisms upon which we rely. This was the dilemma posed by each of the cases I have reviewed.

A second safeguard at work in most cases is party control of proceedings and its criminal law concomitant, restraint on the activities of prosecutors. All the cases under discussion were marked by prosecutorial misbehavior and by the inability of the defendants to counter it by traditional courtroom tactics. In Haymarket, prosecutors Grinnell and Furthmann employed all sorts of tricks to uncover or compel testimony. Their repertoire included "sweating" reluctant witnesses and making extensive payments from a \$100,000 trial fund. At trial the Cook County prosecutors went even further and specially emphasized those matters likely to engender the grossest prejudice. Similar tactics were employed by Frederick Katzmann in the Sacco-Vanzetti case,⁴⁵ and Irving Saypol in the Rosenberg case.⁴⁶ In each of these proceedings, the prosecution paid lip service to notions of restraint and strove for a conviction at almost any cost.

The reasons for prosecutorial excess in these cases are not hard to understand. In each case the public and political outcry was stronger than the countervailing pressure to conform to traditional rules of conduct. Prosecutors who are perceived as lax are obvious political

42. See R. RADOSH & J. MILTON, *supra* note 30, at 277, 428.

43. *Id.* at 281-82.

44. *Id.* at 428-30.

45. See F. FRANKFURTER, *supra* note 28, at 46-62 (prosecutor's exploitation of radical associations of defendants), 77-88 (prosecutor knowingly presented misleading ballistics evidence); L. JOUGHIN & E. MORGAN, *supra* note 28, at 94-98, 117-20, 126-31.

46. See R. RADOSH & J. MILTON, *supra* note 30, at 244-52 (prosecutor's cross-examination of defendant Julius Rosenberg designed to inject question of political affiliations into case), 342-43 (prosecutor manipulated press coverage to prejudice of defendants); W. SCHNEIR & M. SCHNEIR, *supra* note 30, at 147-48, 181-84.

targets, while those who demonstrate an excess of zeal are likely to be applauded or even promoted to higher office.⁴⁷ The only judicial sanction for improper conduct is retrial. The prospect of retrial, with its attendant publicity, is hardly likely to be classified as a deterrent to prosecutors pandering to public prejudice.

In the four cases I have considered, the defense was overborne by the prosecutors' tactics. Where counsel was not particularly skilled, as in the first Scottsboro trial⁴⁸ or in the Rosenberg proceeding,⁴⁹ the conviction of the defendants was virtually uncontested. Even where the case was hard fought by a keen legal mind, however, the outcome was the same. The great Samuel Liebowitz could not convince even a single juror to acquit even one of the Scottsboro boys. The inability of defense counsel to counter prosecutorial tactics in each case was directly related to a judicial or jury bias that could not be overcome. Not even a recantation of testimony⁵⁰ or a strong suggestion of perjury⁵¹ would satisfy decisionmakers inflamed by prejudice and goaded by an ambitious prosecutor.

The final safeguard built into the judicial process is appellate review. In theory, the courts of appeals stand ready to examine trial proceedings and reverse decisions bottomed on violations of important procedural or substantive rights. The judges who are assigned responsibility to review criminal prosecutions are a step removed from the heat of trial and insulated from political pressure. Theoretically, they are in a position to review dispassionately the record and control excesses by judge, jury, or prosecutor. This sort of review did not take place in the four cases under examination. In each, the appellate courts took a crabbed view of their obligations or broadly endorsed the dubious actions of the trial judge and prosecution. The Illinois Supreme Court in its 167-page opinion in the Haymarket case upheld the actions of Judge Gary despite a host of difficult legal questions. The decision is most troubling because it constituted a major departure from prior Illinois case law on jury selection and was effectively overturned within a few years.⁵²

The Massachusetts Supreme Judicial Court took a slightly differ-

47. The prosecutor in the Haymarket case was shortly thereafter elevated to the bench, p. 448, as was Irving Saypol after the trial of the Rosenbergs. See R. RADOSH & J. MILTON, *supra* note 30, at 427. Alabama Attorney General Thomas Knight was elected lieutenant governor within a year after his appearance in the Scottsboro case. See D. CARTER, *supra* note 29, at 273.

48. See *Powell v. Alabama*, 287 U.S. 45, 71 (Scottsboro defendants denied "effective aid in the preparation and trial of the case" at their first trial).

49. See R. RADOSH & J. MILTON, *supra* note 30, at 188-93 (serious blunders by defense counsel at trial).

50. One of the two alleged rape victims in the Scottsboro case, Ruby Bates, recanted her original testimony at the second and subsequent trials. See note 34 *supra*.

51. See note 8 *supra*.

52. See notes 16-18 *supra* and accompanying text.

ent route in the Sacco-Vanzetti case. The high court doggedly refused to examine the problems in the case. The court unanimously insisted that its role on review was tightly constricted and repeatedly relied on the proposition that the challenged activities were within the trial court's discretion.⁵³ In this way, the Supreme Judicial Court evaded the hard questions posed by the case. At least one member of the Massachusetts court, Justice Edward Pierce, indicated on several later occasions that the court's unanimous reliance on technicality masked deep dissension within its ranks.⁵⁴

The Alabama Supreme Court did not, at least at the outset, seem as monolithic as its Massachusetts counterpart. On its first review of the Scottsboro case one of the seven justices dissented from the affirmance of the trial proceedings.⁵⁵ His view was eventually sustained when the United States Supreme Court held that the trials had deprived the defendants of due process.⁵⁶ The Alabama court's initial ruling is troublesome, however, because the trial transcript presents a case that cries out for reversal. The refusal of Alabama's high court to deal fairly with the Scottsboro defendants was reconfirmed when the case came to it for a second time. The court unanimously refused to credit the clearest sort of evidence of racial discrimination in jury selection and upheld a trial of the most dubious sort.⁵⁷ Again the Supreme Court of the United States rejected the findings of the Alabama court, bluntly dismissing the state court's tortured analysis of the evidence.⁵⁸

The Rosenberg case was marked by both appellate hypertechnicality and an apparent animus against the defendants. Various aspects of the case came before the Second Circuit on a number of occasions. Perhaps most noteworthy was the appellate proceeding that addressed the prosecutor's misbehavior in making statements to the press.⁵⁹ The court recognized the troubling nature of the prosecutor's conduct but refused to overturn the verdict because of a technicality involving the absence of a motion for a new trial. This technical ruling was criticized by Judge Learned Hand when he, along with two colleagues, granted a stay of execution to allow an appeal to the Supreme Court.

53. See F. FRANKFURTER, *supra* note 29, at 89-90; L. JOUGHIN & E. MORGAN, *supra* note 28, at 150-51 ("In its first opinion . . . [the Supreme Judicial Court] had to resort to the doctrine of discretion on at least sixteen different occasions covering nine distinct points." *Id.* at 151.).

54. See L. JOUGHIN & E. MORGAN, *supra* note 28, at 352 (quoting Judge Pierce's remarks to Herbert Ehrmann, one of the attorneys who represented Sacco and Vanzetti).

55. See *Powell v. State*, 224 Ala. 540, 554, 141 So. 201, 214 (1932) (Anderson, C.J., dissenting), *revd. sub nom. Powell v. Alabama*, 287 U.S. 45 (1932).

56. See *Powell v. Alabama*, 287 U.S. 45 (1932).

57. See *Norris v. State*, 229 Ala. 226, 156 So. 556 (1934), *revd. sub nom. Norris v. Alabama*, 294 U.S. 587 (1935); D. CARTER, *supra* note 29, at 307-08.

58. See *Norris v. Alabama*, 294 U.S. 587 (1935); D. CARTER, *supra* note 29, at 322-23.

59. See *United States v. Rosenberg*, 200 F.2d 666 (2d Cir. 1952).

Judge Hand said, "People don't dispose of lives, just because an attorney didn't make a point. . . . You can't undo a death sentence. There are some Justices on the Supreme Court on whom the conduct of the Prosecuting Attorney might make an impression."⁶⁰ The Rosenberg case came before the Supreme Court on several occasions. The Court's deliberations were marked by the most unsettling tergiversations and resulted in its refusal to entertain the matter.⁶¹ This decision was reversed when Justice Douglas granted a stay of execution after the Court had ended its term. Then, in an unprecedented move and with the most unseemly haste, the Court reconvened and, in cursory fashion, considered and rejected the Rosenbergs' arguments, thus condemning them to death.⁶²

In all four of the cases I have discussed, the courts of appeals acted in ways that were inconsistent with a fair and full review. What motivated them to act in this way is difficult to say. It is likely, however, that the same animosities that inflamed jurors and trial judges alike may have touched the men sitting on the appellate bench. Moreover, the criticisms made about the behavior of the lower courts probably put pressure on the reviewing panels to support the frontline judges and affirm the integrity of the system in the face of attacks made on behalf of outsiders with anti-establishment views.

Haymarket and the other cases reviewed demonstrate that the system can fail. The question that remains is why it does not cave in to prejudice and fail in a much larger number of cases. The answer to this question is perhaps to be found in the notion that the judicial system can only succeed if its legitimacy is accepted by the vast majority of the populace.⁶³ If citizens come to regard their courts as instruments that serve but a single point of view, they are not likely to respect judicial decisions. Absence of respect in turn leads to a refusal to par-

60. Hand's statement is quoted in J. WEXLEY, *supra* note 30, at 494.

61. The gyrations of the Supreme Court are neatly documented in Parrish, *supra* note 30; see also R. RADOSH & J. MILTON, *supra* note 30, at 397-412.

62. Parrish, *supra* note 30, at 833-36.

63. Most men have a strong sense of justice, at least with regard to their own interests. If the law is evidently partial and unjust, then it will mask nothing, legitimize nothing, contribute nothing to any class's hegemony. The essential precondition for the effectiveness of law, in its function as ideology, is that it shall display an independence from gross manipulation and shall seem to be just. It cannot seem to be so without upholding its own logic and criteria of equity; indeed, on occasion, by actually *being* just. And furthermore it is not often the case that a ruling ideology can be dismissed as a mere hypocrisy; even rulers find a need to legitimize their power, to moralize their functions, to feel themselves to be useful and just. In the case of an ancient historical formation like the law, a discipline which requires years of exacting study to master, there will always be some men who actively believe in their own procedures and in the logic of justice. The law may be rhetoric, but it need not be empty rhetoric. Blackstone's *Commentaries* represent an intellectual exercise far more rigorous than could have come from an apologist's pen.

E.P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT 263* (1975) (emphasis in original); see I. BALBUS, *THE DIALECTICS OF LEGAL REPRESSION* 1-40 (1973); O. KIRCHHEIMER, *POLITICAL JUSTICE: THE USE OF LEGAL PROCEDURES FOR POLITICAL ENDS* 3-21 (1961).

ticipate in the system.⁶⁴ To avoid these results and retain popular allegiance, courts must give the appearance of neutrality and fairness. Hence, each time the courts appear to abandon evenhanded principles they risk popular disaffection and desertion. It would appear that in cases like the ones I have considered, the desire to punish particularly threatening opponents of the system is so great that it overcomes principles of neutrality. If this were allowed to happen too frequently, however, the system could not retain its legitimacy. To abandon, even once, supposedly sacrosanct principles is the most unsettling sort of action. It threatens the very foundation of the system. Actors within the system appear intuitively to appreciate this and to choose, in most cases, to turn aside from temptation.⁶⁵

The restoration of legitimacy after a serious breach of the rules is difficult. It is generally commenced, as in each of the cases discussed, when a broad-based outcry against the injustice of the decision is made.⁶⁶ This sort of agitation triggers a variety of governmental responses, including denial of impropriety and extreme defensiveness. Yet such outcries seem to serve as warnings to the courts not to continue to allow prosecutions by prejudice. The *cause célèbre* usually fixes the high water mark of bias. The defendants in such cases seem to serve as the sacrifices by which a large measure of evenhandedness is eventually restored, and the participants in the system are reminded of the importance and fragility of legitimacy.

The Haymarket Tragedy is an important book both because of its effort to strip away the stereotypes that prevent us from understanding our political history and because of the questions it raises about the delicate nature of our system of justice. It deserves to be widely read and to be used as a springboard for further consideration of the way we deal with hard cases in our courts.

64. See E.P. THOMPSON, *supra* note 63; Markovits, *Law or Order — Constitutionalism and Legality in Eastern Europe*, 34 STAN. L. REV. 513, 552-61 (1982) (workers avoid socialist legal forums perceived as unconcerned with protecting litigants' rights).

65. See I. BALBUS, *supra* note 63 (In response to widespread civil disorders of the middle 1960s courts first used repressive tactics that ignored individual rights, but once order was restored they returned to enforcement of a full panoply of rights as a means of reestablishing their legitimacy in the eyes of the community.)

66. See L. JOUGHIN & E. MORGAN, *supra* note 28, at 221-97 (detailing work of Sacco-Vanzetti Defense Committee and national debate about fairness of trial); D. CARTER, *supra* note 29, *passim* (discussing role of International Labor Defense in defending Scottsboro defendants and national outcry about the case); R. RADOSH & J. MILTON, *supra* note 30, at 347-60 (discussing operation of National Committee to Secure Justice in the Rosenberg Case and international agitation on behalf of defendants).