



Winter 1972

## Davies, The Rosenbluth Case

Malcolm Sharp

### Recommended Citation

Malcolm Sharp, *Davies, The Rosenbluth Case*, 2 N.M. L. Rev. 122 (1972).  
Available at: <https://digitalrepository.unm.edu/nmlr/vol2/iss1/10>

## *The Rosenbluth Case*

By

ROSEMARY REEVES DAVIES

The Iowa State University Press, 1970.

Pp. xxii, 252, \$8.95

On October 25, 1918, a small regiment was in training in expectation of quick transfer overseas, at Camp Lewis, Washington. A battalion went on a hike, accompanied by Major Cronkhite and Sergeant-Bugler Pothier, and including Captain Rosenbluth. At a clearing, Major Cronkhite, who was away from the battalion with Sergeant Pothier, was shot and killed.

He was thought to have been shot with a borrowed .45 revolver that he was carrying. Suicide was out of character. The angle at which he was shot made an accident unlikely but not impossible. He had been shooting, for fun, at cans set up as targets. Pothier was with him, but Pothier's precise location and what he was doing were never clear. He had borrowed a revolver that morning, like Major Cronkhite's, a .45, but that was all that was ever known of either revolver.

At the sound of shooting, ahead of the battalion, Captain Rosenbluth came forward and joked with Major Cronkhite, but he had turned back, it seems likely, when the fatal shot occurred. He returned, and then summoned aid.

A hearing before a military board of inquiry left a record, but an inadequate one. The hearing was informal. Everyone thought he knew what had happened. There was speculation about suicide, which gave some motive then and later for covering up, and later perhaps for changing the record. But the death was assumed to be an accident.

Guns, bullet, and identifiable shells disappeared. No adequate record has ever been made of them or of other physical items, like clothes, which had been picked up and which also disappeared.

On March 17, 1921, Pothier confessed, under questioning by an F.B.I. agent, that he had shot the major by accident. On March 22, he confessed that he had deliberately shot the major, under previous instructions by Captain Rosenbluth.

The evolution took place under the influence of Major Cronkhite's father, Major General Cronkhite. Returned in 1919 from an overseas command, General Cronkhite had become, understandably, uneasy about the inadequate records of his son's death, then suspicious, and then by a leap, suspicious of Captain Rosenbluth. He had influence, and he used it, in the War Department, but more effectively in the Department of Justice, then headed by Attorney General Daugherty, appointed by President Harding.

Captain Rosenbluth was a stalwart public servant, who—since his graduation from Yale as a forester, in 1907—had practiced his profession and engaged creditably in useful acts related to it. He had a good overseas combat record, which led to his assignment to Camp Lewis in 1918. He had in the mean time won favorable recognition, which led to moral support, from Herbert Hoover, for participation in Hoover's Russian relief work. In 1921, Hoover was Secretary of Commerce. He and many others gave witness to Rosenbluth's abilities and character.

Implausible motives were suggested: concern for a good report from Major Cronkhite; a German-Jewish conspiracy to unsettle and incapacitate General Cronkhite.

Rosenbluth was arrested and charged with murder on the basis of Pothier's confession. By March 29, Pothier, who had a record of eccentricity, had repudiated his second confession and returned to the story that he had shot the major by accident, a story which contained implausible details.

Under pressure from General Cronkhite and a growing but not overwhelming public interest, the case was barely kept alive in the Justice Department. Henry Ford's Dearborn Independent contributed an anti-Semitic series on Rosenbluth. Rosenbluth was generally out on bail, at one time secured by Felix Warburg's then famous New York house, and pressing for an end of the prosecution. Pothier was also free on bail part of the time. The Justice Department lawyers were uneasy about the merits of their case. A motion about jurisdiction depending on the effect of a delay in the conveyance of Camp Lewis land to the United States, and related maneuvers, occupied the years.

Finally on September 30, 1924, Pothier was brought to trial, on the theory of his second confession, for murder. (His confessions had ruled out negligence and manslaughter, now in any case barred by limitations.) He was tried separately because the prosecution was sure that Rosenbluth would have a directed verdict and save them both, if they were tried together. Even so Pothier was acquitted and the case against Rosenbluth dropped.

After the grief of those four years, Rosenbluth went on to continue his constructive career, and to enjoy a cheerful old age.

Told in a low key, with few concessions to a reader's weakness, and with a wealth of detail, the story is a quiet version of Kafka's *The Trial* and—on administration—*The Castle*. The condensed version given here is meant to encourage you to read it all, though at points it may seem to go slowly. The author does not labor the matter, but makes it clear that the episode has meaning beyond its narrow limits.

From 1950-1961 George Anastaplo, without any evidence against

him, but on his support for the philosophical "right" of revolution was denied admission to the Illinois bar.<sup>1</sup> This was part of the immense mass of loyalty proceedings, state and national, legislative, Congressional and administrative, which kept public employees and others anxious and in trouble, without turning up anything of consequence. The most notable victim was Professor Oppenheimer. At the same time Communist Party leaders went to prison under the Smith Act, upheld but not interpreted by the Supreme Court, which, when interpreted in 1957 was found not to apply to long-pending prosecutions of some one hundred secondary leaders, whose cases were one after another dismissed.

During the same period Alger Hiss was convicted of perjury about non-weapon and inconsequential "espionage." Mr. and Mrs. Rosenberg were convicted of a more serious offense, conspiracy to commit atomic espionage, and Morton Sobell, their co-defendant, of conspiracy, but not to commit atomic espionage.

General Cronkhite, in his case, like the public in the 1950's, went through a sequence of disturbing emotions. His case, it will be noticed, was contemporaneous with phases of the Mooney-Billings murder case and the Sacco-Vanzetti murder case. They all were affected by emotional factors which anticipated the reappearance of similar influences, after a long period of quiescence, in the 1950's.

The factors are emotional as well as rational, but they express themselves often as simply rational. There are for example arguments and instructions addressed to juries.

*Law and Society* for February 1971, includes papers on current efforts to quantify non-mathematical probabilities affecting the satisfaction of a burden of proof, and related topics. How would you bet on guilt if you were about to know the truth?

The Rosenbluth case represents to me the lower limit, .5%. The Greenlease kidnapping-murder case of a few years ago represents the upper limit, 99.5% likelihood of guilt.<sup>2</sup> Between are the great controversial cases of my time: the labor organizers Mooney and Billings (Billings' ball bearings the only evidence), 10%; the anarchists Sacco and Vanzetti (Sacco's gun and a bullet the only evidence), 30%; internationalist Alger Hiss (a typewriter), 30%;<sup>3</sup> Oswald (a gun and a practically unscored bullet), 40% (without confederates, 10%).<sup>4</sup>

1. See Anastaplo, *The Constitutionalist* 331 (1971). The best introduction to this case still seems to me the dissent of Mr. Justice Bristow, a downstate Illinois Republican in *In re Anastaplo*, 78 Ill. 2d 182, 163 N.E.2d 429 (1959).

2. See Sharp, *Review Essay*, 25 U. of C. L. Rev. 560, 562 (1958) on capital punishment and related problems.

3. On these three cases, see Sharp, *Sacco-Vanzetti, Review Essay*, 28 U. of C. L. Rev. 399 (1961) (note 7 on Mooney and Billings and 23 on Alger Hiss). The essay also includes some discussion of the Rosenberg-Sobell case.

4. Sharp, *Unmaking History, The Warren Report and its Critics*, 34 U. of C. L. Rev. 453

The Rosenberg-Sobell case, with a photograph of a table, because of my commitment to belief in the defendants' innocence, receives special consideration. I would, and indeed have, bet 99.5 to .5 on innocence. But I recognize that I am influenced by strong emotion, and that independent and able critics disagree with me. I would not advise or expect another to bet more than 80% on innocence, or estimate the chances of guilt at less than 20%.

I make no such psychological corrections in a comparable estimate about the future. My estimates of the chances of a thermonuclear war in my time (say, by 1987) have gone from 45% in 1957; to 55% in most of Kennedy's administration; to 50% in most of Johnson's; to 40% from the spring of 1968 to the summer of 1971; to 45% today.<sup>5</sup> (Today for the first time the government, for whatever reasons, is taking what seem to me the best available steps to reduce the chances.) Non-mathematical probability is not mathematical, but we treat it as though it were in all the affairs of life, and it is instructive to think about it.

In her treatment of the Rosenbluth case, Mrs. Davies—an English teacher—gives us admirable materials for exercise. I found myself considering the likelihood that Major Cronkhite killed himself accidentally and the likelihood that Sergeant Pothier killed him accidentally as about equal—50%. Her argument that the second alternative is the more likely has however finally convinced me, and I think its likelihood is about 51%. Read the book and see how you come out.

MALCOLM SHARP†

---

(Winter 1967), with references in note 1 to some intervening publications on the other cases, but concentrating on the case against Oswald. The most interesting publications since then are Frost, *The Mooney Case* (1968) and Ehrmann, *The Case that Will not Die* (1969), (the Sacco-Vanzetti case). See also Chambers, *Odyssey of a Friend* (1969) (Chambers maintaining his position as principal accuser and prosecution witness in the Hiss case; letters published posthumously by his correspondent, William F. Buckley0 Thompson, *Six Seconds in Dallas* (1967) (another view of the Oswald case).

5. See Sharp, *The Pragmatic Pacifist*, 29 U. of C. L. Rev. 404 (1962); *Reflections On Conscientious Objection to War*, 25 National Lawyers Guild Practitioner 115 (1966). For an introduction to revisionist history of the Cold War see Ambrose, *The Rise to Globalism* (1971) and Steel, *Did Anyone Start the Cold War?* 17 *The New York Review of Books* 23 (Sep. 1971). For the present situation see Ikle, *Every War Must End* (1971), especially Epilogue following Chapter 5, and York, *Race to Oblivion* (1970), especially Ch. 12.

† B.A., Amherst College; M.A., University of Wisconsin; LL.B., S.J.D., Harvard Law School. Professor Sharp is Professor Emeritus at the University of Chicago School of Law and is a member of both the New Mexico and New York bars. He is at present conducting a seminar in Private Law Reform and the Constitution at the University of New Mexico School of Law, where he was a Visiting Professor of Law from 1965-1970. He has written numerous articles dealing with many areas of law including civil liberties. He participated as counsel for the defense during the two weeks preceding the execution of Mr. and Mrs. Rosenberg and is the author of "Was Justice Done?—The Rosenberg-Sobell Case" (1956) which received a favorable review by the late Bertrand Russell.