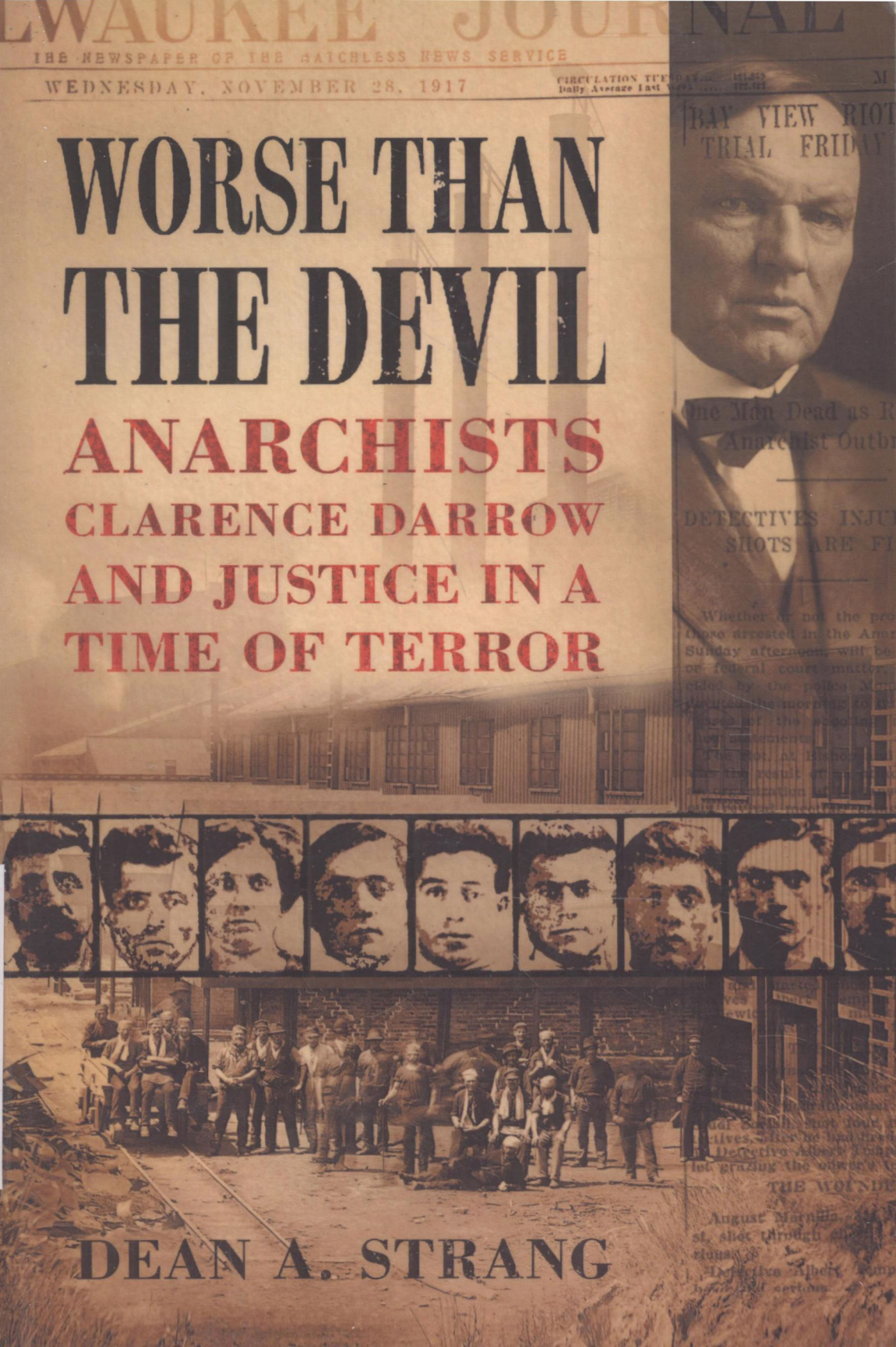

WORSE THAN THE DEVIL

ANARCHISTS CLARENCE DARROW AND JUSTICE IN A TIME OF TERROR

DEAN A. STRANG

WORSE THAN THE DEVIL

Anarchists, Clarence Darrow, and Justice in a Time of Terror

Dean A. Strang

The University of Wisconsin Press

The University of Wisconsin Press
1930 Monroe Street, 3rd Floor
Madison, Wisconsin 53711-2059
uwpress.wisc.edu

3 Henrietta Street
London WC2E 8LU, England
eurospanbookstore.com

Printed in the United States of America

Library of Congress Cataloging-in-Publication Data

Strang, Dean A.
Worse than the devil: anarchists, Clarence Darrow, and justice in a time of terror / Dean A. Strang.
p. cm.
Includes bibliographical references and index.
ISBN 978-0-299-29394-9 (pbk.: alk. paper)
ISBN 978-0-299-29393-2 (e-book)
1. Trials (Riots)—Wisconsin—Milwaukee—History—20th century.
2. Judicial corruption—Wisconsin—Milwaukee—History—20th century.
3. Darrow, Clarence, 1857–1938.
4. Anarchists—Wisconsin—Milwaukee—History—20th century.
5. Italian Americans—Wisconsin—Milwaukee—History—20th century.
6. Bay View (Milwaukee, Wis.)—History—20th century.
7. Milwaukee (Wis.)—History—20th century. I. Title.
HV6483.M55S77 2013
345.775′0243—dc23
2012032689

Worse than the Devil

In memory of

Alma Sieber Strang

Catharine McClelland Wedge

Per (Paul) Strang

Arthur H. Wedge

Illustrations

Preface

Usually, Chicago's Haymarket Square comes to mind first when the topic of radicals on trial arises or when we ask how justice fares in the heated atmosphere of political struggle, fear of foreign-born agitators, and grief over lives lost. Just maybe, though, events that took place ninety miles north of Chicago and thirty years after the Haymarket tragedy offer an even better moment for considering those questions. More police officers died in a Milwaukee bombing in November 1917 than died in the May 4, 1886, bombing in Chicago. Several of the Chicago defendants were immigrants; all of the Milwaukee defendants were. And, while both cases concerned anarchism, the dominant radical (and sometimes violent) ideology of that era, the Milwaukee case arose in the early months of this country's direct participation in an unprecedented world war, when the country was awash in nativist sentiment, patriotism, and intolerance of dissent.

The trials themselves provide even sharper contrast. After the bomb exploded in the ranks of police officers who were clearing Haymarket Square, the ensuing trial in Chicago directly concerned responsibility for that bombing. And that trial may not have been the failure that conventional wisdom has had it for decades.[1] The Milwaukee trial was different. It was but a proxy proceeding in two senses.

First, police and prosecutors never charged anyone with making or planting the bomb that eventually exploded in an assembly room at Milwaukee's central police station. The trial that began the very next week nominally concerned only a separate event, a disturbance in an Italian neighborhood that had resulted in gunplay and death more than two months before the bomb destroyed much of the police station. Because the trial began in Milwaukee just three days after that city buried nine fallen police officers whose deaths otherwise went unvindicated, it became a proxy for the bombing trial that never would be.

Second, the eleven defendants themselves were proxies for their supporters whom the public, police, and mainstream newspapers widely blamed for the

bombing. When someone planted the bomb, these eleven already were in jail awaiting trial on the separate events two months earlier. Jail is exactly where they had been since that melee. They could not have made or planted the bomb had they wanted to. But because the intended target of the bomb was the man at the center of the neighborhood disturbance, an antagonist of the eleven defendants, it was easy, even natural, to assume that supporters of the eleven were responsible.

Even if not the travesty that many think, Chicago's Haymarket trial surely included a kind of corruption of the justice system. That corruption is the sort that festers in any opportunity for the selfish ambitions of lawyers and judges to overtake the selflessness that their official duties high-mindedly suggest. In the light of intense public interest, judges sometimes strut a path that they hope will lead to higher office, prosecutors preen for the same reason, and both defense lawyers and their clients resort to political theater designed to advance their personal fame or broad causes rather than their legal interests. The Milwaukee story includes corruption of the justice system in the same sense and possibly to an even greater degree. Specifically, it ends in an appeal that leaves one queasy even today. No less than Chicago's own Clarence Darrow is a central figure in that unsettling appeal.

This book explores all of this.

Uncoupled from its day and details, the book's story is a parable of the human frailty that necessarily weakens every link in any system of justice, including ours today. In its own time, the story concerned immigrants who were real or suspected anarchists. Thirty years later, after the next world war, it would have concerned actual and suspected communists, many of them also immigrants or the children of immigrants. Today, it might concern actual and suspected Islamist radicals, who again often are immigrants, the children of immigrants, or watching the West (and the United States especially) from afar.

So the accidental details of characters, creed, and catalyst change over time. But the underlying flaws, even failings, of our institutions of criminal justice stubbornly resist rectification. In a land that proposes to dispense equal justice under law, the alienated newcomer—the "other," whoever he or she is in a given day—remains at real risk of an outcome that has little to do with individual justice or even fair process and much to do with assuaging public fear and venting anger. The prejudices, superstitions, and plain fears that animated police officers, prosecutors, judges, and juries a century ago all persist today. Now, more than ten years after the September 11 attacks and the sometimes repressive or lawless responses of our institutions of criminal justice to those events, the parable is worth telling and remembering.

Beyond its value as parable, this story also has concrete historical importance. The most significant aspect is a previously unknown episode in which America's

greatest trial lawyer, Clarence Darrow, perhaps tried directly to corrupt the justice system. Questions about Darrow's ethics and tactics are not new. He stood trial twice in Los Angeles on juror bribery charges after the 1912 McNamara brothers prosecution, and there are other documented, if hazier, incidents in which allegations arose about the lawfulness of his work. But no biographer or researcher ever has raised a question about his role in the 1918–19 appeal from the Milwaukee convictions of eleven Italians. While the evidence is not conclusive, it also is not weak: it begins with the sworn testimony of an ex-prosecutor who directly implicated himself in the illegal plot and continues with some corroboration of that lawyer's testimony.

Given the comparative rarity with which Darrow handled appeals at all and the fact that this was a one-off relationship with clients he had not known and never represented again, the mere fact that Darrow may have joined an effort to corrupt the appellate process casts his other likely wrongs in a different light. If Darrow in fact sought to bribe either of two jurors in the McNamara case, that was but one trial case among many hundreds in his long career. Further, the defendants were heroes of organized labor at a time when Darrow was labor's champion. And the two McNamara brothers faced hanging. Those facts might suggest that such a high-stakes gamble was a rare mistake, if Darrow was guilty at all. But Darrow appeared as counsel in fewer than sixty appeals in his long career, and he had no special stake in this one. That may suggest a different context entirely, if he in fact gambled his reputation and liberty in an effort to corrupt this appeal.

In all events, the transcribed testimony implicating Darrow, drawn from a secret grand jury proceeding in 1922–23, lay in Wisconsin Historical Society files for more than eighty years before seeing light here for the first time. Darrow researchers and all those with an interest in him have new questions to consider.

This tale has historical interest as well for the minor gaps it fills in our knowledge of Emma Goldman's last months in the United States. A letter in the papers of a nearly-forgotten Milwaukee lawyer, William Benjamin Rubin, locates the Chicago hotel in which Goldman likely hunkered down while she awaited deportation after losing an appeal to the U.S. Supreme Court from a federal conviction for opposing the World War I draft in New York. The historical record does not quite link Goldman directly to Darrow's appearance as counsel in the eleven Italians' appeal, but it makes a reasonable circumstantial case that it was she who intervened to secure the famed lawyer's services. And the record does support Goldman's active interest, both public and private, in the plight of the eleven Milwaukee Italians. Out of public sight, she anchored that interest in part in a touching concern for the welfare of one little boy whom she never met. Without making this a purely academic work, I have tried to locate Goldman's role and

other events in the history of the Progressive era and World War I, as factually they are a piece of those times. The insights of scholars, where I have offered them, add to the story.

Finally, the fact that more American police officers died in a forgotten terrorist bombing in Milwaukee in 1917 than in any other single event until September 11, 2001, should be of some somber historical interest. In the frighteningly haphazard way that marks any act of terror, the Milwaukee bomb was more lethal than the Haymarket bomb. The police investigation, prosecution, trial, and appeal that all followed were themselves haphazard and frightening, too.

But these events were nearly a century ago. Have not the U.S. Supreme Court and advances in policing in fact rectified much since then? After all, we do not often hear today about random, dragnet searches and arrests, third-degree tactics, or the use of illegally gathered evidence in court, all of which were common in 1917 and on display here.

No doubt both court decisions and the increasingly professional ethos of policing and prosecuting over the intervening decades have improved procedural regularity. In the United States, in ordinary criminal investigative efforts, interrogation methods are more deftly psychological now; only rarely are they crudely physical.[2] The grossest sorts of warrantless, speculative searches also are rarer. In general, for example, the police have learned that *Miranda* need not prevent them from securing confessions (one major specter at the time the Supreme Court announced that decision). They also have come to know that the Fourth Amendment's warrant preference need not defeat many searches, for judges generally are quite compliant in issuing warrants.

So it is not that progress has been impossible or nonexistent. Yet our institutions of criminal justice continue stubbornly to resist rectification, the same way they did in 1917. Improvement, when it comes at all, comes in the teeth of resistance by thousands upon thousands of police officers, prosecutors, defense lawyers, and judges across the country, most of whom are deeply habituated to institutional inertia and suspicious of change. Their resistance often is fiercest when it is utterly silent. Progress does not come; it must overcome. And not uncommonly, the battle is unheard.

When progress does overcome, often it is at the procedural level that Americans rightly hold dear, but not necessarily at a substantive level. There is a linkage between the procedural and the substantive, to be sure. But procedural change

often is incremental, and at best it mediates substantive advance. While the process of approaching a judge for a search warrant now may be more routine, the cozy relationship between judges and the police, and the tendency of judges to bend toward the concrete appeal of detecting crime rather than toward the abstract call of civil liberty, means that objectively questionable searches probably remain about as common as ever.[3] They just are more likely to occur now under cover of the procedural regularity that a warrant represents. And while psychological techniques of interrogation are not bloody or brutal, they too may lead to false confessions just like the physical abuse that was common in 1917.[4]

Consider one striking and obvious example of institutional defiance to progress in truth-finding. At a time when technology makes recording police interviews easy and cheap, many police departments stoutly resist creating a visual or audio record of their questioning of suspects. A police report of the suspect's words and the interaction between police officers and the suspect remains the only—and far more malleable—means of preserving a record of the interview. In that sense, some police departments still prefer the recording methods of 1917, not those of the twenty-first century.

There are other examples. Notwithstanding substantial research data on the unreliability of eyewitness identifications (especially cross-racial identifications) and on the problems of suggestiveness in police lineups, those lineups and identification procedures are now nearly as they would have been nine decades ago.[5] And jailhouse informants, no more reliable than they were in 1917, continue to find their places on prosecution witness lists. They still succeed in escaping part of the consequences for their own crimes by claiming to have overheard a cellmate's confession, just as they did almost a century ago.

At the level of legislative policy, two-thirds of this country's states, as well as its federal government, rely occasionally but tenaciously on a mode of criminal punishment—death—that has vanished in Europe and other Western nations.[6] Indeed, capital punishment practically disappeared in other first-world nations closer to 1917 than to today. Our *procedures* for meting out death are much more complex and cautious (improved, in a sense) than they were generations ago. But in the United States the death penalty persists substantively all the same.

Lastly, and perhaps most broadly, the rising numbers of exonerated prisoners, often but not always cleared by DNA evidence, expose the institutional resistance to rectification so common in American criminal justice. The essential point is not that mistaken convictions continue to happen; they will, in any human and thus fallible system of justice. Instead, the essential point is that it often is years after a trial court and one or more appellate courts have affirmed those convictions

that the truth comes out—and then often only through the efforts of people who are, relatively speaking, outsiders. It is law students, volunteer lawyers, even journalism students who finally upset the wrongful conviction. Most damning, they typically do so only after months or years of determined resistance by the offices of attorneys general, trial court prosecutors, original defense lawyers, law enforcement agencies, and judges to whom the obligation of doing justice squarely was entrusted.

Apologists insist that such exonerations prove that, in the end, the system works. But a system that "works," when it works at all, only because volunteers and strangers persist in seeking justice long after duty-bound insiders have failed and quit is a system dependent on happy accidents to cure its unhappy ones. That is not rightly a system of justice at all: it is a system of chance, and a cruel one at that. It is an inverted system that sets self-justification for those on the inside above justice for those it should serve on the outside.

That, fundamentally, was the system that was operating in this story from 1917. It was a system that depended on accidents to fix its mistakes, even on offsetting corruption to redeem its corruption. In important ways, our criminal justice system still does.

Acknowledgments

A humbling number of people contributed to this book in many ways over the years that I worked on it. The staff at the Wisconsin Historical Society's archives reading room I relied upon most frequently. Likewise, the staff at the Milwaukee County Historical Society was unfailingly helpful. Candace Falk and Alice Hall, scholars and keepers of the Emma Goldman Papers at the University of California, Berkeley, were very kind with their help. Staff at the University of Wisconsin–Milwaukee's Golda Meir Library provided important early aid, as did the University of Wisconsin Law Library's capable staff.

Beverly Gage, Matthew Rothschild, Mike Mooney, and Athan Theoharis graciously read the entire manuscript. They corrected errors, suggested improvements, and offered valuable insight. Matt Rothschild's detailed editorial suggestions were an especially welcome gift. Tom Cannon gave freely of his time and his family history. Jeri Famighetti was a helpful copyeditor. Carol Roberts did the tedious but necessary job of indexing, for which I am grateful, and Sheila McMahon shepherded production and more. Throughout, Gwen C. Walker was a steady, smart, and extraordinarily skilled editor. She devoted much more time to this book than any obligation required.

If I have learned anything in writing this book, it is this: authors mean it when they thank those who have read and edited a book, and when they take the blame for remaining mistakes. Truly, the flaws that persist in this book are reflections of me, and of none other.

Like most of us, I needed encouragement over the years. Stanley Kutler, John Demos, Steve Glynn, Charles G. Curtis Jr., Jerald Podair, and Ellen Kozak provided that at important moments. From others, encouragement was constant. These include Mike Mooney, Lynn Adelman, Steve Hurley, Marcus Berghahn, the late Gilda B. Shellow, and my most demanding, devoted, and fearless mentor,

Jim Shellow. Finally, two people both encouraged and tolerated me; they lived not just with this book but with me. I owe Angela Kvidera and Jannea Wood my deepest gratitude. I did not earn what they gave.

Contents

Worse than the Devil