

cord



He was a Northerner.
He was an industrialist.
He was a Jew.
And a young girl was
murdered in his factory.

The Fate of Leo Frank

BY LEONARD DINNERSTEIN

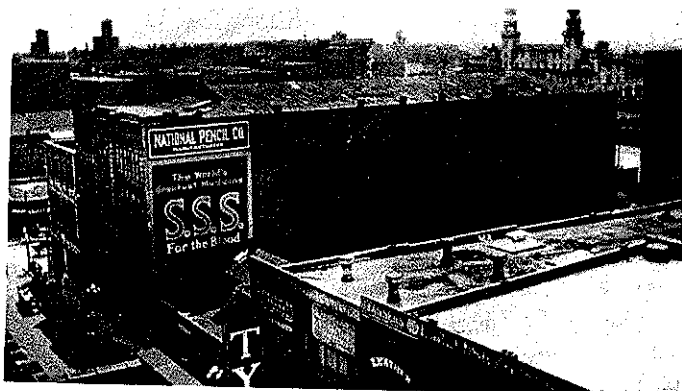
ON DECEMBER 23, 1983, THE LEAD EDITORIAL IN THE ATLANTA *Constitution* began, "Leo Frank has been lynched a second time." The first lynching had occurred almost seventy years earlier, when Leo Frank, convicted murderer of a thirteen-year-old girl, had been taken from prison by a band of vigilantes and hanged from a tree in the girl's hometown of Marietta, Georgia. The lynching was perhaps unique, for Frank was not black but a Jew. Frank also is widely considered to have been innocent of his crime. Thus the second "lynching" was the refusal of Georgia's Board of Pardons and Paroles to exonerate him posthumously.

Frank's trial, in July and August 1913, has been called "one of the most shocking frame-ups ever perpetrated by American law-and-order officials." The case became, at the time, a cause célèbre in which the injustices created by industrialism, urban growth in Atlanta, and fervent anti-Semitism all seemed to conspire to wreck one man.

Until the discovery of Mary Phagan's body in the basement of Atlanta's National Pencil Company factory, Leo Frank led a relatively serene life. Born in Cuero, Texas, in 1884, he was soon taken by his parents to Brooklyn, New York. He attended the local public schools, the Pratt Institute, and Cornell University. After graduation he accepted the offer of an uncle, Moses Frank, to help establish a pencil factory in Atlanta and become both co-owner and manager of the plant. He married Lucille Selig, a native Atlantan, in 1910, and in 1912 he was elected president of the local chapter of the national Jewish fra-



Leo M. Frank (opposite), manager and co-owner of the National Pencil Company (right) was accused of the murder of Mary Phagan (top right), found dead in the factory's basement.



ternity B'nai B'rith. Then, on the afternoon of April 26, 1913, Mary Phagan, an employee, stopped by Frank's factory to collect her week's wages on her way to see the Confederate Memorial Day parade and was murdered.

A night watchman discovered the girl's body in the factory basement early the next morning. Sawdust and grime so covered her that

Hugh Dorsey built a case around Frank's alleged perversions. Four weeks after the murder the grand jury granted the indictment he sought.

when the police came they could not tell whether she was white or black. Her eyes were bruised, her cheeks cut. An autopsy would reveal that her murderer had choked her with a piece of her own underdrawers and broken her skull. The watchman, Newt Lee, summoned the police; they suspected that he might have committed the murder, and they arrested him. After inspecting the scene, the officers went to Frank's home and took him to the morgue to see the body. The sight of the corpse unsettled him, and he appeared nervous. He remembered having paid the girl her wages the previous day but could not confirm that she had then left the factory. The police would find no one who would admit to having seen her alive any later.

A NUMBER OF UNSOLVED MURDERS HAD taken place in Atlanta during the previous eighteen months, and the police were under pressure to find the culprit. Early newspaper reports erroneously suggested that Mary Phagan had been raped, and crowds of people were soon milling about the police station, anxious to get their hands on whoever had committed the crime. Frank's uneasy behavior and the public's hunger for justice made him a prime suspect. He was arrested two days later.

Shortly thereafter some factory employees told a coroner's jury, convened to determine the cause of death and suggest possible suspects for investigation, that Frank had "indulged in familiarities with the women in his employ." And the proprietress of a "rooming house" signed an affidavit swearing that on the day of the murder Frank had telephoned her repeatedly, seeking a room for himself and a young girl. Both these charges were later proved false (many witnesses recanted their accusations later), but newspapers headlined them, fueling talk of Jewish men seeking Gentile girls for their pleasure. The solicitor general, Hugh Dorsey, built a case for the prosecution around Frank's alleged perversions. Four weeks after the murder the grand jury granted the indictment Dorsey sought.

Unknown to the members of the grand jury, however, another suspect had also been arrested. He was Jim Conley, a black janitor at the factory who had been seen washing blood off a shirt there. He admitted having written two notes found near the body. They read: "Mam that negro hire down here did this i went to make water and he push me down that hole a long tall negro black that hoo it was long sleam tall negro i wright while play with me" and "he said he wood love me land dab n play like the night witch did it but that long tall black negro did buy his slef."

At first almost all investigators assumed that the author of these items had committed the crime. But Conley claimed to have written them as Frank dictated the words, first the day before the murder occurred, then, according to Conley's second affidavit, on the day of the crime.

Conley ultimately signed four affidavits, changing and elaborating his tale each time. Originally he said he had been called to Frank's office the day before the murder and asked to write phrases like "dear mother" and "a long, tall, black negro did this by hisself," and he claimed to have heard Frank mumble something like "Why should I hang?" But the newspapers found the idea of Frank's having prepared for an apparent crime of passion by asking a black janitor to write notes about it utterly ridiculous. So Harry Scott, the chief detective, said he then "pointed out things in [Conley's] story that were improbable and told him he must do better than that." Another lengthy interrogation led to the second affidavit. It stated that Frank had dictated the notes just after the murder and that Conley had removed the dead body from a room opposite Frank's office, on the second floor, and taken it by elevator to the basement. (Later evidence showed that the elevator had not been in operation from before the time of the girl's death until after her body was discovered.) A third affidavit spelled out in greater detail the steps Conley had allegedly taken in assisting Frank with the disposal of the dead girl. The *Atlanta Georgian* had already protested after the janitor's second statement that with Conley's "first affidavit repudiated and worthless it will be practically impossible to get any court to accept a second one." But Atlantans had been so conditioned to believe Frank guilty that few protested the inconsistencies in the janitor's tale.

Among those who questioned the prosecution's case against Frank were the members of the grand jury that had originally indicted him. They wanted Dorsey to reconvene them so that they could charge Conley instead. Dorsey refused, so the jury foreman did it on his own. It was the first time an Atlanta grand jury had ever considered a criminal case against the wishes of the solicitor general. Then Dorsey came back before the group and pleaded with them not to indict the black man. Exactly what he told them was not made public, but the next day the *Atlanta Constitution* reported that "the solicitor did not win his point without a difficult fight. He went in with a mass of evidence showing why the indictment of the negro would injure the state's case against Frank and stayed with the grand jurors for nearly an hour and a half."

It is difficult to say why the grand jury ultimately supported Dorsey. Perhaps they accepted the *Atlanta Georgian's*

explanation: "That the authorities have very important evidence that has not yet been disclosed to the public is certain." Or, given Southern values, they may have assumed that no attorney would base his case on the word of a black man "unless the evidence was overwhelming." In any case, the solicitor prevailed and prepared to go to trial.

THE TRIAL BEGAN ON JULY 28, 1913, AND brought forth large and ugly-tempered crowds. The heinous nature of the crime, rumors of sexual misdeeds, newspaper reports of "very important evidence that has not yet been disclosed," the solicitor general's supreme confidence, and anti-Semitism (a Georgia woman had written that "this is the first time a Jew has ever been in any serious trouble in Atlanta, and see how ready every one is to believe the worst of him") combined to create an electric tension in the city. Gossip about Frank had been widespread, and many Georgians wondered if an unbiased jury would be possible. But jury selection was swift, and in an atmosphere punctuated by spontaneous applause for the prosecuting attorney and shouts of "Hang the Jew" from throngs outside the courthouse, the proceedings unfolded.

Solicitor Dorsey opened his presentation by trying to establish where and when the crime had occurred. He elicited testimony from several witnesses about blood spots on the floor and strands of hair on a lathe that Mary Phagan had allegedly fallen against in the room opposite Frank's office. (The state biologist had specifically informed the prosecution that the hair was not Mary Phagan's, and many witnesses testified that the bloodstains could have been merely paint spots; Dorsey ignored them.)

The heart of the state's case, however, revolved around Jim Conley's narrative. Although his story had gone through several revisions during the previous weeks—all of them published in the newspapers—his courtroom account mesmerized the spectators. Conley told how he had served as a lookout in the past when Frank "entertained" women in the factory (no such women ever appeared at the trial), how after an agreed-upon signal he would lock or unlock the front door or go up to the superintendent's office for further instruction. He claimed that on the fatal day Frank had summoned him to his office, and when he arrived there, he had found his boss "standing up there at the top of the steps and shivering and trembling and rubbing his hands. . . . He had a little rope in his hands. . . . His eyes were large and they looked right funny. . . . His face was red. Yes, he had a cord in his hands. . . . After I got up to the top of the steps, he asked me 'Did you see that little girl who passed here just a while ago?' and I told him I saw one. . . . 'Well . . . I wanted to be with the little girl and she refused me, and I struck her and . . . she fell and hit her head against something, and I don't know how bad she got hurt. Of course you know I ain't built like other men.' The reason he said that was, I had seen him in a position I haven't seen

any other man that has got children." Conley did not explain that last sentence; instead he went on to detail how Frank had offered, but never given him, money to dispose of the body. He said Frank had then asked him if he could write and, when he said yes, had dictated the murder notes.

When Dorsey concluded his presentation, *Frost's Magazine* of Atlanta, which had previously made no editorial comment about the case, condemned both the solicitor and Atlanta's chief detective for misleading the public into thinking that the state had sufficient evidence to warrant an accusation against Frank. "We cannot conceive," the commentary read, "that at the close of the prosecution, before the defense has presented one single witness, that it could be possible for any jurymen to vote for the conviction of Leo M. Frank."

Frank had retained two of the South's best-known attorneys to defend him: Luther Z. Rosser, an expert at cross-examination, and Reuben R. Arnold, a prominent criminal lawyer. Despite their brilliant reputations, they failed to display their forensic talents when they were most needed. Rosser and Arnold cross-examined Conley for a total of



Frank's wife, Lucille Selig Frank, sits close by him during the murder trial.

sixteen hours on three consecutive days and could not shake his basic tale. He continually claimed to have forgotten anything that tended to weaken the case against Frank, and some observers thought Conley had been carefully coached by the solicitor general and his subordinates. The murder and disposal of the body would have taken at least fifty minutes to accomplish as the janitor described them, yet witnesses corroborated Frank's recollection of his whereabouts for all but eighteen

minutes of that time. Furthermore, much of Conley's narrative depended on his having removed the body to the basement via the elevator, but floor markings, the absence of blood in the elevator, and other incontrovertible evidence proved that he hadn't. Why Frank's attorneys failed to exploit these facts, and why they also failed to request a change of venue before the trial began, has never been explained. But their inability to break Conley undermined their client's case. A reporter who attended every session of the hearings later observed, "I heard Conley's evidence entire, and was impressed powerfully with the idea that the negro was repeating something he had seen. . . . Conley's story was told with a wealth of infinitesimal detail that I firmly believe to be beyond the capacity of his mind, or a far more intelligent one, to construct from his imagination."

Rosser and Arnold's biggest error was probably their at-

One juror had allegedly been overheard to say, "I am glad they indicted the God damn Jew. They ought to take him out and lynch him."

tempt to delete from the record Conley's discussion of times he had "watched for" Frank. For a day the two men got the janitor to talk about Frank's alleged relationships with other women, hoping to poke holes in the testimony; then they tried to get the whole discussion stricken. Even one of Dorsey's assistants agreed this information should not have been allowed into the record but added that once Conley had been examined and cross-examined on the subject, it was wrong to try to expunge it. "By asking that the testimony be eliminated," the *Atlanta Constitution* noted, the defense "virtually admit their failure to break down Conley."

It did not matter thereafter that witnesses came in to attest to Frank's good character and his whereabouts before, during, and after the murder. It also made little difference that Frank's explanation of his activities on the day of the murder carried, according to the *Constitution*, "the ring of truth in every sentence." Conley's narrative absolutely dominated the four-week trial.

In their summations Arnold and Rosser accused the police and solicitor general of having fabricated the evidence. Arnold stated that "if Frank hadn't been a Jew, there would never have been any prosecution against him," and he likened the entire case to the Dreyfus affair in France: "the savagry [*sic*] and venom is . . . the same."

But once again Dorsey emerged the winner. The *Constitution* described his closing argument as "one of the most wonderful efforts ever made at the Georgia bar." The solicitor reviewed the evidence, praised his opponents as "two of the ablest lawyers in the country," and then re-emphasized how these men could not break Conley's basic narrative. He went on to state that although he had never mentioned the word *Jew*, once it was introduced he would use it. The Jews "rise to heights sublime," he asserted, "but they also sink to the lowest depths of degradation." He noted that Judas Iscariot, too, had been considered an honorable man before he disgraced himself. The bells of a nearby Catholic church rang just as the solicitor was finishing. Each time Dorsey proclaimed the word *guilty* the bells chimed, and they "cut like a chill to the hearts of many who shivered involuntarily" in the courtroom.

The jury took less than four hours to find Frank guilty, and the judge, fearing mob violence, asked the defense to keep their client out of court during sentencing. Rosser and Arnold agreed. Solicitor Dorsey requested that they promise not to use Frank's absence as a basis for future appeals—even though barring a defendant from his own sentencing might constitute a denial of his right to due process of law—and the two defense attorneys assented.

Frank's attorneys kept their word and ignored the issue

in their appeals for a new trial. According to state law, appeals in a capital case could be based only on errors in law and had to be heard first by the original trial judge. Rosser and Arnold based their appeal on more than 115 points, including the alleged influence of the public on the jury, the admissibility of Conley's testimony about Frank's alleged sexual activities, and affidavits from people who swore that two of the jurors were anti-Semitic. (One had allegedly been overheard to say, "I am glad they indicted the God damn Jew. They ought to take him out and lynch him. And if I get on that jury I'd hang that Jew sure.") Dorsey and his associates countered with affidavits from the jurors swearing that public demonstrations had not affected their deliberations. In his ruling, Leonard Roan, the trial judge, upheld the verdict and commented that although he was "not thoroughly convinced that Frank is guilty or innocent. The jury was convinced."

THE NEXT APPEAL, TO THE GEORGIA Supreme Court, centered on Roan's doubt of Frank's guilt, but the justices went along with the earlier decision. This court concluded that only the trial judge could decide whether the behavior of the spectators had prevented a fair trial and whether the jurors had been partial. The judges also ruled Conley's testimony relevant and admissible and dismissed Roan's personal expression of doubt.

At this point Frank replaced his counsel. The new attorneys did not feel bound by their predecessors' promise to Dorsey, and they pressed the argument that Frank had been denied due process by being absented from his sentencing. But the state supreme court responded that "it would be trifling with the court to . . . now come in and . . . include matters which were or ought to have been included in the motion for a new trial."

The new attorneys went on to try to get the United States Supreme Court to issue a writ of habeas corpus, on the ground that the mob had forced Frank to absent himself from the court at the time of his sentencing, and thus he was being held illegally. The Court agreed to hear arguments on that question and, after two months, rejected the plea by a vote of 7-2.

Justice Mahlon Pitney explained that errors in law, no matter how serious, could not legally be reviewed in a request for a writ of habeas corpus but only in a petition for a writ of error. And Frank's contention of having been denied due process "was waived by his failure to raise the objection in due season. . . ." In a celebrated dissent, Justices

Oliver Wendell Holmes and Charles Evans Hughes concluded, "Mob law does not become due process of law by securing the assent of a terrorized jury."

It is difficult for those not well versed in the law to follow the legal reasoning behind such procedural and constitutional questions, especially when judges are not even considering disputes in testimony or blatantly expressed prejudices. Thus many people assumed that the Court was reconfirming the certainty of Frank's guilt. Afterward his attorneys sought commutation to life imprisonment rather than a complete pardon because they concluded that after all the judicial setbacks they would have a better chance with the governor that way.

Once the case came before him, Gov. John M. Slaton moved with dispatch. He listened to oral presentations from both sides, read the records, and then visited the pencil factory to familiarize himself with the scene of the crime. Since the two sides differed in their arguments on where the murder had actually taken place—the metal-lathe room on the second floor versus the factory basement—and whether the elevator had been used, the governor paid particular attention to those parts of the building. Besides the voluminous public records, Slaton received a personal letter written by the trial judge recommending commutation, a secret communication from one of Hugh Dorsey's law partners stating that Jim Conley's attorney believed his own client was guilty, and a note from a federal prisoner indicating that he had seen Conley struggling with Mary on the day of the murder.

For twelve days Slaton wrestled with the materials. On the last day he worked well into the night, and at 2:00 A.M., on June 21, 1915, he went up to his bedroom to inform his wife. "Have you reached a decision?" she asked.

"Yes," he replied, "... it may mean my death or worse, but I have ordered the sentence commuted."

Mrs. Slaton then kissed her husband and confessed, "I would rather be the widow of a brave and honorable man than the wife of a coward."

A ten-thousand-word statement accompanied the governor's announcement. Slaton appeared thoroughly conversant with even the minutiae of the case. He saw inconsistencies in Conley's narrative and zeroed in on them. The first significant discrepancy dealt with the factory elevator.

Conley had admitted defecating at the bottom of the shaft on the morning before the murder. When police and others arrived the next day, the feces remained. Not until someone moved the elevator from the second floor was the excrement mashed, causing a foul odor. Therefore, Slaton concluded, the elevator could not have been used to carry Mary Phagan's body to the basement. Furthermore, according to scientific tests, no bloodstains appeared on the lathe or on the second floor—where the prosecution had contended that the murder had taken place—or in the elevator. But Mary's mouth, nostrils, and fingernails had been full of sawdust and grime similar to that in the basement, not on the second floor.

OTHER DETAILS ALSO INCRIMINATED CONLEY. The murder notes found near the body had been written on order pads whose numerical sequence corresponded with those stored in the basement and not at all with those in Frank's office. Another major discrepancy that Slaton noticed concerned the strand of hair found on the metal lathe. Since the state biologist had determined that it could not have come from Mary's head, testimony from Dorsey's witness that "it looked like her hair" had to be dismissed.

Privately Slaton told friends that he believed Frank was innocent, and he claimed that he would have pardoned him except that he had been asked only for a commutation and he assumed the truth would come out shortly anyway, after which the very people clamoring for Frank's death would be demanding his release. Slaton's announcement of the commutation sent thousands of Atlantans to the streets, where they burned Frank and the governor in effigy; hundreds of others marched toward Slaton's mansion, where state troopers prevented them from lynching him.

A wave of anti-Semitic demonstrations followed. Many Georgians assumed that the governor's "dastardly" actions resulted from Jewish pressures upon him. Atlanta Jews feared for their lives, and many fled the city. Responding to these actions a few days later, Slaton declared: "Two thousand years ago another Governor washed his hands of a case and turned over a Jew to a mob. For two thousand years that Governor's name has been accursed. If today another Jew were lying in his grave because I had failed to do my duty I would all through life find his blood on my hands and would consider myself an assassin through cowardice."

But the mob would not be thwarted. A fellow inmate at the state prison farm cut Frank's throat. While he was recovering in the hospital infirmary, a band of twenty-five men, characterized by their peers as "sober, intelligent, of established good name and character—good American citizens," stormed the prison farm, kidnapped Frank, and drove him 175 miles through the night to Marietta, Mary Phagan's hometown, where, on the morning of August 17, 1915, they



Gov. John M. Slaton and his wife.
The governor commuted Frank's death sentence, in 1915.

Although most of Marietta knew who the killers were, a coroner's jury concluded that Frank had been lynched by persons unknown.

hanged him from an oak tree. Although most of the people in Marietta knew who the killers were, a coroner's jury concluded that Frank had been lynched by persons unknown. The *Pittsburgh Gazette* restated that finding: "What the coroner's jury really meant was that Frank 'came to his death by hanging at the hands of persons whom the jury wishes to remain unknown.'"

Many of Frank's friends and later defenders attributed the hanging to unbridled mob passions, but the explanation cannot suffice. "The very best people," a local judge opined at the time, had allowed the Frank case to go through all the courts, letting the judicial process take its course. Then, after every request for a new trial had been turned down, the governor had outrageously stepped in. "I believe in law and order," the judge said. "I would not help lynch anybody. But I believe Frank has had his just deserts."

OBVIOUSLY, MUCH MORE THAN JUST A wish to carry out the court's decision motivated Frank's killers. The man symbolized all that Georgians resented. He was the Northerner in the South, the urban industrialist who had come to transform an agrarian society, a Jew whose ancestors had killed the Savior and whose co-religionists rejected the truth of Christianity. Thus, despite the fact that the state used a black man as its key witness, something that would have been unthinkable had the accused been a Southern white Christian, Atlantans could easily believe the worst about this particular defendant.

Over the years scores of people have wondered why many Georgians were loath to suspect that a black man might have committed the murder. The answer may have come from the pastor of the Baptist church that Mary Phagan's family attended. In 1942 the Reverend L. O. Bricker wrote: "My own feelings, upon the arrest of the old negro night-watchman, were to the effect that this one old negro would be poor atonement for the life of this little girl. But, when on the next day, the police arrested a Jew, and a Yankee Jew at that, all of the inborn prejudice against the Jews rose up in a feeling of satisfaction, that here would be a victim worthy to pay for the crime."

As time passed, people no longer remembered the specific facts of the case, but they told the story of Mary Phagan and Leo Frank to their children and grandchildren. As with all folktales, some details were embellished, others were dropped; however, as the first three verses of "The Ballad of Mary Phagan" unfold, no listener can have any difficulty knowing what happened:

*Little Mary Phagan
She left her home one day;
She went to the pencil-factory
To see the big parade.*

*She left her home at eleven,
She kissed her mother good-by;
Not one time did the poor child think
That she was a-going to die.*

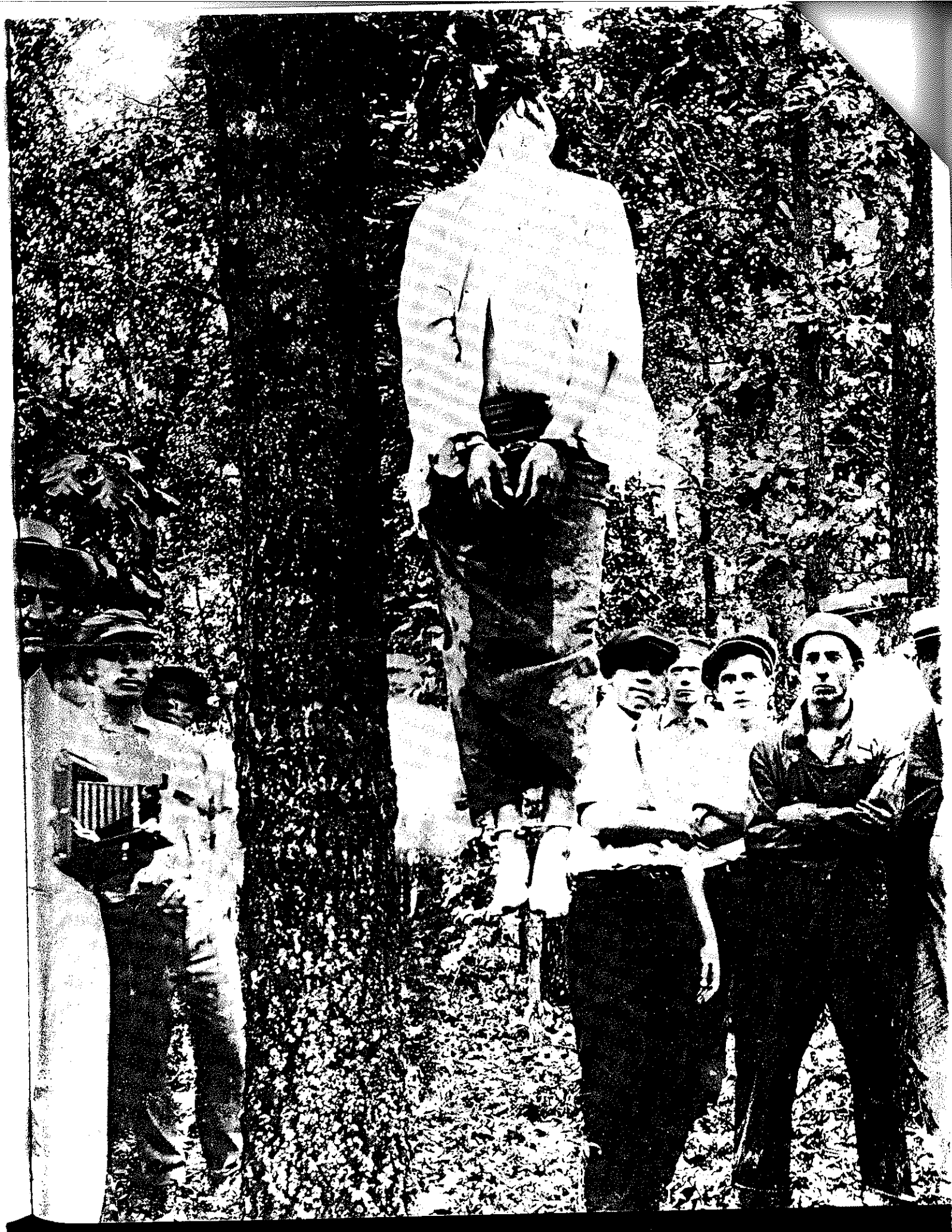
*Leo Frank he met her
With a brutish heart, we know;
He smiled and said, "Little Mary,
You won't go home no more."*

People have argued the Frank case again and again, but usually without specific knowledge, falling back on hearsay to support their positions. However, in 1982 a dramatic incident put the case back in the public spotlight. Alonzo Mann, who had been a fourteen-year-old office boy in the Atlanta pencil factory in 1913, swore that he had come into the building on the day of the murder and witnessed Jim Conley carrying Mary Phagan's body toward the steps leading to the basement. The janitor had warned him, "If you ever mention this, I'll kill you." Lonnie Mann ran home and told his mother what he had seen and she advised him to "not get involved." He obeyed her but eventually began telling his tale to friends. Finally, in 1982, two enterprising reporters filed the story in the *Nashville Tennessean*.

Mann's revelations stimulated a renewed effort to achieve a posthumous pardon for Leo Frank. Newspapers editorialized on the need to clear his name, public-opinion polls showed a majority in Georgia willing to support a pardon, and the governor of the state announced in December 1983 that he believed in Frank's innocence. But three days before Christmas the Board of Pardons and Paroles denied the request. It asserted that Mann's affidavit had provided "no new evidence to the case," that it did not matter whether Conley had carried the body to the basement or taken it via the elevator, and that "there are [so] many inconsistencies" in the various accounts of what had happened that "it is impossible to decide conclusively the guilt or innocence of Leo M. Frank."

Once again a storm broke as editorials and individuals excoriated the Board of Pardons and Paroles. The *Tennes-*

On August 17, 1915, Frank was lynched in Mary Phagan's hometown. This photograph, later sold throughout the South, was taken by a member of the mob that killed him.



the police with his information right away, Conley would surely have been arrested, the police and district attorney would not have concentrated their efforts on finding Frank guilty, and the crime would most likely have been quickly solved. But by the time the trial began, in July 1913, Mann's testimony might hardly have even seemed important.

WHEN REVIEWING THE CASE, ONE need not be so one-sided as to ignore the very real gut reactions that Atlantans had to Mary Phagan's murder, the trial, and Leo Frank. Prejudice did exist in Atlanta, some people did lie at the trial, and anti-Semitism did contribute to the verdict. There were also contradictions in the case that people could not understand. Rational persons believed Conley's tale, and there is no denying that the janitor made a tremendously good impression on the stand. A reporter listening to him wrote that "if so much as 5 per cent" of his story was true, it would suffice to convict Frank.

The struggle to exonerate Leo Frank continued, and in March 1986 the state Board of Pardons and Paroles reversed

itself and granted a pardon. It had been granted, said the accompanying document, "in recognition of the state's failure to protect the person of Leo Frank and thereby preserve his opportunity of continued legal appeal of his conviction, and in recognition of the state's failure to bring his killers to justice, and as an effort to heal old wounds."

Not, that is, because Frank was innocent.

In the late 1980s a Georgia citizen, firmly convinced of Frank's guilt, vehemently underscored the point in a letter to the Marietta *Daily Journal*: "The pardon expressly does not relieve Mr. Frank of his conviction or of his guilt. Rather, it simply restored to him his civil rights, permitting him to vote and serve on juries, activities which, presumably, at this date are meaningless."

Meaningless they may be. Still, Leo Frank's unquiet spirit continues to vex the conscience of many Georgians eighty-one years after he died on an oak tree in Marietta. ★

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of supporting papers strongly suggests that Pinkerton wanted Frank to be found guilty and worked toward that end.

The National Pencil Company's case against Pinkerton turned on the actions of the agency's employee Harry Scott. As assistant superintendent of Pinkerton's Atlanta office, Scott was in charge of the investigation of the Phagan murder from the day after her body was discovered in late April until sometime in August, the month Frank was convicted. Ironically it was Leo Frank himself, as manager of the pencil factory, who arranged with Scott to hire Pinkerton. Not only did Scott take an active part in the investigation, he also supervised all the numerous Pinkerton employees looking into the crime.

From the beginning the pencil company's lawyers should have been wary of the way Scott handled the investigation, for in his testimony Scott explained that "the established policy of the plaintiff [i.e., Pinkerton] in dealing with [a] crime in its relations with the local police is to cooperate with the State and County authorities to the fullest extent and work with them in the interest of public justice."



Witnesses for the state: the police detective John Black (left) and Pinkerton's Harry Scott.

When Frank's lawyers requested that Scott inform them first about any new development, he was adamant that "any new facts that we unraveled in a criminal case, we go right to the police about it." The Atlanta police, in turn, assigned Detective John Black to work with Scott.

The record indicates that Scott may have been more than merely ineffective as an investigator; there is ample evidence that he actually conspired with the prosecutor, Hugh Dorsey. After Scott was subpoenaed by the prosecution in the Frank trial, Frank's lawyers asked Scott to discuss with Dorsey beforehand the nature and content of what the prosecutor planned to ask him on the stand and then report back to them. But Scott never spoke to Frank's lawyer about his forthcoming testimony, although it would prove a devastating setback for the defense.

The reason was that Scott differed with Frank about many things—what Frank had done on the day of the murder, Frank's knowledge of the principals in the crime, Frank's behavior after the discovery of the victim's body—and the accumulation of differences undermined the veracity of the defendant's testimony. Worse still, Scott posed not only as a disinterested third party whose only concern was the truth but as an employee of the defense.

Early in the trial Scott contradicted what he had said at the coroner's inquest and written in a report he had made as a Pinkerton employee to the National Pencil Company's lawyers. At issue was what Frank had told Scott soon after the murder, when he explained how Mary Phagan had come by the pencil factory for her pay and that before leaving she had asked whether the metal had arrived. This

sean said that "the board turned its back on the chance to right an egregious wrong."

The *Tennessean*, and others that were so certain about what the board should have done, had the advantage of hindsight. While this historian believes there is no question that Frank was an innocent man, the fact is that his case was much more complex than those who have read about it afterward recognize. One should not dismiss the impact of Jim Conley's performance on the witness stand or the electrifying effects of the innuendoes and charges in the courtroom that Frank might have engaged in improper sexual activities with the young people who worked in the pencil factory. Aside from the defendant's partisans, most people who heard the evidence or read about it in the newspapers during the summer of 1913 accepted its truthfulness. No reporter who attended the proceedings daily ever wrote of Frank's innocence. Long after the trial ended, O. B. Keeler and Herbert Asbury, newspapermen who covered the case, still regarded him as guilty; Harold Ross, another writer and later the founding editor of *The New Yorker*, stated merely that the "evidence did not prove [Frank] guilty beyond that 'reasonable doubt' required by law."

Another factor is the ineptitude of Frank's counsel. They

failed to expose the inaccuracies in Conley's testimony, and they blundered by asking him to discuss occasions when Frank had allegedly entertained young women. This opened the door for a great deal of titillating but irrelevant material and allowed Dorsey to bring in witnesses to corroborate Conley's accusations. The defense attorneys demonstrated their limitations once more by ignoring relevant constitutional questions in their original appeal to the Georgia Supreme Court. Thus a reinvestigation of the case in the 1950s led one observer to write that "the defense of Leo Frank was one of the most ill-conducted in the history of Georgia jurisprudence."

Still another consideration is the environment in which the trial took place. Today judicial standards have been tightened, and it is unlikely that any court proceedings would be conducted in so hostile an atmosphere as that in which Frank met his doom. But that does not necessarily outweigh the effect of the witnesses' testimony and the subsequent cross-examinations. To be sure, many of the jurors feared going against popular opinion, but perhaps they might have reached an identical judgment in a hermetically sealed chamber.

There is no reason to doubt that Alonzo Mann's affidavit is accurate. Had he ignored his mother's advice and gone to

A newly discovered document casts a disturbing light on exactly how Frank's prosecutor won his case

Framed

BY STEPHEN J. GOLDFARB

FEW CRIMINAL TRIALS IN AMERICAN HISTORY have been so carefully studied as Leo Frank's, and with all the principals of the case now deceased and the written record generally available, it may come as a surprise that there is something new to be said about the case. But there is.

About three months after the murder of Leo Frank, a case was tried in the Fulton County Superior Court, of which Atlanta is the county seat. Unfortunately the record of this trial is not available; the case was appealed, however, and papers associated with that appeal provide an accurate, if less than full, account of the trial's proceedings, a trial that reveals much about the one that doomed Frank.

The original case, *Pinkerton's National Detective Agency v. National Pencil Company*, was heard before Judge W. D. Ellis on November 17, 18, 19, and 22, 1915. At issue was an

unpaid bill in the amount of \$1,286.09 for detective services rendered by Pinkerton in 1913 for the investigation of Mary Phagan's murder. Pinkerton prevailed in the superior court; National Pencil appealed the decision to the Georgia Court of Appeals, and Pinkerton, now the appellee, won that decision as well.

The reason that the National Pencil Company refused to pay Pinkerton's bill can be found in the Amended Motion for the New Trial, in which National Pencil claimed that Pinkerton "did not seek honestly and in good faith to ascertain the truth, but, on the contrary, endeavored dishonestly and in bad faith to suppress and distort the truth and to bring about the conviction of Frank regardless of guilt or innocence." Even though the court found against the National Pencil Company, a fair-minded reading of the Brief of Evidence—a 134-page document that summarizes the trial and whose accuracy was ratified by lawyers for both sides—and

Scott may have been more than merely ineffective as a defense investigator; he may have actually conspired with the prosecutor.

was important to her because her job was to attach the metal sleeves to the pencils, and no metal meant no work. Both in his report and at the coroner's inquest, Scott had said that Frank told him he had answered no to Phagan's question. However, at the trial Scott changed the answer to "I don't know," which let the prosecution contend that Frank had an excuse to go with Mary Phagan to another part of the factory where he could check on the metal's availability and that it was there that the murder had taken place. Though caught off guard, Frank's attorney, Luther Z. Rosser, was able to question Scott on why he had changed his testimony from what he had written in his report and thus blunt, but not entirely remove, doubts about Frank's actions on the day of the murder.

THIS IS ALSO TRUE OF ANOTHER CHANGE in Scott's testimony. Scott reported to the pencil-company lawyers that in an early interview Frank had said he had left the pencil factory to go home for lunch at 1:00 P.M. on the day of the murder. At Frank's trial Scott changed this to 1:10 P.M., suggesting that the defendant had more time to move Mary Phagan's body to the basement. Again, Rosser pressed Scott for the reason why he changed his testimony from 1:00 P.M. to 1:10 P.M. Scott claimed that "it must be a typographical error" in the coroner's report and that his notes would show that Frank had said 1:10 P.M. From what is available of the trial record, it appears that these notes were never entered into evidence.

On another point there was no written evidence to help Rosser contradict Scott's damaging testimony. Scott claimed that Frank had told him that J. M. Gantt, a former employee whom Frank had fired only a couple of weeks before the murder, "was very familiar and intimate with Mary Phagan." This testimony suggested that Frank knew the dead girl by name, although he had testified to the contrary at the coroner's inquest; indeed, he'd had to check his payroll books to verify that it was Mary Phagan who had been paid around noon that day.

With no written record on this point, all Rosser could obtain from Scott was a lame admission that his failure to mention it at the coroner's inquest "was an oversight, if anything at all." Under cross-examination Scott made a contradictory statement: "I did not consider it material at all to mention in the report to the Pencil Co. that statement of Leo Frank regarding Gantt's intimacy with Mary Phagan. . . . I knew that Frank had stated that he did not know Mary Phagan and that he had to look into the books to tell

her name, but it wasn't a material fact against Frank at that time that he said to me that Gantt was familiar with her. . . . The first time I saw the materiality of it was when the Solicitor [Dorsey] asked me the question [during Frank's murder trial]." This is quite an admission for a man who considered himself a savvy and seasoned detective.

The record, however, suggests more than a mere oversight. The following exchange during Frank's murder trial between Rosser and Scott implies collusion between Dorsey and Scott:

Q. [Rosser] Was it an oversight before the coroner's inquest too[?] Look at it [i.e., the transcript of the coroner's inquest], and see if you said anything about that before the coroner's inquest; your mind was fresher then about a verbal conversation [between you and Frank] than it is now, wasn't it[?]

A. [Scott] Well, it was fresher on my mind at the time, certainly, but you will understand the coroner asked me certain questions, and I gave him answers to the questions, but he did not cross examine me like Mr. Dorsey has. . . .

There is more. Scott's testimony at Frank's trial on how Frank behaved when confronted with the night watchman Newt Lee, who had found the body and was for a time a prime suspect, went far beyond what Scott had said at the coroner's inquest. Two days after the discovery of the body, Scott and Detective John Black asked Frank to talk with his employee Lee and persuade him to be more forthcoming. Black and Scott left the two men alone in a room for about ten minutes, then returned. Scott, at Frank's trial, described what happened next: ". . . we took seats alongside of both of them; Newt Lee was handcuffed to the chair, and he says: 'Mr Frank, it is awful hard for me to remain handcuffed to this chair,[]' he says: 'It is awful hard, awful hard, Mr Frank.' Frank hung his head the entire time the negro was talking to him. Finally in about 30 seconds, he says: 'Well, they have got me, too.'"

Dorsey continued the questioning:

Q. [Dorsey] Now, describe if you can the appearance and deportment and manner in which Frank talked and carried himself at the conference set forth on that occasion.

A. [Scott] Well, he was extremely nervous at that time. . . . very squirmy in his chair, crossing one leg and then with the other[,] he didn't know how to put his hands, he was moving them up and down on his face, and he hung his head a great deal of the time while the negro was talking to him, that is, in my presence.

Q. How did he talk[?]

A. Well, as I say, he hesitated some . . .

Q. How did he breath[e][?]

A. Well, he just took a long sigh that [illustrating], more of a sigh than a breath.

Q. Did you notice his eyes[?]

A. Yes sir, I judged their insecure condition all the way through, yes.

On cross-examination Rosser was not able to refute much of Scott's testimony. However, he did establish that at the coroner's inquest Scott had testified he heard nothing of the conversation between Lee and Frank and then at the murder trial claimed that Frank had declared: "Well, they have got me, too." Rosser forced Scott to admit that this was a change in his testimony.

As for Frank's nervousness, Scott had never mentioned it at the inquest. When Rosser asked him about this, Scott said: "At the time, Frank's nervousness had no effect whatever on my mind, because I did not consider Frank any suspect at all. Knowing the man was under a strain, I did not suspect him at all at that time, and therefore it was not a material fact at the time. I did not consider him a suspect." This is impossible to believe, for Scott admitted that on the previous day, when he first interviewed the defendant, he "knew then that Frank was under strong suspicion."

Though Rosser blundered later in the trial, he was powerful and effective when confronting the state's witness John Black, the city detective who worked with Scott on the case. Through careful and insistent questioning, Rosser all but destroyed Black's testimony against Frank. At one point Black was so confused that he took six minutes to answer a question, and near the end of his testimony he declared, "I don't like to admit that I'm crossed up, Colonel Rosser, but you have got me in that kind of a fix and I don't know where I'm at." No surprise then that the headlines of the story of Black's testimony read: DEFENSE RIDDLES JOHN BLACK'S TESTIMONY/SLEUTH CONFUSED UNDER MERCILESS CROSS-QUESTIONS OF LUTHER ROSSER. The *Atlanta Georgian* said, "There is a feeling growing more fixed every day, . . . that the state, if it hopes to win, must set up something more than it has yet made public."

When Scott took the stand, he proved a more difficult target for Rosser's cross-examination than Black had been. Dorsey was able to get Scott to give testimony that damaged the defense's case, and as we have seen, because much of this was a surprise to the defense, Rosser was hard-pressed to get Scott to retract it. Summarizing the day's testimony, the *Atlanta Constitution* declared, "Harry Scott . . . proved a strong witness for the state, although at first it looked as if he would prove of more value to the defense." Though the trial had been under way for several days, Scott was the first witness who really aided the case against Frank.

Rosser was emphatic about how the changes in Scott's testimony had damaged the defense. In the trial over the unpaid Pinkerton bill, he declared: "At no time prior to

the trial of the Frank case, was I informed verbally by Mr. Scott . . . that he intended to change the testimony that he gave at the Coroner's inquest and the information that he gave me in his reports as to the matter of Frank's saying 'no' or 'I don't know[.]' He certainly did not tell me before he went on the stand at the trial that he was going to testify that Frank told him that Gantt was intimate with Mary Phagan. His testimony at the trial on that point certainly surprised me. In my opinion, as an attorney, that was certainly a matter of materiality and consequence in the case."

On cross-examination Rosser expressed in even stronger terms what he considered Scott's duplicity: "Mr. Scott never made any effort to get a conference with the attorneys for the defense before the trial. I did not know that Mr. Scott had any opinion about the case that had not been communicated to me . . . and everything he knew was supposed to have been put in writing in the reports, that he had made to me, and I supposed that those reports were true. If I had thought that Mr. Scott was going to testify anything different from what was in the writings that had been submitted to me, I would have wanted to talk to him."

SCOTT CLAIMED THAT AFTER HE HAD DISCUSSED his testimony with Dorsey, he attempted to speak to Frank's attorneys but was refused an interview. But surely, if Frank's lawyers had had any indication that Scott's testimony at the murder trial would differ from what he'd said at the coroner's inquest or in his written reports, they would have found time to talk to him.

More plausible is that even though he was employed by the defense lawyers, Scott had been conspiring with Dorsey for some time to establish Frank's guilt. This is nowhere more evident than in the role he played in the several statements made by the prosecution's most devastating witness, Jim Conley.

At first Conley had been overlooked as a possible suspect because the investigators believed his claim that he could not write. But at some point two Pinkerton detectives, L. P. Whitfield and W. D. McWorth, became suspicious. According to Leo Gottheimer, a National Pencil Company salesman, the two detectives visited the factory on May 16, 1913, a little more than two weeks after the murder, and asked "those present if they knew whether Jim Conley could write." At McWorth's request Gottheimer went over to the "Tower," the county jail where Frank was being held, to ask Frank. The answer was definitive: "Yes, I know he can write, I have had notes from him asking me to lend him money . . ."

Frank directed Herbert Schiff, acting superintendent of the pencil factory, to a drawer in the company safe that contained documents associated with Conley's purchase of watches from local jewelry stores and pawnshops. These led the Pinkerton detectives to three shops where they were able to secure loan contracts signed by Conley, and when the signatures were compared with the murder notes, Whit-

Four times in all, and all under oath, Schiff insisted Harry Scott had stated explicitly that Pinkerton wanted Frank to be found guilty.

field noted in his report for that day, "the hand writing appeared to be identical."

Though Scott could not prevent the knowledge that Conley was able to write from becoming known, he did try to hide Frank's role in its discovery, for if Frank were guilty of the murder and Conley were his accomplice, then Frank would be expected to try to shield Conley from questioning.

Luther Rosser had no doubts about the significance of Scott's failure to inform him that Frank was instrumental in the discovery. At the unpaid-debt trial he stated, "In my opinion, as an attorney, it was material that I should have known before hand the information that the Pinkerton's [*sic*] had that Leo Frank had said that Conley could write and that information should have been given me by the Pinkertons." Under questioning by the attorney Harry A. Alexander, acting for the pencil company, Rosser explained how valuable this knowledge could have been for the defense:

Q. [Alexander] When Mr. Scott took his stand at the trial and testified that he ha[d] gotten [*sic*] the information about Conley writing from sources entirely disconnected from the pencil factory, would it or would it not have been material to you? . . . You could have disproved it by their own reports, couldn't you[,] if Mr. Scott, had—

A. [Rosser] If they had reported to me, I could have shown it in their reports, of course.

Q. Yes, if it was in that report that they had got it from Leo Frank?

A. If they had given me that information I could have just handed it up to him [Scott], and said: "What did you report that to me for?"

Evidence offered by the National Pencil Company lawyers shows that Scott edited Pinkerton documents to remove any mention of Frank. This evidence consisted of two copies of Whitfield's report for May 16, 1913—a draft in Whitfield's hand and the final typed version. In the handwritten version the following words were crossed out: "but that he would sent [*sic*] to the tower and learn from Leo Frank if Conley could write." These words did not appear in the typed version submitted to Frank's lawyers, and it was Harry Scott who had edited Whitfield's draft report.

Once Conley became a prime suspect, he eventually made four different statements, a process that involved Harry Scott more than any person except Conley himself. At Frank's trial Scott claimed that he coaxed Conley to write by dictating "That long, tall, black negro did by himself," words similar to those on the murder notes. Scott explained: "We [Scott and John Black] talked very strongly

to him, and tried to make him give a confession[;] we used a little profanity, and cussed him, and he made that statement that he knew that I knew that he could write; we talked for about 2 or 3 hours that day. He made another statement on May 24th, which was put in writing."

On the basis of the second statement, Scott and Black "questioned him [Conley] very closely for about 3 hours" and again the next day, but Conley stuck to his story. In this statement Conley claimed that Frank had paid him to write the murder notes on Friday, April 25, the day before the killing. Scott continued: "We saw him [Conley] again on May 27th in Chief [Newport] Lanford's office. Talked to him about 5 or 6 hours. We tried to impress him with the fact that Frank would not have written those notes on Friday, that was not a reasonable story, that showed premeditation and that wouldn't do."

On May 28, 1913, Scott, joined this time by Chief Lanford, "grilled" Conley for "5 or 6 hours, endeavoring to make clear several points which were far fetched in his statement; we pointed out to him [Conley] that his statement would not do, and would not fit. He then made us another long statement on May 28th."

This was Conley's third statement. On the very next day, May 29, Scott and another person, most likely either John Black or Chief Lanford, spent "almost all day" talking with Conley in an attempt to improve on it. As Scott explained, "we pointed out things in his story that were improbable, and told him he must do better than that, anything in his story that looked to be out of place, we told him wouldn't do; after he had made his last statement, we did not wish to make any further suggestions to him at that time; he then made his last statement on May 29th."

MORE THAN TWO YEARS LATER, when he was confronted with these statements by the National Pencil Company attorneys, Scott explained that he was only trying "to make Conley confess that he killed the girl. That was my idea, and I put most unusual efforts in that line. The affidavits that I took from Conley were taken to make him confess that he committed the crime himself."

This strains credulity. Scott's own words give ample evidence that rather than induce Conley to confess that he alone murdered Mary Phagan, Scott was working with Conley to produce a statement that would convict Frank of the killing and portray Conley as a paid accomplice after the fact. Had Scott and the others not pushed Conley on

his several statements, it is very likely that Conley rather than Frank would have been found guilty.

The sequence of events lends further support to the hypothesis that Scott and the prosecution were working single-mindedly to establish Frank's guilt. Conley made his second statement on May 24, 1913, the same day that Frank was indicted for the murder. If Scott was really trying to get Conley to confess, the indictment could have been delayed pending the results of his interrogation. Rather, they had no doubt already made up their minds; Scott could not have been ignorant of the proceedings of the grand jury as he testified before it on the very day Frank was indicted.

THE TRIAL OVER THE UNPAID BILL OFFERS further evidence about Scott's motives. According to H. B. Pierce, superintendent of Pinkerton's Atlanta office, Scott failed to broaden the investigation to include Conley but "was entirely interested in developing the Frank proposition." Pierce testified that he and Scott "clashed very often" and "had several discussions on some matters [associated with the investigation] bordering at time[s] on quarrels." Pierce went on to say that Scott "was influenced by public opinion, he was of the opinion that if so many people saw it that way, that is the way the case was being developed, [and] that, in his opinion, must be right, against all other facts or anything else, regardless of [the] facts." Pierce, on the other hand, thought that public opinion could be wrong and that if there were differences between the Pinkerton agency and the police, Pinkerton should "go on making [the] investigation for our client, regardless of the theories of the police department or anybody else, or we would quit."

The reason that Scott could go against the wishes of Pierce, his supervisor, was that the Pinkerton hierarchy was on his side. Pierce testified that "Mr. Scott had the weight of opinion both with his superiors and with himself. By superiors, I mean his general superintendent and his other superior officers. Mr. Scott, was then in correspondence with the officers higher than myself and his course in working on the Frank angle met [with] their approval."

Pierce queried his immediate superior A. S. Cowerdin. "I went over the case with him in detail and explained my views. He very politely replied that from the revealed facts and the reports that had been submitted, and that were being rendered, it was his opinion that the investigation was being carried on in a proper way. He disagreed with me and agreed with Mr. Scott."

Pierce was not the only one in the local Atlanta Pinkerton office who differed with Scott over the direction of the investigation. Leo Gottheimer, the National Pencil Company salesman who had been sent to ask Frank whether Conley could write, testified about conversations he had had with Whitfield and McWorth. According to Gottheimer, the two investigators "said as to the relations between themselves and their superiors . . . there seemed to be friction with

their superiors, everything they done . . . they told me they would not accept their theories, and they seemed to be tickled to death to get this new evidence . . . [that Conley could write. Gottheimer quotes them as saying] 'We have got the goods now, they can't deny this, we can prove this on them in such a way that they can't deny it.'"

Herbert Schiff, Frank's successor as factory superintendent, also testified about tensions in the Pinkerton's Atlanta office. During several of the many visits that Whitfield and McWorth made to the factory, "they told me of the dissention [*sic*] in the office, and of the things that they put up that never seemed to agree with Mr. Scott, and Whitfield told me on one occasion that Mr. Scott called him into the private office and told him that if Leo Frank wasn't convicted it would be the last of the Pinkerton agency in Atlanta." Twice under cross-examination and twice more under re-direct examination—four times in all, and all under oath—Schiff insisted that Scott had stated explicitly that Pinkerton wanted Frank to be found guilty.



Dorsey's success as prosecutor in the Frank case aided his gubernatorial victory in Georgia in 1916.

tion—four times in all, and all under oath—Schiff insisted that Scott had stated explicitly that Pinkerton wanted Frank to be found guilty.

In itself this document, the Brief of Evidence, which has for so long lain dormant, does not prove guilt or innocence. It does, however, add substantially to the evidence that Leo Frank did not receive a fair trial. In fact, the conclusion that he was railroaded is now inescapable.

Whatever his reasons, Harry Scott was a key figure in convicting Frank of murder. Less certain, but still highly suggestive, was the malign role played by the prosecutor, Hugh Dorsey. Here ambition was certainly a motive, and a successful one, for Dorsey was twice elected governor of Georgia. This document strongly suggests that Dorsey urged witnesses to embellish their testimony, even lie under oath, to build a case against Frank.

The picture that emerges from this civil trial over an unpaid bill is of a conspiracy between the prosecutor Hugh Dorsey and Harry Scott of Pinkerton's National Detective Agency to find Leo Frank guilty of murder. Although we will almost certainly never know just what was said between Dorsey and Scott, their collaboration seems to have assured that Leo Frank would not receive a fair trial for a crime he almost certainly did not commit. ★

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