

The Rocky Mountain Law Review published an article in December 1940 with the intriguing title “Wrongful Convictions.”¹ Several months later, “Pathology Of Criminal Justice: Innocent Convicted In Three Cases,” was published in the *Journal of the American Institute of Criminal Law and Criminology*.² Both articles were written by Max Hirschberg, a German lawyer who was 56 when he emigrated to the United States in 1939.

Even though Hirschberg is virtually unknown in the United States, he is one of the greatest lawyers in history at rectifying wrongful convictions. The impressiveness of his achievements is magnified by the fact that it was in Germany during the tumultuous years preceding Hitler’s ascendancy to power in 1933 that he accomplished overturning the convictions of plainly innocent defendants.

Brief biography

Born in Munich, Germany in 1883, Hirschberg passed the state legal examination in 1911. He started a private law practice in Munich and soon gained respect for his skill as a criminal defense lawyer. His career was interrupted by WWI, when he was mobilized into the German army in 1914. He served on the Western Front and was awarded two decorations for valor before his discharge after the Armistice in November 1918.

Hirschberg resumed his legal career, and he became the leading criminal defense lawyer in Munich, and some say all of Germany.

In 1925 the German Reichstag passed legislation allowing the appeal of a conviction by the People’s Court.³ Hirschberg’s legal work resulted in him receiving letters from imprisoned people claiming innocence. Since he had represented a person convicted of treason in spite of his innocence, Hirschberg didn’t casually dismiss the pleas for help.⁴ When Hirschberg became convinced of a person’s innocence, he dedicated himself to overturning their conviction – oftentimes working *pro bono* for years on a case. He would methodically deconstruct a case to understand the flawed evidence relied on to convict the person, and he then proceeded to accumulate new evidence exposing the flaws and establishing the person’s innocence.

The first person that Hirschberg helped exonerate illustrates his technique. Johann Pfeuffer was a married father of six whose pregnant young mistress died while the two were alone in the woods. Pfeuffer claimed she became ill while she was aborting her pregnancy. He was convicted of second-degree murder based on

Max Hirschberg – One Of The World’s Great Wrongful Conviction Lawyers

By Hans Sherrer

the prosecution’s argument that he suffocated her after she refused to abort her pregnancy, and he was sentenced to fifteen years imprisonment. Hirschberg investigated Pfeuffer’s case and discovered scientific evidence that his mistress didn’t die from suffocation, but from an embolism caused by her attempted self-abortion. Pfeuffer was granted a new trial, and released from prison after his acquittal of murder.⁵ When word began circulating through Germany’s prisons about Pfeuffer’s release, Hirschberg received “hundreds of letters from convicted persons asking for help.”⁶

After Hirschberg was successful in exonerating another man wrongly convicted of murder – the man’s fiancée died during a botched self-abortion – a play was written in 1929 and produced across Germany that attacked the country’s law criminalizing abortion.⁷

Hirschberg also invested time and energy promoting awareness of the problem of wrongful convictions among his German legal peers, by writing nine articles on the subject.⁸

At the same time Hirschberg was defending accused criminals and aiding the wrongly convicted, he was involved in a number of high-profile political civil cases. Munich was the birthplace of Nazism and during the 1920s and 30s he butted heads with the Nazis in the courtroom. There was even one major case in which Hitler was personally involved.

A particularly memorable exchange between Hitler and Hirschberg occurred during the 1930 factual appeal of Hitler’s successful libel suit against the *Munich Post* newspaper (and several individuals) for reporting that Hitler made a secret deal with Italy’s Prime Minister Mussolini: In exchange for a large sum of cash from Mussolini, Hitler would, if he became Germany’s Chancellor, surrender territorial claims to the German-speaking region of South Tirol (The northernmost Italian province on the border with Austria.). During the appeal’s hearing, Hirschberg ignored an associate’s warning that he was endangering his safety by presenting a former Nazi as a witness who had personal knowledge of the deal. Hitler’s lawyer and personal legal advisor, Hans Frank, later reported that during the ex-Nazis’ testimony Hitler became more “enraged” than he had ever seen him.⁹



Hitler’s rage was directed at Hirschberg when he objected to a question during Hitler’s vigorous cross-examination of the former Nazi. Hitler was personally conducting the cross-examination and he lashed out at Hirschberg, “We listened to you without interruption for an hour.”¹⁰ Hitler attempted to undermine the witness’ credibility, but a newspaper reported, “Hitler foamed” when Hirschberg “proffered rebuttal evidence point by point.”¹¹

Assassination and assaulting of public and political figures occurred in Germany during the 1920s and early 1930s, as various factions (of which the Nazis were only one) jockeyed for political influence and power. Although Hirschberg was able to avoid physical harm, it was only a matter of time before he would experience the Nazis’ wrath. That happened five weeks after Hitler became Germany’s Chancellor in January 1933, when Hirschberg was arrested in a pre-dawn raid on his home. After almost six months of imprisonment without charges, Hirschberg was released.

Knowing it wasn’t safe to stay in Germany, Hirschberg, his wife and 12-year-old son Erich went into exile in Milan, Italy in April 1934. Five years later the family obtained visas and emigrated to the United States in 1939. Hirschberg settled in New York City, and it was shortly after he arrived in the U.S. that he wrote his two perceptive articles about wrongful convictions. Hirschberg did not practice law in the U.S., but he became a citizen in 1944.

After WWII ended, Hirschberg began representing dispossessed Jewish families seeking restitution and reparation from the German government for their losses. Since he was only dealing with overseas legal matters he did not have to be a bar member to represent his Jewish clients. He was very successful at recovering compensation for property stolen or destroyed by the Nazis.

Hirschberg’s experiences and thinking about the causes and prevention of wrongful convictions was synthesized in his 1960 book written in German and published in Germany, *Das Fehlurteil im Strafprozess: Zur Pathologie der Rechtsprechung*. (English translation, *Miscarriages of Justice in Criminal Trials*.) Although Hirschberg’s biographer Douglas Morris considers Hirschberg’s book to be the best one published on the subject of wrongful convictions, it has not been translated into English.¹²

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Hirschberg was 80 when he died in New York City. He was considered a significant enough person that *The New York Times* published a six-paragraph obituary on June 22, 1964. It had the heading, "Dr. Max Hirschberg, Lawyer, Anti-Nazi."

Hirschberg's legacy

Morris' scholarly biography of Hirschberg, *Justice Imperiled: The Anti-Nazi Lawyer Max Hirschberg in Weimar Germany* (University of Michigan Press 2005), is the most comprehensive source in English of information about Hirschberg's life. As the sub-title suggests, the book intensely focuses on his career from 1919 to 1933 when he was representing people victimized by the extreme political unrest and widespread violence in Germany, and actively rectifying wrongful convictions.

There are people in Germany who think that if there had been more people with Hirschberg's principles and fortitude, Nazism could have been stopped before it took control of Germany's government. Dr. Reinhard Weber, editor of Hirschberg's memoir published in Germany in 1995, has said, "He was very early against the Nazis and that was a cause very near to his person. He defended several Nazi opponents and if there had been more Max Hirschbergs there may have been no Hitler."¹³

Hirschberg was recently honored for his courage in risking his life to aid journalists and politically unpopular people in pre-Nazi Germany by the naming of a street after him in a Munich suburb – Max Hirschberg Way.

Erich Hirschberg, who as a youngster delivered food for his dad to the prison where the Nazis imprisoned him, is in his mid-80s and lives in Greenwich, Connecticut.

Justice Imperiled by Douglas Morris (464 pages) is only available in hardcover. It can be purchased from *Justice:Denied's* Bookshop for \$30 plus \$5 s/h, Send a check or money order to: Justice Denied, PO Box 68911, Seattle, WA 98168. Or order with a credit card from *Justice:Denied's* online Bookshop at, www.justicedenied.org/books.html

Endnotes:

1 "Wrongful Convictions," 13 *Rocky Mountain Law Review* 20 (December 1940)

2 "Pathology Of Criminal Justice: Innocent Convicted In Three Cases," 31 *Journal of the American Institute of Criminal Law and Criminology* 536 (Jan.-Feb. 1941)

3 The People's Court was a special court with truncated procedures, established in the chaos following WW I. They were abolished in 1924, but were resurrected by the Nazis.

4 Morris, Douglas; *Justice Imperiled: The Anti-Nazi Lawyer Max Hirschberg in Weimar Germany* (University of Michigan Press 2005), pp. 67-155. (The man wrongly convicted of treason was Felix Fechenbach in 1922.)

Hirschberg Endnotes cont. on p. 33

Pathology Of Criminal Justice*

By Max Hirschberg

Introduction to the Problem

A comparison between American Criminology and European Criminology is extremely interesting. ... we find a striking similarity of problems and methods. ... Everywhere there has been collected enormous, valuable material about the psychology of the criminal, the fallibility of testimony, the unreliability of evidence by expert witnesses, but the main problem, the *psychology of criminal justice* itself, is neglected. We are in the strange position of possessing a psychology of the criminal and the witness, but not of the judge and the jury. ... And so we have a criminology which is neglecting its main problem, that is to say, the psychology of just that person who has to make the decision and has to assume the responsibility for the life or death of the defendant. This responsibility is very heavy: the life or death of the defendant is at stake, not only when a death sentence is involved; a man of blameless conduct, who is convicted of fraud or forgery, is just as well dead. Thus arises the very serious problem of *wrongful conviction*. (536) ... But the scientific analysis of wrongful convictions is more important than the analysis of the criminal or the witness. A system of medicine without general and special pathology surely would be an absurdity, but just as absurd is the position of modern criminology without a psychology of the judge and the juror and without a careful analysis of wrongful convictions. We need a radical, a really Copernical turning around of the general position in criminology; we need a *pathology of criminal justice*.

... The method of a pathology of criminal justice has to resemble the methods of medical pathology. ... We may see exactly where and why justice faltered, with what obstinacy the Court tried to insist on the errors once committed; we look at the long and difficult fight against the reluctant Courts and finally we see the recognition of the mistake and the acquittal of the innocent man. ... (537)

... The author has learned by his own experience that the scientific results of modern criminology have not penetrated deep enough into criminal justice. We have collected an enormous material about the fallibility of testimony; but criminal justice often acts as if there were no perjury, no error in identification, no hysteria of female witnesses, no fantastic stories of children trembling on the witness stand.

... We know much today of the fallibility of expert witnesses, but the blind confidence of criminal justice in the expert witness and his

Justice:Denied Comment

Although published almost seventy years ago, the *Pathology of Criminal Justice* has perceptive insights that are still not a part of general discussion's concerning wrongful convictions. Four of Hirschberg's most compelling observations are:

- Wrongful convictions are a breakdown in the legal process that need to be as systematically examined for their cause and correction, as are medical errors.
- The psychology of judges and their role in wrongful convictions needs to be examined.
- Reliance on the probability standard of "reasonable doubt" is inadequate to prevent wrongful convictions.
- Expert witnesses are given too much deference for the alleged authoritative-ness of their opinions.

alleged authority has not been shattered. ...

A second main reason for wrongful conviction is the superficial judgment, which contents itself with probability or half-evidence and overlooks the doubt still remaining. The Court contents itself with a *feeling of certainty*; but only *exact evidence* excluding every possible doubt justifies a sentence which may destroy the life and happiness of a man and his family forever. Criminal justice often soothes the remaining doubts light-heartedly with the common-place idea, that it is human to commit errors and that only "reasonable doubt" must be eliminated. Even Nathaniel F. Cantor [*Crime Criminals and Criminal Justice* (1932), p. 243] states: "In scientific research, evidence is rejected unless accompanied by data which support one hypothesis and do not support alternative hypotheses. Judicial proof rests on probability rather than certainty." Here we have the main problem: criminal justice which is satisfied with probability instead of certainty is exposed to endless wrongful convictions. The task of the defense of tomorrow will be to analyze every inference with the weapon of exactness as long as some doubts remain. Every doubt is "reasonable" when life or death of our fellow-beings are at stake. ... (538)

Of course, wrongful convictions are not altogether unavoidable; it is only indolence in thought and sentiment to resign before the "unavoidability" of error in justice. Today we are able to restrain to a considerable amount these errors and their terrible consequences, in making use of the methods of precision provided by modern criminology. ... (539)

* Excerpts from: "Pathology Of Criminal Justice: Innocent Convicted In Three Cases," 31 *Journal of the American Institute of Criminal Law and Criminology* 536 (Jan.-Feb. 1941) (All italics in original.)

Roberts cont. from page 5

system punishes the honest and innocent and rewards those who are guilty and manipulate the process!

Excuse me? The State's Attorney said ... our prosecutors went to prison to get him out." As Herb observed, "I couldn't believe that! The prosecutor said they came looking to find Hank and release him only to learn he had passed away! I'm sure they came to find and release Hank the same way they came to find and release Michael Austin when they suddenly discovered he was innocent!"

Excuse me? Hank died in prison, but the State doesn't even know what year it was, much less how he passed? Baltimore *Sun* stories echoed that fuzziness on when Hank died. On April 9, 2002, the *Sun* headlined their article, "Inmate who died in 1995 was innocent." On April 10 the *Sun* reported, "... in May 1997, Roberts died at age 68 ..." And on April 11 the *Sun* reported Hank "... collapsed outside his cell ... and died a day later, on December 22, 1996"! Thus on three consecutive days the *Sun* reported that Hank died in 1995, then 1997, and finally got it right that he died in 1996.

The most unsettling aspect of Hank's case is that if he had been a little less ornery he may have lived to see his vindication.

"You know Hank believed everything people told him," said Herb. "They told him Jessup had a better program for seniors, that they weren't locked up all the time. When he first got into processing at Jessup he was locked down almost all day. They went in one morning to check on him and found him deceased. And it happened only about two weeks after he left here, and then he laid in the morgue longer than he was in Jessup, because they had a hard time locating his sister."

Hank had heart problems after Tomczewski shot him in the chest, but Hank was in an annex with just a score of prisoners. We looked out for him, and Sergeant Verdier and Officer Decker also looked out for him. There was something special about Hank; his guardian angels seemed to tell us we'd better keep helping him, and Hank knew it.

And while Hank listened to others, once he had made up his mind about something he was more stubborn than an old mule. He knew about the POPS program – Project for Older Prisoners – from *Washington Post* and *Wall Street Journal* articles outlining Professor Turley's program at George Washington University School of Law. POPS enabled

students to conduct exhaustive and detailed investigations into an older prisoner's background, criminal history and parole plans to evaluate whether they warranted consideration as a low risk for violence or recidivism, and thus might merit release. Ever hopeful, Hank thought the POPS program just might be able to do something for him.

Hank heard POPS was operating from the "Old Man's Dorm" at the House of Correction in Jessup, where about 100 prisoners 60 years of age or older have their own space. He wanted some freedom. We fussed with Hank and pointed out that as the only old-timer in the annex we could get him prompt medical attention every time he was feeling ill. Also, several times Warden Waters had gone out of his way to see to it that Hank got his prescriptions renewed when the medical contractors tried to skimp on costs.

We begged Hank not to transfer, pointing out that as just one of a hundred old-timers in Jessup's "Old Man's Dorm" his voice for care and attention would be overwhelmed by others, and the officers would probably be too burdened to look out for him. They'd have their own concerns and ignore Hank.

But Hank had faith, said it was what he needed to do, and impatiently waited for months until classification got him transferred to Jessup. At Jessup he would also be closer to Gary Garland, so Gary wouldn't have to travel so far to see him.

Hank never even made it into the vaunted "Old Man's Dorm" much less into the POPS program. It didn't seem like ten days after his transfer when we got word by telephone, letters and messages from friends and family members, as well as prisoners at Jessup, that Hank had trouble getting his medication renewed, and he had died.

Adding insult to injury, Maryland's criminal justice system has never acknowledged its last "oversight" in the case of Henry Myron Roberts. I looked in every paper for his obituary, but never saw it. I guess run-of-the-mill criminals who die in prison don't deserve one.

But now we know the Hankster wasn't run-of-the-mill, now we know he was innocent. Perhaps by printing this eulogy and tribute to his spirit, and an anatomy of the body of his case, we can finally say, "Rest in Peace, Hank."

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Fugitive Endnotes cont. from p. 26

though the government of Afghanistan did not commit any act of war against the United States.

6 See e.g., *The New Individualists: The Generation After the Organization Man*, Paul Leinberger and Bruce Tucker (HarperCollins 1991), at pp. 16-18. Also see, *Managing Globalization in the Age of Interdependence*, George C. Lodge (Jossey-Bass 1995). See also Mr. Lodge's previous book, *The New American Ideology*, George C. Lodge (Alfred A. Knopf 1975). Written less than a decade after *The Fugitive's* last episode, it was apparent to Lodge that the men, women and children who accept the sovereign authority of an organization – such as the government – are considered to be one of its appendages.

7 Yale psychology professor Stanley Milgram's obedience experiments first conducted in 1961 demonstrated that a significant segment of society at that time in the United States was unduly obedient to authority. However, his experiment also revealed a solid one-third of the participants drew a clear line in the sand and refused to obey an instruction when they thought their action would cause harm to an innocent person. See, *Obedience To Authority*, Stanley Milgram, 1975, New York, Harper & Row. It is people of the ilk of those conscientious people that either overtly would have helped, or at the very least would have done nothing to harm Kimble.

Peirce Endnotes cont. from p. 22

4 "When Sir Ian heard who the lawyer was, it is likely he let out a long, hard sigh," By Andrew Alderson and Nina Goswami Nina, *Telegraph* (UK), August 21, 2005.

5 In the Name of the Father, By Hans Sherrer, 2 *Justice:Denied* 4, http://forejustice.org/wc/in_the_name_of_the_father_JD_v2_n4.htm.

6 Guildford Four, *Wikipedia*, http://en.wikipedia.org/wiki/Guildford_Four
7 British P. M. Tony Blair Apologizes To Guildford Four and Maguire Seven, *Justice:Denied*, Issue 31, Winter 2006, p. 45.

8 Gareth Peirce, *Wikipedia*, http://en.wikipedia.org/wiki/Gareth_Peirce

9 "When Sir Ian heard who the lawyer was," *supra*.

10 The CCRC can refer a case to the Court of Appeal when it finds there is a possibility to overturn a conviction based on:

- An argument not raised in the court proceedings.
- Evidence was not presented to the court; or,
- Other exceptional circumstances were present.

As of February 28, 2007, the conviction was quashed in 218 of 310 cases referred by the CCRC to the CoFA. (70%). *CCRC website*, http://www.ccr.gov.uk/cases/case_44.htm. The U.K. has about 20% of the U.S.' population, so the 218 exonerations due to the CCRC would be the equivalent of about 1,100 in the U.S.

11 Profile: Gareth Peirce, By Andrew Walker, *BBC News*, March 10, 2004.

12 "When Sir Ian heard who the lawyer was," *supra*.

13 *Id.*

14 Profile: Gareth Peirce, *Supra*.

Hirschberg Endnotes cont. from p. 28

5 *Id.*, at 195-99. (See also, "Pathology of Criminal Justice," *supra* at 546-8.)

6 *Id.*, at 199.

7 *Id.*, at 203.

8 *Id.*, at 200. The articles were written from 1927 to 1935.

9 *Id.* at 262. Hans Frank was one of the Nazi Party's earliest members, having joined in 1919, and he knew Hitler intimately. He was captured after WW II ended, and he was one of the defendants in the Trial of the Major War Criminals Before the International Military Tribunal in Nuremberg. During his defense he testified, "A thousand years will pass and the guilt of Germany will still not have been erased." Frank was found guilty of war crimes and crimes against humanity, and sentenced to death. He was executed by hanging on October 16, 1946.

10 *Id.* at 256-263 (Events related to the trial); Hitler's quote at 262.

11 *Id.* at 264.

12 The Justice Institute is attempting to have Hirschberg's book translated into English.

13 Lawyer's courtroom battles with Nazi party, *Greenwich Time* (Greenwich, CT), June 18, 2006.

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