

Hirschberg cont. from page 27

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.)

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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.)