

FAIR TRIAL. By Richard B. Morris. New York: Alfred A. Knopf, Inc., 1952. Pp. xv, 494. \$5.00.

THIS account of the trials of "fourteen who stood accused, from Anne Hutchinson to Alger Hiss," makes a very interesting book. The normal fascination that criminal cases have is supplemented by heavy doses of blood and of sex. A variety of appropriate covers could easily be designed for a pocket-book edition; and indeed, the book might well appeal to the two-bit literati. Readers seriously concerned with the problem raised by its title, however, are likely to think this book pretty poor stuff.

One of the themes which recurs throughout is "the radical revision Anglo-American concepts of fair trial procedure have undergone since the trial of Anne Hutchinson in 1637."<sup>1</sup> While Professor Morris recognizes that our society is not yet at a point where it can afford to rest on its laurels in this regard, he is very fond of pointing out how specific abuses which happened in one or another of these trials in the past could not happen today. Of course there has been much improvement in the last three centuries, but I was most impressed in reading the book, not with our success in eliminating the barbarities of the past, but with the extent to which contemporary cases show the same kinds of unfairness of which our fathers were guilty. A present-day court could still fail to provide counsel for Anne Hutchinson without offending today's standard of "due process of law."<sup>2</sup> Courts today can give just as short shrift to a defense of insanity as did the courts which tried John Brown and Bathsheba Spooner; indeed it was held permissible to ignore the plea in a recent Third Circuit decision<sup>3</sup> under circumstances far more outrageous than those involved in the cases Morris writes about. Our sense of fair play is offended by the atmosphere of public hostility in which the Haymarket rioters were tried, yet only last term the Supreme Court affirmed a murder conviction in the face of inflammatory newspaper reports inspired by the District Attorney.<sup>4</sup> It is no longer allowable for the prosecution deliberately to suppress evidence favorable to the accused as the British government did in the case of Captain Kidd. But prosecutors have not stopped resorting to this practice;<sup>5</sup> neither have they heeded—nor some state courts recognized<sup>6</sup>—Supreme Court admonitions against encouraging prosecution witnesses to perjure themselves, the practice criticized by Professor Morris in his discussion of the *Triangle Fire* case.

1. P. ix.

2. See *Bute v. Illinois*, 333 U.S. 640 (1948) (as in the *Anne Hutchinson* case, a non-capital offense).

3. *United States ex rel. Smith v. Baldi*, 192 F.2d 540 (3d Cir. 1951).

4. *Stroble v. California*, 343 U.S. 181 (1952).

5. See *United States ex rel. Almeida v. Baldi*, 195 F.2d 815 (3d Cir. 1952). Habeas corpus was granted on a showing that the prosecution had suppressed evidence that the fatal bullet was fired by a policeman, rather than by defendant. The state court had not found this sufficient ground for granting of the writ. *Commonwealth ex rel. Almeida v. Baldi*, 361 Misc. Docket No. 9, Pa. Sup. Ct., May 20, 1950, cert. denied, 340 U.S. 297 (1950). See also Hanna, Letter to the Editor, *N.Y. Times*, March 12, 1950, § 2, p. 8, col. 5, quoted in Wright, Book Review, 35 *MINN. L. REV.* 228, 235 n.20 (1951).

6. See *Weathers v. State*, Fla. Sup. Ct., July 15, 1952.

One specific improvement which Morris finds in our standard of a fair trial is that the power of summary punishment for contempt of court has been so confined that "American courts today would no longer condone De Lancey's behavior"<sup>7</sup> in the case of John Peter Zenger. This statement is probably not true, and his companion observation that "present-day judges have shown exemplary restraint under outrageous provocation" has a hollow ring to those of us who have thought that the use of the summary contempt power affirmed in *Sacher v. United States*<sup>8</sup> was every bit as bad as anything that Chief Justice De Lancey ever tried.<sup>9</sup>

In so far as I can judge what Professor Morris thinks about the merits of the various cases he describes, there are only four of the fourteen in which he believes that an innocent person was convicted,<sup>10</sup> and two cases in which he thinks a guilty man was acquitted.<sup>11</sup> In the other eight cases, half of which resulted in convictions and half in acquittals, Morris seems satisfied with the result. What, then, is all the shouting about? Two of the cases included make me wonder whether Professor Morris really wanted to make a contribution to our understanding of the concept of a fair trial or whether he just wanted to write, as he has, an interesting book. The trials of Duff Armstrong and of Carlyle Harris seem to me almost models of fairness; and I suspect the first was included because it turns on a famous story about Abraham Lincoln, and the second because it is dramatic and sordid. Aside from these, I think that the inclusion of so many cases in which the jury guessed right shows that Professor Morris has never come to grips with one of the central problems of our criminal jurisprudence: so long as the result is right does it matter that there may have been elements of unfairness in the course of achieving it?

This problem, stated in the abstract, is easily answered: it is one of the articles of Anglo-American faith that a fair trial is as much the right of those clearly guilty as of those who may be able to win acquittal. Unhappily the appellate courts, on whom the duty falls to enforce contemporary standards of fairness, are not vouchsafed the luxury of abstract decisions, and they are constantly forced to make the most agonizing kind of choice between the public interest in maintaining fair trials and the public interest in putting criminals behind bars. The dilemma is not resolved by elegant language about protecting the pure fabric of criminal prosecution against the "ghostly phantom of the innocent man falsely convicted";<sup>12</sup> neither is it resolved by a doctrinaire insistence on freeing the guilty in every case in which the prosecutor has overreached or the trial court lapsed. It is hard

7. P. 78.

8. 343 U.S. 1 (1952).

9. See the brilliant dissents in the Supreme Court, *Sacher v. United States*, 343 U.S. 1, 14, 23, 89 (1952), and in the Court of Appeals for the Second Circuit, 182 F.2d 416, 463 (2d Cir. 1950). My view is stated at Wright, *The Court Calls Retreat*, *The Progressive*, September, 1951, p. 13.

10. Anne Hutchinson, Captain Kidd, the Haymarket rioters, and Alger Hiss.

11. Dan Sickles, and the defendants in the *Triangle Fire* case.

12. L. Hand, J., in *Di Carlo v. United States*, 6 F.2d 364, 368 (2d Cir. 1925).

for me to take seriously Morris's lament that John Brown was "railroaded to trial with an indecent haste."<sup>13</sup> Even granting that sound policy requires justice to move in a particularly orderly manner in major state trials, when, as here, it is so clear that Brown had to be hung no matter how long he had to prepare his defense, it seems to me unrealistic to get very concerned about the speedy disposition of his fate. But nowhere in this book is there even the faintest indication that a conviction may be proper despite procedural irregularities, or even that reasonable men may differ as to the dilemma posed above.

The kind of problem which I think difficult and important, but which Professor Morris does not deign to notice, is well illustrated by a recent case in which defendants' guilt was beyond question, but in which several untoward incidents marred the fairness of the trial:<sup>14</sup> at one point the trial judge, by way of an irrelevant rebuff to defendant's counsel, made a flag-waving oration so effective as to move two of the jurors to burst into applause; later in the proceedings there were found in the jury room four copies of an issue of *The New York Times* which contained a story, planted by the prosecuting attorney, that made false and inflammatory statements about one of the defendants. These incidents seem to me far more barbarous than any Morris reports, and it would be naive to suppose that their effect was cured by the cautionary instructions of the judge. Does this mean that the government should be put to the expense of a new trial, when the result could not possibly be different? Two distinguished judges thought not, and their point of view is common and important enough that a book on fair trials cannot be excused for its failure to grapple with this position.

The longest chapter here deals with the perjury trials of Alger Hiss. More than anything else in the book, I think that this chapter needs to be sharply criticized. It is with considerable regret that I say this, for I agree with the conclusions that Professor Morris has reached on this controversial matter, and the courage with which he states his unpopular view is a quality particularly to be cherished at this time when the pressures for conformity are so great. Nevertheless, I feel obliged to say that this discussion of the Hiss case is neither unbiased nor accurate. I have had occasion elsewhere to castigate authors who suppose that the verdict of guilty in that case entitles them to accept all of the Chambers story as gospel.<sup>15</sup> How much less defensible it is, in the face of the jury's verdict, to present as established fact the theory of the defense on all contested matters!

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13. P. 269. Brown was arrested October 18 and sentenced November 2. What must Morris think of the practice, of which the state of Wisconsin boasts, of having criminals tried and sent to the penitentiary by dinnertime of the day on which their crime is committed! See Davis, *Milwaukee: Old Lady Thrift*, in ALLEN, *OUR FAIR CITY* 294 (1948).

14. *United States v. Leviton*, 193 F.2d 848 (2d Cir. 1951).

15. Wright, Book Review, 35 *MINN. L. REV.* 228 (1951); Wright, Book Review, *The Saturday Review*, May 24, 1952, p. 12.

The most important argument which can be made by those who think Alger Hiss innocent is this: many of the State Department papers which Whittaker Chambers produced never went to the office in which Hiss worked; every one of these documents had gone either to the Trade Agreements Division or the Far Eastern Division of the State Department; Chambers had an admitted source of documents—Julian Wadleigh—in the Trade Agreements Division, and there is circumstantial evidence from which it is, in the words of defense counsel, a “reasonable conclusion”<sup>16</sup> that he also had a source in the Far Eastern Division. This is not the way Professor Morris tells the story. First he speaks of “the Far Eastern Division, where Chambers had a demonstrated source of stolen documents.”<sup>17</sup> At the next iteration of this tale, we hear of “the Far Eastern Division, where Chambers admittedly had one of his sources. . . .”<sup>18</sup> This claim of an admission by Chambers of what is perhaps the most crucial fact in the whole case is just plain not true.

Morris is also indiscriminating in his presentation of the new evidence which has recently come to light, on the basis of which the defense made its unsuccessful motion for a new trial.<sup>19</sup> Twice he describes in some detail affidavits of experts retained by the defense, which cast great doubt on the Chambers story.<sup>20</sup> Never a word is said, however, to indicate the existence of reply affidavits by the government’s experts which attempt to challenge what the defense’s people have to say. A reasonable man can find the government affidavits unconvincing; a fair-minded scholar cannot ignore their existence.

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BEHIND THE WALL STREET CURTAIN. By Edward Dies. Washington: Public Affairs Press, 1952. Pp. 153. \$2.75.

THE LAWYER’S INVESTMENT MANUAL. By Kenneth Redden and Alexander Thelen. Charlottesville, Va.: The Michie Company, 1952. Pp. xiv, 358. \$10.00.

“Of making many books there is no end.” These two are among the books which could best have been omitted.

These two books are reviewed together because their titles are calculated to catch the eye of persons interested in investment and financial materials. Whether designedly or not, they fall into the pattern of the large quantity of material being ground out in an attempt to persuade the public that it can understand the securities markets and should be interested in investment therein.

It is stated in a publisher’s note about the author of *Behind the Wall Street Curtain* that Mr. Dies “has written this book to dispel popular mis-

16. Brief for Appellant, p. 33, *United States v. Hiss*, 185 F.2d 822 (2d Cir. 1950).

17. P. 454.

18. P. 455.

19. *United States v. Hiss*, 107 F. Supp. 128 (S.D.N.Y. 1952).

20. P. 437 n.4; p. 467 n.8.

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