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Cook: The Unfinished Story of Alger Hiss

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American legal realism have recently confirmed independently.²¹ Still more important, notable advances have recently been made in empirically verified theories of nature and neurological man. Analysis of the verified theories of contemporary mathematical physics has exhibited far more complex and diversified types of conceptual meaning than contemporary legal analysis or traditional political and legal theory has envisaged. An adequate cognitive theory of government and law is more likely, therefore, to be ahead of us rather than behind us.

Even so, the paradox of political and legal obligation seems to be resolvable only along the lines previously mentioned. Unless man-made normative laws are scientifically verified or verifiable, they do not have the objectivity necessary to impose an obligation upon both sovereign and subject. But if their verification consists in their conformity to the *de facto* "is" of human behavior and man-made institutions, then they cannot measure, they are not normative. Only if the normative laws of social science are verified by appeal to facts logically antecedent to and independent of those which they measure can the paradox of political and legal obligation be resolved.

F. S. C. NORTHEROP†

THE UNFINISHED STORY OF ALGER HISS. By Fred J. Cook. New York: William Morrow & Co., 1958. Pp. 184. \$3.50.

It has long been a cantankerous conviction of mine that nobody writes about legal stuff for non-legal eyediencies with such consummate ineptness as do lawyers. The bench-and-bar boys, however articulate, can never resist, when writing for laymen, the flat, solemn style that poses as profundity, the cautious and irrelevant qualification of statement, the whole linguistic jungle of legal-dygoon that is their chief stock in trade. This crusty conviction of mine was recently strengthened by my reading of two books on precisely the same subject, based on almost identical material. One was written by a lawyer—or rather (lawyerly qualification) by an ex-lawyer; his name is Alger Hiss and his book is titled *In the Court of Public Opinion*; reviewing it—in the *Texas Law Review*, if anybody cares—I said that it was just as surgically sterile as its title implies; it is. The other book was written by a veteran New York crime reporter who, so far as I know, never set seat in a law school—unless perhaps a criminal suspect was around; his name is Fred J. Cook and his book is titled *The Unfinished Story of Alger Hiss*. The Hiss story may be unfinished, but the Cook story will not be by anyone who starts to read it; it is that good.

21. Northrop, *The Mediatonal Approval Theory of Law in American Legal Realism*, 44 VA. L. REV. 347 (1958).

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For what Cook has done—and what Hiss, the legalist, miserably muffed doing—is to tell the tale of the Hiss case to date with such sheer craftsmanship of condensation, of analysis, of style, that the book can best be characterized as brilliant. On condensation, I can only say that, having once slogged my own way through the millions on millions of words that make up the official record of the case, from congressional committee hearings to the dismissal of an appeal for a third trial, I was astounded that Cook could select from all this mountain of material the really salient stuff, and record it in less than 200 pages. On analysis, I can only say that, though my reading of lawyer Chester T. Lane's new-trial motion (and the government's evasively inadequate reply) convinced me too that Hiss had been framed, Cook's no-nonsense slant plus his probing skill make a far stronger case for this thesis than has ever been made in print before. On style, I can only say: go read reporter Cook's book yourself.

A review is supposed, I suppose, to tell what a book says and then comment on it, but to summarize what Cook has to say would be like giving away a detective story. Hence, from here on in I shall hold myself to one further, but rather oblique, remark about the book—and some observations of my own, based in part on the book, about the case. About the book, let me merely note the coincidence that the only other volume worth reading about the Hiss-Chambers affair (and I believe I have read them all) is another non-culinary Cooke book, *A Generation on Trial* by Alistair C.; but Mr. Cooke wrote before lawyer Lane performed his post-conviction miracles of investigation; Mr. Cook wrote afterward and thus had the incalculable advantage of knowing things that Mr. Cooke could not know. About the case, let me merely record a few afterthoughts, stimulated by Mr. Cook's book, to the four pieces I have previously written elsewhere. These afterthoughts concern three major matters in the case—the prothonotary warbler, the trial typewriter, and Judge Goddard's denial of the Lane-Hiss motion for a third trial.

As reporter Cook recognized when he titled his first chapter "The Prothonotary Warbler," and as others had recognized before him, it was the rare little bird with the long legal name that turned the whole tenor of the congressional committee inquiry against Hiss, and so started the buzzards circling over Hiss's head. Until the warbler flitted into the picture, the Republican-run Committee—much as many of its members would have loved to pin a charge of disloyalty or worse on a high New Deal official (this was 1948)—found it impossible to credit the word of the sloppy man with the murky Communist past against the word of the clean and correct young head of the Carnegie Foundation for Peace. Then Chambers, in secret session, told the Committee that he remembered hearing Hiss enthuse about having seen a prothonotary warbler along the Potomac. When a committee member asked Hiss off-handedly if he had ever seen such a bird, Hiss affirmed the fact—and enthused again. From that moment, everything else that Chambers said, however contradictory, was accepted by the Committee as near-gospel. From that moment, Hiss was doomed.

Now it just happens that I, like Alger Hiss, watch birds, though I do it in sedentary instead of A.M.bulatory fashion, and I too get excited about seeing rare ones. Last winter we had around our house a yellow purple-finch (a mutant, like a white crow) and I daresay that every soul who spent ten minutes in my home was bored by my talk of this avian rarity. If ten years hence, some plumber or drummer or wife of a student or friend of a friend should accuse me of espionage or treason, should claim intimate acquaintance with me way back when, and should "prove" it by remembering my yellow purple-finch, I'm afraid I would be a dead duck. I would be a dead duck, that is, if the same absurd test of total credibility were accepted from *my* accuser that was accepted from Whittaker Chambers by those eager believers and obvious non-bird-watchers who made up the Committee on Un-American Activities in 1948.

But it was not the prothonotary warbler that eventually *convicted* Hiss. It was an old Woodstock typewriter, number 230,099, which was traced, found, and produced in court by the *defense*, not by the prosecution, under the obviously innocent impression that it was the machine once owned by the Hisses and that its type-faces would *not* match the typing on Chambers' incriminating "pumpkin papers." The type-faces did match; various experts, with FBI men in the van, testified that to alter the faces of one machine to match the typing of another machine was utterly impossible; *ergo*, the documents must have been typed on the machine that Hiss admitted having owned. Hiss went off to jail protesting—ridiculously, it seemed at the time—that he was a victim of "forgery by typewriter." And there has been no commentator on the case, including Cook, but believes it was Woodstock number 230,099 that led the second jury to pronounce Hiss guilty.

Then Chester T. Lane of the New York bar came into the case and set out to test the feasibility of Hiss's silly-sounding forgery charge. What Lane found in the course of a Sherlock Holmes-like hunt and investigation was nothing short of astounding in the holes it punched in the crux of the Hiss prosecution. With the aid of typewriter and document experts, he proved beyond any doubt that not only can the type-faces of one machine be altered to match the typing done on another but that this can be achieved with no more to work from than samples of typing done on the machine to be imitated; in short, he proved that "forgery by typewriter" is entirely possible. (Wrote Wayne K. Boulton of the Royal Typewriter Company in the *Saturday Review* after reading Lane's proof of this: "There is no question about the validity of this premise"). And "premise" it was, for Lane went further. In his motion for a third trial for Hiss, Lane asserted that Woodstock number 230,099 was not the old Hiss machine but a fabricated fake with its type-faces deliberately altered; he charged that it had been planted where defense investigators would likely find it (and did); he strongly hinted that the FBI helped Chambers achieve this deception; and he flatly stated that his efforts to bring proof of this deception into court, in the form of tangible evidence and sworn testimony, had been hampered and blocked at every turn by the FBI.

To all this, including the conclusive countering of the prosecution's bland assertion that forgery by typewriter was impossible, the government's reply brief made only oblique, evasive, and (to me) quite unconvincing retort. Nor do those professionally pro-Chambers writers and reviewers who still pooh-poo the possibility of Hiss's having been framed come forth with any more substantial answer to Lane's grave charges. It is with one of their pet points—a point that has been stressed over and over by Sidney Hook, by Victor Lasky, and by others—that I here want to deal. The point they keep making is in no sense a refutation, or even an attempted refutation, of Lane's *evidence* that the trial typewriter was a planted phony. It is rather a rhetorical question, and it goes (here I quote Professor Hook, in the New York Times): "Once more, if he [Chambers] were able to have access to the original, why should he need to forge a new typewriter?" Or, as Mr. Lasky asks it in the *Saturday Review*, "why [was it] essential for the 'Government investigators' to go to such great pains to manufacture the model when the original could have been repaired?"

Now the fact is that this question, however phrased and by whomever asked, is either incredibly stupid or intellectually dishonest, in its implication that it would have been idiotic (Hook once used the word "idiot") for Chambers and/or the FBI to have a fake machine built. Bend an eye: Chambers and his FBI backers either did or did not find the original Hiss typewriter; whether they did is still uncertain and unproved. If they did not find it and wanted to plant a machine, it is clear that they would have to have one built which would match the typing on the "pumpkin papers." Impossible? Scarcely—for this is precisely what the typewriter engineer hired by Lane did, with no more than samples of typing from Woodstock number 230,099 to work with. But suppose Chambers or the FBI *did* find the Hiss machine; would the Hook-Lasky implication of idiocy in having a fake machine built then stand up? Again, scarcely. For all the available—and uncontradicted—evidence indicates that the real Hiss machine must, by 1948, have been in such decrepit physical shape that it could not possibly have been "repaired." It had long ago been discarded as unusable by the colored family to whom the Hisses had given it; it had eventually ended up in 1945 in the hands of a truckman who had picked it up from a Washington backyard in a drenching rain. To suggest that it would be easier to repair such a bent, broken, and rusted machine than to find a workable Woodstock of about the same vintage and put incriminating type-faces on it (or to suggest that such a wreck of a typewriter could have been transformed into the comparatively clean and completely usable number 230,099) is the real idiocy—or the real dishonesty.

Why then—and here I come to my final observation—did Judge Goddard not grant Hiss a new trial, in the light of Lane's revelations and charges? My explanation must be partly conjecture, for Judge Goddard's opinion did not answer those charges any more than the government's reply brief answered them; the judge merely dismissed them. But Judge Goddard was an old and tired man, more than seventy-five years of age and near death; presiding over

the trial that convicted Hiss had been the exhausting high point of a judicial career that began when President Harding appointed him to the federal bench almost thirty years before; for the part he had played in sending Hiss to prison, he had received praise from the press, presumed pats on the back from the political and social circles in which he moved (see his last listing in *Who's Who* for these), and popular acclaim such as a trial judge very rarely knows. Is it too far-fetched to wonder whether the newly headlined old jurist may not have been, at the least, reluctant to put all this aggregated attention in jeopardy by risking—counter to his own pretty patent predilections—having Hiss's conviction overturned by a new jury faced with Lane's new and damning material? For be it remembered here that no jury has ever passed on the stuff that Lane dug up after Hiss was in prison; it was passed on—and passed off—by one man alone: Judge Goddard. Further, the major reason Judge Goddard did give for denying another trial was that any new evidence discovered by Lane was either too trivial to warrant one *or* should have been discovered in time for the prior trial if the defense had used "due diligence." This may be good law, verbally, but it is something less than good justice. It is considerably less than good justice—and is not even good law—if Lane's flat accusation that the FBI bent every effort to *prevent* the defense from getting evidence is true.

I defy any open-minded lawyer to read reporter Cook's book (remember it?—these comments were all sparked by it) and not come away with the same conclusion I did: either Chester T. Lane should be disbarred from further practice of law or every member of the FBI, no matter how highly placed, who knowingly helped frame Alger Hiss should be exposed and fired. For it is just as impossible to believe that Lane did not lie in his new-trial motion *and* that the FBI did not help frame Hiss and keep him framed as it is to believe that Alger Hiss and Whittaker Chambers *both* told the truth.

FRED RODELL†

NOT GUILTY. By Jerome and Barbara Frank. Garden City, N.Y.: Doubleday & Company, Inc., 1957. Pp. 261. \$3.75.

THIS humane and disturbing book discusses thirty-six examples, eighteen in detail, of the conviction of wholly innocent people. Clear and nontechnical descriptions of the cases by Barbara Frank are followed by critical analyses completed by her distinguished father just before his death.

To people happily situated, the phrase "miscarriage of justice" may connote little more than an idea to be vaguely deplored and then dismissed from the mind. But, for those who are devastatingly affected, it is very real and tragic. It was no fleeting abstraction to Joe Majczek, who served twelve years for a murder he knew nothing about; or to his heroic and devoted mother, who

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