

Spring 1934

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Hans V. Hentig

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### Recommended Citation

Hans V. Hentig, Clinical Method in Teaching Criminal Law, The, 24 *Am. Inst. Crim. L. & Criminology* 1081 (1933-1934)

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# THE CLINICAL METHOD IN TEACHING CRIMINAL LAW<sup>1</sup>

HANS V. HENTIG<sup>2</sup>

A number of elements in effective crime repression are found outside the specific content of the law. Unfortunately, the laymen, frequently represented by the visible or invisible legislator, limit their efforts to the verbal formulation of penal law paragraphs. When this has been done, they believe they have seized the reality of crime, shattered its structure and changed it effectively, according to the strength or weakness of the dose of punishment they have applied.

We know that reality does not correspond to this simplified—one may well say, naïve causal view. And therefore, we see failures everywhere where the treatment of social missteps exclusively follows the fetish of the law.

The social order of a people has no specific value. It is only *one* form of self-expression and development. The social order may be felt as a distinct aid in living, if it lies lightly and protectively on the animate, restlessly developing organism of a people. It may, however, be felt as a hindrance in development when it becomes rigid and interferes with the expiration and building up of vital forces.

The criminal law is the most obvious element in every social order. No social regulation penetrates deeper and with less consideration into human existence. Criminal law and its application does not for a moment disengage our attention and our imagination. In the criminal law—formulated as a defense and a threat—we are confronted hourly by the wisdom or imperfection, narrow-mindedness or liberality of our social organization. And we apportion the extent of our cooperation in the enforcement of the law according to the degree of inner assent or refusal which we feel for a wise or unwise law.

This ethical connection between the written law and the citizen alone determines whether a threat of punishment will receive that thousand-fold reenforcement which elevates it to a real force. Beside the law stands the judge. He cannot burst the framework in

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<sup>1</sup>Translated by Regina Gottfried, Bureau of Social Hygiene, New York City.

<sup>2</sup>Professor of Criminal Law and Criminology, University of Kiel; Co-editor, *Monatsschrift für Kriminalpsychologie und Strafrechtsreform*.

which the law places him. However, he has allotted to him by law a wide margin for the exercise of judgment. He is able to effect a negative decision by suspension of proceedings or by acquittal, thus nullifying the law in this or that case. The people see the judge, and not the law. The judge—his mode of administering the law, the confidence which he enjoys, or the distrust which is accorded him—is, therefore, a principal factor in effective law administration. For the cooperation of the people is accorded not only to the perfect law, but perhaps still more to the perfect judge. Every great reform in criminal law ought to begin with the personality of the judge. It was an entirely clear and correct view which, in the legends of antiquity, envisaged the gods and kings—perfect beings—as placed in the seats of judges. The wise judge engenders loyalty to the law. By creating an inner bond of confidence and by mobilizing cooperative forces, the upright judge instills real life into the bloodless shadow of the law.

## II.

When I have lectured to my students on criminal procedure or criminal law, and spread before them, well separated, the screws, valves, pistons, and rollers of this complicated machine, I have often felt that the university ought not be content to treat only the technical side of this question. Legal practice has its own laws. The experience which the young lawyer acquires in court is one-sided, falsely directed, and soiled by the innate cynicism of the struggle for reputation and wealth. After leaving the university, the personality of a young lawyer begins to crystallize. With few exceptions, he becomes insensible to influence.

I have, therefore, attempted to teach the future judge not only the historical fundamentals of criminal law and criminal procedure, and the complicated interplay of rules of legal systems, as has been customary since ancient times. I have told myself that the judge has a two-fold duty to fulfill, and must be prepared for it: first, the purely logical, juridical function of defining certain events in terms of the criminal law; second, deciding on the question of the reality of the events—an empirical, psychological procedure which extends far into the explanation and evaluation of legal facts. University instruction accomplishes the first duty; the second duty is not only neglected, but entirely overlooked. There were various possibilities for an introduction to such study. Famous criminal cases offered material for discussion of complicated cases. The scene of the crime

and the personality of the criminal could be made alive by means of photographs. But all these methods seem to me to be too removed from life, and useful only in a subsidiary way.

Therefore, in the summer of 1929, I decided to experiment with the presentation of prisoners as a part of the instruction of criminal law. At that time I was teaching at the University of Giessen, and I began these demonstrations in the Butzbach and Marienschloss prisons of Hesse. I used to visit the penitentiary with my students, and spend an entire Saturday afternoon there. Of course, it would have been much more practical to gather and to present prisoners in the observation station of a criminological institute at the university. An institute of this kind had been discussed now and then, but the economic crisis had upset the plans.

### III.

What is the preparation and the procedure for such a presentation of prisoners? What knowledge have I gained by the use of this new method? I should like to stress the fact that perhaps, since the psychiatrist has for a long time made clinical instruction the basis of more advanced instruction, we may not here speak of a "new" method at all; we have merely applied to criminals the method already in use with the insane.

I prepare for the presentation of prisoners in the following way: I select, in agreement with the director of the institution, a number of cases which illustrate the theme which I have chosen for discussion. For example, I present cases of the "genuine" criminal, the endogenous criminal, then of criminals who were overcome by strong environmental pressure, then, perhaps, the type of criminal who instigates crime, and the sort who is incited to commit crime, murderers of the various gradations, sex offenders, the intellectual criminal, various categories of recidivists, etc. I speak to all the prisoners to be presented, and seek to understand their personality. I also endeavor to make clear to them the purpose of the demonstration. No prisoner is compelled to appear; I must attempt to win their voluntary cooperation. I do this by questioning them on their sentence. They usually complain that the sentence was wholly or in part unjust. I then say to the prisoner that the young judge, exactly like the young medical student, must see socially "ill" persons and become acquainted with the social conditions which cause such "illness" before he can form a fairly just opinion of a criminal act and a guilty person. If he, the criminal, instead of scolding and complain-

ing, wishes to contribute to reform, he ought to let the future judge see him and consider his case. Almost without exception, the prisoners declare themselves ready to relate to the students the story of their life and the details of their crime, and to reply to my supplementary questioning.

The demonstration is conducted in the following way: The man is brought in. I ask him to tell the story of his life. If he is embarrassed or excited, I try to quiet him by a few divertive questions, and then lead up to the crime gradually. I always emphasize, in this connection, that the offense is not the main thing, but that everything which preceded it is more important. I regularly ask the prisoner what qualities must have been lacking in him and what traits in his environment which, in his opinion, would have prevented the crime. In this way, I try to direct the students, and also the criminal himself, to an etiological point of view. I also ask, without exception, what the prisoner thinks about his future after discharge; what he would do if, by some chance, he was discharged the following day; what is his position on the question of recidivism; what persons and situations will aid him during the first, difficult period, or which are likely to be of a dangerous nature.

It is astonishing how openly many prisoners view the poor outlook in their position: the ineradicable nature of unfavorable qualities, especially of a certain lack of will power; and the socially uprooting effect of repeated prison sentences. The fact that the law threatens or does not threaten with a specific penalty plays an alarmingly insignificant rôle. We see the criminal law dethroned from the heights where it alone ruled—it has become a single, comparatively not so very significant causal factor within a sum of centripetal etiological forces. Of course, the questioning of the prisoner and his own explanations is only *one* part of the procedure. The prisoner exaggerates. He makes excuses for his crime. He is engaged in that transforming process whereby we extenuate all our failures and look for a guilty person outside ourselves. After the prisoner has left the room, I therefore offer for comparison the prisoner's testimony at the trial and the conclusions reached in the judgment, according to the proceedings of the case which I have read in advance. As a rule, I purposely let the matter rest with this presentation of the opposite side. The short acquaintance with the prisoner is not sufficient for an accurate opinion; moreover, I do not regard it as my duty to check up on legal decisions, even if I have considerable misgivings, but to introduce my students to the technique and psy-

chology of judging the facts of a case. When the whole case is laid out before us, in a contradictory way as it were, I usually ask the director of the institution, who is present, the physician, and the parole-officer to give their opinion of the prisoner. Some of the officials know the man better than I, and their prognosis is altogether instructive. Finally, I allow the students to ask questions, which I answer, or ask one of the expert officials of the institutions to answer. Four to five cases are presented in this way during an afternoon. The time passes quickly, and the students are usually astonished when the three-to-four hour clinic, which is interrupted only by a short intermission for tea, is at its end.

#### IV.

I began these demonstrations in Hesse, in the prisons of Butzbach and Marienschloss. I continued them, when I became professor of criminal law at the University of Kiel, in the central prison at Neumünster, the men's penitentiary at Rendsburg, and the women's penitentiary at Lübeck. The prosecuting attorney of Kiel, as well as the directors of these institutions, have supported my endeavors with much understanding. Since I do not wish the number of students to exceed fifty, it has been necessary, as a rule, to refuse some applicants. Perhaps, it would be better here to allow the students to express their opinion of the effect of these presentations. One may readily believe those who maintain that they have gained new insight into the character of criminality, the function of the criminal law, and the effectiveness of legislation directed toward crime prevention and repression. In the case of the majority of the students these impressions will endure, I believe, in spite of the wearing-off process of practicing law. I should like to add that, as a matter of principle, I take women students to the men's penitentiary and men to the women's penitentiary, for the male judge must later deal with women too, and the female judge with men. Difficulties have never arisen; in a single instance, an exhibitionist asked that the women students go out before he related his offense. I found the request entirely reasonable, and fulfilled his wish immediately.

In Germany, aside from the open-approval received from criminological experts, objection has been raised that these demonstrations are unpedagogical because they use the prisoner as *object* of the instruction and wound his dignity. After three years' experience and careful self-criticism, I consider these doubts unfounded. It is precisely his dignity which the prisoner sees respected, and he dwells on the

fact that university instructors are endeavoring to train a generation of judges who, in addition to knowledge of the theory of law, will possess insight into the phenomena of life. I consider it right to gain this experience not by experimentation on the accused person, the "living" object, which involves all sorts of errors; but to gain it from a study of the phantom, as it were—the prisoner. Without doubt, the result will be improvement in the administration of justice, greater confidence among the people who live under the law, and as a result, greater effectiveness of the law.

What the student learns from such demonstration is not merely insight into the causal chain of every criminal act and thought on preventive possibilities. He also gets accustomed to ask himself the question as to what, in addition to the mere threat of punishment, is to be done with the prisoner, what readjustment of external living conditions and mental influences is to be effected, in order to reinstate him in society. With the sentence, the purely juridical consideration of a case is ended. No attention is paid to the most important subsequent problems. Furthermore, the student learns from these demonstrations, in a sort of play, what he never again forgets: the technique of questioning difficult people; quiet, objective dealings with a criminal, without unnecessary brusqueness and severity; and reflection as to what in the prisoner's statements is credible and what is not—something fixed rules can destroy. He learns to refrain from false credulity or incredulity. The jurist acquires all these things in the practice of law only after many small and major blunders. Sometimes he never develops these essential technical and psychological methods. We have all made the acquaintance of such judges.

## V.

The presentation of prisons represents, I believe, substantial progress in juridical pedagogy, and should be tried out in other countries too. In Germany, Graf Gleispach of Vienna and Professor Exner of Leipzig have used similar methods, in somewhat different form, to be sure. As far as I know, Gleispach and Exner do not use convicts and women criminals because they do not visit the prisons, but draw on prisoners held for trial and available in Vienna and Leipzig respectively. Theoretically, the best solution would be to have a criminological clinic in the university with two dozen cells which would draw material from the prisons as the need might arise. In such an institute the prisoners to be presented could be studied with much greater care, and the clinical instruction thereby greatly en-

hanced in value. In Germany, we can only make such plans, for the present; we cannot carry them out.

To supplement the presentation of prisoners, I present in Kiel, in a *practicum* on forensic psychiatry, mentally diseased or defective criminals. The course is given at the University Psychiatric Institute, in cooperation with the Director of the Clinic, Professor Stertz, and Professor Wedemeyer, a teacher of civil law. During one semester my students saw, in both courses, over sixty cases; instead of dead, always numerically increasing rules or paragraphs of law, they saw the living person and the tremendous difficulty of correctly judging and treating him. I believe that I am on the right road in this attempt to train a new type of judge.