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PATHOLOGY OF CRIMINAL JUSTICE

Innocent Convicted in Three Murder Cases

Max Hirschberg¹

I

Introduction to the Problem

A comparison between American Criminology and European Criminology is extremely interesting. If we look at outstanding works of modern American criminology such as those by Hugo Muensterberg (1), John Henry Wigmore (2), Robert H. Gault (3), Nathaniel F. Cantor (4), Roscoe Pound (5), Sol Sheldon Glueck (6), Harold Ernest Burtt (7), Henry Weihofen (8), Edwin H. Sutherland (9), Francis C. Ainsworth Mitchell (10), Joseph N. Ulman (11) on the one side and at outstanding works of modern European criminology as those by Hans Gross (12), Otto Moenkemoeller (13), Erich Wulffen (14), Gustav Aschaffenburg (15), Hans v. Hentig (16), Albert Hellwig (17) (Germany); Cesare Lombroso (18), Enrico Ferri (19), Enrico Altavilla (20), Francesco Pagano (21) (Italy); Zangger (22) (Switzerland); Emile Fourquet (23) Maurice Lailler and Henri Vonoven (24) (France), on the other side, we find a striking similarity of problems and methods. The criminal and the witness are the central problem everywhere, not the judge and the jury. 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. We find the most striking evidence of this fact in the work "*Psychologie und Psychopathologie der Aussage*" by Otto Moenkemoeller (13); only two of the four hundred twenty-five pages of this work are devoted to the psychology of the judge, while all the rest deals with the criminal and the witness. A glance at his bibliography gives further evidence for our statement. 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*. A comparison between American and European criminology shows the second striking similarity, that this problem is neglected in both of them. There are very few

¹ 60 E. 42nd St., New York City, (Dr. Jur.).

books which deal with the problem of the conviction of the innocent. Only France—of course not the corpse of France of today, but the immortal France of Human Rights, which will arise again, and Italy—of course not the caricature of Italy under the dictatorship of Mussolini, but the immortal Italy of Mazzini, which will arise again—have investigated arduously the errors in criminal justice (25); it is the glory of France that she fought for twelve years, from 1894 to 1906, to restore justice in the case of Captain Dreyfus. The few works written by Edwin M. Borchard (26), Erich Sello (27), *Lailler and Vonoven* (24) are exceptions. 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 writer recognized this problem many years ago while acting as a German lawyer. He received a letter from a man convicted for murder. The man insisted he was innocent. A careful investigation resulted in the discovery that the convicted man was not guilty of murder. I entered upon a long and difficult struggle and finally was successful; the man got a new trial and was acquitted. This story circulated

through the prison cells of Germany and I got many hundreds of letters from convicted persons, asking for help. Of course, many of them were not innocent; but I had to investigate every case carefully. Thus I had to deal for many years with the great problem of conviction of the innocent, practically and scientifically. Under German law the defendant is entitled to a new trial if there is evidence of new facts which create reasonable doubt about the first sentence. The enormous material, thus collected, laid the basis for a scientific analysis about the sources of wrongful convictions. The result of these many years of defense-work and scientific research is a manuscript completed in the United States one year ago: "Wrongful Convictions. A Pathology of Criminal Justice." Only a few results can be submitted in this article to the judgment of American lawyers and scientists.

The method of a pathology of criminal justice has to resemble the methods of medical pathology. The material of the research consists of cases of wrongful convictions, in which the innocence of the defendant had been recognized later by the Courts. The author has collected from his material for this Journal three murder cases, in which the scientific findings can be explained excellently. We may see exactly where and why justice faltered, with what obstinacy the Court tried to insist on the errors once committed; (29) 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. This

analysis of three cases may be more instructive than merely theoretical statements.

This outline cannot give all details of the research; but a short summing up of some of the main results may facilitate the understanding of the following statements. 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. Exactly the same observation may be quoted for American justice from Roscoe Pound, *Criminal Justice in America* (1930, p. 35): "A complete change in the spirit and attitude of the science of law has been foregoing in the twentieth century. But as yet it has made little impression upon the profession." We know much today of the fallibility of expert witnesses, but the blind confidence of criminal justice in the expert witness and his alleged authority has not been shattered. We find, especially in American criminology, excellent methods to substitute or control the unreliable evidence by testimony with methods of precision; but criminal justice is still dealing with the dangerous identification by witnesses, without using the methods of precision prepared by modern science.

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 for ever. 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 (4 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.

Any progress from the feeling of evidence, the "conviction intime" to exact scientific evidence is impossible in Europe today, for political and spiritual reasons; but it can be achieved in the United States, where the attempt is prevailing to give a fair trial and a just sentence to every defendant. Science has prepared the means of progress, because the principles of exact scientific proof, worked out by Wigmore (2), Gault (3), Cantor (4), Pound (5) and others are the most valuable con-

tribution of American criminology to the fight against error in criminal justice; there is nothing in French, Italian, Swiss or German criminology which might prove as important for the exactness of evidence as these American conceptions. On the other side, many findings of European criminology could highly enrich American criminology and American justice; many cases of wrongful identification, for instance, may be avoided with the scientific material collected in Europe. Besides, the English-American system of cross-examination is superior to the European procedure, where the judge directs the hearing.

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. The following statements may show not only why and where a mistake occurred, but also that it could have been avoided, had criminal justice taken in consideration the results of science and had the defense fought against the error with methods of exactness instead of popular phrases.

The author acted as counsel in the three following cases only in the new trial, not in the original trial, where the wrongful convictions took place. The three cases are published here for the first time in America; except two short statements of the author about the Rettenbeck-case and the Pfeuffer-case the

material has not been published in Germany either.

II

The Rettenbeck-Case

The farmer Lorenz Rettenbeck was sentenced to death by the Jury of Straubing (Bavaria) on June 24, 1919. The death sentence was commuted to life prison. On July 6, 1934 he was acquitted by the Court of Landshut (Bavaria). He had served fifteen years of prison for a crime he had never committed. The murderer had been another man.

Rettenbeck lived in unhappy marriage with his wife. He threatened and maltreated her several times. During the new trial the witnesses stated unanimously that the wife was to be held responsible for that fact; she constantly was calumniating the neighbors, and her husband had to pay fines and fees to the lawyers; it could be understood that his anger was aroused against his wife. But even more the mother of his wife who lived with them, was regarded as a "devil." The wife was ill, so she hired a servant. Unfortunately the latter was a woman of very immoral conduct. She entertained sex relations with many men, among them Rettenbeck himself. While she was living with Rettenbeck and his wife, these relations continued. She had her twelve year old daughter living with her.

On Sunday, December 1, 1918 Rettenbeck finished a basket, ordered by a neighbor and asked his wife to deliver it to the customer, who lived in a nearby village, some twenty minutes distant. She left at 4 p.m. delivered the basket and talked with a friend in the other village. Then she left for home at 5 ¼ p.m. Exactly at 5 ½ p.m. she was murdered in a wood half-way between the two villages. The time could be determined exactly because several witnesses heard the shooting. The post-mortem examination discovered a wound in the temple resulting from a revolver shot fired at short distance. The suspicion arose at once that nobody

else but Rettenbeck could be the murderer. He had told a witness that he would like to get rid of his wife and that he would gladly pay for her burial.

The servant Anna Noebauer and her daughter declared that no stranger had entered the house on December 1, 1919. This was untrue. A witness, calling on Rettenbeck at noon of this day, had seen a soldier sitting in the sitting-room. When the magistrate told Anna Noebauer and her daughter that an unknown soldier had been seen, they confessed finally that the soldier was a relative of Anna Noebauer, named Georg Schickaneder and that he had called on her on this very day. Stricken by fatal blindness which characterizes so many trials, the Court dismissed Anna Noebauer and Georg Schickaneder at once as not being involved in the crime and continued the prosecution exclusively against Lorenz Rettenbeck, who seemingly was the only one, interested in the death of his wife. Not even a search warrant was issued against the servant and her cousin. Rettenbeck was arrested. The magistrate failed to investigate why Georg Schickaneder had called on Anna Noebauer this very day, where he came from, when he arrived, how long he had remained and when he had left. The police, the magistrate and the whole village was so convinced that only the husband could have killed his wife, that no investigation of other persons, but only the conviction of Rettenbeck seemed to be necessary.

The most important statement was given by three witnesses; two ten year old boys were skating on a sheet of ice near the Rettenbeck house; a woman looked out of the window of a near-by house. They saw at a distance of three hundred and ten yards that a man was leaving the Rettenbeck house at 4 ¾ p.m. The two boys declared that it had been too dark to identify the man with certainty; but knowing that Rettenbeck was the only man living in that house, they concluded that Rettenbeck was the man who came out of that house. Questioned whether the man wore a grey

uniform they answered that the man had worn a plain suit, not a uniform. The female witness stated that the man leaving the house, did not look like Rettenbeck, as his way of walking was different.

The trial before the Jury began on April 1919. It was postponed because more witnesses seemed to be necessary. The counsel applied to set free the defendant; the district attorney had no objections. Thus the unprecedented fact occurred that a man, indicted for murder, was released without bail; bail is unknown in European procedure. There is no other explanation for this strange decision save that the Court itself doubted his being guilty. The trial went on on June 24, 1919. Rettenbeck had awaited the trial in his home; he had not thought to escape. But Anna Noebauer failed to appear; she had sent a doctor's certificate of alleged illness. Georg Schickaneder was present; he testified under oath and denied any complicity. The counsel did not insist on the witness Anna Noebauer and did not object that the highly suspicious Schickaneder testified under oath. Anna Noebauer had stated before that Rettenbeck had not left his home during the whole critical afternoon. The counsel evidently gambled with the life of his client, a carelessness without example in criminal justice. The jury gave a verdict of first degree murder. Rettenbeck was sentenced to death.

Rettenbeck appealed the sentence. He entrusted the defense to a new counsel. This lawyer gambled again carelessly with the life of his client. He withdrew the appeal, although the Supreme Court certainly would have annulled the sentence on account of the illegal procedure. Then the counsel applied for a new investigation. The Court admitted the new investigation, which shows that the Court itself seriously doubted the defendant's guilt. The files of the new investigation covered not less than five hundred pages. So many new facts had been discovered after the death sentence had been spoken. The Court decided to admit a new trial. The district attorney appealed this decision to

the Supreme Court, which made a fatal decision: it rejected the motion for a new trial; this fatal decision was only based on the fact that the statements of Anna Noebauer were unreliable. The evidence of five hundred and twelve pages was not even mentioned.

Rettenbeck's death sentence was commuted to a life term. He repeatedly applied for a new trial, but without any success. After nine years of prison he wrote me: "I am innocent, convicted to lifelong imprisonment, please save me." The investigation of the files brought me to the conviction that Rettenbeck had been convicted without any evidence at all; but during the investigation I became firmly convinced that nobody but Georg Schickaneder had murdered the woman and that he had been instigated to the crime by Anna Noebauer. Of course, this intuition had to be proved before denouncing two other persons. I cannot possibly state here all details of this legal fight of six years.

I repeatedly applied for a new trial; after a long hearing the Court rejected this motion. I appealed to the Supreme Court. The appeal was rejected. But here the fight entered a new stage; the Supreme Court admitted the possibility that Rettenbeck was not the murderer; but even then it seemed certain that he had instigated the crime; also an instigator of first degree murder is liable to death sentence and so the sentence was approved by the Supreme Court.

In this desperate situation I came to a desperate decision: I myself denounced Georg Schickaneder for murder to the district attorney. After hard resistance this procedure began. There was evidence that he had left the Rettenbeck house at exactly 5 o'clock and that he went to the spot, where the woman was killed at 5:20 p.m. Furthermore it was proved that he had hidden himself after the event for several weeks and that his family had given false addresses to the police. Among many other proofs the following were important: a woman testified that she lived with a hedge-lawyer in Munich; one night, shortly after the murder, Anna

Noebauer called on this man and had a long nightly conference with him. The witness heard him say: "This letter is heavy evidence against you, that is a difficult job." The next morning he told the witness that Anna Noebauer had confessed that Georg Schickaneder was the murderer. The new evidence was so overwhelming that finally, in June 1934, Rettenbeck was acquitted and released from prison. I may quote the following facts from that last sentence: The daughter of Anna Noebauer who meanwhile had grown up and had married, told several witnesses that Rettenbeck was innocently convicted. She declared that he had been at home when the fatal shot was heard. She told one witness, who admonished her to confess the truth, that her mother had advised her to testify that she didn't remember anything. Being called as witness in the new investigation, she showed one of the witnesses a postcard, just received this day from her mother Anna Noebauer. There was written: Rettenbeck has applied for a new trial. You know what you have to state. She told another witness that the murderer was a soldier. Later on she stated that her mother had told her in the first trial to testify that nobody else was present in Rettenbeck's house on December 1, 1918 and that her mother had sent her to call Schickaneder to the house. The two witnesses who saw the man leaving the house, testified that it had been too dark to ascertain whether the man leaving the house wore a uniform or not. They could not identify the man; they only believed that it had been Rettenbeck, because they knew of no stranger present there on that particular day. One witness testified that two days after the murder, on December 3, 1918, when Rettenbeck had already been arrested, a man knocked at her window in the evening and begged for a piece of bread. The man wore a soldier's cap. He said: "I have killed her, the arrested man is innocent, he must be released." One sister of Anna Noebauer had a love-affair with a worker and Anna Noebauer tried to estrange those two. The sister told one

witness: "If Anna gives me any trouble, I will bring her into prison and Georg Schickaneder as well; my sister is guilty, she tried once before to drown Mrs. Rettenbeck in a watertrough."

The decision concludes that there was no basis for suspicion and no evidence at all for the fact that Rettenbeck had slain his wife. The basis of the first sentence was completely shaken and destroyed. Rettenbeck got an indemnity from the State to buy a new farm.

III

Analysis of the Rettenbeck-Case

It is only fair to emphasize that we are looking at an extreme example of blindness, unscrupulousness and blundering of criminal justice. But for a manual of pathology the most extreme cases are especially instructive. The master of criminology Hans Gross (12) emphatically warns the magistrate and the judge not to follow only one of the possibilities in the investigation, and to avoid the fatal blindness which sees only one trace and overlooks all the others. It is clear that in the Rettenbeck-case suspicion at once arose against the husband. But even if he had been guilty, the complicity of Anna Noebauer was completely clear; to dismiss her a few days after the opening of investigation, was absurd. No less absurd was the failure to prosecute Georg Schickaneder, who undoubtedly was the real murderer. Anna Noebauer had sent for him the day before the murder occurred. He arrived in the evening when Rettenbeck and his wife were already asleep and had a long secret talk with Anna Noebauer. He left at 4¾ p. m., allegedly for the station; but no train was leaving at that time. The afternoon train had already passed and the evening train

started at 8 p. m. To get to the station he had to pass the forest on the same way on which Mrs. Rettenbeck was returning. He must have met her a few minutes before 5½ p. m. exactly at the spot, where the corpse was found later. The moment he and the victim met, could be fixed exactly, even mathematically. At 5½ p. m. several witnesses heard the shooting. Schickaneder was hiding himself, his family gave a false address to the police. He was a soldier, accustomed to kill without hesitation. Anna Noebauer confessed to two witnesses two weeks later that Rettenbeck was innocent, but the murderer was a soldier. Before the magistrate Anna Noebauer and her daughter testified that nobody else had called on Rettenbeck this very day. It really cannot be understood that no persecution at all, no search-warrant, no arrest was ordered against Schickaneder. Today we know for certain that he killed the victim and that Anna Noebauer instigated him, because she hoped that Rettenbeck would marry her later and that she would thus become mistress of the farm. Of course, she was not free; but her husband was a prisoner of war. Later it was proved that she maintained sex relations with another man and that she asked him to marry her; when he objected that she was not free, she answered: "My husband will not return any more." It is incredible that the real murderer was permitted to testify under oath against the innocent defendant. He stuck to his lies without hesitation and he had not the slightest remorse in seeing an innocent man serve fifteen years in prison for a crime he,

Schickaneder, had committed; only the twelve year old girl, when she was grown up, felt she could not bear the responsibility any longer and so she confessed the terrible fact before several witnesses.

The case is instructive because it shows a man convicted without any evidence at all. We recognize the dangerous mistake of accepting a possible motive as evidence. It naturally was possible that Rettenbeck would wish to get rid of his wife, this was a reasonable motive. But the motive can never replace the real evidence. Three witnesses had seen the man when he left the house. It is very instructive to see how the witnesses testified: the woman-witness said the man was not like Rettenbeck; the two boys said they could not identify the man clearly, but they believed him to be Rettenbeck because they did not know anything about the soldier who had called at Rettenbeck's house. They even told the magistrate: "We believed that he was Rettenbeck because no other man was in Rettenbeck's house, so only Rettenbeck could leave the house." Questioned whether the man who left at 5 p. m. wore a uniform, they denied that fact.

Here the defense in the new trial proceeded to a new proof which is of greatest importance in cases of doubtful identification. The *Vincent's Rule* (27 p. 243) tells us that a witness may identify during daylight a man who is clearly visible at a distance of not more than from 109 to 163 yards. But we are able to supply a highly important new method of precision here. An expert of astronomy and optics can fix the dis-

tance of possible identification exactly if the time of observation is exactly known. The man left at 4¾ p.m. on December 1, 1918. At this moment the three witnesses saw him at a distance of 310 yards. I asked Professor Kuehl of the Technical University of Munich for an expertise. The expertise read as follows: The sun sets on December 1 for this village at twenty minutes after 4 p.m. Forty-five minutes past 4 p.m. it was 4 degrees, seven minutes past 5 it was 6½ degrees under the horizon. Forty-five minutes past 4 p.m. the visibility was reduced to ¼ of the normal visibility, at seven past 5 p. m. to 1/10. At the time after sunset a few minutes change the visibility already considerably. When the visibility is reduced to ¼ of the normal visibility, one may recognize the face of a person at a distance of 31,6 yards, the figure of a person at a distance of 57,7 yards; when the visibility is reduced to 1/10 one may recognize a face at a distance of 13,4 yards, a figure at a distance of 22,9 yards. If the sky is covered or the body is seen against a black background, these figures are to be reduced. Therefore it is impossible that the boys at the time given could surely identify the face of a walking man at a distance of more than from 13 to 32,7 yards and his figure at a distance of more than from 21,8 to 54,5 yards. His suit could not be exactly recognized at a distance of more than from 65,4 to 109 yards; a grey military cloak could just as well seem to be black. A sure judgment about the cap was just as well impossible at a distance of more than from 21,8 to 54,5 yards. Consequently the two

boys could not identify by any means neither the man nor his cap nor his suit.

The country lawyer who was defending in the first trial had no idea of this modern kind of evidence. Thus he was unable to tell the jury that the alleged evidence was an impossibility. The man who left the house might have been Georg Schickaneder as well and he surely was the man. Later this fact was proved beyond doubt and he could not deny it himself. It goes without saying that many cases of wrongful identification can be avoided with similar methods of precision. It was funny that one of the judges concerned opposed this expertise in saying: How can the expert determine that after so many years? Of course, an expert of astronomy and optics can just as well determine exactly the visibility in the battle of Salamis when day and hour are known. The fight for justice—the details cannot be explained in this short outline—was fought during six years. We see how reluctantly the Court admitted the fact, that a terrible error had occurred (29). But the power of truth is invincible. You may bury the convicted innocent; his body will rise again as long as there are men to fight for justice.

III

The Goetz-Case

The twenty-one year old worker Otto Goetz was convicted on December 5, 1919 by the Court of Augsburg (Bavaria) for first degree murder. The death sentence was commuted to life-long prison on April 27, 1920, that is to say, after nearly five months of terrible waiting. After long investigations he got a new trial in February 1929. I

was charged with the defense in the new trial. The Court acquitted the defendant from the indictment of wilful murder. He got a three year term for abortion and homicide caused by negligence. As he had already served nine years of prison for first degree murder, he was set free at once and received an indemnity from the State.

Goetz had made the acquaintance of the housemaid Maria F. who exercised a very good influence upon him. He loved her very much and decided to marry her. Both had already published the bans for matrimony. At that time the bride told her friend that she was pregnant from him. She insisted on an abortion though he disapproved of this intention. She got in touch with a woman in Munich who undertook criminal abortion professionally; a letter from this woman was found in the pocket of the girl after her death. She insisted that Goetz should provide the means for abortion, otherwise she would consult that woman in Munich. So he reluctantly agreed. A sanitary sergeant of the Army advised him to use hydrocyanic acid, which is one of the most dangerous poisons; he told him to mix the poison with another cyanide, black coffee and lemonade, in this case the poison would only destroy the fetus, but would not harm the mother. Goetz thanked him for his advice and went to Munich. Here he bought a bottle of hydrocyanic acid from a druggist; he told the man that he needed the poison for some photographic work. He signed his true name twice in the poison book of the druggist, although he had a false identity card with him, which he was to use for smuggling cigarettes from France to Germany.

He met his bride in Augsburg; a witness had accompanied her there. He testified that both were evidently so much in love with another, that he preferred to leave them alone. Both spent the evening in a dancing-club in full harmony. They passed the night together in a hotel, where Goetz again signed his full name. The girl at once asked for the "drops" he had promised her; but he told her to wait until morn-

ing. Then, when all the people in the hotel were already awake, he gave her the bottle with the poison mixed with black coffee and lemonade. She drank half of the bottle. She felt unwell at once. He ran away to call a midwife because he thought that the fetus was coming out. When he returned the poor girl was in agony. He became utterly upset and frightened and ran away without looking for help. She died. Beside the corpse the half-filled bottle with poison was found. Goetz went to Stuttgart; here he confessed to a friend that he had attempted to make an abortion, that his bride had taken "too much" of the mixture or that the mixture had not been made in the right way and that the girl was dead. Shortly afterwards he was arrested.

In the first trial he gave an untrue statement about the question how he had got the "fatal prescription." Later he explained that he had tried to conceal the name of his comrade in order not to involve him. But suspicion arose, when his lie became evident. The main evidence of the prosecution was an expert witness, an old pharmacist. This expert stated that the use of such a dangerous poison clearly gave evidence of the fact that Goetz had planned wilful murder, not abortion. The Court submitted to the authority of the expert witness without checking his statement. The counsel had no knowledge of judicial medicine as well. Thus nobody was aware of the fact that the statement of the pseudo-expert was complete nonsense.

The difficulty was to find a reasonable motive. The district-attorney had an ingenious idea: On the arrested man the watch of his bride had been found. Thus he had murdered his bride in order to get her watch.

In the new trial where the author was defending, it could be proved easily that all kinds of poison are used by ignorant people for abortion. It was necessary to call an expert of criminology to the witness-stand, Professor Hans v. Hentig, coeditor of *Aschaffenburg-Hentig's Review for Criminology*, now professor at the University of Colorado.

He made an interesting statement about the questions involved; he pointed out that if Goetz had planned wilful murder instead of abortion, he undoubtedly would have committed the crime in the evening and not in the morning, thus being able to leave Germany during the night, before the murder was detected; and he surely would not have left the poison bottle at the bedside of his victim.

The Court acquitted Goetz of wilful murder, stating that no evidence, not even a reasonable suspicion, remained any longer.

IV

Analysis of the Goetz Case

The Goetz-case, published here for the first time, is instructive material for the pathology of criminal justice. First we see that a lie of the defendant is being overvaluated, a very interesting problem the writer has dealt with already in 1929 (20); Goetz first had stated that he had got the final prescription from a certain friend, which proved untrue; then he declared that he had got it from an unknown person in Francfort, which was untrue as well. Only in the new trial he gave the exact name and address of the sanitary sergeant; the latter naturally denied that he had given this advice. The prosecution in the first trial could easily prove that Goetz was lying; and so the fateful prejudice arose that a lying defendant must be guilty. The masters of criminology, Hans Gross and Enrico Altavilla, have warned in vain (30) that the lie of the defendant is no proof against him at all. It was to be understood that Goetz attempted to protect his friend. The second reason for the wrongful conviction in this case was

the ignorance and false authority of the expert witness; the old pharmacist thought himself to be an expert for abortion cases, although he had no knowledge at all about them. In the new trial true experts were able to prove exactly, that the use of poison does by no means exclude the intention of abortion or give evidence for wilful murder—on the contrary—all the heavy poisons are used by ignorant people for abortion. The Court, the prosecution and the defense had been just as ignorant as the expert witness, although they could easily have checked on the statements of the expert by studying any manual of legal medicine (31); especially all cyanites are often used for abortion. Here we may clearly recognize what tragic results can be caused by ignorance and laziness in criminal justice. Finally, the case gives evidence of the fact that once the wrong way is chosen, it is continued with an incredible blindness; there was no reasonable motive at all why this man should murder his girl. He was in love with her, he was to marry her within a few weeks. She was expectant. She, not he, insisted on abortion. But even if he himself wished to get rid of the child, he could do so by making an abortion, not by murdering his bride. The prosecution stated that he had stolen the watch of the girl. In the new trial the defense was able to prove by producing a letter, that his watch was in repair and that she therefore had lent him her watch. But if this evidence would not have been given, it still seems complete nonsense that a man, who is to marry a girl,

should murder her to get her watch, when he may get her and all her property within a few weeks. The Court was so stubborn and so blind that it overlooked the undoubtable fact that Goetz had registered with his full name at the druggist's where he got the poison and at the hotel, where the tragic event occurred, although he was in possession of a false identification card. A little common sense, a little exactness in investigating the clear facts and this wrongful conviction could have been avoided easily.

V

The Pfeuffer-Case

The worker Johann Pfeuffer, a married man with six children, had fallen in love with a girl. The girl was expectant. The girl was found dead on June 9, 1923, in a forest near the city where both were living. The post-mortem examination gave evidence of two facts: in the uterus a small ovum was found, so that pregnancy was proved. In the bottom of the gullet a set of twelve false teeth was found. The medical expert stated that the death was caused by suffocation, because the set of false teeth had closed the trachea. A dentist was called as expert witness. He stated that it is impossible to accidentally swallow such a big set of false teeth and that the set must have been driven by using violence, into the throat.

Pfeuffer submitted to justice himself. He stated that the girl had given him a rendezvous in the forest and that she had attempted abortion there by pouring water into the uterus with a rubber tube. She told him that she felt unwell and shortly afterwards she collapsed and gave no answer when he addressed her. He thought she was joking, left her and went home. The following morning he noticed that he had forgotten his coat in the wood. He re-

turned, saw the girl lying on the ground as before and finally made the dreadful discovery that she was dead. He told the event to his wife and his aunt and confessed that he had attempted the fateful abortion himself. Both advised him to deny this fact because he thus would be made responsible for her death. So he told the Court that she had made the attempt herself.

In the first trial the medical expert and the dentist insisted on their statements. The prosecution made up a whole story of invention: she had been reluctant when he had tried to make the abortion, he had gagged her with his handkerchief and thus he had driven down into her throat the set of false teeth. The prosecution demanded a death-sentence. But the Court, unconsciously feeling the weakness of evidence, sentenced him to a fifteen year term for second degree murder. The most aggravating circumstance was that a married man, father of six children, had had sex relations with a girl.

It was very difficult to obtain a new trial. The prisoner asked me for help. I began to analyse the story of gagging her with a handkerchief. His handkerchief had been examined by chemical methods to find germs from the cavity of the mouth of the victim. The result was negative. This does not prove anything, explained the district attorney, the defendant probably washed the handkerchief after the gagging. But this seemed unlikely, as the defendant would have had ample time to throw the handkerchief away, had he felt guilty. But if the story of the district attorney was true, did that mean murder? A man who gags a woman and thus drives the false teeth into her throat, commits homicide caused by negligence, not murder. And the whole story seemed most unlikely. Undoubtedly the woman had planned an abortion, as she brought with her the water container and the rubber tubing. When the girl was willing, why must he gag her? Reading the files, I made a second discovery: the statement of the post-mortem examination acknowledged

three corresponding facts: three small blood-stains were found at the entrance of the uterus; traces of blood were discovered on the entrance to the vagina and on the petticoat, jammed between the legs of the corpse. The truth was evident: during the attempted abortion there occurred a violation of the uterus. This often brings about an embolia; if air penetrates into the veins it causes sudden death by suffocation. In the new trial the medical expert insisted on his wrong statement that the death was caused by suffocation through the false teeth, but two expert witnesses of the defense smashed this statement completely and gave evidence that the death of the girl was caused by inexperienced abortion practice and not by suffocation, on account of gagging her. Now the Court agreed with the defense in all points. It admitted that this set of false teeth possibly had been removed after the death into the throat, while the corpse was conveyed from the forest to the city on a van. The wrongful conviction was annulled and the defendant was set free at once.

VI

Analysis of the Pfeuffer-Case

The analysis of this third case can be very short because it corresponds with the analysis of the Goetz-case in many points. We have the lie of the defendant used as proof of his guilt, we have the ignorant, stubborn expert witness and we have the lack of reasonable motives. In the new trial two dentists insisted again that it was impossible to swallow such a big set of teeth. I asked these two experts how many cases of swallowed sets they had seen in their practice. The effect was striking: none. This answer had to be expected, because cases of this kind are extremely rare. Now I asked them where their knowledge came

from. They answered that they were quoting from scientific works. It now was easy to prove that the standard-work of legal medicine by Hoffmann-Haberda and other books (32) show many cases where big sets of false teeth had been swallowed and that the possibility is emphasized there that such sets may be displaced after the death if the body has been shaken. So we see the same lack of control in this case: a glance into the scientific works would have proved the ignorance of the experts, but neither the defense nor the Court felt it their duty to do so in the first trial.

VII.

Conclusions

The following main causes of wrongful conviction may be deducted from these three cases: the blindness of the prosecution which stubbornly insists on one possibility, thereby overlooking all other possibilities; this blindness appears in the Rettenbeck-case in its extreme forms, but it reigns over criminal justice in many cases every day. It is significant that the most absurd statements were made in order to uphold an incorrect thesis: in the Goetz-case the prosecution made the ridiculous contention that Goetz had killed his bride to steal her watch, although he could marry her within a few weeks and thus get all her property. Of course, such a nonsensical assertion in a murder case is an exception; but the blunder in its finer forms is the more dangerous. Criminal justice must return to the wisdom of our great master *Hans Gross*: to enlist all possibilities

in every single case and to follow every way as long as one of the possibilities may not be eliminated with certainty. The *method of elimination* the writer is fighting for, corresponds exactly with *Wigmore's* suggestion to design all the possibilities in every case and to subdivide the drawing then into the single assertions, objections, proofs and counter-proofs involved. If we apply this method on the Rettenbeck-case we see at once how easily the fateful blunder could have been avoided. The second cause is the false confidence in the witness and the expert witness; if the Court had made scientific investigations of its own in the Goetz-case instead of trusting the authority of the ignorant "expert" the fateful blunder could have been avoided. Criminal justice must finally accept the findings of criminology that testimony is the most fallible evidence and that modern methods of precision (see the measures for identification given by Professor Kuehl in the Rettenbeck-case) are by far more exact and more reliable. It is the merit of American criminology to plead for the use of the camera, the chemistry, the fingerprinting method, etc., in order to control the statement of the witnesses. In this short outline all this can only be pointed out without going into details.

One conclusion may be deducted from these three cases: in all of them the error could have been avoided easily by using the methods of modern criminology. This is true for most of the cases of wrongful conviction. A little more consciousness and knowledge of criminology, a little less blind-

ness and indolence, introduced into criminal justice and the number of wrongful convictions would be reduced greatly. The main task will be today to do away with the prejudice that probability and not certainty is needed for the conviction. We must return to the wisdom of our master Hans Gross: the greater the responsibility of a decision, the more exactness and certainty is required. The decision which involves death or life of our brother is the greatest responsibility a man has to bear.

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