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W. Eliasberg

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THE NEW THEORY OF THE PERPETRATOR AND THE DUTIES OF THE PSYCHIATRICAL EXPERT

W. ELIASBERG

There are very good reasons in favor of the principle that criminal law must not take into consideration anything but the real facts of the case; the real aim is however to reform the culprit's position within criminal law. Casting a retrospective glance at how the problem of the culprit has been treated during the last fifty years we are able to distinguish two phases; a positivistic and a non-positivistic one.

The final aim of criminological positivism is to find the reasons why a certain person committed a certain crime on a certain place, at a certain time. This question is parallel to the problem of the Laplace formula of the Universe. Positivists regard all individual fields of science (e.g., Criminal Statistics, Criminal Biology, Criminal Psychopathology, the Art of Deduction, the isolated analysis of certain phenomena, like Graphology) as components of a mosaic picture which will reveal the connection—viz, the causal interrelation—without the need of any further explanation.

Positivism recognizes only one connection and this is the causal interrelation. The perpetrator is the provisional last link of a causal chain. The other theory (and there is no reason why it ought to be dubbed idealistic) is based on the plain given facts. And in criminology man is not given as a mosaic picture composed of individual facts, not as a last link of a chain but as a coherent structure which in its history and development, in social space, in legal and religious dimensions exceeds beyond the boundaries of the "When" and "Where," beyond the boundaries of the individual Self and of the actual given facts.

Criminology faces the task of realizing criminal—i.e., normative¹—states of matter through actual actions. Criminology has consequently to adapt itself to two planes: the plane of Existence and the plane of Moral Necessity. If criminology—the intelligent elaboration of given facts—would be the only way of achieving the

¹ Cf. Liszt-Schmidt [15], Mezger [16], Erik Wolf [21].

objective synthesis of the above mentioned two planes—well, there could simply be no criminology. This is however, not so. The synthesis lies rather in the subject, in the actual facts, in the very person of the culprit. And this is the first point that has to be proven.

If we want to describe the character of a criminal, the best way is that we not only start with the description of his actions but put these actions in the center of the description of his character. This plan is advisable when describing not only criminals but any active person in general.

Every action with outward effects is determined by two factors: the Character and the Situation. These two determinants create permanent phenomena in the character. I made the suggestion that these be called Motivations (cf. Eliasberg [6]).

The psychoanalytical hypothesis that the "real causes" of action lie in the impulse, is not contradictory to the establishment of the concept of "Motivation" as the permanent background of action. Whatever the real causes are, it is incontestable that we keep gaining new experiences and our later actions are being determined by such experiences. This fact ought to be sufficient here.

Motivations, permanent background—phenomena of action, attitudes which are the origin of individual action and which stand behind the action determined by individual motives, have an ontogenesis. Attitudes develop as the individual matures, in the same extent as the character is getting entangled in the exterior interrelations of existence. In our modern existence the strongest exterior urge and motive of the development of motivations is the occupational activity.

Through ontogenesis we are able to understand the structure of occupational motivation. The youth who is already developed physically and through the acquisition of the necessary schooling and knowledge perhaps mentally too, is (as Charlotte Buhler [4] has shown) not yet apt to carry on in an occupation. He still lives in the period of the eagerness of accomplishing great facts. We say that youth is driven by an eagerness of action and mean thereby that although the adolescent is able to realize the values in the course of his action, yet this action has too much of a momentary character: the "quiet heroism of everyday life" is unknown to him as yet. Lives and actions of adolescents—like those of many psychopaths—are guided by sudden emotions and not by attitudes.

We have been speaking of Ontogenesis and distinguished (be-

side the stages of early childhood, which we do not intend to discuss now) the period of the eagerness of accomplishing great facts and the period of Motivation, especially of Occupational Motivation. Ontogenesis in the actual sense of the word, is a biological concept. We apply it to denote the course of maturing which is prevalently determined from within. Everything that may be said about human behavior is connected with that structural interrelation which—as the end of a historical development—is called the spirit of the age. We have to be familiar with the structure of our age in order to be able to understand different, strange, remote structures—the mind of the patient, that of primitive Man, of our very selves in our beginnings and finally the mind of the Culprit.

There have been attempts to ignore the historicity of human existence by including history into individual evolution and by limiting it on this latter. Ontogenesis, respectively phylogenesis instead of history. Karl Lamprecht intended to write history in this manner, viz., as a history of the mind and Felix Kruger's *Evolutionary Psychology of Civilization* [13] represents one of the most recent attempts to explain civilization on the basis of ontogenesis, by means of the examples of the changes in mental functions. The same attempt has been undertaken by Erwin Straus [17]. (Straus says that experience is based on the psychological event which in its subjectivity subordinates the individual moment to a superior Whole.) All these attempts of replacing history by some sort of psychologism are doomed to be abortive. It will always be a futile Faust-like endeavor to limit the mental essence of man to the facts of experience and especially to subjectivity. Nobody will ever be able "to devour alone all that has fallen to the share of whole Mankind." This connection has been especially clearly realized by Max Weber [18]:

"Differences of the psychological qualities of an attitude are therefore not necessarily of great sociological consequence. Homogeneousness of the meaningful relation does not depend on the homogenousness of the psychical constellations involved. . . . A category like e.g., striving for profit has, however, positively no place within any psychology. Because the same striving for lucrativeness . . . may not only go hand in hand with absolutely heterogeneous character traits, but . . . may even be dependent on just contrarious constellations and character traits."

Permanent dispositions may appear in our occupational existence if there exists the ability of subordinating ourselves as well as the ability of self-determination. In the age of "Free Labor" no activity is possible (not even the most simple one) without self-

determination. Without self-determination we could not even manage to report for work daily at the usual hour. The proportion between self-determination and subordination is of course quite different in the various occupations. The businessman, the man of premeditated risks must possess quite different a proportion of self-determination than the simple worker and on the other hand there is a peculiar proportion of self-determination in subaltern independence or in the characters of holders of confidential posts (cf. Eliasberg [6] and [8]).

We see, therefore, that there are individual interior attitudes which either are or may become conscious; they bear upon one particular sphere of civilization and have a self-determinatory effect on the action of the individual; they regulate social attitude in particular, so that they act so to speak as "traffic regulations of social intercourse." Such motivations are caused by the introception of objective orders. Social Order and Motivation, Regulations and Real Actions, Indigence and Crime are never identical. This is the point where the so-called "Milieu Theory of Crime" has especially often made errors and this is where the theories based on criminal statistics are basically wrong. The fault never lies with the social conditions, from the juridical point of view. They never act right through the individual; as soon as someone has built up a motivation within himself, he introceives social conditions in the same manner as any other causal motive of biological or physical nature.² Disease, Indigence become causes of his attitude through Introception, through being included in the motivation.

I do not intend to disavow by any means the statistical conformity of actions and attitudes of human beings; this is secondary. Actions of human beings will not be similar unless motivations are similar. We are not going to speak about the factors which can promote the assimilation of actions (factors like ideology, class consciousness, class, etc.). The essence is that social existence never acts right through the individual directly.

We must, therefore, refuse to accept the "claim" of social ex-

² In an important treatise Wetzel [19] places the more restricted determination of Intentionality into the wider bounds of Causality.

W. claims further that there is a regularity of sensory intentionality; he does so in two ways, viz., as an immanent structural regularity of objects and as the ideal regularity of values. In this manner, however, the regularity which W. claims to exist, cannot be arrived at. Thus W. confines himself to will and its motives and we have already proven in the above paragraphs and on other places too that a real intentional system cannot be established in this manner. The development of the concept of motivation is the only basis of the development of the regularity of sensory intentionality in addition to causality.

istence just like we refuse to accept the so-called "True, unconscious Causes." The same what goes for them, goes for social determinations, too, viz., that one experiences them and regulates his actions accordingly.

Since the so-called "Old School" (Binding [3]) adheres to the distinction between accountable, responsible and legally sane persons—and on the other hand those who lack these mental qualities, since the entire legal system is based on Free Will, i.e., one's mental ability of action—we will accept it but at the same time we will demand that this concept be interpreted in a much deeper sense.³

There is namely something else that in no way is given with the ability of action—not even with the ability of regulated action—viz., that action is logically regulated by a generally valid moral philosophy. The manifestations which we have been discussing, i.e., the motivations are duties; but they are individual manifestations. In spite of the similarity and historical harmony of the motivations of certain epochs, we must still make reference to the fact that there are two polytypiks of motivations; an intraindividual and an interindividual one. Modern times would be entirely inconceivable without that. There must be self-determination and subordination in the most various proportions, not only appositely but even in the very same person. The ardent member of the political club must be a part of the organization. The independent businessman must comply with the rules of his association, etc.

I have been trying to show how the action of the actual human being in his plain givenness is constituted. The purpose of this was to understand the mind of the perpetrator. We have gained a picture of the acting man; this picture contains the realization of something normative. The planes of existence and of moral necessity—the planes of "Is" and of "Shall"—now are within the same reality.

It is the duty of justice to put this cognition to good account. Here we must be concerned with the consequences of the work of the psychiatric expert. The expert faces facts above all (cf. Eliasberg [10]). He would, however, commit a grave error in mistaking facts for the disintegration into structureless objectivity. His

³ Von Liszt [14] and Aschaffenberg [2] regard crime as a product of the criminal's peculiarity on one hand and of the peculiarity of the social conditions environing the criminal in the moment of his committing the crime—on the other hand; although this definition is not altogether wrong, it is insufficient. First of all, the surrounding conditions are by no means the decisive factor, furthermore this product is no objectively fixed concept, but something subjective. As an objective concept it can not be efficient beyond the extent of its being incorporated into the subjective concept: Motivation.

duty is to investigate objective evidence but he must not be satisfied with that unless there is nothing more to disclose; unless there is no more personality structure or as we want to call it now: motivational structure of noticeable poise. This is the case when he encounters advanced destruction, regression, exhaustion of motivations through some grave and real psychosis. In all other cases he is obliged to indicate the interrelation of motivations through his very duty of disclosing actual given facts. But there are other reasons of juridical nature which demand the disclosure of motivations.

The life story of a habitual forger shows alternative periods of law-abiding behavior and of stereotype repetitions of the same offense.

Son of an independent hotel owner; lost his father very early; brought up by the mother; 16 years old when war starts; enlists voluntarily; serves 3½ years in the trenches, 180 special errands, awarded highest medals for bravery; his courage earns him the promotion to commissioned officer in spite of his lack of higher education; wounded several times, always returns to the trenches. After armistice he serves in the army's demobilization bureau; very efficient, best references. Demobilized and compelled to establish himself in business. Inflation comes. Makes several buying trips abroad; mingles with speculators of all kinds; some of these rather imaginative persons, involved (just like he himself) in queer transactions, but always in the money. His business activity results in bankruptcy after a very short while; turns out that he had kept no books at all, so that it must have been conspicuous even in those times. Sentenced to jail for simple bankruptcy; after being released he receives a subaltern position in the municipal service. Excellent service record, his letters of recommendation praise his energy, his reliability in such words as are usually rarely wasted on men of his low position. Het gets discharged (different reasons). Compelled to be independent again; the same course of events as described above; bankrupt again—this time a longer jail sentence follows for fraudulent bankruptcy. Periods of morphiophage. Marriage; highest degree of dependency (interior attachment to wife and children); his wife divorces him because of the jail sentence, but he keeps talking about her ardently.

The most conspicuous trait is the alternation of the not only immaculate but even energetically efficient attitude when in the low position of a subaltern on one side, and of downright failure when "independent," on the other side. This is in agreement with the fact that (as mentioned above) in the position of com. officer he performed quite extraordinary feats during the war and further that in marriage he created a position of subordination for himself; for he cannot exist without subordination.

We see that there is a close relation between the sort of the crime and the motivation. There is one thing that this individual has been unable to live up to, viz., economical independence, i.e.,

independent activity within the limits of business occupation. It may be safely predicted that this man will sooner or later lose his foothold in such activity and the further events are inevitable consequences of the degree of abasement which he undergoes. He is neither a born, nor a habitual, nor a professional criminal. He has no criminal predispositions either. Crime did not become a second nature with him—it does not seem to be the only way of existence for him; he is not incorrigible either. The entire prognosis (including the criminal prognosis) depends on whether he can find a subalternous position where—under strict regulations—he finds his peace of mind and is able to do his best.

We see, therefore, that the analysis of motivation results not only in what is called with an improper but traditional definition “The Psychological Comprehension of the Perpetrator”—it yields above all a basis for prognosis, prophylaxis and therapy.

We have said that motivations were situated between the Character and the Situation and that they formed tangent-planes. They are not identical either with character or with situation as such. They are diffusion-membranes so to speak. The actual phenomena depend on the tensions on both sides and on the osmotic-membranes themselves.

It is, therefore, entirely justified when the psychiatric expert makes reference to the peculiarities of the social background and of social conditions. E.g., when delivering opinions on crimes dating from the after war inflation period it would be unthinkable not to take into consideration the particular temptations of that period. Periods bring forth tendencies just like physical and biological circumstances bring forth dispositions. When we say that murder by poisoning is the typical crime of women, we mean a disposition and not a motivation. The difference is shown by the fact that the above proposition cannot be converted. It would be a nonsense to say: “Women are born to be poisoners.” And in the very relation of these two probabilities stand value and meaning of Temporal Tendency and Biological Disposition, on one side and Motivation, on the other side.

But what about cases where motivations are missing or have not been completely developed or have been destroyed? Motivation is the preliminary condition of one’s responsibility for his own actions: does it logically follow that whenever there is no motivation, this responsibility must be denied and punishment must be restricted? This is positively not so. The most conspicuous example thereof is the problem of Negligence. First of all: the formal crime

of Negligence does not depend on the person's restricted psychological efficiency but it cannot be definitely denied on basis of the evidences of psychological deficiency.

Let us suppose that in a certain hypothetical case we have subjected an automobile-driver to psychological experiments; we have arrived at the conclusion that the man's ability of reaction is by nature slower than it should have been necessary when the incident in question happened (we must presume that it was an incident that might have happened amidst ordinary traffic). In this case we must declare that negligence has been committed, to a certain extent; viz., that driver ought to have become familiar with the reactional type he belonged to and ought to have given up his occupation. Occupational activity requires not only the acquisition of the technical knowledge but first and foremost the building up of motivations. A person fails to build up social motivations within himself which could and must have been expected from him—this means already that the formal crime of Negligence has been committed—if not more. There can be no exoneration. The same goes for the case when motivations have been destroyed. Let it be mentioned in this connection that a beginner must never be expected to possess a complete motivational structure; therefore, not the beginner in Life—the Youth and not the beginner in the trade—the Apprentice either. This is the very reason why criminal law has established special regulations for adolescents.

In our age the consideration of the destruction of motivations is especially important. This may be the result of biological causes, e.g., of diseases and very frequently of chronic indigence. We have only one way of understanding the influence of social conditions (as said above), viz., through considering the motivations. When considering the effects of indigence, up to now merely its acute effects (i.e., the acute demolition of motivations) has been taken into consideration and been given special attention by Justice. (Article No. 248a of the German Criminal Code; cf. Eliasberg and Hirschberg [12] and furthermore Eliasberg [7].)

I quote the "Leipsc Commentary" (p. 660): "The decisive factor is not whether the perpetrator has been suffering indigence or not; imaginary indigence is sufficient, too. . . . The fact that the perpetrator has been suffering indigence is not sufficient in itself; indigence must have been the motive of his actions."

The effects of chronic indigence are of far greater importance than such situations where—as the most plain psychological insight may show it—the perpetrator cannot be expected to act in a lawful

way. A characteristic trait of chronic indigence cases is that the person yields to indigence, his activity and his mental standard lowers. This state is very dangerous because it is no state of equilibrium;* on the contrary it keeps being ready to explode. Cf. the following case:

A person with excellent peace- and wartime record, factory foreman, loses his job on account of depression and falls into poverty. In arrears with several months rent; has to vacate his apartment where he has lived for 30 years; this drives him into complete despair. On one Sunday while wandering around town ("I cannot be helped" he ponders) he drinks a few glasses of beer. In a crowded midtown street he happens to see a lady with a hand-bag. (She came across him when crossing the street so that he positively could not have seen her before their actual encounter.) He snatches her hand-bag, runs away, after a few steps throws it away—without even having opened it or inspected its contents. He is caught; he is in utter despair, cannot understand how he could have happened to do it. The prosecutor prefers charges of theft only, not of robbery. This is a case where a man's action is based on an impulse—a man whose motivations have been shattered to pieces. The stipulations of Article No. 51 of the German Criminal Code are missing. These are effects of chronic indigence.

Our above discussions were based on the hypothesis that there is an interrelation between motivation and crime.

But how about the so-called sex crimes? The strange feature of such cases is that nobody had ever suspected the perpetrator of such acts. And that is why in such cases, too, one is inclined to think of circumstances which might seem to comply with the stipulations of Article No. 51 of the German Criminal Code.

Various cases are to be distinguished here: 1. when the question is the establishment of a person's guilt; when, e.g., a heretofore law-abiding, correct and industrious citizen is being incriminated through the testimony of a child or of a minor; in such cases either the known motivation can be an argument against the authenticity of the witness or reference can be made to the fact that special circumstances have been involved in the case.

The interrelation between sensuality and character in such cases in its details is not at all different from that in the case of permitted impulsive acts. Also in such cases it is necessary to investigate the interrelation between character and the act. Cf. Eliasberg [6].

The following factors must be taken into consideration: Diag-

* See transactions of the XIIIe congrès international de sociologie (Revue internationale de Sociologie, 45e Année, Nos. XI-XII, Nov.-Déc. 1937)

nosis of the crime; its meaning and peculiarities; periodicity, intensity and nature of the inhibitions; structure, importance of the act; emotional course of the impulse, and especially the eventuating components of the act. The mere eventuating components, i.e., the missing motive are to be met with the case of every act and especially in the case of the impulsive act and of the pathological impulsive act. In the latter case it may completely supplant the motivated act (and the act based on motivation). The problem of the perpetrator can, therefore, not be transformed completely into a problem of motivations. If we may regard the perpetrator as a person responsible for his actions, then, of course, the motivations are to be considered first. The more the perpetrator is looked up on a last line of a causal chain, the more will the motivations recede into the background. The duty of the psychiatric expert is to elaborate each of these factors individually.⁴

We can therefore distinguish the following aims (sections) of the work of the psychiatric expert:

- 1) to describe the structure of the character according to ontogenetical-biological points of view;
- 2) to describe the motivations, i.e., the outward relation of the character, the structure of its attitude and its effect upon the perpetrator's actions;
- 3) to describe how motivations and motive reconcile themselves with any unmotivated impulsive act within the crime;
- 4) a thorough analysis of this kind is the best way to arrive at an answer to the question according to the stipulations of Article No. 51 of the German Criminal Code; a definitely negative answer to the question is possible after the analysis only.

It would be a serious mistake of the psychiatric expert, not to undertake this thorough analysis just because he has been convinced from the very beginning of the lack of the stipulations of the Article No. 51 of the German Criminal Code. Many a practical hint to the judge, the meting of the punishment, etc., would be impossible without an analysis of the motives.

The work of the psychiatric expert in this sense is absolutely indispensable when dealing with the problem of decreased legal responsibility. At first the general opinion was that the problem of decreased legal responsibility could be mastered through biologic-

⁴ It has been impossible to establish the desired and often attempted theory of criminal psychological types as long as it has been meant to be limited to mere objectivation. The theory of motivations seems to offer the basis of a satisfactory theory of types; we do not want, however, to discuss this any further.

pathological points of view alone, just like it was often attempted to master the problem of legal sanity through those. Williams [20] proved in a thorough treatise—the significance of which is the denial—that it was impossible to reconcile the punishment mechanically with the postulated decreased guilt.

Of more importance is the fact on which Alsberg lays an especially great stress, viz., that the decreased legal responsibility can by no means be sufficiently comprehended from mere biological points of view. Alsberg even speaks about “Depathologization” of the concept of decreased legal responsibility. The foundation thereof he seeks in the idealistic psychology of Spranger which is independent from any biological psychology.

This relying on Spranger’s psychology and Spranger’s separation of psychologies is not correct anyway. Cf. Karl Buhler’s [5] deep criticism of Spranger’s point of view. Today no practically scientifically minded psychologist or biologist or psychiatrist would dare to make a sharp contrast between Body and Soul, like Spranger does. The psychiatrist may lay the main stress on the sensory interrelations but must always consider the psychological possibility which is, of course, not identical with the former concept.

One of the fundamental principles of our ideology concerning all manifestations in life can be found in the “Hypothesis of Continuity.” A psychology denying this continuity would therefore have to overcome very serious methodical scruples.

The “Hypothesis of Continuity” is, however, not the only argument for giving a different consideration to the problem of decreased legal responsibility. When Alsberg indicated that the causes of decreased legal responsibility might lay not only in so-called “pathological” but also in characterological motives, he fails to consider the fact that his classification is not one that offers itself immediately but an aetiological one which is arrived at after examination. The plain fact as given offers no clue whether the cause is to be sought in a natural process of events or in the development of a character, in a momentary emotion or in a permanent motivation, in the characterology or in pathology.

A true aetiological diagnosis cannot be reached unless all similar possibilities have been taken into consideration. And this is the very reason why the task of examining the perpetrator must remain with the physician, although we admit that the “Principle of Depathologization” has certain points of merit. Nobody but the physician can make the diagnosis and, if need be, state that a certain

case of decreased legal responsibility is no pathological case. The physician must, of course, be in a position (as explained above) to comprehend the motivations, the forms of action and attitudes of the individual. The physician has, however, a much easier task in working himself into the field of motivations than the psychologist would have trying to familiarize himself with the biological foundation.

SUMMARY

1) An unbiased phenomenological analysis shows that there are rules within every human action. Human action is being determined by permanent attitudes that are of a historical and compelling character and have an individual form. Permanent attitudes develop gradually; they are most conspicuous as occupational motivations. Their presence is evident from the minute when the child subordinates his actions to considerations of law and order; this happens at a very young age.

2) The preliminary condition of guilt is present in the average human action inasmuch as this is guided by motivations.

3) The expert's opinion and legal judgment have been entirely incommensurable, inasmuch as the expert's opinion used to cover objectivated facts, i.e., facts missing the normative structure. The expert has to deal with plain given facts and not with objectivations required by a hypothesis; he must therefore regard the perpetrator as an active and acting human being and not merely as a last link of a causal chain. It is true that the courts have to decide whether the defendant is guilty or not but the expert cannot be expected to represent the same man whom the court claims to be guilty, as a mere causal element.

4) Also the problem of decreased legal responsibility must be handled by the physician.

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