1943

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Recommended Citation

W. G. Eliasberg, Acute Psychosexual Situation; Legal Meaning and Diagnosis, 33 J. Crim. L. & Criminology 443 (1942-1943)

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THE ACUTE PSYCHOSEXUAL SITUATION; LEGAL MEANING AND DIAGNOSIS

W. G. Eliasberg¹

"Dabis mihi factum, dabo tibi jus."

It is a characteristic sector in criminality where the deed approaches the field of sexuality or is tinted or tainted by it. The diagnosis of sexual motives sometimes may be absolutely clear. But in other cases, the sexual motivation is disputed and would be valuable evidence if and when established.

This is a typical case: A girl of pre-pubertal age, (10 to 11 years) denounces, or as the case may be, perchance prattles about a sexual offense, whose victim and only witness she has been. The alleged offender denies; the laws of many states carry the provision that no verdict of guilty against an adult should be returned on the sole basis of a child's testimony, with no other corroborative evidence available. Practice has not gained any too much through the more or less heated theoretical discussions of child psychology for more than 30 years that were led by psychiatrists and psychologists on the one hand, and counsel for the state, the defendant or the plaintiff on the other. The conclusion that should have been arrived at: to leave the child without the protection against the adult defender, is very hard to bear.

Under these circumstances, one must ask again and again: What is corroborative evidence? We will not deal here with physical findings that may confirm the narration of the child, nor shall we go into the details of the psychological examination, aptly called cross-examination, of the child's testimony, his subjective truthfulness and credibility. The testimony of the subjectively truthful child does not necessarily reflect objective occurrences, nor is the adult's subjectively credible testimony a mere mirror of the happenings. In many investigations of forensic and experimental psychologists, sociologists, propagandists and political scientists, the same fact was established, that the testimony is dependent upon stereotypes, to use Walter Lipman's expression; or to use a certainly abbreviated formula: every perception (and reproduction) is an apperception. The child designs what he knows and therefore expects

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the thing to be. And in the same way, he describes the happenings which may have become important.

The apperception of the child in sexual matters necessarily differs widely from that of the adult, at least subjectively. It is only to Freud that the terminus of child sexuality and the collection of facts thereof date back. His theory and his interpretation of the facts he was able to gather was criticized on the basis of a sort of Gestalt argument by William Stern and many other psychologists. Granted that there are certain actions which in the adults of our civilization must be interpreted as unequivocally sexual, these psychologists would say, the same actions will admit quite another interpretation in the child. In him, the psychosexual background, the eroticism, is either missing or different and the whole drawing changes with the perspective. If one can show that the narrative of the child has too much grown-up perspective, that there is too much psychosexual eroticism and apprehension, this may shatter the credibility of the whole testimony.

Let us change for a moment the pathway of our deductions, in order to arrive at some more inductive material. Many divorce suits are based on the so-called cruelty of either the husband or the wife. How about cruelty? The jurist will answer this question with an enumeration of certain deeds that are called cruel. If the husband beats the wife; or if she, in the presence of other people, abuses him, destroys his reputation, or vice versa; if she is not responsive to his erotic suitorship; or he, because of jealousy, does not allow her to associate with friends; if her allowance is not in keeping with his position; and if she has to "wear darned stockings," all this may be embraced in cruelty. The jurist will be inclined to differentiate, in so-called cruelty cases, between those where the sexual background is obvious and those where a kind of "asexual" hatred caused through economic or other motives is supposed to exist. The psychoanalysts will object to this. Be this as it may; if we should be able to establish the diagnosis, if we should *objectively* understand the type of cruelty, we would be able to decide the case on its merits and to adjudge the awards more justly than is usually done at present.

The idea of an objective psychology dates far back in the history of scientific psychology. It was first used in the psychology of the sensations and led to the discovery of the personal equation of the astronomical observers. It played its part in social psychology where we learned that the characters and individuals change according to the social situations; that there is a psychology of social groups as masses, churches, parliaments and courts. In psychotechnics, we learned to differentiate the psychology of the worker from the psychology of the tool.

In the court, too, this differentiation proves useful. In the last

generation, the interest was focussed upon the psychology and differential psychology of the perpetrator.² The interest in the objective psychology of the crime itself and the characteristics of its commitment, are somewhat eclipsed by the psychology of the criminal. We are willing to admit that the psychology of crimes did not yield a useful system, but this does not exclude the idea of objective criteria wherever they may be found. If we were, e.g., in possession of a criterion of the psychosexual situation, the advantage as compared with the usual explanations in forensic psychology and psychoanalysis would consist in a higher degree of objectivity, and the judge, in using the criterion, would feel more reassured than formerly when standing on the ground of data which he could never check.

Let us discard first the idea of a device, electric or otherwise, to measure eroticism. Even if it were possible to take certain blood pressure curves, accompanying the sexual excitement to the climax and back to relaxation, it would not mean anything for practical purposes. Nobody could possibly have witnessed, let alone analyzed scientifically, the situation that is interesting in court.³

What we call erotic is, no doubt, a bio-sociological situation, in which biological urges and social, moral and esthetic patterns cooperate with and rival one another, and are intertwined. In order to handle this problem one might think of: a) a definition, and b) a method of diagnosing. The definition would have to embrace the sociological situation with the background of our culture, and one might try, in addition to this, to show the biological,⁴ sociologi-

² Cf. Eliasberg, W.: "The New Theory of the Perpetrator and the Duties of the Psychiatric Expert," JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY, Vol. XXX, No. 4, Nov.-Dec., 1939.

³ The objective indicators of emotional strain may have many meanings. One must know "the inside story" in advance to achieve the correct interpretation. Cf. the parallel situation in the Lie Detector problem, P. V. Trovillo, A History of Lie Detection, JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY, Vols. 29 and 30. The author's conclusion after a comprehensive survey is: "The use of any one method in the detection of lies is inadequate. Some people react under stress one way, some another." In a previous publication, "The Significance of Association Experiments," in Court, Zur Forensischen Bedeutung des Assoziationsexperimentes, Ztschr. f. Strafrechtswissenschaft, Band 51, I showed that this holds true for every kind of experiment which would try to establish full conscious resistance on the basis of conscious or unconscious symptoms.

⁴ One might wonder why we do not start off with the biological, anatomical, physiological, chemical, hormonal data for the definition of sexuality. The fact is that there is no such definition, on the basis of our present knowledge. No cortical, cerebral center of sexuality has been proven. As to the chemistry, and the autonomous system, the facts have been surveyed by Calvin P. Stone in Edward Allen's book, *Sex and Internal Secretions*, Baltimore, 1939. Sympathectomy, e.g., has little effect upon the overt responses in the reproductive cycle of animals, rabbits, with the only exception that certain characteristic expressions at the end of the intercourse cannot be observed. In short, we are not yet in a position to diagnose the sexualization beyond the general fact that an individual is sexually mature. And we are not in a position to diagnose, on the basis of such facts as were enumerated, an actual sexual behavior. The bio-psychological aspects will be dealt with more comprehensively in another paper.

ical and historical developments, combining in this way archaic, primitive, deviated, antiquated, ontogenetically early childhood-patterns with the generally recognized patterns of our culture. The second task will be to find some marks which would allow the diagnosis irrespective of whether the other tasks are already fulfilled. The diagnosis, of course, refers to a certain culture.⁵ As to the definitions, let us for a moment examine those which are current.

A situation which intentionally culminates in intercourse one calls erotic. This definition may not hold its own in such cases as are interesting to the criminalist. One observes preliminary actions among feeble-minded that are not intended to culminate so, even if they finally do. On the other hand, there are types of certainly erotic situations which are impossible of culmination in the normal way, as the so-called perversions, fetishism, exhibitionism, masturbation and others. Even more ineffective is the theory that would substitute the intention through general experience of a general observer, and this for the reason already mentioned. There can't be, for the law, eroticism without intent, anymore than there can be crime without guilt. On the other hand, the mere intent without overt action is not sufficient to constitute an erotic situation in the meaning of the law.^{5a}

Notwithstanding the difficulty of the definition we still might grapple with the diagnostic problem, as we may diagnose and measure the electric current, whatever hypotheses of electricity we

⁵ For our problem, the methodical idea of a definition would be the same as for broader descriptions of a culture. Cf. Margaret Mead, *Cooperation and Competition among Primitive Peoples*, McGraw Hill, 1937, "Introduction."

^{5a} Some modern authors may be quoted. Carney Landis, (*Sex in Development, a Study of the Growth and Development of the Emotional and Sexual Aspects of Personality together with Physiological, Anatomical, and Medical Information, etc.*, N. Y., London, 1940, Paul B. Hoerber) has this to say: (P. 1). "By psychosexual we mean all that is known about the sexuality of the individual, anatomically, physiologically and psychologically. Psychosexual development refers to the growth and changes in the biological, psychological and sociological aspects of sex in the course of the life history of the individual." While this definition, derived from an empirical and highly purposeful investigation, cannot be doubted in itself, still we do not see that it can serve practical purposes, e.g. in the courtroom. Gordon Allport, in *Personality, a Psychological Interpretation*, N. Y., 1937, takes exception with the psychoanalysts. He finds that sex cannot be regarded as a single factor of motivation. The sexuality of a life can be understood only as one of the variations within the complete pattern of personality. "Excepting in the most infra-personal sense there is no such concrete fact of sex." To make clear the author's standpoint, the following idea is highly characteristic. "Human motives are highly individual affairs. It misrepresents them to say that they are only changes run upon universal themes." In other words, there is no definition of sex given, because in the manifestations of the mind, the author thinks, it doesn't play a recognizable part. It is like one strand in a whole Gobelin carpet. We do not criticize the two authors. It is sufficient for us to show that there is, indeed, no definition of sex that would be sufficient for practical purposes wherever they may arise.

Much more positive in his statement is S. Placzek in his richly stored collection of historical material, *Friendship in Sexuality*, Bonn, 1916. Cf. also S. Freud, *Lectures Introducing Psychoanalysis*, German 5th edition, 1926, p. 331: "Let us remember that we are not at present possessed of a generally accepted mark of sexuality, with the only exception that a sexual occurrence belongs to the function of propagation which we must decline as too narrow."

adhere to. This attempt again might be faced with the objection, that, because of their being only a female or male eroticism, we would need at least two criteria. Embryology, physiology of the androgen and oestrin excretions, as well as the clinic of the erotic disorders, have shown us the importance of mixed sexuality. In the psychological field mixed sexuality does not compare to pathological excrescences as e.g., a tumor growth; these are forms of regression to or developmental arrest at a normal rung of the ladder. In a paper published in the *Journal of Criminal Psychopathology*, April 1942, I have shown that pornographic products could not be diagnosed as to the sex of the writer, and Margaret Mead, in her studies on the sexual behavior of certain primitive tribes in the South Seas, described psychosexual traits which we usually call male or female as bound in one tribe to the woman and in another to the man. There is no primordial link between sex and certain temperamental, erotic features. The erotic sphere, then, is not identical with a) the anatomic physiological sex, and b) with certain psychosexual attitudes that are often found in our own civilization.

While a general definition of sexuality would be insufficient if valid only in a certain culture, our diagnostic criterion need not claim more than being characteristic of a certain time, a certain civilization, i.e., of the western civilization of our time. In other words, we do not claim that the criterion to be developed holds true in the middle ages or in modern Soviet Russia. With all these limitations, which should be kept in mind, we do think the problem of the diagnostic criterion worth examining and applying, should it hold water.

Should there be such a criterion, then this necessarily must have far reaching consequences in court procedure. In the trial one would have to search the evidence to see whether it yields the criterion. And this would have to be mentioned by the court in charging the jury. On the other hand, we must admit that a diagnosis in such matters can never be correct to such a degree as in natural science. And the experiences one single expert or judge can gather in his lifetime are trifling as compared to those already piled up, e.g., in studies of chemical problems. These limitations, too, should be kept in mind.

The most important discovery in the theory of sexuality, no doubt, was that of Freud in 1906 about the partial urges developing separately in childhood and composing what is to be the mature sexuality of the grown up. These partial urges develop, as we know, in different stages of childhood. Among them are, most characteristic, the oral and manual phase with sadistic traits and the epidermal masochistic phase. We have already shown that the sexuality of the grown up is more than the arithmetical sum of the partial urges,

but these two partial urges which we mentioned, the sadistic and masochistic ones, seem to remain fairly recognizable as such in the mature sexuality, both of the man and of the woman.

The succession, though, in typical cases, is the mirrored opposite in the man and the woman. Before the acme, the man is, at the same time, masochistic, amorous, devoted, tender, and on the other hand searching for stimulus and aggressive, while the woman behaves more passively. After the acme this changes. The man becomes childish, passive, while in the woman maternal superiority, a certain aggressiveness, comes to the fore. This has been described in 1927 by W. Reich in his valuable study, the *Function of the Orgasm*, published by Freud in *New Contributions to Medical Psychoanalysis*.

Urges, as one knows, may be studied much better in the stage of want than in that of full gratification, when the urge is about to disappear completely. This holds true also for the urges within the compass of culture. In our own culture, simple gratification is very rare. The pursuit of happiness, a naively entered-on legacy of the 18th century, carries no conviction at all in the culture of the 20th century. Providing for the family, supporting them, giving a good education to the young, having a bank account, getting ahead, getting up in the world, being a respectable citizen, spending oneself unremittingly in work, denying oneself leisure, "bending one's energies to the endless acquisition of the means of living," dreaming and planning for the future, these are the ideas about "Happiness in Middletown."⁶

Want of gratification has deep consequences not only for happiness, but also for the configuration of the sexual attitudes themselves. It is a fact that cannot be doubted, that unsatisfied men and women become cruel, sadistic. The component of tenderness, devotedness, the tendency toward stroking, the "epidermal" component, weakens. Still it shines through all disguise, and may be recognized.

Compare with these results of psychoanalysis the stage directions given by Bernard Shaw in *Widower's House*, written before the era of psychoanalysis:

"The lover, left alone, looks round carefully, then goes on tip-toe to the piano, leans upon it with folded arms, gazing at the beloved's portrait. The latter herself appears presently at the study door. When she sees how he is occupied, she steals over to him, watching him intently. He rises from his leaning attitude, takes the portrait from the easel, and is about to kiss it, when, taking a second look, he finds Blanche close upon him. He drops the portrait, and stares at her. He flushes and

⁶ See Robert S. Lynd's famous book.

Le bonheur est une idée neuve en Europe. Crane Brinton in *Revolutions, Encyclopedia of Social Sciences*, vol. I, quotes these words with which Saint-Just addressed the National Convention. This novel idea did not survive the most dangerous period, that of infancy. It died before reaching adolescence.

retreats a step. She follows him up remorselessly. Red and wincing, he starts huffily to get his hat from the table. When he turns to the door with it, she deliberately stands in his way so he has to stop. Blanche: 'I don't want you to stay.' For a moment they stand face to face, quite close to one another, she provocative, taunting, half-defying, half inviting him to advance, in a flush of undisguised animal excitement. It suddenly flashes on him that *all this ferocity is erotic*. (italics mine) His eyes light up: a cunning expression comes into the corners of his mouth. He plants himself in the chair with his arms folded. She comes down the room after him."

This is a masterful picture of sadistic and masochistic quick successions in both the man and the woman. And it is true. Nobody who would listen to such a description could fail diagnosing the situation that is described above as erotic. Erotic split situations may be characterized in the following way: either masochistic and sadistic tendencies are separated through time intervals or they occur fairly simultaneously but refer to different sociological types of the partner. The man, e.g., adores the lofty image of the woman of his own class while with the woman of the lower class, he wallows through the vale of aggression and travail. This split between masochistic and sadistic tendencies is seen either in mere temporal succession or in the class-bound differentiation between the partners. An example of the first type was given by Sinclair Lewis in *Elmer Gantry*. Without any hypocrisy, Elmer falls on his knees and promises to himself never again to be mean, never again to trespass the limits of paternal tenderness toward his female flock. But the other type of split is much more frequent. Although we would not deny the more intense emotional response and even a typical disposition towards hysteria on the part of the woman, there is no basic difference as to masochistic and sadistic patterns between men and women. Authors and poets as mostly and typically sexually split personalities, have dwelt on the description of male sexuality and mostly called the Elmer Gantry type a hypocritical one.

How the split sexuality appears when seen with the eyes of pulp-psychology can be seen in the average Hollywood picture.

The aggression on the part of the male is only rivalry. It is meant to overcome competitors and such hindrances as high walls and latticed windows. Aggression is not directed towards the female. As soon as the lips touch one another for the first time, they stand entranced in their dreams and sheer gentleness reigns in the realm of love. This mawkish picture of the film is identical with that of the average man and woman whose abstract knowledge and concrete experience in sexual matters are equally limited.⁷

⁷ Our first interest in the graph of sexual gratification was the diagnostic one. But taking up the strand of the definition, we may refer to the following facts: physiologically and psychologically, the response to a stimulus is quite different from those responses which we find in the anorganic nature. Stimulus, the passive masochistic stage, is followed by an overcompensating reaction; nor does this reaction of the living matter or the mind resemble the stimulus. It is an overcompensating action rather than reaction. In other words, the passive

We now feel entitled to sum up and to develop our criterion of the erotic sexual situation in one sentence: Wherever one finds that there is a succession of amorousness and violence, of tenderness and aggression, of affection and hate, of spoiling and beating, of gift and wound, and a quick succession at that, with or without sudden collapse, or where the experience of the expert in cooperation with that of the court and the jurors may unveil these bent together masochistic and sadistic traits, there one may diagnose the presence of the erotic criterion.⁸

What was the situation before the application of the psychosexual criterion? This was reflected in the words of Carney Landis, *Sex in Development*, (p. 32,) when he finds himself in no position to ascertain whether "aggressions reported actually occurred, were fantastical exaggerations of minor events or pure fantasy." In other words, this author, in one of the most comprehensive studies, declares himself unable to establish the reality of alleged deeds. We will not be astonished to find about the same situation in otherwise

stage is followed by a hyperactive, aggressive phase. This is never seen in the anorganic world where pressure of any kind is answered with counterpressure, that is, mostly, although not always, with a resembling reaction whose aim is not aggressive but only the restitution of the original equilibrium. This is the famous principle of Le Catelier. It seems as though typical sexual gratification follows the principle of the organic action which holds true also for the third phase, that of relaxation. In the sexual gratification, as we already saw, the succession is not always that of stimulus (passivity) and response. And again we know that in biology there is the principle of the search for the stimulus. Stimulation is actively sought then passively received and, again, aggressively overcompensated.

This *microscopic view of the psychology* of sexual gratification and other urges is different from the macroscopic or even gigantosopic picture which has been developed exclusively so far by psychoanalysis which describes the development and the patterns of sexual urges through the years of ontogenesis and the eras of phylogenesis. To understand this lack, one must read, e.g., Helene Deutsch *Psychoanalysis of the Female Sexual Functions, New Contributions towards Medical Psychoanalysis*, edited by Sigmund Freud, 1925. No psychology of the actual processes is to be found in such chapters as defecation or psychology of intercourse. Instead of this only developmental phases, as e.g., the oral or the anal or the oedipus phases are discussed. The two methods do not, of course, contradict one another. The macroscopic description of the bone doesn't lose its truth after one becomes aware of the microscopic structure of the slide. The macroscopic picture, though, is often insufficient, both for practical and theoretical purposes. Reading Steckel's and other authors' *Case Histories on Kleptomaniacs, (Peculiarities of Behavior, N. Y., Liveright, 1924)*, one finds certain symptoms of sexuality but one would not be able to establish the diagnosis of a psychosexual acute situation or a symbolic gratification without either carrying out a whole psychoanalysis, or, which is much more simple, finding the typical graph. Kraft-Ebbing's (*Psychopathia Sexualis*) case histories are much more valuable in this respect. As a matter of fact, nearly everyone of his cases, especially on fetishistic-sadism-masochism, could be used to prove the existence of the full drawn graph. See, e.g., his case no. 35, p. 116, of his book edited by Victor Robinson, N. Y. 1939. The microscopical psychology of this one urge may prove useful for quite a lot of psychological and physiological problems. Although many investigations will still be needed for this purpose, for our criminological work our present knowledge is already sufficient.

⁸ Cf. Freud, *Das ökonomische Problem des Masochismus*, Internationale Zeitschrift, f. Psychoanalyse, vol. 10, no. 24, especially page 124 ff.

valuable contributions⁹ that do not state how they found out the objectivity of the facts if not through confession of the defendant and avowal of the witnesses or the verdict of guilty. Were there any doubts, and, if so, how were they overcome?

Only one author, S. Placzek, in his already quoted book, has come near to our criterion. In discussing the problem of the differential diagnosis (characteristically enough this author too was prompted by diagnostic deliberations) between friendship and love, he says: "The basic difference between friendship and love seems to lie in that love is always—generally speaking—governed by a will to overwhelm while friendship is a purely mental feeling of being connected without lust for power. Lust for subjection, the psychical mainstay of love, is brought to the fore consciously or unconsciously; in the aggressive part there is the will to subdue, while the passive part is inclined to unconditional submissiveness." "I, on purpose," the author goes on, "omitted to identify the basic difference between the aggressive and passive partner, with that difference between the male and the female. It can also be otherwise." In summing up Placzek, however, acquiesces to the subjectivity of the judgment, and the necessity for personal confession—if possible under oath.

This agnosticism and subjectivism can now be overcome. And we need not, if we are to rely on witnesses, place emphasis on the oath.

Fortunately, "laymen in love matters, and lay women," are not able to invent or falsify our criterion consistently enough to deceive the court and to stand cross examination. The reason for this lies not only in the already mentioned lack of practice and theory, but in the blind spots of the average man in sexual matters. This is one more reason why the sado-masochistic criterion, if found, is evidence in the affirmative of the acute psychosexual situation.

Objections to the correctness, not of the idea of a criterion in general, but against the correctness of the masochistic sadistic criterion have already been mentioned. There are sexual actions which under certain circumstances may involve legal actions, as, e.g., exhibitionism or other even more solipsistic actions that do not seem to be amenable to it, whether because of the lack of acme or the lack of either one of the preceding stages. As to the first moment, it is not involved in our criterion, and is often to be missed in the so-called perversions or symbolic actions with no real gratification. But this is no objection against the criterion in other cases; the proof of the presence may be given through thorough searching

⁹ See Lauretta Bender and A. Blau, *American Journal of Orthopsychiatry*, Vol. 7, 1935, and, on the other hand, A. Rasmussen, *Die Bedeutung sexueller Attentate auf Kinder unter 14 Jahren für die Entwicklung von Geisteskrankheiten und Charakteranomalien*, 1934.

or indeed through psychoanalysis. In the great majority, however, the latter will not be needed. On the other hand, in analyzed cases it is worth organizing the material in order to establish the presence of the criterion. This will enable us in future cases to do without analysis.

In the use of the criterion, certain confusions should be avoided. These are: a) the implication that the impulsive sexual nature of an action does involve the non-punishable character of the action; b) Equally wrong would be the idea that evidence given as to the presence of the criterion would render investigations as to the psychology of the perpetrator superfluous. The following table should be resorted to for point *a*.

Table I.¹⁰

- A. Non-punishable impulse actions
 - 1. non-punishable normal impulsive actions
 - 2. non-punishable abnormal impulsive actions
 - a) obsessive compulsive actions within the frame of obsessive compulsion if found combined with clinical psychosis, or disorder of consciousness or demence.
 - b) other non-punishable abnormal sexual actions.
- B. Punishable impulse actions
 - 1. punishable normal impulsive actions; many crimes for the purpose of gratification of impulse carrying out a guilty intention
 - 2. The abnormal impulsive action with no accountability to law on the basis of "irresponsibility tests."

This table shows clearly that there is a great number of impulsive actions where no irresponsibility is involved and the guilty intent can be established,¹¹ either for the complete crime or overt action showing guilty attempt or criminal negligence.¹²

The cooperation between the objective criterion and the psychology of the perpetrator will best be illustrated in examples. (See above table—b.) There were, in the early thirties, two affect murders in Germany that were tried most responsibly in court, with the best available experts rendering opinions. In the one, a physician was shot by a nurse, Miss Flessa: the other involved an officer of the state police who murdered his sweetheart. Both cases were dealt with in many publications, among them the Flessa Case by Otto Lowenstein,¹³ now clinical professor of neurology in New York

¹⁰ Taken from Eliasberg, W.: *Die abnorme Triebhandlung in forensischer Beurteilung*, Monatsschr. f. Kriminalpsychologie und Strafrechtsreform, 1930, Jg. 21, H. 7.

¹¹ Cf. Henry Weihofen, *Insanity as a Defense in Criminal Law*, N. Y., 1933: "The states which accept irresistible impulses as a defense to crime simply apply this general rule of law to the case where the lack of free-will to govern and control actions is the result of mental disease."

¹² The latter is often to be found typical of kleptomaniacs. The patient steals and seeks the excuse of irresistible compulsion or a twilight state of consciousness. But after this, he goes back to the same place where these abnormal states developed. This then, is typical criminal negligence. Cf. Eliasberg, *Rechtspflege und Psychologie*, Berlin, 1933, pp. 128 ff.

¹³ Lowenstein, *Strafrichter und Psychiatrischer Sachverständiger, Lehren des Falles Flessa*, Juristische Rundschau, 1926, no. 19.

University; the other case by Walter Riese.¹⁴ The personalities in these two cases were widely different, not only in their present appearance, but in their life histories; the one a man, the other a woman. The action itself was carried through in a manner which, while it is not characteristic of the sex of the perpetrator, is characteristic of the emotional crime. Physiological and psychological moments combined from the outset to awaken and to stimulate the erotic impulse and to direct it in a way that is known as masochistic. There is the heat of a summer day which creates predispositions to hyperemia of the skin; alcohol intake increases this effect, and, at the same time, creates irritation of the bladder, which may account for the fact that many exhibitionistic deeds are committed by bicycle riders; optical and tactile stimuli are found in many cases; in cases of moral offense committed against children, we learn that the child jumped on the lap. In other cases, the woman floats wiffs of perfume as the sensitizing stimulus. When the organism, in this phase, is conditioned epidermally—masochistically—the psychological development is the following: the individual feels shaken, uprooted, humiliated, offended, endangered. He is in a state of being terrorized and frightened. It would not matter whether these feelings bear the hue of the persecuted paranoic. We know very well that, on the basis of anxiety, paranoic delusions may develop acutely. Thus the initial tendency towards suicide is changed into homicidal tendency. The masochistic phase is followed by the sadistic. Nietzsche spoke of the pale criminal. Dostoyevski, in *Crime and Punishment*, describes the trembling murderer who, injured, offended, humiliated, broken, commits a murder but doesn't take the money that is handy and then collapses and lies for days in a feverish state.

The characteristic moments in the commitment of these crimes, to repeat, were the following: sexual masochistic conditioning on the physiological level; unrequited love, unresponsiveness of the partner, or humiliation, social isolation or paranoic fear on the basis of anxiety states—one of these or the combined moments turn the scene to aggression and violence.

The case we mentioned in the introduction which was investigated for educational purposes, not on the behest of prosecuting authority, has characteristics: The piano teacher while sitting next to the child, was opening the buttons of his pants and scratching his penis. It could be proven that at the time that was involved in the child's story, she brought home valuable gifts from this man, and that her body showed weals from severe beating. The credibility of the child could be proven psychologically, but apart from this, the masochistic-sadistic criterion which neither she nor her mother possibly could have invented, being fulfilled, the objective truth is highly probable.

One more example should bring this into bold relief:¹⁵

¹⁴ Riese, *Das Triebverbrechen*, Bern, 1933.

¹⁵ Eliasberg W. and Hirschberg M.: *Ein "Fall" von Notdiebstahl*, *Monatschr. f. Kriminalpsychologie und Strafrechtsreform*, Jg. 18, H. 12, 1927.

An honest worker, who for the first time in his life had gotten into arrears with his rent, received notice from his landlord, and walks through the streets in full despair. He had had some beers, and then—it was a hot day in August—in the middle of a square, snatches a pocketbook from a lady whom he has caught sight of just a few moments before. He runs a few yards, then drops it. "What have I done?" he murmurs, and lets himself be arrested without any resistance. He had had no idea that he would do such a thing. As he saw the pocketbook, he felt hypnotized. "If I had it, I could pay my rent."

I think it is clear at first glance that the economic background cannot account for the behavior. Masochistic prophase: conditioning through despair, alcohol, heat hypoglycemic states; masochistic phase, with increasing tension; then sudden change to sadistic violence and complete collapse immediately after the acme. This is the graph of the psychological characteristics of the crime and we know it already to be the graph of the acute psychosexual situation. Therefore the conclusion: this crime is a psychosexual one.

The classical example of the psychosexual interpretation of a crime is the so-called kleptomania. The problem, incidentally, is often put incorrectly, namely: crime or disease, which is certainly not the only alternative even if we are in a position to show either the psychosexual root in general or the fact that owing to the fulfillment of the acute psychosexual graph, we may recognize the crime at hand as a psychosexual symbolic gratification. As I already showed, this may nevertheless constitute a punishable deed. (See table above.) But the jurist will be grateful, I think, to the expert who can satisfy him beyond doubt of the symbolism.¹⁶

Whatever the personality of the perpetrator, the criterion can and must be found on the mere basis of the general psychology of the sexual impulse and the general psychology of fear. But it may become important to have the life history of the individual and to see why this masochistic sadistic-development could have become so overwhelming as to bring about the crime. Here we would investigate the whole childhood setting, would look after persistent infantilistic signs, would see whether or not the libido was fixed on certain subjects. We would investigate hereditary moments as well as the character of the individual and would try to understand it on the basis of causal, analytical and teleological mechanisms. But these trails can and must be followed separately. The jurist has to investigate separately the psychology of the perpetrator and that of the deed including its objective psychological moments, as e.g., the guilty intent. Among these objective psychological moments, a psychological mark of the deed, not of the perpetrator, is the masochistic-sadistic criterion.

¹⁶ Cf. the case 17 described by Max Hirschberg in his paper, "Wrongful Convictions," *Rocky Mt. Law Review*, Dec. 1940. The case is interesting, but even more interesting is what the author has to say about the reaction to the new insights of modern medical psychology. Many of the case histories to be found in Steckel's already mentioned book or in Krafft-Ebing, are highly amenable to the search of the criterion.

Summary

1. The problem of diagnosing an actual psychosexual situation must not be confused with the problems of the definition of sexuality or sexual personality patterns or the biological and cultural role of sexuality. Our problem consists in finding or excluding a characteristic pattern of the succession of action phases, namely, a physiologically or psychologically masochistic phase, a phase of violence and aggression and final collapse. Such phases, although not in the same succession, may be found wherever adults are involved, irrespective of the sex of the adult. This holds true in our western civilization. Wherever there is a succession of amorousness and violence, tenderness and aggression, affection and hate, spoiling and beating, gift and wound, and a quick succession at that, with or without final collapse, or where the experience of the expert in cooperation with the court and jurors may unveil these intertwined masochistic and sadistic traits, there one may diagnose the presence of the psychosexual criterion.

2. The sado-masochistic criterion is a pattern of action which seems to govern every organic response to stimulus if we keep in mind that the search for stimuli is also a characteristic of life. The microscopical picture of the psychology of gratification is needed as a clarification of the macroscopical theory of the development of the sexual urge that has been considered exclusively, so far, in psychoanalysis.

3. Whenever the jurists find a reason to look after the psychosexual situation, then the presence of this criterion will enable them to answer the question in the affirmative. No more and no less is maintained in the criterion. Where the criterion is borne out through pertinent facts, there the situation has developed at least to the degree of recognizable attempt, with overt action. Whenever, on the other hand, the real occurrences are unknown or are being disclaimed, and the sado-masochistic criterion is not found, then the psychosexual situation may be excluded as far as the jurist is interested, that is, not even a recognizable felonious attempt can be assumed.

4. If through finding the criterion we establish the diagnosis of a psychosexual situation, that, of course, does not always imply that the deed is not punishable. This is not even the case if we find one of the forms of frustration or symbolism characteristic of kleptomania or certain cases of assault and battery or murder. There may be the complete crime with guilty intent; or overt action showing the guilty attempt; or criminal negligence.

5. The masochistic-sadistic criterion is an objective, psychological one, no less than the guilty intent. Both criteria are more or less independent of the differential psychology of the perpetrator.

6. A revival of the objective psychology of the deed is suggested. The psychology of the deed and that of the perpetrator should be investigated separately and added up only in the final conclusions.

APPLICATION TO THE TRIAL OF ERROL FLYNN

"I came with lust of instant pleasure,
And lie dissolved in dreams of love's sweet
leisure."

—Faust, in Gretchen's room

The pageant of false and true witnesses, or the alchemists of truth, of the clairvoyants and eye readers and physiognomists of the witnesses and the testimonies, of the wizards of cross-examination ("Your witness, my esteemed colleague"), of jeering and cheering audiences, has passed by. Gone with the wind is the short lived fame of Peggy LaRue Satterly and Betty Hansen. Or at least let us hope it is. Nor do we intend to take up a case that, in the common interest of the actors as well as the public, should glide into forgetfulness, the earlier the better.

Was the administration of justice, in this case, handled according to present-day scientific knowledge? This is quite another question and in this regard we should not readily be satisfied with what was reeled off.

Briefly, this is what happened. Counsel for defendant, focusing his attack on the personalities of two youthful female witnesses, described in detail the milieu in which they had lived, their more than doubtful attitudes, their precocity, and tried to shake, in this way, their trustworthiness and credibility. It is an old device of the lawyers. They use it rightfully when they can show that the witness has lied as to the merits of the matter. If, however, the lawyers want the jury not to believe the liar even when he speaks the truth, then while congratulating them on their successful artifices, we should not give in, in substance. We know that the subjectively trustworthy witness does not always reveal facts. But it is not, to any extent, recognized that the opposite also may hold true. The liar may tell the truth. Things have gone to such lengths as to discredit whole groups of witnesses. Thus we are told that children, girls of the pre-pubertal age and many adolescent girls cannot be relied upon. Is this a sound policy? Discrediting indiscriminately the testimony of groups or of individual witnesses is tantamount to depriving them of the protection of the law, making them victims of the criminal assault with impunity.

In the Flynn case, the nine women among the jurors retired into a private corner and discussed the evidence furnished by a woman gynecologist. They decided that the findings were not conclusive and therefore found for the defendant. Are women, housewives as such, experts in this matter? The question needs no answer!

The situation in such trials is a tragic one. The jurors may return a just sentence only if they are furnished with facts. And the best procedure may be wrecked on the cliffs of the facts. Are there facts? In the preceding pages, I showed that we are able to recognize an erotic situation and a criterion was developed. This criterion of objective psychology consists in a succession of masochistic and sadistic happenings; it cannot be adulterated or feigned. It should have been applied in the Flynn case. The witnesses' reports should have been scrutinized for it. The testimony should have been examined in a new way to bear out this characteristic succession of actions. As far as can be judged from the newspapers, in the Flynn case the criterion was absent.