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## TO THE MEMORY OF ERNST SEELIG

GERHARD O. W. MUELLER

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On the occasion of Ernst Seelig's sixtieth birthday, on March 25, 1955, the Enken Publishing Co., of Stuttgart, Germany, longtime publishers for the great Austrian scholar, published a collection of his most important articles as a *Festschrift* in his honor.<sup>1</sup> The preface to this book concluded with an expression of hope for many more criminological contributions and the wish: *Ad multos annos!* But fate did not permit Ernst Seelig to complete a single one of the many more years which we all had wished him. After a prolonged illness he died in Vienna on November 1, 1955. Not only Austria and the Saar, the countries of his immediate activity, but Europe as a whole will feel this bitter loss.

Ernst Seelig was born on March 25, 1895, in the university city of Graz, Austria. Hans Gross, the father of modern criminalistics,<sup>2</sup> had already made Graz the criminological capital of Europe, and this prestige it continued to maintain under Seelig. Seelig became Gross' student at the University of Graz. Two years after Gross closed his eyes forever (1915), Ernst Seelig graduated with the degree of Doctor of Law, as a specialist in Criminal Law, Criminology and Criminalistics. After the usual practice training in various public offices, Ernst Seelig became a lecturer in Criminal Law and Criminology in 1923, and was promoted to a professorship at his *alma mater* in 1928. He was then only 33 years old, an age at which a European scholar ordinarily dares not hope for such a promotion. His ability and creativeness soon brought him the directorship of the Institute of Criminal Law and Criminology of the University of Graz, and in 1952 he accepted a call to Saarbrücken, to organize and head a similar institute at the University of the Saar. The new appointment did not cause Professor Seelig to give up his directorship in Graz. From then on he doubled his already magnificent efforts and headed both institutes, with teaching commitments at both, without ever neglecting either. Although Ernst Seelig died at a premature age, the work he accomplished would fill more than the life span of any ordinary scholar blessed with a much longer life.

It is rare that a criminologist rises to fame in more than one of the various major and minor disciplines which form the composite science of criminology (in the wider sense). But Ernst Seelig became master and authority of all these disciplines, es-

<sup>1</sup> SCHULD, LUEGE, SEXUALITAET (GUILT, FALSEHOOD, SEXUALITY). By ERNST SEELIG. Ferdinand Enke Verlag, Stuttgart, Germany. 1955.

<sup>2</sup> See GAULT, HANS GROSS (editorial obituary) 6 J. AM. INST. C. L. & CRIM. 641 (1916), with an enumeration of translations of Gross' works into English.

pecially the three major ones: criminal law and procedure, criminology,<sup>3</sup> and criminalistics, or the study of the methods for the detection of crime and the apprehension of criminals.

A brief glance at his major publications confirms this judgment. His first book was concerned with the judicial determination of insanity.<sup>4</sup> Three years later, in 1923, his second book appeared, "The Penal Law on Gambling."<sup>5</sup> In 1931, as a contribution to criminal-biological casuistic and methodology, he co-authored with Lenz a personality investigation under the title, "Murderer."<sup>6</sup> His fame increased when he completely rewrote and modernized the foremost work of his esteemed teacher, Hans Gross, the "Handbook of Criminalistics."<sup>7</sup> In 1949 he co-authored with Weindler "Criminal Types," a subject which occupied him until his death.<sup>8</sup> In 1951 his very original textbook on "Criminology" appeared,<sup>9</sup> and a second edition became necessary in the same year. Since then the book has been translated into French, and has found widest acceptance in all German-speaking countries.

Ernst Seelig wrote widely for criminological journals in his native Austria and abroad, in France, Italy, Germany, Poland, Switzerland, the Saar and elsewhere. In 1932 he contributed the article on "*Lotteries*" in our "Encyclopaedia of the Social Sciences." In a series of articles (1925-1927) Seelig discussed the psychodiagnostic registration of expression and its criminalistic use. These articles contributed materially to the perfection of lie detector techniques in this country.

It is plainly impossible to list Seelig's many practical achievements, his successes in applied criminology and his many scientific periodical articles. The publication which was to be his birthday gift and which became the last tribute to his greatness reproduced some of his most significant essays. It was to be my honor to review this book for the readers of our journal. It is now my sad task to use this unique book as the principal source material for an American tribute to him.

The publisher of this book arranged the articles under three main headings, corresponding to three of Seelig's main interests: I. Criminal Guilt; II. Falsehood; III. Sexuality.

Since Seelig followed the great criminalist Hans Gross in office, he was particularly respected for his continuation of Gross' work in criminalistics. Indeed, his contributions in this discipline are important and manifold. The entire second section of this publication is dedicated to essays within this discipline, dealing with the analysis and detection of falsehoods, suggestibility and fraud crimes (among them artistic falsifications, gem fraud, etc.). In its handling of the topic of suggestibility, his work is of a pioneering nature. He first touches on the importance of suggestion (without hypnosis) in the commission of crime, which leaves the perpetrator responsible but should

<sup>3</sup> In the narrower sense, i.e., "the study that attempts to explain crime." TAFT, *CRIMINOLOGY* 9, 2nd ed., Macmillan, New York, 1950.

<sup>4</sup> *DIE PRUEFUNG DER ZURECHNUNGSFAEHIGKEIT GEISTESKRANKER DURCH DEN RICHTER*, Graz, 1920.

<sup>5</sup> *DAS GLUECKSSPIELSTRAFRECHT*, Graz, 1923.

<sup>6</sup> *MOERDER*, Graz, 1931.

<sup>7</sup> *HANDBUCH DER KRIMINALISTIK*, 2 vols., Berlin, 1942, 1944-1954.

<sup>8</sup> *DIE TYPEN DER KRIMINELLEN*, Berlin, 1949.

<sup>9</sup> *LEHRBUCH DER KRIMINOLOGIE*, Graz, 1951.

lead to recognition of mitigating circumstances.<sup>10</sup> Secondly, he discusses the importance of suggestion in the courtroom, a topic of prime interest in this country as well, especially to attorneys specializing in criminal cases. This problem is further discussed in a separate article, following the essay on suggestion.<sup>11</sup> Of no less significance in this part of the book is the article dealing with handwriting identification.<sup>12</sup>

It was Seelig's research in the area of sex crimes which first brought me into contact with him. He was kind enough to supply me with reprints of a number of his articles that proved very helpful in preparing my report for the Illinois Sex Offenders Commission. We find some of these reprinted in the last part of the instant book. His study of post-war rapists is a fine piece of scholarly inquiry,<sup>13</sup> as is his study of pimps.<sup>14</sup> His original research on ambivalence deserves special mention.<sup>15</sup> This was one of Seelig's earlier works, but he was already so competent that he was able to discredit the then prevailing view and to explain a number of criminal sexual perversions in terms of an exaggerated ambivalency, e.g., exhibitionism, os-genital contact, and even masochism and sadism.

One of the major topics which interested Seelig particularly, has unfortunately been omitted in this publication: criminal typology, the classification of criminal types for the purpose of crime prevention, crime detection and resocialization. When in 1952 Walder published his book on the use of the psychodiagnostic Szondi test as a means of classifying criminals,<sup>16</sup> I had the occasion to criticize this method briefly in the pages of this journal.<sup>17</sup> Seelig immediately wrote me, expressing his accord with my critique. But whereas my critique had nothing to offer as an alternative to Walder's method, Seelig could rely on an already established system of classification of his own,<sup>18</sup> which was soon further refined, notably in one of his last public addresses, delivered at the Eighth Congress of the Society for Criminal Biology, held in Graz, Austria, in September 1954.<sup>19</sup> Seelig's essay is entitled "The Criminological

<sup>10</sup> SCHULD, LUEGE, SEXUALITAET, p. 112, *Suggestion*.

<sup>11</sup> SCHULD, LUEGE, SEXUALITAET, p. 121, *Die Ergebnisse und Problemstellungen der Aussageforschung*

<sup>12</sup> SCHULD, LUEGE, SEXUALITAET, p. 173, *Schriftvergleichung und Schriftnachahmung*.

<sup>13</sup> SCHULD, LUEGE, SEXUALITAET, p. 215, *Triebkoppelung, Triebkompensation und Ambivalenz bei Notzuechtern der Nachkriegszeit*.

<sup>14</sup> SCHULD, LUEGE, SEXUALITAET, p. 211, *Die psychosexuelle Struktur des Zuhaelters*.

<sup>15</sup> SCHULD, LUEGE, SEXUALITAET, p. 203, *Die Ambivalenz der Gefuehle im Zuge des Sexualerlebens*.

<sup>16</sup> TRIEBSTRUKTUR UND KRIMINALITAET, Bern and Stuttgart 1952.

<sup>17</sup> MUELLER, *Book Review*, J. CRIM. L., C. & P. S., 43: 803, 1953.

<sup>18</sup> See his above mentioned book on criminal types, no. 8, *supra*, and his article *Ueber den Wert der kriminologischen Typologie fuer die Untersuchung Jugendlicher* (On the value of criminological typology for the examination of adolescents), in the symposium DER JUGENDLICHE IM LICHT DER KRIMINALBIOLOGIE (The adolescent as viewed by criminal-biology). Munich, 1952.

<sup>19</sup> The proceedings of this congress, which was concerned primarily with the discussion of typology, are in my hands for review purposes: Vol. 2 of KRIMINALBIOLOGISCHE GEGENWARTSFRAGEN. Ferdinand Enke Verlag, Stuttgart, Germany, 1955, pp. 82. D.M. 11.20. I hope the publisher will pardon me for concentrating on Seelig's contribution for the purpose of this memorial, in lieu of a review of the entirety of this publication. However, in passing, the criminologist's attention should be called to the valuable essays in this publication which deal with typology, written by Mezger (Munich), di Tullio (Rome), Leferenz (Heidelberg) and Hirschmann (Tuebingen). The very names of the authors indicate the importance of the publication. Two additional articles deal with the problem of the combination of causes of crime.

Type of the Primitive-Reactive Criminal.”<sup>20</sup> In this study he demonstrated ably the application of his typology as a diagnostic tool for the proper evaluation of the criminal deed. A few remarks about Seelig’s typology are in order. The primitive-reactive criminal with whom his last typological study was concerned, is one of Seelig’s eight major types: (1) the professional criminal (work shirker); (2) the perpetrator of property crimes for lack of restraining power; (3) the brutal-aggressive criminal; (4) the sex offender for lack of restraining power; (5) the crisis law breaker; (6) the primitive-reactive criminal; (7) the criminal out of conviction; (8) the criminal for lack of community discipline. Seelig had developed his typology in decades of painstaking practice with criminals, as a researcher and court and prison consultant in Graz and elsewhere. The examination on which classification is based is one of criminal-biological nature. The American reader must be warned about this term. “Criminal biology” is not identical with the doctrine that criminality is a result of heredity or physique. Seelig’s criminology is “biological” only because any concern with human body and soul, with the depth and surface of human nature and action, pertains to life (*bios*), and thus is biological. We can, therefore, understand that Seelig’s method of classification rests on factors from all relevant spheres of “biology” in this wider sense. There are psychological-pedagogical considerations, including the vast variety of environmental, or better, non-hereditary, factors. There are psychiatric (including psychoanalytical) considerations which certainly take in both some hereditary and some non-hereditary factors. There are biological considerations in the narrow sense, pertaining both to heredity (gene structure) and physique, and there are lastly considerations based on the highly progressed state of European research on somatic retardation.<sup>21</sup> In a way Seelig’s work is not dissimilar to that of Healy (with Bronner and with Alexander) and the Gluecks. The Glueck studies also would be classifiable as criminal-biological in the above sense. Healy’s work, of course, is criminal-biological in the narrower sense as well by reason of Healy’s special emphasis. The work of the mentioned authors always commanded Seelig’s special attention,<sup>22</sup> although he criticized the American work methods in general for their lack of correlation of categorized mass data, as he said. In other words, he believed that competent analysis was not followed by (an equally competent) synthesis. The “average” delinquent, especially of the Gluecks, does not exist, according to Seelig. He is merely the product of analytical-statistical methodology. Important individual or typological diagnoses thus are lost. It was Seelig’s endeavor to uncover the variable individual criminal or delinquent whose typologically differing and often even opposed characteristics (e.g., imagination or mental apathy, emotional excitability or emotional impassiveness, etc.) he felt had been disregarded in American mass studies.

The scheme of Seelig’s classification is not one of strict logic. It is empirical. As perfected, the scheme now shows 92 percent of the innumerable criminals tested to be “typical”, i.e., of one or another of the eight major types. Less than 7 percent of those examined were fully mixed types, i.e., showing the characteristics of two types. Only 1.4 percent were atypical. Seelig’s practical application of this typology was as

<sup>20</sup> DER KRIMINOLOGISCHE TYPUS DES PRIMITIVREAKTIVEN VERBRECHERS, p. 34.

<sup>21</sup> See the essay on CRIMINAL TYPOLOGY, no. 18, *supra*, p. 51 *et. seq.*

<sup>22</sup> *Ibid.*, p. 53.

successful as the theoretical verification of the scheme itself. The system permitted him to competently detect the underlying causes of individual and general criminality, which in turn enabled him to initiate preventive measures of a strategic nature. In addition, it helped him greatly in the creation of his penological-pedagogical policies. A more detailed discussion cannot be part of this testimonial and must be reserved for some future occasion.

It is only fitting that as a teacher, interested in the systematic development of our penal law, I should conclude my testimonial with a tribute to Seelig's work in this field. The essays collected in the first part of the instant book include some of Seelig's best works in doctrinal criminal law. They are concerned with the concept of "criminal guilt."

In the Anglo-American legal world "criminal guilt" is the most undeveloped concept. Our courts, codes and scholars still operate, for the most part, on rather naive assumptions, based upon generalities and guesswork. On the Continent, precisely the opposite is true. There no concept is as refined or as developed as that of criminal guilt, and this refinement was not the least of Seelig's contributions. He himself always thought of it as the central concept of criminological thinking.<sup>23</sup> In his *opus magnum* in this field, "The Guilt in Criminal Law," Seelig dismissed prior definitions of criminal guilt. It is not a mere "psychic relation" (Franck), although it is related to the psyche; it is not the mere socio-ethico-legal disapproval of the deed, called blameworthiness, nor the blameworthiness of the actor. Seelig's deep insight into the motivations of the human mind and soul, his wide experience in applied criminology and law, and particularly his intricate knowledge of philosophy—as an adherent of Alexius von Meinong, coupled with an admirable knowledge of utilitarian philosophy—permitted him to supply a more complete answer than could any of the theoreticians who treated the law as either solely psychological, or solely normative, or solely metaphysical.

Criminal Guilt is the ethico-legal negative value of the deed, carried both by the actual motivation event (actual guilt) and the dispositional status of the actor at the time of the deed (dispositional guilt). If only one of these sinks down to zero in any particular actor, . . . he is [as a rule] without criminal guilt. The proportion between the two may vary . . .<sup>24</sup>

As an example of the absence of actual guilt, Seelig referred to cases of *force majeure* (exculpation), of the absence of dispositional guilt to cases of psychotic actors (incapacity).<sup>25</sup>

In 1928 Seelig already had laid the foundation for his guilt doctrine, when Germans and Austrians debated the question of the proper apportionment of punishment to guilt.<sup>26</sup> It was on that occasion that Seelig provided us with the clues to his later developed guilt doctrine. Guilt is negative value. Values, both positive and negative,

<sup>23</sup> SCHULD, LUEGE, SEXUALITAET 3, *Die Schuld im Strafrecht*. The essay was written in 1953.

<sup>24</sup> *Ibid.*, pp. 30-31. In the case of dispositional guilt Seelig restricts the rule of legally relevant lack of guilt to mental disease and infancy. See text, *infra*. Typical examples of dispositional guilt are lacking resistance through long practiced nonchalance toward civic-social duty, emotional dullness, sexual perversion (the latter two only if not caused by "disease").

<sup>25</sup> *Ibid.*, p. 30.

<sup>26</sup> *Ibid.*, pp. 65-67.

are ideal objects of the higher order (v. Meinong) which adhere to other objects, their carriers. Man perceives them through emotional experiences, so called value senses. These, in turn, form the basis for intellectual judgments, value judgments. Value itself, value carrier and psychic value experiences (both value senses and value judgments) must be strictly kept apart. As soon as criminal guilt is regarded as a negative value itself, it is at once apparent that it is not identical with what we have come to regard as the subjective elements of crime, because these, in the above scheme, can be nothing but value carriers. This means also, that guilt is not identical with value judgment (to the effect that a certain conduct creates liability).

Crime itself, then, is the carrier of the negative value. It is a psychophysical event. The extraneous appearance of the crime with its immediate causal consequences is as much the carrier of the negative value as are the psychic events within the actor that cause the bodily movement resulting in the completion of the criminal act. The psychic event within the actor rests as much on the immediately preceding endogenous and exogenous psychic occurrences as on the relatively constant dispositions of the actor.

Certainly, the result of a criminal activity itself—as long as within predictable causal relation—will and must be somewhat determinative of both guilt and measure of punishment, particularly since, in an indirect way, the result permits some conclusions about the actor's actual and dispositional guilt. But an overemphasis of results will lead to absolute criminal liability.

On the other hand, those who rest the value judgment of the deed solely on the dispositional guilt of the actor evidence a desire to make the social maladjustment or repulsiveness of the actor the sole determinant for the measure of punishment. Finally, those who disregard dispositional guilt in an effort to make the particular "intent"—I am using the familiar Anglo-American term for "*mens rea*"—the sole measure of guilt and punishment, disregard the fact that the last clicking of the mind prior to the act is not the sole cause of the actor's deed, but that the crime depends also on years of character formation.

Two of Seelig's examples will demonstrate this.<sup>27</sup>

(1) D 1 is apprehended during a minor burglary in which he played the lookout. His actual guilt, based on *mens rea* alone, would prescribe a punishment of, let us say, from one to five years in the penitentiary. But assume that this is the third such felony to which his "pals" have been able to induce him by reason of his unstable character (psychopathy, perhaps). In order to arrive at a just and utilitarian disposition of D 1, his dispositional guilt must be taken into consideration as well. Conviction under a habitual criminal act would be a typical example thereof.

(2) D 2 kills her infant child in despair because the child's father, her husband, has deserted the family, and she is subjected to the constant nagging of her mother who had disapproved of the marriage from the outset. Testimony establishes D 2 to be of excellent reputation. As the result of childbirth she had lost the faculty of conception. If only dispositional guilt were determinative of punishment, then the minimum punishment for murder would undoubtedly be much too severe to provide for the proper measure. But, of course, actual guilt, i.e., *mens rea*, prescribes punishment for

<sup>27</sup> *Ibid.*, p. 74.

reasons of general deterrence. Thus, in many cases the judges are confronted with a disproportionate relation between actual guilt (maximal) and dispositional guilt (minimal). (With habitual criminals the relation tends to be balanced; in the case of the sexual psychopath the relation would be vice versa.) Courts prove all the time that just punishments can be assessed in such cases. Much more difficult is the apportionment of punishment in cases of large dispositional guilt and small actual guilt, *vide* example (1), above. Is it at all just to use the dispositional guilt as part-determinative of the measure of punishment? If the disposition rests on the inability to distinguish between right and wrong ("and"—as Seelig says—to act according such realization) on account of disease or infancy, we cannot talk of dispositional guilt at all, only of disposition without legal significance. But any disposition resting on other factors which has resulted in the removal of the natural power of resistance (including lack of "value senses" and lack of "value judgments"), such as the addiction to a particular vice etc., is legally relevant. In some cases this undoubtedly imposes hardships, of which Seelig must have been aware, although he might not have thought of Mr. Justice Holmes' statement that the criminal law requires the individual "at his own peril to come up to a certain height . . . unless the weakness is so marked as to fall into well-known exceptions, such as infancy or madness."<sup>28</sup> Seelig had particularly the cases of self-induced substandard disposition in mind. Self-induced lack of restraining power is a just co-determinant of guilt, since man is a rational animal, gifted with the power of reason and self-restraint.

How ethical is such a liability which seems to rest, in part at least, on the dangerousness of the actor, a dangerousness which has found expression by a combination of actual and dispositional guilt and *actus reus*? Seelig cautions us to distinguish between guilt and dangerousness. The actor is *liable* primarily for his *guilt* not for his dangerousness. And guilt, as defined above, is the mere negative value of the deed. The degree of dangerousness of the actor will merely lead to a variation in the apportionment of punishment to guilt. Thus, punishment and guilt, while ordinarily commensurate, need not be so. Thus, in a very real sense the actor is responsible for being what he is at the time of his deed, and this is the yardstick for his guilt. Dangerousness itself does not enter the measurement of guilt, although it may lead to an increased penal-correctional disposition, perhaps—under modern doctrine—for the main reason of obtaining the necessary time in which to *résocialize* the offender.

It will take many years before the importance of Seelig's vast contributions will be fully appreciated in his native country and abroad. He has provided us with a rich source material for future research, and has left us an estate of scientific accomplishments from which we can lavishly fill many of our needs for decades to come. If his was not a long life, it was a rich and productive one. Criminologists all over the world shall not forget him.

<sup>28</sup> HOLMES, THE COMMON LAW 50, Boston, 1881.