

# Sexual Science and Sexual Forensics in 1920s Germany: Albert Moll as (S)Expert

MATTHEW CONN\*

Department of History, University of Iowa, 280 Schaeffer Hall, Iowa City, IA 52242, USA

**Abstract:** Using court records involving the expert testimony of the Berlin sexologist Albert Moll, my article demonstrates that during the early 1920s a shift in the ‘epistemologies of justice’ concerning the adjudication of sex crimes took place within German courtrooms. Namely, presiding judges considered a greater number of sexual acts as punishable, despite no change in the laws themselves. Central to my argument is the role of expert testimony in practice and its critical reception. By focusing upon the rhetorical strategies presented by attorneys, judges and expert witnesses (as well as defendants themselves and their relatives), it illustrates the functions of expert and tacit knowledge in court, which were often not mutually exclusive. Moll’s stature also enabled him to translate his scientific–medical expertise into state support for his testimonies, as well as the rebuilding of an international community of sexological authorities. It was only under Moll’s leadership that the First International Sexology Congress could take place in 1926, an event that marked the apex of his prestige.

**Keywords:** Courtroom, Expert Testimony, Homosexuality, International Congress, Sexology, Sexual Forensics

## Introduction

In October 1926, Berlin hosted the first international scientific conference to take place in Germany after the First World War. Following months of preparation and negotiation with the German government to provide financial support for the conference, and cultural excursions for its participants, the proceedings opened with a speech by the Minister for the Interior Wilhelm Külz given at the Reichstag and attended by luminaries such as Chancellor Wilhelm Marx and President Paul von Hindenburg. The conference attracted much media attention prior to, during, and following the proceedings, which the

\* Email address for correspondence: [matthew-conn@uiowa.edu](mailto:matthew-conn@uiowa.edu)

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conservative *Kreuzzeitung* welcomed as ‘the end to the boycott of German science’.<sup>1</sup> Yet, in the German world of science which had produced the majority of Nobel laureates in the first quarter of the twentieth century, this pivotal meeting of scientists included neither Albert Einstein nor Sigmund Freud, neither Fritz Haber nor Max Planck. Its focus was sexology; its organiser was Albert Moll (1862–1939).

That same year, the German press remained attuned to other public displays of Moll’s scientific authority. Several newspapers covered the daily proceedings of a trial concerning the accusation of sexual misconduct, in which Moll served as an expert witness. The defendant had served as the rector of a boy’s academy in Zossen, a few miles south of Berlin. Because of its proximity to Berlin the story drew the attention of several metropolitan reporters, who conveyed every sordid facet. For instance, one argument in the case involved the question of whether the rector had spanked students in order to discipline them or to satisfy his own sexual desires. While the trial itself contained no shortage of such salacious details, much of the media’s attention focused upon the debate amongst the expert witnesses regarding the very meaning and applicability of ‘sexual’ as well as state laws prohibiting infractions of ‘sexual indecency’. ‘The expert opinions in this trial’, Berlin’s largest daily newspaper the *Berliner Morgenpost* reported, ‘will play an important role here as will active altercations between different scientific trends pitted against one another’.<sup>2</sup> In some ways the direction of the emerging discipline of sexology appeared to be on trial as well.

This court case and the conference were connected by more than their coincidence in 1926, as key aspects of the trial were treated in two of Moll’s addresses during the *Internationaler Kongress für Sexualforschung* [*International Congress for Sexual Research*]. In his talk ‘Concerning Psychological Appraisal of Young Witnesses in Sex Trials’, he defended the reliability of young witnesses to provide accurate courtroom testimony; in ‘Homosexuality and so-called Eros’ Moll addressed the reluctance of same-sex desiring men to identify their actions as ‘homosexual’.<sup>3</sup> The conference as a whole aimed to enhance the respectability of sexology, because the field’s reputation had suffered in the years prior to the war. This was due, in part, to the obscure language employed by leading practitioners, and to the embarrassing testimonies offered in highly publicised trials such as the Eulenburg Affair (see below). Thus, Moll’s role in each of the proceedings – in the courtroom and at the congress – conveyed the degree of prestige achieved by researchers in sexology by the 1920s.

Whereas much previous scholarship frames sexologists and their work in the context of contemporary scientific advances, political struggles, and social values, this article instead

<sup>1</sup> Kreuz-Zeitung, (Berlin) 17 September 1926, located in Bundesarchiv Berlin-Lichterfelde (hereafter BAArch) R 9501/111178, 64. The article emphasised the conference’s significance, particularly with regard to the aftermath of the First World War: ‘An diesem Kongress nehmen nicht nur Gelehrte aus den Ländern unseren ehemaligen Verbündeten und der neutralen Mächte, sondern auch zahlreiche Gelehrte aus den Ländern unserer ehemaligen Kriegsgegner... teil’.

<sup>2</sup> Berliner Morgenpost, 23 February 1926, located in Geheimes Staatsarchiv Preussischer Kulturbesitz Berlin Dahlem (hereafter GStA PK), I.HA Rep. 84a Justizministerium, Nr. 57940, 18. ‘Die Gutachten werden in diesem Prozess eine wichtige Rolle spielen und zu lebhaften Auseinandersetzungen führen, da verschieden wissenschaftliche Richtungen gegeneinander auftreten werden’.

<sup>3</sup> BAArch R 1501/111178, 87–91. For an overview of the conference speeches see Max Marcuse (ed.), *Verhandlungen des I. Internationalen Kongresses für Sexualforschung, Berlin, vom 10. bis 16. Oktober 1926*, 5 vols (Berlin: Marcus & Webers, 1927–8).

examines how sexological ideas shaped state practices.<sup>4</sup> Focusing upon the practice of expert testimony, and specifically on sexologists acting as forensic examiners, offers one way to measure the social and political impact of sexology. Sexual forensics helped transform private sexual matters into concerns of public state officials, and scientific experts such as Moll served as key functionaries in this process. This article uses Moll as a case study to examine how experts exerted the basis of their authority, earned and maintained public recognition, and how each of these processes extended the importance of sexual knowledge and its effects.<sup>5</sup>

While debates over forensic evidence provide one way to assess the impact of sexology, this article also examines the contested role of early twentieth-century sexologists serving as forensic experts in German courtrooms. In so doing, it casts the work of Albert Moll in the larger context of German sexologists offering expert testimony regarding the meaning of sex acts and sexuality. Over the first decades of the twentieth century the courtroom transformed as a social space, becoming a setting not only where legal issues were resolved, but also a location where the defendant's sexual character was evaluated. Accordingly, this article tracks Moll's position among competing interpretations of homosexuality as they played out in the German courtroom, and within efforts to make same-sex desire legible for the administration of criminal justice. Moll was a vital figure in these transformations, and the courtroom became a new site for evaluating the legal meanings of sexuality.

The article will proceed in three parts. First, it places Moll and his work in the context of the growing significance of forensic psychiatry in general and sexual forensics in particular, during the first decades of the twentieth century. While doing so, it emphasises the contested views amongst various experts regarding both the nature of human sexuality and the role of sexual scientists in its interpretation. The following two sections use three court cases, as well as Moll's conference, to examine the ways in which Moll and others put sexology on display in public forums, particularly the courtroom. Finally, the article concludes by considering the role experts serve in democratic society and situates Moll's work in the trajectory of the 'scientification of the social' and sexual.<sup>6</sup>

### Forensic Medicine and the Problem of Identification

As explicit discussion of sexual matters in open forums – ranging from the Reichstag chamber to the courtroom, from newspapers to academic journals – crescendoed in the 1920s, Moll and his colleagues attempted to consolidate their authority by speaking on such topics. Yet, a range of factors both facilitated and inhibited the mandate of Moll's and others' expertise. German laws prohibiting various sexual acts lacked transparency, and their vague wording was left open to interpretation. For example, Section 174 of the German Penal Code forbid 'indecent behaviours' with a dependent minor, but did not

<sup>4</sup> Here I concur with the observations of Edward Ross Dickinson and Richard Wetzell, 'The Historiography of Sexuality in Modern Germany', *German History*, 23 (2005), 291–304: 293–8; and more recently, Franz X. Eder, *Kultur der Begierde: Eine Geschichte der Sexualität*, 2nd edn (Munich: Beck, 2009), 188–209. See also the essays in Roy Porter and Mikuláš Teich (eds), *Sexual Knowledge, Sexual Science: The History of Attitudes to Sexuality* (New York: Cambridge University Press, 1994).

<sup>5</sup> Bruno Latour, *Reassembling the Social: Introduction to Actor-Network-Theory* (Oxford: Oxford University Press, 2005), 219–46.

<sup>6</sup> Lutz Raphael, 'Die Verwissenschaftlichung des Sozialen als methodische und konzeptionelle Herausforderung für eine Sozialgeschichte des 20. Jahrhunderts', *Geschichte und Gesellschaft*, 22 (1996), 165–93.

make clear how one was to determine whether the ‘general shame and moral feelings had been violated’.<sup>7</sup> Sexologists frequently assisted jurists in adjudicating cases concerning a variety of purported sexual deviancies, especially same-sex acts and desires between men, thus establishing their authority in matters of sexual forensics.<sup>8</sup> These efforts were hindered by a lack of consensus amongst leading practitioners, as well as the inherent difficulties in translating and reconciling theories into practices. Further complicating the scientific authority claimed by sexologists was the context of growing animosity directed at the increasing trend towards specialisation and expertise during the years of the Weimar Republic.<sup>9</sup> Moll and others found themselves working to convince not only state officials but also the general public of their authority. As was the case in Bolshevik Russia, ‘forensic expertise was a public, not a private act’, as the historian Dan Healey has recently argued, ‘in common with the educative function of patient demonstrations in the lecture hall or hospital ward, expert opinions were staged events in which the subject’s bodies and minds, characteristics and injuries, were uncovered, shown, and explained for lay audiences’.<sup>10</sup>

The peculiarities of German law inadvertently provided German sexologists the opportunity to project and consolidate their authority on sexual subjects. In Germany, only same-sex acts between men could be prosecuted (Section 175 of the German Penal Code). The vaguely worded legislation, forbidding ‘*perverse sexual acts*’ (*widernatürliche Unzucht*) often left itself open to interpretation and led many judges to rely upon scientific interpretation of a defendant’s motives and behaviours. In the late nineteenth century, persons standing trial under Section 175 of the Penal Code found themselves at a moment when important shifts in sexology and criminology were taking place. They were simultaneously the subjects and objects of these discourses and part of a larger effort to identify recurrent characteristics of perceived criminal types.<sup>11</sup> The work of Johann Ludwig Casper (1796–1864), the Berlin trail-blazer in the field of medical jurisprudence, inspired much renewed interest after 1850, as it concerned forensic sexuality and was written for doctors who might be called to give expert testimony.<sup>12</sup>

Prior to entering the courtroom, as in other criminal cases, the nature of evidence was subject to debate. Yet, attempts to identify either homosexuals or same-sex acts proved challenging as experts disagreed upon what could serve as evidence as well as the appropriate means of its collection. For a long time, legal practitioners were at odds in determining how to identify homosexuals. This became a further problem in 1871, as Germany unified under Prussian leadership, and subsequently all twenty-five states were

<sup>7</sup> *Strafgesetzbuch für das Deutsche Reich*, 22nd edn, Hans Rüdorff (ed.) (Berlin: Guttentag, 1907), 158. The text reads: “‘Unzüchtige Handlungen’ müssen objekt. das allgem. Scham- u. Sittlichkeitsgefühl verletzen’.

<sup>8</sup> By sexologists I refer to a group of degree-holding professionals, most of whom worked as medical doctors and/or psychologists, and who published monographs on a wide range of themes pertaining to human and non-human sexuality. Sexual forensics refers to the provision by these practitioners of expert opinions and testimony in court cases pertaining to various sexual offences (*Sexualdelikte*).

<sup>9</sup> Fritz Ringer, *The Decline of the German Mandarins: The German Academic Community, 1900–1933* (Cambridge, MA: Harvard University Press, 1969), 106–11.

<sup>10</sup> Dan Healey, *Bolshevik Sexual Forensics: Diagnosing Disorder in the Clinic and Courtroom, 1917–1939* (Dekalb, IL: Northern Illinois University Press, 2009), 161.

<sup>11</sup> Richard Wetzell, *Inventing the Criminal: A History of German Criminology* (Chapel Hill: University of North Carolina Press, 2000), 28–72; for the reception of Cesare Lombroso’s theory of the ‘born criminal’ in Germany, see *ibid.*, 28–31.

<sup>12</sup> Johann Ludwig Casper, ‘Über Nothzucht und Päderastie und deren Ermittlung Seitens des Gerichtarztes’, *Vierteljahrsschrift für gerichtliche und öffentliche Medicin*, 1 (1852), 21–78 ; *idem*, *Handbuch der gerichtlichen Medizin*, Carl Liman (ed.), Vol. 1 (Berlin: Hirschwald, 1881), 168.

forced to adopt the Prussian Legal Code.<sup>13</sup> Whereas many of the more liberal states such as Bavaria had repealed their anti-homosexual legislation in the 1810s under the Code Napoleon, German unification required these states to adopt Prussia's conservative stance on what the former considered private individual matters.<sup>14</sup> From the onset, this newly founded federalism proved problematic. Jurists in several non-Prussian states pleaded uncertainty concerning the legal meaning of 'perverse sexual acts', especially with regard to its religious connotations.<sup>15</sup> Prosecutions under Section 175 remained scant in these states during the 1870s, which resulted, in part, from the ambiguity of its wording, and from what historian Helmut Walser Smith terms the 'recrudescence of confessional conflict' following German unification.<sup>16</sup> Yet, after a decade of relative inaction, and in response to juridical criticism, an 1880 ruling by the Leipzig Imperial Court offered what promised to be a definitive statement regarding the applicability of Section 175. Namely, it applied only in cases where 'acts resembling (*ähnlich*) sexual intercourse can be demonstrated to have occurred', thus limiting its interpretation to anal and or inter-femoral sex.<sup>17</sup> Such interpretation proved prevalent in German courtrooms throughout the 1880s and 1890s, and reflected Johann Casper's influential directives in the field of forensic pathology.<sup>18</sup>

Understanding the aetiology of sexual desire was crucial to several Central European jurists, because many early works in the field of sexual science were intended for use within the courtroom.<sup>19</sup> For instance, regarding cases involving homosexuality, the widely used handbook by Austrian criminologist Hans Gross (1847–1915) advised examining magistrates that it should be decided in each case whether 'we have to deal with a disease of the mind... or an innate peculiarity'.<sup>20</sup> The greatest dispute concerned the very manner in which 'sex' and 'sexuality' were classified. Contemporary practitioners recognised this dilemma, and noted its relationship to the problems of identification and interpretation.

<sup>13</sup> In addition to Casper, there were several efforts to study same-sex desires and behaviours prior to 1871, and in addition, the adoption of the old Prussian Section 143 as the grounds for Section 175 was also much debated. See Kai Sommer, *Die Strafbarkeit der Homosexualität von der Kaiserzeit bis zum Nationalsozialismus: Eine Analyse der Strafbestände im Strafgesetzbuch und in den Reformentwürfen (1871–1945)* (Frankfurt/Main: Lang, 1998), 105–72.

<sup>14</sup> Isabel Hull, *Sexuality, Civil Society, and State in Germany, 1700–1815* (Ithaca, NY: Cornell University Press, 1996); Sabine Kienitz, *Sexualität, Macht und Moral: Prostitution und Geschlechterbeziehungen Anfang des 19. Jahrhunderts in Württemberg: Ein Beitrag zur Mentalitätsgeschichte* (Berlin: Akademie Verlag, 1995).

<sup>15</sup> The tension between religion and homosexuality was much discussed during Imperial Germany; for a contemporary view see 'Schütz § 175 Rechtsgüter', *Jahrbuch für sexuelle Zwischenstufen*, 2 (1900), 30–52.

<sup>16</sup> For Catholics and Poles see Helmut Walser Smith, *German Nationalism and Religious Conflict: Culture, Ideology, Politics* (Princeton, NJ: Princeton University Press, 1995). For an older view including socialists, see Dieter Groh, *Negative Integration und revolutionärer Attentismus: Die deutsche Sozialdemokratie am Vorabend des ersten Weltkrieges* (Frankfurt am Main: Ullstein, 1973).

<sup>17</sup> *Entscheidungen des Reichsgerichts in Strafsachen*, Vol. 1 (Leipzig: de Gruyter, 1880), 395–7. The decision itself came on 23 April 1880. This narrow interpretation is consistent in the limited number of court records that I have found for the 1880s and 1890s.

<sup>18</sup> Casper, *Handbuch*, *op. cit.* (note 12), 184.

<sup>19</sup> For instance, see the introduction to the first edition of Richard von Krafft-Ebing, *Psychopathia sexualis: Eine klinisch-forensische Studie* (Stuttgart: Enke, 1886). The larger context of medical intervention by the state in Germany during this period is well documented by Paul Weindling, *Health, Race and German Politics between National Unification and Nazism, 1870–1945* (Cambridge: Cambridge University Press, 1989).

<sup>20</sup> Hans Gross, *Handbuch für Untersuchungsrichter als System der Kriminalistik*, 3rd edn (Graz: Lenschner and Lubnisky, 1899; first published in 1893), 120. His use of the term 'Homosexualität' is also of interest. This distinction also appears in his *Criminalpsychologie* (Graz: Lenscher and Lubnisky, 1898).

According to the Swiss psychologist Hans Kunz (1904–82), writing in the *Zeitschrift für Sexualforschung* [*Journal for Sexology*] (1926):

There is no prospect of a general agreement on a valid definition of what we mean by sexuality. . . . We see no way of exactly determining the object of sexology. Other academically tolerated sciences find themselves in the same situation, psychology and biology, for example. . . . Nobody will, in the hope of achieving general agreement, dare to offer an exact definition of ‘soul’ or ‘life’.<sup>21</sup>

Acting as expert witnesses thus served two functions for the growing field of sexology. First, it provided a location to work out debates regarding the origin and nature of (homo) sexual desires. Second, this role helped to legitimise the nascent profession, whose standing remained uncertain in the eyes of some contemporaries – both in the medical profession and beyond.<sup>22</sup> Yet, such confidence proved fragile, as experts at times also undermined their newfound status by providing evidence later found to be contradictory, misleading or even false.

Testimony offered by expert witnesses served as a point of interest amongst criminologists, as did the use of criminal psychology by such experts to identify homosexuality. In his oft-cited *Kriminalpsychologie* [*Forensic Psychology*], Hans Gross encouraged his fellow judges to employ experts in areas where magistrates’ own interests proved lacking. ‘The expert’, he argued, ‘whether a very modest workman or very renowned scholar, must in the first instance become convinced of the judge’s complete interest in his work; of the judge’s power to value the effort and knowledge it requires; of the fact that he does not question and listen merely because the law requires it, and finally of the fact that the judge is endowed, so far as it may be, with a definite comprehension of the expert’s task’. Furthermore, he encouraged penal sentences offering ‘psychological deterrents’ (*Hemmungsvorstellungen*) for sexual crimes.<sup>23</sup> By the 1920s, more and more practitioners wrestled with how to employ psychological analysis in the courtroom; for instance, a 1929 study entertained the notion that same-sex desires should be understood not merely through the prism of the ‘criminal mind’, but simultaneously as the manifestation of societal fears of a ‘community breakdown into its grossly sexual manifestations’.<sup>24</sup> Yet, other experts still expressed the view that sexual deviancy in general, and homosexuality in particular, was a congenital abnormality, recognisable as ‘criminal stigmata’.<sup>25</sup>

<sup>21</sup> Hans Kunz, ‘Zur Methodologie der Sexualwissenschaft’, *Zeitschrift für Sexualwissenschaft*, 13 (1926), 21. ‘Es bietet sich deshalb von vornherein keine Aussicht auf Zustimmung, das mit Sexualität Gemeinte irgendwie gültig zu definieren, [z.B.] . . . eine exakte Beschreibung der seelischen und körperlichen Ausdrucksformen und ihrer genetischen Zusammenhänge, sowohl innerhalb des Psychischen und Physischen wie in bezug zueinander zu liefern. . . . Zuletzt darf man aber hinweisen auf andere akademisch geduldete Wissenschaften, die grundsätzlich von der gleichen Situation stehen, die Psychologie oder Biologie z.B. niemand wird es wagen, in der Hoffnung auf allseitige Zustimmung definitiv umgrenzen zu wollen, was Seele sei oder Leben’.

<sup>22</sup> For the general context see Richard Wetzell, ‘Psychiatry and Criminal Justice in Modern Germany, 1880–1933’, *Journal of European Studies*, 39 (2009), 270–89: 271–4.

<sup>23</sup> Gross, *Kriminalpsychologie*, *op. cit.* (note 20), 37–8. See also Wilhelm Hammer, ‘Über ärztliche Sachverständigentätigkeit hinsichtlich Abweichungen des Liebestriebes’, *Monatsschrift für Harnkrankheiten und sexuelle Hygiene*, 5 (1908), 5–17.

<sup>24</sup> Franz Alexander and Hugo Staub, *The Criminal, the Judge, and the Public: A Psychological Analysis*, Gregory Zilboorg (trans.) (Glencoe, IL: The Free Press, 1931; first German edn, 1929), 115.

<sup>25</sup> Friedrich von Rohden, ‘Lombrosos Bedeutung für die moderne Kriminalbiologie’, *Archiv für Psychiatrie und Nervenkrankheiten* (1930), 140–54.

Expert testimony could be fraught with paradox and often received with cynicism.<sup>26</sup> When judges called sexologists to offer expert evaluations, the choice was a political one, as the methods and interpretations of these experts varied considerably. One of Moll's professional rivals, sexologist Magnus Hirschfeld (1868–1935), at times found himself providing evidence to help adjudicate a law that he himself had organised committees and petitions to repeal. The public and media were often aware of the stakes involved with selecting who would provide expert testimony, and that such choices reflected the arbitrary and unpredictable nature of the justice system, particularly in the years prior to the First World War. This was indeed the case during the notorious Eulenburg Affair (1907–9) – a highly publicised and politicised series of trials pertaining to accusations of sexual indecency involving the entourage of Kaiser Wilhelm II; chiefly involved were his personal friend and advisor Prince Phillip zu Eulenburg (1847–1921) and General Kuno Graf von Moltke (1847–1923), both exposed by journalist Maximilian Harden. Press reports vilified Hirschfeld's role as an 'expert' as well as the theories he purported. 'We should be weary of the dirty finger', one article begins, 'of this pseudo-scientist (*Afterwissenschaftler*)...polluting the public sphere with his self-made products of perversity. The circulation of his dodgy (*windige*) hypotheses regarding notorious facts are a sign of the times (*ein Zeichen der Zeit*)'.<sup>27</sup> The expert opinion drew particular scorn, as Hirschfeld purportedly identified the defendant's sexual character by observation in the courtroom, and based his decision on the feminine features he perceived as well as consideration of comments made by the defendant's wife. Remarkable in this case was the relating of a sexual identity – the defendant's effeminate mannerisms displayed in court – to presupposed sexual acts. The relationship between personal characteristics and behaviours would become more prominent in cases tried in the 1920s and 1930s. Hirschfeld's expert testimony in prominent cases throughout the 1900s, however, blemished the reputation of sexology in the public's eye; it arguably would not recover until after the war.<sup>28</sup>

Speaking before the crowded congress hall at the International Sexology Congress in Berlin in 1926, Moll addressed the special role of expert testimony in trials pertaining to sexual offences. Following the earlier views of Caspar and Gross, and reiterating claims from his own work published in the 1890s, Moll emphasised the need for expert witnesses to distinguish first between 'innate' and 'acquired homosexuality'. Furthermore, he advised his colleagues to heed caution when presenting ideas to non-medical audiences – whether it be a trial jury or the educated public – because their personal views might be predisposed towards a sceptical view of medical science. Regarding testimony in cases pertaining to homosexuality, he offered two further recommendations. First, he claimed: 'The opinion of a so-called expert can be dangerous to public safety when he states that in principle all cases of same-sex desire are innate, yet conceals from the court that the opposite opinion also has medical supporters'. Furthermore, Moll

<sup>26</sup> Benjamin Carter Hett, *Crossing Hitler: The Man Who Put the Nazis on the Witness Stand* (New York: Oxford University Press, 2009), 8; Wetzell, *op. cit.* (note 22), 271–4.

<sup>27</sup> 'Das Geschlechtsleben und die Pseudowissenschaft', *Deutsche Tagezeitung*, 29 October 1907. See also Norman Dormeier, *Der Eulenburg-Skandal: Eine politische Kulturgeschichte des Kaiserreichs* (Frankfurt am Main: Campus, 2010).

<sup>28</sup> GSStA PK, I.HA Rep.84a Justizministerium, Nr. 57917, 200–20. Elsewhere Hirschfeld claimed to be able to identify homosexuality simply by looking at photographs, see Magnus Hirschfeld, *Die Homosexualität des Mannes und Weibes* (Berlin: Marcus & Webers, 1914), 190. For the reputation of sexology see both James Steakley, *Die Freude des Kaisers: Die Eulenburg-Affäre im Spiegel zeitgenössiger Karikaturen* (Hamburg: MännerschwarmSkript, 2004) and Dormeier, *op. cit.* (note 27).

continued, 'I would like to state and demonstrate that in the public's opinion everywhere, homosexuality stands beneath heterosexuality'. For as he reminded his audience, this negative opinion of homosexuality 'is connected undoubtedly to the people's healthy feeling (*gesundes Gefühl des Volkes*), and with the drive towards self-preservation of the human race'.<sup>29</sup> Many of Moll's comments found support in the conference address of the psychologist Wilhelm Weygandt, '*Beiträge zur forensischen Sexualpathologie*' [*Contributions in Forensic Sexualpathology*], in which he advocated, 'in any case it is appropriate in matters of homosexual offences that at least an examination of its foundations be conducted'.<sup>30</sup> As the following sections suggest, Moll's admonishments derived directly from his experiences in the courtroom.

### Rethinking Sexuality in 1920s German Courtrooms

Albert Moll's activities during the 1920s occurred during the twilight moments of a juridical transition. By the dawn of the Weimar Republic the law and its protectors remained one of the few constants in a society still yet to recover fully from the upheaval of the First World War.<sup>31</sup> Although legislators installed a new constitution in 1919, the criminal code remained largely unchanged, as did its adjudicators.<sup>32</sup> Yet, there were important changes in the way these laws were applied. Patterns of interpretation for Section 175 and other sexual offences revealed broader parameters regarding the understandings of sex and sexuality, and both the conviction rate and severity of penal sentences spiked. While historians have often described the Weimar Republic as an 'experiment in democracy', its jurists experimented with new epistemologies of justice. Their reasoning in cases involving 'immoral acts' relied less on moral or religious interpretations of Section 175 than had been the case in the 1880s and 1890s. Instead, jurists and sexologists collaborated in a search for new logics, which would prove plausible to an increasingly secular state and society following decades of 'moral panic'.<sup>33</sup> This resulted in expanding, rather than restricting, the possible meanings of (homo-)sexuality.

<sup>29</sup> Albert Moll, 'Homosexualität und sogenannter Eros', in Marcuse, *op. cit.* (note 3), Vol. 3, 136–47: 137, 143, 143–4. 'Ebenso wird ein Gutachten eines sogenannten Sachverständigen gemeinefährlich, der grundsätzlich alle Fälle gleichgeschlechtlicher Leidenschaft für eingeboren erklärt, aber vor Gericht verschweigt, daß die entgegengesetzte Ansicht ebenfalls ärztliche Vertreter findet. Ich führe das an, um zu zeigen, dass überall die Homosexualität im Urteil der Öffentlichkeit tiefer steht als die Heterosexualität... hängt das aber zweifellos mit dem gesunden Gefühl des Volkes, mit dem Trieb der Selbsterhaltung des Menschengeschlechts zusammen'. For Moll's relationship to Weimar eugenics, see Thomas Bryant's contribution to this volume.

<sup>30</sup> Wilhelm Weygandt, 'Beiträge zur forensischen Sexualpathologie', in Marcuse, *ibid.*, Vol. 4, 424–35. '[A]uf jeden Fall aber ist es angebracht, dass bei Homosexualdelikten wenigstens in einer Prüfung der Grundlage eingetreten werde'. His support of Moll's ideas might also be viewed in light of their mutual loathing of Sigmund Freud, the mention of whose name reportedly led Weygandt, at a 1910 Hamburg congress, to pound his fist upon a table and proclaim: 'this is not a matter for discussion at a scientific meeting, but rather for the police'.

<sup>31</sup> Using 'twilight moments' to rethink the history of sexuality is inspired by Anna Clark, 'Twilight Moments', *Journal of the History of Sexuality*, 14 (2005), 139–60. The fragility of the post-war moral order is well described in Richard Bessel, *Germany after the First World War* (New York: Oxford University Press, 1992), 220–53.

<sup>32</sup> Emil Gumbel, *Vier Jahre politischer Mord* (Berlin: Verlag der neuen Gesellschaft, 1922), cited by Heinrich Hannover and Elisabeth Hannover-Druck, *Politische Justiz, 1918–1933* (Frankfurt/Main: Fischer, 1966).

<sup>33</sup> By 'epistemology of justice' I refer to the interrelated definitions of what served as evidence of gender and sexuality in social, scientific, and legal terms, and the instrumentalisation of such meanings (particularly in the context of enforcing laws regarding sexual conduct). For further elaboration, see my forthcoming PhD thesis 'Sex before Fascism: Sexual Forensics, Sexual Science, and Social Belonging in German-Speaking Central Europe, 1750–1945'. For the thesis of 'moral panic', see Edward Ross Dickinson, 'The Men's Christian Morality Movement in Germany, 1880–1914: Some Reflections on Politics, Sex, and Sexual Politics', *Journal of Modern History*, 75 (2003), 59–110; for the Weimar Republic as a social and political laboratory, see Peter Fritzsche, 'Did

The shift within sexual forensics towards an expansive interpretation and application of Section 175 was already underway in the months immediately before the war. A telltale sign of this transformation was a 1914 pamphlet addressed to jurists, doctors and educated laymen, *Eros vor dem Reichsgericht* [*Eros before the Imperial Court*], which used Moll's *Untersuchungen über die Libido sexualis* [*Investigations concerning the Sexual Libido*] and *Die Conträre Sexualempfindung* [*The Contrary Sexual Feeling*] to establish several of its claims. While regarding inter-femoral, anal, and oral sex as punishable offences, it offered an even wider range of acts that would go unpunished, ranging from the sensual embraces between clothed persons to mutual masturbation.<sup>34</sup> These arguments generally mirrored those found in the chapter on forensics in Moll's popular *Handbuch für Sexualwissenschaften* [*Handbook of Sexology*], published two years earlier and reprinted in 1926, particularly its remarks on the 'forensic relationship to psychopathology'. 'Their diverse nature', Moll claimed, 'affects the very particular criminal law'. Concerning same-sex acts between men specifically, he opined, 'many acts are prosecutable, and indeed fall under Section 175'.<sup>35</sup> Attention to the language of individual court records permits a preliminary consideration of whether such deliberations were heeded in practice.

In general, discussion of evidence within the courtroom became quite explicit by the 1920s. During previous decades, the language of court reports of cases regarding Section 175 displayed much ambiguity and did so mechanically. Judges referred only to 'sexual parts' (*Geschlechtsteile*), and by the early twentieth century, 'homosexual acts' (*homosexuelle Handlungen*); however, the usage of select verbs such as 'to insert' made clear that the context denoted anal or inter-femoral sex. Rarely did other sexual acts or desires receive mention; if they did, then only to note that they were not punishable. Courtroom language was equally restrained in other cases of moral violations pertaining to sexual acts; for instance cases concerning prostitution – both female and male – mentioned only sexual intercourse and monetary matters (*gewerbsmässig*); the latter often dominated deliberation.

Also remarkable is that jurists employed the word used for heterosexual intercourse (*Verkehr*) to describe same-sex acts until the 1920s. Although they conflated the terminology related to heterosexual and homosexual intercourse, judges also began expanding the parameters of what counted as 'sex' and 'sexual' under the law. In general, courtroom procedure followed from the 'free evaluation of evidence' (*freie Beweiswürdigung*), Section 260, which meant that once each case reached the courtroom, judges did not base their decisions upon legal precedent, but rather upon the evidence presented in each individual case. In addition, under German trial procedure, the presiding judge questioned the defendant and all other witnesses prior to the prosecutor and defence council.

In several cases expert opinion focused not only on the sexual act itself, but also on the defendant's sexual character. Although an entire chapter of his memoirs was devoted to his work as an expert witness, Moll curiously offered few words about sexual forensics,

Weimar Fail?', *Journal of Modern History*, 68 (1996), 629–56; see also the special issue of *Central European History*, 43 (December 2010).

<sup>34</sup> BAArch R 3001/21763 5773, *Eros vor dem Reichsgericht: Ein Wort an Juristen, Mediziner und gebildete Laien zur Aufklärung über die 'griechische Liebe' von einem Richter* (unpaginated).

<sup>35</sup> Albert Moll, *Handbuch der Sexualwissenschaften mit besonderer Berücksichtigung der kulturgeschichtlichen Beziehungen*, 3rd edn (Leipzig: Vogel, 1926; first edn, 1912), 673–4. 'Sie sind mannigfacher Natur, berühren aber ganz besonders das Strafrecht', and later 'viele Akte sind strafbar, und zwar auf Grund §175 des Strafgesetzbuch'.

despite his frequent presentation of expert testimony in such matters.<sup>36</sup> In 1926, his work in this field took him to the outskirts of the Reich, to Stettin, the capital of the Prussian province of Pomerania, where he testified in a trial concerning two young men – Heinz M. and Hermann S. – who stood accused of partaking in ‘perverse sexual acts’ with one another.<sup>37</sup> Following common procedure, in order to indict, the police investigation initially produced three witnesses. This meant typically the two men engaging in the acts in question as well as a third party, who might or might not have witnessed the act (often either a landlord or police watchman). Prosecutors suggested inviting the Berlin sexologist Albert Moll to serve as an expert witness; the presiding judge found no reason to object. The court report details several ‘tests’ of the defendant’s sexual character, including obtaining a writing sample and a description of the contents of his trouser pockets. The purpose of these inquiries was not to ascertain whether Heinz M. had engaged in sexual intercourse with Hermann S., but rather to sketch the former’s sexual character – or as the state prosecutor Stegemann put it, ‘the picture of one’s personality’ was to be determined ‘from the question of his sexual integrity (*Unbescholtenheit*)’.<sup>38</sup> Such logic would conflate a sexual identity with sexual acts *without* necessarily demonstrating that the latter took place (as Heinz M. denied having engaged in same-sex acts with Hermann S.). Whereas in earlier years the case might have been one of the twelve to twenty per cent dismissed before reaching the courtroom because of a lack of evidence, the judge decided to hear the case, directing it towards a demonstration of the defendant’s ‘deviant personality’, rather than showing that he had explicitly committed an act prohibited by law. The judges mentioned Moll’s testimony in explaining their sentence. Moll believed that Heinz M. displayed effeminate traits, but could not be classified as a potential recidivist. The successful prosecution of Heinz M. for engaging in mutual masturbation represents a pattern, of judges expanding the consideration of what could serve as evidence of ‘sex’.

Other cases illustrate concern for the ‘sexual’ acts themselves, and show that successful prosecution was not restricted to demonstrating anal sex. During the 1920s, judges frequently considered evidence of mutual masturbation as sufficient for conviction. In such cases, the judges constructed legal rhetoric focusing on notions of ‘successful’ sexual encounters, typically measured by evidence of ejaculation (*Samenerguss*). In addition to luridly describing the sex acts themselves, judges compelled defendants to describe their sexual histories – which often included detailed experiences and emotional responses. In fact, as would be the case with trials concerning ‘race defilement’ in the Third Reich, these interrogations often devoted much attention to eliciting facts that would later prove irrelevant to the assessment of guilt.<sup>39</sup> This unyielding attention to detail by judicial investigators resulted, in part, from the often-painstaking standards of proof requiring thorough documentation of a crime and of criminal motives. To corroborate the latter, jurists often called sexologists to frame the context of meaning regarding a defendant’s sexual acts. Such efforts were not altogether uncommon in the 1920s, as determining

<sup>36</sup> Albert Moll, *Ein Leben als Arzt der Seele: Erinnerungen* (Dresden: Reissner, 1936), 166–78.

<sup>37</sup> Following the German Data Protection Act the names of private persons discussed in this article have been made anonymous.

<sup>38</sup> GStA PK Rep. 84a (Justizministerium) (2.5.1)/57884: 9.12.1926 OSA an GSA durch LG Strafkammer, Bd. 2, 14–6, 17–22. ‘Das Bild von der Persönlichkeit. . . auf die Frage seiner geschlechtlichen Unbescholtenheit’.

<sup>39</sup> Patricia Szobar, ‘Telling sexual stories in the Nazi courts of law: race defilement in Germany, 1933–1945’, in Dagmar Herzog (ed.), *Sexuality and German Fascism* (New York: Berghahn, 2005), 131–63.

a perpetrator's attitude (*Gesinnung*) – roughly understood as one's ethical framework – played an expanded role in the German criminal justice system.<sup>40</sup>

### **Instrumentalising Expertise: The Zossen Trial and Berlin Sexological Conference**

The testimony of sexological experts, however, did not always go unchallenged, and at times the courtroom served as a forum for competing practitioners to debate their ideas. In a few cases more than one sexologist offered expert testimony, which left judges to determine the more plausible scientific explanation. Some cases represented an expansion in the types of sexual acts that counted as well as a sense that comportment counted as evidence. Both shifts were on display in the 1925–6 trial of 42-year-old Erich L. in Zossen, mentioned at the onset of this article. After having served at the front during the First World War, Erich L. returned to the countryside to teach at a local boy's academy (*Erziehungsanstalt*), where his wife's father served as director. Over the course of an eight-month criminal investigation, initiated after an 18-year-old student confessed to his parents that he had engaged in mutual masturbation with his teacher, Erich L., the police found fifty-eight other boys and young men – some of whom were fourteen or younger – who claimed to have engaged in same-sex acts with him to testify in court. The problem for the presiding judge was that none of them confessed to partaking in anal sex, and only three initially confessed to masturbation – none of whom had removed their clothes. In other cases regarding mutual masturbation the decision to prosecute hinged upon whether the act in question took place between naked or clothed participants.<sup>41</sup>

Members of the community were outraged at the allegations and demanded proof of Erich L.'s misconduct. Several letters to the court suggested that the teacher had been a victim of slander. The presiding judge called upon Moll to help decipher the evidence. Moll's expert testimony suggested that the defendant was a 'pseudo-homosexual', who, in the trenches of the First World War, had developed the 'character habits of a sexual pervert'.<sup>42</sup> Such claims, on the one hand, were somewhat common amongst proponents of theories regarding 'acquired' homosexuality. They also mirrored the assertions of other medical practitioners, which linked the experience of prolonged trench warfare in the First World War to male sexual disorders.<sup>43</sup> On the other hand, the defendant's veteran status could also serve as evidence of his heteronormative masculinity, which was the basis of claims made by Erich L.'s wife; she was the daughter of the academy's founder and also lived at the school. In a letter to the district attorney's office she defended his masculine, and thereby, heterosexual 'honour' in allusion to both the scars of war as well as those marking his face from his years of duelling in a student fraternity. Protesting the claims

<sup>40</sup> Pamela Swett, 'Political violence, *Gesinnung*, and the courts in late Weimar Berlin', in Frank Biess, Mark Roseman and Hanna Schissler (eds), *Conflict, Catastrophe, and Continuity: Essays on Modern German History* (New York: Berghahn, 2007), 60–79.

<sup>41</sup> GStA PK, I.HA Rep. 84a Justizministerium, Nr. 57939. OSA beim LG an GSA beim Kammergericht, 9; 17.2.1925 OSA an GSA, betr. 6.1.1925 Gutachten, s11; 28.7.1925 GSA an Preussischen Justizminister, 16.

<sup>42</sup> GStA PK, I.HA Rep. 84a Justizministerium, Nr. 57939: 16–22. 6.6.1925 OSA an GSA, betr. 14.4.1925 Bericht von San. med. Rat Moll, and 28.7.1925 GSA to Preussischen Justizminister, mit handgeschriebener Bemerkung 'Das sehr gründliche und ausführliche Gutachten des Geheimrats Moll, dem der Medizinalrat Stoermer in den Grundzügen schon jetzt beigetreten ist, rechtfertigt den dringenden Tatverdacht auch hinsichtlich des innern Tatbestandes'.

<sup>43</sup> Jason Crouthamel, 'Male Sexuality and Psychological Trauma: Soldiers and Sexual Disorder in World War I and Weimar Germany', *Journal of the History of Sexuality*, 17 (2008), 60–84: 77.

made by Moll in court, she remarked, ‘based on his [Moll’s] well-known theories, there is absolutely no way to gain understanding of my husband’s alien (*wesenfremd*) psyche. He [the husband] is much more inclined toward the corporal punishment of our pupils, which is followed by friendliness in order to show them that all is forgiven and forgotten’. One was not witnessing in this corporal punishment, she concluded, ‘the outbreaks of criminal sadism’.<sup>44</sup> Yet, even granting Moll’s well-known anathema to Freud and his theories, harder to swallow must have been the intervention by Magnus Hirschfeld, which drew much public attention.

Following the court’s directive, Hirschfeld interviewed Erich L. at the Institute for Sexual Science in Berlin. Reporting back to the magistrates, Hirschfeld offered the following court testimony, which was also directed at Moll: ‘homosexuality *cannot be acquired* by general elements, but rather is always an absolutely endogenous nature grounded exclusively in the congenital constitution and linked to the individuality of a person inseparably and immutably’.<sup>45</sup> Mimicking the rhetoric he often used when calling for the repeal of Section 175, Hirschfeld argued that because the defendant’s desires for members of the same sex were an innate condition, akin to colour-blindness, the law should not punish him. As Berlin’s daily newspapers uniformly reported nearly every word from the trial (including Hirschfeld’s testimony mentioned above), the public easily could follow the process as well as the forensic debate, despite the judges’ call to limit unwanted attention by closing the trial to both press and public. In response, one paper warned ‘the public sphere will not be excluded – from following the trial’, as it held the right to report the unpleasant incidents. In fact, the sparring between experts titillated the reading public; as one report noted, the energy with which Hirschfeld delivered his testimony was received by ‘all those participating in the trial with excitement’.<sup>46</sup>

Nevertheless, Hirschfeld’s appeal fell on deaf ears, as despite Erich L.’s lack of previous convictions, under Sections 174 and 175, the state attorney initially suggested a sentence of two years in prison (*Gefängnis*) and the loss of citizenship rights for three years. In rendering their sentence, the judges warned that in at least thirteen instances Erich L. had ‘acted with sexual motives – albeit difficult to prove’, and offered concern regarding the ‘danger of further desires manifesting themselves into more dangerous acts’ directed toward minors (Section 174).<sup>47</sup> The distinction between corrigible and incorrigible offenders was typical of the broader language of Weimar penal reform, and sentencing often reflected concern for preventing recidivism. Curiously enough, despite

<sup>44</sup> GSStA PK, I.HA Rep. 84a Justizministerium, Nr. 57939, 29–32. Handgeschriebene Brief aus Frau L. an GSA und LG. ‘... von seinen bekannten Theorien ausgehend, für die ihm wesenfremde Psyche meines Mann [sic] schlechterdings kein Verständnis zu gewinnen. Er ist vielmehr geneigt, in jeder körperlichen Züchtigung unsere Zöglinge, und erst recht in jeder darauf folgenden Freundlichkeit, die ihnen zeigen soll, dass das Geschehene nunmehr vergeben und vergessen sei. ... Ausbrüche eines verbrecherischen Sadismus zu erblicken’.

<sup>45</sup> GSStA PK, I.HA Rep. 84a Justizministerium, Nr. 57939: 112–13. For the reception of psychoanalysis during the 1920s see Doris Kaufmann, ‘Science as Cultural Practice: Psychiatry in the First World War and Weimar Germany’, *Journal of Contemporary History*, 34 (1999), 125–44.

<sup>46</sup> *Der Tag*, 12 May 1926; *Berliner Tageblatt*, 16 May 1926; ‘Magnus Hirschfelds Gutachten’, *Berliner Morgenpost*, 16 May 1926. ‘Die Öffentlichkeit wird nicht ausgeschlossen; wir wollen uns aber mit der Mitteilung begnügen, dass es sich zum Teil um recht unangenehme Vorgänge handelt’. While these newspapers ranged from radical (Rudolf Mosse’s *Berliner Tageblatt*) to reactionary (August Scherl’s *Der Tag* – the second daily edition of the *Lokal-Anzeiger*) to the Ullstein group’s *Berliner Morgenpost*, during the trial, coverage in most dailies differed little one from another; in fact, many reports match the trial transcripts verbatim.

<sup>47</sup> At the pre-trial stage, Erich L. was also accused of assault (*Körperverletzung*) under Sections 232 and 232a. GSStA PK, I.HA Rep. 84a Justizministerium, Nr. 57939, 41–114, 61: 22.7.1925 LG Bericht durch den PJM. He was acquitted (see below).

attention devoted to Hirschfeld and his theories, as in this case, the emphasis on biological foundations proved of little significance in cases tried over the following decade.<sup>48</sup>

Erich L.'s trial was representative of shifts in the epistemology of justice witnessed during the 1920s. Unlike prior decades, when the burden of proof rested upon clear demonstration that anal sex had taken place, a wider possible range of meanings was associated with same-sex acts. Furthermore, judges began relying more on expert testimony and distributing harsher penalties. Accordingly, not only did the overall rate of prosecution double, but so did the average length of penal sentences. In the years 1902–9 only fourteen per cent of cases led to a sentence longer than one year, whereas nearly thirty-two per cent did during the years 1922–9. The latter period also witnessed an increasing number of sentences that included a suspension of civic rights or citizenship – this part of the sentence would begin after the period of incarceration – which rose by eleven per cent compared with the two decades prior. Although these shifts may be merely coincidental, they nevertheless suggest the inclination of various jurists to search for ways to reconcile an old and ambiguous law with modern legitimisations. In addition, the detailed results of these attempts filled countless sheets of bureaucratic reports, which shared the intimate details of those accused of sex crimes and their partners – whether or not they were indeed convicted.

The cases of Heinz M. and Erich L. are also of interest because they would both eventually appeal their sentence. Most cases presented before the appeals courts prior to the First World War pertained to murder trials; after 1919, an increasing number of cases under the broad range of offences 'against morality' were appealed, and in some cases pardoned. For example, in all cases tried within Prussia (Germany's largest state), there was a rise from 23,000 pardons in 1919 to 125,000 in 1921. Furthermore, those convicted under Section 175 appealed their sentences more often than other moral offenders, and were also more likely to have a sexologist participate in their trial (and likewise in the appeals process). The appeal of Heinz M., specifically, was again representative, because the language of his petition contained several themes recurrent in similar cases. Not only did he reference scientific findings – questioning how someone might be prosecuted for an inborn condition – he also referred to notions of bourgeois respectability when mentioning his marriage, children, and his previous national service during the First World War. Much as in the original trial, the rhetorical strategy of the appeal stressed the characteristics of his masculinity, rather than the sexual act in question.<sup>49</sup>

The Zossen case was seemingly on Moll's mind when he gave his remarks at the conference in autumn 1926. In addition to the expert assessment of Erich L.'s sexual disposition, the magistrates also based their original ruling on their favourable appraisal of testimonies given by several young boys. The reliability of adolescent witnesses, however, had been a matter of debate among experts; for instance, one conference participant, the Hamburg psychologist William Stern (1871–1938), who also often served as a court-

<sup>48</sup> Wetzell, *op. cit.* (note 11), 129–36; for the Nazis' lack of unanimity regarding congenital homosexuality see Harry Oosterhuis, 'Medizin, Männerbund und die Homosexuellenverfolgung im Dritten Reich', in Burkhard Jellonek and Rüdiger Lautmann (eds), *Nationalsozialistischer Terror gegen Homosexuelle: Verdrängt und ungesühnt* (Paderborn: Schöningh, 2002), 119–26: 125.

<sup>49</sup> See George Mosse, *Nationalism and Sexuality: Respectability and Abnormal Sexuality in Modern Europe* (New York: Howard Fertig, 1985); *idem*, *Image of Man: The Creation of Modern Masculinity* (New York: Oxford University Press, 1996). Regarding the general increase in appeals and pardons, see Warren Rosenblum, *Beyond the Prison Gates: Punishment and Welfare in Germany, 1850–1933* (Chapel Hill, NC: University of North Carolina Press, 2009).

appointed expert, remained sceptical of what young witnesses could convey, as they were particularly prone to suggestion. In his conference paper, however, Moll concurred with Hans Gross's estimation, that in fact, 'a young boy... is the best observer and witness there is. He observes everything that occurs with interest, synthesises events without prejudice, and reproduces them accurately, while the girl of the same age is often an unreliable, even dangerous witness'.<sup>50</sup>

Stern's conference presentation also invoked the case of Erich L. as a warning about the 'waves of homosexuality' (*Inversionswelle*) storming down upon the nation's youth, whose exposure to even the ideas of 'homosexuality' should be regarded as dangerous to impressionable young minds. Even Moll's opponents could agree that, at some level, young witnesses understood the meaning of sexual advances – if not their erotic comportment.<sup>51</sup>

The congress enjoyed a rather favourable reception among the press, which praised Moll for his prestige and expertise. 'Only Moll's personality', exclaimed the *Tägliche Rundschau*, 'could unite various scientific directions under a single expert'. Moll's introductory remarks, the same article noted, showed that he was 'perhaps the most suitable man for the job in Germany, not only because he established the conference, but also because his objective leadership will certainly ensure the conference would be free of unnecessary hyperbole'. Nonetheless, members of the print media noted Freud's refusal to participate and Moll's decision not to invite Hirschfeld.<sup>52</sup> Defending his stance, Moll's response to allegations by the socialist *Vorwärts* of 'reactionary attitudes in sexual questions' (*reaktionäre Gesinnung in Sexualfragen*), revisited the courtroom confrontation concerning sexual forensics and clarified his views on the proper use of expert knowledge:

Magnus Hirschfeld has recently credited himself with the achievement that through his service as expert witness he had saved the accused thousands of years in prison. I have been told repeatedly, if Hirschfeld's expert opinions indeed led to their release, then there would be no more reason to continue demanding the repeal of 175. It would in fact give supporters of the punishment valuable material. Moreover, it is not the role of an expert to save the accused from prison, but to give his expert opinion according to the best of his knowledge and conscience; neither to disadvantage nor to benefit the accused.<sup>53</sup>

<sup>50</sup> Gross, *Criminalpsychologie*, *op. cit.* (note 20), 366; Albert Moll, 'Psychologische Begutachtung jugendlicher Zeugen in Sexualprozessen', in Marcuse, *op. cit.* (note 3), Vol. 4, 140–6: 141; William Stern, 'Der Ernstspiel-Charakter der Jugend Erotik und Sexualität', in Marcuse, *ibid.*, Vol. 3, 174–80. See also Moll, *op. cit.* (note 36), 177–9.

<sup>51</sup> Stern, *op. cit.* (note 50), 178–9; see also the discussion following his remarks, *ibid.*, 179–80. His paper addressed Moll's remarks at the conference itself, rather than his earlier and well-known work on child sexuality: Albert Moll, *Das Sexualleben des Kindes* (Leipzig: Vogel, 1908). See Lutz Sauerteig's paper in this issue.

<sup>52</sup> *Tägliche Rundschau* 17 October 1926; *Vorwärts* 17 October 1926. From the former, 'Nur die Persönlichkeit Molls konnte es fertig bringen, die verschiedensten Richtungen unter einem einzigen Kenner zu vereinen. ... wohl der geeignetste Mann in Deutschland, dessen Sinn nicht nur die Tat des Kongresses entsprungen ist, sondern von dessen Sachlichkeit auch mit Sicherheit eine von unnötigen Hyperbeln freie Kongressführung zu erwarten ist'.

<sup>53</sup> Albert Moll, 'Der "reaktionäre" Kongress für Sexualforschung', *Zeitschrift für Sexualwissenschaft*, 13 (1927), 24–31: 29–30. 'Magnus Hirschfeld hat es kürzlich als sein Verdienst hervorgehoben, wieviel tausend Jahre Gefängnis er durch Sachverständigkeit den Angeklagten erspart habe. Mir ist wiederholt gesagt worden, wenn durch Hirschfeldsche Gutachten die Betreffenden doch freikommen, dann habe man gar keinen Grund mehr, zu verlangen, dass der 175 aufgehoben wird. Sie würden ja doch nicht Anhängern der Bestrafung das wertvolle Material geliefert. Im übrigen ist es nicht Sache des Sachverständigen, Angeklagten Gefängnis zu sparen, sondern nach bestem Wissen und Gewissen sein Gutachten abzugeben. Nicht zuungunsten, aber auch nicht zugunsten des Angeklagten'. For the background of Moll's rivalry with Hirschfeld, see Volkmar Sigusch's paper in this issue.

Although Moll doubted the objectivity of Hirschfeld's science, the two shared the opinion that the state should reform its regulations against sexual criminals, and both practised this conviction in the courtroom.

The apparent plasticity of laws protecting 'crimes and offences against morality' was further complicated by efforts geared towards societal rationalisation during the 1920s. Much like the Germans' fascination with Fordism, Taylorism, and all things 'modern', the legal interpretation of sexuality followed the general trend of privileging the role of experts in the 'scientification of society'. The presiding judge, who had formulated his moral compass during Imperial Germany, was now forced to apply it in cases where defendants embodied the new spirit of (sexual) science. The unsentimental matter-of-factness (*Sachlichkeit*) represented in the ways that many men openly and specifically described their sexual experiences might have symbolised the 'cool conduct' often associated with the *Bubikopf*-wearing 'New Woman' of the era.<sup>54</sup> Moll's views, acknowledging both changing morés and gender inversions, were thus emblematic of the times.

### Conclusion: Scientification of the Sexual and the Social

As a laboratory of modernity, the Weimar Republic marked an opportunity for sexologists to seek and solidify their authority. Their efforts were facilitated by what historian Lutz Raphael terms the 'scientification of the social', by which he refers to the trend of affording scientific experts the tasks of identifying, interpreting, managing and solving problems caused by social crisis, an extension of the influence they had been gaining since the end of the nineteenth century. Moll's work in sexual forensics illustrates the influence of this process for sexuality as a discourse.<sup>55</sup> His efforts towards reconciling the ways of understanding, means of recognition, and uses of sexual knowledge for the state represent what he believed were the appropriate functions of an expert. Conversely, Moll's expert testimonies also might be read as an attempt to reconcile sexual theories with lived sexual experiences.<sup>56</sup>

Here two tactics predominated. First, an emphasis on a defendant's innate sexuality relied upon privileging the 'biological' as the site of 'sexual truth', whereby the magistrate had to confer his own authority to the sexologist. Second, defendants' bodies and sexual histories could be read as a repository of signs, where experts reaffirmed a gendered matrix equating masculinity and heterosexuality. Men's status as fathers, husbands and war veterans seemingly demonstrated their virility. Attention to experts, and the basis of their expertise, allows us to see the cultural conditions of knowledge transfer – especially that expressed as tacit knowledge – and the social and political implications of its

<sup>54</sup> For 'Scientification of the social', see Lutz Raphael, *op. cit.* (note 6), 166–170. For the 'New Woman' and homosexuality see Marti Lybeck, 'Gender, Sexuality, and Belonging: Female Homosexuality in Germany, 1890–1933' (unpublished PhD thesis: University of Michigan, 2007), 317–488; Cornelia Osborne, 'The "New Woman" and generation conflict: perceptions of young women's sexual mores in the Weimar Republic', in Mark Roseman (ed.), *Generations in Conflict: Youth Revolt and Generation Formation in Germany, 1770–1968* (Cambridge: Cambridge University Press, 1995), 137–63.

<sup>55</sup> Michel Foucault, *History of Sexuality*, Vol. 1, *The Will to Knowledge*, Alan Sheridan (trans.) (London: Penguin, 1976).

<sup>56</sup> For a convincing counter example of Raphael's model see Harry Oosterhuis, *Stepchildren of Nature: Krafft-Ebing and the Making of Sexual Identity* (Chicago: University of Chicago Press, 2000), 11–15 and *passim*. Oosterhuis finds that Krafft-Ebing did not impose categories of identity upon his patients, but rather constructed them based upon negotiations between doctor and patient. See also his contribution to this volume.

exchange.<sup>57</sup> Judges recognised that same-sex desires were manifested and fulfilled in multifarious ways, and with the help of sexologists reconciled that sexual pleasure was not only physical but emotional. Moll, of course, had distinguished this decades prior, positing same-sex attraction as ‘contrary sexual feelings’ [*Conträre Sexualempfindung*, 1891]. Once cases reached the courtroom, judges faced a problem in formulating secular legitimisations for laws that were created and contested on religious morals. The structure of German law and the disunity concerning how to identify homosexuals forced them to concede new social logics regarding the meaning of ‘sexual’.

State officials recognised Moll’s authority and expertise, granting him nearly 10,000 marks for his conference, and regularly asking him to testify in court, where he earned hundreds more.<sup>58</sup> Although many German business and civic leaders had already rejoined the international community – often via Rotary Clubs – following the war, it was not until Moll’s conference that international scientists returned to Germany to renew their professional associations. Moll’s personal networks, as well as the state investment in his authority, facilitated this revival – each also facilitated the success of the conference, which Moll later noted, he organised ‘all on his own’.<sup>59</sup> Moll’s expertise therefore opened doors to meld democratic with scientific decision-making.

By investigating, defining and quantifying perceived social problems, the new and distinctly ‘German’ field of sexual science reflected the ‘modern’ spirit of science. During the 1920s, expanded epistemologies of justice resulted from the enhanced status of experts such as Moll and other sexologists following the First World War. The expertise of Moll and others operated in what philosopher Stephen Turner terms a ‘penumbral region of science’, where their claims received tacit consent.<sup>60</sup> While attempts to find new logics to define the legal meaning of same-sex desires marked a somewhat pessimistic rationalisation of social relations, this Janus-faced process also bred further democratisation of knowledge, and accordingly, a scientification of the sexual.

<sup>57</sup> My line of argument here follows that of Detlev J.K. Peukert, ‘Genesis of the “Final Solution” from the spirit of science’, in David Crew (ed.), *Nazism and German Society, 1933–1945* (London: Routledge, 1993), 274–99; Detlev J.K. Peukert, *The Weimar Republic: The Crisis of Classical Modernity*, Richard Deveson (trans.) (New York: Hill and Wang, 1992; first German edn, 1987). More broadly, see Latour, *op. cit.* (note 5).

<sup>58</sup> BArch R1501/111178, 21.8.1926 Sitzung, Reichsministerium des Inneren, 37–9; also, see Moll’s negotiation with state officials, beginning 26 March 1926, *ibid.*, 2–39.

<sup>59</sup> Moll, *op. cit.* (note 36), 229. In 1926, the Prussian interior ministry approved plans for a building in Berlin-Dahlem, which would be used to host eminent visiting scientists; the Harnack House opened its doors on 7 May 1929. For its history, see Kristie Macrakis, *Surviving the Swastika: Scientific Research in Nazi Germany* (New York: Oxford University Press, 1993), 30, 36–7. The context of business and civic elites is drawn from Victoria de Grazia, *Irresistible Empire: America’s Advance through Twentieth-century Europe* (Cambridge, MA: Harvard University Press, 2005), 15–74.

<sup>60</sup> Peukert, ‘Genesis’, *op. cit.* (note 57), 274–99. For the broader problem of relating technical expertise and democratic control see Stephen Turner, ‘What’s the Problem with Experts?’, *Social Studies of Science*, 31 (2001), 123–49: 141; see also Richard Wetzell, ‘Bio-Wissenschaften und Kriminalität: Eine historische Perspektive’, in Lorenz Böllinger (ed.), *Gefährliche Menschenbilder – Biowissenschaften, Gesellschaft und Kriminalität* (Baden–Baden: Nomos, 2010), 315–28.