

CRIMINAL LAW AFTER NATIONAL SOCIALISM

The Renaissance of Natural Law and the Beginnings of Penal Reform in West Germany

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The effort to achieve a comprehensive revision of the penal code had occupied German professors and practitioners of criminal law since the *Kaiserreich*.¹ But the penal reform movement and the official reform commissions, which continued all the way up to the Nazi regime's penal reform commission under Justice Minister Franz Gürtner, remained unsuccessful. This chapter investigates when penal reform reappeared on the agenda of German criminal law professors after 1945 and what shape this new penal reform discourse took. The early postwar phase of the reform discourse had little influence on the comprehensive penal reform that was eventually passed in 1969 or on the revisions of laws on sexual offenses that took place from 1969 to 1973. But this early phase is of considerable interest because it reveals the complex mix of continuity and change in a particular discipline at a moment of political rupture and because it reconstructs how a new reform discourse emerged under the influence of the experiences of the Nazi period and the social and cultural upheavals of the postwar era.

This chapter begins with a brief overview of the penal code and of the situation of academic criminal law at the universities around 1945. The next two sections examine the debates on natural law and the question of why there were no efforts to completely revise the criminal code immediately after 1945. This issue leads into the following two sections, which explore the work situation, publication venues, and professional meetings of legal academics in the field of criminal law after 1945. The final two sections trace which professors participated in the reform debates and examine the two basic positions in the reform discourse:

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retribution versus behavioral prevention (*Spezialprävention*). The conclusion seeks to explain why retributivism prevailed in the postwar reform discourse.

The Penal Code

The German penal code that was in force after 1945 was a product of the nineteenth century. Aside from a few amendments, it was identical to the Reich Penal Code of 1871.² The criminal law focused on the criminal offense; the purpose of punishment was retribution for this offense. The offender, the individual perpetrator, played no role in this conception of criminal law. The criminal code's system of punishments included *Zuchthaus* (imprisonment with hard labor), *Gefängnis* (regular prison), *Haft* (jail), *Einschliessung* (*custodia honesta*, a special form of detention for prisoners of conscience), and fines. Fines were the exclusive punishment for some offenses; for other offenses they could be imposed either instead of or in addition to a prison sentence. Despite the failure of a complete reform of the penal code, the code was significantly altered through individual amendments in the Kaiserreich and in the Weimar Republic.³ In addition to changes resulting from particular political, economic, or sociocultural events and developments,⁴ these alterations of the penal code included a 1912 amendment that reduced punishments for many offenses, the Juvenile Justice Act of 1923,⁵ as well as the expansion of the use of monetary fines in 1923–1924,⁶ which already by 1911 accounted for more than half of all punishments. Around the turn of the century, suspended sentencing was introduced through administrative ordinances in Prussia and several other German states in the form of a “conditional pardon” based on the right of pardon of each state's ruler.⁷ (Suspended sentencing was not integrated into the penal code until 1953.)⁸ Shortly after the National Socialists came to power, a further amendment introduced “Preventive and Corrective Measures” including indefinite detention for “habitual criminals,” internment in an asylum for mentally abnormal offenders or in a workhouse for asocial offenders⁹ as well as castration for sex offenders, which was removed from the penal code after 1945 by the Allies.¹⁰

In terms of penal theory, the Reich Penal Code was based on a combination of retributive justice and general deterrence: general deterrence through just retribution.¹¹ Since the late nineteenth century, the debates about reforming the criminal code centered around three elements of punishment: retribution, general deterrence (*Generalprävention*), and specific (i.e., individual) deterrence (*Spezialprävention*). In the discourse on criminal law, the concept of retribution was usually derived from Kant and Hegel's theories of absolute punishment.¹² But whereas authors who have studied Kant and Hegel's philosophies of law have offered nuanced interpretations,¹³ in the mainstream retributivist criminal law discourse Kant and Hegel were simply placeholders for absolute theories of punishment, at the center of which stood retribution.¹⁴

The Situation of Academic Criminal Law in 1945

The situation of the German legal profession after the National Socialist regime was extremely difficult. The profession's adaptation to the Nazi state without any resistance, its compliant support of the regime through judicial verdicts that flouted the rule of law, the willing exclusion of Jewish jurists, and many other misdeeds had utterly compromised the entire profession. This was especially true of criminal law, which of all the areas of the law was capable of the greatest interference in citizens' lives.¹⁵ The most infamous example here was the People's Court (*Volksgerichtshof*), which can only be described as an "instrument of terror."¹⁶ The criminal law professor and legal historian Eberhard Schmidt therefore characterized the situation in drastic terms: "With the collapse of 1945, what remained of the field criminal law was spiritual rubble."¹⁷

After 1945 both professors and practitioners of criminal law faced the difficulty of simultaneously dealing with the violent crimes of the National Socialists in criminal trials, reflecting on the Nazi regime's instrumentalization of criminal justice and searching for a new foundation for their discipline. Their debates on these topics took place not only in the journals of the legal profession, which started to appear again or were newly founded, but also in general-circulation newspapers and magazines, which were appearing in unprecedented numbers in the early postwar years.¹⁸ In 1947, for example, journals such as *Forum* and *Die Kirche in der Welt* published articles on "Criminal Law and Culture" and "Justice and Legal Certainty"; an essay on the "Removal of National Socialist Interference in Criminal Justice" appeared in *Geist und Tat*, a Hamburg monthly for "Law, Freedom, and Culture"; and a key text by Gustav Radbruch on the "Renewal of Law" was published in the renowned journal *Die Wandlung*.¹⁹ Such articles were sometimes supplemented by autobiographically inspired pieces on the desolate situation of the prison system.²⁰ These articles and their dissemination in prominent periodicals reveal the widespread interest in the problems of criminal law and the penal system after 1945. The discourse among jurists took place in the newly founded professional journals, initially the *Süddeutsche Juristenzeitung* (*SJZ*) and the *Deutsche Rechts-Zeitschrift* (*DRZ*). The *SJZ* was licensed for the American zone of occupation in 1946, and the *DRZ* for the French zone.²¹

The Critique of Legal Positivism and the Renaissance of Natural Law

One of the first professors of criminal law to address the issue of law under National Socialism after 1945 was Gustav Radbruch, who had been a Reich Justice Minister and prominent penal reformer during the Weimar Republic.²² In a much-cited article with the programmatic title "Legal Injustice and Supra-legal

Justice,” Radbruch assigned the primary blame for judicial compliance with Nazism to legal positivism (*Gesetzespositivismus*). Legal positivism, Radbruch argued, “with its conviction that ‘law is law’ rendered the German legal profession defenseless against laws of arbitrary and criminal content.”²³ Although a comprehensive analysis and critique of Radbruch’s “positivism thesis” cannot be pursued here, it should be noted that legal-historical studies have identified numerous cases in which judges handed down sentences that went beyond the National Socialist laws and many instances of legal academics interpreting the existing laws very broadly, thus demonstrating that legal positivism actually played little role in Nazi jurisprudence.²⁴ In the postwar era, however, Radbruch’s thesis had considerable appeal because it offered “easy exoneration” for both legal practitioners and legal academics.²⁵ After all, a legal theory could hardly be put in the dock for criminal prosecution; and blaming a theory also conveniently obviated questions about personal responsibility for legal verdicts during the Nazi era. The exoneration was made still more effective by the fact that Radbruch himself could not be accused of wanting to exculpate Nazi justice. As a staunch democrat Radbruch was above suspicion politically and in no way tainted by National Socialism. He had lost his university chair immediately after the Nazi seizure of power. In addition, Radbruch himself had been considered a representative of legal positivism during the Weimar Republic, which gave his critique special validity.²⁶

Radbruch thought that “overcoming positivism”²⁷ could represent a new beginning even though, unlike other jurists, he shied away from a simple endorsement of natural law and timeless legal norms.²⁸ Instead, he situated law in a field of tension between legal certainty (*Rechtssicherheit*), justice (*Gerechtigkeit*), and expedience (*Zweckmäßigkeit*), with an emphasis on the first two aspects:

The conflict between justice and legal certainty [*Rechtssicherheit*] should be resolved by granting priority to the existing positive law that is secured by statutes and power even when its content is unjust and inexpedient [*unzweckmäßig*], unless the contradiction between the positive law and justice reaches such an unbearable extent that the law, as “incorrect law” [*unrichtiges Recht*] must give way to justice. It is impossible to draw a sharper line between cases of legal injustice [*gesetzlichen Unrechts*] and laws that remain valid despite their incorrect content. Another boundary, however, can be drawn quite sharply: Where justice is not even striven for, where equality, which constitutes the core of justice, is intentionally denied in the establishment of positive laws, in those cases the law is not only “incorrect law” but lacks the character of a legal norm [*Rechtsnatur*] altogether. For law, even positive law, cannot be defined as anything other than an order and statute whose very purpose is to serve justice.²⁹

Despite his skepticism regarding natural law,³⁰ Radbruch stood at the beginning of the “renaissance of natural law” that took place after 1945; many authors explicitly referred to his arguments.³¹ The early postwar years saw the publication of numerous essays and books on natural law that resolved the conflict of legal

positivism versus natural law in favor of the latter. Participants in this discussion included jurists—not only from the field of criminal law—as well as theologians and philosophers.³² Although natural law was not always discussed with reference to a Christian canon of values—Radbruch himself did not make such references—religious arguments were common. The reference to Christian values was appealing given the prominent postwar role of both the Protestant and Catholic Churches as allegedly untainted institutions.³³ The influence of Christian traditions, especially Catholic natural law, steered the postwar jurisprudence that was based on natural law arguments in a conservative direction, which was especially apparent in the decisions of the *Bundesgerichtshof*, the highest German court, in the 1950s.³⁴

In the immediate postwar years, natural law arguments served to condemn and reverse Nazi injustice. In contrast to many esoteric discussions in the realm of criminal jurisprudence (*Strafrechtsdogmatik*), the natural law debate was not without practical relevance. Legal arguments referencing natural law played an important role in the judicial practice of German criminal courts, especially in court decisions regarding Nazi justice and Nazi crimes. As the West German legal historian Winfried Hassemer has written, in the postwar years “criminal law jurists faced a problem of natural law that could not to be evaded: . . . [during the Nazi period] judges had applied the criminal laws, which had been established in a formally valid manner, and the result was a mockery of proportionality, fairness, and human dignity.”³⁵ A legal reckoning with National Socialism—however inadequate it may be considered in retrospect—probably could not have taken place without resorting to standards based on natural law. This was not only true of the Nuremberg Trials, but also for many smaller trials, for example, trials in denunciation or desertion cases, and was reflected in the judgments of many German courts.

Among professors of criminal law, however, not everyone drew on natural law arguments. At one of the first postwar meetings of German jurists, in 1947, for instance, Hellmuth von Weber of the University of Bonn opposed the idea that individual judges should check criminal laws against a natural law standard.³⁶ Even Karl Peters, one of very few Catholic professors of criminal law, who was closely associated with Catholic moral teachings, represented more of a legal positivist view, arguing that the only time to refuse to obey a law was when “an overt, grave violation of natural law or the supernatural order is present” or “when the law is consciously driven by considerations that are foreign to the law.”³⁷ Radbruch had supported a similar position, even if both differed in their terminology.

In evaluating the postwar years, one would have to agree with Dieter Simon’s assessment that both the law faculties and the courts “made their way back to natural law.”³⁸ With the exception of the jurisprudence of the *Bundesgerichtshof*, however, it is not clear how long the sway of natural law over legal academics and

legal practitioners lasted. The contemporary evidence is contradictory. Whereas as late as 1955 criminal law professor Thomas Würtenberger still claimed that “after overcoming legal positivist inhibitions and prejudices, natural law presently dominates not only the theory of criminal law but also its practice,”³⁹ two years earlier his colleague Hans Welzel had already argued the contrary: “A relatively rapid disenchantment has spread. The enthusiasm for natural law has been replaced by a renewed turn toward positive law.” Although he himself was a critic of natural law, Welzel warned: “Seven years after the collapse, we find ourselves . . . in severe danger of sliding back into an extreme legal positivism [*Gesetzespositivismus*].”⁴⁰

These differing judgments regarding the duration of the postwar natural law renaissance may be explained by the differing sources used to support the two arguments. Whereas Würtenberger’s thesis is supported by a wealth of monographs and essays on the subject of natural law and legal positivism published in this period, Welzel’s statement referred to a decision by the Oberlandesgericht (Superior District Court) Hamburg and to a decree of the British military government, both of which asserted the validity of a law even when it contradicted supra-legal principles.⁴¹ Even the Bundesgerichtshof decision of 1954 regarding *Verlobten-Kuppelei*, which declared sexual intercourse between adults who were engaged to be indecent, raises doubts about the long-term effects of the renaissance of natural law.⁴² For although the ruling’s natural law argumentation appears to support Würtenberger’s position, the decision met with massive criticism among professors of criminal law; only the Catholic Karl Peters praised the decision.⁴³

“Purging” Criminal Law of Nazi Provisions or Comprehensive Reform?

Parallel to the natural law debate, the immediate postwar period faced the issue of removing the specifically National Socialist influences and formulations in criminal law. The issues involved ranged from the removal of specific Nazi terms such as *gesundes Volksempfinden* (healthy popular sentiment)⁴⁴ and the repeal of clearly National Socialist penal laws such as those regarding *Rassenschande* (race defilement) to the removal of newly introduced penal sanctions such as castration⁴⁵ and some highly controversial subjects. The latter included the question of whether the 1935 changes made to the penal code’s article 175, which aggravated the prosecution and punishment of male homosexuality, were National Socialist in nature or well within the scope of similar pre-1933 legislation.⁴⁶

The initial legal basis for changes of the penal code was provided by the laws issued by the Allied Control Council and by the decrees of the military governments in the individual zones of occupation.⁴⁷ The basic principles for this

process had been laid down by the Potsdam Conference, which had decreed “that the legal system shall be purified in accordance with the basic principles of democracy, equality before the law, and equal rights for all citizens, without regard to race, nationality, or religion.”⁴⁸ Implementing this decision, the military governments restricted the imposition of the death penalty and made major changes in the penal code in several comprehensive laws.⁴⁹ In West Germany, this process continued with the permanent repeal of the death penalty in the Grundgesetz (Basic Law) and further far-reaching modifications of the criminal law in a series of laws amending the criminal code, the so-called *Strafrechtsänderungsgesetze* (StrÄG), starting in 1951. These laws, however, were not limited to purging the penal code of Nazi elements. Through new definitions of political offenses (1. StrÄG of 30 August 1951) the new laws already reflected the influence of the Cold War, and by introducing suspended sentences on probation (3. StrÄG of 4 August 1953), they embarked on new paths in penal policy.⁵⁰

Given the numerous attempts at penal reform from the Kaiserreich through the Nazi era and the considerable number of changes to the penal code that were needed in the postwar period, the question arises of why a fundamental reform of criminal law was not attempted early on after the war. There were, however, good arguments against such an approach, including the division of the country into different zones of occupation, the lack of a sovereign lawmaker, as well as the chaotic economic and social conditions of the postwar years. In 1946, criminal law professor Eberhard Schmidt regarded the “revision of the penal system” as “irrefutably necessary,” but doubted whether this could be realized at that time:

Here we see quite clearly that a penal reform that strives for justice and effectiveness in penal policy requires orderly state, social, and moral conditions. . . . Only when we emerge from the current chaos, when we live in orderly social conditions, and when, last but not least, the individual is given back his moral center [*sittliche Selbstbestimmung*], and a fundamental recognition of human dignity and human rights has finally taken place, can we make an attempt at a just and rational penal reform with any hope of success.⁵¹

Especially Germany’s division into zones of occupation and their later transformation into two states appeared to be detrimental to a fundamental penal reform. Richard Lange, one of the first professors of criminal law to address the issue of penal reform after 1945, formulated this clearly in 1949: “In the interest of the unity of the Reich, one will certainly refrain from intervening in the criminal code. Our present situation does not call for comprehensive legislation in this area.”⁵² Despite Lange’s rejection of a comprehensive reform, he was not satisfied with the status quo and did not content himself with simply purging the criminal code of Nazi influences. In his revision of the criminal code for Thuringia in 1945, he had called for major changes by introducing “indefinite sentencing” for “dangerous habitual offenders” instead of increased penalties or

preventive detention.⁵³ By changing the order of the “Maßregeln zur Sicherung und Besserung” (Measures for Prevention and Correction) of the 1933 Law on Habitual Criminals to “Maßregeln der Besserung und Sicherung,” he sought to give the idea of rehabilitation priority over the protection of society.⁵⁴

The legal academics who viewed the chances of fundamental penal reform with skepticism in the postwar years had one dissenter, Karl Peters. Already in 1947, Peters anticipated that work on reforms would soon begin and called for the formulation of Catholic interests for this project: “It is our task to grapple with the numerous problems early enough so that we can make our contribution to the revision of criminal law when the time comes.”⁵⁵

The Situation of the Criminal Law Professors after 1945

The question of why only a few professors of criminal law tackled the issue of a comprehensive reform of criminal law in the immediate postwar years requires an examination of their circumstances of work and life, a classic approach in the sociology of knowledge. In 1946 Eberhard Schmidt had spoken of “orderly social circumstances” and the overcoming of the “present chaos” as preconditions for taking up the project of reforming the penal code. The circumstances of the professors, by contrast, were characterized by uncertainties in many respects, in some cases into the 1950s. Leaving aside the precarious socioeconomic conditions of the postwar era (regarding food and housing), which were shared by the majority of the population,⁵⁶ I will focus on the specific situation of the legal academics regarding their opportunities and conditions of work. University professors are members of an extremely specialized profession who can practice their profession only in a few places. In 1937, these were the twenty-three universities in the territory of the old Reich, as well as the German University in Prague, to which after 1938 the three Austrian universities in Graz, Innsbruck, and Vienna were added. As a result of Nazi occupations, the universities in Posen and Strasbourg also fell under German authority, so that the “German University Guide” of 1941 counted a total of twenty-nine universities with law faculties.⁵⁷

After 1945 the number of work opportunities was drastically reduced.⁵⁸ Prague, Breslau, Königsberg, Posen, and Strasbourg returned to the formerly occupied countries or ended up as part of other nations in the wake of the reorganization of Europe. In Austria, the German university teachers had to vacate their positions. In the territory occupied by the Soviets (SBZ) and the later German Democratic Republic (GDR), the law faculties in Greifswald⁵⁹ and Rostock⁶⁰ were closed, and many law professors from the other universities emigrated to the western zones. All in all, the universities in the western zones of occupation absorbed nearly all of the professors of criminal law from the rest of the universities listed in 1941. These included the universities of East Berlin, Greifswald,

Halle, Jena, Leipzig, and Rostock; the Austrian universities of Graz, Innsbruck, and Vienna; and the universities of Königsberg, Breslau, Posen, Strasbourg, and the German University in Prague.

For professors of criminal law, this meant that the number of potential employers was reduced from twenty-nine to initially fourteen.⁶¹ Through the founding of new universities, the University of Mainz in 1946 and the Free University of Berlin in 1948, the number of universities in West Germany and West Berlin increased to a total of sixteen.⁶² German university professors also taught at the University of Saarbrücken, founded in 1948, which until the incorporation of the Saar into the Federal Republic in 1957 was situated on French territory.

Most of the universities in the three western zones of occupation were affected by war damage.⁶³ Only the universities of Heidelberg⁶⁴ and Tübingen⁶⁵ made it through the war nearly unscathed; the universities in Erlangen⁶⁶ and Göttingen suffered only minor damage. In the last months of the war and the immediate postwar period, the University of Göttingen became the gathering place for professors from the eastern universities,⁶⁷ while Strasbourg University and the law, political science, and economics faculties from Freiburg and Heidelberg were moved to Tübingen.⁶⁸ All other universities had suffered severe damage.⁶⁹ Despite the damage and the cuts in personnel, the universities returned to teaching relatively quickly, some as soon as the Fall of 1945.⁷⁰

But another factor added to the uncertainty of professors: denazification. The military defeat of Nazi Germany and the division of the country into four zones of occupation resulted in denazification procedures that obliged university teachers to undergo individual examinations of their past during the Third Reich. Nearly all professors had to submit to this scrutiny of their political and academic careers during National Socialism. The guidelines for these procedures, however, showed significant differences between the occupation zones;⁷¹ moreover, they varied from university to university within the same zone, and, in fact, depended largely on the local military government and even the individual university officer (*Universitätsoffizier*).⁷² In general, it can be said that the purges of the university teaching corps were most radical in the Soviet zone of occupation, followed by those in the American zone. In the British and the French zones, the approach of the occupation authorities was more moderate and more strongly shaped by pragmatic considerations.⁷³

For one criminal law professor, Karl Siegert, the end of the Nazi regime spelled the end of his career.⁷⁴ For the majority of the professors of criminal law, however, denazification meant only a short interruption in their career. While many could return to their positions after a few months, for others the denazification procedure lasted between one and three years. For professors like Edmund Mezger (Munich) and Gotthold Bohne (Cologne), denazification brought only relatively short interruptions of their university teaching; Mezger, for example, was reinstated in 1948. Hamburg criminal law professor Rudolf

Sieverts was detained by the British occupation authority in 1945,⁷⁵ but soon returned to his position. A few professors had to wait longer until they were able to return to the universities in the wake of the so-called “131-er” Law of April 1951, which facilitated the reinstatement of former civil servants: among these were Georg Dahm and Friedrich Schaffstein (both of whom had been militant National Socialists from the very beginning of the Third Reich), as well as Heinrich Henkel and Hans-Jürgen Bruns.⁷⁶

Other professors, such as Thomas Würtenberger, changed universities when their denazification did not go well for them; Würtenberger moved from Erlangen to Mainz.⁷⁷ These professors exploited the varying intensity with which the occupying powers pursued denazification. Whereas the Americans, in whose zone Erlangen was located, carried out the purges with great seriousness, the French were more lenient. Würtenberger was not the only one to find a haven in the French zone of occupation after 1945; Ulrich Stock, who was dismissed from his Marburg post in 1945, joined the Saarbrücken faculty in 1948.⁷⁸

If one looks at specific universities and the biographies of individual professors, it becomes clear that denazification certainly had a share in producing discontinuities in university faculties. For the early postwar period, the high fluctuation of this group is particularly apparent. Their lives, like those of the population as a whole, were characterized by a high degree of mobility.⁷⁹ Only a few biographies show no change of university in the immediate postwar years. And in contrast to “normal” times, these moves to a different university were not motivated by offers of a famous university chair or a prestigious university.⁸⁰ Such career moves become apparent again only in the mid-1950s at the earliest, when, to take Thomas Würtenberger as an example, he left his professorship in Mainz to take up a university chair in Freiburg, which he retained for the next eighteen years until he was granted emeritus status.⁸¹

The tight employment market for law professors was somewhat improved by the establishment of new universities, retirements, and the dismissal or suspension of a number of professors in the denazification process. We should also note that the number of law professors had declined in the Nazi era, and that in the last years of the war law faculties had further contracted as professors were drafted into military service, died, or became prisoners of war. After the war, there was therefore increased demand for law professors, especially at the universities in the western zones.

Nevertheless, from the perspective of the criminal law professors, the postwar years were a time of extreme uncertainty and high mobility under difficult conditions. Professors who arrived in the western zones of occupation from universities that ended up in the Soviet zone or fell to other states in the wake of territorial reorganization could not usually hope for a seamless continuation of their careers. To be sure, Eberhard Schmidt, who left Leipzig, immediately received a professorship in Göttingen because the dismissal of Karl Siegert left one of the

two chairs in criminal law vacant.⁸² But Schmidt lived in rather makeshift conditions in Göttingen, while his family remained in the Soviet zone.⁸³ His colleague Paul Bockelmann, formerly a full professor in Königsberg, had to be content with adjunct teaching in Göttingen from 1946 to 1949, until he was appointed to a full professorship there after Eberhard Schmidt's move to Heidelberg.⁸⁴ A similar trajectory was shared by Friedrich Schaffstein, who had much greater difficulties with the denazification process (for good reason) and therefore did not get an adjunct appointment at Göttingen until 1952; within two years, however, he succeeded Hans Welzel as full professor after Welzel had moved to Bonn.⁸⁵

Although university professors were certainly no worse off than the rest of the population in terms of their living and working conditions, postwar conditions were subjectively experienced as particularly difficult by this highly privileged social group, most of whom, certainly among the law professors, had been born into the propertied and educated middle classes. These social-psychological circumstances were, of course, not conducive to a return to penal reform debates. The top priorities for most law professors, aside from surviving the immediate postwar period, were the continuation of their careers, the restoration of their former workplaces, the replacement of the law libraries and teaching materials, and the building of new university structures.

Denazification and the control exercised by the occupying powers also led to a depoliticization of university professors in the early postwar years. Especially for jurists the early postwar motto was: "Whatever you do, don't stand out!" Concerned about uncertain career prospects, handicapped by denazification proceedings, and limited by precarious institutional settings, most did not consider it advisable to attract attention through bold pronouncements on fundamental policy matters such as the shaping of the future criminal law. Those who did so were usually among those who were not compromised by association with the Nazi regime (at least in the postwar judgment of their colleagues), such as Richard Lange and Eberhard Schmidt, or convinced democrats who had passed through the Nazi period completely untainted, such as Gustav Radbruch. Despite these exceptions, the work of criminal law professors after 1945 was generally characterized by a retreat from politics and a turn to "pure" scholarship. This was true, of course, not only for the academic field of criminal law, but for professors and the universities in general. After years of the "political university" and politicized scholarship under the Nazi regime, this turn away from politics in the academic field of criminal law was reflected in a preference for issues of jurisprudence and legal philosophy over questions of penal policy. This escapism often took the form of philosophical meditations on the meaning of punishment, justice, or the gap between *ought* and *is*, all conducted in the academic style of humanist education. Work in this vein was complemented by legal-historical studies, through which politically compromised professors of criminal law reentered the academic conversation and sought to rehabilitate themselves; witness, for example, Friedrich

Schaffstein's 1952 study of Wilhelm von Humboldt and his 1954 study "The European Academic Field of Criminal Law [*europäische Strafrechtswissenschaft*] in the Age of Enlightenment."

Publication Venues and Professional Meetings After 1945

In addition to the changes in the working and living conditions after 1945, the resumption of a discourse of penal reform was hampered by the scarcity of professional journals and the initial lack of opportunities for meeting at conferences. There were few professional venues at which the isolation of the individual scholar could be overcome and opinions shaped. Moreover, the first postwar meetings of German jurists were held under the aegis of the occupying powers.

Thematically, the professional meetings of jurists after 1945—held mostly for the individual zones—primarily discussed problems of judicial practice and the organization of the courts.⁸⁶ After the Association of German Jurists (Deutscher Juristentag) assembled again in 1949, the first meeting of its criminal law section, in 1950, addressed offenses related to the protection of the state. Not until the following year was the revision of the criminal code placed on the Juristentag's agenda.⁸⁷ The professors of criminal law did not resume their own professional meetings until 1952.⁸⁸

The most important media for the criminal law professors' reform discourse were the legal journals. After the end of the occupying powers' licensing policy, the number of legal periodicals increased in the late 1940s and the early 1950s. The *Süddeutsche Juristenzeitung* (SJZ) and the *Deutsche Rechts-Zeitschrift* (DRZ),⁸⁹ licensed in 1946 for the American and French zones, respectively, fused in 1951 to become the *Juristen-Zeitung* (JZ).⁹⁰ In the same year, the venerable *Zeitschrift für die gesamte Strafrechtswissenschaft* (ZStW), founded by Franz von Liszt in 1881, began appearing again. *Goltdammer's Archiv für Strafrecht* (GA) appeared again in 1953.⁹¹ The *Neue Juristische Wochenschrift* (NJW) and the *Monatsschrift für Deutsches Recht* (MDR)⁹² had been on the market since 1947. The *Juristische Rundschau* (JR) also began publication in 1947, and the *Deutsche Richterzeitung* (DRiZ) since 1949. The *Monatsschrift für Kriminologie und Strafrechtsreform* (MschrKrim), whose changing name reflected the shifting priorities of criminological thought—from 1904 to 1936 it was titled *Monatsschrift für Kriminalpsychologie und Strafrechtsreform*, from 1936 to 1945 *Monatsschrift für Kriminalbiologie und Strafrechtsreform*—resumed publication in 1951; *Kriminalistik* resumed publication already in 1946, and the *Archiv für Kriminologie* in 1955.⁹³ The *Zeitschrift für Strafvollzug*, a newly created periodical that did not pick up the tradition of the *Blätter für Gefängniskunde*,⁹⁴ appeared for the first time in 1950.

Criminal law professors published mainly in the *Zeitschrift für die gesamte Strafrechtswissenschaft*, which always printed the papers presented at their annual

meetings, in *Goldammer's Archiv*, the *Juristen-Zeitung*, and the *Neue Juristische Wochenschrift*. Occasionally, articles on criminal law appeared in the *Juristische Rundschau*, the *Monatsschrift für Deutsches Recht*, and the *Deutsche Richterzeitung*. The *Zeitschrift für Strafvollzug* and the *Monatsschrift für Kriminologie und Strafrechtsreform* were specialized publications that published the work of criminal law professors interested in prison reform (*Zeitschrift für Strafvollzug*) or engaged with criminological research (*Monatsschrift*).⁹⁵ Essays or short contributions also appeared in general-interest magazines or church-affiliated publications such as the Catholic *Caritas* or the Protestant *Radius*.

Who published in which journal had to do with the composition of editorial boards or agreements to serve as a regular contributor for a certain journal. In 1955, for example, almost all of the criminal law professors who served on the official Commission on Criminal Law were members of the editorial board of the *Zeitschrift für die gesamte Strafrechtswissenschaft*: Paul Bockelmann, Wilhelm Gallas, Hans-Heinrich Jescheck, Richard Lange, Eberhard Schmidt, and Hans Welzel all served on both capacities; only commission members Rudolf Sieverts and Edmund Mezger were missing from the editorial board. Sieverts served as co-editor of the *Monatsschrift für Kriminologie und Strafrechtsreform*, and Mezger headed the reconstituted Kriminalbiologische Gesellschaft (Criminal-Biological Society).⁹⁶ In addition to the German periodicals, German legal academics also used the journals of other German-speaking countries for their publications. In Austria, these consisted of the *Österreichische Juristenzeitung* and the *Juristische Blätter*. In Switzerland, the most important was the *Schweizerische Zeitschrift für Strafrecht*, which in the Nazi era had given emigrated German law professors Gustav Radbruch and Wolfgang Mittermaier the opportunity to publish.

The *Monatsschrift für Kriminologie und Strafrechtsreform*, the only journal whose title included the words “penal reform,” was neither a preferred forum for professors of criminal law, nor were its articles primarily focused on penal reform. During the 1950s, the *Monatsschrift* featured only a handful essays by professors of criminal law. Even Rudolf Sieverts, who co-edited the journal together with Hans Gruhle, professor for psychiatry in Bonn, published only one article and an obituary (1959) there. Of the fifty articles published in the *Monatsschrift* from 1954 to 1957 only 10 percent were written by professors of criminal law; a further 16 percent by other jurists (including judges and junior scholars); and 18 percent by prison psychologists, prison clerics, and other prison staff. The largest share, 56 percent, was comprised of contributions from medical doctors, especially psychiatrists (twenty-eight articles).⁹⁷ Only a few of the contributions addressed the issue of penal reform; the overwhelming majority of articles were devoted to issues of criminology and criminal psychology, the prison system, and juvenile justice. This analysis therefore confirms how little interest criminal law professors showed in criminological issues compared to their interest in jurisprudence and legal philosophy.

The Participants in the Postwar Discourse on Penal Reform

From the 1880s through the Nazi regime, penal reform had been a central topic for German professors of criminal law. Although one might have thought that, after the initial restrictions of the postwar era had passed, criminal law professors would have been eager to resume the debate in the 1950s, in fact very few did so. Of the about thirty-five professors of criminal law who taught at West German universities (or continued to publish as emeriti), only a tiny minority published articles that addressed central issues of penal reform. If the others made any contributions at all, they only addressed partial aspects of reform.⁹⁸ The minority of professors who took an active part in the reform discourse included some members of the official Commission on Criminal Law which began its work in 1954 (Hans-Heinrich Jescheck, Richard Lange, Eberhard Schmidt), but also Karl Peters, whose contributions appeared in legal journals as well as publications associated with the Catholic Church, and Thomas Würtenberger, whose articles often focused on the system of penal sanctions and the prison system. Paul Bockelmann, Karl Alfred Hall, Wilhelm Sauer, and Walter Sax also made some contributions; Karl Engisch and Wilhelm Gallas published the reports they prepared for the Commission on Criminal Law.

Those professors of criminal law who experienced a longer interruption in their careers as a result of denazification made almost no contributions regarding penal reform. Ulrich Stock published a single essay on reform in 1952,⁹⁹ and Hans-Jürgen Bruns commented on suspended sentencing in 1956 and on “measures of correction” in 1959.¹⁰⁰ Georg Dahm, a prominent voice for an explicitly National-Socialist approach to penal reform during the Third Reich, did not publish anything on penal reform after the war, whereas his comrade-in-arms Friedrich Schaffstein wrote primarily on juvenile justice after the war; not until 1963 did Schaffstein publish a piece on penal reform.¹⁰¹ Karl Siegert, the only criminal law professor not to receive a professorship after 1945, published nothing on penal reform; neither did Heinrich Henkel or Erich Schwinge.

The enumeration of professors with a significant Nazi past who kept out of the postwar penal reform debate should not give the impression that those who actively participated in the debate after the war had escaped the Nazi period politically untainted. Rather, the Nazi pasts of those who participated in the debate were characterized by two traits: first, they had not been among the regime’s favorites who were appointed to professorships in 1933–1934; second, their behavior during the Third Reich had been at least somewhat ambivalent—in other words, political conformity in one area (for example, university politics) had coexisted with nonconformist behavior in another area (such as publications or private contacts with expelled colleagues).

The discussions in the academic field of criminal law did not, of course, center exclusively on penal reform. Professors of criminal law commented on

amendments to the penal code and published monographs and articles on general and specialized topics in criminal law, textbooks, and commentaries on judicial decisions. In the area of criminal jurisprudence, the 1950s and 1960s were dominated by the debate about the “finale Handlungslehre” formulated by Hans Welzel, which offered a new approach to analyzing and judging the criminal act and the degree of guilt associated with it.¹⁰² The discussion regarding natural law versus legal positivism was another area of emphasis.

The Penal Reform Debate: Retribution versus Individualized Prevention

The criminal law professors’ discourse on penal reform was characterized by two competing positions. The first position saw the primary purpose of criminal justice in retribution (*Vergeltung*), to which all other functions of punishment were subordinated. The opposing position stressed *Spezialprävention*, individualized behavioral prevention, that is, preventing the individual perpetrator from offending again in the future. This position focused on rehabilitation, the system of penal sanctions, and the prison system. To be sure, the developments examined in this chapter so far—the post-1945 debate on natural law, the turn toward issues of legal philosophy, and the depoliticization of the university teachers—were all more suitable to defending the first position. Nevertheless, it should be noted that at least initially, the postwar penal reform discourse was fairly open regarding the future direction of reform.

The academic community’s uncertainty about the future direction of criminal law reform can be illustrated by a lecture on the system of penal sanctions delivered by Karl Alfred Hall, professor of criminal law at Marburg, at the 1952 meeting of criminal law professors. In it Hall posed a number of central questions, including:¹⁰³ Should criminal law place more emphasis on retribution, general deterrence, or individualized behavioral prevention? How should the system of penal sanctions be reformed? Should the *Zuchthausstrafe* (imprisonment with hard labor) be retained as a distinct sanction, or should it be merged with the regular prison sentence (*Gefängnisstrafe*) in a unified prison sentence? How should the problem of short-term punishments be addressed in the future? Hall’s answers to these questions were contradictory and logically inconsistent, as though he sought to keep open as many options as possible. The distinction between *Zuchthaus* and *Gefängnis*, for instance, was strongly criticized by proponents of individualized behavioral prevention because they regarded the *Zuchthausstrafe* as stigmatizing and hence hostile to rehabilitation.¹⁰⁴ But Hall’s position on this issue was contradictory: even though he argued that the administration of both kinds of prison sentences should be unified, he also insisted that the distinction

between *Zuchthaus* and *Gefängnis* should be legally maintained “for reasons of general deterrence.”¹⁰⁵

Regarding short-term prison sentences, Hall suggested setting three months as a minimum.¹⁰⁶ Prison terms under three months, he argued, should be replaced by fines, suspended sentences with probation (*StrafAussetzung zur Bewährung*), or special penalties such as suspending a driver’s license or banning someone from a profession.¹⁰⁷ But although the replacement of short prison terms by alternative sanctions was a key demand of those who championed *Spezialprävention*, Hall’s argumentation was mainly retributivist:

Adult penal law is focused on the criminal offense [*Tatstrafrecht*]. Punishment is first and foremost retribution [*Vergeltung*], atonement [*Sühne*]. Justice takes priority over purposiveness [*Zweckmäßigkeit*]. . . . A purpose is externally ascribed to punishment. The purposes of deterrence, rehabilitation, and prevention can be achieved or not achieved. They do not affect the essence [*Wesen*] of punishment. . . . From the perspective of the legal community the punishment is retribution. From the perspective of the perpetrator the punishment is atonement.¹⁰⁸

Even in his legitimation of probationary sentences, Hall referred to the retributivist idea of atonement (*Sühne*). “Atonement through probation” was the motto.¹⁰⁹ “The perpetrator atones for his deed by proving himself on the front of life.”¹¹⁰ Failure to prove himself did not necessarily mean committing another crime: “It suffices, for example, if he continues to be refractory [*renitent*], if he violates the ban on visits to the tavern, seeks out bad company, and so on.”¹¹¹ Here, the metaphysical idea of retribution was joined by an agenda of regulating behavior that was not limited to legal violations but sought to impose discipline. The proposed bans on tavern visits and “bad company” were indicative of anachronistic ideas about the “dangerous classes.” Thus even though the content of Hall’s proposals seemed to point in the direction of individualized behavioral prevention, the terminology he used showed his proximity to retributivism. In sum, his 1952 lecture marked the beginning of the retributivist discourse of penal reform that would characterize the official Commission on Criminal Law (*Große Strafrechtskommission*) convened in 1954.¹¹²

The general discourse on penal reform as well as the official Commission on Criminal Law were dominated by the proponents of retributive justice. This assessment is supported not only by the predominance of retributivist publications, but also by the lack of opposition from the silent majority of criminal law professors who did not take part in the reform discourse. Retributive justice was based on the idea of nondeterminism, in other words, the notion of an individual free will that is not determined by genetics, environment, or upbringing. Central concepts for this position were justice, retribution, atonement, and value system (*Wertordnung*). Its proponents drew connections to the values of freedom and

human dignity enshrined in the West German Basic Law (*Grundgesetz*) and to the rule of law (*Rechtsstaatsidee*).

One of the most active proponents of retributivism in the postwar penal reform debate was Richard Lange, professor of criminal law in Cologne, who was well positioned to influence the debate through his dual role as a member of the official Commission on Criminal Law and editor-in-chief (*Schriftleiter*) of Germany's premier criminal law journal, the *Zeitschrift für die gesamte Strafrechtswissenschaft*, from 1953 to 1968. Lange claimed that the ideal of retributive justice could be justified empirically, based on criminological studies, "historical experiences," and the reception of work in other disciplines such as psychology.¹¹³ His reception of psychological research was, however, highly selective: Lange did not draw on the Freudian positions that would have contradicted his arguments, but on the Austrian psychologist Viktor Frankl, whose works, he argued, proved the indeterminate nature of man. Despite these limitations, Lange demonstrated a certain openness to other disciplines and to criminological research, which was highly unusual among his colleagues.

The arguments of the proponents of the retribution paradigm were characterized by a tendency to appeal to higher philosophical principles and to issue categorical statements, for example, regarding anthropological definitions of the "image of man" (*Menschenbild*) that supposedly lay at the root of criminal justice and penal reform. By the early 1960s, at least three studies by criminal law professors had appeared that were exclusively devoted to the image of man, not including numerous considerations of this issue in other essays and monographs.¹¹⁴ In lectures, too, "the image of man and penal reform" was a popular subject, as demonstrated by a lecture with this title that Richard Lange delivered to the Society of Hamburg Jurists (*Gesellschaft Hamburger Juristen*) in 1962.¹¹⁵ The image of man that was expounded in these lectures and publications was explicitly based on the West German constitution, the *Grundgesetz* (Basic Law). The Basic Law, it was argued, saw man as free and self-determined; therefore, it was deduced, man possessed free will and was morally and legally responsible for his actions; there was no room for determinism. For the retributivists, the Basic Law's injunction to respect and protect "human dignity" was evidence that the Basic Law rejected a criminal justice system based on either *Spezialprävention* or *Generalprävention*. Individual preventive measures such as rehabilitation, correctional education, and psychiatric treatment were rejected as excessive interventions in the life of the individual, while general deterrence was rejected as reducing the individual to a mere object in the deterrence of the general public. Characteristically, Hans-Heinrich Jescheck ended his essay on the "image of man and penal reform" with a reference to Hegel:

The image of man of our time [must] be determined by the great postulates of freedom and personal dignity, which form the supporting pillars of our state. In criminal law,

the notion of [human] freedom must be understood in the sense that man, despite determining factors like drives, body-type, mental state, hereditary traits, and environment, is a being founded on individual responsibility. . . . Therefore punishment means that man is “held responsible” for his rebellion against a system of values that he, too, desires; and in this sense, Hegel’s dictum that through punishment “the criminal is honored as a rational being” remains valid.¹¹⁶

The retributivist contributions to the penal reform discourse were notable for their focus on ethical-philosophical questions, especially the “meaning” (*Sinn*) and “essence” (*Wesen*) of punishment and the “system of values” (*Wertordnung*) on which criminal law was supposed to rest. As Jescheck wrote: “Our time must give itself laws that reflect its own best nature in order to show the rest of the world its true purpose [*Bestimmung*]. . . . The spiritual situation of our time must be mastered through legislative achievements.”¹¹⁷

Such philosophically inclined texts obscured the political content of the positions; more generally, the contributions of retributivist criminal law professors to the penal reform debate were characterized by an avoidance of political references. This reflected the silence with which National Socialism was being treated in many areas of social and intellectual life. Although National Socialism was omnipresent, it was rarely referred to explicitly. Approaches favoring individual behavioral prevention (*Spezialprävention*) were denounced with vague references to Nazi criminal law and the omnipotent intervention of the Nazi state in the life of the individual citizen. This line of argument linked *Spezialprävention* and *Zweckstrafe* (a utilitarian, as opposed to retributive, conception to punishment) to a totalitarian criminal justice system that was hostile to freedom, as Wilhelm Gallas formulated it in the Commission on Criminal Law:

The *Zweckgedanke* [i.e., the notion that punishment should serve a preventive purpose] contains something hostile to freedom. To be sure, often, as in Nazi criminal law, the ideas of atonement and retribution [*Sühne und Vergeltung*] have been used to veil the *Zweckgedanke*. . . . The concern that *das reine Zweckdenken* can lead to totalitarian criminal justice forces us to hold fast to the notion of the *Schuldstrafe* [i.e., retributive punishment based on guilt].¹¹⁸

This strategy of discrediting the position that punishment primarily ought to serve the purpose of individualized behavioral prevention (rather than retributive justice)—which was the position of Franz von Liszt and the “modern school of criminal law” that dominated the penal reform movement in the Kaiserreich and the Weimar Republic—by associating it with Nazism and totalitarianism was characteristic of other retributivists as well. Thus, during the deliberations of the Commission on Criminal Law, Edmund Mezger justified his support for retributive justice by claiming that the “*Zweckstrafe* leads to a totalitarian criminal law.”¹¹⁹ These arguments allowed the commission to justify both the retention of

the highly stigmatizing *Zuchthausstrafe* (imprisonment with hard labor) and the retention of short-term prison sentences (as opposed to alternative sanctions).

Before the official Commission on Criminal Law made these decisions, the direction that postwar penal reform would take had still been an open question. In a 1955 lecture in Vienna, Richard Lange contrasted the Commission's recent decisions with international developments and the penal reform trajectory of the Weimar Republic, concluding that the Commission had taken a "surprising" direction:

It must appear surprising that already in the first meetings to lay the foundations of its work, the German commission on criminal law has taken a different, almost opposite approach. The new direction is characterized by a conscious return to a commitment to material justice. . . . The commission has quite consciously tried to establish a firm structure of values between the absolute and the relative purposes and meanings of punishment.¹²⁰

Despite holding on to a retributive model of criminal justice, nearly all professors of criminal law who tended in this direction—and this was the overwhelming majority—tried to integrate some elements of individualized prevention into the criminal law. More far-reaching ideas for reform, however, were blocked by the fundamental decision in favor of a retributive system of criminal justice. In the draft code produced by the official Commission on Criminal Law between 1954 and 1959, the retributivists were able to impose their notions on the system of penal sanctions. Although they agreed, for example, to limit the *Zuchthausstrafe* to serious crimes, they prevented its elimination, arguing that the "social-ethical condemnation," which differed for criminal acts of varying gravity, had to be reflected in different types of punishment. Similarly, even though short-term prison sentences were viewed as problematic, nothing was done aside from a name change: prison terms of one week to one month were going to be called *Strafhaft* rather than *Gefängnisstrafen*. The minimum term for *Zuchthausstrafen* should be two years. Suspended sentences with probation were to be an option for prison sentences up to nine months' duration.¹²¹ Fines should be imposed along the lines of the Scandinavian system of *dagsböter*, fines levied in proportion to the offender's daily wages and ability to pay.¹²²

The criminal law professors' reluctance to revise the system of penal sanctions thoroughly as well as their divergence from international developments can be explained by their endorsement of retributive justice (and, to some extent, general deterrence) rather than individualized prevention as the primary purpose of criminal justice. This should not, however, leave the impression that the discourse of the retributivists was entirely homogeneous. Even professors of criminal law who endorsed the idea of retribution could oppose the *Zuchthausstrafe* and short-term prison sentences, as Hans-Heinrich Jescheck and Paul Bockelmann, both members of the Commission on Criminal Law, did.¹²³ According to Jescheck,

making punishments match an offender's guilt by no means required that every punishment must be executed (rather than suspended).¹²⁴

Such distinctions, however, faded before the fundamental decision in favor of a criminal justice system based on retribution. This point was driven home by critics such as Thomas Würtenberger, who began the published version of his 1955 inaugural lecture, "The Intellectual Situation of German Academic Criminal Law,"¹²⁵ with an attack on the current state of criminal law at the law faculties:

Behind the mask of tough adherence to a criminal law based on guilt and retribution, which is certainly justified at its core, a deplorable "doctrinarianism" has spread. All this leads to the result that a true breakthrough to a social criminal justice system [*soziale Strafrechtsordnung*] has eluded German academic criminal law [*Strafrechtswissenschaft*]. Opinions regarding the meaning and purpose of punishment are—not least in the effort to achieve a reform of criminal law—mostly characterized by a fear of genuine penal policy decisions. This is most noticeable in a pronounced mistrust of individualization and *Spezialprävention* as key penal policy concepts of our time.¹²⁶

Those professors of criminal law who, like Würtenberger, wished to reform the criminal justice system in the direction of individualized prevention were in the minority. Their reform agenda had no place for the *Zuchthausstrafe* or for short-term prison sentences. Instead, they called for replacing short prison terms with other sanctions such as fines, alternative punishments such as the suspension of driver's licenses, or suspended sentence with probation. Moreover, the prison system (*Strafvollzug*) played an important role in their argumentation.¹²⁷ After the decisions of the Commission on Criminal Law had brought a victory for retributive justice, some of the proponents of individualized prevention, such as Eberhard Schmidt, sought to shift priority from the reform of criminal law to a reform of the prison system. "Would it not be perhaps more important to use all of the energy for reform and all the means available to achieve a thorough reform of our prison system [*Strafvollzug*]?" he asked in 1957¹²⁸ and criticized the retributivists' fixation on jurisprudence and theory:

In my view, the revival of the idea of retribution is to blame for the fact that the fundamental conceptions of punishment, its purpose, and sentencing have been derived entirely from the realm of theory, and that the hard realities that actually determine the fate of those convicted in the prison system remain completely unexamined.¹²⁹

It is also quite possible that Schmidt's shift from the subject of criminal law reform to the subject of prison reform was primarily strategic because he had been unable to prevail against the proponents of retributive justice in the first arena. Schmidt placed himself within the tradition of the "modern school of criminal law" of Franz von Liszt, with whom he had studied, whereas the retributivists oriented themselves toward Kant and Hegel—at least partly in an effort to overcome the stain of the Nazi past through recourse to leading lights of German philosophy.¹³⁰

By contrast, Eberhard Schmidt, Rudolf Sieverts, and others embraced a more pragmatic approach and focused on the so-called hard realities of the prison system. While the discourse of the retributivists was primarily normative, based on a formulaic equivalence of offense and punishment, the discourse of those favoring individualized prevention was characterized by frequent references to the actual administration of punishment. Thus it should come as no surprise that most of the criminal law professors who championed individualized prevention were active participants in the Working Group for the Reform of the Prison System (*Arbeitsgemeinschaft für die Reform des Strafvollzugs*). The *Arbeitsgemeinschaft*, founded in the 1923,¹³¹ met again for the first time after the war in 1948. It included practitioners who worked in the prison system or dealt with prison matters in the bureaucracy as well as professors of criminal law who were interested in the prison system, often quite consciously continuing discussions of the Weimar years.¹³² Its inner circle was composed of Eberhard Schmidt (chairman) and Rudolf Sieverts (secretary), both also members of the Commission on Criminal Law, as well as criminal law professors Wolfgang Mittermaier and Thomas Würtenberger.¹³³ The *Arbeitsgemeinschaft's* first resolution in 1948 simply called for the implementation of an educational approach in the penal system, the training and hiring of prison personnel educated in *Sozialpädagogik*, and unified regulations for the penal system.¹³⁴ At its second meeting in 1950, the *Arbeitsgemeinschaft* supplemented these demands with calls to restrict the imposition of prison sentences and to abolish the distinction between *Zuchthaus* and *Gefängnis*. The group thus explicitly picked up where the Weimar reform movement had left off and established clear positions on key issues before the beginning of the later work on reform.¹³⁵

Conclusion

What was the attraction of a retributivist conception of criminal justice for the majority of criminal law professors in the 1950s? The question can only be answered by reference to a complex of reasons ranging from psychological and social factors to individual preferences to the historical situation of the postwar period and the legacy of the Nazi past. Many of them have been suggested in the course of this chapter.

First, the sociologist Hans Braun has used the phrase “the pursuit of security” (*Streben nach Sicherheit*) to characterize the collective social-psychological state of German society in the 1950s.¹³⁶ If we compare the competing positions in the penal reform debate, the concept of retributive criminal justice undoubtedly conveyed a greater degree of security. First, existing criminal law was already oriented in this direction. Second, one could draw on the politically unproblematic “classical” era of German history around 1800 with its important figureheads Kant

and Hegel. Third, retributivists could remain within the security of the “ivory tower” of ideas and philosophical meditations on the meaning and purpose of punishment without exposing themselves to the uncertainties of empiricism and a pragmatic penal policy, an orientation that also reflected the trend toward depoliticization and an apolitical academy.

Second, the inclination toward retributive criminal law was at least partially prepared by the renaissance of natural law. In the postwar era, natural law was important for coming to terms with and prosecuting Nazi injustice, but also pushed the penal reform discourse toward legal philosophy, that is, grounding criminal law on a metaphysical rather than a pragmatic foundation. As law professor Walter Sax put it in 1957: “Every legal policy must . . . transcend the narrow realm of utility to the state; that is, taking full consideration of the factual needs of community life, it must derive its fundamental aims from realms that lie beyond the state [*staatsjenseitigen Bereichen*].”¹³⁷

Third, the expulsion of Jewish and left-wing professors of criminal law during the Nazi regime had severely weakened certain reform traditions. As the sociologist M. Rainer Lepsius wrote, “[T]he emigration is . . . more than the sum of persecuted individuals, it also represents traditions and ideas, academic paradigms and ways of looking at problems, artistic styles and programs.”¹³⁸ The casualties of emigration included criminal law professors who had been active in the prison reform in the Weimar era (such as Max Grünhut) as well as some who were criminologically oriented (such as Hermann Mannheim). In the 1950s, German criminology was primarily the domain of psychiatrists, as our analysis of the *Monatsschrift für Kriminologie und Strafrechtsreform* demonstrated. For the proponents of a retributivist criminal law, criminological knowledge was not necessary because absolute theories of punishment derive from norms rather than empirical data. For the proponents of *Spezialprävention*, however, the lack of an interest in criminology among most criminal law professors was an additional handicap.

Fourth, on the few occasions when Nazi criminal justice was discussed after 1945, the majority of criminal law professors portrayed it as *Präventionsstrafrecht*, that is, a criminal justice system based on *Generalprävention* (general deterrence) and *Spezialprävention* (individualized prevention), rather than retribution; given the prominence of retributivist arguments and rhetoric in Nazi criminal justice, this was at the least a one-sided interpretation. Nevertheless, it resulted in placing postwar reform proposals that emphasized prevention under general suspicion of either running roughshod over the perpetrator in the service of general deterrence or, more importantly, going too far in intervening in the life of the individual perpetrator through individualized preventive measures.

Fifth, the proponents of retributive criminal law succeeded in linking their theory of punishment to the West German Basic Law. The Basic Law’s concept of the rule of law and its image of man both offered openings for legitimating a retributivist moral foundation of criminal law.

Finally, the retributivist direction of penal reform was also determined by the Justice Ministry's selection of the members of the official Commission on Criminal Law. The views of potential members were relatively easily to identify through publications and personal contacts. The published proceedings of the commission demonstrate how frequently Eberhard Schmidt found himself defending a minority position against the retributivists. The decisions of the commission then sent a message to the larger community of criminal law professors.

Notes

Translated by Keith D. Alexander and Richard F. Wetzell.

1. See Richard F. Wetzell, "From Retributive Justice to Social Defense: Penal Reform in Fin-de-Siècle Germany," in *Germany at the Fin de Siècle: Culture, Politics, and Ideas*, Suzanne Marchand and David Lindenfeld, eds. (Baton Rouge, 2004), 59–77; Christian Müller, *Verbrechensbekämpfung im Anstaltsstaat: Psychiatrie, Kriminologie und Strafrechtsreform in Deutschland 1871–1933* (Göttingen, 2004), 125–169; Wetzell, *Inventing the Criminal: A History of German Criminology, 1880–1945* (Chapel Hill, 2000), 31–38; Monika Frommel, "Internationale Reformbewegung zwischen 1880 und 1920," *Erzählte Kriminalität: Zur Typologie und Funktion von narrativen Darstellungen in Strafrechtspflege, Publizistik und Literatur zwischen 1770 und 1920*, Jörg Schönert, ed. (Tübingen, 1991), 467–495; Eberhard Schmidt, *Einführung in die Geschichte der deutschen Strafrechtspflege*, 3rd ed. (Göttingen, 1983; orig. 1947), 394–399, 405–413.
2. On the 1871 German penal code (*Reichsstrafgesetzbuch*) and its origins, see Sylvia Kesper-Biermann, *Einheit und Recht: Strafgesetzgebung und Kriminalrechtsexperten in Deutschland vom Beginn des 19. Jahrhunderts bis zum Reichsstrafgesetzbuch 1871* (Frankfurt, 2009), 270–371; Werner Schubert and Thomas Vormbaum, eds., *Entstehung des Strafgesetzbuchs*, 2 vols. (Baden-Baden, 2002; Berlin, 2004); Werner Schubert, "Der Ausbau der Rechtseinheit unter dem Norddeutschen Bund: Zur Entstehung des Strafgesetzbuchs von 1870 unter besonderer Berücksichtigung des Strafsystems," in *Festschrift für Rudolf Gmür zum 70. Geburtstag*, 28. Juli 1983, Arno Buschmann et al., eds. (Bielefeld, 1983), 149–189; Schmidt, *Einführung*, 344; Karl Kroeschell, *Rechtsgeschichte Deutschlands im 20. Jahrhundert* (Göttingen, 1992), 32; Thomas Nipperdey, *Deutsche Geschichte 1866–1918*, vol. 2, *Machtstaat vor der Demokratie* (Munich, 1992), 184.
3. On changes in criminal law during the Kaiserreich and Weimar Republic, see Thomas Vormbaum, *Einführung in die moderne Strafrechtsgeschichte* (Berlin, 2009), 117–183, esp. 142–152, 163–169; Wolfgang Sellert and Hinrich Rüping, *Studien- und Quellenbuch zur Geschichte der deutschen Strafrechtspflege*, vol. 2, *Von der Aufklärung bis zur doppelten Staatsgründung* (Aalen, 1994), 107–122, 177–187; Thomas Vormbaum and Jürgen Welp, eds., *Das Strafgesetzbuch: Sammlung der Änderungsgesetze und Neubekanntmachungen*, vol. 1, *1870 bis 1953* (Baden-Baden, 2000).
4. Schmidt, *Einführung*, 399.
5. See Christine Dörner, *Erziehung durch Strafe: Die Geschichte des Jugendstrafvollzugs von 1871–1945* (Weinheim/Munich, 1991), 59–73; Frank Kebedies, *Außer Kontrolle: Jugendkriminalpolitik in der NS-Zeit und der frühen Nachkriegszeit* (Essen, 2000), 69–73.

6. On the reform of fines, see Hans-Heinrich Jescheck, "Der Einfluß der IKV und der AIDP auf die internationale Entwicklung der modernen Kriminalpolitik. Festvortrag auf dem XII. Internationalen Strafrechtskongreß in Hamburg am 17. September 1979," *Zeitschrift für die gesamte Strafrechtswissenschaft* [hereafter, *ZStW*] 92 (1980), 997–1020, esp. 1002.
7. Schmidt, *Einführung*, 401.
8. Hans-Heinrich Jescheck, *Lehrbuch des Strafrechts. Allgemeiner Teil* (Berlin, 1969), 69.
9. In general regarding the workhouse: Andrea Rudolph, *Die Kooperation von Strafrecht und Sozialhilferecht bei der Disziplinierung von Armen mittels Arbeit: Vom Arbeitshaus bis zur gemeinnützigen Arbeit* (Frankfurt am Main, 1995), 31ff.
10. On the 1933 law, see: Christian Müller, *Das Gewohnheitsverbrechergesetz vom 24. November 1933* (Baden-Baden, 1997). On the Allied invalidation of the law, see Matthias Etzel, *Die Aufhebung von nationalsozialistischen Gesetzen durch den Alliierten Kontrollrat 1945–1948* (Tübingen, 1992).
11. Jescheck, *Lehrbuch*, 50.
12. Schmidt, *Einführung*, 232; Arthur Kaufmann, "Problemgeschichte der Rechtsphilosophie," in *Einführung in Rechtsphilosophie und Rechtstheorie der Gegenwart*, ed. Arthur Kaufmann and Winfried Hassemer (Heidelberg, 1985), 23–123, esp. 61.
13. On Hegel, see Jens-Christian Müller-Tuckfeld, *Integrationsprävention: Studien zu einer Theorie der gesellschaftlichen Funktion des Strafrechts* (Frankfurt am Main, 1998), 281–287 and passim; on Kant see Wolfgang Schild, "Anmerkungen zur Straf- und Verbrechensphilosophie Immanuel Kants," in *Festschrift für Wolfgang Gitter zum 65. Geburtstag am 30. Mai 1995*, ed. Meinhard Heinze and Jochem Schmitt (Wiesbaden, 1995), 831–846, esp. 833 note 17.
14. See, for example, Franz von Liszt, *Lehrbuch des Deutschen Strafrechts* (Berlin, 1894), 39f.
15. Dieter Grimm, "Die 'Neue Rechtswissenschaft'—Über Funktion und Formation nationalsozialistischer Jurisprudenz," in Grimm, *Recht und Staat der bürgerlichen Gesellschaft* (Frankfurt am Main, 1987), 373–395, esp. 382.
16. This term was used in a unanimous declaration of the German Bundestag in 1985, Bundestags-Drucksache 10/2368, cited in Klaus Marxen, *Das Volk und sein Gerichtshof: Eine Studie zum nationalsozialistischen Volksgerichtshof* (Frankfurt am Main, 1994), 24.
17. Eberhard Schmidt, "Probleme staatlichen Strafens in der Gegenwart," *Süddeutsche Juristenzeitung* 1 (1946), 204–209, quote 205. Schmidt (1891–1977) was one of the last living students of Franz von Liszt, the Kaiserreich's leading penal reformer. He had received his first professorship in 1921 in Breslau. At the end of World War II he was a professor in Leipzig, but was immediately offered a professorship in Göttingen. In 1948 he moved to the University of Heidelberg, where he became emeritus in 1959. In 1948 he became chairman of the Frankfurt Committee for Economic Criminal Law (*Wirtschaftsstrafrecht*). In the 1950s he was a member of the official Commission on Criminal Law. On Eberhard Schmidt, see Karl Engisch, "Eberhard Schmidt," *Jahrbuch der Heidelberger Akademie der Wissenschaften* (1979), 80–83.
18. Dietrich Thränhardt, *Geschichte der Bundesrepublik Deutschland* (Frankfurt am Main, 1986), 42.
19. Richard Lange, "Strafrecht und Kultur," *Forum. Zeitschrift für das geistige Leben an den deutschen Hochschulen* 1 (1947), 10; Karl Peters, "Gerechtigkeit und Rechtssicherheit," *Die Kirche in der Welt* III. Lfg. 76 (1947–1948), 379–386; Hans Lüttger, "Beseitigung nationalsozialistischer Eingriffe in die Strafrechtspflege," *Geist und Tat: Monatsschrift für Recht, Freiheit und Kultur*, Hamburg, 2 (1947), 8, 28; Gustav Radbruch, "Die Erneuerung des Rechts," *Die Wandlung* 2 (1947), 8–16.
20. Herbert Blank, "Hinter dem Gitter . . . schmeckt der Honig bitter," *Nordwestdeutsche Hefte* 1 (1946), 9, 17–22; "Heutiger Strafvollzug," *Union-Pressedienst*, Hamburg (1948), 5–6; Ernst Schwaiger, "Eine deutsche Strafanstalt. Die Lebensbedingungen der Gefangenen," *Rheinischer Merkur*, 7 February 1948, 3–4; "Verhaftet . . ." *Benjamin. Zeitschrift für junge Menschen*,

- Hamburg 2 (1948), 4, 16–17; Heinz Scholl, “Strafvollzug reformbedürftig,” *Begegnung. Zeitschrift für Kultur und Geistesleben* 4 (1949), 11–12.
21. On the origins of the *Deutsche Rechts-Zeitschrift*, see Karl S. Bader, “Walter Mallmann und die Gründung der ‘Deutschen Rechts-Zeitschrift,’” in *Festschrift für Walter Mallmann zum 70. Geburtstag*, Otto Triffterer and Friedrich von Zezschwitz, eds. (Baden-Baden, 1978), 17–31; as well as his journal entries: Karl Siegfried Bader, “Der Wiederaufbau. Tagebuch Juli 1945 bis Juni 1946” (with an introduction and comments by Ulrich Weber), in *Gelb-rot-gelbe Regierungsjahre. Badische Politik nach 1945: Gedenkschrift zum 100. Geburtstag Leo Wohlebs (1888–1955)*, Paul-Ludwig Weinacht, ed. (Sigmaringendorf, 1988), 33–88. Bader, later legal historian at the University of Zurich, participated in the founding of the *Deutsche Rechts-Zeitschrift* in his capacity as the Badenese Attorney General.
 22. Gustav Radbruch (1878–1949) was among the most important German professors of criminal law in the twentieth century. During his short term as Social Democratic Minister of Justice he produced a draft penal code in 1922. A law professor in Heidelberg, he was dismissed by the Nazis in 1933, but got his professorship back in 1945 before becoming emeritus in 1948. On Radbruch, see Arthur Kaufmann, “Gustav Radbruch—Leben und Werk,” in Gustav Radbruch, *Rechtsphilosophie I*, Arthur Kaufmann, ed. *Gustav Radbruch Gesamtausgabe* (GRGA), vol. 1 (Heidelberg, 1987), 7–88.
 23. Gustav Radbruch, “Gesetzliches Unrecht und übergesetzliches Recht,” *Süddeutsche Juristenzeitung* [hereafter, *SJZ*] 1 (1946), 5, 105–108 (107).
 24. See Dieter Simon’s analysis of legal positivism in the Nazi era in Dieter Simon, “Zäsuren im Rechtsdenken,” in *Zäsuren nach 1945: Essays zur Periodisierung der deutschen Nachkriegsgeschichte*, Martin Broszat, ed. (Munich, 1990), 153–167, esp. 154. For an example of a very broad interpretation of the penal code, see a 1942 article by Richard Lange, who conceded that “a deed that does not make a German a sex offender cannot be used to qualify a Pole as a sex offender” but continued with the remark: “but in the case of [a Polish offender] the need for just retribution will more often require the death penalty.” Richard Lange, “Täter-schuld und Todesstrafe,” *ZStW* 62 (1942), 175–232, quote 179. On the broad interpretation of the “Volksschädlingsverordnung” in the administration of justice see Helmut Kühn et al., “32 Strafurteile der Hamburger Justiz 1933–1934. Mit Erläuterungen zum juristischen, zeitgeschichtlichen und biographischen Hintergrund. Fall 25: Schwerer Diebstahl 1943,” in *Von Gewohnheitsverbrechern, Volksschädlingen und Asozialen. . . . Hamburger Justizurteile im Nationalsozialismus*, Justizbehörde Hamburg, ed. (Hamburg, 1995), 310–329, esp. 321. Helmut Kramer reached a similar judgment regarding the Nazi administration of justice. He notes that in “zahlreiche[n] Entscheidungen . . . Richter dem nationalsozialistischen Gesetzgeber vorauseilten.” Helmut Kramer, “Die Aufarbeitung des Faschismus durch die Nachkriegsjustiz in der Bundesrepublik Deutschland,” in *Recht, Justiz und Faschismus—nach 1933 und heute*, Helmut D. Fangmann and Norman Paech, eds. (Cologne, 1984), 75–93, quote 85.
 25. Simon, “Zäsuren,” 154.
 26. See Radbruch’s comments on “Geltung des Rechts” in Gustav Radbruch, *Rechtsphilosophie* (Stuttgart, 1973, unaltered reprint of the 1932 original), 178.
 27. “Grundsätzliche Überwindung des Positivismus”; Radbruch, “Gesetzliches Unrecht,” 107.
 28. On this point, Arthur Kaufmann (the foremost expert on Radbruch’s legal philosophy and the editor of Radbruch’s complete works) has noted: “Radbruch’s notion of law cannot be equated with natural law since for him ‘correct law’ is not an absolute value . . . For Radbruch ‘correct law’ can only be approximated.” Kaufmann, “Gustav Radbruch,” 72.
 29. Radbruch, “Gesetzliches Unrecht,” 107. On this concept, see Björn Schumacher, “Rezeption und Kritik der Radbruchschen Formel” (Ph.D. diss., Universität Göttingen, 1985); Frank Saliger, *Radbruchsche Formel und Rechtsstaat* (Heidelberg, 1995).

30. Radbruch, "Gesetzliches Unrecht," 107: "Es darf nicht verkannt werden—gerade nach den Erlebnissen jener zwölf Jahre—, welche furchtbaren Gefahren für die Rechtssicherheit der Begriff des 'gesetzlichen Unrechts' für die Leugnung der Rechtsnatur positiver Gesetze mit sich bringen kann." A nuanced introduction to Radbruch's legal philosophy is offered by Winfried Hassemer in Gustav Radbruch, *Rechtsphilosophie III* (GRGA Bd. 3), (Heidelberg, 1990), 1–16, who draws on Radbruch's texts from the Nazi era and after 1945.
31. See, for example, Helmut Coing, "Zur Frage der strafrechtlichen Haftung der Richter für die Anwendung naturrechtswidriger Gesetze," *SJZ* 2 (1947), 61–64 (64); Adolf Arndt, "Die Krise des Rechts," *Die Wandlung* 3 (1948), 421–440, esp. 421.
32. See Arthur Kaufmann, "Die Naturrechtsrenaissance der ersten Nachkriegsjahre—und was daraus geworden ist," in *Die Bedeutung der Wörter: Studien zur europäischen Rechtsgeschichte. Festschrift für Sten Gagnér zum 70. Geburtstag*, Michael Stolleis et al., eds. (Munich, 1991), 105–132, esp. 109ff. and 117ff.
33. Christoph Kleßmann, *Die doppelte Staatsgründung: Deutsche Geschichte 1945–1955* (Göttingen, 1991), 59–63; Thränhardt, *Geschichte*, 38–39.
34. Ulfried Neumann, "Rechtsphilosophie in Deutschland seit 1945," in *Rechtswissenschaft in der Bonner Republik: Studien zur Wissenschaftsgeschichte der Jurisprudenz*, ed. Dieter Simon (Frankfurt am Main, 1994), 145–187, esp. 148.
35. Winfried Hassemer, "Strafrechtswissenschaft in der Bundesrepublik Deutschland," in *Rechtswissenschaft*, ed. Simon, 259–310, quote 264.
36. Hellmuth von Weber gave a presentation at the meeting of German jurists held in Bad Godesberg from 30 September—1 October 1947 on "Recht und Pflicht des Richters zur Prüfung der Gültigkeit des Strafgesetzes." *SJZ* 2 (1947), 567–570 (569). Hellmuth von Weber (1893–1970) became a professor extraordinarius at the German University in Prague, then moved to a professorship in Jena and in 1937 to Bonn. While the Commission on Criminal Law was being convened, he was a frequent contact for the ministerial bureaucracy, but he declined to serve on the commission and rejected a comprehensive reform of criminal law, advocating instead for amending it through legislation. This can be seen in a note by Ministerialrat Eduard Dreher, who played a large role in organizing the commission: Vermerk von Dreher, 2.2.1954, 4. Bundesarchiv (BA) B 141-17229. On the biography of von Weber: Hans-Heinrich Jescheck, "Hellmuth von Weber zum Gedächtnis," *JZ* (1970), 517–518.
37. Karl Peters, "Gerechtigkeit und Rechtssicherheit," 380. Peters (1904–1998) completed his *Habilitation* in Cologne in 1931, assumed a professorship in 1942 in Greifswald, moving to Münster in 1946. In 1962 he moved to Tübingen, where he became emeritus in 1972. Karl Peters participated in the penal reform discourse with many articles, but due to his Catholic orientation played an outsider role in the legal academic community, which was dominated by Protestants. He was one of the few professors of criminal law who welcomed the controversial Bundesgerichtshof decision on so-called *Verlobten-Kuppelerei* (see below). A large number of his texts did not appear in the usual legal journals, but in publications close to Catholicism, such as *Caritas*, *Hochland*, *Stimmen der Zeit*, *Michael*, and *Die Kirche in der Welt*. On Karl Peters, see Jürgen Baumann, "Karl Peters 70 Jahre," *Juristische Zeitung* 2 (1974), 66–67.
38. Simon, "Zäsuren," 154.
39. Thomas Württenberger, *Die geistige Situation der deutschen Strafrechtswissenschaft* (Karlsruhe, 1959), 19.
40. Hans Welzel, "Naturrecht und Rechtspositivismus," in *Naturrecht oder Rechtspositivismus*, Werner Maihofer, ed. (Darmstadt, 1966), 322–338, quote 325 [Originally published 1953]. As early as 1951, Welzel had formulated his criticism of natural law arguments: "All natural law arguments prove only as much as their substantive arguments; reference to nature does not add to their plausibility but, on the contrary, is likely to expose them to the suspicion

- of being ideological.” Hans Welzel, *Naturrecht und materiale Gerechtigkeit* (Göttingen, 1962), 249.
41. Welzel, “Naturrecht und Rechtspositivismus,” 325.
 42. The court ruled: “The moral order demands that the intercourse of the sexes take place in a monogamous marriage because the meaning and result of intercourse is the child.” *Entscheidungen des Bundesgerichtshofes in Strafsachen (BGHSt)* vol. 6, Mitglieder des Bundesgerichtshofes und der Bundesanwaltschaft, ed. (Berlin, 1954), 46ff., cited in Hermann Weinkauff, “Der Naturrechtsgedanke in der Rechtsprechung des Bundesgerichtshofes,” *NJW* 38 (1960), 1689–1696, quote 1694.
 43. Karl Peters, “Kuppelei bei Verlobten,” *Ehe und Familie im privaten und öffentlichen Raum. Zeitschrift für das gesamte Familienrecht* 1 (1954), 96–99; Paul Bockelmann, “Zur Strafbarkeit der Kuppelei. Bemerkungen zu dem Beschluß des Großen Senats für Strafsachen vom 17. Februar 1954,” *JR* 10(1954), 361–364; Hans-Heinrich Jescheck, “Zur Frage der Kuppelei gegenüber Verlobten,” *MDR* 8 (1954), 11, 645–649; Walter Sax, “Zur Frage der Kuppelei bei Geschlechtsverkehr unter Verlobten,” *JZ* 9 (1954), 15/16, 474–477. Comments on the ruling: *NJW* 20 (1954), 766–768; *JZ* 15/16 (1954), 508–511.
 44. A decision by the Supreme Court of the British Zone of 7 June 1949 decreed that all penal laws “that use the term ‘gesundes Volksempfinden’ [healthy popular feeling] in reference to the application of penal laws have lost their validity.” *SJZ* 4 (1949), 10, 711–713.
 45. Control Council Law no. 11 of 30 January 1946.
 46. The Supreme Court of the British zone took the latter view and therefore upheld the 1935 version of §§ 175, 175a. See *SJZ* 4 (1949), 278–282. Specifics regarding additional court decisions in *Das Strafgesetzbuch an Hand der höchstrichterlichen Rechtsprechung für die Praxis*, with explanations by Erich Mühlmann and Gert Bommel (Regensburg, 1949), 388f.
 47. In general, see Etzel, *Aufhebung*.
 48. Cited in Albert Krebs, “Zur Erneuerung des Gefängniswesens (insbesondere in der amerikanischen Besatzungszone Deutschlands),” *SJZ* 1 (1946), 209–231, quote 209.
 49. Law no. 1 of the military governments, Art. IV Ziff. 8. *Das Strafgesetzbuch an Hand der höchstrichterlichen Rechtsprechung für die Praxis*, footnote 466.
 50. The second Strafrechtsänderungsgesetz (StrÄG) of 6 March 1953 only added § 141, which criminalized the recruitment of Germans into foreign military service. See Hans Welzel, *Das deutsche Strafrecht: Eine systematische Darstellung* (Berlin, 1956), 401.
 51. Eberhard Schmidt, “Probleme,” 208.
 52. Richard Lange, “Zur Strafrechtsreform,” *NJW* 18 (1949), 695–698, 696. Richard Lange (1906–1995) became professor extraordinarius in Jena in 1940, where he received a professorship in 1943. In 1949 he moved to the Free University of Berlin and in 1951 to Cologne, where he taught until he received emeritus status. In 1946 he was president (without party affiliation) of the consulting state assembly in Thuringia, which drafted Thuringia’s constitution. In the 1950s he was a member of the official Commission on Criminal Law. On Lange see Hans-Heinrich Jescheck, “Richard Lange zum Gedächtnis,” *ZStW* (1996), 1–8.
 53. *Das Strafgesetzbuch für das Deutsche Reich in der Fassung des Thüringischen Anwendungsgesetzes vom 1. November 1945 mit strafrechtlichen Einzelgesetzen*, Richard Lange, ed. (Weimar, 1946), 44f. § 20, par. I.
 54. In 1947 Lange called the Nazi version a “reversal of the system of values.” Lange, “Zu neuen Ufern im Strafrecht,” 10.
 55. Karl Peters, “Caritas und Strafrecht,” *Caritas: Zeitschrift für Caritasarbeit und Caritaswissenschaft* (1947), 73–75.
 56. See the chapter on the “Zusammenbruchgesellschaft” in Kleßmann, *Staatsgründung*, 37–65; relevant eyewitness reports can be found in Alexander von Plato and Almut Leh, “Ein unglaublicher Frühling”: *Erfahrene Geschichte im Nachkriegsdeutschland 1945–1948* (Bonn, 1997).

57. The figures are from the entries in the German University Guide of 1941. Reichsstudentenwerk, ed., *Der Deutsche Hochschulführer: Lebens- und Studienverhältnisse an den deutschen Hochschulen*, vol. 23 (Berlin, 1941), 44f.
58. A brief view of the universities after 1945 is given in Hans-Werner Prah, *Sozialgeschichte des Hochschulwesens* (Munich, 1978), 326–330; Axel Schildt, “Im Kern gesund? Die deutschen Hochschulen 1945,” in *Vertuschte Vergangenheit: Der Fall Schwerte und die NS-Vergangenheit der deutschen Hochschulen*, Helmut König et al., eds. (Munich, 1997), 223–240.
59. Friedrich Schubel, *Universität Greifswald* (Frankfurt am Main, 1960), 98f.; *Universität Greifswald 525 Jahre*. Im Auftrage des Rektors verfaßt von Wolfgang Wilhelmus et al. ([East] Berlin, 1982), 59.
60. Christiane Drawz, “Die Schließung der Juristischen Fakultät 1950,” *Beiträge zur Geschichte der Universität Rostock* 19 (Rostock, 1994), 33–43.
61. In Gießen, which was two-thirds destroyed in the war, the university was reduced to only three faculties and remained without a law faculty for twenty years. See Markus Bernhardt, *Gießener Professoren zwischen Drittem Reich und Bundesrepublik: Ein Beitrag zur hessischen Hochschulgeschichte 1945–1957* (Gießen, 1990), 9ff.
62. Boehm/Müller, *Universitäten und Hochschulen*, 256f.; 64.
63. David Phillips, “Die Wiedereröffnung der Universitäten in der britischen Zone. Nationalistische Gesinnung, Entnazifizierung und das Problem der Zulassung zum Studium,” *Bildung und Erziehung* 36 (1983), 1, 35–53 (35).
64. Eike Wolgast, *Die Universität Heidelberg 1386–1986* (Berlin, 1986), 167.
65. Otto Herding, “Bericht der Universität Tübingen,” *Studium Generale* 1 (1948), 3, 185–188.
66. Kurt Stangl, “Bericht der Universität Erlangen,” *Studium Generale* 1 (1948), 7, 440–443; Hans Liermann, *Erlebte Rechtsgeschichte* (Neustadt an d. Aisch, 1976), 152–167 on the period 1945–1948 in Erlangen.
67. Günther Meinhardt, *Die Universität Göttingen. Ihre Entwicklung und Geschichte von 1734–1974* (Göttingen, 1977), 114.
68. Wilfried Setzler, “Die Tübinger Studentenfrequenz im Dritten Reich. Ein Kurzüberblick zur zahlenmäßigen Entwicklung des Universitätsbesuchs und deren Ursachen,” in Uwe Dietrich Adam, *Hochschule und Nationalsozialismus. Die Universität Tübingen im Dritten Reich* (Tübingen, 1977), 217–227 (222).
69. On the situation at the universities, see: for Bonn, Gernot Rath, “Bericht der Universität Bonn,” *Studium Generale* 1 (1948), 383–388; *Einweihung des Fakultätsgebäudes der Rechts- und Staatswissenschaftlichen Fakultät der Rheinischen Friedrich-Wilhelms-Universität am 21. November 1967* (Bonn, 1970), 6f.; for Frankfurt, Edelgard Timm, “Bericht der Universität Frankfurt,” *Studium Generale* 2 (1949), 62–66, and Notker Hammerstein, *Die Johann Wolfgang Goethe-Universität Frankfurt am Main. Von der Stiftungsuniversität zur staatlichen Hochschule*, vol. 1, *1914 bis 1950* (Neuwied, 1989), 550; for Freiburg, Gerd Tellenbach, “Bericht der Universität Freiburg,” *Studium Generale* 3 (1950), 326–330; for Hamburg, Jürgen Lafrenz, “Die Universität in Hamburg als Problem der Stadtplanung 1919 bis 1945,” in Eckart Krause, ed., *Hochschulalltag im Dritten Reich. Die Hamburger Universität 1933–1945*, vol. 1 (Berlin, 1991), 327–366 (360); for Cologne, Bernd Heimbüchel, “Die neue Universität. Selbstverständnis—Idee und Verwirklichung,” in Heimbüchel and Klaus Pabst, *Kölner Universitätsgeschichte*, vol. 2, *Das 19. und 20. Jahrhundert* (Cologne/Vienna, 1988), 101–692 (600); for Münster, Peter Respondek, “Der Wiederaufbau der Universität Münster in den Jahren 1945–1952 auf dem Hintergrund der britischen Besatzungspolitik” (Ph.D. diss., University of Münster, 1992), 43; for Würzburg, Jürgen Aschoff, “Bericht der Universität Würzburg,” *Studium Generale* 2 (1949), 4/5, 278–284; *Bayerns Hochschulen in der Nachkriegszeit 1945 bis 1952* (Munich, 1953), 11.
70. On the reconstruction phase, see Christoph Oehler, *Hochschulentwicklung in der Bundesrepublik Deutschland seit 1945* (Frankfurt/New York, 1989), 16f.; an overview of the scattered

- timing of the reopenings can be found under the title “Neues Leben an den deutschen Universitäten nach dem Zweiten Weltkrieg,” in *Wiedergeburt des Geistes: Die Universität Tübingen im Jahre 1945. Eine Dokumentation* (Tübingen, 1985), 118f.
71. Liermann, *Erlebte Rechtsgeschichte*, 164; Hammerstein, *Goethe-Universität*, 585.
 72. On the university officer, see the information in Respondek, “Wiederaufbau,” 178ff. with further notes.
 73. Schildt, “Im Kern gesund?” 230–234.
 74. Frank Halfmann, “Eine ‘Pflanzstätte bester nationalsozialistischer Rechtsgelehrter’: Die Juristische Abteilung der Rechts- und Staatswissenschaftlichen Fakultät,” in *Die Universität Göttingen unter dem Nationalsozialismus: Das verdrängte Kapitel ihrer 250-jährigen Geschichte*, Heinrich Becker et al., eds. (Munich, 1987), 88–141, esp. 120.
 75. According to Hoimar von Ditfurth, Sieverts was imprisoned by the English occupation authorities in the former KZ Neuengamme but was released in 1946 after the intervention of the former *Oberlandesgerichtsrat* Rée and the first postwar mayor of Hamburg, Petersen. Hoimar von Ditfurth, *Innenansichten eines Artgenossen: Meine Bilanz* (Munich, 1991), 215.
 76. On the origins of this law and on the significance of Art. 131 of the Basic Law for the reinstatement of denazified officials, which, of course, included university professors, see Norbert Frei, *Vergangenheitspolitik: Die Anfänge der Bundesrepublik und die NS-Vergangenheit* (Munich, 1997), 69–100.
 77. Alfred Wendehorst, *Geschichte der Friedrich-Alexander-Universität Erlangen-Nürnberg* (Munich, 1993), 235.
 78. Ulrich Stock (1896–1974). Anne Christine Nagel, ed., *Die Philipps-Universität Marburg im Nationalsozialismus: Dokumente zu ihrer Geschichte* (Stuttgart, 2000), 546. In Saarbrücken, the Austrian criminologist Ernst Seelig also found a refuge. Seelig had lost his professorship at the University of Graz after the war ended and taught as of 1954—after a guest professorship—as a professor at Saarbrücken University. Karlheinz Probst, *Strafrecht—Strafprozessrecht—Kriminologie. Geschichte der Rechtswissenschaftlichen Fakultät der Universität Graz, Teil 3* (Graz, 1987), 61–72; specifically on the postwar era, 68ff. Ernst Seelig was a functionary of the *NS-Dozentenbund*: see Steirische Gesellschaft für Kulturpolitik, eds., *Grenzfeste Deutscher Wissenschaft: Über Faschismus und Vergangenheitsbewältigung an der Universität Graz* (Graz, 1985), 71.
 79. In general, see Kleßmann, *Staatsgründung*, 39–44.
 80. An exception was Eberhard Schmidt’s change from Göttingen to Heidelberg in 1948.
 81. Würtenerger taught from 1946 to 1955 in Mainz and from 1955 to 1973 was Professor für Strafrecht, Strafverfahrensrecht, Kriminologie und Rechtsphilosophie in Freiburg. Renate Wittern, ed., *Die Professoren der Friedrich-Alexander-Universität Erlangen 1763–1960. Teil I: Theologische Fakultät, Juristische Fakultät* (Erlangen, 1993), 181.
 82. Wilhelm Ebel, ed., *Catalogus Professorum Göttingensium 1734–1962* (Göttingen, 1962), 55.
 83. The depiction of living conditions in Göttingen comes from the legal academic Ludwig Raiser. See Ludwig Raiser, “Wiedereröffnung der Hochschulen—Ansätze zum Neubeginn,” in *Nationalsozialismus und die deutsche Universität* (Berlin, 1966), 174–188, quote 175.
 84. Ebel, *Catalogus*, 56, 61, 72.
 85. Meinhardt, *Universität Göttingen*, 114.
 86. Only at the interzonal meeting of jurists in 1946 did Eduard Kohlrausch report on the “Revision des Strafgesetzbuches durch Beseitigung der Vorschriften nationalsozialistischen oder militaristischen Ursprungs.” “Interzonale Juristentagung 3.–6.12.1946 in Wiesbaden,” *SJZ* 2 (1947), 37–40. At the meeting of jurists in Konstanz, held in 1947 for the French occupation zone, the Tübinger professor of criminal law Eduard Kern addressed the “Probleme der Gerichtsverfassung und der Wiedereinführung der Laiengerichtbarkeit in Deutschland.” Militärregierung des französischen Besatzungsgebietes in Deutschland. Generaljustizdirektion,

- Der Konstanzer Juristentag (2.–5. Juni 1947). Ansprachen, Vorträge, Diskussionsreden* (Tübingen, 1947), compare to the report: “Der Konstanzer Juristentag,” *SJZ* 2 (1947), 6, 347–349. At the 1947 meeting of jurists in Bad Godesberg, Hellmuth von Weber spoke about “Recht und Pflicht des Richters zur Prüfung der Gültigkeit des Strafgesetzes,” and Eberhard Schmidt addressed the “Unabhängigkeit der Rechtspflege.” *Tagung deutscher Juristen Bad Godesberg, 30. September/1. Oktober 1949. Reden und Vorträge*, ed. Zentraljustizamt für die britische Zone (Hamburg, 1947), see the report: “Tagung deutscher Juristen in Bad Godesberg vom 30.9.-1.10.1947,” *SJZ* 2 (1947), 10, 567–570. At the 1948 meeting of jurists in Munich, Eberhard Schmidt spoke about “Wirtschaftsstrafrecht.” See the report: “Juristentagung in München vom 1.–4. Juni 1948,” *SJZ* 3 (1948), 6, 338–342.
87. The agenda item was called “Grundfragen der Bereinigung des Strafgesetzbuches unter besonderer Berücksichtigung der Strafzwecke, der Strafzumessungsnormen und der Tatbestandstechnik.” See the chronological overview: “Die Verhandlungen des Deutschen Juristentages 1860 bis 1960,” assembled by Jan Albers, in *Hundert Jahre deutsches Rechtsleben. Festschrift zum hundertjährigen Bestehen des Deutschen Juristentages 1860–1960*, vol. 2, Ernst von Caemmerer, Ernst Friesenhahn, and Richard Lange, eds. (Karlsruhe, 1960), 353–387.
 88. The reports, lectures, and discussions at the Deutschen Juristentage are available in printed form. The lectures at the Strafrechtslehrertagungen (meetings of the professors of criminal law) are partially reprinted in the *Zeitschrift für die gesamte Strafrechtswissenschaft*, while the discussions at those meetings are only available in conference reports in the professional journals, above all in the *Juristenzeitung*. On the meetings of the professors of criminal law, see Johannes Driendl, “Die deutsche Strafrechtslehrertagung in Geschichte und Gegenwart,” *ZStW* 92 (1980), 1–18.
 89. Bader, “Wiederaufbau,” 33–88; Bader, “Walter Mallmann,” 17–31.
 90. Karl S. Bader, “Zum 50. Jahrgang der Juristenzeitung,” *JZ* 50 (1995), 1. 1.
 91. See Hans-Jürgen Bruns et al., “Geleitwort,” in *140 Jahre Goldammer’s Archiv für Strafrecht. Eine Würdigung zum 70. Geburtstag von Paul-Günter Pötz*, Jürgen Wolter, ed. (Heidelberg, 1993), v–x.
 92. Egon Schneider, “50 Jahre MDR,” *MDR* 51 (1997), 4, 305.
 93. Starting in 1951, the journal was subtitled “Monatsschrift für naturwissenschaftliche Kriminalistik und Polizeiarchiv.” Robert Heindl, “Das ‘Archiv für Kriminologie’: Ein historischer Rückblick,” *Archiv für Kriminologie* 115 (1955), 3–5.
 94. Albert Krebs, “Die ersten 25 Jahre der Zeitschrift für Strafvollzug. Zur Geschichte des Gefängniswesens in Deutschland seit 1945,” *Zeitschrift für Strafvollzug* 26 (1977), 1–7 (2).
 95. On German criminology after 1945 see Imanuel Baumann, *Dem Verbrechen auf der Spur: Eine Geschichte der Kriminologie und Kriminalpolitik in Deutschland 1880–1980* (Göttingen, 2006).
 96. Except for the volume on the first working meeting after 1945, the *Mitteilungen der Kriminalbiologischen Gesellschaft* appeared in the series *Kriminalbiologische Gegenwartsfragen* and contained the (sometimes expanded) lectures at the meetings of the society. On Edmund Mezger (1883–1962), who headed the *Kriminalbiologische Gesellschaft* until 1961, see the biography by Gerit Thulfaut, *Kriminalpolitik und Strafrechtslehre bei Edmund Mezger (1883–1962). Eine wissenschaftsgeschichtliche und biographische Untersuchung* (Baden-Baden, 2000), esp. 328–334. Mezger became professor in Marburg in 1925; in 1932 he moved to Munich, where he taught until he retired. He was a member of the Nazi regime’s Commission on Criminal Law Reform and the Große Strafrechtskommission that was convened in 1954.
 97. This statistical analysis is based on the tables of contents of the *Monatsschrift* from 1954 to 1957. Only the articles in the category “Abhandlungen und Sprechsaal” were considered; the short reports, obituaries, or congratulatory items in the category “Mitteilungen und Besprechungen” were not included.

98. Of the numerous essays, only those by Kern and Sauer are cited here: Eduard Kern, "Das künftige Schicksal der Übertretungen," *Der Rechtspfleger* (1960), 266ff. and Wilhelm Sauer, "Tatbestand, Unrecht, Irrtum und Beweis. Zur Strafrechtsreform," *ZStW* 69 (1957), 1ff.
99. Ulrich Stock, "Zur Strafrechtsreform in Deutschland," *Die Kirche in der Welt* 5 (1952), 2, 195–198.
100. Hans-Jürgen Bruns, "Die Strafaussetzung zur Bewährung. Ein Rückblick auf Rechtsprechung und Lehre seit dem Inkrafttreten der §§ 23ff. StGB (n.F.)," *GA* (1956), 193–240; Bruns, "Die Maßregeln der Besserung und Sicherung im StGB-Entwurf 1956," *ZStW* 71 (1959), 2, 210–251.
101. Friedrich Schaffstein, "Die vorbeugende Verwahrung nach dem StGB-Entwurf 1962," in Hans Welzel, ed., *Festschrift für Hellmuth von Weber zum 70. Geburtstag* (Bonn, 1963), 121ff.
102. See Wolfgang Naucke, *Strafrecht: Eine Einführung* (Neuwied, 1995), 247–258. Hans Welzel (1905–1977) taught in Göttingen from 1937 to 1952, from 1952 up to his retirement in Bonn. On Welzel see Fritz Loos, "Hans Welzel (1904–1977), Die Suche nach dem Überpositiven im Recht," in Loos, ed., *Rechtswissenschaft in Göttingen: Göttinger Juristen aus 250 Jahren* (Göttingen, 1987), 486–509.
103. Karl Alfred Hall, "Die Freiheitsstrafe als kriminalpolitisches Problem," *ZStW* 66 (1954), 1, 77–110. The text contained an expanded version of his lecture of 1952. Hall was appointed professor extraordinary (adjunct or associate professor) in Gießen in 1936, was a Soviet prisoner of war until 1950, and then taught in Marburg, where he was appointed as full professor (Ordinarius) in 1961 at age fifty-five. On Hall, who is depicted as an eccentric figure, see the biographical sketch by Heinz Holzhauer, "Karl Alfred Hall (1906–1974)—ein Denkmal," in Wilfried Küper et al., eds., *Beiträge zur Rechtswissenschaft: Festschrift für Walter Stree und Johannes Wessels zum 70. Geburtstag* (Heidelberg, 1993), 1263–1279.
104. "Das spezialpräventive Denken . . . fordert die Einheitsstrafe." Eberhard Schmidt, "Vergeltung, Sühne und Spezialprävention," *ZStW* 67 (1955), 2, 177–195 (185).
105. Hall, "Freiheitsstrafe," 80.
106. Hall, "Freiheitsstrafe," 81.
107. Hall, "Freiheitsstrafe," 80–93. The warning with the possibility of punishment sets the penalty simultaneously with the declaration of guilt. A second, oral hearing held after a set probationary period determines whether the perpetrator has reformed. If so, he can be considered not to have a prior conviction because the sentence was set but not pronounced.
108. Hall, "Freiheitsstrafe," 93f.
109. Hall, "Freiheitsstrafe," 95.
110. Hall, "Freiheitsstrafe," 94.
111. Hall, "Freiheitsstrafe," 99.
112. Hall made only one more contribution to the penal reform debate: Karl Alfred Hall, "Sicherungsverwahrung und Sicherungsstrafe," *ZStW* 70 (1958), 41–63.
113. Lange, "Grundfragen," 373–397.
114. Hans-Heinrich Jescheck, *Das Menschenbild unserer Zeit und die Strafrechtsreform* (Tübingen, 1957); Ernst Heinitz, "Das Menschenbild im Strafrecht," *Franz-Lieber-Hefte* (Bad Nauheim) 2 (1960), 4, 7–21; Richard Lange, "Menschenbild und Strafrechtsreform," *Zeitwende. Die neue Furche* (Hamburg) 33 (1962), 582–597.
115. On 23 March 1962, see Lutz Jasper, *Gesellschaft Hamburger Juristen 1885–1985. Erinnerungsschrift anlässlich ihres hundertjährigen Bestehens im Dezember 1985* (Cologne, 1985), 91.
116. Hans-Heinrich Jescheck, "Grundgedanken der deutschen Strafrechtsreform," *Radius. Vierteljahresschrift der Evangelischen Akademikerschaft in Deutschland* 1 (1956), 11–17 (15).
117. Jescheck, "Grundgedanken," 12.
118. Wilhelm Gallas in the official Commission on Criminal Law in *Niederschriften über die Sitzungen der Großen Strafrechtskommission*. 14 Bände, Band 1 (Bonn, 1956), 41.

119. Edmund Mezger in the Commission on Criminal Law in *Niederschriften Band 1*, 43.
120. Richard Lange, "Grundlagen der heutigen deutschen Strafrechtsreform," *Österreichische Juristenzeitung* 10 (1955), 11, 307–308 (307).
121. This was consistent with the existing penal code: *Strafausetzung zur Bewährung* had been introduced in 1953 through the Third Criminal Law Amendment Act.
122. See the draft code of the Commission on Criminal Law in the first reading (Erste Lesung) in *Niederschriften über die Sitzungen der Großen Strafrechtskommission*, vol. 12 (Bonn, 1959).
123. In the second reading of the draft, however, Bockelmann spoke in favor of *Zuchthausstrafe*.
124. Jescheck, "Grundgedanken," 17.
125. Thomas Würtenberger, *Die geistige Situation der deutschen Strafrechtswissenschaft* (Karlsruhe, 1957). The text is the expanded version of the inaugural speech held by Würtenberger in 1955 at the University of Freiburg.
126. Würtenberger, *Situation*, 8 (quote from the 1959 edition).
127. See, for example, Schmidt, "Vergeltung" and Schmidt, "Kriminalpolitische und strafrechtsdogmatische Probleme in der deutschen Strafrechtsreform," *ZStW* 69 (1957), 359–396.
128. Schmidt, "Kriminalpolitische und strafrechtsdogmatische Probleme," 367.
129. Schmidt, "Kriminalpolitische und strafrechtsdogmatische Probleme," 374.
130. This also stemmed from the love of quotations by Goethe. See Hans Wrobel, *Verurteilt zur Demokratie. Justiz und Justizpolitik in Deutschland 1945–1949* (Heidelberg, 1989), 194–199.
131. On the *Arbeitsgemeinschaft* during the Weimar years, see Nikolaus Wachsmann's chapter in this volume.
132. On postwar prison reform, see Kai Naumann, *Gefängnis und Gesellschaft: Freiheitsentzug in Deutschland in Wissenschaft und Praxis 1920–1960* (Berlin, 2006), esp. 206–213, 228–232.
133. See "Zur Reform des Strafvollzuges," *JZ* 21 (1951), 698–699. Prison officials and other practitioners active in the group included Curt Bondy, Helga Einsele, Walter Herrmann, Albert Krebs, Wilhelm Mollenhauer, Harald Poelchau, and Franz Zeugner.
134. "Resolution der 'Arbeitsgemeinschaft für Reform des Strafvollzuges' vom 4. September 1948," *ZfStrVö* 1 (1950), 6, 57–58.
135. "Reform des Strafvollzuges," *SJZ* 5 (1950), 302–303. "Bericht über die Tagung der AG am 22./23. März 1950; Abdruck der Resolution vom 23. März 1950," *ZfStrVö* 1 (1950), 6, 58–59.
136. Hans Braun: Das Streben nach 'Sicherheit' in den 50er Jahren. Soziale und politische Ursachen und Erscheinungsweisen, in *AfS* 18 (1978), S. 279–306.
137. Walter Sax, "Kriminalpolitik und Strafrechtsreform," *JZ* 1 (1957), 1–7 (3f.).
138. M. Rainer Lepsius, "Kultur und Wissenschaft in Deutschland unter der Herrschaft des Nationalsozialismus," in Lepsius, *Demokratie in Deutschland: Soziologisch-historische Konstellationsanalysen. Ausgewählte Aufsätze* (Göttingen, 1993), 119–132, quote 122.