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## German Prevention of Crime Act, 1933

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# THE GERMAN PREVENTION OF CRIME ACT, 1933<sup>1</sup>

HERMANN MANNHEIM<sup>2</sup>

I. The changes introduced by the National-Socialist Government into the sphere of German Criminal Law refer mainly to three subjects:

(1) *The substantive Criminal Law.* I quote here the Criminal Law Amendment Act of 26 May, 1933,<sup>3</sup> and several Acts dealing with high treason;<sup>4</sup>

(2) *The treatment of prisoners* (see the Prussian Act of 1 August, 1933: "Preussisches Strafvollstreckungs-und Gnadenrecht" which has been recently discussed by Cantor);<sup>5</sup>

(3) *The increased measures of protection of the public against certain particularly dangerous categories of criminals.* It is with these last mentioned reforms that I shall now deal. Professor Exner of the Munich University has reported in May, 1933, on the position of the problem at that time.<sup>6</sup> Meanwhile things have been completely changed by the enactment of the Statute of 24 November, 1933.

The German Penal Code of 1871 was incomplete with regard to its system of punishment. The reason of this defectiveness was to be found—as is frequently the case in Germany—in difficulties concerning the general principles of Criminology. The authors of the Penal Code adhered to the ideas of retaliation and deterrence. They believed that the Criminal Law has to deal only with the specific offense of which the prisoner stands convicted, and that this offense ought to be punished according to the degree of guilt which it shows. Therefore, they deemed it inadvisable to introduce into the Penal

<sup>1</sup>I. E.: Act concerning the treatment of dangerous habitual criminals and some measures of prevention and reformation.

<sup>2</sup>This article was accepted for publication in November, 1934. Since that time several new developments—court decisions, etc.—have taken place in Germany affecting criminal law and procedure in that state. These developments may be described in a subsequent article. Professor Mannheim is a former judge of the Court of Appeal, Berlin, and a former member of the staff of the University of Berlin, now in London.—Ed.

<sup>3</sup>See the German "Reichsgesetzblatt," 1933, Part I, p. 295, *et seq.*

<sup>4</sup>See, for instance, the "Gesetz zur Abwehr politischer Gewalttaten" of 4 April, 1933, and the "Gesetz zur Änderung von Vorschriften des Strafrechts und des Strafverfahrens" of 24 April, 1934.

<sup>5</sup>Journal of Criminal Law and Criminology, Vol. XXV, pp. 84 ff.

<sup>6</sup>Journal of Criminal Law and Criminology, Vol. XXIV, p. 248 ff.

Code measures intended (a) for the treatment of innocent, but extremely dangerous law-breakers (as lunatics and dipsomaniacs), and (b) of offenders whose dangerousness followed not so much from their particular crime as from their whole criminal individuality. The German Criminal Courts, consequently, were compelled to allow even the most dangerous lunatics or dipsomaniacs to remain at large, and they could console themselves only with the hope that the Administrative Authorities might be considerate enough to confine the law-breaker in a lunatic asylum. And in just the same way the German Prison Authorities had to release the dangerous habitual offender after he had served his fixed time of punishment, which they had the power only to shorten and not to extend—although well knowing that he would commit new crimes within a few days or weeks of his release. The number of persistent offenders thus increased more and more.

The opposition to these shortcomings of the Penal Code, which started almost immediately after it came into force, is associated with the name of Franz von Liszt, with the "*Internationale Kriminalistische Vereinigung*" (International Criminological Union), and the "Sociological School," of which he was one of the chief founders. Already in the so-called "Marburger Programm" of 1882<sup>7</sup> as well as in numerous articles in his "*Zeitschrift für die gesamte Strafrechtswissenschaft*" (Journal of Criminal Law and Criminology), and in the first editions of his textbook Liszt emphasized the idea of the "*Zweckstrafe*."<sup>8</sup> Thus, in the third edition of the "*Lehrbuch*" (1888) he says: Reformation, deterrence and rendering harmless are the immediate objects of punishment; the most important purposes of the "*Zweckstrafe*" are the struggle against the professional criminals by means of substituting a more efficient method of treatment for useless short-period terms of imprisonment and by confining the incorrigible offenders for life. The tripartition recommended by Liszt was: (a) the warning of occasional law-breakers by short, but rigorous imprisonment, failing good behavior during a period of Probation, or alternatively by the imposition of fines; (b) the reformation of the corrigible habitual offenders by long sentences of reformatory imprisonment; and (c) the rendering harmless of the incorrigible habit-

<sup>7</sup>The "Marburger Programm" (published in the "*Zeitschrift für die gesamte Strafrechtswissenschaft*," Vol. III, and in Liszt's "*Strafrechtliche Aufsätze und Vorträge*," Vol. I (Berlin, 1905), deals with the "*Zweckgedanke im Strafrecht*," i. e., the idea that the infliction of punishment is only a means to an end and not an end itself.

<sup>8</sup>This means: *poena ne peccetur*, as contrasted with the "*Vergeltungsstrafe*" (punishment for the sake of retaliation = *poena quia peccatum est*).

ual offenders by confinement for life. It may be useful to bear in mind this programme, because it has become common in certain circles to maintain that the "Sociological School" of Liszt paid too little attention to the problem of the habitual criminal.

It is true, however, that during half a century (from the "*Marburger Programm*" up to 1933) there had been taken in hand only those parts of Liszt's programme which dealt with the substitution of short sentences of imprisonment by fines or Probation (see the *Geldstrafengesetz*<sup>9</sup> of 1921 and the Acts of 1919 concerning the "*bedingte Strafaussetzung mit Bewährungsfrist*," i. e., Probation) and with the reformation of young offenders (see the *Jugendgerichtsgesetz* (Juvenile Act) of 1923). These—as it was justly objected—were reforms resulting only in a more lenient treatment of the offenders. There remained unclosed the gaps in the Penal Code mentioned above which rendered almost impossible an efficient struggle against the most dangerous classes of law-breakers. All the seven Draft Codes which came into existence between 1909 and 1930 failed to be adopted. The reason is to be found in the strange political and philosophical interrelationship of those circles, who were interested in the Reform; furthermore, in the noted instability of the whole German situation after the war. The distribution of forces was not the same in Criminology as in Politics. The followers of the so-called Classical School, being averse from the introduction of measures aiming at the reformation of the criminal and at the protection of the public, and supporters of the theory of retaliation and deterrence, laid stress upon the fact that the reforms endangered the liberal principle of the "*Rechtsstaat*"<sup>10</sup> and the franchises of the citizen. Therefore, the members of the Classical School, in addition to the political right wing to which they themselves belonged, obtained reinforcements from all those members of the political left wing who—whether they called themselves "Socialists" or "Liberals"—in any case held more with the Liberals than with the Socialists. Eventually, in fact, they were supported by many genuine Socialists who opposed the extension of the judicial powers required by the "Sociological School." The Socialists, regarding the majority of the judges as enemies of the working classes, preferred the ineffectiveness of the old Penal Code to the possibilities of an extension of arbitrary powers to the judges. That is the explanation why the Classical School, even after the war, was able to offer successful re-

<sup>9</sup>Act dealing with the imposition of fines.

<sup>10</sup>This principle means government by law, not by men, and may nearly correspond to the Rule of Law.

sistance to the reformatory efforts of the Sociological School. For all that, it is true, that a considerable part of the members of the Classical School, step by step, became convinced of the necessity of introducing measures aiming at reformation and protection. The struggle now became not a question of "If," but of "How." The followers of the theory of retaliation adhered to the dogma that the measures of reformation and protection must be thoroughly separated from punishment and determined according to an entirely different principle (viz., to the principle of dangerousness, not of guilt); furthermore that such measures ought not to be brought into operation before the prisoner has served his time of imprisonment. This, in effect, amounts to an accumulation of punishment and the aforesaid other measures (the so-called "*Zweispurigkeit*," double-track or dualistic system). The members of the Sociological School, however, regarded punishment and measures of reformation and protection as identical institutions destined for the same purposes, so that every separation seemed, both in theory and practice, to be superfluous. They found the ultimate solution in a fusion of punishment and the other measures in the form of the Indeterminate Sentence. For the time being, however, they were ready to content themselves with conferring upon the judges the authority (already contained in the *Jugendgerichtsgesetz*) to replace the punishment in special cases by measures of reformation and protection (so-called "*Vikariieren*" or single-track system, "*Einspurigkeit*").<sup>11</sup>

The Draft Codes vacillated between these two opinions, according to the political balance of power. Whilst the Draft Code of 1925 was dualistic, the Draft Codes of 1919 and 1930 allowed, to a certain degree, the replacement of punishment by measures of reformation and protection. In addition to this, there was some doubt whether the judicial or the administrative authorities ought to be competent for the infliction of the aforesaid measures.<sup>12</sup> The last mentioned method might have strongly emphasized the fundamental contrast between punishment and the other measures.

II. The problem has now been settled by the "*Gesetz gegen gefährliche Gewohnheitsverbrecher und über Massregeln der Sicherung und Besserung*" (Act concerning the treatment of dangerous habitual criminals and some measures of prevention and reformation)

<sup>11</sup>The recently published Dutch monography of Dr. B. V. A. Röling, *The Laws Concerning the So-called Professional and Habitual Criminals* (The Hague, 1933) is also opposed to the dualistic system (see Thorsten Sellin, *Journal of Criminal Law and Criminology*, Vol. XXV, p. 318).

<sup>12</sup>See v. Liszt-Schmidt, *Lehrbuch des Strafrechts*, Vol. I, 26 ed., 1932, §§16, 56 and 65.

of 24 November, 1933, in the form of a Criminal Code Amendment Act. This Statute introduces into the Penal Code several measures of protection and reformation.

(1) The most important of these measures is the *Preventive Detention* (*Sicherungsverwahrung*). Art. 1 of the Act provides that, first of all, the punishment shall be aggravated if the offender has been convicted as a dangerous habitual criminal. There are two different groups of requirements:

(a) In the first group it is required

- (A) that the prisoner has been previously sentenced at least twice to death, penal servitude or imprisonment of no less than six months for a "Verbrechen" (felony) or a malicious "Vergehen" (misdemeanor) in the sense of §1 Penal Code;<sup>13</sup>
- (B) that he must be again sent to prison for a malicious offense,<sup>14</sup> and
- (C) that the general impression of his offenses shows that he is a dangerous habitual criminal.

If these requirements are fulfilled, then the Court has to aggravate the sentence up to five years or—the last offense being a "Verbrechen" (felony)—up to fifteen years penal servitude.

(b) In the second group it is not required that the prisoner has been previously *sentenced* at all. It suffices that he has altogether *committed* three malicious offenses, and it is not necessary that these offenses are "Verbrechen" or "Vergehen." Speaking theoretically, it would suffice, if the three offenses were only small transgressions ("Übertretungen"), provided that the general impression produced by them is that the actor is a dangerous habitual criminal. The last mentioned consequences, however, may scarcely ever be drawn from the commission of petty offenses.<sup>15</sup> In any case, the aggravation of

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<sup>13</sup>It may be interesting for the foreign jurist that the Statute puts foreign convictions on an equal footing with German convictions, provided that the action is, according to the German Criminal Statutes, a "Verbrechen" or a malicious "Vergehen."

<sup>14</sup>Glueck, *Mental Disorder and the Criminal Law*, p. 16 fn. 1, calls habitual criminals persons who "have been previously sentenced on one or two occasions for serious offenses."

<sup>15</sup>The English Report of the Departmental Committee on Persistent Offenders (London, 1932), p. 11, says: "If a man with a bad record were liable to receive the same sentence whether he were convicted of a minor larceny or of robbery with violence, there is a danger that he might more often commit the graver offense on the principle that it is better to be hanged for a sheep than a lamb."

punishment provided by the new Statute can be very considerable.

In the cases under (b) the aggravation of punishment is at the option of the Court, and not compulsory. This contrast between the two groups, however, is rather unimportant in practice; for, the aggravation of punishment in either case being dependent upon the interpretation of the elastic conception "dangerous habitual criminal," the judge can always act at his own discretion. The difference consists only in the fact that the discretionary power refers in the first case only to the sphere of the legal requirements, in the second case also to the legal consequences of the action.

More important than the possibility of aggravating the punishment is the further effect of the decision of the Court declaring the actor a dangerous habitual criminal: According to Art. 2 of the Statute the Court, which declares a person a dangerous habitual criminal, is bound to pass a sentence of Preventive Detention in addition to the punishment, "provided that the protection of the public requires such a measure." The Statute has thus fully taken into account the objections raised by the Classical School and follows the system of "Zweispurigkeit" (double-track systems), evidently because its authors were convinced that the principle of retaliation would be too much neglected in case of a substitution of punishment by the Preventive Detention. This point of view has been very distinctly expressed in an article recently published by a prominent National-Socialist criminologist, Professor Friedrich Schaffstein of the Leipzig University.<sup>16</sup> In this article Schaffstein opposes the "Denkschrift" (memoir), published by the Prussian Ministry of Justice a few months before the Statute of 24 November, 1933, because the "Denkschrift," in stating that public opinion did not discriminate between punishment and Preventive Detention, supported the principle of "Einspurigkeit."<sup>17</sup> Schaffstein says that this latter principle does not harmonize with the National-Socialist ideas of Criminal Law which emphasize the objects of retaliation and deterrence. The people's love of justice, he declares, would revolt when an habitual criminal although having committed only a petty offense, would be sent to Preventive Detention for life. The judges, especially the laymen, would, according to Schaffstein, resolve more easily to pass a sentence of Preventive Detention for a long term, if they felt assured that the prisoner after having served his real

<sup>16</sup>Zeitschrift für die gesamte Strafrechtswissenschaft, Vol. 53, pp. 615/6.

<sup>17</sup>This dissension, by the way, furnishes a further proof of the truth of our statement that the fighting lines in Germany are not the same in Criminology as in Politics.

punishment, would be transferred to a Preventive Detention Establishment, where the conditions would be less repressive than in prison. Schaffstein, however, overlooks that his last argument is conclusive only when the combined measure of treatment entirely consists in a prolonged sentence of penal servitude, not when it assumes the more lenient form of Preventive Detention. But it is just the latter solution which is rejected by Schaffstein, because it does not meet the requirements of the ideas of retaliation and deterrence.

The Statute of 24 November, 1933, accordingly, does not take into account the experiences contained in the already mentioned English Report on Persistent Offenders. This Report, as is commonly known, confesses to the comparative failure of Part II of the Prevention of Crime Act, 1908, which deals with the Preventive Detention of habitual criminals.<sup>18</sup> This unsatisfactory result is traced back mainly to the restrictions to which the passing of a sentence of Preventive Detention is subjected by the Act,<sup>19</sup> and, furthermore, to the dualistic system.<sup>20</sup> The Report emphasizes<sup>21</sup> "that the dual sentence is apt to create the impression that the offender is being punished twice for the same offense"; the Report furthermore regards it to be inadvisable to postpone the beginning of the Preventive Detention, provided that it has been deemed to be necessary at all: "So far as the object of Detention is the protection of society, this can be effected by sending the offender straight to a Detention Establishment, and so far as the object is to train the offender, it is better that the training should start at once."

In the practice of the German Criminal Courts the difficulties connected with the system of the supplementary Preventive Detention apparently have been already demonstrated. This fact follows from the decision of the Supreme Court, dated the 9th March, 1934.<sup>22</sup> Here the Reichsgericht has quashed a sentence of Preventive Detention, because the Lower Court had examined only the question whether the Preventive Detention had been necessary at the time of the passing of the sentence, without considering whether it would still be necessary after the prisoner had served his time of punishment. Although this standpoint of the Reichsgericht is entirely right, it is, nevertheless, conceivable that it may be very difficult for the Courts to predict whether the prisoner, after having served a sen-

<sup>18</sup>Report pp. 55, 60. See Sutherland, *Journal of Criminal Law and Criminology*, Vol. XXIV, p. 885; Cicely M. Craven, Vol. XXIV, p. 241/2.

<sup>19</sup>Report pp. 14, 15, 16.

<sup>20</sup>Report p. 61, *et seq.*

<sup>21</sup>P. 62.

<sup>22</sup>*Juristische Wochenschrift*, 1934, p. 1051, No. 9.



tence of several years' penal servitude, will still be in need of a period of Detention.<sup>23</sup> The responsibility imposed upon the Criminal Courts is all the greater as the Statute does not allow a subsequent cancellation of the sentence of Preventive Detention. If it is proved after the prisoner's serving his term of punishment that a further measure of protection or reformation has become unnecessary, there remains only the possibility of a pardon, or of a release on license immediately after the prisoner has been sent to the Detention Establishment.

The German Statute, it is true, contains, up to a certain point, an approach to the proposals of the English Report. This Report recommends the divorcing of the Preventive Detention from the requirement of previous convictions which, as the Report declares (pp. 15, 61), has not proved a great success. This recommendation, however, refers only to the Preventive Detention of maximum four years, not to the Prolonged Preventive Detention; in the latter case the Report requires at least three previous convictions (p. 19). The German Statute, as I have mentioned before, also dispenses with the requirement of previous convictions, provided that the actor has committed at least three offenses. But, in addition to this, the Statute goes even further with regard to the length of the Detention than the English Report proposes in case of Prolonged Preventive Detention. Whilst, according to the Report, the periods of the Preventive Detention and Prolonged Preventive Detention together shall not exceed fourteen years, the Preventive Detention of the German Statute is indeterminate in length: . "The Preventive Detention is to be continued so long as its purpose requires," says the Act (§42 f). According to the Statute, a person, without having previously served any term of imprisonment, can be sentenced to Preventive Detention for life, provided the Court thinks the other legal requirements to be fulfilled. Nevertheless, it is not to be expected that the Criminal Courts will use their powers otherwise than with great reserve.<sup>24</sup>

Every three years the Court has to examine whether the purpose of the Detention has been secured, and if the answer be affirmative,

<sup>23</sup>The *Reichsgericht* has apparently in the meantime appreciated this difficulty. For, in a more recent decision (*Juristische Wochenschrift*, 1934, p. 2057, No. 18) it declares that, in examining the question whether the prisoner would still be a danger to the public at some later date, the Courts should not exaggerate the requirements, all the more since any undue leniency cannot be repaired.

<sup>24</sup>Exner, in his article in the *Zeitschrift für die gesamte Strafrechtswissenschaft*, Vol. 53, p. 655, criticizes that the Statute has mixed up the question of Preventive Detention with the question of aggravation of punishment. Such a method, he states, must necessarily result in a too great restriction of punishment, or in a too great enlargement of the application of Preventive Detention.

it must release the prisoner. Furthermore, the Court is entitled to undertake such an investigation at any time outside the aforesaid intervals. The release is always conditional. The Court has the power to impose special obligations on the prisoner after release and can recall him if it is shown from his behavior that his Detention has again become necessary. Thus the previous scruple whether to the Courts or to the Administrative Authorities should be given the power of passing a sentence of Preventive Detention and of licensing, has been solved entirely in favor of the Courts. In many other directions too, as I shall show later, the Statute has strengthened the power of the Criminal Courts, instead of that of the Administrative Authorities.

Neither the Statute nor its "*Ausführungsgesetz*"<sup>25</sup> deals with the treatment of offenders sentenced to Preventive Detention. The question, however, is provisionally settled by an edict of 14 May, 1914 (Reichsgesetzblatt, Part I, p. 383 *et seq.*), which shall be in force until a definite settlement will be made. This edict provides that the well-known "Strafvollzugsgrundsätze" (principles for the treatment of prisoners) of 7 June, 1923, save for certain changes, shall provisionally remain in force. Furthermore, it completes the aforesaid "principles" with regard to the new measures of protection and reformation. According to these provisions the Preventive Detention is to be served in an institution which can be connected with a prison; the inmates of the Detention Establishment, however, must be entirely separated from the prisoners. The Preventive Detention, according to art. 3, §16, of the edict, aims at the rendering harmless of the prisoner after he has expiated his crime by serving his period of punishment. The aim of protecting the public against further offenses is to be ruthlessly pursued. The question of reformation is not mentioned in this section of the edict. Nevertheless, it cannot be entirely eliminated, since reformation is, in the end, also a method of rendering the criminal harmless. As to the particulars, the following main deviations from the treatment of the prisoners are enacted: The inmates, as contrasted with the prisoners sentenced to imprisonment, are permitted neither to use their own beds and bedding nor to wear their own clothes and underclothing nor to cater for themselves. On the other hand, they are better off than the offenders sentenced to penal servitude or imprisonment in so far as they are permitted, within certain limits, to buy additional food and comforts by spending money that they have brought with them or

<sup>25</sup>An Act which provides the detailed procedure for the execution of the main Statute.

that has been paid in for them by other persons. Furthermore, they can be allowed, within a wider scope than the prisoners, to read their own books and to get books and periodicals. They are permitted to receive visitors every second month and to forward a letter every month, whilst the corresponding periods in the case of penal servitude are three months and two months, and in the case of imprisonment six weeks and four weeks. It is possible to grant other privileges, also, to the inmates of Preventive Detention Establishments, provided they behave themselves and work industriously.

The treatment is thus, so far as can be judged from these few regulations, less repressive than the treatment in the institutions for penal servitude, and partly more, partly less lenient than in the institutions for simple imprisonment. It is, however, questionable whether these differences, will in the whole, be practically important enough to be appreciated by the inmates, all the more since the Preventive Detention Establishment, as mentioned before, can be connected with an ordinary prison. If the differentiation is imperceptible, then the transfer of the prisoners from prison to the Preventive Detention Establishments would mean only a change of name, not of aim, and the whole double-track system becomes useless.

(2) With regard to *insane and feeble-minded offenders* the Statute contains several important reforms:<sup>26</sup>

(a) Partly they refer to the definition of insanity itself. Art. 3 gives an entirely new formulation of the fundamental §51 of the Penal Code the first part of which runs now as follows:

“An act is not punishable when the actor, at the moment of his action, in consequence of mental disturbance, of mental disorder or imbecility is incapable of understanding the unlawfulness of his action or of acting in accordance with his understanding.”

By this formulation the former wording of §51 has been improved twofold. Although the so-called biological-psychological method of defining the conception of insanity has been retained, the two parts have been reformed. Regarding the biological side, imbecility is treated now like mental disorder, provided, of course, that the law-breaker suffers from a considerable degree of imbecility. Slighter degrees come under the second part of §51. With regard to the psychological side, the dangerous and ambiguous phrase “*Ausschluss*

<sup>26</sup>As I intend, in another essay, to go more deeply into the problem of insanity, I may confine myself here to a summary of the new provisions.

*der freien Willensbestimmung*" (exclusion of free decision of the will),<sup>27</sup> contained in the former wording, which could be interpreted as an unjustifiable legal interference with the struggle between the dogmas of Determinism and freedom of will, is abolished. It is replaced by the same psychological test which has been successfully used in §3 of the Jugendgerichtsgesetz of 1923: the capacity of understanding the unlawfulness of an action and of acting in accordance with this understanding. The practice of the Courts, it is true, has administered the §51 in this sense for a long time.<sup>28</sup>

(b) The *treatment* of the insane and feeble-minded offenders has been changed, too. Firstly, to give effect to suggestions discussed for many decades, the law-giver has now acknowledged officially the existence of feeble-mindedness as a widespread phenomenon among criminals. Up till recently this category had certainly been present in the practice of the German Criminal Courts, but in a totally undefined way. In the conception "*verminderte Zurechnungsfähigkeit*" there had been comprehended the huge mass of mental defectives of the most varied types<sup>29</sup> who, although not exempted from punishment by §51, could not be regarded as normal persons of full mental health. Especially after the war, they constituted an alarmingly numerous contingent in Germany; and the method of dealing with this group in the Criminal Courts was, in consequence of the failure of legislation, very unsatisfactory. The medical experts, in general, used to recommend a more lenient punishment, and the Courts would follow them, although knowing the inadequacy of this method. For, be the guilt of such offenders slighter than that of normal criminals, their dangerousness is, in any case, at least the same, in consequence of their unrestrained temperament. Furthermore, the members of this group, as contrasted with the insane and the imbecile of higher degrees, can be influenced by punishment, whilst, in case of too lenient treatment, they usually abandon all restraint. "They would not have yielded to their insanity if a policeman had been at their elbow."<sup>30</sup> For this species of criminals, therefore, even an aggravation of punishment might be suggested.<sup>31</sup> The German Draft Codes adopted the

<sup>27</sup>See Henry Weihofen, *Insanity as a Defense in Criminal Law*, 1933, pp. 44 and 436.

<sup>28</sup>See Hellmuth von Weber, *Zeitschrift für die gesamte Strafrechtswissenschaft*, Vol. 53, p. 668.

<sup>29</sup>See the borderline-cases mentioned by Weihofen, p. 96, furthermore sect. 1 of the English Mental Deficiency Act, 1927, and Kenny, *Outlines*, 14 ed., p. 58.

<sup>30</sup>A dictum of Lord Bramwell, quoted by Kenny, p. 54.

<sup>31</sup>As to the German point of view, see furthermore the interesting book of Karl Wilmanns (Professor of Psychiatry at Heidelberg), *Die sogenannte verminderte Zurechnungsfähigkeit*, 1927. Sheldon Glueck, *Mental Disorder and*

system of mitigation, deviating merely with regard to the question whether the mitigation should be compulsory (as art. 89 of the Italian Penal Code provides) or only optional. The new Statute (§51, part 2) provides that the punishment *may* be mitigated according to the provision dealing with the punishment of attempted crimes when the capacity of understanding the unlawfulness of an action or of acting in accordance with this understanding was considerably enfeebled at the time of acting, this enfeeblement being caused by one of the factors mentioned in part 1 of §51.<sup>82</sup> It is remarkable that, in consequence of this reference to part 1 of §51, the question of "*verminderte Zurechnungsfähigkeit*" henceforth, at least theoretically, can be answered in the affirmative even in cases of mental disorder. It was previously the prevailing opinion that real mental disorder always led to complete exemption from punishment. In this respect there will probably be no changes in the practice of the Courts, and thus, part two of §51 will deal not so much with cases of mental disorder as of feeble-mindedness.

Of greater importance than the new formulation of §51 is the fact that the Statute has given to the Courts the power of sending to an institution for mental patients every person who commits an offense (save petty transgressions) in a state of insanity or feeble-mindedness, provided that the protection of the public requires such a measure. In case of part two of §51 the detention is to be served in addition to punishment; as contrasted with Preventive Detention, however, as the "*Ausführungsgesetz*" provides, it can be carried out (in accordance with art. 220 of the Italian Penal Code) also *before* the punishment. The period of detention is limited by the Statute just as little as the period of Preventive Detention, and also with regard to release there are here the same provisions as mentioned before.

(3) *Inebriates* meet with the special attention of the new Statute. Previously, a person who had committed a crime in a condition of insanity produced by drunkenness was punishable only when he had wilfully produced this condition, although he knew (or ought to have known) that he might in this state probably commit an offense of such a kind as he later actually did commit. Owing to the difficulties of construing such a so-called "*actio libera in causa*"<sup>83</sup> the prac-

*the Criminal Law* (1925) says, p. 387: "Where criminal acts are committed with premeditation, it would be socially dangerous to allow neurasthenics any favored position before the criminal law."

<sup>82</sup>The list given by Perkins, *Journal of Criminal Law and Criminology*, Vol. XXV, p. 183, may thus be completed by this German Statute.

<sup>83</sup>See Liszt-Schmidt, *Lehrbuch*, 26 ed., Vol. I, §37, No. IV; furthermore Weihs, *loco cit.*, p. 89, fn. 66 and art. 91/2 of the Italian Penal Code.

tice of the Courts very seldom secured a conviction. There were frequently acquittals which aroused public indignation. In order to avoid this, the Courts sometimes endeavored to limit the applicability of §51 to the most serious degrees of drunkenness. On the other hand, drunkenness, as such, was not punishable. The detention in reformatories of drunkards who had proved themselves dangerous to the public was the business not of the Courts, but of the Administrative Authorities who were obliged to take into account the costs and the available accommodation. This whole settlement was unsatisfactory.

The new Statute provided, in the first place, that every person who puts himself, by means of alcohol or other intoxicants, wilfully or negligently in a state of drunkenness covered by part one of §51, is to be punished with imprisonment not exceeding three years or with a fine, when he commits an offense in this state. This provision goes further than the construction of the "*actio libera in causa*" mentioned before; for it suffices now that the actor has produced his state of drunkenness only negligently and without considering that he might commit an offense in his drunkenness.

Secondly, the Statute permits the confinement in an institution for inebriates of every person (a) who has been convicted of the offense just mentioned, or, (b) who, being an habitual drunkard, is convicted of a crime (except a petty transgression) committed under the influence of drink, or caused by his drunken habits. This latter case (b), which has been obviously framed according to the prototype of the English Inebriates Act, 1898, as contrasted with the first case (a), deals with the slighter degrees of drunkenness; the actor, however, is supposed to be an habitual drunkard, which is not required in the first case. The confinement can, in every case, be ordered only when it is necessary for training the law-breaker for a law-abiding and orderly life. It cannot exceed three years, and can be served either before or after the punishment.

(4) The German Criminal Code, already before the passing of the new Statute, provided in §362 that certain categories of persons, as, for instance, vagabonds, incorrigible beggars, common prostitutes, etc., having served their short term of imprisonment, might be sent to a workhouse for a period not exceeding two years.<sup>34</sup> But the Courts were competent only to permit such a measure, and it depended upon the discretion of the Administrative Authorities whether they utilized this permission.

<sup>34</sup>These provisions are similar to the English Vagrancy Act, 1824.

The Criminal Courts themselves are now enabled to pass a sentence of detention in a workhouse. For the first occasion the maximum is two years, but in case of repetition the sentence is indeterminate. With regard to the treatment in the workhouse the Statute contains only the same few provisions as for the Preventive Detention. According to the edict of 14 May, 1934, however, only such restrictions may be imposed upon the inmates of the workhouses as are required for the purpose of their detention and for the maintenance of safety and good order. The confinement in a workhouse aims at the intellectual and moral betterment of the inmates.

(5) The provisions dealing with the *castration of dangerous sexual offenders* may, perhaps, be interesting especially for the American reader, since just in the whole of this sphere the example of the United States has been suggestive for Germany. For many decades the German criminal and biological science has devoted its deepest attention to the United States legislation and practice.<sup>35</sup> This statement, of course, has its greatest bearing upon the question of sterilization which is now settled by the German "Law for the Prevention of Hereditary Disease in Posterity," 14 July, 1933.<sup>36</sup> Here I have only to deal with the struggle against the sexual offender. The Statute empowers the Courts to pass a sentence of castration upon male persons over the age of twenty-one who are convicted of one of the various types of sexual crimes to be punished according to the §§176-178 of the Penal Code or of crimes against the §§183, 223-226 when committed in order to produce or to indulge in sexual lust. There suffices a single conviction of imprisonment of at least six months, provided the actor had been previously convicted of an offense of the aforesaid kind. If not, it is required that he is now convicted of at least two such offenses and sentenced to a minimum of one year imprisonment. In any case, however, the Court may pass a sentence of castration only when it is convinced that the actor is a dangerous sexual offender. Finally, the Court, without any further requirements, may impose a sentence of castration on a person who is convicted of murder or manslaughter when committed in order to produce, or to indulge in, sexual lust.

With regard to the procedure the "Ausführungsgesetz" provides only that the operation is to be performed in a hospital by a doctor

<sup>35</sup>One of the last numbers of the *Zeitschrift für die gesamte Strafrechtswissenschaft* (Vol. 53, p. 712, *et seq.*) contains articles by Landman, Popenoe, Frank C. Richmond and Mabel Elliott on this subject.

<sup>36</sup>An English translation is to be found in the English "Report of the Departmental Committee on Sterilization" (London, 1934, Cmd. 4485), p. 122, *et seq.*

approved for the German Reich. If this doctor is not an official, an official doctor must be present. The Ministry of Justice has to determine the hospitals and the doctors to be entrusted with the carrying out of castration. The application of force is permissible, if other methods fail.

The Supreme Court has already emphasized that the Criminal Courts are permitted to utilize such a grave measure only in cases of extreme necessity and only when the safety of the public urgently demands it.<sup>37</sup>

(6) The new Statute empowers the Criminal Courts to disqualify from following his profession or trade for a maximum period of five years any person whom they have convicted of an offense (except a petty transgression) committed in abusing his profession or trade or in a serious violation of the duties imposed upon him by his profession or trade. The disqualification is permissible only when it is necessary for the protection of the public against further dangers. Previously such a measure could be adopted by the Administrative Authorities only.

(7) A foreigner may be expelled from the Reich when (a) he has been condemned to at least three months imprisonment and when his further sojourn would be dangerous to other persons or to the public or (b) when a sentence of detention or of castration has been passed upon him.

Against persons under eighteen measures of protection and reformation in the sense of the Statute of 24 November, 1933 (save detention in an institution for mental patients or drunkards and expulsion) are not lawful; here is applicable only the *Jugendgerichtsgesetz*.

III. The "*Ausführungsgesetz*" provides several *safeguards* with regard to the *procedure*:

A sentence to undergo protective or reformatory measures cannot be passed by a judge in a lower Court without laymen. A medical expert must be consulted at the beginning of the procedure, when it is to be expected that a sentence of detention in an institution for mental patients or drunkards or a sentence of castration may be passed. At the trial the medical expert must be heard with regard to the physical and mental health of the prisoner. The prisoner must be defended by counsel. Furthermore, the provisions dealing with the rehearing of a case (§§359-373 of the Code of Criminal Procedure) and the awarding of compensation<sup>38</sup> according to the Act of

<sup>37</sup>*Juristische Wochenschrift*, 1934, p. 2061, No. 21/22.

<sup>38</sup>See the interesting survey of Professor Edwin M. Borchard, *Convicting the Innocent*, 1932, pp. 375, *et seq.*, 385.



20 May, 1898 are extended to persons who are erroneously condemned to undergo protective or reformatory detention. Consequently, persons who are unjustly detained have the remedy of compensation awarded by the State, if the rehearing of their case proves their innocence with regard to the crime or, at least, that there is no longer a well-founded suspicion against them. But there is an important limitation: The claim for unjust detention shall be excluded if it appears that consideration for the public weal may have justified the measure taken by the Court even without any reference to the crime or to the conviction. That means apparently that the Court, for instance, is empowered to state that, although the prisoner had not committed the theft which formed the subject of the last conviction, the sentence of Preventive Detention was quite appropriate, the prisoner, in any case, being a dangerous habitual criminal. Every claim would then be excluded. It may be stated, by the way, that the "Ausführungsgesetz" introduces another restriction also, which, however, refers to all cases of rehearing (not only to the wrongful imposing of a sentence of detention according to the Act of 24 November, 1933): the awarded indemnity must not exceed the sum of 75000 Reichsmark (or, alternatively, an annuity of 4500 RM).

When the trial takes place in the absence of the prisoner—a procedure permitted by the German Code of Criminal Procedure in many cases (see the §§231-235)—in such a case a protective or reformatory sentence is not lawful, save the "Procedure concerning measures of protection"—"Sicherungsverfahren" which has been newly created by the "Ausführungsgesetz." This procedure is adopted when there are reasons to suppose that the prisoner committed the act in a state of insanity so that an indictment might be unsuccessful. Then the public prosecutor may put into operation an independent procedure with the object of confining the prisoner in an asylum. This procedure is framed fundamentally like the ordinary criminal procedure. If, however, the presence of the prisoner at the trial is inadvisable in consequence of his mental condition or for the sake of public safety and good order, the Court is permitted to carry out the trial without him.

IV. It is the special merit of the new Statute that it has at length energetically grappled with a subject the legal settlement of which had been for a long time considered as absolutely necessary. Even if it may, perhaps, go too far in many respects, it must be admitted that, in the sphere of the struggle against crime, an occasional mistake is better than complete inactivity. The following point,

however, must be emphasized: The Statute, in its essential parts, contains conceptions the meaning of which it was impossible fully to indicate. The ultimate elaboration of these conceptions is, therefore, the business of the Courts, and upon the question of how far the Courts will be equal to this task the success of the Statute will depend as much as upon the work of the Prison Authorities who have to carry out the Preventive Detention, etc. The most important of the aforesaid conceptions is that of the "dangerous habitual criminal." The Statute, by its own formulation, has acknowledged that by no means every person who has been sentenced three times is to be regarded as a dangerous habitual criminal. According to what tests, however, this fundamental question is to be answered, the Statute does not intimate. The whole burden of this problem rests upon the Courts. How heavy it is, has been already shown by the decisions of the Supreme Court, as yet published, which deal with the question whether a person is a dangerous habitual criminal and should be sent to Preventive Detention in order to protect the safety of the public. The Reichsgericht, in these decisions, has more than once been forced to quash a sentence of Preventive Detention, because the general impression of the offenses committed by the prisoner did not prove adequately that he was a dangerous habitual criminal.<sup>89</sup> To be sure, it is not necessary, declares the Reichsgericht, that the particular offenses be all of exactly the same category; but in case of important differentiations between the particular offenses an especially careful examination is needed. The sole fact that an offense is committed by a person who has been previously convicted of a similar offense—so the Supreme Court emphasizes in another decision (*Jur. Wochenschrift* 1934 p. 2056)—does not justify the conclusion that the action is symptomatic of a propensity towards criminal habits which is rooted in the individuality of the offender. A crime committed by a recidivist can nevertheless be an occasional crime. Furthermore, the Supreme Court has availed itself of the first opportunity to express its opinion with regard to the conception dangerous habitual criminal. The word "habit," says the Court, points to an inclination of the criminal's inward nature, to a state of mind which favors certain ideas as contrasted with others so that they, finally, are repeated as if under compulsion. "It is not important whether the ultimate reason for this state of mind is to be traced back to a peculiarity of character which has been transmitted by heredity or acquired by education or

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<sup>89</sup>*Juristische Wochenschrift*, 1934, p. 1662, No. 28; p. 1666, No. 29; p. 2056, No. 17.

otherwise or as a result of a repeatedly exercised repulsion of opposite ideas. . . . The conception of an habitual criminal, therefore, requires an individuality which, in consequence of a propensity derived from innate characteristics or acquired by practice, commits repeatedly offenses and inclines to the repetition of offenses."<sup>40</sup> It is remarkable that the Supreme Court puts here "the criminal qualities transmitted by heredity or acquired by education or otherwise" side by side in such a neutral manner, without indicating a preference for one or other. As may easily be understood, there is in the Germany of today an inclination towards emphasizing the influence of heredity and race more than the influence of social environment. It is upon this tendency that the work of the German crimino-biological service<sup>41</sup> has been based from the beginning, and the National-Socialist program has been penetrated with it. For the method of administering the new Statute it is obvious that the problem: "heredity or environment" is of great importance. A judge who regards the crime exclusively as a result of heredity must answer the question whether a certain person is a dangerous habitual criminal in another manner than his colleague who lays stress only upon the influence of social environment. The former would be inclined in a much higher degree to take the reports of the crimino-biological service as a basis for his decisions; he would be biased to regard as an habitual criminal a person of a certain constitution (*e. g.*, according to the types created by Professor Kretschmer in his famous book "Körperbau und Charakter"), who descends from a family with a hereditary disposition, even when his offenses are of a relatively harmless kind. Furthermore, such a judge would be apt to consider the question of corrigibility much more skeptically; therefore, he would deal with the question of carrying out the period of Preventive Detention in another way than would a follower of the theory of environment. Just so a prison officer might treat the prisoner according to other principles if, as an advocate of the theory of heredity, he believes in their incorrigibility. The administration of the new Statute will thus evidently depend—although often unconsciously—upon the criminological ideas which prevail among the circles of the judges and prison officers.

It may be interesting in this connection to consider the views of one of the most authoritative German criminologists, Eduard Mezger, Professor of the Munich University and a member of the recently

<sup>40</sup>*Juristische Wochenschrift*, 1934, p. 1662, No. 28. and p. 2057, No. 18.

<sup>41</sup>See Viernstein in the *Journal of Criminal Law and Criminology*, Vol. XXIII, p. 269; furthermore, Viernstein in the "*Mitteilungen der Kriminalbiologischen Gesellschaft*," Vol. III, p. 30, *et seq.*

founded "*Akademie für Deutsches Recht*" as well as of the Committee for the Codification of Criminal Law. Professor Mezger deals with the questions discussed above in his new book, "*Kriminalpolitik*."<sup>42</sup> In this book, which is especially based upon biological principles, Mezger emphasizes, on the one hand, that the sociological theory of crime, against which he fights, would mean the collapse of the whole civilization (p. 172) and that an extreme theory of environment would be intolerable for the "totalitarian" state (p. 173). Furthermore, he supports the statement of Viernstein that *at least 50%* of prisoners are incorrigible. Nevertheless, he does not agree with an extreme theory of heredity. He points out that the question whether the external or the internal causes of crime prevail is wrongly formulated. A "dynamic" point of view, he says, shows that heredity and environment are ambiguous and very complicated conceptions which influence each other (p. 177 et seq.). Mezger acknowledges explicitly that many of the so-called inherited qualities are in reality acquired later. He calls "acquired inheritance" the character of a person, which is produced by mutual influence between an inherited constitution and environment (p. 178). On the other hand, he states that environment, although playing an important rôle in the genesis of crime, is inseparably connected with the individuality, since every person reacts to the influences of environment in a different manner according to his character (p. 188). The borderline between the biological and the sociological element is, therefore, nowhere distinctly marked; never can it be indicated where the biological element ends and the social begins, and vice versa.

These statements—besides the doubtfulness of the hereditary factor as such<sup>43</sup>—are, for the most part, self-evident. They are remarkable only as a symptom that the administration of the new Statute, prospectively, will not be biased by extremely one-sided biological aspects, provided that it will take into account the views of Prof. Mezger. Nevertheless, there may arise difficulties in the application, both theoretically and practically, of the German Criminal Law—difficulties originating in the fact already mentioned that the new legislation adheres to the idea of retaliation which is supported by the Classical School. Mezger who is also a follower of this School has therefore to overcome the rather difficult task of reconciling the

<sup>42</sup>Eduard Mezger, *Kriminalpolitik auf Kriminologischer Grundlage*, Stuttgart, 1934, 208 p.

<sup>43</sup>See, for instance, Healy-Bronner, *Delinquents and Criminals*, 1926, p. 97 et seq.; Sheldon Glueck, *Mental Disorder and the Criminal Law*, p. 284, et seq.; Cantor, *The Causes of Crime*, Journal of Criminal Law and Criminology, Vol. XXIII, p. 1029, et seq.

consequence, which results from the theory of race, that it is not the particular offense committed, but the individuality of the offender that must be the object of punishment, with the idea of guilt, correlated as it is, by the Classical School, to the particular crime. He tries to solve this difficulty by modernizing the conception of retaliation: "According to the principle of the responsibility of the individual towards the community—he declares—the particular crime and the retaliation of guilt becomes again the center of Criminal Law. But the guilty mind itself is strongly influenced by the relation between the particular crime and the biological character of the individual. . . . In this sense of responsibility towards the community retaliation, being the very essence of every kind of punishment, means much more than it did according to the former liberal doctrine; it means a valuation of the biological structure of the offender's particular crime" (p. 138). In conclusion he says: "The future administration of Criminal Law will consider its highest ambition to be to serve the racial improvement of the people. This task embraces two different things: the restoration of the responsibility of the individual towards the community and the elimination of elements which are detrimental to the people and the race. The former tendency is based upon the principle of dealing with the particular crime (*Tatprinzip*), the latter upon the personality of the wrong-doer (*Täterprinzip*): combined they support the Criminal Law of the new totalitarian and national State in a synthesis of punishment and measures of protection" (p. 203). These sentences seem from many points of view to bear the marks of artificiality, vagueness and ex-cogitation. The problems and their solution can by no means be so simply adjusted and made to match with the facility claimed by Mezger. It may, after all, be very doubtful whether the highest task of criminal administration should in reality be the racial improvement of the people. Personally, I should think that criminal justice should rather content itself with the protection of the public against crime and should leave the racial improvement of the people to other institutions which are better fitted for this work. *Qui trop embrasse mal étreint*. In any case, the elimination of elements detrimental to the people and the race can be the business of criminal administration only when the aforesaid elements are criminal. Furthermore, I cannot admit that the distinction between the "*Tatprinzip*" and the "*Täterprinzip*" must necessarily result in the double-track system of punishment and measures of protection and reformation. As long, at least, as there is no proof of any actual differentiation in treatment

of the inmates of prisons and of Preventive Detention Institutions, I would prefer the one-track system recommended by the English Report and the Prussian "*Denkschrift*." Otherwise even the most ingenious theories may not prevent the public from feeling that the whole differentiation is only for the sake of appearances. A decisive difference between the treatment of prisoners and that of Preventive Detention inmates, however, is very difficult in practice, since it may result either in too much severity for the first group or in an undesirable leniency for the second.

To sum up: The advantages of the new Act are that it has introduced for the first time into German Criminal Law important measures of protection of society and has strengthened the power of the Criminal Courts instead of that of the Administrative Authorities. Its disadvantages are that it is based on the double-track system and that it enlarges too much the discretionary powers of the Courts with regard to the liberty of the individual.