The Limits of Criminological Positivism
The Movement for Criminal Law Reform in the West, 1870–1940

Edited by
Michele Pifferi

First published 2022

ISBN: 978-0-367-34059-9 (hbk)
ISBN: 978-1-032-13353-9 (pbk)
ISBN: 978-0-429-32371-3 (ebk)

Chapter 2

Penal reform in Imperial Germany: Conflict and compromise

RICHARD F. WETZELL

Funder:
German Historical Institute Washington

DOI: 10.4324/9780429323713-3

Routledge
Taylor & Francis Group
LONDON AND NEW YORK

2 Penal reform in Imperial Germany
Conflict and compromise

Richard F. Wetzell

Introduction

One of the most far-reaching implications of the reform agenda promoted by the late nineteenth-century penal reformers variously described as advocates of "positivism", "social defense", or as members of the "modern" or "sociological" school of criminal law was that their proposed reforms threatened to erode the boundary separating criminal justice from extra-judicial forms of social control. Focusing on the German case, this essay examines the debates between Imperial Germany's "modern" school of criminal law and its critics over two questions that posed particularly stark challenges to the dividing line between criminal justice and extra-judicial forms of state intervention.[1]

The first of these debates arose from the modern school's commitment to placing criminal law on a scientific foundation. By this the reformers meant that criminal justice should be based not on abstract principles of moral philosophy but on empirical research on the causes of crime and the best ways of combating it.[2] This commitment led some reformers to arrive at a determinist approach to explaining human behavior that negated free will and therefore threatened to undermine the classic conception of criminal responsibility, which was based on the assumption that perpetrators exercised free will in committing their offenses. This determinist challenge to criminal responsibility raised the question: if punishment was no longer predicated on the perpetrator's criminal responsibility, what would distinguish the penal sanction from non-penal state measures such as administrative detention in a workhouse or correctional education?

The second debate was sparked by the reformers' demand that the penal sanction ought to be determined by the offender's future dangerousness rather than his or her past offense. This demand was opposed by Germany's "classical" school of criminal law, a convenient shorthand for the mainstream of late nineteenth-century German criminal jurists who were critical of the modern school's reform proposals, but who, it must be noted, did not form a coherent "school" of penal philosophy or penal policy in the same way that the "modern" school did. Despite differences between

DOI: 10.4324/9780429323713-3

retributivists and legal positivists, however, it is fair to say that most jurists in the classical school agreed that the essence of criminal adjudication consisted in matching the punishment to the crime. Therefore, in their view, if the penal sanction were to be based on dangerousness, it would lose its penal character. If dangerousness became the criterion for determining the appropriate penal sanction, whose sole purpose was to consist of remedying this dangerousness, they asked: what would distinguish penal sanctions from nonjudicial state interventions based on dangerousness such as police detention or involuntary psychiatric commitment?

In its first two sections, this essay analyzes German criminal jurists' debates of the 1890s over, first, the implications of determinism for the question of legal responsibility, and second, the implications of making dangerousness the key criterion for punishment for the nature of criminal justice, the rule of law, and the relationship of penal and extra-judicial measures of intervention. The next three sections examine the rapprochement between the modern and classical schools of criminal law around 1900, the emergence of compromise proposals at the biennial congresses (*Juristentage*) of German-speaking jurists from 1900 to 1906, and the draft codes produced by Imperial Germany's official penal reform commissions from 1906 until 1914.

Determinism and the problem of criminal responsibility

The German penal reform movement was founded by Franz von Liszt, professor of criminal law at the University of Marburg and later in Berlin, whose 1881 inaugural lecture, titled *Der Zweckgedanke im Strafrecht* (The idea of purpose, or utility, in criminal law), which became known as the "Marburg Program", sketched out a penal reform agenda based on the notion that criminal justice must serve the purpose of social defense.[3] After starting a new journal—the *Zeitschrift für die gesamte Strafrechtswissenschaft*—to serve as the mouthpiece for the "modern" school of criminal law in German-speaking Europe, in 1889 Liszt, together with his Belgian colleague Adolphe Prins and his Dutch colleague Gerard Anton van Hamel, co-founded the *Internationale Kriminalistische Vereinigung* (hereafter: IKV; also known as the *Union Internationale du Droit Pénal*) in order to give the penal reform movements that were developing along similar lines in multiple, predominantly (but not exclusively) European countries an international platform. Although the IKV was founded as a vehicle for promoting a penal reform agenda focused on social defense as the primary purpose of criminal justice and dangerousness as the key criterion for the determination of punishment, the IKV leadership also sent out strong signals that they were interested in pragmatic cooperation with the classical school of criminal law.[4]

In early 1892, this cooperative spirit was abruptly disturbed, when Liszt's *Zeitschrift für die gesamte Strafrechtswissenschaft* published an article that explored some of the most radical implications of the "scientific" study of crime. The article's author, Hugo Appelius, was a public prosecutor in

the city of Elberfeld in the Ruhr area and an active member of the IKV. Appelius argued that the empirical study of crime implied a strict determinism. As a matter of scientific method, he contended, sociologists and anthropologists had to conceive of humans as the necessary results of their circumstances. "Man is the product", he wrote, "of his descent, his upbringing, and the changing environments of his life to such a degree that these influences determine his actions with compelling force, without his being able to resist this force through any free or independent decision". Since the IKV statutes mandated that the criminal justice system must be based on the results of the scientific study of crime, the author concluded, the legal system had to adopt this determinist viewpoint. Because humans were not free to act differently from the way they did, criminals could not be held morally responsible. But if offenders were not morally responsible for their actions, the only legitimate purpose of punishment was the protection of society. Society had no right to reject criminals as corrupt or evil, but must make every attempt to win them back for society. Finally, society must shoulder its share of responsibility and take all possible measures to remove the social causes of crime.[5]

This radical attack on responsibility and retributive justice predictably provoked a strong response from the "classical" mainstream of German criminal jurists. The most influential German reaction came from Otto Mittelstädt, a judge on Germany's supreme court, the *Reichsgericht*. Mittelstädt's main charge was that Appelius's claim that punishment must serve the protection of society burdened the criminal justice system with "sociological tasks". Such tasks, Mittelstädt insisted, were alien to criminal justice, whose sole purpose was to "keep the sword of justice sharp and shiny"—a task that was achieved by inflicting the just measure of pain, and nothing else. To be sure, Mittelstädt did not deny the state the right to take preventive measures against crime, but he insisted that such measures were not part of the criminal justice system.[6] Unlike most critics of the modern school, who endorsed retributive justice as the moral foundation of criminal justice, Mittelstädt was a legal positivist. Arguing that the law needed neither a moral-philosophical nor a scientific foundation, Mittelstädt insisted that guilt, responsibility, and punishment were purely formal concepts that derived their meaning and validity from positive law—without reference to either moral philosophy or empirical science. According to this legal-positivist logic, since the penal code listed mental illness and unconsciousness as grounds for exemption from legal responsibility, anyone not qualifying for these conditions was legally responsible.[7]

Franz von Liszt responded in a lengthy article, in which he rejected Mittelstädt's legal-positivist conceptions of responsibility and punishment as the product of a "superstitious belief in the omnipotence of positive law" and firmly endorsed Appelius's position.[8] The criminal, he wrote, "is, for us humans, absolutely and unconditionally unfree; his crime is the necessary and unavoidable effect of given conditions". Since the received notions of

guilt (*Schuld*) and legal responsibility (*Zurechnungsfähigkeit*) were based on the assumption that the criminal could have chosen to act differently, they had become untenable. The same was true of retribution, because "exacting retribution from someone for a mishap incurred through no fault of their own [was] not only cruel, but offensive". Since Liszt had long formulated an alternative, social-defense conception of punishment, this rejection of retributive justice was unproblematic for his reform agenda. By contrast, Liszt's attack on legal responsibility posed a problem for his own vision of criminal justice. If no one was legally responsible, retribution was not the only punishment that was no longer tenable: how could any type of punishment, indeed any kind of criminal justice, still be justified?[9] Realizing this, Liszt rescued legal responsibility by redefining it. Having jettisoned free will, Liszt defined legal responsibility as "receptiveness to punishment". Since the purpose of punishment consisted in instilling or eradicating motivating ideas, punishment should be applied only to those who were capable of responding to it. Hence, legal responsibility should be defined as the "capacity for normal reaction to motives" (*normale Bestimmbarkeit durch Motive*).[10]

Less than three years later, in 1896, however, Liszt admitted that he had failed to provide a viable definition of legal responsibility. In a widely publicized keynote address at the Third International Congress of Psychology in Munich Liszt drew the radical conclusion that the scientific and determinist approach to crime had indeed rendered the concept of legal responsibility unsustainable. Concretely, Liszt had realized that his definition of legal responsibility was unworkable in the cases of incorrigible criminals. Since these criminals were not receptive to rehabilitation, they were, by Liszt's definition, not legally responsible. Furthermore, Liszt had come to think that his criterion of "normal reaction to motives" was meaningless. Were not most crimes abnormal reactions in the first place? Had not medical research shown that normality and abnormality, mental health and illness, were linked by a continuum of intermediary conditions that resisted any sharp distinction? Liszt concluded that the distinction between legally responsible and irresponsible individuals and the corresponding distinction between punishment and medical treatment must be abandoned:[11]

> The distinction between the detention of incorrigible criminals and the institutionalization of dangerous insane persons is not only impracticable but also has to be dismissed as a matter of principle (…) How long has it been since, in the eyes of the people, the lunatic, too, bore the stigma of guilt? The history of mental institutions is that of a continual battle against received prejudices (…) I do not doubt for a moment that penal policy will follow the same path. We will continue the fight against crime, more forcefully, more comprehensively and more resolutely than before. We will seek to get at its deepest root, the social conditions from which it arises. We will also apprehend the individual

> criminal, without false weakness (…) We will not hold back with our judgment of the man's and the deed's social unworthiness. But we will no longer burn the brand onto his forehead. We will not deny the incorrigible our pity, whom for the sake of the common social interest we have to isolate from the sight of his fellow men for the rest of his days on earth. May the prison [*Zuchthaus*] still be outwardly separated from the asylum for the hopelessly and dangerously insane—the same spirit will rule here and there: the spirit of benevolent clemency and caring nursing. May the notions of "crime" and "punishment" live on in the creations of our poets as before; they do not stand up to the strict criticism of scientific knowledge. Thus, the concept of punishment gives way to those of curative rehabilitation [*heilende Besserung*] and protective detention [*sichernde Verwahrung*]. The conceptual dividing line between crime and insanity gives way and falls—and with it (…) the concept of legal responsibility.[12]

Thus, Liszt had arrived at the radical position advanced by the prominent German psychiatrist Emil Kraepelin more than 15 years before.[13] As the notion of legal responsibility was abandoned, penal institutions would become absorbed into the larger framework of medical and police institutions that served the purpose of protecting society against dangerous individuals, be they vagrants, lunatics, or offenders against the law. The projected disappearance of responsibility and punishment would amount to no less than the demise of the criminal justice system. Since Liszt had always demanded that a criminal's punishment not depend on the individual measure of guilt, but on the future danger the offender posed, he found it easy to dispense with the notion of responsibility. For the replacement of "punishment" by "treatment" or "protective measures" would not change the rehabilitative or incapacitating content that Liszt had always envisaged for punishment.

Liszt, however, was enough of a pragmatist to see that this demand for the abolition of legal responsibility stood no chance of realization. At the end of his lecture, he conceded that "the reigning legal-moral conceptions of the people undoubtedly demand a distinction between crime and insanity, prison and asylum". Since legal reformers could not radically break with such ingrained popular conceptions, criminal justice would have to continue to operate with the concept of legal responsibility. Since it was impossible to give the concept a positive definition, the justice system would have to make do with a negative one and simply define as legally responsible all persons who were not mentally ill or minors below a certain age. By the same token, incorrigible habitual criminals would still have to be interned in prisons, not asylums.[14] These pragmatic concessions, however, could not obscure the fact that the body of Liszt's lecture had vindicated those critics who had long insisted that his determinism undermined the foundations of criminal justice. Liszt's 1896 lecture provoked outraged responses from many members of the "classical school" and a wave of resignations from the IKV.

In response, the IKV leadership decided to place the issue of legal responsibility on the agenda of the IKV's seventh international congress the following year. At the 1897 Congress, which took place in Lisbon, the radical position that Liszt had outlined in Munich was defended by van Hamel, the Dutch member of the IKV's founding triumvirate, who taught criminal law at the University of Amsterdam. Since society had to protect itself against all dangerous individuals regardless of their responsibility, and since criminal anthropology had shown that it was impossible to draw a sharp line between normal and abnormal persons, van Hamel argued, the concept of legal responsibility had become both irrelevant and unacceptable. Moreover, current developments in juvenile justice had convinced him that the criterion of legal responsibility was already being abandoned in current judicial practice. Many judges, he reported, were replacing the question of whether juvenile delinquents were legally responsible—that is, whether they possessed the "discernment" necessary to recognize the illegality of their actions—with the pragmatic question of what measures were most suited for the child in question. Then, depending on whether the chosen measure—correctional education, a suspended sentence or simple admonishment—was penal or nonpenal, the judges simply decided the question of "discernment" accordingly. Van Hamel was confident that it was only a matter of time before this judicial practice would be confirmed in written law and then extended to adults; the time was near when the concept of legal responsibility would no longer have a place in criminal justice.[15]

At the Lisbon Congress, van Hamel's radical position was met with disagreement from Liszt. Liszt conceded that defining legal responsibility as synonymous with "normal reaction to motives" (as he himself had proposed) was unworkable because it could not justify holding incorrigible criminals legally responsible. But although he himself had concluded, in his Munich lecture the previous year, that the distinction between crime and insanity was specious, he now insisted that the concept of legal responsibility was indispensable for one crucial reason: because it was essential to differentiate between "punishment" (including that of incorrigibles) and "preventive measures" (imposed on the mentally ill). This distinction was not important because of any difference in content (which Liszt thought would be the same), but because it marked the difference between penal and administrative sanctions. Adopting the stance of his own critics, Liszt argued that van Hamel's proposal to eliminate legal responsibility went "much too far in giving a unified [state] organ the right to impose both administrative and judicial measures".[16] Therefore, Liszt insisted, the point of examining the inadequacy of current definitions of legal responsibility was not to dismiss the notion altogether but to come up with a new definition. Not surprisingly, the Lisbon congress failed to come up with such a definition. The determinism inherent in the reformers' "scientific" approach had effectively rendered the concept of legal responsibility meaningless. That, of course, had been

van Hamel's point, which received substantial support at the Congress. Yet Liszt and many others refused to abandon the notion. Unable to reach agreement, the meeting adjourned without passing a resolution. Although the question surfaced in other debates, the IKV did not take up the problem of legal responsibility again.

Dangerousness and the limits of criminal justice

While the problem of legal responsibility was essentially dropped and everyone agreed to stick to psychiatric criteria for mental illness as the only grounds for being exempted from legal responsibility, the closely related question to what extent the criterion of dangerousness would supplant that of the criminal offense was very much alive—and central to the reform effort. If criminal justice served the purpose of administering retribution, its tasks were sharply distinguished from other branches of state activity. If, on the other hand, its purpose was to protect society by preventing future crimes, then how was it to be differentiated from other forms of state intervention, such as those exercised by police or welfare agencies?

The reformers' call to abandon retributive justice in favor of social defense based on dangerousness also raised thorny questions regarding the limits of punishment, individual freedom, and the rule of law. Retributive justice determined the "just measure of pain" on the principle that every punishment ought to be proportional to the crime committed; this proportionality principle provided a built-in limit to each punishment. But if the purpose of punishment was to prevent any given offender from committing future crimes, so the retributivists charged, punishment would become potentially limitless because no one could predict when that preventive goal would be achieved.[17] Moreover, some retributivists raised the question: if the reason for punishment lay in the offender's future dangerousness, why wait until he or she had committed an offense? The modern school's preventive approach, they warned, would induce it to punish anyone who gave any sign that he or she might commit a criminal act.[18]

In addressing these criticisms, Liszt had to negotiate between diametrically opposed inclinations and pressures. Most fundamentally, he was torn between a temperamental inclination toward bold, provocative pronouncements and an acute awareness that in order to be able to realize any part of his reform agenda he would have to make pragmatic compromises with the classical school. Regarding the question of making dangerousness the sole criterion of punishment, Liszt maneuvered between two competing insights: on the one hand, the conviction that the logic of social defense demanded that an offender's punishment be based exclusively on their future dangerousness, which meant that sentences had to be absolutely indeterminate; on the other hand, the recognition that it was necessary to make pragmatic concessions for the sake of achieving reform, concretely: to settle for relatively (rather than absolutely) indeterminate sentences and to see the

indefinite detention of habitual criminals implemented as an extra-judicial security measure (rather than a penal sanction).

Let us begin with the question "why wait until the offense?" In his programmatic article "Der Zweckgedanke im Strafrecht" of 1882 Liszt had dismissed this question as absurd. Those who asked it, he had written, might as well ask why the doctor cured only the sick.[19] Ten years later, however, in his response to Mittelstädt's reply to Appelius, Liszt acknowledged the legitimacy of the question. This change of heart was at least partly due to the fact that members of the Italian positivist school had actually adopted the position that the state should be able to intern people who appeared dangerous even if they had not committed a crime. Since several of these Italian scholars were members of the IKV, Liszt and the IKV could no longer avoid the issue. This was one reason why the question of the impact of the empirical study of crime on criminal law was placed on the agenda of the 1893 IKV congress.[20]

In his 1893 response to Mittelstädt and in his written report for the IKV Congress, Liszt now stated that he did not consider it absurd to demand the internment of "dangerous" persons who had not committed a crime. After all, society interned dangerous lunatics without requiring that their dangerousness manifest itself in an offense; and many people approved of subjecting wayward children to correctional education, even if they had not become delinquent.[21] Moreover, Liszt suggested that the issue must be seen in the context of larger political developments:

> Liberal individualism (…) brought us the strict limitation of the state's punitive power; will this limitation be able to withstand the force of the incoming socialist current? I welcome this current; I would welcome it even if it were to sweep away the criminal code together with its practitioners and interpreters. But I am convinced that this will not happen. The socialist state will find punishment as indispensable as our current legal order does, even if the overall picture of criminality might become a different one. But precisely because it places more emphasis on the interest of the community, because it will have to take more relentless action against the rebellious individual, it will have to determine more precisely the conditions under which the individual becomes subjected to the community and the bounds that the loss of legal protection may not exceed.[22]

This passage shows that Liszt saw Germany's penal reform movement as part of a broader move toward a more socialist, interventionist state, whose thrust was opposed to the individualist liberalism that had informed the late eighteenth and early nineteenth-century penal reforms. In terms of party politics, however, Liszt was a left-liberal, not a socialist. While his endorsement of "socialism" signaled a willingness to deemphasize individual rights in favor of the common welfare, his liberalism demanded that the fundamental guarantees for individual liberty remain in place. Liszt, therefore, explained that his answer to the question whether nondelinquents

could be punished was "No" because the punitive power of the state must be limited in the interest of civil liberty. Paul Johann Anselm Feuerbach's twin principles that all crimes and all punishments had to be defined by law, Liszt affirmed, was the "bulwark of the citizen against the almighty state".[23] In this sense, as Liszt put it in a famous formulation, the criminal code was "the Magna Carta of the criminal". In sum, Liszt agreed that the demands of social defense had to find their limit in the basic guarantees for individual liberty that had been won in the liberal penal reforms.[24]

While Liszt made it clear that he would not punish non-delinquents, he still had to answer the retributivist charge that his "protective punishment" (*Schutzstrafe*) violated the principle of fixed punishments. For if a criminal's punishment was to prevent him or her from committing future offenses, it would have to last until the criminal in question was no longer dangerous; and Liszt had indeed demanded that habitual criminals should be subject to indefinite detention (*Einschließung auf unbestimmte Zeit*).[25] Now, however, Liszt quietly dropped this demand and modified his reform proposal: in order to safeguard Feuerbach's principle of fixed punishments, the penal code would continue to fix minimum and maximum limits for the punishment of each offense. The actual length of an offender's punishment within these parameters, however, would be determined not at trial but during the administration of punishment, when a special review panel would adjust the sentence to the convict's rehabilitative progress. Liszt was thus proposing relatively indeterminate rather than absolutely indeterminate punishments.[26] Finally, he indicated that as a compromise he would be willing to have the trial judge set specific minimum and maximum sanctions in each case.[27]

Liszt's explanations failed to satisfy Maximilian von Buri and Melchior Stenglein, two supreme court (*Reichsgericht*) judges, who now emerged as his most prominent critics. In addition to serving on supreme court, Stenglein was editor-in-chief of a leading criminal law journal, the *Gerichtssaal*,[28] and the author of several legal commentaries. Von Buri and Stenglein charged that Liszt's social-defense approach inexorably led to the maxim that "whoever commits a legal offense of any sort will be interned until one can be sure that he will not repeat this or any other offense".[29] Consequently, any suggestion that punishments could still be fixed by law was absurd. Moreover, these retributivist critics maintained, Liszt's declaration that no one would be subject to punishment without having committed an offense was inconsistent with his preventive conception of punishment. This conception, they insisted, inevitably led to prophylactic measures against nondelinquents and would therefore "turn the state into a giant correctional facility". Drawing on Liszt's provocative statement that he would "welcome the socialist current, even if it were to sweep away the criminal code", Stenglein concluded that Liszt's approach would lead directly to the socialist state.[30]

Both Liszt and his critics considered the debate about the limits of criminal justice so important because it bore on the problem of civil liberty.[31] The connection between the two issues was not, however, as clear as it might

appear. To be sure, when the retributivists argued that Liszt's reform agenda would lead to indefinite punishments, they insisted that indefinite detention posed a grave threat to civil liberty.[32] But although they rejected indefinite *punishment*, most of his critics were willing to accept the indefinite detention of habitual criminals as a *police measure*. Consequently, their disagreement with Liszt was not really about the limits of state power but about preserving a formal *distinction* between criminal justice and extra-judicial measures, such as those imposed by the police or welfare agencies.

This point emerged most clearly from Otto Mittelstädt's aforementioned 1892 article, which had charged that the modern school was dissolving the distinction between punishment and police measures. Punishments, Mittelstädt insisted, must represent only retribution for a given offense, whereas any measure designed to prevent future crimes was a police measure. This distinction was, in fact, honored in contemporary German practice. Vagrants and beggars, for instance, were sentenced to brief prison terms for the minor offense of begging but, after release from prison, were sent to workhouses for two or three years as a police measure. Mittelstädt did not oppose Liszt's demand for the long-term internment of habitual offenders, but insisted only that it be imposed as a police measure, like the workhouse for beggars. Although Stenglein was less specific, he too admitted that the state was "obliged to combat the tendency to commit criminal acts through measures of the welfare-police".[33]

Hence, retributivist opposition to the indefinite detention of habitual criminals was not so much directed at the measure's content but at its form. Therefore the "classical" school's critique of the modern school had less to do with preserving civil liberties than its rhetoric might have lead one to believe. In fact, one could argue that Liszt's inclusion of indefinite detention as part of the penal sanction offered more protection for individual rights because punishments were subject to judicial review while police or welfare measures were not. This point was confirmed by Mittelstädt, who frankly pointed out that the separation of preventive measures from criminal justice, which he advocated, would allow the state to apply such measures without being constrained by the formal rules of the criminal law.[34]

The question of the connection between the "classical" position and civil liberty was slightly more complicated as far as the protection of nondelinquent citizens was concerned. On the one hand, many retributivists were genuinely concerned with protecting the liberty of nondelinquents and opposed both penal sanctions for nondelinquents and their internment as a "police measure". On the other hand, Mittelstädt argued that the police should be allowed to take preventive measures against individuals who had not committed an offense, since "there always are certain (…) members of society that one can immediately recognize as dangerous to the legal order without any judicial procedures".[35]

Even if we dismiss Mittelstädt's call for measures against nondelinquents as exceptional among the modern school's critics, we must still conclude

that their objection to indefinite preventive detention as a punishment, coupled with its acceptance as a police measure, did not serve the purpose of protecting civil liberties. This observation raises the question of why the distinction between punishment and police measure, between criminal justice and administration, was so important to Mittelstädt and other critics.[36] The answer is difficult because none of these critics reflected on the need for such a distinction. Mittelstädt, for instance, referred to the separation of the judiciary from the rest of the administration as an important historical achievement, without explaining why it ought to be preserved.[37] To be sure, both the independence of the judiciary and its subjection to a codified system of rules were nineteenth-century achievements that served to protect individual liberty. But what Mittelstädt and his fellow retributivists seemed to ignore was that this protection would be undermined if the police were to be given expanded powers to impose long-term detention on habitual criminals—which was what they were advocating. We are left to conclude that the classical school's insistence that the indefinite detention of habitual criminals must be implemented not as a punishment but as a police measure, in what became known as a dual-track system, was their solution to a dilemma. While the modern school's critics insisted that social defense was not a legitimate purpose of punishment, most had come to agree that the social danger posed by habitual criminals made their preventive long-term detention necessary.

In addition, some critics undoubtedly feared that Liszt's penal reform movement would eventually sweep away many of the legal rules whose mastery was criminal jurists' main professional skill. For if punishments no longer depended on the offenses committed, but on the offender's dangerousness, the penal code's provisions detailing the punishments for each offense would become irrelevant and the trial judge would no longer be in charge of sentencing. Hence, the critics' insistence that Liszt's proposals had no place in the criminal justice system was also, to a certain extent, due to professional self-interest.[38]

The retributivists' inability to provide a substantive reason why the indefinite detention of habitual criminals must be implemented as a police measure rather than a punishment allowed Liszt to dismiss their objection as a matter of arbitrary definitions and labels that had no practical relevance. "The most obliging trait of our opponents", he wrote, "is that they are content as long as the time-honored labels are spared". Although he himself considered combining short-term prison sentences with subsequent long-term internment in a workhouse "ridiculous", Liszt indicated that as long as long-term internment for habitual criminals was introduced, he did not care whether it was called a punishment or a "protective measure". This last proposal did indeed become the basis of subsequent compromises between the two schools.[39]

Liszt's Munich lecture and the ensuing controversy about legal responsibility marked the zenith of his radicalism and the nadir of his relations

with the classical school. Liszt's unyielding insistence that the notion of legal responsibility was scientifically unsustainable was a departure from his generally conciliatory stance toward the classical school. From his first programmatic article, Liszt had been much more interested in working toward practical reforms than in constructing a new theory of criminal justice. It had been his desire to establish a broad forum for developing practical reform proposals that had led him to co-found the IKV. Moreover, since he realized that any reform legislation would have to be the result of a compromise with the classical school, Liszt had encouraged reform-minded retributivists to join the IKV and had sought to ensure that the IKV agenda avoided any issues of principle that might alienate them.

This atmosphere of cooperation had been disturbed by Appelius's incendiary article, which had introduced the issue of determinism; and Mittelstädt's counterattack had then provoked Liszt into taking a stance on this explosive issue. Quite willing to make compromises in his reform proposals, Liszt was not one to compromise on questions of principle. Once the Pandora's box of determinism had been opened, Liszt's sincerity as well as his penchant for provocation got the better of him and led him to draw conclusions that threatened to spell the end of criminal justice. Convinced of the intellectual soundness of his conclusion that the notion of legal responsibility was untenable, Liszt was unwilling to take it back. This had led Liszt to a dead end. No matter how logically correct his conclusions might have been, they were clearly unacceptable to the majority of German jurists. The only way out of this situation was to abandon the whole problem of the scientific grounding of criminal justice and to focus on pragmatic reform proposals. This is exactly what Liszt resolved to do.[40]

Initiating the revision of the penal code

In the inaugural lecture that Liszt delivered when he moved to the chair in criminal law at the University of Berlin in 1899—a lecture that filled the university's *auditorium maximum* to capacity and attracted detailed coverage in all the major newspapers[41]—Liszt carefully avoided the issue of determinism. He also sought to avoid future controversies by arguing that philosophical justifications of criminal justice were matters of "belief" that fell outside of the realm of what he called "the science" or "academic discipline of criminal law" (*Strafrechtswissenschaft*). While retributivists could hardly be pleased to see the moral foundation of criminal justice excluded from academic scholarship, Liszt's change from confrontation to a strategy of separating matters of "scholarship" from matters of "belief" did open up the possibility that one might come to a compromise on penal policy by setting aside disagreements over retribution. As far as the causes of crime were concerned, Liszt offered the formula that "crime is the product of the offender's character at the moment of the crime and of the external circumstances surrounding him at this moment" and insisted that this finding had

nothing to do with the question of free will and was acceptable to determinists and indeterminists alike.[42]

In a lecture delivered before the *Juristische Gesellschaft*, a professional association of jurists, in Berlin the following year, in October of 1900, Liszt argued that the time had come to initiate the reform of the German penal code. The most important factor explaining Liszt's timing was the completion of Germany's unified civil code (*Bürgerliches Gesetzbuch*), which had occupied the legal profession and the German legislature from 1874 to 1898.[43] The work on this monumental project had long precluded a general reform of criminal law. Now Liszt argued that the civil code's going into effect on the first day of the new century had "cleared the path" for a revision of the penal code.[44]

Eager to convince as many people as possible of the need for a new code, Liszt began his lecture by appealing to national sentiment. Presenting the German Penal Code as a copy of the French Code Pénal, whose Prussian reception had supposedly interrupted a flowering of German jurisprudence, Liszt called for a new code that would reflect the "legal consciousness of the German people". In outlining his reform proposals, Liszt referred to his familiar tripartite division of criminals into: (1) occasional, (2) corrigible habitual, and (3) incorrigible habitual criminals. As a compromise, Liszt was willing to leave the first category entirely in the hands of the retributivist school. Since the punishments of occasional offenders ought to deter them by "making them feel the power of the violated legal order", their punishments could continue to be based on the objective gravity of their offense. This was a real concession insofar as Liszt was giving up his demand for the abolition of short-term prison sentences and the introduction of suspended sentencing for all "occasional" offenders. On the other hand, several German states had already introduced limited administrative versions of suspended sentencing, so that Liszt's demand had in fact already been partially fulfilled.[45]

With regard to the other two categories of offenders, the modern school, Liszt argued, would have to insist on two key demands: pedagogical correction for corrigibles (which Liszt proceeded to identify with juvenile delinquents), and the protection of society against incorrigible, dangerous criminals. As far as the first demand was concerned, Liszt was glad to report that the principle of subjecting juveniles to pedagogical correction rather than punishment had already gained widespread acceptance in the course of the public debates that had led to the Prussian law on mandatory correctional education for wayward children in July of 1900.[46] This, Liszt emphasized, left only one major demand that the modern school made: better protection against dangerous incorrigibles, above all against "professional criminals", primarily thieves and swindlers. In principle, such criminals ought to be imprisoned for life. But, as a compromise, Liszt proposed that anyone convicted of a "professional crime" receive five years in prison at the first conviction and ten years at every subsequent one. At the

end of his lecture, which reached a larger public through publication in his *Zeitschrift*, Liszt stressed that he considered the particulars of his proposals less important than the fundamental message he wanted to convey: that the two schools of criminal law could come to a compromise on a general revision of the criminal code.[47]

At this point, everything depended on whether someone from the retributivist camp would respond to Liszt's advances. Less than three months after Liszt's lecture, on January 1, 1901, Fritz van Calker, a retributivist professor of criminal law in Strassbourg, published a short piece in the *Deutsche Juristen-Zeitung*, a widely distributed biweekly journal for the legal profession, in which he used the occasion of the thirtieth anniversary of the Imperial Germany's Penal Code coming into force to assess the need and prospects for its revision. Van Calker agreed that the present Code was based on French law and therefore represented an unfortunate break with the tradition of German jurisprudence. What is more, he conceded that the rising crime rate was due to fundamental flaws in the existing criminal justice system and therefore joined Liszt in calling for a revision of the code. According to van Calker, the question was no longer if but how the penal code should be revised.[48]

Van Calker tried to show how a "deeper and purer understanding" of the idea of retribution would be able to address Liszt's concerns. Retributive justice determined punishments on the basis of the gravity of the offense, which, van Calker explained, was composed of both an objective and a subjective aspect. While the objective aspect derived from the value of the legal claim (*Rechtsgut*) that had been violated, the subjective aspect consisted in the "intensity of the criminal disposition" (*verbrecherische Gesinnung*).[49] While the existing criminal code gave primacy to the objective factor, the subjective factor was recognized in a variety of provisions including the distinction between premeditated and unpremediated crimes, the judge's consideration of motives as well as the aggravation of punishment for certain kinds of recidivism. If the criminal justice system were to pay more attention to the "intensity of the criminal disposition", van Calker argued, the modern and classical schools should find it easy to come to agreement on all practical questions.

One month later Karl von Birkmeyer, professor of criminal law in Munich, delivered a public lecture in which he gave voice to the retributivist opposition. Remarkably, even this staunch retributivist admitted that the time was ripe for a thorough revision of the penal code. But he vehemently opposed Liszt's suggestion that this revision could be based on a compromise and insisted that the legislator had to take a position in the dispute between the two schools. Retributive justice was the only acceptable position because it alone guaranteed the continuity of legal development, it alone reflected the legal consciousness of the German people, and it alone conformed to human nature. Moreover, Birkmeyer repeated the old argument that Liszt's system of "protective punishments" was politically unacceptable, because it would eliminate all guarantees of civil liberty.[50]

Most interesting was Birkmeyer's exposition of the reforms needed from the retributivist standpoint. Since retributive justice mandated that punishment be a measure of *pain*, Birkmeyer demanded that monetary fines be adjusted to the culprit's economic status, that short-term punishments become harsher, and that suspended sentencing be abolished. At the same time, since retribution must also be *just*, punishments must be proportional to the culprit's guilt. In this respect, Birkmeyer felt that the criteria for assessing a culprit's guilt were too vague, which was why sentencing practices differed so widely between courts. Therefore, a reform of the penal code ought to limit judicial discretion by providing judges with more precise criteria for assessing guilt. Regarding the content of these sentencing guidelines, Birkmeyer shared van Calker's opinion that the penal code must pay more attention to the subjective dimension of guilt, that is, to the personality and attitude (*Gesinnung*) of the criminal. Finally, Birkmeyer acknowledged the importance of prevention. While he approved of the preventive side-effects of punishments based on retributive justice, he insisted that preventive detention that went beyond retribution was not a matter for criminal justice but for social policy (*Sozialpolitik*). In practice, however, he would see no harm in having such measures regulated in the penal code and administered by the criminal courts—as long as such preventive measures were clearly distinguished from punishment. At the end of his lecture, Birkmeyer insisted that the differences between the retributivists and the IKV represented a clash between two irreconcilable *Weltanschauungen*.[51]

The fact that even an inveterate retributivist like Birkmeyer admitted the need for penal reform reflected the influence that Liszt and the IKV had begun to exert on the climate of opinion among Germany's jurists. For no one had done more than Liszt and the IKV to prepare the ground for such a reform by bringing the shortcomings of the current criminal justice system to public attention. Since the mainstream of German jurists had come to recognize the need for a revision of the penal code, the government had to act. In March of 1901, not quite half a year after Liszt's call for reform, the head of the *Reichs-Justizamt*, Imperial Germany's Department of Justice, announced that his Department was ready to undertake preparatory steps toward penal reform.[52]

Compromise at the *Juristentag*

In response to the government's announcement, the standing committee of the *Deutscher Juristentag*, the biennial meeting of the German-speaking legal profession, put the revision of the penal code on the agenda of its upcoming meeting, in September of 1902. The written reports to be prepared ahead of the meeting were assigned to Liszt and van Calker, indicating a growing inclination toward compromise. The meeting's designated speaker on the subject was Wilhelm Kahl, a member of the classical school and a colleague of Liszt's on the Berlin law faculty, who publicly declared

his support for cooperation between the two schools of criminal law in July 1902, in advance of the meeting, and urged his colleagues to do the same. In response, Liszt reiterated his support for compromise, but Karl Birkmeyer remained adamant, arguing that "the entire dispute between the [two] schools would be an unconscionable waste of time and effort if the legislator could ignore it and still come up with an adequate penal code".[53]

In his report at the *Juristentag* in September of 1902, Kahl recommended that the penal code be fundamentally revised. Due to the project's scope, Kahl decided not to address substantive issues, but proposed an agenda of the major issues meriting discussion at upcoming *Juristentage* over the next few years. This list of issues comprised a review of the criteria for sentencing, changes in the system of punishments, and the legal treatment of three categories of offenders: juvenile delinquents, mentally abnormal offenders *(geistig Minderwertige),* and recidivist or professional criminals. Even if these categories had not been precisely the ones to which Liszt and the IKV had long called attention, the fact that Kahl did not list categories of *offenses* but of *offenders* demonstrated the impact of the modern school. Since sentencing criteria and the system of punishment, too, were issues raised by the modern school, Kahl's entire reform agenda was evidence that Liszt and the IKV had reshaped thinking about criminal justice among the mainstream of German jurists.[54]

When the *Juristentag* voted, the overwhelming majority endorsed the call for the revision of the penal code. Moreover, the discussion following Kahl's report showed that most people were willing to set aside the scholarly dispute between the two schools for the common purpose of working on the reform. Liszt's, Kahl's, and van Calker's appeal for cooperation and compromise had won out over Birkmeyer's resistance. In addition, Kahl's list of key issues was accepted and became the official agenda of the penal law section for the next three *Juristentage*.[55] The legal treatment of juveniles and *geistig Minderwertige* was discussed in 1904; the treatment of recidivists and professional criminals in 1906; and the criteria for sentencing in 1908.

The first vision of the compromise between retributive justice and social defense was elaborated by Liszt and van Calker in their written reports for the 1902 *Juristentag.* At its core, this compromise consisted in the demand that the new penal code should place more emphasis on the offender's "criminal *Gesinnung"* (disposition) as opposed to the objective gravity of the offense. Although this was an appealing formula, Liszt's and van Calker's understanding of the term *Gesinnung* and the weight they wished to assign it in sentencing revealed considerable differences.[56]

In Liszt's social-defense blueprint, offenders were to receive whatever treatment was necessary to prevent them from committing future crimes. Concretely, this meant that an offender's treatment would depend on whether he or she was an occasional, corrigible or incorrigible habitual criminal; occasional criminals were to be deterred, corrigibles corrected, and incorrigibles incapacitated. Once subject to correction or incapacitation, each

offender would remain interned until it appeared certain that he or she would not commit another crime. As we have seen, in IKV debates, this system of individualized punishment was often referred to by the maxim that each offender should be punished according to his "dangerousness". While Liszt used the German equivalent, *Gefährlichkeit*, he also coined a slightly different formulation to capture the same idea; namely, that every offender should be punished according to his "criminal *Gesinnung"* (criminal attitude or criminal disposition).[57] This formulation had one crucial advantage: whereas retributivists objected to the criterion of "dangerousness" because they denied the prevention of future crimes any place in criminal justice, the criterion of "criminal *Gesinnung"* appeared similar to the subjective component of guilt familiar to every retributivist.

Although van Calker insisted that habitual offenders who committed minor offenses could only receive short prison sentences, he was willing to subject them to special "protective measures" (*Schutzmaßregeln*), police measures on the model of the existing workhouse for beggars and vagrants. Thus, while van Calker was unwilling to revise his conception of justice, he recognized and shared Liszt's concern about the protection of society against habitual crime and proposed to address it by expanding the range of police measures—which he was willing to see regulated in the penal code and imposed by the criminal courts.

This proposal was the core of the agreement reached when the *Juristentag* discussed the legal treatment of recidivist, habitual, and professional criminals at its 1906 meeting. Both of the preparatory written reports for this meeting reflected the demands of the modern school and recommended indeterminate sentencing for such offenders.[58] In his oral report to the *Juristentag*, however, Wilhelm Kahl rejected indeterminate sentencing with the familiar retributivist arguments. First, he argued that since the duration of indeterminate sentences depended on the criminal's behavior in detention, such sentences violated the fundamental character of punishment as the imposition of pain (*Übel*) for a *past* offense. Second, Kahl contended that the preventive character of indeterminate sentences and the fact that the prison administration would take part in determining their duration would blur the distinction between judiciary and administration, which was an important guarantee for civil liberty. But because he also recognized the need to protect society against professional criminals, Kahl proposed that such offenders be subject to indefinite *Sicherungsnachhaft* ("preventive" or "protective detention") as an *administrative* measure. Such a measure, he insisted, was not an invention of the modern school, but dated back to the days of the *Carolina*, the German penal code of 1532, and had been recommended by several late eighteenth-century Prussian legal scholars. The introduction of "preventive detention" would therefore be a "truly organic development" of German legal principles.[59]

Kahl's compromise proposal met with overwhelming support, and the meeting resolved to recommend that "dangerous and recidivist habitual

criminals can, in addition to punishment, be subject to protective detention of indefinite duration".[60] The resolution demonstrates that the retributivist mainstream of the German legal profession had recognized the modern school's demand that society must be better protected against habitual criminals. The retributivist principle that punishments must depend on the past offense and the Feuerbachian principle that all punishments must be fixed by law were preserved only in form; in substance, the introduction of indefinite detention as an administrative sanction, which came known as the "dual-track system", gave social defense effective priority over retributive justice and due process.[61]

The preparations for reform were not limited to the meetings of the *Juristentag*. In the fall of 1902, the *Reichs-Justizamt* sponsored the formation of an "independent scholarly committee" composed of prominent representatives of both schools of criminal law, including Liszt, Kahl, van Calker and Birkmeyer.[62] This committee laid the academic groundwork for reform by producing a comprehensive comparative study of German and foreign criminal law. By 1905, the first few volumes of the sixteen-volume work had been published and the rest were appearing on a regular schedule.[63] With these scholarly preparations nearing completion, in April of 1906 the *Reichs-Justizamt* decided to take the next step in the reform process by setting up an official reform commission charged with elaborating a first draft of a new code.[64]

While this official beginning of the reform process was welcomed in most quarters, Karl von Birkmeyer greeted it by redoubling his oppositional efforts. In 1907, he published a polemical treatise entitled *Was läßt Liszt vom Strafrecht übrig?* (What remains of criminal law after Liszt?)[65] In it Birkmeyer served up a careful selection of Liszt's more radical statements in order to show that Liszt's social-defense approach would spell the end of legal responsibility, punishment, and criminal justice. Given some of the radical statements that Liszt had made, such a collection was easy to assemble and embarrassing for Liszt. But Birkmeyer and the handful of hardliners that supported him were unable to turn back the clock. Liszt had overcome the isolation that threatened him just before the turn of the century and won the retributivist mainstream over to cooperation. Any revision of the code was bound to be affected by his ideas.

The official reform commissions

The reform commission appointed by the *Reichs-Justizamt* in April of 1906 included neither law professors nor lawyers in private practice but was entirely composed of ministerial officials and judges. Chaired by Hermann Lucas, department chief (*Ministerialdirektor*) in the Prussian Ministry of Justice, who had written a textbook of criminal law, the five-member commission was composed of another official from the Prussian Ministry of Justice (*Vortragender Rat* Schulz); one representative of the *Reichs-Justizamt* (*Vortragender*

Rat Johannes von Tischendorf; succeeded by Curt Joel), a Prussian judge (*Kammergerichtsrat* Ditzen; succeeded by *Kammergerichtsrat* Oelschlaeger), and a judge chosen by the Bavarian Ministry of Justice (*Oberlandesgerichtsrat* Meyer).[66] The subsequent careers of several members show that for mid-level officials appointment to the commission was an important stepping stone in accelerating one's career: both Ditzen and von Tischendorf were appointed as judges on Germany's Supreme Court (*Reichsgericht*), and, within about a decade, Curt Joel ascended all the way to the rank of *Staatsekretär* (the top official) of the Reich Justice Ministry, a position he held for most of the Weimar Republic, from 1920 to 1931. In almost weekly meetings over three years, from May 1906 to April of 1909, this commission elaborated a "preliminary draft" (*Vorentwurf*) of a new German penal code. This draft was published in October of 1909, together with an 850-page commentary in which the commission justified its decisions. The commentary's introduction pointed out that the draft was not "official" but merely reflected the opinions of the commission. For although the commission had been appointed by the *Reichs-Justizamt*, its draft had not been reviewed by the *Reich* government. It was published in order to submit it to public criticism, before a second commission would produce a revised draft code for consideration by the German legislature, the *Reichstag*.[67]

Lucas's chairmanship had led some members of the modern school to speculate that the commission's draft was bound to be disappointing. Lucas's criminal law textbook had revealed him as a conservative retributivist, and he had written an article arguing that a revised code should not introduce the radical innovations demanded by the modern school, but rather, should represent an "improved edition" of the current code.[68] As it turned out, however, the commission's draft introduced considerable innovations. Its introduction argued that the purposes of punishment should not be reduced to any single aspect; "retribution, rehabilitation, the protection of society, deterrence, and behavioral prevention" were all legitimate purposes of punishment. While the draft code was generally based on the classical school, it made significant concessions to the modern school.[69]

The draft code's first major innovation was a new section instructing judges on the criteria for determining individual sentences within the legally defined parameters, a matter not previously covered in the penal code. Since Liszt had long complained about the vagueness of retributivist sentencing criteria, this innovation was in itself an implicit admission that Liszt's criticism was justified. What is more, the newly defined sentencing criteria gave first place to the offender's "criminal *Gesinnung*". Furthermore, the draft code generally increased the discretionary power of the judges, permitting them, for instance, to lower sentences below the statutory minimum in "especially light cases" and to increase them in "especially grave cases". In short, the draft gave judges unprecedented discretion to adjust sentences to the character and circumstances of the individual offender, a change the modern school had called for.[70]

Beyond this general trend toward individualization, the commission also satisfied the IKV's long-standing demand for suspended sentencing by authorizing judges to suspend the short-term sentences (up to six months) of first-time offenders.[71] The most important concession to the modern school came in the draft's provisions for recidivists. While Liszt had arrived at the position that it was not recidivists *per se* but rather "habitual" (or "professional") criminals who should receive aggravated sentences, the reform commission considered the concept of the "habitual criminal" too vague. Instead, the commission decided to rely on the clear-cut criterion of recidivism and to introduce a general, mandatory aggravation of punishment for all recidivists regardless of the offense. Since the existing penal code threatened recidivists with aggravated sentences only for a very limited number of offenses, the draft code's general provision represented a drastic crackdown on recidivism. Even though Liszt had come to regard the criterion of recidivism as too schematic, the mandatory aggravation of sentences for recidivists implemented a key demand of the modern school.[72]

The draft code provided for even harsher measures against multiple recidivists. Offenders who had five previous convictions and appeared to be "professional or habitual criminals" would be subject to a minimum sentence of five years in prison.[73] Liszt had, in principle, demanded indeterminate sentencing for such offenders, and even the *Juristentag* had called for indefinite "protective detention". The reform commission, however, rejected indeterminate sentencing. Since every punishment had to be proportional to the offender's guilt, the incapacitation of a criminal for preventive purposes in excess of this "just punishment" could not be justified. The commission also rejected the *Juristentag*'s recommendation of indefinite "protective detention" (as an administrative police measure, following a fixed prison sentence) because it found no practical difference between such "protective detention" and punishment. Nevertheless, even though the commission did not go as far as Liszt or the *Juristentag*, the imposition of five-year minimum sentences on fifth-time recidivists went quite far in addressing the modern school's call for combatting habitual criminals.[74]

The *Vorentwurf* (preliminary draft code) also honored the IKV's and the *Juristentag*'s demands for changes in the legal treatment of mentally abnormal (*geistig Minderwertige)* offenders and juvenile delinquents. Regarding the former, the draft introduced the concept of "diminished responsibility" (which was absent from the existing German penal code) and provided that those whose responsibility was determined to be "diminished" would receive reduced sentences. What is more, if public safety demanded it, the draft authorized the courts to order the internment of persons with diminished responsibility in an insane asylum, following their reduced prison sentence. The draft code also made significant innovations regarding juvenile delinquents. Under the current penal code, juvenile delinquents aged 12–18 were subject to punishment unless they lacked the maturity necessary for being held legal responsible. The draft code raised the age of legal responsibility

from 12 to 14 years and eliminated the question of legal responsibility for 14–18 year-olds, instead allowing judges to waive punishment in favor of correctional education in all cases where they deemed it appropriate. The draft code, therefore, promised to drastically increase the use of correctional education for juvenile offenders.[75]

Finally, the commission's draft introduced the workhouse as a "protective measure" with broad application. Whereas under current law only vagrants, beggars, and prostitutes could be sent to the workhouse, the draft code extended the use of the workhouse to theft, fraud, and a number of other offenses. If such an offense was attributable to "dissoluteness" (*Liederlichkeit*) or "unwillingness to work" (*Arbeitsscheu*), the offender could now be sent to a workhouse for up to three years "in order to habituate him to a lawful and industrious life", a drastic innovation that would allow the courts to subject any first-time thief to three years in the workhouse.[76]

In summary, the commission incorporated an amazing number of the modern school's demands. While the 1909 preliminary draft code still rested on the principle that punishments were primarily based on the offense committed, its key innovations gave unprecedented weight to the offender's character and *Gesinnung* as important criteria for sentencing. A week after the *Vorentwurf*'s publication in October of 1909, Liszt declared that it had surpassed his highest expectations and concluded that the conflict between the two schools of criminal law was over and the time for constructive work had finally arrived. While Karl von Birkmeyer attacked most of the draft code's concessions to the modern school, van Calker and other retributivist champions of compromise gave the draft high marks.[77]

Since Birkmeyer interpreted the retributive maxim that no offender must go unpunished to mean that every offender had to serve the full punishment corresponding to his guilt, he flatly rejected all provisions that allowed punishments to be waived (by judicial discretion in "especially light cases" or through suspended sentencing), or replaced (by correctional education for youth, or by internment in the workhouse). In addition, Birkmeyer protested that the introduction of "diminished responsibility" would give psychiatrists even more opportunities to undermine criminal justice and that the draft's extension of judicial discretion undermined the basic principle that all offenses and punishments must be defined by law. But at this point, Birkmeyer's rigid retributivism had definitely become a minority position.[78]

Although Liszt was generally pleased with the preliminary draft and considered it an excellent basis producing a revised draft, he had a number of improvements in mind. Although the *Vorentwurf* made substantial concessions to social-defense demands, it did not go as far in making concessions as the *Juristentag* had—in the matter of indefinite detention for recidivists, for instance. This allowed Liszt to count on the support of more progressive retributivists such as Wilhelm Kahl, the original author of the *Juristentag*'s relevant resolutions, in calling for a more progressive draft code. Since both Liszt and Kahl, who were colleagues in the Berlin law faculty, wanted to

foster cooperation between the two schools, they agreed to collaborate on a joint "alternative draft code" (*Gegenentwurf*). In this effort, they were joined by Karl von Lilienthal, a close associate of Liszt's, co-editor of Liszt's *Zeitschrift* and professor in Heidelberg, and James Goldschmidt, a junior colleague on the Berlin law faculty and a former student of Liszt's.

Published in early 1911, their alternative draft conformed more closely to the recommendations of the *Juristentage* and generally went further in meeting the demands of the modern school.[79] A first set of changes reflected the modern school's conviction that recidivism as such was too schematic a criterion for imposing aggravated sentences. The alternative draft, therefore, restricted the imposition of aggravated punishments to recidivists whose repeat offenses derived from a criminal disposition, while at the same time extending aggravated punishments to *first-time* offenders if the criminal investigation revealed that they were, in fact, habitual or professional criminals (whose previous crimes had gone undetected). Furthermore, the alternative draft proposed the *Juristentag*'s more drastic measures for fifth-time recidivists: whereas the *Vorentwurf* had imposed five-year sentences, the alternative draft imposed administrative detention for an indefinite period.

The alternative draft proposed a severe treatment of mentally abnormal offenders by making the *Vorentwurf*'s mandatory reduction in punishment for offenders with "diminished responsibility" merely optional, and by subjecting them to unprecedented surveillance through a new provision that persons with "diminished responsibility" whom the courts did not find "dangerous" (and who were therefore not subject to internment in an asylum) could be placed under "state medical supervision" for up to five years.[80] Juvenile offenders, in contrast, stood to benefit from more lenient provisions. While the *Vorentwurf* had allowed judges sentencing juveniles 14–18 years of age only the choice between prison and correctional education, the alternative draft added the option of acquitting juvenile offenders on the grounds of insufficient discernment. In the same spirit, the *Gegenentwurf* also sought to make suspended sentencing easier. In sum, the alternate draft pushed both sides of the social defense agenda further. On the one hand, the state was given the power to take the most drastic measures against habitual or mentally abnormal offenders; on the other hand, judges were encouraged to spare juvenile delinquents and occasional first-time offenders from prison by resorting to correctional education or suspended sentencing.[81]

Shortly after the publication of the alternative draft, in April of 1911, the German section of the IKV met to discuss the *Vorentwurf*. At this meeting Liszt reiterated his opinion that the preliminary draft had fulfilled "all of the important demands in penal policy that were raised in the course of the last twenty years". Beside some criticisms concerning legislative technique, the IKV meeting focused on the treatment of habitual criminals and juvenile delinquents and generally endorsed the recommendations of the alternative draft.

As the IKV was meeting to discuss the *Vorentwurf*, the next stage of the reform process had already begun. In the fall of 1910, the *Reichs-Justizamt* had started to appoint the second reform commission, which was to elaborate a revised, "official" government draft of the new code for submission to the legislature. Although most of the 16 members of this enlarged commission were ministerial officials or judges from the states that were represented on the justice committee of the *Bundesrat,* the upper chamber of Germany's national legislature, the commission also included one lawyer in private practice, one psychiatrist—and three professors of criminal law: Wilhelm Kahl, Robert von Hippel, and Reinhard Frank. The fact that Liszt was not invited must have been a disappointment to the man who had devoted his life to the criminal law reform movement; it showed that the *Reichs-Justizamt* still regarded him as too radical and feared the influence he might exert on the commission. The three academics who were chosen were all advocates of compromise sympathetic to the modern school. Kahl's proposals at the *Juristentage* and his collaboration on the *Gegenentwurf* had shown that he was willing to make far-reaching concessions to the modern school. Von Hippel and Frank were both former doctoral students of Liszt's; von Hippel had also been Liszt's *Assistent* in Halle and Frank had written his *Habilitation* under Liszt as well. Although strongly influenced by Liszt, both had retained a belief in the legitimacy of retribution and had endorsed the undogmatic position that retribution and social defense were easily compatible purposes of criminal justice.[82]

During the commission's deliberations from April 1911 to September 1913, Kahl, von Hippel, and Frank pushed for the changes recommended by the *Gegenentwurf* and generally tried to obtain more concessions to the modern school. While the commission's revised code preserved all the preliminary draft's concessions to social defense, some of the efforts to make further progress failed. The *Gegenentwurf*'s toughening of measures against mentally abnormal offenders, its aggravation of punishments for first-time "habitual" offenders (whose earlier crimes had gone undetected), and a proposal to reduce short-term punishments by raising the minimum period for prison sentences from one day to one week, were all voted down.[83] But these failures paled before a crucial victory: the commission's acceptance of the alternative draft's provision that habitual fifth-time recidivists should be subject to mandatory indefinite "preventive detention".[84] While the distinction between punishment and "preventive police measures" formally preserved the purity of the retributive foundation of criminal justice, this provision effectively recognized the principle that habitual offenders must be incarcerated until they were no longer dangerous to society. With regard to this crucial issue Liszt's ideas had triumphed.

The draft of the second reform commission had not yet been published when the reform effort was cut short by the outbreak of the First World War. Although the work of the official reform commissions was resumed during the Weimar Republic (1919–1933) and even reached the parliamentary stage,

governmental instability and the Republic's eventual collapse prevented the planned revision of the penal code from coming to pass.[85] The Weimar years did, however, witness the passage of several pieces of penal reform legislation that realized key parts of the modern school's reform agenda, including the Juvenile Justice Law of 1923 and the Law on Fines passed the same year.[86] When the Nazis came to power, the modern school was attacked as soft on crime even as the new regime implemented one of its key demands, the indefinite detention of habitual criminals, in the 1933 Law on Habitual Criminals.[87] Although an official reform commission produced a new draft code, that code never became law.[88] In the end, a comprehensive revision of the German penal code did not occur until the late 1960s, when both West and East Germany passed major reforms. The postwar era produced starkly divergent interpretations of the legacy of Liszt and the modern school. While East German legal scholars castigated Liszt for promoting an authoritarian, repressive penal policy that paved the way for Nazi criminal justice, in West Germany left-liberal law professors who in 1966 produced an alternative draft code that strongly influenced the 1969 reform hailed Liszt as the key founding figure in the development of progressive penal reform in Germany. Since the 1980s more critical voices emerged in West Germany, too. The interpretation of the legacy of Liszt and the modern school still remains a subject of disagreement and debate.

Conclusion

The entire reform agenda of the modern school of criminal law was predicated on opening up the academic study of criminal law (*Strafrechtswissenschaft*) to the results of empirical research on the causes of crime and the effects of punishment. Professors of criminal law would then be able to advise the political system on drafting a revised penal code that would place criminal justice on a scientific foundation. This is why Liszt advocated for an enlarged vision of a *gesamte Strafrechtswissenschaft*—a comprehensive suite of "penal sciences"—that would combine the study of criminal law, criminology, and penal policy. Those among the reformers who took the demand that penal policy must reflect an empirical analysis of the causes of crime most seriously arrived at a deterministic understanding of criminal behavior that negated the role of free will and challenged the conventional concept of criminal responsibility (*Zurechnungsfähigkeit*).

At his most radical moment, in his 1896 Munich lecture, Liszt thus concluded that the concept of criminal responsibility had become untenable and should be jettisoned, arguing that incorrigible criminals were no more responsible for their deeds than insane persons, and that the distinction between punishment and treatment should therefore be abandoned. But Liszt had no sooner articulated this logically consistent, radical position than he began to retreat from it—both with the pragmatic argument that, in the foreseeable future, this was not an achievable goal and with the substantive argument that

concentrating the power over penal and medical, welfare, or administrative sanctions in a single decision-making body was politically dangerous. As a result, Liszt and the mainstream of the modern school retained the notion of criminal responsibility, which they pragmatically defined as the absence of mental illness, and which remained a necessary condition for being convicted of a crime. The fact that Liszt had articulated the radical position that criminal responsibility was specious was, of course, welcome fodder for hardliners in the classical school who warned that Liszt and the modern school would spell the end of criminal justice.

The decisive obstacle or limiting factor that the determinist approach to criminal behavior came up against was that without a viable definition of criminal responsibility it would be impossible to differentiate criminal justice from other forms of state intervention, such as medical treatment or police measures. Liszt and most of his fellow reformers were not, however, willing to give up on criminal justice as a juridical decision-making process—with the characteristic features of reaching a verdict and pronouncing a sentence—that was distinct from medical, police, or administrative decision-making processes. For this reason, the reformers ended up preserving the notion of criminal responsibility even though its deeper philosophical foundation, the notion of free will, had fallen away.

The most fundamental change proposed by Liszt and the modern school was that punishments should no longer be based on the offense committed (the principle of retributive justice) but on the future dangerousness of the individual offender—in the concrete sense, that each offender should receive the punishment that would prevent him or her from committing future crimes. Making dangerousness rather than the criminal offense the key criterion for sentencing raised two concrete issues. First, critics asked the question: if the penal sanction was based on dangerousness, why wait until an offense was committed? After initially dismissing this question, Liszt came to take it seriously, and justified the prohibition with a civil-liberty argument. Nondelinquents must not be punished because the punitive power of the state must be limited in the interest of civil liberty. In this sense, the criminal code was the "Magna Carta of the criminal".

The second issue was thornier. The penal sanction was to be based on the offender's dangerousness in the sense that it was to consist of whatever measures were necessary to prevent an individual offender from committing future crimes. But if this was so, then how could the sentence be fixed in advance? This issue was especially pressing with regard to that category of criminals whom Liszt called "incorrigible habitual criminals", for whom Liszt proposed indefinite detention. This demand was sharply criticized by jurists from the classical school, who insisted that indeterminate sentences violated one of the most fundamental guarantees of the rule of law, that all punishments must be fixed by law. But even as they argued that indeterminate sentences posed a threat to civil liberty, the classical school shared the modern school's concern about incorrigible habitual criminals as a threat to

society. The mainstream of the classical school therefore came to accept the reformist demand for the indefinite detention of such criminals, but with the proviso that this detention be imposed as a police measure following the fixed prison sentence. The resulting compromise proposal to formally divide a recidivist offender's detention into a fixed term of "punishment" and a subsequent indefinite term of "preventive detention"—the so-called dual-track system—revealed that the mainstream of German jurists was beginning to yield to the reformers' call for a highly interventionist strategy of crime prevention.

It also demonstrated that the classical school's professed concern with the rule of law as a guarantor of individual freedom was, in many respects, more rhetorical than substantive. For the dual-track solution of imposing indefinite detention as an administrative measure was likely to leave detainees with even fewer due-process guarantees than they would have had under Liszt's proposed system of indeterminate sentencing, where sentences were to be periodically reviewed by a judicial body.[89] After downgrading his original proposals from absolutely indeterminate sentencing to relatively indeterminate sentencing (i.e. with a minimum and maximum set by the trial judge), Liszt was willing to settle for the dual-track system in order to reach compromise and move the reform effort forward.

The nature of the barrier that the reformers' demand for indeterminate sentencing came up against is not easy to identify. To be sure, the classical school opposed indeterminate sentencing in the name of the rule of law and civil liberties. But, as we have seen, their commitment to the rule of law—including, crucially, the "nulla poena sine lege" principle—was limited to the realm of the criminal justice system. This is why the mainstream of German jurists was willing to endorse the dual-track system, which introduced indefinite detention as an administrative measure, without raising the same civil liberties concerns that they had raised about indeterminate sentencing. It is therefore too simple to cast the classical school as the champions of civil liberty in the penal reform debate. Instead, we can make two observations. First, the fact that the mainstream of the classical school came around to endorsing both the dual track system for recidivists and post-prison detention in an asylum for mentally abnormal offenders demonstrates that they had come fully to accept the modern school's claim that "habitual criminals" as well as "mentally abnormal" offenders posed serious threats to the social order that were not being sufficiently addressed by the existing legal system. Second, the conflict between the modern and classical schools was not about the question of whether measures based on an offender's "dangerousness" (rather than the offense committed) were warranted; the majority of the classical school agreed that such measures, including indefinite detention, were warranted. Instead, the conflict concerned the different, narrower question of whether such measures should be imposed as part of the criminal justice system or whether they should be imposed outside this system, as extra-judicial measures, that is, in the form

of administrative, police, welfare, or medical measures. Put differently, the debate between the two schools was mostly a debate over what form social defense measures should take. Whereas the modern school called for a broader vision of criminal justice in the service of protecting society against dangerous individuals, the classical school sought to keep criminal justice narrowly focused on offense-based retributive justice and therefore insisted that social-defense measures based on dangerousness be farmed out to non-judicial state agencies.

Notes

1 For overviews of German criminal justice history in the nineteenth and twentieth centuries, see Richard F. Wetzell, "Crime and Criminal Justice in Modern Germany", in Richard F. Wetzell (ed.), *Crime and Criminal Justice in Modern Germany* (New York: Berghahn, 2014), 1–28; Thomas Vormbaum, *Einführung in die moderne Strafrechtsgeschichte* (Berlin: Springer, 2009), also available in English translation as *A Modern History of German Criminal Law* (Berlin: Springer, 2014).

2 On the close connection between this penal reform movement and the emergence of criminology as a field of research, see Richard F. Wetzell, *Inventing the Criminal: A History of German Criminology, 1880–1945* (Chapel Hill: University of North Carolina Press, 2000); Silviana Galassi, *Kriminologie im Deutschen Kaiserreich: Geschichte einer gebrochenen Verwissenschaftlichung* (Stuttgart: Steiner, 2004).

3 On Liszt and his school, see Arndt Koch and Martin Löhnig (eds.), *Die Schule Franz von Liszts: Sozialpräventive Kriminalpolitik und die Entstehung des modernen Strafrechts* (Tübingen: Mohr Siebeck, 2016); Therese Stäcker, *Die Franz von Liszt-Schule und ihre Auswirkungen auf die deutsche Strafrechtsentwicklung* (Baden-Baden: Nomos, 2012); Richard F. Wetzell, "From Retributive Justice to Social Defense: Penal Reform in Fin-de-Siècle Germany", in Suzanne Marchand and David Lindenfeld (eds.), *Germany at the Fin de Siècle: Culture, Politics, and Ideas* (Baton Rouge: Louisiana State University Press, 2004), 59–77.

4 On the IKV, see Sylvia Kesper-Biermann, "Die Internationale Kriminalistische Vereinigung", in Sylvia Kesper-Biermann and Petra Overrath (eds.), *Die Internationalisierung von Strafrechtswissenschaft und Kriminalpolitik (1870-1930): Deutschland im Vergleich,* (Berlin: BWV Verlag, 2007), 85–107; Richard F. Wetzell, "Franz von Liszt und die internationale Strafrechtsreformbewegung", in Koch and Löhnig (eds.), *Die Schule Franz von Liszts*, 207–227; Elisabeth Bellmann, *Die Internationale Kriminalistische Vereinigung, 1889–1933* (Frankfurt: Lang, 1994); Leon Radzinowicz, *The roots of the International Association of Criminal Law and their significance* (Freiburg: Max-Planck-Institut für Ausändisches und Internationales Strafrecht, 1991).

5 Hugo Appelius, "Die Reformbestrebungen auf dem Gebiet der Strafrechtspflege und das heutige Strafrecht", *Zeitschrift für die gesamte Strafrechtswissenschaft* [hereafter: *ZStW*], 12 (1892), 1–33.

6 Otto Mittelstädt, "Schuld und Strafe", a three-part series published in *Gerichtssaal*, 46 (1892), 237–60, 387–416, and *Gerichtssaal*, 47 (1892), 1–31.

7 Mittelstädt, "Schuld und Strafe", 387–406, 14–25, passim.

8 Franz von Liszt, "Die deterministischen Gegner der Zweckstrafe", *ZStW* 13 (1893): 325–70, reprinted in Id., *Strafrechtliche Aufsätze und Vorträge* (Berlin: Guttentag, 1905), vol. 2, 25–74.

9 Ibid., 39, 48.
10 Ibid., 42–45.
11 Liszt, "Die strafrechtliche Zurechnungsfähigkeit. Vortrag gehalten am 4. August 1896 auf dem III. Internationalen Psychologenkongress", *ZStW*, 17 (1897), 70–84; reprinted in his *Aufsätze*, v. 2, 214–29.
12 Ibid., 229 (final passage).
13 Emil Kraepelin, *Die Abschaffung des Strafmasses* (Stuttgart: Enke, 1880); for more on Kraepelin's interest in penal and criminological questions, see the editors' introduction in Emil Kraepelin, *Kriminologische und forensische Schriften* (Munich: Belleville, 2001).
14 Liszt, "Die strafrechtliche Zurechnungsfähigkeit", 227–29.
15 "Proceedings of the 7th Hauptversammlung der IKV, Lissabon, 20–22 April 1897", *Mitteilungen der IKV*, 6 (1896–97), 468–74.
16 Liszt's interventions at the IKV Congress, in "Proceedings of the 7th Hauptversammlung", 474–75.
17 Maximilian von Buri, "Der Zweckgedanke im Strafrecht", *ZStW*, 4 (1884), 174; Maximilian von Buri, "Determinismus und bedingte Verurtheilung", *Gerichtssaal*, 46 (1892), 329; Melchior Stenglein, "Die Internationale Kriminalistische Vereinigung und ihre Zielpunkte", *Gerichtssaal*, 49 (1894), 149.
18 von Buri, "Zweckgedanke", 171; Stenglein, "Die IKV und ihre Zielpunkte", 152; Karl von Birkmeyer, "Die Strafgesetzgebung der Gegenwart in rechtsvergleichender Darstellung", *ZStW*, 16 (1896), 117.
19 Liszt, "Der Zweckgedanke im Strafrecht", (originally published 1882), in Id., *Aufsätze*, v.1, 128, 176.
20 Liszt, "Die deterministischen Gegner", 58; Id., "Die IKV und ihre Zielpunkte", *ZStW*, 14 (1894), 619.
21 Liszt, "Die deterministischen Gegner", 59.
22 Liszt, "Über den Einfluß der soziologischen und anthropologischen Forschungen auf die Grundbegriffe des Strafrechts", in Id., *Aufsätze*, v. 2, 81–82; compare Id., "Die deterministischen Gegner", 60.
23 On Feuerbach, see Arndt Koch and Martin Löhnig (eds.), *Feuerbachs Bayerisches Strafgesetzbuch* (Tübingen: Mohr Siebeck, 2014).
24 Liszt, "Die deterministischen Gegner", 60; Id., "Einfluß", 80.
25 Liszt, "Zweckgedanke", 170.
26 For a comparative historical analysis of the debates about indeterminate sentencing in Europe and the United States, see Michele Pifferi, *Reinventing Punishment: A Comparative History of Penology and Criminology in the Nineteenth and Twentieth Centuries* (Oxford: Oxford University Press, 2016), on the late nineteenth-century European context, see esp. 86–116.
27 Liszt, "Die deterministischen Gegner", 69–70; Id., "Über den Einfluß", 91–92.
28 One of Germany's three major journals of criminal law, the other two being Liszt's *Zeitschrift* and the *Archiv für Strafrecht und Strafprozeß*.
29 von Buri, "Determinismus und bedingte Verurteilung", 329.
30 Stenglein, "Die IKV und ihre Zielpunkte", 151–53; Maximilian von Buri, "Determinismus und die Internationale Kriminalistische Vereinigung", *Gerichtssaal*, 48 (1893), 383–84.
31 For a comparative analysis of the implications of indeterminate sentencing for the rule of law, see Pifferi, *Reinventing Punishment,* 143–77, passim.
32 von Buri, "Determinismus und IKV", 384.
33 Mittelstädt, "Schuld und Strafe", 252–60, 11–12; Stenglein, "Die IKV", 152; compare also Karl Birkmeyer's statement: "as long as such preventive measures are not treated as punishments (…) their regulation in the penal code is

unobjectionable" in: Karl Birkmeyer, "Gedanken zur bevorstehenden Reform der deutschen Strafgesetzgebung", *Archiv für Strafrecht und Strafprozess*, 48 (1901), 78; only von Buri did not spell out his stance on police measures.

34 Mittelstädt, "Schuld und Strafe", 12.

35 Ibid.

36 Among them also Karl Birkmeyer, who later became Liszt's most prominent retributivist opponent.

37 Mittelstädt, "Schuld und Strafe", 258–59.

38 See von Buri's comment: "On this logic, the law would need only to enumerate the actions to be punished and to establish a list of permissible punishments", in his "Determinismus und bedingte Verteilung", 325; and Liszt, "Über den Einfluß", 90.

39 Liszt, "Die deterministischen Gegner", 72.

40 This resolve showed in a lecture Liszt delivered in Dresden in December of 1898: "Das Verbrechen als sozial-pathologische Erscheinung", in Liszt, *Aufsätze*, v. 2, 230–50.

41 *Vossische Zeitung*, 28 Oktober 1899; *National-Zeitung*, 2 November 1899.

42 Franz von Liszt, "Die Aufgaben und die Methode der Strafrechtswissenschaft. Antrittsvorlesung gehalten am 27. Oktober 1899 an der Berliner Universität", *ZStW*, 20 (1900), 161–74; reprinted in Id., *Aufsätze*, v. 2, 284–98.

43 See Michael John, *Politics and Law in the Late Nineteenth Century Germany: The Origins of the Civil Code* (Oxford: Oxford University Press 1989). Although the Civil Code itself was passed in 1896, the deliberations about its *Einführungsgesetz*, the law that regulated its implementation, lasted until the end of 1898; see Liszt, "Das Verbrechen als sozial-pathologische Erscheinung", 249.

44 Liszt, "Das gewerbsmässige Verbrechen. Vortrag gehalten in der juristischen Gesellschaft zu Berlin am 13. Oktober 1900", *ZStW*, 21 (1901), 121–41, reprinted in Id., *Aufsätze*, v. 2: 308–30; Id., "Das Verbrechen als sozial-pathologische Erscheinung", 230–50.

45 Liszt, "Das gewerbsmäßige Verbrechen", 122.

46 See Detlev Peukert, *Grenzen der Sozialdisziplinierung: Aufstieg und Krise der deutschen Jugendfürsorge von 1878 bis 1932* (Cologne: Bund, 1986), 128–30.

47 Ibid., 137–40.

48 Fritz van Calker, "Unser Strafgesetzbuch. Ein Rück- und Ausblick", *Deutsche Juristen-Zeitung* [hereafter: *DJZ*], 6.1 (1 Jan. 1901), 9–13.

49 van Calker also used the term "Schuldenergie" (energy of guilt), which illuminates the strange fusing of moral and psychological categories in Calker's attempt to use the "subjective aspect" of the offender's guilt in order to accommodate Liszt's concern with the dangerousness of the offender.

50 Karl von Birkmeyer, "Gedanken zur bevorstehenden Reform der deutschen Strafgesetzgebung", *Archiv für Strafrecht und Strafprozess*, 48 (1901), 67–100.

51 Ibid., 75–78.

52 Ibid., 81, note 3; Franz von Liszt, "Nach welchen Grundsätzen ist die Revision des Strafgesetzbuchs in Aussicht zu nehmen?" [originally published in 1902], in Id., *Aufsätze*, v. 2, 363.

53 Wilhelm Kahl, "Eine Vorfrage zur Revision des Strafgesetzbuches", *DJZ*, 7.13 (1 July 1902), 301–03 (this included a brief note of endorsement by Liszt); Karl Birkmeyer, "Die Revision des Strafgesetzbuches und die Strafrechtsschulen", *DJZ*, 7.14 (15 July 1902), 325–27.

54 *Verhandlungen des 26. Deutschen Juristentages* [Berlin, 1–12 September 1902], vol. 3 (Berlin: Guttentag, 1903), 210–40.

55 Ibid, 249–75.

56 "Gutachten des Herrn Prof. v. Liszt über die Frage: Nach welchen Grundsätzen ist die Revisions des Strafgesetzbuches in Aussicht zu nehmen", *Verhandlungen des 26. Deutschen Juristentages*, vol. 1 (Berlin, 1902), 259–302; "Gutachten des Herrn Prof. van Calker über die Frage: Nach welchen Grundsätzen ist die Revisions des Strafgesetzbuches in Aussicht zu nehmen", ibid, vol. 2, 237–62; Liszt's Gutachten was reprinted in Liszt, *Aufsätze*, v. 2, 356–410 (citations below refer to this edition).

57 On the terminology used in the IKV, see, for instance, the question "Wie kann für bestimmte Kategorien von Rückfälligen der Begriff der *Gemeingefährlichkeit* des Täters an die Stelle des heute zu ausschließlich angewandten Begriffs der Tat gesetzt warden", Proceedings of the Tenth International Congress of the IKV, Hamburg, September 1905, *Mitteilungen der IKV*, 13 (1906), 426; Liszt first used the term "Gesinnung" in 1893, in "Die deterministischen Gegner", 56–57.

58 "Gutachten von Prof. Max Ernst Mayer über die strafrechtliche Behandlung von Rückfall, gewohnheitsmäßigem und gewerbsmäßigem Verbrechertum", *Verhandlungen des 28. Deutschen Juristentages*, vol. 1 (Berlin, 1906), 145–200; "Gutachten" by Gustav Aschaffenburg on the same question, ibid., vol. 2, 3–32. Aschaffenburg called for indefinite detention; Mayer proposed that habitual offenders' sentences be only relatively indeterminate.

59 Kahl's report, *Verhandlungen des 28. Deutschen Juristentages*, vol. 3 (Berlin, 1907), 369–88, here esp. 384–86; see also Moritz Liepmann, "Die strafrechtlichen Verhandlungen des 28. Deutschen Juristentages", *Gerichtssaal*, 70 (1907), 44–78.

60 *Verhandlungen des 28. Deutschen Juristentages*, vol. 3, 435.

61 For a comparative and transnational analysis of the formation of the dual-track system in different European countries, see Pifferi, *Reinventing Punishment,* 117–42.

62 Memorandum of the *Reichs-Justizamt*, by *Staatssekretär* Nieberding, June 14, 1904, Bundesarchiv Berlin R3001 (RJM), Nr. 5805, Bl. 41–42.

63 Karl Birkmeyer et al. (eds.) *Vergleichende Darstellung des deutschen und ausländischen Strafrechts*, 16 vols (Berlin: Guttentag, 1905–1909). On the project, see "Der erste Schritt zur Reform unseres Strafrechts" [announcement by the members of the publication committee], *DJZ*, 9.14 (15 Juli 1904), 657–59.

64 Memorandum by *Staatssekretär* Nieberding, April 23, 1906, Bundesarchiv R3001 (RJM), Nr. 5805, Bl. 68–69. The commission's existence did not become public knowledge until February of 1907, when an unsigned notice in the "Miscellaneous" (*Vermischtes*) section of the *Deutsche Juristen-Zeitung* reported on it: "Die Strafrechtsreform", *DJZ*, 12 (Feb. 15, 1907), 221–22.

65 Karl von Birkmeyer, *Was läßt Liszt vom Strafrecht übrig?* (Munich: Beck, 1907).

66 The commission's members are listed in: *Vorentwurf zu einem Deutschen Strafgesetzbuch: Begründung* (Berlin: Guttentag, 1909), v. Except for the chairman, their names were not made public until the publication of the draft.

67 *Vorentwurf (…): Begründung*, v; Bundesarchiv, R3001 (RJM), Nr. 5806, Bl. 7, 9, 12, 18, 22, 68, 97.

68 Hermann Lucas, *Anleitung zur strafrechtlichen Praxis* (Berlin: Liebmann, 1904, 2nd ed. 1907); [Hermann] Lucas, "Zur Reform des Strafrechts", *DJZ*, 11.1 (1 Jan. 1906), 26–32; [Eduard] Kohlrausch, "Strafrechtsreform", *ZStW*, 27 (1907), 590–93; Hermann Lucas, "Strafrechtsreform", *DJZ*, 12.7 (1 April 1907), 410–12; and Kohlrausch's rejoinder, *DJZ*, 12.9 (1 Mai 1907), 531–33.

69 *Vorentwurf (…): Begründung*, ix–x.

70 *Vorentwurf zu einem Deutschen Strafgesetzbuch*, bearbeitet von der hierzu bestellten Sachverständigen-Kommission, veröffentlicht auf Anordnung des Reichs-Justizamts (Berlin: Guttentag, 1909) [hereafter: VE], §81, §83, §84; *Vorentwurf (…): Begründung*, 313–18.

71 §38 VE.
72 §87 VE; *Vorentwurf (…): Begründung*, 331–40.
73 Less if their offense was a *Vergehen* (misdemeanor) instead of a *Verbrechen* (felony).
74 §89 VE; *Vorentwurf (…): Begründung*, 359–61.
75 §§68–70 VE; §§63, 65.
76 §42 VE; *Vorentwurf (…): Begründung*, 147, 150.
77 Franz von Liszt in *Münchner Allgemeine Zeitung*, 44 (Oct. 30, 1909), copy in Bundesarchiv, R3001 [RJM], Nr. 6035, Bl. 31); Franz von Liszt in *Münchner Neueste Nachrichten*, 536 (16 Nov. 1909), cited in Robert von Hippel, "Vorentwurf, Schulenstreit und Strafzwecke", *ZStW*, 30 (1910), 904; see ibid, 871 for a good bibliographic overview of responses to the *Vorentwurf*; Fritz van Calker, "Der Vorentwurf zu einem deutschen Strafgesetzbuch", *ZStW*, 30 (1910), 279–89; Karl Birkmeyer, *Die Stellung des Vorentwurfs gegenüber dem Streit der Strafrechtsschulen*, Beiträge zur Kritik des Vorentwurfs, Heft 1 (Leipzig: Engelmann, 1910); Id., *Strafe und sichernde Massnahmen im Vorentwurf*. Beitäge zur Kritik des Vorentwurfs, Heft 2 (Leipzig: Engelmann, 1910).
78 Birkmeyer, *Die Stellung des Vorentwurfs*; for a critique of Birkmeyer, see von Hippel, "Vorentwurf, Schulenstreit", 904–15.
79 *Gegenentwurf zum Vorentwurf eines deutschen Strafgesetzbuchs*, aufgestellt von Kahl, Lilienthal, Liszt, Goldschmidt, 2 vols. (Berlin: Guttentag, 1911) [hereafter: GE]; for a retributivist critique of the *Gegenentwurf*, see: Josef Kohler, "Über den Gegenentwurf eines Strafgesetzbuchs", *Archiv für Strafrecht und Strafprozess*, 58 (1911), 289–301 and 59 (1912), 48–64.
80 §§ 95, 97, 98, 14 GE.
81 §§ 16, 17, 92 GE.
82 The official reform commission's work was authorized by a Kaiserlicher Erlaß countersigned by Bethmann-Hollweg, on June 25, 1910, Bundesarchiv, R3001 (RJM), Nr. 5806, Bl. 151; on the composition of the commission: ibid, Bl. 149–50, 163, 171; the so-called "Kommissionsentwurf" of 1913 was not published until 1920, as the first volume of *Entwürfe zu einem Deutschen Strafgesetzbuch* (Berlin, 1920); for a list of the commission's members see ibid, 6. On Hippel, Frank, and what became known as the "third school" see Robert von Hippel, *Strafrechtsreform und Strafzwecke* (Göttingen: Vandenhoeck & Ruprecht, 1907); Id., "Vorentwurf, Schulenstreit"; Reinhard Frank, *Vergeltungsstrafe und Schutzstrafe. Die Lehre Lombrosos. Zwei Vorträge* (Tübingen: Mohr, 1908).
83 Minutes of the Strafrechtskommission, Bundesarchiv, R3001 (RJM), Nr. 5922, Bl. 62, 363; Nr. 5923, Bl. 6.
84 "Sicherungsnachhaft"; §§ 106, 107, 121, Kommissionsentwurf; Minutes of the Strafrechtskommission, 60th and 61st Sitzung, Bundesarchiv, R3001 (RJM), Nr. 5923, Bl. 181 ff.
85 The best overview of the effort to revise the penal code in the Weimar years is provided in Christian Müller, *Verbrechensbekämpfung im Anstaltsstaat: Psychiatrie, Kriminologie und Strafrechtsreform in Deutschland 1871-1933* (Göttingen: Vandenhoeck, 2004), 180–227.
86 On juvenile justice reform, see Gabriel N. Finder, "The Medicalization of Wilhelmine and Weimar Juvenile Justice Reconsidered", in Richard F. Wetzell (ed.), *Crime and Criminal Justice in Modern Germany* (New York: Berghahn, 2014), 137–57.
87 See Richard F. Wetzell, "Nazi Criminal Justice in the Transnational Arena: The 1935 International Penal and Penitentiary Congress in Berlin",

in Stephen Skinner (ed.), *Ideology and Criminal Law: Fascist, National Socialist and Authoritarian Regimes* (Oxford: Hart/Bloomsbury, 2019), 77–104; Christian Müller, *Das Gewohnheitsverbrechergesetz vom 24. November 1933* (Baden-Baden: Nomos, 1997).

88 See Lothar Gruchmann, *Justiz im Dritten Reich 1933-1940: Anpassung und Unterwerfung in der Ära Gürtner* (2d ed., Munich: Oldenbourg, 1990)

89 For a comparative perspective on this issue, see Pifferi *Reinventing Punishment,* 179–82.