Criminal Law in National-Socialist Germany.

By Otto Kirchheimer.

The first period after the downfall of the Weimar Republic was marked by the rise of authoritarian ideology. An authoritarian criminal theory, mingled with elements of the old classical school, dominated the academic field. In the criminal courts the transition was immediately reflected by the imposition of harsher punishments and by a weakening of the status of the defendant.

In this early period, the genuine National Socialist contribution is to be found in the theory of the volitional character of penal law *(Willensstrafrecht)*. This theory, the ideological offspring of Dr. Freisler, Undersecretary of Justice, completely shifted the emphasis from the objective characteristics of the criminal act to its subjective elements. It asserted that the state is justified in demanding greater self-control from the individual and also in considering criminal intent as the main object of the offensive action of the authorities. The content and even the style of these ideas were copied from Nietzsche, who characterized penal law as war measures used to rid oneself of the enemy.[1])

The most important practical consequence of this more or less deliberately vague theory was a disappearance of the distinctions usually separating criminal attempt and the consummated criminal act.[2]) Neither doctrine, however, made much headway. When German theorists discovered that Germany is not an authoritarian state but a racial community, authoritarian criminal theory lost its theoretical foundation.[3]) The doctrine of the volitional character of the

[1]) Heinze, *Verbrechen und Strafe bei Friedrich Nietzsche*, Berlin, 1939.

[2]) cf. Freisler, in: *Grundzüge eines Allgemeinen Deutschen Strafrechts, Denkschrift des Zentralausschusses der Strafrechtsabteilung der Akademie für deutsches Recht*, Berlin, 1934, p. 13-14, and the same author in: *"Das kommende deutsche Strafrecht"* Allgemeiner Teil, 2nd edition, Berlin, 1935, p. 26. The National Socialist ideology of penal law and the proposed changes in the penal code, as well as the changes already introduced, are dealt with in more detail though without much regard for the actual administration of criminal justice by Donnedieu de Vabres, in: *La Crise Moderne Du Droit Pénal, La Politique des Etats Autoritaires*, Paris, 1938.

[3]) cf., for instance, Dahm, *Nationalsozialistisches und Faschistisches Strafrecht*, Berlin, 1935, p. 6 et seq. which speaks of the gulf separating the German people's community from the Italian ideology of State and Nation. This is especially interesting because of the fact that the same author was one of the initiators of the authoritarian school two years before in Dahm and Schaffstein: *Liberales oder Autoritäres Strafrecht*, Hamburg, 1933.

penal law, although never officially discarded and still considered as a clue to National-Socialist law,[1]) ran into a maze of contradictions and theoretical difficulties. At first it seemed to foreshadow the conversion of punishment of consummated acts into prohibitions against the commission of acts which would merely endanger the community. In effect, the new legislation of 1933, relating primarily to treason and the protection of the People and the Government, has made punishable a large number of mere preparatory acts which, although not having done any actual damage, might, had they been consummated, have endangered the community.[2]) The theory, although justifying the punishment of such preparatory undertakings in the case of high treason and related subjects, nevertheless fought with all available arguments against the unlimited extension of the penal sanctions.[3]) The measures of security—one of the corner stones of the National-Socialist penal legislation—introduced in 1933 are intended to protect society from future misdeeds and therefore aim also at wholly or partially irresponsible persons.[4]) These measures, too, defy classification under a system of volitional penal law. Moreover, the doctrine would not apply to the whole field of negligence.

The so-called *Kieler Schule* (Phenomenological School) gained some theoretical following and its doctrine superseded, at least to a limited extent, the volitional penal law doctrine. With the beginning of the present war its influence could even be noticed in the formulation of governmental decrees and court decisions, which were seeking a concept to minimize the legal requirements for punishableness. In its theoretical foundation, this doctrine shares Carl Schmitt's attack on general conceptions, on normativism and positivism, and stresses, instead, the concrete order of life. Intuition and essence are introduced as the true method of discovering the criminal agent. His innate character can never be educed by mere logical deduction from the statutory requisites. "A person who takes away a movable object not belonging to him does not necessarily classify himself as a burglar. Only the very nature of his personality can make him such."[5]) Vehement controversies rose around this doctrine. Its chief adversaries tried to prove that a penal code retaining ra-

[1]) cf. Graf Gleispach, "Willensstrafrecht" in *Handwörterbuch der Kriminologie*, volume 2, Berlin, 1936, pp. 1967-1979.

[2]) cf. the decree of February 28, 1933, *Reichsgesetzblatt (R.G.Bl.)* 1933, I, 83 §90 a-d and §92 a-f of the Penal Code.

[3]) Oetker, *Grundzüge* p. 48 among others, used the argument that such a policy would tend to weaken the reliance of the members of the community on their own ability to avert possible dangers.

[4]) *Strafgesetzbuch*, §43 a-n.

[5]) Dahm, *Verbrechen und Tatbestand*, 1936, p. 46.

tional and teleological elements was more in line with the aspirations and needs of National Socialism than was the *Kieler Schule.*[1])

For practical purposes it was sufficient to abandon the *nulla poena sine lege* rule and to substitute the postulate of material justice (legitimacy) for mere formal deduction from the law (legality). These devices and, more effectively, the constant stream of new and sometimes retroactive statutes and decrees, coupled with the increasing subordination of the judiciary to the orders of the central authorities, worked to fashion the new fabric of National-Socialist penal law. The postulate, always recurrent in the National-Socialist literature of penal law, that mere formal wrong-doing must be superseded by the motive of material justice, leads to the demand that the eternal tension between morality and law, dominant in the liberal philosophy of law, must disappear.[2]) The social order of the racial community postulates the identity of law and morality. With this identification the given order is theoretically accepted as unquestionable and just. On the practical side, however, German literature no longer holds that acts formally forbidden by statute but performed in the higher interest of the country are not punishable *per se.* As in any other established order, there is still the contradiction between legal and legitimate. If there is an urgent need to suspend the validity of criminal sanctions—and many such cases are found in the Germany of today—the reference to a legitimacy beyond the law does not seem to be sufficient. In 1934, in the case of Roehm and his followers, a special law was promulgated, retroactively covering murder in these cases with a cloak of legality.[3]) With regard to the recurrent criminal acts of overzealous Party followers, amnesty laws with *nolle prosequi* clauses intervene, thus maintaining the fiction of a coherent legal order. The main importance of the attempted unification of the moral and legal order lies, therefore, in the symptomatic desire to broaden the scope of the penal law, and to extend its activities to new fields. We abstain from remarking on mere changes of phraseology which, in order to justify more severe punishment, try to find a foundation for secondary social rules in the new mores of the country. Under the pre-Hitler penal code, a person who abused a position of special trust was punished for breach of trust; the new prescription retained the old definition but added to its scope the violation of the

[1]) The whole controversy is surveyed by E. Wolf, "Der Methodenstreit in der Strafrechtswissenschaft und seine Überwindung," in *Deutsche Rechtwissenschaft* IV, 1939, p. 168 seq.

[2]) see *National-Sozialistische Leitsätze für das deutsche Strafrecht,* edited by Frank, second edition, 1935, and *Das kommende deutsche Strafrecht,* Allgemeiner Teil, second edition, 1935, p. 17 and p. 45.

[3]) cf. Reichsgesetz über Massnahmen der Staatsnotwehr of July 3, 1934, *R.G.Bl.,* 1934, I, p. 529.

duty to take care of other people's financial interests. Corruption was to be attacked through this comprehensive definition.[1]) The mass of published decisions contains no hint of an intensified drive against corruption, but what quite naturally happened was that heavy pressure was brought to bear upon contract partners by initiating criminal prosecutions. The *Reichsgericht* was compelled to side against such attempts at enlarging the content of the penal law by explaining that mere violation of contractual relationships does not come under the modified prescription, and that the duty to protect other people's financial interests must be the essential content and not a circumstantial element of the contract in order to enjoy the protection of the modified §266.[2])

More far-reaching than this attempt to raise the standard of business ethics, was the extension of the category of crimes committed by omission. This extension was carried through by new legal rules as well as by judicial interpretation. §330 c of the Penal Code makes it a legal duty for all people to render assistance in cases of accident or common danger, and the neglect to do so may be punished by imprisonment for two years. But still more important is the way in which judicial interpretation has extended the legal necessity of action. Every conceivable statute, whether in the realm of civil or of criminal law, may create such duties. An attorney who does not prevent his client from lying to the court when under oath, may be punished for participation in perjury, as §138 of the modified Code of Civil Procedure requires the parties to give complete and true accounts.[3]) The wife of an hereditary farmer has the duty of extinguishing fires on the property because the hereditary farm law and the legislation in the field of agricultural production aim at raising production[4]) The *Reichsgericht's* interpretation creates special duties for people living in a family or in a domestic community. Here the *Reichsgericht* decides that the moral duty of Christian charity becomes a legal duty, the neglect of which results in punishment.[5]) There have been many objections to this method of converting moral into legal duties whenever the court likes to inflict punishment.[6]) The previously mentioned Kieler school has therefore tried to replace the moral-legal duty argument by increased emphasis on

[1]) Dahm in *Das kommende deutsche Strafrecht*, special section 1935, p. 339; Kohlrausch, *Strafgesetzbuch* 34th edition, 1938, §266, note 1.

[2]) Compare the *Reichsgericht* decisions in criminal cases (*RG.S.* vol. 71, p. 90), and the decision of the same court quoted in the Journal of the Academy of German Law (*Z.A.* 1940, 15) with commentary by Nagler.

[3]) *RG.S.* 70, 82.

[4]) *RG.S.* 71, 193.

[5]) *RG.S.* 69,321 and 72,373.

[6]) Helmuth Mayer, *Das Strafrecht des deutschen Volkes*, 1936, p. 178.

the nature of the criminal. Motives, general disposition, criminal antecedents and personal character here largely replace objective characteristics, making the uncertain boundaries between legal and illegal still more indeterminate.[1])

The "sound feelings of the people" occupy a special position among the attempts to enlarge the scope of criminal law. In some instances—as in the previously mentioned §330 c, and in the analogy prescription §2—they were explicitly inserted in the statutes. But in addition to that, they play an important part in the general reasoning of the courts. It may be doubtful, though, in particular instances, what the "sound feelings" of the people amount to. It is interesting to know that in such cases the individual judge is not supposed to act as an independent source of the "people's feelings." He is directed to find the authoritative expression of the "people's feelings" in two sources: first, in the pronouncements of the nation's leaders and secondly, in the homogeneity of conceptions developed by the similarity of educational and professional standards among members of the judiciary. That is to say, the people's feelings are crystallized by the authentic interpretation first, of the executive and secondly, of the judicial bureaucracy.[2]) Most important of all, because of its wide field of application, is the mention of the "people's sound feelings" in the analogy prescription. The application of §2 is allowed only when two conditions coincide: first, that the fundamental idea underlying the statute can be applied to the case in question and secondly, that "the people's sound feelings" require such application. If the fundamental idea of a statute is conceived as something fixed once and for all at the time of the statute's perfection, §2 serves only as a permissive clause for closing gaps unintentionally left open by the legislator. But it would not be permissible to extend this application to new facts which the legislator could not foresee.[3]) In Germany, criminal law theory embraces all shades of opinion. Representatives of a very conservative application[4]) are found side by side with advocates of an opinion which al-

[1]) On the whole problem there is an abundant though partially confused literature. Cf. Drost, "Der Aufbau der Unterlassungsdelikte" in *Gerichtssaal* vol. 109, 1937, p. 1-63; Dahm, "Bemerkungen zun Unterlassungsproblem" in *Z.f.d.ges.Strafrechtswiss.* vol. 59, 1939, pp. 133-183.

[2]) Peters, Das gesunde Volksempfinden in *Deutsches Strafrecht* vol. 3, 1937, pp. 337-350.

[3]) The view that the underlying idea of the statute could itself undergo changes was warmly recommended to the 1937 Congress of the International Association of Penal Law in Paris by Professor Donnedieu de Vabres, although he would never have admitted that this extensive interpretation contemplated the abandonment of the *nulla poena sine lege* rule. Cf. the report of Pierre Bouzat in *Revue Internationale de Droit Pénal*, 1937, p. 33 et seq.

[4]) Kohlrausch, op. cit., commentary to §2.

lows for changes in the fundamental idea[1]) and both are outdone by a number of extremists who start by emphasizing the "people's sound feelings." Of course, in the phraseology of the statutes, "sound popular feeling" only takes second place after the mention of the fundamental idea of the statute. But for these extremists the analogy has little meaning as they acknowledge the legal prescriptions only as signposts for the judge, to guide him in his creative endeavor to form the conception of material wrong doing.[2]) The numerous opinions delivered by the *Reichsgericht* on this question show a remarkable restraint in the use of §2 in contrast to the practice of the lower courts.[3]) It would be futile to pin down the *Reichsgericht* to a well defined doctrine, but it constantly refused to lend support to the more extremist views, and even recently it declared that no dispensation of the judge from obeying the statute follows from §2.[4]) The following are among the most important decisions: The application of §2 in order to punish false accusations of unknown persons is denied, since the legislator intentionally refrains from punishing such accusations.[5]) Merely immoral acts cannot be punished as incest because the legislator has deliberately demarcated the realm of punishable acts.[6]) The cases in which the abuse of the dependency-relationship is punishable are also explicitly limited and no extension into new fields may take place.[7]) Neither did the interesting attempt to extend rape into the field of matrimonial relations find favor.[8]) Manslaughter cannot be interpreted as murder simply because the accessory circumstances were especially atrocious.[9]) A wide domain was more or less completely closed to the application of §2 when the *Reichsgericht* argued that the analogous application of prescriptions given by the National Socialist legislator must be examined with the utmost care in order to make sure that the lawmaking authorities did not intend to erect a barrier against extension by analogy.[10]) Of the less frequent cases where the *Reichsgericht* approved of the application of §2, we mention only two significant ones. The first case is concerned with the receiving of stolen goods.

[1]) Mezger, "Der Grundgedanke des Strafgesetzes," *Deutsche Rechtwissenschaft* IV, 1939, pp. 259-266.

[2]) Boldt, "Bericht über Stand und Aufgaben des Strafrechts," *Deutsche Rechtswissenschaft* II, 1937 p. 47 et seq., who, however, is not very consistent; cf. his later much more moderate programmatic formulation of principles in *Gerichtssaal*, vol. 112, 1938, p. 93 et seq.

[3]) Cf. J. Hall, "Nulla poena sine lege," *Yale Law Journal* 40, 1937, p. 175.

[4]) *RG.S.* 72, 93 and RG in *Z.A.* 1940, p. 67.

[5]) *RG.S.* 70, 367.

[6]) *RG.S.* 71, 196; 71, 306 and RG in *ZA.* 1940, p. 180.

[7]) *RG.S.* 71, 94.

[8]) *RG.S.* 71, 109.

[9]) RG in *Juristische Wochenschrift (J. W.)*, 1937, p. 1328.

[10]) *RG.S.* 70, 218.

If a person, instead of receiving stolen goods, did receive the gains obtained by selling or exchanging them, he will nevertheless be punished. In this case, of course, the *Reichsgericht* admitted a change of the fundamental idea on which this prescription rests. The original prescription was directed against the hiding of stolen property, whereas in the new interpretation the idea of attacking participation in, and profiting through, crime prevails.[1]) Embezzlement by employees of the Party and related organizations is dealt with as embezzlement by public officials.[2]) But it is interesting to know that so far the *Reichsgericht* utilises only old tactics from the post-war revolutionary period (1918/19) when it convicted revolutionary organs of "malfeasance in office," as if they were public officials. Throughout the decisions of the *Reichsgericht* there is an evident tendency to maintain rationality in the realm of criminal law. This rationality requires that the statute is preserved as a main focus for the decisions of the individual cases. On the other hand it pays for its attempt to maintain a certain coherence in the legal system by complete submission when cherished ideas of the new régime are at stake. Thus, for instance, its decisions regarding race defilement fall in line with the interpretations of the most ardent adherents of the official dogma, and try to extend the range of this legislation as far as possible.[3])

It is especially interesting to note the willingness of the *Reichsgericht* to extend legislation on race defilement to include foreigners who have contravened this German legislation on foreign soil.[4]) It is just a preliminary stage of the realization of the ambitious plan to extend the limits of criminal jurisdiction over foreigners in foreign countries. This plan aims at extending the jurisdiction beyond the traditional limits of high treason, felony, etc. to embrace the punishment of all violations of German interests.[5]) This principle remained a mere postulate, without much actual importance, as long as Germany's rule was restricted to her own territory. But at the point at which she began successfully to invade other countries the retroactive extension of part of the German criminal legislation, as done by decree of May 20, 1940, to foreigners acting in foreign countries,

[1]) *RG.S.* 72, 146.

[2]) *RG.S.* 71, 390. The decisions on §2 are collected and systematized by Hans Bepler in *J.W.*, 1938, pp. 1553-1570 and 1939 pp. 257-266.

[3]) *RG.S.* 72, 91; 72, 149; 72, 245.

[4]) R.G. in *J.W.* 1940 p. 790. In this case one of the parties was a "non-Aryan" Czech, and the other was an "Aryan" German girl. The "crime" was committed in the sovereign Republic of Czecho-Slovakia, before Munich, and the act was not punishable under Czech law.

[5]) Reimer in *Das kommende deutsche Strafrecht*, pp. 223-24; Maurach: "Treupflicht- und Schutzgedanke," *Deutsches Strafrecht*, vol. 5, 1938, pp. 1-15.

served the double purpose of giving a cloak of legality to persecutions of foreign political enemies who fell in German hands, and then to frighten into submission the population of still unconquered territory by indicating the legal consequences involved in any move against Germany—a kind of legal counterpart to the *Blitzkrieg* movies shown to the upper classes in the countries about to be invaded.[1])

But it is questionable how far the influence of the *Reichsgericht* extends. The changes in appeal practice, no longer allowing many cases to come up to the *Reichsgericht* for review, limit the sphere of influence of the highest court. Where the influence of the *Reichsgericht* has diminished, the administration has stepped in with its much more effective weapons for coercing judges to fulfill its wishes not only as regards the general ideas but also as regards decisions in concrete cases. Whenever the government so desires, it can compel the judiciary to mete out sentences according to its wishes by means of retroactive statutes. This method was used in two types of cases. First, in the "cause celèbre" of van der Lubbe (*Reichstags* fire) the retroactivity served to obtain a desired sentence in an individual case. Secondly, retroactive statutes were later issued as, for instance, the statute against kidnapping and the statute against car-holdups with the help of traps, as well as in the more recent war legislation. Here the retroactive death penalty was introduced in order to achieve an immediate deterrent effect. The executive influence on the administration of criminal justice has been further increased by the gradual abandonment, since 1937, of judicial selfgovernment. The assignment of tasks within the court is no longer carried out by the president of the court in connection with the presidents of the various sections and the highest ranking associate judge, as independent organs of the court, but by the president of the court alone as representative of, and on orders from, the ministry of justice. The assignment may be changed during the year not only for specific reasons, e.g. illness, but also in the interests of the administration of justice.[2]) This development, which tends to lower the judiciary to the status of a mere administrative agency, finds its logical conclusion in new regulations issued at the beginning of the war. These regulations grant the ministry of justice the right to change and unify jurisdictions and to abolish the immovability of judges, by ordering them to accept all

[1]) Incidentally, the retroactivity here, as in the Roehm case, also serves the German yearning for legal correctness. This longing for a wholly worthless legality is a strange sign in a legal order which, officially at least, rests on "material justice."

[2]) *R.G. Bl.* 1937. I 1286. cf. E. Kern. "Die Selbstverwaltung der Gerichte", in *Z.A.*, 1939, pp. 47-50.

assignments within the jurisdiction of the ministry of justice.[1]) The dismissal and the compulsory retirement of judges, at first only planned as a transitional measure for the stabilisation of the regime, have become a permanent device. The judges are subjected to §71 of the civil service statute, which provides for the compulsory retirement or dismissal of officials if they do not give sufficient guarantees of adherence to the N.S. regime. The removal may, however, not be ordered by reason of the material contents of a judicial decision. But the boundaries are difficult to draw and a decision not punishable in itself may nevertheless reveal just that personal unreliability on which the removal may be based.[2]) The changed status of the judge is quite naturally reflected in the official ideology which, instead of formal independence, emphasizes the judge's incorporation in the racial community.[3]) The central administration also increasingly influences the decision of individual cases through the medium of the public prosecutor's office. Legally speaking the courts are at liberty to deviate from the punishment asked for by the public prosecutor, but in practice they are strongly discouraged from doing so.[4]) The effect is evident. The rate of acquittals fell from 15.06% in 1932 to 10% in 1938. Duration and severity of sentences have increased[5]), even if the share of fines in all punishments has not varied very much. From 56.6% in 1932 it went down slightly to 54.5 in 1938, an interesting sign that even the penal law of the racial community cannot dispense with such capitalist institutions as fines. There is also, so to speak, a certain type of public opinion which exerts heavy pressure on the courts from below. This public pressure is allowed to express itself in the more extremist organs of the National Socialist Party, which sometimes disagree violently with the judiciary, and publicly express their opinion in their newspapers.[6])

But there is another feature to which little attention has been paid and which seems, however, very seriously to have influenced the administration of criminal justice in Germany: that is the disappearance of a unified system of criminal law behind innumerable

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[1]) *R.G. Bl.* 1939. I. p. 1658.

[2]) Cf. Brandt: *Das deutsche Beamtengesetz*, 1937. Note 2 to §71.

[3]) Jaeger, *Der Richter*. 1939, p. 69.

[4]) In a recent address given by Undersecretary of Justice Freisler before the presidents of the special courts, he draws their attention to the fact that the public does not understand unimportant differences between the punishment asked for by the public prosecutor and the sentence given by the court. Freisler: "Die Arbeit der Sondergerichte in der Kriegszeit." In: *Deutsche Justiz*, 1939. p. 1753.

[5]) cf. Rusche & Kirchheimer: *Punishment and Social Structure*, New York 1939, p. 186 table 23.

[6]) see e.g. the discussion between the *Schwarze Korps* and the ministry of justice, parts of which are reprinted, especially the arguments of the judicial bureaucracy, in: *Deutsche Justiz* 1939, pp. 58-59, and pp. 175-178.

special competences (departmentalisation). The ever increasing number of administrative agencies with independent penal power of their own has enormously diminished the scope of action of the regular criminal courts.[1]) This curtailment of the judiciary's activity is a phenomenon of deep social significance. Special administrative units like the S.S., the National-Socialist Party, the Labor Service and the Army have their members partially or totally exempted from the competence of the ordinary criminal courts. Under the special disciplinary rules of such organizations, the legal demarcation between permissible and illicit behavior may be fundamentally the same as in the ordinary law courts. But the primary object of such organizations is the unconditional maintenance of a strictly hierarchic order, and this colors and varies the application of the penal law. The reestablishment of special military courts, abolished under the Weimar Constitution, was one of the first fruits which Hitler's victory brought to the Army. Since then, the organization of the military courts has been carried out with great thoroughness. From a purely legal point of view the compulsory Labor Service has only a rather restricted disciplinary power over its members.[2]) But in practice two-thirds of all punishable acts committed by members of this service are handled by the Labor Service organs themselves.[3]) The same applies to more exclusive organizations like the S.S. The exercise of this disciplinary power makes it impossible for rival bureaucracies like the judiciary, and, to a certain extent, the public, to get too many glimpses of the conditions prevailing in such services, which are thus more or less hermetically sealed against outside influences. But at the same time the peculiar mixture of special disciplinary and regular penal power which prevails even if nominally special penal courts are set up in the particular administrative branch, appreciably increases the administrative pressure on the members of the service.

The facts that the demarcation lines between special disciplinary and general penal power[4]) are insignificant and that both these powers are combined in one bureaucracy, result in a guarantee of the complete subservience of the individual, and is of an immense advantage for the service. The separation of functions between the entrepreneur and the coercive machinery of the state is one of the main guarantees of liberty in a state of affairs where few people control their own

[1]) Dahm: "Wissenschaft und Praxis" in *J.W.* 1939, p. 829.
[2]) *Dienststrafordnung* of January 8, 1935, *R.G.Bl.* 1935. I, 5.
[3]) Brausse: "Zur Frage einer Strafgerichtsbarkeit für den Reichsarbeitsdienst," in *Z.A.* 1938, p. 228.
[4]) see for example: Hoder: "Erweiterte Disziplinarstrafgewalt im Krieg," in *Zeitschrift für Wehrrecht*, vol. 4, 1940. pp. 433-43.

means of production. This separation has often been threatened and rarely completely achieved. Now, however, it is completely eliminated under this combination of disciplinary and penal power in the same administrative service.

Whereas the exemption of the members of the Labor Service or of soldiers are personal and more or less complete exemptions, German practice also knows a considerable number of exemptions which are only attached to specific functions, while in other respects the competence of the ordinary criminal courts is upheld. We do not need to go into the treatment of political offenders by the *Volksgerichtshof*, which is one of these special agencies for a selected category of criminal cases. The importance of this agency, by the way, is diminished by the very fact that the *Gestapo* (Political Secret Police) are not obliged to abide by its decisions, but may keep in custody people acquitted by this court. The commercial part of the administrative penal law is only concerned with the professional activities of merchants, factory owners, their deputies and the affairs of taxpayers in general. The term "exemption" is, strictly speaking, incorrect, as the German legal system provides for a dualist procedure. The administration is at liberty to carry the case to the courts or to impose fines of varying amounts on its own authority. The German theorists try hard to find a demarcation line between ordinary criminal law and commercial-administrative criminal law. They refer to the degree of immorality involved or call upon the difference between proven and presumed culpability for the different procedures.[1]) In reality the completely discretionary power of the administrative agency as to whether it decides to initiate a criminal prosecution or prefers to deal with the offender by administrative methods, defies theoretical classification. Criminal prosecution carries with it loss of social and economic position through imprisonment, publicity and criminal records. The administrative procedure means a change in the basis of calculation, perhaps an alteration in the distribution of the social product between different participants in the process of production or distribution, perhaps only between entrepreneur and administration. This applies equally to tax evasion and to infringement of price, marketing, or production regulations. In many aspects such administrative procedure can be compared with the anti-trust prosecution by the

[1]) Part of the field is now regulated by the "Decree on punishments and procedures in regard to contraventions against price regulations" in *R.G.Bl.* 1939. I, p. 999. As regards the literature, see: Rauch: "Werdendes Wirtschaftsstrafrecht," in *Zeitschrift für die ges. Strafrechtswissenschaft*, vol. 58, 1938, pp. 75-98 and the same: "Umgestaltung des Preisstrafrechts," ibidem. vol. 59, 1939, pp. 360-70. Siegert: "Zum allgem. Teil des Wirtschaftsstrafrechts," in *J.W.* 1938, 2516-21.

U. S. Attorney General whose last report expressly states: "The defendants are usually not members of what is ordinarily called the criminal classes."[1]) But whereas the U. S. courts decide as sovereign bodies when they are willing to further and when to bar the industrial policies of the administration, the use of the administrative penal law in Germany represents an effective weapon of the administration's economic policy. It is applied, not to ascertain what the law of the land is in the question under dispute, but in order to coerce the merchant or industrialist to fall in line with the administrative regulations. In some cases private combinations as e.g. marketing organizations, were invested with disciplinary and penal power, and the official industrial associations *(Wirtschafts-Gruppen* and—*Kammern)* which had similar powers, were mostly dominated by the most powerful affiliated corporations.[2]) On the other hand the choice of the administrative penal procedure in the field of taxation, marketing or price fixing, represents a noticeable advantage to the commercial and industrial classes in their typical clashes with the public order. Its consequences are of a financial nature and do not prejudice the social status of the persons involved. For a long time the administration has even acknowledged that these penalties form a part of the ordinary business expenses to be deducted when establishing the net income of corporations for tax purposes.[3]) Behind these advantages which the administrative penal procedure grants to the business classes, there is always, of course, an evident danger that the administration may use the weapon of criminal prosecution against a recalcitrant or

[1]) *Annual report of the Attorney General of the U. S.* 1939 p. 37.

[2]) Cf. Drost: "Der Krieg und die Organisation der gewerblichen Wirtschaft," in *Z.A.* 1940, pp. 25-26.

[3]) The extent to which this administrative criminal procedure lacks any relationship with penal law, may be seen in an example which at the same time shows the ascendancy of the administration over judicial bodies. Up to the beginning of 1939 the revenue collectors, under the explicit rule of the highest judicial body in the field of taxation, the *Reichsfinanzhof*, maintained the practice of admitting the deduction of administrative penal fines from gross income when establishing the net corporation income. (See e.g. the decision of the *Reichsfinanzhof* of August 17, 1938, in *Reichssteuerblatt*, 1939, p. 229.) It was reasoned that these fines represented a typical case of normal business risk. As these fines sometimes attain considerable amounts—in one case the amount was over 1 million marks—the finance ministry ordered the revenue collectors to stop this practice (order of January 4, 1939, p. 257). The *Reichsfinanzhof*, legally a completely independent judicial body, hastened to fall in line with the order given to the revenue collectors, thus completely reversing the decision which it gave 9 months before. (Decision of March 8, 1939 in *Reichssteuerblatt*, 1939, p. 507.) It now argues that the administrative penal procedure also intends to punish guilt but with the difference that for reasons of mere convenience the guilt is often presumed and need not to be proved. Its main argument for the abandonment of its earlier line are the changing aims and significance of the administrative penal procedure which lead to a change in the people's conceptions of such procedures. As it is very unlikely that the people have a definite conception of such intricate problems as the legal nature of administrative fines, we can safely assume that the order of the finance ministry is the real explanation of the miraculous change in the people's opinion.

otherwise unpopular member of the business classes.

Administrative penal procedure does not necessarily imply that the offender fares badly in the individual case, as its foremost task is not one of punishing but of enforcing the obedience of the individual to the administrative policy with its rapidly changing needs. These administrative needs have also been responsible for a completely changed treatment of petty criminality (minor offenders in ordinary criminal cases). The increasing maze of regulations, economic hardships and fundamental processes of economic dislocation, with their inevitable consequence of loosening moral standards, have created an urgent problem of what to do with the enormous army of minor offenders. The theory which had elevated the criminal as such to the rank of the arch-enemy who has to be exterminated, hastened to show that the essential nature of those petty offenders raises a totally different problem.[1]) The administration coped with the problem in its own way. It institutionalized an expedient which democratic governments use only very hesitantly. In 1933, 1934, 1936, 1938, and at the beginning of the war, in 1939, amnesties were issued for: a) minor offenses of all types, punishable with prison terms of one to six months, b) minor offenses of political enemies, covering sentences up to six months and c) almost all types of offenses and sentences of overzealous political adherents. The amnesty laws applied to judged as well as to pending cases.[2])

[1]) H. Mayer, cit. above, p. 84 et seq.

[2]) We have not taken into account the numerous special amnesty laws for the members of particular administrative services or for the inhabitants of special (mostly newly incorporated) regions.

The magnitude of these amnesties may be seen from the following figures, although they are very incomplete.

	Numbers of convicted for crimes and misdemeanors[1])			Amnestied	Nolle prosequi	*Strafbefehle*[2]), asked for by prosecutor concerning trespasses and misdemeanors (In thousands)
1928	588492					831
1932	566042			139899	64839	695
1933[4])	491638	Amn. Dec. 30, 1932 results for Prussia only (55% of Reich)	up to 6 mos.[3]) polit. up to 5 years	51933		643
1934	383885	Amn. Aug. 2, 1934 (Prussia only) (55% of Reich)	up to 3 mos.[3]) polit. 6 mos.	193350 44174	120244 50334	563
1935	429335			6305		648
1936	383315	Amn. Apr. 23, 1936 Reich as a whole	1 month[3]) overzealous adh.	240340 1592	254674 1940	525
1937	438493					530
1938	335666	Amn. Apr. 30, 1938 Reich as a whole, old territory	1 month[3]) pol. 6 mos. pol. 1 month	437000 6428 22826	238000 12163[5])	406

[1]) all figures are taken from the official statistics given in *Deutsche Justiz*.
[2]) *Strafbefehl* = written order of the court issued without hearing on request of the prosecutor and imposing prison terms up to 3 months (6 months since September 1939) and fines.
[3]) Persons with more than 3 months antecedents not allowed to benefit from amnesty.
[4]) Figures for 1933 amnesty not available.
[5]) Austrians included.
Amnesties and *nolle prosequi* refer to fines too.

Whereas the convictions for crimes and misdemeanors and the amnesties and *nolle prosequi* relate to numbers of persons, the *Strafbefehle* relate to numbers of cases. This difference is partly balanced by the fact that about 40 per cent of the penal mandates are Bavarian cases (see: *Deutsche Juristenzeitung*, 1936, p. 46). But in Bavaria the prevailing practice is to handle, through judicial *Strafbefehle*, all kinds of violations of police regulations (e.g. traffic) elsewhere dealt with by the police and never appearing in any criminal record. It must also be noticed that the "number of convicted" covers crimes and misdemeanors, the amnesties and *nolle prosequi* crimes of political adherents, less important misdemeanors, and probably also some major trespasses, whereas the *Strafbefehle* include only trespasses and minor misdemeanors. In spite of all this overlapping, which prevents accurate comparison, one result stands out very clearly: In the years 1932, 1935, 1937, when the amnesties could have had no practical influence on the movement of criminality, the figures for convictions and for *Strafbefehle* are in general appreciably higher than in preceding or subsequent years, when the influence of the amnesty laws could be traced. We may notice, by the way, a secondary consequence of the amnesty policy with its numerous *nolle pros.*, as well as of the transition from ordinary to administrative procedure: Criminality-figures based on convictions by ordinary criminal courts become meaningless. (Von Weber: "Die deutsche Kriminalstatistik, 1934," in *Zeitschrift für ges. Strafrechtswissenschaft*, vol. 58, 1938, pp. 598-624 admits the deceptive nature of the German criminality figures. As regards the 1939 amnesty the administration has ordered that, in so far as nolle pros. are concerned, no material for statistical use should be collected. Cf. *Deutsche Justiz* 1939 p. 1432. This order makes it impossible to follow the application of the 1939 amnesty.) We cannot, therefore, obtain a statistically accurate picture of the development of that part of criminality usually handled by the repressive agencies of the government.

The German solution of the problem of petty criminality by generous and regularly recurring amnesties is open to grave doubts. When, by sheer good fortune, or by adroit manipulation, it is possible, even if discovered, to avoid punishment, the enforcement of the penal law assumes the character of a gamble. A purely technical consideration must also be added because of its specific weight. Whether the offender is classed as a first offender or as a recidivist merely depends upon the chance of whether, at the time of the amnesty, the proceedings had already advanced as far as the judgment stage, and that his records have therefore been transferred to the criminal files, or whether he is lucky enough to get away with the nolle pros. and therefore keeps his criminal record "virgin," as the French like to say.[1]) Let us agree, for a moment, that the lawyer is a mere administrative classifier. Even a purely classificatory practice will suffer in the long run, if the administrative technique is completely reversed during the year, while the aims to be achieved remain unchanged. And the most subtle differentiation will hardly be able to show why a larceny committed on April 23rd is something different from one committed on April 24th.

The war, as we have already had the opportunity to mention, brought a mass of new legislation. This legislation was doubtlessly influenced by special considerations of war policy, but it also contains matured concepts of National Socialist criminal policy.

Insofar as substantive law is concerned, the principal aim is to guarantee the security of the country in war time by an extremely harsh policy of punishment. The chief weapon is the unsparing use of capital punishment. As early as August 17, 1939, a decree made the death penalty mandatory for any attempt at treason.[2]) At the beginning of the war, the scope of application of the death penalty was also extended to crimes committed during the carrying out of anti-aircraft defense measures and also generally to all those who profit from the state of war in order to commit crimes. Whereas in these cases the death penalty is optional along with hard labor, it is mandatory for crimes involving danger to the public.[3]) A more recent decree applies the mandatory death penalty to anyone committing rape, highway or bank holdup, or other crimes of violence involving the use of firearms or swords or daggers or other equally dangerous implements. The same decree makes the punishment pro-

[1]) This state of affairs has led to proposals to introduce a file of pending criminal procedures, Seidel: *Deutsches Strafrecht*, vol. 6, 1939, p. 23.

[2]) *R.G.Bl.* 1939, I, p. 1455 et seq. We do not comment on the aggravations of punishment for military and related offenses.

[3]) *R.G.Bl.* 1939, I, p. 1679 et seq.

vided for consummated acts mandatory for anyone only attempting or participating in a crime.[1])

The decree of October 4, 1939, concerning dangerous juvenile delinquents, also merits special attention.[2]) Up to the war there was some tendency to spare juveniles the harshness of N. S. criminal policy. The new decree, however, apparently a consequence of increasing juvenile delinquency, marks a break with the previous policy. It exempts juveniles between 16 and 18 from the jurisdiction of the juvenile court when the culprit, in view of his mental and moral development, could justifiably be regarded as a person over 18, and when the offense exhibits a particularly degraded criminal character or if the protection of the community requires such a punishment.[3])

The new evaluation of these criminal offenses shifts the emphasis from the personal motives, the direction of the criminal's will, to the special external circumstances under which the offense was committed.[4]) The deterrent purpose prevails above all other considerations. Where the statutory formulation still gives equal weight to the evaluation of the offender's personality and to the protective needs of the community, the official interpretation makes it abundantly clear that the latter aim has absolute predominance. In this relationship, the doctrines which lay special stress on the type of the criminal, gain official recognition. The war parasite, the precociously dangerous criminal youth, and the brutal criminal, as they appear in the war decrees, are criminal types for which the pictorial impression *(Bildtechnik)* prevails over precise legal definition *(Merkmalstechnik)*. In decisions deriving from these decrees, this method has led to the use of antecedents for establishing the guilt in the crime in question, and guilt becomes guilt not in relation to the particular offense, but in relation to the whole career and the earlier ways of life of the criminal.[5]) This method of considering antecedents not only in order to decide the punishment but also to judge the guilt in the offense before the judge, helps in practice to establish the pre-

[1]) *R.G.Bl.* 1939, I, p. 2378.

[2]) *R.G.Bl.* 1939, I, p. 2000.

[3]) Although the number of unemployed youths between 14-18 fell almost to zero between 1933 and 1937, the number of criminal youths rose in many towns much higher proportionally than would have been justified by the 34% increase in the age classes between these years. In Hamburg e.g. their number rose from 658 to 1068, in Erfurt from 111 to 230, in Halle from 150 to 230. The figures are taken from the reports on crime among youth in *Z.ges.Strafw.* vol. 54 (1934), p. 667, and vol. 59 (1939), p. 187. The most obvious rise is in the field of morality; the percentage of moral offenses in the whole of youth criminality rose from 4.6% to 10% between 1934 and 1937 in the townships.

[4]) "The picture of the personality of the offender cannot be separated from the state of war," Freisler in: "Gedanken zum rechten Strafmass" in: *Deutsches Strafrecht*, vol. 6 (1939, p. 329-342).

[5]) Cf. the decision of the Stuttgart *Sondergericht*, in *J.W.* 1940, p. 442.

dominance of a rather crude form of social protection as the main content of the criminal law.[1])

In the field of criminal procedure before the war, opinions arose, even in the National Socialist camp, resenting the fact that no mutual trust could be established between the defense attorney and the court. Nor had the problem of providing an adequate defense for the overwhelming majority of indigent defendants found a solution.[2]) The deterioration in the position of the defense attorney was, after all, very largely an unavoidable result of the transition from the liberal to the National Socialist system. Instead of improving the position of the defense attorney, the war increasingly shifted the main task from the judge to the public prosecutor, member of the "militant" corps of the administration of justice. The war decrees have given the public prosecutor an almost completely free hand to choose before which judge he would like to bring a case. Competence in criminal matters is no longer regulated according to the nature of the offense, but depends on the sentence which the public prosecutor is prepared to ask for. Thus he has complete power to decide whether he intends to bring the defendant before the "one-judge-tribunal," which may prescribe hard labor up to two years and imprisonment up to five years and against the decisions of which there is no appeal, or before one of two kinds of "three-men-courts," which may prescribe any kind of sentence, including the death penalty. If he chooses to bring the defendant before the ordinary "three-men-court" *(Strafkammer)*, an appeal to the *Reichsgericht* is possible. Incidentally, we should note here that the abolition of the principle of the inadmissibility of *reformatio in pejus* now allows a conviction to be reversed to the detriment of a defendant, even if the decision has been appealed only by him. But if the prosecutor prefers to bring the case before the "special tribunal" *(Sondergericht)*—usually composed of the very same three judges who ordinarily sit as *Strafkammer*—no appeal is allowed.

The participation of laymen in criminal proceedings has been completely abolished as a measure of war economy, but even now it is still possible that the judges might not conform quickly enough to the policy of extreme deterrence initiated by the government. There were some instances where the "three-men-court," constituted as a "special tribunal," and issuing a decision which was legally unappealable, did not react quickly enough to the wishes of the government.

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[1]) *RG. S.* vol. 71, 179 anticipates this trend when it explains that a state of diminished responsibility by no means excludes the application of the death penalty.

[2]) Siegert, "Die Lage des Strafverfahrens," in *Deutsche Rechtswissenschaft*, vol. II (1937), p. 47-57.

To remedy the situation and to secure a jurisprudence in absolute conformity with the wishes of the political leadership, a special division was set up inside the *Reichsgericht.*[1]) Before this division, the chief public prosecutor of the *Reich (Oberreichsanwalt)*, as representative of, and on order from, the *Führer*, may directly bring—omitting the lower courts—certain cases which seem to him of special importance. Moreover, even cases which have been finally decided, may be brought by him to a new trial before this division, within a period of a year after the final decision of the lower court had been rendered. The decree provides for this new procedure in case there are grave objections to the accuracy or the justice of the judgment. But let us not misunderstand the position: when the chief public prosecutor demands a new trial, he at the same time stipulates the sentence which the division is expected to give.[2]) Not without justification, the position of this special division has been compared to that of the princes in the XVIIth and XVIIIth centuries, who had the sovereign right of confirming or modifying decisions of criminal courts, and, therefore, the possibility of increasing or decreasing the punishment. A slight difference, however, should not be overlooked. Frederick II of Prussia, whose memory the new German regime sometimes takes pleasure in invoking, exercised this jealously guarded right of "confirmation" in order to foster the humanization of the criminal law and not, as the present regime does, solely for the purpose of converting the criminal law into a system of deterrence and brutality.[3])

The situation of the German judiciary in dealing with criminal cases may be summed up as follows: Like any other administrator of importance, the judge has the right and the duty to decide the particular case before him according to the existing laws of the land.

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[1]) Decree of September 16, 1939, *R.G.Bl.*, 1939, p. 1841.

[2]) Tegtmeyer, "Der ausserordentliche Einspruch," in *J.W.* 1939, p. 2060. The decision of the special division, quoted in *Z.A.* 1940, p. 48, shows that the judges understood the orders given to them when they changed a sentence of hard labor into a death sentence.

[3]) E. Schmidt, "Staat und Recht" in *Theorie und Praxis Friedrichs des Grossen.* 1936, p. 30 et seq.—A later decree of February 21, 1940 (*R.G.Bl.* 1940, I, p. 405) generalized the option of the chief public prosecutor of the *Reich* to take exceptions to final decisions during a period of a year following the decision. The decree allows him to challenge criminal sentences before the ordinary divisions of the *Reichsgericht*, if he finds faults in the application of the law. Conservative lawyers were eager to interpret this as a new nullification procedure in substitution of the extraordinary exception before the special division (Klee: "Die Verordnung ueber die Zustaendigkeit der Strafgerichte." *Z.A.* 1940, p. 90). But it was immediately authoritatively confirmed that the extraordinary exception did not yield to the new rules (Freisler, "Die neue Methode der Strafgerichtszuständigkeitsbestimmung," in: *Deutsche Justiz* 1940, p. 281). It seems, therefore, that in order to obtain the desired results in questions of practical importance, a new trial before the special division will be asked for, whereas in questions of more legal than practical significance, the unification of the criminal practice will be obtained by means of the nullification procedure before the ordinary divisions of the *Reichsgericht.*

Just as the administrator may receive, from his superior, a circular prescribing certain desired changes in administrative methods, so the judge may be presented with a retroactive decree ordering him immediately to change criminal practice. The difference between the administrator and the judge is the following: in particularly important cases the administrator usually receives orders from his superior, prescribing how to proceed and to decide. But a judge is legally only bound to decide according to the existing laws—subject, however, in so far as his person is concerned, to compulsory transfer or removal, and subject, in so far as the judgment is concerned, to the order of the *Führer* to the special division of the *Reichsgericht* to change the decision in the way indicated by the chief public prosecutor of the *Reich*. Of the many changes which the administration of criminal law has undergone in Germany since 1933 the most far-reaching one is its conversion into an administrative technique. New prescriptions are made and remade; the emphasis may shift from personality factors to the social situation; harsh punishment in one field and for one set of persons may be counterbalanced by wholesale exemptions for other violations and other groups of persons. And at the same time there is a continual process of levelling down the judiciary from the status of an independent organ of the state to that of an administrative bureaucracy. As early as the beginning of February 1933, the freedom of action of the judiciary became increasingly restricted through the replacement of the general law of parliament by the *Führer's* uncontrolled and incessant decree legislation, often applying to specific cases.[1]) The war time decrees, by making it possible to control individual criminal decisions, mark the last stage in the transformation of the judge from an independent agent of society into a technical organ of the administration.

One of the most serious consequences arose from the accompanying process of departmentalization. We have seen how the increased efficiency of State and industrial machinery was paid for not only by the loss of the benefits of abstract citizenship, but also by the complete subordination of man in his productive relationships to the disciplinary and penal machinery built up by the special services and by private combinations invested with the garments of public authority. It is at this point that the inroads of the National Socialist State machinery on the daily life of the average citizen appear to be most striking and that the exclusive predominance of strict power relationships will most likely create frictions.

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[1]) Franz Neumann, "Der Funktionswandel des Gesetzes im Recht der bürgerlichen Gesellschaft" in: *Zeitschrift für Sozialforschung*, vol. VI (1937), pp. 542-597.

The fight between normativism and the concrete conception of life did not affect developments in the field of criminal administration until a very late stage, when this conception could, by its very loftiness, be conveniently used to bridge theoretical difficulties in the recent campaign for ruthless extermination. The attempt of the legislator and of the judiciary to use the criminal law to raise the moral standards of the community, appears, when measured by the results achieved, as a premature excursion by fascism into a field reserved for a better form of society. In effect, it is difficult to see how the goal of improving public morality could be obtained by a State which not only operates at such a low level of satisfaction of needs, but which also rests on a supervision and direction of all spheres of life by an oppressive political organization.