German Criminal Law and Its Reform

Horst Schroder
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HORST SCHRODER†

It is to be assumed that anyone who proposes reform does so because he is convinced that the existing state of affairs is unsatisfactory and therefore requires improvement. This goes for the factory manager who employs an efficiency expert as well as for the legislator who decides to pass a new law in lieu of an old one. It is, therefore, impossible to talk about the reform of the German criminal law and about the new Draft Code without, at the same time, taking a glance at the existing state of law which is supposed to be reformed thereby.

The German Penal Code dates back to the year 1871. One might think that this factor, alone, is sufficient to demonstrate the need for reform. That, however, would hardly be convincing. In Europe there are far older penal codes, for example, the 150-year-old Code Pénal.¹ Therefore, a code which is merely 90 years old seems to be rather chipper. Moreover, the Code, as drafted in 1871, is not the same piece of legislation which survives as today’s German Penal Code. Since 1871, there have been over 60 amendments; also, material segments of the entire Code have been completely reformed.

Foremost, the reform has affected the number and content of the various penal provisions. By way of example, section 49a² was inserted

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* This article is based on the German Draft Penal Code of 1962 which, with some minor exceptions, follows its predecessor, the German Draft Penal Code of 1960. The “General Part” of the latter, first and second divisions, has been published in English translation as an Appendix to Mueller, *The German Draft Criminal Code of 1960—An Evaluation in Terms of American Criminal Law*, U. ILL. L.F. 25 (1961). Excerpts in this paper, concerning provisions which have not been changed in the new draft, have been produced therefrom with permission. A translation of the current German Penal Code by Mueller and Burgenthal, with an introduction by this author, has been published in 1961 as Volume 4 of the American Series of Foreign Penal Codes of the Comparative Criminal Law Project of New York University. The complete translation of the German Draft Penal Code of 1962 is scheduled for publication in 1966, as Volume 11 of the American Series of Foreign Penal Codes.

† Dean and Professor of Law, University of Tübingen, Germany; Judge, Supreme Court, Stuttgart, Germany. Visiting Professor, New York University, 1960-61.

Editor’s Note: This is the second of a four part Criminal Law Symposium which is dedicated by its authors to the memory of the late Professor Paul W. Tappan, whom the world of criminology lost too soon. The remaining articles which will appear in the next two successive issues are: *Arrest, Prosecution and Police Power in the Federal Republic of Germany* by Cyril D. Robinson; and *The Principle of Harm in the Concept of Crime* by Albin Eser.


2. Since first conceived, this section has been amended several times. The present formulation dates from 1953. It provides for the punishability of solicitation and conspiracy, acceptance of an offer, or declaration of willingness to commit a felony. Comparable
when a Belgian blacksmith, named Duchesne, declared, to a Catholic bishop, his willingness to murder Bismarck—if the bishop so desired. One must remember that this was during the so-called cultural conflict between church and state in Germany. However, the bishop was not willing to accept the offer. Upon examination, it was found that neither the Belgian nor the German Criminal Code contained any provision under which such an offer to commit a felony could be punished. Therefore, both nations agreed to incorporate similar provisions into their penal codes. Currently, there are new provisions, such as those governing the unauthorized deprivation of motor vehicles (joyriding legislation), the extent of jurisdiction over offenses committed abroad, and political propaganda and subversion in the cold war. During the course of routine reform, such important matters as the law of homicide, perjury, and the forms of participation were amended. Praeter-intentional liability (like felony-murder)—was abolished.

But more important than structural and numerical changes in penal provisions is the complete change of the system of penal consequences or sanctions. When the penal code was first promulgated, it knew only one reaction to crime—punishment. In consonance with the doctrines of the German idealistic philosophy, this meant retributive and vindictive

3. GERMAN PENAL CODE § 248b.
4. GERMAN PENAL CODE §§ 3-4.
5. GERMAN PENAL CODE §§ 88-89.
6. See GERMAN PENAL CODE § 56. Prior to this amendment in 1953, Praeter-intentional liability—existed in Germany in the form of the so-called result—qualified offenses, i.e., modifications of basic crimes committed intentionally, but with unintentionally produced results for which the code sections prescribed additional punishments, e.g., § 226, assault with fatal consequences, punishable by imprisonment in a penitentiary or by jailing for not less than three years. Ordinarily assault carries a punishment of jailing not to exceed three years or fine, while murder commands a life sentence (§ 211) and manslaughter (§ 212) a minimum term of five years imprisonment in a penitentiary. Anglo-American law provides a different solution by turning a crime ordinarily requiring intentionally produced harm into a crime for which the harm may be produced unintentionally. Felony murder is a typical example.
punishment.\(^7\) The idea of the protection of the general public and the pedagogical influence on the perpetrator, in order to resocialize him, could be practiced only within the framework of punishment and the sole determinant of the degree of punishment was the gravity of the crime. This restriction of criminal policy was evidenced by the statistical rise in crime during the last decades of the 19th century. Demands were made by the sociological school, founded by von Liszt, for a reform of the German criminal law with respect to its criminological outlook. There was no immediate result because a new penal code could not be created at that time. Nevertheless, new criminological devices were introduced, piecemeal, into the old code. For example, short term jail sentences for first offenders, which had created more harm than good, were, to a great extent, abolished. Thus, in 1924, it was made possible to impose a fine, in lieu of a jail sentence of not more than three months, provided that the purpose of the punishment could be attained.\(^8\) This was true even though such fines were not specifically envisaged by the Code. In 1953, with the introduction of the suspended sentence for the purpose of probation, this old and established common law institution, which had already been introduced by the first Juvenile Court Law of 1923, was also taken into the Penal Code. It, too, is splendidly capable of avoiding the imposition of damaging short terms of imprisonment.

In 1933, another reform formulated in earlier draft codes, namely, the more effective protection of the community against dangerous habitual and insane criminals, as well as the possibility of resocialization of the perpetrator by institutionalization, was fulfilled. The habitual criminal may be incarcerated as long as he is a threat to society and, if necessary, for life (so-called protective custody). This measure, rarely resorted to, is used only in extremely grave cases. The dangerous insane offender may be committed to an asylum. The offender addicted to alcohol or narcotics may be placed in a correctional institution devoted to this particular purpose; whereas, the asocial migrant type offender might be placed in a workhouse for rehabilitation purposes. However, if the results are not promising, he might be kept there for the protection of the general public.\(^9\)

With such amendments the major demands of criminological reform, which were heard at the beginning of the German reform movement, have certainly been fulfilled. One can say, with a clear conscience, that the German criminal law reform has taken place.

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8. German Penal Code § 27b. This was accomplished in the sweep of the so-called Emminger Reform, which also resulted in the abolition of the Anglo-American type jury.

9. German Penal Code §§ 42a-b.
For that reason it is strange that officially the question of whether a new and major German reform is necessary and desirable has never been asked. After comprehensive research and comparative studies, submitted to the Ministry of Justice in 1953, the Minister appointed a commission in 1954 which was charged with the task of preparing a draft of a new German criminal code. Therefore, it seems to have affirmatively answered, at that time, the question of whether or not reform was necessary. Nevertheless, the question has popped up again and again, and opinions have been uttered to the effect that such a reform is neither desirable nor appropriate. One of the most serious charges made was that the introduction of a new German criminal code would lead to a material loss of legal certainty. We must remember that a new law does not reveal its effect automatically but gains body and significance only by reason of court interpretation. This may take some time. The interpretation which the courts place upon a statute—a perpetual process—creates a firm and reliable basis for the behavior of the populace who have to live by that law. The value of legal certainty is necessarily sacrificed whenever an existing law is replaced by a new one. Obviously, such sacrifice should be made only if absolutely necessary. Is it absolutely necessary? Leading German jurists doubt this and have asked the question: "Are there judgments of the courts which are bad and unjust because such result was demanded by the code?" The answer is a clear "no." These authorities have also doubted whether the desires for a new, systematic and perhaps even aesthetic quality of the codified law (which may explain the wish for a unification of the somewhat multifarious nature of the amended existing penal code) is a sufficient legitimation of a new criminal draft code. At this point I cannot pursue this question any further. In any event, the German Ministry of Justice has affirmatively answered the question of the need of a criminal law reform and has consequently appointed a so-called Grand Commission of Penal Reform. The members of this Commission are lawyers from all branches of the profession, that is, judges, defense attorneys, prosecuting attorneys, civil services officials, parliamentarians, and professors of criminal law. The Ministry selected the members of the Commission, acting occasionally on the recommendation of the various states and their administrations. The Commission that undertook this task can be described by the term "commission of experts." They voted on the various disputed provisions of the proposed code, but the Ministry, itself, made the ultimate decision on its contents. In any event, the draft is that of the Ministry who is responsible to the Cabinet and Parliament for its contents. This means that many of the draft provisions, as approved by the Cabinet, do not represent the views of a majority of the Commission.

10. The materials and expositions are published in Materialien zur Strafrechtsreform, I-II (1954).
The Commission had been at work for six years. It presented various interim drafts, namely one pertaining only to the General Part and two versions of the entire code, before completion of the final draft. Although, according to earlier prognostications, the Ministry of Justice expected that the Parliament expiring in 1957 would pass the new penal code, the final draft was not submitted to the Parliament until 1960. Since that parliamentary session expired in 1961 without having passed the law, the draft, with some minor changes, was again presented to the Lower House in 1962 (Draft 1962). After the first reading, it was referred to a special parliamentary subcommittee where it is still under debate. This means that the code cannot be passed by the end of this session. Thus, we can only hope that the next Parliament, which begins near the end of 1965, will be more successful.

In an attempt to characterize the present draft, I should say, first of all, that it is more voluminous than the present penal code. This is the result of an attempt to reach perfection and to examine in detail even such questions as hitherto had been left for the judiciary. For example, the question of whether or not the interruption of a pregnancy in special medical or other cases should be lawful, and the detailed and highly

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11. The minutes of its twenty-two working sessions are published in Niederschriften über die Sitzungen der Großen Strafrechts Kommission, I-XIV (1956-1960). The total published output of the commission now comprises 26 volumes, folio size.

12. Because of the highly controversial nature of the provisions, they are reproduced for the benefit of the reader. Note that in cases of an erroneous assumption of legal indication for (lawful) abortion, the code now provides for lesser punishment under a special provision, while, heretofore, the German Supreme Court had affirmed the convictions for intentional abortion.

TITLE FOUR
Surgical Operations and Medical Treatment

§ 157 Surgical Interruption of Pregnancy Because of Danger to Patient
(1) The killing of a foetus by a physician is not punishable under § 140 if according to medical knowledge and experience, danger of death or of undue and serious injury to the body or health (§ 147, paragraph 2) of the woman can be averted only by the abortion.
(2) The killing of a child at birth is not punishable under § 134 if done by a physician under the requirements of paragraph 1.

§ 158 Medically Unjustified Interruption of Pregnancy
(1) If a physician performs the killing of a foetus or child at birth under the erroneous assumption that the requirements of § 157 are satisfied and if he is to be blamed for the error, he shall be punished with jailing up to three years or with penal custody.
(2) An attempt is punishable.

§ 159 Unconsented Interruption of Pregnancy
(1) Any physician who kills a foetus or child being born where the requirements of § 157 are satisfied or in the erroneous assumption that such requirements are satisfied, without
1. The woman having consented, or
2. the medical advisory office having certified the requirements for the operation indicated in § 157, shall be punished in cases under number 1 with jailing up to three years or in cases under number 2 with jailing up to one year or penal custody.
(2) The act shall not be punishable under paragraph 1, number 1, if the consent could
complicated treatment of the question of its necessity. Moreover, heretofore undefined technical terms, such as intention and negligence, are now spelled out. Such endeavors have resulted in an appreciable expansion in the definitions of the various crimes contained in the Special Part. For example, the question of the illegality of artificial insemination has been elaborately dealt with, resulting in this practice being declared unlawful. The sphere of offenses against privacy has been expanded. However, on the whole, these new formulations do not present anything novel. In the vast majority of cases the draft restricts itself to molding the results of case law into the form of a statute.

Overall, we can assess the position of the draft code as rather conservative. This is especially true for the sphere of the criminological question, that is, the criminological goals and their practical attainment through the sanctions employed by the law. The draft code retains a dualism of penal consequences. It continues to distinguish between punishments on the one hand and measures of security and rehabilitation on the other. These two types of penal consequences are basically of different stature, both in their aim and in their justification. Punishment is regarded as vindication and retribution for the wrong which the offender has committed. It is inherent in the very concept of crime as a consequence or just dessert; its content being determined by the relation between the gravity of the offense and the reaction of the politically organized community to the perpetrator's deed. Since the gravity of the deed is essentially determined by the guilt of the offender, the criminal law of the draft code is a mens rea determined law. That means not only the recognition of the premise that there should be no punishment without guilt, but also the recognition of the further maxim, that the

only be obtained by a postponement of the operation which might put the woman in danger of death or serious injury to body or health (§ 147, paragraph 2) and circumstances do not compel the conclusion that the woman would refuse consent. The act shall not be punishable under paragraph 1, number 2, if, because of the danger indicated in sentence 1, the certification of the medical advisory office cannot be obtained in time.

(3) If the physician acts in the erroneous assumption that the requirements of paragraph 2, sentence 1, are satisfied and if he is to be blamed for the error he shall be punished with jailing up to two years, penal custody or a fine. If he acts in the erroneous assumption that the requirements of paragraph 2, sentence 2, are satisfied and if he is to be blamed for the error, he shall be punished with penal custody or a fine.

(4) An attempt is punishable.

(5) If merely the consent of the woman is lacking, the act shall be prosecuted only upon complaint.


14. See text infra note 23.


16. See GERMAN DRAFT PENAL CODE §§ 182-186 (1962), extending over the entire sphere of defamation, up to and including slander, concerning a private matter, regardless of its truth, and absent justifiable cause and public interest.
measure of punishment must correspond to the measure of guilt—the so-called maxim of proportionality. There is doubt expressed, however, if this last maxim has been sufficiently realized in the most recent version of the draft and, as such, has been the subject of frequent and forceful controversies among German criminal scientists.

As for the measure of safety and rehabilitation, for example, the protective custody or the detention in an asylum, the so-called dualism of penal consequences means that the offender will suffer a restriction of his freedom without imposing upon him the ethical stigma of true punishment. The measures of safety and rehabilitation find their sole justification in necessity and in the community's endeavor to resocialize its fallen members. The number and kind of the so-called measures have been increased. Besides the already existing measures of safety and rehabilitation, such as protective custody, detention in an institution for cure or for drug addiction, the draft code proposes two entirely new measures: preventive custody and protective surveillance.

Preventive custody is the institutionalization of juveniles and adolescents, ranging in age from sixteen to twenty-seven years, who show proclivities for habitual criminality. The holding of a habitual criminal in protective custody, which is permitted by the present code, was considered inappropriate in such cases, because, in the eyes of the public, the perpetrator would be characterized as an incorrigible, habitual criminal when, perhaps, he has not as yet reached that stage. This constituted the reason for the introduction of a new concept of preventive custody which has met with more optimism than the old institution of protective custody. However, in discussions concerning penal reform the preventive custody provision has not been free from criticism. This innovation was introduced as a result of the pressure exerted by criminologists. They must bear the responsibility, for it is their view which regards this institution as more appropriate and successful in the rehabilitation of offenders. The criminologists have maintained that with scientific means they are capable of giving the proper diagnoses and prognoses to insure a successful application of this measure.

The other new measure is protective surveillance for perpetrators of certain crimes. This is to be imposed after completion of the penal sentence as its purpose is community safety. To this extent it is the successor to the existing institution of police surveillance and is designed to prevent the perpetrator's regression into criminality.

17. German Draft Penal Code § 60 (1962). "The basis for fixing a punishment shall be the guilt of the perpetrator."
optimism which bespeaks this institution seems somewhat unjustified if
one examines the categories of perpetrators which it encompasses. Among
these are convicts who did not qualify for release on parole, because, in
accordance with the provisions of section 79, the judge could not take
the responsibility that, if released, the defendant would not revert to
crime. Consequently, there is little hope that this institution will be
more successful in rehabilitating him.

In the area of punishment, the new draft code, following existing
law, does not utilize capital punishment, but retains deprivation of
liberty by penitentiary and jail sentences. By introducing the so-called
“Strafhaft” (incarceration), it adds a further mode of deprivation of
liberty, so as to make possible a further differentiation. This is a mode
of detention designed to demonstrate that the penal offense, which the
perpetrator has committed, is extremely insignificant and, therefore, is
not subject to the stigma of true criminality. Since petty misdemeanors
have been removed from the draft code, this third kind of deprivation
of liberty recognizes the fact that even within the sphere of gross mis-
demeanors there is an area of petty criminality. For a long time, the
differentiation between German penitentiary and jail sentences has
been attacked by those contending that this is a mere nominal distinc-
tion. Many demanded that a uniform mode of deprivation of liberty
be created, which then, according to a criminological diagnosis and
prognosis of the perpetrator, should be adjusted, on an administrative
level, in order to be applicable to the particular convict. However, the
draft code did not follow these demands and, it seems to me, justifiably
so. It is particularly significant that in a jurisdiction which has abolished
capital punishment the gravity of the offense should be expressed by a
different gravity of detention, a mode of characterizing the worst and
most heinous felonies by the very sentence which, after all, expresses
the disapproval of society.

The discussions which concerned the questions of substantive criminal
law were more frequent and vehement than the discussions on the
criminological aspects of the new draft. Whereas the practitioners vir-
tually agreed along conservative lines on the criminological questions,
there were controversies on the question of substantive criminal law—
the so-called dogmatic questions. This is quite understandable in a
country like Germany, where the desire for a complete, all-rounded and
logical system is extremely strong. Therefore, several members of the
commission fought fierce battles along dogmatic grounds in order to
achieve recognition, within the draft code, of their own petty theories.
It was equally obvious that such attempts were bound to fail. After all,

legislation is not a scientific or scholarly task, but rather a practical and political one. For with the many doctrinal controversies within a democracy, there is need to compromise. This is evidenced throughout the draft code. It is almost impossible to say that the draft caters to any one particular doctrinal opinion, though one could say, that by and large, it reflects the results of the present state of the case law. Of course, it cannot be expected that case law, which has reached just and practical solutions, should be forfeited in favor of some scholarly dogma. In the course of the debates within the commission, the readiness to engage in elaborate theoretical and doctrinal statements and dissertations has consistently decreased. Nevertheless, the draft code contains several novel definitions. For example, intention and negligence are now defined. However, I am not sure that this will survive into positive law. The endless difficulty of attempting to differentiate between intention—in the form of dolus eventualis, an approving of chance-taking with respect to the result, and mere recklessness, the latter in Germany regarded predominantly as a form of negligence—makes it almost mandatory that the statute itself be silent on this point. A definition would impede development of a better definition by scholarly endeavor or case law.

The systematical structure of the draft code is the same as that of the existing code. It follows the European pattern of separating the code into

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§ 17 Purpose and Scienter.

(1) Anybody who seeks to effectuate a circumstance for which the law requires purposefulness, acts purposefully.

(2) Anybody who knows or takes for granted that a circumstance for which the law requires scienter, is present or will come to pass, acts knowingly.

§ 18 Negligence and Wantonness.

(1) Anybody who fails to exercise that care to which the circumstances and his personal conditions require him and of which he is capable and for that reason does not recognize that he is effectuating all the definitional elements of crime, acts negligently.

(2) Anybody who deems it possible that he will effectuate the definitional elements of a crime, but in violation of duty and in blameworthy fashion trusts that he will not effectuate them, also acts negligently.

(3) Anybody who acts with gross negligence acts wantonly.

24. Though the concept of recklessness has no agreed upon meaning in American law, it is sometimes defined as conscious risk taking, though occasionally as simply risk taking, thus including unconscious recklessness. Moreland would prefer the latter trend. Moreland, Criminal Negligence (1944). In any event, one can say that the cases which in American law would be regarded as recklessness, found no special regulation in German law. According to the prevailing German option they are partially regarded as forms of intention (dolus eventualis) partially as forms of negligence, here called conscious negligence, as distinguished from unconscious negligence. Both are punishable in German law, but not in American law, although the Model Penal Code proposes to do so. A.L.I., Model Penal Code § 2.02. In Germany there are opinions holding that all conscious negligence should be regarded as belonging to intention. This corresponds to American criminal law insofar as the concept of negligence, as distinguished from recklessness, comprises virtually only the cases of unconscious negligence.
a General Part and a Special Part. The Special Part contains the definitions of the various offenses while the General Part deals with all those questions which, regardless of the type of offense involved, are applicable to the entire body of criminal law. It contains what Professor Jerome Hall would treat under the category of principles and doctrines. For example, the question of attempt, the various forms and degrees of participation, such matters as jurisdiction and the entire range of penal sanctions, as well as all the questions of mens rea are treated in the General Part.

Major improvements have been made within the Special Part. In this Part, the new draft code has systematically arranged and categorized the various offense groups, thereby distinguishing it from the present law. Whereas the present law begins with offenses against the state, the commission has decided to list the value of life before that of the political value of the state. First it treats offenses against the person. This is then followed by the group of offenses against the moral order, property, public order, the state and its institutions, and the community of peoples.

Hoping to have conveyed a general impression of the background and stature of the German Criminal Law reform, I should now like to turn to the treatment of a few special problems which played a particularly important role in the debates of the Grand Commission of Penal Reform.

There is, first of all, the basic question of what bearing the mens rea of the perpetrator should have on the determination of his punishment. Obviously, there was never any doubt that a perpetrator should not be punished if he has acted without any mens rea whatsoever. But there was a debate as to whether or not the maxim of the commensurateness of guilt and punishment implies that punishment is dependent solely upon the mens rea of the perpetrator. The realization of such a demand would, for example, result in the impossibility of imposing a particularly high punishment for the purpose of deterring the general public. A predominant number of German scholars are of the opinion that the measure or extent of the punishment is dependent on the mens rea, in other words,

the blameworthiness of the perpetrators. There are, however, groups of criminal law practitioners with enough influence to press for a formulation which seemingly makes it possible to reach the other alternative—to allow the possibility of imposing a more severe punishment on a particular defendant for purposes of deterrence. The scholars, on the other hand, have contended that the ethical stigma of criminality and the moral opprobrium imposable upon his conviction prohibits the imposition of punishment which he did not "deserve." The ends of deterrence may, therefore, be served only within this framework of retribution. Nevertheless, in imposing punishment, heretofore the case law has not hesitated to consider even the results caused by the perpetrator for which he could not be blamed, in the sense that he did not possess mens rea. To demonstrate the point, the German Supreme Court handed down a decision which is similar to the famous American case of People v. Goodman. In the German case a truckdriver had picked up a hitchhiking girl, had made immoral advances toward her, and when she refused, had ordered her out of the cab of the truck. In order to avoid being left standing at a desolate place on the highway, the girl clung to the rear of the truck. She fell off when the truck started moving and was killed. Now, while the court in the case of People v. Goodman seemed to have no difficulty finding the defendant truckdriver guilty of manslaughter, under those circumstances the German court did have difficulty. However, it did find that it had to consider the resulting death as an aggravating circumstance in the determination of the punishment for the underlying morals offense.

Another problem considered important for practical application in court was the statutory treatment of offenses of omission. An omission is the non-execution of some activity which the defendant should have performed. These are offenses in which the statute, itself, makes an omission criminal, for example, where one spouse fails to pay support to the other spouse, or if somebody with knowledge of the contemplated commission of a certain felony fails to report this fact to the authorities or to the contemplated victim. But quite apart from these relatively simple cases are the problem cases of the so-called unreal offenses by

32. See text at note 17 supra.
33. This decision does not mean that preventive ideas have remained unconsidered. There has been no debate about the necessity of adding to punishments a system of preventive measures. This was clear from the outset.
34. 182 Misc. 585, 44 N.Y.S.2d 715 (1943), reprinted at HALL AND MUELLER, CASES AND READINGS ON CRIMINAL LAW AND PROCEDURE 133 (2nd ed. 1965).
35. 10 B.G.H. St. 260.
36. GERMAN PENAL CODE § 170b.
omission. These are cases in which one cannot tell from the naked statute how the problem is to be handled. Such a case, for example, would be a situation where the mother fails to provide food for her child and it dies, or where the father fails to rescue his drowning child. In such cases, the court is forced to operate within a definition of a crime phrased entirely in terms of active commission of an offense. According to the view prevailing in Germany, as well as in the United States, such statutes are applicable whenever the perpetrator had a legal duty to act and failed to do so. This is where the difficulties begin. Frequently, the duties with which we are concerned are not regulated by statute; therefore, doubt has been expressed as to whether or not the punishment of such omissive perpetrators would violate the principle of legality, *nullum crimen sine lege*. In order to avoid such difficulties the draft code has attempted to regulate the legal duty to act. This attempt, however, fell short of its mark because the duties come from so many spheres of legal regulation that a uniform treatment is virtually impossible. Hence, the draft, at best, succeeded in raising the problem but did not solve it. It imposed the duty to act whenever the omission would be tantamount to punishable positive action.\(^8\)

The treatment, in the code, of the problem of mens rea deserves special attention. One must differentiate between various individual problem areas within this problematic sphere. First of all, there was the question of whether or not the draft should attempt to define the concepts of intention and negligence, which have long been the two German forms of mens rea. The result was a definition in general accord with that of the former Reichsgericht, which succeeded in defining mens rea in terms of “the knowing and intending of the deed and of all its concrete definitional elements.”\(^3\)\(^9\) There was no doubt about the accuracy of this definition. The draft’s real task, therefore, was establishing the dividing line between intention and negligence. This border is extremely significant because, while all offenses may be committed intentionally, negligence is a crime only where the legislator has so provided.\(^4\)\(^0\) Therefore, the attitude of the offender at the time he committed the offense may be a decisive factor in his conviction. It would depend upon whether his attitude qualified as intention or whether it was merely negligence. The complexity of the problem arises in those cases where the perpetrator is not certain but surmises that his proposed conduct contains all those elements which compose criminality. For example, in case of statutory

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\(^8\) GERMAN DRAFT PENAL CODE § 13 (1962). Commission by Omission. Anybody who fails to avert the definitionally required harm specified by a penal statutory provision is punishable as a principal or accessory, if it was his legal obligation to avert the harm, and if his conduct, under the circumstances, is tantamount to effecting the definitional elements of the act by commission.

\(^3\) 58 R.G. St. 249; 70 R.G. St. 258.

rape, the perpetrator considers the possibility that the girl with whom he has sexual intercourse is below the statutory age; or, in a case of perjury, the perpetrator considers that his statement might be false, or, in the case of manslaughter, that the rifle shot directed toward game may hit a passing farmer. Different solutions were reached by criminal scholars on the one hand and the case law on the other. It is remarkable that in this area the tendency of case law is not toward one definite solution of the problem but rather toward several, depending upon what seemed desirable for a just solution in a given case. Frequently, in sexual offenses, the courts satisfied themselves with a finding that the perpetrator did consider the possibility of producing the given harm. On the whole, the draft follows this approach. It holds the act to be intentional if the perpetrator considers the possible creation of the criminal harm and with that contingency occurring prospectively approves of such a result.

For example, in the case of a morals offense committed with a minor, it suffices if the defendant considered the possibility that the person with whom the offense was committed was not, as yet, of statutory age. This would still qualify as intentional, because here the defendant considered the possibility of producing the envisaged harm—the immoral contact upon a minor. However, there is doubt as to whether or not the court must affirmatively find that the defendant who considered the possible result but, nevertheless proceeded, actually approved prospectively of the creation of this harm, or whether, in view of such possibility, approval is inherent in his very consideration and decision to continue the activity. The draft did not answer this hotly debated question, satisfying itself with the formulation and “not minding the result.”

But there was another mens rea question which created far greater problems. This was the question of the awareness of wrongdoing and the question of error or ignorance. The point of departure for the draft’s solution differed greatly from that of the American law. After lengthy debates between adjudication and criminal law scholars, the German Supreme Court, in 1952, finally recognized that the blameworthiness of the deed must be based on the perpetrator's decision against right and for wrong. It follows, as the court found, that the awareness of wrongdoing is, after all, similar to the question of mens rea, as had been presumed by the old German Supreme Court. Consequently, one should have expected that the court would recognize intentional criminality only when the defendant was aware that his act was wrong or unlawful.

41. In most of these cases American law, likewise, would operate either with absolute liability or would assume recklessness.
42. GE]{35}RMAN DRAFT PENAL CODE § 16 (1962). Supra note 23.
44. 61 R.G. St. 258; 63 R.G. St. 218.
45. While most common law courts held contra, an American trend in this direction has
Instead, the German Supreme Court was ready to find impunity for the perpetrator who did not know that he did something wrong and had no possibility of gaining such knowledge. That would correspond roughly to the holding of the United States Supreme Court in the case of Lambert v. California.\footnote{46} But, in the Court's opinion, the offender, who fails to ascertain this knowledge, must, because of this blameworthiness, be punished for intentional commission of the crime.\footnote{47} Should he not be punished in accordance with the real basis of his blameworthiness, namely for negligent commission of the crime, if that is punishable? Time prevents me from going into more detail of this rather lame compromise with principles. In summation, the draft code punishes without limit anybody who knows that he is doing something prohibited.\footnote{48} It also punishes for the intention with regard to his possible ignorance. However, in this case, the perpetrator can be punished only if his ignorance rests on negligence and if, in such cases, negligence happens to be punishable under the provision of the code.\footnote{49} All the other cases in which the perpetrator knows all the elements of his action but, nevertheless, does not know that his action is prohibited must be contrasted with this type of error. It is in the former situation that the previously discussed solution of the Supreme Court and the draft code is applicable.

Standing in between these two groups of errors, there is a third group of cases in which the perpetrator erroneously assumes the existence of circumstances which would justify his action, for example, if he erroneously assumes that he is subject to an attack by the decedent, or that he is in danger of losing his own life. In such instances today's case law holds that the perpetrator lacks the intention to commit the offense. Consequently, there remains no possibility of punishing him for an intentional commission.\footnote{50} I agree with this position. It is plausible because the perpetrator's attitude toward right and wrong is recognizable not only from the application of the definitional elements, but also from the erroneous supposition that justifiable grounds are present. But in such cases the draft code has proposed still another solution. In the case of all such circumstances which make the perpetrator's activity appear permissible, as, for example, in the case of supposed self-defense, the present solution is applicable. That means there is no intention, but the perpetrator may be punished for his negligence insofar as negligence is

\footnote{47. Corresponding to American practice. See HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 376-414 (2nd ed. 1960).}
\footnote{48. GERMAN DRAFT PENAL CODE § 21 (1962), with reference to the mitigation provisions of § 64.}
\footnote{49. GERMAN DRAFT PENAL CODE § 19 (1962).}
\footnote{50. 3 B.G.H. St. 106; 3 B.G.H. St. 194; 3 B.G.H. St. 357.}
punishable. However, if the perpetrator erroneously assumes the presence of circumstances which remove only his guilt (his mens rea) but not the unlawfulness of his act, the draft code has provided a solution which amounts to a bad compromise. His action is regarded as having been intentional, but the penal consequences do not correspond to those cases involving an error of unlawfulness, rather, the punishment is further mitigated.

The Penal Reform Commission witnessed long and vigorous debates on the question of capital punishment, a problem on which opinions will remain divided. Of course, in my opinion, for Germany these debates have very little practical significance. Article 102 of the Constitution provides that capital punishment is abolished, and it would require a constitutional amendment to reinstate it. It is impossible to find a two-thirds majority of Parliament for such a purpose. Strangely enough, a national plebiscite would probably result in the reintroduction of capital punishment. But the German Constitution does not permit a plebiscite. Therefore, there is absolutely no possibility for the reintroduction of capital punishment.

Finally, I would like to comment on the draft code’s solutions to the problems of murder and manslaughter. I attribute particular significance to the problem of homicide because these offenses play a major role in American law and frequently are specifically utilized for the purpose of developing general doctrines and principles.

Until 1941 the German Penal Code differentiated murder from manslaughter in accordance with long historical tradition, namely on the element of deliberation or, as you would call it, deliberation and premeditation. Thus, murder was the killing of a human being with deliberation, while manslaughter was the same offense but without deliberation. This corresponds to typical American differentiation between first degree and second degree murder. Such a qualitative differentiation attributes an unique conceptual quality to murder. But this solution to the problem was subjected to increasing criticism, because ultimately the difference between life and death depended on such a flimsy criterion as the offender’s consideration of the pros or cons of murder, without ever evaluating the motivations for his deliberation. For example, the offender who commits euthanasia to alleviate an incurably diseased and suffering relative may well have deliberated the pros and cons before killing, but certainly his offense does not deserve the same characterization as that of a well planned gang-land killing.

In 1941, therefore, the German Penal Code switched to a more quanti-
tative delimitation of the two offenses. It recognized that, ultimately, murder is nothing but a characterization of the more serious cases of intentional killing and that the criteria for determining the gravity of such an offense may be quite multifarious. In fact, one can say that murder is only a title, not a concept. Thus, section 211 was cast into a new form, which, in the nature of a catalog, lists a multitude of circumstances which elevate manslaughter to murder. Sometimes this determination is made relying particularly on the motivation of the perpetrator and his blameworthy attitude toward the life he took, sometimes relying more on characterization of his specially dangerous or serious modes of perpetration. Nevertheless, to some extent the difficulty remained in that there would be cases which would ipso facto fall under one or the other of the categories specified by the law, but would not amount to particularly serious and blameworthy modes of killing. For example, in one of its murder categories the code makes maliciously deceitful killing murder. Now, obviously, the mercy killing of a seriously diseased relative already doomed to death may be accomplished with the application of deceit, but without elevating this deed to the severe cases which the murder category attempts to embrace. Therefore, the opinion was frequently voiced that the catalog of section 211 is not binding, but that it contains only criteria recommending its application by the court. This means that in exceptional cases—in which the code’s intention, to embrace, as murder, only the most serious cases of killing, is not fulfilled—the judge would be able to reduce a particular killing from murder to manslaughter, even though the criteria set forth in the murder category are formally met. Principally, the new draft code retains the system of the applicable law. However, it has greatly reduced the necessary requirements for elevating manslaughter to murder. There remains only killing for reasons of homicidal lust, for the excitement or satisfaction of the offender’s sexual urges, for motives of greed and for the purpose of facilitating another crime.

There is an interesting novelty contained in paragraph 2 of section 134. Anyone who kills another with premeditation is similarly punishable for murder. But the draft catered to the objections which I had long voiced, by permitting an exception when a perpetrator has killed for

54. It is interesting to note that in both German and American criminal law, the basic form of homicide is the intentional killing. But it is significant that German law considers this basic form to be manslaughter (§ 212 German Penal Code) while it is considered to be murder (in the second degree) in most American jurisdictions. This is usually subject to the defendant’s power to prove the killing to have been merely voluntary, or even involuntary, manslaughter, and the state’s ability to raise it to murder in the first degree.


reasons of mercy, desperation or similar motives which materially lessen his guilt and blameworthiness.

I am aware of the fact that I have discussed only a small portion of the problems which the draft code raises and which are obviously worthy of discussion. Nevertheless, I hope to have succeeded in conveying a general impression of the multifariousness of its problems which, I hasten to emphasize, differ in many respects from the way these problems are approached by the American criminal law. However, these problems may lend themselves as an aperture through which the American criminal lawyer may gain some insight into the German criminal law. Perhaps he may even be stimulated into reviewing his own old and accustomed ways of handling problems of criminal law.