"MORAL ORDER"

AND

THE CRIMINAL LAW

REFORM EFFORTS IN THE UNITED STATES AND WEST GERMANY

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ORLAN LEE and T. A. ROBERTSON

with a foreword

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Director of the Institute for Criminology and Penology
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MARTINUS NIJHOFF / THE HAGUE

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of Our Parents' Traditions

"...therefore keep my statutes and my judgements: which if a man do, he shall live in them...." (*Lev.* 18,5)

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FOREWORD:
IMPRESSIONS AND REMARKS

A. *General*

This is a book concerned with the problems of criminal law reform in the United States and in Germany. The section on Germany gives the English-speaking reader a good and comprehensive introduction into the historical and on-going development of German criminal law reform and the results which have been achieved thus far.

As is suggested in the title, this presentation attempts to make clear the role of the various political, social ethical, philosophical, and religious ideas which have competed to influence criminal law reform and continue to influence further development of the law. In the course of these discussions, the authors' own fundamental attitudes to political theory become apparent. Very simply, they are based upon the importance of the ideal of the limitation of the power of the state over the individual. This is consistent with the liberal democratic tradition, as it is especially characteristic of Anglo-American thinking, perhaps; but the tradition is alive not only in that cultural sphere.

In the first chapter the authors consider some of the sociological and political developments of recent years and how these historical events are treated in various social perspectives. Among other things, the revolution of sexual permissiveness and of forms of political resistance (as for example the anti-war movement) in the United States, are considered. Similar developments are also to be observed in Germany, although in German criminal law reform these have not played as decisive a role. Yet the general liberalizing of sexual attitudes has had a certain influence on the section of the German criminal law governing sexual offenses. Political demonstrations which have occurred in Germany, too, in recent years have, furthermore, led to a government bill to reform the regulations governing what constitutes disturbing internal security.[1]

[1] This bill is discussed by Müller-Emmert: in *Zeitschrift für Rechtspolitik* (ZRP) 1970, fasc. 1, pp. 1ff. The bill is printed on p. 21 of the same issue.

Seen as a whole, however, I regard the work before us to be especially noteworthy precisely because of its illumination of both the social contexts surrounding the law and the ideas which underlie the efforts towards criminal law reform. An analysis of this kind has not appeared until now, to my knowledge, even in the German literature on the subject, so that this book is of great value to the German reader as well as the American.

B. *Particulars*

In Chapter IV: A the authors give a general introduction into the development of the German criminal law reform. In that connection they recognize the special role of the Christian Democratic (CDU), Socialist (SPD) coalition in the political situation [leading to passage of the reform law]. The authors emphasize the importance of the introduction of a uniform prison sentence [that is to say the termination of the distinction between kinds of prison sentences] and the elimination of short term prison sentences, as the main points of the reform in the "general part" of the code. They remark (pages 170; 192) that a uniform concept of the goal of punishment is still lacking, although, when all is said, there is a general agreement on the principle of resocialization. The absence of such a common concept is attributable, in my opinion, to the same underlying political problem as the authors previously described, namely that in earlier years no single party government and no "small coalition" [i.e. the earlier Christian Democratic (CDU), Free Democratic (FDP) coalition] was in a position to bring about criminal law reform by itself. The reasons are clear: The legislators were always attempting to base criminal law reform on very broad support, so that it could be sure of not only the approval of all political parties and religious denominations, but, more than that, of the support of all the people. If one holds fast to this goal—and one definitely should—it is naturally not possible to reduce all the divergent theories of what the penal goal should be to one common denominator.

In giving a general survey of the situation in the law pertaining to the protection of the state (page 170f.), the authors consider the importance of surrounding political circumstances in Germany, such as the attitudes of the cold-war days, the mistrust of a pure liberal democracy as practised in the Weimar Republic, and of the later stronger drive toward resuming contacts with the East. Here another central concern of the book becomes clear, namely the relationship between law and ethics. The authors

emphasize the susceptibility especially of the criminal law to the attempts to design law according to political, philosophical, or religious ethics (page 171). In this manner they come to address themselves to the moral-ethical question so often raised in the debates leading to the German criminal law reform: the contention surrounding the claim that there should be "no guilt without moral guilt" (page 174f.).

Arthur Kaufmann defended this idea more than anyone else, and I would like to refer on this point to his dissertation for admission to university faculty rank, *Das Schuldprinzip* [*The Principle of Guilt*], Heidelberg, 1961,[2] where he indicates that: "What one describes as legal guilt is either a phenomenon of morals or it is no guilt at all...". It is very interesting, here, how the present authors point to the other side to that argument, namely the danger of reading-in a moral guilt, even to ethically indifferent violations (as for example of simple administrative regulations). Where all legal guilt becomes moral guilt, a moralizing state, untenable to a pluralistic democracy, arises.

When the authors criticize the all too self-assured invocation of the Federal Supreme Court (for civil and criminal law) of the "absolute moral law" in the famous decision BGHSt 6, 46 (cf. page 176f.) perhaps even then too "moralistic" a picture of German jurisprudence arises for the English-speaking reader. That decision was after all repeatedly criticized, and it is very interesting to observe in this connection how in its recognition of the validity of wills which married men had set up in favor of their mistresses, the Federal Court has taken a surely cautious but still clearly more liberal attitude in recent years.

On page 179 the authors remark that law without a moral-ethical content would be only an empty collection of rules of behavior and administration. As obvious as these words may be, I still consider it important to emphasize them in today's technical age in which a kind of data determinism over broad areas of life conceals the danger that the law can forfeit its relevance to man, its humanity. Without an ethical content in the law it would not be possible, either, for the individual to feel bound in his *conscience* to the obligation imposed in the law. That this is especially necessary today I have explained more closely in my paper "On the Lawmaking Conscience." [3]

[2] Arthur Kaufmann: *Das Schuldprinzip*, Winter, Heidelberg, 1961, esp. Ch. 4: The Idea of Guilt as an Absolute Moral Principle" (*"Das Schuldprinzip als absoluter sittlicher Grundsatz"*).

[3] Th. Würtenberger: "Vom rechtschaffenen Gewissen," in Th. Würtenberger:

Here too the authors point to the other side of the problem: the attempt to insure the moral-ethical content of the law can turn into an over-moralizing in the law (page 179). In my opinion this danger can be met insofar as we limit the criminal law to the so-called "ethical minimum" (Jellinek). This is the ambition of the plan, either to drop all minor violations from the German criminal code by 1973, or to redesignate them as simple breeches of regulations. This ambition was already realized in part by the law regarding violations of public order of 1968.[4] In this "de-criminalization" one can at the same time catch sight of a "de-moralization" in the criminal law.

Where the authors take up the difficulties one encounters in the attempt to eliminate the strictly moralizing criminal law provisions (cf. page 179) they consider the often repeated argument that the public might misunderstand the lifting of the prohibitions to mean not simply that thereafter these things would not be prohibited by law, but would infer that society no longer considered these things morally unacceptable. The authors do not regard it as a primary legislative concern to have a law for the purpose of lifting public morals, if for no other reason, than because the currently increasing rate of violent criminality confronts us with more important enforcement priorities. They critize as misleading the argument [frequently employed towards attaining the same goal] that the actual source of severe violent crime lies in open immorality (cf. page 180, n. 19). I believe that a reform must unquestionably extend to the elimination of out of date morals laws, if only to legitimate [the claim of] the criminal code to be the law not only for a moral elite but for all the people. So far as severe criminality is concerned, on the other hand, I think not so much a reform of substantive prohibitions as much more a reform of criminal procedure and penology is necessary.

In Chapter IV: A. (2), the authors consider the history of the ideas and politics behind the present reform of the German criminal code. On page 182, they conclude from a quotation from Jescheck [one of the leading German criminal law professors active on the criminal law commission appointed in 1954 to prepare what later became the government's draft code of 1960 and of 1962], which rejects the purely value-free ideal of the state, that according to his position the law

W. Maihofer; A. Hollerbach (eds.): *Existenz und Ordnung, Festschrift fur Erik Wolf zum 60. Geburtstag,* V. Klostermann, Frankfurt a.M., 1962, pp. 337-56.

[4] *Gesetz über Ordnungswidrigkeiten* (OWiG) of 24 May, 1968. [See also page 173 n.7, below.)

ecomes an instrument of a kind of "moral rearmament". This logical onsequence may be supportable from the perspective that Jescheck ctually is an advocate of the thesis that there is a "morals-strengthening" ower in the law. One should distinguish between two different things ere, however. A form of government that wants to implement certain alues does not really have to write the legislative enforcement of good orals into its platform. A declaration of adherence to ethical values government, as for example in the list of fundamental rights contained the Basic Law of the Federal Republic [or the American Bill of ights] is not something primarily concerned with questions of public orals.[5]

The authors consider the tension between the penal goals of retribution nd resocialization (cf. page 184f.) and try to relate these concepts to the olitical standpoints of the conservatives, social democrats, and social berals. This discussion in terms of concepts and political philosophy clearly meant only to contribute an abstract basis of reference. In ractice, or when it comes to describing the attitude of any particular riminal lawyer, these points are not so easily distinguishable. The uthors suggest the same thing later themselves: "Even the most hardened gal moralist adherent of retributive justice is more or less prepared accept the resocialization theory to some extent today" (page 193). any case it is accurate to say that political, social philosophical, even eological questions are involved here (cf. page 185).

Whether it is a question of a choice between the rights of the individual one hand and the rights of the collective on the other, the authors' bservations following from the above discussion are very revealing specially for the German reader (cf. page 185f.). While in England and merica there was always something of the debate between individualism

[5] [Liberal minded people in the English speaking world would probably consider e Bill of Rights (and the same provisions in the German Basic Law) to be imarily a set of legal and political guarantees, not of ethical values. Naturally puts the matter into a much different perspective if one feels himself compelled justify philosophically or ideologically why these guarantees should exist. In e one case we accept that these are already a part of our cultural historical ritage. In the other we have first to be able to say why we should enjoy these ghts and what society itself should and should not be.

In Continental political theory—and nowadays in ideological circles in America—timate questions are asked before the pragmatists practical ones. But if the fferences our point of departure makes are not clear from the start, the rest of ur discussion will never be mutually intelligible, Auth.]

and collective interests (or between the individual and the government or "the system"), in Germany this dichotomy has never played the same role. Even German liberalism was more an economic liberalism not so much democratic, individualistic liberalism. Therefore, in Germany the debate was not formulated as often as individualism *vs.* the common good, but rather more as the good of society-conservative *vs.* the good of society-social democratic, or something else.

This view is by and large correct, although an incisive characterization such as this must always accept some degree of over-simplification. One should expand upon this impression of German political life for the English-speaking reader, however. For in Germany too, at least in the post-war years, and as a reaction to the National Socialist reign of force, a strong liberal democratic, individualistic tendency has dominated all the major parties, and has been clearly expressed in the Basic Law of the Federal Republic. Even then it is not to be denied that this wholesome recognition of the importance of the individual has in the meantime faded a little again; and since the 50's the Federal Constitutional Court has repeatedly given stronger emphasis to the obligation of the individual to his society.

If one examines the very newest development of the dominant ideas in the criminal law in the Federal Republic, one can detect that the social ideal is more strongly brought out. This is shown above all in that to the concept of "rule of law" which arose in the 19th Century (i.e. to a concept implying among other things freedom from the state) inferences are now drawn which more properly have their origin in the principle of the social state [and hence emphasize obligation to society and thus to the state]. For a further discussion on this development see my recently published collection of articles, *Criminal Law Policy in a Social Liberal Democracy*.[6]

On page 186 the authors observe (in reference to the example of the alternative draft penal code) that in Germany new ideas have first of all to be taken up in the program of one of the political parties in order to achieve political success. The justifiable recognition that West German democracy is a party democracy underlies this position. Theoretically perhaps this is only partly true, as Article 21 of the Basic Law records: "The (political) parties cooperate in the formation of the political desires of the nation." In practice, however, the generalization is every bit the case—one can take a stand on what ought to be as one will.

[6] Th. Würtenberger: *Kriminalpolitik im sozialen Rechtsstaat*, Enke, Stuttgart, 1970.

In Chapter IV: B, the authors take up the reform of the "general part" of the German criminal code. They show (page 194) the danger of a "perfectionized" resocialization plan. Implementation of such a plan could take on just as moralizing a character as a penal system built on plain retribution, in the case where the freedom to form one's own civil and social values is taken from the inmate of such a house of correction. Significantly, in the case of Red China, for example, one speaks not of resocialization so much as re-education. This may be properly said, for that matter, for all the countries of the East Bloc, in any case according to the nature of their ambitions. In order to carry out resocialization in a reasonable manner, it is certainly wise (as the authors remark on page 194) to keep the ultimate logical consequences of the resocialization argumentation before our eyes, namely that a "perfect resocialization" can only be achieved through a total reordering of the personality of the offender. Accordingly the authors differentiate between a re-education of the prisoner and offering him the opportunity of putting himself in a position to make his way in society again (page 195). This differentiation even then affords some difficulty to apply in practice.[7] In any case the authors warn against assigning educational missions [in the area of social convictions] to the American prisons in their present state, and particularly considering the mounting incidence of violations arising from political or social moral convictions.[8] This warning may be said to apply in similar manner to Germany, too.

In Chapter IV, Section C (2), the authors give a very comprehensive overview of the German penal system. Perhaps I may add a word here on the concept of "measures of safeguarding (*Sicherung*) and resocialization (*Besserung*)". This section of the penal code in the reform version applying from 1973 is now called "Measures of Resocialization (*Besserung*)

[7] [The latter choice is, of course, intended only to supply vocational training or additional education to those for whom either economic deprivation, or even the lack of need, or interest in the past, to pursue this course or become self-supporting, and not personal or political convictions led to their conflict with the law. Auth.]

[8] [If there is any reason at all for the marijuana smoker to be in prison, it is for violation of the law against possession, not for his disreputable taste or personal philosophy. Similarly, the draft resister, who sees some moral reason for facing prison in the United States rather than fleeing to Canada, may be because he just likes it better in the United States, is only guilty of resisting the draft. His "moral gesture", which has pretty weak impact in the United States, anyway, is not the crime. Auth.]

and Safeguarding (*Sicherung*)". The inversion of the older usage is intended to put stronger emphasis on the resocialization ideal.

Chapter V goes on to the reform of the "special part" of the code. The authors first discuss constitutional and theoretical questions. While they see a common intellectual development and historical background in the human rights concepts of the Western World, there appear to be differing ways of life and of thinking regarding whether men's legal rights pertain to the individual as such or derive instead from his social relationships and obligations to his society. On this point I am of the opinion that the social nature of man is a natural phenomenon of mankind itself.

The authors then discuss the stipulations of the Basic Law of the Federal Republic for the protection of the liberal democratic constitution of the state (e.g. Arts. 18 and 21, which permit limitations on fundamental rights in the case of persons whom the Federal Constitutional Court decides are acting contrary to the constitutional legal order of the Federal Republic). In Germany these rulings are often characterized under the political caption: "No freedom for the enemies of freedom." How often Article 18 [for which the above caption is best applied] has been invoked, (cf. page 206) may well change before publication. Even so, I do think the reference to the decision of the Federal Constitutional Court (*Bundesverfassungsgericht*) in which it emphasized its sole responsibility for deciding questions in regard to Article 18 of the Basic Law [9] is important.

In connection with the prohibition of the neo-Nazi Socialist Reichs Party (SRP) and the Communist Party (KPD) [of the years before 1956],[10] the authors consider the difficulties of devising a positive definition of what a liberal democracy must consist of (cf. page 207) [since we are often clearer on the negative formulation, what it does not consist of]. Such positive definitions are found, moreover, in § 88 of the penal code (StGB) [which enumerates constitutional principles the contravention of which is tantamount to treason], whereby even then § 88, No. 6, "Exclusion of any rule of force or action without due process of law (*Willkürherrschaft*)" is also negatively formulated. A positively

[9] *Entscheidungen des Bundesverfassungsgerichts* (BVerfGE) 10, 118.

[10] [The communist party was reconstituted without opposition in 1968 employing the device of switching the order of the KPD (*Kommunistische Partei Deutschlands*) to create the DKP (*Deutsche Kommunistische Partei*). For a further account see V. A (1.), p. 208ff. below. Auth.]

formulated definition may also be seen in the list of fundamental rights of the Basic Law, however. When the authors remark (on page 209) that it is not at all correct to look for a positive, dogmatic "ideology" to express the liberal democratic standpoint because that ideal does not, for the most part, go beyond the rejection of unnecessary force, this seems to be a somewhat too Anglo-American way of looking at things. The liberal democratic form of government in the Federal Republic is not intended to embody only this kind of an individualistic liberal resistance to undue coercion. Rather it is also concerned with the preservation of certain traditional, distinctly European cultural values, which one could call the "Christian, Western cultural tradition". These separate attitudes seem to be brought together on page 204 where the authors do not hesitate to equate [the constitutional commitment of the Federal Republic to upholding] the "dignity of man" of Article 1 of the Basic Law, which certainly refers to man as a moral agent, with [the philosophical dedication of American democracy to] the "certain unalienable rights" of the American Declaration of Independence. If I am not mistaken those rights ("life, liberty, and the pursuit of happiness") amount to precisely a declaration of belief by the individualistic liberal. Beyond that I would completely agree with the authors that the Federal Constitutional Court does not have the mission of defining the "correct democratic philosophy" (cf. esp. pages 207 and 209), and furthermore, that the prohibition of the communist party (KPD) was decisively influenced by the political climate of the cold-war (cf. page 209). In a broader sense one could also picture this latter decision as a moralistic intrusion into the legal sphere.

In Section A, Part (2), the authors go on to the reform of political justice and concern themselves especially with the problems of state secrets. On pages 215f., there is a very interesting argument for a legal means for revealing "illegal state secrets" [a concept originally introduced by the alternative draft penal code and which has been embodied in the reform law to the extent that § 93.II of the criminal code now recognizes that certain constitutional or treaty violations "are no state secrets"] which would not fall under the provisions of § 97a [a provision prohibiting informing a foreign power of a secret, which although "no state secret" according to § 93.II, could contribute to a "severe disadvantage for the external security of the Federal Republic"]. In this [pursuit] positively formulated inferences are drawn from the negative formulation of § 97b [a provision detailing what one should consider before

concluding that he has knowledge of what ought to be "no state secret" under § 93.II and which he feels ought, therefore, to be released].

It is very understandable from a liberal standpoint when the authors criticize the whole new ordering of the political justice section as stemming from a "the King can do no wrong" mentality (cf. page 215). In any case it is a question here of a clear value judgment within the polarity between a democratic liberalism on the one hand and a strongly protective attitude toward the state on the other.

The criticism that the old § 100.III StGB [the provision protecting members of the parliament from prosecution for revealing what they considered to be unconstitutional state secrets] was stricken without a replacement offering equal guarantees is surely well taken. I would, however, still see an adequate protection in Article 46.I.1 of the Basic Law.

In Chapter V, Section B the authors come to speak of the reform of offenses against the religious peace. I can completely agree with the critical remarks about the "Germanic drive" for perfectionism (cf. pages 218f.). In the pages 220ff., the political and religious denominational tendencies which have played a role in the reform in this area are very clearly shown.

In Chapter V, Section C, the authors take up the reform of the morals laws, under the title "Offenses Against Public Morality". It seems to me that the discussion of abortion under this heading does not fit very well, since it is a matter here, as the authors themselves say (on page 224), of an offense against life. On the other hand this part of the matter is pretty hard to separate from the discussion of birth control and the description of the economic exploitation of sex.

The authors give a comprehensive account of the problems which arise in the medical grounds for abortion, and especially in the religious background. On page 229 they see the connection between the so-called ethical grounds and medical grounds and establish the danger of suicide as a connecting link. On pages 230ff. they go on to discuss the Swedish regulations concerning the interruption of pregnancy.

The opinion of the Federal Supreme Court for civil and criminal matters cited on page 233 regarding pandering (and indecency) should not be too easily regarded as "judicial opinion" today, sixteen years later. In this sub-section one may wonder whether there has been some influence of the pill on the number of abortions. One might also mention here the reduction in penalty for performing an abortion on someone else (§ 218.III of the old version, II of the new version StGB).

In Chapters III: D and V: C (2), the authors consider the prohibition of homosexuality, and it is surely correct for them to have compared the crassly conflicting judgments and opinions in this matter in their full scope (cf. pages 164ff.; 240ff.). On page 244 they show themselves very circumspect regarding German legal perfectionism and the thesis of the "morals-strengthening power" of the law. I would also share this attitude. I believe that the law, particularly the criminal law, cannot make and form morality, but rather it can only reflect a morality which is already there and has been nurtured from other sources; but this is something that the criminal law should also do. Finally the last sentence on page 245 is written completely from the view of a pragmatic liberal but could be very useful in promoting the self-recognition of many a German, even though it shows that the "principle" represents a completely impregnable fortress in the German mind.[11]

In the discussion of adultery (Chapter V: C (3)) the authors show that here the dogma of the "morals-strengthening" power of the criminal law was of special importance in the discussion of the elimination of this prohibition. On page 249 they also come to speak of the problem of artificial insemination. The question arises in this connection how it is that the Catholic authorities resisted the idea of homologous insemination, although lust is a sin according to Catholic doctrine. This may be explainable insofar as sexual relations without the desire for progeny is held to be contrary to natural law in the same manner as artificial insemination.

In Chapter VI, the authors draw the logical inferences from these investigations. Properly they reach the conclusion that legislation is not the product of only objective needs, but rather also of the outlooks of the particular legislators (cf. page 252), and that one cannot really speak of an "end of ideology" [in the law]. One can also agree with the contention (page 253), that there is always a temptation in the making of a law not only to satisfy public needs but also to realize cultural and moral ambitions. The authors contend that the criminal law must contain a "social ethical minimum" [of what is our obligation to find in order to convict]. However, this use of the expression "social ethical minimum" seems to me a little misleading. In this inversion of meaning, the social responsibility is not so much the obligation of the individual to uphold the social values of his society as it is primarily a democratic liberal limitation upon the use of the criminal law by the public.

[11] [Not only the German! Auth.]

The authors consider briefly the theory of Popitz that there is a general preventive function in the number of undiscovered offenses. There is surely much that can be said about this interesting theory, and at least this, that it does not fit all categories of offenses, and perhaps only very few, as for example morals offenses and traffic offenses. The authors say as much themselves (on page 254).

In conclusion the authors bring their central ideas together: the law is neither solely the product of objective needs ("the shoe to the foot of necessity") nor is it an easily tractable medium for moral-ethical ambitions or even for political philosophical purposes. It contains something from all of these including apparently irrational impulses, and even completely unsound arguments. The best intentions and principles of morally committed or rational liberal lawmakers offer no guarantee against dilution and ineffectiveness because of an already prevailing practice or because of the momentum of the tried and true ("the instinctive logic of business as usual"). The solution for these inescapable complications which arise for the best legal regulations may be only to legislate for what is absolutely necessary: in this way laws are a medium for the protection of our lives, interests, and property. Philosophy, ethics, and politics are surely bound up with the laws, but their true role is to recognize the proper function of the law and to apply it with justice. The proper function of the law as seen here lies in the pragmatic Biblical sense that we may "live by them".

I consider these observations to be both valuable and illuminating. I too believe that philosophy and ethics cannot be codified and positivized, or, one may say, decreed according to law; rather, the positive law, including the criminal law, ought primarily to serve a specific purpose. Here lies the task of a pragmatic politics. But, at the same time ethics and philosophy ought not to be excluded from the sphere of the law, they must rather provide the indispensable guidelines for the *application* of the law, which men are able to be true to in their own consciences. In this manner the ethical heart of the law can be preserved, without the danger that the private life of man would become the object of an all-confining, moralizing government regulation. With that I come to speak again of the liberal point of departure of the authors.

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