THE POLITICS OF PUNISHMENT: PENAL REFORM IN MODERN GERMANY, 1870-1970

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This project examines how, beginning in the late nineteenth century, a new generation of penal reformers gradually transformed Germany’s criminal justice system. The reformers argued that the primary purpose of criminal justice was not retributive justice but the protection of society. To protect society effectively, they insisted, the criminal justice system must be based on a scientific foundation, namely, on scientific studies of the causes of crime and the effects of different penal sanctions. In this respect, penal reform was part of the larger process of the scientification of the social. The reformers’ demand that the penal sanction must serve to prevent the individual offender from offending again led them to call for the replacement of standard fixed prison sentences with a variety of alternative sanctions tailored to the individual offender. Although the reformers still used the term “punishment,” they were in fact proposing to strip the penal sanction of punitive content and to transform it into a range of individualized preventive measures drawn from non-penal areas of state intervention such as education (for juvenile delinquents), medical treatment (for abnormal offenders), and welfare (detention in a workhouse for incorrigible habitual criminals). Although the penal reformers protected the legal profession’s control of criminal justice against the claims of psychiatrists and welfare officials, they gave medical doctors and welfare workers increased roles in criminal justice, both in the assessment of an offender’s “dangerousness” and in the subsequent administration of the individualized penal sanction. The penal reform process thus broke down the existing boundaries between law, welfare, and medicine.

The German penal reform movement was part and parcel of an international penal reform movement that encompassed most of Western Europe as well as other parts of the world. This study therefore embeds the German penal reform debate in its transnational context and compares it to legal reform developments in other countries. The reformers found themselves attacked by critics with two different sets of arguments. While some charged that the reformers’ deterministic understanding of the causes of crime undermined the notion of individual legal responsibility and the moral foundation of criminal
justice, others warned that the reformer’s system of individualized, indefinite preventive measures (instead of fixed sentences) would establish a police state that had no regard for individual freedom. These contradictory critiques reflected that fact that the reformers’ drive to replace the retributivist system of fixed punishments with individualized preventive measures had profoundly ambivalent implications. On the one hand, the new primacy of individualized treatment promised to liberate criminal justice from the schematism of deterrence and the harshness of retribution. By turning the penal sanction into a preventive, rather than punitive, measure the reformers opened the way for a more humane justice system, which could prescribe education or medical treatment instead of prison terms. On the other hand, if punishments were no longer limited by the principle of retributive justice or by a system of fixed punishments, the individual would be left unprotected against the potentially limitless protective needs of society, including the indefinite detention of habitual criminals.

The penal reform movement’s Janus-faced character explains how its reform agenda could influence the penal policies of a succession of different political regimes, from Imperial Germany through the Weimar Republic to the Nazi dictatorship to the postwar German states. It also explains why different regimes stressed different aspects of this agenda. In this respect, the project seeks to move beyond the two dominant interpretations of law under the Nazi regime. The first of these has argued that the Nazi seizure of power in 1933 marked a radical break in legal history because the Nazi regime established an Unrechtsstaat that “perverted” justice and law. Challenging this view, a second interpretation has stressed continuities across 1933, focusing either on a particularly German brand of legal positivism or on the right-wing political leanings of the German judiciary. While both interpretations contain elements of truth, this study contends that both miss a crucial element of continuity that has nothing to do with German peculiarities, namely, the continuity of the transnational penal reform agenda. At the same time, it shows that the repressive side of this reform agenda could become transformed into state terror only because the Nazi regime completely abandoned the rule of law. This study also demonstrates, however, that it can be difficult to determine whether or not a criminal justice system conforms to the rule of law because the history of modern penal reform is one of changing interpretations of what the rule of law means. Probing the notion of the rule of law — the Rechtsstaat — in the context of criminal justice history is therefore one of the major themes of this study.