

Kai Ambos

National Socialist Criminal Law

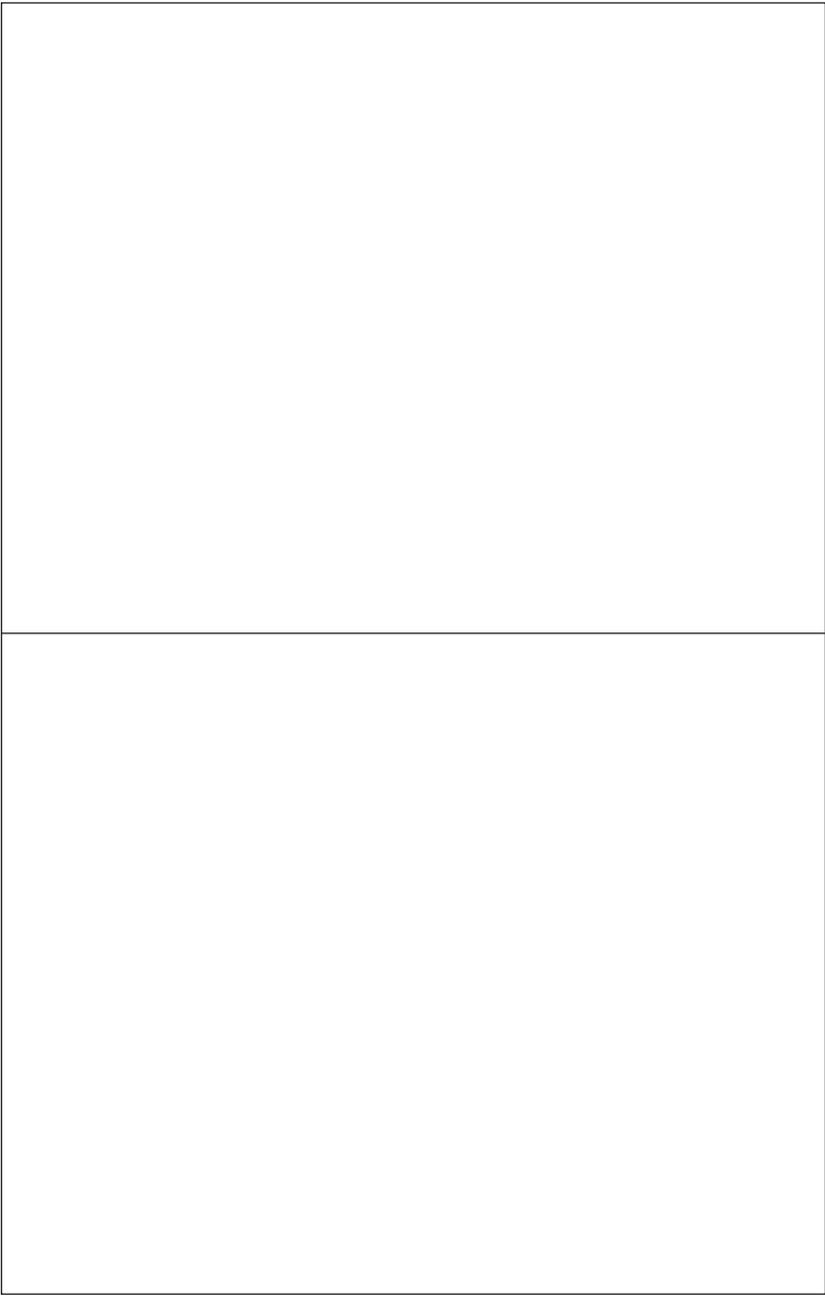
Continuity and Radicalization



HART
PUBLISHING



Nomos



Kai Ambos

National Socialist Criminal Law

Continuity and Radicalization

Preface by R.A. Duff



Nomos



Translation from German by Margaret Hiley
Revision and update by the author

The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data are available on the Internet at <http://dnb.d-nb.de>

ISBN: HB (Nomos) 978-3-8487-5808-1
ePDF (Nomos) 978-3-8452-9925-9

British Library Cataloguing-in-Publication Data

A catalogue record for this book is available from the British Library.

ISBN: HB (Hart) 978-1-5099-3678-6

Library of Congress Cataloging-in-Publication Data

Ambos, Kai

National Socialist Criminal Law

Continuity and Radicalization

Preface by R.A. Duff

Kai Ambos

205 pp.

Includes bibliographic references and index.

ISBN 978-1-5099-3678-6 (hardcover Hart)

1st Edition 2019

© Nomos Verlagsgesellschaft, Baden-Baden, Germany 2019. Printed and bound in Germany.

This work is subject to copyright. All rights reserved. No part of this publication may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopying, recording, or any information storage or retrieval system, without prior permission in writing from the publishers. Under § 54 of the German Copyright Law where copies are made for other than private use a fee is payable to "Verwertungsgesellschaft Wort", Munich.

No responsibility for loss caused to any individual or organization acting on or refraining from action as a result of the material in this publication can be accepted by Nomos or the author.

For Analu, Patrick and Lara

“Does such a system deserve the name of law? Yes, if law is merely the will of the sovereign; definitely not, if law, unlike the sovereign's command must be rational either in form or in content. The National Socialist legal system is nothing but a technique of mass manipulation by terror. Criminal courts, together with the Gestapo, the public prosecutor, and the executioners, are now primarily practitioners of violence.”

(Franz Neumann, *Behemoth*, 1942, p 458)

“But precisely because the Third Reich destroyed a tradition with which German identity was so profoundly connected, the Germans... need to think back before Auschwitz and forward beyond Auschwitz... In any case, Jewishness forms an inalienable part of German identity, and those born after [the Holocaust] should see it as their duty not only to lastingly commemorate the important history of Jewishness, but also to scatter the fruitful seed of this commemoration, sowing it in Germany's and Europe's future.”

(Dieter Borchmeyer, *Was ist Deutsch?*, 2017, p 22
[translation from German])

“How arrogant to believe we could get away so easily! As if there were any way or any time that anything could ever be normal once more. ... *Nothing will ever be alright again.*”

(Max Czollek, *Desintegriert Euch* [“Disintegrate Yourselves”], 2018, p 182 [italics in original, translation from German]).

Preface

Mention ‘National Socialist criminal law’ to many people, at least in the common law world, and they will suppose it to have been simply an aberration: if it should be counted as ‘law’ at all (given that it was part of the *Unrechtsstaat* of Nazi Germany), it must be seen as marking a radical hiatus in the history of German criminal law, utterly disconnected both from what had gone before and from what was then reconstructed after 1945. Mention ‘National Socialist criminal law theory’, and the reaction is likely to be the same: no doubt Nazi propagandists offered ‘theories’ of criminal law, as part of their efforts to rationalise their regime; but such theories could have no real connection with the doctrines that informed and structured German criminal law before and after the Nazi era. In this fascinating book Kai Ambos shows just how mistaken such reactions would be.

Ambos meticulously traces the deep continuities between National Socialist criminal law doctrine and pre-1933 criminal law scholarship, as well as the traces that it left in post-1945 doctrine (in Germany, but also in Latin America). He does this by paying careful attention to the writings of doctrinal theorists of the period, to their relationships and disagreements with each other, and to the ways in which they drew on earlier doctrines and philosophical ideas, whilst also more or less profoundly modifying those doctrines and ideas in the service of the Nazi ideology. He presents these authors in their own words, and thus enables us to see for ourselves the ways in which they developed doctrines that would sustain a National Socialist criminal law.

The book offers us an illuminating history of this dark period of German criminal law doctrine and theory, and revealing insights into the doctrinal theorists who helped to form it (as well as those who resisted it); but it also shows us revealingly how, as Ambos puts it in his Foreword, ‘National Socialist criminal law neither came out of nowhere nor disappeared completely after 1945’. If we reflect on the historical character of the institutions of criminal law, and the historically situated character of criminal law doctrine and theory, this should not surprise us: but given prevalent conceptions of the Nazi era, it might surprise many of us; this book, apart from its intrinsic historical interest, provides an invaluable corrective.

R A Duff, July 2019

Foreword

The present study came about as a result of reading the famous Argentinian criminal law scholar Eugenio Raúl Zaffaroni's recent monograph on National Socialist criminal law doctrine ("Doctrina Penal Nazi", 2017). While the initial aim was to produce only a brief review, the in-depth examination of the sources cited by Zaffaroni and consultation of further primary and secondary sources have resulted in an independent treatise of its own. In line with theories of National Socialism as a continuation and radicalisation of existing trends, it interprets Nazi criminal law as a racist (anti-Semitic), nationalist ("Germanic"), and totalitarian construct that continues and develops further the authoritarian and anti-liberal tendencies of German criminal law of the *fin-de-siècle* and the Weimar Republic. This is borne out by a systematic analysis of writings by relevant authors that focuses first and foremost on the texts, which speak for themselves, and is less concerned with morally judging the scholars who produced them. Readers will also learn about the reception of German (National Socialist) criminal law in Latin America.

A brief word on the aforementioned continuity: it existed not only between the Nazi period and the eras preceding it, but also between National Socialism and the period that followed (the Bonn and even the Berlin Republic). In short, National Socialist criminal law neither came out of nowhere nor disappeared completely after 1945. Current identitarian attempts by the so-called *Neue Rechte* ("New Right") to reconstruct the Germanic myth represent yet another continuation that links seamlessly to National Socialist ideology. In today's digital age, the New Right's populist style of politics is seeking to replace argumentative discourse by "supposedly direct and immediate agreement in a virtual ethnic community" (Stollberg-Rilinger, Interview, faz.net, updated 2 September 2018). This discourse is disturbingly reminiscent of Nazi language and its racist undertones (Detering, 2019).

There are many colleagues I would like to thank for their critical comments, which helped to develop this study. Thomas Vormbaum and Fritz Loos read the manuscript in its entirety. Friederike Wapler provided me with valuable suggestions for the fourth chapter (NS criminal law and Neo-Kantianism), as did Gunnar Duttge, Katrin Gierhake, Luis Greco, Katrin Höffler, Tatjana Hörnle, Günther Jakobs, Urs Kindhäuser, Uwe Mur-

mann and Dietmar von der Pfordten. Paulo de Sousa Mendes, Leandro Dias, Michael Kubiciel, Javier Llobet, Eva Schumann and Fernando Velásquez commented on other aspects. Florian Jessberger and Moritz Vormbaum kindly provided me with their forthcoming contributions on H. Henkel, and Urs Kindhäuser let me have a copy of his forthcoming essay on “Günther Jakobs and Hans Welzel”. Furthermore, I would like to thank my student assistants Marieke Buchholz, Matthias Friese, Leon Augustin Hill, Roman Jusen, Alina Sviridenko, Dara-Lisa Szielinski and Tjorven Vogt for their support in researching this project (Tjorven's help was indispensable to create the list of figures). My gratitude also goes to my doctoral student Yingxin He for comments on the Chinese understanding of the rule of law.

This English version would not have been possible without the help of Dr Margaret Hiley, who produced a translation from the German original in close collaboration with myself. I also want to thank Antony Duff, who not only took it upon himself to write a preface, but also read the translation carefully, suggesting improvements. Last but not least, the publisher, especially Prof. Rux and Mr. Schwarzenberger, have been extremely helpful and flexible. This research is a work in progress, and therefore not only updates but also substantive additions have been made to this English version.

Kai Ambos, Göttingen, August 2019

Table of Contents

List of Abbreviations	17
Chapter I. Preliminary Remarks	21
1. Zaffaroni’s “Doctrina Penal Nazi”	21
2. My approach	23
Chapter II. The Foundations of National Socialist Criminal Law	36
1. Racism, Volksgemeinschaft, Führer state, Führer principle and exclusion	36
2. The material concept of justice and wrongdoing, ethicisation, “total” criminal law and deformalisation	57
3. General preventive and atonement-focused Willensstrafrecht (criminal law of the will)	66
Chapter III. Continuity and the “Schulstreit” (“Dispute between the Schools”) (?)	72
Chapter IV. National Socialist Criminal Law and Neo-Kantianism	79
1. The (alleged) influence of Neo-Kantianism	79
2. The “Marburg School of Neo-Kantianism”	84
3. Neo-Kantianism—a forerunner of National Socialist criminal law?	94
4. Collectivism and material theories of value—forerunners of National Socialist criminal law?	102
Chapter V. The Independent National Socialist Criminal Law of the Kiel School	113
1. Basic orientation and main representatives	113
2. Criminal policy: an authoritarian NS criminal law	117
3. The role of the judge in the NS Führer state	127
4. Loyalty, breaches of duty, honour punishments	130

Table of Contents

5. Concrete Wesensschau (focus on the substance of the offence), Täterstrafrecht (agent-focused criminal law) and Willensstrafrecht (criminal law of the will)	138
6. A comprehensive actus reus defined by overall disvalue ("offence type") instead of a structured theory of crime	147
Chapter VI. Erik Wolf: From Perpetrator Types to an Attitudinal Theory of Agency	149
1. Authoritarian-social criminal law and theory of agency	149
2. Wolf's turn towards and away from National Socialism	154
Chapter VII. Some (preliminary) conclusions	161
1. Selective reception of German (NS-inspired) criminal law in Latin America	161
2. Did Hans Welzel truly overcome (Neo-Kantian) NS criminal law?	163
3. A continuity of National Socialist criminal law thought in Latin America?	175
Bibliography	177
I. Literature before 1945	177
II. Literature after 1945	186
Index of Persons (selected)	201
Subject Index	203

List of figures

Figure 1: The infamous Memorandum of the Prussian Ministry of Justice on NS Criminal Law (“Prussian Memorandum”, Preußischer Justizminister, 1933)	24
Figure 2: Gemmingen’s book on criminal law in accordance with Hitler’s ideas (not authorized by Hitler), 1933	24
Figure 3: Schaffstein’s fundamental text on a “Political Criminal Law Science” based on his inaugural lecture at Leipzig University, 1934	30
Figure 4: Roland Freisler	39
Figure 5: The Report on the work of the official Criminal Law Commission, headed by Reich Minister of Justice Gürtner, volume I on the General Part (Gürtner, 1934; vol. II on the Special Part was published in 1935)	41
Figure 6: Memorandum of the Central Committee of the Criminal Law Section of the (NS) Academy for German Law on the Main Features of German Criminal Law (Frank, 1934)	41
Figure 7: Nicolai’s Racist Legal Theory, 1932	44
Figure 8: Mezger’s influential textbook on “Criminal Policy”, first published in 1934 (our picture), the 2nd edition following in 1942; in 1931 Mezger also published a very influential textbook on criminal law, of which several editions appeared over the following years	44
Figure 9a: Trial re 20 July 1944; from left to right: Hermann Reinicke (general, assisting judge), Roland Freisler (presiding judge) and Heinrich Lautz (prosecutor)	53
Figure 9b: Trial re 20 July 1944; from left to right: Hermann Reinicke (general, assisting judge), Roland Freisler (presiding judge) and Heinrich Lautz (prosecutor)	53

List of figures

Figure 9c: Trial re 20 July 1944, Berthold von Stauffenberg second from right	54
Figure 9d: Ruins of the Volksgerichtshof (People`s Court of Justice), Berlin, 1951	54
Figure 10: Execution notice from the Prosecutor at the Volksgerichtshof re Hasso von Boehmer; the execution took place on March 1945; the publication of and obituary was prohibited	55
Figure 11: Sieger`s main contribution to the NS criminal law “in the new State”	61
Figure 12: NS Guiding Principles for a new German Criminal Law, First Part (General Part) (Frank, 1935); the Second Part on the Special Part was published in 1936	61
Figure 13: Mezger`s early call for the “elimination” (Ausscheidung) of “incorrigible individuals” (Unverbesserliche) from human society, 1928	83
Figure 14: The Marburg (more traditional) reply of 1937 to the Kiel anti-liberal and authoritarian booklet of 1933; however, it should be noted that both texts agreed on the overall goal of implementing the NS ideology	89
Figure 15: Dahm and Schaffstein`s anti-liberal and authoritarian booklet of just 50 p, 1933	122
Figure 16: Schaffstein`s main text on the central theory of breaches of duty (<i>Pflichtverletzung</i>), published in Dahm et al (1935), p 108 ff	132
Figure 17: Wolf`s first truly National Socialist text on “Right Law in the NS State”, 1934	150
Figure 18: Welzel`s Habilitation thesis, 1935	164
Figure 19: Welzel`s very influential textbook, first published in 1940 as a “General Part” and right after WWII in its 4th edition of 1949 with a slightly changed title (our picture), the final 11th edition appearing in 1969	170

List of Abbreviations

ADPCP:	<i>Anuario de Derecho Penal y Ciencias Penales</i>
ARSP:	<i>Archiv für Rechts- und Sozialphilosophie / Archives for Philosophy of Law and Social Philosophy</i>
BGBI:	<i>Bundesgesetzblatt</i> (Federal Law Gazette)
BGH	Bundesgerichtshof (Federal Supreme Court)
BGHSt	BGH in Strafsachen (Official collection of BGH decisions in criminal matters)
BMJ:	Bundesministerium der Justiz (Federal Ministry of Justice)
BVerfG:	Bundesverfassungsgericht (Federal Constitutional Court)
cf:	conferatur (“compare”)
cit:	cited
col:	column(s)
DJ:	<i>Deutsche Justiz</i> (1933–1945; ed. Reichsminister der Justiz; “amtliches Organ der deutschen Rechtspflege und Rechtspolitik” [“official organ of German administration of the law and legal policy”]; predecessor in title: <i>Zeitschrift Preußische Justiz</i>)
DJZ:	<i>Deutsche Juristenzeitung</i> (under National Socialist control after 1933; ed. Carl Schmitt [from 1934 onwards]; prior to this, the journal had been published since 1896 by Otto Liebmann, who suffered Nazi persecution as a Jew; discontinued in 1936 and replaced by the <i>ZAkDR</i>)
DPC:	<i>Derecho Penal y Criminología</i> (Bogotá, Colombia: Universidad Externado)
DR:	<i>Deutsches Recht</i> (1931–1945, “Zentralorgan des National-Sozialistischen Rechtswahrerbundes” [“central organ of the National Socialist Association of Legal Professionals”, merged with <i>JW</i> in 1939])
DRWis:	<i>Deutsche Rechtswissenschaft</i> (founded in 1936 to support the “renewal of the law” / disseminate the ideas of the Kiel School)
DStR:	<i>Deutsches Strafrecht. Strafrecht. Strafrechtspolitik. Strafprozess</i> (a supplement to <i>DJ</i>) (1934–1944, ed. Roland Freisler, published under its former title of “Goldammer’s Archiv für Strafrecht” from 1953 onwards)
ed:	edited by / editor / edition
eds:	editors
eg:	exempli gratia (“for example”)
et al:	et alia (“and others”)
FG:	<i>Festgabe</i>
fn:	footnote

List of Abbreviations

FS:	<i>Festschrift</i>
GDR:	German Democratic Republic
GerS:	(<i>Der</i>) <i>Gerichtssaal</i>
GLJ:	<i>German Law Journal</i>
HRG:	<i>Handwörterbuch zur deutschen Rechtsgeschichte</i>
ibid:	ibidem (“in the same place”)
id:	idem (“the same”)
JCL&Crim:	<i>Journal of Criminal Law and Criminology</i>
JJZG:	<i>Jahrbuch der juristischen Zeitgeschichte</i>
JoJZG:	<i>Journal der juristischen Zeitgeschichte</i>
JW:	Juristische Wochenschrift (“Organ des Deutschen Anwaltsvereins” [“organ of the German Lawyers’ Association”] until 1939, then merged with <i>DR</i> ; influenced by NS concepts of the law during the NS period; only became a more practice-oriented and the most important legal journal when refounded as <i>NJW</i> in 1947)
JJZ:	<i>Jahrbuch für Juristische Zeitgeschichte</i>
JZ:	<i>JuristenZeitung</i> (since 1951, succeeding <i>SJZ</i>)
KJ:	<i>Kritische Justiz</i>
KritV:	<i>Die Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft</i>
LH:	Libro Homenaje (Festschrift)
LTO:	<i>Legal Tribune Online</i>
MDR:	<i>Monatsschrift für Deutsches Recht</i> (since 1947)
MIH:	<i>Modern International History</i>
mn:	margin number
MS:	manuscript
MSchKrim:	<i>Monatsschrift für Kriminologie und Strafrechtsreform</i>
MSchKrimBio:	<i>Monatsschrift für Kriminalbiologie und Strafrechtsreform</i>
MSchKrimPsych:	<i>Monatsschrift für Kriminalpsychologie und Strafrechtsreform</i> (published under this name from its foundation until 1936, then <i>MSchKrimBio</i> , now <i>MSchKrim</i>)
MüKoStGB:	<i>Münchener Kommentar zum Strafgesetzbuch</i>
NDP:	<i>Nueva Doctrina Penal</i>
NFP:	<i>Nuevo Foro Penal</i> (Medellín, Colombia: Temis, Universidad Eafit)
NJW:	<i>Neue Juristische Wochenschrift</i>
NK:	<i>Nomos Kommentar</i>
NS:	National Socialism / National Socialist
NSDAP:	Nationalsozialistische Deutsche Arbeiterpartei (National Socialist German Workers’ Party)
OGH:	Oberster Gerichtshof (Supreme Court)
OJLS:	<i>Oxford Journal of Legal Studies</i>
pos.	position (e-book)

Prussian Memorandum:	Memorandum of the Prussian Justice Minister on NS criminal law (Preußischer Justizminister, 1933).
RDP:	<i>Revista de Derecho Penal</i> (Buenos Aires, Argentina: Ediar)
RDPc:	<i>Revista de Derecho Penal y Criminología</i> (Madrid, Spain: UNED and Buenos Aires, Argentina: La Ley)
REP:	<i>Revista de Estudios Penales</i> (Valladolid, Spain: Universidad de Valladolid)
RG:	Reichsgericht (Supreme Court of the Reich)
RGBL:	<i>Reichsgesetzblatt</i> (Reich Law Gazette)
RJ:	<i>Rechtshistorisches Journal</i>
RStGB:	Reichsstrafgesetzbuch (Reich Criminal Code)
RW:	<i>Rechtswissenschaft</i>
SchwZStW:	<i>Schweizerische Zeitschrift für Strafrecht</i>
StGB:	Strafgesetzbuch (Criminal Code)
SJZ:	<i>Süddeutsche Juristenzeitung</i> (1946–1950, precursor to JZ)
TWC:	Trial of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, 15 volumes, Washington D.C. 1946 ff.
UCLA J. Int'l L & For. Aff.:	<i>University California at Los Angeles Journal of International Law and Foreign Affairs</i>
ZakdR:	<i>Zeitschrift der Akademie für deutsches Recht</i> (journal of the “Academy of German Law”, an institution subject to the NS Reich Ministry of Justice and Ministry of the Interior)
ZDRW	<i>Zeitschrift für Didaktik der Rechtswissenschaft</i>
ZIS:	<i>Zeitschrift für Internationale Strafrechtsdogmatik</i>
ZJJ:	<i>Zeitschrift für Jugendkriminalrecht und Jugendhilfe</i>
ZKph:	<i>Zeitschrift für deutsche Kulturphilosophie</i>
ZRG-GA:	<i>Zeitschrift der Savigny Stiftung für Rechtsgeschichte. Germanistische Abteilung</i>
ZStW:	<i>Zeitschrift für die gesamte Strafrechtswissenschaft</i>

