

NAZI CRIMINOLOGY: CONTINUITY AND RADICALISATION

*Kai Ambos**

Contrary to the ‘rupture thesis’ favoured in Anglo-American academic discourse, Nazi criminal law did not emerge from a vacuum; nor did it disappear after 1945. The article explains and defends this ‘continuity thesis’. In fact, Nazi criminal law adopted earlier authoritarian tendencies of German criminal law and exacerbated them (the ‘radicalisation thesis’). It is for this reason that Nazi criminal law should not lightly be dismissed as ‘non-law’, thus omitting any further engagement with it. The article will show that the same continuity and radicalisation arguments can be made, mutatis mutandis, for German Nazi criminology, which ultimately became a legitimating science (‘Legitimationswissenschaft’) for Nazi criminal justice policy. The argument is developed in four stages. First, an account is given of the racist and criminal-biologicistic foundations of National Socialist criminology, including their continuity both with the past and into the future. This is followed by an explanation of the influence of criminal anthropology (particularly that of Lombroso) on the ‘scientification’ of criminology (the ‘Kraepelin and Aschaffenburg paradigms’). Third, the National Socialist radicalisation of criminology on the basis of the criminal-biological utopia of the ‘blood-based’ Volksgemeinschaft is described. Thus, Nazi criminology derived its strength from and built upon biological theories of crime, which in turn laid the foundations of the deadly Nazi criminal justice policy. The discipline became a science that legitimated National Socialism, contrary to Wetzell’s thesis of a somewhat dissident ‘mainstream criminology’. With regard to disturbing developments in current German politics, all this will make clear that the approach of the (German) ‘New Right’ to criminal justice is not novel at all but is derived from the ideologically infused theories and policies of Nazi criminologists during the 1930s.

Keywords: National Socialism, Nazi criminal justice, criminology, euthanasia, racism, antisemitism, New Right

1. INTRODUCTION

During the Nazi era (1933–45), German criminal law assumed a very different character, moulded by the regime’s ideology.¹ One reading of this radical transformation is that it constituted a dramatic change of direction, only to collapse along with the fall of the regime. However, Nazi criminal law neither emerged from a vacuum, nor did it completely disappear after 1945. This is the gist of the so-called *continuity thesis*, which I defend elsewhere.² Indeed, Nazi criminal law did not only continue earlier authoritarian tendencies of German criminal law but even exacerbated them – the so-called *radicalisation thesis*. Perhaps the most

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¹ Kai Ambos, *National Socialist Criminal Law* (Hart/Nomos 2019) 36–71.

² *ibid* 23–35.

prominent and horrific example of this radicalisation is the Nazi euthanasia programme in carrying nineteenth century social-Darwinist and biologist thinking to its deadly extreme.

This article focuses on Nazi, and thus German criminology, but this does not mean to imply that criminology is a 'nationalist' discipline. On the contrary, criminology operates transnationally as a cross-cultural enterprise and this becomes clear if one studies Nazi criminology, for example, in its reliance on the Italian positivist school, especially Lombroso, as demonstrated in Section 3. Similarly, while this article does not focus on the human rights dimension of criminology in general and Nazi criminology in particular, this is not to say that such a dimension does not exist or is of minor importance. Indeed, there are various human rights norms which concern the criminal justice system and thus deserve to be analysed from a criminological perspective,³ although this is outside the scope of this article.

Instead, the article will demonstrate how German Nazi criminology, similar to German criminal law, constituted, *mutatis mutandis*, a continuation and radicalisation of earlier explanations for crime. Both the continuity and the radicalisation theses stand in stark contrast with the 'rupture thesis' favoured in Anglo-American academic discourse. This thesis holds that Nazi (criminal) law constituted an historic aberration which departed from previous German traditions and contemporary explanations of criminality.⁴ Given the continuity of Nazi criminal law, it should not lightly be dismissed as 'non-law', thus omitting any further engagement with it.⁵ In fact, anyone who makes the effort to understand the functioning of the Nazi criminal justice system, studying its structural and theoretical underpinnings, will quickly realise that both the rupture and the non-law theses need to be corrected.⁶

It should also become clear from this article that Germany's 'New Right', represented at all (federal, state and local) parliamentary levels by the *Alternative für Deutschland* (AfD) party, has a perspective on criminal behaviour and the state response to crime which is not novel but can be traced back to the ideologically infused theories and policies of Nazi criminologists during the 1930s. This is evidenced by various legislative initiatives at the federal and state levels.⁷

³ See, eg, art 10(3) International Covenant on Civil and Political Rights (entered into force 23 March 1976) 999 UNTS 171 ('reformation and social rehabilitation' as aims of the penitentiary system) or the infamous art 5(1)(e) European Convention on Human Rights and Fundamental Freedoms (entered into force 3 September 1953) 213 UNTS 222 (authorising the detention of, inter alia, 'persons of unsound mind ... or vagrants' (emphasis added)).

⁴ For a recent critique see Simon Lavis, 'Nazi Law as Non-law in Academic Discourse' in Stephen Skinner (ed), *Ideology and Criminal Law: Fascist, National Socialist and Authoritarian Regimes* (Hart 2019) 59, especially 59–61, 75–76.

⁵ cf *ibid* 60, 75–76; also Richard F Wetzell, 'Nazi Criminal Justice in the Transnational Arena: The 1935 International Penal and Penitentiary Congress in Berlin' in Skinner (n 4) 77, 101.

⁶ Antony Duff, 'Preface' in Ambos (n 1) 9 ('this book ... provides an invaluable corrective' to the non-law and rupture theses).

⁷ See – as *pars pro toto* – the paradigmatic Draft Law of the *Alternative für Deutschland* (AfD) party, BT-DrS 19/6371, on 'harsher punishment for reoffenders'; critically, in that respect, Kai Ambos, 'Zurück zum NS-Täterstrafrecht?', *FAZ Einspruch Magazin*, 27 March 2019 (demonstrating its incorrect interpretation of criminological data and use of classical Nazi language), <https://einspruch.faz.net/einspruch-magazin/2019-03-27/c0f096943087ab27cae731a98b74d262/?GEP=s5>.

In fact, this New Right, especially its Nazi-like, *völkisch* ‘wing’ (*Der Flügel*),⁸ openly embraces a racist-genetic⁹ and ethnic-biologicistic agenda of superiority¹⁰ and employs supposed criminological insights in doing so, in a similar way to Nazi criminologists such as Helmut Nicolai, to whom we now turn. In ideological terms there is thus nothing ‘new’ about this ‘Right’; rather, it is a Nazi-like, *völkisch* movement in the modern garb of the internet age.

2. NAZI RACISM, CRIMINAL BIOLOGY AND CONTINUITY

In as early as 1932, Helmut Nicolai had already attempted to provide a populist philosophical foundation for National Socialist (NS) racial theory¹¹ in his *Foundations of a National*

⁸ At the end of March 2020 the Federal Office for the Protection of the Constitution (*Bundesamt für Verfassungsschutz* (BfV)) declared that *Der Flügel* is now to be considered as an ‘extreme right-wing endeavour directed against the liberal democratic basic order’ (*rechtsextremistische Bestrebung gegen die freiheitliche demokratische Grundordnung*), <https://www.verfassungsschutz.de/de/oeffentlichkeitsarbeit/presse/pm-20200312-bfv-stuft-afd-teilorganisation-der-fluegel-als-gesichert-rechtsextremistische-bestrebung-ein>. As a consequence, the party’s governing board ordered *Der Flügel* to be dissolved, which the latter apparently accepted, <https://www.zeit.de/politik/deutschland/2020-03/afd-fluegel-bjoern-hoecke-andreas-kalbitz-aufloesung>. However, it is highly unlikely that this will make the openly Nazi-like elements of the AfD disappear overnight, if at all.

⁹ The ‘88 Precepts’ of David Lane, a leading ideologist of the White Supremacy movement, are a classic example: see, eg, Precept No 32: ‘Miscegenation, that is race-mixing, is and has always been, the greatest threat to the survival of the Aryan race’, https://archive.org/stream/88Precepts_937/88Precepts_djvu.txt; for more information on Lane, <https://www.splcenter.org/fighting-hate/extremist-files/individual/david-lane>. That such theories are scientifically untenable is confirmed by the recent statement of the American Society of Human Genetics, ‘ASHG Denounces Attempts to Link Genetics and Racial Supremacy’, 19 October 2018, [https://www.cell.com/ajhg/full-text/S0002-9297\(18\)30363-X](https://www.cell.com/ajhg/full-text/S0002-9297(18)30363-X) (‘misuse of genetics to feed racist ideologies ... Genetics demonstrates that humans cannot be divided into biologically distinct subcategories ... It follows that there can be no genetics-based support for claiming one group as superior to another’).

¹⁰ cf in this regard the BfV’s report on the AfD, according to which some ‘prominent protagonists of the party propagate an understanding of the people based upon ethnicity and biology or ethnicity and culture that violates the guarantee of human dignity’ (‘herausgehobene Protagonisten der Partei ein ethnisch-biologisch bzw. ethniskulturell begründetes Volksverständnis propagieren, dass gegen die Menschenwürdegarantie ... verstößt’), <https://netzpolitik.org/2019/wir-veroeffentlichen-das-verfassungsschutz-gutachten-zur-afd>. From the perspective of constitutional law, Klaus Ferdinand Gärditz, ‘Die Alternative für Deutschland und der Verfassungsschutz’ *VerfBlog*, 17 January 2019, <https://verfassungsblog.de/die-alternative-fuer-deutschland-und-der-verfassungsschutz> (‘“völkisch” concepts of democracy that bind membership of the people as the subject of legitimation to sacrosanct/inviolable [?] ethnic or biologicistic definitions of the community and associated ideas of homogeneity [are] obviously impossible to reconcile with human dignity and democracy’ [‘“völkische” Demokratiekonzepte, die Mitgliedschaft im Legitimationssubjekt Volk an unverfügbare ethnische oder biologische Gemeinschaftsdefinitionen sowie an daran anknüpfende Homogenitätsvorstellungen binden, offenkundig mit ... Menschenwürde und Demokratie unvereinbar’]).

¹¹ cf, eg, Roland Freisler, ‘Gedanken zur Strafrechtserneuerung’ in Preußischer Justizminister, *Denkschrift des preußischen Justizministers, Nationalsozialistisches Strafrecht* (Decker 1933) 6–9, 6 (race- and blood-based concept of the *Volksgemeinschaft*, the ‘community of the people’, to ‘protect the people itself, its community of blood and fate’ [‘Schutz des Volkes selbst, seiner Bluts- und Schicksalsgemeinschaft’]); Otto Thierack, ‘Sinn und Bedeutung der Richtlinien für die Strafrechtsreform’ in Hans Frank (ed), *Denkschrift des Zentralausschusses der Strafrechtsabteilung der Akademie für Deutsches Recht über die Grundzüge eines Allgemeinen Deutschen Strafrechts* (Decker 1934) 25–26 (‘Blood and soil as the sacred goods of the German people’ [‘Blut und Boden als heilige Güter des deutschen Volkes’], ‘blood’ as the ‘source of life’ [‘Blut ... Lebensquell’]) that creates a ‘community of blood’ [‘Blutsgemeinschaft’]; protection of the people’s ‘racial honour’ [‘Rassenehre’] under criminal law). In greater detail on racism as the foundation of Nazi criminal law, Ambos (n 1) 36–48.

Socialist Legal Philosophy,¹² in which he invoked supposed criminological findings according to which the crime rate is dependent on ethnicity: ‘crime rates show that criminality is lower the more Nordic and Germanic the population’.¹³ Therefore, Nicolai argues, NS criminal law should be used first and foremost against those who do not belong to this ethnic group, for their ‘legal conscience’ is not ‘unadulterated’, and their ‘predisposition’ leads them ‘down the path of dishonourable crime’, which is why they need to be ‘removed’ from the *Volksgemeinschaft*.¹⁴

Nicolai’s work met with the approval not only of criminal law scholars,¹⁵ but also of the renowned Hans von Hentig, who praised it in the highly regarded *Monatsschrift für Kriminalpsychologie und Strafrechtsreform* (*MSchrKrimPsych*, now *Monatsschrift für Kriminologie und Strafrechtsreform*, *MSchrKrim*),¹⁶ the main medium of German criminology¹⁷ of which von Hentig was co-editor at the time. Von Hentig himself advocated biologist positions at the beginning of the twentieth century, as we will see below,¹⁸ but later set himself against one-sided biologism and, in addition, criticised the naive ‘trust in authority’ of the younger generation, represented mainly by Georg Dahm and Friedrich Schaffstein,¹⁹ at the conference of the German section of the *Internationale Kriminalistische Vereinigung* ((IKV) International Penal Association) in 1932–33.²⁰ Von Hentig also criticised Nicolai’s criminal-biological emphasis

¹² Helmut Nicolai, *Die rassengesetzliche Rechtslehre: Grundzüge einer nationalsozialistischen Rechtsphilosophie* (Eher 1932) 42–44. On Nicolai’s National Socialist attitude, see Klaus Marxen, *Der Kampf gegen das liberale Strafrecht* (Duncker & Humblot 1975) 90–91, 147–50, 153.

¹³ Nicolai (n 12) 43 (‘die Kriminalität zeigt, daß die Straffälligkeit umso geringer ist, je nordischer und germanischer eine Bevölkerung ist’; rejection of the ‘theory of environment’ [‘Umweltlehre’] and emphasis on ‘predisposition’ [‘Veranlagung’], the aim of criminal law is to ‘protect the people from degeneracy that is hostile to life and damaging to the law, which is revealed in an unhealthy predisposition’ [‘Schutz des Volkes vor lebensfeindlichen, rechtsschädigenden Entartungen, die sich in einer ungesunden Veranlagung offenbaren’]).

¹⁴ Nicolai (n 12) 43 (‘Rechtsgewissen’, ‘unverfälscht’, ‘Veranlagung’ ‘auf den Weg des ehrlosen Verbrechens’, ‘entfernt’).

¹⁵ Erik Wolf not only included the text in the highly regarded *ZStW* literary review ‘Rechts- und Staatsphilosophie’ (1934) 53 *ZStW* 560, 572–75, and thus in a series of significant contemporary legal-philosophical writings, but even praised it as a ‘bold and unbiased’ [‘unbefangenen und unerschrockenen’] account of the NS concept of law and as the ‘beginning of National Socialist legal doctrine’ [‘Anfang nationalsozialistischer Rechtslehre’], containing merely some ‘unevenness’ [‘Unausgeglichenheiten’] that ‘could not be otherwise’ [‘nicht anders sein kann’] (573–74). In detail on Wolf’s involvement with National Socialism, Ambos (n 1) 149–60.

¹⁶ Hans von Hentig, ‘Nationalsozialistisches Strafrecht’ (1933) 24 *MSchrKrimPsych* 633 (‘honest, well thought out, does justice to the system and worth reading’ [‘ehrllich, durchdacht, systemgerecht und ... lesenswert’]).

¹⁷ See, eg, Richard F Wetzell, *Inventing the Criminal: A History of German Criminology 1880–1945* (University of North Carolina Press 2000) 67; Hans Joachim Schneider, ‘Kriminalpsychologie gestern und heute’ (2004) 87 *MSchrKrim* 168, 170.

¹⁸ Ambos (n 1) 38–39.

¹⁹ On these two eminent (Nazi) scholars representing the so-called ‘Kiel School’, Ambos (n 1) 113–17.

²⁰ Hans von Hentig, ‘Sturmwarnung’ (1933) 24 *MSchrKrimPsych* 1, 5, and Hans von Hentig, ‘Strafrechtliche Gegenreformation’ (1933) 24 *MSchrKrimPsych* 235–36 (‘that a pure trust in authority is not good for scientific research’ [‘daß reine Autoritätsgläubigkeit wissenschaftlichem Forschertum nicht gut tut’]); on this critical stance also Reinhard Schütz, *Kriminologie im Dritten Reich* (Mainz 1972) 111–12; Florian Berg, *Die Bekämpfung des Verbrechens als Sicherung des Volkes, Die ‘Monatsschrift für Kriminalpsychologie und Strafrechtsreform’ im Dritten Reich* (Springer 2018) 127–29 with further references. In April 1935 Schaffstein took over von Hentig’s chair at Kiel University: Jörn Eckert, ‘Was war die Kieler Schule’ in Franz Jürgen Säcker (ed), *Recht und Rechtslehre im Nationalsozialismus* (Nomos 1992) 53. Franz Streng, ‘Der Beitrag der Kriminologie zu Entstehung und Rechtfertigung staatlichen Unrechts im “Dritten Reich”’ (1993) 76 *MSchrKrim* 141, 166 (invoking von Hentig to ‘save the honour’ [‘Ehrenrettung’] of German criminology, seeing him as a ‘role model’

on hereditary predisposition, stating that his dismissal of environmental influences would need to be ‘preceded by a discussion of the question of how ‘the criminal is imagined to be’, namely as a ‘true criminal’ or only as a ‘small-scale law-breaker’. While it was ‘doubtlessly correct that unfit genetic qualities need to be eradicated’, it was doubtful ‘whether every criminal act is symptomatic of hereditary predisposition or degeneracy and which hereditary traits should be regarded as “unfit”’.²¹

Von Hentig’s views corresponded with the balanced position of *MSchrKrimPsych*, which at the time understood itself as an interdisciplinary forum of jurists and medical practitioners and thus adopted a more differentiated predisposition-environment approach, continuing to do so even during the first years of NS rule.²² The journal was founded in 1904 by Jewish psychiatrist Gustav Aschaffenburg in order to ‘scientifically research the psychology of crime and the criminal’²³ and serve as a ‘reservoir ... of juristic and medical, sociological, psychological and philosophical works’.²⁴ This was a revolutionary interdisciplinary project for its time, involving both legal and medical practitioners,²⁵ as evident from the fact that the important criminal law reformers von Liszt, von Lilienthal and Kloß were involved in the journal’s foundation.²⁶

The *Monatsschrift* has survived until today (as *MSchrKrim*) but was subject both to numerous changes, including its name,²⁷ and, of course, to increasing Nazi pressure. In fact, the journal’s history represents paradigmatically the changes in German criminology, especially under Nazi rule. Dissatisfied with increasing Nazi influence, von Hentig resigned from the editorial board in 1934, followed by Aschaffenburg in 1935. Von Hentig, who had already gone into exile in the United States in 1936, wrote about these events in an obituary for Aschaffenburg, complaining about ‘the atmosphere of *Gleichschaltung*’ and the increasing ‘caution’ of the publisher as a result of Nazi pressure.²⁸ Aschaffenburg himself cited his advanced age and the need for

[‘Vorbild’] ‘in his steadfastness and intellectual independence’ [‘in seiner Standhaftigkeit und geistigen Selbständigkeit’]).

²¹ von Hentig (n 16) 633 (‘eine Verständigung über die Frage vorausgehen, wie man sich “den” Verbrecher vorstellt’, ‘echten Kriminellen’, ‘kleinen Rechtsbrecher’, ‘zweifellos richtig, daß die untauglichen Erbanlagen ausgemerzt werden müssen’, ‘ob jede strafbare Handlung Veranlagungs- oder Entartungssymptom ist und welche Erbanlagen als “untauglich” zu gelten haben’).

²² For a detailed (contents) analysis see Berg (n 20) 5–56 (since its foundation in 1904), 57–116 (German Empire and Weimar Republic) and 117–217 (1933 onwards).

²³ Gustav Aschaffenburg, ‘Kriminalpsychologie und Strafrechtsreform’ (1904) 1 *MSchrKrimPsych* 1, 3 (‘die Psychologie des Verbrechens und des Verbrechers wissenschaftlich zu erforschen’).

²⁴ Gustav Aschaffenburg, ‘Rückblick und Ausblick’ (1935) 26 *MSchrKrimPsych* 531, 532 (‘Sammelbecken ... juristischer und medizinischer, soziologischer, psychologischer und philosophischer Arbeiten’).

²⁵ Berg (n 20) 5; also Wetzell (n 17) 37–38, 67–68.

²⁶ Siegfried Lamnek and Krisztina Köteles, ‘Profil und Entwicklung einer Fachzeitschrift: Die Monatsschrift für Kriminologie und Strafrechtsreform’ (2004) 87 *MSchrKrim* 192.

²⁷ Originally *Monatsschrift für Kriminalpsychologie und Strafrechtsreform* (*MSchrKrimPsych*); between 1937 and 1944 published by the (NS-supporting) J.F. Lehmanns Verlag as *Monatsschrift für Kriminalbiologie und Strafrechtsreform* (*MSchrKrimBio*); Mario Heidler, ‘Die Zeitschriften des J.F. Lehmanns Verlages bis 1945’ in Sigrid Stöckel (ed), *Die ‘rechte Nation’ und ihr Verleger: Politik und Popularisierung im J. F. Lehmanns Verlag 1890–1979* (Lehmanns 2002) 47–103, 89; and finally from 1953 by Carl Heymann under its current title *Monatsschrift für Kriminologie und Strafrechtsreform* (*MSchrKrim*).

²⁸ Hans von Hentig, ‘Gustav Aschaffenburg 1866–1944’ in Hermann Mannheim (ed), *Pioneers in Criminology* (Stevens 1960) 330 (‘After the Nazi regime had lasted one year, I saw clearly that honest science could not

generational change as the reasons for his retirement,²⁹ but in fact he had been forced to resign on the ground of the NS race laws, which prohibited Jews from holding editorial positions.³⁰ In 1934 the Nazis forced Aschaffenburg – who was already 68 years old – to retire prematurely from his chair at the University of Cologne and as director of Cologne’s psychiatric clinic.³¹ He emigrated to Switzerland in 1939 and then to the United States, where he died in 1944.³² Interestingly, before his immigration to the US, Aschaffenburg continued to advise the new editors (Exner, Lange and Sieverts, 1936–44)³³ but was finally forced to break off contact completely as co-editor Lange had been denounced to the Gestapo because of this continued collaboration and the journal feared that the *Reichsschrifttumskammer* (the government agency in charge of books and publishing) would become involved. As a consequence, the three new editors wished to resign *en masse*,

but Aschaffenburg himself, in a moving letter revealing his greatness and generosity, asked them not to place his person above the matter itself, which their intended resignation risked placing in the hands of scientifically half-educated Party ideologues who under certain circumstances might cause great harm.³⁴

Ultimately, with Aschaffenburg’s definitive departure,³⁵ from 1937, at the latest, the *Monatsschrift* was no longer able to evade the biologism promoted by the Nazis and changed its name to *Monatsschrift für Kriminalbiologie und Strafrechtsreform* (*MSchrKrimBio*), replacing ‘criminal psychology’ with ‘criminal biology’. While the (new) editors did not

live in the atmosphere of *Gleichschaltung* ... The publisher was fearful and urged a change in tone or greater caution. I was not ready to yield and tendered my resignation. Aschaffenburg thought I had been too impetuous. He hoped that conditions might improve ... In 1936 when he should have celebrated his seventieth birthday, the regime took the *Monatsschrift* away from him, appointed a new publisher [Lehmans, see n 27] and asked new editors ... to take over’ (italics in the original text).

²⁹ Aschaffenburg (n 24) 531, 535.

³⁰ Hans Gruhle and Rudolf Sieverts, ‘Zum Geleit’ (1953) 36 *MSchrKrim* 3.

³¹ Wetzell (n 17) 186; Berg (n 20) 146.

³² Wetzell (n 17) 187; on his biography also Dorothea Seifert, *Gustav Aschaffenburg als Kriminologe* (Freiburg i. Br. 1981) 7–11; Schneider (n 17) 169–70; Christian Müller, *Verbrechensbekämpfung im Anstaltsstaat. Psychiatrie, Kriminologie und Strafrechtsreform in Deutschland 1871–1933* (Vandenhoeck & Ruprecht 2004) 274–75; Jonas Menne, ‘Lombroso redivivus?’: *Biowissenschaften, Kriminologie und Kriminalpolitik von 1876 bis in die Gegenwart* (Mohr Siebeck 2017) 107.

³³ Franz Exner, Johannes Lange and Rudolf Sieverts, ‘Preface’ (1936) 27 *MSchrKrimPsych* 1.

³⁴ Gruhle and Sieverts (n 30) 3 (‘aber Aschaffenburg selbst bat in einem Brief von ergreifender menschlicher Größe, nicht seine Person über die Sache zu stellen, die durch den beabsichtigten Rücktritt Gefahr laufe, in die Hände von wissenschaftlich halbgebildeten Partei-Ideologen zu geraten, die unter Umständen großen Schaden anrichten konnten’); see also cf Wetzell (n 17) 37–38, 186; Berg (n 20) 148–50.

³⁵ Under Aschaffenburg’s editorship (1904–35) the *MSchrKrim* was not ‘characterised by mere pandering to the politics and ideology of National Socialism’ (‘durch eine bloße Anbiederung an Politik und Ideologie des Nationalsozialismus geprägt’); the distance from the Nazis was even maintained under his successors Exner, Lange and Sieverts (1936–44), at least until 1937; cf Berg (n 20) 150 (with a detailed account of the debates since 1933 on topics such as the new authoritarian criminal law, the prohibition of analogy, criminal biology including eugenics and sterilisation/castration, the treatment of homosexuals: Berg, *ibid* 117–29, 151–56, 185–217).

want to see the change in name as a ‘change of programme’ (‘Programmwechsel’),³⁶ further changes in the editorial board³⁷ and the ever more radical content of subsequent issues showed the journal’s increasingly biologicistic orientation.³⁸ Thus, it is fair to say that the journal ‘had come to terms with National Socialism’.³⁹

At any rate, the ideas of ‘elimination’, ‘selection’ and the like were by no means invented by the National Socialists. In 1913 the same von Hentig, who had tried to impede the biologicistic Nazi takeover of the *Monatsschrift*, had already propagated the selective function of criminal law (‘social selection’s most energetic and sparkling instrument’)⁴⁰ – a fact largely ignored in his Anglo-American reception. One year later he advocated the animal-like breeding of a ‘moral race of human’, which would result in the ‘elimination of a certain type of antisocial human’, embracing a completely biologicistic line of argument.⁴¹ Thus Nicolai and other Nazi jurists⁴² were able to link effortlessly to earlier criminal-biological and social-Darwinist approaches of the *fin de siècle*,⁴³ which themselves were linked in turn to the (thoroughly racist) European

³⁶ The editors’ aim was, allegedly, simply to use the ‘term that is conventional today’ in the journal’s name: (1937) 28 *MSchrKrimBio* 1.

³⁷ Especially the addition to the editorial board of Hans Reiter, President of the Reich Health Department and thus the person in charge of the Criminal-Biological Service (Berg (n 20) 157; on this ‘service’ n 47) and the Research Office for Racial Hygiene and Demographic Policy (Berg (n 20) 191), which was led by Robert Ritter (on Ritter, nn 139 ff including main text).

³⁸ The tragic climax of which was Freisler’s essay ‘Die rassebiologische Aufgabe bei der Neugestaltung des Jugendstrafrechts’ (1939) 30 *MSchrKrimBio* 209–14.

³⁹ Berg (n 20) 178 (‘hatte man sich mit dem Nationalsozialismus arrangiert’).

⁴⁰ Hans von Hentig, ‘Zur selektiven Funktion des Strafrechts’ (1913) 34 *ZStW* 493, 509 (‘das energischste und blitzendste Instrument sozialer Auslese’); see also 494 (‘all law serves the purpose of selection’ [‘alles Recht dient der Selektion’]), those humans ‘are eliminated from the process of life ... whose instinctual life are in conflict with the foundations of communal existence’ [‘aus dem Lebensprozeß ausgeschieden, ... dessen Triebleben zu den Grundlagen der GemeinschaftsExistenz im Widerspruch steht’]) and 495–98 (particularly on the selective function of criminal law).

⁴¹ Hans von Hentig, *Strafrecht und Auslese: eine Anwendung des Kausalgesetzes auf den rechtbrechenden Menschen* (Springer 1914) 1 (‘moralische[n] Menschenschlag[s]’, ‘Eliminierung des asozialen Menschen bestimmter Ausprägung’; ‘use the findings of biological research to analyse the phenomena of social life’ [‘Resultate biologischer Forschung zur Untersuchung der Erscheinungen des sozialen Lebens heranzuziehen’], ‘deal with human beings in the same way we have hitherto dealt with chemical elements and physical forces’ [‘mit Menschen ebenso umzugehen, wie wir es mit chemischen Elementen und physikalischen Kräften ... bisher taten’]); see also *ibid* 164 (‘for us, criminal law meant a means of society to eliminate those of low social standing from the process of life and reproduction by artificially making their living conditions more difficult’ [‘bedeutete das Strafrecht für uns ein Mittel der Gesellschaft, den sozial Niedrigstehenden durch künstliche Erschwerung der Daseinsbedingungen aus dem Lebensprozeß und der Fortpflanzung auszuschneiden’]) and 227 (‘the inferior individuals ..., who depending on their predisposition then prove themselves to be born beggars, vagrants, prostitutes’ [‘die Minderwertigen ..., die dann je nach ihrer Anlage sich als geborene Bettler, Landstreicher, Prostituierte ... erweisen’]). Critically Müller (n 32) 157 (according to whom von Hentig dressed ‘the criminal policy demands of the Lisztian School and the IKV in biologicistic garb’ [‘die kriminalpolitischen Forderungen der Liszt-Schule und der IKV in ein biologicistisches Gewand’]); critically also Mariacarla Gadebusch Bondio, *Die Rezeption der kriminalanthropologischen Theorien in Deutschland von Cesare Lombroso in Deutschland von 1880–1914* (Matthiessen 1995) 17 (‘trend towards racial hygiene’ [‘rassenhygienische Richtung’, 229–33]). However, von Hentig later somewhat toned down the strong emphasis on predisposition that went hand in hand with this: cf Berg (n 20) 89–90 including further references.

⁴² For an attempt at definition, see Ambos (n 1) 34–35 with fn 68 and further references.

⁴³ Dieter Dölling, ‘Kriminologie im “Dritten Reich”’ in Ralf Dreier and Wolfgang Sellert (eds), *Recht und Justiz im “Dritten Reich”* (Suhrkamp 1989) 194, 195–96, 198, 222–23; Jürgen Simon, ‘Kriminalbiologie – theoretische

colonialism of this time.⁴⁴ These approaches were by no means restricted to the political right wing or the Centre Party (*Zentrum*).⁴⁵ In institutional terms, the advance of criminal biology had already become manifest in the 1920s with the setting up of ‘criminal-biological examination offices’ (*kriminalbiologische Untersuchungsstellen*) within the context of the tiered penal system at state level⁴⁶ and the foundation of the Criminal-Biological Society (*Kriminalbiologische Gesellschaft*) in 1927;⁴⁷ the Society in turn formed the scientific nucleus of the Criminal-Biological Service (*Kriminalbiologischer Dienst*) founded in 1937 as part of the Reich Administration of Justice.⁴⁸

It is clear from the above that there was – as with Nazi criminal law⁴⁹ and as generally recognised in historical scholarship⁵⁰ – a *backward-reaching continuity* (post-Weimar) in criminology, too. This stands in stark contrast to the above-mentioned rupture thesis – and the ensuing lack of engagement with Nazi law – which is therefore to be dismissed in this context, too.⁵¹ A *continuity*

Konzepte und praktische Durchführung eines Ansatzes zur Erfassung von Kriminalität’ in Justizministerium NRW, *Juristische Zeitgeschichte Band 6* (Justizministerium des Landes NRW 1997) 69, 71; Wetzell (n 17) 10, 15–17, 125–42; Müller (n 32) 150–58, 171–75, 206–23 (on eugenic approaches in the German Empire and the Weimar Republic), 273–89, 296–302 (racist traditions); Imanuel Baumann, *Dem Verbrechen auf der Spur* (Wallstein 2006) 35–42, 55–89 (especially references to the debate on racial hygiene and sterilisation at 51, 77–89), 364; Menne (n 32) 17–30, 31–54 (‘biology of physical constitution’ [‘Konstitutionsbiologie’]), 71–102 (‘genetic biology’ [‘Erbbiologie’]); Berg (n 20) 79–106; on the history of criminal biology since antiquity, Nadine Hohlfeld, *Moderne Kriminalbiologie* (Lang 2002) 23–44; see also Streng (n 20) 143; Fedja Alexander Hilliger, *Das Rechtsdenken Karl Bindings und die ‘Freigabe der Vernichtung lebensunwerten Lebens’* (Duncker & Humblot 2018) 293–300.

⁴⁴ cf Eugenio Raúl Zaffaroni, *Doctrina penal nazi* (Ediar 2017) 43–50; Ambos (n 1) 38; on the continuity in Germany in this regard, Bartholomäus Grill, *Wir Herrenmenschen* (Bundeszentrale für politische Bildung 2019) 57–58, 63, 70, 97, 147, 189, 195.

⁴⁵ On the social democrats (SPD) in this regard, cf Michael Schwartz, ‘Kriminalbiologie in der Politik der 20er Jahre’ in Justizministerium NRW (n 43) 13–68; generally Baumann (n 43) 51–52, 53–54, 365 (alliance between SPD and NSDAP concerning sterilisation); a differentiated, detailed account is provided by Müller (n 32) 209–10 (‘technical question of social medicine’ [‘sozialmedizinische Sachfrage’], in favour of voluntary, but against forced sterilisation).

⁴⁶ Starting with Bavaria, cf Edmund Mezger, *Kriminalpolitik auf kriminologischer Grundlage* (Enke 1934) 111–38; (2nd edn, Enke 1942) 197–213; (3rd edn [now *Kriminalpolitik und ihre kriminologischen Grundlagen*] Enke 1944) 205–19; in detail Müller (n 32) 228–71.

⁴⁷ In more detail, Thomas Würtenberger, ‘Die Kriminalbiologische Gesellschaft in Vergangenheit und Gegenwart’ in Hans Göppinger and Heinz Leferenz, *Kriminologische Gegenwartsfragen* 8 (Enke 1968) 1–9; Baumann (n 43) 66–69.

⁴⁸ cf Streng (n 20) 144–45; Simon (n 43) 83–94; Gerit Thulfaut, *Kriminalpolitik und Strafrechtslehre bei Edmund Mezger (1883–1962): eine wissenschaftsgeschichtliche und biographische Untersuchung* (Nomos 2000) 109–11; Hohlfeld (n 43) 61–62; Baumann (n 43) 55–60, 94–95; Menne (n 32) 38, 109–10; on the Criminal-Biological Service, in particular, Schütz (n 20) 35–36; informative images of its structure in Simon (n 43) 90.

⁴⁹ From a criminal law perspective in this regard, Ambos (n 1) 23–35 and *passim*.

⁵⁰ One classic example is Martin Broszat, ‘Plädoyer für eine Historisierung des NS’ (1985) 39 *Merker* 373, 384 (‘problematic modernisation tendencies and social pathologies’ that had already ‘taken root’ before the Nazis seized power ‘were legitimated and brought together in National Socialism, suddenly turning into utmost violence’ [‘angelegte problematische Modernisierungstendenzen und Sozialpathologien ..., die, im Nationalsozialismus legitimiert und zusammengerafft, in äußerster Gewalttätigkeit umschlugen’]).

⁵¹ See nn 4 and 5 with main text.

into the future then became apparent in the seamless transition of some criminologists and their works (for example, Exner's *Kriminalbiologie*⁵² and Mezger's *Kriminalpolitik*⁵³), including the entire scientific superstructure, into the Bonn and even Berlin Republic.⁵⁴ There was a climate of widespread silence,⁵⁵ which permeates mainstream textbooks which largely overlook the role of German criminology during the NS period.⁵⁶

This silence perhaps reached its climax in Mezger's speech on the history of the Criminal-Biological Society – an important part of the superstructure referred to above, presided by Mezger himself until 1961 and only renamed the *Gesellschaft für die gesamte Kriminologie* (Society for Comprehensive Criminology) in 1967⁵⁷ – at its first post-war gathering in 1952. Here, Mezger expressed rather cryptic criticism of criminology's

⁵² Exner renamed, in 1949, his *Criminal Biology* (n 71) *Kriminologie* (n 147) and attempted to relativise this: Franz Exner, *Kriminologie*, VI (the 'change in name' did 'not mean anything new' ['Namensänderung ... nichts Neues']); otherwise the work remained 'almost unchanged' (Baumann (n 43) 151) and essentially only the anti-Semitic passages (n 151) were removed. On Exner in this regard, Baumann (n 43) 170–71; Menne (n 32) 123–24.

⁵³ Mezger's *Kriminalpolitik etc.* (n 46) was published with slight changes in 1951 as *Kriminologie*, now understood as a sub-field of sociology (at 3) and, of course, without the passages on racial hygiene (on these, n 192), but still containing (more limited) genetic approaches (eg, 40–41, 125–26, 138–39, 144); in this regard, also Thulfaut (n 48) 325 ('vestiges of a continued orientation towards predisposition' ['Rudimente einer fortbestehenden Anlageorientierung']); critically, also Baumann (n 43) 161 (opportunistic limitation). For a detailed analysis of these authors, among others, see Franz Streng, 'Von der "Kriminalbiologie" zur "Biokriminologie"?' in Justizministerium NRW (n 43) 218–25; previously (more briefly) Streng (n 20) 162; Baumann (n 43) 151–66.

⁵⁴ Critically Streng (n 20) 161–62 ('seamless and unobtrusive' ['nahtlos-unauffällig'], no 'real discussion on the role of criminology' ['eigentliche Diskussion der Rolle der Kriminologie']); also Hohlfeld (n 43) 63–64; Baumann (n 43) 167–74 ('resistance to the past' ['Abwehr der Vergangenheit'], no 'reorientation' ['Neuorientierung'], racist approaches 'continued without reflection' ['unreflektiert fortgeschrieben']), 202–08 (psychopathy, inferiority, hereditary disposition and discrimination against gypsies in criminal law practice), 229–32 (the *völkisch* criminal policy model is handed down), 367–69 (in particular, on youth criminology; in that regard also Katrin Höffler, 'Tätertypen im Jugendstrafrecht' in Eva Schumann and Friederike Wapler (eds), *Erziehen und Strafen etc.* (Universitätsverlag Göttingen 2017) 61, 69–70; Menne (n 32) 123–33, 247 ('shaped by considerable continuities in terms of both content and staff/membership' ['sowohl inhaltlich als auch personell von erheblichen Kontinuitäten geprägt']); on the failure to reappraise racial hygiene (also in Switzerland), particularly with regard to the medical profession, Magdalena Schweizer, *Die psychiatrische Eugenik in Deutschland und in der Schweiz zur Zeit des Nationalsozialismus* (Lang 2002) 179–214.

⁵⁵ On this 'communicative silence', cf Ambos (n 1) 32 including further references.

⁵⁶ Günther Kaiser, *Kriminologie* (3rd edn, Müller 1996) forms an exception in this respect, as it at least mentions the role of criminology during the NS period. Commending this, Thulfaut (n 48) 324, although Kaiser is unable to discern 'a racial-biological or racist standpoint' ('einen rassenbiologischen oder rassistischen Standpunkt', § 18 mn 15, referring to Hans Joachim Schneider, *Kriminologie etc.* (de Gruyter 1982) 19). Other textbooks make only cursory mention of criminology's NS past: eg, Hans Göppinger, *Kriminologie* (6th edn, CH Beck 2008) § 2 mn 72; more or less identically Michael Bock, *Kriminologie* (5th edn, Vahlen 2019) § 1 mn 44; Hans-Dieter Schwind, *Kriminologie und Kriminalpolitik* (23rd edn, Kriminalistik 2016) § 5 mn 1; Frank Neubacher, *Kriminologie* (3rd edn, Nomos 2017) 27–28; slightly more in Klaus-Stephan von Danwitz, *Examens-Repetitorium Kriminologie* (Müller 2004) mn 29, and Bernd-Dieter Meier, *Kriminologie* (5th edn, CH Beck 2018) § 2 mn. 27–28), or no information at all in, eg, Ulrich Eisenberg and Ralf Kölbel, *Kriminologie* (7th edn, Mohr Siebeck 2017); Peter-Alexis Albrecht, *Kriminologie* (4th edn, CH Beck 2010); Horst Clages and Rolf Ackermann (eds), *Grundsätze der Kriminalpraxis* (14th edn, Kriminalistik 2019).

⁵⁷ cf Streng (n 53) 225–26; Baumann (n 43) 258–68; critically on its continuity both in terms of staff/membership and otherwise, *ibid* 171–74, 372–73.

‘one-sided ... untenable natural-scientific orientation’ during the Third Reich and the practice of ‘remote diagnosis’, but without making any explicit mention of National Socialism.⁵⁸ In as late as 1959, an article by a student of Rudolf Sieverts appeared in *MSchrKrim*, paying tribute to youth concentration camps in NS parlance.⁵⁹ Only during the 1960s did a critical appraisal of the past and a suppression of criminal biology set in⁶⁰ with Würtenberger’s memorable 1967 lecture on the inglorious history of the Criminal-Biological Society,⁶¹ also marking an impressive turning point in mainstream criminology. Würtenberger recalled the Criminal-Biological Society’s involvement in National Socialism,⁶² criticised (Mezger’s) silence⁶³ and the failure ‘thus far’ to overcome ‘criminal biology’,⁶⁴ and called for ‘all viewpoints to be integrated into a “comprehensive criminology”’.⁶⁵ Thus, if the rupture thesis ever had any merit, the 1967 Würtenberger lecture can be seen as a turning point of German criminology – in terms of a first attempt to confront its Nazi past and, perhaps, even break with it.

⁵⁸ Edmund Mezger, ‘Die Geschichte der Kriminologie und die Kriminalbiologische Gesellschaft’ in Deutsche Vereinigung für Jugendgerichte und Jugendgerichtshilfen, *Der Jugendliche im Lichte der Kriminalbiologie etc.* (Steinebach 1952) 7–16, 9 (‘einseitige ... unhaltbare naturwissenschaftliche Orientierung’, ‘Ferndiagnose’); critically Baumann (n 43) 171–74; more positively, however, Thulfaut (n 48) 328–34 (who emphasises Mezger’s role in reforming the Society).

⁵⁹ Wolfgang Lüders, ‘Die Jugend-Bewahrung – eine Lösung des Problems der Behandlung minderjähriger Schwersterziehbarer?’ (1959) 42 *MSchrKrim* 156–66, 159 (the task of ‘youth protection camps’ [‘Jugendschutzlager’] was ‘to support those still capable of being part of the community in such a way that they would be able to fill their place in the *Volksgemeinschaft* and to hold in custody those incapable of being educated ... while exploiting their labour power’ [‘die noch Gemeinschaftsfähigen so zu fördern, dass sie ihren Platz in der Volksgemeinschaft würden ausfüllen können und die Unerziehbaren ... unter Ausnutzung ihrer Arbeitskraft zu verwahren’]). Critical reply by Franz Marcus, ‘Der Reichsführer der SS und die Aschaffenburgsche Monatsschrift’ (1960) 43 *MSchrKrim* 43–47; rejoinder by Rudolf Sieverts, ‘Antwort der Redaktion auf den vorstehenden Beitrag’ (1960) 43 *MSchrKrim* 47–48 (no critical evaluation of the camps necessary, as they were generally known); on this matter as a whole, Baumann (n 43) 230–32.

⁶⁰ cf Baumann (n 43) 235–302 (identifying a ‘fresh start and reorientation’ [‘Aufbruch und Neuorientierung’] from 1959 onwards), 370–73 (‘process of change’ [‘Wandlungsprozess’]). On the weakening of the ‘psychiatric-forensic central focus’ [‘psychiatrisch-forensische[n] Zentrierung’] by the use of sociological approaches, Streng (n 53) 232–33.

⁶¹ Würtenberger (n 47) 1–9; in that respect, also Baumann (n 43) 263–66.

⁶² Würtenberger (n 47) 4–5 (‘The dark years of the National Socialist dictatorship had a negative effect upon our Society ... highly prone ... to supporting the delusional political ideas of that epoch ... since then, a dark shadow has lain upon the name and work of the Criminal-Biological Society’ [‘Die dunklen Jahren der nationalsozialistischen Gewaltherrschaft wirkten sich auf unsere Vereinigung im negativen Sinne aus ... in hohem Maße anfällig ... zur Unterstützung der politischen Wahnideen jener Epoche ... Seitdem liegt ein tiefer Schatten auf Namen und Wirken der Kriminalbiologischen Gesellschaft’]).

⁶³ *ibid* 5 (‘not a word about the more recent past’ [‘kein Wort über die jüngste Vergangenheit’]).

⁶⁴ *ibid* (‘bisherigen Kriminalbiologie’, ‘Integration aller Sehweisen in einer “gesamten Kriminologie”’; ‘scarcely any realisation of the need to overcome the hitherto overly monistic conception of criminal biology in the future’ [‘kaum eine klare Erkenntnis von der Notwendigkeit, die allzu monistische Gesamtkonzeption der bisherigen Kriminalbiologie künftig zu überwinden’]). However, with his reference to Exner, Mezger ‘shattered the overly narrow framework of old-style criminal biology’ (‘allzu enge[n] Rahmen einer Kriminalbiologie alten Stils gesprengt’: *ibid*).

⁶⁵ *ibid* 7.

3. EFFECTS OF CRIMINAL ANTHROPOLOGY

The influence of the Italian positivists, and particularly of Lombroso's theory of the born criminal,⁶⁶ should not be underestimated.⁶⁷ Lombroso's theory – at least in its criminal-anthropological radicalism (physiological and constitutional characteristics of the 'born criminal', going beyond hereditary criminal traits)⁶⁸ – was widely rejected in Germany. Thus, for example, Aschaffenburg criticised the 'unreliability' of the data gathered, considered the approach as 'mistaken' and concluded that the distinction between the 'born criminal' and the normal human being has 'failed', as has the attempt to 'characterise the criminal in "clinical and anatomical" terms'.⁶⁹ Even authors with certain Nazi tendencies in their writings, like Mezger and Exner, dismissed Lombroso's approach. Thus, for the former it has 'not been possible to provide evidence' of 'born criminals' and the criminal-anthropological core of the approach has been 'refuted'.⁷⁰ Exner even more radically considered the idea of the 'born criminal' as 'nonsense if taken literally', but also 'unproven and unprovable' concerning hereditary criminal character traits, as 'inherited potentialities' need not 'necessarily lead to crime'.⁷¹

However, Lombroso served as inspiration for some sort of mixed innovative (albeit implausible) approaches⁷² and his fundamental ideas have, at any rate, been taken up by research on the

⁶⁶ Cesare Lombroso, 'L'Uomo delinquente' in *Rapporto all'antropologia, alla giurisprudenza ed alle discipline carcerarie* (Bocca 1876); summarising the origins and essence of his theory, Cesare Lombroso, 'Über den Ursprung, das Wesen und die Bestrebung der neuen anthropologisch-kriminalistischen Schule in Italien' (1881) 1 *ZStrW* 108. On Lombroso's works and time, cf Gadebusch Bondio (n 41) 18–51; see also Wetzell (n 17) 28–31, 300–01; Menne (n 32) 18–25.

⁶⁷ cf, eg, Erik Wolf, *Krisis und Neubau der Strafrechtsreform* (Mohr 1933) 13–15 (the Italian brand of criminal-biological naturalism as one of the main driving forces of the reform movement); cf also Nicole Rafter, 'Criminology's Darkest Hour: Biocriminology in Nazi Germany' (2008) 41 *Australian & New Zealand Journal of Criminology* 287, 290–91.

⁶⁸ Lombroso's most faithful followers in this regard were his translator, Hans Kurella (on Kurella, Gustav Aschaffenburg, *Das Verbrechen und seine Bekämpfung* (2nd edn, Winter 1906) 146, 151; Gadebusch Bondio (n 41) 104–17) and Max Nordau (on Nordau, *ibid* 118–21).

⁶⁹ cf, eg, Aschaffenburg (n 68) 27, 138, 145–84 (145: 'Unzuverlässigkeit', 146: 'verfehlt', 172: 'gescheitert', 'den Verbrecher "klinisch und anatomisch" zu charakterisieren'). See also Friedrich von Rohden, 'Gibt es unverbesserliche Verbrecher?' (1933) 24 *MSchrKrimPsych* 74, 76 ('practically nothing of Lombroso's criminal morphology remains' ['so gut wie nichts von Lombrosos Verbrechermorphologie übrig geblieben']). cf for a more recent, differentiated account, Gadebusch Bondio (n 41) 14 ('methodological conditions of his research largely seen as out of date' ['methodologischen Voraussetzungen seiner Forschung zum großen Teil als überholt angesehen']), 236–38 (distinguishing between three stages of reception); Müller (n 32) 73–81; Hohlfeld (n 43) 37–40; Menne (n 32) 21–25 (reception 'muted' ['verhalten', 21] with 'hardly any adherents' ['kaum Anhänger', 23]).

⁷⁰ Mezger (1934) (n 46) 18–20 ('geborener Verbrecher ... nicht nachweisen lassen', 'widerlegt').

⁷¹ Franz Exner, *Kriminalbiologie* (Hanseatische Verlagsanstalt 1939) 150 ('wörtlich genommen ein Unsinn', 'unbewiesen und unbeweisbar', 'ererbte Potenzen' need not 'unbedingt zum Verbrechen führen'); also 178–79 (alleged physical characteristics are not specific to criminals), 180–81 ('link between criminality and ... physical traits ... not provable' ['Zusammenhang zwischen Verbrechen und ... körperlichen Eigenschaften...nicht erweislich'], 'specific physical trait ... could not be identified' ['spezifisches Körpermerkmal ... nicht auffindbar']).

⁷² Thus, eg, Hans W Gruhle, 'Die Erforschung der Verbrechensursachen' (1928) 19 *MSchrKrimPsych* 257, 258, came up with a version of Lombroso's born criminal superimposed with environmental influences ('born criminal ... certain traits of his character are endowed in such a way by nature ... that, on the social level of the working class, he had to arrive at crime ... Accordingly, belonging to the proletariat is one of the main

human physical constitution.⁷³ Also, his theory played a leading role in the empirically oriented scientification⁷⁴ of criminology – similar to the positivist sociological ‘French school’ of Tarde⁷⁵ or Lacassagne⁷⁶ and going beyond the ‘classical’, metaphysically oriented school of Beccaria,⁷⁷ Bentham⁷⁸ and Feuerbach.⁷⁹ Lombroso thus facilitated the emergence of an *empirical criminology* oriented towards the natural sciences, thereby opening up ‘new horizons in modern criminal law’⁸⁰ and making Lombroso for some the ‘founder’ of modern criminology⁸¹ or ‘father of the scientific investigation of crime’.⁸²

In addition, Lombroso had a more concrete influence upon the development of criminal psychiatry, as expressed particularly in the work of Emil Kraepelin⁸³ and his

conditions of crime’ [‘geborener Verbrecher ... von Natur in bestimmten Zügen seines Charakters ... so ausgestattet ..., daß er *auf dem sozialen Niveau des Arbeiterstandes* zum Verbrechen ... kommen mußte ... Insofern ist die Zugehörigkeit zum Proletariat einer der Hauptbedingungen des Verbrechenens’] (italics in the original text). In more detail on Gruhle, Berg (n 20) 98–100.

⁷³ cf Ernst Kretschmer, *Körperbau und Charakter. Untersuchungen zum Konstitutionsproblem und zur Lehre von den Temperamenten* (Springer 1921) 10–28, 28 (‘biological affinity’ [‘biologische Affinität’] between certain body types and [cycloid and schizoid] types of temperament or personality); on the difference from Lombroso’s approach, however, see Exner (n 71) 181–82 (arguing that Kretschmer rejected a physical criminal type as well as a ‘firm linking of conduct, character and body shape’ [‘feste Verkoppelung von Verhaltensweise, Charakter und Körperbauform’]); Klaus Laubenthal, ‘Historische Entwicklung der Kriminalbiologie’ in Eric Hilgendorf and Jürgen Weitzel (eds), *Der Strafgedanke in seiner historischen Entwicklung* (Duncker & Humblot 2007) 147–59, 156 (Kretschmer was not concerned with a criminal type in Lombroso’s sense, but instead attempted ‘to predict the likelihood of the future legal conduct of different body types based on an analysis of physique and character’ [‘aufgrund einer Körperbau-Charakteranalyse eine Wahrscheinlichkeitsprognose für das künftige Legalverhalten verschiedener Körperbautypen zu geben’]); on his significance, also in the postwar period, Streng (n 53) 229–30. In greater detail on research on (physical) constitution, Exner (n 71) 181–82; Hohlfeld (n 43) 48–51; Menne (n 32) 39–54, 246 (‘strongest indicator of a “Lombroso renaissance”’ [‘stärkster Indikator einer “Lombroso-Renaissance”’]); Berg (n 20) 94–106.

⁷⁴ On the general scientific historical context, Baumann (n 43) 35–42 (‘scientification of the social’ [‘Verwissenschaftlichung des Sozialen’, 36]); Menne (n 32) 29 (from the [morally] ‘fallen’ [‘gefallenen’] to the [constitutionally or mentally] ‘hindered’ [‘verhinderten’] human being).

⁷⁵ Gabriel Tarde, *La criminalité comparée* (2nd edn, 1890) 39–44, 62–66.

⁷⁶ Alexandre Lacassagne, *Des transformations du droit pénal et les progrès de la médecine légale de 1810 à 1912* (A Rey 1913).

⁷⁷ Cesare Beccaria, *Dei delitti e delle pene* (1st edn, 1764); also Kai Ambos, ‘Cesare Beccaria und die Folter – Kritische Anmerkungen aus heutiger Sicht’ (2010) 122 *ZStW* 504–20.

⁷⁸ Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (2nd edn, W Pickering and R Wilson 1823).

⁷⁹ Paul Johann Anselm von Feuerbach, *Lehrbuch des gemeinen in Deutschland gültigen peinlichen Rechts* (11th edn, Heyer 1832).

⁸⁰ cf, eg, Mezger (1934) (n 46) 7 (‘starting point for the “new horizons” in modern criminal law’ [‘Ausgangspunkt für die “neuen Horizonte” im modernen Strafrecht’]).

⁸¹ Müller (n 32) 73 (‘Begründer’), also 78 (‘prompted ... criminal-etiological discourse that contributed majorly to the institutionalisation of criminology’ [‘regte ... kriminalätiologischen Diskurs an, der wesentlich zur Institutionalisierung der Kriminologie beitrug’]).

⁸² Menne (n 32) 21 (‘“Vater” der wissenschaftlichen Erforschung des Verbrechenens’), also 243 (his works ‘as the hour of criminology’s birth’ [‘als Geburtsstunde der Kriminologie’] with an ‘uninterrupted presence’ [‘ungebrochene[r] Präsenz’]); Göppinger (n 56) § 2 mn. 67 (‘initial spark’ [‘Initialzündung’]).

⁸³ From the 7th edn (1904) of his standard textbook onwards, Kraepelin used the term of the born criminal for ‘personalities with a morally inferior inclination’ (‘sittlich minderwertig veranlagten Persönlichkeiten’), which are ‘often’ marked by ‘pronounced physical degeneracy’ (‘häufig mit ausgeprägter körperlicher Entartung’): Emil Kraepelin, *Psychiatrie: Ein Lehrbuch für Studierende und Ärzte*, 2 Vols (7th edn, JA Barth 1904)

more⁸⁴ individual-psychological psychiatric school (the ‘Kraepelin paradigm’),⁸⁵ it is fair to say that Lombroso provided an ‘impetus for medical and psychiatric research into the “*uomo delinquent*” as an individual’.⁸⁶ By contrast, the more sociologically and psychologically oriented Aschaffenburg School (the ‘Aschaffenburg paradigm’) rejected, as did its founder,⁸⁷ the concept of the ‘born criminal’ in the first place, emphasising the role played by environmental factors.⁸⁸

The (psychiatric) concept of *moral insanity*,⁸⁹ which was already used by Lombroso, formed the foundation of psychopathy;⁹⁰ in turn, psychopathy – which was less radical than Lombroso’s

816–25, 821, 822 (Kraepelin (1904)). See also his earlier positive comment on the significance of Lombroso’s theory: Emil Kraepelin, *Compendium der Psychiatrie* (Ambr. Abel 1883) 353 (Kraepelin (1883)) (‘achievement of Italian psychiatry to have shown the traces of this diseased predisposition ... in “born” criminals ... the anthropological school of criminalistics, which emerged from it [i.e. Italian psychiatry], is busily trying to clarify the direct psychopathic origin of such natures and their somatic accompanying symptoms’ [‘Verdienst der italienischen Psychiatrie, die Spuren dieser krankhaften Anlage ... bei den “geborenen” Verbrechern, nachgewiesen zu haben ... die aus ihr hervorgegangene anthropologische Schule der Kriminalistik ist emsig bemüht, den direkten psychopathischen Ursprung solcher Naturen und die somatischen Begleitsymptome klarzustellen’]). Interestingly, Kraepelin wrote an early positive review of ‘L’uomo delinquente’: Emil Kraepelin, ‘Lombrosos Uomo delinquente’ (1885) 5 *ZSiW* 669–80 (Kraepelin (1885)) (‘brought together to form a unified, well thought-out system’ [‘zu einem geschlossenen wohldurchdachten Systeme zusammengefügt’, 670]), possible later refutations of individual findings will not alter the work’s ‘major significance’ [‘hohe Bedeutung’, 680], but later contrasted the constitutional-biological approach with a psychiatric approach (where individual cases are concerned, an ‘analysis of the mental personality’ [‘Analyse der psychischen Persönlichkeit’] is more appropriate than analysing ‘the somatic accompanying symptoms’ [‘der somatischen Begleiterscheinungen’, 674]), foundation of ‘scientific criminal psychology’ [‘der wissenschaftlichen Kriminalpsychologie’, 680] and was critical of the possibility of precisely defining ‘moral insanity’ [‘moralischen Irreseins’] as a psychiatric disease (677–78). For more detail on Kraepelin’s work in this respect, cf Gadebusch Bondio (n 41) 182–99 (especially 186–89).

⁸⁴ On Kraepelin’s more social-psychiatric approach, however, see n 103 below.

⁸⁵ On the modern definition of the concepts of criminal psychology and criminal psychiatry, cf Schneider (n 17) 168–69 including further references (psychological analysis of the criminal individual and his or her conduct, including social reactions to it). However, this blurs the boundaries between psychology and psychiatry.

⁸⁶ Gadebusch Bondio (n 41) 239–40 (‘Impulse zur medizinisch-psychiatrischen Erforschung des “uomo delinquente” als Individuum’); also 220–23 (on the criminal-psychological modification of Lombroso’s theory in Sommer and Frank) and 233–36. However, see also the instructive distinction between Lombroso and Freud in Schneider (n 17) 174 (‘criminal as a somatic and mental atavism’ [‘Verbrecher als somatisch-psychischer Rückschlag’] versus a focus on purely ‘mental stages of development’ [‘psychische Entwicklungsstufen’]). On the growing significance of (forensic) psychiatry as the foundation of empirical-scientific criminology from the mid-nineteenth century onwards, Müller (n 32) 23–81, especially 72–81 (‘history of the genesis of criminology ... is simultaneously a story of psychiatry’s success’ [‘Entstehungsgeschichte der Kriminologie ... zugleich eine Erfolgsgeschichte der Psychiatrie’, 80]).

⁸⁷ See n 69 and main text; on Aschaffenburg, also Gadebusch Bondio (n 41) 199–201.

⁸⁸ Wetzell (n 17) 39, 44–71 (especially 69), 297–98 (according to whom the Kraepelin School recognised the concept of the ‘born criminal’ in principle, but as a purely psychiatric category – persons with an endogenous moral defect – without attributing any physical traits, while the Aschaffenburg School rejected even the concept); on these so-called Kraepelin and Aschaffenburg ‘paradigms’, see also Schneider (n 17) 171; Baumann (n 43) 41–42; Göppinger (n 56) § 2 mn 68.

⁸⁹ The term was originally coined by the English doctor, James Coles Prichard (Menne (n 32) 19 with fn 20, including further references) and was also taken up (critically!) by Kraepelin in his review of Lombroso: Kraepelin (1885) (n 83); even more critically Aschaffenburg (n 68) 176 (‘highly contentious concept’ [‘vielumstrittener Begriff’] that in itself does not describe an illness); also Müller (n 32) 68–69 (drawing attention to the link with Lombroso’s born criminal as a ‘degenerate criminal’ [‘degenerierten Kriminellen’]).

⁹⁰ Gadebusch Bondio (n 41) 189 (‘link between moral insanity, criminal tendencies (born criminals) and degeneracy’ [‘Zusammenhang zwischen moralischem Schwachsinn, verbrecherischen Neigungen (geborene Verbrecher) und Entartung’]); Schneider (n 17) 172; Menne (n 32) 19, 23–24, 246.

criminal-anthropological and constitution-focused approach and thus more acceptable to a criminal law guided by the principle of culpability⁹¹ – became the dominant (medical) frame through which to interpret criminality.⁹² At any rate, one must not overlook the fact that as a marker of ‘inferiority’, this concept of psychopathy was hugely stigmatising,⁹³ while at the same time, as acknowledged by Kraepelin himself,⁹⁴ being too vague for a precise psychiatric diagnosis.⁹⁵ Thus, as a diagnostic and prognostic tool, it only made a comeback with Hare’s PCL-R checklist.⁹⁶ In this context, ‘psychopathy’ is concerned less with identifying ‘inferiority’ in whatever shape or form and more with a degree of social dissociation or anomie that fosters crime.⁹⁷

The recognition of ‘born’ or otherwise predisposed criminals formed the basis for protective or *incapacitating criminal law measures*,⁹⁸ which in Germany were forcefully advocated especially by Franz von Liszt. While von Liszt took a differentiated view of Italian positivism,⁹⁹

⁹¹ cf Müller (n 32) 64–72 (pointing out the problem of the lacking culpability of ‘insane’ [‘schwachsinniger’], ‘degenerate’ [‘degenerierter’] and ‘born’ [‘geborener’] criminals, through which psychopathy became a compromise as a more moderate concept), 291 (‘as an evaluative concept for the practical purposes of forensic psychiatry’ [‘als Wertungsbegriff für die praktischen Zwecke der forensischen Psychiatrie’, quoting Straßmann], in order to ‘circumvent legal insanity and thus relieve the pressure on mental asylums’ [‘Unzurechnungsfähigkeit zu unterlaufen und die Irrenanstalten somit zu entlasten’]).

⁹² Müller (n 32) 16–17 (referring to Becker), 43–72 (‘criminal-etiological interpretative patterns of psychiatry’ [‘kriminalätiologische Deutungsmuster der Psychiatrie’], such as the link between insanity and crime); 82–95 (on the corresponding commitment and psychiatrisation of mentally ill (‘insane’) law-breakers in the German Empire).

⁹³ cf originally Julius Ludwig August Koch, *Die psychopathischen Minderwertigkeiten* (Maier 1891–93) and Kraepelin, in his *Psychiatrie* (n 83) (born criminal as an inferior psychopath). Also Aschaffenburg (n 68) (‘inferiority’ [‘Minderwertigkeit’] of ‘whores’ [‘Dimen’]), 107 ‘inferiority’ [‘Minderwertigkeit’] as the ‘result of descent and upbringing’ [‘Ergebnis der Abstammung und Erziehung’]), 173 (recognition of ‘inferiority’ [‘Minderwertigkeit’] as a result of Lombroso’s studies), 174 (‘inferior individuals’ [‘Minderwertige’] as ‘socially unfit’ [‘sozial Untaugliche’]), 183 (inferior persons as ‘incorrigible’ [‘Unverbesserliche’], incapable). Then, above all, Aschaffenburg’s disciple Kurt Schneider, *Die psychopathischen Persönlichkeiten* (Deuticke 1923) 16 (psychopathic persons as ‘abnormal characters who suffer from their abnormality, or from whose abnormality society suffers’ [‘abnorme Persönlichkeiten, die an ihrer Abnormalität leiden, oder unter deren Abnormalität die Gesellschaft leidet’]). Also Müller (n 32) 70–72; Baumann (n 43) 43–45; Wetzell (n 17) 144–53 (‘psychopathic personalities’); Thulfaut (n 48) 237–43; Hohlfeld (n 43) 60.

⁹⁴ Kraepelin (1885) (n 83) 677–78 (pointing out the difficulty of distinguishing between normality and psychopathy).

⁹⁵ cf Schneider (n 17) 172 (‘overly vague and therefore unsuitable as a psychiatric diagnosis’ [‘zu vage und deshalb als psychiatrische Diagnose ungeeignet’]).

⁹⁶ Robert D Hare, *Hare Psychopathy Checklist – Revised (PCL-R): Technical Manual* (2nd edn, MHS 2007).

⁹⁷ On this modern understanding, Norbert Nedopil and Jürgen Müller, *Forensische Psychiatrie* (5th edn, Georg Thieme 2017) 221–26.

⁹⁸ On the historical development around the turn of the century, Müller (n 32) 126–41.

⁹⁹ See Franz von Liszt, ‘Der Zweckgedanke im Strafrecht’ (1883) 3 *ZStW* 1, 5–6 (fight ‘with youthful impetuosity in the evaluation of only recently discovered findings’ [‘mit jugendlichem Ungestüm in der Bewertung kaum gefundener Resultate’], but also ‘took up the fight against classic crime with youthful vigour and enthusiasm’ [‘mit jugendlicher Kraft und Begeisterung den Kampf gegen die klassische Kriminalität aufgenommen’]), which is why science should not ‘pretend that [the movement] does not exist’ [‘nicht totgeschwiegen werden darf’], but instead should ‘state its position on it’ [‘zu ihr Stellung nehmen’]; Franz von Liszt, ‘Kriminalpolitische Aufgaben’ in Franz von Liszt: *Strafrechtliche Aufsätze und Vorträge*, Vol I, 1875–1891 (Guttentag 1905) 290 (297: well-founded ‘distrust’ [‘Misstrauen’] in criminal-biological studies, 308: ‘criminals do not form a unified anthropological type’ [‘der Verbrecher bildet keinen einheitlichen anthropologischen Typus’]).

he later drew upon criminal-biological and anthropological approaches¹⁰⁰ and argued for the ‘neutralisation’ of incorrigible offenders within the framework of the second track of his purely protection- and security-focused criminal law (the ‘Marburger Programme’).¹⁰¹ From this point of view, Lombroso’s ‘born criminals’ can be read as a ‘cipher for “incorrigible” and “dangerous” criminals’.¹⁰² In fact, Kraepelin too called for ‘elimination of incorrigible individuals’¹⁰³ in line with his individualistic psychiatric approach inspired by Lombroso.¹⁰⁴ Thus, ultimately – regardless of the intentions of Lombroso and von Liszt – this whole thinking not only laid the intellectual ground¹⁰⁵ for the Nazi theory of perpetrator types (*Tätertypenlehre*¹⁰⁶) which in turn is derived from *Willensstrafrecht* (criminal law of the will¹⁰⁷), but also – more importantly in our context – paved the way for later Nazi legislation on neutralising so-called *Volksschädlinge* or ‘elements harmful to the people’ (particularly through the *Gewohnheitsverbrechergesetz* (Habitual Offenders Act)¹⁰⁸ and the *Volkschädlingsverordnung*

¹⁰⁰ cf Menne (n 32) 26–28 including further references; on von Liszt in this regard, also cf Gadebusch Bondio (n 41) 223–29 (who concludes that von Liszt later rejected this approach).

¹⁰¹ von Liszt (1883) (n 99) 1, 34–43, especially 36 (reforming the criminals capable and in need of reform, deterring the criminals who do not need reform, and neutralising the criminals who are incapable of reform).

¹⁰² Menne (n 32) 255, 262 (‘Chiffre für “unverbesserliche” und “gefährliche” Kriminelle”).

¹⁰³ Emil Kraepelin, *Die Abschaffung des Strafmaßes* (Enke 1880) 74 (‘Ausscheidung der Unverbesserlichen’); also Kraepelin (1885) (n 83) 678, 680 (with regard to the morally insane and in light of crime, the ‘unreserved recognition of the principle of guilt’ [‘rückhaltlose Anerkennung des Schutzprinzips’] is a ‘necessary occurrence’ [‘notwendiges Vorkommnis’, Lombroso]); Emil Kraepelin, ‘Das Verbrechen als soziale Krankheit’ in Franz von Liszt, *Vergeltungsstrafe, Rechtsstrafe, Schutzstrafe. Vier Vorträge* (Winter 1906) 22–44, 23 (‘temporary eradication of persons hostile to society ... our task is to improve the criminal as far as possible, while neutralising those who are incorrigible’ [‘zeitweilige Ausmerzung gesellschaftsfeindlicher Persönlichkeiten ... haben wir den Verbrecher nach Möglichkeit zu bessern, den unverbesserlichen dagegen unschädlich zu machen’]). Furthermore, Kraepelin sees the widespread ‘damage to culture’ (‘Kulturschädigungen’, city slums, alcoholism, sexually transmitted diseases) as the threat of ‘a continuous deterioration of the race towards certain tendencies, ... a degeneration’ that ‘impacts upon our entire race’ [‘einer fortschreitenden Verschlechterung der Rasse nach bestimmten Richtungen hin, ... einer Entartung ... unsere ganze Rasse beeinflusst’], which is why individual studies are carried out and countermeasures adopted: Emil Kraepelin, ‘Zur Entartungsfrage’ (1908) 31 *Zentralblatt für Nervenheilkunde und Psychiatrie* 745–51, 750–51; also Gadebusch Bondio (n 41) 183–89 (especially 186), 193–99 (especially 195).

¹⁰⁴ See nn 83 ff above with main text.

¹⁰⁵ cf, eg, Marxen (n 12) 160–62 (who does, however, accurately point out the liberal orientation of von Liszt’s rationale of punishment); Klaus Marxen, ‘Zum Verhältnis von Strafrechtsdogmatik und Strafrechtspraxis im Nationalsozialismus’ in Udo Reifner and Bernd-Rüdiger Sonnen (eds), *Strafjustiz und Polizei im Dritten Reich* (Campus Verlag 1984) 82–83 (accurately pointing out that Liszt referred only to sentencing and the execution of sentences); more critically Klaus Marxen, ‘Das Problem der Kontinuität in der neueren deutschen Strafrechtsgeschichte’ (1990) 73 *KritV* 287, 292–93 (Liszt’s focus on the perpetrator as a precursor of *Willensstrafrecht*). A differentiated counter-argument is presented by Benedikt Hartl, *Das nationalsozialistische Willensstrafrecht* (Weißensee 2000) 58 (emphasising the modern school’s orientation towards special prevention and reference to the elements of the *actus reus*, which Marxen (n 12) 160–62 also recognises, however). On juvenile criminal law in this regard Höffler (n 54) 62–67 (which is necessarily – also – perpetrator-focused, as oriented towards special prevention).

¹⁰⁶ On *Täterstrafrecht* (agent-focused criminal law) and the perpetrator types (arising from the supposed ‘nature’ of the act) Ambos (n 1) 141–43, 150–53 with further references.

¹⁰⁷ On the NS criminal law of the will, including further references, Ambos (n 1) 67–69.

¹⁰⁸ Law against Dangerous Habitual Criminals and on Measures of Reform and Incapacitation, 24 November 1933, RGBI I 1933, 995. Art 1 sets out fiercer punishments for habitual offenders; art 2 details measures of reform and incapacitation. On this law, cf Manuel Cavaleiro de Ferreira, ‘A Reforma do Direito Penal Alemão’ in Cavaleiro de

(*Volkschädling* Decree¹⁰⁹). In fact, von Liszt, notwithstanding his otherwise liberal reformist tendencies, referred to ‘habitual criminality’, which he saw as present primarily in incorrigible criminals, as a ‘sick limb’ of the organism, as a ‘cancerous damage’ eating its way ‘ever deeper into our social life’.¹¹⁰

This Lisztian line of continuity had already been emphasised at the time. Thus Exner traced the Habitual Offenders Act back to Liszt’s efforts to introduce ‘effective legal means of combatting dispositional criminality’.¹¹¹ Eberhard Schmidt stated that the Habitual Offenders Act had fulfilled ‘Liszt’s old call to intensify the fight against habitual criminality’,¹¹² which is why it does not represent ‘a specifically National Socialist statement on sentencing’.¹¹³ More recently, Dölling argued that von Liszt’s special preventive focus on the effective protection of society had led to ‘the danger of a scientifically informed positivism that failed to reflect upon its preconditions and consequences – a danger that had its roots in early criminology – becoming realised’ in the Nazi period.¹¹⁴ While Streng emphasises Liszt’s unifying theory (*Vereinigungstheorie*)¹¹⁵ approach, he sees links to NS criminal policy in the harshness with which Liszt excludes ‘incorrigible individuals’ and his ‘extreme purposive orientation’.¹¹⁶ While this continuity can hardly be denied in relation to the Habitual Offenders Act, the same does not apply for the *Volkschädlingsverordnung*, for this decree legalised eradication through the death penalty, which Liszt was always against: ‘and as we do not wish to behead or hang and are unable to deport [incorrigible individuals],

Ferreira, *Obra Dispersa*, Vol I (Universidade Católica Editora 1938/1996 reprint) 79–81; later Eberhard Schmidt, *Einführung in die Geschichte der deutschen Strafrechtspflege* (3rd edn, Vandenhoeck & Ruprecht 1965) 430–32; Gerhard Werle, *Justiz-Strafrecht und polizeiliche Verbrechensbekämpfung im Dritten Reich* (de Gruyter 1989) 86–108; Müller (n 32) 278–89, 295–96, 300–01; Fernando J Arnedo, ‘Roland Freisler: “El soldado político de Hitler”’ in Eugenio Raúl Zaffaroni, *Roland Freisler, Derecho penal de voluntad* (Ediar 2017) 9–84, 59–60; from the perspective of the criminal law of the will, Hartl (n 105) 233–34; drawing a comparison with the New York ‘Baumes Law’, Frederick Hoefler, ‘The Nazi Penal System’ (1945) 35 *Journal of Criminal Law & Criminology* 385, 389.

¹⁰⁹ Decree against Elements Harmful to the Nation of 5 September 1939, RGBI 1939 I, 1679; also Werle (n 108) 233–72; Hartl (n 105) 309–15.

¹¹⁰ von Liszt (1883) (n 99) 36–42 (36: ‘Krebsschaden’, eating ‘sich immer tiefer in unser soziales Leben’).

¹¹¹ Franz Exner, ‘Das System der sichernden und bessernden Maßregeln nach dem Gesetz v. 24. November 1933’ (1934) 53 *ZStW* 629 (‘wirksame gesetzliche Kampfmittel gegen das dispositionelle Verbrechen’).

¹¹² Eberhard Schmidt, ‘Anselm von Feuerbach und Franz von Liszt’ (1942) 33 *MSchrKrimBio* 205, 222 (‘Liszt’s alte Forderung nach der Intensivierung des Kampfes gegen das Gewohnheits-Verbrechen’).

¹¹³ Schmidt (n 108) 431 (‘eine spezifisch nationalsozialistische Aussage zur Strafzumessung’). Also cf (mainly critically) Marxen (n 12) 162–63; Monika Frommel, *Präventionsmodelle in der deutschen Strafzweck-Diskussion* (Duncker & Humblot 1987) 87–97; Hans-Ludwig Schreiber, ‘Die Strafgesetzgebung im “Dritten Reich”’ in Dreier and Sellert (n 43) 167–68 (not a ‘specifically National Socialist innovation’ [‘spezifisch nationalsozialistische Neuerung’]); Michael Kubink, *Strafen und ihre Alternativen im zeitlichen Wandel* (Duncker und Humblot 2002) 94 (‘predecessor ... of biological cleansing and “special treatment” [“Vorläufer ... der biologischen Säuberung und “Sonderbehandlung”]’).

¹¹⁴ Dölling (n 43) 223 (‘in den Anfängen der Kriminologie angelegte Gefahren eines naturwissenschaftlich geprägten Positivismus realisiert, der über seine Voraussetzungen und Folgen nicht reflektierte’).

¹¹⁵ This theory aspires to unify absolute (retributivist) and relative (preventive) theories of punishment.

¹¹⁶ Streng (n 20) 158–61 (160–61: ‘Unverbesserlichen’, ‘extreme Zweckorientierung’).

only lifelong imprisonment remains'.¹¹⁷ Thus, here too the Nazis did not just continue what they found, but radicalised it.¹¹⁸

4. NATIONAL SOCIALIST RADICALISATION AND THE CRIMINAL-BIOLOGICAL UTOPIA OF THE 'BLOOD-BASED' *VOLKSGEMEINSCHAFT*

Despite these precursors, we can state – in accordance with the radicalisation thesis referred to above – that National Socialism strengthened and developed hereditary, genetics-based ideas further with a racist, populist (*völkisch*) bent¹¹⁹ – as evident not least in the renaming of *MSchrKrim* (*Criminal Biology*)¹²⁰ – while the role of environmental factors¹²¹ was increasingly disregarded. Thus, criminal biology marginalised, on the one hand, criminal sociology, arguing that an 'extreme milieu-based theory' is 'unacceptable to the total state';¹²² on the other hand, psycho-analytic criminology was stigmatised as 'Jewish' and displaced in favour of biologicistic psychiatry.¹²³ With this criminal biology – continuing the reception of Lombroso around the turn of the century (backward-reaching continuity!) – finally became criminology's most important

¹¹⁷ von Liszt (1883) (n 99) 39 ('und da wir köpfen und hängen nicht wollen und deportieren nicht können, so bleibt nur die Einsperrung auf Lebenszeit').

¹¹⁸ cf Kubink (n 113) 249 ('use of criminal law that is scarcely bound by legal rules' ['rechtlich kaum mehr gebundene Verwendung des Strafrechts'] as a 'radical Lisztian line' ['radikale Liszt-Linie']).

¹¹⁹ Similarly Dölling (n 43) 198 (expansion and escalation of genetic concepts), also 202 ('overemphasis on predisposition-based thinking' ['Anlagedenken überbetont']), 209 ('biological radicalisation' ['biologische Radikalisierung']); Meier (n 56) § 2 mn 27; Berg (n 20) 130 ('time ... characterised by pronounced biologism' ['Zeit ... im Zeichen eines betonten Biologismus'], a Lombroso renaissance); Streng (n 20) 141–55 (141: 'markedly biologicistic orientation' ['ausgeprägt biologicistische Ausrichtung']); Simon (n 43) 72–77, 87–94 (intensification of racial hygiene and eugenics, close link between criminal biology and racial hygiene); Hohlfeld (n 43) 56–62; Müller (n 32) 266 ('criminal biology narrowed down by genetics' ['erbbiologisch verengte Kriminalbiologie']), 302 ('merging of the modern idea of security/incapacitation and the classic principle of retribution into a generally illiberal criminal policy' ['Verschmelzung des modernen Sicherungsgedankens und des klassischen Vergeltungsprinzips zu einer insgesamt illiberalen Kriminalpolitik']); Baumann (n 43) 80–113, (88: 'views concerning "inferior individuals" recast' and 'sanctions ... radicalised' ['Ansichten über "Minderwertige" umgeprägt ... Sanktionen ... radikalisiert']), (93: 'clear shift in emphasis' ['deutliche Schwerpunktverschiebung'] towards predisposition); Menne (n 32) 102, 111, 121 (two phases, radicalisation from 1939 onwards), 256 ('bio-policy focused upon the "*Volksgemeinschaft*"' ['auf die "*Volksgemeinschaft*" ausgerichtete Biopolitik']). See also the discussion at the (Nazi dominated) 1935 International Penal and Penitentiary Congress in Berlin as summarised by Wetzell (n 5) 94–104 (identifying, however, a transnational consensus, including regarding eugenics: *ibid* 102–03).

¹²⁰ cf n 27.

¹²¹ cf, eg, Franz von Liszt, *Lehrbuch des deutschen Strafrechts* (21st/22nd edn, de Gruyter 1919) 9–10 ('describe crime as an event in the life of the individual, investigate the individual shape and form and individual conditions of tendencies towards crime' ['Verbrechen als Ereignis im Leben des Einzelmenschen zu schildern, den Hang zum Verbrechen ... in seiner individuellen Gestaltung und seinen individuellen Bedingungen zu untersuchen']); similarly, but with a focus on the act, Exner (n 71) 5 ('theory of the overall phenomenon of crime in the life of the people and in the life of the individual' ['Lehre von der Gesamterscheinung des Verbrechens im Leben des Volkes wie im Leben des einzelnen']); almost identically, Exner, *Kriminalbiologie* (2nd edn, Hanseatische Verlagsanstalt 1944) 11.

¹²² Mezger (1934) (n 46) 173 ('extreme Milieutheorie ... für den totalen Staat unannehmbar'); on the marginalisation of criminal sociology, also Thulfaut (n 48) 257–58; Menne (n 32) 35–36, 103, 247.

¹²³ Mezger (1942) (n 46) 74 ('theories founded and advocated by Jews' ['von jüdischer Seite begründeten und vertretenen Lehren']); albeit not in the 1st edn (1934) 56–57 and no longer in the 3rd edn (1944) 74; in that respect

key and umbrella concept,¹²⁴ understood in racist, biologicistic terms. Viernstein, as one of the most important authors in this regard, defined ‘criminal biology’ as ‘the research into, typification and definition of the social and racial value of the criminal personality’.¹²⁵ In a similar vein Stumpfl explained, specifically alluding to the *Führer*, that ‘criminal-biological family research is called to significantly promote the study of character and thus contribute to our *knowledge concerning people and race* that *Adolf Hitler* has made the foundation of his great work of renewal’.¹²⁶

At the same time, criminal biology proved to be a ‘legitimizing science’ (‘Legitimationswissenschaft’)¹²⁷ for the Nazi criminal policy of ‘racial hygiene’; as such, it was to make a scientific contribution to the realisation of the social-technological utopia¹²⁸ of the *Volksgemeinschaft*, understood in terms of race and blood,¹²⁹ ascertaining the social ‘fitness’ of those members of the people (‘Volksgenossen’) who had committed a crime.¹³⁰ It found ‘its long-desired object of research’¹³¹ in ‘incorrigible habitual offenders’ (‘unverbesserliche Gewohnheitsverbrecher’)¹³² and contributed to Nazi race and selection policies as a radical continuation of the idea of protection by the ‘interlocking of biologically oriented psychiatry with ... protective criminal law’ as the ‘root of racism’.¹³³ Thus the ‘findings [of criminal biology] were

also Streng (n 53) 215; Menne (n 32) 103–10, 247 (who states that a further reason for the marginalisation of psychoanalytic criminology was that it was partly abolitionist and against retributive punishment).

¹²⁴ cf Gustav Aschaffenburg, ‘Kriminalanthropologie und Kriminalbiologie’ in Alexander Elster and Heinrich Lingemann (eds) *Handwörterbuch der Kriminologie*, Vol 1 (de Gruyter 1933) 827 (including criminal somatology, somatopathology, psychology and psychopathology) and the reasons for the renaming of *MSchrKrim* by the editors, in (1937) 28 *MSchrKrimBio* 1 (n 36). As a secondary source, Menne (n 32) 35, 247 (‘umbrella term’ [‘Oberbegriff’] for the ‘theory of crime’ [‘Lehre vom Verbrechen’]); on the earlier use as an umbrella term, Menne, *ibid* 17, 246–47.

¹²⁵ Theodor Viernstein, ‘Die Stellung und Aufgaben der Kriminalbiologie im Hinblick auf die nationalsozialistische Gesetzgebung’ (1936) 26 *Zeitschrift für die gesamte gerichtliche Medizin* 3 (‘Kriminalbiologie ist Erforschung, Typisierung und soziale sowie rassische Wertbestimmung der verbrecherischen Persönlichkeit’); also Theodor Viernstein, ‘Schlußansprache’, in Kriminologisches Institut der Universität Graz, *Mitteilungen der Kriminalbiologischen Gesellschaft*, Vol V (Ulr. Moser 1938) 117, 120 (‘scientifically grounded treatment in particular of that definable stratum of the population ... that ... is harmful also in terms of genetic and racial value and thus must be subject to planned elimination’ [‘wissenschaftlich begründete Behandlung gerade jener abgrenzbaren Bevölkerungsschicht ..., die ... auch erb- und rassenwertlich schädlich ist und insoweit einer planmäßigen Ausschaltung zugeführt werden muß’]). On Viernstein’s important role in criminal biology’s increased orientation towards genetics and racial hygiene, Müller (n 32) 266–71, 274, 297–98.

¹²⁶ Friedrich Stumpfl, ‘Grundlagen und Aufgaben der Kriminalbiologie’ in Ernst Rüdin (ed), *Erblehre und Rassenhygiene im völkischen Staat* (Lehmann 1934) 317, 331 (‘kriminalbiologische Familienforschung dazu berufen ist, die Charakterkunde wesentlich zu fördern und dadurch einen Beitrag zu liefern für unser *Wissen um Volk und Rasse*, das *Adolf Hitler* zur Grundlage seines großen Erneuerungswerks gemacht hat’ (italics in the original text)).

¹²⁷ Streng (n 20) 164; Streng (n 53) 214; Simon (n 43) 104 (‘Legitimation’); previously Schütz (n 20) 114 (criminology provided the ‘theoretical foundations’ [‘theoretischen Grundlagen’]); Dölling (n 43) 197 (criminology as a ‘legitimizing foundation’ [‘Legitimationsgrundlage’]); Baumann (n 43) 92.

¹²⁸ Also cf Menne (n 32) 258 (biopolitical vision).

¹²⁹ On the NS theory of race in this regard, see n 11 above including further references.

¹³⁰ Simon (n 43) 76, 91–94 including further references (‘Brauchbarkeit’).

¹³¹ Müller (n 32) 288 (‘ihren lang ersehnten Forschungsgegenstand’).

¹³² On the legal basis, see n 108 above.

¹³³ Müller (n 32) 296 (‘Verklammerung der biologisch ausgerichteten Psychiatrie mit dem ... schützenden Strafrecht’ as ‘Wurzel des Rassismus’).

rendered usable for the people and the state’;¹³⁴ criminal biology was ‘of interest to the political state leadership’¹³⁵ and received both resources and recognition in return.¹³⁶

With the Nazis’ rise to power, this racist and anti-Semitic criminal policy became socially acceptable. In the mainstream *Dictionary of Criminology* ‘racial belonging’ was advocated as ‘the most important factor determining the presence or development of a person’s criminogenic disposition’.¹³⁷ A radically anti-Semitic author like Johann von Leers, invoking none other than the Jewish (!) Lombroso to turn the latter’s ‘born criminal’ against the Jews themselves, could proclaim ‘Jewishness’ as ‘hereditary criminality’, which is why every human being needs to take part ‘in the fight to bring down the Jews’.¹³⁸ Robert Ritter’s study on ‘vagabonds, rogues and robbers’, dedicated to Alfred Ploetz, ‘the doyen of racial hygiene’, propagated a crude genetic and racial-biological determinism.¹³⁹ Its core hypothesis was that this ‘breed of people’ outlasts the (sociological) existence of a ‘rogue society’ (‘Gaugnergesellschaft’), precisely because their antisocial and criminal behaviour is biologically and genetically determined and they thus are ‘born criminals’ and ‘vagabonds’.¹⁴⁰ At the same time, Ritter,

¹³⁴ Franz Exner, ‘Aufgaben der Kriminologie im neuen Reich’ (1936) 27 *MSchrKrimPsych* 3 (‘Ergebnisse für Volk und Staat nutzbar’).

¹³⁵ *ibid* 5 (‘für die politische Staatsführung von Interesse’).

¹³⁶ cf Dölling (n 43) 198 (‘becoming established in the scientific system’ [‘Etablierung im Wissenschaftssystem’]); Streng (n 20) 164 (‘recognition, opportunities for scientific work and material resources’ [‘Anerkennung, wissenschaftliche Wirkmöglichkeiten und materielle Ressourcen’]); Hohlfeld (n 43) 56; Menne (n 32) 110 (‘an increasingly solid link between science, politics and practice’ [‘immer stärker verfestigende[n] Verbindung von Wissenschaft, Politik und Praxis’]).

¹³⁷ Max Hagemann, ‘Rasse’ in Alexander Elster and Heinrich Lingemann (eds), *Handwörterbuch der Kriminologie*, Vol 2 (de Gruyter 1936) 454 (‘Rassenzugehörigkeit’ as ‘der wichtigste Faktor für das Vorhandensein oder Zustandekommen kriminogener Dispositionen einer Persönlichkeit’).

¹³⁸ Johann von Leers, *Die Verbrechernatur der Juden* (Hochmuth 1944) 4, 6, 169 (‘Judentum ist Erbverbrechertum’, ‘Niedererkämpfung der Juden’); also Menne (n 32) 118.

¹³⁹ Robert Ritter, *Ein Menschenschlag. Erbärztliche und erbgeschichtliche Untersuchungen über die – durch 10 Geschlechterfolgen erforschten – Nachkommen von ‘Vagabunden, Gaunern und Räubern’* (Tübingen Habilitation thesis, Thieme 1937). As part of his role as director of the Criminal-Biological Institute of the Security Police and Security Service (Kriminalbiologisches Institut der Sicherheitspolizei und des SD (KBI)), Ritter also carried out criminal-biological studies in Moringen youth concentration camp, only 20 km from Göttingen. Measures such as forced sterilisations were carried out at the university hospital, cf <http://www.gedenkstaette-moringen.de/website/30.html>.

¹⁴⁰ Ritter (n 139) 10 (‘Menschenschlag’, ‘Gaugnergesellschaft’, ‘geborene Kriminelle’, ‘Vagabunden’; ‘fateful power of descent’ [‘Schicksalsmacht der Vererbung’]), 13–26 (physiological traits of insane ‘villains’ [‘Strolche’] and significance of genetic constitution), 27–50 (‘riff-raff of thieves, robbers and crooks’ [‘Diebs-, Räuber- und Jaunergesindel’] as the ancestors of the ‘villains’ [‘Strolche’]), 51–64, 65–79 (‘born vagabonds’ [‘geborene Vagabunden’] and corresponding ‘clans’ [‘Sippen’] including eleven generations of a ‘well-known tribe of crooks’ [‘namhaften Gaunersippschaft’]), 80–111, especially 82 (development and survival of the ‘breed of vagabonds and crooks’ [‘Vagabunden- und Gaunerschlag’] over centuries, ‘tendency to vagrancy passed down through centuries of selective breeding’ [‘Hang zur Landstreicherei durch jahrhundertelange Auslese vererbt’]), “‘rejects of civil society’ seep into the hereditary line of the breed of vagrants and crooks, strengthening those urges hostile to society’ [“‘Auswurf der bürgerlichen Gesellschaft’ hie und da in den Erbstrom des Vaganten- und Gaunerschlags eingesickert und ... gesellschaftsfeindliche[n] Antriebe ... verstärkt’]), 110–11 (‘society of crooks ... disappeared, but the breed, the biological imprint, survived unrecognised ... biological forces, inherited instincts and the bonds of blood interacted fruitfully ... so that the members of the breed of crooks procreated with one another and passed on their particular genetic material to subsequent generations again and again throughout the centuries’ [‘Jaunergesellschaft ... verschwand, aber der Schlag, das biologische Gepräge,

himself a psychiatrist, represented the increasing influence – already on the rise before Nazi rule¹⁴¹ – of medicine and psychiatry¹⁴² and of studies on hereditary factors and family clans (including twin studies)¹⁴³ in criminology.¹⁴⁴

However, ideas on genetics are also to be found in non-medical authors such as Franz Exner,¹⁴⁵ although Exner principally regarded environmental factors as equally important, arguing that crime is always a ‘reaction to environmental influences’ and it is ‘never possible to draw fully reliable conclusions concerning genetic material from behaviour’.¹⁴⁶ Exner also recognised the significance of criminal sociology,¹⁴⁷ though he contributed to its marginalisation under the

blieb unerkannt bestehen ... biologische Kräfte, ererbte Instinkte und Bindungen des Blutes, die in reichem Wechselspiel zusammenwirkten ... daß die Glieder des Gaunerschlags sich miteinander fortpflanzten, und daß sie damit ihr geprägtes Erbgut immer wieder durch die Jahrhunderte an die folgenden Geschlechter weitergaben’]. Critically on Ritter and his ‘faulty reasoning’, Wetzell (n 17) 219–22, 229 including further references (‘simplistic and methodologically backward quality of Ritter’s research that accelerated his career in the Third Reich’); critically also Dölling (n 43) 209; Streng (n 20) 145–46, 149 (lacking – genetically uncontaminated – reference group from the same peripheral milieu); Baumann (n 43) 110–11; Berg (n 20) 190–91 (‘gypsy researcher’ [‘Zigeunerforscher’]); Menne (n 32) 116–17; essentially concurring, however, Exner (n 71) 176.

¹⁴¹ On criminal psychiatry in the Weimar Republic, including the psychiatrisation (psychopathisation) of so-called habitual offenders, Menne (n 32) 31–39, 54–71; previously Dölling (n 43) 200–01; Wetzell (n 17) 125–37 (relation to criminal biology), 296.

¹⁴² On medicine in the Nazi period in general, Norbert Frei (ed), *Medizin und Gesundheitspolitik in der NS-Zeit* (Oldenbourg 1991); on psychiatry cf Dirk Blasius, *Einfache Seelenstörung. Geschichte der deutschen Psychiatrie 1800–1945* (Fischer 1994) 145–94 (distinguishing between race-focused and extermination-focused psychiatry, concluding that psychiatry, caught up ‘in its delusions of medical feasibility, followed the orders of NS policy’ [‘in ihrem medizinischen Machbarkeitswahn den Anweisungen der NS-Politik gefolgt’] and ‘let medical ethics go to ruin’ [‘die ärztliche Ethik zuschanden werden lassen’, 196]); on the role of medicine and psychiatry in implementing racial hygiene and eugenics, Schweizer (n 54) 13–67.

¹⁴³ cf critically Streng (n 20) 145–50 including further references, 164 (heredity studies as the basis of selection policy); 150–51 (critically on the special form of twin studies).

¹⁴⁴ cf Wetzell (n 17) 190–202 (eugenic research), 295 and *passim*; on the contributions of medicine to criminal biology, Exner (n 71) 5 (which ‘owes its most significant impulses and progress to medical practitioners’ [‘ihre bedeutendsten Anregungen und Fortschritte Medizinern verdankt’]); on the influence of medicine in prisons and their corresponding orientation towards hereditary biology, Berg (n 20) 82–94 including further references; for a basic account of the influence of psychiatry, Müller (n 32) 23–169 and *passim*; also Streng (n 20) 142 (‘influential stimuli’ [‘einflußreiche Impulsgeber’]); Menne (n 32) 25.

¹⁴⁵ cf, eg, Exner (n 71) 149–55 (significance of genetic material, which is at any rate ‘not insignificant’ [‘nicht bedeutungslos’, 149], ‘degrees of criminogenic hereditary predisposition’ [‘Grade einer kriminogenen Anlage’]), 177–84 (physical attributes); also later Franz Exner, *Kriminologie* (Springer 1949) 272–81 (recognition of environmental influence but further emphasis on the particular significance of ‘hereditary predisposition’ [‘Anlage’] or ‘genetic makeup’ [‘Erbgut’]).

¹⁴⁶ cf, eg, Exner (n 71) 149 (‘Reaktion auf Umweltliche Einflüsse’, ‘knot of hereditary and environmental influences’ [‘Knoten von Anlage- und Umwelteinflüssen’], ‘Verhalten ... kann niemals mit voller Verlässlichkeit auf ... Erbgut geschlossen werden’); also 25–46 (chapter titled ‘Predisposition and Environment’ [‘Anlage und Umwelt’]), 151 (‘predisposition towards crime by no means ... biological unit’ [‘Anlage zum Verbrechen keineswegs ... biologische Einheit’]), 152 (‘deduce’ predisposition from ‘environmental conditions’ [‘Umweltbedingungen erschließen’]); here, too (130–48), the ‘National Revolution of 1933’ is emphasised as defining the ‘political environment’ (‘politische Umwelt’). See also Exner (n 134) 9–10 (where he refers to ‘the new sense of community’ [‘das neue Gemeinschaftsgefühl’] in the Third Reich when mentioning environmental conditions, however); Franz Exner, ‘II. Umwelt’ (1936) 27 *MSchrKrimPsych* 362–74 (referring to ‘environment’ as one of criminology’s two basic concepts; on ‘predisposition’ as the other, Johannes Lange, ‘I. Anlage’ (1936) 27 *MSchrKrimPsych* 353–61.

¹⁴⁷ Franz Exner, ‘Kriminalsoziologie’ in Elster and Lingemann (n 137) 10–26; on that point in greater detail, Wetzell (n 17) 116–20; Thorsten Kruwinnus, *Das enge und das weite Verständnis der Kriminalsoziologie bei Franz Exner* (LIT 2009). Otherwise Exner made no contribution to criminal sociology, his – renamed (n 52) –

Nazis nevertheless.¹⁴⁸ In fact, Exner was inconsistent in his views, as some of his statements advocate the rule of law, for example, by criticising the vagueness of the notion of the ‘healthy sentiment of the people’¹⁴⁹ and police preventive detention,¹⁵⁰ while others are overtly racist and anti-Semitic, for example, referring to ‘negro criminality’, to the lower criminality of the ‘Nordic race’ and to ‘Jewish racial idiosyncrasy’ and ‘criminality’ which corresponds with ‘basic traits of the Jewish nature’.¹⁵¹ These inconsistencies led the most thorough legal-historical and biographical study to see him as a ‘careerist’, ‘who suppressed any moral doubts in favour of his scientific career, placing himself in the service of the NS dictatorship’.¹⁵²

Authors with a primary focus on criminal law, such as those of the Kiel School mentioned at the beginning of this article or Edmund Mezger, also took up biologicistic and genetics-focused ideas. Thus Dahm and Schaffstein criticised the over-emphasis placed upon the idea of education and demanded that incorrigible individuals ‘incapable of being educated’ be neutralised.¹⁵³ These individuals could be identified on the basis of ‘unchanging hereditary factors’ the ‘significance’ of which has been ‘clearly shown’ by ‘modern biology’¹⁵⁴ and which, at any rate, can be explained with the (superior) Nazi ‘idea of race’ based upon ‘genetic disparity’.¹⁵⁵ On the other hand, while Mezger stressed the ‘complicated interaction’ of heredity and environment

opus magnum on criminology only mentions the term in the introduction; on his shifting positions in this regard, also cf Kruwinnus: *ibid* 59–64.

¹⁴⁸ cf n 122 and main text above.

¹⁴⁹ Exner (n 134) 15 (also stating that ‘views concerning ... how the people’s legal consciousness judged this or that often diverge considerably’ [‘Ansichten darüber ..., wie das Rechtsbewußtsein des Volkes dies oder jenes beurteile, gehen oft erheblich auseinander’]).

¹⁵⁰ Franz Exner, “Nationalsozialistischer Kampf gegen das Verbrechertum” (1936) 27 *MSchrKrimPsych* 433–34; also critical of the *intensity* of the prosecution of homosexuals: Franz Exner, ‘Die Reichskriminalstatistik 1935/1936’ (1944) 35 *MSchrKrimBio* 25, 26.

¹⁵¹ Exner (n 71) 50–71 (‘assumption of a racially conditioned criminality’ [‘Annahme einer rassisch bedingten Kriminalität’, 66–67]). See also Franz Exner, ‘Volkscharakter und Verbrechen’ (1938) 29 *MSchrKrimBio* 404–21, 414, 421.

¹⁵² Andrea Elisabeth Sebald, *Der Kriminalbiologe Franz Exner* (Lang 2008) 327 (‘Karrieristen’, ‘der etwaige moralische Zweifel zu Gunsten seiner wissenschaftlichen Laufbahn unterdrückt und sich der NS-Diktatur dienstbar gemacht hat’). Sebald presents a detailed analysis of Exner’s writings (*ibid* 106–204) and other work (56–70), especially his support for the *Gemeinschaftsfremdengesetz* or Law on Community Aliens (205–09; see also Menne (n 32) 114; on this law, below nn 197 ff), the Habitual Offenders Act (Sebald, *ibid* 258–60), and his ‘völkisch’ understanding of punishment (266–68). Thus Exner – despite the merely ‘formal exoneration’ (‘formal[en] Entlastung’) in the denazification proceedings (80) – ‘made himself available to Hitler’s regime as a scientific propagandist and intellectual pioneer’ (‘dem Hitler-Regime als wissenschaftlicher Propagandist und Vordenker zur Verfügung’) and had no ‘qualms’ (‘Bedenken’) about doing so (222); he ‘abetted the endeavour of the NS regime’ (‘den Vorhaben des NS-Regimes Vorschub’), ‘in part actively’ (‘teilweise tatkräftig’), ‘in part at least verbally’ (‘teilweise zumindest verbal’, 325). Critically on Exner, also Streng (n 20) 153; Streng (n 53) 218–19; Baumann (n 43) 151–54; Menne (n 32) 117–18. Nevertheless, Sebastian Scheerer and Doris Lorenz, ‘Zum 125. Geburtstag von Franz Exner (1881–1947)’ (2006) 89 *MSchrKrim* 436, 448, believe that Exner attempted ‘to counter the dominant trend as best he could’ [‘der herrschenden Strömung so gut wie möglich gegenzusteuern’]; similarly Schütz (n 20) 123 (‘differentiating stance’ [‘differenzierende Haltung’]).

¹⁵³ Georg Dahm, ‘Autoritäres Strafrecht’ (1933) 24 *MSchrKrimPsych* 162, 172 ff, 176; Friedrich Schaffstein, ‘Die Bedeutung des Erziehungsgedankens im neuen deutschen Strafvollzug’ (1936) 55 *ZStW* 276, 282–85.

¹⁵⁴ Dahm (n 153) 176 (‘moderne Biologie ... die Bedeutung unveränderlicher Anlagefaktoren deutlich gezeigt’).

¹⁵⁵ Friedrich Schaffstein, *Politische Strafrechtswissenschaft* (Hanseatische Verlagsanstalt 1934) 19 (‘erbbiologische Ungleichheit’).

within the framework of a ‘dynamic understanding of crime’ in the late 1920s,¹⁵⁶ he was already at this point influenced by genetics and racial hygiene.¹⁵⁷ In fact, he adopted an increasingly biologicistic and racist standpoint¹⁵⁸ and advocated the ‘elimination of incorrigible individuals’.¹⁵⁹ Despite his fundamental criticism of Lombroso’s theory,¹⁶⁰ he acknowledged its basic tenets in essence,¹⁶¹ believing that ‘there are undeniably human beings destined to become criminals because of their innate predisposition’.¹⁶² From this, he derived a ‘requirement for racial-hygienic measures to stamp out criminal strains’,¹⁶³ which was fully in line with his calls for a ‘racially selective breeding of the people’.¹⁶⁴ Mezger welcomed ‘the new state’s race legislation’ where ‘race itself is now afforded the consideration it deserves’.¹⁶⁵ In sum, Mezger’s increasingly biologicistic and racist orientation, along with his collaboration in the Law on Community Aliens¹⁶⁶ and

¹⁵⁶ Edmund Mezger, ‘Konstitutionelle und dynamische Verbrechensauffassung’ (1928) 19 *MSchrKrimPsych* 385–400 (‘komplizierte Wechselwirkung’, ‘dynamischen Verbrechensauffassung’); previously Edmund Mezger, ‘Anlage und Umwelt als Verbrechensursache’ (1928) 19 *MSchrKrimPsych* 141, 143, 146 (according to which ‘criminal science could never dissolve into criminal biology’ [‘sich die Kriminalwissenschaft niemals in Kriminalbiologie auflösen’], as environmental factors always play a role); also Mezger (1934) (n 46) 175–204; 3rd edn (1944), 165–83; Edmund Mezger, *Kriminologie* (Beck 1951) 225–35 (with references to criminal policy). On that point in greater detail, Thulfaut (n 48) 100–08, 258–63.

¹⁵⁷ The title already placed the ‘constitutional understanding of crime’ on an equal footing with the dynamic one; also see Mezger, ‘Verbrechensauffassung’ (n 156) 388–93 (eg. emphasis on an ‘attitude strongly focused upon genetics and racial hygiene’ [‘stark erbbiologischen und rassenhygienischen Einstellung’, 392]); thereto also Thulfaut (n 48) 104–08, 112–14, 116 (genetic adaptation, especially to Viernstein’s ‘causal genetics’ [‘Kausalgenetik’]).

¹⁵⁸ In greater detail Thulfaut (n 48) 261–63.

¹⁵⁹ Mezger, ‘Verbrechensauffassung’ (n 156) 393 (‘Ausscheidung der Unverbesserlichen’; ‘special treatment’ [‘Sonderbehandlung’]). With his demands for ‘elimination’, Mezger ultimately joined von Liszt’s earlier demand (n 101 and main text above); also Thulfaut (n 48) 117–22.

¹⁶⁰ n 46; on Mezger’s fundamental criticism, also Thulfaut (n 48) 232–36.

¹⁶¹ Similarly Thulfaut (n 48) 235 (‘partly identified with Lombroso’s findings’ [‘identifizierte sich ... teilweise mit den Ergebnissen Lombrosos’]).

¹⁶² Mezger (1934) (n 46) 18 (‘unleugbar Menschen, die vermöge ihrer angeborenen Anlage zum Verbrecher bestimmt sind’); also cf Mezger (1934) (n 46) 54 (particularly ‘pathological predisposition’ [‘krankhafte Veranlagung’]) of ‘psychopathic criminals’ [‘psychopathische Verbrecher’], which makes them especially dangerous), 104–11 (emphasis on ‘ancestral genetic material’ [‘Erbgut der Ahnen’] within the context of a biologicistic understanding of crime); on the biologicistic perspective on and (consequently) prevention of genetically defective offspring, also Mezger (1942) (n 46) 79–124, 269–73 and 3rd edn (1944) 79–124, 278–83; previously Mezger, ‘Verbrechensauffassung’ (n 156) 393 (‘criminals who are and will remain different from other human beings all their lives because of their genetically conditioned predisposition’ [‘Verbrecher, die vermöge ihrer erbbiologisch bedingten Anlage anders sind und zeitlebens anders bleiben als andere Menschen’]). For a differentiated account of Mezger in this regard, Thulfaut (n 48) 231, 232–36, 249 (suppression of psychoanalysis); critically Dölling (n 43) 202–05; Streng (n 53) 220–21 (‘continued orientation towards predisposition’ [‘fortbestehende Anlageorientierung’]).

¹⁶³ Mezger (1934) (n 46) 21–22 (‘rassenhygienische Maßnahmen zur Ausrottung krimineller Stämme’).

¹⁶⁴ *ibid* v (‘rassenmäßige Aufartung des Volkes’).

¹⁶⁵ Mezger (1944) (n 46) 146 (‘In der Rassengesetzgebung des neuen Staates findet die Rasse selbst nunmehr ihre gebührende Berücksichtigung’). On Mezger’s racist and anti-Semitic orientation, including his calls for ‘eradication’ (‘Ausmerzungen’), also Thulfaut (n 48) 229–31, 250–54 (253–54: racial policy as a further objective of criminal biology); Baumann (n 43) 98–106.

¹⁶⁶ nn 200ff and main text below; on Mezger’s cooperation, Baumann (n 43) 105–06; Menne (n 32) 114.

bizarre visits to Dachau concentration camp,¹⁶⁷ made him one of the leading ideologues of NS criminology.¹⁶⁸

But even among criminal law scholars sympathetic to Nazi thinking, criminal-biological research was by no means uncontroversial. Thus, the distinguished Hellmuth Mayer, member of several Nazi organisations (although not of the party)¹⁶⁹ and actively involved in the Nazi criminal law reform efforts¹⁷⁰ (although not a full-blown Nazi),¹⁷¹ criticised it from two angles. On the one hand, from a humanities point of view – which Mayer claimed was the relevant perspective, as criminal policy, including criminology, should be understood as part of the humanities¹⁷² – the contrasting of predisposition and environment was ‘deficient and inappropriate’¹⁷³ as the ‘purely natural-scientific question of milieu versus predisposition’ is unable to grasp

¹⁶⁷ Francisco Muñoz Conde, *Edmund Mezger – Beiträge zu einem Juristenleben* (BWV 2007) 95–118.

¹⁶⁸ Klaus Rehbein, ‘Zur Funktion von Strafrecht und Kriminologie im nationalsozialistischen Rechtssystem’ (1987) 70 *MSchrKrim* 193, 207–08 (‘criminology’s chief National Socialist ideologist’ [‘nationalsozialistischen Chefideologen der Kriminologie’]); critically in that respect, Thulfaut (n 48) 107–08 (‘unjustified’ [‘unberechtigt’] on the ground of the multi-dimensionality of Mezger’s views), 258–59 (‘distorting the meaning’ [‘sinnentstellend’] of the dynamic theory of crime). However, Thulfaut himself accuses Mezger (335–43) of supporting Nazi ‘legislative endeavours that fundamentally contravened the rule of law’ (‘elementar rechtsstaatswidrige nationalsozialistische Gesetzesvorhaben’, 336) and ‘developing missionary intellectual zeal’ (‘missionarisch-denkerischen Eifer entwickelt’, 349), thus ultimately ‘serving on the ramps’ (340). In greater detail on Mezger as a criminal law scholar, Ambos (n 1) 80–84.

¹⁶⁹ Mayer was a member of the Association of Legal Professionals (NS *Rechtswahrbund*: cf Hellmuth Mayer, ‘Kriminalpolitik als Geisteswissenschaft’ (1938) 57 *ZStW* 1 including fn *) and other NS organisations (Natalie Willsch, *Hellmuth Mayer (1895–1980)* (Nomos 2008) 127–39).

¹⁷⁰ See the preface to Hellmuth Mayer, *Das Strafrecht des deutschen Volkes* (Enke 1936) vii, according to which ‘he was consulted regarding the work of the Criminal Law Commission of the Academy for German Law [founded by the Nazis, K.A.]’ (‘dass er zu den Arbeiten des Strafrechtausschusses der Akademie für Deutsches Recht herangezogen wurde’) and thus ‘gained the opportunity to integrate his efforts into the endeavour to shape a new German criminal law in the National Socialist state’ (‘die Möglichkeit gewann, seine persönlichen Bemühungen einzuordnen in die Bestrebungen um die Gestaltung eines neuen deutschen Strafrechtes im nationalsozialistischen Staat’); in doing so, he was ‘in agreement with the fundamental ideas of the “Principles for a National Socialist Criminal Law”’ (‘sich mit den Grundgedanken der “Leitsätze für ein nationalsozialistisches Strafrecht” in Übereinstimmung’). On his work for the Commission, also cf Willsch (n 169) 139–67; on the ‘Leitsätze’, which were edited by Hans Frank, cf Ambos (n 1) 60 and *passim*.

¹⁷¹ For a differentiated treatment of Mayer’s Nazi involvement cf Willsch (n 169), who concludes – based on a thorough analysis of Mayer’s relevant writings between 1930 and 1947 (169–222) and other activities (113–68) – that he remained aloof from National Socialism, particularly because of his experiences as a defence lawyer in the 1924 Hitler Putsch trial (45–58); rather, he ‘continued to affirm the classical views aligned with the rule of law’ (‘weiterhin zu den klassischen rechtsstaatlichen Ansichten bekannte’, 223) and thus may rather be characterised as a ‘liberal-conservative criminal law scholar’ (‘liberal-konservativer Strafrechtswissenschaftler’ (349–50)).

¹⁷² Mayer (n 169) 1, 2–12.

¹⁷³ *ibid* 9–12 (‘unzulänglich und schief’; for if one sees ‘the world as intellectual events and happenings, a fundamental distinction arises between natural influences and the effect of natural needs in the individual case on the one hand and the world of the objective intellect, the world of intellectual tradition, on the other hand. For the latter, that is, the relation between the objective and subjective intellect, the contrast between predisposition and environment becomes meaningless, for contrasting human beings with an intellectual environment as an alien force contradicts the nature of the intellect as something general and connective’ [‘die Welt als geistiges Geschehen, so ergibt sich ein grundsätzlicher Unterschied zwischen natürlichen Einflüssen und der Einwirkung natürlicher Bedürfnisse im Einzelfall auf der einen Seite und der Welt des objektiven Geistes, der geistigen Traditionswelt, auf der anderen Seite. Für letztere, also das Verhältnis zwischen objektivem und subjektivem Geist, verliert die Gegenüberstellung von Anlage und Umwelt ihren Sinn, denn es widerspricht dem Wesens

‘the overall problem’, which can ‘only be understood from the point of view of a humanities-based structural psychology’, emphasising the free will.¹⁷⁴

On the other hand, for Mayer the significance of inherited traits – in relation to social conditions – was impossible to prove beyond doubt; rather, it should be assumed that with criminality, too, as in other areas of life, ‘the outcome can be quite different even with the same predisposition’.¹⁷⁵ In fact, as Mayer argues elsewhere,

crime can also arise as actions which are fully to be expected of healthy human beings in a healthy communal life ... criminals and crimes are nothing other than purely legal labels. There are no somehow distinguishable sociological, psychological or biological fields of reality behind these labels.¹⁷⁶

Mayer’s empirical doubts are reminiscent of criticism already voiced in the late Weimar Republic concerning the lack of results of criminal-biological research on prisons,¹⁷⁷ with which Mayer concurred for the reason alone that prisons contained ‘only the sum of those who were caught’.¹⁷⁸ Others criticised the one-sidedness of race-based theories of predisposition.¹⁷⁹

des Geistes als eines Allgemeinen und Verbindenden, den Menschen einer geistigen Umwelt als einer fremden Kraft gegenüberzustellen’, 9)).

¹⁷⁴ Mayer (n 170) 41–43 (emphasis on the ‘valid social norms’ [‘geltenden Sozialnorm’] and ‘moral tradition’ [‘moralischen Tradition’], which is why the ‘rein naturwissenschaftliche Fragestellung Milieu oder Anlage’ cannot fully grasp ‘das Gesamtproblem’ which can be understood ‘nur vom Standpunkt einer geisteswissenschaftlichen Strukturpsychologie’).

¹⁷⁵ Mayer (n 169) 21–27 (27: ‘der Erfolg bei gleichen Anlagen ... recht verschieden sein kann’).

¹⁷⁶ Mayer (n 170) 38–39 (‘Verbrechen kann auch als durchaus zu erwartende Handlung gesunder Menschen in einem gesunden Gemeinschaftsleben entstehen ... Verbrecher und Verbrechen sind nichts anderes als rein juristische Etiketten. Hinter diesen Etiketten steht kein irgendwie abgrenzbarer soziologischer oder psychologischer oder biologischer Bereich der Wirklichkeit’), also 37 (‘theory of the genesis of crime as a theory of the abnormal development ... of human communal life’ [‘Lehre von der Verbrechensentstehung als Lehre vom anormalen Verlauf ... des menschlichen Gemeinschaftslebens’]), 40 (‘By far the majority of crimes arise from temptations that are automatically given as part of general human nature’ [‘Die allermeisten Verbrechen erwachsen aus Versuchungen, welche mit der allgemeinen Menschennatur ohne weiteres gegeben sind’]), 144 (‘proportion of inferior individuals involved in crime is not much higher than their corresponding proportion among the population as a whole’ [‘Anteil der Minderwertigen an der Kriminalität doch nicht sehr viel höher ist, als dies ihrem Anteil an der Gesamtbevölkerung entspricht’]). Here, Mayer certainly recognises biologically inferior individuals as a group, but distinguishes them from otherwise ‘abandoned persons’ (‘Haltlosen’), especially the group of ‘pariahs’ (‘Parias’) ‘beyond the ... world of valid social values’ (‘außerhalb der ... gültigen sozialen Wertwelt’: *ibid* 144–59, 146).

¹⁷⁷ cf, eg, Rudolf Sieverts, ‘Gedanken über Methoden, Ergebnisse und kriminalpolitische Folgen der kriminalbiologischen Untersuchungen im bayrischen Strafvollzug’ (1932) 23 *MSchrKrimPsych* 588–601 (speaking of ‘criminal-psychological dilettantism’ [‘kriminalpsychologischen Dilettantismus’]); also Berg (n 20) 23, 104–06.

¹⁷⁸ Mayer (n 170) 43–46 (43: ‘nur die Summe der Erwischten’), criticising the theory based upon this that ‘crime is caused by degeneracy’ (‘das Verbrechen durch Entartung bedingt ist’).

¹⁷⁹ Wolf (n 15) 573–74 (critically on Nicolai’s (n 12) pure, race-based theory of predisposition); Hans Dieter von Gemmingen, *Strafrecht im Geiste Adolf Hitlers* (Winter 1933) 14 is also surprisingly differentiated, claiming that Hitler himself (!) emphasised the importance of the ‘milieu factor’ (‘Milieufaktors’) and was thus certainly against any one-sided emphasis on predisposition.

5. MAINSTREAM AND NAZI CRIMINOLOGY?

Against this background, is it possible to say that *mainstream criminology* during the Nazi period – in clear distinction specifically to Nazi criminology – rejected racial-genetic determinism *à la* Ritter and adhered to an interaction involving predisposition and environment – as least as a theoretical starting point?¹⁸⁰ Wetzell argues along these lines, claiming that while National Socialism needed research in criminal biology to support its eugenic and biologicistic views, mainstream criminology provided only limited support for these ideas,¹⁸¹ as ‘genetically deterministic and racist explanations of crime did not predominate in criminal biology and criminology’, and ‘mainstream criminology ... was characterized by a continuing process of increasing methodological sophistication’.¹⁸² Therefore, neither a connection between ‘criminal biology and racism (including anti-Semitism)’¹⁸³ nor ‘a natural affinity between Nazi jurists and criminal biology’ can be assumed.¹⁸⁴

However, this view is problematic in that Wetzell does not define explicitly what he means by ‘mainstream criminology’. He quotes important authors such as Aschaffenburg, Mezger and Exner, and concedes that ‘leading criminologists’ sought to attract the Nazi regime’s support by emphasising the significance of criminology for Nazi eugenics, but ultimately failed to gain acceptance in ‘mainstream criminology’.¹⁸⁵ In a way Wetzell seems to posit a distinction between normal and Nazi criminology¹⁸⁶ but such a distinction did not and indeed could not exist as such, given the totality of the Nazi rule embracing all academic institutions and movements.¹⁸⁷ This can be seen in the composition and status of the above-mentioned Criminal-Biological Society as the leading professional association, which significantly promoted the rise of criminal biologism and concepts of racial hygiene.¹⁸⁸ The personal – academic and/or institutional – efforts of most criminologists, such as Exner and Mezger in the field of law,

¹⁸⁰ Dölling (n 43) 198, 201 (no ‘simplistic biological determinism’ [‘platte biologische Determinismus’]).

¹⁸¹ Wetzell (n 17) 179–231 (concluding at 230–31). Concurring, Geoffrey Cocks, ‘Richard R. Wetzell. Inventing the Criminal: A History of German Criminology, 1880–1945 (Studies in Legal History) University of North Carolina Press 2000’ (2001) 106 *American Historical Review* 1486, 1487; Müller (n 32) 276; critically Daniel Mark Vyleta, ‘Inventing the Criminal: A History of German Criminology, 1880–1945 ... Richard F. Wetzell ... University of North Carolina Press, Studies in Legal History, ed. Thomas A. Green and Hendrik Hartog, 2000’ (2003) 46 *The Historical Journal* 234, 235 (‘dangerously close to an apologia of mainstream criminology’).

¹⁸² Wetzell (n 17) 230.

¹⁸³ *ibid* 187.

¹⁸⁴ *ibid* 209.

¹⁸⁵ *ibid* 230.

¹⁸⁶ Wetzell disputes this interpretation in an email of 14 February 2020 to the author pointing to Wetzell (n 17) 231 where he argues that ‘a considerable portion of mainstream criminological research in the Nazi era was not characterized by the crude genetic determinism and racism that pervaded much of Nazi Germany’. This quote indeed suggests that Wetzell generally refers to ‘mainstream criminology’ without distinguishing it from ‘normal’ criminology, but his overall argument still seems to imply such a distinction. Apart from that, his analysis suffers, as stated above in the main text, from the lack of a proper definition of the ‘mainstream criminology’.

¹⁸⁷ Critically also Baumann (n 43) 91–98.

¹⁸⁸ *cf ibid* 96–97 (‘involved in the NS policy of extermination’ [‘in die NS-Vernichtungspolitik involviert’]).

show that even scientifically reputable ‘mainstream’ criminologists (to use Wetzell’s term) became caught up in and partly even contributed to Nazi radicalisation.

Against this background it is more convincing to affirm the responsibility of criminology as a whole – as a ‘legitimizing science’ (a position which ultimately is also shared by Wetzell, although he does not use this term).¹⁸⁹ The discipline’s genetic and racist focus, combined with the radical development of the earlier concept of (biological or mental) inferiority (linking criminality to the lowest – ‘inferior’ – classes and persons)¹⁹⁰ and the idea of a protective criminal law,¹⁹¹ not only slotted perfectly into NS ideology, but also prepared the ground for ‘racial-hygienic’ cleansing measures (‘elimination’ and ‘eradication’).¹⁹² These measures entailed either extensive forced sterilisation or castration¹⁹³ (giving a radical turn to a debate that had already begun to gather steam around the turn of the century),¹⁹⁴ or, as a final consequence, the killing of ‘life unworthy of living’ (*lebensunwertes Leben*),¹⁹⁵ with the infamous 1920 text of legal scholar Binding and psychiatrist Hoche on the approval of killings (*Die Freigabe der Vernichtung*

¹⁸⁹ cf Wetzell (n 17) 304–05 (arguing, inter alia, that ‘the more nuanced picture of scientific research under the Nazi regime is not meant to suggest that most scientists were somehow politically neutral, immune to Nazi ideology, and therefore free from responsibility for the crimes of the regime. They were not. I have shown that many prominent criminologists were eager to connect criminology to the agenda of Nazi biological politics’).

¹⁹⁰ n 90 and – after the Nazis’ accession to power – eg, Exner (n 71) 180–81 (‘Serious criminality ... inferior and also in a purely biological sense represents the dregs of the class from which it comes’ [‘Schwerverbrechertum ... minderwertig und repräsentiert ... auch in rein biologischer Hinsicht den Bodensatz jener Schicht, aus der es stammt’]); Mayer (n 169) 15 (‘criminality of biologically inferior persons’ [‘Kriminalität der biologisch Minderwertigen’]); see also Dölling (n 43) 204–05 including further references; Baumann (n 43) 43–49, 50, 98, 369.

¹⁹¹ n 92.

¹⁹² cf, eg, Mezger (1934) (n 46) 203 (‘elimination of elements harmful to the people and the race’ from the *Volksgemeinschaft* [‘Ausscheidung volks- und rasseschädlicher Bestandteile’]); Mezger (1942) (n 46) 238, 240, 245 (‘elimination ... with no regard to personal guilt’ [‘Ausscheidung ... ohne Rücksicht auf die persönliche Schuld’]), ‘eradication of parts harmful to the people and the race’ [‘Ausmerzung volks- und rasseschädlicher Teile’]); similarly Mezger (1944) (n 46) 245, 247, 252 (previously n 145); Schaffstein (n 153) 276, 287 (limit to education ‘in the idea of race, which wasting any effort on genetically inferior persons would contradict’ [‘im Rassegedanken, dem jede Kräfteverschwendung an erbbiologisch Minderwertige widersprechen würde’]); Helmut Mittasch, *Die Auswirkungen des wertbeziehenden Denkens in der Strafrechtssystematik* (de Gruyter 1939) 133–34 (‘racial hygiene’ [‘rassehygienische’] measures due to social ‘inferiority’ [‘Minderwertigkeit’]); Hans Welzel, *Der Allgemeine Teil des deutschen Strafrechts in seinen Grundzügen* (3rd edn, de Gruyter 1944) 168 (if necessary, the death penalty should be applied in cases of the ‘inferiority of the perpetrator and ... burden to the *Volksgemeinschaft*’ [‘Minderwertigkeit des Täters und ... Belastung der Volksgemeinschaft’]); Exner (n 71) 358 (admission to ‘safeguarding institutions’ [‘Bewahrungsanstalten’] and, to the extent that ‘hereditary criminality’ [‘anlagemäßiges Verbrechen’] can be ascertained, also ‘consideration of measures of racial hygiene’ [‘rassehygienische Maßnahmen in Erwägung ziehen’]).

¹⁹³ cf Streng (n 20) 154; Simon (n 43) 95–104; Baumann (n 43) 80–89; Berg (n 20) 106–16 (emphasising the criminal-biological and racial hygiene foundations), 131–43 (on NS sterilisation legislation and practice); Menne (n 32) 111; reference to the ‘Criminal-Biological Collection Point’ (‘Kriminalbiologische Sammelstelle’) in Cologne in Frank Sparing, ‘Zwangskastration im Nationalsozialismus’ in Justizministerium NRW (n 43) 169–212; critically on the evaluation of forced castration Streng (n 20) 152–53 (‘ideologically induced wishful thinking’ [‘ideologisch induziertes Wunschenken’]).

¹⁹⁴ cf Wetzell (n 17) 100–05, 237–46, according to whom the medical and psychiatric professions for the most part welcomed this possibility (290), which can be explained by their ‘hereditarian bias’ (291, 299), establishing their ‘greater culpability’ as compared with the legal profession (293).

¹⁹⁵ On euthanasia operations between 1939 and 1945 in this regard, Wetzell (n 17) 280–89; Schweizer (n 54) 87–105; Menne (n 32) 111–12, 115–16, 121–22; on Nazi extermination policies in general, Baumann (n 43) 106–13;

lebensunwerten Lebens) as its intellectual precursor.¹⁹⁶ Ultimately, biologicistic-eugenic thought also formed the basis of and legitimated Freisler's understanding of Nazi criminal law as a 'law of combat' (*Kampfrecht*)¹⁹⁷ with the aim of preserving the racially homogenous *Volksgemeinschaft* through 'healthy selection', to be achieved through excluding the 'carriers of degeneration'¹⁹⁸ and eradicating the 'type of the disturber of the peace in the people'.¹⁹⁹ The legislative culmination of this development was to have been the *Gemeinschaftsfremdengesetz* (Law on Community Aliens),²⁰⁰ criminalising all citizens who did not want to integrate into the 'community of the people',²⁰¹ however, this law did not enter into force because of the events of the War.²⁰²

In light of these considerations it is fair to say that the (biologicistic) criminology of the Nazi period contributed to 'the steering of society by criminal law, based on a biologicistic foundation',²⁰³ that is, the 'elimination' and eradication of entire groups of the population.²⁰⁴ It thus constituted a major 'ideological building block', cementing the Nazi terror rule.²⁰⁵ However, one must not overlook that the criminal-biological thinking (which was promoted by the Nazis) stood in the tradition of nineteenth-century biologicistic concepts inspired by social Darwinism (thus once again demonstrating *continuity* – with the past).²⁰⁶ Furthermore, such thinking need not necessarily lead to excesses of the Nazi ilk;²⁰⁷ there was no 'unbroken line' between earlier

aply Müller (n 32) 297 ('potential willingness to murder' ['potentielle Mordbereitschaft'] of *völkisch* racial hygiene as a fundamental difference to rival variants of eugenics).

¹⁹⁶ In that regard also Eva Schumann, *Dignitas – Voluntas – Vita. Überlegungen zur Sterbehilfe aus rechtshistorischer, interdisziplinärer und rechtsvergleichender Sicht* (Universitätsverlag Göttingen 2006) 21–22 ('intellectual trailblazer' ['geistiger Wegbereiter'] of the euthanasia policy); for a differentiated account, Ambos (n 1) 74–75, especially fn 267.

¹⁹⁷ Roland Freisler, 'Der Wandel der politischen Grundanschauungen in Deutschland und sein Einfluß auf die Erneuerung von Strafrecht, Strafprozeß und Strafvollzug' (1935) 97 *Deutsche Justiz* 1247, 1251. However, on criminal law as a 'law of combat', cf Mezger (1934) (n 46) 59 and 3rd edn (1944) 78.

¹⁹⁸ Roland Freisler, 'Die Maßregeln der Sicherung und Besserung in Deutschland' in Roland Freisler and Franz Schlegelberger (eds), *Römischer Kongreß für Kriminologie. Beiträge zur Rechtserneuerung*, No 8 (Decker 1939) 20–30, 29 ('gesunde Auslese', 'Träger der Entartung').

¹⁹⁹ Roland Freisler, 'Willensstrafrecht; Versuch und Vollendung' in Franz Gürtner (ed), *Das kommende deutsche Strafrecht: Allgemeiner Teil, Bericht über die Arbeit der amtlichen Strafrechtskommission* (Vahlen 1934) 9, 12 (eradication of the 'Thypus des Friedensstörers im Volke').

²⁰⁰ cf *Entwurf des Vorsitzenden des bayerischen Landesverbands für Wanderdienst A. Seidler für ein Gesetz über die Behandlung Gemeinschaftsfremder mit Begründung*, Munich, 1 February 1939, documented in Wolfgang Ayaß, 'Gemeinschaftsfremde', Quellen zur Verfolgung von Asozialen 1933–1945, Materialien aus dem Bundesarchiv, Vol 5 (Bundesarchiv 1998) No 87, https://www.bundesarchiv.de/imperia/md/content/abteilungen/abt/dzd/dokumentenverzeichnisse/materialien_5_gemeinschaftsfremde.pdf.

²⁰¹ cf, *ibid.*, the definition before and in § 1.

²⁰² Also cf Streng (n 20) 155, 163; Baumann (n 43) 105–06 (biologicistic rationale); Menne (n 32) 113–15.

²⁰³ Dölling (n 43) 206 ('kriminalrechtlichen Sozialsteuerung auf biologicistischer Grundlage').

²⁰⁴ On the work of criminal biologists as 'selection consultants' ['Selektionsgutachter'], Streng (n 53) 215.

²⁰⁵ Dölling (n 43) 224 ('ideologischen Baustein'); also Streng (n 20) 159 (criminal biology as the 'companion, if not precursor' ['Weggefährtin, wenn nicht gar Wegbereiterin']), 163 ('part of the nefarious overall system' ['Teil des verbrecherischen Gesamtsystems']); Streng (n 53) 215–16 ('shambles' ['Scherbenhaufen'], 'corrupted' ['korrumpiert']).

²⁰⁶ cf n 43.

²⁰⁷ cf Wetzell (n 17) 187 ('connection' between criminal biology and 'a racist and anti-Semitic agenda ... by no means inevitable'), 302 (even among the Nazis, 'the spectrum of opinion on eugenic policy [was] diverse' and

demands for ‘incorrigible persons’ to be ‘neutralised’ and the Nazi policy of sterilisation and eradication.²⁰⁸

This is shown not only by Lombroso’s *scuola positiva* (which did not lead to comparable excesses in its Italian motherland), but also by the consistency and continuity of criminal-biological thinking up to the present day,²⁰⁹ although this thinking has overcome its former purely deterministic approach (‘born criminal’).²¹⁰ The ‘neutralisation’ of dangerous criminals is the logical consequence of criminal-biological *deterministic* thinking, precisely because these criminals are seen as incapable of being treated (‘incorrigible’). This need not necessarily lead to their physical elimination, as in radical National Socialism, but will certainly result in their lifelong detention in order to safeguard the primary goal of protecting society²¹¹ (preventive detention).²¹² The primacy of the protection of society over the perpetrator’s individual freedom is fully in line with Lisztian criminal policy – detention as an alternative to ‘beheading and hanging’²¹³ – and forms the fundamental idea underpinning today’s institution of preventive detention.

This line of continuity may go some way in explaining why Jewish criminologists, such as Gustav Aschaffenburg,²¹⁴ ‘Germany’s foremost expert in criminology’ with worldwide renown,²¹⁵ essentially agreed with those who criticised the ‘softening’²¹⁶ of the Weimar

‘Nazi biological politics left more room for disagreement than historians have often assumed’); concurring, Menne (n 32) 108, 121 (NS experience ‘unique’ [‘singulär’]).

²⁰⁸ Baumann (n 43) 53, 80 (‘ungebrochene Linie’, ‘Unschädlichmachung Unverbesserlicher’; ‘not inevitable’ [‘nicht zwangsläufig’]).

²⁰⁹ Menne (n 32) 243–62; previously Streng (n 53) 237–39 (‘biology renaissance’ [‘Biologie-Renaissance’]).

²¹⁰ Thus it is recognised today that there are (epi-)genetic risk factors for criminality, cf Matt De Lisi and Michael G Vaughn, ‘The Vindication of Lamarck? Epigenetics at the Intersection of Law and Mental Health’ (2015) 33 *Behavioral Sciences and the Law* 607–28.

²¹¹ Also cf Gadebusch Bondio (n 41) 218 (the antisocial individual is sacrificed ‘in favour of society’ [‘zugunsten der Gesellschaft’], ‘communal ethics’ [‘Gemeinschaftsethik’] takes precedence over ‘individual ethics’ [‘Individualethik’]).

²¹² Accurately on the historical continuity in this regard Menne (n 32) 257–58, 260 (‘without exception, bio-scientific criminology [served] as a criterion justifying negative special prevention and a dichotomy’ of ‘normal’ and ‘dangerous’ criminals [‘biowissenschaftliche Kriminologie durchweg als Begründungskriterium für eine negative Spezialprävention sowie für eine Dichotomie ... normalen ... gefährlichen’]); on preventive detention as the ‘long arm of National Socialism’ (‘lange Arm des Nationalsozialismus’) Baumann (n 43) 225–26; also cf Müller (n 32) 278–89, 295–96, 300–01.

²¹³ cf n 117.

²¹⁴ Aschaffenburg published the seminal work on crime mentioned at n 93 in 1903 (Wetzell (n 17) 64–67), which is regarded as the first criminology textbook in the German language (Kaiser (n 56) 116). In it, Aschaffenburg – distancing himself clearly from Lombroso’s criminal-anthropological approach (n 66) – succeeded in ‘combining the social causes of crime with the individual causes of the law-breaker’ and thus in ‘integrating criminal sociology and criminal psychology’ (‘soziale Ursachen des Verbrechens mit individuellen Ursachen des Rechtsbrechers zu kombinieren ... Kriminalsoziologie und Kriminalpsychologie zu integrieren’: Schneider (n 17) 168, 187).

²¹⁵ Wetzell (n 17) 63; also Schneider (n 17) 170 ff. On his biography and role in the *MSchrKrimPsych*, see n 23.

²¹⁶ cf Gustav Aschaffenburg, ‘Neue Horizonte?’ (1933) 24 *MSchrKrimPsych* 158–62 (Aschaffenburg (1933)) (‘Verweichlichung’) (where – referring to Dahm and Schaffstein – he emphasises the primacy of public safety and the need for preventive security measures); in this sense also in favour of the Habitual Offenders Act, Gustav Aschaffenburg in Alfred Hoche (ed), *Handbuch der gerichtlichen Psychiatrie* (Springer 1934) 59 (where he writes that it has ‘finally achieved the longed-for measures of security and reform’ [‘endlich die ersehnten Maßregeln der Sicherung und Besserung gebracht’]). Critically Gadebusch Bondio (n 41) 199–217, 218 (‘social Darwinist’ [‘sozialdarwinistisch’], ‘components of racial hygiene’ [‘rassenhygienische Komponenten’]).

Republic's liberal criminal law,²¹⁷ rejected the responsibility of criminology for it and even advocated the 'neutralisation' of certain members of the 'community of the people'.²¹⁸ These criminologists – perhaps as children of their time and victims of the *Zeitgeist*²¹⁹ – were neither able to predict the Nazi radicalisation of these ideas, nor recognise that such an inhumane criminal policy would sooner or later turn against themselves.²²⁰

6. CONCLUDING REMARKS

This brings these (preliminary) reflections on criminology under the Nazi regime to a close. They have shown that Nazi criminology – as well as Nazi criminal law – did not emerge from nowhere and did not disappear completely in 1945. In fact, German criminology during the Nazi reign, especially its biological turn, became a legitimating science preparing the ground for genocidal Nazi criminal justice policies. Sadly, the rise of the 'New Right' in Germany shows how current and necessary these reflections are. Whatever our stance on the history of German criminology and the theory of continuity and radicalisation, today their scientific examination and appraisal is more necessary than ever, lest criminology once more becomes the tool of an inhumane criminal policy.

²¹⁷ Georg Dahm and Friedrich Schaffstein, *Liberales oder autoritäres Strafrecht?* (Hanseatische Verlagsanstalt 1933) 22, speak of criminal law and prison sentences being 'softened' ('Erweichung') by the idea of education. However, this criticism was nothing new: see, eg, Hans Grossmann, *Die Grenze von Vorsatz und Fahrlässigkeit* (Gente 1926) 8 (where he refers to the new theory of guilt as 'soft and weak' ['weichlich']).

²¹⁸ cf Aschaffenburg (n 24) 531, 534–35 (where, in his final editorial, he protested against criminology being criticised for its alleged responsibility for the 'softening' ['Verweichlichung'] of Weimar criminal law, stating that the goals of the criminal law reform were 'to free the *Volksgemeinschaft* from harmful elements and assure it that its continued existence will not be threatened by antisocial human beings' ['die Volksgemeinschaft von den Schädlingen zu befreien und ihr die Gewißheit zu geben, in ihrem Bestand nicht durch asoziale Menschen gefährdet zu werden']); also Gustav Aschaffenburg, 'Gleichzeitige Anordnung der Entmannung und der Sicherungsverwahrung' (1935) 26 *MSchrKrimPsych* 385, 388 (advocating castration – 'emasculatation' ['Entmannung'] – for reasons of public safety); on Aschaffenburg in this regard, also Dölling (n 43) 221–22; Berg (n 20) 143–50. Another Jewish criminologist, Karl Birnbaum, made a name for himself in psychiatry with the above-mentioned psychiatrisation (n 141); in that respect Wetzell (n 17) 149–53, 168–74; Menne (n 32) 60–62; on his persecution by the Nazis: Menne, *ibid* 107.

²¹⁹ Aschaffenburg (n 216) 161 ('personally, I cannot convince myself that an authoritarian criminal law would take a different path to the Lisztian School' ['ich persönlich kann mich nicht davon überzeugen, daß ein autoritäres Strafrecht einen anderen Weg geht als die Liszt'sche Schule']). Also cf Schneider (n 17) 171 ('pressure of the *Zeitgeist*' ['Druck des Zeitgeistes']).

²²⁰ cf Wetzell (n 17) 187 (who in this respect contradicts himself, however: on the one hand, he considers Aschaffenburg's failure to recognise the complementarity of criminal biology and anti-Semitism as part of a eugenic-racist criminal policy aiming to eradicate 'biologically inferior' elements to be a lapse of judgement; on the other hand, he sees this connection as 'by no means inevitable').