

The Criminal Registry in the German Empire: The ‘Cult of Previous Convictions’ and the Offender’s Right to Be Forgotten*

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In 1926, Leopold Schäfer, a high official at the Ministry of Justice of the Weimar Republic, wrote a commentary for other officials on what was known as the ‘Expungement Law’ of 1920. This law regulated that, after a certain period of time, only ‘limited information’ from the criminal registry could be provided to interested parties. In addition, it ruled that after an extended period of time, entries in the registry were to be erased definitively. This law, Schäfer argued, offered a ‘reasonable balance’ between two ‘diametrically opposed’ interests in German criminal policy:

On the one hand, the interest of the state and society, which needs to be able to get knowledge about a person’s history, particularly their criminal history, in order to judge them. And on the other, the interest of the person punished that the stigma of the punishment is expunged after an appropriate length of time and the crime is forgotten.¹

During the nineteenth century, the production of knowledge had become integral to the administrative efficiency and power of modern state bureaucracies.² The criminal registry was part of the new information technologies that expanded the state’s capacity to collect information on the population.³ British criminologist David Garland has argued that ‘criminal individuals have few privacy rights that could ever trump the public’s uninterrupted right to know’.⁴ Schäfer, by contrast, had stressed the need to balance two crucial and ‘well-founded’ interests: the bureaucratic will to know and the offender’s right to be forgotten.

The article focuses not on tools deployed to expand the power of the ‘knowing state’, but instead on attempts to curtail the state’s will to know. Long before the Expungement Law was ratified in 1920, the use of the criminal registry had been circumscribed in various ways. Arguments in favour of ‘the right to be forgotten’ circulated copiously in commentaries on the keeping of criminal records. Imperial Germany’s system of criminal justice has long been described as dominated by ‘class justice’ and the authoritarian

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¹ L. Schäfer and A. Hellwig, *Straftilgungsgesetz und Strafregisterverordnung* (Berlin and Munich, 1926), pp. 69–70.

² A. Giddens, *The Nation State and Violence* (Cambridge, 1984), pp. 172–80; for other classical contributions on the knowledge function of modern state bureaucracies: M. Weber, *Wirtschaft und Gesellschaft* (Tübingen, 1972), pp. 128–9; M. Foucault, *Power/Knowledge: Selected Interviews and Other Writings, 1972–1977*, trans. C. Gordon (New York, 1980); P. Collin and T. Horstmann (eds), *Das Wissen des Staates: Geschichte, Theorie und Praxis* (Baden-Baden, 2004).

³ See R. Shoemaker and R. Ward, ‘Understanding the Criminal: Record-Keeping, Statistics and the Early History of Criminology in England’, *British Journal of Criminology*, 57, 6 (2017), pp. 1442–61.

⁴ D. Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford, 2001), pp. 180–1.

mentality of its officials. Yet, the existence of administrative policy intended to constrain the use of the criminal registry suggests liberalizing features were also part of the system of criminal justice in the German Empire. The term ‘liberalizing’ is used here to describe an approach that sought to keep the activities of the state within certain bounds. The article therefore joins recent scholarship that has emphasized such liberalizing trends along with the gradually developing rule of law in Wilhelmine Germany.⁵

The worries of bureaucrats, politicians and citizens about the unbridled use of the criminal registry are central to this article, where they are set within the framework of the multifaceted problems related to the criminal registry. To understand the attempts to counteract the effects of record-keeping, the organization and implementation of the criminal registry in 1882 will first be discussed. The article then explores how the campaign to mobilize empathy for the ‘victims’ of the registry generated by the ‘cult of previous convictions’ paved the way for the Expungement Law of 1920 and considers the different potential paths to codifying a ‘right to be forgotten’. Finally, the article addresses the unease that surrounded the ratification of the Expungement Law and discusses why the liberalization of the criminal registry in the end failed to guarantee the full protection of citizens within the culture of excessive suspicion that characterized German society.

I. The Implementation of the Criminal Registry in Germany

The criminal registry was introduced in Germany in 1882. Its method, which involved recording earlier sentences on index cards, was based on the system of the *casier judiciaire* (judicial registry) introduced in France in 1850.⁶ In 1876 Julius Hamm, an influential legal scholar from Strasbourg, published a pamphlet on criminal records and recommended that the French system be introduced for the entire German Empire, based on his good experience with this procedure in Alsace. The criminal registry could then be used, he argued, to ‘determine the criminal history’ of any individual citizen.⁷ As his recommendations were largely adopted by the Bundesrat, Hamm was instrumental in transferring the system from France, via Alsace, to Germany, earning him the status of father of the criminal registry in Germany.⁸

The German registry was decentralized, with information about the individual’s criminal history collected and registered in his or her place of birth. For practical reasons, the information was stored at the place of birth and not at the location of sentencing, for then the information for each individual was kept in one place, even if that person had been sentenced by different courts in different towns. In general, the records were stored at a special office under the authority of the state prosecutor in the local municipality. The management of the criminal registry was regulated at the level of the German Empire’s constituent states. The record-keeping system therefore required

⁵R. F. Wetzell ‘Introduction’, in R. F. Wetzell (ed.), *Crime and Criminal Justice in Modern Germany* (New York, 2014), pp. 1–28; A. Ortmann, ‘Jenseits von Klassenjustiz: ein Blick in die ländliche Gesellschaft des deutschen Kaiserreichs’, *Geschichte und Gesellschaft*, 35, 4 (2009), pp. 629–58; K. F. Ledford, ‘Formalizing the Rule of Law in Prussia: The Supreme Administrative Law Court, 1876–1914’, *Central European History*, 37 (2004), pp. 203–24.

⁶G. Le Poittevin, *Traité pratique des casiers judiciaires* (Paris, 1899).

⁷J. Hamm, *Die Einführung einheitlicher Strafregister* (Mannheim, 1876).

⁸J. Stern, ‘Das Wesen des Strafregisters’, *Archiv für Kriminal-Anthropologie und Kriminalistik*, 8 (1902), pp. 260–7, here p. 264.

an active communication network covering the courts of the German Empire and the local offices of the state prosecutors. The protocols dictated that information from the criminal registry would be requested by a court official. On receiving the request, the state prosecutor would then send the information on a form designed for the purpose, generating what was known as an ‘excerpt’ from the criminal registry.⁹

For the registry to function effectively, it was essential that individuals use a uniform name in public matters. Not coincidentally, then, around this time first names and surnames became much more strictly regulated in the German Empire. The use of a single name for all official affairs made it easier to combine the offences of a single person within the criminal registry and helped officials construct criminal biographies. The Penal Code mandated the use of official names in all civic matters and forbade changes made to names at will.¹⁰ The authorities then also had to spend time combatting the use of false names which frustrated attempts to establish the scope of an individual’s criminal history.¹¹

In 1882, the year in which the criminal registry was implemented, official crime statistics for the German Empire were published for the first time too. Combined, the introduction of the criminal registry and the publication of crime statistics formed the central knowledge-producing elements of Imperial Germany’s criminal policy. Indeed, according to legal scholar Franz Liszt, ‘systematic observation of individuals’ and ‘systematic observation of the masses’ were two elements of gaining crucial knowledge of criminal activity.¹² As a tool designed to isolate individuals in a strategic way and to create knowledge about the subject’s ‘criminal career’, the criminal registry was perfect for measuring and assessing recidivism, a central concern for the burgeoning new field of criminology.¹³ Scholars from the ‘modern school’ of criminal sciences (of which Liszt was a principal proponent) believed that the production of knowledge was the best way to isolate ‘habitual criminals’ and to protect society against them.¹⁴ They

⁹The description of the practical organization of the criminal registry is in large part based on two published legal dissertations: H. Marchand, *Das Strafregister in Deutschland* (Berlin, 1900); J. Müller, *Vorstrafen und Strafregister* (Breslau, 1908).

¹⁰J. Caplan, ‘“This or That Particular Person”: Protocols of Identification in Nineteenth-century Europe’, in J. Caplan and J. Torpey (eds), *Documenting Individual Identity: The Development of State Practices in the Modern World* (Princeton, 2001), pp. 49–66, here p. 62. See also J. Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (New Haven, 1998), p. 71.

¹¹H. Gross, *Handbuch für Untersuchungsrichter als System der Kriminalistik*, 2 vols (6th edn, Munich, 1914), vol. 1, pp. 385–96.

¹²F. von Liszt, ‘Kriminalpolitische Aufgaben’, *Zeitschrift für die gesamte Strafrechtswissenschaft*, 9 (1889), pp. 452–98, here p. 473.

¹³The importance of the notion of ‘biography’ for knowledge of criminal behaviour is demonstrated by Peter Becker; see P. Becker, *Verderbnis und Entartung: eine Geschichte der Kriminologie des 19. Jahrhunderts als Diskurs und Praxis* (Göttingen, 2002), pp. 57–64. See also P. Becker, ‘Strategien der Ausgrenzung, Disziplinierung und Wissensproduktion: Überlegungen zur Geschichte der Kriminologie’, *Geschichte und Gesellschaft*, 30, 3 (2004), pp. 404–33. On the notion of the ‘criminal career’: A. R. Piquero, D. P. Farrington and A. Blumstein, ‘The Criminal Career Paradigm’, *Crime and Justice*, 30 (2003), pp. 359–506.

¹⁴R. F. Wetzell, *Inventing the Criminal: A History of German Criminology, 1880–1945* (Chapel Hill, 2000), p. 36; A. Fleiter, ‘Die Kalkulation des Rückfalls: zur kriminalstatistischen Konstruktion sozialer und individueller Risiken im langen 19. Jahrhundert’, in D. Schaub and S. Freitag (eds), *Verbrecher im Visier der Experten* (Stuttgart, 2007), pp. 169–95. On the establishment of the field of criminology as a social science: S. Galassi, *Kriminologie im Deutschen Kaiserreich: Geschichte einer gebrochenen Verwissenschaftlichung* (Stuttgart, 2004).

therefore actively supported the introduction of the criminal registry. The authorities' reliance on these 'tools of knowledge' can be seen as a sign of the first stage of the 'scientization of the social'.¹⁵

II. The Contested Purpose of the Registry

Scholars have tended to assume that the information contained in the criminal registry was primarily of relevance for judges. In the German criminal trial, prior convictions functioned as propensity evidence, indicative of credibility and culpability. When sentence was passed, the defendant's criminal record was taken into account as an aggravating factor. While previous convictions had a similar function in the common-law tradition, unlike in Anglo-Saxon practice German judges also used such information against a suspect. A lengthy criminal record could be assumed to be evidence that the defendant had a certain tendency to commit the crime he or she was accused of.¹⁶ While such character-based arguments were prohibited as evidence of guilt in common-law trials, they were central in legal cultures on the European continent, particularly the German legal culture. This difference can be ascribed to the inquisitorial character of the German trial.¹⁷ In this system there was no fundamental difference between determining guilt and sentencing.¹⁸

German authorities also believed that criminal records provided crucial information about the reliability of witnesses called to appear at court.¹⁹ In order to judge the credibility of testimonials, the 1877 Code of Criminal Procedure (*Strafprozessordnung*) required prosecutors to conduct a thorough assessment of the criminal past of everyone who was called to the witness stand or accused of any kind of offence.²⁰ It was common practice for judges to inform the entire courtroom of these facts, and public revelations of the criminal biographies of defendants and witnesses thereby became a central feature of trials in Wilhelmine Germany. In light of what Ann Goldberg has termed the 'litigious honour culture' of the German Empire, where defamation lawsuits occurred on a daily basis, we can readily imagine how frequently the criminal records of a German citizen were exposed before a court of justice.²¹

¹⁵L. Raphael, 'Embedding the Human and Social Sciences in Western Societies 1880–1980: Reflections on Trends and Methods of Current Research', in K. Brückweh, R. Wetzell, D. Schumann and B. Zeimann (eds), *Engineering Society: The Role of the Human and Social Sciences in Modern Societies, 1880–1980* (Basingstoke, 2012), pp. 41–58, here p. 50; P. Becker and W. Clark (eds), *Little Tools of Knowledge: Historical Essays on Academic and Bureaucratic Practices* (Ann Arbor, 2001).

¹⁶J. Olshausen, *Der Einfluss von Vorbestrafungen auf später zur Aburtheilung kommende Straftaten. Eine Abhandlung aus dem Reichsstrafrecht* (Berlin, 1876), p. 2; P. Chuchul, 'Strafregister', *Deutsche Juristen-Zeitung*, 11, 10 (1906) pp. 562–3.

¹⁷On the inquisitorial and adversarial elements in the German criminal trial: B. C. Hett, *Death in the Tiergarten: Murder and Criminal Justice in the Kaiser's Berlin* (Cambridge, MA, 2004), pp. 22–5.

¹⁸M. R. Damaska, 'Propensity Evidence in Continental Legal Systems', *Chicago-Kent Law Review*, 70, 1 (1995), pp. 55–70, here p. 58; J. Q. Whitman, 'Presumption of Innocence or Presumption of Mercy: Weighing Two Western Modes of Justice', *Texas Law Review*, 94, 5 (2016), pp. 933–94, here pp. 939–42.

¹⁹See H. Gerland, 'Die Verjährung der Vorstrafen', *Nord und Süd*, 123 (1907), pp. 393–407, here p. 396.

²⁰See A. Ortmann, *Machtvolle Verhandlungen: zur Kulturgeschichte der deutschen Strafjustiz 1879–1924* (Göttingen, 2014), pp. 195–200, 235–6.

²¹A. Goldberg, *Honor, Politics, and the Law in Imperial Germany, 1871–1914* (Cambridge, 2010), pp. 43–4.

Although the registry was designed to make information about individuals' criminal histories available to court administrators and judges, these officials were not the only people who had access to them. The Prussian regulations for the criminal registry stated that every public agency was allowed to ask for the contents of a criminal record.²² Public authorities at both the lower communal and the higher state levels could—if they considered it necessary—directly inquire into a person's criminal history. The original regulations for the criminal registry even included quasi-public institutions like insurance agencies and railway companies in the list of agencies permitted to request this information.²³

Simultaneously, however, the Prussian Ministry of the Interior was interested in ensuring the records not be accessed too liberally. Information from the criminal registry was therefore not to be distributed to private agencies. If private parties were interested in criminal biographies, they could ask individuals to provide a certificate of conduct (*polizeiliche Führungszeugnis*), but they were not allowed to inquire directly at a local office about a person's criminal records. In this respect, the Prussian authorities were stricter than the authorities in France or even Saxony, where so-called 'private information agencies' (*private Auskunftsinstitute*) were allowed direct access to the criminal registry.²⁴ These organizations were mostly interested in establishing information related to creditworthiness, for which a clean record was considered important. The Prussian officials were opposed to this practice, though their opposition was not necessarily grounded in concern about the privacy of ex-offenders but instead based on the principle of the secrecy of bureaucratic files (*Aktengeheimnis*).²⁵ To ensure that principle was upheld in the local offices of the state prosecutor, the Prussian Ministry actively monitored how information from the criminal registry was distributed and repeatedly undertook mass inquiries into its use at the local level.²⁶

According to a circular letter from 1906, as a result of such oversight the Prussian Minister of the Interior had been made aware that, regrettably, local authorities often provided information from the criminal registry to such information agencies even though this went against protocol.²⁷ For that reason, the minister launched another investigation, into the supplying of information from the criminal registry to non-governmental parties in several Prussian districts. It turned out that local authorities often had their own way of dealing with information contained in the criminal registry. In the police district of Aachen, for instance, the authorities were relatively lax about providing information from the criminal registry. In response to an enquiry from the Prussian minister, the Aachen police authorities reported that their official policy was not to give private parties information from the registry, but the police commissioner wrote to

²² 'Verordnung betreffend die Einrichtung von Strafregistern und die Wechselseitige Mittheilung der Strafurtheile', *Central-blatt für das Deutsche Reich*, 10 (1882), pp. 309–31.

²³ See Müller, *Vorstrafen und Strafregister*, pp. 24–5.

²⁴ Marchand, *Das Strafregister*, p. 113; E. Delaquis, *Die Rehabilitation im Strafrecht* (Berlin, 1907), p. 192; H. Rohé, *Das kaufmännische Auskunftswesen: seine Entwicklung und seine Beziehungen zu Kaufmannschaft und Behörden* (Munich, 1901), p. 41.

²⁵ Marchand, *Das Strafregister*, p. 51. On the problem of the secret in state administration: M. Foucault, *Security, Territory, Population: Lectures at the Collège de France, 1977–78*, ed. M. Senellart, trans. G. Burchell (Basingstoke, 2009), pp. 275–8.

²⁶ Geheimdes Staatsarchiv Preußischer Kulturbesitz, Berlin (henceforth GStA PK), I. HA Rep. 84a, no. 7853.

²⁷ Landesarchiv Nordrhein-Westfalen, Abteilung Rheinland, Duisburg (henceforth LAV NRW R), BR 0005, no. 23246.

the minister that he had lectured his officials about correct practices in relation to the criminal registry as it had turned out that the local administrators gave out information to practically anyone who wanted it.²⁸ Thus, even though the state aimed to have full control over the circulation of criminal histories, (private) parties repeatedly tried to renegotiate the terms under which the information was distributed.

Capacity was another problem. Almost immediately after the registry came into being, officials started complaining about the constantly increasing number of offences it recorded.²⁹ In a circular from 1889, the Prussian Minister of the Interior, Ernst Ludwig Herrfurth, indicated that almost 350,000 sentences had been recorded in Prussia in 1887 alone.³⁰ Although Herrfurth noted that he was convinced that the criminal registry was proving its worth as an information system, this increase meant that bureaucrats responsible for maintaining the registry were seriously overburdened. They wondered if entries might be erased, but the regulations stated that records could only be removed if it was proven beyond reasonable doubt that the relevant person was deceased. As this information rarely reached the offices of those responsible for the criminal registry, prison officials and police officers were requested to send reports of everyone who died in their districts to the bureaucrats responsible for the criminal registry.³¹ These early concerns demonstrate that limiting the expanse of the registry was an issue long before citizens and legal scholars of the German Empire started to demand regulations for the expungement of criminal records—and not in an effort to protect ex-offenders' privacy, but simply in order to keep the system manageable.

While bureaucrats were voicing a concern that they had too much information to control, legal scholars were arguing in the opposite direction, seeking an expansion of the information stored in the registry. Some jurists argued that the registry should be complemented with other information that might be relevant for court decisions. For instance, Walter Matthaei, a judge from Hamburg, argued that information about acquittals could be of interest to judges too and should therefore be included in the biography of the criminal records alongside actual convictions. He also argued that information about mental disabilities and alcoholism could be valuable for judges in determining guilt.³² Matthaei was not the only jurist to argue for an expansion of the types of information gathered in the database. The fundamental issue here was the purpose of the registry: was it to serve as a record of a person's criminal history or as a source of information on a person's trustworthiness and possible culpability?

In an encyclopaedia article published in 1890, Herman Seuffert pleaded for the listing of physical characteristics such as the size of the skull and length of the arms and for the inclusion of a photograph, if available.³³ In a scholarly article from 1902, legal

²⁸ *Ibid.*

²⁹ See Bundesarchiv Berlin-Lichterfelde (henceforth BA-BL), R 3001/5578. The information kept at the Reichsjustizamt concerned the criminal records of people who were not born in Germany. A circular from 12 Jan. 1897 complained about the overburdening of the officials in this office. See also BA-BL, R 3001/5500; the 'constantly growing workload' was also raised in these files.

³⁰ LAV NRW R, BR 0005, no. 22834, circular from 11 June 1889.

³¹ *Ibid.* The same circular is also found in Brandenburgisches Landeshauptarchiv, rep. 2A I Pol, 2109.

³² W. Matthaei, 'Erweiterung des Strafregisters', *Archiv für Kriminal-Anthropologie und Kriminalistik*, 18 (1905), pp. 304–12. Similarly, L. Hagen, 'Die geistig Minderwertigen und das Strafregister', *Deutsche Juristen-Zeitung*, 11, 3 (1906), pp. 197–8; see Wetzell, *Inventing the Criminal*, p. 98.

³³ H. Seuffert, 'Strafregister', in K. von Stengel (ed.), *Wörterbuch des deutschen Verwaltungsrechts* (1890), pp. 565–74, here p. 573.

scholar Jacques Stern argued that the authorities should include information about family, physical health and any 'hereditary defects'; in short he held that the criminal record should focus not only on the biography of a person but also on their genetic characteristics. He believed that the information contained in the criminal registry should represent the 'complete character' of the offender and nothing less.³⁴ The 'complete character' of the criminal was a popular notion amongst scholars of the modern criminal sciences who sought a focus on the character of the offender rather than on the nature of the offence.³⁵ Furthermore, Stern's views were associated with the 'medicalization' of criminal policy, with 'incurable' offenders increasingly labelled incapable of reform and diagnosed with exceptional psychological states.³⁶ As Richard Wetzell has noted, criminologists at this time increasingly highlighted inherited traits, an approach evident in Stern's emphasis on the 'hereditary defects' of past offenders.³⁷

Despite the dominant presence of modern medicalized criminology in academic journals, the criminal registry was not reformed in this direction. None of the suggestions made by these scholars were incorporated into the criminal registry. Information about mental disabilities, alcohol abuse or hereditary characteristics was never included. Their suggestions were viewed with scepticism by other scholars, who argued that they were not in accord with the purpose of the registry. They pointed out that the criminal registry was not to be confused with Bertillonage, a system designed by the French criminologist Alphonse Bertillon that involved recording a criminal's physical features in order that the individual could be identified again.³⁸ Bertillonage was intended as a tool for establishing identity, whereas the identity of the individual listed in the criminal registry was already known to the authorities; the register was instead intended to assess moral credibility.³⁹

All these suggestions therefore met with opposition from conventional bureaucrats and the more classically oriented legal scholars. The rejection of the suggestion that further information about the mental state of ex-offenders should be included should also be seen in light of a broad mistrust of psychiatry, particularly in conservative circles.⁴⁰ Opponents emphasized that moral credibility should be determined on the basis of earlier actions/criminal activities not hereditary characteristics or elements such as

³⁴ Stern, 'Das Wesen des Strafregisters', p. 261. See Becker, 'Strategien der Ausgrenzung', p. 429. This question was also debated at a meeting of the International Union of Penal Law in 1896: *Mitteilungen der Internationalen Kriminalistischen Vereinigung*, vol. 5 (Berlin, 1896), p. 496.

³⁵ See E. von Sichert, 'Über individuelle Faktoren des Verbrechen', *Zeitschrift für die gesamte Strafrechtswissenschaft*, 10 (1890), pp. 37–50.

³⁶ R. F. Wetzell, 'The Medicalization of Criminal Law Reform in Imperial Germany', in N. Fintzsch and R. Jütte (eds), *Institutions of Confinement: Hospitals, Asylums, and Prisons in Western Europe and North America, 1500–1950* (Cambridge, 2003), pp. 275–84; C. Müller, *Verbrechensbekämpfung im Anstaltsstaat: Psychiatrie, Kriminologie und Strafrechtsform in Deutschland 1871–1933* (Göttingen, 2004).

³⁷ Wetzell, *Inventing the Criminal*, pp. 299–300.

³⁸ On the use of Bertillonage in Berlin: Hett, *Death in the Tiergarten*, pp. 175–8; D. Kammerer, 'Welches Gesicht hat das Verbrechen? Die "bestimmte Individualität" von Alphonse Bertillons Verbrecherfotografie', in N. Zurawski, (ed.), *Sicherheitsdiskurse. Angst, Kontrolle und Sicherheit in einer 'gefährlichen' Welt* (Frankfurt/Main, 2007) pp. 27–38. See also Gross, *Handbuch für Untersuchungsrichter*, pp. 357–62.

³⁹ Stern, 'Das Wesen des Strafregisters', pp. 260–1; Marchand, *Das Strafregister*, p. 49; F. Paul, 'Zum Wesen des Strafregisters', *Archiv für Kriminal-Anthropologie und Kriminalistik*, 9 (1902), pp. 350–2.

⁴⁰ E. J. Engstrom, 'Zur Geschichte der Psychiatriekritik im 19. Jahrhundert', *Themenportal Europäische Geschichte* (2011), <http://www.europa.clio-online.de/2011/Article=507> (accessed 16 July 2019).

religious affiliation which had no bearing on moral credibility, or were at least difficult to interpret.⁴¹ A list of past convictions was a simplification and the most 'legible' record for the formulated purposes of the criminal registry.⁴²

III. The 'Cult of Previous Convictions'

Even though the criminal registry remained limited to information about past convictions, the prominent role of criminal records in Wilhelmine trials had undesired consequences. In 1907, an author for the *Frankfurter Zeitung* noted that the legal significance ascribed to past convictions—in combination with the 'police's nosing about into the lives of ex-offenders'—was one of the worst aspects of the German system of criminal justice: 'Being asked about previous convictions by a court years after living an exemplary life can destroy a man with a single stroke'.⁴³ Commentators frequently equated inquiry into a person's 'criminal career' with the practices of the Inquisition and termed it a 'modern torture'.⁴⁴ In the public arena, this issue became known as the problem of 'the previous convictions' (*die Vorstrafen*). And according to a journalist for the *Vossische Zeitung*, a 'cult of previous convictions' had infested the German judicial system.⁴⁵

What was the extent of the problem? Legal scholars knew about the huge number of criminal convictions recorded in the German crime statistics. However, detailed knowledge about the number of people who belonged to this class of 'previously convicted people' was not available. In 1912 a publication by Karl Finkelnburg, director of the prison in Moabit, changed this situation. Based on his assessment of the official statistics, Finkelnburg argued that at least one in six male German citizens must belong to this class of people.⁴⁶ Without a doubt, the proliferation of short-term prison sentences (a thorn in the side of many liberal scholars) strongly contributed to this figure.⁴⁷ To many commentators, the large number of previously convicted citizens was reason to argue that an earlier conviction was a meaningless piece of information. As Weimar lawyer and literary critic Kurt Tucholsky years later cynically noted, 'I am not proud of having no criminal record, it is a coincidence'.⁴⁸

Yet, as the author of a short treatise on previous convictions (published anonymously by the Volkswirtschaftliche Verlag in 1913) argued, not every punishment should

⁴¹ Delaquis, *Die Rehabilitation*, p. 192.

⁴² On the notion of 'legibility' and simplification see Scott, *Seeing Like a State*.

⁴³ GStA PK, I. HA Rep. 84a, 8509, p. 127: *Frankfurter Zeitung* (9 Apr. 1907).

⁴⁴ 'Juristische Rundschau', *Deutsche Juristen-Zeitung*, 13 (1908), p. 860; 'Rehabilitation', *Dresdner neueste Nachrichten* (3 Dec. 1910).

⁴⁵ 'Die Vorstrafen', *Vossische Zeitung* (28 Sept. 1905).

⁴⁶ K. Finkelnburg, *Die Bestraften in Deutschland. Ein Ermittlungsversuch, wieviele Millionen der deutschen Reichsbevölkerung (Reichsvolkszählungstag vom 1. Dezember 1910) wegen Verbrechen oder Vergehen gegen Reichsgesetze bestraft sind* (Berlin, 1912), pp. 38–9; Schäfer and Hellwig, *Straftilgungsgesetz*, p. 11.

⁴⁷ Liszt, 'Kriminalpolitische Aufgaben', p. 742; A. Wach, *Die Reform der Freiheitsstrafen* (Leipzig, 1890), p. 17; E. Rosenfeld, *Welche Strafmittel können an die Stelle der kurzzeitigen Freiheitsstrafe gesetzt werden?* (Berlin, 1890); H. Appellus, *Die bedingte Verurteilung und die anderen Ersatzmittel für kurzzeitige Freiheitsstrafen: eine Kritik der neuesten Reformbestrebungen auf dem Gebiet des Strafrechts* (Cassel, 1890); P. Heilborn, *Die kurze Freiheitsstrafe* (Leipzig, 1908).

⁴⁸ K. Tucholsky [pseudonym: Ignaz Wrobel], 'Aha!', *Freiheit*, 3, 447 (21 Oct. 1920), p. 2.

be perceived as a previous conviction—only those that had an impact on the ‘social appraisal’ of an individual.⁴⁹ The emphasis on the notion of ‘social appraisal’ is indicative that the concern was not just with the distribution of criminal records. The larger problem was that a great moral significance was attributed to this information. At the same time, the various authorities held different ideas about which offences were relevant for the registry and what affected the ‘social appraisal’ of citizens. For instance, the Bavarian bureaucracy registered many more offences than the authorities in other German states, for it included simple contraventions.⁵⁰ Critics believed that the problem lay not only in the bureaucratic will to know, but also, and even more so, in the people’s strong attachment to specific ideas about honour and morality. From this point of view, the bureaucratic will to know appeared as the inevitable outcome of a general mind-set that equated law-abidingness and ‘unblemishedness’ (*Unbescholtenheit*) with honour.⁵¹

The effects of the moral vocabulary that surrounded criminal records were visible in what the influential criminologist Albert Hellwig termed ‘the Karl May problem’.⁵² In his youth, the famous adventure author had served time in prison for several offences, such as robbery, swindle and fraud. During his subsequent career as a writer, he had been publicly ‘exposed’ as an ‘untrustworthy’ criminal, particularly by those who questioned the moral influence of his work on German youth.⁵³ His criminal record became a prime argument for his opponents who sought to establish that his works were morally suspect.⁵⁴ In his autobiographical writings, May denounced the ‘cruel’ and ‘deep-rooted prejudice’ in German society that meant that all those who had served a sentence were seen as a ‘criminal’ for the rest their lives:

There are hundreds of ways in which he [the ex-convict] is viewed and treated as a second-class person, and he has to have command over an uncommon presence of mind, serenity and willpower to bear it again and again without falling back into old habits. The greatest danger for him is that his neighbours gradually take from him his feeling of honour. [...] This will not and cannot change so long as people continue to hold onto the old, nonsensical, cruel prejudice that every person who has been punished should be viewed as a ‘criminal’ for the rest of his life.⁵⁵

May was most upset not by the activities of the information state, but by the culture of gossip. Shaming citizens for a criminal sentence forced the previously convicted to lead a sequestered life. The quote illustrates a widespread sentiment that Germans ascribed too much moral significance to a previous conviction. The equation of law-abidingness with honour would influence future legislation concerning the criminal registry.

⁴⁹ *Die Löschung von Vorstrafen im Strafregister. Von einem Juristen* (Berlin, 1913), p. 5.

⁵⁰ Müller, *Vorstrafen und Strafregister*, p. 37.

⁵¹ F. Zunkel, ‘Ehre, Reputation’, in O. Brunner, W. Conze and R. Koselleck (eds), *Geschichtliche Grundbegriffe: historisches Lexikon zur politisch-sozialen Sprache in Deutschland*, vol. 2: *E–G* (Stuttgart, 1975), pp. 1–63, here p. 32; see U. Frevert, ‘Ehre—männlich/weiblich: zu einem Identitätsbegriff des 19. Jahrhunderts’, *Tel Aviver Jahrbuch für Deutsche Geschichte*, 21 (1992), pp. 21–68.

⁵² A. Hellwig, ‘Die kriminalpsychologische Seite des Karl-May-Problems’, *Karl-May-Jahrbuch*, 3 (1920), pp. 187–250.

⁵³ For instance: F. W. Kahl, *Karl May. Ein Verderber der deutschen Jugend* (Berlin, 1908).

⁵⁴ In fact, even in his obituary people found it necessary to mention his prison sentences as a significant part of his biography. See L. Gurlitt, *Gerechtigkeit für Karl May* (Dresden, 1919), pp. 9–13.

⁵⁵ K. May, *Mein Leben und Streben* (Freiburg, 1910), p. 125.

IV. Mobilizing Empathy

The concerns about the ‘cult of previous convictions’ were the start of a broader campaign to mobilize empathy for the ‘victims’ of the criminal registry. In November 1905, a story about a Cologne-based mechanic was published in the *Kölnische Volkszeitung*. In his youth the mechanic had served time in prison, but he had subsequently found employment as a skilled labourer with a Cologne manufacturer who knew his reputation. He married and started a family, but his wife and his future employers were unaware of his criminal past. When he had to appear before a court of assizes (*Schöffengericht*) for what in the eyes of the author was a mere ‘bagatelle’, the court president mentioned in the presence of his wife and assistants that the man had been sentenced years earlier to time in prison. Acquitted but gripped by shame, he immediately left the court after the trial and moved abroad, only to find himself entangled in another judicial affair years later. His lawyer then pleaded that it was the harshness of the law that was to blame for the man’s situation.⁵⁶

In the September issue of the *Freiburger Zeitung* for the same year, a writer recalled a similar story.⁵⁷ Both stories revolved around embarrassment experienced by a German citizen, a feeling the authors believed understandable in light of the moral prejudices against people with criminal records. They highlighted their subjects’ mortification in order that their readers might empathize and support the arguments against such humiliation. These newspaper articles had significant similarities with a type of narrative frequently found in novels and plays from the 1880s onwards, authored in particular by members of the naturalism movement, a literary genre that aimed to evoke compassion for the least well-off in society.⁵⁸ The proponents of this movement sought to portray life within the substrata, or *milieus*, of society such that their readers or audiences would feel empathy for the protagonists in their stories.⁵⁹ The *Milieustücke* of naturalism portrayed characters of a type hardly ever present in earlier German theatrical plays. In particular, they wrote about members of the working classes and petty bourgeois citizens who had fallen into the lowest levels of society. In choosing previously off-limit topics, the naturalists sought to familiarize their audience with a broader range of social experiences.⁶⁰

Novels and plays that centred on the sorrows of ex-convicts included Hermann Sudermann’s play *Stein unter Steinen* (1905), Albert Bernstein-Sawersky’s play *Vorbestraft!* (1905), Max Treu’s novel *Das ewige Gericht* (1905) and Diedrich Theden’s novel *Die zweite Buße* (1902). In a review of Sudermann’s play *Stein unter Steinen*, an American literary critic observed that ‘the attitude of society toward an ex-convict’ was ‘not un-familiar in German dramatic literature’.⁶¹ Gerhart Hauptmann, the archetypal author of

⁵⁶ ‘Aus Westdeutschland’, *Kölnische Volkszeitung* (23 Nov. 1905).

⁵⁷ ‘Die Reformbedürftigkeit unserer Strafjustiz’, *Freiburger Zeitung* (3 Dec. 1905).

⁵⁸ See J. H. Marschan, *Das Mitleid bei Gerhart Hauptmann: psychologisch-ästhetische Betrachtungen* (Dortmund, 1919).

⁵⁹ On the notion of ‘milieu’ in naturalist fiction see J. Feldhoff, ‘Milieu’, in J. Ritter (ed.), *Historisches Wörterbuch der Philosophie*, vol. 5: L–Mn (1980), pp. 1393–5.

⁶⁰ R. Arnold, *Das moderne Drama* (Strasbourg, 1908), p. 249; G. Finney, ‘Poetic Realism, Naturalism, and the Rise of the Novella’, in C. Koelb and E. Downing (eds), *German Literature of the Nineteenth Century, 1832–1899* (Rochester, 2005), pp. 117–38, here p. 127.

⁶¹ ‘Two New Plays by Sudermann’, *Current Literature*, 40 (1906), p. 198.

naturalism, also explored this theme in his novella *Phantom*, published in 1923. Many of these writings sought to make the case that the aftermath of a punishment could be just as bad as the punishment itself and particularly harmful to the ‘sense of honour’ of upstanding citizens. That idea was integral to the very title of Theden’s novel *Die zweite Buße* (The Second Penance).

The earliest and most clear-cut example of such a narrative was found in a serial novella titled *Vorbestraft* (1891/2) by the novelist Paul Blumenreich, who would later found the *Theater des Westens*, an important theatre for the naturalistic movement in Berlin. Blumenreich was not a particularly prominent author, but as a frequent contributor to the feuilletons of leading newspapers, he could ensure his work reached a large audience. The novella tells the story of Ewald Heinrich Forster, a physician described as an educated and honourable man. But Forster has a big secret: when he was about twenty years old, he was found guilty of fraud and served time in prison. His spouse and her family are unaware of his conviction. Forster’s secret eventually comes out when a man Forster knew from his childhood is put on trial for fraud. Forster’s father-in-law, Mr Brausewein, happens to be the judge in the case and plans to call Forster to the stand as a character witness. As protocol requires, Brausewein contacts the local authorities at Forster’s place of birth and asks them to send an extract from his son-in-law’s criminal record. He is informed that Forster ‘lacks credibility’ because of a criminal conviction. Concerned about Forster’s ability to be an upright father and role model, Brausewein forces his daughter to separate from her husband to save their children, commenting, ‘Better they would have a poor but honourable day labourer for a father! The ex-con must get out of our house!’⁶²

Such stories almost always focussed on men from a middle-class background who had served time in prison, often after being falsely convicted or having acted out of youthful naivety. Critics were not unanimously positive about the stories, arguing sometimes that they appealed too much to a bourgeois audience and exploited a real social problem.⁶³ One critic argued that Blumenreich’s story would be much more appealing if the main character was more complex—for instance if he had consciously and willingly turned to crime. The German bourgeoisie’s rigidity on the essential distinctions between social classes would then be exposed more effectively.⁶⁴

Yet such criticism missed the point of most of these stories. Members of the German middle classes—white-collar workers (*Angestellte*) in particular—were more prone to becoming ‘victims’ of the culture of suspicion than other members of society. Paragraph 831 of the German Civil Code (*Bürgerliches Gesetzbuch*), which addressed the accountability of employers for damage caused by their employees, required employers to assess the ‘moral irreproachableness’ of their employees before they hired them. This obligation covered only workers with greater responsibilities, not workers who carried out simple, repetitive tasks.⁶⁵ As a result of this disparity, skilled workers were asked for

⁶² P. Blumenreich, ‘Vorbestraft’, *Bibliothek der Unterhaltung und des Wissens*, 3 (1892), 75–195, here p. 145.

⁶³ This critique was for instance also often heard as a reaction to Sudermann’s *Stein unter Steinen*, whose main protagonist was convicted although innocent and thus not a ‘real’ criminal: P. Goldmann, ‘Stein unter Steinen’, in P. Goldmann, *Vom Rückgang der deutschen Bühne: polemische Aufsätze* (Frankfurt/Main, 1908) pp. 189–99; *Literarisches Zentralblatt für Deutschland*, 57, 6 (1906) pp. 127–8; *Die Fackel*, 188 (1905), pp. 17–19.

⁶⁴ H. von Weber, ‘Paul Blumenreich, Vorbestraft’, *Die Gesellschaft*, 13, 2 (1897), pp. 122–3.

⁶⁵ See A. Karger, ‘Die Anstellung vorbestrafter Personen und die Unternehmerhaftung’, *Deutsche Strafrechts-Zeitung*, 5, 11 (1918), pp. 364–5.

a certificate of conduct to attest to their 'moral irreproachableness' much more frequently than unskilled day labourers.⁶⁶

In addition, the stories may have been intended to criticize the criminal registry's disruption of (presumably) stable class distinctions, in that a single criminal record could expose an 'upstanding' middle-class citizen as a member of the lower 'criminal classes'. Ironically, this destabilizing aspect of the criminal registry was the flipside of an anxiety about the criminal's passing that could be found in many commentaries on modern urban life and crime. This anxiety is well illustrated by Berlin public prosecutor Gustav Otto's comments on 'the Berlin criminal' found in his work *Die Verbrecherwelt von Berlin* (Berlin's Criminal World), published under the pseudonym Omega Sigma:

The clueless citizen or visitor in Berlin who walks around, goes to restaurants and looks at the sights doesn't realize that a large number of the people he comes into contact with, who offer him their services or who actually serve him are really subjects with a lengthy criminal record. [...] The Berlin criminal [...] is generally polite and humble and has the urbane sensibilities that life in a big city impresses even upon its lower-class residents. His appearance is not unkempt and filthy. Rather, he is, so long as he can afford it, well-kempt and well-dressed, even elegant, and he goes further in ensuring a fine appearance by keeping his skin clean and taking good care of his hair and beard.⁶⁷

The idea that members of 'the criminal underworld' could blend into society so easily made city dwellers fearful.⁶⁸ The anxiety about passing originated in this possibility and fuelled a desire for tools that could be used to expose offenders.⁶⁹ This anxiety also surfaced with the *cause célèbre* of Friedrich Wilhelm Voigt, better known as the Hauptmann von Köpenick (the Captain of Köpenick), who managed to con the Berlin authorities by 'passing' as an army officer.⁷⁰ For critics of the registry 'upstanding' middle-class citizens had become collateral victims of this perhaps well-founded anxiety about passing and therefore needed special protection.

The authors of these stories aimed to create empathy with a specific class of victims with whom their bourgeois audience could easily identify. Here lies, indeed, the paradox of empathy: it is more easily felt for people to whom the empathizer can relate.⁷¹ In this way, the authors' endeavours to mobilize empathy for the victims of the registry frequently contributed to reinforcing society's belief in stable class distinctions.

V. Paths to Codifying the Right to be Forgotten

The stigmatizing associated with the criminal registry conjured up associations with punishments in the early modern penal arsenal, such as branding. Many commentators,

⁶⁶ See H. Prasse, 'Die Bedeutung der Vorstrafe im Arbeitsrecht', *Arbeit und Recht*, 5, 3 (1957), pp. 76–81, here p. 77.

⁶⁷ G. Otto, *Die Verbrecherwelt von Berlin* (Berlin, 1886), p. 86.

⁶⁸ See P. Leo, 'Der "fremde Andere": zur Sichtbarkeit des Einzelnen in den Inszenierungen der modernen Großstadt', in W. Hardtwig (ed.), *Ordnungen in der Krise: zur politischen Kulturgeschichte Deutschlands 1900–1933* (Munich, 2001), pp. 261–92.

⁶⁹ On 'stigma' and 'passing': E. Goffman, *Stigma: Notes on the Management of Spoiled Identity* (Englewood Cliffs, NJ, 1965), pp. 48–62.

⁷⁰ Hett, *Death in the Tiergarten*, pp. 179–94; W. Rosenblum, *Beyond the Prison Gates: Punishment and Welfare in Germany, 1850–1933* (Chapel Hill, 2008) pp. 103–21.

⁷¹ J. Eder, 'Ways of Being Close to Characters', *Film Studies*, 8, 1 (2006), pp. 68–80, here p. 74; S. Keen, 'A Theory of Narrative Empathy', *Narrative*, 14, 3 (2006), pp. 207–36; C. J. Van Lissa, M. Caracciolo, T. van Duuren and B. van Leuven, 'Difficult Empathy: The Effect of Narrative Perspective on Readers' Engagement with a First-person Narrator', *Diegesis: Interdisziplinäres E-Journal für Erzählforschung*, 5, 1 (2016).

including Fritz Hartung, a high official in the Prussian Ministry of Justice, felt the need to emphasize that inclusion in the registry did not belong to the *genus* of punishments.⁷² That distinction allowed policy makers to insist that inclusion in the criminal registry should not have the emotional impact of a punishment. Practice did not necessarily align, however, with their intention. In 1908 a law student could record in his dissertation on the criminal registry, 'Today it is really quite difficult to clearly distinguish between additional punishments and the consequences of having been punished'.⁷³

The punishment-like impact of the criminal registry led to demands for the harm done by the registry to be eliminated. In 1907 the liberal politician Robert Friedberg brought the excrescence of the criminal registry before the Prussian House of Representatives, terming it 'the sin of our times'.⁷⁴ The solution was sought predominantly in the codification of the 'right to be forgotten'. Most of the calls for legislation in this direction preceded a failed political initiative to reform the Penal Code and the Code of Criminal Procedure in 1909.⁷⁵ An intensive exchange about the pros and cons of legislation that would combat the 'cult of previous convictions', for instance, appeared in the journal *Nord und Süd* in 1907.⁷⁶ Positions in the debate were not easily reduced to a liberal/conservative political divide. Prominent liberal progressivists such as the criminologist Hans Gross devotedly defended the current use of the criminal registry. Gross recorded that the practice of 'collecting information about past convictions is essential and indispensable [...] Beyond human knowledge, we have nothing that tells us more about a person than his biography, his previous convictions'.⁷⁷

Inspired by accounts in newspapers and naturalist fiction, scholars and politicians often alluded to the emotional stories of the 'victims' of the registry as an argument in favour of reform of the legislation surrounding the criminal registry. Ernst Delaquis, the most-cited expert on the different kinds of formal rehabilitation, frequently referred to letters he received from people who shamefully had had to expose their status as 'previously convicted'.⁷⁸ In a newspaper article, legal professor August Köhler in fact underlined that the circulation of narratives on 'victims' of the registry severely influenced the judicial debate.⁷⁹

Before there were any laws or regulations on expungement, ex-offenders had only one option for striking an entry from their record and thus becoming 'forgotten': they could petition for a pardon. As the police records of the city of Aachen show, these petitions ended up in a stack along with petitions from individuals who had been punished

⁷² Fritz Hartung, *Das Strafregister: Gesetz über beschränkte Auskunft aus dem Strafregister und die Tilgung von Strafvermerken* (Berlin, 1926), p. 19.

⁷³ Müller, *Vorstrafen und Strafregister*, p. 67.

⁷⁴ *Stenographische Berichte über die Verhandlungen des Preussischen Hauses der Abgeordneten, 20. Legislaturperiode* (Berlin, 1907), p. 74.

⁷⁵ T. Vormbaum and K. Rentrop, *Reform des Strafgesetzbuchs: 1909 bis 1919* (Berlin, 2008).

⁷⁶ F. Wachenfeld, 'Die Vorstrafen', *Nord und Süd*, 122 (1907), pp. 25–35; J. Rosenblatt, 'Die Vorstrafen', *Nord und Süd*, 123 (1907), pp. 273–9; H. Gross, 'Die Bedeutung der Vorstrafen im Strafprozeß', *Nord und Süd*, 123 (1907), pp. 128–31; Gerland, 'Die Verjährung der Vorstrafen'; K. von Lilienthal, 'Die Vorstrafen', *Nord und Süd*, 124 (1908), pp. 154–60; W. Höpfner, 'Die Vorstrafen', *Nord und Süd*, 125 (1908), pp. 481–8.

⁷⁷ Gross, 'Die Bedeutung der Vorstrafen im Strafprozeß', p. 128.

⁷⁸ E. Delaquis, 'Rehabilitation und Strafregister', *Schweizerische Zeitschrift für Strafrecht*, 25 (1912), pp. 99–128, here p. 109.

⁷⁹ A. Köhler, 'Die Feststellung der Vorstrafen im Prozess', *Allgemeine Zeitung* (26 Apr. 1907).

with the formal forfeiture of their civil rights (*Aberkennung der bürgerlichen Ehrenrechte*).⁸⁰ In Germany this sentence was known colloquially as the ‘honour punishment’. While some historians have argued that this punishment was an irrelevant relic from earlier times, it would have a crucial role in the public debate over the use of the criminal registry.⁸¹ The reason lay in the practical similarities between this punishment and the effects of the criminal registry: both created an invisible stigma that might be exposed.

In the absence of laws that held out the possibility of expungement, local municipalities initially treated requests for expungement in the same way as they treated requests for clemency when civil rights had been deemed forfeited. This approach became official policy with a decree from 17 April 1913 which ruled that people could petition for the expungement of their record in the same way that people could ask for the restoration of their civil rights.⁸² ‘The right to be forgotten’ was thus for the first time acknowledged in a national decree. Yet, the decree was much criticized and it was in many ways inconsistent with the views of scholars who believed that expunging a criminal record should not be treated as a pardon. The use of clemency, they argued, would create the impression that an entry in the criminal registry was not just a bureaucratic procedure but actually a punishment.⁸³ Such arrangements, they feared, would bolster the already existing impression that criminal records served the same emotional function as ‘the honour punishment’.

The most prominent vocal critic of the decree from 1913 was left-wing politician Karl Liebknecht. He argued that the decree granted the right to be forgotten as a privilege, available only to some, which was not a real solution to Germany’s ‘overproduction of punishments’:

We are still suffering from too much punishment, from the overproduction of punishments [...] You all are aware of the fact that on 17 April of last year a decree was issued that made expungement possible through petitioning for clemency. But it is clear that this is insufficient. We must make legal guarantees that records be deleted after a certain period of time, there must be a right to rehabilitation in this fashion.⁸⁴

In Liebknecht’s view, there was only one solution: legally defined expiration dates for entries in the criminal registry. The right to be forgotten would then be within reach of all offenders, and German society would benefit from having a smaller set of previously convicted subjects.

In the scholarly debate, however, another option was generally favoured. An interesting coalition emerged here between advocates of the ‘modern’ school and proponents of the ‘classical’ school. Delaquis (who was a pupil of Liszt and a typical modern scholar) and Friedrich Oetker, one of the most important proponents of the classical school, both argued that expungement should be a matter of effort and reward. If judges were given responsibility for assessing an ex-offender’s improvement,

⁸⁰ LAV NRW R, BR 0007, no. 30722.

⁸¹ M. Fröhling, *Der moderne Pranger: von den Ehrenstrafen des Mittelalters bis zur Prangerwirkung der medialen Berichterstattung im heutigen Strafverfahren* (Marburg, 2014) p. 109; Ortman, *Machtvolle Verhandlungen*, p. 202.

⁸² Bundesratsverordnung vom 7. April 1913, *Zentralblatt für das deutsche Reich*, 22 (1913), p. 495.

⁸³ Müller, *Vorstrafen und Strafregister*, p. 67; BA-BL, R 3001/5480, *Rechtsvergleichende Arbeit von Prof. Dr. Mittermaier* (unpublished manuscript, 1932), p. 25.

⁸⁴ Sitzung 05.02.1914 in Karl Liebknecht, *Gesammelte Reden und Schriften*, vol. 7: *Januar bis August 1914* (Berlin, 1974), p. 51.

the prospect of rehabilitation could be used as a tool to govern the behaviour of ex-offenders and nudge them in the right direction.⁸⁵ They opposed both *rehabilitation gracieuse*, as formulated in the decree from April 1913, and Liebknecht's idea of rehabilitation-by-expiration.⁸⁶ The right to be forgotten should serve, they held, as a 'reward for decent behaviour', in line with the systems of probation and parole.⁸⁷ A version of this idea was included in the draft for a reformed penal code in 1909.⁸⁸ However, after its publication, the idea was criticized as impractical: the system would require too much administration and be too bureaucratic.⁸⁹

Before the outbreak of the First World War, the general dissatisfaction with the criminal registry became clear once again when in 1914 another tragic story instigated a debate in the Reichstag about the criminal registry. It started with public outcry following an account in a newspaper of a failed suicide attempt by a 25-year-old woman from Nuremberg. According to the local press, when she appeared as a witness at a court in Amberg, she had been confronted with her criminal record, which stated that she had been imprisoned at age eighteen for petty theft. After the trial, the woman had returned home and slit her wrists; she had survived but remained in hospital. The story was quickly picked up by newspapers around the German Empire.⁹⁰ When the story reached the Reichstag, the National Liberal member of parliament Eugen Schiffer used the case to call on judges to show more empathy: 'They should feel first and foremost as human beings and should only hold a witness's previous conviction against him when it facilitates the course of justice or is absolutely necessary for determining whether he will tell the truth'.⁹¹ The Reichstag debate did not lead to any significant changes in legislation, but interestingly Schiffer, in his function as Minister of Justice, would be responsible for the introduction of the Expungement Law in the early years of the Weimar Republic.

VI. Introducing the Expungement Law

During the First World War, Delaquis listed reform of the legislation surrounding the criminal registry as one of the 'penal-related aims of the war'.⁹² Notwithstanding a complicated one-time amnesty established in January 1916, which ruled that previous convictions were pardoned 'in reverse', so that an excerpt from the register noted 'pardoned' after a previous conviction, the debate over structural reform of the registry temporarily subsided.⁹³ After the war had ended, however, the momentum of the political revolutions of 1918/19 was seized by those advocating changes to the treatment

⁸⁵ See Delaquis, *Die Rehabilitation*, pp. 102–4; F. Oetker, *Strafe und Lohn* (Würzburg, 1907) p. 24.

⁸⁶ On the notion of *rehabilitation gracieuse* see Delaquis, *Die Rehabilitation*, pp. 96–100.

⁸⁷ F. Oetker, 'Rechtsgüterschutz und Strafe', *Zeitschrift für die gesamte Strafrechtswissenschaft*, 17, 1 (1897), pp. 493–588, here p. 561.

⁸⁸ *Vorentwurf zu einem Deutschen Strafgesetzbuch* (Berlin, 1909), pp. 175–7.

⁸⁹ W. Kahl, K. von Lilienthal, F. von Liszt and J. Goldschmidt, *Gegenentwurf zum Vorentwurf eines deutschen Strafgesetzbuchs* (Berlin, 1911); G. Lindemeyer, *Die Wiedereinsetzung, Rehabilitation* (Berlin, 1913).

⁹⁰ For instance: 'Die Vorbestrafte', *Berliner Volkszeitung* (31 Jan. 1914). See Landgerichtsrat Appellmann, 'Eine Tragödie im Gerichtssaal', *Deutsche Richterzeitung*, 6, 4 (1914), pp. 187–8.

⁹¹ *Stenographische Berichte über die Verhandlungen des Reichstages*, vol. 293 (Berlin, 1914), p. 7438.

⁹² E. Delaquis, 'Strafrechtliche Kriegsziele', *Zeitschrift für die gesamte Strafrechtswissenschaft*, 39, 1 (1918) pp. 276–99, here p. 283.

⁹³ *Dresdner Nachrichten*, 'Die Löschung von Vorstrafen' (1 Mar. 1916); *Berliner Tageblatt* (15 Feb. 1916).

of previously convicted citizens.⁹⁴ The Prussian Ministry of Justice received many letters and complaints about the use of the criminal registry in public affairs during these months. A lawyer from Elberfeld, for example, wrote a lengthy letter to the Prussian Minister of Justice arguing that it was a major task of the new republic to reintegrate citizens with a criminal record into economic life. In the future, he argued, the government should take an active role in reintegrating one-time offenders into the class of 'irreproachable' citizens. Given that crime rates—especially among adolescents—had risen significantly at the end of the First World War, he argued that many eighteen- to twenty-year-olds were being made into 'pariahs' for the rest of their lives.⁹⁵ The lawyer directed his anger mostly at the 'arrogant' (*dünkelhaft*) notions of honour and the 'Pharisaic self-exaltation' of employers which stemmed from the period before the war.⁹⁶ The editor-in-chief of a Berlin-based publishing company also filed an official complaint, arguing that it was time to abolish the practice of interrogating people about their criminal records at court (particularly the criminal courts in Berlin).⁹⁷

Meanwhile, a society involved in 'the struggle for law' (*Kampf um's Recht*) was addressing fair work for ex-convicts and lobbied actively for the protection of those sentenced by a criminal court but hindered in their search for employment by their conviction.⁹⁸ The Association for the Legal Protection of the Previously Convicted (*Rechtsschutzverband der Vorbestraften*), closely associated with the Independent Social Democratic Party of Germany, was founded in Berlin and would later spread its activities to Leipzig, Mannheim and Ludwigshafen.⁹⁹ The organization lobbied for reform of the criminal registry and assisted people with a criminal record in searching for a job, providing them with legal counsel and helping them get their records expunged. The existence of these organizations led to many cynical comments about 'criminals' joining political negotiations.¹⁰⁰ Yet, in this *Traumland* phase in German history, as Wolfgang Schivelbusch called it, these pressure groups believed that a law that provided for expungement could stand as a symbol of the clean slate of the new social state (*Sozialstaat*), which was to be built from the ground up.¹⁰¹

A direct impact of such petitions and pressure groups on German politicians cannot be established, but a draft law making the expungement of entries in the criminal registry possible was presented to the Weimar National Assembly of 1919. In the surprisingly short debate on the draft, it became clear that many members of parliament saw it as the perfect law for the moment. Eugen Schiffer, the minister responsible for the law, was not surprised that it was so uncontroversial, for it was, he believed, the

⁹⁴ H. Freudenthal 'Noch immer kein Rehabilitationsgesetz?', *Berliner Tageblatt* (28 July 1918).

⁹⁵ GStA PK, I. HA Rep. 84a, 7853, p. 7.

⁹⁶ A. Donson, *Youth in the Fatherless Land: War Pedagogy, Nationalism, and Authority in Germany, 1914–1918* (Cambridge, MA, 2010), pp. 162–7; Wetzell, *Inventing the Criminal*, 109–15.

⁹⁷ GStA PK, I. HA Rep. 84a, 7853.

⁹⁸ *Ibid.*

⁹⁹ *Freiheit* (15 Aug. 1920); *Vorwärts* (29 July 1921).

¹⁰⁰ For instance: 'Ein Bund der Vorbestraften und Angeklagten', *Jugend*, 25, 37 (8 Sept. 1920), p. 914; A. Stein, *Berliner Allerlei* (Berlin, 1922), p. 81; *Leipziger Zeitschrift für deutsches Recht, Rechts- und wirtschaftliche Nachrichten*, 14 (1920), p. 16.

¹⁰¹ W. Schivelbusch, *Kultur der Niederlage: der amerikanische Süden 1865, Frankreich 1871, Deutschland 1918* (Berlin, 2001).

endpoint of a longer development rooted in the 'healthy sensitivity of the people'.¹⁰² The only critical reactions in the parliamentary debate were directed not at the law's content but at its timing. Liberal member of parliament Wilhelm Kahl, who was also an influential legal scholar, and conservative Fritz Warmuth wondered if the current time was also the correct time to introduce such a law. Kahl favoured the law in principle, but he noted that postwar societies are typically and inevitably characterized by growing crime rates and feared that the law could impede the deterring function of the penal law.¹⁰³ Otto Landsberg, of the Majority Social Democratic Party of Germany, argued in response, however, that the timing of this law was more than perfect, for it showed that the state could give hope to those who had made a mistake.¹⁰⁴ The new law fitted the rhetoric of hope and the ideals of the new republic, providing a fresh start for the citizens of a new state. Conservative newspapers also supported the law, but they stressed that it was a product not of revolution but of a timeless demand.¹⁰⁵

The law stated that after a certain period of time, its length determined by the nature of the crime, information from the criminal registry provided to interested parties would be limited. Convictions would not be mentioned on a certificate of conduct or delivered to criminal courts. Furthermore, after an extended period of five or ten years, entries in the registry would be erased definitively. If ex-offenders wanted their convictions expunged earlier, they could still petition for clemency.¹⁰⁶ The Weimar government had opted for a system different from the one based on effort and reward for which the coalition of progressive and classical reformers had advocated before the war. Concerns about expanding administration and the immediate problem of the high rate of criminal conviction were reasons for the lawmakers to prefer this model.¹⁰⁷ The Expungement Law did have serious flaws, which Hugo Freudenthal among others highlighted: in an article for the *Berliner Tageblatt* Freudenthal noted that denying a previous conviction during a court interrogation was still an act of perjury, and citizens were therefore still forced to 'confess' their previous mistakes during a trial.¹⁰⁸ The moral panic in the Weimar Republic about perjury reinforced this problem.¹⁰⁹ Other commentators, such as the Berlin member of the court of appeal Karl Klee, therefore argued that this law was only the first step in the much-needed reform of the system of rehabilitation within German penal policy.¹¹⁰

Several commentators noted that without a change of attitude among the German population, the law would have no real effect. The real problem, argued Alfred Brodauf, member of parliament for the liberal German Democratic Party, was the 'overstrained

¹⁰² *Verhandlungen der verfassunggebenden deutschen Nationalversammlung*, vol. 331 (Berlin, 1920), p. 3744.

¹⁰³ *Ibid.*, p. 3746.

¹⁰⁴ *Ibid.*, p. 3748.

¹⁰⁵ *Sächsische Volkszeitung* (3 Dec. 1919).

¹⁰⁶ M. Weiss, *Die Rehabilitation und das Straftilgungsgesetz* (Blaubeuren, 1931), p. 27.

¹⁰⁷ E. Kohlrausch, 'Strafrechtliche Tagesfragen', *Zeitschrift für die gesamte Strafrechtswissenschaft*, 41 (1920) pp. 175–99, here pp. 184–8.

¹⁰⁸ H. Freudenthal, 'Erlösung für Vorbestrafte', *Berliner Tageblatt* (8 Sept. 1920). Examples in *Der Tag* (20 May 1919); *Der Tag* (20 June 1919).

¹⁰⁹ See newspaper articles in *GSa PK*, I. HA Rep 84a, no. 8258; P. Schlesinger (pseud. Sling), *Richter und Gerichtete* (Berlin, 1929); K. Petersen, *Literatur und Justiz in der Weimarer Republik* (Stuttgart, 1988), p. 182.

¹¹⁰ K. Klee, 'Das Straftilgungsgesetz', *Deutsche Strafrechtszeitung*, 7 (1920), pp. 165–7.

appraisal of previous convictions' in German society.¹¹¹ The text that accompanied the Expungement Law explained that it was principally a reaction to the prejudice that 'the penal law is an expression of a people's morals and that he who violates the penal law has shown himself to have moral faults that diminish him in the eyes of his fellow citizens'.¹¹² Thus, the law was justified not as part of a (non-existent) programme to include as many people as possible in the working population but, ultimately, as a measure to root out a moral prejudice.¹¹³

The development that saw the state curtailing emotionally damaging activities linked with the criminal registry could therefore be viewed as part of a larger trend whereby modern nation states no longer used shame as a method of control. In practice, however, as Ute Frevert recently argued, shaming practices did not cease. In most cases, the shaming of citizens previously exercised by the state was now taken on by other citizens.¹¹⁴ This dynamic was also diagnosed and condemned by Kurt Tucholsky: 'We should be at a point in time', he argued in an essay for *Freiheit* in 1920, 'in which wise people do not take the fact of a punishment as a reason to express their distrust in a fellow human being'.¹¹⁵ Yet, he noted in another essay from the same year, German people still had a 'ludicrous aversion to so-called "previously convicted" people'.¹¹⁶ During the years of the Weimar Republic, Tucholsky frequently returned to this topic. In his assessment the greatest problem was that ex-convicts were not protected from prejudice on the shopfloor. In an essay for the *Weltbühne* in 1928, he argued that German workers excluded and shamed ex-convicts as a means of elevating themselves, which was 'a disparagement of one's fellow human being and an overrating of the judge's verdict'.¹¹⁷ Indeed, the Expungement Law could not prevent such discrimination.

VII. Conclusion

The society of the German Empire experienced a cult of previous convictions. Since both authorities and citizens considered a previous conviction a crucial sign of an individual's morality, information about previous convictions was eagerly used and distributed in public administration. The 'anxiety of passing' created by modern urban life reinforced a presumed need to know about individuals' criminal biographies. Meanwhile the victims of this 'cult of previous convictions' continued to grow in number with the more effective use of the criminal registry. The use to which the registry was put, combined with the very large number of criminal convictions, was considered a serious social problem, and from the moment the criminal registry was implemented, various parties in the German Empire were keen to see its deployment curtailed. The emergence of 'the knowing state' also marked the history of a movement in support of the 'not-knowing state'.

¹¹¹ *Verhandlungen der verfassungsgebenden deutschen Nationalversammlung*, vol. 331, p. 3746.

¹¹² *Verhandlungen der verfassungsgebenden deutschen Nationalversammlung*, vol. 339 (Berlin, 1920), p. 1518.

¹¹³ It is generally assumed that support for full-employment policies goes back to the initiatives of William Beveridge; see W. Beveridge, *Full Employment in a Free Society* (London, 1944).

¹¹⁴ U. Frevert, *Die Politik der Demütigung* (Frankfurt/Main, 2017).

¹¹⁵ Tucholsky, 'Aha!'.

¹¹⁶ K. Tucholsky [as Ignaz Wrobel], 'Die Papiere', *Freiheit*, 3, 513 (3 Dec. 1920) pp. 2–3.

¹¹⁷ K. Tucholsky [as Ignaz Wrobel], 'Mit einem Zuchthäusler?', *Die Weltbühne*, 24, 35 (28 Aug. 1928), pp. 315–8.

In their pursuit of curbing the use of the registry, bureaucrats who were interested in administrative efficiency and those concerned with the emotional effects of the registry on the German citizenry formed an unexpected coalition. A solution to the problems stemming from the criminal registry was sought in a codification of the ‘right to be forgotten’—an idea that met the demands of both parties. With the ratification of the Expungement Law, this right to be forgotten was for the first time translated into a law, forming the endpoint of a liberalizing trend, with the state’s will to know bounded in a significant way. However, despite a successful campaign to mobilize empathy for the victims of the registry, the Expungement Law could not guarantee protection from discrimination and humiliation. As a law born out of empathy for the emotional impact of the knowing state, it targeted only harmful activities of the state. The process of liberalization lifted the obstacles that had been created by the state but did not force the state to take any further positive action. The right to be forgotten was not a right to be protected against discrimination. In this sense, the curtailing of the knowing state was a liberalizing trend devoid of modern liberal values of respect and upholding human dignity.

Abstract

In 1882 the criminal registry, a bureaucratic tool used to assemble information about the criminal biographies of German citizens, was implemented in all territories of the German Empire. This article demonstrates that the registry, evidence that states were accumulating ever more knowledge about the population, was from the beginning surrounded by critical reflection on its functioning. Worried about the scale of the work involved, in the interests of administrative efficiency bureaucrats wished the use of the registry to be curtailed. Prussian officials stressed that private parties should be denied access to the registry, while scholars pointed out that the registry was not intended to support forensic investigation. Journalists and worried citizens argued that the use of the registry in German courts was responsible for a culture of excessive suspicion. By portraying the emotional effects of the registry on German citizens, critics therefore sought to mobilize empathy for the ‘victims’ of the registry and started to demand a ‘right to be forgotten’. The Expungement Law of 1920 was designed as a solution to many of these problems and can be viewed as the endpoint of an important liberalizing process in German society. Yet, for many contemporaries the law was largely ineffective, for it did not combat social prejudices against citizens with a criminal record.

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