

THE ERADICATION OF NAZI IDEOLOGY AND TERMINOLOGY FROM THE CURRENT GERMAN PENAL CODE

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I. INTRODUCTION

Nazi ideology consumed and terrorized Europe, commanding the attention of the world's nations during the twelve years the Third Reich was in power.¹ The Nazi party consisted of aggressors and tormentors who considered intimidation and power to be necessary and commendable virtues.² Nazi ideology radiates the idea that while some people are elite, there are other inferior people, referred to as *untermenschen*, or subhuman.³ Those considered to be *untermenschen* were often referred to as “rats” or “cockroaches” by the Nazi regime, and were treated as such leading up to the Holocaust.⁴ The belief was that some people are inherently weak-minded, and therefore undeserving of the same consideration as those deemed to be elite.⁵ Nazi philosophy favored the strong, and encouraged the bullying and even the killing of those thought to be a burden, rather than an asset, for the party and society.⁶

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¹ *Nazi Party*, HISTORY.COM, www.history.com/topics/world-war-ii/nazi-party (last visited Nov. 24, 2015) (The Nazi regime was in power from 1933 to 1945).

² *Id.*

³ DAVID LIVINGSTONE SMITH, *LESS THAN HUMAN: WHY WE Demean, ENSLAVE, AND EXTERMINATE OTHERS* 15 (2011) (“It’s wrong to kill a person, but permissible to exterminate a rat. To the Nazis, all the Jews, Gypsies, and the others were rats: dangerous, disease-carrying rats.”).

⁴ *Id.* at 15–16.

⁵ Stephen Evans, *The Nazi Murder Law that Still Exists*, BBC NEWS (Feb. 6, 2014), www.bbc.com/news/magazine-26047614.

⁶ Solveig Bach, *Das Problem mit Mord und Totschlag: Paragraf 211 ist Vollkommen Überholt* [*The Problem with Murder and Manslaughter: Clause 211 is Completely Overhauled*], N-TV.DE (Jan. 14, 2014), <http://www.n-tv.de/panorama/Paragraf-211-ist-vollkommen-ueberholt-article12074966.html>; Pema Dechen Raptan, *The Rise of the Nazi Party, 1933*, MT. HOLYOKE C., www.mtholyoke.edu/~rapte22p/classweb/interwarperiod/naziparty.html (last modified Dec. 20, 2010) (stating that Hitler was constantly in trouble for being a bully and that he criticized Jesus Christ for being “weak”).

Over seventy years have passed since the fall of Germany's Third Reich, but the weathered talons of the Nazi regime maintain their grip of German society in disconcerting ways.⁷ Nazi ideology continues to taunt lawyers, judges and legal students as it remains embedded in sections of the modern German Criminal Code: *Strafgesetzbuch*.⁸ Specifically, Paragraph 211(2) of Chapter 16 maintains a definition wrought with Nazi philosophy.⁹ Chapter 16 is titled "Crimes Against Life," and particularly problematic is section 211, which contains the definition of "murder": *mord*.¹⁰

Infamous leader of the Nazi People's Court, Roland Freisler, penned paragraph 211 of the *Strafgesetzbuch* in 1942, and his words remain unaltered today.¹¹ Freisler was a prominent Nazi attorney who, under Adolf Hitler, became State Secretary in the Justice Ministry and later rose to be the most senior judge in Hitler's People's Court.¹² As a close associate of Adolf Hitler, he was one of a select few individuals invited to the Wannsee Conference.¹³ An exceptionally notorious lawyer, he was known for humiliating those who were on trial and for prosecuting defendants accused of "political crimes,"¹⁴ most of which involved defeatism.¹⁵ Freisler's infamy is due in large part to his time spent as judge of the People's Court, where he sat in each proceeding not only as judge, but also as jury and prosecutor, thereby giving

⁷ Mihret Yohannes, *Germany Still Has an Awkward Nazi Law and Some Don't Want to Let it Go*, GLOBALPOST (Sept. 15, 2015), www.globalpost.com/article/6650701/2015/09/16/germany-nazi-murder-law.

⁸ STRAFGESETZBUCH [StGB] [PENAL CODE], §§ 211–22, *translated at* <http://germanlawarchive.iuscomp.org/?p=752>; Ben Knight, *Justice Ministry to Change German Law's Nazi Definition of Murder*, DW (July 31, 2015), www.dw.com/en/justice-ministry-to-change-german-laws-nazi-definition-of-murder/a-18620945.

⁹ § 211(2) StGB; Yohannes, *supra* note 7.

¹⁰ § 211 StGB.

¹¹ Knight, *supra* note 8.

¹² *Id.*

¹³ C. N. Trueman, *Roland Freisler*, THE HIST. LEARNING SITE (May 26, 2015), www.historylearningsite.co.uk/nazi-germany/nazi-leaders/roland-freisler/; *Holocaust Encyclopedia: Wannsee Conference and the "Final Solution,"* U.S. HOLOCAUST MEM'L MUSEUM, www.ushmm.org/wlc/en/article.php?ModuleId=10005477 (last updated Aug. 18, 2015) (The Wannsee Conference is the meeting where the leaders of the Nazi party discussed the "Final Solution" of exterminating the Jews.).

¹⁴ Trueman, *supra* note 13 (Almost any offense could have been categorized as political during this time period. The Nazi party was able to put any defendants that they wished in front of Freisler, and be certain that the defendant would not be a problem to the party.).

¹⁵ *Id.*

defendants virtually zero chance of success at trial.¹⁶ In this role, Freisler condemned to death most of the people brought before him, many of whom were children.¹⁷ The words scripted by Freisler remain unaltered and emanate flashes of a time that present-day Germans are unable to strike from their memory.¹⁸

Now that the history of Chapter 16 of the *Strafgesetzbuch* has been discussed, this article will move to section II by describing the current definitions of *mord* and *totschlag*,¹⁹ as most accurately translated in English, and the mandatory sentences that accompany a finding of guilt for each. It will also further delve into the statutory interpretation of the related chapter. In Section III, this article will discuss the problems that these definitions and punishments create for present day attorneys and judges by providing examples of a few highly publicized and oft-cited cases. The outcomes of many of these cases have provoked hostile responses from German citizens demanding rectification. Finally, Section IV will discuss how the possible solutions to the discussed problems will affect German society along with positive and negative reactions of German attorneys and citizens to the proposed alterations.

II. NAZI DEFINITIONS OF TERMS IN THE *STRAFGESETZBUCH*

Paragraphs 211 and 212 of Chapter 16 of the *Strafgesetzbuch* bear a resonating connection to the Nazi regime.²⁰ Indeed, the definitions of the terms in Paragraph 211 and 212 were birthed from Nazi philosophy and remain in force, thus controlling the decisions of present day jurists.²¹ Schleswig-Holstein Minister of Justice, Anke Spoorendonk, opined that the definitions in this section were written to muzzle political

¹⁶ Trueman, *supra* note 13.

¹⁷ *Id.*

¹⁸ Bach, *supra* note 6; Klaus Dahmann, *No Room For Holocaust Denial In Germany*, DW (Dec. 23, 2005), <http://www.dw.com/en/no-room-for-holocaust-denial-in-germany/a-1833619-1>.

¹⁹ *Mord*, *Collins German-English Dictionary*, COLLINSDICTIONARY.COM, <https://www.collinsdictionary.com/dictionary/german-english/mord> (last visited Nov. 27, 2015) (*Mord* is the German word for “murder”); *Totschlag*, *Collins German-English Dictionary*, COLLINSDICTIONARY.COM, www.collinsdictionary.com/dictionary/german-english/totschlag (last visited Nov. 27, 2015) (*Totschlag* is the German term for “manslaughter”).

²⁰ STRAFGESETZBUCH [StGB] [PENAL CODE] §§ 211–12, *translated at* <http://germanlawarchive.iuscomp.org/?p=752>; Bach, *supra* note 7.

²¹ Evans, *supra* note 5.

opponents of Nazi dictatorship.²² Spoorendonk reasoned that, “[t]here is no doubt that the wording of the law reflect[s] the Nazi criminal ideology,” and aided in the advancement of the party.²³

Specifically, paragraph 211 defines *mord* as someone who kills another human being “out of bloodlust, to satisfy a sexual desire, out of greed, or otherwise base motives, insidiously, treacherously or cruelly, or with means dangerous to the public or to make another crime possible or to cover up another crime.”²⁴ East Germany had a different murder law that closer resembles the U.S. definition of murder requiring intent, but after the unification of Germany in 1990, West German law took control and remains as translated above.²⁵

Statutory interpretation of this section shows two distinct types of *mord*.²⁶ The definition includes both objective conditions and subjective conditions, and at least one of either must be present for a successful conviction.²⁷ The three objective conditions or motives within the definition include, “insidiously or cruelly or by means that pose a danger to the public.”²⁸ This part of the definition also includes the words, “or otherwise base motives.”²⁹ Those conditions outline the first type of murderer contemplated in the definition.³⁰ The subjective elements, or motives, signifying the second type of murderer are given as specific examples in the wording, for the “pleasure of killing, sexual gratification, greed and the motive to facilitate or to cover up another offense.”³¹ Only one of either the subjective or objective

²² Bach, *supra* note 6.

²³ *Id.*

²⁴ § 211(2) StGB; Paul Shoebottom, *Translation Problems*, FRANKFURT INT’L SCH., esl.fis.edu/grammar/easy/trans.htm (last updated Jan. 2011) (The translation from German to English is not exact due to language barriers and has been subject to a slightly different interpretation in various publications. It has been noted that the translation to English is difficult and cannot be exact. This causes the interpretation of the definition to be confusing as to whether the commas indicate that the terms used are elements or factors to be considered. Another problem that this poses is that some German words have definitions that lack English equivalents.).

²⁵ Evans, *supra* note 5.

²⁶ MARKUS DUBBER & TATJANA HÖRNLE, *CRIMINAL LAW: A COMPARATIVE APPROACH* 539 (2014).

²⁷ *Id.*

²⁸ *Id.*

²⁹ § 211(2) StGB ; Knight, *supra* note 8 (This may be translated slightly differently as “low motives.”).

³⁰ § 211(2) StGB.

³¹ *Id.*

conditions is necessary for a conviction to be achievable according to German court's interpretations of the *Strafgesetzbuch*.³²

Immediately following the definition of *mord* is Paragraph 212, which defines manslaughter: *totschlag*.³³ According to Paragraph 212(1), "whoever kills a human being without being a murderer, shall be punished for manslaughter."³⁴ If a person kills another in a way that fails to fall into either of the two types of murderers described in the definition of *mord*,³⁵ the next highest crime they may be charged with is *totschlag*.³⁶

Equally problematic are the penalties associated with the crimes outlined in this chapter. Paragraphs 211 and 212 also set forth the punishment for *mord* and *totschlag*.³⁷ Prior to 1949, the death penalty was the reprimand for *mord* under German law.³⁸ This made it possible for Roland Freisler to sentence to death many of the people he convicted.³⁹ However, in 1949, the German Constitution (*Grundgesetz*) abolished the practice of capital punishment throughout Germany.⁴⁰ Currently, Paragraph 211(1) advises that a "murderer will be punished with imprisonment for life."⁴¹ Therefore, when a person is convicted of *mord*, life

³² DUBBER & HÖRNLE, *supra* note 26.

³³ STRAFGESETZBUCH [StGB] [PENAL CODE] § 212, *translated at* <http://germanlawarchive.iuscomp.org/?p=752>; COLLINSDICTIONARY.COM, *supra* note 19. *Totschlag*,

³⁴ § 212(1) StGB.

³⁵ DUBBER & HÖRNLE, *supra* note 26; *See* STRAFGESETZBUCH [StGB] [PENAL CODE] §§ 213, 216, *translated at* <http://germanlawarchive.iuscomp.org/?p=752#211> (The killing must also not fall under paragraph 213, for "less serious cases of manslaughter," or paragraph 216, for "homicide upon request," in order to be considered manslaughter.).

³⁶ DUBBER & HÖRNLE, *supra* note 26.

³⁷ *Id.*

³⁸ Charles Lane, *No More Hanging. How the Germans Abolished the Death Penalty*, ATLANTIC TIMES (July 2005), www.atlantic-times.com/archive_detail.php?recordID=247.

³⁹ *Id.*; Charles Lane, *The Paradoxes of a Death Penalty Stance*, WASH. POST (June 4, 2005), www.washingtonpost.com/wp-dyn/content/article/2005/06/03/AR2005060301450.html (Communist East Germany abolished the death penalty for all crimes in 1987. West Germany abolished the death penalty in 1949. This is usually documented as a humanitarian turn after a particularly nasty period of history. However, the abolition also had the effect of saving many Nazi criminals from the gallows since World War II had ended just prior to the change. The motive for the abolition of capital punishment in Germany is arguable and Article 102 of German Basic Law simply reads, "[t]he death penalty is abolished" without further explanation.).

⁴⁰ Lane, *supra* note 38.

⁴¹ STRAFGESETZBUCH [StGB] [PENAL CODE] § 211, *translated at* <http://germanlawarchive.iuscomp.org/?p=752>.

imprisonment is a mandatory sentence.⁴² Alexander Ignor, a Berlin-based lawyer who was on the experts' panel leading the move for the reform, explains that, "[t]he judge can't regulate the framework of the sentence."⁴³ Put plainly, judges have no ability to consider any mitigating factors that may be present when sentencing a murderer.⁴⁴

Conversely, according to Paragraph 212(1), a person who is convicted of *totschlag* shall be punished "with imprisonment for not less than five years."⁴⁵ Paragraph 212(2) provides a mandatory sentence of five years but, unlike Paragraph 211(2), it gives judges the ability to contemplate larger sentences by including the phrase, "in especially serious cases, imprisonment for life shall be imposed."⁴⁶ These discrepancies entice present day judges to convict defendants of *totschlag* rather than *mord* so they may have more control over sentencing and take mitigating factors into account.⁴⁷

III. THE CURRENT DEFINITIONS OF *MORD* AND *TOTSCHLAG* CREATE ISSUES FOR JUDGES, ATTORNEYS AND THOSE WHO STAND ACCUSED

There are two main reasons why these definitions are in need of reformation. Firstly, the definitions were born from Nazi ideology and they presuppose that some people are naturally better than others.⁴⁸ This does not square well with modern thinking and modern criminal law.⁴⁹ "The idea behind [the Nazi definitions] is that an individual is already born a murderer It's a question of genetics and socialization of the character . . . the person *is* a murderer . . . and that is typical of National Socialism. It's making this distinction between people who belong to the community and those one removes."⁵⁰

Further, the definition of *mord* describes the type of person that may be a murderer rather than defining exactly what the act

⁴² Knight, *supra* note 8.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ STRAFGESETZBUCH [StGB] [PENAL CODE] § 212(1), *translated at* <http://germanlawarchive.iuscomp.org/?p=752>.

⁴⁶ *Id.*

⁴⁷ Knight, *supra* note 8.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* (quoting Christoph Safferling, Erlangen Law Professor who sat on a commission of law professors, lawyers and public prosecutors that filed a 909 page report on reformation of this section of the *Stragesetzbuch*).

of murder entails.⁵¹ This assumes that a person's nature is what brands them a murderer rather than the nature of the crime they committed.⁵² Unlike the rest of the *Strafgesetzbuch*, the section defining *mord* assumes that only certain people can be a murderer.⁵³ Pinar Gul, a Hamburg criminal law attorney, argues that the definition does not do what most of the current version of the *Strafgesetzbuch* does and what this section is intended to do: protect human life.⁵⁴

Secondly, the objective portion of the definition of *mord* in Paragraph 211 contains the German term *heimtueckisch*,⁵⁵ meaning in a sneaky or insidious way and also refers to otherwise low or base motives.⁵⁶ Nazi ideology is especially evident in the characteristic descriptions of "insidious" and "low motivation" and, consequently, it is controversial whether such legal terms are usable.⁵⁷ The definition intuitively assumes that a murderer abuses the defenselessness of an unwary victim, explains Dr. Stefan Koenig, Berlin defense attorney and Chairman of the Association of Lawyers' Penal Committee.⁵⁸ The theory behind the definition mirrors Nazi ideology in that it favors the strong, allowing them to prey on the weak.⁵⁹ As put by German Justice Minister Heiko Maas, the *Strafgesetzbuch* represents a "constricting definition of murderer, in the way the Nazis imagined [murderers]."⁶⁰ In other words, a person who kills another by flagrantly overpowering them does not fit into this category of murderer. However, the people who do fit the description are sympathetic defendants who cannot match the brute strength of their tormentors and must resort to a surprise attack in order to cease the persecution.⁶¹

⁵¹ *Id.*

⁵² *Id.*; Bach, *supra* note 6.

⁵³ Knight, *supra* note 8; Yohannes, *supra* note 7; Bach, *supra* note 6.

⁵⁴ *Germany Mulls Cleansing Law of Nazi-Inspired Language, Report Says*, HAARETZ, (Sept. 18, 2015), www.haaretz.com/misc/iphone-article/1.676487.

⁵⁵ This is a loose translation because the German term has no exact English equivalent.

⁵⁶ Evans, *supra* note 5; Knight, *supra* note 8.

⁵⁷ Knight, *supra* note 8 (citing Alexander Ignor, a Berlin-based attorney who sat on the same commission as Safferling).

⁵⁸ Evans, *supra* note 5 (citing Dr. Stefan Koenig, Berlin defense attorney and Chairman of the Association of Lawyers' Penal Committee).

⁵⁹ *Id.*

⁶⁰ *Justice Minister Maas Eyes Reform to Germany's Nazi Era Definition of Murder*, DW, (Feb. 8, 2014), www.dw.com/en/justice-minister-maas-eyes-reform-to-germanys-nazi-era-definition-of-murder/a-17418763.

⁶¹ 18 U.S.C.S. § 1111(III)(A) (2015) (under American law this may fit under

In the immediate subsequent section of the *Strafgesetzbuch*, the definition of *totschlag* is outlined, essentially providing that if a person kills another, and that killing does not fit the definition of *mord*, then they have committed manslaughter.⁶² This distinction brings about certain conundrums that create disadvantages for more passive criminal defendants and generate headaches for legal practitioners.⁶³

Essentially, a person would be guilty of *mord* if he or she kills an unsuspecting victim from behind. However, that same person would merely be guilty of *totschlag* if he or she made his or her intentions to kill known to the victim and immediately committed the homicide. One all-too-common situation where this has become a major issue involves an instance of a battered spouse.⁶⁴ For example, assume that a husband beats his wife mercilessly and the onslaught results in her death. According to the current writing in the *Strafgesetzbuch*, whether he meant to kill her or not, the husband would most likely be convicted of *totschlag*.⁶⁵ This differs from the American Model Penal Code in that the intention of the killer is key to a conviction of murder in the U.S., whereas intention is only considered in a restricted way in the subjective portion of the definition of *mord*.⁶⁶

Under German law, it would be difficult to find the husband guilty of *mord* in the situation involving the battered spouse, because the killing was not committed *heimtueckisch* or “sneakily/insidiously” due to the fact that his victim arguably had the chance to defend herself because she could expect the attack even though she was essentially overpowered.⁶⁷ As long as the attack was head-on, direct and might have been expected, the husband is shielded from a charge of *mord* under the objective motives outlined in the definition.⁶⁸

Conversely, assume the same woman who was beaten mercilessly by her husband somehow survives the tirade and decides that she cannot take the torture any longer. She then waits until her drunken and abusive husband passes out from too

a self-defense category and can be a mitigating factor in sentencing).

⁶² See STRAFGESETZBUCH [StGB] [PENAL CODE] § 212, translated at <http://germanlawarchive.iuscomp.org/?p=752>.

⁶³ Bach, *supra* note 6.

⁶⁴ *Id.*; Evans, *supra* note 5.

⁶⁵ Evans, *supra* note 5.

⁶⁶ MODEL PENAL CODE § 19.02(d) (AM. LAW INST., Proposed Official Draft 1962) (*mens rea* dictates whether or not murder or manslaughter would apply).

⁶⁷ Evans, *supra* note 5.

⁶⁸ *Id.*

much alcohol and kills him while he is sleeping to avoid enduring the abuse again. As Koenig points out, this is often how battered spouses end up killing their abuser.⁶⁹ In this situation, the wife could then potentially be convicted of *mord* because she satisfied the term *heimtueckisch* noted within the definition of the crime.⁷⁰

The sentencing associated with the charges intensifies the definitional issues. The mandatory sentence for a conviction of *mord* is life in prison, and the mandatory sentence for *totschlag* is only five years.⁷¹ The lack of discretion in mandatory sentences creates complications for judges and has caused protests by German citizens in situations where people perceive that the punishment of life imprisonment does not fit the crime committed.⁷² Adjudicators sometimes feel that certain people who are convicted of *mord*, under the current definition, should be punished more leniently due to mitigating factors.⁷³ However, judges are left with no recourse to rectify situations with such considerations.⁷⁴ Ignor says that the current definitions lead judges to “odd decisions where certain features of murder are denied.”⁷⁵ Since judges have no discretion concerning a mandatory life sentence for *mord*, many attempt to force convictions of *totschlag* instead so that they may exercise more control over the sentencing.⁷⁶ To do this, judges simply create dicta that enable them to come to a more desirable result for sympathetic plaintiffs like the one in the battered wife example above.⁷⁷

Consider again the abusive husband who kills his wife and would potentially be facing a minimum of five years in prison for his crime, and the battered wife who kills her abusive husband in his sleep and would potentially be facing a mandatory life in

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ STRAFGESETZBUCH [StGB] [PENAL CODE] §§ 211(1), 212(1), *translated at* <http://germanlawarchive.iuscomp.org/?p=752>. Consider, however, STRAFGESETZBUCH [StGB] [PENAL CODE] § 57a, *translated at* <http://germanlawarchive.iuscomp.org/?p=752>, wherein after fifteen years of a life sentence has been served, the court may grant conditional release if “the particular gravity of the convicted person’s guilt does not require its continued execution.”

⁷² Evans, *supra* note 5.

⁷³ *Id.*

⁷⁴ Knight, *supra* note 8.

⁷⁵ *Id.* (quoting Alexander Ignor, a Berlin-based attorney who sat on the same commission as Safferling).

⁷⁶ *Id.*

⁷⁷ *Id.*

prison sentence.⁷⁸ This example shows an obvious association to Nazi ideology: bullies who are able to physically dominate their victims are treated less harshly than are more passive or modest individuals.⁷⁹ Professor Dagmar Oberlies of Frankfurt University, stated that “battered women were more often convicted of murder than violent men [because] [w]omen who suffered violence for many years premeditated the killing of their partner. Violent men, who did not have to fear anything, simply battered their wives until they were found dead.”⁸⁰

As briefly discussed earlier, the Nazi terminology living within the *Strafgesetzbuch* tempts judges to find ways around the plain words of the code in order to impose sentences that weigh mitigating factors.⁸¹ These deviances from the written law create uncertainty in the legal system and create unnecessary complications.⁸² One specific example of the problems created by this legal definition is the highly publicized case involving Marianne Bachmeier.⁸³

Marianne Bachmeier’s seven-year-old daughter was tortured and killed by a man who was thirty-five years of age at the time.⁸⁴ On March 6, 1981, the suspect was in a courtroom standing trial for killing the young girl.⁸⁵ During the trial, while the suspect was standing and facing the judge, Bachmeier stood up behind the suspect and shot him in the back seven times.⁸⁶ She was then quoted saying, “[h]opefully, he’s dead”—indeed he was.⁸⁷ Bachmeier did not resist arrest or attempt to flee.⁸⁸

Initially, a West German court charged Bachmeier with *mord* finding that a charge of *totschlag* was impossible since the victim never anticipated the threat and was, in fact, in a

⁷⁸ MODEL PENAL CODE § 19.02(d) (AM. LAW INST., Proposed Official Draft 1962) (The wife’s conviction resembles passion provocation or even self-defense in the American Model Penal Code, which may allow a lesser degree of murder and carry a lighter sentence.).

⁷⁹ Evans, *supra* note 5.

⁸⁰ *Id.*

⁸¹ *Germany Mulls Cleansing Law of Nazi-Inspired Language, Report Says*, *supra* note 54.

⁸² *Id.*

⁸³ Evans, *supra* note 5.

⁸⁴ *Mother is Sentenced for Killing Man on Trial for Daughter’s Death*, THE EVENING INDEP., Mar. 2, 1983, at 2-A.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ Evans, *supra* note 5.

⁸⁸ *Id.*

courtroom when he was shot from behind.⁸⁹ German citizens vehemently disagreed with the charge believing that life in prison would be a harsh punishment under the circumstances.⁹⁰ Soon after, a television program aired titled, *I'd Have Shot Him Too*, and became immensely popular.⁹¹ It was obvious that many people in the country were understandably outraged with the result commanded by the wording in the *Strafgesetzbuch*.⁹² After considerable uproar by citizens, and four weeks of convoluted legal argument, the charge was reduced to manslaughter, purely so that the judge would have more discretion for sentencing and to pacify the enraged citizens and media.⁹³ The judge's alteration of the charge lacked comprehensible legal reasoning, making it seem to be a workaround of the law and leaving statutory interpretation of Paragraph 211 even further from elucidation.⁹⁴

The 1980s produced another highly cited case where a husband killed a man who raped the husband's wife.⁹⁵ The rapist was "making fun of" the married man and tormenting him about it.⁹⁶ One day, "in a bar, in a situation where the victim could not expect an attack", the husband approached the unsuspecting rapist and killed him.⁹⁷ The husband was originally charged with *mord* due to the fact that the rapist was oblivious to the threat, but at trial the court found that a life sentence was too harsh a punishment since the man had been so humiliated by the rapist.⁹⁸ Dieter Dolling, Director of Heidelberg University's Criminology Institute, explained the situation by saying, the judge "invented a new reason to justify a lighter sentence" so that he could bypass the written language and get a more desirable result, but this also had the effect of moving statutory interpretation of the terms further from clarification.⁹⁹

A more recent and highly publicized case that is prominently cited by advocates for reform involved a cannibal

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ Evans, *supra* note 5.

⁹⁴ Bach, *supra* note 6.

⁹⁵ *Germany Mulls Cleansing Law of Nazi-Inspired Language, Report Says*, *supra* note 54.

⁹⁶ *Id.*

⁹⁷ Knight, *supra* note 8.

⁹⁸ *Id.*; Yohannes, *supra* note 7.

⁹⁹ Yohannes, *supra* note 7.

whose victim consented to being killed and eaten.¹⁰⁰ In 2001, a man named Armin Meiwes posted an ad on the Cannibal Café website for a “well-built 18 to 30-year-old to be slaughtered and then consumed.”¹⁰¹ Meiwes received many responses to his ad but only one responder decided to fully accept the proposition.¹⁰² When the two met, Meiwes stayed true to his intentions by killing the responder, cooking him, and consuming parts of his body—including the responder’s penis.¹⁰³

When Meiwes was brought to trial, the court originally could not see fit to convict him of *mord* since it could not be said that the killing was done sneakily or insidiously because the victim had consented to it.¹⁰⁴ The court felt compelled to charge and convict Meiwes with the lesser crime of *totschlag* instead.¹⁰⁵ However, after another fit of citizen uproar, the German court system ordered a retrial.¹⁰⁶ The second trial ended in a successful conviction of *mord* by placing his crime under the objective motives in the definition of *mord*, reasoning that, since Meiwes ate the man’s penis, it must have satisfied a sexual desire.¹⁰⁷ This example not only highlights the absurd result of these terms, but also outlines the distinction between the two different types of *mord* encompassed in the definition. The Meiwes court creatively ensured that the definition of *mord* could apply to the presented facts.¹⁰⁸ Meiwes was therefore sentenced to life in prison due to the judge’s clever maneuvering and muddying of future statutory interpretation.¹⁰⁹

IV. THE STRAFGESETZBUCH IS IN NEED OF RECTIFICATION TO PREVENT FUTURE CONFUSION AND TO BALANCE THE ODDS OF CONVICTION FOR ALL CRIMINAL DEFENDANTS BASED ON THE CRIMES CHARGED RATHER THAN THEIR PERSONALITIES

The issues related to Paragraphs 211 and 212 have been “hotly debated in legal conventions” since the 1970s.¹¹⁰ The

¹⁰⁰ Evans, *supra* note 5.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ Evans, *supra* note 5.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ Bach, *supra* note 6.

German Bar Association is aiming for a complete reformulation of this section eliminating the biolistic and personality aspects of the definition.¹¹¹ Present German Justice Minister, Heiko Maas, is leading the initiative for reform of the definitions of *mord* and *totschlag* and hopes to present a bill to the German parliament outlining ideas for restructuring this section before his term ends in 2017.¹¹² The German Central Council of Jews has also been outspoken about removing Nazi terminology from the *Strafgesetzbuch*.¹¹³ Council President Josef Shuster agrees that alteration is necessary and stated, “[f]ormulations introduced into our code of laws by the Nazis should certainly have no place there.”¹¹⁴ Erlangen law professor Christoph Safferling advocates for reform as well and asks, “[w]hy should you leave bad law?”¹¹⁵

However, not all of Germany is in agreement with those advocating for the amendments.¹¹⁶ Many politicians, including Parliamentarian Wolfgang Strobl, are worried that a change in the definitions will send the wrong message to terrorists.¹¹⁷ The Christian Democratic Union deputy parliamentary faction leader, Thomas Strobl, explained the position stating, “[w]hen I see . . . what horrific dimensions terrorist violence has taken on, I think we have some more important questions to resolve.”¹¹⁸ Although Dolling disagrees with both members of parliament, he explains the reasoning behind their apprehension by commenting that, “[l]awmakers have always been cautious [about changing the *Strafgesetzbuch*], because it goes to the core of criminal law.”¹¹⁹ “There was always the concern, [i]f we change something there, it might be misunderstood as an attempt to undo the protections of

¹¹¹ *Id.*

¹¹² *Justice Minister Maas Eyes Reform to Germany’s Nazi Era Definition of Murder*, *supra* note 60.

¹¹³ *Germany Mulls Cleansing Law of Nazi-Inspired Language, Report Says*, *supra* note 54.

¹¹⁴ *Id.*; Yohannes, *supra* note 7.

¹¹⁵ Knight, *supra*, note 8.

¹¹⁶ *Germany Mulls Cleansing Law of Nazi-inspired Language, Report Says*, *supra* note 54.

¹¹⁷ *Id.*

¹¹⁸ Knight, *supra* note 8; Yohannes, *supra* note 7; Jacob Siegel, *In Germany, The Rise of Anti-Muslim Terrorism*, THE DAILY BEAST (May 8, 2015), www.thedailybeast.com/articles/2015/05/08/in-germany-the-rise-of-anti-islam-terrorism.html (Germany has faced a rise in anti-Muslim terrorism in 2015. Many times, terrorists attack in sneaky ways and are more easily convicted of murder because their attacks are often done without warning and when the victims are unsuspecting.).

¹¹⁹ Knight, *supra* note 8 (quoting Dieter Dolling, Heidelberg law professor).

criminal law.”¹²⁰ However, this argument lacks merit because rectification of the written code would protect victims more efficiently by ensuring that proper and satisfying sentences are imposed.

It would be wise for Germany to take a stand and clarify the definitions of *mord* and *totschlag* in a manner that is congruent with present day criminal law and modern legal sophistication. If the fact that the Nazi party composed the definitions in an attempt to more easily sentence to death certain individuals is not enough to effect the rectification, then the absurdities that those definitions impose upon defendants certainly are. The definitions should be improved so that their interpretation may be clearly understood and so judges do not feel an obligation to read the statute in ways that are unintelligible to legal scholars.

Germany has evolved since WWII and has enacted efforts to come to terms with the horrifying events leading to and occurring throughout the war.¹²¹ In an effort to teach and learn from Nazi repression, German Parliament has passed strict legislation disallowing public endorsement denying or downplaying the Holocaust.¹²² As Germany strives to escape the massive and long lasting shadow cast upon its society by an oppressive past, it seems that rectification of the *Strafgesetzbuch* should become a priority.

Furthermore, a swift change would be particularly fitting in terms of timing, considering the fact that so many Syrian refugees have recently sought and found sanctuary in Germany.¹²³ Since the current definitions alienate and victimize people for innate qualities rather than punishing them for bad acts, they send an exceptionally poor message to both individuals fleeing from countries where they were assaulted with similar oppressions, and the terrorists causing the displacement of those refugees.

They also send a disheartening signal to Anti-Islam groups within Germany who violently protest accepting Syrian refugees. Anti-Muslim groups in Germany have burned down shelters designated for asylum-seeking refugees and even attacked Red

¹²⁰ *Id.*

¹²¹ Dahmann, *supra* note 18.

¹²² *Id.*

¹²³ ‘One Million Refugees’ May Arrive in Germany This Year, AL JAZEERA (Sept. 14, 2015 11:50 GMT), www.aljazeera.com/news/2015/09/million-refugees-arrive-germany-year-150914101006005.html.

Cross workers as they set up tents for the oppressed travelers.¹²⁴ These acts of violence and hatred are displayed in the media and should be just as aggressively rebutted.¹²⁵ As TV reporter Anja Reschke stated, “[i]f you’re not of the opinion that all refugees are spongers who should be hunted down, burned, or gassed, then you should make that known, oppose it, open your mouth, maintain an attitude, pillory people in public.”¹²⁶

Deleting a law constructed by one of the most oppressive parties in history will not only send a strong signal to German citizens against the ideas of oppression and xenophobia, but will also show that discrimination based on characteristics has no place in modern society. It would be practical for legislators to use this as an opportunity to show German citizens, and the world, the lessons learned by the mistakes of WWII and how the modern leaders of Germany would like their country to be regarded.

¹²⁴ Sumi Somaskanda, *Germany Has A Refugee Problem, And The Problem Is The Germans*, FOREIGN POLICY (Aug. 7, 2015), foreignpolicy.com/2015/08/07/germany-refugees-asylum-seekers-arson-violence-unwelcome/.

¹²⁵ *Id.*

¹²⁶ *Id.*