

## BOOK REVIEW

**POLITICAL CRIME IN EUROPE: A COMPARATIVE STUDY OF FRANCE, GERMANY AND ENGLAND.** By Barton L. Ingraham.\* University of California—Berkeley Press, 1979. Pp. 380.

Professor Ingraham has undertaken a comparative examination of Political Crime in France, Germany and Great Britain from the French Revolution in 1789 to the present. The undertaking is most ambitious. Perhaps because of that, the author's handling of this subject is uneven. Yet, the book is not without its merits; chief among them is the compilation of foreign statutory and other legal material dealing with political crime that is not readily accessible to the United States reader. Ingraham finds patterns in the development of political crimes common to all three countries. His insights are interesting, if not entirely original. Generally, however, these merits should not obscure the basic fact that this book does not add a great deal to our understanding of political crime.

In Ingraham's judgment, American scholarship on political crime suffers from a general subjectivity of approach as well as three specific deficiencies. These deficiencies are: (1) the assumption that political crime is aberrational in this country; (2) the tendency to define political crime in terms of the motivation of the actor rather than the reasons for prosecution or the imposition of other legal sanction; and (3) a parochialism of perspective attributable to the absence in the United States of the more extreme forms of political violence and polarization that have characterized the experience of other nations.<sup>1</sup> To overcome these deficiencies, Ingraham begins from the premise that the management of dissent and internal conflict presents problems common to all governments. He seeks to demonstrate this by offering an operational definition of criminal law and an explanation of political crime within that framework. He then proceeds to his comparative analysis of legal measures to control political crime in France, Germany and Great Britain.

Ingraham attaches great methodological significance to the

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<sup>1</sup> B. INGRAHAM, *POLITICAL CRIME IN EUROPE: A COMPARATIVE STUDY OF FRANCE, GERMANY AND ENGLAND*, x-xi (1979).

general definition of crime. In defining crime, he rejects the positivist approach because, as he recognizes, what is defined as criminal in statutes is not always treated as criminal in practice. In his view, behavior is criminal only when it elicits what he calls the "repressive response", that is, "the desire to inflict suffering on the wrongdoer or to eliminate any further activities of a similar kind on his part or on the part of others similarly disposed."<sup>2</sup> Thus, the proper focus is upon the behavior of the law enforcement authorities and not the subjective purpose of the actor or the character of his act.<sup>3</sup>

As a reaction to undesirable conduct, the repressive response is far stronger than other measures of social control such as administrative regulation or the private dispute resolution process. To Ingraham the difference is pivotal. The less severe measures are designed to *regulate* behavior; they work on the premise that human activity may be harmful in some forms but not in all. The objective is to control the harmful aspects of such activity, not to eradicate the activity itself. The author acknowledges that criminal laws are sometimes enforced in a *regulatory* manner, but he places such laws outside the scope of his study even though their application might be governed by purely political considerations. Thus, as a preliminary matter, he defines crime as:

any act or omission or course of behavior deemed to be wrongful and injurious to the society as a whole or to its political leaders which they, acting through their law makers, interpreters, and enforcers, seek to punish or permanently prevent from recurring.<sup>4</sup>

Ingraham's next step is to identify four types of conduct which traditionally have been regarded as political crimes: (1) acts of betrayal; (2) challenges to political authority and legitimacy; (3) hindrance of official function; and (4) usurpation of granted powers.<sup>5</sup>

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<sup>2</sup> *Id.* at 7.

<sup>3</sup> In the author's opinion, many writers on the subject of political crime become mired in subjectivity because their concept of political crime attaches great significance to the motive of the actor. B. INGRAHAM, *supra* note 1, at ix, 3-5. His quest is for a theory of political crime that is not a function of the writer's political leanings.

<sup>4</sup> B. INGRAHAM, *supra* note 1, at 13.

<sup>5</sup> These four categories of political crime are distilled from a longer and more detailed compilation. It includes offenses which have been regarded as political crimes by some governments from the time of the Greek city-states to the beginning of the nineteenth century. B. INGRAHAM, *supra* note 1, at 21-22. The list is quite encompassing. Except for the fact that the offenses involve a challenge to established authority directly or indirectly, nothing about them suggests an immediate connection with the subject of political crime. Ingraham purports to clarify this connection, but does not succeed.

These categories overlap, in some instances significantly, and each includes specific offenses ranging from the serious to the relatively minor. The reader anticipates some refinement at this juncture, but is disappointed. Ingraham never adequately explains the factors which prompt the state to treat some offenders as *political* criminals and others as *common* criminals. This omission is all the more perplexing since the distinction is crucial to Ingraham's attempt to understand political crime in objective terms.<sup>6</sup>

Ingraham makes a major point in claiming that the motivation of the actor is not the key to understanding political crime. In offering an alternative theory, however, he does not probe deeply enough the motivations of governing officials. Despite a professed interest in the actual *administration* of criminal law,<sup>7</sup> Ingraham writes what is in the main a comparative history of *legislation* designed to protect the interests of established political authority. While there is merit in this type of descriptive enterprise, it does not advance the more fundamental explanatory objective that Ingraham set for himself at the outset. For example, Ingraham regards assassination of the head of state as the quintessential political crime.<sup>8</sup> But does this characterization really fit John Hinckley, the man who attempted to murder President Reagan? What difference would it make if the government tried to punish Hinckley more severely than is normally appropriate in such cases, solely because Hinckley acted for political reasons?<sup>9</sup> Notwithstan-

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<sup>6</sup> B. INGRAHAM, *supra* note 1, at 18-22. Curiously, Ingraham seems to think that it is easier to understand why certain offenses have been regarded as political than to understand why they have also been considered criminal. *Id.* at 22. Ingraham declares, somewhat tautologically, that offenses are political crimes if the state treats them as such. *Id.* at 19. The important analytical question, however, is why and under what circumstances the state would choose to distinguish among offenders along political lines.

<sup>7</sup> B. INGRAHAM, *supra* note 1, at 15-17.

<sup>8</sup> B. INGRAHAM, *supra* note 1, at 20, 23-24.

<sup>9</sup> The state's interest in protecting life, any life, accounts for the heirarchy of offenses subsumed within the law of homicide including the general law of attempts. This interest is objectively rooted and its vindication is sufficient to authorize punishment of a life taker, any life taker, without regard to his motive. Presumably no one considers homicide *per se* a political crime.

But consider these situations under Ingraham's approach. Assassination of the head of state is a species of homicide, yet, it is also, according to Ingraham, a form of political crime. If Ingraham is correct, was Lee Harvey Oswald a political criminal for taking the life of President Kennedy in 1963? At the time there was no federal law dealing with presidential assassination. The only law under which Oswald could have been punished for bringing about Kennedy's death was the Texas general law of homicide. *See* S. REP. No. 498, 89th Cong., 1st Sess. 1-4, *reprinted in* [1965] U.S. CODE CONG. & AD. NEWS 2866-69. The other obvious argument for treating Oswald as a political criminal is the identity of his victim. The reader should recall that in making this judgment Ingraham would not

ding the author's emphasis on methodology and precise terminology, the reader must guess as to how Ingraham would deal with these questions. In the final analysis, Ingraham's conception of political crime is not sharply differentiated from ordinary crime. This is a major shortcoming, given Ingraham's purpose of rescuing current thinking about political crime from its subjectivity.

Ingraham asserts that prevention, not regulation or punishment, has been the chief objective of laws dealing with political crime.<sup>10</sup> However, the extent to which Ingraham emphasizes prevention is questionable. Many criminal laws are enacted and enforced for overlapping and occasionally conflicting purposes. The state, in the run-of-the-mill criminal prosecution, regularly must decide which objectives to emphasize and how best to proceed. This is true of the prosecution of political crime as well. Yet, Ingraham discounts the regulatory objective in the enforcement of laws dealing with political crimes, at least prior to the twentieth century. He does acknowledge regulatory features in the insane asylums for dissenters in the Soviet Union<sup>11</sup> and in the host of registration and disclosure requirements applicable to Communist Party members in this country.<sup>12</sup>

One wonders whether the emergence of the regulatory approach to political crime is an entirely modern development. It is not necessary, or perhaps even desirable, to eradicate all politically

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consider Oswald's possible motives, such as allegiance to the Soviet Union or Cuba.

Now there is a federal criminal statute, 18 U.S.C. 1751, dealing with presidential assassination and John Hinckley will be prosecuted under it. Surely the presence of a presidential assassination statute does not distinguish Hinckley from Oswald. Under Ingraham's approach, the argument for treating Hinckley as a political criminal is even *stronger* than it is for Oswald. This logic strikes me as perverse. Perhaps Ingraham would regard them both as political criminals, but that answer would only confound the confusion since evenhanded enforcement of this law against all attempted assassins does not seem to be an example of political crime prosecution. Ingraham acknowledges this but never adequately explains why governments sometimes abandon the policy of evenhanded enforcement to deal with offenders viewed as political deviants.

<sup>10</sup> He notes several preventive aspects of such laws: (1) the predisposition to eliminate political offenders from the scene either by execution or banishment; (2) the prevalence of speech offenses; (3) the regularity with which anticipatory crimes such as attempt and conspiracy are charged; (4) the special procedures associated with the conduct of political trials; (5) the extralegal functions of political trials, and (6) the manner in which sanctions are applied, withheld or withdrawn for political purposes. B. INGRAHAM, *supra* note 1, at 26-34.

<sup>11</sup> For a gripping discussion of this practice see Z. MEDVEDEV & R. MEDVEDEV, *A QUESTION OF MADNESS* (1971).

<sup>12</sup> A review of these laws and the Supreme Court's treatment of them is contained in N. DORSEN, P. BENDER, B. NEUBORNE & J. GORA, *EMERSON, HABER & DORSEN'S POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES*, 101-143 (4th ed. 1976).

offensive activity to render it impotent.<sup>13</sup> It seems that this point has not been lost on the political leaders of France, Germany and Great Britain. In the nineteenth century they possessed a wide range of responses to so-called political crime from the death penalty to relatively mild penalties like banishment and *custodia honesta*.<sup>14</sup> It does not seem plausible to think that sanctions were imposed against political criminals without reference to the deterrent effect on sympathizers. Much of Ingraham's research suggests that rulers often exercised a high degree of political skill in manipulating available legal procedures to pursue ends which must be characterized as regulatory.<sup>15</sup> In the final analysis, Ingraham's emphasis on the dichotomy between prevention and regulation is unconvincing.

Fortunately, many parts of this book are not burdened by Ingraham's highly conceptualized methodology. The author's review of laws dealing with political crime in each country is detailed and brings out some interesting patterns. The discussion is organized along strict chronological lines and is divided into five parts, each apparently coinciding with a major era in the evolution of political crime in France, Germany and Great Britain:

1. 1770-1789—A Comparative Analysis of Laws Relating to Political Crime and Their Administration in France, Germany and Great Britain.
2. 1789-1830—The French Revolution and the Period of Reaction.
3. 1830-1851—A Time of Ferment; Springtime of the Policy of Leniency.
4. 1852-1914—A Time of Consolidation: The Summer of the Policy of Leniency.
5. 1914-1970—Political Crime in an Age of Ideology: The Autumn and Withering of the Policy of Leniency.

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<sup>13</sup> The discretion of law enforcement officials to accomplish a variety of objectives is well documented. K. DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* (1976); K. DAVIS, *POLICE DISCRETION* (1975). Preventive and regulatory objectives can be achieved simultaneously. The tactical advantage of such enforcement flexibility is important in the area of political crime since it can provide a useful subterfuge for the pursuit of political objectives for which Ingraham's "repressive response" might appear too heavy-handed.

<sup>14</sup> This term refers to "honorable punishment", a practice which occurred in all three countries. It meant the separation of political from common criminals and according them better treatment.

<sup>15</sup> An example of this type of strategy is President Nixon's compilation of an "enemies" list. Based on the list, he caused the IRS to audit the tax returns of individuals politically hostile to him. Another example stems from President Nixon's well-known contempt for the *Washington Post*. It apparently led him to generate opposition to the license renewal of a television station owned by the *Post* in Florida.

This breakdown is actually a function of historical and political developments in France. It is more or less imposed on Germany and Great Britain even though internal developments in those countries differed significantly from those in France. Granting that a common reference point is essential to comparative scholarship, one can still question Ingraham's mechanical and somewhat contrived approach. While it may have advantages from the author's standpoint, it is not necessarily the most illuminating way to develop this subject matter.

Ingraham is most interesting and controversial when he places legal developments in France, Germany and Great Britain into a broader context. For example, he argues that the decline of monarchies, which had morally rooted claims of allegiance based on religion and feudal relationships, led to a major shift in thinking about political crime.<sup>16</sup> After this decline, the state increasingly had to rest its claim to loyalty on a measure of political legitimacy. According to Ingraham, this was due to the influence of enlightenment philosophy which linked political legitimacy to the consent of the governed. The implication was that governments have obligations and that people have rights. As a result, political and social values in nineteenth century Europe became more pluralistic and relative. The entrenched orthodoxies of previous eras were no longer sufficient to justify harshly punitive sanctions against the political criminal solely on grounds of the moral reprehensibility of his action. Ingraham perjoratively refers to this general movement as liberalism.<sup>17</sup>

He contends that as the law of political crime lost its moral component under the influence of liberalism, it gradually ceased to focus on punishment as an objective. The political criminal, unlike the common thief, had a kind of honorable status; if he was deviant, it was not because of a lack of character, but because of the political means by which he proposed to achieve the common good.<sup>18</sup> According to Ingraham, this view of the political criminal prevailed in France, Germany and Great Britain and led to an extended period of lenient treatment in the nineteenth century. Largely because this leniency persisted, despite periodic and in many instances severe threats to established authority, Ingraham con-

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<sup>16</sup> B. INGRAHAM, *supra* note 1, at 39-44.

<sup>17</sup> B. INGRAHAM, *supra* note 1, at 41.

<sup>18</sup> B. INGRAHAM, *supra* note 1, at 34-35.

cludes that ideology and philosophy have shaped the law of political crime.<sup>19</sup>

Ingraham supports this thesis using examples from the twentieth century. A number of forces and events reversed the nineteenth century pattern of leniency toward political crime. They were: nationalism; the growing democratization of Western European governments;<sup>20</sup> the Russian Revolution of 1917; and, finally and most importantly in Ingraham's view, the emergence of positivism and related antiliberal doctrines.<sup>21</sup> Ingraham suggests two theories to explain positivism's influence. First, positivism implied a rejection of the idea of natural law, which Ingraham regards as the cornerstone of liberalism.<sup>22</sup> Second, positivism was peculiarly adaptable to statist ideologies such as Nazism, which conceived of the political community in highly prescriptive and inclusive terms.<sup>23</sup> In this conception of the state, the political criminal is immoral *per se*. By virtue of his actions, religion, or racial status, his very existence and presence threatens the state.

While this account may explain political crime in Nazi Germany, Ingraham overstates the relationship between ideology and political crime. One needs to understand not only the content of ideology, but also the reasons for its intense hostility toward non-adherents. This inquiry necessarily entails a deeper examination of history than Ingraham attempts. History and circumstance may influence ideology just as much as ideology influences them. A striking example of the author's "tunneled" history<sup>24</sup> is the omission of any discussion of the link between nineteenth century anti-semitism in Europe and the treatment of the Jews under Hitler.<sup>25</sup> Furthermore, non-ideological factors may shape twentieth century attitudes toward the political criminal. For example, modern technology has greatly enlarged the capability of totalitarian governments to control and repress political crime on a massive scale. Does ideology really explain why some political leaders exploit these awesome

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<sup>19</sup> B. INGRAHAM, *supra* note 1, at 317-23.

<sup>20</sup> Ingraham's citation of this factor, *See* B. INGRAHAM, *supra* note 1, at 219-21, seems anomalous since liberalism in part stimulated the emergence of democracies in Europe. What he appears to mean is that the idea of popular sovereignty which underlies democracy was easily adaptable to statist movements like facism and Nazism. Both movements regarded the state as the perfect embodiment of popular will, and hence, a realization of the democratic ideal.

<sup>21</sup> B. INGRAHAM, *supra* note 1, at 221-27.

<sup>22</sup> B. INGRAHAM, *supra* note 1, at 221-27.

<sup>23</sup> B. INGRAHAM, *supra* note 1, at 227.

<sup>24</sup> D. FISCHER, HISTORIANS' FALLACIES: TOWARD A LOGIC OF HISTORICAL THOUGHT 142-44 (1970).

<sup>25</sup> *See generally*, H. ARENDT, THE ORIGINS OF TOTALITARIANISM (1951).

means of repression to their full potential and others do not? Ingraham's thesis, while providing a helpful starting point, does not seem to account for the excesses of Idi Amin in Uganda or the apparent policy of *leniency* toward at least some dissidents in the Soviet Union today.

At various points, Ingraham refers almost contemptuously to liberalism's focus on the individual and in particular the individual's constitutional rights.<sup>26</sup> He apparently believes that such thinking is dangerous and so admonishes the reader in his preface.<sup>27</sup> To make sure that his meaning is clear, Ingraham concludes with a series of "lessons" in the efficacy of repression. They have a hackneyed and doctrinaire quality which will stir the emotion of only the most resolute law and order enthusiast.

Ingraham reserves for last his sublimely Orwellian "four limiting principles for the effective use of legal repression":

First, authorities should be careful to stay within the bounds of legality which they themselves have created, even if it is necessary to stretch those limits in times of emergency by specially enacted temporary legislation.

Second, caution should be practiced in the use of preventive measures such as mass arrests, searches and seizures, internment without trial, suppression of news and public meetings, security checks, and police harassment, not only because these appear to be procedures of dubious legality even in times of emergency, but also because, by their very nature, they tend to involve in their operations many persons who would, but for their victimization, have remained uncommitted or who would have even supported the government in an open conflict with its political adversaries.

Third, nothing should be done in the way of repression to call

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<sup>26</sup> This is a recurrent theme. Ingraham believes that liberals are much too quick to raise constitutional issues when preventive legal measures are employed against political offenders. He also thinks that liberals are excessively concerned about the possibility that limited uses of repression might lead to a police state. B. INGRAHAM, *supra* note 1, at xii, 41-44.

<sup>27</sup> There can be little doubt as to Ingraham's meaning, for he declares:

Contrary to popular belief, repressive measures, when used with restraint, have not led to the spreading or strengthening of political opposition (the metastasis theory), but instead have subdued it and forced it into legitimate and peaceful modes of expression. Moreover, the limited use of legal repression for defensive purposes has not led to the growth of a "police state." More often it has been the *failure* to employ limited measures of repression during a period of weakness and division which has led to the polarization of factions within society, the defeat of democracy, and the introduction of a dictatorial regime.

B. INGRAHAM, *supra* note 1, at xiii.

more public attention to political agitators than their activities would have otherwise received.

Finally, repressive measures should never be taken without serious consideration being given to positive responses to the grievances which political crimes and disturbances so often reflect.<sup>28</sup>

If they represent Ingraham's idea of governmental restraint, one must admire his faith in the wisdom of those who govern us.

Except for assembling basic legal materials reflecting the legislative treatment of political crime in the countries studied, this book is of limited value. The attempt to develop an objective, theoretically coherent basis for understanding political crime is unsuccessful. Ironically, Ingraham does not escape the subjectivity of approach that he denounces in the work of others. Indeed, one finishes this book with the conviction that it reveals more about the author's politics than political crime. This is unfortunate because Ingraham's basic purpose in writing this book is a laudable one.

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<sup>28</sup> B. INGRAHAM, *supra* note 1, at 323-25.

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