

# Foundational Texts in Modern Criminal Law

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# Introduction

## Grounding Criminal Law: Foundational Texts in Comparative-Historical Perspective

*Markus D Dubber*

This book features essays in which contemporary scholars engage critically with foundational texts in modern criminal law: formative texts in criminal legal thought since Hobbes.<sup>1</sup> It aims to contribute to the emergence of a canon, along with a documentary intellectual and disciplinary history, of modern criminal law and, at the same time, to take a snapshot of contemporary work on criminal law within that historical context.

As a first, programmatic (not to say foundational), effort, this project does not attempt to assemble a comprehensive, never mind a definitive, set of certified “classic” texts. Instead it features a selection of texts reflecting significant aspects in the development of modern conceptions of crime, punishment, and law.

Criminal law discourse has become, and will continue to become, more international and comparative, and in this sense global: the long-standing parochialism of criminal law scholarship and doctrine is giving way to a broad exploration of the foundations of modern criminal law in the new *lingua franca* of legal scholarship, English. The present book seeks to advance this promising scholarly and doctrinal project by making available key texts, including several not previously available in English translation, from the common law and civil law traditions, accompanied by contributions from leading contemporary representatives of both traditions.

Global discourse on criminal law needs a common foundation of texts, if not of principles. Eventually, scholars from throughout the world will be able to draw on a shared *fundus* of materials, and of concepts, that define the discipline and shape academic discourse, while at the same time, as in any other discipline, being subjected to constant challenge and reconstruction. A canon of key texts, however contested, forms part of the scholarly infrastructure of a global discipline, along with common journals, monograph series, reference works, informal and formal networks, as well as compatible curricular programs grounded in a basic vision or visions, however general or abstract, of the field of study as a whole.

Eventually, contributors to the global discipline of criminal law, no matter what their institutional or national affiliation, would be expected to have grappled with a common *corpus* of texts and concepts. In a global environment, it makes no sense that a budding criminal law scholar at an English institution would be unfamiliar with the key texts that structure the intellectual worldview of her colleague at a German institution, or vice versa. (To see this point, substitute “political science” or “psychology” or “philosophy” or “chemistry” for “criminal law.”) The point is not that there cannot, or should

<sup>1</sup> Primary texts, notably those not readily available elsewhere, are accessible through the book’s companion website: <[www.oup.com/uk/law/foundational-texts](http://www.oup.com/uk/law/foundational-texts)>. Newly translated primary texts appear in the Appendix.

not, be scholarly traditions or “schools” (which may or may not be tied to a country, a city, an institution, a department, or even an individual or group, or coffee shop), but that they should operate within a shared discourse, a common discipline, however fluid and self-critical.

It must be said, of course, that the present book is preliminary in a still broader sense: it would be preliminary even if it managed to be comprehensive within its systemic scope. It is post-parochial and supranational, but it is not global, if global is taken literally to mean encompassing every country, and every system of law and governance, or even every system of *criminal* law, around the globe. The present early effort at canon construction has a hard enough time capturing at least some important, or at least interesting, aspects of one recent (“modern”) slice in the development of criminal law in (some) Western countries. It doesn’t even try to speculate about, never mind to make contact with, other traditions of law and governance. In this sense, even this project remains parochial, though its parochialism at least is no longer national, but systemic, and recognized as such.

In the end, then, this book makes no claims about universal, or even truly global, foundations, or principles, of criminal law. At best, it provides the resources for a better informed conversation—in the spirit of bilateral comparative analysis, rather than the unilateral dissemination of one’s domestic system to a receptive audience in other, presumably, in some sense less advanced system<sup>2</sup>—about just what might be these points of commonality that would make a shared discourse about criminal law possible, and even about whether they exist at all. Soon, we’ll take a closer look at some of the threads that can be seen running through the texts, and the essays, in this book. For now, one obvious candidate for a formal, if not a substantive, point of commonality suggests itself: it is tempting to see the various texts in this collection as contributions to the history of efforts to generate a conception of crime and punishment in the modern *liberal* state. The limited usefulness of this common denominator becomes apparent as soon as one reflects on the difficulty of defining with anything approaching fruitful specificity just what sort of conception of liberalism is at stake.

Nonetheless, at least as a convenient label, the notion of a shared “liberal” project may be worth keeping if only because several of the contributors to the volume make a point of emphasizing the liberal credentials of “their” primary text authors. The essays on Hobbes and Bentham come to mind (chapters 1 and 4), but even the relationship between Pashukanis’s Marxist account of criminal law and the object of its “bourgeois-liberal” critique turns out to be more complicated—and even interesting—than one might think, and not merely in the predictable dialectic sense (chapter 10). Much the same might be said about Foucault or Christie, *mutatis mutandis* (chapters 16 and 17). And so even those who railed against “liberalism,” or who ostensibly sought not to attack it, but merely to analyze it, arguably remained within its conceptual framework, which may not be saying much since “liberalism” may be inescapable precisely because it has become so indistinct and malleable a concept.

<sup>2</sup> See MD Dubber, “Comparative Criminal Law” in M Reimann and R Zimmermann (eds), *Oxford Handbook of Comparative Law* (2006) 1287.



# 1. Toward a Comparative-Historical Analysis of Criminal Law

## a. Comparative

Whatever marker we use to draw a thin line around the supranational project for which the texts in this collection might count as “foundational,” for the moment the mode of discourse populated by these texts will be primarily *comparative*. It will be comparative both internally and externally. Internally (within the Western/liberal tradition), this book makes possible an intersystemic conversation between common law and civil law systems based on a shared familiarity with some important, or at least provocative or even surprisingly bland, texts. Most obviously, and mundanely, the translation into English of texts by Feuerbach, Birnbaum, Radbruch, and Jakobs for the first time brings Anglophone readers face-to-face with sources that until now had been accessible only to their civil law counterparts. In the case of Feuerbach, the translated text is an acknowledged “classic” (as Tatjana Hörnle confirms, in chapter 6), a certified foundational text in the history of German criminal law, and therefore also of civil criminal law which has been strongly influenced by German theory and doctrine over the past two centuries or so, in no small part thanks precisely to Feuerbach’s many and varied efforts, as a theorist, textbook author, and codifier (of the influential, even foundational, Bavarian Criminal Code of 1813). It is difficult to make sense of German criminal law without reference to Feuerbach; for that reason, it is difficult to have a meaningful conversation with someone steeped in German criminal law thought without knowing anything about Feuerbach’s views. This is not to say that Feuerbach, like many classic texts in any tradition, is in fact still read with any care even by those within that tradition, apart from a small class of self-professed historians, or antiquarians. In that case, making Feuerbach available for the first time to a new, external, audience may encourage those who claim his work as foundational to reassess the taken-for-granted cornerstones of their systemic worldview. The now possible comparative discourse may thus invigorate scholarly debate not only across, but also within, the systems in conversation.

Without anticipating the discussion of Feuerbach’s text in the next section, the excerpt from Feuerbach’s textbook provides rich opportunities for comparative analysis, from the very conception of criminal law as a scientific discipline straddling the distinction between doctrine and theory and its accompanying scholarly apparatus of intricate conceptual structures (laid out in minutely detailed tables of contents) and ubiquitous footnotes covering domestic and foreign, historical, doctrinal, and theoretical sources (but not cases!) to the development of a concept of crime and punishment on the basis of a political theory of the state and law and, more specifically, to the still often-cited (if not -quoted) description of what has come to be known in the Anglo-American literature as the “principle of legality” (*nullum crimen sine lege*) and its various formulations.<sup>3</sup>

<sup>3</sup> Not to be confused with the *Legalitätsprinzip* in German criminal law, which requires executive officials—police officers and prosecutors—to investigate and charge any provable violation of a criminal norm, subject, in the case of prosecutors but not police officers, to a countervailing principle, the opportunity principle (or *Opportunitätsprinzip*), that makes an exception for minor cases. For further discussion, see MD Dubber and T Hörnle, *Criminal Law: A Comparative Approach* (2014) ch 5.C.

The translation of the Birnbaum article from 1834 (written as a critique of the then-orthodox Feuerbachian view) makes available to an Anglophone audience a text that, on its face, is as insignificant as its author, a fairly minor figure in nineteenth-century German law.<sup>4</sup> And yet this short paper is frequently cited as the source of one of the central concepts of German criminal law, the *Rechtsgut*, an idea that also has attracted comparative attention by Anglo-American scholars eager to explore alternatives to the ubiquitous yet elusive “harm principle” as a limitation on the scope of criminal law. Closer scrutiny—or, in fact, even a fairly cursory reading—of Birnbaum’s article, however, reveals that it says nothing about a *Rechtsgut*, but instead takes Feuerbach to task for setting out an account of criminal law based on the idea of violation of a personal right (*Recht*), which Birnbaum insists should be replaced by the idea of interference with a common good (*Gut*). Birnbaum’s article achieved foundational status only some decades later, particularly through Karl Binding, who placed the *Rechtsgut* at the heart of his—thoroughly positivistic—account of criminal law.<sup>5</sup> In Birnbaum’s text, then, comparative analysis will not find a well-worked out alternative, deduced from fundamental principles of one form of another, to John Stuart Mill’s harm principle set out 25 years later across the Channel, and to much greater immediate acclaim, in *On Liberty* (1859) (chapter 8). Instead, the Anglophone reader (and perhaps also the occasional Germanophone reader not intimately familiar with the Birnbaum article) will find a somewhat meandering, pragmatic, and positivistic attempt to come to grips with what the author felt was a troubling mismatch between Feuerbach’s dominant account of criminal law and its (far more sprawling and varied) reality.

The Radbruch text, too, opens up opportunities for comparative analysis, although one of a more historical, than theoretical or doctrinal kind (chapter 11). Radbruch’s account of the origins of criminal law has received very little attention in Anglo-American scholarship (with the notable exception of Thorsten Sellin, whose provocative claims about the connection between slavery and punishment, and imprisonment in particular, themselves did not gain much traction<sup>6</sup>). In fact, it has largely been ignored in Germany, and the civil law literature, as well, perhaps because Radbruch’s foray into early legal history did not fit neatly into his broad and varied output in criminal law doctrine, theory, and reform, and of course in legal philosophy, where the “Radbruch formula” played a central role in the post-World War II revival of natural law.<sup>7</sup> From a comparative perspective, Radbruch’s essay is interesting for the same reason that drew Maitland to Heinrich Brunner’s and Otto Gierke’s legal historical work some decades before, in the late-nineteenth century: it encourages an exercise in comparative legal history not only for its own sake but also—more ambitiously, and controversially—as historical analysis of law, ie with an eye toward a critical analysis of features of contemporary penalty.

<sup>4</sup> And literature. Johann Michael Franz Birnbaum (1792-1877) taught at various Dutch and German universities. He studied law under Feuerbach in Landshut, where he also became friendly with Karl Joseph Anton Mittermaier, the (often critical) editor of later editions of Feuerbach’s textbook who went on to become a well-known scholar of criminal law, and notably comparative criminal law, in his own right.

<sup>5</sup> See generally MD Dubber, “Theories of Crime and Punishment in German Criminal Law” (2006) 53 *Am J Comp L* 679.

<sup>6</sup> JT Sellin, *Slavery and the Penal System* (1976); see Mireille Hildebrandt’s essay in this book (ch 11).

<sup>7</sup> On Radbruch, see ch 11. His “formula” first appeared in a short 1946 paper, “Gesetzliches Unrecht und übergesetzliches Recht” (1946) 1 *Süddeutsche Juristenzeitung* 105, 107 (English translation: “Statutory Lawlessness and Supra-Statutory Law” (2006) 26 *OJLS* 1 (B Litschewski Paulson and SL Paulson trans)).

The fourth, and final, text made available for the first time in English translation sets out Günther Jakobs's distinction between citizen and enemy criminal law, and once again packs a more immediately obvious comparative punch for contemporary critical analysis in criminal law doctrine and theory (chapter 18). The obvious question, from an internal comparative perspective, is whether the distinction between two contradictory yet mutually dependent paradigms of criminal law—whether or not it takes the form of the distinction between citizen and enemy in particular—can inform the critical analysis of Anglo-American criminal law, descriptively, as a matter of analysis, or (also) normatively, as a matter of critique. More specifically, comparative analysis here might inquire into the connection between the citizen-enemy distinction and other, more familiar, ones, such as that between the “due process” and “crime control” models of criminal law (Herbert Packer), that between the punishment and treatment of (certain) offenders, or one between a “traditional” or “liberal” conception of criminal law, on one hand, and the “war” on crime (or drugs, or terror), on the other, or—in yet a different register—that between the experience of white and minority persons in the criminal justice system.

The potential for comparative analysis obviously is not limited to the mentioned texts that are being made available for the first time in English. The above discussion merely served to illustrate how these texts in particular can contribute to a transnational criminal law dialogue within the confines of Western political and legal systems. By assembling foundational texts from several “common law” and “civil law” countries, including those previously unavailable in English, the present book invites comparative analysis as a mode of critical analysis of contemporary Western criminal law. Over time, this internal form of comparative analysis then may expand in scope to generate a transsystemic, and in that sense also a more global, discourse beyond the confines of the Western/liberal cluster.

## b. Historical

The important comparative dimension of this project, however, should not obscure its central historical aspect. If the ultimate object is scrutiny of the exercise of the state's penal power, both comparative and historical analysis appear as modes of critical analysis. As such they place a particular manifestation of that power, in a particular place and time, within an intra- or inter-temporal (ie a comparative and historical) context that creates the necessary space between subject and object of inquiry to make analysis and critique possible. Critical analysis, here, is taken simply to mean an attempt to capture the operation of an exercise of state power with an eye toward its critique, without prejudicing one mode of critique over another (say, Pashukanis's Marxist “ideological” critique or a “liberal” critique in terms of some notion of “justice”).

The present project is historical in several senses. Most immediately, the texts in the collection trace, if only in broad strokes, histories of criminal legal thought in Anglo-American and German criminal law (and therefore, by imperfect but familiar extension, in common and civil criminal law). They also, more opaquely, reflect histories of criminal law doctrine and, more clearly, of criminal law as a discipline that

attempts to define itself, often in relation to other emerging scholarly enterprises, such as psychology, penology, and, in particular, criminology, whose continued struggle of self-discovery (and self-doubt) is documented in the chapters on Foucault and Christie (chapters 16 and 17).

More interesting, and controversial, is the attempt to see the texts in this book (primary and secondary alike) not only as mapping out parallel, or at least distinct, histories, but a common non-parochial history of, again, Western (or perhaps “liberal”) criminal legal thought, if nothing more. This attempt to construct a broader narrative, however, would require a careful exercise in comparative history, which in turn would presuppose the development of the domestic narratives subjected to comparative analysis.

In the end, the construction of a non-parochial (or more broadly parochial) historical account likely will involve the continuing contraction and expansion of analytic focus, oscillating between the domestic and the supra-domestic realm, with insights flowing in both directions. Comparative analysis, after all, aids not only the development of an overarching supra-domestic account (which may or may not emerge, in the end!) but also informs the construction of a domestic account, through the critical space created by any turn to comparative analysis.

Initially, the present book may be useful in suggesting alternative histories, and raise questions about the boundaries, and the foundations, of the historical arc that is often taken for granted, to the extent historical curiosity arises in the first place. Take, for instance, the often drawn line connecting Beccaria (chapter 2), Bentham (chapter 4), Stephen (chapter 9), and Wechsler (chapter 12) (with any number of other links in between and beyond, including Livingston, Macaulay, Holmes, and even Posner and Becker (chapter 15)), which—notwithstanding the fact that Beccaria was Italian—tends to be associated with the common law tradition in criminal law and is often seen in contrast to another line, from Kant to Feuerbach to Hegel to Binding to Radbruch to contemporary German criminal law, which is ordinarily associated with the civil law tradition. A comparative historical analysis here may reveal—and perhaps challenge—the tendency to match a given conceptual approach with a specific legal tradition. It might even go further and raise the question whether both traditions can be seen as struggling with some—and perhaps even the same—fundamental tension between two conceptions of state penal power, or at least with a similar contrast between basic approaches to questions of crime and punishment (see section 2.c.).

Inquiries into the “foundations” of a given legal subject, or the “theory” or “philosophy” of that subject, occasionally start from the conclusion of this comparative historical enterprise. To the “theorist,” the questions worth asking may appear to be the same, as may the range of conceivable answers. Why punish? What is crime? What is punishment? Intent? Justification? Insanity? And so on. From this ahistorical perspective, Beccaria and Kant, and Wechsler and Radbruch, are all trying to answer the same question, in various (if often similar, and even recurrent) ways. A text by Feuerbach and one by Becker, in this view, are sources of arguments that exist outside the realm of space and time. Certainly the “foundational” texts in the present collection can be—and have been—read in this way. In that case, one might wonder why anyone would

both studying texts written years, decades, even centuries ago. Aren't they just early attempts that might have been remarkable at the time but have long since been supplanted by more nuanced, comprehensive, advanced, modern, even "correct" analyses? If law, and criminal law in particular, is a *science*—a theme that runs through this book—what's the point of turning back the clock of scientific progress, other than as an exercise in the history of science?

There is another approach to the inquiry into legal "foundations," and into foundations of criminal law as a practice (and a discipline), one that takes seriously the historical, or perhaps more helpfully the genealogical, nature of the enterprise. The search for foundations, from this perspective, is not merely a matter of uncovering foundational principles—either inductively from observed (doctrinal, or institutional) data, generally in the form of legal norms (and, less often, practices) or deductively from yet more foundational, or abstract, principles. It is instead an attempt to trace the development of norms and practices within a given system through the reading of texts that shaped, or even originated, this development in significant ways, and that are in this sense formative, or perhaps even foundational. This inquiry is not merely historical, but genealogical, in its attempt not to discover historical facts to reconstruct a past reality, or to record changes in that reality over time, but to capture development within a paradigm defined, and reflected, in part by certain texts. The comparative dimension of this genealogical project can be either internal, within a given paradigm, or external, across paradigms. In both cases, the recognition and conceptualization of that paradigm is a prerequisite for meaningful study.

Applied to the project of reflecting on the development of the *discipline* of criminal law mentioned at the outset, this approach suggests that the search for foundational texts of a discipline implies a historical consciousness, one that sees scholarship as a shared endeavor not only across space, but also across time. A discipline may reinvent itself, question its origins, limits, even its *raison d'être*, but it cannot regard itself as a sequence of moments of utter originality. Ideally, a discipline combines a recognition of its foundations with an urge to challenge and to critique, to combine tradition with innovation. The present book is offered in this spirit.

## 2. "Foundational Texts in Modern Criminal Law"

Having laid out the ambition and the approach driving the underlying project, it is high time we focus more closely on the essays collected in this volume. Rather than giving a chapter-by-chapter account, I will consider conceptions of "foundational texts in modern criminal law" running through the various contributions and, along the way, touch on some of the many themes that one might see emerging from the book as a whole.

### a. *Foundational texts*

In the essays, the question of what makes a text "foundational" attracted considerable attention. While this question was never settled, many contributors saw the need to consider whether "their" particular text met the standard of foundationalness or other. On

one end of the spectrum, Guyora Binder argues that Bentham's work in general, and the *Principles of Morals and Legislation* in particular was self-consciously and deliberately foundational. Bentham, according to Binder, set out to create a new mode, and field, and method of inquiry that was to replace everything that had gone before. Bentham, in other words, was a radical reformer, and saw his texts as laying the foundation for a new and all-encompassing enterprise. Invoking Bentham's comparison between the "science of legislation" and the "science of architecture," Binder draws attention to the architectural significance of the very notion of a foundational text.

Architectural imagery, incidentally, makes another appearance, in Simon Stern's essay on Blackstone (chapter 3), in particular the understudied and-appreciated volume four of his *Commentaries on the Laws of England*. As has been pointed out often before, Blackstone was fond of using architectural images in the *Commentaries*. In contrast to Bentham, however, the parallel to architecture highlights the limits of Blackstone's ambition, not its radical scope.

Blackstone was attacked as both too ambitious, and not ambitious enough. On one side were critics like Thomas Jefferson, who faulted Blackstone for lacking the humility of a Coke, whom they portrayed as content merely to let the common law speak for itself (despite considerable evidence of the unreliability of his reports of just what the "common law" spoke). In contrast to Coke, so the unflattering comparison went, Blackstone took it upon himself to remold the common law in the name of elegance in substance and in style. Bentham, by contrast, assailed Blackstone as a mere apologist for the common law, who showed no interest in subjecting it to critical analysis (preferably in utilitarian terms) and instead found sense in even the most senseless of doctrines.

As Stern points out, even Bentham grudgingly made an exception when it came to volume four of the *Commentaries*, in which he noticed an unusual number of critical remarks, with many of which he found himself agreeing, to his surprise. But as it turns out, Blackstone's *Commentaries* were non-original—and in that sense non-foundational—even at their most original, in the volume on "public wrongs." Blackstone's discussion of criminal law is derivative not only in its uncritical reliance on other common law summarizers of the criminal law before him (eg Hawkins, Hale, but also Coke) but even in its flashes of originality. Whenever Blackstone ventured into the realm of critique, or even reform, something that he appears to have thought more appropriate in the case of the (statutory and supposedly haphazard and amateurish) criminal law than in the case of the common law's other (private) realms, he did not go beyond relying uncritically on . . . Beccaria. (Ironically, Blackstone shared this deference to Beccaria as the supplier of critical perspective with both Jefferson and Bentham, two of his fiercest critics, from opposite directions.<sup>8</sup>) Even in the criminal law, where even

<sup>8</sup> Jefferson's schizophrenic Virginia criminal law reform bill consisted of a gloss on Coke and Anglo-Saxon dooms and a preface with frequent references to Beccaria. MD Dubber, "An Extraordinarily Beautiful Document: Jefferson's Bill for Proportioning Crimes and Punishments and the Challenge of Republican Punishment" in MD Dubber and L Farmer (eds), *Modern Histories of Crime and Punishment* (2007) 115. Beccaria's influence on Bentham is well known. See eg HLA Hart, "Bentham and Beccaria" in *Essays on Bentham: Studies in Jurisprudence and Political Theory* (1982) 40; see also Guyora Binder's essay on Bentham in this volume (ch 4).



Bentham begrudgingly granted him a critical spirit that he found sorely lacking elsewhere in the *Commentaries*, Blackstone was not an architect, but an interior decorator.

On the other end of the spectrum, several contributors went out of their way to contest the foundational status of “their” primary text. The chapter on Wechsler not only points out the non-foundationalness of Wechsler’s Model Penal Code, but then goes on to argue that this very feature made it foundational after all. Obviously, two different notions of foundationalness are at play here. There is, on one hand, the notion of a foundational text as devoted to the exploration of fundamental issues, if not—unlike in Bentham’s case—necessarily providing the foundations itself. Wechsler’s text is not foundational in this sense; it is not concerned with foundational matters of principle, and the question of legitimacy in particular, or, at best, takes these matters to have been settled for too long, and too definitively, to warrant reconsideration. In fact, for the Model Penal Code—as a Legal Process document—this assumed consensus about, and consequent lack of interest in, basic questions of the legitimacy of the state’s exercise of its penal power is central. And yet, the Model Penal Code is foundational in another sense: it was in fact tremendously influential. It is the most foundational non-foundational text in American criminal law.

In Malcolm Thorburn’s telling, HLA Hart’s *Punishment and Responsibility* also was influential, and formative, yet oddly non-foundational at the same time (chapter 14). Of course, Hart, the philosopher-jurist, would have sought out the very foundational questions of criminal jurisprudence that Wechsler, the Legal Process codifier, made a point of ignoring as uninteresting. And yet Thorburn’s exercise in legal theoretical archaeology comes up empty; persistent attempts to push past the veneer of foundational theorizing reveal nothing: nothing foundational in the sense of “original,” since Rawls in particular had already covered much of the same ground, and nothing foundational in the structural, or architectural, sense, regardless of provenance, since Hart performs a “sleight of hand” precisely at the foundational moment, ironically by “cleverly disguis[ing]” his only innovation (the notion of limiting, or “negative” retributivism) as an incidental gloss on the familiar theory of retributivism.

The chapter on Foucault (by Pat O’Malley and Mariana Valverde) makes the case that *Discipline and Punish* not only was not meant to be foundational but, more disturbing, was *misinterpreted* as foundational. In making their case against foundationalness (in design, if not in fact), O’Malley and Valverde lay out a detailed *Wirkungsgeschichte* of the text, exemplifying another genre represented in the contributions to this book. The Foucault chapter, in fact, sketches the recent history of criminology as a discipline as a series of misreadings of a supposedly foundational text. In the end one may well be left with the impression that *Discipline and Punish* turned out to be foundational after all, and in spite of itself (or its author’s supposed intentions), in a discipline on the lookout for foundations after the collapse of the project of Marxist theorizing. The chapter thus raises the more general question of the foundational status of a text that is read, and perhaps misread, as foundational, not only in a one discipline but also in others, for instance criminal law. Does the tortured (and perhaps even damaging) *Wirkungsgeschichte* of this text in one discipline, even one that claims it as one of its own (criminology), affect the text’s foundational significance in another (criminal law)?

A *Wirkungsgeschichte* of a radically different kind appears in Bernard Harcourt's essays on Beccaria's *Crimes and Punishments* and Mill's *On Liberty* (chapters 2 and 8). Harcourt does not focus on the question of whether a given text was intended to be "foundational," and whether later readings were true to its intended meaning, and yet in both cases, his account traces shifting interpretations and, more to point, uses or deployments of the texts in question. In the case of Beccaria, Harcourt—leaving aside the question of correctness—challenges the common practice among contemporary writers on criminal law from an economic perspective of claiming Beccaria as their foundational figure. As Alon Harel points out in greater detail in his essay in this collection, Gary Becker (chapter 15) was explicit about conceiving of—or at least portraying—his work as a mere updating of Beccaria's foundational text. Yet, as Harcourt argues, partly by expanding his analysis beyond *Crimes and Punishments* to Beccaria's other work (notably his short essay *On Smuggling*, which is well known among economic historians but little known among scholars of criminal law<sup>9</sup>), and by placing Beccaria within the intellectual context of late-eighteenth century continental Europe, Beccaria was no proponent of a minimal state that left the free market to its own devices.

Instead, Beccaria should be seen as contributing to a by then long-standing intellectual, political, and institutional project, *police science*, aimed at supplying (absolute) sovereigns with well-considered, rational, and eventually scientific advice on prudent or good governance ("gute Polizey"). Beccaria, in other words, was a practitioner of "political economy," in the traditional sense epitomized by Rousseau's *Discourse on Political Economy* (his entry on the topic in Diderot's *Encyclopédie*), published only nine years before *Crimes and Punishments*, in 1755:

THE word Economy, or OEconomy, is derived from oikos, a house, and nomos, law, and meant originally only the wise and legitimate government of the house for the common good of the whole family. The meaning of the term was then extended to the government of that great family, the State. To distinguish these two senses of the word, the latter is called general or political economy, and the former domestic or particular economy.

It should be noted that Adam Smith, another political economist claimed as a founding father by modern laissez-faire economists, also at least initially treated "police" in the traditional, oeconomic, sense in his roughly contemporaneous Glasgow lectures on jurisprudence, preserved in student notes under the title "Juris Prudence or Notes from the Lectures on Justice, Police, Revenue, and Arms" (1763).<sup>10</sup>

In Harcourt's telling, the story of Mill's *On Liberty*, or rather of a short passage—if not a single sentence ("the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others")—introducing the so-called "harm principle" at the beginning of that book (in chapter 1, entitled "Introductory"), is no less eventful and reflective of the evolution of criminal

<sup>9</sup> This essay is available on the Foundational Texts companion website, <[www.oup.com/uk/law/foundational-texts](http://www.oup.com/uk/law/foundational-texts)>.

<sup>10</sup> A Smith, "Juris Prudence or Notes from the Lectures on Justice, Police, Revenue, and Arms delivered in the University of Glasgow by Adam Smith Professor of Moral Philosophy" in RL Meed et al, *Lectures on Jurisprudence* (1978) 396, 398.



law since its publication, almost a century later, in 1859, than Beccaria's short tract. Expanding on his celebrated article on the "collapse" of the harm principle, Harcourt demonstrates that by merely placing Mill's initial statement of the "principle" within the context of the (not particularly long) book in which it appears—or, in other words, simply by *reading on*—it very quickly loses its libertarian sheen and instead emerges as a rather flexible standard, or consideration, concerning a state's decision to exercise its power to govern, penal and otherwise. As a limit on state power—rather than as a guide to its exercise—the principle, it turns out, does not stand in the way of any number of robust regulatory interventions, including, for instance, the penal prohibition of marriage among the poor, idleness, drunkenness, and offenses against "good manners" and "decency." Here Mill's text recalls the long (yet oft-ignored) list of offenses against the "public police or oeconomy" in volume four of Blackstone's *Commentaries*, published only five years after Beccaria's *Crimes and Punishments*, in 1769. These "violation[s] of the public oeconomy and decency of a well ordered state," drew on a definition of "public police and oeconomy" as

the due regulation and domestic order of the kingdom: whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behaviour to the rules of propriety, good neighbourhood, and good manners; and to be decent, industrious, and inoffensive in their respective stations.

A closer reading, therefore, challenges *On Liberty's* status as a foundational text in a particular and often self-consciously "liberal" conception of the state's penal power that revolves around significant and hard limits on that power. What initially appears, and is frequently presented, as a manifesto on the limits on state penal power instead emerges as a more nuanced, and literally balanced, reflection on the exercise of that power in general and in a number of specific "applications."

The connection to Beccaria here is clear enough. According to Harcourt, both Beccaria and Mill proceed from the premise of a sovereign state equipped with powers to implement policy. The fundamental challenge is not—certainly not only—to limit concededly comprehensive state power, but to properly guide its exercise. Neither Mill's nor Beccaria's text, in Harcourt's reading of both the texts and of their subsequent readings—is obviously foundational to a conception of limited government, and of criminal law within it.

Comparative analysis reveals, however, that the similarities between Mill's and another text often cited as—or at least taken to be—foundational are even closer: the previously mentioned 1834 article by JMF Birnbaum, entitled "Concerning the Need for a Right Violation in the Concept of a Crime, having particular Regard to the Concept of an Affront to Honour," which is regularly cited as the supposed source of the analogue to the "harm principle" in German criminal law, the so-called *Rechtsgut* principle. The parallels between the careers of the harm principle in the common law world and of the *Rechtsgut* principle in the civil law world (originally and mainly in German criminal law, but also beyond, given German criminal law's long-standing influence in other civil law countries) are remarkable.<sup>11</sup> In fact, the German literature has produced accounts of

<sup>11</sup> For a more detailed discussion, see Dubber (n 5) pt 1.

the intellectual history of the *Rechtsgut* principle that mirror Harcourt's narrative of the harm principle's twists and turns. The *Rechtsgut* principle has been cited for decades as a cornerstone of German criminal law. Along with the so-called *ultima ratio* principle (according to which penal power may only be invoked as a "last resort"), the *Rechtsgut* principle is said, again and again, to be central to a modern, liberal, enlightened system of criminal law: the state may only invoke its penal power to protect a *Rechtsgut*, or "law good." This is often treated as something akin to self-evident, as an analytical truth; to say that a *Rechtsstaat* ("law state") may invoke its penal power only to safeguard a *Rechtsgut* ("law good") under the rule of law (a *Rechtsstaat*) goes, literally, without saying. A law good just is precisely that good which a law state may seek to protect.

Without going into obvious problems of a *petitio principii* here, or related difficulties in distinguishing between descriptive and normative claims about what the (German) state in fact does or what it *may* do (not to mention whether or how violations of this prescription would be monitored and enforced), for our purposes it is enough to note that the cited Birnbaum article performs a function similar to Mill's *On Liberty*: it is routinely cited as the source of the limiting principle in question. As in the case of the Mill text, however, even a modestly attentive scrutiny, or mere perusal, of the Birnbaum essay raises serious doubts that it can bear the weight that has been placed on it. In fact, the Birnbaum text does not even attempt to set out an account of limits of state action through criminal law; on the contrary, it attacks such an attempt, by PJA Feuerbach, and *precisely for that reason*. Birnbaum, in this paper, criticizes Feuerbach for setting out a normative account of the nature and limits of the state's penal power instead of limiting himself to a positive account of the scope of the exercise of that power in fact. What's more, Birnbaum criticizes Feuerbach specifically for elevating to the level of actual legal principle a mere philosophical speculation about the proper limits of state power *based on the concept of a right violation*. Pointing out that Feuerbach's account of crime as a violation of personal *right* leaves no room for the very same offenses against the public police and economy we've encountered in Blackstone, Birnbaum calls for replacing *right* as the operative concept with *good*. In other words, Birnbaum does away with exactly that feature of the *Rechtsgut*—*Recht*—that makes the *Rechtsgut* principle self-evident in a *Rechtsstaat*. The object of state protection, the *good*, simply becomes any interest the state finds worthy of protection.

It is this positivist impulse motivating Birnbaum's substitute of *right* with *good*, *Recht* with *Gut*, that recommended his essay to Karl Binding, a central figure in German criminal law at the turn of the twentieth century,<sup>12</sup> whose influential "norm theory" revolved around the generation of *Rechtsgüter* and the establishment of "protective norms" (*Schutznormen*) around them. Binding, like Birnbaum before him, insisted that morality (*Sittlichkeit*) was indeed a *Rechtsgut* (as indicated by its recognition as a protected interest in the Prussian Criminal Code at the time) even though it did not violate a personal right. In fact, the only limits on the state's recognition of *Rechtsgüter* were its "discretion and logic."<sup>13</sup> *Rechtsgüter* were "interests of the law," which encompassed

<sup>12</sup> Binding will also make an appearance, as occasional historian of criminal law, in Mireille Hildebrandt's essay on Radbruch (ch 11).

<sup>13</sup> K Binding, *Die Normen und ihre Übertretung* (2nd edn, 1890) vol 1, 340.

“anything that the legislature considers valuable and the undisturbed retention of which it therefore must ensure through norms.” Binding, after all, held that “the right to punishment is nothing but the right to obedience of the law, which has been transformed by the offender’s disobedience” and saw the purpose of punishment as “the inmate’s subjugation under the power of law for the sake of maintaining the authority of the laws violated.”

The *Rechtsgut* principle survived the Nazi period largely unscathed; after initial concerns that the principle was in some sense “liberal” and therefore incompatible with the conception of a National Socialist state, it found its place in Nazi criminal law. The principle could be retained simply by defining *Rechtsgut* to include such things as interests as “maintaining the purity of German blood.”

After the collapse of the Nazi regime, however, the *Rechtsgut* principle increasingly came to be saddled with normative significance. The mere fact that German criminal law did not at any given time—after World War II—exceed the limits drawn by the principle was treated as confirmation of a wide and deep manifestation of the idea of the *law state*, rather than as evidence of the principle’s lack of normative bite. The basis for the claim that the principle was, in fact, a principle, rather than a descriptive term or one that could prove useful in the application of existing norms (for instance, in the balance of evils defense or in exercises in statutory interpretation), remained unclear, however.

The tension between a descriptive and a normative view of the concept of *Rechtsgut* came to a head in the 2008 Incest Judgment of the German Constitutional Court. The Court there upheld the incest prohibition in the German Criminal Code in a case involving two adult siblings. In the face of a spirited dissent by Judge Winfried Hassemer, a former criminal law professor, the Court flatly rejected the constitutional significance of the *Rechtsgut* principle as a substantive constraint on the state’s penal power.<sup>14</sup>

Returning to the other side of our comparative analysis, the harm principle, the Canadian Supreme Court, five years earlier, had rejected a constitutional attack on the criminal prohibition of marijuana possession as a violation of the “harm principle.”<sup>15</sup> According to the Court, the harm principle did not amount to a constitutional limitation on the state’s penal power as a “principle of fundamental justice.” Both the Canadian and the German courts, however, were happy to acknowledge that their respective “principles” may well function as prudential guidelines that might inform the legislative decision whether or not to invoke the state’s penal power in a particular instance. But the harm principle was only one consideration among many and its “violation” did not have constitutional significance by itself.

## b. Foundational texts

The texts that serve as springboards for the essays in this volume reflect a range of genres of legal writing, and therefore also varying conceptions of its producers and consumers, and, in the end, of the discipline of law. Initially, it is worth noticing that, among the first five authors and texts, only Blackstone could be considered a legal

<sup>14</sup> BVerfG, 2 BvR 392/07 (2008).

<sup>15</sup> *R v Malmo-Levine; R v Caine* [2003] 3 SCR 571.

scholar and his *Commentaries* a work of legal scholarship.<sup>16</sup> Under a suitably broad definition of a treatise (namely one that includes not only works devoted to a single legal subject), the *Commentaries* would count as a treatise, if a very broad, and ambitious, one: Blackstone set out not merely to record, but to present the entirety of English law in a systematic way (rather than, say, in alphabetical order, or in an order that follows a sequence of procedural steps).<sup>17</sup> Blackstone's immediate audience in the *Commentaries* was very specific, and limited: students who attended his Oxford lectures. Of course, it ended up reaching a far wider audience, particularly in the New World; in the early American Republic, it has been said, the significance of his *Commentaries* was only second to the Bible.

Hobbes and Beccaria before him, and Bentham and Kant after him, would not be considered—nor would they have considered themselves—legal scholars; they were interested in general questions of governance and state power, which led them to reflect on the state's penal power, as the most acute manifestation of that power. Their texts were not intended narrowly as legal texts; their audience was the educated public and, more ambitiously, the state officials (and, later on, the emerging scholarly community). Kant did get around to addressing questions of law explicitly; Meir Dan-Cohen, however, largely ignores these late efforts (commonly referred as the *Rechtslehre*) and instead constructs a Kantian account of criminal law based on his other, moral (not political), writings, a practice not uncommon among Kantian scholars of law in general and of criminal law in particular (chapter 5).

Feuerbach's *Lehrbuch* is the first text in our collection devoted exclusively, and expressly, to *criminal law* (or rather *peinliches Recht*, penal law, a then common term reflecting its not only etymological association with the infliction of pain (*Pein*)); it also nicely illustrates the genre of the German law textbook, and makes explicit that persistent genre's original motivating assumptions and aims.<sup>18</sup> Unlike Blackstone's treatment of "public wrongs," which appears in the fourth, and last, volume of his comprehensive

<sup>16</sup> In the history of the study of law at English universities, Blackstone remained the exception for at least another century, if not for two; while Oxford and Cambridge returned their attention to the subject in the second half of the nineteenth century, law was still a backwater of university study when HLA Hart was appointed Professor of Jurisprudence at Oxford almost a century later. In the US, the first university professorship in law was the chair in "law and police" established by Thomas Jefferson at the College of William & Mary in 1779. T. Jefferson, *A Bill for Amending the Constitution of the College of William and Mary, and Substituting More Certain Revenues for Its Support* (1779). Law was among the traditional founding faculties of German universities (generally alongside philosophy, theology, and medicine), as, for instance, at Humboldt-University Berlin where Hegel began lecturing (at the philosophical faculty) on "natural law and state science" in 1818.

<sup>17</sup> On the legal treatise as a genre, see generally A. Fernandez and M. D. Dubber (eds), *Law Books in Action: Essays on the Anglo-American Legal Treatise* (2012). On limiting the definition of the treatise to single-subject works, see A. W. Simpson, "The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature" (1981) 48 U. Chi. L. Rev. 632. Denying the *Commentaries* treatise status seems odd, given that its systematizing impetus is generally thought to be a, if not the central, distinguishing characteristic of a treatise. Their scope, then, would make the *Commentaries* *too much* of a treatise to qualify for treatisehood; in that event, one would of course be free to think of, say, its (fourth) volume on public wrongs as a separate treatise on criminal law instead, making the *Commentaries* a series of treatises, rather than a single one.

<sup>18</sup> Compare Feuerbach's pioneering textbook with Savigny's similarly foundational treatise on the law of possession, and its similarly extensive methodological exposition, published two years later. F. C. Savigny, *Der Begriff des Besitzes: Eine civilistische Abhandlung* (1803).

*Commentaries*, Feuerbach deals with criminal law exclusively, and in fact more narrowly still, with *substantive* criminal law. His textbook aims to set out a principled and systematic account of criminal law. As Feuerbach explains in the preface to the first edition of 1801, “[h]e wanted to present the penal law—purified in all its parts from positive as well as philosophical errors—in the strictest scientific context, in its highest logicity in accordance with all requirements of systematic unity.”

Feuerbach then goes on to formulate, in a remarkable passage, “the maxims from which the author has worked and as to which he had to give an account to his readers”:

When he had made his decision to examine penal law, he was very assiduous to call in question for the time being everything that existed before him, and also to forget what he thought he already knew. He spent a lot of time solely with the sources; he read and studied, particularly Roman law and German criminal statutes, and philosophised about the principles of science and their treatment; because here neither historical findings alone nor philosophising alone suffices. He thus laboriously created for himself the construct of his own science... He went back to the scientific experts after he had collected enough to be able to learn from them without having to share their confusions with them. They were the touchstone for his own system, they smoothed off the sharp corners of his construct [Gebäude] and they filled many gaps that had remained hidden from him when left to himself. He thankfully acknowledges what they were to him; may he also be the same to them!

Here then we have a description of legal scientific method by “Professor Feuerbach” (as he is listed on the title page), oscillating between doctrinal study and theoretical reflection, and pursued within a community of scholars engaged in a common enterprise. In this textbook, Feuerbach addresses not only his students, but also his fellow criminal law scientists (to two of whom the first edition is dedicated). He is engaged in a conscious effort to “construct” a system; the preface is followed by 10 pages of a “short overview of the system.” The first sections of the book contain methodological “Prolegomena to the concept, sources, ancillary disciplines and literature of penal law.” The scholarly apparatus includes many, and often lengthy, footnotes, with references to materials in German, Latin, Italian, and French (in later editions also in English, including one to “Blackstone’s well known *Commentaries* Book 4”), as well as a (still common) list of basic texts at the start of individual sections.

The other textbook—if we leave aside Blackstone’s *Commentaries*—among the primary texts in this project is Glanville Williams’s *Criminal Law: The General Part*, published a century and half later, in 1953. As Lindsay Farmer points out (in chapter 13), the book tends to be credited with the introduction of the concept of a “general part” into English criminal law (at the same time as Herbert Wechsler began work on the American Model Penal Code and its general part in the US), but lacks the systematic and theoretical ambition that animated Feuerbach’s textbook. While Feuerbach pleads that “the evidence for his scientific endeavours should not be sought in the philosophical part alone,” where “the philosophical part” refers to what we would now call the general part, Williams insists that his interest is in the law alone, anxious to limit “the unwelcome attentions of certain criminologists and philosophers.” Feuerbach, by contrast, includes a long list of auxiliary disciplines, including



A) sciences in the true sense and amongst these... principally: I) philosophy, namely 1) psychology; 2) practical philosophy in general, pre-eminently the philosophy of law (natural law) and... 3) criminal policy. II) Historical sciences, in particular 1) history of the states in which the statutes currently in force have arisen 2) history of the criminal statutes applicable in Germany and of the criminal law as a science itself. III) The science of criminal law and legislation of other states and peoples. IV) The forensic science of medicine.

Birnbaum's 1834 critique of Feuerbach is the first of several *articles* among the foundational texts in the book. Here, too, even in this otherwise rather unexceptional paper, the scholarly apparatus already is quite extensive, including German and Roman law sources, along with primary and secondary literature from England, France, Italy, Portugal, and Switzerland, much of which is not only cited but also discussed in the text. Birnbaum's paper appears as a text fully integrated into a well-trenched and highly developed scholarly discourse on criminal law: published in a scholarly journal specifically devoted to criminal law (and edited by a group of four criminal law scholars, including Birnbaum himself), it targets another scholar's work (Feuerbach's), discusses and cites scholarly literature (along with primary sources), and appears primarily to address other scholars (rather than students or state officials<sup>19</sup>).

Stephen published in a great many genres: in addition to his prodigious output as a leading Victorian essayist, there are of course his judicial opinions and other official documents, including his draft codes and his *General View of the Criminal Law of England* (1863) and *Digest of Criminal Law* (1878) (conceived as preparatory for his codification effort).<sup>20</sup> Marc DeGirolami (chapter 9) focuses primarily on Stephen's "magisterial and (at the time) unique (in a three-volume *History of the Criminal Law of England*)." While the *History* may well be Stephen's "major scholarly work," it is worth recalling that it was not produced by a professional academic with a university appointment (not unusual given the state—and status—of legal education in English universities at the time<sup>21</sup>), but rather was the work of a gentleman scholar shot through with extensive, and often entertaining, discussions of Stephen's views on any number of criminal law topics.

The other primarily historiographical text in the collection, by Gustav Radbruch, is also not the work of a professional legal historian (chapter 11). Radbruch, unlike Stephen, held a university appointment, although in the 1920s he also served as a Social Democratic member of German Parliament and even as Justice Minister (when he produced a draft German Criminal Code). By the time he published his provocative article on "The Origin of Criminal Law in the Status of the Unfree," in a Swiss journal, the Nazis had removed him from his professorship, in 1933.

<sup>19</sup> It is not surprising, but still worth noting, that judges initially were not among the primary audience of German scholarly literature on law, including on criminal law (though this changed over time with the development of the genre of critical "decision comments" (*Entscheidungsanmerkungen*)). By contrast, English legal literature was not only addressed to judges, but was often produced by them as well (eg Stephen, in this collection; Blackstone eventually managed to receive a judicial appointment, partly on the strength of his publication of the *Commentaries*).

<sup>20</sup> See B Wright, "Renovate or Rebuild? Treatises, Digests, and Criminal Law Codification" in Fernandez and Dubber (n 17) 181.

<sup>21</sup> See eg JP Dawson, *The Oracles of the Law* (1968) 95.

Noteworthy about the Radbruch text is not its genre, but its methodology (or perhaps not its formal, but its substantive genre), or more precisely its approach to the study of legal history. As Mireille Hildebrandt points out, Radbruch's essay fits into a by then over a century old scholarly project, *historical jurisprudence*, which originated as the study of law from a historical point of view, as opposed to the study of legal history for its own sake, as a variety of applied history. Launched by Savigny with the publication of his treatise on the law of possession in 1803, the *historische Rechtsschule* was a "historical school of law," rather than a school of legal historiography. The point of historical inquiry was to produce a legal theory, or more broadly a critical vantage point for the analysis of contemporary law. In Savigny's mind this meant recovery of original Roman law texts, out of which Roman law scholars—like himself—would construct a system of (private) law. The more general idea, however, was the pursuit of legal history as *historical analysis of law*. In Radbruch's hands, historical inquiry sheds light on features of contemporary criminal law: "To the present day criminal law bears the features of its derivation from serf punishments. Punishment since that time signifies a *capitis deminutio* [degraded status] because it assumes the *capitis deminutio* of the one for whom it was originally intended." Half a century earlier, Stephen's *History*, too, can be seen as a project in the spirit of historical jurisprudence in England, as practiced by Henry Sumner Maine and, to the greatest effect, by Frederic William Maitland (and to a lesser extent, Frederick Pollock) and, later, Paul Vinogradoff.

Another formal genre of legal text to which both Stephen and Radbruch made significant contributions deserves our attention: the *code*. While Herbert Wechsler's Model Penal Code is the only example of this genre in the present collection of foundational texts, the list of primary text authors who tried their hand at codification also includes Bentham (the codifier—*manqué*—par excellence, who never got a chance to work out his ideas for penal codification in detail, despite his best efforts), Feuerbach (who drafted the influential Bavarian Criminal Code of 1813), Williams (who was active in England criminal codification efforts and kept close ties with Wechsler during the drafting of the Model Penal Code in the 1950s), and, interestingly, Pashukanis (who, Peter Ramsay tells us, produced draft penal codes that were not only used for training purposes but even were adopted in some Soviet republics).

Tracing the conceptions of codification, along with structural, stylistic, and substantive features, of the codes envisioned, and drafted, by these writers would be a fascinating exercise—which will have to await another opportunity. For now, a general observation will have to do. As the essay on the Model Penal Code points out in some detail, Wechsler saw himself very much as working within the tradition he saw as including Beccaria, Bentham, and Stephen (among the writers represented in our collection), without however drawing any specific connections between Bentham's and Stephen's codification efforts and his own. He had in mind not codificatory technique but a general approach to codification, and to criminal law in general, that proceeded from the conviction that consequentialism was the only possible rationale for punishment (or, peno-correctional treatment, as he and his contemporaries preferred to call it), while retributivism was at best irrational, and at worst simply barbaric and pointlessly cruel.

It is worth reflecting for a moment on the fact that every primary text author in this collection who turned his attention to codification shared this, consequentialist rather than deontological, view of the purpose of punishment, in one form or another. Although Feuerbach and Radbruch held broadly Kantian views on general matters of moral theory, they both rejected Kant's retributivist position on the subject of punishment (leaving aside interpretations of Kant's writings as endorsing a mixed theory of punishment<sup>22</sup>). Feuerbach, in fact, made his name as a proponent of a thoroughly consequentialist theory of general, rather than special, prevention, and drafted the Bavarian Criminal Code accordingly. Stephen saw himself as a utilitarian in the tradition of Bentham, even though—as DeGirolami points out—his views on Bentham (and utilitarianism) were no less fluid and self-contradictory than on many other subjects. His insistence that punishment mirror public feelings of hatred for offenders did not reflect a retributivist theory of punishment, in his mind, but an unflinching commitment to an objective assessment for purposes of the utilitarian calculus of pain and pleasure actually experienced (in contrast to Mill, who in his mind abandoned clear-eyed, social scientific, utilitarianism when he postulated the harm principle as *deus ex machina*). Wechsler's position already has been mentioned, and Williams in this context does not differ significantly from Wechsler (although, as we saw, he appears to have been less enamored of advances in penological science than his American colleague). Pashukanis is the most noteworthy member of the group. As Ramsey shows, he was committed to a radically consequentialist vision of criminal law, and of criminal codification, which abandoned detailed offense definitions in favor of broad prohibitions of violations of "Soviet policy" for the sake of the "technical regulation of persons."

In the end, then, the shared consequentialism of all the codifiers represented among the primary text authors in this book raises the question about the conception of codification at play in their codification efforts. More pointedly, it suggests that this conception is compatible with a wide range of positions on the idea of the state, and of law. Wechsler's and Pashukanis's approaches to codification in different ways draw into question the relationship between codification and law, as well as codification's possible contribution to the legitimation of state power, and state penal power in particular. The potential for codification as anything other than a coordinated and efficient mechanism for the exercise of sovereign power, no matter to what end, remains oddly unrealized (in both senses of the word).<sup>23</sup>

### c. Modern criminal law

Considering the question of what *really* counts as "modern" could take up at least as much time, and space, as pondering *the* meaning of "foundational."<sup>24</sup> While we'll spend

<sup>22</sup> See S Byrd, "Kant's Theory of Punishment: Deterrence in Its Threat, Retribution in Its Execution" (1989) 8 L & Phil 151. Radbruch's "neo-Kantian" views on legal philosophy are discussed in Hildebrandt's essay in this book (ch 11).

<sup>23</sup> Alternative conceptions of criminal codification are explored in MD Dubber, "Penal Panopticon: The Idea of a Modern Model Penal Code" (2000) 4 Buff Crim L Rev 53.

<sup>24</sup> On self-consciously "modern" approaches to criminal law, and criminal codification, see the essays on Wechsler and Williams (chs 12 and 13).



some time on this point, the bulk of what remains of this introduction will be devoted to some reflections on the conceptions of criminal law, and modern criminal law in particular, circulating in this book.

It may be useful to approach the concept of law at play in these pages in the context of contrasts to other concepts. There is first the law that is distinguished from religion and from morality, where religion and morality are often treated as synonyms, or at least as functional equivalents, ie as sufficiently similar vis-à-vis their common point of contrast, law. This distinction is often associated with the idea of “modern” law in particular, with Hobbes, for instance, or Beccaria, qualifying as “modern” or as ushering in a “modern” era of law insofar as they rescue law from the dark, literally, medieval realm of religious dogma and irrationality, if not outright barbarity. Morality, in this view of law, may play the role as the modern remnant of religion, as modern law’s counterpoint at a time when religion has lost much of its institutional and discursive force, or threat. Note here DeGirolami’s perceptive discussion of Stephen’s meandering remarks on the distinction between law and morality and/or religion (chapter 9).

The conception of law in contradistinction to religion and morality, then, has an important temporal dimension. Law coexisted with religion for a very long time, but then turned modern at the moment its fundamental incompatibility with religion was discovered (by Hobbes, perhaps). As the power of the church, and of religion, faded away, morality took religion’s place as the contrasting non-legal normative system, with even organized religion redefining its mission in moral terms. The criminal law played an important role in this evolution since it was located, and placed, at the supposed fault line between law and morality.

This is a familiar story about the relationship between law and morality (religion having become so irrelevant as to have completely dropped out of the analysis, even as a convenient counterpoint), and between criminal law and morality in particular. And it is one that is played out in many of the primary texts, and the essays, in this project. The animating irony of this story is, of course, the obvious difficulty of categorically separating “law” from “morality,” when the language of criminal law overflows with moral terms, arguments, considerations, and meanings, in doctrine, theory, policy, and everyday conversation. The history of criminal law thought, in this sense, can be seen as the constant struggle to both deny and insist on the connection between criminal law and morality, at the same time. As modern, modern criminal law must keep an anxious distance from morality while its legitimacy depends on its moral foundation.

The notion of legitimacy, however, points toward another distinction, or rather a cluster of distinctions. I mean the distinction, in primary texts and essays in this collection, between law and justice, on the one hand, and peace (and war!), economy (including political economy), politics and policy (and regulation) and, in the particular case of criminal law, medicine (or public health), on the other.<sup>25</sup> The basic idea animating this distinction is that modern law radically redefined and sharpened a long-standing distinction between two fundamental modes, or genres, of governance that had remained submerged throughout the Middle Ages. At bottom, this

<sup>25</sup> See generally MD Dubber, *The Police Power: Patriarchy and the Foundations of American Government* (2005).

is the distinction between autonomy and heteronomy, self- and other-government, which is at least as old as that between the Athenian householder's governance of his household, the *oikos*, and his governance *qua* citizen of himself and other citizens in the agora.

With the collapse of Roman republicanism, and the emergence of the imperial sovereign as *pater patriae*, began a long period during which heteronomy was the dominant mode of governance in all realms of government, and a collapse of the distinction between the private and public realm. The householder's essentially patriarchal *mode* of governance became the *model* of governance, from the family to the manor to the monastery to the church to the prison to the military and eventually, and most importantly, to the state. The creation of the central sovereign state was achieved not through the replacement of (local) autonomy with (central) heteronomy, but through the extension of one heteronomy throughout the land. More specifically, the creation of the pre-modern state was the expansion of one householder's peace at the expense of another's. At the end of a development (already well under way in the days of Hobbes's peacemaking *Leviathan* and long completed by the time of Blackstone's *Commentaries*), the king's land peace had incorporated the lord's manorial peace or, to put it in terms of law, the king's common law had swallowed the lord's particular law, and the king's jurisdiction had transformed the lord's jurisdiction into a juris-audition, and the lord from a lawgiver into a law recipient.

This process of pacification is not separated from that of legalization. The latter is a tool for the accomplishment of the former; the spread of the king's peace is accomplished by, among other things, the spread of the king's common law, the law that is common throughout his realm precisely insofar as it is *his* law. The pacification of the land (through "land peaces") gives an answer to the age-old question: whose peace? And the answer is the same as that to the question: whose law? It is the king's peace and the king's law, with all other peaces and laws, or jurisdictions, being mere delegations of the king's.

The criminal law, now, serves to protect the king's peace. Just as the householder's power had encompassed the protection of the householder's peace, no matter how modest or wide in scope, as defined by the boundaries of his house or *mund*, by any means he deemed necessary, so now the king—as *pater familias* of the nation, in Blackstone's phrase—wields his penal power to protect the king's peace, or the peace of the realm, and, eventually, the public peace.

In this account, the shift to modernity arrives with the rise of the state as an institution separate from the king's household, when the sovereign draws a distinction between the peace of his (personal) household and the public household of the state. At that point, once the dismantling, degradation, and incorporation of the (now) micro households of (now) lower lords and men—who can be the victims only of "petit" treason as opposed to the high, or grand, treason that can apply only to the sovereign—into the king's household is so complete that the notion of the king as a *primus inter pares* has long been forgotten, and the king's power is synonymous with governmental power itself, the king can transcend his royal household and even (bizarrely) assumes the role of "first servant" (as in the case of Frederick II of Prussia) of the newly apersonal and distinct state.

The rise of the modern state is marked by, among other things, the rise of the science of state administration, ie the science of *police* (*Polizeiwissenschaft*). This science is produced by experts, police scientists, who advise the enlightened sovereign on the prudent government of the state. The study of “political economy,” at this point, pursues the same goal, while nicely capturing the combination of private and public governance through the expansion of economy (*oikonomia*, or household government) into the public sphere, or *polis* (as pointed out by Rousseau in his *Discourse on Political Economy*).

The modern conception of law now arises in reaction to, and as a critique of, this attempt to rationalize, scienticize, and objectivize the traditional radically arational, discretionary, and subjective mode of household governance transferred onto the government of the state. Driven by the discovery, or “declaration,” of the capacity for autonomy as the defining, sufficient, and “universal” characteristic of personhood, “law” places against the radical and all-encompassing heteronomy of “police” a similarly radical and all-encompassing autonomy of law. The law state (*Rechtsstaat*) must displace the police state (*Polizeistaat*); autonomy must not only end, but reverse, the millennia-long hegemony of heteronomy. Autonomy replaces heteronomy as the universal model of governance, as law replaces police, and justice replaces peace as the measure of political power.

Now the notion of legitimacy is crucial to this originary moment of tension between modern police and modern law (or modern heteronomy and modern autonomy as genres of governance). Law and justice are no longer compatible, if not synonymous, with police and peace, as benefits dispensed by the householder-sovereign, much as the lord once did to “his man” in exchange for the latter’s obeisance. They instead frame a new critical analysis of state power that demands justification of every exercise of that power as a potential violation of the autonomy of the person-citizen. The legitimacy of the state turns on its compliance with “the rule of law” (which is explicitly distinguished from “the rule of men,” and the rule of the sovereign in particular) and with “principles of justice.” At bottom, however, consistency with, and respect for, the capacity for self-government of every subject-object of state power is the touchstone of the new critical discourse of legitimacy.

In this changed landscape, the state’s penal power attracts considerable critical attention as a *prima facie* illegitimate and severe interference with the autonomy of its object. At the same time, criminal law—*qua* law—no longer merely describes a set of norms, institutions, and practices but faces the burden not only of applying, but at the same time of legitimating, the state’s penal power, as consistent with the autonomy of all affected person-citizens, including notably the “victim” and the “offender.” Kant, Feuerbach, and Hegel (and perhaps Mill, and later Hart, though less clearly) all can be seen as framing this legitimacy challenge, and addressing it, in different ways.

Birnbaum’s public good-based critique of Feuerbach’s personal right-based account of criminal law, however, is symptomatic of the dualistic condition of modern criminal law, or penalty, which continues to reflect the long-standing (and in this sense foundational!) tension between heteronomy and autonomy, recovered in the conflict between modern police and law. The critical moment of modern law might have interrupted the hegemony of heteronomy, but it has not replaced it with

the hegemony of autonomy. The police state persists alongside the law state, as an uneasy complement in continuous tension. All “modern” accounts of criminal law reflect this tension, some placing different emphases on one conception of penalty or another, and some drawing the distinction more explicitly than others. Wechsler and Becker, for instance, are content to approach criminal law as a tool for the administration of measures to maximize public welfare, in Wechsler’s case through a fairly elaborate administrative apparatus designed to identify and deter, or if necessary to neutralize (through peno-correctional treatment), abnormally dangerous people, without giving much thought to an alternative conception of criminal law. Jakobs, by contrast, expends considerable effort to differentiate between criminal law for citizens (or criminal law properly speaking) and criminal law for enemies (or criminal police), and has drawn intense criticism for his refusal to privilege the former over the latter in all cases.

This introduction can only give a poor sense of the opportunities for further thought and study presented by the essays in this collection, along with the foundational texts themselves. This project—from the selection of “foundational texts” and the solicitation of an international and interdisciplinary group of contemporary scholars, the translation of key German texts now available for the first time to an international Anglophone audience, the two intensive workshops where the contributors shared their work, and eventually to the completion of the manuscript (and even the writing of this introduction)—has been a tremendously stimulating and rewarding experience. Hopefully this introduction managed to capture some of that excitement, in the hope that others will take up this invitation to engage with, and to discover or rediscover, the foundational texts that inspired the provocative reflections collected in this volume.

## APPENDIX A

# Textbook of the Common Penal Law in Force in Germany\*

*Paul Johann Anselm Feuerbach\*\*†*

### PREFACE TO THE FIRST EDITION 1801

This textbook was planned some years ago, and the major parts of it executed. But the further the author progressed, the more difficulties he discovered and the more complicated the main and subsidiary investigations became into which he was drawn almost against his will; and yet his duties towards his science would not allow him to sacrifice the higher demands of science and of the public to the need to have a basic theme for his lectures (however *compelling* this need was for him). He sincerely wished to be able to give something complete to his readers. He wanted to present the penal law [das peinliche Recht]—purified in all its parts from positive as well as philosophical errors—in the strictest scientific context, in its highest logicity [in seiner höchsten Konsequenz] in accordance with all requirements of systematic unity. This was what he intended and desired. He knew only too well the small measure of his powers in relation to this idea; but, forgetting himself, he believed he would have to work as if it was possible to attain what was not attainable at all, or at least not for *him*.

If doubt leads to truth, then the author was on the right path. When he had made his decision to examine penal law, he was very assiduous to call in question for the time being everything that existed before him, and also to forget what he thought he already knew. He spent a lot of time solely with the sources; he read and studied, particularly Roman law and German criminal statutes, and philosophised about the principles of science and their treatment; because here neither historical findings alone nor philosophising alone suffices. He thus laboriously created for himself the construct [Gebäude] of his own science; but his labours rewarded him richly. He went back to the scientific experts after he had collected enough to be able to learn from them without having to share their confusions with them. They were the touchstone for his own system, they smoothed off the sharp corners of his construct [Gebäude] and they filled many gaps that had remained hidden from him when left to himself. He thankfully acknowledges what they were to him; may he also be the same to them!

These are the maxims from which the author has worked and as to which he had to give an account to his readers. What he has actually achieved any expert can easily decide. He merely asks that the evidence for his scientific endeavours should not be sought in the philosophical part alone and that this part should also not be regarded as just an extract from the author's *Revision* [PJA Feuerbach, *Revision der Grundsätze und Grundbegriffe des positiven peinlichen Rechts* (Revision of the principles and basic concepts of positive penal law) 1st vol Erfurt 1799, 2nd vol, Chemnitz 1808]. The

\* *Lehrbuch des gemeinen in Deutschland gültigen peinlichen Rechts* (13th edn, 1840). The original text of this, the thirteenth, edition (CJA Mittermaier, editor) is available on the *Foundational Texts in Modern Criminal Law* companion website: <[www.oup.com/uk/law/foundational-texts](http://www.oup.com/uk/law/foundational-texts)>; the first edition of the textbook appeared in 1801 (and is also available on the companion website).

\*\* Paul Johann Anselm Feuerbach (\*1775 Hainichen/Jena; †1833 Frankfurt a.M.) was a law professor, codifier (Bavarian Criminal Code of 1813), judge, and author. He was also the father of Ludwig Feuerbach. Gustav Radbruch wrote his biography, *Paul Johann Anselm Feuerbach: Ein Juristenleben* (1934).

† Raymond Youngs prepared an initial translation of the text, which was then revised by Markus Dubber for *Foundational Texts in Modern Criminal Law* (2014). The intricate table of contents and most of the (original) footnotes were retained; most of the footnotes added by the editor, Carl Josef Anton Mittermaier, were not. Work on this project was supported by a grant from the Social Sciences and Humanities Research Council of Canada.

object of his investigation was science in its full scope, and in the same way as he revised others' opinions, he also subjected his own convictions, which he had already laid before the public, to revision. As to the method of examination, the arrangement of the whole and the individual parts, as well as the boundaries that the author has drawn between what is philosophical and what is positive, he will perhaps be able to present the grounds for these in a special little paper: *Theory of the scientific development of positive penal law*.

The author believes that he has acted rightly in not completely ignoring practice (however much he hates this cushion for literary lethargy and prop to blind caprice). But he mostly allocates it to a place in the notes. There he has also from time to time allowed himself to discuss briefly important contentious issues and to refute significant errors that affect either the treatment of the whole or of individual scientific doctrines. Science was always a major consideration here; the secondary aim was saving time for oral instruction. The author considered it to be very important in a textbook [Lehrbuch] to cite statutes and the literature, however much this is now out of fashion. But he has only cited works that he knows from his own perusal; he has only accepted a few in good faith from scholars [Literatoren].

Now a short word to the author's opponents. After the appearance of his *Revision* he had an experience that certainly did not take him aback, because he expected it and because everyone must expect it who does not let himself be carried away in the stream of custom. All kinds of weapons have been used against him: he has been challenged in publications and from lecterns—occasionally only for dubious reasons and often by insults and ridicule. The encouraging approbation of the better part of his contemporaries, and still more the liberal investigations that he provoked, could easily console him over those encounters if he had needed consolation about them. With these principles he looks forward dispassionately to the future and he will never again debase himself by giving an answer to similar arguments. The author for his part considers his dispute with Herr Klein to be concluded. He finds no grounds for answering the most recent publications by this academic directed against him. To wrestle once on the literary battlefield is excusable, and perhaps good; to linger on it for long, always struggling over the same issue, is tiring and tedious for the combatants and at least ridiculous for the spectators. If the prize were conviction and truth, then it would still be well worth the effort; but it is well known to be all too true that *nimum altercando veritas amittitur* [truth is lost by too much altercation]. Let Herr Klein go his way and the author will go his. We intend to say what we think and do what we can. Time and the just tribunal of this world may one day decide who did the most and the best.

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## PROLEGOMENA TO THE CONCEPT, SOURCES, ANCILLARY DISCIPLINES AND LITERATURE OF PENAL LAW

### § 1

The *criminal law* (criminal law science, penal law) is the science of the rights of the state, which are based on criminal statutes against subjects who are contravenors [Uebertreter] of these. It is therefore a part of *public law* and is differentiated from *civil law* in so far as this covers rights of private persons, and from *state law* [Staatsrecht], as a part of public law co-ordinated with it, in so far as this represents rights based on the constitution of the state.

[Footnotes omitted]

### § 2

The *general penal law*, as the philosophy of the legal grounds of criminal law and its exercise, is the science of the *possible* rights of the state arising from criminal statutes; *positive penal law* is the science of the *actual* rights of a particular state (Germany) arising from given criminal statutes.

[Footnotes omitted]

### § 3

The *common* penal law of Germany has, like the common law in general, with the dissolution of the imperial constitution [Holy Roman Empire of the German Nation] lost the character of general juridical validity, and therefore no longer applies according to its *form*—as *common law*. However, where and in so far as it is not limited or repealed by original particular statutes of the former German imperial territories, it continues to exist in Germany, but only as *particular state law* in accordance with its *content*, with the exception of those legal rules that relate to relationships of the German imperial federation or are based exclusively on principles of the former imperial state law.

[Footnotes omitted]

### § 4

The science of positive penal law proceeds I) from the general principles about punishment of unlawful actions in general,—*philosophical (general) part*, and then describes II) the particular rights of the state in regard to punishment of individual types of unlawful actions—*positive (special) part*.—The doctrine concerning the manner in which the state statutorily [gesetzmäßig] claims its rights from criminal statutes (*criminal process*) is really part of procedural law in general and is associated with the criminal law itself only by the needs of academic instruction.

[Footnotes omitted]

### § 5

The *sources* of common German criminal law are I) *the philosophy of criminal law* [Strafrecht], insofar as it is not limited in its application by positive statutory provisions; II) the *positive* criminal statutes of the former *German Empire*; to which belong A) *foreign* statutes adopted in Germany, namely 1) those of *Roman* and 2) *Canonical* law; B) *indigenous*, namely 1) the *penal*

court ordinance of Charles V of 1532 [Constitutio Criminalis Carolina] 2) besides other imperial statutes.

[Footnotes omitted]

## § 6

*Subsidiary knowledge* [Hilfskenntnisse] about criminal law includes A) *sciences* in the true sense and amongst these, besides the remaining parts of positive law, principally: I) *philosophy*, namely 1) *psychology*<sup>a</sup> 2) practical philosophy in general, pre-eminently the *philosophy of law (natural law)*<sup>b</sup> and, as a specially adapted part of this, *general penal law*<sup>c</sup>, as well as 3) *criminal policy*<sup>d</sup> [Criminalpolitik], in particular in relation to new legislation<sup>e</sup>. II) *Historical sciences*, in particular 1) *history of the states* in which the statutes currently in force have arisen 2) history of the *criminal statutes* applicable

<sup>a</sup> *Feder* Investigations concerning the human will. 3 parts, 2nd edit, Göttingen and Lemgo 1785–1792.—*Schmid's* Empirical psychology 1st part Jena 1791, 2nd edit 1797.—*Jacobs* Outline of experiential theory of the soul, 2nd edit Halle 1795.—*Kant's* Anthropology from a pragmatic point of view, Königsberg 1798, 2nd edit 1800.—*J G E Maass* Concerning the passions, 2 vols, Halle 1805, 1807. *J G E Maass*, Essay about the feelings, especially the emotions, 1st, 2nd vol, Halle 1812. *Schaumann's* Ideas on a criminal psychology, Halle 1792.—*Hofbauer*, Psychology in its major applications to the administration of justice, Halle 1808.—*C L v Weber* Handbook on psychological anthropology with special regard to practice and the administration of criminal justice, Tübingen 1828. *Médecine légale (Legal medicine)* by Hofbauer translated by Chambeyron with notes by Messrs Esquirol and Itard, Paris 1821.—*Friedreich* Systematic handbook of forensic psychology, Leipzig 1825. *Ray* A treatise on the medical jurisprudence of insanity, Boston 1838.

<sup>b</sup> Knowledge of the best literature of natural law is assumed from the lectures on this science.

<sup>c</sup> *Regn. Engelhard* Essay concerning a general penal law, Frankfurt and Leipzig 1756.—*P Raurici* Positionum ad rem crimin. philosophico practicarum liber unus, Berol et Leipzig 1787.—*Bergk*, Philosophy of penal law, Meissen 1802.—*Zachariae* Elements of philosophical criminal law, Leipzig 1803.—*Bauer* Principles of philosophical criminal law, Göttingen 1825.—*Richter* Philosophical criminal law etc, Leipzig 1828.—*Carl Trummer* On the philosophy of law and criminal law in particular, Hamburg 1827.—Numerous materials are woven into the literature about criminal policy.

[Rest of footnote (editor's addition) omitted]

<sup>d</sup> *Beccaria* Del delitti e delle pene, Napol. 1764. German translation, Hamburg 1766—Ulm 1767—by Hommel with comments and amendments, Breslau 1778, 2 parts.—with comments, notes and treatises etc by J A Bergk Leipzig 1798, 2 parts. Pre-eminently *Beccaria* Del delitti e delle pene, Con l'aggiunta d'un esame critico dell A Paolini ed. altri opuscoli, Firenze 1821 5 vols.—(Voltaire) Prix de la justice et de l'humanité a Ferney 1775.—*Cajetan Filangieri* System of legislation, translated from Italian, Anspach 1784 ff (new edit 1794 ff), 3rd and 4th vol.—*Servin* De la législation criminelle (Concerning criminal legislation), Basle 1782, German translation by Joh. Ernst Gruner, with preface by Feder, Nuremberg 1786.—*Brisot de Warville* Théorie des lois criminelles (Theory of criminal laws), Paris 1781.—*Pastoret* Les lois pénales (Penal laws), Paris 1790, translated by Erhard, 2 vols. Leipzig 1792.—*von Soden* Spirit of the German criminal statutes, 3 vols, 2nd edit Frankfurt 1792.—*von Globig and Huster*, Treatise concerning criminal legislation, Zürich 1783. The same: four additions to the prize-winning essay on criminal legislation: Altenburg 1785.—*Gmelin* Principles of legislation concerning crimes and punishments, Tübingen 1785.—*E C Wieland* Concerning the spirit of the penal statutes, 2 parts, Leipzig 1783–1784. *Oerstadt* Concerning the basic rules of criminal legislation, Copenhagen 1818.—*Villaums* Essay on a theory of criminal legislation, Copenhagen 1818.—*Jeremy Bentham* Traité de la législation civile et pénale par Dumont, Paris 1820. The same work translated by Beneke, 2 vols, Berlin 1830.—The following are important as materials on criminal policy: various drafts of criminal codes by *von Quistorp*, *Dalberg*, *Kleinschrod* and *Eggers*, the drafts of a criminal code for the Kingdom of Saxony by *Tittmann* (Meissen 1813), *Erhard* (Leipzig 1816), *Stübel* (1824); further for Hannover (von Bauer), for Brunswick (von Strombeck) amongst others.—In respect of Bavaria, the following fall to be considered 1) the draft by *Kleinschrod* of 1802 (against which *Feuerbach*, Critique of *Kleinschrod's* draft for the Electoral Palatinate of Bavarian States, 3 parts, 1804); 2) *Feuerbach's* draft of 1810 which served as a basis for the Bavarian Criminal Code of 1813, but experienced much misfortune in the consultations; 3) the draft of the Criminal Code of 1822 (von Gönner and Stürmer): against which, in particular, *Oersted's* detailed examination of the new draft for a Criminal Code for the Kingdom of Bavaria etc, Copenhagen 1823.—The *Projet de Code criminel, avec les observations des redacteurs* etc Paris 1804 and *Collezione dei travagli sul Codice penale del regno d'Italia*, vol I, Brescia 1807 is not to be disregarded.

<sup>e</sup> Critical expositions and comparisons of recent legislation. *Mittermaier* Concerning the basic errors in the treatment of criminal law in text and statute books, Bonn, 1819. *Mittermaier* Concerning the most recent state of criminal legislation in Germany, Heidelberg 1825. *Bauer* in the Comments on the Hannover

in Germany and of the *criminal law* as a science itself. III) The science of criminal law and legislation of other states and peoples.<sup>g</sup> IV) The *forensic science of medicine*.<sup>h</sup>—B) The necessary *linguistic*

draft, Hannover 1826, 2 parts, and in Comparison of the original draft and the revised draft for the Kingdom of Hannover, Göttingen 1831. *Hepp*, Comparison of the original Hannover criminal draft with the revised Heidelberg one, 1832.—Articles in the New Archive of Criminal Law concerning the individual drafts,—and in the Critical Journal (by Mittermaier and Zachariae) for Foreign Legislation and Legal Science. The writings which appeared on the occasion of the Bavarian drafts (of 1822, 1828, 1831) also belong here.

<sup>f</sup> As a separate issue as yet little studied. Materials provide the usual compendia of legal history, the writings quoted in § 5 note c by Thomasius, Horis and Malblank. *Chr G Hoffmanni* Praenotiones de origine, progressu et natura jurispr. crim. Germ. Leipzig 1722 are mere outlines as well as the History of penal law by Stein, Heilbron 1807. On the other hand the detailed *E Henke* Essay on a history on penal law 2 parts, 1809–1810. For the history of Roman criminal law, in particular: *C Fr Dieck* Historical essays about the criminal law of the Romans, Halle 1822.—*J Fr H Abegg* De antiquissimo Romanorum jure crim. Comm. I, Königsberg 1828.—*C E Jarke* De summis princ. juris Rom. e delictis corumque poenis etc, Göttingen 1822.—For German legal history: *A R Frey* Obs. ad jur. crim. Teuton. Carol V. const. crim. hist. Heidelberg 1825. Many individual discussions in *Ed. Feuerbach* The Lex Salica in its various reviews, Erlangen 1831, and the writings quoted in the addendum § 5 c by Woringer and especially *Rosshirt* History and system of German criminal law, Stuttgart 1838, 3 parts.

<sup>g</sup> The following are particularly noteworthy: I) from, non-European legislation 1) the Mosaic cf *Michaelis* Mosaic law, parts V and VI. 2) The Hindustani cf Statute book of Gontoo etc. From the English by R E Raspe, Hamburg 1778.—Hindu Code or Menu's ordinances—by Jones. From the English by J C Hüttner Weimar 1797 pre-eminently *Manava d'harma sastra au lois de Manou traduites de sanscrit par Coisclair des long champs*, Paris 1833. 3) The legislation of the Muslims cf *Feuerbach* Criminal jurisprudence of the Koran (in the Library of penal law 2nd vol 1st item no 1). 4) The Chinese, Ta-Tsing-Leulee, ou les lois fondamentales du Code pénal de la Chine avec le choix des statuts supplémentaires traduit de chinois par G Th Staunton, mis en français par Renouard de St Croix, vols I and II Paris 1812; II) From the European 1) The English cf *Blackstone's* well known Commentaries Book 4, Chap 1-33.—*Cottu* De l'administration de la justice criminelle en Angleterre (Cottu Concerning the administration of criminal justice in England), Paris 1820.—Much is also found about this in *P Colquhoun's* Police of London, translated by J W Volkmann, part II, Leipzig 1800.—2) The French a) Under the King, cf Code pénal ou recueil des principales ordonnances etc (Penal Code or collection of principal ordinances etc) Paris 1752.—*Muyert de Vouglans* Institutes au droit criminel (Institutes of criminal law), Paris, 1757 4.- b) The republican, according to the Penal Code and the Code of Delicts and Punishments cf *von Almendingen* (in the Library of penal law, vol 2 item 1 no 1), *Klein* (in the Archive vol I item 3 4, vol IV, item 1), *Scipion Bezon* Parallèle du Code pénal d'Angleterre avec les lois pénales Françaises etc, Paris [1799]—and finally c) The imperial—based on the Code d'instruction criminelle, suivi des motifs etc, Paris 1809 translated by Flachsland and others, then the Code pénal ou Code de délits et des peines, précédé des exposés des motifs, Paris 1810, translated by Hartleben Flachsland and others, by *Feuerbach* As to the constitution of the courts and court proceedings in France etc, Giessen 1825, especially the 3rd division.—3) The Dutch, Criminal Code for the Kingdom of Holland, translated from Dutch by L Zimmermann and H Brükner, Aurich 1809. 4) The Code of St Domingo, which emulated the French one, under the title Code Henry 1812. 5) The Tuscan by Grand Duke Leopold (translated in Schlözer's State Gazette vol 10 pp 348–393). 6) The Prussian, in the General Land Code, part II title 20. The first part of the new edition appeared in Berlin in 1806 under the title: General criminal law for the Prussian states, which contains the Criminal Order.—7) The Austrian, in which the Theresianic and then the Josephinic Codex and now the Code of crimes and serious police misdemeanours, Vienna 1803, are noteworthy. 8) Criminal Code for the Kingdom of Bavaria, Munich 1813, published in 1814 with few amendments, for the Grand Duchy of Oldenburg, and then translated into Swedish (by Ozenius) to serve as the basis for Swedish legislation. For the new legislation of several Swiss cantons, eg of St Gallen (1819), Basle (1821), Zürich (*H Escher* Four treatises about subjects of criminal law science) it became a main source, and the drafts of the criminal codes for Saxony-Weimar (1822), Württemberg (1823), Hannover (1825) and others are modelled on it. The (internal) history of the origin and fate of the Bavarian Criminal Code has not yet been published.—*Von Wendt's* Outline of a comparative presentation of criminal law etc Nuremberg 1825 is to be recommended as a repertory.

<sup>h</sup> *J D Metzger's* System of forensic medical science, Königsberg—Leipzig 3rd edit, 1805.—*G G Plouquet*, Commentarius medicus in processus criminales etc Argentor 1787.—The same: Treatise concerning the natural forms of death, Tübingen 1788.—*A Henke* Textbook of forensic medicine, Berlin 1812, 9th edit 1837. The same, Treatises from the realms of forensic medicine 4 vols Bamberg 1815—20, 5th vol 1834. *Masius* Textbook of forensic pharmacology, 2nd edit Rostock 1812.—*Bernt* Handbook of forensic pharmacology, Vienna, 1815, 1834. *Klose* System of forensic physics, Breslau 1814. *Meckel* Textbook of

knowledge includes in particular knowledge of *Latin* and *old German*<sup>i</sup> indispensable for the study of the sources and the knowledge of old German legal *maxims*<sup>k</sup> especially useful for the elucidation of legal customs of the Middle Ages.

## § 7

The literature of penal law itself is divided into the following main categories: I) literary resources<sup>a</sup>, II) commentaries about the sources<sup>b</sup>, III) systems (handbooks)<sup>c</sup>, IV) compendia<sup>d</sup>, V) miscellaneous

forensic medicine, Halle 1821. *Mende* Comprehensive handbook of forensic medicine for legislators and jurists, Leipzig 1819–1829, 6 vols. *Orfilu* Leçons de la Médecine légale, Paris 1827, German (translated by Hergenröther) 1829 3 vols. *Beck* Elements of forensic medicine, translated from English, Weimar 1827, 2 vols. *Barzellotti*, Medicina legale secondo lo spirito delle leggi, Bologna 1823 2 vols. *Moll* Leerboek der geregelyke Geneeskunde (Textbook of forensic medicine), Arnheim 1827, 3 vols. *Devergie* Traité de médecine légale revu par Debaussy, Paris 1835 37, 2 vols.

<sup>i</sup> Besides the well known glossaries by Wachter, Haltaus and Scherz, in particular: *C F Walch* Glossarium germanicum interpretationi C C C inseruiens, Jena 1790.

<sup>k</sup> *J Fr Eisenhart's* Principles of German law in maxims etc published by Erns' L A Eisenhart, Leipzig 1792, division V, pp 441–505.

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<sup>a</sup> Library of German penal and feudal law by J S Gruber, Frankfurt and Leipzig 1788. Outline of literature of criminal law in systematic order (by Heinrich Blücher) Leipzig 1794.—*Kleinschrod* Concerning the Italian authors on penal law and criminal policy. In Klein's and Kleinschrod's Archive I vol 1 item no 8.—*Christof Lor. Brunner* Handbook of the literature of criminal legal science, 1st vol Bayreuth 1804 (which is designed according to the order in this textbook)—*G W Böhmer* Handbook of the literature of criminal law in its general relationships with special regard to criminal policy, 1st vol Göttingen 1816.

<sup>b</sup> *Anton Matthaei* De criminibus ad Libr. XLVI and XLVIII. Dig. Commentarius edit. noviss. c. notis Nani Tomi II, Ticini 1803.—*D Classenii* Commentarius in C C C etc, Leipzig 1718.—*J P Kress* Commentatio succinta in C C C etc, ed. nov. Hannover 1755.—*J S Fr Böhmer* Meditationes in C C C Halle 1774.

<sup>c</sup> *B Carpsovii* Practica nova rerum criminal. cum observ. *J S Fr Böhmeri* Tom. III Frankfurt 1759. folio.—*Böhmer's* Observ. are in particular printed there in the same year in folio.—*Phil. Mar. Renazzi* Elementa jur. crim. Rom. Tom. IV. 1773–1786. *Alois Cremari* De jure crim. libr. III, Ticini 1791–1793. *Carmignani* Juris crim. elem., Pisa 1823 2 vol. *J Chr von Quistorp* Principles of German penal law, 2 parts, new edit provided by Klein, Rostock 1809, published by Chr Ross: 1810.—*Chr L Stelzer's* Principles of penal law 1st part, Erfurt 1790.—*Chr C Stübel* System of general penal law with application to the statutes effective in the Electorate of Saxony, 2 parts 1822 Leipzig 1795.—*Salchow* Description of the doctrine of the punishments and crimes, 2 vols Jena 1804, 1805. *Wirth* Handbook of criminal law science, Breslau 1823. *Tittmann* Handbook of common German penal law, 2nd edit, 3 parts 1822–1824. *A Schröter* Handbook of penal law according to Roman, canonical and German statutes, 1st vol Leipzig, 1818. *E Henke* Handbook of criminal law and criminal policy 4 vols, Berlin 1823.—*C E Jarcke* Handbook of common German criminal law etc, 4 vols, Berlin 1827.

<sup>d</sup> *Chr Fr G Meister* Princ. jur. crim. German comm. edit 6th Göttingen 1781.—*G J Fr Meister* princ. jur. crim. German comm. edit 4th 1802.—*J Chr Koch* Institutiones jur. crim. edit 9A, Jena 1781.—*E Ferd. Klein* Principles of common German penal law, 2nd edit Halle 1799.—*C von Grolman* Principles of criminal legal science, Giessen 1798. 4th edit 1825.—*C A Tittman* Basic rules of criminal law science etc, Leipzig 1800.—*Salchow* Textbook of common penal law, Halle 1807.—3rd edit 1823.—*Dabelow* Textbook of common penal law, Halle 1807. *H W E Henke* Textbook of criminal law science, Zürich 1815. *Martin* Textbook of German common criminal law with special regard to the new Bavarian Criminal Code, Heidelberg 1825. *C Rosshirt* Textbook of criminal law according to the sources of common German law, Heidelberg 1821.—*Rosshirt* Development of the principles of criminal law according to the sources of common German law, Heidelberg 1828.—*J F H Abegg* System of criminal law science, Königsberg 1826.—*Abegg* Textbook of criminal law science, Neustadt 1836.—*C G Wächter*, Textbook of Romano-German criminal law, 2 parts Tübingen 1825.—*A Bauer* Textbook of criminal law science, Göttingen 1827, 2nd edit 1833. *Klenze* Textbook of common criminal law, Berlin 1833. *Heffter* Textbook of common German criminal law, Halle 1834. *C Bonanni* Element. juris. Crim., Aquila 1837.



publications by various authors<sup>e</sup>, VI) miscellaneous publications by the same author<sup>f</sup>, VII) doctrinal [casuistic] writings<sup>g</sup>, writings about individual parts or subjects in their place.

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## SCIENTIFIC PRESENTATION OF PENAL LAW ITSELF

### FIRST BOOK

#### PHILOSOPHICAL OR GENERAL PART OF PENAL LAW

*Gallus Alloys Kleinschrod* Systematic development of the basic concepts and basic truths of penal law, 3 parts, Erlangen 1794, 1796, second edition 1799, third edit 1805.

*P J A Feuerbach* Revision of the principles and basic concepts of positive penal law, 1st vol, Erfurt 1799, 2nd vol Chemnitz 1808.

*A F J Thibaut* Contributions to the critique of Feuerbach's theory about the principles of penal law, Hamburg 1802.

<sup>e</sup> *J Fr Plitt* Repertory for penal law, 1st vol Frankfurt 1786, 2nd vol 1790.—The same *Analecta juris crimin* Hannover 1986.—*Chr Martin* Select. Dissertationum et commentat. juris crim. collectio. vol 1 1822.—Library of penal law (published by C Grolman) 1st vol Herborn and Hadamar 1799. Library etc edited by Almendingen, Grolman and Feuerbach, 2nd vol 1st item Göttingen 1800.—Archive of criminal law (published first by Klein and Kleinschrod and then also by Konopak), Halle 1799–1810, 7 vols.—New archive of criminal law (by Mittermaier, Kleinschrod, Konopak, Rosshirt, and finally also Abegg, Wächter, Birnbaum, Hechter, Zachariae) 1817–1830, 24 vols, new series since 1834.—*Graue* Journal of criminal law, 1st issue, Marburg 1804.—*Salchow* Archive for friends of philosophy of law, 1st vol 1st item, Jena 1805. *Hurlebusch* Contributions to civil and criminal legislation and jurisprudence, 1st and 2nd issues, Helmstädt 1810.—Criminological contributions by Hudtwalker and Trummer, Hamburg 2 vols, 1825. *Rosshirt* Journal for civil and criminal law, Heidelberg 1831, 3 vols so far. The journals cited in note g by Hitzig and Demme also belong here.

<sup>f</sup> *Püttmann* Opuscula jur. criminalis, Leipzig 1799.—*C A Kleinschrod* Treatises from penal law and penal processes Erlangen 1st part 1797, 2nd part 1798, 3rd part 1805.—*G Bayl* Contributions to criminal law, Bamb. 1812.—*Feuerbach* *Thémis*, Landsnut 1812.—*Escher* Four treatises concerning objects of criminal law science, Zürich 1822.—*F C T Hitzig* Essays concerning individual doctrines of criminal law science, Heidelberg 1827.—*J F H Abegg* Investigations from the realm of criminal law science, Breslau 1830.

<sup>g</sup> *F Chr Harprecht* Responsa criminalia juridica, Tome III, Tübingen 1701, folio. The same *Consultationes criminales et civiles*, Paris I–III, Tübingen 1812, f.—*Joh. Tob. Carrach* Legal judgments and opinions in penal matters, Halle 1775 4.—*Ch. F. G. Meister's* Legal findings and opinions in penal cases, 1st and 2nd parts Göttingen 1771 72. 3rd, 4th and 5th parts published by G Jac Fr Meister; the same 1783–1799 folio.—*J C Friedr Meister's* Judgments and opinions in penal and other cases, Frankfurt an der Oder 1808.—*Feuerbach* Remarkable criminal law cases, 1st and 2nd vols Giessen 1808, 1811. In place of this, now his documentary presentation of remarkable crimes 2 vols Giessen 1828, 1829.—*W von Schirach* Criminal law cases, Altona 1813.—*Pfister* Remarkable criminal cases with special regard to the conduct of the investigation, 1st to 4th vol Heidelberg 1814–1819.—*C A Tittmann* Lectures and judgments concerning remarkable criminal cases from records, Leipzig 1815.—*Eisenhart's* Narrations from special legal actions (10 vols 2nd edit Halle 1767–1779).—*Klein's* Annals (26 vols 1788–1809) and the same, Remarkable legal opinions of the Halle Legal Faculty (5 vols 1796–1802) likewise contain many, mostly remarkable criminal cases.—*Hitzig* Journal for administration of criminal justice in the Prussian states, Berlin 1825–1835 16 vols. *Hitzig* Annals of German and foreign administration of criminal justice, Berlin 1828–1835, 9 vols. Both journals, as important to the practitioner as to the theorist, are continued. As continuation, Annals of German and foreign administration of criminal justice Altenburg appear from 1837 to the present day, 6 vols. See further *Bauer*, Criminal law cases Göttingen 1835–1837, 3 vols. *Bopp* Library of selected criminal law cases Leipzig 1834. *Graba*, Theory and practice of common German criminal law Hamburg 1838. *Richter* and *Klose* Journal for administration of criminal justice in the Prussian states, Königsberg 1839, 1st issue. The French literature on this subject includes, besides *Pitaval* Causes célèbres (Paris 1734 ff 14 vols, later revised by Richer and translated several times into German but never completely).—*Méjan* Recueil des causes célèbres etc, Paris 1808 ff 22 vols. From the English literature the Collection of state trials etc published by Howel since 1809 in more than 30 vols and the Celebrated trials and remarkable cases etc, 6 vols London 1826, Criminal trials London 1832, 1 vol, 1836, 2 vol.

*Stübel* Principles of lectures concerning the general part of the criminal law of Germany and Electoral Saxony, Wittenberg 1804.

The works of Richter, Romagnosi, Rossi and Carmignani cited above in § 6 above, note c also belong here.

## I.

## INTRODUCTION

## ACCOUNT OF THE HIGHEST PRINCIPLES OF CRIMINAL LAW

*Carl H Gros* Diss. de notione poenarum forensium, Erlangen 1798.

*Feuerbach*: Is security from the criminal the purpose of punishment? And is criminal law a law of prevention? (Library of criminal law, 1st vol, 2nd item N 1)—*The same*, Revision etc 1st vol 1st chap.—*The same* Concerning punishment by security measures against further offence by the criminal. Together with a more detailed examination of Klein's criminal law theory. As appendix to the Revision, Chemnitz 1800.

Against the theory described in the writings mentioned, especially:

*Karl Grolman*: Concerning the establishment of criminal law and criminal legislation etc, Giessen 1799.—*The same*, Should there really be no law of compulsion for preventative purposes? In his Journal on philosophy and history of law 1st vol, 2nd and 3rd items.—*Gömmel* (in the Archive for legislation 1st vol, 1st issue nos 2, 3, 2nd vol 1st issue no 2).

Besides this, the following are included here:

*Schneider* Concerning the principle of criminal law, Giessen 1806.

*E Hencke* Concerning the present state of criminal law science, Landshut 1810.—and: Concerning the conflict of criminal law theories, Regensburg 1811.

*A von Bothmer* The concept of punishment, Berlin 1808.

*Unterholzner* (in the Juristic treatises, Munich 1810) no 3.

*Pfitzer* Articles for the purposes of a new criminal legislation, Tübingen 1810.

*G Hänsel* Concerning the principle of criminal law, Leipzig 1811.

*W G Tafinger* Concerning the idea of a criminal legislation, Tübingen 1811.

*Borst* Essay on a new pure-law description of criminal law, Nuremberg 1811.

*C E Schulze* Guide to the development of the philosophical principles of civil and penal law, Göttingen 1813.

*C Th Welker* The ultimate bases for law, state and punishment developed in philosophy and legal history, Giessen 1813.

*H Cock* De fine poenis proposito, Groningen 1819.

*E Spangenberg* Concerning the moral and civic improvement of criminals by means of the penitentiary system as the only permissible purpose of any punishment. Free translation from English Landshut 1821.

*F C F Hepp* Critical description of criminal law theories, Heidelberg 1829.

*A Bauer* The warning theory besides a description and evaluation of all criminal law theories, Göttingen 1830.

## [§ 7 a (by editor) omitted]

## I. NECESSITY OF PSYCHOLOGICAL COERCION IN THE STATE

§ 8<sup>a</sup>

The union of the will and the powers [Kräfte] of individuals for the guarantee of the reciprocal freedom of all establishes *civic society* [begründet die bürgerliche Gesellschaft]. A civic society organised by subjection to a common will and by a constitution is a *state*. Its purpose is the *establishment of*

<sup>a</sup> The *historical* development of criminal law begins with all peoples with the *private revenge* of families or tribes and soon transforms into the system of *expiatory fines* (compositions) which in the end—recognised by a (mediating) *judge* who, for want of a composition, submits the offender to a revenge which he himself implements or arranges to be implemented—form the transition to the proper civic punishments. However instructive historical development of criminal law may in many cases be, it does not in any way lead to a secure basis for *science* which is of service to life or for legislation.

*the legal condition* ie the co-existence of human beings in accordance with the law of right [nach dem Gesetze des Rechts].

### § 9

Right violations [Rechtsverletzungen] of any kind contradict the purpose of the state (§ 8), and therefore it is absolutely essential *that no right violations at all [gar keine] occur within the state*. The state is thus justified and bound to take measures [Anstalten machen] by which right violations are made *altogether* [überhaupt] impossible.

### § 10

The required measures by the state must necessarily be *compulsory measures*<sup>a</sup> [Zwangsanstalten]. These include first the *physical compulsion* of the state that negates [aufheben] right violations in two ways, I) *anticipatively* by preventing an offence that has not yet been completed 1) by compelling a security benefiting the person threatened, 2) by directly overcoming the offender's [Beleidiger] physical powers directed towards right violation; II) *after* the offence [Beleidigung], by compelling reimbursement or compensation [Rückerstattung oder Ersatz] from the offender.

### § 11

Physical compulsion, however, is not sufficient for the prevention of right violations altogether. This is because *anticipative* compulsion is only possible under the prerequisite of facts from which the state recognises either the certainty or at least its probability (as in the case of compulsion to provide security), and *subsequent* compulsion only under the prerequisite of those right violations that have a replaceable good [ersetzliches Gut] as their object [Gegenstand]. Physical compulsion is therefore not sufficient 1) for the protection of *irreplaceable* rights because anticipative compulsion, which is the only kind possible here, is dependent on the completely *coincidental* recognition of the impending violation, and also not 2) for the protection of rights that are in themselves *replaceable*, because they often *become* irreplaceable, and, for anticipative compulsion, that merely coincidental prerequisite is likewise a necessary condition.

### § 12

If therefore right violations are to be prevented altogether, besides the physical compulsion there must also be another that *precedes* the completion of the right violation, and, emanating from the state, comes into effect in every *individual* case without any prerequisite of recognition of the *now* impending violation. Such a compulsion can only be a *psychological* one.

## II. POSSIBILITY OF SUCH A PSYCHOLOGICAL COMPULSION

### § 13

All contraventions have their psychological origin in sensuality [Sinnlichkeit], insofar as the human capacity for desire is driven to commit them by pleasure [Lust] of or from the action. This sensual [sinnlich] impulse can be negated [aufheben] by everyone knowing *that an evil [Uebel], greater than displeasure [Unlust] that arises from the unsatisfied impulse to commit the act, will inevitably follow his deed*.

### § 14

Now, for the establishment of the *general* belief in the *necessary* association of such evils with offences [Beleidigungen] there must be I) a statute that determines these evils as the necessary consequence of the act (*statutory threat*). And for the *reality* of this statutorily determined ideal connection to become established in the imagination of all II) that causal connection must also appear in actuality,

<sup>a</sup> The fact that *moral* measures (education, instruction, religion) are not excluded, and even form the ultimate basis of all compulsory measures and determine their effectiveness, is of course beyond doubt. *Sed de his non est hic locus*.



and therefore as soon as the contravention has occurred the evil connected with it in the statute must be inflicted (*enforcement, execution*). The harmonious effectiveness of the executive and legislative power for the purpose of deterrence [Abschreckung] creates the psychological compulsion.

### § 15

*The evil that is threatened by the state through a statute and that is to be inflicted by virtue of this statute is civic punishment (poena forensis).* The general ground for the necessity and for the existence of it (in the statute as well as in the exercise of it) is the necessity of maintaining the reciprocal freedom of all by removal of the sensual impulse to right violations.

Note. The question of whether there is a natural criminal law is one that we can well leave alone if the issue is the justification of positive penal law. Those to whom criminal law is defensive law [Vertheidigungsrecht] cannot avoid this detour.

### § 16

The *purpose* of the punishment is the effect the creation of which must be thought of as the cause of the existence of a punishment, if the concept of punishment is to be present<sup>a</sup>. I) The purpose of the *threat of punishment* in the statute is the deterrence of all, as possible offenders [Beleidiger], from right violations. II) The purpose of its *infliction* is the establishment of the effectiveness of the statutory threat, insofar as without it this threat would be empty (ineffective). As the statute is to deter all citizens, but the execution is to give effect to the statute, the *mediate* [mittelbar] purpose (end purpose) of the infliction is likewise the mere deterrence of citizens *through the statute*<sup>b</sup>.

### § 17

The *legal ground* [Rechtsgrund] for punishment is a ground on which the legal possibility of punishment depends. The *legal ground* I) for the *threat* of punishment is the co-existence of it with the *legal freedom* of the persons threatened, in the same way as the necessity to secure the rights of all is the ground for the *obligation* of the state to direct punishments. II) The legal reason for the *infliction* is the preceding threat of the statute<sup>a</sup>.

### § 18

Civic punishment as such therefore does not have as its purpose and legal ground 1) *prevention* of future contraventions by an individual offender [Beleidiger]<sup>a</sup>, because this is not punishment and

<sup>a</sup> The purpose of punishment is not to be confused with the *purpose of the inflicter of the punishment*. Compare *Feuerbach* Concerning punishment as a security measure p 43 ff.

<sup>b</sup> A lucid description of the different criminal law theories, besides the writings further cited above, is given by Bauer Textbook of criminal law § 2229.—Concerning the purpose of punishment, the following in particular should be read: *Michaelis* Preface to the 6th part of the Mosaic law.—*Cäser* Memorials from the philosophical world, vol IV, treatise VI and his treatise: Regarding the purpose of punishments. (The 2nd appendix to his translation of Valazé concerning criminal statutes).—*Püttmann* De poenis exemplaribus. In Opusc. J Cr no IX—*C Vening* Disp. qua exponuntur diversae de fine poenarum sententiae, Groningen 1826.—*Leisler* Essay on criminal law, Frankfurt 1796.—For discussion, *Leysen* Sp. 649, M I.

\* \* \*

<sup>a</sup> The detailed description of this legal reason orally. Compare *Feuerbach* Concerning punishment as a security measure etc pp 92–118.

\* \* \*

<sup>a</sup> As *Stübel* Diss. de justitia poenarum capitalium praesertim in Saxonia, Wittenberg 1795, the same, in the System of penal law, 1st part § 13–15, *Malblank* Comment. de poenis ab effectibus defensionis naturalis etiam in statu civili probi distinguendis—(in *Plitt* Annals no 11 p 44), *Grolman* and many others *before* and *after* these writers assert.

no legal ground is shown for such anticipation; 2) nor *moral retribution*<sup>b</sup> [*moralische Vergeltung*] because this belongs to a moral and not a legal order and is physically impossible; [3] nor *direct deterrence* of others by the pain of the evil inflicted on the wrongdoer<sup>c</sup>, because there is no right to this [hierzu giebt es kein Recht]; 4) nor *moral improvement* [*moralische Besserung*] because this is the purpose of *discipline* [*Züchtigung*] but not of punishment<sup>d</sup>.

Note. If the accusation is made that the author's system establishes a *terrorism* [*Terrorismus*] at the expense of humanity and other state aims, this overlooks the fact that, as the author well recognises, cruel punishments effect the exact opposite of deterrence, and that it is solely a matter for the legislating *state wisdom* (*criminal policy*) to discuss the question of which punishments to determine and how they are to be set up in their *implementation* in order not merely to correspond with the purpose of all *punishments*, but also incidentally to promote other humane and civic purposes *as much as possible*. The properly understood theory of deterrence and Bentham's principle of general utility agree very well with each other.

### III. HIGHEST PRINCIPLES OF PENAL LAW

#### § 19

From the above deduction the following highest principle of penal law arises: *Every legal punishment in the state is the legal consequence of a statute that is based on the necessity of maintaining the rights of others and that threatens the violation of a right with a sensual evil.*

#### § 20

The following subordinate principles, which are subject to no exception, flow from this:

- I) *Every infliction of a punishment presupposes a criminal statute* (*Nulla poena sine lege* [*no penalty without law*]). Because only the threat of the evil by the statute grounds the concept and the legal possibility of a punishment.
- II) *The infliction of a punishment is contingent on the existence of the threatened act* (*Nulla poena sine crimine* [*no punishment without a crime*]). Because the threatened punishment is linked to the deed by the statute as a legally necessary prerequisite.
- III) *The statutorily threatened deed* (the statutory prerequisite) *is contingent on the statutory punishment*. (*Nullum crimen sine poena legali* [*no crime without a legal penalty*]). Because the evil is linked by the statute to the specified right violation as a necessary legal consequence.

[§ 20 a (by editor) omitted]

## II.

### ACCOUNT OF THE DERIVATIVE LEGAL RULES [RECHTSSÄTZE] OF THE GENERAL PART.

#### FIRST TITLE

#### ON THE NATURE OF CRIME

#### FIRST SECTION

#### CONCEPT AND CLASSIFICATION OF CRIME

Ja Ge Claus De natur. delictorum Jenae 1794

G B Hansel De natura delictorum observat. Leipzig 1810

Van der Ton De delictis. Lovan. 1822

<sup>b</sup> *Jacob* Philosophical legal doctrine § 415 and § 419–426. The so-called *legal retaliation* which is asserted as a principle of punishment by some more recent writers eg Zachariae, Fries, Bergk amongst others, reduces in the end to this moral retribution and is moreover without any practical utility for the legislator or for the judge, if it is to be used as a yardstick for the relationship of the punishment to the magnitude of the crime. Wit must usually help to build a swaying bridge over the wide gap which exists here between theory and practice. [Comment (by editor) omitted.]

<sup>c</sup> *Klein* Concerning the nature and purpose of punishment. In the Archive 2nd vol, 1st item, no IV.

<sup>d</sup> Cf *von Arnim*, Fragments concerning crime and punishments, 2nd part, 8 ff.

## § 21

Who exceeds the boundaries of legal freedom commits a *right violation, an offence* [*Beleidigung*] (*Läsion*). A person who violates the freedom guaranteed by the state contract [Staatsvertrag] and secured by criminal statutes commits a *crime*. This is therefore in the widest sense *an offence contained under a criminal statute or an action that threatened by a criminal statute and contradicting the right of another*. Offences are therefore also possible outside the state, but crimes only within the state.

Immorality, vice, sin.

[Note (by editor) omitted]

## § 22

Independently of the exercise of an act of government and the declaration of the state, there are rights (of the subjects in the state or of the state itself). These, secured by criminal statutes, establish the concept of a *crime in the narrower sense*, which—according to the difference in size of the punishments associated with it and the type of jurisdiction depending on this—can be divided again into *criminal* and *civil crimes*<sup>a</sup>. Insofar as the state is justified to work *indirectly* towards its purpose through *police statutes* and by these to prohibit actions that are not unlawful in themselves, there are to this extent *special rights of the state to forbearance from these specially prohibited actions* [besondere Rechte des Staates auf Unterlassung dieser speziell verbotenen Handlungen] that were originally legally possible for the subjects. *If the right of the state to obedience to a particular police statute is the subject of a threat of punishment, the concept of a misdemeanour arises, a police contravention*<sup>b</sup>.

*Crimen* and *delictum* in the sense of Roman law.—Cf *Birnbaum* Concerning the difference between *crimen* and *delictum* with the Romans. (In the new Archive of criminal law vol VIII nos 14 and 22, vol IX no 16).

[Notes I-IV (by editor) omitted].

## § 23

The maintenance of rights *in general* is the purpose of criminal statutes; thus the rights of the *subjects* as well as those belonging to the *state* (as a *moral person*) are subject [Gegenstand] of its protective threats. Who through contravention of a criminal statute directly<sup>a</sup> violates the rights of the state commits a *public crime (state crime del. publicum)*; but if the right of a subject is the direct subject [Gegenstand] of the contravention, this is a *private crime (del. privatum)*.

<sup>a</sup> Cf *Robert and Koch* Concerning civil and criminal punishments and crimes, Giessen 1785. The division into *crimes* and *police contraventions* corresponds with the Italian classification into *delitto di pena d'alto Criminale, delitto di pena correzionale, del. di pena polizia*. The new Austrian Criminal Code mixes civil crimes with police contraventions eg small thefts, frauds etc. *Hudtwalker* Is the distinction between crimes and misdemeanours of practical use? (Criminal papers, issue I, no 1).

<sup>b</sup> A division which is of great significance for the legislator but in the positive common legislation of Germany has small consequences because both categories are dealt with according to the same principle. It is different in Austrian and French legislation. Compare the *Collezione del travagli sui codice penale del regno d'Italia*, p 139, seq. Moreover *Gönner* in the *Archive of legislation* 1st vol, 1st issue, no 3 and *A Hanamann* Concerning the boundary between crime and misdemeanour, Vienna 1805.—*W J Behr* Which chief requirements must a criminal code fulfil? In this connection, Regarding the legislative distinction between crimes and police contraventions, Würzburg 1813.—Police criminal legislation can very easily be abused so as to fetter all human freedom and to turn the citizen into a living Chinese doll who cannot take a small step, be it ever so blameless, without incurring punishment. An outrageous example of this kind is provided by the 2nd part of the Bavarian draft of criminal legislation of 1822.

\* \* \*

<sup>a</sup> Apart from this characteristic it would not be possible to distinguish state and private crimes. In every individual the state is also (indirectly) injured or endangered, and in the state every individual.

\* \* \*

Note. *J Stadler* Concerning the division of crimes into state and private crimes, Heidelberg 1824.—*Mixed* (state and private) crimes—*Martin* Textbook § 290.—*Delicta publica—extraordinaria—privata* in the Roman sense.—*Koch* Inst. jur. crim. § 27.—*Birnbaum* loc cit § 7 ff.—*C Th Graun* Diss. de super-vacua delictorum divisione in publica et privata moribus nostris, Jena 1756 (in *Martin's* Sel. Diss. I 9)—*Gruner* De poenis Roman. privatis carumque usu hod., Leipzig 1805 (in *Martin* loc cit no 2).

[Note (by editor) omitted].

#### § 24

Insofar as a person has a right to actual performance [Aeusserung] of our activity, to this extent there are *crimes of omission* (*del. omissionis* in contrast to *delict. commissionis*). But because the original obligation of the citizen only extends to omissions, a crime by omission always presupposes a special legal ground (statute or agreement) by which the obligation of *commission* is established. Without this one does not become a criminal by omission<sup>a</sup>.

[Note (by editor) omitted].

#### § 25

There are rights that are established against the citizen as such but also rights that apply only against the members of a particular status in the state. The distinction between *common* (*del. communia*) and *special crimes* (*del. propria*) is explicable from this.

<sup>a</sup> *J H Winkler* Diss. de crimine omissionis, Leipzig 1776.—*Spangenberg* in the new Archive of criminal law 4th vol no 23. In particular: *Simoni* dei delitti del mero affetto. I p 165.

## APPENDIX B

# Concerning the Need for a Right Violation in the Concept of a Crime, having particular Regard to the Concept of an Affront to Honour\*

*Johann Michael Franz Birnbaum\*\*†*

The concept of a *violation* has for a long time been regarded in differing ways in criminal law and used in connection with various *other* concepts for the establishment of general principles that by their very generality have, even if not always, directly produced error. These principles have also mostly made discovery of the truth more difficult and at least led to an inappropriate method of presentation. In some of the most recent products of German legislation in particular traces of this are yet to be found that in my opinion might well hinder the understanding and correct application of the laws.

The *most natural* understanding of *violation* seems to be that by which we apply it to a *person* or a *thing*, in particular to one that we think of as *belonging* to us or to something that is a *good* [*Gut*] for us which can be *taken away* from us or *diminished* by the action of another. The Romans have in this sense spoken of *laesio alterius* and *laesio rebus illata* in connection with the general legal principles *neminem laedere* and *suum cuique tribuere*;<sup>1</sup> and in our most recent criminal statutes mention still is not infrequently made in a similar sense of *violation of body, property and honour* or of someone being *violated in relation to his life and the like*. These expressions have their basis in the common use of language and in concrete notions, and the less the legislator can avoid them according to the nature of the things [Natur der Sache], and the more he wishes to rely on knowledge of the law and thereby to affect the notions of those who are to be prevented from committing crimes, the more he should strive to avoid expressions derived from them, which really only describe a *violation* in *figurative* terms and have passed into legal language use partly from abstract concepts of recent philosophy. It therefore seems to me to be scarcely appropriate that the most recent Baden law about violations of honour, of the 28th December 1831, § 3,<sup>2</sup> refers to utterances and actions by which someone *intentionally* [*absichtlich*] *violates the right of another to honour*...

Earlier still than the feature of *right violation*, the requirement of *violation of a criminal law* [*Strafgesetz*] has been taken into consideration in the establishment of the concept of crime. The

\* “Ueber das Erforderniß einer Rechtsverletzung zum Begriffe des Verbrechens, mit besonderer Rücksicht auf den Begriff der Ehrenkränkung,” in 1834 Archiv des Criminalrechts, Neue Folge 149–194 (hrsg. von Abegg, Birnbaum, Heffter, & Mittermaier). The original text is available at: <[www.oup.com/uk/law/foundational-texts](http://www.oup.com/uk/law/foundational-texts)>.

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† Raymond Youngs prepared an initial translation of the text, which was then revised by Markus Dubber for *Foundational Texts in Modern Criminal Law* (2014), available at: <[www.oup.com/uk/law/foundational-texts](http://www.oup.com/uk/law/foundational-texts)>. Most of the footnotes (as numbered in the original) were retained to capture the scope and diversity of the scholarly apparatus, which includes not only German and Roman sources, but also primary and secondary literature from England, France, Italy, Portugal, and Switzerland. (Errors in the original have not been corrected, or identified, nor has the spelling been modernized.) A translation of excerpts from Feuerbach’s textbook, frequently cited in the article, is available in Appendix A. For English-language discussion of Birnbaum’s article, see MD Dubber, “Grounding Criminal Law: Foundational Texts in Comparative-Historical Perspective,” in this Volume; “Theories of Crime and Punishment in German Criminal Law” (2006) 53 Am J Comp L 679. Work on this project was supported by a grant from the Social Sciences and Humanities Research Council of Canada.

<sup>1</sup> L 23 D communi dividund. L 6 C de magistratibi conveniendis.

<sup>2</sup> The statute is also in *A Müller’s Archive for the most recent legislation of all German states*, volume IV, issue 1, p 62.

most noteworthy thing in this respect is the definition<sup>4</sup> contained in the first article of the draft of a criminal code for the Kingdom of Italy of 1806 that is limited merely to that requirement. Besides this, at the same time, there was talk of the *intention to violate the law* as the general requirement of *attribution* and, in a manner reminiscent of *Filangieri*, of the dual manner in which the intention to violate the criminal law could be combined with its violation. It had in fact been assumed that this could occur in a *direct* and an *indirect* manner and accordingly had been believed necessary even to provide for the concepts of an *intentional* [*dolose*] and *negligent* [*culpose*] violation of the statute.<sup>5</sup> It scarcely needs to be mentioned how little these provisions would have corresponded to the expectations of the legislator if they had been enacted. Attention has also been drawn to the inadequacy of these provisions by some in the expert opinions solicited for the draft that remarked that the people should not be presented with any subjects of learned discussion, while others praised the title in which they were found as a golden one that was, as it were, the statutory logic of the entire work.

Admittedly in recent times other legislators have made the concept of crime dependent in general on the punishments placed on acts or omissions, only this is less with the intention of giving a real *definition* of crime than with giving judges and those to be judged a general *feature* by which it could be recognised what the state wants to be regarded as a crime. . . . [W]e must in any case hold fast to the *feature of criminality* [*Strafbarkeit*] of an action in order to be able to establish the *legal* concept of crime, although e.g. French law also recognises a *civil law* concept of *delicts* that is determined by the *obligation to compensate* arising from it,<sup>7</sup> and is entirely independent of those meanings of this word under which it is applied to *every criminal* action in general<sup>8</sup> and in particular to that which is *criminal* in the *corrective* sense [*correctionell-strafbar*]. It should also not be overlooked that, under the positive law of a people according to which a punishment in the true legal sense may not be applied except when it has been pronounced in an express law [*Gesetz*] (and, as will be the case with the imperfection of all human things, even with the best criminal legislation, actions that should not reasonably [*vernunftgemäß*] be subject to a punishment must be punished at least now and again according to certain statutes), no other *definition* whatsoever can be given of crime than calling it a *violation of a criminal statute* [*Gesetz*]. The word *violation* here is to express a *dual* concept: first that *action is taken contrary to the law* and then that this action can be *attributed*. The expression *contravention* [*Übertretung*] of the criminal statute might however be more appropriate in this respect.<sup>9</sup> At any rate it is in the nature of things that besides the mentioned *positive* legal concept of crime there must be a *natural* concept of it, which however is not to denote that difference which in old and new legal systems has been indicated by the contrast between *delicta juris civilis* and *delicta juris gentium*, or *probrum more civitatis* and *natura probrum*, or *mala prohibita* and *mala in se*, or *délits politiques* and *délits d'immortalité*, and in most recent times has been the subject of particular discussion.<sup>10</sup> I do not in any way hold the same view as Jarcke by which he recently distinguished between a *legal* [*juristisch*] and a *moral* [*sittlich*] concept of crime<sup>11</sup>. . . . Heinroth has to a certain extent surpassed him in this regard by declaring *every evil deed* to be a *crime*.<sup>12</sup> In my opinion criminal legal science will in this way scarcely be able to escape that confusion of concepts that

<sup>4</sup> *La violazione di una legge penale è un delitto.*

<sup>5</sup> Arts 3 and 4. It was not very much in accord with this when in the motives of the draft the *dolus* was called a *vizio della volontà*, but the *culpa* a *vizio dell' intelletto*. Compare the Collezione dei travagli sul Codice penale, Brescia 1807, vol 1, p 146.

<sup>7</sup> Civil Code art 1382 f compared with the heading *délits et quasi-délits*.

<sup>8</sup> E.g. in the expression *corps de délit* and the like: Code d'instruction criminelle arts 22, 32. The proposal by a new reformer of the statute, to say *corps de crime* or *corps de contravention* according to the difference in the criminal actions has, as can be imagined, not met with approval.

<sup>9</sup> The French speak in this sense of *infraction* and in general of *contravention à la loi*. The designation *laesio legis* might be found with the Romans just as infrequently as the expression *laesio juris*, but the classical writers speak of *violator juris gentium* and the Pandectists of *offensa edicti*.

<sup>10</sup> I still owe a rejoinder to a reply which appeared to my article in the Archive about this subject, and have not abandoned this. This issue is given much consideration in the article by *Dr H A Zachariä* about the retrospective effect of statutes, Göttingen 1834. Compare *Heffter* Textbook of criminal law, Halle 1833, § 30.

<sup>11</sup> Handbook of common German criminal law, vol 1, §§ 15, 16.

<sup>12</sup> *Hitzig's Journal for administration of criminal justice*, issue 40, pp 201 f.



one has sought to banish from it for almost a half century. Much that has been said against this more recent view by Droste-Hülshoff in a discussion of whether only *right violations* [Rechtsverletzungen] may be punished by the state as crimes<sup>13</sup> seems to me to be very worth heeding, although I cannot agree with its basic position. I must not however pass in silence over the fact that Heinroth in the third part of his *Criminal Psychology*, in what he calls the “act doctrine” [Tatlehre], seems, in laying down the definition of crime—although taken as a whole it is not to be in any way approved—nevertheless to have felt the inappropriateness of abstract concepts on which the usual definitions by jurists are based. I consider it at least to be a praiseworthy return to a more natural use of language if in relation to crime “the violation of a person or several persons or an entire personal organisation, e.g. the state, in their or its existence, possessions and the like” is emphasised as essential.<sup>14</sup>

When we speak of the *natural legal concept* of crime, we understand this as including that which, according to the *nature of criminal law*, can reasonably [vernunftmäßig] be regarded as punishable in *civic society* [bürgerliche Gesellschaft],<sup>15</sup> in so far as it is brought under a common concept. It is however a known fact that in Germany<sup>16</sup> the feature of *right violation* [Rechtsverletzung] has been regarded for some time as the essential feature by easily the majority of legal scholars and also by most legislators, although now and again a disapproval of this view already has been expressed earlier.<sup>17</sup> Feuerbach’s definition has been particularly influential, according to which a crime is called *an offence, right violation or injury* [Läsion] contained in a criminal statute [Strafgesetz]; or an action that is threatened by a criminal statute [Strafgesetz] and contradicts the right of another.<sup>18</sup> It is in principle not a deviation from this view when Martin<sup>19</sup> regards crime as *such a violation of a compulsory duty as to form the basis of a right to its punishment* and the definition that Rossi has recently given is also in the main not a different one, although he seems to have made Feuerbach’s concept the object of his polemic and should have reached a different result according to the basis of his system. Admittedly he has rejected as *bizarre* some principles at least previously postulated under the theory that sees a right violation in every crime, e.g. that the killing of a human being with his consent is not *meurtre* [murder], and the like.<sup>20</sup> Yet what is said against this is not directed against the *principle*, but against the *conclusions* from it, which in part already have been withdrawn by the most consistent defenders of that theory.<sup>21</sup> Incidentally, Rossi, who seems to place the essence of crime in the violation of a duty, which otherwise used to be called a compulsory duty or a perfect duty,<sup>22</sup> himself has remarked:<sup>23</sup> “It has long been disputed whether a crime has to be defined as a right violation. The question, at least in appearance, is about a dispute over words. If in relation to a crime there is a duty present the fulfilment of which can be demanded, this duty must correspond to

<sup>13</sup> In the Archive of criminal law, vol IX, pp 600 f.

<sup>14</sup> Loc cit p 210 § 45. Wächter has also made frequent use of the *natural* meaning of the word *violation* in the description of categories of crime in his Textbook of Romano-German criminal law, e.g. §§ 49, 55, 56, 57, 58, 59, 60.

<sup>15</sup> The presence of a criminal law in the so-called state of nature, the assumption of which German criminalists have long ago abandoned, has recently been asserted again in *von Rotteck’s Rational law*, part I § 53; disputed outside Germany in particular by Rossi and Romagnosi. I am pleased that the latter’s work on criminal law a part of which has already been reported in the Upper German general literature Journal of 1793 item 3 and by me in the Archive of Criminal Law, vol VII p 181 in 1825, has now found a translator. The same author’s work about general state law also deserves to be better known.

<sup>16</sup> Outside Germany there is almost nowhere where this view has taken root, Switzerland and Holland excepted.

<sup>17</sup> Compare *Thibaut’s Contributions to the critique of Feuerbach’s theory of basic concepts of penal law*, Hamburg 1802, p 82; *Mittermaier*, Basic errors in the treatment of criminal law, Bonn 1819, p 30. As to the most recent state of criminal legislation in Germany, Heidelberg 1825 p 24, *Trummer*, Criminalistic contributions, Hamburg 1827, vol III issue 2, p 131.

<sup>18</sup> Textbook of penal law, § 21 of the 11th edition.

<sup>19</sup> Textbook of criminal law, § 67 of the 2nd edition. Compare *Wächter* Textbook §§ 32, 61.

<sup>20</sup> *Traité de droit pénal*, Paris 1829, vol II pp 8 and 9.

<sup>21</sup> Compare *Feuerbach* Textbook § 35, with *Abegg’s Investigations in the area of legal science*, Breslau 1830, p 60 f.

<sup>22</sup> *Le délit est la violation d’une devoir exigible* [Delict is the violation of a duty owed].

<sup>23</sup> I 1 p 10.

a certain right existing somewhere here on earth. Duties towards God and oneself are not within the jurisdiction of human justice; one of the two definitions can therefore be justifiably replaced by the other." When it is then further asserted that this is not the sense of the familiar definition, this might well be open to doubt. And when the definition is challenged on the ground that there are two different types of *devoirs exigibles* [duties owed], or duties whose fulfilment could be demanded, and consequently two types of specific rights corresponding to them, or *droits positifs* [positive rights], namely rights of society and rights of individuals, then this is likewise no substantial deviation from Feuerbach's view.<sup>24</sup> Such a deviation, however, may admittedly consist in Rossi's (following older scholars of natural law who today are more highly regarded outside Germany than with us) defining the concept of right [den Begriff des Rechts] itself more broadly than does Feuerbach.

In order now to approach our true subject more closely, it must initially be remarked that we have not made it our chief task here to investigate whether *according to the nature of things* [Natur der Sache] only right violations may be punished as crimes, but that we wish to consider the matter from another point of view, which more concerns *application of the law* than *legislation*. From this viewpoint our first question is whether it is appropriate to preface a system of *positive criminal law*, in particular that of common German criminal law [des gemeinen deutschen Strafrechts], with a definition of crime as a right violation [Rechtsverletzung] contained under a criminal statute without further differentiation between a *natural* and *positive* concept of right [Rechtsbegriff]. From this point of view Thibaut earlier had criticised Feuerbach's definition of crime, as well as his definition of civic punishment [bürgerliche Strafe] as an evil [Übel] threatened by a criminal statute and inflicted because of a committed right violation [Rechtsverletzung]. After he had raised several objections against the latter that he did not however consider to be very substantial, as a *practically important conclusion could hardly be drawn from the defects in the definition complained of*, he added the following:<sup>25</sup> "but it is all the more important if, for the existence of a civic crime, a right violation could be required and this is understood as meaning that without a right violation no civic punishment could be applied." Thibaut was accordingly of the opinion that the definition of *crime* which prefaces a *positive legal system* could be of *great practical importance* and that if the same *is not appropriate to the spirit of the law to be presented*, its consistent use in the development of individual legal rules [Rechtssätze] would have to lead in many cases to these being mere *conclusions from an arbitrarily assumed principle instead of statements of the positive law to be presented*. No one will want to assert that the common German criminal law imposes punishment merely for right violations, even assuming the widest sense of this word. But as Feuerbach nevertheless has made the feature of right violation the general requirement of the common law concept of crime and has not idly placed this concept at the pinnacle of the system, but, as a philosophical and logically consistent jurist, has often applied it, much that is not part of the common law [viele Nicht-Gemeinrechtliche] has in fact been accepted by him as common law [gemeinrechtlich]. This, as Thibaut has remarked,<sup>26</sup> redounds so much the more to his reproach, as he himself has elsewhere posited the principle that the judge, in a case where the legislator has subjected an act to a criminal statute, when it would not at the same time be an *injury* [Läsion] and its punishment would contradict reason [Vernunft], ought not to exempt it from punishment, and not to leave it unpunished merely because its punishment would not comport with the philosophy of criminal law.<sup>27</sup>

As much as we are convinced that Thibaut's critique of Feuerbach's definition of crime is well-founded, however, insufficient attention seems to have been paid subsequently to the very circumstance that primarily attracted his criticism. In the extremely valuable treatise by Abegg<sup>28</sup> that appeared only a few years ago (in which some of the conclusions drawn, at least earlier, by Feuerbach from the assumption that the concept of crime required a right violation—which conclusions Thibaut also had criticised in the mentioned paper—are made the subject of special investigations) we read the sentence: "In an account of *positive criminal law* [Criminalrecht], where the

<sup>24</sup> I cannot therefore fully agree with what is said by Abegg in the Schunck Yearbooks vol XVII p 264. Compare *Feuerbach* Textbook § 23.

<sup>25</sup> Loc cit p 28.

<sup>26</sup> Loc cit p 85.

<sup>27</sup> Revision of the basic concepts and basic truths of penal law, vol II, p 14.

<sup>28</sup> Loc cit p 60.

*unlawfulness* [Rechtswidrigkeit] of the act is also an essential requirement for the concept of crime, it is entirely correct to say that where a legal relationship [Rechtsverhältnis] or the particular one presupposed does not exist the otherwise violative act would in this regard not be a crime.”—We do not now know whether the author of the said publication includes *common German criminal law* [das gemeine deutsche Strafrecht] among those positive laws in which *unlawfulness* [Rechtswidrigkeit] belongs essentially to the concept of crime; at least we cannot say from the quoted statement with certainty what his view is; but we believe we must assert that it would not be well founded if those words were meant to express a specific reference to common German criminal law. In any case, it would in our view have been appropriate on this occasion to enter into a more detailed discussion of that question on which, if we are not mistaken, must depend the revision of the doctrine of supposedly unpunishable killings more than on any other consideration. As Falck says<sup>29</sup> in simple words: it is in fact true of all peoples that they reckoned fear of God and good morals [gute Sitten] as well as maintenance of external [äußerlich] peace—and not merely as conditions of the legal order [Rechtsordnung] but on their own account—to be matters about which the state should concern itself; and the fact that this is especially to be found in the statutes [Gesetze] under which blasphemy and incest are to be punished just like murder and theft can in particular be taken to be confirmed by the history of development of common German criminal law and those statutes that are still to be regarded today as their primary sources. We must however not leave out of consideration here that the examination of older as well as more recent German imperial and state statutes and ordinances [Reichs- und Landesgesetze und Ordnungen] at times presents to us some of these as *legal, capital and malefaction ordinances* [Rechts-, Halsgerichts-, Malefizordnungen], and others as *police ordinances* [Polizei-Ordnungen]. We find especially in the latter many punishable acts that cannot really be seen as right violations; according to the older concept of the word *police*<sup>30</sup> [Polizei] (which adhered more closely to its etymology), however, consideration of the *interest of the state* was paramount in the punishment of these acts. Accordingly if we, following Rossi, regard the *interest of the state* in punishing these acts—in a sense that somewhat expands German language use—as a *right of the state*, in a certain sense *criminal acts in general* can be placed under the common heading of *unlawful acts* [rechtswidrige Handlungen] to a greater extent than would appear at first glance, even from a *positive* standpoint. It can therefore be said that our ancestors already felt to some extent what the mentioned Italian criminalist had in mind when he recently undertook to correct the views of contemporary German jurists on the concept of crime. At least there rests in our common law sources a distinction between *police* and *other* crimes that is closer to the more recent distinction between *state* and *private* crimes than to the more recent distinction between so-called *police contraventions* [Polizeiübertretungen] and *real crimes* [eigentliche Verbrechen]. I consider it one of Feuerbach's philosophical errors not to have sufficiently considered the positive aspect of these concepts according to common German criminal law, making them in fact almost entirely dependent on what appeared to him to lie in the nature of things [Natur der Sache], so that the concept of police contraventions has been placed not very logically under the general concept of crime, and neither the positive and philosophical aspect, nor the common law and particular law [Particularrechtliches] nature, nor the statutory perspective and more recent practice have been properly distinguished.<sup>31</sup> Wächter has more correctly distinguished two different concepts of police crimes and, in presenting them in the legal system [Rechtssystem], has proceeded predominantly [vorzüglich] from the content of the Imperial Police Ordinance.<sup>32</sup>

In France as well there was in former times a concept of *police* and of *police contravention* that is essentially different from the present day one. And it is not only in earlier French positive criminal law that there was talk of *contraventions à la police du royaume qui se poursuivent par action criminelle*,<sup>33</sup> we also find in Montesquieu a division of crimes, according to the nature of things

<sup>29</sup> Encyclopaedia of Jurisprudence, § 3.

<sup>30</sup> Compare Mohl, *Police science according to the principles of the constitutional state*, Tübingen 1832, part 1, p 10. <sup>31</sup> Textbook § 22. <sup>32</sup> Textbook, part I, §§ 62 and 107, part II, §§ 231 f.

<sup>33</sup> And also of *contraventions au fait de police*, not, as today, *contraventions de police*. Compare Jousse *Traité de la justice criminelle de France*, Paris 1771, vol 1, pp 162, 173.

[Natur der Sache], into those which violate morality [Sittlichkeit], those which violate religion, those which violate tranquillity [Ruhe] and those which violate the security of citizens, with the third class being described as *simple lésion de police*.<sup>34</sup> This third class is also indicated in its difference from the fourth as *violation de la simple police* in contrast to *grande violation des lois*, likewise as *police violation* in contrast to *right violation* [Rechtsverletzung]; this is so because in relation to the fourth class Montesquieu primarily had in mind crimes against life and property, and while in relation to these the punishment in his view should be a kind of *talion*, he emphasised the viewpoint of *correction* in relation to punishment of the three other classes.<sup>35</sup> These views in a sense fall in the middle between the older and the more recent ones and they clearly influenced the formulation of the more recent views of law, especially in France. Montesquieu, in differentiating the *fourth* class of crimes from the *first three*, may also well have had in mind something similar to what Rossi meant when he differentiated crimes against the *rights of individuals* from crimes against the *rights of society* [Gesellschaft], and described society as an *être moral, dont le pouvoir politique doit représenter la raison, protéger les intérêts, accomplir les devoirs*. He links directly to this the implementation of the principle that a nation without morals [ohne Sitten] has neither a political nor a moral life [moralisches Leben], and what we have remarked above is hereby confirmed: that insofar as the concept of a *police crime* in the older sense of imperial statute law approaches the more recent concept of *state crimes* a kind of agreement is found here with the mentioned views of the Italian jurist.

By speaking of *police crimes* in the older sense of imperial statute law, we understand this as including in particular those crimes that made up the chief subject-matter of the Imperial Police Ordinances directed at the maintenance of religiosity, morals and morality [Religiosität, Sitte und Sittlichkeit].<sup>36</sup> But if one considers primarily the ordinance and reform [Ordnung und Reformation] of *good police* that came into existence a few years before the Carolina [Constitutio Criminalis Carolina 1532] and finds that *the welfare, peace and unity of the German nation and the benefit, establishment and prosperity of the Holy Roman Empire*<sup>37</sup> had served as the main consideration in its establishment, one will also be convinced that the concept of *good police* in those days resembles the way *buon governo* is spoken of nowadays in Italy in the higher scientific sense.<sup>38</sup> Although in customary usage, even in statutes, *police* is often understood also in the sense that is *customary* in Germany nowadays,<sup>39</sup> *police crimes* in that older sense are very close to what is nowadays called in England *offencer* [sic] *against the Common wealth*, in contrast to crimes against *individuals*, in which latter group also crimes against the *King* are sometimes included, although in general there is no agreement on the classification of these crimes.<sup>40</sup> I had this English concept of *crimes against the common good* in mind when I stated above that the older concept of *police crimes* approaches the newer concept of *state crimes*; because neither what is described in Germany by this designation in contrast to *private crimes*, nor what is called in France *crimes et délits contre la chose publique* in

<sup>34</sup> *Crimes qui choquent la tranquillité* [crimes that disturb the peace] or *crimes contre la tranquillité* [crimes against the peace], Esprit des lois XII, 4, XXVI, 24.

<sup>35</sup> Les peines des *crimes contre les moeurs* doivent encore être tirées de la nature des choses... toutes les peines, qui sont de la juridiction *correctionnelle*, suffisent etc... XII, 4. Les reglemens *de police* sont d'une autre ordre que les autres lois civiles. Il y a des criminels que le magistrat punit, il y en a qu'il *corrige*, XXVI, 24 [The punishments for *crimes against morals* ought still to be drawn from the nature of things... all the punishments that are from the *correctional* jurisdiction, suffice etc... XII, 4. *Police* regulations are of a different order than the other civil laws. There are criminals whom the magistrate punishes, and there are those whom he *corrects*, XXVI, 24].

<sup>36</sup> Compare *Wächter* Textbook, § 231.

<sup>37</sup> Imperial Police Ordinance of 1530, Preface § 1.

<sup>38</sup> Compare *Carmignani* Teoria delle legge della sicurezza sociale, vol 1, ch 11, p 169, which talks about the *scienza del buon governo*, and ch 13, p 197 which talks about *polizia* as a part of that science.

<sup>39</sup> Codice penale di Parma of 1820, art 10, pene di *polizia o buon governo*.

<sup>40</sup> Earlier jurists, like Blackstone and Archbold have assumed several main classes, often four, of which the class of crimes against *religion* was later moved to the class of crimes against the *common good*, and the class of crimes against *international law* as for example piracy later to the class of crimes against *individuals*. In the *last* respect however, as in respect of the placing of crimes against the *King*, in particular treason, e.g. *Hawkins*, edition of 1824, and *Russell*, edition of 1826, deviate from each another.

contrast to *crimes and délits contre les particuliers* perfectly resembles this concept. It is however noteworthy that in Portugal a classification of crimes into *public* and *private* crimes is taken as synonymous<sup>41</sup> with a classification of crimes against the *public interest* and crimes against the *rights of citizens as individuals*. Under the former have been placed crimes against the state, the head of state and the public order as well as crimes against religion and morality [Sittlichkeit], from which it is evident that the Portuguese jurists appear in the classification of their positive legal system to be more in agreement with the philosophical views of Montesquieu and Rossi than are the jurists of other nations.

They accordingly define a crime as a prohibited [unerlaubt] action that originates from free will [freie Willkühr], by which the civic order [bürgerliche Ordnung] is violated either to the detriment of the public or to that of private persons. It is true that they rely here less on the spirit of their positive law than on the natural law views of Grotius and Cocceji, Puffendorf and Heineccius.<sup>42</sup> Nevertheless *crime in general* may be defined according to these views with more justification as *an injury [Läsion] or right violation* contained in a criminal statute than is the case according to Feuerbach's system. According to this there is at least a recognition of a right of the general public [Gesamtheit] to demand of every individual citizen that he refrain in the interest of the whole [im Interesse des Ganzen] from certain irreligious and immoral actions, and consequently, if the commission of these actions cannot otherwise be prevented, to threaten them with punishment; and in the same way as actions of this kind are regarded apart from this as insults [Beleidigungen] against the moral and religious feeling of an entire people, that right is also regarded as entirely independent from a given threat of punishment.

Admittedly Feuerbach also has subsumed within his concept of *crime in general* what he called *crime in the narrower sense* as well as what he called *misdemeanor* [Vergehen] or *police contravention*, and has included among these also *immoral* and *other* actions. Yet *immoral* actions, insofar as they should be subjected to punishment according to the agreement of all peoples, ought not to be placed in the same class as those that can, according to Stübel,<sup>43</sup> be called specifically *dangerous* when, as often happens, the idea of the *least* criminality [Strafbarkeit] determines the establishment of such a class. Here I must remark that I also cannot accede to those views according to which Trummer<sup>44</sup> in particular placed all crimes under the single viewpoint of *communal dangerousness* [Gemeingefährlichkeit], and that in my judgement there are also criminal actions that could be qualified even in relation to their ground of punishment as *individually dangerous* [individuellgefährlich] if e.g. someone through *careless* actions *threatened* a good [Gut] of an individual human being in such a way that only circumstance [Zufall] prevented *harm* [Beschädigung] that, if it actually had occurred, would have been attributed to the perpetrator qua *negligence* as a greater crime [zur Fahrlässigkeit als größeres Verbrechen]. Actions of this kind are punished everywhere as police contraventions, yet there is no doubt that they affront [angreifen] the community [Gemeinwesen] far less than actions that outrage the moral feeling of an entire people. It has often been remarked, and with good reason, that it could only have a disadvantageous effect in a state if the punishment of the former or the latter action [dieser oder jener] were placed by the legislator under the same approach. But what is more closely connected with the task placed before us here is the remark recently made by Hepp<sup>45</sup> that a sleight of hand [Kunstgriff] would be required to bring, as Feuerbach does, all these actions that he puts together under the concept of *police contraventions* within the general concept of *crime as right violation*. We would rather however say directly that

<sup>41</sup> It must be noted that this is not the case with several nations. The words *public and private wrongs* indicate a quite different contrast in England and the words *delitto pubblico e privato* yet another in Italy e.g. in the draft of the Criminal Code of 1806, arts 44 and 45, in the Criminal Code of Ticino, and sometimes even in France the words *délits publics et privés*.

<sup>42</sup> J J Caetano Pereirae Soura *Classes dos Crimes*, Lisbon 1816, §§6–14. Compare J Mellii Freirii *Institutiones Juris Criminalis Lusitani*, Olisipone 1794 §§ 2, 4.

<sup>43</sup> In the excellent publication in the *Archive*, vol VIII, pp 236 f.

<sup>44</sup> In the incidentally very valuable article in the *Criminalistic contributions* loc cit.

<sup>45</sup> In the review of *Bauer's* Warning theory, in the *Heidelberg Year Books* of 1830, 12th issue p 1199.



the famous criminalist has been guilty here of a significant *logical error*, and this has also already been very convincingly established in an article by one of my former students.<sup>46</sup> Let us abstract from the virtual senselessness of the words that were criticised at the time: “If the *right of the state* (?) to obedience to a certain police statute is *threatened with punishments* (!), the concept of a police contravention arises.” These words incidentally still appear in the eleventh improved edition of the textbook. Yet is it not illogical to adduce something as a sub-species of a genre that is clearly *not included* in the *concept of the genre*? But the fact that Feuerbach has done this will not be questioned by any impartial observer. If *crime in general* is defined as an action that is threatened by a penal statute [Strafgesetz] and inconsistent with the right of another, this indisputably assumes that the action was a *right violation* [Rechtsverletzung] already in itself and before the penal statute existed. If on the other hand it is said of *police contraventions* that they are *not unlawful* [rechtswidrig] acts in themselves or that they are actions that were originally legally possible [rechtlich möglich] for subjects, but that the state was justified [berechtigt] to forbid, and the prohibition issued founded a *right to obedience*; and if it is then further asserted that the fact that the *right to obedience* is protected by a *threat of punishment* but nonetheless is violated by commission of the forbidden action<sup>47</sup> gives rise to the concept of a *police contravention*, it is thus clearly revealed that this [a police contravention] could not be called a *right violation that is threatened by a penal statute*, but an action that by the fact that it has been forbidden and threatened with punishment, only acquires the feature of a *right violation when it is committed after and notwithstanding the enactment of the penal prohibition*. It is further apparent that not the least thing is said here to demonstrate the *legal basis* [Rechtsgrund] for the punishment for such actions, and that through the asserted right to obedience the most innocent action could be branded a *right violation*.<sup>48</sup> But we have yet to draw attention to other detrimental effects the mentioned definitions and distinctions can have on practice.

Feuerbach divides crimes into *crimes in the narrower sense* or right violations that already exist independently of the exercise of an act of government and the declaration of the state, or actions that in themselves contradict the rights of others; and *police contraventions* or misdemeanours, i.e. right violations that only arise through declaration of the state or actions that do not in themselves contradict the rights of others. But he has not stated where the definite boundary is to be found between the two. Let us now think of four different circumstances in which a firearm loaded with a bullet was fired by four different individuals. The first did it in such a way that upon the slightest reflection he would have had to think it possible that someone would be injured by the shot, but neither had the intention [Absicht] of injuring someone nor did his bullet hit anyone, although it missed but narrowly. The second was in exactly the same situation but his bullet unfortunately hit a person who was deprived of his life as a result. The third had the intention of hitting but missed his man. The fourth with the same intention attained his goal and killed his opponent. According to the terminology of many of our criminalists, it is only possible to speak of a *true right violation* in the last three cases, and Feuerbach likewise assumes a *crime in the narrower sense* only in these cases, that are otherwise spoken of as *intentional crime*, *culpable crime* and *attempted crime* [vorsätzliches Verbrechen, verschuldetes Verbrechen, und Verbrechenversuch]. But in the first case, if punishment can really be imposed for this, the action is seen at the most (and certainly not merely because it, as the least serious action, is referred for punishment to *police authorities* within a hierarchy of criminal authorities arranged accordingly, but by its nature, as people say) as a *police contravention*. This is also the case according to Feuerbach’s approach.

But if *crime in the narrower sense* as a *true right violation* is now to consist in the fact that it is an *action already in itself contradicting the right of another*, it is not easy to see why in the first case a *true crime* should not have been committed. In the first and second cases we have assumed the same deed [That], the same *negligence* [Fahrlässigkeit] on the actor’s part; should the mere result

<sup>46</sup> Lelièvre De poenarum delictis adaequandarum ratione, Lovanii 1826, pp 30–37. Compare, about the value of this article, the Archive vol X, p 536 and Carmignani vol III p 223.

<sup>47</sup> This must at least be accepted as the sense of the sentence objected to above, if it is to have any sense at all.

<sup>48</sup> Lelièvre loc cit.



determine the *nature* of the action? Stübel,<sup>49</sup> worthy of respect and distinguished by practical sense, says, very truly: “The distinguishing mark of an action cannot be looked for in a coincidental circumstance. The *nature* of the action does not depend upon *coincidence* [Zufall]. If an action is not unlawful [rechtswidrig] when it remains without a result, it will not become such when it has one.” Not less pertinently, he says elsewhere:<sup>50</sup> “If a person may not take a good [ein Gut] from another, he may also not do or omit anything whereby that person is put in danger of losing it. The opposite would be contradictory and absurd. The right to demand that no one injure us thus indisputably includes the right to demand that no one endanger our right [in Rechtsgefahr setze]. *Right endangering actions* are consequently, in consideration of the second analogous right [the right to demand that no one endanger our right], *true right violations*.” With these words Stübel also has indicated the source of a whole variety of errors that we not infrequently encounter in doctrine as well as in legislation. But he ought to have gone one step further to find the origin of this source and, by blocking it, prevent the errors themselves. By failing to do so and following too closely a use of language that has arisen in Germany due to an excess of abstract ideas, he himself has not entirely avoided those false ideas that can in my view easily give rise to errors. If *danger* is a condition in which we must fear *losing* something or being deprived [beraubt] of a good [eines Gutes],<sup>51</sup> then it is highly inappropriate to speak of a *right danger* [Rechtsgefahr]. When we lose something or are deprived [beraubt] of a thing that is the *object of our right* [Gegenstand unsers Rechtes], when a *good* to which we are legally entitled is taken away from us or diminished, our *right* itself is neither diminished nor taken away. Admittedly when we are *deprived* [beraubt] of *life*, in the nature of things [Natur der Sache] it is no longer possible to speak of exercise of our rights by ourselves and when a *particular physical object* of ours is *destroyed*, the right to this individual object can no longer be said to exist and we are only entitled to a right to an equivalent [Aequivalent].<sup>52</sup> But such individual cases in which ordinary language use might not be quite inappropriate do not in any way justify the use of language in general, and the same reasons that militate against use of the word *right danger* [Rechtsgefahr] can be claimed against use of the word *right violation*, even in the case of those crimes by which a good [Gut] truly is unlawfully [widerrechtlich] taken from us or we are deprived [beraubt] of something to which we have the most uncontestable right.

Recently even the expression *maintenance of rights* that is ordinarily used in the doctrine of the natural right of compulsion and right of defence [Zwangs- und Vertheidigungsrecht] and also in the presentation of positive principles of self-defense [Nothwehr]<sup>53</sup> has been rejected by a famous scholar of the law of reason [Vernunftrechtslehrer] as *completely non-essential* [uneigentlich] and leading to *conceptual confusion*.<sup>54</sup> Yet the power of habit is so great even with those who according to their basic principles are averse to what is habitual [dem Gewohnheitlichen], especially in law, that the same author in the same doctrine without hesitation uses the expressions *right violation* [Rechtsverletzung] and *right endangerment* [Rechtsgefährdung], which in our judgement are far more dubious.<sup>55</sup> Apart from this, we consider his remark against the expression quoted above to be as a whole very well founded, and only intend to draw attention to the fact that older as well as more recent legislators<sup>56</sup> in relation to the doctrine of self-defense [Nothwehr] have found it more advisable to remain true to the *natural* use of language in relation to the words *violation* and *endangerment*. Indeed, Feuerbach himself wisely refrained in relation to this doctrine from an expression

<sup>49</sup> Loc cit p 258.

<sup>50</sup> Loc cit p 263.

<sup>51</sup> Ibid p 236.

<sup>52</sup> In this sense it is said—by the natural lawyers too, e.g. in *Gros Textbook* § 88, a right could cease without the intention of the person entitled to it by the further exercise of it becoming physically impossible through the *destruction of the object* or the *death of the subject*.

<sup>53</sup> Feuerbach's textbook § 37 speaks of *protection of rights* and even of *right violation arising from self-defence* which is a true *contradictio in adjecto*, because *quod quisque ob tutelam corporis sui fecerit, jure fecisse existimatur*. L 3 D de justit. et jure.

<sup>54</sup> Von Rotteck's Rational law Pt I, § 51 p 246.

<sup>55</sup> Ibid p 244, § 50.

<sup>56</sup> CCC [Constitutio Criminalis Carolina 1532] art 140 “and the person subjected to the necessity cannot [füglich] escape without *danger* to or *violation* of his *body, life, honour* and *good reputation*.” Compare Code pénal art 828, Prussian Land Law, Pt II, Tit 20, § 517.

in the drafting of the Bavarian Criminal Code<sup>57</sup> that he employed in his system of common German criminal law, and I am of the opinion that, even in this respect, the doctrine of self-defense would have far fewer difficulties if its portrayal deviated less from the *natural* use of language (which is also its *statutory* use).

Another of our outstanding legal philosophers, Zachariä, in relation to another doctrine that is likewise of importance in criminal law and was also partly influential in the arrangement of materials in the positive German criminal law system<sup>58</sup> (the doctrine of the *inalienability* of rights and of their division into *original* or *inborn* and *acquired*) has made the not unfounded remark<sup>59</sup> that it is only *goods* and not *rights* that should be divided into inborn and acquired, rights as such being neither inborn nor acquired. We refrain from investigating more closely here whether this remark is well founded in every respect and whether sufficient and consistent use has been made of it in the author's system, but indisputably the same feeling has guided Zachariä here that led von Rotteck to censure the expression *maintenance of rights*, and has caused us to draw attention to the unsuitability of the expressions *right endangerment* and *right violation* according to the nature of things as well as to the conceptual confusion and practical disadvantages arising from its use in *criminal law*.

The superior practical sense of the French is often praised (and at times, at least, not incorrectly) and in fact if we read the writings of their most distinguished practitioners we now and again find ideas about the purpose and true subject matter [Gegenstand] of criminal law that, having sprung from natural observation of human conditions [Verhältnisse], might often be more fruitful than many results obtained by German criminalists following their endless disputes about the foundation [Grund] of criminal law, which might lead the foreigner to respond, perhaps not without reason: we do not see the forest for the trees.

One of the most noteworthy French practitioners was undoubtedly the distinguished President of the Court of Cassation, Henrion de Pansey. In one of his excellent writings<sup>60</sup> about the foundation and subject matter [Gegenstand] of criminal jurisdiction he has made observations in which he used the following words, attractive in their simplicity: "The subject matter of all criminal legal science is the maintenance of those great benefits to which the purpose of all political association relates, namely of life, honour, civic freedom [bürgerliche Freiheit] and property. Everything that humans do in order to deprive others of these benefits or to disturb others in their enjoyment of them is a crime or a misdemeanour." We do not intend in any way to assert that this definition of crime is perfect and without errors but only that it aptly emphasises what in my opinion is *essential* in determining the nature of crime and draws attention to the fact that if one wishes to consider crime as a *violation*, this concept must by its nature relate not to that of a *right* but to that of a *good* [eines Gutes]. This idea can also to some degree be united with that by which in recent times the distinguished criminalists of modern Italy, Carmignani, consistently criticised the view of those who see in crime a *right violation*. Although he expressed the conviction that every definition of a crime ought to proceed on the basis of requiring the *violation of a statute* [eines Gesetzes] for the commission of a crime, he nevertheless accepted the *violation of societal security* [Verletzung der gesellschaftlichen Sicherheit] as constituting the nature of crime. In other words he described *societal harm* [gesellschaftlicher Schaden] or *danno sociale* as that which, according to the principles of policy [Politik], an action would have to carry within itself as its essential character in order to be capable of being regarded as a crime or *offesa*. Accordingly he considers crime as a violation (recognisable in an outward deed [äußere Tat] that derives from a complete and direct intention [vollständiger und direkter Vorsatz]) of a civic statute [bürgerliches Gesetz] guaranteeing public and private

<sup>57</sup> Bavarian Criminal Code Pt I, art 125: "attacks on persons or goods," art 127: "the threatened good." Feuerbach's textbook itself § 38 naturally speaks about *violation of a good* but then again about *detriment to other rights or goods* whereby at least a *superfluum* occurs about which it cannot be said: *non nocet*.

<sup>58</sup> Feuerbach's Textbook, the headings to § 206 and 310. Henke, who in his Textbook of criminal law, Zürich 1815, seems mostly to have followed this progression of ideas in application of private crimes, has nevertheless refrained from the principal classification based on it.

<sup>59</sup> Forty Books of the State, Book XXIV, Introduction, vol III, p 90.

<sup>60</sup> De l'autorité judiciaire en France, chap 20, 3rd edit, Paris 1827.

security.<sup>61</sup> I have in my earlier lectures about the Dutch-French criminal law, as well as in my later ones about the common German criminal law, found the relationship of the feature, contained in the concept of crime, of violation to the concept of a *good* [eines... Guts] to be protected by statute law to be extraordinarily productive and especially appropriate for avoiding many kinds of error. . . .

However one may think about the legal foundation [Rechtsgrund] and the purpose of the state, differing opinions can unite about this if it is accepted that it belongs to the nature of state power to guarantee to all human beings [Menschen] living in the state in a uniform [gleichmäßig] manner the enjoyment of certain goods [Güter] that are given to human beings by nature or are the result of their societal [gesellschaftlich] development and civic association [bürgerlicher Verein]. It may remain undecided whether a human being outside the state in a so-called state of nature already has *rights* or not. But it cannot be subject to any doubt that the *goods* [die Güter], to the enjoyment of which (to be guaranteed uniformly [gleichmäßig] to all) within the state the sphere of right [Rechtssphäre] of each individual relates, are already partly given to the human being by *nature* and are partly the result of his *societal* [gesellschaftlich] development. Thus, as in the laying down of the definition, so also in the classification of crimes the same simple concept can be taken as a foundation and also, in a certain easily comprehensible sense, a classification of crimes into natural and social can be assumed. It may also be left undecided how far in the state rights of the state itself as a moral person and the rights of the state citizen can be distinguished and whether accordingly a classification of crimes into state and private crimes should be approved. But there can be no doubt that among those actions that tend to be punished as crimes in all states some are of the type by which first of all certain *persons* are *violated* in one of the goods [Güter] to be guaranteed to all by state power and others of the type in which the action directly *deprives, diminishes or endangers* one of these goods [Güter] in relation to the *community* [die Gesamtheit]. Thus it is possible to determine the classification of crimes as a whole according to the different extents of the *violation or endangerment* in relation to the directly harmed or threatened subject or, which amounts to the same thing, according to the nature of the good [Gut] primarily threatened or diminished by the action; and to determine a division of the same into crimes against the *community* [Gemeinwesen] and crimes against *individuals* according to their nature, and also the difference between *attempt* and *completion* of a crime in a more natural way than is possible under the uncertain concept of right violation [Rechtsverletzung] in the usual sense. Accordingly the most correct view of judging immoral and irreligious actions, in so far as they can be punishable at all, can be stated. However a people may think about the value of positive religions and however many positive religions may exist in a state, a sum of religious and moral ideas [Vorstellungen] can always be regarded as a *common good* [Gemeingut] of the people, to be placed under the general guarantee, the maintenance of which stands in such a close association with the maintenance of the constitution itself that, even independently of a specific prohibition issued under the threat of punishment, certain types of immoral or irreligious actions must be regarded as *unlawful in themselves* for human beings [Menschen] living in the state. If I am not mistaken, it is also a related idea according to which Heffter has recently spoken of crimes against *religious rights*, crimes against *legal requirements regarding outward morals* [äußere Sitte] and *chastity* [Zucht], crimes against *legal requirements regarding common and individual welfare* and, in relation to a type of the first class, of *common legal requirements regarding satisfaction of religious needs, otherwise of right and duty violation* [Rechts- und Pflichtverletzung].<sup>62</sup> In accordance with these opinions of mine I believe that a crime, punishable in the state according

<sup>61</sup> In the work quoted book II chaps 1 and 3. Vol II, especially pp 11, 12, 42, 48, 50, and 51. Compare Archive of Criminal Law vol XIII p 610 f especially pp 617–619. The author describes the word *violation* in a fourfold regard, as *infrazione*; in relation to the statute mention is also made of *trasgressione* (p 46). Reference is however made to *violation of a right protected by statute* on p 13 in a way which does not take into consideration the dubiousness of this expression; it is also an idea which ought not be approved when on p 61 actions against *security* are differentiated from actions against *welfare* and thereby the real *crimes* are as it were separated from *police contraventions* according to their nature. Carmignani's definition of crime has in other respects some similarity with the *Portuguese* one quoted above.

<sup>62</sup> Textbook, §§ 415, 421, 427, 442, 445, and the preceding headings, and also § 31, at the end.

to the nature of things [Natur der Sache] or reason [vernunftgemäß], is to be regarded as any violation or endangerment, attributable to the human will, of a good [Gut] that is to be guaranteed to all uniformly [gleichmäßig] by the state power [Staatsmacht], if a general guarantee cannot be effected otherwise than by threat of a specific punishment and by execution of the statutory threat against each perpetrator. Accordingly, I believe I am no more able to agree with those who elevate a *right violation* in the usual sense than with those who elevate communal *dangerousness* [Gemeingefährlichkeit] to be the essence of crime or to be the feature enabling recognition of an action's criminality [des Strafbaren]. This is because even if in a certain sense the one feature like the other is contained in all that is truly punishable, the one expression as well as the other easily leads to a certain *one-sidedness* of view and gives rise to *misunderstandings* that can only have a disadvantageous effect in legislation as in application. In particular the acceptance of *communal dangerousness* [Gemeingefährlichkeit] as the essential feature of each crime could easily lead to the view that e.g. the duty of the state power [Staatsgewalt] to punish murder lay less in its duty to protect the life of the individual human being as such than in the duty to maintain the state as a whole. It might accordingly appear as though the intention was to claim that human beings were only there so that the state could exist instead of assuming the state to be necessary because of the interests of human beings. In my opinion however the abstract concept of the state ought also not to be elevated to the level that formerly, during periods when the state was so readily identified with the head of state, was at times claimed for the head of state. So far as concerns the concept of *right violation* we would only add a few remarks to what has already been said above about this in order to better highlight the errors to which the use of this word and the importance generally attached to it can lead.

To speak of violations of life, human capacities, honour, personal freedom [persönliche Freiheit] and wealth as particular crimes is natural and corresponds with natural ideas; this is because all the mentioned goods [Güter] are subject to a *deprivation or a diminution* by the actions of others, as they can be seen as objects [Gegenstände] of our rights.<sup>63</sup> Instead of following this natural use of language, Feuerbach, in listing individual private crimes has spoken first of *crimes against the original rights of the human being [des Menschen] and the citizen* and under this category of *violation of the right to life*, of *crimes against the right of the citizen to free disposition over his body*, of *violation of the right to honour* and then of *crimes against acquired rights* and under this title of *violation of the right to things*, of *violation of the right arising from contracts*, and in particular of *violation of the marriage contract*, which otherwise and more naturally as well, is called *violation of marital faithfulness*, and which similarly to the violation of honour consists in deprivation of an intellectual good [Gut] in relation to the person against whom this crime is committed. In relation to a class of crimes against original rights that Feuerbach represented as *violations of the integrity of human capacities* he has remained true to the natural use of language.<sup>64</sup> Incidentally it ought easily to be capable of proof that, for almost all the kinds of crime cited, the description chosen by him could lead to conceptual confusions. However we merely intend in accordance with our plan, after some general preliminary remarks, to emphasise the inappropriateness of this description in relation to the crime of insult [Injurie].

If we consider the four cases differentiated above of discharge of a firearm, all four of them are strictly speaking to be regarded according to what has already been said as *violations of the right to life* in so far as one understands *right violation* as including nothing more than *an action contradicting a right*. This is because necessarily someone also has committed such an action who has *exposed another to the danger of the loss of his life through carelessness [Unvorsichtigkeit]*. As Feuerbach did

<sup>63</sup> When the Romans speak of *laesa majestas* in relation to one of the most important crimes, it should be borne in mind that in legal sources the expression *minuere majestatem* i.e. *magnitudinem, amplitudinem, potestatem, dignitatem populi Romani* is more frequently mentioned, and that they consequently remain within the boundaries of the natural use of language. Compare Brissonius s v *majestas*.

<sup>64</sup> Compare the headings to §§ 206, 244, 251, 271, 310, 370 and 373. In § 418 mention is made of *perjury as violation of an obligation*, in § 199 of *violation of the oath of truce [Urphede]*, in § 244 of *violation of the body*, in § 275 of *violation of honour*, in § 206 of *violation of life as the condition of all rights*, and in § 207 of the human being as the *object of the violation contained in the crime of homicide*.

not include such actions under that category, he has also in no way managed by those words to express the characteristic feature of the crimes dealt with under it, that which differentiates them from all other crimes. If one wished to argue that crimes of this kind did not belong under this category because they are *not true violations of life*, then it would be quite correct, adhering to the natural use of language so far as concerns the last part of the sentence; but according to this natural use of language attempted homicide or the third of the cases given above would also *not* be called a *violation of life* but only an *endangering of life*. At any rate Feuerbach has also *included* this case in *the category of crimes against the right to life*. According to the nature of things [Natur der Sache], the first of the cases given above is related to the second in the same way as the third is related to the fourth; an *endangering of life* is contained in the first as well as in the third, and a *taking, deprivation or violation of life* in the second as well as in the fourth, and the first two are differentiated from the last two only by the fact that in the former the deed derived from *negligence* whereas in the latter it derived from an evil intent [böse Absicht]. This will also suffice to show that by the designation *violation of the right to life* and similar expressions nothing at all is demonstrated which would not have emerged much more naturally by such words as *crime against life*. This designation can however easily lead to misunderstandings and diverts us completely from the standpoint from which it is possible in the case of this crime to distinguish between *completion* and *attempt*. If for instance the violation of the right to life were to be seen as the characteristic feature of the crime against life then logically the attempt to kill would have to be seen as an already completed crime. This is because a *violation of the right to life* has been already thereby *completed* or the *right to live* is *no more and no less violated* by the attempt to kill than by the killing itself. But the *violation of life* is *not completed* by the attempt to kill, and the *good of life* [Gut des Lebens] has neither been *taken away* nor *diminished* in the fourth case cited above but has merely been *endangered*.

That the application of the concept of *right violation* is inappropriate and detrimental is demonstrated most strikingly in the designation of particular crimes in the doctrine of *insults* [Injurien]. The word *honour* has within it primarily three different meanings that in my opinion need to be carefully distinguished, the difference between which will be apparent to anyone who makes the effort to investigate precisely the true sense of the following three expressions that often occur in ordinary life. People often speak of the honour that someone is *shown* [erwiesen] by others, then we speak of our honour being *wounded* [gekränkt] by others through crimes and finally of the honour of a criminal being *diminished* [geschmälert] as punishment. The second and third expressions have this in common with each other that in both *honour* is taken as a *good* [Gut] that can be *taken away* [entzogen] or *diminished* [gemindert]. But the third has this special feature that the *good* [Gut] which is subject to removal or diminution consists of *civic legal capacity* [bürgerliche Rechtsfähigkeit], which the Romans called *existimatio* or *dignitatis illaesae status* with express mention of the fact that this could be *taken away* from someone or *diminished* by statute as a result of his crime.<sup>65</sup> But we can safely say that it is *not this* good [Gut] which could be taken away from us or diminished by the unlawful action of another and which is regarded as the subject matter [Gegenstand] of the crime of affront to honour [Ehrenkränkung], and that at least the attack on our honour is not aimed directly at this good [Gut] (even though it could be taken away from us as a consequence of a violation of honour by an unjust judgment), just as much as we can say that the diminution in honour as a punishment cannot easily consist of *something other* than deprivation or diminution of that legal capacity.<sup>66</sup>

<sup>65</sup> *Minuitur aut consumitur* L 5 D de extraord. cognitionib. *Illaesae dignitas* is thus also spoken about here in the natural sense of the word *laedere*, as in the expression noted above *laesa majestas*, and likewise *laedere opinionem* in the sense of violation of a good name in L 1 D de famosis libellis. Compare *Molitor* de minuta existimatione, Lovanii 1824. Zimmern acceded to much of the views of this former pupil of mine in the *History of Roman Private Law*, vol I p 456 f.

<sup>66</sup> This is the reason why formerly many jurists, who have likewise not differentiated between the various concepts of honour and merely conceived of it as that which cannot actually be taken away by the power of the legislator, have also railed so much against dishonouring [infamirende] punishments. Besides, Carmignani in vol II p 12 has also drawn attention to the fact that the expression *right violation* in so far as



If we speak of the *honour* that someone *is shown*, we admittedly rely on the concept of honour that Feuerbach traces to the outward appearance of respect that we feel towards others or to the outward appearance of recognition of the value in others.<sup>67</sup> But it would be quite absurd if we were to rely on this concept where it is a question of us having been *deprived* [*beraubt*] of honour by others and a concept of *violation of honour* is required. It is clearly *not possible to deprive* [*berauben*] someone of the *outward appearance of respect*. But it is quite natural to *speak of deprivation of the intellectual good* [*Gut*] *that exists for us in the recognition by others of our worth as human beings and citizens*, and in this regard Martin's definition of honour is to be preferred to that given by Feuerbach, and his criticism of the latter is not unjust.<sup>68</sup> Feuerbach is not however to be blamed for the definition given but rather for the fact that he has comprehended honour from only *one* point of view and has proceeded from this point of view, which is *unsuited* for this purpose, in determining the concept of *insults* [*Injurien*]. The cause of this error, however, is to be sought in the inappropriate formulation that he used in determining the characteristic feature of the individual categories of crimes and that we have chosen as the primary object [*Gegenstand*] of these observations. We often say, according to a use of language that is not unusual but artificial [*uneigentlich*], that a person who appears to us *worthy of respect* [*Achtung*] has a *right to our respect* in the sense in which Grotius speaks of *aptitudo* and *ius imperfectum*. If however the expression *violation of the right to honour* was chosen for the description of *insult* [*Injurie*], as it is most centrally with Feuerbach, it was a natural connection of ideas (if the *right to honour* was represented as a *right to recognition*), that a concept of *honour* which incidentally was useless for the definition of *insult*, was placed ahead of the modifications necessary according to the idea of a proper right [*eigentliches Recht*]. Feuerbach's definition of *violation of honour* has also arisen through this, which cannot be much service to legislators and judges, although it has not infrequently served as a pattern for legislators and writers who have come forward with legislative claims and in fact particularly in relation to the most important questions of our time, though it has at times been surpassed in terms of unsuitability of expression.

The author of an article about press freedom that recently appeared in Switzerland<sup>69</sup> gives as the only true and the only possible way in which misdemeanours by the press could be limited appropriately in legislation that statutes of this type must be based on the doctrine of insults [*Injurien*] and the doctrine of crimes against the state.<sup>70</sup> In this respect the textbooks of Grolman and von Feuerbach in my opinion offer everything that is important in this matter and thus the *violation of honour or insult* [*Injurie*] in the wider sense is defined as the *intentional violation of the compulsory rights* [*Zwangsrechte*] of others to general human and citizen honour [*Menschen- und Bürgerehre*] as well as in respect of a good name! If this definition is to serve as the foundation for legislation against press misdemeanours, then we very much doubt that it will attain its purpose. In respect of *violation of compulsory rights to honour* it is all the less possible to imagine anything specific in the case of a people for whom the concept of *right violation* has such an unsteady and uncertain application as seems to be the case in Switzerland. We would like to cite only one example of this. In § 56 of the Statute concerning Correctional Jurisdiction for the Canton of Basle of 1824, the *misdemeanours* contained in this statute are classified as *right violations*. In the proposals submitted by the criminal court in June 1829 for a revision of the first part of the Criminal Code, § 37 of the Code, having regard to § 56 of the Correctional Statute mentioned above, made the punishment of

it might easily be taken for *right deprivation* [*Rechtsentziehung*] could in this sense certainly be the result of a *criminal statute* but not of a *criminal action*.<sup>67</sup> Textbook § 271.

<sup>68</sup> Textbook § 88. It is less worthy of approval that *the same* concept of honour was taken by him as a basis for determining the concepts of *violation of honour* and *honour punishments*. *Gioja dell' ingiuria*, Milano 1821, vol 1, p 4 seems at least to have grasped the correct point of view when he proceeded to establish the concept of *ingiuria* from that of *reputazione*, which however he defined somewhat strangely as the certainty of receiving free services without payment which depend on goodwill. Compare, incidentally, *New Archive* vol VIII, p 716.

<sup>69</sup> Considerations on the introduction of freedom of the press in Switzerland and regarding statutory provisions about the press, Zürich 1829, pp 46, 52.

<sup>70</sup> The author takes the concept of crime against the state very narrowly. He has also declared himself decisively against all punishment of immoral actions.



subsequent offences [Rückfall] dependent upon *earlier right violations of the same kind* having been committed and it was added that e.g. *concealed pregnancy and child birth* were to be considered as included among these! What the criminal court had imagined otherwise was included under a right violation is hard to guess; but this example will give a fresh instance for my view that this expression will not get us very far if it is meant to serve an explanatory function.

There cannot be any doubt that *honour* belongs to those *goods* [Güter] the necessary guarantee of which forms the essence of criminal legislation. From this point of view the concept of honour lives in the population [im Volke], and the most sophisticated criminalists and natural law scholars believed that they need not distance themselves from it. Among earlier scholars of natural law Henrici<sup>71</sup> in particular has regarded honour as a good [Gut] that however does not lie originally in the *sensory organism of a human being* [sinnlicher Organismus des Menschen] but merely in the *opinion of other rational beings different from him*. Among the more recent Zachariä<sup>72</sup> also has, along with Feuerbach, regarded honour as the outward recognition of the moral value [sittlicher Werth] of a human being, and in one respect the concept can be portrayed, as has already been remarked above, in such a way, as it also can be said that *the outward nonrecognition of value in other human beings* is the *means* whereby affronts to honour are committed. But it is evident that honour cannot be *defined* as outward recognition if the *foundation* [Grundlage] for the *concept of violation of honour* is to be found, and honour is to be regarded as something associated with a person that could be the object [Gegenstand] of an attack or could be taken away or diminished through such an attack. Now Zachariä also has regarded honour as an *ideal good* [Gut] despite his definition of it that has just been quoted, and has linked to this the proposition that words and works are only affronts to honour by virtue of the *intention* [Absicht] of the *insulter*. We wish to leave this point open here and also not to go any further into the related question whether honour is an *inborn good* [Gut] and the right to maintenance of honour belongs to the *original rights* of human beings. It is evident that honour is not an *inborn good* [Gut] like life. But as soon as a human being comes into contact with others of his kind and the capacity for moral discernment has developed in him, the feeling of the value of the opinion of others about him will already be present in him, as also the feeling of having lost the respect of others through some action develops in the physical organism in an outwardly visible manner. The *feeling of honour* has the same root as the *feeling of right* and every *injustice* [Unrecht] done to a human being is essentially for him a *violation of honour*. It is associated with this that the Roman in order to express both concepts used the same word and that the concept of *honour punishments* [Ehrenstrafen] developed in such a close connection with the *legal capacity* of citizens [bürgerliche Rechtsfähigkeit].<sup>73</sup> Originating from a similar opinion is the statement by von Rotteck<sup>74</sup> about the *right to honour* or the *right to respect* [Achtung], that it could not consist in anything else or be derived from anything, and thus also could not be determined or measured by anything, other than the *right to equality*, which has its counterpart in the duty to *recognise the equal personhood* [gleiche Persönlichkeit] in others. There is much truth in this, but one also cannot overlook what Walter aptly says,<sup>75</sup> that the concept of honour has the most precise connection with *human personhood* [Persönlichkeit des Menschen] as well as with the *basic conditions of civic society* [Grundverhältnisse der bürgerlichen Gesellschaft]. Although one can relate the right to inviolability of the intellectual good [Gut] of honour as a *natural and original right to the equal personhood of all*, it is not for that reason to be regarded any less as a *natural* one insofar as through the *nature of civic society* it appears determined in a *particular* relationship and the *right to respect* [Achtung] may not in any case be separated too sharply from the concept of *dignity*.<sup>76</sup> For this reason we do not consider it appropriate, along with Marezoll, to regard honour as that personal *feature* which confers a *claim to recognition of certain privileges* based on the idea of dignity. We also cannot accept

<sup>71</sup> Ideas on a scientific foundation of jurisprudence, Hannover 1810, pt II, p 374.

<sup>72</sup> Forty Books of the State, Book XXIV, pt I, section 1, vol III, p 100 f.

<sup>73</sup> Compare Marezoll on the honour of citizens, Giessen 1824, p 6, and Walter in the Archive of Criminal Law, vol IV, p 112.

<sup>74</sup> Textbook on the law of reason [Vernunftrecht], vol I, p 132. Compare Mittermaier in the Archive vol XIV, p 73. <sup>75</sup> Loc cit. <sup>76</sup> Compare, against this, von Rotteck loc cit.

it without limitation when Zachariä asserts that the concepts of *honour and affront to honour refer merely to the moral worth of a human being*.

In a so to speak opposite manner Heffter<sup>77</sup> relates the concept of insult to *affront to civic personhood* [*Kränkung der bürgerlichen Persönlichkeit*] and besides this he has also spoken of affronts to honour in relation to the *ambit of political legal capacity* [*Umkreis der politischen Rechtsfähigkeit*] to which everyone is entitled according to his position in the state. He has however drawn attention here, and certainly not without reason, to the fact that it is necessary to take good care not to formulate the crime of insult for the *common law* from *such an uncertain concept as honour*. Yet even the sources of the *common law* are based, in the doctrine of insults [Injurien], on *some concept of honour*, and it is well to note that the concept that underlies the Roman development of the concept of *honour punishment* is not the same as that which forms the basis of the common law concept of *insult* [Injurie]. This seems to me not to have been sufficiently emphasised even by Heffter, but it follows in part simply from the fact that for the concept of insult in the *special sense* Roman law uses the word *contumelia*, which is related to *contemnere*, and in *this special sense* even speaks of a *publica injuria* as a type of *injuria contra bonos mores* if, for instance, public springs are polluted.<sup>78</sup> There is in fact also in such actions a *disrespect of the public* [*Nichtachtung des Publikums*], an *insult to the feeling of decency and morals* [*Beleidigung des Gefühls für Schicklichkeit und Sitte*], which the Romans believed they had to protect by punishment just as, according to Heffter's observation in regard to the *honour of peers* [*Ehre der Standesgenossen*], the common law aims to protect the *feeling of being in possession of this honour* by punishment of certain wrongs [Unbilden].<sup>79</sup> Indeed, when the Carolina speaks of *taking away virginal and female honour* in relation to the crime of *rape* [Nothzucht],<sup>80</sup> the legislator by these words did not in any way think of the taking away or harming of a *physical thing*, but of the deprivation [Raub] or destruction of a *moral feeling* [moralisches Gefühl] by a crime arising from the most culpable disrespect [sträflichste Nichtachtung] of moral dignity associated with physical ill treatment, and fixed its punishment for the protection of *that feeling* as an *inestimable* [unschätzbar] *good* [Gut] for noble women and virgins. It seems to me according to this view that the question of when this crime is complete also ought to be resolved in a quite different way than is common practice. Further, it certainly cannot be denied that in the mentioned cases of an insult or violation of honour recognized in the sources of the common law, however diverse they may appear to be, a common feature could yet be found, that the concept of *honour*, which forms the basis of the concept of this crime, does not refer merely to *civic personhood* [bürgerliche Persönlichkeit]. I therefore consider the investigations into whether the concept of *honour* would be a *natural* one and whether the right to maintenance of the good [Gut] in which honour consists would be an *original* one, even as regards the application of the common law, not to be pointless; even the question that was once raised by Henrici<sup>81</sup> as to whether that right is originally an *independent* one is not entirely useless for practical jurists. The sense of the question was whether *honour* existed as a *legal object* [Rechtsobject] originally on its own account or rather more because of the three *original conditions of personhood*—*life, health and freedom*—in other words whether originally *violation of honour* could be regarded as an *injustice* [Unrecht] if it does not express itself as a violation of *life or health* and not as a hindrance to the development of the *intellectual and physical capacities* of the human being. In whatever way the question may be resolved, no one will dispute the fact that, in the state, *violation of honour* must be regarded as an *independent violation* on account of conditions that belong to the natural essence of civic society [and] reasonably [vernunftgemäß] require a guarantee no less than many other conditions for the development and recognition of which the abstract idea of a so-called compulsory right [Zwangsrecht], which is usually taken as the lodestar in such investigations, is of little importance. The words of Cicero quoted

<sup>77</sup> Textbook § 296, p 320.

<sup>78</sup> Compare L 1 and 45, D. de injuriis with L 1 § 1, D. de crimimb. extraord.

<sup>79</sup> The word *wrong* [Unbill] is by its origin related to *injustice* [Unrecht], but the word *offence* [Beleidigung], which in the common use of language signifies *insult* as *injustice* in general much more frequently, is related to *suffering* [Leid] which is understood as including in particular the *feeling of pain over a good* [Gut] taken away.

<sup>80</sup> Art 119.

<sup>81</sup> Loc cit.

by Heffter, which state that what should be compensated for by the *actio injuriarum* is called a *dolor imminutae libertatis*, indicate likewise a relationship with some of the views developed above, in particular with the feeling of pain [Schmerz] about a good [Gut] that is violated, taken away or diminished as the natural result of an inflicted insult [Injurie].<sup>82</sup> Every piece of *criminal legislation directed against insults* [Injurien] in connection with *moral concepts* of a particular people must in my judgement take this into consideration. Besides this, it might perhaps not be easier to define *violation of honour* more precisely than to give a precise definition of what is to be understood as included in an *immoral action* [unsittliche Handlung]. I have already on another occasion<sup>83</sup> drawn attention to the observations on this subject that a famous German statesman and a sophisticated [geistvoll] English author have made almost at the same time and in the same manner as well as to the fact that for this very reason English legal opinion accords to the *jury court* greater jurisdiction [Befugniß] in relation to *cases of insult* than for other crimes. Otherwise I am of the opinion that the *concept of violation of honour* by its nature could not be anything different in relation to a *claim for compensation* to be granted than it could be in consideration of a *punishment* to be imposed. But just as *all immoral actions* or *all violations of ownership* [Eigentumsverletzungen] cannot and may not be subjected to *punishment*, a wise legislator will no more allow this in relation to *all insults* [Injurien]. Doctrine can investigate more precisely the *conditions* under which a legislator should allow *punishment* to occur for violations of honour. But this investigation will all the less be expected here as, after the excellent treatment on the subject that recently appeared in the Archive,<sup>84</sup> it either would be either superfluous or, insofar as there was an intention to propound possible divergent views, or would require separate treatment.

<sup>82</sup> Pro Caecina cap 12. Compare note 79 above.

<sup>83</sup> My Notice sur les dispositions du droit anglois relatives aux délits de la presse, Bruxelles 1828, p 63 with reference to the Quarterly Review no 70 p 594 and Aneillon on the mediating of extremes in opinions, Berlin 1828, vol I, p 252 f.

<sup>84</sup> Mittermaier on the statutory definition of the concept of violations of honour, in the Archive XIV, p 66.

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## APPENDIX C

# The Origin of Criminal Law in the Status of the Unfree\*

Gustav Radbruch\*\*†

Primitive German history shows three precursors to public criminal law. They appear in the Germania of Tacitus as follows:

1. In the foreground we have the system of feuds and fines. More serious violations of law establish a right, and indeed a moral duty (*necesse est*), for the clan of the injured person to a feud against the perpetrator and his clan. But the feud can be averted or ended by the payment of a fine. This fine consists of a certain number of horses, oxen or small livestock and is transferred from one clan to the other (c. 21). For lesser delicts the feud had already been excluded by the time of Tacitus, and there was only a right to a fine [*Buße*] (c. 12). The right to a fine can be claimed by the land assembly [*Landsgemeinde*]. In this case, part of the fine goes to the king or the people (c. 12).

2. Set against this intergentile regime is the discipline for misdeeds [*Missetaten*] by one clan member against another member of the same clan, exercised by the head of the family over women, children and serfs. Tacitus describes the ignominious [*schimpfliche*] chastisement of an adulteress by her husband (c. 19) and the treatment of offending [*straffälliger*] serfs (c. 25): beating, chaining and compulsory labor were permissible but not frequent, and killing was immune from punishment, but more often an outbreak of sudden anger than a purposeful punishment. The intragentile discipline remains in a pre-legal condition, determined by mood and custom [*Laune und Sitte*] and not yet by the legal order.

3. Finally the first signs of a supragentile, public criminal law are also to be found in Tacitus as a more recent layer of criminal law development. Three comprehensive community structures [*Gemeinschaftsgebilde*] begin to rise above the clans: the land assembly, the war army [*Kriegsheer*] and the cult community [*Kultgemeinschaft*]. In these three areas the first signs of a public criminal law are at work. Tacitus initially mentions five cases of war criminal law [*Kriegsstrafrecht*]:<sup>1</sup> war treason [*Kriegsverrat*], defection to the enemy, cowardice in the field or failing to report for military service (*ignavi et imbelles*) and pederasty (*corpore infames*) (c. 12). As the other four cases are war crimes [*Kriegsverbrechen*], the fifth and last must also be understood as a war crime: pederasty in the army camp. For war treason and defection—and thus for disloyalty [*Treulosigkeit*—the death penalty by hanging applies, and for cowardice, failure to report for service and pederasty—and thus for unmanliness [*Unmännlichkeit*—smothering in marsh and swamp, *tamquam scelera* (wicked acts) *ostendi oporteat, dum puniuntur, flagitia* (disgraceful acts) *abscondi*. Besides this, there is, as a punishment for the man who returns from battle without his shield, ignominious exclusion from the land and cult community [*Lands- und Kultgemeinde*] (c. 6). Tacitus identifies it with the word the Romans used for their religious law: *fas*. The entire war criminal law of the Germans appears to have had a religious character: punishments in the war army—execution, chaining, flogging—are not imposed in the name of the army commander, but in the name of the god of war—deo

\* “Der Ursprung des Strafrechts aus dem Stande der Unfreien,” in *Elegantiae Juris Criminalis: Vierzehn Studien zur Geschichte des Strafrechts* (2d edn, Basel: Verlag für Recht und Gesellschaft 1950) 1. The original version of this paper appeared in *Elegantiae Juris Criminalis: Sieben Studien zur Geschichte des Strafrechts* (Basel: Verlag für Recht und Gesellschaft 1938) 1.

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<sup>1</sup> On the following *Conrad* in 56 ZStW pp. 709ff (1937).

imperante, quem adesse bellantibus credunt (c. 7). They are therefore executed by the priest. The priest who in the land assembly demands peace by his command of silence has for the protection of the assembly peace [*Dingfriede*] the power to punish those who disturb it (c. 11). In light of this strong priestly share in the administration of Germanic criminal law [*Strafrechtspflege*] it may be assumed that there was a criminal law of the priests in their particular religious sphere: for cult crimes. Beginnings of public criminal law can thus be established in the Germanic period for war crimes, cult crimes and violations of assembly peace.

All further claims about Germanic criminal law are hypotheses. It is a hypothesis that the system of revenge and fines as well as the beginnings of a public criminal law are based on the legal concept of peacelessness [*Friedlosigkeit*] (Brunner). It is also a hypothesis that, over and above the capital crimes to which Tacitus testifies, other crimes had been threatened in the primitive Germanic period [*germanische Zeit*] with a public death penalty, principally murder, qualified theft [*qualifizierter Diebstahl*] and rape, “the three things that draw toward death” (Amira). Finally it is a hypothesis that public punishments for these crimes would have had not merely a religious tint but the specific character of human sacrifices (Amira).<sup>2</sup> Entirely unsubstantiated is Amira’s degeneration theory [*Entartungstheorie*], according to which public punishments in the Germanic period would have arisen from the impulse to keep the race pure,<sup>3</sup> and the taboo theory according to which punishment was originally to facilitate the delivery of the person taken by the deity to the higher taboo to which he has fallen a victim.<sup>4</sup>

From which of these three roots did the public criminal law arise? There was an attempt to derive the development of public punishments from revenge, and to regard revenge as a primitive punishment, and punishment as a refined revenge.<sup>5</sup> But while punishment is a phenomenon within the community that it serves, revenge is an intergentile occurrence, an event between the most comprehensive community structures at that time, not primitive criminal law but primitive international law [*Völkerrecht*]<sup>6</sup>—the path of development from it into the present leads to war between states, not to punishment within the state. Punishment has no conceptual relationship to revenge—and also no causal connection: that later on public punishment also gratified the desire for revenge of the individual, who could no longer seek to satisfy it, proves nothing as to its origin. This is because as the state power [*die Staatsgewalt*] began to intervene in disputes between clans, it did not further develop revenge in any way, but on the contrary suppressed it. The germs of later criminal law do not lie in revenge, but rather in fines [*der Buße*]. From the state share contained in it, the peace money—and besides this from the *Bannbusse* [fine for disobedience of sovereign command] this “rapidly rising wild plant of criminal law development”—sprang the monetary punishment [*Geldstrafe*] as the “first punishment due to the community, and thus public punishment.”<sup>6</sup>

The people’s revenge [*Volkstrache*]<sup>7</sup>—the lynch law [*Lynchjustiz*] of agitated crowds in the case of misdeeds that harmed and outraged all and every individual—can with more justice than the clan’s revenge [*Sippenrache*] be regarded as the origin of public punishments. When the state power took revenge out of the hand of the people and replaced its instinctiveness [*Triebmäßigkeit*] with a rationally ordered administration [*rational geregelte Ausübung*], public punishments developed. At least in proceedings for someone caught in the act the background of the old people’s revenge is still clearly recognizable.<sup>7</sup>

But how far have these early public capital punishments (possibly) arising from the people’s revenge for war and cult crimes been fruitful for the further development of criminal law? As punishments with a sacral tint, in the way they were presented to us in Tacitus, especially as human

<sup>2</sup> Sceptical as to all these hypotheses, v. Hippel, *Deutsches Strafrecht I* 1925, pp. 104 f. note 7, 106, 108 note 1. Compare also Eberhard Schmidt, *Einführung in die Geschichte des deutschen Strafrechts* 1947, pp. 24 f.

<sup>3</sup> Contra Pappenheim in 50 *Zeitschrift für deutsche Philologie* pp. 450 ff. (1926).

<sup>4</sup> Gerland, *Die Entstehung der Strafe*, 1925, pp. 20 ff.

<sup>5</sup> On the following Vlavianos, *Zur Lehre von der Blutrache*, Munich diss., 1924.

<sup>6</sup> Binding, *Die Entstehung der öffentlichen Strafe*, 1909, pp. 45, 32.

<sup>7</sup> People’s revenge as the origin of public punishment: R. Schmidt, *Aufgaben der deutschen Strafrechtspflege*, 1895, pp. 147 ff., *Grundriss des Strafrechts*, 2d ed., 1931, pp. 7 ff.



sacrifices, after Christianization they were bound to meet the resistance of the church, which could use the law of asylum [*Asylrecht*] in particular to frustrate them. “The clergy pursued the salvation of criminals condemned to death as a kind of sport. It is evident from numerous legends of the saints that nothing brought the aroma of holiness more easily than when a pious man saved a criminal with or without a miracle from death on the gallows, which he deserved several times over.”<sup>8</sup> In fact in the Merovingian period the death penalty noticeably receded into the background, to reemerge only under the Carolingians—but, as will be shown, from a new root.<sup>9</sup> The sacral death penalty could not bear fruit in the ensuing period, even if memories of the old sacrifice ritual attached to the capital punishments newly arisen from another root.

There was another attempt also to derive the later corporal punishments, those involving mutilation, like those to skin and hair [*an Haut und Haar*], from the sacral capital punishments of the primitive Germanic period, as fragmented parts [*abgespaltene Teile*] of the sacrifice ritual.<sup>10</sup> In fact slitting of ears and emasculation appear as preparation of the victim in that famous provision of the Lex Frisionum (tit. XI of the *additio sapientium*) on the sacrifice of temple desecrators. But precisely this sacral character of certain mutilations resulted in the disappearance of these types of mutilation after Christianization; thus at least emasculation completely recedes in medieval criminal law.<sup>11</sup> On the other hand the corporal punishments have been interpreted as “fragments of peacelessness” (Brunner and already Wilda)—but why laboriously distilling these punishments from other kinds of punishment when they already existed elsewhere in the legal order: in serf criminal law [*Knechtsstrafrecht*].

By this means we at last meet with a fertile area for the further development of criminal law: types of punishment that had formerly been only applied to serfs later invaded the general criminal law. Principally mutilation punishments: previously almost exclusively imposed on the unfree, in the Carolingian period they are applied more and more against the free “and especially in relation to offences which reveal a base and serfsh mind [*niedrigen, knechtischen Sinn*].”<sup>12</sup> Likewise the punishments against skin and hair were until near the end of the Carolingian period predominantly serf punishments.<sup>13</sup> Even the capital punishments appears as serf punishments<sup>14</sup> (and in this respect are certainly not “fragments of peacelessness,” as serfs have no share in the people’s peace [*Volksfrieden*]); the new upswing in capital punishment during the Carolingian period could connect itself to these capital punishments for serfs after the disappearance of the sacral capital punishments. In particular the qualified capital punishments [*qualifizierten Todesstrafen*], these combinations of punishments against life and limb [*Leibes- und Lebensstrafen*], might ultimately be rooted in serf criminal law. Thus, for instance, the Lex Frisionum recognizes (XX 3) a “*tormentis interficere*” for serfs. The whole of the later system of punishments against life and limb thus was already prefigured in serf criminal law.

Three writers so far have more or less emphatically pronounced in favor of the descent of public criminal law from serf punishments: Köstlin, v. Bar and Jastrow.<sup>15</sup> Köstlin in his posthumous History

<sup>8</sup> Brunner, *Abspaltungen der Friedlosigkeit, Forschungen zur Geschichte des deutschen und französischen Rechts*, 1894, p. 455; Heinerth, *Die Heiligen und das Recht*, 1939, pp. 52 ff.

<sup>9</sup> On the other hand H. Mitteis, along with others, sees even in the renewal of capital punishment at a significantly later time “a new foundation on the old stratum of people’s law [*volksrechtliche*] institutions that had been concealed but not destroyed”; Mitteis, *Politische Prozesse des frühen Mittelalters, in Sitzungsberichte der Heidelberger Akademie*, 1926-7, Abh. 3, p. 33.

<sup>10</sup> Brunner-Schwerin, *Deutsche Rechtsgeschichte II*, 2d ed., 1928, pp. 763 f. note 1, 786.

<sup>11</sup> Compare His, *Strafrecht des deutschen Mittelalters I*, 1920, p. 520; Fehr, *Savigny-Zeitschrift, Germanistische Abteilung*, vol. 35, 1914, pp. 149 f.; Grimm, *Deutsche Rechtsaltertümer*, 1828, pp. 709 f.

<sup>12</sup> His, loc. cit. p. 510, His, *Geschichte des Strafrechts bis zur Carolina*, 1928, pp. 85 ff.

<sup>13</sup> His, *Strafrecht des deutschen Mittelalters I*, pp. 528 f., *Geschichte des Strafrechts bis zur Carolina*, p. 70.

<sup>14</sup> Amira, *Die germanischen Todesstrafen*, 1922, p. 27.

<sup>15</sup> Köstlin, *Geschichte des deutschen Strafrechts*, 1859, v. Bar, *Handbuch des deutschen Strafrechts I*, 1882, Jastrow, *50 Schweizerische Zeitschrift für Strafrecht* pp. 33 ff. (1936), *Weltgeschichte* 1932, p. 146. (Jastrow’s article was prompted by an article by Radbruch in *49 Schweizerische Zeitschrift für Strafrecht* pp. 17 ff. (1935)). Unsubstantiated remarks to the same effect already in Henke, *Entwicklungsgeschichte des Strafrechts*, *1 Neues Archiv des Criminalrechts*, pp. 256 ff. (1817).

of German Criminal Law, which is still well worth reading, finds in the generalization of serf punishments the first indication of “the rise of the concept of punishment” (p 81). This concept includes “the idea of an absolutely higher right [*absolut höheren Rechts*] as against the culpable person.” This is realized neither in the anarchic law of feuds and fines [*anarchischen Fehde- und Bußrechts*] nor in the (alleged) basic concept of occasional public punishments in the Germanic period: peacelessness. This is because this “negative concept of peacelessness,” which merely permits but does not prescribe the destruction of the peaceless, contains in itself “a lack of positive, self-confident power of the community over its member.” Only in the relationship between masters and serfs can “the first appearance, admittedly still very crude and imperfect, of that concept” be found. It can be seen that the Hegelian Köstlin lacks neither the mode of expression nor the way of thinking of his master. But he also does not lack sound historical-sociological insight; he explains again and again very insistently that the “at least partial development (of criminal law) from the master’s right of chastisement [*herrschaftliches Züchtigungsrecht*]” (113) is based on the “decline of landless [*unbegütert*] freemen in their political and legal significance” (81), and on the “convergence of the law of free and unfree villeins by subordination under *one* judicial master [*Gerichtsherrn*]” (100). Also *v. Bar* explains that “the application of punishments against life and limb against the unfree... later, as the number of the completely free... diminished so severely, had to be of great importance for the conception of criminal law in general” (68 f), but not of the nature and scale that the change of status relationships is often imagined to have (88). This limitation is intended to mean that *v. Bar* only sees it as a factual, and not as a juristic difference, that the free man without means [*unvermögend*] undergoes, along with the unfree, the punishment against life and limb which the free man with means [*vermögend*] escapes. *Jastrow* expresses himself with great decisiveness in a delightful article, the basic idea of which he had conceived back in his days as a student in the seminar of K. W. Nitzsch, but did not publish until the evening of his life when he was more than eighty years old. His article bears the title that the present work has borrowed from him: The origin of criminal law from the status of the unfree, and concludes with the confident words: “Punishment not merely has arisen in this way, it cannot have arisen in any other way.” *Jastrow*, however, adds to his thesis certain explanations and limitations (p 36 note 1): Criminal law, which he seeks to trace back to serf punishments, is only to be understood as public criminal law and still more especially as the system of punishments against life and limb; by contrast, the system of fines to the injured party and to the state, as well as the exceptional killing of criminals, whether because of treason in war or to pacify the anger of the gods, is independent of serf punishments—limitations also adopted in the present article. An essential and new trend in *Jastrow*’s discussion is the reference to the important role that attaches to the God and Land Peace movement in the process of generalization of serf punishments, and thereby to the Emperor Henry IV [1050-1106] who set himself at its head, and thereby won the reputation of a protector of the lower classes of the people and their peaceful activity.<sup>16</sup> “These, emerging from a state of slavery, were still subject to the punishments against life and limb that the master could impose on them; with them, besides the old Germanic wergeld, a system of public punishment came into German legal practice [*das deutsche Rechtsleben*]... Through the Land Peace the reign of Henry marks the beginning of a public criminal law” (World History, p. 146).

The need had then long existed for a more effective [*schärfer durchgreifendes*] criminal law. The law of feuds and fines at the heart of pre-criminal law institutions was a law between equals and the equally wealthy, a law only for those capable of giving satisfaction and making payment. It had increasingly to break down as there grew under the feet of this upper class capable of providing satisfaction and payment a class of the people too lowly for a feud and too poor for a fine.<sup>17</sup> Such a class structure arose in the Frankish period.<sup>18</sup> Crime thereby also had also to assume a new character: it

<sup>16</sup> In the same vein regarding Henry IV, *H. Mitteis*, loc. cit., pp. 31 ff.

<sup>17</sup> *Richard Schmidt* has emphasised most emphatically what he calls the “gradual development of the proletariat” as a factor in the history of criminal law. *Aufgaben der deutschen Strafrechtspflege*, 1895, pp. 174 ff.

<sup>18</sup> The view advocated here is however independent of the disputed question of whether in the Germanic period a broad stratum of free peasants was present or whether already then the majority of peasants consisted of unfree serfs and half-free bondmen dependent on large manors (*v. Dopsch*); compare *Adel und*

was now no longer an individually determined occurrence within a community [*Gemeinschaft*] of approximately equally situated members of the people [*Volksgenossen*], but an increasingly socially determined mass phenomenon in a society [*Gesellschaft*] stratified by class. The role that robbers, the earliest of professional criminals, now obtain in continually recurring statutory provisions [*Kapitularien*] is characteristic! In Caesar's times raids had still been war operations: *latrocinia nullam habent infamiam* (BG, VI, 23)—it testifies to the growing strengthening of state power that robbery now begins to become a common crime. Only now the “common crime” arises—common in the sense of its origin from the common people as well as in the sense of its assessment as dishonorable, the crime of another stratum, not understood and held in contempt [*geringgeschätzt*]. Only from this time onward, when crime begins to become a social mass phenomenon, “is it possible in a real sense to speak of legislative policy [*Legislativpolitik*] in the area of criminal law.”<sup>19</sup> Only now does punishment turn from being an instinctive act into a socially purposeful act. Its purpose however is unambiguously expressed in a statute of Childebert II of 596: *Disciplina in populum modis omnibus observetur*—to maintain by all means discipline over the (low) people. As a means to this end the punishments that had always applied to the lowest stratum naturally suggested themselves: serf punishments.

Before serf punishments could enter general criminal law, it was necessary that they themselves should obtain the character of law.<sup>20</sup> The treatment of slaves was the exercise of the right of ownership over them, but “the boundary of the right accruing to the master is not drawn up by the abstract concept of ownership and property, but by good custom.”<sup>21</sup> Such limits of custom, which church influence consolidated and strengthened, gradually became limits of law. In a society of slave owners it is in the common interest not to treat serfs so strictly as to raise the prospect of despair and rebellion, nor so softly as to nourish their insolence [*Übermut*]. It is no coincidence that the people's law [*Volksrecht*] demands the killing of the slave for killing the master or sexual intercourse with the daughter of the house;<sup>22</sup> because it was precisely here that considerations of shared guilt or sympathy were conceivable, which could prevent survivors or relatives from implementing punishment.

The slave came completely under the dominion [*Herrschaft*] of state criminal law if his misdeed was directed against members of another clan. Here the master could deliver the wrongdoer to the injured party in order to exclude or limit his own responsibility. Although the injured party originally could punish the person who was delivered to him as he pleased, the punishments later were regulated by the state and at that time already resembled punishment by the public power [*öffentliche Gewalt*], as they had to be executed openly by the injured party. Finally the state power itself assumed punishment of serfs and demanded their delivery to the public authorities. The system of public punishment of serfs was thereby complete: the people's laws [*Volksrechte*] mention the death penalty, cutting off hands, putting out eyes, flogging and initially even emasculation, which later only seldom arises.

These serf punishments were then applied more and more to the free as well. At least the appearance of an application to the free arose. If a wrongdoer, because he was not able to pay the fine, fell under the victim's [*des Verletzten*] debt servitude [*Schuldknechtschaft*] and was subjected to a serf's punishment by him, someone without a juristically practiced eye might overlook the previous subjection to servitude [*Verknechtung*] and imagine he saw before him a serf's punishment executed against a freeman. Far more important for serf punishments' intrusion into general criminal law than the sinking of individuals into servitude was the lapsing of whole strata of people

Bauern im deutschen Staat des Mittelalters, edited by *Theodor Mayer*, 1943, especially the article by *Bader*, pp. 109 ff. What matters is only that at some point in time the relationship of the free and the unfree evolved, royal officials became free, even noble, the free became bondmen and so former serf punishments came to be doubly applied to the free.

<sup>19</sup> *R. Schmidt*, loc. cit., p. 150.

<sup>20</sup> On the following *Jastrow*, *Zur strafrechtlichen Stellung der Sklaven bei Deutschen und Angelsachsen*, *Untersuchungen zur deutschen Staats- und Rechtsgeschichte*, issue 2, 1878, *Georg Meyer*, *Gerichtbarkeit über Unfreie*, *Savigny-Zeitschrift*, *Germanistische Abteilung*, vol. 2, 1881, pp. 83 ff.

<sup>21</sup> Thus in the words of *Mommsen*, *Brunner*, *Forschungen*, p. 475. <sup>22</sup> *Brunner*, loc. cit., p. 456.

[*Volksschichten*] into social dependence, the great restructuring of status [*der Stände*] that occurred throughout the Middle Ages. Freeman fell into dependence, for instance, by commendatio [*Kommendation*]; conversely unfree men came to honor, for instance, royal officials [*Ministerialen*] to knighthood [*Ritterwürde*]. On the one hand the manors and on the other hand the cities operated, each in the opposite direction, as a great crucible in the sense of the assimilation of the free and the unfree: here they said “air makes you free” [*Luft macht frei*] but there it could be said “air makes you unfree.” Thus on the one hand the free villeins of the landlord fell under serf criminal law and on the other hand the rising unfree, knights as well as city dwellers, took the criminal law of their former status up with them to their raised status and gradually forced it also on their new status fellows [*Standesgenossen*]. This development extended over centuries, beginning in the Merovingian period, reaching a first high point under the Carolingians and coming to a conclusion and to legal recognition (having until then been of an essentially factual nature) in the God and Land Peaces.

The God and Land Peaces<sup>23</sup> initially still distinguished between punishments for the free and punishments for the unfree: for the former outlawry [*die Acht*], and for the latter capital punishment, mutilation and flogging—so, for example in the Mainz God Peace of Henry IV of 1085. Subsequently they absorb increasingly numerous crimes and therefore serve to expand the system of punishments against life and limb. They eventually extend this system of former serf punishments to freemen: in the 1152 *Constitutio de pace tenenda* of Frederic I every difference between the free and unfree has disappeared.<sup>24</sup> The last Land Peace that still contains penal [*peinliche*] punishments is the *Treuga Henrici* of 1224: since then they have passed into the common law and the general legal consciousness.<sup>25</sup> A development that had lasted for centuries thereby has reached its end, the system of punishments against life and limb was complete: serf criminal law became common criminal law, and the distinction in criminal law between the free and unfree was overcome.<sup>26</sup>

To the present day criminal law bears the features of its derivation from serf punishments. Punishment since that time signifies a *capitis deminutio* [degraded status] because it assumes the *capitis deminutio* of the one for whom it was originally intended. To be punished now means to be treated as a serf. That was symbolically emphasized when for instance in earlier times corporal punishment was accompanied by a shaving of the head, for shorn hair is serf custom. Occasionally, for instance in the *Lex Visigothorum*, flogging, appears literally in association with enserfment.<sup>27</sup> But the serflike treatment meant in that age not only a social but at the same time a moral [*moralisch*]

<sup>23</sup> On the following *Schnellböck*, Die innere Entwicklung der bayerischen Landfrieden des 13. Jahrhunderts, *Deutsch-rechtliche Beiträge*, vol. 13, issue 2, pp. 209 ff., especially pp. 217–219 note; *Hans Hirsch*, Die hohe Gerichtsbarkeit im deutschen Mittelalter, 1922, pp. 150 ff.; *Eberhardt Schmidt*, Einführung, pp. 38 ff., 44 ff.

<sup>24</sup> *Jastrow* in his article in *Schweizerische Zeitschrift für Strafrecht*, pp. 43 ff. shows that in the peace agreements as well as in the invocation of land peace statutes and in city laws [*Stadtrechte*] the concept of the “chosen” law is expressed, according to which the free man subjects himself to new law (and thus also to new criminal law) by a free determination of his will.

<sup>25</sup> That the differentiation in status is replaced by a differentiation of classes, and that insofar as punishments against life and limb are redeemable the rich can pay while the poor must bleed, a state of the law to which only the Carolina put an end by the irredeemable application of the penal [*peinlich*] punishment: all this lies beyond the scope of this article. Compare on this the vivid description of *Richard Schmidt*, *Aufgaben der deutschen Strafrechtspflege*, 1895, pp. 156 ff.

<sup>26</sup> Agreeing in principle *Eberhard Schmidt*, *Maximilianische Halsgerichtsordnung*, 1949, p. 41 ff., *Einführung in die Geschichte der deutschen Strafrechtspflege*, 1947, p. 22; *Gwinner*, *Einfluss des Standes im gemeinen Strafrecht*, 1934, pp. 1 f., 22–28, also 31 *Monatsschrift für Kriminalbiologie* p. 256 (1940); partially in agreement (maiming punishments) *Wohlhaupter*, 34 *Archiv für Rechts- und Sozialphilosophie* pp. 187 ff. (1940/41). Compare also *Hans Hirsch*, *Die hohe Gerichtsbarkeit im deutschen Mittelalter*, 1922, pp. 125 ff. For Roman law, the origin of criminal law derives from domestic discipline *Th. Mommsen*, *Römisches Strafrecht*, 1899, pp. 16–26, 898 f. For Italian developments agreeing with the above view is *Dahm*, *Untersuchungen zur Verfassungs- und Strafrechtsgeschichte der italienischen Stadt*, 1941, p. 49. “Also applying to Russian circumstances” according to *Hans v. Eckardt*, *Ivan der Grausame*, 1941, p. 401.

<sup>27</sup> Although not enserfment as a result of the flogging, as *Grimm*, *Rechtssaltertümer*, 1828, p. 704 assumed, but flogging on the occasion of enserfment: *Wilda*, *Strafrecht der Germanen*, 1842, p. 514.

degradation. “Baseness” [*Niedrigkeit*] was at that time simultaneously and inseparably a social, ethical [*sittlich*] and even aesthetic value judgment. The common man [*der gemeine Mann*] is at the same time the “mean churl” [*gemeine Kerl*] and the “vulgar” man [*ordinäre Mensch*]. Vilain (villain) is in French as in English the unfree peasant as well as the rogue [*Schurke*]; in German, the villager [*Dörfler*] became the “Tölpel” [dolt]. The pictorial manuscripts of the *Sachsenspiegel* give simple folk [*einfache Leute*] conspicuously coarse and ugly facial features.<sup>28</sup> The diminution in honor associated with punishment to this day is rooted not least in its origin in serf punishments. Nietzsche already recognized this connection intuitively:<sup>29</sup> “Punishment only acquired its insulting character because certain sanctions [*Bußen*] were attached to contemptible people (slaves, for example). Those who were most punished were contemptible people and ultimately there was something insulting present in punishment.”

<sup>28</sup> v. Künssberg, *Sachsenspiegel* (Inselbücherei 347), p. 14.

<sup>29</sup> *Wille zur Macht* [Will to Power], aphorism 471.

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## APPENDIX D

# On the Theory of Enemy Criminal Law\*

Günther Jakobs\*\*†

## Introduction

There is a fierce discussion raging on the subject of “enemy criminal law,” but large parts (although not all) of it are somewhat devoid of theory. To establish a basis for this harsh judgment, I shall not begin with the concept of enemy criminal law, but I shall deal in an introduction with two basic concepts of every legal order,<sup>1</sup> *first*, the concept of *legal coercion* and, *second*, the prerequisites specifically of the *power of orientation* of a normative, and in particular a legal, institution.

### A. Introduction: two basic concepts

#### I. LEGAL COERCION

*First*: the most important philosopher of liberty apart from *John Locke*, *Kant*,<sup>2</sup> in whose *Metaphysics of Morals* only liberty—independence from the coercive arbitrary power of another—exists as an “inborn right,” links law (which according to his understanding is “the embodiment of the conditions under which the arbitrary power of one person can be united with the arbitrary power of another, according to a general law of liberty”),<sup>3</sup> with the authority to coerce: “force” against “wrong” is “as the prevention of a hindrance to liberty” for its part “right.”<sup>4</sup> This coherence of law and enforceability<sup>5</sup> is explained so convincingly by *Kant* that any questions seem to resolve themselves in advance, and, in *Kant’s* text, this resolution is conclusive; but *Kant* does not say something that is closely related to it, at any rate not in the *Metaphysics of Morals*: what coercion against a

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<sup>1</sup> We are talking here of a legal order that is legitimate today: it has to make possible liberty including the possibility of political collaboration; education, participation in wellbeing and security are included in it. Without these services, individuals will not conceive of themselves as subjects and thus not adjust to the structure of society, so that it will remain unstable and degenerate into an order of violence [Gewaltordnung]. On this, *G Jakobs*, Norm, person, society, 3rd edition, 2008, pp 41 ff and passim.

<sup>2</sup> *I Kant*, *Metaphysics of morals*, First part, *Metaphysical rudiments of legal doctrine*, 2nd edition 1798, quoted according to the version by W Weischedel (ed), *Immanuel Kant, Works in six volumes*, vol 4, 1963, pp 305 ff, 345 (=B45); on this, *Köhler*, There is only one inborn right, in K Schmidt (ed) *Variety of rights—unity in the legal order?* Hamburg lecture series 1994, pp 61 ff.

<sup>3</sup> *Kant* (fn 2), p 337 (=B33).

<sup>4</sup> *Kant* (fn 2), p 338 (=B35).

<sup>5</sup> On the following text: *G Jakobs*, *Legal coercion and personhood*, 2008, pp 9 ff.

person amounts to conceptually *in relation to this person*.<sup>6</sup> Although *Kant* gives a formal interpretation: “coercion” as “a hindrance or resistance which occurs to liberty;”<sup>7</sup> what happens to the person who is coerced?<sup>8</sup>

*Feuerbach* took the question not dealt with by *Kant*, at least not openly, and gave a valid answer to it: the coerced, although an “intelligent being,” is governed “according to the laws of nature;”<sup>9</sup> which, conversely, means: not according to the laws of reason. Compelling the lawbreaker to desist from his action or punishing him is a law of reason, but the coercion itself lies in nature; in other words, the law of reason permits or requires proceeding with legal coercion according to the laws of nature. Thereby it is also established how the person who is coerced in so far and only in so far as he is coerced is to be characterized, i.e., not as a person, not as the holder of rights and the bearer of duties, but as a natural being, as an individual [Individuum]. That coercion may be exercised at all may follow from his personhood [Personalität]—it is only persons who commit crimes or make themselves liable to provide compensation or to carry out some other performance—but the coercion to perform is brought to bear on the natural being.—This result cannot be dismissed by referring to the rationally formed will of a rational being and in this respect to the virtual will of the coerced. While *Hegel's* formulation is that the law as “the will in and for itself” is also “the absolute will of each”<sup>10</sup> and that therefore legal coercion has “one (!) side according to which it is not coercion”<sup>11</sup> But this *one* side concerns the undeveloped *ought* manifestation of the person [Sollgestalt der Person]; the *is* manifestation [Istgestalt] does not occur according to the person's will, but according to the laws of nature.

The connection thereby sketched—and more than a sketch cannot be achieved here<sup>12</sup>—of law, legal coercion and the status of the coerced means in somewhat different words: in legal coercion the law permits or requires to treat the being to be coerced as a part of nature, and thus in this respect not as a person, even if his personhood triggered this permission or this command in the first place. Coercion depersonalizes the coerced; anything else would be mere sugarcoating. Legal coercion is legally correct [rechtlich richtige] administration of the sphere of organization of the coerced, but this coercion is *heteronomy* [Fremdverwaltung] and thereby a diminution of the personal area of the coerced. Jurists who work *within* the legal system and thus only *legally* [juristisch], and not also legal *scientifically* [rechtswissenschaftlich], do not notice this harsh result as they content themselves with the legality of the coercion and at most refer to the triggering of the coercion by the personal behavior of the person coerced, and to his duty to tolerate the coercion. That it is a duty to tolerate a depersonalization remains unspoken. *Feuerbach* sees farther here; he was after all also—although not only—a scientist.<sup>13</sup>

<sup>6</sup> *Gierhake* fails to recognize the necessity of this clarification in Treatment in law as an enemy? A criticism of so-called enemy criminal law and an argument against the criminal theory of Günther Jakobs, ARSP [Archiv für Rechts- und Sozialphilosophie = Archive for legal and social philosophy] 2008, pp 337 ff; if according to *Kant* law and *authority* to coerce mean the same thing (p 354), that only signifies that the coerced experiences something that is permitted; it does not indicate what it is. Failure to broach the subject of heteronomy of the coerced means working with ill-founded assumptions of harmony.

<sup>7</sup> *Kant* (fn 2), p 338 (=B35).

<sup>8</sup> *Kant* answers this question in relation to punishment indirectly: the punished [zu Bestrafende] loses the status of citizen (fn 2, pp 454 f [=B228]) and is thus not treated according to the rules for persons in the law of a state (and thus the rules for citizens).

<sup>9</sup> *P J A Feuerbach* Critique of natural law as an introduction to a science of natural laws [natürlichen Rechte], 1796 (2nd impression 2000), p 296, also 120 and passim.

<sup>10</sup> *G W F Hegel*, Doctrine of right, duties and religion for the underclass, 1810 ff quoted from the edition of Moldenhauer and others (ed), *G W F Hegel*, Works in twenty volumes, vol 4, 1970, pp 204 ff, 234. See also *Kant* (fn 2), p 457 (=B233).

<sup>12</sup> In somewhat greater detail, *Jakobs*, as fn 5.

<sup>13</sup> Moreover, I make this distinction not evaluatively but descriptively: there are brilliant jurists and feeble legal scientists—and the other way round as well; they should simply not be confused with each other. On this, *G Jakobs*, Criminal law as a scientific discipline, in Engel and others (ed), The characteristics of legal science, 2007, pp 103 ff; *Pawlik*, Scientific theory of criminal law in: the same and others (ed), Festschrift for G Jakobs, 2007, pp 469 ff.

At this point—but not any more after this—I want to briefly address an argument that has often been adduced against the loss of status as a person: this loss as violation of the demands of human dignity since through heteronomy of the coerced's organization he is degraded to an object.<sup>14</sup>—Because of this dignity (the capacity to have rights) a return to full status must, as far as possible, be held open (for example, in the case of a necessary killing in self-defense this is not possible); that is not disputed here. At the same time care must be taken not to apply the mentioned prohibition in such a way that the prohibition itself degrades: it is after all always a question of losses of status for which the bearer of the loss is himself to blame;<sup>15</sup> for the legal coercion is provoked by wrong (there is no question of correctional coercion [helfender Zwang] here), and the coerced is therefore responsible for it. A person who suppresses this responsibility and denies the coerced the capacity to diminish his status as a person in law and in the last resort even to squander it, does not take him seriously as a person.<sup>16</sup>—Not another word on this!<sup>17</sup>

## II. ORIENTATION TO LEGAL INSTITUTIONS

Now to the *second* subject, the reality of legal institutions. These institutions are understood here in a broad sense, i.e., as establishments characterized at least partially by norms, where in the present context we are concerned only with persons as holders of rights and bearers of duties. As persons they have to take account of the law, and thus to fulfill their duties and not only when others do so as well, but solely because of the validity of the law. In the criminal law sense, that concerns the side of the potential perpetrators: they have to comply with the law and this is not subject to any provisos.<sup>18</sup> On the side of the potential victims it is initially reciprocal, but only initially. The potential victims may, with a legal emphasis [mit rechtlichem Nachdruck], direct at potential perpetrators the legal expectation that they will not to become actual perpetrators and again without provisos; and if this expectation is disappointed, it was not their expectation which was incorrect, but the perpetrator's behavior. But it is only possible to grasp a legal situation by means of this normative expectation; it is not possible to live by it. The personhood concerns the abstract side of legality,<sup>19</sup> but the subjects who do not find their *wellbeing* (and wellbeing also includes not becoming victims of a crime) will soon no longer care about abstract law. To put it graphically, for abstractly conceived persons the knowledge may suffice that they *ought* not to be killed; but subjects additionally need the certainty that they will probably not *be* killed.<sup>20</sup>

That the law recognizes this connection—and it would scarcely exist otherwise—is not primarily to be seen in the establishment of security police [Sicherheitspolizei] and in the criminal law, but in

<sup>14</sup> References in *Morguet*, Enemy criminal law—a critical analysis, 2009, p 257 fn 1295.

<sup>15</sup> Collateral damage depersonalizes the innocent and cannot therefore be understood as *legal* coercion. In more detail *Jakobs* (fn 5), pp 25 ff. *Schünemann's* assertion (Enemy criminal law is not criminal law, in Griesbaum and others (ed) Criminal law and the granting of justice, Festschrift for K Nehm, 2006, pp 219 ff, 224) that according to my view it may be accepted, misrepresents my statement (Citizen criminal law and enemy criminal law, HRRS 2004, pp 88 ff, 93): it is accepted but—as against the victims!—*ought* not to be (in the sense of “allowed as against them *legally*”).

<sup>16</sup> On this *Pawlik*, The terrorist and his law. On the legal classification of modern terrorism, 2008, pp 38 ff.

<sup>17</sup> A footnote, however: The assertion that in my little book “Norm, person, society” (fn 1) human dignity is neglected (thus *Morguet* [fn 14], p 258) is beside the point because the realm of dignity is *post*thematic to the subject: I want to describe the origin of norms as the emergence of culture, and no more. A cursory reading of the summary alone ought to show this sufficiently clearly.

<sup>18</sup> *G Jakobs*, Enemy criminal law?—An investigation of the conditions of legality, HRRS 2006, pp 289 ff., 291.

<sup>19</sup> *G W F Hegel*, Elements of the philosophy of law or natural law and the science of the state in outline, 1820/1, quoted from the edition of Moldenhauer (fn 10) vol 7, 1970 § 36: “The imperative of right is therefore: *be a person and respect others as persons.*”

<sup>20</sup> *Jakobs* (fn 1) pp 28 ff, 50 ff; State punishment: meaning and purpose, 2004, pp 26 ff, 31 ff; *Polaino Orts*, Derecho penal del enemigo: Fundamentos, potencial de sentido y límites de vigencia [Enemy criminal law: Foundations, potential of meaning and limits of applicability], Barcelona 2009, pp 223 ff; on the cognitive foundation for the expectation see also *Bung*, Enemy criminal law as a theory of norm validity and of the person, HRRS 2006, pp 63 ff....

such an elementary institution as self-defense: it is simply self-evident that someone under immediate unlawful attack may continue to normatively expect not to be harmed, but the law “knows” that this expectation in this situation can no longer ensure the wellbeing of the attacked, and it therefore permits a cognitive “cleaning up” [Bereinigung] of the situation. I have explained what that means in my first introductory observation: coercion against the attacker as his depersonalization. This depersonalization occurs only within the temporal and material scope of the necessary defense; thereafter the attacker may show himself to be fit for society again. Nevertheless the simple example teaches that a normative expectation requires a cognitive foundation if it is to suffice for the actual and not the merely abstract orientation of citizens. For this very reason, because of the cognitive foundation, is the law linked with the authority to coerce! Law should not only be a mere conceptual matter but should *actually* orient in everyday life and in this sense.

No normative argument—for example, that depersonalization ought not to occur—can be presented against this.<sup>21</sup> This argument would contain the assertion that legal coercion ought not to exist,—an outcome that no one endowed with reason or merely with understanding desires. Admittedly one may virtually empty the concept of person: every human [Mensch] is at all times to be treated as a person [Person], perhaps in the sense that Kant designates as *inborn* personhood.<sup>22</sup> But it is not a question here of this inborn personhood, but of the *legal* status, which incidentally even for *Kant* can be lost to the extent of a “status of slavery” [Skavenstand].<sup>23</sup> The virtually emptied concept does not prevent doing what is necessary to maintain the orienting effect of the legal order, in particular against those responsible for turbulences; the concept only forbids proceeding in this way with scorn and derision.

## REGARDING I. AND II.

If we summarize what has been sketched rather than explained in the two introductory remarks, it follows, *first*, that every right is linked conceptually with the authority to coerce and thus with the permission or even the requirement of heteronomy, depersonalization, even if this connection is brought about personally [personal] and hence in the responsibility of the coerced.

*Second*, it turns out that a right without wellbeing [Recht ohne Wohl] in the long term will not be an actual right [wirkliches Recht]. Legal institutions must thus have a cognitive basis; otherwise the institution—in the present context it is a question of the person—cannot direct actual orientation.

Talk of the person in law without talk of the decimated [dezimierte] person or even, in the borderline case, the suspended [aufgehoben] person ignores the conditions of the reality of law and thereby also decimates the law [dezimiert damit auch das Recht]—namely from an daily practiced order to a mere conceptual matter.<sup>24</sup>

## B. Policification [Verpolizeilichung]

Since the last quarter of the 19th century there has been discussion, in connection with *criminal law* of establishing, for the sake of preventing *future* actions, the option of imposing measures of rehabilitation and security.<sup>25</sup> The need for security from future crimes obviously was not then discovered for the first time—it is a classic function of the police—and this need was also already linked

<sup>21</sup> Prototypically, *Crespo*, “Enemy criminal law” ought not to be! On the impermissibility of so-called enemy criminal law and on the concept of security with special consideration of scientific discussion and trends in Spain, ZIS 2006, pp 413 ff; *B Heinrich*, The boundaries of criminal law in the prevention of danger. Do we need or have an enemy criminal law? ZStW 121 (2009) pp 94 ff, 129 f; *González Cussac*, “Enemy criminal law.” The rebirth of authoritarian thinking in the bosom of the constitutional state, 2009, pp 25 ff, and *passim*. <sup>22</sup> *Kant* (fn 2), p 453 (=B226). <sup>23</sup> *Kant* (fn 2), pp 454 f (=B229).

<sup>24</sup> *Gierhake* concedes that a “state as an idea” cannot be attained (fn 6) p 359 but considers that it is possible to get by with compromises on incidental issues (see the examples there). The solutions for the really “hard” cases are not concretized; instead we are left with the *abstract* assurance that everything must occur within the framework of the law—a conceptual matter.

<sup>25</sup> For detail on the history of the measures, *Desseker*, Danger and proportionality, 2004.

with the criminal law, namely in the form of *preventive* punishment, but not through some separate type of reaction. The introduction of measures in Germany in 1933<sup>26</sup> (!) brought an open policification of criminal law—“policification” because the measures do not constitute a reaction to a past act, but an attempt on the occasion of a past act to prevent future acts through specific prevention; and this policification occurs “openly” because it no longer comes disguised as punishment.

This open policification is joined by a more hidden form consisting of the legislature providing punishments that, because of their enormous severity, can scarcely be explained as a reaction to the moderate or middling wrong to which they are linked, but appear instead as negative general preventive or specific preventive measures. The legislature occasionally makes its intent plain by announcing openly the “combating” of certain types of criminality.<sup>27</sup> Where the literature seeks to justify this by saying that a “phenomenon” of criminality is to be combated, but not “specific perpetrators,”<sup>28</sup> then it needs to be pointed out that the “combating” of the phenomenon is to occur not through the enlargement of cultural leisure opportunities or within the framework of adult education, but through harsh punishments and thus through coercion of persons—that is to say: through depersonalization.

The mixing of open and disguised police generates a somewhat chaotic picture: what belongs where? *Pawlik* has suggested, so far as terrorists are concerned, to thoroughly clean house, i.e., to put “things” where they belong. He wants to regard the terrorist not as an enemy within the state (more precisely within society), but outside the state (outside society), and thus, following on *Roellecke*,<sup>29</sup> can formulate this as: “One honors and destroys enemies.”<sup>30</sup> The honoring consists precisely not in recognizing the enemy as a developed person according to the *local* order,<sup>31</sup> but in the presumption [Vermutung] that he is a person in *his* order; the *local* order, however, will in any case defend itself and not by means of criminal law but with measures to be newly created: “The legislature could... (in this regard; G. J.) draw to a large extent on norms... that already exist, namely on § 129a StGB<sup>32</sup> and the proposed § 89a StGB<sup>33</sup> because these provisions have... by their nature the function of an anticipatory preventive detention:<sup>34</sup> they establish the prerequisites under which endangerers [Gefährder] may be taken out of circulation at an early point in time,<sup>35</sup> obviously, as *Pawlik* adds at the same time, in keeping with (administrative) judicial legal protection.<sup>36</sup>

<sup>26</sup> Law against dangerous habitual criminals and concerning measures of security and rehabilitation of Nov. 24, 1933, RGBl I, 995. As to the dispute about the degree of National Socialist slant to these measures: *Desseker* (fn 25) pp 90 ff.

<sup>27</sup> References in *Jakobs*, The self-image of the science of criminal law in the face of the challenges of the present time. Commentary in: Eser and others (ed), *The science of German criminal law before the turn of the century. Retrospect and outlook*, 2000 pp 47 ff, 51. For criticism of this “vocabulary of combat” (*Sinn*), *Gómez-Jara Diez*, Enemy combatants versus enemy criminal law: An introduction to the European debate regarding enemy criminal law, and its relevance to the Anglo-American discussion on the legal status of unlawful enemy combatants, *New Criminal Law Review*, vol 11 number 4, pp 529 ff, pp 557 ff; *Sinn*, Modern prosecution for crime—on the way to an enemy criminal law, *ZIS* 2006, p 107 ff, 111, 116.

<sup>28</sup> *Kinderhäuser*, Guilt and punishment. On discussion of an “enemy criminal law,” in Hoyer and others (ed), *Festschrift for F -C Schroeder*, 2006, pp 81 ff, 95. It is obvious that a combating of harmful “things” is to be understood differently, but criminality is always caused by *persons*.

<sup>29</sup> *G Roellecke* The constitutional state in the struggle against terror, *JZ* 2006, pp 265 ff, 265.

<sup>30</sup> *Pawlik* (fn 16), p 41.—For a strict separation of police prevention and criminal law repression see also *B Heinrich* (fn 21) p 127.

<sup>31</sup> See already *Pawlik*, Punishment or combating danger?—The principles of German international criminal law before the forum of criminal theory, in Hoyer (fn 28) pp 357 ff.

<sup>32</sup> Formation of a terrorist organization. <sup>33</sup> Carrying out training to be a terrorist.

<sup>34</sup> See already *Schroeder*, Criminal acts against criminal law, 1985, p 29.

<sup>35</sup> *Pawlik* (fn 16) p 43.

<sup>36</sup> *Pawlik* (fn 16) p 42. For criticism of this *Paeffgen*, Citizen criminal law, preventive law, enemy criminal law? in Böse and others (ed), *Foundations of criminal and criminal procedural law. Festschrift for K Amelung*, 2009, pp 81 ff, 88 ff; *Paeffgen* admittedly joins with *Pawlik* in demanding “varietal purity” [Sortenreinheit] of the reaction (punishment versus prevention of danger), pp 103 ff, 105 ff.—The dangers of “varietal mixing” are shown impressively by *Monica Hakimi*, International standards for detaining terrorism suspects: Moving beyond the armed conflict-criminal divide, *The Yale Journal of International Law*, vol 33, pp 369 ff, 383 ff, 384, 386 (the retrospective criminal law system is contaminated by a prospective



Now according to *Pawlik* the terrorist should be held responsible in criminal law for past wrong (at least if he has acted on the territory of the local state)<sup>37</sup> and that means in any case always in relation to dangers that result from the formation of a terrorist organization, as this formation deserves punishment as a disturbance of public security—even if not to the exorbitant extent provided for by positive law. Furthermore, merely planned actions are *wrong* actions [*Unrechtsaktionen*], even if in the stage of mere preparation, and are not acts of war free from punishment. In this situation, for *Pawlik* the preferable clear separation of punishment and preventive detention remains, but it is at least doubtful whether the latter does not depersonalize. Crimes, not acts of war, are to be averted and in this situation preventive detention depersonalizes, as lawful behavior can no longer be expected from the detainee;<sup>38</sup> in other words, preventive detention because of the danger of crime is the opposite of honoring (without thereby disavowing the allocation of preventive detention to administrative law; although this allocation does not exist at the present time).

### C. Enemy criminal law

About ten years ago, before the events of September 11, 2001, I referred to this open or disguised policification of criminal law in a short commentary on the subject of the state of German criminal law science,<sup>39</sup> and contrasted actions for the prevention of future acts with reactions to past acts: enemy criminal law<sup>40</sup> versus citizen criminal law.<sup>41</sup> “Enemy” is understood here as someone who “to a not merely incidental extent in his attitude... or his occupational life... or... by his inclusion in an organization...,... has at any rate presumably permanently [dauerhaft] turned away from the law and in this respect does not guarantee the minimum cognitive security of personal behavior and demonstrates this deficit by his behavior.”<sup>42</sup>

The consequences of my drawing this contrast might be familiar and show straight away that the representatives of German- and Spanish-language criminal law science (most of the opinions became known to me from these two areas) carry an unpolished up image of their respective

view, without thereby becoming sufficiently effective). *Hakimi* argues, like *Pawlik*, for *administrative law* measures (seizure of the suspect: “administrative detention”), pp 386 ff, 400 ff and passim.

<sup>37</sup> That follows amongst other things from *Pawlik*’s observations on the prohibition of exploitation in criminal procedure ([fn16] p 46)

<sup>38</sup> Unless *Pawlik* understands the “limited war” ([fn 16] p 40 fn 180) in an international law sense in favor of the terrorist.—Admittedly the legislature should consider the difference between a retributive punishment and a preventive punishment. That applies, as *Pawlik* explains, to § 129a StGB, but it also applies for instance to the suspension of punishment or the remainder of punishment on probation as here purely specific preventive considerations move immediately into the foreground (§§ 56 paras 1 and 2, 57 paras 1 and 2 StGB): refusal to suspend because of a bad prognosis gives the guilt punishment the function of a preventive punishment.—On the limits of “varietal purity,” *T Rogall*, Book review, GA 2009, pp 375 ff, 378.

<sup>39</sup> See fn 27.

<sup>40</sup> On the (absence of) connection of the local enemy concept with that of *Carl Schmitt* (The concept of the political, 1927/1932), *Jakobs* (fn 18) p 294; on this *Paeffgen* (fn 36) pp 85 f with fn 23.—[Contra] *Stübinger*, The enemy concept of Carl Schmitt in the anti-terror war. Concerning the relationship between law and politics in a state of emergency, *Ancilla Juris* 2008, p 73 ff; *Donini*, Criminal law and the “enemy,” 2009, who certainly sees that *Schmitt*’s enemy is “not an unjust, immoral and still less a criminal person” (p 9) but does not draw the conclusion from this that the *local* concept (*inimicus*) was obviously not the same as *Schmitt*’s (*hostis*)....

<sup>41</sup> *Jakobs* (fn 27), p 51; Criminalizing in advance of violation of a legal interest, ZStW 97 (1985) pp 751 ff, 783 f; Citizen criminal law (fn 15 also in: Foundations and limits of criminal law and criminal procedure. An anthology in memory of Professor Fu-Tseng Hung, Taipei, 2003, pp 41 ff); Enemy criminal law (fn 18); On the limits of legal orientation: Enemy criminal law in: *Parmas* and others (ed), *Nullum ius sine scientia*. Festschrift for J Sootak, Tallin 2008, pp 131 ff.—[On t]he German language literature on the subject, see *Morguet* (fn 14), passim; further references in *B Heinrich* (fn 21) p 101 fn 37.—On the Spanish language literature see the articles in: Cancio Méliá and others (ed), *Derecho penal del enemigo* [Enemy criminal law], vols 1 and 2, Madrid and Buenos Aires 2006; additionally with extensive references: *Polaino Orts*, (fn 17), passim.

<sup>42</sup> *Jakobs* (fn 27) p 52.....



constitution deep in their hearts.<sup>43</sup> Obviously there is a widespread distaste for plain language, in particular so far as concerns the concepts of “person” and “coercion,”—as if not every (non-correctional) coercion was a depersonalization. Certainly, punishment imposed within the framework of positive general prevention<sup>44</sup> can still be understood as a form of damage compensation, and after the settlement of the damage, the personal world is in order again, but until then it is not in order, even if this disorder is attributable to the punished [dem zu Bestrafenden], as a person. *Kant* and *Feuerbach* would probably have just shaken their heads about the designation of a criminal, locked up for perhaps ten years, as a person in the full sense of the word: their concepts were more exact.

When a *past* act is punished, the accusation is raised that “*You* have culpably harmed us (and therefore we are forcibly compensating ourselves)”; one is still communicating with the criminal. When it comes to the prevention of *future* acts, however, it is more a question of isolation: “*He*, cognitively speaking, is a dubious figure against whom we are securing ourselves.” Because of this at least partially excluding effect of measures or preventive punishments, I chose the expression “enemy criminal law,” and I find it more precise than the far more wide-reaching one of preventive criminal law, which does not indicate from which dangers we are securing ourselves: in fact, from future crimes.

Setting citizen criminal law against enemy criminal law involves *ideal types*<sup>45</sup> on both sides, and thus sharpened concepts [begriffliche Zuspitzungen], which are scarcely ever to be found in this purity in reality, although, so far as concerns enemy criminal law, the camp at *Guantanamo* approaches the ideal type, and contrary to widespread opinion, this occurrence is indeed relevant to our subject, as after a massive crime it also serves amongst other things to prevent further acts.

In German criminal law the liberty depriving measures might most clearly be characterized as enemy criminal law:<sup>46</sup> preventive detention (§§ 66 ff. StGB) and placement in a psychiatric hospital (§ 63 StGB) or a treatment center (§ 64 StGB) and further the especially serious case of criminal association directed against ringleaders and other members (§ 129 StGB) and the provision against terrorist organizations in its entirety<sup>47</sup> (§§ 129 a, b StGB); besides this it appears that there will shortly be the criminal provisions of the Law on Prosecuting the Preparation of Serious Acts of Violence Endangering the State.<sup>48</sup>—In addition, there are numerous cases of anticipatory criminality for

<sup>43</sup> For balanced assessment, see *T Hörnle*, Descriptive and normative dimensions of the concept “Enemy criminal law,” GA 2006, pp 80 ff; as a whole also *B Heinrich* (fn 21), in particular in the presentation of the development trends, pp 112 ff; conscious of the problem *Domini* (fn 40) pp 23 (!), 33 ff, 97 ff and passim (but see in *Domini* also fn 45); in agreement *Perez del Valle* (fn 40) pp 515 ff; *Polaino Navarrete*, The function of punishment in enemy criminal law in: Pawlik (fn 40) pp 529 ff; *Polaino Orts*, Derecho penal del enemigo. Desmitificación de un concepto [Enemy criminal law. Demystification of a concept], Lima 2006; the same, as fn 17. On the more recent international criminal law situation in detail *Krefß*, International criminal law of the third generation against transnational power of private persons? in: Hankel (ed) Power and law. Articles on international law and international criminal law at the start of the 21st century, 2008, pp 323 ff.

<sup>44</sup> See *G Jakobs*, State punishment (fn 20) pp 31 ff; *the same*, Criminal law, general part. The foundations and the doctrine of attribution, 2nd edition 1991, 1/4 ff.

<sup>45</sup> *Jakobs* (fn 15), p 88; *the same*, (fn 18), p 293; also *Hörnle* (fn 43) p 81; *Morguet* (fn 14), pp 39 f and passim. *Donini* recognizes the ideal typicality of the concepts “citizen” and “enemy” (fn 40), pp 41 f, but does not see that the drastic concept of “unperson” used by me likewise concerns an ideal type, pp 38 ff, 46 ff and passim.

<sup>46</sup> Downplaying legal coercion *Gössel*, Argument against enemy criminal law—Concerning human beings, individuals and legal persons, in Hoyer (fn 31) pp 33 ff, 47.

<sup>47</sup> On the procedural side of this delict *Paeffgen* (fn 36) p 102.—*Cancio Meliá* attempts to understand §§ 129a, b StGB not in terms of actor criminal law, but act criminal law (attack on the state’s monopoly of force), and argues at the same time for a reduction of the punishment range. *Cancio Meliá*, On the wrongness of the criminal association: danger and significance, in: Pawlik (fn 13), pp 27 ff, 48 ff.

<sup>48</sup> See *Sieber*, NSTz 2009, pp 353 ff, citing the draft version, p 354. *Sieber* considers punishment as legitimate if it is not based on the dangerousness of the perpetrator (p 356) but on the dangerousness of the act, which admittedly—as with an attempt—should be determined “in light of the perpetrator’s plan” (p 362). There is a failure here to recognize that the attempt already *is* a breach of the norm (on this *G Jakobs* Criminal law [fn 44] 25/21), while with preparations the breach of the norm is at most threatened: protection of legal interests and enemy criminal law (against this *Sieber* p 356) are not incompatible.

future wrong, without any link to a presumption that the perpetrator at least somewhat *permanently* has abandoned the law or parts of the law; this therefore at most amounts to enemy criminal law in a very wide sense: the perpetrator in *one* case only offers no cognitive guarantee. In any case it is a question of—highly problematical—preventive criminal law. Consider the following examples.

I consider the regime of punishment for preparation for a crime<sup>49</sup> (§ 30 StGB) to be illegitimate because of the enormous level of the punishment—the punishment range is that which applies to the minimum punishment attached to an attempt of the planned act, for example, for murder preparation, a sentence of imprisonment of from three to 15 years (§§ 211 para. 1, 49 para. 1 no. 1 StGB). This immense threat of punishment is not based on the presumption of a hardened criminal attitude; it is thus not a question of a preventive punishment, but of a punishment for *future* wrong. When during the German Empire in 1876, as a reaction to preparations made to assassinate Bismarck, punishment of up to five years in prison [Gefängnis] (not [the harsher] penitentiary [Zuchthaus]) for crime preparations was introduced, that was an appropriate reaction to the *manifested* wrong, i.e., the disturbance of public security; by contrast, the present punishment range—which, however, as far as is evident, is not or only extremely rarely exhausted by the courts—is clearly related to the future act.<sup>50</sup> If this punishment range, introduced, incidentally, in 1943 (!), which for crimes [Verbrechen, as opposed to misdemeanors, Vergehen] marginalizes the boundary between preparation and attempt,<sup>51</sup> is noted calmly in the standard literature, that shows a lack of theory entirely comparable with the confounding of citizen and enemy criminal law.

Further examples of the punishment of future wrong include insurance fraud, which is completed by merely disposing of an insured thing with the intent to deceive,<sup>52</sup> and forgery, which since 1943 (!) is completed by the mere creation of the counterfeit document.<sup>53</sup> The page begins to turn when a commercial or gang element serves as a ground for criminality or for an increase in punishment: In that case rigidified criminogenic structures determine the wrong, at least partially.—In the same way as for instance the commercial element [Gewerbsmäßigkeit] represents a sprinkling of enemy criminal law in citizen criminal law, thus, conversely, enemy criminal law is shot through with citizen criminal law, for example by the vagueness prohibition (art 103 para 2 GG) or by a process that at least broadly satisfies rule of law principles [rechtsstaatliche Prinzipien]—even if wiretapping or undercover investigations should not be used in proceedings against citizens, which does not mean that that they would be impermissible against enemies. Details need not detain us here.

The above discussion is somewhat inexact, as is always the case when reality is tested against an ideal type, which often gives rise to objections,<sup>54</sup> though unfairly. Anyone who cannot handle such inexactitudes should turn to norm logic: there at least some sharp boundaries are to be had. Still less appropriate is the claim that the inexactness violates the vagueness prohibition;<sup>55</sup> it cannot possibly be seriously thought that there should be some kind of reaction against an enemy only because he corresponds to the abstract type; instead the conduct of the enemy (in most cases only as partially hostile conduct [feindliches Verhalten]) and the reactions must be statutorily determined.

More important is the objection (anticipated by me)<sup>56</sup> that enemy criminal law is not law at all,<sup>57</sup> because law is a relationship between persons and does not permit depersonalization. Here

<sup>49</sup> On its development in detail *J-D Busch*, The criminality of unsuccessful participation and the history of § 49 a StGB, 1964.

<sup>50</sup> *G Jakobs*, Criminalization (fn 41) p 752 and passim; *the same*, (fn 20) pp 47 f; see also *Donini* (fn 40) p 95.

<sup>51</sup> *Bung* (fn 20) p 64; *G Jakobs*, Criminalization (fn 41) p 752.

<sup>52</sup> *Kindhäuser* (fn 28) p 95 correctly remarks that it is not, in spite of the antedating of liability, a question of enemy criminal law in the narrow sense.

<sup>53</sup> On this *G Jakobs*, Falsification of documents. Revision of a crime of deceit, 2000, pp 89 ff.

<sup>54</sup> *Hörnle* (fn 43) p 95; *Saliger* Enemy criminal law: Critical or totalitarian criminal law concept, JZ 2006, pp 756 ff, 761; *Ambos* Enemy criminal law, SchwZStr 124 (2006) pp 1 ff, 15 ff; *Kindhäuser* (fn 28) p 95; *Morguet* (fn 14) pp 257 ff, 272 ff with further references.

<sup>55</sup> *Morguet* (fn 14) pp 272 ff, 278; *González Cussac* (fn 21) pp 37 ff, 40 f.—Whether an enemy or a citizen is being punished is an *interpretation* of a given criminal law situation and not an element of the offense definition.

<sup>56</sup> *Jakobs* (fn 27) p 53.

<sup>57</sup> *Cancio Meliá*, Enemy “criminal law”? ZStW 117 (2005) pp 267 ff, p 267 in the heading, p 286 fn 68 p 288; *Ambos* (fn 54) p 26; *Bung* (fn 20) p 70; *Müssig*, State of emergency as order: On the concept and idea

one must differentiate: law is associated with coercion that not only helps but enforces, and this coercion is heteronomy [Fremdverwaltung] of a person, and thus depersonalizes, and indeed even if its necessity was triggered responsibly by the coerced person (above A. I.). For penal coercion I may in this respect recall the above mentioned image of compensation for harm: the coerced must again—*sit venia verbo*—be made compatible with the law (NB: be made, in the passive voice [passivisch], i.e., through coercion). By contrast, coercion exercised to prevent future acts, for instance through preventive detention, is not concerned with the new ordering of a legal relationship, but with—as a rule, partial—exclusion and, *in this respect* vis-à-vis the excluded person, not with law but with war.<sup>58</sup>

This does not mean, however, that the exclusion has nothing to do with the law: insofar as it provides the excluded [dem zu Exkludierenden] (partially, e.g., through locking up) with a process, possibly even one for his return, he remains, in this respect, included; and in addition the law persists *among the other citizens*, who remain bound<sup>59</sup> to deal with the (partially) excluded in this, and only in this, way.<sup>60</sup>

The exclusion occurs because the perpetrator offers no guarantee for future legal behavior and thus his personhood lacks a sufficient cognitive foundation. The exclusion does not come upon the perpetrator as an undeserved fate; as every orienting normative institution must have a cognitive foundation, he like everyone else has the duty<sup>61</sup> to present himself as somewhat [einigermaßen] reliable—he ought not to be expected to commit serious and very serious crimes. The perpetrator is thus—in contrast to Köhler's recent article on preventive detention—not subjected to an “instrumental purpose concept” that would be inappropriate for dealing with him as a “fellow subject,”<sup>62</sup> but he has made himself unfit for society by the violation of his duty.

The assumption of a duty to present oneself as reliable has been disputed on the ground that this demand is totalitarian; the accusation runs: “The state alone is no longer responsible for guaranteeing the citizen's basic right to security. The individual citizen is likewise obligated to resolve the security problem.”<sup>63</sup> The danger of totalitarianism, however, may more readily be sought and found “on the other side.” If the state alone had to provide for a sufficient cognitive foundation for personhood (as Kant in his example of a civic society [bürgerlicher Verein] for a “people of devils” [“Volk von Teufeln”] in fact proposed),<sup>64</sup> the monitoring would have to be so dense that there could no longer be any question of liberty [Freiheit], since after all the monitors themselves also would require monitoring.—Cognitive reliability is the condition of every inclusion; without it, i.e., with included enemies, society cannot survive. In other words, personhood is as little a mere societal grant [Gewährung der Gesellschaft] as it is a mere self-development of the individual; instead it is the product of a relationship to which both sides, society and the individual, must contribute.

## D. Conclusion

Law is associated with the authority to coerce; (non-correctional) coercion is conceptually heteronomy, and thus depersonalization. Law is accordingly associated with the authority, if necessary,

of an “enemy criminal law,” in: Dona Scripta MMVII. Festschrift for K.-D. Becker, vol 2, 2007, pp 1033 ff, p 1050 and passim.

<sup>58</sup> Jakobs, as in fn 56, and frequently.

<sup>59</sup> Enemy criminal law as “limited war”: Jakobs (fn 15) p 92; *the same* (fn 18) p 44; against this Pawlik (fn 16) p 40.

<sup>60</sup> On the concept of law: H L A Hart, Positivism and the separation of law and morals, in: Law and morals (ed by Hoerster) 1971, pp 14 ff, 50 f.

<sup>61</sup> In more detail Jakobs (fn 5) pp 41 ff; Terrorists as persons in law? ZStW 117 (2005) pp 839 ff, 843.

<sup>62</sup> But see Köhler, The lifting of security measures through criminal justice, in Pawlik (fn 13) pp 273 ff, 279.—Köhler himself relies on the increasing of culpability and therefore of punishment for “habitual” delinquency instead of on preventive detention, p 289 and passim; on this Jakobs (fn 5) pp 40 f.

<sup>63</sup> Saliger (fn 54) p 762.

<sup>64</sup> Kant (fn 40) p 686. On the devil's people Pawlik, Kant's people of devils and their state, in Byrd and others (ed) Yearbook for law and ethics, vol 14 (2006) pp 269 ff, 270 f.

to depersonalize. This depersonalization is, in the basic cases—punishment, compulsory execution, detoxification—linked with the expectation that after conclusion of the coercion, personal interaction will be restored on all sides. This expectation of future unlimited personhood on all sides requires cognitive foundation if it is actually to guide orientation. Without this foundation, security must be established by coercion; in my words: the unreliable character is treated as an enemy. A society that is incapable of—and I repeat a much criticized expression—putting its enemies on ice,<sup>65</sup> goes under, and if it does not go under, this shows that it is capable of this after all (even if it shamefully describes the event in another way).

The degree to which treatment as an enemy must be practiced depends on two factors: citizens' need for security and the unreliable characters' potential for violence [Gewaltpotential]. Both factors may be subject to influence by society and the administrator of the law, the state; nonetheless, the assumption that it is possible simply to resume the usual routine of the perfect state under the rule of law [Rechtsstaat] that permanently and fully integrates everyone is completely unfounded. The law must instead, if it is to remain capable of orienting, also recognize exceptions from integration, and preventive detention, harsh punishment for the formation of a terrorist organization, wiretapping, undercover investigations, etc. testify to such exceptions: the state does not speak in this way to its citizens, but in this way it incapacitates its enemies [unschädlich]. Should it fail to do this and go under?<sup>66</sup> If the answer to the question is no, the state must be able to confront its enemies actually, in their being; abstract forms of law and real law after all are two different things.

<sup>65</sup> *Jakobs* (fn 27) p 53.

<sup>66</sup> For an apparent preference for going under, see *Jahn*, Criminal law in state emergency. The criminal law grounds of justification and their relationship to intrusion and intervention in current constitutional and international law, 2004, passim (on this *G Jakobs*, Book review, ZStW 117 [2005] pp 418 ff, 425); *Bung* (fn 20) p 70; *Gierhake* (fn 6) p 361 and other sources. *Morguet* shrinks from this consequence: she wants to understand art 1 para 1 GG as meaning that “in principle unfavorable treatment in criminal law on the ground of danger posed by a person” is forbidden (fn 14) p 284, but she legitimizes punishment without restraint by the commonplace “protection of legal interests” in such a way (see for instance under § 30 StGB pp 254 f) that a method of protection from going under will be found.....