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Kant on Punishment and Criminal Law – Nine Thesis

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Introduction

Kant is generally regarded as a representative of the theory of retaliation.[2] This position is accused as scientific untenable. Supposedly, the idea of retaliation disregards all social purposes and demands punishment even where it was not necessary for the protection of legal interests. In doing so it would lose its social legitimacy. The state was not entitled to realize the "metaphysical idea of justice". Finally, the idea of guilt which is to retaliate could not alone bear the punishment, because individual guilt was bound to the existence of a freedom of will. But freedom of will could not be proved which made it unsuitable as the sole foundation for state intervention. [3] This view of Kant's has been widely held since the "Verabschiedung" of Kant by Ulrich Klug in 1968.[4] However, as will be shown below, it has very little to do with Kant. On the contrary: Kant's Metaphysics of Morals of 1797 [5] contains an already quite sophisticated criminal theory of timeless quality. In order to elaborate on them, however, one must not, as is customary, pick out a few passages, but one must take note of the "whole" doctrine of law, in particular Kant's statements on subjective law, on the abandonment of the law and on the rule of law. [6]

The basic features of Kant's theory of crime will be presented in the following nine theses, backed up by relevant textual evidence.

[1] This article is based on a lecture I gave at Universidade Lusófona do Porto on 24 February 2020.

[2] Instead of many, see Claus Roxin, and Luís Greco, Strafrecht: allgemeiner teil, Vol. 1. (Beck, 1992, 5th ed. 2020), sect. 3 marginal no. 3.

[3] Id., sect. 3 Rn. 8; similar, e.g., Wolfgang Joecks and Volker Erb in: Münchener Kommentar zum Strafgesetzbuch, vol. 1, 4th ed. (2011), Einl. marginal no. 57 ("no longer tenable"); Schünemann, Bernd. "Aporien der Straftheorie in Philosophie und Literatur—Gedanken zu Immanuel Kant und Heinrich von Kleist" in: Prittwitz et al. (eds.), Festschrift für Klaus Lüderssen (2002), p. 327 (332: "Dead end"); Stratenwerth Günter, Was leistet die Lehre von den Strafzwecken (1995), p. 9 ("marginal position"). Of course, there are other views as well, instead of many e.g. Michael Pawlik, Person, Subjekt, Bürger: Zur Legitimation Von Strafe, 2004, p. 45 et seqq.

[4] Ulrich Klug, Abschied von Kant und Hegel in: Baumann (ed.), Programm für ein neues Strafgesetzbuch – Der Alternativentwurf der Strafrechtslehrer, 1968, p. 36-41.

[5] Immanuel Kant, Metaphysik der Sitten (2. Aufl. 1798), in: Kants gesammelte Schriften, (Published by König–lich Preußische Akademie der Wissenschaften, Erste Abteilung, vol. 6, 1907), p. 203-493, hereafter cited as AA VI with page reference.

[6] Volker Haas, Staatsverständnis und Prozessstruktur, Tübingen 2008, p. 182 et seqq. interprets other passages in Kant's works, namely from the Critique of Practical Reason and Religion within the Limits of Mere Reason, as evidence for an absolute theory of retribution. Indeed, there is also a corresponding passage in the Metaphysics of Morals. Thus it says in § 36 of the Doctrine of Virtue (AA VI, p. 460): "Every act that offends a person's rights deserves punishment, whereby the crime is avenged on the perpetrator (...)." – " Eine jede das Recht eines Menschen kränkende Tat verdient Strafe, wodurch das Verbrechen an dem Täter gerächt (...) wird." – "Such an avenging punishment", as it goes on to say, may be inflicted by no one "other than he who is also the supreme moral lawgiver, and he alone (namely God) can say: 'Vengeance is mine; I will repay.'" However, one must – like Kant – strictly distinguish divine punishment from "judicial punishment (poena forensis)", which is the sole subject of legal doctrine.

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I.: It is the task of the constitutional state to guarantee the freedom of the citizens "as independence of the compulsory will of another ... according to a universal law" by the means of the law.

In the second part of the Doctrine of Rights, entitled "Public Law", Kant's theory of criminal law can be found in the section on "The Right of Punishing and of Pardoning". [7] The systematic context of the Metaphysics of Morals shows that Kant is not concerned with any criminal law of any legal system. Rather, his theme is a liberal criminal law in a state under the rule of law, which takes its starting point from the freedom of the individual as a legally protected freedom. This freedom as "independence of the compulsory will of another" is "the one sole original, inborn right belonging to every man in virtue of his humanity". [8] This (subjective) right is admittedly not without limits, but finds its limit in the freedom of every other person, and it is the task of law, now at the same time understood as the epitome of legal laws, to determine its scope.

"Right, therefore, comprehends the whole of the conditions under which the voluntary actions of any one Person can be harmonized in reality with the voluntary actions of every other Person, according to a universal Law of Freedom." [9]

Consequently, the "general principle of law" is

"Every Action is right which in itself, or in the maxim on which it proceeds, is such that it can co-exist along with the Freedom of the Will of each and all in action, according to a universal Law."[10]

Of course, legal protection is only possible in a constitutional state. According to Kant, the constitutional state is not only a state that makes its own laws and bases the actions of its organs and citizens on laws. These laws serve – unsurprisingly – one purpose above all: to secure freedom.

"The Juridical state is that relation of men to one another which contains the conditions, under which it is alone possible for every one to obtain the Right that is his due." [11]

Because outside a state under the rule of law, in the traditionally so-called state of nature, no legal certainty is guaranteed, everyone is obliged a priori to overcome the state of nature.

"From the conditions of Private Right in the Natural state [that is the right to have something as my one, J.R.], there arises the Postulate of Public Right. It may be thus expressed: 'In the relation of unavoidable co-existence with others, thou shalt pass from the state of Nature into a juridical Union constituted under the condition of a Distributive Justice." [12]

In this way, the rule of law is established:

"A State (Civitas) is the union of a number of men under juridical

[7] AA VI, p. 331-337.

[8] Id., p. 237: "Freiheit (Unabhängigkeit von eines anderen nötigender Willkür), sofern sie mit jedes anderen Freiheit nach einem allgemeinen Gesetz zusammen bestehen kann, ist diese einzige, ursprüngliche, jedem Menschen kraft seiner Menschheit zustehende Recht."

[9] Id., p. 230: "Das Recht ist also der Inbegriff der Bedingungen, unter denen die Willkür des einen mit der Willkür des anderen nach einem allgemeinen Gesetze der Freiheit zusammen vereinigt werden kann."

[10] Ibid.: "Eine jede Handlung ist recht, die oder nach deren Maxime die Freiheit der Willkür eines jeden mit jedermanns Freiheit nach einem allgemeinen Gesetze zusammen bestehen kann."

[11] Id., p. 305 et seq.: "Der rechtliche Zustand ist dasjenige Verhältnis der Menschen untereinander, welches die Bedingungen enthält, unter denen allein jeder seines Rechts teilhaftig werden kann."

[12] Id., p. 307: "Aus dem Privatrecht im natürlichen Zustand [d.h., das Recht, etwas als das Meinige zu haben, J.R.] geht nun das Postulat des öffentlichen Rechts hervor: du sollst, im Verhältnisse eines unvermeidlichen Nebeneinanderseins mit allen anderen, aus jenem heraus in einen rechtlichen Zustand, d.i. den einer austeilenden Gerechtigkeit übergehen."

[13] Id., p. 313: "Ein Staat (civitas) ist die Vereinigung einer Menge von Menschen unter Rechtsgesetzen. Sofern diese als Gesetze a priori notwendig, d.i. aus den Begriffen des äußeren Rechts überhaupt von selbst folgend (nicht statutarisch) sind, ist seine Form die Form eines Staates überhaupt, d.i. der Staat in der Idee, wie er nach reinen Rechtsprinzipien sein soll, welche jeder wirklichen Vereinigung zu einem gemeinen Wesen … zur Richtschnur (norma) dient."

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Laws. These Laws, as such, are to be regarded as necessary à priori,—that is, as following of themselves from the conceptions of external Right generally,—and not as merely established by Statute. The Form of the State is thus involved in the Idea of the State, viewed as it ought to be according to pure principles of Right; and this ideal Form furnishes the normal criterion of every real union that constitutes a Commonwealth." [13]

In his Metaphysics of Morals, Kant not only develops the model of a free constitutional state, but also anticipates considerations as formulated over 270 years later by the "personale Rechtsgutslehre": Criminal law is only legitimate insofar as it serves to protect the individual and the state institutions necessary for this. [14] For Kant, a (criminal) law that disregards all social purposes [15] is not even conceivable.

II.: Since the motives of the norm addressee are not subject of the law, the only means of influencing behaviour remains coercion.

All laws, in order to become practical, are designed to determine arbitrariness. Kant speaks of "determining principles".[16] Nevertheless, one can distinguish between two types of legislation:

"The Legislation which makes an Action a Duty, and this Duty at the same time a Motive, is ethical. That Legislation which does not include the Motive-principle in the Law, and consequently admits another Motive than the idea of Duty itself, is juridical. In respect of the latter, it is evident that the motives distinct from the idea of Duty, to which it may refer, must be drawn from the subjective (pathological) influences of Inclination and of Aversion, determining the voluntary activity, and especially from the latter: because it is a Legislation which has to be compulsory, and not merely a mode of attracting or persuading. (…)

Duties especially in accord with a Juridical Legislation, can only be external Duties. For this mode of Legislation does not require that the idea of the Duty, which is internal, shall be of itself the determining Principle of the act of Will; and as it requires a motive suitable to the nature of its laws, it can only connect what is external with the Law." [17]

The associated distinction between morality and legal law or "morality" and "legality" is important in two respects. Firstly, internal motives for the mutual demarcation of the spheres of

[14] Cf. Michael Marx, Zur Definition des Begriffs "Rechtsgut". Prolegomena einer materialen Verbrechenslehre, 1972; Hassemer, Theorie und Soziologie des Verbrechens, 1973, p. 68 et seqq.; ähnlich Claus Roxin, and Luís Greco, Strafrecht: allgemeiner teil (supra), sect. 2 marginal no. 7.

[15] This is the general accusation of Claus Roxin, and Luís Greco, Strafrecht: allgemeiner teil (supra), sect 3 marginal no. 8, which falls far short of the mark, since the so-called "prevention theories" cannot specify which legal interests can legitimise the use of criminal law, and in this respect depend on additional premises.

[16] Kant (Fn. 4), AA VI, p. 214: "innere Bestimmungsgründe". The freedom of the will thus addressed is logically necessarily connected with the notion of norms, laws or rights.

[17] Id., p. 219: "Diejenige, welche eine Handlung zur Pflicht und diese Pflicht zugleich zur Triebfeder macht, ist ethisch. Diejenige aber, welche das letztere nicht im Gesetze mit einschließt, mithin auch eine andere Triebfeder als die Idee der Pflicht selbst zuläßt, ist juridisch. Man sieht in Ansehung der letzteren leicht ein, daß diese von der Idee der Pflicht unterschiedene Triebfeder von den pathologischen Bestimmungsgründen der Willkür der Neigungen und Abneigungen und unter diesen von denen der letzteren Art hergenommen sein müsse, weil es eine Gesetzgebung, welche nötigend, nicht eine Anlockung, die einladend ist, sein soll. (…)
Die Pflichten nach der rechtlichen Gesetzgebung können nur äußere Pflichten sein, weil diese Gesetzgebung nicht verlangt, daß die Idee dieser Pflicht, welche innerlich ist, für sich selbst Bestimmungsgrund der Willkür des Handelnden sei und, da sie doch einer Triebfeder bedarf, nur äußere mit dem Gesetz verbinden kann."

[18] Cf. Kant, Immanuel. Kritik der reinen Vernunft, 2. Aufl. 1787, in: Kants gesammelte Schriften, vol. 3, 1911, B 373 footnote: "The actual morality of actions (merit and guilt) therefore remains completely hidden from us, even that of our own behaviour. Our imputations can only be related to the empirical character." – "Die eigentliche Moralität der Handlungen (Verdienst und Schuld) bleibt uns daher, selbst die unseres eigenen Verhaltens, gänzlich verborgen. Unsere Zurechnungen können nur auf den empirischen Charakter bezogen werden." Similar already Von Aquin, Thomas. "Summa theologica."Leonina, 2nd ed. (1923), Ia IIae, qu. XCI, art. IV, co.: "Quia de his potest homo legem ferre, de quibus potest iudicare. Iudicium autem hominis esse non potest de interioribus motibus, qui latent, sed solum de exterioribus actibus, qui apparent. Et tamen ad perfectionem virtutis requiritur quod in utrisque actibus homo rectus existat. Et ideo lex humana non potuit cohibere et ordinare sufficienter interiores actus …" This results in fundamental difficulties for those positions which, like positive general prevention, emphasise awareness raising, cf. e.g. Frisch, Wolfgang. "Zum Zweck der Strafandrohung." In: Hefendehl et al. (eds.), Streitbare Strafrechtswissenschaft. Festschrift für Bernd Schünemann, 2014, p. 55 (63 et seqq.). This goal is of course very welcome, but can only be a side effect, because the (criminal) law would be completely overwhelmed with the expectation of being a kind of moral popular school.

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law play no role. Evil thoughts alone do not affect the law of another. Secondly, although legal laws also appeal to the will of the norm addressees, the legal system does not rely on their good will. The determinants of actions can be analysed, but their existence cannot be verified. [18]

"A strict Right, then, in the exact sense of the term, is that which alone can be called wholly external. Now such Right is founded, no doubt, upon the consciousness of the Obligation of every individual according to the Law; but if it is to be pure as such, it neither may nor should refer to this consciousness as a motive by which to determine the free act of the Will. For this purpose, however, it founds upon the principle of the possibility of an external Compulsion, such as may co-exist with the freedom of every one according to universal Laws." [19]

Those who are already acting in accordance with the law of their own (moral) conviction thus basically do not need the additional instruction of the laws. [20] Thus, the law is above all necessary for those beings of reason whose determinants are "pathological", because they are incompatible with the freedom of everyone according to a universal law. Since they have not already let themselves be determined by the idea of duty, legal coercion can help alone. The connection between law and coercion is fundamental to Kant.

"Hence, according to the logical principle of Contradiction, all Right is accompanied with an implied Title or warrant to bring compulsion to bear on any one who may violate it in fact." [21]

Without legal protection by coercion, a right is not conceivable at all. [22] Kant considers rewards to be unsuitable, because it is not a certain attitude that is to be taught, but rather a behaviour that is to be forced. Moreover, rewards are reserved for those who do more than what they are legally required to do. [23]

The traditionally seen contrast between general prevention and the Kantian position is misguided. Kant as well emphasizes the control of conduct by the law. But this is not a special feature of criminal law. All laws are intended to control behaviour – by prescribing an 'Ought' and establish a sanction in case of

[19] Kant (Fn. 4), AA VI, p. 232: "Ein striktes (enges) Recht kann man also nur das völlig äußere nennen. Dieses gründet sich zwar auf das Bewußtsein der Verbindlichkeit eines jeden nach dem Gesetze; aber die Willkür danach zu bestimmen, darf und kann es, wenn es rein sein soll, sich auf dieses Bewußtsein als Triebfeder nicht berufen, sondern fußt sich deshalb auf dem Prinzip der Möglichkeit eines äußeren Zwanges, der mit der Freiheit von jedermann nach allgemeine Gesetzenzusammenbestehen kann."

[20] In this regard, for example, already Augustinus, De libero arbitrio, I.15, 31 or also Aquin (Fn. 17), Ia IIae, qu. XCVI, art. V, co.: "Et hoc modo homines virtuosi et iusti non subduntur legi, sed soli mali." This, of course, cannot be relied upon, for people "may be thought as benign and law-loving as one likes, it is nevertheless a priori in the rational idea of such a (non-legal) state that, before a publicly legal state has been established, isolated people ... can never be safe from acts of violence against one another ..." – "… sie mögen auch so gutartig und rechtliebend gedacht werden, wie man will, so liegt es doch a priori in der Vernunftidee eines solchen (nicht-rechtlichen) Zustandes, daß, bevor ein öffentlich gesetzlicher Zustand errichtetworden, vereinzelte Menschen … niemals vor Gewalttätigkeiten gegeneinander sicher sein können …" Kant (Fn. 4), AA VI, p. 312.

[21] Kant (Fn. 4), AA VI, p. 231: "Mithin ist dem Rechte zugleich eine Befugnis, den, der ihm Abbruch tut, zu zwingen, nach dem Satze des Widerspruchs verknüpft."

[22] For details Ripstein, Arthur. "Hindering a Hindrance to Freedom." JRE 16 (2008): 227 (232 et seqq.).This can certainly be understood in the meaning of an individualistic justification of self-defence, cf. for example Renzikowski, Joachim. "Notstand und Notwehr, Diss." (1994), p. 230 et seqq; in the constitutional state, however, it is primarily the state that is responsible for legal protection and thus also for coercion.

[23] On Supererogation see Byrd, B. Sharon, Joachim Hruschka, and Jan C. Joerden. "Altruismus und Supererogation Altruism and Supererogation." Jahrbuch für Recht und Ethik, 6 (1998)

[24] It is idle to argue about whether this idea is not outdated because a rational-choice approach is not suitable for criminal law: many offenders do not act in a deliberate manner, for example, the criticism by Jakobs, Strafrecht. Allgemeiner Teil, 2nd ed. 1991, 1/28, and Roxin, Claus, and Luís Greco (Fn. 1), sect. 3 marginal no. 25, of negative general prevention. A law can be expected to do no more than provide another (prudential) reason among other sensual motivations, for details Greco, Lebendiges und Totes in Feuerbachs Straftheorie, 2009, p. 359 et seqq.

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disobedience. [24] Even those who conclude a sales contract, for example, can rely on being able to enforce their claim, if necessary, in court and by way of execution. Laws can only retain their authority if they are executed.

III.: By committing the crime, the offender not only violates the victim's subjective right, but also calls into question the legal system as such.

From the reversal of the above-mentioned "general principle of right" follows that an act is wrong if its maxim cannot coexist with the independence of the compulsory will of another according to a universal law, in other words: if it violates the right of another. [25] A legal wrong can be seen in two respects: first, "formally", as the harm of a subjective right, secondly, "materially", as a breach of a public law, which guarantees this right. Whoever commits a crime, takes "all validity away from the conception of Right", [26] because "Every Transgression of a Law only can and must be explained as arising from a Maxim of the transgressor making such wrong-doing his rule of action." [27]

The fact that the crime corresponds to a maxim means that the perpetrator has determined himself to do so through his free will, otherwise the crime could not be imputed to him. [28] However, as can easily be seen, the criminal action maxim runs counter to the maxim given by the law. Kant illustrates this with the example of theft.

"In this way, that whoever steals anything makes the property of all insecure." [29]

Thus, he not only disregards the victim's right to property, but property as a legal institution – as if the prohibition of theft did not apply to him. [30] So although every violation of law has these two aspects, it does not yet require the use of criminal law. Rather, Kant distinguishes between one:

"Transgression of the public law which makes him who commits it incapable of being a Citizen" [31]and other legal wrongs. He calls the former "crimen per se" or "crimen publicum". They endanger "the Commonwealth, and not merely some particular

25 Following on from this, von Feuerbach, Paul Johann Anselm, later develops his doctrine of crime as a violation of rights, see Lehrbuch des gemeinen in Deutschland gültigen peinlichen Rechts, 14th ed., published by Mittermaier, 1847, sect. § 21: "Whoever transgresses the limits of legal freedom commits a violation of rights, offence (lesion). Whoever violates the freedom guaranteed by the social contract and secured by criminal law commits a crime." – "Wer die Grenzen der rechtlichen Freiheit überschreitet, begeht eine Rechtsverletzung, Beleidigung (Läsion). Wer die durch den Staatsvertrag verbürgte, durch Strafgesetze gesicherte Freiheit verletzt, begeht ein Verbrechen."

26 Kant (Fn. 4), AA VI, p. 308 footnote to sect. 42: "… weil sie dem Begriffe des Rechts selber alle Gültigkeit nehmen …"

27 Id., p. 321, footnote to annotation to sect. 49: "eine jede Übertretung des Gesetzes kann und muß nicht anders als so erklärt werden, daß sie aus einer Maxime des Verbrechers (sich eine solche Untat zur Regel zu machen) entspringe; …"

28 Kant calls the ability to give maxims to one's actions free choice ("freie Willkür", see id., p. 213 et seq.); this is a prerequisite for judgments of imputation (see below) and makes the person concerned a "person".

29 Id., p. 333: "Wer da stiehlt, macht aller anderer Eigentum unsicher."

30 See also Ripstein (Fn. 21), p. 240 et seqq.

31 Kant (Fn. 4), AA VI, p. 331: "Diejenige Übertretung des öffentlichen Gesetzes, die den, welcher sie begeht, unfähig macht, Staatsbürger zu sein, heißt Verbrechen schlechthin (crimen)."

32 Ibid.: "… öffentliche Verbrechen, weil das gemeine Wesen und nicht bloß eine einzelne Person dadurch gefährdet wird."

33 Ibid.: "… daher das erstere (das Privatverbrechen) vor die Zivil-, das andere vor die Kriminalgerechtigkeit gezogen wird." More on this and the historical origin of this distinction Hruschka, Drei Vorschläge Kants zur Reform des Strafrechts, in: Jahn et al. (eds.), Strafrechtspraxis und Reform. Festschrift für Heinz Stöckel, Berlin 2010, p. 77 (88 et seqq.).

34 See Ripstein (Fn. 21), p. 243 et seq.

35 Kant (Fn. 4), AA VI, p. 331: "das Recht des Befehlshabers gegen den Unterwürfigen, ihn wegen seines Verbrechens mit einem Schmerz zu belegen."

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individual." [32]

Only they are dealt with by a public court, while "private crimes" are to be judged by the civil courts. [33] Insofar as the commonwealth is affected, a public reaction is necessary that confirms the validity of the legal system against the maxim of the criminal, which is to be declared irrelevant. [34]

IV.: Retribution means nothing else than that an evil is inflicted on the offender for wrongs he has culpably committed. Retribution is not a punitive purpose, but the very definition of punishment.

Criminal law defines Kant as:

"the Right of the Sovereign as the Supreme Power to inflict pain upon a Subject on account of a Crime committed by him." [35]

By the sovereign, as the foregoing already makes clear, we do not mean some absolute ruler who is able to punish his subjects at will. Although at first glance Kant's subsequent formulation that the "Head of the State cannot be punished" [36] may be understood in this sense, such a view falls short. The Kantian state is a constitutional state, which has to be noticed. Therefore, the sovereign is not any individual but he represents all, who, "on account of their mutual influence on one another require a juridical Constitution uniting them under one Will, in order that they may participate in what is right." [37]

The "Union of a number of men under juridical Laws" [38] is not as such subject to criminal law.

Punishment is now itself the pain with which the criminal is punished for his crime. At no point in the entire section E on "The Right of Punishing and of Pardoning" does Kant speak of the infliction of an evil being a purpose that lies outside of punishment and is particularly pursued with it.

The reason for imposing the punishment is that "the individual on whom it is inflicted has committed a Crime." [39]

From this follows two things. According to Kant, a crime is the "violation of a public law", that is

"the whole of the Laws that require to be universally promulgated in order to produce a juridical state of Society." [40]

This is nothing other than the constitutional principle of nulla poena sine lege. Only an act that was legally defined as a criminal offence at the time it was committed may be punished. A law that has been promulgated is public. Only then does it attain its binding force. Only a threat of punishment known to the citizen can give him a (wise) reason to refrain from the incriminated behaviour. [41]

This presupposes, however, the faculty to orientate one's actions according to determining principles of will, in other words: imputability. Only the person who has committed the crime is guilty, and this brings us to the fifth thesis.

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[36] Ibid.: "Der Oberste im Staate kann also nicht bestraft werden."

[37] Id., p. 311: "... die, im wechselseitigen Einflusse gegeneinander stehend, des rechtliche Zustandes unter einem sie vereinigenden Willen, einer Verfassung (constitutio) bedürfen, um dessen, was Rechtens ist, teilhaftig zu werden." Cf. Ripstein (Fn. 21), p. 237.

[38] Kant (Fn. 4), AA VI, p. 313: "Ein Staat (civitas) ist die Vereinigung einer Menge von Menschen unter Rechtsgesetzen."

[39] Id., p. 331: "Richterliche Strafe ... muß jederzeit nur darum wider ihn verhängt werden, weil er verbrochen hat."

[40] Id., p. 311: "Der Inbegriff der Gesetze, die einer allgemeinen Bekanntmachung bedürfen, um einen rechtlichen Zustand hervorzubringen, ist das öffentliche Recht."

[41] Feuerbach (Fn. 24), sect. 20 then bases his elaboration of the principle "No punishment without law" on this consideration.

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V.: The imputation of the offence contains a legal blame.

Modern criminal theories place blame at the centre of their considerations. The function of punishment is to blame the offender for his or her misconduct. [42] In this respect, too, however, one can already make a find in Kant.

"Imputation, in the moral sense, is the Judgment by which any one is declared to be the Author or free Cause of an action which is then regarded as his moral fact or deed, and is subjected to Law. When the Judgment likewise lays down the juridical consequences of the Deed, it is judicial or valid (imputatio judiciaria s. valida) …" [43]

Imputation means first of all that an act is the result of free will. [44] In criminal law terminology: It can be imputed to guilt. The judge is responsible for the legally binding imputation.

Judgments of imputation are made – only – with regard to whether an act contradicts a norm. This is possible in two ways: "When any one does, in conformity with Duty, more than he can be compelled to do by the Law, it is said to be meritorious (meritum). … And when less is done than can be demanded to be done by the Law, the result is moral Demerit (demeritum) or Culpability. The juridical Effect or Consequence of a culpable act of Demerit is Punishment (poena)." [45]

Whoever does more than he has to do is therefore praised, whoever does less is blamed. In Kant's work, "moral" does not have the meaning we associate with this expression today, such as "in accordance with morals" as opposed to "in accordance with the law". Rather, moral describes the system of rules of conduct by which the action in question is measured. These can be (in today's sense) moral rules or even legal laws. [46] The blame finds expression in the punishment. Thus not only does an imputation judgment have the meaning of blame, but this blame is also connected with the punishment and its execution – precisely because it can only be justified by the imputation judgment.

VI.:If the state threatens certain behaviour with punishment, it is also absolutely obliged to apply the criminal law.

The following passage is widely used as proof that Kant's theory of retaliation ignores all considerations of purpose, in which punishment is an end in itself.

"Judicial or Juridical Punishment (poena forensis) is to be

[42] Cf. Von Hirsch, Andrew. "Censure and sanctions.", 1993; Duff, Punishment, Communication and Community, 2001.

[43] Kant (Fn. 4), AA VI, p. 227: "Zurechnung (imputatio) in moralischer Bedeutung … das Urteil, wodurch jemand als Urheber (causa libera) einer Handlung, die alsdann Tat (factum) heißt und unter Gesetzen steht, angesehen wird; welches, wenn es zugleich die rechtlichen Folgen aus dieser Tat bei sich führt, eine rechtskräftige (imputatio iudiciaria s. valida) … sein würde."

[44] On the history of the concept of imputation in Hruschka, Joachim. "Imputation." BYU L. Rev. (1986): 669-710.

[45] Kant (Fn. 4), AA VI, p. 227: "Was jemand pflichtmäßig mehr tut, als wozu er nach dem Gesetze gezwungen werden kann, ist verdienstlich (meritum); … was er endlich weniger tut, als die letztere fordert, ist moralische Verschuldung (demeritum). Der rechtliche Effekt einer Verschuldung ist die Strafe (poena)."

[46] The opposite of "moral" for Kant is "pragmatic" or "technical". Such pragmatic rules are imperatives of prudence that show what action must be taken in order to achieve a certain purpose, see also Byrd, B. Sharon, and Joachim Hruschka. "Kant's doctrine of right: A commentary." (2010), p. 3 et seq.

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distinguished from Natural Punishment (poena naturalis), in which Crime as Vice punishes itself, and does not as such come within the cognizance of the Legislator. Juridical Punishment can never be administered merely as a means for promoting another Good either with regard to the Criminal himself or to Civil Society, but must in all cases be imposed only because the individual on whom it is inflicted has committed a Crime. For one man ought never to be dealt with merely as a means subservient to the purpose of another, nor be mixed up with the subjects of Real Right. Against such treatment his Inborn Personality has a Right to protect him, even although he may be condemned to lose his Civil Personality. He must first be found guilty and punishable, before there can be any thought of drawing from his Punishment any benefit for himself or his fellow-citizens. The Penal Law is a Categorical Imperative; and woe to him who creeps through the serpent-windings of Utilitarianism to discover some advantage that may discharge him from the Justice of Punishment, or even from the due measure of it." [47]

Kant calls the criminal law a categorical imperative. Categorical imperatives are binding without regard to a specific purpose, while other ("technical") imperatives specify a means of pursuing a specific purpose and are therefore binding under the hypothetical condition that this purpose is pursued. [48]

Kant objects to making the punishment of an act dependent on other purposes. His reference to Caiaphas' statement in the trial against Jesus that it is "better that one man should die than that the whole nation should perish" [49] makes it clear that no example may be made of an innocent person. [50] But one can also imagine the situation in reverse: A guilty person is let off for some reason. [51] This too is not acceptable, for

"Justice would cease to be Justice, if it were bartered away for any consideration whatever." [52]

Kant argues decidedly against Seneca's aphorism: "Nemo prudens punit quia peccatum est, sed ne peccetur" [53] and thus takes a standpoint in the discussion of that time on punishment and criminal law that is roughly opposite to that of Beccaria. While Beccaria demanded that the purpose of punishment could be no other than "to prevent the guilty party from inflicting new harm on his fellow citizens and to deter others from similar acts", [54] such reasoning turns things upside down for Kant. Rather

[47] Kant (Fn. 4), AA VI, p. S. 331: "Richterliche Strafe (poena forensis), die von der natürlichen (poena naturalis), dadurch das Laster sich selbst bestraft und auf welche der Gesetzgeber gar nicht Rücksicht immt, verschieden, kann niemals bloß als Mittel, ein anderes Gute zu befördern, für den Verbrecher selbst oder für die bürgerliche Gesellschaft, sondern muß jederzeit nur darum wider ihn verhängt werden, weil er verbrochen hat; denn der Mensch kann nie bloß als Mittel zu den Absichten eines anderen gehandhabt und unter die Gegenstände des Sachenrechts gemengt werden, wowider ihn seine angeborene Persönlichkeit schützt, ob er gleich die bürgerliche einzubüßen gar wohl verurteilt werden kann. Er muß vorher strafbar befunden sein, ehe noch daran gedacht wird, aus dieser Strafe einigen Nutzen für ihn selbst oder seine Mitbürger zu ziehen. Das Strafgesetz ist ein kategorischer Imperativ, und wehe dem! welcher die Schlangenwindungen der Glückseligkeitslehre durchkriecht, um etwas auszufinden, was durch den Vorteil, den es verspricht, ihn von der Strafe oder auch nur einem Grade derselben entbinde."

[48] See id., p. 222 et seq.

[49] Id., p. 332 quoting John 11,50.

[50] This, however, would be the – extreme – consequence of a stringently implemented utilitarianism, cf. the example discussed by Smart (in: Smart, John Jamieson Carswell, and Bernard Williams. Utilitarianism: For and against. Cambridge University Press, 1973, p. 69 et seqq.): The sheriff of a small town is faced with the choice of handing over an innocent man to the mob for lynching or risking riots in which hundreds will lose their lives. Williams' criticism (id., p. 93 et seqq.) is directed primarily against this consequence of utilitarianism.
Kant gives the example of the criminal who is exempted from the death penalty because he makes himself available for dangerous medical experiments.

[51] Kant gives the example of the criminal who is exempted from the death penalty because he makes himself available for dangerous medical experiments.

[52] Kant (Fn. 4), AA VI, p. 32: "die Gerechtigkeit hört auf, eine zu sein, wenn sie sich für irgend einen Preis weggibt."

[53] Seneca, De Ira, Liber I, XIX,7.

[54] Beccaria, Dei delitti e delle pene (1764), Opere di Beccaria, Milano 1821, p. 51: "Il fine dunque non è altro che d'impedire il reo dal far nuovi danni ai suoi cittadini, e di rimuovere gli altri dal farne uguali."

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"Punitive Justice (justitia punitiva), in which the ground of the penalty is moral (quia peccatum est), must be distinguished from punitive Expediency, the foundation of which is merely pragmatic (ne peccetur) as being grounded upon the experience of what operates most effectively to prevent crime." [55]

The justification of the punishment is prior to any considerations of benefit and it results from the law itself. Because the legislator has enacted a criminal law and because the criminal has transgressed this law, punishment must therefore be imposed. Pragmatic wisdom is simply not a legal point of view. It does not therefore have to be completely ignored, but can be taken into account, for example, in the execution of sentences. [56] Anyone who serves a lawfully imposed sentence is then not "merely" used as a means of pursuing other purposes. The legal basis of the punishment is solely the commission of the offence. In today's diction this is nothing other than the principle of legality. [57]

However, the execution of the law seems to degenerate into a mere formality without further use when the state community dissolves. And so Kant's famous island example appears as a paradigm for understanding that punishment is ultimately purposeless and therefore pointless. So Kant writes:

"Even if a Civil Society resolved to dissolve itself with the consent of all its members—as might be supposed in the case of a People inhabiting an island resolving to separate and scatter themselves throughout the whole world—the last Murderer lying in the prison ought to be executed before the resolution was carried out. This ought to be done in order that every one may realize the desert of his deeds, and that bloodguiltiness may not remain upon the people; for otherwise they might all be regarded as participators in the murder as a public violation of Justice." [58]

Since the complete dissolution of a state is a rather unlikely event, a potential criminal would hardly be allowed to hope for it, so that the authority of the law would not be challenged by this mere possibility. However, such a consideration misses the point of the island example. Since the earth is a globe, the islanders would inevitably come into contact with other people again after the dissolution of their state, [59] whereupon

[55] Kant (Fn. 4), AA VI, p. 363 et seq., footnote to annex explanatory notes 5: "die Strafgerechtigkeit (iustitia punitiva), da nämlich das Argument der Strafbarkeit moralisch ist (quia peccatum est), … von der Strafklugheit, da es bloß pragmatisch ist (ne peccetur) und sich auf Erfahrung von dem gründet, was am stärksten wirkt, Verbrechen abzuhalten, unterschieden werden."

[56] Like this Feuerbach, Anti-Hobbes oder über die Grenzen der höchsten Gewalt und das Zwangsrecht der Bürger gegen den Oberherrn, 1798, p. 226 footnote: "The sentence of Seneca so often used by philosophical criminologists ... is therefore true and false in different respects. It is the former when it refers to the purpose of the execution of the punishment; it is the latter when it refers to the legal ground of the same." – "Die von den philosophischen Criminalisten so oft gebrauchte Sentenz des Seneca … ist daher in verschiedenern Rücksicht wahr und falsch. Sie ist jenes, wenn sie auf den Zweck der Execution der Strafe; sie ist dieses, wenn sie auf den Rechtsgrund derselben bezogen wird."

[57] Cf. Byrd, B. Sharon, and Joachim Hruschka. "Kant zu Strafrecht und Strafe im Rechtsstaat." JuristenZeitung (2007) : 957 (960 et seqq.).

[58] Kant (Fn. 4), AA VI, p. 333: "Selbst wenn sich die bürgerliche Gesellschaft mit aller Glieder Einstimmung auflöste (z.B. das eine Insel bewohnende Volk beschlösse, auseinander zu gehen und sich in alle Welt zu zerstreuen), so müßte der letzte im Gefängnis befindliche Mörder vorher hingerichtet werden, damit jedermann das widerfahre, was seine Taten wert sind, und die Blutschuld nicht auf dem Volke hafte, daß auf diese Bestrafung nicht gedrungen hat; weil es als Teilnehmer an dieser öffentlichen Verletzung der Gerechtigkeit betrachtet werden kann."

[59] Cf. id., p. 262: "… wenn [die Erde] eine unendliche Ebene wäre, [könnten] die Menschen sich darauf so zerstreuen …, daß sie in gar keine Gemeinschaft miteinander kämen, diese also nicht eine notwendige Folge von ihrem Dasein auf Erden wäre." In detail Hruschka, Joachim. Das Erlaubnisgesetz der praktischen Vernunft und der ursprüngliche Erwerb von Stücken des Erdbodens, in: Kant und der Rechtsstaat, 2015, p. 48 (67 et seqq.).

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the foundation of a state as a postulate of reason would again arise. But how can one get involved with people who have already shown on other occasions that they do not abide by the law? In other words: The islanders have lied; why should one believe them again.

One can illustrate this line of argument by asking whether one could want "a universal law to lie", with which Kant explains the first variant of the categorical imperative [60] in the Groundwork to the Metaphysics of Morals. One could not want a general law to lie,

"Even after such a promise there would be no promise at all, because it would be in vain to pretend my will in view of my future actions to others who do not believe this pretence, or, if they did it hastily, would pay me in the same coin, so that my maxim, as soon as it was made a general law, would have to destroy itself." [61]

A law that is not applied is nothing but a lie of the legislator. Since, according to Kant, the legislator is nothing more than the entirety of the members organised in civil society, this lie is then liable as "bloodguiltiness" – like any collective guilt – to each individual member of this collective. [62]

With the island example, Kant thus wants to make it clear that the law cannot be called into question for reasons of principle. The consequence of a waiver of the execution of the sentence in the Island case would be complete lack of rights – not an acceptable alternative for Kant.

VII.: An exception only applies if the threatened coercion obviously cannot fulfil its purpose.

For a case of necessity (desculpe emergência) Kant accepts an exception from the obligation to punish a crime. Kant exemplifies this exception on the classical "plank of Karneades". [63] Even in the greatest danger to life, there can be no right to kill another in order to save one's own life. [64] For if a right of necessity is recognised – necessarily for all persons in danger of their lives – legal compulsion would be opposed to legal necessity, which is incompatible with a mutual legal relationship between free persons. Nevertheless, in such situations the control of behaviour by the law fails.

"There can be no Criminal Law assigning the penalty of death to a man who, when shipwrecked and struggling in extreme danger for his life, and in order to save it, may thrust another

60 Kant, Grundlegung zur Metaphysik der Sitten (2nd. ed. 1785), in: Kants gesammelte Schriften, vol. 4, 1911, p 385 (402): "Ich soll niemals anders verfahren als so, daß ich auch wollen könne, meine Maxime solle ein allgemeines Gesetz werden."

61 Id., p. 403: "(D)enn nach einem solchen Versprechen würde es eigentlich gar kein Versprechen gebe, weil es vergebclih wäre, meinen Willen in Ansehung meiner künftigen Handlungen anderen vorzugeben, die diesem Vorgeben doch nicht glauben oder, wenn sie es übereilterweise täten, mich doch mit gleicher Münze bezahlen würden; mithin meine Maxime, sobald sie zum allgemeinen Gesetze gemacht würde, sich selbst zerstören müsse."

62 Hruschka, Joachim, Die "Verabschiedung" Kants durch Ulrich Klug im Jahre 1968: Einige Korrekturen, Zeitschrift für die gesamte Strafrechtswissenschaft 122 (2010), p. 493 (501 et seq.), has pointed out that, according to the usage of the time, the phrase "bloodguiltiness" by no means meant something mystical, but was merely "said of those who exempt a criminal, who deserves the death penalty, from that penalty". Thus to be read in: Walch, Johann Georg. Philosophisches Lexicon, 4th ed., published by Hennings, 1775 (reprint 1968), vol. I, col. 454.

63 On its origin Aichele, Was ist und wozu taugt das Brett des Karneades? Wesen und ursprünglicher Zweck des Paradigmas der europäischen Notrechtslehre, Jahrbuch für Recht und Ethik 11 (2003), p. 245-268.

64 See Kant (Fn. 4), AA VI, p. 236: "... und gleichwohl kann es keine Not geben, welche, was unrecht ist, gesetzmäßig machte."

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from a plank on which he had saved himself. For the punishment threatened by the Law could not possibly have greater power than the fear of the loss of life in the case in question. Such a Penal Law would thus fail altogether to exercise its intended effect; for the threat of an Evil which is still uncertain—such as Death by a judicial sentence—could not overcome the fear of an Evil which is certain, as Drowning is in such circumstances. An act of violent self-preservation, then, ought not to be considered as altogether beyond condemnation (inculpabile); it is only to be adjudged as exempt from punishment (impunibile)." [65]

Kant's treatment of the act of necessity as "unpunishable (impunibile)" [66] means that the offender in a state of necessity is not held responsible for his illegal act and the legal consequences of his prohibited actions are not imputed to him. If the assertion were correct that retaliation is an end in itself, then this exception could not be explained. For the loss of the victim's life is just as unshakeable as the fact that it is a result of an unlawful act. The purpose of the whole enterprise of criminal law, even for Kant, is not the realization of some transcendental justice, [67] but rather the question of how (criminal) law can control behaviour and thus protect freedom.

VIII.: The contrast between retribution and prevention theory is a pseudo problem.

According to the considerations so far, the conflict between retribution and prevention theory, at least as far as Kant is concerned, turns out to be a pseudo problem. Every legal norm, not just a criminal law, is intended to influence the behaviour of the norm addressees and therefore has a preventive effect. However, legal norms must also be applied – or they are not law. By imposing punishment, the state demonstrates that it is serious and will continue to respond to crimes accordingly in the future. If a constitutional state is the epitome of a legal order, it ceases to be a constitutional state if it does not apply its laws.

The criminal laws and their execution are thus intended to prevent future crimes by offering potential perpetrators the prospect of an evil that will occur if necessary. Prevention is therefore not without retribution. [68] Prevention, however, is only an uncontrollable side effect of criminal law and punishment, because the driving forces behind someone's actions can only be analysed theoretically, but not determined practically. Perhaps this is precisely what shows the liberal nature of the rule of law: that it renounces the claim to be a moral reformatory.

65 Id., p. 235: "Es kann nämlich kein Strafgesetz geben, welches demjenigen den Tod zuerkennte, der im Schiffbruche, mit einem anderen in gleicher Lebensgefahr schwebend, diesen von dem Brette , worauf er sich gerettet hat, wegstieße, um sich selbst zu retten. Denn die durchs Gesetz angedrohte Strafe könnte doch nicht größer sein als die des Verlustes des Lebens des ersteren. Nun kann ein solches Strafgesetz die beabsichtigte Wirkung gar nicht haben; denn die Bedrohung mit einem Übel, was noch ungewiß ist (dem Tode durch den richterlichen Ausspruch), kann die Furcht vor dem Übel, was gewiß ist (nämlich dem Ersaufen) nicht überwiegen."

66 Id., p. 236.

67 Not: "metaphysical" justice. Justice has nothing to do with metaphysics, unless one advocates an extreme natural law doctrine according to which all things carry their standard of justice within themselves and thus "right" and "wrong" are no more than empirical properties. Kant, however knows very well the difference between 'Is' and 'Ought', so that this accusation is pure nonsense with regard to his theory of punishment.

68 See also Ripstein (Fn. 21), p. 237 et seqq., 247 seq.

69 Kant (Fn. 4), AA VI, p. 332: "Welche Art aber und welcher Grad der Bestrafung ist es, welche die öffentliche Gerechtigkeit sich zum Prinzip und zum Richtmaße macht? Kein anderes als das Prinzip der Gleichheit. … Nur das Wiedervergeltungsrecht (ius talionis) … kann die Qualität und die Quantität der Strafe bestimmt angeben."

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IX.: The degree of punishment depends on the wrong and guilt and is therefore contingent.

With regard to the level of penalties, Kant advocates a rigorous principle of talion.

"But what is the mode and measure of Punishment which Public Justice takes as its Principle and Standard? It is just the Principle of Equality … This is the Right of Retaliation (jus talionis); and properly understood, it is the only Principle which … can definitely assign both the quality and the quantity of a just penalty." [69]

For the murderer there can therefore only be the death penalty, for robbers and thieves forced labour.[70] But even the last example no longer fits exactly, and in the case of rape or sexual child abuse, for example, Kant also sees it that way. Such crimes allow "no retaliation", "as being either impossible in itself, or as in the circumstances involving the perpetration of a penal offence against Humanity generally". [71] It is doubtful whether such a strict talion principle follows at all from the principles of Kantian legal doctrine or whether one does not – merely – have to conclude that the sentence must correspond to the extent of the injustice and guilt.

Kant's concern is above all to put an end to the arbitrariness of the judicial practice of sentencing that prevailed at the time.[72] Arbitrary punishments are contrary to the concept of criminal justice.

"Only then the criminal cannot complain that wrong is done to him, since his own evil deed draws the punishment upon himself; and he only experiences what is in accordance with the spirit, if not the letter, of the penal Law which he has broken in his relation to others." [73]

Such an assessment of punishment "in the spirit of the penal law" takes into account the fact that the offender, by committing the offence, has excluded himself to a certain extent from participation in civil society by disregarding the laws of freedom. He makes himself "incapable of being a citizen". Through the punishment he now receives just this. Thus, in Hegel's words, punishment corresponds to "the inherent nature of the injury", its "value". [74] With the punishment, therefore, the same thing is returned to the offender: Punishment is a form of exclusion from full participation through a loss of rights, which is most emphatically manifested in the prison sentence. But a fine is also an alternative, because it affects the economic basis for activity in society. The loss of freedom or property must be commensurate with the gravity of the offence.[75] In substance, this means that the punishment must be proportional to the crime [76] as a prerequisite for punishment to appear fair and not merely as arbitrary revenge. However, the concrete relationship between punishment and offence is quite obvious and depends on the cultural and social characteristics of the respective legally constituted society.

In this respect, a German criminal law scholar can only look upon Portuguese criminal law and the much more varied reaction possibilities there with a certain envious admiration. In German criminal policy, on the other hand, the principle of 'more, stricter, sharper' seems to have always prevailed.

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70 Id., p. 332 et seq.

71 Id., p. 363: "… die keine Erwiderung zulassen, weil diese entweder an sich unmöglich oder selbst strafbares Verbrechen an der Menschheit überhaupt sein würden."

72 Cf. Schaffstein, Schaffstein, Die allgemeinen Lehren vom Verbrechen in ihrer Entwicklung durch die Wissenschaft des Gemeinen Strafrechts, 1930, p. 39 et seqq.

73 Kant (Fn. 4), AA VI, p. 363: "Willkürliche Strafen für sie zu verhängen, ist dem Begriff einer Strafgerechtigkeit buchstäblich zuwider. Nur dann kann der Verbrecher nicht klagen, daß ihm unrecht geschehe, wenn er seine Übeltat sich selbst über den Hals zieht und ihm, wenngleich nicht dem Buchstaben, doch dem Geiste des Strafgesetzes gemäß das widerfährt, was er an anderen verbrochen hat."

74 Hegel, Georg Wilhelm Friedrich. Berlin 1820/21, § 101: "… Gleichheit …, in der an sich seienden Beschaffenheit der Verletzung – nach dem Werte derselben."

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Conclusion

For Kant, retaliation is therefore by no means an end in itself, but a form of legal compulsion to enforce the law. The concept of a supreme power and that of a criminal justice imply each other.[77] Not only is the rule of law a necessary condition for criminal justice, but criminal justice is also a necessary condition for the rule of law. Therefore, the study of Kant is not due to a certain nostalgia, which does not promise any gain in knowledge. Rather, one finds with him many impulses for considerations that are nowadays praised as modern and original. Perhaps the controversy over the various doctrines on the purpose of punishment is based on the fact that the concept of punishment is over-charging rather than differentiating:

Punishment is, by definition, an evil that is imposed for culpable wrongdoing. Punishment has the (communicative) meaning of rebuke. Its execution serves the purpose of prevention.

But this is not a combination theory in the usual sense, in which various set pieces are mixed together in the manner of a stew.

75 Ripstein (Fn. 21), p. 246.

76 ICf. Hörnle, Tatproportionale Strafzumessung, 1999.

77 Hruschka, Kant, Feuerbach und die Grundlagen des Strafrechts, in: Paeffgen et al. (eds.), Strafrechtswissenschaft als Analyse und Konstruktion. Festschrift für Ingeborg Puppe, 2001, p. 17