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6

Close encounter: What Kant says about criminal law and punishment

6.1 Aim and outline

Whether, how, and to what extent one can justify the use of punishment has been a longstanding discussion. The need for a justification is evident: the more 'brute' forms of power the state displays, the more pressing the justification challenge will be, and criminal law operates as a form of manifest power.[402] Hence, it is no surprise that political philosophers, including Kant, also address the issue of penal power in their strive to define legitimate political power. Kant's view of criminal law is, however, a contested issue.[403] It is, for a number of reasons, not easy to discern what view of criminal law Kant actually subscribes to, nor is it a straightforward exercise to determine how he should be interpreted on issues such as those mentioned: 'Few philosophical

402 See also 3.2 above.

403 This is not the case in Nordic criminal law scholarship, though: As shown in Chapter 2 above, there has been a general consensus that Kant holds a fairly crude hard-core retributive position.

discussions have been interpreted so variously, so condemned on some fronts, praised on others, as Immanuel Kant's theory of punishment'.[404]

There is disagreement on even the most general characteristics of his account of criminal law: It is much debated whether he really was the hard-core retributivist that he sometimes appears to be, or if he rather considered punishment as a means to an end, a kind of deterrence to provide security for rights. One can find writings that support both views, and, correspondingly, attempts in the literature to frame Kant as advocating either this or that kind of criminal law theory, or somehow merging these two perspectives.[405] Different strategies are applied to solve the apparent inherent tensions in Kant's remarks on criminal law and punishment and the debate relating to it. Thom Brooks, for instance, has suggested that Kant is a retributivist in the ethical domain, but a consequentialist in the domain of law.[406] In recent years, what are called mixed theories have also been influential.[407] Others, such as Jean-Christophe Merle, is critical of these mixed theories: Merle considers these as leaning towards retributivism after all, and suggests reconstructing Kant on Kant's own premises, resulting in a 'special deterrence' view of punishment.[408] A different approach is Greco's, claiming that Kant's critical philosophy provides space for different criminal law philosophies:

> *Die Kritizismus ist keine eindeutige Philosophie, dem nur eine Straftheorie entsprechen kann*. Viele seiner grundlegenden Konzepte sind vielmehr im höchsten Maße unklar und umstritten, so dass sie einen Spielraum für unterschiedliche Konkretisierungen offen lassen.[409]

404 Holtman (1997) p. 3. There is extensive German literature specifically focusing on the difficult topic of Kant and criminal law, see e.g., Enderlein (1985) who also points out different interpretations and their problems. See also further below in 6.8.

405 Wood (2010) p. 111 clearly considers Kant a retributivist: 'It seems to me there can be no doubt that this common [retributive] view of Kant is correct.' This view is also common in German criminal law science, see e.g., Greco (2009) pp. 73–74. For the deterrence view, see in particular Byrd (1989). See also e.g., Mosbacher (2004).

406 See Brooks (2003).

407 Cf. Merle (2000) p. 312.

408 Cf. Merle (2000) p. 325.

409 Greco (2009) p. 87.

Some have even questioned whether Kant can be said to have a theory of criminal law in any reasonable sense of 'theory'.[410] The discussion on Kant's view of criminal law tends however, to also be influenced by some of the harsh viewpoints he (apparently) advocates. As George P. Fletcher has pointed out: 'No area of Kantian thinking provokes us more than his stringent injunction of punishment'.[411] In a similar vein, Holtman claims that: 'Unquestionably, Kant's work on punishment is perplexing, at times seemingly contradictory, and for some Kantians disquieting.'[412]

In view of this, for our purposes of exploring Kant as contributor to explicate the normative foundations of Nordic criminal law, it seems well-advised to take a step out of this discussion about Kant's viewpoints. This allows us to instead devote time and effort to clarify what Kant explicitly says about criminal law. For this reason, this chapter will contain several longer quotes from Kant's discussions of criminal law and punishment. This exercise will show that grasping Kant's view of criminal law is indeed challenging, to the extent in fact, of suggesting that Kant's criminal law is not a fully thought through or finished project; that it is less capable of (directly) providing criminal law scholarship with sound foundations for criminal law. The aim of this chapter can thus be described as *negative*: it aims to show that it is indeed deeply challenging to discern in Kant's remarks about criminal law a hidden, coherent conception of criminal law that matches the level of Kant's philosophy

410 See in particular Murphy (1987).

411 Fletcher (1987) p. 432. See also e.g., Ripstein (2009) p. 300.

412 Holtman (1997) p. 3.

more generally.[413] For our part, this implies that we should take a step back to his political philosophy more generally to reconstruct a sound republican conception of criminal law, which is the aim of the remainder of this book.[414]

In accordance with this chapter's aim, I will not delve deeper into the scholarly debates on Kant's criminal law. As already mentioned, these debates have spurred different views, each emphasising different aspects of Kant's writings, while also being dependent on more underlying premises about Kant's philosophy, which would make a proper outline and view of this debate an extensive research enterprise on its own – an undertaking which is not needed for this book. Moreover, such an exercise would most likely bring us back to the starting point for this chapter: That grasping Kant's view of criminal law is challenging. At the end of the chapter, however, I will address the reception of Kant in German criminal law scholarship from the middle of the 19th century. Kant came to influence German philosophy of criminal law in various ways, with consequences also for Nordic criminal law scholarship.[415] A particular reason for delving into this is the ongoing debate between Greco's revival of Feuerbach, reconnecting us to the breach with Kant also in Nordic criminal law scholarship, and Michael Pawlik's Hegelian point of view. The latter in particular, may be said to have links to the reconstructive enterprise that we

413 In order to avoid any misunderstanding of what is said here, I do not claim: 1) that Kant did not have a (coherent) conception of criminal law and punishment, and their justification, 2) that even if he had such a (coherent) conception, the nature of his writings makes it impossible to discern it or 3) that there is nothing of relevance to us in this part of Kant's textual corpus. The claim made is only that as long as there is disagreement on these issues, we (in this project) are well advised to review what Kant says and make some observations, but then fairly quickly take a step back to what appears as a solid foundation for reasoning on these issues, i.e., to Kant's more general political philosophy. One of several reasons for making this claim is the observation made in Chapter 2 about Kant's fate in Nordic criminal law scholarship (see 2.5 in particular). If one's focus is Kant's specific (but fairly short) remarks about criminal law, one easily gets disappointed and fails to grasp the broader political philosophical project and the resources in it – which also hold relevance for debates about criminal law.

414 See also e.g., Wood (2010) p. 121: Referring to the coercion aspect of Kant's political philosophy, he claims that: 'In the context of Kant's practical philosophy, this seems to be a much better grounded justification of punishment than Kant's retributivism'.

415 See 2.3 above.

will embark on, thereby adding to the background for developing a republican account of criminal law in the remaining chapters.

In accordance with these starting points, this chapter is structured as follows: In 6.2, some general starting points about Kant's writings on criminal law and punishment are provided. In 6.3, we look at what has been a key problem in interpreting Kant, i.e., what he considers the aims of criminal law and punishment to be. As this is not easily discerned, in 6.4, we look closer at Kant's remarks on the right to punish and the concept of crime, to see if these help us capture Kant's approach to criminal law. In 6.5, the focus is on Kant's discussion of forms and amount of punishment. In 6.6, we look closer at Kant's discussion of the death penalty, an issue with which he seems to have been particularly concerned, and gather together some impression from the review of Kant's discussion of criminal law and punishment. As these sections aim to track Kant's different claims and remarks on the issue, (lengthy) quotations will be relatively frequent. The chapter ends in 6.7 with a view into German criminal law philosophy and how it has evolved after Kant, bringing us from Kant to contemporary criminal law philosophy.

6.2 Kant's discussion of criminal law and punishment: An overview

Kant mainly discusses criminal law and punishment as part of the *Rechtslehre* in *Metaphysics of Morals* (MM), in the part about public right. Here, Kant starts out with the 'Right to a state', which, after some initial observations, is followed by a section titled 'General Remarks'. This section concerns 'the effects with regard to rights that follow from the nature of the civil union'. Here, Kant discusses criminal law and punishment. Hence, Kant does not address punishment in the state of nature but considers the institution of punishment to emerge with the constitution of the state. In the state of nature, Kant only finds room for what he calls 'natural' punishment, in which 'vice punishes itself'.[416] We will reconnect to that observation below.

416 Kant (1797/1798) 6: 331.

This section of MM is organised into subsections A-E. Of these, the final section E – which is the one that concerns us – is the only one with a heading of its own, 'On the right to punish and to grant clemency'. This section, in turn, is divided into two parts, I and II, whereof I addresses the right to punish, and II is concerned with clemency. Part I is more extensive than part II – five pages, compared to only one for the second part. Clearly, however, the remarks on criminal law and punishment are not detailed, and as indicated above, they are mostly occupied with the death penalty.

Before we look further into the passages in MM on the right to punish, it should be stressed that this section of MM does not contain a full account of Kant's remarks on criminal law. There are also comments of relevance in other parts of MM, as well as in other parts of his writings, including the second critique, the *Critique of Practical Reason* (CPrR). Consider, for instance, this passage in MM, from section D, just before the right to punishment becomes the subject in section E:

> Certainly no human being in a state can be without any dignity, since he at least has the dignity of a citizen. The exception is someone who has lost it by his own *crime*, because of which, though he is kept alive, he is made a mere tool of another's choice (either of the state or of another citizen). … Even if he has become a *personal* subject by his crime, his subjection cannot be *inherited*, because he has incurred it only by his own guilt.[417]

This sets the tone for the apparently harsh view of criminals often ascribed to Kant: Crime implies the loss of all (or any) dignity, which, given Kant's general emphasis on the dignity of human beings, appears to be a quite strong statement.[418] The quote points out the availability of the criminal person as a means of society ('a mere tool for another'). At the same time, it also underscores the requirement of individual guilt for a citizen to face such a drastic consequence. But interpretive challenges quickly emerges. What Kant talks about here is primarily the loss of dignity of a citizen. Furthermore, it is not obvious that *all* criminals lose their dignity as citizens. Upon closer examination, all

417 Kant (1797/1798) 6: 330.

418 Similar statements are also found in other of Kant's work, see e.g., Kant (1793) 8: 292.

we can say for certain is that, according to this passage, Kant seems to think that some crimes, at least, result in the loss of the dignity of citizens in some form. Further challenges arise when we go into the core of Kant's discussion of criminal law in section E, which points us in direction of a complex account of criminal law and punishment.

When looking further into this, we should be mindful of the reservations made in 5.3 about the quality of MM in general. Such reservations may be particularly relevant to Kant's writings on criminal law and punishment. It is worth noting that many other topics addressed in MM, such as war, peace, and international law, had been discussed by Kant in publications prior to MM, which meant that they had also been subject to extensive interpretation and discussion, leading Kant sometimes to revise or at least develop his viewpoints. The reflections on criminal law and punishment were, for their part, seemingly his first attempts at writing about such issues, although he had addressed them in his lectures. Furthermore, Kant's repulsion towards crime seems sometimes to gain the upper hand here, contrary to the more sober reasoning in many other parts of his authorship. We should also keep in mind the state of criminal law scholarship at the time: understanding the state of the art and intellectual context that Kant related to, is often essential to understanding his argument.[419] While criminal law and punishment had been a long-standing subject for philosophy, including Enlightenment philosophy (as mentioned in 5.2, Montesquieu, for instance, paid much attention to this subject), at the time, there was nothing resembling modern criminal law philosophy and criminal law scholarship. The philosophy of criminal law was mostly, like in Kant's writings, a fragment of a larger argument, and criminal law scholarship was a fairly practical and casuistic enterprise.[420] This means that much of the later progress on concepts and principles in criminal law was not available to Kant.

419 See e.g., Maliks (2018) with regard to political philosophy.

420 See on the historical development of German criminal law science, e.g., Schaffstein (1986).

6.3 The aims of punishment: Retributive or not?

In the beginning of the previous section, we saw Kant describing the right to punish as a right that resides in the hands of the ruler, with authority to react to crimes. However, having such a right does not necessarily explain why one should make use of it. So, the question is: Should the right to punish be understood to imply a categorical duty to punish as well, or is – according to Kant – a supplementary justification required? This brings us straight to the core of the discussion of Kant's criminal law and whether this is a form of 'absolute' retributivism or a 'relative' view of criminal law and punishment oriented towards deterrence. But, as we will see, Kant himself seems to point us sometimes in one direction, sometimes in another, suggesting a more complex position on the aims of criminal law and punishment.

On this issue, we get some clues, for instance, when Kant goes on to speak of 'punishment by a court'. Here, the famous remarks appear, claiming that punishment by a court:

> … can never be inflicted merely as a means to promote some other good for the criminal himself or for civil society. It must always be inflicted upon him only *because he has committed a crime*. For a human being can never be treated merely as a means to the purposes of another or be put among the objects of rights to things: his innate personality protects him from this, even though he can be condemned to lose his civil personality. He must previously have been found *punishable* before any thought can be given to drawing from his punishment something of use for himself or his fellow citizens. The law of punishment is a categorical imperative, and woe to him who crawls through the windings of eudaimonism in order to discover something that releases the criminal from punishment or even reduces its amount by the advantage it promises, in accordance with the Pharisaical saying, 'It is better for *one* man to die than an entire people to perish.' For if justice goes, there is no longer any value in human being's living on the earth.[421]

421 Kant (1797/1798) 6: 331–332.

Whereas the first part of this quote is open to the idea of (at least) a supplementary, consequential justification of the use of the right to punish, the latter – describing punishment as a categorical imperative, suggests a retributive view, where the right to punish also implies a duty to do so. At the same time, the alternative strategy, applied by the one who 'crawls through the windings of eudaimonism', but rejected by Kant, is noteworthy: it is not at all related to something we would understand as 'punishment'. We are speaking about strategies that 'release' the criminal from the deserved punishment or 'reduce it'. This is even clearer when we proceed to an example that Kant applies, which appears as the complete substitution of punishment for something else, beneficiary to society:

> What, therefore, should one think of the proposal to preserve the life of a criminal sentenced to death if he agrees to let dangerous experiments be made on him and is lucky enough to survive them, so that in this way physicians learn something new of benefit to the commonwealth? A court would reject with contempt such a proposal from a medical college, for justice ceases to be justice if it can be bought for any price whatsoever.[422]

That one cannot *substitute punishment* for some other beneficial arrangement does not imply that (something that counts as) punishment cannot serve societal ends at all. On the contrary, parts of the previous quotation, such as 'not merely as a means', and 'drawing from his punishment something of use for himself or his fellow citizens', suggest that it can. At this point, it is also worth mentioning that in his lectures, Kant stressed the preventive effect of punishment. Here, for instance, he states: 'All punishments by authority are deterrent, either to deter the transgressor himself or to warn others by

422 Kant (1797/1798) 6: 332.

his example'.[423] But here, he also states that 'the punishments of a being who chastises actions in accordance with morality are retributive.'[424]

Then again, Kant's reasoning in the quotation above about the criminal sentenced to death seems to rely on punishment having some unique non-consequential features, which implies (at least) limits to what kinds of social benefits it can pursue. And, one should notice, in the preceding quote, the use of someone for societal benefits cannot even be used to *reduce* the punishment.

Passages in other works may seem to go even further in suggesting a strictly retributive view, such as the following quote from the CPrR:

> Finally there is in the idea of our practical reason something further that accompanies the transgression of a moral law, namely its *deserving punishment*. Now, becoming a partaker in happiness cannot be combined with the concept of a punishment as such. For, although he who punishes can at the same time have the kindly intention of directing the punishment to this end as well, yet it must first be justified in itself as punishment, that is, as mere harm, so that he who is punished, if it stopped there and he could see no kindness hidden behind this harshness, must himself admit that justice was done to him and that what was allotted to him was perfectly suited to this conduct. In every punishment as such there must first be justice, and this constitutes what is essential in this concept. Kindness can, indeed, be connected with it, but the one who deserves punishment for his conduct has not the least cause to count on this. Thus punishment is a physical harm that, even if it is not connected with moral wickedness

423 Kant (1784–1785b) 27: 286.

424 Kant (1784–1785b) 27: 286. The full passage reads: 'Punishment in general is the physical evil visited upon a person for moral evil. All punishments are either deterrent or retributive. Deterrent punishments are those which are pronounced merely to ensure that the evil shall not occur. Retributive punishments, however, are those pronounced because the evil has occurred. Punishments are therefore a means of either preventing the evil or chastising it. All punishments by authority are deterrent, either to deter the transgressor himself, or to warn others by his example. But the punishments of a being who chastises actions in accordance with morality are retributive.'

> as a *natural* consequence, would still have to be connected with it as a consequence in accordance with the principles of moral lawgiving.[425]

We should notice the claim in the first of the two quotations that '[i]n every punishment as such there must first be justice, and this constitutes what is essential in this concept'. But, punishment is there also explained as 'mere harm', and the quotations include several phrasings that seem to generate uncertainty about what Kant is actually saying here. The passage continues, and what Kant says here, is particularly difficult to discern:

> Now if every crime, even without regard to the physical consequence with respect to the agent, is of itself punishable – that is, forfeits happiness (at least in part) – it would obviously be absurd to say that the crime consisted just in his having brought a punishment upon himself and thereby infringed upon his own happiness (which, in accordance with the principle of self-love, would have to be the proper concept of all crime). The punishment would in this way be the ground for calling something a crime, and justice would have to consist instead in omitting all punishment and even warding off that which is natural; for then there would no longer be any wickedness in the action, since the harm that would otherwise follow upon it and on account of which alone the action would be called wicked would now be prevented. But to look upon all punishment and rewards as mere machinery in the hands of a higher power, serving only to put rational beings into activity toward their final purpose (happiness) is so patently a mechanism which does away with the freedom of their will that it need not detain us here.[426]

There are quite a few points to comment on in this quote, including questioning whether Kant's remarks here are valid not only for the ethical domain but also for law. Anyway, we cannot, based on these quotes, take it for granted that Kant adopts a strictly retributive position.

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425 Kant (1788) 5: 37.

426 Kant (1788) 5: 37–38.

However, an even stronger expression of (some kind of) retributive aspect of Kant's view of criminal law is the famous statement about 'blood guilt', which brings us back to the discussion of criminal law in MM. The 'blood guilt' statement is one of the most well-known passages in MM, often considered as the clearest expression of Kant's (hard-core) retributivism:

> – Even if a civil society were to be dissolved by the consent of all its members (e.g., if a people inhabiting an island decided to separate and dispersed throughout the world), the last murderer remaining in prison would first have to be executed, so that each has done to him what his deeds deserve and blood guilt does not cling to the people for not having insisted upon this punishment; for otherwise the people can be regarded as collaborators in this public violation of justice.[427]

As the many discussions of and references to this passage illustrate, it is notoriously difficult to understand. Particularly the reference to 'blood guilt' seems, at first glance at least, as a kind of (unwarranted) intrusion of religion in Kant's otherwise 'secular' reasoning. But it can also be understood, as Krista K. Thomason claims, as a symbol of justice.[428] Here, it might also be helpful to keep in mind two fundamental aspects of Kant's normative system (we will get back to the troubles with the death penalty in that regard): the right to life and the security of rights. The violation of the right to life, which does away with the victim's ability to enjoy all other rights as well, implies such a fundamental insecurity for the remains of society that it must be reacted against. This is so even if the members of the community would disperse all over the world because justice is not local, but universal, and hence insecurity also applies universally.

Arguably, preserving the civil state and the justice it provides, is the ultimate aim, not the categorical retribution in itself, which seems clear from this interesting reservation Kant later makes on the same section:

427 Kant (1797/1798) 6: 333.
428 Thomason (2021).

> – If, however, the number of accomplices (*correi*) to such a deed is so great that the state, in order to have no such criminals in it, could soon find itself without subjects; and if the state still does not want to dissolve, that is, to pass over into the state of nature, which is far worse because there is no external justice at all in it (and if it especially does not want to dull the people's feeling by the spectacle of a slaughter-house), then the sovereign must also have it in his power, in this case of necessity (*causa necessitatis*), to assume the role of judge (to represent him) and pronounce a judgement that decrees for the criminals a sentence other than capital punishment, such as deportation, which still preserves the population. This cannot be done in accordance with public law but it can be done as an executive decree, that is by an act of the right of majesty which, as clemency, can be exercised only in individual cases.[429]

This passage shows Kant's deep concern with maintaining civil society and external justice: The sovereign should (at least have the possibility to) adjust the reasoning and reactions chosen in individual cases (assuming the role of the judge) in order to protect the state as a guarantee for external justice. In other words, justice should be done, but one should also protect the presuppositions for justice being done, i.e., the state. While Kant is not clear here, in view of the general aims of the state and the emphasis on securing and guaranteeing rights, one possible way to think of this, as I will return to, is to emphasise the importance of the state *as a protector and guarantor of rights*.

Summing up so far: The passages considered in this section suggest that Kant's writings convey a rather complex view, open to criminal law and punishment serving both retributive and preventive aims. Other issues that Kant discusses, such as the right to punish and the nature of crimes, the proper forms and amount of punishment, and the death penalty, point us in the same direction.

429 Kant (1797/1798) 6: 334.

6.4 The right to punish and the nature of crime

In section E part I, Kant describes the right to punish as 'the right a ruler has against a subject to inflict pain upon him because his having committed a crime'.[430] As Kant at this point has already clarified in the previous section D, the right to punish is part of the rights of 'the supreme commander'.[431] In section E part I, he goes on to point out that the head of the state cannot be punished, all that one can do is to 'withdraw from his dominion'.[432] At this point, it is also worth taking into account Kant's view on the relation between states. In his remarks about war, Kant makes it clear that a war between independent states cannot be 'a *punitive war*', the reason being that 'punishment occurs only in the relation of a superior (*imperantis*) to those subject to him (*subditum*), and states do not stand in that relation to each other'.[433] This is of importance, as it suggests that punishment conceptually presupposes a (public) *authority*. This, in turn, invites us to ask why authority is required for punishment and what this means for our understanding of punishment in itself. If, for instance, punishment was merely a means to achieve certain beneficial effects, it is hard to see why for instance state *X* should not be able to 'punish' another state, state *Y*, by means of warfare, for instance, for previous violations committed by state *Y* against state *X*, so as to deter future violations. The reason for punishment, according to Kant, not having a role in international relations is that institutions for decisive judgement in matters of right are lacking in such situations. This, as we have seen, is the core of the move from the state of nature to the civil state. Punishment, according to Kant, can only be part of the civil state. But this line of reasoning also indicates that punishment is not a mere tool to force citizens into conformity, but rather has what we can call an aspect of normative supremacy, which connects to Kant's overall political philosophical view of the state as guardian of external freedom, if needed by the use of its monopoly of force.

This discussion of punishment and sovereignty furthermore leads us to the notion of crime in Kant's conception of criminal law, which Kant goes directly on to address. What kinds of acts qualify as crime? From the quotes

430 Kant (1797/1798) 6: 331.
431 Kant (1797/1798) 6: 328.
432 Kant (1797/1798) 6: 331.
433 Kant (1797/1798) 6: 347.

from CPrR in the previous section, it seems that Kant would not embrace the view that the need for (applying) punishment should decide what should be considered as crimes, a view often ascribed to clear-cut utilitarian positions. In the MM, something that at first glance appears as a definition of crime is introduced: 'A transgression of public law that makes someone who commits it unfit to be a citizen is called a *crime* simply (*crimen*) but is also called a public crime (*crimen publicum*); so the first (private crime) is brought before a civil court, the latter before a criminal court.'[434] The first part of this passage may seem promising: It suggests that a 'crime' is an act that makes one 'unfit' to be a citizen. This may even be read as a criminalisation principle. What is required for making someone 'unfit' to be a citizen is, however, not very clear from the quotation. But the claim does cohere with the loss-of-dignity viewpoint which we saw in a passage earlier in MM, and which – by reasoning from the serious consequence – would apparently require some level of seriousness: it seems likely that not every trivial misdoing would result in a loss of dignity.

Kant's concept of crime, however, becomes more difficult to grasp when we move on to the latter part of this quotation where Kant distinguishes between public crimes and private crimes. The public crime is characterised by being brought before a 'criminal court', while the private crime is to be brought before a 'civil court'. This in effect makes the very notion of crime in Kant's writings problematic. The term 'private crime' may, first of all, seem challenging given Kant's insistence on the superior/subordinate relation as a prerequisite for punishment, but we should keep in mind that also in these cases it is the court that judges, so it is not a contradiction. In any case, the institutional system for the different crimes is not necessarily *defining* characteristics. Actually, the entire phrasing here is quite elusive, which supports Paul Natorp's claim (also referred to in the English translation) that at this point, something of Kant's manuscript that went into print may have gone missing.[435] If so, it may be very difficult to come to terms with Kant's view of these two forms of crimes and how they are to be defined.

Kant offers, however, examples that bring some clarity. Embezzlement and fraud in buying and selling, 'when committed in such a way that the other

434 Kant (1797/1798) 6: 331.

435 See footnote by editor of the Kant-translation referring to Natorp's claim about this.

could detect it', are used as examples of private crimes, while counterfeiting money or bills of exchange, theft, and robbery, illustrate public crimes, which 'endanger the commonwealth and not just an individual person'.[436] It is added that 'they' can in turn be distinguished by whether they arise from a mean character or a violent character, but it is not clear whether 'they' refers to the private/public or solely to the different examples of public crimes. Most likely this distinction between crimes arising from mean or violent character refers to public crime, as the new distinction follows directly on the examples of public crime.

Let us, however, return to the examples of public and private crimes. Do they have anything to tell us about the how this distinction is to be understood? Both seem to 'endanger' the individual, but public crimes also endanger the public. It is not clear from the examples why this applies (only) to acts such as those referred to as examples of public crimes. Still, a key difference can be detected in Kant's examples: the private crime examples are limited to cases where the violations are 'committed in such a way that the other could detect it'. At least if we understand 'detect' here as implying an opportunity to avert the crime, this suggests a kind of division of responsibilities: Where they are committed in a way that can be detected by the victim, the individual is the one who guards his or her rights, and, if needed, abstains from making the arrangement or contract. The victim is so to speak fooled, and so the shame is (partly) on him or her. Kant more generally considers us to have duties also towards ourselves in the political realm (the first of the duties of public justice is *honeste vive)*.[437] Members of the public could, then, claim that such a violation would not happen to them, or at least feel that they (should) have a certain control over whether they would be subject to, for instance, fraud. Acts that one cannot guard oneself against, on the other hand, are equally likely to afflict any one of us and therefore, they cause public insecurity. This interpretation could give some direction to Kant's argument and view of public crime. But, of course, it does not immediately appear as convincing and much

436 Kant (1797/1798) 6: 331.

437 The importance of *honeste vive*, the duty of rightful honour, in Kant's practical philosophy has been analysed and underlined by several commentators, see e.g., Brandt (2016).

more work is needed to provide a comprehensive account of Kant's view, not to mention a satisfactory concept of crime.

We will get further indications of Kant's view later on in the section when we enter into the reasoning on the forms and amount of punishment. However, as it is of relevance to the issue of the nature of crimes as well, let us introduce it already here:

> – But what does it mean to say, 'If you steal from someone, you steal from yourself'? Whoever steals makes the property of everyone else insecure and therefore deprives himself (by the principle of retribution) of security in any possible property.[438]

Most of all, this quotation underlines the importance for Kant of *security* of rights. What kind of criminalisation principle that could be drawn from this is, however, not clear. The example is one of the core issues of Kant's political philosophy: property rights. It is not clear how far we could extend this principle with regard to, for instance, other individual rights.

6.5 The forms and amount of punishment: Proportionality

A further issue for Kant is the proper kind and amount of punishment. The answer is, in very basic terms, the principle of equality, that is, whatever you inflict upon another, you inflict upon yourself:

> But what kind and what amount of punishment is it that public justice makes its principle and measure? None other than the principle of equality (in the position of the needle on the scale of justice), to incline no more to one side than to the other. Accordingly, whatever undeserved evil you inflict upon another within the people, that you inflict upon yourself. If you

438 Kant (1797/1798) 6: 331.

> insult him, you insult yourself; if you strike him, you strike yourself; if you steal from him, you steal from yourself; if you kill him, you kill yourself.[439]

This general principle again shows Kant emphasis on justice in its most fundamental meaning. Then he adds:

> But only the *law of retribution* (*ius talionis*) – it being understood, of course, that this is applied by a court (not by your private judgement) – can specify definitely the quality and the quantity of punishment; all other principles are fluctuating and unsuited for a sentence of pure and strict justice because extraneous considerations are mixed into them.[440]

Kant's argument thus appears to support a retributive reading: All other forms of considerations than the law of retribution would imply 'extraneous' considerations being mixed into the reasoning. However, this does not clarify how we can measure the normative demerit of the crime, a point which relates to the lack of precision on the nature of crime itself, which we will return to.

Kant does not see the forms of punishment as 'fixed'. Rather, he seems to indicate many different forms of punishment, depending on the crime, as exemplified by the forthcoming lengthy quote (which has already been rendered in parts above), where Kant discusses the implications of difference in social rank for punishment:

> – Now it would indeed seem that differences in social rank would not allow the principle of retribution, or like for like, but even when this is not possible in terms of the letter, the principle can always remain valid in terms of its effect if account is taken of the sensibilities of the upper classes. – A fine, for example, imposed for a verbal injury has no relation to the offence, for someone wealthy might indeed allow himself to indulge in a verbal insult on some occasion; yet the outrage he has done to someone's love of honour can still be quite similar to the hurt done to his pride if he is constrained by judgement and right not only to apologize publicly to

439 Kant (1797/1798) 6: 332.
440 Kant (1797/1798) 6: 332.

> the one he has insulted but also to kiss his hand, for instance, even though he is of a lower class. Similarly, someone of high standing given to violence could be condemned not only to apologize for striking an innocent citizen socially inferior to himself but also to undergo a solitary confinement involving hardship; in addition to the discomfort he undergoes, the offender's vanity would be painfully affected, so that through his shame like would be fittingly repaid with like. – But what does it mean to say, 'If you steal from someone, you steal from yourself'? Whoever steals makes the property of everyone else insecure and therefore deprives himself (by the principle of retribution) of security in any possible property. He has nothing and can also acquire nothing; but he still wants to live, and this is now possible only if others provide for him. But since the state will not provide for him free of charge, he must let it have his powers for any kind of work it pleases (in convict or prison labor) and is reduced to the status of a slave for a certain time, or permanently if the state sees fit.[441]

If it concerns murder, the death penalty is the only alternative:

> – If, however, he has committed murder he must *die*. Here there is no substitute that will satisfy justice. There is no *similarity* between life, however wretched it may be, and death, hence no likeness between the crime and the retribution unless death is judicially carried out upon the wrongdoer, although it must still be freed from any mistreatment that could make the humanity in the person suffering it into something abominable. – Even if a civil society were to be dissolved by the consent of all its members (e.g. if a people inhabiting an island decided to separate and disperse throughout the world) the last murderer remaining in prison would first have to be executed, so that each has done to him what his deeds deserve and blood guilt does not cling to the people for not having insisted upon this punishment; for otherwise the people can be regarded as collaborators in this public violation of justice.[442]

441 Kant (1797/1798) 6: 332 – 333.
442 Kant (1797/1798) 6: 333.

In this discussion Kant observes that equality is not always possible 'in terms of the letter'; there can be cases where punishing like for like in strict terms would not work. In these cases, other forms of punishment can be more suitable, at least as long as we are not talking about the death penalty. Furthermore, what this lengthy passage also shows is that punishment is not only a matter of the crime committed, including against whom it is committed, but also a matter of where punishment is directed: It must, so to speak, have proper meaning not only for the punisher but also for the punished. This then suggests that punishment in Kant's account can properly be called a particular form of *normative interaction* where also the character of the punished is important. This view is also suggested by some of his remarks on the death penalty (to be further discussed in the next section):

> This fitting of punishment to the crime, which can occur only by a judge imposing the death sentence in accordance with the strict law of retribution, is shown by the fact that only by this is a sentence of death pronounced on every criminal in proportion to his *inner wickedness* (even when the crime is not murder but another crime against the state that can be paid for only by death). – Suppose that some (such as Balmerino and others) who took part in the recent Scottish rebellion believed that by their uprising they were only performing a duty they owed the House of Stuart, while others on the contrary were out for their private interests; and suppose that the judgement pronounced by the highest court had been that each is free to make the choice between death and convict labor. I say that in this case the man of honor would choose death, and a scoundrel convict labor. This comes along with the nature of the human mind; for the man of honor is acquainted with something that he values even more highly than life, namely *honor*, while the scoundrel considers it better to live in shame than not to live at all (*animam praeferre pudori. Iuven*). Since the man of honor is undeniably less deserving of punishment than the other, both would be punished quite proportionately if all like were sentence to death; the man of honor would be punished mildly in terms of his sensibilities and the scoundrel severely in terms of his. On the other hand, if both were sentenced to convict labor the man of honor would be punished too severely and the other too mildly for his vile action. And so here too, when sentence is pronounced on a number of criminals

> united in a plot, the best equalizer before justice is *death*. – Moreover, one has never heard of anyone who was sentenced to death for murder complaining that he was dealt with too severely and therefore wronged; everyone would laugh in his face if he said this. – If his complaint were justified it would have to be assumed that even though no wrong is done to the criminal in accordance with the law, the legislative authority of the state is still not authorized to inflict this kind of punishment and that, if it does so, it would be in contradiction with itself.[443]

Kant's point of a man of honour opting for death because he is 'acquainted with something that he values even more highly than life', shows how the meaning of punishment should be understood in reference (also) to what it means to the criminal who is punished and his status.

In general, the discussion of Kant's concept of punishment is a good illustration of the complex relationship between principle and application in Kant's political philosophy. The quoted example seems to go far into the application point of view, while the principle informing this application is not very clearly spelled out. Thus, it might be that Kant's argument can be reconstructed by bringing out the principles behind the applications, and, at other points, giving more space for the issue of application. This will be a central topic in the next chapter.

6.6 More on the death penalty

As already shown, much of Kant's reasoning on criminal law and punishment concerns the death penalty, which was widely debated at the time. While regarded as a more or less obvious part of the institution of criminal law and punishment, it had come to be questioned and was, for instance, subject to critique from Beccaria and the Enlightenment thinkers, leading to arguments of its abolishment.[444] Kant, however, was not among those advocating reform

443 Kant (1797/1798) 6: 332–333.

444 On Beccaria in the Nordics, see Björne (1995) pp. 317–326.

and abolishment of the death penalty.[445] On the contrary, we have already seen proof of Kant advocating the death penalty, underlining the strong retributive aspect of Kant's theory. Further supporting such as interpretation are the claims, for instance, that 'every murderer – anyone who commits murder, orders it, or is an accomplice in it – must suffer death; that is what justice, as the idea of judicial authority, wills in accordance with universal laws that are grounded a priori'.[446]

Kant's discussion of the death penalty makes up a central part of the entire section on criminal law and punishment. Beccaria is, as mentioned, the target of Kant's discussion.[447] First, Kant refers to Beccaria's argument:

> In opposition to this the Marchese Beccaria, moved by overly compassionate feelings of an affected humanity (*compassibilitas*), has put forward his assertion that any capital punishment is wrongful because it could not be contained in the original civil contract; for if it were, everyone in a people would have to have consented to lose his life in case he murdered someone else (in the people), whereas it is impossible for anyone to consent to this because no one can dispose of his own life.[448]

Kant's judgment of Beccaria's social contract argument is harsh:

> This is all sophistry and juristic trickery. No one suffers punishment because he has willed *it* but because he has willed a *punishable action*; for it is no punishment if what is done to someone is what he wills, and it's impossible *to will* to be punished. – Saying that I will to be punished if I murder someone is saying nothing more than that I subject myself together with everyone else to the laws, which will naturally also be penal laws if

445 As a consequence, in Denmark-Norway, Beccaria was criticised also by the Kant-devotee Schlegel, see 2.3. But Beccaria's viewpoints were rejected also by Ørsted, by reference to Feuerbach's theory of punishment, see Björne (1995) pp. 322–323 and Björne (1998) pp. 381–403, for a broader analysis of the discussion about the death penalty in the Nordics in the 1800's.

446 Kant (1797/1798) 6: 334.

447 The questions have however been raised whether Beccaria actually was against the death penalty, see Greco (2009) p. 71.

448 Kant (1797/1798) 6: 335.

> there are any criminals among the people. As a colegislator in dictating the *penal law*, I cannot possibly be the same person who, as a subject, is punished in accordance with the law; for as one who is punished, namely as a criminal, I cannot possibly have a voice in legislation (the legislator is holy). Consequently, when I draw up a penal law against myself as a criminal, it is pure reason in me (*homo noumenon),* legislating with regard to rights, which subjects me, as someone capable of crime and so as another person *(homo phaenomenon*), to the penal law, together with all others in a civil union. In other words, it is not the people (each individual in it) that dictates capital punishment but rather the court (public justice), and so another than the criminal; and the social contract contains no promise to let oneself be punished and so to dispose of oneself and one's life. For, if the authorization to punish had to be based on offender's *promise*, on his *willing* to let himself be punished, it would also have to be left to him to find himself punishable and criminal would be his own judge. – The chief point of error … in this sophistry consists in it confusing the criminal's own judgement (which must necessarily be ascribed to his *reason*) that he has to forfeit his life with a resolve on the part of his will to take his own life, and so in representing as united in one and the same person the judgement upon a right and the realization of that right.[449]

Once again one may speculate whether his loathing for acts such as murder, and people who commit them, made Kant move a bit too fast in his own argument. Even if Beccaria's argument should not hold, this is not necessarily sufficient to justify the use of death as punishment. Even if it is not the *homo phaenomenon*, i.e. the actual individual, but the rational *homo noumenon* who is to consider the justifiability of this kind of punishment, this does not exclude the possibility of the *homo noumenon* itself rejecting it. Kant's argument, then, seems to rely heavily on another premise, as mentioned above, that by committing a crime, the human being loses its dignity, and particularly so if the crime is murder. However, Kant does not really justify this view. Interestingly, also, Kant seems to recognise certain limitations to the death penalty even for murder, relating to the societal context from which the crimes arise. This

449 Kant (1797/1798) 6: 335.

seems to be a part of Kant's reasoning on criminal law and punishment that receives less attention. However, these passages are arguably quite powerful:

> There are, however, two crimes deserving of death, with regard to which it still remains doubtful whether *legislation* is also authorized to impose the death penalty. The feeling of honor leads to both, in one case the *honor of one's sex*, in the other *military honor,* and indeed true honor, which is incumbent as duty on each of these two classes of people. The one crime is a mother's *murder of a child* (*infanaticidium maternale*); the other is *murdering a fellow soldier* in a *duel* (*commilitonicidium*) – Legislation cannot remove the disgrace of an illegitimate birth any more than it can wipe away the stain of suspicion of cowardice from a subordinate officer who fails to respond to a humiliating affront with a force of his own rising above fear of death. So it seems that in these two cases people find themselves in the state of nature, and that these acts of *killing* (*homicidum*), which would then not have to be called murder (*homicidum dolosum*), are certainly punishable but cannot be punished with death by the supreme power. A child that comes into the world apart from marriage is born outside the law (for the law is marriage) and therefore outside the protection of the law. It has, as it were, stolen into the commonwealth (like contraband merchandise), so that the commonwealth can ignore its existence (since it was not right that it should have come to exist in this way), and can therefore also ignore its annihilation; and no decree can remove the mother's shame when it becomes known that she gave birth without being married. – So too, when a junior officer is insulted he sees himself constrained by the public opinion of the other members of his estate to obtain satisfaction for himself and, as in the state of nature, *punishment* of the offender not by law, taking him before a court, but by a *duel*, in which he exposes himself to death in order to prove his military courage, upon which the honor of his estate essentially rests. Even if the duel should involve *killing* his opponent, the killing that occurs in this fight which takes place in public and with the consent of both parties, though reluctantly, cannot strictly be called *murder* (*homocidium dolosum*).[450]

450 Kant (1797/1798) 6: 335–336.

Kant has thereby introduced two problematic cases for the criminal law, which need to be dealt with:

> – What, now, is to be laid down as right in both cases (coming under criminal justice)? – Here penal justice finds itself very much in quandary. Either it must declare by law that the concept of honor (which is here no illusion) counts for nothing and so punish with death, or else it must remove from the crime the capital punishment appropriate to it, and so be either cruel or indulgent.[451]

The problem is, in other words, that the social context and its idea of honour challenge the demands of justice *a priori*. Recognising the one would undermine the other, so either societal norms or rational norms would be breached. His solution is this:

> The knot can be undone in the following way: the categorical imperative of penal justice remains (unlawful killing of another must be punished by death); but the legislation itself (and consequently also the civil constitution), as long as it remains barbarous and undeveloped, is responsible for the discrepancy between incentives or honor in the people (subjectively) and the measures that are (objectively) suitable for its purposes. So the public justice arising from the state becomes an *injustice* from the perspective of the justice arising from the people.[452]

So, what does Kant actually say here? One way to interpret him, and here we have to remember that he considers legislation *not* warranted to authorise death for these two crimes, is that he considers the social situation – 'barbarous and undeveloped as it is' – as pushing the citizen into a conflict with justice and therefore, the state, which is ultimately responsible for this situation and its reform. Therefore, the citizen cannot be fully held accountable.

Finally, it is worth noting Kant's use of the notion of 'state of nature' in the first of these three quotes. As we will return to, while the state of nature is left

451 Kant (1797/1798) 6: 336.

452 Kant (1797/1798) 6: 336–337.

behind on a broad scale upon entering into civil society, it may still be useful to think in terms of the individual finding themselves in state of nature-like situations, that is, where the state and its lawful force do not reach.

Approaching the end of our discussion of Kant's writings about criminal law: As suggested in the introduction to this chapter, Kant's discussion of criminal law cannot be said to be well elaborated or clear, and the best we can say about it is perhaps that it is very complex. Hence, one should not be surprised by the debate it has spurred. It seems clear that Kant does not provide us with a comprehensive criminal law philosophy. This does, however, not mean that the analysis in this chapter has been in vain: At least we have seen that Kant's view of criminal law is not easily discerned, which also implies that the rash rejection of it often seen in Nordic criminal law is dubious.[453] The broad rejection of Kant displayed in Nordic criminal law scholarship appears more as an ideological rejection of 'metaphysical retributivism' than as an informed assessment of Kant (or retributivism in general, for that matter). Also, despite its lacks, Kant's criminal law points out premises, perspectives, and challenges for a philosophy of criminal law.[454] His role in German criminal law science testifies to that.

6.7 After Kant: Some remarks on modern German criminal law philosophy

Before reconstructing a republican philosophy of criminal law, it seems pertinent to bring modern German criminal law science into our discussion. There are several reasons why we should do so (here): The German criminal law science has for some time now been deeply engaged in the justification of criminal law, which also provides a prominent background for the

453 See 2.5 above.

454 See also, e.g., Enderlein (1985) p. 327; 'Kant hat die Kernfrage jeder Straftheorie, die er selber aufgeworfen hat, nicht überzeugend beantwortet: Wie kann die Strafe dem Verbrecher gegenüber gerechtfertigt werden, ohne ihn zum Objekt gesellschaftlicher Nützlichkeitserwägungne [sic] herabzuwürdigen. Immerhin ist es Kant gelungen, diesem Problem eine vor ihm noch nie erreichte Schärfe zu verleihen. Darin liegt kein geringes Verdienst seiner Lehre von der Strafe im Staat.'

development of Nordic criminal law scholarship.[455] The German discussion offers several important viewpoints and premises which will be applied in the final chapters of this book. But there is also a reason relating to Kant that justifies the inclusion of the German discussion in this chapter: Much of this discussion can (in one perspective, at least) be read as responses to Kant's philosophy and viewpoints. As this is often made explicit, the German discussion shows the relevance of Kant to contemporary criminal law scholarship – contrary to the impression one may easily get from Nordic criminal law scholarship. However, only some brief remarks about German criminal law science may be offered here.[456]

German criminal law science after Kant has been framed by in particular two, somewhat different, contributors. One of them is Feuerbach, himself a core contributor to and figure in German criminal law science.[457] Starting out from Kant's philosophy, Feuerbach developed a highly influential deterrence theory where the purpose of criminal law was the deterring effect of the threat of punishment, combined with a consent from the offender to actually be punished for his crime (a necessary follow up on the threat itself). At the heart of Feuerbach's philosophy of criminal law was his sharp distinction between morality (i.e., ethics) and law, which must be seen in connection with his interpretation of Kant's *homo noumenon* and *homo phenomenon* as clearly demarcated domains.[458] Feuerbach influenced German criminal law

455 See 2.3–2.5 above.

456 The development of German philosophy of criminal law are often outlined by contributions to this discussion, as well as in legal historical works, such as Vormbaum (2009). Recently, the German discussion has also been outlined in some English texts, see e.g., Dubber (2005b) and Dubber (2006). Outlining the German discussion is challenging as central contributors, such as Liszt, are subject to a range of different interpretations and extensive debates in themselves. Also for that reason, the discussion here is limited to some fairly uncontroversial starting points and references to central works and outlines.

457 See e.g., Greco (2009) p. 32 and Hörnle (2014) p. 120: 'praised as one of the founding fathers of modern criminal law science'.

458 For Feuerbach's theory of criminal law and punishment, see in particular Feuerbach (1799/1800). See also the overview in Greco (2009) pp. 34–73, and for a comparison of Kant and Feuerbach, Brandt (2014). Furthermore, see Hilgendorf (2014) who plays down the 'Kantian' aspect of Feuerbach, emphasising instead the influence of French Enlightenment political philosophy.

and criminal law science in different ways, including through his own textbook on criminal law, *Lehrbuch des gemeinen in Deutschland gültigen Peinlichen Rechts*, as well as his legislative works, such as the Bavarian criminal code of 1813. Similarly to the influence of Feuerbach himself in Nordic criminal law scholarship, this code became highly influential and a model for e.g., the Norwegian criminal code of 1842.[459]

The other core contributor to German criminal law science is Hegel, who was not, as opposed to Feuerbach, a part of the discipline itself, but still became very influential within it. Hegel was critical of Feuerbach's viewpoints, describing it as lifting a stick to a dog, a violation of the dignity of rational beings.[460] Instead, Hegel advocated what has been known as a distinct retributive point of view where the offender even has the right to be punished.[461] Hegelian philosophy of criminal law came to dominate German criminal law science until the turn of the 20th century. Hegelian viewpoints were for instance advocated by Albert Friedrich Berner (1818–1907).

Viewpoints from both the two key contributors could be seen in the classical school of criminal law, with Adolf Merkel (1836–1896) as one central contributor.[462] Not only deterrence viewpoints, but also themes such as guilt, proportionality, and retribution were central to this classical school of law, which more generally can be seen as expressions of the *Rechtsstaats*-ideology that emerged with Kant. But its contributors also emphasised the authority of the state. Karl Binding, for instance, has been viewed as a 'Wortführer eines autoritären, obrigkeitsstaatlichen (Straf-)Rechtsverständnisses'.[463] But Binding's philosophy of criminal law is complex in this regard, founded on a general

459 See also 2.3 above. With regard to our interest in the normative foundation of Nordic criminal law, it may here be of relevance to add that Feuerbach's code is even considered as 'die Geburt liberalen, modernen und rationalen Strafrechts', see Koch et al. (2014), key words used by Nordic criminal law scholars to characterise Nordic criminal law.

460 Hegel (1821) § 99.

461 See Hegel (1821) § 99.

462 Merkel was also influential in the Nordics through the works of Hagerup, see 2.3 above.

463 For an overview of Binding's philosophy of criminal law, see e.g., Pawlik (2020), quotation from p. 113.

conception of law as 'Ordnung menschlicher Freiheit', with the aim of human freedom 'in höchst möglichem Umfange sicher zu stellen'.[464]

Modernity emerged, and with it positivism as the dominant theory of science, which generally starts out from a conception and recognition of theoretical reason, while rejecting practical reason and hence normativity – not unlike the way Ross and the Uppsala school split Kant's thinking in two and left aside his conception of practical reason.[465] In Germany, this development initiated the famous *Schulenstreit* in German criminal law science between the classical and modern (sometimes called positivistic or sociological) school of criminal law.[466] Liszt advocated a kind of threefold social defence utilitarianism, consisting of the rehabilitation of eligible offenders, deterrence of 'average' offenders, and incapacitation of dangerous offenders.[467]

Later, the so-called neo-Kantian school of criminal law made their mark, before Hans Welzel (1904–1977) gained influence through his phenomenology-inspired finalism, reconnecting to Pufendorf's natural law theory, however focused on the doctrine of criminal responsibility.[468] The enactment of Germany's *Grundgesetz* (1949) provided the discussion with a new, constitutional framing, leading to views of criminal law that, on the one hand, had to respect the basic rights in the constitution, with its principle of guilt and Kantian concept of the dignity of human beings, and on the other, were intended to serve social interests in preventing crime and protecting the public. In various ways, these perspectives found their way into criminal law scholarship.[469] In this post-war epoch, forms of 'unification theories', attempting to pay attention to different points of view, thereby came to play a significant role.[470] Also

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464 Binding (1916) p. 52, quoted from Pawlik (2020).

465 See 2.3 above.

466 See in this regard, e.g., Küpper (2003).

467 Of particular importance here was Liszt's 'Marburger Programm', see Liszt (1882).

468 See Welzel (1969). Regarding the 'neo-Kantian' school, see Ziemann (2009).

469 See for instance Jescheck/Weigend (1996) pp. 21–28 on the three 'Grundsätze der Kriminalpolitik'; 'der Schuldgrundsatz', 'der Grundsatz der Rechtsstaatlichkeit' and 'der Grundsatz der Humanität'.

470 See e.g., Küpper (2003) p. 54 claiming that '[d]ie überwiegende Auffassung in der Strafrechtswissenschaft neigt einer „Vereingungstheorie" zu, die möglichst alle Elemente in sich aufnehmen soll'. An overview and classification can be found e.g., in Montenbruch (2020) pp. 78–124.

central was the concept of positive general prevention gaining traction, as a response to Hegel's critique of Feuerbach's deterrence theory. To solve this problem, the focus turned towards the integration of social norms in terms of the citizen's recognition of the norms and hence respect for these.[471] This viewpoint, which has connections to the Nordic theory of positive general prevention, has had significant impact. But there are different forms of it, including Günther Jakob's functionalist point of view where the cognitive reaffirming of norms is a central tenet.[472]

Highly influential is also the teleological school of criminal law advocated by Claus Roxin, which emphasises a distinction between the deterrence aim of criminal law and the limits for criminal law. Similar viewpoints can be found in Greco's more recent reappraisal of Feuerbach.[473] Relatable to Roxin, but more principled in its approach were the contributions from the Frankfurt school of criminal law, including Winfried Hassemer and Wolfgang Naucke, the latter often engaged in Kant's philosophy.[474] Hassemer, notably, advocated ideas closely resembling those of Jareborg and his 'defensive criminal law' ideology, as mentioned above in Chapter 2, a key expression of Nordic criminal law.

Furthermore, there has also been a strong retributive branch of German criminal law science and even a 'Renaissance des Vergeltungsdenken'.[475] There are certainly several different retributive positions in this discussion,[476] but one branch of German retributive viewpoints, at least, is clearly influenced by Kantian viewpoints, including Michael Köhler's works.[477] In a similar vein, we find Pawlik's Hegelian freedom theory of criminal law ('eine freiheitstheoretisch reflektierte Strafbegründung'), seeing punishment as a retributive response to violations of the citizen's duty to participate ('Mitwirkungspflicht'): 'Ein Verbrechen zu begehen bedeutet danach, die Bürgerpflicht

471 See, for instance, Hörnle (2011) pp. 25–28 for a short overview.

472 See Jakobs (1992).

473 Greco (2009).

474 See e.g., Hassemer (2000) and Naucke (2000).

475 See Pawlik (2012) p. 87.

476 See also Hörnle (2011) p. 15 about what she describes as a problem in the German discussion; the strict identification with 'absolute' theories of criminal law with the views of Kant and Hegel.

477 See Köhler (1997) pp. 9 ff.

zu verletzen, an der Aufrechterhaltung des bestehenden *Zustandes rechtlich verfaßter Freiheitlichkeit* mitzuwirken, und die Strafe vergilt einen Bruch dieser Verpflichtung'.[478]

This leaves us with a contemporary German criminal law philosophy as a many-faceted and vivid discussion with a broad range of positions feeding into it, of relevance to the discussion in the following chapters. This discussion is in itself an objection to the claim that 'ideologies' of criminal law cannot be studied and rationally discussed, as argued by Greve in Nordic criminal law science, for instance.[479] Moreover, Kant remains a central and productive reference point for contributions to this tradition, suggesting that we are well advised not to put aside Kant, despite the challenges faced in this chapter with regard to interpreting his philosophy of criminal law.[480] Kantian influence may even be seen in the parts of German criminal law science that has been most closely connected to the Nordic discussion: the Frankfurt school of criminal law.[481]

Finally, one particularly important observation to be drawn from this discussion is the critique that can be directed towards attempts to juxtapose different rationales – in terms of combining consequentialist purposes and deontological limits to criminal law – without a proper explanation of their inner relation. As aptly pointed to by Pawlik's comment to Greco's theory of this kind:

> Diese Konzeption … ist auf den ersten Blick nicht ohne Eleganz. Der Preis, den sie von ihren Anhängern fordert, ist allerdings ebenfalls nicht gering. Er besteht in der Preisgabe des Anspruchs auf axiologische Geschlossenheit. …

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478 Pawlik (2012) p. 23, further elaborated by Pawlik at pp. 82 ff.

479 See 2.4 above.

480 See correspondingly in Germany, where Joachim Hruschka has challenged the basis for Ulrich Klug's '*Abschied von Kant und Hegel*', see respectively Klug (1968) and Hruschka (2010), and also the later exchange between Hruschka (2012) and Klaus Lüderssen in Lüderssen (2011) on this issue. See also e.g., Greco (2009), who considers a weakness in Feuerbach's criminal law philosophy that it fails to account for the importance of 'umstößlichen deontologischen, rechtsmoralischen Schranken' (p. 140), and at that point turns to Kant as reference for what Greco coins the '*Instrumentalisierungsverbot*' (pp. 160 ff.).

481 This I have discussed previously, see Jacobsen (2009a) pp. 493 ff.

> Die Forderung nach begründungstheoretischer Konsistenz einer Straftheorie entspringt nicht den ästhetischen Luxusbedürfnissen weltflüchtiger Theoretiker, sondern dem Respekt gegenüber den von der Verhängung einer Strafe betroffenen Delinquenten. … Wer einen der empfindlichsten Eingriffe dulden soll, die unsere Rechtsordnung kennt – die Strafe –, darf deshalb verlangen, daß ihm dafür eine Begründung gegeben wird, deren einer Teil nicht die Prämisse des anderen Teils dementiert.'[482]

Kant, on a more general level, also stressed the importance of providing a complete and coherent line of reasoning in science in particular:

> If a science is to be advanced, all difficulties must be *exposed* and we must even *search* for those, however well hidden, that lie in its way; for, every difficulty calls forth a remedy that cannot be found without science gaining either in extent or determinateness, so that even obstacles become means for promoting thoroughness of science. On the contrary, if the difficulties are purposely concealed or removed merely through palliatives, then sooner or later they break out in incurable troubles that bring science to ruin in a complete skepticism.[483]

This, then, also poses a challenge for Nordic criminal law scholarship and its pragmatic tradition for acknowledging the relevance of different considerations, without fully accounting for their relevance and inner relation. This, however, is not to say that a philosophy of criminal law cannot be complex. Actually, the discussion pertaining to Kant's criminal law as well as the recurring historical shifts in criminal law philosophy more generally, suggest that an adequate philosophy of criminal law would have to be complex.[484]

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482 Pawlik (2012) p. 86. See also e.g., Pawlik's critique of Roxin and 'die Knappheit, mit der er nach wie vor die Rechtsphilosophischen Grundlagen seiner Konzeption abhandelt. … Was ihnen indessen nicht selten fehlt, ist eine systematisch überzeugende Verzahnung ihrer einzelnen Teilkomponenten' (pp. 50–51).

483 Kant (1788) 5: 103.

484 See also Hörnle (2011) p. 60, concluding that '[e]ine Straftheorie, die mit einem *einzigen Grundgedanken* auskommt, kann nicht in überzeugender Weise entwickelt werden'.