Source: Foundational Texts in Modern Criminal Law (Markus D. Dubber ed., OUP 2014)

APPENDIX D

On the Theory of Enemy Criminal Law*

*Günther Jakobs***†

Introduction

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

A. Introduction: two basic concepts

I. LEGAL COERCION

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

* Original German version published as "Zur Theorie des Feindstrafrecht" in Henning Rosenau and Sanyun Kim (eds), *Straftheorie und Strafgerechtigkeit* (Augsburger Studien zum Internationalen Recht, 2010) vol 7, 167–82.

** Former Professor of Criminal Law and Legal Philosophy, Universität Bonn (em. 2002).

† The text was translated by Raymond Youngs, and revised by Markus Dubber, for *Foundational Texts in Modern Criminal Law* (2014), available at: <www.oup.com/uk/law/foundational-texts>. In this text, Jakobs presents his account of the distinction between enemy and citizen criminal law within the context of a wideranging response to critics. For an earlier statement, see "Bürgerstrafrecht und Feindstrafrecht" (2004) HRRS 88, available at: <www.oup.com/uk/law/foundational-texts>. Work on this project was supported by a grant from the Social Sciences and Humanities Research Council of Canada.

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

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

[3] *Kant* (fn 2), p 337 (=B33).

[4] *Kant* (fn 2), p 338 (=B35).

[5] On the following text: *G Jakobs*, Legal coercion and personhood, 2008, pp 9 ff.

person amounts to conceptually *in relation to this person*.[6] Although *Kant* gives a formal interpretation: "coercion" as "a hindrance or resistance which occurs to liberty,"[7] what happens to the person who is coerced?[8]

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

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

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

[7] *Kant* (fn 2), p 338 (=B35).

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

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

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

[11] *Hegel*, as fn 10.

[12] In somewhat greater detail, *Jakobs*, as fn 5.

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

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

II. ORIENTATION TO LEGAL INSTITUTIONS

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

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

[14] References in *Morguet*, Enemy criminal law—a critical analysis, 2009, p 257 fn 1295.

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

[16] On this *Pawlik*, The terrorist and his law. On the legal classification of modern terrorism, 2008, pp 38 ff.

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

[18] *G Jakobs*, Enemy criminal law?—An investigation of the conditions of legality, HRRS 2006, pp 289 ff., 291.

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

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

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

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

REGARDING I. AND II.

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

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

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

B. Policification [Verpolizeilichung]

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

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

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

[25] For detail on the history of the measures, *Desseker*, Danger and proportionality, 2004.

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

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

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

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

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

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

[29] *G Roellecke* The constitutional state in the struggle against terror, JZ 2006, pp 265 ff, 265.

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

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

[32] Formation of a terrorist organization. [33] Carrying out training to be a terrorist.

[34] See already *Schroeder*, Criminal acts against criminal law, 1985, p 29.

[35] *Pawlik* (fn 16) p 43.

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

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

C. Enemy criminal law

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

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

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

[37] That follows amongst other things from *Pawlik's* observations on the prohibition of exploitation in criminal procedure ([fn16] p 46).

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

[39] See fn 27.

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

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

[42] *Jakobs* (fn 27) p 52. …

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[51] *Bung* (fn 20) p 64; *G Jakobs*, Criminalization (fn 41) p 752.

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

[53] On this *G Jakobs*, Falsification of documents. Revision of a crime of deceit, 2000, pp 89 ff.

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

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

[56] *Jakobs* (fn 27) p 53.

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

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

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

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

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

D. Conclusion

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

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

[58] *Jakobs*, as in fn 56, and frequently.

[59] Enemy criminal law as "limited war": *Jakobs* (fn 15) p 92; *the same* (fn 18) p 44; against this *Pawlik* (fn 16) p 40.

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

[61] In more detail *Jakobs* (fn 5) pp 41 ff; Terrorists as persons in law? ZStW 117 (2005) pp 839 ff, 843.

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

[63] *Saliger* (fn 54) p 762.

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

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

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

[65] *Jakobs* (fn 27) p 53.

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