APPENDIX A

Textbook of the Common Penal Law in Force in Germany*

*Paul Johann Anselm Feuerbach***†

PREFACE TO THE FIRST EDITION 1801

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

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

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

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

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

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

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

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

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

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

§ 1

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

[Footnotes omitted]

§ 2

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

[Footnotes omitted]

§ 3

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

[Footnotes omitted]

§ 4

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

[Footnotes omitted]

§ 5

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

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

[Footnotes omitted]

§ 6

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

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

[b] Knowledge of the best literature of natural law is assumed from the lectures on this science.

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

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

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

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

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

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

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

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

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

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

§ 7

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

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

[i] Besides the well known glossaries by Wachter, Haltaus and Scherz, in particular *C F Walch* Glossarium germanicum interpretationi C C C inserviens, Jena 1790.

[k] *J Fr Eisenhart's* Principles of German law in maxims etc published by Ernst L A Eisenhart, Leipzig 1792, division V, pp 441–505.

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

[b] *Anton Matthaei* De criminibus ad Libr. XLVII and XLVIII. Dig. Commentarius edit. noviss. c. notis Nani Tomi II, Ticini 1803.—*D Classenii* Commentarius in C C C etc, Leipzig 1718.—*J P Kress* Commentatio succinta in C C C etc, ed. nov. Hannover 1786.—*J S Fr Böhmer* Meditiones in C C C Halle 1774.

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

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

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

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SCIENTIFIC PRESENTATION OF PENAL LAW ITSELF

FIRST BOOK

PHILOSOPHICAL OR GENERAL PART OF PENAL LAW

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

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

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

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

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

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

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

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

I.

INTRODUCTION

ACCOUNT OF THE HIGHEST PRINCIPLES OF CRIMINAL LAW

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

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

Against the theory described in the writings mentioned, especially:

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

Besides this, the following are included here:

Schneider Concerning the principle of criminal law, Giessen 1806.

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

A von Bothmer The concept of punishment, Berlin 1808.

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

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

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

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

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

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

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

H Cock De fine poenis proposito, Groningen 1819.

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

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

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

[§ 7 a (by editor) omitted]

I. NECESSITY OF PSYCHOLOGICAL COERCION IN THE STATE

§ 8[a]

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

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

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

§ 9

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

§ 10

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

§ 11

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

§ 12

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

II. POSSIBILITY OF SUCH A PSYCHOLOGICAL COMPULSION

§ 13

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

§ 14

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

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

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

§ 15

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

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

§ 16

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

§ 17

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

§ 18

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

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

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

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[a] The detailed description of this legal reason orally. Compare *Feuerbach* Concerning punishment as a security measure etc pp 92–118.

* * *

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

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

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

III. HIGHEST PRINCIPLES OF PENAL LAW

§ 19

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

§ 20

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

I) *Every infliction of a punishment presupposes a criminal statute (Nulla poena sine lege [no penalty without law]).* Because only the threat of the evil by the statute grounds the concept and the legal possibility of a punishment.

II) *The infliction of a punishment is contingent on the existence of the threatened act (Nulla poena sine crimine [no punishment without a crime])*. Because the threatened punishment is linked to the deed by the statute as a legally necessary prerequisite.

III) *The statutorily threatened deed* (the statutory prerequisite) *is contingent on the statutory punishment. (Nullum crimen sine poena legali [no crime without a legal penalty]).* Because the evil is linked by the statute to the specified right violation as a necessary legal consequence.

[§ 20 a (by editor) omitted]

II.

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

FIRST TITLE
ON THE NATURE OF CRIME

FIRST SECTION
CONCEPT AND CLASSIFICATION OF CRIME

Ja Ge Claus De natur. delictorum Jenae 1794
G B Hansel De natura delictorum observat. Leipzig 1810
Van der Ton De delictis. Lovan. 1822

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

[c] *Klein* Concerning the nature and purpose of punishment. In the Archive 2nd vol, 1st item, no IV.

[d] Cf *von Arnim*, Fragments concerning crime and punishments, 2nd part, 8 ff.

§ 21

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

Immorality, vice, sin.

[Note (by editor) omitted]

§ 22

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

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

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

§ 23

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

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

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

* * *

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

* * *

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

[Note (by editor) omitted].

§ 24

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

[Note (by editor) omitted].

§ 25

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

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