APPENDIX B

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

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

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

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

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

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

[1] L 23 D communi dividund. L 6 C de magistratibi conveniendis.

[2] The statute is also in *A Müller's* Archive for the most recent legislation of all German states, volume IV, issue 1, p 62.

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

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

[4] *La violazione di una legge penale è un delitto*.

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

[7] Civil Code art 1382 f compared with the heading *délits et quasi-délits*.

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

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

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

[11] Handbook of common German criminal law, vol 1, §§ 15, 16.

[12] *Hitzig's* Journal for administration of criminal justice, issue 40, pp 201 f.

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

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

[13] In the Archive of criminal law, vol IX, pp 600 f.

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

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

[16] Outside Germany there is almost nowhere where this view has taken root, Switzerland and Holland excepted.

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

[18] Textbook of penal law, § 21 of the 11th edition.

[19] Textbook of criminal law, § 67 of the 2nd edition. Compare *Wächter* Textbook §§ 32, 61.

[20] Traité de droit pénal, Paris 1829, vol II pp 8 and 9.

[21] Compare *Feuerbach* Textbook § 35, with *Abegg's* Investigations in the area of legal science, Breslau 1830, p 60 f.

[22] *Le délit est la violation d'une devoir exigible* [Delict is the violation of a duty owed].

[23] 1 1 p 10.

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

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

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

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

[25] Loc cit p 28. [26] Loc cit p 85.

[27] Revision of the basic concepts and basic truths of penal law, vol II, p 14. [28] Loc cit p 60.

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

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

[29] Encyclopaedia of Jurisprudence, § 3.

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

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

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

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

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

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

[36] Compare *Wächter* Textbook, § 231.

[37] Imperial Police Ordinance of 1530, Preface § 1.

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

[39] Codice penale di Parma of 1820, art 10, pene di *polizia o buon governo*.

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

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

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

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

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

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

[43] In the excellent publication in the Archive, vol VIII, pp 236 f.

[44] In the incidentally very valuable article in the Criminalistic contributions loc cit.

[45] In the review of *Bauer's* Warning theory, in the Heidelberg Year Books of 1830, 12th issue p 1199.

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

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

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

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

[47] This must at least be accepted as the sense of the sentence objected to above, if it is to have any sense at all.

[48] Lelièvre loc cit.

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

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

[49] Loc cit p 258. [50] Loc cit p 263. [51] Ibid p 236.

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

[53] Feuerbach's textbook § 37 speaks of *protection of rights* and even of *right violation arising from self-defence* which is a true *contradictio in adjecto*, because *quod quisque ob tutelam corporis sui fecerit, jure fecisse existimatur*. L 3 D de justit. et jure. [54] *Von Rotteck's* Rational law Pt I, § 51 p 246.

[55] Ibid p 244, § 50.

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

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

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

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

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

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

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

[59] Forty Books of the State, Book XXIV, Introduction, vol III, p 90.

[60] De l'autorité judiciare en France, chap 20, 3rd edit, Paris 1827.

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

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

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

[62] Textbook, §§ 415, 421, 427, 442, 445, and the preceding headings, and also § 31, at the end.

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

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

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

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

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

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

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

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

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

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

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

it might easily be taken for *right deprivation* [*Rechtsentziehung*] could in this sense certainly be the result of a *criminal statute* but not of a *criminal action*.

[67] Textbook § 271.

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

[69] Considerations on the introduction of freedom of the press in Switzerland and regarding statutory provisions about the press, Zürich 1829, pp 46, 52.

[70] The author takes the concept of crime against the state very narrowly. He has also declared himself decisively against all punishment of immoral actions.

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

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

[71] Ideas on a scientific foundation of jurisprudence, Hannover 1810, pt II, p 374.
[72] Forty Books of the State, Book XXIV, pt I, section 1, vol III, p 100 f.
[73] Compare *Marezoll* on the honour of citizens, Giessen 1824, p 6, and Walter in the Archive of Criminal Law, vol IV, p 112.
[74] Textbook on the law of reason [Vernunftrecht], vol I, p 132. Compare Mittermaier in the Archive vol XIV, p 73. [75] Loc cit. [76] Compare, against this, von Rotteck loc cit.

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

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

[77] Textbook § 296, p 320.

[78] Compare L 1 and 45, D. de injuriis with L 1 § 1, D. de crimimb. extraord.

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

[80] Art 119.

[81] Loc cit.

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

[82] Pro Caecina cap 12. Compare note 79 above.

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

[84] Mittermaier on the statutory definition of the concept of violations of honour, in the Archive XIV, p 66.