Kant's Theory of Criminal Law and the jus talionis[1]

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1 Kant's Rehabilitation of the jus talionis and Its Contemporary Critics

The justification of criminal law is among the most controversial parts of Kant's *Metaphysical Principles of the Doctrine of Right*, published in 1797. Various aspects of this justification, as well as Kant's acutely dense form of presentation, already called forth fierce objections from some contemporary readers.[3] Some reviewers even discovered in his "egregious theory of criminal law"—at least in regard to its application of basic juridical principles—"[…] deplorable examples of senile decay, ignorance of the status quaestionis, even an increased amount of arbitrariness and plain inconsequence"[4]. Yet originally, the contemporaries had yearned for the treatise with great expectations:

> Quite likely, the philosophical public has never desired a promised book more strongly than the present one, which already a few years ago deluded our wishes to acquire possession of the same just in the very moment when we believed their realization to be all but certain. It is to be expected that this book, since it has now finally appeared, will be devoured both by the friends and opponents of Kantian philosophy, and it may indeed be of interest to observe the sensation that it will necessarily have to cause both, but particularly to the latter.[5] (GROLMAN, 1797, p. 123).

The same reviewer of the *Doctrine of Right*, however, rejects Kant's rehabilitation of the jus talionis as a legal-philosophical relapse into the bygone era of the Old Testament:

> Of this I am certainly convinced, that only a principle of pure justice is appropriate;—and who would doubt this!—but that this solely appropriate principle should be the Old Testament principle of retaliation, for this I am not capable at all to state the reason. Kant will certainly have had good reasons for regarding all other principles as reprehensible; but alas! he did not convey them to us, and neither did he specify the other considerations interfering, from which their unsuitability with pure justice

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> might be illuminated, and indeed he even forgot to deduce his principle of retaliation, so that no-one who did not already share Kant's opinion is able to find any other reason to abandon his previous conviction than Kant's authority. (GROLMAN, 1797, p. 130).[6]

Yet, retracing Kant's argumentation posed a difficulty to these reviewers in that they identified Kant's application of the "principle of retribution, of like for like"[7], with a defense of material retribution as represented by "an eye for an eye, a tooth for a tooth". This applies, for example, to the reviewer of the *Doctrine of Right* writing in the *Allgemeine Juristische Bibliothek:*

> The author places the ground of criminal law in a categorical imperative, and the standard of punishment respecting the quantity and quality of the same in the Right of retaliation (jus talionis). That imperative is not expressed in its generality; yet in the examples adduced—he who kills ought to die, he who defames another defames himself—lies the general proposition: he who commits a crime ought to be punished, and the punishment ought to be equal to the crime. Still, the ground for the right to punish, which a court of justice is supposed to hold in a state, is not yet demonstrated here. There is something to it, indeed, that one can only be punished on the account that he is punishable; but in this first requirement for the conceivability of punishment does not yet lie a ground of necessity, if not this one: Satisfaction is owed by him who violated the public order; the object of satisfaction demanded from the punishable is that he be punished, as a means of deterring others from future crimes. But how is retaliation now supposed to be the standard? Is the adulterer supposed to experience the same evil himself? If the proposition is commanded: he who killed shall die!—is he who killed from neglectfulness supposed to die nevertheless, like an evil murderer, since he killed? Here, at any rate, many a thing still obstructs the applicability of this principle in criminal law. Mr. Kant himself may note that, toward the end of his book, some sections are treated with less elaboration.[8] (REZENSION…, 1797, p. 166).

Another contemporary reviewer of the *Doctrine of Right*, Ludwig Heinrich Jacob, criticizes Kant's rejection of a penal authority *contained in natural law,* which was championed by Grotius, Locke, and their successors. According to this conception, the *jus puniendi* is a competence that is originally, viz. in the state of nature, contained in each individual's right to self-preservation, and is only later transferred from these individuals to the bearer of state authority.[9] In regard to Kant's contrary opinion that the right to punish is "[…] a right a ruler has against a subject to inflict pain upon him because of his having committed a crime" (KANT, RL, AA 06: 331), Jacob objects:

> This explanation presupposes that there occurs no right to punish between persons who are on terms of equality. But even if this were true, it would still require a proof, which this reviewer loathed to miss. For that [!] no right to punish can take place in the state of nature is neither contained in the concept of this right, nor is it contrary to common sense. For if a bratty boy, in the state of nature, continually teases a man, and this man gives him a good beating in return; then anyone will recognize this for an entirely just punishment, even if the one who metes out the punishment does otherwise have no authority over the tease. (JACOB, 1797, Column 57 f.).[10]

Neither did Kant's theory of criminal law meet with much approval subsequently. Correspondingly, Kant's reputation as a theoretician of criminal law remained weak: While, for example, Köstlin asserts that Kant's "[…] dicta on criminal law straightforwardly contradict the principles of his overall philosophy"[11], von Bar apodictically declares that Kant's theory, "[…] if one wants to be honest and does not allow oneself to be blinded by the famous name, hardly [deserves] to be called a scientific attempt"[12].

From the beginning, the rehabilitation of the notion of retribution, particularly in the

shape of the jus talionis, was at the center of the criticism directed at Kant's justification of criminal law.[13] What already made this rehabilitation of the jus talionis look problematic in the eyes of the contemporaries was above all its seemingly blatant fallback to theological or theologizing patterns of argumentation. Kant writes in the *Doctrine of Right*'s famous "island example"[14]:

> Even if a civil society were to be dissolved by the consent of all its members (e.g., if a people inhabiting an island decided to separate and disperse throughout the world), the last murderer remaining in prison would first have to be executed, so that each has done to him what his deeds deserve and blood guilt does not cling to the people for not having insisted upon this punishment; for otherwise the people can be regarded as collaborators in this public violation of justice. (KANT, RL, AA 06: 333).[15]

Among criminalists of the Enlightenment, however, the language of blood guilt was considered the epitome of a theocratic theory of criminal law[16], which informed the practice of punishment within the European states far into the 18th century. This is the reason why Kant's reference to this concept was criticized by contemporary commentators and reviewers of the *Doctrine of Right* as an anachronistic relapse. The theocratic theory of criminal law was dominated by the belief that it is a ruler's duty to severely punish the sins and offenses of his subjects in order to ascertain that his entire people would not become the object of divine retribution due to the blood guilt that was to result from a neglect of such punishment. As a rule, these considerations were based on "the general notion of the 17th and 18th centuries according to which public punishment primarily was supposed to serve in diverting the wrath of God from a community stained by the sins of its members."[17] The idea of blood guilt occupied a natural, unquestioned place in Benedikt Carpzov's *Practica nova*, arguably the most influential German textbook on criminal law in the 17th and early 18th century.[18]

Carpzov comprehends the crime primarily as an insult to God, respectively as a violation of the moral order ordained by God. If the authorities did not punish these crimes severely, God would bring "*ames, peste, bella, terrae motus, inundationes, atque alias id genus plagas generales*" over the country as punishment.[19] Not only was the theory of criminal law founded upon the notion of blood guilt, but also many penal codes. This is the reason why the Kingdom of Prussia's *Verbessertes Landrecht*, enacted in 1721, stated in regard to blasphemy that

> […] among all vices and abuses which are prohibited by divine law, insult to the Divine Majesty is deemed the first, greatest, and most grave, by which men, if they gravely insult the Almighty, do not only become unworthy and are deprived of the Divine Grace in this world and the hereafter, but also in regard to which the wrathful and offended God himself did earnestly threaten in is holy Word to let severe punishments and plagues, such as famine, inflation, pestilence, war, bloodshed, malformation, and suchlike, come over the people and countries in which such abominable abuse is exuberant and not severely punished. (SELLERT, 1989, p. 467).[20]

This notion central to the theocratic theory of punishment—that the ruler effectively administers penal jurisdiction on the authority of God and is dutybound to punish crimes severely in order to divert the blood guilt threatening state and people—increasingly became an object of criticism by the spokesmen of criminal-political Enlightenment during the 18th century. However, their advocacy of displacing theological determinations of the purpose of punishment in favor of a humanization

of criminal law[21] does not amount to a fundamental critique of cruel punishments so much as to a functionalization of criminal justice in the interests of a secular political authority. To the latter, a theologically grounded theory of punishment appears "irrational" because it imposes a barrier on the enforcement of its political interests, viz. the purpose of the state. The following remarks by Karl Ferdinand Hommel are characteristic for the negative stance taken by Enlightenment criminalists in regard to the notion of blood guilt:

> Among those bulky words that knock reason, sentiments, senses, and everything to the ground thus also belongs the word *blood*, or, even more terrifying, *man's blood*, but especially *blood guilt*, the latter of which does have no meaning among us Christians anyhow, and not the least significance. […] Among the Jews and Arabs, this [the exclamation: "His blood be upon us and upon our children!" D.H.] certainly had a reasonable meaning, in that this Hebrew expression is taken from *blood vengeance*, since the closest relative of the disembodied had—if he did not want to be disdained by all earth and regarded a cowardly wretch, and for other reasons besides—an obligation on him to take revenge on the manslayer, which obligation one called *blood guilt*, so that the authorities were bound to support the avenger and, if they held the murderer captive, to surrender him in order that this blood avenger may kill him himself and indulge in taking his revenge on him. […] I do not doubt that this blood vengeance was a beneficial law among those migrating patriarchs, who knew no authorities—that is, among other people and at other times. But among Christians the expressions: *to bring blood guilt upon oneself, to bring blood guilt upon a country* are mere words, which certainly surprise a lot and provoke a shudder, but otherwise contain as little true meaning in themselves as raving and clamoring do, which are without all meaning, but employ tremendous words. To bring blood guilt upon a country, what does that mean? It means that God, due to the lenience of a single judge, will bring ruin on an entire country, on a million men—among whom after all there will also be the orthodox—a million, I say, of innocent men who do not participate in government. Is suchlike [consistent] with the divine attributes?[22]

It is apparent that Hommel is familiar with the theological and historical background of the notion of blood guilt and that he at the same time regards this notion as thoroughly inappropriate for an adequate comprehension of the nature of punishment. We are here faced with a question: What may have motivated Kant to make use of a terminology so problematic and historically burdened?

Moreover, contemporary reviewers of the *Doctrine of Right* also felt perturbed by the penal principle of retribution as such, and its connection to the notion of talion. Here, Kant's critics could point to a long tradition of natural law scholars who had regarded retribution as a principle identical to revenge, which was held to be impermissible on natural law grounds and even regarded as cruel or inhuman, since it only considers the deed as located in the past but is not connected to some future purpose.[23] The vast majority of early modern theoreticians of criminal law had assumed that the purpose of punishment could only lie in the future: reform of the offender and above all deterrence of persons tending toward crime.[24] Similarly, a series of more recent commentators maintains reservations toward the principle of retaliation and sees an uncritical bias in favor of the notion that "[…] a repair of the breach of Right by the criminal can only take place in the form of retaliation", when "[…] the protection of liberty and the security of the state" are supposed to form the actual center of Kant's theory of punishment (FALCIONI, 2001, p. 110).[25]

In what follows, I will attempt to show that Kant's rejection of traditional penal

principles—of the so-called *relative* purposes of punishment, of legal security, deterrence, reform, or of rendering innocuous[26]—and his rehabilitation of the notion of retribution, viz. the jus talionis, are a reaction to certain problems faced by the consequentialist theories of punishment in regard to determining the degree of punishment.[27]

2 The Problem of Determining the Degree of Punishment in the Criminal Law Literature of the Enlightenment

But what are the reasons that moved Kant to rehabilitate the principle of talion, in opposition to the predominant convictions of contemporary natural law doctrine and its theory of punishment? An answer may be found by investigating the specific problems resulting from the question of what the determining grounds for the degree of punishment are. I already indicated that the vast majority of criminal law theoreticians during the Age of Enlightenment rejected the idea of retribution and instead declared deterrence and reform the only legitimate purposes of punishment.[28] Because of its assertion that the so-called relative purposes of punishment possess primacy, the criminal law doctrine of the Enlightenment faced a problem: On the one hand, the punishment was supposed to correspond in its severity to the crime committed. This was required by the rational law principle of proportionality as accepted by most theoreticians of criminal law.[29] But on the other hand, no a priori principle for determining the degree of punishment—by means of which the relationship between crime and punishment could have been determined—was to be found in purposes of punishment like deterrence or reform. For the efficacy of the degree of punishment threatened, be it for reasons of deterrence or of reform, does not at all stand in an a priori determinable relation to the juridical quality of the crime. An answer to the question of what degree of punishment is sufficient to contain the "*peccandi libido*"[30] of the offender after all entirely falls within the realm of psychological considerations, viz. of so-called "criminal psychology" ("Criminalpsychologie"), and is hence dependent on the expected psychological effects of deterrence that accompany the threatening and execution of punishment. Characteristic for this problem—as well as for the inability exhibited by advocates of the relative purposes of punishment to solve it—are the remarks by Wolff's disciple Regner Engelhard[31], who is cited here as representative (together with his teacher, Wolff) for advocates of the notion of deterrence. In his treatise *Versuch eines allgemeinen peinlichen Rechtes*[32]*, Engelhard on the one hand endorses the natural law requirement that "[…] the magnitude of the punishment should be established according to the magnitude of the offense" ("[…]* die Größe der Strafe nach der Größe der Beleidigung eingerichtet")[33], but at the same time also endorses the purpose of deterrence, according to which "[…] the intent of punishment consists in the future prevention of crime" ("[…] die Absicht der Strafen in der künftigen Abwendung der Verbrechen bestehe")[34]. Engelhard's further discussion regarding the determination of the degree of punishment clearly reveals that the natural law requirement of proportionality is thrust aside in all cases where the criminal-political interests of the state to intensify the punishment for reasons of deterrence predominate. It is in this spirit that Engelhard discusses the question of whether, for example,

theft could also be punishable by death. The objection against the imposition of the death punishment, derived from the proportionality requirement, "[…] that money and property are incommensurable to the life of a human being; and that thus a thief, who only took money and property, cannot be deprived of life on that account" ("[…] daß Geld und Gut nicht mit dem Leben eines Menschen in Vergleichung kommen; Und daher ein Dieb, der nur Geld und Gut genommen hat, nicht dafür des Lebens beraubet werden könne")[35], is rejected by Engelhard

> […] because, in the determination of penalties, we are not to compare the evil inflicted by the crime with that in which the punishment consists; but to make use of the necessity to avert the crime with the means against it: It is thus elucidated that this objection, too, is not of relevance ("weil bey Bestimmung der Strafen nicht das Übel, welches durch das Verbrechen zugefügt wird, mit dem, worinnen die Strafe bestehet, zu vergleichen ist; Sondern die Nothwendigkeit das Verbrechen abzuwenden, mit dem Mittel dagegen gebrauchet wird: So erhellet, daß auch dieser Einwurf von keiner Erheblichkeit seye").[36]

Since the deterring motives, which are created in the imagination of an individual by the threatening of punishment, are of differing efficacy, it remains a priori indeterminable whether a certain degree of punishment can actually deter someone from willfully intending the deed. Engelhard draws the consequence of this indeterminability—that no universally valid principle for determining the punishment can be established at all—with logical consistency: Since it must remain a priori indeterminate which degree of punishment is sufficient in order to deter a crime, it follows

> […] that one cannot set a limit to the magnitude of punishment, but has to determine it according to circumstances. Since such a right is called an infinite right ([Wolff] Inst. §94): Thus, the right to punish is infinite" ("daß man der Größe der Strafe keine Gränzen setzen könne, sondern dieselbe nach den Umständen bestimmen müsse. Da nun ein solches Recht ein unendliches heißet ([Wolff] Inst. § 94): So ist das Recht zu strafen unendlich").[37]

Substantially, this constellation of problems can already be found in Christian Wolff, whose moral philosophy Engelhard systematically reverts to in all of its major points. Like most of his predecessors (such as Grotius or Pufendorf), Wolff rejects the principle of retaliation in his *Jus naturae*: On the one hand, retaliation is contrary to the general preventive purpose of punishment, and on the other hand, to punish merely out of reasons of revenge is forbidden by natural law. In this context, Wolff moreover invokes Grotius' principle (2005, II, § 20, § 1) that no misdeed by its nature entails the necessity of being punished: "malum in se tale non est, ut puniri debet" (WOLFF, 1968, VIII, § 642). The repudiation of any criterion by means of which the relationship between crime and punishment could be determined—and thereby also the quantity and quality of the punishment—already leads Wolff to replace the principles of natural law with an arbitrary power held by the bearer of state authority and embellished with considerations of political convenience. Wolff answers the question—"An malum poenæ æquale esse debeat malo culpæ" (WOLFF, 1968, VIII, § 641)—by reference to the state's need of deterrence, so that the punishment may either fall short of or exceed the degree of the offender's guilt, when and as the need arises. Wolff indeed holds the view that, due to its function of deterrence[38], there can be no limit to the jus puniendi as a matter of principle.[39]

Since the standard of punishment is not contained within the deed itself, respectively within the guilt of the offender[40], the only principle for determining the punishment remains the law-giver's intent to deter the perpetration of criminal offenses by means of threatening and executing punishment. Therefore, only the effect expected by the law-giver as a result of his threatening of punishment can serve as a principle for determining punishment: "In eum, qui te læsit, tantundum tibi licet, quantum ad avertendum periculum læsionis futuræ [...] sufficit."[41]

However, the determinability of the human will by the threatening of evils differs among individuals. Due to this differing efficacy of the motive, which is supposed to be created in the imagination of an individual by the threatening of punishment in order to deter the deed, it remains a priori indeterminable whether a certain degree of punishment will actually deter someone from intending the deed. This is the reason why in all instances in which the criminal justice interest of the state in crime prevention dominates, the proportionality requirement is thrust aside and an increase in punishment promoted that bears little relation to the gravity of the deed. Wolff is therefore logically consistent in deriving the consequence of this indeterminability, namely that no universally valid principle for determining the degree of punishment can be established: The right to punish can only be conceived of as a *jus infinitum*.

On these grounds, Wulff never tires of describing with great detail and in accordance with the common law practice of punishment the suitable means, e.g., for making a criminal contemptible in the eyes of his fellow men, for the sake of deterrence by means of public humiliation. In this case, Wolff advocates for a special "thieves' habit" in order to highlight the "vileness of the crime":

> Precisely because the punishment imposed on the evildoer is to serve as an example unto others, so that they are moved by it to beware of such crimes and get to loathe them; hence the observers need to find an opportunity in it to vividly picture the vileness of the crime as much as the sternness of the authorities in punishing it. […] For example: In some places, thieves are specially dressed as they are shown around, so that they be pictured to observers by their thieves' habit according to how their mind was conditioned, that is, that they look treacherous and fraudulent, and eager to conceal what they have stolen. (WOLFF, 1975, § 354).[42]

Considerations like these only make it all too clear that the degree of punishment is not to comply with the juridical quality of the deed but with the contingent requirements of the state's interest in deterrence, and that it therefore can be arbitrarily varied according to these interests. This is why Wolff feels no scruples to expand the execution of a criminal—by means of aggravating the punishment in the form of particularly degrading "ceremonies"—into a "theater of terror"[43]:

> Since a large crowd should see the miserable exhibition made of the evildoer both when he is shown around and at the place of execution; hence the place of execution should lie far off from the place where he is sentenced so that he may be comfortably lead through many people and his own fear of death is augmented as well, in order that he make an even greater impression on the minds of the observers by his wretched appearance. (*WOLFF*, § 351).[44]

Proposals like these make it obvious that a determination of punishment according to purposes of general or specific deterrence implies as its "[…] principle of possibility that a subject of the state is without rights in the face of the ruler." (*EBBINGHAUS*, 1988, p. 306).

3 Kant's Justification of the Principle of Retaliation

In what follows, I will only address Kant's justification for the principle of punishment, respectively for the principle of determining the degree of punishment, but neither his justification of punishment as such, nor the closely connected problem of juridical imputation. Similarly, I will not address the problem of the death punishment, which constitutes a special case in the application of the jus talionis, since Kant's attitude toward the death punishment (today regarded as problematic) all too easily obstructs the view on the systematic reasons that underlie his defense of retaliation. In regard to his justification of punishment, I will limit myself here to three systematic remarks.

(1) First of all, as I have already mentioned, Kant only talks about punishments meted out by the *state* in the *Doctrine of Right*: "The right to punish is the right a ruler has against a subject to inflict pain upon him because of his having committed a crime. [...] Punishment by a court (*poena forensis*) [...] is distinct from natural punishment (*poena naturalis*), in which vice punishes itself and which the legislator does not take into account." (KANT, RL, AA 06: 331). This definition of the right to punish is of importance in that Kant solely regards punishment that is *legally* determined by the sovereign as punishment in the true sense of the word and accepts no-one other than the sovereign as the authority called upon to exercise the penal power. Hence, Kant clearly rejects the conviction—which had been prevalent since Grotius—that the legal ground for the penal power consists in a natural or original right of each individual, and that it should therefore be regarded as a natural law competence: The jus puniendi is a sovereign competence constituted by constitutional law and as such presupposes the submission of individuals to the universal legislation of a sovereign coercive power. However, Kant's view that the penal power can only be exercised by an authorized public authority—and that punishment in the true sense of the word can only refer to the punishment imposed by a judge—does not imply that the principles of penal justice are exclusively to be found in the *Doctrine of Right*. That, for example, violations of the law deserve to be punished is a proposition based upon the idea of a moral world order, and it therefore holds good for ethics at large, i.e., "[…] even before any possibility [arises] for a differentiation of Right and Ethos in the narrower sense (Virtue)." (*OBERER,* 1982, p. 401)[45]. The reason for an immoral deed's punishability, already addressed in the *Critique of Practical Reason*[46], consists in its being committed for the sake of increasing one's own happiness, yet without respect for the rights of others or one's own duties. For this reason, the immoral deed deserves a punishment in the sense of inflicting a physical evil that diminishes happiness. The concept of punishment is thus not an exclusively juridical concept, but a basic concept of ethics as such in that it addresses the "[…] imputable relationship between ought and action". (OBERER, 1982, p. 401).[47] In this regard, the notion of punishment is an "[…] implication of the concept of positive freedom, in the sense that each violation of a practical law is punishable as a matter of principle, i.e., that punishment is necessitated by reason." (OBERER, 1982, p. 410).[48]

(2) The reason for linking punishment (as imposed by a judge) with state authority consists in the Doctrine of Right's "Hobbesian legacy", viz. in Kant's adoption of a central aspect from Hobbe's conception of the state of nature: The state of nature is that state

in which—due to the indeterminacy and indeterminability of legal claims—there can be nothing but a private mode of determining and enforcing Right. It is therefore "[…] a state of externally lawless freedom, [where] men do one another no wrong at all when they feud among themselves; for what holds for one holds also in turn for the other, as if by mutual consent *(uti partes de iure suo disponunt, ita ius est)*." (KANT, RL, AA 06: 307).[49] Accordingly, there is no action in the state of nature which someone were forbidden to undertake by his own judgment in order to enforce his (alleged) legal claims against another: In this state, arbitrary coercive actions against others are allowed to all individuals. It stands to reason that, under such conditions of private assessment and enforcement of Right, the difference between injustice and punishment is merely one of subjective opinion. In the state of nature, no competence can be thought of according to which the actions someone believes necessary to undertake in order to enforce his (subjectively determined) rights can be subjected to punishment by others. The abolishment of the private enforcement of Right—by determining punishment according to the positive laws of the state as well as by imposing such punishment by the appropriate state-operated courts of law—is therefore constitutive for overcoming the state of nature.

(3) As is generally known, Kant limits the regulatory reach of juridical legislation (and thereby also the legislative competence as well as the coercive and penal powers of the state) to the external use of *Willkür*. This is why the concept of Right only pertains to "[…] the external and indeed practical relation of one person to another, insofar as their actions, as facts, can have (direct or indirect) influence on each other." The Law of Right is the principle which determines the external use of freedom in a manner so that "[…] the choice of one can be united with the choice of another in accordance with a universal law of freedom." (KANT, MS, AA 06: 230).[50] Within the framework of this concept of Right, coercion is legally possible only "[…] as a hindering of a hindrance of freedom". Only then is it "[…] in accordance with universal laws, that is, it is right." (KANT, MS, AA 06: 231).[51]. The foundation for punitive coercion—i.e., the condition for the punishability of a deed—therefore exclusively consists in the violation of the rights of another as effected by the deed. This limitation of the state's juridical legislation and penal power to the conditions of mutual security in the external use of freedom clearly differentiates Kant's *Doctrine of Right* from Wolff's theory of punishment, which also treats vices as punishable under certain circumstances. In the eighth volume of his *Jus naturae*, Wolff expressly declares that depraved actions can be punished within a state even if no third party was harmed or violated in their rights.[52] For Wolff, the decisive consideration for punishability is not the occurrence of a rights violation, but the deed's social detriment. In this regard, Wolff draws no distinction between the punishability pertaining to the violation of a legally ascertained right and that pertaining to depraved moral conduct, by which someone sets a bad example for others. According to Wolff, both vice and breach of law are equally lines of action whose proliferation the authorities are empowered to forestall by threatening punishment.

The starting point for Kant's entire theory of criminal law is the *principle of punishment,* i.e., a law which stipulates punishment for the infringement of a legal norm. According to Kant's view, this law is a *categorical imperative* which states that crimes must be punished

without fail because the perpetrator incurred guilt through his unlawful deed and thus deserves punishment as compensation for his infringement of the law.[53] In this connection, the addressee of the categorical imperative is not discreet individuals but the authorities empowered to punish as well as those who bear these authorities.[54] That crimes can and must be punished or retaliated against follows from the idea of juridical legislation for the external use of Willkür: Accession to the status civilis results from the necessity to guarantee mutual legal security. He who acts in contradiction to the possibility of general legal security, by violating the rights of others, therefore deserves to be punished.

However, the mere insight into the possibility and necessity of retributive punishment does not determine anything in regard to its principle, i.e., regarding "the quality and the quantity" of punishment. The *how* of punishment thus requires further juridical justification that transcends the mere notion of retribution. (KANT, RL, AA 06: 332).[55] The justification for the necessity of punishment and the principle of punishment's categorical imperative on the one hand, and the principle for determining the degree of punishment or jus talionis on the other therefore rest on a difference between the principle of retribution as such (*Vergeltung*: crimes must be atoned for) and the principle of retaliation (*Wiedervergeltung*: the degree of punishment is determined according to the juridical quality of the crime). Within the framework of Kant's theory of punishment, the doctrine regarding the penal principle of retribution needs to be differentiated from (formal) talion as the principle that determines the degree of punishment. While both principles are closely related in systematic terms (as the two central aspects of the justification for criminal law), they need to be distinguished nonetheless due to their different grounding functions: According to Kant, the purpose of punishment is retribution of the guilt incurred by infringing on the Law of Right. For Kant, this guilt is sufficient ground for punishing the perpetrator; no further consideration of the so-called relative purposes of punishment is required for it. That, however, retribution itself may only take place in the form of (formal) talion and in this sense functions as principle for determining the degree of punishment is a further claim made by Kant and in need of separate justification. It is obvious that justice in regard to punishment can only mean the commensurability of punishment and unlawful deed, in that (formally) like is retaliated against with like. Correspondingly, the principles of retribution and retaliation are to be differentiated: That the crime requires retribution by punishment is, according to Kant, a categorical imperative; that the standard of this retribution derives from the deed itself is a conclusion following from it and just as much a categorical demand of justice.[56]

The method and manner of determining and executing the punishment have to accord with the principles of justice, and this is only to be guaranteed, in Kant's view, by the principle of *re*taliation, respectively by the jus talionis as the principle determining the punishment.[57] For the determination of the degree of punishment is *just* only if it stands in a possible lawful relation to the deed, i.e. if the standard of punishment corresponds to the deed itself, respectively to the gravity of guilt. In light of this differentiation between (1) the justification of punishment as such and (2) the determination of the degree of punishment and the kinds of punishment, it

seems only consistent that Kant distinguishes the already mentioned categorical imperative of the *principle of punishment,* which justifies the penal principle of *retribution*, from the "categorical imperative of penal justice", which manifestly refers to *retaliation as the principle determining the punishment*: "[…] unlawful killing of another must be punished by death." (KANT, RL, AA 06: 336 f).

The infinity of the right to punish, as outlined in the second section, the arbitrariness of the degree of punishment, respectively the lack of principle in determining the punishment, are the problems in the theory of criminal law that Kant's theory of punishment in the *Doctrine of Right* had to address. That he replaces the penal purposes of deterrence, prevention, and reform with the penal principle of retaliation or talion[58] results in the first place from the insight that the jus talionis represents the sole legally possible principle for determining the punishment because only this principle "[…] can specify definitely the quality and the quantity of punishment; all other principles are fluctuating and unsuited for a sentence of pure and strict justice because extraneous considerations are mixed into them." (KANT, RL, AA 06: 332).

In the *Doctrine of Right*, specifically in his examination of the relative purposes of punishment, Kant makes it obvious that the primacy of deterrence and reform leads to the subjection of the perpetrator to the arbitrariness and contingency of the state's criminal-political intents—and to managing human beings "[…] as a mere means to the intents of another", against which however he is protected according to Kant's theory of Right by "his innate personhood." (KANT, RL, AA 06: 331).[59] In this regard, the rejection of the penal purpose of deterrence is also a result of the categorical imperative, which forbids that a human being be treated merely as a means without also being treated as an end-in-itself at the same time.[60] To secure the innate Right of the person against an arbitrary determination of punishment, i.e., the *justice* of punishment (the 'iustitia punitiva'), is thus the governing factor in Kant's discussion regarding the degree of punishment.[61] For this reason "[…] disgraceful punishments that dishonor humanity itself (such as quartering a man, having him torn by dogs, cutting off his nose and ears)." (KANT, TL § 39, AA 06: 463), which Wolff and Engelhard had regarded as particularly suited to the criminal-political purpose of deterrence, are inadmissible. In contrast, Kant advocates for a "judicially executed" enforcement of the punishment "[…] against the perpetrator, but [freed] from all abuse that could turn humanity in the person affected into an abomination." (KANT, RL, AA 06: 333)[62]. Above all, however, it is important to foreclose an arbitrary determination of punishment: "To inflict *whatever* punishments *one chooses* for these crimes would be literally contrary to the concept *of punitive justice.*" (KANT, MS, AA 06: 363)[63] Therefore, punishment—contrary to reward—needs to stand in an a priori determinable "relationship of Right"[64] to the deed.

In his *Anhang erläuternder Bemerkungen zu den metaphysischen Anfangsgründen der Rechtslehre, published in 1798, Kant himself calls attention to the central consideration motivating his endorsement of the jus talionis. First of all, it is necessary for a philosophical justification of Right to distinguish*

> […] punitive justice (iustitia punitiva) [...] from punitive prudence, since the argument for the former is moral, in terms of being punishable (quia peccatum est), while that for the latter is merely pragmatic (ne peccetur) and based

> on experience of what is most effective in eradicating crime. (KANT, MS, AA 06: 363).[65]

Furthermore, it is necessary to answer the question

> […] whether it is a matter of indifference to the legislator what kinds of punishment are adopted, as long as they are effective measures for eradicating crime (which violates the security a state gives each in his possession of what is his), or whether the legislator must also take into account respect for the humanity in the person of the wrongdoer (i.e., respect for the species) simply on grounds of Right. (KANT, MS, AA 06: 362 f).[66]

As far as the *distinction between punitive justice and punitive prudence* is concerned, it is easy to see that Kant takes up a theme here that had also been important to him in his so-called "Gemeinspruch" essay, namely the relationship between a priori justified moral-philosophical principles and the political application of such principles in the context of merely empirical considerations of prudence. The determination of the perpetrator's punishability (including the related distinction of culpa and dolus[67]) and the determination of the degree of punishment according to the gravity of guilt have to remain of overriding importance, in terms of justification, compared to all other considerations (i.e., regarding the "ne peccetur"), for otherwise justice is not served. Punishability itself does not rest on the perpetrator's evil intent, but exclusively on the fact that he "acted in contradiction to the possible realization of the Right of humanity under conditions of experience", though not in the sense that he failed to adopt "this realization as the purpose" of his action. (*EBBINGHAUS*, 1988, p. 308).[68] The justice of the punishment is purely **external** and concerns the compliance of action, not of intention, with the duties that result from the Right which human beings have amongst each other.

With his claim that "[…] the ius talionis is by its form always the principle for the right to punish since it alone is the principle determining this Idea a priori." (KANT, MS, AA 06: 363)[69], Kant distinguishes himself clearly from the prevalent natural law doctrine and its theory of criminal law, including the relative purposes of punishment. According to Kant's view, the infinite penal authority articulated in theories of deterrence à la Wolff results in a violation of the perpetrator's human Right. A legal coercive authority not restricted by an a priori principle for determining the punishment does not stand in any possible lawful relationship to the perpetrator's will, and therefore in contradiction to his right to be only subjected to laws such that he, as a matter of possibility, could have himself consented to. This contradiction—between the infinity of the authorities' penal competence on the one hand, and a human beings' right to a punishment that stands in a possible lawful relationship to the will of the punished on the other hand—leads Kant to rehabilitate the principle of retaliation ("not […] in terms of the letter"[70], but "by its form"[71]) because only if we follow this principle in determining the degree of punishment will the perpetrator's own deed (according to its juridical quality) yield the proper standard of punishment, by applying the "[…] principle of equality (in the position of the needle on the scale of justice)". The principle of equality, by means of which the "kind" and "amount of punishment" can be determined, is formulated as follows: "Whatever undeserved evil you inflict upon another within the people, that you inflict upon yourself. If you insult him, you insult yourself; if you steal from him, you steal from

yourself; if you strike him, you strike yourself; if you kill him, you kill yourself." (KANT, RL, AA 06: 332).[72] "The *law of retribution* [...] is applied by a court (not by your private judgment)." Therefore, "[…] this fitting of punishment to the crime […] can occur only by a judge [...] in accordance with the strict law of retribution" and "in proportion" to the "inner wickedness" of the criminal. (KANT, RL, AA 06: 332 f).[73] For Kant, the "Idea of juridical authority" is thus determined by the idea of justice "[…] in accordance with the universal laws that are grounded a priori." (KANT, RL, AA 06: 334).[74] Reference to the idea "of pure and strict justice" thus constitutes the characteristic feature of Kant's theory of punishment.

4 Conclusion

What follows from Kant's rehabilitation of the jus talionis? First of all, I demonstrated that, on Kant's account, the penal principle of retribution cannot be misunderstood as a fallback to the Old Testament principle of revenge.[75] To him, the principle of talion represents the one and only principle—for systematic reasons pertaining to criminal law theory—that allows for a definitive determination of the degree of punishment, by making the criminal's deed itself (respectively the gravity of guilt connected to it) the standard of punishment. In contrast, the perpetrator would become a mere object of arbitrary encroachment by the state if not the principles of justice—namely those of retribution according to the principle of equality—but the criminal-political intent of the authorities (such as an effective control of crime by means of deterrence) were decisive in the determination of the degree of punishment.

In this regard, the reasons that moved Kant to rehabilitate the jus talionis appear fully convincing to me. The assertion advanced by many commentators—that Kant, in the justification of criminal law, fell short of the standards established by his own theory—thus appears as rather unconvincing. Yet, it is not my goal in this paper to immunize Kant's justification of criminal law against criticism at all cost. The purpose of my considerations was to clarify the reasons for certain fundamental systematic decisions made by Kant, which are not sufficiently taken into account by most of his critics. That Kant's theory of punishment raises critical questions in regard to some points—often due to the terseness of the relevant explanations—is obvious for example in the case of his discussion regarding the punishability of the "crimina carnis contra naturam", viz. "1. Onania, 2. Paederastia, 3. Sodomia." (KANT, Refl 7594, AA 19: 464 f.)[76]. Kant's justification for the punishability of the *crimina carnis contra naturam*, as stated in the "Reflexionen"—namely that "[…] compliance with the essential purposes of nature [is] the supreme ground for obligations toward another" ("die Übereinstimmung mit den wesentlichen Zweken der Natur [...] doch der oberste Grund der Verbindlichkeit gegen einen anderen"); which, of course, cannot be regarded as the philosopher's final verdict on the matter—only makes it obvious that Kant here still uncritically followed a Wolffian theory of obligation and thus overlooked that "[…] a normative distinction between 'the natural' ('according to nature') and 'the unnatural' ('contrary to nature') on the basis of given (natural) phenomena", as the Wolffians propagated it, is impossible.[77] It is striking how this view contrasts with Kant's revolutionary concept of Right—revolutionary in that Kant "[…] founded the

Right not on a supposed harmony of creation with all possible natural purposes of man, but on a Law of Freedom" that determines the legal powers of each individual according to the possibility of their lawful concordance with the freedom of all others (and thus not according to some presupposed purposiveness of nature).[78] Objections of a different kind can also be raised against the already mentioned demand that sexual offenders be castrated.[79] Hariolf Oberer has pointed out that, with this demand for castration, an "unnoticed contradiction" befell Kant in that he implicitly substituted material talion for the formal talion which, on principle, his approach demands.[80]

There also remain certain doubts in regard to Kant's justification for the right to punish, even on a charitable reading of the *Doctrine of Right*: First of all, we may here mention again his problematic use of blood guilt, as already discussed. The question remains why Kant, in the *Doctrine of Right*, invokes a notion so closely "[…] connected to belief in the penal justice of God in the Old Testament." (SCHILD, 1998, p. 440)[81]. A preliminary answer may be that Kant, in regard to justice, indeed has in mind the idea of Divine law-giving as a norm. According to his view, the principle of the Divine will "can be none other than that of justice". While the philosophical "idea of a Divine penal justice" lends itself to being imagined as "personified", it is not as "[…] a particular, judging being that exercises it […], but Justice alike a substance (otherwise called Eternal Justice), which, like the Fate (destiny) of the ancient philosopher-poets, is even above Jupiter." In this capacity, it pronounces "Right according to an adamant, indivertible necessity that remains inscrutable to us." (KANT, TL, AA 06: 488 f).[82]

Moreover, there remain other problematic aspects of Kant's theory of punishment that have only been addressed insufficiently in the literature: For example, Kant holds it to be possible that a thief sentenced to time in jail can, depending on the gravity of his guilt, also be sentenced to forced labor ("Karren- und Zuchthausarbeit") and in this manner be transferred "[…] into the state of slavery for a certain time or even forever, depending on adjudication". Yet how is such punitive enslavement, widely recognized as a punishment in early modern natural law doctrine, supposed to be compatible with the "[…] original Right that every man is entitled to in virtue of his humanity", or with the juridical "[…] quality of being *his own master (sui iuris)*"? (KANT, MS, AA 06: 237 f).[83]

ABSTRACT: Kant's theory of criminal Right was already criticized by his contemporaries. His manner of speaking of the „blood debt" and his rehabilitation of the jus talionis were considered a relapse into the Middle Ages. The essay tries to show against this the reasons that Kant had in order to discharge the principle of retaliation: the dominant theory of punishment as a deterrent (in Pufendorf, Wolff, Beccaria and many other representatives of the criminal political Enlightenment) leads to increase the punishment arbitrarily and to threaten with tougher penalties, because only in this way the purpose of deterrence can be achieved. Kant, however, thinks that the degree of the punishment must be appropriated to the weight of the crime. Such a consistency between crime and punishment is only guaranteed within the frame of the jus talionis.

KEYWORDS: Natural Right. Philosophy of Punishment. Jus talionis.

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Notes

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2 After studying at the Freie Universität in Berlin and the Philipps Universität in Marburg, he received an undergraduate degree in philosophy from the Philipps Universität in Marburg. In 1996 he gets his PhD with the thesis „Freiheit und Herrschaft in der Rechtsphilosophie des Thomas Hobbes" (Berlin 1998). In 2009 he became Doctor in Philosophy in the University of Siegen with the essay „Philosophie der Strafe. Aspekte der Grundlegung des Strafrechts in der neuzeitlichen Naturrechtslehre" (Göttingen/New York 2013). Since April 2010 he works as research assistant at the Kant-Forschungsstelle of the University of Trier. He is author of many essays focused on the doctrine of Natural Right in the Modernity, the Philosophy of the Enlightenment and the German Idealism.

3 On the ambivalent reception of the Kantian *Doctrine of Right* overall and the conditions of reception informing it, cf. the elaborate account by Diethelm Klippel (2001), and especially p. 100 ff. on the reception of the criminal law theory. Likewise, cf. Rückert (1991).

4 Cf. Abhandlung… (1805) [Julius Friedrich Heinrich Abegg]: "So far Kant himself had not remarked on the philosophy of law, apart from a few, very vague intimations. The chief cause of this was his utter ignorance of the science of law, and of that which *had been done for it in modern times*. But since this science had not been *accommodated* yet by him to his doctrine, he proceeded to work with a rashness that (every unbiased observer must acknowledge it) is only pardonable by the weakness of old age, above all with such an infinitely important enterprise, and he completed—after preparations that had at most granted him a knowledge of the legal system at the time of the *Lauterbachs* or *Ludovicis*—the most monstrous of his works, the *general Doctrine of Right*, which contains the *most admirable proofs* of an *incomparable penetration* in its presentation of the basic principles; but, regarding their *application*, in contrast, deplorable examples of senile decay, ignorance of the status quaestionis, even an increased amount of arbitrariness and plain inconsequence. Nowhere, however, did the latter show themselves more unmistakably than in his egregious *Theory of Criminal Law.*" ("*Noch hatte Kant selbst sich über die Philosophie des Rechts, bis auf einzelne sehr unbestimmte Winke, nicht geäussert. Die Hauptursache davon war seine völlige Unkunde in der Rechtswissenschaft und dem, was in neuern Zeiten für dieselbe gethan worden war. Da aber diese Wissenschaft auf seine Lehre von ihm selbst noch nicht accomodirt worden war; so schritt er (jeder Unbefangene muss es anerkennen) mit einer, zumal bey einem so unendlich wichtigen Geschäft, nur der Schwäche des Greisses verzeihlichen Voreiligkeit zum Werke, und vollendete nach einer Vorbereitung, die ihm höchstens zur Kenntniss des Rechtssystems aus den Zeiten* der *Lauterbache* und *Ludovicis* verholfen hatte, das monströseste seiner Werke, die A*llgemeine Rechtslehre*, welche die *bewundernswürdigsten Beweise eines unvergleichbaren Scharfsinnes* in Darstellung der Grundprincipien; bey deren *Anwendung* hingegen beklagenswürdige Proben der Altersschwäche, Unkunde des status quaestionis, ja eine gedrängte Zahl von Willkührlichkeiten und klaren Inconsequenzen enthält. Nirgends haben sich indess die letzteren unverkennbarer gezeigt, als bey seiner unerhörten *Theorie des Strafrechts*.")

5 "*Noch nie war wol das philosophische Publikum auf ein versprochenes Buch begieriger, als auf dieses, welches schon vor einigen Jahren unsre Wünsche, den Besitz desselben zu erlangen, gerade in dem Augenblick getäuscht hatte, als wir der Realisirung derselben völlig gewiß zu seyn glaubten. Es ist zu erwarten, daß dieses Buch, da es nun endlich erschienen ist, sowol von den Freunden, als auch den Gegnern der Kantischen Philosophie werde verschlungen werden, und es mag allerdings sehr interessant seyn, die Sensation zu beobachten, die es nothwendig bey beiden, vorzüglich aber bey den letztern, verursachen muß.*" – I want to thank Prof. Dr. Diethelm Klippel (Bayreuth) for granting me access to the texts of contemporary reviews of the *Doctrine of Right*.

6 "*Davon bin ich freilich überzeugt, daß nur ein Princip der reinen Gerechtigkeit angemessen sey; – wer wird auch dieses bezweifeln! – aber daß dieses allein angemessene Princip das alttestamentarische der Wiedervergeltung sey, davon bin ich im geringsten nicht im Stande, den Grund anzugeben. Kant muß freilich seine guten Gründe gehabt haben, warum er jedes andre Princip verwerflich fand; allein er hat diese uns leider! nicht mitgetheilt, hat uns nicht die andern sich einmischenden Rücksichten angegeben, aus welchen ihre Unangemessenheit mit der reinen Gerechtigkeit erhellte, ja, er hat sogar vergessen, sein Princip der Wiedervergeltung zu deduciren, so daß also jeder, der nicht schon vorher Kants Meynung war, keinen andern Grund finden kann, seine vorige Ueberzeugung aufzugeben, als Kants Auctorität.*" (GROLMAN, 1797, p. 130). *Rezension der Rechtslehre*. A similar criticism of Kant is raised by *Heinrich Stephani (1797, p. 117).*

7 *Immanuel Kant*, Metaphysical First Principles of the Doctrine of Right, in: The Metaphysics of Morals, ed. by Mary J. Gregor, Cambridge 1991, specifying the pagination of the Akademie-Ausgabe (Gesammelte Schriften, Vol. VI, Berlin 1900 ff., abbreviated in what follows as 'AA' with number of volume and page), p. 332.

8 "*Den Grund des Strafrechts sezt der Verf. in einen categorischen Imperativ, und den Maastab der Strafe in Rücksicht auf Quantität und Qualität derselben in das Wiedervergeltungsrecht (jus talionis). Ausgedrückt ist jener Imperativ in seiner Allgemeinheit nicht; doch liegt in den angezogenen Beyspielen: wer tödtet, der mus sterben, wer den andern beschimpft, beschimpft sich selbst, der allgemeine Saz: wer ein Verbrechen begeht, mus gestraft werden, und die Strafe mus mit dem Verbrechen gleich seyn. Hier ist doch wohl der Grund des Strafrechts, das ein Gerichtshof im Staate haben soll, noch nicht erwiesen. Es ist zwar an deme, daß einer nur deswegen gestraft werden kann, weil er strafbar ist; aber in dieser ersten Bedingung der Denkbarkeit der Strafe liegt noch kein Grund der Nothwendigkeit, wenns nicht der ist: Genugthuung ist derjenige schuldig, der die allgemeine Ordnung verlezt hat; das Object der Genugthuung, das von dem Strafbaren gefordert wird, ist die Strafe an ihm, als Abhaltungsmittel für Andere von künftigen Verbrechen. Aber wie soll nun die Wiedervergeltung der Maastab seyn? Soll der Ehebrecher dis nemliche Uebel wieder an sich erfahren? Soll, wenn der Saz geboten ist: wer getödtet hat, der sterbe! derjenige nun, welcher aus Nachlässigkeit tödtet, dennoch sterben, weil er getödtet hat, wie der boshafte Mörder. Hier liegt*

wenigstens noch manches der Anwendbarkeit dieses Grundsazes für das Strafrecht im Wege. Hr. Kant bemerkt selbst, daß gegen das Ende des Buchs manche Abschnitte mit minderer Ausführlichkeit behandelt seyen." (REZENSION…, 1797, p. 166). The same mistake of not differentiating between material and formal talion is also committed by the author of the already quoted "Abhandlung über die neueste Behandlung des Criminalrechts" (see above, footnote 2), Column 5: "How the legislator is supposed to avenge uproar and riot, counterfeit in coins, and the like with the punishment of *talion* (which is advanced as the *sole* just standard), or how it should be possible to him to take a *tooth* for a *tooth* when an *entirely toothless* woman knocks out the teeth of another, is not determined." (*"Wie der Gesetzgeber Aufruhr und Tumult, Falschmünzen u. s. w. mit der Strafe der Talion (die als einziger gerechter Maasstab aufgestellt ist) ahnden, oder wie ihm möglich seyn sollte, Zahn um Zahn zu nehmen, wenn ein ganz zahnloses Weib einem andern die Zähne eingeschlagen hat, ist nicht entschieden."*) – Hariolf Oberer (1981, p. 423) remarks on this: "It is more of an argument against an author's rational powers of judgment than against the retaliation principle of justice when the argument is brought forward that deed and punishment are not comparable measures. The tertium comparationis is the freedom in the external use of *Willkür*." (*"Es ist eher ein Argument gegen die vernünftige Urteilsfähigkeit eines Autors als gegen das Vergeltungsprinzip der Gerechtigkeit, wenn damit argumentiert wird, daß Tat und Strafe keine vergleichbaren Größen sind. Das tertium comparationis ist die Freiheit des äußeren Willkürgebrauchs."*)

9This assertion—that the jus puniendi is a natural law competence of the individual which only later got transferred to the bearer of the supreme political authority—essentially reaches back to *Hugo Grotius* (); on Grotius' theory regarding the right to punish cf. my article *"Nonne puniendi potestas reipublicae propria est" – Die naturrechtliche Begründung der Strafgewalt bei Hugo Grotius (*HÜNING, 2000*)*.

10 *"Diese Erklärung setzt voraus, daß zwischen Personen, die auf dem Fusse der Gleichheit mit einander stehen, kein Strafrecht statt finde. Aber wenn dieses auch wahr wäre; so bedürfte es doch eines Beweises, welchen Rec. ungern vermißt hat. Denn das [!] im Naturstande kein Strafrecht statt finden kann, liegt weder im Begriffe dieses Rechts, noch ist es der gemeinen Vernunft zuwider. Denn wenn ein muthwilliger Bube z. B. im Naturstande einen Mann kontinuirlich neckt, und dieser giebt ihm eine Tracht Schläge dafür; so erkennt jeder dieses für eine ganz gerechte Strafe, ob der Strafende gleich dem Beleidiger sonst nichts zu befehlen hat."* (*JACOB*, 1797, Column 57 f.).

11 *"Aussprüche über das Strafrecht […] stünden mit den Prinzipien seiner Philosophie überhaupt […] in geradem Widerspruch." (KÖSTLIN*, 1845, p. 1); a similar argument is found in (*LAISTNER*, 1872, p. 102), who claims that "[...] the notion of retaliation as Right contradicts Kant's own principles." (*"der Gedanke der Wiedervergeltung als Recht mit Kants eigenen Prinzipien in Widerspruch steht"*) (LAISTNER, 1872, p. 105).

12 *"[…] wenn man ehrlich sein will und sich nicht blenden lässt durch den berühmten Namen, kaum die Bezeichnung eines wissenschaftlichen Versuchs", (BAR*, 1882, p. 242).

13 Köstlin (1845, p. 7): Kant "[…] really believes that, out of the theologians' archaic metaphysical concept of retaliation and punishment, he made a new concept which allegedly agrees with his new metaphysics, founded upon the necessities of practical reason, and does not, from the outset, contradict his tracing back of the remaining Doctrine of Right to transcendental freedom." (*"vermeint wirklich aus dem altmetaphysischen Vergeltungs- und Strafbegriff der Theologen einen neuen Begriff gemacht zu haben, der sich mit seiner neuen, auf die Bedürfnisse der praktischen Vernunft gegründeten Metaphysik vertrage und von vornherein in keinem Widerspruch zu seiner Zurückführung der übrigen Rechtslehre auf die transzendentale Freiheit stehe."*)

14 On this cf. *Byrd* (1989); *Zaczyk* (1999). Neither authors discusses the problem of "blood guilt" that is of interest here.

15 KANT, RL, AA 06: 333. – The theme of blood guilt reappears toward the end of the "Metaphysical First Principles of the Doctrine of Virtue" (in the "Concluding Remark"): "I will not allow *blood-guilt* to come upon my Land by granting pardon to an evil, murdering duelist for whom you intercede, a wise ruler once said" (KANT, TL, AA 06: 490).

16 On the continuation of the Mosaic idea of talion far into the 18th century, cf. the evidence presented by *Louis Günther* (1891, p. 20 f.; 1895, p. 48 f).

17 "*[...] die grundsätzliche Auffassung des 17. und 18. Jahrhunderts, nach der die staatliche Strafe in erster Linie dazu dienen sollte, von der durch die Sünde ihrer Mitglieder befleckten Gemeinschaft den Zorn Gottes abzuhalten*." (*SCHAFFSTEIN,* 1988, p. 9).

18 *Carpzov (1635*, Practica nova, Pars III, quaestio 101, n. 15): "*Ac licet maxime poenarum irrogatio delinquentem nec juvet, nec corrigat, attamen propter alios nequaquam haec omittenda erit; ne scilicet ob delictum alterius impunitum, gravius quid aliis, eiusdem Civitatis hominibus contingat. Saepe enim ob unius delictum, dum non vindicatur, DEUS in universum irascitur populum*" (quoted after *Sellert (*1989, p. 286). – For the earlier literature on Carpzov, cf. *Schild* (1997); regarding the more recent state of scholarship cf. the anthology by *Jerouschek, Schild and Gropp* (2000).

19 *Carpzov* (1635, q. 76, n. 5). – On Carpzov's conception of punishment cf. *Härter (*2000, p. 184 ff).

20 Quoted after *Sellert (*1989, p. 467). Also cf. *Günther* (1891, p. 13 ff). Even as late as 1748, the penal code for the Electorate of Hesse (Title IV §1) specifies as the purpose of punishment that "God's wrath and punishment be diverted from country and people, and that blood guilt not be brought over the country" ("*Gottes Zorn und Strafe von Land und Leuten abgewendet und nicht Blutschuld auf das Land gebracht werde*"). Quoted after *Fischl* (1913, p. 8).

21 On another occasion, I attempted to delineate the process by which secular purposes of punishment came to be widely accepted by investigating the penologic assessment of atheism. Cf. *Hüning* (2002).

22 "*Unter diese baumstarken Wörter, die Vernunft, Empfindungen, Sinne und alles zu Boden schlagen, gehört also auch das Wort Blut, oder noch schreckhafter, Menschenblut*, besonders aber *Blutschuld*, *welches letztere gleichwohl bey uns Christen keinen Sinn, und nicht die geringste Bedeutung hat. […] Bey den Juden und Arabern hatte das allerdings eine vernünftige Bedeutung, indem diese hebräische Redensart* vom *Bluträcher* hergenommen

ist, da des Entleibten nächster Anverwandter wenn er nicht vor aller Welt verachtet, und für einen feigherzigen Schurken gehalten seyn wollte, so wie auch ausserdem, eine Verbindlichkeit auf sich hatte, an dem Todschläger sich zu rächen, welche Obliegenheit man *Blutschuld* nennte, so daß die Obrigkeit verbunden war, den Rächer zu unterstützen, und, wenn sie den Mörder gefangen hielt, ihn auszuliefern, damit dieser Bluträcher ihn selbst tödten, und seine Rache an ihm austoben könnte. [...] Ich zweifle nicht, daß diese Blutrache bey denen herum ziehenden Patriarchen, die keine Obrigkeiten kannten, also bey andern Völkern und zu andern Zeiten ein heilsames Gesez gewesen, aber bey den Christen sind die Redensarten: *Blutschuld auf sich haben; Blutschulden auf ein Land bringen* blos Worte, die allerdings s*ehr überraschen, und ein Schaudern erregen, übrigens aber so wenig wahren Sinn in sich fassen, als Zeter und Zetergeschrey, welches ohne alle Bedeutung, gleichwohl aber ein gewaltiges Wort ist. Blutschuld auf ein Land bringen, was heißt das? Es bedeutet, daß Gott wegen der Nachsicht eines einzigen Richters, das ganze Land, eine Million Menschen, worunter doch auch Orthodoxen, eine Million, sage ich, unschuldiger an der Regierung nicht Antheil nehmender Menschen, verderben wird. Stimmt dergleichen mit den göttlichen Eigenschaften [überein]?" Hommel* (1784, § 56, p. 114 f., 117). – An approach that attempts to place retributive punishment in its *historical* context can also be found in *Filangieri* (1787, p. 164 ff.): On the one hand, punishment by retaliation (in the sense of material talion) is of such a kind that it "must be effaced from every code of law of a nation yet come to its maturity" ("aus iedem Gesetzbuch einer schon zu ihrer Reife gekommenen Nation vertilgt werden muß"), but on the other hand it is thoroughly appropriate in primitive or barbaric societies since it was, by means of it, possible to "give the people the first, albeit inchoate idea of the punishments' relation to the crime" ("dem Volk die erste obgleich unvollkommene Idee von dem Verhältnis der Strafen zu dem Verbrechen") and to avoid private revenge.

23 Regarding the rejection of retaliation by the vast majority of natural law scholars, cf. *Hobbes (*1991, p. 106 f.): "[W]e are forbidden to inflict punishment with any other designe, than for correction of the offender, or direction of others. [...] Revenge, without respect to the Example, and profit to come, is a triumph, or glorying in the hurt of another, tending to no end; [...] and glorying to no end, is vain-glory, and contrary to reason; and to hurt without reason, tendeth to the introduction of Warre; which is against the Law of Nature; and is commonly stiled by the name of *Cruelty*"; Hobbes (1983, III, § 1); *Pufendorf (*1998, § 8 ff.); *Thomasius (*1994, lib. III, cap. VII, § 37); *Wolff* (1968); Wolff (1980, § 156); *Voltaire* (1818, art. III, p. 211); *Michaelis* (1775, p. 11 ff.); *Filangieri (*1787, v. 4, book 3, p. 17 ff.).

24 In lieu of the vast majority of criminal law theoreticians I will here only refer to *Hobbes* (1991, p. 215 f.): "the aym of Punishment is not a revenge, but terrour". – On the overall problem of the purpose of punishment, cf. *Seelmann (*1987).

25 Also cf. *Thomas Auxter*, Kant's Theory of Retribution, in: Gerhard Funke (ed.), Akten des Siebten Internationalen Kant-Kongresses Mainz 1990, Bonn/Berlin 1991, Vol. II, 2, pp. 307-315, who claims that "retribution is not suitable as a theory of criminal justice for Kant's moral philosophy" (p. 315).

26 On Kant's rejection of the theories of punishment prevalent in the 18th century, cf. *Ritter* (1971, p. 176 ff).

27 This thesis was already argued by *Ebbinghaus* (1988, p. 306). That it is necessary in regard to Kant's justification of criminal law to distinguish "between the reason for threatening and the reason for executing punishment", since the doctrine of retaliation only relates to the latter problem, was emphasized by B. Sharon Byrd (1989, p. 153). – Incidentally, Kant was not the only one who championed the notion of talion during the Age of Enlightenment, cf. *Günther* (1891, p. 149 ff., here p. 149): "In opposition to those who object to the notion of talion on principle [Christian Wolff and his disciple Regner Engelhard, D.H.] we find disquisitions, still strongly embellished with theological set phrases, by the jurist Samuel v. Cocceji, the theologian and philosopher Crusius, and the philosopher Baumgarten, which remained of rather minor importance to the history of criminal law theory overall. All of them behold the actual nature of punishment in its orientation toward the *past*, and therefore still allow vast dominion to the *idea of retribution*." ("Im Gegensatz zu diesen prinzipiellen Gegnern des Talionsgedankens stehen die im ganzen nur von ziemlich untergeordneter Bedeutung für die Geschichte der Strafrechtstheorien gebliebenen, noch stark mit theologischen Floskeln verbrämten Erörterungen des Juristen *Samuel v. Cocceji*, des Theologen und Philosophen *Crusius* und des Philosophen *Baumgarten*, welche sämtlich das eigentliche Wesen der Strafe in ihrer Richtung auf die *Vergangenheit* erblicken und daher auch der *Vergeltungsidee* noch ein weites Herrschaftsgebiet einräumen.")

28 *Seelmann* (1987, p. 336 f.).

29 On the rational law requirement of proportionality, cf. for example *Thomasius* (1994, III, 7, § 120): "Quamvis igitur exactissimæ regulæ propter infinitas circumstantias tradi nequeant, summa tamen eo redit, quod princeps *in pœnarum irrogatione prospicere debeat, ut pœnæ adhibeantur proportionatæ delictis*, hoc est, ut illæ tantæ sint, quantæ sufficiunt ad reprimendam libidinem mortalium, qua feruntur in peccatum, nam & medicus medicamenta adhibet proportionata morbis"; *Montesquieu* (1979, XII, c. 4); *Beccaria* (1966, p. 47 ff.); *Filangieri* (1787, p. 286 ff.); *Marat* (1955, p. 51).; *Jakob* (1797, 429 ff.); regarding the proportionality requirement also cf. *Rüping* (1991, p. 59), und *Seelmann (*1985, p. 241-267), as well as the article by the same author mentioned in the previous footnote.

30 According to the formulation by *Heineccius (*1744, II, 8, §§ 164 f.) (quoted after Kurt Seelmann (1987, p. 340).

31 In what follows, Engelhard and Wolff are treated as authors whose theories exhibit the problems related to the determination of the degree of punishment in a remarkably clear manner. However, I do not claim that Kant is actually referring to these authors in his Doctrine of Right. – On Wolff's theory of punishment, cf. the still important analysis by *Frank (*1887), as well as the remarks by *Bachmann* (1977, p. 222 ff.), who however attempts to soften the difficulties of determining the degree of punishment in Wolff.

32 *Engelhard* (1996). Cf. my review of this reprint in: Hüning (2001, p. 595-597).

33 *Engelhard*, *Versuch eines allgemeinen peinlichen Rechtes, § 8.*

34 *Engelhard*, *Versuch eines allgemeinen peinlichen Rechtes, § 170.*

35 *Engelhard*, Versuch eines allgemeinen peinlichen Rechtes, § 299.

36 *Engelhard*, *Versuch eines allgemeinen peinlichen Rechtes, § 299.*

37 *Engelhard*, *Versuch eines allgemeinen peinlichen Rechtes, § 172.*

38 On the preventive purpose of punishment, cf. for example *Wolff* (1975, § 346; quoted in what follows as: Deutsche *Politik)*: "Since punishments, where necessity requires it, are also executed against the life of criminals, in order that everyone behold the sternness of the authorities and dread is awakened on that account; they do not take place merely to reform those who endure them, so that they will no longer accede in the future to the same misdeeds the like they had carried out, but for the most part—and, as far as the life penalties are concerned, solely—as an example unto others, that they may reflect on themselves in it." ("Weil die Straffen, auch, wo es die Noth erfordert, am Leben der Verbrecher, vollzogen werden, damit jedermann den Ernst der Obrigkeit siehet, und dadurch eine Furcht erwecket wird; so geschehen sie nicht allein zur Besserung derer, die sie ausstehen, daß sie sich künfftig nicht mehr auf dergleichen Unthaten, als sie ausgeübet, betreten lassen, sondern hauptsächlich, ja die Lebens-Straffen einig und allein, zum Exempel anderer, daß sie sich daran spiegeln.")

39 *Wolff*, Jus naturæ I, Frankfurt/Leipzig 1740, § 1063: "Jus puniendi infinitum est. Etenim cum jus puniendi illud sit, quod tibi competit in eum, qui te læsit (§ 1061), in hunc vero tantumdem tibi liceat, quantum ad avertendum periculum læsionis futuræ, sive ab eodem tibi atque aliis, sive ab aliis ejus exemplum secutis tibi metuendæ sufficit (§ 1059); juri puniendi in genere non præscribi possunt limites, sed ei demum ex circumstantiis præsentibus præsigendi. Quoniam itaque jus infinitum est, cui in genere præscribi limites non possunt, sed cui demum ex circumstantiis præsentibus præfigendi (§ 977); jus puniendi infinitum est"; cf. *Frank*, Die Wolff'sche Strafrechtsphilosophie, pp. 82 f.

40 Nonetheless, on other occasions Wolff holds on to the proportionality principle and accordingly to the requirement that the degree of punishment correspond to the gravity of guilt, cf. *Wolff*, Jus naturæ VIII, § 625; Id., Deutsche Politik § 343.

41 *Wolff*, Jus naturæ I, § 1059.

42 "Eben deswegen weil die Straffe, damit die Ubelthäter beleget werden, andern zum Exempel dienen sol, daß sie nemlich dadurch bewogen werden, für dergleichen Verbrechen sich zu hüten, und einen Abscheu davor zu bekommen; so müssen die Zuschauer dabey Gelegenheit finden, nicht weniger die Schändlichkeit des Verbrechens, als den Ernst der Obrigkeit es zu bestraffen, ihnen lebhafft vorzustellen. [...] Z. E. Es werden an einigen Orten die Diebe besonders angekleidet, indem man sie ausführet, damit sie durch den Diebs-Habit denen Zusehern abgebildet werden, wie das Gemüthe bey ihnen beschaffen gewesen, das ist, daß sie tückisch und betrügrisch, und begierig das gestohlene zu verbergen aussehen".

43 *Dülmen* (1988).

44 "Da eine grosse Menge das klägliche Bezeigen des Uebelthäthers so wol bey der Ausführung, als auf der Gerichtsstäte sehen sol; so sol die Gerichtsstete von dem Orte, wo er verurtheilet wird, weit abliegen, damit er durch viele Leute bequem kan durchgeführt werden, auch ihm dadurch die Angst des Todes vermehret wird und er durch seine erbärmliche Gestalt einen desto grösseren Eindruck in das Gemüthe der Zuschauer machet". Wolff also declares that, should the culprit have died prior to the execution of the death punishment, it is permissible to carry out the punishment as a poena exemplaria against his corpse. Cf. *Wolff (*1968, VIII, § 705).

45 "[...] noch vor aller Möglichkeit einer Unterscheidung von Recht und Ethos im engeren Sinne (Tugend)."

46 KANT, KpV, AA 05: 37.

47 "[...] zurechenbare Verhältnis von Sollen und Handlung."

48 "Implikat des positiven Freiheitsbegriffs, in der Bedeutung der prinzipiellen Strafwürdigkeit eines jeden Verstoßes gegen ein praktisches Gesetz, d. h. die Vernunftnotwendigkeit der Strafe."

49 Doctrine of Right.

50 Doctrine of Right § B.

51 Doctrine of Right § D.

52 *Wolff (1968,* VIII, §§ 653 f).

53 KANT, RL, AA 06: 331: "The principle of punishment (Strafgesetz) is a categorical imperative" which states that punishment can be inflicted on the criminal "only because he has committed a crime". Kant (nominally) defines punishment itself as "the rightful effect of what is culpable" (KANT, MS, AA 06: 227). Regarding the real definition of punishment, Kant follows the natural law tradition, which again follows Grotius in designating punishment as a "malum passionis quod infligitur ad malum actionis" (*GROTIUS*, 2005, II, 20, § 1); cf. *Achenwall* (1763, § 40), (AA 19: 347), *KANT,* Praktische Philosophie Powalski, V-PP, AA 27: 150; Moralphilosophie Collins, V-Mo/Collins, AA 27: 286; Metaphysik der Sitten Vigilantius, V-MS/Vigil, AA 27: 552.

54 On this cf. *Byrd (1989,* p. 153); *Brandt* (1996, p. 449); *Hruschka (2003*, p. 218).

55 On this cf. *Hepp* (1968, § 4, p. 23): "The rational necessity of punishment does not yet give the principle for its *quantity and quality* (the degree and kind of punishment)." ("Mit der Vernunftnothwendigkeit der Strafe ist aber noch nicht das Princip für die *Quantität und Qualität* (den Grad und die Art der Strafe) gegeben"). For a similar view, cf. *Ebbinghaus* (1988, p. 306).

56 On this cf. *Ebbinghaus* (1988, p. 306 ff.); *Cattaneo* (1998, p. 44) and *Höffe* (1981, p. 364 ff.), where he distinguishes between 'general' and 'special' retribution. However, Höffe believes that Kant made the "[…] transition from a broad to a narrow concept of retribution […] without enunciating it, perhaps even without noticing it" ("Übergang vom weiten zum engen Vergeltungsbegriff [...] ohne es auszusprechen, vielleicht auch, ohne es zu bemerken") (HÖFFE, 1981, p. 367 f.). To me it seems that this distinction is of a **systematic** nature in Kant, in the way outlined above, and thus carried out knowingly.

57 That the principle of talion is specifically located in the question regarding the determination or execution of the punishment was repeatedly and rightly pointed out in the literature, cf. *Byrd* (1989, p. 152 f.), who emphasizes that Kant strictly differentiates between "[…] the reason for threatening and the reason for executing punishment" (BYRD, 1989, p. 153); likewise *Brandt* (1996, p. 456), *Schmitz* (2001, p. 113) and *Merle* (2001, p. 196), who likewise limits Kant's use of the principle of retaliation to the determination of the degree of punishment.

58 Kant does recognize the relative purposes of punishment of deterrence or reform, but only as subsidiary principles for determining the punishment; regarding this cf. *Oberer (1982,* p. 412 f).

59 Kant also rejects the deterministic psychology presupposed by theories of deterrence: "But to regard punishments and rewards completely as a clockwork in the hands of a higher power, which serves only to move rational beings into activity toward their final intent (happiness) by their means, is even too obviously a mechanism of their will, abrogating all freedom, for us to occupy ourselves with." ("Vollends aber Strafen und Belohnungen nur als das Maschinenwerk in der Hand einer höheren Macht anzusehen, welches vernünftige Wesen dadurch zu ihrer Endabsicht (Glückseligkeit) in Thätigkeit zu setzen allein dienen sollte, ist gar zu sichtbar ein alle Freiheit aufhebender Mechanism ihres Willens, als daß es nöthig wäre uns hiebei aufzuhalten.") (KANT, KpV, AA 05: 38).

60 KANT, GMS, AA 04: 428 ff.

61 Critique of Practical Reason, in: The Cambridge… (KANT, KpV, AA 05: 37): "In every punishment as such there must first be justice, and this constitutes what is essential in this concept."

62 "am Thäter gerichtlich vollzogenen, doch von aller Mißhandlung, welche die Menschheit in der leidenden Person zum Scheusal machen könnte", Doctrine of Right.

63 Explanatory Remarks on the Metaphysical First Principles of the Doctrine of Right.

64 "Rechtsverhältniß", KANT, RL, AA 06: 228.

65 Explanatory Remarks on the Metaphysical First Principles of the Doctrine of Right; regarding the distinction between "punitive justice" and "punitive prudence", also cf. KANT, Metaphysik der Sitten Vigilantius, V-MS/Vigil, AA 27: 551; Moral Mrongovius, V-Mo/Mron, AA 27: 1436.

66 Explanatory Remarks on the Metaphysical First Principles of the Doctrine of Right.

67 KANT, Doctrine of Right, RL, AA 06: 224: "An *unintentional* transgression of a Duty, which is, nevertheless, imputable to a Person, is called a mere *fault (culpa).* An *intentional* transgression—that is, an act accompanied with the consciousness that it is a transgression—constitutes a crime *(dolus).*"

68 "[...] im Widerspruch mit der möglichen Realisierung des Rechtes der Menschheit unter Bedingungen der Erfahrung gehandelt" "sich diese Realisierung nicht zum Zwecke".

69 Explanatory Remarks on the Metaphysical First Principles of the Doctrine of Right.

70 KANT, Doctrine of Right, RL, AA 06: 332.

71 The decisive specification—that the principle for determining the degree of punishment can be nothing but formal talion ("das jus talionis der Form nach")—is only found in the 'Anhang erläuternder Bemerkungen' (KANT, MS, AA 06: 363) and probably represents a reaction to the misunderstandings that befell reviewers, as outlined above.

72 Doctrine of Right.

73 Doctrine of Right.

74 Doctrine of Right. – I will disregard the fact that Kant uses these formulations to justify the legitimacy of the death punishment; in this context, I am only concerned with reconstructing the principles behind the Kantian argument in favor of the jus talionis.

75 *BYRD*, Strafgerechtigkeit bei Kant, p. 157: "Retributive justice […] is […] not a principle that serves to justify state-legitimized revenge for criminal deeds, but rather a principle that prescribes strict limitations for the state's treatment of each individual." ("Vergeltungsgerechtigkeit [...] ist [...] nicht ein Prinzip, das dazu dient, staatlich-legitimierte Rache für kriminelle Taten zu rechtfertigen, sondern vielmehr ein Prinzip, das die strikte Begrenzung der staatlichen Behandlung eines jeden Individuums vorschreibt.")

76 Cf. also KANT, MS, AA 06: 277.

77 "[...] eine normative Unterscheidung zwischen ‚Natürlichem' (‚Naturgemäßen') und ‚Unnatürlichem' (‚Naturwidrigen') auf der Grundlage von vorfindlichen (natürlichen) Phänomenen", *Geismann* (1974, p. 33), who criticizes Kant's discussion of the "crimina carnis contra naturam" as a fallback to a "mode of thought oriented toward that which *is*" ("am Sein orientierte Denkweise", Geismann (1974, p. 34)), a mode of thought typical for natural law doctrine.

78 "[...] das Recht statt auf die angenommene Harmonie der Schöpfung mit allen möglichen natürlichen Zwecken des Menschen auf ein Gesetz der Freiheit gründete" (*EBBINGHAUS*, 1988, p. 296).

79 KANT, Doctrine of Right, RL, AA 06: 363.

80 "[…] unvermerkte[r] Widerspruch", *Oberer (1982,* p. 416 ff.) demonstrated that one can in fact argue against punishment by castration or death on the basis of the Kantian principles of Right.

81 "[...] mit dem Glauben an die Strafgerechtigkeit Gottes im Alten Testament verbunden war."

82 "kein anderes sein als das der Gerechtigkeit" "Idee einer göttlichen Strafgerechtigkeit" "[...] ist nicht ein besonderes richtendes Wesen, was sie ausübt [...], sondern die Gerechtigkeit gleich als Substanz (sonst die ewige Gerechtigkeit genannt), die wie das Fatum (Verhängniß) der alten philosophirenden Dichter noch über dem Jupiter ist" "[...] das Recht nach der eisernen, unablenkbaren Nothwendigkeit aus, die für uns weiter unerforschlich ist", Doctrine of Virtue.

83 "[...] auf gewisse Zeit, oder nach Befinden auch auf immer in den Sklavenstand" "[...] ursprüngliche(n), jedem Menschen kraft seiner Menschheit zustehende(n) Recht", Doctrine of Right.

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