[https://gegen-kapital-und-nation.org/en/punishment/]

The logic of punishment in democratic states

Punishment in the public debate

Crime pays – especially in the public debate. These days, many seem to be concerned with how to best fight crime. The discussions are diverse: some are concerned whether the state's actions against criminals are sufficient enough so that the citizens' need for protection is met. Others consider the possibilities of legal punishment to be adequate but claim that the law has to be enforced more persistently. Then there is a minority claiming that strict punishment and too much imprisonment do not help in turning criminals into good and decent citizens.[1] Especially the Left argues that only those who have problems, cause problems and demands more money for the reintegration of (former) criminals into society. If prison conditions constantly become worse because less money is spent on, e.g. education in prison and probation workers, then no wonder that imprisonment does not help make better people out of criminals and protect them from a relapse, is a common leftist argument.[2]

So, as divergent the debates on crime and approaches to fighting it may be, the need for punishment and for the state's capacity to use force is common ground – from right to left.[3] For some, for example, it may be evident that we would get nowhere without the protection of private property and/or freedom. Without punishment citizens and their rights would not be properly protected and justice would not prevail. Even if some would admit that harsher punishment does not help, the necessity for the state to punish in order for a society to work is hardly an issue. Sentences, which impose punishment on offenders, it is claimed, have a deterring effect which – as sad as it may be – is inevitable in order for communal life to work. In this view then without punishment, it is claimed, many people would not accept the "legal rules" essential to live harmoniously together and it would always be the more powerful people asserting their "right". This would result in the "law of the jungle". And this, obviously, would be harmful for anyone without the "muscle". Punishment by the state and its systematic practice is necessary, it is argued, because it respects the people's need for punishment. But, in a "civilised", predictable and just way, i.e. there is no "cruel and unusual punishment".[4] And this, as those who hold this view conclude, is the only way to prevent boundless and arbitrary punishment, i.e. that people take the law into their own hands.

In the following, we want to critique this explanation for the necessity of state punishment and show that the crucial basis for the continued existence of crime is not to be found within people themselves. Instead, we argue that the fact that the state by law guarantees private property, freedom and equality is what continuously produces "good reasons" to break the law. Moreover, we question what the public and jurisprudence consensually claim to be criminal law's purpose: that it saves people from harm and ensures their daily "peaceful coexistence".

But, before we really start we would like to briefly clarify: this article deals with punishment in states with a capitalist economy and a democratic legal order. Hence, the subject of this article is not the question of how to deal with people doing harm to other people in a reasonable society. And to avoid any misunderstandings: we do not rule out that in a society based on a social plan of production encroachments on the life and limb of other people may take place. In order to protect

ourselves and others from harm, some form of coercion may now and then be necessary – otherwise one would just be subjected to violence. But, this is a different question: temporary coercion on the one hand or, on the other, an enduring necessity not only for a monopoly of violence, but also for the complete punishment system of the state.

Why the bourgeois legal order's economic substance continuously invites to break the law

In order to explain and put forward a critique of state punishment, it is necessary to take the bourgeois legal and property order into account as a whole, i.e. the basic legal institutions of freedom, equality and private property have to be critically assessed and their purposes explained. Put differently: if a proper analysis of state punishment comes to the conclusion that its purposes – forcing through and maintaining the ever so peaceful coexistence of people in the bourgeois-democratic state – cannot be asserted and maintained without such sanctions, then also the purposes have to be critically looked into. Hence, a critique of bourgeois criminal law is not to be had without a basic critique of the bourgeois legal and property order, that is freedom, equality and private property.

Private property is the institution regarded by many as the means through which people are able to secure their access to stuff. But, in fact, it mainly excludes people from stuff, i.e. from anything and everything they do *not* own. This exclusion again and again gives rise to situations where people violate property law – simply in order to be able to satisfy their material interests and basic needs. Whenever the purse limits this satisfaction of needs a person might think about an extra-legal way to get access anyway, which means to commit a crime.[5]

There is no need to look far: even in successful capitalist states crime occurs on a large scale. It is a daily habit to dodge the fare, download films illegally, to evade taxes, or to make misstatements to maybe get just a little more in (state) benefits. People squat houses or do not pay for, e.g. electricity because the little money they had was spent for something else.

These examples of crime indicate that life – also in successful capitalist states – is not a life in which people's needs, wants or desires are provided for (or on the state's agenda). Instead, one finds that to satisfy one's needs the law must often be broken.

Moreover, in a society which is based on its members pursuing their economic success in competition against each other, it is no surprise that the rules set to facilitate this competition are constantly broken. Two or more companies, for example, may work together illegally in order to drive others out of the market to expand their position on the market: they engage in "unfair competition". Or a capitalist might disregard labour or environmental protection regulations, might bribe an official or might hire people without valid immigration status in order to have an advantage on the market. The capitalist tries to succeed economically like everybody else, an interest which has the state's blessing, but with illegal means.

So, while not all forms of crime result from the dependency on property, most crime only exists because of the pursuit of economic success in competition with and against each other. And it is this regular production of crime that makes a penalty system in bourgeois societies imperative.

No crime without law

In contrast to our condensed explanation above, it is public opinion that by means of the law the state merely *reacts* to violently carried out clashes of interest that simply exist in every society at all times. However, interests clashing on a systematic basis only happens *because* of the bourgeois state and its law. Guaranteeing the premises of these competing interests does not mean that the state welcomes the resulting breaches of the law, though. On the contrary and following the above, the state's purpose is a functioning capitalist economy – and for that it wants clashes of interest to be productive. This means, the state must also guarantee a stable order for and smooth running of such a society.

The basic form for bringing conflicting interests in a capitalist society into a *productive form* is the contract: here, two parties specifically come to some agreement that both sides hope to *gain* from. Yet, in and through the contract their conflicts are not dissolved. Instead, each contracting party is now equipped with entitlements that allow for the assertion of her contractually recorded interests against the other party. Such entitlements can be enforced with the help of *civil* law, i.e. the law predominately concerned with the relation between citizens.[6]

In *criminal* law the state relates the actions of its subjects to itself and defines – among other things – what kind of breaches of the social rules are considered to be of state concern and prosecuted accordingly. Not every action which the state regards as detrimental to society and the coexistence of its citizens is met with punishment, e.g. breaches of contract, are not in themselves criminal matters. It is only those deeds it considers to be matters of principle, i.e. actions the state regards as directed against its basic legally protected interests (e.g. personal freedom, life, the human body and health, and property), which are classified as offences and responded to with punishment. However, even though there are no objective criteria within each offence according to which an action is classified (in law) as serious and thus is punishable by law, it is not for nothing that in most capitalist states murder and robbery are considered serious crimes (see section on criminal law below).

Both, in respect of civil law and criminal law the state aims to make sure that its citizens' interactions follow a certain set of rules, even in situations of colliding interests. The state is well aware of the variety of conflicts and consequently it also knows that there are ample invitations to break the law. So, instead of solely relying on some kind of moral considerations that the citizens may make and which possibly would prevent them from illegally obtaining the objects of their desire, the state intervenes by means of criminal law. The punishments meted out in these interventions damage the guilty citizens through restrictions on their property and freedom. The state thereby creates and maintains a situation in which people are obliged to make the following cost-benefit-calculation: how much do I want something versus how much would the punishment impair me if I got caught. Indeed, it assumes its citizens make this calculation. The higher the punishment, the more probable it is that citizens act in line with the state's hope and obey the law. By punishing and therefore creating costs for the offender the state, with varying degrees of success, limits breaches of the law in society as a whole.

If this calculation works in society as a whole, then every citizen can rely on conditions where contracts are usually fulfilled – be it with respect to trade, work or tenancy – even if it might be tempting to not fulfil some contract for whatever reason. This is two-folded: firstly, every citizen can expect that fare-dodging, car theft and other crimes stay exceptions. Secondly, as long as all her actions take place in compliance with the legal order every citizen may refer to the state as the

guarantor of this order in case she is confronted with a breach of the law negatively impacting herself, for example, when someone steals her bike.[7] This is an offer to the citizens to use this legal order as their means to success – an opportunity they simply need to take – and thereby ignore their own subjugation that comes with it.

The bourgeois state's task for its citizens: to abide and to appreciate it

To illustrate the specificity of bourgeois law it makes sense to look back in time. During the Middle Ages, many relationships of domination were based on a few, very specific acts that subjects of a monarch had to perform resp. rules they had to adhere to (and if they did not, they had to face punishment). Common ones were, for example, to tithe or to have to send the first son to do military service. In many other regards, a ruler's subjects were of little to no interest to him (or rarely: her). Put in a very condensed way: a feudal ruler's interest was to mainly squeeze out some wealth out of its subjects. Less of concern was whether or not his subjects endorsed the law, there was no generally accepted ideology for the subjects to "translate" this power relation into a bunch of chances.

The state under the rule of law is usually more demanding. It and the capitalist society it rules over need the majority of people to not only abide by the law but also principally appreciate the legal order. Generally, the state's citizens know what they are allowed to do and they stick to the rules. If the law is accepted in general and asserted by the state, especially when it is broken, then an important prerequisite for a successful national capital accumulation and attracting foreign capital is fulfilled. Then capital may be invested in the country instead of somewhere else and long-term growth becomes possible. Such long-term growth, if it occurs, holds the possibility that it pays off economically – at least for a few. If exploitation of workers and the poverty, which produces and is produced by this kind of wealth, are ignored as usual, then these conditions seem to be a friendly offer. It is noteworthy that this offer usually seems to work out even if there is only hope for a little bit of success. Even only reasonably successful capitalist states are able to assert and maintain such nasty conditions without their citizens having fundamental doubts in the legal or the economic order. This has only recently been demonstrated by many of the protests in reaction to the global financial crisis of the last years.

The citizen as an economic subject pursuing her economic interests, may and is required to pursue a blinkered personal interest to make money. But there is another role inevitably to be 'played', namely, that of the political subject or citizen. The democratic state relies on the general self-identification of its citizens as citizens, i.e. that they accept that there must be rules and restrictions, in order that being a subject in ceaseless competition may work out. After all, if murder and manslaughter were allowed, simply eliminating competing subjects would indeed be a possible alternative and economic success would be a question of the bigger gun.

The citizens, though, are not only to understand their roles for the sake of their own petty standing in competition but also in terms of the national whole, i.e. they are to accept their own sacrifice(s) in order for the economy and state to function. For instance, I do accept the building of a new nuclear power plant in my backyard for the sake of improved regional development. This means a basic loyalty to the state. The state's function to rule – the state as legislator, law enforcer and monopolist of violence – has to be appreciated and recognised on a very basic level. It is the state asserting the basic rights and ground rules and only within the realm of these rules may one change anything.[8] The state, in turn, wants and needs these yes-men-citizens in their dual role as

citizens of the state and subjects in ceaseless competition: they ought to be political and private persons at the same time.[9]

A state's rules are usually misunderstood as an altruistic service to its citizens regarding a "civilised coexistence". Politicians may also have this understanding. The state, however, does in fact pursue its own interests by enforcing the law. It puts people in the position of legal persons that, at the same time, depend on each other and act against each other. For the sake of a continuous national growth of capital, these contrasting positions need to be and remain in productive conflict. This way the state has established a permanent need for regulation. In various laws it now has to regulate the course of this competition and restrict individual interests at various points.

Nowadays the subjugation and loyalty that the state demands from its citizens is no battle ground any more – the majority has signed off on this. However, it should be borne in mind that it is an intellectual effort to establish this loyalty. How come people so easily appropriate such a scheme? How come they subordinate themselves *voluntarily* to quite a large extent under this order *and* on top of it appreciate it?

How come citizens idealise law and state violence?

The violent enforcement and the rule of law is justified by the citizens with an ideal of the constitutional state. The state under the rule of law stands as an authority above the citizens' opposing interests; it is solely bound to the law and its assertion and it treats every citizen equally (before the law). While this, in fact, is not wrong, it is commonly idealised because it is usually understood as an offering. Law is seen as a means for one's own interest. Thankfully, the state is there to help the citizens to enforce their rights – rather than to enforce it's own, the state's law. There is a widespread appreciation for and acceptance of such idealising pictures of law and of the constitutional state as well as the actual institutions in the economically successful democratic states.[10] How is that encouraged?

An important social institution is school where one learns to not only put one's own interests into relationship with other's interests but especially to relate them to rules. Already as pupils many accept such rules as vital, i.e. they are unquestionable.[11] Based on their own will they learn to live up to the standards at school that they are confronted with. Sooner rather than later they learn to worship the fact that the rules of performance assessment apply universally (i.e. to every pupil). Put more abstractly, they come to appreciate justice as a supposedly good means to pursue their own interests. Within this ideology then the fact that the same rules apply to everyone also means, usually, no child is favoured or disadvantaged. Everyone has the same opportunities in standardised performance comparison. In their later daily routines citizens find this esteem for justice and the rule of law, which they have internalised during education and through experience, to be true. Hence, what you already learned at school is "useful" later on in the competition of "the real life". The lesson is given not only through what teachers and parents might say, but also because of the form in which education is organised.

When explaining what law is and does, it appears to many as an "achievement of civilisation": because it protects the interests of those who abide by the law; because it protects the landlord's property just as well as the tenant from arbitrary evictions; because the Employment Protection Act, a protective action by the state offering oneself *as worker* some security, inhibits an immediate "hire and fire".

If people do question the law then it is not the law as such but rather its ostensible false implementation. Then an ideal of the law is compared to a specific rule and this rule is disputed in the name of this ideal. Or else, the demand is put forward that the executive power shall apply the intrinsically just law correctly. But that the law itself might be the issue very rarely appears in the debate.

People who base their appreciation for the law on their practical interests, e.g. as tenants or employees, draw this conclusion from the standpoint of the market participant, i.e. they remain within the realm of the existing legal and economic conditions. In these conditions they want to get by. Sooner or later, as politicised citizens, they find a reason to think in more general terms about how worthy such a well-functioning constitutional state is for the citizen. This leads to roughly the following conclusion: if there were no rights and no state seeing to it that these rights apply equally to everyone (every citizen, that is), it would be impossible that everyone, including oneself, has the same opportunities to defend one's interests against others. To workers, for example, it seems rather easily conceivable that companies would not pay them their wages on time if this was not regulated in law. By means of its legal order the state facilitates the "anyway existing" conflicts so that they are carried out without violence – this is the usual ideology. It goes on: by being impartial the constitutional state ensures that also the weak get their rights. From this point of view the state with its monopoly on violence and legal order joins with the citizens to ensure a civilised way of dealing with their conflicts.

This same idea applies when it comes to justifying state violence and penalties by the state. The starting point of this ideological thinking is the conditions of a bourgeois society. Then thoughts are made about how "this world" would be if the state did not have a monopoly on violence and if there were no fines and penalties inflicted by the state. In this picture the conditions are such that no one would take rights seriously any more, hence, it would be all out chaos and misery, and anarchy as imagined by its opponents.[12] Department stores would have to close down, transport services would have to stop their service because their business would no longer be profitable – their would be too many thieves and people dodging the fare. All this, such the conclusion, because there were no rule of law, no state monopoly on violence preventing people from ruthlessly enforcing their colliding interests. Given such an alternative then the state monopoly on violence and penalties seem inevitable for (a) human(e) coexistence.

These considerations serve to "prove" that state punishment is effective because potential offenders are deterred from breaking the law by way of threat of punishment. The central mistake with this line of argument for the imperative existence of state punishment is to simply think the conditions – which are constituted by the state in the first place – can exist without the state. That is, a society based on everyone competing against each other and the misery caused by this are thought to be (even naturally social) conditions already existing before and outside the state's existence. In this ideological train of thought cause and effect are twisted. By justifying democratic punishment in this way the state is not seen as responsible for establishing the conditions that give rise to crime but rather as a response to those conditions.

If such thought experiments "prove" anything at all it is not that punishment is useful. Indeed it shows that a reasonably peaceful communal life is not possible in a world of property, competition and socially produced scarcity.

Criminal law: not a realisation of an ideal of justice but a manifestation of political will to protect the bourgeois legal order

Before we turn to the popular belief that by criminal law some sort of true justice is realised, it seems apt to give a brief overview of the criminal law, more precisely, the Federal German Criminal Code.

This article is based on a German text which extensively refers to German law. Yet, any principles we present here and illustrate using German law are valid in most or all democratic states as we attempt to demonstrate by reference to British law. Therefore we spare the reader from anything too specific and will focus on the principles of democratic law, exemplified in German law.

Germany's Criminal Code consists of a general and a particular part. The former contains abstract definitions of when an action is a criminal offence, whereas the latter deals with defining and listing such criminal offences (such as manslaughter, murder, fraud, theft and many others).

In order to determine when an action is a criminal offence the following criteria have to be met: a deed (i.e. an act according to law) has to exist, which has to meet the criteria of being unlawful so that the so-called *actus reus* is given; and the mental element, which means the guilty mind (or *mens rea*) of the offender has to be proven – then the offender is criminally liable.

Besides defining criminal offences the Criminal Code also contains (in the particular part) regulations for the sentencing range for each criminal offence. The sentencing range determines a minimum and maximum punishment one has to face for a given crime. So, the actual punishment for each single offender is not specified in law but is determined by the respective court in the course of assessing the penalty. Hereby, the Criminal Code follows the principle that every punishment has to conform to the extent and severity of the offender's guilt.

When defining offences and the relevant range of sentences the state in its capacity as legislator acts as follows: everything that people do – or could do or do not do[13] – is related to the state's basic legally protected interests.[14] On the basis of its political interests the state decides which and to what extent actions are considered to be, and are punished as, a fundamental threat to the legal order. Here, the state does not act according to a timeless ideal of justice. The mere fact that a number of criminal laws presuppose private property, shows that the criteria for the selection of goods that are worth protecting do not originate from (timeless) measures, but are measures essential for a bourgeois society. Criminal law, like the law in general, is the materialisation of a bourgeois state's political programme.

There is disagreement about what this programme is: political parties have quite different opinions and the "valid opinion" prevails only in dispute. But, this does not substantially affect the basic standards of assessment of criminal law, respectively punishment itself. There is a political consensus in many cases about what constitutes a crime: the activity of smugglers or traffickers, for example, is not perceived as a job like any other, but as a crime.[15] While the intentional killing of another person is punished by law, the intentional killing of other soldiers does not constitute an offence if it happens under lawful orders in war.

It may also well occur that the criminal law changes. This happens, for example, if behaviours which had previously been judged either useful to or disruptive of the legally protected interests are now assessed differently. In these situations the state has decided either that activities which used to be criminal are no longer a problem, or that activities which used to be lawful are now a threat to bourgeois society. Rape within marriage, for example, was not recognised as a crime in Germany until 1997 (in England and Wales it was 1991, in Scotland 1982). In the past, sexuality within marriage, be it consensual or exactly not, constituted a part of the sexual entitlement of the spouses towards each other (i.e. in practice usually the husband's entitlement towards his wife). By recognising rape within marriage as a crime women's status as subjects was enforced also within marriage and the legal entitlement was lost. This said, sexuality as an entitlement and performance of an obligation within marriage does still exist as a demand of people against each other, but it is no longer covered by the law.

As much as sexuality was taken as a given within a marital relationship until roughly World War II, it was also limited to it. The bourgeois state treated sexuality outside of marriage as a threat to society. It demanded subjugation, surrender, modesty and subordination in this field. A sexuality for the mere reason of lust did not quite fit the moral system. The state took action accordingly and allowed only one way of socially accepted and state-served practice of sexuality: in a marriage. Thus, until 1969, the so-called matchmaking-clause existed in German law, by which it was a crime to provide an unmarried man and woman an opportunity to commit "fornication".[16] Also until the same year homosexuality was a criminal offence in Germany. "Deviating forms" of sexuality were criminalised and sanctioned. Among the parties of government and in the public the opinion became prevalent, though, that "deviating forms" of sexuality would not compromise marriage and its duties – namely, the compulsion to mutual care and commitment to the education of the next generation – but rather stabilise it. So the state took action and at the end of the 1960s and the beginning of 1970s it abolished a series of laws, which earlier had made its citizens lives (even) harder.

The definition of guilt in criminal law: lack of will to subjugate under the bourgeois legal order

The state's interest in its citizens' voluntary subjugation (to the law) comprises an explanation for an important principle of criminal law: no punishment without guilt, nor without culpability. The state very carefully differentiates between law breakers on the one hand and law-abiding citizens on the other.[17] When judging a crime it is not sufficient that an action of the accused constitutes an offence and is unlawful.[18]
Only if, in addition, the accused has a so-called guilty mind, can she be punished. This is usually referred to as the "mental element" as distinct from the actual deed. For criminal liability to exist the accused, thus, must be (cognitively) able to realise that her action was unlawful *and* be capable of acting accordingly.[19]

For guilt to exist there is a presupposition that the criminal had ignored the fact that something is prohibited by law, even though she would have been able to act differently.[20] The state's basic assumption (here) is that every offence results from the fact that someone (actively) decided to break the law, i.e. to not subordinate herself to the legal system, but to (deliberately) defy it. The German Supreme Court puts it as follows, "guilt is culpability. If convicted, i.e. if considered guilty, the offender is accused of not having behaved lawfully. He chose (to do) wrong, although

he would have been able to decide (to do) right".[21] This definition of guilt shows that the state does not merely assess the act itself, but always also the exercise of one's will. This means, for example, theft always implies the active intention to break the law (as such).[22] Hence, besides charging the accused with a particular deed she always is also accused of a lack of will to subordinate herself to the legal system.

In respect of the definition of guilt in criminal law it may be seen what the state expects of each of its citizens: she has to absolutely subjugate herself to the legal order, irrespective of her social and individual situation and reasons for committing a crime. If a citizen breaks the law, then the state judges this as a lack of the will to subordinate. The penalty is not only the consequence but also the substitute for this denial of voluntary subordination.

Levels of hostility?

When judging someone's lack of will to subordinate, the law looks to determine the severity of guilt. This means, the severity of guilt is not only measured against the violation of a legally protected interest, but it is asked to what extent the alleged offender deviated from the legal order.

Therefore, the extent of the individual's hostility towards the law, which apparently shows in the respective offence, is important both with regard to the range of the sentence and the sentence itself in each individual case.

Now, how are the differences of a hostile attitude towards the law characterised in criminal law? A first distinction is made between what is called deliberate act(ion) and (act of) negligence. She who commits an offence, such as deliberately placing paint on an exterior wall of a house without the owner's consent, conducts a deliberate action. On the contrary, she conducts an act of negligence if to paint the wall was ordered by the owner, but the work was carried out without the necessary caution.[23] The state considers the former to be more serious than the latter.[24] Crimes where the action was deliberate are punished harder by the state because it considers the offender's respective disposition to be more dangerous than with regard to negligent acts. Deliberate actions are identified by a hostile or indifferent attitude of the offender towards the legal code of conduct as opposed to a careless or thoughtless attitude with regard to acts of negligence.

In cases of deliberate actions, however, the crime is further distinguished with regard to the alleged hostility towards the law. For the same conducted deliberate actions, such as the unlawful, culpable killing of a person – in legal terms: the violation of the legally protected good "life" – very different levels of minimum and maximum penalties apply. For example, murder and voluntary manslaughter (both offences that constitute homicide) both describe the intentional killing of another human being in law. But, murder is punished much harder because the accused has the so-called guilty mind for murder, which in short means that the intention was deliberately to cause grievous bodily harm (i.e. serious harm) and no partial defence applied.[25]

As part of the judgement the extent of individual guilt is further explored: the German Criminal Code highlights the offender's particular attitude and will, which it determines in (and from) the committed crime as well as the acts' circumstances. This is considered by the judge when determining the punishment, i.e. how high or low the sentence should ultimately be. Similarly, the British Sentencing Council suggests to reduce the severity of a sentence to reflect an early guilty plea or when the accused is cooperating with the authorities. In both cases, the accused signals her

willingness to subjugation. Inversely, it suggests to punish those harder who commit crimes while on bail, have offended before, planned their offence, are “professional” offenders (even they put that in scare quotes), attempted to conceal or dispose of evidence or are “motivated by hostility towards a minority group”.[26]

There is no right degree of penalty, no “proper sentence” and no “fair punishment”

As already mentioned above, a common idea of criminal law is that it contributes to justice being realised. Along with moral ideas of “the good” in law this ideology forms the basis for regular discussions on the “right” degree of penalty. In such discussions, citizens, encouraged by politicians and the media, feel compelled to express their ideas about which crimes should be punished harder than others for the sake of justice. Just like in criminal law it is assumed by these citizens that there is a general moral measure which determines and forms sentences. Furthermore, it is assumed that it is this general moral measure, which makes it possible to compare and evaluate such diverse offences as fraud, theft, assault and the killing of a human being with regard to the severity of the underlying crime. Otherwise, it would be absurd to claim a fair punishment for each offender, i.e. adequate to the “seriousness” of her guilt. Not only are these acts equated with each other in quality, but they are also related in quantity in terms of the sentence being a certain number of months of imprisonment or a certain amount of money to be paid as a fine. But what could possibly be the objective conversion factor of handbag robbery to prison months? These are, as such, incommensurable; there is nothing in the act itself, that would make the stolen handbag equate to a certain amount of time in prison. Punishment can never fit the crime.[27]

Crimes are, of course, made commensurable, i.e. measurable by the same standard. The common standard is very real as it is set by the state. How hard the state judges one crime or another depends on how much it considers it to endanger the social order it wants. However, there is no such thing as a common measure *immanent* to these diverse crimes.

Both in criminal law and in some ideological deliberations an effort is made to not consider the crimes for themselves but the *extent* of damage done as a measure. This way they ought to be made comparable. This is nonsense: admittedly, the mentioned examples do each cause a form of harm. But, it is absurd to say that someone who was shot experiences much more damage than a battered person and she in turn is much more damaged than someone whose handbag got stolen. Every attempt to determine the quantitative relation of sentences for different crimes in proportion to the degree of damage caused must fail because damages and harm always have a subjective side. After all, how bad a car theft really is for the owner also depends on whether she is insured against this, if she has the money to buy a new car and if she needs it for her job. Also, again we would have to ask what the conversion factor is between really really needing that car to go to work and months in prison. So, there cannot be an objective justification for fair punishment on the basis of determinants, which correspond to the actions constituting the offence or the harm caused, no matter how much sentencing guidelines would like it to be true.[28] The determination of a sentence therefore always is arbitrary and the determination of the degree of guilt is solely based on political assessment. The main principle in this context is: how serious is the threat of

the respective crimes towards the basic legally protected interests (personal freedom, life, property, etc.) and the legal order as a whole?

Legally protected interests equal protection from harm?

Crimes do often involve harm to the victims. This suggests another common misconception: actions are criminal acts simply because people are harmed by them (no matter how much) – be it physically, emotionally or materially. This implies that punishment foremost is about people's well-being or one's individual means to be able to live, i.e. to protect the individual from harm. But this is wrong. The following examples will illustrate this:

- A company sacks 2,000 of its employees because it is cheaper and therefore more profitable to produce its commodities in another country. This is not criminal. Regardless of what it means for the people sacked to lose their income and thus their means of subsistence.

- The right to life, liberty, and security of person applies to everyone: an employee may rely on the protection of her person if she is assaulted by her boss. But this does not apply if she is worn out by work. While deliberately harming someone is punishable as a crime with severe penalties, the destruction of body, mind and psyche occurring in capitalist factories are not to be found as offences in the criminal law. If the work exceeds an average and as such even allowed amount of damage, the company may have to expect a fine in civil court – at most.

- There are actions in which no one is harmed and where no threat of damage exists, but which nevertheless are punished, for example, consensual incest. This might be because it contradicts the currently prevailing idea of the institution family and its function for population policy.

This clearly demonstrates: criminal law works as a standard imposed on the actions of the citizens. And for this standard to operate it is not crucial that an action causes harm. The important difference between the protection of legal rights and the protection from harm is: when the state punishes crimes it acts as the affected party. Where it reacts to harm caused by crime by means of its criminal law, the state is merely and only from the outset interested in this damage from the point of view of the violation of its legally protected rights.[29] Hence, protection of legal rights is not protection against harm. If at some point protection of legal rights also entails protection against damage, then that is a by-product. As to the rest, viewing the law as designed to provide protection from harm is purely ideological.

Let's take a look at how the state acts when its citizens are damaged as a result of a breach of the law. Take an owner of an off-license who was deprived of goods worth £400. But, the damage to be "atoned for" is not directly the damage, which has occurred to the off-license owner – she is not reimbursed that stolen £400 from the state. According to the state of law the off-license owner was harmed in his capacity *as an owner*, therefore the legally protected interest *property* was damaged, i.e. the legal order. Following the rule of law the state judges accordingly: theft means the offender has questioned the legal order.

There is a section in law – at least in Germany and the UK – in which compensation for damage suffered as a result of crime is dealt with. In the UK it is called a "criminal injuries compensation award". This provides cash payments to people who have suffered injury to their bodies (not their property). However, it is not a determinant factor for punishment by the democratic state.[30]

The kind of "compensation", however, that criminal law may well be concerned with, rather consists in restoring the unconditional validity of the law. And this is not measured against the compensation of material or harm to the health of the victims, but against the offender's subordination under the violence of the state, which corresponds to the offender's severity of guilt.

Purposes of sentencing in criminal law

What is the purpose of sentencing? Within much legal scholarship it is common sense that criminal law serves to protect rights. Hence, its existence is justified if the citizens' peaceful and materially secured coexistence can only be preserved by the threat of punishment.

Criminal law itself attempts to serve various purposes of sentencing. For example, Section 141(1) of the British Criminal Justice Act 2003 lists: "(a) the punishment of offenders (b) the reduction of crime (including its reduction by deterrence) (c) the reform and rehabilitation of offenders (d) the protection of the public (e) the making of reparation by offenders to persons affected by their offence."[31] Public, politicians and legal scholarship[32] hold differing views on the importance of these different purposes.[33] But, it is common ground and a basic prerequisite that there must be punishment and that punishment has a certain benefit, at least for the society in general, if not for the offenders themselves.

(a) "Each to his own" – the punishment of offenders

For this purpose, penalties are not inflicted in order to mitigate the crimes' effects or to protect the victims. Instead, the punishment adds to (the violence of) the crime one more violent act to break the offender's will. Why? From the state's perspective the citizen by breaking the law has violated the law's unconditional validity. Through the penalty the law-breaking citizen's subordination under the law according to the respective degree of culpability is demonstrated. Thereby the law's unconditional validity is restored. But, how is one to imagine such restoration of the violated right by means of punishment? After all, the crime itself, i.e. the breach of law cannot be undone. By means of punishment the law-breaker is damaged in freedom and/or property until she has paid for her "debts", which is to say the degree of her culpability found by the state. She is forced to go to jail, pay a fine or do community service. This way, punishment is compensation for the subordination owed by the law-breaking citizen. It is in this way that the state achieves "restoration" of the violated law.

Critical approaches sometimes equate the retribution of the state with revenge. However, this retribution is something other than revenge because it does not respond to a need or want of an individual person or that of a group but it is a reaction of the state to a breach of its generally valid law. While it is usually people's subjective concern that is the relevant measure for taking revenge, this is irrelevant with regard to prosecution, judgement and punishment: for example, the prosecutor's action in the process of prosecution and the Court's evaluation of the crime exist

entirely separate from any personal concern. Prosecutions can be initiated by the prosecutor irrespective of the victim's desires.[34]

(b) "Crime doesn't pay" – the reduction of crime (including its reduction by deterrence)

In order for deterrence to work, which means that citizens actually consider it more useful to not break the law, the state's violence against offenders must prevail. In this respect, the restoration of the law's unconditional validity by violent subjugation necessarily aims at an additional effect. Tools such as the process of criminal prosecution, criminal justice and carrying out sentences always serve as demonstrations of the superiority of the force of law towards potential offenders. But, the force of law gaining ground against the criminals not only deters crime but also encourages the state's citizens in their confidence in state authority and in its protective function and efforts to enforce justice.

A justification of punishment by reference to its deterrent effect implies that punishing some criminals is needed to prevent many other crimes. However, if to prevent crime really was the aim of punishment then one could doubt its success as a means of deterrence. Depending on the offences and time served in prison the re-offending rate of offenders is around 60%.[35] The good opinion people have about punishment as a means of preventing crime often comes about because the law-abiding actions of many citizens are attributed to the deterrent effect of punishment. So the common opinion – "punishment deters" – prevails, even when the number of crimes increases.

The popular opinion that punishment is necessary to deter people from acting against the law contradicts the equally popular idea that there are a good many moral and material reasons to appreciate the law. Even if the argument that people would not obey the law without force holds true for this social reality, it is neither an argument for the existing current social conditions nor for the violence that is entailed in enforcing the law.

(c) "You don't stand a chance, so take it" – the reform and rehabilitation of offenders

Punishment not only serves as retribution and prevention of (repeated) crimes. Punishment shall also have the effect that the offender in the future abides by the law. The German Prison Act states that by completing the sentence the prisoner should "become able to lead a life without crime and be socially responsible in the future". This results in specific requirements as an educational comment on punitive law states: "Imprisonment shall be designed so that the life of the detainees is aligned with the general conditions of life as much as possible. The – necessary – negative effects of imprisonment such as deprivation (breakup of personal ties) and adaptation to the artificial world of the institution shall be reacted to". On the one hand, rehabilitation in respect of imprisonment means a number of measures to prevent the prisoners from being completely mentally and physically destroyed and entirely unable to reintegrate into society when leaving prison. On the other hand, rehabilitation also means preparing for an independent life "outside of prison". This can be educational achievements and training, work, therapeutic treatments in jail but also relief from imprisonment and a transition to open prison. This may all sound friendly, but it is not. Rehabilitation does not seek, as the literal sense of the word may suggest, reintegration into social life in the sense of the supply of jobs and other things. Instead, rehabilitation measures are intended to prepare the prisoners for everything that comes after jail without re-offending – be it to endure a life on benefits, precarious jobs on minimum wages and an often destroyed social environment.

The state wants punishment also to be designed in accordance with the objective of reintegration into society. The state wants retribution, yes, but not in the way that its offending citizens turn their back on it for all time. The attempt is to turn criminals into law-abiding citizens. It is widely acknowledged that the risk of becoming criminal is somehow related to people's "unfavourable living conditions". Hence, imprisonment's negative effects are being limited and plenty is undertaken to not make subsequent survival impossible from the outset. Every now and then the damaging effects of imprisonment are pointed out in order to show that the legal guideline of rehabilitation is poorly implemented. This, however, does not concern the vast majority of politicians much. They shrug and refer to what rehabilitation really is about according to the law: rehabilitation means the forced voluntary adjustment of offenders to the bourgeois legal and property order. All rehabilitation programmes are solely to enable the released prisoner to remain "clean" – despite unemployment, lack of money, social isolation and stigma(tisation).[36] The crucial condition for rehabilitation to be a success or failure is therefore seen mainly in the adaptability of the offender, showing that she successfully internalized the external coercion. But, this often fails and the reasons of politicians and journalists to explain this differ (too lax penalties versus lousy prison conditions).

Most people agree that rehabilitation is subordinated to other purposes of punishment, namely retribution and deterrence, even though there may be disagreement about the details of how to organise imprisonment. Even with high re-offending rates no politician questions punishment as an ineffective means for reintegration.

To avoid any misunderstandings: we have no objections to the demand for improved conditions for prisoners. But we object to the arguments provided. A critique of conditions within the prison system that shares the aim of rehabilitation but complains about failure is mistaken about its real purpose. This critique goes hand in hand with the position that it does not substantially object to the state's violence for the sake of punishment – and this is to be criticised. A critique of prison and its effects which finds its ideal in rehabilitation, is to be called naive at best. These critics do correctly describe the physical and psychological destruction that imprisonment causes. But, they do not at all object to imprisonment itself and the purposes it serves, instead, they campaign for proper rehabilitation. This way, they then judge prison conditions according to their operation and ask whether and to what extent an "improvement" is actually achieved for the prisoners. In all this, the violence imposed through law and the misery this causes only become problematic insofar as they are considered an obstacle for a successful "recovery" and (re-)integration into the order protected under the rule of law. Those who criticise imprisonment on behalf of a better rehabilitation stand up for a more successful penal system. It is not a critique of the rule of law which always comes with violence and punishment. But, instead these critics contribute, intentionally or not, to morally legitimising the violence of the state.

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1 A recent example in the UK: http://www.guardian.co.uk/law/2013/jul/09/whole-life-sentences-david-cameron-human-rights (last access 22. July 2013).

2 We do not disapprove of claims to improve prison conditions, but, we do criticise the justifications made in this context. People criticising the penal system in the name of a better rehabilitation speak for a bourgeois-democratic state's better functioning. They do not criticise or question the violence always involved in punishment. Instead, those people contribute to morally legitimise it – we deal with this in more detail later on in the article.

3 Even some people of the radical left approve of punishment – if it is directed against the "right" offenders, e.g. racists or tax dodgers.

4 The phrase cruel and unusual punishment describes punishment which is regarded unacceptable because of the bodily and/or emotional harm (pain, suffering, humiliation) people experience whom this punishment is inflicted on, see http://en.wikipedia.org/wiki/Cruel_and_unusual_punishment (last access 22. July 2013).

5 Hereafter, we will focus on such crimes through which – in any way – a person aims at illegally acquiring material wealth. This also includes a good many violent crimes, such as extortion or robbery, which, however, by the public usually are not counted and discussed as property offences. While not all forms of crime result from dependency on property still most crime only exists because of the material lack connected to one's dependency on wage labour or else on the way to succeed in competition.

6 In civil law the state, among other things, regulates contractual entitlements which the parties have towards each other. This means the state, on the basis of its monopoly on violence, provides and forms the possibilities of action (in case of breaches of contract). Seeking legal enforcement of debt means to utilise state violence in order to enforce entitlements of the creditor against the debtor on the basis of a title, for example through attachment, i.e. through ordering deductions from earnings, or forced sales. The state is not directly involved in this as a subject, it merely establishes and provides the framework of action in which this is carried out.

7 The harm done to citizens by further car thefts or unpaid loans is in no way eliminated just because it is possible (by law) to send bailiffs round to tardy payers or imprison car thieves. In other words, that offenders are imprisoned does not make the offence and its social reasons disappear. And neither does the work of bailiffs eliminate the reasons why many people regularly cannot pay the instalments of their loans any longer.

8 Every action a citizen may carry out – be it (in) a public campaign, voting in an election, founding a party, initiating or signing a petition – are subordinated to these ground rules. This is why a critique of current policies does not question this fundamental loyalty.

9 A more detailed analysis of the bourgeois, or subject on the market as a competitor, and the citoyen, the politically-thinking citizen, who also cares for the "common good", can be found in "Why anti-national" available at http://antinational.org/en/why-anti-national.

10 The political integration of the working class into bourgeois society, for example, is a historical prerequisite for this.

11 For example, there are experiments at schools in which 10 year old pupils are asked to suggest actions to improve everyday life at school. Even though the introduction of this task may not be biased the kids rarely think of questioning or wanting to change the authoritarian relation between pupil and teacher, everyday life at school or other ground rules at school.

12 Regular news about pillage and violence from parts of this world in which state monopoly of violence does not exist or is temporarily suspended seem to encourage or even confirm this position. In 2005, for example, the latter was the case when the flooded city New Orleans was temporarily not state-controlled any more. People looted because either they were desperate – or simply happy to not have to pay for once. What characterises these news though is that they either

concern temporary break downs of the order maintained by the state – and hence do not offer a glimpse into a world without state violence – or concern parts of the world where the local (subsistence) economy was destroyed by the world market.

13 Denial of assistance or failure to render assistance in an emergency is a criminal offence.

14
Legally protected interests have a special ideal quality to them. A bicycle, for example, entails, besides its concrete usefulness of being a means of transport, the quality of being property. The quality of being property, though, has nothing to do with the object itself, but is solely related to the state establishing such a social relation. In other words, the quality of being a legally protected interest refers to the state's self-commitment to protect these interests. Life, personal freedom, health and honour (in German law in this order according to their value) are also legally protected interests.

15 Actions by traffickers and facilitators of illegal entry are regarded as especially reprehensible in and by the public. Besides illegally crossing borders they are reproached of carrying out their action (which is quite a risky one) for mere profitable reasons, i.e. against payment of money, and not the least caring for the people they smuggle.

16 A landlord, for example, could be liable to prosecution if she allowed her premises to be used for illegitimate sexuality.

17 In the process of prosecution this differentiation becomes apparent in the fact that actions are prosecuted as offences only if they have legally been defined as such at the time those actions were performed.

18 To put it simply: With respect to offences, this means all actions defined as crimes in the Criminal Code. Theft, for example, means someone (unlawfully) takes away an object (of someone else) for the purpose of possessing it herself; one has accessed and taken an object without the owner's consent. Regarding the unlawfulness of an action, defences such as self-defence, state of emergency, or enforcement powers have to be ruled out.

19
If someone has performed an action, which constitutes a crime and is unlawful, but is not liable because she is mentally ill, then the state will not prosecute her. But, if the court reaches the verdict that the offender still is a threat to the community, restriction orders may be imposed on her. Preventive detention and forensic commitment are different from punishment. They are measured according to the offender's ostensible threat to the community not the action performed.

20 This does not mean that someone has to be aware that an action performed constitutes an offence. It merely means someone was not forced to carry out the action. Drunkenness does not "protect" from being punished.

21 Klaus Riekenbrauk,*Strafrecht und Soziale Arbeit* [Criminal Law and Social Work], München: 2004, p. 76, our translation.

22 It is entirely irrelevant for the legal determination of guilt during trial that thieves do not steal to break the law (but to get access to the stuff they steal). This becomes relevant when the offence is determined and the offender's guilt has basically been "proven". At this stage, namely, the length of sentence is determined within the range set (which is defined in criminal law for a particular offence).

23 The Sentencing Council's guidelines know four levels of culpability for the sentencing purposes: intention, reckless behaviour, knowledge of the risks and negligence. See Sentencing Guidelines Council, *Overarching Principles: Seriousness*, available at http://sentencingcouncil.judiciary.gov.uk/docs/web_seriousness_guideline.pdf (last access 16. August 2013).

24 Furthermore, and among other aspects such as base motives, the deeds' circumstances and purposes are also considered when determining someone's "hostile attitude" towards the law.

25 With regard to voluntary manslaughter the intention to kill or cause grievous bodily harm also is present. But, a partial defence applies, e.g. diminished responsibility or loss of control (provocation).

26 See Sentencing Guidelines Council, *Overarching Principles: Seriousness*, op. Cit.

27 When activists, for example, decry that certain hacking related crimes, leaking certain state secrets or public order offences can be punished more harshly than, say, assault, they may appeal to a sense that this does not fit the respective crimes. However, this ideal is just as wrong as claiming it was realised in bourgeois law: punishment cannot fit the crime.

28 In the beginning, the aforementioned Sentencing Guidelines state that indeed harm is not something that can be objectively measured quantitatively: "The types of harm caused or risked by different types of criminal activity are diverse and victims may suffer physical injury, sexual violation, financial loss, damage to health or psychological distress. There are gradations of harm within all of these categories. The nature of harm will depend on personal characteristics and circumstances of the victim and the court's assessment of harm will be an effective and important way of taking into consideration the impact of a particular crime on the victim." That is, the guidelines almost immediately turn around and advise to translate harm to seriousness to prison time, community service or fines.

29 The citizen's interests and those of the state may coincide – in the citizens' consciousness, that is. Jean and Jane Lunchbucket got deprived of their motorbike once again. They plead for more police presence in their neighbourhood. The reason for their demand is not their personally stolen motorbike, but they express a particular concern about the safety of their area, which they share with the state and other fellow citizens. However, local police headquarters turn down the plan – too expensive and too much staff needed. In other words, Joe and Jane Lunchbucket's interest in this case does not coincide with the state's resp. its local representative's concept of order. The constant police patrol may also bring a disadvantage: the Lunchbuckets' enthusiasm may be dampened when they suddenly get caught jumping their usual red light.
By aligning their own interest in protection with the common good, the Lunchbuckets have at the same time signed off on subordination: the willingness to serve the general public interest. Depending on where problems for the common weal are located, the question of where the state effectively takes action against criminals and establishes orders may become more important for the individual than improving their own material living conditions. Such an opinion is quite widely spread.

30 The Criminal Justice Act 2003 lists "the making of reparation by offenders to persons affected by their offence" as one of five purposes of sentencing. So, reparation also plays a role as part of assessing the penalty, i.e. this aspect in combination with others has an effect on the court's decision on the actual sentence (meaning: to what extent will the range of sentence be exploited).

31 Points (a), (b) and (c) are discussed in the following. Points (d) and (e) were already discussed above.

32 Theories of punishment within jurisprudence differ with regard to what purpose resp. use punishments are supposed to have. All have in common to not ask the question if and why punishment is necessary at all. Instead these theories justify punishment in itself as well as the violence in connection with it. In an article on the spirit and purposes of punishment it says: "Punishment means (to) deliberate(ly) harm (someone). (…) Such dictated and accomplished harm-doing by the state needs to be legitimised in a particular way; not only formally, i.e. secured by law. It also needs a legitimisation in relation to content, based on ethics and common sense. This is what theories of punishment have been developed for" – Heribert Ostendorf, *Vom Sinn und Zweck des Strafens* [On sense and aim of punishing], available at http://www.bpb.de/izpb/7740/vom-sinn-und-zweck-des-strafens (last access 27. August 2013), our translation. Such theories and discussions of specialists around them seem faulty. None of the theories is able to give sufficient reasons for the purposes of punishment. But this lack does not seem problematic, because the one crucial point is already certain anyway: there must be punishment. And the explanation for that? The usual: a "civilised" coexistence would not work otherwise.

33 For example, in German law the purpose of retribution is prioritised against the other purposes of punishment. The Criminal Code makes clear that the importance of reintegration as a principle is not as significant as that of ensuring retribution. In the law it reads: "The offender's guilt is the basis for the assessment of penalty. The effects on the offender's future life in society to be expected from the punishment are to be taken into account." In other words, firstly, the court determines the offender's guilt so that the general range of punishment is clear, on the basis of which the assessment of penalty has to be carried out. Secondly, it is evaluated how the punishment could effect the offender's expected reintegration into society. This can have a mitigating effect on the actual extent of penalty.

34 This does not apply to every criminal offence. There are criminal offences liable to public prosecution and for those the above holds true as the expression implies. It is not the case for criminal offences prosecuted only upon application by the victim (e.g. trespass or assault).

35 For more on the current numbers see, e.g. http://www.guardian.co.uk/society/2011/may/10/reoffending-rates-short-jail-terms or https://www.gov.uk/government/publications/proven-re-offending--2 (last access 15. May 2013).

36 The convict's addiction, poverty and immiseration are only taken into account in terms of being barriers for her to be able to lead an independent life in compliance with the rules. But, such conditions must not prevent someone from leading a law-abiding life, so the demand. Rehabilitation is the tool to overcome such obstacles and it is the prison staff, psychologists, teachers and social workers offering "help" in order to master them.