Crime Ideologies

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1 What is an ideology?

”Ideology” is a word that easily evokes suspiciousness. The reason for this is not only its role in Marxist philosophy. A leading British dictionary (Collins) lists four senses:

(1) a body of ideas that reflects the beliefs of a nation, political system, etc.;
(2) an idea that is false or held for the wrong reasons but is believed with such conviction as to be irrefutable;
(3) speculation that is imaginary or visionary; and
(4) the study of the nature and origin of ideas.

In sense (2), the word is pejorative. The other senses are at least compatible with the view that an ideology is something less than fully rational, and often the word is used to suggest that a thought has no clear rational basis. On the other hand, there is no reason to hold that an ideology could not be fully rational. Personally, I prefer to use the word in a sense that has no implication of irrationality. An ideology is then (a set of) *basic conceptions concerning some aspect of reality*, the fundamental ideas in a system of thought. According to this view, the relation between an ideology and a theory is analogous with the relation between a principle and a rule. To my mind, there is no doubt that we need such a concept, and no better term than ”ideology” is available.

In practice, no ideology can cover all aspects of reality. So we talk about religious ideologies, political ideologies, world views, views of human nature, and philosophies of science. (In daily speech the word ”philosophy” is more used than ”ideology”.) But the fact that one aspect or perspective is in focus does not preclude an interdependence between different types of ideologies, or the dominance of one type of ideology. On the contrary, one normally strives for

coherence: a person's religious views affect his[1] political views, a scientific ideology affects the world view, etc.

Ideologies can, of course, be correlated to their bearers. From the point of view of the historical sciences, the study of ideologies associated with different cultures, nations, classes, groups, and time periods, is of special interest.

Ideologies can be "descriptive" or "normative", or both. In any case, in my opinion the question of right and wrong can always be raised. Such an opinion is, of course, somewhat controversial, but I will not try to defend it here. More important is that ideologies, in the sense suggested, are indispensable. They are tools without which we cannot live a life that is "decent" – in more than one sense. They are the basic instruments for making the world understandable and managable, and for improving the human condition. Often they are acquired in a way that make them unnoticed by their bearers since they form part of the cultural environment into which people are born.[2] But no ideology is exempt from queries and objections, although everything cannot be questioned at the same time.[3]

2 Penal Law Ideologies

A penal (or criminal) law ideology is a basic conception of crime and/or punishment. Its object is very limited, in comparison with "grand" ideologies, such as religious, political, etc. And obviously, anyone's views on crime and punishment depend to a large extent on his views of the relation, if any, between God and Man, the relation between Man and Nature, the optimal organization of society, causal mechanisms, and the status of different types of persons. With regard to the last point it can be said that, e.g., the Greek conception of a fixed station in life, the feudal view of position in society, and a democratic egalitarian standpoint will yield drastically different ways of thinking about crime and punishment.

If my topic had been *punishment ideologies* no one would have been surprised. The last 250 years in particular have been a battleground for different punishment ideologies. To mention only one point: last century's technological achievements in the natural sciences inspired a punishment ideology which put offenders more or less on a par with animals, in some cases dangerous animals,

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1 Throughout the paper, "he" is meant to be read as "he or she".

2 "Aber mein Weltbild have ich nicht, weil ich mich von seiner Richtigkeit überzeugt habe; auch nicht weil ich von seiner Richtigkeit überzeugt bin. Sondern es ist die überkommene Hintergrund, auf welchem ich zwischen wahr und falsch unterscheide. – Die Sätze, die dies Weltbild beschreiben, könnten zu einer Art Mythologie gehören. Und ihre Rolle ist ähnlich der von Spielregeln, und das Spiel kann man auch rein praktisch, ohne ausgesprochene Regeln lernen." Ludwig Wittgenstein, *Über Gewissheit: On Certainty* (1969) §§ 94-95.

3 "Ja, wenn wir überhaupt prüfen, setzen wir damit etwas voraus, was nicht geprüft wird." Wittgenstein, *op. cit.* § 163. "... agreement at some points is a necessary condition of our giving any content to the notion of objectivity. ... we have to *presuppose* that common world if the enterprise is to get off the ground at all." D.W. Hamlyn, *The Theory of Knowledge* (1971) p. 178.

and which saw the solution of the crime problem in therapeutic measures or incapacitation. A hundred years later, science has advanced beyond recognition, but diagnosis and treatment optimism has dwindled.

My topic is, however, *crime ideologies*, and this is intriguingly different. The nature of crime, what makes a crime reprehensible, is taken for granted, and not explicitly discussed. It is not too difficult to find historical literature indicating a development of basic conceptions, but I have not yet seen an analysis of the historical dependence of prevalent crime ideologies on contemporary (or outdated) ”grand” ideologies (religious, political, etc.). And what is more interesting in this connection: as far as I know there is no serious attempt to correlate different fundamental dogmatic solutions with different crime ideologies. It is simply assumed that there is consensus about what is wrong with a crime. I want to argue that this is mistaken. It is also stultifying since it is not recognized that standard arguments are based on conflicting crime conceptions; this can result in invalid reasons being treated as valid and (maybe) affecting the outcome of a process of reasoning.

The identification of distinct crime ideologies must occur against a background of legal history and history of ideas; otherwise it would be of little interest. The main features of such a historical development are in fact quite uncomplicated, thanks to something that deserves more attention than it has received. When the Roman Empire was dissolved north of the Alps criminal law was also dissolved. It took 600-800 years before we meet a developed criminal law as a significant feature of worldly government within the Germanic world.[4] Feudalism was basicly conceived in private law terms. The legal boundaries were set by contracts and oaths of allegiance. The princes did not govern territories but pyramids of people. The renaissance of criminal law, undoubtedly inspired by the Church, coincides with the intensified struggle for worldly power during the 11th and the following centuries. It is hardly a matter of chance that at the same time what has been called ”the persecution society” emerges: deviant groups like heretics, Jews, lepers, homosexuals, etc. began to be systematically persecuted.[5]

The following remarks are not based on extensive historical studies. The three ideologies that I want to parade certainly have a historical background, but my main intention is to show that their implications for the content of the criminal law are not negligible. To make my point clear, the conceptions are defined in a very simple manner; from a historical point of view they are certainly oversimplified. They should be viewed as archetypical responses to the question ”What is (really) wrong with wrongdoing that amounts to a crime?” or ”What is characteristically reprehensible in committing a crime?” or ”What is the essence of crime?”.

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4 See, e.g., Viktor Achter, *Geburt der Strafe* (1951), Elmar Wadle, *Die Entstehung der öffentlichen Strafe – Klassische Vorstellungen und neue Fragen*, Perspektiven der Strafrechtsentwicklung (ed. by Heike Jung, Heinz Müller-Dietz & Ulfrid Neumann, 1996, pp. 9-30).

5 R.I. Moore, *The Formation of a Persecuting Society: Power and Deviance in Western Europe 950-1250* (1987).

3 The Primitive Conception

Historically, the type of organization and power supremacy needed for the institution of state punishment was thus realized comparatively late. Punishment was practiced and developed within fairly small units: the family, the tribe, the band, the horde, the troop, the army. Whatever the reasons for considering an act or omission to be wrong, punishment was the reward of *disobedience* (or insubordination or defiance or rebellion). The offence was seen as directed against an *individual* in a position of power or authority, let us call him the *ruler* (in practice this individual often also was legislator). When state punishment was introduced this conception of crime as disobedience to a ruler was taken over. This is especially clear in the case of the peace legislation of the Germanic rulers: the essence of the offence was that the prince's peace was broken. When the ruler stepped in as a guarantor of peace, a breach of the peace automatically implied disobedience (infidelitas). The nature of the offence changed. It was no longer a private matter but an offence against the state power embodied in the ruler.[6]

This idea of the crime as damaging or severing the relation between two unequal individuals – the ruler and his subject – became even more pronounced when religious authorities gained power. Instead of a fallible mortal prince we find (a) God in the shoes of the legislator/ruler. (In the Old Testament the tribal god Jehova takes the roles of legislator and judge; obedience/disobedience is the scarlet thread of the stories.)

Although this conception is medieval – if we confine ourselves to the development in Germanic Europe – it was not really affected by the Renaissance and the Reformation. In *Paradise Lost*, Milton, a full-blooded rationalist, asks his muse to sing of "Man's First Disobedience". Milton is unable to find a valid reason for prohibiting man's acquisition of knowledge, but this is irrelevant: a crime was still committed since God was disobeyed.[7] And the 17th century witnesses amazing power being placed in the hands of mortal princes on the understanding that they are God's lieutenants on earth: a crime could then be seen as an act of double disobedience. Historically, such a Christian-theological version of the primitive conception dominated. In Sweden, e.g., the content and practice of criminal law during the 16th, 17th and 18th centuries were formed by theological thinking and a world view based on the texts of the Bible.[8] In criminal law the Middle Ages went on until the end of the 18th century.

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6 "Da der Herrscher sich selbst als Garanten des Friedens einsetzt, wird der Bruch des Friedens zugleich zur infidelitas gegenüber dem König; das Verbrechen wandelt seinen Charakter von einer blossen Verletzung privater Interessen zur Auflehnung gegen die im König verkörperte Staatsmacht." Thomas Weigend, *Deliktsopfer und Strafverfahren* (1989) pp. 43-44.

7 Discussed by Georg Henrik von Wright, *Humanismen som livshållning och andra essayer* (1978) pp. 34-39.

8 See Bo H. Lindberg, *Praemia et poenae: Etik och straffrätt i Sverige i tidig ny tid. I. Rättsordningen* (Diss. Uppsala 1992).

4 The Formal Conception

If we take the prince–subject relation as one marginal case of legal subordination, the opposite marginal case could be characterized as *the authority of the law*, within its (personal and territorial) scope of validity. It is, of course, possible to construct a series of intermediate steps, making the authority involved less and less individual and more and more abstract. The first step has already been indicated: the ruler changes from a natural to a supernatural person. When the state takes over the supreme position it is often seen as something like a person, or an organism, but such ideas are now abandoned.[9] Although the law is an expression of state power, in the last stage the now very abstract state withdraws into the background, and the *norm order* itself captures the scene.[10]

When the legislator/ruler is replaced by the law, ”disobedience” is no longer the most appropriate word for the attitude connected with a crime: the term *indifference* (or ”repudiation”) is more apt to convey what is involved. The offender is no longer disturbing someone’s peace, he is disturbing the law’s peace (Rechtsfrieden). He behaves in an antisocial way by flouting or not caring about the values and interests of the society, i.e. the values and interests that form the basis of the prevailing norm order. In a way, he places himself outside the legal community (Rechtsgemeinschaft), he demonstrates hostility, or indifference, to what makes peaceful living together possible. Schmidhäuser says: ”Hat der Täter schuldhaft ungerecht getan, so hat er in seiner Tat seine eigene Teilhabe an den Grundwerten des Gemeinschaftslebens sozusagen verleugnet; er hat sich als subjektiv-geistiges Wesen über seine Teilhabe am objektiven Geist – bewusst oder unbewusst – hinweggesetzt.”[11] In the German criminal law literature in particular, there are many instances of similar, scattered remarks. The vocabulary used varies, partly depending on the philosophical convictions of the author, but the general thrust suggests consensus on the ”formal” (or ”collectivistic”) conception, i.e., the reprehensibleness of the crime depends on the indifference or hostility to the legal order, lacking ”Rechtsgefühl”.[12] This conception seems to be a general

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9 Many other entities can figure as the relevant supreme authority: the community, the nation, the ”Rechtsgemeinschaft”, the ”sittliche Ordnung”, the natural law, be it religious or secular.

10 See, e.g., David Garland, *Punishment and Modern Society: A Study in Social Theory* (1990) pp. 48, 140, 143, 166-267.

11 Eberhard Schmidhäuser, *Strafrecht: Allgemeiner Teil* (2nd ed. 1975) 6/22.

12 For a few exemples, see Hellmuth Mayer, *Strafrecht: Allgemeiner Teil* (1953) p. 51, Hans Welzel, *Das deutsche Strafrecht: Eine systematische Darstellung* (10th ed. 1967) p. 15, Claus Roxin, *Täterschaft und Tatherrschaft* (3rd ed. 1975) p. 199, Günther Jakobs, *Strafrecht: Allgemeiner Teil: Die Grundlagen und die Zurechnungslehre* (1983) p. 392, Hans-Heinrich Jescheck & Thomas Weigend, *Lehrbuch des Strafrechts: Allgemeiner Teil* (5th ed. 1996) p. 418. See also Jerome Hall, *General Principles of the Criminal Law* (2nd ed. 1960) pp. 139-140.

See also, e.g., Chin Kim & Craig M. Lawson, *The Law of the Subtle Mind: The Traditional Japanese Conception of Law*, International and Comparative Law Quarterly (vol. 28, 1979, pp. 491-513) p. 504: ”... Japanese law descended from the early Chinese Codes, which were almost exclusively penal. This may explain how the law came, early on, to be associated with

characteristic of the so-called modern criminal law, the law of the 19th and 20th centuries.

5 The Radical Conception

Common to the primitive and the formal conception is that a crime involves a specific type of attitude. The radical conception denies this. (In other respects it is not particularly radical.)

One may wonder if this is an ideology at all. To make it clear that it in fact is an ideology, a possible misunderstanding must be eradicated.

In this paper, I am *not* talking about *reasons for criminalization*. Throughout, it is assumed that there exist good reasons for criminalizing the behaviour in question, and that these reasons primarily refer to its (possible) *harmfulness*. Under all crime conceptions, the main reason for criminalizing assault or theft is that it causes some kind of harm to an actual victim.[13] All crimes have some relation to harmfulness, to an invasion of the interests of individuals, or groups of individuals, or of collective interests (of upholding important public institutions, etc.). Those who want to talk about crimes as ”Rechtsgüter-verletzungen” are welcome to do so. Personally I find the literature about Rechtsgüter both confusing and confused.[14] The distinction between word and concept is not always kept clear; the object of discussion is then taken to be the same although it is different, and the real dispute concerns how a term should be used. The discussion also tends to move in circles: if there is a crime, there must be a Rechtsgut – if there is a Rechtsgut, there should be a crime. We are badly in need of a better articulated, more rational, and less abstract theory of reasons for (and against) criminalization. Recent attempts of theorizing in terms of ”social harm” do not seem to be up to the mark.

Nor am I talking about prerequisites of *culpability*. That crime is culpable (schuldhaft) wrongdoing is, in this paper, kept constant under all three conceptions of crime.

A possible source of misunderstanding is that ”indifference to the (values embodied and interests protected in the) legal norm order” can be interpreted in two ways:

(A) indifference to the specific values or interests invaded or threatened in a concrete case; and

(B) indifference to the legal norm order as such (as an entity).

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constraint. Law still connotes pain and penalty, and is still primarily conceived of as an instrument by which the State imposes its will.”

13 It is a separate question to decide who is the victim. The answer depends on other ideologies. In a patriarchal society, the victim of rape may be the husband, not the wife raped.

14 See e.g. Knut Amelung, *Rechtsgüterschutz und Schutz der Gesellschaft: Untersuchungen zum Inhalt und zum Anwendungsbereich eines Strafrechtsprinzips auf dogmengeschichtlicher Grundlage: Zugleich ein Beitrag zur Lehre von der ”Sozialschädlichkeit” des Verbrechens* (1972) and Knut Amelung, *Rechtsgutverletzung und Sozialschädlichkeit*, Recht und Moral: Beiträge zu einer Standortbestimmung (ed. by Heike Jung, Heinz Müller-Dietz & Ulfrid Neumann, 1991, pp. 269-279).

What is mentioned in (A) is simply a necessary and very important aspect of culpability; it does not add anything to the radical conception. It is the sort of indifference referred to in (B) that is part of the definition of the formal conception.

The radical conception can now be defined as claiming that what is wrong with a crime is *solely what makes it worthy of criminalization*, i.e. an invasion of or a threat to a value or interest worthy of protection by criminal law. No special attitude is needed.

The difference between this and the two other conceptions is most evident in relation to victimising crime. The wrongdoing of, e.g., assault or theft is, so to say, exhausted by the harm it does to the victim. There is no additional wrongdoing directed at the ruler or the legal order.

The difference between the formal and the radical conception could be said to consist in that according to the former, but not the latter, crime always involves social harm: all crimes are, in a weak sense, crimes against the state.[15]

Common to both conceptions are

(1) that criminalization is a state business; and

(2) that some acts are crimininalized because of their harmfulness in relation to state interests, and that other acts are criminalized because of their harmfulness in relation to individual interests.

But the formal conception accepts, and the radical conception denies

(3) that all crimes in the end are crimes because they repudiate the state norm order.

The primitive conception is, of course, hopelessly outdated. At least in Western countries, there are no longer any individual legislating rulers and God does not ”rule” any more through a monopoly church. In any case, it is in conflict with the dominating ”grand” idelogies, which stress the importance of recognizing fundamental human rights, democratic forms of government, religious and cultural tolerance, the social responsibility of state authorities, and peaceful settlement of conflicts. Might alone is no longer accepted as right. But old patterns of thinking die hard, and there is reason to believe that the primitive conception is still responsible for considerable parts of the content of the criminal law.

There is reason to expect far-reaching correspondence between the implications of the formal and the radical conception. Some may even want to say that the distinction is too subtle to have any practical impact.[16] I shall

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15 Note that under the radical conception we are still dealing with state crime. For the implications of this, see Winfried Hassemer, *Theorie und Soziologie des Verbrechens: Ansätze zu einer praxisorientierten Rechtsgutslehre* (1973) pp. 232-233.

On the role of the European human rights convention, see Joxerramon Bengoetxea & Heike Jung, *Towards a European Criminal Jurisprudence? The Justification of Criminal Law by the Strasbourg Court*, Legal Studies (vol. 11, 1991, pp. 239-280).

16 An even more telling objection would be that I have misunderstood the whole thing. Maybe there is no real adherence to what I have called the formal conception; it is then only a logical construction, not a living ideology. Maybe I have mistaken an approximate characterization for a theory – a characterization from which no consequences are supposed to follow. Splendid! But then no consequences are to follow.

presently try to show that it is not so, but first I should indicate what I find problematical with the formal conception.

6 Criticism of the Formal Conception

All nations are to some extent heterogenous and conflict-ridden. But does not the formal conception presuppose harmony, or value-consensus, or at least a kind of social contract? How can we talk about offenders contravening the ”objective spirit”[17] of a society’s shared life, if the criminalization is an expression of oppression by a dominating majority or class? The answer might be that the criminal law should deal only with such things that ”everybody” ought to find reprehensible. We know that the reality is different: (imagined) social control through criminalization is very inexpensive, and therefore overused; in practice, the principle of criminalization as the legislator’s last resort, ultima ratio,[18] is obsolete.

This line of thought is, however, more suited to raising doubts than to providing an argument. I think there is something wrong with the formal conception even if a criminal justice system is immune to such objections.

Let us remember that the formal conception claims that what is really wrong with a crime is that the offender shows at least indifference to the legal norm order, wheras the radical conception claims that there is nothing wrong with a crime besides the harmfulness that provides the ratio legis for criminalization.

Many forms of legal wrongdoing are also moral wrongdoings, but the exact relation need not bother us here. What is important, however, is that there is no convincing argument for the existence of a categorical moral duty to conform to the criminal law.[19] A case can be made that there is a moral duty to conform most of the time to most of the criminal law of a decent legal order. But that is not sufficient. A defender of the formal conception will immediately reply that this is irrelevant: we are not talking about moral duties, but only about legal duties.[20] My answer is then that the formal conception needs a moral wrongdoing to supplement the legal wrongdoing. Let me try to explain.

Any criminalized wrongdoing can be described in many different ways, all of which are correct since they focus on actual aspects of the deed. E.g., a case of theft can be described as

(a) prohibited appropriation of another’s money;
(b) causing economic harm to an actual victim;

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17 See Schmidhäuser’s dictum at note 11.

18 See Jescheck & Weigend, *op. cit.* (note 12) p. 3, Klaus Lüderssen, *Die im strafrechtlichen Umgang mit Aids verborgenen Motive – Hypermoral oder Gesinningsethik?,* Recht und Moral (note 14; pp. 281-293), Winfried Hassemer, *Sozialtechnologie und Moral; Symbole und Rechtsgüter*, Recht und Moral (note 14; pp. 329-333).

19 See, e.g., A. John Simmonds, *Moral Principles and Political Obligations* (1979) and Joseph Raz, *The Morality of Freedom* (1986) chs. 2-4.

20 See Jescheck & Weigend, *op. cit.* (note 12) p. 418.

(c) culpable criminalized invasion of another's legitimate interests;
(d) intentional breach of law; and
(e) indifference to the legal norm order.

From this no one would be willing to conclude that the offender has committed five types of wrongs. But the formal conception seems to claim that (e) is a special kind of wrongdoing, separate from causing harm to the victim, and – according to the view just referred to – not (only) a moral wrong.

Such a claim must be distinguished from a claim that two wrongs, defined in the same norm system, are committed (a normal case of Idealkonkurrenz), or a claim that two wrongs, defined in different norm systems, are committed (e.g., an act may be an offence according to a secular legal norm system and at the same time a sin according to a religious norm system).

The only remaining option for a proponent of the formal conception is to claim that (e) conveys the *most important aspect* of the crime characterized in five different ways. But then we are back to square one. In my opinion, it is quite obvious that description (e) does not convey the most important *legal* aspect. Acts are prohibited under threat of punishment because they cause harm or are conducive to harm, not in order to make it possible to show indifference to the legal norm order. It is, of course, true that the element of harmfulness is not sufficient for legal wrongdoing: not all types of causing some sort of harm are criminalized. But that only emphasizes that it is a criminalization that effectuates the "quality jump", the transition from no wrong or only a moral wrong to a legal wrong. The fact of something being prohibited under criminal law does not imply anything about the importance of indifference to the values embodied therein, apart from that it is legally wrong not to conform.

I conclude that the formal conception at the most can claim that (e) conveys the most important *moral* aspect of the deed. And as already mentioned this presupposes that everyone has a categorical moral duty to obey the law (which I believe is wrong).

The formal conception claims that a crime ipso facto involves indifference to the legal norm order (as such). So far, I have taken this connection as a matter of definition. But suppose we ask whether it is in fact true that every commission of a crime expresses indifference to (or repudiation of) the legal norm order. Is it not evident that this is not true? Such indifference (or repudiation) is an attitude that has to be proven in the concrete case, and it must be kept in mind that it is an attitude differing from indifference to the interests of the victim, etc. Some offenders show or harbour such indifference, others do not. It might now be held that although the radical conception stands unshaken, and the formal conception is not vindicated, proof of such indifference is still legally relevant as an aggravating factor. I will return to this question at the end of section 7.

7 Some Consequences

The remaining pages will be dedicated to brief remarks on some of the implications of different crime conceptions.

Although the three conceptions reflect a historical development, for my purposes conceptual considerations are sufficient: from a critical point of view, the interesting question is what present legal doctrines presuppose.

Let us recapitulate. The main characteristics of the three crime conceptions are that the primitive conception focuses on the relation between the ruler and the offender, the formal conception on the offender (and his relation to the legal norm order), and the radical conception on the offence (and the victim, if there is one).

A complete eradication of valuations incompatible with the radical conception would change the criminal codes of all countries drastically. Theft would no longer be treated as a more serious crime than causing damage to property; theft might even be regarded as less serious since there is often a chance that the stolen property is returned unharmed. Intent of appropriation (Zueignungsabsicht) would lose in importance, and intent of harming (Schädigungsabsicht) would carry the day. Mental suffering, humiliation, and loss of self-confidence, in short ”subjective” harm, would no longer be seen as comparatively unimportant compared with bodily injury and material loss. The relevance of mistake of law would have to be reconsidered; there should probably be a larger area of acquittal as far as crimes against the state are concerned. The doctrine on consent will probably also have to be changed, even if there is no reason to allow everyone personally to decide what is harmful to himself. And so forth.

A more general problem concerns *the respective seriousness of crimes against the state and crimes against individuals*. All crimes are state crimes in the sense that the state has a monopoly of definition and administration. But not all crimes are crimes against the state itself, as opposed to crimes against physical and legal persons. As we have seen the three conceptions differ, however, in emphasis on loyalty to the state. From this follows a difference in relative seriousness. Under the primitive conception crimes against the state (and against God, when the prince is seen as God’s deputy) are primary. Under the radical conception they are secondary, at least if we presuppose a political ideology stressing that the state exists for the sake of the citizens, and not vice versa. The reprehensibleness of crimes against the state is then based on their being, so to say, indirect crimes against individuals.[21] Under the formal conception the two categories seem to be on equal footing. There is no ready argument for giving one of them primacy. I fear, however, that this conception easily lends itself to association with the view that the state is quite free to use criminalization in ”self-defence”. This is an area where unprejudiced thinking is sorely needed.[22]

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21 Hassemer, *op. cit*. (note 11) pp. 82-83.

22 See further Hassemer, *op. cit*. pp. 85-86 and 231-234.

Different crime conceptions favour different legislative techniques for criminalization of acts which do not lead to actual harm. The primitive conception favours criminalization of *attempt*, and since the offender's will is all-important, preferably in a "subjective" version (not making exceptions for attempts doomed to fail). The radical conception favours criminalization of *danger-creation* and *risk-taking*. For traditional and practical reasons, there may be a case for a restricted use of the attempt device, but then in a pronounced "objective" version. (Similarly, the primitive conception favours criminalization of conspiracy while the radical conception favours criminalization of dangerous preparation.)

The formal conception does not seem to give any guidance in this respect, and is thus compatible with the present state of affairs in most countries: an unprincipled mixture of different techniques and, at best, a more or less arbitrary compromise in the "subjective"–"objective" dispute (the extent of criminalization of attempts to do the impossible is quite amazing).

The issue is, however, much more complicated than these remarks indicate, and I have dealt with the problems in detail elsewhere.[23]

It took a long time for *negligence* to be accepted as an appropriate form of mens rea. If they existed at all, criminal sanctions for negligence were considered more as educational measures than as proper punishment. Negligence does not express disobedience, so it does not fit in with the primitive conception.[24] Under the radical conception, negligence is acceptable as a form of culpability: the offender demonstrates blameworthy indifference to (the victim's) interests that are protected by the criminal law. (Intention is of course more blameworthy, since it shows a much more pronounced indifference, or even something worse: animosity.[25]) Under the formal conception, negligence is also acceptable as a form of culpability.[26]

A crime conception also influences the rules of *criminal procedure*. I shall be very brief.

Hassemer says quite correctly: "Staatliches Strafrecht entsteht mit der Neutralisierung des Opfers."[27] Under the primitive conception *the position of the victim* in the criminal procedure is peripheral. He is nothing more than a notoriously unreliable witness. Under the radical conception the victim should be given a major role on the understanding that the police and the prosecutor still have the primary responsibility for collecting evidence and initiating legal action against offenders. A victim should thus be protected, and offered support of different kinds. A subsidiary right to prosecute may be relatively rarely

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23 Nils Jareborg, *Criminal Attempts and Penal Value*, De lege: Rättsvetenskapliga studier tillägnade Carl Hemström (Juridiska fakulteten i Uppsala. Årsbok, årgång 6, 1996, pp. 117-134).

24 On the other hand, objective liability in the form of versari in re illicita is acceptable since there is a kernel element of disobedience.

25 I have discussed these questions in *Straffrättsideologiska fragment* (1992, pp. 173-205).

26 But see Hall, *op. cit*. (note 8) p. 139: "there is no challenge to the ethics of penal law in the behaviour of negligent harm-doers" (no challenge – no "real" crime).

27 Winfried Hassemer, *Einführung in die Grundlagen des Strafrechts* (1981) p. 67.

exercised, but it is not without importance. Empirical studies show that the question that most of all concerns victims is the question of *compensation*. A possibility of cumulation of criminal and civil proceedings is therefore vital. The formal conception implies nothing of this.[28] On the other hand, it seems compatible with a far-reaching recognition of victims' interests.[29]

Under the primitive conception there is little reason to claim *jurisdiction* over acts committed outside the realm of the ruler, or over acts committed by foreigners against other foreigners.[30] Under the radical conception there is, in principle, reason to take jurisdiction over all acts that invade or threaten interests or values that are protected by criminal law. For example, a murder should be the concern of any country, irrespective of the place of commission or the citizenship of the offender and the victim. Under the formal conception, legitimate jurisdiction over foreign acts seems to depend on whether the norm orders involved largely share the same values.

Finally, a few words about the the question of *recidivism and culpability*: does the fact that the offender has previously been sentenced make him more culpable when he commits a (new) crime? Note that we are not talking about harsher treatment of recidivists for reasons of general prevention (a more severe punishment level for the class of recidivists) or individual prevention (individual deterrence, or incapacitation of habitual or dangerous offenders).[31]

It is notoriously difficult to reach agreement on whether repeated crime signifies increased culpabiltity.[32] Most discussions end in divided opinions, and the argumentation quickly comes to an end. Many fall back on a paradigm of bringing up children using increased threats of withholding favours or of corporal punishment as the brats continue with their mischief. But criminal offenders are not to be brought up like small children, and in the criminal justice system no one is in loco parentis.

Under the primitive conception, repeated criminality is a symptom of more pronounced disobedience. Conversely, under the radical conception repetition is

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28 Hassemer, *op. cit*. p. 70.

29 See Weigend, *op. cit*. (note 6) and, e.g. Heike Jung, *Die Stellung des Verletzten im Strafprozess*, Zeitschrift für die gesamte Strafrechtswissenschaft (vol. 93, 1981, pp. 1147-1176).

30 Characteristically, international cooperation in criminal matters began as an expression of friendship between rulers (traitors were handed over). Christine van den Wijngaert, *The Political Offence Exception to Extradition: The Delicate Problem of Balancing the Rights of the Individual and the International Public Order* (1980) pp. 5-6.

31 In actual sentencing practice prior criminality is a very important factor, probably in all countries. It is, however, impossible to know how much is to be attributed to culpability considerations, and how much to considerations of general and/or individual prevention.

32 According to the Swedish sentencing law (in force 1989) previous criminality does not affect the "penal value" (Strafwert), i.e. the seriousness of the crime, but it is still an aggravating factor affecting the culpability of the offender. The bill to Parliament defends this without a discussion of principles. The main argument is that previous criminality must be regarded as relevant – in order to preserve the credibility of the criminal justice system! See *Regeringens proposition 1987/88:120* om ändring i brottsbalken m.m. (straffmätning och påföljdsval m.m.) p. 52.

immaterial: the harmfulness and hence culpability of the behaviour is not increased because the offender has previously been sentenced. Under the formal conception it could be argued that repeated criminality shows a more pronounced indifference to the values and interests protected and accordingly to the legal norm order as such (or shows that what was taken as indifference in reality is repudiation).

It might, however, be premature to conclude that the view that a recidivist deserves a more severe sanction is incompatible with the radical conception. Suppose that it is proven that a particular offender in fact harboured a manifest attitude of indifference to or repudiation of the legal norm order as such. Is that not an aggravating factor which in any case makes him deserve severer punishment?

This is not the place to argue for a solution, so I will restrict myself to a few remarks. First, we should note that a prior sentence is not necessary for the existence of the required attitude. On the other hand, it is eminently advisable that criminal justice keeps away from the kind of investigations needed if prior sentences are not required. Second, it is more appropriate to say that such culpability precludes mitigation than to say that it provides a ground for aggravation.[33] We certainly do not expect offenders to be ardent supporters of the existing legal system, and repeated criminality is quite a normal phenomenon. To say that a hardened criminal does not (any more) deserve a lenient response is much more palatable than to adopt a model which presupposes that the standard criminal is a first-time offender and then escalates aggravation as more and more crimes are committed. The latter kind of reasoning smacks too much of attribution of Lebensführungsschuld,[34] and overstresses one culpability factor among many. Third, it could make a difference if a crime is repeated against the same victim. An element of persecution is morally relevant and constitutes an aggravating factor.

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33 See Andrew von Hirsch, *Past or Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals* (1985) pp. 77-91. This view inspired the proposals of the legislative committee preparing the Swedish sentencing reform mentioned in note 31. The bill to Parliament (p. 49) exasperatingly referred to this view as ”illogical and otherwise unfounded”.

34 Jakobs, *op. cit.* (note 12) pp. 401-403, Jescheck & Weigend, *op. cit*. (note 12) pp. 423-424.