

BERICHTE UND DISKUSSIONEN

Personal Identity and Social Responsibility in the Process Thought of Alfred North Whitehead

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Whitehead's definition of personhood has received quite a chorus of criticism. According to a number of scholars, the consequences of process thought for personal identity, human agency and social responsibility constitute the greatest obstacle to or *Achilles' heel* of a consistent and adequate Whiteheadian ethic. Freedom and self-causation, it is argued, are necessary but not sufficient grounds for ethical identity and social responsibility. In the following, we should like to reopen this debate by re-examining Whitehead's position and discussing its adequacy in terms of experience, in general, and our feelings of responsibility, in particular. We then seek to support our case by exposing Whitehead's understanding of personhood, together with its underlying perspective on social relations and order, to what can be considered one of the hardest tests: the question of crime and punishment. This will involve examining how Whitehead's ideas on personhood and social relations square with the practical necessities in the application of criminal law, whether his premises can offer a working basis for criminal law theory and, if so, what this would mean for the function and objectives of punishment. Let us first begin by posing the question of whether Whitehead's concept of personal identity is commensurate with our daily lives as well as our feelings and demands of moral, viz. social responsibility?

Is Whitehead's concept of personal identity commensurate with our daily lives as well as our feelings and demands of moral responsibility?

Nathan Rotenstreich¹, Paul Weiss² and J. P. Moreland³ (to name but a few) have all objected that process thought cannot explain self-identical persons. In the words of Moreland, Whitehead's (and Hartshorne's) „ancestral chain model of the self [...] inexorably leads to unacceptable conclusions.“⁴ The unacceptability of this process approach to human personhood lies for all critics in its divergence from common sense intuitions. It flies in the face and annuls moral responsibility. An enduring self that maintains absolute identity over the course of an individual life, an ‚I‘ unifying the sameness of the self over a period of time, is not only necessary to account for the phenomenon of human intentionality and agency, they argue, but imperative for ethical identity and social responsibility.

¹ N. Rotenstreich, The Superject and Moral Responsibility, in: The Review of Metaphysics 10 (1956/7) 201–206.

² P. Weiss, History and Objective Immortality, in: I. Leclerc (ed.), The Relevance of Whitehead (London/ New York 1961) 319–332.

³ J. P. Moreland, An Enduring Self: The Achilles' Heel of Process Philosophy, in: Process Studies 17 (1988) 193–199. See also R. B. Edwards' more constructive-critical assessment of Whitehead's approach to the human self (The Human Self: An Actual Entity or a Society?, in: Process Studies 5 [1975] 195–203).

⁴ J. P. Moreland, An Enduring Self, 193.

In defence of Whitehead, Donald Sherburne⁵ suggests that, while past entities cannot be made accountable for their deeds, as they are not recoverable, process philosophy can still uphold an entity's responsibility due to its responsibility before God and the divine judgement involved in the world's reception into God's consequent nature. „[T]he fact that you can't catch an actual entity by the scruff of the neck and deal with it at leisure does not mean that it is not both responsible and judged.“⁶ While we agree with Sherburne that Whitehead's philosophy does offer scope for responsibility, we would contest that responsibility is to be reduced to a responsibility vis-à-vis God's initial conceptual aim and His judgement. An actual entity never experiences its own satisfaction⁷ and does not stick around to await its pending judgement. Certainly, the initial subjective aim, originally derivative of God, has moral implications as an ideal, and one strives to be good for the feeling of greater self-importance⁸; however, there is no religio-moral obligation towards the divine and this position can quickly lead to an obfuscation of the religious and ethical perspectives in Whitehead's scheme.⁹ Whitehead, we believe, is quite clear on this point. Responsibility is essentially the responsibility of determining one's own definiteness for one's own purposes and inner life; an entity answers only to itself. „[F]eelings aim at the feeler, as their final cause [...] the subject is responsible for being what it is in virtue of its feelings [...] an actual entity feels as it does feel in order to be the actual entity which it is [...] it is a *causa sui*.“¹⁰ An actual entity is free to turn its back on the ‚divine lure‘ inadvertently, out of ignorance or on purpose (although for Whitehead, as for Plato, the latter could only be pathological) and forfeit a higher form of value experience and value attainment; it is then ‚good‘ but destructive.¹¹

Sherburne's reasons for identifying responsibility with an obligation of the present are based on the conviction that „it is *not* possible, in my opinion (though some may want to disagree with me), to save Whitehead by joining the concept of responsibility to the notion of a nexus, or enduring object. My reasons for rejecting this possibility are as follows. A nexus is an abstraction; it has being only as a function of the actual entities constitutive of it. To seek the locus of responsibility is to seek a reason, and the ontological principle [...] asserts: ‚[...] to search for a *reason* is to search for one or more actual entities‘ [...] To lodge responsibility in a nexus is to commit the Fallacy of Mislabeled Concreteness.“¹²

With this statement, Sherburne is offering his understanding of the above-mentioned critics of Whitehead's concept of the self and their complaints of its inadequacies. We should therefore like to reopen the debate and readmit the question as to whether Whitehead's position is commensurate with our feelings of personal responsibility, of whether the ‚philosophy

⁵ D. Sherburne, Responsibility, Punishment, and Whitehead's Theory of the Self, in: G. L. Kline (ed.), Alfred North Whitehead: Essays on His Philosophy (Lanham 1989) 179–188.

⁶ Ibid., 184.

⁷ A. N. Whitehead, Process and Reality. An Essay in Cosmology (New York 1979) 85.

⁸ See R. Sayer, The Good, the Bad and the Beautiful. Differentiating between aesthetic and ethical lures of feeling in the process thought of A. N. Whitehead, forthcoming in: Process Studies 32.1 (Spring 2003).

⁹ In emphasising the relatedness of religion and ethics, both Lynne Belaief (Toward a Whiteheadian Ethics, Lanham 1984) and Hans-Joachim Sander (Natur und Schöpfung – die Realität im Prozeß, Frankfurt am Main 1991) have, in our opinion, failed to give due attention to the ‚essential‘ distinctiveness of the moral and religious perspectives in human experience. In our view, Whitehead cast morality first and foremost in a secular mould; morality springs from an intermediate decision or position, to be differentiated from value experience *sub specie aeternitatis*. For further details, see R. Sayer, Wert und Wirklichkeit. Zum Verständnis des metaphysischen Wertbegriffes im Spätdenken Alfred North Whiteheads und dessen Bedeutung für den Menschen in seiner kulturellen Kreativität (Würzburg 1999) 211.

¹⁰ A. N. Whitehead, Process and Reality, 222; see also *ibid.*, 255.

¹¹ A. N. Whitehead, Religion in the Making (Cambridge 1927) 81 ff.

¹² D. Sherburne, Responsibility, Punishment, and Whitehead's Theory of the Self, 183.

of organism' – with its accommodation of modern science – can do justice to our general ,common sense intuitions' of being in the world and offer a basis of ethical identity. The answer to this question hinges, in part, on whether a nexus is so abstract as Sherburne claims. The issue at stake here is *not* what provides the principle of apperception in our consciousness of mental and physical self-identity at any given moment of wakefulness. This unity is supplied by the actual entity currently ,concreasing' at the apex, so to speak, of the complex spatio-temporal society we call a human being and which, in functioning consciously and self-reflectively, gives this composite numerical and personal identity.¹³ Rather, the crux of problem lies in the discontinuity of actual occasions constitutive of ,the self' that sustain personal order.

Now we would disagree with the critics that human purposefulness, deliberation and agency presuppose an enduring self. Our grounds for this contention rest on Whitehead's theory of social relations, in virtue of which nexus are not as abstract as one might be led to believe.¹⁴ In Whitehead's categorial schema the inter-relatedness of existence is so fundamental that a nexus is granted a relatively concrete status. As a result, the decisive question is not whether it is abstract – but how much. Certainly, Whitehead's account of personal identity is based on a continual and incurable interruption. Yet there are two aspects to his theory which need to be stressed when discussing its commensurability with our day-to-day experiences. On the one hand, the macroscopic continuity, arising from the conformation between old and new, overrides the discontinuity underlying a personal history of discrete occasions. ,Conformal feelings' provide not only for a reappearance of the immediate past's factual relations, but also, and most importantly, for the affective tonality of these relations. As a result, and given the nature of conscious feelings, it makes sense to speak of ourselves in the singular, as an abbreviation referring to the past and the future that we call our own in the immediacy of the present.

On the other hand, however, this discontinuity forming the foundation of Whitehead's considerations is not alien to our experiences in daily life. Howsoever we are wont to define personal identity in theoretical terms, every time we fall asleep we lose the clear and distinct consciousness of our personal history. On awakening, we re-enter this personal history and, in doing so, rely on memory and external verification. Indeed, we are sure we are not alone when we look back on our teenage years and wonder how different our views were. This feeling of alienation is further heightened when one sees childhood photographs and fails to remember that particular perspective at such an early age.

Even if one is open to such thought experiments, willing to embark upon a detachment from our ingrained thought patterns and the nominalisation tendencies of language, and prepared to approach our experiences from a process perspective, the question of moral responsibility has yet to be tackled. Is it at all possible to feel responsible for a discontinuous self? The fact that on the basis of the ,philosophy of organism' a past offence cannot be traced to a present offender would seem to exonerate all wrongdoers from blame or fault, undermining our moral intuitions. In order to forestall confusion, we think it is helpful to differ-

¹³ In order to save space, we have omitted an introductory discussion of Whitehead's general theory of societies and the self. Excellent summaries are to be found in D. Sherburne's *Responsibility, Punishment, and Whitehead's Theory of the Self*, 181 f., and D. Browning's critical article, *Whitehead's Theory of Human Agency*, in: *Dialogue* 2 (1963–1964) 424–441.

¹⁴ Cf. A. N. Whitehead, *Process and Reality*, 18, 108 f. S. Janusz and G. Webster have also emphasised the ,actuality' of nexus, that is to say, the organic unity of personal societies. While they argue that ,the problem of persons cannot be solved without some basic changes in understanding Whitehead's metaphysics' (*The Problems of Persons*, in: *Process Studies* 20 [1991] 157), their position does not entail a radical re-reading of the ,philosophy of organism'.

entiate between *responsibility* and *accountability*. Strictly speaking, a subject cannot be made accountable for past deeds within the framework of Whitehead's philosophical premises, in the sense of a simple equation. The passage of time renders the subjective decision for a deed, together with its *mens rea*, an objective fact. Nevertheless, this does not render our sense of responsibility obsolete, undo a feeling of connectedness with our personal history and rule out its affirmation or admonishment in view of our decisions for the future. On the basis of Whitehead's theory of conformal feelings, we enjoy, or indeed suffer, an intimacy with the structures and course of ,our' personal line of inheritance, not only in its structural objectivity and recurrent themes but also in its emotional motivation. Many would object that this discreteness constitutes an unbridgeable cleft. Certainly, one senses a feeling of insecurity. However, the merits of such an enterprise deserve consideration. Renouncing the substantialist approach must not only signalise danger, but can offer an opportunity of freedom, a foundation on which to become a real centre of freedom, a self-determining subject, contextually conditioned but ultimately responsible for one's own decisions and with a capacity to redirect the course of the future.

How adequate is Whitehead's approach to personhood in the light of theories of punishment?

If we seek to further explore the adequacy of Whitehead's processual approach to personal identity and, connected to this, the relativity at the basis of all social relations or order in general, and turn to the field of crime and punishment, it would seem that we meet the greatest challenge. Surely here the question of an individual's accountability becomes particularly pertinent. On what grounds, the criminal lawyer might ask, is it legitimate to punish someone for a crime he or she committed in the past, if we adopt the concept of personhood set forth by process thought? How can a subject be made responsible for an offence if we accept Whitehead's model and assume that the person standing accused is ,essentially' discontinuous and that the sentence cannot affect the original, viz. actual perpetrator? Since it is clearly unreasonable to respond to an evil by simply inflicting another, it would seem that we require a further reason, alongside the givenness of a wrong, in order to ascribe a criminal act to a perpetrator as the work of his own person and punish him for this, even if we suppose that he is not identical to the subject that committed the crime. Unless we are willing to side with the abolitionists, who advocate doing away with criminal law as such, we must seek this reason against the background of prevailing theories of punishment and their respective views on the individual in his social relations.

Within the discourse on the question of punishment and its justification, it is common practice to differentiate between an absolutist and a relativist, that is to say, between a retributivist and a consequentialist approach to penal theory. Appealing to a fundamental, transcendent higher order, absolutists argue that injustice demands punishment. Here punishment does not serve a particular purpose in the sense of a means to an end within the experiential world of socio-political relations, but is seen as an intrinsic value in itself vis-à-vis a morally guilty party. The moral right, in other words, precedes the social good. Insofar as absolutists aim at moral exoneration, so that an offender can be freed of his guilt and recover full possession of his personal dignity, their position presupposes a substantialist concept of personal identity. However, because atonement relates in essence to a religio-ethical concept of personhood, it cannot be enforced by the state by way of punishment. Essentially, abolition rests on a metaphysical concept of personal identity and autonomy: it can be associated with the purpose of punitive measures, but cannot be employed by a secular state to legitimise punishment. As a result, absolutist penal theories, shaped above all by Immanuel Kant (1724–

1804), are not concerned with the empirical and, in this sense, individual welfare of an offender and his or her social relations as such; rather, the purpose of retributive punishment is directed exclusively at restoring a just world order. Punishment in this form is absolute because it springs exclusively from the concern for the criminal's dignity: it is confined to redressing injustice and not concerned with considerations of social policy and expediency. In absolutist penal theories, respect for the intrinsic dignity of the defendant is deemed paramount; a relativist justification of punishment, it is argued, involves the risk that this human dignity and freedom can be instrumentalised for purposes of the state.

An absolutist approach to punishment does not necessarily presuppose that the relationship between crime and punishment is established for all time so as to contradict a historico-relativist conception of order. To be sure, Kant would not have accommodated Whitehead's 'creative advance into novelty' or the latter's understanding of ethical freedom, and remained committed to defining just punishment on the basis of an unchanging, a priori relationship between the subject, deed and society. Here punishment mirrors the law of retribution: an eye for an eye. That Kant was not prepared to define punishment in relation to the prevailing social order is clearly shown by his famous island allegory. Even if it were mutually agreed to dissolve a society, Kant insists solemnly, the dictates of justice demand that every last murderer be executed so that every individual experiences, i.e. realises the 'worth' of his or her actions, so that unpunished blood guilt does not sully the nation of a people.¹⁵ Because in Whitehead moral rules are dependent on the particular social environment for which they are designed, as well as contextual, offering the individual a benchmark for self-realisation, Kant's and his followers' approach to punishment loses its legitimacy.

In retributivist penal theories that have recourse to Hegel's understanding of punishment, however, we find the idea of universally valid behavioural rules of good and evil, and as a result also that of a rigid system of criminal law, being qualified in relative terms. Here the relationship between criminal act and punishment is no longer reduced to the simple equation of causal succession – of 'a life for a life' and 'property for property' – but raised to a communicative, symbolic level. While crime infringes 'law as law', the violation exists positively only 'as the particular will of the criminal'.¹⁶ Where an offender 'negates' the objective and general law of a rational statutory order by an individual act of crime, he or she gives rise to a contradiction which is annulled by the state by way of punishment ('negation of negation').¹⁷ According to Hegel's theory and its exponents, the criminal is to be seen as a free and self-responsible person who is granted the right to shape the world according to his or her own free will, but in recognition of this freedom is required to take responsibility for the consequences of his or her actions. Whoever seeks to resolve the on-going dispute in criminal law theory over determinism, by favouring a personal, viz. not arbitrary but self-determining freedom (as is also the position of Whitehead), can only define, model and measure punishment on the basis of the criminal act itself. Penal law is then not rigidly fixed to compensating for the violation of the law by retaliating with equal force, i.e. with penalties of the same type (*lex talionis*), but becomes subject to the prevailing societal situation at any one time. Since, for the Hegelian camp, crime exists only phenomenally, penal law cannot claim validity for all time, but is both qualitatively and quantitatively determined by the social context.¹⁸ Otherwise it would difficult to explain why a society can, for instance, punish a property offence such as theft, although the legal assignment of capital and material assets

¹⁵ Cf. I. Kant, *The Philosophy of Law*, trans. by W. Hastie (Edinburgh 1887) 194–201.

¹⁶ Cf. G. F. W. Hegel, *The Philosophy of Right*, trans. by T. M. Knox (Oxford 1942) §99.

¹⁷ Cf. *ibid.*, §97.

¹⁸ Cf. *ibid.*, §218.

follows exclusively from a society's internally defined proprietary relations. By the same token, there are penal laws whose interpretation is largely dependent on the dialogue between the parties concerned, as in the case of fraud or false pretences. The process of determining the extent and nature of the deceptive act, on which such offences depend, can only succeed by considering the variable of social expectations. Indeed, even the violation of seemingly absolute values, such as murder, can engender very different legal consequences, depending on the particular context and prevailing socio-political order. After the German reunification, for example, frontier guards who had served the former GDR at its border with West Germany were sentenced to imprisonment on the charge of murder for shooting 'illegal emigrants'. Strictly speaking, these soldiers were justified by the law of former East Germany, having acted on the instructions of the *Politburo*. Irrespective of the fiercely discussed controversies surrounding this decision, this case serves as an example of the degree to which changes in the socio-political order can effect the legal terms of reference for a criminal offence and how little importance is attached to the personal or inner 'feeling of responsibility' of the parties concerned. The convicted persons had been honoured for their services by the government authorities of the GDR and pleaded in court that this was one of the reasons why they had not been aware of committing a wrong in carrying out their duties. This objection was, however, rejected: the federal supreme court argued that the guards had not been under an obligation to shoot and by shooting they had, according to German and international law, committed a serious crime – and they should have been recognised this. It must be added that the rancour of the general public had helped to sway the decision of the court and that the West German government had not recognised East Germany as an independent state so that its crimes could be viewed as part of the German nation and its history.

Against this background of the importance of socio-political factors governing our determination of the terms of crime, it does not yet necessarily follow that the criminal lawyer's concept of personhood also rests on an equally open, social construction (nexus), so that the imputation of responsibility within criminal law does not require a substantialist concept of personal identity. Before we can pass a final judgement on this issue, we must first of all answer the question of whether it might not be easier to reconcile Whitehead's approach to persons and social relations with the propositions of relativist penal theorists who, in opposition to the absolutist conception of criminal law, pursue exclusively social goals. While the distinctively modern school of such consequentialist legal thought was not established until well into the nineteenth century, primarily under the influence of the writings of Jeremy Bentham (1749–1832), its preventative programme dates back to antiquity and was first formulated by the sophist Protagoras of Abdera (c. 485 – c. 420 BC), who succinctly summarised it thus: no rational human being inflicts punishment because of a past sin but only to prevent future crime – whether by the offender himself (to deter him from further wrongdoing) or by others who might emulate his example (as a general deterrent). Since, according to Whitehead, the individual is, to a certain extent, capable of anticipating the effects of his decisions on the basis of objectively given relations of the past, one could interpret the meaning of legal punishment as the infliction of an evil so as to provide the person in question, i. e. the subject connected to a past offence, or others in a similar situation, with a means of gauging the value of present decisions for the future. In short, punitive measures would then serve to control the process of self-determination as a constitutive and constructive component of one's personal or social history, formatively influencing the aesthetic drive of the individual and encouraging the realisation of socio-aesthetic aims.

Insofar as legalities can be interpreted as contributing to the control of social relations between the one and the many, a parallel can be drawn between process thought and relativists who base their interpretation of punishment as a general deterrent on psychological

premises.¹⁹ According to Feuerbach and other proponents of this camp, human actions are not only guided by practical reason; more fundamentally, we strive for aesthetic, that is to say, sensorial satisfaction. The human being, it is argued, will deny himself a minor pleasure if, in so doing, he can hope to achieve a greater gain, and will tolerate minor constraints of freedom in order to avoid greater ones. The threat of punishment therefore serves the negative function of deterring potential offenders from committing a crime by connecting the latter with the less attractive choice for a greater evil. Irrespective of whether such a negative approach to the function of punishment accords with our understanding of human nature or, indeed, does justice to our understanding of a free society, instrumentalising punishment as a psychological deterrent is flawed because it requires that the offender receive a punishment sufficient to motivate him to choose right over wrong, rather than making the measure of his punishment commensurate with the severity of his act. And neither is it possible to quantify the motivation of an offender nor can we develop a general scale of subjective criteria that could be applied to all offenders alike.

Also, a positively defined function of punitive measures as a general deterrent, with the goal of an educational effect which is not based on fear but on insight, cannot conceal the fact that the punishment of an offender essentially serves as a mechanism for motivating the law-abiding citizen. One is reminded of Nietzsche's dictum: „the purpose of punishment is to improve those who punish“²⁰; punishment, here, does not serve to redress wrongful doing, but to help remedy socialisation deficiencies in a given society. Of course, if we punish a criminal as a warning, with a view to strengthening a society's collective consciousness, then the focal point of concern can only be the criminal act, not the criminal as such. However we define human nature, its historical evolution and development of social norms, as long as the criminal act alone provides the grounds for socio-political intervention, an offender can only be called to account for his or her actions insofar as he or she can be connected to and made liable for the latter. In this way, the respect for the inner freedom of human beings sets a limit to the positivistic position (commonly championed by the consequentialist camp) according to which the causes of human behaviour are scientifically determinable and can therefore be influenced by punishment, to the end of maintaining and bettering social order. Taken to its logical conclusion, however, every concept of punishment based on the preventive argument answers to future-oriented considerations, because the concrete nature of an offence is not necessarily relevant to the purposes of socialisation. As a result, serious crimes could go unpunished, if they took place on account of unique motives and situations, and the offender could be deemed otherwise socialised, as is so often the case in crimes of domestic violence. Indeed, one might well ask how preventive concepts of punishment, which specifically aim at deterring individual offenders from further wrongdoing, can be brought in line with common punitive practices: from the preventive perspective it seems paradoxical to seek to prepare an offender for a future life in freedom by sentencing him to imprisonment and depriving him of freedom.

If we seek to reconcile Whitehead's category of the freedom of subjects with the two above-mentioned key themes of criminal law, viz. the relativity and openness of societal order and the objective principle of focusing on the criminal act, then punishment can only serve to counterbalance the discord caused by an act within a given social order. Analogous to the dialectic principle of Hegel's criminal law theory, punishment would consist in a symbolic representative act, communicating that the subjective aim of experiential diversity can-

¹⁹ This argumentation was first set forth by one of the most important German criminal law theorists of the nineteenth century, Paul Johann von Feuerbach (1775–1833). Cf. P. J. v. Feuerbach, *Revision der Grundsätze und Grundbegriffe des positiven peinlichen Rechts*, Teil I (Erfurt 1799) 40, 43 f., 45 ff.

²⁰ F. Nietzsche, *The Gay Science*, trans. by W. Kaufmann (New York 1974) § 219.

not be pursued at the cost of others. Punishment would be imposed to influence the decisions of the present for the future, by reiterating the public relations between the one and the many, reinforcing the right and wrong for a given society, and reassuring those who respect this order. In this respect, criminal law has the relative function of safeguarding and fostering the basic conditions of social existence, by confirming the social expectations of those who work towards social harmony and the greater good. Thus reacting to an offence against the general order with punitive measures serves to communicate to others that the infringement runs counter to the general order of society, and the freedom and rights of its members. However, on the basis of Whiteheadian socio-philosophical premises, no one state or legal system can be deemed absolutely rational; in the absence of absolute reason, no one system of order can lay claim to absolute validity. The justification of punishment cannot exceed the *mores* of a particular society, i. e. the consensus of social values arrived at by way of agreement between the one and the many in a particular historical epoch according to the principle of unity and diversity. In short, the justification of a penal code will always be intrinsic to the process in which it is evolved.

From this interpretation of criminal law as a means to reinforce a code within a particular context where rules have been violated, it comes as no surprise that criminal responsibility does not require a substantialist understanding of personal identity. Certainly, a large majority of criminal lawyers presuppose (implicitly or explicitly, critically or no) such a concept by defining the human person as a physical and mental system that endures from birth to death and is endowed with metaphysical dignity or intrinsic worth. The question is, however: how do practical necessities in the application of law square with our theoretical premises? The first difficulties arise, for instance, if we endeavour in the course of criminal proceedings to uncover the subjective circumstances of a criminal act, that is to say, the offender's knowledge of the relevant circumstances and his or her intentions and motives. By virtue of the generally recognised 'privilege against self-incrimination' – which in German law, in particular, is derived from the postulate of human dignity or intrinsic value – we have no alternative but to reconstruct the subjective conditions or factors from the objectively given circumstances of an offence and infer liability from the facts. Ultimately, then, in criminal proceedings responsibility or personal accountability is not established but imputed according to the particular act and its social context.

Of course, punishing someone accused of having committed a crime in the past presupposes a certain degree of continuity in our personal existence. Yet to deem a person accountable for a past crime requires merely that we can ascribe a course of action to a personal history: personal existence need not consist in subjective endurance; it is sufficient that a relative stability be demonstrable on objective grounds. Moreover, criminal law's concept of personhood and personal accountability can vary considerably, depending on a range of conditions, social and otherwise. While the acts of children under the age of criminal responsibility cannot be prosecuted, the measure of liability grows in direct proportion to the degree of freedom granted to an offender according to legally set standards. Here profession can play a crucial role. Far stricter standards of liability can be imposed in cases of negligence or recklessness where doctors, engineers or businessmen are concerned, i. e. where the adjudged party can be accused of having been able to foresee the consequences of his or her actions to a far greater extent than the 'average man on the street'. It is to be noted, however, that in all cases the operative term is *average*. Not unlike the statistician's probability calculus, criminal courts will, as a rule, weigh up a person's accountability against a purely normative construct: what can be demanded of the average citizen, 'the reasonable man', with a similar background in similar circumstances?

In complete accord with this principle, it is common practice in continental European

jurisprudence, in contrast to Anglo-American legal traditions, to speak of a ‚social concept of culpability‘ (*sozialer Schuldbegriff*) where the decisive criteria are of a socially comparative nature: the question is not whether the individual person on trial could have acted differently, but whether ‚another‘ in the situation of the offender could have resisted the temptation of breaking the law. Thus we may postulate an intrinsic and immutable dignity of the individual person, but this theorem is of no direct relevance to the imputation of responsibility in criminal law. Strictly speaking, the private, subjective or inner sphere of the offender’s person can enter into the criminal lawyer’s equation only inasmuch as it has social bearing on generally definable contexts that run counter to legally defined codes. In this sense a subject is never treated as such, but as a *causa efficiens* in the normativised many-one construction of a given society at any one time.²¹ And, as we have seen, this normative construct of personal freedom and thus responsibility varies both within a given society and from country to country. In the interest of safeguarding fundamental democratic conditions, the legal system of the US, for example, places particular importance on the freedom of expression so that instances of defamation, which could in other countries lead to a libel suit, are considered justified.

In summary, it can be said that Whitehead’s ‚philosophy of organism‘ provides a modern approach to personhood and social responsibility which is compatible with present-day systems of criminal law. Indeed, process thought, with its theory of social nexus, affords areas of criminal law a theoretical framework where traditional substantialist concepts of personal identity and responsibility run into insurmountable obstacles. In cases of corporate crime, for instance, the North American legal system applies the principle of strict liability in such a way that a corporation can be held responsible for criminal acts as one body or nexus: it is of no concern which employee originally instigated the criminal offence nor whether this individual is still an employee. Criminal responsibility is merely the reverse side of a legally defined freedom permitting a legally defined entity, whether a person or an organisation, to take part in economic life in this function.

Taken to its logical conclusion, Whitehead’s social philosophy can only imply a consequentialist approach to criminal law. Given the arrow of time, all social, political and legal concerns are future-oriented. Nonetheless, Whitehead’s ‚givenness of the past‘ does not warrant an unbridled instrumentalisation of the one for the greater good of the many, a consequence of consequentialism to which retributivists object. The intrinsic worth of an individual and its creative freedom are values of the highest magnitude and therefore seen as sacrosanct. Thus, although criminal law focuses on a past ‚wrong‘ as an objective fact, taking legal action against given conflicts can only have meaning if used as a curative opportunity to foster not merely social harmony, in general, but more importantly the value of a singular personal history. In this way, the subjectivist principle of Whitehead’s ‚philosophy of organism‘ does not imply a rejection but, rather, a reformation of Kant’s practical philosophy and the latter’s theorem of personal dignity.

²¹ In Anglo-Saxon legal traditions, weight is attached not only to objective or strict but also subjective liability, where proof of a guilty state of mind (*mens rea*) is (usually) required in addition to the unlawful act (*actus reus*). Many consider it an essential condition of a just legal system that for an agent to be held criminally liable he or she must have committed an offence freely, knowingly and deliberately. While the objective test is concerned with determining what was reasonably foreseeable and believable about the circumstances of the crime (known as the test of ‚the reasonable man‘), the subjective test aims at determining what the defendant actually foresaw and believed about the circumstances of the crime. It must be pointed out, however, that this distinction between *subjective* and *objective* is misleading. It is neither possible nor – in the name of freedom – desirable to ‚peer into‘ another’s mind. *Mens rea* is ‚merely‘ an attempt to individualise cases. Yet, even here, one cannot escape generality and comparative terms of legal reference. One can only point to an individual; ultimately, all description abstracts from the concrete.