Towards a Re-Principled Criminal Law

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ABSTRACT: The perceived tension in current discussion of criminal law among efficiency, security, and constitutional rights should be examined in light of the work of Dworkin and Alexy (among others) in order to develop a model of legal argumentation based on Principles for Criminal Law. I consider the following three principles to be the foundational elements of legal argumentation in criminal law: 1) establishing societal security; 2) ensuring respect for legal norms; and 3) assuring respect for the person and human dignity. The roots of these three fundamental principles of legal argumentation are grafted directly from distinct human characteristics: 1) our coexistence, or the social character of the human being; 2) personal freedom; and 3) the dignity of the human person based on equality. These roots, as such, are direct, historical expressions of our concept of Western civilization in the modern age. By definition, principles such as the three listed above are far too broad and generalized to be immediately applicable to specific legal cases. We can apply them with greater ease, however, once they can be expressed as legal rules (e.g., nulla poena sine lege). One may deduce legal rules necessary for the application of criminal law through an analysis of principles in opposition (in the cited example, the collision between protection of the social aspect of the human condition and that of a respect for legal norms). The theoretical relevance of constructing this principled legal argumentation for criminal law lies in the fact that such argumentation allows us to establish practical criteria for a critique of the law, and our courts’ juridical and administrative decisions. Furthermore, construction of this principled legal argumentation assists in the development of a systematic doctrine for criminal law. Ultimately, this movement towards a re-principled criminal law provides us with more efficient tools designed to address the crisis of over-criminalization and our efforts to balance societal security and human rights.

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The goal of a criminal law governed by principles has become so generalized as to be essential in our current politics, law, and scientific doctrine. Although the threat of resorting to ius puniendi and not to the formal and material principles of criminal law can never be completely overcome in our Western societies, we must begin with the

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need to limit our recourse to the instruments of punishment (ius puniendi or subjective criminal law) through the application of principles (ius poenale or objective criminal law). There is broad agreement that this objective is just as characteristic of the traditions of the État de droit and Rechtsstaat as it is of the Rule of Law, yet such agreement begins to dissolve when it comes to specifying which principles come into play and how they should operate.

I begin this essay from the basis that the protection of society cannot be carried out using the criteria of justice if the principles of security in social life, legality, and respect for dignity are not observed.¹ In this Article, following an introduction discussing the necessity and operational capacity of the principles (I), I establish the concepts of principle and rule from which they derive (II), in order then to elaborate a description of the basic principles of criminal policy and legal argumentation and their foundation (III). The principles also apply to the reasoning and defense of solutions – rules – for which we must also have meta-rules (IV). This way of proceeding defines the jurist’s work as the reasoning of decisions (V).

I. The necessity and operational capacity of principles

1. In dealing with law, liberties, and rights, the only possible limitation is provided by norms, those various instruments that are normative rather than factual. We must identify the normative means that must regulate the conduct of the legislator, the government, and the courts when they exercise ius puniendi in society. In turn, in order for those normative means to achieve their limiting goal, they must be based on those norms which give meaning to others. Otherwise, we would fall into circular arguments or infinite regressions.

Norms that exercise a limiting function in criminal law are what we understand as principles, and more specifically, what we consider principles of criminal policy.² These are the so-called basic legal principles that underlie concrete legal provisions (e.g., the penal code), administrative proceedings (e.g., the classification of prisoners into sentencing levels by parole boards), or judicial decisions (e.g., particular judgments).

By criminal policy we understand that body of knowledge whose object is human actions, and whose aim is to avoid those actions which are harmful to the survival of society (crimes).³ It includes, therefore, legislative decisions, but also those

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¹ This paper is part of a broader research project that I have been working on for several years; I offer this paper now with the goal of advancing some conclusions and encouraging academic debate. Partial results have been published already in Pablo Sánchez-Ostiz Gutiérrez, Principios y reglas de las decisiones de la Política criminal, 56 PERSONA Y DERECHO 59 (2007); Política criminal sobre la base de principios, 20 REV. PERUANA DE CIENCIAS PENALES 387 (2008); Principios constitucionales de la Política criminal. Una aproximación, 21 REV. PERUANA DE CIENCIAS PENALES 289 (2009). See infra, note 23.

² Beginning with the programmatic work of CLAUS ROXIN, KRIMINALPOLITIK UND STRAFRECHTSSYSTEM (2d ed. 1973), it appears to be a generally assumed ideal that the categories of criminal law, and in particular the theory of crime, should receive their content from the principles of criminal policy. However, differences emerge from the moment we seek to give content to those principles.

³ The fact that it is “policy” should have no pejorative connotation, but rather an ameliorative one. Policy here means belonging to the “polis,” to public life. When we use the word “politics” in a pejorative sense, we use qualifiers such as “of convenience,” or “instrumental.” The criminal policy discussed here differs
of other institutions (state’s attorney, police, judiciary, parole boards), and of the people itself (to the extent that the citizen is affected by laws and other measures).

2. There is a certain consensus for the proposition that principles constitute the origin, beginning, point of departure, or “source of sources” of the law. Nevertheless, we find disagreement about how principles operate; we speak both of deductive models, by which principles could resolve every case strictly, and of inductive descriptions, in which principles appear as common elements that give reason to concrete laws in force.\(^4\) In any case, we may affirm that the principle possesses a radiating force insofar as it gives meaning and content to, and imposes limitations on, the determinations of positive law, whether it be a legal provision or a sentence. In this sense, they operate as a common denominator to the various manifestations of the law.\(^5\)

\(^4\) In this sense, see JOSEF ESSER, PRINZIP Y NORMA EN LA ELABORACIÓN JURISPRUDENCIAL DEL DERECHO PRIVADO 57, 88 (Eduardo Valentí Fiol trans., 1961) [GRUNDSATZ UND NORM IN DER RICHTERLICHEN FORTBILDUNG DES PRIVATRECHTS (1956)]; while for others the axiological would impede proceeding in a logical-deductive way, see KARL LARENZ, METODOLOGIA DE LA CIENCIA DEL DERECHO 466 (Marcelino Rodríguez Molinero trans., 2d ed. Barcelona 1994) [METHODENLEHRE DER RECHTSSWISSENSCHAFT (1960)].

\(^5\) But the question of their relation to so-called “values” immediately emerges. For Canaris, although principles make valuation explicit, their results are more concrete than values. See CLAUS-WILHELM CANARIS, EL SISTEMA EN LA JURISPRUDENCIA [SYSTEMDENKEN UND SYSTEMBEGRIFF IN DER JURISPRUDENZ] 59-60 (Juan Antonio García Amado trans., 2d ed. 1998).

On the relation between principles and values, see ROBERT ALEXY, THEORIE DER GRUNDRECHTE 125-34 (2\(^{nd}\) ed. 1994); ALEXY, RECHTSSYSTEM UND PRAXISCHER VERNUFT, 18 RECHTSTHEorie 409 (1987) (published in Spanish as Sistema jurídico y razón práctica, in ALEXY, EL CONCEPTO Y LA VALIDEZ DEL DERECHO (Jorge Seña trans., 1994)): “between principles and values there is a broad structural coincidence,” up to the point at which tensions among principles may appear also to be tensions among values. But values are concerned with what is better, while principles are concerned with what is owed “principles and values are the same, the one in deontologic dress and the other in axiological dress”, id.). See also ALEXY, RECHTSREGLERN UND RECHTSPRINZIPIEN, in ALEXY ET AL., ELEMENTE EINER JURISTISCHEN BEGRÜNDUNGSLEHRE 217, 228-29 (2003) (also in 25 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE 13 (1985)); ALEXY, Sistema jurídico, principios jurídicos y razón práctica, 5 DOXA 139, 145 (Manuel Atienza trans., 1988). This position has drawn criticism from JÜRGEN HABERMAS, FAKTIZITAT UND GELTUNG 310 (4\(^{th}\) ed. 1994), discussing ALEXY, Zur Struktur der Rechtsprinzipien, in REGELN, PRINZIPIEN UND ELEMENTE IM SYSTEM DES RECHTS 31-52 (Bernd Schilcher et al. eds., 2000) (published in Spanish as Sobre la estructura de los principios jurídicos, in ALEXY, TRES ESCRITOS SOBRE LOS DERECHOS FUNDAMENTALES Y LA TEORÍA DE LOS PRINCIPIOS 92 (Carlos Bernal Pulido trans., 2003); ALEXY, Epílogo a la Teoría de los derechos fundamentales, 66 REV. ESPAÑOLA DE DERECHO CONSTITUCIONAL 13, 14, 32-37 (Carlos Bernal Pulido trans., 2002); ALEXY, Derechos fundamentales, ponderación y racionalidad, in THE SPANISH CONSTITUTION IN THE EUROPEAN CONSTITUTIONAL CONTEXT. LA CONSTITUCION ESPAÑOLA EN EL CONTEXTO CONSTITUCIONAL EUROPEO 1508-15 (Francisco Fernández Segado ed., David García and Alberto Oehling trans., 2003), above all, for the objection that the logic of principles threatens to drain the content and power of fundamental rights.
What I have described requires – and there is consensus for this – that principles possess a relatively high level of abstraction; they are characterized as overly broad and inapplicable to particular cases. For that reason, together with principles arise rules, which are another type of statement without which it is impossible to resolve a legal conflict, and which must operate as a conceptual correlate. Rules also claim validity, but in addition they allow for the resolution of concrete cases, which the principles cannot accomplish. We recognize basic differences between principles and rules. Although rules specify the factual premises to which they refer, principles do not; while principles are general, rules work for more specific cases; and while principles allow for gradual application, rules are alternative. In addition, rules operate by subsumption, and principles by ponderation. At this point we take as our point of departure the hypothesis that principles are, at least, normative formulations (that is to say, formulations of must be, with a claim of validity) that orient and give meaning and structure to legal decisions. More specifically, they give structure to legal decisions at

6 See generally LARENZ, supra note 4, at 418.

7 Prieto Sanchis’s approach attempts a different route from the conventional doctrine: he considers that “los principios no son un determinado tipo de normas […] sino cualquier norma en cuanto adopta una determinada posición o papel en el razonamiento o argumentación jurídica [principles are not a fixed type of norm […] but rather norms insofar as they adopt a fixed position or role in reasoning or legal argumentation],” LUIS PRIETO SANCHÍS, SOBRE PRINCIPIOS Y NORMAS. PROBLEMAS DEL RAZONAMIENTO JURÍDICO 55 (1992), which does not argue for a strong distinction between rules and norms, but rather a weak one, see also id. at 132-33, and especially 153-86. According to this approach, principles must fulfill functions that are either explicative (the descriptive technique of norms, see id. at 154) or normative. Normative (that is, interpretive, integrative, directive, and limiting, see id. at 155) functions can be reduced to two: “o bien los principios son una norma primaria llamada a disciplinar directamente un supuesto de hecho cualquiera o bien representan una norma secundaria que permite o contribuye a dotar de sentido a otra disposición normativa, limitando o ampliando su significado lingüístico, o incluso anulándolo si resulta por completo incompatible con el sentido del principio [either principles are a primary norm called to discipline directly any supposition of fact or they represent a secondary norm that permits or contributes to giving meaning to another normative disposition, limiting or expanding its linguistic significance, or even annulling it if it turns out to be completely incompatible with the meaning of the principle],” id. at 155 (emphasis added). This function of secondary or informative norm can be perceived above all when principles aid in interpretation, while in the integration of (lacunae in) norms the function of primary norm is evident, see id. at 155-161. The directive function can be rechanneled into an interpretive or integrative one, see id. at 161, and the limiting function is the one that would fulfill a principle by reason of the results that one of the prior operations allows it to reach, see id. at 162. For their part, principles fulfill functions in legal argument: among others, they allow for the universalization, they allow for the admission of consequentialist considerations (as he explains, it is precisely principles that make a consequentialist approach possible), and allow for systematic interpretation, see id. at 162-186.

8 Given that principles are norms just as rules are, see ALEXY, THEORIE DER GRUNDRECHTE, supra note 5 at 71-2, they allow for formulations of prohibition, prescription, or capacity, see id.

9 “Los principios generales del Derecho no son exclusivamente meros criterios directivos ni juicios de valor ni escuetos dictados de razón. Son auténticas normas jurídicas, pues suministran pautas o modelos de conducta [the general principles of the Law are not exclusively mere directive criteria, nor value judgments, nor concise dictates of reason. They are authentic norms, as they supply guidelines or models for conduct].” LUIS DÍEZ-PICAZO & ANTONIO GULLÓN, I INSTITUCIONES DE DERECHO CIVIL 85 (1998). Also as norms, see, among others, NORBERTO BOBIO, TEORIA GENERALE DEL DIRITTO 271-72 (1993) (norms with a high degree of generality). According to other authors, they would not be norms to the extent that norms are defined by assumption and consequence, see CANARIS, supra note 8 at 57, nor general concepts, see id. at 58-59, nor values, see id. at 59-60.
the legislative level and at the level of judicial resolutions or administrative actions; however, they carry out this structuring not in a simple or direct way, but rather through various crystallizing operations, through successive rules.

3. In that sense, principles are a clear expression of the law’s rationality, understanding by this that the law is characterized by agents who are endowed with reason and of whom we demand, precisely because of that reason, intersubjective rationality in their decisions. This rationality does not mean, however, that principles have given rise to univocal solutions throughout history, but rather that they have led to decisions that are mutable through time. What leads to tendentially uniform solutions is the conception of the law as the application of perfect, closed norms, while arguing with principles (and rules and subprinciples) allows for a great variety of solutions without falling thereby into arbitrariness.

The foregoing is borne out by at least three observations. First: that over and above the various solutions given throughout history, there exists a community of problems and solutions that demonstrate a high level of coincidence. This is expressed, for example, in those ancient aphorisms that presume to state a solution for groups of similar cases. A second observation: there is also a community of problems and solutions among various contemporary states and legal systems that are coincident in time. Of course, the legal systems of western democracies share the same community of problems that characterize constitutionalism: the need to rein in excess power, the division of powers, legality, respect for human dignity, etc. Such a community of problems does not seem to me to be the exclusive patrimony of the West, and it can indeed be seen in other regions of the world.10 And a third observation: if it is possible to criticize and demand changes of the prevailing law, it is because it is possible to put forward better reasons, which we appeal to because they display a critical power in confronting excesses. For these three reasons, we may say that just as norms, laws, sentences, administrative acts, etc., move at a level of operativity characterized above all by their positivization (based on the “norm of recognition,” or more simply on their capacity, jurisdiction, legitimacy, promulgation, etc.), there is a series of claims that operate at another level. This level could be characterized less by positivation and more by the power of conviction that leads to its general validity (the community of problems and solutions in time and space), and its practical efficacy (a critical capacity when confronted with excesses even while relying on positivized law).

4. In short, principles are normative statements with claims to validity and application, that constitute the origin of other legal decisions to which they give meaning, and that are endowed with a high level of abstraction which makes them inoperable for direct application by subsumption into them.11 They must not, on the

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10 Thus, it should not surprise us that the African Charter on Human and Peoples' Rights expresses a view of human rights that compares favorably with better-known declarations. See African Charter on Human and Peoples' Rights, June 27, 1981 [hereinafter ACHPR]. It could be said that the charter is more of a desideratum than a reality that guarantees respect for human rights in those nations. But the universal, European, and American declarations make no guarantees either; it is enough to look at the facts.

11 I think that Alexy’s model contains elements that are worthy of being taken into account by penal doctrine. Nevertheless, I think it could be productive to rely on the “principle of proportionality,” see ALEXY, THEORIE DER GRUNDRECHTE, supra note 8 at 100-4, with its subprinciples of appropriateness, necessity, and proportionality strictly defined, as a key element.
other hand, always be positivized, although their legal or jurisprudential expression may cooperate in the securing of consensus and acceptance. Nor would they be suitable for concrete, uniform solutions. Such solutions are mutable, according to their circumstances, because of principles.

II. Principles and rules

1. I propose to employ a more precise concept of principle than is usual. Let us consider principles here as statements endowed with claims of maximal application; precisely because of that claim, principles are inapplicable by themselves.\(^{12}\) Therefore, some statements which practice defines as principles must be denied such a designation and must instead be called rules. By rule I understand a statement derived from two or

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\(^{12}\) See the conceptualization outlined by ALEXY, THEORIE DER JURISTISCHE ARGUMENTATION, supra note 11 at 319, for whom “principles are normative statements of such a high level of generality that, as a general rule, they cannot be applied without adding additional normative premises and, more often than not, they face limitations by way of other principles.” See also id. at 299, note 81, where Alexy states: “because of their generality they are not directly usable to found a decision. They require additional normative premises” (see also id. for other references). From which the key question arises: from where do we extract these principles, and how do they operate? See id. at 20-1. Why do principles collide with each other? (see ALEXY ET AL., ELEMENTE EINER JURISTISCHEN Begründungslehre, supra note 5 at 223-224; Alexy, Sistema jurídico, principios jurídicos y razón práctica, supra note 5 at 143), what is their relation to values? (see ALEXY, THEORIE DER GRUNDBRECHTE, supra note 5 at 125-134), are they sufficient to guarantee rationality in the application of the law? (see ALEXY, 18 RECHTSTHEORIE (1987), supra note 5 at 410-419).
more principles which claims applicability to a group of cases. A case may be subsumed under a rule, while it is impossible under a principle. The claim to maximal application forces principles to collide with each other. Rules, on the other hand, must be those statements which are the product of the collision between principles, valid for particular groups of cases that would indeed be subsumable into them. Rules are, according to this concept, statements such as *ne bis in idem, nulla poena sine lege*, and many others. A norm that always governs when the respective factual premise is given is that when two precepts of the penal code overlap, only one of them may be applied: “se garantiza la libertad ideológica, religiosa y de culto de los individuos [freedom of ideology, religion, and worship of individuals is guaranteed]” (art. 16.1 CE Constitution of Spain) constitutes a norm of tendentially maximal obligatoriness that may collide with others (for example, limitations for reasons of public order). This approach coincides, for the moment, with the one sketched by Alexy.

2. In Alexy’s view, “Sowohl Regeln als auch Prinzipien sind Normen, weil beide sagen, was gesollt ist [rules, like principles, are norms because they both state what should be],” but they present differences not only of degree but also of quality. Principles and rules are differentiated by their structure: rules are norms that dictate a legal consequence when the premise described within them is fulfilled, while principles are norms that allow for degrees of execution. From this we may derive that they are distinct also in their mode of validity: just as rules are norms that prescribe, prohibit, or permit something in a definitive way (they are definitive commands: “definitive Gebote”), principle required that something be done in the greatest measure possible under the circumstances (they are optimization commands: “Optimierungsgebote”).

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13 See Ernst Kramer, *JURISTISCHE METHODENLEHRE* 189 (1998). In fact, if the rule is articulated through a group of cases, its formulation allows for identification of which cases contradict the claim contained in the rule. In principles, on the other hand, normative statements do not allow for subsumption because they are merely prescriptive for any case: security in social life, respect for dignity, for example.

14 The distinction between principles and rules should not lead us to think that the latter are of lesser stature and relevance than the former. See Alexy, *Rechtsstheorie*. 1 ARGUMENTATION UND HERMENEUTIK IN DER JURISPRUDENZ 82, note 96 (1979).

15 Alexy, *THEORIE DER GRUNDRECHTE*, supra note 5 at 72. See also Alexy, *ELEMENTE*, supra note 5 at 218, 225; Alexy, 18 RECHTSTHEORIE (1987), supra note 5 at 408; Alexy, *TRES ESCRITOS*, supra note 5 at 96.

16 See Alexy, *THEORIE DER GRUNDRECHTE*, supra note 5 at 76.

17 From the beginning this conception has provoked the criticism of Manuel Atienza & Juan Ruiz, *LAS PIEZAS DEL DERECHO* 31-34 (2004), who see that the character of the optimization command is not properly one of principles (that they conceive as “principios en sentido estricto [principles in the strict sense]”), but rather of “directrices o normas programáticas [directives or programmatic norms],” and they consider that there is a series of principles that cannot be complied with in a gradual way, by which they would have the character of rules (also critical, for this and other reasons, is Prieto Sanchís, supra note 7 at 44-50). Alexy replies to the position of Atienza and Ruiz (on the basis of the English version of the first edition of their work, *ATIENZA & RUIZ, A THEORY OF LEGAL SENTENCES* (Ruth Zimmerling trans., Kluwer 1998)), in Alexy, *TRES ESCRITOS SOBRE LOS DERECHOS FUNDAMENTALES*, supra note 5 at 118-23. Another critique comes from Klaus Günther, *DER SINFUR ANGEMESSENHEIT. ANWENDUNGSDISKURSE IN MORAL UND RECHT* 270 (1988) (apud Alexy, *TRES ESCRITOS SOBRE LOS DERECHOS FUNDAMENTALES*, supra note 5 at 104-07), who also criticizes optimization as a *raison d’être* of principles, given that it would be so for all norms (whether rule or principle) and would not mark a clear distinction between one and the other. See Alexy’s reply, *id.* at 105-07. For Aulis Aarnio, *Taking Rules Seriously*, 42 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE 183 (1990), apud Alexy, *TRES
Their operativity is also distinct: rules operate through subsumption (of the respective factual premise under the normative premise) while principles operate through ponderation (with the opposite principles in each case).\textsuperscript{18} To the degree that rules provide the solution to a group of cases, they must present themselves as “definitive” solutions, in contrast to principles, which must be endowed with only \textit{prima facie} prevalence.\textsuperscript{19}

3. Faced with the distinction and conceptualization described by Alexy, I believe the next step is to outline two differences. On the one hand, we place our emphasis not on fundamental rights, but rather on their foundation, what we call principles. The recognition of fundamental rights requires a public (social) defense in response to their violation. This presupposes the acceptance of human sociality, coexistence, and a minimal social organization, in the framework of which the defense of the infringed rights occurs. If the protection of fundamental rights demands a minimal social recognition of structures (law enforcement, for example, however simple its organization), it becomes advisable to include the social condition in the principles. Therefore, the reality of fundamental rights must not be detached from sociality, from coexistence as a personal or intrinsic human trait, and from the associated principle of security in social life (or of protection of social life). If, with reason, fundamental rights may be considered projections of human dignity, it is necessary to incorporate sociality into them.

On the other hand, it is also necessary to incorporate freedom and legality (or “legal security,” known in European law as the “principle of legality”\textsuperscript{20}), as it is not enough to enjoy and possess fundamental rights unless we can be assured that they will be respected and guaranteed. This presupposes normativity, which is to say, that there

\textsuperscript{18} Although rules operate through subsumption, they may enter into conflict (\textit{Regelkonflikt}) with each other, a moment in which thanks to a norm of conflict (\textit{Konfliktm\o{}r}) the contradiction is resolved by declaring one of them null and excluding it from the code: ALEXY, 18 RECHTSTHEORIE (1987), supra note 5 at 408. Principles collide with each other (\textit{Prinzipienkollision}), and the situation’s tension (or \textit{Spannungslage}) is resolved through ponderation between them, but without excluding any of the principles in play. See id. at 408-9; ALEXY, TRES ESCRITOS SOBRE LOS DERECHOS FUNDAMENTALES, supra note 5 at 96-101. See also ALEXY, THEORIE DER GRUNDRECHTE, supra note 5 at 77, 85. This is a critical point of discrepancy with Dworkin’s position. See ALEXY, 1 RECHTSTHEORIE, ARGUMENTATION UND HERMENEUTIK IN DER JURISPRUDENZ 72-78 (1979).

\textsuperscript{19} See ALEXY, THEORIE DER GRUNDRECHTE, supra note 5 at 75-8, 88-90; ALEXY, 18 RECHTSTHEORIE (1987), supra note 5 at 407-8; Alexy, Rechtsregeln und Rechtsprinzipien, supra note 5 at 223-25; Alexy, Sistema juridico, supra note 5 at 140-144. See also in more recent texts: ALEXY, TRES ESCRITOS SOBRE LOS DERECHOS FUNDAMENTALES, supra note 5 at 95-96, 104-37; Alexy, Epílogo a la Teoría de los derechos fundamentales, supra note 5, in which he confronts various criticisms directed at his approach.

\textsuperscript{20} This is stated here without sufficient precision. From the outset we must distinguish between the principle of legality as a guarantee of the law (\textit{Gesetzlichkeitsprinzip}), in contrast to legality in a procedural sense (\textit{Legalitätsprinzip}). It is a question of highlighting criminal law’s function of guarantee when confronted with the interference of public power in the sphere of citizens.
are prohibitions and prescriptions to further that end. Such normativity is connected to the free nature of the person, as a normative claim would lack any meaning without the capacity for execution or omission of the conduct of the addressee. Therefore, the free nature of the subject person, which is both social and worthy of dignity, enters fully into any consideration of rights and thus, in addition to fundamental rights (based on dignity), sociality and normativity.

4. As I understand principles, they cannot be negated without eliminating the very possibility of reasoning. Specifically, the negation of a principle implies the negation of the possibility of reasoning; that is to say, its negation would lead to self-contradiction.21 This is the quality that identifies principles in contrast to rules (and subprinciples). Thus, whoever denies sociality denies the very possibility of affirming what he affirms, since to express something through language proves sociality itself (relying on a message and an addressee). In a similar way, the possibility of freedom cannot be denied without relying on the free nature of that very proposition. And whoever rejects dignity cannot put up resistance against whoever claims to deny its effect on his person. Rules, on the other hand, allow for their negation without affecting the very possibility of thought. In this way, it is not only possible to deny the validity of a rule that establishes the ne bis in idem, for it is true that doctrine and practice do operate this way in certain cases. At the same time, it is possible to make an exception to the rule of taxativity the moment we allow for the inevitable porosity of legislative language. Abundant examples demonstrate that every rule allows for an exception, while principles cannot cease or be suspended without negating at the same time the very possibility of language and, with it, of understanding. This basic character of principles leads us to suppose that very few statements deserve this name.

5. It is also necessary to have an additional tool that I can only leave suggested, without supporting detail. I mean the so-called sub-principles. I understand sub-principle a set of rules that respond to the same operation balancing of principles involved. Although the doctrine uses the term with other meanings, I propose to use this name, at least to meet the rules that respond to the same operation of ponderation. The sub-principles are, therefore, classification criteria of specific consistent rules. Itself is not of principle but of (groups of) rules.

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21 For KARL LARENZ, RICHTIGES RECHT. GRUNZÜGE EINER RECHTSETHIK 29 (1979) – who begins from the premise that not all principles (perhaps we should say rules and subprinciples) are just law – Prinzipien richtigen Rechts “können dies nur solche Prinzipien sein, die sich vor anderen dadurch auszeichnen, daß sie einen unmittelbaren Sinnbezug aufweisen zu einem letzten Grundsinn oder, wenn wir dabei den teleo-logischen Charakter aller Regelung berücksichtigen, einem Endzweck allen Rechts, in dem wir zugleich den letzten Rechtsfertigungsgrund für seinen normativen Anspruch erblicken [they can only be [principles of just law] those that are characterized above all by transferring a charge of immediate meaning to a basic or final meaning or, if we refer to the teleological character of all regulations, to an objective or ultimate end of all law, in which we contemplate at the same time the ultimate justifying cause of their normative claim]”; and, citing JOACHIM HRUSCHKA, DAS VERSTEHEN VON RECHTSTEXTEN 69 (1972), he argues that they constitute “el punto de referencia interno de todo el Derecho, a través del cual el Derecho como categoría se hace posible y sobre el cual en consecuencia todo el Derecho está erigido [the internal point of reference of all law, by which the law as a category is made possible and upon which as a consequence all law is built].” The self-contradiction that contains the negation of a principle, as he maintains, confers on it a firmer meaning, as I understand it.
III. The three principles of criminal policy (and criminal law)

As we can see in the practical reality of criminal policy, certain generalized observations about the person can be identified as principles and set the conditions for politics and argumentation. There are at least three such observations: in the first place, the obligation to assure the foundations of social life (security in social life); followed, second, by the obligation to respect human freedom, therefore the ideal means to achieve the protection of social life will be norms and not factual instruments (legality as legal security), with all that entails; and third, that the dignity of the human being must be respected as such (respect for dignity in the means of protection).

III.1. The principle of security

1. I understand that current praxis relies implicitly on the primary postulate that social life deserves to be protected (value) and requires protection (the deontic aspect of the principle). In light of the performance in criminal policy, we can affirm that there is consensus for the affirmation that man is social. Even more: the human being is social or does not exist. This statement affirms that the human being is essentially social. Sociality (and not sociability as a character trait) is no mere accident then, tacked onto an individual who hardly resists others. Sociality, on the other hand, is constitutive; that is, the human being is social as a being-with-others. As a consequence, isolating a subject (“individual”) from the others with whom he coexists is a chimera, an abstraction. Sociality means that the person without society is not a person, that the isolated individual is an unreal creation, and as such something illusory, a mirage. Thinking about individuality as something isolated and separate from others is a construct done by another human being, and is still a mode of thinking about ourselves as social, since whoever conceives the idea of a personal subject similar to himself demonstrates with his thought that he is social. That is to say, such an approach to individuality evinces a limited capacity to constitute the person, and is at the same time a means of demonstrating that we understand ourselves as co-existent, social beings.

2. How we understand this sociality, and upon what it is founded, have given rise to a multitude of interpretations. One need not be a convinced Aristotelian to recognize that there is some unavoidable sociality at the very heart of what we understand by humanity. We must consider that one of the most ancient discussions of politics conceived of the human being as a social being. Something similar must be

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23 In earlier phases of this research I have used other terms to refer to the same concepts. What I now call security (in social life) I referred to in earlier versions (see supra, note 1) as the necessity of protection of social life; legality as (legal) security; and the postulate of respect for dignity as adequation of the reaction to the dignity of the person. The essence has not changed; I have modified my way of expressing the same realities with more conventional terminology.

24 These do not coincide with the three basic decisions of criminal policy identified by JOSÉ LUIS DÍEZ RIPOLLÉS, LA RACIONALIDAD DE LAS LEYES PENALES. PRÁCTICA Y TEORÍA 136 (2003), around which he describes “un modelo estructural de racionalidad ética penal [a structural model of rational penal ethics],” id. at 136-163. Nor are they the three capital points identified by Bernd Schünemann, Aufgabe und Grenzen der Strafrechtswissenschaft im 21. Jahrhundert, in HOLM PUTZKE ET AL., FESTSCHRIFT FÜR ROLF DIETRICH HERZBERG 39, 46-51 (2008).
deduced from the idea of the social contract, or from theories of procedural justice: the latter are based, as a necessary condition, on the presupposition of the parties’ capacity to arrive at an agreement; and the former is founded on the consequence that we are social beings by virtue of the “contract,” which certainly presupposes the sociality that it affirms, since a normative-political concept of the person must presume the capacity “de argumentación de lo público, de lo intersubjetivo [for argumentation of what is public, of the intersubjective]”). Indeed, the postulate of sociality is present in Enlightenment thought, in the various versions of the social contract as origin of society, and in the ideal of human brotherhood. Due to this sort of demand for principle, it seems to me that it is not appropriately explained.

Long before the Enlightenment versions, we find sociality in Aristotelian thought. Thus, sociality as entitative of the personal being is expressed in the well-known citation from Aristotle’s Politics, where we begin with the human being as a social being (“a political animal,” zoon politikon): and further, in the forceful statement that a being who does not need to live in society is either a beast or a god. This insight, although with different content, is taken up again by Hegel. If the human being is social, then by being human, sociality is constitutivum of the person. That is to

25 Other proposed constructions are clearly procedural: paradigmatically, that of John Rawls, A THEORY OF JUSTICE § 24 y passim (1972), of justice as impartiality or equity (fairness). This leads Rawls to dematerialize the content of the pact as far as possible, with the confidence that the original position provides the best conditions for social coexistence. And this means – as I understand it – that he is obliged to renounce approaches that have a material foundation (freedom, for example) and is left with an explanation that is merely operative (id. at 202), as if the procedural approach supposed renouncing nuclear declarations (for a similar discussion regarding obligation and power, see id. at 236-7). In another work, Rawls describes a case of “pure procedural justice.” RAWLS, POLITICAL LIBERALISM 73 (expanded ed. 2005). In any case, I understand that such an approach entails taking a position on nuclear or material content that it claims to relegate to the original position, which it would no longer be in that sense of veil of ignorance in order to become a selective means of “rational” choice.

26 The idea of the discursive foundation of decisions has found special relevance in Rawls’ approach (as it has in Habermas), which has influenced the thesis of the social contract as the basis for the construction of the social order itself. The procedure for adopting a decision is thus in the foreground, ahead of the question of the contents of the pact, or of the decision itself. Rawls’ position cannot be fully understood without consideration of his challenge to utilitarianism for which he articulates his version of contractualism (see id.). His contractualism, beyond being a thesis on the construction of the social order, presupposes and bases itself on the autonomy of the moral subject.

27 See, e.g., ALFREDO CRUZ PRADOS, ETHOS Y POLIS. BASES PARA UNA RECONSTRUCCIÓN DE LA FILOSOFÍA POLÍTICA 201 (1999).

28 On the relation to and difference from the Enlightenment ideal of fraternity and that of security (here, security in social life), see PAUL KIRCHHOF, DAS MAß DER GERECHTIGKEIT. BRINGT UNSER LAND WIEDER INS GLEICHGEWICHT! 116-117 (2009).


30 “[O]ne who is incapable of association with others or is independent and has no need of such association is no member of a State, in other words he is either a brute or a god.” Id., book I.2 14:

31 See GEORG W.F. HEGEL, 1 ÜBER DIE WISSENSCHAFTLICHEN BEHANDLUNGSARTEN DES NATURRECHTS 510 et seq. (Hermann Glockner ed., 1958). I find an association of the ideas of Aristotle and Hegel in GUNTHER JAKOBS, SOCIEDAD, NORMA Y PERSONA EN UNA TEORÍA DE UN DERECHO PENAL FUNCIONAL 33-34 (Manuel Cancio & Bernardo Feijóo trans., 1996), who discusses the arc that runs from one to the other in European thought.
say, there is no person without society. Depending on how this is understood, we find the most varied interpretations that have been given of sociality. Under this banner the most radical collectivism can be justified, with the human being as an irrelevant pawn in the social collective; or we can justify the mediation of the person by sociality, in the manner of Hegel, or the construction of the person by the social system, in the manner of Luhmann; and indeed, the various versions of the so-called communitarianism of today.

3. The great difference that I find among these varied positions and their origin in Aristotle resides in the classical (though not Aristotelian) distinction between essence and act of being. Here we begin with the distinction between essence and act of being, by virtue of which what something is can be distinguished from its act of being, from its existence. I propose, therefore, that the person is social insofar as his essence includes sociality. Society, on the other hand, does not confer personhood (act of being) upon the subject, but rather is the manifestation of the person as the subject of sociality. If the subject were to receive his act of being from society, the latter would exist before the former, which would also transcend the individual subject. The person is social, which means that either he is social, or he is not a person. But his existence as a person, his act of being, does not come from society. On the contrary, it could be stated that society receives its act of being from the person.

This approach differs from Hobbes’ idea of the social contract, in which the passage from the state of nature to the political state “makes” the person (or better: the “individual”) insofar as he avoids his disappearance by external attack and internal offenses. It differs as well from Rousseau’s version of the social contract as a pact that guarantees freedom (condition of the pact) and establishes equality (product of the pact). Nothing could be further from what has been elaborated here, where sociality forms part of the person but does not identify itself with his act of being. Sociality expresses, on the contrary, the constitutivum of the person: as his development as a person is social, the unfolding of his freedom through time is social. The mediation of sociality, as understood by Hegel, is insufficient; sociality as an essential trait of the person presupposes that without society there is no person. But that the essence of the person is social is not mere shading drawn on the subject in his action as Scheler would

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32 Life in society would be possible through the State, which would emerge as an artifice constructed by the demands of reason to calculate the costs and benefits of abandoning the condition of nature, renouncing part of human freedom, in order to gain freedom before others. Both society and the State must respond to this idea of being artifices that make the individual’s very existence possible. The State is thus the source of a calculus of needs (it guarantees peace and harmony among individuals), but also of differences, faced with the natural condition, in which everyone would be equal in order to confront each other or go to war with each other, bellum omnium contra omnes (“man is a wolf to man,” according to the dictum taken from Plautus and immortalized by Hobbes). This is an aporetic approach, as the subjects of the contract acquire their individuality thanks to that contract.

33 The basic difference between the approaches of Hobbes and Rousseau is rooted in the non-sociable (Hobbes) or sociable (Rousseau) character of man in the state of nature. For the latter, it is a question of transforming the man into a citizen through the contract, which transforms the individual being into a collective entity, the general will.

34 The very idea of the social contract contains a reductionism of justice, understood as justice among equal individuals (commutative), but it relegates the transpersonal dimension of justice: distributive justice above all.
have it.\textsuperscript{35} The essence of the person means that what the person is, is social – his action, his growth, his development in the world – it is with-others, is a being-with in reference to other subjects.\textsuperscript{36}

4. Obviously, this society is not the only society with the high degree of complexity (such as a city, nation, or state) normally understood by that expression (even more so in the “coordinates” of globalization). The expression “society” arises as well in the original perception of the person who discovers that he is not alone in the world, that there are other subjects like him (the basic, foundational expression that “you are you”). It is precisely by virtue of those other subjects that he perceives as similar that he re-cognizes himself as a person. And it is in relation to others that he lives as a person.\textsuperscript{37} Granting relevance to this membership in intermediate groups as socializers, as “constitutive communities,” is the very focus of “communitarian” philosophy. Although such a focus has in recent times highlighted this personal facet of coexistence,\textsuperscript{38} it does not seem to me to be the exclusive domain of Communitarianism.

5. Thinking about sociality is immediately linked to the radical limitation of the person.\textsuperscript{39} Humanity’s radical limitation looks to social life as a possible way to overcome that inborn imperfection which is marked by the scant influence of human beings’ instinctive resources in comparison with other animals. In the human being the scant influence of instincts corresponds to an inversely proportional capacity for rational learning and growth in a human, which is to say social, setting. We may state, then, that inborn human limitation supports sociality, but understood not as a simple remedy for a deficit, but rather as an entitative complement. The human being may achieve a certain perfection, to the degree perfection is achievable, by reference to others, to a social life in which he grows and acquires experiences of himself, of others, and of his environment.

For its part, sociality, coexistence in society, cannot achieve perfection defined as overcoming all deficiencies, but rather finds itself subject to the continuous limitation of not interfering with the others’ scope of liberty. Radical imperfection and factual connection to others mean that restrictions on personal freedom are inevitable; social life cannot be conceived of without restriction on the spheres of personal freedom.\textsuperscript{40}

\textsuperscript{35} On the human being as a social individual (“sociale Individualität”), see MAX SCHELER, DER FORMALISMUS IN DER ETHIK UND DIE MATERIALE WERTETHIK 563 et seq. (4th ed. 1954), following ARTHUR KAUFMANN, RECHTSPHILOSOPHIE 215 (1997).

\textsuperscript{36} We avoid falling into the position that the person is such because of society, in the manner of Marx, when he argued in his sixth thesis on Feuerbach that the reality of human essence is the collective of human relations.

\textsuperscript{37} “Aristotle … represents a tradition of thought, in which he is preceded by Homer and Sophocles, according to which the human being who is separated from his social group is also deprived of the capacity for justice.” ALISDAIR MACINTYRE, WHOSE JUSTICE? WHICH RATIONALITY? 96 (1988), with references to Homer, cited by ARISTOTLE, POLITICS, 1253a 6; and SOPHOCLES, PHILOCTETES, 1018, cited by ARISTOTLE, Politics, 1252b 28-1253a 39.

\textsuperscript{38} See MICHAEL SANDEL, PUBLIC PHILOSOPHY: ESSAYS ON MORALITY IN POLITICS 164-68, 175-78 (2005).

\textsuperscript{39} Thus, in the thinking developed, for example, by McIntyre.

\textsuperscript{40} See in this sense, from the idea of freedom, UDO DI FABIO, DIE KULTUR DER FREIHEIT 72, 83, 86, 97, 113 y 117 (2005).
Furthermore, at the essence of his personal being, the person is, from his very origin, restriction: that is to say, limitation. Social life is the limitation that makes it possible to overcome the radical imperfection of the person. Specifically, social life entails the restriction of personal liberties and rights not as the fruit of an underlying agreement that might be called a “social contract” but rather as the manifestation of personality itself. In this sense, it would not be mistaken to say that perfect society is a utopia. Given the excesses which we have witnessed in the twentieth century, no further argument is necessary.

Neither radical human imperfection nor the evidence that doing away with excesses would be a utopian ideal invalidate this claim to coexistence. On the contrary, both demand the persistence of a society in which deficiencies may be alleviated and excesses avoided. For this reason, coexistence deserves and needs protection.

6. Sociality might then express itself as a principle with the statement of security in social life and the need to protect it. Thus, sociality must be a governing principle of decision-making in society. Can it properly be considered a principle? According to what we have discussed above concerning its concept, yes. Indeed, it is a principle, because the statement security in social life entails a maximal claim of validity. If we identify something as social life, as a society, it requires protection and subsistence. But such a claim of maximal validity comes into conflict with the principle of dignity. This was already indicated in the previous paragraph: if the person, as a social being, looks to society to overcome his limitations, he will not succeed, to the extent success is possible at all, without limiting in turn the freedom of others, and his own. The exacerbation of such a claim enters into friction, as we shall see, with the principle of respect for dignity. In turn, sociality looks to the establishment of connections and limits, which are established in norms. Thus, the desire to encourage social life enters into friction with what we are calling "legality."

III.2. The principle of legality

1. I understand that current praxis also relies implicitly and explicitly on another postulate: that society must be protected not by factual instruments but by legal means, that is, by norms. The possibility of a norm presupposes the freedom of the addressee, specifically, an addressee who, because he has freedom, is subject to guidelines. In view of the necessary recourse to law, we might affirm that there is agreement with respect to the affirmation that man is free, which constitutes a good, something valued positively

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41 On the other hand, social utopianism has been supported by various political and social thinkers, from Plato’s republic to the collectivisms of recent times.

42 See LARENZ, supra note 21 at 52-3.

43 A terminological clarification: what is here referred to as “security in social life” conforms to the conventional designation, as much in the specialized literature and in the media, as in judicial decisions and legal language, of “security.” (See Déclaration des droits de l'Homme et du Citoyen, 1793, art. 8 [hereinafter DDHC 1793]: “La sûreté consiste dans la protection accordée par la société à chacun de ses membres pour la conservation de sa personne, de ses droits et de ses propriétés [security consists of the protection afforded by society to each of its members for the preservation of his person, his rights, and his property].”) In earlier versions of this research I have used the designation “need for protection of social life [necesidad de tutela de la vida social].”
in our personal being. This affirmation may be bold. Let us suffice for now, beyond a declaration in favor of free will, with a minimal acceptance of the motivability of the person through limitations, whatever their character might be. In other words, it is enough for us that sociality protects itself not by factual means, that is, by the mere technical prevention of behaviors that makes their realization physically impossible, but rather with deterrent norms. And in turn, reliance on these norms supposes taking the addressee as a person.

This idea means that the human being – the social being – is also a free being, that is to say, open and not predetermined. In acting, the person is ruled by norms. From which two consequences are derived. On the one hand, the presence of a norm in the moment of acting lets one affirm that he has acted according to, or against, or beyond the norm in question. This presupposes, in turn, that he may affirm that he has acted. Normativity presupposes that we can impute the process in which someone is involved not as a mere process but as an action. Therefore, the agent’s freedom looks to the existence of norms, which presuppose imputation (of something as action, and of that action, once valued according to the norm as reproachable or meritorious, whatever the case).

On the other hand, the norm depends on the addressee’s freedom: a not-free being does not require norms. In this way, it is principally through norms (prohibitions) that sociality must be protected. Norms establish the limits of what we can do (“can” in the normative sense: you cannot do this because it is prohibited). Through norms and not only by factual means: that is to say, not only by merely avoiding behaviors that physically make it impossible, but rather because of prohibitions (“can” in the factual sense: you cannot do this because it is impossible). From freedom emerges the idea of normativity or juridicity as an indispensable postulate, given that, if a being acts freely, he is guided by norms, and norms precede action. If norms precede action, and the agent is social, he starts from the premise that the aforementioned prior norms rest in order to value (measure) the action. The action is measured according to a preexisting standard and continues to be valid as a scale of mediation. On the other hand, to use as a standard of measurement norms that the agent did not have when he acted would mean ignoring his free nature. Therefore, the agent’s freedom demands reliance on norms.

The sphere of contemporary criminal policy cannot disregard the idea of legality (or normativity) with respect to crimes and punishments. But, as the basis of this conventional understanding, we must return to the idea of normativity, understood as the legality that accompanies all human action. This is not simply a question of

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44 This idea of normativity (that norms must exist) can also be found in FULLER, supra note 22 at 39, when he refers to the “principles” of legality, and in particular to the first of them, that of the generality of the law, id. at 46-49. See what I have discussed elsewhere: PABLO SÁNCHEZ OSTIZ, IMPUTACIÓN Y TEORÍA DEL DELITO. LA DOCTRINA KANTIANA DE LA IMPUTACIÓN Y SU RECEPCIÓN EN EL PENSAMIENTO JURÍDICO-PENAL CONTEMPORÁNEO 387-401 (2008).

45 The imputation as correlate, on the other hand, is not found among the characteristics of the “inner morality of the law” (see FULLER, supra note 22 at 39), unless it may be included in some of the requirements set out by Fuller.

46 See the discussion of normativity through “autonomía personal [personal autonomy]” in FRANCISCO LAPORTA, EL IMPERIO DE LA LEY. UNA VISIÓN ACTUAL 23-33 (2007).
“juridical legality (or juridical normativity)” (which would be too narrow a scope because it can serve only for legal norms) but rather, above all, of juridicity or normativity (which would include any kind of rules and not only the legal norms).

2. From ancient times we have taken as our point of departure this normativity of human actions, and therefore the open character of the person. Even Roman law, with the value it conferred on fides, to give your word for something, recognized the possibility of not complying with an expected behavior, which nevertheless became foreseeable – that is, “secure” – through loyalty to one’s own pact. This conviction is oriented more toward security (avoidance of the unforeseeable) than to personal freedom. Such a personal conception of freedom is inherent in the Christian conception of the human being as a being in the hands of his own free will.

Thought on freedom is later more problematic, above all in the modern period, and it left a profound mark on the period of European history that leads up to the Enlightenment. It is at this point that Kant theorizes freedom as autonomy, one of the qualities that define the person in Enlightenment philosophy. Another characteristic of the Enlightenment is its orientation of the normativity of human action toward obtaining security through legality – avoiding the excesses of judges’ decision-making power by restricting their judgments (including considering them as mere appliers of a clear and univocal law). This is the point at which human freedom arises as the correlate of legality.

The idea of legality thus acquires the substance of the Enlightenment ideal of freedom and its claim to limit power through the Law, or the Rule of Law (État de Droit, or Rechtsstaat) tied to the idea of legality (the so-called “principle” of

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Translator’s note: The Spanish word “juridicidad” refers to the juridical nature of the human being, the basis of which is human freedom, which requires rules for action. Although “juridicity” is a literal translation not generally employed in English, it serves to distinguish “juridicidad, “juridicalidad,” from “legalism,” from “legalismo,” which refers to a formal system of laws.

48 The overcoming of the cycle of history, common to ancient Greek thought, by a lineal conception, attributes to the human subject the reins of his destiny, which entails freedom as its presupposition. See ALAIN FINKIELKRAUT, NOSOTROS, LOS MODERNOS 166-68 (Miguel Montes trans., 2006); see also JAVIER GOMÁ, EJEMPLARIDAD PÚBLICA 38-40 (2009).

49 Also, specifically, in Ecclesiasticus (Sirach) 15:14: “Deus ab initio constituit hominem et reliquit illum in manu consiliui sui et dedit eum in manum consuepscentiae suae.”

50 In Kant’s approach, freedom is not only the absence of coercion (freedom in a negative sense), but is above all autonomy: “the capacity of pure reason to be of itself practical,” KANT, THE METAPHYSICS OF MORALS (Mary Gregor trans., 1991) [213-4 DIE METAPHYSIK DER SITTEN, 1797-1798 (Academy Edition)]. These positive and negative meanings of freedom do not coincide, as I understand it, with the two aspects highlighted by Isaiah Berlin (as Berlin himself perceives; see ISAIAH BERLIN, TWO CONCEPTS OF LIBERTY, 38, note 1, because in Kant freedom in the positive sense is autonomy, which yields a (moral) foundation. See SHARON BYRD AND JOACHIM HRUSCHKA, KANT’S DOCTRINE OF RIGHT. A COMMENTARY 77-93 (2010).

51 But see GUSTAVO ZAGREBELSKY, EL DERECHO DÚCTIL. LEY, DERECHOS, JUSTICIA 22-23 (Marina Gascón trans., 6th ed. 2005) (1992), who explains that this “formal” version is not enough, but rather it is
At this point let us take a brief detour into the liberal meaning of the principle of legality in order to later continue with its “principal” character.

The principle of penal legality is articulated as a basic postulate of criminal law, as a liberal demand of the Rule of Law. We understand this term to mean that all restrictions on freedom must be carried out through legal instruments, specifically, through formal laws, on which a community that elects its representatives may rely to govern itself. Although some formulations of the principle of legality were known before the Enlightenment, it is during this period and in Enlightenment thought that it acquires a peculiar political meaning: the exercise of *ius puniendi*, to the extent that it affects the rights and liberties of citizens, must be established by the legislative power, that is, by the citizens’ representatives.

In 1764 C. Beccaria posited legality as the core of Enlightenment criminal law – the expression of popular sovereignty against the arbitrariness of judicial activity. It is a few years later, in the work of Feuerbach, that legality assumes its most complete formulation. Against the excesses of the application of his era’s law (in the practice of the *ius commune*), he expresses his conviction that the law must capture precisely both necessary, if we want to avoid that even totalitarian models may be considered states of law, to endow the postulate with material content.

52 It is interesting to consider the opinion of GUSTAV RADBRUCH, *DER GEIST DES ENGLISCHEN RECHTS* 38-50 (4th ed. 1958), when he proposes as one of the fundamental traits of the English legal system precisely legal security, id. at 38: and the law’s means of realization does not rely on formal laws as European systems do!

53 For example, in the Charta Magna Libertatum (1215) of Juan Sin Tierra; Constitutio Criminalis Carolina (1533/1555) of Carlos V; and other legal sources: see PRINCIPIOS DE DERECHO GLOBAL 1000 REGLAS Y AFORISMOS JURÍDICOS COMENTADOS (Rafael Domingo et al. eds., 2006).

54 On the differences and similarities between the liberal tradition of the *état de droit* and the rule of law (and on the current convergence between the two systems), see ZAGREBELSKY, supra note 51 at 24-27.

55 The following passage from Beccaria must be understood in the context of the common criminal judicial practice of the time: “a fixed legal code that must be observed to the letter leaves the judge no other task than to examine a citizen’s actions and to determine whether or not they conform to the written law,” CESARE BECCARIA, *ON CRIMES AND PUNISHMENTS* 12 (David Young trans., Hackett Publishing 1986) [DEI DELITTI E DELLE PENE (1764)]. *See infra*, note 63.

56 The idea is the legacy of Enlightenment thought, as can be seen in the works of other authors. See the work of the Spaniard MANUEL DE LARDIZÁBAL Y URIBE, *DISCURSO SOBRE LAS PENAS, CONTRAÍDO A LASLEYES CRIMinaLES DE ESPAÑA PARA FACILITAR SU REFORMA* ch. II (Ignacio-Jesús Serrano Butragueño ed., Granada 1997) (1782, 1828).

57 In his *Revision*, see LUDWIG FEUERBACH, *REVISION DER GRUNDSÄTZE UND GRUNDBEGRIFFE DES POSITIVEN PEINLICHEN RECHTS* (repr. Aalen, 1966) (1799-1800), Feuerbach refers above all to the law compiled in the Constitutio Criminalis Carolina (1533/1555). The application of common law by judges of the earlier period is maked by the arbitrariness allowed by the discretion that the legislation gave to the judge. Specifically, the institution of extraordianry punishment opened the possibility that the judge could impose a punishment without limiting himself to what is directed by the law (that is to say, the imposition of a punishment – so-called “extraordinary” punishment – according to judicial will as opposed to the punishment signaled by the law – the “ordinary”; see FRANCISCO TOMÁS Y VALIENTE, EL DERECHO PENAL DE LA MONARQUÍA ABSOLUTA 333, 377 (1969); FRIEDRICH SCHAFFSTEIN, DIE ALLGEMEINEN LEHREN VON VERBRECHEN IN IHRER ENTWICKLUNG DURCH DIE WISSENSCHAFT DES GEMEINEN STRAFRECHTS 39-43 (repr. 1973) (1930); also very illustrative, but in another context, is ALEJANDRO NIETO, EL ARBITRIO JUDICIAL 214-16 (2000), discussing when a judge is faced not with a case of a completed, intentional crime by a single actor, but rather cases of recklessness, attempt, or accomplice liability.
infractions and sanctions. Specifically, he writes in 1801: any imposition of punishment presupposes a criminal law (*nulla poena sine lege*); a condition of the application of a punishment is the existence of a prohibited act or crime (*nulla poena sine crimen*); and a condition of crime is a punishment established in the law (*nullum crimen sine poena legali*). Since then, the idea has been expressed, with several variants and additions, in the formulation of a series of guarantees (*nullum crimen, nulla poena sine praevia lege penale certa, scripta et stricta*), that has come to encapsulate the idea of penal legality and that has become common in both doctrine and case-law. And above all, it is expressed in the various texts on human rights and codified criminal law.

The Enlightenment ideal of a strict legal definition of the behaviors subject to punishment has a clear political motivation: the restriction of judicial power by the law, the legislative power. This motivation is tied to the fear that judges might interpret the law, which is the origin of the postulate that judges must limit themselves to applying the law as if it were a univocal and linear syllogism; thus Beccaria, in chapter IV of his work *On Crimes and Punishments*, postulated the recourse to a “perfect syllogism” in the application of the law, without interpretation. But Beccaria is not the only thinker...

58 See Ludwig Feuerbach, Lehrebsch des Gemeinen in Deutschland geltenden peinlichen Rechts 20, § 24 (1st ed. 1801) (in the 4th (1808) and successive editions, § 20, pp 21-22). Already in Feuerbach, Revision, supra note 57 at 148, he explains that for any crime there is a corresponding, legally established punishment (*nullum crimen sine poena legali*), and that the legally established punishment corresponds to only one crime (*nulla poena legali sine crine*).

59 Beyond the liberal foundation of the principle, its explanation is based on Feuerbach’s personal conception of the law and so-called psychological coercion (see Ludwig Feuerbach, Anti-Hobbes oder über die Grenzen der Höchsten Gewalt und das Zwangsrecht der Bürger gegen den Oberherrn 192 (1798); Feuerbach, Revision, supra note 65 at 38): the addressee of the law, a rational individual who can calculate the consequences that will flow from committing the crime, is warned to avoid it. His own conception of psychological coercion requires a legislation that is precise in its definition of what it prohibited and what the sanctions are. What Feuerbach maintains about the principle of legality is thus not only a political-criminal proposal consistent with the spirit of the Enlightenment, but also a demand for the idea of psychological coercion, an irreplaceable part of his theory of punishment (see the discussion in the first three chapters of the Revision, dedicated to explaining his doctrine on punishment, criminal law, and imputation: the judicial application of punishment requires a doctrine of imputation, which he derives from the doctrine of punishment and criminal law: see Feuerbach, Revision, supra note 57 at xx).

60 The statement *nullum crimen sine lege*, which has since become common, does not appear in these texts of Feuerbach, who concentrates on defending the idea that judges must operate subject to the law (see Feuerbach, Revision, supra note 57 at 109 et seq.), but seems to be a later reworking that is more focused on legislative activity, which also leads to the idea that the law must be precise in its definition of what is prohibited: see id. at 136-39, 163.


62 See the Bavarian Penal Code (1813, work projected by Feuerbach). Although the Latin statement is not captured, obviously, in the law, the latter does claim to be a complete expression of such a rule: the legal descriptions of crimes and punishments must be precise and exact, so as to leave no room for doubt in their application. On the intention of Feuerbach and his contemporaries to limit the exercise of *ius puniendi*, we must take into account the judicial practice of the previous era (see supra, note 57).

63 “The authority to interpret penal law can scarcely rest with criminal judges for the good reason that they are not lawmakers. […] In every criminal case, the judge should come to a perfect syllogism: the
to advocate this prohibition on interpreting laws.\textsuperscript{64} In the compilation of Prussian territorial law (the \textit{Allgemeines Landrecht für die Preußischen Staaten}, 1794), although judicial interpretive activity was not categorically prohibited, one can see clear suspicion of judicial “creativity.”\textsuperscript{65} The Bavarian Penal Code (1813) did not reach as far, but it did prohibit private legal commentaries, while at the same time it authorized some official annotations.\textsuperscript{66} The Spanish Constitution of 1812 distinguished between interpretation of laws (proper to the legislative power) and their application (corresponding to the judicial power). The current article 4 (basically introduced in 1850) of the Spanish penal code is heir to this movement to deny any judicial capacity for interpretation of the law. Thus, the procedure for applying the law becomes reduced to a certain automatism, which would become one of the hallmarks of the positivism that emerged in the years immediately following.\textsuperscript{67} This turns out to be foreign to the major premise should be the general law; the minor premise, the act which does or does not conform to the law; and the conclusion, acquittal or condemnation. If the judge were constrained to form even two syllogisms, or if he were to choose to do so, then the door to uncertainty would be opened. Nothing is more dangerous than the common axiom that one must consult the spirit of the law. This is a dike that is readily breached by the torrent of opinion. [...] The spirit of the law, then, would be dependent on the good and bad logic of a judge, on a sound or unhealthy digestion, on the violence of his passions, on the infirmities he suffers, on his relations with the victim, and on all the slight forces that change the appearance of every object in the fickle human mind. [...] Any confusion arising from the rigorous observation of the letter or the law cannot be compared with the disorders that spring from interpretation. [...] [A] fixed legal code that must be observed to the letter leaves the judge no other task than to examine a citizen’s actions and to determine whether or not they conform to the written law [.]” \textit{Beccaria, supra} note 55 at 10-12.


\textsuperscript{65} See \textit{Allgemeines Landrecht für die Preußischen Staaten} 1794 (Hans Hattenhauer & Günther Bernert eds., 1996). See \textit{id.}, Publikationspatent, no. XVIII; and Einleitung, §§ 46-50, where it is stated that the judge, on deciding an issue, can only employ the meaning that is derived from the words in the law (§ 46), and if the law is ambiguous, he must show his doubts to the legislative commission (§ 47), without the harm that if he finds no precept, he must recur to the general principles of the law and to similar cases (§ 49) and denounce the omission so that it may be remedied through legislation (§ 50).

\textsuperscript{66} Through the royal decree of publication, of October 19, 1813; in these official commentaries (which also appeared in 1813, in three volumes), Feuerbach does not seem to take part. Feuerbach’s purpose – consistent with his conception of the principle of legality and the liberal ideal of the citizen – was rather that the clear edition of the Code (see \textit{Feuerbach, Revision, supra} note 57 at 136-39, 163) permit its application without any doubts: see \textit{Eberhard Schmidt, Einführung in die Geschichte der deutschen Strafrechtspflege} 266-67 (3rd ed., 1965).

\textsuperscript{67} And although with the passage of time, together with the proposals of Hermeneutics and the theory of interpretation, the value of the judicial “development” of the law has been highlighted, there is no lack of modern attempts to limit judicial activity to mere “application.” See, in particular, the proposals of the “New Textualism” (which stands in opposition to the classic idea of “judicial supremacy”) in contrast with the theses of “dynamic statutory interpretation.” See, in this regard, Michele Taruffo, \textit{Ley y Juez en el “Rule of Law” inglés y en el constitucionalismo americano, in LA EXPERIENCIA JURISDICCIONAL: DEL ESTADO LEGISLATIVO AL ESTADO CONSTITUCIONAL DE DERECHO} 152-56 (Andrés Ibáñez ed., 1998).
praxic character of the law, which is not limited to “applying” the law, but rather resolving social conflicts with justice.

Here, then, is the detour into the liberal political – and generalized – vision of the “principle” of legality as tied to the constitutional legitimacy of laws. Let us return to our main thread: the principle of legality, legal security, or juridicity at its foundation.

3. Indeed, the Enlightenment version of the principle of legality just described should not lead us to think naively that this is only a liberal claim, nor one whose content is as clear as it is sometimes presented. On the contrary, together with formal law there have recently emerged a motley tangle of elements (economic interests, demands of efficiency, supra- and infranational orders) that relativize what was understood in Enlightenment thought as “law.”

Nevertheless, we cannot dispense with law, with norms, as a means of prevention. That is to say, preventative measures have no other assignment, no other tools, when confronted with the endangerment of society than sanctions, or norms. Norms presuppose freedom, that their addressees are not faced with a single course of conduct, but rather that it is possible to respect the norm and also fail to comply with it. We are dealing with freedom as a root of humanity that appeals to norms as suitable means to obtain concrete behaviors from rational subjects and constitutes itself as a principle, articulated with claims of maximal validity. Resorting to these norms is a requirement of freedom. And it is thus, through norms, that we rationally achieve the protection of coexistence (the principle of security in social life) and how we respect the dignity of the norms’ addressee, the person. But this demands a broader explanation to follow.

4. First, we should remember that the freedom at the foundation of norms’ demands is not what makes the person. The person, his essence, is an inborn openness. From this personal freedom emerges the idea of legality as a necessary postulate. Legality means, from this perspective, that sociality protects itself through norms, which is fitting for a rational subject. As I understand it, this idea of legality relies on the addressee as an open being, unfinished, but at the same time the subject of his own personal development. His personal being is freedom. Not so much Kantian freedom, which is ultimately autonomy, and which could ground dignity, but rather freedom as

68 For a graphic description, see ZAGREBELSKY, supra note 51 at 33-40.

69 We should consider that in the era in which Feuerbach formulated his idea of legality, in other parts of the world a different rule emerged. I refer to Justice Marshall’s decision in Marbury v. Madison 5 U.S. (1 Cranch) 137 (1803), which “established that fundamental principle of freedom, that a permanent, written Constitution controls a temporary Congress,” the clearest expression of “judicial review.” BERNARD SCHWARTZ, The Judicial Ten: America’s Greatest Judges, 4 S. ILL. U.L.J. 405, 408 (1979) (quoting 4 A. BEVERIDGE, THE LIFE OF JOHN MARSHALL 430 (1919)).

70 I set aside, for now, other paths to the reestablishment of norms such as the possibility of nullification, restitution, etc., and focus instead on penal norms.

71 See infra, note 73.

72 We can see this clearly in Kantian philosophy, where autonomy is the foundation of the dignity of human nature and all rational nature: see IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS (Mary Gregor trans., Cambridge University Press 1998) [GRUNDLEGUNG ZUR METAPHYSIK DER SITTEN 1785].
an openness of the human being to the future and the present, to his end and his means.\(^{73}\)

But such an idea of freedom is prone to misunderstandings, as may be the conception that freedom (the all-embracing freedom to choose) is what makes us human, as we see in Sartre and existentialism, or in authors like Nietzsche or Rorty. Understanding freedom in this way also supposes a lack of focus on what is personal essence and the person’s act of being. A person is not a person by being free, but rather his personal being is freedom: he is free.\(^{74}\) Even more: his personal nucleus is freedom, as his personal being is openness.

5. Openness and “indeterminacy” require guidelines or standards which, by being social, are legal norms. The fact that the human being is free forms part of the basic postulates that allow us to understand ourselves as people. Social life begins from the assumption that we are free, that our existence is not governed by an inexorable destiny. That is what allows us to recognize human action: because it is governed by guidelines that later enable the imputation of something and its value to someone. That normativity of human action makes social life itself possible\(^{75}\) and gives meaning to our projections into the future. Freedom and behavioral guidelines implicate each other mutually in the sense that a free act offers guidelines to the agent, who is governed by rules of conduct – that is to say, that the agent had the option to choose among different possibilities.

Behavioral guidelines may later take the physiognomy of laws (including the Constitution), rules, or informal commands. Any of these possesses claims to normative validity to the extent that it aspires to condition the “feasible” conduct of the addressee. Whether it governs effectively is another question and depends on formal factors such as jurisdiction and validity.\(^{76}\)

\(^{73}\) For LAPORTA, supra note 46 at 36, the personal autonomy at the heart of his analysis “no es rigurosamente igual a lo que Kant entendía por tal [is not rigorously equal to what Kant understood as such].” Indeed, Kant’s autonomy presents a clearly moral character that is tied to dignity. Nevertheless, LAPORTA, id. at 23-33, on describing autonomy in terms of four traits (and something more than traits, as they endow our actions with “un perfil ‘constitutivo’ o definitorio [a ‘constitutive’ or defining profile],” id. at 36) does not distance himself from the general conviction of dignity, although he does not aim that high, id. at 37. These traits are the negative sense of freedom, rationality and autonomy, development of personal autonomy through time, and capacity to plan one’s own life. On legal security and the capacity to design one’s own life, see ANDREAS VON ARNAULD, RECHTSSICHERHEIT. PERSPEKTIVEN ANNÄHERUNGEN AN EINE IDÉE DIRECTRICE DES RECHTS 67-72 with notes (2006).

\(^{74}\) See KAUFMANN, supra note 35 at 279-82.

\(^{75}\) A reference to this postulate might perhaps be found in the Aristotelian idea of the human being as a being who speaks (“man is the only animal endowed with speech,” ARISTOTLE, POLITICS, supra note 34, book I.2), and thus the relevance of language for the human being: according to the widely cited statement of von Humboldt, “Der Mensch ist nur Mensch durch Sprache, aber zu erfinden, müßte er schon Menschen sein,” see KAUFMANN supra note 35 at 116, note 23, which is the tradition that leads to Wittingenstejn. Fuller, supra note 22 at 185-86, points out something similar when he refers to the idea of communication, better than Hart’s idea of survival, as the minimal (natural) content of the law.

\(^{76}\) This is the distinction between normative validity (“determinabilidad o vinculatoriedad de una exigencia de conducta o de una pauta por la que la conducta humana tiene que ser medida [determinability or linkability of a behavioral demand or of a guideline by which human conduct must be measured]”) and factic validity (“su eficacia o la posibilidad de lograr imponerse [its effectiveness or possibility of imposing itself]”). LARENZ, supra note 4 at 184.
6. This openness of the person, this normativity of his action, might express itself as a principle with the statement that the protection of social life will only be appropriate if it submits to this condition, if it effectuates itself through norms. This demand could also be a governing principle for decision-making in society. And as such, its character as a principle also seems to me predictable. Indeed, the statement “legality” expresses a maximal claim to validity insofar as the human subject understands the language of norms as specific to him. Not following this language would suppose negating the personal character of the one affected. Thereby any behavioral requirement of the person that is not normative would become an excess, would constitute violence or manipulation.

In turn, security in social life, even through norms, comes into conflict with the inevitable effects on the dignity of the person, as the prohibition or prescription of certain behaviors in and of itself restricts freedom, and the imposition of a sanction constitutes by definition a serious impairment of assets that are tied to a person’s dignity to a greater or lesser extent. Freedom (the principle of legality) and sociality (the principle of security in social life) thus appeal to a third statement, that of adaptation (or respect) of the means of protection of the addressee’s dignity. Let us examine it.

III.3. The principle of respect for dignity

1. As I understand it, current legal practice relies on a belief in the dignity of the human person. There is general agreement on the existence of an indispensable dignity within the human being as a positively valued reality. This idea may be found in the recognition of fundamental human rights and the obligation to protect them. It is found above all in the liberal thought of the Enlightenment and abounds in any programmatic political text. Nevertheless, it is difficult to arrive at a definition for this concept or to discover a satisfactory foundation for it; at times, as Münch has pointed out, it is even difficult to define when dignity has clearly been injured.

I prefer not to employ the term “proportionality” here because it is equivocal, although it is frequently found in doctrine and judgments – including in political opinions in the media – to express some aspects of dignity. The term “dignity,” on the

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77 See Ingo von Münch, La dignidad del hombre en el Derecho constitucional, 5 REV. ESPAÑOLA DE DERECHO CONSTITUCIONAL 9 (Jaime Nicolás trans., 1982); Di Fabio, supra note 40 at 267, 270. In Germany, the question is preceded by the declaration in article 1.1 of the German constitution: “Die Würde des Menschen ist unantastbar [the dignity of man is inviolable].” GRUNDGESETZ [G.G] [Constitution] art. 1.1 (F.R.G).

78 See UDHR, supra note 70, preamble and art. 22; Charter of Fundamental Rights of the European Union, Dec. 7, 2000 [hereinafter CFREU], preamble and arts. 1, 20. In addition, on the equality of all persons before the law, see DDHC 1789, supra note 70.

79 See Münch, supra note 77 at 19.

80 In this sense, we need only consult Werner Maihofer, RECHTSSSTAAT UND MENSCHLICHWE FORDE (1968) to accept which acts are violations of dignity, id. at 24, but it turns out not to be so easy to acknowledge their foundations, see id. at 44-57.

81 Indeed, I avoid here the term “principle of proportionality,” as it is used so habitually in doctrine and judgments that it would be inappropriate. Thus, we speak of proportionality both broadly and strictly, of the “test alemán de proporcionalidad [German test of proportionality].”
other hand, highlights the absolute character of the principle in accordance with Kant’s theorization of dignity, which is close to the idea of the “general principle of reciprocal respect,” judging by discussion of it,82 or to the “moral constructivism of Kant.”83

2. The idea of the dignity of the human being is tied to the proposals and achievements of modernity,84 and respect for it is considered one of the characteristic achievements of our time. With the idea of dignity we claim to preserve a sphere of respect for the person. The dignity of the human being, the inviolable rights that are inherent in him, respect for his freedom, ideas that have come to be part of the conceptual patrimony of our social discourse, are theorized in Kant. Indeed, Kant explains in his Grundlegung the distinction between price (Preis) and dignity (Würde):

In the kingdom of ends everything has either a price or a dignity. What has a price can be replaced by something else as its equivalent; what on the other hand is raised above all price and therefore admits of no equivalent has a dignity.85

Kant is speaking of the human being, as he later makes clear in describing the foundation of that dignity: “Autonomy is therefore the ground of the dignity of human nature and of every rational nature.”86 Dignity is what impedes treatment of the human being as merely a means, and not always as an end in himself. Dignity leads us to understand that the human being is not measurable by any of his counterparts, nor is he subject to exchange for value, as he is above any price.87

3. Dignity is also entwined with the Enlightenment ideal of equality, and with justice understood as equality.88 Although the Enlightenment ideal suffers – in my view – from nominalism in that it claims to include any content, however minimal its connection to personal freedom,89 it is an expression of the conviction that there are no differences (social, economic, cultural) among human beings that justify unequal treatment of equals.90 At the same time, justice demands unequal treatment in unequal

82 See LARENZ, supra note 21 at 45-56.
83 More specifically, see RAWLS, POLITICAL LIBERALISM at 99-101 (2005). In spite of the express differences between the Kantian model of autonomy and political liberalism, connections and affinities remain when the “construction” of the criteria for justice in the “original situation” is based on the Kantian idea of autonomy.
84 We need look no further than the relevant and oft-cited, though short, work of Pico Della Mirandola (1463-1494), ORATION ON THE DIGNITY OF MAN [DE HOMINIS DIGNITATE].
85 KANT, supra note 72 at 42. See Mario Cattaneo, Menschenwürde bei Kant, 101 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE 24 (2004).
86 KANT, supra note 72 at 43.
87 “But man regarded as a person, as the subject of a morally practical reason, is exalted above any price,” IMMANUEL KANT, THE METAPHYSICS OF MORALS 230 (Mary Gregor trans., 1991) [434 DIE METAPHYSIK DER SITTEN, 1797-1798 (Academy Edition)].
88 See DI FABIO, supra note 40 at 109 (“equality can only be thought of with the innate dignity of man’s dignity and freedom”). For his part, MARTIN KRIELE, RECHT UND PRAKTISCHE VERNUNFT 58-59 (1979), emphasizes the idea of impartiality tied to dignity, id. at 57.
89 For a critical view, see Horst Dreier, Bedeutung und systematische Stellung der Menschenwürde im deutschen Grundgesetz, 101 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE 40 (2004).
90 What is more, in the view of GOMÁ, supra note 48 at 55-56, 65-59, 89-90, human dignity is the equality of democracies.
situations, while requiring that we justify that inequality. This unequal treatment of unequal situations is precisely the expression of a radical equality that compels us to equilibrate what was originally disproportionate, the unequal.

4. But even before the Enlightenment project we can find clear signs of the idea of dignity. I am thinking not of Aristotle, who defended even slavery and the abasement of the barbarians, ideas which are difficult to square with the recognition of human dignity. As I understand it, the idea of the dignity of the human being did not originate with Kant, although it was theorized by Kant within the framework of morality. The idea is earlier, much earlier, and Kant also employs it. I believe the idea’s origin is clearly in both Stoic philosophy and Judeo-Christian thought, which recognizes in the human being a being made “in our image and likeness,” made in the image and likeness of God. Certainly Kant’s reference to dignity is anchored in the ideas of

91 See Kirchhof, supra note 28 at 136-37.
92 This is distinct from an equality understood as a condition of the pact, in order to participate in the original position. From the position of Rawls, supra note 25 at § 24, equality does not have a material basis (id. at 510), but is instead procedural, in recognition of the potential actors of the original position (as conditions to participate in that original position): see id.; see also Rawls, supra note 25, at 3, 57-9 (it is not a question of the citizen as moral agent in general, but rather as member of a society, id. at 86).
93 In its purest form, equality is found in the representation of the person who adopts a decision for a given situation (in that sense it is “mental” and not “real” to the extent that he does not engage a reality outside the mind). In extramental reality, two realities are always unequal; the mind that judges or decides establishes later the equality between those realities.
94 Or he considered the superiority of certain things over the human being: “there are other things far more divine in nature than human beings, such as – to take the most obvious example – the things constituting the cosmos,” ARISTOTLE, NICOMACHEAN ETHICS 109 (Roger Crisp trans., Cambridge Univ. Press 2004).
96 See Kriele, supra note 88 at 11.
97 See Cattaneo, supra note 85 at 24; Di Fabio, supra note 40 at 97; see also id. at 13, 114; Josef Isensee, Menschenwürde: die säkulare Gesellschaft auf der Suche nach dem Absoluten, 131 ARCHIV DES ÖFFENTLICHEN RECHTS 199 (2006); Paul Kirchhoff, Der Staat – eine Erneuerungsaufgabe 19-20 (2005); Kirchhoff, supra note 28 at 208; Kobusch, supra note 95 at 215; Kriele, supra note 88 at 57 (for whom dignity is not foundational, but rather must be taken for granted; see id. at 57, 65); Münch, supra note 77 at 13 (although he cannot be understood solely within this tradition); Tugendhat, supra note 88 at 29 (but affirming that “la idea de igualdad tiene una validez en sí y que fue por eso que llegó a tener importancia dentro del cristianismo [the idea of equality has a validity in and of itself and it was for this reason that it came to be important within Christianity]”). But also in an author such as Jürgen Habermas, Vorphilosophische Grundlagen des demokratischen Rechtsstaates?, in Jürgen Habermas & Joseph Ratzinger, Dialektik der Sakularisierung. Über Vernunft und Religion 32 (2d ed. 2005). In any case, such an origin has also drawn critical voices (see generally, for example, Hans Blumenberg, Die Legitimität der Neuzeit (1966), for whom it is precisely in the abandonment of the divine where modern man finds his dignity and freedom; see also Ulfrid Neumann, Die Tyrannen der Würde, 84 ARCHIV FÜR RECHT UND SOZIALPHILOSOPHIE 164 (1998), for whom it is in the strength of premises where the weakness of this type of foundation may be discovered).
98 Specifically, in this passage from Genesis 1:26-27: “Faciamus hominem ad imaginem et similitudinem nostram […] Et creavit Deus hominem ad imaginem suam.” This idea is repeated elsewhere: Genesis, 9:6; Psalm 8:5-6; Wisdom 2:23; Ecclesiasticus (Sirach), 17:3-5; Colossians 3:10; James 3:9; Acts 17: 24-29.
freedom and autonomy, but autonomy is far more than mere self-proposed ends by practical reason, and Kantian freedom is also much more than the capacity for choice. Kantian dignity is the moral version of the intangible character of the human being (homo noumenon). In the intangible makeup of the person, it seems to me, we find the nucleus of dignity. In effect, the fact that the human being is not susceptible to quantitative valuation is not based merely on a will not to put a price on people, but rather in that the human being cannot be quantified because he is spiritual, immaterial.

5. In this discussion I have avoided the term “proportionality,” as it calls for a comparison, and comparing demands a certain relationship. As the law deals with goods, it is easy to fall into comparisons of value, which easily lead us to overlook dignity. Neither does it seem appropriate to me to fall back on equality as, although it speaks to its operativity as a principle, it displays only one aspect or projection of something more basic, like dignity. I also find unacceptable the term “identity,” to the extent that it says little about its content. Nevertheless, if by identity we understand that in order to give meaning to the human being, it is unnecessary to revert to his species, but rather each man himself is superior to his species and deserving of dignity, then it could be meaningful to use the term “identity.” Since for the sake of clarity we must choose a term to pin on this human root, I propose to employ “respect for dignity.”

6. The foregoing brings us back to the origin and content of that dignity. The arc from its biblical origin (Judeo-Christian) to Kant (Enlightenment liberal) describes the conviction that the human being is endowed with immaterial (spiritual) faculties. If I am capable of knowing an object, and to know also that I know it, I think that I think, I acquire knowledge of my own act of knowing. And thus I acquire consciousness of something beyond my sensory impressions. This capacity to transcend the senses and, even more, to transcend one’s own faculties of knowledge and desire, is only possible if one faculty (knowledge and will) is not chained to the material aspects of the organs of perception, but rather can rise above them. This faculty is then immaterial. Let us remember how Kant’s idea of dignity is wedded to autonomy, and autonomy to the freedom and reason that are proper to the homo noumenon. Let us also keep in mind that

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99 Bearing in mind that “freedom and the will’s own lawgiving are both autonomy and hence reciprocal concepts,” KANT, supra note 72 at 55 [450 GRUNDLEGUNG ZUR METAPHYSIK DER SITTEN 1785 (Academy Edition)]. See supra, note 50.

100 See Kobusch, supra note 95 at 218-19, understanding by morality that which refers to human action. Thus we may understand the assertion of HANS-MARTIN PAULOWSKI, METHODENLEHRE FÜR JURISTEN. THEORIE DER NORM UND DES GESETZES. EIN LEHRBUCH no. 911 (3d ed. 1999), that the dignity of the human being is rooted in his freedom, in his capacity to be the subject of imputation, whether of the merit or the culpability of his actions. In these pages we begin with the postulate of respect as a human root tied to dignity, while legality is freedom’s own postulate. On this foundation (characteristic of modernity) of dignity in freedom and not in being, see FINKIELKRAUT, supra note 48 at 24-25.

101 In the firm understanding that what is appropriate to that dignity of the human being is respect: see Kobusch, supra note 95 at 224-26.

102 See Kobusch, supra note 95 Error! Bookmark not defined.at 208-27; Isensee, supra note 97 at 199-209; DI FABIO, supra note 40 at 68-70; RAFAEL DOMINGO, THE NEW GLOBAL LAW 132-33 (2010).

103 See supra note 50.
the “image and likeness” of Judeo-Christian thought cannot refer to the material without risk of contradiction, but rather to that which is immaterial.104

One might venture the criticism that this approach to the personal dignity of the human being is inappropriate in the discourse of a society that has expelled the religion from the public square.105 There is no need to refute such a view, as what is discussed here does not constitute an argument based in religion, but rather in the rationality of the human being himself. Note that here we do not begin from religious premises but rather argue from human experience, whatever the religion, if any, of the interlocutor. And the fact that these arguments coincide with elements of the Judeo-Christian thought that underlies our culture – whether we like it or not106 – is not an argument against, but rather an affirmation of the ancientness of what we perceive. The person who possesses faith (who professes a religion) will have additional reasons to convince himself of the plausibility of these rational arguments. In other words, recourse to the religious aspect is not in and of itself a motive for irrationality in public debate, since it is a question of reason qua ratione and not concrete religious positions as such.

7. Nevertheless, the Kantian idea of dignity is prone to blurring, which distorts judgments made of it. In effect, Kant’s transcendental freedom emerges from the human being as autonomous. In such an approach, what is really the essence of the human being seems to have been taken as an act of being. That is to say, the human being is not autonomy, but rather acts with autonomy; his essence is not the dictation of practical laws for himself through reason, but is rather reason in time, a rational being who develops his faculties in time, in existence – a rational essence that exists in time. The Kantian approach, on the other hand, begins with the understanding that the human being is freedom, that his essence is his mode of existing.107 The well-intentioned Kantian defense of personal dignity thus seems to be frustrated, because the firm declaration in favor of personal dignity finds itself later closed to any metaphysical approach, thrown outside of the critical project. The person is dignity – Kant would say – but we can know very little else about it. And what such an approach denies to our knowledge (access to the being of things, of the person), it will recognize for the will: the recognition of human dignity – respect (Achtung) – will remain as a tenacious effort to accept the being that it can nevertheless not access through knowledge. This point of departure leads to the overvaluing of the subject and of its manifestations in liberal Enlightenment formulations, something that not even Kant dared to support. This is the blurring referred to above: the one derived from the confusion between essence and act of being.

104 Whoever believes in a higher spiritual being, God, may also have a reason for defending the affirmation of the immateriality of certain human faculties. But even then it would not be an argument ex fide, but from reason, as we may, in effect, derive the immateriality of these faculties from reason; and from reason the necessity of its principle in something other than matter.

105 See Neumann, supra note 97 at 163-65. In the face of such a critique we might reply that the exclusion of such arguments from public discourse has precisely yet to be proven, just as we are also dealing with a foundation that is un-reasonable because it is theological. On the other hand, we might suspect that, by excluding the theses of those who hold other positions from public discourse, we may be negating the underlying premise of the search for a discursive relational foundation (see id. at 165).

106 See supra note 98.

107 See supra note 86.
And therein lies the difficulty in identifying what is personal in subjects deprived of the capacity to dictate practical laws for themselves. On the other hand, if we understand it as essence, the fact that the subject finds himself deprived of it temporarily or definitively is nothing but the manifestation of an imperfection in his existence, but not in his essence, which continues to participate in what is common to other human beings.

8. Is this a principle? As we have discussed, and according to the way that thought about human dignity tends to operate, it is a principle of Politics, because dignity contains a claim to respect and validity. Furthermore, such a claim to validity is in a generalized form110 proper to principles, as they have been defined. And further, with respect to dignity, our modern societies do not seem inclined to dispense, at least externally, with the idea of dignity as an unbreachable limit. When it comes to dignity, agreement about its intangibility and respect appears to hold sway.111

Consistent with the discussion above, we can also say with respect to dignity that it constitutes a principle with claims to respect – in a general sense – and maximum validity. Specifically, personal dignity can be expressed as a principle with the statement of respect for the dignity of the person in social decisions. And as a principle that is, it finds itself in tension with the other two; more specifically, with the principle already described of security in social life or of need for protection of coexistence (life in society brings with it restrictions on one’s own freedom), just as with that of legality (it is not without juridicity or normativity). It is a question of the necessary protection of social life developing with measure and respect for the dignity of the human person and with the means appropriate to his mode of being.

In short, what emerges is the idea that social life (principle of security in social life) is protected through norms (principle of legality) that respect the dignity of the person (principle of dignity).

IV. The necessity of relying on meta-rules

1. Throughout this discussion I have turned to the expression ponderation, as an operation proper to argumentation with principles.112 Principles – as has also been stated

108 See KANT, supra note 50 at 280-81.
109 See DI FABIO, supra note 40 at 78.
110 The nuance established by Münch, supra note 77 at 18, 21, that “in no way is it an absolute concept,” may be understood precisely as the manifestation of its “principal” character, that is to say, that it governs in a general sense, which does not mean that it may be equal in every case, but rather allows for differences.
111 See Isensee, supra note 97 at 173-218. The issue refers not only to article 1.1 of the Grundgesetz, supra note 90, but goes further, in a general sense, in our culture, id. at 179-80. Certainly, dignity acquires perspective in the historical context of the development of article 1.1 of the Grundgesetz (see MAIHOFER, supra note 80 at 10), but it goes beyond such a question, as Maihofer explains, see generally id.
112 A key source on ponderation is JOSÉ MARÍA RODRÍGUEZ DE SANTIAGO, LA PONDERACIÓN DE BIENES E INTERESES EN EL DERECHO ADMINISTRATIVO 105-11 (2000). For criticism of such a legal approach see id. at 11-16, and for Rodríguez’s defense, see id. at 143-67; see also DAVID MARTÍNEZ ZORRILLA, CONFLICTOS CONSTITUCIONALES, PONDERACIÓN E INDETERMINACIÓN NORMATIVA 145-272 (2007). A
– admit no exception, but rather collide against each other and lead to decisions through ponderation or intermediate solution between one and another. Specifically, what I call ponderation is that operation of balance or equilibrium between two principles. It allows for both the supremacy of one principle over another and the more or less stable equilibrium between the two. Thus, the preponderance of one principle over all the rest is possible, as is the compensation of some by others. Both operations, preponderance and compensation, are means of weighing two elements at issue and making a decision. Specifically, I take as my point of departure here that ponderation (as genus) yields preponderance and compensation (as species). These two forms of ponderation do not imply a mathematical relationship but rather the relevancy given in the argumentation of reasons that come from one or another principle. Not surprisingly, ponderation is found above all in the work of applying the law, and it requires the adoption of a decision whose result is justified and proportional. As was expressed above in reference to the procedural meta-rule, the preponderance of one principle should translate into a greater argumentational burden that justifies the decision and makes it plausible.

2. What has been discussed regarding the rise of exceptions to the rules makes plain how necessary it is to give priority to one principle or another, and how the one that gives way does not remain definitively relegated but rather may continue to operate. Thus it is important to distinguish the rules that we have referred to (rule and exception) from other statements that would bring operative criteria to bear on the ponderation among principles. These would be statements on the mode of proceeding in the conflict among principles and, therefore, in the adoption of rules. Thus, for example, in making decisions, one that safeguards the person’s dignity prevails over one that favors the protection of social life. What I call meta-rules are those operative criteria for cases of conflict among principles. They operate to resolve the conflict and lead to concrete rules that resolve groups of cases. It is not precisely a question of rules that have emerged from ponderation among principles, but rather of statements (criteria) about the operativity of those principles and the prevalence of some over others.

3. I propose to consider as meta-rules at least three statements. In the first place one material statement, which we could call a meta-rule of the conditioned priority among principles: that among the three principles with which we operate in decision-

critic of the operation of ponderation is JUAN CIANCARDO, EL CONFLICTIVISMO EN LOS DERECHOS FUNDAMENTALES 116-19 (2000).

113 The Latin etymology of “ponderation,” as well as “preponderance,” is not far removed from that of compensation, to the extent that all three terms refer to weight: pondus, pensus.

114 If we operate with three basic principles (supra, section III), the preponderance of the principle of legality over that of dignity or that of security is possible; or the preponderance of the principle of dignity over either of the other two; or of security over the other two. At the same time, compensation between the principles of security and legality, security and dignity, or dignity and legality is also possible. There are nine situations of ponderation (that correspond to what I call “subprinciples”).

115 Some statements that we sometimes use as rules would truly be meta-rules (lex specialis derogat legi generali): see RODRÍGUEZ DE SANTIAGO, supra note 81 at 40; it also seems to me that the “regla de prevalencia condicionada [rule of conditioned prevalence]” that Alexy proposes is really a meta-rule (see id. at 41). Beyond a mere – less important – question of terminology, what is relevant to these effects is to perceive that we are dealing with normative statements of diverse operativity.
making there is a certain hierarchy\textsuperscript{116} that appeals to the progressive perfection of the person. Thus, coexistence refers to one of the human roots, the good of sociality, which is relevant to it, but less so than the good of freedom. Freedom, in turn, is relevant because it also forms part of the essence of the humanity of the person, but as it relates to human action, which evinces a certain perfection or qualification of the subject as an agent and not merely as a co-existent; and this, in turn, demonstrates a certain imperfection with respect to dignity, which would make it, in turn, of lower significance than the good of dignity. The dignity of the human person may be above the other two insofar as it designates the most specific attribute of the person. This does not mean that sociality and freedom are unnecessary for the benefit of dignity, as all three are human roots. It means only that, if the principles are in tension, there will be “reasons of weight” (preponderance), unless other factors intervene, to make dignity prevail over freedom, and freedom over sociality.\textsuperscript{117} Such priority among principles does not go so far as to lead us to say that in any conflict the principle of legality always prevails over the principle of security in social life, and the principle of dignity over both; rather, superiority of rank brings a justification – though not a definitive one – in favor of a solution.\textsuperscript{118} This is the origin of the term “conditional” applied to the priority among principles.

When two principles enter into tension, this meta-rule signals the opportunity for a decision. This is what meta-rules do, as we have defined them above. This meta-rule, specifically, emphasizes the priority of one principle or another in the conflict, according to a ranking or preference among the three. Thus, dignity prevails over freedom, and freedom over coexistence. Its concrete operativity could well be categorized as subsidiarity given that, in effect, a decision based on coexistence as a preponderant would be justified when the detriment to freedom is acceptable, just as a decision based on freedom as a preponderant would be justified when the detriment to dignity is acceptable. In criminal policy, the principal manifestation of this meta-rule can be seen in the rule of subsidiarity. But this is not its only manifestation. On the contrary, I understand that the meta-rule makes legal argumentation in general move toward the defense of dignity, then toward the defense of freedom, and then toward the defense of sociality.

In the second place, a meta-rule of a procedural nature, which we could call the meta-rule of nonexclusivity: that which impedes the resolution of any conflict among

\textsuperscript{116} In Dworkin’s approach, principles would accept an axiological hierarchy, which rules lack (see RONALD DWORIN, TAKING RIGHTS SERIOUSLY 26-7 (1978)). The more precise the relationship and range of principles, the stronger the theory of the principles in question (see ALEXY, ELEMENTE, supra note 5 at 227; Alexy, Sistema jurídico, supra note 5 at 145). Alexy, in ELEMENTE, supra note 5 at 228, defines Dworkin’s theory as a strong theory.

\textsuperscript{117} One hears on occasion the idea that the Spanish legal code has already declared itself by a hierarchy that enthrones freedom, followed by justice, as could be derived from the priority and precedence foreseen in article 1 of the Spanish constitution, see CONSTITUCIÓN ESPAÑOLA [CE] art. 1 (Spain). Apart from the fact that the text does not strike me as conclusive on the issue, it is not properly one of principles, but of “higher values” in the legal code, whose conceptual statute must be charged to whoever would base himself in such statements, something that at the moment does not seem to have occurred.

\textsuperscript{118} This is Alexy’s critique of one aspect of Dworkin’s approach. See ALEXY, Zum Begriff des Rechtsprinzips, supra note 11; Argumentation und Hermeneutik, supra note 14 at 75-78 (see also note 116).
principles whose origin is in only one of the principles in conflict. Its basis derives from
the fact that one principle in isolation, owing to its generality, cannot serve as the
solution for groups of cases, but rather requires a ponderation with others in collision.
Any principle applied with exclusivity would produce a negation – a contradiction – of
the other principles.\textsuperscript{119} From this we could propose that the greater the effect on a
principle, the greater the burden of argumentation to justify it (make it plausible). Thus,
among other worthy reasons, we see fit to value the more or less immediate effects that
the decision will have, the temporality and reversibility of the situation it creates.

The choice of one principle in isolation, forgetting the rest, would suppose the
negation of the very concept of principles. The ponderated decision is typical of the law,
or legal argumentation. On the other hand, the absolute prevalence of any principle,
without the “counterweight” offered by the others, leads to excesses that a
constitutionally based criminal policy must avoid. Accordingly, we could imagine
punitive models (from criminal policy and law) based solely, or fundamentally, on
security in social life, in the claim to protect society above all: this is the characteristic
model of totalitarianism, whose aim is to avoid at all cost “harm” to “society,” or to one
sector of society, and which ends up transforming criminal policy into “criminal
politics.”\textsuperscript{120} A punitive system based above all on legality (or “legal” security) would
give way to a model (more ideal than real) of legalist or formalist positivism, of
“positivism as ideology”\textsuperscript{121} in which respect for laws would prevail over respect for the
law: a legalist statism.\textsuperscript{122} We could also imagine a third model, a product of the blurring
of the idea of dignity: the model of anarchic individualism,\textsuperscript{123} which would dispense
with sociality and with the freedom of the norms’ addressees in order to protect without
limits the interests of some over others, and would lead us backwards into a “state of
nature,”\textsuperscript{124} no matter the purported justification.\textsuperscript{125} History provides ample evidence to
convince us of the possibility that any of these three models could come to pass, even
for a brief time. They thus serve as a hypothesis, as descriptive models of a “possible”
policy to avoid for all they imply about loss and catastrophe for civilization, of the
reduction of politics to technology, or the “administration of things.”\textsuperscript{126} And they serve
therefore as prevention, faced with the risk that accompanies all criminal policy of a

\textsuperscript{119} See ZAGREBELSKY, supra note 51 at 17, although in the broader context of politics generally.

\textsuperscript{120} The analysis of CRUZ PRADOS, supra note 27 at 82-83, is very illustrative.

\textsuperscript{121} The expression is Bobbio’s, cited by LAPORTA, supra note 46 at 152, note 1.

\textsuperscript{122} Which would find its basis in the radical separation between legality and morality, to the extent that it
supposes dismembering the person and leaving it in the hands of mere legality (see GOMA, supra note 48
at 121-22).

\textsuperscript{123} Individualism does not eliminate society but does conceive it as a collection of relations among
individuals motivated by purposes of utility, in which norms would be instruments in the service of a
circumstantial cohesion. On the concept and origins of individualism, see the synthesis of LORENZO
IZQUIERDO, supra note 26 at 21-45, particularly 43.

\textsuperscript{124} Into a “state of nature” in which each person would possess all the rights: see THOMAS HOBBES, DE
CIVE, I, 10: “Natura dedit unicumque jus in Omnia” (emphasis added).

\textsuperscript{125} For example, in the “libertarian” liberalism of a ROBERT NOZICK, ANARCHY, STATE AND UTOPIA
(1974), who posits a minimal state (and a maximal individual, it must be added).

\textsuperscript{126} See BERLIN, supra note 50 at 3-4.
totalitarian, formalist, or anarchic nature. The principles of criminal policy allow us thus to avoid the excesses of policy models without limits. This is a “negative” effect – to the extent that it supposes a restriction – on the principles of criminal policy.

As an expression of this procedural meta-rule, in short, we should include the need to provide sufficient reasons for the decision, so that if one principle is made to prevail over others, it should be sufficiently justified so as to be plausible; this will require arguments “of weight” in favor of that decision. To the contrary, the operation of the principles would be confused with the mere arbitrary choice of a desired outcome in a given case.

In the third place, a meta-rule of a logical nature, which we could call the meta-rule of compensation among principles: to the extent that a solution presupposes the preponderance of one principle over another opposing it without being contradictory, it is possible that the third may operate to resolve some subgroup of cases. This derives from a logical determinant, as we are not dealing with mutually exclusive principles, and so this approach would not merit criticism for failing to respect the tertium non datur. Thus, we may affirm that criminal policy argumentation from principles admits the possibility of exceptions.

Such a conclusion is plausible if we take as our point of departure that two principles would oppose each other through that relation known in logic as “disjunction” (subcontrary opposition), by virtue of which two statements (here, two principles) may both be correct, but may not both be incorrect; one of them is always correct. In this way, two principles collide, but on occasions one may cede and a third enter into play, or the third may contribute reasons that are worthy of consideration.

Thus, in short, we may understand that the greater the preponderance of the contents of a principle, to the detriment of the others, the more scrupulously we must respect the contents of the third to the extent that they maintain a certain relationship to the interests and goods at play.

4. We are not dealing, however, with rules of argumentation that lead to a single solution. In this way I avoid the dogmatism of thinking that what are proposed here are the only possible solutions. Just as rules allow for other classifications and precisions, these meta-rules that aid in the argumentation and reasoning of policies are not the only ones possible. Nevertheless, meta-rules are endowed with a certain power of conviction, as they possess a material character that is valuative (the first and second) or logical (the third); nothing to dismiss.

5. In relation to the meta-rules discussed above, we may affirm that any proposed solution must be preceded by a convincing burden of argumentation. The hierarchy of principles may provide reasons (meta-rule 1). At the same time, the more preponderant a principle may be over another, reasons with a greater force of conviction will be required, because preponderance means that some of the contents of a principle cede to those of another, and it is this sacrifice by one that demands greater justification; while if two principles enter into compensation, a lower argumentative burden will be necessary (meta-rule 2), because the sacrifice of a principle’s contents is less. As we can see, the “weight” of a principle (its hierarchy or specific value) is not self-imposed, but requires argumentation to give it value. And the preponderance of a principle, or the compensation of others, does not prevent the “displaced” principle from continuing to affect (meta-rule 3), for example, the establishment of exceptions.
V. Argumentation in a re-principled criminal law

1. The dynamic of principles, rules, and exceptions is characteristic of practical reasoning in criminal policy. In short, there is no single solution to a case, but rather singular cases that allow for a certain generalization. And therein lies, to a great extent, the justice of the case; yet justice also resides in knowing how to turn away from a unique solution if the singular case demands it. Both conclusions presuppose that the function of the jurist does not consist of the mere acceptance of a legal text that must be applied by simple subsumption. This last point embodies the myth of modernity about the being and development of the law. There are more than sufficient reasons, however, to think that the law is a practical knowledge, a knowledge about decisions and solutions to social problems insofar as that they are derived from behaviors. To the extent that the law gives reason to popular decisions, it is tied to politics, in the understanding that the latter is the “supreme praxis” and not the “strategy for obtaining and maintaining oneself in power.”

Let us look at some examples of this mode of proceeding. First, the prohibition on excessive judicial delays, that is to say, the requirement that delays in the administration of justice must not unduly burden the defendant (or the victim), as such delays would constitute a kind of “sanction” for the defendant, and an undeserved punishment for the victims, or, better articulated, the effects of the delay may come to affect societal confidence in the law (a punishment imposed long after the commission of a crime would constitute a claim to enforce the law without the law’s having a significant effect on the protection of society). Such a rule implies considerations of security in social life and legality, that is to say, confidence in the validity of the law in the face of compliance with the infringed norms. As I understand it, this is a rule that expresses the conflict between security and legality, which is resolved by compensation between the two. An exception to the relevance of judicial delays is the case of delays provoked by the party who benefits from them.

Second, the non-retroactivity of restrictive dispositions of rights. The fact that the application of punishments or, in general, restrictions of rights, cannot be based on a

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128 A mode of operation characteristic of paleopositivism, as defined by Prieto Sanchís, supra note 7 at 96, and elsewhere. See the diagnosis of Alejandro Nieto, El positivismo jurídico y la Constitución de 1978, 26 REV. ESPAÑOLA DE DERECHO CONSTITUCIONAL 9, 23 (1989).

129 See Zagrebelsky, supra note 51 at 121, who understands that a science of the law based on principles must be a “ciencia práctica [practical science].”

130 See International Covenant on Civil and Political Rights, Dec. 16, 1966 [hereinafter ICCPR], art. 14, para. 3c; Convención Americana sobre Derechos Humanos [American Convention on Human Rights], Nov. 22, 1969 [hereinafter CADH], art. 8 para. 1; CFREU, supra note 90, art. 47, para. 2; and CONSTITUCIÓN ESPAÑOLA [CE] (Spain) art. 24, para 2.

131 See DDHC 1793, supra note 43, art. 14; UDHR, supra note 61, art. 11 para. 2; European Convention on Human Rights, Sep. 3, 1953 [hereinafter ECHR], art. 7 para. 1 (see European Court of Human Rights, case of Veeber v. Estonia (No. 2), App. No. 45771/99, (Eur. Ct. H.R. 21 January 2003); ICCPR, supra note 144, art. 15 para. 1; CADH, supra note 144, art. 9; ACHPR, supra note 10, art. 7 para. 2; Rome Statute of the International Criminal Court, July 17, 1998, art. 22.1; CFREU, supra note 144, art. 49 para.
precept promulgated after the conduct in question, has been from ancient times part of the postulates linked to the “principle” of legality. Preventive measures, however urgent they may be, cannot lead us to ignore the possibility that the agent may behave differently. Thus, the principle of legality imposes itself upon the principle of security. In the case of dispositions that favor the criminal, the possibility of retroactive application does exist. This would be an exception to the aforementioned rule based on reasons of humanity (respect for dignity).

Third, the rule ne bis in idem (that is to say, that it is not possible to punish the same behavior twice) that governs European law and has been recognized in international texts. To attempt a double punishment would mean making formal law prevail as a value in its own right (legality), even when it produces a disproportionate limitation on dignity (respect for dignity). Thus it becomes clear that the rule is an expression of a conflict between two principles, legality confronted with respect for dignity, with the preponderance of the latter. But this rule also recognizes exceptions: specifically, in those cases in which the double punishment has been accepted (when the so-called disciplinary administrative law is applied).

2. We find ourselves, then, before a body of knowledge whose particular characteristic is decision-making with reference to principles. And these decisions are not mere technical or mathematical affirmations, but rather valuative or axiological ones, with an elevated deontic burden that cannot cloak itself in a supposed appearance of logical neutrality. But merely identifying principles is no guarantee of arriving at a just solution to a specific case, as principles do not point to a predetermined, exclusive solution, but rather must be pondered, weighed – argued, in a

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132 This is expressed in the ancient aphorism lex retro non agit (see DOMINGO, supra note 53 at no. 538).

133 See ICCPR, supra note 144, art. 14 para. 7; ECHR, supra note 145, protocol 7, art. 4.

134 See the model described by LUIGI FERRAJOLI, DERECHO Y RAZÓN, TEORÍA DEL GARANTISMO PENAL section 5.4 and passim (Andrés Ibáñez et al. trans., 5th ed. Madrid 2001). For Alexy, principles orient argumentation, and for that reason they are a primordial example of practical or moral argumentation. (see ALEXY, ELEMENTE supra note 5 at 226, 233; Alexy, Sistema jurídico, supra note 5 at 144, 150-51; Alexy, La institucionalización de la razón, supra note 11 at 243-49).

135 See GONZALO RODRÍGUEZ MOURULLO, APLICACIÓN JUDICIAL DEL DERECHO Y LÓGICA DE LA ARGUMENTACIÓN JURÍDICA 15-16 and passim (1988); RODRÍGUEZ DE SANTIAGO, supra note 94 at 16, 117, 144 (with reference to the attempt by HUBMANN, Die Methode der Abwägung, in FESTSCHRIFT FÜR LUDWIG SCHNORR VON CAROLSFELD 173 (1972) to explain ponderation in mathematical terms; Hubmann himself recognizes, id. at 197, how, even when the given values operate at each term, the key is to determine the value of each one, which would be difficult to arrive at through mere mathematical operators.

136 See LARENZ, supra note 4 at 288-89.

137 See LARENZ, supra note 21 at 34, who begins from the premise that the principles of positive law “müß ihnen ein ‘richtiger’ Gedanke zugrundeliegen, dann weisen sie auf Prinzipien richtigen Rechts mindestens hin [must serve at least as indicators of the principles of just Law],” and therefore not all principles of positive law are just (see id. at 37).
word— to make a decision “comprehensible.” Indeed, legal reasoning is presented as a very precise mode of practical reasoning; that is, as a procedure for bringing justifying reasons to decisions. Understood this way, it neither reveals decisions easily, nor is it a conduit for the manifestation of a supposed transcendent Law that might exist, not in laws, but in the distant world of “objective Law.”

The aforementioned principles’ mode of formulation (to the extent that they are an expression of respective roots of the human being) and their mode of operation (insofar as they reach the case in a normative sense), expose them to the criticism of falling into a naturalist fallacy. Such a fallacy would exist if deontic statements (principles, from the order of the “ought to be”: security in social life, legality, respect for personal dignity in reaction) had been derived from ontic data (of the order of the “being,” of the human roots, respectively, of sociality, freedom, and dignity). The criticism would be justified if there were a caesura between a merely ontic human root and the normative statement of a principle. Such a caesura or continuity solution would be covered by a veiled premise by which the principle could be stated by whomever would look to the normative statement for the certainty that is characteristic of factual data. This is not the case, and not because the valuative or normative contents are not “placed” on an ontic foundation; rather, their foundation already possesses a normative character which is the perception of reality as a set of contents that are as much ontic (or factual) as normative (or valuative). Statements of principles are perceived as these types of norms in anthropological reality: they are discovered, not constructed, in the perception of sociality, freedom, and dignity. The constructive labor of the jurist begins and continues with such principles. They are primarily understood this way through

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138 For Paolo Grossi, Mitología jurídica de la modernidad 59-60 (Manuel Martínez Neira trans., Madrid 2003), it is a question of demystifying the belief that the Law resides in particular laws (an idea we have become accustomed to in modernity) in order to highlight the applicatory or interpretive function of the norm. The Law thus “es aplicación más que norma [is application more than norm]” id. at 60. And for Zagrebelsky, supra note 51 at 33, “[e]l Estado constitucional está en contradicción con esta inercia mental [the constitutional state is in contradiction with this mental inertia]” (referring to the idea of the jurist’s work as “simple exegesis”).

139 See Alexy, Theorie der juristischen argumentation, supra note 11 at 261-72; Atienza & Ruiz, Las piezas del derecho, supra note 17 at 44; George Pavlakos, Our Knowledge of the Law. Objectivity and Practice in Legal Theory 2-4, 211-38 (2007) (à propos of the “Practice Theory of Law”).

140 See, among others, Atienza & Ruiz, Las piezas del derecho, supra note 20 at 44-49; Manuel Atienza, El derecho como argumentación (2006), passim; Atienza, Argumentación y Constitución in Aguiló Regla et al., Fragmentos para una teoría de la Constitución 130-32 (2007), in particular, the description at 130-32. In Spain, in the area of constitutional law this was brought to the forefront by Ángel Carrasco Perera, El “juicio de razonabilidad” en la justicia constitucional, 11 Rev. Española de Derecho Constitucional 39 (1984); and in the area of administrative law, Rodríguez de Santiago, supra note 81 at 117-41, has developed the method of ponderation in terms of argumentation.

141 See the connection highlighted by Cruz Prados, supra note 27 at 137-43, between political philosophy and “retórica política [rhetorical politics],” id. at 137.

142 See Prieto Sanchís, supra note 7 at 99-108, for an illustrative description of the myth of originary positivism and antiformalist reactions that risk falling into the same evil they denounced in the former: conceiving judicial activity as the unquestioned application of an external reality to the case (see id. at 107-08).
practical reason. And it is from such normative, deontic statements that we proceed to the adoption of practical decisions (rules): first, recognition of the principles, and then, construction of specific rules. It is by virtue of this originating practical experience that the being is therefore interpreted.\textsuperscript{143}

At the same time, we avoid the risk of falling into a normative fallacy (deriving the “being” from the “ought to be”) if the statements remain in their respective spheres. A normative reconstruction of reality cannot overlook the distinct orders within which the ontic and the deontic operate. It is a question of respecting the conditioning factors of each order: the normative messages cannot overlook the conditions of being, nor ignore deontic conditions in them.

3. The judge’s work cannot be understood without decision-making within a framework established in the law. The rules then show their nature as established solutions to be applied, and the principles their nature as directors to be followed.\textsuperscript{144} The legislator also adopts decisions in the task of lawmaking, like a dogmatic jurist. We may, in the end, understand that the law consists of adopting decisions through argumentation in the public sphere. We perceive then that the practical nature of political decisions about criminality must be understood, not as a mere “ideation” of the applicable law, but as the argumentation of decisions (rules) according to principles. In other words, principles as force lines trace a framework of decisions susceptible to evolution and improvement.

VI. Conclusion

The perceived tension in criminal law among efficiency, security, and constitutional rights was be examined in light of the work of Dworkin and Alexy (among others) in order to develop a model of legal argumentation based on Principles for Criminal Law. The following three principles were considered as the foundational elements of legal argumentation in criminal law: 1) the principle of security in social life; 2) the principle of legality; and 3) the principle of respect for human dignity. These three fundamental principles of legal argumentation have respectively as roots three distinct human characteristics: 1) our coexistence, or the social character of the human being; 2) the personal freedom; and 3) the dignity of the human person. These roots, as such, are direct, historical expressions of our concept of Western civilization in the modern age.

By definition, principles such as the three listed above are far too broad and generalized to be immediately applicable to specific legal cases. We can apply them with greater ease, however, once they can be expressed as legal rules (e.g., \textit{nulla poena sine lege}). One may deduce the legal rules necessary for the application of criminal law through an analysis of principles in opposition (in this cited example, the collision between security in social life and that of legality).

\textsuperscript{143} See MARTIN RHONEIMER, LA PERSPECTIVA DE LA MORAL. FUNDAMENTOS DE LA ÉTICA FILOSÓFICA 127 (José Carlos Mardomingo trans., 2000).

\textsuperscript{144} And from there principles “otorgan a los órganos de aplicación del Derecho un poder (una capacidad de afectar –positiva y negativamente– los intereses de los súbditos) muy superior al de las reglas [grant to the Law’s organs of application a power (a capacity to affect – positively and negatively – the interests of its subjects) that is much greater than that of rules],” ATIENZA & RUZ, LAS PIEZAS DEL DERECHO, supra note 17 at 42.
The theoretical relevance of constructing this principled legal argumentation for criminal law lies in the fact that such argumentation allows us to establish practical criteria for a critique of the law, and our courts’ juridical and administrative decisions. Furthermore, construction of this principled legal argumentation assists in the development of a systematic doctrine for criminal law. Ultimately, this movement towards a re-principled criminal law provides us with more efficient tools designed to address the crisis of over-criminalization and our efforts to balance societal security and human rights.