Bergen Journal of Criminal Law and Criminal Justice • **Special Issue** • Volume 14, Issue 1, 2025, pp. 1-22.

Essay

New Legal Science in the Dual Penal State

Critical Analysis of Law and the Legitimacy of State Power

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Abstract

New Legal Science pushes legal discourse beyond its traditional parochialism to tackle fundamental issues confronting all modern legal systems as such, including the legitimacy challenge of state power through 'law' posed most acutely by penal law.

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New Legal Science is an approach to the study of law that aims to push legal discourse beyond its traditional parochialism by bridging the divide between common law and civil law systems, marked by the abandonment of the project of 'legal science' in the former and its persistence in the latter. Thus reconceived, the study of law would allow us to frame and face fundamental issues confronting all modern legal systems as such, most importantly the legitimacy of state power through 'law.'

Part I lays out the basics of a New Legal Science approach to the study of law. Part II briefly shows this approach in action by applying it to the study of penal law, now reconsidered as part of a comprehensive critical analysis of state penal power from

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the perspectives of law and police as two modes of governance in the dual penal state.[1] In New Legal Science, penal law moves from the periphery to the core of inquiry: as the most awesome manifestation of state power through law, penal law poses the legitimacy challenge of modern law most acutely and urgently.

I. Toward a New Legal Science

A. Beyond Law's Parochialism

Over the past few decades, supranational legal regimes have emerged to govern, or at least to order, behaviour and phenomena (*e.g.*, 'global poverty') beyond the reach of traditional domestic legal systems. Familiar areas of law like international private and public law have been joined by regimes such as international criminal law, European law, 'global administrative law,' and so on, all generating and perhaps even enforcing norms of various shapes and sizes in a wider and more complex world that, we are often reminded, has outpaced the tired old model of the Westphalian nation state.[2]

More prosaic, domestic legal systems for some time have been said to converge, making the well-worn distinction between 'common law' and 'civil law' systems less useful than it once might have been. For instance, it may well be that it has become difficult, and perhaps pointless, to trace the once supposedly categorical line between the common law's 'adversarial trial' and the civil law's 'inquisitorial process' in a world where the existence of plea (or confession) bargaining is now widely acknowledged in civil law and common law systems alike.[3]

All the while, approaches to the study of law have remained curiously, and even fundamentally, divided. On one side, jurisprudes in civil law countries see themselves as advancing their domestic version of 'legal science'; on the other, their common law colleagues go about their scholarly work treating the idea of legal science as taboo, or at best a historical curiosity.[4]

If the study of law is to shed its persistent parochialism and evolve into a shared scholarly enterprise, this categorical divide is worth reconsidering.

Hopefully, this could be done without slipping into a soporific—and self-consciously 'scientific'—inquiry into what forms of human intellectual activity count as science, so that they may have the fairy dust of 'science' sprinkled upon them, entitling their practitioners to don the regalia of a true scientist, including a lab coat. There is nothing magical, or inexorable, about the development of a shared legal science. After all, scholarly convergence in the form of some semblance of a shared methodological

1 Dubber (2018), Dubber (2005b).

2 See Kingsbury *et al.* (2005).

3 *E.g.*, Langer (2014), Dubber (2019a).

4 Rechtswissenschaft, science juridique, scienza giuridica, ciencia jurídica, etc.

approach could be achieved, not by envisioning an enterprise of legal science palatable to the common law world, but by spreading the taboo of legal science to the civil law world instead. In other words, instead of collectively rejuvenating and broadening the project of legal science, we could come together by abandoning it once and for all.

New Legal Science, the approach outlined here, would do neither. It doesn't impose one system's conception of the study of law on the other. Instead, it seeks a middle course between two unsatisfactory extremes: the reflexive tabooization of legal science, on one hand, and its unreflected continuation, on the other. In the end, it makes little difference whether one labels the resulting common methodological foundation—or, less ambitiously, the serviceably shared methodological understanding—'science', never mind 'New Legal Science'. The point is to encourage scholars on both sides of the systemic divide to reflect upon their own ingrained methodological habits, and adjust their calcified assumptions to make room for a fresh, less parochial and more considered, start.

Given the shared and deeply rooted conception of jurisprudence as legal science across the civil law world and the general absence of a disciplinary methodology in the common law world, the prospect of developing a 'new', cross-systemic, legal science looks more promising than that of creating an explicitly ascientific legal methodology from scratch. At the same time, any exercise in methodological reflection runs the risk of descending into unproductive—and, in this case, also counterproductive—navel-gazing. A common thread running through the various instances of common law jurisprudence scattered across the former lands of the British Empire may be the almost complete lack of interest in methodological speculation. This allergic reaction may be praiseworthy, but it shouldn't prevent the emergence of the sort of shared methodological understanding necessary to create a common scholarly enterprise in law; since basic methodological questions inevitably arise once a discipline steps outside its parochial boundaries, the lack of methodological curiosity may be nothing more than a telltale symptom of precisely the sort of parochialism we are trying to overcome.[5]

B. Legal Science(s)

A non-parochial project of legal studies meant to draw together the strands of legal scholarship in the common law and civil law worlds would do well to undertake a fresh comparative-historical inquiry into conceptions of legal science on both sides of the methodological divide. Without predicting the results of such a study, which would far exceed the bounds of this essay, there's reason to suspect it'll turn out that

5 A broadly shared conception to its subject matter is conducive, and perhaps even necessary, to overcome law's parochialism; it is not sufficient. Fruitful international exchange also requires the development of a shared body of primary and secondary foundational texts, along with easily and freely accessible (preferably online) reference works, collections, resources, teaching materials, journals, and other forums.

there's nothing inherently misguided, impossibly self-contradictory, etc. about the project of 'legal science'—or 'law as a science'—*per se*. It's not the idea of legal science that's the problem, but particular manifestations—or caricatures—of it in the recent history of law as an academic subject.

On the common law side, invocations of 'legal science' in nineteenth-century America and, earlier, in England have received considerable attention, as a matter of traditional legal historiography, often in the context of the history of legal education or writing.[6] For instance, the story of the rise (and fall) of the treatise in Anglo-American law has been told in tandem with the story of the changing fortunes of Anglo-American legal science.[7] At the intersection of English and American histories of legal science (and genres) sits Jefferson's well-known disdain for Blackstone's attempts to style himself as legal scientist in the *Commentaries on the Laws of England*; Jefferson preferred to consult 'the deep and rich mines of Coke and Littleton' instead, whose modest marginalia did not presume to squeeze the multifarious wonders of the common law into the straightjacket of scientific taxonomy and systematicity, however elegant and deceptively coherent.[8]

The eventual disappearance of legal science from the face of the Anglo-American jurisprudential earth in the twentieth century has attracted less attention. So *outré* has the very idea of considering legal studies a 'science' been ever since, that its outlandishness—and its disappearance—requires no explanation. If one were requested nonetheless, say, by a visitor from another planet, or a civil law country, the disappearance of legal science would likely be vaguely associated with that generally acknowledged great turning point in the history of American jurisprudence, when Legal Realism poured cynical acid over all the old ways of thinking and doing, in this case washing the veneer of scientism off the rough-and-tumble enterprise of lawtalk.[9]

The casual attribution of the death of legal science to 'American Legal Realism' is ripe for reconsideration; even a cursory investigation suggests a more complex picture.[10] Clearly, some Legal Realists had no patience for what they regarded—or at least portrayed—as a formalist quasi-botanist conception of legal science (that they, fairly or not, attributed to Langdell); whether they dismissed the project of legal science (or the scientific project of jurisprudence) altogether is considerably less clear.

6 *E.g.*, Macias (2016), Schweber, (1999), Berman and Reid (1996).

7 *E.g.*, Simpson (1981), see generally Fernandez and Dubber (eds.) (2012).

8 Jefferson (1829) p. 183.

9 On cynical acid, see Holmes (1897) p. 462. On Holmes on science in law, see Yntema (1931), cf. Wells (1994).

10 Cairns (1941), Llewellyn (1941), Goble (1933), Cohen (1932), Yntema (1931), Kantorowicz and Patterson (1928).

Even as talk of 'legal science' faded around the middle of the twentieth century and eventually gave way to the less laden and methodologically ambitious discourse of law as one 'discipline' among others, engaged in the friendly give-and-take of a broader 'interdisciplinary' context, other legal-political academic projects continued to claim the mantle of science. Consider, for instance, the great hopes attached to 'criminal science' as the foundation for a comprehensive and systematic reform of substantive criminal law and the law of corrections, manifested most clearly in the American Law Institute's ambitious Model Penal Code project.[11] The Model Penal Code was a product of the Legal Process School, which in the wake of the New Deal marked a turn to 'policy science' in American jurisprudence.[12] American political science redoubled its supposedly distinctive commitment to scienceness just as the project of American legal science faded away.[13] Later on, economic analysis of law launched its continuing comprehensive project of bringing the rigours of 'economic science' to bear on a hopelessly de-scientized discipline of law.[14]

On the civil law side, there have been tentative indications of an openness to revisit the two-centuries-old Savignian paradigm of legal science.[15] These may appear in commission reports calling for more or less ambitious institutional reforms in legal education and scholarship, often including the shift to a more interdisciplinary approach to legal studies, or in a scholarly literature reflecting on general methodological questions, such as the nature(s) and function of legal science, the relationship between doctrine (*Dogmatik,* doctrine) and jurisprudence, between the traditional branches of legal science (*e.g.*, private law, public law, criminal law), and between these branches and various auxiliary disciplines (*e.g.*, history, philosophy, criminology).[16]

Even in its country of origin, the Savignian model has periodically faced spirited attacks over the centuries of its existence, from several directions.[17] None has left a scratch, so far. It remains to be seen whether the current mini-methodological moment will trigger a more noticeable rethinking. Certainly, some civil law countries have been more enthusiastic in calling for and implementing change in research and teaching than others.

11 Wechsler (1952), see also Radzinowicz and Turner (eds.) (1945).

12 Eskridge and Frickey (1994), Berman and Reid (1996).

13 Crick (1959).

14 Horwitz (1980). Horwitz was amused by what he regarded as the law & economics movement's blatant attempt to hide its political agenda behind legal scientific pretensions. He also thought law & economics was a passing fad.

15 For an English-language account, see Reimann (1990).

16 *E.g.*, Jestaz and Jamin (2004), Engel and Schön (eds.) (2007), Jestaedt and Lepsius (eds.) (2008), Smits (2012), see also Wissenschaftsrat (2012).

17 See, *e.g.*, Kirchmann (1848), Flavius (Kantorowicz) (1906), Wiethölter (1968), Wiethölter (1973).

Many critiques that have been, or might be, levelled—or, in some cases, prejudices held—against the civil law legal science project will seem familiar to students of the past century of American legal thought. Here's a quick list in keywords, which—as is common for necessarily abbreviated efforts of this sort—makes no claim to comprehensiveness or completeness. It's instead tailored in at least three ways: it focuses on (i) Germany (as the origin and still most influential—and rigid—manifestation of the legal science model, and, generally speaking, the most significant representative of a civil law system), (ii) criminal law (as the most parochial, most important, and therefore most promising test case for a fresh methodological start), and (iii) those features of the traditional legal science model that are least compatible with a non-parochial methodological project, particularly one driven by the need to critically assess the legitimacy of state power:[18]

- (empty) formalism: also labelism, sloganism, taxonomism
- (faux) positivism and codism: code-based positivism of convenience[19]
- apolitical scientism as cover for (reactionary) conservatism, statism, discrimination (gender, race, ethnicity, nationality, political, economic status, etc.)
- blindered, simplistic, one-dimensional doctrinalism (jurisprudence as doctrinal analysis of law)
- superficiality (peripheral system maintenance, doctrinal gap filling, and incremental improvement with no interest in revisiting fundamental issues)
- pseudo-botanist taxonomism: pedantic rule-and-order fetishism
- pseudo-logicism & -mathematicism (syllogism fetishism): claim to scientific objectivity and 'correctness' of 'solutions'
- ontologism (correctness as fact, nature, truth, being)
- declaratory, enunciatory style: revealing truths, rather than making arguments, lecturing rather than convincing
- incompleteness, narrowness in scope and perspective (despite professed pursuit of comprehensiveness and systematicity)[20]
- in doctrine and scholarship, focus on abstract norms over impact, substance over process, definition over implementation, and implementation over enforcement
- parochialism (oddly, combined with universalism, where domestic law reflects Lawness)
- self-referentialism typical of a hermetically sealed system (echo chamber)

18 The sources cited in notes 16 & 17 above rehearse most of the items on the list, and others besides. The list reflects a focus on criminal law, anticipating the discussion of criminal law science in part II. For a more detailed methodological analysis of this small—but, for New Legal Science significant—corner of the legal science project, see Dubber (2018), see also Jakobs (2007), Pawlik (2007).

19 Müller (1987); see Dubber (1993) (review essay).

20 *E.g.*, focus on private law (and, at least originally, on Roman law); in criminal law, focus on a sliver of the general part of substantive criminal law.

- siloism (external, vis-à-vis other disciplines, other countries' legal systems; internal, vis-à-vis other branches, 'pillars,' of jurisprudence [private, public, criminal law])
- irrelevance to, and disconnect from, 'practice' (legal, lawyerly, legislative, executive, or judicial practice)[21] and 'reality' (social, economic, political etc. conditions)
- intellectual plaything for great legal scientific minds (Glasperlenspiel; juristischer Begriffshimmel)[22]
- institutionally and programmatically hierarchical, dominated by leading scientists and their students/followers (schools)
- Whiggish/progressivist, ahistorical: the inevitable march of scientific progress
- elitist, expertist, secretive, technocratic, non-democratic
- arrogance: nationalistic (vs. other countries' legal systems), methodological and institutional (vs. other disciplines, notably the social sciences: sui generis), and systemic (vs. courts in general and lay judges in particular, but also 'the legislator,' despite claims to positivism)
- failure in the face of an acute legitimacy crisis: *e.g.*, the role of German legal science, notably in public law and criminal law, 1933-1945

In lieu of an impracticable (not to mention tedious) review of methodological debates over the past two centuries, this list is meant to suggest some issues that may be worth a closer look in a fundamental reassessment of the traditional legal science project. The point isn't that these critiques are justified, that they are unique to legal science-based jurisprudential enterprises (as opposed to differently framed jurisprudential projects in, say, common law countries), or that they are necessarily prompted by the 'legal scienceness' of these enterprises (as opposed to other features), never mind the idea of a legal science in general. On the contrary, the list is meant to suggest the sort of challenges that any shared methodological foundation for a non-parochial discipline of law will continue to face.

It's no surprise then that it should be easy to assemble a similarly varied list of actual or supposed shortcomings of the distinctly non-scientific approach to legal studies associated with common law countries. In fact, one might find considerable overlap between the two, along with points of complementary difference:[23]

- unscientific: no science, not even the attempt to build, maintain, and refine a science of law[24]
- critique fetishism: one critique after another, with little interest in constructive work, with some notable exceptions (*e.g.*, law & economics)
- no method: haphazard, sporadic recurring discovery, and rediscovery, of topical issues that might attract the attention of student law review editors (again, but see law & economics)

21 *E.g.*, Naucke (1973).

22 A popular, and gentle, form of self-criticism. See, *e.g.*, Jhering (1884).

23 This list is as U.S.-centric as the previous list was Germany-centric, for contrast and convenience.

24 Cf. Dubber (2009).

- instead of method, a general atmosphere of hard-nosed pragmatism, combined with rule-cynicism and a broad commitment to consequentialism
- no single system, or multitude of systems: no ambition to build, expand, improve, maintain a doctrinal system, or systems
- still, in the 'common law' tradition, court-focused (at the expense of legislative and executive state governance), resulting in (i) focus on the marginal policing of the limits of state power, rather than on its full depth and breadth and (ii) casuistic, fact-based doctrinal pointillism
- within this narrow project, narrow focus on federal (appellate) courts, and more narrowly still on the U.S. Supreme Court's (constitutional) jurisprudence, while failing to engage state courts, and state law in general, in scholarship and in teaching, even in state-centred areas (*e.g.*, criminal law)
- insufficient conceptual apparatus to subject legal doctrine to systematic and comprehensive analysis, never mind critique (*e.g.*, 'harm principle' in U.S. criminal law)
- no treatise literature: no large scale systematic works of legal doctrine (again with the exception of law & economics)[25]
- no broadly framed, sophisticated, multi-generational analysis of the legal system that could lay the foundation for an informed and comprehensive critique (since Hart & Sacks's *The Legal Process*)
- the end of ambitious restatement and model code projects by the American Law Institute (including the ALI's Model Penal Code)
- large-scale abandonment of doctrinal analysis among elite law schools and, eventually, law schools in general
- in particular, the disappearance of private law as a subject of serious doctrinal analysis, resulting in a narrow conception of the discipline of law
- more broadly, a pervasive sense of law fatigue triggering a search for alternative research approaches and a wide embrace of 'interdisciplinary' scholarship, again first at elite law schools and then throughout legal education
- amateurish dabbling in 'interdisciplinary' research that, in fact, fails to engage interlocutors in any other discipline besides law
- crude result-oriented, casuistic, case-based functionalism that leaves no place for principle-based analysis
- in doctrine and scholarship, focus on facts over norms, impact over abstract principles, process over substance, implementation over definition, and enforcement over implementation
- despite the realist posturing, a wide gap between scholarship and 'practice,' with judges regularly calling on legal scholars to produce work that could guide judicial decisionmaking, with similarly persistent complaints among the bar about law graduates totally unprepared for the practice of law, requiring extensive professional training

25 Starting with Posner (1973), for a recent overview of the next fifty years, see Kornhauser (2022).

- apolitical formalism, logicism, 'principledness,' doctrinalism, etc. as cover for (reactionary) conservatism, discrimination (gender, race, ethnicity, nationality, political, economic status, etc.), resulting in the launch of a series of critical movements: *e.g.*, Legal Realism, Law & Society, Critical Legal Studies, Law & Feminism, Critical Race Theory
- arrogance: nationalism (vs. other countries' legal and legal education systems); ideological imperialism (U.S. and U.K. law as the most perfect manifestation of right and justice—even if they differ); sense of pedagogic and scholarly superiority (stereotypes of civil law lecturing and doctrinal purism untouched by 'law on the streets')
- failure in the face of an acute legitimacy crisis: *e.g.*, the post-1968 War on Crime

Perhaps these competing, and complementary, lists, in the end, amount to little more than a collection of more or less familiar features of 'The Civil Law' and 'The Common Law' as ideal types, or worse, stereotypes. They are not intended as contributions to the long-running Civil Law vs. Common Law parlour game of comparative law. Still, there are less productive ways of thinking about a New Legal Science project than as an attempt to bridge the gap between these two (actual or contrived) systems by mobilizing their respective strengths and leaving aside their parochial weaknesses in the service of bringing the combined international resources of legal scholarship to bear on a critical analysis of the legitimacy of state power through law.

C. The Idea of a New Legal Science

New Legal Science would be an essentially contextual enterprise, aware of the contingency of its central concepts, without at the same time abandoning the effort to subject a legal regime, as the state's exercise of its coercive power through law, to rigorous and systematic critical analysis. First, it would critically analyse the legal regime's constituent norms (principles, doctrines, rules, standards, etc.), institutions, and practices in light of its foundational norms (external critique: legitimacy). Second, it would critically analyse the legal regime's constituent norms, institutions, and practices with respect to each other (internal critique: coherence, consistency, and compliance).

There's nothing 'new' about the second type of critical analysis (although, as a matter of fact, traditional legal science has spent considerably less effort on questions of compliance than on matters of coherence and consistency). What's 'new'—and modern—about New Legal Science is its central commitment to critiquing the *legitimacy* of the state's exercise of coercive power through law.

New Legal Science, then, is a normative critical science. Unlike other sciences ('natural', 'empirical,' 'social,' 'behavioural,' 'physical,' 'hard,' 'ontological,' etc.) or conceptions of legal science derived from them, the life of New Legal Science would not be truth or fact, nor logic or (*pace* Holmes) experience, for their own sake. It would not pursue, again for their own sake, the accurate and complete description or systematization—not to mention the conceptual beauty—of a body of legal doctrine, as in conceptions

of 'pure' or 'true' legal science. New Legal Science instead would pursue the critical analysis of law (*Recht, droit, diritto, derecho*), conceived as a fundamental mode of coercive state power in dire need of continuous legitimation.

More specifically, New Legal Science would pursue a comprehensive, continuous, and systematic critical analysis of the exercise of law in the particular, modern, sense that arose out of the application of the enlightenment's all-encompassing project of normative critique to the political realm and since then has come to shape political and legal thought—in theory, most definitely not consistently in practice—in countries commonly referred to as liberal democracies. (For now, I leave for another day—and others more qualified than I am—the important question of what a modern legal science in other political systems or projects might look like.)

New Legal Science, in other words, would be a legal science for states ostensibly committed to the project of 'the rule of law,' or *Rechtsstaat*; it therefore would be no more or less 'purely' legal, or historically or systematically non-contingent, or objective, or logically obligatory, or empirically determined, than this broader project (regardless of whether—and if so, on what basis—that project is labelled political 'science'). It would also be subject to the same doubts as any other scientific project, in an age when science's claim to objectivity requires constant justification, as does the very idea of objectivity itself, along with ascriptions of expertise that rely on it.

These doubts have not rendered scientific inquiry obsolete elsewhere. Why should they doom legal science? Why should we not pursue a legal science, self-reflective and self-critical, appropriately modest and humble, stripped of pretensions of apolitical objectivity and logical inexorability, and claims to special *ex officio* influence beyond the force of the better (or at least better informed) argument?

New Legal Science would be no panacea. But it could serve a crucial function in a modern democratic state: the critical analysis of the legitimacy of state power in the name of 'law'.

D. Critical Analysis of Law

New Legal Science would pursue a *critical analysis of law* in the following sense.[26] It would be *critical* in that its aim would be critique of the exercise of state power through law, both external and internal (see above). It would undertake critical *analysis* because critique would be pointless and toothless if it did not build on a comprehensive, contextual, and open-minded analysis of the exercise of state law power under scrutiny. This analysis would be the 'proprium' (*i.e.*, the business as well as the task) of legal science, and those who pursue it, in the straightforward sense that it draws on the expertise of persons trained in the analysis of legal norms,

26 See generally Critical Analysis of Law and the New Interdisciplinarity (2012).

institutions, and practices.[27] This analysis should employ any and all disciplinary, methodological, and epistemological tools available, including but not limited to the so-called 'doctrinal' analysis of legal norms, in systematic context (*Rechtsdogmatik*, *doctrine juridique*). This point is worth emphasizing. Legal analysis has tended to fall into one camp or the other: *either* doctrinal *or* 'interdisciplinary' analysis ('law' *or* 'law &'), each dismissing the other as irrelevantly alien or quaintly blinkered, respectively. To welcome interdisciplinary analysis, however, does not imply excluding doctrinal analysis, *i.e.*, the type of analysis legal scientists are uniquely qualified to undertake. New Legal Science is inclusive and multifaceted; to systematically and comprehensively analyse the complex legal regime of a modern state, it will take all the help it can get.

Finally, and crucially, New Legal Science would be critical analysis of *law*. Just what this means obviously depends on one's conception of law. As mentioned previously, for present purposes, I am using law in a specific (and certainly contestable) sense, as a mode of state governance that emerged from the enlightenment critique of state power: to legitimate state power was to transform the state from a police state (*Polizeistaat, l'état de police*) into a law state (*Rechtsstaat, l'état de droit*), *i.e.*, from a state governed through police (*Polizei, police*) to one governed through law (*Recht*, *droit*). I have explored the distinction between police and law elsewhere,[28] tracing it to the interrelation between heteronomy and autonomy in private and public governance rooted in the distinction between household and city/state government in classical Athens and Rome – i.e., between *oikos* and *agora*, and between *familia* and *forum*, respectively. To quote Jill Lepore's pithy summary of this account: 'Under the rule of law, people are equals; under the rule of police, we are not.'[29]

In classical Athens, governance of the household (*oikos*) turned on the radical distinction between subject (householder) and object (household). The householder's power over the (human and non-human) animate and inanimate resources that constituted his household was discretionary and unlimited, subject only to self-imposed and self-policed guidelines of prudence occasionally collected in manuals on the art and science of household management, *oikonomikos*,[30] precursors of the later *Hausväterliteratur* and *Fürstenspiegel*,[31] and much later antebellum slave owner manuals in the American South.[32] In the public sphere of the *agora*, by contrast,

27 Cf. Engel and Schön (eds.) (2007).

28 Dubber (2005b), Dubber and Valverde (eds.) (2006), Dubber and Valverde (eds.) (2008).

29 Lepore (2020).

30 *E.g.*, Xenophon (1995).

31 *E.g.*, Machiavelli (1532).

32 Bush (1993).

government rested on the identity of subject and object: city/state government of householders by householders was autonomous. Private and public government were intimately, and individually, connected: participation in autonomous public government presupposed the exercise of heteronomous government at home.

Police as a mode of state governance emerged through the expansion of household government to the government of the state as the king's (private) micro household was transformed into a (public) macro household through the incorporation of other households. The police power was the power of the king as *pater patriae* over the resources of his realm, the power of 'the due regulation and domestic order of the kingdom: whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behaviour to the rules of propriety, good neighbourhood, and good manners';[33] the king maintained the royal peace over the state household, as other, lesser, householders' power over their micro households was transformed from originary sovereignty into delegated royal power.

In the political sphere, the enlightenment's discovery—or invention, or postulation—of the capacity for autonomy of persons as such posed a fundamental challenge to the exercise of state power, by eradicating the once axiomatic distinction between subject and object of government. State power now had to be legitimated to those in whose name it was exercised, even—and especially—if it was to be used against them. Autonomy thus became the touchstone for the legitimacy of state power; unlike in classical Athens, however, the capacity for autonomy was now (if only in theory) the universal characteristic of personhood, instead of the distinctive feature of householders.

In the law state, the exercise of power was to be subject to a constant and vigilant legitimacy critique in light of the fundamental principle of autonomy. State power in the law state thus was to be strictly constrained; state power in violation of the principle of autonomy was illegitimate. By contrast, in the police state, the sovereign's power was—like the householder's—essentially discretionary and unlimited, defined by its very indefinability, 'the power of sovereignty, the power to govern men and things within the limits of its dominion'.[34]

By the seventeenth century, in Germany and France the traditional *oeconomical* literature had developed into the field of police science (*Polizeiwissenschaft, science de la police*), initially pursued by bureaucrats and magistrates, and eventually taught at universities. With some notable exceptions,[35] a common law police science never developed. In the civil law world, the comprehensive project of police science was

33 Blackstone (1769) p. 162.

34 License Cases, 46 U.S. (5 How.) 504 (1847).

35 Colquhoun (1814), Freund (1904).

abandoned over the course of the nineteenth century, by limiting the once all-encompassing concept of police as the pursuit of royal peace (later republicanized as 'public peace') to its least objectionable aspect—public security—and transforming the remainder into the new field of administrative law (and police law, *Polizeirecht*, in Germany).

E. New Legal Science and New Police Science

New Legal Science would complement New Police Science, which pursues a comprehensive critical analysis of state power *qua* police.[36] The two would add up to a comprehensive critical analysis of state power from the perspectives of police and law as modes of state governance (New State Science).[37] This two-pronged inquiry would proceed from the assumption that, rather than law simply having replaced police as the sole mode of governance—and the law state having replaced the police state—law and police persist as parallel modes of governance, thus manifesting the long-standing relation, and tension, between autonomy and heteronomy in the political sphere. A comprehensive critical analysis of state power therefore would include a parallel critical analysis from each perspective: on the one side, as an exercise of power subject to formal norms grounded in principled constraints of legitimacy that reflect the conception of the subject-object of government as a person characterized by the capacity for autonomy and, on the other, as an exercise of sovereign power through discretionary resource management subject to self-imposed and self-policed informal guidelines of prudence and maxims of good government.

New Police Science shares with the original police science its focus on 'police' (*Polizei, la police*) as a basic mode of governance worthy of study on its own terms, apart from whatever legal framework the law state has attempted to superimpose on it, if only nominally ('administrative law', 'police law'). As a post-enlightenment critical analysis of police, however, it also differs from the original police science's conception as a genre of advice literature for absolute sovereign state householders.

New Legal Science would bear a similarly differentiated relation to its original incarnation. Leaving aside earlier references to 'legal science,' the modern project of legal science is generally thought to originate with Savigny, and more precisely with the publication of his dissertation on *The Law of Possession* in 1803.[38] Savignian legal science, which continues to shape legal science in the civil law world to this day, was historical and descriptive in *method*, and limited to private law—and more precisely to Roman private law—in *scope*.[39] New Legal Science, as critical analysis of law, also would be historical, but not in the limited sense of Savigny's Historical Jurisprudence:

36 Dubber and Valverde (eds.) (2006), Dubber and Valverde (eds.) (2008).

37 Schuppert (2003).

38 Savigny (1803), Savigny (1848).

39 Reimann (1990), Stein (1986).

first, it would not be limited to unearthing pure legal principles through the careful study of ancient (or even merely old) texts, but would be historical in the sense of taking into account the historical context and development of norms, institutions, and practices; second, it would not be limited to historical analysis, but would regard historical analysis as only one form of analysis among others.[40] Most significant, New Legal Science would not be merely descriptive; it would perform analysis not for its own sake, but as the foundation for critique; it would not limit itself to doctrinal analysis any more than to historical analysis.[41]

Moving from method to scope, while both Savignian legal science and New Legal Science pursue a comprehensive and systematic analysis of law, New Legal Science would expand the scope of analysis beyond private law and beyond legal norms to legal institutions and practices. In fact, the critical analysis of public law—and in particular of the most intrusive form of public law, criminal law—would be central to New Legal Science, as one track, alongside New Police Science, of the comprehensive critical analysis of *state power*.

II. New Legal Science in the Dual Penal State

A. Penal Law at the Centre

Given penal law's key role in the critical analysis of state power from the perspective of New Legal Science, it makes sense that New Legal Science should prove its mettle in this field. If the state, without legitimacy, wields the power to deprive us of property, liberty, and even life in the name of penal law, what does it matter if its private law norms competently—or even, in some sense, fairly—facilitate our commercial interactions? If the state's penal law apparatus amounts to a mass incapacitation regime, characterized by systemic racism and institutionalized violence, what does it matter if its administrative law regime—at least marginally and episodically—oversees the provision of public benefits and services?

Reframed as one aspect of the critical analysis of state penal power, the critical analysis of penal law would complement a critical analysis of penal police. A suitably comprehensive analysis thus would include a comparative historical analysis of penal law and penal police leading to an account of what might be termed a 'dual penal state.'[42] It would also require a contextual analysis of norms, institutions, and practices, both across aspects of the penal process ('substantive' criminal law, 'procedural' criminal law,' 'prison' law: collectively 'penal law') and across areas of law (*e.g.*, tort law, victim compensation law, criminal law).

40 Dubber (2015).

41 *Id.*

42 Cf. Fraenkel (1941).

This contextual analysis would have to rely on a broader account of types, areas, and fields of law, and their interrelation, a subject of considerable analytic importance that has attracted little attention. For instance, the distinction between public and private law remains unsettled (perhaps not surprisingly, given the formative influence of Roman law, to which the distinction is often traced), if it is not dismissed as 'utterly decrepit',[43] politically motivated,[44] or simply ignored as both passé and déclassé (since everyone has known for some time that 'all law is public law').[45] The very status of criminal law, as a species of public law, private law, or sui generis, has been only slightly better illuminated than the distinction among specific areas of law, such as that between criminal law and tort law. Even German penal law science, over two centuries of systematization (or at least classification), has lavished the vast bulk of its analytic attention on one approach to one part of one aspect of the penal process: the descriptive doctrinal analysis of selected issues in the general part of (German) substantive criminal law. Much analysis remains to be done, not to mention the legitimacy critique that comprehensive analysis makes possible.

B. Critical Analysis of Possession Between Law and Police

To illustrate, with a nod to Savigny, let us consider what a critical analysis of *possession* in modern penality from the perspective of New Legal Science might look like.[46] To begin with, a New Legal Science inquiry might consider possession's place not only in the so-called general and special parts of substantive criminal law doctrine, but also in the broader context of the penal regime, including its role in investigation, prosecution, adjudication, sentencing, and punishment.

This analysis, from the perspective of penal *law*, could reveal features of criminal possession doctrine (*e.g.*, prospective & retrospective, explicit & implicit presumptions; constructive & joint possession; implicit omission; pre-preparatory inchoacy; status-based exemptions), some of which may conflict with basic norms of criminal law (*e.g.*, actus reus, mens rea, accomplice liability, attempt).[47]

Analysis from the perspective of penal *police*, however, may show possession performing a key role as a sweep, gateway, and fallback offence in a system for the identification and incapacitation of human dangers, as a more sophisticated and effective alternative to the age-old, vague, status- rather than act-based, disciplinary tool of 'vagrancy.'[48]

43 Kennedy (1982).

44 Horwitz (1980).

45 See, *e.g.*, Goldberg (2012).

46 See generally Dubber (2002).

47 Ashworth (2011), Yaffe (2016).

48 Dubber (2005a).

Historical analysis might trace efforts in, *e.g.*, Anglo-American law to accommodate possession liability within a still evolving cluster of substantive criminal law norms (*e.g.*, act requirement), culminating in the codificatory fiat that possession, simply, is an act.[49] Comparative analysis, in turn, might investigate the treatment of possession in, *e.g.*, German criminal law, against a different set of background legal norms (*e.g.*, guilt principle, *Schuldprinzip*).[50] Intrasystemic comparison could explore the relationship between possession in criminal law and in other areas of law, including administrative law and property law.[51]

This inquiry into possession could be adjusted as needed or desired, *e.g.*, by widening (external or internal) comparative scope or expanding analytic focus (*e.g.*, beyond possession as an offence to possession as a protected interest, in the law of theft and other so-called property offences).

A similar parallel analysis could be expanded throughout the penal process, including not only other doctrines in all aspects of penal law, but also beyond norms to institutions and practices: for instance the institution of the jury[52] or the practice of plea bargaining.[53]

The analysis could be extended not only horizontally, but vertically, for instance, from 'doctrines' such as criminal liability for possession to 'principles' such as the legality principle (in its several, and ever multiplying, Latinate variations),[54] the *Rechtsgut* principle, the *Schuldprinzip* ('*nulla poena sine culpa*'), *ultima ratio* (last resort), '*actus non facit reum nisi mens sit rea*', etc.[55]

49 See Model Penal Code § 2.01(4).

50 See Lagodny (1996).

51 See Lepsius (2002), Savigny (1803), see also Posner (2000), Gordley and Mattei (1996).

52 From the perspective of law, a 'palladium of liberty' or more specifically an indirect manifestation of the 'offender's' and the 'victim's' autonomy, or self-judgment, through vicarious empathic identification by judges drawn from 'their' 'community'; from the perspective of police, an instrument of sovereign—and more specifically of royal—power to determine the king's rights and assert his fiscal interests, through the exercise of his jurisdiction at the expense of lesser, micro, householders. See Dubber (2016), see generally Dubber (2019b).

53 Q*ua* law, an opportunity for direct, if partial, self-judgment through the accused's participation in the disposition of her case; *qua* police, a delegation of unreviewable sovereign discretionary power to a state official. See Dubber (2019b).

54 *E.g.*, *nulla poena sine lege*, *nulla poena sine crimine*, *nullum crimen sine poena legali, nulla poena sine lege scripta, nulla poena sine lege praevia*, *nulla poena sine lege certa, nulla poena sine lege stricta, nulla poena sine culpa*, even, in socialist criminal law, *nulla poena sine periculo sociali*.

55 Legally speaking, these fundamental principles of justice—preferably framed in Latin—are deeply and immutably grounded, eventually, in a conception of the person as a being endowed with the capacity for autonomy; policially speaking, they are recommended maxims of prudence, or good governance, addressed to a sovereign householder with ultimate discretion as to whether, and if so how, to consult and to heed them.

C. The Essentially Contested Legitimacy of State Power

This cursory sketch can at best serve to illustrate how a dual analysis of the state's penal power might proceed and what role New Legal Science (and New Police Science) could play in this inquiry. Ultimately, it set out to suggest how one might tackle the task of a New Legal Science: subjecting the state's exercise of its law power to comprehensive and systematic critical analysis as part of a general, and continuing, inquiry into the legitimacy of state power, including but not limited to its *penal* power.[56] The task of critical analysis of the state's penal power, and especially as penal law, is particularly urgent insofar as its exercise is particularly likely to interfere with the very autonomy that is said to legitimate it. That is not to say, however, that other types of state power, *qua* law or police, should not—or could not—be subjected to critical analysis as well, nor that the legitimacy of penal power implies the legitimacy of other forms of state power.

In closing, it is worth emphasizing that, in the spirit of critical analysis, the legitimacy of state power in general—and of state penal power in particular—cannot be treated as a foregone conclusion. A modern science of law cannot fulfil its critical function if it sees itself as providing justifications for the status quo. In law, the critical spirit of scientific inquiry requires the constant questioning of assumptions and long-familiar practices, not merely the accumulation of knowledge, or the management of taxonomic systems. An apologetic 'normative' science of law poses at least as great a threat to the legitimation of state power as an apologetic 'descriptive' one.

56 To stick with the example of possession, the two accounts of the private law of possession generally traced back to Savigny's 1803 dissertation—public order and ownership—could be mapped onto the distinction between police and law.

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