

On the Outside, Looking in

Observations on the weird and wonderful world of criminal law scholarship

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1 Introduction

Concepts and principles, that within the context of private law exude technical neutrality and systemic integrity, reveal themselves as pure ideology in the field of criminal law. The question is whether this transformation represents a necessary adaptation to a specific field of inquiry or provides irrefutable proof of a flawed method.

In order to shed some light on this particular enigma, I will rely heavily on the single most important achievement of the Romantic era: The revaluation of the cognitive importance of perspectives. The metaphysics of earlier periods entertained a deep suspicion towards the notion of perspectives, since it clearly presupposes three-dimensional and hence temporal objects. In fact, the relativity of such knowledge was considered to be a sign of the fallibility connected with the cognition of mortals. This, however, is an essay in the tradition of the Romantic era: It represents an attempt to observe the history and systematics of criminal law scholarship from a vantage point. I have, by both necessity *and* choice, adopted the point of view of an outsider, trying to glean an insight into a foreign area of law. One of the reasons behind the deliberate use of perspectives is, after all, to make the familiar seem strange and the alien familiar. By reversing these attributes, scientific analysis can contribute to our understanding of both the familiar and the unfamiliar in law.

My choice of vantage point is not arbitrary. The subject of this essay is not criminal law as such; instead the analysis concerns the scholarly qualities of criminal law and its relevance to legal scholarship in general. In the civil law tradition one particular group of legal scholars has earned an unparalleled standing within academia. Private law scholars have often been considered paragons of academic virtue in the field of law, thereby driving other legal disciplines to the very fringes of legal scholarship. This might be consid-

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ered unsurprising, since one of the very first attempts at a learned study of law, the 11th century School of Glossators, mainly dealt with questions concerning private law. The fact that private law scholars still retain this enviable status is more astounding. Private law jurisprudence, in particular its general principles and concepts, seem to epitomise the scientific study of law. By choosing private law as my point of departure, focus will inevitably shift from *criminal law* to *criminal law scholarship*.

Another, no less important aspect of the chosen method is that it challenges the popularly held notion that scholarly qualities in law – *die Rechtswissenschaftlichkeit*¹ – remain quintessentially the same, despite changing conditions in a specific field of law. Like a mould or a matrix, the scholarly method is more or less forcibly imposed on the object of the study, regardless of the ensuing resistance. This clearly untenable assertion can only be understood, and indeed excused, in the context of man's eternal quest for absolute truth. It would seem that the human mind is prepared to make great sacrifices in order to retain its belief in the perfect objectivity of knowledge. Whether this belief is founded in logical axioms, according to the 18th century *mos geometricus*, or in the supposed empirical validity of natural sciences, is of no particular consequence. It is my contention that the notion of legal science owes as much to its specific object as to its own predicates. The concept of criminal law scholarship is, if I am right, something else and more than the sum of its parts.

2 Norms as facts: What is legal scholarship that law is not?

Approximately 2500 years of history teaches us that the human mind is deeply unoriginal. Throughout the millennia scholars have shown a strong and constant predilection for systematic unity in knowledge, ranging from modest demands of basic coherence to the construction of elaborate systems. Whereas Pre-Enlightenment philosophy only acknowledges the perfect system – the *Systema mundi* is indistinguishable from God's creation – Immanuel Kant showed a slightly more relaxed attitude to the demands of systemic coherence in science. As the architectonics of pure – but human – reason is imposed on empirical data, knowledge transforms into science. During the first half of the 19th century a succession of brilliant idealistic philosophers – in particular Friedrich Wilhelm Joseph von Schelling and Georg Wilhelm Friedrich Hegel – carried out a “silent”² revolution in philosophy, by shifting the focus of epistemological inquiry from the notion of a fixed system to the act of systematisation itself. Regardless of the exact defini-

¹ The concepts of *Wissenschaft* and *Rechtswissenschaft* are simply impossible to translate into English with any degree of precision. For the purpose of this essay, *science* and *scientific* are used as equivalents to *Wissenschaft* and *wissenschaftlich*, *Rechtswissenschaft* has as a rule been given the rather crude translation *legal scholarship*.

² Or at least strangely low-key, considering its momentous importance to, among other things, legal scholarship.

tion of scientific knowledge, it is obvious that the concepts of *system* and *systematisation* are keys to understanding and evaluating any scholarly endeavour.

It is tempting to simply equate jurisprudence with legal systematisation. If philosophy is recognised as “die Wissenschaft der Wissenschaften”, the application of almost any philosophical doctrine would seem to lead to that conclusion. Law, however, has put up formidable resistance against this idea. The systems and schemata proposed by philosophers are almost uniquely aimed at organising facts. Law, however, is rarely concerned with facts. Systematising norms, instead of facts, is a whole other kettle of fish. The fact, that legal systems are normative rather than descriptive in character will as a rule preclude a direct application of most philosophical models on jurisprudence.³ The particular nature of legal systems does not, however, render philosophy completely useless in the field of law, but its models must be “tweaked” to suit the specific object of scholarly scrutiny, namely positive law. Legal scholars, keen to associate their discipline with the scientific nimbus emanating from philosophy, soon found a clever solution: Why not simply pretend that norms are facts?

It is a rather mundane observation that jurists often treat norms as facts, when arguing a point of law. This holds true for most jurists, including legal scholars. For instance, according to the Swedish Sales of Goods Act, section 45, a court may, if the parties have not agreed on a price, stipulate a price that is reasonable. When a jurist argues a case, he does not treat this rule as a normative statement. Instead it takes on the form of a categorical proposition – the major premise – within a legal syllogism, leading to a fixed, preferably logical conclusion. This is possible because norms, like most factual propositions, rely on the notion of causality, albeit a different kind of causality than the one found in nature. In law certain facts, often in combination, are linked to specific legal consequences by a certain type of causality. Ultimately, the effect or consequence relies on a convention, which transforms pure value-judgments into “facts”.⁴ This convention is the doctrine of legal sources, which elevates certain norms – belonging to *geltendes Recht*⁵ – to categorical propositions. Like facts, these rules can be proved or disproved within a given legal framework.

³ The obvious exception to this rule is natural law, since “is”, in the form of *essentia*, and “ought” are one and the same.

⁴ The Swedish philosopher Ingmar Hedenius distinguished between “true” (äkta) and “untrue” (oäkta) legal propositions, see Hedenius, *Om rätt och moral* (Tidens 1941) pp. 60–67, 71–77. This distinction did not, however, emanate from Hedenius or indeed the Uppsala School. Instead it predates the Uppsala School with at least 100 years: During the first half of the 19th century the Historical School differentiated *positives Recht* from *geltendes Recht*, see Sandström, “The Concept of Legal Dogmatics Revisited” in *Epistemology and Ontology: IVR Symposium Lund 2003*, (Franz Steiner Verlag 2003) *passim*.

⁵ This is another concept that defies translation. A rough equivalent would be “valid law” or “law in force”.

3 The Janus faced legal system

The next issue to be resolved concerns the very nature of a legal system. The act of systematisation has often been considered to be purely inductive. Through inductive reasoning the human mind constructs abstractions, in the case of legal science concepts and leading principles, which assure a certain consistency. Hence, induction can be described as a sort of intellectual striptease, by which a pre-existing unity is exposed by the process of abstraction. This form of systematisation has been heavily favoured by legal realists like the Swedish philosopher Axel Hägerström, who perceived generalisations based on individual instances as more “real” than others. Inductive reasoning normally produces comparatively “weak” systems, since the unifying elements that make up the system – in particular legal concepts – only exist as pale shadows of the “real” and concrete foundations of law. In this sense, legal realists would seem to side with Julius von Kirchmann, who famously asserted that three modifying words from the legislature will turn whole libraries of legal textbooks into waste paper.⁶ As soon as the foundations shift, concepts and principles shift with them. It is, therefore, impossible to consider the system as such on a par with the rules or the ideology that make up the normative basis of the structure. A legal concept is no more than a least common denominator, which serves to ensure basic consistency in law. Substance will invariably trump form.

This makes perfect sense to a strict legal positivist, since inductive reasoning prevents legal scholarship from over-stepping its boundaries into the alien realm of non-cognitive value judgments. The equally obvious downside is the striking vulnerability of the system insofar as it is susceptible to any interference, either from the legislature and the courts or from society. It is also a completely passive entity, since it lacks any capacity to control or at least resist change. Friedrich Carl von Savigny, the founder of the German Historical School, scornfully described this amalgamation of form and substance as a structure existing below the true system: A system based on pure induction is an entity, which contains “die Mannigfaltigkeit, daß was in einem System vereinigt werden soll”⁷, but fails to unite them. As a consequence, jurists, including legal scholars, get lost in the sheer amount of legal arguments, since they utterly fail to appreciate the true relationship that exists between rules, legal relations and institutions.

Legal scholars have, as a rule, shunned purely inductive reasoning. The reason is obvious. If systematisation is the hallmark of science, uncovering a latent – “natural” – unity in law by means of abstraction does not presuppose the notion of science, let alone the notion of legal scholarship. In fact, one could argue that the reproductive character of this type of systematisation negates the notion of legal doctrine as a true source of law, since scholarly writing would be restricted to a pure reproduction of law’s internal structure.

⁶ See Kirchmann, *Die Werthlosigkeit der Jurisprudenz als Wissenschaft*, (Reprint: Rudolf Haufe Verlag 1990) p. 23.

⁷ Savigny, *Vorlesungen über die juristische Methodenlehre*, (Vittorio Klostermann Verlag 2004) p. 100.

The productive, and therefore independent, character of legal doctrine would be irretrievably lost. It is, hence, unsurprising that legal scholars have tended towards the very opposite. Even medieval legal scholars had enough pluck to claim absolute *droit moral* to their own creation. In fact, they went as far as to assert that the natural law system transcends both the temporal and the spatial, so as to make it impervious to any human, or indeed godly, intervention. The means, by which this feat was eventually achieved, are deductive reasoning.

Deductive logic is based on the assumption that a conclusion by necessity follows from a set of premises. Natural lawyers, who honed this technique to near perfection, attempted to deduce a complete legal system from one single axiom. The philosophical critique of the Enlightenment made scholars more wary of the risks involved in promising more than legal doctrine can deliver. Kant, for instance, famously chose to separate the perfectly logical form from its substance, since the latter consists of pure assumptions.⁸ The Conceptual School of the second half of the 19th century decided, on the basis of post-Kantian idealism, to forgo axioms altogether. Instead an intricate web in positive law – “Verwandtschaft” – of legal concepts⁹, principles and doctrines serves as a matrix for the construction of a highly abstract and surprisingly functional system in law. The legal system of the Conceptual School represents the polar opposite to the inductive structure discussed above.

The concept-based system of the Conceptual School is the result of a self-assured, even cocky legal scholarship, engaged in a purposeful scientific construction of law. Despite its footing in the internal relations between concepts within positive law, the system still retains a great deal of autonomy, since it – when left to its own devices – seems to have the ability to grow and develop by means of logical deduction alone, separated from substance. It is also an “aggressive” form of legal systematics, since it will actively oppose a change deemed incompatible with the existing structure. On the other hand, when the system is finally forced to surrender to major change, it does so in a consistent and comprehensive manner. The unifying force that upholds the system works, as it were, both ways.

Furthermore, the immense strength of the deductive system is reflected in the importance attached to the abstract norms that make up its backbone. Legal principles and doctrines act as “default settings” in the minds of jurists, as they interpret statutes or fill gaps. This trait would seem to be most striking in the doctrine of legal analogies. The

⁸ In 1911 the Kant scholar and philosopher Hans Vaihinger published a book, *Philosophie des Als ob*, in which he argued that human understanding is limited and, as a consequence, systems, with the exception of the purely formal ones, must be based on assumptions. Scholars in particular must behave “as if” the material content of their systems actually correspond with reality. See Sandström, Marie, „Das dogmatische Verfahren als Muster der rechtswissenschaftlichen Argumentation“, in *Entwicklung der Methodenlehre in Rechtswissenschaft und Philosophie vom 16. bis zum 18. Jahrhundert* (Steiner Verlag 1996), passim.

⁹ The school’s heavy emphasis on legal concepts is reflected in the derogatory designation used by its detractors, viz. *Begriffsjurisprudenz*.

very notion of a “gap” would seem to presuppose at least some belief in a “system”, since it clearly implies that a gap is an irregularity. In any case, the jurist’s sensibility to gaps is directly related to the strength of his or her conviction that law is, in fact, a system and not merely a haphazard compilation of rules.¹⁰ Having identified a true gap in the system, the jurist is by no means released from the influence of the legal system. On the contrary, its hold would seem to strengthen even further. Thus the similarity upon which analogous reasoning ultimately rests concerns the degree of systematic “kinship” between, for instance, two or more cases. The system will not leave the jurist free to pursue other lines of reasoning until he or she has ascertained that the proposed analogy is compatible with the existing structure of law. Compatibility is therefore a necessary, albeit not, in most cases, sufficient condition for analogous reasoning in law.¹¹ The crucial question, whether a legal argument is compatible with the system or not, is hence of paramount importance. Only legal scholars can provide a reliable answer.

In *Marburger Methodenlehre*, Savigny vividly described systems that are too “systematic” to be true, “[d]ie eine Einheit suchen, worin das Mannigfaltige selbst nicht mehr enthalten ist”¹² The reason for his obvious displeasure was that systematisation, based almost entirely on deductive reasoning, will obscure the true source of law, i.e. the *Volksgeist*.¹³ Ultimately, a philosophical system will result in a “directe, erklärte Empörung gegen das Gesetz.”¹⁴ His censure, though it clearly predates the Conceptual School, would seem to be relevant to any system attributed with logical necessity by means of deductive reasoning. In this case, form invariably trumps substance.

4 The perfect system? Private law scholarship

For a considerable period of time the study of private law, and in particular its general concepts and principles¹⁵, has been considered the very pinnacle of legal scholarship. During the 19th century, the systematisation of private law by the Historical and Conceptual Schools gave rise to the so-called *Professorenrecht*, whereby legal doctrine was raised to an unprecedented level as a legal source, on par with both statute law and case law. The abstract doctrines in private law are in effect a lasting legacy of the Conceptual

¹⁰ There would seem to be a marked difference in the use of analogies from country to country. Analogies drawn from statute law are highly indicative of the legal method employed by jurists in the Nordic countries. This peculiarity is largely due to the fact that Nordic private law has not been codified. See Zweigert and Kötz, *An Introduction to Comparative Law*, 2 Ed. (Clarendon Press 1987), p. 293.

¹¹ This is often referred to as a *condicio sine qua non* in legal doctrine.

¹² Savigny, *ibid.*

¹³ The concept of *Volksgeist* might seem enigmatic to the modern and non-German reader, but is quintessentially the same as law’s reliance on external factors, i.e. history and society.

¹⁴ Savigny, *ibid.*

¹⁵ *Der allgemeine Teil des Privatrechts.*

School. The ideal nature of concepts and principles has in no way weakened their persuasive character; in fact it would seem to be the major asset of legal doctrine, since abstract norms are at least potentially applicable to a wide range of cases. In practice, doctrinal writing often serves as the legal source of last resort. Ernst Viktor Nordling, professor of private law at Uppsala University during the latter half of the 19th century, defined the task of legal doctrine as

... interpreting legal rules and systematically developing what law as a unity is, thereby giving precision and limits to legal rules emanating from other sources and also instructions on legal norms that do not emerge in any other way.¹⁶

The School's particular penchant for deductive reasoning has also left its mark on the general part of private law. Nordling argued that legal doctrine influences case law and statute law in two different ways:

Legal theory has a twofold relationship with statute law and case law: By analysing the basic principles of law, legal theory gives direction, in advance, to the legislative and judicial bodies and by systematizing already established rules in statutes and precedents, it fixes and limits their scope.¹⁷

The legal realists of the early 20th century managed to temper, but not reverse, this proclivity for deductive reasoning. The critique was aimed at exposing the lack of epistemological basis for the normative inferences drawn exclusively from an analysis of legal concepts. According to legal realists, the process of abstraction has been driven to extremes by both natural lawyers and the proponents of the Conceptual School. As a result, legal concepts had taken on a supernatural quality, which literally attributes life-force to legal concepts. This hypostasis of legal abstractions will, according to this view, inevitably lead to the idolatry of legal concepts: an anathema to legal realists.

Despite the philosophical censure of the *Professorenrecht*, the general part of private law has remained almost unchanged. Abstract legal concepts and principles have largely retained their argumentative worth, resulting in legal scholars that favour form over substance. Hence, private law – and in particular the law of obligations and property¹⁸ – has been idealised to the point that it, to all intents and purposes, creates its own truth, regardless of the contradictions that may arise in the confrontation between internal and external perspectives of law. As a rule, the “outside” lacks legal relevance. There is, however, one more curious observation to be made. The dogmatic character of private law

¹⁶ Nordling, *Svensk civilrätt. Allmänna delen (anteckningar efter professor Ernst Viktor Nordlings föreläsningar)* Uppsala ht 1877 – vt 1879 (V. Roos, 1879), p. 26.

¹⁷ Ibid. p. 29.

¹⁸ So-called *Vermögensrecht*.

has not excluded a marked temporal dimension in private law scholarship. In fact, it seems to be the other way around. These branches of law are so steeped in history that it might seem strange to talk about a *geltendes Recht*. The truth is that legal history and legal dogmatics can co-exist quite happily, as long as the sources of law retain an organic quality. Legal relevance – and hence the dogmatic quality of law – is, in effect, blind to the historical quality of legal rules. Only a codification would, at least temporarily, sever the historical ties of private law.

The history of private law provides ample support for this view. Consider, for instance, the succession of schools aimed at reforming private law in the 19th century. Both the Historical and the Conceptual School departed from the metaphysical path of their predecessors, i.e. the natural lawyers, in order to focus scholarly study of law on the positive, rather than the natural. The main difference between the two schools concerns the precise method and the level of ambition for the systematisation of private law. The emphasis on the technical side of jurisprudence is also evident in the way in which legal textbooks on private law are written. Savigny devoted the first book of his masterpiece, *System des heutigen römischen Rechts*, to the doctrine of legal sources and the methodology of law. The same is true for Nordling's lectures on the general part of private law; included in the curriculum is a comprehensive introduction to legal methodology, in particular to the doctrine of legal sources. The timing of these methodological "revolutions" is also suggestive, since they seem to coincide with major shifts in epistemology.

There is, of course, a price to pay for the incredible robustness of the private law system. It is a system that does not take kindly to being upstaged; no attempt to steal the limelight will go unpunished. If the notion of a system has been internalised in law, the converse would be true for its polar opposite, private law's reliance on society. While pretending that legal norms are facts, jurists by and by cease to consider the external forces behind legal reform. They will be aware that the development of private law is fuelled by changes in living conditions and values, but that knowledge will leave few marks on legal doctrine. The ideological basis of private law is regarded as alien territory, where jurists fear to tread. In fact, it would seem to be bad form to even raise the issue, since the value judgments upon which the private law system is constructed are deemed to be philosophical rather than political. There seems to be very little justification for this distinction, but it none the less persists.¹⁹

5 The odd man out? Criminal law scholarship

There is little doubt that Savigny would have considered the general part of private law a system that has risen above its true level. The opposite, however, seems to be true as far as

¹⁹ See Peterson and Sandström, "Till frågan om rättsvetenskapsmannens bevisbörda. I väntan på historiens dom" in 3 *Juridisk tidskrift* (1999 – 2000) pp. 767f.

criminal law is concerned. Whereas private law scholars have overdosed on logic in an attempt to evade the ideological implications of private law, their criminal law counterparts would seem to do the exact opposite. Even a cursory look at the textbooks reveals the peculiar character of criminal law scholarship. Johan Hagströmer's lectures on Swedish criminal law, published at the turn of the last century, are a case in point.

Hagströmer opened his series of lectures with an analysis of the concept of criminal law and its place within the legal system. The notion of punishment is absolutely essential to the understanding of this particular branch of law. Punishment is in fact the main legal institution, i.e. the focal point of a set of connected legal rules, in the system of criminal law.²⁰ Legal institutions should, according to Hagströmer, be given a purely formal definition. By comparing the manifestations of this notion in criminal law – an inductive process – the scholar finally arrives at a lowest common denominator: Punishment equals “a legal restriction or forfeiture that is intentionally imposed on someone, because of an illegal act, according to statute law (*geltendes Recht*)”.²¹ The pivotal importance of this notion, in conjunction with the formal definition, may be considered as proof of a rather timid form of systematisation. That would, however, be a mistake. However apt the description might be, it has in itself no value to the process of systematisation: “The incorporation of each legal institution [into the legal system] is dependent partly on the purpose of the institution, partly on its legal basis”.²² Thus legal scholars must consider two aspects of criminal law insofar as the development of the institution must serve the intended purpose, without imposing an unnecessary burden on the individual.

Criminal law institutions are clearly considered to be the result of deductive, rather than inductive reasoning. However, the axiomatic point of departure is not, as in private law, legal concepts and principles, but the external purpose of a specific institution or of criminal law as a whole. This methodological stance differs widely from the one advocated by civil lawyers, since it implies that legal rules should be treated as norms rather than facts. Far from shunning the ideological implications of his work, Hagströmer seems to wallow in them. Compared to private law, the priorities seem to be completely reversed.

It is true that Hagströmer, like his peers, embraced a legal positivist attitude to legal scholarship, but it seems to be a legal positivism with a difference. The purpose of punishment must be understood within the framework of *lex lata*.²³ However, this restriction on jurisprudential creativity seemed to be of little consequence, as he passed judgment – “wholly from the point of view of positive law”²⁴ – on criminal law theories in history. Each theory is judged by its compatibility with law as it stands. The theory that is most

²⁰ Hagströmer, *Svensk straffrätt. Föreläsningar*, bd 1, (Uppsala 1901-1905) p. 5.

²¹ *Ibid.* p. 11.

²² *Ibid.* p. 14.

²³ *Ibid.* p. 15.

²⁴ *Ibid.* p. 14.

congruent with *lex lata* is simultaneously the most scholarly satisfying. Hagströmer dismissed out of hand all absolute theories concerning punishment²⁵, since they fail to provide a reasonable explanation of the choices made by the legislative bodies to punish one act, but not the other, despite a common underlying categorical imperative. Having thus excluded Kantian and Hegelian ethics from the analysis, he turned to the relative theories, according to which punishment is considered a *res relata ad effectum*, i.e. dependent on an external purpose like, for instance, deterrence.²⁶ The deterrence theory was not necessarily at odds with positive law, but was still rejected on the rather shaky ground that it contravenes a common sense of justice.²⁷ Only the prevention theory found favour with Hagströmer, despite it being congruent with criminal law “only as a rule”.²⁸ The claim that criminal law is a “conscious manifestation” of the prevention theory is clearly impossible to substantiate.²⁹

It is difficult to shake off the impression that Hagströmer simply preferred the prevention theory to other theories. As he discussed the State’s right to punish wrongdoers – the legal basis for the punishment – he freely admits that this question concerns legal philosophy rather than positive criminal law. It is striking how the emphasis in private law on legal method is matched in criminal law by an equally strong reliance on teleological arguments with little or no footing in positive law. The famous *Schulenstreit* between the Titans of criminal law, Karl Binding and Franz von Liszt, underscores this peculiar character of criminal law. The publication in 1882 of Franz von Liszt’s *Marburg Program*³⁰ sparked the controversy, by advocating a theory of special prevention at odds with the prevailing theory of retribution held by the Classical School. Karl Binding, the leading criminal law scholar at the time, leapt to the defence of the Classical School. The moot point was, as always, the nature of punishment. According to Binding’s theory, punishment must be understood as the State’s response to the violation of its authority. Hence, the offender is punished for breaking the laws rather than for committing an offence. In essence, this is the flipside of Paul Johann Anselm von Feuerbach’s maxim, *nullum crimen, nulla poena sine praevia lege poenali*. As long as the State respects the laws, thus inflicting punishment in a foreseeable and impartial way, it is only reasonable that it may ask the same of its citizens.

In opposition to Binding and the Classical School, Franz Liszt proposed a radical shift in criminal law ideology. He suggested that the aim of criminal law is to reform offend-

²⁵ According to the absolute theories, punishment needs no external rationale, since it is a *res absoluta ab effectu*. The imbalance caused by an illegal act must be redressed by an appropriate and foreseeable reaction from the state.

²⁶ Hagströmer, *ibid.* p. 15.

²⁷ *Ibid.* p. 28.

²⁸ *Ibid.* p. 26.

²⁹ *Ibid.* p. 22.

³⁰ Liszt, *Der Zweckgedanke im Strafrecht*, (Pfeil, 1882) *passim*.

ers and to eliminate crime. As a consequence, criminal law scholarship must be brought in line with the times. Considering Litz's bold assertions, his definition of criminal law scholarship appears unoriginal, even trite:

Ich verstehe unter Strafrecht den Inbegriff derjenigen Rechtsregeln, durch welche die Strafe als Rechtsfolge an das Verbrechen als Tatbestand geknüpft wird. Die Aufgabe der sogenannten Strafrechtswissenschaft ist demnach die systematische Zusammenfassung und Entwicklung dieser Rechtsregeln. Rechtssätze sind ihr Gegenstand; und die Logik ist ihre Methode.³¹

There is nothing in this description to betray the *sui generis* of criminal law. In fact, with a few minor modifications it would equally well convey the main characteristics of the work carried out by the Conceptual School in private law. However, the scope of modern criminal jurisprudence is not restricted to this purely "juristisch-logische"³² task. Liszt's statement only concerns "Strafrechtswissenschaft im engeren Sinn"³³, thereby implying that criminal law scholars have other – possibly more important – duties than the systematisation of criminal law. According to the Modern or Sociological School, criminal jurisprudence should be considered "die Lehrmeisterin des Strafgesetzgebers".³⁴ Furthermore, it is her calling to fight crime, rather than to promote systemic unity in criminal law.³⁵ Liszt was convinced that "einer schärferen Betonung des Zweckgedankens"³⁶ would eventually transform criminal law scholars into criminal policy-makers:

In der Erfüllung dieser politischen Aufgabe wird die Strafrechtswissenschaft zur Kriminalpolitik.³⁷

His only concession to the sensibilities of legal scholars was the assurance that even criminal policy can be founded in scholarship, though not necessarily in law. Sociological and anthropological research will supply legal scholars with the necessary basis for policy-making in the field of criminal law.

The radical readjustment of the scientific basis of criminal law scholarship from practical philosophy to sociology must have sent scholars reeling. Their new task was to create systemic coherence in criminal policy on the basis of extralegal concepts and hypothe-

³¹ Liszt, "Über den Einfluß der soziologischen und anthropologischen Forschung auf die Grundbegriffe des Strafrechts" in *Strafrechtliche Aufsätze und Vorträge*, Vol. II (Guttentag 1905a) p. 77.

³² Liszt, "Die Aufgaben und die Methode der Strafrechtswissenschaft" in *Strafrechtliche Aufsätze und Vorträge*, Vol. II (Guttentag 1905b) p. 296.

³³ Ibid.

³⁴ Ibid. p. 293.

³⁵ Liszt, (1905a), p. 78.

³⁶ Ibid. p. 83.

³⁷ Liszt, (1905b), p. 293.

ses.³⁸ This notion of systematisation in criminal law seems to share a vital characteristic with its private law counterpart. Both systems are, at least in part, deductive in character. The main difference lies in the nature of the premises. Whereas the basis and driving force behind the systematisation of private law is internal, the method proposed by Liszt makes use of extralegal hypotheses. The line of demarcation between the Modern and the Classical School³⁹ is consequently not "derjenige zwischen Zweckstrafe und zweckfreier Strafe, sondern derjenige zwischen rechtlicher und außerrechtlicher Zwecksetzung".⁴⁰

It is obvious that Liszt intended to reform criminal law by reforming the process of systematisation. By introducing extralegal arguments into existing, predominantly dogmatic, legal institutions, Liszt hoped to cleanse criminal law from unnecessary abstractions:

Der Einfluß der kriminal-politischen Auffassung wird sich also in einer wesentlichen Einschränkung des rein logischen, begriffsmäßigen Elementes in unseren Strafgesetzbüchern wohlthätig äußern.⁴¹

Paradoxically, the purpose of the school's scientific readjustment of criminal law scholarship was to make its system less "systemic" in character. The "auf den Isolierschemel der logisch-juristischen Abstraktion gestellte Tat" should no longer be at the centre of the criminal law system. Instead a far more holistic concept, the life and attitude of the offender, came into play.⁴² Liszt's aversion to legal abstractions mirrors his deep distrust of the dogmatic quality of law. After all, legal dogmatics thrives on abstractions.⁴³ The emphasis on extralegal arguments indicates that the Modern School advocated a genetic, rather than a dogmatic perspective on law. It is the driving forces behind law, rather than law itself, that ought to excite the scholar.

6 Is there a perfect system?

In the 1830s, the main proponents of the German Historical School – Friedrich Carl von Savigny and Friedrich Julius Stahl – published works on the nature of legal systems and systematisation. Their aim was to reconcile the conflicting demands made on the systemic unity in law, by formulating a common method for jurisprudential systematisation, viz.

³⁸ Ibid. 294: "Das System der Kriminalpolitik ist noch nicht geschrieben".

³⁹ Liszt even refers to the "klassisch-juristische" School, see Liszt, (1905a) p. 85.

⁴⁰ Vormbaum, "Johannes Nagler" in *Neue Deutsche Biographie*, vol. 18 (Duncker & Humblot 1997) pp. 715 f.

⁴¹ Liszt, (1905a), p. 88.

⁴² Ibid. p. 88f.

⁴³ Liszt's reliance on Rudolph von Jhering's later works has most certainly influenced his views on legal abstractions.

the doctrine of legal institutions.⁴⁴ Both authors were well aware of the difficulties. Legal systems seem to embody a number of conflicting, but nevertheless essential principles. The very essence of the system, its coherence, is supported by some aspects and threatened by others. In fact, just like oil and water do not mix unless an emulsifying agent is added, form and substance seem to be subjected to opposing forces. True to its origin in German idealistic philosophy, the School refused to choose form over substance or vice versa. In order to reconcile the opposites, Savigny and Stahl instead turned to nature for inspiration. The organic quality of living things provided them with a template for a “living”, continuously developing, legal system. Opposites are, according to this view, not a curse, but a blessing. The tension emanating from the interplay of opposites is the silent and unmoving force behind the system’s continual development. As a consequence, the construction of a perfect, albeit momentary system requires a formidable balancing act. The excellence of legal scholars is measured by how well they manage to strike a balance between the conflicting aspects of law.

One could argue that the history of both private law and criminal law scholarship has proved Savigny and Stahl wrong. In both instances legal scholars have failed to achieve the required balance. An unusual degree of systemic unity characterises the general part of private law. The strength of the system, which is due partly to its abstract nature, partly to its “closed” or dogmatic character, actually manages to make the rationale behind its rules and principles almost invisible to legal scholars. A curious example of this phenomenon is the hue and cry caused by a proposed redrafting of the general part of the *Bürgerliches Gesetzbuch* (BGB). The proposed amendment concerned the introduction of a specific category of persons, viz. consumers, into the general part of the code. To a Swedish jurist, the reactions of German legal scholars may have seemed excessive, but there is no denying that the concept stuck out like a sore thumb among the noble abstractions of the *Professorenrecht*. Long dead Roman jurists were invoked to stop German private law from straying off the well-worn path of individual freedom.⁴⁵ Any objection, like the astute observation that individual freedom has never been absolute, was dismissed out of hand. Judging by the tenor of the discussion, most private law scholars are particularly ill-equipped to assess the ideological consequences of law reforms.

Whereas change within the private law system is painful and yet at the same time both obvious and comprehensive, the same could hardly be said for criminal law. Here change would seem to be more insidious. Despite his radical program, Franz von Liszt always maintained that the proposed changes should be considered reforms, and not a revolu-

⁴⁴ See Sandström, *Rättsvetenskapens princip. Till frågan om rättsvetenskapens värdelöshet och Friedrich Julius Stahls rättsinstitutslära*, (Institutet för rättshistorisk forskning 2004) pp. 219 ff.

⁴⁵ The freedom, so eloquently defended by German private law scholars, is the so-called *Privatautonomie*, a general right for persons to act freely according to their will, from which freedom of contract often is derived. The *Privatautonomie* is an obvious liberal construct – dating back to the 18th and 19th centuries – that has acquired an almost transcendental quality in private law.

tion, of the criminal law system. This is, in a sense, the hallmark of a “weak” or underdeveloped system. It is wide open to and defenceless against external influence. Ideological shifts, even short-lived changes in public opinion, can result in partial and inconsistent law reforms, leaving criminal jurisprudence in tatters. It is fair to assume that the fragmentation of law will prove detrimental to legal certainty in the application of criminal law. On the other hand, criminal law scholars are much less likely to repress their insights into the ideological dimensions of law. Change would seem to be the natural state of the criminal law system. The scholars’ understanding of the driving forces behind these changes seems superior to that of their private law counterparts. As a consequence, criminal law scholars seem to be drawn to the fringes of legal scholarship, in particular to legal history, theory and philosophy, and beyond.

This is a tale of two systems. Whether this tale is proof of a deeply flawed method in jurisprudence or not, is a question that defies a simple answer. The difficulty lies in the very nature of a system. Systems do not appear out of thin air. They are created – by humans – to serve a particular interest or meet a specific need.⁴⁶ Hence, the truth of a legal system largely depends on its perceived function. Despite this concession, it is difficult not to share Savigny’s dream of a perfect legal system, in which coherence and *teleos* are given equal importance.

⁴⁶ Stahl, *Die Philosophie des Rechts nach geschichtlicher Ansicht*, Vol 1 (Mohr 1830) pp. 5f.