

Special Issue:

**A Forum on Markus Dubber’s ‘New Legal Science in the
Dual Penal State’**

Introduction

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Markus Dubber’s essay ‘New Legal Science in the Dual Penal State. Critical Analysis of Law and the Legitimacy of State Power’¹, published in this journal, is a deliberately provocative intervention. It does not offer a modest proposal for incremental reform of comparative criminal law scholarship; it stakes out a comprehensive claim about what he thinks has gone wrong with the study of law on both sides of the civil-law/common-law divide, and what a genuinely non-parochial, critical legal science might look like instead. Dubber’s controversial diagnosis is that legal scholarship in the civil-law world remains attached to a conception of ‘legal science’ whose formalism, doctrinalism, and self-referentiality have insulated it from the fundamental question of the legitimacy of state power, while common-law scholarship, having abandoned any comparable methodological ambition since the advent of Legal Realism, has settled into a rule-cynical, result-oriented pragmatism equally incapable of sustained critique. Building on his earlier work on the ‘dual penal state’ and the parallel modes of governance he calls *law* and *police*, Dubber proposes ‘New Legal Science’ as a third way: an essentially contextual, comprehensive, and continuous critical analysis of the state’s exercise of coercive power—most acutely its penal power—measured against the touchstone of individual autonomy.

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1 Dubber, M.: ‘New Legal Science in the Dual Penal State. Critical Analysis of Law and the Legitimacy of State Power.’ *Bergen Journal of Criminal Law and Criminal Justice*, Special Issue, Volume 13, Issue 1, 2025, pp. 1–22.

Because the essay is so wide-ranging in its ambitions and so pointed in its critique of existing scholarly traditions, a deliberately diverse group of criminal law scholars, working across common-law and civil-law systems and across several continents, was invited to respond to it. The resulting collection does not converge on a single verdict. Some contributors embrace the diagnosis while pressing Dubber to sharpen its conceptual apparatus; others question whether the diagnosis and the proposed remedy actually belong together; still others test the New Legal Science idea against the realities of legal systems and normative political ideals that sit outside the essay's principal frame of reference. Taken together, the comments illustrate both the fertility of Dubber's proposal and the difficulty of translating a call for a shared, critical approach into an actual research program.

Several contributions take up Dubber's central diagnosis of parochialism directly. **Anna Błachnio-Parzych** examines whether the assumption underlying the whole project—that legal scholarship, and criminal law scholarship in particular, suffers from a peculiarly self-enclosed, nationally bounded discourse—is well founded. Largely agreeing with Dubber's diagnosis, she argues it is nevertheless incomplete in that it does not cover all the circumstances affecting the predominantly local nature of criminal law scholarship, a field of study inherently more provincial than others due to its domestic nature, its link to state sovereignty, and the crucial role of natural languages in statutory interpretation. She emphasizes that the idea of New Legal Science requires a clear account of the role of the state in social life and of the desired relationship between penal law and penal police. **Adriano Teixeira** interrogates the concept of parochialism from the vantage point of the civil-law tradition. He argues that Dubber understates the extent to which a transnational criminal law science has already emerged through sustained dialogue among German, Spanish, Italian, Portuguese, Latin American, Japanese, and Chinese scholars, increasingly in exchange with the common law. He also rejects the claim that German scholarship lacks critical engagement with the legitimacy of state punishment, arguing that it has long combined analytical precision with liberal-constitutional legitimacy critique. He concludes that Dubber's project, while worth pursuing, is only 'new' relative to a caricatured version of the 'old' German-influenced science. Writing from a Nordic perspective and building on his own earlier review of *The Dual Penal State*, **Kimmo Nuotio** situates the essay within Dubber's longer trajectory, largely endorsing the diagnosis of scholarly complacency but questioning the fruitfulness of the civil-law/common-law dichotomy as described in the essay. He also questions how far a legal science grounded in Enlightenment values of autonomy and rule of law can travel beyond the Western legal orders that produced them, pointing to the need for a dialogue with non-Western traditions as the only way to measure the true value of the Enlightenment's heritage today.

Other contributors focus on the second pillar of Dubber's argument: the claim that a critical legal science must be organized around the legitimacy of state power, tested by reference to individual autonomy. **Julieta Di Corleto** reads the essay from the vantage point of feminist legal theory and argues that an autonomy-based criterion of legitimacy presupposes an abstract, undifferentiated individual, and that without an explicit account of how race, class, and gender shape the unequal distribution of autonomy itself, it offers too little guidance for a critique of law's structural hierarchies. She also cautions that a critical project aspiring to bridge common-law and civil-law traditions may, if unreflective about the hierarchies internal to legal academia, eclipse the voices it does not take as its reference points. **Abhinav Sekhri** challenges Dubber's classification of former colonies of the British Empire as part of the 'common-law' world and extends the inquiry beyond the essay's own frame of reference by asking what New Legal Science would look like applied to a postcolonial jurisdiction, taking India as a test case. India's constitutional order provides an explicit axis for external critique through enforceable fundamental rights, but any straightforward legitimacy test is complicated by the relationship between enforceable and non-enforceable constitutional values. He sees a basic problem with the New Legal Science project here: its prong of external critique often involves interpretive questions about the values at the core of any system and this prompts judicial intervention, which in the case of India has led to internal inconsistencies.

A third group of comments raises methodological and conceptual objections. **Stefano Manacorda** situates Dubber's comparative method against the tradition of Fletcher, Delmas-Marty, and Sieber, and praises the ambition behind his attempt to move past the civil-law/common-law divide, noting at the same time that the comparison, resting almost entirely on Germany and the United States ('a significant but limited sample of jurisdictions'), undercuts its universalist aim. He also notes that having recourse to 'doctrinal analysis' (*Rechtsdogmatik*) to criticize the exercise of punitive power is, from a European perspective, far from unprecedented, and asks how far the search for convergence across legal traditions can be pushed without collapsing into precisely the kind of totalizing ambition the essay otherwise disclaims. He concludes that the essay's value lies more in its stimulation of debate than in its novelty. **Martin Mindestrømmen** offers three sharp critiques. First, he thinks Dubber's proposal lacks conceptual clarity in that it never settles on a clear definition of 'legal science', leaving it unclear what exactly is being criticized. Second, he notes the lack of support for central empirical claims, though the only example Mindestrømmen himself gives is the posited almost complete lack of interest in methodological speculation in common-law countries. Finally, he takes issue with what he sees as an outdated reliance on ethos as an argumentative style. He concludes by calling for a humbler, more empirically grounded legal science, which he sees as a rising tendency in Scandinavian academia. **Aya Gruber** shares Dubber's goal of scrutinizing state coercion but argues that New Legal Science conflates reducing scholarly parochialism with critiquing carceral power, leaving the formalism/realism tension unresolved rather than overcome. She finds the

‘parochialism’ label too elastic and disputes that ‘critique of coercive power’ is a shared first principle, since progressives themselves diverge over whether state coercion is the problem or the solution. She doubts the project deserves the label ‘science’ at all, seeing it instead as one more post-realist approach. Finally, **Eric Hilgendorf** endorses the essay’s emphasis on criminal law’s distinctive role in constraining state power, but disputes Dubber’s genealogy of legal science in civil-law countries. In his view, the historical roots of a *systematic* criminal legal science lie less in Savigny’s historicist, *Volksgeist*-oriented jurisprudence—a doctrine long since abandoned—than in the Enlightenment-inflected tradition associated with Feuerbach, and in the idea of criminal law as an instrument for restraining state punitive power (von Liszt’s ‘Magna Carta of the offender’). He adds that contemporary criminal law scholarship already has a whole arsenal of control tools—teleological interpretation, the proportionality principle, and above all constitutional and fundamental-rights review—and he closes by agreeing with Dubber on the need for greater interdisciplinarity, pointing to some approaches that, following in Jhering’s footsteps, see lawmaking and interpretation as a ‘social technology’ controlled and guided by legal science.

Read together, these responses do more than annotate Dubber’s essay; they stage the very cross-systemic conversation that New Legal Science calls for, conducted by scholars trained in different traditions. Whether or not the project succeeds in producing a single shared methodology—and several contributors and this editor doubt that it either can or should—the exchange collected here demonstrates that the underlying question Dubber poses cannot be dismissed: how legal scholarship, across its parochial divides, might do a better job of holding the state’s exercise of coercive power to account.