

A New Legal Science Instead of an Old Parochial and Uncritical Criminal Law Science?

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Dubber's comprehensive article offers multiple topics for discussion. In this brief commentary, I will discuss only two of them: the terms 'parochialism' and 'critical analysis of the legitimacy of state power'. They seem to be key to both Dubber's criticism of the 'old' science and his suggestion of a new one.

1. Parochialism

The article in question begins by stating that

'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.'¹

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1 Dubber (2025) p. 1. See also Dubber (2018) p. 4, *passim*.

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With regard to the civil law tradition (where I include myself, and on which I feel comfortable commenting) and more specifically to Germany, the criticism is even harsher in his book *The Dual Penal State*, in which Dubber refers to ‘a well-entrenched tradition of self-complacency that proceeds from an assumption of superiority vis-à-vis other states, including but certainly not limited to the United States’.²

With this criticism, Dubber seems to either ignore or implicitly reject the idea of an ‘international criminal law science’,³ as developed by Roxin in particular.⁴ This concept refers to an activity that does not engage in legal comparison in the traditional sense, but rather attempts to draft supranational rules for situations that can arise in any country.⁵ As further developed by Greco, the universality of criminal law is rooted in the distinction between law and power: the essence of the law lies not in authority but in its underlying *reasons*, which claim universal validity. As such, debates on the legitimacy and application of criminal law should not be limited by national borders, even though national specificities remain relevant.⁶

Of greater pertinence in the present context is the fact that ‘universal criminal law’ is not merely an ideal, but a notion that has already been put into practice, albeit as an ongoing, continuous effort. There is a lively exchange among German, Spanish, Italian, Portuguese, many Latin American, Japanese, and Chinese scholars (*inter alia*), all of whom are bound together by a common normative foundation.⁷ Without denying the well-justified influence of German *Rechtsdogmatik*, one can now speak of an authentic exchange or dialogue, rather than of a mere import-export process.⁸

A dialogue with the doctrines of the common law world is also noteworthy. For example, the reception, albeit partially critical, of the harm principle.⁹ More palpable are the fruits of scientific exchange with the ‘just deserts’ movement¹⁰ in the field of sentencing

2 Dubber (2018) p. 2.

3 Expression coined by Schünemann (2001) p. 1.

4 Roxin is one of the main targets of Dubber’s book. See e.g. Dubber (2018) p. 91, where he denounces Roxin’s supposed ‘insistence on engaging in “scientific” doctrinal “describing” – rather than “theorizing”’, adding that ‘Roxin shows remarkably little interest in a close analysis of actual positive German law, relying instead on the intuited confirmation of the status quo as defined (or intended) by the “the legislator”’. See also Dubber (2018) pp. 89-90.

5 Schünemann (2001) p. 1.

6 Greco (2015) pp. 46 et seq, 55 et seq.

7 Which Schünemann (2015) p. 236, and (2016) pp. 654, 665, refers to as the *mos analytico-philosophicus civitatis iuris*.

8 On the dangers of focusing on the export of criminal science, see Hörnle (2016) p. 292.

9 Seher (2000); Roxin/Greco (2020), § 2 Mn. 123.

10 Von Hirsch (1976).

theory.¹¹ What is more, a number of authors from that legal tradition – such as Douglas Husak, Antony Duff, and Stuart Green – have recently been widely read and translated.

However, the alleged parochialism (and the implied rejection of a universal criminal science along the lines mentioned above) seems to have, in Dubber's eyes, a *more profound* source. The unifying factor that promotes these dialogues would, according to him, stem from a superficial passion for taxonomy and labelling, leading to an uncritical and positivistic approach. As he writes:

‘A comparative analysis of German criminal law is unlikely to unearth ready-made responses to the fundamental challenge of liberal penalty because German criminal law does not, as a whole, concern itself with basic matters of the legitimacy of state penal power.’¹²

This leads to our next topic.

2. Critique of the Legitimacy of State Power

In his book, Dubber concludes that German criminal science reflects the idea that criminal law is merely a means of interpreting the *legislator's commands*. He refers to the

‘absence of a critical analysis of these positive norms in light of what is considered an unscientifically external – and therefore inapposite – standard of justice, legitimacy, or right.’¹³

His ‘New Legal Science’ would be different. What is new and modern about it is a ‘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.’¹⁴

11 Von Hirsch (1993); Hörnle (1999); Frisch et al. (2003). See another example of Anglo-German dialogues in Ambos et al. (2025).

12 Dubber (2018) p. 17. See also p. 27.

13 Dubber (2018) p. 92.

14 Dubber (2025) p. 9.

Of course, there is nothing wrong with critiquing the legitimacy of the state's exercise of coercive power; rather, the opposite is true. What is questionable is whether that is indeed a *new* enterprise vis-à-vis the 'old' criminal law science, especially the German-influenced one that he relentlessly criticizes.¹⁵

One can always question what is meant by 'criticism' or 'critical'. Discussing this would go beyond the scope of this brief commentary. In any case, there is neither the space nor the need to mention every critical analysis of the foundations of criminal punishment and criminal law in the continental tradition.¹⁶ Furthermore, the criminal policy debate, characterised by a rigorous examination of legislative initiatives by criminal law scholars, has remained historically intense. In addition to the most representative example — the liberal-leaning Alternative Draft of the German Penal Code (*Alternativ-Entwurf*) — there are countless others.¹⁷

Most importantly, this art of foundational or 'external' reflection is not usually divorced from the day-to-day internal work and analysis undertaken both in positive law and in case law. I disagree with Dubber's portrayal of German criminal law science as merely an uncritical descriptive enterprise.¹⁸ One should not confuse rigour and analytical precision with blind or meaningless 'taxonomic bookkeeping'.¹⁹ Rather, what can be observed is a combination of analytical and systematic precision with philosophical reflection and established liberal-constitutional principles.²⁰ What is often overlooked is that this doctrinal approach amounts to paying special attention to, and showing authentic care for, concrete problems and individual cases, without resorting to an ad hoc, merely result-oriented method.²¹ While this may not be as stimulating or appealing as the role of a bold, sophisticated external critique, its ability to ensure a liberal criminal law has yet to be properly recognised.

15 Similarly, in response to similar criticism from the 'critical theory' tradition Baur/Gerson (2024) p. 275.

16 One could just recall Schünemann's idea of the *overkill* nature of modern criminal law and the resulting limitations for every democratic constitutional state (Schünemann (2016), p. 654). See also Greco's idea of the *singularity of punishment*: 'Reflection on punishment only exists against the backdrop that punishments are not something good, but rather an evil whose existence therefore requires justification' (Greco (2023), p. 418). Consider also the recent, multifaceted discussion about the legitimacy of state punishment of marginalised groups in society (Silva Sánchez (2018); Cigüela Sola (2019); Coca Vila (2023); see also Zaibert et al. (2025)).

17 Baumann et al. (1966).

18 Dubber (2025) p. 15; in similar critical sense, Weigend (2025) p. 632.

19 Dubber (2018) p. 79.

20 Schünemann (2015) pp. 223, 236.

21 As Hörnle pointed out, 'The internal perspective is a normative perspective: it is focused foremost on the interpretation of positive law, but not exclusively. It is also focused on finding the appropriate, just solution for a legal conflict', see Hörnle (2013) p. 209. See also Baur/Gerson (2024) p. 269, who highlight the power of criticism 'from within'.

3. Concluding Remarks

There is no doubt that the content of Dubber's 'New Legal Science' should be promoted. This is especially true given that it is said to pursue a critical analysis of the law, in the sense that it purports to critique the exercise of state power through law, both internally and externally.²² However, this project is only novel through its caricatured view of the 'old' criminal law science, especially the continental version under German influence.

22 Dubber (2025) p. 15.

References

- Ambos et al. (eds.)** (2025) *Core Issues in Criminal Law and Criminal Justice* (Vol. 3). Cambridge University Press. <https://doi.org/10.1017/9781009038126>.
- Baumann J et al.** (1966) *Alternativ-Entwurf eines Strafgesetzbuches*. Mohr-Siebeck.
- Baur A / Gerson O** (2025) Zur „kritischen Strafrechtswissenschaft“. *Neue Strafrechtswissenschaft* 4, 265.
- Ciguela Sola** (2019) *Crimen y castigo del excluido social: sobre la ilegitimidad política de la pena*. Tirant lo Blanch.
- Coca Vila I (ed.)** (2023) *Pena y vínculo político. Sobre el castigo no-paradigmático en el Derecho penal del ciudadano*. Atelier.
- Dubber M D** (2018) *The Dual Penal State: The Crisis of Criminal Law in Comparative Historical Perspective*. Oxford University Press. <https://doi.org/10.1093/oso/9780198744290.001.0001>.
- Dubber M D** (2025) 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* 14(1). <https://doi.org/10.15845/bjclcj.v13i1.4525>.
- Frisch W et al.** (2003) *Tatproportionalität. Normative und empirische Aspekte einer tatproportionalen Strafzumessung*. C. F. Müller.
- Greco L** (2015) *Strafprozesstheorie und materielle Rechtskraft*. Duncker & Humblot.
- Greco L** (2023) Zur Singularität der Strafe. *Zeitschrift für die Gesamte Strafrechtswissenschaft* 135, 378. <https://doi.org/10.1515/zstw-2023-0018>.
- Hörnle T** (2013) Moderate and Non-Arbitrary Sentencing Without Guidelines: The German Experience. *Law and Contemporary Problems* 76(1), 189.
- Hörnle T** (2016) Plädoyer für eine transnationale Strafrechtswissenschaft. In eds. Tiedemann et al., *Die Verfassung moderner Strafrechtspflege: Erinnerung an Joachim Vogel*. Nomos, 289. <https://doi.org/10.5771/9783845276953-289>.
- Roxin C / Greco L** (2020) *Strafrecht Allgemeiner Teil*, (5th ed.). C. H. Beck.
- Schünemann B** (2001) Strafrechtsdogmatik als Wissenschaft. in *Festschrift für Claus Roxin*. C.H. Beck, 1. <https://doi.org/10.5771/9783845276953-289>.
- Schünemann B** (2015) Vom schwindenden Beruf der Rechtswissenschaft unserer Zeit, speziell der Strafrechtswissenschaft. *Selbstreflexion der Rechtswissenschaft*. Mohr Siebeck, 223.
- Schünemann B** (2016) Über Strafrecht im demokratischen Rechtsstaat, das

unverzichtbare Rationalitätsniveau seiner Dogmatik und die vorgeblich progressive Rückschrittspropaganda. *Zeitschrift für Internationale Strafrechtsdogmatik* 10, 654.

Seher G (2000) *Liberalismus und Strafe. Zur Strafrechts philosophie von Joel Feinberg*. Duncker & Humblot. <https://doi.org/10.3790/978-3-428-50131-1>.

Silva Sánchez J M (2018) *Malum passionais. Mitigar el dolor del Derecho penal*. Atelier.

Weigend T (2025) AufgabeneinerNeuenStrafrechtswissenschaft–Gedanken zu Markus D. Dubber, „Neue Rechtswissenschaft im doppelten Strafstaat“. *Zeitschrift für die gesamte Strafrechtswissenschaft* 137, 630. <https://doi.org/10.3790/978-3-428-50131-1>.

Von Hirsch A (1976) *Doing Justice: The Choice of Punishments*. Hill and Wang.

Von Hirsch A (1993) *Censure and Sanctions*. Clarendon Press.

Zaibert et al. (ed.) (2025) *Responding to the culpable State. Is sentence mitigation appropriate?* Hart. <https://doi.org/10.5040/9781509975686>.