

The Promise of German Criminal Law: A Science of Crime and Punishment

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A. Introduction

The system of German criminal law is the product of a centuries-long project of scientific discovery undertaken by scholars who traditionally have defined the science of criminal law (*Strafrechtswissenschaft*) in contradistinction to the markedly unscientific business of criminal justice policy (*Kriminalpolitik*¹). Insular and formalistic by design, the resulting highly differentiated taxonomy of doctrinal categories can claim only a loose connection to rules of positive law as codified in the general part of the German Criminal Code and instead derives more directly from scientific inquiries into the ontology of crime dating back to the early decades of the twentieth century.²

While this approach to law may strike Anglo-American observers as foreign, perhaps even as anachronistic, some features of German criminal law theory have attracted considerable attention among Anglo-American criminal law scholars, most notably the German system for the analysis of criminal liability, or “criminal offense system” (*Straftatsystem*). The *Straftatsystem* distinguishes between three levels of inquiry: satisfaction of all offense elements as defined in the statute

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¹ *Kriminalpolitik* can also be translated as criminal justice politics, which would make for a still starker contrast with *Strafrechtswissenschaft*.

² See generally Bernd Schünemann, *Strafrechtsdogmatik als Wissenschaft*, in *FESTSCHRIFT FÜR CLAUS ROXIN 1* (Bernd Schünemann et al. eds. 2001).

(*Tatbestandsmäßigkeit*), wrongfulness (*Rechtswidrigkeit*), and culpability (*Schuld*).³ This general analytic system applies to all questions of criminal liability, no matter what the offense. Underlying it is the notion that there is such a thing as a general part of criminal law – and of a criminal *code* – that contains the general principles of criminal liability governing all offenses defined in the criminal law’s – and the criminal code’s – special part.

Traditionally Anglo-American criminal law has broadly distinguished between elements of an offense (*actus reus* and *mens rea*), on one hand, and defenses, on the other, even if the question of what exactly counts as an offense element and what does not is often open to debate. (E.g., does mistake negate an offense element or does it constitute a separate defense? Is non-consent an offense element that is negated by consent or is consent a separate defense?) The German scheme, however, insists on a further distinction between two types of defense: justification and excuse. While this distinction is not unknown to traditional Anglo-American criminal law (see, e.g., the common law’s differentiation between “excusable” and “justifiable” homicide⁴), it has not been drawn quite as rigorously⁵ and comprehensively; furthermore, its cogency has met with considerable skepticism.⁶ Certainly no claim has been made in the Anglo-American literature that the distinction between justification and excuse represents a scientific discovery of the essential nature of crime.

This article provides an overview of the project of German criminal law science. We begin, in *Part B*, by exploring the origins of the discipline of German criminal law as a branch of legal science, constructed by legal scientists (i.e., law professors) engaged in the collective pursuit of truth. *Part C* highlights the professoriate’s traditional influence in shaping and policing German criminal law doctrine on the strength of their scientific expertise. We next consider, in *Part D*, how the absence of meaningful lay participation in the German criminal justice process contributes

³ For an excellent English-language exposition of the *Straftatsystem* by a leading German criminal law scholar, who retains some useful critical distance to it, see Wolfgang Naucke, *An Insider’s Perspective on the Significance of the German Criminal Law Theory’s General System for Analyzing Criminal Acts*, 1984 BYU L. REV. 305; see also GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 575-78 (1978).

⁴ See, e.g., 4 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 177-78, 182 (1769); see generally MARKUS D. DUBBER, *CRIMINAL LAW: MODEL PENAL CODE* § 3.2 (2002); MARKUS D. DUBBER & MARK KELMAN, *AMERICAN CRIMINAL LAW: CASES, STATUTES, AND COMMENTS* 499-509 (2005).

⁵ The Model Penal Code, for instance, only drew “a rough analytic distinction” between justifications and excuses. MODEL PENAL CODE COMMENTARIES art. 3, introduction, at 2 (American Law Institute ed. 1985).

⁶ See, e.g., Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 COLUM. L. REV. 1897 (1984).

to the scientific self-image of German criminal law. In *Part E*, we turn to the carefully defended autonomy of German criminal law science, which is meant to proceed along a path of scientific progress sheltered from the distorting influence of other disciplines within and outside law as well as, and most important, of criminal justice policymaking. Finally, *Part F* highlights the taxonomic ambitions and characteristics of German criminal law science, which resemble those ordinarily associated with certain biological sciences, most notably botany and zoology.

B. The Idea of Criminal Law Science

An eminent Spanish criminal law scholar recently praised the German system of criminal law as “an imposing construct that must be considered one of the great achievements of the human sciences.”⁷ The results of two centuries of German criminal law theorizing, and of well over a century of concerted doctrinal systematizing (beginning in earnest with the creation of the German Empire and its German Criminal Code in 1871), are indeed impressive. Assembled by generations of scholars and their stables of assistants, who themselves join the professoriate after producing – as is the German custom – two book-length monographs on a criminal law subject, the German system of criminal law is unparalleled in comprehensiveness and complexity.⁸

The serious and sustained attention criminal law theory has received in Germany frequently has been contrasted with the comparative neglect of this subject in Anglo-American jurisprudence, which traditionally has taken a greater interest in matters of private law and, at least in the United States, of constitutional law.⁹

This contrast has not gone unnoticed in the German literature.¹⁰ A popular treatise, for example, justifies the very project of German criminal law theory by citing the

⁷ Enrique Gimbernat Ordeig, *Sind die bisherigen dogmatischen Grunderfordernisse eines Allgemeinen Teils geeignet, dem heutigen Stand der Kriminalität, der Strafzumessung und des Sanktionensystems zu genügen*, in *KRISE DES STRAFRECHTS UND DER KRIMINALWISSENSCHAFTEN?*, at 152, 165 (Hans-Joachim Hirsch ed. 2001). On the history and scope of the influence of German criminal law in Spain, see José Cerezo Mir, *Die deutsche Strafrechtswissenschaft aus spanischer Sicht*, in *DIE DEUTSCHE STRAFRECHTSWISSENSCHAFT VOR DER JAHRTAUSENDWENDE 255* (Albin Eser et al. eds. 2000).

⁸ See HANS-HEINRICH JESCHECK & THOMAS WEIGEND, *LEHRBUCH DES STRAFRECHTS: ALLGEMEINER TEIL* 199 (5th ed. 1996) (continuing effort “to improve and to supercede” German criminal law through “renovations of the doctrinal edifice”).

⁹ See, e.g., George P. Fletcher, *The Fall and Rise of Criminal Theory*, 1 *BUFF. CRIM. L. REV.* 275 (1998).

¹⁰ See, e.g., Bernd Schünemann, *Die deutsche Strafrechtswissenschaft nach der Jahrtausendwende*, 148 *GA* 205 (2001) (reviewing *Die deutsche Strafrechtswissenschaft vor der Jahrtausendwende: Rückbesinnung und Ausblick* (Albin Eser et al. eds. 2000)).

famous nineteenth-century English case of *Regina v. Dudley & Stephens*, about murder and cannibalism after a shipwreck on the high seas.¹¹ We need a theory of crime that attempts to “theoretically capture punishable conduct in its entirety through the enumeration of general characteristics,” the authors explain, precisely because without it the “solution of this case remains uncertain and dependant upon emotional considerations.”¹² The English judges would have been better off, so the argument goes, had they enjoyed the benefit of the tripartite analysis of criminal law developed by German criminal law theory (decades *after* the decision in *Dudley & Stephens*), with its “differentiation of the concept of crime into offense definition, illegality, and guilt and the further distinctions connected to it, such as that between necessity as a justification and as an excuse.”¹³ Had they not proceeded upon the – it turns out, incorrect – assumption that necessity could only justify, but not excuse, the authors suggest, the English judges would have solved the case correctly, namely by acquittal on the ground of necessity as an excuse, rather than sentencing the defendants to death for murder, only to see the sentence reduced to six months by way of royal pardon later on.

Now the notion that there could be such a thing as a *solution* to a case, which might be correct or not, is quite foreign to Anglo-American law, which instead emphasizes that there are always different ways of analyzing a case, and different ways of resolving it, depending not only on the formulation of the relevant legal norms but also, equally important, on the statement of the facts of the case.¹⁴

¹¹ (1884) 14 QBD 273 (CCR). In this classic case, Dudley and Stephens were convicted of murder for killing (and then cannibalizing) a fellow occupant of their lifeboat. The English court rejected the argument that the defendants acted under circumstances that forced them to choose the lesser of two evils (causing the death of a single weakened person vs. permitting the deaths of several persons, including the defendants, the victim, and a fourth occupant of the boat). Note, however, that the Queen then commuted their death sentences to six months’ imprisonment. For a detailed analysis of this case from a comparative perspective, see DUBBER & KELMAN, *supra* note 4, at 191-97; see generally A.W.B. SIMPSON, *CANNIBALISM AND THE COMMON LAW: THE STORY OF THE TRAGIC LAST VOYAGE OF THE MIGNONETTE AND THE STRANGE LEGAL PROCEEDINGS TO WHICH IT GAVE RISE* (1984).

¹² JESCHECK & WEIGEND, *supra* note 8, at 195.

¹³ *Id.* Note, however, that the authors also warn of the “danger of a criminal law doctrine that excessively relies on abstract formulas” and “disregards the particularities of the individual case.” *Id.* at 195-96 (emphasis in original).

¹⁴ On the notion of a solution of a legal case, as opposed to a resolution of a legal dispute, in German law generally speaking, see JAMES E. HERGET, *CONTEMPORARY GERMAN LEGAL PHILOSOPHY* 118 (1996). Herget also notes the absence of dissenting opinions (except in opinions of the German Constitutional Court), which would be incompatible with the view that the court had arrived at the correct solution of the case before it. *Id.* at 146-47. For an interesting exploration of similar issues in a broader context, see Vivian Grosswald Curran, *Romantic Common Law, Enlightened Civil Law: Legal Uniformity and the Homogenization of the European Union*, 7 COLUM. J. EUR. L. 63 (2001).

Similarly unfamiliar is the idea that a system of criminal law would qualify as a *scientific* achievement (never mind one that would rank among “the great achievements of the human sciences”). These two features of German criminal law are related: there is a solution to every case precisely because law is a science.

That German criminal law should consider itself a science may come as a surprise to the Anglo-American observer. But it makes perfect sense within the context of German law generally. For in Germany, all of jurisprudence has been considered a science since the nineteenth century.¹⁵ The science of criminal law (*Strafrechtswissenschaft*) is simply one branch of the science of law (*Rechtswissenschaft*) – the others are civil law and public law. There was a time when Anglo-American jurisprudence, too, considered itself a science, with law libraries as its laboratories.¹⁶ But that time has passed so long ago, and the idea of a legal science was laid to rest so insistently and completely by the Legal Realists of the 1920s and 1930s, that few Anglo-American lawyers even remember it.¹⁷ Today whatever is scientific about law is borrowed from the unquestioned (or at least less questioned) scientific status of the social and behavioral sciences, economics chief among them, with sociology a remote second.¹⁸

¹⁵ On the origins of the German idea of legal science, and its influence on nineteenth century American jurisprudence, see generally Mathias Reimann, *Nineteenth Century German Legal Science*, 31 B.C. L. REV. 837 (1990).

¹⁶ Michael H. Hoeflich, *Law & Geometry: Legal Science from Leibniz to Langdell*, 30 AM. J. LEGAL HIST. 121 (1986); Marcia Speziale, *Langdell's Concept of Law as Science: The Beginning of Anti-formalism in American Legal Theory*, 5 VT. L. REV. 1 (1980); Howard Schweber, *The Science of Legal Science: The Model of the Natural Sciences in Nineteenth-Century American Legal Education*, 17 L. & HIST. REV. (1999).

¹⁷ The German analogue, and precursor, of American Legal Realism, the Free Law School (*Freirechtsschule*) of the early twentieth century, had no lasting effect on German jurisprudence, in stark contrast to Realism's transformative effect in the United States, which continues to this day, through Realism's contemporary heirs, “Law and Economics,” “Law and Society,” and “Critical Legal Studies.” In fact, German criminal law bears a certain stylistic resemblance to classical formalism in American law prior to Realism's arrival. See James E. Herget & Stephen Wallace, *The German Free Law Movement as the Source of American Legal Realism*, 73 VA. L. REV. 399 (1987).

¹⁸ Criminal law as a science (*Strafrechtswissenschaft*) must be distinguished from the attempt to integrate it into a more comprehensive scientific program, which includes other (social) sciences as well. In Germany, this program is generally associated with its early champion, Franz v. Liszt, who in the late nineteenth century gave it the somewhat awkward, but still popular, name “general criminal legal sciences” (*gesamte Strafrechtswissenschaften*), encompassing both criminal legal science and “criminal sciences,” including most importantly criminology.

C. The Role of the Professoriate

As a science, German criminal law is the province of scientists. As criminal law scientists, German professors traditionally have enjoyed significant influence on the doctrine of criminal law, though that influence has begun to fade somewhat over the past few decades. Historically, the significance of the German professoriate has dwarfed that of the German judiciary – and certainly that of Anglo-American legal scholars. It is a commonplace that German law, as the law of all civil law countries, is codified, rather than “judge-made.” German judges, as the theory goes, are applying the law, rather than making it, by “subsuming” fact patterns under codified legal norms. This much is true. What’s easily forgotten, however, is that the statutory norms the courts are applying to facts, particularly in the general part of criminal law, often do not say very much at all, and that they are, in fact, incomplete by design. The ambiguities and gaps in the code are filled by the professor-scientists, who through continuous scientific research and discourse refine the science that is the criminal law, and whose discoveries aid – or at least *should* aid – judges in resolving particular cases and, more ambitiously still, the legislature in reforming the criminal code.

The German criminal code thus is remarkably short. It’s noteworthy not so much for what it contains, but for what it leaves out. One example is the definition of the various types of mens rea – intention (*Vorsatz*) and negligence (*Fahrlässigkeit*). The American Model Penal Code devotes great effort to this task. It would be no exaggeration to say, in fact, that the section defining the four mental states (purpose, knowledge, recklessness, and negligence) is the core of the entire Model Code, and its most important contribution to law reform.¹⁹ The German criminal code, by contrast, does not define the mental element of crime. Definitions were proposed on the occasion of the basic reform of the general part of the German code in the 1970s.²⁰ They were removed, however, for the explicit purpose of leaving their continued refinement to the development of legal science.

Although the influence of the professoriate waned in the late twentieth century, it remains considerable to this day. German law students are required to take three semesters of substantive criminal law, and at least one semester of criminal procedure. These comprehensive courses traditionally have followed a strict lecture format, with the professor often sticking so closely to a prepared script that students’ lecture notes are bound and sold to incoming students. The primary

¹⁹ See DUBBER, *supra* note 4, § 4.2.

²⁰ ALTERNATIV-ENTWURF EINES STRAFGESETZBUCHES: ALLGEMEINER TEIL 56-57 (2d ed. 1969).

teaching tools are not collections of court opinions, but textbooks written by professors and, for more ambitious students, treatises.²¹

Note also that admission to the German bar, or entry into the legal profession, is not policed exclusively by members of the profession, as in the United States. Instead criminal law professors – acting in their capacity as servants of the state – participate in administering the official “state examinations” (*Staatsexamen*) required for admission to legal practice.²²

The professoriate’s influence on the doctrine of criminal law, however, goes beyond the training, and official examination, of its practitioners. Traditionally, criminal law professors have played an important role in criminal code drafting and reform. The Bavarian Penal Code of 1813, hailed as the first modern German criminal code, was drafted by a professor, Paul Johann Anselm Feuerbach,²³ who is considered the founder of modern German criminal law. Feuerbach’s draft in turn resulted from his criticism of a draft submitted by another professor (by the curious name of Gallus Aloys Kleinschrod).²⁴ Professors took part in the fundamental reform of the German criminal code in the 1970s not only directly, through participation in the official parliamentary drafting commission, but also indirectly, through the development and publication of a comprehensive, and influential, “Alternative

²¹ Recently law lectures at German universities have become somewhat more interactive and court opinions are beginning to receive more attention in teaching materials as a result of several factors, including the general lowering of professors’ status vis-à-vis the student body in the wake of the 1960s student movement, attempts to reform German legal education loosely based on an American model (including the introduction of teaching evaluations), and the growing sense (particularly among the professors themselves) that the professoriate’s influence on the judiciary, and the legislature, has diminished. Even some “casebooks” have begun to appear, starting with constitutional law, though they remain very much the exception.

²² There are two sets of state examinations, one following the completion of coursework, the other after a subsequent mandatory period of apprenticeship (*Referendariat*). Professors help administer the first set, which consists of written and oral examinations.

²³ 1775–1833. Feuerbach was the father of the important philosopher Ludwig Feuerbach (1804–72), and a colorful figure in his own right. After falling victim to an intrigue at the Bavarian Court, Feuerbach was appointed to a rural judgeship. There he found himself in the unusual position of applying the very code he had drafted. Finding the deterrence-oriented code overly strict and incapable of taking into account the culpability of individual defendants, Feuerbach grew frustrated and recorded his experiences in a series of popular case histories. He also wrote a highly scandalous book about a young man who one day walked into town after claiming to have been raised by wolves. Feuerbach suspected that he was the illegitimate offspring of a local aristocrat. See generally GUSTAV RADBRUCH, PAUL JOHANN ANSELM FEUERBACH: EIN JURISTENLEBEN (3d ed. 1969) (1934) (a biography of Feuerbach written by Gustav Radbruch, himself an important German criminal law scholar and justice minister in the Weimar Republic).

²⁴ 1762–1824.

Draft.”²⁵ Unlike the American Model Penal Code, which was drafted by the American Law Institute from 1952 to 1962 under the direction of Professor Herbert Wechsler of Columbia Law School with the significant contribution of leading judges like Learned Hand, the authors of the Alternative Draft had no institutional affiliation, or backing, beyond their status as criminal legal scientists.²⁶

To their great chagrin, the German professoriate had little influence on the recent revision of the code’s special part, raising the specter of “Legislation Without Criminal Legal Science.”²⁷ Legislatures’ failure to pay sufficient heed to advancements in German criminal legal science has become a common complaint among German criminal law professors.²⁸ The fear of irrelevance has spread from domestic law to international law, in particular the development of a system of European criminal law and of an international criminal law, associated with the creation of the International Criminal Court.²⁹

Based on a yet longer tradition is the professoriate’s participation in the judicial branch of government. Through the latter half of the eighteenth century, and in some German states until the beginning of the nineteenth century, the law faculties of German universities functioned as a kind of expert appellate court. In a famously cumbersome, and time-consuming, procedure known as *Aktenversendung*, judges would send the professors a sealed case file for their consideration. The faculty would then resolve the case, draft a decision (*ratio decidendi*), and return it to the judge, who would announce the judgment. This practice has been discontinued for some time, of course. But even today, German criminal law professors are qualified *ex officio* to assume judicial office.³⁰ Moreover, German criminal law

²⁵ JÜRGEN BAUMANN ET AL., ALTERNATIVE DRAFT OF A PENAL CODE FOR THE FEDERAL REPUBLIC OF GERMANY (JOSEPH J. DARBY TRANS. 1977).

²⁶ On the significance of the American Law Institute’s prestige for the Model Penal Code project, see Markus Dirk Dubber, *Penal Panopticon: The Idea of a Modern Model Penal Code*, 4 BUFF. CRIM. L. REV. 53 (2000).

²⁷ The title of the 1999 biannual meeting of German criminal law professors (Halle, May 1999) (“Gesetzgebung ohne Strafrechtswissenschaft?”).

²⁸ It has also become a popular conference topic. See, e.g., KRISE DES STRAFRECHTS UND DER KRIMINALWISSENSCHAFTEN? (Hans Joachim Hirsch ed. 2001).

²⁹ See, e.g., Cornelius Prittwitz, *Nachgeholte Prolegomena zu einem künftigen Corpus Juris Criminalis für Europa*, 113 ZStW 774 (2002).

³⁰ Any law professor is so entitled, provided he or she has successfully completed the second state examination. See DRiG (German Judiciary Law) § 7 (“Every law professor at a university within the jurisdiction of this law is authorized to hold judicial office.”). As a rule, law professors are appointed to positions on the appellate bench. Details of judicial appointments vary from state to state.

professors frequently produce so-called *Gutachten* (expert opinions) either for the defense or, less frequently, for the court.³¹ These detailed analyses of doctrinal questions can exert considerable influence on the court's decision, even if they do not determine the outcome.³²

The professoriate's greatest influence on German criminal law, however, has come not through teaching, state examinations, legislation, or adjudication, but through the publication of treatises, textbooks, and code commentaries. The doctrinal literature on German criminal law, which has been accumulating since the early nineteenth century, is vast in every respect. Not only does it reach every nook and cranny of doctrine; it creates, or rather discovers, the nooks and crannies in the first place. The comprehensive and complex artifice that is German criminal law is almost entirely a creation of the German professoriate. Even though the influence of the judiciary has increased over the past century, it still cannot match the scope and depth of the professoriate's continuing scientific output.³³

In the traditional German model of criminal law as science, to the extent that the judiciary participates in the construction of criminal law doctrine, it does so mostly by adopting a particular solution, or approach, favored by a particular scientific school. In fact, German judicial opinions in criminal law, of which there are many because every decision in every case must be supported by reasons in writing, read more like expert reports than like opinions of common law courts. They closely

³¹ Occasionally these expert opinions are transformed into separately published articles and monographs and thus contribute to German criminal law science. See, e.g., Harro Otto, *Keine strafbare Untreue im Fall Kohl*, in 36 RECHT UND POLITIK 109 (2000); see also Ex-Kanzler _ ex culpa? Interview mit dem Bayreuther Professor für Strafrecht Harro Otto zu seinem Rechtsgutachten zur „Parteispendeaffäre“ um Dr. Helmut Kohl, <http://www.alt.tip-bt.de/SS_00/Ausgabe_164/kanzler.html>. I am indebted to Sascha Ziemann for this reference.

³² For a recent example, consider the celebrated *Daschner* case, which involved the prosecution of police officers for the (threatened) use of torture against a suspected kidnapper. The court's decision in the case quoted extensively from a defense *Gutachten* prepared by a criminal law professor (Cornelius Prittwitz, Frankfurt) and devoted considerable effort to refuting the *Gutachten's* doctrinal analysis. *Schriftliche Urteilsgründe in der Strafsache gegen Wolfgang Daschner*, LG Frankfurt a.M., Feb. 15, 2005, <[http://www.lg-frankfurt.justiz.hessen.de/C1256E4B004692BD/vwContentByKey/W269PMLU645JUSZDE/\\$File/Pressemitteilung%20Urteilsgr%C3%BCnde%20Daschner%20u.a.%2017.02.05.pdf](http://www.lg-frankfurt.justiz.hessen.de/C1256E4B004692BD/vwContentByKey/W269PMLU645JUSZDE/$File/Pressemitteilung%20Urteilsgr%C3%BCnde%20Daschner%20u.a.%2017.02.05.pdf)>. I am indebted to Lutz Eidam for this reference.

³³ For instance, the massive *Leipziger Kommentar* on the German criminal code in its most recent complete edition—the 10th—takes up eight volumes and ca. 8,000 pages, published over the course of eleven years. LEIPZIGER KOMMENTAR: STRAFGESETZBUCH (Hans-Heinrich Jescheck et al. eds. 10th ed. 1978-1989); see also ADOLF SCHÖNKE & HORST SCHRÖDER, STRAFGESETZBUCH (Theodor Lenckner et al. eds. 25th ed. 1997) (ca. 2,390 pp.).

follow the tripartite analytic structure of criminal law science, which has remained more or less unchanged since it was developed by professors – not the judiciary or the legislature – in the early twentieth century. Generally short on facts, and long on legal rules, these opinions reflect the abstract style traditionally favored by German criminal law science.³⁴

It has been said that civil-law court opinions are addressed not so much to the public but to fellow judges. Although an obvious oversimplification, there is some truth in this observation, except that in the case of German criminal law, the audience includes not only one's judicial superiors, but the professoriate as well.

D. Substance and Procedure

The absence of a jury, and meaningful lay participation of any kind in the German criminal process, may further contribute to what an Anglo-American observer might regard as the formalism, if not outright obscurity, of German criminal law in general, and criminal court opinions in particular. German criminal law doctrine is literally self-referential – it is created by experts for experts, be they judicial or professorial.³⁵ There is no need to translate complex doctrinal constructs into jury instructions, or into a judgment that a layperson could understand, never mind render him- or herself (as a juror would). The intricacies of German criminal law doctrine in fact serve an important institutional function. They allow professional judges to dominate the few lay participants who remain in the German criminal process today. In the lower courts – not the lowest, which are run by a professional judge sitting alone – lay judges outnumber the (presiding) professional judge two-to-one. They could therefore, in theory, exert tremendous influence on decision-making. In practice, however, their impact is negligible, thanks in considerable part to the professional judge's expertise in a criminal law doctrine that is not only

³⁴ See JUTTA LIMBACH, *IM NAMEN DES VOLKES: MACHT UND VERANTWORTUNG DER RICHTER* 30-31 (1999). Judges, it should be noted, ordinarily are appointed following their successful completion of the second state examination. At that time they have no practical legal experience apart from the required general two-year apprenticeship (*Referendariat*) sandwiched between the first and second state examinations. Upon appointment, judges are promoted through the ranks from trial to appellate courts based on their performance, as evaluated by their superiors in the judicial hierarchy. (Law professors, by contrast, can be appointed directly to an appellate court. See *supra* note 30.)

³⁵ And so whatever constraints upon the accessibility of German criminal law doctrine are recognized, even in theory, tend to reflect concerns about its efficient implementation in routinized procedures by expert officials – “police, prosecutors, and courts.” JESCHECK & WEIGEND, *supra* note 8, at 198 (goals of clarity and simplicity).

enormously complex and comprehensive, but also appears – by and large – not in published statutes but in a forbiddingly inaccessible expert literature.³⁶

In Anglo-American criminal law, by contrast, a criminal law doctrine is only as good as a jury instruction. And of course the criminal judgment itself is famously oracular – in the absence of special verdicts and a justification, or explanation, of any kind, the jury's verdict of guilty or not guilty makes reference to no doctrine whatsoever. In fact, one of the functions of the American jury has long been its discretion to ignore the apparent demands of doctrine, and acquit in the teeth of the evidence. (*Conviction* through jury nullification is supposed to be prevented through the judge's power to acquit *non obstante verdicto*.)

The absence of the jury, along with a greater penchant for categorical separation, also helps explain the *substantiveness* of German criminal law, i.e., the comparative insignificance of evidentiary notions such as “affirmative defenses” or “burdens of proof” familiar from Anglo-American criminal law. To begin with, in a criminal process run by professionals, and professional judges in particular, rules of evidence play a less central role than in a process that places the ultimate decision regarding the sufficiency of the evidence in the hands of a group of more or less randomly selected nonexperts, as the contrast between a bench trial and a jury trial in the common law system makes clear. Without a group of impressionable and confusable laypeople, so the argument goes, there is less of a need to carefully limit what evidence is introduced and, once introduced, how it is to be presented, and weighed.

Unlike the common law trial, the German criminal process is based on the assumption that its goal is the discovery of truth by the court. In the inquisitorial model, the judge discharges his *duty* to find the truth by accumulating whatever evidence he finds most helpful in whatever form he deems most appropriate, and then considers that evidence as he sees fit.³⁷ Not only the jury is missing, in other

³⁶ On lay participation in the German criminal process, see Markus Dirk Dubber, *American Plea Bargains, German Lay Judges, and the Crisis of Criminal Procedure*, 49 STAN. L. REV. 547 (1997). For an excellent brief summary of German criminal procedure, see Thomas Weigend, *Germany*, in CRIMINAL PROCEDURE: A WORLDWIDE STUDY 187 (Craig M. Bradley ed. 1999). For an interesting recent account by a German lay judge of his experiences, see Ernst Köhler, *Mehr Selbstbewusstsein*, FRANKFURTER ALLGEMEINE ZEITUNG, Jan. 11, 2005, at 34. I am indebted to Lutz Eidam for this reference.

³⁷ § 261 StPO (*Grundsatz der freien Beweiswürdigung*); see CLAUS ROXIN, STRAFVERFAHRENSRECHT 84 (23d ed. 1993) (“the court determines the facts on its own (“instructs’ itself) and in this regard is not bound by the motions and declarations of the process participants”). This is not to say, of course, that enterprising criminal defense attorneys—especially in the past few decades—may not make every effort to shape the nature and import of the evidence that the presiding judge decides to collect. See Dubber, *supra* note 36.

words, so is the adversarial process. The judge is not only the weigher of evidence, but also its presenter.

As a result, evidentiary concerns that drive so much of Anglo-American criminal law – such as the definition of burdens of proof (production and persuasion), the selection of the proper evidentiary burden for a particular issue of concern, and the assignment of burdens of proofs to the parties – are of minor importance in German criminal procedure and of even less significance in German substantive criminal law. There are no affirmative defenses, for instance, no matter of what type (shifting only the burden of production or also the burden of persuasion, shifting the burden of proving the defense beyond a reasonable doubt, by clear and convincing evidence, or merely by a preponderance of the evidence),³⁸ nor is there a distinction between burdens of proof attaching to elements of an offense and those attaching to sentencing considerations, another question that has attracted much interest – and created much confusion – in Anglo-American criminal law.³⁹

The latter distinction, between burdens of proofs on matters of liability (or guilt) and matters of sentencing (or punishment), is irrelevant for another, important, procedural reason. Unlike the Anglo-American trial, there is no distinction, institutional or temporal, between the guilt and sentencing phases of the criminal process. The court decides both questions, and both questions at once, or rather *seriatim* during the same deliberation.⁴⁰

At bottom, the irrelevance of evidentiary matters in German substantive criminal law reflects a different relationship between substance and procedure. In Anglo-American law, criminal procedure traditionally has attracted the lion's share of doctrinal attention. Nothing illustrates the primacy of procedure in Anglo-American criminal law – as well as of course the *adversariness* of that procedure – than the basic conceptual framework of substantive criminal law, which divides the field of inquiry into “offenses” and “defenses.”⁴¹ The heart of substantive German

³⁸ Contrast Model Penal Code § 1.12 (burden of production) with N.Y. Penal Law § 25.00 (burden of persuasion); see also *Patterson v. New York*, 432 U.S. 197 (1977) (preponderance of the evidence); *Leland v. Oregon*, 343 U.S. 790 (1952) (beyond a reasonable doubt); see generally MARKUS D. DUBBER, EINFÜHRUNG IN DAS US-AMERIKANISCHE STRAFRECHT § 7 (2005).

³⁹ See generally NORA DEMLEITNER ET AL., SENTENCING LAW AND POLICY: CASES, STATUTES, AND GUIDELINES ch. 6 (2003).

⁴⁰ For a critical discussion of this practice, see WINFRIED HASSEMER, EINFÜHRUNG IN DIE GRUNDLAGEN DES STRAFRECHTS 100 *et seq.* (2d ed. 1990).

⁴¹ DUBBER, *supra* note 38, § 7.

criminal law, by contrast, is its “general theory of crime” which lays out the “general legal prerequisites of punishability.”⁴²

In German criminal law, substance takes priority over procedure. Substantive criminal law concerns itself with the legal principles that are then, subsequently, applied in the criminal process. How these principles are applied, or by whom, is irrelevant for purposes of determining what they are, or should be. Considerations of evidentiary convenience, for instance, are therefore *by definition* out of place in discussions of substantive criminal law.⁴³

E. Scientific Progress

The German science of criminal law—much like the German criminal trial—seeks truth, ultimately, or rightness. Doctrines of criminal law, for that reason, are not simply developed, or refined, or adapted, they are “discovered.” The history of German criminal law theory is a history of these discoveries.⁴⁴

This spirit of scientific discovery, and the concomitant deep commitment to truth, means that at bottom German criminal law is not just about German criminal law, but about criminal law, period.⁴⁵ It is a science of *the nature* of crime and punishment, nothing less. In fact, more or less explicitly ontological or phenomenological claims based on an understanding of “the nature of the thing” (*die Natur der Sache*) are not uncommon.⁴⁶ “Finalism,” easily the most influential recent

⁴² JESCHECK & WEIGEND, *supra* note 8, at 194.

⁴³ See, e.g., Hans Joachim Hirsch, *Tatstrafrecht – ein hinreichend beachtetes Grundprinzip?*, in Festschrift für Klaus Lüderssen 253, 260 (Cornelius Prittwitz et al. eds. 2002).

⁴⁴ See, e.g., Claus Roxin, *STRAFRECHT: ALLGEMEINER TEIL I*, at 149-50 (3d ed. 1997) (charting “the discovery of the fundamental concepts” of criminal law and “their adoption by the legislature”). As one example, consider the “discovery” of “normative” and “subjective” offense elements like the *animus furandi* of theft, as recounted in the standard textbook literature. JESCHECK & WEIGEND, *supra* note 8, at 185, 206; ROXIN, *supra*, at 229; JOHANNES WESSELS, *STRAFRECHT: ALLGEMEINER TEIL 34* (23d ed. 1993). The discovery here was not the *animus furandi* itself, of course, but its doctrinal classification as an offense element, rather than as an issue relating to guilt: without *animus furandi*, it was discovered, no theft had been committed in the first place, rather than, as previously thought, a theft had been committed, but guilt was lacking. The defendant would be acquitted either way.

⁴⁵ This commitment to scientific progress also translates into a surprisingly ahistorical attitude to criminal law; every scientific advance, after all, means the abandonment of a previously held hypothesis, which has turned out to be false. Earlier theories are of interest only to the extent they have withstood the test of time. For a rare study of the historical development of some of the basic concepts of German criminal law, see Bernd Schünemann, *Einführung in das strafrechtliche Systemdenken*, in *GRUNDFRAGEN DES MODERNEN STRAFRECHTSSYSTEMS 1* (Bernd Schünemann ed. 1984).

⁴⁶ JESCHECK & WEIGEND, *supra* note 8, at 210-11 (finalism).

theory of German criminal law, developed an entire system of criminal liability based on an appreciation of the “ontological structure” of conduct (*Handlung*), with the aim of placing it on a “foundation of the law of being,”⁴⁷ as revealed by discoveries of “the newer psychology regarding the translation of psychic acts into the external world.”⁴⁸ Even the more levelheaded, and methodologically self-conscious, among commentators view themselves as exploring the implications of “concrete-general concepts” within the constraints of a “thing logic” (*Sachlogik*), as opposed to *deriving* their entire system from the “nature of the thing,” as the finalists claim to do.⁴⁹

A much discussed recent attempt at system building explicitly sets out to move beyond the “ontologizing” habits of traditional criminal law theory, and of finalism in particular.⁵⁰ Closely associated with Günther Jakobs, a student of the founder of finalism, Hans Welzel, it instead works out another discovery of Welzel’s, this one regarding the function of criminal law: “to secure the recognition of positive socio-ethical act-values.”⁵¹ This “functionalist” (or “normative”) theory is indeed refreshingly free of confident pronouncements about the nature of things. Functionalism, however, appears to have replaced the ontological obscurantism of finalism with an obscurantism derived from its very own grand theory *du jour* – systems theory.

At the outset, functionalism stood for little more than the recognition that the doctrine of criminal law should take into account the purposes, or functions, of punishments. This was considered a significant departure from tradition because it suggested that criminal legal science might do more than ponder the essence of

⁴⁷ ROXIN, *supra* note 44, at 189 (discussing Welzel).

⁴⁸ JESCHECK & WEIGEND, *supra* note 8, at 211 (finalism). Finalism takes its name from what its adherents call the “finalist” (or intentionalist) concept of act (*finale Handlungsbegriff*). In their view, the finality of an act derives from the fact that “man can due to his causal knowledge foresee the possible results of his actions and, for that reason, set himself various aims and direct his actions toward their accomplishment.” ROXIN, *supra* note 44, at 188-89. Only quite recently was it pointed out that this view of a criminal act cannot account for crimes of omission or of negligence. *Id.* at 190-91.

⁴⁹ ROXIN, *supra* note 44, at 180-81. Invocations of “the sense of justice” in support of a claim are perhaps less forbiddingly obscure, but no less unhelpful, and no less uncommon. JESCHECK & WEIGEND, *supra* note 8, at 463 (mistake regarding justification), 604 (omission vs. commission) (5th ed. 1996) (*Rechtsgefühl* (sense of right)); ROXIN, *supra* note 44, at 60 (*Gerechtigkeitsgefühl* (sense of justice) demands punishment according to desert).

⁵⁰ GÜNTHER JAKOBS, STRAFRECHT: ALLGEMEINER TEIL vii (2d ed. 1991).

⁵¹ *Id.* (quoting HANS WELZEL, DAS DEUTSCHE STRAFRECHT: EINE SYSTEMATISCHE DARSTELLUNG 2 (11th ed. 1969))

ontological reality – say, of human conduct, causation, or “thing-logical structures.”⁵² Remarkably this discovery was not made until 1970 in a famous programmatic monograph entitled “Criminal Policy and Criminal Law System.”⁵³ The idea that the doctrine of criminal law – that great construct of criminal legal science – might reflect, even in part, some theory of punishment or other that itself would be subject to public political debate was considered a grave threat to the project of criminal legal science itself, for it abandoned its natural, and privileged, foundation.

The recent rediscovery in German criminal law theory of Kant and Hegel (and, to a lesser extent, Fichte) is likewise noteworthy, for it suggests, if nothing else, that Kant and Hegel needed rediscovering.⁵⁴ This may come as a surprise to an Anglo-American observer given the widely shared assumption that modern criminal law theory, and certainly modern *German* criminal law theory, rests on a Kantian, and less clearly also a Hegelian, foundation. Kant’s and Hegel’s influence on German criminal law theory, however, has been surprisingly limited.⁵⁵ No self-consciously Kantian school of criminal law ever developed in the nineteenth century. Feuerbach may have considered himself a Kantian, but only in the general sense that he followed Kant in insisting on a strict separation of legality and morality. Unlike Kant, Feuerbach was not a retributivist, but a strict adherent of general deterrence.⁵⁶ The nineteenth century did produce several Hegelian scholars of

⁵² ROXIN, *supra* note 44, at 155.

⁵³ CLAUD ROXIN, KRIMINALPOLITIK UND STRAFRECHTSSYSTEM (1970).

⁵⁴ See, e.g., MICHAEL KÖHLER, STRAFRECHT: ALLGEMEINER TEIL (1997); Michael Köhler, *Freiheitliches Rechtsprinzip und Betäubungsmittelstrafrecht*, 104 ZSTW 3 (1992); Ernst Amadeus Wolff, *Das neuere Verständnis von Generalprävention und seine Tauglichkeit für eine Antwort auf Kriminalität*, 97 ZSTW 786 (1985); DIETHELM KLESZEWski, DIE ROLLE DER STRAFE IN HEGELS THEORIE DER BÜRGERLICHEN GESELLSCHAFT (1991); RAINER ZACZYK: DAS STRAFRECHT IN DER RECHTSLEHRE J.G. FICHTEs (1981). Jakobs too recently has taken to invoking Hegel’s legacy. See Günther Jakobs, *Das Strafrecht zwischen Funktionalismus und “alteuropäischem” Prinzipiendenken*, 107 ZSTW 843 (1995); GÜNTHER JAKOBS, NORM, PERSON, GESELLSCHAFT: VORÜBERLEGUNGEN ZU EINER RECHTSPHILOSOPHIE (1997).

⁵⁵ The much-cited essay by Ulrich Klug, entitled “Farewell to Kant and Hegel,” is not to the contrary. Ulrich Klug, *Abschied von Kant und Hegel*, in PROGRAMM FÜR EIN NEUES STRAFGESETZBUCH: DER ALTERNATIV-ENTWURF DER STRAFRECHTSLEHRER 36 (Jürgen Baumann ed. 1968). This five-page essay provides a critical, and rather superficial, discussion of Kant’s and Hegel’s writings on crime and punishment. It does not even pretend to expose, never mind to dismantle, the Kantian or Hegelian underpinnings of current German criminal law. Instead, published in 1968 in a collection of essays dedicated to the alternative draft of a German criminal code prepared by a group of progressive law professors, it provides some historical background to the common call for recodification along rehabilitative, rather than retributivist or “metaphysical,” lines. To the extent it is attacking current Kantian and Hegelian criminal law doctrine, it is attacking a straw man.

⁵⁶ On Feuerbach’s limited Kantianism, see WOLFGANG NAUCKE, KANT UND DIE PSYCHOLOGISCHE ZWANGSTHEORIE FEUERBACHS (1962). This unwavering commitment to general deterrence led

criminal law.⁵⁷ Their influence on the doctrine of criminal law, however, was limited, partly because Hegelianism ran its course in all aspects of German intellectual life, partly because whatever influence they did have preceded the enactment of the German Criminal Code in 1871, which through the unification of the various German states ended the particularism of German jurisprudence and marked the beginning of the construction of a German criminal law science in earnest.

More generally, there is a certain reticence to ground criminal law science on a foundation thought to be external to criminal law science itself—despite the fact that finalism and functionalism made frequent reference to early twentieth-century ontology and late-twentieth century systems theory.⁵⁸ There is, for instance, little connection between German criminal law science and contemporary political theory. There is no Habermasian theory of punishment⁵⁹ nor is there any noticeable effort to translate whatever that theory would be into a concrete criminal law doctrine. The work of other contemporary political theorists, such as John Rawls, has likewise attracted little interest among German criminal legal scientists.⁶⁰

Relatedly, German criminal law theory has defended its scientific independence even from other subdisciplines within the science of law. Criminal law has

Feuerbach, for instance, to increase—rather than mitigate—punishment in cases of duress, so as to counterbalance the increased incentive for criminal conduct represented by the source of the duress (be it economic, circumstantial, or personal). And it was also the reason that Feuerbach in his judicial capacity found the application of his Bavarian criminal code in actual cases so distasteful. *See supra* note 23.

⁵⁷ Prominent Hegelians among German criminal law scholars include Julius Abegg (1796-1868), Reinhold Köstlin (1813-1856), Hugo Hälschner (1817-1889), and Albert Friedrich Berner (1818-1907).

⁵⁸ That is not to say that some German criminal law scholars have not made significant efforts to break out of what they perceived to be the isolation of their discipline by, for instance, opening up a dialogue with the social sciences. *See, e.g.,* VOM NUTZEN UND NACHTEIL DER SOZIALWISSENSCHAFTEN FÜR DAS STRAFRECHT (Klaus Lüderssen & Fritz Sack eds., 2 vols. 1980) (“On the Benefits and Detriments of the Social Science for Criminal Law”). For a recent critical assessment of work in this vein, *see* Ernst-Joachim Lampe, *Strafrechtsdogmatik und Sozialwissenschaften*, in Festschrift für Klaus Lüderssen 279 (Cornelius Prittwitz et al. eds. 2002).

⁵⁹ With the exception of a suggestive essay by Klaus Günther. Klaus Günther, *Möglichkeiten einer diskursethischen Begründung des Strafrechts*, in RECHT UND MORAL: BEITRÄGE ZU EINER STANDORTBESTIMMUNG 205 (Heike Jung, Heinz Müller-Dietz & Ulfrid Neumann eds. 1991).

⁶⁰ For an overview of Rawls’s remarks on punishment in *A Theory of Justice*, *see* Petra Wittig, *Die Aufrechterhaltung gesellschaftlicher Stabilität bei John Rawls*, 107 ZStW 251 (1995); *see also* Sharon Dolovich, *Legitimate Punishment in Liberal Democracy*, 7 BUFF. CRIM. L. REV. 307 (2004) (outlining a Rawlsian theory of punishment).

maintained a careful distance to public law, despite the fact that criminal law is clearly a variety of public law in that it governs a particular form of legal interaction between the state and its citizens (punishment), rather than the legal relationship among private individuals, as in the case of private law.

More recently, German criminal law science has struggled with accommodating another, more fundamental, variety of public law: constitutional law.⁶¹ Insofar as it thinks of itself as based upon ontological facts about the world, German criminal law science exists independently from, and logically precedes, constitutional law. The structure of criminal liability, discovered in the early decades of the twentieth century, is a matter of (ontological) fact regardless of what the constitution might say, or even of whether there is any constitution at all. German criminal legal science, after all, is seen as having followed a single trajectory of scientific progress, moving from discovery to discovery, and presumably closer to truth, during the German Empire, during the Weimar Republic, during the Nazi period, and ever since. Modern German constitutional law, by contrast, did not even come into being until 1949, with the passage of the Basic Law.

The concern with the autonomy of German criminal legal science, from other disciplines within and outside law and from anything resembling “policy,” may well reflect some residual unease regarding the role of German criminal law, and its professorial and judicial practitioners, under the Nazi regime. Some of the central features of German criminal law – such as the famed two-track system of punishments and penal measures – stem from the Nazi period. (The two-track system was enacted in 1933, shortly after the Nazis came to power.⁶²) The same is true of several of the major discoveries of German criminal legal science. Welzel, for instance, worked out the basics of finalism in the 1930s, culminating in a still much-cited article in 1939 and the first edition of his influential textbook in 1940.⁶³

⁶¹ See ROXIN, *supra* note 44, at 15-17 (constitutional foundation of *Rechtsgut*). Even those who, like Roxin, stress the need to turn to constitutional law, however, generally stop well short of establishing, as opposed to asserting, a constitutional foundation for the well-established principles of German criminal law. See generally IVO APPEL, VERFASSUNG UND STRAFE: ZU DEN VERFASSUNGSRECHTLICHEN GRENZEN STAATLICHEN STRAFEN (1998); see also Markus Dirk Dubber, *The Bedrock of German Criminal Law Examined: Positive General Prevention and the Protection of Legal Goods*, AM. J. COMP. L. (forthcoming 2006).

⁶² Law against dangerous recidivists and regarding measures of protection and rehabilitation (Gesetz gegen gefährliche Gewohnheitsverbrecher und über Maßregeln der Sicherung und Besserung), Nov. 24, 1933.

⁶³ Hans Welzel, *Studien zum System des Strafrechts*, 58 ZStW 491 (1939); HANS WELZEL, DER ALLGEMEINE TEIL DES DEUTSCHEN STRAFRECHTS IN SEINEN GRUNDZÜGEN (1st ed. 1940). But see HANS-HEINRICH JESCHECK, LEHRBUCH DES STRAFRECHTS: ALLGEMEINER TEIL 179 (4th ed. 1988) (“political attitude” had no influence on criminal law theory during Nazi period in general (with one possible exception), and on finalism in particular).

Other legislative and doctrinal innovations did not survive past 1945, chief among them the legislative recognition of punishment by analogy – i.e., despite the absence of a specifically applicable statutory prohibition – in 1935,⁶⁴ a reform that found wide scholarly support at the time, including among some professors who continued to play an important role in German criminal legal science after 1945.⁶⁵

Scholars steeped in the view of criminal law as science might well read the decidedly mixed record of German criminal legal science during the Nazi period both as confirmation of the scientific nature of this endeavor (since many “discoveries” were made nonetheless) and as a warning to those who dare to mix science with “criminal policy” (since many criminal law scholars strayed off the path of science and committed errors as a result). It’s no surprise, then, that the initial appearance of modest “functionalism” in the 1970s coincided with the rise of a new generation of German criminal law scholars who were not active during the Nazi period.

F. Criminal Law as Taxonomy

A natural science to which German criminal legal science might be fruitfully compared is botany, or zoology.⁶⁶ Much of German criminal law theory is devoted to classification. Once the basic impetus for classification has been provided, often by the kind of insight into the order of things just mentioned, the German criminal legal scientist seeks to assign each element of the doctrine its proper place in the classificatory system of the criminal law.

This classificatory approach to criminal law science has three main effects. First, it furthers the goals of internal consistency and comprehensiveness. Whatever the advantages of the case-based, fact-centered, judge-dominated approach to legal

⁶⁴ Law to amend the Criminal Code (Gesetz zur Änderung des Strafgesetzbuchs), June 28, 1935.

⁶⁵ See, e.g., Friedrich Schaffstein’s 1934 book, entitled provocatively POLITICAL [!] CRIMINAL LEGAL SCIENCE (POLITISCHE STRAFRECHTSWISSENSCHAFT); see generally Gerhard Wolf, *Befreiung des Strafrechts vom nationalsozialistischen Denken?*, 36 *JUS* 189 (1996); Markus Dirk Dubber, *Judicial Positivism and Hitler’s Injustice*, 93 *COLUM. L. REV.* 1807 (1993) (reviewing Ingo Müller, *Hitler’s Justice: The Courts of the Third Reich* (1991)); Joachim Vogel, *Einflüsse des Nationalsozialismus auf das Strafrecht*, 115 *ZStW* 638 (2003).

⁶⁶ The aforementioned discoveries of German criminal legal science thus would be analogous to the discovery of a new plant, or perhaps even of an entirely new species of plants. For an interesting discussion of the very explicit connection between “taxonomical sciences,” such as botany and zoology, and nineteenth century *American* legal science à la Langdell, see Howard Schweber, *The “Science” of Legal Science: The Model of the Natural Sciences in Nineteenth-Century American Legal Education*, 17 *L. & HIST. REV.* 421 (1999).

issues characteristic of the common law might be, systematic scope is not among them. German criminal law science is not fact-, but concept-driven.

Second, the power of taxonomy provides its practitioners with a potent, and handy, rhetorical tool. For classification implies the possibility of *misclassification*. No “mistake” is more common in German criminal law opinions – and criminal law exams – than a category mistake, at least according to the taxonomy’s main keepers, and authors, the criminal law professors. Still, when confronted with the occasionally dogmatic tone of German criminal law commentary it helps to keep in mind that no matter how categorical the assertion, someone somewhere is likely to make a similarly categorical assertion of the exact opposite. This categorical denial of categoricalness transforms the German science of criminal law into a constant struggle among opposing factions or schools. The debates among these doctrinal schools are often fought with considerable gusto and over extended periods of time, as the followers of each camp are unlikely to switch sides during their scholarly lifetime. These camps tend to be defined, and controlled, by great charismatic figures – like the *paterfamilias* of progressivism, Franz v. Liszt, or Welzel, the father of finalism – whose influence emanates through their loyal following composed of former students.⁶⁷

Third, and most significant, the taxonomical mode of German criminal law lends itself to a certain formalism. Arguments are not infrequently resolved by definition, or rather by classification. Once an issue has been properly classified, it has been properly resolved. Given the care with which it has been assembled, and continues to be maintained, it is perhaps not surprising that the classificatory system of German criminal law is asked to do considerable rhetorical work. If the categories are correct, and an issue has been correctly categorized, then the issue

⁶⁷ The multitude of solutions proposed for virtually every problem of German criminal law makes it difficult, in fact, to get a handle on just what counts as “German criminal law,” rather than this or that approach to it. Not coincidentally, a classification system has been developed to address this problem. When discussing a particular rule, the author—professor or judge—ordinarily will categorize it according to (his perception of) the breadth of support it enjoys in the relevant community, or more precisely the relevant communities, of professors, of judges, or of both together. Beginning with professors, the designation of a rule as “dominant teaching” (*herrschende Lehre*, or simply *h.L.*) marks it as endorsed by a majority of scholars. What Anglo-American lawyers would call the majority rule, i.e., the rule endorsed by a majority of courts, is designated “dominant jurisprudence,” or “dominant practice” (*herrschende Rechtsprechung (Praxis)*). A rule supported by the combined community of scholars and judges is referred to as “dominant opinion” (*herrschende Meinung, h.M.*), or “general opinion” (*allgemeine Meinung, allg.M.*). Adding the adjective “*absolut*” to any of these markers lends emphasis, and suggests supermajoritarian support, adding “*einheitlich*” implies consensus. By contrast, minority opinions are designated, literally, as “deviant” (*abweichend*). Alternatively minority positions might be labelled (particularly by their supporters, or perhaps by alarmed opponents) not as deviant, but as “on the rise” (“*im Vordringen begriffen*”).

has been correctly resolved, or so the syllogism goes. In other words, the time that common criminal lawyers spend on fretting over the proper resolution of a particular case, German criminal lawyers instead dedicate to the correct construction of a system for the resolution of all cases. The more effort goes into the building and quality control of the juridical apparatus, the less effort need go into output control. And so indefinite preventive detention, for instance, is legitimate *because* it is classified not as a “punishment,” but as a “measure,” and large fines against corporations are legitimate *because* they are classified as “monetary fines” (or, once again, as a “measure”) for “order violations” rather than as “punishments” for “crimes,” and so on.⁶⁸

To pursue the analogy to botany for a moment, consider the recent dispute over the proper classification of a tomato in the state of New Jersey.⁶⁹ After the tomato was beaten out by the blueberry in the competition for designation as the state’s official “state fruit,” a campaign was launched to have it recognized as the official “state vegetable” instead. Botanists insisted that the tomato is a fruit. Supporters of the tomato’s bid for state vegetabledom, however, cited the U.S. Supreme Court decision in *Nix v. Hedden*,⁷⁰ declaring the tomato a vegetable under the Tariff Act of Mar. 3, 1883, which imposed a duty on vegetables, but not on fruits. The Court reasoned that

[b]otanically speaking, tomatoes are the fruit of a vine, just as are cucumbers, squashes, beans, and peas. But in the common language of the people, whether sellers or consumers of provisions, all these are vegetables which are grown in kitchen gardens, and which, whether eaten cooked or raw, are, like potatoes, carrots, parsnips, turnips, beets, cauliflower, cabbage, celery, and lettuce, usually served at dinner in, with, or after the

⁶⁸ See generally JESCHECK & WEIGEND, *supra* note 8, at 228 (“fines” (*Ordnungsstrafen*)); ROXIN, *supra* note 44, at 209 (“measures”). See also Günther Jakobs, *Strafbarkeit juristischer Personen*, in Festschrift für Klaus Lüderssen 560, 574 (Cornelius Prittwitz et al. eds. 2002) (corporate “sanctions” are justifiable as long as they are “not christened with the name ‘punishment’”). Order violations (*Ordnungswidrigkeiten*) are governed by, and defined in, the Code of Order Violations (OWiG), not the Criminal Code (StGB). Note that the OWiG did not come into being until 1952. Until then, the bulk of offenses now classified as order violations were defined in the StGB as transgressions (*Übertretungen*), a category of crimes besides felonies and misdemeanors (*Verbrechen, Vergehen*). Transgressions remained in the StGB until 1968, when traffic offenses were reclassified as order violations. See JESCHECK & WEIGEND, *supra* note 8, at 57-58.

⁶⁹ See generally Lisa Anderson, *The Political Adventures of New Jersey’s “Highly Partisan” Tomato*, CHICAGO TRIBUNE, Apr. 30, 2005, at C1.

⁷⁰ 149 U.S. 304 (1893).

soup, fish, or meats which constitute the principal part of the repast, and not, like fruits generally, as dessert.⁷¹

Why indeed should the botanists' classification carry the day? Why should the vice chairman of the New Jersey Assembly's agriculture and natural resources committee adopt the scientists' preferred classification, when in his thirty-year career as a grocer, he didn't "ever recall putting tomatoes in the fruit section"? As another (pro-tomato) participant in the New Jersey debate put it, "Everybody knows, botanically, it's a fruit, but legally it's a vegetable."

The danger of this taxonomical formalism is, of course, that it may deflect attention from the search for justification, and ultimately legitimation. If the task of the criminal law scientist consists exclusively of identifying—and then filling—gaps within the entirely autonomous system of criminal law, the scientific achievements of German criminal law will be appreciated only by fellow practitioners. Outside observers—including legislators, the public, and even Anglo-American criminal law scholars—may find themselves mystified and, ultimately, unconvinced.

Take, for instance, two central discoveries of German criminal law science, the theory of legal goods (*Rechtsgüter*) and the theory of positive general prevention (*positive Generalprävention*).⁷² According to standard German criminal law teaching, criminal law's legitimacy rests entirely on the concept of *Rechtsgut*: criminal sanctions are legitimate if, and only if, they protect interests designated as *Rechtsgüter*.⁷³ German criminal law science indeed has devoted considerable energy to categorizing particular offenses by the *Rechtsgüter* they are said to protect.⁷⁴ The question of the relevance of this categorization project has attracted considerably less attention. With some notable exceptions,⁷⁵ German criminal law science traditionally has shown little interest in exploring the critical, as opposed to the taxonomical, potential of the concept of *Rechtsgut*. So there are apparently no criminal offenses in the German Criminal Code that are *illegitimate* because of an

⁷¹ *Id.* at 307.

⁷² A detailed critical assessment of these theories can be found in Dubber, *supra* note 61. For purposes of the present paper, a cursory discussion must suffice.

⁷³ See, e.g., JESCHECK & WEIGEND, *supra* note 8, at 6 ("Criminal law has the objective of protecting legal goods.") (emphasis in original); see generally .

⁷⁴ See, e.g., ROLAND HEFENDEHL, *KOLLEKTIVE RECHTSGÜTER IM STRAFRECHT* (2002).

⁷⁵ See, e.g., Bernd Schünemann, *Das Rechtsgüterschutzprinzip als Fluchtpunkt der verfassungsrechtlichen Grenzen der Straftatbestände und ihrer Interpretation*, in *RECHTSGUTSTHEORIE: LEGITIMATIONSBASIS DES STRAFRECHTS ODER DOGMATISCHES GLASPERLENSPIEL?* 133 (Roland Hefendehl et al. eds. 2003).

insufficient connection to some *Rechtsgut* or other. In fact, it is unclear what would follow from the discovery of such a criminal offense. What is clear is that, despite repeated references to a constitutional foundation of the concept of *Rechtsgut*, an insufficient connection to a *Rechtsgut* does not imply the unconstitutionality of the offense in question.⁷⁶

The dominant theory of punishment in German criminal law science is “positive general prevention,” according to which punishment serves “to establish to the legal community the inviolability of the legal order and thereby to strengthen the populace’s loyalty to the law.”⁷⁷ Here too a central substantive problem is solved by formal means, in this case through evasion by labeling. Positive general prevention is “positive” to avoid the well-documented normative and empirical problems of “negative” general prevention (i.e., general deterrence); it is “general” to avoid the problems associated with “special” deterrence; and it is “prevention” to avoid the problems associated with retributive punishment. Positive general prevention, in other words, is the correct theory of punishment because, and insofar as, it is defined as none of the incorrect theories of punishment.⁷⁸

G. Conclusion

Given the scientific ambitions of German criminal law theory, its discoveries are not easily translated into a legal system that, like the Anglo-American one, has long rejected the idea of jurisprudence as science and is deeply suspicious of claims to scientific objectivity by any participant in legal discourse, including criminal law professors. There is little chance, then, that Anglo-American criminal law professors will find themselves installed as a “fourth branch of government,” charged with subjecting legislative and judicial decisions on criminal law matters to rigorous scientific scrutiny.⁷⁹

⁷⁶ See, e.g., ROXIN, *supra* note 44, at 15.

⁷⁷ *Id.* at 50 (quoting BVerfGE 45, 255 *et seq.*); see generally POSITIVE GENERALPRÄVENTION: KRITISCHE ANALYSEN IM DEUTSCH-ENGLISCHEN DIALOG (Bernd Schünemann et al. eds. 1998).

⁷⁸ For a recent exploration of the normative underpinnings of positive general prevention, and punishment theory in general, see MICHAEL PAWLIK, PERSON, SUBJEKT, BÜRGER: ZUR LEGITIMATION VON STRAFE (2004). See also Bernd Schünemann, *Zum Stellenwert der positiven Generalprävention in einer dualistischen Straftheorie*, in POSITIVE GENERALPRÄVENTION: KRITISCHE ANALYSEN IM DEUTSCH-ENGLISCHEN DIALOG 109 (Bernd Schünemann et al. eds. 1998).

⁷⁹ *But see* Schünemann, *supra* note 2, at 8.

Still one need not believe in the possibility of a legal science in general, and a science of criminal law in particular, to appreciate the value of analytic clarity and consistency. The German three-part analysis of criminal liability will not by itself produce the “correct” solution to a difficult case like *Dudley & Stephens*,⁸⁰ for instance, but it may well help crystallize the significant issues such a case raises. Surely there is nothing objectionable in a disciplinary project dedicated to constructing a comprehensive and consistent system of criminal law, provided it is driven by a commitment to apply the most intense scrutiny to the state’s most awesome power, the power to punish, rather than by an urge to categorize for the sake of categorization.

⁸⁰ (1884) 14 QBD 273 (CCR); *see supra* note 11.

