

New Legal Science and the Dual Penal State
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This short paper has two parts. In Part 1, I consider the need for a new approach to the study of law beyond traditional parochial boundaries, explore how one might go about developing such an approach, and outline what such an approach might look like (New Legal Science).

The point of the New Legal Science (NLS) is to bridge the divide between the study of law in common law and civil law countries, marked by the abandonment of the project of legal science in the former and its continued pursuit in the latter, and thereby to facilitate the transformation of law from a parochial into a global discipline. I propose to start by undertaking a historical and comparative study of conceptions of legal science (*Rechtswissenschaft*, *science juridique*), then investigating critiques of these conceptions, and finally developing a modern account of legal science that absorbs these critiques and overcomes limitations of previous conceptions. The specific approach I have in mind—without suggesting that it is the only possible, plausible, or useful one—would pursue a *critical analysis of law*, drawing on the distinction between law and police as modes of state governance. The New Legal Science would complement the New Police Science to form a New State Science, devoted to the critical analysis of state power.

In Part 2, I illustrate this approach by applying it to the study of penal law, as part of a comprehensive critical analysis of state penal power from the perspectives of law and police (the Dual Penal State).

Part 1. Toward a New Legal Science

a. Globalizing the Study of Law

Globalization is in the air. Global legal regimes are emerging to govern, or at least to order, behaviour and phenomena (e.g., “global poverty”) beyond the reach of traditional domestic legal systems. Familiar areas of law like international private and public law are now joined by international criminal law, by European law, and even by “global administrative law,” all generating norms in various shapes and sizes, and by various ways and means, all in a world that, one hears, is no longer captured by the tired old model of the Westphalian nation state.

More mundanely, domestic legal systems for some time have been said to converge; long before the current fascination with the emergence of transnational, even global, norms, comparative lawyers have argued that the long-standing distinction between “common law” and “civil law” systems is not as useful as it once was. Comparative analysis suggests, for instance, that it has become difficult, and perhaps pointless, to trace the once categorical line between the common law’s “adversarial trial” and the civil law’s “inquisitorial process” in a world where the existence of plea (or confession) bargaining is now widely acknowledged in civil law and common law systems alike.

Yet while law may have been globalized, approaches to its study remain divided: In the common law world, legal science is taboo; in the civil law world it is *de rigueur*. If the study of law is to keep pace with its subject matter, i.e., if the study of law is to become as global as law itself, then this fundamental divide must be addressed and, if possible, bridged. What is needed is a conception of law as a common global scholarly enterprise, a global legal science.

There is nothing inexorable about the development of a global legal science, or even the need for one. After all, scholarly convergence could be achieved not by expanding the enterprise of

legal science to the common law world, which abandoned it around the middle of the twentieth century, but instead by spreading the taboo of legal science to the civil law world.

The New Legal Science would do neither. Rather than exporting one system's conception of the study of law to the other, NLS seeks a middle course between the tabooization of legal science and its unreflected routinization. A more nuanced exploration of the question whether legal science is possible today may well reveal that the problem lies not with legal science itself, but with specific conceptions of it.

b. Legal Sciences: Conceptions and Critiques

A science of law unmodified, a new global legal science, cannot hope to draw together the strands of legal scholarship in the common law and civil law worlds unless it emerges from a comparative historical inquiry into conceptions of legal science on both sides of the methodological divide.

On the common law side, invocations of "legal science" in nineteenth-century America and, earlier, in England have received considerably more attention than the fate and eventual disappearance of legal science from the face of the Anglo-American jurisprudential earth in the twentieth century. The reflexive attribution of the death of legal science to American Legal Realism is ripe for reconsideration; even a cursory investigation suggests a more complex picture (Cairns 1941; Llewellyn 1941; Goble 1933; Cohen 1932; Yntema 1931; Kantorowicz & Patterson 1928). Clearly, the Legal Realists had no patience for what they regarded as Langdell's wrongheaded botanist/formalist conception of legal science; whether they dismissed the project of legal science altogether is considerably less clear.

Surely, enthusiasm for science remained strong even as talk of *legal* science faded around the middle of the twentieth century and was displaced by the less threatening discourse of law as a "discipline" among others, within an "interdisciplinary" framework. Consider, for instance, the great hopes attached to "criminal science" as the foundation for a comprehensive and systematic reform of substantive criminal law and the law of corrections, manifested most clearly in the American Law Institute's ambitious Model Penal Code project (Wechsler 1952; see also Radzinowicz & Turner 1945). The Model Penal Code was a product of the Legal Process School, which in the wake of the New Deal marked a turn to "policy science" (Eskridge & Frickey 1994; Berman & Reid 1996; Dubber forthcoming 2014). In fact, American political science redoubled its supposedly distinctive commitment to scienceness just as the project of American legal science faded away (Crick 1959). Later on, invocations of the rigor of "economic science" brought to bear on a de-scientized discipline of law may also have played a role in the rise of economic analysis of law (Horwitz 1980).

On the civil law side, there have been recent signs that the two centuries old Savignian paradigm of legal science may be ready for a fundamental reconsideration. In the wake of the Europeanization of private law, the spread of interdisciplinary approaches to law, and the need to justify law's scientific credentials in the competition with other sciences for financial resources and status, questions of research methodology and identity have begun to produce a literature that indicates an openness to a non-parochial exploration of new approaches to the study of law, rather than an interest in the exportation of familiar approaches that may have outlived their usefulness (e.g., Jamin/Jestaz 2004; Engel/Schön 2007; Jestaedt/Lepsius 2008; Smits 2012; see also Wissenschaftsrat 2012).

The New Legal Science would be an essentially contextual enterprise, aware of the contingency of its central concepts, without at the same time abandoning the effort to identify foundational norms—however contingent and differentiated across time, space, and systems—and to subject a legal system’s constituent rules and standards to critical analysis in light of these norms (external critique) and among each other (internal critique).

Unlike other sciences (“natural,” “empirical,” or “social”) or conceptions of legal science derived from them, NLS would not be after truth or fact, logic or (*pace* Holmes’s quip) experience, each for its own sake. Nor would it pursue, for their own sake, the accurate and complete description or systematization—not to mention the conceptual beauty—of a body of legal doctrine, as in other conceptions of “pure” or “true” legal science. NLS instead would seek the critical analysis of a particular mode of state power, called “law” (or *Recht, droit*). More precisely, it would pursue a comprehensive critical analysis of the exercise of law in the particular, modern, sense that arose out of the application of the enlightenment’s all-encompassing project of critique to the political realm and since then has come to shape political and legal thought—if not necessarily also the practice—in countries commonly referred to as Western liberal democracies. (For now, I leave for others more qualified than I am the important question whether a legal science in other political systems is possible and, if so, what it might look like.)

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

These serious doubts have not turned science into a taboo. Why should they doom legal science? Why should we not pursue a legal science, self-reflective and self-critical, appropriately modest and humble, stripped of pretensions of apolitical objectivity and logical inexorability, and claims to special *ex officio* influence beyond the force of the better (or at least better informed) argument? Legal science would not be a panacea, but perhaps it could serve a crucial function in a modern democratic state: the critical analysis of state power in the name of “law.” The aim is to construct a New Legal Science that is not only possible in a modern democratic state, but makes a central contribution to the legitimation, and therefore to the supposed *raison d’être*, of that state.

c. A New Legal Science

(i) Critical Analysis of Law

The New Legal Science would pursue a *critical analysis of law*. It would be *critical* in that its aim would be critique: (1) external critique of legal norms, institutions, and practices in light of the fundamental principle or principles that are held out as legitimating the exercise of state power through law (legitimacy) and (2) internal critique of legal norms, institutions, and practices in light of (other) legal norms (legal systematization, consistency).

NLS would be *critical analysis* in that its critique would be both pointless and toothless if it did not build on a comprehensive, contextual, and open-minded analysis of the exercise of state

law power under scrutiny. This analysis would be the “proprium” (i.e., the business as well as the task, the *Beruf*) of legal science, and those who pursue it, in the straightforward sense that it draws on the expertise of persons trained in the analysis of legal norms, institutions, and practices. This analysis should employ any and all disciplinary, methodological, and epistemological tools available, including but not limited to the so-called “doctrinal” analysis of legal norms, in systematic context (*Rechtsdogmatik, doctrine juridique*). This point is worth making, as legal analysis has tended to fall into one camp or the other: *either* doctrinal *or* “interdisciplinary” analysis (“law” *or* “law &”), each dismissing the other as irrelevantly alien or quaintly blinkered, respectively.

Finally, and crucially, NLS would be critical analysis of *law*. Just what this means obviously depends on one’s conception of law. As mentioned previously, for present purposes, I am using law in a specific (and certainly contestable) sense, as a mode of state governance that emerged from the enlightenment critique of state power: to legitimate state power was to transform the state from a police state (*Polizeistaat, l’état de police*) into a law state (*Rechtsstaat, l’état de droit*), i.e., from a state governed through police (*Polizei, police*) to one governed through law (*Recht, droit*). I have explored the distinction between police and law elsewhere, tracing it to the interrelation between heteronomy and autonomy in private and public governance rooted in the distinction between household and city/state government in classical Athens and Rome (Dubber 2005; Dubber & Valverde 2006 & 2008); I will summarize it here briefly.

In classical Athens, governance of the household (*oikos*) turned on the radical distinction between subject (householder) and object (household). The householder’s power over the (human and non-human) animate and inanimate resources that constituted his household was discretionary and unlimited, subject only to self-imposed and self-policed guidelines of prudence occasionally collected in manuals on the art and science of household management, *oikonomikos* (e.g., Xenophon), precursors of the later *Hausväterliteratur* and *Fürstenspiegel* (e.g., Machiavelli 1532), not to mention antebellum slave owner manuals in the American South (Bush 1993). In the public sphere of the agora, by contrast, government rested on the identity of subject and object: city/state government of householders by householders was autonomous. Private and public government were intimately connected: participation in autonomous public government presupposed the exercise of heteronomous government at home.

Police as a mode of state governance emerged through the expansion of household government to the government of the state as the king’s (private) micro household was transformed into a (public) macro household through the incorporation of other households. The police power was the power of the king as *pater patriae* over the resources of his realm, the power of “the due regulation and domestic order of the kingdom: whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behaviour to the rules of propriety, good neighbourhood, and good manners” (Blackstone 1769); the king maintained the royal peace over the state household, as other, lesser, householders’ power over their micro households was transformed from an originary sovereignty into a delegated royal power, subject to *ultra vires* control.

In the political sphere, the enlightenment’s discovery—or invention, or postulation—of the capacity for autonomy of persons as such posed a fundamental challenge to the exercise of state power, by eradicating the once axiomatic distinction between subject and object of government. State power now had to be legitimated to those in whose name it was exercised, even—and especially—if it was to be used against them, as consistent with their newly found capacity for autonomy. Autonomy thus became the touchstone for the legitimacy of state power; unlike in

classical Athens, however, the capacity for autonomy was now (if only in theory) the universal characteristic of personhood, instead of the distinctive feature of householders.

In the law state, the exercise of power was to be subject to a constant and vigilant legitimacy critique in light of the fundamental principle of autonomy. State power in the law state thus was to be strictly constrained; state power in violation of the principle of autonomy was illegitimate. By contrast, in the police state, the sovereign's power was—like the householder's—essentially discretionary and unlimited, defined by its very indefinability, “the power of sovereignty, the power to govern men and things within the limits of its dominion” (U.S. Supreme Court 1847).

By the seventeenth century, in Germany and France the traditional *oeconomical* literature had developed into the field of police science (*Polizeiwissenschaft, science de la police*), initially pursued by bureaucrats and magistrates, and eventually taught at universities. With some notable exceptions (Colquhoun 1813; Freund 1904), a common law police science never developed. In the civil law world, the comprehensive project of police science was abandoned over the course of the nineteenth century, by limiting the once all-encompassing concept of police as the pursuit of royal peace (later republicanized as “public peace”) to its least objectionable aspect—public security—and transforming the remainder into the new field of administrative law (and police law, *Polizeirecht*, in Germany).

(ii) New Legal Science and New Police Science

The New Police Science (Dubber & Valverde 2006 & 2008) pursues a comprehensive critical analysis of state power *qua* police. The New Legal Science would complement this project, to form a comprehensive critical analysis of state power from the perspectives of police and law as modes of state governance (adding up to a New State Science) (cf. Schuppert 2003). This two-pronged inquiry would proceed from the assumption that, rather than law simply having replaced police as the mode of governance—and the law state having replaced the police state—law and police persist as modes of governance, as continuing manifestations of the long-standing relation, and tension, between autonomy and heteronomy. A comprehensive critical analysis of state power therefore would require a parallel critical analysis from each perspective: on the one side, as an exercise of power subject to formal norms grounded in principled constraints of legitimacy (and, in that sense, of “justice”) that reflect the conception of the subject-object of government as a person characterized by the capacity for autonomy and, on the other, as an exercise of sovereign power through discretionary resource management subject to self-imposed and self-policed informal guidelines of prudence and maxims of good government.

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

The New Legal Science would bear a similarly differentiated relation to its original incarnation. Ignoring, for present purposes, earlier references to “legal science,” the modern project of legal science is generally thought to originate with Savigny, and more precisely with the publication of his dissertation on *The Law of Possession* in 1803 (Savigny 1803 & 1848). Savignian legal science, which continues to shape legal science in the civil law world to this day, was historical and descriptive in *method*, and limited to private law—and more precisely to

Roman private law—in *scope* (see Reimann 1990; see also Stein 1986). NLS, as critical analysis of law, also would be historical, but not in the limited sense of Savigny’s Historical Jurisprudence: first, it would not be limited to unearthing pure legal principles through the careful study of ancient (or even merely old) texts, but would be historical in the sense of taking into account the historical context and development of norms, institutions, and practices; second, it would not be limited to historical analysis, but would regard historical analysis as only one form of analysis (see *Critical Analysis of Law*, above). Most significant, NLS would not be merely descriptive; it would perform analysis not for its own sake, but as the foundation for critique; it would not limit itself to doctrinal analysis any more than to historical analysis (*ibid.*).

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

Part 2. Dual Penal State: New Legal Science in Action

Given penal law’s key role in the critical analysis of state power from the perspective of New Legal Science, it makes sense that NLS should prove its mettle in this field. Framed as one aspect of the critical analysis of state penal power, the critical analysis of penal law would complement a critical analysis of penal police. A suitably comprehensive analysis thus would include a comparative historical analysis of penal law and penal police leading to an account of what might be termed a “dual penal state” (cf. Fraenkel 1941). It would also require a contextual analysis of norms, institutions, and practices, both across aspects of the penal process (“substantive” criminal law, “procedural” criminal law,” “prison” law: collectively “penal law”) and across areas of law (e.g., tort law, victim compensation law, criminal law). Although the contextual nature of the NLS inquiry counsels against the conception of subject-specific legal (or police) sciences, such as a penal law science (or a penal police science), it is worth noting that recent attempts to reconsider the task of legal science in general have also reached penal law (Jakobs 2007; Pawlik 2007; Trendelenburg 2011 [penal law science as “subsidiarity science”]).

This contextual analysis would have to rely on a broader account of types, areas, and fields of law, and their interrelation, a subject of considerable analytic importance that has attracted little attention. For instance, the distinction between public and private law remains unsettled (perhaps not surprisingly, given the formative influence of Roman law, to which the distinction is—ironically—often traced), if it is not dismissed as “utterly decrepit” (Kennedy 1982), politically motivated (Horwitz 1982), or simply ignored as both *passé* and *déclassé* (since everyone knows that “all law is public law”) (see Goldberg 2012). The very status of criminal law, as a species of public law, private law, or *sui generis*, has been only slightly better illuminated than the distinction among specific areas of law, such as that between criminal law and tort law. Even German penal law science, over two centuries of conscious systematization has lavished the vast bulk of its analytic attention on one approach to one part of one aspect of the penal process: descriptive doctrinal analysis of the general part of substantive criminal law. Much analysis remains to be done, not to mention the legitimacy critique that comprehensive analysis makes possible.

To illustrate, with a nod to Savigny, let us consider what a critical analysis of *possession* in modern penalty from the perspective of New Legal Science might look like. An NLS inquiry might consider possession's place not only in the so-called general and special parts of substantive criminal law doctrine, but also in the broader context of the penal regime, including its role in investigation, prosecution, adjudication, sentencing, and punishment. This analysis, from the perspective of penal *law*, may reveal features of criminal possession doctrine (e.g., prospective & retrospective, explicit & implicit presumptions; constructive & joint possession; implicit omission; pre-preparatory inchoacy; status-based exemptions), some of which may conflict with basic norms of criminal law (e.g., actus reus, mens rea, accomplice liability, attempt) (Ashworth 2013). Analysis from the perspective of penal *police*, however, may show possession performing a key role as a sweep, gateway, and fallback offense in a system for the identification and incapacitation of human dangers, perhaps as a more sophisticated and effective alternative to the age-old, vague, status- rather than act-based, disciplinary tool of "vagrancy" (Dubber 2002).

Historical analysis might trace efforts in, e.g., Anglo-American law to accommodate possession liability within a still evolving cluster of substantive criminal law norms (e.g., act requirement), culminating in the codificatory fiat that possession, simply, is an act. Comparative analysis, in turn, might investigate the treatment of possession in, e.g., German criminal law, against a different set of background legal norms (e.g., guilt principle, *Schuldprinzip*). Intrasystemic comparison could explore the relationship between possession in criminal law and in other areas of law, including administrative law and property law (Lepsius 2002; Savigny 1803; see also Posner 2000; Gordley & Mattei 1996).

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

A similar parallel analysis could be expanded throughout the penal process, including not only other doctrines in all aspects of penal law, but also beyond norms to institutions and practices: for instance the institution of the jury (from the perspective of law, a "palladium of liberty" or more specifically an indirect manifestation of the "offender's" and the "victim's" autonomy, or self-judgment, through vicarious empathic identification by judges drawn from "their" "community"; from the perspective of police, an instrument of sovereign—and more specifically of royal—power to determine the king's rights and assert his fiscal interests, through the exercise of his jurisdiction at the expense of lesser, micro, householders) or the practice of plea bargaining (*qua* law, an opportunity for direct, if partial, self-judgment through the accused's participation in the disposition of her case; *qua* police, a delegation of unreviewable sovereign discretionary power to a state official).

Similarly, the analysis could be extended not only horizontally, but vertically, for instance, from "doctrines" such as criminal liability for possession to "principles" such as the legality principle (in its several, and ever multiplying, Latinate variations: *nulla poena sine lege*, *nulla poena sine crimine*, *nullum crimen sine poena legali*, *nulla poena sine lege scripta*, *nulla poena sine lege praevia*, *nulla poena sine lege certa*, *nulla poena sine lege stricta*, *nulla poena sine culpa*, even, in socialist criminal law, *nulla poena sine periculo sociali*), the *Rechtsgut* principle, the *Schuldprinzip* (see *nulla poena sine culpa* above), *ultima ratio*, *actus non facit reum nisi mens sit rea*, etc. (legally speaking, these fundamental principles of justice—preferably in Latin—are deeply and immutably grounded, eventually, in a conception of the person as a being

endowed with the capacity for autonomy; policially speaking, they are recommended maxims of prudence, or good governance, addressed to a sovereign householder with ultimate discretion as to whether, and if so how, to consult and to heed them).

This cursory sketch can at best serve to illustrate how a dual analysis of the state's penal power might proceed and where the New Legal Science could fit into this analysis. (For further illustrations, see Dubber n.d.) Ultimately, it is intended to suggest how one might go about tackling the task of a New Legal Science in general: subjecting the state's exercise of its law power to comprehensive and systematic critical analysis as part of a general, and continuing, inquiry into the legitimacy of state power, including but not limited to its *penal* power. (To stick with the example of possession, the two accounts of the private law of possession generally traced back to Savigny's 1803 dissertation—public order and ownership—could readily be mapped onto the distinction between police and law.) It may well be that the task of critical analysis of the state's penal power, and especially as penal law, is particularly urgent insofar as its exercise is particularly likely to interfere with the very autonomy that is said to legitimate it. That is not to say, however, that other types of state power, as law or police, should not—or could not—be subjected to critical analysis, nor that the legitimacy of penal power implies the legitimacy of other forms of state power in general, or in particular instances.

In closing, it is perhaps worth emphasizing that, in the spirit of critical analysis, the legitimacy of state power cannot be a foregone conclusion. A modern science of law cannot fulfill its critical function if it sees itself as providing justifications for the status quo. The critical spirit of scientific inquiry requires the constant questioning of assumptions, not merely the accumulation of knowledge, or the completion of taxonomic schemes. An apologetic “normative” science of law poses at least as great a threat to the legitimation of state power as an apologetic “descriptive” one.

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