ARTICLE

What Counts as Progress in Criminal Law Scholarship?

Special Issue Progress in Legal Scholarship, Marnix Snel, Sanne Taekema & Gijs van Dijck (eds.)*

*Jørn Jacobsen***

Abstract

The article discusses what should be considered as 'progress' in criminal law scholarship, as a legal scholarly discipline. What is considered progress depends on one's ideas about the aim(s) of a scholarly discipline and how it should develop to better achieve that aim. Criminal law scholarship is, for its part, characterized by its study of positive criminal law from a knowledge point of view, one that puts criminal law scholarship in close contact with the philosophy of criminal law. At the same time, positive criminal law must be subjected to this perspective. As such, while criminal law scholarship may progress in many ways, the article claims particular importance to what is called 'theoretical integration'. This refers to the operation of bringing aspects of positive law into the knowledge perspective of criminal law scholarship, to subject it to study. The article exemplifies the value of doing so by three works from contemporary criminal law scholarship.

1 Introduction

What counts as progress in criminal law scholarship? To my knowledge, this question has not been (explicitly) discussed to any extent in contemporary criminal law scholarship. Views on progress are, however, normally indirectly expressed in scholarly work through, for instance, choice of topic and approach. Based on this, it is possible to distinguish some general orientations within the field, which includes doctrinal, theoretical and empirical research. Indeed, various research enterprises may result in progress in the field. However, there is one form of criminal law scholarship that may provide a particularly important form of progress. Such scholarship provides what I will call 'theoretical integration' of positive criminal law. Its importance lies in subjecting areas of positive criminal

* Thanks to colleagues at the Faculty of Law in Bergen, Prof. Sanne Taekema and the two anonymous reviewers for valuable input to this article.

** Jørn Jacobsen is professor at the Faculty of Law at the University of Bergen, Norway.

law to the knowledge perspective of criminal law scholarship and hence bringing them into the scholarly debate in productive ways.

To explore this, it is necessary to say something about the view of criminal law scholarship that forms the background for this claim (2). Criminal law scholarship is today a multifaceted discipline, and this is one of the reasons why it proves to be difficult to be specific about what we should consider as progress and not (3). However, when we delve into criminal law scholarship's relation to the philosophy of criminal law (4), as well as the importance of subjecting positive law to theoretical perspectives informed by the philosophy of criminal law (5), we may identify one particularly valuable form of progress in terms of 'theoretical integration', which is demonstrated by three very good examples from the past decade (2010-2020) of criminal law scholarship (6).

Generally, my arguments will aim to hold relevance for criminal law scholarship broadly understood. Some of the viewpoints regarding the nature of legal scholarship may, however, make more sense from a Continental and Nordic perspective than from the point of view of Anglo-American criminal law scholarship.[1] Still, in Section 6, where I highlight three works as examples, I have favoured books from the Anglo-American context. The English language facilitates access to and discussion of these examples, and the observable use of conceptual and normative perspectives displayed by (parts of) contemporary Anglo-American criminal law scholarship makes it well suited to exemplify the core message of this article. But similar works can indeed be found in other (linguistic) contexts as well. In Germany, for instance, the approach highlighted here is quite ingrained. It has been characteristic of German legal scholarship since the works of PJA von Feuerbach in the 19th century. A core issue for Feuerbach, 'praised as one of the founding fathers of modern criminal law science', was precisely criminal law science connecting positive law to philosophy.[2] In fact, the following discussion will relate closely to the subject of his famous inaugural lecture from 1804 on 'philosophy and empiricism in their relation to positive jurisprudence'.[3]

2 Criminal Law Scholarship: Some Starting Points

Basically, 'progress' means to move forward. Hence, progress in legal scholarship occurs each time it advances in achieving its aim(s). This does not tell us much, but, at least, it shows us how closely connected our topic is to the general discussions on the nature, aims and method of legal scholarship. Therefore, the view of criminal law scholarship that forms the background for the following discussion needs to be explained.[4]

1 The differences between German and US criminal law scholarship have been discussed, e.g., by Dubber (2005b).
2 See also, for instance, Hörnle (2014, p. 120).
3 See Feuerbach (1804).
4 On the general nature and composition of legal scholarship, see, for instance, Jacobsen (2022, pp. 41-59). 'Legal scholarship' is used interchangeably with 'legal science' in this text.

Law and Method 2023
doi: 10.5553/REM/.000073

Criminal law scholarship, as other forms of legal scholarship, is fundamentally different from the works of lawyers as practitioners. While lawyers and judges, for instance, interpret the law mainly in order to apply it, legal scholarship interprets and systematizes law in order to subject it to a *knowledge perspective*, which I will say more about later. However, at the same time, we should stress that criminal law scholarship's connection to positive law is also strong: positive criminal law can be described as its central study object.[5] Correspondingly, at the core of criminal law scholarship, there is the criminal law doctrine (or dogmatics, if one prefers).[6] At the same time, criminal law scholarship today is a complex discipline where, for instance, historical, philosophical, economic and critical perspectives can be, and are by many, successfully applied to develop knowledge of criminal law.

As to the demarcation between criminal law scholarship (and legal scholarship more generally) and other non-legal studies of law, I consider a study to belong to legal scholarship if it is (somehow) related to positive law from an internal point of view. Conversely, statistical studies of crime trends in society, for instance, belong to sociology or criminology. Obviously, this does not provide us with a clear-cut demarcation, particularly so, perhaps, regarding the (indeed important) relation between criminal law scholarship and criminology.[7]

Criminal law scholarship can sometimes also be very difficult to distinguish from the philosophy of criminal law. As the interaction between these two disciplines is central to this article, I will apply a distinction between *philosophy* of criminal law and criminal law *theory*.[8] I use 'philosophy of criminal law' to focus on analysis aiming to clarify the nature, justifiability and core concepts of criminal law, while 'criminal law theory' is used for engagements with such philosophical issues and views for the purpose of applying them to analysis and discussion of the current positive law. Philosophy of criminal law is mainly, but not solely, a subject for philosophy, while criminal law theory is typically a part of legal scholarship.

Before moving on, it should be stressed that this understanding of criminal law scholarship is different from, on the one hand, strictly doctrinal views which limit it to the legal point of view and use of the general legal method, and on the other, conceptions of legal scholarship, such as legal realism, which emphasize the knowledge perspective but have narrower views about what constitutes knowledge. This cannot be further elaborated on within the scope of this article. The important thing so far is this: criminal law scholarship, as one form of legal scholarship more broadly, is characterized by its reference to positive law, at the same time as it distinguishes itself from legal work in terms of subjecting this to a knowledge perspective. Then, the operation of *connecting* positive law to the knowledge perspective clearly becomes important.

5 Feuerbach (1804, pp. 16ff) distinguished between the 'Form' and the 'Stoff' of criminal law science, positive law providing the latter.

6 On the place and nature of the criminal law doctrine, see, for instance, Jacobsen (2021).

7 For a discussion, see, for instance, Albrecht and Sieber (2006). These disciplines can be seen to be related in different ways, depending on what view of scholarship and of criminal law one starts out from.

8 I have already suggested that this distinction can be useful; see Jacobsen (2014, pp. 213-214).

3 'Progress' in Criminal Law Scholarship and Its Difficulties

Even if one accepts the foregoing view of criminal law scholarship and its overarching aims, it is still very challenging to make claims about what we should consider as progress today. There are at least four reasons why, relating to *contexts*, *diversity*, *validity* and to the needed interaction between *small and big steps* to make progress.

First, there is the *contextual* challenge: beyond the most general and less intriguing claims that progress in legal scholarship means improving our knowledge of law and so on, domestic traditions and situations are important for what we (should) consider as progress. One example is the discussion some years ago in German criminal law scholarship – for many, the flagship of western criminal law scholarship – relating to challenges to its highly advanced conceptual doctrinal tradition.[9] At the same time, Norwegian criminal law scholarship – my own home base – was in dire need of basic conceptual (re)construction after decades of pragmatism and anti-theoretical views which had drained the discipline of theoretical perspectives and resources.[10] Such different starting points for the discussion will likely affect what we think of as progress, also taking into account the fact that criminal law scholarship is mainly about study of *national* criminal law.[11] There is a temporal dimension to this issue as well. When criminal law scholarship developed conceptualizations of the general part of criminal law at the beginning of the 20th century – Franz von Liszt's *Lehrbuch des Deutschen Strafrechts* being the prime example – this was certainly progress. But it also set new standards for what others would *later* consider as progress. A useful way to start a discussion of what would represent progress in criminal law scholarship can therefore be to simply ask what *knowledge need* there is, within the specific domestic, regional or international branch of criminal law scholarship, at a specific time.

Second, there is the *diversity* challenge: As noted previously, many different research agendas and perspectives can be applied within criminal law scholarship. Each brings different pieces of knowledge to the table. But this also implies that different kinds of studies may represent progress: progress may, in other words, occur simultaneously in different forms and directions. One may, for instance, acknowledge that a doctrinal study of terrorism offences represents progress for the discipline. At the same time, a critical study of how these offences at many points depart from recognized principles of criminal law can *also* represent progress. Then, one cannot easily say that one of them is more progress than the other.

9 See further discussions in Eser et al. (2000).

10 For a critique of this tradition, see Jacobsen (2010), and, on the contrast to German scholarship, Jacobsen (2011).

11 Here, we connect to a fundamental discussion in criminal law scholarship, i.e., whether there are some foundational normative principles and conceptual structures that are universal and valid for all national criminal laws. Even if one thinks, as I do, that there are such, understanding these and adapting them to a specific national language and applying them to the study of the law of this country is still a research enterprise in itself.

Law and Method 2023
doi: 10.5553/REM/.000073

Third, there is the *validity* challenge: two comparable doctrinal studies, for instance, may prove to make highly incompatible claims. Deciding which of these represents progress requires that we engage in the same practice of scholarship as we are about to evaluate: which viewpoints and claims are to be considered as justified is the everyday business of scholarship. This is particularly a challenge in regard to highly debated issues, which is also perhaps where we would particularly like to make progress. But which views eventually 'win' are often not known before some time has passed and the viewpoints are discussed and well tested. Even then it can be difficult to be certain which viewpoint was actually progress. What once appeared to be defeated viewpoints about the nature and justification of criminal law, for instance, have re-emerged as the stronger one.

Fourth, and related, there is the *small step/big step challenge*. When we look for progress, we tend to look for *leaps* in the state of the art. We easily focus on the groundbreaking works with the impact that, for instance, George P. Fletcher's *Rethinking Criminal Law* had in Anglo-American criminal law scholarship after its publication in 1978.[12] While such works deserve the attention they receive, it is important to note that most legal scholarship conducts what could be called *revise and expand* research. The continuous refinement of our knowledge basis is, in many ways, the ordinary way for scholarship to proceed. This applies not the least to studies of criminal law, a long-standing and somewhat 'permanent' legal subject and hence less open to revolutionary scientific discoveries.

For such reasons, we should be cautious about making strong claims with regard to what represents progress in criminal law scholarship. Instead, progress can take various forms in various settings and is simply hard to measure.[13] In the end, progress is a complex *disciplinary* achievement. To get there, however, there is one particular kind of works which strongly contributes to what I will call the *theoretical integration* of criminal law which we should be mindful of its importance, that is, the operation of subject-specific areas of positive criminal law to the theoretical discussion relating to the nature, justification and core concepts of criminal law. However, in order to better explain the relevance and importance of this for criminal law scholarship, it is necessary to elaborate on criminal law scholarship's relation to, first, the philosophy of criminal law and then to positive criminal law.

4 Criminal Law Scholarship's Relation to the Philosophy of Criminal Law

Criminal law is, ultimately, about the use of power in a quite distinct and sometimes brutal way. As Markus Dirk Dubber describes it, it is 'the state's most awesome

12 Duff (2005, p. 359) sees it as 'one of the most significant texts in criminal law theory' in the period reviewed.

13 One may claim, for instance, that the number of scholars, publication rates, awards and research grants can be used to measure progress. The number of scholars and publications says something about activity but not necessarily quality. Research grants and awards rely on reviewers, committees, etc. having concluded that something is quality but move us only one step backwards: what should these reviewers, etc. see as progress?

power, the power most in need of legitimation', containing 'the sharpest formulation of the general paradox of power in a liberal state, i.e., the violent interferences with the autonomy of persons upon whose autonomy the state's legitimacy rests' (Dubber, 2018, pp. 1-2). So, after the Age of Enlightenment, at least, a key issue for philosophers such as Bentham, Kant and Hegel has been the justification of criminal law: to what extent can criminal law be justified as part of the political and legal order? These perspectives are still very much present in today's debate (e.g. Dubber, 2014). But by comprehensive, nuanced and subtle discussions of the nature and justification of criminal law, arguments are scrutinized and refined, new concepts and distinctions are created, and viewpoints come up that move the discussion forward (e.g. Duff, 2018).

This philosophy of criminal law is essentially a part of (moral and political) philosophy, but also the core of the theoretical framework that legal scholars apply in their study of positive law. In German criminal law scholarship, for instance, there is a long and strong tradition of engaging philosophy in the study of positive law, bringing us back to Feuerbach mentioned in the introduction. Many of the most notable contributions to German criminal law scholarship do precisely address the foundational philosophical aspects of criminal law (e.g. Pawlik, 2012).

Normative principles, such as the principles of guilt and proportionality and concepts such as wrongs, crimes and punishment are indeed indispensable to make sense of positive criminal law. Without a reasoned approach to these overarching issues, legal scholars can hardly make sense or provide explanation and analysis of their own object of study: the criminal law as it is. As such, the relation to philosophy penetrates deep into the doctrinal studies at the core of the discipline. Textbooks on criminal law, for instance, most often start out with some remarks on this discussion and the author's view on it.[14] These theoretical resources are also indispensable to, for instance, historical analysis of criminal law. Importantly, they also provide criminal law scholars with the much-needed critical distance to positive criminal law, it, as already noted, being a normatively highly debated and in some forms clearly problematic way of treating people.

By their engagement, criminal law scholars may – and do – also contribute to this (ultimately) philosophical discussion. Criminal law scholarship is, for instance, particularly capable of providing real-life examples from positive criminal law applicable to this philosophical discussion, which is valuable for several reasons (see e.g. Husak, 2004): it provides the philosophical discussion with problems that challenge seemingly coherent principled statements. It highlights distinct aspects of criminal law as a legal institution which may easily be left out from a philosophical point of view. It contributes to expanding the philosophical discussion beyond 'classical' issues such as the 'true' nature of criminal responsibility and punishment.[15]

14 A clear-cut German example is Roxin and Greco (2022, pp. 9-176). For a Nordic example, Gröning et al., (2019, pp. 27-55). With regard to the Anglo-American discussion, see, for instance, Horder (2022, pp. 63-105) on principles as part of the 'fabric' of criminal law. See also Duff (2005, p. 365), who speaks about 'a striking change in the theoretical sophistication of textbooks of substantive criminal law'.

15 See also, more generally, Duff (2005, p. 365), who speaks about 'a broader trend that was long overdue – for normative theorists to engage seriously with all aspects of criminal law'.

Law and Method 2023
doi: 10.5553/REM/.000073

The topic of this article is, however, progress *in criminal law scholarship*, not in philosophy. While one can certainly say that improving the theoretical framework is one form of progress in criminal law scholarship, it is still worth recalling the fact that when criminal law scholars connect to this philosophical debate, they do so not primarily with the aim of enlightening the philosophical discussion. Rather, in line with what has been said, their engagement is just as much about acquiring the core theoretical resources for their study of positive criminal law – legislation, court decisions and more. While refined theoretical tools and viewpoints are valuable for criminal law scholarship, something seems to be left wanting if this is not at all utilized for the understanding of positive law.

5 Positive Criminal Law – Mind the Gap!

It follows from what has been said so far that while its relation to philosophy is part of the lifeblood of criminal law scholarship, criminal law scholarship's relation to positive law is just as essential. Here it is also of importance that even if criminal law has a fairly stable core, such as the prohibition of murder, it is clearly also subject to extensive change. Criminal law develops and, notably, broadens in various and complex ways, today perhaps more rapidly than ever. Among the many changes, we find, for instance, new criminal offences addressing internet fraud, trafficking and conversion therapy; new international and regional conventions on a range of issues such as domestic violence; new criminal justice systems such as EU and international criminal law; and – not the least – the ubiquitous ingenuity of new criminal sanctions.[16] A central part of criminal law's current development is also its many connections to other fields of law such as administrative criminal law, including immigration law, creating many 'hybrid' forms of regulation and sanctions.[17] It goes without saying that criminal law scholarship should keep track of this development.

However, it is probably not an unfair accusation against criminal law scholarship to claim that at times it too has had too much of a fetish with some 'classical' theoretical subjects, such as causation, while other subjects, typically viewed as more peripheral subjects, have been neglected. This is unfortunate for several reasons. From a practical point of view, for instance, legal scholarship that studies the criminal regulation of child pornography may have much more relevance than (just another) discussion of the structure of the general part of criminal law. Most important here is, however, the reasons relating to criminal law scholarship itself: in the same way that a botanist would not settle for clarifying the general principles of botany and a few sorts of flowers as examples, criminal law scholarship should expand its scope to cover all parts of positive criminal law.[18] This is, arguably, its very *raison d'être*: to study positive criminal law in its completeness, its changes

16 For a perspective on the Norwegian development of criminal sanctions, see, for instance, Jacobsen (2020).

17 See, e.g., Franko (2020) on 'crimmigration'.

18 The analogy to botany is also applied in regard to German criminal law scholarship; see Feuerbach (1804, p. 35), and later Dubber (2005b).

included.[19] Some of the apparently more peripheral topics may also prove to be no less theoretically intriguing than more 'classical' subjects. Often, they prove to be productive input to and challenges for understanding criminal law, in regard to issues such as the nature of offences, the normative principles for criminal law and its relation to criminal procedure as well as how it intersects with other areas of law, and more.

For such reasons, we should recognize that criminal law scholarship (also) makes progress when it expands its scope and subjects new and/or peripheral parts of criminal law to scientific analysis. But, on the other hand, mere compilation of various rules and judgments is of little value in this regard. Rather, what we should be looking for here is theoretical integration of (more aspects of) positive criminal law.

6 'Theoretical Integration' – Three Recent Examples

As should be clear from the remarks so far, criminal law scholarship is dependent on a solid theoretical foundation as well as an intimate and broad knowledge of positive law and could progress in both directions. With this observation, we can see why works that provide what I call *theoretical integration* represent a particularly valuable form of progress, one worth highlighting in an article of this kind.

Basically, theoretical integration consists in subjecting (not properly studied) parts of positive criminal law to the theoretical perspective on criminal law in order to improve analysis and understanding of positive criminal law. Works that excel in this regard are the works that, well informed about the positive criminal law, connect and subject areas of positive law to discussion by means of well-founded and apt theoretical perspectives. The coupling carried out by such works is inventive in different and complex ways: They draw attention to different, but related, legal rules. They engage with the philosophy of criminal law. They often develop combinations of new principled and conceptual resources for analysing the relevant rules. They also often invite us to broaden our research interest and explore criminal law in, for instance, legal, historical, comparative and sociological perspectives, allowing us to engage with, as well as develop, these facets of criminal law scholarship. In this way, works of the kind we are talking about here create paths between the two poles of criminal law scholarship: positive criminal law and the knowledge perspective for study of it.

To exemplify this, I will highlight three books that illustrate (the value of) such theoretical integration well: Stuart P. Green's book *Criminalizing Sex*, Andrew Ashworth and Lucia Zedner's *Preventive Justice* and Markus D. Dubber's *The Dual Penal State*. I have chosen studies which differ somewhat from more clear-cut conceptual studies relating to, for instance, complicity or consent in criminal law. A strength of the examples chosen is precisely that all of them conceptualize and integrate larger areas of positive law, new or at least not sufficiently studied, at the

19 See also Alldridge (2000, p. xxii): 'Concentration upon "general principles" and the crimes of homicide, theft and assaults obscures the fact that criminal law has changed a great deal recently.'

Law and Method 2023
doi: 10.5553/REM/.000073

same time as they perform the operation of theoretical integration in somewhat different ways. Whereas Green applies normative principles to a fairly established part of criminal law – the sexual offences, Ashworth and Zedner's work can be said to create such an area for study in terms of their concept of 'preventive justice'. Dubber's book is unique on its own terms, as he manages to expand the theoretical perspective even more broadly, showing that sometimes we may even benefit from a kind of 'theoretical *re*-integration'.

As already suggested, theoretical integration is not the least of immense importance to areas of criminal law which, although important for legal practice, have so far escaped or, at least, not been subject to theoretical perspectives to any extent. Stuart P. Green's *Criminalising Sex* from 2020 is a good illustration of this. Sexual offences make up a quite traditional part of criminal law but have still not been subject to much scholarly work, particularly not of the theoretical kind. This is currently changing, not the least as a result of increasing emphasis on equality and women's rights, and awareness of the extent of sexual violations in society, but so far, conceptual issues relating to rape and the nature of consent have dominated. As anyone who has worked on sexual offences will know, the catalogue of offences here is much broader, and the categories of offences are far from clear-cut. In this regard, Stuart P. Green's recent book provides a refreshing new take on sexual offences at a broader scale and subjects them to principled analysis with a view to justifiable criminalization.

A core ambition of Green's work is precisely its ambition to subject sexual offences to broader investigation and to present a unified theory of sexual offences:

> My theory is 'unified' in the sense that it seeks to put all of the sexual offences – nonconsensual, consensual, and aconcensual – into a single analytical frame. It considers the extent to which various key concepts – such as sexual conduct, sexual autonomy, consent, nonconsent, and unwantedness – are used consistently or inconsistently across various regimes. It asks where the law has gone too far in criminalizing or decriminalizing various forms of sexual conduct and where it has not gone far enough. (Green, 2020, p. xvii)

Green's analysis is firmly anchored in the current law of sexual offences in the US, Green's primary context. By including different sexual offences on a broad scale, Green improves our awareness as well as analysis of them. At the same time, Green connects the discussion of sexual offences to a more general discussion on the principles of criminal law. This proves to be a very productive exercise, as Green rehearses and discusses different justification strategies and challenges to them. Approaching sexual offences in this way, as Green's study shows, invites us to develop core criminal law concepts, such as sexual autonomy and its relation to the more general concept of autonomy, including important aspects of sexual autonomy such as the distinction between positive and negative sexual autonomy.[20] Also, many of the more peripheral sexual offences represent great challenges and provide good examples for discussions of, for instance, criminalization principles on a

20 See Green (2020, p. xvi and pp. 19-35).

more general level. Incest, for instance, may not be among the most pleasant subjects to work on. However, it certainly challenges criminalization issues, which Green utilizes, in dialogue with other scholarly work on this specific subject. This illustrates another feature of works of this kind: they create connections between and tie together scholarly works within different fields. By subjecting the sexual offences to such theoretical perspectives, Green also invites us to utilize additional perspectives when studying them.[21] This includes historical and comparative perspectives, as Green examines not only their historical origin but also how the offences are formed in other jurisdictions, such as the UK, Canada, Germany and Sweden.

Undoubtedly, the historical and comparative perspectives could be broadened and further explored. There are, of course, limits to what one work alone can do in this regard, and the important feature of Green's work in relation to our overall topic is precisely that it brings sexual offences, as a category, into a theoretical perspective which invites us to further explore and develop our knowledge of sexual offences within the framework of a more systematic perspective, connected to the philosophical discussion on the principles of criminal law as well as the rules found in positive law.

Another work with similar merits is Andrew Ashworth and Lucia Zedner's study *Preventive Justice* from 2014. In recent years, criminal law has gradually expanded, and, as a result, it has also been subject to new rationales, that is, ways to use the criminal law that come into conflict with traditional views and principles of criminal law. Such regulations sometimes emerge as panic-induced additions to criminal law in the aftermath of, for instance, terrorist acts or refugee crises. At other times, they emerge more steadily and well thought-through, as means to address the (perceived) need for increased security and control in society, pushed forward also by neoliberal market ideas. The rules produced are often shaped (and sanctioned) as a form of criminal regulation. At the same time, these rules are intertwined with other forms of regulations and sanctions, for instance of an administrative kind. As a result, these rules become quite complex. Rules of this kind can also be found in different settings. Understanding the nature of these rules, then, often requires competence in criminal law as well as in other forms of regulation, in addition to an understanding of the specific setting within which they take place.

For such reasons, from a general criminal law point of view, these kinds of rules are, in parts at least, often considered to be at the fringes of the discipline. Basing one's analysis on the core principles of criminal law and the criminal code, which is normally the case for criminal law scholars, one easily ends up disregarding or at best downplaying them, considering them as peripheral and unprincipled 'add-ons' to the 'genuine' criminal law. But they are part of positive (criminal) law and certainly real enough for those who are subjected to these rules in practice. One could even argue that this peripheral and unprincipled character makes it particularly important for criminal law scholarship to analyse and discuss them. There are really no excuses for neglecting them.

21 On the relation to the general principles of criminal law, see, in particular, Green (2020, pp. 37-51).

Law and Method 2023
doi: 10.5553/REM/.000073

Thus, it is particularly valuable for the discipline when seemingly peripheral and unprincipled rules and regulations are reviewed, conceptualized and studied within a broader and well-founded theoretical perspective. Ashworth and Zedner's study exemplifies this very well. Whereas Green's study relates to an overall subject that we have an – albeit less explored – general conception of, that is, sex and sexual offences, Ashworth and Zedner's study goes further in creating a new research topic, starting out by conceptualizing what they call 'coercive preventive justice'. This move, and the elaboration of different aspects of this concept, including a discussion of the state's duty to prevent harm and historical views relating to this, provides the study with theoretical perspectives and conceptual resources that allow for connecting a range of issues that are usually not considered in relation to each other. Ashworth and Zedner's study includes, for instance, analysis of issues familiar to a criminal law scholar, such as policing, what the authors designate as 'preventive offences' and risk assessments in courts in relation to criminal sanctions. This move invites further analysis of typical criminal law issues from the perspective developed by the authors. But it also goes beyond the traditional criminal law point of view and includes issues such as preventive measures in public health law and in immigration law. The fact that the study thereby transgresses the traditional domain of criminal law should be considered (also from the point of view of criminal law scholarship) as a strength of the study: it connects criminal law scholarship to solutions and rationales within other areas of law, which is important not the least given how criminal law develops today. At all points in the study, the authors demonstrate that they are well informed about the relevant positive law, which is seamlessly integrated into the overall theoretical perspective that they develop.

The third example of theoretical integration is Markus Dirk Dubber's *The Dual Penal State*. This study applies a broader perspective, than the other two, moving us back to our point of departure – the connection between political philosophy and criminal law. Overall, from the point of view of theoretical integration, Dubber does much of the same as the previous works. He subjects (positive) criminal law to a theoretical perspective, and thereby fundamentally challenges the rules and practice of criminal law today. Dubber does this by applying a theme developed through several works, the police-power perspective.[22] 'Police' today is usually taken to refer to that part of the administrative branch of the state, occupied by police officers, that works mainly to prevent and investigate crimes. But, as Dubber observes, the term has a more complex history. 'Police' has previously referred to the state's capacity to govern society in general. Whereas the criminal law has been subject to much principled discussion and analysis and remains a focal point for the rule-of-law ideology, Dubber's work demonstrates how the old 'police power', the sovereign's right to regulate, control and sanction his subjects in extensive, harsh and often discretionary ways maintains an impact on our legal orders and core issues in criminal law. As the police-power ideology in many ways represents the opposite of the standards of the rule-of-law ideology, Dubber's study shows criminal law to have built-in tensions which challenge us to rethink and rehearse

22 Dubber's perspective has been developed in a series of books and articles; see, e.g., Dubber (2005a).

the ways in which we discuss, justify and form our criminal law. The principled problems relating to the harsh and extensive drug criminal law found in many rule-of-law based legal orders become much more visible when we consider it in Dubber's perspective.

In this regard, Dubber makes a move which makes his work particularly valuable to our discussion of theoretical integration. Dubber's study shows that theoretical integration is not only about further developing and expanding criminal law scholarship's use of theoretical perspectives for the study of criminal law. It can just as well require us to turn our gaze inwards and critically scrutinize the framework and the language that we work within: the fact that philosophy provides criminal law scholarship with the theoretical framework for studying positive criminal law also makes this theoretical framework the outlook and language that criminal law scholarship works within. As a result, it may also *limit* this scholarship.

This is precisely what Dubber shows. Instead of simply rehearsing and refining the principles usually at work in criminal law doctrine, Dubber starts out his reasoning with a profound analysis of how criminal law scholarship and its conceptions about its theoretical framing and justification of criminal law have developed. Part I of Dubber's study addresses the role of criminal law scholarship in legitimizing penal power and discusses the field's use of 'slogans' as rhetorical 'coping mechanisms' (pp. 33ff), thus demonstrating far-reaching implications of the criminal law scholarship's core: its language and basic presumptions. The analysis is historically informed, tracing the development of the language and views of contemporary criminal law scholarship. As Dubber shows at several points, criminal law scholarship is indeed often characterized, at the very core of its theoretical resources, by certain key notions being simplified, idealized and expanded within the discipline.

This is, from a scientific point of view, a problem. For instance, it contributes to the idealization of criminal law, suppressing inherent problems as well as other perspectives (as we have already seen examples of in the two previous books addressed in this article): cherished normative principles and concepts within the discipline may prove to have less substance and even limit our ability to properly study and subject positive criminal law to deserved criticism. The way Dubber takes on criminal law scholarship and challenges it to question whether it is actually theoretically well founded is highly productive: it not only forces us to see that core ideas and principles in criminal law scholarship are more ambiguous and fuzzier than what we like to think when we apply them in our works. But when this normative framework becomes more uncertain, we also become more open to acknowledging that the current criminal law, too, is riddled with inherent tensions and principled challenges. Studies such as Dubber's, then, theoretically integrate more features of positive criminal law, albeit in a less clear-cut way than do our previous two examples: one could be tempted to call it theoretical *re-integration*, as it precisely renews and deepens our way of studying central aspects of positive criminal law, in ways that allow us to have a new, improved and more complex view of positive criminal law. Regardless, many of us can learn from Dubber's willingness to challenge criminal law scholarship's own key ideas, language and perspectives as part of our work within it.

Law and Method 2023
doi: 10.5553/REM/.000073

7 Conclusion

In closing, I want to stress the following points: first, highlighting (works exemplifying) theoretical integration does not imply that this is the only valuable or 'progressive' way of doing criminal law scholarship. On the contrary, as stated previously, it is quite clear that criminal law scholarship today is a vigorous discipline, increasing its knowledge of criminal law in a number of ways and from a number of perspectives. Also, it keeps maturing in its methodological dimensions, developing, for instance, comparative and empirical perspectives as separate research tracks that feed back into the scholarship at large. Progress is, as said, very much about *disciplinary* progress. Secondly, the claimed value of such theoretical integration does not rely on specific substantive viewpoints relating to the philosophy of criminal law. The notion of 'theoretical integration' is more of a structural concept. The point is that criminal law scholarship must manage to fuse positive law and its knowledge perspective, and the more of positive criminal law we manage to bring in and the better the theoretical resources we have for doing just that, the better becomes criminal law scholarship. It also, I believe, becomes better off in regard to pursuing various forms of research enterprises and keeping these related to each other. Some works, as I have tried to highlight in this article, are particularly good at that, creating paths that connect and initiate interactions between, on the one hand, criminal law's nature and justification and, on the other, positive law, which also other research perspectives can in turn connect to and feed into.

References

Albrecht, H.-J. & Sieber, U. (2006). *Strafrecht und Kriminologie unter einem Dach Kolloquium zum 90. Geburtstag von Professor Dr. Dr. h.c. mult. Hans-Heinrich Jescheck am 10. Januar 2005*. Berlin: Duncker & Humblot.

Alldridge, P. (2000). *Relocating criminal law*. Dartmouth: Ashgate.

Ashworth, A. & Zedner, L. (2014). *Preventive justice*. Oxford: Oxford University Press. doi:10.1093/acprof:oso/9780198712527.001.0001.

Dubber, M. D. (2005a). *The police power – patriarchy and the foundations of American Government*. New York: Columbia University Press.

Dubber, M. D. (2005b). Strafrechtsdogmatik als Botanik. In R. Hefendehl (Ed.). *Empirische und dogmatische Fundamente, kriminalpolitischer Impetus: Symposium für Bernd Schünemann zum 60. Geburtstag* (pp. 245-256). Köln: Heyman.

Dubber, M. D. (Ed.) (2014). *Foundational texts in modern criminal law*. Oxford: Oxford University Press. doi:10.1093/acprof:oso/9780199673612.001.0001.

Dubber, M. D. (2018). *The dual penal state. The crisis of criminal law in comparative-historical perspective*. Oxford: Oxford University Press. doi:10.1093/oso/9780198744290.001.0001.

Duff, A. (2005). Theorizing criminal law: a 25th anniversary essay. *Oxford Journal of Legal Studies, 25*(3), 353-367. doi:10.1093/ojls/gqi018.

Duff, A. (2018). *The realm of criminal law*. Oxford: Oxford University Press. doi:10.1093/oso/9780199570195.001.0001.

Eser, A., Hassemer, W. & Burkhardt, B. (Eds.) (2000). *Die deutsche Strafrechtswissenschaft vor der Jahrtausendwende. Rückbesinnung und Ausblick. Dokumentation einer Tagung vom 3.-6. Oktober 1999 in der Berlin-Brandenburgischen Akademie der Wissenschaften*. Munchen: Beck.

Feuerbach, P. J. A. (1804). *Ueber Philosophie und Empirie in ihrem Verhältnisse zur positiven Rechtswissenschaft – Eine Antrittsrede, Mit einer Einführung von Wolfgang Naucke*. (Reprint 2002). Baden-Baden: Nomos.

Franko, K. (2020). *The crimmigrant other – migration and penal power*. Abingdon: Routledge.

Green, S. P. (2020). *Criminalizing sex – A unified liberal theory*. Oxford: Oxford University Press.

Gröning, L., Husabø, E. J. & Jacobsen, J. (2019). *Frihet, forbrytelse og straff – En systematisk fremstilling av norsk strafferett* (2nd ed.). Bergen: Fagbokforlaget.

Horder, J. (2022). *Ashworth's principles of criminal law* (10th ed). Oxford: Oxford University Press.

Husak, D. (2004). What moral philosophers might learn from criminal theorists. *Rutgers Law Journal, 36*(1), 191-198.

Hörnle, T. (2014). PJA von Feuerbach and his textbook of the common penal law. In M. D. Dubber (Ed.). *Foundational texts in modern criminal law* (pp. 119-140). Oxford: Oxford University Press. doi:10.1093/acprof:oso/9780199673612.003.0007.

Jacobsen, J. (2010). The methodology of the Norwegian criminal law doctrine. In T. Elholm, V. Greve, P. Asp, R. Bragadottir, D. Frände, & A. Strandbakken (Eds.). *Liber amicarum et amicorum Karin Cornils – Glimt af nordisk straffrätt og straffeprosessrett* (pp. 243-266). København: DJØF.

Jacobsen, J. (2011). Zur gegenwärtigen norwegischen Strafrechtsdogmatik: Andenæs und die Folgen. *Zeitschrift für die gesamte Strafrechtswissenschaft, 123*(3), 609-632. doi:10.1515/ZSTW.2011.609.

Jacobsen, J. (2014). Philosophy, theory and criminal law. *Jurisprudence, 5*(1), 209-216. doi:10.5235/20403313.5.1.209.

Jacobsen, J. (2020). Is the last laugh on Liszt? On the development of the Norwegian system of criminal sanctions. *Zeitschrift für die gesamte Strafrechtswissenschaft, 132*(1), 223-249. doi:10.1515/zstw-2020-0009.

Jacobsen, J. (2021). How can legal doctrine be a scientific discipline? Methodological groundworks for the Norwegian criminal law doctrine. In S. Matsuzawa & K. Nuotio (Eds.). *Methodology of criminal law theory: Art, politics or science* (pp. 105-128). Baden-Baden: Nomos/Hart Publishing.

Jacobsen, J. (2022). *Legal reform research – Groundworks for legal scholarship*. Oslo: Karnov.

Pawlik, M. (2012). *Das Unrecht des Bürgers – Grundlinien der Allgemeinen Verbrechenslehre*. Tübingen: Mohr Siebeck.

Roxin, C. & Greco, L. (2022). *Strafrecht – Allgemeiner Teil, Band I Grundlagen – Der Aufbau der Verbrechenslehre* (5. Auflage). München: CH Beck.