Law and Society in the Criminal Sciences:

Entering a Non-Natural World

Dirk Fabricius
University of Frankfurt/Main, Germany

[This text is a translation delivered by the author; I checked it in a – surely incomplete – first round; no content-specific changes. Footnotes as Endnotes, not translated. No overhead file. /H. John, secretary 07/2002]
RuGQuotes

RuG_Overheads

Summary

The understanding of the relation between law and society depends on the concepts behind these terms. Many criminologists and penal lawyers design "the society" and "the law" as if they were acting subjects. Then they create fitting objects by ascribing qualities instead of stating them. They prescribe a treatment of these objects with fixed means (particularly punishment) by variable aims (retribution, prevention). They measure non-existing objects and use a strange logic. In the end, though, very real subjects are being deprived of their freedom and possessions in a very real procedure by the implementation of theories based on and justified by metaphysical assertions.

(Overhead 1)

1 Law and society from a naturalistic point of view

The organizers of this conference mix folk psychology with law and psychiatry with regard to the belief in “free will”. This probably will displease many a jurist, psychiatrist and well possibly laymen who expect to achieve scientific character from law and psychiatry. To me, this in its core seems to be a correct classification. One objection to this could be: sociology of law, theory of law, loans from Luhmann, occasional by Freud, the overcoming of the old forensic psychiatry, apparently indicate modernization and scientific progress in the criminal sciences.

I would like to contribute some considerations which, I hope, will make the thesis plausible that a new metaphysics is quietly developing in the background.**(fn 1)** In order to make it easier to understand the essential part that deals with this new metaphysics in penal law dogmatics and criminology, I shall outline my own point of view at the beginning. A starting point that must be clearly marked, but which – by definition – forbids a standstill. I will come back to this further on. I proceed from the assumption that society, culture, and law have developed on the basis of pre-cultural, pro-social behaviours in the natural history of man; to put it differently -- that there are adaptations, genetically open programs, which enable cooperation between non-relatives.**(fn 2)** Accordingly, I understand “society” as the essence of the relations between its members, the individuals being counted as members, without attributing subject quality to them.

These relations cover questions about who marries whom, who sleeps with whom, who greets whom, which gates are open and which ones are locked, to which insults one replies or need not react, who beats whom and who may beat whom, etc.

A crucial question rarely mentioned in discussions about „the society“, is who is allowed to acquire property and who is to part with it. Norms, and thus law, comes into play if the (immediate) interest failed to establish cooperation and thus conflicts of interests arise. Without taking into account conflicts of interests, inequality, and exploitation, descriptions of the relation between law and society must remain pale.**(fn 3)**

These relations between individuals who enter the world in a merely biological way can only be established if these individuals are socialized, encultured, sometimes indoctrinated **(fn 4)**, or programmed, so that the members of the ensemble can live up to roles, functions, practices -- all those relations that constitute society. Bourdieu calls this “dialectic of habitus and institution.” **(fn 5)**

I tend to grant theoretical potential to so-called Memetics, as developed by Dawkins, Dennett and Blackmore.**(fn 6)** They claim that in addition to genes there is a second kind of replicator which also competes under selection pressure by various survival rates of their mutations or variants. Blackmore understands institutions and conceptions of law and society as “memplexe". I mention this to make clear that a naturalistic point of view does not imply genetic or biological determinism.

Law is a system of norms which evolves culturally, not biologically, its own norm types and institutions, different from other norms such as morals, manners, and custom. Law breaks custom and manners. It can be set, it can be made. In its developed form it becomes codified, democratically developed and decided. It does not contradict morals. Law inconsistent with morals is wrong. Wrong laws are illegitimate.**(fn 7)**

A norm is more “right” (i.e. legitimate) the more it is based on equality and rationality and thus is understandable and acceptable for all, as a means of establishing cooperative social relations.

The means of choice are laws. As laws are constructions that are to work in real social life, there are always different models that function equally well.

To put it differently, norms in general are expressions of wishes for the future and a means of fulfilling these wishes via impact on other individuals, to make them behave according to the norm. Right laws differ insofar as they balance wishes and interests of both or all parties.

2 The old metaphysics

I shall deal shortly with the old metaphysics. What I mean by this term is the metaphysical world where there exists an indeterminate which in turn will influence empirical man with his actions and omissions.

It is this type of metaphysics, which – in the belief of its disciples – defines once and for all what is right and law, which then may be transgressed or occasionally found by those concerned; this is an essentialistic view presupposing a creator, who is above nature and history of civilisation. This metaphysics constitutes the logic of guilt and punishment as retribution, compensation for guilt caused by actions of free will. It still has its representatives and it has a certain political attraction even for me, because it runs directly against ruling trends in criminal politics with its narrow concept of crime and the renunciation of indoctrination of the offenders.**(fn 9)** Scientifically I deem it outdated, because its scientific ancestral line is broken off with Kant or Hegel at the latest, Darwin,

however, also Freud lie on the other side of its horizon. It would neither withstand a corresponding expansion of its horizon.(**fn 10)**

3 A new metaphysics

The essentialistic idea of right is being dismissed. System functionality, proportionality, and symbolic criminal law have taken the place of guilt and atonement after an intermezzo of prevention and rehabilitation. It is my central thesis now that a jurisprudence or criminology which would satisfy general criteria of scientific research has not developed at all substituting old metaphysics. I would rather claim that behind the mask of “modern" scientific opinions a new metaphysics is developing and that the scientific achievements of the past 150 years are only mentioned but not used. To cite Hofstadters description of the difference of mention and use: A violin applied as fly-swat only is mentioned, but not used. (Overhead 2)

What I mean by “common scientific requests" is, in its essence, the following:

- exclusion of non-physica reasons for physical effects,
- exclusion of disproved premises **(fn 11)**. No untested dogmata,
- political autonomy, **(fn 12)**
- methodical fundament, **(fn 13)**
- vertical concept integration **(fn 14)**

(Overhead 3)

I now claim that

- contrary to this a metaphysical model of the connection of law, society and individuals is being designed containing subjects, which cannot be found in reality and objects stripped of their natural qualities and getting meta-natural ones ascribed instead,
- means are constructed, moreover, to deal with subject-object relations, which should really be called magical for lack of traceable natural effects.

(Overhead 4)

I claim further that

- this model is being justified by political considerations or that these can be detected as its background,
- such a model must necessarily be devoid of any methodical fundament to make it seem plausible,
- thereby the connection with the empirical sciences is relinquished in the sense of vertical concept integration with that.

3.1 Non-natural, fictional subjects

This new metaphysics presents itself by treating with *the* society or *the* law and similar abstracta, scientific constructions, as acting subjects **(fn 15).** This could be dismissed as a metaphorical way of description. The following quotations however show that the benefit of creating these subjects by help of grammar form is more than this: It is to cover up decisive questions:

*Criminal law will repair its disturbed validity of norms as such on the communicative level again and again.(**fn 16**)*

As soon as communication is perceived as something very concrete, one has to ask what actually is the essence of „the criminal law", of „validity of norms," and how both of them could be operationalised such that the sentence could pass as a true description. I tried but did not succeed. The sentence makes sense only under the presupposition that

(Overhead 5)

- criminal law is not a highly complex -- I hesitate to say -- system, constituted by many protagonists, institutions, practices, etc.,
- validity of right cannot have many meanings and dimensions, and measuring is difficult even if one chooses one meaning and a fixed set of dimensions,
- contents, forms and media of communication are not as variable as that.

Only if criminal law, communication, and validity of norms are transferred into the Here-after, meaning can be gained from the above sentence. (Un-)fortunately though, this can neither be confirmed nor disproved.

3.2 Non-natural, fictional objects

The new metaphysics also introduces fictional or better non-natural objects that correspond to the subjects described above.

These deeds very clearly show the experience to be unconditional or the sense and feeling of the imperative of behaviour to be unconditional – here these terms must be understood not to carry any psychological meaning whatsoever (De Figueiredo Dias, 2001, p. 534)

For laymen and psychologists it is hardly comprehensible how experience and feeling can be understood devoid of any psychological meaning, where human beings are involved.

In face of a question of conscience, as it was defined before, there cannot be any valid human authority which could to its characterization by sensible ways and means (ibid. p. 535)

This method of dehumanising individuals corresponds to this metaphysical sphere on the other side – individuals – subjects, persons **(fn 17)** are being deprived of their essentials, that is, of their interests, their needs, their feelings, and they finally rediscover themselves as a bundle of responsibilities produced by “society” or the “system”. They merely are metaphysical beings deprived of their very own complexity.

3.3 Magical means: Punishment is necessary

Punishment must be; the only question, though, is how to find suitable reasons for it.**(fn 18)**

*These [sc. criminal political value decisions] are based on the positive functions of punishment” in social life, which must be investigated by criminal science.(**fn 19**)*

Compatibility of the mentioned functions (sc. satisfaction / peace/ prevention/ compensation). already results juridically from the unchallenged existence of a state criminal law (ibid. p. 51)

So the decisive questions are withdrawn from the empirical research by this. “Juridically” here means: No matter what the case looks like **(fn 20)** – the positive affects of punishment are taken for granted, but they have to be examined as to the details.

Whoever in general challenges the criminal law not to be suitable for realising its stated aims has spoken his verdict on the criminal law under the of this model of thought: An

*unsuitable means for attaining a certain purpose is not legitimisable in an enlightened society, and whoever wants to protect the law from this verdict has three ways out…/**(fn 21)***

Haffke, Kargl **(fn 22)**, Lampe, Roxin, Jakobs **(fn 23)**, Schünemann **(fn 24)**: They want to protect the penal law from this verdict. I will deal more in detail with Haffke taking his arguments as an example:

The penal process fulfils different heterogeneous social functions. Hardly one of them can be explained.. solely from the perspective of the perpetrator nor from that of the victim, and neither by help of a combination of both. Therefore the efficiency paradigm is not fit for a description or an explanation of this reality and not as model either (ibid. p. 969)

The conclusion is this:

The symbolic criminal law is the antipode to a law instrumented and directed by ratio and purpose (p. 970).

We rub our eyes in astonishment considering that some pages prior to this we found:

In a secular society, state punishment cannot be conceived as anything else than that it is to be defined by rationally directed purpose (ibid. p. 957).

We will neglect this contradiction for the time being and first explore the following steps of Haffke's train of thought:

The criminal law represents itself as a considerable emphatic reinforcement of the permitted ways to accomplish the aims; the criterion is not technical efficiency but "value-loaded-feeling" (ibid. p. 971).

To my simple understanding I see this reinforcement in connection with socialization: Criminal law as a means of socialization. Why not technical efficiency then? Of what use is the "value-loaded feeling"?**(fn 25)** So then, as soon as we question this shift towards the symbolic wanting to find out the empirical contents of symbols, as Jakobs does, we find ourselves in a tangle of questions the answers to which might rob the sentence of its sense. Only transferring the symbolics to the metaphysical sphere guarantees its meaning and sense.

This method of immunizing the criminal law by help of rational valuing against an evaluation of means and purpose maybe called here symbolic. (ibid. p. 972)

This immunisation works against every way of empirical study because of the metaphysical concept of symbols. There is no further explication, which symbolic effects are triggered, could and should be triggered in those persons who are subject to law. This is consistent, though: Objects that cannot be experienced in reality can obviously only be influenced by magic and magical means. This reversal of an experienced evil in the real world into a magical means becomes very clear, for example, if and when it is claimed that punishment is a purpose in itself:

*Punishment is not only a means of preserving social identity…but it is this preservation.**(fn 26)***

3.4 Measuring of the non-existing

A further and not at all unimportant example of the new metaphysics is the intention of measuring the non-existent. When studying the literature of the dogmatics of criminal law as regards the question of guilt, it becomes obvious that the advocates of the new metaphysics are all of the opinion that guilt does not exist, that at least its existence cannot be fixed and stated, and that here we meet with a special type of the principle of proportionality or something similar to it. Forensic psychiatrists, who are allowed in the courtroom as representatives of the empirical sciences, fully agree with the jurists on this definition. However, this does not stop either of them to allow for measuring criminal responsibility.

How it is possible to measure something that does not exist remains their secret. Measuring of course is something quite modern and complies with modern scientific standards, which then will serve as personal decoration – or camouflage.

This new metaphysics enables to join in all caprioles of criminal politics in the actual world; it permits to abstain from every empirical argument that would question the legitimisation of punishment. One can further live with such "monsters" like "*schwere andere seelische Abartigkeit*" (i.e., other onerous psychological abnormalities) and "*Hang*" (propensity) and thus also the *Sicherungsverwahrung" (*preventive detention).**(fn 27)** *Mordlust* has not only survived in law but can also be reactivated **(fn 28)** any time, although it is no more than a "*einschläferndes Prinzip*" (a means for putting questions to rest). The educational ideas and intentions of juvenile criminal law with its special metaphysical degrees can persist despite all better knowledge of psychology and pedagogics. The miscellaneous contradictions between harmful inclinations and heaviness of guilt can thus find common ground in a metaphysical conception of the world – without any effort. The German BGH demonstrates this, and the dogmatists of law and the criminologists show only restricted annoyance.

We can ask ourselves whether on this basis we could tell a plausible science-fiction story or program a computer game: This would, in my opinion, result in highly incoherent stories. Perhaps this is what distinguishes the old from the new metaphysics: the old one could tell coherent stories.

3.5 Means to perform metaphysical magics

(Overhead 6)

3.5.1 Normative

The magic word *normative:* Its nobility always becomes obvious when there is a pejorative talk of "*psychologisierend (psychologising), naturalistisch (naturalistic)"* or also "*ontologisierend"* (ontologising). However, one would be mistaken to believe that this way law, state under the rule of law, *Gesetzesbindung* (legal obligations) would be enforced. Quite on the contrary. The *Normativierung* serves to escape from law: Guilt no longer needs to be stated but is ascribed **(fn 29)**. The same shall happen to the dolus (explicitly) in future. By installing norms for the constituting facts as regards the offence of negligence the permitted risk has been accepted, and therefore central questions of evaluation, which should have been left or consigned to the legislator to decide, were actually decided by the judicature and social forces exerting their influence. It is just because of the already limited stock of norms of the general parts of criminal law which serves as a quarry for considerations to install more norms implicating in their essence a separation from law. The word *normative* is especially magical because it promises liberation from the requests of both empirical study and law.

3.5.2 A special logic

Roxin (LB § 24 Rz. 62) writes:

It is erroneous to believe that anybody were capable of considering circumstances which do not occur to one's mind.

The sentence is contradictory in itself. One cannot consider circumstances that do not come to mind. At all events one cannot do so, if one means thinking consciously. And also

one cannot consider unconsciously what unconsciously does not occur to one. Roxin continues:

*Our whole social life is based on the assumption that for man it is possible to check dangers caused by him and to keep them under control; if it were different then the motor traffic would for ex. cause intolerable risks and would have to be stopped".***(fn 30)**

This is not a valid argument. Experience rather proves that frequently circumstances that signal danger do come to mind and are indeed considered.

A very special argumentation is to be found with von Hirsch.**(fn 31)** While in the real world somebody of limited freedom of decision – whether this freedom is determined or not – is deemed to be less guilty than somebody who, in full position of his intellectual and psychological strength, owns a great matter of freedom of decision – von Hirsch assumes that these restrictions will not reduce guilt to a great extent. And he concludes that this applies to juvenile offenders, too. Here again a conclusion is drawn from the fictional guilt-capability of adults, which means from an unreal image of the world quite beyond real experience; this will entail consequences for the young persons.

This may be one of the decisive aspects of the transformation. By installing artificial subjects instead of real human beings, which then are treated by means suitable for just these artificial objects, real human beings can be provided with the real evil of punishment -- which then can be denied its effectiveness.

3.5.3 Change of name and reversal of meaning

Practically, according to his own image of himself, man is free – theoretically seen, though, from outside by an objective disinterested observer he is constrained. (Burkhardt, 1998, p. 9)

The words *practically* and *theoretically* are not defined and one may rely on general usage. If one does, then Burkhardt should formulate: Practically, from the view of the objective uninterested observer, man is constrained; from his own theoretical view he is free. The idea of the acting individual -- that something non-neural, non-physical interferes and determines the decision -- is wrong as far as one knows … a wrong theory. Burkhardt does not use *theory* and *practice* as concepts, but mentions them.

3.6 Aura of the sacred

*From the point of view of the value-rational philosophy it is not a decisive question if the behaviour requires punishment but if it deserves punishment. …The principle must remain untouched. In case of violation, the criminal law is threatened to lose its dignity.****(fn 32)***
Lampe, who in a long run claims to embrace the theory of evolution, jumps a salto mortale in the end:

*Historical man is not alone the measure of his law. He, on the contrary is a creature, a being needing a measure when his right is being defined. However, this measure, this yardstick must be as unalterable as the correctness which it is to guarantee.****(fn 33)***

4 From metaphysical heights to the natural and cultural lowlands

If one wants to wander from the metaphysical heights down to the lowlands, then one will meet with an extensive scientific program. This program however offers the advantage that checkable hypotheses and corresponding empirical examinations can be carried out.**(fn 34)**
One would have to explain the reproduction of the social practice as a process of the developing successful socialisation in the positive or negative direction, and the gradual change of the individuals' resistance against socialisation, a self-willed movement. Such movements can in turn only be explained by presupposing a biological structure (and equipment). For the new metaphysics, on the other hand, happy slaves, satisfied raped women, and masochists are no serious problem. Everything has been learned by culture and civilisation and engraved into the individuals who came into this world as white sheets ,as it were, and so the doors are open to relativism. If the knowledge derived from biology, evolutionary psychology, psychoanalysis, and psychology were made use of, disquieting findings and perceptions would be discovered.

5 Hypotheses about the use of metaphysics in the context of *crime machinery* (CM)

(Overhead 7)

If one does not start from ideas and values but from social political, jurisdictional practice, we may ask:

- Which role will these results actual play and how valid are they?
- Which role do they play as *memes*?
- How is the relation between ideal validity and real evaluation to be defined as to the practical function of this relationship?

5.1 Values and their actual regulative function

To my opinion, the whole crime-machinery consists of certain agents who are socialized in a defined way and who then act according to a two-tier-program -- one tier being declared, the other one following suit implicitly. The old and the new metaphysics -- both definitely play their part in covering up the implicit program and strengthening the explicit one, namely the façade, and thus make it more difficult to recognize its character of façade as such.

On the one hand this machinery has eyes, ears, tentacles and claws, its windows are opened now and then, so that its internal ways of processing and treating the defendants and prisoners may be better understood. In the end it spits them out again in changed shape.

Looking at the actual working of this machinery, I think – despite all oversimplifications – the following has to be stated: It does not matter if the concept of crime is material or not. The subject matter of criminal signs cannot be defined. There exists an unlimited playground **(fn 35)**. So, the principles of the protection of legal values, of social injuriousness, of infringement of law do not give us any basis for practical work.**(fn 36)**

The assumption that guilt does exist is of no practical relevance because it can coexist with the opinion of the colleague in an adjacent room that is a hollow illusion; this is possible without greatly disturbing the working of the machinery. The irrelevance of the concept of guilt for the products of the machinery can be seen with regard to the concept of the habitual offender. This is confirmed by looking at, for instance, France or the USA – countries that are not that strange to us.

The constitutional rule of laws stands to disposition, indicated not only by the unchecked and uncontrollable interpretation (for lack of method-teaching) and the

unsatisfactory, if not to say faulty legislation. This is done quite explicitly, for instance, by talking about the *constitutional breakshoe* or *constitutional shackles.***(fn 37)**
This following quote is very informative, too:

*The penal legislation of the past twenty years could be characterized as a period of permanent dismantling of the rule of law in the laws of penal and criminal proceedings, and this is what happens again and again, but – to be fair – it must be admitted that this, though, does not decide by any means, if this dismantling is acceptable, justifiable, reasonable or not.**(fn 38)***

And who will decide on this? Nevertheless, constitutional adequacy, the rule of law, principle of guilt are emphasised again and again, and they are being moved to the centre. The science of metaphysics excuses from both the practical implications and the empirical validation.

5.2 Hypotheses regarding the not declared, really accepted programme

The nondeclared program consists in steps that are necessary for decisions with regard to whom may use resources as his own, who may manipulate whom **(fn 39)**, who may burden whom with which risks **(fn 40)**. Here we deal with negative titles that correlate to titles of civil law, which may be used for acquiring resources. Penal law is neither prima ratio, but nor it is ultima ratio when it is to assign people to their place in society.**(fn 41)**

Negative titles deal with the question of jobs, women, fortune, chances to acquire all of this, and sometimes with questions about life and physical health, or of civil rights. The criteria according to which these negative titles are distributed are indeed largely arbitrary. Those who are caught here, would claim -- would they have only been clear-sighted enough -- that there did exist permissions, licences, and approvals at other places for what they have done.

The transformation of living real people into *personae* and *subjects* results in this: the constituting of distinctions that do not correlate with distinctions in the real world and yet to tie them to far-reaching consequences for those concerned. Nothing will change, regarding the misery of science, as long as science is not definitely separated from political mundane powers. Science will remain within the reach of metaphysics, and will evade to perceive the consequences of its work.

6 Final remarks

A society under the rule of law shows and asserts few norms which demand a transfer of resources of any kind and which approve the withdrawal of resources without providing for services in return – in the sense of reciprocal altruism.

Only such norms will be understood; they relate to real differences between real human beings. Gender, race, *blue blood*, gifts and talents, ethnic or religious allegiances have been deemed to constitute fundamental differences in the course of history, though they are only superficial. But they, in turn, served as legitimisation for the withdrawal of resources with all the accompanying repressive and manipulating measures.

Whether such differences are real cannot be decided by any other than a naturalistic point of view, since a metaphysical point of view does not allow an empirical examination. To insist on a naturalistic point of view in this respect is not the end of law and jurisprudence but perhaps their actual beginning.

The assertion that a law, a code of laws, or a whole legal system, were right, and the ensuing generation of the respective face and the suppression of those, who do not believe in it or will not adhere to it, all this taken together is an effective means to cause injustice.

While on the height of the new metaphysics human rights, rule of law, democracy, guilt principle, law abiding, analogy ban are highly praised, all this erodes in the actual world. The growing inequality in the distribution of wealth and income in and between nations, indicates that these *appropriation-licenses* are produced, and then are claimed and even believed to be right. If one regards this sort of appropriation-licences as wrong, the legitimacy of many laws has to be put in question. Criminal science must do away with these silent identifications of law and right, of what is, and what ought to be. So it is necessary to develop a material law and crime concept as well as a concept of man that does not exclude biology.

Introducing real men into the living reality of working means the necessity there is no need to introduce a subject named society, which creates right by laws and then ascribes magical validity to them by magical means. Human beings, unions of human beings create laws. Human beings claim these laws are right law and that these laws do not cause any damage to anybody. These statements can be tested by science.

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Footnotes (fn; as endnotes) not translated

[1] Die dann konsequenterweise von in einer Kirche organisierten Priestern verwaltet wird – H.L. Kröber bemerkte auf der Tagung, so kämen ihm die Juristen in ihren schwarzen Kitteln oft vor.

[2] Der theoretische Ausgangspunkt liegt also in der evolutionären Psychologie bzw. der Evolutionstheorie.

[3] Vgl. Alexander 1987, S. xxx.

[4] Maynard Smith; Szathmáry, 1999, S. xxx.

[5] Bourdieu, 1980, S. 107.

[6] Blackmore, 2000; Dennett, 1995.

[7] Lüderrssen xxx; Fabricius xxx.

[8] Hauptverteter derzeit wohl M. Köhler xxx.

[9] Naucke etwa kritisiert von einem kantschen Standpunkt aus die Entwicklung des Strafrechts in überzeugender Weise, ohne sich zum Verfechter eines „kantschen" Strafrechts zu machen.

[10] Allerdings sind die Grenzen zwischen „alter" und „neuer" Metaphysik nicht so deutlich, wie es die Gliederung suggerieren mag. Köhler z.B. geht in der Rezeption empirischer Befunde sehr weit und über diese Strecke auch sehr klar, um allerdings an den entscheidenden „Bruchstellen", nämlich der Frage der (Notwendigkeit von) Strafe und der Konstruktion derjenigen, die sie verdienen (die Psychopathen, Gewohnheitsverbrecher) abzubrechen. Und sein Ausgangspunkt ist metaphysisch. Es ist eine skeptische, strafrechtskritische Position von einem metaphysischen Standpunkt aus.

[11] „Strafe hat es immer gegeben"; „Strafrecht ist für eine Gesellschaft unverzichtbar" usw.

[12] Diese Perspektive fehlt in der Gegenwartsjurisprudenz weitgehend, ein rechts- und kriminalpolitischer Standpunkt wird fast selbstverständlich eingenommen. Zur notwendigen Trennung vgl. Bourdieu (xxx), der auch auf die Lage der Naturwissenschaften vor und während der „kopernikanischen Revolution" verweist.

[13] Dieser ermangelt es nach eigenem Eingeständnis weitgehend

[14] s. dazu xxx.

[15] Die Kritik an diesen „metaphysischen Täuschungen" ist nicht neu, vgl. Bourdieu xxx, aber ihre Wiederholung keineswegs überflüssig.

[16] Jakobs, 1995, S. 843.

[17] Jakobs xxx.

[18] Vgl. schon ausführlich xxx.

[19] Lampe, 2001, S. 47.

[20] Dies wird noch einmal unterstrichen, wenn es (ebd. S. 53) heißt: „die Frage, welche Funktionen eine Strafe erfüllen soll, ist von ihrer Ist-Funktion nur bedingt abhängig. Seine Gestaltungsfreiheit erlaubt vielmehr dem Staat, der Strafe normativ Funktionen zu geben, von denen unsicher ist, ob sie real erreicht werden können, ja sogar solche, die bis zu einem gewissen Grade von ihren positiven Funktionen abweichen".

[21] Haffke, 2001, S. 956.

[22] Besonders deutlich wird dies in seiner Studie zu den Implikationen der Milgram-Untersuchungen für das Strafrecht (xxx), aber auch schon die Dissertation enthält einen ähnlichen Bruch. Ciompi (Affektlogik) ist dies auch aufgefallen.

[23] Jakobs liefert für die neue Metaphysik vielleicht die klarsten Beispiele. Deswegen scheint seine Lesart auch soviel Widerspruch zu provozieren. Wenn Vagheit die Sprache der Ideologie ist (Bourdieu) und die „neue Metaphysik" Ideologie ist (wie die alte), so verträgt sich Klarheit damit schlecht. Da ich mich mit Jakobs an anderer Stelle – durchaus gleichsinnig wie hier – ausführlich auseinandergesetzt habe, gehe ich hier nur am Rande auf ihn ein.

[24] Schünemann (2001, S. 10ff.) stellt die generelle Legitimation des "grausamen Strafübels" nicht in Frage. Jeder Gedanke an eine empirische Überprüfung der individuellen Vermeidbarkeit wird kontrafaktisch nicht angedacht. Die entscheidenden Operationen bleiben undeutlich. Das Recht wird als ursprünglich behauptet, eine kreationistische Prämisse ist. Auch die weiteren Überlegungen bezüglich der Übersetzung von präskriptiver in deskriptiver Sprache, zum "naturalistischen Fehlschluss", der dem "normativistischen Fehlschluss" (Palmström-Logik) entgegengestellt wird, führen nicht weiter. Der normative Ursprung bleibt empirisch unbestimmt.

[25] Hier wird der beschränkte Effizienzbegriff deutlich, den auch Haffke zugrundelegt. Die wertgeladene Empfindung wird zum deus ex machina, zumal der Begriff der Wertrationalität in Bezug auf Max Weber genau die dort beschriebene privatisierende Konsequenz hat.

[26] Jakobs, 1995, S. 843; vgl. auch Schild xxx.

[27] Vgl. dazu Fabricius, 1999.

[28] BGH StV mit Besprechung xxx.

[29] Das Gesetz, an welches die Richter gebunden sind, schreibt vor, Schuld festzustellen. Ist das nicht möglich, so gilt die Beweislastregel des „in dubio pro reo“. Die Annahme, man dürfe Schuld normativ zuschreiben, stellt also einen Bruch des materiellen wie des Prozessrechts dar, den man nur leugnen kann, wenn man das Gesetz nicht auslegt, sondern es als bloßen Anknüpfungspunkt für höchst eigenständige Überlegungen missbraucht – d.h., es nur erwähnt.

[30] Das ist, notabene, die ganze Begründung für die Bestrafung unbewusst fahrlässigen Handelns.

[31] 2001, S. xxx.

[32] Haffke, 2001, S. 973.

[33] Lampe, 1993, S. 216 f.; s.a. ders., 1986, S. 146, wo von „unverrückbaren Wesensinhalten“ und der „Verantwortung vor Gott und den Menschen“ die Rede ist.

[34] Zum Beispiel kann man naheliegenderweise das generalpräventive Konzept, wenn man es nicht metaphysisch, sondern diesseitig versteht, als ein Lernprogramm (oder meinetwegen auch Belehrungsprogramm) ansehen. Nur muss man nicht gleich ganze Gesellschaften und das ganze Strafrecht daraufhin untersuchen, ob diese Art von negativer oder positiver Generalprävention funktioniert, man kann sich zum einen das Wissen um Lernvorgänge zunutze machen, man kann Experimente ersinnen, oder man kann kleinere Gemeinschaften wie z.B. Schulen untersuchen. Man müsste in vieler Hinsicht dazu nicht mehr tun, als die pädagogische Psychologie oder die Lerntheorie durchzumustern und sich von da aus zu fragen, ob die Generalprävention funktionieren kann und wenn ja, wie sie funktioniert. Man hätte die Beziehung zwischen wirklichen Individuen und ihren biologischen Voraussetzungen, ihre biologische Ausstattung ins Auge zu fassen, man hätte für die Generalprävention speziell zu fragen, was eigentlich geht in den Dritten, den Zuschauern, vor, wenn sie sehen, dass jemand bestraft wird. Die beunruhigende Mitteilung ist z. B., dass Schadenfreude ein besonders verbreitetes Motiv ist, dass die Identifikation mit dem Bestraften relativ gering, die mit dem Strafenden relativ groß ausfällt.

[35] Wenn die Sklaverei potentiell kein Verbrechen ist, sondern Sklaven eben Arbeitstiere (s. Jakobs), so steht einer Bestrafung des entlaufenen Sklaven nichts im Wege.

[36] Das lässt sich für die letzten Jahrhunderte besonders gut bei Naucke beschrieben finden.

[37] De Figueiredo Dias, 2001, S. 537; s.a. bei Dallmeyer Diss. xxx

[38] Kuhlen, 2000, S. 63.

[39] Z.B. im Bereich Betrug, Untreue.

[40] Sozialadäquanz, erlaubtes Risiko.

[41] Beschämung, sozialer Ausschluss, Stigmatisierung.

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