Concerning the hypertrophy of law*

A plea for the harmonization between theory and practice

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I. Introduction

For quite a while now lamenting about the relationship between criminal law science and practice has been very fashionable. Already in 1840, *von Savigny*[1] complained about the root evil of the condition of law being the growing separation between theory and practice.[2] Further recently this situation has been complained about wordily. At least three famous inaugural lectures have dealt with this problem: In 1957, *Thomas Würtenberger*[3] critically eyed the spiritual situation of German legal science.[4] *Lutz Meyer-Großner*[5] found in 2000 theory to be without practice and practice without theory.[6] And just one year later *Volker Erb* declared that legal science, high court jurisprudence and lower court practice are in an unsolvable state of tension.[7] Other corresponding articles were written by *Fritz Loos*[8]; *Hans Joachim Hirsch*[9]; *Björn Burkhardt*[10] und *Rainer Zaczyk*[11]. Just last year, in a paper titled "Gestörte Wechselbezüge"[12], *Henning Radtke* dealt with this phenomenon.[13] However, *Wolfgang Naucke* had already verbalized in his presentation at the conference of criminal law scholars 1972 in Kiel that the separation of legal science and practice had been decided around 1859 and since then, has only been subtly reshaped.[14]

Certainly this separation is not a phenomenon limited to our subject. We are all familiar with the expression: This may be right theoretically but does not work in practice.[15] *Kant* famously used this phrase in his 1793 paper by which he defended his moral philosophy.[16] Does this mean that any attempt to close the rift between legal science and practice is doomed to fail? I do not think so. Thus, after a short evaluation of the current situation (II.), I will focus my presentation on looking for reasons to the contemplated lack of communication between legal science and practice (see III.). After reading the title, it might already be clear that I find those reasons to be the pathological overgrowth of German criminal law dogmatics. Hence the third paragraph shall firstly present to you some concise examples of hypertrophic law and criminal law dogmatics (see 1.). The very reasons causing this hypertrophy, however, are not being named yet. We will deal with these later on (see 2.). Ultimately in the fourth paragraph, I will describe possible ways of harmonization followed by a short summary of my results (see V.).

II. Survey: A deep rift, defective interdependence, or a fertile exchange between legal science and practice?

Hirsch mentions in his contribution to the liber amicorum for *Tröndle* that there are only a few states where the professional contact between legal science and the judiciary is as close as in Germany.[17] *Schünemann* as well points out that German courts face a weight of control[18] through legal science that is not known in e.g. England or France.[19] And *Radtke* finally denies the question concerning the defective mutual references[20] he posed in the heading of his already mentioned article: the overall impression being positive, harmony supposedly exceeds and covers the inevitable disturbances.[21]

Certainly, one cannot deny that the German Federal Court of Justice (hereafter: BGH) amongst others is debating over scientific legal views. And indeed, in other countries, courts relating to scientific opinions are highly unusual.[22] However, for German criminal law there is no doubt that the judiciary is actually debating with the legal sciences. Against this background, one can find a worrisome corrosion of the relationship between legal science and practice which reminds me of

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[1] *Savigny*, System des heutigen Römischen Rechts, Bd. 1, Berlin 1840, p. XXV.

[2] "Das Hauptübel unsres Rechtszustandes liegt in einer stets wachsenden Scheidung zwischen Theorie und Praxis".

[3] *Würtenberger*, Die geistige Situation der deutschen Strafrechtswissenschaft, 2nd edition, 1959.

[4] "Die geistige Situation der deutschen Strafrechtswissenschaft".

[5] *Meyer-Großner*, ZRP 2000, 345.

[6] "Theorie ohne Praxis und Praxis ohne Theorie".

[7] *Erb*, ZStW 113 (2001), 1; "Strafrechtswissenschaft, höchstrichterliche Rechtsprechung und tatrichterliche Praxis des Strafrechts" sind in ein "unauflösbares Spannungsverhältnis" gesetzt.

[8] *Loos*, in: Immenga (Ed.), Rechtswissenschaft und Rechtsentwicklung, 1980, pp. 261 et seqq.

[9] *Hirsch*, in: Jescheck/Vogler (Ed.), Festschrift für Herbert Tröndle zum 70. Geburtstag, 1989, pp. 19 et seqq.

[10] *Burkhardt*, in: Eser/Hassemer/Burkhardt, Die deutsche Strafrechtswissenschaft vor der Jahrtausendwende, 2000, pp. 111 et seqq.

[11] *Zaczyk*, in: Widmaier/Lesch/Müssig/Wallau (Ed.), Festschrift für Hans Dahs, 2005, pp. 33 et seqq.

[12] Defective mutual references.

[13] *Radtke*, ZStW 119 (2007), 69.

[14] *Naucke*, ZStW 85 (1973), 399 (424): "Die Trennung von Wissenschaft und Praxis ist entschieden um 1850 und wird danach nur noch subtil ausgeformt".

[15] "Das mag in der Theorie richtig sein, taugt aber nicht für die Praxis."

[16] See *Zaczyk* (Fn. 11), p. 33.

[17] *Hirsch* (Fn. 9), p. 19.

[18] "Kontrolldruck".

[19] *Schünemann*, in: in idem/Achenbach/Bottke/Haffke/Rudolphi (Ed.), Festschrift für Claus Roxin zum 70. Geburtstag, 2001, p. 5.

[20] See Fn. 12.

[21] *Radtke*, ZStW 119 (2007), 90.

[22] Also the ECtHR abstains from references, see ECtHR NJW 2006, 3117; ECtHR NJW 2004, 2209.

the metaphor with the boiled frog[23]: If one puts a frog into a pot with hot water, he will immediately jump out. However, if he is put into cold water and the water's temperature is gradually raised, the frog will cook to death without struggling. This phenomenon seems to fit the current situation in criminal legal science: We have noticed for decades the water getting warmer, but yet we sit still!

In his differentiating and critical article concerning the successful and inconclusive criminal law dogmatics[24], *Burkhardt* accurately identifies the problems between science and practice and comes to a depressing conclusion: Due to the short listing of reasons for this unpleasant situation of criminal legal dogmatics, the promise of an improvement is fading.[25]

III. Law and time – Looking for reasons causing the lack of communication between legal science and practice

The existing reservations between theory and practice have many reasons that cannot be dealt with at this time.[26] However, I want to point out two major aspects that seem to be responsible for this precarious relationship. These aspects deal with the hypertrophy of law (see 1.) and the spirit of the ages (see 2.).

1. On the hypertrophy of law

The term hypertrophy is used in medical science and describes the increase of an inner organ caused by an augmentation of cells.[27] Compensatory hypertrophy means the pathological adaption to an abnormal strain.[28] These two expressions seem to accurately describe the current condition of criminal law dogmatics:[29] No other criminal law system contains such a complex and complicated interdependence between theories, codes, and decisions. And in no other legal system are legal scientists meticulously trying to further refine a practically totally irrelevant theory. However, it is obvious that this specification[30] of dogmatics, excessively exercised, does not reach a practice where needs are at completely different ends. This phenomenon has another more urgent and relevant aspect: In an Europeanized and global world, where the need for international criminal law dogmatics is already present and might soon be joined by the search for an all-European criminal law concept, such a hypertrophic system is out of place.[31] And none of us wants *Burkhardt*'s nightmare to come true; that in a couple of years we will realize that German criminal law dogmatists were too eager at work to procure the survival of German criminal law dogmatics.[32]

Do not get me wrong: I do not want to advocate simplified dogmatics. But I do want to combine this presentation with the appeal to leave overly complicated criminal law dogmatics behind and return to a criminal liability system that is – not simplified but – adequately simple and sufficiently clear, as well as open to compromise. In addition, it should enable a true discussion about the contents of theory and practice. The famous saying by *Albert Einstein* that everything should be made as simple as possible but not simpler[33] can be reversed into: Every scientific theory should be as complicated as necessary but not more complicated.[34]

Yet the current condition is a completely different one, as will be shown by the following examples (see a). The examples are followed by a comparative look beyond criminal law (see b) before we deal with the second group of reasons (see 2.), which I deem responsible for the lack of communication between theory and practice.

a) The hypertrophy of criminal law

In criminal law, the century-old[35] shortcoming of communication between theory and practice continues to grow.[36] Whilst criminal law science mainly occupies itself with all too subtle theories, theoretical and philosophical legal arguments and tries to Europeanize and internationalize its findings, the practitioner is struggling not to drown in the flood of files on his desk, and is trying to keep his department from completely going under. It is obvious that he does not have the time or the resources to put scientific findings into a fair decision, an extensive indictment, or a compelling brief. Additionally, the need for such a scientific way of working is often not even necessary.

In this journal,[37] I have already described the development as a diffusion of criminal law dogmatics and used economic terms in my attempt to analyze it. In my opinion, de-

[23] A reference to the "boiling frog principle" can also be found in *Burkhard* (Fn. 10), p. 137 in Fn. 90.
[24] "Geglückte und folgenlose Strafrechtsdogmatik".
[25] *Burkhardt* (Fn. 10), p. 156: "Die knappe Auflistung von Gründen für den unerfreulichen Zustand der Strafrechtsdogmatik lässt die Hoffnung auf Besserung eher schwinden."
[26] Compare particularly *Burkhardt* (Fn. 10), passim.
[27] Pschyrembel Klinisches Wörterbuch, 259th edition 2002, keyword Hypertrophie, pp. 753 et seq.
[28] Pschyrembel Klinisches Wörterbuch (Fn. 27), keyword Kompensation, p. 885; likewise Aktivitätshypertrophie, p. 35.
[29] Considering that the inflation of criminal law is also causing dogmatical excresences outside the original system, one can also talk of compensatory hyperplasia, compare *Rotsch*, ZIS 2007, 260 (263). See also Pschyrembel Klinisches Wörterbuch (Fn. 27), keyword Hyperplasie p. 749.
[30] "Vergenauerung", *Roxin*, Täterschaft und Tatherrschaft, 8th edition 2006, p. 80, with further reference to *Busch*, Moderne Wandlungen der Verbrechenslehre, 1949.
[31] Compare at length *Rotsch*, in: Hattenhauer/Hoyer/Meyer-Pritzl/Schubert (Ed.), Gedächtnisschrift für Jörn Eckert, 2008, pp. 711 et seqq.
[32] *Burkhardt* (Fn. 10), p. 157.
[33] "Jede Theorie sollte so einfach wie möglich sein, aber nicht einfacher."
[34] "Jede wissenschaftliche Theorie darf so kompliziert wie nötig sein, aber nicht komplizierter!"
[35] Compare Fn. 1.
[36] In addition to the essays mentioned in Fn. 2–15 see also *Vogel*, in: Schünemann/Achenbach/Bottke/Haffke/Rudolphi (Fn. 19), p. 105.
[37] *Rotsch*, ZIS 2007, 260.

scribing the tendencies of diffusion as differentiation, diversification and division has several advantages: First, the economic finding as to the risks accompanying these tendencies might be applicable to the fields we are interested in.[38] And second, all this classification might be the foundation of a way to diminish the rift between legal science and practice. I do not want to linger on that, but continue by giving some up-to-date examples of hypertrophic criminal law dogmatics:

aa) A prominent example of the tendency towards a hypertrophic diffusion of dogmatics can be found in the argument about the indirect perpetration of a crime by means of "Organisationsherrschaft"[39]. This example shows that the BGH too does know how to contribute to the diffusion of criminal law dogmatics. *Claus Roxin* originally (1967) wanted to punish what is called a "Schreibtischtäter"[40] in German as severe as the actual perpetrator, and created the plausible legal concept of "Organisationsherrschaft"; a principal of a crime who controls accomplices belonging to an organizational entity in such a way that the desired aim is reached with certainty. Three decades (!) later, the BGH[41] allegedly[42] adopted this principle to be able to convict the members of the former German Democratic Republic's Nationaler Verteidigungsrat as principals (not only instigators) of the manslaughters committed by shootings at the inner German border. By now, however, through an unusually candid statement by *Armin Nack*,[43] then judge of the deciding *5th Senat* and now presiding judge of the BGH's *1st Senat*, it is clear that the BGH extensively quoted *Roxin*, but had a different – more pragmatic – construction in mind:

The director of a corporation should be punishable as principal of a crime, and to construct such principality where the actual actor himself is also fully responsible (originally the shooters at the Berlin Wall, now the workers and employees) – the doctrine of the so-called "Täter hinter dem Täter"[44] seemed to fit at least principally. Admittedly the judiciary has gone a long way from *Roxin*'s idea, and in the meantime used so many different parameters for explanations, that by now it can pragmatically punish the "Hintermann"[45] as principal of the crime in all cases where he is considered to be the true perpetrator of the crime. After objections in the literature, *Roxin* has modified his original theory in a way which leaves very little of his initial approach. From a practical point of view, the continuing scientific argument – to which I admittedly also contribute – is even more obscure, as the criminal code provides for identical punishment for principal and instigator, see the German Criminal Code (hereafter: StGB)!

That is the hypertrophy of criminal law.

bb) In one of its most discussed decisions, the case concerning soccer referee Robert Hoyzer, the BGH's *5th Senat* came up with a new category of detriment, the "Quotenschaden"[46]. This not being the place to discuss the gratuitousness of such a construction, I will focus on what is interesting; namely the potential of this decision to further the diffusion of criminal law: Up until this decision, the BGH and the leading scientific opinion would find a completed crime of fraud only under two circumstances. The crime of fraud requires a certain result. This is obviously achieved when the victim actually experiences a detrimental effect to its assets, hence does not acquire a corresponding equivalent for a certain performance. In this case, the result crime also constitutes a crime of infringement, as with the accomplishment of the crime, the legally protected interest – the victim's assets – is infringed. However, it is generally agreed upon that the second constellation also does constitute a completed crime of fraud: If the obligations to which the parties of a contract – e.g. a sales contract – have committed themselves are not yet met,[47] the victim's assets, however, are already so highly endangered that they can be considered lost,[48] the existence of a so-called "Gefährdungsschaden"[49] is commonly recognized. Further, dogmatically required is a certain specification of the endangerment[50] which causes the crime to remain a result crime, but also leads to it becoming a concrete endangerment offense[51]. This shift of criminal liability is commonly accepted by the leading scientific opinion.

The situation being as complex as it is – every candidate for the bar exam can tell you a thing or two about it – the BGH's new decision, and the acceptance of the "Quotenschaden"[52] by supposedly establishing a third category of detriment, has finally created a diffusion of criminal law dogmatics caused by unnecessary diversification. By still assuming an "Eingehungsbetrug"[53], despite the newly created "Quotenschaden",[54] the relation between Eingehungs- and Erfüllungsbetrug[55] is reversed: Whilst the "Eingehungsbetrug"[56] only had to be referred to when the exchange of promises actually did not take place, contrary to the BGH's belief[57] the "Quotenschaden" can no longer be constructed as

[38] *Rotsch*, ZIS 2007, 260 (263).
[39] "Organisationsherrschaft" means the indirect perpetration of an offense by virtue of an organizational machinery of power; in detail *Rotsch*, ZIS 2007, 260 (264).
[40] The mastermind.
[41] BGHSt 40, 218.
[42] However, see recently *Rotsch*, ZIS 2007, 260 (262).
[43] *Nack*, GA 2006, 342.
[44] Perpetrator behind the perpetrator.
[45] Wirepuller.
[46] Detriment caused by a shift of odds.
[47] It actually suffices that at least one promise has not been fulfilled yet; to the point *Krack*, ZIS 2007, 103 (109 f.).
[48] Recently on this note, BGH NJW 2007, 782 (786), with references to BGHSt 34, 394; BGH NStZ 2004, 264; BGHSt 21, 112.
[49] Detriment caused by endangerment. The term "schadensgleiche Vermögensgefährdung" is inaccurate, compare *Rotsch*, ZStW 117 (2005), 577 (584 f.).
[50] "Konkretheit der Gefährdung".
[51] "Konkretes Gefährdungsdelikt".
[52] Detriment caused by a shift of odds.
[53] Fraud committed while forming a contract.
[54] Vgl. BGH NJW 2007, 782 (785).
[55] Fraud committed while forming a contract and fraud committed while executing the contract.
[56] Fraud committed while forming the contract.
[57] BGH NJW 2007, 782 (786).

a transitional stage to the "Erfüllungsschaden."[58] If the "Quotenschaden" is actually caused by a shift of odds – so the BGH says[59] – the odds have either already shifted at the moment the contract is formed or they do not shift at all. If one presumes such a shift, however, paying out the winnings does not constitute another step in perpetrating the crime.[60] Yet, if the detriment caused at the moment the contract is formed and the detriment at the moment the contract is executed are corresponding, the "Erfüllungsschaden"[61] has lost its function. The crime of fraud has become a concrete endangerment offense.[62]

That is the hypertrophy of criminal law.

cc) In the "Kanther"[63] case, decided shortly before "Hoyzer",[64] the BGH manages a seemingly obvious escape from accepting the defendant's criminal liability by a noteworthy modification of the mental elements of the crime.

The objection raised by former Minister of the Interior Kanther that he did not mean to harm the party, but to the contrary wanted to protect it, was countered dogmatically by the BGH by requiring a mens rea directed at a financial detriment, even though the actus reus only requires an endangerment of assets. By the *2nd Senat* not being willing to have a mere intent of endangerment suffice, it undertook the welcome attempt to narrow the crime of "Untreue"[65]. However, this only seems possible by creating an incongruity between actus reus and mens rea which is recognized by the judges, but declared irrelevant.[66] Irrespective of this approach being dogmatically persuasive or not[67], it is proof of the diffusion of intent and "Untreue" dogmatics.

That is the hypertrophy of criminal law.

dd) According to § 2 StPO interconnected criminal cases can be joined for economic reasons.[68] The necessary connection required by § 2 StPO is defined in § 3 StPO. According to § 3 StPO a so-called "sachlicher Zusammenhang"[69] is given when several persons are charged with being principals and accomplices of a crime. So far the generally accepted opinion[70] has been that the term *principal* is understood in a material[71] way, whilst the term *accomplice* is understood in a different, procedural way.[72] Again we do not want to consider the question,[73] but merely accept another tendency for diffusion.

That is the hypertrophy of criminal law.

ee) We hammer into our first year students the fact that there can only be withdrawal from an attempted crime, and consider the suggestion of withdrawal from a completed crime in an exam a grave mistake However, I have to teach my bar exam candidates that the modern legislatures tendency to create new norms, especially relating to white collar crime, has led to a situation in which we truly have a withdrawal from a completed (!) negligence (!) crime. (Just have a look at § 330b [1] in conjunction with § 330a [5] StGB).

That is the hypertrophy of criminal law.

ff) One development seems especially fatal. As a matter of fact, one can no longer talk about criminal law being a consistent and homogenous field of law. Long ago a division into different categories took place, each of them characterized by a certain dialectic. Especially the distinction between citizen criminal law[74] and enemy criminal law[75], sensationally introduced into the discussion by *Jakobs*, might be the most prominent example at the moment.[76] More antagonisms can be easily named. During the last couple of years we have been talking about a "modern" criminal law, which clearly appears very different from what we so far have not titled out-of-fashion, but traditional criminal law (probably meaning liberal and in accordance with the rule of law[77]). Preventive criminal law (in contrast to repressive criminal law) can be considered a particular development of modern criminal law: Whoever shares the here noted impression of a deepening rift between theory and science will emphasize the discrepancy between theoretical and applied criminal law. We are talking about core criminal law and accessory criminal

[58] Detriment caused by executing the contract.
[59] BGH NJW 2007, 782 (785).
[60] On this note however, BGH NJW 2007, 782 (786), which at the same time nondistinctively talks about the "Quotenschaden" posing "einen erheblichen Teil des beabsichtigten endgültigen Schadens bei dem Wettanbieter." (the detriment caused by a shift of odds is a significant part of the intended final detriment suffered by the bookmaker).
[61] Detriment caused by executing the contract.
[62] "Konkretes Gefährdungsdelikt".
[63] BGH wistra 2007, 136.
[64] The so-called "Hoyzer"-case was decided December 15, 2006 (5 StR 181/06), the suprisingly little regarded "Kanther"-decision was decided November 18, 2006 (2 StR 499/05; however, compare now *Ransiek*, NJW 2007, 1727).
[65] Fraudulent breach of trust.
[66] BGH wistra 2007, 136 (142).
[67] See now BGH, NStZ 2009, 95; *Brüning/Wimmer*, ZJS 2009, 94; *Schlösser*, HRRS 2009, 19.
[68] Compare *Rotsch*, in: Krekeler/Löffelmann (Ed.), Anwaltkommentar zur StPO, 2007, § 2 Rn. 1 ff.
[69] Factual connection.
[70] Now differently *Rotsch/Sahan*, ZIS 2007, 142.
[71] "Materiell-rechtlich".
[72] *Wendisch*, in: Rieß (Ed.), Löwe/Rosenberg, Die Strafprozessordnung und das Gerichtsverfassungsgesetz, 25th edition 1999, § 3 Rn. 6; *Pfeiffer*, in: idem (Ed.), Karlsruher Kommentar zur Strafprozessordnung und zum Gerichtsverfassungsgesetz, 5th edition 2003, § 3 Rn. 3; *Lemke*, in: idem et. al. (Ed.), Heidelberger Kommentar zur Strafprozessordnung, 3rd edition 2001, § 3 Rn. 4.
[73] See in detail *Rotsch/Sahan*, ZIS 2007, 142.
[74] "Bürgerstrafrecht".
[75] "Feindstrafrecht".
[76] Compare already *Rotsch*, ZIS 2007, 265 with further references in Fn. 53.
[77] This enables an inference to the importance of the term "modern". The development has its origin in the change of climate in criminal-policy – although this is not scientifically verbalized much in Germany; one exception being *Sack*, in: Obergfell-Fuchs/Brandenstein (Ed.), Nationale und internationale Entwicklungen in der Kriminologie: Festschrift für Helmut Kury zum 65. Geburtstag, 2006, p. 35.

law, and even the dichotomy between upper class and lower class criminal law is not unknown. For the future, the most radical pair of terms seems to me that of national and international (including European) criminal law.

Is it not obvious that such a diffuse criminal law, which is not accessible to a consistent conception, becomes frayed out, unclear, and – especially for the practice – intangible?

That is the hypertrophy of criminal law.

b) The hypertrophy of law

These phenomena are not limited to the field of criminal law. Let us take a brief excursion into constitutional law.

Bernhard Schlink titled his essay published by the Juristenzeitung in February 2007: "A farewell to dogmatics. Constitutional jurisprudence and constitutional legal science in a flux."[78] Therein, *Schlink* accounts for the Bundesverfassungsgericht abandoning the binding precedent of its own decisions. It seems as if there is also an increasing diffusion in constitutional law, leading to a rise in self-corrections, namely the changing of older constitutional decisions by the Bundesverfassungsgericht itself. Shorty after the Bundesverfassungsgericht had first noticed how similar members of parliament and civil servants really are (BVerfGE 40, 293 [311]), it suddenly recognized existing differences by having a closer look at it (BVerfGE 76, 256 [341 ff.]). After having been repeatedly criticized for not tax exempting the minimum living wage for families (BVerfGE 43, 108 [121 ff.]), the Bundesverfassungsgericht got tired of the criticism and changed its mind (BVerfGE 82, 60 [85 f.]). After the Bundesverfassungsgericht's insistence on the penal protection of the unborn child had lost its societal and political value (BVerfGE 39, 1 [45 ff.]), the Bundesverfassungsgericht too doesn't want to insist any longer (BVerfGE 88, 203 [264]). After frowning upon the protection of fun and entertainment events by the basic right of freedom of assembly caused by its wide definition of "assembly" (BVerfGE 69, 315 [343]), the Bundesverfassungsgericht changed to a new, narrow definition of assembly (BVerfGE 104, 92 [104]). And concerning the constitutional assessment of funding political parties (BVerfGE 8, 51 [63]; 20, 56 [97]; 73, 40 [84 ff.]; 85, 264 [285 ff.]), it is as fluctuating and at loss in its decisions as are the possible solutions manifold.[79] These self-corrections lead to a decreasing importance of stare decisis; not only is the Bundesverfassungsgericht no longer bound by its own holdings, but the judiciary in general also refuses more and more often to follow the highest judges decisions.[80]

Accompanied by this "de-dogmatisation" is the de-rationalization of judicial decision making. It causes the over-specialization of a few and the powerlessness of many. Coming under the disguise of scientific dogmatics, it is nevertheless resulting in a hypertrophy of constitutional law dogmatics.

That is the hypertrophy of law.

I will leave it at this short trip into unknown territory. Any of the present practitioners and legal scientists may ask themselves whether similar tendencies can be observed in their own field of work. Just by looking at it cursorily, a similar development seems to be taking place in fields such as intellectual property law, tax law, and private international law.

Before finally looking for possible solutions, the question as to what caused the current condition of our legal system has to be asked:

2. Of the spirit of ages

We no longer have to argue about the lack of "Einheit"[81] between theory and practice, as it cannot be construed and also is not desirable[82] – contrary to what e.g. *Binding*[83] and with him the 19th century believed. Too different are the working tasks and conditions:[84] The judiciary being part of the societal machinery of power has to ensure a fair decision in an individual case. It is thereby particularly concerned with legal certainty. The judiciary does not look for problems, it is presented with them. It cannot deny the application of law. It is forced to make a decision and has only limited time to do so.[85] The legal science, however, is free. It chooses its object of examination, it pesters it for originality, and it pesters it as long and as hard as it wants. It aims at perfecting the legal

[78] "Abschied von der Dogmatik. Verfassungsrechtsprechung und Verfassungsrechtswissenschaft im Wandel", *Schlink*, JZ 2007, 157.

[79] *Schlink*, JZ 2007, 157 (159): "Nachdem dem BVerfG zunächst aufgefallen ist, wie ähnlich Abgeordnete Beamten geworden sind (BVerfGE 40, 293, 311 ff.) fallen ihm bei genauem Hinsehen gleichwohl bestehende Unterschiede auf (BVerfGE 76, 256, 341 ff.); nachdem das BVerfG vielfach gescholten worden ist, weil es das Familienexistenzminimum nicht von der Steuer befreit hat (BVerfGE 43, 108, 121 ff.), ist es die Schelte leid und besinnt sich eines anderen (BVerfGE 82, 60, 85 f.); nachdem das bundesverfassungsrechtliche Insistieren auf strafrechtlichem Schutz des ungeborenen Lebens (BVerfGE 39, 1, 45 ff.) seine gesellschaftliche und politische Evidenz verloren hat, will auch das BVerfG nicht mehr insistieren (BVerfGE 88, 203, 264); nachdem es nicht gerne gesehen hat, dass unter seinem weiten Versammlungsbegriff (BVerfGE 69, 315, 343) auch Spaß-, Unterhaltungs- und Aktionsveranstaltungen vom Grundrecht der Versammlungsfreiheit geschützt sind, wechselt es zu einem neuen, engen Versammlungsbegriff (BVerfGE 104, 92, 104), und bei der verfassungsrechtlichen Beurteilung der Parteienfinanzierung ist es so ratlos und schwankend (BVerfGE 8, 51, 63; 20, 56, 97; 73, 40, 84 ff.; 85, 264, 285 ff.) wie die möglichen Lösungen des Problems vielfältig sind".

[80] *Schlink*, JZ 2007, 157 (158).

[81] Unity.

[82] On this note *Erb*, ZStW 113 (2001), 18.

[83] *Binding*, ZStW 1 (1881), 4 (29).

[84] *Burkhardt* (Fn. 10), p. 116 with further references in Fn. 19-21.

[85] The much-critized pressure of time under which decisions have to be made however, has another function, namely serving the defendant's interests; compare for instance *Radtke*, ZStW 119 (2007), 83.

system.[86] And it is another story that in doing so it also serves career and manipulation interests.[87] Science knows everything. But not more.[88]

a) The spirit of the practice

Shortage of time and resources is heavily lamented by practitioners and does not need to be repeated here. Let me just take one single example out of the criminal law jurisprudence that has been heavily and controversially discussed, also in the non-legal public. It is the so-called "Mannesmann-Verfahren". As is generally known, the Landgericht Düsseldorf settled the case with a plea bargain in accordance with § 153c (2) in conjunction with § 153c (1) StPO.[89] For the most famous of the defendants – the Deutsche Bank's CEO Dr. Ackermann – the settlement included the condition of paying € 3.2 Million – at an annual income of € 15-20 Million (Dr. Ackermann was unable to name the exact figure).

This is not the place to argue about the general necessity and legitimacy of plea bargains in criminal trials. However, this case clearly shows what the strained relationship between hypertrophic criminal legal science and – if you want to call it that – atrophic criminal legal practice leads to: Looking at it from a criminal law dogmatist point of view this case poses complicated problems concerning the "Untreuetatbestand"[90] in addition to complex questions concerning error of law and participation in a crime.[91] In its appellate decision, the Bundesgerichtshof[92] very clearly commented on those questions and pointed the Landgericht unambiguously to its opinion of the law – guilty of fraudulent breach of trust. The Landgericht did not dispute this. But it considered the public interest in criminal prosecution served by imposing the fine. And it even claimed that the appellate decision clarified important questions of law exceeding those posed in the actual trial! Therefore, the Landgericht – as well as the BGH – assumes a punishable conduct, however, at the same time assumes such a low level of guilt to not oppose a settlement provided for by § 153a (1) StPO. Understandably this notion might not convince everybody, especially considering the immense public interest as well as the caused detriment of € 57 Million. However, by conciliatory declaring that the plea bargain does not diminish the importance of the BGH's appeals decision, the Landgericht did not quite address the devastating impression its decision has caused not only in the general public[93] but also in criminal legal science. In their ZIS 2007 essay, *Frank Saliger* and *Stefan Sinner*[94] have accurately found a dichotomy of abstract law[95] and concrete will[96]: The interest in clarifying fundamental abstract questions of law is declared done; the concrete will of the participants to settle the case is considered paramount. Such a termination of the binding precedent of a high court decision is not unknown: We have seen it before while dealing with the jurisprudence of the Bundesverfassungsgericht. It is obvious that the legal science worries about this culture of decision making. Analyzed from a practical and pragmatical point of view the settlement can be considered justifiable. From a dogmatical point of view the plea bargain is a catastrophe.

b) The spirit of science

Yet such developments are not caused solely by practitioners. If criminal legal science is less and less able to transport its results intelligibly and utilizably into practice, it has missed its first and foremost goal, and remains unworldly and unrealistic[97] and cannot be a theory of the law[98].[99] Through this, legal science also contributes to the current situation of our criminal legal system.[100]

The reasons for this phenomenon differ widely but they are all related to the current condition of the humanities; the method necessary to achieve a scholarly career nowadays, an immense flood of publications caused by young scholars faced with the pressure to publish more and more original works and with an ever-growing knowledge that is – not only for students – less and less controllable. *Burkhardt* accurately phrased that attached to the problems the new generation of dogmatics find, come the proposed solutions of the old generation.[101]

The result is a high degree of uncertainty in legal science. Uncertainty of law is not only the result of contradicting jurisprudence, but it is also caused by a multitude of finely trimmed, profoundly controversial theories that can only be distinguished in detail by experts. Everybody is claiming an interest in scientific findings, the result however is a loss in certainty making it impossible to form a definite opinion. To hold it with *Arzt*: the diversity becomes the primary detriment.[102] Understandably, the BGH seems more or less unimpressed with the scientific discussion and finds its own law.

Making the efforts even more questionable is the proven fact that a scientific theory is not accepted by the jurispru-

[86] *Röhricht*, ZGR 1999, 445 (463).
[87] *Mertens*, ZGR 1998, 386.
[88] *Paul Montel*.
[89] Compare press release Nr. 09/2006; Nr. 01/2007; www.lg-duesseldorf.nrw.de.
[90] § 266 StGB, fraudulent breach of trust.
[91] Compare recently *Saliger/Sinner*, ZIS 2007, 476 (477).
[92] BGH NJW 2006, 522; *Hohn*, wistra 2006, 161; *Ransiek*, NJW 2006, 814; *Rönnau*, NStZ 2006, 218; *Schünemann*, NStZ 2006, 196.
[93] Compare references concerning press coverage *Saliger/Sinner*, ZIS 2007, 476 in Fn. 1.
[94] *Saliger/Sinner*, ZIS 2007, 476 (479, 481).
[95] "abstraktem Recht".
[96] "konkretem Willen".
[97] "welt- und lebensfremd".
[98] "kann keine Theorie des Rechts sein".
[99] *Zaczyk* (Fn. 11), p. 41
[100] Sure enough the BGH with its appeal decision of the Mannesmann case made a clear statement about the application of the law; *Saliger/Sinner*, ZIS 2007, 481.
[101] *Burkhardt* (Fn. 10), p. 148: "Zu den Problemen, die die neue Dogmatikergeneration vorfindet, gehören die Lösungsvorschläge der alten".
[102] *Arzt*, in: Dornseifer et al. (Ed.), Gedächtnisschrift für Armin Kaufmann, 1989, p. 839 (pp. 867 et seqq., 873).

dence because it is dogmatically persuasive, but only because it fits current criminal-policy needs. Just remember what has been said about *Roxin*'s legal doctrine and its reception by the BGH.

In the aforementioned "modern" criminal law, the scientific discussion is marked by another phenomenon. Being more and more focused on coming to terms with the future than reacting to the past[103] – degenerating criminal law to an instrument made for risk control and risk management – we are faced with the difficulty of finding solutions to more and more complex problems in an even shorter time. This causes direct repercussions for the scientific quality, as science no longer has enough time to insure itself.

This development has another alarming yet opposite consequence: Evidently, scientific publishing companies seem to believe that (criminal) legal science only can be conveyed in a simplified form. While even masterly written textbooks, such as *Roxin*'s "Allgemeiner Teil des StGB", are more popular abroad than in Germany, short "Kurzanleitungen zum Prädikatsexamen"[104] find a ready market. To blame the publishing companies would be absurd; they are oriented at profit maximization, and thus the sales numbers are what considered when developing the catalogue.

c) The spirit of time

We are all a reflection of the spirit of our time.[105] This conclusion is trivial but true. The idea – by a lot of people still attributed to *Johann Gottfried Herder* – to detect the characteristics of an era by using time overlapping instruments and measurement criteria, is originally from the 1760 book by *Christian Adolph Klotz*.[106] The German term "Zeitgeist", a word originally translated from Latin, has found its way into the global language, as it is also used in English. This "Geist der Zeiten"[107] is seducing: anonymous, imageless[108], and nebulous; the term offers us a justification for being so susceptible to accepting the circumstances of our time. The "spirit of ages" is used to banish the ghost of helplessness. Nevertheless, it sometimes offers us an illuminating glance into the intellectual and cultural climate of an era.

An example*:* For years now, even in the so-called reputable media, one can observe the comeback of superficiality. Now even the honorable FAZ has broken its own dogma and presents a colored picture on its front page.

In a meaningful attempt of justification, the editorial board, belied by the daily reality, claimed it to be of a pictorial uniqueness. Whatever one's opinion about that may be: the new layout means that a third of the original text on the front page has disappeared. The modern reader, euphemistically called the "speedy" reader, is degraded to an incapacitated reader. In a digitalized world with no distances, not only the circulation of news but also their presentation and reception has been thinned out and accelerated in a way that transforms those who once were bond-slaves into time-slaves.[109] For some people the alleged blessing of modern email-communication is becoming a curse, and more than a few want the slowness of former times back.

The university, however, has always been a place for countering the tendency to relinquish thinking[110] by enhancing the delight in reflection. And this leads me to my attempt to speak of a possible way to harmonize theory and practice.

IV. A plea for the harmonization between theory and practice

How does this fit together? The depiction of the hypertrophy of law, the demand to return to a simpler[111] legal system, and at the same time the appeal for a deeper thoughtfulness?

To undertake the attempt of freeing the law from its hypertrophic burden should not be misunderstood as a call for the belittlement of problems.[112] On the contrary, especially universities can and should be the places for a profound and scientific problem solving. The art of lecturing is not to trivialize complex issues of law, but to reduce them to their supporting basic structure and convey them without inappropriate trivializations. Therefore, we should not loose track of the practical benefits of the education. It is in our hands to transform our young students into reflecting and critical jurists, who do not become one of *Montesquieu*'s "Subsumtionsautomaten"[113] but develop an appreciation of the legal system as well as the necessary soft skills. This will take time and requires a method of teaching law that is different from those of the commercial "Repetitor"[114]. We should, on one hand, not underestimate today's law students; however, we should on the other hand not let them drown in a flood of irrelevant insider-knowledge. It is our responsibility to ensure that good candidates for the bar become, in every sense of the word, good practitioners.

I believe that especially the University of Augsburg has set the course well for the education of future generations of jurists. The student body is involved in the appointment of new professors, e.g. by taking part in evaluations. In Augsburg an "Examinatorium ohne Rep"[115] has been created, which constitutes a first-class alternative to a commercial tutor and serves as role-model for other Bavarian universities. Talking about the University's equipment is unnecessary,

[103] *Hassemer*, Produktverantwortung im modernen Strafrecht, 1994, pp. 9 et seqq.
[104] Graduation with honors in a nutshell.
[105] *Hiery*, Zur Einleitung: Der Historiker und der Zeitgeist, available at www.uni-bayreuth/de/departments/neueste/ZeitgeistEinleitung.htm.
[106] *Hiery* (Fn. 105).
[107] "Spirit of the age"; compare *Goethe*, Faust, Erster Teil, Nacht.
[108] *Konersmann*, in: unizeit v. 8.1.2005, p. 2.
[109] *Hiery* (Fn. 105).
[110] *Zaczyk* (Fn. 11), p. 41: "Verzicht auf das Denken".
[111] "vereinfachten".
[112] See *Erb*, ZStW 113 (2001), 18, who regards a self-diminution of legal science to be impossible.
[113] A term describing the mindless subsumption of the elements of a crime.
[114] Tutor.
[115] Bar exam preparation classes offered by the university itself, not by a commercial tutor.

even if students that are not familiar with other universities may not yet appreciate it.

Let us be more confident about our students: With interesting lectures one can overcome the prejudice that on Mondays students are not yet and on Fridays they no longer can be found in school. A prejudice also said about professors. Quite a few students are thankful for recommendations aside the usual literature and the popularity of slim books is often simply a result of the student not being told about more sophisticated literature, and in the bulk of offers only takes the cheapest book. And not every student with a philosophical mind has to be advised to finish law school as quickly as possible in eight short and exemplary semesters.

Since this inaugural lecture should also serve as means to show my own current and future field of work, please allow me to suggest some moderate solutions for the described deficiency in criminal law, which to a great deal have been already put underway with the valuable help of many of my colleagues.

In 2006 we founded the online publication ZIS – Zeitschrift für Internationale Strafrechtsdogmatik.[116] Its aim is – contrary to the "zeitgeist" – to be a stage for scientifically deepened thoughts. Its advantage to the classical print media is an unlimited offer of space. In addition, there is no month-long waiting period for publications, which is unattractive for both reader and author.

Following the good reception by both legal science and practice, we have accomplished the creation of an International Advisory Board, presided over by renowned international criminal law scholar *Kai Ambos* who is responsible for the procurement and evaluation of foreign articles. By now it has more than 25 members; all of them respected professors from all over the world.

The success of this journal has encouraged us to launch another free publication aimed at legal education. Having started February 1st, 2008, we are now publishing this new journal called ZJS (Zeitschrift für das Juristische Studium)[117] online in a two-month cycle covering all fields of law relevant to the bar exam.

By organizing the first "Karlsruher Strafrechtsdialog" last year, *Matthias Jahn* and *Armin Nack* contributed valuably to a harmonization between criminal legal science and the judges of the BGH. At this conference, the idea to implement this harmonization into practice ripened. Hence, we, some younger colleagues, *Armin Nack*, and six criminal judges of the BGH have founded the workgroup "Wissenschaft und Praxis" (WuP). This is the legal science's attempt to participate in the finding of law with the highest criminal court, *before* the actual decision is made. Therefore, on the ZIS homepage one can find descriptions of legal problems concerning upcoming BGH cases; every scholar thus has the possibility to comment on relevant practical problems from a scientific point of view.[118]

And of course it is our responsibility to get more practical expertise to the university. Augsburg has recruited several foreign legal scholars for presentations – on the initiative of *Henning Rosenau Prof. Taguchi* from Tokyo, who spoke about the subject of matter in Japanese criminal law[119] on November 5, 2007;[120] *Claus Roxin* has already given a speech about criminal procedure; *Kristian Kühl* has agreed to talk about material criminal law, and in the summer semester there will be a lecture with me and *Armin Nack*, in which we will try to clarify the doctrine of indirect principality by "Organisationsherrschaft" from a theoretical and practical point of view.[121]

V. Result

Criminal law is not the only field of law characterized by a growing diffusion of dogmatics which leads to a hypertrophy of law. This hypertrophy dissolves the concepts of systematization in Germany legal science; last but not least it is also a considerable reason for the increasing estrangement between science and practice. Whoever wants to decrease this estrangement has to accomplish two things: He has to ensure that during legal education science is conveyed to the students with respect of its practical necessity, and he has to use and expand the possibility inherent in his position to intensify the contacts with practitioners.

[116] It is published monthly and is available at http://www.zis-online.com.
[117] Available at http://www.zjs-online.com.
[118] The first article by *Gössel* can be found in ZIS 2007, 557.
[119] "Prozessgegenstand im japanischen Strafprozessrecht".
[120] *Taguchi*, Der Prozessgegenstand im japanischen Strafprozessrecht, ZIS 2008, 70.
[121] In the meantime (on Oktober 27, 2008), the lecture has been held, appreciated by a high number of students.