THE MAKING OF CRIMINAL LAW NORMS IN WELFARE STATES: ECONOMIC CRIME IN WEST GERMANY

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Using the cognitive mapping approach, I investigate the genesis of criminal law norms against economic crime in West Germany. Four theoretical approaches can be derived from the interaction of two dimensions: differentiation versus Marxist theory, and functionalist versus conflict-group theory. Focusing on interests, anticipated functions, and conflict lines, I analyze the argumentation structures in the judicial committee of the Bundestag concerning the criminalization of price fixing in cases of public tender. The results show that the rationalities of politicians are oriented to dominance groups and power, not policy; communicative relatedness between representatives of different political parties is low; and cognitive maps are restricted and do not indicate policy rationality but legitimatory purposes.

I. THEORETICAL PROBLEMS AND OVERVIEW

Are welfare states benevolent states? Or are they states in which the formerly powerful experience increasing negative sanctions in favor of the formerly oppressed? Are they not welfare states at all, but capitalist societies only slightly covered with a state-made curtain of welfare? Does this curtain also serve as a central tool of state control? What would be the consequences of each alternative for the development of criminal law?

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Alber (1982) has recently presented a comprehensive, internationally comparative empirical investigation of the development of welfare states. He distinguishes four types of approaches that try to explain the origin and expansion of welfare states, which he develops by applying two dichotomized dimensions: Marxist versus pluralist (or differentiation) theory and functionalist versus conflict-group (or action) theory. Alber organizes the relevant European and North American sociological literature according to these dimensions. He tests their validity by confronting them with comprehensive, internationally comparative statistical data and finds that the differentiation and conflict-group theories can best explain the origin and development of modern welfare states.

There is no doubt that welfare states have considerable potential for negative sanctions. Criminal law and an appropriate sanctioning apparatus are a constituting element of all existing welfare states. Positive (welfare law) and negative (criminal law) sanctions and their associated institutions must therefore be seen as interrelated. Does this mean that we will find similar answers to the questions investigated by Alber when we explore the development of criminal law in welfare states? This article contributes an answer to this question.

First I systematize and briefly describe several approaches to criminal law. I next deal with Max Weber's idea of the intrusion of material, sociological, economic, and other reasoning into the formal rationality of legal normative systems. I then present a dominance theory approach to criminal law as developed by Haferkamp, who assumes the increasing liberalization of criminal law under conditions of the welfare state. The other approaches under consideration assume the dependency of developments in criminal law upon interests and functional demands within the economic sector. I then confront these theories with an empirical case: the genesis and application of criminal law against economic crime in West Germany, particularly the Second Law against Economic Crime (Zweites Gesetz zur Bekämpfung der Wirtschaftskriminalität). After a brief overview of the political process, I introduce relevant interests, functional demands, and conflict lines. I then relate the theory to the analysis of the arguments of political decision makers by means of the cognitive mapping procedure. This approach, developed and successfully used by political scientists, has not previously been applied to the sociology of criminal law. The analysis suggests conclusions that are relevant for current discussions in the fields of the sociology of criminal law, decision theory, and political science.

Table 1. Theories and Models of the Development of Criminal Law in Modern States

Theories and Models	Sociological Examples	Prognoses for the Development of Criminal Law
Differentiation; action/conflict-group	Weber (1976)	Particularization; increasing relevance of substantive criteria of rationality from nonlegal spheres
	Haferkamp (1980, 1983, 1984)	Reduction of criminal law; redistribution of criminalization chances
Neo-Marxist; action/conflict-group	Turkel (1980)	Particularization; increasing relevance of substantive criteria of rationality from nonlegal spheres, particularly favoring increasingly powerful actors from the economic system
Neo-Marxist; functionalist	Pilgram and Steinert (1975), Steinert (1978)	Adaption of criminal law to the functional demands of the economic system and the mode of production (liberalization and criminalization possible)
Model of welfare state; reaction to deviant behavior (prescriptive)	Sack (1983)	Radical decriminalization; adaption of the normative system and sociostructural reforms instead

II. SOCIOLOGIES OF CRIMINAL LAW IN WELFARE STATES

Several sociologists have tried to explain or predict the development of criminal law under the welfare state. I will first summarize some of these positions, organizing them according to Alber's typology mentioned above, and then confront them with our empirical example. Table 1 gives an overview of this discussion.

In his *Sociology of Law*, Weber (1976: 387–513) provides an early sociological discussion of the development of law in welfare states.[1] After pointing to the "irrational" roots of criminal law, Weber describes its differentiation and development in terms of the process of the rationalization of societies in general and of law in particular. He typologizes law according to the dimensions of rationality versus irrationality and formal versus substantive.

A closer look at the types of formal and substantive ration-

[1] Schluchter (1979: 128) stresses that the literature on Weber's *Sociology of Law* has remained very limited although Talcott Parsons identified it as the core of Weber's sociological work. According to Winckelmann (1976), who edited most of Weber's writings, it is in the *Sociology of Law* that all lines of reasoning of *Economy and Society* are knotted together.

ality Weber distinguishes lays open opposing social ideals and terms of liberty (Winckelmann, 1976: 120). The social ideal of formal rationality consists of the absence of value judgments and the maximum amount of individual freedom for economic, political, social, and personal action. In the case of substantive rationality, the creation and interpretation of legal terms take place with continual reference to concrete problems and conflicts within the given social order. In this latter case the measure of rationality is the reasonability of the proposed social models. The social ideal is the welfare state's guarantee for security, peace, and equal opportunity for the majority of the population. Formal rationality is concerned with liberty in the sense of the liberalistic bourgeois state. Substantive rationality relates to liberty in a sociological sense, the main impediment of which is the legalized differentiation of property (ibid., 146–148).

Weber sees an inescapable contradiction between the abstract formalism of legal logic and the need for the fulfillment of substantive demands. Under the conditions of legal formalism the legal apparatus functions like a technically rational machine (Weber, 1976: 470). It allows for a relative maximum amount of freedom for actors and for the rational calculation or prediction of the consequences of purposeful actions.[2] However, this means, in combination with the unequal distribution of economic means and power, a threat to substantive ideals of justice. Weber points out that this threat is greater when access to legal justice is closed to the masses, which is partially caused by the high private costs of the attorney system.

These qualities of legal formalism are, according to Weber, opposed by ideals of the welfare state. For the development of the legal system in welfare states he predicts antiformalist tendencies (ibid., 503–513) that are closely connected to an increasing particularization of the legal system, that is, to the appearance of particular courts, laws, and procedures for different types of actions.[3] Weber gives two reasons for this legal partic-

[2] Schluchter (1979: 132–163) criticizes the differentiation between formal and substantive rationality by Weber and his apologetic and critical interpreters, for he insists that formal law always contains both formal and substantive aspects. Revisions of court sentences, for example, can always be based on formal as well as substantive reasons (ibid., 142). Schluchter points out that the formal and substantive principles of the legal state complement each other. Yet, the tension between the legal state principle (the formal legal state principle) and the welfare state principle (the substantive legal state principle) remains.

[3] The differentiation of labor and welfare courts in the welfare state is a typical example of this, although particularization is also found within criminal law. Our case of economy-related criminal law provides a good example.

ularization: (1) professional differentiation and the increasing attention that economic interests have gained; and 2) the wish to escape formal legal procedures in favor of legal reasoning more suited to the individual case. In practice this means a loss of legal logic based on the legal definition of facts, abstract legal sentences, and the principle of exclusiveness. These developments mean, according to Weber, that sociological, economic, and ethical reasoning increasingly replaces legal terms in modern, highly differentiated societies organized as welfare states. They are enforced by the ideologies and interests of professional groups of legal practitioners who do not want to degenerate into "legal automats," to use Weber's term, within a highly formalized legal system.

Weber does not clearly state which societal group these developments favor. Following his argument that formal legal rationality finally serves those who are most powerful in a free societal exchange, one could conclude that the materialization of legal processes serves the formerly oppressed.

If Weber's approach is placed in Alber's typology cited above, it could be related to differentiation theory as opposed to Marxist theory and to action or conflict-group theory as opposed to functionalist theory. Weber points to particular interest groups and their members' demands, interests, and actions that finally result in a change of the legal system.

Haferkamp's approach (1980, 1983, 1984), specifically dealing with criminal law, reflects the same type of theory. The key to his analysis is the societal distribution of power and dominance (*Herrschaft*), understood as a function of the level of functional differentiation of societies. His method is to systematize all those works that try to explain the development of criminal law in terms of the activities of interest groups such as the upper class (see, e.g., Carson, 1974; Hall, 1952; Schumann, 1974), the middle class (see, e.g., Arzt, 1976; Schumann, 1974), or organizations of professional groups, sanctioning agencies, and moral crusaders (see, e.g., Akers, 1975; Becker, 1963; Blankenburg and Treiber, 1975; Chambliss and Seidman, 1971; Gusfield, 1963; Matthes, 1964; Peters, 1968; Quinney, 1970; Roby, 1975).

These interest groups are distinguished by very heterogeneous criteria, which Haferkamp tries to overcome by organiz-

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Since the mid-1960s special prosecutors' offices and court chambers for economic crime have been created in West Germany. The consequence was an increase in both the number of identified and sentenced economic crime cases and the level of damages below which a case was not admitted to the specialized court process (Liebl, 1984: XXXVI–XL).

ing them within a common context—dominance. He assumes that criminal law making is considerably determined by groups from different fields (functional sectors of societies) and levels of dominance, which compete with each other, define and articulate their norm-interests, and organize their realization (Haferkamp, 1980: 53–56).

According to Haferkamp, increasing functional differentiation causes the growing dependency of modern societies on the achievements of more and more specialized populations. This development in turn causes the dissolution and redistribution of dominance away from formerly dominating groups and classes and toward new, but more limited, groups. Among the latter are the representatives of social bureaucracies, the "new little masters," as Haferkamp (1984: 124) calls them. The redistribution of dominance is crucial to his analysis of criminal law because he understands the latter as a reflection of the former. A dissolution or redistribution of dominance would thus be followed by a liberalization of criminal law or a redistribution of the chances of members of different classes to become criminalized. This approach offers an explanation for current patterns of decriminalization (Haferkamp and Heiland, 1984; Haferkamp, 1985; Heiland, 1985; Lüdemann, 1985) as well as for current processes of criminalization in specific sectors of law (Schick, 1981).

Haferkamp's prognosis[4] agrees with Weber's in important respects. Formal legal equality, which had been identified by Weber as the basis for the free play of societal power and the resulting structures of inequality, decreases. It is currently being replaced by a substantive (welfare) rationality that aims at a better realization of actual (sociological) equality. This equality consists of equal opportunities for members of a society to obtain certain goods and to avoid certain restrictions, such as the criminalization and sanctioning of behavior by state authorities.

However, the tendencies identified by Haferkamp are not unchallenged. Two opposing, yet closely related tendencies that may influence legal developments as well can be observed. One is a loss of potential participation from below, as is presently experienced by the unions. The other is increasing concentration of political power in, for example, party machines, and of international capital and the growing exchange of

[4] Feest (1984) and Schumann (1985) have rejected this position. They point especially to the creation of functional equivalents for abolished sanctions in the implementation process.

money, services, and goods. Through this process power potentials above the level of state-societies become dominant. How effectively such suprasystemic potentials can affect decisions in political systems can be shown through a comparison of studies of absentee-owned corporations, for power potentials that are organized beyond the limit of a community, state, or country are more likely to be anticipated by the decision makers within a political system (Savelsberg, 1980: 114–132).

Turkel (1980) investigates the impacts of capital concentration on the development of law, using the case of a subsidies law. He shows how formal legal systems that were highly functional under a free competition market economy (Turner, 1981: 318–351) become dysfunctional under high capital concentration. Consequently, substantive criteria and particularization intrude upon the formal legal order, as predicted by Weber. According to Turkel, however, this favors particularly powerful actors. In his case study both the administration and Congress reacted to Lockheed's fiscal crisis with a law that offered very general subsidies and was thereby legitimized but targeted specifically to the needs of the one company.

Turkel explains this particularization through the "privatization" of the public sector: The state is a stockholder and thus dependent on the production of certain economic enterprises. In critical economic situations the state is also expected to intervene in favor of dominant sectors of the economy. As a result the legal discourse expands beyond Weber's term of legal formality to include technical criteria and political standards.

In summary, Turkel's analysis confirms Weber's prognosis of the intrusion of substantive criteria of rationality into formal legal systems and their particularization (that is, loss of universalistic orientation). Here the explanatory factors are not, however, differentiation, as Weber argues, and the dominance of "new little masters," as Haferkamp states. They are, on the contrary, the increased power of economic actors through processes of capital concentration. On the other hand, Turkel's case does support action or conflict-group theory, for the interests of the powerful do not automatically prevail but must be fought for in negotiations with and within the political sector.

The relevance of economic power, interests, or functional demands for the making of law, including criminal law, is documented with several remarkable investigations. Hall (1952) identifies economic interests as the crucial factor in early British laws against thievery. According to Hall's analysis, the most dominant force was the interest in securing the rapidly expanding economic exchange relations in early capitalist society.

In this case the interests of powerful economic groups correlated with the functional demands of the developing industrial-capitalist system. Chambliss (1964) comes to a similar conclusion in his analysis of the history of the English laws against vagrancy. Pilgram and Steinert (1975) explain the reform of the Austrian criminal code in terms of a political economy approach. They point to changed conditions of production and reproduction in Austria during the 1960s. From this perspective liberalizations of criminal law may go along with economic interests. The authors contradict the sociopolitical interpretation of reform, pointing instead to the functional demands of the economic sector as the dominant forces behind liberalization. Amid the economic growth and demographic stagnation of the 1960s, the need for an increase in productive power had become apparent. Within this context criminal law reform is, they argue, an attempt to erase impediments to the qualification of young labor power and to diminish the disqualification that resulted from the traditional system of imprisonment. In a general analysis of the functions of criminal law, Steinert (1978) concludes that the specific selectivities of criminal law aim at a stabilization of the dominant mode of production and reproduction. Peters (1968) draws similar conclusions in his analysis of the reform of the juvenile court and welfare acts in West Germany.

Like Turkel's study, these works relate the development of law to conditions of the economic sector or, more precisely, to the specific mode of production of capitalist societies. With a relatively broad understanding of the term they can be called Marxist studies. In terms of the other dimension of our theory typology, however, they must be differentiated. Turkel's study, for instance, can be considered action or conflict-group oriented. The other works mentioned, however, must be called—to a greater or lesser degree—functionalist, for they try to explain the changes in criminal law through the economic functions it fulfills.

The welfare state orientation of criminal law has been understood as decriminalization particularly in favor of formerly oppressed groups. In another interpretation this orientation supports a redistribution of the chances to become criminalized from the lower to upper classes. Frequently a shift from imprisonment and insulation toward therapy and resocialization is also seen as characteristic of present-day welfare states.

Sack (1983) follows a different notion when he develops his ideal of criminal law policy in a welfare state. The welfare state model sees criminality as a symptom or product of supra-

individual structures; the legal state model understands it as a symptom of the self-directed personality. The welfare state model implies a criminal policy designed as a social policy that tries to change societal structures, while the legal state policy aims, according to Sack, at therapy and resocialization (and probably guilt and punishment).

The welfare state model concentrates on norms when it has to deal with disappointed normative expectations, whereas the legal state model concentrates on those who break the norms. In another context Sack (1977) states that, because of the principle of individual guilt in criminal law, causal attributions that are directed to social systems are defined as irrelevant to criminal law. A welfare state that deserves its name would, according to this logic, be a state without criminal law.

III. CONFRONTING THEORIES WITH AN EMPIRICAL CASE: LAWMAKING AGAINST ECONOMIC CRIME IN WEST GERMANY

A case study, of course, cannot verify or rigorously falsify such complex theories as the ones outlined above, particularly because they refer to long-term developments. Finally, different segments of criminal law may show different tendencies, each of which may better be explained by one or the other approach. However, a case study can suggest modifications or alternative hypotheses. It can also point to contradictions between overly streamlined theory assumptions and help to develop further research questions that have to be answered as first steps to a sufficiently complex and differentiated explanation of the development of criminal law. In my case study, I will concentrate upon the functionalist versus conflict-group controversy and the Marxist versus differentiation (pluralist) theory debate.

A. Political Responses to Economic Crime in West Germany: An Overview

After a long period of inaction, some West German states started to increase their attempts to fight economic crime in the 1960s. Special units were created in the police and the state attorney system as well as special court chambers. In 1972 economic crime was the main topic of the criminal law section of the forty-ninth meeting of the West German Bar Association (Deutscher Juristentag). The same year the Federal Department of Justice established a commission to fight economic crime. This commission held fifteen week-long meetings be-

tween 1972 and 1978.[5] In the same time there was an intense debate on this issue in the legal sciences. In 1974 a new program for the statistical measurement of economic crime was institutionalized (Berckhauer, 1980; Liebl, 1984). On September 1, 1976, the Erstes Gesetz zur Bekämpfung der Wirtschaftskriminalität (First Law against Economic Crime, July 29, 1976, *Bundesgesetzblatt* I, 2034) passed the parliament. Its measures were mostly based on suggestions developed by the commission. Its most important components were an enforced criminalization of subsidy- and credit-related fraud and offenses tied to bankruptcy and usury.

In 1978 the Department of Justice presented its first proposal for the Zweites Gesetz zur Bekämpfung der Wirtschaftskriminalität (Second Law against Economic Crime). This again was mostly based on suggestions of the commission. It took four years until this proposal passed the cabinet in a modified form; it was sent to the parliament in 1982. The chief targets of this proposal were computer-related fraud, forgery of computed data, fraud related to capital investment, and withdrawal of social insurance deductions by employers. It also "modernized" the criminal law regulations of the Börsengesetz (Stock Exchange Act, April 28, 1975, *Bundesgesetzblatt* I, 1013), and eased the assessment of penal liability and responsibility in highly differentiated and complex companies.

The length of time that it took the first proposal of the Department of Justice to develop into the cabinet proposal and the modifications it underwent in this process were due to the heavy involvement of industrial lobbying groups. They particularly tried to eliminate the planned criminalization of price fixing in cases of public tender (bidding for contracts) and succeeded. Interviews and an analysis of files of the Bundesverband der Deutschen Industrie (West German Industry Federation) suggest that the final failure of this norm must most probably be explained through the interest politics of industry (Brühl, 1985). The cabinet proposal passed the State Chamber (Bundesrat) and was directed to the House (Bundestag). After the 1982 change from the Social Democratic/Liberal government to the Christian Democratic/Liberal government, the latter reintroduced the proposal to the parliamentary process. Within this new political constellation two Social Democratic states, Hessen and Hamburg, tried to have

[5] The final report was published by the Department of Justice: Bundesminister der Justiz (1978). Savelsberg (1985) analyzes the commission's structures and decision-making processes on the basis of its reports and interviews with the members of the commission.

the law against price fixing passed in the State Chamber. This attempt also failed. The last attempt of this kind undertaken by the Social Democrats in the Bundestag met the same fate. From December 1983 to February 1986, the cabinet proposal and the alternative proposal of the Social Democrats were under discussion in various committees of the Bundestag. Unusual delays prevented the passing of the cabinet proposal—modified with additional definitions of computer offenses and credit card misuse—until spring 1986.[6]

B. *Interests, Functions, and Conflicts: The Making of the Second Law against Economic Crime*

What kind of functions, and economic functions in particular, could be fulfilled by the various provisions of the Second Law against Economic Crime? Do the articulated interests of conflict groups coincide with these functions? If not, what does prevail?

Responses to these questions will vary, as the following examples indicate. The law holds possible exemplifications of the notion of criminal law as a reflection of functional needs that derive from changes in economic exchange relations (Hall, 1952) or in conditions or modes of production and reproduction (Steinert, 1978; Pilgram and Steinert, 1975). The criminalization of certain computer-related offenses can be interpreted in exactly the same way in which Hall (1952) understands the introduction of criminal norms relating to thievery and Chambliss (1964) the creation of and changes in the law of vagrancy: as a means to secure informational and economic exchange processes and thereby further the growth of productivity and the advancement of modern technologies. The same can be said for the law's criminalization of the misuse of credit cards. The definition of investment firms' incorrectly and/or insufficiently informing investors as capital investment fraud is a reaction to new needs of the investment market. The amount of capital in the hands of the upper middle class (e.g., doctors, lawyers, and other professionals) has been increasing. People from this class, with only minimal experience with capital investment, were easily victimized by fraudulent investment companies. The new law seemed to be necessary to prevent such victimiza-

[6] For a more detailed description of the government proposal see Möhrenschlager (1982; 1983a; 1983b). Möhrenschlager (1984) offers more background on the initiatives of the lawmaker. Savelsberg, Brühl, and Lüdemann (forthcoming) describe additional details of the lawmaking process.

tion and thus to maintain the willingness of these groups to invest and satisfy the market's need for capital.

Yet, our case also shows serious problems with functionalist interpretations of lawmaking, particularly when they use holistic and reifying concepts of *the* state and *the* economy. It thereby supports theory-guided and empirically supported doubts as formulated by Hagan (1980). Functionalist approaches fail to recognize the internal differentiation of these sectors of societies and of the concerns, perceptions, reactions, and decisions within them. They are also inadequate in the face of the necessary differentiation between perceived and possibly articulated interests on one hand and functional demands on the other, and of the rather complex interrelation between the two.

When we deal with criminal law norms that are directed at the economy, those at different levels of the stratification system, namely employers and employees, are predictably affected in different ways. The same is true for different sectors of the economy, different regions of the country, and the organizations that represent functionally, segmentarily, regionally, or class-level differentiated subsystems or subgroups of the economic system. This leads to predictable patterns of conflict and alliance. In computer crime, the conflict may be between employers or customers and employees (e.g., computer programmers). In price fixing it may be between the mining industry and the construction sector, since construction firms in certain coal mining areas regularly execute projects for the mines. Subsidies-related crime, frequent in the European Community–supported agricultural sector, causes increases in consumer prices that are particularly felt in industrial regions with high population density.

On the other hand, there are surprising coalitions in the economic sector exactly where one would expect conflict. In the case of price fixing, for example, we found a hidden coalition between entrepreneurs' organizations and unions: Both were concerned about the survival of those rather numerous construction firms that worked with a small margin of profit.[7]

[7] The union protest was never made public. After the construction union had undertaken informal steps against the criminalization of price fixing, it was prevented from taking any official steps through the West German Federation of Unions, Deutsche Gewerkschaftsbund (DGB). When the Federation and the construction union were invited by the judicial committee of the Bundestag to express their opinion on the price fixing issue, they declined. The reason for the common opposition was the concern that this criminalization would evoke numerous court suits and that it would deter firms from price fixing. If this occurred, it was assumed, many firms that worked with

The price-fixing example also helps to illustrate the possible conflict between the perceived and articulated interests of organized units of one economic sector and the productivity of that sector and the economy as a whole. It may be true that the norm against price fixing in cases of public orders might cause the bankruptcy of some construction firms. On the other hand, as economics professor Finsinger argued at a hearing of the judicial committee of the Bundestag, it might force the construction industry to adapt to given market conditions and to accept technical innovation, which in turn would have positive impacts on other modern technology sectors.

As we have seen, the proposed criminalization of price fixing in cases of public tender was lost in the lawmaking process. Deferring for the moment criminal and legal policy arguments, concrete interests within the economic sector have prevailed against the more abstract and general economic arguments. At least three explanations for this come to mind: (1) Sanctions against lawmakers by those with specific interests, rather than more abstract economic consequences, are more likely to occur within the legislative period. (2) There are concrete network and interest relations between those with immediate interests and political decision makers. (3) Individual and organized interests can be more easily articulated than long-term systemic functional needs.

This finding certainly illustrates the particular importance of the conflict-group or action theory approach, within which we have found two different orientations (see Table 1). Weber (1976) and Haferkamp (1980; 1983; 1984) argue that material or welfare principles are more successful in modern legal decision making processes (differentiation or pluralist orientation), while Turkel (1980) stresses the importance of the powerful actors from the economic sector (Marxist orientation). We have seen that powerful economic interests seem to have a good chance to prevail when they coincide with the functional needs of economic development, which in our case study meant computer offenses, credit card fraud, and capital investment fraud. The price-fixing example shows that both decision making and non-decision making in criminal lawmaking processes may even be influenced by specific interests of powerful economic actors when these interests are contradictory to the functional needs of the economy. Although these examples support Turkel's position, the literature offers many instances when inter-

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only marginal profitability would have to close down and thousands of jobs would be lost.

ests other than economic were successfully articulated by different lobbying groups. In his comparative analysis of forty-three case studies of criminal lawmaking in the United States, Hagan (1980) finds that the manifest interests of the business or capital sector are not relevant at all. However, he investigates lawmaking in very specific fields: juvenile delinquency, alcohol and drugs, and prostitution. The interest groups frequently mentioned in these studies are the sanctional agencies and professional groups that Becker (1963) had originally identified. Very often these are representatives of social bureaucracies, the "new little masters," as Haferkamp terms these supposedly important power groups of the welfare state.

In summary, in our study of the Second Law against Economic Crime we find examples of legal developments that adapted to the functional needs or demands of the economy as such. At the same time, however, we find evidence against the functionalist pattern. An adequate analysis of this phenomenon must refer to concrete, perceived interests and to the situations and contexts of decision making. The conflict-group approach accordingly prevails over the functionalist approach. Within the conflict-group approach we find support for both pluralist and Marxist positions.

In the making of the Second Law against Economic Crime, the interests of professional groups, sanction and control agencies, social bureaucracies, and powerful economic organizations were expressed. This becomes obvious through an analysis of the distribution of the ninety-six different consultants included in the commission (from 1972 to 1978) ($N = 71$) and the hearing of the judicial committee of the Bundestag in 1984 ($N = 25$). Social control agencies dominated both the commission ($N = 24$, or 35%) and the hearing ($N = 13$, or 52%). Among them, the criminal justice system ($N = 30$, including the police [$N = 7$], state attorneys [$N = 13$], judges [$N = 5$], and a defendant's attorney [$N = 1$]) is much more heavily represented than all other control agencies, including the Kartellbehörde (Trust Control Administration) ($N = 7$). The involvement of economic organizations also grew during the lawmaking process. Among members of and contributors to the commission they were hardly represented ($N = 3$ or 4.2%); however, their numbers increased dramatically at the hearing ($N = 8$, or 32%). Within the economic sector the capital side ($N = 9$) was much more strongly represented than the labor and consumer side ($N = 2$). On the other hand, the science and research sector lost "votes" as the lawmaking process proceeded from the commission ($N = 23$, or 32.2%) to the parliamentary hearing ($N = 4$,

or 16%). In sum, the eight criminal lawyers and thirteen economic lawyers by far outweighed economists ($N = 3$) and empirical criminologists ($N = 2$). Representatives from the political sector ($N = 21$), most of whom were from ministries ($N = 18$), were counted as consultants for the commission phase only.

Thus contrary to Hagan's (1980) findings, economic power groups seem to play a major role in criminal lawmaking processes once economic interests are immediately concerned. This supports Turkel's (1980) conclusion. However, these groups appear only relatively late in the process, and even then are greatly outnumbered by representatives of control agencies who compete for fields of control and for legitimation. This supports the arguments of both Haferkamp (1980; 1983; 1984) and Weber (1976).

C. *Arguments and Rationalities of Political Decision Makers*

No matter what groups try to influence lawmaking and what functions may be anticipated or fulfilled by the laws, decisions about laws are made in the political system. Within that system, the administration has more power than the parliament in one concern because of its more plentiful resources and specialists; this is more evident in West Germany than in the United States. The proposal for the Second Law against Economic Crime was written by the Department of Justice, assisted by the commission and the Departments of Justice of the Federal States. Yet, the final decision in lawmaking always has to be made by the parliament. Positions and majorities of the parliament are anticipated by the administration when it prepares a law. The essential position of the parliament also became apparent in our case because several changes in the law were realized in the parliamentary process.

It is therefore worthwhile to look at the parliament's role in this lawmaking process. After a first and rather short plenary session, the law was passed to the committees to be discussed. Because this was a criminal law proposal, the judicial committee was dominant and formally responsible. It negotiated on all paragraphs of the proposed law whereas the other committees involved (domestic, economic, finances, labor, and social affairs) discussed only particular aspects. In the end, the judicial committee had to gather the statements of all others and give recommendations to the parliament for the final plenary session. It was therefore in this particular committee that the specialists of the different factions negotiated and prepared the final decisions. However, time is very limited in the judicial

committee. Its debates are rather restricted. The criminalization of price fixing in cases of public tender, the most disputed paragraph in the law, was discussed only once and then for about one hour (not counting the public hearing held by the judicial committee, mentioned above). Perhaps the unwillingness of the opposing parties to compromise on this issue contributed to the brevity of the discussion. This one hour, of course, did not include all the negotiations on this point. Instead, the positions expressed there had been reached through long negotiations within intraparty work groups where representatives of different parties had informally discussed the issue. The debate in the judicial committee thus reflected much more than just one moment of parliamentary work. We analyzed the structures of the participants' argumentations in its session on price fixing to identify their motives and underlying political interests and rationalities.

1. Analyzing arguments with the cognitive mapping approach. To analyze these argumentation structures we used the cognitive mapping approach developed by Axelrod and others (see Axelrod, 1976). A cognitive map presents the assumptions of an actor on a limited problem and describes the structure of that actor's causal assumptions or argumentations. These maps consist of two basic elements: concepts (variables) and assumed positive or negative causal relations. These relations are represented on the maps by arrows in a presentation that is comparable to path analysis. The procedure can be distinguished by four central steps: the coding of the text (document or interview); the creation of a concept dictionary; the creation of relationship cards; and the construction of cognitive maps.

We followed the coding procedures developed by Bonham and Shapiro (1984). The four steps were executed as follows:

1. First the text was read by two coders. During the second reading they identified causal relations. Terms relevant to these assumed relations were marked by circles. They marked the causal relations with arrows in the direction of the causal dependence. For positive relations the arrows were coded with a +, negative relations with a −. The intercoder reliability was about 90 percent. The coders reached agreement for the remaining cases.
2. After the coding we established a concept dictionary. We listed all terms that express the same idea on cards. We then gave each card a title that expressed the common concept (variable) and each separate concept under that heading an identifica-

tion number. Related concepts were marked by the same letter: conditions for the behavior of entrepreneurs (A); price-fixing behavior of entrepreneurs and related terms (B); reactions of firms to sanctions and norms (C); impacts of entrepreneurs' behavior (D); norms against price fixing (E); actions of the criminal justice system (F); impacts of norms and the behavior of control agents (G); goods to be protected (H); and reactions of the public (I).

Group A, for example, contained four concepts ($A1$, $A2$, $A3$, and $A4$). Under each concept heading the terms are summarized in such a way that they can be reidentified in the text. ($I24$ in front of a term in the concept dictionary means document number I, page 24.) A number behind the term refers to the decision maker by whom it was used. ($C1$ feeling of guilt 2 means concept $C1$ expressed by actor number 2.)

3. We then established the relationship cards. Each causal relation was listed on a card that was marked by the relevant concept number as well as the direction of the causal relations (e.g., $E1$, $G1+$ means the more severe the sanctions, the higher the deterrence effect). In addition the codes of the source and the speaker were noted on each relationship card (e.g., 2:$I19$ means speaker 2 on page 19 of document I). The relationship cards are organized by documents and within documents by speakers.
4. We deduced the cognitive maps directly from the relationship file for each speaker. Concept names and identification codes are organized from the left (independent variables) to the right (dependent variables). The arrows between the concepts and the respective variables are marked by the source and the sign for the causal direction. Each causal relation in the map can therefore easily be traced back to the original document.

The cognitive mapping approach is a reliable tool to identify cognitive or argumentation structures. The high intercoder reliability was reached after intense coder training that helped to establish the coders' common understanding of the issues under consideration and true causal relations (as opposed to tautological, definitional, or time relations). This approach is sometimes used to understand the cognitions of decision makers directly. However, this is not adequate for analyzing the political setting under consideration. Argumentations of politicians or any other negotiating actors do not naively represent these cognitions, and they often do not just represent their indi-

vidual arguments. Instead they are often the result of collective negotiation processes in a political party, a wing of that party, a faction, or a ministry. In addition these argumentations may be influenced by strategic considerations or legitimatory needs. I therefore speak of argumentation structures rather than cognitive structures. However, the analysis of these structures and their comparison with those on other issues or in other situations allow for conclusions on underlying (covert) motives of representatives or their factions. Argumentations, when strategically adapted to different issues or situations, may not be consistent with each other. I am particularly interested in identifying such treacherous contradictions.

2. Argumentation in the judicial committee. The document analyzed in this section is the minutes of the session of the judicial committee of the Bundestag on the criminalization of price fixing in cases of public tender held on November 24, 1983 (for the relevance of this meeting, see above). About fifty persons were present, and eight participated in the debate. Before proceeding to the individual cognitive maps I will present an overview of the concepts that were used by different types of decision makers (see Table 2). The concepts are differentiated according to different social spheres, the decision makers according to their positions as representatives of the Social Democratic Party (SPD) or the Christian Democratic Union/Christian Social Union (CDU/CSU). The representative of the Department of Justice of Hessen, an SPD-governed state that had earlier tried to criminalize price fixing through the state chamber, represents the third type of speaker.

With the exception of one concept relating to legitimation (*I*1: astonishment of citizens), the others may be categorized as

Table 2. Distribution of Concepts Used by Types of Decision Makers and Social Spheres (target concepts in parentheses)

	Concept by Social Sphere			
Type of Decision Maker	Economy	Legitimation	Criminal Law	Total
SPD Representative	2 (1)	1 (1)	8 (3)	11 (5)
Speaker for the Department of Justice in SPD-governed Hessen	2 (1)	0 (0)	11 (4)	13 (5)
CDU/CSU Representative	10 (3)	0 (0)	4 (1)	14 (4)
Total	14 (5)	1 (1)	23 (8)	38 (14)

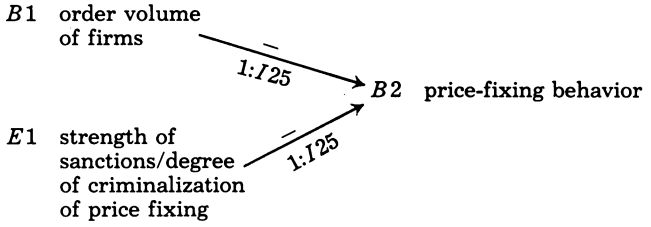
related to the economy or criminal law. Among the economic concepts are: $A2$ (quota of firm-owned capital), $D5$ (damage through bankruptcies), and $D2$ (development of damages). Legal concepts include: $C1$ (feeling of guilt), $F3$ (helplessness of the criminal justice system), and $H2$ (violation of the principle of legal equality). It is not surprising that in the judicial committee the majority of concepts relate to legal policy (23 concepts), although the economic sector apparently also plays a major role (14 concepts).

A comparison of different types of decision makers is illuminating. Among the concepts used by SPD representatives, some 20 percent were economic and 10 percent referred to legitimation, but more than 70 percent were law and criminal policy concepts. There was even more stress on legal concepts by the speaker for the Hessen Department of Justice. The relation between different types of concepts is just the opposite for the CDU/CSU representatives. In this debate of the judicial committee on a criminal law norm, they use more than twice as many economic concepts as legal ones. Even if this categorization of concepts is rough and even if nothing is yet said on the direction of the arguments, this certainly supports Schick's (1981) hypothesis that conflicts between purposes of criminal policy and regulatory needs of non-criminal law fields are more likely in the Nebenstrafrecht (criminal law norms that refer to specific areas of regulation such as environment and economy) than in the general criminal code. It also supports Weber's (1976) prognosis that the increasing particularization of law will be accompanied by an invasion of substantive rationalities from nonlegal spheres into the legal discourse that intrudes upon its formal rationality.

To understand the argumentations of decision makers more precisely, it is necessary to have a closer look at their cognitive maps, that is, all causal-argumentative contributions that were given in the case under investigation. Six speakers gave statements that reflected cognitive arguments: three CDU/CSU representatives, two SPD representatives, and the judge representing the Department of Justice of Hessen.

Let us first follow the contributions by the CDU/CSU representatives in the order in which they were presented. The first contribution contains the very simple cognitive map of Representative B, the official speaker of his faction for this law. He first says that price fixing is a negative function of the volume of orders to firms. He thereby explains the increase of such behavior in times of economic crisis and lack of orders, a situation that is presently particularly relevant for the con-

Figure 1. Cognitive Map of Representative B (CDU/CSU) on Price Fixing in Cases of Public Tender

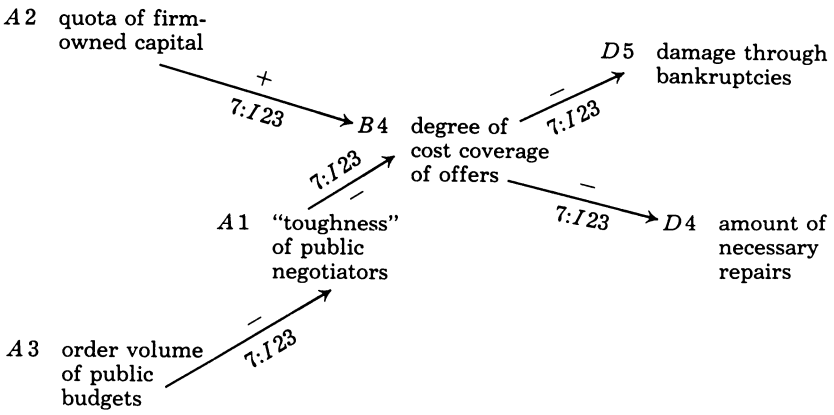


struction industry. This speaker also sees a positive causal relation between the strength of sanctions or the degree of criminalization of price fixing and the frequency with which it happens. This implies the assumption of a general preventive effect of the proposed norm. Apparently he follows the economic model of the entrepreneurial offender. This argument per se would be opposed to the position of Representative B's party, which rejected the norm and instead supports the position of the SPD.

In an interview, this representative stated that he originally was not really opposed to this norm but that the economy wing of his political faction had made a very strong argument against it. It had prevailed in the faction and he had to represent that position in the committee. His original stand is not so surprising if we consider that for quite a while he had been the mayor of a middle-sized town and as such had represented a typical victim of this type of price fixing. Nevertheless, his first argument modifies the second part of his statement. By explaining firms' deviations in terms of their miserable economic situation, Representative B follows a kind of anomie approach, which is not at all typical for conservative representatives, since such an argument usually favors aid programs rather than criminalizations. The contribution of this speaker was followed by those of the other decision makers. Only toward the end of the session did the other two CDU/CSU representatives further defend the position of their party. Their argumentations were almost exclusively economic.

The cognitive map of Representative C, which is shown in Figure 2, contains neither the concept of price-fixing behavior nor that of the proposed norm. Instead the problematic economic situation of the construction industry is discussed, including its conditions and impacts. In the center of the argumentation we find the degree of cost coverage of offers that are

Figure 2. Cognitive Map of Representative C (CDU/CSU) on Price Fixing in Cases of Public Tender

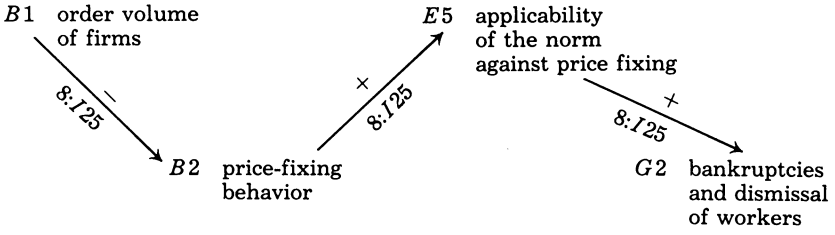


advertised by public investors. Representative C assumes that the cost coverage is a function of the quota of capital that is owned by the firm and of the "toughness" of public negotiators when contracts between public authorities and private firms are worked out. This "toughness" is explained through the presently very small investment budgets of municipalities, states, and the federal government. Considering this situation and the presently low quota of firm-owned capital, one must assume a low degree of cost coverage of offers. The results are a high amount of necessary repairs (low cost coverage means badly executed works) and a high rate of damage through bankruptcies.

Representative C does not make any direct statement on the (non)desirability of the proposed criminal law norm nor any criminal law or legal policy argument at all. His opinions on these terms can be drawn only if his contribution is seen in combination with that of his colleague, Representative B. If we combine the latter's deterrence hypothesis with Representative C's arguments, the criminal law norm would result once more in a decreased degree of cost coverage due to a further weakened position of the firms. The norm would therefore finally result in high damages through bankruptcies and in the increasing need for repairs.

Cognitive maps are originally seen as representations of the knowledge of individuals, although I have modified this understanding. In group discussions, these maps must certainly be interpreted in the context of the argumentations of other participants. In this context, the next CDU/CSU speaker, Representative D, picks up the arguments of Representative C.

Figure 3. Cognitive Map of Representative D (CDU/CSU) on Price Fixing in Cases of Public Tender

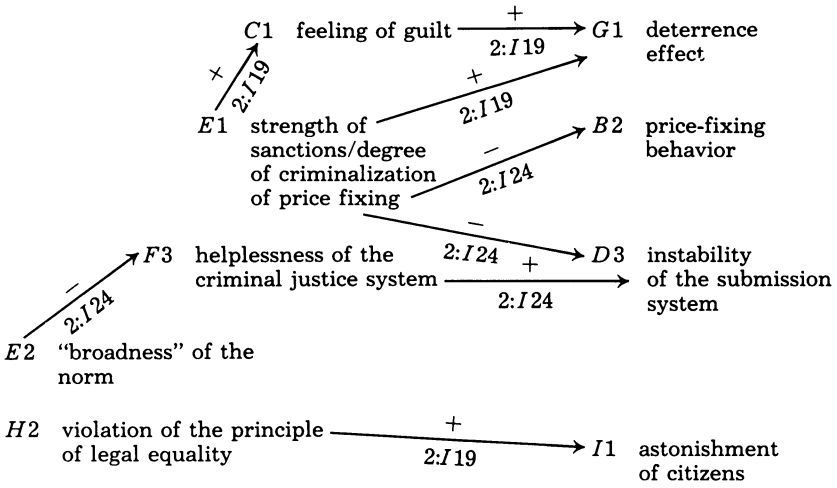


One could say that he leads them to their conclusions about criminal law policy (see Figure 3). According to this speaker, the low volume of firms' orders increases the number of price-fixing cases. Price-fixing behavior, after the introduction of the criminal law norm, would lead to criminal court cases in which the new norm would be applied. This would result in bankruptcies and the dismissal of workers. This consequence might follow directly from sanctions against entrepreneurs. It might also, referring to the arguments of the other CDU/CSU speakers, stem from the deterrence effect and the resulting further decreasing profitability of firms. The argumentation of the CDU/CSU representatives ends with the most effective economic argument against the criminal policy arguments of the following speakers, particularly in times of economic crisis: the loss of jobs.

Certain conclusions may be drawn from this analysis of the cognitive maps of the CDU/CSU representatives: Their argumentations were logically consistent, and they support the position of their party by assuming that the criminalization of price fixing would have a deterrent effect. Despite (or because of) this, they oppose such criminalization, supporting their position mostly with economic arguments. The CDU/CSU representatives try to explain price fixing through the difficult economic situation of entrepreneurs or their firms. They point to negative economic consequences that they expect from criminalization.

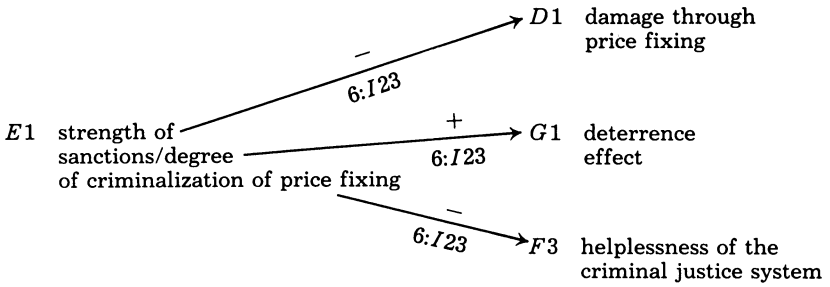
This argumentation differs from the pattern typically followed by representatives of the conservative party in criminal law debates. They normally stress individual freedom and responsibility to act in one way or the other, consistent with or against existing norms. Consequently in other debates they agree with the criminal law principal of individual guilt. CDU Representative Güde, for example, expressed the following programmatic opinion on the general reform of the criminal

Figure 4. Cognitive Map of Representative A (SPD) on Price Fixing in Cases of Public Tender



code: "Scientific knowledge can no longer be directed against the demand that human beings must and should be addressed as moral persons by criminal law. . . . Who demands freedom for human beings must also load responsibility upon them. . . . This proposal bases criminal law on the idea of individual guilt" (Deutscher Bundestag, 1963: 3193). The comparison of this statement in a general debate on the criminal code, which refers to "typical criminals," with the arguments analyzed above, which refer to entrepreneurs' offenses, reveals one of the contradictions to which I referred above. Before interpreting this contradiction, however, I shall discuss the argumentations of the SPD representatives. With Representative A (see Figure 4) we find two nonconnected lines of argumentation. The target concept of the shorter line is the astonishment of citizens, said to be caused by the violation of the principle of equality. The speaker implies that the given state of law offers economic offenders lower chances than others to be sanctioned for acts that cause relatively high damage. Or, expressed in more sociological terms, the violation of the principle of equality causes a loss of legitimation (for the state or for the criminal justice system). This argument supports the SPD demand for the introduction of the proposed norm. The same holds true for the more complex line of argumentation. The strategic variables introduce the causal chain: "broadness" of the norm and strength of sanctions/degree of criminalization. The argument claims that a broadly formulated norm could help to overcome the existent helplessness of the criminal justice system and thereby to

Figure 5. Cognitive Map of Representative E (SPD) on Price Fixing in Cases of Public Tender



counteract, in combination with severe sanctions, the present instability of the submission system. Severe sanctions are assumed to increase the offenders' feeling of guilt and the deterrence effect and thereby directly to diminish price-fixing behavior. All these arguments strongly support the SPD position in favor of the criminalization of price fixing in submission cases. Representative A agrees with CDU/CSU Representative B that the norm would have deterrent effects, but unlike the CDU/CSU representatives does not discuss the conditions that cause this type of deviant behavior.

The contribution of Representative A is supported by that of his colleague Representative E (see Figure 5). According to Representative E, a criminal law norm for price fixing would have three effects: to diminish the helplessness of the criminal justice system, increase the deterrence effect, and limit the amount of damage caused by price fixing. This argumentation, like that of Representative A, therefore supports the SPD position for the introduction of the norm.

In sum the analysis of the argumentations of the SPD representatives yields the following: Like those of the CDU/CSU representatives, they are logically consistent and support the demands of their party. SPD representatives likewise believe in the deterrent effects of the criminalization of price fixing. For them, however, this supports the proposed norm. The SPD representatives, as opposed to those from the CDU/CSU, use predominantly legal policy arguments that mostly concern legal and criminal policy impacts of criminalization. These impacts are chiefly positively evaluated. SPD politicians do not deal with the conditions of the problematized behavior. As is true of the CDU/CSU representatives, the orientation of their argumentation is exactly opposite to their typical position in criminal law debates. SPD politicians tend to stress the societal con-

ditions of deviant behavior as well as the problematic impacts of criminalization, as SPD Representative Wittrock expressed in the session on the general criminal code reform mentioned above: "There are types of behavior that do not necessarily need to be sanctioned as this proposal does. . . . The demand for a minimal program of criminal law must be concluded from our position" (Deutscher Bundestag, 1963: 3199).

The fact that conservative and social democratic politicians exchange their criminal policy roles when they deal with entrepreneurs as offenders, a group that is usually not an object of such debates, suggests that both political parties are inconsistent in their punitive or sociopolitical orientation. They use and exchange these orientations to serve their clienteles, protecting their own from sanctioning and threatening that of the other party with sanctions. This certainly supports Haferkamp's (1980) understanding of criminal law policy as a dominance group-related policy.[8]

Two other observations allow conclusions that are of relevance for parliamentarian decision-making processes in general: (1) The lines of argumentation are extremely short; and (2) the speakers of the different factions present their positions without referring at all to that of the other side. Only one concept was used by both sides. This contradicts the widespread belief that in the West German political system the basic parliamentarian work is done in the committees. What we observe instead is the use of relatively simple arguments to justify and legitimize decisions that had earlier been made within factions or party groups. This observation, however, certainly cannot be generalized. When the judicial committee discussed computer crime, for example, members of the two factions closely cooperated and worked on the formulation of norms. A pure legitimatory negotiation like that seen in the price-fixing case seems to be likely when an issue is highly disputed between the parties and when the debate is polarized. The structure of the CDU/CSU representatives' arguments was still "shorter" and less complex than that of the SPD representatives. This confirms the findings of studies in decision theory that the argumentation of those decision makers who are in a minority position is more complex (Gallhofer and Saris, 1984).

Let us finally look briefly at the most complex contribution, offered by the speaker for the Hessen Department of Jus-

[8] The paper of Scheerer (1986) that was presented at the spring 1985 meeting of the Work Group of Young Criminologists (Arbeitskreis Junger Kriminologen), exemplifies this tendency for alternative political groups and for the Green Party.

tice, X. Space does not allow me to present his cognitive maps and to discuss them in detail; they use twenty concepts and make fifteen causal assumptions within five different graphs. This can be explained by at least two factors. First, as a bureaucrat who is also a judge, he is a specialist in the issue under consideration, whereas the parliamentarians, as generalists, must always deal with a diversity of issues. Second, he argues for a minority position. Those who have the power feel less need to exhaust themselves with long and complicated argumentations, which thus generates simpler cognitive maps.

This speaker's argumentation supports the SPD demand for the introduction of the criminal law norm against price fixing. There are two reasons for this: Speaker X argues for a SPD-governed state and as the speaker of the criminal justice system. His position can therefore be explained by the class-orientation argument and by the systemic rationality of the law sector. In fact, fourteen of his fifteen arguments are expressed in terms of legal and criminal policy.

To legitimize his position Speaker X simultaneously uses an etiological and a labeling argument. First he assumes an autonomous increase in economic crime. Then he attributes the increasing number of identified offenses to the growing activity of the prosecutors. This appears as a convenient although somewhat contradictory legitimation strategy for a control agency that aims to legitimize itself through a high number of identified deviations. In the same time it stresses the need for additional resources and personnel to meet the increasing problem pressure in terms of an actual increase in offenses.

IV. CONCLUSION

This investigation began with the question how different theories within legal sociology relate to the empirical reality of criminal lawmaking against economic offenses in West Germany. I selected theory approaches according to the dimensions of functionalism versus action/conflict-group theory and Marxist versus differentiation or pluralism theory. According to Alber (1982) differentiation and conflict-group theory approaches are best suited to explain the development of welfare states. Do they also explain criminal lawmaking as a "negative" complement to "positive" welfare state policies?

Our empirical data yielded several answers to this question, which I would like to summarize and systematize. As I have said, a case study does not allow verification or clear falsification of rather complex theories. It can, however, suggest modi-

fications of their hypotheses and help to develop further research questions.

First I refer to Sack's (1983) prescriptive model of criminal law policy in welfare states. I then turn to (neo-)Marxist functionalist approaches, to Turkel's (1980) neo-Marxist action/conflict-group theory approach, and finally to the differentiation and action/conflict-group theories of Haferkamp (1980, 1985) and Weber (1976).

According to Sack's prescriptive model of criminal policy in welfare states, there should no longer be criminalizing reactions to new types of deviant behavior. Rather, adequate reactions would be the adaptation of the normative system or the formulation of policies that try to change those social structures that have caused deviations. In West Germany, the reactions to new types of deviance in the economy certainly do not follow Sack's prescriptions. Instead there is a clear trend toward criminalizing such deviations through the creation of new criminal law norms and the reorganization of parts of the criminal justice system.

In the case we studied, this predominantly punitive reaction was modified through the inclusion of economic law specialists in the commission that prepared the package of measures against economic crime. Some of the commission's suggestions were finally realized in the economic law field, and several were adopted in recent economic laws. It is an open question, though, whether this economic law orientation was based on the welfare state orientation of experts and decision makers. It may well have been supported by the interests of possibly concerned powerful classes and/or by the functional needs of economic sectors as perceived by decision makers. Our data indicate this at least for the price-fixing case.

The proponents of (neo-)Marxist functionalist approaches (e.g., Pilgram and Steinert, 1975; Steinert, 1978) more or less try to explain the development of criminal law in terms of functional needs of the capitalist economy, the mode of production, or abstract interests of important sectors or units within the economy. We could find, just as these authors do, impressive illustrations of such theses in our empirical case. In this context I have pointed to the criminalization of certain offenses related to computers, credit cards, and capital investments.

The functionalist aspect of this theory type, however, seems to be problematic. *The* state and *the* economy again turn out to be highly differentiated. We saw several examples of this. First, there is a wide variety of concerns or dimensions, in class-specific as well as in sector-specific terms, that are af-

fected by the norms under investigation. Second, we found conflict processes, lines, and coalitions within each sector to be highly differentiated and flexible according to various norms. Third, industry organizations fight hard against certain norms that they feel are against their members' interests. Fourth, the representatives of different state control agencies (e.g., trust control administration and prosecutors) with various organization-specific interests were highly represented in the lawmaking process. Their interests are certainly not in accordance with those of industry. Instead, they attempt to extend their resources and control capacities. Fifth, concrete and articulated interests of economic actors may well be in conflict with long-term functional needs of the economic sector and yet nonetheless prevail, as shown in the example of price fixing in cases of public tender. Finally, political actors may quite directly follow a political rationality that aims at an extension of their party's power resources. Votes are an important resource in democratic systems, and politicians must not neglect the interests of those who might vote for them. The results of lawmaking processes thus depend, in the parliamentary phase, largely on the representation of different classes or strata in parliament. The functionalist aspect of this type of theory may therefore appear plausible for some norms, but it is seriously questioned for others. The controversy between Marxist and differentiation theory remains to be discussed below.

The arguments against the functionalist approach support the action/conflict-group orientation in Turkel's (1980) analysis. His Marxist-guided theses also find support: He assumes an increasing intrusion of powerful economic actors' criteria of substantive rationality upon legal discourse, which Turkel expects to prevail. This prediction is particularly supported by the argumentations of CDU/CSU representatives and industry's successful fight against the criminalization of price fixing.

Yet our analysis also raises severe doubts about the Marxist approach. First, unions and consumer organizations were also represented in the lawmaking process. Second, the criminal lawmaking and justice reorganization had at least some success against economic offenders, who tend to have a higher status and more power than the average offender. Third, Turkel's discussion of "powerful economic actors" does not sufficiently reflect the diversity of concerns involved in our case. Fourth, his approach cannot explain the successful autonomous (i.e., organization-specific) interests of agents of formalized social control agencies that played a major role in this lawmaking process.

If the Marxist approach should be of explanatory value for our case, its terms have to be specified. What proportion of the success of "powerful economic actors" can be explained by class specific interests and what proportion by sector-specific interests? The attempt to criminalize price fixing was rejected first by entrepreneurs (a class-specific argument) and then by an inner-sector coalition of unions and industry federations (a sector-specific argument). The question of which argument has more explanatory power can only be answered by further comparative analysis.

Haferkamp (1980; 1984; 1985) also follows an action theory approach. He specifies the conflict-group perspective by understanding criminal law policy as a dominance group–related policy. He assumes a loss of dominance as the functional differentiation of modern societies increases. With this background he expects an increasing decriminalization and/or redistribution of chances to become criminalized from lower to higher classes or dominance groups.

Haferkamp's action theory approach is certainly confirmed, unlike the functionalist principle. This aspect of his perspective is consistent with our findings on the activism of the industry organizations and the West German Industry Federation in their prevention of the price-fixing norms. Our case also supports Haferkamp's dominance theory perspective. This is particularly true of the argumentations of the political representatives. In a situation in which they deal with an atypical group of offenders in terms of dominance (i.e., entrepreneurs) they exchange typical arguments. On the other hand, our study also shows that in the preparliamentarian stages of decision making, conflict lines were more sector-specific than dominance-group related (see Savelsberg, Brühl, and Lüdemann, forthcoming; Savelsberg, 1985). A preliminary conclusion can be drawn: The dominance group perspective becomes more relevant as the criminal lawmaking processes move closer to the public stage of politics.

The decriminalization hypothesis is contradicted by our case, however. The lawmaker reacts to the growing phenomenon and new forms of economic offenses primarily with criminal law programs. The initiatives for criminalization are mainly, although certainly not exclusively, taken by Social Democrats. As representatives of the more dominated classes they should, in general, be expected to be the forerunners of decriminalization.

On the other hand, this new criminalizing tendency of the Social Democrats could be explained as an attempt to redistrib-

ute chances to become criminalized from dominated to dominant classes. This partially supports Haferkamp's dominance theory. The Social Democratic initiatives and the industry and Christian Democratic defenses were never as heavy and insistent as when entrepreneurs were concerned in the price-fixing case. In addition, the general stereotype of economic offenders is one of relatively high status people. This stereotype, however, is largely incorrect (see Berckhauer, 1980). The redistribution hypothesis is therefore not valid for a considerable part of economy-related criminalizations. Even if these criminal law programs are initiated with a redistributive intention and even if they are well suited for symbolic policies, their impacts are unforeseeable and possibly counterproductive. This may count even more when the implementation of successfully generated criminal law norms is also considered (for Canada see Hagan and Parker, 1985; for the United States see Mann, Wheeler, and Sarat, 1980; Wheeler and Rothman, 1982; Wheeler, Weisburd, and Bode, 1982; for West Germany see Savelsberg, forthcoming).[9]

Weber's central predictions are supported by our case. First, the creation and expansion of a specific economy-related criminal law, including specialized control agencies, supports his particularization hypothesis. We also found indicators for Weber's prediction of an increasing intrusion of material criteria of rationality as an impact of particularization. Based on his thoughts and our findings, we can formulate a more general preliminary hypothesis: Increasing legalization and a parallel differentiation of the legal system increase problems of integration within the legal system itself. As a consequence we expect an opening of certain fields of law to the criteria of rationality of those social spheres or units that they are supposed to control.

Further analyses of argumentation structures using the cognitive mapping approach are desirable. Such argumentations should be analyzed for different issues from different fields of law, on different levels of the law creation and implementation process, for different historical phases, and for different societies.[10] Such comparative analysis would help to in-

[9] A research project on the implementation of criminal law against economic crime developed by H. Haferkamp and Joachim J. Savelsberg was just started at the University of Bremen. This project is also funded by the Deutsche Forschungsgemeinschaft (West German National Research Council) within its section, Empirical Research on Sanctions (Empirische Sanktionsforschung).

[10] In 1987–88 I will investigate a comparable case in the United States,

vestigate further the hypotheses and research questions formulated in this paper.

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