**I. Introduction**

The important question that must be posed first is “Why yet another treatment of the impossible attempt?” It is certainly true that a number of discussions already exist. My answer to this question would be that I have a personal reason that led me to the topic of this master’s thesis in the first instance. The punishability of an impossible attempt is not as evident everywhere in the world as it is in Germany. In many countries (e.g., in Italy, the Netherlands, Japan) it goes unpunished.[[1]](#footnote-1) In Greece as well, an impossible attempt now apparently goes unpunished according to the new criminal code (Ποινικός Κώδικας 2019). The provision of the old Greek criminal code that regulated cases of impossible attempt (§ 43 Ποινικός Κώδικας 1950) was abolished in the new criminal code, and the punishability of impossible attempts is consequently doubtful.

This rollback of the punishability of the impossible attempt is an effect of a kind of “objectivism” in Greek criminal law. This is clearly expressed in the legislator’s thinking. According to the new criminal code’s official statement of justification, “punishment of an impossible attempt is a severe violation of the principles of objective illegality,” and “the perpetrator of an impossible attempt is punished merely because he believes that he commits an offense, even though in reality he poses no danger to legally protected interests.” Moreover, “the imposition of punishment on the perpetrator of such an action depends merely on his intention and is therefore contrary to the principles of an objective criminal law.”[[2]](#footnote-2) This line of thought muddies the waters around the punishability of the impossible attempt far more than it creates clarity and raises questions about its definition. Nevertheless, this line of thought is also exciting and interesting, because it gives us a reason to investigate the nature of this “objectivity” in criminal law. What does “objectivity” mean? Is it simply equivalent to the concept of dangerousness? Without a more concrete formulation, unfortunately, it means nothing at all, since it is capable of taking on so many forms.

Another and perhaps also more important reason why I have chosen this topic depends on the nature of the problem of impossibility and the solutions previously offered. In my view, they lack dogmatic unity. Imaginative ideas are often lurking at their root, but without structure—that is, without connection to a dogmatic system. It is unsurprising that the usual method of solution consists in topical argumentation and that the most important criterion for correctness is intuition. There is no doubt that it is impossible to shed light on the problem of the grounds for punishing the impossible attempt without a dogmatic system, because in that case the essence of the problem is not recognized. This is the occasion for this thesis’s discussion of the question concerning the grounds for punishing the impossible attempt. Or in other words, why is such an attempt punished?

Initially, a question of this kind seems like a peripheral problem in criminal law, one that deals only with exceptional cases. From a quantitative perspective, this is true, so true that experts in criminal law use their imagination to invent their own cases. From a qualitative perspective, however, the impossible attempt is highly significant. If the impossible attempt is seen as a subcategory of the attempt, the grounds for punishing the former can be understood only in connection with the grounds for punishing the latter.[[3]](#footnote-3) In this regard, the impossible attempt functions as a kind of “test case for fundamental questions of criminal responsibility,”[[4]](#footnote-4) and as a consequence, the punishability of an attempt should only be considered (and understood) in parallel to the punishability of a completed act.[[5]](#footnote-5) This means that our answer concerning the grounds for punishing the impossible attempt transforms our concepts of attempt and responsibility and hence the entire edifice of criminal law. For this reason, it is only possible to investigate the place of the impossible attempt within a dogmatic system.

Without a shared dogmatic structure, the different opinions ultimately cannot speak to one another. We speak here of “incommensurability.” The problem of the punishability of the attempt turns out to be a kind of “Gordian knot” for many experts in criminal law around the world, precisely because of the various concepts and terms and their uses, which the experts sometimes apply differently, and not only in Greece and Germany.[[6]](#footnote-6) Due to their historical and dogmatic connections, both legal orders share a very similar perspective on the problem, and a comparative consideration of the provisions of both criminal codes and the positions put forward in legal scholarship should therefore be helpful for a deeper understanding of the heart of the problem. That is really the goal of this thesis: to critically analyze the heart of the problem of the grounds for punishing the (im)possible attempt from the perspective of comparative law and to offer a dogmatically structured answer.[[7]](#footnote-7) I do not aspire to offer a revolutionary answer but a well-grounded one. Using a comparison of the Greek and the German legal orders as our instrument, therefore, we attempt to pursue a dogmatic argument not based on arbitrary intuitions and topoi, so that our suggested solution will have a dogmatic character.

Loosely formulated, two trends in legal philosophy have addressed the heart of the problem. These trends are reflected in the debate about the punishability of the absolutely impossible attempt and about the (subjective or objective) character that illegality should have. The partisans of subjectivism stress the dangerousness of individuals in order to find and correct them. The partisans of objectivism look for acts that demonstrate a certain “objective” character. This often takes the form of the endangerment of legally protected interests by the perpetrator’s behavior.[[8]](#footnote-8) For many objectivists, the concept of danger is primary. The prevention of crime is only a collateral goal for them. In subjectivism, what is primary is the dangerous person, who should be found for the sake of legally protected interests, even if this is seldom admitted.[[9]](#footnote-9) It could also be said that on one side, there is a social need in the area of criminal policy, and on the other, a dogmatic “consequence.”[[10]](#footnote-10) An opinion focused on the perpetrator’s dangerousness is a very good fit if the safeguarding of legally protected interests is taken as the chief goal of criminal law. Someone who wants to safeguard legally protected interests engages in prevention through repression.[[11]](#footnote-11) From this perspective, the perpetrator is seen as a potential source of danger (an enemy) for legally protected interests,[[12]](#footnote-12) because the perpetrator is the link between past and future, namely the act already committed and a potential future one.[[13]](#footnote-13) The idea of such a doctrine of prevention is nevertheless not convincing. It should not be forgotten that prevention has an “open-ended character,”[[14]](#footnote-14) and the attempt to put limits on it[[15]](#footnote-15) lacks “axiological consistency,”[[16]](#footnote-16) because it attempts to combine consequentialism with deontology. In addition, the concept of rehabilitation, which is based on the idea of dangerousness, is at least suspect according to the most recent empirical studies.[[17]](#footnote-17)

According to the dominant opinion in Germany and in Greece, criminal law is a law of acts.[[18]](#footnote-18) That is our presumption and the element that links the perpetrator to his punishment. It is in the context of this kind of objectivity that we attempt in this thesis to find the grounds for punishing the impossible attempt. If a perpetrator’s dangerousness is assumed, therefore, this principle is violated. Although the concept of a criminal law of acts, due to its abstract character, can naturally be interpreted in various ways, even contradictory ones, we should begin with such an abstract foundation as a “compass” if we are to attempt to offer answers to our problem. Something, even if it is abstract, is better than nothing. The meanings can always be pinned down more closely.

The subsequent chapters of this thesis will attempt to show that the division between objective and subjective theories about the punishability of the (im)possible attempt takes too one-sided a view of the phenomenon of criminal law in general. Crime is a meaningful expressive act. This means that crime can ultimately be understood as an expression of the perpetrator’s rejection of legal obligations. Through his behavior, the perpetrator disregards the legal grounds for action that uphold the freedoms of society. For this reason, he violates his role as a citizen. In this kind of interpretive view of criminal illegality, the impossible attempt really comes across as a malapropism. Although the perpetrator is incapable of using symbolic actions correctly, the communication between the perpetrator and his interpreter is successful. His expression of rejection is clear with the help of the context, and he is also punished for this reason.

Before we engage in a deeper exploration of the grounds for punishing the (im)possible attempt, therefore, the following question arises: why should we look for grounds, and what is the function of such an endeavor in the last analysis? Is the text of the law not clear enough?

**II. Why do we need grounds for punishing the impossible attempt?**

Why is the question about the grounds for punishing the (im)possible attempt interesting in the first place? Is an answer to that question really at all useful? A “naive” legal positivist would claim that the search for grounds, and especially for grounds for the (im)possible attempt, is superfluous. Everything is explained by the text, and we need nothing more. The limits and the meaning of the rules are effortlessly supplied by the text, and the grounds provide us at best with a policy basis for the given provision (even if doubts are raised about this as well). An example of such a legal positivist view of the impossible attempt is found in Herzberg. Herzberg claims that explaining the law’s justification can give us neither help in construing the text nor a basis for legal policy. According to him, no philosophical opinion can change the boundaries of the law[[19]](#footnote-19)—even though this is also obviously a philosophical statement.

In order to examine the matter a bit more precisely, Herzberg’s view has to be placed in context and its formulation improved. The important question is the following: how is the meaning contained in a legal provision discovered, or put another way, who determines the content of criminal law?[[20]](#footnote-20) If we are to be able to answer such a question, we must first make a brief excursion into the theoretical discussion about the nature of linguistic meanings. Although this is a very large philosophical debate and one that is still ongoing, there is one central conclusion that is helpful for our purposes. Meanings are only formed within social praxis. Words have no metaphysical substance and consequently have no firm borders in themselves.

The textual argument does not convince us, unfortunately. Words do not set their own limits. Language is a matter of use, a kind of “game.” The community of participants who employ a language decides about its use.[[21]](#footnote-21) Meanings are not something given but rather the result of a collective praxis of action.[[22]](#footnote-22) In other words, meanings are dependent on the structure of society. Society’s important role in defining language was already shown by Wittgenstein. “Here the teaching of language is not explanation, but training.”[[23]](#footnote-23) The meaning of words can only be grasped through societal instruction. Without this instruction, the functionality of words in societal praxis would remain unclear.[[24]](#footnote-24) Moreover, “‘obeying a rule’ is a practice. . . . Hence it is not possible to obey a rule ‘privately’: otherwise thinking one was obeying a rule would be the same thing as obeying it.”[[25]](#footnote-25) Following this line of thought, we can understand that no “private language” or “metaphysical language” can exist. Society and meanings are always linked, and words themselves have social weight. The same is also true of meanings in criminal law.

Let us now apply this debate from the philosophy of language to criminal law. Who determines the content of the criminal code? The simple answer, “the legislator,” is unfortunately inaccurate. The countless books written about the general portion of criminal law contradict such a simplified view. On the other hand, the position that looks to judicial decisions is also inaccurate, since judicial decisions have no monopoly on interpretation. Theoretical debates can always continue.[[26]](#footnote-26) As in the case of language, the meanings of criminal law are not an “ordering of norms divorced from actual existence” and determined by a “sovereign” individual but are always dynamic and never static, the result of legal and social praxis.[[27]](#footnote-27) We behave as though the law had an ontological substance that has to be discovered, but this is not the case. There is no “objective meaning,” because meanings are “dependent on conflicting attempts at definition in the public linguistic battle.”[[28]](#footnote-28) “References are not put in place in advance and cannot establish norms for language as such. Norms are established by speakers; references are made by legal practitioners.”[[29]](#footnote-29) The various attempts at definition are not authoritatively imposed.[[30]](#footnote-30)

For this reason, criminal law has no specific “author.” Rather, criminal law is an aggregate, a complex entity that changes with every scholarly opinion or every judicial decision. Many opinions and decisions have only minimal significance, and others influence the entire structure of criminal law.[[31]](#footnote-31) In this sense, the meanings of criminal law are bound up with the society of experts in criminal law. The experts themselves determine the meanings through a collective praxis that takes place in space and time. The meanings of criminal law ultimately have no metaphysical existence outside this community; rather, they arise in the first place out of the so-called “interpretive struggle.”

The societal character of language is nevertheless not unproblematic for scholarship on criminal law. On this view, language is neither a standard independent of the speaker nor a pure artificial product of his intentions. It is simply impossible to distinguish between repetition and new creation. “Both” happen at the same time.[[32]](#footnote-32) This kind of creative character of language is problematic for a “confirmation” of the law in a strict sense of “confirmation.”[[33]](#footnote-33) If meanings always remain dynamic, how does the judge apply the law to a particular case?

A perspective centered on confirmation of the law in a strict sense fails to grasp the creative character of legal interpretation, also expressed in changes in case law.[[34]](#footnote-34) This is an immanent characteristic of every legal order. No legal order can avoid this mutability, even if it can contain it “within certain boundaries” through techniques and especially through shared socialization.[[35]](#footnote-35) For this reason, the lack of fixed interpretation is normally only a peripheral problem in legal scholarship. In most cases, we would say, general agreement exists. Dispute between jurists is the exception in practice. This is not by chance. Life itself sets a kind of limit on interpretation, namely a shared legal socialization. Since we are brought up in the same society and have the same legal education, the majority of our references are fixed.

So how does the judge decide, despite the dynamic meanings of criminal law? The solution of this “Gordian knot” is provided by the grounds for decision, which are very important for legal scholarship. It could be metaphorically claimed that legal scholarship depends not on a “goal” but on a “process.” That is, the correctness of a decision depends on its justification. The law’s meaning and its grounds become one. “What is confirmed in the act of imposing a punishment is not only, or rather in the first instance not at all, the particular provision of criminal law being applied as such, but rather the trust that the extrapolation of that provision into a concrete decisional norm takes place in accordance with the established standards and methods.”[[36]](#footnote-36) We are no longer interested in the discovery of an objective meaning but rather in its justification.[[37]](#footnote-37) For this reason, grounds play a much more important role in legal scholarship than in other disciplines. In legal scholarship, there are strictly speaking no right or wrong statements, only more or less convincing ones.[[38]](#footnote-38) The quality of a legal view depends on the quality of its justification.[[39]](#footnote-39) As a consequence, statements must be well grounded in order to be part of legal scholarship.[[40]](#footnote-40) Only then are they linked to the “system” and therefore seen as “scholarly.” “Grounds make the certitude objective,”[[41]](#footnote-41) but “what is a telling ground for something is not anything *I* decide”;[[42]](#footnote-42) rather, it is decided by the recognition of the communicative community.[[43]](#footnote-43) Social knowledge is based on recognition.[[44]](#footnote-44) A good opinion is a “well-connected” opinion, one that is connected to grounds recognized by the legal community.

But what does all this mean for our discussion about the grounds for punishing an impossible attempt? The text, to which Herzberg appeals, is the starting point for interpretation, but a discussion of criminal law can never be permitted to end there. The legislative text is the “tip of the iceberg” and serves only as the entry point for the law’s interpretation. The law simply cannot be understood without interpretation, which is a necessary condition for understanding it. Any other alternative leads to arguments *ad absurdum*. The following example illustrates this idea more clearly. In a park there is a sign that says, “No picking flowers.” A child picks a flower and proudly says to her mother, “Mother, it’s just one flower!” Laws must not be understood through this kind of simplification. A law is always interpreted, even if the interpreter is unaware of it. For example, we remark that statements expressing a norm generally do not have a normative form, but we nevertheless interpret them as if they did.[[45]](#footnote-45) Experts in criminal law are always searching for the meanings of that law, and these meanings arise through specific interpretive schemes.[[46]](#footnote-46) For this reason, the meanings of criminal law are not something objectively given but the result of an interpretive struggle pursued through attempts at justification in a social space concerned with criminal law.

It follows that we are correct in our intuitive answer that finding the grounds for punishing an impossible attempt may be helpful on two levels. On the one hand, these grounds provide us with a policy justification for punishment in specific cases. The sentenced individual has a right to know why he is being punished. On the other hand, our results help us to construe the law. Besides legitimation, then, the grounds for punishment give us an expository tool for cases of impossible attempt. They allow us to determine the scope of the law’s application.[[47]](#footnote-47) For these reasons, it is our duty as legal scholars to answer the question of why an impossible attempt should be punished, and this is a role that has to be taken seriously.

According to our way of thinking, it is understandable that the legislative text remains only one argument in the debate and does not put an end to the discussion. It is only an argument, one that can be superseded by another, better argument. Herzberg’s opinion is an obsolete expression of legal positivism and is in any case incapable of explaining why a legal provision cannot be construed without violating the principle *nullum crimen sine lege*.[[48]](#footnote-48) For this reason, it is right that the grounds for punishment provide both legitimation and an expository tool for the punishability of the (im)possible attempt. Now that the weight due to such grounds has been clarified, the rational next step for our thesis is to address the question of what the relationship between the possible and the impossible attempt should be. Our point of departure for answering this question can be none other than the legal code.

**A) Results**

Why is the impossible attempt punished? This is the question at the center of this thesis. Our tool for finding an answer was a comparison of the German and Greek legal orders and the theories developed in connection with them, which are nearly identical. To summarize, it can be stated that the grounds for punishing an impossible attempt can be investigated only in connection with the grounds for punishing a possible attempt and—by extension—with the nature of criminal illegality. Only from such a dogmatic perspective is it possible to really understand what “to attempt” means in the context of criminal law.

Both the objective and the subjective theory take a one-sided view of the problem of the attempt and overlook the unity of criminal law as a phenomenon. On the one hand, the grounds for punishing an (im)possible attempt cannot be the individual’s manifested will inimical to the law, as the supporters of the subjective theory maintain. This view is similar to a theory of the perpetrator’s dangerousness, because under the influence of the doctrine of legally protected interests, it sees the perpetrator as a possible danger to those interests. Moreover, a position of this kind cannot justify taking the act as a fundamental principle. From this perspective, it would in principle be correct for an attempt not to require any objective element. In order to guarantee the effective safeguarding of legally protected interests against a will inimical to them, it would be better to take preventive measures as soon as possible.

On the other hand, the objective theory seeks to find an “objective” standard with which to limit the subjective theory’s reach. For this purpose, it uses the suspect concept of danger. Experts in criminal law have fought over the concept of danger and its criteria for years without resolution. There is a good reason for this dispute. As has been shown, this concept by its nature cannot avoid the problems of perspective and description without arbitrariness. Danger is a practical concept. It is only an unspecific pattern that has the function of guiding human action with respect to future decisions. For this reason, it is not a suitable tool for precise characterizations of past states of affairs. No one can use this term to draw definite boundaries. Scholarship on criminal law cannot and must not concern itself with such ontological problems.

The impression theory is likewise not a convincing solution. When exactly does something make an impression? There is no unanimous answer to such a question. It poses a problem for this theory that preparations for a crime might also make an impression. This theory would relativize the concept of crime in accordance with the impression made on society, which is impermissible.

In order to discover the grounds for punishing an (im)possible attempt, it is necessary to follow another path. Crime can be understood only as a meaningful act. Crime is an expression of a rejection of the demands of the legal order. The perpetrator shows through his actions his readiness not to comply with legal obligations. From this perspective, crime can be understood only in connection with the law. Namely, it is a communication between the perpetrator and the law concerning the normative structure of society. The perpetrator shows through his actions that he does not contribute to the freedom of society. In this way, he violates his role as a citizen. The symbol that the perpetrator uses in this normative communication, then, is his action.

If crime is understood as communication, then, the impossible attempt plays the role of a malapropism. In such cases, the perpetrator makes incorrect use of symbolic actions. Perhaps due to his inability, or simply because of bad luck, the perpetrator’s actions have an effect similar to that of a misused word. Nevertheless, the meaning of his actions as the expression of a rejection of legal obligations is understandable from the particular context. Context is always a necessary condition for interpreting actions. Since the meaning of an action has to be discovered here, the concrete circumstances of a case, like the context of a text, are of great importance. We cannot say in advance whether an action expresses rejection, because in that case the action relations cannot be determined. A judgment of this kind can be undertaken by the court through a well-reasoned justification with the help of the empirical basis of the particular case, taking the action relations into account.

If the impossible attempt is interpreted as expressing a rejection of legal obligations, as we suppose here, then the punishment of an impossible attempt is not a violation of the principles of objective illegality, as the Greek legislator claims. The impossible attempt is a legitimate form of crime, one that can be understood through interpretation and that is free of ontological concepts such as danger.

For this reason, despite the abolition of § 43 ΠΚ (1950), where cases of impossible attempt were previously regulated, the impossible attempt is still subsumed under the normal attempt in § 42 ΠΚ. It would perhaps be more helpful for the purposes of the Greek legislator, which intends a milder treatment of such cases, to permit the restoration of the old § 43 ΠΚ (1950) to its prior state, in which an impossible attempt due to gross lack of understanding was left unpunished.

In my view, it would be interesting to formulate a more precise theory of the interpretation of actions. In this way, judges would have firmer criteria with which to more easily decide when an action could be characterized as expressing rejection. Naturally, so large an aspiration cannot be fulfilled in this thesis. Nevertheless, it must be emphasized that even if such a theory existed, it would only take the form of recommended guidelines for judges. The hypothetical context of a given action is infinite, and it is doubtful that a theory could cover all possible action relations that could give meaning to an action. Moreover, the meaning of an action always depends on the symbols of a society and is therefore dynamic by nature.

1. Santiago Mir Puig, “Untauglicher Versuch und statistische Gefährlichkeit im neuen spanischen Strafgesetzbuch” in Bernd Schünemann et al, eds, *Festschrift für Claus Roxin* (Berlin: De Gruyter, 2001) at 729. [↑](#footnote-ref-1)
2. Αιτιολογική Έκθεση Σχεδίου Νόμου Ποινικού Κώδικα 2019, Άρθρο 43. [↑](#footnote-ref-2)
3. Αλέξανδρος Κωστάρας, *Η Απρόσφορη Απόπειρα: Δογματική Θεμελίωση και Ερμηνευτική Πραγμάτευση* (Athens: Αντ. Ν Σάκκουλα, 1997) at 84. [↑](#footnote-ref-3)
4. Heike Jung, “Zur Strafbarkeit des untauglichen Versuchs – ein Zwischenruf aus rechtsvergleichender Sicht” (2006) 117:4 ZStW 163–177 at 164. [↑](#footnote-ref-4)
5. Günter Spendel, “Zur Neubegründung der objektiven Versuchstheorie” in Günter Spendel, ed, *Studien zur Strafrechtswissenschaft: Festschrift für Ulrich Stock* (Würzburg: Holzner, 1966) at 90. Ανδρουλάκης has a different view, asserting that the grounds for punishing an attempt are different from the grounds for punishing a completed offense; Νικόλαος Ανδρουλάκης, “Ο Λόγος της Τιμωρήσεως της Απόπειρας και η „Αρχή Εκτελέσεως” ως Ουσιώδες Συστατικόν Αυτής” (1972) 1972:1 Ποινικά Χρονικά 1–25 at 2. [↑](#footnote-ref-5)
6. Thomas Weigend, “Why Lady Eldon Should Be Acquitted: The Social Harm in Attempting the Impossible” (1978) 27:2 DePaul L Rev 231–273 at 234. [↑](#footnote-ref-6)
7. This thesis treats the punishability of the impossible attempt only as a general concept and does not touch on specific problems, such as, for example, the punishability of the impossible subject. [↑](#footnote-ref-7)
8. George P Fletcher, *Rethinking Criminal Law*, reprinted ed (New York: Oxford University Press, 2000) at 172–173. [↑](#footnote-ref-8)
9. *Ibid* at 173–174. [↑](#footnote-ref-9)
10. Jung, *supra* note 4 at 172; alsoΗλίας Γάφος, “Η Απρόσφορος Απόπειρα και ο Νέος Κώδιξ” (1953) 1953:1 Ποινικά Χρονικά 1–20 at 1. [↑](#footnote-ref-10)
11. Michael Pawlik, *Das Unrecht des Bürgers* (Tübingen: Mohr Siebeck, 2012) at 64. [↑](#footnote-ref-11)
12. Günther Jakobs, “Kriminalisierung im Vorfeld einer Rechtsgutsverletzung” (1985) 97:4 ZStW 751–785 at 752–753. [↑](#footnote-ref-12)
13. Matthias Wachter, *Das Unrecht der versuchten Tat*, Freiburger rechtswissenschaftliche Abhandlungen (Tübingen: Mohr Siebeck, 2015) at 19; Fritz Stöger, *Versuch des untauglichen Täters: Zugleich ein Beitrag zur strafrechtlichen Lehre vom Unrecht* (Berlin: De Gruyter, 1961) at 55. [↑](#footnote-ref-13)
14. Pawlik, *supra* note 11 at 82. [↑](#footnote-ref-14)
15. As in, for example, Claus Roxin, *Strafrecht: Allgemeiner Teil I: Grundlagen: Der Aufbau der Verbrechenslehre*, 4th ed (Munich: C. H. Beck, 2005) at 59–62. [↑](#footnote-ref-15)
16. Pawlik, *supra* note 11 at 86. [↑](#footnote-ref-16)
17. Weigend, *supra* note 6 at 261–262. [↑](#footnote-ref-17)
18. Κωστάρας, *supra* note 3 at 90. [↑](#footnote-ref-18)
19. Rolf Dietrich Herzberg, “§ 22 StGB” in Wolfgang Joecks & Klaus Miebach, eds, *Münchener Kommentar zum Strafgesetzbuch: Band 1*, 2d ed (Munich: Beck, 2012) at 835. [↑](#footnote-ref-19)
20. Michael Pawlik, *Normbestätigung und Identitätsbalance* (Baden-Baden: Nomos, 2017) at 63. [↑](#footnote-ref-20)
21. Friedrich Müller, *Syntagma: Verfasstes Recht, verfasste Gesellschaft, verfasste Sprache im Horizont von Zeit* (Berlin: Duncker & Humblot, 2012) at 54. [↑](#footnote-ref-21)
22. Pawlik, *supra* note 20 at 60. [↑](#footnote-ref-22)
23. Ludwig Wittgenstein, *Philosophical Investigations*, reissued 2d ed, trans by G. E. M. Anscombe (Oxford: Blackwell, 1997) at para 5. [↑](#footnote-ref-23)
24. *Ibid* at para 6. [↑](#footnote-ref-24)
25. *Ibid* at para 202. [↑](#footnote-ref-25)
26. Pawlik, *supra* note 20 at 63. [↑](#footnote-ref-26)
27. *Ibid* at 64. [↑](#footnote-ref-27)
28. Ralph Christensen, *Was heißt Gesetzesbindung? Eine rechtslinguistische Untersuchung* (Berlin: Duncker & Humblot, 1989) at 278. See also Pawlik, *supra* note 20 at 64. [↑](#footnote-ref-28)
29. Müller, *supra* note 21 at 348. [↑](#footnote-ref-29)
30. *Ibid* at 364. [↑](#footnote-ref-30)
31. SeePawlik, *supra* note 20 at 65–66. Luhmann similarly characterizes law as “a historical machine that turns into a different machine with each of its operations.” According to him, law has no stable referent. Niklas Luhmann, *Law as a Social System*, trans by Klaus A. Ziegert, ed by Fatima Kastner et al (Oxford: Oxford University Press, 2004) at 129. [↑](#footnote-ref-31)
32. Robert B Brandom, *Reason in Philosophy: Animating Ideas* (Cambridge: Belknap Press of Harvard University Press, 2009) at 93; Christoph Möllers, *The Possibility of Norms: Social Practice beyond Morals and Causes*, trans by Alex Holznienkemper (Oxford: Oxford University Press, 2020) at 110; Müller, *supra* note 21 at 145; Pawlik, *supra* note 20 at 61. [↑](#footnote-ref-32)
33. According to Luhmann, norms have the function of stabilizing expectations in a society.Niklas Luhmann, *A Sociological Theory of Law*, 2d ed, trans by Elizabeth King-Utz & Martin Albrow, ed by Martin Albrow (Abingdon, UK: Routledge, 2014) at 31 ff. [↑](#footnote-ref-33)
34. Pawlik, *supra* note 20 at 59. [↑](#footnote-ref-34)
35. Möllers, *supra* note 32 at 122. [↑](#footnote-ref-35)
36. Pawlik, *supra* note 20 at 62. [↑](#footnote-ref-36)
37. Ralph Christensen & Friedrich Müller, *Juristische Methodik: Band I: Grundlegung für die Arbeitsmethoden der Rechtspraxis*, 11th ed (Berlin: Duncker & Humblot, 2013) at 172. [↑](#footnote-ref-37)
38. Müller, *supra* note 21 at 52. [↑](#footnote-ref-38)
39. Ulfrid Neumann, “Theorie der juristischen Argumentation” in Winfried Hassemer, Ulfrid Neumann & Frank Saliger, eds, *Einführung in die Rechtsphilosophie und Rechtstheorie der Gegenwart*, 9th ed (Heidelberg: Müller, 2016) at 310–311. [↑](#footnote-ref-39)
40. Pawlik, *supra* note 20 at 67. [↑](#footnote-ref-40)
41. Ludwig Wittgenstein, *On Certainty*, paperback ed, ed by G. E. M. Anscombe & G. H. von Wright, trans by Denis Paul & G. E. M. Anscombe (Oxford: Blackwell, 1975) at para 270. [↑](#footnote-ref-41)
42. *Ibid* at para 271; emphasis in the original. [↑](#footnote-ref-42)
43. Pawlik, *supra* note 20 at 67. [↑](#footnote-ref-43)
44. Müller, *supra* note 21 at 131. [↑](#footnote-ref-44)
45. Christensen & Müller, *supra* note 37 at 185. [↑](#footnote-ref-45)
46. Pawlik, *supra* note 20 at 63. [↑](#footnote-ref-46)
47. Claus Roxin, *Strafrecht: Allgemeiner Teil II: Besondere Erscheinungsformen der Straftat* (Munich: C. H. Beck, 2003) at 335. [↑](#footnote-ref-47)
48. Hans Joachim Hirsch, “Zur Behandlung des ungefährlichen ‘Versuchs’ de lege lata und de lege ferenda” in Otto Triffterer, ed, *Gedächtnisschrift für Theo Vogler* (Heidelberg: Müller, 2004) at 34. [↑](#footnote-ref-48)