Smart Things – Dumb Law?
Challenges Smart Things pose to Criminal Law

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A. Introduction: What criminal law tells us – and what (sometimes) not

... what people do – **not**: what Artificial Intelligences do

... with things – **mostly not**: with data
A. Introduction: What criminal law tells us – and what (sometimes) not

General challenges to the law
• Traditional basing of laws on physical objects and on historical ideas of causality.
• Anchoring of large parts of the legal system in the mechanical-objective world.
• Examination of applicability to new phenomena.

Specific challenges to criminal law
• Even stronger anchoring in the mechanical-objective world than many other areas of the legal system.
• Special principle of legality in Art. 103 (2) GG (with strict wording limit, prohibition of the analogous application of law).
B. Smart Home
Possible Scenarios of Attack:

- Hacking into the system and intercepting the door code
- Hacking into the smart phone, initiating the door to open
- Hacking into the WiFi-Router, manipulating the mailbox to play messages live; calling the number and telling the smart home voice control to open the door
- Etc.
D. Fighting and Punishing Burglary in the German Criminal Code (StGB)

(Completion of actus reus dependent on particular modus operandi)

General Offences

- § 242 StGB: Theft ➔ imprisonment up to five years or fine
- § 303 StGB: Criminal Damage ➔ imprisonment up to two years or fine
- § 123 StGB: Trespass ➔ imprisonment up to one year or fine

Specific offences of Burglary

- § 243 (1) No 1: Aggravated Theft ➔ imprisonment from three months up to ten years (presumptive example for assessment of penalty)
- § 244 (1) No 3: Theft by Burglary of Dwellings ➔ imprisonment from six months up to ten years
- § 244 (1) No 3, (4): Theft by Burglary of Private Premises ➔ imprisonment from one year to ten years ➔ Serious Criminal Offence (§ 12 StGB)
D. Fighting and Punishing Burglary in the German Criminal Code (StGB)

§ 244 – Theft by Burglary of Dwellings

(1) Whoever […] 3. commits theft for the commission of which they break into or enter private premises or intrude using a false key or other tool not typically used for gaining access or hide in the private premises incurs a penalty of imprisonment for a term of between six months and 10 years.

[…] (4) If theft by burglary of private premises under subsection (1) nos. 1 to 3 concerns residential accommodation which is uses permanently as private living space, the penalty is imprisonment for a term of between on year and ten years.

§ 243 – Aggravated Theft

(1) In especially serious cases of theft, the penalty is imprisonment for a term of between three months and 10 years. An especially serious case typically occurs where the offender […]

1. breaks into or enters a building, official or business premises or another enclosed space, or intrudes by using a false key or other tool not typically used for gaining access or hides in the room for the purpose of committing the offence […]

Due to the specific course of action during burglaries of Smart Homes, neither § 244 nor § 243 can be applied in many scenarios
D. Fighting and Punishing Burglary in the German Criminal Code (StGB)

§ 244 / § 243

Breaking into

- Does not necessarily have to be accompanied by damage of the substance
- But: Removal of obstacle has to be violent, at least with the use of physical force; given the modi operandi: no violence, no use of physical force

Enter

- Invading the dwelling via an opening, that is not meant to be for accessing the house
- Given the modi operandi, two possibilities:
  - Access through the door: § 244 (-)
  - Access through other openings, e.g. window: § 244 possibly (+)

Intruding

- Using a false key
  - Intercepted code (-), no physical key
  - Counterfeit key card/ transponder (+)
- Using another tool not typically used for gaining access
  - „Jammers“ that interfere with the lock and open it (+)
  - „Jammers“ that block the lock from being locked (-)
D. Fighting and Punishing Burglary in the German Criminal Code (StGB)

In many Smart Home Burglary Scenarios, including the given examples

§ 244 / § 243 are not complete

- Degree of wrongdoing seems to be the same, given the intrusion into the victims‘ private sphere, psychological consequences as well as massive damage of the feeling of security

- However, no possibility of application by analogy of § 244 ⇒ Art. 103 (2) GG*

- Courts tend to apply an unnamed aggravated case (wording: „typically“)
  - Grave concerns in the view of legal doctrine and Art. 103 (2) GG, if the scenario is very similar to the scenarios listed in § 243 (1) No. 1-7
  - Even if § 243 might be applied: less severe sentence and non-attainment of goals of making burglary of private premises a serious crime

*Basic Law = German Constitution
D. Fighting and Punishing Burglary in the German Criminal Code (StGB)

Many of the „Smart Burglarys“ can thereby (only) be punished according to:

- § 242 StGB
- § 123 StGB
- Depending on the particular modus operandi: data offences (e.g. § 202 a StGB, imprisonment up to 2 years / fine)
- Assessment of (concurrent) sentence according to §§ 52 et seqq. StGB

That means:

- Sentence for „Smart Burglary“ will most probably not depict the degree of wrongdoing
- Consequences of not being punishable as a serious offence, e.g. less efficient criminal procedural possibilities
- Making burglary of private premises a serious criminal offence with all of its motivations come to nothing
E. Conclusion

- Shown Example: „Smart Burglary“ might not be punished like „mechanical“ Burglary, although the degree of wrongdoing is (at least) as equal

Big Picture:

- Connected devices pose a challenge on criminal (procedural) law

- As shown for the example of Smart Home Systems, criminal law does not yet have all the answers to those new challenges

- Law Makers have to keep those challenges in mind and face them by a modern criminal law that give adequate possibilities to react
Thank you very much.

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