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Theories of Crime and Punishment in German Criminal Law

Markus Dirk Dubber*

Introduction

German criminal law theory enjoys widespread influence in the civil law world. Its impact extends from European countries like Spain, Portugal, Croatia, Greece, Turkey, Austria, Switzerland, Finland, and Sweden, to Israel and the Spanish and Portuguese speaking countries of Latin America, as well as to Asian countries such as Taiwan, South Korea, and Japan. ¹

By contrast, criminal law in common law countries has, until fairly recently, developed largely independent of German influence. Since the completion of the Model Penal Code in 1962, however, interest in German criminal law theory among Anglo-American criminal law scholars has grown steadily.² George Fletcher’s Rethinking Criminal Law, in particular, has been remarkably successful in introducing basic concepts of German criminal law into Anglo-American criminal law discourse and doctrine.³

² See generally G.O.W. Mueller, Comparative Criminal Law in the United States (1970). The drafters of the Model Penal Code were not particularly interested in German criminal law. Eager to devise a piece of model legislation with a chance of adoption in American jurisdictions throughout the land, they instead turned to existing American law, and the common core of the common law tradition, English law. And so the main foreign contributor to the Model Code effort was not a leading German criminal scholar of the day, but Glanville Williams, the man widely regarded as the father of modern English criminal law. It is no accident that the publication of Williams’s groundbreaking work, Criminal Law: The General Part, coincided with the drafting of the Model Code from 1952 to 1962. Glanville Williams, Criminal Law: The General Part (1st ed. 1953; 2d ed. 1961). Still, even the Model Code drafters occasionally turned their attention to the Continent and its civil law system, and therefore to Germany. For citations to the German criminal code in the official Commentaries to the Model Code, see, e.g., Model Penal Code Commentaries § 3.02, at 11, § 210.3, at 65 (1985).
The feature of German criminal law theory that is perhaps most familiar to Anglo-American scholars is the three-step analysis of criminal liability (*Straftatsystem*). The tripartite (or “structured”) system of analysis appears in American casebooks, textbooks, and court opinions, though its German origins are not always acknowledged.

Instead of focusing on the much-discussed tripartite analysis of criminal liability and the concomitant, and similarly much-discussed, distinction between justifications and excuses, this article highlights two other contributions of German criminal law theory that occupy a still more fundamental position in the system of German criminal law: its theory of *crime*, which posits the sole function of criminal law in the protection of “legal goods” (*Rechtsgüter*), and its theory of *punishment*, which justifies the criminal sanction in the name of protecting legal goods through “positive general prevention” (*positive Generalprävention*).

These aspects of German criminal law theory are of particular interest to Anglo-American criminal lawyers not only because they play a central role in German criminal law and are widely considered to be among the signal accomplishments of German criminal law science. They also tackle issues that so far have escaped a satisfactory treatment in Anglo-American criminal law, for different reasons.

Anglo-American theories of punishment have been stuck in a conceptual rut for quite some time, with battle-weary consequentialists (who advocate punishment for the sake of some beneficial consequence, such as crime reduction) and retributivists (who prefer punishment for its own sake, as a matter of “just deserts”) continuously reenacting a conflict that has advanced little since the days of Beccaria and Bentham.

Anglo-American theories of crime are not so much tired as they are nonexistent. While there is a general sense that not every moral wrong should make a crime—notwithstanding the claims of legal moralists like Michael Moore—and that

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7 Developed in the early twentieth century, the *Straftatsystem* distinguishes between three levels of inquiry: satisfaction of all offense elements as defined in the statute (*Tatbestandsmäßigkeit*), wrongfulness (*Rechtswidrigkeit*), and culpability (*Schuld*). For an excellent English-language exposition of the *Straftatsystem* by a leading German criminal law scholar, see Wolfgang Naucke, An Insider’s Perspective on the Significance of the German Criminal Law Theory’s General System for Analyzing Criminal Acts, 1984 BYU L. Rev. 305.
10 Michael Moore, Placing Blame 754 (1997) (“all and only moral wrongs should be prohibited by the criminal law, for the reason that such actions (or mental states) are wrongful (or culpable) and deserve punishment”).
“victimless” crimes are problematic, there is little in the way of an account of the function of criminal law within a system of law in general.

We will begin, in part I, with a discussion of the German theory of crime (the theory of legal goods), followed by a discussion of the German theory of punishment (positive general prevention), in part II. Throughout, the approach will be one of critical analysis from a comparative perspective: analysis of each aspect of German criminal law theory and doctrine will be driven by a keen interest in exposing and testing underlying principles and assumptions for the sake of assessing its usefulness for Anglo-American criminal law theory and doctrine. For a fuller account of blackletter German criminal law, the reader is advised to consult the standard textbooks in the field, many of which are cited below.

I. Legal Goods: The German Theory of Crime

The significance, and meaning, of the distinctive nature of crime – and therefore, by implication, the proper scope of criminal law – has long befuddled Anglo-American criminal jurisprudence. According to a widely shared assumption criminal law is thought to be about the prevention of harm; but if that is so, the question remains what, exactly, counts – or should count – as “criminal harm.”

At this point, the Anglo-American criminal lawyer may well be tempted to invoke the authority of John Stuart Mill and his celebrated “harm principle,” according to which the state can only use its coercive might to prevent one person from harming another, but not from harming himself, nor from doing, or thinking, anything that doesn’t amount to harming another, no matter how despicable the action or thought might be.

This reference to Mill, however, raises more questions than it answers. Why should law in general, and criminal law in particular, concern itself with “harms,” and with nothing else? What is it about “harm” – as opposed to, say, “offense” or “risk” or “inconvenience” – that legitimizes state action? One might tell a utilitarian story about pleasure and pain, with harm being the infliction of pain, but that too begs the question, as clearly not any type of pain, no matter what quality (psychological vs. physical) or quantity (slight vs. serious) triggers the state’s right to invoke the criminal law. Presumably a story about the point of criminal law, and about the nature of criminal harm, would have something to say about “crime” and about “law.” Otherwise we might learn much about morality or ethics or state action or the varieties of human suffering, but very little about criminal law in particular.

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12 Paul Robinson is interested not so much in the function of criminal law as a mode of state governance as in the functions of various doctrines within a system of (substantive) criminal law. See Paul Robinson, Structure and Function in Criminal Law (1997).
Instead of turning to Mill, now, the Anglo-American criminal lawyer might do well to consult German criminal law; for German law offers a well-developed account of the nature of criminal harm and the point of criminal law: the theory of Rechtsgut, or legal good.\(^\text{16}\) Let us then take a closer look at Rechtsgut theory to see whether it can inform the development of a more sophisticated account of the nature of criminal harm in Anglo-American criminal law.

Rechtsgut, or legal good, is one of the foundational concepts underpinning the system of German criminal law.\(^\text{17}\) It is so basic and essential a concept, in fact, that German criminal lawyers find it difficult to imagine a system of criminal law without it. The concept of legal good serves several crucial functions, at various levels of generality within the German criminal law system. Most fundamentally, the concept of legal good defines the very scope of criminal law. By common consensus, the function of criminal law is the “protection of legal goods,” and nothing else.\(^\text{18}\) Anything that does not qualify as a legal good falls outside the scope of criminal law, and may not be criminalized. A criminal statute, in other words, that does not even seek to protect a legal good is prima facie illegitimate. This principle has been invoked in favor of decriminalizing various morals offenses, such as homosexual sex and the distribution of pornography.\(^\text{19}\)

To perform this basic critical function, the concept of legal good must be defined with reasonable clarity and it must be given normative bite. There is much less of a consensus in the German literature on these two points, however, than there is on the general commitment to the concept of Rechtsgut in the abstract.

A. Positivism and Normativism

To appreciate the scope of the concept of Rechtsgut in the literature, as well as the variety of its manifestations, let’s consider the treatment of the topic in two leading, and fairly representative, treatises. Hans-Heinrich Jescheck and Thomas Weigend, in their popular Textbook of Criminal Law: General Part, declare categorically that “[c]riminal law has the objective of protecting legal goods,”\(^\text{20}\) and then go on to explain that legal goods, or “life goods “ (Lebensgüter), come in two varieties. Among “elementary life


\(^{18}\) See, e.g., Armin Kaufmann, Die Aufgabe des Strafrechts 5 (1983) (“no one in criminal legal science seriously doubts that the protection of legal goods is the objective of criminal law”); Diethelm Kienapfel, Strafrecht: Allgemeiner Teil 39 (4th ed. 1984) (“despite some criticism” legal good remains “one of the immovable cornerstones of criminal law doctrine, today more than ever”).


goods” that “are indispensable for the coexistence of humans in the community (Gemeinschaft) and therefore must be protected by the coercive power of the state through public punishment” one finds,

for example, human life, bodily integrity, personal freedom of action and movement, property, wealth, traffic safety, the incorruptibility of public officials, the constitutional order, the public peace, the external security of the state, the impunity of foreign state organs and indicia, the security of national, ethnic or cultural minorities against extermination or undignified treatment, international peace.\(^{21}\)

Besides these elementary goods there are also those that “consist exclusively of deeply rooted ethical convictions of society (Gesellschaft) such as the protection good of the criminal prohibition of cruelty against animals,”\(^{22}\) which “become legal goods through their adoption into the legal order.”

By contrast, Claus Roxin, in his influential *Criminal Law: General Part*, doesn’t assemble a list of legal goods, not even an exemplary one. In passing, however, he does mention a number of things that have been considered legal goods at some point in time, including, in order of appearance in the text,

life, bodily integrity, honor, the administration of law, ethical order, sexual autonomy, property, the state, the currency, dominant moral opinions, heterosexual structure of sexual relations, undisturbed operation of administration, purity of German blood, public peace, traffic congestion, the life and well-being of animals, the environment, morality, “purity of soil, air, water, etc.,” the variety of species in flora and fauna, maintenance of intact nature, the people’s health, life contexts as such, purity of the system of proof.\(^{23}\)

Also unlike Jescheck-Weigend, Roxin hazards a definition of Rechtsgut:

Legal goods are conditions or chosen ends, which are useful either to the individual and his free development within the context of an overall social system based on this objective, or to the functioning of this system itself.\(^{24}\)

Roxin’s definitional venture is motivated by an attempt to put some teeth into the concept of legal good. While Jescheck-Weigend appear content to follow up their declaration that criminal law protects legal goods with a list of legal goods the criminal law in fact does protect, Roxin strives to give the concept of legal good normative bite. The concept of legal good by itself is supposed to tell the legislature “what it may punish and what it shall leave without punishment.”\(^{25}\)

The tension between positivism (here represented by Jescheck-Weigend) and normativism (Roxin) is inherent in the concept of legal good itself. On the face of it, the concept appears to be in conflict with itself; for it conjoins two very different concepts: Recht and Gut. The translation of Gut, as “good,” is fairly straightforward. What is not

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\(^{22}\) Id.

\(^{23}\) Id. at 12-23.

\(^{24}\) Id. at 15.

\(^{25}\) Id. at 11.
so clear is what sort of “good” one has in mind here. While the term is familiar enough, it’s familiar from moral, or perhaps political, philosophy, but not from legal theory, never mind from blackletter law. What’s more, those disciplines that do concern themselves with the concept of “good” (or “goods”) have had considerable difficulty defining it. Even if moral theory had produced a neat and widely shared notion of good, it’s not immediately obvious why that notion should have any application to the field of law, particularly since German criminal law since P.J.A. Feuerbach (or Kant, whoever came first) has maintained a strict distinction between morality and legality, and criminal law especially.

But it is the other of the concepts welded together in the word “Rechtsgut” that presents the real difficulty. Recht is well-known for its ambiguity. With no equivalent in the English language it straddles the distinctions between justice and law, rightness and legality, natural and positive law, and even rights and right. This inherent ambiguity means, for one, that the question about the relevance of an apparently moral concept like “good” to a system of law cannot simply be answered – as it sometimes is – by pointing out that we are, after all, talking about a legal good, rather than a moral one. The mere invocation of the label “Rechtsgut” – with an appropriate emphasis on the first syllable – cannot stem any unwanted incursion of moral notions into law in general, and criminal law in particular.

B. From Feuerbach to Birnbaum

The impression of a concept at odds with itself is only strengthened when one considers the origins and subsequent development of Rechtsgut. In a very real sense, the tension between a positivist and a normative approach to the concept of legal good is as old as the concept itself. According to the standard account, the concept of legal good was discovered by an otherwise rather undistinguished criminal law scholar by the name of Birnbaum, who first reported his discovery in an often cited article published in

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26 Paul Johann Anselm von Feuerbach, Kritik des natürlichen Rechts also Propädeutik zu einer Wissenschaft des natürlichen Rechts (1796); Immanuel Kant, Metaphysics of Morals (1797). On the relationship between Feuerbach’s and Kant’s views on this issue, see Joachim Bohnert, Paul Johann Anselm Feuerbach und der Bestimmtheitsgrundsatz im Strafrecht 24-26 (1982); Oskar Döring, Feuerbachs Straftheorie und ihr Verhältnis zur Kantischen Philosophie, 3 Kantstudien Ergänzungshefte 23-26 (1907); Richard Hartmann, P.J.A. Feuerbachs politische und strafrechtliche Grundanschauungen 16 (1961); Wolfgang Naucke, Wolfgang. Kant und die psychologische Zwangstheorie Feuerbachs 44-50 (1962); on the question of firstness in particular, see Döring, supra, at 40; Hartmann, supra, at 10 & n. 23. While Kant characterized the criminal law as a formulation of the categorical imperative and viewed the formation of the state as a moral duty, Feuerbach restricted the role of morality in the justification of punishment to the moral notion of freedom underlying the decision of persons in the state of nature to form a state. Bohnert, supra, at 24-26; Döring, supra, at 23-26; Hartmann, supra, at 16; Naucke, supra, at 44-50. According to Feuerbach, persons endowed with moral freedom decide to restrict their freedom by creating a higher authority for the purpose of protecting this more limited form of freedom, i.e., legal freedom. Naucke, supra, at 44-50. As the protector of the legal freedom of its citizens, the state may—indeed must—do anything in its power to prevent attacks on this freedom. Naucke, supra, at 50.


28 The Recht in Birnbaum’s Rechtsgut is not the Recht that is violated in Feuerbach’s view of crime. The former is “the law,” the latter “right,” as in individual rights. To confuse things further, among Birnbaum’s legal goods—goods protected by the law—are individual rights. An individual right protected by the law, then, would become a Rechtsrecht.
In that article, Birnbaum attacked Feuerbach’s view of crime as a violation of “subjective right.” According to Feuerbach, in committing a crime the offender didn’t just violate “the law,” or “a statute,” but the rights of her individual victim. Birnbaum pointed out that this view of crime was much too narrow, as it couldn’t account for a great many criminal statutes which did not concern themselves with violations of individual rights at all, and yet were not considered to be any less criminal as a result.

Feuerbach’s cramped view of crime might work for traditional crimes like murder and theft, but it didn’t have room for such familiar crimes as “unethical and irreligious acts.” Birnbaum had a point. In fact, Feuerbach himself had never denied that crimes against morality and religion were crimes, even though everyone agreed they didn’t violate anyone’s individual rights and therefore didn’t fit Feuerbach’s definition of crimes as violations of individual rights. Instead he had, with some embarrassment, simply categorized them as “crimes in the broad sense” and labelled them “police offenses.”

Birnbaum clearly did a much better job capturing the nature of crime as a matter of positive law. Instead of a violation of individual rights (Rechte), a crime was now to be regarded as a violation of or a threat to goods (Güter) protected by the state. But whatever Birnbaum’s definition of crime gained in accuracy, it lost in critical purchase.

Eventually the notion of legal good, rather than limiting the power of the state to criminalize, turned into a convenient trope for its expansion. By the late nineteenth century, when Birnbaum’s discovery of the legal good was rediscovered by the committed positivist architects of the new national German criminal law, Karl Binding chief among them, the point of the legal good was to justify the expansion of criminal law beyond the protection of individual rights to the protection of communal goods, societal interests, and eventually the state itself. Legal goods became “interests of the law,” transforming law from a means to an end in itself.

Accordingly, Binding defined legal good as “anything that the legislature considers valuable and the undisturbed retention of which it therefore must ensure through norms.” In Binding’s influential norm theory of criminal law, legal goods (e.g., life) were protected by norms (e.g., do not kill) that the legislature, in its discretion, translated into legal prescriptions and prohibitions, including, but not limited to, criminal statutes (e.g., whoever causes the death of another person is guilty of murder and punishable by death).

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29 Johann Michael Franz Birnbaum, Ueber das Erforderniß einer Rechtsverletzung zum Begriffe des Verbrechens, 15 Archiv des Criminalrechts (Neue Folge) 149 (1834).
30 Id. at 178.
31 P.J.A. Feuerbach, Lehrbuch des gemeinen in Deutschland geltenden peinlichen Rechts § 27 (1st ed. 1801).
32 Johann Michael Franz Birnbaum, Ueber das Erforderniß einer Rechtsverletzung zum Begriffe des Verbrechens, 15 Archiv des Criminalrechts (Neue Folge) 149, 179 (1834) (“any violation of or threat to a good that is to be guaranteed by the state equally to everyone and that is attributable to the human will”).
34 See Karl Binding, Die Normen und ihre Übertretung, vol. 1, at 189 (1st ed. Leipzig 1872) (“the condition caused by the prohibited conduct violates the interests of the law”).
At the same time as the move from the protection of individual rights to that of legal goods broadened the scope of criminal law, the move from violations to threats widened its grasp. Where criminal law was once – at least in theory, however awkwardly – limited to the punishment of violations of individual rights, it now reached the prevention of threats to any good, individual or not, which the state declared worthy of its penal protection.

Since Binding’s rediscovery of Birnbaum, the basic framework of the occasionally heated debate about the definition and the function of the concept of legal good have remained fairly constant. Contributors to the debate took their place along the spectrum marked by Feuerbach’s notion of crime as a violation of individual right and Binding’s as a threat to state interests. Even Nazi criminal law, after some initial attempts to discard the notion of legal good altogether as an outdated liberal constraint upon state power, was content to develop new legal goods worthy of penal protection, rather than doing away with the concept altogether (e.g., “race and the substance of the people,” “Germanness”).

C. Constitutional Foundations?

Today the formal-positivist and the material-normative approach to the concept of legal good are represented by Jescheck-Weigend and Roxin, respectively, and among many others. What’s “new” about Roxin is the attempt to derive the content of legal good not from some more or less explicit notion of “law” or “good,” but from constitutional principles, for only they limit legislative discretion in a modern democratic state: “A concept of legal good that constrains penal policy . . . can only derive from those objectives of our law state (Rechtsstaat) grounded in the freedom of the individual which are articulated in the Basic Law,” i.e., the German constitution. Just what these constitutional principles are, however, Roxin does not say. From the quoted declaration, he proceeds immediately to the above-quoted definition of legal goods as “conditions or chosen ends, which are useful either to the individual and his free development within the context of an overall social system based on this objective, or to the functioning of this system itself.”

Roxin’s failure to derive his definition of legal good from the constitution is of course problematic, given that he simultaneously asserts that any such definition must be constitutionally derived. Upon closer inspection one begins to suspect that the definition derives not from its source, constitutional or not, but from its effect. So Roxin explains that the inclusion of “chosen ends,” in addition to preexisting “conditions” (presumably including individual rights), was meant to “express” a prior, unexplored, judgment that his view of legal good does not exclude by definition any crimes that Anglo-American lawyers might call mala prohibita, and that he calls “duties to obey norms generated by law itself.” In other words, he insists on critical bite, but not on too much.

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It is no surprise, therefore, that Roxin spends considerably more time illustrating various applications of his definition than he does justifying it. The definition is correct, the implication appears to be, because it leads to correct results, legitimizing just the right sorts of crimes, while delegitimizing only those that are beyond the pale of the state’s penal power. In fact, Roxin identifies not a single case of a German criminal statute that is illegitimate because it does not protect a legal good.

The statutes, and policies, that fail Roxin’s legal good test are either fanciful or obsolete. “Arbitrary threats of punishment” are illegitimate because they do not protect legal goods. No one may be forced, by fear of punishment, to pay homage to some “symbol” or other, for this “serves neither the freedom of the individual in a state committed to freedom nor the ability of a social system based on such principles to function.” 41 The purity of German blood likewise doesn’t count as a legal good because “protecting ideological objectives through penal norms is prohibited.” 42 Criminalizing homosexual sex too is improper. Morally offensive behavior, Roxin points out, doesn’t violate legal goods because it doesn’t interfere with “the social system’s ability to function.” 43 In fact, it’s the criminalization of morally offensive behavior, rather than the behavior itself, which causes such interference “because it creates unnecessary societal conflict by stigmatizing socially integrated humans.” 44

All existing criminal statutes pass the test, even if not always with flying colors. So Roxin struggles to justify the continued punishability of assisted suicide, which arguably interferes with no legal good, on the ground that it’s difficult to prove the decedent’s “autonomous decision” to end her life and that, at any rate, “the norm of protection of life demands the tabooization of others’ life.” 45 Drug criminal law is legitimate – despite strong criticism that it protects no legal good, individual or communal 46 – because it abates the dangers of drugs “for consumers incapable of responsibility”; the crime of abortion protects the fetus’ “emerging life,” which is a legal good because the German Constitutional Court has held that it is constitutionally protected; cruelty to animals is properly criminalized not because it offends deeply held and widely shared moral convictions (which do not qualify as legal goods in Roxin’s definition), but because “it is to be assumed that the legislature, in a kind of solidarity among creatures, also regards the higher animals as fellow creatures, or ‘foreign brothers,’ and protects them as such;” and environmental crimes too pass muster because “the variety of the species in flora and fauna and the preservation of intact nature belong to a life with human dignity.” Not even “symbolic legislation,” including obviously ineffective policies designed merely to placate voters or to signal the legislature’s commitment to certain values, fails the legal

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43 It presumably goes without saying that consensual, but immoral, behavior does not interfere with “conditions or chosen ends, which are useful either to the individual and his free development within the context of an overall social system based on this objective,” the first prong of Roxin’s definition of legal good.
44 Claus Roxin, Strafrecht: Allgemeiner Teil I, at 16 (3d ed. 1997). We may infer, therefore, that criminalizing immoral acts would not be merely illegitimate, but would itself be criminalizable as a violation of a legal good.

good test, at least not without “a comprehensive study from the perspective of criminal and constitutional law,” which, however, is yet to be undertaken.\textsuperscript{47}

Considering the toothlessness of Roxin’s normative theory of legal good, its bark turns out to be worse than its bite. In fact, one might even wonder just what critical point the concept of legal good retains, when all is said and done.\textsuperscript{48} Even Roxin himself acknowledges that, by his own account, it’s not clear just what the notion of legal good adds to constitutional constraints upon criminal lawmaking. (He concludes that the concept can still serve to “bundle” the various constitutional limitations.\textsuperscript{49}) After all, the definition of legal good is supposed to be derived exclusively from constitutional principles, as it must be as no other constraints upon the legislature are said to be permissible.\textsuperscript{50}

D. Internal Constraints

At this point, it’s worth noting that even a merely – and explicitly – positivist notion of legal good, such as the one favored by Jescheck-Weigend, is not without critical potential, though from within an existing system of criminal law, rather than from without. Even if the ends of criminal law are beyond reproach, the means need not be. In German criminal law, a criminal statute that sets out to protect a legal good – however defined – and therefore has the proper end, may nonetheless be open to criticism if it is insufficiently \textit{connected} to that good, and thus constitutes an improper means. This means-ends test has been used to criticize so-called “abstract dangerousness offenses,” which criminalize conduct that in the abstract poses a threat to some legal good, without any need to prove that the specific conduct posed such a threat in fact.\textsuperscript{51} The classic example here is driving while intoxicated.\textsuperscript{52}

Recall that Birnbaum expanded the scope of criminal law not only in breadth, but also in depth, by recognizing the punishability of mere threats to legal goods, as opposed to actual violations. Modern German criminal law, and in fact modern criminal law in general, has been much concerned with reaching, and neutralizing, ever more remote, and ever more abstract, threats to legal goods.\textsuperscript{53} German criminal law distinguishes between

\textsuperscript{48}Note also that, even among proponents of a normative definition of legal good, it often remains unclear what is supposed to happen if a criminal statute runs afoul of the requirement that it protect a legal good, however defined. Is it invalid, or unconstitutional, or is the critical function of the concept limited to policy pointers that the legislature is free to ignore? See Ivo Appel, Verfassung und Strafe: Zu den verfassungsrechtlichen Grenzen staatlichen Strafen 351-55 (1998).
\textsuperscript{50}Note, however, that this requirement of constitutional origin does not apply to other limitations on the legislature’s power to make criminal law. Roxin, for one, does not lay similar stress on the constitutional foundation of the principles of the general part, as opposed to the concept of legal good, which constrains the scope of the special part. While constitutional status may well be claimed for something as central as the guilt principle (Schuldprinzip), there is no doubt that the principle’s authority does not derive from that status. See, e.g., Claus Roxin, Strafrecht: Allgemeiner Teil I, at 746-47 (3d ed. 1997).
\textsuperscript{52}Roxin sees no problem with this offense, however, because it clearly defines the proscribed conduct and bears a manifest relationship to legal goods (life, limb, property). Claus Roxin, Strafrecht: Allgemeiner Teil I, at 20 (3d ed. 1997) (discussing literature).
concrete and abstract dangerousness offenses. In the former case, the definition of the offense includes actual endangerment, as in the offense of “endangering rail, ship, and air traffic” which criminalizes “endanger[ing] another’s life, limb, or property of significant value”\(^{54}\) in certain circumstances. Abstract endangerment offenses, by contrast, do not include actual endangerment in their definition. They instead cover conduct that “typically creates a concrete danger,”\(^{55}\) whether or not that danger was in fact created by the particular conduct in question. Examples include slander, which requires only an act “capable of” stigmatizing another\(^^{56}\) and drunk driving, which requires no showing that the drunk driver posed a threat to anyone or anything.\(^^{57}\)

Finally, a criminal statute that does set out to protect a legal good still may be illegitimate if it is not necessary to achieve its end. The criminal law, in other words, is said to be the state’s \textit{ultima ratio} in its effort to protect legal goods; it must employ less intrusive, civil, means if they can provide sufficient protection for the legal good in question. The status, and origin, of this so-called subsidiarity principle of German criminal law is not entirely clear. Roxin claims, once again, that the \textit{ultima ratio} principle derives from the constitution, in this case the principle of proportionality which, he continues, “can be deduced from the constitutional principle of the rule of law: Since criminal law enables the harshest of all state interferences with the liberty of the citizen, it may only be applied if milder means do not promise sufficient success.”\(^{58}\) Later on, however, Roxin acknowledges that the legislature enjoys wide discretion in choosing among available means, criminal and noncriminal, concluding somewhat anticlimactically “the subsidiarity principle is more of a guideline for penal policymaking than a compelling requirement.”\(^{59}\)

E. Doctrinal Significance

Apart from its various critical functions, external or internal, toothful or not, the notion of legal good performs several more mundane, doctrinal, tasks. The justification of necessity, for instance, requires a balancing of the affected legal goods (the protection of one legal good making the violation of the other necessary).\(^{60}\) The American Model Penal Code captures very much the same idea when it allows for a justification of “choice of evils” in the case of “[c]onduct which the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that . . . the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged.”\(^{61}\)

The balancing act required takes into account both the relative significance of the legal good, and the degree of its interference. So “personality values” (\textit{Persönlichkeitswerte}) – like “human freedom” – rank higher than “thing goods”

\(^{54}\) StGB § 315a.
\(^{56}\) StGB § 186.
\(^{57}\) StGB § 316.
\(^{60}\) Claus Roxin, Strafrecht: Allgemeiner Teil I, at 621 (3d ed. 1997).
\(^{61}\) § 3.02; Markus D. Dubber, Criminal Law: Model Penal Code 194-201 (2002).
(Sachgüter) – like “property” – and “life and limb” trump not only other “personality values” but also “supraindividual legal goods.” Yet trivial interferences with “personality values” may be justified for the sake of preventing serious interferences with “thing goods,” such as a minor assault necessary to avert a major fire. The origin, as well as the precise order, of the ranking remains, once more, somewhat doubtful. As might be suspected, the ranking of legal goods on occasion is said to derive from constitutional principles.

Certain de minimis conduct that fits the definition of an offense is nonetheless declared noncriminal (or not “subsumed” under the offense definition) because it does not “really” violate the legal good protected by the statute in question. So tipping the mailman is not bribery, playing penny poker not gambling, and calling your brother a bad name not a criminal insult. The Model Penal Code likewise provides for judicial dismissal of a prosecution for prima facie criminal conduct that “did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense or did so only to an extent too trivial to warrant the condemnation of conviction.”

German criminal law also distinguishes between different types of legal good that a criminal statute might protect, individual legal goods, such as life and liberty, and communal ones, such as peace and security. And it may make a doctrinal difference which type of legal good is implicated. For instance, self-defense isn’t available against attacks on communal – as opposed to individual – goods. “Otherwise every citizen could set himself as auxiliary policeman and annul the state’s monopoly on violence.” That’s not to say, however, that no justification would be available, just that the justification of self-defense would not. A citizen who wishes to defend communal goods against attack instead would have to rely on the justification of necessity.

Consent too is available as a justification only in cases involving an offense protecting an individual legal good. Here the reason is that the individual cannot be justified in waiving the criminal law’s protection of a communal legal good, i.e., of an interest that is not merely his own and therefore not his to give away.

Though of no immediate doctrinal significance, the role of the concept of legal good as a method of categorization also deserves mention. The special part of the German

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69 This is true regardless of whether consent is addressed at the first level of analysis—dealing with the question of whether an offense was committed—or at the second—dealing with the question of whether the offense can be justified. See Claus Roxin, Strafrecht: Allgemeiner Teil I, at 462-65 (3d ed. 1997) (offense); Hans-Heinrich Jescheck & Thomas Weigend, Lehrbuch des Strafrechts: Allgemeiner Teil 375-76 (5th ed. 1996) (justification); see generally Theodor Lenckner, in Schönke-Schörder, Strafgesetzbuch: Kommentar 486 (25th ed. 1997). Cf. Model Penal Code § 2.11(1) (consent a defense if it “precludes the infliction of the harm or evil sought to be prevented by the law defining the offense”); Markus D. Dubber, Criminal Law: Model Penal Code 238-46 (2002).
criminal code is divided up into sections which contain offense definitions designed to protect a common legal good or set of legal goods, including “crimes against peace” and “crimes endangering the democratic rule of law” (sec. 1), “crimes against sexual autonomy” (sec. 13), “crimes against personal freedom” (sec. 18), and “crimes against environment” (sec. 29). The Model Penal Code similarly arranges the crimes defined its special part according to the “individual or public interests” they protect.  

By figuring in both the general part and the special part of criminal law, the concept of legal good highlights the connection between the two parts. Issues in the general part, like necessity, involve consideration of the same interests – or goods – that are protected by the offenses in the special part. This common conceptual foundation is obscured by the nomenclature in the Model Penal Code, for instance, which frames questions relating to legal goods in terms of “harms or evils” or “individual or public interests,” depending on whether they arise in the general or special part.

F. Rechtsgut as Analytical Tool

In the end, the most important function of the concept of legal good may well be the facilitation of critical analysis, rather than critique itself. The very existence of the concept stands for the proposition that there are limits within which modern criminal law must operate if it is to claim legitimacy, and ultimately obedience and therefore effectiveness. The notion of legal goods provides critical analysis of German criminal law with a language for expressing itself, no less, but also not much more.

There is clearly a danger in overestimating the significance of the mere existence of a concept called Rechtsgut. Yet, one should also resist the opposite impulse to dismiss the concept as meaningless, or even hypocritical, simply because it has never been invoked to invalidate a single piece of criminal legislation. In American criminal law, a constant reminder—even a purely formal one—of the intimate connection between criminal law and the rule of law might prove useful as state programs such as the “war on crime,” the “war on drugs” or, most recently, the “war on terror” draw into question the identity of criminal law as a species of law, rather than a system for the policing of human threats. Still, there is nothing magical about the concept of Rechtsgut itself. In American criminal law, at least, another concept – such as a concept of criminal harm based on rights of personal dignity and autonomy recently reaffirmed in Lawrence v. Texas – may be able to perform the same function, with more substantive bite and a more solid grounding in American constitutional principles.  

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71 “Offenses against the existence or stability of the state,” “offenses involving danger to the person,” “offenses against property,” “offenses against the family,” “offenses against public administration,” and “offenses against public order and decency.” See generally Markus D. Dubber, Criminal Law: Model Penal Code 183-85 (2002)

72 For a discussion of the war on crime as a type of police action, see Markus Dirk Dubber, Victims in the War on Crime: The Use and Abuse of Victims’ Rights (2002); on the distinction between law and police, see generally Markus Dirk Dubber, The Police Power: Patriarchy and the Foundation of American Government (2005).


Even if the concept of a legal good turns out not to be constitutionally based, and therefore to have no destructive potential, it still can play a constructive role in a general account of the criminal law, perhaps even as a guideline for policy makers, and certainly as an interpretative tool for the courts. At the very least, it would be preferable to have courts ponder the question what legal good, or interest, a particular statute was designed to protect, rather than unsystematically divining the “gist” or “crux” or “gravamen” or “focus” or “scope” or “object” or “hard core” of a particular criminal statute, the “harm” or “evil” just plain “evil” or “injury” it seeks to prevent, or the “individual or public interests” or “rights” it is meant to protect, or worse yet, to wonder which “class of persons” or “bad men” it might have been intended to reach.

Having investigated the potential usefulness of the German theory of crime for constructing an account of the nature of criminal harm in Anglo-American criminal law, we now turn to a critical analysis of the German theory of punishment.

II. Positive General Prevention: The German Theory of Punishment

In the Anglo-American literature, the debate about the rationale, or rationales, of punishment largely remains within the familiar framework of consequentialist and deontological theories of punishment. Ordinarily, lists of the rationales of punishment include the following four: deterrence (general and special), incapacitation, rehabilitation (or reformation), and retribution (or just deserts), with the first three classified as consequentialist and the fourth as deontological. The “consequences” that the first seek to achieve might differ from account to account, but the prevention of crime, or reduction of the crime rate, is certain to be among them.

After roughly two centuries of hostilities between the consequentialist and deontological camps, general exhaustion has set in. By and large, punishment theorists – and legislatures as well as sentencing commissions – have settled on some “mixed

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76 See, e.g., People v. Sanchez, 2002 N.Y. LEXIS 2233 (“crux” of depraved indifference murder is extreme recklessness).
82 See, e.g., Model Penal Code. § 3.02.
84 See, e.g., N.Y. Penal Law 35.05(2) (necessity defense).
85 See, e.g., Model Penal Code § 1.02(1).
theory” or other, generously combining elements of what once were thought to be deeply irreconcilable views.89

The analytic work of the English legal philosopher H.L.A. Hart proved to be particularly helpful in this regard. By helpfully differentiating between the different questions that a theory of punishment should answer, Hart made different answers to these questions possible.90 So one might be a consequentialist with respect to the justification of the institution of punishment in general, while choosing retributivism when it comes to Justifying the infliction of punishment in a particular case. More specifically, we might think that we need punishment to deter people from committing crimes, but at the same time that we shouldn’t punish people unless they in fact deserve it.

Given the widely acknowledged staleness of debates about the rationales for punishment in Anglo-American law, one might be tempted to turn to the German literature on the subject. And indeed, it turns out that German criminal law theory has made a conscious effort to break out of the consequentialist-deontological rut. Whether the effort succeeds in the end remains to be seen.

A. The Schulenstreit

German criminal law, too, once witnessed intense battles pitting consequentialists against deontologists, those who proposed punishment ne peccetur against those who preferred punishing quia peccatum est. The fiercest, and most prolonged, period of this dispute even had its own name, the “Clash of the Schools” (Schulenstreit), whose main protagonists were Franz v. Liszt, the founder of German criminology, for the “progressive school,” and Karl Binding, the originator of “norm theory” in German criminal law, for the “classical school.”

To characterize the dispute between Liszt and Binding (and their associates and successors) as one between consequentialism and retributivism, however, could be misleading. It’s important to keep in mind that both Liszt and Binding were thoroughgoing legal positivists. Binding argued that punishment was justified, and only justified, as the state’s response to a violation of a state norm. The essence of crime thus was the violation of a norm of positive law, rather than the commission of a wrongfult act. The criminal law was not so much a demand of justice, or as Kant would have it, a “categorical imperative,” as a state tool for the enforcement of state authority that the state may or may not choose to employ.

The “right to punishment,” to Binding, was “nothing but the right to obedience of the law, which has been transformed by the offender’s disobedience.”91 The purpose of punishment thus was “the inmate’s subjugation under the power of law for the sake of

91 Karl Binding, Das Problem der Strafe in der heutigen Wissenschaft, in 1 Strafrechtliche und strafprozessuale Abhandlungen 61, 84 (1915).
As such, punishment was to “represent the holiness and inviolability of the duties to which it is attached.”

Liszt, by contrast, accused Binding and his fellow classicists of advocating pointless punishment. (That’s not quite fair, as we just saw, since Binding thought punishment served the purpose of maintaining state authority.) Liszt insisted that punishment, to be legitimate in a modern enlightened state, had to serve some purpose. Punishment could never be an end in itself. More specifically, Liszt argued that punishment must (and does) seek to protect legal goods (Rechtsgüter) against criminal violation. These legal goods, in Liszt’s view, included, broadly speaking, “the life conditions” of a given community so that crimes were all “those acts that this people at this time perceives as disturbances of its life conditions.” Punishment served its purpose through rehabilitation (education), deterrence, or incapacitation, depending on the type of offender. The recidivist, for instance, would upon his third conviction of an offense motivated by “the strongest and most basic human drives” (including theft, robbery, arson, and rape, but also damaging property) be sentenced to an indeterminate prison term, to be served in a state of “penal servitude,” with the use of corporal punishment to enforce prison discipline. Truly incorrigible offenders were to be imprisoned for life, because “we do not wish to behead or hang and cannot deport” them — why that would be so Liszt didn’t explain.

In keeping with their broadly treatmentist approach, Liszt and his fellow progressives called for more or less radical legislative reforms. The cumbersome, and legalistic, construct of criminal law doctrine was to be replaced by a more flexible, modern, scientific (“progressive”) system for the proper diagnosis, and classification, of offenders, which was crucial for the prescription of the correction quality and quantity of peno-correctional treatment. Ironically these reform proposals did not come to fruition until after the Nazis took power in 1933. One of the Nazis’ first criminal law reforms was the Law Against Dangerous Recidivists and Regarding Measures of Protection and Rehabilitation of November 1933, which established the “two-track” sanctioning system that remains in place today. Since then, two general types of sanction have been available: punishments and measures. Only punishments “properly speaking” are subject to constraints of proportionality between culpability and sanction. “Measures” instead are unrelated to culpability and are determined exclusively by the offender’s peno-correctional diagnosis. So if she requires rehabilitative treatment, she might be sent to a drug rehabilitation clinic; if she requires incapacitative treatment, she might be incarcerated indefinitely. Freed of the constraints of proportionality between offense and

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92 Id. at 86.
93 Id. at 85.
94 Franz von Liszt, Der Zweckgedanke im Strafrecht, in 3 ZStW 1, 33-34 (1883) (“Marburg Program”). For more on the concept of Rechtsgut, see part I supra.
95 Franz von Liszt, Der Zweckgedanke im Strafrecht, in 3 ZStW 1, 23 (1883).
96 Id. at 40.
97 Id. at 39.
99 Law against dangerous recidivists and regarding measures of protection and rehabilitation (Gesetz gegen gefährliche Gewohnheitsverbrecher und über Maßregeln der Sicherung und Besserung), Nov. 24, 1933.
100 The two-track system is discussed in greater detail in ch. infra.
sanction, “measures” are served independently – and where appropriate consecutively – to whatever “punishments” are imposed.

At the same time, the retention of the distinction between punishments and measures indicates that the victory of the progressive treatmentists was not complete. While “progressive” considerations governed the realm of “measures,” that of “punishments” remained subject to “classical” quia peccatum considerations. In the end, then, a statutory compromise was reached. Strafrecht (literally, the law of punishment) remained, but was now only one component of the comprehensive vision of Kriminalrecht (literally, criminal law), which encompassed both punishment and treatment.

B. Positive General Prevention

The German theory of punishment thus combined once incommensurable deontological and consequentialist elements, much like Anglo-American punishment theory. Unlike Anglo-American punishment theory, however, which has been content to resolve the tension between deontology and consequentialism, and between utilitarianism and retributivism, by combining these ingredients in “mixed” theories, German punishment theory eventually produced an altogether new theory of punishment that aims to reconcile the differences between what the Germans call “relative” and “absolute” theories of punishment.

This is the theory of “positive general prevention” (positive Generalprävention, or PGP for short), which today is the dominant theory of punishment in German criminal law. There are many varieties of positive general prevention, so many in fact that discussions of the theory as a matter of course caution that it may well be misleading to speak of the theory, rather than theories, of positive general prevention. Still, the basic features of positive general prevention can be discerned easily enough. It’s “general” to distinguish itself from special prevention, which uses punishment to prevent crime by the particular offender subject to punishment, rather than by others. It’s also “positive” because it seeks to prevent crime not by scaring potential lawbreakers into compliance, but by bolstering the lawabidingness of the rest of the population. Finally, and relatedly, it’s about “prevention” generally speaking, rather than “deterrence” as a particular means of prevention. There could be no such thing as positive deterrence, after all.

It’s pretty clear, therefore, what positive general prevention is not. One might think of it, in fact, as being constructed specifically to take advantage of the consensus that special deterrence is an entirely inappropriate attempt to legitimate punishment. Positive general prevention clearly is not negative special prevention (or special deterrence for short). That theory, after all, is generally thought to have been thoroughly, and permanently, laid to rest by the father of modern German criminal law, P.J.A. Feuerbach, at the turn of the nineteenth century.\footnote{Feuerbach’s argument was largely conceptual, if not to say formalistic. He charged that the special preventionists of his day could not “deduce” a right to “punishment” for past violations, but at best a right to “defense” against future ones. Paul Johann Anselm von Feuerbach, Revision der Grundsätze und Grundbegriffe des positiven peinlichen Rechts pt. 1, at 21 (Erfurt 1799) (reprint Scientia: Aalen 1966); see Winfried Hassemer, Variationen der positiven Generalprävention, in Positive Generalprävention: Kritische Analyses im deutsch-englischen Dialog 29, 43 (Bernd Schünemann et al. eds. 1998).}
But positive general prevention is also not positive special prevention, or rehabilitation. It’s no accident that positive general prevention arose out of another, much later and somewhat narrower, consensus in German criminal legal science, namely that – to quote the familiar American phrase – “nothing works.” While American criminal law, in particular, responded to the perceived failure of rehabilitative measures by (re)turning to retributivism, or “just deserts” as it was now called, the German response shifted emphasis among the objects of prevention, rather than leaving the realm of consequentialist punishment altogether. If positive special prevention didn’t work, then perhaps positive general prevention might. If punishment can’t rehabilitate offenders, perhaps it could stiffen the resolve of non-offenders not to become (unrehabilitatable) offenders.

More generally, positive general prevention was hoped to steer clear of the normative and empirical problems that had plagued consequentialist theories of punishment, without endorsing a retributive theory of punishment for its own sake, which was dismissed as literally pointless, and hence barbaric.

The normative problems with deterrence theory have been familiar at least since Kant. The categorical imperative, after all, instructs us never to treat a person merely as a means to an end. And what is punishing one person to deter another from committing a crime, if not treating him as a means to the end of crime control? Invoking Kant in support of positive general prevention, however, is not without irony. Kant, after all, was an arch retributivist, and therefore was very much passé. Moreover, Kant’s objection was not limited to deterrence, special or general, but applied to any consequentialist theory of punishment. For what is punishing one person to prevent another from committing a crime – no matter how – if not treating him as a means to the end of crime prevention?

But there was another normative problem with deterrence theories in particular, which a preventive theory, and more specifically a positive one, might avoid. This objection was formulated by another famous German retributivist, Hegel, who argued that prevention through deterrence was illegitimate because it disrespected the dignity of the deterred. For what, Hegel asked, is punishing for deterrence’s sake if not treating the intended audience of this spectacle as animals, dogs to be precise, which (not who) are to be scared, and (in the case of special deterrence) beaten, into submission?

Positive general prevention did not threaten dogs with raised sticks, but instead addressed human beings capable of making choices, including the choice to follow or to break the law. It sought to deter no one, neither the person punished nor anyone else. It merely aimed to reinforce the “general legal consciousness” of the community at large, perhaps including, but certainly not limited to, the specific offender.

But positive general prevention was to be more than the kinder, gentler version of general deterrence, thus solving, or at least circumventing, the normative problems that had dogged general deterrence for centuries. It was to solve consequentialist theory’s

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empirical problems as well. For not only special prevention, or rehabilitation, had run into empirical difficulties, captured dramatically in the “nothing works” slogan. General deterrence, too, had never quite managed to bolster its scientific claims with hard empirical evidence. There certainly was a strong common sense notion that punishment would have a deterrent effect, but not much else. But common sense hardly seemed enough for a theory of punishment whose central claim was that punishment without a point (or for its own sake) was patently illegitimate. Unlike retributivism, consequentialism was not to rest a state institution as intrusive and violent as punishment on some metaphysics of crime and punishment, or on some abstract principle of justice (such as the categorical imperative). Instead, what was needed was hard evidence of results. Without that evidence, consequentialism was no better than retributivism. To persist in punishing in the absence of evidence of punishment’s beneficial effects would be barbaric indeed.

Deterrence theory’s most embarrassing empirical problem is that the mere fact of crime appears to disprove it. After all, if the point of punishment is deterrence then it becomes difficult, at least after a while, to ignore the fact that crime persists, and even increases, despite continued punishment. Positive general prevention, however, is thought to blunt the force of this empirical objection, largely by virtue of its very positiveness, so to speak. Who knows, after all, what positive effects the threat and infliction of punishment might have on the lawabidingness of the lawabiding? The mere existence of considerable numbers of undeterrable offenders doesn’t imply the absence of scores of people who never even consider a life of crime because they see their trust in the authority of law reaffirmed, all contrary appearances in the form of continued lawbreaking notwithstanding. Clearly, not everyone is committing crimes all the time. Why shouldn’t that be the result of positive general prevention through punishment? Surely, punishment can claim to have made some contribution here.

This speculation, however, if it can be said to prove anything, proves not only the empirical soundness of positive general prevention, but of any method of preventive punishment, including through deterrence. And so one can find arguments that positive general prevention is attractive precisely because of the very absence of empirical evidence for its effectiveness – or more precisely, the impossibility of ever producing empirical evidence. For all intents and purposes, it is said, positive general prevention is empirically immune; it is “hardly falsifiable.”

Nonfalsifiability might appear as an odd benefit of a punishment theory that is designed to combat the nonfalsifiability of retributivist metaphysics. In fact, at some point it becomes difficult to tell the difference between positive general prevention and retributivism. For many retributivists too were concerned with using punishment to manifest the authority of the state, or at least the force of criminal (or social, or moral, or legal) norms (see Binding above). Unlike most supporters of positive general prevention today, they did not claim that asserting the authority of law required any end beyond itself, but if achieving that end becomes so irrelevant as to not require verification (or even verifiability), then one might suspect that positive general prevention adds little to retributivism.

The line between retributivism and consequentialism becomes particularly blurry in a recent, and quite influential, variety of positive general prevention. Echoing Hegel’s theory of punishment as the negation of the negation (of crime), Günther Jakobs regards the function of criminal law as “contradicting the contradiction of norms defining the identity of society.” “Punishment,” in Jakobs’s conception, “is not only a means for the maintenance of societal identity, but already is this maintenance itself.” As such, the efficacy of punishment is beyond empirical falsifiability; maintaining societal identity is what punishment means. That’s not to say, of course, that retributivism, or any other theory of punishment that doesn’t turn on empirical falsifiability, should for that reason be dismissed, only that nonfalsifiable varieties of positive general prevention cannot dismiss it for that reason.

The less emphasis is placed on the effects, the more weight is shifted onto the meaning of punishment. And the more positive general prevention insists that punishment is about meaning something, as opposed to accomplishing something (like prevention, say), the less it appears as a justification of punishment, as opposed to an analysis of it. At some point, positive general prevention becomes not a theory of punishment, but a function of punishment. Perhaps it is true that punishment “demonstrates to the community of law the inviolability of the legal order and thereby strengthens the population’s loyalty to the law.” But does this demonstration and strengthening justify punishment?

Here positive general prevention faces the same difficulties as the so-called expressive theory of punishment. The expressive theory of punishment, in fact, never claimed to justify punishment at all. The expression of the communal condemnation was not a purpose, or rationale, of punishment, but, as the title of the article popularizing it makes plain, a “function of punishment.” As an expressive analysis of the function of punishment, positive general prevention fits into a long tradition of sociological accounts, reaching at least as far back as Durkheim, who regarded state punishment as a medium for the satisfaction of society’s collective feelings of revenge and, for that reason, as playing a crucial role in the maintenance of communal identity in modern societies devoid of substantive commonalities.

C. Theories and Functions of Punishment

Now, attempts to turn sociological accounts of the expressive function of punishment into a normative theory of punishment are nothing new, nor are they unique to German criminal legal science. In the early twentieth century the English idealist philosopher A.C. Ewing developed an account of state punishment as denunciation on behalf of the community. In Germany at around the same time, Heinrich Maier set out a theory of

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109 Id. at 845.
112 Émile Durkheim, The Division of Labor in Society 73, 96 (George Simpson transl. 1933); see also The Power to Punish: Contemporary Penality and Social Analysis 44 (David Garland & Peter Young, eds. 1983).
punishment as medium of the people’s common consciousness (Volksbewußtsein), in earthly analogy to God’s heavenly condemnation in the afterlife.⁠¹¹⁴ More recently, Richard Burgh has argued that punishment *compensates* society by “emphatically expressing” its condemnation of criminal wrongdoing.⁠¹¹⁵

The problem here is, once again, that these normative theories of punishment as expression are avowedly retributivist, with no interest whatever in the preventive consequence of punishment, other than as perhaps a salutary side effect to a practice that must be justified on retributive, or compensatory, grounds. Independent of the merits of a retributive justification of punishment, positive general prevention can ill afford being collapsed into retributivism as it derives much of its appeal precisely from its steadfast opposition to the retributivist claim that punishment is simply *quia peccatum est.*⁠¹¹⁶

Then there is the related observation that an expressive theory of punishment, even if it could justify something, might justify expression, not punishment. If expressing condemnation is what punishment is about, why would we not replace punishment with condemnation rituals, including the public reading of the offense of conviction and the pronouncement of various levels of condemnation, ranging from the slight to the severe and the stern? Moreover it would seem that we would be obliged to do away with punishment altogether, given that surely the pain of the condemned is considerably less than the pain of the punished. A consequentialist balancing of costs and benefits, or pains and pleasures, under the principle of parsimony would seem to require nothing less.⁠¹¹⁷ In that case, the expressive theory of punishment would have justified not punishment, but its abolition.

In fact the expressive theory of punishment recently has been invoked in support of calls for an alternative, if not to punishment in general, then to imprisonment in particular.⁠¹¹⁸ Under this view, the community should express its condemnation directly through shaming, rather than indirectly through more familiar modern punishments, most importantly imprisonment, which do a poor of job of expressing public condemnation precisely because their infliction has been removed from public view. While imprisonment might indirectly express condemnation to the prison inmate, public shaming would not only send a clearer message to the shamed but would also send a message to the law-abiding community, which otherwise would be shut out from whatever expressive punishing might occur behind prison walls. Shaming is the alternative sanction of choice, because only it – unlike other alternative (meaning noncarceral) sanctions such as fines, probation, or community service – “unambiguously express[es] condemnation.”⁠¹¹⁹

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⁠¹¹⁴ Heinrich Maier, Psychologie des emotionalen Denkens 692 (Tübingen 1908) (quoted in Ernst Beling, Die Vergeltungsidee und ihre Bedeutung für das Strafrecht 28 n.1 (Leipzig 1908)).
⁠¹¹⁵ Richard Burgh, Guilt, Punishment and Desert, in Responsibility, Character, and the Emotions (Ferdinand Schoeman, ed. 1987), at 330.
⁠¹¹⁶ Then again, perhaps the Germans are simply protesting too much. Perhaps, despite all their anti-retributive bluster, they are all retributivists at heart. George Fletcher, for one, suspects they are but “[retributive] sheep in [consequentialist] wolves’ clothing.” George P. Fletcher, Utilitarismus und Prinzipiendenken im Strafrecht, 101 ZStW 803, 814 (1989).
⁠¹¹⁹ Id. at 592.
Note that these “alternative sanctions” are very much in keeping with the spirit of positive general prevention. Their primary audience is general, rather than specific: they focus not on shaming’s effect on the offender – without excluding her from the audience, however – but on the community, which reassures itself that its norms remain strong, even and especially in the face of their violation by the proper objects of punitive shame.

Shaming also is positive because it prevents crime by capitalizing on the “‘moralizing’ or ‘moral educative’ effect of punishment,”120 rather than relying on mere threats of pain.

Whether shaming also is preventive is a more difficult question. While proponents of shaming sanctions invoke their presumed preventive effect in support, their argument rests not on prevention, but on expression, not on effect, but on meaning. Shaming is an appropriate sanction because it properly expresses communal condemnation, not because it promises lower crime rates.

But, as we’ve seen, much of the literature of positive general prevention doesn’t seem particularly concerned with prevention either. In some of its variants, at least, positive general prevention makes it clear that the function of punishment is not prevention, but maintaining communal identity.

Presumably, German proponents of positive general prevention nonetheless would recoil in horror at the suggestion that shaming sanctions be reintroduced into the punitive arsenal of modern criminal law. After all, the primary sanction in German criminal law is not imprisonment, but the fine, so that calls for shaming as an alternative to imprisonment are inapposite. Still, the difference between positive general prevention and expressive shaming is not conceptual, but merely conventional. If it turns out that the proponents of expressive shaming are correct and that shaming expresses condemnation, and reaffirm communal identity, as well as, if not better than, the paradigmatic sanction (imprisonment in the United States, fines in Germany), then positive general preventionists cannot reject expressive shaming out of hand. German communal norms may be different from American ones on this point, but it’s only this presumed empirical difference that would militate against the introduction of shaming penalties on positive general preventive grounds in Germany.

D. Positive General Prevention and Criminal Legal Science

The problem with positive general prevention as an expressive theory of punishment thus is not only that it cannot justify punishment as a mode of expression. Perhaps as important, it can justify any mode of expression that happens to – or in the absence of empirical falsifiability is said to – signify communal solidarity under common norms through communal condemnation.

Still, the motives behind the project of constructing a theory of positive general prevention are laudable. The theory of positive general prevention represents an effort to construct a comprehensive theory of punishment that addresses the tensions between consequentialism and retributivism without ignoring them, to extract the attractive features of both approaches and weld them together into a new, better, whole. Its ambition is to move beyond the mere compilation of inconsistent theories of punishment, on one hand, and the dogged insistence of one theory’s superiority, on the other.

120 Id. at 603.
In this way, the theory of positive general prevention illustrates the self-consciously scientific spirit motivating the project of German criminal law as a whole.121 As a matter of science, the problem of punishment must be solved, and a theory of punishment must be discovered. Under this view, the recourse to pragmatism is simply unacceptable, especially in a matter as foundational as the theory of punishment. By contrast, an Anglo-American judge experiencing the opposing pull of consequentialist and retributive theories of punishment may well be content “to equivocate, oscillating between these poles, tempering justice with mercy, just deserts with utility calculations, in varying pragmatic ways.”122

Conclusion

The tripartite analysis of criminal liability developed by German criminal law theory may not quite qualify as “one of the great achievements of the human sciences.”123 It did, however, have a beneficial impact on Anglo-American criminal law. In particular, it has helped American criminal law to refine familiar common law distinctions between offense (consisting of actus reus and mens rea) and defense (consisting of justification or excuse) and to develop a general part of criminal law, setting out the conditions for criminal liability that apply to all offenses across the board, rather than to particular offenses (such as self-defense in homicide or claim of right in larceny).124 One need not believe in the possibility of a legal science to appreciate the value of analytic clarity and consistency. The German three-part analysis of criminal liability will not by itself produce the “correct” solution to a difficult case like Regina v. Dudley and Stephens,125 for instance, but it may well help crystallize the significant issues such a case raises.126

The applicability of other, more substantive, aspects of German criminal law to Anglo-American criminal law is less straightforward. As we have seen, the Rechtsgut theory of crime falls considerably short of its professed ambition to develop an account of the function of criminal law with normative teeth. Similarly, the theory of positive general prevention neither escapes the push-me-pull-me dynamic of traditional

121 On the scientific ambitions of German criminal law theory, see Bernd Schünemann, Strafrechtsdogmatik als Wissenschaft, in Festschrift für Claus Roxin zum 70. Geburtstag 1 (2001).
124 On the relationship between the German tripartite system, the common law, and the Model Penal Code, see Markus D. Dubber, Criminal Law: Model Penal Code § 3.2 (2002).
125 Regina v. Dudley and Stephens, (1884) 14 QBD 273 (CCR). In this classic case, Dudley and Stephens were convicted of murder for killing (and then cannibalizing) a fellow occupant of their lifeboat after a shipwreck on the high seas. The English court rejected the argument that the defendants acted under circumstances that forced them to choose the lesser of two evils (causing the death of a single weakened person vs. permitting the deaths of several persons, including the defendants, the victim, and a fourth occupant of the boat). Note, however, that the Queen then commuted their death sentences to six months’ imprisonment. For a detailed analysis of this case from a comparative perspective, see Markus D. Dubber & Mark G. Kelman, American Criminal Law: Cases, Statutes, and Comments 191-97 (2005).
126 But see Hans-Heinrich Jescheck & Thomas Weigend, Lehrbuch des Strafrechts: Allgemeiner Teil 195 (5th ed. 1996) (court’s incorrect solution of the case would have been avoided through the – presumably proper – application of the German tripartite system of analysis).
punishment theory nor solves the essential problems that have bedeviled consequentialist and deontological rationales for punishment alike.

In the end, therefore, German criminal law’s most important contribution to Anglo-American criminal law may be a formal one, the tripartite analysis of criminal liability and the attempt to systematically differentiate between offense and defense, and between justification and excuse, that it implies. Moreover, even if the resolution of particular issues in German criminal law is not readily transferable to Anglo-American jurisprudence, the very ambition to construct a systematic and comprehensive account of criminal law represents a useful counterbalance to the particularistic case-by-case approach of the common law.