Dubber, Rechtsgut and Harm Principle[*]

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. … [T]he Anglo-American criminal lawyer might do well to consult German criminal law [on this point,] 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. Let us then take a closer look at the 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 German criminal law system. The concept is so basic and essential, 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. 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.

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 us 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 "criminal law has the objective of protecting legal goods," and then go on to explain that legal goods, or "life goods" (Lebensguter), come in two varieties. Among "elementary life 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.

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[*] From "Theories of Crime and Punishment in German Criminal Law," 53 American Journal of Comparative Law (2006) 679.

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," which "become legal goods through their adoption into the legal order."

By contrast, Claus Roxin, in his influential Criminal Law: General Part, does not 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.

Also unlike Jescheck and 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.

Roxin's definitional venture is motivated by an attempt to put some teeth into the concept of legal good. While Jescheck and 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."

The tension between positivism (here represented by Jescheck and 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 so clear is what sort of "good" one has in mind here. While the term is familiar enough, it is 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 is 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 1834. 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 did not 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 could not 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 did not 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 did not violate anyone's individual rights and therefore did not 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 (Guter) 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 19th 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. If crime was thought to violate any right, it was not the rights of individuals but the state's right to obedience.

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).

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, that 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 has 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 and 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.

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." The purity of German blood likewise does not count as a legal good because "protecting ideological objectives through penal norms is prohibited." Criminalizing homosexual sex is also improper. Morally offensive behavior, Roxin points out, does not violate legal goods because it does not interfere with "the social system's ability to function." In fact, it is 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."

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 is 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." Drug criminal law is legitimate - despite strong criticism that it protects no legal good, individual or communal - 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 good test, at least not without "a comprehensive study from the perspective of criminal and constitutional law," which, however, is yet to be undertaken.

Considering the toothless nature 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. Even Roxin himself acknowledges that, by his own account, it is 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.) 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.

D. Internal Constraints

At this point, it is worth noting that even a merely - and explicitly - positivist notion of legal good, such as the one favored by Jescheck and 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 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. The classic example here is driving while intoxicated.

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. German criminal law distinguishes between 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 "endangering another's life, limb, or property of significant value" 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," 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 and drunk driving, which requires no showing that the drunk driver posed a threat to anyone or anything.

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 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 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." 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."

E. Doctrinal Significance

Apart from its various critical functions, external or internal, toothless 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). 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 "conduct 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."

The balancing act required takes into account both the relative significance of the legal good, and the degree of its interference. So "personality values" (Personlichkeitswerte) - like "human freedom" - rank higher than "thing goods" (Sachguter) - 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 is not 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 is also only available as a justification 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 criminal code is divided up into sections that 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 in 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.

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.