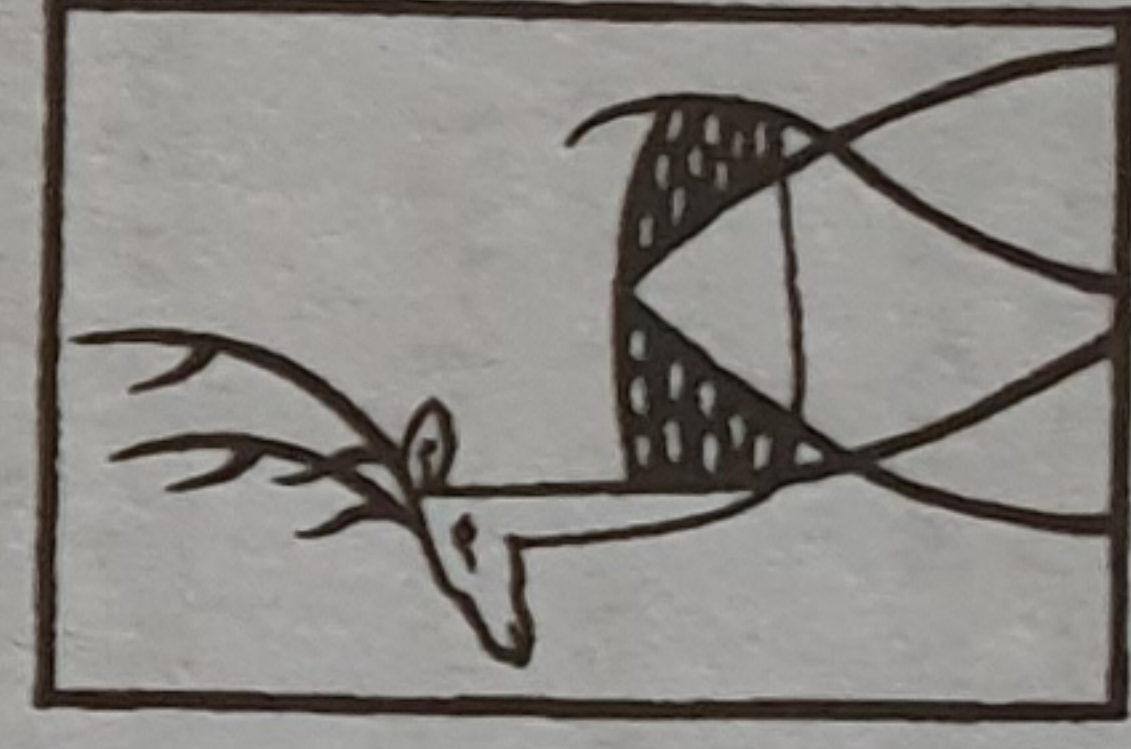


Liberal Criminal Theory

Essays for Andreas von Hirsch

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• H A R T •
PUBLISHING

OXFORD AND PORTLAND, OREGON
2016

The Harm Principle and the Protection of 'Legal Goods' (*Rechtsgüterschutz*): a German Perspective

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I. Dedication

Andreas von Hirsch, our friend and colleague, has – to our and, I am convinced, also to his own happiness – some time ago moved the centre of his life and academic activity to Germany, joining the Institute of Criminology and Legal Philosophy at the Goethe University Frankfurt. Those who know his cosmopolitan outlook will not expect this to have resulted in great changes – after all, our honorand has for many decades been part of the fellowship of German criminal law theorists and legal philosophers.

A. Methods

The contribution Andreas has made to our ways of thinking and to the main assumptions and debates seems to me nevertheless to have grown enormously in recent years, in its extent, depth and profile. Monographs¹ and conference papers² evidence the distinctiveness of his theoretical contributions: engaging with the foundational concepts of Continental criminal law and legal philosophy, von Hirsch reconstructs these according to the Anglo-American methodology that shaped him intellectually, and enriches them with carefully considered additions, modifications and new perspectives.

This is – at any rate, in German criminal law theory – a noteworthy way of practising legal comparison, and, to my mind, the only sensible one. The application of this method, which leaves both sides of the legal comparison able to speak, presupposes however that the comparative scholar knows his way about on both sides of

¹ See, eg, A von Hirsch, *Fairness, Verbrechen und Strafe: Strafrechtstheoretische Abhandlungen* (Berlin, Berliner Wissenschaftsverlag, 2005): hereafter von Hirsch, *Fairness*.

² Eg A von Hirsch, K Seelmann and W Wohlers (eds), *Mediating Principles. Begrenzungsprinzipien bei der Strafbegründung* (Baden-Baden, Nomos, 2006).

the legal-cultural ocean, and is therefore not reduced to bean-counting exercises but is able to grasp structures and foundations – abilities that German criminal law scholars tend to lack when it comes to foreign criminal law. The (elsewhere rightly admired) complexity of our doctrinal structures, and the richness of the questions we pose, are diminished by our traditional ignorance of foreign criminal legal systems, including their foundations and critiques.³

There are no signs that this is going to change anytime soon. With a few exceptions, our efforts at comparative criminal law scholarship will continue to depend on friendly colleagues from other countries who take the trouble to learn our language, study our system of criminal law and its theoretical foundations, listen carefully and then explain our system back to us afresh from their different and illuminating perspectives.⁴

Von Hirsch works differently. He mentions how things are done 'back home' only when this aids our line of thought. He chooses the subject-matter of his scholarly work according to the relevance of the issue for German criminal law theory. He enters the discussions that are important to us, and contributes facts, questions and ideas from his academic and policy experiences that engage directly with our own understanding of the issue.

B. Objects of inquiry

Three areas in particular have been presented to us by von Hirsch in this scholarly style.⁵ These areas encompass both criminal law theory and penal theory, the central building blocks of our Continental-European criminal law scholarship. He treats them in a manner that reveals his Anglo-American scholarly training. The argument does not merely develop as a logical sequence. Each central point is additionally supported by references to insights and experiences which are congenial to the way criminal lawyers think, but are in Germany traditionally not derived from criminal law theory or closely connected thereto. Criminology⁶ and ethics⁷ in particular are sources from which von Hirsch additionally draws. He also has no principled objection to supporting his arguments with assumptions based on everyday morality or everyday experience. In this way we frequently encounter his thoughts

³ See, for instance, the polite but noticeably critical remarks by G Fletcher, F Munoz Conde and A Zoll in A Eser, W Hassemer and B Burkhardt (eds), *Die deutsche Strafrechtswissenschaft vor der Jahrtausendwende. Rückbesinnung und Ausblick. Dokumentation einer Tagung vom 3. bis 6. Oktober 1999 in der Berlin-Brandenburgischen Akademie der Wissenschaften* (Munich, CH Beck, 2000) 235ff (comments by G Fletcher), 199ff (comments by F Munoz Conde) and 283ff (comments by A Zoll).

⁴ A recent example is the well-reasoned and critical discussion of the main problems raised by the doctrine of legal goods in Y-W Kim, 'Verhaltensdelikte versus Rechtsgutsverletzungen – Zur aktuellen Diskussion um einen materiellen Verbrechensbegriff' (2012) 124 *Zeitschrift für die gesamte Strafrechtswissenschaft* 591.

⁵ See, on this point, also U Neumann's Introduction to von Hirsch, *Fairness*, 13. A good example is A von Hirsch and C Shearing, 'Freizügigkeit und Generalprävention. Die Ausschlussung aus dem öffentlichen Raum' in von Hirsch, *Fairness*, 243.

⁶ See, eg, A von Hirsch, 'Ethische Fragen zur Videoüberwachung des öffentlichen Raums' in von Hirsch, *Fairness*, 221.

concerning our fundamental theoretical concerns wrapped in the cloak of Anglo-American reasoning and rhetoric. This certainly does them no harm.

The three areas are: the justification of state punishment; the consequences of this justification for sentencing theory; and the notion of legally protected interests (*Rechtsgüterschutz* or protection of 'legal goods'). These are well suited for transatlantic legal comparisons, since they are traditionally also of interest in Germany, and at the same time their treatment in the Anglo-American tradition is independent and distinct. For this reason they can serve a bridging function.

As regards the first theme, the German debate concerning the aims and justification of state punishment generally draws a basic distinction which is not central to von Hirsch's theoretical arsenal. We tend to discuss these questions by contrasting consequence-oriented and justice-oriented approaches (prevention and retribution), dividing under these opposing headings issues concerning the justification, criticism, traditionalism and modernity of various theories of punishment; and using this contrast as a point of entry into questions concerning the degree of empirical support for thoughts and judgements about punishment.

For von Hirsch, the argument runs on different tracks.⁸ He construes the problem – with reference to the English tradition – through a category that we also recognise as centrally important: 'commensurate deserts' or proportionality, which appears to belong to retributivist thinking. This then gives rise to the difficult comparative question whether and how this line of reasoning can be incorporated into hundreds of years of Continental criminal law theorising which, after all, also has important roots in ethics and in criminology. A central tenet of both theories is, however, clear and convergent: the punished individual should be burdened as little as possible.⁹

In this way, and regarding the second theme, theoretical conclusions regarding the point of state punishment connect effortlessly to the criteria of just sentencing that follow from them. The notion central to von Hirsch's conclusions is 'censure'.¹⁰ This notion is also difficult to fit into our traditional debates. The connection von Hirsch has drawn to a modern variant of preventive theories, positive general prevention, stokes the flames of comparative law fires. After all, German understandings of positive general prevention have tended to conceive of the purpose of punishment in terms of beneficial consequences, while the notion of censure reflects a conception of punishment that is focused on the offender and his criminal acts – a conception that is, to put the point cautiously, not close to consequentialist understandings of punishment. Von Hirsch's work leads, in its further development, to many instructive arguments that culminate in concrete and convincingly grounded conclusions regarding the determination of a just sentence.¹¹

⁸ See, eg, A von Hirsch, 'Tatproportionalität und Sanktionshärte – Führt ein tatproportionales Strafzumessungsmodell zu strengeren Sanktionen?' in von Hirsch, *Fairness*, 175.

⁹ I will elaborate on this aspect below.

¹⁰ See, eg, A von Hirsch and T Hörnle, 'Positive Generalprävention und Tadel' in von Hirsch, *Fairness*, 19; A von Hirsch, 'Die Existenz der Institution Strafe: Tadel und Prävention als Elemente einer Rechtfertigung' in von Hirsch, *Fairness*, 41.

¹¹ Eg A von Hirsch, 'Proportionale Strafen für Jugendliche' in von Hirsch, *Fairness*, 157.

In this chapter, however, I want to focus on the third theme of von Hirsch's work: his use of the harm principle, and its relationship to the protection of legal goods in our criminal law.

II. Harm Orientations through the Doctrine of Legal Goods and the Harm Principle

Mainstream criminal law theory knows more than one way of orienting criminalisation norms about the prevention of harm. Addressing this orientation in his third theme, von Hirsch provides neither a new systematic place nor a new meaning for the German doctrine of the '*Rechtsgut*' (legal good) but a better understanding thereof and a fresh context.¹² It gets a new neighbour, the transatlantic harm principle,¹³ with which it can make friends or engage in arguments; for me it is still an open question whether the two will, in the end, turn out to be compatible, whether they will be mutually enriching or whether they will be locked in inconclusive contestation.

Von Hirsch is, with regard to this third topic, noticeably more guarded than in his other work. Having compared the harm principle and the doctrine of 'legal goods', he asks modestly 'to what extent the result can make a useful contribution to ongoing debates about the German concept of the "*Rechtsgut*"'.¹⁴

My answer is that it certainly can. All in all, Anglo-American and German approaches to criminal law theory can connect better and more effectively in the chapter entitled 'harm principle and the doctrine of legal goods' than in the areas concerning the justification of punishment, and in sentencing theory.¹⁵ Closer examination shows a number of inspirations, confirmations, queries and lessons which our doctrine of legal goods may expect to receive from Anglo-American legal circles. I will not list all of these, but concentrate on those which are sufficiently fundamental to cast our debates in a fresh light. If one were to gather these, with a little force, under one roof, one could say that they concern the harm orientation of the criminal law in theory and practice; under this roof, it seems to me, the harm principle and the doctrine of legal goods can stand together and understand each other.

A. Divisions

As far as the concept and structure of the theory of legal goods are concerned, von Hirsch starts his essay about the harm principle and the doctrine of legal goods with

¹² For me, von Hirsch's central publication in this context is A von Hirsch, 'Der Rechtsgutbegriff und das "Harm Principle"' in von Hirsch, *Fairness*, 69.

¹³ Ibid, 73ff.

¹⁴ Ibid, 70.

¹⁵ See especially section I.B above.

the familiar distinction between the ('immanent') internal-systemic function and the ('transcendental') critical function of the doctrine of legal goods.¹⁶ The – limited – value of this distinction becomes evident in von Hirsch's treatment. After all, the distinction is just an analytical device to split off one already clearly defined (internal) function of the concept of a legal good, with the aim of separating it from the area that really requires further thought, thus narrowing the latter down in order to identify it more precisely. The internal-systemic functioning of the doctrine of legal goods is obvious, and we benefit from it when dealing with analytical questions; but it cannot be of any help when the aim is to provide criminal law theory with arguments of a substantive kind that would enable criminal law policy to be more transparent, principled and controllable. The internal-systemic aspect can thus safely be left to the textbooks; it helps them to present the special part of the criminal law as an ordered system, arranged according to the relevant 'legal good' or legally protected interest or value. Correspondingly, the sections of the German Criminal Code are divided according to legal good, ranging from 'offences against the security of the state' to 'offences against the safety and liberty of the person' and 'offences committed in public office'; and thus some structure is given to the Code.

Yet, if one wants to know whether the offences contained in such a section reflect good criminal law policy, the internal-systemic perspective can only give an internal-systemic answer. It can, for instance, establish that the legislator introduced a systemic flaw by bundling different legal goods together in the same section of the Code.¹⁷ But it cannot tell us more. This is, of course, not insignificant, and at least one can reach some definite results here; but it is – on this side of the Atlantic just as on the other – not a substantive, let alone a critical, argument.

Now, one should not – at least in our system of codified law – brush such internal-systemic insights aside too quickly with legal-theoretical considerations. From a legal-sociological perspective it is certainly noteworthy that the notion of the legal good has stood the test of time as an ordering principle for new criminal legislation, that it has proven itself to be practically sensible and effective. The concept of legal goods is in use both analytically and doctrinally and shapes the daily discourse of criminal lawyers. And it probably suggests, if one looks carefully, something else too: that the legislator, throughout countless legislative reforms and modifications of the German Criminal Code, has seen fit to leave unchanged the historical order of the different sections of the Code – which starts with treason¹⁸ and resisting public officials and only subsequently moves to offences against the person, with offences of environmental damage slotted in towards the end. This may be considered a signalling of their hierarchy and significance that is not exactly congenial to

¹⁶ Von Hirsch, 'Rechtsgutbegriff' above n 12 at 69. See also my book *Theorie und Soziologie des Verbrechens. Ansätze zu einer praxisorientierten Rechtsgutslehre* (Frankfurt, Athenäum, 1973) 19ff.

¹⁷ This is what the legislator has done in Chapter 30 of the German Criminal Code; compare the criticism and references in H Matt and J Renzikowski (eds), *StGB-Kommentar* (Munich, Franz Vahlen, 2013) § 331 marginal note 5f (commentary by S Sinner).

¹⁸ For an instructive review of the legislative reform process in particular cases, see U Kindhäuser, U Neumann and H-U Paefffgen (eds), *Nomos-Kommentar zum StGB*, 3rd edn (Baden-Baden, Nomos, 2013) Vor § 80 f marginal notes 2ff and 15ff (commentary by H-U Paefffgen).

the constitutional order instituted by the German Basic Law.¹⁹ Such issues are important. But von Hirsch's concern is with the transcendental: with the critical function of harm-orientation doctrines and with the substantive critique they promise for the criminal law.

III. Aims of the Harm-Orientation Doctrines

The level of critique is only reached when one asks what principles of harm orientation – the harm principle, and the doctrine of legal goods – are meant to do: what are their objectives?²⁰ This is the critical function level with which the legal goods doctrine is concerned.²¹ At this central juncture the harm principle and the doctrine of legal goods show themselves again to be closely related. Both have the same objectives, and both employ similar means to reach these objectives. In what follows, I consider some central objectives – freedom, transparency, consistency, and social morality – and assess how the two doctrines, German and Anglo-American, help us to secure them.

A. Freedom

If one looks at the harm principle in respect of its origins²² and aims,²³ its proximity to the doctrine of legal goods is evident. This proximity concerns the historical reasons for which, and in the context of which, these two concepts have been developed.

(i) Orientation towards human beings

For both doctrines, the central aim is to preserve citizens' freedom vis-à-vis a punitive state that wields the powers to prosecute and punish and can use those powers to achieve its own aims (faster, cheaper, more fully, more effectively). Both the doctrine of legal goods and the harm principle are instruments put into service to limit the legitimate use of state punishment – an aim that has been the hallmark of liberal criminal law theories for centuries. In both cases, the concern is to have external, clear and concrete criteria to delimit the area within which the state can legitimately criminalise and punish behaviour. Those criteria are, respectively, the

¹⁹ The German Constitution (*Grundgesetz*) begins with the protection of personal legal goods and only then moves to the institutional framework of the state.

²⁰ For a discussion of the general systemic aims not focusing specifically on a comparison with the *zum StGB*, 3rd edn (Baden-Baden, Nomos, 2013) Vor § 1 marginal note 110ff (commentary by W Hassemer) with further references.

²¹ I start to develop such an approach in Hassemer, *Theorie und Soziologie*, above n 16 at 61ff.

²² I am thinking here of the writings of John Stuart Mill and Joel Feinberg.

²³ See the references in von Hirsch, 'Rechtsgutbegriff', above n 12 at 73ff.

violation of a legal good (legally protected interest or value), or the imposition of harm on another person (harmfulness to others).

In both doctrines we find a perspective that has left the legitimating culture of natural law reasoning behind.²⁴ This discourse is no longer concerned, as natural law theory was, with the faithful determination of rights and permissions which are given to human society from outside or from above; the issue now is to discover and to ground these rights and permissions as such.²⁵ From there it is only a small step to the discovery that the criterion for legitimate criminal law legislation (that is, the criterion for legitimate threats of punishment, prosecution and sanctioning of breaches as the sharpest instruments of state regulation) can only be the protection of human beings from other human beings – and not as such the wish of the state to pursue a certain kind of policy or to put an end to, bring about, or secure, a certain state of affairs.²⁶ The infringement of a legal good is, just like the infringement of a human interest,²⁷ the core requirement which legitimizes criminalisation, prosecution and enforcement of punishment; this core is human-oriented. The right to punish arises from the violation of a concrete human interest, and it ends there. Beyond this area one must be free from punitive intervention. Leviathan is bound by these conditions.²⁸ The existence of a legitimate interest on the part of one citizen (that is, of a legal good), and the violation of that interest by another citizen, lies at the heart of the state's right to punish.

This is, of course, only the core. It needs manifold additions, concretisations and also practical adjustments, before it can provide a blueprint for liberal criminal legislation and criminal justice. Thus we must, for example, ask and answer what counts when as an 'interest', whether this interest has to be a 'legitimate' one, and what that means concretely: say, whether 'the health of the population' can be a 'legal good' (for instance, in the area of drugs offences) even though this is not just a many-faceted but also an ever-changing notion, an ephemeral state of affairs subject to constant technical, medical and cultural changes. In states that adhere to the Rule of Law, criminal law theory and doctrine as well as the criminal courts have over a long period of time developed – and then put into practice, actualised and

²⁴ On what follows, see also W Hassemer, *Warum Strafe sein muss. Ein Plädoyer*, 2nd edn (Berlin, Ullstein, 2009) 149ff.

²⁵ From the perspective of the harm principle, von Hirsch says in 'Rechtsgutbegriff', above n 12 at 71: 'If we draw the boundaries between citizens' spheres of individual freedom according to the harm principle, then every citizen has the freedom to pursue his own aims and wishes so long as he does not thereby harm others, that is, set back their legitimate interests.' ['Grenzt man die Freiheitssphären der Bürger nach dem Harm Principle voneinander ab, dann hat jeder Bürger die Freiheit, seine eigenen Wünsche und Ziele zu verfolgen, solange er dadurch anderen nicht schadet, d.h. ihre legitimen Interessen nicht beeinträchtigt.']

²⁶ The central importance of the protection of freedom for the conception of the harm principle von Hirsch develops is also evident in his strong criticisms of paternalistic arguments for criminal prohibitions, which runs like a red line through his work. See, eg, *Fairness*, 79ff and 85ff.

²⁷ See, for this conception of the harm principle, with reference to Feinberg, von Hirsch, 'Rechtsgutbegriff', above n 12 at 73f; 'harmful conduct' is defined there as 'interference with a resource to whose unaffected existence another person has a normative claim.' ['Beeinträchtigung einer Ressource, auf deren unbeeinträchtigte Existenz ein anderer einen Anspruch hat.']

²⁸ E Denninger, *Der gebändigte Leviathan* (Baden-Baden, Nomos, 1990) esp 51ff.

adapted – systems that have given shape and content to the notions of legal goods and harm orientation, concretising them and adjusting them to the times. These systems are themselves in need of application and interpretation; they are subject to change, and such changes keep them relevant on an ongoing basis in the world in which and to which they are intended to apply.

(ii) Personal legal goods

To these systems of thought belongs, for instance, the question whether human interests only qualify as legal goods or whether institutional interests are also (or even mostly or exclusively) eligible.²⁹ After all, it is said that human beings don't live by their own efforts alone, but also thanks to, say, the smooth operation of energy supply systems and the functioning of the Constitutional Court; indeed that humans depend so strongly on institutions of this kind that the protection of legal goods is, first and foremost, a matter of protecting institutions. The protection of legal goods is thus connected not merely to freedom but to security and welfare.

These are, I think, confusing and confused lines of reasoning; they flourish more easily in our country than in the province of the harm principle (which, with its simple focus on human actors standing opposed to each other, stays out of this line of fire and asserts the freedom-protecting aspect of its harm orientation effectively by itself and without much further thought). Nobody would deny that we need not only our health but also public transport systems; and no court would consider a punch-up among youths more deserving of punishment than, say, the destruction of central data processing equipment, or a poisonous leakage into groundwater, merely because the first case concerns direct injury to personal legal goods. For the practical implementation of harm-oriented considerations in criminal law policy decisions, the stark either-or opposition between 'persons' and 'institutions' is a dead end. As long as people live in societies, we are necessarily concerned with both, and the institutions criminal law sensibly protects will always be those that concern human beings. Criminal law policy, engaged in concretising and protecting both person and institution, faces the task of determining the weight of the different legal goods in question and of bringing these into a reasonable relation to each other.³⁰

Many of these disputes are quotidian, and can be pitched at concrete or more abstract levels.³¹ These are the insignia of all substantive basic concepts, not only in

²⁹ See further on the discussion of the doctrine of personal legal goods U Neumann, '“Alternativen: keine”. Zur neueren Kritik an der personalen Rechtsgutslehre' in U Neumann and C Prittwitz (eds), *Personale Rechtsgutslehre und Opferorientierung im Strafrecht* (Frankfurt, Peter Lang, 2007).

³⁰ We will encounter another such task in section III.C(ii) below, when we are concerned with the weighting of violations and with degrees of exposure to risk of legal goods.

³¹ At a more abstract level, the conviction has grown that the German Constitution, and the worth and dignity it attributes to the human person, mean that one should not start with the institutions when approaching such questions; quite the opposite. The Constitution bestows no original value on the and institution-oriented interests, and it realises this, for example, in the balancing of person-oriented goods in W Hassemer, *Strafen im Rechtsstaat* (Berlin, Berliner Wissenschaftsverlag, 2000) 160ff, to which Andreas von Hirsch contributed a Foreword (ibid, 7ff).

criminal law theory and practice. That these concepts remain permanently challenged, also among us, is not evidence for any systemic impotence, but rather of their fundamental nature and their connectedness with a changing world. Moreover, the open texture of these concepts does not distract from their orientation towards civic freedom; in fact this is what makes this orientation concrete. Anyone considering the doctrines of harm orientation to be too vague ought to recall concepts like conduct, causality, and culpability: these have always and constantly occupied us. All concepts which are fundamental and linked to life are also open to the influence of social change.

B. Transparency

Criminal law theories should be transparent – indeed, transparency is a self-evident goal for any academic discipline. Transparency, clarity and comprehensibility are, moreover, also aims of the system of criminal law itself, which is the object of criminal law theory. Hence their importance is especially strongly grounded in this context. Criminal law theory is not an abstract system. Transparency of the system of criminal law is a precondition for its proximity to, and its control by, the citizenry; without transparency, criminal law is necessarily unable to fulfil its task of (positive) general prevention³² because citizens lack a proper grasp of what happens in this system and why.

Obscure criminal law concepts also prevent the law from achieving its aims of certainty, predictability and control, which are precisely what the constitution expects of the criminal law.³³ Clarity and transparency of criminal law interventions, from legislation through to the implementation of sanctions, are not decorative features of some artful and complex system; they are instruments of freedom. They are meant to give people direction, to provide them with an opportunity to gauge their situation, form a judgement and, if necessary, to resist. They are therefore, ultimately, also a component of the central Rule of Law principle of the public administration of justice.³⁴ In this regard, both the harm principle and the doctrine of legal goods are satisfactory. Both attend to these tasks and fulfil them, if everything goes well, in their own way and with their own means. They aim at transparency, and they do this through the notions of 'legal goods' and 'harm'.

(i) 'Core' criminal law

The legal goods of core criminal law (life, health, property, clean water, freedom, reliability of monetary transactions, and possibly also honour) are part of our ordinary lives. Their importance for human beings, their value and their purpose are

³² See on this point already W Hassemer, *Einführung in die Grundlagen des Strafrechts*, 2nd edn (Munich, CH Beck, 1990) 309ff and 324ff.

³³ See Article 103 and Article 104 of the German Constitution (*Grundgesetz*).

³⁴ See my recent comment 'Über die Öffentlichkeit gerichtlicher Verfahren – heute' (2013) 46 *Zeitschrift für Rechtspolitik* 149.

self-evident; we all know them well and are concerned about their preservation. In order to understand what they mean and when they are violated, no theoretical work is necessary, unlike other legal concepts; it is enough simply to look at them.

The harm principle achieves the same objectives of visibility and transparency via a different – and theoretically shorter – path. The mutuality of interests and protection against harm postulated by this principle places the injuring and the injured party in an irrevocable, clearly structured, experience-based relation to each other, which neither leaves open the question of what is at stake nor clouds the answer to this question. Those who consider the concept of core criminal law to be primitive or simplistic have not understood the point of the constitutional requirement of legal certainty in respect of criminal law. This point is not a linguistic one, but one concerned with practical action and protection. The concept of a core criminal law rests on, and realises itself in particular through, the number and texture of those legal goods and interests which may count as legitimate and protected in a given system of criminal law. Core criminal law wants to keep the number of legitimate legal goods and interests low and their determinations concrete; this is its *raison d'être*. With the modernisation of criminal law, however,³⁵ notions have found their way into the criminal law system which have not only enriched that system but also made it more complicated, thus reducing its transparency. In the first line of attack stands the doctrine of the legal good, which has become a victim of efforts to adapt the legal system to the social changes of modernity. This is because it is particularly in the area of legitimate legal goods that new objects of attack, modes of attack, and also protective techniques are conceived.³⁶

The chain of new legal goods outside the core criminal law is, by now, long; its links are comparatively abstract, complex, vague, and thin in content. To give some examples: 'the domestic justice system with respect to its task of counteracting the effects of crimes,'³⁷ 'the creditors of a debtor, considered as a group, in respect of the risk or partial loss of their chances of repayment,'³⁸ or 'the general interest in the reliable operation of the data processing systems used in industry and administration.'³⁹

These are, to start with, when compared to our traditions, substantive and linguistic abnormalities in the special part of our criminal law. They are of a very different kind from honour, health, or clean water. Together with the much discussed tendency of modern criminal law legislation to criminalise conduct in the very early stages of preparation,⁴⁰ long before any legal good is violated or even endangered,

³⁵ That the concept of 'core criminal law' has been coined at all reflects the increasing speed of social change in the last decades and the legitimate need – even duty – of the criminal law system to react appropriately to this change. See, eg, W Naucke, *Über die Zerbrechlichkeit des rechtsstaatlichen Strafrechts. Materialien zur neueren Strafrechtsgeschichte* (Baden-Baden, Nomos, 2000) 97ff and 307ff.

³⁶ On the protective techniques of modern criminal law, see my *Theorie und Soziologie*, above n 16 at 194ff; also my remarks in U Kindhäuser, U Neumann and H-U Paeffgen (eds), *Nomos-Kommentar zum StGB*, 3rd edn (Baden-Baden, Nomos, 2013) Vor § 1 marginal note 170ff (commentary by W Hassemer).

³⁷ See, in the German Criminal Code, § 261(i) StGB (money laundering).

³⁸ See, in the German Criminal Code, § 283 StGB (criminal bankruptcy).

³⁹ See, in the German Criminal Code, § 263 a StGB (computer fraud).

⁴⁰ See, eg, U Kindhäuser, U Neumann and H-U Paeffgen (eds), *Nomos-Kommentar zum StGB*, 3rd edn (Baden-Baden, Nomos, 2013) Vor § 1 marginal note 116ff (commentary by W Hassemer).

and to construe crimes of 'abstract endangerment' where no concrete risk to a legally protected interest exists,⁴¹ this results in a picture of modern criminal law where we can hardly speak of transparency any longer. Instead we find across-the-board criminalisation based on maximal semantic stretching of the protected legal good.

The reasons for and against this have been debated thoroughly in recent years; they extend in their significance much further than the principle of transparency in the determination of the legally protected good – they reach across to the very image of modern criminal law.⁴² I am concerned here only with a side issue, which is the insight that a theoretical doctrine of legal goods cannot confine itself to drawing the boundaries of criminalisation by the state, including its reasons and lines, but must also concern itself with the ways and means by which these boundaries are drawn. This is so because whether the criminal law can communicate effectively with citizens depends on these ways and means.⁴³ A woolly determination of the legally protected good, a misshapen outline of its contours, is not merely regrettable; in a state committed to the Rule of Law it is a manifest violation of right. It obscures the commands of the criminal law, it neglects the constitutional criminal law obligation of legal certainty, and it thereby withholds from the citizen essential – and possible⁴⁴ – direction. This is something that criminal law theorists – their understandable fascination with the modernisation of their object of study, and its nomenclature, notwithstanding – should not simply accept.

C. Consistency

Consistency, too, is a tenet not only of criminal law theory but also of the criminal justice system.⁴⁵ The theory as well as the practice of a liberal criminal law are both very much in need of the consistency of conceptual organisation offered by the doctrine of legal goods or the harm principle. A concept which fails to provide consistent answers to similar questions not only fails to systematise, but also endangers consistency in the practice which strives to follow it. The doctrine of the legal good is also in respect of this desideratum less than perfect (although it does somewhat better here than in respect of transparency).

The doctrine of the legal good – and the harm principle too – must provide a consistent answer to the question: is the use of state punishment legitimate in this or that situation? If they provide different answers to the same question (rendering

⁴¹ We will address this tendency, and its consequences, further in section III.C(ii) below.

⁴² On the notion and the forms of 'modern' criminal law, see W Hassemer, *Produktverantwortung im modernen Strafrecht*, 2nd edn (Heidelberg, CF Müller, 1996) 3ff.

⁴³ Von Hirsch appears to offer a somewhat different perspective in 'Rechtsgutbegriff', above n 12 at 75.

⁴⁴ That it is possible, within the theoretical framework of the doctrine of the legal good protected voluminous and inflated constructions is shown by K Kühl in his discussion of the legal good protected by the offence of computer fraud: see K Lackner and K Kühl (eds), *StGB-Kommentar*, 27th edn (Munich, CH Beck, 2011) § 263a, marginal note 1 with further references (commentary by K Kühl).

⁴⁵ See already section III.B above on this point and the causes, in the context of the discussion on transparency.

them seriously deficient as criterial theories), they would fatally undermine the clear and principled guidance expected of them by the criminal law system,⁴⁶ thus failing in their task of securing human freedom.⁴⁷

This problem is particularly acute for the doctrine of the legal good. It has different aspects. I address two typical instances which have received considerable academic and practical attention.

(i) *Modern legal goods*

Well before the development of a 'modern' criminal law concerned to safeguard every relevant object of protection through criminal law,⁴⁸ the criminal law system has been put under pressure by an expansive criminal policy seeking to bestow the label 'legal good' generously in order to turn criminal law into a modern, flexible and all-encompassing protective instrument which leaves no actual challenges unanswered. This is, for instance, the case today in respect of phenomena such as cybercrime,⁴⁹ and here lies the main problem; it is also true of long-standing attitudes to criminal policy which fail to see anything wrong with treating morals and traditions as 'legal goods' and protecting them through criminal law prohibitions.⁵⁰ Again and again, criminal law policy disputes concerning the criminal character of conduct focus on whether the conduct counts as a violation of a legal good. If it does, this assists the aim of criminalisation and facilitates the protection of an interest through the criminal law.⁵¹

The consequences of this state of affairs are obvious. In times when a strong belief in the ability of criminal law to resolve actual social conflict holds sway,⁵² 'legal goods' shoot up like mushrooms; after all, they open the portals of the Criminal Code. Ultimately, this is, of course, not really a problem concerning the coherence of the concept of the legal good. Its coherence is, indeed, preserved when everything that can just about be fitted under this heading is subsumed under it; almost anything can then be a 'legal good'. The problem lies, rather, as has been argued here, with the transparency of the concept of the legal good⁵³ and with the protection of freedom that it is supposed to secure.⁵⁴ This is where the burdens of an overextended concept of the legal good come to rest: criminal prohibitions of conduct grow surreptitiously, and the concept of the legal good accompanies and hides that growth.

⁴⁶ See section III.B above.

⁴⁷ See section III.A above.

⁴⁸ See section III.A above.

⁴⁹ See section III.B above.

⁵⁰ See, in the German Criminal Code, § 263a StGB (computer fraud). Instructive in this regard is the minority opinion of the decision of the German Constitutional Court (Bundesverfassungsgericht) regarding the constitutionality of the criminal prohibition of incest (§ 173(ii)(2) StGB): see decision of 26 February 2008, BVerfGE 120, 224 (255).

⁵¹ This mechanism, of course, also shows that the doctrine of legal goods has a good reputation with policy-makers in our region.

⁵² I am critical of such an aim in Hassemer, *Einführung*, above n 32, at 279ff.

⁵³ See section III.B above.

⁵⁴ See section III.A above.

On the other hand, another problem of consistency is discussed by von Hirsch⁵⁵ when he identifies the problems that undoubtedly arise⁵⁶ from the criminalisation of abstract endangerments, and of conduct that precedes actual crime, as problems of imputation and seeks to resolve them within this framework.

If this were the correct approach, these two theories of harm orientation would give different answers to the same question concerning the legitimate criminalisation of conduct which merely endangers a legal good (the answers would, on the one hand, rely on the criterion of proximity of harm and, on the other hand, on the criteria of intent and recklessness). That would indeed be problematic. But it appears to me – along with Feinberg – that the solution via imputation is a false path: the concepts of harm orientation are in themselves and by their own means capable of giving a complete and convincing answer to the question of penalising endangerments; imputation doctrines are, in this context, unnecessary.

Two steps suffice to make this clear. The first is as follows. That the legitimating force of a harm orientation approach in the criminal law is not restricted to actual injuries and factual harms, needs – for a conception of harm – no further argument. In our world, there are *threats* to legal goods (the drunken bus driver, the person playing with matches on commercial premises full of highly flammable goods) which far outweigh in seriousness some *actual* violations (eg, a mere bruise) and, from the perspective of a conception of harm, there is no good reason to regard only the latter as harm on the ground that only the latter supposedly involves the ‘violation’ of a legally protected good. There has always been good reason – all the more so in our highly technological world – to consider the risk of harm as an object for inclusion within the scope of the concept of harm. Someone who refuses to entertain the possibility of a violation of a legal good unless a legal good has been literally ‘violated’ has fallen victim to the laziness of ordinary language. The ‘violation’ of a legal good in the criminal law sense can, in our shared understanding of the notion, be constituted by a threat to that legal good. There are venerable offences of early stage criminalisation, whose relationship to a legal good is uncontroversial for the simple reason that if one were to wait until the legal good has already been violated, the very state of affairs which the threat of a legal sanction was meant to prevent would have been brought about.⁵⁷

The second step is this. A problem of early stage criminalisation, if there is indeed such a problem, begins only on the next level up. This level enquires critically into the systemic and substantive appropriateness of including early stage conduct and abstract endangerment offences in a criminal law based on the protection of legal goods (or on the harm principle) – given that these types of conduct have not (yet)

⁵⁵ Von Hirsch, *Fairness*, 78f and 85ff.

⁵⁶ See already my remarks on this point in section III.B above.

⁵⁷ See, eg, the offences in §§ 81ff StGB (high treason). The protected legal good is the territorial and constitutional integrity of the German state. See further U Kindhäuser, U Neumann and H-U Paeffgen (eds), *Nomos-Kommentar zum StGB*, 3rd edn (Baden-Baden, Nomos, 2013) § 81 marginal note 5 with further references (commentary by H-U Paeffgen).

brought about actual harm. I consider this a false problem which does not give us cause either to discard the notion of harm orientation⁵⁸ or even just to make corrective adjustments to the harm principle or the concept of legal goods:

If, as explained above in the first step, the reasoning based on harm and the violation of a legal good is compatible with the realisation that manifest threats of damage to a legally protected value or interest can constitute a violation of that legal good, the only question that remains is what criminal law consequences should follow from the fact that the conduct of the offender did not cause any actual damage to the legal good in question but merely endangered it.

This question is unavoidable in our constitutional legal system. It is the inevitable consequence of the Rule of Law principles of proportionality and appropriateness of state punishment: it acknowledges that abstract endangerment is a 'normative minus' compared to a concrete violation or even damage. It is normatively of a lower order because both the harm principle and the doctrine of legal goods assess the weight of a punishable infringement of the goods and interests of others according to two criteria: the significance of the interest and the intensity of its infringement. (A criminal law system determining the degree of desert of punishment of human conduct according to the seriousness of the duty violation involved, or according to the distance of the conduct to accepted socio-moral standards of decency, would come to very different results.)

This does not completely solve the difficulties of practical application when it comes to the appropriate treatment of the endangerment of legal goods. It remains the task of the penalising state to concretise this problem and its consequences and, in the course of doing this, to decide two things: first, what is the threshold above which mere endangerment can be considered deserving of punishment, and secondly, which mitigation reflects appropriately the circumstance that we are dealing here with a 'normative minus'.

This decision must be made according to the concept of harm orientation we follow, for instance the normative weight of the threatened legal good, the proximity of the risk-creating conduct to the occurrence of harm, and the factual and legal possibilities of preventing that harm effectively by other means. And this process of inquiry makes clear that early stage criminalisation does not lead harm-oriented doctrines of criminalisation into trouble. Rather, it provides them with the opportunity to be applied in a manner that is in tune with the Rule of Law as well as practically reasonable.

D. Social morality

Perhaps we now live in a period when it has become necessary to point out that the long-term goals of the criminal law's orientation towards the concept of harm⁵⁹ include the objective of furthering the social morality of the population through

⁵⁸ See section II above.

⁵⁹ See section II above.

this very means: that is, via a reserved, consistent and appropriate criminal law policy and criminal adjudication, based on concepts such as the harm principle and legal goods. In other words, the notions of legal good and harm are aimed at no less than the achievement of a legitimate criminal justice system as such.

The reason for this remark is not any claim by criminal law scholars that the protection of legal goods and the harm principle, on the one hand, and social morality, on the other hand, have nothing to do with each other – this claim is, as far as I know, not made by anyone. The reason is, rather, that a complete theory of criminal law must address the question of legal goods and social morality – whatever result it reaches. Maintaining silence on this issue tends to conduce towards the conclusion that the concept of harm orientation ought to stay away from the discussion of the aims of punishment – be it because of an exaggerated critique of paternalism, or on account of too narrow a conception of liberalism. I certainly cannot see any good reason for such silence.

If one looks for an instructive example characterised by our three elements (ie, high appreciation for the doctrine of legal goods, openness towards the legal value of social morality, and careful restraint in face of the temptation to connect legal goods and social morality too easily), one can find one in Hans Welzel's textbook,⁶⁰ which has pointed the way for addressing the problem that concerns us here. Welzel addresses, in a prominent place,⁶¹ the 'socio-ethical function of criminal law',⁶² and he leaves no doubt that it is the central 'task of the criminal law' to 'protect the fundamental values of communal life.'⁶³ Moreover he does not hesitate to bring the protection of legal goods into this circle of guiding principles,⁶⁴ and he ultimately intertwines the protection of the fundamental socio-ethical values of practical actions in an intricate manner with the protection of legal goods.⁶⁵ This is a far-reaching and at the same time complex understanding of the relationship between the protection of legal goods and social morality.

Admittedly, this model hails from a time in which criminal law theorists spoke and reasoned differently from today, and the possible affinity between Welzel's notion of 'the attitudes to legal values manifested in behaviour' (*rechtliche*

⁶⁰ H Welzel, *Das Deutsche Strafrecht. Eine systematische Darstellung*, 11th edn (reprinted: Berlin, De Gruyter, 2010; orig 1969).

⁶¹ Ibid, § 1 ('Sinn und Aufgabe des Strafrechts').

⁶² Ibid. In § 1.II we find the discussion of the preventive functions of criminal law.

⁶³ Ibid, § 1.I, especially the 'First guiding maxim' stated there.

⁶⁴ Ibid, § 1.I: 'By penalising conduct indicative of a real defection away from attitudes of respect for legally protected values, the criminal law automatically protects the legal goods which refer to the values of these actions.' ['Indem das Strafrecht so den wirklichen Abfall von den rechtlichen Gesinnungswerten bestraft, schützt es zugleich die Rechtsgüter, auf die jene Aktwerte bezogen sind.']

⁶⁵ Ibid, § 1 (Second guiding maxim): 'The task of criminal law is the protection of particular socio-ethical value of attitudes and actions and only contained therein sozialethischen Gesinnungs-legal goods.' ['Aufgabe des Strafrechts ist der Schutz der elementaren sozialethischen Gesinnungs-legal goods.'] ['Aufgabe des Strafrechts ist der Schutz der einzelnen Rechtsgüter.'] Also the Third (Handlungs-)werte und erst darin eingeschlossen der Schutz der einzelnen Rechtsgüter through the protection of the guiding maxim: 'The task of criminal law is the protection of legal goods through the protection of the fundamental socio-ethical value of actions.' ['Aufgabe des Strafrechts ist der Rechtsgüterschutz durch den Schutz der elementaren sozialethischen Handlungswerte.']

Gesinnungswerte) and 'social morality' deserves critical investigation.⁶⁶ However, it seems to me beyond doubt that, for Welzel, the protection of legal goods and 'attitude of respect for legally protected values' (*rechtliche Gesinnung*) go together as central elements of a theory of criminal law, and relate to each other in the following way:⁶⁷ the 'values of practical actions' as the basis of attitudes of respect for legally protected values are strengthened by the reliable and constant protection of legal goods and, in turn, contribute to the successful protection of legal goods. In his words,⁶⁸

More important than the protection of concrete individual legal goods is the task of securing the actual validity of (compliance with) the values of practical actions manifesting respect for legally protected values; these are the strongest foundation for the state and the community.

At least in its outcome, this perspective sits well with the message of positive general prevention that, when it comes to the long-term preservation of social morality as a precondition of loyalty to the legal order and respect for law, the criminal law ought not to rely on fear but on acceptance.⁶⁹ In doing so, it should be careful not to confuse acceptance with subjection to manipulation. General prevention is 'positive' only when it takes citizens seriously through democratically based participation in 'our law' and its application in practice.⁷⁰

This demand of positivity is, of course, difficult to fulfil, particularly for the criminal law which must in the foreseeable future continue to rely on punishment and its threat. But in a democratic community there is no way that leads past this demand. In my view, acceptance is most likely to be brought about through an approach to prevention that does not merely flash before citizens' eyes the array of instruments designed to force their compliance: ie, the special part of the criminal law with its threats of punishment, and the procedural law with its authorisations to enforcement agencies. Such an approach is nothing but a remnant of deterrence-based or negative general prevention. 'Our criminal law', which in a democratic state can claim to be the criminal law 'of us all', encompasses also the safeguards provided by constitutional criminal law and the general part of the criminal law with its inherent limitations of liability.

⁶⁶ The examples of these values given by Welzel (loyalty, obedience, respect for the person: see Welzel, *ibid.*, § 1.1) suggest, however, that he means 'social morality' in a somewhat different packaging from what we are used to today.

⁶⁷ Keeping criminal law restricted to a 'core area' belongs here. See Welzel, *ibid.*, § 1.1.2: 'By restricting function in order to the fundamental duties, the criminal law is able to fulfil an important social character-building

⁶⁸ *Ibid.*, § 1.1. ['Wesentlicher als der Schutz der konkreten einzelnen Rechtsgüter ist die Aufgabe, die reale Geltung (Befolgung) der Aktwerte rechtlicher Gesinnung sicherzustellen; sie sind das stärkste Fundament, das den Staat und die Gemeinschaft trägt.']

⁶⁹ For a more extensive discussion, see Hassemer, *Warum Strafe*, above n 24 at 107ff ('our criminal law').

⁷⁰ This consideration touches closely on von Hirsch's urgent appeal for a legal order that as far as possible refrains from paternalistic intervention: see, eg, von Hirsch, *Fairness*, 85ff.

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This is the context in which reasoning in terms of legal goods and the harm principle can find its way to social morality. (And based on what I have just said, it is clear that it is accompanied on this path by many other criminal law guarantees: from the culpability principle, and the principle of legal certainty, to the principle of *in dubio pro reo*.) Regular adherence to these in the processes of criminal legislation and adjudication, and their constant application in public criminal trials, constitute the model of legality and reliability which turns the criminal law of a Law state into an ideal blueprint of everyday social control.⁷¹

A conception of harm⁷² – which rests on, and serves, the guarantee of liberty,⁷³ whose instructions are transparent⁷⁴ and give consistent⁷⁵ answers to the problems connected with crime and punishment – may join the ranks of the principles of a legitimate criminal law which can count as 'our criminal law' and which contributes to the emergence of social morality through consistency, appropriateness, publicity and proportionality.

IV. Limits

In exploring the instruments of harm orientation and their aims we have, at the same time, investigated their limitations: without an understanding of its limits, an object of cognition cannot be understood. The red line directing our inquiry – 'What ought, and what can, the doctrine of the legal good do?' – always carried the black line with it: 'And what ought, and can, this doctrine not do?' For this reason all that now remains is to provide a few reminders and underlinings.

We have seen that conceptions of harm are not principles capable of derivation, but argumentative principles: they are an – admittedly strong – argument in the debate concerning the features of a legitimate criminal law, but no more. Moreover, the concept of harm orientation is not capable of standing alone. It belongs in the context of other fundamental principles of constitutional criminal law which strive to provide clarity (like the principle of legal certainty) and to prevent excessiveness (like the principle of proportionality), and it needs this environment in order to bring about its effects.

We have also seen that the implementation of the goals of transparency and consistency of the concept of a legal good runs up, as a matter of fact, against the modern desire to construct modern legal goods. Yet, in the final analysis, reasoning on the basis of legal goods cannot itself determine where the limits of its application lie. Someone who subscribes to this mode of reasoning cannot know, simply on the basis of this commitment, whether there exist any 'reasons for criminalisation

⁷¹ For details, see Hassemer, *Einführung*, above n 32 at 323ff.

⁷² See section II above.

⁷³ See section III.A above.

⁷⁴ See section III.B above.

⁷⁵ See section III.C above.

outside the harm principle',⁷⁶ or what a harm-oriented criminal law should do about 'offensive behaviour'⁷⁷ that falls short of the threshold of wrongdoing deserving of criminal punishment. In both cases, implementation through criminal policy is essential in order to determine, for instance, whether they should meet with an administrative or preventive policing response, or perhaps be treated as 'quasi-criminal' regulatory offences; or receive no official response at all. But what such a person will know is the importance, when making such implementing decisions, of bearing in mind the core features of reasoning when thinking in terms of legal goods – such as the principle of freedom,⁷⁸ the concern for clarity,⁷⁹ and the principle of the 'normative minus'.⁸⁰

⁷⁶ Von Hirsch, *Fairness*, 79ff.

⁷⁷ *Ibid.*, 109 ff.

⁷⁸ See section III.A above.

⁷⁹ See section III.B above.

⁸⁰ See section III.C(ii) above.

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