

The System of Criminal Wrongs: The Concept of Legal Goods and Victim-based Jurisprudence as a Bridge between the General and Special Parts of the Criminal Code

Bernd Schünemann

I. THE IMPORTANCE OF THE CONCEPT OF LEGAL GOODS FOR THE CRIMINAL JUSTICE SYSTEM

A.

It is almost undeniable that the system behind the general part of the German Criminal Code is one of the greatest achievements of European jurisprudence. However, things do not look quite so good when one thinks of the extent of the systemization of the theory behind the specific part of the code. The general prerequisites for imputing criminal liability have been dissected into their various underlying principles and brilliantly discussed and differentiated by both Silva Sánchez and Roxin.¹ Yet, as long as one treats the actus reus and the mens rea as little black boxes about which nothing is really known, this differentiation takes on an eerie feel. The reason is undoubtedly to be found in history, in particular Beling's thesis, which was for a long time accepted, that an offense does not impute any value judgment.² Certainly there is no question today that a criminal offense is the description of a prohibited subject matter, that is, of the social damage,

1. Jesús M. Silva Sánchez, *Kriminalpolitik bei der Strafrechtsdogmatik*, in *Strafrechtssystem und Betrug 1* (Bernd Schünemann ed., 2002); Claus Roxin, *Kriminalpolitik und Strafrechtsdogmatik heute*, in *Strafrechtssystem und Betrug*, supra, at 23.

2. Compare Ernst Beling, *Die Lehre vom Verbrechen* 112 (1906): The offense is devoid of all criminal factors, one "cannot recognize a legal meaning" in it (in this sense, "offense" means the literal description of the behavior as contained in the statute).

which exceptionally remains only to be tested for possible justifications. It would appear to be a natural step to conclude that the core of an offense is the damage caused to some legal good, whereby the good is defined both meaningfully and independent of the various offenses. Nevertheless, this seemingly obvious conclusion, which was adopted by the spiritual ancestors Beccaria and Birnbaum,³ is today not, or no longer, drawn by the vast majority. Allegedly it is not possible to develop a concept of a legal good, which would bind the simple legislator and serve as the constitutional foundation of the criminal law.⁴ Hence, just as it was during the legal-positivist era pre-1933,⁵ a legal good is simply seen as an “abbreviation of the purpose”

3. Whereby Beccaria differentiated himself by relying on the “damage caused to society.” Compare Cesare Beccaria, *Über Verbrechen und Strafen* 65 (Wilhelm Alff ed., 1966) (1764). Hommel built upon this in the preface to his work, Karl Ferdinand Hommel, *Preface to Cesare Beccaria, Des Herren Marquis von Beccaria unsterbliches Werk von Verbrechen und Strafen* 2 (1778); see also Karl Ferdinand Hommel & Heinz Holzhauser, *Über Belohnung und Strafe nach türkischen Gesetzen* §§ 128, 133 (1778). The concept of a legal good was introduced by Johann Michael Franz Birnbaum, *Ueber das Erforderniss einer Rechtsverletzung zum Begriffe des Verbrechens*, 15 *Archiv des Criminalrechts (Neue Folge)* 149 (1834); Johann Michael Franz Birnbaum, 17 *Archiv des Kriminalrechts (Neue Folge)* 560 (1836). Although he did not use the term, he in essence reestablished the continuity to the theory of crime of the enlightenment; see Bernd Schünemann, *Strafrechtsdogmatik als Wissenschaft*, in *Festschrift für Claus Roxin zum 70. Geburtstag*, at 1, 27 n.105 (2001).

4. Compare most recently from the almost endless discussion, Hans-Ludwig Günther, *Das viktimodogmatische Prinzip aus anderer Perspektive: Opferschutz statt Entkriminalisierung*, in *Festschrift für Lenckner* 69 (1998); Günther Stratenwerth, *Zum Begriff des Rechtsgutes*, in *Festschrift für Lenckner* 377 (1998); Heinz Koriath, *Zum Streit um den Begriff des Rechtsguts*, 146 *GA [Goldammer's Archiv für Strafrecht]* 561 (1999). For views which go even further and practically deny any constitutional limitations on the criminal law, see Otto Lagodny, *Strafrecht vor den Schranken der Grundrechte* 64, 130, 247, 455 (1996); Joachim Vogel, 16 *StV [Strafverteidiger]* 110 (1996); Detlev Steinberg-Lieben, *Die objektiven Schranken der Einwilligung im Strafrecht* 508-09 (1997); Ivo Appel, *Verfassung und Strafe* (1998) (following in the footsteps of Lagodny); for further references, see Karl Lackner & Kristian Kühl, *Strafgesetzbuch*, vor § 13, at 4 (24th ed. 2001), and for recent comprehensive discussion, *Die Rechtsgutstheorie* (Roland Hefendehl et al. eds., 2003).

5. Richard Martin Honig, *Die Einwilligung des Verletzten* 94 (1919); Erich Schwinge, *Teleologische Begriffsbildung im Strafrecht* 22 (1930); and the portrayal in Knut Amelung, *Rechtsgüterschutz und Schutz der Gesellschaft* 125, 130 (1972).

of an individual legal norm. That it is not possible to build a system on top of the individual criminal offenses using this limited notion goes without saying. Even the use of the concept of a “system-inherent legal good”⁶ as an aid to interpreting the various offenses is problematic, as it runs the risk of becoming circular by placing the purpose of the law before its interpretation, even though the purpose depends on the results of that interpretation.

B.

Quite apart from this, one must challenge the premise that it is not possible on a constitutional level to arrive at a concept of a legal good, which can aid the legislator in developing individual offenses, the unfolding and arranging of which will achieve perfection in the criminal justice system. After all, the basic condition—that a criminal offense involves socially damaging behavior—was, as said, worked out during the period of enlightenment, which was of fundamental importance to our modern criminal law. It follows that this requirement is, historically speaking, far more entrenched than any modern day constitution, having withstood more than two centuries despite periodic attacks and marginalization. Moreover, the principle of social damage or the principle of the protection of legal goods is, as the linchpin for all teleological argumentation involving criminal wrongs, indispensable. For this reason, I find it a tragedy for German jurisprudence that, in its Cannabis-judgment,⁷ the German Constitutional Court by means of an almost frivolous manner of argumentation almost did away with the principle in its entirety. To make matters worse, a large portion of the academic world followed this *de facto* abolition of a possible constitutional limitation on the criminal law.

6. For the difference between the concept of system-inherent and system-transcending legal goods, see Winfried Hassemer, *Theorie und Soziologie des Verbrechens* 19 (1973).

7. Judgment of March 9, 1994, 2d Senate, 90 BVerfGE [Decisions of the German Federal Constitutional Court] 145.

1. In this context, attention should be drawn to the interesting and methodological fact, that the process of assessing the cost of social damage as an expression of criminal wrong has always involved a strong empirical component. After all, since the period of enlightenment, it has been clear that the mere immorality of an act, particularly in the area of sexual custom, is never sufficient to justify a negative value judgment. Instead, some definable interference with legal goods, which could be adequately defined, was deemed a prerequisite. That an act, which causes no harm, could be criminalized simply because it violated some moral tenet (perhaps because the conduct went beyond decent sexual behavior), was either vehemently challenged (as in the case of the Saxon philosopher of criminal law Hommel) or (in accordance with Beccaria and Birnbaum) only accepted when it threatened the public order.⁸

As the concept of a legal good is one which does not have a pre-existing, layman's meaning, nor, indeed, a meaning outside of the criminal law, which need only be discovered, it is understood that the concept can only be concretized after much work and after much jurisprudential discussion. Naturally, the results of this concretization will also largely depend on the technological and cultural level of the society. Two trivial and two highly charged examples demonstrate this point: Neither the evidential value of documents nor the power to dispose of electronic data can be legal goods within a society, which does not possess a script or computers, respectively. The preservation of the present state of the environment can only be regarded as a property-like legal good of future generations,⁹ once society is in a position to appreciate fully

8. For further discussion, see Schünemann, *supra* note 3, at 138.

9. I cannot and will not go into the continuing and multifaceted controversy about the legal goods involved in environmental offenses at this point. My own opinion is that consumption over and above the amount commensurate for each generation is the most fundamental of crimes and our society is, therefore, criminal down to its core. See Bernd Schünemann, *Zur Dogmatik und Kriminalpolitik des Umweltstrafrechts*, in *Festschrift für Otto Triffterer zum 65.*, at 437, 452 (Kurt Schmoller ed., 1996); Bernd Schünemann, *Kritische*

its destruction of the environment.¹⁰ While it may well have been legitimate in the nineteenth century for a culture, in which all sexual acts were relegated to a quasi-sacred, intimate sphere, to treat the public's freedom from sexual acts as a legal good and, hence, to criminalize such acts as indecent exposure in accordance with § 183a StGB [Strafgesetzbuch] [German Criminal Code] or Art. 185 CP [Código Penal] [Spanish Criminal Code], such an argument can scarcely be made today. In the thoroughly sexualized daily routine of the postmodern, such behavior is, depending on the social context, no more than tastelessness, which does not reach the high water mark of social damage. Therefore, the criminalization of such behavior can no longer be justified, except perhaps where it offends individual persons or specific exhibitionism appears threatening.¹¹ The need for a yet-to-be-determined "normative understanding" (Hassemer) does not dispense with the concept of a legal good being the central avenue for jurisprudential work. Such an understanding does not occur haphazardly or as a result of political negotiation. Instead, firstly, an understanding is determined on the basis of an analysis of society's structure and its demonstrable needs for protection. Secondly, the need to describe and limit a legal good in a tangible manner serves an important channeling and disciplining function for jurisprudential debate, as the Cannabis-judgment of the Constitutional Court so dramatically demonstrates. Where the criminalization of the consumption of cannabis is judged against this standard (something that the Constitutional Court apparently deliberately only does in

Anmerkungen zur geistigen Situation der deutschen Strafrechtswissenschaft, 142 GA 201, 205 (1995); Bernd Schünemann, Principles of Criminal Legislation in Postmodern Society: The Case of Environmental Law, 1 Buff. Crim. L. Rev. 175, 180, 190 (1997).

10. However, this will already have been the case very early in human history. Compare Günther Heine, *Ökologie und Recht: Zur historischen Entwicklung normativen Umweltschutzes*, 136 GA 116 (1989).

11. Compare Tatjana Hörnle, *Münchener Kommentar zum Strafgesetzbuch § 183a*, at 1 (Wolfgang Joecks & Klaus Miebach eds., 2003).

passing),¹² it is evident that criminalization can only be legitimate when necessary to protect minors. However, it immediately becomes apparent that the only legal good, which possibly comes in question—the physical health of the society—is, in truth, not a collective good, but rather a collection of the health of each citizen, subsumed under a generic heading, and is, as such, merely an individual good. The self-responsible decision of an individual to consume cannabis can violate this good no more than the eating of a fatty roast or the riding of a horse in one's spare time. Nevertheless, the Constitutional Court employed an ingenious maneuver to drop, almost without any justification, the high hurdle for the protection of legal goods as being the *ultima ratio*, which had once figured prominently in the abortion decisions.¹³ The Court divided the constitutional analysis into two stages. The first step was to uphold the provision in light of the weak protection afforded by Art. 2 Abs. 1 GG [Grundgesetz] [German Constitution]. The second step consisted of testing the possible sentence against the similarly weak protection of the principle of proportionality.¹⁴ By doing so, the Constitutional Court's Cannabis-judgment reduced the citizen's protection against the brutal weapon of the criminal law to pre-enlightenment levels. Yet, even though it dismantled the boundaries of the criminal law, which had pre-dated all written constitutions by some 250 years and had therefore, at least in a positivist-constitutional sense, become enshrined as part of the rule of law, the Court was not confronted with cries from the academic world, but was, instead, applauded by most.¹⁵ Lagodny, who has so far prepared the most extensive monograph on the constitutional limitations on the criminal law, even

12. 90 BVerfGE at 185-87, 195 (different in the dissenting opinion at 200).

13. Judgment of February 25, 1975, 1st Senate, 39 BVerfGE 1, 47, 51; Judgment of May 28, 1993, 2d Senate, 88 BVerfGE 203, 257-58.

14. 90 BVerfGE at 171.

15. Compare the references at supra note 4, but also the irrefutable criticism of the Cannabis-judgment of Cornelius Nestler, *Handbuch des Betäubungsmittelstrafrechts* 732 (Arthur Kreuzer ed., 1998).

2004] *THE SYSTEM OF CRIMINAL WRONGS* 557

came to the conclusion that the legislator can criminalize anything he wishes, except perhaps the possession of narcotics obtained by inheritance¹⁶—*pariuntur montes, nascetur ridiculus mus!*

2. One must be adamant that the principle of the protection of legal goods (the principle of social damage), which by its direct embodiment in the social contract serves as the basis of every constitutional theory, not be passed over in favor of the weak constraints developed by the Constitutional Court, such as those derived from Art. 2 Abs. 1 GG against arbitrary state action. Whatever difficulties may be involved in defining the principle, they do not detract from its importance. It must also be remembered that the origin of these difficulties is primarily to be found in the reticent and neglectful treatment the boundaries of the criminal law have suffered in the case law of the German Constitutional Court.¹⁷ Rather ironically, where the intrusions of the state into the affairs of its citizens are at their most destructive, one finds far less regulation than in other areas, such as tax or family law. Moreover, the jurisprudence of criminal law, as an independent science, can be consigned to history once and for all were it to relinquish as its foundation the principle of the protection of legal goods (the principle of social damage), which limits the arbitrariness of the legislator and therefore serves as the foremost guideline for interpretation work. For this reason, Roxin quite correctly held on to the idea of the *ultima ratio* being the protection of legal goods and, hence, a limitation on the criminal law.¹⁸ Hefendehl has also recently demonstrated that, despite its decade-long failure to advance beyond generalities, the idea of collective legal goods is most certainly open to precise analysis and, hence, a sufficiently precise delineation.¹⁹

16. Lagodny, *supra* note 4, at 318, 335.

17. See the excellent overview in Klaus Tiedemann, *Grundgesetz und Strafrecht*, 40 Jahre Grundgesetz 155 (1990).

18. Claus Roxin, *Strafrecht I* § 2, at 38 (3d ed. 1997).

19. Roland Hefendehl, *Kollektive Rechtsgüter im Strafrecht* (2002) (*passim*). In my opinion, this also disposes of the criticisms of Stratenwerth, *supra* note 4,

The imperative that the criminal law may only be used in order to protect against social damage (or, put differently, the injury or damage to individual or collective legal goods) is, in my opinion, to be preferred over the criteria the U.S. Supreme Court has developed in defining the constitutional limits on the criminal law. Were the U.S. to latch on to the criminal law theory of the Enlightenment era, such a move would enjoy unprecedented, historic legitimacy, since both the establishment of the U.S. and its foundation, as expressed in the Bill of Rights, are the direct result of the legal and political philosophy of the Enlightenment era. It appears to me that in its most recent decision, *Lawrence v. Texas*,²⁰ the Supreme Court went one significant step beyond this, by expressly accepting the earlier, dissenting opinion of Stevens J. in *Bowers v. Hardwick*.²¹ The Court held that the determination by a majority of government that certain conduct is immoral is an insufficient justification to uphold a law that criminalizes a particular practice. The choice of sexual behavior within one's own four walls is a freedom, which is protected by the due process clause of the 14th Amendment.²² Yet, as Scalia J., dissenting, holds, this approach on the level of fundamental rights must, in fact, contrary to the majority's opinion, lead to far-reaching consequences for all regulations that apply to sexual relationships. The broad interpretation of the freedom of the citizen, as espoused in *Lawrence*, is an inadequate method to limit the government's criminal legislation. Indeed, it is every bit as deserving of criticism as are the narrow interpretation of the German Constitutional Court in its Cannabis-decision and the most recent tendencies in the German discussion, both of which exist despite the fact that the legal goods approach has the advantage that it offers specific limitations on the criminal law without prejudicing other statutory regulations right up to the legalization of same-sex marriages.

at 377.

20. 123 S. Ct. 2472 (2003).

21. 478 U.S. 186 (1986).

22. 123 S. Ct. at 2472.

II. THE "CHECKERED SYSTEM" OF THE SPECIFIC PART

A.

Naturally, one must be careful not to confuse the entire purpose of a statute with the legal good it seeks to protect, as was propounded by Schwinge and Grünhut,²³ and is accepted by a segment of today's academic world.²⁴ The proponents of this opinion overlook the fact that the principle of the protection of legal goods is a necessary, but not a sufficient, condition for the application of the criminal law. Indeed, one must consider by means of a thorough teleological analysis the suitability, necessity, and proportionality of the measure before the criminal law, as *ultima ratio*, may be employed.²⁵ Only the deduction of the criminal wrong, as a heightened, qualified form of reprehensibility,²⁶ from a combination of the principle of the protection of legal goods and the principle that the criminal law is a device of last resort delivers a useable method for interpreting the meaning of specific offenses. This method not only draws together the jurisprudential questions, which have been lost in the confused and arbitrary case law, but also returns them to the system that otherwise governs the criminal law.

23. Schwinge, *supra* note 5, at 22-23; Max Grünhut, 1 Festgabe für Reinhard von Frank zum 70. Geburtstag, at 8 (August Hegler ed., 1930).

24. This is particularly clear in Adolf Schönke et al., *Strafgesetzbuch* § 1, at 48 (26th ed. 2001); Jürgen Baumann et al., *Strafrecht* § 9, at 68 (10th ed. 1995).

25. For this reason, Schaffstein's early criticism of an interpretation based exclusively on the protected legal good is fundamental. See Friedrich Schaffstein, *Leipziger Festgabe für Richard Schmidt* 47 (1936); for an early description of the connection to the *ultima ratio* principle, see Bernd Schünemann, *Festschrift für Paul Bockelmann* 117-18, 129 (1979); Bernd Schünemann, *Festschrift Hans Joachim Faller* 357 (1984); Bernd Schünemann, *Festschrift für Rudolf Schmitt zum 70. Geburtstag*, at 117, 127 (1992).

26. For a concept of criminal wrong based on this as well as the position in the criminal justice system that results therefrom, see Bernd Schünemann, in *Bausteine des europäischen Strafrechts* 149 (Bernd Schünemann & Jorge de Figueiredo Dias eds., 1995); *Fundamentos de un sistema europeo del Derecho penal* 205 (Jesús María Silva Sánchez ed., 1995).

B.

The further systematic development of these principles must occur in a “checkered manner.” At first, general guidelines for the suitability or necessity of a certain form of protection of a legal good through the criminal law must be developed. Then, these must be projected onto the various offenses, which, depending on the criminal-political situation given, will lead to varying consequences. This checkered systemization of the ultima ratio principle can limit itself to a narrow legal good, which is protected comprehensively, such as human life—the simple possibility. Alternatively, it can apply to an indeterminate area deserving of protection, the many boundaries of which are not defined on the systematized level of the ultima ratio principle, but rather at an (of necessity) earlier stage, during which spheres of freedom and control are differentiated, a role that is already often performed by the civil law. Take, as an example, the legal good of property: that it is impossible to comprehensively protect property is not simply a constraint of the criminal law. Instead, the difficulty arises from the constitutional decision to espouse a competitive economy and the various expressions of this decision in civil law. A “pure economic concept of property,” as is still to be found in the case law,²⁷ cannot exist in criminal law, because the value of money, that is the economic position, does not have any legal meaning within a competitive economy. Secondly, a criminal law good and thus also a criminal law concept of property can only cover positively valued interests, meaning that a pure position of strength independent of any legally sanctioned interests is not worthy of protection by the criminal law. Finally, leaving aside that the economy is greatly influenced by the legal order and, by taking the concept of

27. See the fundamental judgment of the Reichsgericht, RGSt 44, 230 (233); unchanged in its terminology until today, compare the judgment of July 18, 1961, BGH [Supreme Court], 1st Senate, BGHSt 16, 220 (221); BGH, NJW [Neue Juristische Wochenschrift] 1234, 1234-35 (1975); BGH, NSTZ [Neue Zeitschrift für Strafrecht] 455 (1986); BGH, wistra 24 (1986).

2004] *THE SYSTEM OF CRIMINAL WRONGS* 561

property literally, one overlooks the fact that the value of money does not depend on a civil law construction of the private law, in a jurisprudential sense. Instead, it depends on the range of possible, legal dealings, as only those dealings that are legally sanctioned can lend meaning to the term.²⁸ Thus, in order to determine the meaning of the legal good property, it must be combined with those legal protected dealings that are attributed to it. Therefore, property must be understood in the sense of an “integrated concept of property,” as I have termed it, meaning that the value of property is an expression in money terms of the value of legally constituted dominion over chattels or social interactions.²⁹

Yet having determined what the law attributes to a particular legal good, it remains to be determined whether protection by means of the criminal law as *ultima ratio* is appropriate. For example, a civil claim is generally only protected by civil law and the rules of civil procedure, but not the criminal law. The criminal law will only be employed where the perpetrator acted in a particularly dangerous manner that cannot be dealt with simply by means of a civil action. Alternatively, the criminal law may be employed where the person circumvents the protection of the civil law. For example, civil law protection is at least partly ineffective in cases of deception or compulsion, as, in accordance with the offender’s plan, the owner of the property does not realize that he has suffered a loss (hence, the offense of fraud). Similarly, when the offender compels the victim to injure his own interests, the victim is unable

28. Compare Bernd Schünemann, LK [Strafgesetzbuch: Leipziger Kommentar (Grosskommentar)] § 266, at 133 (11th ed. 1993); as to the modern criticism of the commercial concept of property, see also Roland Hefendehl, *Vermögensgefährdung und Exspektanzen* 100 (1994); Michael Pawlik, *Das unerlaubte Verhalten beim Betrug* 255-56 (1999); Klaus Tiedemann, LK § 263, at 131 (11th ed. 1993).

29. Schünemann, *supra* note 28, § 266 at 134. This also describes the similar, fundamental idea of the “legal-economic mediating theory,” which the civil law only employs to limit and not to define the concept of property; similarly Hefendehl, *supra* note 28, at 115, 166; Tiedemann, *supra* note 28, vor § 263, at 31, § 263, at 132.

to make use of those avenues the law otherwise makes available to him (hence, the offense of blackmail). Another example is to be found when the offender causes injury “from within,” that is he has been given a position of trust by the victim, since any civil, legal protection against misconduct comes too late. In Germany the special offense of *Untreue* (§ 266 StGB) or disloyalty penalizes fraudulent activity by those acting as fiduciaries. In other words, where a person who is authorized to deal with property appropriates it to his own purposes, he does not commit the German offense of fraud, but rather disloyalty.³⁰ The only partial expression of this offense in the Spanish *Código Penal*³¹ is, in my opinion, an unjustifiable hole in the criminal system. Also of great interest are the offense of evading execution by judgment creditors (§ 288 StGB) and bankruptcy offenses. These offenses perform an important catch-all and sealing function, which derives from the purpose of the criminal law being the *ultima ratio* of the protection of legal goods. After all, when a creditor has exhausted all remedies available in civil law, but the debtor has still successfully managed to evade all these attempts, the criminalization of such evading acts merely acts as a back-up to the civil law, which is the primary remedy.³²

III. THE ROLE OF THE VICTIM-CENTRIC JURISPRUDENCE (VIKTIMODOGMATIK)

Obviously, the “checkered system” of the specific part can only be treated by way of example in such a brief study. As a further illustration, I would like to draw attention to the role of the victim, the importance of which has only been realized within the last twenty-five years through victim-centric jurisprudence. Generally speaking, the role

30. As to the direction of the protection of the offense of embezzlement, see Schünemann, *supra* note 28, § 266, at 2, 17.

31. Compare Silvina Bacigalupo, in *Hacia un Derecho penal económico europeo* 385 (Klaus Tiedemann & Luis Arroyo Zapatero eds., 1995); Miguel Bajo Fernández & Silvino Bacigalupo, *Derecho penal económico* 590 (2001).

32. See Schünemann, *supra* note 28, § 288, at 1.

2004] *THE SYSTEM OF CRIMINAL WRONGS* 563

of the victim has been confined to a more abstract level that deals simultaneously with a broad variety of offenses. More recently, there has been revived interest in the role of the victim in its manifestation as the principle of personal responsibility, which is a theoretical twin of victim-centric jurisprudence and discussed in connection with the rules on causation contained in the general part. Curiously enough, an approach to the specific part of the law based on victim-centric jurisprudence remains heavily criticized. Yet, at the same time, the principle of personal responsibility has been, in connection with the general part, developed into an indispensable, jurisprudential tenet, even though an analysis specific to the criminal law presents a rather more mixed picture.

A.

In 1977, victim-centric jurisprudence arose almost simultaneously out of the work of both Amelung and myself. Amelung used the theory to define the meaning of mistake in context of the offense of fraud. I employed it in order to define the group of potential offenders falling under the offense of breach of confidence (§ 203 StGB—*Geheimnisverrat*). Both deduced the theory from the *ultima ratio* principle and the rule that necessarily follows: that the criminal law may only be employed to protect legal goods when it is necessary to do so.³³ Subsequently, I developed victim-centric jurisprudence (the German term *Viktimodogmatik* being the term given to it by its detractors) into a rule of interpretation, which banishes from the purview of the criminal law all behavior, in cases in which the interests of the victim are not worthy of nor in need of protection³⁴—something that I shall explain in

33. Knut Amelung, *Irrtum und Zweifel des Getäuschten beim Betrug*, 124 GA 1, 6 (1977); my lecture at the convention of criminal law professors in Giessen in 1977, reproduced at 90 ZStW [Zeitschrift für die gesamten Strafrechtswissenschaften] 54 (1978).

34. Schünemann, *supra* note 28, at 117, 130-31; *id.* at 357, 362; Bernd Schünemann, *Zur Stellung des Opfers im System der Strafrechtspflege*, NSTZ 193

further detail later on. Correctly understood, victim-centric jurisprudence should not counter methodologically correct interpretation of the various offenses. Instead, it should complement such interpretation, as I would like to explain using two, in my opinion, very cogent examples. These examples were those used to develop the theory in the first place and remain, to date, the most thought out.³⁵ Even today, whether one can punish donation and/or beggar's fraud through the common offense of fraud causes great headaches for the German academic world, the reason being that the connection between the mistake and the harm—the unintentional self-infliction of harm—as required by the theory of the functional connection (*Theorie des funktionalen Zusammenhanges*), is missing. The “theory of the failed social purpose” (*Theorie der sozialen Zweckverfehlung*), which was thought up as a crutch, misinterprets the importance of the economic sum of performance and counter-performance and, thus, also the meaning of the term property. Moreover, were the mere causality of a mistake, which causes a disposition of property—even an intentional, self-infliction of economic harm—sufficient to justify criminal liability, one would need to convict in absurd cases. For instance, one would have to convict a person of fraud even if he deceived about a matter entirely outside of the purpose of the transaction, such as the level of a donation made by a neighbor, knowing that the victim would want to donate more than the neighbor.³⁶ Although one might attempt to rely on

(pt. I), 439 (pt. II) (1986); Bernd Schünemann, *The Role of the Victim within the Criminal Justice System: A Three-Tiered Concept*, 3 *Buff. Crim. L. Rev.* 33, 38 (1999).

35. The offense of fraud has since been analyzed by three victim-centric jurisprudence inspired monographs. See Raimund Hassemer, *Schutzbedürftigkeit des Opfers und Strafrechtsdogmatik* (1981); Manfred Ellmer, *Betrug und Opfermitverantwortung* 232 and *passim* (1986); Frowin Jörg Kurth, *Das Mitverschulden des Opfers beim Betrug* 169 (1984). I have developed the victim-centric approaches for offenses against the personal areas of life and secrecy in my commentaries in the LK; see Schünemann, *supra* note 28, vor § 201; § 201, at 13, 24; § 202, at 2, 13; § 202a, at 14-15; § 203, at 16-17.

36. Along with further references, Tiedemann, *supra* note 28, § 263, at 181, 185.

2004] *THE SYSTEM OF CRIMINAL WRONGS* 565

general structures or terms, such as “mittelbare Täterschaft” (an offender’s exploitation of an innocent third party, who does not have the requisite mens rea), the in fact rather nebulous notion of “autonomy” or a “right to truth,” which is no more precisely defined outside of the criminal law, one still does not arrive at a satisfactory, criminal political solution.³⁷ However, by deducing from the victim-centric maxim a requirement that both the deception and the mistake be related to the purpose of the transaction (that either follows from the circumstances or is implicitly agreed upon by the parties), one arrives at a solution, which is both elastic and satisfactory in a criminal political sense. The mistake is then not necessarily linked to the economic dimension of the transaction, but is to its purpose.³⁸ And now the second example. Take, for instance, the case of so-called third party secrets, which are entrusted to a person not by the owner of the secret but by another person. In such cases, it is fiercely debated whether permission for disclosure must be granted by the person entrusting the secret or the person whose secret it is,³⁹ thereby eliminating either the actus reus or providing an excuse.⁴⁰ The convincing solution is again provided by the victim-centric interpretation that the improper disclosure of secrets can only be sanctioned when the applicability of the offense is limited to certain classes of confidants. Because third parties may disclose secrets without fear of penalty (after all, the owner of a secret need only be protected vis-à-vis certain persons to whom he is forced to entrust his secret), a third party may also disclose the secret with the assistance of others, again without fear

37. As to these approaches, compare Rolf D. Herzberg, *Funktion und Bedeutung des Merkmals Irrtum*, 124 GA 295 (1977); Urs Kindhäuser, *Täuschung und Wahrheitsanspruch beim Betrug*, 103 ZStW 398 (1991); Pawlik, *supra* note 28, at 74; for further references, see Tiedemann, *supra* note 28, vor § 263 at 25; § 263 at 5.

38. Compare Schünemann, *Festschrift Hans Joachim Faller*, *supra* note 25, at 357, 363-64.

39. On this point with further references, see Schünemann, *supra* note 28, § 203, at 92-93.

40. Similarly, see *id.* at 99, with further references in particular at n.161.

of punishment. Therefore, this third party may dispense with the duty of secrecy, just as the owner of the secret can do, since there is no need for protection, when the owner of the secret no longer wishes for it to be held in confidence.⁴¹

B.

Although the theses of the victim-centric jurisprudence are more moderate than revolutionary, the theory has had to defend itself against vehement attacks, which have come from four directions.

1. Certain critics maintain that the deduction of the victim-centric model from the ultima ratio principle only addresses the subsidiarity of the criminal law vis-à-vis state intervention, but disregards the possibilities available to citizens to protect themselves.⁴² Yet, an a fortiori argument is more apposite than this reservation. Since the ultima ratio principle does not have a historically precisely defined area of applicability, its inherent logic must be determinative. In this context, there can be no doubt that the concept of the “unimpeded, possible and reasonable self-protection,” as coined by myself, is a far more effective alternative to the criminal law than the civil law is. After all, the enforcement mechanisms of the civil law can only ever be called upon after the fact and, in that sense, come too late. On the other hand, sensible self-protection ensures the total intactness of the legal good. Thus, a limitation of the criminal law, in fact, leads to a greater protection of legal goods. When social damage can only be attributed to a particular act of the victim that compromises his own interests, he must, in a sense, be deterred from such acts by highlighting that he will not be

41. See Schönemann, *Der strafrechtliche Schutz von Privatgeheimnissen*, 90 ZStW 11, 58 (1978); Schönemann, *supra* note 28, § 203, at 99.

42. See especially Thomas Hillenkamp, *Vorsatztat und Opferverhalten* 177 (1981); cf. Roxin, *supra* note 18, § 14, at 20; Stratenwerth, *supra* note 4, at 78-79, who prefers the more vague principle of proportionality; Heinrich Jescheck & Thomas Weigend, *Strafrecht, Allgemeiner Teil* 254 (5th ed. 1996); Schönke et al., *supra* note 24, vor § 13, at 70b.

afforded the protection of the criminal law when he, himself, defeats his own interests. Naturally, in cases in which the activity of the victim cannot be regarded as consent, one cannot confer upon the offender a blanket right to injure legal goods. For this reason, the legislator must be given broad discretion in determining the extent of the ultima ratio principle. Precisely this is what victim-centric jurisprudence achieves. It is not intended to correct the legislator, but rather to act as a principle of construction, which guides his relatively vague discretion in a criminal politically sensible manner.

Besides, it is simply not true that the notion of subsidiarity is limited to situations in which the state has less invasive methods for the protection of legal goods. According to the general principle of subsidiarity, as espoused in both state philosophy and constitutional law, the state plays no role where society is in a better position to carry out the tasks in question.⁴³ Naturally, this must also apply when the individual, as the smallest component of society, can best achieve the protection of his legal goods by himself. For this reason, I must contradict the generality of Roxin's statement⁴⁴ that the citizens had put the criminal law into place in order to relieve themselves of their protective duties, thereby enabling them to devote themselves to the development of their own personalities. In the end, the principle of subsidiarity is grounded in the social contract, according to which each citizen only wishes to relinquish as much freedom as is essential for the necessary protection of freedom between the citizens⁴⁵—something applied almost literally to the criminal law by

43. Reinhold Zippelius, *Rechtsphilosophie* § 31 II 4 (3d ed. 1994); Adolf Süsterhenn, *Das Subsidiaritätsprinzip als Grundlage der vertikalen Gewaltenteilung*, in *Vom Bonner Grundgesetz zur gesamtdeutschen Verfassung*; *Festschrift zum 75. Geburtstag von Hans Nawiasky* 141 (Theodor Maunz ed., 1956); Theodor Maunz & Günter Dürig, *Grundgesetz Kommentar* art. 1, at 54 (39th ed. 2001).

44. Roxin, *supra* note 18, § 14, at 20.

45. By way of example, compare the latest and most comprehensive summary of Wolfgang Kersting, *Die politische Philosophie des Gesellschaftsvertrags* (1994).

Beccaria.⁴⁶ Primarily, a citizen must retain the right to deal with his legal goods. Only where his efforts are inadequate does he require intervention by the state.

Therefore, the alleged extension of the principle of subsidiarity by victim-centric jurisprudence reveals, in truth, only the ignorance of the critics themselves. The question of whether fundamental principles are developed by means of the principle of subsidiarity or the ultima ratio model is neither terminological nor historical, but instead one of common sense. Considering the above principles that govern the state, it is sensible that only responsibility for those areas in which society cannot and does not wish to dispose of its own freedom be assigned to the state. In turn, one can conclude that the ultima ratio character of the criminal law is supported by two independent pillars. Firstly, the ultima ratio principle is counterbalanced by the lesser state methods of protection. Secondly, the principle is counterbalanced by the unimpeded, possible, and reasonable self-protection of the owner of the legal good.

2. The next principal objection denies the criminal political wisdom of the victim-centric maxim by alleging it will lead to the unacceptable consequence that society shall become "hedgehog-like," since it results in an area devoid of criminal law in which self-help rules.⁴⁷ This argument is only supported by examples involving offenses against the person. However, no one would argue for a victim-centric limitation of the offense when there has been a clear application of violence.⁴⁸ Instead, in borderline cases involving criminal coercion (Nötigung), victim-centric

46. Beccaria, *supra* note 3, at 53: "It is certain that each individual only wishes to repose the smallest possible amount of his freedom in the public custody, only as much as is necessary to cause the others to protect him too. The total of these smallest possible amounts is what creates the right to punish; anything over and above is abuse and not justice, is pure fact, but not for that reason alone law."

47. Hillenkamp, *supra* note 42, at 205; Thomas Hillenkamp, *Der Einfluss des Opferverhaltens auf die dogmatische Beurteilung der Tat* 7-8, 15-16 (1983); agreeing, Günther, *supra* note 4, at 79.

48. See Bernd Schünemann, *Zur Stellung des Opfers im System der Strafrechtspflege* (pt. II), *NStZ* 439, 440 (1986).

aspects provide a way out of the interpretation dilemma, into which the courts of both Germany and Spain have been thrown by recent, tightening amendments to their respective legislation against sexual offenses. Since the passing of the law 11/99 on April 4, 1999 in Spain, a person may be convicted of indecent assault when he uses a position of clear dominance, which limits the freedom of the victim, in order to perform sexual acts. In Germany, since the enactment of the 33rd Criminal Law Amendment Act [Strafrechtsänderungsgesetz] of July 1, 1997,⁴⁹ § 177(1)(3) StGB now also criminalizes as sexual coercion (sexuelle Nötigung) the exploitation of a situation in which the victim is hapless, causing the victim either to perform or to suffer sexual acts. Art. 181(3) CP raises the question, which is unanswered by the wording of the section, of whether the position of dominance a driving instructor has over his pupil is sufficient to come within the ambit of the section, considering that, in accordance with subsection 1, any sexual act that occurs without the consent of the victim, including simply the unanticipated touching of the victim's genitals in a bus, is punishable by between one to three years' imprisonment or a fine, the equivalent of between eighteen and twenty-four months' imprisonment.⁵⁰ § 177(1)(3) StGB poses similar problems, even though the offense with its requirement that the victim be "without protection" is drawn much narrower than Art. 181 CP.⁵¹ A sensible restriction of these offenses can only be achieved by excluding those cases in which the offender has only a marginal dominance or the victim's haplessness is quite insignificant. In such cases, it is perfectly reasonable to expect the victim to carry out some type of "blocking act." The offender would then need to apply force in order to

49. BGBl. [Bundesgesetzblatt] I 1607.

50. Cf. Kommentar zum Besonderem Teil des Strafrechts 258 (Gonzalo Quintero Olivares & Fermín Morales Prats eds., 2d ed. 1999).

51. This can also be seen in the cases so far decided by the BGH, see BGH, NSTZ 140 (2000) with critical comment by Fischer at 142; Herbert Tröndle & Thomas Fischer, Strafgesetzbuch § 177, at 12 (50th ed. 2000); Lackner & Kühl, supra note 4, § 177, at 6; Schönke et al., supra note 24, § 177, at 11, each with further references.

overcome the resistance, something that is clearly covered by the statutes.

3. Because the consideration of the victim-centric maxim is the rule and not the exception when interpreting offenses, the polemics of Eser and Lenckner in the practitioner's guide Schönke/Schröder, which consign the concept to irrelevance except for its part in teleological interpretation,⁵² miss the point. If one interprets a law in a teleological manner, that is according to the purpose of the law, then one must obviously be able to articulate the purpose or purposes of the statute. It is precisely this that happens (only) when the principle of the protection of legal goods is combined with victim-centric jurisprudence.⁵³ Naturally, the result of such interpretation can and will often lead to the conclusion that, from the perspective of the victim, no limitation on the application of the criminal law is necessary. Günther⁵⁴ is, with his express emphasis of this aspect, knocking on an open door. His "harsh criticism" of victim-centric jurisprudence⁵⁵ is anything but criticism. Instead, it simply highlights a matter of fact, which has implicitly always been a part of victim-centric jurisprudence.

4. Thus, only one final, fundamental objection remains. It latches on to the candidness of victim-centric jurisprudence in respect of the concrete results of interpretation, and accuses it of not being grounded in the general, jurisprudential system and, as such, being without substantive, normative justification.⁵⁶ However, this criticism is based on a misunderstanding of the methodological structure of statutory interpretation. Starting from the protected legal good, this point of view

52. Schönke et al., *supra* note 24, § 1, at 48; *id.*, vor § 13, at 70b.

53. Compare my response in Schünemann, *Festschrift für Rudolf Schmitt*, *supra* note 25, at 128-29.

54. *Supra* note 4, at 69.

55. *Id.* at 80.

56. Most extensively developed by Manuel Cancio Meliá, *Victim Behavior and Offender Liability: A European Perspective*, 7 *Buff. Crim. L. Rev.* *** (2004); see also *Conducta de la victima e imputación objetiva en Derecho penal* 235 (1998) [hereinafter Cancio Meliá, *Conducta de la victima*]. The apparent immeasurability is also criticized by Pawlik, *supra* note 28, at 52.

2004] *THE SYSTEM OF CRIMINAL WRONGS* 571

seeks, in the end, to reduce this structure, as well as traditional means of interpretation, to just one principle and, in doing so, cripples the structure entirely. By shifting the problems of interpretation into the area of causality, specifically the theory of objective attribution (*objektive Zurechnung*), and thus into the general part, one creates the impression that any causal, objectively attributable act is criminal, which, practically speaking, means an abolition of any form of jurisprudence of the specific part. The example of sexual offenses illustrates this point. Cancio, along with many supporters of the theory of objective attribution, proclaim the principle of self-responsibility to be decisive. Under this theory, where the victim contributes to the damage through his own behavior, the damage becomes exclusively attributed to him, so long as the actions are limited to those jointly envisaged by both the victim and perpetrator, the behavior of the victim was not instrumentalized by the perpetrator, and the perpetrator did not have any special duty to protect the legal goods of the victim.⁵⁷ Taking the above examples dealing with sexual offenses, there is quite obviously no joint action by both the victim and the offender. Thus, the indecent assault by the driving instructor, or passenger on the bus cannot be attributed to the assaulted driving pupil, or other assaulted passenger, respectively. However, the question of whether or not the threshold of sexual abuse contrary to Art. 181 CP or sexual duress contrary to § 177 StGB is met cannot be answered simply on the basis of the objective attribution of the events. Instead, the threshold can only be assessed by looking at the “threshold of criminalization” inherent in the offense. In turn, this determination cannot be deduced from some predetermined, general principle. Rather, it must be individually tailored to each offense, bearing in mind that the goal of the protection of legal goods as well as the notion of the victim’s joint responsibility, which point in the

57. Cancio Meliá, *Conducta de la victima*, supra note 56, at 264 (with respect to the principle of self-responsibility in general), 284 (in particular with respect to joint organization).

opposite directions, are to be considered as part of the whole interpretation. To pretend there exists a single, general principle, which allegedly anticipates the concrete result, would be a grave mistake. To do so would ignore the variety of illicit subject matter dealt with by the specific part. It would also substitute the requisite interpretation, mandated by the *nulla poena sine lege* principle, with a deduction from jurisprudential theories contained in the general part that do not convince even there (as I will demonstrate). Hence, there is good reason why the victim-centric maxim does not anticipate the solution, but only provides an important guiding aspect, which must be taken into account during the interpretation of individual offenses. For a criminal law theoretician, who prefers not to take results from the statute but rather from jurisprudential doctrine, this is no great dogma. However, it is the only methodologically correct procedure in the application of the criminal law.

C.

I believe the above discussion also disposes of the various objections leveled by Roxin in his criticism of the victim-centric jurisprudence, even though his results differ only marginally from my own opinion.⁵⁸ Roxin states, there is no indication that the legislator wished to make need for protection dependent upon the reasonable self-protection measures of the victim.⁵⁹ However, this statement is in no way contradictory to my own concept, which only ever brings the victim-centric maxim to bear as part of the interpretation of the offense, that is as a concretization of the general *ultima ratio* principle. Because this principle is already grounded in the Constitution, the ordinary legislator is not required to mention it explicitly nor must he make generalized comments. After all, he only creates concrete offenses and is not involved in the expression of

58. Schünemann, *supra* note 28, § 14 at 15-18.

59. See Roxin, *supra* note 18, § 14, at 15-24.

2004] *THE SYSTEM OF CRIMINAL WRONGS* 573

general principles when dealing with the specific part. How much importance is given to the victim-centric principle is a question of the proper interpretation of each individual offense. Naturally, a theft is a theft, even if the victim was careless, since the contributory negligence of the victim is not relevant. Yet this trivial remark does not alter the fact that the legislator has worked victim-centric principles into the entire system of property offenses, namely in a very obvious fashion. The law draws a distinction between various levels of criminal liability, ranging from embezzlement to simple theft to aggravated theft.⁶⁰ The distinction is always that at each higher level, the victim has protected his property more vigilantly. Once one has reached the stage of aggravated theft, the offender has had to invade a very well protected sphere of his victim. When, in connection with the element of “taking” in § 242 StGB, one interprets whether the victim was in possession of the property or not, the third step in this evaluation, the so-called social attribution,⁶¹ always take into account whether a substantial relaxation of the victim’s control over his property is significant. If the relaxation is the result of typical events or necessities of social life, there nevertheless remains control by the owner (possession), which must be respected by all other members of society. This is clearly a victim-centric criterion. This is even more pertinent in cases of aggravated theft (§ 243 StGB), in which the victim took particular measures to protect his property (§ 243(1)(1), (2) StGB) or is especially worthy of protection (§ 243(1)(6) StGB), thereby justifying a heightened protection by the criminal law. The same is also relevant for the offense of fraud. It is not the gullibility of the victim as such, which precludes criminal liability (which Roxin only mentions⁶²). Instead, when the

60. § 246, § 242, § 243 StGB.

61. Schönke et al., *supra* note 24, § 242, at 26; Rainer Keller, *Normativismus im Strafrecht*, 107 ZStW 478 (1995); Michael Ling, *Zum Gewahrsamsbruch beim Diebstahl, insbesondere in Selbstbedienungsläden*, 110 ZStW 919 (1998); Tröndle & Fischer, *supra* note 51, at 11 (with further references).

62. See Roxin, *supra* note 18, § 14, at 19.

victim holds a real doubt, there is no mistake on the part of the victim, and, so, the offense is not made out. Once again, the victim-centric interpretation leads to a sensible limitation on the applicability of the offense of fraud.

As for the criminal political sense of the victim-centric principle, Roxin counters that the state, because of general social political reasons, should by and large side with the victim of an offense and not with the offender (n.21).⁶³ However, his argument is circular. Again, in the context of fraud, when the victim is not mistaken, there can be no perpetrator. The victim has merely entered into a speculative deal. Therefore, there is simply a common social interaction in the ordinary sense, and the culprit cannot be seen as someone who has been wrongfully absolved of criminal liability. The fact that one must always weigh all interests in order to determine whether an act should be outlawed, as Roxin emphasizes,⁶⁴ coincides precisely with my own articulation of victim-centric jurisprudence. Quite the opposite is true of the principle of self-responsibility, which has recently made popular forays into the jurisprudence of the general part and purports to be a categorical tenet of objective attribution, meaning that no further balancing is required. Indeed, rigidity is not a shortcoming of victim-centric jurisprudence, but rather of the principle of self-responsibility. It is this criticism that I shall take up next.

IV. ELASTIC VICTIM-CENTRIC JURISPRUDENCE VERSUS THE RIGID PRINCIPLE OF SELF-RESPONSIBILITY

During academic debate on the topic of causation as contained in the general part, the victim-centric approach was transformed by a host of commentators into the allegedly superior principle, the rigid doctrine of self-responsibility. One minute, a philosophy of freedom anchored in German idealism is taken as the justification.

63. See *id.*, § 14, at 21.

64. See *id.*, § 14, at 22.

2004] *THE SYSTEM OF CRIMINAL WRONGS* 575

The next, reliance is placed on a particular philosophy of society, as advocated by the Jakobs school of thought, which uses terminology such as “responsibility” and the “common organization between victim and offender.”⁶⁵ The two approaches are objectionable both because of methodological and substantive reasons. By taking the principle of self-responsibility to be a comprehensive rule, under which one must simply test the elements of the offense, one overlooks the fact that a proportionate criminal political solution requires differentiated approaches to causation. More importantly, one must also query whether a principle of self-responsibility that categorically excludes the criminal responsibility of the offender could even provide the foundation for the present law.

A.

The alleged principle of self-responsibility, which is nowhere to be found in the general, statutory rules on criminal liability, is used primarily to push aside those principles of liability that are, in fact, defined statutorily, in particular the actual control of the offense (Tatherrschaft) and mens rea. According to both § 25 StGB and Art. 28 CP, the concept of a principal (Täterschaft), as the central idea behind the imposition of criminal liability, is based on the criterion of whether the person is in control of the offense, leaving aside the intricacies and exceptions for purpose of this discussion.⁶⁶ In order to control the

65. Heribert Schumann, *Strafrechtliches Handlungsunrecht und das Prinzip der Selbstverantwortung der Anderen* (1986); Susanne Walther, *Eigenverantwortlichkeit und strafrechtliche Zurechnung* 78 (1991); Rainer Zaczyk, *Strafrechtliches Unrecht und die Selbstverantwortung der Verletzten* (1993); Cancio Meliá, *Conducta de la victima*, supra note 56, at 373 (with further references), 377.

66. As to the German law, compare by way of example Claus Roxin, *Täterschaft und Tatherrschaft* 60, 643 (7th ed. 2000); Roxin, LK, supra note 28, § 25, at 7, 34. For Spanish law, see, e.g., José Cerezo Mir, *Täterschaft und Teilnahme im neuen spanischen Strafgesetzbuch von 1995*, in *Festschrift für Roxin* 549, 551 (2001); Diego-Manuel Luzón Peña & Miguel Diaz y García Conlledo, *Objektive positive Tatbestimmung und Tatbestandsverwirklichung als Täterschaftsmerkmale*, in id. at 575, 585; José Cerezo Mir, *Curso de Derecho*

offense, the offender must, as a matter of principle, possess intent (more recent, German tendencies and those supported by a majority in Spain, which make do with recklessness for further principals,⁶⁷ need not be addressed here). This has led to the consequence in German case law that, even if the victim contributes to the offense, the offender's acts continue to be causal for the harm, so long as he was in a better position to assess the risks than the victim was.⁶⁸ In my opinion, this solution is sensible for intentional offenses, since superior knowledge of the risks also means superior control of the offense, which, with a grain of salt, must also be valid for reckless offenses. Jakobs⁶⁹ objects to this conclusion, because, to his mind, the process confuses a mental fact with a normative regulation ("who is responsible?"). Yet he overlooks the fact that the criterion of superior knowledge corresponds precisely with the control of the offense, which by virtue of statute (§ 25 StGB) is proclaimed as being paramount. The shell of "responsibility" has neither a psychological nor a normative meaning—it is quite simply empty.⁷⁰

Penal Español, Parte General III 210 (2001).

67. Joachim Renzikowski, *Restriktiver Täterbegriff und fahrlässige Beteiligung* 288 (1997); Simone Kamm, *Die fahrlässige Mittäterschaft* (1999). For Spain: Diego-Manuel Luzón Peña, *Curso de Derecho Penal, Parte General I* 510 (1996); Santiago Mir Puig, *Derecho penal, Parte General* 392 (1998) (with further references); for case law, see Cerezo Mir, *Curso Derecho Penal Español*, supra note 66, at 226-27.

68. This has been the law since the Heroin-giving judgment of February 14, 1984, BGH, 32 BGHSt 262, which followed upon my criticism (with express mention thereof) of the prior case law. Until then, the courts had allowed the imposition of criminal liability even if the victim was fully aware of the risks of the self-endangerment. See also Bernd Schünemann, *Fahrlässige Tötung durch Abgabe von Rauschmitteln?*, NSTZ 60, 62 (1982) and BGH, 32 BGHSt at 264-65. Later, the Court similarly held in the case of a person infected with HIV during intercourse, when only the person infecting, but not the person infected, was aware of the HIV-infection present, see judgment of November 4, 1988, BGH, 1st Senate, 36 BGHSt 1 and Bernd Schünemann, *Riskanter Geschlechtsverkehr eines HIV-Infizierten als Tötung, Körperverletzung oder Vergiftung?*, JR [Juristische Rundschau] 89 (1989); Bernd Schünemann, *AIDS und Strafrecht*, in *Strafrechtliche Probleme von AIDS im internationalen Vergleich* 9, 11 (Andrzej J. Szwarc ed., 1996).

69. Günther Jakobs, *Strafrecht AT*, at 21/78 n.142h (2d ed. 1993).

70. For a critique hereof, see Bernd Schünemann, *Internationale Dogmatik*

2004] *THE SYSTEM OF CRIMINAL WRONGS* 577

For this reason, dicta of the Supreme Court has quite correctly held that were an unsuspecting burglar to die from drinking out of a liquor bottle that had previously been filled with a deadly poison by the homeowner, the homeowner could properly be convicted of murder, although in this concrete case the Court held that the homeowner had not yet begun to attempt the offense.⁷¹ Supporters of the theory of self-responsibility use the theory and the imputation of responsibility solely to the victim, which allegedly inevitably follows from the theory when there is joint action by both the victim and offender. They thereby avoid the imposition of any liability on the offender. This is being done for instance in the AIDS case and the poison case just mentioned, regardless of whether the person infecting the victim or the person poisoning the victim has superior or perhaps even exclusive knowledge of the risks involved.⁷² In my opinion, the result is iniquitous. However, worse still, the method employed is simply flawed, since new jurisprudential terms, which are nowhere to be found in the law, are being devised and being used to test the various elements of the offense, producing an entirely circular process. Were one to proceed in a correct methodological manner, one must and can only start from the one clear, legislative decision that does exist, which is the fact that the aiding and abetting of euthanasia is not punishable. From there, one can take the next step and conclude a fortiori that a person cannot be punished for aiding or abetting (without being in control of the offense) an act of self-endangerment, which is carried out free of any influence and cognizant of all the surrounding circumstances. However, the next step poses a problem. Where a person consents to be harmed by another person (the control is shared between the two) and both have equal knowledge of the risks involved, one cannot simply test the

der objektiven Zurechnung und der Unterlassungsdelikte 49-51, 57 (Enrique Gimbernat et al. eds., 1995). Schünemann, *supra* note 3, at 1, 17.

71. Judgment of August 12, 1997, BGH, 1st Senate, 43 BGHSt 177, 182 (so-called Bärwurz case).

72. Explicitly Cancio Meliá, *Conducta de la víctima*, *supra* note 56, at 288.

elements by using some pre-established principle. Instead, the problem can only be solved by a criminal political balancing act.⁷³ Where an offender, acting intentionally, uses an innocent agent who harms or kills himself, as in a crass variation of the AIDS case or in the poison case, the use of a supposed principle of self-responsibility, which is articulated nowhere and has no inherent meaning, denies the existence of the criminal responsibility of the offender. This is quite simply an unacceptable jurisprudence *contra legum*.

B.

Victim-centric jurisprudence is very different. It is not simply relevant as a tenet of interpretation for the specific part (indeed, this is its natural environment), where it is every bit as important as the interpretation of the protected legal good.⁷⁴ Its philosophy should also be introduced into the system of causation found in the general part. Again, though, one must be careful not to treat categories unknown to the law, such as the principle of “self-responsibility” and the “the joint action of the offender and victim,” as being headings suitable to help test the various elements of the offense, and thereby succumb to circularity. For this reason, the victim-centric principle is jurisprudentially not limited to the level of causation, in particular of objective attribution, in the general part. Instead, it can provide criminal political insight on any

73. For further discussion on the important distinction in the AIDS context between the participation in another person's self-endangerment and the consensual endangerment of another, which is overlooked by many authors, see Claus Roxin, in *Festschrift für Gallas* 241, 243 (1973); Bernd Schünemann, *Moderne Tendenzen in der Dogmatik der Fahrlässigkeits- und Gefährdungsdelikte*, JA [Juristische Arbeitsblätter] 715, 720 (1975); Bernd Schünemann, *Die Rechtsprobleme von AIDS* 373, 474-75 (Bernd Schünemann & Gerd Pfeiffer eds., 1988); Bernd Schünemann, *Riskanter Geschlechtsverkehr eines HIV-Infizierten als Tötung, Körperverletzung oder Vergiftung?*, JR 89, 90 (1989); Schünemann, *AIDS und Strafrecht*, supra note, 68 at 11.

74. Roxin comes to the same result, supra note 18, § 14, at 22. His position is in the final result, to a great extent, the same as the function of victim-centric jurisprudence, as developed by myself.

level dealing with criminal wrongs. Here are a couple of examples. Victim-centric considerations may have to be considered in discerning the legal good protected by the offense. So, for example, they play a role in determining that the legal good protected by the offense of counterfeiting (§ 146 StGB) is society's interest in the security and reliability of the monetary system,⁷⁵ the harming of which will lead to criminal liability if the notes counterfeited are capable of deceiving unsuspecting persons in their regular dealings.⁷⁶ Because of the tremendous speed with which cash changes hands, which makes precise examinations in the course of commerce impossible or, at least, unreasonable, the legal good corresponding to the monetary system is defined broadly and is only limited by possible "punishable" superficiality of a participant in commerce. Thus, the delimitation of the sphere protected is quite obviously not achieved using criteria external to the criminal law. Instead, one must make use of an assessment of both the deservedness of and need for protection of the monetary system (for good reasons, both are extensive in this example).

The next systematic level of the general part in which the victim-centric principle plays a role is on the level of the already often mentioned objective attribution of the acts of the perpetrator. Unquestionably, the unfolding of the victim's behavior, which occurs in various stages,⁷⁷ is crucial to the question of objective attribution, certainly at least in connection with reckless offenses⁷⁸. This unfolding

75. BGH NJW 2802 (1976); Roland Hefendehl, Zur Vorverlagerung des Rechtsgutsschutzes am Beispiel der Geldfälschungstatbestände, JR 353 (1996). Both include further references.

76. BGH NJW 1844 (1995); Ingeborg Puppe in NK [Nomos-Kommentar zum Strafgesetzbuch] § 146, at 4; Lackner & Kühl, supra note 4, § 146, at 4.

77. As to the four different levels (causal, proximate, risk, and "purpose of the protection" associations), see Bernd Schünemann, Moderne Tendenzen in der Dogmatik der Fahrlässigkeits- und Gefährdungsdelikte, JA 575 (1975); for a critical summary of the popular attempts to combine the risk and "purpose of protection" associations into one concept of a "realization of the illicit risk," see Bernd Schünemann, Anmerkung zum Urteil des BGH v. 3.5.1984 (4 StR 266/84), StV 229 (1985).

78. As to the question of whether principles of causation are the identical for

existed even prior to victim-centric jurisprudence and was captured by the jurisprudential concept of the “protected area of the norm” by Rudolphi and Roxin. Indeed, it is, in essence, even recognized by those commentators who prefer a conduct-based approach, which relies on behavior that satisfies the offense as written, over the results-based approach of objective attribution.⁷⁹

The final level is that of defenses. The legal concept of provoked self-defense, along with the ingenious three-step theory⁸⁰ developed by the Supreme Court, provides an instructive example. It does not involve a rigid, all-or-nothing decision (as a strict application of the theory of objective attribution would dictate), but instead employs the elastic victim-centric maxim. In doing so, the Court has held that provocation is, so to say, compensated by self-protection of the person provoking, which becomes more moderate over a certain period, so that the other person who continues to attack can no longer expect to be treated gently. As this example demonstrates, the maxim is indispensable. It also shows that the maxim does not permit a purely logical, deductive method of arriving at a result. Unlike the formal, intellectual construct of the *actio illicita in causa*, from which one can deduce an intra-system result that only finds isolated support since Roxin’s irrefutable criticism,⁸¹ the victim-centric approach does not

intentional and reckless offenses, see Bernd Schünemann, *Über die objektive Zurechnung*, GA 207, 219 (1999).

79. See especially Hans-Joachim Rudolphi, *JuS* [Juristische Schulung] 549 (1969); Roxin, *supra* note 66, at 241; further developed in Bernd Schünemann, *Moderne Tendenzen in der Dogmatik der Fahrlässigkeits- und Gefährungsdelikte*, JA [Juristische Arbeitsblätter] 715 (1975); although the reasoning is different, the conclusion is not necessarily the same in Wolfgang Frisch, *Tatbestandsmässiges Verhalten und Zurechnung des Erfolgs* 148 (1988).

80. The ground-breaking approach of Claus Roxin, *Die provozierte Notwehrlage*, 75 ZStW 541 (1963) [hereinafter Roxin, *Notwehrlage*], has been creatively developed further by the Supreme Court, see 24 BGHSt 356; 26 BGHSt 145, 256; Claus Roxin, *Die “sozialethischen Einschränkungen” des Notwehrrechts: Versuch einer Bilanz*, 93 ZStW 68, 85 (1981).

81. Against the opinion of Theodor Lenckner, *Notwehr bei provoziertem Angriff*, 108 GA 300 (1961), compare the irrefutable arguments in Roxin, *Notwehrlage*, *supra* note 80. For further material on the current state of the debate, see Roxin, *supra* note 18, § 15 at 64.

2004] *THE SYSTEM OF CRIMINAL WRONGS* 581

deliver a final result. However, what it does do is provide the decisive consideration, that is, in concretizing the limiting requirement that the self-defense be “justified,”⁸² there can be no justification when the person attacked is neither worthy nor in need of protection.

C.

From this, one can summarize the methodological and systematic position of the victim-centric principle, reinforced by the point of view developed by myself in 1977, as follows. The principle provides a crucial factor for determining whether a legal good is worthy or in need of protection. Therefore, it belongs on the level of the criminal wrong, where it provides a regulatory principle for the interpretation of offenses. Furthermore, victim-centric jurisprudence, which naturally flows from the ultima ratio principle, gives the legislator a maxim, which, should he not follow it, would lead to the unconstitutionality of the provision. Although it also plays a role along with the provisions of the general part used to assess the criminal wrong, its principal domain is the specific part. In this sense, it serves as a “bridging principle” between the general and the specific parts. One could mention numerous examples in addition to those already mentioned from the field of sexual offenses. Just one further example is the interpretation of the term “gravity” of the threat in § 240 StGB (criminal coercion), for which the standard is that of a reasonable and not a particularly sensitive person.⁸³ This is not the result of a determination of the harm caused by the act, but rather of a limitation on the protective sphere afforded by the criminal law to the human freedom to act and hence an assessment of the legal

82. The legislator deliberately retained this requirement in order to be able to limit the right to self-defense because of normative reasons, see Bernd Schünemann, *Der praktische Fall (Strafrecht: Liebhaber und Teilhaber)*, JuS 275, 279 (1979).

83. Compare BGH, 31 BGHSt 201; BGH, 32 BGHSt 174; BGH, NStZ 278 (1992); BGH, NStZ 494 (1997); Schönke et al., *supra* note 24, § 240, at 9.

good for purposes of the criminal law. Each person must, as part of social interactions, endure threats, which a reasonable person would disregard. Those who feel their freedom has been limited by such threats may not make use of the protection of the criminal law precisely because of their over-sensitivity.

The victim-centric principle performs a “bridging function” between the general and specific parts, because, analytically speaking, it provides interpretation guidelines for all offenses and is, in that sense, general. Unlike *mens rea*, it is not a concept, which classifies, and the characteristics of which are used to test various factual constellations in the same manner (although admittedly, the way in which this is to be done is a matter of further interpretation⁸⁴). Instead, it is an open principle, which must be individually concretized for each offense, depending on its specific features.

84. For an explanation that the present definitions of intent have only led to an apparent determination of a particular psychological set of facts, but, in truth, cannot exist with a typological concretization, see Bernd Schünemann, *Vom philologischen zum typologischen Vorsatzbegriff*, in *Festschrift für Hirsch* 363 (1999).