

The Limits of Criminal Law

A Comparative Analysis of Approaches
to Legal Theorizing

CARL CONSTANTIN LAUTERWEIN
University of Munich, Germany

ASHGATE

Contents

<i>Foreword by Mark Findlay</i>	vii
<i>Preface</i>	ix
<i>Abbreviations</i>	xi
1 Law, Limits and Legitimacy – Germany and Australia	1
2 The German <i>Rechtsgutstheorie</i>	5
The Function of Criminal Law	5
The Concept Developed by Claus Roxin	8
Consequences of the Concept	10
The Expansion of the Criminal Law’s Scope Beyond the Protection of <i>Rechtsgüter</i>	17
Criminal Versus Administrative Offences	18
The Mutability of the <i>Rechtsgut</i> concept	19
<i>Rechtsgut</i> , Offences of Abstract Endangerment and Collective <i>Rechtsgüter</i>	19
The Protection of <i>Rechtsgüter</i> and the Constitution	21
An Obligation to Criminalize?	22
The Subsidiarity of the Criminal Law	24
Dissenting Opinions in the Literature	24
Jescheck/Weigend, Zipf	24
Welzel	24
Lenckner	25
Jakobs	25
Amelung	25
Stratenwerth	26
The Violation of a Subjective Right or an Interest	26
Help from the English-speaking Debate?	29
Excursus: Additional Functions of the <i>Rechtsgut</i> Concept	30
Statutory Interpretation	30
Consent	31
Necessary Defence	34
Necessity	35
Attribution	36
Methodological Interdependence	37
A Dogmatic Tool for Critique	38

3	The Approach to the Problem – A Problem Itself	41
	The Original Plan and its Alteration	41
	An Analysis Using Contextual and Comparative Elements	43
	The Lack of Literature: Time for a Talk	45
	The Questions	46
	The Interviewees	46
	The Interviews	47
	The Results	48
	The Problems Arising From Two Different Types of Data	48
4	The Discussion in Australia	51
	Several (Limiting) Principles	52
	The Harm Principle	57
	The Offence Principle	63
	Morality	65
	The Welfare Principle	67
	The Public Interest	69
	Paternalism	70
	Republican Theories of Criminal Justice	71
	A Principle for Every Case	72
	A Change Towards Theory	73
	The Classic Understanding: Application of the Law as it Stands	74
	An English Tradition	75
	The New Approach – Theory Overload?	80
	Criminology versus Jurisprudence – Criminalization versus	
	Limits of Criminal Law	81
	More Descriptive than Critical = More Pragmatic than	
	Dogmatic = More Political than Legal	87
	Jurisprudential Benefits: Legal Argumentation	88
5	Incest, Bestiality and Drugs – Legitimately Criminalized?	93
	Incest	94
	Bestiality	104
	Possession of Illicit Drugs	109
	Opinions Without Conceptual Theory	115
6	Conclusions	117
	Summary – The Lack of a Normative Concept	117
	Outlook – A Unique Opportunity	118
	<i>Bibliography</i>	123
	<i>Appendix A</i>	137
	<i>Appendix B</i>	139
	<i>Index</i>	141