Review Essay – Facilitating a Comparative Analysis of Criminal Law: Volker Krey's Bilingual Textbook on German Criminal Law

By Lutz Eidam[*]

[Volker Krey, *Deutsches Strafrecht, Allgemeiner Teil – Teil I / German Criminal Law General Part – Part I (Lehrbuch in Deutsch und Englisch; Textbook in German and English)*; Kohlhammer Studienbücher, 2002; 181 pages; ISBN-Nr. 3170170465; Euro 42.00]

[Volker Krey, *Deutsches Strafrecht, Allgemeiner Teil – Teil II / German Criminal Law General Part – Part II (Lehrbuch in Deutsch und Englisch; Textbook in German and English)*; Kohlhammer Studienbücher, 2003; 198 pages; ISBN-Nr. 3170182439; Euro 40.00]

A. Introduction

As early as 1925, Robert von Hippel, Professor for criminal law and former student of the famous scholar Franz von Liszt,[1] stated in the first volume of his textbook on criminal law that only those will be able to fully overlook the law who appreciate it as a scientific phenomenon within the scope of diverse cultural nations.[2] This introductory note is followed by two paragraphs[3] that exclusively deal with a compara-

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[1] Liszt himself is famous for the founding of the "International Criminal Association" in 1889. *See* ELISABETH BELLMANN, DIE INTERNATIONALE KRIMINALISTISCHE VEREINIGUNG (1889–1933) (1994).

[2] ROBERT VON HIPPEL, 1 DEUTSCHES STRAFRECHT – ALLGEMEINE GRUNDLAGEN 376 (1925).

[3] *Supra* at note 2, §§ 19, 20. Before von Hippel, at the beginning of the 20th century, nearly all of the criminal law professors in Germany were working together on a comprehensive approach to interna-

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tive view of different European, Asian and American criminal law systems. In a time between two world wars, where especially German politics and scholars had to deal with many new legal ideas and difficulties in the first German republic, von Hippel can stand as a good example among criminal law scholars using the spirit of the time to take such a comprehensive view in foreign legal systems.

I. Advantages of a Comparative Approach to Criminal Law

Today issues concerning a comparative approach to criminal law are more or less settled.[4] Most scholars take the time to study different legal systems and learn that criminal justice has the same foundations everywhere in the world,[5] although, at first sight, different codifications seem to lead every country along a path of its own.[6] What's more, lines of international jurisprudence also share similar structures and arguments.[7] Even criminal justice policy debates[8] or case problems[9] now

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tional criminal law. The outcome was a work consisting of 16 volumes which was presented in 1909 and titled: Comparative Presentation of German and International Criminal Law. *See* EB. SCHMIDT, EINFÜHRUNG IN DIE GESCHICHTE DER DEUTSCHEN STRAFRECHTSPFLEGE § 327 (3rd ed).

[4] The Max- Planck-Institute for Foreign and International Criminal Law in Freiburg (Germany) can stand as a good example for an international approach to criminal law. *See* http://www.iuscrim.mpg.de/iuscrim.html for details. *See also* the website of the Buffalo Criminal Law Center, State University of New York at Buffalo, *available at* http://wings.buffalo.edu/law/bclc/ . This website presents – among other criminal law related topics – a collection of international penal and procedure codes.

[5] *See, e.g.*, GEORGE P. FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW (1998). In this book, Fletcher presents twelve issues that inevitably come up in every system of criminal justice and therefore presents evidence on the fact that there is much greater unity among criminal justice systems than one might expect.

[6] *Id.* at 3.

[7] *See, e.g.,* Russell Miller, *The Shared Transatlantic Jurisprudence of Dignity*, 4 GERMAN LAW JOURNAL No. 9 (1 September 2003), *at* http://www.germanlawjournal.com. This article shows that the German as well as the American legal system even in the area of capital punishment share a common foundation of values ("dignity") and arguments, regardless of the very different ends the two systems sometimes make out of these values.

[8] A good example would be the changing view as to Victims' rights in criminal law as well as in criminal procedure law. For the German discussion *see, e.g.,* WINFRIED HASSEMER / JAN PHILLIPP REEMTSMA, VERBRECHENSOPFER (2002); for the American discussion *see* the critical approach of MARKUS D. DUBBER, VICTIMS IN THE WAR ON CRIME: THE USE AND ABUSE OF VICTIMS' RIGHTS (2002).

[9] Recently the German criminal law system faced the problem of how to deal with the issue of cannibalism. See Gisela Friedrichsen, Der Spiegel 6/2004, at 44 ("A border line of criminal law"). By contrast, the issue of cannibalism also brought up difficulties in the old English case *Regina v. Dudley and Stephens*, 14 Q.B.D. 273 (1884). Although the issue in *Dudley and Stephens* was not about the applicable statutory provision (that was the problem in the German case) but whether or not a defense applies to cannibalism in order to avoid dying from starvation, both cases nevertheless can stand as a general example that the

involve professionals all over the world.

To sum up: Criminal law deals with similar subjects and thus more or less the same issues internationally. That's why it is a crucial step for criminal law scholars to cross borders to see what kind of solutions other legal systems have to offer for present and future problems. At the very end of such a comparative journey they will always face a broadening of their horizon, no matter whether one agrees with what he or she finds abroad or not. That is why the outcome can only be an advantage for national legal systems as much as it is for scientific work.[10] This kind of international exchange has been every day business in the natural sciences for decades and one can only hope that the legal specialists will enhance such interaction.

A closer look into German and American criminal law can be recommended as a first such comparative step. The U.S. as well as Germany both can be seen as "Law-Exporting Nations,"[11] since both have a great influence on the legal orders of many countries. One can easily view the export of legal ideas in the rules of procedure and evidence of the ICTY (International Criminal Tribunal for the former Yugoslavia) in The Hague.[12] The rules of procedure and evidence of this court are a mixture of legal rules derived from the adversarial as well as the inquisitorial system.

However, language skills may be a problem in exploring either German or American criminal law. Since English is the (un)official international legal language, legal scholars, lawyers and students might sometimes face the barrier posed by the German language in their efforts to study German criminal law. This problem now seems to be solved, at least for the general part of the German criminal law.[13]

II. The Current Project: Volker Krey's "Genaral Part" of German Criminal Law

In his newly published work, Volker Krey presents the first bilingual textbook on

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same issue might bring the criminal law to its border lines since it is not really used to deal with behavior like this.

[10] *Cf.* George P. Fletcher, *Deutsche Strafrechtsdogmatik aus ausländischer Sicht, in* DIE DEUTSCHE STRAFRECHTSDOGMATIK VOR DER JAHRTAUSENDWENDE – RÜCKBESINNUNG UND AUSBLICK, MUENCHEN 236 (Albin Eser et al. eds. 2000). Fletcher emphasizes that a comparative legal approach has always been a „spiritual garden" for him in which his own spirit can blossom out.

[11] VOLKER KREY, DEUTSCHES STRAFRECHT, ALLGEMEINER TEIL – TEIL I & II / GERMAN CRIMINAL LAW GENERAL PART – PART I & II, Preface.

[12] For information and materials see the official court website *available at* http://www.un.org/icty/.

[13] Unedited, uncommented translations of the German penal code have long been available. *See* The German Penal Code, 32 THE AMERICAN SERIES OF FOREIGN PENAL CODES (Stephen Thaman trans. 2002).

the General Part of German criminal law. The book consists of two volumes and is bilingual in the sense that if the reader opens it up, he will be faced with the German version on the left page and the English translation of this text on the right page of the book.

The following intends not only to present a review of the topics presented in the two volumes of Krey's criminal law textbook, but also to comment on the general value of a comparative approach to the criminal law on these specific topics. So this article intends to go beyond a summary review of the textbook to present Krey's topics in an international context.

In order to get a clear focus, the article will assess the value of this international exchange on the basis of German and American criminal law, however, a comparative approach would also make sense as to every other English speaking legal system such as with the criminal law of the UK.

B. German Criminal Law, General Part – Volume I

In the first volume of his textbook,[14] Krey begins with a presentation of the background and the fundamental principles of German criminal law as opposed to the specific doctrinal rules that are presented in volume two. The only topic covered in volume one that has a more or less doctrinal character is the distinction of criminal offenses in the German criminal code.[15]

I. The Ultima Ratio Character and the Structure of a Code Based Criminal Law

In the first chapter the *protection of legal interests* is emphasized as the main purpose of the criminal law, which is said to be crucial for every human society. This leads directly to the important insight that "the purpose of the criminal law must never be to criminalize mere violations of moral, ethical or religious norms."[16] Krey therefore concludes that criminal law is not an all-round tool to deal with unpopular behavior.[17] Thus, criminal sanctions may be used only where the idea of the protec-

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[14] VOLKER KREY, DEUTSCHES STRAFRECHT, ALLGEMEINER TEIL – TEIL I / GERMAN CRIMINAL LAW GENERAL PART – PART I (Lehrbuch in Deutsch und Englisch; Textbook in German and English) (2002) [hereinafter Krey, Teil I / Part I].

[15] *See* section IV *infra*.

[16] Krey, Teil I / Part I, *supra* at note 14, No. 12.

[17] This, for instance, is laid down in the German maxim of the "fragmentary character" of the criminal law as well. This maxim, however, puts emphasis on codified criminal law to clearly set out the boundaries of criminal behavior. *See* WOLFGANG NAUCKE, STRAFRECHT, EINE EINFÜHRUNG, (10th ed.), § 2 No. 13.

tion of legal interest justifies the use of the criminal law towards people. On that basis, Krey explains the above-announced concept of the subsidiary or in other words the "ultima ratio" character of the criminal law. This means that the criminal law may only be used by the legislature if the constitutional standard of proportionality allows it to do so. Krey then takes his time to explain the important mechanism of proportionality. With these notions he opens up an important discussion that has become more important in Germany in the last years.[18] Finally, Krey addresses the interesting question whether constitutional, European and international law not only set boundaries for the criminal law but also contain the obligation for the state to punish certain behavior.[19]

It seems obvious that thinking about the purpose of the criminal law and about the interaction of criminal law and morals is not exclusively a German issue. Exactly the same issues are covered in American textbooks[20] and other legal literature.[21] Also, the concept of legal interests as the "theory of criminalization" has already been examined from an American point of view as to whether or not it should or may have any influence on American criminal law.[22] Thus, Krey has encountered topics in his first chapter that should be highly interesting and informative for every American reader.

Following this first chapter on the subsidiary character of criminal law, Krey's textbook goes on with a short introduction into substantive criminal law as the "core of penology." At first, emphasis is put on the structure of the *Strafgesetzbuch* (StGB – German Penal Code), which is – just like the American Law Institute's Model Penal

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[18] The constitutional standard of proportionality is *e.g.* discussed by IVO APPEL, VERFASSUNG UND STRAFE 171 – 196 and 576 – 590 (1998) as well as GREGOR STAECHELIN, STRAFGESETZGEBUNG IM VERFASSUNGSSTAAT 101 – 167 (1998).

[19] *Cf.* the critical approach of WOLFGANG NAUCKE, STRAFRECHT, EINE EINFÜHRUNG, (10th ed.), § 2 No. 100 – 102. Naucke stresses that one can read the constitution in two different ways. On the one hand the constitution may contain commands to abolish or at least limit criminal sanctions. On the other hand a command to punish harshly in order to protect certain legal interests of the people may also be found in the constitution. This leads to some confusion and to the conclusion that the constitution does not really contain fixed standards for the criminal law. They seem to be changing and they are in the hand of the judiciary.

[20] *See, e.g.*, Wayne R. LaFave, Criminal Law (3rd ed.), 10 – 12.

[21] For the American discussion on the insufficiency of morals *cf.* H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 265 (1969): "In a society like ours, some tensions and ambivalences are better left unmediated by the criminal law. (…) Morals belong to the home, the school, and the church: and we have many homes, many schools and many churches. Our moral universe is polycentric."

[22] *See* the critical approach of Markus D. Dubber, *The Promise of German Criminal Law* (February 23, 2004), *available at* http://ssrn.com/abstract=508643, III.

Code – divided in a general and a special part. Also, a hint is given as to the law of criminal procedure and other disciplines of penology to round out the presentation of the content of substantive criminal law.

II. The Interaction of Criminal Law and Constitutional Law

The book then returns to an important topic with regard to the criminal law that was briefly addressed in the first chapter: the interaction of criminal and constitutional law.[23] Although this opens up the door for a lot of constitutional issues, Krey limits his approach to the constitutional principle that is most important for the criminal law, namely the principle of legality (*nulla poena sine lege*) as codified in Article 103 II of the *Grundgesetz* (GG – Basic Law / German Constitution) and § 1 of the German Penal Code.[24] The principle is divided up in its three sub-principles such as the prohibition against retroactivity, the rule against analogy and the void-for-vagueness rule. Each of these sub-principles is explained in detail and with some case examples.

At this point, Krey has arrived at an area that can highly be recommended for anyone who wants to compare the German with the American criminal law system. The American legal system is still commonly thought of as a traditional case-law system that is based on the English common law. Although case law still plays a quite important role for doctrinal rules and procedures in certain jurisdictions, it is fair to say that the "age of common penal law is over."[25] Penal law in the US is now made by legislators, not in court opinions by judges anymore. On this basis, the U.S. Supreme Court has invoked a principal of legality[26] that is, to a certain extent, similar to the German standard, but also different in some areas. Legality in the

[23] For the upcoming importance of the constitutional law as an area to set boundaries for the criminal law in Germany *see* IVO APPEL, VERFASSUNG UND STRAFE (1998); OTTO LAGODNY, STRAFRECHT VOR DEN SCHRANKEN DER GRUNDRECHTE (1996), GREGOR STAECHELIN, STRAFGESETZGEBUNG IM VERFASSUNGSSTAAT (1998). As opposed to this upcoming importance of constitutional law in Germany, constitutional law and foundations of the criminal law in the U.S. are more or less ignored in substantative criminal law teaching. On the other hand, American procedural criminal law classes deal with nothing but constitutional law. *See* Markus D. Dubber, *Reforming American Penal Law*, 90 J. CRIM. L. & CRIMINOLOGY 49 at 53 (1999).

[24] For further details on this important constitutional standard *see* WINFRIED HASSEMER, EINFÜHRUNG IN DIE GRUNDLAGEN DES STRAFRECHTS, § 27 as well as WOLFGANG NAUCKE, STRAFRECHT, EINE EINFÜHRUNG, (10th ed.), § 2.

[25] Markus D. Dubber, *Reforming American Penal Law*, 90 J. CRIM. L. & CRIMINOLOGY 49 at 50 (1999).

[26] The main source for the principle of legality is the 5th Amendment of the U.S. federal constitution.

U.S. consists of the sub-principles of "Legislativity,"[27] "Lenity,"[28] "Specificity,"[29] "Prospectivity,"[30] and "Publicity."[31] This shows that the U.S. legal system admits to a void-for-vagueness rule and a prohibition against *ex post facto* law making as it is part of the constitutional law in Germany. On the other hand, the American system does not have an explicit rule against analogy incorporated in the principle of legality, which – as the historical development in Germany proves – must be dangerous for every guarantee of legality.[32] Because of the limited space in this article this interesting discussion on legality can not be continued here, but it is hoped this quick comparative note on German and American legality doctrine will serve as an invitation for English-speaking scholars to explore the issue. As regards the doctrine of legality, systems with different historical and above all cultural backgrounds can learn a lot from each other since the discussion of the doctrine leads back to an all important issue of modern criminal law: The question about limiting principles.[33]

After the detailed discussion of the doctrine of legality as a basic principle of German criminal law, Krey ends the third chapter of his textbook with a brief appendix concerned with the principle of culpability (*nulla poena sine culpa*) to round out his treatment of the constitutional foundations of substantive criminal law.

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[27] Legislativity means that the power to make penal law is restricted to the legislature as opposed to the judiciary or the executive. See the leading case *US v. Hudson and Goodwin*, 11 U.S. 32 (1812).

[28] Lenity requires not only to interpret ambiguous criminal statutes in favor of the defendant but also to interpret them narrowly. *See, e.g., Mc Boyle v. United States*, 283 U.S. (1931).

[29] This principle requires that advance and ordinarily legislative crime definitions are meaningfully precise – or at least not meaninglessly indefinite. *See Conelly v. General Constr. Co.*, 269 U.S. 385, 391 (1926) where the Supreme Court set out the standard for this principle.

[30] Prospectivity brings up the requirement that penal laws are only valid if they are enacted prospectively and is explicitly mentioned in Art. I Sec.9 of the U.S. Federal Constitution. It is commonly referred to as the ban against *ex post facto* law making. *See Calder vs. Bull*, 3 U.S. 386 (1798).

[31] Every act of Parliament, in order to give fair warning, is to be published and promulgated.

[32] For the abolishment of the constitutional prohibition of analogies by the National socialist Party in 1935 as the beginning of legal tyranny in Germany *see* Wolfgang Naucke, *Die Aufhebung des strafrechtlichen Analogieverbotes 1935, in* NS – RECHT IN HISTORISCHER PERSPEKTIVE, KOLLOQUIUM DES INSTITUTS FÜR ZEITGESCHICHTE 71 et. seq. (1981).

[33] *See* WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND 3 (1769): "It [meaning the criminal law] should be founded upon principles that are permanent, uniform and universal; and always conformable to the dictates of truth and justice, the feelings of humanity, and the indelible rights of mankind: (…)". For an enumeration and a critical analysis of limiting principles for the criminal law *see* P.-A. ALBRECHT, DIE VERGESSENE FREIHEIT (2003).

III. Purposes of Punishment

Chapter 4 of the textbook is devoted to the purposes of punishment.[34] Here, Krey discusses and explains the theory of retribution (the so called absolute theory of punishment) as well as the prevention theories (so called relative theories of punishment). Krey not only explains the theories themselves but also gives some historical and philosophical background information that makes it easier to get a comprehensive overview in this area. The book then goes on with an explanation of the judiciary's point of view, the so-called combining theories. Finally, the chapter concludes with enumerating and explaining two provisions in the German penal code (§§ 46, 47 StGB), dealing with the purposes of punishment and with the author's point of view as to the issue of the purpose of punishment.

The theories of punishment are clearly another field ripe for the German/American comparative exercise.[35] The four well-known theories of punishment in the U.S. are explained in § 1.02 of the Model Penal Code.[36] They include retribution, deterrence, incapacitation, and rehabilitation. All of them are also known to and discussed by commentators on German criminal law. Furthermore, it seems to be some kind of unwritten rule that German as well as American courts face the necessity to discuss and elaborate theories on the issue of capital punishment. This can be demonstrated by taking a look in Germany's life imprisonment case[37] on the one hand and in American death penalty cases[38] on the other hand. This once again shows how two different systems share similar approaches to specific problems. A comparison can thus be only advantageous for American readers who get a hold of Krey's textbook.

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[34] For the most complete enumeration of possible purposes of punishment *see* FRIEDRICH NIETZSCHE, GENEALOGY OF MORALS 68 (1st Treatise, Chapter 13) (German Goldmann Edition).

[35] This has been proved by a recent piece of work from Markus D. Dubber, *The Promise of German Criminal Law* (February 23, 2004),*available at* http://ssrn.com/abstract=508643, II. Here, Dubber discusses the German punishment theories with emphasis put on the theory of general prevention from an American point of view.

[36] *See* MARKUS D. DUBBER, CRIMINAL LAW, MODEL PENAL CODE 24 (2002).

[37] BVerfGE 45, 187 (1977), 253 et seq.

[38] For example *Atkins v. Virginia*, 122 S.Ct. 2242 (2002), where the U.S. Supreme Court held that the 8th Amendment of the U.S. Constitution bars the execution of mentally retarded people. Here, the Court derived arguments from the theories of punishment. *See* Lutz Eidam, *Mentally Retarded Offenders and the Death Penalty – The latest Supreme Court Ruling and possible European Influences*, 4 GERMAN LAW JOURNAL No. 5 (1 May 2003), B. III.

IV. Sources of the Criminal Law and Classifications of Criminal Offenses

In chapter 5, the textbook presents the sources of the criminal law to the reader. Krey starts here with a reference to the US. Although Germany is technically a federal republic like the United States, criminal law is not state (as it is in the US) but federal law. That is why the 16 German states do not have their own criminal codes. The textbook then draws the reader's attention to the (federal) German Penal Code that dates back to the founding of the German empire in 1871. Additionally, Krey mentions the constitution, the juvenile court act and the supplementary criminal law as important sources for the criminal law. Lastly, Krey addresses the significance of judicial decisions and legal scholarship for the German legal system. As opposed to certain case created rules that are still alive in many doctrinal rules of criminal law and criminal procedural law in the US, case law is not a source of law in Germany. And with regard to the legal scholarship, the book points out the remarkable influence legal scholars and their publications have on court decisions and teaching in Germany.[39]

Krey then goes on to explain the classifications of criminal offenses in chapter 6 of the textbook. Basically the book starts here with a reference to § 12 of the German Penal Code where the code divides possible criminal offenses up into felonies and misdemeanours. Furthermore, other ways to differentiate crimes in the German Penal Code are explained, such as the differences between intentional and negligent offenses, the peculiarities of the so-called *Erfolgsqualifizierte Delikte* (offenses with fatal result), the difference between acts and omissions and other types of offenses of the "special part." American readers familiar with the structure and the doctrinal rules of the Model Penal Code will discover that the code covers more or less all of these subjects. This fact suggests that the mere systematization of criminal offenses in a code is a rich topic for the comparative approach, since it might deliver the chance to understand the underlying structure of every code's special part.

V. A Supplementary View into the Law of the European Union

The first volume of Volker Krey's textbook ends with a brief supplementary view into the law of the European Union. Although the European Union itself does not have the power to directly create criminal law, it can require the states to enact criminal sanction in their national legal systems in certain areas. Though Krey here just uses a few pages to describe this mechanism, he opens up a complete new field

[39] *See* the criticism of Markus D. Dubber, *Reforming American Penal Law*, 90 J. CRIM. L. & CRIMINOLOGY 49, 68 (1999). Drubber sees a problem in the "over-specialisation" of the highly developed German science of penal law (*Strafrechtswissenschaft*), because if over-specialized, the law will not address the majority of the people, namely its non-expert audience.

of criminal justice policy discussions and problems[40] since the EU is just at the beginning of following a general trend pursuant to which it uses the tools of the criminal law to achieve certain political aims. For English speaking readers who are not familiar with the legal nature of the EU, this is a great incentive to gain a more in-depth understanding of this interesting and problematic new field of criminal law.

C. German Criminal Law, General Part – Volume II

Having laid out the above mentioned general considerations such as the constitutional background and the fundamental principles of German criminal law in the first volume of the textbook, Krey goes directly to the heart of the very detailed doctrinal rules of the general part of German criminal law in the textbook's second part.[41]

I. The Three-step Analysis of Criminal Liability

In the first chapter of the second volume, Krey lays out the general framework for a doctrinal analysis of a criminal case in Germany and explains the three-step analysis for determining criminal liability.[42] He therefore introduces the categories of "Criminality" (the fulfillment of all elements of a codified crime charged), "Justification," and "Excuse" as the basis for analyzing any criminal case. This is to say that, in order to impose criminal liability, certain behavior has to: (1) satisfy all offense elements laid down in a statute (Criminality), (2) be wrongful (no justification), and (3) culpable (no excuse).

The traditional English common law approach (which serves as the basis for Anglo-American criminal law) is radically distinct from such a view. It does not necessarily differentiate between justification and excuse but merely deals with "defenses,"[43] which usually includes all claims of justification and excuse. Neither was

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[40] *See, e.g.*, the detailed work of STEFAN BRAUM, EUROPÄISCHE STRAFGESETZLICHKEIT (2003).

[41] VOLKER KREY, DEUTSCHES STRAFRECHT, ALLGEMEINER TEIL – TEIL II / GERMAN CRIMINAL LAW GENERAL PART – PART II (Lehrbuch in Deutsch und Englisch; Textbook in German and English) (2002) [hereinafter Krey, Teil II / Part II].

[42] For the development of the German tripartite structure of offenses, *see* JESCHECK / WEIGEND, LEHRBUCH DES STRAFRECHTS, ALLGEMEINER TEIL, 5th ed. 194 – 217 (1996).

[43] *Cf.* George P. Fletcher, Basic Concepts of Criminal Law 93 (1998). For a detailed comment on the value and the background of the distinction between Justifications and Excuses *see* Winfried Hassemer, *Justification and Excuse in Criminal Law: Theses and Comments, in* 1 JUSTIFICATION AND EXCUSE, COMPARATIVE PERSPECTIVES 175 et. seq. (Albin Eser & George P. Fletcher eds. 1987).

a statutory provision needed in the common law to impose punishment on an individual, since cases were the important mechanisms that drove the evolution of the legal system.

Yet, American criminal law – at least in certain areas – more and more seems to admit to the three step analysis.[44] Although it is hard to generalize this assumption because of all the different jurisdictions with different criminal codes and doctrinal rules, the Model Penal Code seems to be a good piece of evidence for this development, since it follows a three-step analysis of criminal liability.[45] Also, George P. Fletcher stands as a vivid example of American criminal law scholars promoting the advantages of the three-step analysis scheme.[46]

All these points considered, it seems a good choice for Krey to start his journey through the general doctrinal part of German criminal law by lying out and explaining the tripartite scheme as a general foundation. This is not only because it has been praised as the "most important contribution to Anglo-American criminal law"[47] but also because it helps every reader who is not familiar with German criminal law to assign every fact that is presented in the book into a certain category. This should make it much easier to understand and learn about the doctrinal rules of the general part.

II. Objective Elements of the Offense – Actus Reus

What follows in chapter 9 of the textbook can best be described from an American point of view as presenting the specific elements of the *actus reus* requirement in German criminal law. Krey starts here by showing various types of (physical) offense elements such as a result of criminal wrongdoing (for instance the death of another human being[48]), a (possible) description of the perpetrator (this is important for all statutes that prescribe a special qualification for someone to be a possi-

[44] Apart from certain jurisdictions in the U.S., Japan, Italy, Spain, Greece and some Latino-American countries have adopted the three step analysis of criminal liability.

[45] The Code differentiates in Part I, Article 2, 3 and 4 between "General Principles of Liability" (Art. 2), "General Principles of Justification" (Art. 3) and "Responsibility" (Art. 4). *Cf.* the scheme for an analysis of criminal liability under the MPC of MARKUS D. DUBBER CRIMINAL LAW, MODEL PENAL CODE (2002) § 18.

[46] GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 575 – 579 (1978).

[47] Markus D. Dubber, *The Promise of German Criminal Law* (February 23, 2004). *available at* http://ssrn.com/abstract=508643, Conclusion.

[48] *Cf.* §§ 211 et. seq. German Penal Code ("StGB").

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ble perpetrator[49]) as well as human conduct. With this distinction anyone who is familiar with the doctrinal rules of the American Model Penal Code will find a very similar mechanism. The Code basically differentiates between conduct, attendant circumstances and a result (§ 1.13(9) MPC).[50] Thus, at least the American law Institute's Model Code that has influenced certain jurisdictions in the United States lays out nearly the same differentiation with regard to physical offense elements.[51]

And even what comes next in Krey's textbook shows that the German and American criminal law share a significant congruence especially regarding problems in the area of the *actus reus* requirement. Krey, for instance, explains in detail the necessary requirement of conduct ("human action") that is crucial for establishing criminal liability in both systems, although it must be mentioned in this context that under certain circumstances an omission may also give rise to criminal liability.[52] Furthermore he exposes the concept of causation. The general German concepts of causation and *Objektive Zurechnung* (objective attribution), as well as specific case problems arising in these areas find their parallels in the American concepts of "but-for causation" and "proximate causation."[53] So once more the textbook has illuminated an area of potentially highly fruitful comparative analysis.

III. Different Mental States Applying to Each Offense Element – Mens Rea

The last significant chapter (§ 10) of the textbook deals in great detail with the necessary subjective element of a criminal offense or, to speak in the terminology of the common law: *mens rea*.[54] In Germany, the different modes of culpability applying to

[49] Various specific offenses in the German StGB can only be committed by government officials. *See* §§ 331 et. seq. StGB.

[50] For a detailed explanation *see* MARKUS D. DUBBER, CRIMINAL LAW, MODEL PENAL CODE 43 – 52 (2002).

[51] GEORGE P. FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW 3 (1998) gives the approximate number of 35 state jurisdictions that have been influenced by the Model Penal Code.

[52] The American criminal law system goes even further with its exceptions to the act requirement in the area of Possession Offenses. Here, the mere possession of certain items may result in criminal liability. On that basis, § 2.01 (4) of the MPC simply states that "possession is an act", totally ignoring the upcoming tension between the traditional act requirement for criminal liability. *See generally* WAYNE R. LAFAVE, CRIMINAL LAW (3RD ED.), 211 – 231. For a critical approach, *see* Markus D. Dubber, *Policing Possession: The War on Crime and the end of Criminal Law*, 91 J. CRIM. L. & CRIMINOLOGY 829 (2002).

[53] As opposed to German criminal law, both concepts are defined by statute in the Model Penal Code. See § 2.03(1) (a) MPC (but for causation) § 2.03(1) (b) – (4) MPC (proximate causation). *See* MARKUS D. DUBBER, CRIMINAL LAW, MODEL PENAL CODE 128 – 141 (2002) as well as WAYNE R. LAFAVE, CRIMINAL LAW (3RD ED.) 292 – 299.

[54] For an excellent overview of the underlying structure of intentions and negligence *see* GEORGE P. FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW, Chapter 7 (1998).

the various (physical) offense elements are not codified as they are in certain jurisdictions in the United States. § 15 of the German Penal Code, for example, only holds that all criminal offenses require the perpetrator's intent, unless the criminal statute explicitly opens up the possibility for punishment on negligence. So it was the task of the judiciary to define certain mental states.[55] Krey shows that today's German legal system admits to three different forms of intentional mental states as well as negligent behavior.

If one takes a closer look into § 15.05 of the New York Penal Law, a criminal code that has been influenced significantly by the Model Penal Code and its § 2.02, one finds a very similar distinction when the law invokes the mental states of "intentionally," "knowingly," or "recklessly" engaging in certain conduct. Also, § 15.05 (4) of the NY Penal Law lays out a standard of "criminal negligence."[56] However, these similarities between German and U.S. law might nevertheless create different results because of the very detailed differences in legislative and judicial definitions of the concepts in the two systems.[57] Here, too, a comparative survey would be worthwhile.

Lastly, Krey addresses the concept of mistake with regard to the physical elements of the offense definition as it is mentioned in § 16 of the German Penal Code. The two major groups of mistakes that are deeply rooted in the understanding of the concept of the various mental states and their necessary conditions seem to be the *error in persona / objecto*[58] as well as the *aberratio ictus*[59] in German criminal law. Although at first sight doctrinal forms and cases of mistakes with regard to physical offense elements seem a little different in the U.S., the doctrinal outcome and possi-

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[55] The most difficult task in this area was surely the distinction between *dolus eventualis* (a concept similar to the MPC's mental state of recklessness) and conscious negligence (the highest type of negligent behavior). See Krey, Teil II / Part II, No. 347 et. seq. Most noteworthy is the so called German "Aids Case" in BGHSt 36, 1.

[56] An important difference between German and American criminal law is that Germany does not have a concept of strict liability, meaning that certain offenses impose criminal liability without regard to mental states. See § 15.10 NY Penal Law as well as § 2.05 Model Penal Code.

[57] *See, e.g.,* MARKUS D. DUBBER, CRIMINAL LAW, MODEL PENAL CODE 74 – 76 (2002). Here, Dubber runs a comparison between two different cases involving different mental states of the perpetrator showing that the Model Penal Code might come to a different result than the German StGB with regard to the question of whether or not the perpetrator acted intentionally.

[58] This Latin phrase describes a situation where the perpetrator confuses his intended victim. So if A has the plan to beat up B and as a matter of bad sight, say in a foggy night, hits C because he looks much like B in the dark, we would have a typical situation of an error in persona / objecto.

[59] The situation an aberratio ictus has in mind is not so much confusing a victim but accidentally hitting another victim although the attack has been aimed at the designated victim.

ble consequence comes down to the same question: Whether or not the lack of knowledge of the perpetrator with regard to a certain physical offense element "negatives" the mental state in the current situation. That is exactly the wording of § 2.04 MPC and by means of a generous translation of § 16 I German Penal Code (StGB) this is what this provision comes down to in the end (§ 16 talks about "not acting with intent" as the legal consequence for a mistake).[60] For sure, these kinds of mistakes are difficult to deal with from time to time. But since the underlying structure and question of the problem seems to be similar, once again comparative criminal law thinking might also be of help in this area.

D. Final Evaluation of the Textbook

The discussion of Krey's main topics in this article has surely been much too short and selective in the way that the comparison only was done with regard to Anglo-American law. Nevertheless, the hope remains that this quick overview of the textbook's topics as well as their Anglo-American counterparts will encourage not only American readers but criminal law scholars who are fluent in the English language to respond to the comparative invitation that is implicit in Krey's textbook, to get deeply involved in a study of the general part of German criminal law and to run a comparison of it and their own criminal law system.

Unfortunately the book does not cover the very interesting field of "justification" and "excuse" in detail,[61] although these topics technically belong to the general part of the criminal law as well. So it might leave some questions open for a highly interesting area of comparative work. However, this is not so much meant as criticism but as an invitation to Krey to publish a third volume of the textbook covering these topics.

Also, since the book is addressed to foreign students and professionals,[62] it might in some areas be too rich in detail in its treatment of certain doctrinal rules. For it seems questionable whether a foreign reader is helped by Krey's presentation of complicated doctrinal concepts that are frequently deeply rooted in theoretical aspects and details. This can make a basic understanding difficult, since it is hard to extract the important and basic information on the concept. However, any reader who is troubled with encountering overly detailed information can simply skip this chapter. Also, this is not directly the fault of the textbook because, alas, German

[60] *Cf.* GEORGE P. FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW 156 (1998).

[61] However, the book mentions and enumerates some justifications and excuses while it describes the three step analysis scheme. *See* Krey, Teil II / Part II, No. 210 et. seq.

[62] Volker Krey, Teil I & II / Part I & II, Preface.

criminal law, with its scientific history, is a difficult field that has troubled generations of law students!

Thus Krey's bilingual work seems to be a good point to start for English speaking readers to begin a journey through the general part of German law that will not always be easy but in the end always worth it.

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