BYU Law Review

Volume 1986 | Issue 3 Article 1

9-1-1986

Foreword

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Recommended Citation

W. Cole Durham, *Foreword*, 1986 BYU L. Rev. 523 (1986).
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Foreword: Notes on the Dialogue of German and American Criminal Theory

*W. Cole Durham, Jr.**

In this issue, the Brigham Young University Law Review is pleased to publish the German contributions to a major conference on comparative criminal theory held in Freiburg, West Germany during the summer of 1984.[1] The conference was organized by Professor George Fletcher, who has played a major role over the past several years in stimulating American interest in German criminal theory,[2] and Professor Albin Eser, who currently heads the Max Planck Institute for Comparative and International Criminal Law in Freiburg—one of the foremost centers for the comparative study of criminal law in the world. Conference participants included an array of leading figures in criminal law from the Federal Republic of Germany, Great Britain, and the United States.[3] Many of the papers presented by English-speaking participants have already been published in

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1. The conference, officially entitled the "German-Anglo-American Workshop on Basic Problems in Criminal Theory," was held July 1-21, 1984, at the Max-Planck-Institut für ausländisches und internationales Strafrecht in Freiburg, West Germany. The workshop was supported by the Max Planck Society and the Dana Fund for Comparative Law.

2. *See, e.g.*, G. Fletcher, Rethinking Criminal Law (1978).

3. In order of presentation at the conference, the following professors (or research scholars if identified as "Dr.") participated: David A.J. Richards (New York University), Wolfgang Naucke (Frankfurt), Kent Greenawalt (Columbia), Winfried Hassemer (Frankfurt), David Cohen (U.C.-Berkeley), Theodor Lenckner (Tübingen), Paul Robinson (Rutgers-Camden), Joachim Herrmann (Augsburg), Günter Stratenwerth (Basel), John Kaplan (Stanford), Dr. A.T.H. Smith (Durham, U.K.), Gunther Arzt (Bern), Michael Moore (U.S.C.), Joachim Hruschka (Erlangen-Nürnberg), Sanford H. Kadish (U.C.-Berkeley), Hans-Ludwig Schreiber (Göttingen)[paper submitted, but did not appear in person], Gerhard O. W. Mueller (Rutgers-Newark, Criminal Justice), Karl Lackner (Heidelberg), Norval Morris (Chicago), H. Schüler-Springorum (München), Dr. A. J. Ashworth (Oxford), Björn Burkhardt (Göttingen). In addition, the following individuals (in addition to myself) participated in the discussion: Thomas Morawetz (Connecticut), H.H. Jescheck (Freiburg), Dr. Barbara Huber (Freiburg), Dr. Thomas Weigend (Freiburg), Dr. Mordechai Kremnitzer (Jerusalem), and Johan van der Westhuizen (Pretoria).

leading law reviews in the United States.[4] But until now, the German half of the dialogue has been largely inaccessible.[5] Not since 1976, when a symposium issue of the American Journal of Comparative Law[6] celebrated the then-recent adoption of the new German Criminal Code, has a comparable collection of essays by eminent German criminal law scholars been made available to Anglo-American lawyers.

The Freiburg conference was structured to optimize German-Anglo-American dialogue both at the conference itself and more generally. Participants met daily over a period of three weeks, devoting each day to a different topic of what the Germans refer to as the "General Part" of criminal law. These discussions allowed the participants to encounter and confront each other's ideas with an intensity and depth that could not have been matched in any other setting. While the richness of those exchanges cannot be recaptured in detail here, a basic sense for the structure, challenges, and promise of such comparative dialogue can be conveyed.

The broad contours of discussion are at least suggested by the titles of the articles in this Symposium: they deal with interpretation and analogy in construing statutory definitions of crime,[7] attempts,[8] complicity,[9] justification and excuse,[10] imputation,[11] mistake,[12] causing the conditions of a defense,[13] and in-

4. Fletcher, *The Right and the Reasonable*, 98 HARV. L. REV. 949 (1985); Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 COLUM. L. REV. 1897 (1984); Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CALIF. L. REV. 323 (1985); Moore, *Causation and the Excuses*, 73 CALIF. L. REV. 1091 (1985); Richards, *Interpretation and Historiography*, 58 S. CAL. L. REV. 489 (1985); Robinson, *Causing the Conditions of One's Own Defense: A Study in the Limits of Theory in Criminal Law Doctrine*, 71 VA. L. REV. 1 (1985).

5. Professor Fletcher provided a brief overview of discussion at the conference in Fletcher, *Criminal Theory as an International Discipline: Reflections on the 1984 Freiburg Workshop*, 4 CRIM. JUST. ETHICS 60 (1985).

6. *The New German Penal Code*, 24 AM. J. COMP. L. 589 (1976).

7. Naucke, *Interpretation and Analogy in Criminal Law*, 1986 B.Y.U. L. REV. 535.

8. Burkhardt, *Is There a Rational Justification for Punishing an Accomplished Crime More Severely Than an Attempted Crime?*, 1986 B.Y.U. L. REV. 553.

9. Schreiber, *Problems of Justification and Excuse in the Setting of Accessorial Conduct*, 1986 B.Y.U. L. REV. 611.

10. Hassemer, *Justification and Excuse in Criminal Law: Theses and Comments*, 1986 B.Y.U. L. REV. 573; Lenckner, *The Principle of Interest Balancing as a General Basis of Justification*, 1986 B.Y.U. L. REV. 645.

11. Hruschka, *Imputation*, 1986 B.Y.U. L. REV. 669.

12. Arzt, *The Problem of Mistake of Law*, 1986 B.Y.U. L. REV. 711; Stratenwerth, *The Problem of Mistake in Self-Defense*, 1986 B.Y.U. L. REV. 733.

13. Herrmann, *Causing the Conditions of One's Own Defense: The Multifaceted*

sanity.[14] These are themes of obvious concern and interest to English-speaking criminal lawyers. But the deeper strategy behind making them the central focus of a comparative law conference could easily be lost on someone not steeped in German criminal theory's general system for analyzing criminal acts (*Straftatsystem*). This system, which was more fully described in the first comparative law annual of the B.Y.U. Law Review,[15] exerts a critical molding influence on thought about criminal law in most countries outside the ambit of the common law tradition. From the perspective of German thought, the central focus of the Freiburg conference was the applicability of the overarching categories of the *Straftatsystem*—the definition of criminal norms (*Tatbestand*), wrongfulness (*Rechtswidrigkeit*), and culpability (*Schuld*)—to the (comparatively non-systematic) topography of Anglo-American thinking about criminal law. To use the more penetrating dichotomy suggested by Professor Fletcher's conference paper, the dialogue focused on the comparative virtues of "flat" as opposed to "structured" legal thinking.[16]

Accordingly, the German papers in this issue must be understood not merely as insightful summaries of a set of important topics in criminal law—something that makes them extremely valuable in their own right—but more importantly as efforts to display the shaping forces and the fruitfulness of structured legal thinking in coping with an array of crucial problem areas in criminal law. Thus, Professor Naucke's paper is not merely an essay about interpretation and analogical reasoning, a defense of the classical *nullum crimen sine lege* principle against contemporary inroads, and an argument against the tendency to reduce all of criminal law to policy, or (to use the more direct mode of speech Germans are forced to use since no neutral-sounding word like "policy" is available in their vocabulary) to politics. Rather, it is an effort to identify the opposing background influences at work in contemporary culture that shape the contours of the category of *Tatbestand* itself.

Approach of German Law, 1986 B.Y.U. L. Rev. 747.

14. Lackner, *Insanity and Prevention: On Linking Culpability and Prevention in the Concept of Insanity*, 1986 B.Y.U. L. Rev. 769.

15. Naucke, *An Insider's Perspective on the Significance of the German Criminal Theory's General System for Analyzing Criminal Acts*, 1984 B.Y.U. L. Rev. 305.

16. Fletcher, *supra* note 4, at 951. Fletcher stresses that the label "flat" is not intended to be pejorative. *Id.*

Professor Naucke's position attracted sharp criticism at the conference because of its rigid insistence on a sharp contrast between interpretation (legitimate judicial determination of the "reasonable sense of [a legal] text")[17] and analogy ("an arbitrary administration of justice which threatens freedom").[18] The main thrust of the objections was that this dichotomy apparently presupposes an essentialist theory of language inconsistent with the accepted wisdom of twentieth century nominalism, according to which language is endlessly ambiguous, indeterminate, and open-textured. But on reflection this criticism merely demonstrates the historical point Naucke was trying to make: that behind the structures of definition deployed by a legal culture are rival philosophical views on the nature of law, reason, and language. The fact that other conference participants attacked his position demonstrates the existence of one such philosophical orientation toward *Tatbestand*; the fact that their objections were so animated and concerned is an indirect indicator that the alternative philosophical vision has not entirely lost its hold. Whatever the ultimate merits of the opposed orientations Naucke identifies, he is surely right to suggest that their relative merits cannot adequately be assessed without thinking through the full significance of their differing cultural meaning and impact.

Most of the papers at the conference focused not on the category of definition, but on the second and third tiers of the German system of analysis—wrongfulness (*Rechtswidrigkeit*) and culpability (*Schuld*), or, to use the exculpatory labels Anglo-American lawyers are more wont to use, justification and excuse. Indeed, the focus on these themes was so predominant that the forthcoming volume containing the various papers from the conference that is to be published in Germany under the auspices of the Max Planck Institute in Freiburg will be entitled *Rechtfertigung und Entschuldigung* (Justification and Excuse). One of the unfortunate shortfalls of our Symposium is that we have not been able to include Professor Eser's excellent article, *Justification and Excuse: A Key Issue in the Concept of Crime,* which was written following the Freiburg conference for the German volume.

Leaving this casualty of time and space to one side, the

17. Naucke, *supra* note 7, at 537.
18. *Id.*

range of discussion that is included here is extraordinarily rich. Professor Hassemer provides an extremely useful discussion of the grounds for the distinction between justification and excuse,[19] the criteria that are employed in drawing the distinction,[20] and some of the consequences of structuring legal thought in accordance with these categories.[21] Professor Lenckner explores the extent to which the principle of interest balancing provides the central organizing principle behind the category of justification.[22] In addition to presenting a detailed picture of the way German theory has employed balancing analysis, his piece displays—almost without realizing it—the German tendency to think of balancing primarily as a matter of weighing abstract interests as opposed to the casuistic balancing of concrete interests that seems more instinctive in our utilitarian culture.[23] At a more concrete level, Professor Schreiber's article provides not only an extremely useful overview of the German law of complicity, but a detailed analysis of the way that the categories of justification and excuse help to make this extremely complex terrain more manageable.[24]

Turning to the category of culpability or excuse, we are again presented with a number of provocative contributions. Professor Arzt provides a thorough excursis on German refinements in the field of mistake of law, many of which can contribute to the sharpening of Anglo-American analysis in this area.[25] Professor Lackner examines German doctrine on insanity, using this as the focus for a wider-ranging discussion of developments in German thought about the nature of culpability.[26] Pointing first to the great significance attached to the insistence on culpability as a necessary condition for punishment,[27] particularly in the aftermath of the Nazi experience, he then goes on to chronicle recent German efforts to reconcile culpability principles with preventative or deterrent aims of punishment.[28] This has involved on the one hand the resort to compatabilist conceptions

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19. Hassemer, *supra* note 10, at 573-84.
20. *Id.* at 584-97.
21. *Id.* at 598-609.
22. Lenckner, *supra* note 10.
23. *See generally id.* at 645-64.
24. Schreiber, *supra* note 9.
25. Arzt, *supra* note 12.
26. Lackner, *supra* note 14.
27. *Id.* at 770-74.
28. *Id.* at 774-88.

of free will,[29] and on the other, efforts to integrate culpability concerns with more instrumental or purposive legal theory.[30] For those who have come to see the German insistence on the culpability principle as the hallmark of an anti-consequentialist legal culture, Lackner's article thus provides an important counterpoint. Professor Stratenwerth's paper on mistake in self-defense focuses on what might appear to be a relatively narrow issue—the problem of putative self-defense.[31] In fact, this problem has been a central one for German legal culture, at least in part because it poses difficult boundary problems for the German system for analyzing criminal acts.[32] Accordingly, Stratenwerth's paper provides not only useful insights into a fascinating practical problem, but also helps to show the way that a German thinker reflects on the categories he uses to structure his thought.

Professor Hruschka's article is probably the most challenging in the Symposium. It provides an exhaustive historical and philosophical investigation of the roots of the German *Straftatsystem* in the works of what he refers to as the "practical philosophers of the Enlightenment."[33] On the basis of these works, Professor Hruschka develops a carefully articulated theory distinguishing between two levels of imputation: a first level, which determines that a particular event is a deed or action, and a second level, which analyzes whether the deed or action may fairly be ascribed to the actor.[34] Not only does this theory help to unearth the foundations of structured thinking in German criminal theory, but also argues the undoubtedly controversial thesis that the mere "application of any particular rule, and therewith first level imputation, implies liberty of indifference of the person to whom the criticized occurrence is to be imputed. . . ."[35] More dramatically, Hruschka claims, "Kant's statement that 'all men attribute to themselves freedom of will', which was and still is often misunderstood as an empirical ascertainment, is the expression of logical necessity."[36] The question whether Hruschka

29. *Id.* at 775-80.

30. *Id.* at 780-88.

31. Stratenwerth, *supra* note 12.

32. *See generally* Fletcher; *Proportionality and the Psychotic Aggressor: A Vignette in Comparative Criminal Theory,* 8 ISRAEL L. REV. 367 (1973).

33. Hruschka, *supra* note 11, at 670.

34. *Id.* at 672-80.

35. *Id.* at 709.

36. *Id.* (footnote omitted).

believes that this logical necessity is also an ontological necessity, and thus that his theory of imputation contains an argument for the freedom of the will, I leave to the reader. If Hruschka is indeed claiming the latter, I fear his ontological argument against necessitarianism will fall victim to the same type of argumentation that Kant leveled at the better known ontological proof for the existence of God.[37] Existence does not follow from language (or even use of language) about existents.

The Symposium is rounded out by two further pieces which cut across (but certainly do not ignore) the three-tiered German system. Professor Burkhardt's article[38] explores whether there is a rational ground for punishing a consummated crime more severely than an attempt. His paper does an excellent job of collecting the various possible rationalia that could be considered. Finally, there is Professor Herrmann's paper[39] treating situations where a defendant has caused the circumstances that then give rise to a potential defense. More than some of the other German papers, Professor Hermann's paper is a direct response to the paper of his American counterpart at the conference, Professor Paul Robinson.[40] The latter argued, with some caveats about practical implementation, that the cleanest approach to this type of situation would be a rule which allowed an actor to invoke a justification or excuse regardless of whether he or she brought about those circumstances, coupled with a rule establishing liability for causing justifying circumstances or excusing conditions.[41] Drawing on the more extensive scholarly literature and case law dealing with this issue in Germany, Professor Herrmann advances a variety of examples in which German theory might suggest refinements to and criticisms of a broad theory such as Robinson's. Among other things, he argues that causing the circumstances of a justification should be treated differently than causing an excusing condition, and that this difference derives from basic structural differences between justification and excuse.[42] The contrast between "flat" and "structured" legal thinking is preserved in this context in a particularly interesting way. Here the contrast is not between American pragmatism and

37. *See* I. KANT, THE CRITIQUE OF PURE REASON A*592 B*620 to A*602 B*630.

38. Burkhardt, *supra* note 8.

39. Herrmann, *supra* note 13.

40. Robinson, *supra* note 4.

41. *Id.* at 50-51.

42. *See* Herrmann, *supra* note 13, at 759-63.

continental theory, for Robinson has advanced an elegant and sweeping theory for resolving a wide range of disparate cases. But the very structure of Robinson's theory is "flat" (in Fletcher's non-pejorative sense[43]) or monistic in that it seeks to reduce all "causing-the-conditions" situations to a functional common denominator which will trigger liability or non-liability in consistent ways. By ignoring structural variations identified by the structured German approach, Robinson's theory is not quite as sensitive as it might otherwise be.

Taking the Freiburg dialogue as a whole, its most striking feature was undoubtedly the encounter of rival modes of thought and thus of markedly different legal cultures in the field of concrete problems. The problems themselves do not vary substantially across cultures; they grow out of recurring human situations and common difficulties encountered in the legal regulation of crime. Moreover, basic intuitions of fairness do not differ substantially. There are obvious differences of detail, but the dialogue is carried on within the domain of a shared moral horizon. What differs significantly is the light in which the problems are seen, the perceived systemic interconnections of problems, and the extent to which the legal domain is organized into large architectonic structures or simply left in isolated, relatively disconnected liability structures growing up around particular problem complexes.

The challenges to the type of comparative dialogue opened in Freiburg are legion. They begin at the level of mundane translation problems, but quickly extend into the deepest reaches of differing legal cultures. In part, the publication of this Symposium is an effort to overcome some of the problems of translation with the hope of widening the intercultural dialogue. In this connection, thanks must be expressed to all those who have participated in the process of translating the contributions to this Symposium. Some of the essays were written in English from the outset, but several were originally written in German. Initial translations were provided at the conference in Freiburg; since then the translations have been substantially reworked, in part due to changes made by the authors and in part to polish and anglicize language. We have tried to give appropriate credit for those who have been intensely involved in the translation process, but have not always succeeded. We apologize to those

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43. Fletcher, *supra* note 4, at 951 & n.15.

who remain unnamed, and hope that this word of thanks will suffice.

We have also tried to help bridge the language gap by providing a statutory appendix at the end of this issue[44] translating various code provisions that are referred to frequently in the articles. This appendix and its notes are based largely on translations of various provisions of the 1975 German Criminal Code that Professor George Fletcher prepared for conference participants in 1984. In addition, I have translated a number of provisions from older statutes that are cited. Since these are somewhat more difficult to find, we have published both the German text and my translations of these provisions. Some sense for the difficulties of translating technical legal language can be obtained by reading the notes to this statutory appendix.[45]

Beyond our thanks to the authors of the articles in this issue and to those who have assisted with the translation process, additional appreciation must be expressed to the numerous law students at the J. Reuben Clark Law School who have been involved in this project. This issue is in no small part the result of a unique collaboration between the members of the B.Y.U. Law Review and of the B.Y.U. International and Comparative Law Society. Over the past several years, these two organizations have worked out a symbiotic relationship designed to take advantage of the (by American standards) unusual foreign language facility of students at the law school. This arrangement has made it possible for the Law Review to handle foreign projects that a student journal might not otherwise be able to manage, while at the same time making at least part of the law review experience available to a broader range of students. Part of the challenge of comparative dialogue is finding meaningful ways to enable law students to participate in and contribute to the discussion, and in the process of publishing this issue, we feel we have found and implemented an innovative way of responding to this challenge which will provide the foundation for ongoing commitment to comparative legal studies. Developing the needed organizational structures has not always been easy, and normal student turnover has resulted in further complications and delays. We appreciate the patience and understanding

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44. *Statutory Appendix*, 1986 B.Y.U. L. Rev. 793.

45. In addition, for a description of the particular translation problems associated with translation of the terminology associated with the *Straftatsystem*, see Naucke, *supra* note 15, at 306-07 & n.3, 311-14 & n.13.

of the authors, for whom student journals constitute one more distinctive feature of American legal culture. We cannot begin to thank all the students who have been involved, but special recognition must be given to the efforts of Carl Belliston, Glen Collyer, Rand Henderson, Thayne Lowe, John McClurg, Tadiana Walton, and Chris Wilson, who have played particularly significant roles in overseeing the editing and publication process.

In the final analysis, the promise of this type of venture lies in enriching the mental universe of those who join in the dialogue. In some cases, this may result in concrete proposals for reform, but this is certainly not the only measure. In other cases, the result may be significant rethinking of positions. One example of this can be seen in the published version of Professor Kadish's conference paper on complicity.[46] There he ultimately concludes that the "innocent-wrong" theory, according to which an accomplice can be held liable as an accessory for the wrongful but non-culpable act of a principal, "appears to be the best doctrinal move to justify liability that a court could make without statutory changes."[47] The conference version of his paper was much less sympathetic to this German-derived view. It should also be remembered that not all benefits from the comparative work come in the form of borrowing; sometimes the conscious decision not to borrow is equally valuable. Professor Greenawalt's paper,[48] presented near the beginning of the Freiburg conference, sounded this type of warning. Writing on borderline questions in the domain of justification and excuse, he argued that "Anglo-American criminal law should not attempt to distinguish between justification and excuse in a *fully* systematic way."[49] Excessive "structure" can sometimes be as problematic as excessive "flatness". It may not allow enough flexibility in the borderline moral judgments we make with respect to justification and excuse, and it may not dovetail well with procedural requirements of the American system—most notably, the jury trial.[50] One can learn as much from such caveats as from insight into the foreign system. But whatever the ultimate merits of the comparative dialogue in general, comparative work at the level of the Freiburg papers cannot help but enhance the richness of

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46. Kadish, *supra* note 4.
47. *Id.* at 382.
48. Greenawalt, *supra* note 4.
49. *Id.* at 1898 (emphasis added).
50. *Id.*

the legal theories with which we come to grips with our most basic problems.