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# BOOK REVIEW

*Reviewing:*

Kai Ambos, Antony Duff, Julian Roberts and Thomas Weigend (eds.), *Core Concepts in Criminal Law and Criminal Justice: Volume I*, Cambridge University Press, 2020, 483 pp.

20th century linguistics identified a universal grammar of human languages.[1] While languages are divergent in content, they all observe certain basic rules such as distinguishing verbs from nouns. An associated, contested claim is that there is a language instinct; that the basic grammar is innate, and, in a sense, it couldn't be otherwise.[2] Universal grammar is surprising because language seems to be conventional and contingent the whole way through, and it might be expected that similarities, when found, would be traceable to a common historical source. Criminal law, its substance and processes, would seem just as contingent as language, and that shared features around the world are to be traced to historical events of imperialism and the spread of ideas. But what if there is a universal grammar of criminal law? What if, at their core, there is a certain functionally intelligible way for criminal law structures to be? Even if such a thesis is implausible, it is a brilliant device for illuminating the nature of criminal law, as Finbarr McAuley and Paul McCutcheon's *Criminal Law: A Grammar*[3] showed 20 years ago with its seminal historical and comparative survey of criminal law. Now we have *Core Concepts in Criminal Law and Criminal Justice: Anglo-German Dialogues Volume*

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[1] Steven Pinker, *The Language Instinct: The New Science of Language and Mind* (Penguin Books 1994) 22–24.

[2] *Ibid.*

[3] (Round Hall 1999).

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*I*, (''*Core Concepts*'' from now on) edited by Kai Ambos, Antony Duff, Julian Roberts and Thomas Weigend, the first volume to be published as part of the Anglo-German Dialogue project lead by Professor Ambos at University of Goettingen.[4] In the introductory chapter, the editors describe the aims behind *Core Concepts* as including seeing ''whether it is possible to articulate a common grammar or set of foundational concepts that could provide the basis for productive trans-jurisdictional discussion and progress'' (pp. 3–4). They clarify that this work is not seeking to uncover a pre-existing universal grammar of criminal law, but might go towards constructing it. The eleven chapters that follow the book's introduction are organised into two parts: substantive criminal law and criminal procedure. The contributions rigorously adhere to the book's method of comparative conceptual analysis as indicated by the book's title and explained in the introductory chapter.

All but two of *Core Concepts*' chapters are co-authored with one author German law-based and the other author(s) based in Northern/Western common law-heritage jurisdictions. Every sentence is endorsed by the relevant home expert and the main pitfalls and limitations of comparative legal analysis are traversed. Two chapters, ''Omissions'' by Kai Ambos and ''Participation in Crime'' by Antje du Bois-Pedain, are justified departures from the co-authoring method, given the respective authors' trans-jurisdictional expertise. Lucia Zedner and Carl-Friedrich Stuckenberg's chapter on ''Due Process'' is exceptional in *Core Concepts* in providing two separate parts on their respective jurisdictions of England and Wales and Germany. Their analyses are thus not as interwoven as in other chapters, but their separate parts are each remarkably informative and insightful comments on their own jurisdictions in light of a common understanding of ''due process'' notwithstanding that term not being dominant in the examined jurisdictions.

Along with the omissions and participation chapters, in the substantive criminal law part of the book, Stephanie Bock and Findlay Stark provide a chapter titled ''Preparatory Offences'', Tom O'Malley and Elisa Hoven write about ''Consent in the Law Relating to Sexual Offences''; and Andrew Cornford and Anneke Petzsche analyse ''Terrorism Offences''. In the ''Criminal Justice and Procedure'' part of *Core Concepts*, in addition to the Due Process chapter,

[4] See the webpage at https://www.department-ambos.uni-goettingen.de/index.php/forschung/anglo-german-dialogue, last visited 5 June 2020.

there is a chapter titled ''Proportionality of Punishment in Common Law Jurisdictions and in Germany'' by Richard S Frase, Carsten Momsen, Tom O'Malley, and Sarah Lisa Washington. Julian Roberts and Stefan Harrendorf provide ''Criminal Law Enhancements at Sentencing''; Alexander Heinze and Shannon Fyfe, ''The Role of the Prosecutor''; and Jenia I Turner and Thomas Weigend, ''Negotiated Case Dispositions in Germany, England and the United States''. Finally, Stephen C Thaman and Dominik Brodowski supply a chapter called ''Exclusion or Non-Use of Illegally Gathered Evidence in the Criminal Process: Focus on Common Law and German Approaches''.

*Core Concepts*' chapters are commendably efficient in serving as introductions to a topic as well as advanced critical engagements. Readers will learn as much from the chapters on their familiar areas as from chapters covering areas that are relatively new to them. If a student, academic, or lawyer wanted a primer on, say, due process or plea bargaining, I would send them to the chapters of Zedner and Stuckenberg, and Turner and Weigend, respectively. This would be so even if the reader's concern was located just within one jurisdiction because the key combination of comparative and conceptual analysis is particularly valuable in instructing as to what the criminal law and procedures are and what they can be, and in equipping the reader with critical-analytical lenses to engage and develop their own evaluative position. Turner and Weigend's negotiated case dispositions chapter illustrates this very well because it frames with a wide concept of negotiated case dispositions embracing any leniency whatsoever in sentencing exchanged for defendant cooperation, and can then differentiate the hardcore plea-bargaining practices in the United States from those elsewhere. In the wide sense, negotiated criminal justice is practically unavoidable in the world that we have, but the careful evaluation in the chapter illuminates the way to ameliorate the great risks of false guilty pleas and unfair treatment of defendants.

The *Core Concepts* project works towards a comprehensive analysis of the whole system of criminal law. In this first volume, for example, for substantive law, the chapters on preparatory offences and terrorism offences complement each other, as do the chapters on negotiated case dispositions and prosecutorial discretion in the criminal procedure part. Future volumes will continue to map and analyse the criminal system's landscape. *Core Concepts* is consistent in the strength of its chapters throughout and it provides a number of outstanding contributions to comparative and conceptual criminal

law and procedure analysis. Heinze and Fyfe's chapter on the prosecutor's discretion is an exemplar of comparative analysis because, while Germany and the US are its main jurisdictions of focus, the chapter unobtrusively enriches its account with reference to many other jurisdictions' variations. The chapter is a model of discipline in keeping to its precise enquiry into the prosecutor's *role*, and the authors' comprehensive analysis leads to a conclusion of role ambiguity.

Antje Du Bois-Pedain's chapter, ''Participation in Crime'' is a field-advancing reconceptualisation of secondary liability. Her elegant theory can be related succinctly with three paradigms of participation: mediated action (acting through another), concerted action (acting with another), and parallel action (acting alongside another). This is a departure from the apparent structure of current doctrine in Germany and in England and Wales, but it serves to understand and evaluative current law as well as providing an organising model. Such reorganisation does not involve major reform in terms of the criminal law's diagnoses of various complicity cases, but simplifies and clarifies the analysis. It would make the simple cases easier to handle, better reflecting the pre-legal intuitions about responsibility, as well as being more serviceable (than current doctrines) for the kinds of complicated cases, in particular, cases of spontaneous group violence, that arise. The knots that the UK appeal courts have for years been tying and attempting to undo could be avoided. Du Bois-Pedain's chapter is stunningly original, it should be on every criminal law and philosophy reading list. It sets a mark for criminal law theorists in the advancing understanding of the fraught phenomenon of complicity.

The topic of consent in criminal law is among the few that are no less controversial than complicity. O'Malley and Hoven concentrate on the limits of consent in sexual offences in England and Wales, Ireland, and Germany. They examine the margins of what conduct can be permissible when consensual and the threshold of what will count as valid rather than invalid consent. The authors are inevitably drawn into discussing the English cases of *Brown*[5] and *BM*,[6] which did not involve sexual offences but maiming-type offences, though the impugned activity, especially the sado-masochist practices in *Brown*, may be recognised as sexual. O'Malley and Hoven's review of the peripheral cases of consent is hindered by an unstable understanding

[5] [1994] 1 AC 212.

[6] [2018] EWCA Crim 560.

of the central case of consent. They open their chapter with a statement that is not subsequently qualified or rejected:

> 'It seems obvious that the presence or absence of consent can make all the difference between, on the one hand, a meaningful and loving sexual act between two people and, on the other, a serious violation of the human dignity and personal autonomy of those people.' (p. 135)[7]

Far from obvious, this contention is false in respect of the concept of consent that the chapter addresses because consent, as recognised in law, entails neither love nor "meaning"; sexual activity may be devoid of love or even enjoyment and yet be consensual.[8] One could stipulate that consensual sex is just where there is love and meaning, etc, but such a concept of consent will not help analysis of existing law given the gulf between consent-as-love and extant doctrinal-legal conceptions of consent. The authors cite Heidi Hurd's influential account of the "moral magic" and transformative power of consent in law and morality (p. 136).[9] Hurd's account is recognised elsewhere[10] as putting forth literal falsehoods, for example, that consent transforms a trespass into a dinner party and rape into lovemaking,[11] that nonetheless serve as explanatory devices to convey the dramatic, somewhat mysterious normative power of consent. O'Malley and Hoven, however, use the "moral magic" claim to set up their evaluation of what consent should be in law: 'If indeed consent is to be viewed as "moral magic", it should undoubtedly be as genuine and well-informed as possible, rather than being based upon or induced by a mistake as to some significant circumstantial factor' (p. 152).

[7] The next page repeats the claim, "[a]n act of heterosexual intercourse may be a crime or an expression of mutual love, depending on whether both parties freely consent to the act." (p. 136)

[8] Robin West, "Sex, Law, and Consent" in Miller and Wertheimer, *The Ethics of Consent: Theory and Practice* (Oxford University Press 2010), Tanya Palmer, "Distinguishing Sex from Sexual Violation: Consent, Negotiation and Freedom to Negotiate" in Reed, Bohlander, Wake, and Smith (eds), *Consent: Domestic and Comparative Perspectives* (Routledge 2017), John Gardner, "The Opposite of Rape" (2018) 38 OJLS 48.

[9] Heidi M Hurd, "The Moral Magic of Consent" (1996) 2 Legal Theory 121.

[10] Victor Tadros, *Wrongs and Crimes* (Oxford University Press 2016), p. 214; Robin West, "A Comment on Consent, Sex, and Rape" (1996) 2 Legal Theory 233, p. 249; Michelle Madden Dempsey, "Victimless Conduct and the Volenti Maxim: How Consent Works" (2013) 7 Criminal Law and Philosophy 11, p. 12.

[11] Hurd, "The Moral Magic of Consent" (1996), p. 123.

Outside of sexual offences, the authors, in passing, overestimate the work consent does when they say that consent is what makes boxing non-criminal (p. 136). This is not accurate. Courts have specified factors such as organisational structure, safety measures, and social utility,[12] in addition to consent, in explaining why a boxing match does not give rise to criminal liability. In contrast to boxing, for sexual relations between non-closely related adults of sound mind, for the question of criminal liability, consent *can* make all the difference in modern liberal states. So limited, the consent-as-transformative thesis holds, though "transformative" is still not an ideal term given that consensual acts are not typically initiated as something other than consensual, which consent then transforms. In any event, just because consent is the primary factor marking the difference between criminal and non-criminal in this particular context does not mean that it must bear all the burden for making the law respectful and promotive of autonomy, which is the guiding principle invoked by O'Malley and Hoven for the shape of sexual offences. It is uncontroversial to measure sexual offences by reference to autonomy, but the augmentation of consent – that is, requiring it to be "as genuine and well-informed as possible" or embodying substantial personal value, something "meaningful" – is a problematic path to promoting autonomy. Consent's autonomy-promoting power largely comes from the fact that it can operate simply as a matter of will. To borrow an observation from John Gardner, in the right setting, I can consent to a dental procedure even though I in no sense desire or welcome, or can bring myself to desire or welcome, the drilling to my teeth and so on.[13] I can consent to the dental procedure even though it is not feasible for me to be *fully* (as opposed to reasonably) informed about it because it is not worth the time and effort for the dentist, and for me, to get to that place. There are differing moral considerations across dental procedures and sexual activity but there is a common concept that picks out an autonomy-exercising normative power held by each person to make it permissible (in morality and in law) by an act of sheer will for another to do something to them that is otherwise impermissible. This is the core concept of consent. Sexual autonomy would be cut down if sex is permissible only when consensual in the augmented sense that O'Malley and Hoven at times favour, yet this is

[12] *R v Wilson* [1997] QB 47; *Jobidon v R* [1991] 2 SCR 714; *R v Coney* (1882) 8 QBD 534, cited by the authors on p. 136 in connection to the claim about boxing's legality.

[13] John Gardner, "The Opposite of Rape" (2018) 38 OJLS 48.

not their aim in evaluating the peripheral cases, for which they needed a more secure understanding of what the central, non-peripheral case of consent is.

*Core Concepts*' chapter on preparatory offences by Bock and Stark addresses what is usually considered a subset of the topic of inchoate offences, which in turn refers to liability for action where a crime was not completed but was attempted, incited, or conspired towards. Bock and Stark want to highlight the criminalisation of pre-attempt preparatory conduct, which is less proximate to a completed offence than traditional attempt liability (p. 55). They say it is harder to justify criminalisation the more removed the conduct in question is from the completed criminal harm (p. 56). There is some tension, however, in the chapter's overall endeavour of picking out preparatory offences as a grouping that give rise to a criminalisation concern for being remote from criminal harm. For it is not the criminalisation of preparatoriness *per se* that is problematic, from the evaluative perspective that the chapter uses, but the criminalisation of activity that is remote from completed crime. While preparatory work is often remote from the end to which it is directed, it is not always so. Action may be preparatory yet very close to a completed crime. Think of releasing the safety control on a gun immediately before shooting somebody dead, or even simply taking aim before firing. This conduct is preparatory for killing: The weapon is being prepared to deliver a lethal shot, but it is obviously not remote from killing; hence the wisdom in the traditional common law formula for a criminal attempt as an act "more than merely preparatory"[14] towards a crime. "Merely" is important in this formula, recognising that preparation flows into and through the execution of a deed. It is only *mere* preparation, not all conduct that displays preparation, that the common law sought to exclude from the sphere of attempt liability. Likewise, conduct may be quite remote from a completed crime but not have "preparatory" as its salient description. If a crime boss orders a hit to be carried out on someone, it amounts to a traditional inchoate offence of incitement to murder. The order may remote in time and space from the completed crime but from the incitor's point of view it is not preparatory but rather their complete and final involvement. One can adjust the example to stay within attempt liability – imagine someone setting a trap, designed to cause injury, that may or may not be sprung any time soon. Endangerment type offences that criminalise risk, as opposed to materialised harms, raise

[14] As codified in England and Wales' Criminal Attempts Act 1981.

concerns about remoteness from harm and yet for such offences preparation may not be of any relevance. While "preparatory" usefully picks out a remarkable trend among, for example, the modern terrorism offences, as Cornford and Petzsche address in great detail in their chapter, it only contingently, albeit frequently, connects to Bock and Stark's main critical reflections. We can think of their chapter's subject matter as *merely preparatory offences* to match the neat alignment between description and evaluation that the chapter overall delivers.

*Core Concepts'* first substantive chapter, on omissions liability, by Kai Ambos, among other things, highlights a deficiency in common law thinking. Only some common lawyers have recognised a distinction familiar to civil lawyers between pure omissions (omissions proper) and commission by omission or improper omissions (p. 22). A pure omission is a particular offence of not doing what was expected, for example, a failure to rescue offence.[15] The essence of such an offence is inaction. An improper omission may arise with an offence that consists in bringing about a particular result, which can be committed by not doing something in a certain context, for example, where a parent effectively kills, and therefore murders, their child by not feeding them.[16] Ambos' observation may be taken to amount to, at most, a charge of a lack of imagination; it might be said that it doesn't expose a gap in common law exegesis because the common law systems simply don't have omissions proper (p. 22). But this would be a complacent response by a common lawyer. Common law has long had the offence of misprision of felony, which was the offence of failing to report to authorities one's knowledge about the commission of a felony crime by another.[17] Misprision of felony has been abolished in modern times. Where the offence has been preserved in name in federal US law, it is now a crime of action, that of *concealment*.[18] In Ireland, which is arguably the most common law-

[15] Article 63 of the French *Code Pénal*.

[16] *R v Gibbons & Proctor* (1918) 13 Cr App Rep 134.

[17] Christopher M Curenton, "The Past, Present, and Future of 18 U.S.C § 4: An Exploration of the Federal Misprision of Felony Statute" (2003) 55 Alabama Law Review 183.

[18] 18 U.S. Code § 4.

soaked criminal law modern jurisdiction since areas such as inchoate liability, homicide offences, and some defences remain untouched by statute, you can find the modern equivalent of misprision of felony that criminalises pure inaction on witnessing or learning about a serious (i.e. felony-equivalent) offence[19] or a financial or ''white collar'' offence.[20] Liability for these offences may apply in the absence of a pre-existing duty towards a victim or threatened victim of harm. Speaking of which, in respect of child victims, modern criminal law in common law systems have special part offences that seem equally capable of being committed by inaction as by action, though, like endangerment offences generally, they would be classed as improper omissions in Ambos' analysis. This simple omissions liability distinction from early in Ambos' chapter, a chapter which goes on to excavate the underlying normative arguments around omissions liability, shows comparative conceptual analysis enriching the understanding of one's own system and also that the underlying structure of the two traditions is more similar than often supposed. We are not that far from the universal grammar after all.

[19] Section 9 of the Offences Against the State (Amendment) Act 1998: ''A person shall be guilty of an offence if he or she has information which he or she knows or believes might be of material assistance in (a) preventing the commission by any other person of a serious offence, or (b) securing the apprehension, prosecution or conviction of any other person for a serious offence, and fails without reasonable excuse to disclose that information as soon as it is practicable to a member of the Garda Síochána.''

[20] Section 19 of the Criminal Justice Act 2011. The term ''white collar'' is not used in the legislation.