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When more than one person is involved in a criminal offense, various questions arise. It must be determined whether and to what extent actions of one party will be imputed to another party and whether distinctions will be drawn between different types of participation in the criminal offense. Furthermore, it must be determined how justifying or excusing one participant affects the liability of others. Since the effect on various participants of claims that justify or excuse depends on the statutory structuring of the legal categories of perpetration and complicity,[1] it will be useful at the outset to describe the applicable rules in their historical context.

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* Richter, Hannover, 1962; Habil., Bonn, 1970; Prof., Göttingen, 1971. This article was translated from German by Professor W. Cole Durham, Jr., J. Reuben Clark Law School, Brigham Young University. Tadiana R. Walton assisted in polishing the article. The author also wishes to thank his assistants, Detlev Bortfeldt and Michael Perels, for help in preparing this article.

At several points in the text, explanatory material has been added in brackets ("[ ]") by the translator. In addition, translator's notes are added at various points in the footnotes. Translator's notes are clearly labeled. Professor Schreiber is not responsible for the translator's additions.

1. Trans. Note: German law employs a variety of terms to characterize various possible ways in which individuals may be implicated in crime. I have attempted to translate German terms consistently throughout, although in some cases a single German term may have more than one English equivalent, in which case I use the English terms interchangeably, depending on context. It may prove useful at the outset to provide a brief terminological map, to make it clear how the various German terms are being translated.

The most all-encompassing term in this area is "*Beteiligung,*" which corresponds quite literally to the English term "participation." Within this category, there are two broad subheadings: "*Täterschaft*" (perpetration) and "*Teilnahme*" (complicity, accessorial liability, secondary liability). The basic distinction between these two categories is that in cases of perpetration, the liability of the "*Täter*" (the "offender" or, literally, the "doer") is direct, while in *Teilnahme,* liability is derivative from some instance (or pseudo-instance) of direct liability for perpetration. The terms "*Teilnahme*" and "Complicity" could both be used in the broader sense of "*Beteiligung*" or "participation," but in legal usage, they tend to refer to cases of secondary liability.

Within the general category of perpetration, German law distinguishes three subcategories: "*(Allein)täterschaft*" (sole perpetration, or simply, perpetration), "*Mittäter-*

I. Historical Context

The German Criminal Code,[2] in contrast to the German Code of Violations[3] and the Austrian Criminal Code,[4] does not use what is referred to in German literature as a unitary concept of perpetrators.[5] Instead, section 25 of the German Criminal Code differentiates among three forms of perpetration: sole perpetration (*Alleintäterschaft*), co-perpetration (*Mittäterschaft*), and indirect perpetration (*mittelbare Täterschaft*).[6] Sections 26 and 27 of the Code also differentiate between two forms of par-

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schaft" (co-perpetration or joint perpetration), and "*Mittelbare Täterschaft*" (indirect perpetration or perpetration by means of another). *Mittelbare Täterschaft* is an extremely important doctrine, corresponding to some extent to the common law notion of commission through an innocent agent, though the former concept is broader because it does not insist on the "innocence" of the agent to the same degree. Fletcher's translation as "perpetration-by-means," G. Fletcher, Rethinking Criminal Law 639-40 (1978), has the advantage of suggesting immediately what is at stake and of being quite close to the original ("*mittel*" = "means"), but the disadvantage of being a little cumbersome. I have compromised by using "perpetration-by-means" and "indirect perpetration" interchangeably in translating the underlying German words.

In general, one might use the common law term "principal" instead of "perpetrator" to translate the underlying German terms used in connection with direct liability, but that term is linked with agency law in common law countries in ways that can cause confusion. Besides, the categories of first and second degree "principalship" at common law do not correspond precisely to the German categories.

The German terms "*Tat*" and "*Täter*," in addition to their linkage to perpetration, can mean simply "act" and "actor" or "offense" and "offender," and in some cases they have been translated in that manner.

In the course of discussing "*mittelbare Täterschaft*," one encounters two other figures, the "*Tatveranlasser*" (the party who induces the act (or offense)) and the "*Tatmittler*" (the party who carries out the offense or, more literally, the act mediator). Literature refers to these two respectively as the "*Hintermann*" (the "rear person," or more literally, the "behind man") and the "*Vordermann*" (the "front person").

In the category of derivative liability, the landscape of German law appears somewhat different than its Anglo-American counterpart. English has the term "accomplice," which covers this entire category, but also applies to cases of co-perpetration. "Accomplice" tends to mean simply "partner in crime." The term "accessory" corresponds more directly to the German category of "*Teilnahme*." Within the field of accessorial liability, German law distinguishes two basic subcategories, "*Anstiftung*" and "*Beihilfe*." I have translated these as "instigation" and "facilitation."

2. Strafgesetzbuch [StGB] (W. Ger.).

3. Gesetz über Ordnungswidrigkeiten, Bundesgesetzblatt, Teil I [BGBl] 81 (W. Ger.) (1975).

4. Strafgesetzbuch (Aus.).

5. H. Jescheck, Lehrbuch des Strafrechts: Allgemeiner Teil 538-39 (3d ed. 1978).

Trans. Note: According to this conception, anyone who participates in causing a crime is treated as a perpetrator. Provisions grading offenses do not allocate lighter punishments to accessories than to perpetrators. French, British and American law use this approach. *See* G. Fletcher, *supra* note 1, at 636.

6. StGB § 25. Indirect perpetration may also be called perpetration-by-means.

ticipation: instigation (*Anstiftung*) and aiding and abetting or facilitation (*Beihilfe*).[7] These distinctions derive from historical tradition.[8]

The history of the modern doctrine of perpetration and complicity goes back to the middle of the 18th century.[9] The Prussian Code of 1794[10] was most significant in this development. Sections 64-77 of that code had detailed provisions covering perpetration and complicity. Anyone who participated in the actual performance of a criminal act was punished as a perpetrator.[11] Involvement of multiple parties resulted in heightened punishment.[12] A person who helped carry out another's crime was an instigator.[13] Rules covering facilitation were developed casuistically. Among other things, facilitation was defined as rendering necessary aid (*notwendige Hilfeleisten*) other than directly participating in the execution of the crime.[14] Assisting the perpetrator through counsel or direction constituted unnecessary assistance.[15]

Conceptually, the 1794 Prussian Code was more refined than earlier codifications.[16] Concepts were more abstract; the differentiation of perpetration from complicity was structured on the basis of the formal-objective theory of perpetration that had been developed in German common law. [The essential notion of this theory is that perpetrators are only those individuals whose personal, objectively discernible conduct carries out actions that are formally violative of concrete norms defined by the "special part" (as opposed to the "general part") of the criminal law.] In light of this conceptualization of the idea of perpetration, a person who contributed to performing another person's crime was punished as a mere instigator, because he was not personally responsible for the principal offense.

In the first half of the 19th century, a division in legal opinion began to emerge. Feuerbach regarded all cases falling within

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7. *Id.* §§ 26, 27.

8. *Cf.* 1 R. VON HIPPEL, DEUTSCHES STRAFRECHT 74 ff. (1925); 2 R. VON HIPPEL, DEUTSCHES STRAFRECHT 441 ff. (1930).

9. *See* 2 R. VON HIPPEL, *supra* note 8, at 443; H. JESCHECK, *supra* note 5, at 76.

10. ALLGEMEINES LANDRECHT FÜR DIE PREUSSISCHEN STAATEN (Prussia) (1794).

11. *Id.* § 64.

12. *Id.* § 66.

13. *Id.* § 67.

14. *Id.* § 71.

15. *Id.* § 76; *see* 2 R. VON HIPPEL, *supra* note 8, at 279.

16. 2 R. VON HIPPEL, *supra* note 8, at 287.

section 67 of the 1794 Prussian Code as cases of instigation. Other legal scholars, such as Luden, believed that cases in which the actor was merely an innocent agent, or puppet, of the instigator should be treated differently.[17] The Luden group believed that these cases should be treated as instances of perpetration, since the instigator appeared to be the only guilty party. Thus, the concept of indirect perpetration emerged at the beginning of the 19th century.[18]

This doctrinal situation created the need for a new theory of perpetration, since the formal-objective theory could not account for indirect perpetration and its corresponding concept of a perpetrator who does not personally carry out the offense. Perpetrators and facilitators (*Gehilfen*) now had to be distinguished according to subjective considerations. Actors who thought the criminal act involved as their own were perpetrators, and actors who perceived themselves as mere contributors to execution of someone else's criminal act were facilitators.[19] This subjectivist approach to distinguishing perpetration from complicity, however, did not immediately prevail in academic circles; rather, it was slowly implemented in judicial decisions.[20]

Furthermore, accessorial liability was conditioned both on the wrongful (*rechtswidrige*), intentional commission of a crime by the actor who carried out the offense, and on the intent of the accessory to elicit both the decision to commit the crime and the commission of the crime itself. One who induced an insane person or a person suffering from diminished capacity to commit a crime, or who induced the crime through coercive force, or by commanding a person who had a duty to obey, was regarded as a perpetrator. One who intentionally (*dolose*) instigated merely negligent (*culpose*) crimes was also regarded as a perpetrator.[21]

Today, this form of perpetration is characterized as indirect perpetration by means of a puppet figure who is acting without intent. The subjectivist separation of perpetration and complicity also provided the basis for development of a definition of co-perpetration: co-perpetrators were those who, on the basis of a

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17. *See* 2 R. VON HIPPEL, *supra* note 8, at 445; F.-C. SCHROEDER, DER TÄTER HINTER DEM TÄTER 19-21 (1965).

18. *See* F.-C. SCHROEDER, *supra* note 17, at 19.

19. *Id.* at 23; *see also* 2 R. VON HIPPEL, *supra* note 8, at 445.

20. *See* Roxin, in 2 STRAFGESETZBUCH: LEIPZIGER KOMMENTAR §§ 25-29 and Marginal No. 5 (H. Jescheck, W. Russ & G. Willms 10th ed. 1985).

21. 2 R. VON HIPPEL, *supra* note 8, at 445 ff.

jointly framed totality of intent (*Gesamtwillen*), committed the offense both mentally and physically as their own affair.[22] These definitions and differentiations provided the basis for rules governing perpetration and complicity under the Prussian Criminal Code of 1851[23] and in the Reich Criminal Code of 1871.[24] These rules were valid and remained in force until 1975, except for certain modifications made in 1943, of which more will be said later. Section 47 of the Reich Criminal Code provided: "If a number of individuals carry out a punishable action jointly, each will be punished as a perpetrator."[25] This definition was deemed sufficient to distinguish perpetration and facilitation.[26] Section 47 of the Reich Criminal Code can therefore be viewed as the direct predecessor of current section 25 Paragraph 2 of the German Criminal Code.[27] As yet, however, the Reich Criminal Code contained no general concept of a perpetrator; rather, perpetrators were identified using the statutory elements of offenses (*Tatbestände*) in the special part.[28]

The dominant view understood "punishable action" in section 47 of the Reich Criminal Code as a wrongful and culpable (*rechtswidrige und schuldhafte*) action. Accordingly, a co-perpetrator who acted culpably could not be punished if the other co-perpetrator, either by reason of insanity, diminished capacity, or lack of intent, was incapable of acting culpably.[29] Section 48 of the Reich Criminal Code defined an instigator as anyone who induced another to commit a punishable act.[30] Section 49 of the Reich Criminal Code provided that an individual should be punished as a facilitator if he knowingly—by word or by deed—rendered assistance to the perpetrator's commission of a crime or misdemeanor.[31] Although "punishable act" and "crime or misdemeanor" in sections 48 and 49 were not clearly defined, generally a person could only be punished as an instigator or

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22. *Id.* at 446.

23. PREUSSISCHE STRAFGESETZBUCH (Prussia) (1851).

24. STRAFGESETZBUCH FÜR DAS DEUTSCHE REICH [RStGB] (Ger.) (1871). See the Statutory Appendix for translation of the 1871 provisons.

25. RStGB § 47.

26. 2 R. VON HIPPEL, *supra* note 8, at 446 n.8.

27. StGB § 25(2).

28. Gallas, *Täterschaft und Teilnahme,* in MATERIALIEN ZUR STRAFRECHTSREFORM 121-25 (1954).

29. *See* Judgment of Apr. 16, 1888, Reichsgericht, Ger., 17 Entscheidungen des Reichtsgerichts in Strafsachen [RGSt] 413; Gallas, *supra* note 28, at 138.

30. RStGB § 48.

31. *Id.* § 49.

facilitator if the principal offender met the elements of a wrongful and intentional, or at least culpable, offense.[32]

In this period, the slogan "accessorial nature of complicity" also emerged. This phrase meant that instigation and facilitation were only punishable if a wrongful and culpable principal offense had been committed. Punishment of accessorial conduct was conditioned on a punishable main offense based on the argument that complicity derives its punishability from the punishability of a main offense.[33] Nonpunishment of complicity, owing to the derivative character of accessorial liability, was deemed inequitable in certain cases; thus, even though no express statutory provision provided for it, indirect perpetration was utilized to impose liability. At that time, indirect perpetration was viewed essentially as a catch-all for otherwise nonpunishable cases of complicity.[34]

As previously indicated, co-perpetration and facilitation were, until this century, distinguished on the basis of purely objective considerations.[35] A perpetrator was one who personally committed proscribed (*tatbestandmässige*) conduct; an accessory was one who contributed supportive action to such conduct, without himself performing the proscribed act. In German literature, this differentiation is referred to as the restrictive concept of perpetration and the objective theory of complicity. In every instance, the act of perpetration could be specified only by reference to prohibitory norms in the special part of the Reich Criminal Code.[36] The derivative punishability of instigation and facilitation was thus based only on express provisions[37] because neither instigation nor facilitation constituted conduct violative of prohibitory norms of the special part. Instigation and facilitation thus appear as statutory grounds for the expansion of what is by comparison the core area of criminal liability: perpetration as defined by the prohibitory norms of the Special Part.

The restrictive concept of perpetration and the objective theory of complicity distinguished very sharply between perpetration and complicity, but was bound too formally and rigidly

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32. *See* 2 R. VON HIPPEL, *supra* note 8, at 448.
33. *Id.* at 448-50.
34. *Id.* at 470.
35. *Id.* at 453-54; H. JESCHECK, *supra* note 5, at 527; Gallas, *supra* note 28, at 122.
36. *See* H. JESCHECK, *supra* note 5, at 527; Gallas, *supra* note 28, at 122.
37. RStGB §§ 48, 49.

to the wording of the Code.[38] Under the Code, only those who personally carried out proscribed conduct could be punished as co-perpetrators.[39] Thus, a gang leader who planned and directed but did not personally carry out a robbery could be punished only as an accessory. Moreover, this approach could not explain indirect perpetration.[40]

In the 1920s and 1930s, in order to overcome the inadequacies of the restrictive concept of perpetration, a broad concept of perpetrators (*extensiver Täterbegriff*) and a subjective theory of complicity developed.[41] This theory actually originated during the mid-19th century when certain cases of instigation, which were thought to deserve punishment at the same level as perpetration, were being reclassified as indirect perpetration.[42]

In principle, the broader concept classified everyone who contributed causally to occurrence of the proscribed result as a perpetrator.[43] The theoretical foundation of this approach was the theory of conditions (*Bedingungstheorie*). This theory provides that every condition for a particular result is causally related to the result, if the condition cannot be omitted without a failure of the result (*conditio sine qua non*).[44] Since under this theory every causal act leading to a certain result is deemed equivalent in the sense of being just as much a cause of the result as any other cause, it followed that every person who contributed causally to commission of a crime was a perpetrator. Instigators and accessories, since they contributed to the causal process that led to a criminal result, were actually perpetrators. Under this broad theory a unitary concept of perpetrators underlies the criminal law.[45] From the perspective of this expansive theory of perpetration, instigating and facilitating appear as grounds for narrowing liability, since the statutory provisions governing them cover only a portion of the potential domain of

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38. H. JESCHECK, *supra* note 5, at 528.

39. RStGB § 47.

40. H. JESCHECK, *supra* note 5, at 528.

41. *Id.* at 529.

42. 2 R. VON HIPPEL, *supra* note 8, at 455.

43. A. SCHÖNKE, H. SCHRÖDER, T. LENCKNER, P. CRAMER, A. ESER & W. STREE, STRAFGESETZBUCH: KOMMENTAR § 25, Marginal No. 8 (21st ed. 1982) [hereinafter A. SCHÖNKE & H. SCHRÖDER].

44. *See* H. JESCHECK, *supra* note 5, at 529.

Trans. Note: This theory is described at some length in H. HART & A. HONORE, CAUSATION IN THE LAW 391-411 (1959).

45. Trans. Note: See *supra* note 1 for a brief definition of the underlying German term, "*Einheitstäterbegriff*."

complicity and thus impliedly restrict the otherwise all-encompassing scope of perpetration.[46] The punishability of an indirect perpetrator who let someone else act for him and a co-perpetrator who did not personally undertake any proscribed conduct both flow naturally from a broad concept of perpetration.[47] The shortcomings of the restrictive concept of perpetrators and the objective theory of complicity, which could not account for indirect perpetration and co-perpetration, were eliminated by the broad concept of perpetration.

However, the Code was not based on a unitary concept of perpetrators, but rather distinguished instigation and facilitation from perpetration. Therefore, criteria for distinguishing complicity and perpetration had to be developed. Since all conditions for the proscribed result were thought to be equivalent from a causal perspective, perpetration and complicity could not be objectively separated. Rather, the distinction had to be based on subjective criteria.[48] Accordingly, perpetrators were those individuals who contributed to the criminal act with the intent to commit the crime (*animus auctoris*), and accessories were those individuals who made the requisite contribution with the intent to be an accessory (*animus socii*).[49] This method of distinguishing perpetrators from accessories is, in principle, still used by the Bundesgerichtshof, which is the highest civil and criminal court in West Germany.

Under this doctrine, a perpetrator was not necessarily the person who actually committed the offense. Rather, the question was what intent (*Wille*) the party causing a crime had. With the concept of perpetration and complicity, then, one no longer proceeded primarily on the basis of the meaning of the terms, "perpetrator," "instigator," and "facilitator," but instead drew the distinctions on purely normative grounds. For this reason, an individual who personally committed the offense at the instigation of another might not be punished as a perpetrator, but only as an accessory of the instigator.[50] Such implications are probably not found within the meaning of the word "accessory" (*Gehilfe*). The conviction of a perpetrator as an "accessory" can only be

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46. *Id.*; A. SCHÖNKE & H. SCHÖDER (P. Cramer), *supra* note 43, § 25, Marginal No. 8.

47. *See* H. JESCHECK, *supra* note 5, at 529.

48. *Id.*

49. *Id.; see also* Judgment of Jan. 7, 1881, Reichsgericht, Ger., 3 RGSt 181.

50. Judgment of Oct. 19, 1962, Bundesgerichtshof, Senat [Bundesgerichtshof], W. Ger., 18 Entscheidungen des Bundesgerichtshofes in Strafsachen [BGHSt] 87, 96.

explained on the basis of purely normative, somewhat indefinite (*konturlose*) criteria, such as an intent to act as a perpetrator or as an accessory.

The consequences of this doctrine, which was dominant at least until the 1950s, can be seen in two cases decided by the Reichsgericht (predecessor of the Bundesgerichtshof). The first case provides that a person who induces a fully responsible woman to have an abortion is to be punished as a perpetrator rather than as an instigator, insofar as the person possesses the will to commit the offense.[51] The second case provides that the person who kills a newly born child at the request of and in the interest of the mother, is merely an accessory, not a perpetrator.[52] In other words, personally committing an unlawful act is insufficient for a finding of perpetration. Strictly speaking, *animus auctoris* and *animus socii* are merely catchwords that do little to clarify the conceptual distinction between perpetration and complicity. The punishment of a person as a perpetrator or as an accessory proceeded essentially on the basis of purely subjective feelings.[53]

The rules covering instigation were clear and unambiguous: instigation was intentionally inducing another to intentionally commit a punishable action. According to this formulation, intentionally inducing another to commit conduct that was not in itself unlawful (*rechtmässiger Haupttat*), because it did not involve an intentional or culpable main offense, could not constitute instigation in the sense of section 48. If the person who committed the principal offense had a valid justification of self-defense or lacked capacity due to mental illness, the "rear" person who induced the other party (the "front" person)[54] to commit the act could not be punished as an instigator. However, since it was generally thought that the rear person in such cases deserved punishment, these situations were classified as indirect perpetration. In other words, indirect perpetration is intellectual perpetration (i.e., in Feuerbach's terminology, the determination of the will of another to bring about an act prompted by self-interest in the act) minus instigation.[55]

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51. Judgment of Dec. 7, 1939, Reichsgericht, Ger., 74 RGSt 21, 23.

52. Judgment of Feb. 19, 1940, Reichsgericht, Ger., 74 RGSt 84, 85.

53. *See* 2 R. VON HIPPEL, *supra* note 8, at 457.

54. Trans. Note: See *supra* note 1 for an explanation of the "front" person/"rear" person terminology.

55. 2 R. VON HIPPEL, *supra* note 8, at 470.

Due to insistence on the derivative nature of accessorial liability (*Akzessorietät*),[56] aiding and abetting a nonpunishable principal offense necessarily remained nonpunishable, unless one classified accessories, using a subjective theory of complicity, in the same category with other *animus auctoris* criminals, thereby making them perpetrators.[57]

This was the position of German criminal theory from the beginning of this century until the end of the Weimar Republic. Admittedly, during the period of the Weimar Republic some reform efforts sought to relax the strictly accessorial nature of complicity in order to constrain the scope of indirect perpetration and to relegate many of the cases that were thus being dealt with as a species of perpetration back to the category of complicity.[58] However, it was not possible to accomplish this reform before the onset of the National Socialist period. Not until the Regulation (*VO*) of May 29, 1943[59] did the Reich Criminal Code, and later, the (West) German Criminal Code, develop the idea of the limited or partially derivative character of accessorial liability (*limitierte Akzessorietät*), or for short, partially derivative accessoriness.[60] Under the notion of partially derivative accessoriness, the main offense was required to be violative of the definition of the crime (*tatbestandsmässig*) and wrongful (*rechtswidrig*) but not necessarily culpable (*schuldhaft*) in order for the accessory to be liable as an instigator or as a facilitator.[61] The language of sections 48 and 49 of the Reich Criminal Code

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56. Trans. Note: My translation of the term "*Akzessorietät*" as "the insistence on the derivative nature of accessorial liability" is obviously extremely cumbersome. One could make do with "accessoriness," which is the literal translation, but this would not capture the implications that have been built into this term of art. The term "*Akzessorietät*" appearing alone in German texts connotes not only a neutral relationship between perpetrator and accessory, but also an insistence that the derivative nature of accessorial liability be recognized.

57. 2 R. VON HIPPEL, *supra* note 8, at 477.

58. *Id.* at 480.

59. Verordnung vom 29. Mai 1943 (Ger.).

Trans. Note: *See* Statutory Appendix.

60. Trans. Note: The more direct translation would be "limited accessoriness," but an English speaker has to go through some extra mental gymnastics to bear in mind what is at stake if the term "limited" is used. The accessoriness is being limited under this theory in the sense that the insistence on the derivative character of accessorial liability is being narrowed to allow imputation of a main offense to an accessory, even though the culpability elements of the main offense are not satisfied by the perpetrator. The shift to this "limited" or "partially derivative" notion obviously broadens (rather than limits) the scope of accessorial liability.

61. H. JESCHECK, *supra* note 5, at 534.

was revised to reflect that only an "action threatened with punishment" was required. Section 50(1) also expressed this idea, in that where there were several participants in a crime, it made the punishability of each party independent of the culpability of the other participants in the crime.

By this means, the untoward consequence of insistence on strict accessoriness for Section 47—that punishment for co-perpetration required that the conduct of *each* participant be punishable—could also be avoided. Section 50(1) made it clear that a co-perpetrator could be punished as such, even if another co-perpetrator lacked capacity or acted unintentionally.[62] According to the generally held view, the punishability of an accessory also presupposed that the perpetrator acted intentionally, even though the dominant view at the time was that intent was merely an issue of culpability, and one might therefore think (in light of the new partially derivative conception of accessoriness) that the punishability of an accessory was independent of culpability and intention. For adherents of the classical theory of structure of crime (*Verbrechensaufbau*),[63] who viewed intent as a facet of culpability, the dependence of complicity on the intent *of the perpetrator* followed from the nature of criminal act.[64] The teleological theory of action (*finale Handlungslehre*), which was developed by Welzel in the 1930s,[65] came to the same result. Under this theory, action is conceptualized as the carrying out of purposive activity that is consciously guided by reference to a goal.[66] For the teleological theory of action, intent is an issue that arises at the level of the definition of a crime (*Tatbestand*) rather than at the level of culpability (*Schuld*). This is because under this theory, mere initiation of a causal chain does not suffice to bring about a criminal result. Rather, it is necessary that the result be brought about intentionally and consciously.[67]

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62. RStGB § 50(1).

63. Trans. Note: The next few sentences explore how the *kausale Handlungslehre* (causal theory of action) and the *finale Handlungslehre* (the teleological theory of action), major rival approaches in German criminal theory, reach the same result on the issue of whether the intention of the perpetrator is required. For this discussion to be fully intelligible, one would need a more extensive description of these two theories—a task which obviously lies beyond the scope of this translation. The rival theories are explained at length in G. FLETCHER, *supra* note 1, at 434-39.

64. H. JESCHECK, *supra* note 5, at 498.

65. Welzel, *Studien zum System des Strafrechts*, 58 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT [ZStW] 491 (1939).

66. H. WELZEL, DAS DEUTSCHE STRAFRECHT 33 (11th ed. 1969).

67. *Id.* at 33, 64; *see also* Gallas, *supra* note 28, at 126.

Thus, if intent is absent, conduct does not even violate the statutory requirements for the crime (*Tatbestand*).

II. The Current German Criminal Code

The German Criminal Code that is in effect today has incorporated earlier rules governing perpetration and complicity in its general participation provisions.[68] However, it has taken into account more penetrating approaches to the problem. The new Code, which went into effect in 1975,[69] does not make any fundamental changes from old law, but does provide some important clarifications and specifications.[70] However, it should be mentioned that the unitary concept of perpetrators was debated as the counter-model to current provisions during meetings of the Criminal Law Commission for the German Criminal Code reform.[71]

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68. StGB §§ 25-31.

69. StGB of May 15, 1871, in the version of the official promulgation of January 2, 1975 (BGBl I, 1).

70. Roxin, *supra* note 20, § 25, Marginal No. 3.

71. A short discussion of the German criminal reform process is needed in order to explain the context of these debates and the role of the Criminal Law Reform Commission. Brief accounts of the process may be found in H. Jescheck, *supra* note 5, at 76 ff., and in Eser, *Einführung, in* A. Schönke & H. Schröder, supra note 43, at n.1 ff.

The original Criminal Code of the German Empire was promulgated May 15, 1871. Predecessors of this code were the Criminal Code of the North German Federation of 1870 and the Prussian Criminal Code of 1851. The Criminal Code of 1871 was on the whole more a codification (i.e. a restatement) of various provisions from the older criminal codes of various pre-unification German states than a new code incorporating essentially new legal considerations. In light of social changes, refined criminal theory and new criminological knowledge, it soon became apparent that the 1871 law was in need of reform. Instead of recodifying the entire code as a totality, however, the 1871 code was amended in a piecemeal fashion over the years, and remained in force until January 1, 1975, the day before the new, wholly reformed code went into effect. The process leading up to the 1975 Code began shortly after the second World War and took a good twenty years to complete. The general part of the code was totally reworked, while only portions of the special part were reformed. In this area, reform continues in gradual stages.

Three draft codes were particularly significant in the code reform process. The official Criminal Law Reform Commission worked out one draft in 1962 that was presented to the federal parliament. Its merit lay in its new regulation of the prerequisites for punishment in the general part as well as in a more precise formulation of various definitions of the special part. The draft's system of sanctions, however, drew strong criticism. In response, a working group of German and Swiss criminal law professors developed an alternative draft of a criminal code. This draft was presented to parliament in 1968 by the Free Democratic Party. Both drafts were considered, but neither was able to prevail on its own. The Special Committee of the Parliament for Criminal Law Reform (1966-69) created out of the two drafts a synthesis that began to be incorporated into the special part of criminal law as early as 1967. The resulting new version of the 1871 Code was promulgated on January 2, 1975.

The unitary concept of perpetrators wants either to regard all causal contributions to a crime as perpetration, or to differentiate between various forms of participation but to treat them all equally with regard to legal consequences.[72] The unitary concept of perpetration, however, has been almost unanimously rejected in Germany. The unitary concept has the advantage that it would have closed all the loopholes in punishment that exist under a scheme that differentiates in the level of punishment provided for perpetration and complicity.[73] A unitary solution to the problem of perpetrators (*Einheitstäterlösung*) could have been feasible,[74] but significant considerations militated against it. If every causal contribution to the injury of legal interests (*Rechtsgutsverletzung*) is treated as a contribution to the offense, limits of statutorily defined offenses would be leveled because the specificity of proscribed action would be lost.[75] The unitary concept of perpetration tends, in the end, toward a perpetrator-oriented criminal law, which takes advantage of causality "as a triggering mechanism for a dangerousness-oriented system of assessing punishment, and shifts the decision concerning sanctions almost entirely to the judge."[76]

Furthermore, the unitary concept of perpetration leads to an undesired extension of punishability. Today, attempted instigation usually goes unpunished, and attempted facilitation always does. In contrast, under the unitary concept of perpetration, attempted instigation and attempted facilitation would be punishable as attempted perpetration.[77] Finally, the argument that a unitary concept of perpetration would solve the century-old problem of defining boundaries between various types of participation cannot be sustained. This fact indicates that a pure unitary concept of perpetration has little to recommend it, and merely leaves the problem of differentiating types of participation to be resolved at the level of the judiciary in the process

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As already mentioned, the major emphasis of the reform of the general part was in the area of prerequisites for punishment and above all in the area of punishments and regulatory measures (e.g., introduction of monetary fines following the Scandinavian model). In the special part, reforms focused primarily on political, sexual and economic crimes, and on abortion.

72. Roxin, *supra* note 20, § 25, Marginal No. 3.

73. H. JESCHECK, *supra* note 5, at 525.

74. Roxin, *supra* note 20, § 25, Marginal No. 5.

75. *Id.* § 25, Marginal No. 6; *see also* H. JESCHECK, *supra* note 5, at 525.

76. Roxin, *supra* note 20, § 25, Marginal No. 6.

77. *Id.* § 25, Marginal No. 7; *see also* H. JESCHECK, *supra* note 5, at 525.

of assessing punishment.[78] For example, in the case of murder, punishment varies significantly depending on whether the defendant stabbed the victim himself, or merely made the knife available to the actual perpetrator. In order to do justice to the differing weights corresponding to the wrongfulness of varying types of perpetration, the potential range of punishment for various crimes would need to be extended.[79] This may lead to situations where a judge will punish lesser contributions to an offense more severely than more serious ones.

The view that differentiating between instigation and perpetration is merely frivolous theorizing without any particular usefulness, in light of the fact that both stand under an equal threat of punishment, cannot be accepted. For example, because of the principle of the derivative nature of accessorial liability, instigation of suicide remains unpunishable, while homicide by a third party through indirect perpetration—using the person who committed suicide as an agent—is punishable. Examples could be multiplied in which it makes sense to punish perpetration while holding instigation to be unpunishable.[80]

But enough concerning the unitary theory of perpetration and its drawbacks. The theory of perpetration and complicity springs from the current state of the law; thus, one must consider current law to determine concepts and to define limits of individual forms of complicity.

Sole perpetration and indirect perpetration are covered by section 25(1) of the German Criminal Code.[81] This section provides that a person who commits a crime by himself (sole perpetration) or by another (indirect perpetration) is to be punished as a perpetrator. The provision governing co-perpetration (section 25(2) of the German Criminal Code)[82] is practically identical to section 47 of the Reich Criminal Code. Section 26 punishes an instigator as a perpetrator if he intentionally induces another to commit a wrongful act.[83] Thus, the notion of partially derivative accessorial liability is adopted, but with more precise language. Facilitation is dealt with similarly in section 27(1),

78. Roxin, *supra* note 20, § 25, Marginal No. 8.

79. *Id.* § 25, Marginal No. 6.

80. Maiwald, *Historische und Dogmatische Aspekte der Einheitstäterlösung,* in FESTSCHRIFT FÜR PAUL BOCKELMANN ZUM 70. GEBURTSTAG 343-53 (A. Kaufmann, G. Bemmann, D. Krauss & K. Volk eds. 1979).

81. StGB § 25(1).

82. *Id.* § 25(2).

83. *Id.* § 26.

which punishes intentional aiding of an intentionally committed wrongful act.[84] In section 27(2) of the German Criminal Code, the Reich Criminal Code's optional mitigation of punishment is replaced by mandatory mitigation.[85] Section 29 of the German Criminal Code is practically identical to section 50(1) of the Reich Criminal Code, and further illustrates partially derivative accessoriness. Under section 29 each participant in a crime is punished solely according to his culpability, without reference to the culpability of other participants.[86]

In clarifying the question of who is to be regarded as a perpetrator and who as an accessory, the new German Criminal Code was not able to resolve all disagreements. There is a consensus that, with the exception of section 30,[87] which governs attempted complicity in a felony (*Verbrechen*), complicity is punishable only if the principal offense is actually committed. That is expressed in the formulation, "intentionally committed wrongful act," of sections 26 and 27. There is also consensus that the derivative character of complicity implies that an accessory cannot be held liable for a crime more serious than the principal offense that actually occurs, even if this liability is less severe than liability that would be imposed for the offense the accessory intended. For example, when the principal offense desired by the accessory is merely attempted, rather than consummated, the accessory cannot be held liable for more than complicity in an attempt.[88] There is also no doubt that, pursuant to sections 26 and 27, instigation or facilitation of an unintentional or justified action is not punishable. It is conceivable, however, that someone could exploit another's lack of intent for his own purposes. In such a case indirect perpetration would be a possibility.

Thus, the current German Criminal Code regulates the relationship between perpetration and complicity according to its intrinsic structure. However, the Code has not set any further

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84. *Id.* § 27(1).

85. *Id.* § 27(2).

86. *Id.* § 29.

87. *Id.* § 30 provides:

> (1) He who tempts another to commit a crime or to join him in conspiracy will be punished according to the consequences of the act itself.
>
> (2) Likewise, a person will be punished if he readily accepts the invitation to commit a crime or conspires with another to perform a criminal act.

Id. § 23(3) is in agreement with § 30(1).

88. A. SCHÖNKE & H. SCHRÖDER (P. Cramer), *supra* note 43, § 25, Marginal No. 27.

guidelines for determining whether a person is to be viewed as a perpetrator or an accessory. Problems arise in delineating borderlines, especially between co-perpetration and facilitation and between indirect perpetration and instigation.

With regard to borderlines, one must proceed from the concept of perpetration, because one can clarify the meaning of complicity only by referring to perpetration. The so-called concepts of primary perpetration and secondary complicity provide that complicity is a residual category consisting only of those who are not perpetrators.[89] The primary concept of perpetration must be valid, if only because elements of an offense present an organized consequence for the concept of perpetrators. Only through establishing a range of perpetration is the extent of complicity fundamentally codetermined.[90] In terms of the primary concept of perpetration, it may also be explained why, in the case of a criminally adjudged act, one must first establish whether an action constitutes indirect perpetration: if a participant is to be viewed as an indirect perpetrator, he cannot merely be the instigator of the offense.

Since the 1930s, an extremely subjective approach to delineating perpetration and complicity has been dominant in both legal theory and in judicial decisions. This approach has only inquired into the *animus auctoris* or *animus socii* of the accessory. As already noted, this made it possible that even an individual who had committed a crime with his own hands to be regarded as an accessory. The basis for this extreme subjective viewpoint has now been removed under the new provision concerning sole perpetrators in German Criminal Code section 25(1)(1). Under this provision, a person who personally commits the main offense (i.e., the person who fulfills all the elements of the offense) is now always a perpetrator, regardless of his motivation.[91] Admittedly, Bundesgerichtshof case law has not expressly abandoned the subjective theory, and continues to use a formula of "willing the offense as one's own (or alternatively, as that of another person)." However, this formula is not used any longer to describe a purely internal mental state. Instead, its content is determined on the basis of all the circumstances of the particular case, such as the interest in and the scope of the

89. H. JESCHECK, *supra* note 5, at 527; C. ROXIN, *supra* note 20, § 26, Marginal No. 6.
90. Roxin, *supra* note 20, § 26, Marginal No. 6.
91. A. SCHÖNKE & H. SCHRÖDER (P. Cramer), *supra* note 43, § 25, Marginal No. 75.

participation in the offense. This theory might be described as one that reconciles subjective and objective approaches.[92] The Bundesgerichtshof has thus made some concessions to the "hegemony" theory[93] (*Tatherrshaftslehre*) and no longer adheres to the prior extreme subjective theory in delineating perpetration and complicity. In this, the Bundesgerichtshof is now also constrained by section 25(1)(1). The disadvantage of this view, however, is that evaluation of an act remains largely a matter of discretion with the judge.[94]

Since the 1950s, the doctrine of hegemony has established itself in German criminal theory.[95] This doctrine synthesizes purely objective and purely subjective theories. It postulates that the perpetrator is the party who controls the criminal act—the party "who holds the happening of the act in his hands," and decisively controls the "whether" and "how" of the crimes.[96]

Indirect perpetration[97] may also be explained by means of the hegemony theory. Under this theory, an indirect perpetrator is one who uses another person as an instrument in committing an offense, and thereby exerts such dominance that his contribution to the offense is comparable to the degree of control over the act that he would have had if he had committed it himself.[98] Indirect perpetration is illustrated by the example noted above of a person who utilizes another person lacking capacity as an instrument to commit an offense.

The above definitions show that the hegemony concept does not provide descriptive criteria; rather, it provides a guiding principle for analyzing the phenomenon of perpetration. This principle may be made concrete in connection with the three

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92. *See* C. ROXIN, TÄTERSCHAFT UND TATHERRSCHAFT 589 (4th ed. 1984).

93. Trans. Note: The notion of *Tatherrschaft*—literally "lordship over the deed"—goes back at least to Welzel. *See* Mayer, *Täterschaft, Teilnahme, Urheberschaft*, in FESTSCHRIFT FÜR THEODOR RITTLER 242, 246-47 (S. Hohenleitner, L. Linder, & F. Nowakowski eds. 1957). I follow Fletcher in translating this notion as "hegemony over the act." This translation has the disadvantage of sounding like a rather foreign notion, but it conveys the basic idea. Moreover, the term "hegemony" is used rarely enough in English that it is clear that a technical German notion lies behind the term.

94. C. ROXIN, *supra* note 92, at 590.

95. H. BLEI, STRAFRECHT I: ALLGEMEINER TEIL 266 (17th ed. 1979); P. BOCKELMANN, STRAFRECHT: ALLGEMEINER TEIL 177 (3d ed. 1979); H. JESCHECK, *supra* note 5, at 531; G. STRATENWERTH, STRAFRECHT: ALLGEMEINER TEIL Marginal No. 750 (3d ed. 1981).

96. A. SCHÖNKE & H. SCHRÖDER (P. Cramer), *supra* note 43, § 25, Marginal No. 69.

97. STGB § 25(1)(2).

98. H. JESCHECK, *supra* note 5, at 532.

types of perpetration—sole perpetration, co-perpetration, and indirect perpetration—only by differentiating the features that characterize them.[99]

III. The Impact of Justification on Accessorial Liability

This section explores the effects of one participant's justification or excuse on the punishability of other participants in the same offense. This will be done on the basis of illustrative examples, which will allow the problems of the German theoretical system and its limits to be shown.

In principle, justifying and excusing conditions operate only to benefit the accessory who personally fulfills the elements of the pertinent exculpatory defenses. Only for such a person do they bar punishability for what is otherwise proscribed conduct (*tatbestandliches Tun*). For example, if a facilitator is justified, he has no liability and does not become punishable because the perpetrator of the main offense has committed an intentional, wrongful act. By the same token, it is impossible for the principal offender's justification or excuse to benefit the accessory.

Illustration 1. In some cases, behavior worthy of punishment is present, but because the principal offender has a justification, the complicitous party cannot be punished as an instigator due to the derivative character of accessory liability (*wegen Akzessorietät*). An example of this can be seen in a Federal Criminal Court decision from the 1950s.[100] *A* consciously lodges a false accusation of sabotage of military airplanes against another, with the result that policeman *P,* acting in good faith, arrests the unjustly accused party.

The arresting officer fulfills the definition of false imprisonment (*Freiheitsberaubung*) under section 239.[101] However, he will not be punished for acting in this manner, since he acted justifiably, at least insofar as he made the arrest within the scope of his legitimate discretion under section 127(2) of the Code of Criminal Procedure.[102] Since *P*'s arrest of *B* was justified, *A* cannot be punished as an instigator. Thus, *A* will escape

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99. Roxin, *supra* note 20, § 25, Marginal No. 28; A. Schönke & H. Schröder (P. Cramer), *supra* note 43, § 25, Marginal No. 69.

100. Judgment of July 10, 1952, Bundesgerichtshof, W. Ger., 3 BGHSt 4.

101. StGB § 239.

102. Strafprozessordnung § 127(2) (W. Ger.).

punishment unless he can be punished as the perpetrator of the false arrest.

The view that the concept of a perpetrator is primary has become an established part of German jurisprudence; thus, one must first analyze whether *A* is the central figure in the occurrence of conduct that violates the prohibitory norm. Since indirect perpetration is considered true perpetration, *A* is liable only if he had hegemony over the act.[103] In the false imprisonment example, it does not matter that *P* was justified; rather, it is important that *A*'s false accusation was unlawful.[104] Because *A* deceived state authorities, *B* was arrested. *A* could have terminated the proceedings instituted against the accused party at any time simply by revealing the truth. In this case, *P* was required to arrest *B*. *P*'s purposive conduct led to the false arrest of *B;* however, we must consider the purposive conduct of *A* independent from *P*'s conduct. The arrest was *A*'s goal; he consciously and willingly sought the arrest. *A,* therefore, is accordingly punishable as an indirect perpetrator. *A* had complete hegemony over *P*'s action.

Illustration 2. Another case involving justified conduct of a principal offender, involves a situation in which a "rear" person (*der Hintermann*) deliberately contrives a self-defense situation. For example, suppose *A* induces *B*—whom *A* wishes to have killed—to attack *C*. *A* hopes that *C* will kill *B* in self-defense, and that in fact occurs.[105] Again, the question is whether *A,* who provoked the result, will escape punishment because *C*'s action was justified. Alternatively, the question is whether *A,* because he purposely created *C*'s self-defense situation, can be punished as the indirect perpetrator of an intentional homicide.

Since it is really the conduct of *C* that caused *B*'s death, *A* is liable as an indirect perpetrator for the definition-fulfilling conduct of *C* only if *A* had hegemony over *C*'s conduct. However, no direct connection exists between *A* and *C*. Hegemony

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103. As previously discussed, jurisdictions which lean toward the combined subjective-objective doctrine are attuned to the criteria of interest in the act and hegemony over the act. Presumably the evaluation of the judge would reach the same result as that prescribed by legal theory. *See* H. BLEI, *supra* note 95, at 266; P. BOCKELMANN, *supra* note 95, at 177; H. JESCHECK, *supra* note 5, at 540; G. STRATENWERTH, *supra* note 95, at Marginal No. 750.

104. R. HERZBERG, MITTELBARE TÄTERSCHAFT BEI RECHTMÄSSIG ODER UNVERBOTEN HANDELNDEM WERKZEUG 40 (1967); H. JESCHECK, *supra* note 5, at 543.

105. C. ROXIN, *supra* note 92, at 163; Mezger, *Mittelbare Täterschaft und rechtswidriges Handeln,* 52 ZStW 529-34 (1932).

over *C*'s conduct can be found only through the middleman, *B*. To presume indirect perpetration on *A*'s part, *A* must have hegemony over the acts of *B*.[106] In other words, *A* must have caused *C*'s self-defense situation by means of someone he has used as an instrument.[107] *C* is essentially an instrument of *A* because he cannot react in any way to the self-defense situation created by *A* other than by killing *B*. *A*, through his influence on *B*, created *C*'s self defense necessity. At this point, we must consider what conditions must be present to find that *A* had hegemony over *B*'s conduct. One view is that the requirements necessary for a finding of hegemony are relatively slight. Under this approach, *A* has hegemony over *B*'s conduct if he induces *B* to attack *C* by deceiving *B*—for example, by prompting *B* to act on the basis of mistaken motivation.[108] However, some scholars think this goes too far.[109] These scholars say that the "rear" person has hegemony only when the party who is induced to attack (*B*) is a child, an insane person, or a person who otherwise lacks capacity.[110]

Neither approach is totally persuasive. There is no particular reason why indirect perpetration can only be based on and mediated with the help of a child or an insane person. In this case, of course, the hegemony of the will of the "rear" person over the "instrument" who is induced to attack is particularly obvious. By contrast, hegemony over the will of adults not lacking capacity is not easy to substantiate in cases of provoked self-defense. Unlike children or insane persons, adults can in principle make a responsible decision whether to execute the crime.

On the other hand, the view that virtually any means of bringing about a self-defense situation suffices in order to ground indirect perpetration goes too far. For under this approach, means of deceiving the attacker such as eliciting a mistaken motive that moves the attacker to execute a punishable act desired by the "rear" man would suffice for indirect perpe-

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106. *See* F.-C. SCHROEDER, *supra* note 17, at 100.

107. A. SCHÖNKE & H. SCHRÖDER (P. Cramer), *supra* note 43, § 25, Marginal No. 28.

108. J. BAUMANN, STRAFRECHT: ALLGEMEINER TEIL 571 (9th ed. 1977). For a discussion of the subjective doctrine, which does not require hegemony, see R. HERZBERG, TÄTERSCHAFT UND TEILNAHME 29 (1977); R. MAURACH, K. GÖSSEL & H. ZIPF, STRAFRECHT: ALLGEMEINER TEIL 207 (5th ed. 1978); F.-C. SCHROEDER, *supra* note 17, at 100.

109. H. JESCHECK, *supra* note 5, at 543; H. WELZEL, *supra* note 66, at 105 (in which it is not entirely clear whether mental incapacity of the "front" person is necessary in order for the "rear" person to be a perpetrator-by-means).

110. H. JESCHECK, *supra* note 5, at 543.

tration. Generally, mere deception of the attacker (*B*) is not sufficient to show hegemony by the "rear" person (*A*).[111] For the decision of the mediating actor to go forward with the proscribed attack that in turn justifies *C*'s self-defense is totally in *B*'s control. For this reason it is much better to require that the "rear" man applies heightened means such as coercion or duress against the attacker, in order that hegemony over the criminal act (in the form of hegemony over the attacker's will) can be imputed to him.[112] The mere generation of a mistaken motive cannot suffice, because then the occurrence cannot be controlled and guided by the "rear" man.[113] If one allowed deception to suffice, one would have an excessively broad notion of perpetration-by-means, which would run the risk of losing its contours and assuming again the role of a stopgap that would be used to deal with cases left unpunished due to the derivative character of accessoriness. In the case where the attacker has merely been deceived, the instigator should not be punished because of the derivative nature of complicity.

Thus, in order for *A* to be liable as an indirect perpetrator, *A* must have hegemony as described over the acts of both *B* and *C*. Consequently, in this type of case, *A* can at most be an indirect perpetrator in connection with the legal injuries inflicted by *B* on *C*, and vice versa. If *A* lacks hegemony over the acts of *B*, *A* can only be punished for the instigation of *B*.

IV. Complicity and Exculpation

As we turn to cases of participants in a crime who lack capacity or whose conduct is otherwise excused, it is important to remember that excusing conditions benefit only the particular person to whom they relate. If a person who lacks capacity or acts excusably encourages someone else to commit a crime, he is not punishable. The problematic cases are those in which the person who actually committed the act (*der Haupttäter*) did so excusably or without culpability, under the theory that accessorial liability is only partially derivative (*limitierte Akzessorietät*), liability for complicity is not ruled out. A person who

111. *But see* H. Preisendanz, Strafgesetzbuch: Lehrkommentar § 25, Comment III 3a (30th ed. 1978).

112. Roxin, *supra* note 20, § 25, Marginal No. 55; A. Schönke & H. Schröder (P. Cramer), *supra* note 43, § 25, Marginal No. 789.

113. 1 H. Rudolphi, E. Horn & E. Samson, Systematischer Kommentar zum Strafgesetzbuch § 25, Marginal No. 32 (3d ed. 1981).

induces another to become intoxicated and then persuades him to set fire to a neighbor's house could be punished as an instigator of arson. Often, however, punishing someone merely as an instigator seems inadequate. Indeed, actual responsibility may lie with the initiator of the course of conduct rather than with the inebriated person. However, in this fact situation, punishment as a perpetrator is only possible through the concept of indirect perpetration. And in fact, there is consensus in case law and the literature that when the "rear" person has induced the lack of culpability of the person actually performing the offense (*der Tatmittler*) in order to exploit him or her for the planned offense, that "rear" person should be punished as an indirect perpetrator.[114]

Here, then, one is not required to choose between nonpunishment and indirect perpetration, as in the case of the justified main actor (*Haupttäter*). Rather, the issue concerns a distinction between indirect perpetration and instigation.

One could ask why one should worry about drawing the difficult distinction between perpetration and complicity, since the accessory will be liable in any event due to the notion of partially derivative accessoriness. (i.e., the accessory can be held derivatively liable for an act that is violative of the prohibitory norm (*tatbestandsmässig*) and wrongful (*rechtswidrig*) but not culpable (*schuldhaft*)). The German Criminal Code, however, proceeds on the assumption that the concept of a perpetrator is primary (*primaeren Taeterbegriff*). In other words, before one analyzes whether someone should be punished as an accessory, one must first determine that he is not the perpetrator of the alleged crime.[115]

Delineating the boundary between indirect perpetration and complicity should be done on the basis of the notion of hegemony over the criminal act. Hegemony over an act consists of hegemony over the outer action (*Handlungsherrschaft*) and hegemony over the will (*Willensherrschaft*). A perpetrator who lacks capacity or who acts under an excusing condition will usually possess hegemony over the outer action because he determines the course of the act. However, if hegemony over the outer action is subject to the "rear" person's hegemony over the

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114. R. HERZBERG, *supra* note 108, at 30; H. JESCHECK, *supra* note 5, at 544; C. ROXIN, *supra* note 92, at 239, 606; A. SCHÖNKE & H. SCHRÖDER (P. Cramer), *supra* note 43, § 25, Marginal No. 39.

115. H. JESCHECK, *supra* note 5, at 27; C. ROXIN, *supra* note 92, at 27.

perpetrator's will, the "rear" person should be punished as an indirect perpetrator.[116] What the "rear" man's will-hegemony is based upon will be worked out in what follows on the basis of selected groups of cases.

A. Perpetrator Lacks Capacity

A decision of the Reichsgericht[117] provides a useful example of situations involving the effect of lack of capacity. *A* induced his thirteen-year-old grandson to set fire to several buildings. *A* realized his grandson lacked capacity, in the sense of section 19,[118] and exploited this lack of capacity to bring about the proscribed act. In light of the primary character of perpetration, one is required to determine in this case whether *A* is the indirect perpetrator of the arson committed by his grandson.

Initially, it is unclear whether the result turns on the degree of lack of capacity. That is, it is unclear whether mere knowledge of the lack of capacity suffices, or whether *A* must intentionally induce the lack of capacity to be punished as an indirect perpetrator. The Reichsgericht assumed that the grandson had sufficient capacity to realize the nature of his act, and that *A* was therefore only punishable as an instigator. This result is approved, at least to some extent, in the scholarly literature.[119]

However, some argue that whenever the party who induces the act knows that the person who was the means of the offense lacked capacity, the inducer should be viewed as an indirect perpetrator.[120] Opponents of this view argue that assessing indirect perpetration based on the ability of the person performing the offense to make mature judgments is inappropriate. They claim empirical evidence does not show that mentally ill persons who are highly impaired are more submissive to a person with hegemony than less disturbed persons, or that a younger person is more tractable than an older one. As a result, the determination of who is a perpetrator becomes very arbitrary. Therefore, scholars such as Herzberg claim that one should adhere to the princi-

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116. C. ROXIN, *supra* note 92, at 602; J. WESSELS, STRAFRECHT: ALLGEMEINER TEIL 134 (13th ed. 1983).

117. Judgment of Mar. 17, 1927, Reichsgericht, Ger., 61 RGSt 265.

118. StGB § 19 provides: "If a person is not at least fourteen years of age at the time the act is committed, he is not capable of being found guilty."

119. P. BOCKELMANN, *supra* note 95, at 180; H. JESCHECK, *supra* note 5, at 544; H. WELZEL, *supra* note 66, at 103.

120. R. HERZBERG, *supra* note 108, at 30.

ple of responsibility (*Verantwortumgsprinzip*), and punish the party who induced the prohibited act as an indirect perpetrator whenever that party knows that the person induced to perform the act lacks capacity.[121]

Roxin, a leading scholar in this area, agrees in principle with these objections.[122] However, he does not go as far as Herzberg, who holds that any knowledge of incapacity, even conditional intent (*dolus eventualis*), suffices for liability as a perpetrator. Instead, Roxin focuses on whether the "rear" person merely strengthens or furthers a decision to commit the act already made by the person lacking capacity or simply modifies the structuring of a decision already made. In such cases, Roxin holds that only complicity is present.[123] Roxin's views on this matter should be accepted, because he continues the notion of act-hegemony less expansively than Herzberg. Herzberg would find indirect perpetration in an offense committed by an agent who lacked capacity as soon as the "rear" person's intent includes awareness of the agent's lack of capacity. It appears more sound, however, to emphasize objective criteria for delimiting perpetration and complicity. Indirect perpetration and complicity should be distinguished based on whether commission of the act depends on the "rear" person, who oversees all interconnected matters involved (in which case there should be liability for indirect perpetration) or whether an independently decided act is merely encouraged by the "rear" person (in which case a charge of complicity would be appropriate).

B. Perpetrator Excused

The distinction between indirect perpetration and complicity also becomes relevant where the offender can assert an excuse. If *A* intentionally creates a situation that puts *B* in a position satisfying requirements for an exculpating necessity defense,[124] and from which *B* cannot save himself except at the cost of killing *C*, *A* is guilty of homicide through indirect perpetration.[125] This case is not problematic. Also unproblematic are cases of necessity resulting from duress. If *A* uses a weapon to

121. *Id.*
122. C. ROXIN, *supra* note 92, at 606.
123. *Id.*
124. STGB § 35.
125. H. JESCHECK, *supra* note 5, at 545; C. ROXIN, *supra* note 92, at 149.

coerce *B* to kill *C* under circumstances in which the pressure on *B* is so great that he has hardly any independent possibility of choice left, *B* is excused under section 35 of the German Criminal Code,[126] but A is liable as an indirect perpetrator.[127]

Considerably more difficult are cases in which an individual exploits an existing situation of necessity. The recurrent hypothetical here derives from the "plank of Carneades"[128] situation: while two shipwrecked individuals, *B* and *C*, are struggling to stay afloat, with *C* holding onto a plank, a third shipwrecked party, *A*, who is in a lifeboat, calls to *B* that he should push *C* off the plank in order to save his life. This idea had not occurred *B* previously, and he acts upon it, with the result that *C* drowns. In this case, the question is whether *A* should be punished as a perpetrator, an instigator, or possibly not at all.

Gallas[129] views this as a case of indirect perpetration, since the "rear" person's dominance remains intact even though he is exploiting a necessitous situation. The "front" person, according to this view, is delivered into the hands of the "rear" person because he must expend more energy to counter the "rear" person's temptation than he would have had to do in deciding whether to commit the act in similar circumstances but without the outside influence.[130] Another view of the plank hypothetical concludes that the "rear" person may only be punished as an accessory.[131]

Finally, some scholars think that a further differentiation must be made in connection with the plank hypothetical. By merely encouraging the person acting under necessity, the "rear" person does not exercise any hegemony over the actor. Thus, the "rear" person should only be punished as an accessory. The coercive circumstances experienced by the "front" person, which as a practical matter leave him with no freedom of choice, derive solely from the outer situation. The nudge provided by the "rear" person may have removed some of the actor's inhibitions—which is typical in situations of instigation—but it did

126. StGB § 35.

127. C. Roxin, *supra* note 92, at 148.

128. *Id.* at 150; R. Herzberg, *supra* note 108, at 15.

129. Gallas, *supra* note 28, at 134.

130. *Cf. id.* at 14 n.44.

131. P. Bockelmann, Strafrechtliche Untersuchungen 86 (1957); R. Maurach, K. Gössel & H. Zipf, *supra* note 108, at 208.

not increase the pressures already inherent in the outer circumstances.[132]

The situation may be different, however, if the "rear" person manipulates outer circumstances in favor of the person driven by necessity. For example, *A* might give *B* a knife so that *B* can drive *C* from the plank. The question for consideration is whether such an act constitutes facilitation[133] or indirect perpetration.[134]

Even here, it will probably be difficult to find indirect perpetration by *A*. It is clear that *A*, by providing the knife, has altered the circumstances in favor of *B*. The danger for *C*, the victim of the necessity-induced attack, increased as a result of *A*'s action. The availability of the knife may well be the factor that first determines *B* to commit a wrongful homicide.[135] Inducing someone to commit homicide is a typical act of instigation, and providing a knife also appears to be solely a matter of providing aid. Punishment of such conduct is adequately covered by facilitation. As a matter of fact, then, *A*'s action is merely a combination of instigation and facilitation. That, however, is not sufficient to provide the basis for hegemony over the acts of another.

Rudolphi[136] denies altogether any punishability for participation in an act motivated by necessity. His position, however, turns on old statutory provisions[137] that required that there be a punishable principal offense for complicity to arise. Rudolphi assumed, contrary to the then dominant view, that complicity in excused conduct was not punishable, because the framers of the Code had expressly provided in section 54 that they did not intend to punish an act prompted by necessity.[138] This approach is not consistent with the new provisions governing accessorial conduct. Apparently, Rudolphi himself no longer claims that his view constitutes a valid interpretation of the Code; he espouses it only for purposes of reform.

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132. R. HERZBERG *supra* note 108, at 16; H. JESCHECK, *supra* note 5, at 545; C. ROXIN, *supra* note 92, at 151.

133. H. BLEI, *supra* note 95, at 231.

134. H. JESCHECK, *supra* note 5, at 545; C. ROXIN, *supra* note 92, at 151.

135. *See* C. ROXIN, *supra* note 92, at 152.

136. Rudolphi, *Ist die Teilnahme an einer Notstandstat i.S.d. § 52, 53 Abs. 3 und 54* StGB *Strafbar?*, 78 ZStW 67 (1966).

137. StGB §§ 47-48 (pre-1975 version).

138. StGB § 54 (pre-1975 version).

C. *Perpetrator Acts Under Mistake of Law*

Another type of situation in which the "front" person acts without culpability arises in the context of unavoidable mistake of law.[139] If the "rear" person causes this mistake, or realizes and exploits it, he will be punished as an indirect perpetrator, just as in the cases involving innocent parties who lack capacity.[140]

Here the difficult question is whether the "rear" person should be punished as an indirect perpetrator or as an accessory, when the mistake made by the "front" person is an *avoidable* (i.e., culpable) mistake. Consider the following case: *A*, a person with sadistic tendencies, wants *B*, a neighbor, to beat *B*'s son. For this purpose, he represents to *B* that the law as contained in the German Civil Code[141] governing parental rights allows parents to deal with their children in any manner they choose. In particular, he suggests that the law allows parents to severely beat their children, whereas in fact, the law only allows mild punishment. *A* makes this statement hoping that *B* will then abuse his son in *A*'s presence. On the basis of the information imparted by *A*, *B* severely beats his son, who has done something to aggravate *B*.

According to one view, even though *B* acts with reduced culpability, he is still responsible under the Criminal Code. Thus, *A*'s contribution is merely that of an accessory. *A*'s inducing the mistake of law made it easier for *B* to commit the act, but was not sufficient to constitute hegemony over the act. Of course, in situations of avoidable mistake of law, the "front" person's responsibility could conceivably be reduced to such an extent that it would seem appropriate to treat a "rear" person who exploited the mistake as an indirect perpetrator. But the degree of reduction of responsibility is too uncertain a standard to use in drawing the borderline between instigation and indirect perpetration. Under this approach, indirect perpetration would only come into consideration when the freedom of the "front" person is limited to such an extent that he is no longer legally responsible.[142] At

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139. *See* StGB § 17.

140. R. Herzberg, *supra* note 108, at 23; H. Jescheck, *supra* note 5, at 544; C. Roxin, *supra* note 20, § 25, Marginal No. 67; G. Stratenwerth, *supra* note 95, § 224, Marginal No. 779; H. Welzel, *supra* note 66, at 203.

141. Burgerliches Gesetzbuch.

142. *See* H. Jescheck, *supra* note 5, at 544; G. Stratenwerth, *supra* note 95, at Marginal No. 780; H. Welzel, *supra* note 66, at 103.

that point, however, the borderline leading to an unavoidable mistake of law would have already been crossed.

A second view is that the "rear" person is guilty of indirect perpetration even when the "front" person commits the act because of an avoidable mistake of law. This position holds that responsibility of the "front" person is so limited that he cannot be charged with any conscious lawbreaking.[143]

Treating such cases solely as instigation or solely as indirect perpetration, while logically consistent, fails to do complete justice to this type of case. One thinks for example of the punishability of offenses outside the criminal code itself (*Nebenstrafrecht*), where it is considerably simpler to make mistakes of law than in the core criminal law (*Kernstrafrecht*).

Admittedly, some blame is imputed to the party acting under an avoidable mistake of law, but this need not rule out indirect perpetration by the "rear" person. Comparing situations of avoidable and unavoidable mistake of law makes certain parallels apparent. In both cases, the "rear" person is fully conscious of the factual and legal significance of his action and, by his conduct, desires to induce or exploit the mistake of the actor. In neither case is the "front" person aware of the wrongful nature of the act. It is not clear, then, why the "rear" person should be punished only as an instigator in the case of an avoidable mistake of law, although the "front" person is no more aware of the wrongfulness of his action than he would be if his mistake were unavoidable. The criterion of unavoidability, therefore, provides no objective basis for sensibly differentiating between instigation and indirect perpetration, since the avoidability or unavoidability of the mistake of law does not have any impact on the influence of the "rear" person in inducing or exploiting the mistake.[144]

The criterion of responsibility that has been worked out in the context of duress cases (*Nötigungsfällen*) to delimit the scope of the concept of act hegemony does not fit well in the context of avoidable mistake of law. In cases of duress, the "rear" person has the responsibility for the criminal act, precisely because the "front" person is freed from responsibility

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143. R. HERZBERG, *supra* note 108, at 23; R. MAURACH, K. GÖSSEL & H. ZIPF, *supra* note 108, at 210.

144. C. ROXIN, *supra* note 92, at 609; Roxin, *Bemerkungen zum Täter hinter dem Täter*, in FESTSCHRIFT FÜR RICHARD LANGE 173-79 (G. Warda, H. Waider, R. von Hippel & D. Meurer eds. 1976).

due to irresistible pressure or coercion emanating from the "rear" person.[145] In the case of avoidable mistake of law, however, the "front" person is not only theoretically free to decide whether or not to carry out the proscribed act, but is also actually free to make that decision. The "rear" person's deception may eliminate some inhibitions but does not give the "rear" person hegemony over the proscribed act—at least not to the degree existing in cases of duress.

Roxin's view may be preferable in a situation involving an avoidable mistake of law. He suggests that the relevant criterion of act hegemony is the superior knowledge (*Wissensübermacht*) of the "rear" person. Existence of superior knowledge is tested according to the knowledge of the "front" person concerning formal or substantive wrongfulness (*Rechtswidrigkeit*) of that act.[146] If the "front" person recognizes the substantive wrongfulness of his conduct—i.e., he understands that his conduct is contrary to social values—he possesses hegemony over his own act and his conduct is not determined as a result of the superior knowledge of the "rear" person. This would be true even though the "front" person may be mistaken concerning the formal wrongfulness of his conduct—i.e., concerning actual facts to which the law applies. In this case, the "rear" person should only be punished as an instigator.[147]

On the other hand, the "front" person may not grasp the substantive wrongfulness of his conduct, and may only recognize the objective circumstances of the act with respect to which the law affixes punishment. In this case the "front" person's hegemony gives way to the superior knowledge of the "rear" person, and the "rear" person should be punished as an indirect perpetrator.[148]

If it were not for partially derivative liability, cases in which the "rear" person does not possess hegemony over the act would necessarily remain unpunishable. In the case of indirect perpetration, hegemony over the act means, in the abstract, that the occurrence must result from the "rear" person's controlling will and that behavior of the "front" person is in the "rear" person's hands.[149] As a result, indirect perpetration cannot exist when the

145. *See* StGB § 35.
146. C. Roxin, *supra* note 92, at 199, 609.
147. *Id.*
148. *Id.*; C. Roxin, *supra* note 20, § 25, Marginal No. 68.
149. H. Jescheck, *supra* note 5, at 540.

"rear" person comes on an existing situation in which the offender is acting under a necessity-based excusing condition, and the "rear" person then gives advice or assistance with respect to the wrongful act. When the "rear" person merely supports the wrongful act, he is not—through his supportive actions—controlling the "front" person. Furthermore, hegemony over the act does not exist when the "rear" person is unaware of the circumstances which create the "front" person's lack of capacity. By insisting only that liability derive from a prohibited (*tatbestandsmässig*), wrongful (*rechtswidrig*) act (as opposed to one that is, in addition, culpable (*schuldhaft*)), the notion of partially derivative accessorial liability makes it possible to punish complicity in cases such as those discussed above.

V. Comparison with American Law

In conclusion, we should briefly consider the extent to which the American common law approach to distinguishing perpetration and complicity differs from the German approach, and whether differences at the level of theory lead to practical differences in results. Anglo-American case law, after all, is unlikely to generate enthusiasm for a theoretically richer explanatory model if it has no practical application in deciding cases.

The comparison is based, to a large extent, on the picture of the Anglo-American approach that has been provided by Professor Kadish.[150] The comparison suffers from the problems created by the divergent terminology used in German and American theory. Much cannot be accurately explained until fundamental concepts used in both legal cultures have been clarified and academic exchange can occur without loss resulting from terminological friction.

At common law, no distinction is made between perpetration and complicity when participants are at the scene of the crime and stand in close spatial proximity to it at the time the crime is committed. In this case, every participant is punished as a perpetrator, regardless of the bearing his participation had on the criminal result of the principal offense. Differential levels of wrongdoing on the part of participants present at the scene of the crime are taken into account only in the sentencing context. In all probability, it is the possibility of differential sentences

150. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 Calif. L. Rev. 323 (1985).

that justifies dispensing with careful differentiation between perpetration, instigation, and facilitation in the American view.

Differentiation, however, is recognized by the common law when the person is an accessory *before* the fact. According to Kadish's understanding, when the principal offender is acting with full responsibility, this bars the accessory before the fact from having the act imputed to him as a perpetrator. Such a person, therefore, may only be a participant in the narrow sense—an accessory before the fact as an instigator or facilitator. The reason for punishment here is participation in the culpability of a third person. In contrast to the current position of German law[151] and criminal theory, American law justifies the punishability of complicity not on the basis of a theory of supporting perpetration or contributing to the causation of a criminal offense, but rather on the basis of participation in culpability. This doctrine of participation in culpability, however, is viewed in Germany as outmoded and unsuitable. Among other reasons, this is because it cannot account for punishing, as a perpetrator, a "rear" person who uses a "front" person lacking in responsibility to commit a crime, since it is precisely the characteristic of culpability that is not available as a starting point from which the liability of the "rear" person can be derived.

Only the doctrine of causation—in concert with the doctrine of hegemony over the act—accounts for punishment of the "rear" person responsible for the offense. Of course, the common law in this case does not reach the conclusion that the "rear" person is not punishable because he cannot participate in the nonexisting culpability of the "front" person. Instead, the American judiciary has closed this manifest loophole by developing the so-called innocent agent doctrine. This doctrine provides that the presence of an acting "front" person does not bar imputation of an action to a "rear" person if the "front" person is not responsible for his conduct. The concept of responsibility here covers not only cases of a "front" person acting without culpability, but also cases in which responsibility is absent for a variety of other reasons.

In these cases, the "rear" person is to be held responsible as a perpetrator for a wrongful act, even under American law. This brief sketch suggests that American law has developed—by means of the innocent agent doctrine—a legal notion (*Rechts-*

151. StGB § 29.

figur) similar to that developed by German law in the area of indirect perpetration. Pursuant to common law, punishment of the "rear" person should be possible when he, according to the causation doctrine, is the "cause" of action by a person who is not responsible. Beneath the causation doctrine, however, is hidden more than just the German concept of causality. Rather, what is involved appears to be an element of imputation which consists of viewpoints that are to be fleshed out by legal categories reflecting varying viewpoints as to whether particular conduct deserves punishment. On the whole, however, the innocent agency and causation doctrines together correspond with the German notion of indirect perpetration. A detailed study concerning the extent to which German and American law may lead to different results in this area goes beyond the scope of this article. However, if one compares various cases and solutions described by Professor Kadish to cases examined in this paper, it appears that as a practical matter, German and American law are quite similar.

Nevertheless, German theory possesses some advantages. In contrast to American common law, it furnishes a coherent explanatory model for the classification and punishment of the entire domain of complicity. This has been made possible by the acceptance of the doctrine that accessorial liability is only partially derivative (*limitierte Akzessorietät*), and of the notion that the punishability of complicity is grounded in causation as explained by the hegemony theory. By rejecting the idea that complicity is grounded in imputed culpability and by refusing to insist that accessorial liability is fully derivative (i.e., requires a punishable rather than merely wrongful principle act), the German approach avoids certain system ruptures which may make application of the law uncertain and unpredictable. Legal certainty, particularly in criminal law, is vital for a society committed to the rule of law.

The advantages of German law lie not in the difficult, and sometimes excessively artificial, drawing of boundaries between perpetration and complicity. This side of German complicity law probably holds little practical interest for American law. Rather, the significant advantages are to be found in the more precise limitations on punishability in the case of criminal conduct involving multiple participants.

Whether this will make an impression on American legal thought, and the extent to which it may do so, remains to be

seen. Both Germans and Americans share interests in determining what more precise conditions are required to impute the act of a nonresponsible person to a "rear" person. Pursuing those interests, however, will require clarifying in detail precisely the values and criteria of attribution that underlie the German doctrine of act hegemony on the one hand, and the American doctrine of innocent agent on the other. For German legal science, discovering what is meant by the concept of responsibility would be of especial interest. What does responsibility mean in relation to innocence, excuse, intentionality, and justification? In any event, each side can profit from an in-depth intellectual and systematic exploration of the legal materials of the other.