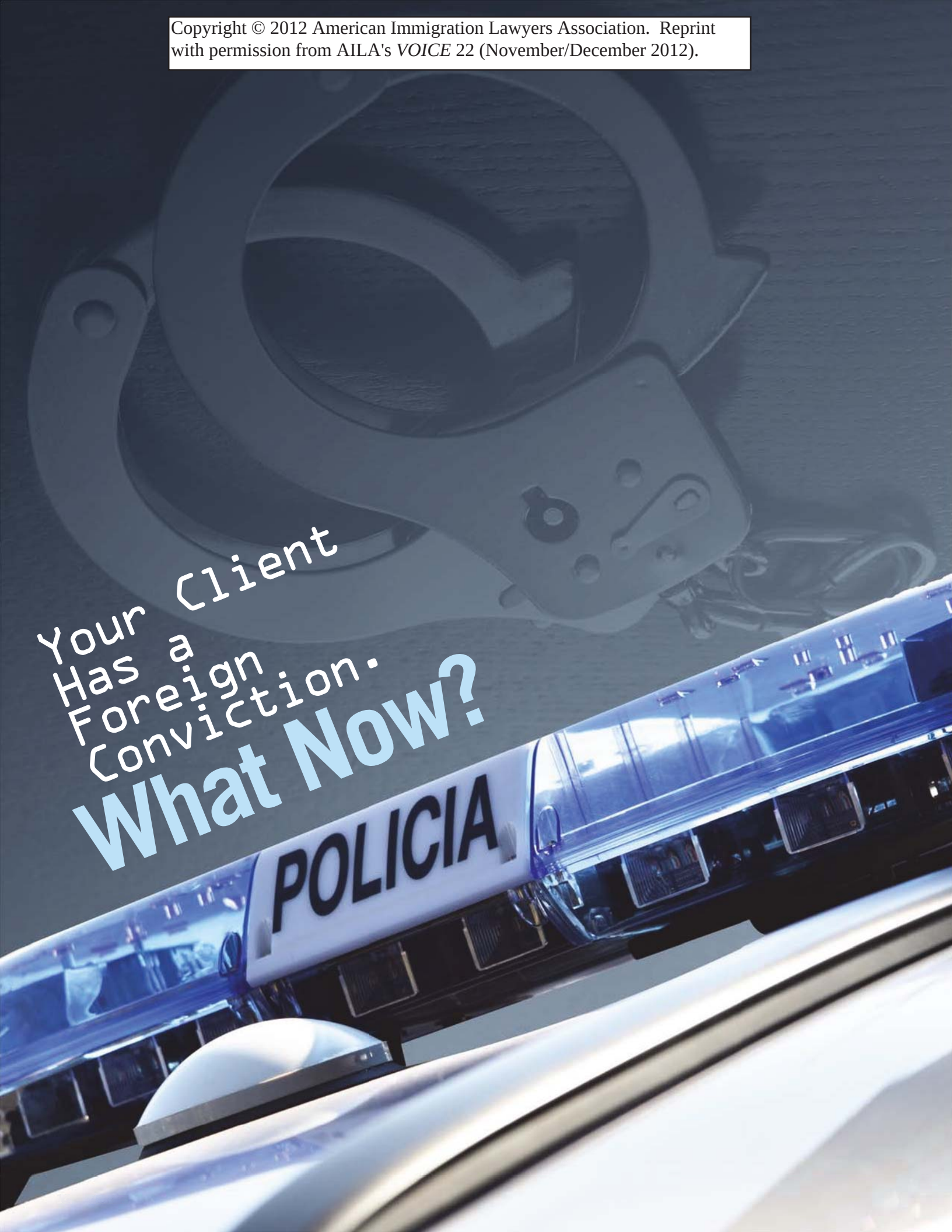

Your Client Has a Foreign Conviction. What Now?

by Terrence Ayala and Ellen von Geyso

Immigration lawyers face a challenge when dealing with a client who has a foreign conviction. This is especially so where the conviction arises under a statute relating to the control and management of an otherwise legal business. U.S. immigration laws say that a conviction under most narcotics and several other statutes will render a foreign national inadmissible. Those same laws, however, would quickly become unmanageable if they attempted to specify every foreign statute, which, if violated, would yield a negative immigration consequence.

Since 1891, immigration officials have relied on a tractable standard to decide whether a visitor will be admitted to the United States.[1] Thus, because there is no black-and-white litmus test, practitioners must carefully assess each foreign statute giving rise to a conviction to determine whether it presents a crime involving moral turpitude (CIMT) under U.S law. That task would be much simpler if the U.S. Department of State (DOS) maintained a publicly accessible listing of its prior determinations regarding which foreign statutes present CIMTs. Unfortunately, and at least since 2003, DOS has maintained that such determinations are confidential. If a consular official has questions concerning the effect of a particular foreign statute, he or she may request an advisory opinion from DOS's Office of Legislation, Regulations, and Advisory Assistance, Advisory Opinions Division. 9 *Foreign Affairs Manual* (FAM) 40.6 N2.1.

However, when a consular officer requests an advisory opinion, the Visa Office (VO) will not issue a copy of the advisory opinion to the applicant or the lawyer. *See* "DOS Answers to AILA Questions (Oct. 14, 2003)," AILA InfoNet Doc. No. 03102043 (advisory opinions not published). Rather, the VO will send a letter to the lawyer or applicant explaining the substance of the advisory opinion, unless classified or other sensitive information is involved. Accordingly, as we attempt to assess the immigration consequences of convictions under a broad range of statutes, we are left to our own devices.

Comments? use your VOICE

Regarding convictions arising under statutes or regulations in the business context, those assessments can be particularly challenging. For example, consider the body of statutes that govern business formation and capitalization. It might surprise some lawyers in European countries to learn that there are no minimum capital requirements for LLCs formed in the United States. Similarly, American lawyers might find it surprising to learn that, under German law, to form a GmbH (*"Gesellschaft mit beschränkter Haftung,"* a German private limited company), organizers must make an initial capital investment of Euros 25,000. Moreover, this required initial registered capital—as a general rule—may not be distributed to the shareholders. Indeed, in certain European jurisdictions, managers have been subjected to criminal liability after failing to report capital deficiencies or initiate an insolvency proceeding on time. This is just one set of laws that illustrates how a foreign statutory framework can diverge from U.S. laws in the immigration context.

For this discussion, assume that you are asked to assist a German client with a nonimmigrant visa application that is to be submitted to a U.S. consulate. While interviewing the client, you learn that she faced charges similar to those prosecuted in the recent cases involving Volkswagen (VW) executives. In this highly publicized case, high-level VW executives were charged with aiding and abetting in connection with, among other things, embezzlement and abuse of trust. M. Landler, "Sentence in Volkswagen Scandal," *N.Y. Times*, Feb. 23, 2008; V. Ram, "Volkert: The Man Volkswagen Would Forget," *Forbes*, Feb. 25, 2008.

Ultimately, in your case, the client was only charged with and convicted of embezzlement and abuse of trust under §266 *Strafgesetzbuch* (StGB), the German Criminal Code.

If not analyzed properly by immigration counsel, a conviction for such a charge may yield significant immigration consequences for a European manager →

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who seeks a U.S. visa. As we will illustrate here, however, one can argue that the charge does not rise to the level of a CIMT under U.S. law. We will discuss the steps practitioners should take to give U.S. consular officials the information they will need to give clients facing these circumstances fair and expeditious consideration. While this discussion focuses on the German case as an example, the guidance applies to business-related immigration applications that might be presented at a U.S. consulate anywhere in the world.

Step One: The Record

During the intake, clients should disclose all prior convictions, arrests, citations, charges, or stints in prison, no matter when or where they occurred. This is because DOS and U.S. Citizenship and Immigration Services (USCIS) will expect applicants to reveal all encounters with law enforcement—even those that may fall outside the reporting period that a foreign jurisdiction deems appropriate. For example, in the German context, a client might obtain a *"Führungszeugnis"* (a German "Certificate of Good Conduct") and assume that the information in it rises to the level of full disclosure. This may leave a client with the misunderstanding that any infraction that is not mentioned in the Certificate need not be disclosed. Therefore, practitioners should advise clients about the immigration consequences of intentional and unintentional omissions and help them gather court records documenting long-forgotten offenses or arrests. Obtaining these items from foreign courts might require more legwork because of language issues, as well as privacy considerations that stand in stark contrast to our "sunshine" laws. Often, due to stricter privacy laws abroad, certain criminal infractions may have been expunged by the time your client consults you.

TIP: Begin any search for foreign records by visiting DOS's Visa Reciprocity Tables. DOS states which records it believes are available in each country and who might help you obtain them. Nevertheless, the Visa Reciprocity Tables and list of contacts should not be deemed conclusive or authoritative. Immigration attorneys should consult local counsel who know the criminal case record-keeping practices and procedures in the relevant jurisdictions.

After the client has provided complete details of his or her criminal history, the practitioner should obtain a certified copy of the record of conviction, including the charging document. Again, in the German context, this is distinguishable from a *Führungszeugnis*. The record of conviction is the set of documents that includes, in most cases, the charging instrument and the judgment. The former is a document that the client can obtain through the Federal Central Criminal Register (FCCR). It is only available for applicants older than 14 years of age and may be requested only by the applicant or by the legal guardian for a minor, not by the attorney. However, due to Germany's highly protective privacy laws, not all convictions are actually recorded in the certificate. Although they are registered in the FCCR, petty and first-time convictions receiving a fine of no more than 90 daily units or imprisonment of no more than three months are not usually listed in the certificate. German courts impose a fine in daily units, which are determined based on the personal and financial circumstances of the offender. The amount that he or she earns or receives each day becomes the "daily unit" or "daily rate." The fine may not exceed 90 times the amount that the offender earns or receives each day. *See* StGB §40. Moreover, a suspended juvenile conviction is usually not listed in the certificate. Accordingly, one should not rely solely on the Certificate of Good Conduct as evidence of the absence of a prior conviction.

Unfortunately, privacy and disclosure laws outside the United States greatly reduce the scope and quality

of information that can be obtained by third parties, including a client's attorney. Some services advertise that they will provide criminal histories covering as much as seven years; however, great caution should be exercised before relying upon such services. Instead, if a practitioner is concerned about the information available regarding a client's history, he or she should consult a local attorney to confirm the records and sources.

Step Two: Obtain a Proper Translation

Get a certified translation of all documents, including the relevant statutes. Preparing such a translation is a critical step that requires a unique combination of skills and sensitivity. Unfortunately, even a certified and highly experienced translator might not know the nuances of the legal concepts involved. Therefore, counsel must discuss and approve the translation with the translator before it is finalized.

In addition, it is often prudent to obtain translations of statutes that are related to those cited in the judgment, even though the client was not charged under the related statutes. Consider the circumstance where a defendant is convicted of a "lesser included offense" (a lesser included offense encompasses some, but not all, elements of a more serious crime, *e.g.*, unlawful entry is a lesser included offense of burglary). It is possible that the statute describing the more serious crime contains additional elements, such as a scienter requirement. The more serious offense may also resemble U.S. criminal provisions more closely than the actual statute of conviction. In either situation, having a translation of the other relevant statutes will support an argument that the foreign prosecutors consciously distinguished your client's case from one that more closely resembled a CIMT under U.S. law. With your work product in hand, your client will then be in a better position to explain to the consular officer handling his or her application that the actual judgment does not rise to the level of an excludable offense.

TIP: When dealing with foreign convictions, even the slightest variation in the translation may affect the evaluation and, ultimately, the result of the case. Therefore, have the translation prepared or at least reviewed by an attorney who is admitted to practice in the country of the conviction's origin and in the United States. It is even more advantageous if the translation is prepared through consultations with an attorney who has experience handling criminal matters in U.S. courts.

Step Three: Addressing the Substantive Issues

The *Foreign Affairs Manual* (FAM) offers a thumbnail description of the types of crimes that will give rise to CIMTs. Moreover, according to 9 FAM 40.21(a), the consular officer must determine whether the conduct proscribed by the foreign statute would be deemed immoral under "the moral standards generally prevailing in the United States" and render the applicant inadmissible. Therefore, attorneys must compare the relevant foreign statute with the analogous U.S. statute because, for example, a crime labeled as "embezzlement" in a translation of the foreign statute might differ from the crime labeled as "embezzlement" under U.S. law. Where a foreign statute lacks any of the elements required to sustain a conviction under U.S. law, it should not be read to state a CIMT. U.S. legal research resources, such as LEXIS, Westlaw, Fastcase, and AILA's InfoNet can facilitate the analysis.

Regarding the German conviction in our example, 9 FAM 40.21(a) and the accompanying notes indicate that StGB §266 is not a CIMT. Moreover, 9 FAM 40.21(a) N2.2 describes the most common elements involving moral turpitude as fraud, larceny, and intent to harm persons or things. And, specifically addressing →

property crimes, such as embezzlement, 9 FAM 40.21(a) N2.3-1 states that crimes rising to the level of a CIMT "involve an inherently evil intent ...." According to an unofficial translation, StGB §266 says:

> ***Embezzlement and Abuse of Trust***
> *Whosoever abuses the power accorded him by statute, by commission of a public authority or legal transaction to dispose of assets of another or to make binding agreements for another, or violates his duty to safeguard the property interests of another incumbent upon him by reason of statute, commission of a public authority, legal transaction or fiduciary relationship, and thereby causes damage to the person, whose property interests he was responsible for, shall be liable to imprisonment not exceeding five years or a fine.*

Note that StGB §266 (as translated) is completely silent with regard to the element of intent. Because the caption in this translation describes StGB §266 as "Embezzlement and Breach of Trust," we will compare it to D.C. Code §22-3211 (2001), which addresses embezzlement.

> ***§22-3211. Theft.***
> *(a) For the purpose of this section, the term "wrongfully obtains or uses" means: (1) taking or exercising control over property; (2) making an unauthorized use, disposition, or transfer of an interest in or possession of property; or (3) obtaining property by trick, false pretense, false token, tampering, or deception. The term "wrongfully obtains or uses" includes conduct previously known as larceny, larceny by trick, larceny by trust,* ***embezzlement****, and false pretenses (emphasis added).*
>
> *(b) A person commits the offense of theft if that person wrongfully obtains or uses the property of another with intent:*
> *(1) To deprive the other of a right to the property or a benefit of the property; or*
> *(2) To appropriate the property to his or her own use or to the use of a third person.*
>
> *(c) In cases in which the theft of property is in the form of services, proof that a person obtained services that he or she knew or had reason to believe were*

"When dealing with foreign convictions, even the slightest variation in the translation may affect the evaluation and, ultimately, the result of the case."

available to him or her only for compensation and that he or she departed from the place where the services were obtained knowing or having reason to believe that no payment had been made for the services rendered in circumstances where payment is ordinarily made immediately upon the rendering of the services or prior to departure from the place where the services are obtained, shall be prima facie evidence that the person had committed the offense of theft.

Let us compare the conduct proscribed under §266 against that proscribed under §22-3211. Under §266, the conduct proscribed is that which *"causes damage to the person, whose property interests he was responsible for."* In contrast, §22-3211 proscribes conduct that "deprive[s] the other of a right" or "appropriate[s] the property to his or her own use or to the use of a third person." From this, we can see that the U.S. statute requires a showing that the defendant engaged in some form of taking. On the other hand, the German statute merely requires a showing that the defendant's action or inaction resulted in a loss experienced by the victim. Thus, the German statute reaches a much broader range of conduct, including conduct that might be deemed innocent in the United States.

In addition, §266 does not explicitly state an intent requirement. Rather, §266 must be read in conjunction with StGB §15, which addresses the intent element. German criminal law differs from the U.S. law because most serious U.S. crimes are specific intent crimes, where the intent is defined in the relevant U.S. statutes. In Germany, "intent" is defined in the official commentary on StGB §15. Only some crimes have explicitly stated specific intent requirements. Under German law, intent is not only acting and doing willfully and knowingly, but also so acting and doing while having contingent intent, referred to as "*dolus eventualis*."[2] *Dolus eventualis* consists of two components: (1) the cognitive element that considers the state of the accused's knowledge that the offense may occur, and (2) a volitional or dispositional element that has never been part of the common law criminal analysis. Accordingly, under German law, one can be found to have violated §266, upon a showing that he or she acted with an intent of *dolus eventualis*, which would be somewhat equivalent to "recklessness" under U.S. law. Therefore, §266 does not provide a criminal mental state or any type of evil intent that would sustain a conviction under U.S. law.

TIP: Once you have gathered and reviewed the aforementioned materials, the next step is to decide whether (a) to pursue a waiver of inadmissibility or (b) to submit a letter (or memorandum of law) explaining why the conviction in question is not a CIMT. Assuming the latter, the letter, attachments, and the client's visa application should be submitted to the consulate with a cover letter presenting the best arguments for finding that the client is not inadmissible and is eligible for a visa.

Final Thoughts

While this article uses a particular conviction under German law as an example, the analysis required and practical considerations facing visa applicants and their immigration counsel are relevant to any foreign conviction. In representing such a client, it is vital to compile a clear and complete record reflecting the client's history. Also, contact attorneys who are licensed in the relevant foreign jurisdiction and the United States. By engaging in such robust consultations, practitioners will be providing their clients with the zealous representation they deserve.

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1 *See* P. R. Dadhania, "The Categorical Approach for Crimes Involving Moral Turpitude After *Silva-Trevino*," 111 *Colum. L. Rev.* 313, 315 n.14 (2011).

2 *See* G. Taylor, "Concepts of Intention in German Criminal Law," 24 *Oxford J Legal Studies* 99–127 (2004). For a comparison of intent concepts under common law to those under civil law, see R. L. Christopher, "Tripartite Structures of Criminal Law in Germany and Other Civil Law Jurisdictions," 28 *Cardozo L. Rev.*, Vol. 28:6, p. 2675.