



Elmar Geus. *Mörder, Diebe, Räuber: Historische Betrachtung des deutschen Strafrechts von der Carolina bis zum Reichsstrafgesetzbuch.* Berlin: Siedler-Verlag, 2002. 288 pp. EUR 20.00 (paper), ISBN 978-3-931278-14-4.

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Criminals, Lawyers, Historians

A book review by an American historian of a book on German legal history faces the prospect of multiple gaps in understanding. German and American historians do not look at the world the same way. Add the element of law, and matters become several degrees more complicated. Historians and lawyers do not look at the world, least of all that part of it involving the past of legal things, in the same way either. Lawyers trained in the civil law tradition of continental Europe do not see law or legal history like lawyers trained in the common law tradition of Great Britain and its imperial children; and lawyers on the east side of the Atlantic ocean do not think about law as Americans do (in some ways the British are more akin to continental Europeans, despite very different legal traditions, than they are to Americans).

In America, the legacy of the Legal Realist movement of the 1930s, along with habits of mind associated with the common law's pattern of incremental and judge-led evolution, produced a body of legal history profoundly different from that of Germany. One need only take a cursory look at great works of legal history from the two different traditions to get a quick feeling for this divergence. Morton Horowitz's two-volume *The Transformation of American Law* is about what judges do; Michael Stolleis's three volume *History of Public Law in Germany* is about what intellectuals and (occasionally) legislators do. One must look a very long way to find mention of so pedestrian a thing as a "case" in a German legal history: Law is not made in courtrooms there, or so it is generally believed.

This long windup is intended to introduce the considerable promise and partial disappointment of Elmar Geus's *Mörder, Diebe, Räuber: Historische Betrachtung des deutschen Strafrechts von der Carolina bis zum Reichsstrafgesetzbuch*. The book is a revised version of Geus's 2001 doctoral dissertation submitted to the Kulturwissenschaftliche Fakultät at Frankfurt-Oder. Geus starts off with an excellent theoretical introduction that sets forth a plan for a very innovative work. Legal history has, he notes, long remained a subfield of legal scholarship, and social and political history often completely overlook legal developments. He alertly characterizes the differences between legal and other kinds of history, noting, "[i]n der traditionellen Rechtsgeschichte ist das Interesse an Normen, deren juristische Analyse und Interpretation vorherrschend. Bei einer historischen Untersuchung muß hingegen das gesamte Spektrum von Einflussfaktoren betrachtet werden, die direkt oder indirekt auf die Entwicklung einwirken" (p. 13). Geus goes on to cite Hans Hattenhauer's dictum that legal reforms emerge out of crises; and his basic argument is that the three legal reforms studied here, milestones in the evolution of German criminal law—the *Constitutio Criminalis Carolina* (1532), the *Allgemeines Landrecht für die Preussischen Staaten* (1794), and the *Reichsstrafgesetzbuch* (1871)—follow and illustrate this rule (p. 13).

The book is divided into three main sections, one for each of these landmark pieces of legislation. Each of the sections is in turn divided into two parts. One part surveys the history of the legislation's origins; the second

part analyses its treatment of homicide, theft, and robbery. The sections dealing with murderers and thieves delve, to varying degrees, into the social history of crime in the respective periods in an effort to give some background to the textual provisions.

Work that seeks to combine the doctrinal and normative orientation of the lawyer with the empirical political, social, and cultural concerns of the historian is always rare in any national tradition, in part because acquiring the necessary disciplinary competencies is time-consuming and wearying. Geus demonstrates a commendable fluency in these very different literatures. He is alive to the often highly arcane debates among historians of law, and offers balanced judgments on many of them. Furthermore, Geus displays a deft hand with legal doctrine. He is at home in the realm of distinctions between *Absicht*, *Vorsatz*, and *Äberlegung*, and their implications for *Mord* and *Totschlag*. This ease is impressive as his book-cover biography does not disclose any formal legal training.

But in the end, Geus's book does not go very far toward realizing the agenda he frames so well in the opening. Probably he has set himself an impossible task: if one wants to integrate social and political with legal history, a book that covers nearly 400 years—in a slim 261 pages of text at that—is far from the ideal vehicle. It is simply not possible for Geus to develop enough richness in his accounts of either legal or social evolution to move beyond cursory observations. Geus sketches, for instance, the complex social conditions at the end of the fifteenth century which made it plain that the existing structure of criminal law in the Empire was inadequate: the beginnings of “early capitalism,” technological and monetary economic expansion, generally deteriorating living conditions due to an expanding population, land hunger, and a growing urban proletariat which could form the core of a new breed of career criminal. But all of this material is dispatched in about a page and a half. The origins of the three pieces of legislation are very conventionally narrated, not deviating significantly from the accounts of historians like Eberhard Schmidt. The doctrinal analyses, skillful as they are, would have been of tremendous benefit to a law student at the time of Charles V or Frederick the Great, but as history they are too lacking in context to be fully satisfying.

A related, but more serious problem is that the source base for this project consists entirely of printed materials: scholarly editions of the legal texts and secondary historiographical literature. Not that there is not plenty

of relevant archival material; Geus just has not consulted it. Perhaps more remarkably, he explains that he has not used the hundred or so volumes of documents on the *Allgemeines Landrecht* that lie in the Geheimes Staatsarchiv PreuÃ?ischer Kulturbesitz because of the “generelle Problem des Umfangs des Quellenmaterials.” Although published volumes of this material are beginning to appear, he continues, they were not (apart from one volume of drafts by Carl Gottlieb Svarez) helpful for this work “weil nicht in absehbarer Zeit mit einem Erscheinen der Edition zu rechnen ist, die das Strafrecht betrifft” (p. 139). The nature of Geus's sources, then, plus the brevity with which he tells this long and complicated story, give the book the quality of an extended bibliographic essay.

And yet, despite its brevity, the book is not an especially easy read. Geus often slips into pronouncements that smack of a bygone age of German historicism: “Doch erst die Constitutio Criminalis Bambergensis,” he tells us, “entsprach in materiell-rechtlicher wie prozessrechtlicher Beziehung wirklich den rechtswissenschaftlichen Erfordernissen und damit dem Gerechtigkeitsverlangen der Zeit” (p. 33). This sort of writing is not just a matter of literary style. In a similar vein he quotes Wolfgang Sellert, remarking that “Rechtskrisen entstehen in der Regel, wenn sich die bestehende Rechtsordnung und die Lebenswirklichkeit nicht mehr im Gleichgewicht befinden; wenn alte gemeinsame RechtsÄ¼berzeugungen brÄ¼chig geworden sind und nicht mehr dazu taugen, die Lebenswirklichkeit zu bewÄ¼ltigen; wenn also die Balance zwischen Sollen und Sein gestÄ¼rt ist” (p. 32). As a theoretical position statements like this come trailing clouds not only of German historicism and the “sociological jurisprudence” of Eugen Ehrlich, but also the much more insidious neo-Hegelian jurisprudence of Karl Larenz and others in the National Socialist 1930s, though in all fairness Geus seems not to be aware of these theoretical stakes. The more serious problem with this kind of analysis—with the realities of life taken as some kind of given, and convictions about law defined independently of the interests of various social fractions—is that it leaves out, or rather suppresses, the crucial question for the historian: “who/whom.”

From the Anglo-American perspective, it seems reasonable that Geus would have benefited from consulting some English-language secondary literature (which is completely absent here). Especially in light of his admirable cross-disciplinary concerns, it seems odd to read his extensive comments on the death penalty in the *All-*

gemeines Landrecht or the *Reichstrafgesetzbuch* without any mention of Richard J. Evans, or to read about judicial torture without a reference to John Langbein. These are examples of historians—one coming from social history, one coming from legal scholarship—who have produced fine examples of work that integrate legal ideas with a broader social and intellectual context.

Readers unfamiliar with the history of German criminal law may find this book useful as a basic introduction and a guide to printed sources and historiography, in shorter compass than is to be found in the standard works. Specialists in German legal history will not learn anything new here. It is to be hoped that Geus will have an opportunity in the future to apply his considerable conceptual talents in a more promising frame.

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